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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

FEBRUARY 28, 2020

(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 28th day of February, 2020, between the hours of 8:52 a.m. and 3:59 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

20-01 SB 325 Protective Order Registry highlights

20-02 DRAFT Protective Order Registry request to grant removal of publicly viewable information

20-03 SB325 Summary

20-04 10-29-2019 Subcommittee Report on Protective Order Registry

20-05 2-28-2020 Memo, New rules for civil actions-$250,000

20-06 Survey answers from selected County and District Court Judges

20-07 2-28-2020 Memo, Appeals in parental termination cases

20-08 2-17-2020 Memo, Parental Leave Continuance Subcommittee discussion draft

20-09 State Bar Of Texas proposal with changes noted, Draft 3, February 7

20-10 Discussion draft comment to TRCP 253, 2-25-2020

20-11 Amendments to FL Rules of Judicial Administration, parental leave

20-12 Rule 26 North Carolina secure leave, parental leave

20-13 North Carolina Appellate Rule 33

20-14 North Carolina secure leave form, local rule

20-15 FMLA 2019, Section 2612 leave requirement

20-16 2613 Certification

20-17 October 23, 2018 Letter from State Bar - parental leave

20-18 ABA resolution

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CHAIRMAN BABCOCK: Welcome to our little session. Programming notes, and as a Marti sent out a notice a couple of days ago, we're going to have to leave -- we're going to have to end today at 4:00. So to make up that time we're starting a little bit early, and we're going to take 10 minute breaks instead of 15, and we're going to take half an hour for lunch instead of an hour, so we will get started and move right into the remarks of the Chief.

HONORABLE NATHAN HECHT: Well, first of all, Judge Kelly Moore of Lubbock has retired from his position as Judge of the Ninth Administrative Region, and Judge Moore has been a tremendous help on the Judicial Council for years. He is the architect of many of the criminal justice proposals that we've had, and he is just -- he is just what we want in a regional judge. He's the David Peeples of the regional judges.

CHAIRMAN BABCOCK: A good thing.

HONORABLE NATHAN HECHT: That's a good thing, yeah.

HONORABLE DAVID PEEPLES: Write that down, Dee Dee.

HONORABLE TOM GRAY: Write it down twice.

HONORABLE NATHAN HECHT: But the Governor has

quickly named a replacement, and it's our own Judge Ana Estevez, and --

(Applause)

HONORABLE NATHAN HECHT: So those judges sort of administer the assignment of visiting judges and move cases around and sign recusal motions and all sorts of things that come up in the region, and when there's a vacancy, I have to do it, and there was a vacancy a couple of years ago down in South Texas, and it's a lot of work. So it's good to have Judge Estevez in that position. We wish her well.

On the Court front, we have gotten final approval of the licensing of -- temporary licensing of military spouses. They can practice in Texas for three years if they maintain a Texas residence, complete CLE, and avoid discipline. So this will be a small way, but hopefully important way, of providing support for military families as they come in and out of Texas.

We have given final approval to all of the rules changes in response to the legislative mandates, which includes Rule 91a, making the award of costs and fees discretionary rather than mandatory, so that rule has been changed. The MDL rules prohibiting transfer of certain DTPA cases and Medicaid Fraud Prevention Act cases from assignment to the MDL panel. And then notice of appeal

rules requiring the delivery of the notice to court reporters. So all of those changes were required by the Legislature, and we couldn't meet their deadlines and still get public comment on them, so we've put them out without public comment, as has been our practice in the past, but we got comment in afterward, and none of the comments suggested any reason to change the amendments that were published, so all of those are becoming effective.

Texas Rule of Civil Procedure 277, the committee recommended changes in the questions in a parental rights termination case, and we approved those changes, and just as a word of note, this is a little technical, but the best interest question will be -- there will just be one best interest question at the end, and it will be conditioned on one positive liability or reason for termination, grounds for termination finding. So we're going to send that over to the pattern jury charge to actually draft the charge, but the rules are changed.

We approved last month the citation by publication rules, the -- as we've discussed here over and over again at length, citation by publication is expensive and not very effective, and so now there will be a requirement that you publish citation in the newspaper still, but also on the OCA-run website. The three exceptions to that, if the litigant is indigent, if the

cost of the publication is prohibited, probably over $200 per time that it runs, and if there's no newspaper in the county. So we thank the committee for the recommendations on all of those issues.

We changed Rule of Evidence 103(c) at the recommendation of this committee's evidence subcommittee, the Court of Criminal Appeals rules committee, and the State Bar's rules of evidence committee all agreed that we should change the rule to clarify that its offer of proof provisions apply in bench trials as well as jury trials; and over some objection, we moved a sentence in the rule to align the textbook. That will be effective June 1, 2020.

At the Board of Legal Specializations' request we have created a new legislative and campaign law specialization, so we asked them about that, if they really saw a need for that and it was going to be a legitimate specialization, and they told us how much work they had done on it, assured us that it would be, so we approved it, and they're accepting the first wave of applications, and we will begin certifying candidates in 2021.

And then finally, we're still moving seamlessly, I hope, to the Uniform Bar Examination. We received about a hundred applications to transfer in from other states, and we are completing work on the Texas law component of the bar exam, which should be done in -- next

month or perhaps in April. So I think that's what -- I think that's an update of what we've done.

CHAIRMAN BABCOCK: Okay, great. Justice Bland has yielded her time back to the committee, unless she's changed her mind about that.

HONORABLE JANE BLAND: I haven't changed my mind.

CHAIRMAN BABCOCK: And we have David Slayton from OCA here. David, anything to add?

All right. Thank you. Well, we'll go into the first item, protective order registry forms, but, another programming note, we're going to flip items five and six, because an important member of the subcommittee has to be in court for when this looks like it will come up, so we'll just flip the order of those, so Richard.

MR. ORSINGER: Yes, Chip, so those of you who were there will recall in Houston that we had a discussion about this legislative mandate to prepare -- for Office of Court Administration to prepare a registry for protective violence orders, protective orders against family violence, and OCA was given the responsibility to bring up the website and to make it, at least portions of it, open to the public so that people could investigate persons that they know or persons that live nearby, et cetera, and that has been the responsibility of OCA.

Last time we talked in generalities about the different information forms that were used to feed into the criminal justice system at the state level, at the federal level, at the firearms registration level; and those forms are somewhat different; and the forms that are used by the State of Texas, DPS, may be not as clear as they could be; and so we had some discussion last time about simplifying or unifying the way this kind of information is reported. But we later -- it was later decided that this committee's primary focus should be on just the form that the public uses that a victim who has secured an order uses to either designate a protective order as available to the public or remove its availability from the republic -- from the public.

And so what we have to discuss at today's meeting was attached to the agenda as a draft protective order registry form that the victim can use to either designate that certain portions of the form will be public or to withdraw it from the public. Our liaison on this is Kim Piechowiak, who is an attorney with OCA, and she is going to I think walk us through the form. David Slayton is here today to listen. We might also hear a little bit about what's going on. There's -- on the IT side, there's a July -- I think a July deadline under the statute.

MR. SLAYTON: June.

MR. ORSINGER: June deadline under the statute. So I can feel it breathing down our necks, I don't know, so the IT stuff is probably harder than the form stuff. At any rate, I think at this point, Kim, can you take over and kind of walk us through this proposed form that we just --

MS. PIECHOWIAK: Yes, sir, I sure can.

MR. ORSINGER: Thank you.

MS. PIECHOWIAK: Good morning, everybody. This again is a draft. We've just been kind of looking at what is going to be the best way for a petitioner, the primary protected party in a case, to be able to request that their information or at least some very limited information on their order to be allowed to be seen by the public. And, again, this is only for -- regarding orders that are permanent orders under Chapter 85 of the Family Code. It's not for magistrates' orders of emergency protection, it's not for ex parte orders. It's only if there is a permanent order. So that -- that right there is going to narrow the number of -- that could potentially have any public access, and even then if the default is going to be that this is going to be private information, this is not going to be on the public facing part of the registry.

But if they do opt to do that, this

information right here, again, it's a draft. We will be discussing with some other ideas about whether or not we need to add kind of the information regarding the law, specifically Monica's Law, that precipitated this type of -- the creation of this, so that victims would understand that the reason that we are looking at it is because maybe if someone could look up their -- the person that they maybe have met and may be involved in in some way -- with in some way, would be able to do that and just check some very basic information. Again, not the actual image of the order. None of that would be publicly accessible. It would just be some very, very basic information regarding that there is an order, whether or not it's in effect right now, when it expires, and that kind of stuff.

This specifically tried to summarize that information. I am anticipating that we will likely have a separate instruction sheet that would include more information about that situation, but we kind of -- we were kind of interested -- when I say "we," I say me and my program manager and when we were kind of looking at trying to make it on just all on one page if we possibly could, but that certainly is not a requirement, but it would be kind of nice. At this point we have just some of the basic information and the name and some information regarding the

petitioner and to say whether or not that they want to have this information publicly done or if they've already done that in the past, that they now want to withdraw it from public view, and that is all provided for in the statute, that they're able to do that at any number of times.

I know last time we had a discussion about subject of the protective order and petitioner and the names of the people. We kind of went with primary protected party in this one because usually that's going to be the petitioner, but we wanted to make sure that we were clear that oftentimes there are many protected parties in an order, other family members, members of the household, whatever. The main person who is the petitioner on this order would be the one who has the right to make this request. Also, concerned with having -- making sure that the person that is coming and making that request is the actual petitioner in the case, and part of this is a holdover from my years as a prosecutor where sometimes I would have a defendant's new significant other coming and posing as the victim of my case to say, "Hey, I don't want this case to go forward anymore. My name is such-and-such. I want to drop this charge," and then that always made me nervous, and we went to a fair amount of lengths to make sure that we were dealing with the right person. And then once we asked too many questions, people immediately

changed their mind and ran away, so we were trying something that we could do to at least try to confirm that information, and that is to be completed -- to be sworn either by a notary or signed in front of the clerk of the court.

And now, I think we are just kind of at the point where whether or not we need to add more information to this without making it too much legalese and also how they're going to get that request to us. We've batted around a couple of different things, and I was just discussing -- and, David, you can jump in here any time if I'm saying something stupid. We were just discussing potentially whether this is a form that should go directly to the clerk and from the clerk to OCA to make sure it gets where it needs to go, but we are not quite there on the -- kind of the housekeeping business side of that, of this yet.

That's pretty much what I would say about the form. I can give you a little bit -- and David may be able to give you more. He talks to Casey a little bit more than I get to, but right now I can tell you that as far as the registry is concerned, we are knee-deep in trying to make sure that we are working on the security features for the -- for the registry. We want to make sure that users -- and when I say users, not public users. I mean users

such as are delineated in the statute, law enforcement, prosecutors, courts, that we are able to authenticate who those people are and for them to be able to have this access. And so, actually, my understanding is that the IT end of it is not real hard. It is trying to figure out that part of how we can sort out who should have access and who should not and how are we going to kind of -- kind of police that. So that's kind of where we are on that.

We've been having user calls with different -- depending on what people's roles are, confirming with law enforcement, the various things that they would use this for. Even though they have the initial TCIC way to check on the status of a protective order, many of them have indicated that, yes, being able to look at the image of the order will be very helpful. That may not happen on the street, but it might happen on the street, depending on what they've got going on. I know when there's been questions in the past a lot of times those officers will try to contact the sheriff's office or the courts, but of course, if it's 3:00 o'clock in the morning that's a little hard to do.

Also, I just had a discussion, which I was happy to hear about and think about with a judge the other day, and we were talking about those situations where sometimes for magistrates' orders of emergency protection,

let's say we have someone who was smart enough to be gone before the police got there, a report is made. They ultimately decide to file charges at large and along with that a request for a magistrate's order of emergency protection to be entered once that person is in custody.

Now, sometimes that may be months down the road, depending on the situation, but being able to have the information and the request actually in the registry, but again, only for criminal justice users, to be able to pull up and look at that actual request and then make decisions based upon, okay, we need to contact complainant, find out if they still need this order, what is the situation. Because that was always something that was kind of blind out there, but it was certainly in cases where if that person had been arrested immediately a protective order probably would have been warranted. So that may be another use for this registry that just kind of keeps coming up.

So probably more than y'all wanted to know or maybe not enough, but that's what I've got right now. David, do you have anything to add or no?

MR. SLAYTON: No. I think you did a good job.

CHAIRMAN BABCOCK: All right. Great. Richard, should we take comments?

MR. ORSINGER: Yeah. I'd like to -- is it anticipated that this could be filled out online, or will they have to appear in front of the court clerk, or do they go to the notary public and then mail it to Austin, or what do you think?

MS. PIECHOWIAK: I think that our main goal would be for it to happen in front of the court clerk, but because at any time it might be several months or years down the road, if this is like a lifetime protective order, if at any time they decide that they would like to change whatever that current status of that is, whether or not it's publicly viewable, to be able to go to a notary and do that, and then us have a way for it to be sent. Now, whether or not that will be still go submit it to your local -- your county clerk, where this is done, that may be the case. Again, we're still trying to figure out what is going to be the best way to get that kind of managed, and so we're still trying -- we're in discussions on how best to do that. Anybody with ideas, I'd love to hear them.

MR. ORSINGER: Well, I'm wondering if you could have an unsworn declaration that's submitted over the internet as -- in lieu of having to go to the courthouse or --

MS. PIECHOWIAK: Probably. I think it depends on, again, authentication of who this person is,

kind of hard to identify someone over the internet. So that would be the biggest concern, and, David, you had something to add?

MR. SLAYTON: I just wanted to say I think we would -- Kim mentioned that we are thinking -- and certainly would be interested in any feedback here -- about this document being filed with the individual clerks in the local jurisdiction and then that information transmitting to us. And if so, then there would be no reason why they shouldn't be able to electronically file it.

Now, the issue about the notarization at the bottom or the signature of the clerk indicating if that person's been verified is a big piece, and I think the concern that we're worried about other people, perhaps even the person who is under the protective order, subject of the protective order, filling it out saying, "Oh, remove that from the website." So we want -- this whole part of the notary or the clerk signing is to try to have some verification that the person who is actually asking for it to be added or asking for it to be removed is the actual protected party under the protective order. So I think even if we -- I think we would allow this form to be filled out online, we would allow it to be submitted online, but I think the piece about the clerk signing or notarization and some verification of that is going to still have to happen.

So if you want to electronically file you probably want to get it notarized and then electronically file it, unless y'all have a better idea that we're not aware of. We just want to make sure that the person submitting the form is the person who is supposed to be submitting it.

MR. ORSINGER: Okay. So another question I have is was there a conscious decision to not -- not to have the order itself viewable from the website, or was that a technical choice because it's just too difficult to manage the image? What was the thought on that?

MS. PIECHOWIAK: Well, the order itself --

MR. ORSINGER: Yeah, and --

MS. PIECHOWIAK: The way the order -- the way the website, the registry, is supposed to be -- and again, that's all by statute. Statute is what delineated what specifically would be viewable or not, but if there's an application or there is the actual order, a lot of times there is personal information in there that should not be out there in the public, and as opposed to going through and having to redact all of that stuff for it to be publicly viewable, it certainly is not something that would be an easy thing to do, but also just in general just being able to know that it exists it would most likely -- bless you. It most likely would get the job done, if it's

publicly viewable that there is an order that exists, but we're trying to maintain and preserve as much privacy for victims and their families as we possibly can.

MR. ORSINGER: So, Kim, if someone were to find the registry, it's going to have the case number and the court.

MS. PIECHOWIAK: Yes.

MR. ORSINGER: So could a person physically go to the courthouse and get a copy of the original order in totality?

MS. PIECHOWIAK: They can go and get whatever is public record. It's just a lot of people really got to want to do it, and not to say that they won't really want to do it, but we're trying to stop the whole it's 3:00 o'clock in the morning and batterer are stalking, or you know, people are stalking or whatever and being able to just pull up whatever information they want on people. And so kind of similarly to so many people who have the right to not have their information in their county appraisal website. It may be their public record to go and look at if you want to go look at it in person, but it's not something that's just going to go pop up on the internet.

CHAIRMAN BABCOCK: Yeah, Justice Christopher.

HONORABLE TRACY CHRISTOPHER: And I think we've had this discussion before, but there's a law that

says you can use an unsworn declaration in lieu of a notary, so that we put in the Civil Practice & Remedies Code. So I'm not really sure that you can only require the notary.

MS. PIECHOWIAK: True.

CHAIRMAN BABCOCK: Okay, Richard.

MR. MUNZINGER: My memory is not what it should be, but when we discussed this the last time I raised the question of routine protective orders being entered in divorce cases by divorce lawyers who simply put these orders in there, whether there has been a history of violence or an incident of violence or not; and as I recall Richard said that he -- I don't want to say that you routinely use them, Richard, but you were aware that there were many practitioners in the family law who when there is a divorce case enter an order or ask the judge to enter an order as a routine matter that has many of the things that this form references. Don't go around the house, don't do this, don't do that, et cetera, et cetera, but there has been no evidence or no event of violence, but it's done as a prophylactic measure and routine measure. And so now is that type of order going to be picked up in this registry? Because the potential for harm to a person who has not committed violence, who has not even threatened violence, but an order has been entered.

If I'm a family lawyer, I would say if my female client, male client, whoever said to me, "Should such a protective order be entered," if I'm the lawyer I would say "sure", as a prophylactic matter, whether he's hit you or not in the past he might, and this gives you some relief, and I want to have that relief. Now, that's good legal advice, but if this registry records people who are the subjects or respondents in such an order and there has been no crime, how do you stop that from happening? Because the potential for harm to reputation and the potential for harm possibly even to employment, "Oh, you're the subject of a protective order? My God, man, I didn't know that, and you're dealing with people, and you're dealing with females and little children, and you're the subject of a protective order?" You now have done something to a person who is innocent who hasn't done anything. I think the risk is substantial. It bothers me. And I don't know how the OC -- the Office of Court Administration or anybody else weeds these out.

I do notice in one of the handouts here it says, "Beginning September 1, 2020." This is the document, "SB325, protective order registry highlights," and I'm reading from (B), subparagraph (B)(c). "Beginning September 1, 2020, limited public access to information for protective orders issued pursuant to TFC, Chapter 85, will

be allowed only if victim requests such access." Victim. That means there has to have been an incident of violence, if that comes from the statute. What have you done to protect the person who is innocent? What can be done?

I'm not -- I'm always this way. I'm always emotional, and I apologize to you. I'm not being ugly to you.

MS. PIECHOWIAK: No, I --

MR. MUNZINGER: I mean no offense to you, but I am concerned that there are people whose lives can be adversely affected by their entry into a registry, a formal registry of the State of Texas, that law enforcement has that says, be careful, that son of a sea cook is on the damn protective order registry. He can't -- I mean, to me it is -- it is a dangerous thing. I know the Legislature passed it, and we give glory to God that they meet only every other year, but it is a problem, and I don't see how -- I'm very concerned. The OCA, something has to be done here to protect these people, and I'm sorry to take your time.

CHAIRMAN BABCOCK: No, no, no, very appropriate, and I assume, Richard, that sons of sea cooks are a protected class.

MR. MUNZINGER: They are.

HONORABLE ANA ESTEVEZ: I think David really

wants to speak to that. I don't think you can see his hand.

MR. SLAYTON: I want to be clear, and there are certainly more intelligent lawyers in the room who could speak to this more intelligently than me, but I think what you're refering to as the prophylactic measure that's used all the time are temporary restraining orders, which are routinely entered in divorce cases and routinely signed by judges. Those are not going to be in the registry. There is no finding of family violence in those cases. They're just routinely entered. Those are not subject to being entered into the registry.

The ones that we're talking about entering that are under Chapter 85 of the Family Code and Chapter 83 and the magistrates' orders of emergency protection, in those cases there has to be an actual finding that there has been family violence committed by the person. Those -- if there is an application made that they're alleging family violence, so the application is filed, those will be entered in the registry, but they will only be available to law enforcement, but they have to be under those specific statutes, Chapter 85, Chapter 83, and 17.292.

And then the only ones that will be made public is where there is a full due process hearing made available to the repondent where the judge makes a --

reviews the evidence, makes a finding, hears from the respondent that whether or not they -- when they present their case as to whether or not there was family violence, and the judge would have to make an order that said, "I find that there has been family violence and I'm entering this protective order."

Those are the ones we're talking about, not the ones that are entered routinely as part -- I don't think -- and Kim can correct me or somebody else can correct me if I'm wrong. I don't think protective orders are being routinely signed by judges in divorce cases without a finding of family violence. If so, I don't know under what statute they're doing that.

MR. MUNZINGER: I can assure you in my personal experience that's not the case, that judges sign -- Richard can correct me if I'm wrong. He's a practitioner, but many judges enter these orders routinely because they're asked to do so. But coming back to your response, and I appreciate it very much, but who is it that makes the first -- the initial registration of these orders? It's going to be, I assume, the district clerk or whatever the clerk of the court.

MR. SLAYTON: That's correct.

MR. MUNZINGER: Now, that's going to be an employee. How does that employee in the clerk's office

know that this order that has been signed by the judge, which I'm going to say is a routine order, is or is not eligible for the registry? Is it -- everything that you've just said I hope is in the statute that limits registration of these orders to what you described as a protective order, that there is a definition that does that and all of those things, but who is it that is going to make this decision that this order is -- goes into the registry? I'm not so concerned -- I'm concerned about the whole thing, but, yes, law enforcement should have access to a person's history of violence that hasn't gone into the court system, the criminal court system. Yeah, I think that's a good law, but putting someone into that registry erroneously has the potential for great effects on that person, and so I need to know -- I don't need to know. I'm just curious, what training, who makes the decision that these things go in there or don't go in there.

MR. SLAYTON: So one of the things that -- I mean, the law is clear as to which ones are to be put into the registry. It's the ones issued under -- either applications under Chapter 83 or orders of emergency protection under 17.292 of the Code of Criminal Procedure or Chapter 85 of the -- those are the only three that are currently addressed by statute, and so when an application is filed under one of those, let's be clear, there are

other protective orders that are not those. Stalking, human trafficking, there are other types of protective orders. Those are not addressed by the statute. The statute is silent, but the intent is that whenever an order and application comes in under one of those statutes, the clerks will have to recognize that that's what it is under those statutes. We will -- as part of this plan that we have and, actually, I think the statute actually requires us between June and September to train the clerks of the State to say this is -- these are the ones that we need you to enter into the registry.

What we've envisioned from our side is that these are not going to be automatic. It's going to be somewhat like e-filing. There's going to be a queue. The clerk is going to enter the information and submit it, and someone at OCA who is well-trained in how to recognize it is going to look at every one of them and approve them before they get posted on the registry, because we have a similar concern of what if someone puts a temporary restraining order on there. That shouldn't be on there, so in that instance we will --

MR. MUNZINGER: And last question.

MR. SLAYTON: -- make sure it gets caught.

MR. MUNZINGER: You use the word "application." You mean an application for a protective

order?

MR. SLAYTON: That's correct.

MR. MUNZINGER: Not an application to register an issued order in the system. So that there has to be some kind of an application specifically authorized by one of the statutes you have stated before this order can even get into the system.

MR. SLAYTON: That's correct.

MR. MUNZINGER: Thank you very, very much.

MR. SLAYTON: Let me be clear about one thing, if I may, just to clarify. There are orders issued under Code of Criminal Procedure 17.292. Those are magistrates' orders of emergency protection, that when someone is arrested for domestic violence or some offense involving family violence, that a magistrate when they are initially seeing the defendant the first time can sua sponte issue a magistrate's order of emergency protection without an application, and those would be put into the registry as part of the law enforcement visible only side of that, but that's the only one where there's not an application required by statute.

MR. MUNZINGER: Thank you very much.

CHAIRMAN BABCOCK: Lisa, you want to jump into this discussion?

MS. HOBBS: Well, I'll defer to Richard

Orsinger if he had something else to say about -- I didn't know if you did.

MR. ORSINGER: Well, I just wanted to say that the concerns that you've expressed, Richard, I think are legitimate ones and that the OCA has made -- the Legislature and OCA has made wise decisions to go only with permanent orders that are clearly identifiable as protective. When you started into your discussion, I just looked on the internet. It reminded me very much of this Fifth Circuit case, *United States vs. Emerson*, 270 F.3d 203, decided in 2001; and it was a doctor here in Texas who was prosecuted for possessing a weapon in violation of the Violence Against Women's Act, and if you -- the case went off into Second Amendment rights and whether or not his Second Amendment rights were compromised.

But as a family lawyer I looked at the case, and it was disturbing because the order that he was accused -- that made it illegal for him to possess a firearm was a standard agreed upon temporary order in a divorce case, right out of the form book. There was no special language about there having been family violence. There was just a prohibition against harassment. You know, it was very general, and so I think that that danger that you could be prosecuted because of a simple order that's right out of a form book with no specific focus on evidence

of violence is eliminated by concentrating on final orders that issue out of these particular statutes that require a history of family violence or a credible threat of future family violence, and I think OCA is implementing those safeguards, and therefore, the danger that someone who hasn't been adjudicated appropriately to have this warning to the public, I think that that's been eliminated, and I'm happy about that.

CHAIRMAN BABCOCK: Okay. Lisa.

MS. HOBBS: Okay. So I have two questions. One, what if a protective order is on appeal? So you have a final judgment by a trial court judge, but you're appealing it, and you have valid grounds -- well, I mean if you're appealing it, you're paying a lawyer to -- whether they're valid or not is for a judge to decide, but it's on appeal. And then secondly, and relatedly, who is an authorized user under D(a)? Would that be the respondent's counsel? Because --

MS. PIECHOWIAK: No.

MS. HOBBS: It would never be the respondent's counsel?

MS. PIECHOWIAK: Unless it's the respondent's counsel is part of like the county attorney's office or district attorney's office.

MS. HOBBS: No, that's usually petitioner.

MS. PIECHOWIAK: I'm sorry. Respondent -- no, respondent's counsel would not have access.

MS. HOBBS: So you may not even know that your client is on the registry to even know what -- and like I -- and my two comments are related in that if you are respondent's counsel, you don't even have access to see like what is on the registry, and you might be appealing that protective order, and I disagree with you a little bit, but you -- I don't want to disagree with you because you know what you're doing, and I don't. I'm flirting with these family law cases.

CHAIRMAN BABCOCK: You aren't directly commenting on Orsinger, are you?

MS. HOBBS: But I think you can go down and get a protective order upon -- and, yeah, there's some due process, but I have an appeal right now where there was a complete violation of due process on getting the protective order, and we're on appeal, and as part of that protective order it is standard that -- so like in my divorce decree, it's not -- no one is telling me I can't have a gun if I want it. So it's not in every divorce, right, but where there has been a protective order, they can have a finding of family violence, and that immediately creates that you can't have guns, you can't be around guns, you can't go on your hunting trip with the boys, whatever.

MR. ORSINGER: Okay.

MS. HOBBS: But you might be challenging that, that finding of family violence for legitimate reasons, and that -- and so I guess what I'm saying is, one, I do think that respondent's counsel needs to be an authorized user, if the statute would allow for it. And, two, I feel like there needs to be a way for at least to alert OCA that this is under appeal, and ultimately what happens with the appeal needs to be taken into account in this, because there are counties that have protective order judges who routinely you go down there; you say, "I need a protective order." They write it out, and like there is a limited due process rights in those counties, with these counties with the designated protective order.

And God love them, and I know what they're trying to do and I support what they're trying to do, but they don't go without error, and I feel like this registry either needs -- one, I think it needs to account for respondent's counsel. If you're on a registry, your lawyer should be able to know whether you're on a registry, and then, too, I think there needs to be some flag that says this person has appealed it and some ability to take it off once there is an appeal, if it's reversed.

CHAIRMAN BABCOCK: Hayes.

MR. FULLER: Along those same lines, if there

is an order on appeal and the protected party signs this form, are they making a privileged communication disclosure by allowing the public to look at this, or are they laying the grounds for a potential defamation case if the order is reversed on appeal by saying, okay, you know, here's my signed signature saying I'm going to publish this false or nonfinding to the world.

CHAIRMAN BABCOCK: Well, it's not going to be false in the sense that there is an order.

MR. FULLER: Right. Right.

CHAIRMAN BABCOCK: And the OCA and the clerks are going to make sure there is an order.

MR. FULLER: Right.

CHAIRMAN BABCOCK: An appropriate order.

MR. FULLER: Right.

MS. HOBBS: An order.

CHAIRMAN BABCOCK: Roger.

MR. HUGHES: Well, I had a question and then maybe some observations. First, is this form itself -- is there any protection from the Open Records Act? And is it going to be treated as some sort of court record that the party -- the opposing parties will be allowed to see?

The reason is, is that you have some information like their phone number and their e-mail address, and I'm sure if I were a harassed woman the last

thing I want is the respondent and especially the respondent's girlfriend to know my phone number and my e-mail address, because pretty soon that's going to get filled up with stuff that she may not want to be seeing. So that's a question.

The other is -- another one is about expungement from the registry. I'm not real clear. I mean, suppose the order expires by its own terms and nothing further is done, or it gets reversed on appeal, or maybe the order is actually reversed later after the judge hears new evidence. Is there a process to basically expunge it so that it ceases to be on the registry or not?

And then finally, a suggestion. I, frankly, had never thought about imposters coming in and filing this, but apparently I'm naive about that. Is it possible that the respondent or the respondent's counsel could be notified if one of these things is submitted so they could come in and say, "Wait a minute, it's not me. I didn't submit this"? But that's just a suggestion.

MS. PIECHOWIAK: Maybe, yeah.

MR. HUGHES: That, of course, may create problems in and of itself --

MS. PIECHOWIAK: Right.

MR. HUGHES: -- about protecting the petitioner, but that's -- if it can be done in a way that

protects their privacy, that might be a hedge against imposters coming in and filing it, but I'm still curious about the open records problem. And, I mean, frankly, whether they can expunge or not doesn't bother me, but I know a lot of people will be upset if they can't buy a handgun because they were on the registry five years ago.

MS. PIECHOWIAK: As far as -- and we're all still kind of on the fence about the information that's in this order -- order, form. This is a form to OCA for the registry. It's not handled -- the court doesn't handle it, doesn't do anything. So in my world this would not be something that would be very accessible otherwise. However, and we may wind up taking off some of that contact information. It still comes down to kind of one of our discussions when we were looking at it, was we kind of want to be able to have information on here or at least some way to be able to access the information so in case there is a problem, in case there is a question, in case they inverted the numbers and that's not the correct case number, we can't find it, to be able to do their request. Those kind of housekeeping type things. And so those are certainly things that we need to keep looking at and seeing what we need to do.

As far as expiration, the whole point of this is to know if this is someone who is potentially a

dangerous person. If it's expired, it will show that it's expired, but it's not going to be expunged. Just because there would be a history -- to show that there's been a history because if there's been a history, if there's been two protective orders, they've both expired, but there's been two protective orders, that might be relevant to know. As far as in the -- and the statute only says that it's noted whether or not it's expired or if it's been rescinded in any way. There is nothing in the statute that provides that it's going to be pulled off of the registry at all.

I am with you. If there is a due process issue with whether or not it should have been granted to begin with, then, you know, that may be something that needs to be addressed -- and, David, you can jump in here any time with -- you know, through the Legislature, to do some adjusting with that as well, I don't know, but that's -- nothing in the statute discusses that part of it.

CHAIRMAN BABCOCK: David.

MR. HUGHES: Well, and I just want to say I understand that the fact that there's been a series of protective orders and they may be divorced still may be probative to something, because just because they got a divorce doesn't mean that the respondent has suddenly decided to become peaceable about their separation.

MS. PIECHOWIAK: Right. Or be peaceable also

with other people.

MR. HUGHES: Yes.

MS. PIECHOWIAK: Because unfortunately I've had a fair amount of same ones keep coming in but with new victims and when I was prosecuting also. I'm sorry.

CHAIRMAN BABCOCK: David, then Richard, then Pete.

MR. SLAYTON: Just to answer a few questions, to Lisa's issue about authorized users, authorized users as defined in the statute does not include -- it is primarily that term "authorized user" is meant to really refer to the clerks who are entering the information, but the statute also says who has access to it, and it lists "An authorized user," which will be the clerks, "attorney general, district attorney, criminal district attorney, county attorney, municipal attorney, and peace officer." That's who is listed in the statute as having access. There is no respondent's counsel here.

With regard to whether or not the form is subject to the governmental -- the constitutional right to open courts or to the Rule 12 of the Rules of Judicial Administration and the Judiciary's Public Information Act, I think you-all should proceed as if whatever is on that form is going to get out. Because I think it either gets filed with the court, and therefore, it's in the court's

record, unless the -- unless it was sealed for some reason. Or if it comes to OCA directly, we are subject to Rule 12 of the Rules of Judicial Administration. Someone requests it, unless we have an exception that we could withhold it, we would be required to -- we would be required to disclose it. That doesn't mean that we couldn't withhold certain pieces of information on there.

MS. PIECHOWIAK: Right.

MR. SLAYTON: So, for instance, dates of birth, phone numbers. However, this is not fair to Kim, but just this morning I pulled Kim aside and said I personally don't think we need all of that information about the petitioner on the form because I think it's a risk. We have that information in the court's file. The clerks have that, so I don't know what you-all think about that, what you're going to do with the form, but my recommendation would be that we collect as little information as is necessary to allow us to do the job of publishing it on the registry, and that's that.

It's interesting you raise the issue of expunction. I think it's pretty interesting that the statute itself says if an order -- if a protective order is vacated. It doesn't say that it should be removed from the registry. It just says it should be noted in the registry that the order has been vacated. I think that's unusual,

because if an order is vacated then why would we still want it on the registry. So we may have to figure out exactly how to navigate that issue, but, you know, in Lisa's example, if it's reversed on appeal for violation of due process, I'm not sure why we want to keep it on the registry.

And the last thing I would say, just to maybe clear up, nothing about you being placed on the registry would prohibit you from possessing a firearm. If the entry of the protective order occurs, you are prohibited from possessing a firearm, regardless of whether there's a registry or not. In fact, we work with the clerks, and the clerks do this everyday, where they report that to the state and federal government with regard to entry of protective orders. That happens everyday, and that's what causes the -- that's what triggers the prohibition on possessing or purchasing a firearm.

CHAIRMAN BABCOCK: Richard, then Pete, and then Judge Peeples.

MR. ORSINGER: So there's already an existing requirement and framework for the reporting of these protective orders up the chain through the TCIC, the Texas Crime Information Center, and they have a form, and it's used for criminal purposes, and it's not available to the public, and that's a longstanding procedure, and there's

some wisdom perhaps in combining the requirement for federal reporting under the Brady Act and the TCIC form and this form to unify them into one form, so that you can -- this one form will serve all purposes, but the scope of this committee's concern is just this idea that we're going to make certain information available to the public through an OCA website and how do you -- how do you trigger that. How does a potential victim -- I'm sorry, the name that's used here is primary protected party. How do they trigger that it be made public, or how do they remove it from public, and that involves the question of whether they have to trigger it or whether it will automatically be public, et cetera, et cetera.

But the actual underlying process of the consequences of an adjudication and the reporting of it to the law enforcement is already there. All we're really concerned about is how does a primary protected person fit into this process of making these protective orders public. So some of the debate this morning is about the whole idea. For example, Lisa's point about what do you do if your order is on appeal. Well, it's already going out across the computers and all of the police cars all over Texas, so but that's not -- that's not our focus. Our focus is how do we comply with the legislative requirement to make certain information public and to give the primary

protected person some kind of control over whether it's public or not public.

CHAIRMAN BABCOCK: Pete, you got anything?

MR. SCHENKKAN: My question -- my comments and questions would only be on the draft of the request to grant the publicly viewable information, and I don't think we're ready for that. It sounds to me perhaps we're still discussing the substance.

CHAIRMAN BABCOCK: So you'll defer?

MR. SCHENKKAN: I defer for now.

CHAIRMAN BABCOCK: Judge Peeples.

HONORABLE DAVID PEEPLES: I want to just be sure I've got some things right, Richard Orsinger. Three things. First of all, there are a lot of papers filed in these applications for protective order. There's the application itself, and there will be a temporary order frequently, and then a final one, a lot of times by default. They expire by operation of law after, what, a couple of years? Whatever it is. They can be extended, and as I read this summary of the statute, it looks like all of those are potentially going to be in the registry. Am I right about that?

MS. PIECHOWIAK: Yes.

HONORABLE DAVID PEEPLES: Okay. All of those. Okay. And, you know, I think David Slayton alluded

to this and maybe Richard, too, just a minute or two ago. My county, Bexar County, all of those things are going to be at the courthouse electronically available. These are not sealed. And so if a policeman in Dallas pulls somebody over, without this registry he or she is not going to know if there is a protective order on the person that the officer has pulled over. The registry, if it works, will make that information available all -- in all 254 counties.

MR. ORSINGER: Okay. So we already have the criminal justice side of this covered. It's up and running, and they are reported, and they are available to peace officers on their computers and to prosecutors on their computers already.

HONORABLE DAVID PEEPLES: Even without this registry.

MR. ORSINGER: Exactly. Do you agree with that?

MR. SLAYTON: They don't have the -- Kim can probably speak to this better than I can. They don't have images of the orders, which I'm assuming they'll have through the registry.

MS. PIECHOWIAK: Right.

MR. SLAYTON: Law enforcement will. That's one unique thing because I think law enforcement's frustration is they know there is a protective order. They

have no idea what it says. They don't know when it was issued. They just know there is a notation in the criminal history file that there's a protective order --

MS. PIECHOWIAK: Right.

MR. SLAYTON: -- and that's it.

MS. PIECHOWIAK: Yeah. A hit on the TCIC return for a protective order, they have a lot of information on there, but it doesn't have everything on there, and also, it kind of becomes an issue as far as this is kind of another reason, depending on what's going on, some of -- not all protective orders are making it all the way into TCIC, which we know that that's an issue as well, and this would be another place that they can check.

Let's say victim says, "I have a protective order," and they're running it on TCIC, they can't find it. This is another place that they can look for it and then also the fact that it's for reasons -- for the officer on the street, but also for investigators that are looking for things, for prosecutors that are looking to figure out what to do. Because, I mean, I did not have access as a prosecutor to run TCIC on my own. I had to go get my investigator to do that for me to be able to do this, and so then this is a way for them to be able to access and get that certain information and be able to do what they can to file charges if necessary, but mostly -- and when I've

talked to -- when I've discussed this with law enforcement, just about all of them are like, yes, this would be great because we don't always have the information, we can't always confirm that there is actually a protective order.

CHAIRMAN BABCOCK: Lisa, did you have a comment?

MR. ORSINGER: I interrupted David.

HONORABLE DAVID PEEPLES: Would you elaborate? You said we have the criminal side covered. Would you say more about that?

MR. ORSINGER: You know, Kim can talk to that, but DPS already has a computer system, a form to fill out that the clerks are required to fill out, and it automatically feeds up into the computer system that all law enforcement officers have access to in their cars or in their desks.

HONORABLE DAVID PEEPLES: And -- okay. Bexar County, for example, we have two county courts at law that do, as I understand it, nothing but family violence. That's all they do.

MS. PIECHOWIAK: Right.

HONORABLE DAVID PEEPLES: Two county courts at law, and then all of the 14 civil district courts do family law protective orders -- family law --

MS. PIECHOWIAK: Right.

HONORABLE DAVID PEEPLES: -- including protective orders, are the second kind issued by a civil court in the criminal system when the police officer has somebody pulled over on the highway.

MS. PIECHOWIAK: Yeah, once a protective order is issued by the family court --

HONORABLE DAVID PEEPLES: Okay.

MS. PIECHOWIAK: -- then what happens is the clerks of that court have like within 24 hours to send it to law enforcement and then they have a certain amount of time they've got to get it uploaded into TCIC, the information but not the image of the order.

HONORABLE DAVID PEEPLES: Thank you very much.

CHAIRMAN BABCOCK: Okay. Lisa.

MS. HOBBS: Sorry. So there is coordination once a protective order is issued, and it's not just with law enforcement. It also must be a federal agency, like whoever does the -- when you come into the country or not. Because I have a --

MR. ORSINGER: There's a Brady Act requirement that you submit certain information.

MS. HOBBS: It's not Brady.

MR. ORSINGER: It's not?

MS. HOBBS: Yeah, so there's a federal entity

that once you have a protective order entered, so I have some -- I have a client who has one who is entered, and every time he comes back into the country he gets pulled aside. So there are some -- and my point is not -- and you're right. This is happening everywhere, and law enforcement already has this. I just think that we can learn from them, so if they have a way for expungement or whatever you want to call it, if a protective order gets reversed on appeal, we should figure out how those reporting requirements are and model them if there is -- or be better than them if there's not, but a way if, in fact, something does get reversed, because it has a real impact on people's lives if it's ultimately reversed on appeal.

CHAIRMAN BABCOCK: Yeah, Hayes. I'm sorry.

MR. FULLER: This process envisions that the protected party is either going to say, yes, make that information public, include it in the registry or not. Would it maybe simplify the process, better protect the public, and still comply with the statute if the presumption was this is going into the registry? As we complete this process, we, the court, the clerk, this information is going into the registry, unless at this moment in time, you, the protected party, say, "No, I don't want that published"?

MS. PIECHOWIAK: Well, the way it's -- the

way the statute is written is the default is it's not going to be available to the public.

MR. FULLER: Right, and I think if the purpose is to protect the public, shouldn't the default be it is going to be made public unless you say "no"?

MR. SLAYTON: This was the subject of much debate at the Legislature.

MR. FULLER: Okay. So that's --

MR. SLAYTON: The original version of the bill made it presumptively on and only removed if the party didn't -- well, actually just made it presumptively on.

MS. PIECHOWIAK: Yeah.

MR. SLAYTON: And many of the victims rights advocacy organizations came in and said that can't happen, it should be the other way where it's presumptively not on, and you give the victim the choice about putting it on there. And the statute, it says that it may only be added to the public registry if the protected person requests that it be added.

MR. FULLER: So we have to do it this way.

MR. SLAYTON: That's right.

CHAIRMAN BABCOCK: Okay. Yeah, Justice Gray.

HONORABLE TOM GRAY: Just two quick comments. Can you do this request to add or remove through an attorney, and if not, why not? And then on your -- that

would also address to some extent your protection security on who is making the application because you would have an attorney putting their license on the line if they were doing it fraudulently.

And then I don't know exactly how TAMES does the security for attorney filings, but could you implement something like that if they're not using an attorney to give them a password or a specific e-mail address that it must come through to file it electronically so that you are secure, confident, that they are the person that is in the language "primary protected party"? You could assign some type password to that person for doing this process.

CHAIRMAN BABCOCK: Yeah, Richard.

MR. ORSINGER: It hasn't been debated, but one thing that I think is interesting is the way this is structured it's just the respondent who will be identified, not the primary protected party. So if a person elects to have the information published, it won't reveal their name as a victim. It will just reveal the name of the person who is prohibited under the order. However, it will allow the public enough information that if they want to do it, they could go to the courthouse and get a copy of the order and find out the name of the victim, but I think it should be noted that the identity of the victim is presumptively and as a practical matter, other than shoe leather going to

the courthouse, is not going to be public. Would you agree? Yeah, and I think that's significant.

There is nothing for us to decide, but I think it should be noted that this is all about the respondent, the respondent in the protective order being identified, not the victim in the protective order.

CHAIRMAN BABCOCK: All right. Kim, a couple of questions. In the third paragraph of the form --

MS. PIECHOWIAK: Yes, sir.

CHAIRMAN BABCOCK: -- you say that you, being the requester, "may request that the information be removed from the registry website as public view at any time." That "at any time," that's not in the statute, is it?

MS. PIECHOWIAK: I believe it is. Yes, sir.

CHAIRMAN BABCOCK: Where --

MS. PIECHOWIAK: Let me see.

CHAIRMAN BABCOCK: It's not in (c), I don't think. I'm looking at that. Here's what -- here's what I'm worried about. A requester asks that it be public and then at any time says, no, remove that from public view, but then two months later says, "Oh, no, put it back in," and then two months later says, "Oh, no, I've changed my mind," for whatever reasons. Richard may have had experience with people in this context who are --

MS. PIECHOWIAK: Oh, I definitely -- I would

agree, and that is definitely the case. However, the statute just says "may later request to remove that access." So it doesn't put a limit, time, or number of times. It doesn't request --

CHAIRMAN BABCOCK: Doesn't address that.

MS. PIECHOWIAK: It doesn't address that. It just says "may later request."

CHAIRMAN BABCOCK: Right. And that's fine. Obviously the statute has to be followed, but it also says that "The Supreme Court by rule may prescribe procedures for requesting a grant or removal of public access as described by subsections (a) and (b)."

MS. PIECHOWIAK: Sure.

CHAIRMAN BABCOCK: So the Court could, if it wanted to, say, look, you can request public access and that's great, and you can also request that it can be removed, but you can't keep doing it every other month or every other week or successive times, or maybe you think that would do violence to the statute. I don't know.

MR. ORSINGER: No pun intended.

CHAIRMAN BABCOCK: Huh?

MR. ORSINGER: No pun intended.

MS. PIECHOWIAK: I don't -- and David --

CHAIRMAN BABCOCK: Thank you for pointing that out, because that was not intended.

MS. PIECHOWIAK: I think the intent -- and I totally understand what you're saying because I agree that's going to be a bit of a mess. I am not anticipating that that is going to happen a whole lot. I'm not anticipating that a whole lot of people are going to be actually asking for this to be publicly accessible, at least not immediately. However, I think the intent is to give as much autonomy to the victim in these cases to be able -- because they will have their reasons why they want it accessible, and a lot of times when -- and again, I'm going on my prior prosecutor days, that many times that's when a complainant would finally decide to go forward, because they don't want this to happen to somebody else.

So and I think that's kind of the same thing here, but for their own personal safety, having the option that it's not going to go in unless I absolutely say it needs to go in, because my last name is Piechowiak. We live in Bexar County. The only other Piechowiak is my husband and my boy, so it will not be too hard to figure out who that person is.

CHAIRMAN BABCOCK: Right.

MS. PIECHOWIAK: But again, that's why they are given the option to do it or not, and so clearly it is within the purview of the Court and this committee about how that -- how that needs to happen. And, David, do you

have thoughts that are going to be like, no, Kim, you're wrong? And that's absolutely fine if you do.

CHAIRMAN BABCOCK: Yeah, I'm not saying it ought to be decided -

MS. PIECHOWIAK: Right.

CHAIRMAN BABCOCK: -- one way or another. I'm just raising that as an issue.

MS. PIECHOWIAK: Oh, it definitely is -- we've talked about that as a possibility. I don't anticipate that that's going to be a very -- I don't anticipate that's going to happen very often, but that's just my best guess.

CHAIRMAN BABCOCK: Richard, as a practitioner in the area, is -- does this "I'm going to make this public," I'm going to -- "you're going to be in a database, you" -- what's that, son of a sailor or cook or something?

MS. PIECHOWIAK: Oh, sea cook.

MR. GILSTRAP: Daughter of a sailor.

CHAIRMAN BABCOCK: Huh?

MR. GILSTRAP: Daughter of a sailor. Include that.

CHAIRMAN BABCOCK: Is that likely to be something that will be injected into the --

MR. ORSINGER: Yeah.

CHAIRMAN BABCOCK: -- negotiation process?

MR. ORSINGER: I think so, and I think that it's also whether it's in settlement of a family law case or a tort claim. Money may be paid in order to get someone to agree, or a certain concession may be made about limitations on visitation or otherwise in exchange for representation that the person would not -- would not request public -- publication. So if this power is given to the victim, the victim is free to use it, and it could be used as part of a settlement. It could be used as part of a financial settlement. So I fully expect that's going to happen in every case. Some attention will be paid in mediation or otherwise to whether someone will exercise their right to registry or agree to remove it once it's already been --

CHAIRMAN BABCOCK: Yeah. No question the victim has been granted by the Legislature the power, so they've got the power. The question is whether over time can they continually use it, withdraw it, use it, withdraw it, use it, withdraw it. I'm not so sure that the statute requires that.

MR. ORSINGER: No, it doesn't, but, boy, when you get into the world of who is going to make the subjective assessment as to whether these varying decisions or varying emotional states are legitimate or not and how many times you're entitled to change your mind, that's

going to be pretty sticky if you give anybody the authority to make that decision.

CHAIRMAN BABCOCK: Well, I mean, and again, I'm not advocating this. I'm just raising it as an issue. You could say you can request it and you can withdraw it at any time, but then if you go requesting it again, it has to be for good cause or there has to be some standard that the Court, Supreme Court, could insert into the rules. You could do that. I'm not saying they should. I'm just saying they could.

MR. ORSINGER: The history of family violence is that there -- that it's a cyclical pattern of behavior of wrongdoing and then shower of promises of no further wrongdoing and then reacceptance and more wrongdoing, and it ends up being cyclical. I've seen this in my practice. It's in the literature, and I can easily imagine that a couple that's together and the man does something violent and gets reported, and then there is a reconciliation, and I think that that cycle is recognized.

Now, maybe it moves a little quicker than this registry would, but, Chip, you're dealing in a very deep and controversial area of power dynamics and interpersonal dynamics and gender dynamics, and so anybody that attempted to propose restrictions on the exercise of this statutory right is going to be meshed in controversy

as well as disagreement over what would be an appropriate standard. But at any rate, it's worth looking at, and I'm just saying that it's going to be a very dicey proposition, if anybody, OCA or even the Legislature, were to say you can only change your mind every so often or so many times total.

CHAIRMAN BABCOCK: Yeah. Okay. Good points. David, did you have anything to add to that? Okay. Any other comments? Pete.

MR. SCHENKKAN: Time for the form?

CHAIRMAN BABCOCK: You betcha. Let's do it.

MR. SCHENKKAN: First question. I've got five. First question is this form is signed by a person who represents that he or she is the primary protected party. I don't have the actual statute in front of me, but I have the TCIC protective order data entry form in the various summaries that we have, and they refer to the protected person. There isn't a distinction of primary or secondary. There is a protected -- there can be in addition to the protected person, the order can also protect the child of the protected person or a member of the family or household, but as best I can tell we only have the protected person.

And so if that's right, should there be a reference to primary? If there is, what does it mean? And

why do we only use the word "primary" in the sentence about "I am the primary protected party, and I am the primary protected party who was granted protection" and elsewhere we say "a protected party"? We're leaving confusion about that issue. Could we maybe take these one at a time?

CHAIRMAN BABCOCK: Yeah, let's take it one at a time, because the statute says in 158(a)(1) "a protected person requests." "A protected person."

MS. PIECHOWIAK: Right. First of all, the TCIC data entry form promulgated by DPS and they just need to know who all the protected people are so that they make sure that they're part of that order if they need to enforce it, whatever. For purposes of this, our discussion -- and again, this can change because, unfortunately, as David pointed out, there is a lot of really good questions that the statute is silent on. That, okay, what if I'm the person who went and got the -- I'm the petitioner, I'm the one who went and got the protective order, but also as part of that is there's other protected people, and maybe one of my protected people is my teenage kid who this person is the -- the respondent is the one who actually -- who was the one that the order is against, but is someone that my daughter wants to date, did date, no longer dates, still dating. Whether or not they would have the right to say, "Oh, no, no, I don't want that access, but mom, you can't

grant it."

Well, mom is the original petitioner, and so that's kind of what we're looking at, whether or not every protected party has a right to come in and request access or to take off -- take away access. That's kind of what we were trying to nail down.

MR. SCHENKKAN: Is it nailed down --

MS. PIECHOWIAK: Now, whether or not that's something that we should or can really, but the statute is -- it does say "a protected party," and so I guess that's something that we would have to sort out and see how we would need to do that.

CHAIRMAN BABCOCK: Any protected person, not a party.

MS. PIECHOWIAK: A protected person, yes.

CHAIRMAN BABCOCK: Roger.

MR. HUGHES: Well, following that one step --

CHAIRMAN BABCOCK: On this, because he's got five points. This is point number one.

MR. HUGHES: I just want to ask if there is going to be an age cut-off. I mean, you just posed a situation where the mother is the formal party and probably is suing on behalf of some minors in the family, but what if we -- if one of the minors is, say, a 16-year-old daughter who is also the victim of family violence or maybe

incest, and et cetera, et cetera, et cetera. What happens if mommy and daughter disagree?

MS. PIECHOWIAK: Right.

MR. HUGHES: Does mommy control because she's an adult and the young lady is under 18? Are we going to have an age cut-off? In other words, a minimum age to file. And I'm not -- I don't know that the statute answers that question, and but I somehow suspect it may come up.

MS. PIECHOWIAK: Right. And I agree that it may come up, and definitely minors can certainly seek protective orders and get protective orders on their own, and certainly if they are the petitioner, absolutely, I don't think there should be an age cut-off for that. But I think we still have the idea of who the petitioner is, and I think that's kind of how would be a good way to narrow it down. I think I was trying -- we were trying to make this not so much legalese, and so being able to kind of like -- I'm the person who sought the order and I'm the one who is protected under the order, so I'm the one who has the right to do this. So and we want to fix -- there's still legalese in here we want to fix, but, David, do you have any suggestions or ideas on how if that would need to --

CHAIRMAN BABCOCK: You're on your own, Kim.

MS. PIECHOWIAK: Oh, I know, but it's rare that I actually have the big boss actually here with me, so

I want to take full advantage.

MR. SLAYTON: I'm curious -- you know, I'm curious what we think about whether or not it is the petitioner's right to -- I mean, who is the petitioner? Is that the person who has the right to grant or remove public access, because that's the person who actually filed the case. So should we instead of using "primary protected person" use "the petitioner," because they are the person who is the one who sought the case?

MS. PIECHOWIAK: Right.

MR. ORSINGER: Or broaden it out even further to any of the protected persons because there may be three people in the order that are protected, even though only one of them requested it.

MR. SLAYTON: I think the only risk there is so let's say the father is the person who the protective order is against, and it's the mom and two kids, one of whom is 14 and one of whom is seven. Can the seven-year-old write us and tell us to take it off, and then we have to take it off? I mean, I think that gets a little dicey. I know Kim said minors can do it and they can choose, but I'm a little --

MS. PIECHOWIAK: To a certain degree.

MR. SLAYTON: I'm a little concerned about minors who are maybe seven years --

MS. PIECHOWIAK: Yes.

MR. SLAYTON: -- being able to make choices about dad, who might put pressure on them. So anyway, I sort of wonder whether it's the petitioner who should be the right party to make the choice about grant or remove.

CHAIRMAN BABCOCK: Is a protected person defined anywhere else in the statute? I mean, 72.158(a)(1) just says, "a protected person." Is it defined anywhere else? Is protected person defined?

MS. PIECHOWIAK: I'm trying -- I'm looking into the Family Code, is going to be where that definition actually would probably -- I don't believe it's defined in the -- in the Chapter 72, but let's see, entitlement to protective order.

MR. ORSINGER: Chip, during this interlude, we probably need to have a definition somewhere of primary protected party if we're going to use that, because if three people are protected, but one is the petitioner, does that mean that the petitioner is primary and the other two are not primary? Because no one will know whether they are -- I mean, everyone probably will feel like they're primary because, you know, they were a victim of violence, and they now have an order prohibiting this person from -- from going around or whatever, so if we use this special term, we have to define it. But, boy, there's a

significant policy decision that wasn't -- I wasn't aware of until this came up in discussion, which is if we have three victims who are protected by the order, why should only one of them have a voice and the other two don't.

CHAIRMAN BABCOCK: Well, that would be an issue, wouldn't it?

MR. ORSINGER: That's a policy question that's not -- I don't think -- to me the statute nudges us to if you're protected under the order, you have this choice.

CHAIRMAN BABCOCK: Right.

MR. ORSINGER: Because their focus was not on who solicited the court's ruling, but rather who was the beneficiary of the court's ruling.

MR. SCHENKKAN: But, Richard, if that were the case, then wouldn't you have a situation in which one of the several protected persons could request it and then another of the protected persons could request that it be withdrawn?

MR. ORSINGER: Absolutely.

MR. SCHENKKAN: And that isn't a workable system.

MR. ORSINGER: Well, it is a workable system if you have a rule that breaks the tie, and the rule that breaks the tie is, I think, already in the statute, that

any protected person can get this information public, and someone else can't -- because they're protected, can't take that away.

MR. SCHENKKAN: The statute says that?

MR. ORSINGER: No, the statute says that a protected person -- let's get the statutory language. I think the statute says we're supposed to set up a procedure where a protected person can cause this information to be public.

CHAIRMAN BABCOCK: Yeah, it says "a protected person." It doesn't say "a protected party," and "protected person" is not defined in the statute, because there is a definitional section, 151, and that doesn't define "protected person." So, I mean, your first issue is great. Are the other four going to be this bad?

MR. SCHENKKAN: No, this is the only one that is both substantive, and the rest of them are --

CHAIRMAN BABCOCK: Are not great?

MR. SCHENKKAN: Should we move to the others?

CHAIRMAN BABCOCK: No, no, no. Nina.

MS. CORTELL: I would just say on protected person that I would think it would be anyone named in the protective order as being covered. Sometimes, sometimes, they have broader language I assume, so any unnamed person who's in the order, I would say that it wouldn't include

them. Anyone named in the protective order I think should fall within this category.

CHAIRMAN BABCOCK: You would --

MR. ORSINGER: See, I would agree with that, but then the proposition here is whether there is going to be a primary versus a nonprimary protected person.

CHAIRMAN BABCOCK: Yeah, but where are we driving -- drawing primary from, just for administrative convenience?

MR. ORSINGER: I don't know. That's why we're having this discussion. Isn't it fortunate? The OCA's proposal so far tentatively is to only allow one of the protected persons to make this decision, and that's the primary person, and it's not defined as what makes you primary, but logically it's the petitioner. But did the Legislature only want the petitioner to be able to have this power, or did they want anyone who was protected under the order to have this power?

CHAIRMAN BABCOCK: Well, the 17-year-old son comes in and says, "Look, you know, dad doesn't lay a hand on mom. He's just beating the crap out of me, so I'm the primary guy."

MR. ORSINGER: I agree. And then we have another question, which is, is a minor empowered to trigger this right? You know, we have disabilities and minority

relating to alcohol, relating to voting, relating to signing contracts. Does that disability extend to this statutory right as a protected person?

CHAIRMAN BABCOCK: Is the minor a protected person?

MR. ORSINGER: Sure.

CHAIRMAN BABCOCK: Well, why wouldn't they?

MR. ORSINGER: Hey, I agree with you.

CHAIRMAN BABCOCK: Yeah, Evan. Get us out of this, Evan.

MR. YOUNG: Say that again.

CHAIRMAN BABCOCK: Get us out of this mess.

MS. PIECHOWIAK: Yes, please do.

CHAIRMAN BABCOCK: That Schenkkan has created.

MR. YOUNG: If any protected person in theory could check the box that requires it to be publicly viewable, why would we not think that maybe only the person who made it publicly viewable could withdraw their choice in that way --

CHAIRMAN BABCOCK: Well, I think --

MR. YOUNG: -- so in theory you could have three different people say, "I want it publicly viewable," unless all three of them take it back, but then no other person can veto one protected person's choice. If even one

person wants it publicly viewable, I would think that that would stand, and that's not doing any violence to the statute.

CHAIRMAN BABCOCK: Yeah. Pete, what do you think about that comment?

MR. SCHENKKAN: You know, all I meant to do was open the discussion here. I don't have an idea of what the clear answer is. I just think we need one. We need to decide what we're doing on this and why and then try to do it.

CHAIRMAN BABCOCK: Troublemaker. Roger.

MR. HUGHES: Well, I agree with Richard. There needs to be a tiebreaking rule in case you have applicants who disagree, but I guess it goes back to the language of the statute. If the statute is worded in a way that they -- that upon application by the appropriate applicant it must be made public, then it seems to me the tiebreaker is whoever wants it public gets their way. But I think it goes back first to the language of the statute about what -- what the court must -- must do upon application, and if it says that upon application by a -- or the primary protected party or a protected party it shall be made public, then I think that breaks any tie or disagreement.

CHAIRMAN BABCOCK: But there are two

requirements under the statute. The first is a protected person request.

MR. HUGHES: Okay.

CHAIRMAN BABCOCK: And the second is the office approves the request. Now, that suggests that the office may have some discretion, but I suppose that's why we're making rules here. Yeah, Justice Kelly.

HONORABLE PETER KELLY: Is there some mechanism for something similar to a severance where you could duplicate the order, redact certain of the names, and make public only the portion that's relevant to the requester?

CHAIRMAN BABCOCK: David.

MR. SLAYTON: So just to be clear, Richard mentioned this earlier, but just to remind everybody, so the public is not going to see the order. The public is only going to see the information about the cause number, the name of the respondent, so I'm not sure severing would actually change the information that's available to the public. So let's just say that there are three protected persons in there. Two of them don't want it in, one of them does. Whether there's one or three of them who say they want it, the same information is going to be available. Law enforcement is going to have a copy of the order. That's who is actually going to have the actual

order, and they're going to have that regardless of whether the protected persons say they want it in or not. But the information that's made available to the public through the registry will just be the things that are specifically delineated in the statute, which are the cause number, the name of the respondent, the court that issued the case, the county of residence, the date of birth, interestingly enough. Anyway, those type of things that are specifically delineated in the statute.

CHAIRMAN BABCOCK: Okay. Any more comments on Pete's first issue?

HONORABLE TOM GRAY: It might help to note, Chip, that the statute does say that only the person who made the request to make it public can request that it be removed from the public.

MR. YOUNG: There you go then.

MS. HOBBS: And the primary protected person is not in the statute at all. That's something that y'all have come up with in these forms.

MR. SLAYTON: I don't see it anywhere in the statute.

MS. PIECHOWIAK: It's not.

MS. HOBBS: Yeah, I just did a Family Code Westlaw search, and it's not.

MS. PIECHOWIAK: No, it's not. We were just

trying to figure out what was going to be the best way to get it out there, but --

MR. ORSINGER: One way to avoid conflict between different people is to just give one person the authority to do it, but it doesn't seem to me like that's defensible under the language of statute. The statute I think gives each protected person this right, and no one else can take it away, and so OCA shouldn't take it away through the definition of "primary," and we shouldn't adopt a policy that victim two or three can override victim one. I think each victim is entitled to this right unconditionally.

CHAIRMAN BABCOCK: Yeah. And Justice Gray is exactly right, on 72.158(b) it's the person whose request under subsection (a) was granted has the right to make it nonpublic.

HONORABLE TOM GRAY: Which may make it a problem for y'all on the software if two people request the right, you're going to have to track that and then not remove it unless both of them request that it be removed.

MR. SLAYTON: I think that's possible. We just have to design it that way.

CHAIRMAN BABCOCK: Evan.

MR. YOUNG: The form could be clarified to just make it clear that it's my information that was made

public at my request, and I hereby -- that way it doesn't incentivize somebody else from trying to remove it, which the statute apparently doesn't allow.

HONORABLE TOM GRAY: Well, it could have a -- the form could have a "I have previously requested" --

MR. YOUNG: Right.

HONORABLE TOM GRAY: -- "that this information be made public, and I am now -- I am now specifically requesting that it be removed."

MS. PIECHOWIAK: Right.

MR. YOUNG: The flowchart thinking is you don't get to the point of removal unless you've clarified that you're the --

CHAIRMAN BABCOCK: Pete, before we get to your second point, could I butt in here with a comment, because it's pertinent to what Evan just said?

MR. SCHENKKAN: Of course.

CHAIRMAN BABCOCK: Kim, in the -- still in the third paragraph but this is the second sentence. It says, "Please complete the information below if you would like to make the information available on the registry website." Should we put "publicly" before "available"? Because that's what we're talking about.

MS. PIECHOWIAK: Yes.

CHAIRMAN BABCOCK: Okay. Point two, Pete.

MR. SCHENKKAN: Just like as Richard when he opened the discussion, Kim, had to explain that he wasn't being insulting to you, it's just he always raises the due process issues --

MS. PIECHOWIAK: Not offended.

MR. SCHENKKAN: -- and he's famous for that here, I'm famous for picking nits about the wording, especially when the problem is, as I see it, a risk that the users of the system who are not lawyers won't be able to figure out what it is we're talking about in doing such instances. I'm really keenly interested in making this as user-friendly as possible.

It seems to me in your introduction before you get to the information that this person would have to fill in, you have four different points. The first one is that it's -- not counting the general explanation, the first paragraph, the first one you have in bold, but you don't have it all in bold.

MS. PIECHOWIAK: Right.

MR. SCHENKKAN: You ought to finish with information about these words "are not publicly available unless you request that the information be made public."

MS. PIECHOWIAK: Okay.

MR. SCHENKKAN: Then the next sentence is a separate point and should start a new paragraph, and it

should be bolded. "If you request it, the following information will be public." And then the first sentence of the next paragraph is the third point. "You may request that it be removed at any time." That's a bold point, and then you need to make that last sentence "please complete" a separate paragraph and decide whether it needs to be bold or not.

MS. PIECHOWIAK: Sure.

MR. SCHENKKAN: So then second, in that "Please complete the information below," we're using "information below" twice, and we mean two different things behind it.

MS. PIECHOWIAK: Right.

MR. SCHENKKAN: "Information below" here meaning the cause number, issuing court, whatever, as opposed to the information that's going to be available. I think it would be helpful if you found some other word to distinguish between the two.

MS. PIECHOWIAK: Yes. Agreed.

MR. SCHENKKAN: Third, we all know what a cause number is, and maybe the kinds of folks who have been in this system long enough to have gotten a protective order have learned what it means, and I don't know whether they do or not. But just -- so just raising the question, do we need to have some, you know, very short, you know,

"the number in the court" or "the number" --

MS. PIECHOWIAK: Right.

MR. SCHENKKAN: -- "that the court gave the case" or "the case number" or something?

MS. PIECHOWIAK: Right. Absolutely. And I don't practice family law. I will tell you when I was prosecuting and people knew they had a protective order, they knew they had a cause number.

MR. SCHENKKAN: And maybe they do.

MS. PIECHOWIAK: But, also, we're kind of anticipating that there's going to be a more detailed information packet that's going to kind of go along with this.

MR. SCHENKKAN: Right.

MS. PIECHOWIAK: So they're getting more of that information, and we can certainly include this is the number we're talking about, you know, kind of thing.

CHAIRMAN BABCOCK: And, Pete, while we're in this paragraph, Kim, you may consider rather than "protected party," "protected person," because that's what the statute says.

MR. SCHENKKAN: Yeah. I was saying whatever we've come out on that would go through consistently.

CHAIRMAN BABCOCK: Yeah.

MR. SCHENKKAN: And make it work.

MS. PIECHOWIAK: Right.

CHAIRMAN BABCOCK: Sharena.

MR. SCHENKKAN: Protected person or petitioner or --

MS. PIECHOWIAK: Exactly. Protected person is --

MR. SCHENKKAN: Whatever it's going to turn out to be.

MS. PIECHOWIAK: Exactly.

CHAIRMAN BABCOCK: When I recognize somebody else, Pete, you've got to stop talking.

MR. SCHENKKAN: Sorry.

CHAIRMAN BABCOCK: I'm trying to keep control of this. It's like a democratic primary debate. Yeah, Sharena.

MS. GILLILAND: Kim, I'm anticipating these are probably being filled out maybe in the clerk's office at some point. I think a question we would probably get pretty commonly for a layperson reading this, I think the question the clerks might be getting is "If I fill in my address and my phone number, my e-mail, is that what I'm authorizing to be made public in the registry," and maybe just a small quick sentence that said, "This is just for contact purposes by the registry administrators only" --

MS. PIECHOWIAK: Right.

MS. GILLILAND: -- and not -- because I just anticipate them asking that.

MS. PIECHOWIAK: Right. And if that stays in there, then, yes, I think that that would be very good, because that's really the main reason it's there, so that we can contact them if there's a question. But, again, that may not stay in there. We may need to do that on another -- some other mechanism, but, yes, because I definitely don't want them to think that they are -- yes. Perfect. Thank you.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: So why do we want to know their address, phone number, and e-mail address, if it's possible that this has to be released under open records requests? Why do we even want to save that information and have to fight over whether it's exempt or not?

CHAIRMAN BABCOCK: David made that point earlier.

MS. PIECHOWIAK: It's probably not going to stay.

MR. ORSINGER: I see.

CHAIRMAN BABCOCK: It's probably not going to stay.

MS. PIECHOWIAK: It's not going to stay.

CHAIRMAN BABCOCK: And we've got to stick

with Pete's point number two.

MR. ORSINGER: Okay. But we haven't gotten to that, have we?

CHAIRMAN BABCOCK: Relevant.

MS. PIECHOWIAK: Yes, and like I said, that was only for -- mostly for contact purposes for in case OCA or someone else needed to contact them with the court to clarify something, but that certainly is something we can find another mechanism if we need to.

CHAIRMAN BABCOCK: All right. Pete, we're still on your point number two. Anybody else have comments on that, or do you have a comment, further comments?

MR. SCHENKKAN: No.

CHAIRMAN BABCOCK: Okay. Point number three.

MR. SCHENKKAN: Respondent's full name, the TCIC protected order data, court order data entry form, also has a provision for AKA's. I know that -- as best I can tell, I don't have the actual statute in front of me, but there are no other references to AKA's except in the TCIC entry form.

MS. PIECHOWIAK: Right.

MR. SCHENKKAN: But I would have thought an AKA was actually fairly important information if you were going to be trying to identify a -- make the identity of respondent publicly available and wonder if the Court might

be willing to read the statute to include it, and if so, if that would be a good idea or not. I don't know whether it is, but --

CHAIRMAN BABCOCK: Where does the statute talk about AKA?

MR. SCHENKKAN: It doesn't.

CHAIRMAN BABCOCK: Oh, okay.

MR. SCHENKKAN: I'm saying the only place I see AKA at the moment is in the TCIC protective order data entry form, and it's also not in a very logical place. It has "respondent name" up at the top of the form and then about six or eight lines further down in the middle of the same box that has "scars, marks and tattoos" it has AKA's, but it does have them, and I would have thought they might be important a lot of the time. Just a question.

CHAIRMAN BABCOCK: Good point. Any discussion on Pete's point three?

All right. Moving on to Pete's point four.

MR. SCHENKKAN: Down there toward the bottom "I am the" -- whatever we're going to wind up calling this person, protected person, "in the above-referenced cause number" is -- seems to me more legalistic than we need.

MS. PIECHOWIAK: Okay

MR. SCHENKKAN: "In this order." And then parallel edits to "information about this order be publicly

available," "information about this order is currently publicly available be removed." And I don't know how I got to five because I think that's it. I think that's it.

CHAIRMAN BABCOCK: You had a number five or you don't?

MR. SCHENKKAN: I thought I did, but apparently I don't. Oh, I know what it was. It was the same one we've now repeatedly talked about, this --

CHAIRMAN BABCOCK: On your also known as, section 72.154(a)(2) says "the name of a person who is the subject of the protective order." And I assume that -- is that the respondent or the requester?

MR. SLAYTON: Respondent.

MS. PIECHOWIAK: That's the respondent. I think we had this discussion last time.

CHAIRMAN BABCOCK: So if the respondent goes by a different name, it seems to me you would have authority to plug that into the --

MR. SCHENKKAN: That was my question.

CHAIRMAN BABCOCK: Right. Yeah. I would think that would give you authority to do that. Richard.

MR. ORSINGER: Judge Estevez just told me what Pete's fifth point was, and that is under "cause number," on the right, there is a space and then a blank that's not being used for anything. So we could put AKA in

there. We could take it out. We could put it in bold. We have a lot of choices.

CHAIRMAN BABCOCK: Yeah.

MR. ORSINGER: But I think we should comment on the fact that there's an extraneous blank there.

CHAIRMAN BABCOCK: That was his point.

MR. SCHENKKAN: You took responsibility for that one.

CHAIRMAN BABCOCK: That was his point number five.

MS. PIECHOWIAK: I need y'all to look at everything I write because it would be much, much better.

CHAIRMAN BABCOCK: Okay. What other -- what other comments about the form in general or --

HONORABLE TOM GRAY: Would it not be helpful to have the style of the cause number in there somewhere, like maybe on the other side of that little brief blank line?

HONORABLE ANA ESTEVEZ: Won't that identify the other people?

CHAIRMAN BABCOCK: Name of the case? I don't know. David, would that be helpful or not to have the name of the case? Smith V. Smith?

MR. SLAYTON: You know, I was sitting up here thinking to myself, if the Court ultimately adopts this,

especially if we're thinking about it -- which I would still prefer that it be filed at the clerk's office, that we actually just style it like a normal pleading would be and then put the information below it rather than -- anyway, so I think to the point, I think we would end up having the style of the case, the case number, all of that, just like we normally would at the top and then have this information below it.

MR. ORSINGER: The style never has the petitioner's name in it, or does it?

MR. SLAYTON: It is Jane vs. Joe, right, and that's basically how they are styled.

MR. ORSINGER: So we don't want the style on this form, do we, or do we?

MR. SLAYTON: Well, I mean, it's public record already now. I mean, you know, I've been advocating for basically removing the whole middle section, which is all of petitioner's information I don't think needs to be on this form, but it is the style of the case. I don't know how that information would get out. I mean, it would basically be in the file at the clerk's office, and then we would get a copy of it, but it wouldn't be made available in the public registry. Like this form isn't going to be in the registry. This is just information for us to know when to make it public and when to remove the access.

MR. ORSINGER: So but the petitioner's name is in the style, and it's in this form, and this form has to be disclosed on an open records request, then we've made the name of the petitioner more easily available than actually driving to the courthouse, parking, going inside and buying a copy.

MR. SLAYTON: So what I would suggest, one of the reasons why I want it filed with the clerk's office is because if it is filed in a case, it is a court record not subject to Rule 12. It is then just subject to the general open courts provision. They could go to the courthouse and get it. In other words, we're not the custodian of the record at OCA. The custodian of the record is Sharena in her county, and they can go get it from them, so if someone says, "Give me all of your requests to grant removed publicly viewable documents," I would respond back and say, "Those are not records subject to Rule 12. You need to go get them from all of the various clerks across the state."

So I think there's greater protection if we file it more like a court document. I mean, it's still open, but just you can't -- I don't have to disclose all of them in one swoop under Rule 12 like I would if it was just another type of document that was just sent to me.

CHAIRMAN BABCOCK: Okay. Have we exhausted ourselves with respect to this form? If so, we will take a

10-minute break, and be back at a quarter of.

(Recess from 10:34 a.m. to 10:45 a.m.)

CHAIRMAN BABCOCK: All right. What happened to Richard? Are we done with this?

MR. ORSINGER: Yeah.

CHAIRMAN BABCOCK: Or do we want to talk about some more things?

MR. ORSINGER: This has been a very valuable session. I thought it was going to last five minutes.

CHAIRMAN BABCOCK: Yeah, I did, too. So do we have anything else to talk about on this subject? Kim, you okay?

MS. PIECHOWIAK: I am good.

CHAIRMAN BABCOCK: You got what you need?

MS. PIECHOWIAK: I just want to make sure that y'all don't need me anymore.

CHAIRMAN BABCOCK: My recommendation would be escape as quickly as you can.

MS. PIECHOWIAK: Okay. That's why you see me, I'm peeling out of the parking lot like I stole something, right. Y'all have a great weekend. Thank you guys.

CHAIRMAN BABCOCK: I made a further adjustment to the schedule, unless somebody violently disagrees, because expedited actions is under a legislative

mandate, so we're going to move that up on the agenda. This is item eight, and Justice Christopher is the person on our committee who is responsible for this, so why don't you take it away.

HONORABLE TRACY CHRISTOPHER: Okay. Thank you. So if y'all will remember, we talked briefly last year about the fact that the Supreme Court needs to adopt rules to promote the prompt, efficient, and cost-effective resolution of civil actions filed in county courts at law in which the amount in controversy does not exceed $250,000. And we -- as a subcommittee, I'm not sure -- or as a group, I'm not sure we took a formal vote, but agreed that because of the overlapping jurisdictions, that these new rules should not just apply in county courts. They should also apply in district courts for cases involving the $250,000 or less amount in controversy.

So Justice Hecht gave us the name of some various resource judges to talk to. We sent them a survey on what they thought in connection with rules concerning the prompt, efficient, and cost-effective resolution of civil cases; and not surprisingly, we got very diverse answers; and we have attached the survey answers as the next attachment on your agenda.

So and you'll notice that I asked questions about Rule 169 also, because there was -- that was what we

had done to try to do the prompt, efficient, and cost-effective resolution of cases involving 100,000 or less, and so I wanted to see how people thought that rule was working, and so we asked them questions about that. We don't have to change 169 in connection with these rules. We had discussed whether or not all of these cases could, you know, fit into 169 and decided that that was not workable to put them all into a 169 format, not the least of which is that under 169 the cases are supposed to get priority for trial, and this would be a hundred percent of a county court judge's docket. And so they, you know, could not be given priority.

But one of the things that the county court judges did not -- and the district court judges did not like about 169 is giving them priority for trial, and uniformly they say just can't be done. So we have a 169 that says they're supposed to give priority, and apparently they aren't. We have a 169 that's supposed to limit trial time, and nobody follows that, and so 169 is probably not working as intended, and I don't know whether we want to try to change that.

We had several preliminary ideas in our subcommittee about what to do about these 250,000-dollar cases, and we have three potential ideas on what to do with them, and because as a subcommittee we rejected putting all

of the cases in level one because we thought level one was too restrictive for cases involving $250,000. And you have to remember that $250,000 amount in controversy does not include attorney's fees. It does not include punitive damages. It does not include interest. So we're talking about in county court -- you know, even with a 250,000-dollar amount in controversy threshold a potentially larger amount of dollars when you consider those other elements of damages.

So we talked about three different things, create a new rule 190.2, a level 1-A for these cases, just put them in either level one or two. I think we've all rejected level one, although one of the county court judges did think that they could all be handled in level one, and then our third option was to put the cases in level two, but lower the deposition limit for all level two cases. And -- and we also recommend that the Court adopt some of the previous changes that the Supreme Court Advisory Committee has already talked about and vetted in our prior incantation talking about the discovery rules, and that includes automatic disclosures instead of a request for disclosure, no discovery with the petition, changing level one to $100,000; level two, rewording the discovery period, because that's always been a problem, and adding a limit to the number of requests for production to 25 in level two,

and then we had some wording changes in the scope of discovery and limitations on discovery that we talked about a lot already.

But because we think all of those changes all fall under the rubric, I mean, we think all of our changes fall under the rubric of prompt, efficient, and cost-effective resolution. But with respect to cases involving $250,000 or less, we think those changes would have the most impact.

So what -- as you can see, specifically, question No. 2 to the various judges was should we limit discovery with respect to the higher dollar amounts. One judge says level one. Two judges say -- well, three judges say level two. Or, well, two said level two, one said less than level two, another said yes to limiting, but wasn't specific, and then we had a couple that said would not limit. So it's, you know, these answers are across the board, and so we are coming to the Court -- or to the advisory committee to get advice on which way to go in terms of drafting the rule. And so the advice we're looking for here is either creating a level 1-A, putting them in level one or two, putting them in level two but lowering the limits on deposition hours in the level two cases.

I think when we created level two and we had

that 50 hours of deposition that we were overly generous in most cases that are level two cases with 50 hours. I mean, lawyers now have gotten used to a six-hour deposition. Sometimes they are less than six hours, and you know, anecdotally, like I asked my husband who recently got a 600,000-dollar case ready for trial and plus attorney's fees, and it required five depositions, and so roughly 30 hours, and that was a 600,000-dollar case plus attorney's fees. So, you know, having the 50 hours strikes me as too high a limit in level two just in general.

If you'll remember in level two, it says it's a 50-hour limit, but you can go to the court and ask for more deposition hours if you need it, or of course you can put yourself in level three where you make a more tailored plan to your case. So that is kind of what -- we need to know which one of these things to go forward with, and that's why we're asking the committee what they think in terms of a new level for these cases that's specifically tailored to them, level 1-A would be somewhere between level one and level two in terms of discovery limitations, or level two by itself, level one by itself, or level two with a lower deposition limit.

CHAIRMAN BABCOCK: Justice Christopher, I think you said last time how these county court at law judges and the one district judge were selected. Can you

remind me?

HONORABLE TRACY CHRISTOPHER: Yes. Well, okay. We -- I'll tell you a little bit more about these. Justice Hecht gave us these potential names. Judge Ramirez, county court at law, civil only, not concurrent with the district court, and he is from Denton County. Judge Hall is a rural county court at law, multi-county judge, Nolan, Fisher, and Mitchell. Judge Rymell is county from Tarrant County, civil only. Judge Betancourt is from Cameron County, general jurisdiction county court at law. Judge Piper McCraw is district court in Collin County, and then Ana got a couple more judges for us because some of the judges we reached out to were not interested in participating, and so Ana got a few more judges for us. And so we have Judge Sirmon from Potter County, who was a county court at law judge for 20 years and now a district judge, and Judge Martindale, who is from Randall County.

So we've gotten, I think, you know, a pretty wide -- we didn't get anybody from Dallas to respond, and we didn't reach out from Houston because I kind of feel I know what the Houston courts think about -- or think on this, so that's what we've done. So no judge thinks we should limit experts in these higher cases. Well, one does, but wasn't sure how to do it. Most of them said no on trial time, limiting trial time, because courts can do

this on their own. Almost all of them thought mandatory disclosure requirements rather than a request for disclosure was a better system, and they made some changes or suggested changes about Rule 169, including something that we all thought about on that mediation issue, if y'all will remember that, and they don't like the restrictions on mediation, you know, the two that commented on it.

And one case that was interesting, one suggestion, but I don't see how we would do this absent a constitutional amendment was to enforce that cases with low dollar amounts would go into the lower courts rather than into the higher courts, but a district court I believe constitutionally has a 500-dollar limit, so, I mean, we would have to -- I suppose we could do it through a Rule of Judicial Administration. I'm not sure whether we could, you know, override that and say, you know -- but I think that's kind of outside our scope of --

CHAIRMAN BABCOCK: Right.

HONORABLE TRACY CHRISTOPHER: -- you know, what we need to do, and the reason why I asked to be bumped up is the Court has to have these done by January 1, and the Court asked us to have them completed by our June meeting so that they can take it up in their September -- or their August meeting and then get it published for comments in time for it to get done by the January 1

deadline. So that's -- we're looking for guidance on which of the three ways to go, if anyone has any advice on it or thoughts.

CHAIRMAN BABCOCK: Okay. Yeah, Professor Hoffman.

PROFESSOR HOFFMAN: I'll jump into the fray. So you will -- no one will probably be surprised to know that I'm not much of a fan of the statute, but it is what it is. Of course, it has it exactly backwards. Cases that are this small even with punitive damages tend not to be our biggest problems, so once again the Legislature is looking at the wrong end of the hose. But in any event, given that we have to deal with this, of the choices you describe it does seem to me that level 1-A does not make the most sense to me. It feels like it just adds complexity to be adding a whole new level, and it just feels like unless you can really explain why one of our existing levels is not sufficient, that sounds awful -- confusing enough as it is, that seems more confusing.

I'm also not a fan of level one for this type of case. Again, because I think it's too restrictive, and so that leaves me with level two, and then the only other comment I have is do I think the deposition limits should be lower, and my answer is no. I think the parties will manage that themselves as they do most of the time, as we

all do. Nobody wants to spend more money than they need to, and so those limits operate most of the time pretty effectively. We know that people rarely take depositions in the vast majority of cases, so I don't see that as a problem.

Bottom line, my vote would be put it in level two and leave level two as it is. The only thing I might add is it sort of bothered me for a while that level two doesn't have the same potential opt-out the way that like expedited action does, and I don't know why we wouldn't want to mirror that action, that on a showing of good cause you can explain to the court you don't belong in level two even though that's kind of the default place that it goes. Just like with expedited actions, that's where you can get out of that as well.

HONORABLE TRACY CHRISTOPHER: So what you're saying is that the 250,000-dollar cases should be in level two with the ability to opt-out, not an exclusive --

PROFESSOR HOFFMAN: Yes.

HONORABLE TRACY CHRISTOPHER: -- idea.

PROFESSOR HOFFMAN: Yes.

CHAIRMAN BABCOCK: Justice Kelly.

HONORABLE PETER KELLY: I concur with Professor Hoffman's statements for two basic reasons. One is we're seeing around the state the rise of

counter-affidavits in 18.001 situations. 18.001 was supposed to streamline litigation of establishing the reasonableness and necessity of medical expenses. Now, what's happened, there is a cottage industry, so the plaintiff would file their medical bills with the affidavit, and it would be prima facie proof that it's reasonable and necessary, and it could not be contested unless the defendant filed a counter-affidavit.

And what we've seen throughout the state and there are mandamuses in virtually every court going on right now is that the defendants are getting -- they're just affidavit mills, and they're countering these affidavits that the plaintiffs are prima facie affidavits with -- and they're just signed by, frankly, hacks, saying it's not reasonable and necessary. And that puts the issue -- so 18.001 loses efficacy and is no longer streamlining, which creates more discovery, more depositions, and so the plaintiff has to establish reasonableness and necessary, and you have a multiplicity -- and this is in relatively small suits as well that should be streamlined that are not being streamlined.

And secondly, and actually it's a case out of your court that came out last month called the Donis case, which I think has a very strict expanse -- strict or expansive, depending on which way you look at it,

application of *Guevara vs. Ferrer*, about the necessity of expert testimony to establish causation in personal injury cases.

HONORABLE TRACY CHRISTOPHER: That case is still ongoing in our court.

HONORABLE PETER KELLY: Okay. Is it?

HONORABLE TRACY CHRISTOPHER: Yes.

HONORABLE PETER KELLY: I hadn't checked that.

HONORABLE TRACY CHRISTOPHER: It would be better if we don't discuss it here at all, because I don't want people to give opinions that --

HONORABLE PETER KELLY: Okay.

HONORABLE TRACY CHRISTOPHER: -- would impact my potential view of the case.

HONORABLE PETER KELLY: I thought it had been decided in your court.

HONORABLE TRACY CHRISTOPHER: No, sorry.

HONORABLE PETER KELLY: Okay. I'll just rely on the counter-affidavits point.

HONORABLE TRACY CHRISTOPHER: Okay. So you think then level two, no changes to the depos.

HONORABLE PETER KELLY: Right.

HONORABLE TRACY CHRISTOPHER: Okay.

HONORABLE PETER KELLY: Because you have the

possibility of having to do too many depos of records custodians.

CHAIRMAN BABCOCK: Okay. Other comments? Yeah, Richard, and then Lisa. Sorry. I saw him first, Lisa.

MS. HOBBS: He's more important than me for sure.

CHAIRMAN BABCOCK: He's just got a bigger arm. That's all.

MR. ORSINGER: There doesn't seem to be any groundswell for shortening the length of depositions to less than six hours, so the focus is whether to reduce the total of 50 hours per side.

HONORABLE TRACY CHRISTOPHER: Fifty, right.

MR. ORSINGER: And I was just reviewing that rule for the first time in a long time, and I want to see if I understand this clearly. As I read this, the 50 hours is not an overall limit. It's a limit of the depositions you can take of the opposing party, their experts, and the witnesses under their control. But you could take the depositions of third parties that are eyewitnesses or other people that are not part of your 50 hours. I guess I didn't realize that until now, but the 50 hours, if I'm right, the 50 hours is not truly a cap. It's just a cap on the depositions you take of the opponent and their

affiliates.

So I've never -- I had never reached the 50-hour cap, and I, frankly, I don't know -- I would be curious if there's anybody in the room that's ever bumped up against a 50-hour cap. It's very high. It -- I think it doesn't apply to third party witnesses. It doesn't apply to your preserving people under your control whose testimony you want to preserve for trial, so my goodness, that 50 hours is pretty high and could come down. And actually, in the last five years my deposition time has dropped to almost zero. I mean, in my family law practice, people are just not wasting the time on depositions anymore.

HONORABLE TRACY CHRISTOPHER: I think that seems to be the common occurrence across the state, that a lot of cases go to trial without depositions.

CHAIRMAN BABCOCK: Yeah, Alex.

PROFESSOR ALBRIGHT: I feel like --

MR. ORSINGER: Uh-oh.

CHAIRMAN BABCOCK: Oh, I'm sorry, Lisa. Sorry.

MS. HOBBS: I would defer to you, Professor Albright.

PROFESSOR ALBRIGHT: No, go ahead.

MS. HOBBS: So I just wanted to say for what

it's worth, the Supreme Court can ignore this or not, but -- and I appreciate the Supreme Court is putting it back to us to re-examine all of these things, but the intent of the bill to -- as I understand it, as somebody personally involved with the bill, to move it from $100,000 to $250,000 was not to change the fast track of level one. It was to expand the cases that would go into level one, and so I think this is great conversation and worthy of discussion, but I really think the intent of the Legislature that would prove out to me if you listened to any hearings would mean that they were hoping to get to expand the cases that would be in the level one fast track.

HONORABLE TRACY CHRISTOPHER: Okay. Level one and fast-tracked are not the same thing.

MS. HOBBS: Okay.

HONORABLE TRACY CHRISTOPHER: So are you talking about level one, which 50,000 or less, or are you talking about expedited actions?

MS. HOBBS: Expedited actions.

HONORABLE TRACY CHRISTOPHER: $100,000.

MS. HOBBS: Yes, $100,000. So the intent was to expand the $100,000 to 250,000, and that's -- and we can all decide what a 250,000-dollar case is worthy of being, and I open this conversation. I think the Supreme Court opened -- has welcomed this conversation, but the moving

it, expanding it, was because we got data from trial lawyers, defense lawyers, construction lawyers, everybody that said this is working really well and if we expand it, it will work well for more people, and it was not a -- and you're looking at me, Judge Christopher, like you do not believe me.

HONORABLE TRACY CHRISTOPHER: Because it's not what I hear, that 169 works at all. I mean --

MS. HOBBS: Okay.

HONORABLE TRACY CHRISTOPHER: Look at the judges' responses, "no," "no," "no," no one uses 169.

MS. HOBBS: Well, I have personal experience otherwise and close friends' experience otherwise. 169 does work, and the testimony in front of the Legislature was that it did, and so for whatever it's worth, I think this is a great conversation about what we need for cases that are $250,000 or less. I'm not trying to disrupt the conversation. I am just trying to give the Supreme Court some information about the idea was to take that $100,000 that was working really well and realizing how we had defined what a small case was, was a little narrow, and that the same thing could work for cases that were 250. And that is my comment, and I'm not a litigator, so good luck telling me how many deposition hours y'all take.

CHAIRMAN BABCOCK: Yeah, you fix the messes

that the litigators make, is what you do.

MS. HOBBS: Thank you.

CHAIRMAN BABCOCK: Professor Albright.

PROFESSOR ALBRIGHT: So I feel like I'm talking like I remember when I was first on the committee, and there were these old guys who would talk about why things were decided the way they were, so now I'm in that situation. So when in 1999 when we passed the discovery rules, if y'all will remember, we had a big discussion about the number of hours of deposition time, and everybody was completely freaked out about the idea of limiting deposition time. It will never work, and so the number kept getting bigger and bigger and bigger, and types of depositions kept getting excluded.

I agree with Justice Christopher. I think, you know, we're now 22 years down the road, and people have gotten used to the idea, and I think the 50 hours plus all of the other depositions is too big, and we can now move to something simpler. I mean, even if we move to 50 hours period, it would make this rule so much simpler. I also think what we're doing is -- is making some changes to improve prompt, efficient, and cost-effective resolution of all cases, not just these smaller cases. So I think we can have an impact on lots of different cases, so I would definitely -- I'm in favor of decreasing the number of

deposition hours in all level two cases, and I think the whole idea behind the limiting deposition hours, I remember doing research on that. The states that had originally done that, they had severe limits. I think you were allowed to take two depositions or one deposition. The idea was limit it so much that the parties have to agree to take more, and it makes the conversations start. We didn't go that way because the idea was, well, that's -- our people aren't going to have that conversation. But I think if we can limit it, I think people are having those conversations, and we can encourage more conversations. So I would say 30 hours, period. 50 hours, period. Something along those lines.

CHAIRMAN BABCOCK: Thank you. Judge Wallace.

HONORABLE R. H. WALLACE: At a recent meeting of the American College of Trial Lawyers, Chief Justice Roberts said that we used to have trials without discovery, now we have discovery without trials, and in large measure that's true. And I think I'm generally all for anything to do with limiting discovery, but I think this is -- this is kind of a self-policing thing. I agree with Justice Christopher's -- and Professor Albright. I remember as a trial lawyer when that came out, trial lawyers were going, "Oh, my God, what are we going to do, we can't take a deposition for two or three days anymore," and now it's --

you know, if it's -- if it's a case that really needs more than 50 hours, they're going to ask for level three. They're going to look to get out of level two, so in a way it's a solution in search of a problem.

I just don't see -- I mean, if we lower it, the only problem may be if we lower it and somebody is in a level two, and they think they need more than 30 hours, then they're going to file a motion and have to go to court, so to me it's kind of self-policing right now. I can't recall the last time I had somebody come in and say, "Judge, we need to take more hours -- we need more hours," and the other side won't agree.

CHAIRMAN BABCOCK: Anybody else? Any other comments?

MR. ORSINGER: Well, it seems to me like nobody has addressed the question of whether we ought to have a 1-A or a two, but it -- not having studied it as closely as anyone on the subcommittee, it seems to me that we don't need another subcategory. We ought to go with two, and if you feel like it's too generous, let's reduce the overall deposition time, but not reduce the six-hour maximum for individual depositions.

HONORABLE TRACY CHRISTOPHER: So we also looked at taking 169 and making 169a, you know, for the slightly bigger cases, and, but again, it does add

complexity if we do that, and -- and as I said, so many judges have said we -- it's fine if you want to say you're in 169, but we don't reach you in the trial time that's required under this rule, and we are not a timekeeper, and no one ever asks us to do it. So now maybe it's helping because people are self-limiting themselves, but we are already asking the court to do that by changing all level one cases to be a $100,000.

So, you know, so I think -- because 169 says, okay, discovery is governed by, you know, level one, and then total time for trial, continuances, ADR, et cetera; and what judges don't like about is they can't reach it when they're supposed to be able to reach it; and we could not make that requirement applicable because 250,000 is the maximum amount, you know, required in most of the county court at law, so they can't give priority. People with general jurisdiction in county court, they have to give priority to all of their criminal cases, so we really didn't think 169 would be workable. But we could revise 169, too, and then, you know, add in just a different layer into 169. We thought the better way to do it -- I think the better way to do it would be to do level two and lower level two.

CHAIRMAN BABCOCK: Alistair.

MR. DAWSON: So I think I concur with that

recommendation, and I think you should put the 250,000 for most cases in level two, and I would suggest you just recommend that the language -- or recommend that the number of hours stay at 50 but be applicable for all depositions per side. And I also concur with the recommendation to limit the number of request for production of documents. I don't know if 25 is the right number, but put a limit on the number of request for documents. And one of the things, I've said this before, is having a limit on the number of depositions makes each side be strategic in terms of what depositions they take. If it doesn't -- I'm not often in level two, but if it doesn't include third parties, it ought to include third parties. The total number ought to include third parties, to Richard's point.

CHAIRMAN BABCOCK: Justice Gray, you had your hand up.

HONORABLE TOM GRAY: Well, I was trying to understand Lisa's comments and the history, and it seemed like to me, based on what she said, the solution that the Legislature might have anticipated was going to Rule 169 and changing $100,000 to be $250,000 and walk away from it, and I just needed to -- she's nodding her head as if that is what they kind of thought the -- in the Legislature was going to happen. And while I think some of -- as Lisa was saying, some of these other changes, like automatic

disclosures instead of requests and no discovery served with the petition, I like those changes, but that's not what the Legislature -- based on the little summary here that we have and I don't have the bill in front of me, but it doesn't seem like that's where they were headed.

They weren't headed to changing levels one, two, and three, which may be good changes, but what they wanted was to dump more cases into Rule 169 as it currently exists, and I don't see why we can't do that. At the same time maybe look at some of these changes, but to meet the deadline, the mandate, just do what they thought we would do, which I don't understand why they didn't do it since that is their job, but 169 and change it to 250 and go on down the road.

CHAIRMAN BABCOCK: Okay. Richard, you had your hand up and then Justice Christopher.

MR. ORSINGER: Well, I just wanted to say that if there's a discussion about reducing the number of requests for production of documents, it's going to present problems in some divorce cases where there is issues of separate property and community property. There's a presumption that all property on hand during marriage or on divorce is community. The party who has -- would like to assert separate property has to prove it, and some of these transactions may go back 20 years or 30 years. And so in a

lot of my divorces I have a kind of a general request that I send out, but then as the case develops and I get more specific issues surface, I send additional requests for production that are more targeted for information, and you can't cap that number effectively because in these cases, as you get deeper into it where you're dealing with 10 or 20 years worth of transactions, to put an arbitrary number on there is to cut off someone's substantive claim.

CHAIRMAN BABCOCK: Yeah. Justice Christopher had her hand up, but then Lisa wants to call, you know, BS.

MS. HOBBS: I just wanted to say family -- if we go with the changing 169 family law cases are excluded from it.

HONORABLE TRACY CHRISTOPHER: No, not anymore. That got changed. So I'm sorry I don't have my previous memo here, but that -- those exceptions were removed from the Government Code. When -- so if you'll remember this Government Code provision, it had a paragraph about $100,000 or less cases, and it had these exceptions, and at one point in time the Legislature was going to just change that provision to 250, but they didn't. They instead made a whole separate paragraph about cases involving $250,000. And they deleted -- I'm pretty sure they deleted a couple of those things, including the Family Code. Like I said, I don't have my other memo with me.

So --

HONORABLE TOM GRAY: But the rules --

HONORABLE TRACY CHRISTOPHER: There was a -- there might have been an idea that these cases were all going to go into 169, but that's not what they passed. They kept the 100,000-dollar cases separately and then they added a second paragraph about 250,000-dollar cases. And if you'll remember, there is a big difference between Rule 169 $100,000 because it includes damages of any kind, penalties, costs, expenses, prejudgment interest, and attorney's fees; and the 250 amount in controversy in a county court case does not exempt those things. Those are on top of the 250,000-dollar jurisdictional limits of the county court. So maybe at one time they were thinking of putting them all in 169, but I think they changed it, and that -- I mean, you know, 100,000 total cap is a really big difference from potentially a million-dollar total cap when you talk about damages and fees, and --

CHAIRMAN BABCOCK: Yeah. Professor Carlson.

PROFESSOR CARLSON: So, Justice Christopher, what you're referring to on the 250,000 limit, that used to be 200, is the default provision for county court at law?

HONORABLE TRACY CHRISTOPHER: Right.

PROFESSOR CARLSON: Yeah. So the way you calculate the amount in controversy for those courts is

different than we do it under the common law, as you point out.

HONORABLE TRACY CHRISTOPHER: Right. Right.

PROFESSOR CARLSON: We don't include attorney's fees and costs and punitives and things like that, so it could be a much larger number, and I read a case last year, and I'm sorry I don't know the style, I don't have it -- he's rocking. Where a court of appeals, I don't think it was Houston, held that although it looks like Rule 169 limits recovery to 100,000, the plaintiff in that case sought damages exceeding it. I can't remember the dollar amount, but let's just pretend it was 300,000 and then once they applied the percentage of fault, it came down to like 99,000, and the court of appeals said that's an expedited action and that's okay. So it could be something higher if that court of appeals is correct.

HONORABLE TRACY CHRISTOPHER: How did it come up as a point of error?

PROFESSOR CARLSON: I don't know. I was just reading --

HONORABLE TRACY CHRISTOPHER: I mean, was somebody complaining that they were too limited?

PROFESSOR CARLSON: Yes. That the plaintiff could only recover 100,000 at the end of the day.

HONORABLE TRACY CHRISTOPHER: Right.

PROFESSOR CARLSON: Or less than 100,000.

HONORABLE TRACY CHRISTOPHER: Right.

PROFESSOR CARLSON: And they said since your lawsuit was for more than 100,000 for actual damages, that it didn't fall under Rule 169. So the discrepancy there was whether it really was in 169 or wasn't and could the judgment be upheld for that amount. So it could be -- if that court of appeals is right, I don't know if they are, it could be a much larger number than 250.

CHAIRMAN BABCOCK: Yeah. Professor Albright.

PROFESSOR ALBRIGHT: One thing, I'm looking at 169 right now, and it includes $100,000. It's cases -- monetary relief aggregrating $100,000 or less, including damages of any kind, penalties, costs, expenses, prejudgment interests, and attorney's fees, but I think Rule 191.2, level one, is written differently; is that correct?

HONORABLE TRACY CHRISTOPHER: Right.

PROFESSOR ALBRIGHT: Which is another huge confusion place, because 169 puts all of these cases into level one for discovery.

HONORABLE TRACY CHRISTOPHER: Right.

HONORABLE TOM GRAY: But that's discovery. That's not the merits of the case or amount of the judgment, if you will.

HONORABLE TRACY CHRISTOPHER: Right. It's just discovery.

HONORABLE TOM GRAY: It's just the discovery level.

PROFESSOR ALBRIGHT: Right.

HONORABLE TOM GRAY: Even though it's above the $50,000. We've got that now. $50,000 for level one, but yet 169 is $100,000.

PROFESSOR ALBRIGHT: Right. But they're calculated different ways. So --

HONORABLE TOM GRAY: Which the cap in level one discovery doesn't matter with regard to 169.

PROFESSOR ALBRIGHT: So 169 you are limited to the amount you can recover, but level one you are not? I can't remember.

HONORABLE TOM GRAY: I don't know that -- it doesn't matter what the cap in level one would be, because the cap that's relevant is 169's cap, and it's only the limits on discovery from level one that apply to cases under 169.

PROFESSOR ALBRIGHT: I'm just saying as a human being reading these rules and trying to figure out which -- where your case falls when you're trying to file it, it's a mess.

HONORABLE TOM GRAY: Well, see, we don't care

about the human beings because we're Autobots or whatever.

(Laughter)

CHAIRMAN BABCOCK: Note the laughter, Dee Dee, please, that we don't care about human beings. Justice Christopher.

HONORABLE TRACY CHRISTOPHER: I just want to remind Richard that we have been asking for a tailored request for disclosure in divorce cases --

CHAIRMAN BABCOCK: Forever.

HONORABLE TRACY CHRISTOPHER: -- for years.

MR. ORSINGER: And you know what, you've had one for years, too. We can go back and dig it out.

HONORABLE TRACY CHRISTOPHER: Not that I ever saw.

MR. ORSINGER: So when this all first came up when we were going to have the request for disclosure, there was a movement, I think instigated by the Supreme Court, for various practice areas to come up with required disclosures, and I remember Terry Tottenham did one for medical malpractice, and I was on the committee at the Family Law Council that did one for family law, and they were all duly submitted through the committee and referred -- I don't know whether they were referred to the Supreme Court or not.

About every 10 years it comes up, so I go

back in my old, old, files and re -- reinvigorate them, and I can do that again, Justice Christopher, now that I know that you're frustrated over that.

HONORABLE TRACY CHRISTOPHER: Well, but I believe in connection with our last discussion just like a year or so ago, when we -- our group urged the adoption of mandatory disclosures that I said I need your list.

MR. ORSINGER: Okay. Well, I'm going to rebuke myself, and I'm going to try to redeem myself by sending --

HONORABLE ANA ESTEVEZ: That's family violence against yourself.

MR. ORSINGER: Right. So am I a protected person? Okay. I will try to dig that up, and I will send that to you for whatever use you may have for it.

CHAIRMAN BABCOCK: Yeah, you're not going to out "I've been around here longer" than him.

HONORABLE TRACY CHRISTOPHER: No, no. I'm just reminding him of his continuing duty to supplement.

CHAIRMAN BABCOCK: She may have you there, Richard.

MR. ORSINGER: I know. I have to give up now. It's just going to get worse.

CHAIRMAN BABCOCK: Exactly. Okay. Back on track. Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, maybe a straw vote first, who thinks the idea of a separate category 1-A is a good idea.

CHAIRMAN BABCOCK: Okay. Everybody that thinks a separate category 1-A as defined, raise your hands.

MR. PERDUE: Representing --

HONORABLE TRACY CHRISTOPHER: This class of cases --

MR. PERDUE: -- county court cases pled under 250?

HONORABLE TRACY CHRISTOPHER: Not just county court. District court also.

CHAIRMAN BABCOCK: Okay. 1-A. Everybody that thinks 1-A would be a good idea? A half a hand.

Everybody thinks it would be a bad idea? Okay. That one fails. 15 think it's a bad idea. Half a person thinks it's a good idea, and not only the Chair but a bunch of other people not voting. All right.

HONORABLE TRACY CHRISTOPHER: Okay. We had one county court judge who thought level one discovery was sufficient for cases involving $200,000. It didn't seem like there was any support in this group for that.

CHAIRMAN BABCOCK: Lisa, then Justice Gray.

HONORABLE TRACY CHRISTOPHER: Oh, there is.

All right. Let me hear it.

HONORABLE TOM GRAY: If you do the other vote, maybe this is where you're headed, then all we need to do is change the hundred to 250 in 169, and that's level one discovery for cases up to $250,000 then.

HONORABLE TRACY CHRISTOPHER: Right.

HONORABLE TOM GRAY: And so that's why I'm raising my hand now, for a limit on discovery in these cases to level one.

HONORABLE TRACY CHRISTOPHER: Okay.

HONORABLE TOM GRAY: Because I think that's adequate. And I think it's what the Legislature was really after.

MS. HOBBS: Same.

MR. JACKSON: Is that with the expectation they'll be expedited? I think that's where some of the judges are getting crossways with it, is they wouldn't -- they would fall in line with all of their other cases.

CHAIRMAN BABCOCK: Yeah.

MR. FULLER: Theoretically it could make the backlog more because I think the thought is that more people will choose an expedited action if the amount you could recover is more, thus the 100 to 250, but if you had more people choosing it, what I'm hearing from the judges is that's just going to mean you -- it takes longer to get

there because we can't get to the 100,000-dollar cases right now, so if you're going to increase that number, it's just going to get worse.

CHAIRMAN BABCOCK: Lisa.

MS. HOBBS: If I can say, I've never been involved with or heard of a mandamus of somebody who did not get a case reached on 169. Of course, their criminal docket needs to take precedence over their civil docket. That does not make 169 unmeaningful. Also, from what I heard through a lot of back and forth with different contingencies on this issue, which I have spent a lot of time talking about, is we're -- yes, trial dates are good, but only because they incentivize settlement.

So when you say what do the judges think about 169, that is a narrow focus, and it doesn't talk about what the lawyers think about 169, because if you can cheaply get rid of a bunch of disputes about discovery, get the things you need to know that actually get the information that is critical to that -- evaluating the case and valuing the case, and then get it settled because you have a trial date, that is a -- I know we can't write rules that talk about, you know, what happens before you get to trial, but I do think we can't ignore that that's one of the big purposes and driving forces and why people like 169 who are not judges.

CHAIRMAN BABCOCK: Yeah. Justice Christopher.

HONORABLE TRACY CHRISTOPHER: I would be really interested to talk to whoever it is that claims 169 is working and being used. I have seven county court judges who all say "no," "no," "no," "no," "no."

MS. HOBBS: I just said the judges --

HONORABLE TRACY CHRISTOPHER: No, this is whether it's being used, whether people are asking for it. "Has anyone asked for it in your court?" And the answer is "no."

HONORABLE ANA ESTEVEZ: I'm only aware of one.

CHAIRMAN BABCOCK: Judge Estevez, one. Lisa, you're saying it's being used, right?

MS. HOBBS: My -- yes. And, look, I'm not going to go to bat for this. I think that's what was intended, but I think 169 is being used. I think people get small cases, and we can -- and the Legislature decided what was a small case, right. We say $100,000 is a small case. I think the Legislature is now saying $250,000 is a small case, but the fact remains is we don't need -- we need to expedite these, and they get settled more quickly when we expedite them, and people are happy with that, so --

CHAIRMAN BABCOCK: Okay. The vote is going to be on whether or not we apply level two.

HONORABLE TRACY CHRISTOPHER: Apply level one first.

CHAIRMAN BABCOCK: Apply level one first. Okay. Do you want to frame the question for what we're voting on?

HONORABLE TRACY CHRISTOPHER: Yes. Should the discovery limits in level one apply to $250,000 plus cases. .

CHAIRMAN BABCOCK: Okay. Everybody in favor of that, raise your hand. Everybody opposed? Okay. Five in favor, 16 opposed. Chair not voting. Anything else you'd like to get a sense of?

HONORABLE TRACY CHRISTOPHER: So that leaves us with level two as our default, and then the next question is do we want level two to be reduced? Should we make changes in level two across the board?

CHAIRMAN BABCOCK: Okay. Discussion about that.

HONORABLE ANA ESTEVEZ: Can I just ask a really stupid question because I've been thinking about what she said at the very beginning and rereading our assignment over and over again to see if I could interpret it the way that she's stated. I'm sorry, but actually

that's a good thing.

MS. HOBBS: It's great. I love this discussion.

HONORABLE ANA ESTEVEZ: So my question is, if we put it in expedited actions under Rule 169, would we be done if all we did was raise the limit to 250,000? Because that's always an optional; and so if it's 250,000 or less, it can still be level one, it could still be level two, or they could still go under level three; but they would just have that expedited action option without us doing anything else. And that may be a very dumb question because I probably should have been somewhere way before.

PROFESSOR HOFFMAN: I think it turns on the question of whether the $250,000 is limited to all damages or not. I haven't seen that language, Tracy, that you're talking about.

MS. HOBBS: It's in the statute.

HONORABLE ANA ESTEVEZ: The statute says, so in reading the statute, "In addition to the rules adopted under subsection (h), the Supreme Court shall adopt rules to promote the prompt, efficient, and cost-effective resolution of civil actions filed in county courts at law in which the amount in controversy does not exceed 250,000. The rules shall balance the needs for" -- and it's all the normal rules. So if all we did was give them the option of

an expedited action for cases 250,000 instead of the 100,000, then there's a rule that's been adopted. They can go under level one or level two or level three, or they can go ex --

MS. HOBBS: Okay. Can I just -- I think a clarification --

HONORABLE ANA ESTEVEZ: Is that what you said?

MS. HOBBS: -- on two comments that have been made. One, Judge Christopher said to me judges are saying people aren't asking for 165 -- or 169. People don't ask for 169. It's a pleading requirement. It happens whether they ask for it or not. I think I'm right on that, and someone correct me if I'm wrong on that. Same thing to your thing. They're not opting into it. 169 is if your pleadings say this, which currently is $100,000, but now will be $250,000 if -- depending on what this committee recommends to the Court, then these -- you shall comply with these limitations and --

HONORABLE ANA ESTEVEZ: They have to tell us it's expedited.

MS. HOBBS: Well, they may have to tell you, but this says it shall, so there's nothing -- either they say -- if they plead the amount, as I understand, and I am an appellate lawyer, so God love all of the trial lawyers

here can correct me on this. I'm just reading a rule, but I understand that if you plead yourself into 169, you plead yourself into expedited actions, and when you do there are consequences for your pleading. Hey, if you want to plead yourself out of that, say $100,000 and one cent as your damages.

HONORABLE ANA ESTEVEZ: It could be it's on the civil sheet, but I'm going to say there's something they have to check that puts it in ours as expedited or under Rule 169.

MS. HOBBS: Well, David is not here about what the civil sheet says, but I'm guessing it does because we adopted the civil sheet about the same time as we adopted 169, and it has categories.

HONORABLE TOM GRAY: We repealed the sheet.

MS. NEWTON: We repealed the sheet.

MS. HOBBS: Oh, there's no sheet.

MR. ORSINGER: But there's still a form to fill out when you file, but that's not implicated by her comments. You still have to check the boxes.

MS. NEWTON: Well, because of e-filing all of the information that was on the sheet now --

MS. HOBBS: So now if I go to e-file and I am doing an expedited action, under $100,000, I will check a box that says, "I am filing my original petition," and

there is a box that I check that says it's under $100,000.

MS. NEWTON: I don't know the answer to that.

MS. HOBBS: I think -- well, I think that was the point of repealing the sheet, is that you just entered all of the information when you -- now, I haven't done it, because again, I'm an appellate lawyer, so but my understanding is that the boxes you checked when you e-filed gave OCA the information they need to track these other cases, which would be similar to what we were filling out.

MS. NEWTON: Yes.

CHAIRMAN BABCOCK: Justice Gray, and then Justice Christopher.

HONORABLE TOM GRAY: I'm going to have to apologize to Lisa because in part she was relying on my reading --

MS. HOBBS: I was.

HONORABLE TOM GRAY: -- of 169, and I have now found Rule 47, which if you do it the way we're thinking it needs to be done will also need to be amended because it is a pleadings requirement of claims for relief, and it --

MS. HOBBS: Yes, you're right.

HONORABLE TOM GRAY: It has a statement. It has to include a statement that "except in suits governed

by the Family Code" -- that's the Richard exception -- "a statement that the party seeks the $100,000 of monetary relief." So that is where it would come under, in effect, a pleading requirement, but still, as Lisa was saying, the lawyer controls that. It's not -- the judge may never know when they sign the dismissal because the suit is settled that that was an expedited action.

MS. HOBBS: Yes.

CHAIRMAN BABCOCK: Okay. Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Okay. Back to Jim's question. Subsection (h) is talking about the amount -- the $100,000 or less, and it specifically says that it's inclusive of all claims for damages of any kind, whether actual penalty, attorney's fees, expenses, costs, so we use that language in 169. The new provision does not use that. It says the amount in controversy does not exceed $250,000. The amount in controversy is the jurisdictional limit of a county court case, and that has been interpreted to mean 250,000 in damages with attorney's fees, punitive damages, interest, penalties on top of it.

So, my understanding, that's why they didn't change (h) to $250,000. Instead they adopted (h)(1), because otherwise we would have this weird subset of county court cases of -- you know, there would be -- almost all

cases would be -- you know, in each one, except for the ones where you're asking for, you know, penalties and interest and punitive damages and et cetera, so the idea of (h)(1) was to capture every possible case in county court.

MR. PERDUE: Is this the bill that went to 12 jurors in county court?

HONORABLE TRACY CHRISTOPHER: Yes.

MR. PERDUE: Same bill?

HONORABLE TRACY CHRISTOPHER: Yes.

MR. PERDUE: Yeah, this one was ground up a bunch.

HONORABLE TRACY CHRISTOPHER: Yes.

MR. PERDUE: There's some sausage in this. That's the problem.

HONORABLE TRACY CHRISTOPHER: Yes. Okay. So I guess my next vote would be do -- do we want to put these cases in 169 and make changes to 169?

CHAIRMAN BABCOCK: And when you say "these cases" you're talking about 250 --

HONORABLE TRACY CHRISTOPHER: 250 plus. I call them 250 plus.

CHAIRMAN BABCOCK: All right. Everybody in favor of putting 250,000 plus into Rule 169, raise your hand.

All opposed? Five in favor, 13 opposed.

HONORABLE TRACY CHRISTOPHER: Okay. Then my next question is are people in favor of limiting discovery in level two? Because based on these votes our plan would be to put them in level two, and then the question is whether we want to limit discovery in level two.

CHAIRMAN BABCOCK: Okay. Discussion about that? Roger.

MR. HUGHES: Well, I'm going to ask for information here.

CHAIRMAN BABCOCK: No, no, no. No information.

MS. HOBBS: We vote blind.

MR. HUGHES: What was the sense of the Legislature? Were they concerned that discovery in cases in 250,000 was just way too much is going on, because 250 would automatically -- normally would fall into level two, so it would seem that if they wanted level two to be much cheaper, then they're going to want narrower discovery. Not that I agree with it, but, you know, the Legislature says do it, so I guess my sense is what was their intent?

CHAIRMAN BABCOCK: Anybody have any insight? Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I mean, I agree with you. You can't just dump them in level two and do nothing else, because that doesn't seem to be complying

with the statute, which is why I posited the 1-A to begin with, but then -- which would have limits somewhere between one and two. But then a lot of people on our committee said that's too complicated, what we need to do is lower level two, and that would be a response to the legislative request, in our opinion. It would be. Plus some of the other changes that we also think would be useful to make -- that we've talked about that are on my list. So I do have concerns if we don't do something to level two, if we just put them in level two and don't do something.

CHAIRMAN BABCOCK: And what changes to level two do you think are appropriate?

HONORABLE TRACY CHRISTOPHER: Well, definitely I would like to add the document request, and I would like to lower the deposition hour limit. I mean, those are the two things.

CHAIRMAN BABCOCK: Lower the hour limit, but keeping it confined to parties and people under their control and expert?

HONORABLE TRACY CHRISTOPHER: I didn't really even think about that, and we'll come back with different proposals on that when we think about that some more.

CHAIRMAN BABCOCK: Okay. Yeah, Professor Hoffman.

PROFESSOR HOFFMAN: One more time into the

fray. I don't understand. I'm now even more confused than when I started. So I don't understand why we would tighten level two for all cases, not just county court cases and not just cases limited to $250,000. We have no legislative directive to do that. Agree?

HONORABLE TRACY CHRISTOPHER: Right.

PROFESSOR HOFFMAN: So instead you're responding to this legislative directive, which is just to write rules to promote prompt, efficient, cost-effective resolution of county court cases where the amount in controversy doesn't exceed 250. Which, side note, is -- as I've said before, doesn't make any sense. But even -- but excepting that I didn't get to vote on that, why would -- unless we think as a policy matter they are right and that they are so right we ought to apply it to this rule that's been in effect since 1999, I don't understand why we would want to make things worse. And in my mind it would be making it worse to mess with all level two cases, so -- so where I end up with this is I'm like -- we have to do what the Legislature told us to do, but the Legislature is super unclear here.

They could have said put these cases subject to 169. It's been on the books for this whole time. They parroted language that they used in 2011, with the hundred thousand-dollar rule, the prompt, efficient, and

cost-effective, but then they didn't parrot that same language in terms of the amount in controversy. And we know 169, one of the big hammers, right, is if you plead -- if you are an expedited case you can only recover $100,000, and yet this one explicitly seems to not go that way.

So all I can say is we have an ambiguous directive from the Legislature. That's why my recommendation, particularly given that I don't think this is very good policy, would be we put it in level two. I think that satisfies the legislative requirement. If the Legislature doesn't like the way we did it, they'll let us know when they amend the statute again and say what we meant was stick these in 169, but they clearly haven't done that. They certainly haven't done anything clear. They certainly haven't done that.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I also think increasing level one cases across the board to $100,000, will also be in response to this bill. Okay. But I think, just in terms of when we're talking about it and how these rules have operated in practice, that our deposition limits are too high and that, you know, we had previously thought you needed document request limits; and that was the recommendation of our committee; and that would have applied to, you know, all of level two. Both of

those -- both of those changes were not in response to this.

CHAIRMAN BABCOCK: Yeah.

HONORABLE TRACY CHRISTOPHER: But then looking at it and trying to think to ourselves, well, do we do a 1-A and if we do a 1-A, you know, what would be a good number of hours, and then our response is, well, most level two cases don't get anywhere near the 50 hours.

PROFESSOR HOFFMAN: So what harm is it doing then?

HONORABLE TRACY CHRISTOPHER: Well, I mean, we're -- we are making a limit that then people have to come to court, and level two says we'll have this limit, but you just come to court if you need more, which I think would satisfy yours and Justice Kelly's concern about, you know, well, they've done these counter-affidavits so I need to go take these five doctors' depositions, you know, to get to my hours in, and I -- I just think it would be good for the system to have a lower limit, frankly, so --

PROFESSOR HOFFMAN: I guess my vote, Tracy, is just there may be lots of changes to our discovery rules that we ought to do, and obviously we've had this conversation in here fairly recently a lot, but there's nothing in the amendments to 22.004 that require that we do that. And so our normal mode of operation when we're given

a charge from the Legislature, particularly here when we have to do it by January 1, is to be responsive to what they've asked us to do. Here they've asked us to write rules to cover cases where the amount in controversy doesn't exceed 250. We can do that. We can put those into level two. That's one that would be responsive to what they've asked.

CHAIRMAN BABCOCK: Okay. Alistair.

MR. DAWSON: So I respectfully disagree with Professor Hoffman. I mean, and I share a -- for two reasons. One is I have a concern that if we say, okay, you only told us we had to come up with a rule, we're just going to slot you into our existing rule, that the Legislature will come back and say, okay, you didn't listen to us, you didn't accomplish what we wanted, so now we're going to make you put it in Rule 169, which I don't think is a good thing, for cases that are between 100 and 250,000.

And separately, if it's part of this process we discover that there are things in the existing rules that could be improved, then why not take advantage of this opportunity to make those changes? And I do think that there are improvements that could be made. I mean, I said earlier I think you could limit the number of depositions, and I think a limit on the request for documents, maybe you

make that just to the parties, so it doesn't apply to if you have to get third party discovery, but those -- in my mind those are improvements to the rule, and we ought to take advantage of it.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: He just asked why don't we just do all of these changes to the discovery rules. I understood Justice Christopher to say that we had a time frame required as a practical matter that we complete whatever work we're going to be doing between now and the end of June meeting, if we have a meeting in June. That being the case, I think that's the answer to your question, why don't we review or do a whole wholesale discovery review, which brings me to the point that I agree with you, Professor, that if you simply add to section two saying all cases 250,000, within the legislative definition, you have complied with the Legislature. If they disagree with us, they say, no, we meant for you guys to put it in 169, then you put it in 169. Otherwise, you've done what they've told you to do.

Had the Legislature not passed this law we wouldn't be discussing it. I agree with you that there is need for changes in the discovery rules. I'm not so sure that we need to cut down depositions and what have you. Part of the price of justice is time. We're after justice.

We're not after efficiency. That's the purpose of the law, is to do justice based on truth. That's the purpose of law and why we're here. Sometimes you have to cut corners and reduce it, but it isn't money that we're trying to save here, but I think the professor's solution is a great one since we've rejected putting it into 169. Thank you.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, these are things that we have talked about extensively in this committee, so we would not be rushing to do anything. Because we extensively discussed having a request for production limit in level two, and it passed in this committee, and we extensively discussed having automatic disclosures instead of request for disclosures,and it passed, so -- and I know the Court has said on occasion that they like to do big changes all at one time rather than piecemeal, because that, you know, helps people say, oh, well, these are the, you know, 2020 changes to the discovery rules, the new discovery rules versus the 1997 discovery rules.

So we have discussed these changes, and in my mind they're ready to go and they should be part of the package when we make these changes for this 250 cases.

CHAIRMAN BABCOCK: Okay. Anybody else?

MR. PERDUE: But the -- but the legislative

enactment is not a change to (h). It is a creation of a (h)(1).

HONORABLE TRACY CHRISTOPHER: Correct.

MR. PERDUE: Which is specific to county court.

HONORABLE TRACY CHRISTOPHER: Right. But we discussed because of the fact that we have overlapping jurisdiction between county court and district court and, in fact, in a couple of courts where they have -- where they have overlapping jurisdiction, you don't even get to pick whether you want county court or district court. It just goes in and gets assigned and that it would be kind of crazy to have one set of rules just for county courts, given the system of how our county courts work.

MR. PERDUE: But and maybe Lisa can remind me of what the compromise was that led to (h)(1) versus -- because my recollection is there was a constituency that was quite frustrated with county courts in certain jurisdictions and the concept of concurrent jurisdiction and wanted in one version of a court reorg bill to get rid of those, which had political pushback.

MS. HOBBS: Yeah. So we have a few still that exist --

MR. PERDUE: Right.

MS. HOBBS: -- where the county court at law

is the same jurisdiction as the district court. I think there is a commitment in the Legislature that we're going to not create those anymore. Either you get a district court, county court, but this whole idea of a county court -- but I guess, I mean, as I'm reading the bill and maybe I'm wrong, Judge Christopher. It's 2342 by Creighton?

HONORABLE TRACY CHRISTOPHER: Yeah.

MS. HOBBS: Okay. It says the rule shall apply to civil courts and district courts, county courts at law, and statutory probate courts. I think the number 250 was intended to coincide with what the traditional county court at law -- like at least newly created county court at laws will be, but I think it -- there's nothing in here that's saying we're writing a rule that would apply to county courts at law. Like it would apply to any trial court that had a jurisdiction where you could file something for $250,000 or less.

MR. PERDUE: But that's not what it says.

PROFESSOR HOFFMAN: I don't think so, Lisa.

HONORABLE TRACY CHRISTOPHER: No, that's not --

PROFESSOR HOFFMAN: So just to be clear, the only change that the Legislature made to (h) where you were reading, that list of courts --

MS. HOBBS: Yeah.

PROFESSOR HOFFMAN: -- is they just eliminated the very, very end of it where it used to have the if it conflicted with Chapter 74, Family Code, and those went away, and the new language in (h) just says "under statutory law." That's the only change to (h). So no substantive change in terms of the courts or the dollar amount or anything. The addition is (h)(1), as Jim was just saying --

MS. HOBBS: Okay, sorry, I got it.

PROFESSOR HOFFMAN: -- which is limited to the courts at law.

MS. HOBBS: I was looking at the House version instead of the enrolled version.

MR. PERDUE: I think it ended up being a different bill.

MS. HOBBS: Thank you. Yeah, sorry.

CHAIRMAN BABCOCK: So, Justice Christopher, the vote would be whether we should amend or suggest changes to level two discovery plan.

HONORABLE TRACY CHRISTOPHER: Yes.

CHAIRMAN BABCOCK: Okay. So everybody that is in favor of making changes to the level two discovery control plan, raise your hand.

MR. DAWSON: Come on, Hoffman.

MR. PERDUE: Can I be a half a person?

CHAIRMAN BABCOCK: No. All of those opposed?

MR. ORSINGER: The nonvoters have it.

CHAIRMAN BABCOCK: 15 in favor of change, four against, Chair not voting. All right. So now we're going to have change. Change is good.

HONORABLE TRACY CHRISTOPHER: Then I guess the -- I mean, now we know where to go, and I've come up with sort of a question on the fly here that's not in the memo, that I haven't discussed with the committee, but if I have time, can I just throw this one out?

CHAIRMAN BABCOCK: Yeah, throw it out.

HONORABLE TRACY CHRISTOPHER: Are we going to allow people -- are we going to allow county court cases to move into level three? Are we going to force county court cases to stay in level two? And if we did that, that again would be extremely responsive to the bill, okay, which might make Lonny happy.

HONORABLE ANA ESTEVEZ: What about the ones that have full concurrent jurisdiction? So they have to be able to do level three.

HONORABLE TRACY CHRISTOPHER: Well, no, we could say all $250,000 cases have to stay in level two.

HONORABLE ANA ESTEVEZ: Well, you just said county court at law.

HONORABLE TRACY CHRISTOPHER: Yeah. That's true.

HONORABLE ANA ESTEVEZ: So I didn't understand.

HONORABLE TRACY CHRISTOPHER: You're right. That wouldn't work. Never mind. You're right.

PROFESSOR HOFFMAN: But see, Tracy, if it's under $100,000 you can still opt out of level one and go to level three.

HONORABLE TRACY CHRISTOPHER: Yeah.

PROFESSOR HOFFMAN: So you're asking -- okay, I must not be understanding you right. You want to know whether or not we should have a rule that says if you're in a county court at law and your case is up to $250,000 in compensatory damages, you're stuck in level two. There's no way to get out of it.

HONORABLE TRACY CHRISTOPHER: Yeah.

PROFESSOR HOFFMAN: But if you have a 100,000-dollar case, if you're in county court at law or some other court, just as 169 now says, you can opt out of that for level three.

HONORABLE TRACY CHRISTOPHER: Yeah. But we could also change level one to say no opt-outs, too.

PROFESSOR ALBRIGHT: To clarify --

CHAIRMAN BABCOCK: Professor Albright.

PROFESSOR ALBRIGHT: -- the opt-out is for a showing of good cause. It's not like you can just say "I'm out."

PROFESSOR HOFFMAN: Right. But why would we -- that's totally inconsistent to me. Why would you have a good cause option for cases under $100,000 in any court, but have no good cause if you have 250,000, but only in county court at law?

HONORABLE TRACY CHRISTOPHER: So if you're in level one, if you plead level one, and you change your pleading and so you're no longer in level one, then discovery has to reopen, and you're either in level two or level three.

MS. HOBBS: No. The judge has to agree to it.

HONORABLE TRACY CHRISTOPHER: Right. Right. If the suit is removed or the filing of the pleading renders this subdivision no longer applicable, the discovery period reopens.

MS. HOBBS: Right, because remember that when you plead into a 169 case, you're limited to those damages under current 169.

HONORABLE TRACY CHRISTOPHER: Yeah, he's talking about level one --

MS. HOBBS: I know, I was just telling you

why we have the get out of jail, like you have to get a judge to agree to --

HONORABLE TRACY CHRISTOPHER: Right.

MS. HOBBS: -- to change it.

HONORABLE TRACY CHRISTOPHER: Right. But in normal level ones that are not 169, if you plead more than 50,000, then discovery automatically reopens. You fall into level two or level three.

PROFESSOR ALBRIGHT: I have a --

CHAIRMAN BABCOCK: Professor Albright.

PROFESSOR ALBRIGHT: I have a clarification question. So I've just been looking at level one and 169, and after hearing you and remembering things, although my memory I think is from the old days, I think there are no level one cases other than Rule 169 cases except for --

MS. HOBBS: 50,000.

HONORABLE TRACY CHRISTOPHER: 50,000.

MS. HOBBS: 50,000 or less.

HONORABLE TRACY CHRISTOPHER: Level one is 50,000.

PROFESSOR ALBRIGHT: Yeah, but level one is -- are also expedited actions or discovery is governed by 190.2 --

HONORABLE TRACY CHRISTOPHER: Right.

PROFESSOR ALBRIGHT: -- which is level one.

HONORABLE TRACY CHRISTOPHER: Right. But it's still different. Because you've got to plead it.

PROFESSOR ALBRIGHT: Well, but okay, so 190.2 applies to expedited actions, Rule 169, and any suit for divorce where you plead between zero and $50,000. So I think -- I mean, I had forgotten this, but this looks to me like there are no level one cases except expedited action cases and little divorce cases. Am I right?

MS. HOBBS: That's not how I remembered it, but yes, you're reading the rule correctly.

PROFESSOR ALBRIGHT: Because when we wrote level one, it was like 169 in the sense that if you plead it, you're $50,000, you're limited to $50,000, and you can't recover more than $50,000, but now it's gone up to 100 in Rule 169.

MS. HOBBS: I think the -- you can't receive more than what you pled -- pleaded, is I think that's what we decided in 169. I'm not sure that was the original.

PROFESSOR ALBRIGHT: Well, it was in -- I remember it being in the original, but --

MS. HOBBS: I could be wrong, too, but I thought that you could move around more easily --

PROFESSOR ALBRIGHT: Well, for good cause.

MS. HOBBS: -- and so you did 169, and 169, the big controversy we had in here on 169, because it's the

same language that we're looking at right now, and the question we debated back and forth then was is it "may" or a "must," like are we going -- and we decided -- we didn't decide. We gave recommendations to the Court who then decided it was going to be mandatory, and if you pled into it, you were going to be limited in your damages. That's not in the statute. That is by rule, 169, that you can't recover more than $100,000 in an expedited action. I don't think that that was level one in the beginning.

PROFESSOR ALBRIGHT: I remember it was part of the old rule, too, but it may have been a little wishy-washier.

MS. HOBBS: Right, right, right.

PROFESSOR ALBRIGHT: The way it is now you plead 50,000-dollar case, you plead a 75,000-dollar case, you plead 100,000-dollar case, you're in Rule 169 unless you can call -- have good cause to get out.

MS. HOBBS: Well, because now you've limited everybody to all of these things, so if you want to get the benefit of limited discovery then you're going to stay in it until a judge tells you you can get out of it.

PROFESSOR ALBRIGHT: Right, but it's a lot more than discovery.

MS. HOBBS: No, no, no, it is. It's a lot more than discovery, but you're getting advantages to it,

and we can't let a case go for six months, assuming this is the value of the case and the amount of money that we're going to spend on the case and then suddenly right before trial you remove yourself from it. Like that was the compromise.

PROFESSOR ALBRIGHT: No, that was what the rule was originally, too.

MS. HOBBS: So I'm not sure about that.

PROFESSOR ALBRIGHT: Well, we can --

MS. HOBBS: Whatever.

THE REPORTER: Okay, guys. You can't talk at the same time, please.

PROFESSOR ALBRIGHT: Anyway, so what we would be doing is if there's -- so I agree. 250,000-dollar cases are now in level two, by default. Unless they're taken out to level three or whatever. So those of y'all that are talking about putting these 250,000-dollar cases into level one, I guess we have a choice of whether to put them into 169 or to amend 190.2, which is level one, and say if you're between 100 and 250 you're only under the discovery limitations of level one and we're not putting you under the expedited action, other parts of it other than discovery. That would be an option as well.

CHAIRMAN BABCOCK: Professor Carlson.

PROFESSOR CARLSON: Yeah, I agree with what

you said in the beginning there, Alex, that these 250,000-dollar cases are already in level two, right?

PROFESSOR ALBRIGHT: Right.

HONORABLE TRACY CHRISTOPHER: Right, today.

PROFESSOR CARLSON: Unless somebody opted out to a custom level three.

HONORABLE TRACY CHRISTOPHER: Right.

PROFESSOR CARLSON: And the reason, right, Lisa, was we didn't want someone to game the system, plead a case as a 99,000-dollar case, have limited discovery, and then be able to recover more, limiting the other party's discovery unfairly. But on the other hand, we said you can get into a level one case and it could be worth a lot more than you thought; and if you get into discovery and you figure that out, there ought to be a way for people to get out of level one and be able to recover more than 100,000.

MS. HOBBS: With a judge.

PROFESSOR CARLSON: With a judge.

PROFESSOR ALBRIGHT: And that's an amended pleading also.

HONORABLE TRACY CHRISTOPHER: Within a limited time period, though.

MS. HOBBS: It's a time period and a judge.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: I just wanted to clarify on

the point that Elaine just made, is that you don't have the option to plead from level two to level three. It requires a court order, which you can get by agreement, or you can file a motion and fight your opposition, but you can elect to plead in or out of level one into level two, but it requires the court to order that you move from level two to level three. And level three may be less than level two. I mean, it's up to the court to design a tailored discovery package, but it's a little bit different. You can't just plead in or out of it.

CHAIRMAN BABCOCK: Yeah. Justice Christopher, are we looking to today vote on specific changes to level two, or is this a matter of where having gotten the authority 15 to 4 to make changes to level -- or proposed changes to level two, that you want to go back to your subcommittee and work on that, or do we need to keep going?

HONORABLE TRACY CHRISTOPHER: That's fine. We can -- we can come back.

CHAIRMAN BABCOCK: Okay. Come back is your preference?

HONORABLE TRACY CHRISTOPHER: That's fine. That will be fine.

CHAIRMAN BABCOCK: Anybody opposed to that? Professor Hoffman.

PROFESSOR HOFFMAN: I think Alex has a nice idea, and it may just be I am seeing momentum shifting in the other direction, and that's fine, but I think her notion of amending level one so that there can be this up to 250 now but that you're not subject to all of the other strictures to 169 is an interesting idea for the subcommittee to think about. Because it sort of accomplishes what you want without doing a wholesale revision to level two.

HONORABLE TRACY CHRISTOPHER: Level one is only six hours of depositions.

PROFESSOR HOFFMAN: I'm aware of that. You also have the opt-out. You can -- as long as you build in, you know, a good faith motion option.

HONORABLE TRACY CHRISTOPHER: Well, that kind of sounds like 1-A, which was, you know, an original idea that we would have, you know, totally tailored set that -- and that got rejected, or though, actually not a lot of people voted on it. Maybe -- maybe you're trying to move us more back towards a 1-A.

CHAIRMAN BABCOCK: Okay. Yeah, Professor Albright.

PROFESSOR ALBRIGHT: I have one other question. I know there's been a lot of discussion, at least in our committee, about the difference between a

100,000-dollar case and $200,000 is a big deal. I don't know what -- what is the difference? I just Googled what is $100,000 in 1999 is equivalent to 150 -- basically $155,000 now. So is the difference between one and two -- I guess it's 250, not 200, but is the difference between 100 and 250 so significant that they should be treated differently?

PROFESSOR HOFFMAN: I think the bigger difference is the issue that one is all-inclusive as drafted and one -- and the other is definitely not. That that is the $100,000 under 169 is everything all in as 169 was written, and the new statutory language is just the amount in controversy. So that seems -- as Tracy has been saying, that seems to indicate attorney's fees, punitive damages, would all be separate, so that number could be a bunch higher.

PROFESSOR ALBRIGHT: And we can't -- we are not allowed to say to put it in expedited action we need to make it the way it works.

HONORABLE TRACY CHRISTOPHER: Well, we could, but then we would have this weird set of cases in county court that were 250 all-inclusive and then 250 not all-inclusive. You know, but I mean --

PROFESSOR ALBRIGHT: You just say -- if you put it 169, $250,000 as it's written, I guess it would

apply to -- I guess the issue is which cases would it apply to in county court.

HONORABLE TRACY CHRISTOPHER: Right. Or district court.

PROFESSOR ALBRIGHT: I need a chart.

CHAIRMAN BABCOCK: Okay.

MS. HOBBS: There would be a lot of asterisks.

CHAIRMAN BABCOCK: So the subcommittee is going to study this further, and we're going to put this on the agenda, high up on the agenda, for our next meeting, and we'll now break for lunch for half an hour, and we'll be back here at 12:45 to continue.

And before I do that, Bill, do you still want to flip your -- you don't need to?

HONORABLE BILL BOYCE: I'm fine to go now in whatever order works best.

CHAIRMAN BABCOCK: Okay. Well, you would be next on the schedule. Elaine, do you care whether we do the parental leave continuance rule after Bill's suits affecting the --

PROFESSOR CARLSON: That will be fine.

CHAIRMAN BABCOCK: Okay. All right. So we'll do Bill's suits affecting parent-child relationship and out of time appeals and then we'll go to parental leave

continuance rule after lunch, and back at 12:45. Thanks.

(Recess from 12:13 p.m. to 12:47 p.m.)

CHAIRMAN BABCOCK: Let's get back to work.

HONORABLE BILL BOYCE: So this is a resumption of a conversation that started at the last meeting regarding parental termination appeals. You've got an updated memo in your materials that covers actually our last meeting and the meeting before that. By way of a brief overview, there are a number of issues captured by the referral to the committee and captured by the House Bill 7 task force addressing appeals and procedures in parental termination cases and related questions such as how to address out-of-time appeals and procedures for that.

If you look at page two of the memo, the current memo, the February 28th memo, you'll see issues for discussion. We are still at stage 1(a). The subcommittee is taking this one stage at a time dealing here first with the preliminary aspects of notice of right to appeal and the actual procedures at the conclusion of a termination proceeding leading to appeal, and we're going to unpack that a little bit.

There are subsequent discussions that we're going to have related to untimely appeals, claims for ineffective assistance, and so on and so forth. At the September meeting we talked about the notice and citation

issues. The last meeting, the November 1st meeting, we talked about authority to appeal and addressing what I think Richard Orsinger had referred to as concerns about phantom appeals. Appeals taken by counsel on behalf of absent parents whose rights have been terminated where it may not be clear and it may not be feasible at a particular time to determine whether or not the parent actually wishes to challenge the termination, and so this can create a situation involving pursuing an appeal as a protective matter in the absence of a clear indication that there isn't a desire to appeal, to go ahead and pursue that appeal, and that has consequences in terms of how the dockets work. It has consequences potentially in terms of having a record created for an appeal that the appellant may or may not want to pursue. That was kind of the overview.

So we talked at some length last meeting about mechanisms for trying to determine intent to appeal. The task force had proposed a rule that would require the statement in the notice of appeal that the attorney has conferred with the client and the client does indeed wish to appeal. There was discussion -- and I'll certainly throw open the floor after this preamble because I know that there are folks who have specific experiences with these types of cases, and we've talked to some of them, but

there was concern about the situation that a parent may not be present at the trial that leads to a termination order or judgment. What then? How do you address whether or not there is intent to appeal?

There also may be a situation where a parent or a putative parent is absent because they've never been part of the case. They were named as an alleged parent or a presumed parent, have never made an appeal -- an appearance in the case. You may also have a situation where a parent has been intermittently involved in the case, but for various reasons may fall in and out of participation in the case, may or may not be at trial because of circumstances that may involve untreated mental illness, incarceration, fear of domestic violence, homelessness, any number of reasons, substance abuse, other things that may cause a parent whose rights are being litigated to come in and out of the case at different times.

So the upshot I think of our last discussion at the November 1st meeting was a committee -- a full committee vote in favor of approving a mechanism for a judicially signed order or certificate or certification, the terminology kind of varied a little bit, but at the conclusion of the proceedings leading to a termination order to have a judicial certificate or order stating

whether or not there was a basis to conclude that the parent whose rights were being litigated wished to appeal. This was kind of the direction that the committee's comments and discussions had gone into, in a somewhat different direction from the proposal of just requiring certain language in the notice of appeal that says "I talked to the client and the client wants to appeal."

So we go into the direction of having a determination. We had some discussion around the question of when that might occur, is that going to be a discussion or a determination that's made at the conclusion of the trial court proceedings, is it going to be at some point later on when an actual judgment gets signed, and that's kind of where the discussion ended in broad terms at our last meeting. And so we took this information back as the subcommittee, discussed it, and also reached out to address the underlying question of how to deal with the circumstance of a parent who is absent in determining intent to appeal for an absent client parent.

And I know Lisa had had some comments about this. I talked to Lisa's colleague, Karlene Poll, about it, who has handled many of these cases, and the takeaway that I had from the front lines of folks working on appeals in this space was that it is potentially problematic to infer an intent not to appeal on behalf of an absent parent

whose rights have been terminated, primarily because of circumstances where the parents may come in and out of the case for the reasons that have already been summarized, may not be there at trial, but may come up -- come back into the scene later on after judgment has been signed and then may express the desire to have the appeal go forward.

So the subcommittee's discussions and recommendations brought back to this full committee for consideration is this: If we're going to have a procedure that asks a trial court to make a determination with respect to intent to appeal and that's going to kick off the next stages of whatever the procedures are for how the appeal unfolds and when it unfolds, that -- that some caution needs to be exercised about having the parents' absence serve as an indication as lack of intent to appeal. And we can talk about whether this is a fact finding or a presumption, you know, we can unpack that, but the basic point that I took away from kind of the front line report was that there may be an appropriate conclusion that can be drawn from the absence of a parent who has never made any effort at all to participate in the termination proceedings. They've -- they're there only procedurally because somebody has been appointed to represent their interests, but they themselves have not participated in any way. That's one narrower circumstance.

The broader circumstance is the parent who is intermittently involved in the case, drops away for a period of time, and then comes back into the case, and the subcommittee's takeaway from this and the point I would ask for a discussion and guidance on is if we're looking at a rule, potentially it would be part of existing Rule -- Texas Rule of Civil Procedure 306 which talks about specific requirements for judgments in parental termination cases. If we're talking about adding to that to flesh out a procedure for determining intent to appeal based on a trial court determination, then any kind of inference drawn about parental absence would want to be narrowly drawn in terms of the parent who has not ever participated or been part of the case. And if we're in a circumstance where the parent has participated intermittently but is not presently there when it's time to decide whether to try to appeal or not, that that absence would not be a sound basis to have a trial court say we think that it is not an intent to appeal, so appointed counsel is discharged, and there's not going to be an appeal.

That's the overview of the stage we're at right now. So, Chip, I would solicit reactions or comments to that.

CHAIRMAN BABCOCK: Okay. Richard.

MR. ORSINGER: I'd like to make four points

if I'm allowed.

CHAIRMAN BABCOCK: Yeah. Where's Schenkkan? Is he -- you know, he would probably want you to do six just to keep ahead of him.

MR. ORSINGER: Okay. So the first thing I wanted to comment on is that this area of the permanent termination of the parent-child relationship, United States Supreme Court has repeatedly said that the relationship between a parent and a child is a fundamental right under the 14th Amendment, and any law or I guess rule that transgressed that would be held up to a strict scrutiny standard. And so with an -- in making this discussion we're not just talking about default judgment against somebody that might have a judgment -- a money judgment taken against them. We're talking about a fundamental right.

Number two, a countervailing consideration which the Legislature has repeatedly sent to the Court, who has referred it to us, is that excessive concern about due process of law connotes delay in permanent placement of children who are eventually going to be adopted, and the more time you spend fooling around with the termination decision, pursuing anyone's preference for due process, is coming at a cost to the child. That's -- the Legislature, in my opinion, has said that to us repeatedly; and so we

have to balance, I think, the fact that we are taking away a fundamental right through the action of the government, but that in many, if not most, of these cases the evidence is overwhelming that there was grounds for termination; and perhaps you could say that the evidence is overwhelming that termination is in the best interest of the child.

And so all you're doing by piling due process upon due process upon due process is you're not really increasing due process, you're just delaying placement. So to me that makes this a less obvious question. Because just naturally by my background and the fact that I'm a lawyer I tend to think man, oh, man, we're talking about a fundamental right here, we ought to be sure that there's plenty of due process of law, beyond anyone's desire we're meeting all these concerns about taking away this fundamental right. On the practical side, though, a lot of these cases are open and shut, and they're going to get affirmed on appeal, and the question is how many -- how many appeals, how many months or years of an appeal.

The next thing is on this phantom appeal question is the wasted resources. We waste a lot of resources in this state in conducting appeals in termination cases for people that either don't know or don't care that they were terminated, and it's a problem that family lawyers talk about. It's a problem that court

of appeals justices talk about, probably county commissioners as well, because they have to pay for all of this; and so if there's some way, if we can either be clever or if we can maybe cut a little corner on due process and somehow take away the waste of appealing cases when nobody cares about an appeal, including the party whose due process rights we're protecting.

And my fourth point is based on prior discussions I'm very concerned if the individual lawyer appointed to appeal makes the decision that an appeal should not go forward, a free appeal, by a court-appointed attorney, because I think that puts too great a burden on the individual lawyer to make a judgment call that's a policy decision that balances constitutional rights against the cost of free legal care and everything else. So if we have a phantom appeal problem, my preference is for it to go back to the judge, for the appointed lawyer to have a job to make an effort to contact the person, find out what they say, report what they say back to the court; but it seems to me that the judge ought to be the one that decides that there's going to be no free appeal rather than the lawyer. And the lawyer could be sued later, the lawyer doesn't have the resources, and the lawyer really doesn't have the authority to make a decision that these services from the state are not going to be available.

CHAIRMAN BABCOCK: Richard, the appointed lawyer is representing the terminated parent, correct?

MR. ORSINGER: Right. And --

MS. HOBBS: Well, be clear, are you talking about the appointed trial lawyer or the appellate lawyer?

MR. ORSINGER: I'm talking about any of them.

CHAIRMAN BABCOCK: That's what I was trying to --

MR. ORSINGER: We have had discussions, and of course, I was on the task force, so I may confuse some of our discussions there with our discussions here, but you're in, if you're a trial lawyer you're in until you're relieved by the court, but a lot of trial lawyers are not competent or not interested in handling the appeal, and so there has to be a transition between the trial lawyer and the appellate lawyer. And the appellate lawyer is coming in new and knows nothing about the case, and the trial lawyer is on the way out, maybe doesn't know anything about appeals, so they're not filing a motion for new trial, they're not requesting findings of fact and conclusions of law in a nonjury trial, so there's just a lot of difficulty about that transition.

CHAIRMAN BABCOCK: Well, that aside, what if the appointed lawyer goes to his client, the terminated parent, and says, "Hey, I'm here, I'm free, I'm for you,"

and the terminated parent says to that lawyer, "You know, this is in the best interest of the child, I don't want to appeal." What's his duty there?

MR. ORSINGER: So in my view, the lawyer -- what I think is the best solution is for there to be a hearing in which the lawyer tells the judge what the client said and then the judge makes a decision about whether the appeal will be discontinued or waived or no one will be appointed for the appeal.

CHAIRMAN BABCOCK: So we have a rule that requires the lawyer to breach the attorney-client privilege.

MR. ORSINGER: No. It's not a breach if the client consents to the disclosure.

CHAIRMAN BABCOCK: Well, no.

MR. ORSINGER: My suggestion as a practical solution to that is when you conduct that interview with your client you tell them that I'm conducting this interview with the purpose of getting -- finding out what you want so I can tell the court and the court will know whether to appoint a lawyer for your appeal or not. If the client won't waive confidentiality then the trial lawyer can't speak.

CHAIRMAN BABCOCK: And the trial lawyer can't pursue the appeal either, if the client tells him not to.

MR. ORSINGER: No. I don't know that that's true.

CHAIRMAN BABCOCK: Client says, "I don't want you to appeal."

MR. ORSINGER: I think you're -- I think the trial lawyer is required by the appointment to pursue the appeal even if the client tell him no, but I don't think we have a case on that, but when you're -- the cases indicate that when you're appointed as a trial lawyer you have to carry on through the case until you're relieved, which I think everyone who has studied it agrees that that includes appeal. I stand corrected if somebody has a better idea, but I think that if you have a -- if you've been appointed and the client has said, "I don't want you to appeal, but I don't want you to tell the judge that I told you that," then the lawyer is in a quandary, because he's been appointed or she's been appointed to see the case through the end, so I'm not sure --

CHAIRMAN BABCOCK: If he gets it in writing, "I do not want you to appeal this adverse ruling against me."

MR. ORSINGER: So then I have to go into the trial judge and say I'm not going to -- you know, "You appointed me to this case, but I'm not going to fulfill my obligation to pursue the appeal for reasons I'm not going

to tell you."

CHAIRMAN BABCOCK: No, just say, "Your Honor, my client doesn't wish to proceed any further, so I'm not going to."

MR. ORSINGER: I think that's fine, but haven't you just compromised a potentially confidential conversation if the client won't agree to release of the information?

CHAIRMAN BABCOCK: Maybe.

MR. ORSINGER: So it seems to me that -- I just don't like a private lawyer appointed to do a public service to make a decision to waive a fundamental constitutional right. I would prefer that that decision be made based on a hearing in a court in front of a judge so that the lawyer is not ultimately responsible.

CHAIRMAN BABCOCK: Lisa.

MS. HOBBS: If I could just -- Justice Boyce, remind me where we are. I thought that at least the house bill -- and again, like Richard, we're both on the HB7 committee, so we're probably mixing up what we've talked about in committee versus what we've talked about in this committee. But we're -- I thought right now we were talking about not what obligation you might have as an attorney if you have a client who's elected not to appeal, because I think what we -- and maybe, again, this isn't

this committee, but at least HB7 had said you'll put a certification in your notice of appeal that you did talk to the client and they do want to appeal, and, Richard, you may or may not be right that that's some limited waiver of attorney-client privilege, but I thought we were past that and that right now what we're dealing with is a client that we're having a hard time getting a hold of, right?

HONORABLE BILL BOYCE: Yes. That is the continuation from our discussion last time.

MS. HOBBS: Okay.

CHAIRMAN BABCOCK: Roger.

MR. HUGHES: Well, I just had a question. It seems to me we're dealing with something I call robo appeals. In other words, the court-appointed attorney just sort of gets on autopilot and drives on continuously. So I guess my real question is what percentage of these termination cases do we have where the parent represented by the appointed counsel just never shows? I mean, they got served or whatever, and that's it, nobody ever hears from them again. And then what percentage are ones where we have the -- I guess you might call the in and out parent, who may have participated in some hearings and then disappears? I mean, I'm kind of wondering what the percentages are we're dealing with.

MS. HOBBS: I can't talk about specific

percentages, and I doubt we have that kind of deep data anywhere in the state, but I think you have cases where there's a putative father or presumed father, that may never show up, right. It's just maybe it's presumed because you were married or whatever, and they just have never participated, or just never showed up if the mother claims that their the father. I'm using mother and father, like I'm not trying -- y'all know what I'm talking about.

But I do think a bigger chunk of people -- and those are -- those are easier ones. And that's what Justice Boyce started off saying. Like if we're going to have any presumption, it should only be with people who just never participate in the process at all, but this other category of people that's the harder category is when they have intermittent participation, and we can judge why they didn't show up for different hearings or whatever, but they have shown some, you know -- they've acknowledged fatherhood or parenthood, and they've shown up and maybe because of all these reasons that Justice Boyce said, homelessness, mental illness, addiction, incarceration or whatever. They have intermittently participated in the process, and I think that's the harder group of people if you're going to try to deal with what people perceive to be a problem, which is these phantom appeals, which I'm not even sure is a big problem, but I think that's what we're

trying to address here.

MR. HUGHES: Well, the other thing is -- and maybe I'm jumping ahead. Is there any recognized practice of filing Anders type briefs --

HONORABLE TOM GRAY: Yes.

MR. HUGHES: -- in these cases?

MR. ORSINGER: Actually that's part of this process that the House Bill 4 task force was put together, was to suggest what to do about Anders in termination cases and whether -- whether they're appropriate, and I think that the committee has already taken the recommendation --

MS. HOBBS: It's a Supreme Court opinion. You have Anders briefs in these cases. You cannot withdraw without an Anders brief.

MR. HUGHES: Okay. Thank you.

MR. ORSINGER: But there's also the question of whether you have to withdraw after an Anders brief.

MS. HOBBS: Right.

MR. ORSINGER: I thought we debated that and made a recommendation, but perhaps not.

MS. HOBBS: But as the law currently stands because of the Texas Supreme Court opinion, there is an Anders process.

MR. ORSINGER: Uh-huh.

MS. HOBBS: We might seek to refine that

process, but there is currently a process on these cases that there will be some sort of Anders process.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: As the intermediate appellate court I just need clarity of what the rule is and we'll do our best, but the one thing in the trial process in getting there that I think the Court in making the rule really needs to be aware of is the interplay between what we're doing here with this issue and the ad litem appointment process that we talked about before and the scope of the ad litem in these cases, because if the ad litem is charged only with making sure that the service of process was adequate and that the person is, therefore, in court but not charged with representation of the person's interest, which would lead normally to a default, because there's no answer filed, what does that mean for me as the appellate court of a default in a termination case?

But more importantly, what does it mean to the parent that never got into court, if you will, that never showed up in court, and then what happens on the appeal in this process? Because it's presumptive at that point that they're in court. They've been served by some lawful process, acceptable under due process. They're there, and but yet they weren't actually represented by an attorney. And so it is a -- that overlay -- where those

two issues come together, the ad litem's responsibility and this potential for a need for a notice of appeal come headlong together to figure out what needs to be done.

CHAIRMAN BABCOCK: Okay. Richard.

MR. ORSINGER: So to follow up, Justice Gray, to me the policy associated with appointing an ad litem where you have citation by publication and the expectation there's no actual notice in civil matters should be handled completely differently from the appointment of a lawyer to represent a parent in a government-sponsored termination case. And I don't -- I am not aware that anyone is suggesting that a lawyer appointed to represent a parent in a termination case should do anything other than fight the very best they can to stop termination, but if that is a proposal, I would strongly resist that because the role of an attorney appointed to represent a parent in a termination case is, if you will, the last safeguard that the parent has of a fundamental constitutional right that the case made against them is supported by evidence and evaluated by an independent member of the judiciary and maybe an appeal after that.

To me a citation by publication in civil cases, the policy issues there, although they do implicate due process, they don't implicate a fundamental right, and so to me they ought to be treated separately, and that

ought to be made clear if it's not clear.

HONORABLE TOM GRAY: Well, it is not clear. I can tell you that in the ad litem appointment arena that we've struggled here in this committee with in making the recommendations to the Court. The other thing that complicates these is that the parent may actually be there for the pretermination decision process when the department first takes custody of the child before the termination decision is made by the department, but then for whatever reason the parent is not there at the time that that termination decision is made, and service of process then may become complicated upon the parent and the -- but there may already be a lawyer involved and that out of ultimate caution the trial court had already appointed.

All I'm saying is that bear in mind when we're looking at the ad litem rule and this process where you can get appointed to a case for other than representation purposes, and I'm talking about where we talked about the determining the adequacy of the service of process and wherever that rule goes, they don't necessarily match up perfectly in the representation. Because if the parent is truly unlocated and the lawyer comes in and does everything that he thinks -- he or she thinks needs to be done, doesn't know if he's representing what the parent wants or not, he's just in there trying to stop what the

government is doing, and I'm all for that. Now, I'm smiling now, for the record, but any time you can stop the government is a good thing.

CHAIRMAN BABCOCK: Says a member of the government.

HONORABLE TOM GRAY: And a lot of what I do apparently needs to be stopped, I don't know. But the point is there is some very serious interplay in this area that is not clearcut because of the definition of the role of what is the ad litem supposed to be doing. And, of course, that bleeds over into -- I don't think it's on the agenda for today, but the default aspect of the rule and what happens if you really truly have a default in a termination case where the parent is clearly served and just doesn't show up for court.

MR. ORSINGER: It's my understanding that the department still has to make their case even if it's a default. Does anyone know for sure?

HONORABLE TOM GRAY: There is no case law on that.

MR. ORSINGER: There is no case law on that?

HONORABLE TOM GRAY: Not that we were able to find when the issue came up.

MR. ORSINGER: Is there a departmental policy to put on a case on the merits, or do they just take a

default and scoop it up and leave?

HONORABLE TOM GRAY: The description of the record I saw was a meeting where they just yucked it up in front of the judge.

MS. HOBBS: I think more likely than not --

MR. ORSINGER: The people I have talked to have talked more about having a prove-up hearing, but I don't know if that's --

MS. HOBBS: I know one of --

MR. MUNZINGER: Richard, remember you're speaking to the whole room.

MR. ORSINGER: I was saying in my conversations with DPRS lawyers they have suggested to me that they have merits hearings even when they are default, but I don't know if that's true because --

MS. HOBBS: Well, and a lot of times remember that you have one parent who has shown up, so you will have a hearing as to the termination of parent A, and then sometimes the complication gets involved when parent B is not participating. So, yeah, DFPS has -- there is a merits determination of some kind as to parent A, and whether -- whatever DFPS might do for parent B, who knows, but I think a lot of times one parent is showing up, and it's the second parent not showing up that's creating some of this problem.

HONORABLE TOM GRAY: And a lot of times it's a parent that they haven't been able to find.

MR. ORSINGER: Which means they may have been served by citation.

CHAIRMAN BABCOCK: Bill, you said that we're at stage 1(a) in terms of our recommendations?

HONORABLE BILL BOYCE: Yes.

CHAIRMAN BABCOCK: Or have we moved beyond that?

HONORABLE BILL BOYCE: So the answer is yes. Stage 1(a), the preliminary steps leading up to whether or not an appeal gets perfected before we move to addressing and then what.

THE COURT: Yeah. Well, is there -- is there a consensus about whether the indigent parent has a right to counsel on appeal?

MR. ORSINGER: The Supreme Court has ruled that they do, as a matter of constitutional law.

CHAIRMAN BABCOCK: So that would be a consensus.

HONORABLE TOM GRAY: At least nine people saw it that way. It was unanimous.

CHAIRMAN BABCOCK: So we have stepped over that hurdle at stage one, and then notice of right to appeal, that's certainly established, right?

MR. ORSINGER: We discussed giving notice and citation. I know the task force on House Bill 7 recommended that the citation, which should be in Spanish as well as English, would contain a disclosure that if you lose the case, you know, you're entitled to an appeal to the Supreme Court and a lawyer will be appointed if you're indigent. That sets up the idea that there's notice, and, therefore, there's waiver, but is that a good notice, and is that a solid waiver? I mean, that remains to be discussed.

MS. HOBBS: And then we discussed, too, that the judge at the final termination hearing would reiterate that right to counsel and possibly put it in the final judgment. Those are all conversations we have had --

CHAIRMAN BABCOCK: Yeah.

MS. HOBBS: -- that I'm not sure where we are on it.

THE COURT: Do we need further discussion on that?

MR. ORSINGER: And I would point out a distinction --

MS. HOBBS: Or not.

MR. ORSINGER: -- on the criminal side is that the judges -- I think when I practiced criminal law, I think they still do, give the defendant notice that they

can appeal the case and et cetera, et cetera. But the defendant is always there or almost always there when that conversation occurs, but in a default judgment or a parent who's vanished during the trial they're not there to get that admonition from the court, so then what do we do? We deputize the poor ad litem to try to find him somewhere in the western hemisphere? I mean, so what do you do after that?

CHAIRMAN BABCOCK: So you think there shouldn't be notice beyond what's in the courtroom?

MR. ORSINGER: I don't think notice in the courtroom is effective for the phantom appeals because by definition the client is not participating in the discussion about whether to have an appeal.

MS. HOBBS: Well, under the rules they should somehow get a copy of the judgment.

MR. ORSINGER: Well, they're going to mail it to whatever address they don't live at anymore.

MS. HOBBS: Right.

MR. MUNZINGER: Your discussion contemplates proper service on the parent whose rights are being terminated that you just had. Why would the citation form -- if it were to be amended, why would the citation form not be sufficient notice to a person in that capacity if it explains in detail that if you lose this case, you have a

right to appeal, if you personally do whatever, come to court and say you want to appeal it or something else? In most criminal cases there is no mandatory appeal. The only one I know of is a capital murder case. There is mandatory appeal in a capital murder case. I think it's whether the person got the death penalty or not, but there is a mandatory appeal in capital murder but that's the only mandatory appeal I know in criminal law. I may be wrong. I'm not a criminal lawyer.

But why -- I do understand why you have to have due process at the -- to take away a parent's right. I'm all in favor of that. At the same time, if the citation puts the onus on the person as distinct from the onus on the attorney who was appointed, why has he not had due process? Would a default judgment be valid? I get my citation, we're going to take away your rights to be a daddy, and I don't go get a lawyer? And the judgment is entered. Did I have due process? I was given notice and a right and an opportunity to be heard, and I chose not to appear or to say a thing. Are default judgments in this area no good? If they are good, isn't part of the problem cured by addressing the nature of the citation in this type of a case? It's a suit brought by the State of Texas. I understand that's what we're talking about. The State is taking away a person's right to be a parent. If they've

been served and all of that notice is put in the citation, why have they not received due process?

MR. ORSINGER: Well, you know, to me a strong argument can be made that if citation notice is sufficient to support a default judgment, it should also be sufficient to support a waiver of appeal --

MR. MUNZINGER: I agree with you.

MR. ORSINGER: -- if it's in the citation, which it isn't right now.

MR. MUNZINGER: Absolutely.

MR. ORSINGER: Secondly, I am not sure that default judgments are the same in termination cases as they are in civil -- ordinary civil litigation. Justice Gray has said that he's not aware of any requirement that there be a merits proof to support a default judgment in a parental termination case. My understanding from talking to the lawyers who do it is that they do feel like there's an obligation to do a merits prove-up.

HONORABLE ANA ESTEVEZ: I've always had one if someone didn't show up.

MR. ORSINGER: And what did you do with it?

HONORABLE ANA ESTEVEZ: Like I probably terminated. What do you mean? I heard it. Yeah, I heard it. I heard the merits, so they proved up the case like you would prove up the damages in a default case.

MR. MUNZINGER: Yeah, because the standard in a default judgment, if you have unliquidated damages they set them aside all the time because you didn't put on your evidence of unliquidated damages.

HONORABLE ANA ESTEVEZ: Well, then I just wait to see what I have to do next, and the court of appeals tells me.

MR. MUNZINGER: So if process requires proof sufficient under the statute to take away the child and the person has received and been served with citation, giving him notice that he's involved in this case, that he has a right to appeal if he pursues it. If he doesn't pursue it in person or otherwise, he waives it. If the notice does all of these things, why is that not sufficient due process? I agree with you, Richard, that you can make due process -- who was it, some judge said the Constitution is not death by suicide. We can go too far in doing due process, but we need to do due process. But why is this fellow not bound by a notice that tells him these rights?

HONORABLE ANA ESTEVEZ: Richard, I think sometimes it's just a question of what -- oh, I'm sorry.

CHAIRMAN BABCOCK: Judge.

HONORABLE ANA ESTEVEZ: Richard, I think sometimes it's just a process of, you know, that the litigants are looking at these type of cases, and there is

a high reversal rate on these, and it is a lot easier when everybody is ready to go, to go ahead and put it on and take 15 minutes. So whether it's a due process or it's required or it's not required, to me the better practice is to have it so tight that it's not going to go anywhere.

MR. MUNZINGER: You're saying the appellate courts are reversing cases?

HONORABLE ANA ESTEVEZ: I'm saying the Texas Supreme Court, when you look at parental cases they seem to be reversed at a higher rate to me. I mean, maybe I just notice them a lot more.

MR. ORSINGER: There's a lot more --

MS. HOBBS: Yes.

MR. ORSINGER: -- on appeal, so you notice a lot more reversals because there's a lot more cases up there.

HONORABLE TOM GRAY: The Supreme Court doesn't take them to affirm them. We know that.

MR. ORSINGER: The complaint I hear from the courts of appeals justices is that they are becoming overwhelmed with these appeals, and I understand that that's even having an impact on the Supreme Court and the staffing as to how to allocate the resources to deal with all of these appeals. So it's a growing problem, and it's not -- I mean, this is a good time to address it, but,

Richard, I happen to agree that maybe we don't need any more due process than the citation. Maybe we don't need an extra special step to be sure that they are waiving their appeal, but if they're participating and they have a lawyer, we know that they're going to get plenty of advice about having an appeal.

So the question is what do you do about these people that are -- have checked out, either they never checked in or they checked in and they checked out? Did they know when they walked away from it that they were likely going to lose? Do they care? Do they want to appeal? The question is do we have to like reverify with them that they are no longer interested in the case? And I think you can very easily make a policy decision, if the notice and the citation is good enough for a default judgment, the notice and the citation is good enough for a waiver of appeal.

CHAIRMAN BABCOCK: What you're advocating is you can check out, but you can never leave.

MR. ORSINGER: Hotel California.

CHAIRMAN BABCOCK: Lisa. Glad you got that, Richard.

MR. ORSINGER: Eagles. Yeah. Yeah.

CHAIRMAN BABCOCK: Lisa passes. Overwhelmed by my Eagles reference

MS. HOBBS: Exactly.

CHAIRMAN BABCOCK: Yeah, Bill.

HONORABLE BILL BOYCE: So here's what I'm proposing to bring back to the -- bring to the subcommittee and then bring back to the full committee in light of these comments, which is citation form, see if we can get an agreement on that. We've talked about it, but I don't know that we've taken specific formal votes with respect to notice of appellate rights in citation form. Proposed language that would amend Texas Rule of Civil Procedure 306 to sketch out a post-trial -- or at the end of trial procedure for determining intent to appeal. We can decide whether we really want that or not and what that should say. That would -- if I understand the gist of the discussion, that would be a procedure that would have a judicial determination about intent to appeal, have those two things there and try to nail down this piece of the larger issue in terms of the procedures about how much due process and how much notice and how much inquiry into right of appeal and intent to appeal do we want to provide by rule.

CHAIRMAN BABCOCK: Okay. That sounds fair. Yeah, Frank.

MR. GILSTRAP: I think I'm convinced by the argument where the person is given a comprehensive notice

at the time he's served and never appears, never does anything. He's just not in sight. The default judgment is taken, and he doesn't appeal, and if we tell him at the outset that he has -- that if he doesn't appeal, it's over. Under that scenario, assuming that the cases say that meets due process and we get the right notice, I'm okay. I'm a little troubled, though, by this area where he gets notice and then does appear or does have a lawyer and is in the lawsuit for a little bit. It seems to me that you've kind of broken the chain of causation there. Maybe that's not the right analogy, but it seems to me that once that's happened the person needs some additional notice.

CHAIRMAN BABCOCK: Okay. Bill, do you want to continue discussion on other issues, like showing authority to appeal or subpart (b) of stage one?

HONORABLE BILL BOYCE: No, I think I've got enough guidance that the subcommittee can work on specific rules, because I think what we're talking about would subsume everything that's under 1(a).

CHAIRMAN BABCOCK: Okay. So we'll bring this back to our next meeting?

HONORABLE BILL BOYCE: With specific rule language to evaluate.

CHAIRMAN BABCOCK: Okay.

MR. MUNZINGER: Can I ask a question, Chip?

CHAIRMAN BABCOCK: Yeah, sure, go ahead.

MR. MUNZINGER: Who is responsible for the contents of the citation, the Legislature or the Supreme Court?

MR. ORSINGER: Supreme Court. There is a rule that specifies what must be in the citation, but they leave it up to the clerk of the court to make the citation, and the Rules 16 through 165a subcommittee as well as the House Bill 7 task force as well as the subcommittee on this I think have recommended that we replace the idea of having a general list of information to include in the citation and instead adopt a uniform citation that applies across the board in every county and every district. So instead of letting the district clerks decide what to put in there in addition to or how to express what's on the list, let's standardize it and then everybody get the same notice everywhere in Texas. And the Supreme Court has the authority to do that, and they have done it by specifying a list of things to include, but the exact language is not specified, and it should be. It should be uniform across the state. In my view anyway.

PROFESSOR CARLSON: For all cases.

MR. ORSINGER: For all cases that are district court cases or all cases that are county court cases, but parental -- in my view any time that you have a

right to appointment of counsel if you're indigent, that needs to be in those kinds of citations, but not in an ordinary civil citation.

MR. GILSTRAP: We're talking about some additional language that's not in the ordinary citation here about the fact that if you -- if you don't do anything you have a right to appeal and you're going to lose that right, too. That's what we're talking about, isn't it?

MR. ORSINGER: Well, actually Richard's comment was broader than that because he said does the Supreme Court have the authority to do it or the Legislature. And the Supreme Court clearly has exercised the power to tell clerks what to put in their citations, but when I did a study of all the states that I could find that have citation rules, there was the old school of -- that was 50 years ago of be sure you have these 10 things in your citation, and then there's the new school where somebody has sat down and written the citation that is required in every case and then that has been promulgated.

MR. MUNZINGER: My concern that I was speaking to was your comment and Justice Gray's comment that the courts are flooded and drowning in these cases because they're concerned about giving due process to people who haven't participated or what have you, and I was just addressing the discrete case of where a person has

been served with notice, and if he doesn't want to go to court, fine. He gets a default judgment in everything else. Why would that not apply here?

Well, we're concerned about an appeal. Same thing, give him notice of what his rights are, but if he's entitled to a court-appointed attorney in this type of a case, you've got to say at the same time, in the notice I'm saying, you may be -- you are entitled to a court-appointed attorney if you can't afford one, but you've got to cooperate with him. Because, I mean, good God, we can't make people quit taking drugs, and they sleep on the streets, and I'm not passing moral judgment on them, but they've lost to a degree their humanity. You couldn't make one of those people stand up and come to a lawyer sometimes, and society has got to reach a point where it says, okay, don't care for yourself, that's -- you've got to live with the consequences. We're not going to destroy our court system for people like this. We shouldn't. And just you give them notice, and if the Supreme Court of the United States and the Supreme Court says you had notice and opportunity to be heard and you turned it down, okay, you didn't give a damn about your son.

CHAIRMAN BABCOCK: Okay, boomer.

MR. MUNZINGER: Or your daughter.

CHAIRMAN BABCOCK: Judge Peeples.

HONORABLE DAVID PEEPLES: Chip, I want to mention four trial court situations to Bill Boyce and the subcommittee that I -- that I think call for different treatment. The first is where the alleged father can't be found in the first place and may have had no contact with the child. He's just gone. That's one situation. But the mother names him as the father, and he's got to be dealt with. That's one situation.

The second situation would be where the father is served properly but doesn't show at trial. A lawyer has been appointed, and the lawyer says, "I've tried and I can't find him."

HONORABLE TOM GRAY: Why would a lawyer be appointed?

HONORABLE DAVID PEEPLES: For somebody that's been served?

HONORABLE ANA ESTEVEZ: You get a statutory right to it.

HONORABLE TOM GRAY: Not until they show up and file the indigency.

HONORABLE DAVID PEEPLES: Let me finish.

HONORABLE TOM GRAY: Okay. I'm sorry.

HONORABLE DAVID PEEPLES: The father has been served, no show. There's a lawyer there who says, "I can't find him and what do we do." That father probably has had

no contact with the child in a long time.

A third situation is when the father shows up at trial and the evidence is overwhelming that it's in the best interest and good grounds to terminate, and that's an Anders, a quote, Anders situation. I mean, should the legal system entertain a free appeal for somebody that the lawyer, if it happened in a criminal case, would say, "Here's all the evidence, here's what happened, I can't find any basis to appeal this case."

That's the third situation, and the fourth is the father is at trial, and you know, there's evidence and so forth, and now he's gone, and we can't find him. That will happen, too. And I just -- I mentioned those because I've seen all of those at one time or another, and I think they just call for a different analysis and a different response, and I just want to be sure that we're dealing with those, and I can't tell if we've got it all here. That's all.

THE COURT: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Have we made the decision that something has to be changed in connection with the right to appeal? Before, I mean, have we made that decision in this group that something has to be changed? I mean, it seems to me other than having an implemented Anders procedure, which people are doing

anyway, that it seems to be working pretty well; and, yes, we have a lot of cases on appeal, but I'm not really sure that going through what we're talking about here is really going to improve things in that regard. And like -- like having the attorney get, you know, permission from the client to appeal to begin with, and they can't find the guy, and the attorney gets nervous, I didn't try hard enough, I better just appeal. And then, yes, it's -- from an Anders brief point of view, that's easier for the court of appeals, but it's not really any easier for the lawyer.

HONORABLE DAVID PEEPLES: Yeah.

HONORABLE TRACY CHRISTOPHER: I mean, you know, the lawyer gets paid a pittance to do these appeals, at least in Harris County. They don't get paid very much, and it's pretty much the same price whether you file the evidence was insufficient appeal or an Anders appeal. And so, I mean, to me I guess I'm just wondering have we made the decision that we need to make a change?

THE COURT: Well, Richard and Bill seem to be the most invested in this. What do you-all think?

HONORABLE BILL BOYCE: I thought that there was consensus or at least majority view at the last meeting about having a procedure at the end of trial with a judicial determination of intent to appeal, so if there isn't majority view or consensus around that, then we

can -- we can visit about that more. We can bring a proposal to the -- an actual written rule proposal and have that ultimate determination. I guess my thought would be that that is a more fulsome discussion if we've got proposed language in front of us to look at and decide do we really need this or not.

CHAIRMAN BABCOCK: Yeah, Lisa.

MS. HOBBS: So I just pulled up House Bill 7, so if we can remember the whole reason we've gone down this road is because of House Bill 7, and House Bill 7 directs the Supreme Court to establish rules, civil and appellate procedures to address -- this word that I don't love -- "conflicts between the filing of a motion for new trial and the filing of an appeal of a final order rendered under this chapter," which I have no idea what that means.

MR. ORSINGER: I can comment on that.

MS. HOBBS: Well, I know what they probably intended, and then the period about court reporters, which is kind of what House Bill 7 committee started, but my broader point is the Supreme Court appointed a task force to look at this, and the task force is the one who told the Court, "Here's what we think we need," and then I think why it's in front of the advisory committee is because the Court said, "Oh, House Bill 7 task force has said these are the rule changes that we need, and what does the advisory

committee think about it." And that's where we are, and let's not lose sight of it, and the House Bill 7 report is a good report for people to read as background as to why we're talking about all of these things. And have we gotten it straight or not, I don't know.

And I think you're raising a good point, Judge Christopher, that why is always a good question, but I just -- that's why we're here. It started with a 2017 command and then a task force and then now us.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: From my perspective, the original impetus for the House Bill 7 task force was the Rule 277 problem on jury charge submissions and the developing perception among a few courts of appeals that due process of law required that individual grounds be submitted separately, together with the best interest determinations, kind of like a Casteel issue.

HONORABLE TRACY CHRISTOPHER: Right, and we took care of that.

MR. ORSINGER: We addressed that in our first year or nine months, and but there was so many other issues like phantom appeal and the Anders process and things, that we came back with additional authority from the Supreme Court to address issues. And I was listening closely to your comment because I don't get exposed to it on a daily

or weekly basis like you do, but the comment you made sounded most relevant to me to cases where there was a true adversarial proposition that was met in court, and there was evidence, and there were rulings, and now there's a question -- there's an appeal. But the opposite extreme is a situation where the defendant, respondent parent, didn't appear at all; and there was a perfunctory show of evidence to support termination, and then there was termination; and now the trial lawyer feels obliged to conduct the appeal, even though there was no contrary evidence or whatever, simply because of the appointment as a trial lawyer.

And so I have heard comments from around the room that that's the -- that's the case where everybody feels most comfortable compromising due process, is when someone has never bothered to show up. So at the very least, even if we decide not to cure many problems with truly adversarial trials, we shouldn't do the robo appeal as it's been called where we just by rote, by momentum of appointing somebody that we now have to go all the way to the Texas Supreme Court. That doesn't help anybody. It probably even hurts the other litigants in the system that have a legitimate need for our resources, and so there's a spectrum there.

CHAIRMAN BABCOCK: Okay. Yeah, Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, my only thought is when we do that, when we do robo appeals, we have afforded due process; and, you know, a lot of times you'll have the mother's appeal and then the father's appeal. I mean, you know, it's 99.9 percent the father that doesn't show up, and it might be a father that doesn't even know he's a father. I mean, that happens quite a bit. The mother might name three or four men as potential fathers.

CHAIRMAN BABCOCK: Mama Mia.

HONORABLE TRACY CHRISTOPHER: Because, you know, she's just not sure, and so, I mean, those kind of appeals, they just come along with mom's appeal, and you read one transcript, and you know, you've got two briefs, but you read one transcript, and it's not that hard to deal with a father who has never been in the child's life and has never -- because that's the evidence they put on. You know, has the father ever done anything, you know, no, no, no, and, you know, then they have the best interest testimony. So I just -- a lot of this sounds complicated to me and creates potential pitfalls, and so I just wonder if we are really going to save time and money in the system by making these changes, but if everyone feels like we have a directive to go forward to do it then -- then we will.

CHAIRMAN BABCOCK: Richard, how about this?

We get OCA to create a form that has nine squares, and you've got to check each square that has a bus in it, so no more robo appeals.

MR. ORSINGER: I'm not sure they have enough time to address that.

CHAIRMAN BABCOCK: Okay. Anything more on this? Okay. Let's move on to the parental leave continuance rule, and Kennon is out hustling for every available vote in early voting on the last day, so she's not here to help us with this, but Elaine is going to take over, right?

PROFESSOR CARLSON: Yes, I am.

CHAIRMAN BABCOCK: Enthusiastically, I believe.

PROFESSOR CARLSON: Yes. If you look at Exhibit G, that's a preliminary discussion draft from the subcommittee. And the first line is wrong, and I apologize. It says "At the November 1 SCAC meeting, the full committee voted 20 to 5" -- not "20 to 1" -- "in favor of proposing a rule addressing parental continuance." Remember, by way of background that this came to us through the State Bar of Texas committee on court rules. They gave us their draft. We discussed a little bit of it, quite a bit last time we met in November, but the only decision we made was the majority felt that we should have a rule that

addressed parental leave.

Since we last met Florida and North Carolina have finalized and adopted their rules providing for parental leaves. That's in Exhibits H, I, J, K, I think, and we'll come back to that. We were contacted by Jaclyn, who has asked us, the subcommittee, to consider broadening the continuance proposed rule to not only address parental leave but to address the potential continuance of a case based upon grounds for which an employee can seek family -- federal family and medical leave, and that is attached as Exhibit N.

So we have -- as I put forth in the next sentence, this discussion draft is just that. It's not a recommendation of the committee. We just have a number of discussion points that would be very helpful to get the input from this committee. North Carolina and Florida took very different approaches. The Texas bar did not have a North Carolina rule at the time to consider, and the State Bar of Texas court rules committee proposal is largely modeled after the federal -- or the Florida approach.

The North Carolina approach is similar to what we would think of as a vacation leave. You file your form when you want to take -- they call it secured leave, and -- the attorney parent, and designate the dates not to exceed 12 weeks out of 24 weeks after the birth or adoption

of the child, and they file it at least 90 days before the secure leave period is to begin, and you get that leave. Either parent.

The rule recognizes that -- the North Carolina rule recognizes that -- if you'll look at Tab K, and by the way, Tab K, which was originally sent out with Marti's e-mail, was the original Rule 26 and not the amended one. So if that's the only one you had, you may want to get the updated one that includes paragraph (a) that allows for secured leave for parental as well as for lawyers. Let me back up. The original North Carolina rule allowed lawyers to file for three different weeks, all lawyers to file for three different weeks a designation of secured leave, and that was for quality of life purposes of lawyers who are stressed out and need to leave and want to take the leave. They have now come back and amended their rule to provide for secured leave also for when a parent is adopting or gives birth to a child. It does extend to both genders.

The rule recognizes that often adoption does not allow for 90-day notice. If you've ever talked to people who have adopted children, it's usually a very short period of time. I know someone in December who actually had like a half a day to make the decision, do you want this child or not, come get them, an adoption. So if they

were an attorney, they wouldn't be able to make the 90 days. So we included -- and North Carolina included "but because of the uncertainty of a child's birth or adoption date, the court must make reasonable exception to this requirement," and the rule precludes proceeding in any case in which the attorney is an attorney of record and also disallows depositions during that 12-week period as to that attorney of record.

And you'll notice if you look at Tab L, you have a similar secured leave period in North Carolina on appeal for attorneys who are new parents for oral argument. It does not address briefs. And then if you look at Exhibit M, you'll see they actually have a secure leave form, and it's a very straightforward fill out the form, file it, and then you get the leave.

The Florida approach is similar in that it requires the trial court to grant a timely filed motion for continuance based on parental leave of the movant's lead attorney. Now, remember, North Carolina was any attorney of record, so very broad where Florida limited it to the lead attorney, unless another party would be substantially prejudiced by the continuance or would unreasonably delay an emergency or time sensitive proceeding.

We talked about that last November, and the way I read the transcript is many people thought using the

prima facie demonstration of substantial prejudice with the burden shifting was overengineering the rule and was not desirable, but others may feel differently. We'll come back to that in some of our votes. In Florida the trial court is required to enter a written order, ruling on the motion and the specific grounds for the ruling, whether they grant the leave or they don't.

I went back and observed the oral argument that the Florida Supreme Court had in considering this rule, because you remember their main rule -- our counterparts suggested or voted, no, they didn't think it was a good idea to have a parental leave. Another division of the State Bar of Florida said, yes, we think this is a good rule, and then it became very wide publicized, and the Supreme Court of Florida was getting a lot of input on the desirability or not of the rule, so they decided to have oral argument, which I thought was fascinating. Some of the -- and it's a six -- it's 9-0 opinion with three judges concurring. During that oral argument, the justices seemed to be asking those making oral argument, well, if you get a specific ground for the ruling denying your leave for continuance, can't you seek immediate review? I guess something akin to mandamus, but they did not use that wording. It was a procedure that I've never -- I'm not familiar with, but it sounded like it was like mandamus.

The Florida rules required the parent attorney seeking leave to do so within a reasonable time after the later of the movant's lead attorney learning of the basis for the continuance or the setting or the setting of a specific procedure of the scheduling of a matter for which the continuance is sought. So it's kind of a fuzzy time like the State Bar proposal.

So turning to the preliminary discussion draft, not recommended draft, us, and that would be I think it's G, Exhibit G. Yeah. Page one has the existing Rule 253, and then I thought we would kind of run through this, Chip, if it's all right with you, and just kind of raise different policy decisions.

Subsection (a) applies to parental leave continuance. If you go over to subsection -- page three, subsection (b) deals with family medical leave type grounds for a continuance, and subsection (c) of this draft is the current -- our current rule. Okay. So other cases. Let me just -- we'll just come back to the Family Medical Leave Act and stick with the parental leave at the moment. So should parental leave continuances apply to just trial? In North Carolina it applies to proceedings, in quotes, and depositions. Should it extend to dispositive motions? If you keep it just to trials, that's for someone who is a small solo practitioner who is doing a lot of other things,

like a family law lawyer, this isn't going to help them out very much. On the other hand, as Justice Peeples has reminded our subcommittee, we have to balance this with the administration of justice for all the parties in the system itself.

So that's our first kind of question. Should we limit this proposed parental leave continuance to trial settings? Should it include dispositive motions like summary judgments? Should it include proceedings, discovery?

MR. GILSTRAP: Oral argument on appeal.

PROFESSOR CARLSON: Yes, and oral argument on appeal. There's a draft over on page -- somewhere, we're getting to it, for changes to our appellate rule for oral argument, and we'll talk about that a little bit later and whether it also should go to briefs or none of the above. So that's the first discussion point.

CHAIRMAN BABCOCK: Okay. How far does the legislative continuance rule apply? Does that apply just to trials or to everything?

PROFESSOR CARLSON: Just to trials.

CHAIRMAN BABCOCK: Just to trials. All right. Discussion about --

PROFESSOR CARLSON: At least that's my understanding.

CHAIRMAN BABCOCK: -- about the scope of the parental leave continuance. Richard Munzinger.

MR. MUNZINGER: Are we going to get to discuss later when the notice has to be given or when somebody should notify?

PROFESSOR CARLSON: Yes.

MR. MUNZINGER: Thank you.

CHAIRMAN BABCOCK: Okay. Still on the scope. Yeah, Justice Christopher.

HONORABLE TRACY CHRISTOPHER: I would prefer to leave it to trial setting, especially since we are not -- since we are expanding it beyond lead attorney.

PROFESSOR CARLSON: That's another vote, but yes.

MS. HOBBS: That's another vote.

HONORABLE TRACY CHRISTOPHER: I mean, if it was just lead attorney, then I might be a little bit more enthusiastic about "or dispositive motion," but you know, I just think that you can get somebody else to handle your dispositive motion. You might not be able to get somebody else to handle the trial, but somebody else can handle the summary judgment motion that has to be done on the briefs and, you know, on the papers any way.

CHAIRMAN BABCOCK: Judge Wallace.

HONORABLE R. H. WALLACE: That was my

thought, too, not to apply it to dispositive motions, but how do you deal with a solo practitioner? I don't know. I mean, unless you can make some carve out that doesn't apply to dispositive motions unless there is, you know --

CHAIRMAN BABCOCK: Nobody else.

HONORABLE R. H. WALLACE: -- a showing that no other attorney is available to do it. But, yeah, and besides --

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: I sort of take the opposite approach. I mean, if you're going to have this continuance, and I'm not saying you should, it seems to me, you know, since most cases are decided outside of the trial then you should expand it to dispositive motions. I have a little problem with oral argument because the result of a continuance for oral argument is probably going to mean you just don't get oral argument.

CHAIRMAN BABCOCK: Yeah. Richard.

MR. MUNZINGER: The reason that I asked the question that I did of Elaine about this -- about will we be able to talk about time of notice, it has an impact on how far you want the rule to extend. My wife knows when she's pregnant within 60 days or so of the time of pregnancy. The doctors are giving her a prediction pretty early on "Your baby is going to be due the first two or

three weeks of November." She knows that seven months in advance of that time, seven months in advance of the time that a continuance of this nature is to be enforced. This is for not adoptions, but for regular pregnancies.

Why do we put the time limit 90 days from the date of continuance instead of putting it early on in the process? If you put it early on in the process, putting the onus on the person who is going to seek the leave, male or female, normal birth, what you've done is given lots of people lots of time to get ready for that and certainly made it more fair to expand it to the number of proceedings that the rule could be applied to because you now have months of notice, more months, 60 days or maybe even 90 days more, who knows, to do that.

On the business of adoption, much the same thing can apply. I don't know -- I've heard the stories, too, and had experiences if you're going to adopt the child you may find out the day before, certainly it's shorter. At the same time if a person is seeking to adopt a child and has an active application with an adoption agency, that's -- it's private, but at the same time it won't be private when you get the continuance for it. The onus should be on the people who seek the continuance to give notice early on, and that way you don't inconvenience or cause great expense to the defendant. I've never gotten --

taken 90 days to get ready for a trial, but I have taken close to 60. I mean, some of these damn cases, we all know that, and if you're a solo practitioner, it can be just as hard on you if you're a firm. It costs a great deal of money to get ready for trial, a huge amount, only to be told a week in advance, well, we've got legislative continuance, or a day in advance, and you've spent that money. We don't want that here.

But to me, I think that it would help us to figure out to what we should apply this rule if we know as early as we can possibly know, and a woman knows, has a dang good idea when her baby is due within I would think -- I'm not a woman, but I have a child and I have a son who just had a child. By 90 days, you know -- you have a target date out there. You know this baby is going to be due the last two weeks of October, the first two of November, somewhere, it's out there. And you may or may not have that same target date with adoption, but anyway, that's my thought.

CHAIRMAN BABCOCK: Justice Christopher, Professor Albright, and then Professor Carlson.

HONORABLE TRACY CHRISTOPHER: Oh, I pass.

CHAIRMAN BABCOCK: You pass? Professor Albright.

PROFESSOR ALBRIGHT: You apparently have

never had a miscarriage or fetal anomaly and wanted to keep your pregnancy secret. There are lots of reasons why women and parents do not want to make their pregnancy public until much later in the pregnancy when they know everything is going to be okay and there will be a baby. So I don't think it's reasonable to say, okay, you get the pregnancy test, and whammo, you've got to file your motion. I think 90 days is probably about right.

CHAIRMAN BABCOCK: Yeah, Professor Albright, would that also apply to some -- some families, not all, with respect to adoptions, you don't want --

PROFESSOR ALBRIGHT: I would assume that a lot of people don't want people -- they want it to be public, but they're seeking an adoption because it might not happen, and there are a lot of personal decisions that are being made there.

CHAIRMAN BABCOCK: Well, and some families choose not to tell their child that they're adopted until much later in life.

PROFESSOR ALBRIGHT: That's true, too.

CHAIRMAN BABCOCK: Yeah. Professor Carlson, and then Judge Wallace.

PROFESSOR CARLSON: I was just going to say what Alex said, and we did discuss that at the committee.

CHAIRMAN BABCOCK: Excuse me, yeah. Judge

Wallace.

HONORABLE R. H. WALLACE: I was just going to weigh in. As a father of two adopted daughters, yes, I mean, you may know the process is in the works, but you may not know until a day or two ahead of time that, okay, there's a baby and you know, if you want it, it's yours. So you have to take that, and it's probably more often than not the case.

CHAIRMAN BABCOCK: Yeah. Alistair.

MR. DAWSON: So I think we should keep the continuance for the dispositive motion, and, you know, I mean, those can be very determinative motions in a case, and you know, putting if you're a solo practitioner or if you're the lead lawyer on the case and you're pregnant and the hearing is, you know, two, three weeks after the child is to be born, you should have a right, an absolute right, to not have to deal with that stress and to tend to your child and have a continuance of that hearing. So I don't think there's much harm in moving the hearing by whatever, 60, 90 days, and there's potentially a lot of harm to the lawyer who can't get that -- can't get that hearing moved.

CHAIRMAN BABCOCK: Evan, and then Justice Kelly.

MR. YOUNG: I was just going to make two quick points. First, in terms of the time in which it has

to be announced, I think that one of the goals that is being pursued by this is to equalize the opportunity primarily for young women who otherwise find themselves or potentially find themselves in some professional difficulties solely because of the plan to have a baby, and I think that there are a lot of young women who even beyond the -- the possibility of catastrophe, which many of us have experienced, might have some reservation for professional reasons about announcing this, just because of I think the still legitimate concern that people within a law firm or clients will start thinking about them differently. And so delaying the point at which they have to start telling the whole world, "I'm going to have a baby," it seems like that serves the interest, and pushing that point back further in time undermines the very interest of why we would want to have this rule.

And the second point is on the question of what its scope should be, and I agree, I think, with Alistair, especially if it's someone who isn't able to -- is not in a great big firm and there's just people all around that are happy to take on a draft of a summary judgment, something like that, and maybe some certification that that is necessary, whether it be a solo or even in a small firm or not having someone that has the expertise, that the goal of being able to put these primarily young

women in the position of everyone else would be served by not gerrymandering it so that it's very complicated and, well, for this kind of proceeding I'm going to have figure something out or I'm going to have bring the baby with me to the courtroom to argue for this little thing or whatever.

Just let them out. Just give them this period of time, and that would be I recognize some cost, but a much greater way of welcoming that group of people to full participation and practice of law in Texas than I think is true in a lot of states right now or maybe in our state right now.

CHAIRMAN BABCOCK: Got it. Justice Kelly.

HONORABLE PETER KELLY: There's some interesting language that seems to be structure in the legislative continuance that someone mentioned earlier. "The section applies to any criminal or civil suit, including matters of probate and to any matters ancillary to the suit that require action by or the attendance of an attorney, including appeals but excluding temporary restraining orders." So that would sort of debilitate in favor of dispositive motions, or that "matter ancillary to the suit."

It's also structured that it's mandatory to be granted unless the legislator is employed on or after

the 15th day before the date the suit is set, in which case it's discretionary with the court. So you could have a 15-day deadline like that where it's mandatory ahead of time and discretionary afterwards, and the affidavit also requires that the legislator/attorney has "intention to participate actively in the preparation or presentation of the case and that the attorney has not taken the case for the purpose of obtaining a continuance under this action," but some of that type of language or structure could be incorporated into a rule like this.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I mean, I sought and got a three-month continuance in all of the cases that I was the lead lawyer in with my first pregnancy because I was the only lawyer on it, and I asked for a continuance from trial and all discovery, because, I mean, just doing a hearing on a dispositive motion, I mean, yeah, that helps in terms of trying to find a babysitter so you can actually go in for a hearing, but, I mean, if you really want to take three months off, you don't want to be responding to a summary judgment motion. You don't want to be responding to discovery. You don't want to have to worry about a deposition. I mean, you want to take three months off.

MR. YOUNG: Take it off.

HONORABLE TRACY CHRISTOPHER: Completely. So, I mean, if we're not limiting it to trial then it ought to be to everything.

MR. YOUNG: Right.

HONORABLE TRACY CHRISTOPHER: And, now, you know, I did it on the basis of motion. I had a couple of lawyers contested it, and we had hearings, and you know, we dealt with it. I mean, if there was some reason why they, you know, specifically had to get a deposition done during that three-month time period then, you know, we worked around it. I mean, I was in a big firm, so I had other people that could do it for me, but, you know, it's -- we either write it for trial setting or we write it broad.

PROFESSOR CARLSON: I agree.

CHAIRMAN BABCOCK: Judge Wallace.

HONORABLE R. H. WALLACE: I'm coming back to the adoption again. This gets a little more complicated. Birth, we know when that is. You can fix the date of birth.

PROFESSOR ALBRIGHT: Sometimes. Sometimes.

HONORABLE R. H. WALLACE: Adoption is the day you go to court and the judge says, okay, this is your kid. They've probably been living in the home, you know, maybe from an infant for sometime, so can someone say -- you see what I'm saying? That's really when they need to be at

home, is when the -- especially for a young child, for an infant. I don't know how you deal with that.

CHAIRMAN BABCOCK: Nina.

MS. CORTELL: Going back to the pregnancy and delivery example, I would say I agree with going broad on as much as the committee tolerates in terms of giving true leave to the new parents. If there's a need because of, Judge Peeples' good observation, that this is a balancing, then you might look at limiting it to the lead attorney. We have a defined term, I believe, for that. I think it could probably get a little problematic when you talk about a really large case and you say "substantial responsibility." I saw also alternative wording of first or second chair. That might work. That might solve it, but I would say if you want to provide an even balance I would look at, you know, limiting the persons who are eligible for it, but expanding the coverage we're providing.

CHAIRMAN BABCOCK: Somebody had their hand up. Lisa.

MS. HOBBS: I agree with you that they interplay with each other. I probably lean towards both a limited -- I would probably limit it just to trial, and I would limit it to lead lawyer or second or third chair. I've seen a lot of gamesmanship with the legislative

continuances. I've worked with a mother's group about how they cover for themselves, and it works, and it's not ideal, but it's really hard to halt litigation for three months. Sometimes you're going to have to rely on other people in your firm, or if you are solo you tend to have people who are going to back you while you're out on maternity leave, and I'm sympathetic to it, but we're talking about a right to continuance, not what an individual judge would give you if you go in and make your case for it.

And so if it's going to be some sort of automatic, you know, no discretionary type thing, then I feel like it needs to be limited to being in charge of the case and limited to the trial of the case, and that doesn't mean that a judge won't give you a continuance for lots of other things. It's just what are we going to say to trial judges that these are when you have to do it, and that leaves a lot of discretion for trial judges to balance out all of the other factors that we're all talking about in this room about when -- like how big the firm is and what their responsibility is on a case, and so that's where I land, and I wanted to speak up as a female so that any gentlemen who agree with me won't be afraid to offend every woman in the room.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: Well, let's be mindful that we're talking about a lot more than the time of adoption or the time of birth. We're talking about -- the parental statutes talk about a period of time after the child is born. At Google you have to take three months off when your child is born. That's what we're talking about here. We're not just talking about when it's born. We're talking about the first few months of life so that the mother or father can stay home and take care of the kid. That's what I understand parental leave is about. And so what this all boils down to is, is it going to be mandatory or is it going to be discretionary? It's one discussion if it's mandatory. It's another discussion if it's discretionary.

PROFESSOR CARLSON: I agree.

CHAIRMAN BABCOCK: I think that's probably right, but what would the -- how would the discretion be exercised?

MR. GILSTRAP: Well, like --

CHAIRMAN BABCOCK: You're not really pregnant or --

MR. GILSTRAP: No, no, no. But is -- is this person going to take the lead in the case or is not? Is -- let me give you an example. We're talking about if it's mandatory there's a potential for abuse, and the paradigm

is the legislative continuance, and you can read all the stuff into the legislative continuance rule, but the fact is the week before trial they walk into trial with their throwdown legislator, judge signs continuance. You know, after the legislator is out of session the person is never seen again, but we're not talking about the first four months of odd-numbered years of each biennium. We're talking about all times, and I promise you throwdown parents are going to be a lot easier to come by than throwdown legislators, and it will be abused.

CHAIRMAN BABCOCK: Throwdown parents, have you just coined a term of art now? Richard.

MR. ORSINGER: Okay. So a couple of things that maybe haven't been discussed is that I'm still struggling with the problem pregnancies where the emphasis is to take the mother out of the pressured situation or the work situation leading up to the birth and the idea that we need three months of time after the birth, and I'm wondering if those -- if you're going to use a month of it before the birth, do you only get two months after the birth, or do you get three months after the birth? That's one issue.

The second concern I have is hiring in people who meet these criteria, a pregnant lawyer or a husband of a pregnant lawyer, or spouse, I should say, of a pregnant

lawyer nowadays, and you know, does this mean you have to hire in someone who's going to qualify for the continuance 90 days before trial, or can you hire them in 15 days before trial? This -- the way I read this 90-day requirement, subdivision (a)(1), "Any application must be filed at least 90 days before the commencement of the parental leave period." So that means you couldn't hire in someone who qualifies three weeks before trial. You have to hire them in at least 90 days before trial. And I think that that's wise. I think that if you don't force the decision to be made to bring in a lawyer to qualify this far in advance you're going to get a lot of gaming.

Additionally, if it's done shortly before trial, you're not going to be able to reschedule it 91 days later. This is conceived of in such a way that there's going to be plenty of time for the court to reset it on the 91st or the 92nd or the 93rd day, but if you wait until shortly before trial that's not going to happen.

And then my next and last point is, is that this reminds me very much of what the Legislature did with recusal rules and serial recusal motions to recuse. There's no limitation on one party electing two or three sequential lawyers who qualify for mandatory continuances, and so I'm wondering if we shouldn't discuss either a prohibition or some kind of freed up discussion to deny a

second motion in the same case based on this continuance, because by linkage someone could literally close the courthouse doors for a half a year or more.

CHAIRMAN BABCOCK: You mean by a different lawyer, not by the same lawyer?

MR. ORSINGER: Yes. I do mean by a different lawyer. But that's not prohibited here, and I wonder if it shouldn't be.

CHAIRMAN BABCOCK: Yeah. Lisa, did you have your hand up? Or Justice Gray, I guess. And Judge Peeples.

HONORABLE TOM GRAY: I think it's in four comments. I note that other than legislative continuances, that's already on the books, this will be the only rule that is about the lawyer as opposed to the parties and the witnesses and the process or a result. This is a rule about us as lawyers, and so I think we're going to take some -- what I would characterize as justified criticism for making life easier on us.

On the balance of that, however -- and I don't know if this is the right time to address it, but the North Carolina version to me, because it takes all the reasons out, you don't have to give a reason for the period that they call secure leave. You don't give a reason. And it takes all of the -- it doesn't matter what the procedure

is. It gives you a period of time in which you know you're not going to be involved in judicial proceedings in your role as an attorney. And so for those two reasons I think it is highly preferable over the general draft that's been proposed and talked about that is wrapped around birth and gives it a much broader application and that not only to what it -- not only the reasons for it, but the events to which it is applied in the judicial proceeding.

Third, as far as the appellate arena in particular, they've talked about the argument date. Much more critical to an appeal is not the argument. It's the brief.

CHAIRMAN BABCOCK: Right.

HONORABLE TOM GRAY: And if it's not about the motion for extension of time to file the brief and when it's due, you're really not doing much at the appellate level. I mean, if you look at the number of cases in which the intermediate courts of appeals have argument, it's a fraction of the cases, but there's a brief in every one, and so that would argue to me again for the South Carolina version of this where it's broader and it doesn't -- it applies to everything.

And then also the benefit of the North Carolina version, it doesn't -- I sat fourth chair in a case that was being tried for six weeks -- six months in

East Texas, and while I was fourth chair, I was the document and discovery guy in that case. Any of the other two lawyers could have been filled by another of the two. Nobody else knew my job. Nobody else knew where everything was, and to limit it or try to limit it to who we think sitting here today is the important people in the litigation, I think is a exercise in futility, because we don't know who the important people are on a litigation team the way the litigants do. And so, again, that says to me the North Carolina version is much superior to the Florida or what we tentatively talked about on the child leave or pregnancy leave.

CHAIRMAN BABCOCK: Do you think -- adoption aside, but you're concerned about the documents person who knows the documents, going to get them --

HONORABLE TOM GRAY: Yeah, it could be a paralegal for all practical purposes.

CHAIRMAN BABCOCK: But if you know far enough in advance that that person is going to have to take a leave right around trial, can't you plan for that and get somebody to replace that person more readily than you can the lead trial lawyer?

HONORABLE TOM GRAY: Well, another case, also East Texas, lead lawyer's father got very sick. They had done the full -- what they used to call beauty contest and

we had won the beauty contest, and we had the trial lawyer, and I was the assistant -- in that one it was second chair, but I was still the discovery guy. When the number one guy's father became terminally ill and he stepped out of the case, they went to another firm and hired a trial lawyer to do the number one, sit number one, and I stayed on the case as his assistant.

So there's a million scenarios, and what I'm really sad about is that we're even needing to have this discussion, that trial judges will not grant these continuances based on their discretion on the events that occur to them, and that was one reason that I thought that -- there was a little blurb in one of these handouts that Elaine had provided about things that should be considered in giving a motion for continuance and when they should be granted. And you know, if the Supreme Court popped a couple of these failure to give a continuance trial judges having to retry a six-week case because they didn't let somebody out when they should have and let them have their counsel of choice, we wouldn't need to be talking about this big complicated -- I mean, I really do think that the problem here is an education of the trial judges of really open your eyes, guys. And I say that intentionally of the judges that are in the anecdotal evidence that we've received about why this is needed. It seems to be male

judges not giving female attorneys continuances when they need it. I hate that that's the reason. It shouldn't be the reason, but if that is the reason, maybe we need to work on the judges aspect of it in education and not have to engage in this process with a big complicated rule. But if we are, I like the North Carolina version much better.

CHAIRMAN BABCOCK: Thank you. Judge Peeples.

HONORABLE DAVID PEEPLES: Yeah, I'm very sympathetic to the need for something strong in this area. The concern I have that Elaine alluded to is let's just take a lawyer, typically lawyer who might have 25 cases. I mean, some have more than that, but pick your own number about how many cases. A lawyer that's got a pregnancy, you know, childbirth issue coming along, 25 cases, and it's kind of like a vacation letter. We call it a continuance, but you notify the court basically, and you might have to have hearings or something, but those cases, a period of time is going to be blocked out that the court can't set that lawyer and those cases and has to continue existing settings. And if there are very many of these that are multi-party cases then to reset those gets harder and harder because you've got to find something that works for everybody.

But one protection that we have here is that 90 days before the setting is a pretty long time, and I --

the discussion between Alex and others about, you know, you're pregnant, but you don't want it to become public for a while, if that 90 days could be maybe 120 or so. I don't know if that's an unreasonable number, but even having more notice before cases are reset makes it easier on the legal system, and if that's not unreasonable to the birth parents, that would help the legal system. The judge just got -- the other people in these cases usually want to go to trial. Justice delayed is justice denied.

And we haven't even talked about what exceptions or exemptions there might be for cases involving protective orders. There's family violence happening. I think we probably would not want this to be an absolute rule in those cases, and I think in North Carolina and Florida, I can't remember which, they made exceptions for those cases and for juvenile. Injunctive cases, cases involving temporary injunctions and so forth. I mean, just as sympathetic as we are to the need to be humane when people are starting their families, the legal system does need to do justice, and there's a trade-off there, and I'm simply coming up with the thought that maybe, although 90 days before you get to state your period, that's a good chunk of time. If that period were a little bit longer, I think that takes away a lot of the pain on the legal system because it's just easier to reschedule. I just don't know

in terms of going public about your pregnancy if that's an unreasonable -- you know, five months post-conception is too soon. I don't know.

And we need to remember that there are two either three-month or 90-day periods. One is the trigger date. I mean, you ask for it now, and the soonest you can get it as a mandatory matter is 90 days from now, but with the three months that you're immune from settings is a moving period. You don't have to start it with the birth. It could be two weeks before, you know, and the remainder afterwards, and so you've got to keep those separate.

CHAIRMAN BABCOCK: Evan.

MR. YOUNG: Just one point, Chief Justice Gray mentioned that this might be a rule that is seen as a special gift for lawyers to lawyers, but he also made the point at the end of his comments that urged the Supreme Court to -- I think you said pop a few of these district judges for denying parties counsel of their choice, which I think actually reflects that it's not just for lawyers. It is something that allows the litigants in the state to have access to these lawyers without the limitation, which typically affects the young women especially, and it protects people's ability to choose those lawyers out of the fear that this occasion in life is going to deprive them of their counsel of choice.

I think that the Supreme Court passing this rule would be something that I hope would be largely symbolic in that I do hope that most judges are making the kinds of accommodations right now that should be made, but it's still a valuable thing for the Supreme Court to say in order to really affirm that this is a value that our profession has in protecting not just the members of the profession, but all Texans who are hiring lawyers.

CHAIRMAN BABCOCK: Yeah, good point. Nina, then Frank. And then Judge Wallace.

MS. CORTELL: I would just follow up with what Evan said. That's pretty much -- I can see a variety of ways of getting at the issue, and obviously in a perfect world Justice Christopher's examples where continuances were for the most part obtained, I think that would be a fairly common experience, but we all know of situations where that did not happen. And so some indication from the Court by comment, by rule, by whatever, would be I think a wonderful statement for this state and this Court to make.

I'm not wedded to any particular thing, and obviously the more we micromanage anything -- we all know this on all the rules -- the more troublesome everything gets, but some statement by comment, by general rule, I think would be helpful.

CHAIRMAN BABCOCK: Okay. Frank, and then

Judge Wallace.

MR. GILSTRAP: Insofar as Justice Gray's comment about judges denying these continuances, there isn't any evidence. The only evidence we've seen is in this report from the ABA, which found some legal blog's report of a 2014 case in a Georgia immigration court. That's it. There's nothing else out there. I think what's driving this is uncertainty, and it's concern about the career paths of women lawyers, which is a real concern. I mean, I'm with a big firm, I'm about to hire this case up, what about Jane Doe? Well, she's pregnant, she's due in January, and this case is going to trial in January, probably I'll pass over her. This rule actually would flip that. Jane Doe is going to trial in January. Look, we get an automatic continuance, let's hire her on. Probably that's going too far.

I think what you could do, you could simply take the existing rule -- the existing Rule 253, and it says that "absence of counsel is not good cause for a continuance, except it be allowed in the discretion of the court, upon good cause shown or upon matters within the knowledge or information of the judge to stated on the record, which can include" and throw in parental leave, throw in some other stuff if you want. That way it's in the rule. People aren't reluctant to ask for the

continuance. They -- they know it's proper, and that solves the problem without creating this huge weapon for the defense to avoid trial, which is what we're going to do if we pass this rule.

CHAIRMAN BABCOCK: Okay. Judge Wallace.

HONORABLE R. H. WALLACE: I was just going to echo what Judge Peeples said. There needs to be some kind of exception for expedited proceedings. Someone files a TRO, you've got 14 days to have a hearing, and if the lawyer shows up, says, "Judge, I'm on whatever leave," then that may be another thing that you need to carve out. It wouldn't happen a lot, but if it did, you would have a predicament.

CHAIRMAN BABCOCK: Did you get that, Elaine? And that just caused me to think, Judge, you know, summary judgment is viewed as a trial under the case law, so -- so that might -- might factor into it in some fashion. Yeah, Judge.

HONORABLE R. H. WALLACE: Can I add something to that? There's something here that's also going to be kind of self-regulating, and that is you've got to have the consent of your client. If the client doesn't want to go to trial, that's great, they'll consent, but if there's a client that wants to get their case to trial, they may not consent for the lawyer applying for this leave.

CHAIRMAN BABCOCK: Yeah, good point.

HONORABLE R. H. WALLACE: I don't know if that's good or bad, but it's life.

CHAIRMAN BABCOCK: Okay. Any more comments on scope? Justice Kelly.

HONORABLE PETER KELLY: Just to address Frank's point, I saw it happen twice down in the Harris County courthouse. A partner was down for a docket call and a judge known to us all here set him for trial April 3rd. He said, "My wife's due that day." He goes "You're not giving birth," and called to trial on April 3rd, and I saw it happen to another -- never to a young woman, but only to men, asking to accompany their wife to the hospital.

CHAIRMAN BABCOCK: Anything else on scope? Elaine, I think it's premature for a vote, don't you, or do you?

PROFESSOR CARLSON: Well, probably.

CHAIRMAN BABCOCK: Yeah.

PROFESSOR CARLSON: Probably on that. On that.

CHAIRMAN BABCOCK: On that.

MR. DAWSON: Well --

CHAIRMAN BABCOCK: Alistair.

MR. DAWSON: I respectfully might disagree

with Professor Carlson. I would be interested in a vote on two issues, limited to trials only or dispositive motions or broader. We've talked about all three, and I would personally find interesting for the subcommittee to know what the consensus, if there is one, of this group is on those three issues.

CHAIRMAN BABCOCK: You know me, I'm all for voting on stuff. Nina.

MS. CORTELL: There's been interplay --

MR. DAWSON: But Professor Carlson can overrule the issues.

PROFESSOR CARLSON: No, I defer to you.

MS. CORTELL: There's an interplay with what lawyers are we talking about. I mean, if it's the lead, that might dictate a different answer to Alistair's question.

CHAIRMAN BABCOCK: Yeah, good point. Frank.

MR. GILSTRAP: My vote on all of those would be determined in the first instance by whether it's mandatory or discretionary. I'm all for doing all of those things if it's discretionary. If it's mandatory, none of them.

MR. DAWSON: So the rule as written is mandatory.

MR. GILSTRAP: Yes.

MR. DAWSON: And as written includes first chair and a proposal for substantial responsibility, so my suggestion for Frank and for Nina is vote for your one, two, or three as it is currently written.

MR. GILSTRAP: But it's clear it's mandatory now. It's discretion except in -- I don't know what the -- okay.

PROFESSOR CARLSON: I think it was extraordinary circumstances.

MR. GILSTRAP: Except in extraordinary circumstances, you've got to grant the continuance. That's how the rule is written now.

PROFESSOR CARLSON: Remember, this is a discussion draft.

MR. GILSTRAP: That's what we're voting on, though.

CHAIRMAN BABCOCK: Okay. Yeah. Richard, sorry.

MR. ORSINGER: Yeah, I have a concern that would affect the vote, too, and that is do we -- what rule are we applying to the people that are hired shortly before trial in order to qualify for these, for this dispensation, and the shorter that period of time is, the more reluctant I am to make all of these mandatory rights when it's obvious that the choice is -- the choice is being made to

get the delay, and if you push it out by 90 or 120 days, that's less obvious. There's actually time for someone to become familiar with and try a case in 90 to 120 days. But the closer you get to the deadline, the more the hiring looks like a manipulation of the system, and so I would -- I would want or would like to know whether what we're voting on here as mandatory is going to have a long lead time or a short lead time.

CHAIRMAN BABCOCK: Okay.

HONORABLE DAVID PEEPLES: Could I ask for clarification? Richard, what's your issue if you've got the 90 days before and you've got to affirm that counsel is lead attorney or has substantial responsibility?

MR. ORSINGER: I don't have a problem with the 90 days, and I would like even better 120 days. What I have a problem with is less than 90 days notice of the --

MR. DAWSON: We're not proposing that.

HONORABLE DAVID PEEPLES: I thought you were concerned that people could get hired within the 90 days period and get the case continued.

MR. ORSINGER: Well, under this wording, as far as I'm concerned you can't do that, because you've got to file your motion 90 days before, and that means you have to have been hired 90 days before.

HONORABLE DAVID PEEPLES: Okay.

MR. ORSINGER: But there's been some discussion about shortening that period of time, and that's why I said, hey, you know, the shorter that period of time is, the more likely the rule will be manipulated.

MR. MUNZINGER: I can always hire somebody 90 days before to get ready for a trial that I know has been on the docket for a year. It's a multimillion dollar case. I've got all kinds of documents and what have you, and I've been on the docket for a year and a half, and all I know I've got to hire a pregnant person or a person whose wife is pregnant, due to deliver in that period of time, and I get myself a continuance that I couldn't get otherwise.

MR. ORSINGER: That's the problem.

MR. MUNZINGER: It is a problem. It is a problem. The whole thing, there's more than just the people involved. It is a problem. I mean, it's a young women lawyer and her spouse. You know, having a baby is a big deal.

CHAIRMAN BABCOCK: I've heard.

PROFESSOR CARLSON: So why don't we hold off on that until we get through with some more discussion and then come back and do several votes so people have a clear idea.

CHAIRMAN BABCOCK: Is that all right with you, Alistair? Reluctantly?

MR. DAWSON: No, I always agree with Professor Carlson. Except when I don't.

CHAIRMAN BABCOCK: That's a wise course of action.

PROFESSOR CARLSON: The next thing we wanted to take up is should the parental leave be up to 12 weeks. That is what Florida went with. That's what North Carolina went with. That's what the State Bar of Texas rules committee suggested, and that mirrors the federal Family Leave Medical Act, which allows or I guess requires an employer to give at least unpaid leave to -- I guess somebody knows this better than I, more than 50 employees, they are required to give leave when --

MR. GILSTRAP: There's some size limitation. I don't know what it is.

PROFESSOR CARLSON: Yeah, a parent who is giving birth or adoption or foster care, I think it says, as well as other reasons. So do we think 12 weeks leave is right, and if we do, should we mirror what North Carolina has that it can be -- the counsel can pick the 12 weeks within -- they say 12 weeks out of the 24 weeks after the birth or adoption of the child.

CHAIRMAN BABCOCK: Say that again.

PROFESSOR CARLSON: Yeah. Within 12 weeks -- "Counsel can pick the 12 weeks, within 12 weeks out of the

24 weeks after the birth or adoption of the child." I think what was envisioned there is that because it is gender neutral, that if you had two parents who were trial lawyers, they could both take their 12 weeks leave.

CHAIRMAN BABCOCK: Yeah. And the possibility that somebody raised of a lawyer -- a pregnant lawyer who for medical reasons has got to get off her feet for two weeks before the birth or three weeks, that could be handled as a normal medical -- I mean, you're not going to put a lawyer to trial that's had a heart attack. Right?

PROFESSOR CARLSON: We've got a rule for that.

MR. ORSINGER: Chip, I mean, realistically you could have a 30- to 60-day prebirth period where the mother's activity is restricted, and if you're required to give a three- or a four-month period after the birth, then you're talking a five- or six-month period.

CHAIRMAN BABCOCK: Right.

MR. ORSINGER: No?

PROFESSOR CARLSON: I don't think we want to go more than 12 weeks.

MR. ORSINGER: Yeah, but it said 12 weeks after birth of the child?

PROFESSOR CARLSON: Yeah. We can change that to 12 weeks total.

MR. ORSINGER: What is your restriction on two months before the birth of the child? Added to 12 weeks after the birth of the child.

PROFESSOR CARLSON: Well, we could rewrite it so it's a 12-week period commencing two weeks before the birth of the child. Of course, you don't really know. It would be a little tricky but a total of 12 weeks maximum.

MR. ORSINGER: That's not the way it's written.

PROFESSOR CARLSON: No, it's not, and I'm just -- we're here for a discussion.

CHAIRMAN BABCOCK: Picky, picky, picky.

HONORABLE DAVID PEEPLES: The person asking gets to designate what three-month period.

PROFESSOR CARLSON: Right.

HONORABLE DAVID PEEPLES: When it starts and when it expires.

MR. ORSINGER: But the proposal in Florida, it starts with the date of birth.

HONORABLE DAVID PEEPLES: I think that's not our case here. The subcommittee is advocating a moving period chosen by the applicant, and the judge always has discretion to grant more.

CHAIRMAN BABCOCK: Yeah, but what about the situation where the woman is pregnant; the doctor says,

"Hey, you've got to get off your feet for two weeks before birth"? Are we going to say that she can't have three months with the baby after -- after birth? In other words, she's got to use, you know, two of her three months up because the doctor told her ahead of time?

HONORABLE DAVID PEEPLES: I think the way this is written it would be a mandatory unless there are extraordinary circumstances, a mandatory three-month period, a moving period. The judge can grant more, but doesn't have to, but --

CHAIRMAN BABCOCK: No, no, no. I'm just raising the question.

HONORABLE ANA ESTEVEZ: I was just agreeing with him. Then you go back to what 99.9 percent of the judges would have done in the first place, and let her or him be with the baby. So if they need two months before because they have to be in the hospital with their legs up, maybe this doesn't apply yet, but obviously they're not going to be in court if they have to do everything to save the baby, and then once they have the baby they have this protection, so --

PROFESSOR CARLSON: So you think it should be longer?

HONORABLE ANA ESTEVEZ: No. I don't think it needs to be covered. I think it should be obvious that if

somebody has a health problem that has to be in the hospital that they're not going to be in court.

CHAIRMAN BABCOCK: Yeah.

HONORABLE ANA ESTEVEZ: I mean, it's very unfortunate that we feel like we need this so badly. It's really -- it's really unfortunate that we don't have consensus in our society and our state to allow people to have healthy pregnancies and healthy beginnings of families.

CHAIRMAN BABCOCK: Well, to Frank's point, there is not a whole lot of empirical evidence in Texas that we do have a problem, but nevertheless, I think it's a good thing to have a rule.

HONORABLE ANA ESTEVEZ: I think that we can have this -- what I'm trying to say is we can have this rule, and because we have this rule does not exclude all of those other circumstances that happen.

CHAIRMAN BABCOCK: That was my point.

HONORABLE ANA ESTEVEZ: And so you don't have to address them all.

CHAIRMAN BABCOCK: Yeah.

MR. GILSTRAP: That would be a discretion -- maybe a discretionary addition to the mandatory time.

HONORABLE ANA ESTEVEZ: Right.

MR. GILSTRAP: But you solve the whole

problem by making it all discretionary.

HONORABLE ANA ESTEVEZ: I don't think people hire people because they're pregnant just to get out of trial. I'm sorry, I just --

MR. ORSINGER: Not right now because it doesn't work, but what if it's absolutely guaranteed?

HONORABLE ANA ESTEVEZ: You've got to find a lawyer that --

CHAIRMAN BABCOCK: Professor Albright.

PROFESSOR ALBRIGHT: I just have some questions. I know when I was working for the university, I think the only parental leave that's allowed -- and this may be all state government, and I just can't remember, is under FMLA, which means that only the mother having the baby or adoption, medical reasons, you're guaranteed your job for 12 weeks. So what this is, is it's an FMLA leave. I mean, like anybody can say, "I've got medical issues with myself or my family, and I need 12 weeks off from -- from having to deal with the court," plus it's the other parent getting parental leave as well. Is that correct?

I'm just wondering if we can word this in terms like the FMLA works where it's like you're guaranteed your job for three months, 12 weeks, and it may be that you take three weeks here and four weeks there, because some people have to get off their feet at six months and then

they're back on their feet and then the baby is born, or there's any number of things that can happen, and I don't think we should micromanage that, but what we're talking about is requiring a judge to give leave, which they certainly should have to do under FMLA circumstances whether you're a man having a heart attack or a woman having a baby, and then there are other reasons to provide parental leave that then we can deal with as well.

PROFESSOR CARLSON: Alex, in the Exhibit N is the current version of the FMLA, I think. And it says "Subject to 2613," the certificate that the employee files, "an eligible employee is entitled to a total of 12 work weeks of leave during any 12-month period for one or more of the following: Because of birth of son or daughter of the employee and in order to care for such son or daughter."

PROFESSOR ALBRIGHT: So both parents are entitled to FMLA.

HONORABLE TRACY CHRISTOPHER: Yep.

PROFESSOR CARLSON: That's how I'm reading it. I don't know anything about it.

PROFESSOR ALBRIGHT: The world has improved. But so it seems to me that FMLA could be the basis for this, and then it becomes perhaps less controversial about letting all of these pregnant women get out of trials.

CHAIRMAN BABCOCK: Okay. We're going to take our afternoon break for 10 minutes. We'll be back at 3:00 and get ready to do some voting at some point.

(Recess from 2:49 p.m. to 3:02 p.m.)

CHAIRMAN BABCOCK: All right. The first thing, Elaine, you've got to listen to this.

PROFESSOR CARLSON: Yeah, I'm listening.

CHAIRMAN BABCOCK: The first thing we're going to vote on is whether to take any votes. Alistair has withdrawn his thirst for votes, so we're going to keep talking and give more sense of the committee to Elaine rather than burden her with votes on ticky tacky issues. Did I get that right, Judge Peeples?

HONORABLE DAVID PEEPLES: Sounded good to me.

CHAIRMAN BABCOCK: Huh?

HONORABLE DAVID PEEPLES: It sounded good to me.

PROFESSOR CARLSON: All right, well --

CHAIRMAN BABCOCK: All right.

PROFESSOR CARLSON: The next question we need to address at some point is what type of cases should be exempt from the rule.

CHAIRMAN BABCOCK: Family law.

PROFESSOR CARLSON: Judge Peeples suggested temporary injunctions, TRO. The draft we got from the

Texas -- State of Bar Texas court rules committee included juvenile, exempting on juvenile and involuntarily parental termination cases. I have a footnote that -- sorry, yeah, footnote two on page two of the February 17th memo. Florida has other rules for parental leave in criminal, juvenile, and involuntary civil commitment of sexually violent predators. North Carolina has different provisions for criminal, special proceedings in estate, and juvenile. I don't know enough about those other areas to really speak on it, although I would say it's pretty obvious we have to protect children who are in harm's way. So involuntary parental termination to me makes sense. I don't do juvenile, but I assume that's a speedy trial kind of concern.

CHAIRMAN BABCOCK: Professor Albright.

PROFESSOR ALBRIGHT: Can I suggest that we conduct the conversation with men who have heart attacks or women who have heart attacks instead of pregnant women? I think if you have -- let's take it that -- because this is an FMLA -- has that continuance, too. So if you are a man who has diabetes and you may have a heart attack sometime, should you not take a case? No. I mean, you take the case, but there are times that you shouldn't be able to get a continuance. If you have a heart attack, you should have to give it to someone else, and I just -- I just think we

need to think about it in terms of if there is an emergency or, you know, if you're planning on getting your knee replaced or something, there are times that you are not going to be able to work. You may be able to plan it and you may not be able to, and what are the situations that you should have to hand it off to someone else and not have a continuance of any kind.

PROFESSOR CARLSON: Okay. I can think of it that way as well.

CHAIRMAN BABCOCK: Justice Kelly.

HONORABLE PETER KELLY: As a general comment on that, it seems that parental leave is not really for the protection of the parent, but for the newborn child or for the newly adopted child. So having a heart attack or other medical condition is -- I think is a different situation than -- it's a different policy imperative than trying to protect the newborn child.

CHAIRMAN BABCOCK: Judge Estevez.

HONORABLE ANA ESTEVEZ: I wanted to just talk about regarding exceptions --

PROFESSOR CARLSON: Yeah.

HONORABLE ANA ESTEVEZ: I would propose that it is a shorter period of time with no exceptions, so a six weeks -- I know that the FMLA is 12 weeks, but I think that throughout our society six weeks has been the number that

people take as maternity leave, and I don't think there should be any exceptions for that six weeks, and it can extend to the 12 weeks, but maybe those other things can be -- the exceptions can be in that second section. Because are we saying when you say there's an exception that, no, if it is this case, then what happens? What happens if it's a juvenile case, and she just had the baby and had a C-section yesterday? I mean, what's supposed to happen --

PROFESSOR CARLSON: Other counsel --

HONORABLE ANA ESTEVEZ: -- if there is no exception?

PROFESSOR CARLSON: Other counsel comes in. That was the State Bar proposal, and those, juvenile, were also subject of an exception in Florida and --

HONORABLE ANA ESTEVEZ: So how do they find that lawyer in that short period of time?

PROFESSOR CARLSON: I know nothing about juvenile.

HONORABLE ANA ESTEVEZ: Well, I just meant practically, I don't think -- I think everything can wait usually, I mean, unless --

PROFESSOR CARLSON: What about expedited trials?

CHAIRMAN BABCOCK: Yeah, Richard.

MR. MUNZINGER: Just, again, in response to

heart attack analysis, pregnancy is predictable. Heart attacks are not. And one is catastrophic, the other is not; and we're dealing with a rule that is intending to anticipate something that is good for the child, good for the mother, good for the father, and fair to the other side, which has an interest in this because they've spent a heck of a lot of money; and if you've got a trial setting in September, you generally know that six to eight, nine months, maybe even a year beforehand; and a lot of dockets don't change usually. You miss your slot in September of 2020, you may not have another slot for another year, depending on the court and how they operate.

CHAIRMAN BABCOCK: Yeah.

MR. MUNZINGER: It's a real problem, which, again, is why putting the onus on the pregnant person -- and I know you can't do it with an adoption, but the earlier you have the notice of it, the less chance there is for abuse of it.

CHAIRMAN BABCOCK: Judge Peeples, and then Richard.

HONORABLE DAVID PEEPLES: I'd like to point out that the draft -- it would be helpful to the subcommittee to notice the distinction the draft makes. (A) deals with a mandatory continuance for the birth situation; (b) deals with a discretionary continuance for

the serious health issue, two kinds of cases, and you've got to file an affidavit and so forth. We had a draft comment that was -- that just sort of lists some factors that judges ought to consider when considering one of those serious health issues, matters, and those are -- (a) and (b) are just very, very different, and I think some discussion would be helpful about the second one, serious health and discretionary continuance.

CHAIRMAN BABCOCK: Okay. Frank. No, was there somebody else?

MR. GILSTRAP: Is there a problem with the serious health issues? I mean, they're dealt with now. Everybody deals with them in terms of common human decency and understanding. Is there a problem? Do we even need it, or are we putting that in there as kind of a mask for this special treatment for lawyers?

PROFESSOR CARLSON: Well, the Court asked us to consider that.

HONORABLE DAVID PEEPLES: Well, the serious health part of it deals with lawyers, too.

MR. GILSTRAP: I understand. It's just, you know, are there any cases where people have heart attacks where the continuance is denied? I don't think so.

CHAIRMAN BABCOCK: I've heard of one recently. It wasn't in Texas, but the guy had a heart

attack the week before trial and the judge denied a continuance. Lead lawyer.

MR. GILSTRAP: In the case that Peter -- excuse me, Justice Kelly talked about, you know, a quick mandamus would solve the whole problem. All we need is one mandamus to say, you know, you should have given these people a family leave continuance. That's all you need to solve the problem. It doesn't solve the problem of women not getting hired in these cases, which is a real problem and the real problem we're talking about today.

CHAIRMAN BABCOCK: Somebody down there had their hand up.

MR. ORSINGER: I put my hand up because I'm trying to do this on my cell phone, but there's an exception here to Chapter 54 cases and 262 cases under the Family Code, but I see that the protective order chapters are 85 and 83. And 83 is probably just ex parte, but I'd like to look at the -- Elaine, do you remember what is covered in Chapter 54 and 262, off the top of your head?

PROFESSOR CARLSON: Yes, 54 is juvenile, and 262 is involuntary parental termination.

MR. ORSINGER: Okay. So one of my concerns is -- has to do with the family violence litigation, and I noticed that this rule wouldn't stop an ex parte application or a temporary order. I think the way it's

written is just the final trial.

PROFESSOR CARLSON: I don't know.

MR. ORSINGER: Well, okay, this says -- let's see, the prohibition is, I thought, for trial on the merits or dispositive motion.

PROFESSOR CARLSON: That's what the draft discussion says.

MR. ORSINGER: Okay. So first of all, that doesn't prohibit temporary relief, whether it's under the Family Code or whether it's a temporary restraining order or injunction in ordinary civil litigation, so I feel like the door is open to get emergency relief under this proposal. Would you agree with that?

PROFESSOR CARLSON: Yes, because it says, "Absent extraordinary circumstances the court is to grant the continuance" in (a)(3).

MR. ORSINGER: So then the question becomes if emergencies can still be addressed by temporary proceedings, then the question is, for me anyway, under the Family Code on these family violence, how critical is it that we be able to have a final trial? And I'm not sure that I -- I'm not sure that it is. If we can get a temporary order that is effective to protect the individuals, then maybe we don't need a trial right away. Maybe we can wait six months for the trial.

PROFESSOR CARLSON: Anyone that has experience in that area, that would be very helpful input to the committee.

MR. DAWSON: Well, wouldn't -- the rule as drafted wouldn't cover the temporary orders that he's talking about, so there wouldn't be a continuance of those temporary orders.

MR. ORSINGER: Right.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: TCPA motions, 91a motions, they would have to be exempted. I would consider both of those dispositive motions.

CHAIRMAN BABCOCK: Yeah.

HONORABLE TRACY CHRISTOPHER: If we extended it to dispositive motions.

MR. ORSINGER: Special appearances, too.

HONORABLE TRACY CHRISTOPHER: Yeah. I mean, when you have statutory deadlines to get something done.

CHAIRMAN BABCOCK: Yeah, you might say "trial setting including a motion for summary judgment." But you wouldn't want to -- you wouldn't want 91a or the TCPA to be covered, I wouldn't think.

PROFESSOR CARLSON: That's helpful. Thank you. So can we look now at the -- when we talked in November there was a lot of support, I thought, from the

record for requiring counsel who is seeking the leave to -- I think we used the word "certify" certain things. This draft under (a)(2) has an affidavit that has to be sworn out by the parent seeking the leave, and my question to you is are these the right requirements for the affidavit, or are some of them not -- do you think some of them don't belong there? And I had an additional question, do you think we should have them state in the affidavit whether or not the opposing party opposes, although the court must grant it so that's sort of an oxymoron?

CHAIRMAN BABCOCK: Yeah, that's true. You probably should say "affidavit or declaration," because they are I think synonymous in all instances, aren't they?

PROFESSOR CARLSON: Almost, yeah, under Chapter 132 of the Civil Practice and Remedies Code.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: (2)(b), you have to certify that parental leave will be taken by the applicant as allowed by this rule. Well, it's written, it will be real easy, yeah, the applicant didn't show up for trial, because that's what's covered by the rule. I think what this is trying to do is to say that the applicant also will not work at Baker Botts during those three months. I don't think we can make them do that, but that's extremely vague. What are we trying to do with (2)(b)?

CHAIRMAN BABCOCK: You're trying to avoid the situation where the lawyer gets the continuance and then the child is born, and the lawyer is back at work three days later.

MR. GILSTRAP: Okay. The second scenario, she goes back to work at Baker Botts right away.

CHAIRMAN BABCOCK: Or he does.

MR. GILSTRAP: Well, you can't do that.

CHAIRMAN BABCOCK: Can't do what?

MR. GILSTRAP: You're not going to stop them from doing that.

CHAIRMAN BABCOCK: Okay. Richard.

MR. ORSINGER: So my concern is more -- I have a more serious concern in addition to your concern, and that is selective implementation of this rule among your cases. So if one lawyer were to say, "I want 120 days" or however many I can get on this case, but in the meantime I'm going to be trying two or three other cases, to me that would be a breach of faith, and we need to be sure that people that say that I can't go to the courtroom in this case means they can't go to the courtroom in any case.

Secondly, I don't know what to do about someone who says I just want to get out of this trial, but I'm going to continue to work a 40-hour week at the office,

because the whole point for giving this exemption is to stay home with the child, as I understand it; and so to me it's a reasonable policy discussion whether someone should be permitted to work full-time or part-time while they're exempted from going to trial, which then has a negative effect on all of the opposing parties. And so it seems to me to be reasonable -- I mean, in a perfect world someone is going to say, "I'm taking off for 90 days after this child was born, and I'll see you at the end of three months"; and that's what the policy is, that's what we're trying to encourage, that's what we would want them to do. We don't want them to say, "I need a continuance" and then I'm going to go back and work 40 hours a week. That's not what this is --

CHAIRMAN BABCOCK: What if they work 20 hours a week?

MR. ORSINGER: Well, you know, I don't know what to say about that. I think it's a discussion we should have, but I hate to think that someone is going to be immune from trials but still going to be -- first of all, I don't think they should -- if they're immune from any trial, they should not try any cases, even one-day trials. Otherwise they're going to selectively invoke this for just some cases and not others.

Secondly, if we really are encouraging people

to spend the time with their child, then maybe we should say your getting an exemption from trial is conditioned on you spending your time with your child, right?

HONORABLE TOM GRAY: Send photos.

CHAIRMAN BABCOCK: That's a little big brother.

MR. ORSINGER: Well, I know, but is this not intrusive?

HONORABLE TRACY CHRISTOPHER: I don't think that ought to be in there. I think it is way too much big brother. I think, you know, if the spouse doesn't want to go to trial, that's great, and you know, if the spouse still -- I mean, when I was on maternity leave if my spouse came home two hours early, that was huge. Huge. Okay. And, I mean, there is a big difference between, you know, 15-hour trial days and six hours in the office.

CHAIRMAN BABCOCK: Yeah.

HONORABLE TRACY CHRISTOPHER: And so I don't -- I don't think you should require that.

PROFESSOR CARLSON: You're talking about (2)(b)?

HONORABLE TRACY CHRISTOPHER: (2)(b), uh-huh.

CHAIRMAN BABCOCK: Judge Estevez, and then Lisa.

HONORABLE ANA ESTEVEZ: Well, just to answer

kind of some of the comments that Richard was saying, I also don't think that a first-time mother is going to have any idea how much time she's going to spend with the child and how much she can do. If you have a C-section, you're going to have a different type of recovery, and it's not that you have to spend all of that time. They may want to do, because I think women lawyers just tend to want to do work, so they may be doing work with the baby next to them and take the baby to work, and they're still with the baby, but I think it's just micromanaging, and they should have the right to ask for whether it's six weeks or the 12 weeks, whatever you determine that number is, not knowing when they would be able to be released from -- to go.

I mean, I didn't get released when I wanted to go, because I -- it just took me longer to heal from, you know, the surgery, but everybody is different. So you can't -- you can't know before you have a baby how it's going to affect you. I mean, some people have effects for years and years to come, so they should be able to have that full 12 weeks and then do what they decide to do with it. And if they want to go to work because they can go to work because it makes them feel better, they should be able to do that.

MR. ORSINGER: Well, should they be able to try some of their cases and not others?

HONORABLE ANA ESTEVEZ: You know what, people do that all the time. You know, they ask me for a continuance because they're going to be in federal court. You know what happens? They go settle that case. Do you think they come back and go, "Oh, by the way, can I be number one on your docket?" I'm just saying, and not only do they do that to me knowing that it might settle, but they do that. I mean, yeah, should they be able to, well, they should be able to do that if that's how they feel inside and their conscience allows them to do that, because there's different types of lawyers with different types of ethics that if they feel like they shouldn't be doing that then they're not going to be doing that, and the ones that are going to abuse the system are going to abuse whatever system we put in.

CHAIRMAN BABCOCK: You see, Judge, Richard doesn't get out much, so -- Lisa.

HONORABLE ANA ESTEVEZ: I mean, you just can't micromanage.

MS. HOBBS: I'm amplifying messages that have already been said, but keep in mind we're talking about professional women or men, and we're talking about them being lead on a case, so they're probably pretty experienced. And when I have the flu and I might ask one court for continuance of something that I don't -- I can't

lift my head from the bed, but I might have a client who has something that day that I just have to suck it up and figure out what my client needs in that moment. We are -- in the end we're not employees, presumably, if we're talking about lead lawyers on cases, so we're going to do things that we have to do, even when we would rather be cuddling with our baby and not doing them, because we're not just employees.

We're -- we have a fiduciary relationship to our clients, and I mean, I think that's what everybody is saying here, but we're professionals, and especially at the level of a lead lawyer, which is presumably where we're going with this. We're going to take care of clients' needs; and while I might get a continuance, rightly so, for a trial that says I don't have to work 15-hour days, if my client calls me and says, "I need a TRO tomorrow" and I just had the baby three days ago, I'm probably going to go down and get that TRO if there's no one else that can do it and I can't hand it off because I'm a professional and I need to take care of my client's needs. We just can't get into this micromanaging about what we're going to say you can or cannot do in your 12 hours when really your obligation is to your clients and taking care of them.

CHAIRMAN BABCOCK: Anybody else have their hand up? Anybody want a say about this? Yeah, Judge.

HONORABLE R. H. WALLACE: Well, I was just looking, the North Carolina form, it signs, "I hereby certify that the secure leave period designated below is not being designated for the purpose of delaying, hindering, or interfering with the timely disposition of any matter in any pending action or proceeding," and then they go on to further certify that "no action or proceeding in which I have entered an appearance has been scheduled, peremptorily set, or noticed for trial, hearing, deposition, or other proceeding during the designated leave period."

So it sounds like under their rules, if you've got a trial setting, you wouldn't be able to come in and file that in that period of time, and also, the certification that it's not being done for hindering, interfering, or whatever, you know, if you make that sanctionable, then that would at least probably help address some of the really egregious abuses, possible abuses, we're talking about here.

CHAIRMAN BABCOCK: Yeah, Elaine.

PROFESSOR CARLSON: You know, I agree with that reading, Judge, but how is that -- how would that work with scheduling orders that schedule things out a year in advance?

HONORABLE R. H. WALLACE: I don't know. I

don't think it would.

PROFESSOR CARLSON: I don't know if in North Carolina they use a lot of pretrial orders or scheduling orders. Harris County does.

HONORABLE R. H. WALLACE: I don't know. It would make it almost meaningless.

PROFESSOR CARLSON: Right. Right. So that's another matter we need to talk about.

CHAIRMAN BABCOCK: Another kettle of fish, but what about what we're supposedly talking about, which is whether we exempt juvenile proceedings, involuntary parental termination, and any case Richard Orsinger doesn't want to have apply to the rule?

HONORABLE DAVID PEEPLES: Chip, I think the subcommittee ought to come back with a list of things and the Supreme Court decide. I mean, it seems to me --

CHAIRMAN BABCOCK: List of things of what, on not applying?

HONORABLE DAVID PEEPLES: On exemptions.

CHAIRMAN BABCOCK: On exemptions.

HONORABLE DAVID PEEPLES: Child protection, family violence, things like that, I mean, you just can't tie the hands of the judicial system in those situations, it seems to me.

CHAIRMAN BABCOCK: Yeah.

HONORABLE DAVID PEEPLES: But there are other things that are a little harder. And, you know, I don't think that this basically civil committee ought to do something that would apply in criminal cases without the acquiescence of the Court of Criminal Appeals.

CHAIRMAN BABCOCK: Of course.

HONORABLE DAVID PEEPLES: That's just my view. We just don't know enough about how that system operates, but I think the better way to handle this would be for us to come up with a proposed list and maybe talk about them. You know, the reference to juvenile, exempt all juvenile cases or just trials or just a temporary commitment or I don't know. That's a little harder.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: As I understand it, unless it's changed, the Supreme Court and the Court of Criminal Appeals are free to implement Rules of Evidence, but the Legislature has retained the exclusive rule-making authority on criminal procedure, and I think that's covered in the Code of Criminal Procedure. Is that still true? Does anyone know?

HONORABLE TOM GRAY: Do what now?

MR. ORSINGER: I think that criminal procedure is exclusively in the Legislature's control in the Code of Criminal Procedure, but they've delegated

evidence rules to the Court of Criminal Appeals and the Supreme Court.

HONORABLE TOM GRAY: And appeals.

MR. ORSINGER: And the appellate rules have been delegated. So, David, your concern about we can't do anything here on the criminal side, but juveniles are quasi-criminal, they're run in a civil court under the Family Code for criminal offenses. Not all of them, but some of them.

HONORABLE TOM GRAY: They're considered civil.

HONORABLE ANA ESTEVEZ: They're considered civil.

MR. ORSINGER: But you can have a child in need of supervision and a lot of other things, but if you're being -- you can be prosecuted or should I say you can be -- they can litigate your status as a juvenile for committing an offense under the Penal Code, but it's not considered a criminal prosecution. Would you agree?

HONORABLE TOM GRAY: Yes.

MR. ORSINGER: So that's why I say it's kind of quasi-criminal. There's an elevated burden of proof. You have -- the due process rights for a child would be the same as for an adult criminal prosecution.

HONORABLE DAVID PEEPLES: Chip, my point is I

think we can spend our time more wisely on other things than this. We haven't talked about it very much in the subcommittee.

PROFESSOR CARLSON: So we'll move on to the big question for discussion. Should the parental leave be mandatory, presumptively mandatory, say for exceptional circumstances or something like that, which is what we have in the discussion draft, or discretionary with factors with a trial court being required to make findings in support of its rulings.

CHAIRMAN BABCOCK: Well, if you make the trial court make findings, unless the party is going to provide the findings, it's going to make it a lot more complicated.

PROFESSOR CARLSON: Yes, but I'm trying to set up a mandamus.

MR. ORSINGER: So what she's talking about is the judge needs to make findings so that the appellate court can say you abused your discretion.

PROFESSOR CARLSON: Right.

CHAIRMAN BABCOCK: What's everybody's thoughts on that?

HONORABLE DAVID PEEPLES: There's another reason for that. I think if a judge denies one of these, if it's discretionary, it has to say on the record why.

It's a little harder to just outright deny something if you don't have good reasons that you can state. That's an additional reason why I think that's a good thing, if you want to make it discretionary.

CHAIRMAN BABCOCK: Okay. Professor Carlson.

PROFESSOR CARLSON: One of the reasons for -- in support of the mandatory, say for exceptional circumstances and exemptions, is the parent, what's most helpful to the parents is to know that they have child care covered and they can take care of the child. So leaving it up in the air is not as helpful as a presumptively mandatory, giving the court some discretion in extraordinary circumstances.

CHAIRMAN BABCOCK: Good point. Judge.

HONORABLE R. H. WALLACE: We've got discretion now. You're talking discretion, so I think it ought to at least be presumptively or in the absence of extraordinary circumstances, or otherwise, why make the rule?

CHAIRMAN BABCOCK: Anybody disagree with that? All right. So as -- yeah, Frank.

MR. GILSTRAP: Well, look, you make it -- you make it mandatory, it becomes -- it opens the door to the abuse issues. If it's not mandatory, you don't have the abuse issues, and there -- you know, the notion that people

aren't going to say, "Hey, look, I know you just had a" -- "I know your wife just had a baby. File this motion to get us out of this trial, and come back here and write a brief." That's going to be the real world.

CHAIRMAN BABCOCK: Okay. Justice Christopher.

HONORABLE TRACY CHRISTOPHER: I just don't think there's going to be abuse, and I think we ought to just write the rule that it's mandatory, and if we find some hard evidence that there's some abuse down the road then we'll tweak our rule.

CHAIRMAN BABCOCK: Yeah. Justice Gray.

HONORABLE TOM GRAY: I'm delaying long enough for Dee Dee to have a drink.

CHAIRMAN BABCOCK: Yeah, that Diet Coke there is spiked, by the way.

MR. DAWSON: Bet you that doesn't make it in the record.

CHAIRMAN BABCOCK: Okay. Well, mandatory, presumptively mandatory, or discretionary, those are the three choices, right? Yeah.

MS. HOBBS: I don't think we've done this. I had to step out, so maybe we did. Are we talking lead attorneys, first and second chair? Because that affects my vote on whether it's -- how I'm going to vote on the --

does that make sense, if we're talking about any lawyer on the case --

PROFESSOR CARLSON: We have not voted on that.

MS. HOBBS: Okay, sorry. I just think those issues are intertwined. Maybe other people disagree with that.

CHAIRMAN BABCOCK: So either lead attorney or an attorney that has substantial responsibility for the preparation and presentation of the case.

MS. HOBBS: That's the proposal.

CHAIRMAN BABCOCK: That's the way it's written.

PROFESSOR CARLSON: That's the draft discussion.

CHAIRMAN BABCOCK: It's drafted that way.

MS. HOBBS: I would do it lead attorney or define lead attorney, and -- I forgot. Maybe Nina or somebody, like first or second chair. There was some discussion about how you define lead attorney, but -- but I would be more inclined to make it mandatory if we limited who could use it, and it wasn't just fourth-year associate on the case, even if they know all the documents and we think, oh, wow, they know all the documents. That's not the same as the actual Jim Perdue, Jr., trying the case.

CHAIRMAN BABCOCK: Judge Wallace.

MR. PERDUE: And I've still never been pregnant.

HONORABLE R. H. WALLACE: I think the Texas rules define lead attorney, unless they're otherwise designated, as the first attorney to sign the pleadings, so and that's very oftentimes is not the real lead attorney.

CHAIRMAN BABCOCK: Elaine.

PROFESSOR CARLSON: That's the attorney in charge.

HONORABLE R. H. WALLACE: Attorney in charge. I'm sorry, I stand corrected.

CHAIRMAN BABCOCK: Judge Estevez.

HONORABLE ANA ESTEVEZ: I have no problem with how Lisa stated it, because it's still going to be discretionary. So if they have some other lead attorneys and then they have the discovery guru and they come and they come for the motion for a continuance saying, "She's pregnant, I understand the statute doesn't show that, but this is a very important person and it would take us -- it would be impossible for us to get the 50,000 documents in somebody else's brain," you know, I think that that's fine, because it will still take care of it. We still have that discretionary power, so if we just make it mandatory to the lead attorneys there will be less abuse.

CHAIRMAN BABCOCK: Well, you're just shifting the fight to whether or not the fourth chair lawyer is really -- really has substantial responsibility for preparation and presentation of the case.

HONORABLE ANA ESTEVEZ: That's okay. They can argue that if they've only been on it for two weeks, because they just got hired by Richard, you know, because he was trying to get out of trial and looking for a pregnant woman --

MR. ORSINGER: I'm always ready to go to trial.

HONORABLE ANA ESTEVEZ: I know.

CHAIRMAN BABCOCK: But if they've been on the case since the beginning, and they, you know, have got a thousand hours on it, working on it --

HONORABLE ANA ESTEVEZ: Then you should probably continue it.

CHAIRMAN BABCOCK: Yeah. Richard.

MR. ORSINGER: From the standpoint of a vote it might be useful to take a vote on whether we're talking about lead attorney only or lead attorney and other attorney.

CHAIRMAN BABCOCK: Alistair is against that.

MR. ORSINGER: And then -- then decide whether it's mandatory or presumptive or discretionary, and

then shift and say we're going to do the narrow first vote and then we're going to do the broad vote and see how it changes the discretion. I think it will change the discretion.

CHAIRMAN BABCOCK: Justice Kelly.

HONORABLE PETER KELLY: Why not mandatory for the lead attorney, discretionary for anybody else? That way if you really have a team approach where you have a discovery guru, you can make your case to the judge.

CHAIRMAN BABCOCK: Yeah. Professor Carlson.

PROFESSOR CARLSON: Well, the discussion we had about the second chair or the attorney who had a substantial responsibility for the trial of the case was that's probably the person who needs the protection. There is a group that Jackie and I spoke with through the Florida situation -- was it Esquire Moms? I think that was the name of it.

MS. DAUMERIE: Yeah, something like that.

CHAIRMAN BABCOCK: Esquire Moms?

PROFESSOR CARLSON: Uh-huh. It's a nonprofit who is studying this issue and really trying to get some national movement on it. They're working on Kentucky right now, and they thought that it was very important that someone who was second chair have this ability to, one, continue to work with the client, because that's a really

important thing; and, two, to be able to keep that business, if that's what the client wanted. So I think there is a good reason to include second chair is just my impression talking to them. I agreed with it. You may not.

CHAIRMAN BABCOCK: I'm sorry. Justice Kelly.

HONORABLE PETER KELLY: Then you have to have some mechanism for designating up front who is first chair and second chair.

PROFESSOR CARLSON: And we could do that.

HONORABLE PETER KELLY: And as a side note, it's so frustrating trying to get Randy Fairless to trial because he's lead counsel on 500 cases, and he's set for trial, you know, all the time, and so very rarely is he actually going to be trying the case. It's going to be somebody else trying it. So lead counsel, it might force more truth telling in the designation of lead counsel by a defendant.

CHAIRMAN BABCOCK: Is there consensus that whatever -- whoever else may get mandatory treatment, that lead counsel should get mandatory treatment? Anybody disagree with that?

MR. GILSTRAP: You mean -- you mean, yeah, I disagree. I don't think anybody ought to get mandatory treatment.

CHAIRMAN BABCOCK: Well, you're a curmudgeon.

MR. GILSTRAP: You make it discretionary, it's okay to do it. People understand. You can show it to the judge. You know, law firms will say, okay, we can put this pregnant parent on the case because we're probably going to be able to get a continuance. It solves the problem. That's all you need. It solves the perceived problem.

CHAIRMAN BABCOCK: So, Frank, your thought is that we don't make it mandatory for lead -- even for lead attorney?

MR. GILSTRAP: Yeah, right. Nobody.

CHAIRMAN BABCOCK: Professor Hoffman.

PROFESSOR HOFFMAN: Now is probably a good time for me to offer my alternative, which is my instinct is it ought to be the opposite. It ought to be mandatory across the board. It sends the right signal, and the showing should be -- the burden should simply be on the part of someone asking for it, that they have a instrumental, substantial role to play, and that's essentially where we could build into the rule. That's where the discretion sort of lies in sort of making that judgment call. To me a better rule is a rule that says it's mandatory across the board because this is a good practice to have, and I'm with Tracy that it's very rare

that we're going to see abuses, but if we're wrong about that, we can always revisit it later. But in the meantime the rule protects against that by having the process of review happen not at the worthiness of the request, but on just essentially how involved is this person, which is essentially what our whole debate has been about, manufactured importance.

CHAIRMAN BABCOCK: So you would be in favor of a rule that made it mandatory for the lead attorney, attorney in charge, and then -- and also mandatory for a broader group of people.

PROFESSOR HOFFMAN: That's right.

CHAIRMAN BABCOCK: Okay. Professor Albright, and then Frank again.

PROFESSOR ALBRIGHT: I would agree with that, but also put in the medical reasons as well and anybody who would certify that they have a medical reason why they can't participate. It should all be treated the same. What I fear is that by treating parental leave differently, you set up people to be chastised for -- for taking advantage of their pregnancy or having a baby, and I just don't think -- I think we need to take that out of the equation. If you think -- if you as a professional think you have a reason that keeps you from representing your client adequately for a period of time up to 12 weeks, you

should be trusted on that.

CHAIRMAN BABCOCK: Do you think that kind of stigma exists today for the woman who doesn't, you know, have the baby and then get right into trial?

PROFESSOR ALBRIGHT: What do you mean, stigma?

CHAIRMAN BABCOCK: Well, what I took you to be saying, maybe I misunderstood, is that you're saying that -- well, I thought you were saying that the person asking for the parental leave would be stigmatized by asking for it, and therefore, we ought to call it something else.

PROFESSOR ALBRIGHT: Well, you don't have to call it anything else, but I think you see it with men all the time. Men don't take parental leave because there's a stigma attached, and I think still for women it's if you say, "I'm going to take 12 weeks" or however long and "I'm not going to do anything, I'm going to really, you know, stay home with the baby," there is a rolling of eyes that "Well, when I had a baby back in the Eighties, we still showed up for X, Y, and Z," or you'll hear women who say, "I tried a case when my baby was a week old." I mean, we just don't need to get into that. I think -- I think it's -- if you have a reason -- I think what a rule like this would do is say we respect reasons to stay home with

your children, and we respect reasons to stay home with your very sick family member, and we respect reasons to stay home because you are sick. I mean, so it should -- to me if you are saying as a professional "I think this is a reason that I need to back off," it should be respected.

CHAIRMAN BABCOCK: Got it. Got it. Frank.

MR. GILSTRAP: Well, if you want -- if one of the real goals of this is to get the big firms to put more women on cases and not be afraid of their having to take time off from being pregnant, extend it to everybody, because more likely the down -- the lower roles are going to be occupied more than the upper roles. That may change later on, but that's the case today. So if that's the goal, make it apply to everybody.

PROFESSOR CARLSON: What do you mean by that, all attorneys of record in the case?

MR. GILSTRAP: Yeah. Yeah. Sure.

CHAIRMAN BABCOCK: What was your question, Elaine?

PROFESSOR CARLSON: I said do you mean all attorneys of record in the case, and Frank said "sure."

CHAIRMAN BABCOCK: Okay. Justice Hecht is holding his hands in prayer.

HONORABLE NATHAN HECHT: Yeah.

MR. ORSINGER: Pray for guidance.

CHAIRMAN BABCOCK: Anybody else on this?

PROFESSOR CARLSON: I just want to point out that, you know, we do have a subsection (b) --

PROFESSOR ALBRIGHT: Right.

PROFESSOR CARLSON: -- those grounds, but what I hear you saying now, Alex, is you think that should be parity of the mandatory leave or however we treat parental leave.

PROFESSOR ALBRIGHT: I would treat them both the same. I'm actually more on the discretionary grounds. Y'all may be surprised to hear me say that, but I think that each person, each case is different, and there may be some cases that have 20 lawyers listed as being on the case, you know, and that's different from somebody that has one lawyer listed as being on the case. But I'm sympathetic to the, well, you already have discretion, but it sounds to me like there needs to be a thumb on the scale to say, you know, we need to take these seriously.

CHAIRMAN BABCOCK: Yeah, Lisa.

MS. HOBBS: I do think there does need to be a thumb on the scale. I think you and I would agree on that. Query whether we need a rule to do it or could the Supreme Court just issue some sort of statement or Rule of Judicial Administration or something that just emphasizes to trial courts, hey, these are the things you should think

about when you're granting continuances or not. Because I -- I mean, I'm with you, Alex. Like it probably should be discretionary, but every time I hear someone say that, I'm like you mean like the motion for continuance that we filed today?

And so if all we're trying to tell trial courts is, "Hey, listen up, guys, don't be jackasses when people have serious problems going on in their life," then we can do that without -- the Supreme Court has multiple ways to get out messages like that to a trial court. Take up some mandamuses. Hell, I'll be happy to mandamus a judge or two up to you if you promise me you're going to grant it, and y'all can write whatever you want to about how we should be mindful of these things, but every time y'all say it should be discretion, all I keep -- poor Chief Justice Gray over here. I keep saying, "You mean a motion for continuance like we have today?" And so it's got to be something different --

PROFESSOR ALBRIGHT: Yeah.

MS. HOBBS: -- if we're not going to make it mandatory.

CHAIRMAN BABCOCK: Yeah, Judge Wallace.

HONORABLE R. H. WALLACE: Well, and that's my thing. If we're trying to pass a rule that remedies the situation where some judge is being unreasonable and

whatever in giving continuances for trial for family leave or whatever leave, if you then say, okay, now it's discretionary, they are probably not going to pay attention to that rule either. So I think if you're going to -- if we're going to pass a rule -- and I hate that we have to have a rule, but I think we probably do, but I think it should be something more than just discretionary. I think it ought to be as written. I like that it's the court must grant it absent exceptional circumstances or something.

CHAIRMAN BABCOCK: Yeah. Well, with the exception of Frank, I think we have consensus that it ought to apply to lead counsel or attorney in charge. Anybody here can speak up, say otherwise, but that struck me as there's at least consensus on that, and then you go from there, Elaine.

MR. ORSINGER: Chip, are you saying mandatory for lead counsel or discretionary?

CHAIRMAN BABCOCK: I thought so, yeah, but maybe not. I know there's some discretionary people here, but whatever the -- whatever the highest level is, it ought to at least apply to lead counsel, maybe others, but at least -- yeah, Judge.

HONORABLE ANA ESTEVEZ: Well, if we say mandatory except for extraordinary circumstances, I just -- I want Richard to know that we can have a hearing where

somebody comes up and says, "We've been working on this case for nine years, Judge, and all of the sudden this new pregnant person that's never been on the pleadings, never showed up at any discovery stuff, is here and asking for a continuance." And the judge can say, "How long have you been working with them?" And they can say, "Two weeks. They sent me an e-mail saying I heard you were pregnant can you come work," and then I can say, "Hey, this seems to be a great reason to deny this." And it will all be on the record.

So I just don't think that -- I think the abuse issue can be taken care of because there's going to be -- there's a relationship you guys have, you know, the plaintiff and defendants, whether it's love, whether it's hate, whatever it is, but before you get to trial you've at least exchanged -- you've talked on the phone hopefully at least once. Maybe somebody made you mediate so you actually saw each other. You know, you know who's on those cases. You read who wrote things. It's not -- all of the sudden you're not going to find a pregnant woman who just pops into there, and if it does, you have the right to have an objection to this mandatory continuance that should have been filed. 90 days, you have plenty of time to set it, to hear it, and to get it fixed.

CHAIRMAN BABCOCK: Well, what if the lawyer

comes to you, Judge, and says, "Yeah, the case is nine years old. I've only been working on it for seven months, but I have taken a couple of depositions, and I'm not lead counsel, but I'm co-lead, and you know, I'm going to do the opening statement, and we don't know yet about closing, but I may do closing or my co-counsel may do that, and I for sure am pregnant," so --

HONORABLE ANA ESTEVEZ: If it's been seven months she wasn't --

CHAIRMAN BABCOCK: Huh?

HONORABLE ANA ESTEVEZ: If she's been on it for seven months and we're 30 days before, she got on it before the -- you know, it wasn't -- she didn't plot to get on the case.

CHAIRMAN BABCOCK: So on the first instance you would deny it, but in that instance you would grant it and then it's not mandatory. I mean, you're exercising your discretion.

HONORABLE ANA ESTEVEZ: Well, there was an exception to it.

HONORABLE TRACY CHRISTOPHER: Extraordinary circumstances.

MR. GILSTRAP: She's saying it's extraordinary circumstances.

HONORABLE ANA ESTEVEZ: That was an

extraordinary circumstance that all of the sudden there was a pregnant woman working on this case.

MR. ORSINGER: If I may, there's a difference between pure discretion and a mandatory rule that's subject to exceptions. The mandatory rule that's subject to exceptions is probably less discretionary than a purely discretionary rule. Yeah, so it's probably more amenable to mandamus as well.

CHAIRMAN BABCOCK: Only lawyers who do this, you know.

HONORABLE ANA ESTEVEZ: And only Richard can say it so beautifully.

CHAIRMAN BABCOCK: Yeah. Evan.

MR. YOUNG: I don't think that, you know, the lawyer that comes in and says, "Oh, yes, they were trolling around for pregnant women, pregnant lawyers, and here I was," that's not an exceptional circumstance. That is a bad faith use of a rule that's aimed at solving a problem, and what I think is if that were to be seen as happening, I don't think it will happen, but if it were seen to be happening, that would be a very devastating consequence of this rule. So the thing that I think that the affidavit should include is something a little more express than it has right now, which is that the client also certifies that I was not hired on account of my ability to invoke this

rule.

PROFESSOR CARLSON: The client certifies that?

MR. YOUNG: Well, I mean, who else could? The lawyer could certify knowledge but might not know. I mean, you can imagine hiring and choosing somebody on the team that you know is pregnant with the intention of invoking this. I don't think this is like that, but so many people have invoked this specter, that it seems like maybe the lawyer and the client -- the client consents to it and also says, "I did not," you know, "agree to have this person" or "I certify this person is not on my team because of pregnancy," and the woman says that, and then we don't have this problem. I mean, there's this idea of all of these women being hired late in the day in order to be able to exploit their pregnancy.

I mean, heck, maybe you're going to get pregnant next month because we've got a trial coming up, you know. Like come on, this is ridiculous, but just certify it. It's not hard, and it has the benefit of signaling that the Supreme Court is saying that's not what this rule is for. So there's no gray area anymore about the idea that somebody, some client or some lawyer or some partner in a firm, that sticks a pregnant person on the case in order to delay justice, that is not good, and I

think the rule can say as much. It can be very calm about it, but then it has the benefit of saying that everybody else who does invoke it, that's not a -- that shouldn't be a specter because they're certifying it, and I think that's an awful thing, right, the stigma that was mentioned about using pregnancy. We can protect people by having them say, "Of course, I'm not doing this." I'm certifying it because the Supreme Court says this is something that people have invoked on the Supreme Court Advisory Committee that they're assuming that their fellow lawyers all across the state are going to be putting pregnant women on cases in order to be able to thwart, you know, for a few months a trial. That's not what's happening. Let's just say it.

CHAIRMAN BABCOCK: Justice Kelly, and then Justice Christopher.

HONORABLE PETER KELLY: The statute governing legislative continuance provides or requires certification and affidavit, saying the attorney has not taken the case for the purpose of obtaining a continuance under this section, and --

MR. GILSTRAP: Of course, we all know that's not abused.

HONORABLE PETER KELLY: Pure as driven snow, these legislators are, and they've never taken one for that purpose, but we have certification, and I've seen the

abuse. So --

MR. YOUNG: Most pregnant women are probably more honorable than legislators.

MR. GILSTRAP: Well, let me say this. They may be, but their bosses aren't. We've got Jane Doe, she's pregnant. We've got four cases out here that are likely to go to trial. She's on all of them. Simple.

MR. ORSINGER: The more likely problem is hiring a co-counsel. It's not hiring an employee because she's pregnant or selecting an employee because she's pregnant. It's going out and hiring a co-counsel. That's what they did with the legislative continuances. The main lawyer was always there. They just hired the legislator, used to be the day before trial.

MR. GILSTRAP: Yeah.

MR. ORSINGER: But the Legislature was finally shamed through the public press to impose some limits on it, but I practiced before that, and you know, during the session you could show up for trial and you would have no trial.

CHAIRMAN BABCOCK: Richard, would you mind while I call on Justice Christopher --

MR. ORSINGER: I'm sorry.

CHAIRMAN BABCOCK: No, no, no, would you put the fire in Lisa's hair out while we're doing that?

MR. ORSINGER: I'm out of water.

HONORABLE TRACY CHRISTOPHER: I just think a statement like that would be so unnecessary and would be stigmatizing to a woman trying to get business.

CHAIRMAN BABCOCK: I'm sorry. Make that point again.

HONORABLE TRACY CHRISTOPHER: Having a statement like Evan suggested is unnecessary and would be stigmatizing to a pregnant woman trying to get business.

CHAIRMAN BABCOCK: Got it. Lisa, then Judge Peeples.

MS. HOBBS: I'm sorry, my hair is on fire because we are not talking about pregnant women. Okay. So every time y'all keep saying, oh, they're going to go hire somebody -- some pregnant woman, this at least as it's drafted we're talking about a male -- a father could want to stay home with their kids. So y'all are playing into Alex's concern about how y'all just think, you know, these women are just going to -- you know, so I say that to please stop saying that. Please stop saying that. Okay. That's why my hair is on fire.

Secondly, if you want to talk about games, it's even more, because if any dude on your team who has no intention of taking parental leave wants to -- you know, we're not just talking about hiring a pregnant woman.

We're talking about an existing male on your team whose wife happens to also get pregnant, and so I want us to stop talking about this in terms of pregnant women. I think Alex is really good to keep us focused on that, but then secondly, because it doesn't just relate to that, there's -- but no one is sitting here saying like, oh, my gosh, my mother-in-law, you know, had a stroke and I have to take care of her and now everybody is going to be hiring somebody and saying their mother-in-law had a stroke, you know. I mean, y'all are stigmatizing women just in your conversation about it, which is why my hair is on fire. So, sorry, but thank you for recognizing it.

CHAIRMAN BABCOCK: No, no, no. I want to be sure she didn't burn up over there. Evan.

MR. YOUNG: I think that it should be anybody who is trying to invoke the rule. It could be a man, or it could be for any health purpose, if it's including that. The point is just to say, like the legislator thing, which has been abused, but "I am not being retained in order to be able to leverage this rule for purposes of delay." That can be said expressly, and it doesn't have to be gender-based or pregnancy-based or anything, but it can be an express way of making clear this rule is not a little tool. It's not an arrow in your quiver in tactics for trial. It's a way of ensuring that those who need to be

away from work, whether it just be all trials or it's all things, actually can be away from work.

But the more significant thing I think is, as Justice Christopher had said this a while back, if all of this parade of horribles comes to happen, that would be a true shame, but the Court can respond when that happens. Right now we know that there is a concern. People may have different views on how pressing it is, but solving that concern surely is something that can be done, and then there can be, as in every other kind of rule that we've ever considered here, revisions and amendments and modifications in order to correct it.

CHAIRMAN BABCOCK: Hayes, then Nina.

MR. FULLER: As we've gone round and round today, I finally decided to go back to the letter that kind of prompted all of this, and I think we need to keep in mind the following. Number one, are we trying to draft a rule to implement the policy consideration and concerns that prompted this discussion? Or are we trying to write a rule or draft a rule that somehow anticipates and deals with, you know, the potential for abuse. It seems to me that those of us who are concerned that we might need a mandatory rule, that we might be concerned about abuse by the court, and those of us who want a discretionary rule are somehow concerned on abuse by the practitioners. I

don't think we're ever going to be able to solve either of those issues.

We need to focus on the policy. We need to draft a rule that best implements and gets to promoting that policy, and if we end up with some abuse happening in the future, we can address it by amendment or subsequent action on our part, but the fact of the matter is I think 98 percent of this is going to, you know, be dealt with in a responsible, professional manner, and it's the two percent that we're never going to be able to prevent with any rule. So I think we just need to keep that in mind.

I think discretion allows the courts to give a more nuanced consideration of parties and practitioners in front of them. Mandatory, you know, perhaps not, but at the same time neither way is going to be perfect. We just need to pick the one that will best implement the policy that prompted the discussion and not worry about the rest of it.

CHAIRMAN BABCOCK: Got it. Nina, final word from you.

MS. CORTELL: I just thought that we might as we think about this area think about what is much in the literature now and in the news, and that's the wellness initiatives that people are trying to roll out in the bar because of an acknowledged problem of substance abuse,

stress, suicide, et cetera, and that any rule we pass or any comment we give or any guidance we can provide that makes our profession a more hospitable one and recognizes a bit more quality of life than maybe some of us have experienced would be a very positive thing. So I think that's an overarching concept to keep in mind.

CHAIRMAN BABCOCK: Yeah, thanks. Whatever rule we wind up with and recommend to the Court, it's going to respect everybody. It's not going to play into stereotypes, and it's going to treat everybody with respect and not stigmatize anybody. That's our goal, and we're going to achieve that. Thanks, Elaine, and we're in recess.

(Adjourned)

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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 28th day of February, 2020, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are $ 2,077.00 .

Charged to: The State Bar of Texas.

Given under my hand and seal of office on this the 6th day of April, 2020.

/s/D'Lois L. Jones
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