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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

FEBRUARY 15, 2019

(FRIDAY SESSION)

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Taken before *D'Lois L. Jones*, Certified Shorthand Reporter in and for the State of Texas, reported by machine shorthand method, on the 15th day of February, 2019, between the hours of 9:00 a.m. and 4:57 p.m., at the Texas Association of Broadcasters, 502 East 11th Street, Suite 200, Austin, Texas 78701.

INDEX OF VOTES

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

Documents referenced in this session

19-01 Cyberbullying Restraining Order 2-8-19

19-02 Cyberbullying Petition 2-8-19

19-03 Cyberbullying Instructions 2-8-19

19-04 Cyberbullying Statute

19-05 Discovery Subcommittee Proposed Amendments (2.6.2019)

19-06 Discovery Subcommittee Rule 215 Sanctions Albright Working Document (2.6.2019)

19-07 Discovery Subcommittee Revised Spoliation Rule (2.6.2019)

19-08 Spoliation Draft Rule (Texas)-Levy Submission

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CHAIRMAN BABCOCK: Welcome, everyone. At our last session I congratulated Peter Kelly on his successful campaign for the court of appeals, but I was remiss in not thanking our four members who were not successful in their campaigns, and so I want to correct that error now and thank them for their service. Not everybody is here, but I know Justice Bland is going on to Vinson & Elkins and is going to be the new Marie Yeates, right? Maybe not.

HONORABLE TRACY CHRISTOPHER: Don't tell Marie that.

CHAIRMAN BABCOCK: And Harvey Brown is going to be the new Mark Lanier. Harvey is going with Mark's firm, and that will be a great -- a great combination, and Justice Boyce I spoke to this morning, and he will have a big announcement in two weeks; is that right, Bill?

HONORABLE BILL BOYCE: Thereabouts.

CHAIRMAN BABCOCK: And I know Brett Busby is on the trail, and he may have an announcement at some point, but nothing yet. So anyway, I want to, again, correct my error for not -- for not thanking all of them, all of you, for your many years of fine service to the state. And with that we'll go to the Chief, who will have his usual comments for our consideration.

CHIEF JUSTICE HECHT: The Court has a new rules legal assistant, Pauline Easley, who is here. She has got a B.S. degree in Criminal Law from Texas State University and also her Masters in Public Administration. She worked for the Department of Licensing and Regulation in rules research and writing, so she comes to us with a little experience in that particular area. And she's a Navy vet, and so am I, so that helped her get the job.

CHAIRMAN BABCOCK: Same year?

CHIEF JUSTICE HECHT: No. On the developments front, the Court repealed Rule 78a and the civil case information sheet since we're getting all of that information through electronic filing, and there's been a suggestion that we also repeal the corresponding justice of the peace rule, which is 502.2, but they don't have mandatory electronic filing yet, so I'm not sure whether we'll do that or not. And you may have seen or heard that one request that we have to the Legislature this time is that they fund a standard case management system for all of the courts of Texas. The Governor called for this in response to the Santa Fe shooting because it's difficult to get information in the federal database to do background checks when they're necessary, and this would help us. It doesn't cost a lot, relatively speaking, but if we get that -- and I'm hopeful we will --

we will know a whole lot more about the operation of Texas courts than we do now. We're still just barely past keeping statistics on note cards. We do have some computerization, and OCA does a marvelous job coordinating all of that, but we still don't know as much as we need to about the justice system in Texas. For example, how many cases are there self-represented litigants and what kind of -- what kinds of cases are there. We know from -- in fiscal year '18 the debt actions in the civil courts were up 141 percent over the last couple of years, and if we knew more about our dockets we could channel our resources better and be more efficient, so we hope that that will happen.

That's all on the rules front, and, of course, the Legislature is in session, and we have a number of initiatives that the Judicial Council has recommended. Justice Boyce is a member of the council, and Evan Young, who is not here today, is a member of the council, and they have recommended bail reform, continued support for basic civil legal services access to justice, which the Legislature this year, this session for the first time ever is very supportive. Not that they haven't been supportive in the past, but they're looking for ways to improve access to justice, and that's really a step forward.

We're trying to monitor guardianship cases more carefully. We have 51,000 guardianships open in Texas, $5 billion in estates, and a lot of these drop through the cracks because judges don't have the resources to make sure that the guardians file the reports that they're supposed to. So we're looking at that, and of course, judicial compensation, mental health. Our Mental Health Commission is going great guns. They had a summit in October. They produced a bench book. Justice Boyce is the progenitor of all of these efforts. It was his work on the Judicial Council that led to them, and they're doing a great job. The Legislature is very supportive of that, and then we want to use the Children's Commission to improve juvenile justice, the way the juvenile justice system operates in Texas and in Child Protective Service cases, so there's a lot. That's just a few of them. There are probably two dozen initiatives.

The House and Senate sponsors are very positive, and so we're looking for a good session, and Chief Justice Gray and I just came from the House budget hearing this morning at 7:30 and --

HONORABLE TOM GRAY: Is that where I was?

MR. LEVY: That's why he's wearing a tie.

CHIEF JUSTICE HECHT: The chairman asked me didn't the judges need a raise? I said I've been on the

bench 38 years, and that's the first time a legislator ever asked me didn't I need a raise.

CHAIRMAN BABCOCK: And your response was?

CHIEF JUSTICE HECHT: Vote on Senate Bill 387, and the -- they really seem to be working together in a good spirit this time, and I'm hopeful the session will be good for them and good for us. That's all I have.

CHAIRMAN BABCOCK: Great. I don't know if any of you were there in person or saw it online or have read it, but the Chief's State of the Judiciary speech was terrific. I think it was your third one, and up to standard from his first two. It was really good, and I recommend it to you if you haven't seen it or heard it or read it. Justice Boyce -- Justice Boyd. Boyce is over there.

HONORABLE JEFF BOYD: I won't add much to that. Normally I like to just give you a quick update on the technology implementations, and we're continuing to see a substantial increase both on users of e-filing, trying to finish rolling out the criminal courts for that and actually implementing some of the justice courts. Not mandatory, but they like the idea, and so lots of increases in the numbers. On re:SearchTX, a substantial increase over the last few months. That's the program where lawyers, judges, and registered users from the

public can get on and access documents from courts around the state. If you haven't gone to re:searchTX.org and signed up, you should do it. It's really user-friendly. They've just even in the last month made additional changes to the appearance of the platform, and really a helpful program. So things are moving smoothly.

There's always little glitches along the way, but if you know some of the members of JCIT, the committee that oversees it, and Rebecca Simmons is the chair of that committee, and you should thank them because they really do a great job and manage this process very well.

CHAIRMAN BABCOCK: Great. Thank you, Judge. Okay. We'll go to cyberbullying. Judge Yelenosky. Yeah, Justice Gray.

HONORABLE TOM GRAY: It has come to my attention that we do have another anniversary in the group. Dee Dee has been doing this now for 25 years.

HONORABLE JEFF BOYD: Wow.

(Applause)

CHAIRMAN BABCOCK: Nicely done.

HONORABLE JEFF BOYD: She was seven when she started.

CHAIRMAN BABCOCK: Right, exactly. Oh, and I should have introduced Bill Davis, who is the Assistant

Solicitor General, is over here to my left, and Bill is the Attorney General's designee in our meeting here today, and thank you for coming, and speak up if you've got anything you want to add to our deliberations. Anything else from anybody? Okay. Where is Judge Yelenosky?

HONORABLE STEPHEN YELENOSKY: My usual place, sort of.

CHAIRMAN BABCOCK: The floor is yours.

HONORABLE STEPHEN YELENOSKY: I'm sorry? Okay. First thing is to tell you what to ignore. My fault, I overlooked something that was included to -- with the stuff that we sent out, and hard copies were over here in the A folder, and I took them out. This will be news to Frank I think because it was your memo from 2017, which hopefully is now out of date, and would be confusing. So ignore A.

That leaves three documents, and they are -- well, first of all, just to remind you, the Legislature passed a statute which deals with bullying in schools, but also has multipart provision for an action in court to get injunctive relief, starting with a TRO, hopefully to allow parents some relief for a child who is being cyberbullied; and so we were to write instructions for a petition that a pro se adult will fill out, and so the instructions obviously come first. Then there's the petition for

cyberbullying, which was really difficult given the statute, which has certain specific requirements, and then last is the proposed actual order for the court. Frankly, we spent probably 75, 80 percent of our time on the instructions and petitions and not a whole lot on the order, so you may find more problems there. I'll just ask you when you read the instructions to keep in mind that we tried to write them for a layperson, and they should be read in that -- from that perspective if you can.

We redrafted and redrafted many times, but we need some other eyes on that. For example, I think you will find some things that are not technically correct, but make it more understandable hopefully for parents, even not grammatically correct I think at one point. I think you say, "Whom do I sue," is that correct, grammatically? Well, we wrote "Who do I sue?" And there may be others like that, because being precise, except for the statutory definitions, from the perspective that we usually have here, which is writing for attorneys, is a little different. I think probably the best way to -- well, let me go back to last time.

Some of the input we got last time was that the petition could be more like a protective order, and we tried to do the protective order kit. We tried to do that. I know that Justice Hecht asked that we make it

more balanced, and I took that to mean a couple of things. One, to be a little more perhaps agnostic about whether or not the person petitioning actually had a claim that met the definition in the statute, and then also to emphasize more the alternative ways of resolving a dispute to the actual suit in court. So we've tried to address both of those things, and all I can really suggest for going through this is to -- rather than line by line, but obviously up to Chip, would be to take a minute, read the instructions first, and then look at the petition that we drafted and see if the instructions are helpful enough in filling out the petition. So, Chip, how do you want to handle this?

CHAIRMAN BABCOCK: I want to handle it the way you want to handle it, so --

HONORABLE STEPHEN YELENOSKY: Okay.

CHAIRMAN BABCOCK: -- if you want to do it broadly, that's fine.

HONORABLE STEPHEN YELENOSKY: Well, all right. Well, then I would say take a little minute or two and read through the instructions and then we'll go to the petition.

CHAIRMAN BABCOCK: Yeah, Lamont.

MR. JEFFERSON: Just as we're doing that, I think that the sense of the committee, although this was a

legislative mandate, was that this is really wishy, squishy, and not very well-conceived; that is, the mandate from the Legislature is not -- it wasn't well-conceived; and we didn't get a lot of good instruction that we can really use here; and so I understand I wasn't at the last meeting, but I did read the transcript of the discussion; and it seemed like there was a sense in the room that -- or at least some people believed that we should be giving direction to parents who are in this situation about, you know, how to handle disputes; and I think -- I think that's a good idea, but I don't think that's our charge; and I don't think that the Legislature -- I don't think the Legislature did a good job of -- of trying to either define or solve this problem and then just kind of dumped it on this committee or on the Supreme Court and said, you know, come up with something.

So, I mean, my take, and I get the idea behind, okay, let's try to manage this in a way that makes sense for a lot of different situations; and there will be -- you know, there's umpteen situations that require different responses every time; but my overall suggestion here is that we stick to the legislative mandate very narrowly and just do what the Legislature told us to do, accomplish that task, because that's what we were told to do, and not sort of endorse the idea about whether this is

good or not, whether this -- that you should go to court or you should call the parents or you should, you know, talk to the principal. I mean, I don't think -- I think that's beyond our purview to make suggestions about how these various situations should be addressed when we're talking about people confronting other people.

So I -- and I say that because we -- you know, the first couple of paragraphs in the instruction are sort of social suggestions, you know, how to be civil; and, you know, I just don't think we're qualified to make a call about what should be done in most situations. I think we just -- and it doesn't seem like it's subject to a legal rule. So I mean, I would -- and one of the suggestions that I had is that we just not do that, that we not say what you ought to do if your child is harassed, because we don't know. The Legislature, though, told us to draft some rules that would allow a parent to go to court and get an injunction; and we could do that, I mean, but we don't have to endorse the idea or go beyond that, even though, you know, that's everybody's instinct, is let's solve this problem, but I think it's a bad idea.

HONORABLE STEPHEN YELENOSKY: Well, obviously there was some disagreement on that because those things are in here, and they were in here partly because we thought it provided or I thought -- I know

Lamont doesn't agree, but I thought and I believe Pete and Frank thought that these things would be helpful and that in the vast majority of situations the parent may -- may be able to resolve this by talking to the other parent. True, the statute doesn't say that, but the statute also doesn't ask us to write rules. It asks us to write instructions for the -- for drafting a petition, and so the petition follows as best we could do what's required by the statute, and the order follows what's required by the statute and includes one thing I'll get to later that doesn't contradict the statute, but on the other hand, it's in there.

So my perspective at least on this was let's make the best of a difficult statute to implement, and there are parents out there who need help in dealing with cyberbullying. We didn't do anything, I don't think, that contradicts the statute. I think Lamont thinks we overstepped in suggesting, for instance, that you talk to the other parent, but I think those things are probably the most helpful in my experience with pro se litigants, and that's why we included them.

CHAIRMAN BABCOCK: Okay. Any other comments? Yeah, Frank.

MR. GILSTRAP: Well, first of all, I would agree --

HONORABLE STEPHEN YELENOSKY: Can you speak up?

MR. GILSTRAP: -- with Lamont and just about everybody --

CHAIRMAN BABCOCK: Speak up, Frank. He can't hear you.

MR. GILSTRAP: I'm sorry, I'm sorry.

CHAIRMAN BABCOCK: He's getting older.

HONORABLE STEPHEN YELENOSKY: I know. I don't have my hearing aids.

MR. GILSTRAP: And I think just about everybody here, but I'm going to say this privately and not as a -- it's not -- I'm not representing the committee or the subcommittee. This was well-intentioned, and it's just a terrible statute. Now, having -- because it's so -- it's so difficult to implement and because it is so broad and vague, but we can't do anything about that today. I do think that we were told to draft some pro se instructions, and I agree with the user-friendly approach that Judge Yelenosky has taken. We talked about this last time. We got a little feedback in saying maybe you went too far. For example, I wanted to put something in there about, you know, hearsay problems or authentication problems, as Judge Yelenosky has corrected me. Everybody said, look, you're going too far.

The one place that I would say that we do need to step out of our neutral role is to tell the people not to attach a screenshot of the offending screen on the internet to the petition so it becomes public record. I think that would just be a horrible event. I think we need to go at least do that, but other than that, I think we've got to make it friendly, we've got to make it where people can use it, and you know, and some court is going to get it and have to deal with it, and hopefully they'll strike it down as vague, but that's my own opinion. I mean, it's First Amendment. You don't know what it covers. I don't want to go into all of that, but it is -- it is terribly vague.

CHAIRMAN BABCOCK: Yeah, we mentioned that briefly last time, I think, that --

MR. GILSTRAP: I won't mention it anymore.

CHAIRMAN BABCOCK: -- it had some speech implications. Yeah, Robert.

MR. LEVY: Speaking of that, does the TCPA then get triggered if a parent files a pro se claim on severability?

MR. GILSTRAP: It's an exclusion right.

MR. LEVY: Oh, it is.

HONORABLE STEPHEN YELENOSKY: Anything triggers TCPA, but it wasn't part of our charge, so

whatever it does, it does.

CHAIRMAN BABCOCK: Okay. Yeah, Justice Gray.

HONORABLE TOM GRAY: In following up with Lamont's concerns, on the first two paragraphs the thing that hit me is with this instruction, if I look at that and I think, okay, I need to trot over and talk to the other child's parent, there's -- I've never seen one of these, and my exposure to this is extremely limited, so take it for what it's worth, but the first thing -- there's always two sides of every story, and the other side may very well think they're the bully -- the ones that have been bullied, and it's going to create a race to the courthouse or a race to get one of these in place, and there -- you know, they're not cautioned that that could be the problem that they trigger by engaging in this prefiling meeting, and so I'm inclined with Lamont that anything you go outside of the very narrow strictures of what we're trying to do to comply with our duties under the statute is fraught with danger to start giving legal advice in effect. Well, let's go talk to them first, and then you start a war about who's really being bullied here, and so --

CHAIRMAN BABCOCK: Yeah. Yeah, Holly.

MS. TAYLOR: On page three in the paragraph

with the heading "Completing and signing the petition and declaration" you have a typographical error in the first line. "Fill in you child's name" instead of "your child's name."

HONORABLE STEPHEN YELENOSKY: Okay.

MS. TAYLOR: Along those same lines, although you say at the top of page two, "Although these instructions say 'your child,' if you are now an adult, the instructions are directed to you." I still think that it doesn't at any other point mention if the person filling out the petition is an adult that they should sign it rather than their parent, and I think it's a little confusing because people will miss that sentence. I mean, maybe there's nothing to be done about that, but for example, at the bottom of page two where it says, "Only a parent of the minor or a person acting as a parent to the minor can complete and sign the declaration," but I assume if the person is 18 when they're filing this then that person would fill out the declaration. I just think it's a little confusing in the situation where the person is actually an adult.

And then one other thing, which is at the bottom of page three, we refer to the "Court Clerk," capitalized, "of the county or state district court," and then on page four in the third line down we refer to "the

clerk of the court." And I just -- I think maybe we should be -- and that's not capitalized. I just think we should be consistent about how we refer to someone like the clerk, to make it clear that we're talking about the same clerk. You refer to them consistently. That's all.

CHAIRMAN BABCOCK: Thank you. Anybody else? Yeah, Roger.

MR. HUGHES: Well, this is to pick up on something that was pointed out in the memo. I think it's always valuable, whether the reader is an attorney or a pro se litigant, that the instructions include a little bit about the process, how courts actually do things; and what's not clear from these instructions is that when this -- if the court is issuing a TRO, it's going to set a hearing for a TI; and I think that's not being made very clear that there's going to be a temporary injunction hearing and what -- and what will be decided at that.

I mean, from reading this, a person with no legal training might get the idea that what is this TRO? They may not think it's going to end, when, in fact, it will in so many days. So I realize this may be difficult to boil down to easily digestible, clear instructions for somebody who is not a lawyer, but for them not to understand that -- that may come as a shock after reading this that in 14 days this restraining order is over and

there's going to be a hearing if you want it continued and what's going -- and a little bit about what's going to happen at that hearing.

And the other thing is, if I may put in my two cents worth about advising people they can settle or discuss with the other side, that might be an advisory of what a person may do because if we're -- I kind of get the idea in most cases we're going to be dealing with pro se litigants everywhere. The defendant, the petitioner, are all going to be pro se, and if the first time they decide to talk to each other is at the hearing I could imagine the judge -- and I'll bow to the people who actually are judges -- they're probably going to say, "Is it possible you two can go out in the hall and solve this rather than me do this?" and maybe some sort of advice that if you want to, you can talk to them during the TRO, that the parents can talk to each other.

I realize that this might be a little difficult, given what the TRO may say. I mean, you don't want the -- say, "Well, I was just communicating with him over this" and the other side, "No, no, you were violating the TRO" or whatever, but I think not telling them is just meaning that it's going to happen at the TI hearing, and any -- and maybe that's a good thing in some cases. Maybe they need a safe place where they can talk to each other

under a little supervision, but maybe not. I'll -- I think it's just something that they advise they can do, but then again, we're going to have to coordinate that with the terms of the TRO so that, you know, peace discussions don't violate the restraining order.

CHAIRMAN BABCOCK: Pete.

MR. SCHENKKAN: I just want to follow up on Roger's comments. I do think it's very important that the people going through this process, who we have to assume are going to be completely pro se, not only because that's what we're doing in the forms here but because of the nature of this controversy, this kind of controversy; and we need to be a little clearer about the hearing; but the materials in there at the bottom of page five of the instructions, it's just I think we could probably perhaps use another subheading, Judge Yelenosky, after the notifying of the parent, you know, where we say it expires in two weeks and may be worked out, and we could have a -- say so if a hearing is necessary what will be involved or something like that.

HONORABLE STEPHEN YELENOSKY: The TI part?

MR. SCHENKKAN: Yeah. So that there is a bold subheading about the hearing itself. In terms of the back and forth about whether to and how far to and how to talk to people who are -- if they're proceeding at all

down this road are proceeding pro se about the legal system and the alternatives, it's obviously a question of balance and judgment; and none of us knows how this is going to work out until it's been in effect for a while. We're all just guessing, but it seems to me that in most cases it neither should go to court nor will and that if we have gently and not using interrole tactics reminded that in most cases the parent or in the place of a parent adult, there's some other ways you might want to look at trying to deal with the situation, that's worth doing, as the form presently is. And then as to the rest we've got to -- we really have to walk a line between telling them something about what could happen and getting so much detail and so bogged down that it just becomes hopeless, it's too complicated; and I like, generally speaking, where the balance is.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: I just want to respond to a couple of things to think about. Thank you for the corrections. With respect to somebody who is filing this as an 18-year-old, this was the most frustrating part of trying to write a petition for both an adult who might proceed and a parent who is proceeding on behalf of a minor. When you think about it, you've got -- you can have a minor suing a minor. You can have a minor

suing an adult, who is a student. You can have an adult who was a minor at the time of the incident suing a minor or suing an adult. So you've got this sort of matrix of four, so how do you explain that to a parent? Very difficult. Any suggestions on improving that, we would love.

We did sort of play down the adult part just because it's so confusing. If we give as much attention to that, we're probably going to confuse them more, because I suspect 90 percent of the time this will be a minor and the parent is bringing it in, as opposed to an adult bringing the suit in, because that person had to have been a minor at the time it occurred is my understanding of the statute, right, Frank, or Pete? They had to have been a minor at the time it occurred, so this would be somebody who is seeking injunctive relief for something that happened when they were a minor and they're now an adult, and so the first question would be, well, why are they -- why are they doing that for something that happened a long time ago? Well, if they turned 18, you know, the day after, then maybe so, but that's going to be a rare situation. We do have to address it, but we tried to play it down some because we think it's not going to be very common, but if you have a better solution, that would be helpful.

As to whether a TI will happen, two things. Well, first, as far as the TRO expiring in 14 days, the instructions do say that, page five, but we could do a subheading and make that clearer. As to whether a TI hearing will inevitably happen, two things. One, one of the problems with this statute, but what it says is "A temporary restraining order or temporary injunction is not required to," among other things, "include an order setting the cause for trial on the merits with respect to the ultimate relief requested." It says that about TROs and TIs. You can read that to mean you can give a TRO without setting a TI, and certainly you can give a TI without setting a final hearing. So that's what the statute says.

Our inclination is, nonetheless, to put that -- nonetheless, to put that in or a judge's inclination would be to put that in the order. It doesn't forbid that, but the other part of it is a TI is not necessarily going to occur because the parents or parent may not pursue it after that point; and, in fact, my guess is if a judge issues a TRO against a parent that orders the parent to take reasonable measures, through all reasonable measures to stop cyberbullying, that it's probably not going to go forward except perhaps for enforcement during the TRO period. Especially if the judge has managed to

get a hold of the respondent at the TRO hearing and talks to the parents at the TRO hearing and tells them what they're being ordered to do. It isn't necessarily true that the parent is going to want to have a TI hearing after that, so it's not inevitable for those two reasons.

CHAIRMAN BABCOCK: Okay. Justice Christopher had her hand up.

HONORABLE TRACY CHRISTOPHER: I -- I think we should give more warnings than what's in here and more effort to resolve before you go to court. I mean, and everyone here is assuming that both sides are going to be pro se, and I don't think that's the case. I mean, just -- you know, I think if -- I think the defendant is the more apt to get a lawyer than the person, you know, bringing the lawsuit. I mean, just imagine if you got served with this in connection with your child, right? You would not -- you would do everything you possibly could to prevent an order being entered that says your child is a cyberbully, okay, which is going to follow that child the rest of his life or her life. I mean, it is not something that you would want to not worry about.

So I think you have to be -- I think you have to tell them about the anti-SLAPP. I think you're going to have to say, "You could be sued. You could have to pay attorney's fees from the other side." I mean, if I

was a lawyer and someone came to me for advice about this, what would I do? I would run through all of those ramifications. I mean, when I was a trial judge and we used to get restraining orders for people that would come down -- you know, like the harassing boyfriend, right, and a company, a workplace, would come down to get a restraining order against the harassing boyfriend, and I'm like, what is the point of this? You know, it's not going to make him stop, and the company says, "Well, I'm just doing it to protect myself in case he gets really crazy and hurts somebody in the workplace."

Okay. So, I mean, to me what would you say if you were a lawyer, okay, and someone came in to you and described this situation? And, I mean, I understand Lamont saying that's beyond our scope, but I just think we have to -- I think we have to give that information.

CHAIRMAN BABCOCK: Okay. Frank, and then Lamont, and then Judge Wallace.

MR. GILSTRAP: Well, I'm not sure the Legislature envisioned this going on past the initial hearing. They certainly don't talk about it. I think they view it as kind of a trip to the principal's office, except it's a judge. The judge is going to stand up there and say, "Okay, I've seen what you've put on the internet," and he's going to say one of two things, "Take

it down," or "Let's have a hearing," and at that point people are going to know there's a hearing. But if they take it down, that might be the end of the story.

There's also an ancillary problem. It talks about imbalance of -- an imbalance of power, and that often means people ganging up. Well, what if 20 people have it up? You're going to have to get a restraining order against 20 people to have any effective relief, but that's another problem with the statute, but I think in the real world, you guys who are judges, I mean, what are you going to do? You're going to say, "Take it down or have a hearing." What else are you going to say?

CHAIRMAN BABCOCK: Lamont, then Judge Wallace.

MR. JEFFERSON: I agree with everything you said, Justice Christopher, about, you know, is this a good idea, but that debate's passed. I mean, that's apparently happened in the Legislature. The Legislature is creating this opportunity and instructing the Supreme Court to enable people to go to court and ask for an injunction, and they give us specific direction about how we're supposed to do that. So, yeah, I mean, we -- I think there are a lot of ramifications to this that are not thought through, and I don't think it's a -- I don't think the statute it's a good idea, but we didn't write the

statute. We were given the mandate, and so I think we've got to just do what they say and not -- you know, you're right. If you're sitting in a lawyer's office and you're saying, "What are my options," the lawyer is going to give you all kinds of options; and the last one, if it's cyberbullying, is going to be let's go file a TRO, but we don't get to have that conversation. We are instructed to enable people to on their own go to court and file suit.

CHAIRMAN BABCOCK: Judge Wallace, and then Pete.

HONORABLE R. H. WALLACE: Well, I went back and read the statute that was passed, and the definition of cyberbullying incorporates the definition of bullying.

CHAIRMAN BABCOCK: Right.

HONORABLE R. H. WALLACE: And I would defy anyone to read that and summarize it in simple terms. It cannot be done. And just to say that -- and whoever is on the committee, I admire. I would have thrown up my hands and said I'm done, but you say cyberbullying -- this is on the first page about the third paragraph, "Cyberbullying is defined under Texas law to be harassment." It's defined to be a whole lot of things other than just harassment; and, like I say, I don't know how you simplify that.

Also, it looks to me like under the statute

one of the elements of bullying is that another student that exploits an imbalance of power is one thing you have to have, and I don't think that's addressed anywhere in the form. I'm not sure what that means. I've got some vague idea, but if you read that, that looks --

CHAIRMAN BABCOCK: What's your thought of what it means?

HONORABLE R. H. WALLACE: Pardon me?

CHAIRMAN BABCOCK: What is your thought about what it means, imbalance of power?

HONORABLE R. H. WALLACE: Well, I mean, I guess a mentally challenged kid being bullied by two or three, you know, other of his classmates; but if I send Judge Evans an e-mail that says, "You know, I think you're the worst damn judge I've ever seen in my life" --

HONORABLE DAVID EVANS: That was yesterday.

HONORABLE R. H. WALLACE: -- and he sends me one back and tells me where I can go, I don't think that's an imbalance of power.

HONORABLE STEPHEN YELENOSKY: And then he files anti-SLAPP, and you file an anti-SLAPP.

HONORABLE R. H. WALLACE: Yeah, and then the anti-SLAPP, you're right about that. I mean, this is tailor-made for an anti-SLAPP case.

HONORABLE TOM GRAY: Y'all may have missed

Frank's explanation. This statute is exempted from the application of the anti-SLAPP.

HONORABLE R. H. WALLACE: Okay, good, great. Thank you.

CHAIRMAN BABCOCK: What about if the cyberbullier is a popular kid? Is that an imbalance of power?

MR. JEFFERSON: Yes.

HONORABLE STEPHEN YELENOSKY: Exactly.

HONORABLE R. H. WALLACE: Well, yeah.

CHAIRMAN BABCOCK: Pete had his hand up, and then you, Frank.

MR. SCHENKKAN: Yeah, I'm going to just push back a little bit on what Judge Christopher said. I certainly understand, again, back to square one, none of us knows or can know how this is going to play out, when this is first -- notice is given that this is available. My personal prediction is it's not going to happen practically ever, but that's just my guess. I think the point is well-taken that one way to think about it is what would you do if you were a lawyer and a parent came to you with this issue, but if you're going to go down that way of thinking about it, again, I think that is one of the good ways to think about it, do it both times.

If you're the parent of a child who has been

named in a pro se petition for a cyberbullying order as a cyberbully and you go to the lawyer, does the lawyer tell you -- even if the lawyer doesn't notice that the statute exempts this kind of action from the anti-SLAPP statute, does the lawyer invite -- recommend to the client that we file an anti-SLAPP statute? I don't think so. I think that's the ideal way to get your child branded with a high degree of publicity as at least possibly a cyberbully. I think that's a scenario in which it falls to the first responsible adult who has the right background and experience to deal with the situation the first time the lawyer has been consulted, to tell a client and through the client the other parents, "Let's cut this out at a calm and more reasonable way. Let's see if we can work this out, even without this."

And so that's why I was in favor of where we struck the balance at the moment in the instructions is to try to headline this with you don't necessarily have to go this way, and that I hope will fall on fertile ground because we're going to be dealing with by definition, by assumption, with people who if they do proceed are going to need to be proceeding pro se. And so pausing to think, "I don't know what I'm doing, I've got six pages of instructions as to what I might be doing, and there are things in there, words that I don't even know what they

mean," that's good advice, and that's kind of the best we can do for now, and then we don't want to, you know, substitute for the advice of a lawyer by putting all of the major hypotheticals we can think of from each side in here. It becomes unwieldy, and all it does is confuse rather than help.

So, again, I guess I'm defending a balance that's been struck on something that is only and necessarily a matter of balance, but I think the idea of what would happen if somebody did go to a lawyer and talk to them is in the vast majority of cases I would expect and hope that the lawyer's advice would be "Let's work this out without a court case."

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: As long as we're talking about what the statute says --

CHAIRMAN BABCOCK: Oh, come on.

MR. GILSTRAP: It just requires a student on a student. They don't have to be in the same school, the same county, even the same state. It requires an imbalance of power. That could be all of the traditional notions of bullying. People ganging up. The classic example is the older kid against the younger kid, and no five-year-old is a match for an eight-year-old, and it can be an adroit kid who is verbally adroit who is real good

about picking on people against some kid who is tongue-tied. This is all covered.

The only other thing you need is -- under the statute is that it interferes with a student's educational opportunity. "Daddy, I don't want to go to school. They're picking on me." That's all you need. That's what the statute says.

CHAIRMAN BABCOCK: Okay. Judge Yelenosky, then Kennon.

HONORABLE STEPHEN YELENOSKY: You want to go first, Kennon?

MS. WOOTEN: No, please.

HONORABLE STEPHEN YELENOSKY: Yeah, I mean, I think there's a fundamental question here, and I don't know whether taking a vote helps. The discussion will be available to the Supreme Court whether or not we do more redrafting, but the fundamental issue is do we go to more like attorney advice or more like advice for a pro se. The first thing about it is the top of it says, as the statute requires, "This is not a substitute for the advice of an attorney." So the best advice would be to say nothing but "There's a statute. Go to an attorney and tell the attorney that your child is being bullied." That would be the best advice you could give, legal advice.

We're not charged with doing that. It would

not be helpful. So how much advice do we give them? If you try to cover everything then you're going beyond, for example, what a protective order kit does for people who are suffering from domestic violence. It's to help them get into court. If, in fact, they go to court in the domestic violence situation and it doesn't meet the definition because it's not a spouse or somebody they've dated, the judge is going to tell them that, or the other side is going to say it; but the imbalance of power, for instance, if you put that in here and you have a pro se litigant, it could discourage them from proceeding, when, in fact, there may be an imbalance of power such as you suggested. The quarterback of the football team and all of the cheerleaders are picking on, you know, the egghead kid. So do we list what possible imbalances of power are? Because if we don't, "imbalance of power" is not going to mean anything to a pro se litigant. So I don't know where to go. These are all problems. I guess we could decide that we want to go one direction or another, but short of that, we are kind of saying this is the best we could do.

CHAIRMAN BABCOCK: Kennon.

MS. WOOTEN: In reading the instructions I tried to put myself in the shoes of a parent who isn't an attorney and is questioning whether I should go after another kid who is bullying my child, and when I read the

paragraph about the petition and declaration will be public, it made me pause because if I'm a parent I'm probably not going to file a lawsuit if it's going to entail putting this information about my child in the public record. That would probably be enough for me not to proceed in many cases because I don't know whether my child one day will be scarred by the fact that I did that, will have this record that follows her for the rest of her life.

And so then I questioned whether it's absolutely necessary that these documents have to be part of the public record; and under the rules, you know, 76a, the sealing rule, we have an option for a temporary sealing order that's out there for people without going through all of the typical steps. So it's possible that somebody could couple this petition with a motion for a temporary sealing order, and then I thought that's cumbersome. If I'm a pro se person, would I go forward if I have to do all of this stuff just to get into the courthouse, and that made me wonder whether 76a, we should be considering an exception for documents filed in an action entailing bullying or cyberbullying.

Right now 76a excepts documents filed in an action originally arising under the Family Code, and it strikes me that these types of cases involving children

are sensitive by their very nature, so I just put out there for consideration whether there ought to be in conjunction with the analysis of these forms and instructions contemplation of amendment to 76a.

CHAIRMAN BABCOCK: Could you solve your -- part of your problem by filing it as a Jane Doe or a John Doe?

MS. WOOTEN: It's a good question. I don't know how you could put the information you need to put out into the record as a Jane Doe or John Doe in this case.

CHAIRMAN BABCOCK: Judge Evans.

HONORABLE DAVID EVANS: You have an option of going under 21c, I think it is, and restricting internet access, although it does not cut off access inside the kiosk inside the courthouse, but remember these minors are just -- will some day come back and want to look at these court records in their own names, and we've already created some problems in personal injury litigation where people represented by next friends can't come back and locate themselves in a name index, because we failed to put in something like the Family Code has that requires the name of the child to be at least in the name index that the district clerk is required to statutorily maintain. All of these records at some point may want to be reviewed by the participants themselves,

and so any restrictions would have to be narrow.

Now, you're right, Family Code lets you seal the whole file without anything, but you're not supposed to be able to seal the name index, which would then allow somebody to come back and find the case later in their life and get the record folder if the case became relevant for what they -- maybe they're getting a law license.

MS. WOOTEN: Uh-huh.

HONORABLE DAVID EVANS: And they have to come back and find out what court proceedings they were in.

CHAIRMAN BABCOCK: Professor Carlson.

PROFESSOR CARLSON: What courts would have subject matter jurisdiction over this?

HONORABLE STEPHEN YELENOSKY: I think it's the county or the district, because it's injunctive relief. It wouldn't be a JP court, unless there's an exception in the statute that I've forgotten. It would have to be a court that could issue injunctive relief, but do you-all remember? Without scanning the document.

PROFESSOR CARLSON: And it wouldn't be juvenile court?

HONORABLE STEPHEN YELENOSKY: No, juvenile court is criminal -- well, it's civil, but we all know that it involves crimes. Keep in mind also that without

this statute anybody could go in and seek a TRO under 680, right, if you got a lawyer? So why do we even need the cyberbullying statute, or why might the Legislature have written it and asked us to write a petition that could be understood, I think it says? Because the assumption is that a parent without this is not going to know anything about going into court to get anything. Because otherwise they would just use 680.

PROFESSOR CARLSON: Thank you.

CHAIRMAN BABCOCK: Steve, are we still on the instructions or --

HONORABLE STEPHEN YELENOSKY: Yeah, I don't know where we are. It's kind of a general discussion, but take it where you want at this point because I don't know.

CHAIRMAN BABCOCK: Professor Albright.

PROFESSOR ALBRIGHT: Here on page two, it says cyberbullying -- "The cyberbullying law does not apply to an internet service provider such as Facebook, the library, or a school." It took me a second to figure out why doesn't it apply to Facebook, what if I post on Facebook. My -- I think people will think it means, well, it means a text could be cyberbullying or an e-mail, but not a Facebook post. Well, a Facebook post is the epitome of cyberbullying, and so I think what you're saying is these people aren't plaintiffs, but I think that's a

fine --

HONORABLE STEPHEN YELENOSKY: Or not defendants.

CHAIRMAN BABCOCK: Not defendants.

PROFESSOR ALBRIGHT: Not defendants, yeah, that's what I mean.

HONORABLE STEPHEN YELENOSKY: You can't sue Facebook.

PROFESSOR ALBRIGHT: Not defendants. You can't sue the library or school that's providing the internet or you can't sue Facebook, but posts on a library or school intranet could be cyberbullying, if they had some kind of -- we used to call them bulletin boards, but I don't know what they would be anymore.

HONORABLE STEPHEN YELENOSKY: Your point is there's confusion between the internet service provider as a defendant and the internet service provider as the medium.

PROFESSOR ALBRIGHT: Right, exactly.

HONORABLE STEPHEN YELENOSKY: And you can sue with whatever medium that's done with the internet or the phone, so we do need to make it clear that we're talking about as a defendant. I agree.

PROFESSOR ALBRIGHT: Yeah. I'm just not sure you need that paragraph because I think if your

paragraph says you sue the bully then that may take care of it without confusion.

HONORABLE STEPHEN YELENOSKY: Frank, I think you wanted this in.

MR. GILSTRAP: Say again.

HONORABLE STEPHEN YELENOSKY: I think you wanted this paragraph in or suggested it. Is it directly from the statute?

MR. GILSTRAP: Yeah, it's from the statute. The statute does have an exemption.

HONORABLE STEPHEN YELENOSKY: Yeah. That's what I thought. Well, we don't have to say it.

MR. SCHENKKAN: Well, we can say it, but we can add in does not allow you to sue --

HONORABLE STEPHEN YELENOSKY: Right.

PROFESSOR ALBRIGHT: Right.

MR. SCHENKKAN: -- or whatever, because we are sure that's what they meant, and we were trying to make it understandable and not lead to the confusion you caught, which is a good catch.

CHAIRMAN BABCOCK: Professor Albright, did you have anything else?

PROFESSOR ALBRIGHT: That's it.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: Since we're on that

paragraph and we've talked about that the best advice is to go get a lawyer, I can't help but point out that's exactly what we tell them at the end of that paragraph.

CHAIRMAN BABCOCK: Yeah.

HONORABLE TOM GRAY: "You will have to consult a lawyer," and if, you know, this cyberbullying doesn't -- so in these instructions in some way particular attention needs to be paid to that sentence before it goes out as the final draft.

HONORABLE STEPHEN YELENOSKY: That applies only to things that are not -- the sentence before is talking about other things you may do.

HONORABLE TOM GRAY: Yeah, but you don't have to go consult a lawyer --

CHAIRMAN BABCOCK: No.

HONORABLE TOM GRAY: -- if cyberbullying doesn't apply.

HONORABLE STEPHEN YELENOSKY: Well, that's true, but --

HONORABLE TOM GRAY: But we tell them that they have to.

HONORABLE STEPHEN YELENOSKY: Understood.

HONORABLE TOM GRAY: The other thing that --

CHAIRMAN BABCOCK: And before you leave that, Judge, "You will have to consult a lawyer about

that," that struck me as a little strong.

HONORABLE STEPHEN YELENOSKY: "Should".

CHAIRMAN BABCOCK: What if it's a paralegal who, you know, is way up to speed on -- or a legal secretary or somebody who is not a lawyer, but nevertheless, would it be fair to say, "You may have to consult a lawyer about that"?

HONORABLE STEPHEN YELENOSKY: Or "should."

CHAIRMAN BABCOCK: Or "may" rather than "will."

HONORABLE STEPHEN YELENOSKY: "Should."

HONORABLE TOM GRAY: I would just leave out the sentence.

CHAIRMAN BABCOCK: Yeah, okay.

HONORABLE TOM GRAY: But, yeah, some suggestion to soften it as to --

CHAIRMAN BABCOCK: Yeah.

HONORABLE TOM GRAY: -- "You may want to consult other resources" --

CHAIRMAN BABCOCK: Yeah.

HONORABLE TOM GRAY: -- "if you need something beyond the cyberbullying statute."

CHAIRMAN BABCOCK: Yeah. I didn't mean to interrupt. Sorry.

HONORABLE TOM GRAY: No, I mean, the

recommendation that you had and I think it was in the memo that you've now excised from today's conversation about --

HONORABLE STEPHEN YELENOSKY: Because it's so old.

HONORABLE TOM GRAY: -- having multiple petitions, I think would be -- make it vastly easier for a pro se to navigate through filling one out effectively and have one in the division sort of like you recommended in the memo that you were either -- I think it was (1) and (3) and (2) and (4) together. I could even see four different petitions and pick which one applies and then fill in the blanks. It makes the process a lot easier.

I didn't know this until I sat on the criminal rules committee. This whole deal about the difference between the applicant and the petitioner is critical in an 11.07, which is a post-felony conviction writ of habeas corpus, for those of y'all that don't deal in the criminal arena. There's a big long reason for having the differentiation between an applicant and a petitioner, and it's real, and it's substantial, and it has to be there, and it kind of fits into this where the petitioner can be the adult parent and the applicant is the child, the minor child, and so there actually is a different role there, and it's an important distinction to be maintained, and the multiple forms could, in fact,

ensconce that in the paperwork.

CHAIRMAN BABCOCK: Okay. Nina, and then Kennon.

MS. CORTELL: In terms of referencing that you can seek a legal professional, didn't we in the family law forms suggest a more global statement to that effect? In other words, not having it as cabined in this one area.

HONORABLE STEPHEN YELENOSKY: We have it across the top. Maybe just leave it like that.

MS. CORTELL: Well --

CHAIRMAN BABCOCK: Kennon. Oh, I'm sorry. Were you finished, Nina?

MS. CORTELL: No, no. I think I would say it a little differently, but you could do that, yeah.

CHAIRMAN BABCOCK: Kennon, and then Judge.

MS. WOOTEN: A few suggestions. On page five in the first paragraph after the heading, "What can the judge do if the judge finds that it is likely that my child has been cyberbullied?" We need to close the quotation after "cyberbullying restraining order." And lower in that paragraph, second to the last sentence, says "The restraining order is served, which means delivered in hand by an authorized person." I'm wondering if we should say to whom or on whom it's served, so maybe add to the end of that sentence "on the respondent" or "to the

respondent."

HONORABLE STEPHEN YELENOSKY: Served on.

MS. WOOTEN: And then in the final paragraph on page six, the first sentence reads, "If the judge denies the restraining order." I'm wondering if we need to say, "If the judge denies the request for a restraining order." And the final suggestion and I think I made this before and maybe it's -- maybe it's a bad one, but I realize this is for people who are not attorneys, but I think it might be helpful to at least give them a citation to the law that's being referenced so if they want to go read it they can.

HONORABLE STEPHEN YELENOSKY: Oh, God forbid.

HONORABLE TOM GRAY: Which reminded me, on the criminal -- the attorneys have to use the approved form as well on the 11.07 writs. The CCA has a form that is approved, and what she said reminded me that I was going to mention that, that even attorneys have to use the approved form.

CHAIRMAN BABCOCK: Judge Estevez.

HONORABLE ANA ESTEVEZ: Okay. So I guess I'm going to be the only parent that could be subject to one of these ever in life, but I will start with the background of my teenage daughter had a party at our

house, sleepover, in which some of these things apparently had occurred; and luckily for people that do like paragraph (1), I got a phone call to let me know that cyberbullying was occurring at my sleepover at my house; and my -- the issue I would have, I think someone needs to define or discuss what this imbalance of power was or is because my child had been at a private school, was now in a public school, and the sleepover had people that were still at that private school and some that was in the public school; and several of them from both schools were targeting a popular girl at the private school.

So one could argue this wouldn't apply, because if I would have gotten served with this, I would say there's no imbalance of power. She's a bully at school, or she used to be a bully because she was a bully at school; and now there's a group of other people that are now coming together and cyberbullying her by -- I don't know if you know these phones can do this; but you type in a code first and then when you call them it doesn't show your number; and they can't trace it, so they can say whatever, and they said very hurtful, hateful things that made her not want to go to school. So it would have fallen in everything here, except for what an imbalance of power was.

So I think this is an important statute,

unfortunately. I mean, I would be concerned if I was the one getting this because it occurred at my house; and I don't know how much my child was involved or not; but somebody had posted something about a party on Instagram, so it was all connected so her mother knew it was coming from here. So I -- you know, we fixed it, but my concern is we do need to have this type of instruction. Let's not go straight to the courthouse. Let's not just assume that every parent who has a bullying kid is going to think that that's appropriate. You know, the poor child didn't have a party again for 10 years. No, I don't know, but obviously she was punished and so were the other parents, and we made all of the other parents aware of what was going on at my party or at my house, but this paragraph is important for those who aren't thinking about the other side.

So it does happen, whether it's by peer pressure, and it's usually groups of people that get together, and they may not be targeting the inpopular or the person that has slower responses. It could be they're going against someone that is popular and finally they're all together, so if the imbalance of power can be once you get a whole bunch of group of people together who normally don't have power and they abuse that power at that time, I don't know, but I'm concerned what does that mean?

Because I think that's a strong defense for me, if I would have come to court, and I think she had a really strong case from what I understand was communicated to her.

CHAIRMAN BABCOCK: Uh-huh.

HONORABLE ANA ESTEVEZ: So I think those are important parts because what if somebody looks at it and they go, "Well, my kid's not at" -- there's no imbalance. She's not exploiting it because my kid -- the unpopular girl or less popular person --

CHAIRMAN BABCOCK: The -- I'm sorry, were you done?

HONORABLE ANA ESTEVEZ: Yeah. I was just --

CHAIRMAN BABCOCK: What did you do, by the way?

HONORABLE ANA ESTEVEZ: Oh, everybody got in trouble. I called everybody's parents, and, you know, we discussed that everyone had to apologize to her. I mean, I did everything -- I asked her mother, "What would you like me to do" so that her mother would have satisfaction for whatever happened.

CHAIRMAN BABCOCK: Right.

HONORABLE ANA ESTEVEZ: And then I doubled whatever she said.

CHAIRMAN BABCOCK: Having a mom as a judge is --

HONORABLE ANA ESTEVEZ: Yeah, she actually has left because she decided she didn't like my parenting skills, but she's 18 now.

CHAIRMAN BABCOCK: The statute says in 129A.003(a) that the court has -- the Supreme Court, "as the Court finds appropriate," has to promulgate instructions for the proper use of each form. What does -- this gets back to how Lamont started our discussion. What does that mean? "Instructions for the proper use of each form." Yeah, Professor Albright.

PROFESSOR ALBRIGHT: I just want to say real quickly that the record kind of reflects that we think being popular gives you power. I think teenage popularity is a very fragile thing, and teenage power is very fragile, and the power can shift at any moment, and we should not make any assumptions about who has power or not. You know, like this little girl you were talking about. She was popular, but her power at that moment crashed, and it could have changed dramatically. I was lucky I only had boys, but I saw a lot of it.

HONORABLE ANA ESTEVEZ: Girls are mean.

CHAIRMAN BABCOCK: I think the statute ought to have a definition of mean girls, actually. Back to what the statute does say, "Instruction for the proper use of each form."

MR. GILSTRAP: That's as vague as the rest of the statute.

MR. JEFFERSON: Well, I mean --

CHAIRMAN BABCOCK: But we've been told before to do instructions, right? And what have we done, or what have we recommended to the Court and what has the Court done?

MR. GILSTRAP: I think we followed the user-friendly approach in the past.

CHAIRMAN BABCOCK: Orsinger, are you paying attention?

MR. ORSINGER: I sure am, Chip, and I would like to be heard, but it does occur to me that the statute asks the Supreme Court to promulgate forms to implement the statute, and the statute has not only a TRO and a temporary injunction and a permanent injunction. These forms get the lawsuit started, but it doesn't -- unless I'm missing something, it doesn't provide any guidance after you get your temporary restraining order or what you do if your temporary restraining order is denied, and -- or the option of sidestepping the temporary restraining order and going directly to the temporary hearing where evidence is presented, but you don't have all of these complicated ex parte problems.

And so I agree with the comment that Lamont

made that we shouldn't be debating the wisdom of this. We've just got to do the best we can, because if we don't do it, the Legislature may do it, and I think we can do a better job on the rules than they can. So at some point I think we need to focus on what do we do with these people. We've now launched this lawsuit. We've got a TRO that expires in 14 days. We don't give them any guidance at all about what to do at the end of 14 days, how to get a temporary hearing, what to do with the temporary hearing, or what you do after the temporary hearing, and so maybe that's all. Maybe the TRO quashes it, the parents stop the kid from cyberbullying. Maybe there will never be a temporary hearing. Maybe there will never be a permanent hearing, but it does occur to me that at some point we need to focus on what we're telling these people about getting a TRO and then what to do after they either get the TRO or have it denied.

CHAIRMAN BABCOCK: Well, Richard, what I was focusing on was the forms in the, you know, uncontested divorce, no kids, which --

MR. ORSINGER: That's a fond memory. That's a fond memory.

CHAIRMAN BABCOCK: -- generated some documents, but what were our instructions on that? I mean, it was --

MR. ORSINGER: Well, we kind of assumed that they would get together and work out a property division and then we gave them a form decree. I don't recall whether there were form temporary orders. There might have been. Somebody may remember more clearly than I do, but we definitely didn't abandon them after the original petition. We definitely had a form decree, and we spent a lot of time debating what it should say; and we said, you know, if you've got real estate and you've got kids, don't use this form. If you've got retirement, don't use this form. Otherwise, use this form. So we gave them some way to finish the lawsuit and go on with their lives.

So anyway, so far as I can tell the forms have been working. I'm not the best one to know because I don't get involved in those cases, but I haven't heard a lot of pushback --

CHAIRMAN BABCOCK: Yeah, but I'm not focusing on the forms right now because we started with instructions. That's what we're talking about now is instructions.

MR. ORSINGER: I see. We're not talking about the forms yet?

CHAIRMAN BABCOCK: We're not talking about forms. We're talking about instructions, and the statute says, "instructions for the proper use of each form." So

maybe we should have started with forms, but we didn't, and it seems to me like maybe we're going beyond instructions for the proper use of each form, but maybe not. I'm just wondering if anybody has got a thought about what this language means. I think it could be read narrowly.

HONORABLE STEPHEN YELENOSKY: Yeah, it could be just that we do the form and any instructions we have are within the form, and that would not include any instructions about -- you know, any of these paragraphs about talking to the parents, what's going to happen. We could take all of that out and maybe add a few things into the form itself, I mean, the petition itself that you're filling out. In the protective order context, double-checking -- you might know, Richard. I think that's how it's done, isn't it, in the protective order context?

MR. ORSINGER: You know, there are some pretty tightly worded instructions on how to use the protective order form, but in at least some iterations they are actually embodied in the form. You have kind of a general instruction sheet and then as you go to fill out your protective order form, you get help at each numbered paragraph, my recollection.

MS. HOBBS: Yeah, on those forms they were

done -- I think the Equal Access to Justice Commission had like a grant so they had somebody do the forms. They're pretty phenomenal, but they have these bubbles, so there's like a -- if you can imagine if you took the form then there's these little bubbles that tell you an instruction for each part of filling out that form. Like, you know in this case it would be like "If you're over 18, list your name"; "If you're filing this on behalf of your child"; and it becomes this kind of like bubble thing that's embedded within the form itself that's -- I mean, it's a really good job, but it was definitely done by --

MR. ORSINGER: Professionals.

MS. HOBBS: By professionals, yeah.

HONORABLE STEPHEN YELENOSKY: That's what we need, professionals.

CHAIRMAN BABCOCK: Frank. Oh, I'm sorry, Richard is not done yet.

MR. ORSINGER: I'm sorry.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: Yeah, it seems to me that we're -- that we could end up getting lost in a deep discussion with no solution if we try to explain these terms to a layperson in the forms. Where the rubber meets the road is what the judge decides.

CHAIRMAN BABCOCK: Yeah.

MR. ORSINGER: Whether we can agree on what cyberbullying is or what an imbalance of power is is kind of irrelevant. All you have to do is make the allegation, put on the proof, and you either get your TRO or you don't get your TRO. So maybe we shouldn't try to define imbalance. Maybe we shouldn't try to define cyberbullying beyond just what's in the statute. Let them go to court. Everybody will holler and shout, and the judge is going to make a ruling.

CHAIRMAN BABCOCK: Yeah. Frank, will you yield to Judge Newell for a minute?

MR. GILSTRAP: Sure.

CHAIRMAN BABCOCK: Judge.

HONORABLE DAVID NEWELL: I would just add really quickly and just to sort of build on something Chief Justice Gray mentioned earlier, we actually had to go through a process of trying to come up with instructions for writ applicants, and I just would emphasize that there's a real potential to make it perfect. The perfect the enemy of the good, and so we can hash and have a really big discussion about this, but at the end of the day less is probably more, and so at some point you're just going to have to sort of write or die. So I just want to --

CHAIRMAN BABCOCK: And, by the way, the

record should reflect the judge put a thumbs up to that. Frank.

MR. GILSTRAP: As long as we're talking about what the statute requires, it says, we shall "promulgate forms for use as an application for initial injunctive relief." It doesn't go past there.

CHAIRMAN BABCOCK: Right.

MR. GILSTRAP: And the statute doesn't go past there.

CHAIRMAN BABCOCK: Right.

MR. GILSTRAP: And then it says "by individuals representing themselves." That seems to me that implies we've got to tell the individuals how to represent themselves at least to a certain extent. Otherwise, that is meaningless.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: I'm having trouble hearing today because of some problems with my ears, and I may be repeating something that someone else has already said. The definition of cyberbullying in the instructions does not include the concept of an imbalance of power. The statute does, because the statute defines bullying and then bullying is incorporated into cyberbullying. So the instruction here needs to include for a layperson, for anybody, the definition of the concept of imbalance of

power, and I agree -- I mean, the last comment, you're writing for laypersons. It seems to me that the intent of the Legislature is to encourage laypersons to stop whatever situation is causing distress or harm without the necessity of going to lawyers, to do it effectively and inexpensively for the protection of the child. I think you have to give some example of what an imbalance of power is.

CHAIRMAN BABCOCK: Aren't we legislating if we do that?

MR. MUNZINGER: We are not -- we aren't legislating, but at the same time, if you were instructed to explain something to a layperson, is the Supreme Court going to keep its mouth shut and not instruct the layperson?

CHAIRMAN BABCOCK: Well, it may if it gets a case, but --

MR. MUNZINGER: Well, I understand we're not making law -- it's a problem. I understand the problem.

CHAIRMAN BABCOCK: Well, we would be making law.

MR. MUNZINGER: I don't know how -- cyberbullying, and I'm a person that hadn't gone to law school, and I read this statute or I read a definition, and it says cyberbullying and then I get down to this

business about imbalance of power, what are we talking about, an imbalance of power? Here in the room today we've talked about the quarterback having more power than the nerd.

CHAIRMAN BABCOCK: The popular quarterback.

MR. MUNZINGER: The popular quarterback having more power than the nerd.

CHAIRMAN BABCOCK: Because there are quarterbacks that are not so popular.

MR. MUNZINGER: You know, I don't know how you do this without giving some indication even in the most general of terms what this embodies or could embody.

CHAIRMAN BABCOCK: But doesn't the parent say, okay, there's an imbalance of power because it's popular quarterback or it's the mean girls or whatever it may be; and then the judge says, "No, that's not imbalance of power." And then it goes up to the court of appeals, and they say, "Well, yes, it is," and then the Supreme Court says, "No, it's not."

MR. MUNZINGER: I understand the problem. All I know is that I don't know how you could conceivably expect a layperson to understand the concept of balance of power in the context of what we're trying to do here to avoid the necessity of getting -- first off, who has got the money to go hire a lawyer to stop this?

HONORABLE STEPHEN YELENOSKY: Can I interject something here that's radical and --

CHAIRMAN BABCOCK: Judge Newell had his hand up.

HONORABLE STEPHEN YELENOSKY: Okay.

HONORABLE DAVID NEWELL: I would just say that my sense as a parent is, is that if someone is cyberbullying my kid I don't really care if there really was or wasn't a balance or imbalance of power. If I'm going to proceed, I'm going to proceed.

HONORABLE STEPHEN YELENOSKY: And the judge isn't going to care either.

HONORABLE DAVID NEWELL: Maybe not. So I would just say that I don't know that a definition or trying to solve that problem right here for the instructions is necessarily going to do anything for the people that are reading the instructions.

CHAIRMAN BABCOCK: Okay. Judge Wallace, then Judge Yelenosky.

HONORABLE R. H. WALLACE: Well, I was thinking in terms of going back to the forms. You could almost -- I think you might be able to almost instruct them almost like in a -- the charge in a criminal case the elements of the offense are A, B, C, and D. Well, the elements of cyberbullying are set out here, and you could

almost go down and check the box. There's an imbalance of -- you tell me why there's an imbalance of power, because, you know, let them state like here, state the reason. And then there is a -- it disrupts the educational process, if that's their point, check that box and say why. Because otherwise, if you bring that petition to a judge right now, I think you could look at there and they've done everything they're told to do in the form, but they haven't met the --

CHAIRMAN BABCOCK: Right.

HONORABLE R. H. WALLACE: They haven't shown cyberbullying under the statute. It would take a lot longer form.

HONORABLE STEPHEN YELENOSKY: Right, but -- are you done?

HONORABLE R. H. WALLACE: Yeah.

CHAIRMAN BABCOCK: Judge.

HONORABLE STEPHEN YELENOSKY: I'm going to suggest something radical, and because, you know, obviously these are problems. In 129A.03(d) -- no, I'm sorry, (e). No, I'm sorry, (f). Keep going. "A court shall accept the form promulgated by the Supreme Court under this section unless the form has been completed in a manner that causes a substantive defect that cannot be cured." The way I read that is that the Supreme Court

prepares the form. Obviously this will all be subject to appellate review, but coming from the Supreme Court, promulgates a form and unless the way it's filled out creates -- the way the form is filled out creates a substantive defect, then the court has to accept it and proceed. That may be the best solution, because we're getting into -- you know, I hate the idea that we have six-page instructions. I really do. And it may be just that we do a bare bones form and what really happens is the court accepts the form and then figures out what's going on and decides what to do.

CHAIRMAN BABCOCK: Justice Kelly, and then Robert.

HONORABLE PETER KELLY: To pick up on something Judge Christopher said earlier, the defendants are likely to have attorneys, and the plaintiffs are not. This is the type of thing that would be covered under a homeowners insurance policy, and so the defendant who gets an injunction or sought could get an attorney and not have to pay for it. And that can be important because once you have an indication of, say, Rule 91a you have to make sure that the application on its face comports with the cause of action or the ability to get the injunction under the statute. So you have to list all of the elements to entitle you to an injunction and not just have a bare

bones form. Otherwise, the petition, the application, does not on its face entitle you to injunctive relief, and you would be subject to paying attorney's fees under Rule 91a and dismissal.

HONORABLE STEPHEN YELENOSKY: Well, but the form promulgated by the Supreme Court doesn't necessarily have to include all of that. Those things have to be shown, right, but I don't know that they have to be in the petition. But again -- well, what you pointed out about homeowners insurance, I think we have the wrong perspective here. A lot of these people aren't going to be owning homes. They're going to be renters. They're not going to know what you're talking about when you say homeowners insurance is going to cover it.

CHAIRMAN BABCOCK: Well, there cannot be an imbalance of power if they're renters.

HONORABLE STEPHEN YELENOSKY: Well, they're not going to have homeowners insurance.

CHAIRMAN BABCOCK: Yeah.

HONORABLE STEPHEN YELENOSKY: That's my point. They're not going to have an attorney.

CHAIRMAN BABCOCK: Robert, who has been waiting patiently.

MR. LEVY: Just a small point, and I apologize if this was mentioned. On page five it talks

about the issue of a restraining order is served, which means delivered by -- in hand by an authorized person, but then the next section talks about "The order is effective as soon as the person restrained receives a copy of it." So is that -- if I send them an e-mail is that enough? If I post it on Facebook, is that enough or not, or is service required or --

HONORABLE STEPHEN YELENOSKY: Well, service is required of the petition, and maybe we misworded it, but once a TRO is issued, if there is actual knowledge by the person --

MR. LEVY: Right.

HONORABLE STEPHEN YELENOSKY: -- affected, that's just the law.

MR. LEVY: So I'm not sure that the "served" language matters.

HONORABLE STEPHEN YELENOSKY: Maybe we have it in the wrong place.

CHAIRMAN BABCOCK: Good point. Frank, you had your hand up a minute ago.

MR. GILSTRAP: I want to go back to what Richard Munzinger says, and there's kind of another approach here, and it has two parts. One is I'm not sure that we shouldn't replace "harassment" with "bullying." I mean, they're both vague terms. They're both vague terms

under the law, but bullying might be closer to some parent's idea of what's going on than harassment. The other thing to do is put at the end of the form -- put the definition in there. I mean, if that's what the law is and that's the law, that's the law your case is going to be judged on. Maybe we're a little embarrassed to put such a vague statute in the form, but that's another approach.

CHAIRMAN BABCOCK: Well, the Legislature has defined it; and they say, for example, "imbalance of power"; and so your form could say, "There is an imbalance of power because," colon, fill in why it's there. Because it's the quarterback or popular or non-owns the home or whatever it may be. Richard, then Skip.

MR. MUNZINGER: I'm not sure that's necessarily true. What would be wrong with having an instruction which would say, in effect, "Set out the facts that you believe support your claim. The judge will make the decision as to whether the statute has been met," or words to that effect, which, in fact, is the case. Pro se litigant or otherwise. If I set out my facts in detail, the judge is going to make the decision. So I'm -- earlier I said you need to give examples of cyberbullying. Maybe we don't. Maybe we just say, "Say what the facts are. Say why you believe this is cyberbullying and

present it to the court, who will make the decision." That's the fact of the matter. That's what happens, whether you've got a lawyer or you don't.

CHAIRMAN BABCOCK: Skip.

MR. WATSON: I was concerned in reading this that we would get balled up on the exploits and an imbalance of power. It would be very easy for that to happen and very easy for that to throw a form to the point that it's not going to get used. I may be off, and I haven't heard this, but I think it kind of follows what Alex was saying. When I read this, I thought of bullying as being something that is happening now, who is the bully now, and that I saw the significant act or patterns of action or pattern of acts being what creates the imbalance of power.

I saw this as a very real possibility of the person who historically lacks power using the ability to cyberbully to turn the tables and gain the imbalance of power through the act, and I just don't see -- I think it's aimed at stopping the act that is creating an imbalance of power and doing harm rather than saying, no, this only applies to the popular quarterback, but it doesn't apply to the nerd who's had enough and goes too far. I just don't -- I just think we're going down the wrong road there. Bullying is bullying, and the imbalance

of power comes from the bullying per se. To me that's pretty clear, but I think I may have really missed something here because I haven't heard it.

CHAIRMAN BABCOCK: No, I think that's a great thought. Rusty, did you have your hand up? Or are you finger-combing your hair?

MR. HARDIN: No, but I agree with that. I'm still lost on this whole thing about power. I don't see what difference that makes.

CHAIRMAN BABCOCK: Okay. Frank.

MR. GILSTRAP: What if the quarterback and the cheerleaders are bullying the nerd because he's cheating in class, because he groped one of the cheerleaders in the hall? That's bullying. It covers the statute.

CHAIRMAN BABCOCK: Could be retribution.

MR. GILSTRAP: The problem is this deals with speech in all -- every single order will inhibit free speech, and we're taking -- we're not taking it seriously because it's kids, and at some point there's a danger that this will be elevated to adults. It's a serious matter, but the vagueness in the statute, you know, we just can't let it pass.

CHAIRMAN BABCOCK: Well, this statute can apply to adults.

MR. GILSTRAP: What's that?

CHAIRMAN BABCOCK: If they're students.

HONORABLE STEPHEN YELENOSKY: It does. Yeah.

MR. GILSTRAP: Yes. Yeah, I know, but I'm saying it could be -- look, this is going to be in the law and some well-meaning person is going to elevate it to some other context, like the workplace.

CHAIRMAN BABCOCK: You're right. Right, right. Pete, and then Judge Evans. Roger, did you have your hand up, too?

MR. HUGHES: Yes.

CHAIRMAN BABCOCK: Okay.

MR. SCHENKKAN: I think we may need to look again at the form for the order and petition to see whether there is some way in which we have said in it enough to be legally sufficient; and I think we probably have not looked carefully enough at that; and it may require us to put into the form and the instructions the words "imbalance of power"; and if we have to do that, and I think we may well, then I think Richard is right, that we don't try to define it. We just require the petitioner to fill in the facts that the petitioner thinks satisfy this list of words, which now includes "balance of power."

I am less worried about that fact, about the

fact that that's vague, about the fact that it involves speech, about the fact that we don't know what different people can think what this means, because we ought to go back to why the Legislature rightly or wrongly thought this whole thing was a good idea. They think it is a good idea because they think that if a parent in the usual case has this available in some instances that it wouldn't otherwise have happened a responsible adult in the legal system, to wit, a judge, will be told "This is what I say the facts are"; and the judge would say, "I think I should do something about that" or "I don't think I should." That's all we're trying to get to, as I understand it, is to get this in front of a judge with enough for the judge to be the responsible adult to say should something be done about this or not. And so while I agree it looks as though we need to revise the form to get the imbalance of power in there in some way or another, the words --

HONORABLE STEPHEN YELENOSKY: Uh-huh.

MR. SCHENKKAN: -- again, less is more. I mean, if we can get it to the point where first a parent looking at this makes a more responsible than otherwise decision whether to do something about this other than call the other parent or talk to somebody at the school, first step, do that, and then if we are in a suburban high school and the parent that -- the parent of the child who

is being accused of being the cyberbully looks at this and says, well, should I talk to the other parent first or should I go hire a lawyer and ask the lawyer is there some way I can get this paid for since I can't really afford to pay them, and hopefully the lawyer knows that your homeowners insurance covers this. You know, we're trying at each step to set up a process that is going -- is aimed at getting the adults to act like adults, to stop this sooner, with the last backstop being a judge presented, if necessary, with an ex parte petition.

CHAIRMAN BABCOCK: I've got Judge Evans and then I've got Roger and then I've got Lisa.

HONORABLE DAVID EVANS: I think this is a small matter, but this section that talks about acceptance of the form unless there's a substantive defect, and the 129A.003(f), I can't tell if the Legislature is describing the act of the district -- of a court clerk or the act of a judge in accepting the form, and if the committee can any way and the Court can in any way give the trial courts and the district clerks and county clerks guidance over who it is that's supposed to reject a form for substantive defect, it would be helpful I think in the future. I don't know of any way for a clerk to reject anything except under the electronic filing rules before they accept it, but of course, these could be pro se filings

coming in in a different way, and trial judges normally just deny pleadings or allow for amendment if they don't meet the requirements.

This rule is -- obviously everybody knows it could have been better drafted, but whenever you refer to a court doing something you need to identify the actor that has to do -- that has the duty to act; and if we can broaden that any, it would provide us some guidance in who has that duty to reject that defective form. Because this is -- this is a 91a motion on the other side by represented counsel. There will be a substantive defect, and there will be this motion to reject because it doesn't meet the requirements, and the filing has to go out. That's a real first.

CHAIRMAN BABCOCK: Uh-huh. Roger, and then Lisa.

MR. HUGHES: Two things. First, I guess picking up on what Mr. Watson just said about this imbalance of power, my recommendation is we tell them that we've got to say something about it, but if we try to give examples in the form, we're automatically narrowing a concept which has yet to receive any kind of judicial definition, and this form --

CHAIRMAN BABCOCK: That was my point, by the way.

MR. HUGHES: -- will then be pointed to as some sort of official pronouncement of what this term means and what it doesn't mean. I would rather trust judges who actually have to deal with these to go, "Looks likes an imbalance of power to me" until we get some higher courts to tell us, and I'll tell you why. I remember -- this is kind of a long-winded explanation, but on the plane up here I watched the movie biography of Fred Rogers, and the one thing he said is children have emotions every bit as powerful as we do. The difference -- and I don't think he would have said this, but I do, is that until they become an adult, sometimes maybe even in their twenties, they don't know how to deal with them; and any insult to their ego is more than they can tolerate, which is why we see children or even adolescents lash out and do vicious things, because in their world that's the only way they know how to deal with an insult to their ego; and that's what we're dealing with here.

So picking up what Mr. Watson said, I think the thing about what makes technology -- the use of technology to bully almost an imbalance of power is that in their world these little cell phones that they have are almost like guns. I'm sorry, they're as real to them and the insults that they see on their screen are as real to

them as if they were sitting around in a room like this and all the people were talking to them and pointing fingers at them. That's the way they perceive it, and the use of technology to do that is a way of threatening to them. So I can sympathize we not get too far down this road because the use of technology to do it is itself I think maybe an imbalance of power, and I'm reminded that when I went back and actually read an article on the invasion of privacy written by Brandeis over a hundred years ago, what he was saying was the threat to personal privacy coming in the 20th century was technology. The use of cameras, which was like, you know, portable cameras, et cetera, et cetera, meant that pictures could be taken of someone doing a performance and spread around, and they would now be able to exploit it, et cetera, et cetera. Once again, technology is doing the same thing.

Now, the other thing about speech, I'm not sure that we need to be too worried because I think we already are getting a very highly developed sense of what slander and libel are, and certainly there are more cases coming out to tell us what it means. My concern is that -- that our adolescents and young children are growing up in a world in which that stuff that appears on their computer is as real to them as everybody in this room is real and talking to them, and it creates the same

kind of pressure, threatening presence, et cetera; but the one thing that makes it different is there's also a belief -- and I'm not sure where they got it -- at least under twenties, that it's the wild, wild west. There are no rules. I can say or do anything I want on these screens; and I think, if anything, the Legislature is going, no, there is -- you have to be responsible for what you put out there. And if this means we're going to have the same fights over -- in cyberbullying that we're having in slander and libel, the one thing that it may do is bring a sense that there is -- that people are as responsible for what they put on these screens, what they post anonymously, as anyone else who prints it in the local paper or, you know, starts a rumor campaign.

So once again, get back to my two points. I think we're better off saying -- say something about imbalance of power and let the judge sort it out; and secondly, I think it's better that we do something and not -- and be assured that our current rules about defamation and speech protection will stay the hand of an overaggressive judge; but at least it will create I think a sense of responsibility for what people put out there.

CHAIRMAN BABCOCK: Well, this statute is not limited to defamatory speech. So, Lisa.

MS. HOBBS: So I was involved a little bit

in the legislative process of this, and I just want to give kind of a broader view; and it's playing off of Pete's point about like the whole point is to get some adult to step into this process, right, whether it's you call a parent and get them; but why this statute went into play really is that there were educators who felt like they only had to intervene when they saw bullying on campus. So the real heart of this bill is to get educators to realize there are things that are happening off your campus, including online, that you need to be aware of, and we're holding you accountable for them if you know about them.

And I only say that because we're getting sort of like hung up on some of this terminology, but remember the definition of that imbalance of power, that's coming from the Education Code, and it's meant to get principals to really think about -- because that's the bulk of this bill. This side issue that we're dealing with -- and I'm not saying it's -- I'm not saying it's not important, but it really is like a very small part of what the Legislature was trying to do. The bulk of what they were trying to do is to get educators to realize you can't just turn a blind eye on bullying when it's not happening on your campus, and so that's the bulk of this bill, and so, you know, I support the idea -- the concept of like a

form that gets someone to lay out the facts and let the judge decide whether it meets these definitions or not, meets these definitions keeping in mind the broader scheme of what the Legislature was trying to do.

CHAIRMAN BABCOCK: Yeah. That's a good way to move into our morning break, and when we come back we've got some scheduling issues, so I think we're going to have to -- I hate to do it this way, but we're going to have to break off of this and go to an aspect of the discovery subcommittee, because Commissioner Sullivan has broken away from his busy schedule to be with us and wants to talk about some thoughts he has about the discovery rules. So we'll take a 15-minute break, and then when we come back Commissioner Sullivan and Mr. Meadows will discuss this aspect of the discovery rules. So we're in recess for 15 minutes.

(Recess from 10:43 a.m. to 11:08 a.m.)

CHAIRMAN BABCOCK: All right. We are going to shift topics here briefly to discovery and the subcommittee chaired by Bobby Meadows, who is going to lay out the issues. On the phone is Kimberly Phillips, so don't say anything mean about her that you don't want her to hear, and also --

MS. PHILLIPS: Hello.

CHAIRMAN BABCOCK: -- I've had several

requests that when speaking you speak to the group and not, as some people have done way down there in the corner speaking to each other, which means people down here like Rusty who is hard of hearing can't --

MR. HARDIN: Actually, he's absolutely right, even though he's trying to give me a hard time.

MR. LEVY: Is he bullying you?

MR. HARDIN: He is. He is, and there's definitely an imbalance of power.

HONORABLE ANA ESTEVEZ: If we only could add technology, just got to add technology.

CHAIRMAN BABCOCK: All right. Bobby, how about it?

MR. MEADOWS: Thank you. Perhaps just as a place to start we could just examine where we've been. So the discovery subcommittee was asked to take up the discovery rules in -- I believe it was in 2016, and we made -- the subcommittee met, worked up a set of proposals that were first discussed in this committee in September of 2016 and were further discussed in February, April, and June of 2017; and as a result of those discussions, which pretty much covered the entire scope of the discovery rules, we made revisions that reflect those discussions and decisions that were reached in this committee; and all of that is in the proposed changes that we have submitted

to you, Chip, and to this committee, which I believe have been circulated; and so what you have is a set of discovery rules short of Rule 215, the spoliation rule, which I will speak to in just a moment that reflects what we consider to be the full review and consideration by this committee; and the changes that were adopted are reflected in yellow highlighting; and decisions that were made to delete language or to remove either proposed -- our proposals or existing language, that -- those have been deleted.

So what you have now is the set of rules that our discovery committee believes reflects the thinking, wisdom, discussion, and decisions of this committee, all except for Rule 215, which has not been fully discussed here, and fuller consideration of a spoliation rule. You will remember that Rule 37(e) was a -- of the federal rules was revised in the 215 amendments -- 2015 amendments, and when we first came forward with our proposals in this committee, we largely were suggesting a spoliation rule that was -- that was consistent with, but not -- that did not mirror the 37(e).

It was our belief at the time that it should be a rule that was limited to ESI, but we wanted it clear that in our revisions that it required an intentional spoliation of ESI in order for the court to comment on the

loss of the material and give an instruction in an adverse presumption. That never really got fully debated and reviewed by this committee over the course of this time that I've described since 2016, but what has happened in that context is that there's been a great deal of interest that we have heard as a subcommittee on what to do with spoliation in Texas. We do not have a spoliation rule, and it's been -- the Supreme Court has made it clear that spoliation is not a cause of action in Texas. What it is, and we know from Brookshire and other treatment by the Court, that it is a sanction; and so dealing with that as the issue, what do you -- what do we do about material that's lost, perhaps not just ESI because we have heard from certain members of this committee and outside this committee that there is interest by some in having a spoliation rule that deals -- that's broader than just focused on ESI.

We've also heard from others that the burdens of preserving ESI in today's age and in the context of modern litigation is so expensive and so burdensome, that we should step back in terms of examining how we handle that type of material when it's lost. So in -- at the basic level spoliation requires a duty and a breach of the duty, and I think Kent and Robert Levy are here today I know and have thoughts about this, and I

imagine others in this committee do as well, in terms of what should we do in taking a fresh look at spoliation, because as in the federal rule and I think what we see in the case law in Texas is the courts have dealt with it in terms of defining duty around anticipation of litigation.

The question that came to our subcommittee and that we have examined and actually you will find reflected in a draft rule for discussion is a -- is a new way to look at duty, and I just want to frame it correctly in terms of why this is an issue. I think it's because there is so much concern around the cost and the ambiguities around preserving ESI and what it can mean if you fall short of what some court thinks you should have done. So I think there are others that want to speak to this, and I think before we bear down on any particular rule perhaps it would be worthwhile to hear from Kent and others about views in terms of duty, because the interest that we're hearing is that there needs to be at least with regard to ESI, which I think we -- our subcommittee would purport to be the single focus of a spoliation rule, is that there should be a more precise definition of "duty"; that is, that there should be a bright line test about when there is an obligation to preserve ESI and whether it's with the filing of a lawsuit or there's a notice that puts a party or a -- to make them aware that they -- that

ESI is relevant to the potential claim. And so the point is, something other than a -- the notion of litigation, should there be something that's a bright line test in terms of an obligation to preserve duty.

So it's around that point, I think, that we have an issue and then if you step beyond that, what would the -- what would be the nature of the notice? What puts a party on notice that they need to preserve ESI? And then, of course, then the obvious elements of a spoliation rule, and that's what would be the remedies if there is spoliation, either intentional or by virtue of negligence, in terms of the breach of the duty, and what about the company that's trying to just go about its work in the normal course of business and documents are lost or destroyed, but there's no -- but there's no intent and there's no notice. Those -- that's sort of I think the set of issues that we've been dealing with and we would like to hear some discussion on.

CHAIRMAN BABCOCK: Great. And I know a lot of people have opinions about this. Commissioner Sullivan. By the way, everybody knows that Kent is the Commissioner of Insurance, right? If you didn't know that, he is, and he's got a very tight schedule today, so I kind of tried to schedule this around his schedule and to make sure that we hear his comments, so I'm going to

call on him first and let him talk on the topic, if that's all right, Kent.

HONORABLE KENT SULLIVAN: You're very kind, and I'm happy to do it and happy to do it briefly. My main interest was just trying to raise a conceptual issue, and that is we've been talking about spoliation for sometime, and the question that I tried to raise was, was it more appropriate to try and have an objective standard and more bright line standard and provide greater certainty in this area, given not only where we are in terms of the costs associated with data preservation and the various difficulties, but where we are likely to go. What does it look like over the next 5 to 10 to 15 years, and that's particularly important, I think, given that we only revisit rules like this about every 20 years, it seems like.

So I thought that sort of prospective viewpoint was an important part of the debate, and as I say, I just have an interest in what is the appropriate standard for -- particularly for triggering a presuit duty to preserve, and my suggestion was at least conceptually that we ought to consider objective benchmarks that would trigger the duty, and we've got a couple, I guess, in the proposals that Robert has. One, I had a group that was toying with a draft as well, and I think Bobby has

included that as well. My group included two others that really had done most of the work, but they fled by way of appointments to federal and state appellate courts, so now I'm on my own; but as I say, I think it might be a mistake to dive into the weeds on this, because I think there's a threshold issue that is the conceptual issue. To what extent is it appropriate to be bright line and create an objective, not subjective standard.

The second thing I'll toss into the mix is I thought it was useful with respect to presuit litigation hold issues to try and explicitly create an avenue for judicial relief, to the extent that there is a dispute over the scope of presuit litigation holds. I don't know what the experience, the collective experience, has been of people in the room, but it's not entirely clear to me how one obtains judicial relief if there is no lawsuit and there's simply a hold letter and arguably a duty to retain that may be one of some very substantial dispute, and it occurred to me that it would be useful to at least discuss providing access to judicial relief.

So those are really the points that I wanted to raise and make sure that we sort of ventilated today, and Robert I think may have some other thoughts. He has a separate, I guess, newer iteration of a proposal that I think has some elegant changes to it.

CHAIRMAN BABCOCK: Robert.

MR. LEVY: Thank you. And I appreciate the work of Bobby's committee; and focusing on the question of when does the trigger apply is obviously a very important one, and I struggle with the issue about whether we want a bright line rule that is easily understood and objectively applied or is it a rule that should be applied under the circumstances of a particular case; and I think that the draft that we're looking at that the committee has proposed includes some objective standards about when notice is received; but it also adds a provision about when a claim or privilege might apply, the work product privilege, which is often used as a surrogate for when somebody is on a reasonable notice -- notice of a reasonable likelihood of a litigation; but that's not -- they're not the same issue and sometimes the standards should be different.

One of the other big concerns that I think we need to keep in mind is the concept of unintended consequences, which is that if we create a standard about when trigger applies and that's a fact question, are we opening the door to discovery about that issue, which will create an even worse situation, because all of this focuses on trying to avoid the cost and burdens that are created by overpreservation and too early preservation.

And just to keep this in context, I think generally speaking, and there's empirical evidence to back this up, that companies generally put on hold about 90 to 95 percent of data that's never actually used in a lawsuit, so that when an issue comes up and a hold is applied, you overapply it in terms of scope, you overapply it in terms of people. You also overapply it in terms of the risk of litigation because you don't want to face the consequence of a sanction, but the results of that overapplication of privilege is -- causes significant disruption and cost, and I think that's a factor that we should keep in mind as we look at this.

The -- one of the elegant ideas I think about the idea that the commissioner proposed about service of citation or service of a notice of a suit is that that provides some clarity as to when a preservation duty applies. The challenges that also should apply to the party bringing those claims as well, so you've got to have some way to balance that. You also I think need to be concerned about keeping in mind the difference between a duty to preserve and a duty not to destroy, and I'm not sure if we -- if that's something we can draft around, but sometimes we get focused on the duty just to keep everything and keeping everything means changing a lot of systems and processes that are designed to keep your

information systems efficient, like you don't want too much e-mail so you harvest e-mail off your systems, and you do that with databases, you do that with other systems, so that you have well-managed processes; but then you have to apply a preservation system to protect against losing that data if there's a lawsuit; and when you've got a lot of people you don't know who the right people are, you don't know what the right information is, and you've got information sources in thousands of different places.

So sometimes information doesn't get retained, but that's a big difference than the idea that information is deliberately deleted, and I think our focus in some of the other changes on the proposed spoliation rule are really focused in the right place, which is trying to avoid and provide sanctions or consequences for the deliberate deletion of data, which is I think the real problem that we need to focus on and provide remedies for.

So that's some of the larger topics. I do have some specific comments about the language, but I'll defer for that until we get to the rules.

HONORABLE KENT SULLIVAN: Mr. Chairman, can I add one thing briefly?

CHAIRMAN BABCOCK: Yeah, absolutely.

HONORABLE KENT SULLIVAN: As they say in Congress, could I revise and extend my remarks? I had

printed out some information that Microsoft had provided. I guess this was in connection with the review that was being undertaken by the federal committee that resulted in the new rule, and, you know, they -- I won't belabor some of the statistics, but they are interesting. They noted that in 2011 in connection with pending litigation they were preserving 760,000 pages per custodian on average, but the interesting thing was that by 2013, two years later, it was 1,317,000 pages per custodian. And, of course, they give a lot of data about what the relative cost of that is. For me the interesting thing was the trend line, and I don't have updated data. Robert may. But I think of that and then I also think of the data points of the potentially significant disparities in sophistication and technological capabilities that litigants and potential litigants have. So I think this is a big issue and that we ought to get out in front of it, and arguably we are already behind in dealing with it.

And I'll throw out one other issue in terms of capabilities and the like, and that is that there are many, many different players. Something that I brought up before I had my current job was government and the particular problem that is created for government, like the executive branch of Texas. And I'm going to -- if you'll allow me, Mr. Chairman, I might even defer -- we

have a representative from the Attorney General who deals with this a lot and who might want to offer two cents on that.

MR. DAVIS: Thank you, Commissioner. Bill Davis from the Attorney General's office. There are others in my office that have worked on this much more than I have, but the point that Microsoft is having trouble with this, some of you might not believe this, but some state agencies don't have quite the software and data capabilities as Microsoft does. I think that any rule along these lines should be cognizant of both that and just the sheer volume of data that some of these agencies have to process, and having a standard that looks to whether an agency should have known some things is different in that context than it is in a lot of others, and so I think just from our perspective that's a consideration that should play into this.

CHAIRMAN BABCOCK: Okay, great. All right. Good. The issue is more or less framed. I'll just add that not too long ago I undertook some fairly detailed discussions with one of the broadcast networks, and they pointed out that with respect to their business, which is -- which is publishing massive amounts of data everyday in all different platforms, they may get on a daily basis 50 communications complaining about what they've said, and

those range from, you know, the subject of a Tweet saying, "Hey, I disagree, I didn't do what you said I did," to maybe an e-mail from, again, a person who is upset about coverage, to a letter from a lawyer that's casual but says, "Hey, you know, my client didn't like this," to a formal demand letter from a client that might get resolved in a day or so; and their question is, well, I know what the federal rule is now, but there are all of these states, and we do business in all of them, and we can't possibly preserve documents with all of these, you know, 50 or so a day communications we get, so what are we to do? And, of course, I referred them to Bobby and said, "He'll tell you for Texas," but I don't know if they've called Bobby or not, but anyway, it's -- you know, in the business world it's a pretty big issue.

MR. LEVY: It's a huge issue.

CHAIRMAN BABCOCK: As I know Robert will attest. Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I just wanted to say that the federal rule does not define when the duty to preserve begins; and we have attempted to do that in our draft; and, of course, that can lead to problems if you're following state rule, but you're sued in federal court, you know, but what duty is going to be followed. So, you know, to say that they know what the

federal rule requires is kind of surprising to me, because it doesn't define the duty at all.

CHAIRMAN BABCOCK: Professor Hoffman.

PROFESSOR HOFFMAN: Okay. I'm going to limit my comments just to duty, so as with Kent, I hope I'll reserve the right to come back on some of these other provisions.

CHAIRMAN BABCOCK: No, no, no, you've waived it.

PROFESSOR HOFFMAN: And I'll start with what Tracy just said. The federal rule makers made a conscious choice not to define duty, and that has created all kind of controversies as a result of that, but that's very clearly the choice they made. Now, one of the complaints that probusiness groups often make is that the rule doesn't define it, but then the very next complaint they make is that even if it tried to define it, businesses, as all entities and people are, are subject to multiple sets of rules. So if the state rule in Illinois happens to be a stricter standard for preservation duties then the fact that the Seventh Circuit or the federal rules generally have that standard doesn't save them.

So the notion that we're going to -- A, the notion that we ought to do this for business is not at all obvious, point number one. For every story of the costs

of litigation holds, there is a story of evidence of destruction that we ought to weigh on the other side; and the Court's Brookshire opinion does a marvelous job, it seems to me, of laying out some of those concerns that the Court itself has recognized of how concerned we should be with the spoliation of evidence. We don't need to hear me say that. The Court has told us that. But in any event, we can't fix those problems because, again, this is a multijurisdictional problem. So that's point number one.

Point number two, it's interesting and notable that the attempt to define the duty is limited to after a lawsuit. It says a party has -- the language is "A party has a duty to take reasonable and proportional steps to preserve relative to the dispute or lawsuit after" -- and then of all the things thereafter all relate to the filing of a suit, as I understand it, although I guess sub (3) could potentially be prelitigation. Of course, that then raises the question in my mind that is just unclear to me, Bobby. Are we intending to replace common law duties with this? You know, what happened to the Wal-Mart, the National Tank standard about, you know, reasonable anticipation of litigation? There may be an answer that's just unclear to me, but that's a question that I -- that the rule doesn't sort of answer for me. If anything, it seems like it's trying to replace it.

And then the third point and then I'll stop on this is notice also that the rule is limited to party, so it's only a duty as to party. So a party has a duty to take these. The rule doesn't seem like it speaks to nonparties. Having said that, look at (b). "A written notice to preserve ESI or a written notice of litigation," but that -- so that sort of sounds like it's talking about nonparties, right, because if you were a party you would know about litigation because you're in it; but I don't think that's the intent to apply to nonparties because the very next sentence of (b) says, "A party receiving such notice must take steps." So I'm both unclear about whether it applies to nonparties or not or whether we even consider it, and then maybe we can talk some more about whether that's a good or bad idea. So those are three things that come to mind.

CHAIRMAN BABCOCK: Thanks. Roger.

MR. HUGHES: Well, I'm going to echo some of Professor Hoffman's concerns but in a different way. First, this whole thing is phrased in terms of a duty to preserve evidence, and -- but this is put in a rule about sanctions for discovery violations. I think it might be better to rephrase it as not in terms of creating a duty but in simply saying under what circumstances the discovery sanction will be done, and I say this because

we've already had the Supreme Court tell us over a decade ago there is no common law duty to preserve evidence such that you could be sued for damages for losing or destroying it. Well, if you phrase 215.7 in terms of a duty to preserve evidence, arguably this will be the springboard for saying there is a common law duty for which the person who loses, destroys, failed to preserve can be sued for actual damages, even if they don't end up being a party.

And the second thing of it is, to echo what Professor Hoffman said, we start off with all these things that a person who gets a notice or whatever is supposed to do, but the only real sanction that is employed when you get down to (d) is effectively a remedy in the lawsuit for a discovery violation or a jury instruction. Well, how is this rule going to apply to people who aren't parties? Nonparties. For example, the hospital that loses the medical records that would be of value in the personal injury litigation, et cetera, and so on and so forth.

And then if we're going on about that, if we're going to say you have a duty to preserve, to whom does this duty run? For example, let's say the claimant sends out presuit notices to defendants A, B, and C, but then sues only defendants A and B, and they bring in C as a third party defendant. Well, if you're going to

sanction defendant C for losing evidence, who is the person who has been injured here, the defendants who brought the person in and never sent them a notice saying please preserve this? Because they're the only ones that brought defendant C into the litigation, or does that even matter? I mean, these are all things to think about.

And I might also add that when we start thinking about presuit notices and the burden, I have seen this in some cases. Software changes, and the software in which you -- the data was created may go out of style. I mean, we don't have Microsoft, you know, Vista anymore and all of these ones; and what you may be doing in some cases is telling a person you not only have to destroy -- you can't destroy the evidence, you can't change your software, or you're at least going to have to preserve it in some way, even if that software goes completely out of date. These are all things to think about.

CHAIRMAN BABCOCK: Yeah. And on that point, Roger, sometimes at the other end of the spectrum when you're an individual defendant with a laptop -- I may have said this before, but there are software programs in your -- on your iPad or your laptop that you don't even know is deleting stuff --

MR. LEVY: Right.

CHAIRMAN BABCOCK: -- from your machine, and

then if they get an expert, he goes in and looks at it. He says, "A-ha, you've deleted something. I don't know what it is, but I see you've deleted something." How did that happen? You have a program that deletes stuff. Yeah, Kennon.

MS. WOOTEN: I want to echo Lonny's comments about the lack of clarity in terms of whether there's an intent in 215.7(a)(3) to modify the duty as set forth in common law, because my reading of Brookshire -- and perhaps some others have a different reading, but my reading is that that opinion sets forth a standard for when the duty to preserve arises, and it goes through this analysis that is comparable to assessing when the work product privilege kicks into gear. So I think that we already have a duty, and I just don't know whether and to what extent this rule would change it.

When I read it I wondered about the phrasing because it says, "from the time a claim of privilege under 192.5(a) arises," and I think to myself I may never claim work product. That may be my choice, and I could, if I were not a good litigant, kind of manipulate this, right? I could say, well, I'm not going to claim work product, I'm going to destroy that evidence, I never had a duty to preserve it, and now I'm going to sue. I know we don't write rules for bad actors, but I think the phrasing as it

stands is a little unclear in terms of the intent with the interplay with common law.

Going to the comment about what you do presuit with the notice letters, that is an area of concern because I've had that happen a couple of times. I get a letter saying I have a duty or my client has a duty to preserve the universe of ESI, which is extremely expensive; and it covers, you know, just inordinately long period of time sometimes, particularly when you're litigating against the state and there's no statute of limitations to kind of cut it off. So the reaction that is seemingly most appropriate in the current state of affairs is to send a letter saying, "No, you don't get to set it that way. Tell me what my client has to preserve" and kind of go back to 196.4 and the common law that's out there to kind of confine discovery pertaining to ESI, but it's a little unsettling because you may send that letter back and say, "You're wrong" and then have no resolution. And I have that right now where I have a letter exchange back from a year plus ago, no resolution, it hasn't come to a head in litigation that just recently got filed, so I have no idea what a court is going to do with it. It would be good to have a little bit more clarity in terms of what you're supposed to do under the circumstances.

HONORABLE TOM GRAY: Is that with the Texas

Department of Insurance?

MS. WOOTEN: No, it isn't.

HONORABLE KENT SULLIVAN: She was looking at me, and --

HONORABLE TOM GRAY: That's why I asked.

CHAIRMAN BABCOCK: Professor Albright got her hand up just before you did, Bobby.

PROFESSOR ALBRIGHT: Bobby, I defer to you as the chair.

MR. MEADOWS: Well, I'll only take a moment. So the rule that we have in front of you and the things that we're talking about, I mean, that's the reason we obviously wanted to come to this. So for us I think the first question is whether or not there should be a change in the duty, a redefinition of the duty with regard to ESI. Because, Lonny, and you're right, this is a change from the Brookshire common law that we appreciate deals with tangible things like the videotape. So that's an important first question, is do we want to have the bright line that Kent and Robert have been advocating for ESI and a different duty with regard to conduct under it?

CHAIRMAN BABCOCK: Yeah, now Professor Albright.

PROFESSOR ALBRIGHT: I -- I am of the opinion that we should not put a duty in this rule. There

is -- like we've discussed, there is no duty in the federal rule and if we have a duty here, if people want certainty, it's not -- unlikely to affect a duty in federal court even in Texas, so -- so I generally think it doesn't make sense to have a duty here. I think the duty is spelled out in common law, and it's the -- it's a reasonableness under the circumstances type of duty, and the draft that we got from Mr. Levy had the duty was only if you had specific notice for the citation or the specific notice, which I -- I think is a bad idea. I think that presumes that there's no duty unless someone has the wherewithal or a lawyer to impose that duty, so I think we should take the duty out.

I think what service of a citation or service of a notice does is it tells you -- it gives you notice of the lawsuit, so I think you still should send these notices because it tells you -- it tells the other side, "You are going to be sued, and here's what the claims of the lawsuit involve, so you need to take reasonable steps to deal with that." I might in that notice tell you what I think are reasonable steps, and we may have to -- we may disagree on that, but that's life. I think that's what we deal with all the time, and I don't think we can have absolute certainty in any of this.

We also rejected the idea of having pre -- a

mechanism for presuit litigation. We did not think that was a good idea. We felt that there was -- there were other mechanisms for that, if there was extreme disagreement over something. I think we talked about filing objections. Is that correct, Judge Christopher? I'll let her -- I'll defer to her on exactly that part of the discussion. But I think we included duty because we felt like it needed to be discussed because it was an important part of the other proposal. I feel very strongly it shouldn't be just the notice of the citation.

The claim of privilege was because they're both in anticipation of litigation, and there was a sense that it was what's good for the goose is good for the gander, and I think that Brookshire Brothers provides that balance as well. I would prefer to just leave it to Brookshire Brothers or whatever happens after.

CHAIRMAN BABCOCK: Robert.

MR. LEVY: So I wanted to respond. Professor Hoffman points out that the federal rules do not define the trigger of when preservation arises, and the reason why they did not address it is that they felt that that was beyond the Rules Enabling Act provisions to the extent that a duty to preserve could apply before a lawsuit is filed, and under their articulation the rules apply to cases in controversies and not just some event

that might happen before. So that's why there is no federal rule proposed on trigger. We -- I don't think that the Supreme Court is bound by that same issue, and it can define a duty; and while parties, companies, plaintiffs, defendants, have to make decisions based upon where they're being sued and where they think they might be sued, and, yes, it would be great if we had a universal standard in all 50 states and nationally. We would rather have clarity versus uncertainty or shifting provisions or inconsistent provisions, so that while the federal standard might not define trigger, I think that if Texas defined it, it would be a significant advance; and don't forget that Texas jurisprudence has led the way on many of these issues and some of the key issues were followed later by federal rule making or federal case law.

So I don't think that should be a reason for us not to act, and I do want to make one sort of broad comment. I think we talked about it before, is to consider the possibility that this rule not just apply to ESI, and I meant to mention it earlier, but when we talk about Brookshire Brothers, it's a case about a videotape. Is that videotape ESI? It was a physical, tangible item. Some courts, federal courts, have found that a videotape is physical evidence. Other courts have found that it's ESI. And if you print out an e-mail and you've got a

version electronically stored and in paper, which is it? And if you destroy one and not the other or you destroy both do different standards apply? And I think that with the complexity of information systems, trying to divide a line between ESI and none ESI is going to be increasingly problematic, and it will ask courts to try to figure out whether a disk -- you know, is an iPhone ESI? You could argue that it stores ESI, but it's physical and tangible, so that will create some potential problems.

The question about triggering, it is a difficult one, and the proposal that I had set out does provide a duty, an obligation, in that it's that duty that I was referencing not to deliberately destroy information rather than an obligation to always preserve information if you happen to be on some type of notice that, therefore, becomes a question of is it -- is it reasonable anticipation, is it reasonable likelihood, is there reasonable certainty. All of these are potential choices that become substantive, and does one company have a higher or lower trigger for when they reasonably believe litigation is likely versus another, and we -- and when you talk about issues of notices, I got a notice one time that said that we could not even turn off any computer worldwide because turning off a computer might destroy some information, RAM information on that machine, and so

they wanted us to tell everyone around the world not to turn off their computers until -- and this happened to deal with a royalty dispute in East Texas, and we made a choice not to follow that guidance.

And, you know, so I think that, you know, getting back to the question of providing clarity, providing a clear bright line, while there is common law that is helpful, it will be beneficial to give the parties a specific standard, and I do agree with the concerns and the suggestion that setting out a duty should not be misconstrued to create an independent cause of action or a right to bring damages. I recognize the issue about nonparties. That is a problem because nonparties or preparties to a lawsuit have in some cases faced tremendous burdens in terms of preservation obligations, and so we do need clarity to the extent that it would apply, but I think fairly put that a nonparty would also have some obligations to preserve information if the trigger conditions were satisfied.

CHAIRMAN BABCOCK: Robert, let me ask you a question, and this would go for Commissioner Sullivan as well, but the proposal that the subcommittee has come up with is found at page 59 of the materials, and it's 215.7, and it has a duty that's subsection (a), and it has a notice subsection (b), which is a -- they use the word

"triggers." So how would you and/or Commissioner Sullivan change, modify, or replace those two subdivisions?

MR. LEVY: Well, on the question of -- let's get into some language. On the issue of duty, first, my suggestion is to consider changing the duty to not just be electronically stored.

CHAIRMAN BABCOCK: Okay.

MR. LEVY: That's one issue, and then the provisions of the obligation to preserve a duty under (a)(1) and (2) I would leave the same, but on (3) this is where it starts to get challenging. Instead of having the kind of the more, I would say, mushy language of when a work product privilege applies, but actually, I would probably go back to somewhat of what Brookshire Brothers has in terms of when you know or are reasonably aware of a substantial likelihood that a claim will be filed and that, in this case if it's ESI, electronic information or report information, in the enemy's possession will be material and relevant to that claim. I think that's the Brookshire Brothers language so that if you're using this construct then the duty would be a little bit more concrete in terms of when that circumstance would apply. In terms of the notice issue --

CHAIRMAN BABCOCK: Can I just stop you for a minute?

MR. LEVY: Sure.

CHAIRMAN BABCOCK: The subcommittee's proposal, subsection (a)(3), "from the time a claim of privilege under 192.5(a) arises."

MR. LEVY: Right, that's the one.

CHAIRMAN BABCOCK: That's a pretty bright line, isn't it? Because you send your opponent an interrogatory and you say, "When did you reasonably anticipate litigation," and they say, "December 1, of, you know, 2016. 2018."

MR. LEVY: Well, the irony about that is usually parties that are making that application are trying to assert it as early as possible.

CHAIRMAN BABCOCK: Right.

MR. LEVY: Sometimes they don't realize that it will come back and bite them on this very issue because it's usually used as a surrogate to when preservation duties apply.

CHAIRMAN BABCOCK: But it is a bright line.

MR. LEVY: It is, except how would you make that determination without looking at when did you first contact a lawyer, and is that enough? So when they -- when your client calls you, are they sure they're going to be sued? Maybe not, and if you don't have a lawyer, when does that issue apply? So I think it becomes a challenge,

and it -- the other risk, as I pointed out earlier, is the potential that this would open up, you know, "When did you call your lawyer? Where are your phone logs? Show me your e-mails, or if you're not going to show me the context of the e-mails at least show me the fact of when you e-mailed your lawyer or talked to them, and if you have in-house counsel when did you walk down the hall?"

CHAIRMAN BABCOCK: That's what I spot as the problem with this because when you call your outside counsel and say, "Hey, we got this demand letter and we've got a problem," I mean, that's --

MR. LEVY: Much more bright. You're paying for that.

CHAIRMAN BABCOCK: Yeah, you're paying, and they open a file and conflicts check, but before that your in-house lawyers --

MR. LEVY: In-house, we get questions all the time. "Is this an issue?" I don't think so.

MR. MEADOWS: Excuse me, if you -- Robert.

MR. LEVY: Yeah.

MR. MEADOWS: If I may, Chip.

CHAIRMAN BABCOCK: Yeah, absolutely.

MR. MEADOWS: If you changed our number (3) to the Brookshire test, doesn't that swallow (1) and (2), because surely you're on notice if you get citation and

you get a written notice. So if the test is Brookshire in (3), you don't even need (1) and (2).

MR. LEVY: If the idea is that service of the citation or that notice would be enough to trigger (3), so I guess it's the flip, yes. I think you could read it that way.

CHAIRMAN BABCOCK: Commissioner, do you have any thoughts on this? You've -- I think bright lines in this area are probably a good idea, but the subcommittee's subpart (3) is a bright line. It's subject to --

HONORABLE KENT SULLIVAN: This conversation has evolved from my perspective very much in the right direction, because I think we started out in more of a 37(e) direction and absolutely we are much closer to where I would like to be. The reality, though, is I assume that there is going to be some discussion in the room and I sense some interest in the room to being more towards 37, and that's --

CHAIRMAN BABCOCK: Okay. All right. But for now we've got this proposal in front of us. You say it's moving in the right direction. How could we rewrite 215.7(a) to get across the goal line from your perspective?

HONORABLE KENT SULLIVAN: You know, I think it's close with respect to this. I think there's still

the issue about presuit access to courts, and I guess, you know, if conceptually the Court is on board that they want to go with a bright line trigger then I think it's just a question of polishing.

CHAIRMAN BABCOCK: Okay. Robert, let me go back to you if I may.

MR. LEVY: Yes.

CHAIRMAN BABCOCK: 215.7(b) in the proposal uses the word "trigger." Is that adequate or inadequate from your point of view?

MR. LEVY: Well, it -- the challenge goes back to the issue.

CHAIRMAN BABCOCK: Well, Robert -- Robert and Kent are saying, you know, we want something that's a bright line. We don't want anything that's subjective, and we want to know when duty is triggered.

MR. HARDIN: Right.

CHAIRMAN BABCOCK: And so I'm just asking if this --

MR. HARDIN: My question down here was what did he mean by adequate in the question? That's what he's answering.

CHAIRMAN BABCOCK: Yeah, he violated the rule where we were just talking to each other.

MR. HARDIN: I did. I did.

MR. MEADOWS: We put the rule into effect for him.

CHAIRMAN BABCOCK: Yeah, sorry. Violated my own rule.

MR. LEVY: The concern about the notice issue is the example that I mentioned or the situation Kennon was talking about that you end up with the context where you get inundated with notices or, Chip, your scenario that your broadcast clients get complaints all the time, is that a notice, and so I think that the notice needs to be cabined with language that that trigger would -- the 215.7(a) trigger would apply if there's a substantial chance or likelihood that a claim will be filed and then back to the Brookshire Brothers language that electronically stored information in the party's possession or control is material and relevant to that claim, so that -- that the notice has to be specific. It has to -- it has to be in a context that a suit is actually likely.

So the scenario that we would be looking at is I get a notice from a party that says, "I don't like what you did, and I might sue you." Can I decide that I don't think that suit is going to happen, so I decide not to trigger preservation? Now, if I'm right, the issue goes away, and it's never going to be a problem; but if

I'm wrong then the question is if that notice happened, is this triggering this sanctions provision, or can I argue that I get 700 notices like that every year and three of them result in litigation, and so that should also be a factor that I didn't think it was likely that a suit would be filed?

CHAIRMAN BABCOCK: Well, if you are satisfied or relatively satisfied, close to the goal line in the commissioner's words, with 215.7(a), doesn't 215.7(b) substantially broaden your duty?

MR. LEVY: It would if it did not have the language that I suggested.

CHAIRMAN BABCOCK: Well, as written.

MR. LEVY: Right, as written, yes, it would be a problem.

CHAIRMAN BABCOCK: It broadens the duty.

MR. LEVY: Yes, and I think that's a problem because it will then result in parties issuing those notices, and they could become themselves just an avenue for mischief.

CHAIRMAN BABCOCK: Professor Albright and then Bobby, or Bobby and then Professor Albright.

MR. MEADOWS: No, Alex first.

PROFESSOR ALBRIGHT: Well, I guess I'm confused because we put the notice in there because that's

what you-all wanted. Now it sounds to me like you want a notice but you want to have the choice to ignore the notice, so that makes it a reasonableness standard, which is a Brookshire standard. Because right now people can send you notices and say, "I'm going to sue you," and if it's -- if you don't think it's reasonable to react to it, you can ignore the notice. So it seems to me that that's exactly where we are, so I would take that out, too.

MR. MEADOWS: But I would also say just to the point Alex is raising -- and I think it's important to keep in mind that this is largely a thought piece, just trying to capture everything that's been coming to the subcommittee about this --

CHAIRMAN BABCOCK: Yeah.

MR. MEADOWS: -- as opposed to kind of a rule that we're going to, you know, die over. But to this whole idea about the notices come in, they impose impossible, unreasonable demands on the recipient, we put in the last sentence of this notice to say, "A party receiving notice must take reasonable and proportional steps to preserve electronically stored information," which may not have anything to do with what was demanded.

CHAIRMAN BABCOCK: Yeah.

MR. MEADOWS: You get a notice. You think it's unreasonable. You just do what you think is

appropriate and proportional.

CHAIRMAN BABCOCK: But to Professor Albright's point, if this rule as written exists, you know you have the duty under (a)(1), (2), and (3), but then if you get a notice, which is a triggering event, you ignore it at your peril.

MR. MEADOWS: Yeah, you need to do something. You need to do something that is reasonable and proportional.

MR. LEVY: And that's helpful. That is helpful, but I guess if I was given this context I would probably say not putting the notice language in because of the problems that Chip points out.

PROFESSOR ALBRIGHT: So you would prefer to have it or not?

CHAIRMAN BABCOCK: Robert, you've turned your head just slightly.

MR. LEVY: I apologize. I would prefer if the language as written is in there on notice, then not having that language would be preferable than having the language as worded, although Bobby's point is well-taken, but the issue is you do have to do something, and in some cases the notice might be so frivolous that is doing nothing something, and then you get into that debate as to whether that was reasonable. You just ignore it, is that

sufficient? So not having the notice language would probably be preferable.

CHAIRMAN BABCOCK: Commissioner Sullivan.

HONORABLE KENT SULLIVAN: Which brings us maybe full circle, because I know there's something to the debate as to whether or not this is solved by way of access to the court reasonably to resolve issues of scope, duty, et cetera, and I think it's an important piece of the debate.

CHAIRMAN BABCOCK: I'm sorry, I couldn't hear everything you said, Kent, but are you saying that (b) is a good thing or a bad thing or needs to be modified?

HONORABLE KENT SULLIVAN: I think that right now in terms of common practice and expectation is something you have to have in there. I mean, because that's a part of the current litigation, is getting presuit hold demands.

CHAIRMAN BABCOCK: Okay. So you're the general counsel of Big Ass Company and you get --

HONORABLE KENT SULLIVAN: BAC.

CHAIRMAN BABCOCK: -- one of these things. Under what circumstances do you ignore the notice?

HONORABLE KENT SULLIVAN: Well, that's why one of my recommendations was to include as part of the

Rules of Civil Procedure the ability to access the courts and get a court ruling on a presuit hold notice.

CHAIRMAN BABCOCK: Okay. That's where that comes in.

HONORABLE KENT SULLIVAN: Yes.

CHAIRMAN BABCOCK: Okay. I got it. Roger.

MR. HUGHES: Well, following up on that, I guess I'll preface what I was going to say by noting that where we're headed is to create a whole new area of satellite litigation because the moment you talk --

CHAIRMAN BABCOCK: Which you're in favor of, by the way.

MR. HUGHES: Yeah. Spoliating evidence, backs get arched and all sorts of stuff goes on because that little instruction at the end of the case can be a killer, and everybody gets worried. Now, if you're going to create a -- if you're going to see say, well, you can give a presuit notice and the defendant has to -- or the prospective defendant has to do something, and they can get to -- and they ignore it at their peril, you've created a one-way street, and now they're talking about a safety valve.

Well, think about the -- this is where I say we're worried about what the defendant might do when the plaintiff has remedies. We already have Rule 202 to

permit presuit discovery to discover evidence and obtain documents, and what's being proposed here would work entirely independent. In fact, in one sense it would mean that, well, why take a Rule 202 deposition? Just send a notice letter, and, you know, then they'll have to preserve it and you can figure it out later if you want it.

And the other thing, if we're talking about expanding it beyond ESI, you know, already in litigation you have -- we have people who seek injunctive relief presuit not to destroy evidence so it can be tested, and if you're talking about preserving tangible evidence, you know, preserving it forever can get pretty expensive. I mean, if we're talking about ESI, can you change your hard drives? Can you upgrade to a different kind of hard drive? What do you need to do if you need to change your software? If you're going to expand it, for example, if we have automobile accidents or trucks, can you repair your truck because that gets rid of the physical evidence of the accident? If your truck is totaled, can your insurance company buy it and sell it for salvage or scrap it after you get a presuit notice to preserve that truck? How long do you have to preserve it?

I'm just saying, I think if we're going to have presuit notices as some sort of blessed by rule of

procedure thing, we're going to have to think about not merely creating, you know, some sort of safety valve, but some consideration that the claimant who wants this evidence preserved has other presuit remedies available and whether or not they should be required to exhaust those in some manner before they just impose by fiat on the other side an obligation to preserve or maybe overpreserve evidence.

CHAIRMAN BABCOCK: So you're -- you would impose a -- a requirement on the requesting party, the party sending the notice, a list of -- a laundry list of things he's got to do before the duty arises to the defendant, the punitive defendant? Is that what you're saying?

MR. HUGHES: Well, and that's why I think maybe having these presuit notices being blessed and then punished as a sanction, if you would, if something happens to the evidence may not be the best idea in the world until we figure out some way of -- pardon me, some presuit mechanism that allows some adjustment for all of these benefits and burdens, but just to impose it willy-nilly I think, like I said, it creates a one-way street or whole bunch of satellite litigation.

CHAIRMAN BABCOCK: Professor Hoffman, and then Justice Kelly.

PROFESSOR HOFFMAN: So I actually have a question. Robert, help me -- and these things are hard, so maybe I'm just not following. Why do we even need a duty at all? Why isn't everything -- the sort of the concerns you're raising satisfied by the existing standard in (d) and (e)? And let me just kind of be clear about what I'm asking. In other words, and I just want to be clear, I'm not a fan of how (d) and (e) are currently drafted, so when we get to (d) and (e) I have some thoughts about that, but before we get there, if we did end up with an intentional standard that you can only essentially have kind of really bad sanctions against you if you intentionally spoliate, and then you have the safe harbor in (e) that if in the ordinary course, usual course of business practices, then you didn't have an intent, doesn't that fix all of the concerns you have as to defining the scope of the duty? Because there's no consequence unless your actions are intentional.

This is just a legitimate, I just don't understand. Why not just leave the duty out and let the problem in terms of what you need to do be taken care of by having a much stricter rule as to when serious sanctions could follow? Because it seems like that's what the rule is doing. Why isn't that enough?

MR. LEVY: In terms -- that is an option in

terms of clarifying what the consequences are versus when the situation arises.

PROFESSOR HOFFMAN: And that's, of course, what the federal rule does.

MR. LEVY: Right.

PROFESSOR HOFFMAN: It makes that choice.

MR. LEVY: Right. But then the goal is in terms of providing some level of certainty to understand when are you playing -- when are the rules applying to you or not and to help the courts be able to determine that issue. I will point out that I don't think that it happens all that frequently in terms of when, disputes about trigger, but it does happen, and typically the cases are decided on the margins. Companies are resolving that issue by overpreserving, and so if we had a clearer line or more light shown on when that circumstance would apply, I think companies could do a better job -- and I say companies. It's not just companies. It applies to individuals as well. When that duty is going to apply you can have some more consistency of approach; and, you know, it's a situation that I want to clarify. It applies to anyone who is likely to get sued more than once because that's when you have to have processes in place.

CHAIRMAN BABCOCK: Could I get back to Kent's idea?

MS. PHILLIPS: So this is -- this is Kim, and I hope can you hear me, and I think that was Robert just explaining, you know, the perspective from an in-house view, which I completely agree with. I think I appreciate that the consequence management is a little bit easier to deal with if it is based on intent, but it is a major challenge in terms of preservation and then also collection in terms of what exactly do you have to preserve and just a massive go -- of kind of what we're dealing with on a daily basis when you have so many suits coming in and notices, so a long-winded way of saying I agree with Robert.

CHAIRMAN BABCOCK: Thank you. Do you have a view about, Kim, about this idea of there being some presuit mechanism for a punitive defendant to go into court and say, "Look, I've gotten this notice and to comply with this it's going to cost my company a million dollars a year," hypothetically, and "You know, I think that's way overbroad. I've written back and they won't respond to my request to narrow it. Plus it's a frivolous lawsuit anyway. So, Judge, give us some protection here." Do you think that's a good idea, bad idea, or do you want to pass it on to Justice Christopher?

MS. PHILLIPS: Or do I want to pass it on to what?

CHAIRMAN BABCOCK: To Justice Christopher who raised her hand while I was talking.

MS. PHILLIPS: Oh, yeah, I think, you know, it's one of those things like sitting here at the moment it sounds like a good idea, but I would have to think about all of the unintended consequences, right, like are we creating a new cottage industry of lawsuits. So at the moment I don't.

CHAIRMAN BABCOCK: Got it. Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, we looked at the presuit process that was in a draft that was given to us and just found that we did not think it would be workable. All right. Number one, the way the presuit process was envisioned is for a potential defendant to go into court and say, "I only want to preserve this amount of evidence."

CHAIRMAN BABCOCK: Right.

HONORABLE TRACY CHRISTOPHER: Well, and get a trial court order saying, "I only have to preserve this amount of evidence." Well, the plaintiff has no obligation to maintain their lawsuit in that trial court. So they can go file someplace else, and, of course, one trial court's order is not binding on any other trial court. So that's problem number one. And problem number

two is the plaintiff might not know the scope of their claims at that point, and you're kind of reversing the burden by having a defendant come in and say, you know, "I only want to preserve this amount."

We just didn't think it was a workable solution, so we tried to put in that even if you get this presuit notice, you can take reasonable and proportional steps. You don't have to preserve what they're asking you to preserve. And, I mean, I think ultimately at the end of the day that is what the judge is going to have to decide. The lawsuit gets filed. They ask for discovery of 20 years' worth, and you say, "Hey, this is a small case, I've only preserved five, here it is," and then you work it out at that point. I just don't see how the presuit process would work. I really don't.

CHAIRMAN BABCOCK: Robert.

MR. LEVY: On that point, and I actually agree with that perspective. I think that while it's a great goal to try to give an opportunity for a party to get or a potential party to get the issue resolved, I do think it's probably not going to be well used, and it's going to --

CHAIRMAN BABCOCK: You mean often used or well?

MR. LEVY: Well, both. It won't be used

well, and it won't be used very often, but it will create this kind of flip perspective that if I have an issue and I decide not to go to a judge and I make my choice that I think is reasonable and proportional in terms of what I preserve and what I don't preserve, and then later the judge will say, "Well, why didn't you come to me and get me to bless it," and I didn't have to, but if I could have, does that mean I should have and will be held to a different standard. You know, and one of the other challenges is that we want to know when trigger applies, but in terms of the processes that I think, generally speaking, companies follow when they're addressing preservation, is they're making a standard that will apply to the hundreds or thousands of cases that they are facing at any given point in time, and it's not practical to try to define a different standard for each case in terms of what the preservation approach is.

We want it to be consistent and broadly applied and judged on that standard, but if I have to go into a court and say, "Is this process okay" and the judge might say, "Well, do it this way or do it that way, change this or that," and that could create its own problem. So I think most companies would probably rest on their system as being defensible versus trying to get it blessed in a particular case.

CHAIRMAN BABCOCK: Justice Kelly, I passed over. I apologize. Go ahead.

HONORABLE PETER KELLY: No problem. The -- one thing that's missing from the draft rule, which is in Brookshire is the burden of proving, the burden of proof; and the Brookshire is very clear that the party seeking the remedy, whether it's the instruction or whatever, must establish three elements; but the rule doesn't state who has the burden of establishing whether it's reasonable or unreasonable. And if you track Brookshire, where it's the party seeking the remedy, or in the rule's case it would be the sanction, has the burden proving it's unreasonable, I think that affords the defendant who has received the discovery request or is considering what to preserve, that gives them all a safe harbor. If they paper their decision-making process that it has been reasonable, that should insulate them from sanctions, but the rule should indicate somewhere who has the burden of proving what's reasonable or unreasonable.

CHAIRMAN BABCOCK: Other comments? Yeah. Professor Hoffman.

PROFESSOR HOFFMAN: On the topic of burden, there actually -- so just to kind of build on what Peter said, there are actually sort of two or three issues about burden that the very few cases we've got on the federal

side have been wrestling with, so I'll just flag them. One of them is the federal rule also doesn't define the burden, and the courts are split on that. The majority it seems, based on what I've read, have put the burden on the nonspoliating party, though even there it varies. That's number one.

Number two, what is the evidentiary standard, so especially when it gets to the business about intent and failure to take reasonable steps and prejudice. Is that a preponderance of the evidence standard, is it a clear and convincing standard, what is that, and then finally, this is an interesting one that I hadn't thought of until I read the cases. There's some split about whether these issues are to be decided by a judge or a jury, and so on the question of reasonableness of efforts and some of the courts, especially courts where the claim is sort of closely related to the nature of the spoliation, kind of fraud type claims, they let those go to a jury to decide whether it was reasonable, under the theory that it kind of goes to the heart of the case. So it looks like a bunch of them don't. So anyway, I just want to flag that I think there are sort of multiple kind of burden-related issues here.

MR. MEADOWS: I don't think that point would be a problem in Texas because it's clear that this is for

the trial court to decide, and under Rule 37(e) under the 2015 amendments there's a note, an advisory note, that says the judge can toss it to the jury to decide intent.

PROFESSOR HOFFMAN: I see, so you think it would be different in our state practice.

CHAIRMAN BABCOCK: Richard, then Roger.

MR. MUNZINGER: I was listening to the discussion concerning the intent of this draft to protect the defendant in the latter part of Rule 215.7(b), as in boy; and going back up into number (a), you get a notice from the claimant, and my experience in these things is the claimant sends a letter saying, "I'm going to sue you for, let's say, breach of contract. Keep everything you've got in the world relevant to the contract." And that's what this rule contemplates, a written notice to preserve electronically stored information or litigation, et cetera. "The notice shall state with specificity the claim or claims of the anticipated action." It doesn't require the person demanding that you keep the documents to outline what the person thinks will be a reasonable process to preserve the information.

The next sentence says, "A party receiving such notice must take reasonable and proportional steps to preserve electronically stored information, which may differ from steps that the party seeking preservation

demands." My experience is that the person making the demand never demands any steps. They just say, "Keep everything in the world, you son of a sea cook, and you've got to keep it," and I think that's your experience.

MR. LEVY: Right, but that -- that keeping everything is itself a step. It's don't delete anything.

MR. MUNZINGER: Well, but I mean, so -- well, and I agree with that. I agree with that. My only point is I don't think the latter part of the rule speaks to what the notice requires, and then I have one other question I just want to ask. We use the word "relevant" in (a), "stored information relevant to the dispute." Relevance is defined in the Rules of Evidence, specifically, as something -- some evidence that makes a fact more or less likely -- and I don't recall the exact words of the language of the rule about whether it's a fact material to the dispute, but then relevance for discovery purposes is different, much broader, likely to lead to the discovery of admissible evidence. Which relevance are we talking about, and maybe I'm stupid because I don't know the answer to that question. Maybe it's been litigated. I don't know, but they certainly are different standards, and relevant to discovery, relevance in the discovery context is far broader than relevance in the trial context.

CHAIRMAN BABCOCK: Anybody know the answer to that? Is it different?

HONORABLE KENT SULLIVAN: I think we're conflicting --

HONORABLE TOM GRAY: Are you talking about the definition of relevance or the definition between evidence -- relevant evidence and discoverable?

CHAIRMAN BABCOCK: Richard says relevant is defined by the evidence rules. He says relevant is also defined, he says, by the discovery rules, and they're different definitions. Is that true?

MR. SCHENKKAN: I think he means, though, discoverability has a different standard.

MS. WOOTEN: Yes.

MR. SCHENKKAN: It's not that both definitions apply.

MR. MUNZINGER: Well, I'm in front of a trial judge, and I'm making the argument. I'm either the plaintiff or the defendant, and I'm arguing relevant in this rule means -- doesn't mean likely to lead to the discovery of admissible evidence, your Honor. And what's the trial judge going to tell me? I know most trial judges are going to tell me I'm wrong because I don't represent the plaintiff, but that's neither here nor there. The rule is silent on what relevance means here.

CHAIRMAN BABCOCK: Okay. Roger.

MR. HUGHES: Well, I understand the desire to have some sort of certainty for presuit -- concerning presuit demands to preserve evidence. Where I see this rule going from the draft that's been presented, we're headed towards uncertainty in which everybody is gambling because as it's currently structured we have no -- we have no procedure beforehand. The plaintiff -- the claimant makes the demand. The defendant doesn't have to do it, and the rule says if they're -- whoever is the most reasonable gets what they want as soon as the suit is filed. If the defendant was reasonable for not complying with it, then nothing happens; but unfortunately, at the point where that decision has been made it's not like the defendant can resurrect the evidence and turn it over. It's been destroyed. That was the whole purpose of building in some uncertainty.

So now the defendant is in a position of where they do what -- or the person who is the responding party does what they think is reasonable and proportional, and they're gambling that the judge, whoever it's going to be in front of, agrees with them. Because if not, then they're sanctioned and there's nothing they can do to prevent it. They can't resurrect the information, can't recreate it, et cetera, et cetera, et cetera.

My out of the box thinking here -- and I throw this out for consideration. If we're going to make these things have the effect of you can be sanctioned for your decisions in hindsight, then I suggest we treat these presuit demands for error preservation as an analog of a Rule 202 petition to produce evidence. The plaintiff who wants you to do that has to file a petition, invite everybody who is going to be at this party to the dance, and then we can have the judge say, "Okay, this is too far. This is what proportional is." Because otherwise the defendant is gambling that the judge -- that the judge in two years is going to think it was proportional under -- I understand the difficulty of this, because if you're the claimant, you don't know what the defendant's procedures are, what they have, and you have a tendency to over-describe just to protect you and your client from, you know, missing a trick, so to speak.

CHAIRMAN BABCOCK: Justice Christopher, then Professor Albright.

HONORABLE TRACY CHRISTOPHER: Well, I don't want to open this back up.

CHAIRMAN BABCOCK: But?

HONORABLE TRACY CHRISTOPHER: But our draft did change the scope of discovery, and it eliminated reasonably calculated to lead to discovery of admissible

evidence. So we eliminated that from 192.3(a) so there would not be then a difference when we use the word "relevant" in this rule.

CHAIRMAN BABCOCK: It would be the same.

HONORABLE TRACY CHRISTOPHER: They would be the same.

CHAIRMAN BABCOCK: Professor Albright.

PROFESSOR ALBRIGHT: I just want to point out that everyone needs to look at (c). You know, you kind of think, oh, my God, if we guess wrong we're subject to sanctions. It's like in the Seventies, the Eighties, the -- you know, we missed a piece of paper or a piece of ESI, and we're going to get a default judgment against us for zillions of dollars. The sanctions are allowed under (c), 215.7(c), only if you failed to take reasonable steps and it can't be restored or replaced through additional discovery and it's prejudicial. So it's not just the fact of not preserving that imposes sanctions. You have to meet these three requirements, so it has to matter.

MR. LEVY: Right.

CHAIRMAN BABCOCK: Okay. Thanks. Pete.

MR. SCHENKKAN: And I second that and add and even then if you've met those three the sanctions are limited under (d)(2) to measures no greater than necessary to cure the prejudice and cannot include -- must not

comment on the failure to preserve the evidence or -- and I assume the right way to read this is must not instruct the jury that a duty to preserve the evidence existed, and I assume also we should read this as must not instruct the jury on the consequences of the failure to produce the evidence. I'm sort of curious as to what is left? What may the court do even if, as Alex has said, the first three criteria have been met? Assuming again, we're not in the category where it was intentional.

MR. MEADOWS: Award attorney's fees or something.

MR. SCHENKKAN: I mean, is that really all that's left?

PROFESSOR ALBRIGHT: And you do get to present evidence on the law, so you get to say, "The reindeer isn't here anymore."

MR. SCHENKKAN: But, okay, if that's adequate, if there is something left in the middle there for the court to do, it's not much; and that ought to go a long way toward satisfying people who have to make these difficult and expensive decisions on a day-to-day basis in the in-house counsel's office that as long as what we're doing is clearly not designed intentionally to frustrate a plaintiff or a category of potential plaintiffs. It is clearly intended to try to balance these considerations of

operating your business and not getting rid of stuff that might --

CHAIRMAN BABCOCK: Judge Wallace.

HONORABLE R. H. WALLACE: I have a question of the group really. I mean, the vast majority of cases that I see this is never even an issue, and what I'm wondering is, given the current method for dealing with the preservation of electronically stored evidence of the people handling the big, big cases, is this a real problem that needs to be addressed by a new rule, or are we just creating a rule that may create a problem? I don't -- I don't know, seriously. I mean, your everyday garden variety case.

CHAIRMAN BABCOCK: I'll tell you from my experience it's not a problem until it's a problem, and when it becomes a problem, you spend enormous amounts of time and energy in trying to address it, but many companies, Robert's among them, are proactive about trying to make sure there is not a problem.

HONORABLE R. H. WALLACE: Right.

CHAIRMAN BABCOCK: And they spend untold amounts of money trying to protect themselves from anything arising, and the question is whether there was more of a bright line to guide them if they might not have to spend all of that money, and once the problem arose in

litigation it might be easier to resolve without the expense and the time that goes into it, but I'll defer to my friend to the right, Mr. Hardin, because he handles cases like this all the time. And is it a problem or not?

MR. HARDIN: Not -- actually, your comment was right. It's not a problem until it is. It's not that often, but when it is, it is a big one, so what do we do with the rule to take care of a big problem that only happens every so often.

CHAIRMAN BABCOCK: Marcy.

MS. GREER: Well, having gone through two spoliation hearings, full-blown evidentiary hearings, it's a huge problem, I agree with that, when it becomes a problem; and it's threatened a lot more than it's used; and I think it is concerning because it's easy for documents to get lost and miss one person in the 70 people that you send the notice to; and for that reason I'm concerned about calling it sanctions in subpart (c) because there's a lot of -- there are things that the court can do to kind of remedy. Even if some prejudice is shown, there are some things that can be remedial to try to get rid of the problem, and they're very fact-specific, and the federal rule does not use the word "sanction." The federal rule talks about remedying the situation, and I think that there's a -- I would recommend deleting the

word "sanctions" and just "remedial relief" because once you put the word "sanctions" in the order, even if it's kind of a remedial situation, it takes on a new character, and it goes in the -- you know, Law 360 and everywhere else as being a real problem, and there are ways to remedy.

You know, like for example -- I'm trying to think of a good example, but let's say a box of documents is lost because it was in Iron Mountain and somehow they can't find it. Well, maybe you ask the defendant to use electronic records to try to approximate what would have been in that box, or you know, something that they wouldn't have to do normally. They have to come up with a report or something like that, but it's a way to remedy the potential prejudice, and I think there are ways that you need to give judges flexibility so this isn't in the world of sanctions automatically just because things got lost, because I think people can disagree over what reasonable steps to preserve it would be.

CHAIRMAN BABCOCK: That's a great point. Thanks. I might throw it to Jim here in a minute because he gets involved in a lot of big litigation. The other thing I've seen, and I don't know that you can write a rule to protect against this, but a lot of times when a plaintiff's claim may not be real strong, a lot of times

they will start a spoliation fight. I had that in the Southern District in New York where there wasn't any spoliation, but the other guys, they didn't have a very good case, and so they tried to divert attention to spoliation so that they could -- you know, they could get a settlement, frankly. They never got it.

MS. GREER: One of mine was in New York, too, the Northern District.

CHAIRMAN BABCOCK: Well, and New York federal courts treat things a lot more -- a lot differently than other courts I've -- and state courts, too. Jim, any experience?

MR. PERDUE: Not with this in particular. Certainly Exxon counsel is talking about a volume of data that, you know, I've only seen in three or four cases, so that's a completely different thing; but, you know, it's dangerous to write a rule for a .05 percent classification of party when there are other aspects; and so I've been listening to a conversation where you have a federal rule, which is the rule that would apply to almost everybody for which this is an issue, big data sets, a lot of ESI. I mean, that is -- that kind of litigation more often than not lives in federal court. That kind of corporation or that party will be multijurisdictional, and so you have that rule, like it or not, that is the rule that you are

working under in I would think the majority of cases you are found.

So I'm listening to a conversation in this room, which thematically seems to be we would like a bright line about when we have to preserve, but we want to have a real soft line about how much we do preserve in response to that bright line, and we want to lower the standard for what could be done to us if we don't do it and comply with that notice and that requirement and that duty, and even if we do it intentionally we want to lower that standard. So thematically the conversation -- I get the perspectives. I understand the constituencies that would make that argument, but you have a rule that in federal court in my practice works, and it may be burdensome, but it's burdensome -- I understand ESI is the world you live in, and so on -- if you look at anything about the gross amount of data, that trend is always going to be up just because that's the world you live in.

CHAIRMAN BABCOCK: Yeah.

MR. PERDUE: And so, you know, I've got kids with 2,000 pictures on their phone. That didn't exist for me, you know, 10 years ago, but I would -- I don't know what the subcommittee's determination was on going ahead and doing a rule that differed this greatly from the federal rule. I would be curious about that thought

process just because generally it seems like there's been an effort to try to get more consistency, and now you're talking about a big break in two relevant aspects. The federal rule, which is two-tiered, does the end result effect, right, which is you have to have four criteria plus two to get to the concept of any sanction. I mean, you have to really intentionally throw some shit out to get sanctioned under the federal rule, and that's where the law is.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, back in 2016 that was our rule, prospective rule, was to make it like the federal rule. I think Commissioner Sullivan, Mr. Levy, they had a different draft they wanted us to look at; and at one of these meetings, I don't know whether Justice Hecht did or you did, said let's -- you know, let's look at it. So we looked at it and tried to come up with something a little more definitive. It's not necessarily what the subcommittee wants. I mean, Alex says she doesn't really agree with it. I don't really agree with it, but we tried to come up with something to put out there.

CHAIRMAN BABCOCK: Yeah.

MR. MEADOWS: Can I just --

CHAIRMAN BABCOCK: Yeah, Bobby.

MR. MEADOWS: That was the way I hoped to open this, and that is that when we originally did our submission it was the federal rule with our emphasis on the fact that you had to have intentional conduct to get to the presumption, and it is true that we got a lot of feedback, not just on ESI but on whether or not the rule should embrace -- should be broader and encompass more than ESI, and so over the years there has been continued discussion and a lot of interest in it, and we've seen how the federal rule works and doesn't work, and so that's right.

This is, as I said -- although there are parts of this that I actually like and that I think my practice would benefit from, that perhaps Alex and Tracy don't agree with, but it is more to get a discussion in this committee. So we got a proposal from Robert and from others. We as a group decided we didn't want some of it, and we didn't put it in this proposed rule, but otherwise we came up with a set of thoughts about how we could move away from the federal rule if we chose to, and that's what this is.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I just wanted to say I agree that some things in here are good, but I also agree with the judge that I just don't see it

in state court for the most part. It's just not, you know -- it doesn't come up in the trial court. It doesn't come up in the appellate court. We just don't see it that much, and it sounds like from people's description, it's in federal court; and so, yes, are we writing a rule -- like Jim said, are we writing a rule that doesn't really affect the vast majority of our cases; and that's what I have been worried about with respect to this.

CHAIRMAN BABCOCK: Judge Peeples, and then Roger, and then Professor Hoffman.

HONORABLE DAVID PEEPLES: On the multinational corporation question, if I'm such a corporation and there's an explosion in Texas or a truck accident in Texas and I've got a Texas state court lawsuit, I think the way this would work is I don't look to the federal law. I mean, if I've got regular destruction of evidence and cleaning of files and so forth, I would look at a Texas law, and I've got Texas safe harbor provisions that might not be available to me under the federal law. Would it work that way? So I know I've got the other 49 states or federal court to think about, but in this case, which is one off and is a Texas case, I would deal with Texas law, would I not?

CHAIRMAN BABCOCK: Well, I mean, unless there's diversity.

MS. WOOTEN: Right. Or a federal question.

CHAIRMAN BABCOCK: Or a federal question, but in his hypothetical --

HONORABLE DAVID PEEPLES: Notice comes in a state court case -- yeah, okay.

CHAIRMAN BABCOCK: Roger, then Professor Hoffman, and then Lisa.

MR. HUGHES: I'll let Professor Hoffman go before me. I always enjoy what he has to say as opposed to what I have to say.

CHAIRMAN BABCOCK: You can second what he has to say. Is that it?

MR. HUGHES: Yeah.

CHAIRMAN BABCOCK: Professor Hoffman.

PROFESSOR HOFFMAN: So I wanted to talk about one way in which this rule is exactly like the federal rule. So I agree mostly with what you said, Jim, but I just want to flag that one of the ways that this rule is exactly like the federal rule is in terms of the section that's currently called "sanctions," and Marcy may rename it something else, but section (d). So one of the things that I didn't like about the federal adoption that we seem to be copying here is that in order to get a sanction, just to make sure we're clear, even for the most egregious behavior, right, so this intentional destruction

of evidence that everyone agrees no one should count, you still have to satisfy (c)(1), (2), and (3).

That is to say, you have to show they didn't take reasonable steps. That's easy because they were intentional. That part is done, but you also have to show it can't be restored or replaced, there is no solution to this problem, and that prejudice has resulted; and so there are cases -- there's a -- one of the more notable ones that gets talked about is Marquette Transport out of the Northern District of Illinois in which everyone agrees there was just these terrible bad acts by the spoliating party, but the judge couldn't award sanctions under new Rule 37(e) because they were unable to show prejudice because they found -- they found it in another way. It turned out that they had destroyed it, but before they destroyed it it was burned onto a DVD and then the DVD was later discovered.

And so my point is only that as the rule is set up we are going to excuse -- we're going to tie the hands of trial judges from being able to impose sanctions even in the most egregious circumstances if there can be a showing of no prejudice or replacement, and to me that doesn't seem like the right choice. It didn't seem like the right choice when I was in the debate on the federal side. I lost that. I have another chance to perhaps

persuade others on this side, so I raise that issue.

The other small concern -- since I've got the floor, I may not get it again. I know we've been going long in the tooth -- is it's interesting that we don't -- the federal rule doesn't do this either. We don't talk about attorney's fees as being potentially recoverable. It's particularly notable in our rule compared to the federal rule because in our rule almost every other subsection of 215 refers to the right to recover attorney's fees in the event of some violation of Rule 215, but we say nothing about it in 215.7, the proposed rule. That may or may not have been the subcommittee's intent, but I just flag that, that that seems like that's going to send a message to the bench and bar that we were not intending attorney's fees to be available, again, even in the most egregious of circumstances.

CHAIRMAN BABCOCK: Okay. Lisa, and then Commissioner Sullivan, and then Alex. And then Roger. Hold on, wait a minute.

PROFESSOR ALBRIGHT: I just wanted to answer that question.

CHAIRMAN BABCOCK: Roger went out of turn. Go ahead. That's what you do when you give up your turn.

MR. HUGHES: Yeah, well, I appreciate the

Chair's indulgence. Two points. First is to the volume of whether we're really seeing this in state court. I can only speak from my perspective, and this can be a real problem, and I'll point out two instances in which ESI is becoming more and more important in ordinary garden variety litigation. First one is every law enforcement agency now has to record their phone calls and their dispatch calls. More and more we're seeing videotape cameras in the police vehicle that go on every time there is a stop or if there is a police pursuit, which happens a lot in the big cities, and more and more police officers are having to wear body cameras.

Now, these are going to be -- already are and will become more important in the standard personal injury litigation we see coming up under the Tort Claims Act about excessive force, wrongful death, shootings, all of that stuff, and this is all -- and more and more we're seeing this stuff doesn't lie. We believe whatever the camera shows us, et cetera.

In personal injury litigation, a lot of it is turning on very expensive electronic studies. Most of the studies, if you go in for an MRI or CT scan, that's all ESI. It's all stored in a computer. They just show it to you on a screen, and the same thing goes for a lot of the other studies that are done, and getting the

original data is often critical, and for what I'm also going to get to my second point, and that is time marches on.

I'm trying to say that subsection (c) is going to be the first line of defense because they have to show prejudice from destroying it. The kind of manipulation of electronic data that is available when it's made changes over time, and we're already beginning to find out in our personal injury litigation that the way of refining or re-evaluating medical studies that are ESI, such as MRIs or CT scans, we now have software that can further refine them to show things that might not -- that software didn't exist when these scans were made.

So the defendant may think, or, for example, the hospital, we can -- we can erase the data for the MSI because we have printouts that show what it is, and then it turns out by the time you get into litigation there is new software that could further have refined it to make -- to show whether one side or another was right about whether those studies showed what their experts say.

So all I'm going to say is I'm not sure that subsection (c) is going to be the great savior for the defendant who is trying to behave reasonable because when they find out that when it comes time to defend themselves in the court there may have been -- there now are new ways

to manipulate that data which would either favor one side or torpedo the other.

CHAIRMAN BABCOCK: Okay. Let me see if I can get back on track here. I think Lisa had her hand up, and Professor Albright, and I'll give Kent the last word before we go to lunch.

MS. HOBBS: I did not have my hand up.

CHAIRMAN BABCOCK: You didn't have your hand up, okay.

MS. HOBBS: I always want to hear from Professor Albright, though.

CHAIRMAN BABCOCK: So you yield to Professor Albright.

MS. HOBBS: Yes.

PROFESSOR ALBRIGHT: Thank you. I just wanted to answer Professor Hoffman's question about fees and expenses when there's intentional conduct. If you look at Rule 215.3, abuse of discovery, I think that would definitely be abuse of discovery if you intend to discard discoverable evidence, and then that gives the court power to award fees and expenses. Or sanctions that are just, perhaps, if you go that far.

PROFESSOR HOFFMAN: That's right. In other words, what you're saying is from your viewpoint even though 215.7(d) lays out the sanctions for this in the

circumstance, spoliation of ESI, you're saying that the court's not limited to that, that they could look, for example, to 215.3 on abuse generally and take from those options as well.

PROFESSOR ALBRIGHT: I would think so. I mean, I think especially if you -- if you use Marcy's language on remedy, is what you're doing is trying to remedy the prejudice for the lawsuit, which is what is really important to do in the context of that litigation right that minute, and then there can be other -- there's other conduct that can be dealt with as an abuse of discovery, that part of the satellite sanction litigation.

CHAIRMAN BABCOCK: All right. Commissioner Sullivan is going to get the last word before we have lunch because Dee Dee is hungry, so be brief.

HONORABLE KENT SULLIVAN: I'll try and be brief in deference to Dee Dee. And I do want to acknowledge that I think the subcommittee draft has evolved over time, and candidly speaking just for myself, it's much closer on issues of duty and the like to what I was proposing and others who are like-minded were proposing. My views are driven by the notion that certainty is good, that user-friendlinesss is good, that we should have a standard that is clear enough that it facilitates compliance. On a practical level I think it

would be a good idea for the average lawyer to be able to answer the question posed by a client of "What do I need to do," and answer it with a reasonable level of clarity.

I hear the comment that we're not seeing that much in state court now, and I think the keyword is "now." I think that we need to acknowledge what the trend lines look like, and there have been some isolated comments around the room acknowledging how much things have changed. We might want to note that the first iPhone rolled off the assembly line in June of 2007. Wasn't that long ago. It's now ubiquitous, and our world has changed. So that's been 10, 12 years. What's it going to be like 10 or 12 years from now? Would we have in May of 2007 predicted where we are now 10 or 12 years later? I think we need to be looking prospectively in terms of how we begin to shape our rules.

The difference between the federal and state rules, I have to acknowledge that as well. There are far fewer federal judges who are implementing that rule, and that universe of personnel is entirely different. It is drafted with very broad discretion for them, and there's a very significant distinction, I think, between federal and state judges. In some sense I think our rules may be more significant in a way, because they are a much greater likelihood of some degree of oversight relative to those

rules. I can't remember the last time a federal judge was subject to a mandamus for a routine discovery ruling. The same may not be true and has not been true, I think, with respect to the willingness of state appellate courts to review decisions of state judges, and I think there is a very practical reason for that.

In any event, I think we're -- the current draft is close to where -- or significantly closer anyway to where it ought to be from my perspective. So, I mean, the last thing I would raise is just this issue about court access. A number of people have said things like it's not a problem until it's a problem, and I agree with that. Hard to argue with. I guess the question is so what do you want then? When it is that problem do you want access to a court? Kennon I think raised an interesting situation where apparently recently I guess said there was significant uncertainty involved and felt like -- I don't want to put words in her mouth, but it sounded like she felt like the stakes were very significant. I do wonder if that isn't worth careful consideration, but my thanks to everybody for the hard work and discussion because I think we've advanced the ball.

CHAIRMAN BABCOCK: Well, thank you for taking time out from what I know is a very busy schedule

to be with us, and I'd say let's eat and be back in an hour.

(Recess from 12:55 p.m. to 2:02 p.m.)

CHAIRMAN BABCOCK: Judge Yelenosky, let's go back to cyberbullying, and I wonder if it might not be a bad idea, as somebody suggested, to get a sense of whether our -- the instructions should be narrow and tied to the -- tied to the form very closely or whether they should be more broader and more user-friendly as --

HONORABLE STEPHEN YELENOSKY: Yeah, we talked about -- the subcommittee talked, or at least most of us did, I guess, and I think Pete agrees with this, that we needed to get a sense of the committee; and I guess I saw maybe three possibilities here; but knowing how votes go, you know, people ask, "Well, what if I voted that way, can I then vote the other way." So what I guess I would say, that there is the instructions that are just limited to be within the petition itself, and we can go to the petition in a minute, but the answer to that would affect how we read the petition. And then there would be a modification of what we presented as instructions; and probably the first modification would be, from what I heard, to perhaps take out references to informal resolutions; but in any event, that would be a modification.

And maybe the last thing would be to add more instructions or be more detailed so that people aren't perhaps misled, they know exactly what's going to happen in the future, a la Justice Christopher's suggestion. So I guess I would propose that we hear from people what would be his or her first choice.

CHAIRMAN BABCOCK: Okay. And I think Justice Hecht maybe has some historical information on what we've done on other delegations from the -- from the Legislature.

CHIEF JUSTICE HECHT: And Stephen and I were visiting about this during lunch, but --

CHAIRMAN BABCOCK: You and I -- you were two-timing me. You and I were talking about this during lunch.

HONORABLE STEPHEN YELENOSKY: He said not to tell you.

CHIEF JUSTICE HECHT: The protective order kit has instructions more like -- more expansive than just "insert your name" and instructions limited to the form itself, and the probate forms statute and the landlord-tenant forms statute both have very similar language about instructions regarding the form -- use of the forms; and while we cannot consider those yet, both sets of forms have been completed, and they have more

expansive instructions in them. So as far as I know every time we've done something like this, the instructions were more extensive.

HONORABLE STEPHEN YELENOSKY: And I think it's -- after we got done talking about you, Chip, the Chief -- I think we discussed also that --

CHAIRMAN BABCOCK: You do know you have superior power over me.

HONORABLE STEPHEN YELENOSKY: Yes, I do. The thing that might be different is that in the case of a protective order -- I don't know so much about the guardianship, I think you said, but the law is well-established in the protective order family violence situations. It's not fraught with, as far as I know, constitutional problems. People aren't extreme on this or that. Here there are people on the extreme this or that, so if we are going to have detailed instructions then I guess we need more guidance on what they should be, and I do see -- you know what I took from this morning that is one good suggestion is to be skeletal about it, I guess, and do the petition; and if we're going to put in more instructions, put them in where they apply within the petition. But, again, yeah, I looked at the protective order kit during the break, and they have four pages, but it's a much smaller font, so --

CHAIRMAN BABCOCK: Okay. Well, should we -- should we discuss and vote on each of the three options that you've laid out?

HONORABLE STEPHEN YELENOSKY: Yeah, and I guess what I propose is, right now anyway, just vote once on your first -- what your first choice would be.

HONORABLE DAVID PEEPLES: Could we hear those again, please?

HONORABLE STEPHEN YELENOSKY: Sure. You want to tell them?

CHAIRMAN BABCOCK: No, no. I had written down notes that I can't even read. Was the first one the skeletal?

HONORABLE STEPHEN YELENOSKY: Yeah.

CHAIRMAN BABCOCK: The skeletal approach, very minimalist, and then modifying it to delete informal resolution, and then a more instructions and more detail. So from minimal to more slightly as robust as what we have here in the draft to even adding to what we have as the draft.

MR. GILSTRAP: As I understand, it's skeletal versus user-friendly. Is that our --

CHAIRMAN BABCOCK: Not to be pejorative about it.

HONORABLE STEPHEN YELENOSKY: Well, that's

putting a spin on it. That's a framing trick.

CHAIRMAN BABCOCK: We might want to make it skeletal or user-unfriendly.

MR. JACKSON: Which one of those --

CHAIRMAN BABCOCK: Yeah, David.

MR. JACKSON: Which one of those is where the instructions are in the petition itself?

HONORABLE STEPHEN YELENOSKY: First one.

CHAIRMAN BABCOCK: The first one.

MR. JACKSON: Okay. That's the one I want.

CHAIRMAN BABCOCK: Okay. How many people are for the skeletal approach? Raise your hand. Okay. That got 10 votes.

How many people's first choice is the draft we have but modified in some ways? That has five votes. And how many to make it more robust than we have already? That got nine votes, so --

MR. LEVY: Can we lobby some in the middle?

MR. MUNZINGER: If you took the last two and combined them, the sense is you would have more than a skeletal approach.

CHAIRMAN BABCOCK: That's true. Holly says maybe somebody voted --

MR. MUNZINGER: So you rejected the skeletal approach.

MR. JACKSON: We got the most votes.

HONORABLE STEPHEN YELENOSKY: Yeah, but it got a plurality.

Yeah. We could take a second vote and drop one, but it's clear that, yes, the majority were against the skeletal approach.

HONORABLE TOM GRAY: The majority were against the expanded version of the instructions.

HONORABLE STEPHEN YELENOSKY: Well, let's count them. Let's count them.

CHAIRMAN BABCOCK: Judge Peeples.

HONORABLE DAVID PEEPLES: Yeah, I was dissatisfied with that choice. I think it doesn't even scratch the surface. Here's how I think this will work. Number one, I think it will empower both parents, the parent whose child is the aggressor, let's say. You know, you might have to go to court, and there will be a judge there. "You need to take a look at this," as opposed to "You're grounded"; and of course, the person who is the, quote, victim would be empowered also. And if it's easy to get into court, I think these will not be time-consuming cases, because to get people to talking is a lot of the goal here, it seems to me; and a court setting gets the two people there, and then they come in and the judge says, "What's that issue? Have y'all

talked? No, you haven't? Go to the conference room over here, and I want you to talk and come back in after you've done that." And usually they don't come back, but if they do, the judge is there, and they'll have a little bench hearing for a few minutes.

I mean, it's I think -- I don't know how often these will get to court, but I think the possibility that you'll go there and it's easy and get a neutral forum will do some good; and I think that it will be a rare case where someone says, "I have a First Amendment right to do this and I want to litigate it to the hilt"; and I don't know which of those proposals helps get us there, but I think that can do some good; and frankly, the Legislature has told us to do this; and we don't have a choice.

HONORABLE STEPHEN YELENOSKY: Well, what I take from the sense is that there's some -- there's a fair amount of support for each of these; and of course, the Supreme Court is going to do what it wants to do; and so we at least have one of them. The unmodified version, we can make a modified version, we can make a skeletal version, and just make them all available to the Court.

CHAIRMAN BABCOCK: Any other comments about that? Any other dissatisfaction with the vote or reinterpretation? Yeah, Frank.

MR. GILSTRAP: Why don't we revote skeletal

versus current draft plus?

MR. HARDIN: What would his be? Would you be the second?

HONORABLE DAVID PEEPLES: What does skeletal look like?

HONORABLE STEPHEN YELENOSKY: Skeletal to me is Pete's idea and some other convert to it, which is to require of the person only what's necessary to get them into court and not to tell them about consequences and where it can go, not to tell them what the judge will do. That doesn't need to be done. The judge can handle it.

CHAIRMAN BABCOCK: Rusty.

MR. HARDIN: How about a revote? I want to vote with Judge Peeples. I voted against it while ago.

CHAIRMAN BABCOCK: Well, which one is Peeples?

HONORABLE DAVID PEEPLES: Peeples doesn't know.

CHAIRMAN BABCOCK: Well, I think we have --

MR. SCHENKKAN: Maybe I should -- if I can, Chip --

CHAIRMAN BABCOCK: Yeah, Pete.

MR. SCHENKKAN: I'm sorry if I left the impression that I think we should take more out of what we have now. I like what we have now, but I took the point

-- I've now forgotten whose idea it was, but a couple of people made the point that we probably ought to have the magic words about balance of power in there somewhere and we probably ought to have something that does just say, "Say what you think the facts are that lead you to believe that this ought to be done." If that's what's meant by skeletal then that's what I'm in favor of, but it's really just kind of a --

HONORABLE STEPHEN YELENOSKY: Yeah, that's my fault. I misunderstood what you were saying, or I forgot.

MR. SCHENKKAN: It's easy.

HONORABLE STEPHEN YELENOSKY: Well, subcommittee members, what do you-all think we need at this point? Do you think we've got enough input?

CHAIRMAN BABCOCK: Well, there's been a motion to have another vote where we just vote against --

HONORABLE STEPHEN YELENOSKY: Oh, okay.

CHAIRMAN BABCOCK: -- skeletal versus -- yeah, Professor Albright.

PROFESSOR ALBRIGHT: Motion to -- I don't know my parliamentary procedure. What if we call this the Peeples-Schenkkan version versus a lot more?

MR. SCHENKKAN: No spin there.

CHAIRMAN BABCOCK: Skeletal versus the draft

plus more. Maybe a lot, maybe a little. All right.

HONORABLE DAVID PEEPLES: Well --

PROFESSOR ALBRIGHT: Mine is not adopting skeletal. It's whatever they --

HONORABLE DAVID PEEPLES: I thought what Frank Gilstrap, who I thought wrote a lot of it, was, you know, we're going to tweak it. I didn't have the impression he was going to make it longer, but work on it. Am I wrong about that, Frank?

MR. GILSTRAP: I think we're talking about making it more detailed.

HONORABLE DAVID PEEPLES: Oh, really. Okay.

MR. GILSTRAP: Maybe the vote might be current draft less something versus current draft more something. That might capture where we're all going.

CHAIRMAN BABCOCK: That sounds reasonable. Lamont.

MR. JEFFERSON: We're over the question about whether there will or will not be instructions, it sounds like. So there will be some kind of instructions.

CHAIRMAN BABCOCK: There will be instructions.

MR. JEFFERSON: Outside of the draft of the outline of the petition, for instance?

CHAIRMAN BABCOCK: I think so.

MR. JEFFERSON: It sounds like. So the instructions won't be just contained within the form.

CHAIRMAN BABCOCK: I think that's right.

MR. JEFFERSON: And then so now the question is are the instructions about right or too little or too much.

MS. WOOTEN: Goldilocks question.

CHAIRMAN BABCOCK: Yeah, I think we've already had the Goldilocks vote.

MR. JEFFERSON: And the result was?

CHAIRMAN BABCOCK: Ten to five to nine.

MR. JEFFERSON: Yeah.

CHAIRMAN BABCOCK: So the five is -- Goldilocks was the five.

MR. JEFFERSON: Well, but didn't that -- that included the option of all of the instructions.

CHAIRMAN BABCOCK: It had the papa bear and the mama bear. Yeah.

HONORABLE STEPHEN YELENOSKY: Let's let David Peeples frame the vote.

HONORABLE DAVID PEEPLES: Well --

HONORABLE STEPHEN YELENOSKY: Because he doesn't like --

HONORABLE DAVID PEEPLES: I want to understand. We've got the forms. We really haven't

talked about them, have we?

MR. ORSINGER: No. And I would like to do that before we run out of time.

CHAIRMAN BABCOCK: We started with the instructions.

HONORABLE DAVID PEEPLES: So we're going to have some forms, and, frankly, these look okay to me. We haven't talked about them. If the question is some instructions versus no instructions, that's a pretty easy one for me.

CHAIRMAN BABCOCK: Yeah, yeah. I think we're past that. We're going to have instructions.

HONORABLE DAVID PEEPLES: But it's going to be instructions plus form. Okay.

HONORABLE STEPHEN YELENOSKY: Well, there still is the question of when you say some instructions, do we take from this some of this and then incorporate it into this, or are they going to be separate documents, if we're going to have --

HONORABLE TOM GRAY: I thought I had already voted on that.

HONORABLE STEPHEN YELENOSKY: -- separate documents.

CHAIRMAN BABCOCK: Let's keep it for now separate document just so we can --

HONORABLE STEPHEN YELENOSKY: Okay. Well, that's helpful because when we look at the petition if we're saying it's all going to be in the petition then we're going to look at it differently than knowing that there's a separate document.

CHAIRMAN BABCOCK: Yeah, and so the vote will be should we have less than the draft before us or more. So everybody that thinks less, put your hand up. Keep them up. .

Okay. Less has eight votes. How about more? Who's in favor of that? 13 for more, so what we have here is plus some, plus some stuff.

Okay. What do we want to add to what we already have here? And we started out by saying we're not going to go section by section, but maybe that's the only way we can do it.

MR. GILSTRAP: I think Richard has some -- Richard has some good ideas on this.

MR. ORSINGER: I wanted to make a comment that doesn't start with the first paragraph. Is that all right?

CHAIRMAN BABCOCK: Yeah, sure.

MR. ORSINGER: Okay. So one of the things that concerns me about both the forms and the instruction set is that we don't really tell them what to do when they

get to the courtroom or what to do if the TRO is granted or denied. If the TRO is granted it expires in 14 days. The order does tell them that, but it doesn't tell them that you should have a temporary hearing and get a temporary injunction. I think in fairness we need to educate these people that we're going to file this -- you can file this form, and you can get a signature of the judge, but you need to get a hearing, and you need to have your child there, and you need to show up and present testimony and get a temporary injunctive order. And then I would think at least a parting paragraph that said that in the temporary injunctive order the court will probably set a final trial in which you'll have to find out whether there's a permanent injunction or not.

I'm very uncomfortable with launching these people into the process on an ex parte emergency hearing with no indication of what they do with it at the end of that 14 days or the end of the seven days. So I think we ought to add a little bit on there about that.

MR. GILSTRAP: Richard also had a comment on sealing I thought was pretty good.

MR. ORSINGER: Oh, well, that's in the form. I've been just wanting to talk so badly about the forms, I'm going to try not to --

CHAIRMAN BABCOCK: Good.

MR. ORSINGER: -- but in the form we say that you can request that the court seal all of the documents that may be legally sealed. I think that none of these documents may be legally sealed, and I think that it's misleading to tell these people who might decide to put something that's hugely embarrassing to their daughter or son into a public document that gets filed under oath in a public record on the idea that I'm going to ask the judge to seal it and then you find out that there has to be a Rule 76a hearing and that notice has to be given and then they're mortified and they would have never filed if they had known that.

So I think that we probably should eliminate that suggestion that you can ask the court to seal everything that can legally be sealed and then put a little paragraph in there saying that "Understand this is public proceeding, the things you put in your affidavit or your unsworn statement in your petition will be a public record, and the testimony may be recorded and may be public as well," and I think we ought to put that warning in there because that may influence some people about whether to go to court or not.

CHAIRMAN BABCOCK: Okay. Yeah, Scott.

MR. STOLLEY: I voted to add to the form for precisely the reasons Richard said, plus I think we need

to add that imbalance of power language, but beyond that I didn't really see a need to add anything to this.

MR. JACKSON: What happens if this petition for cyberbullying restraining order starts going viral? People start filling them out never knowing there's instructions. That's my problem with having two separate documents, if you -- if this gets filled out and filed and they never know that there's an instruction set that goes with it. Maybe you put a check box in there that you have read the instructions for filling out this form.

CHAIRMAN BABCOCK: Okay. Yeah, Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I'm looking at the protective order forms, and it's little bit easier to understand, and I just -- I didn't know whether the idea was that this was going to be -- and I guess this sort of varies from county to county, whether this was going to be done without a hearing at all to get the TRO. Because it can be ex parte and sometimes you just file it and the judge will sign it, and that's -- to me that's unclear.

The protective order kit kind of goes through that. You know, if the judge doesn't sign it then you have to go down there and get it and then you're going to have to go back for the final hearing on it, so do I

have to go to court? Yes. I mean, I think just you could take a lot of what we have there and duplicate it for this. And then I have some specific questions about the forms, but I don't know if we're there yet, just in terms of the instructions.

CHAIRMAN BABCOCK: I don't think we're there yet. Let's try to --

HONORABLE TRACY CHRISTOPHER: Oh, one other thing on the instructions. I thought on page one at the beginning where they say, "The internet includes text messages, instant messages, e-mails, postings on social media," that that is not what most people think the internet includes; and so we have the same problem I think with the form that says, "I saw what the student wrote on the internet and I can show you a copy of it." I would not think that that was a text message if I was a parent, and I don't think putting that, for example, as a definition in the form is useful.

HONORABLE STEPHEN YELENOSKY: Okay.

CHAIRMAN BABCOCK: Okay. Let's go through this. The heading is after you say, you know, this is not a substitute for a lawyer, and then "What can I do if my child has been harassed by another student on the phone or internet?" Is it limited to that? Is the statute limited to phone or internet?

HONORABLE STEPHEN YELENOSKY: Yes. That's the cyber part.

HONORABLE TRACY CHRISTOPHER: No. I mean, it says a computer, a camera, electronic mail, IM, text messaging, social media application.

HONORABLE STEPHEN YELENOSKY: Well, those are devices, but it has to be transmitted over the phone or through the internet. Isn't that how you read it, Frank?

MR. GILSTRAP: I think so.

CHAIRMAN BABCOCK: Yeah, the bullying is -- it says "physical conduct."

HONORABLE STEPHEN YELENOSKY: Yeah, but cyberbullying has a particular definition.

CHAIRMAN BABCOCK: Right, but it means bullying, which is defined in (a)(1).

MR. GILSTRAP: Yeah, but it limits -- the definition part (2)(a) I think of the cyberbullying statute limits it. It's oddly drawn.

CHAIRMAN BABCOCK: Say this again.

MR. SCHENKKAN: If you look at --

HONORABLE TRACY CHRISTOPHER: It's on page two.

MR. SCHENKKAN: -- page two of the redlined version of the statute you'll find the definition of

cyberbullying, which incorporates bullying that's been defined on page one --

CHAIRMAN BABCOCK: Right.

MR. SCHENKKAN: -- but limits it to bullying done through the use of "any electronic communication device, including a cellular or other type of telephone, computer, camera, electronic mail, instant messaging, text messaging, social media application, internet website, or any other internet-based communication tool." But I think we were just using "internet" as the shorthand for internet-based communication.

HONORABLE TRACY CHRISTOPHER: But if somebody took a bad picture and then was just showing it to everybody instead of passing it --

HONORABLE STEPHEN YELENOSKY: That wouldn't be covered.

HONORABLE TRACY CHRISTOPHER: I think it would.

HONORABLE STEPHEN YELENOSKY: It's not through -- what is it through then?

HONORABLE TRACY CHRISTOPHER: Through a camera.

CHAIRMAN BABCOCK: Richard Munzinger.

MR. ORSINGER: Could be use of the camera.

HONORABLE TRACY CHRISTOPHER: Yeah.

MR. MUNZINGER: If I understand the statute, -- statutes, plural, correctly, the cyberbullying must be done in connection with something to do with a public school having an effect on education of the victim or others. It's not just cyberbullying per se that doesn't have an effect on education. Am I wrong in that?

HONORABLE ANA ESTEVEZ: Yes.

HONORABLE STEPHEN YELENOSKY: There has to be an effect on it.

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

HONORABLE STEPHEN YELENOSKY: They have to be students and then there has to be an effect on the student's education.

MR. MUNZINGER: Yeah. I'm looking at the section 11, the handout, "Section 11 of the statute relating to cyberbullying," Title 6, Civil Practice Code, et cetera; and then it makes reference to the Education Code defines bullying as "a single event," et cetera, "which has the effect," number one, "or will have the effect of physically harming a student, damaging his property, placing him in reasonable fear of harm to the student's person, to the student's property, and is sufficiently severe, persistent, or pervasive enough that the action or threat constitutes an intimidating,

threatening, or abusive educational environment for a student, and materially and substantially disrupts the educational process or the orderly operation of a classroom or school or infringes on the rights of the victim at school." So --

MR. GILSTRAP: You left off "and includes cyberbullying"; and cyberbullying is a much looser definition, which ends with "interferes with a student's educational opportunity."

MR. MUNZINGER: No, not so. Cyberbullying is defined as including bullying.

MR. GILSTRAP: It's -- no.

MR. MUNZINGER: Yeah, it does. Number (2), "Cyberbullying means bullying."

MR. GILSTRAP: But also, look at bullying includes cyberbullying.

MR. ORSINGER: It's circular. They refer to each other.

MR. MUNZINGER: No, vice versa. Cyberbullying by definition means bullying. Bullying is defined in number (1).

MR. GILSTRAP: It says bullying done in a certain way.

MR. MUNZINGER: Well, wait a second.

THE REPORTER: Wait a minute.

CHAIRMAN BABCOCK: Hold on, hold on. Dee Dee can't get this all down.

MR. MUNZINGER: We've voiced some concerns about the constitutional overreach of an order telling a student that the student can't call my son fat and ugly. There are constitutional limitations to it. I've got the legal right to say to anybody in this room "You are fat and ugly," whether you're fat and ugly or not.

MR. ORSINGER: Better not say that to one of the women.

MR. MUNZINGER: And you can't take it away from me, and you can't take it --

HONORABLE STEPHEN YELENOSKY: How does that --

MR. MUNZINGER: -- away from a teenager.

THE REPORTER: Wait, wait, wait.

CHAIRMAN BABCOCK: Hey, guys, hang on.

MR. MUNZINGER: The justification for this --

CHAIRMAN BABCOCK: Let Richard finish.

MR. MUNZINGER: -- is that you are affecting education, that's what brings the state into play here, so how can you have forms and instructions that omit reference to education and the effect on the student and the student's education, et cetera, in accordance with a

statutory definition? And the reason I had my hand raised was it seems to me that the easiest way of doing this is to have a form which says -- asks a series of questions. "Who are you?"

"Richard Munzinger."

"On whose behalf are you filing this petition?"

"My son, Richard Munzinger."

"Where does he go to school?" Why does it -- et cetera, et cetera. "What is the conduct you are complaining of?" Down below the line, parentheses, "Set forth the conduct in detail. Tell the names of the persons who are performing the conduct. Explain why they are in a position to," quote, "'bully,'" close quote, "your child. Bullying meaning" -- et cetera, and the person does this. Now, they're -- they may or may not have assistance of a lawyer. They may or may not have the assistance of a school person.

If I go to a school and I say to the school, "Stop that boy from bullying my child." "Well, I can, but on the campus, and I -- but I can't on the internet. I can't control what the boy does on the internet." This gives the school something to say about why it's going on in the internet, and the parents' involvement in taking it to court allows the school to get involved. That's my

only point.

It seems to me that this also helps us sidestep the problem of coaching people about what the law is. You just have them fill out the dadgum form and tell them what to put there. "Name all persons who are involved." The form that we have -- and I know it's a scratch form that we've just begun to work with -- has a place for one defendant. Most of this stuff, if I understand the press reports that I read, are more than one student. Everybody is currying favor with the popular quarterback, and the people currying favor with the popular quarterback are a clique now that says that my son is fat and ugly. He looks like his father. It's true, he is fat and ugly, but that's immaterial. You can't tell him that. He's a boy, a little boy.

Okay. So who are the people involved? Quarterback, quarterback's girlfriend, quarterback's best friend, best friend's girlfriend, et cetera, et cetera. You name all of them, because the order is going to tell them "Don't do this anymore."

MR. HARDIN: On behalf of the court reporter, please slow down.

MR. MUNZINGER: Sorry. But again, part of the problem here is this form does not -- and again, I recognize that it's a discussion document. It wasn't

intended to be the final form. I imply no criticism at all of the form. What jurisdiction does a district court have to say to quarterback and quarterback's girlfriend, "Don't call Richard fat and ugly"? It has no jurisdiction to do that unless the educational ramifications of the conduct are involved and pled.

HONORABLE STEPHEN YELENOSKY: Well, it addresses that.

CHAIRMAN BABCOCK: Hang on. Richard -- I mean, Frank.

MR. GILSTRAP: Well, Richard, insofar as the First Amendment issues, you're preaching to the choir with me. I'm simply trying to talk about what the statute does apply to, and section (a-1) under section (2) says that it applies to "(3), cyberbullying that occurs off school property or outside of school-sponsored or school-related activity if the cyberbullying interferes with the student's educational opportunities," and I think that probably overrides the more strict definition of bullying. That's how I read the statute. I think the question -- what the question is I think Richard is posing is should we put some something into the statute -- or into the form or in the instructions that tells people what cyberbullying is, and we've shied away from that. We've just told them it's harassment because it is so doggone

vague.

CHAIRMAN BABCOCK: I thought you were making a different point, Frank. I thought you were saying that -- following up with what Richard said, cyberbullying means bullying, but -- wait a minute, but it is then limited by the language that follows because the bullying has to be done through use of electronic communication device, including all these things they listed. So in other words, you know, cyberbullying on the playground, not using an electronic device, doesn't count.

MR. GILSTRAP: Well --

CHAIRMAN BABCOCK: That's what I thought you were trying to say. Lamont.

MR. JEFFERSON: Yeah, that's what the statute says, is that you only get the injunction for cyberbullying, not just for bullying.

CHAIRMAN BABCOCK: Right.

MR. JEFFERSON: And cyberbullying requires some kind of electronic communication.

MR. MUNZINGER: But the injunction still has to pertain to something at school. Education has to be involved here.

PROFESSOR CARLSON: Because otherwise it violates the First Amendment.

MR. MUNZINGER: Yes, in the statute itself,

bullying is defined in section (a). In (A)(i), "Bullying means" so-and-so. Then section (2), cyberbullying means bullying. Well, my God, what does bullying mean? Well, dumbbell, not speaking to me, it was just defined right above you. Bullying, cyberbullying incorporates bullying, using as means the electronic instruments or means that are described in the statute. All of that is fine, well, and good, but it is only meaningful to the state when it interferes with the educational process.

MR. ORSINGER: The problem is, is that both the instructions and the form say that it only applies to students, so you're giving a speech that we don't need to hear. It's already here.

CHAIRMAN BABCOCK: Well, no, no, no. I don't think that's true.

MR. ORSINGER: Why?

CHAIRMAN BABCOCK: Because we said earlier today that could be -- in Judge Estevez' example, it could be students at school A are cyberbullying somebody at school B.

MR. ORSINGER: There's no requirement that they be in the same school.

CHAIRMAN BABCOCK: Or it could be somebody's -- you know, it's no longer a student, but used to be a student.

MR. ORSINGER: So the form -- the instructions say school, school, school, school, and then the form itself says, "I have reason to believe that the student is." My cyberbullying of my child is a student. "I believe the student's name." I think student is covered. Your other point, which is cyber is covered but bullying is not covered, that is true.

HONORABLE ANA ESTEVEZ: That's not his point.

MR. MUNZINGER: That isn't my point, Richard.

MR. ORSINGER: It isn't your point, okay. Well, that was the part of your point that I understood.

HONORABLE ANA ESTEVEZ: Let me --

CHAIRMAN BABCOCK: Judge Estevez.

HONORABLE ANA ESTEVEZ: Can I try to say his point? His point is we cannot infringe on a constitutional right unless there's a state interest. The state interest has to be pled. The state interest has to be in the order and in the petition, because the state interest is interfering with education.

MR. MUNZINGER: Absolutely. And the statute itself when it defines bullying in section (A)(i), "has the effect or will have the effect of physically harming a student, damaging a student's property, or placing a

student in reasonable fear of harm to the student's person or of damage to the student's property." That's the first aspect. There's no "or" there.

The next part of the definition continues on "is sufficiently severe, persistent, or pervasive enough that the action or threat creates an intimidating, threatening, or abusive educational environment."

MR. GILSTRAP: That's not applicable here.

MR. MUNZINGER: Say again.

MR. GILSTRAP: That's not applicable here. If you do that then you read section (2)(a-1), that becomes surplusage.

HONORABLE STEPHEN YELENOSKY: Yeah.

MR. GILSTRAP: That means something. It says it just has to interfere with a student's educational opportunities. That's the use of electronic media.

HONORABLE STEPHEN YELENOSKY: But why -- Richard, why isn't that enough to satisfy your constitutional --

MR. MUNZINGER: I'm sorry, I can't hear you. My ears are gone from flying over here.

HONORABLE STEPHEN YELENOSKY: I mean, it doesn't say in detail, but page one of six says, "What is cyberbullying?" It's bullying of one student by another, one, two, three is "when the harassment is related to

school or affects the bullied student's education."

MR. MUNZINGER: All I can say by way of answer is that the way I read the statute, and I may very well be wrong with the statute, and it just seems to me that those three aspects -- that those four aspects, rather -- I'm sorry, the first three aspects are all essential in the definition of both bullying and cyberbullying. All three of those must be shown. So I'm a parent. I'm looking at section -- bullying, section (a), subpart (3), "materially and substantially disrupts the educational process." My son cannot go to school and study because he is frightened of the quarterback. I just satisfied the statute. "Or the orderly operation of a classroom or school," doesn't apply, but to materially and substantially disrupt the educational process of my son qualifies under the statute. In the absence of such a thing, the courts have no right to get involved in a parental dispute like this absent a lawsuit.

HONORABLE STEPHEN YELENOSKY: So what would you do?

MR. MUNZINGER: Sir?

HONORABLE STEPHEN YELENOSKY: What would you write?

CHAIRMAN BABCOCK: Judge Wallace.

HONORABLE R. H. WALLACE: Well, and I read

it the same way, Richard. I think you have -- I mean to define -- to figure out what cyberbullying means you first have to know what bullying means up there. Okay. So if there's no bullying, you can't have cyberbullying, but I'd go back to what I was saying. It's almost like a take the checklist approach that you have, but make it more extensive and more lengthy and go through those requirements of what is bullying. Does it have the effect of physically harming the student? If so, how? I mean, and those are or's I think. Once you get beyond the -- includes subsection (A)(i) and "has the effect or will have the effect of physically harming, is sufficiently severe, persistent, or pervasive," et cetera, and "materially or substantially disrupts the educational process," et cetera, "or." So I think (A), subparagraph capital (A)(i)(1), (2), (3), and (4) are disjunctive requirements, as I read that. Any one of those could constitute, quote, bullying. Okay. Now, if you've got bullying, we go down and look and see if it's cyberbullying.

CHAIRMAN BABCOCK: And if it's -- and to be cyberbullying it has to be bullying plus using an electronic communication device.

HONORABLE R. H. WALLACE: That's the way I read it.

MR. MUNZINGER: That has the prescribed effects.

MR. GILSTRAP: But then you're rendering the next section completely unnecessary.

CHAIRMAN BABCOCK: Which section are you talking about?

MR. GILSTRAP: Section (a-1) under (2).

MR. MUNZINGER: And my only response to that is the Legislature was attempting to articulate further what it meant in the first section.

CHAIRMAN BABCOCK: Yeah, I think that's right.

MR. GILSTRAP: No, but the term "interferes with a student's educational opportunities" is total surplusage if it has to materially and substantially disrupt the education process.

HONORABLE STEPHEN YELENOSKY: But those are just disjunctive anyway.

CHAIRMAN BABCOCK: Rusty.

MR. HARDIN: That's not true, the way I read it. The kid is getting off school property. He's being cyberbullied. The definition of bullying plus cyberbullied, and it can still be done if it -- there's a difference in interfering with the student's activity and his educational opportunities and the school's, and so you

could have both or one and not the other. So, I mean, I -- when you look at what the definitions are of off campus, you still get into if that individual student's educational opportunities are being interfered with, he can't go back to school because he's so scared. That may not be interfering with the institutional educational opportunities, but it is for that individual, and I think might be both of them.

MR. MUNZINGER: I agree with that, Rusty.

MR. GILSTRAP: But that's all you have to prove. You don't have to prove material and substantial disruption of the educational process.

MR. MUNZINGER: To other persons.

MR. GILSTRAP: It says "process," if you can simply prove that it interferes with a student's educational opportunities.

HONORABLE STEPHEN YELENOSKY: Well, even if you read it the way you do, Richard, it's disjunctive. So all you have to have even with your reading is it infringes on the rights of the victim at school, because it's disjunctive. You don't need "severely persistent, pervasive." It's all "or."

CHAIRMAN BABCOCK: Has anybody read the Supreme Court case *Davis vs. Mecklenburg County*? I think a lot of this language is taken from that case, Supreme

Court case. That was --

MR. GILSTRAP: Monroe County.

CHAIRMAN BABCOCK: Is it Monroe County?

MR. HARDIN: I think it's Mecklenburg County, which is where Charlotte is.

CHAIRMAN BABCOCK: Whatever it is. Some county. I know it was Davis. I know that. But there was harassment going on of a student, but it was student to student harassment like that.

MR. GILSTRAP: But it was physical. It was physical.

CHAIRMAN BABCOCK: No, I think there was e-mails involved, but anyway, the -- they sued the school district. The school district said, "Wait a minute, this is student on student harassment. We don't have anything to do with it." You know, they're out in the playground and on the internet, you know, messing with each other; and the Supreme Court said there can be liability against the school district if -- and then a lot of this language about how it interferes with the educational opportunity and the school district knows about it. I'm just saying I think they borrowed a lot of language from that, it looks to me like, from that case.

MR. MUNZINGER: And I think in part, Chip, it's because of the constitutional issue. What prompts my

conversations, Frank and I were talking earlier this morning. This thing is fraught with constitutional risks to nonschool conduct by adults. Down the road -- Frank said if this thing is not limited in some way down the road why if I can tell a 17-year-old that you can't say A, B, C to another 17-year-old, can I not say to an 80-year-old, you cannot say A, B, C to another 80-year-old? Well, the answer is because this is America. I can call you a name. I can say you're an anti-Semitic conservative Republican part of anatomy.

MR. ORSINGER: What part?

MR. MUNZINGER: I can say something like that, and I can't be -- that's -- I didn't strike you. I didn't harm you. I voiced my opinion of you, and admittedly that's an ugly opinion, and admittedly -- say "You're a racist." What kind of a word is that to say to a human being? That's a sin to say that to a human being, just like saying "You're anti-Semitic" is the same. These are fighting words. These are ugly words. We can do that in America, and by God's grace I hope we can do it a hundred years from now because this is America. You can't do it in France. So we were concerned about this whole principle being taken into the adult world and into the world of citizens and the Legislature saying, "No, you can't do that. The reason we've got the authority to do

this is we're talking about schools and kids and education."

CHAIRMAN BABCOCK: You're right, it's Monroe County. But it is Davis.

MR. GILSTRAP: I just wanted to make sure I had the right case, Chip. I'm sorry.

CHAIRMAN BABCOCK: Judge Estevez.

HONORABLE ANA ESTEVEZ: Well, I was just going to -- I think some people might not have heard when Richard brought up this issue, he was -- and it could have been premature since we're not on the forms, but nowhere in the forms do they flat out talk about the educational. That's what his whole point is, is it can't be constitutional because nobody is pleading it in the forms. The judge isn't finding it in the order. So that's how he brought it up. I mean, I understand he saw it in the statute, but he was talking about the forms. So those are going to have to be changed.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: Well, chronologically the definition of bullying did come earlier, and it sounds to me like they might have -- somebody might have read Davis against Monroe County, but when they came to promulgate the cyberbullying statute, they added on 129 -- 129.00 -- excuse me. They added on section (B) and (a-1) beneath

that, and it's clear to me that they meant to broaden it.

Now, I certainly -- whether that's constitutional or not, that's really not our call today. We can certainly voice our concerns or we can say all of that, but our job is to draft a form, and I think -- I think the form, it's enough that we either have a definition or we don't. If we do have a definition, it has to be the one in section (2)(a-1), not the one in section (1).

CHAIRMAN BABCOCK: Okay. Anybody else on that issue? Yeah, Richard.

MR. MUNZINGER: The only thing about the form giving the definitions is that you -- the Legislature I think wants to encourage pro se parents to take advantage of this procedure, and the less demanding we are in terms of the forms to let people tell their stories and take it to court, the purpose is being met of the Legislature and of the law. If the form itself includes the language of the law and the person filling in the form is told to state the facts, state the facts relating to the exercise of power or whatever it is, without defining it. We don't have to define it, and we can define it if the Court wants to define it, but the question of whether or not a temporary restraining order in an application for a TRO in a noncase like this would be up to the judge to

say, "Well, you didn't allege the irreparable harm," and in this case, "Well, you didn't allege so-and-so, Mrs. Smith. You need to go back and tell me why, Mrs. Smith, this person has authority over your child to make your child frightened or intimidated or whatever." Why is it -- "You have to go back and do more." Okay. "Well, I'll come back in an hour," hour or two, whatever it might be.

CHAIRMAN BABCOCK: Okay. Yeah, Judge.

HONORABLE R. H. WALLACE: Well, I see how Frank is reading that, and if that's the way you read it, you just go straight to paragraph -- or in parentheses (2), "Cyberbullying means bullying that is done through the use," et cetera, et cetera, then there's no definition of bullying to worry about. I guess you just say if you can't -- if you don't look back up there above it to see how bullying is defined because you don't think that's what they mean by cyberbullying then you've just got cyberbullying means bullying, and that's whatever somebody wants to make it sound like. And maybe that's the simple way to do it.

CHAIRMAN BABCOCK: Okay. Do you want to try to run through these instructions real quick? Let's look at the -- the title we decided is okay. Although, is it limited to phone or internet? Does that meet the

definition of electronic communication device?

HONORABLE STEPHEN YELENOSKY: Well, to be accurate, if we're going to have it in the title, it would have to say, "Through the use of any electronic communication device, including use of a cellular or other type of telephone, computer, camera, electronic mail, instant messaging, text messaging, social media application, an internet website, or any other internet-based communication tool." Anything less than that is not the statute. So can we say something less than that, or we just don't refer to it at all?

CHAIRMAN BABCOCK: Well, could you say, "What can I do if my child has been harassed by another student using an electronic communication device?"

HONORABLE STEPHEN YELENOSKY: You could because the rest of it's -- is included.

CHAIRMAN BABCOCK: Is that inclusive?

HONORABLE STEPHEN YELENOSKY: I don't -- a lot of parents aren't going to know what that means.

HONORABLE ANA ESTEVEZ: I don't think you think of a phone. I mean, I don't think the normal person thinks of a phone as an electronic storage device.

CHAIRMAN BABCOCK: So everybody is okay with leaving "phone or internet" there? It's okay with me. Richard.

MR. ORSINGER: No, I think we ought to add to it. I mean, I think this is going to be interpreted as a layperson to mean that you have to do whatever it is using a phone. I think this applies to -- this applies to a desk computer, too. You have to infer that internet means any device connected to the internet. Well, that's not that obvious to me, so I would prefer that we use the statutory language, because it's more inclusive and it's more specific.

CHAIRMAN BABCOCK: Okay. How's everybody feel about that? The inclusive definition does include a camera, which is neither a phone nor the internet. Right?

MR. ORSINGER: Right. I mean, the camera could be a phone camera, or it could be a camera that's digital and then you e-mail it to a phone and then -- but that camera is not the same as --

CHAIRMAN BABCOCK: Or it could be a camera with a telephoto lens that gets compromising pictures that are put up on the school bulletin board.

MR. ORSINGER: I think we're unnecessarily narrowing down the possible availability of this form by limiting it to internet and camera. I mean, internet and phone.

CHAIRMAN BABCOCK: Phone. Stay in your lane, bro.

MR. ORSINGER: Sorry.

CHAIRMAN BABCOCK: Pete.

MR. SCHENKKAN: I think on the other side is having it be comprehensible and accessible, and if you reproduce the full text of the statute I think you lose a lot of benefit in the opposite direction. I personally think we are almost there with what we have. I think we need to get rid of the "harassed" and go with "cyberbullying."

CHAIRMAN BABCOCK: That was going to be my next point.

MR. SCHENKKAN: But then I think after that, if you look at the structure of (2), the cyberbullying definition, it's really a duo disjunction, and the first half of the duo has a bunch of "including" as examples. So what it really says is "Cyberbullying is bullying that is done through," and then it's either use of any electronic communication device, including --

CHAIRMAN BABCOCK: Such as.

MR. SCHENKKAN: -- the long list, "or any other internet-based communication tool," and so I think that is the way to boil it down, is to say, "This is about cyberbullying by another student -- by one or more other students using any electronic communication device or any other internet-based communication tool." It's a little

longer than what we have now, but it doesn't go into the full detail, doesn't leave anything out.

Yes, you're right that camera is in there, but camera is in there as something that is an electronic communication device, and I'm willing to take my chances on the notion of what they really meant was those cameras that have the built in feature where you hit one button on it and it goes to Instagram or something. I don't even know social media apps to know what we're talking about.

CHAIRMAN BABCOCK: Okay. So "What can I do if my child has been cyberbullied by another student on" --

MR. SCHENKKAN: "On any electronic communication device or other internet-based communication tool."

CHAIRMAN BABCOCK: I could live with that.

MR. ORSINGER: But, Peter, I would say you shouldn't say "other internet-based" because this should apply just a plain old phone call from one person to another person, which is not internet-based. It's cellular-based. So if one kid or 10 kids are calling one kid on the phone --

MR. SCHENKKAN: Okay.

MR. ORSINGER: -- that's prohibited.

MR. SCHENKKAN: Strike "any." "Any other

electronic communication device or internet-based communication tool." I like that better.

CHAIRMAN BABCOCK: Yeah, would a land line be covered by this?

MR. ORSINGER: I think so.

MR. SCHENKKAN: That's electronic communication.

MR. ORSINGER: I think so because it says "or any other type of telephone." We're just now thinking about postings on the internet, but if 10 people are calling the kid all night long, that's cyberbullying.

CHAIRMAN BABCOCK: Okay. So what's the title, Richard? "What can I do if my child has been cyberbullied by another student on" --

MR. ORSINGER: You know, I think it's smarter to say, "Cyberbullying is 1, 2, 3, and 4." "If your child has been a victim of cyberbullying then" -- trying to put all of the statutory concepts into one sentence to me is a problem. That ought to be a numbered list or a dot list.

CHAIRMAN BABCOCK: Well, we voted on user-friendly, didn't we?

MR. ORSINGER: You think it's user-friendly to put all of that language in one sentence? I think --

CHAIRMAN BABCOCK: No, I was --

MR. ORSINGER: -- it makes it impossible to understand.

CHAIRMAN BABCOCK: No, I was the contrary. Anybody else got any other ideas about the headline? Judge Evans.

HONORABLE DAVID EVANS: I think you could overwrite these instructions to the point that a layperson reading them would decide they didn't qualify and have a chilling effect of bringing a meritorious claim before the court; and you're doing the judging before the judge is involved; and you're better off just to have interrogatories in the form that says what was used and how did it occur. And, you know, we're used to -- I know everybody would like to protect a lot of pro se petitions coming in, but it's our job to read them, to determine if they're meritorious, and to weed out the ones that are bad and have the people above us grade the papers. You over-instruct this, you'll have the clerks answering questions all afternoon downstairs instead of the judges in the courtroom.

CHAIRMAN BABCOCK: Justice Christopher, and then Frank.

HONORABLE DAVID EVANS: And, by the way, you're labeling this "instructions and explanations," and the Legislature just said "instructions." They're not

asking for an explanation from the Legislature. They're asking for instructions on how to do the forms.

CHAIRMAN BABCOCK: Good point.

HONORABLE TOM GRAY: With regard to that, Chip, if I may, the title there could be "The form and these instructions," and it addresses an issue that somebody had down here earlier about tying these two together and then that could -- that leader line would be on both, "The form and these instructions are not a substitute for the advice of an attorney," which is required by the statute.

CHAIRMAN BABCOCK: Right. Right. Good point. Justice Christopher.

HONORABLE TRACY CHRISTOPHER: I would just call it "Cyberbullying Court Order."

CHAIRMAN BABCOCK: Whoa.

HONORABLE TRACY CHRISTOPHER: Okay, because that's the goal here, is to get a court order. Right?

CHAIRMAN BABCOCK: Yeah.

HONORABLE TRACY CHRISTOPHER: And then I would say, "You have to meet these requirements to get a cyberbullying court order," and I mean, and go through the statutory requirements; and I disagree that the petition should be vague, because I think if the petition doesn't specifically track the statute, the judge is going to have

no idea what we're talking about here; and they're going to look at this order in the temporary restraining order, and it doesn't have the usual things that are in a temporary restraining order, and they'll be like "Well, this isn't right," and so, I just -- I just think it has to be more statutory-based, because otherwise the judge won't grant it, and they won't look at the order, and they won't look at the rule.

CHAIRMAN BABCOCK: Yeah. Richard -- no, Frank, then Richard.

MR. GILSTRAP: I have a little trouble with the last comment because this is such an unusual statute, I think the judge is going to have to read the law on this one.

CHAIRMAN BABCOCK: He's supposed to.

MR. GILSTRAP: I know what Judge Christopher is talking about. Normally you don't on a TRO. You know the law, but here you don't. This is such a new thing. Insofar as balancing the plain language versus the definition, maybe we could try this. We could put two or three notes at the end of the instructions. One, "phone or internet includes" and have a more prolix definition. "Cyberbullying includes," that type thing, but if -- if we start throwing in these complicated legal definitions on the first page, it's not going to be -- you know, the

Legislature wants something that can be used by laymen, and laymen can't use that, and it seems to me that's a reasonable compromise. I understand the tension here, but let's -- let's plow through this and put some notes at the end. That might be a way to do it.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: In line with the Judge's comments about the order, temporary injunctions according to the Rules of Civil Procedure have certain statements that are required to be made in the order when the injunction is granted, and certainly a TRO in this circumstance and a temporary injunction in this circumstance are very significant. I don't mean to start a political argument, but had Mr. Kavanaugh had had a temporary restraining order issued against him for cyberbullying, he probably wouldn't be sitting on the Supreme Court today. So the person who is the target of this motion has every bit as much of an interest in its being -- in the dots being dotted -- the I's being dotted and the T's being crossed as the person bringing it, and the judge who enters such an order should be very keen to what that judge may be doing to the reputation of a youngster later on in his life or her life or at that point in time.

So perhaps we need to have an order in which

-- I mean, a form of the order in which the court finds that, and then the court is required to make the findings, and the court can't do that in the absence of an affidavit or a petition that meets the requirements of the statute. Both interests are protected.

CHAIRMAN BABCOCK: Okay. Yeah, Judge Estevez.

HONORABLE ANA ESTEVEZ: I would suggest on that other comment about the judges, they probably won't know much about the statute, so it needs to be either in the petition or the request or in the order "pursuant to" whatever the section is of whatever code so that when they're looking at it they know right away where to look.

HONORABLE TRACY CHRISTOPHER: Right.

CHAIRMAN BABCOCK: By the way --

HONORABLE ANA ESTEVEZ: On all of them.

CHAIRMAN BABCOCK: -- I'm not so sure that the Supreme Court should be suggesting a form of an order in a speech case. The Legislature didn't tell us to provide the judge with a form order, and --

HONORABLE STEPHEN YELENOSKY: That's fine.

CHAIRMAN BABCOCK: And in a speech case there are requirements about what has to go into an order.

HONORABLE ANA ESTEVEZ: I don't think you can do this without having a form for the order. I'm

sorry, but they're not going to know that it -- it's kind of like the things that we were talking about. They're not going to know that it expires in 14 days unless it's in the order. They're not going to know that they need to have another hearing within 14 days, and that hearing date needs to be in that order with a blank. So when I looked at the form they had here, they did supply one, I mean, we need one for the next hearing date. You know, does it need a bond? I mean, does it? I mean, if it does, I mean, we require bonds. This one is exempt from bonds or there is no bond. There's no bond requirement.

CHAIRMAN BABCOCK: Well, but isn't that up to the judge, though?

HONORABLE TRACY CHRISTOPHER: No.

HONORABLE ANA ESTEVEZ: No. It's required.

HONORABLE TRACY CHRISTOPHER: It's not valid without a bond.

CHAIRMAN BABCOCK: No, no, no. I mean isn't the -- what the order says, isn't that up to the judge?

HONORABLE ANA ESTEVEZ: No. There's some requirements that if we don't have it in it, it's not a valid order, period. So what are we doing? I mean --

HONORABLE TRACY CHRISTOPHER: This changes the requirements.

MR. SCHENKKAN: The statute changes that.

Whether or not valid is --

CHAIRMAN BABCOCK: I'm cool with that, but --

HONORABLE ANA ESTEVEZ: I'm saying we're wasting everybody's time. If this is assuming we have two pro se people and you're going to come and do this great petition that will satisfy the law but then you're not going to bring an order that's going to satisfy the law, then --

CHAIRMAN BABCOCK: Pete.

HONORABLE ANA ESTEVEZ: -- what are we doing?

MR. SCHENKKAN: For those --

THE REPORTER: Speak up, please.

MR. SCHENKKAN: I think some in the room know this and others don't, but for this problem of what should -- should there be an order and, if so, what should the form order say, the statute says the temporary restraining order or temporary injunction is not required to define the injury or state why it is irreparable, state why the order was issued without notice or include an order setting the cause for trial on the merits. That's in the statute. Now, that may or may not be valid, but again, I don't think that's -- I mean, obviously that's for the Court to decide, but at the moment I think in

terms of this committee, unless -- I mean, I doubt if this is the way the Court would like to hear more about the constitutionality of such an order, having this committee comment on that possibility, an effective use of everybody's time. We should do one that does not define the injury or state why it's irreparable or state why it was granted without notice because the Legislature said it doesn't have to.

CHAIRMAN BABCOCK: Well, the Legislature may not have meant this, but the section about promulgation of forms says that "The Supreme Court shall, as the Court finds appropriate, promulgate forms for use as an application for initial injunctive relief by individuals representing themselves" in these kind of cases, "and instructions for the proper use of each one." It doesn't say anything about orders.

MR. SCHENKKAN: That's right. We don't have to do an order at all.

HONORABLE STEPHEN YELENOSKY: We only did it -- well, we only did it because the protective order kit has one.

MR. SCHENKKAN: All I'm saying is I think we do need to --

CHAIRMAN BABCOCK: And I'm suggesting that this may be different than protective order.

HONORABLE STEPHEN YELENOSKY: No, I agree with you. I'm just saying I have no problem with that.

HONORABLE TRACY CHRISTOPHER: I mean, if you want a pro se to get relief, you have to do an order. The judge is not going to sit there and craft an order. The judge is going to say, "Where's your order?"

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: I agree with Justice Christopher on that, and I want to point out something else. This requires a very minimal showing. It says 129A.002(b), "A plaintiff in an action for injunctive relief is entitled to a TRO on a showing that the plaintiff is likely to succeed in establishing that the individual was cyberbullied." The recipient, and then it says, "A plaintiff is entitled to a temporary permanent injunction upon a showing that the individual was cyberbullying the recipient." One event entitles to an injunction. There's no requirement of ongoing -- of continuing harm here. I think that was pretty clearly the intent of the Legislature.

HONORABLE STEPHEN YELENOSKY: Or a statement of injury.

MR. GILSTRAP: What's that?

HONORABLE STEPHEN YELENOSKY: Or a statement of injury.

MR. GILSTRAP: Yeah. Yeah. There's no requirement of injury.

CHAIRMAN BABCOCK: So what is -- what is the Supreme Court in a form going to tell the judge to tell the defendant not to do? Cyberbully?

MR. GILSTRAP: Well, yeah, that's the restraining order, and that gets into the really neat part on paragraph -- on page two of the order, and it tells that the parent -- one, the parent "shall take reasonable actions to stop the student from using the phone or internet to cyberbully the defendant," or that the parents shall take possession of so-and-so's phone and computer, or -- and this is the one, that the defendant -- the parents shall instruct the child to delete what she's posted on the internet. Those are the three forms of relief, and I think that's what -- realistically, that's what the Legislature would expect the rule -- otherwise there's no realistic relief here. It may be too broad, take your computer away. Who knows.

CHAIRMAN BABCOCK: Well, here's what I'm worried about. This form is going to have the imprimatur of the Supreme Court, which suggests that it's okay, and does anybody think that that order that you just read is okay?

MR. GILSTRAP: Well, you know, it's going to

have -- the Supreme Court by promulgating this -- this whole thing may be promulgating an unconstitutional procedure. I mean, that's the whole problem.

CHAIRMAN BABCOCK: Well, but the point -- the statute does not require the Court to promulgate an order.

MR. GILSTRAP: Well --

HONORABLE TRACY CHRISTOPHER: Yeah, but it says what the court should order. It says it right there in the statute.

CHAIRMAN BABCOCK: It says what the district judge should order, but it doesn't -- it doesn't require the Supreme Court to promulgate an order that -- that, you know, if I were on the Court I would have concerns about whether this form that I'm sending out is constitutional.

MR. MUNZINGER: Why would that power not be inherent in the Supreme Court's power granted by the Rules of Civil Procedure to make orders concerning civil procedure? This is a civil procedure. It's a civil proceeding in a civil court. Why couldn't the Court do that? Why couldn't the Court -- there was a discussion earlier this morning about the need for privacy.

CHAIRMAN BABCOCK: Are you saying that they have jurisdiction to do it?

MR. MUNZINGER: You know, we have a court

rule that Rule 76a doesn't apply to these and that they may be confidential at the discretion of the court. It would seem to me the Texas Supreme Court has that discretion now without any enabling statute from the Legislature on this particular problem. This is -- to me it's civil litigation, so I think the Court would have that authority.

CHAIRMAN BABCOCK: Well, yeah, the question is -- you know, I think they do. They have jurisdiction. They have the authority. The question is whether they should exercise it. Yeah, Pete.

MR. SCHENKKAN: Chip, is your question on that, does it have to do with constitutionality of the speech context? Is that what you're --

CHAIRMAN BABCOCK: Yeah, concerning that.

MR. SCHENKKAN: I mean, you know, we're sitting in the room with you as an expert on this. Why don't you just briefly tell us what that concern is because it may be that it's insoluble by anything we can do. We have to have an order attached to this form, or we are wasting everyone's time. Now, it may be that because the order under the statute by statute doesn't have to include some stuff that you say it does -- that you might tell us it does have to say. That's what I'm not -- I'm not understanding yet whether we have a problem that can

be solved by the words.

CHAIRMAN BABCOCK: Well, you know, to follow up on Richard's "This is America speech" --

MR. SCHENKKAN: Right.

CHAIRMAN BABCOCK: -- if I'm a parent or an 18-year-old child defendant. I guess you wouldn't be a child, but 18-year-old defendant, and a judge is saying that you can't -- you can't say this anymore. You can't -- you've got to erase something from your system, there has to be detailed findings in the First Amendment context as to why that is so. I mean, it's prospectively when you're enjoining somebody from speech that's a prior restraint, and it has to be justified by a compelling governmental interest, and having just a form order that is -- that is sanctioned by the Supreme Court, you know, of course, all of the district judges say, "Oh, well, we've got a form order here. Let's just enter it." But the Court is then misleading the district judges into what -- or the county judges into what is an okay form.

MR. SCHENKKAN: That's helping because I'm starting to understand how this looks to you from where you're sitting and has a problem, but isn't -- I would have thought that the answer to that was that the draftsperson of this for the Legislature, rightly or wrongly, he or she thought it met that standard to say

you're going to issue an order to stop further cyberbullying upon a finding that there has been a cyberbullying when cyberbullying is defined to include as an absolute requirement one or the other or both of two things, interferes with the student's intellectual opportunities or substantially disrupts the order and operation of the classroom, et cetera, and I thought that was what the Davis versus whatever turned out to be, Monroe.

CHAIRMAN BABCOCK: Yeah. Whoever said it was about conduct was right. It was. It wasn't an internet case, but they've got to be taking the language from that case.

MR. SCHENKKAN: But if that's right then isn't that the answer to that concern, that the Legislature has tried, maybe not terribly artfully, but they have built into the definition of what will be found as a fact to have happened and will be ordered to not happen again, something that would serve a compelling state interest in the narrow context of schools. It either interferes with the student's educational opportunities or it substantially disrupts, et cetera, and so isn't that enough for purposes of setting up this process? And then, sure, they've got to be hard cases at the lines where the facts that some particular judge said

met this standard might seem too thin to you or someone else with sensitivity sensitized by a whole lot more litigation in a lot more contexts where the precedent might matter. Well, that's not a very good idea to draw the line there, but for our purposes wouldn't that be good enough?

CHAIRMAN BABCOCK: Well, I don't know. Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, if it's your position that you cannot draft a constitutional order to address cyberbullying then the Supreme Court should not create the petition at all, period. If you think that there is a way to craft a constitutional order then I think the Supreme Court can impose the requirements in its draft order that would be constitutional.

CHAIRMAN BABCOCK: No, I don't think so at all, Tracy. The statute directs the Supreme Court to promulgate a form, a petition. That's not the same -- in implementing the statute. The Court doesn't have in front of it right now an adversary proceeding where they can say, "Oh, this looks unconstitutional to us" or not. They've been directed. They've been given specific direction by the Legislature to pass a -- to pass -- to promulgate a form implementing the statute. Fine. But they --

HONORABLE TRACY CHRISTOPHER: But the form implementing the statute includes an order because it talks about what the judge can do, what the judge can order.

CHAIRMAN BABCOCK: Well, we just read the statute differently. Judge.

HONORABLE STEPHEN YELENOSKY: Well, the -- when we were drafting this I wanted to put in some things that would make it more constitutional, hopefully; and it was pointed out to me by somebody on the subcommittee, I guess, that, well, you're putting a higher burden on that parent than the Legislature said he or she had. What business do you have doing that? Particularly when it says you don't need something, it would be in direct conflict with the statute to require it. So we probably do have an unconstitutional statute, so what does the Supreme Court do in that situation? Wait for the case to come up. In the meantime, we promulgate what's consistent with the statute. I guess the Court could decide that we're not going to promulgate it because it's unconstitutional, but usually it waits for case.

CHAIRMAN BABCOCK: Yeah, I agree with that. No, I think -- I agree with what you said. You can't -- and I heard some suggestions this morning that we ought to define, you know, what --

HONORABLE STEPHEN YELENOSKY: Right.

CHAIRMAN BABCOCK: -- what different terms mean. No, I agree, that's legislating, and I don't think we should do that. I think the Court has been directed to create a form that a pro se litigant can take and say, "Okay, I'm filling this form out and I'm going to file it in court."

HONORABLE STEPHEN YELENOSKY: Without an order. Yeah. And then the court -- I guess your idea is then the judge does what he or she knows needs to be done to make it First Amendment constitutional.

CHAIRMAN BABCOCK: Yeah. I mean, I would hope.

HONORABLE STEPHEN YELENOSKY: Well, but if I'm the district judge and I'm reading the statute, I guess I could say, "I'm going to require this of you," even though the statute says you're not required to do it, because I know when it goes up it will be reversed on constitutional grounds.

CHAIRMAN BABCOCK: The judge could look at it and say, "I'm looking at this statute, and I've got two pro se litigants here," or "I've got a representative defendant who is raising a First Amendment issue," which you don't have to raise as an affirmative defense, and "I don't think this is constitutional. So I'm going to enter

an order that says, you know, even though all of these elements are met, they can't -- I cannot enjoin you consistent with the First Amendment." Signed, judge.

HONORABLE STEPHEN YELENOSKY: Okay.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: Well, you know, it's obviously not what the Legislature intended.

CHAIRMAN BABCOCK: Well, of course not. They think it's constitutional, and it may be. It may be constitutional, but we ought not to be weighing in on that now.

MR. GILSTRAP: Well, I think the Court in promulgating a form could probably take comfort in the diminished right, the fact the Supreme Court has held repeatedly that the rights of students to have free speech in school-related activities is very diminished.

CHAIRMAN BABCOCK: Oh, they don't say that.

MR. GILSTRAP: Well, they got the famous Bong Hits for Jesus case, Morse against Frederick where they unfurled a banner across the street from the school, said -- and it said "Bong Hits for Jesus" to give you some idea of the maturity level of the students, and the Court said you could expel them for that.

CHAIRMAN BABCOCK: Well, I haven't read that case in a while, but I believe it pivoted on the fact that

the kid testified that it was a joke, he wasn't trying to express an idea on a matter of public concern.

MR. GILSTRAP: Well, I think that -- I doubt if the Court would have reached a different one if he would have said, "I'm serious about bong hits for Jesus."

CHAIRMAN BABCOCK: I don't know about that. Pete.

MR. GILSTRAP: It is clearly diminished. Case after case says that students don't have the same First Amendment rights as adults.

CHAIRMAN BABCOCK: Well, and there were also -- we don't need to get into this debate. Pete.

MR. SCHENKKAN: Chip, isn't -- isn't the situation that if it's clear that the statute doesn't require the Court to promulgate instructions that include an order --

CHAIRMAN BABCOCK: Right.

MR. SCHENKKAN: -- but it's also clear as a practical matter that if you don't have an order, judges who are not going to be -- have 50 lawyers from around the state, including one of the leading First Amendment lawyers in the country, available at their hand to tell them there even is a constitutional issue, much less what it is and what you ought to do about it, especially on a TRO, where all of these cases are going to get decided,

most of them finally decided, that's a big decision, but it is the Court's decision.

It seems to me that the best service we can be to the Court is to give a draft of instructions and a form of petition which is user-friendly to the parent of the cyberbullied child and a form of order which uses the statute's efforts, however imperfect, to comply with the Constitution, and then see if we ever have a case where the defendant shows up at the temporary injunction with a real lawyer who says, "You've got a First Amendment problem here, Judge. This is unconstitutional restraint on prior speech, according to the United States Supreme Court decision in" whatever.

CHAIRMAN BABCOCK: Yeah, I think that the record is probably fulsome on the two different competing positions here. The Court certainly does have the authority to promulgate an order. The statute doesn't require it to, and some people think that it should be -- it should promulgate it, and I don't think it should, but --

MR. SCHENKKAN: And I'll let it go with just one more, which is I don't think we have that order in the packet at the moment, and I would certainly like the subcommittee to have a chance to give you one that tries to --

HONORABLE STEPHEN YELENOSKY: We do have.

HONORABLE ANA ESTEVEZ: There is an order.

MR. SCHENKKAN: But with that language.

HONORABLE STEPHEN YELENOSKY: No.

MR. SCHENKKAN: That's what I'm saying, try to use the language that's in the statute that is an attempt to comply with *Davis vs. Monroe*'s idea of what constitutes a compelling state interest in this specific context. We don't have to sign off on whether it works.

CHAIRMAN BABCOCK: Yeah. Richard.

MR. MUNZINGER: I just wonder if there's a need for any amendment to the Court's existing rules on temporary restraining orders and temporary injunctions to recognize this statute and the statutory exemptions from certain provisions that are required customarily in both TROs and temporary injunctions, because if I'm a practitioner and I get one of these dadgum things, first thing I do is go to the Rules of Civil Procedure to see what TROs and injunctions say, and none of this stuff is said in this form or this order, and so now what do I do? And it may be that we want to give some thought to amendments, at least some kind of a notice amendment to those two rules or that series of rules, saying, "See so-and-so" and whatever the Court decides to say, but --

CHAIRMAN BABCOCK: Yeah, good point.

MR. MUNZINGER: There are certain things in the statute that the Legislature says the order does not have to say, but it doesn't impose any restriction on the Supreme Court concerning confidentiality and concerning other things that the Court may want it to say.

CHAIRMAN BABCOCK: Yeah, good point. Nina.

MS. CORTELL: A couple of things. One, the instructions refers to "forms" in the plural, and I don't think it's just restricted to the petition itself, and I think it would be an empty exercise from all we've heard today to only provide the petition, and I don't think the Legislature intended an empty exercise. So I think it's fair to have it include the order. Second, it seems to me that we often have rules or -- that the Court's not saying it will ultimately uphold in a certain context. I mean, it's never vouching for that. It only means that the clerk has to accept the form if it's filled out as intended. It's not a voucher by the Supreme Court of its constitutionality. But if that is a concern, I don't know why we can't have sort of a reservation of rights or something like that where that's made clear, but the bigger point is that we're supposed to be providing something that's easily used by these litigants, and if we don't give them the order, I think we're defeating the purpose, and again, it says "forms" in the plural.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: Apart from all of that, we also I think enjoy a good working relationship with the Legislature now, which we didn't have 10 or 15 years ago.

CHAIRMAN BABCOCK: Yeah, last time you testified.

MR. ORSINGER: And so we -- if we refuse to implement their public policy decision, they may go back to adopting rules in the form of statutes and things like that, so the -- the rule-making capacity of the Court I think should be done consistent with the legislative viewpoint, and then the Court always reserves the right to rule on constitutional issues when they're presented a case in controversy.

Having said that, it's really -- I think this whole debate boils down to two things. In the statute a recipient of cyberbullying behavior can seek injunctive relief, and the plaintiff is entitled to temporary or permanent injunction on showing that the individual was cyberbullying the recipient. All you've got to prove is that you were the victim of cyberbullying and that that's the person that did it, and then you get a temporary restraining order, a temporary injunction, or permanent injunction. So our form should be that simple, and there may be severe constitutional concerns about

that, and if we want to have CLE at the judicial conference, they do that four times a year. You can talk to them about, you know, what they want to do as judges, whether they want to worry about the First Amendment or follow the statute; but from our perspective it seems to me like we ought to do what the Legislature asked us to do, which is make a recommendation to the Court that if you prove you're a victim of cyberbullying and the respondent is the person that did it, they need to get injunctive relief. So to me we ought to be focused on that and realize that all of these other criteria that we normally are concerned with are really not a factor.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: What if the judge -- quite often the judge will delay his ruling. I don't want to make a ruling I found you did this, but you come back and that, and our order doesn't give him that option. He's got to find that child did that. He can't delay a ruling or anything. He has no discretion but to either find yes or no? He can't delay under the order?

CHAIRMAN BABCOCK: I don't know.

MR. ORSINGER: We're not really telling him when the court has to rule. They could rule today, they could rule a week from now, or they could just --

MR. LOW: Well, but then when you come back

and you said, but if you come back in five days, let me know if this is continued or something, he could dismiss it without finding some kid did that, so it's on his record for good.

CHAIRMAN BABCOCK: Yeah, I mean, there's lots of ways that the trial court could handle it.

MR. LOW: Yeah, and a form that -- the suggestion was to help the nonlawyer.

CHAIRMAN BABCOCK: Right.

MR. LOW: The judge is the lawyer. He knows the law. He should -- if he doesn't and is not an expert on that, then he should refer it to a judge that knows more about that law, because he's supposed to know what the law is, and he can do. Anyway, that's all.

CHAIRMAN BABCOCK: Yeah. Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, rather than amending the TRO rule, I think it would be better to put in the form of the order "Pursuant to Texas Education Code, Section 11" -- you know, whatever -- "this TRO does not require the following findings."

MS. BARON: Or a bond.

HONORABLE TRACY CHRISTOPHER: Or a bond.

HONORABLE ANA ESTEVEZ: Well, does it require a bond?

MR. ORSINGER: Yes, it does. There's nothing that waives the bond requirement.

HONORABLE ANA ESTEVEZ: I think it requires a bond.

MS. BARON: I thought I heard it does not.

HONORABLE TRACY CHRISTOPHER: It doesn't say.

MS. BARON: It does not say. Okay.

CHAIRMAN BABCOCK: Judge Estevez.

HONORABLE ANA ESTEVEZ: I'm going to suggest that if a lawyer shows up at the next hearing they're going to want a bond, and I've never signed a TRO without one, so unless it says this does not require a bond, I'll be putting in a bond about the amount that I would think an attorney would have to -- you know, someone would have to hire an attorney to appear.

MR. GILSTRAP: If we're going to require a bond, it's got to be in the instructions. It's got to be a warning in there.

HONORABLE ANA ESTEVEZ: I think the law requires a bond unless you're --

MR. MUNZINGER: Well, granting -- a trial court has discretion to grant a temporary injunction with or without bond, and the silence of the Legislature should be interpreted as saying that that's -- the discretion of

the trial court is left undisturbed by this statute.

CHAIRMAN BABCOCK: Is that true? Can you do it without a bond?

HONORABLE ANA ESTEVEZ: I think just a supersedeas bond, but other than that appellate supersedeas bond I don't think so.

CHAIRMAN BABCOCK: Justice Christopher was shaking her head.

HONORABLE TRACY CHRISTOPHER: It has to be at least a dollar, unless the party affirmatively waives the bond.

MR. MUNZINGER: You have to have a bond?

HONORABLE TRACY CHRISTOPHER: You have to have a bond.

MR. ORSINGER: Is that a rule requirement or a statute requirement?

HONORABLE TRACY CHRISTOPHER: A rule requirement.

MR. ORSINGER: Okay. That can be changed in a rule. So that's a very important question that we've just discussed because a bonding requirement is going to eliminate this remedy for most people. They're not going to know how to post a bond. They don't want to post a bond. They won't be able to afford to post a bond. Certainly if the bond is enough to pay for defense fees of

1,500 or $2,500. So the Legislature should have but didn't waive the requirement of a bond.

CHAIRMAN BABCOCK: Well, maybe it didn't want to.

MR. ORSINGER: Maybe it didn't want to. I would be curious to know if anybody knows whether it was considered and discussed, but the Supreme Court has the power to eliminate the bond requirement. I don't know if they care to.

CHAIRMAN BABCOCK: Pete.

MR. SCHENKKAN: Yeah, on this, on the bond question, we do have less to go on on the statute. I think -- I really think it's pretty clear that they thought they were complying with the Constitution as far as compelling state interest and things we might say that they didn't. But on the bond, yeah, it's less clear, but it does seem to me that the fairer reading of this from the fact that you're also not required to plead or prove any of the things you usually are for temporary restraining orders and temporary injunctions such as irreparable injury, that they really didn't contemplate this would be something that would then stop because you couldn't do a bond. If -- at a bare minimum I think we're in a situation where it didn't occur to the Legislature that that would be something that would stop this from

ever doing it again; and if it had occurred to them they would have solved it in some way, such as saying either waive a bond or a nominal bond or something.

So, you know, we don't have as much to go on there, but I think it's -- it's kind of, back in Nina's point of view, if we're going to do something they intended us to do that's possible to actually be used, it ought to assume that a bond is not required, and then we will have to fight that one if somebody comes in and says, "My God, there should have been a bond."

MR. ORSINGER: I guess that leads me to ask another question here for the procedure hounds in the room, which is that an order is different from a temporary restraining order. A temporary restraining order is actually issued by the order of the court, and the order signed by the judge is the order directing the issuance of the temporary restraining order. So are we anticipating that we will direct -- that the order will direct the clerk to issue a temporary restraining order, or are we just going to prohibit behavior like grab your kid's phone and don't let them use the computer for a week? Because our form right now is just an order directed at the respondent, but I think technically that order is not a TRO. The TRO is a piece of process issued by the clerk of the court.

CHAIRMAN BABCOCK: Elaine.

PROFESSOR CARLSON: It's a writ, type of writ.

MR. ORSINGER: So, I mean, in reality, this order is an order to issue a TRO, and it's really not written that way. It's written as if it's self-enacting.

PROFESSOR CARLSON: Rule 693a says, "In a divorce case the court in its discretion can dispense with the necessity of a bond in connection with an ancillary injunction in behalf of one spouse against the other." So that's an express instance, though, where it's not necessary.

I would like to just say that I come at this very differently than others. I think it's terrible for parents to get involved in the judicial process over bullying and put their child into the system, and I think we should say everything we can to give advice to the parents that this is expensive, it's time-consuming, it's public, you may have to put up a bond, you may not be able to get these records --

CHAIRMAN BABCOCK: Sealed.

PROFESSOR CARLSON: -- sealed. I was going to say expunged. Sealed. I see it years later in the application process for law school, and I can't tell you how many young people have already had a run-in with the

law in terms of minor in possession, so they have to explain that. One of the questions we have on our application is "Have you ever been the subject a restraining order?" If they are, we are now very concerned. We take active shooting classes every year, and we are concerned about the safety of the other students in our school, and when you get into the process, it seems like it doesn't go well for the bully. They just get worse, and they do incredibly bad things. So I -- I question the wisdom of this approach. It's not my call. Obviously it's the Legislature, in dealing with obviously our psychological problems, and I just want to put that on the record.

MR. MUNZINGER: Well, the suit by statute is brought against the parent of the bully if the bully is --

CHAIRMAN BABCOCK: Alleged bully.

MR. MUNZINGER: -- under 18, or the alleged bully, if the bully is under age 18 and may be brought against the underaged alleged bully, which would I assume require the appointment of a guardian ad litem for that person, unless the statute has done away with the requirement of a guardian ad litem by saying you may sue the parent. The general tort rule being I'm not responsible for the torts of my son, unless they're malicious and within that one statute. I mean, that's the

last time I looked at that subject was many, many years ago, but it used to be parents were not responsible for the tort of their child unless it was malicious property damage and then there was a statutory capital in the statute. I mean, this thing has got all kinds of issues in here that the Legislature has -- apparently didn't choose to address.

PROFESSOR CARLSON: Unintended consequences.

MR. GILSTRAP: Yeah, but the problem is everybody agrees it's a bad statute. Everybody agrees that a lot more thought should have gone into it. We're all in agreement, but we've got it. What should we do? Should we make it where it just can't be used, and that's one approach, or do we make it where it can be used and let the court sort it out?

CHAIRMAN BABCOCK: I think you have to fairly follow what the Legislature has instructed the Court to do, but I wouldn't read that instruction as broadly as some people in the committee do. I would be a strict constructionist on this statute.

MR. GILSTRAP: It's a question of degree for you.

CHAIRMAN BABCOCK: Yeah. Go ahead, Richard.

MR. ORSINGER: One thing to keep in mind about this is that the Legislature probably anticipated

that this could only last for 14 days or maybe even be moved for one time to the 28 days because it's a TRO, and so if we are stepping on some constitutional amendments or even kicking them around and bruising their legs or knees, it's going to go away pretty quickly. I doubt any of this is ever going to hit an appellate court because TROs vanish too quickly. It's almost like somebody would have to bring public interest litigation on behalf of all the potential defendants in order to make this work.

CHAIRMAN BABCOCK: Can't you get a TI under this?

MR. ORSINGER: Yeah, but as a practical matter how many of these people are ever going to show up for a temporary injunction hearing? What will happen is some judge is going to say, "I want you to take your kid's phone away," and you know, send them to do X, Y, and Z. I bet you -- I mean, we'll see, but I'll bet you that a lot of these problems get solved by appearing one time in front of the judge, and then the parent of the abusing child is going to get real upset and is going to come down on the kid and it's going to stop. So I think as a practical matter it probably won't get past the temporary hearing.

CHAIRMAN BABCOCK: So without appellate review the kid can't get into Elaine's law school.

MR. ORSINGER: Well, you know, I think Elaine's issue there -- you know, maybe these judges will decide to announce their relief from the bench without ever signing an order. In fact, maybe -- maybe we ought to encourage that. I don't know. You give them a big lecture, you tell them they're going to be in trouble if they don't quit it.

HONORABLE ANA ESTEVEZ: They're not even coming.

MR. ORSINGER: Why not?

HONORABLE ANA ESTEVEZ: They didn't give them notice. The other side never got notice of these hearings.

MR. ORSINGER: Oh, but I'm talking about at the temporary hearing.

HONORABLE ANA ESTEVEZ: Yeah, but, I mean, the first time they didn't get notice, so there's nobody to scream at.

MR. ORSINGER: Well, the temporary restraining orders will be out there.

HONORABLE ANA ESTEVEZ: Well, it --

MR. ORSINGER: I guess that constituted an adverse finding it might be -- it might carry, how long?

PROFESSOR CARLSON: It doesn't preclude your admission, but I'm just saying schools have a much more

significant concern now about mental health behavior after mass shootings.

MR. ORSINGER: Sure. And if the temporary restraining order -- we have to be careful what we say in it because if it has any taint of sex or violence in it then it's going to have huge consequences for the rest of their lives.

PROFESSOR CARLSON: Yep.

MR. GILSTRAP: But Elaine says the question is "Have you ever been the subject of a restraining order?" We have an 18-year-old defendant, and I don't think it's going to do a lot of good to tell the plaintiff's parents, "Hey, you might give this kid a permanent record." They'll say, "Great. Look what he's done to my kid." I mean, but the business about giving an 18-year-old -- I mean, "Have you ever been the subject of a restraining order?" That's a question going into college. That probably gets me -- that concerns me more than the First Amendment right now.

HONORABLE STEPHEN YELENOSKY: Well, the child isn't the subject of the restraining order. It's the parent.

MR. GILSTRAP: Well, if they're 18, they are.

HONORABLE STEPHEN YELENOSKY: Right, but

most of the time.

CHAIRMAN BABCOCK: Well, could they slip the question if they were 15?

MR. GILSTRAP: Well --

CHAIRMAN BABCOCK: No, I'm asking Elaine.

PROFESSOR CARLSON: I don't know if they said "no" and then there's an investigation on the back end and the kid ends up in good standing to take the bar exam, and a lot of those things get fleshed out in much greater detail after the student has already been in school for two and a half years and has a hundred thousand dollars in loans, and they say, "Well, you lied." So --

MR. GILSTRAP: Well, if your parents are subject -- if your parents are told to take your phone away from you, are you the subject of a restraining order?

HONORABLE STEPHEN YELENOSKY: No.

MR. SCHENKKAN: No, you're the object. I mean, you're the subject but not the object.

CHAIRMAN BABCOCK: You're the subject of conduct that results in a restraining order.

MR. GILSTRAP: I understand. I'm just trying to get the kid past the entrance.

CHAIRMAN BABCOCK: Well, let's take our afternoon break.

(Recess from 3:36 p.m. to 4:02 p.m.)

CHAIRMAN BABCOCK: Okay. We've got about an hour left, and we're going to finish this rule today, and we're never going to talk about it again, ever.

HONORABLE STEPHEN YELENOSKY: Yeah.

MR. GILSTRAP: We'll let the Supreme Court talk about it.

CHAIRMAN BABCOCK: Yeah, the Supreme Court is going to get all the opportunity they can handle to deal with it, and I've consulted with Chief Justice Hecht, and I think we need to focus on what the -- what our committee thinks are the remaining items that are of importance or that we want the Court to consider. A lot of it I think we've fully vetted. Schenkkan wants to bring up again whether there should be an order, but I said absolutely not, we've already talked about that. Scott.

MR. STOLLEY: Are we to the forms yet, because I've been waiting all day to talk about something on the forms?

CHAIRMAN BABCOCK: We're going to talk forms. Why don't you talk forms, Scott?

MR. STOLLEY: Well, I have a question, and I'm sorry if it's been addressed, but the form calls for the child's full name, and isn't the usual practice to use initials?

CHAIRMAN BABCOCK: Yeah, it has to be. 21c.
MR. STOLLEY: Okay. So that was a question.
CHAIRMAN BABCOCK: Am right about that?
MS. WOOTEN: 21c.
CHAIRMAN BABCOCK: Yeah. That's right, isn't it?
CHIEF JUSTICE HECHT: Yeah, that's it.
CHAIRMAN BABCOCK: Yeah, it's got to be initials. If it's under 18, it's got to be initials.
MR. STOLLEY: So the form needs to change in that respect.
MR. ORSINGER: Is that for the respondent as well as the petitioner?
CHAIRMAN BABCOCK: Yeah. Yes.
HONORABLE STEPHEN YELENOSKY: Well, we were --
HONORABLE TOM GRAY: Unless they're --
HONORABLE STEPHEN YELENOSKY: -- I think we were concerned about since it's an injunction, the injunction, you're going to have to name somebody enjoined, and I guess you're going to have to tell them with respect to -- tell them what to do with respect to a particular child, but I guess you could do that with initials, but you're going to have a last name anyway of a parent, and if it's Yelenosky, it's not going to be hard

to figure out who that is.

CHAIRMAN BABCOCK: Yeah. J.Y.

MR. ORSINGER: But if your name was Smith it would be a little harder.

HONORABLE STEPHEN YELENOSKY: Yeah, that's true.

HONORABLE TOM GRAY: But as you're doing it remember, though, there can be adults in this.

CHAIRMAN BABCOCK: That's right.

HONORABLE TOM GRAY: Yeah. So you can't just blindly say, "Put your initials up here." So --

CHAIRMAN BABCOCK: You would have to -- you would have to say in the form that if the -- if the party is under 18 then 21c mandates use of initials.

MR. MUNZINGER: But the statute contemplates suit against an adult parent.

MR. ORSINGER: Yes. Unless the child is --

MR. MUNZINGER: Unless the child is --

THE REPORTER: Wait a minute.

MR. ORSINGER: Unless the child has obtained majority.

MR. GILSTRAP: Well, we do have the name of the --

MR. ORSINGER: The named respondent will be an adult no matter what, but they may reference events

that were caused by a child, who will have to be identified by initials.

MR. GILSTRAP: "I believe the student's name is ABC" in the form.

MR. ORSINGER: The respondent.

MR. GILSTRAP: Or "The respondent's name is ABC."

CHAIRMAN BABCOCK: Scott, what else do you got?

MR. STOLLEY: That was it.

CHAIRMAN BABCOCK: You're one for one, man. You're batting a thousand. Yeah, David.

MR. JACKSON: So what happens if you have a list of students? I mean, we were talking earlier about listing all of these students' names.

CHAIRMAN BABCOCK: The parties?

MR. JACKSON: Yeah. What do you do?

CHAIRMAN BABCOCK: I don't think that 21c calls for parties to be listed by the clerk.

MR. GILSTRAP: No, but it is a problem. I mean, this only contemplates a suit against one person; and, you know, what if 20 people are, you know, doing some kind of collective shaming on the internet. That's, I think, a typical case here. I think that's what the statute -- the terrible incident that gave rise to the

statute. It was a bunch of kids.

CHAIRMAN BABCOCK: Yeah.

MR. GILSTRAP: If you stop one, you don't do any good. So do we have a place for more than one person?

CHAIRMAN BABCOCK: Anybody acting in concert therewith. Richard.

MR. MUNZINGER: Also the statute is silent concerning court costs and the cost of service. You know, I mean, to serve somebody today is a couple hundred bucks.

MR. ORSINGER: Well, there's nothing in here about serving anybody anyway. There's nothing in here about --

MR. MUNZINGER: Well, how do you get --

MR. ORSINGER: -- issuing a citation, issuing a temporary restraining order, issuing a notice.

MR. MUNZINGER: I understand, but how do you get jurisdiction -- how do you get jurisdiction over them if you don't cite them and serve them? How does the court get jurisdiction?

MR. ORSINGER: Our instructions --

MR. MUNZINGER: It asks you to presume that somebody is going to pay a court cost filing fee.

MR. ORSINGER: Well, our instructions don't provide for the requesting a citation to be served on the respondent. It doesn't request that a show cause order to

appear at a temporary injunction hearing. It doesn't provide for the issuance of a temporary restraining order, which I said before is typed by the clerk, not by the judge; and then at the end of our form we ask for "to recover all court costs and reimburse me for any fees I have paid"; and I don't know if that "fees" means fees paid to the clerk or to the sheriff or to the -- I guess that would be -- I don't know to --

MR. MUNZINGER: I'm thinking out loud, Richard, but how can --

MR. ORSINGER: Are these court costs --

MR. MUNZINGER: -- a court enter an injunction restraining a defendant from doing X without having given the defendant an opportunity to be heard. He has to be brought into court. To be brought into court he has to be served. To be served he's either served with a pauper's affidavit or what's was called a pauper's -- affidavit of inability to pay costs or he pays costs. I mean, all of these things the Legislature is silent on, but the Constitution isn't.

MR. ORSINGER: So what we've got right here is we've got a pleading, but the pleading leads to an order that's really not self-executing, and the order doesn't provide for notice of the temporary hearing, and it doesn't provide for the issuance by the clerk of the

TRO. It doesn't give instructions to request a petition to be typed up. I mean, a citation to be typed up and served on the respondent. I mean, we are really not telling these people how to initiate a lawsuit.

MR. MUNZINGER: Well, given what the Legislature has said, somehow or another -- here I am, Joe Schmoe, and I've got my little girl who's been abused or I think she's being abused, and I don't have any money. And so now I'm going to go down there, and I'm going to file this petition and get relief for my little girl, and all of the sudden I find out that I either have to execute an affidavit of inability to pay costs or pay to serve each of the persons who is abusing my daughter. There's eight of them, times $250 each is what? $2,000 dollars. And I'm going to pay $2,000 to put an end to this? Can the court take the case? Can the court issue an order without service and a hearing? You can't. How can you have such a thing?

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: Well, all of that gets back to the problem that Chip raised. We're told to promulgate an application, but the response is, well, the application without an order is going to be meaningless, so we promulgate a form. Now, the form without citation is going to be meaningless. We promulgate citation. I mean,

how far do we go?

MR. MUNZINGER: Well, that may be Elaine's point, too. Elaine's point was do all you can to dissuade these things because of the harm that they're doing. It isn't that you're being contumacious of the Legislature to point out that in order for you to get an order that will withstand constitutional muster in America you've got to have a hearing, and to have a hearing the court has to have jurisdiction, and to get jurisdiction the party has to be served with a citation, and to get a citation costs 250 bucks, and the only people bound by the order are those persons who had their conduct adjudicated. Therefore, give some thought before you file this because you might have to do all of this. That's the form. The form has got to say to a poor person who is seeking relief they think it's a simple thing to get relief.

I kidded the Chief at the break. I said, "Gee, Chief, just another statute," and we both laughed, you know, but here's the point. The parent who doesn't have the money seeking a inexpensive, efficient relief for the child they love is getting themselves into a morass of expense and complication by filing that they don't have the least idea of what they're doing, and the Legislature didn't say a word to them, and the Legislature doesn't have the authority to do away with the requirement for due

process to have a right to notice and a hearing to prepare for it and a hearing to have it. And the defendant is going to be -- I mean, the Court has to take all of these things into consideration.

CHAIRMAN BABCOCK: Wasn't that the -- wasn't that the point that I think Elaine made about --

MR. MUNZINGER: Yeah. I agree.

CHAIRMAN BABCOCK: -- you better know what you're getting into.

MR. MUNZINGER: I agree. I think that's part of the form.

CHAIRMAN BABCOCK: Yeah. Richard.

MR. ORSINGER: I agree with Tracy Christopher's comment that if you don't do an order that probably there will not be an order; but maybe that's the best thing, that there isn't an order, because if there's going to be an order there needs to be an order to the clerk to issue a temporary restraining order and then there has to be a hearing set and then there has to be an order to issue a show cause order to appear and show why the temporary injunction shouldn't be granted, and we're not doing any of those things.

So it seems to me like we either ought to tell them how to really do this lawsuit and get it started and get citation and get a temporary restraining order

issued and get a temporary injunction hearing set; or we ought to just decide we're going to do what the Legislature says and give them a petition and an order that really has no legal effect with no instructions on how to carry through to a temporary hearing or a final hearing, no mention of a bond, no explanation of posting a bond; and what we have is a procedure that's going to die because we -- there's not enough information here to actually make it go anywhere, and maybe we want it to die. Maybe it just will have the effect of scaring somebody that the legal system has arisen and is about to get involved, but doesn't actually get involved because there's no due process, there's no binding orders issued. That's a possibility.

But if we're going to do an order, if we really want this to be valid, don't we have to tell them that they need to issue citation? Don't we need to tell them they have to have a temporary hearing? Don't we have to tell them that there are costs associated with this?

CHAIRMAN BABCOCK: Kennon.

MS. WOOTEN: I just want to put on the record as well that this law to my knowledge came about because a young man committed suicide after being bullied. I understand the concerns. They're valid about somebody bringing a child into this law process, litigation

process, and scarring that child, but this -- this is a problem that leads to children committing suicide, and I don't want us to forget that and say this procedure should die because it's complicated and it may have constitutional flaws somewhere along the way. There's a very real reason for this law, and I hope that we would do our best to try to address the problems that gave rise to it.

CHAIRMAN BABCOCK: Yeah. Jim Perdue was talking to me, and he had to leave, but he said that -- and Lisa was involved in the bill, I understand; but he said that this started out as a private right of action against the parent, and some people objected to that, and so somewhere in the process it got changed where the sections creating a private right of action got taken out and the injunction aspects of it went in; but I think you make a good point, Kennon, that if there is -- if there is a persistent pervasive kind of attack on a child that has the potential to lead to that child killing himself, the parent, most parents, would be motivated enough to get the thing on file and get the thing served and -- but there's a continuum of how serious these things are; and some of them may be farther down the line than a child killing himself. So I don't know what that means, but it is what it is. But Judge Peeples.

HONORABLE DAVID PEEPLES: Chip, if we're not going to -- and if the Court is not going to take final action on this, if the Legislature is told that, they're still in session right now. I think a big, big improvement to this would be to have an amendment this session that would authorize these to be filed in JP court where they're designed for quick hearings, informal. They know how to get people served, and their dockets -- it doesn't take a long time. Informal, quick, effective. You get them in court. I think that would be a big improvement if the statute could be changed, if it's -- if there are enough problems with it right now that it's not going to be done quickly.

HONORABLE PETER KELLY: Do JP courts have constitutional authority to do that?

HONORABLE DAVID PEEPLES: Well --

HONORABLE STEPHEN YELENOSKY: We've got a constitutional restriction or a statutory one.

HONORABLE DAVID PEEPLES: Maybe they couldn't.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: I was going to point out that in the instructions as proposed there is a discussion about the charges and how to proceed without payment of those costs, and then in the next paragraph it

says, "What happens when I file the petition," which is a abbreviated discussion of post-filing; and the part in there that scares me -- and since we don't have a clerk on the committee anymore, I'll raise it from the clerk's perspective; but when there is an expressed instruction to ask the clerk to explain the next steps, you're probably going to have a revolution on your hands if you have the clerks -- if you give that instruction in the instructions to tell them, "Well, right here they said to ask you what happens next, and I'm asking." So I would think maybe there's some other way to give them guidance without that.

And about one, two, three, four, five lines down, "They may tell you to wait," just a word missing. I don't think that one is particularly significant, but on the -- there's two places where they're talking about oaths or declarations subject to perjury and the word "purposely give false information." "Purposely" to me is too loose a term, and I just think it ought to be "You can be prosecuted for perjury if you give false information." While it may not technically be correct, there may be an intent requirement there. Given the purpose of the instructions, I don't think you're going to lose anything if you take out the word "purposely." So -- and I would like to repeat my iteration of Stephen's recommendation in his original memo more than a year ago, the memo to Frank,

that said we may be better off having multiple forms that's tailored to the person that's filling out the form, and then that way I think it makes it infinitely more understandable.

The only other comment that I would make is the statute does require that something be provided in Spanish, the form and the instructions.

CHAIRMAN BABCOCK: Right.

HONORABLE TOM GRAY: I personally would recommend that the Spanish translation be on the form itself, not in a separate form that can't be used, so that we've only got -- if we've got two different forms and one set of instructions, we don't wind up with two set of forms in English, one set of instructions in English, two in Spanish and one in -- instruction in Spanish, and you can't use the Spanish form. Specifically under the statute, you can't fill out and file the Spanish form. They're only for purposes of instruction and explanation, and so but they specifically say you can incorporate them, and I would recommend them be incorporated.

CHAIRMAN BABCOCK: Great. Anything else, Judge?

HONORABLE TOM GRAY: No.

CHAIRMAN BABCOCK: I had a question, Judge Yelenosky, on the where to file the petition.

HONORABLE STEPHEN YELENOSKY: Yeah.

CHAIRMAN BABCOCK: What if the student and/or parent lives in a different county? Is that okay?

HONORABLE STEPHEN YELENOSKY: My quick answer to that is there are going to be a bunch of problems like that, which is one of the reasons -- you know, clerks don't give legal advice, but they do tell people things like "You're in the wrong courthouse." "This judge hears TROs on this day." That kind of stuff.

CHAIRMAN BABCOCK: Yeah.

HONORABLE STEPHEN YELENOSKY: So I would put that into that category. Unless something we say here is wrong in that regard the silence is because there are too many things to discuss, and maybe it's this one is particularly important to you.

CHAIRMAN BABCOCK: No, I just can't remember my injunction law well enough.

HONORABLE STEPHEN YELENOSKY: Oh, it's in the county -- in the county of the enjoined person, I'm pretty sure.

CHAIRMAN BABCOCK: Yeah.

HONORABLE TOM GRAY: That's not what the instructions say.

MR. JACKSON: No, it isn't.

HONORABLE STEPHEN YELENOSKY: What do they

say?

HONORABLE TOM GRAY: That they'll be filed "where you live."

MR. JACKSON: "Where you live."

HONORABLE STEPHEN YELENOSKY: Oh, well, that's true. That's wrong.

CHAIRMAN BABCOCK: It seems to me --

HONORABLE STEPHEN YELENOSKY: As a practical matter it may not be a big deal because, again, 90 percent of these will probably be the same school, but you're right. That's wrong.

MR. GILSTRAP: Or any -- it should be "where any of the defendants live."

HONORABLE STEPHEN YELENOSKY: Yeah.

CHAIRMAN BABCOCK: You're going to have to account for -- you're going to have to account for the county where the enjoined defendant is living, right?

MR. GILSTRAP: Yeah, but if there is -- if one lives in Dallas County, the other lives in Tarrant County, you can sue in either county, I think.

CHAIRMAN BABCOCK: Can you enjoin the Dallas County resident in Tarrant County?

MR. GILSTRAP: I think so. I think so. Gulf Television Antenna. I think that's the case.

CHAIRMAN BABCOCK: Citing cases to us.

HONORABLE PETER KELLY: Well, particularly with cyber cases, though. You could have people all over the state or all over the country doing the bullying.

CHAIRMAN BABCOCK: Right.

HONORABLE STEPHEN YELENOSKY: Right.

MR. GILSTRAP: All over planet earth.

HONORABLE STEPHEN YELENOSKY: So it happens that --

CHAIRMAN BABCOCK: Well, but Justice Kelly raises a personal jurisdiction issue as well as a venue issue under our law, so I don't know.

MR. SCHENKKAN: Again, I think we're making life unduly hard here. There are a few cases in Texas where it might be two counties. Potter and Moore come to mind, but in general, even if we've got the parents of multiple kids who are doing the cyberbullying, all of the parents are going to live in the same county, and it's the same county that the adult filing on behalf of the cyberbullied child lives, and we ought to design it for that circumstance and then fake through what we say about the possibility of complications, because I believe Judge Yelenosky is right, that that's the permanent problem we have. We could always go farther into more details, and if we do that every time, it's totally useless. So we really do have to triage and decide which ones of those

things are worth including.

HONORABLE PETER KELLY: We're doing it on the discovery rules.

MR. SCHENKKAN: Including on the discovery rules. I agree completely.

HONORABLE STEPHEN YELENOSKY: But those are rules for lawyers.

CHAIRMAN BABCOCK: We shouldn't be giving wrong advice, though.

MR. SCHENKKAN: No, I agree, and we fixed that.

CHAIRMAN BABCOCK: This needs to be fixed.

MR. SCHENKKAN: It should be "where any of the respondents live."

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: So I think I would like to revisit this question about the style of the case, because the respondent is the parent of the minor who's causing the trouble, but the style is in re the name of the student who's the victim, even though the lawsuit is being brought by the victim's parent, and maybe it would be better if we had the name of the parent rather than the victim, the initials of the victim child.

MR. SCHENKKAN: And wouldn't we really actually instead of in re, we would have the way we have

it in the order? Petitioner, who is the parent of the cyberbullied child versus respondents, who are the parents of the alleged cyberbullied.

MR. ORSINGER: Yes, that in re is usually used for proceedings that would name a minor, so --

MR. SCHENKKAN: I understand.

MR. ORSINGER: -- if it's going to be adult against adult then it ought to be plaintiff versus defendant.

MR. SCHENKKAN: But, again, we've got a trade-off here, and here the virtue of doing it with the names of the adults in the petition and in the order is that's who we're actually talking about --

MR. ORSINGER: Right.

MR. SCHENKKAN: -- in terms of who we want to get in front of this judge and who we want the judge to look in the eye and tell them to work it out and if they can't get it worked out in 15 minutes he or she is going to decide whether or not to order them to stop. So I think the advantage lies with doing it -- changing it to the parent.

HONORABLE STEPHEN YELENOSKY: Okay.

MR. ORSINGER: So next question, Chip.

CHAIRMAN BABCOCK: Yes. Fire away.

MR. ORSINGER: I'm a little worried on the

petition about the last page -- or page three of five. "I request the court order the respondent to pay all court fees and reimburse any" -- "reimburse me for any fees that have been paid." I don't know what fees are reimbursable if they're not court costs, but I would say we ought to use the word "court costs" and then decide are there, in fact, any other fees that are not court costs that are recoverable, because they would have to be -- they're not recoverable under this provision. They would have to be recoverable under the Civil Practice and Remedies Code, which doesn't allow recovery for attorney's fees. So I'm thinking maybe we should eliminate "any fees," "and to reimburse me for any fees."

Then the next sentence is -- I made this comment before. I think we should be very careful about misleading parents into thinking this file can be sealed when I don't think it can be. And then on the declaration under penalty of perjury, it's my view that the petition is kind of a road map for what you prove in the hearing. This petition really just lists the parties and then refers you to the unsworn declaration under the penalty of perjury, which is where the real meat of the allegations are.

And, first of all, the comment was made before we probably should say on here this has to be

written in English, not a foreign language, because someone who's filling out the form may do it in their own language. We ought to tell them. And secondly, do we want -- do we want this kind of narrative form, which may be unstructured and loose, to be the road map for what you have to prove; or should we break the petition down into little component parts, like "Explain the allegation as to why my child was a victim" and then what they were a victim of and then the identity of the respondent and put more of that in the pleading, put out in separate numbered paragraphs so that you're kind of making them think logically.

And then when we get over to the restraining order, there's a finding on the first page of the restraining order, "The court finds the petitioner is likely to succeed in proving at a final hearing." That's a standard for the issuance of a temporary injunction. You have to have probability of success, but that's not the standard for issuing a temporary restraining order. So I think we should remove that or some judges may think that they have to find a likelihood of success in order to issue a TRO. Well, to me that just should come out.

The next finding is "The order was granted without notice and without hearing because the emotional injury to the petitioner's child is irreparable and

ongoing or a threat and is imminent." The statute specifically says you don't have to prove that in order to get this injunction, and so I think we ought to take that finding out, too, because it is telling the judge not to sign this form unless they make the finding, but the finding is irrelevant.

MR. MUNZINGER: Richard, can I ask you a question right now about that very issue?

MR. ORSINGER: Yeah.

MR. MUNZINGER: Does the form contemplate the issuance of a temporary restraining order without any kind of a finding by the trial court on that very subject of imminent harm?

MR. ORSINGER: Yes. That's what the statute says. It says you don't have to find --

MR. MUNZINGER: But that says it for an injunction. It doesn't say that the trial court must issue a temporary restraining order on application.

MR. ORSINGER: It says "a plaintiff is entitled to a temporary or permanent injunction under this section on showing that the individual was cyberbullying the recipient."

MR. MUNZINGER: I'm distinguishing between a temporary restraining order and an injunction.

MR. ORSINGER: Well, this talks about a

temporary or permanent injunction. That provision I just read you there doesn't even address temporary restraining orders.

MR. MUNZINGER: Well, the only -- what prompts my question is that the obvious harm to the person restrained by a temporary -- by an ex parte temporary restraining order, and are we all contemplating that every one of these cases involves the issuance of an ex parte temporary restraining order, or are we contemplating a situation where that is the emergency situation and otherwise you will have a hearing on a temporary restraining order as to whether or not there will a TRO issued pending a hearing on a temporary injunction, as in the ordinary case? Because the statute, as you point out, says in -- I'm sorry, I've lost the section, but it does say something about notice and a hearing prior to the injunction. Yes, section 129A.002(c) on page two. "The plaintiff is not required to plead or prove that, before notice can be served and a hearing can be held, immediate and irreparable injury, loss, or damages is likely to result from past or future cyberbullying by the individual against the recipient," but that is in a section entitled "Injunctive relief," not in a section addressing the issuance of a temporary restraining order.

So I'm not sure that in every case a TRO

issues ex parte. That would be a pretty serious, drastic injury in today's world where, as Elaine points out, the question is "Have you ever been the subject of a TRO," and that can keep you from getting into law school or make you go through some other kind of deal or, you know, I mean, what have you. It could be a serious problem in today's world.

MR. ORSINGER: There is a section that applies to TRO, which is subdivision (e), and it says the court can grant the TRO -- I'm paraphrasing -- on motion of either party or sua sponte order the preservation of relevant electronic communication. The temporary restraining order or temporary injunction is not required to, number (1), "Define the injury or state why it's irreparable; (2), state why the order was granted without notice; or, (3), include an order setting the cause for trial on the merits with respect to the ultimate relief."

MR. MUNZINGER: I see that. My only question is, is that every case, or is that the urgent case?

MR. ORSINGER: Well, I mean, we could -- we haven't discussed this because the Legislature told us to draft the TRO, application for a TRO. It didn't say draft the pleading if you're going to skip the TRO hearing and go directly to the temporary injunction hearing, but we

could, and it might be smart if we did, saying you don't have to get a TRO. You can just file a lawsuit, and you can get citation, and you can get a hearing and then, you know, put on your proof.

MR. GILSTRAP: Chip?

CHAIRMAN BABCOCK: Yeah, Frank.

MR. GILSTRAP: Well, certainly we ought to give the judge the option to either issue the TRO or not issue the TRO and have them come back for a hearing. That seems to me to just be fundamental.

CHAIRMAN BABCOCK: Okay.

MR. GILSTRAP: So it should be -- it shouldn't be a one size fits all temporary restraining order. It ought to have two parts. One, this is a TRO. Two, this is we're coming back for a hearing. Check one or both -- check one and two or two.

MR. ORSINGER: Okay. So and the family law practice around the state is typically to combine the temporary restraining order and the show cause order into one document, but you don't have to. Now, that's only the order. The temporary restraining order is issued by the clerk, and the show cause order is issued by the clerk, and so the TRO signed by the judge, the TRO order and the show cause order, directs the clerk to issue the TRO and the show cause order.

So we're kind of ignoring the mechanics of that, but we could prepare a form that doesn't have a TRO, it just has a show cause order, and then the court doesn't do anything other than to set a hearing and direct the clerk to issue a show cause order to the respondent to appear and show cause why the following relief shouldn't be granted. And then you go down to the clerk's office and they type it up and then they'll -- whatever it is in your order about the four or five things that are going to be at the temporary hearing, they type them right there in the show cause order, and it gets handed over to a private process server or a deputy and they go serve it.

CHAIRMAN BABCOCK: Justice Kelly.

HONORABLE PETER KELLY: If the Legislature is listening or might be reading this, what this is closest to it seems to me is domestic violence restraining order, which is handled through the district attorney's office, at least in Harris County, as a criminal proceeding; and I don't know if cyberbullying is a crime or if they were to make it a misdemeanor to give the criminal courts jurisdiction over it; and if there was a procedure that tracked the domestic violence restraining orders that could be adapted to the cyberbullying context, that might solve a lot of these problems; but that requires a legislative fix, which is what we're all

struggling with here. The Legislature has not thought through all the jurisdictional, et cetera, ramifications of its statute.

HONORABLE STEPHEN YELENOSKY: And you think that would be different from looking at the protective order kit that we looked at, which is a civil procedure? But if that's -- that is kind of the model everybody has referred to is protective order kit, which may be brought by the county attorney in Travis County or it may be brought pro se.

MR. ORSINGER: You know, I would be curious to know whether it is pro se, because in most of the instances I'm aware of somebody is assisting the pro ses in filling out and filing and pursuing the show cause orders. That may not be true in the rural counties, but I think in Travis County they have -- in Bexar County they have lawyers, and I don't know if that's true in --

HONORABLE STEPHEN YELENOSKY: Why does that matter? I mean, as long as there's one person who's going to -- we're supposed to write it for them.

MR. ORSINGER: Well, one of the reasons I think the protective order kit works is there are a lot of people helping that -- helping to fill it out correctly and get them in front of the correct judge with the correct order to sign. We don't have that infrastructure.

These guys are on their own. These instructions and these forms are the only help they're going to get in doing this right, but I agree it's a model because it's working. It seems to me that it's working quite well to have these pro se initiated civil protective orders, but they're assisted I think in many instances is why they work so well.

HONORABLE PETER KELLY: I said district attorney. I meant county attorney as doing those, but I mean, that's sort of an unfunded mandate at this point, but if that is -- if the Legislature really wants to fix it, they say each county should have a designated for doing cyberbullying, and it might be only, you know, one a year or one every decade in Loving County, but at least there's someone there to fill it out and do it.

HONORABLE STEPHEN YELENOSKY: Well, and they don't take all of them because they can't, so we still see people come in pro se because the county attorney didn't take it for one reason or another. So they may get help, but they're not going to be represented in that instance by the county attorney.

MR. ORSINGER: How do the pleadings look for the pro ses that have no legal input whatsoever?

HONORABLE STEPHEN YELENOSKY: Well, they're using the kit.

MR. ORSINGER: Are they pretty good?

They're pretty readable?

HONORABLE STEPHEN YELENOSKY: Well, yeah, I mean, the big point is the affidavit, you know, I mean, so we always turn to what's this about, as I think Richard was saying, read the affidavit. If the county attorney is there, you know, of course, everything is filled out properly. We don't see that many who are not coming with the county attorney, but --

MR. ORSINGER: Okay.

HONORABLE STEPHEN YELENOSKY: -- I can't remember particular problems with people who came on their own.

MR. ORSINGER: Well, one of the difficulties I have about this, what we've done so far, is that we start a complicated process and we don't tell them how to finish it or even really how to implement it. So we're doing what the Legislature said, which is an application and a TRO, but my God, that doesn't really get this lawsuit off the ground. It's just rolling down a runway. It hadn't taken off yet.

HONORABLE STEPHEN YELENOSKY: Well, but where do you stop? And then you said, well, they don't have to file for a TRO, they can go straight to the TI. Well, they don't have to file for a TI either, right? They can go straight to a permanent injunction. So do we

have to explain that, too?

MR. ORSINGER: I don't know. But right now -- right now we're telling them how to get an order that probably is not enforceable against someone who doesn't even know that it was filed on information that's probably incomplete and all of which is unconstitutional.

HONORABLE STEPHEN YELENOSKY: Well, now, that's the point we started at.

CHAIRMAN BABCOCK: What else? Justice Gray.

HONORABLE TOM GRAY: Agree with Richard's point about putting the descriptive paragraphs that are currently on pages four and five under the declaration for -- or declaration page and move those into the body of the petition, because you're moving the information up into the operative pleading, it seems like to me, and it just -- it makes sense to me to have it up there and not at the end as sort of a tag on.

I do want to make the observation that this conversation that y'all were just having about the temporary restraining order is actually not what the statute says for us to be promulgating forms on. We're supposed to be -- or in our instance recommending to the Supreme Court forms for use as an application for initial injunctive relief. Now, that may be just a misnomer, but it's not temporary restraining order. That language is

not in the statute.

MR. ORSINGER: What does it mean?

MR. SCHENKKAN: But it is in the statute.

MR. ORSINGER: What is initial injunctive relief?

HONORABLE TOM GRAY: Well, I would think when you use the term injunctive you're going to use a temporary injunction.

MR. ORSINGER: Is that what initial means, is temporary?

HONORABLE TOM GRAY: Well, as opposed to permanent.

MR. ORSINGER: Or does it mean TRO as opposed to temporary?

HONORABLE TOM GRAY: Okay. So we've got -- we all agree that there's three different stages to this proceeding, and what stages the Legislature had in mind, and I do think that when you shift and you look at the purpose of the statute, and people disagree on statutory interpretation of whether or not we should be looking at the intent of the Legislature or the purpose, and I'm a purpose person. I want to look at what was the purpose of the statute. If we look at that and we look at those words then I think we have been down the right road. I think it is a temporary restraining order headed towards a

temporary injunction, headed ultimately potentially to a permanent injunction, but I also agree with you that we do not guide them all the way through that process, and I lost the vote earlier, and so I'm willing to try to make a better set of forms, and I think that if you're going to go with this more explanation, you do need to lead them all the way through the process, and we don't do that.

CHAIRMAN BABCOCK: Even though you lost, you're going to be cheerful about it.

HONORABLE TOM GRAY: No, I'm not going to be cheerful about it. I'm going to try to be helpful to a better product in the end, so --

CHAIRMAN BABCOCK: Pete.

MR. SCHENKKAN: The Legislature is specific that this is about TROs as well as temporary injunctions, if you look at the redlined version of the bill that made this as an amendment to the Civil Practice and Remedies Code. So you've got that set, and you've got page 12, which is the second page of the description of chapter 129A, relief for cyberbullying of child that they add. (c) is "A plaintiff in an action for injunctive relief brought under this section is entitled to a temporary restraining order upon the showing that the plaintiff is likely to succeed in establishing that the individual" -- which is the context -- "was cyberbullying the recipient"

and is not required to prove these other things, and then there is the next clause, (d), which is for the temporary and the permanent injunction on showing that the individual was cyberbullied.

And so -- and if much is clear, I think the question is how much farther to go along Richard's -- the line Richard is asking about in helping the pro se petitioner get the airplane off the ground. It does seem to me at a minimum we ought to provide what they need to do to get it -- get service done, so that the process of getting notice out is at least started, even if this turns out to be ex parte and even if what's ex parte turns out to be the whole ball game, but they do intend it for being to be TRO. They don't intend to require anything else for the TRO, and they do also intend if you do get to the later stage you still don't have to prove anything other than that my child was cyberbullied.

HONORABLE TOM GRAY: You think that they did not intend anything beyond the TRO?

MR. SCHENKKAN: No, no, they intend --

MR. ORSINGER: All three.

MR. SCHENKKAN: They provide that option as well.

HONORABLE TOM GRAY: Okay. And my point was not that they didn't intend a TRO. They didn't say the

Supreme Court should draft rules or a form to obtain a TRO unless you expand the definition of injunctive relief, which they used on that provision of instructing the Court what to do and ignored what they had said on the page before. In other words, if you assume they used the terms consistently, which is what we're supposed to do, the injunctive relief referred to is just that. It's injunctive relief. It's not a temporary restraining order, but I just wanted to point out the potential limitation on the forms. I agree that we should go ahead and do the TRO, the temporary injunction, and with advice about what -- or not advice, but direction of what's coming down the pipe with regard to a permanent injunction, but --

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: Well, the ultimate relief to be granted is a permanent injunction. The court doesn't say anything at all about this is a temporary restraining order of its own species. It just simply uses the word "temporary restraining order," as I read it. If that's the case, it dies in 14 days unless renewed for 14 days. So the temporary restraining order to be granted by the court if it's a temporary restraining as contemplated by the rest of the Rules of Civil Procedure, if I understand those rules correctly, is an order that lasts for 28 days

until you can have a hearing on a temporary injunction, at which time the temporary injunction can be made permanent, denied, et cetera, et cetera.

I don't see that this is doing anything differently than that. It doesn't say that the temporary restraining order is the final judgment of the court. On the contrary, it contemplates a temporary injunction, which again, is part of origins of my comment earlier that perhaps the rules relating to injunctions and TROs need to be looked at to see if they require some kind of an amendment, because I don't -- this order is not a -- a temporary order is not a final order saying "Don't bully anymore." It's an order that says, "Quit doing what you were doing. I find you were doing this" or whatever, and "Don't be doing this until we have a final hearing," and then we're going to have an injunction hearing.

HONORABLE TOM GRAY: I don't think anybody disagrees with you. I certainly don't. So --

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: You know, normally you don't plead for a TRO, and you don't even really plead for a temporary injunction. You plead for a permanent injunction and then you seek the other relief ancillary to the primary relief of a permanent injunction. Normally you don't just plead for a TRO. You plead for an

injunction. You get the TRO to preserve the status quo, and the temporary injunction remains in effect. This legislation, though, oddly says, "A plaintiff is entitled to a temporary or permanent injunction under the showing that the individual was cyberbullying the recipient." So does the statute -- the statute doesn't require that you seek a permanent injunction, does it? I mean, doesn't the statute say you can get a temporary injunction?

MR. SCHENKKAN: Yes.

MR. ORSINGER: Without even seeking a permanent injunction? As counter-intuitive as that may be.

MR. SCHENKKAN: Well, it's not cleanly worded, but 129A.02 is the lead provision on relief. It's called "Injunctive relief," and it says the recipient or the parent of that person may seek injunctive relief, not defined. And then immediately the next subsection is (b), and the "court may issue a temporary restraining order," comma, "temporary injunction, or permanent injunction appropriate under the circumstances to prevent any further cyberbullying, including an order or an injunction," colon, (1), enjoining the defendant from engaging in it, or (2), compelling a defendant who's the parent to stop the child; and then the one we've been talking about.

There's now then (c), a plaintiff in an

action for injunctive relief, which is now not defined, but is discussed in ways that suggests that the Legislature thought here it included a TRO as well as a temporary injunction and a permanent injunction that you've got (c), a plaintiff in an action for injunctive relief brought under this section is entitled to a temporary restraining order on the showing that the plaintiff is likely to succeed, that the individual was cyberbullying the recipient, and then is not required to plead and prove the usual thing.

And then you go to (d), which is your first mention of temporary or permanent by themselves without TRO in there, but all it says is the -- the plaintiff is entitled to a temporary or permanent injunction under this section on a showing that the individual was cyberbullying the recipient. And then it gets -- it's further complicated by the fact that then you have (e), which is the one that is specific to a temporary restraining order or a temporary injunction. It no longer can fairly be worded to contemplate governing a permanent injunction, but the court may on the motion order the preservation of any relevant electronic information, but then the key we've been focusing on is the temporary restraining order or temporary injunction is not required to -- and the things the temporary injunctions are normally required to

do, or TROs in the case of the notice.

So in the -- I think it is fair to say that the Legislature wanted the judge to rule on whether or not there was cyberbullying, and if there was, to say, "Stop it," at either the TRO stage or the temporary injunction stage -- not either. At both, at successfully the TRO stage and the temporary injunction stage. All that's supposed to be in front of the judge is was the individual cyberbullying the recipient, and if the answer is "yes," the judge is supposed to issue the temporary restraining order or the temporary injunction.

We do need to provide because of the -- our assumption, which seems reasonable to me, that the Legislature wasn't abolishing the time limits on TROs. We do need to make sure the petitioner knows to do or at least ask for help in doing the things required to do to get to a temporary injunction hearing, and then we have a separate question of how far down the road to go to helping the petitioner get from a temporary injunction hearing all the way to a permanent injunction. Is there any -- it seems to me we've gone over these grounds several times. Is there any part of that that is not right under this statute?

HONORABLE STEPHEN YELENOSKY: It's right, but it's rarely going to happen.

MR. SCHENKKAN: Exactly.

HONORABLE STEPHEN YELENOSKY: I just don't -- I think we even talked about this during the break, Richard. Person goes in, asks for TRO. Judge finds it to be cyberbullying. The parent who is not there ex parte is going to have to be served at some point. Judge has just said it's cyberbullying. Judge has said to stop it. So what's the next step likely to be? The parent deals with the child. Now, is the parent going to deal with the child and then on day 15 say go at it again? Probably not. Therefore, does the plaintiff petitioner really even need to worry about it? And if the parent does do that, then there's a new act, maybe that parent files another TRO and then goes to TI. That's not a good thing, but I just don't -- I mean, we're dealing with telling parents the judge has said this is wrong. The judge has said to stop it. I don't -- I don't know that many of those are going to go to TI, much less permanent injunction.

MR. SCHENKKAN: I agree with that. I really think if we get the temporary restraining order and petition and the temporary restraining order and the provision for service, we've accomplished what the Legislature wanted -- not we, but the Court has accomplished what the Legislature wanted the Court to do in the way of facilitating that.

CHAIRMAN BABCOCK: Justice Kelly.

HONORABLE PETER KELLY: I haven't quite worked out the details on this, but talking about service and getting to the parent. In New York if you had a suit on a sworn account, you could attach a form that was a waiver of service. You mailed it by certified mail, and you agreed to waive service, and if you didn't and they actually had to serve you then you had to pay the cost of service. So if the idea is to stop the cyberbullying, judge signs the order. You send it certified mail. Parent gets it two and a half days later, and I would say the cyberbullying is probably going to stop 90 percent of the time. If they face they're going to have to, you know, hire a lawyer, appear, they're going to have to pay for service by -- you know, just some kind of cost-shifting mechanism. I don't know if that's constitutionally sound in Texas, but it might be an alternative form of service to Rule 21 that you could use -- adopt into this particular context.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: So the title of the form and the thrust of the form is that I am pleading for the court to give me a TRO but not anything else, except I do want to recover my court costs. Is that right? I mean, is this a lawsuit to get a TRO, or is this a lawsuit to get a

permanent injunction and ask for a TRO as ancillary to that relief? I don't know that there's such a thing as a lawsuit to get a TRO. I've always looked at a TRO as being ancillary to other litigation, and you use the TRO to preserve the status quo.

HONORABLE STEPHEN YELENOSKY: That's because you're thinking like a lawyer, and that's the problem.

MR. ORSINGER: I know. So this is called a petition for a TRO, but it does say, "I request the temporary injunction hearing." So at least it requests the temporary injunction --

HONORABLE STEPHEN YELENOSKY: Yeah.

MR. ORSINGER: -- so maybe we ought to call this a petition for a temporary injunction.

MR. SCHENKKAN: I think what we ought to call it is the way the Legislature did, which is injunctive relief. It's a petition for cyberbullying injunctive relief.

MR. ORSINGER: Okay. Now then, do we want to take them just to the TRO stage or the temporary injunction stage or all the way to the permanent injunction stage in our forms and our instructions, our explanations?

MR. SCHENKKAN: That I think was what we were just talking about, and we think we may as a

technical matter be required to include in there a request for temporary and permanent, but as a practical matter it's going to be over after an ex parte TRO hearing --

MR. ORSINGER: Okay.

MR. SCHENKKAN: -- and the delivery of that TRO to the parent of the individual.

MR. ORSINGER: Then we have to make a decision about whether we do or don't want to set a temporary hearing in the TRO, because normally you do.

MR. SCHENKKAN: And the Legislature says --

HONORABLE STEPHEN YELENOSKY: We don't have to.

MR. SCHENKKAN: You don't have to.

MR. ORSINGER: Okay. So -- no, it says in the temporary injunction you don't have to set a trial. There is no requirement that you set a temporary hearing and a temporary restraining order. That's just a convention because people want to avoid the expiration of the TRO without a temporary injunction to protect them. So, yes, we don't -- in the temporary injunction you don't need to set a trial, but as a practical matter we have to decide whether we want to set a temporary hearing or not in the order that we put in the form, and that depends on whether we want to encourage these people to have a temporary hearing. If we want them to have a TRO that's

going to vanish at the end of 14 days then we don't tell them about the temporary injunction hearing. The respondent never gets due process, and the thing goes out of existence before there's an opportunity to even appear and hire a lawyer. Or we can tell them we're going to request a temporary hearing because your TRO is going to expire, and besides which the temporary hearing gives the defendant due process to try to disprove what's in your affidavit. We have to make a policy decision about whether we're going to actually take them that far into the process or not.

CHAIRMAN BABCOCK: Richard, we're going to take a brief time out for a two-minute warning. Two-minute warning. Roger.

MR. HUGHES: You know, what it seems to me we keep going around is we have all of these technical rules that we've built up in the Rules of Procedure to deal with applying for a TRO followed by the hearing on the TI followed by the trial date. Well, for the first time we now have a process that allows us to get rid of all of those rules that are in the way of the statute. We don't have to set a trial date. We don't have to find all of the things that would normally go into a temporary injunction or all of that; and, frankly, at this point I think it would behoove us to start thinking, okay, how do

we make it happen if we could change the Rules of Procedure to make it happen rather than, gee, this is a stupid idea and the Legislature did a miserable job of drafting a statute so let's just throw up our hands and say it can't work and don't do anything.

So my suggestion is we think seriously about rewriting the temporary injunction and temporary restraining order rules to make this thing work, which may mean that we don't set a date. It may mean there never is a date set. It just goes on infinitum. I don't think the judge is going to do that, and then we craft a petition that lets the person know that there's going -- that after the TRO is issued, and we draft the forms for it, because we're not doing them any favors. We certainly aren't accomplishing the legislative end to say, "Okay, here's a petition, and from here on in you're on your own. Figure it out." No. We need to draft the orders for them.

I'm sure there will even be counties that won't let you file it if you don't have the order, and so I think we need to start working on that rather than continually to throw up all of the objections like we're trying to preserve a system that's fine for, you know, business disputes or family matters. This is sui generis. We need to start thinking of it like that.

CHAIRMAN BABCOCK: Well, the good news is

the Court is going to get to start thinking about it like that, because we're done with this rule, and we will reconvene on May 3rd right here at the TAB, and this is a two-day meeting, and the first item on the agenda to be finished in our May meeting is the discovery rules. And if it takes the whole time, it will, but we'll have some back-up in case it doesn't. But thanks, everybody, for coming and especially for this group for sticking around.

(Adjourned at 4:57 p.m.)

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REPORTER'S CERTIFICATION
MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

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I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 15th day of February, 2019, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are $ 1,871.00 .

Charged to: The State Bar of Texas.

Given under my hand and seal of office on this the 13th day of March, 2019.

/s/D'Lois L. Jones
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