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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

JULY 13, 2018

(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 13th day of July, 2018, between the hours of 9:00 a.m. and 4:00 p.m., at the State Bar of Texas, 1414 Colorado Street, Austin, Texas 78701.

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

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

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

18-03 Examples of Local Rules

18-04 Examples of Standing Orders

18-05 Rules In SAPCR Filed By A Government Entity

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

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

MS. PHILLIPS: Thank you for having me.

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

MS. WALKER: Sir?

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

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

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

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

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

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

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

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

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

We also made some changes in the

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

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

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

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

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

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

As you may know, the Legislature and the

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

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

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

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

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

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

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

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

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

CHAIRMAN BABCOCK: Surprisingly.

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

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

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

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

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

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

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

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

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

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

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

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

MS. NEWTON: Right.

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

information is the Governor wanting that would be helpful?

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

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

CHIEF JUSTICE HECHT: Yeah.

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

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

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

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

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

CHAIRMAN BABCOCK: Sure.

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

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

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

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

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

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

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

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

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

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

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

website and part of the materials.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

right now myself.

CHAIRMAN BABCOCK: Yeah.

HONORABLE DAVID PEEPLES: Is that okay?

CHAIRMAN BABCOCK: Judge Yelenosky.

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

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

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

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

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

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

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

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

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

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

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

CHAIRMAN BABCOCK: Okay. Justice Bland, then Buddy.

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

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

CHAIRMAN BABCOCK: Too bad, Martha.

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

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

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

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

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

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

MS. NEWTON: Chip?

CHAIRMAN BABCOCK: Yeah, Martha.

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

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

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

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

really addressing procedural rules.

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

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

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

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

CHAIRMAN BABCOCK: Yeah, easy for you to say.

HONORABLE DAVID NEWELL: Holly thanks you.

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

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

CHAIRMAN BABCOCK: Okay. Richard Orsinger.

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

MR. LOW: Yeah.

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

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

MS. NEWTON: Now it's Jackie.

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

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

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

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

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

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

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

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

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

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

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

CHAIRMAN BABCOCK: Buddy, and then Professor Hoffman.

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

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

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

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

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

CHAIRMAN BABCOCK: Professor Hoffman.

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

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

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

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

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

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

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

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

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

HONORABLE DAVID NEWELL: Decorum.

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

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

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

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

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

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

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

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

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

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

MS. NEWTON: Yeah.

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

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

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

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

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

MS. WOOTEN: Hire local counsel.

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

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

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

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

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

attorney can figure out what it is.

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

CHAIRMAN BABCOCK: Richard Munzinger.

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

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

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

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

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

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

CHAIRMAN BABCOCK: Justice Bland.

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

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

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

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

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

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

CHAIRMAN BABCOCK: 25 years.

MS. HOBBS: Yeah, something like that.

CHIEF JUSTICE HECHT: It seems like just yesterday.

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

HONORABLE STEPHEN YELENOSKY: Did you get as many submitted?

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

attorneys? What number are you now, nine?

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

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

CHAIRMAN BABCOCK: Speaking just for yourself.

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

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

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

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

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

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

MS. WOOTEN: Uh-huh.

CHAIRMAN BABCOCK: Evan.

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

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

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

That's something that would be a more

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

CHAIRMAN BABCOCK: That's what I heard.

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

CHAIRMAN BABCOCK: Yeah.

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

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

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

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

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

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

CHAIRMAN BABCOCK: Yeah, today.

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

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

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

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

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

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

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

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

But that said, I also do empathize greatly

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

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

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

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

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

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

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

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

CHAIRMAN BABCOCK: Okay. Great. Judge

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

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

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

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

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

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

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

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

HONORABLE STEPHEN YELENOSKY: And who would that be?

MR. STOLLEY: No, but I believe that under

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

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

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

do it, of course, is in the details.

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

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

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

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

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

HONORABLE DAVID PEEPLES: Yeah.

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

HONORABLE DAVID PEEPLES: Yeah.

CHAIRMAN BABCOCK: -- elected officials.

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

approved."

CHAIRMAN BABCOCK: Yeah.

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

CHAIRMAN BABCOCK: Sure.

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

CHAIRMAN BABCOCK: Kennon.

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

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

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

perhaps too late to be helpful.

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

for now.

CHAIRMAN BABCOCK: Martha.

MS. NEWTON: Well, I just wanted to add since I worked with Kennon and Shanna on that project kind of two complications that we ran into that -- just so it's on the record and the committee knows. So one is that it's very difficult to get a complete set of the current local rules of any particular court or county because sometimes -- or frequently they don't send us an entire new set. They say, "Here's our amendment to," you know, "Rule 7, local Rule 7, 14 and 28," and so then we issue an order that approves local Rule 7, 1 4, and 28, kind of without regard to the whole set. So getting a complete set was difficult, and so then we thought, well, we can link to the websites, but we also found that some lower courts didn't have websites. I think eventually that will be remedied. Or you had to, you know, go through a bunch of links to find them and then they might be moved, and so we did work on that diligently but ran into some complications.

CHAIRMAN BABCOCK: Judge Evans.

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

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

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

think they'll be published.

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

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

that can pick through.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PROFESSOR DORSANEO: I certainly am.

CHAIRMAN BABCOCK: All right, great.

MS. BARON: Excellent.

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

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

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

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

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

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

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

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

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

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

MR. ORSINGER: No.

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

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

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

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

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

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

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

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

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

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

CHAIRMAN BABCOCK: Okay, great.

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

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

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

MS. BARON: Is it statutory?

MS. HOBBS: It's statutory.

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

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

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

CHAIRMAN BABCOCK: Chief Justice Hecht.

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

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

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

CHIEF JUSTICE HECHT: Yeah.

MR. ORSINGER: It may not relate to demographics.

CHIEF JUSTICE HECHT: Yeah.

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

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

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

CHAIRMAN BABCOCK: Okay. Other comments? Richard.

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

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

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

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

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

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

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

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

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

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

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

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

CHAIRMAN BABCOCK: Say that again.

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

CHAIRMAN BABCOCK: Justice Bland.

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

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

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

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

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

HONORABLE HARVEY BROWN: Yeah, agreed.

CHAIRMAN BABCOCK: Okay. Judge Estevez.

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. ORSINGER: Brazos County has their option.

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

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

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

but --

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

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

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

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

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

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

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

CHAIRMAN BABCOCK: Okay.

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

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

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

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

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

HONORABLE TOM GRAY: Oh, let's not.

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

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

lawyer who is appealing has the duty to contact.

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

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

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

CHAIRMAN BABCOCK: Okay. What about on --

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

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

CHAIRMAN BABCOCK: Should be five.

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

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

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

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

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

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

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

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

MS. BARON: Right.

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

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

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

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

CHAIRMAN BABCOCK: Judge Estevez.

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

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

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

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

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

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

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

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

MS. BARON: Okay.

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

CHAIRMAN BABCOCK: Professor Albright.

PROFESSOR ALBRIGHT: Well, it sounds to me

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

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

PROFESSOR ALBRIGHT: So where does that fall?

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

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

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

CHAIRMAN BABCOCK: Richard and then Levi.

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

CHAIRMAN BABCOCK: I'm sorry, go ahead.

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

CHAIRMAN BABCOCK: Okay.

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

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

CHAIRMAN BABCOCK: Orsinger.

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

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

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

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

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

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

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

MR. JACKSON: I don't know.

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

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

CHAIRMAN BABCOCK: Okay. Justice Brown.

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

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

CHAIRMAN BABCOCK: Judge Estevez.

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

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

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

Now, I don't know if the extension is

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

CHAIRMAN BABCOCK: Okay. Professor Albright.

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

CHAIRMAN BABCOCK: Pam.

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

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

CHAIRMAN BABCOCK: Okay. Pete.

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

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

CHAIRMAN BABCOCK: Okay. Yeah, Commissioner Sullivan.

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

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

CHAIRMAN BABCOCK: Professor Albright.

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

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

PROFESSOR ALBRIGHT: Yeah.

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

PROFESSOR ALBRIGHT: Yeah.

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

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

CHAIRMAN BABCOCK: Okay. Yeah, Justice Gray.

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

CHAIRMAN BABCOCK: Uh-huh.

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

is sometimes difficult.

MR. MUNZINGER: That was my point.

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

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

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

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

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

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

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

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

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

MR. ORSINGER: Yes.

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

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

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

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

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

CHAIRMAN BABCOCK: Okay. Richard.

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

CHAIRMAN BABCOCK: You're talking about Gilstrap?

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

CHAIRMAN BABCOCK: Pam.

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

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

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

CHAIRMAN BABCOCK: So you're ready to vote.

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

know what her answer is.

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

CHAIRMAN BABCOCK: Yeah.

MS. BARON: Yes, in parental termination cases.

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

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

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

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

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

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

MS. BARON: Thank you.

CHAIRMAN BABCOCK: Forget about everything I said, Kim.

MS. PHILLIPS: Okay. I can do that.

HONORABLE TOM GRAY: No problem.

CHAIRMAN BABCOCK: How many people are in

favor of adding five days?

MR. GILSTRAP: To termination.

CHAIRMAN BABCOCK: Raise your hand.

MR. GILSTRAP: In termination cases. Right?

MR. ORSINGER: Yeah. First vote.

CHAIRMAN BABCOCK: How many are against?

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

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

CHAIRMAN BABCOCK: Lisa.

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

CHAIRMAN BABCOCK: Okay. Pam, what do you

think about that?

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

MS. HOBBS: Oh.

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

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

CHAIRMAN BABCOCK: Right.

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

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

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

CHAIRMAN BABCOCK: Pam, you okay with that?

MS. BARON: I'm perfect with that.

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

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

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

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

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

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

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

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

can introduce them if appropriate and start out the discussion.

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

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

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

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

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

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

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

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

concerns.

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

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

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

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

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

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

HONORABLE STEPHEN YELENOSKY: Well --

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

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

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

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

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

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

HONORABLE JANE BLAND: Levins.

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

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

HONORABLE JANE BLAND: I know you are.

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

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

MS. BARON: Yes.

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

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

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

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

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

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

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

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

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

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

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

CHAIRMAN BABCOCK: Okay. Frank.

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

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

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

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

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

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

MR. LEVY: So that --

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

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

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

MR. LEVY: Okay.

CHAIRMAN BABCOCK: Richard, and then Peter,

and then Harvey.

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

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

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

CHAIRMAN BABCOCK: Is that rhetorical?

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

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

CHAIRMAN BABCOCK: Justice.

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

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

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

"Yes, but you sent it to the wrong lead

lawyer."

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

CHAIRMAN BABCOCK: Judge Estevez.

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

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

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

CHAIRMAN BABCOCK: Yeah, Lamont, and then Trish.

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

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

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

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

CHAIRMAN BABCOCK: Okay. Trish.

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

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

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

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

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

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

CHAIRMAN BABCOCK: Kennon.

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

MS. McALLISTER: Right.

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

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

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

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

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

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

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

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

CHAIRMAN BABCOCK: Judge Yelenosky.

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

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

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

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

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

CHAIRMAN BABCOCK: Buddy.

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

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

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

MR. LOW: But, but --

CHAIRMAN BABCOCK: Kennon.

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

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

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

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

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

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

CHAIRMAN BABCOCK: Kennon.

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

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

HONORABLE JANE BLAND: And we can talk about

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

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

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

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

CHAIRMAN BABCOCK: Okay. Justice Brown. Then Richard.

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

(Conference Phone interrupts with automated

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

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

HONORABLE JANE BLAND: We know we have long meetings.

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

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

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

CHAIRMAN BABCOCK: Yeah.

HONORABLE HARVEY BROWN: That would work.

CHAIRMAN BABCOCK: Go ahead, Richard.

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

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

HONORABLE DAVID EVANS: It forces a separate trial.

HONORABLE STEPHEN YELENOSKY: Yeah.

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

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

HONORABLE DAVID EVANS: Sure.

MR. ORSINGER: -- like one legal --

HONORABLE DAVID EVANS: Yeah.

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

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

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

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

CHAIRMAN BABCOCK: Does that happen, Judge?

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

HONORABLE ANA ESTEVEZ: Yeah.

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

CHAIRMAN BABCOCK: Judge Yelenosky.

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

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

HONORABLE DAVID EVANS: In worst cases.

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

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

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

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

CHAIRMAN BABCOCK: Okay.

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

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

HONORABLE STEPHEN YELENOSKY: But my point is this --

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

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

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

HONORABLE STEPHEN YELENOSKY: Right.

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

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

HONORABLE DAVID EVANS: Yeah.

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

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

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

CHAIRMAN BABCOCK: Okay.

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

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

CHAIRMAN BABCOCK: Yeah, Justice Gray.

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

HONORABLE STEPHEN YELENOSKY: I think it's

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

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

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

HONORABLE TOM GRAY: Right.

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

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

having -- of making a limited appearance.

HONORABLE STEPHEN YELENOSKY: No.

CHAIRMAN BABCOCK: Levi.

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

CHAIRMAN BABCOCK: Yeah. But --

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

been a winning argument. So --

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

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

HONORABLE STEPHEN YELENOSKY: Right.

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

CHAIRMAN BABCOCK: Right.

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

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

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

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

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

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

MS. McALLISTER: Part, yeah.

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

HONORABLE LEVI BENTON: Right. That's right.

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

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

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

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

MR. GILSTRAP: The problem is the term

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

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

MR. JEFFERSON: I don't like that.

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

MR. LEVY: Yeah.

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

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

CHAIRMAN BABCOCK: What?

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

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

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

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

HONORABLE STEPHEN YELENOSKY: Chicago.

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

representation of the client.

HONORABLE STEPHEN YELENOSKY: Because it --

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

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

CHAIRMAN BABCOCK: Well, I think --

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

CHAIRMAN BABCOCK: Okay.

HONORABLE STEPHEN YELENOSKY: And I think Justice Bland --

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

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

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

MR. STOLLEY: The court does.

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

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

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

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

MR. KELLY: Yes, I did.

CHAIRMAN BABCOCK: For a long time.

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

My third note is there was some discussion

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

CHAIRMAN BABCOCK: Justice Bland.

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

HONORABLE STEPHEN YELENOSKY: Right.

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

MR. KELLY: But opposing party can have a

lawyer.

HONORABLE JANE BLAND: Right. Right.

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

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

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

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

CHAIRMAN BABCOCK: You like that or you

don't like that?

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

CHAIRMAN BABCOCK: Okay. Richard.

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

HONORABLE STEPHEN YELENOSKY: Yeah.

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

CHAIRMAN BABCOCK: Scott.

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

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

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

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

CHAIRMAN BABCOCK: Yeah. Skip.

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

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

CHAIRMAN BABCOCK: Kristen, you had something?

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

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

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

CHAIRMAN BABCOCK: Yeah, Professor Hoffman.

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

CHAIRMAN BABCOCK: Judge Yelenosky.

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

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

CHAIRMAN BABCOCK: But that's what we do.

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

CHAIRMAN BABCOCK: Okay. Kristen.

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

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

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

CHAIRMAN BABCOCK: Okay. Yeah, Chris.

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

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

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

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

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

CHAIRMAN BABCOCK: Judge Yelenosky.

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

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

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

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

opposing party is clear.

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

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

CHAIRMAN BABCOCK: Yeah, so --

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

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

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

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

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

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

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

there are multiple parties involved you might want to --

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

CHAIRMAN BABCOCK: Yeah.

MR. LEVY: Yeah.

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

MR. LEVY: Okay.

CHAIRMAN BABCOCK: Yeah, Justice Gray.

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

HONORABLE JANE BLAND: That's a good point.

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

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

CHAIRMAN BABCOCK: No, no, no.

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

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

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

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

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

HONORABLE STEPHEN YELENOSKY: But --

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

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

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

HONORABLE STEPHEN YELENOSKY: Well, not completely.

HONORABLE JANE BLAND: Not completely, okay.

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

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

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

HONORABLE STEPHEN YELENOSKY: I'm sorry?

MR. LEVY: Was that rule reviewed?

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

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

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

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

HONORABLE STEPHEN YELENOSKY: Okay.

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

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

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

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

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

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

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

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

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

CHAIRMAN BABCOCK: Professor Hoffman.

HONORABLE JANE BLAND: But there are others that disagree.

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

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

HONORABLE JANE BLAND: I agree.

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

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

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

HONORABLE STEPHEN YELENOSKY: What's that?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CHAIRMAN BABCOCK: Okay.

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

CHAIRMAN BABCOCK: (d).

HONORABLE JANE BLAND: If I can find it.

CHAIRMAN BABCOCK: Service?

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

representing the party for this.

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

CHAIRMAN BABCOCK: Okay. Judge Yelenosky.

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

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

CHAIRMAN BABCOCK: Peter.

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

CHAIRMAN BABCOCK: Yeah. Good thoughts. Robert.

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

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

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

MR. LEVY: Right.

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

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

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

MR. LEVY: Right.

HONORABLE JANE BLAND: We could do that.

CHAIRMAN BABCOCK: Richard, then Levi.

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

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

HONORABLE STEPHEN YELENOSKY: Yeah.

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

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

HONORABLE STEPHEN YELENOSKY: Yeah.

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

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

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

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

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

HONORABLE STEPHEN YELENOSKY: Right.

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

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

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

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

pointing out the point that --

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

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

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

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

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

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

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

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

what did we decide about that?

MS. WOOTEN: We decided no.

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

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

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

HONORABLE STEPHEN YELENOSKY: Right.

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

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

MR. LEVY: Chip?

CHAIRMAN BABCOCK: Yeah, Robert.

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

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

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

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

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

HONORABLE JANE BLAND: Yeah.

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

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

MS. WOOTEN: Right.

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

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

HONORABLE STEPHEN YELENOSKY: Well, I don't

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

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

HONORABLE STEPHEN YELENOSKY: Well --

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

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

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

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

HONORABLE TOM GRAY: I was just going to say that my very first court appearance was to represent a corporation for the sole purpose of that hearing, and it was for a default judgment hearing, and they were trying

to avoid the default judgment because an owner of the corporation had filed the answer, and they were going to take a default because the answer was ineffective, and so, yeah, you can wind up in that weird situation. Had I known about this I probably would have done a limited appearance and then it would have been -- I don't know what would have happened, but anyway.

HONORABLE STEPHEN YELENOSKY: Okay.

CHAIRMAN BABCOCK: Okay. Any more comments about subparagraph (d), service?

HONORABLE JANE BLAND: And (e) is a mirative provision for court notices and provides that the court, trial court, must direct notice to the attorney and the party. So we'll fix (d), too, more like that.

CHAIRMAN BABCOCK: Justice Bland, is subparagraph (e) sort of self-evident or circular or something? I mean, it says if you've got to give a notice, you've got to give a notice, right?

HONORABLE JANE BLAND: Well, when the court sends notices it usually sends notices to the attorney of record.

CHAIRMAN BABCOCK: Right.

HONORABLE JANE BLAND: So this requires the court to send notices to the attorney and the party.

CHAIRMAN BABCOCK: I didn't get that from

this language. I mean, I understand what you're saying, but would it be better to say you've got to give notice to the party when notice is to be given under (d)?

HONORABLE JANE BLAND: Well, there's other kinds of notice. So there's notice of a trial. The main kind is notice of a trial setting. The trial court sends notice of that, and the other kind is notice of a final judgment. Trial court is supposed to send the notice after a final judgment is signed, and the language in those two rules are very different, but they both require a form of notice, and so -- and there's a couple of other places where, you know, the court will be sending out a notice, like a docket control order, for example. And the idea behind (e) was that if the court is sending out a notice and there has been a limited appearance filed, the court should send notice not just to the attorney but also to the party. Ordinarily the party doesn't get that notice.

CHAIRMAN BABCOCK: Okay. The phrase "these rules" in subparagraph (e) --

HONORABLE JANE BLAND: Is too vague.

CHAIRMAN BABCOCK: Excuse me?

HONORABLE JANE BLAND: Is it too vague?

CHAIRMAN BABCOCK: Well, does that mean the Texas Rules of Civil Procedure?

HONORABLE JANE BLAND: Yeah.

CHAIRMAN BABCOCK: Or does it mean 8.1 and 8.2?

HONORABLE JANE BLAND: It means the Texas Rules of Civil Procedure.

CHAIRMAN BABCOCK: Okay, that's what I thought.

HONORABLE JANE BLAND: So we'll have to clarify that.

CHAIRMAN BABCOCK: Okay. Any other comments on (e)?

MR. KELLY: Yes.

CHAIRMAN BABCOCK: Yeah, Peter.

MR. KELLY: Similar to what I made above, emphasis is not necessarily the giving of notice, but what notice is effective, and so I would phrase it that "Notice should be effective if the trial court provides notice to the attorney and to the party directed by these rules."

CHAIRMAN BABCOCK: Okay. Good. Any other comments about (e)? All right. Let's talk about the comment. Let's make comments on the comment. Richard.

MR. ORSINGER: I like the comment insofar as it covers and references people to the code of professional responsibility. What concerns me is that I don't know -- in fact, I believe that civil liability does

not equate with the scope of the Rules of Professional Conduct.

HONORABLE STEPHEN YELENOSKY: That's correct.

MR. ORSINGER: And so I think it's dangerous for us to provide an official procedure for limited representation and then to tell everybody that it only goes so far as what's ethically allowed, but now our rules are recognizing it, and yet the civil liability system may hold lawyers responsible for failure to point out to their client claims that they are waiving or rights that they're waiving or error they're not preserving, and I'm not sure the civil liability is caught up with the Code of Ethics on this, so I'm concerned that we now have an official rule that says you can do this. You've now been told to be sure that it's okay with the ethical code, and we haven't told everybody, guys, there's a whole world out there of potential malpractice litigation that you need to pay attention to.

Now, I talked to Trish about this before the meeting started, and she said that in her experience or at least in the experience of the people in her field that they don't have malpractice claims, and maybe that's because the parties that they represent are indigent and don't have damages or don't have the wherewithal to sue,

but I'm really concerned that we're not telling the full story in this warning here when we say just be sure that what you're doing is ethical and not telling them that there may be a danger on the civil liability side.

CHAIRMAN BABCOCK: So how would you change it?

MR. ORSINGER: I don't know what to say. We didn't -- we're not the first ones that have ever done this. Has anybody else addressed the civil liability question in either comment or statute or anything? Does anybody know?

HONORABLE STEPHEN YELENOSKY: Well, why don't we just say the rule does not -- put some civil liability in there. "The rule does not address the civil liability or ethical responsibility of a lawyer."

MR. ORSINGER: Something like that. I would figure as popular as this is surely someone has thought about this and written something.

HONORABLE JANE BLAND: Well, I think any rule presents an opportunity to be, you know -- I mean, any time you go into court there's a potential for having an impact in the civil liability. I mean, that's like saying, you know, you know, anything you do in the legal profession could potentially be the subject of a malpractice claim, so why --

MR. ORSINGER: Okay. I don't know why any of the other rules --

HONORABLE JANE BLAND: -- why do we carve this one out?

MR. ORSINGER: I don't know how many of our other rules are creating an entirely new legal procedure that we say is only applicable to the extent that it's ethical and not mention that there's a whole world of civil liability out there, so we're branching out in something we've never done before. We're trying to encourage lawyers to go to places they've never gone before, and we're telling them -- we're warning them about the grievance committee, but we're not warning them about damage suits, and it bothers me. And, I mean, I don't know if it bothers anybody else, but it bothers me. So I don't have a suggestion.

HONORABLE JANE BLAND: Well, and we're not really warning them about the grievance system. We reference the disciplinary rule only really to say that this kind of engagement is permitted, so to the extent that the comment needs to warn, it does not warn.

CHAIRMAN BABCOCK: Yeah, the warning is very subtle. You have to be looking for the warning.

MR. ORSINGER: Well, to me the first thing I would do if I was going to do this for the first time is

I'd go look and see what Rule 1.02(b) says.

CHAIRMAN BABCOCK: Yeah.

MR. ORSINGER: That's why this is in here. If they don't do that, then this is -- it's no good if they don't go read it. But at any rate, maybe that's not a big deal and maybe -- you know, what Trish says is around the country historically people -- there's a high client appreciation for a limited representation and there's very little litigation. I mean, Trish, speak for yourself there. I'm sorry, I didn't mean to --

MS. McALLISTER: No, no, that's okay, no. Yes. I mean, yes, from what we understand or the feedback we've gotten from other states is that the data that shows that people who -- their client satisfactions are higher when they're doing limited scope representation, possibly because they have a better understanding of what's going on in their case because they're participating more. I don't know. There's some speculation as to why that is, but the incidence of malpractice is lower as well, or at least malpractice, you know, filings or claims. So it could be, you know, that the population is poorer and they don't have, you know, the wherewithal to, you know, follow through on a malpractice claim, but the incidence in malpractice, reported malpractice, is lower. So --

CHAIRMAN BABCOCK: Kristen.

MS. LEVINS: And so some stats to back up what Trish was saying, I don't have anything on malpractice or civil liability, but I went to a conference on limited scope in October, and the attorney general regulation council of the Colorado Supreme Court was there, and he's the one that handles attorney discipline and complaints, and he said they get 25 -- I'm sorry 35,000 requests for investigation a year, and .3 of one percent involve limited scope, and there's been no disciplinary hearings on limited scope as of October 2017.

HONORABLE STEPHEN YELENOSKY: But that just means it's terribly unlikely, and that doesn't answer the question of whether --

MS. McALLISTER: Right.

HONORABLE STEPHEN YELENOSKY: -- it should say something. Why not just take the comment out like any other rule? As you said, Justice Bland, you still have to look at the ethical rules and you have to --

HONORABLE JANE BLAND: It's been our common practice to have a comment when we have a new section to the rule, and the committee felt --

MS. McALLISTER: I did like the reference to 1.02, frankly.

HONORABLE JANE BLAND: -- as though a comment that at least directed the practitioner to the

disciplinary rule cross-reference and then talks about the fact that this is really not intended to govern the attorney-client relationship, but only the representation in court by the lawyer. That's the reason for the comment. It wasn't to sort of warn or anything. It was more typical of our other comments in the rules that cross-reference the, you know, other places in the rules, in other rules, that the practitioner needs to be aware of.

MR. ORSINGER: But this rule comment says the rule addresses the attorney's responsibilities to the court and opposing counsel.

HONORABLE STEPHEN YELENOSKY: Not the client.

MR. ORSINGER: Not the client, is that --

HONORABLE STEPHEN YELENOSKY: Yeah, that's the point.

MR. ORSINGER: Is that what you're trying to say by omission, is that this doesn't govern your responsibilities to your own client?

HONORABLE JANE BLAND: Because that's governed by the engagement agreement.

MR. JEFFERSON: I mean, you could make that more plain in the last sentence where "the rule does not otherwise define the scope or method of representation by

a lawyer, nor does it define a lawyer's ethical responsibilities to his client" or something like that.

MR. ORSINGER: Nor does it limit his responsibilities or her responsibilities, which is my concern. Because you can file this all day long, but if it doesn't truly limit your duties to your client you're just walking into a lawsuit.

MR. JEFFERSON: Well, but, no, but it still allows you to -- I mean, I think the whole purpose of the rule is to go to the trial judge when you're done with your task and say "Let me out." Right? I mean, it encourages limited representation so lawyers don't think they're going to get stuck in a piece of litigation, and so the benefit of the rule is to let you out when you're finished.

The only other point I was going to make about the comment is I would want to add a comment that -- something about ghost writing, if we're satisfied that that's okay. I still -- I'm concerned with having a rule that would in an unintended way discourage people from doing either ghost writing or helping of clients or anything without actually becoming attorney of record.

HONORABLE JANE BLAND: We'll figure out a way of adding a provision to the rule that it's not intended to cover --

CHAIRMAN BABCOCK: Judge Peeples.

MS. McALLISTER: It's all activities, not just ghost writing.

HONORABLE DAVID PEEPLES: I think we want to encourage lawyers to take on limited representations. It would be a good thing, and my question has to do with how sure a lawyer can be that he or she can by contract limit this, and Richard raises the malpractice question. The last sentence in the comment, the last half of it, says that, you know, the rule doesn't deal with it, leaves to the lawyer and client to address it in the agreement. In other words, leaves it to contract and then in 10.2 we're going to get to withdrawal; and as I read 10.2, I'm concerned that if I'm a lawyer, I'm doing fine, I don't need this representation, but I want to help somebody, but I want a limit on it, and I'm willing to go over on the temporary orders hearing, but I don't want to get tied down on the order. I may not. That could drag on. The other side can hassle me about the language of that order, and I have to go back and forth on it, and it seems to me that if I the lawyer and the client are willing to agree I'm going over with you on the temporary orders hearing and my fee will be X and that is it and if I -- if I really deal with it with tight language, it's over after that, and I can walk away. And if I was negligent in that

hearing, okay, maybe I get sued, but I want to be out of it after that, and I'm not willing to do this if I can't get that agreement. My question is, can that be done airtight with this statute, and I don't think I can --

HONORABLE STEPHEN YELENOSKY: Not if we include the rule. I mean the draft part.

MR. ORSINGER: It's inherent -- David, it's inherent in the situation you can't control that by contract, because the -- you are the attorney of record until you get the judge's permission to leave the case. So your contract can give you the right to quit. Your client can fire you three times, but if the judge doesn't tell you you're free you've got to sit at the counsel table next to that person that you quit or who has fired you, and you can't leave. So the truth is this isn't controlled by contract law, and I'm concerned that there's a lot of tort law out there that operates even in the face of contract disclaimers.

HONORABLE DAVID PEEPLES: I think that -- been a long time since I was a lawyer, I'll grant you that, but I think there are going to be good people out there who would like to help, but they're willing to help for this amount and no more, and that would be a good thing. But if I'm such a lawyer and I might get dragged in, kept in by some judge that won't honor my agreement,

I'm not going to touch this with a 10-foot pole, and my question is shouldn't we be concerned about that? Shouldn't we want to encourage the person of goodwill who says, "I'll help you, but only on this, and I want some airtight language that gives me protection."

CHAIRMAN BABCOCK: Yeah, Skip.

MR. WATSON: Isn't the comment trying to say -- and I'm not involved in this, but I'm just trying to flesh out what the core of it is -- that we're recognizing the right to contractually limit the scope of an engagement with a client under DR or whatever, this rule addresses the attorney's responsibilities to the court and counsel, period. Stop there.

HONORABLE STEPHEN YELENOSKY: Only addresses.

MR. WATSON: Correct.

HONORABLE STEPHEN YELENOSKY: No, I'm adding the word "only."

MR. WATSON: That's great, yes.

CHAIRMAN BABCOCK: Okay. Speaking of that, why don't we move on to 10.2 so we can --

HONORABLE JANE BLAND: Okay.

CHAIRMAN BABCOCK: -- see when you can withdraw.

MR. ORSINGER: Chip, one last word, can we

-- before we go on perhaps we should consider making the contractual limitations binding on the trial court. In other words, should we consider saying that the trial judge is bound to recognize the lawyer's right under the contract to withdraw at the end of the hearing or whatever?

CHAIRMAN BABCOCK: No, I'm just going to hire Levi for that.

MR. ORSINGER: You need local counsel for that.

HONORABLE LEVI BENTON: From your lips to God's ears, as they say.

HONORABLE JANE BLAND: So under 10.2 is our effort to provide clarity to the lawyer who wants to get out that he or she may get out, and the trial judge will let them out if once they've completed the tasks, and in 10.2(a) you require a motion to withdraw like you do in any case where you're withdrawing before the conclusion of litigation. And then we have language that "The trial court must permit the withdrawal," and five parameters for that. Client consents in writing, statement that the other parties do not oppose the withdrawal, the address of the client, statement of any pending trial settings, and a certification that all tasks required by the notice have been completed; and we're going to add "expressly

including" -- don't have the right language right here today, but after discussing with Chris and Judge Yelenosky that somewhere in here is going to say "including a draft order" so that we make sure that whatever the task is, part of that task has to include a draft order. And then if those things are performed the trial court must let the lawyer out. Then the -- that's (a).

(b) is substitution, and it's just as -- you know, it's one limited scope lawyer substituting for another limited scope lawyer, and we're going to allow that as long as the client consents. Then (c) is the order, and the order would be either withdrawal because all of the things in (a) have been complied with, or the court has had a hearing and the court has made the finding that the lawyer has complied with all -- completed all of the tasks and permits the withdrawal. And then finally there's a requirement that when the court orders the withdrawal that the withdrawing attorney serve a notice of the order on all the parties. So that's the withdrawal in a nutshell, and now we can go through and talk about tweaking it.

CHAIRMAN BABCOCK: Okay. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: One concern is (c) says, "If the motion is opposed by the client or another party then the court must determine," and so the

court can't sua sponte say, "Hey, you haven't finished your tasks," and, I mean, the court still has to be guided by whether you finish your tasks or not, but the parties could agree for whatever reason and they haven't.

HONORABLE JANE BLAND: So (a) contemplates everybody believes the lawyer is finished with the lawyer's tasks and the court for some reason doesn't. (a) says the court must allow the withdrawal. In other words, if everybody thinks the lawyer has completed the tasks, the lawyer, the client, and the opposing parties --

HONORABLE STEPHEN YELENOSKY: Yeah, okay.

HONORABLE JANE BLAND: -- the trial judge should allow --

HONORABLE STEPHEN YELENOSKY: If you want that certainty. I'm just imagining a situation where judge -- I understand judges shouldn't be allowed to deny it because you haven't done more, but you could disagree or judge could disagree about whether you've done what you said you wanted to do and the other party not put up a fuss, but I understand the importance of certainty here and the objective, so I get it. That's fine.

CHAIRMAN BABCOCK: What else? Any other comments? Yeah, Kennon.

MS. WOOTEN: I'm just still a little concerned that requiring consent from the other parties to

get out is going to be a deterrent to some people to engage in limited scope representation. I understand the reason for it, but I think part of what we're trying to do is give people a roadmap. I don't think there is any kind of goal or intent to discourage limited scope representation, but I do think that might have the effect that's unintended.

A more subtle comment I guess is that although we've gone with "issues" in the prior Rule 8, the term "task" -- "tasks" appears in (a)(5).

HONORABLE JANE BLAND: Yeah. We'll make that uniform. That's because we were going back and forth.

MS. WOOTEN: Okay.

HONORABLE JANE BLAND: It was just an error.

HONORABLE STEPHEN YELENOSKY: I didn't hear what --

MR. ORSINGER: Number (5).

CHAIRMAN BABCOCK: Any more comments? Chief Justice Hecht.

CHIEF JUSTICE HECHT: Shouldn't a lawyer be allowed to withdraw from a limited appearance before the agreed work is done, just like in any other case?

HONORABLE LEVI BENTON: Yes.

CHIEF JUSTICE HECHT: Communication breaks

down, they don't pay, whatever.

MS. HOBBS: And, Judge, I thought about that same argument, but I think then you just wouldn't file a withdrawal under this rule. You would just file a withdrawal under the other rules. So I raised that in my head, but I think you would just use a different procedure. You would do what we currently do right now.

CHAIRMAN BABCOCK: Well, but it could be -- this could be confusing.

MS. McALLISTER: Right, I was thinking that, too.

MR. ORSINGER: If you make a limited appearance, I don't think you get a withdrawal except under a withdrawal from a limited appearance.

CHAIRMAN BABCOCK: So that ought to be clarified, I think. I don't think there is any disagreement about that, right? For all of the usual reasons you ought to be able to get out.

HONORABLE STEPHEN YELENOSKY: Well, you just put on the grounds that you've completed your tasks.

CHAIRMAN BABCOCK: Justice Brown.

HONORABLE HARVEY BROWN: I want to echo that I think the subpart (2) about other parties we should remove, but I wanted to raise a question about subpart (c). What is the effect of the court in making this

determination if later the attorney is sued and there's a fight over whether the attorney, in fact, fulfilled his or her duties? Will that finding have some kind of collateral estoppel effect or some type of evidentiary effect in a malpractice claim? I don't know that we need the court to make a determination on that. So I don't know the answer, but I just raise the question.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, obviously the notice of appearance if it's signed by the client is going to be relevant to that malpractice claim, but I still want to keep -- or would counsel against having the court having anything to do with the letter of engagement, so when the court makes a decision here, the court's operating only the notice of limited appearance, and if the letter of engagement contradicts that or whatever, that's an issue to be resolved in the subsequent court, and the court is not ruling on the contractual agreement between -- that you've completed your contractual agreement.

All the court's saying is, well, on this limited appearance you've done this. I don't know the answer to your question if that's all there is, but if there's a written letter of engagement with the client, that would be something the judge wouldn't have looked at

and, therefore, I don't know how it could be collateral estoppel in a subsequent malpractice

HONORABLE JANE BLAND: We can rephrase that so that it doesn't have a qualitative aspect to it and say something about "The court must determine whether the attorney has fulfilled the tasks required in the notice of limited scope representation."

HONORABLE DAVID EVANS: Wouldn't the client oppose it if it hadn't been completed? I mean, it would just be a motion to withdraw, and if the client opposed it because it wasn't completed then that would be down there where the court was. By "representation is complete" I think we're overwriting it.

HONORABLE JANE BLAND: Really? Overwriting? Us?

HONORABLE DAVID EVANS: I mean, it is if you permit limited representation in court and you say that, and the person says, "I finished my representation and I want to be withdrawn," all you've got to do is say that a person has completed their representation and the court can release them if there's not some other obligation like a motion for sanction is pending or any of those other things.

I would still like to just put on the record I think that -- I know you don't like to write rules for

certain classes, but pro se litigants are different, and I would frame this whole set of rules from the very beginning as applying to pro se litigants who are represented -- have limited representation by counsel so that there's no confusion, there's no magic words that have to be read, no comments. This is what happens when a pro se individual hires an attorney for limited representation, and these are the rules that apply, and then you make it clear what you're doing, and you don't -- and we're living with pro se litigants everyday.

CHAIRMAN BABCOCK: Yeah.

HONORABLE DAVID EVANS: So I would urge you to reconsider that point.

CHAIRMAN BABCOCK: Justice Bland, it's your intention to, I think, to go back with the subcommittee and redraft this pursuant to the comments today?

HONORABLE JANE BLAND: That is the plan.

CHAIRMAN BABCOCK: Excuse me?

HONORABLE JANE BLAND: Yes, that is the plan.

CHAIRMAN BABCOCK: Okay. And you can come back on our September agenda and spend a little bit of time, a half an hour maybe or an hour?

HONORABLE JANE BLAND: I would be delighted to have a time limit imposed.

MR. ORSINGER: This is a limited engagement, 30 minutes only.

CHAIRMAN BABCOCK: We're having a limited engagement, limited representation.

HONORABLE JANE BLAND: If you will permit me to withdraw at the conclusion of 30 minutes.

CHAIRMAN BABCOCK: Well, only so you can spend more time on the Bland committee.

HONORABLE STEPHEN YELENOSKY: Yeah.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: It seems to me that (a)(4) could be taken out entirely, or it needs to be written consistent with Rule 10. Rule 10 says "all pending settings and deadlines." I don't care really one way or the other whether or not the entirety of (4) comes out because it's not the limited scope attorney's responsibility to tell the client what remains to be done. Their part is finished, but --

HONORABLE JANE BLAND: We talked about that and --

HONORABLE TOM GRAY: And what was y'all's decision?

HONORABLE JANE BLAND: Well, the decision is that we put in the pending trial setting and nothing else with the idea being, yes, there's no obligation, but a

trial setting is such a critical juncture of any lawsuit and that if you don't -- if you don't at least give notice of the trial setting then you probably haven't done your work. There were some on the committee that thought we should tell the client all pending deadlines, but others who thought that that was too cumbersome and -- Chris, you want to speak to that?

MR. NICKELSON: I think I was on the side of, yeah, just the trial setting only, not all of the deadlines because if you say all deadlines then you're imposing upon the limited scope lawyer to go figure out everything else about the case, and that sort of defeats the whole purpose of the limited scope idea.

HONORABLE TOM GRAY: So why not just relieve him of his obligation to say anything rather than lead his client down a blind alley that this is the only thing left to do?

MR. NICKELSON: I understand that. Nobody, I don't know why -- everybody just kept saying, well, there's one thing, and it was the trial setting, making sure the client was aware of the trial setting.

CHAIRMAN BABCOCK: Yeah, good. All right, everybody. Thank you very much for coming here on a summer day, and we will -- what's the date in September?

MS. WALKER: 28th and 29th.

CHAIRMAN BABCOCK: All right. September 28th and 29th.

(Adjourned)

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REPORTER'S CERTIFICATION
MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

* *

I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 13th day of July, 2018, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are $ 1,632.00 .

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