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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

June 2, 2006

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Taken before *D'Lois L. Jones*, Certified
Shorthand Reporter in Travis County for the State of
Texas, reported by machine shorthand method, on the 2nd
day of June, 2006, between the hours of 9:04 a.m. and
11:38 a.m., at the Texas Association of Broadcasters, 502
East 11th Street, Suite 200, Austin, Texas 78701.

INDEX OF VOTES

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

<u>Vote on</u>	<u>Page</u>
Rule 21	14818
Rule 21	14819 (two votes)
Rule 21	14820

Documents referenced in this session

06-4 Proposed Rule 21 draft (6/1/06)

1 *-*-*-*

2 CHAIRMAN BABCOCK: All right. Everybody
3 ready to get started? Thanks for being here today. This,
4 as you can tell, is going to be a short meeting. We will
5 certainly be done by noon and probably before that, and so
6 without further adieu Justice Hecht will, as is tradition,
7 give us his report on what's happening.

8 HONORABLE NATHAN HECHT: I only have to tell
9 you that --

10 CHAIRMAN BABCOCK: Easy.

11 HONORABLE NATHAN HECHT: -- which some of
12 you may know, that our former rules attorney, Lisa Hobbs,
13 is expecting in August. She is now general counsel to the
14 Court, so that's an exciting time for her; and one of our
15 members, you may have heard, Kent Sullivan has decided to
16 be First Assistant Attorney General to Greg Abbott, which
17 I called Greg the other day and told him that if he had
18 any more positions open over there I'd give him a list of
19 the judges we would prefer he pick from and leave our good
20 ones alone, but we're going to miss Kent on the bench, but
21 he'll make a wonderful contribution over in the Attorney
22 General's office.

23 CHAIRMAN BABCOCK: Great. Rule 21, whether
24 we -- yes.

25 HONORABLE DAVID PEEPLES: Before we move

1 away from that, could I make a request? I would be
2 interested in seeing a list, if it could be gotten, of the
3 various proposals we've voted on and sent to the Supreme
4 Court and we've never heard anything back on.

5 HONORABLE NATHAN HECHT: Okay.

6 HONORABLE DAVID PEEPLES: Just a list.

7 CHAIRMAN BABCOCK: Over what period of time?

8 HONORABLE DAVID PEEPLES: Pick a date, but
9 at least five years.

10 CHAIRMAN BABCOCK: From the date of the
11 recodification?

12 HONORABLE DAVID PEEPLES: Well, five is a
13 good number, but --

14 HONORABLE NATHAN HECHT: Okay.

15 HONORABLE DAVID PEEPLES: There is a lot of
16 it, and frankly, some of them don't deserve to be
17 implemented, but I would just be interested in seeing --

18 HONORABLE NATHAN HECHT: Okay.

19 HONORABLE DAVID PEEPLES: -- a list of them,
20 and I think all of us would like to know what's happening.

21 HONORABLE NATHAN HECHT: I would be happy to
22 before the next meeting.

23 CHAIRMAN BABCOCK: Okay. Next meeting, so
24 don't miss it.

25 MS. SENNEFF: August 18.

1 CHAIRMAN BABCOCK: Huh?

2 MS. SENNEFF: August 18th.

3 CHAIRMAN BABCOCK: August 18th and 19th.

4 Okay. Back to Rule 21, and it's Richard Orsinger's
5 subcommittee, but I think Judge Sullivan has been carrying
6 the laboring oar. Who wants to talk about it?

7 MR. ORSINGER: Just to lay some groundwork,
8 at the meeting, the last meeting we had, on April 14 of
9 2006 we took a vote on Judge Sullivan's suggestion that we
10 shorten the -- pardon me, lengthen the minimum notice
11 required for a hearing, and by a vote of 26 to 6 it was
12 agreed to lengthen it, but the question of whether it
13 would be 5, 7, or 10 days was somewhat in dispute, and we
14 took a vote on 10 days, and it won by 14 to 13, and there
15 were arguments for shorter days.

16 And then we had the issue about the response
17 deadline being three days before the hearing and a lot of
18 timing issues relating to that, like if you served your
19 response by mail does that mean that it had to be done six
20 days in advance, how are we going to handle weekends, what
21 are we going to do with the fax rule on both of these
22 rules, because if minimum notice is 10 days, do we want to
23 add three days for mail and fax or do we absorb that out
24 of the three; and with that stage being set then Judge
25 Sullivan has recrafted this rule and is going to explain

1 it this morning.

2 CHAIRMAN BABCOCK: Judge Sullivan.

3 HONORABLE KENT SULLIVAN: We have an updated
4 version of the proposal that was laid before this
5 committee the last time. There are a few changes. I
6 don't know to what extent the subcommittee had some
7 opportunity to look at this and whether there is any
8 additional work product that we ought to consider because
9 all I've attempted to do is, through the help of various
10 people who have commented and stealing ideas from one
11 place or another, just try to update and further clarify
12 the proposal that was on the table before.

13 A couple of things I guess I would point out
14 in terms of what was made available to everybody yesterday
15 and I guess this morning, in the list of exceptions there
16 is some attempt, I guess, in that first paragraph to
17 provide some greater clarity. There are a few language
18 changes made at the suggestion of various individuals, but
19 nothing substantive. With respect to the list of
20 exceptions there are four that are explicitly shown.
21 There are -- so there is some difference.

22 Under subsection (3), it specifically
23 references written motion and leave of court for cause
24 shown. It was at the suggestion of various individuals
25 that we not use the term "good cause." That can be the

1 subject of some additional debate today, but to
2 intentionally lower the standard and simply say "for cause
3 shown"; and No. (4) was "upon order of the court for cause
4 stated and entered of record." The intent there, again at
5 the suggestion of various individuals, was to ensure that
6 the court had discretion to take action even in the
7 absence of a written motion.

8 HONORABLE STEPHEN YELENOSKY: How many days
9 do have you to give notice of the written motion to get an
10 order shortening the period?

11 HONORABLE KENT SULLIVAN: There is nothing
12 specified. It's like any emergency motion you would file
13 now. I mean, that's the intent, and let me say one thing,
14 is that there is no question that any new rule will raise
15 some questions and is bound to have some degree of
16 ambiguity. Obviously the advantage point from which I
17 start is the question of can we improve upon what we've
18 got in terms of a rule intended for statewide application
19 and against the backdrop of a rule that is -- that has
20 some significant age on it and really was not crafted in
21 an era that contemplates interstate and even international
22 commerce and dispute resolution.

23 I went through that before in the context of
24 some of the remarks we made in the last hearing, so I
25 won't repeat any of that, but I hope we don't let --

1 what's the old saying -- the perfect become the enemy of
2 the good, because I do think that having something to
3 provide some greater certainty, some enlargement of time
4 and some sense of order with respect to increasing the
5 expectation that everyone would know what was at issue in
6 a hearing before the court, would improve circumstances
7 and it would certainly be an improvement I think from the
8 trial judges' perspective to have all of the materials
9 that are going to be at issue in the hearing available to
10 the court for review in advance of the hearing. That's
11 the intent. That's the backdrop of this.

12 One last quick point was there were some
13 issues raised the last time about trying to clarify that
14 no written response is required, that this was not some
15 sort of a paper work requirement for increase in paper
16 work or a burden, and that was intended to be resolved by
17 way of pointing to any desired written response, making
18 it -- intending to make it clearer that if someone simply
19 wants to appear at the oral hearing and make oral argument
20 they could.

21 I will tell you that I tried to access the
22 website and pull up the transcript and just wasn't able to
23 do so when I needed to, and I did go back subsequently. I
24 was able to catch it later, and I think it was -- I think
25 it was Pam's language that was even more explicit on that

1 point, which is also fine, that she had made a suggestion
2 at the last hearing, which I couldn't remember and
3 couldn't access when I needed to, to the effect of making
4 it very explicit that there was no waiver of your right to
5 appear and make oral argument by not filing a written
6 response, although I would hope that would not be an
7 issue, and I actually have that language now if someone
8 wants to substitute one for the other, but that's where I
9 am, Mr. Chairman.

10 CHAIRMAN BABCOCK: Okay. Great. The -- has
11 everybody received the input of some members of the family
12 bar who yet again want to be exempted from the rules?

13 MR. ORSINGER: We didn't -- I was not able
14 to get the proposed draft circulated to the entire family
15 law counsel until late yesterday, and only the ones who
16 were still around at 5:00 o'clock who cared responded. I
17 expect to have a deluge of e-mails today.

18 CHAIRMAN BABCOCK: I thought I saw the hand
19 of Richard Orsinger at work in these e-mails.

20 MR. ORSINGER: Well, it's the question of
21 whether you want them inside the tent or outside, and so
22 the four or five e-mails I did get, which I forwarded to
23 Jody and he's printed up here, I think were opposed to a
24 10-day period because of the kind of sensitive nature of
25 some of the matters that come up in family law court. I

1 received one that was kind of lukewarm or ambiguous and
2 suggested that the family law judges adopt the submission
3 docket like they have for civil cases in Houston; and then
4 we did get one e-mail that I had nothing to do with from
5 Judge Martin, who is a senior judge or retired judge and
6 who apparently has quite a background, if I remember this
7 correctly, if this is the right one, in family law
8 matters; and he was -- as you can see from his e-mail
9 here, he was opposed to lengthening those matters for
10 family law.

11 Now then, a factor to consider is that in
12 the past there have been exceptions made for family law
13 practice. The Rule 76a is a perfect example of it. Cases
14 that are brought under the Family Code are exempted from
15 the public notice requirements to seal court records, and
16 there are, of course, legitimate public policy reasons to
17 maybe protect the kinds of issues that are litigated in
18 family law cases and treat them a little bit differently
19 from tort and contract litigation.

20 On the other hand, there is a view that we
21 should write a rule that will apply to most of the
22 practice, and in the Bexar County courts the bulk of the
23 cases that are being heard now are family law by a wide
24 margin; isn't that right, David?

25 HONORABLE DAVID PEEPLES: (Nods head.)

1 MR. ORSINGER: I mean, I've heard something
2 like 85 or 90 percent of the docket is family law now. Is
3 that an exaggeration?

4 HONORABLE DAVID PEEPLES: The nonjury docket
5 that's probably correct.

6 MR. ORSINGER: Now, in a lot of other larger
7 cities they differentiate civil courts from family law
8 courts, but I suspect that the family law docket does
9 consume quite a larger part of the civil trial docket than
10 it used to because of mediation, arbitration, and the
11 diminishment of med mal cases and bad jury verdicts on
12 plaintiffs' cases generally. So in a sense the rule we
13 crafted, probably you're going to primarily have an effect
14 on family law cases; and then I guess one last thing to
15 remember is, is that if the family lawyers get too upset
16 about a rule they typically will go to the Legislature for
17 a fix; and there is nothing sure about going to the
18 Legislature for a fix, but if this committee or this -- if
19 the Supreme Court adopts a rule that the family lawyers
20 truly find intolerable collectively they will probably go
21 to the Legislature for an exception, so in a sense that's
22 a safety valve if it's the decision to apply the rule
23 across the board and then they just can't live with it.
24 So I guess the e-mails kind of speak for themselves, and
25 I'll forward to Jody more, and he said if we get a lot of

1 them he'll summarize them and submit them rather than
2 giving you copies of all of them.

3 CHAIRMAN BABCOCK: Richard, what's your
4 feeling? You do a lot of family law practice.

5 MR. ORSINGER: You know, Chip, I think that
6 in some courts it's going to make a big difference and
7 others it won't. Like in Dallas, for example, sometimes
8 it takes two weeks to get a hearing in a family law court.
9 In most of the cities that have dedicated family law
10 courts each judge runs their own docket, unlike San
11 Antonio where there is a central assignment and you can
12 get a hearing on a motion in three days. You just -- any
13 day of the week, unless it's a judicial conference week,
14 you can get a hearing in three days on a motion, but in
15 Dallas and in Houston and other places with the dedicated
16 family courts that run their own dockets you can't get a
17 hearing on three days and often not inside 10 days anyway.
18 So if you're in a court where your next hearing date is
19 out 10 days to two weeks, unless it's an emergency this
20 isn't going to affect the practice other than it's going
21 to make lawyers do their written work in advance of
22 hearing.

23 CHAIRMAN BABCOCK: Uh-huh.

24 MR. ORSINGER: And that is a little bit of a
25 concern for me for family lawyers because a lot of family

1 lawyers are not making enough money on the case and the
2 clients don't have enough money to really warrant the same
3 preparation that you would get representing a commercial
4 client or an insurance company, and so a lot of family
5 lawyers I think tend to deal with tomorrow's problems
6 today and they will deal with next week's problems next
7 week, and so if you have a response deadline that is three
8 days and if we add three -- if we make it six because it's
9 going to be served by fax, then I think a lot of family
10 lawyers are not going to get responses filed.

11 Now, after the current generation of family
12 lawyers gets old and retired and the new ones come on
13 board with that rule I'm sure it will no longer be a
14 problem, so I'm sure that time will correct that, but I
15 think a lot of the reaction of the family lawyers is,
16 number one, emergencies come up a lot, and number two,
17 they're not used to preparing their cases that far in
18 advance, so I don't know.

19 HONORABLE STEPHEN YELENOSKY: Richard, the
20 other central docket, in Travis County, by local rule the
21 announcement period starts, they pick their time, and
22 you've got to set it before that anyway, so it comes out
23 to 10 days in Travis County at least, just to make a point
24 that we differ from Bexar County on that, and that applies
25 to family cases because we don't have dedicated family

1 courts.

2 MR. ORSINGER: Yeah.

3 CHAIRMAN BABCOCK: Could exempt family cases
4 in Bexar County.

5 MR. ORSINGER: No, I don't think you should
6 do that. Don't try to take away the central assignment
7 docket, please, but I think that, you know, we can
8 practice law the same way that everybody else does.

9 CHAIRMAN BABCOCK: Yeah, Judge Christopher.

10 HONORABLE TRACY CHRISTOPHER: I actually
11 went and read through the local rules book to see what
12 other counties are doing because --

13 CHAIRMAN BABCOCK: You're easily amused.

14 HONORABLE TRACY CHRISTOPHER: I was -- I
15 read the transcript and was -- you know, felt that Houston
16 was sort of getting a bad wrap on requiring responses and
17 the 10-day requirements, so I wanted to see if we were the
18 lone county doing this, and we're not. So I would just
19 like to put that in the record that we're not.

20 And, for example, Angelina says "motions and
21 responses shall be in writing." Okay. Brazos requires at
22 least 10 days notice for a hearing, as does Comal.
23 Crockett, the date has to be agreed for a hearing, and
24 Bexar says three business days between service and the
25 hearing date. Dallas says "briefs not filed and served

1 likely will not be considered." El Paso says "failure to
2 present a response with supporting authorities in a
3 reasonably timely manner may cause such arguments to not
4 be considered by the court," and they have the same system
5 that we used to have in Houston where you first put it on
6 submission and then you have to request a hearing, and you
7 get at least 10 days to even request a hearing in El Paso.

8 Fort Bend has the same language that Harris
9 County has, "failure to file a response may be considered
10 a representation of no opposition." Galveston has that
11 same language. Guadalupe, hearing date must be agreed. I
12 really like those small counties that require that. I
13 don't know how that works.

14 We've talked about Harris County. Harrison
15 requires at least 10 days notice. Jefferson requires 10
16 days notice in civil cases. Montgomery has the same
17 failure to file language, no opposition, response two
18 working days before. Smith, 15 days submission docket and
19 you have to request a hearing before you actually ever get
20 a hearing, with the response two working days before and
21 the failure to respond equals no opposition language.
22 Upton, Sutton, Pecos, and Reagan all have to have an
23 agreed hearing date.

24 So Harris County is not alone in, A,
25 requiring responses be in writing and, B, having the time

1 limit extended in most cases, but I did want to ask about
2 -- and then so many of these counties have separate rules
3 for family courts; and I focused mainly on looking at the
4 civil court rules versus the family court rules in terms
5 of what I looked at; and so I guess what I would like to
6 know with respect to the family court, rather than
7 exempting them totally with respect to this is there a
8 class of motions like -- because I don't do family work
9 and I'm not really sure what they're all talking about,
10 but everyone is always talking about temporary orders in
11 the family law local rules, which I assume those sort of
12 things would have to do in an emergency basis, but I would
13 think most motions in family court, you know, discovery
14 disputes, any other sort of, you know, routine motion that
15 we see in civil could be subject to the same 10 days. I
16 don't understand why that would have to be different, and
17 I guess I just don't know enough about family law practice
18 to understand that.

19 MR. ORSINGER: Let me respond on the
20 temporary orders. Usually the temporary orders are the
21 first thing that are heard in the case, and usually
22 they're heard as a result of the service of the citation
23 and a TRO, and the TRO expires at the end of 14 days, and
24 so you're always struggling with getting the hearing set
25 out far enough to get service but within the 14-day period

1 when the TRO expires. It would be completely unworkable
2 to require responses on temporary restraining order
3 hearings to be filed three days in advance of the hearing,
4 especially if it means six unless it's hand-delivered,
5 because sometimes people don't get served until three or
6 four days before the hearing, and sometimes they don't get
7 a lawyer hired until one or two days before the hearing.

8 HONORABLE STEPHEN YELENOSKY: You said
9 temporary restraining orders. Do you mean the temporary
10 orders? Because temporary restraining orders are
11 usually --

12 MR. ORSINGER: The temporary restraining
13 order as a matter of custom is always accompanied by
14 notice of a temporary hearing.

15 HONORABLE STEPHEN YELENOSKY: Right, but you
16 said to file a response in advance of the hearing on the
17 temporary restraining order.

18 MR. ORSINGER: Oh, let me restate it. Thank
19 you. To file a response in advance of the hearing on the
20 temporary orders, which involves formalizing the temporary
21 restraining orders, so if we absolutely have to have an
22 exception in family law probably that's it. If you create
23 a stated exception that emergency motions do not have a
24 10-day minimum requirement or a three-day requirement for
25 filing a response, that probably would be workable, but I

1 think that lawyers will overuse what constitutes an
2 emergency, but even if you don't state that exception, I
3 believe that they're going to create that exception anyway
4 by filing emergency motions for this and that and the
5 other.

6 HONORABLE TRACY CHRISTOPHER: What I'm
7 saying is, is there a way to describe the kind of motions
8 in family court that you consider on a routine basis need
9 to be heard on a shorter time rather than exempting family
10 completely --

11 CHAIRMAN BABCOCK: Judge Sullivan.

12 HONORABLE TRACY CHRISTOPHER: -- from it.

13 HONORABLE KENT SULLIVAN: I think consistent
14 with Judge Christopher's remarks just a moment ago, that
15 problem that Richard is identifying is one that already
16 exists in all of those counties, because effectively you
17 are asking to be exempt from all of those local rules that
18 she began by reciting, so it's a problem that is already
19 out there in specie.

20 HONORABLE TRACY CHRISTOPHER: Well, I can't
21 represent that everything I recited applies to family.

22 HONORABLE KENT SULLIVAN: No, I --

23 HONORABLE TRACY CHRISTOPHER: Because, you
24 know, some divisions have civil rules and family rules --

25 HONORABLE KENT SULLIVAN: Right.

1 HONORABLE TRACY CHRISTOPHER: -- like Harris
2 does, for example. I don't think our language about
3 failure to file a response is in the family courts. I
4 could look, but I don't think it is.

5 MR. ORSINGER: Without knowing, I'll bet you
6 some small amount of money that it doesn't apply to
7 temporary hearings because you never know when you're
8 going to effect service. If the other spouse is trying to
9 avoid service you may be tracking him for four or five
10 days and get him one or two days before the hearing.

11 HONORABLE KENT SULLIVAN: Let me ask one
12 quick question about this, because this was identified and
13 described in the context of the issuance of a TRO and the
14 necessity of a hearing, which, of course, I think of in
15 the context of the rules dealing with both TROs and
16 temporary injunction hearings. Do they encompass the sort
17 of relief that you're talking about, Richard? In other
18 words, are these hearings already dealt with by way of
19 existing rules on TROs and TIs?

20 MR. ORSINGER: I don't have an answer to
21 that.

22 HONORABLE STEPHEN YELENOSKY: They are in
23 Travis County. Does anybody here practice family law in
24 Travis County, because I get a little small diet of it,
25 but I can't see -- I mean, they have to comply, as I said,

1 with central docket rules generally, and they don't have
2 to comply with them when there is a real emergency.

3 TROs are signed routinely -- actually, we
4 have a standing order so we no longer really sign TROs.
5 You get a standing order. They can come in and get an
6 order setting a temporary orders hearing prior to the
7 answer, but that would fall in this rule because it's an
8 order of the court setting the hearing. They come in on
9 emergency writs of attachment to get the children, which
10 are emergencies. They come in on TROs to stop the
11 other -- the other spouse from taking the laptop and all
12 the client confidential information that the estranged
13 attorney husband has on his laptop. All of those things
14 happen in the general course of dealing with emergency
15 matters. In Travis County that goes to a particular judge
16 who is assigned for emergency matters, and it's outside of
17 the central docket.

18 HONORABLE KENT SULLIVAN: Would exceptions
19 (1), (3), and (4) be enough to not sweep that in and take
20 care of it?

21 HONORABLE STEPHEN YELENOSKY: Well,
22 exceptions (1), (2), (3) and (4) sweep it in because some
23 of them are also by agreement on temporary orders.

24 CHAIRMAN BABCOCK: Alistair.

25 MR. DAWSON: That was going to be my

1 question. Why can't the exceptions address the situation
2 where you've got these emergency family motions. It seems
3 to me writs of attachment and trying to protect the kids,
4 you know, court has got ample latitude to say, you know,
5 we're going to waive the 10-day rule.

6 CHAIRMAN BABCOCK: Buddy.

7 MR. LOW: We don't have a provision in our
8 rules like we do in Appellate Rule 10(e). Appellate Rule
9 10(e) has a 10-day provision, but says expressly that an
10 exception is an emergency. We don't have that and our
11 courts may create that and so forth, and I think we should
12 also -- I don't have any suggestions; but it should be
13 pointed out, as Kent earlier pointed out, that most of the
14 local Federal rules, Federal courts, have 10 days, but
15 they have what is called a hotline. You can get a hearing
16 like that. We don't have a hotline.

17 Secondly, I think we should at least show on
18 the record that we did read Federal Rule 6, which gives
19 five days. Nobody has discussed that. The Federal rule
20 itself is five days, and the Federal rule says an
21 exception is ex parte. That is Rule 6. Federal Rule 78
22 provides that the judge at any time, as the judge
23 considers reasonable, may set a hearing. In other words,
24 it's not cause. The judges just set it, so I think we
25 should also consider something besides just the effect of

1 the family law, but we should consider what the Federals
2 have done and what they're now doing, and I don't have any
3 suggestions, and I'm not against it, but I just want the
4 record to show that those are things that are in existence
5 now that we need to be cognizant of.

6 HONORABLE STEPHEN YELENOSKY: Ex parte,
7 there is no notice of hearing.

8 MR. LOW: Well, but, see, we don't have any
9 such thing in the state rule. Federal rule does provide
10 ex parte.

11 HONORABLE STEPHEN YELENOSKY: I'm just
12 saying this rule wouldn't apply to something that's ex
13 parte.

14 MR. LOW: Well, you're not supposed to have
15 ex parte at all.

16 HONORABLE STEPHEN YELENOSKY: TRO says you
17 have can ex parte.

18 MR. ORSINGER: Why wouldn't you have to meet
19 the notice requirement on an ex parte? It's not evident
20 to me that this language doesn't require 10 days notice of
21 a hearing even if it's set ex parte; and, furthermore, the
22 response deadline, which doesn't exist under the current
23 rules, it's not apparent to me that your response isn't
24 due at least three days in advance of a hearing that was
25 set ex parte.

1 MR. LOW: But, Chip, I really want to see if
2 we should provide, quote, for an emergency, like the --
3 and I can tell you that whatever we do is not going to
4 change locally what is being done. They're going to have
5 hearings at short notice, and this is going to be as long
6 as you allow local rules.

7 HONORABLE STEPHEN YELENOSKY: I didn't
8 understand the ex parte part. People come in with TROs
9 and ask to have them signed, and they don't get three days
10 notice or --

11 MR. LOW: Well, Rule 6(d) of Federal court
12 say "as written motion other than one which may be heard
13 ex parte."

14 HONORABLE STEPHEN YELENOSKY: Oh, well --

15 MR. LOW: I don't know -- I don't know what
16 they're talking about. I don't find any cases on it, but
17 they recognize it I guess. I don't know.

18 CHAIRMAN BABCOCK: Judge Peeples.

19 HONORABLE DAVID PEEPLES: Yes. I think
20 what the status quo right now is that by local rule in
21 family law cases and sometimes in civil cases generally,
22 different counties have said we're going to require more
23 notice than three days, and I'm thinking the way this
24 proposed new Rule 21 is drafted, if we go with 10 days,
25 the courts could say by local rule in family law it's

1 three days. I mean, that would be an order of the court,
2 so I think that if we draft it that way courts could opt
3 out of the 10-day rule in family law or other matters for
4 something shorter. That's point one. I think --

5 CHAIRMAN BABCOCK: Would there be any reason
6 why a county couldn't opt out of the 10-day rule?

7 MR. ORSINGER: Well --

8 CHAIRMAN BABCOCK: If we wrote it that way.

9 MR. ORSINGER: Theoretically it requires the
10 Supreme Court's permission to opt out of a statewide rule,
11 although I have found that many family law judges are not
12 aware of that limitation on their power.

13 CHAIRMAN BABCOCK: Okay.

14 HONORABLE DAVID PEEPLES: Just to be sure we
15 know what temporary orders and TROs are about in family
16 law cases, the ones I've seen, the ones that are issued ex
17 parte say things like no violence, don't strip the bank
18 accounts, things like that, and there is a long list of
19 them; and then the three days or less sometimes temporary
20 orders hearing will deal with things like who gets to live
21 in the house right now, who gets the car, not the several
22 cars but the car, who is going to pay the bills, who is
23 going to, you know, have access to these children while
24 we're getting you a more complete hearing; and those, you
25 can call them emergencies or not, but those have to be

1 heard quickly; and I think family law ought to -- you
2 know, the typical things in family law ought to be shorter
3 than 10 days, but I can't see how family law discovery
4 would be different from ordinary discovery. Richard, do
5 you?

6 MR. ORSINGER: No.

7 HONORABLE DAVID PEEPLES: Family law
8 discovery, it ought to be like civil discovery.

9 CHAIRMAN BABCOCK: Yeah.

10 HONORABLE DAVID PEEPLES: But these garden
11 variety temporary orders hearings have to be heard
12 quickly.

13 CHAIRMAN BABCOCK: Pete Schenkkan.

14 MR. SCHENKKAN: It seems to me that what's
15 achieved by this rule if we adopt it is two things. One
16 is it sets a default or a benchmark or starting point of
17 10 days with the writing and the opportunity for response,
18 and the other is that it contemplates that exceptions to
19 that will be justified in writing by the judge. I think
20 both of these are beneficial steps and then that the need
21 to have flexibility of various kinds, and we've heard
22 discussions of needs for several different kinds of
23 flexibility. We've heard discussion of need for
24 flexibility for an entire county that operates a
25 particular part of its system on the basis that at least

1 some may think needs some matters to be handled more
2 promptly.

3 We've heard that some -- in some counties
4 the family law judges only do family law and it's judge by
5 judge. That judge may need to adopt an order that says in
6 my court in my family law cases we do it this way. And we
7 hear of the need for in individual cases for matters to be
8 done more rapidly than this, some of which any of us would
9 probably agree constitute emergencies and others of which
10 may not constitute emergencies, but may satisfy someone's
11 standard of cause.

12 It's my notion that as drafted Kent's
13 proposal allows this. Anything that is an emergency is
14 clearly covered within "for cause shown," and so is a lot
15 more that is not an emergency, but the judge has to say
16 so, and that's true whether he's doing it in a specific
17 case where someone has come in and said, "I need this done
18 in less than 10 days because under (3)" or whether she's
19 doing so because this is the way she runs her entire
20 family law docket in that county, and she does it under
21 No. (4), order of court for cause shown.

22 The only concern I have about whether we get
23 everything we want as far as that's humanly possible and
24 mindful of the notion that we don't want the perfect enemy
25 would be No. (1) where it ought to be "only as otherwise

1 provided for by these rules" or whether it's broader than
2 that and says "otherwise provided by law," which includes
3 these rules and some statutes that Judge Martin calls
4 attention to or refers to and to the possibility of local
5 rules, if they have been properly submitted to the Supreme
6 Court for its review and approval.

7 CHAIRMAN BABCOCK: Okay. Harvey had his
8 hand up and then Judge Yelenosky and then Lonny.

9 HONORABLE HARVEY BROWN: One point that's
10 similar to something Pete said, and that is I think the
11 word "cause" is a more liberal and easier standard to meet
12 than an emergency, so I think that's a better word than
13 what the Federal rule has; and second, if we're concerned
14 about maybe courts may feel the need to do this with some
15 type of standing order then (4) would probably limit the
16 court's ability to do that, I think, because "for cause
17 stated" to me seems to indicate cause in that particular
18 case, so if you wanted to give the court more flexibility
19 to have some type of standing type of order for a
20 particular type of problems like David listed you could
21 just say "upon order of the court" and take out the "for
22 cause stated," and that would give even more ability for
23 the court to be flexible.

24 CHAIRMAN BABCOCK: Okay. Judge Yelenosky,
25 then Lonny.

1 HONORABLE STEPHEN YELENOSKY: Well, that
2 actually is what I want to speak against, because in
3 general it has to do with the philosophy about local rules
4 and standing orders. Standing orders are just things that
5 judges want to do that they don't want to submit to the
6 Supreme Court for approval in my opinion, and it's a false
7 dichotomy. Then you have the courts that don't submit
8 even local rules for approval, but we wouldn't now allow a
9 local -- I don't think the Supreme Court, this is my
10 guess, would approve a local rule that says under the
11 current rules instead of three days notice you get 30
12 minutes notice.

13 They wouldn't approve that as a local rule,
14 and calling it a standing order doesn't change the fact
15 that it shouldn't be done, so I don't think we should --
16 if we think that there is a large area of practice in
17 which there should be a shorter period, then that shorter
18 period either should be stated in the rule or somehow
19 circumscribed in the rule, and there shouldn't be just
20 this blanket possibility of a standing order that
21 essentially denies the litigants in a particular locale
22 the amount of notice that everybody everywhere else gets,
23 and I think that in a lot of locales where they don't
24 submit their local rules, you know, people really are in a
25 position to complain about that, and that's a real

1 problem.

2 I know we do. In fact, we recently
3 submitted ours, and there was a particular problem we
4 hadn't foreseen regarding notice involving visiting
5 judges, and so the process proved useful, but that's a
6 whole other topic, and I don't know if Justice Hecht wants
7 to speak to that about local rules, but it's a concern of
8 mine that we don't have uniformity across the state
9 because they aren't submitted or they're called standing
10 orders and there is some rationale that they don't need to
11 be submitted.

12 CHAIRMAN BABCOCK: Lonny.

13 PROFESSOR HOFFMAN: I think, following on
14 that point, I guess the comment I was going to make is I'm
15 not persuaded yet, though I'm happy to be, that what
16 currently exists is not adequate to achieve what you think
17 individual judges may want to achieve; and sort of
18 following that point, Judge Sullivan, I guess what I'm
19 confused about is it sounds like some of the best defenses
20 for objections to uniformity are already embodied here,
21 which feels like we're circling back around to where we
22 already are, so if the court can modify it and shorten it
23 here and they can do that already in the rule, what do we
24 gain?

25 HONORABLE KENT SULLIVAN: I think you gain a

1 lot. I think that Pete, you know, dealt with that in some
2 of his remarks. I think three days is too short for the
3 baseline timetable for hearings in a court of general and
4 plenary jurisdiction. It does not give you --
5 particularly when the relief sought can be significant, I
6 think it's too short.

7 PROFESSOR HOFFMAN: Right, and so the
8 current rules let you change that, either by case-by-case
9 or standing order for a local rule.

10 HONORABLE STEPHEN YELENOSKY: Well, not
11 change the language.

12 HONORABLE KENT SULLIVAN: No, I think you've
13 got to justify the change.

14 PROFESSOR HOFFMAN: Of course you can. It
15 says at least three days. So you can always make it
16 longer.

17 HONORABLE KENT SULLIVAN: That's the whole
18 idea.

19 HONORABLE STEPHEN YELENOSKY: Right, but we
20 need a baseline. We don't want to be getting -- if the
21 norm is that you need more than three days, we don't want
22 to get written motions requesting more time.

23 HONORABLE KENT SULLIVAN: Right.

24 HONORABLE STEPHEN YELENOSKY: I mean, that
25 just wouldn't work.

1 HONORABLE KENT SULLIVAN: To me that's
2 backwards, and the question is what is the default
3 timetable going to be.

4 CHAIRMAN BABCOCK: Elaine.

5 PROFESSOR CARLSON: Rule 3a at least in
6 theory as is written precludes any local rule that varies
7 the time periods provided by the statewide rules. I
8 realize reality may not mirror the rule, but that was the
9 intent, that we don't have different dates in different
10 counties.

11 Rule 680 that deals with temporary
12 restraining orders provides that if it's issued ex parte
13 then the order itself has to state the date for the
14 hearing on the temporary injunction, and that is to be
15 held as soon as practical, so presumptively that would
16 trump 21, I think, on the time period; but every
17 restraining order must set a date for a hearing; and Rule
18 681 dealing with just temporary injunctions, not TRO,
19 simply provides that notice has to be given. So the way
20 I'm looking at the structure of the rules, that then would
21 revert to Rule 21 for the time period for the temporary
22 injunction unless you go in and come within some of Judge
23 Sullivan's proposed exceptions.

24 Rule 21a provides for the extension of time,
25 of course, and how you serve your motion, and I guess that

1 wouldn't change under this. This would say you get 10
2 days and then you hook up with Rule 21a and add on the
3 additional days. What I hear Richard saying and I think
4 is a concern is -- and I agree, Judge Sullivan, three days
5 is a very short period of time, but do we really want to
6 enact a rule that requires in effect two hearings if you
7 want to get your motion heard earlier? And while that's
8 not a problem in a large commercial case, it certainly
9 would be expensive in a domestic case, so I wonder if we
10 just get to the number. You're shaking your head "no."

11 HONORABLE KENT SULLIVAN: Well, it doesn't.
12 I mean, the whole idea is that you file a motion -- it
13 happens all the time now when --

14 PROFESSOR CARLSON: What if I want to do it
15 in four days under your proposal?

16 HONORABLE KENT SULLIVAN: File a written
17 motion, you state cause. If the judge agrees with you,
18 signs an order saying it's granted.

19 PROFESSOR CARLSON: So that can be done ex
20 parte without any hearing? The lawyer just goes to the
21 judge ex parte and presents --

22 HONORABLE KENT SULLIVAN: Well, no, I don't
23 contemplate that. It's like written submission. That
24 does happen, and what generally happens in terms of actual
25 practice I think is that you'll make an attempt to get the

1 lawyers on the phone and give the other side some
2 opportunity, but it's not routine, and someone has to
3 justify in writing why it is they want to deviate from the
4 rule.

5 PROFESSOR CARLSON: And that's fine, but
6 you're still requiring two written motions, so do we have
7 the right day with 10 days?

8 HONORABLE KENT SULLIVAN: With all due
9 respect, I think you could encompass it all in one. You
10 can file one document and take you up -- you know, as long
11 as it's clearly marked, you could take up both points. I
12 really don't see this as something that increases the
13 paper work. I really don't. I think it increases the
14 minimum time due, and it also increases the likelihood
15 that you will see whatever written response someone
16 desires to file in advance of the hearing so that both the
17 judge and the movant have some opportunity to address
18 that.

19 I mean, as I mentioned before, I think what
20 happens now in practice too often is that you've got a
21 situation where people actually create subsequent hearings
22 or follow-up because they say, "I just got this, I want
23 more time," and we end up with that, or you end up with
24 the judge who is just handed it, the movant who is just
25 handed it, and the judge says, "Well, I have no idea

1 what's in here. I will look at it and then I will rule."
2 Suddenly the movant then is scrambling to decide was there
3 something in there that I really need to respond to that's
4 incorrect or whatever? So either way I think you find
5 people under the gun, so to speak, for reasons that are
6 not helpful that do not further the administration of
7 justice. I just think some clarity and something that is
8 more organized would advance this process significantly.

9 CHAIRMAN BABCOCK: Following up on Elaine's
10 point, though, if I have a motion that I prepare the
11 substance of the motion and I want to get it heard in
12 three days and so I put in the motion there is cause to
13 have it heard within three days, how do I get that motion
14 set? I mean, I suppose I could call up the other side and
15 say, "Hey, would you agree to hear this thing in three
16 days," and they say, "Hell, no, we're not going to do
17 that. That's ridiculous." So then how do I get it set?
18 Do I ever get it set?

19 HONORABLE KENT SULLIVAN: I think it's
20 exactly the same way you get something dealt with now that
21 you claim is an emergency. The exact problem that you're
22 identifying already exists because people say that they
23 need a hearing on less than three days notice, or in the
24 case of some of the counties Judge Christopher pointed to
25 on less than 10 days notice or whatever the local rule

1 calls for that's more than three days, so I agree with you
2 there is some ambiguity there, but it already exists.
3 That's my earlier point about I don't think we should let
4 the perfect become the enemy of the good, so there are
5 idiosyncratic procedures, I think, that exist that deal
6 with that.

7 Generally speaking, my experience has been
8 that somebody files the motion that they often ask the
9 clerk or the coordinator will the judge read it, is the
10 judge willing to take it up, and then that judge -- you
11 know, in a more perfect world -- I mean, my practice was,
12 assuming that it was worth consideration, then you get
13 both parties on the phone. Sometimes it would be
14 summarily denied, if on the face of the motion you could
15 tell that there was no cause at all for shortening the
16 time period, but that's my response.

17 CHAIRMAN BABCOCK: Justice Gaultney had his
18 hand up about 10 minutes ago.

19 HONORABLE DAVID GAULTNEY: Well, it's a
20 minor point, but the rule as I read it does two things.
21 One -- it creates two concerns. One is that you might
22 want to shorten it, shorten the time to 10 days, and we
23 need a procedure for allowing that to happen. The other
24 is that you might want to actually enlarge the time for a
25 response. That's the three-day problem, and we have Rule

1 5 in terms of enlargement of the time for the response.
2 The rule as it's currently written says "as otherwise
3 provided by these rules." Now, does that incorporate Rule
4 5 for enlarging the time for response or not? That was my
5 only question.

6 CHAIRMAN BABCOCK: Okay.

7 HONORABLE DAVID GAULTNEY: But I will say
8 that I'm in favor of the rule. That's just a friendly --

9 CHAIRMAN BABCOCK: Carl. Carl, then Pete,
10 then Buddy.

11 MR. HAMILTON: As I read the rule, there are
12 two ex parte proceedings before the court. One is under
13 (3) on a written motion and one is under (4) if it's not a
14 written motion, and if we're talking about (3) being all
15 in one document I think it ought to say "upon leave of
16 court for good cause shown in the application," because
17 the rule starts out with an application to the court and
18 then we switch over to (3), filing a motion, which makes
19 it sound like they are two different things. If they're
20 all going to be in the same document it might ought to say
21 "upon leave of court for good cause shown in the
22 application," and then that one document would have an
23 affidavit or something attached so that the court could ex
24 parte shorten the time for that motion without having a
25 hearing on that.

1 CHAIRMAN BABCOCK: Okay. Pete. Do you have
2 something?

3 MR. SCHENKKAN: Just -- again, I think what
4 we achieve by doing this is we change the default setting
5 from 3 to 10, and that's helpful, and then we need
6 mechanisms to allow it to be changed from 10 in either
7 direction if necessary. It sounds to me like Rule 5
8 adequately covers enlargement and is contemplated to be
9 cross-referenced here, and for shorter what we've done
10 here is we've allowed full flexibility to make the change,
11 but we do require an explanation. That's not in there
12 now. That is some deterrence against the kind of abuses
13 that -- I know it's anecdote, not data, but I experience
14 them. It's not perfect, but I don't know what is. I'd
15 like to see us at least make the people who want, you
16 know, to have -- who file motions in Cameron County courts
17 at law in a case they know I'm representing the other side
18 recite in the motion why it has to be decided in three
19 days before I've even heard it's been filed, and maybe
20 that will achieve some deterrence. Maybe it won't.

21 CHAIRMAN BABCOCK: Justice Hecht.

22 HONORABLE NATHAN HECHT: Just one other
23 wrinkle. Of course, a three-day period is most -- is
24 usually five because you don't count Saturdays and
25 Sundays. Of course, you don't count holidays either, but

1 we figured out if you serve it on Monday or Tuesday it's
2 going to be three days; if you serve it Wednesday,
3 Thursday, or Friday it's going to be five days. A
4 seven-day period is usually seven because unless it ends
5 on a holiday you're not going to run into a weekend
6 problem and you do count Saturdays and Sundays, and then a
7 10-day period is kind of, you know, going to be frequently
8 longer but sometimes -- sometimes not, and I just mention
9 that there is a project under way in the Federal system to
10 try to lengthen these periods and omit the provisions that
11 don't count intervening Saturdays, Sundays, and holidays,
12 so to get it closer to what the period actually is; and to
13 do that, of course, the period needs to be 7 days or 14
14 days or some multiple of 7, so that it works out that the
15 period is usually what the period is stated to be as
16 opposed to frequently longer because it ends in the
17 weekend. I just -- that's going on out there, too.

18 CHAIRMAN BABCOCK: Buddy.

19 MR. LOW: Chip, let me -- I agreed with
20 Pete, and the reason I brought up those other provisions,
21 Harvey is in error when he says the Federal rule has
22 emergency. It's our appellate rule is the only reference
23 to emergency. Federal rule says "as a judge considers
24 reasonable," and I think that Kent has probably done a
25 better job by showing cause shown, but those are the

1 exceptions, and I think he's improved upon that on our
2 appellate rule, which has to be an emergency, and upon the
3 Federal rule which says judge considers reasonable, so I
4 think he's improved.

5 CHAIRMAN BABCOCK: Judge Yelenosky, then
6 Alex.

7 HONORABLE STEPHEN YELENOSKY: Well, if the
8 problem we're addressing is three days is too short why
9 isn't the proposal merely to replace the word "three" with
10 "ten" in Rule 21, because everything else that's been
11 discussed is addressing a nonproblem? We already know how
12 to shorten from three days. There are mechanisms in
13 place. If we're going to change the wording, it seems to
14 me we're going to have unintended consequences. 21 has
15 worked fine. Everybody knows how to shorten it from three
16 days now. The only question is do we want to make them
17 shorten it from 10 days. Now, of course, the written
18 response part is new, but why all this discussion of how
19 are people going to shorten it, what are the exceptions.
20 That exists now for a three-day rule.

21 CHAIRMAN BABCOCK: Alex.

22 PROFESSOR ALBRIGHT: I have two questions.
23 One, on No. (4), does that contemplate a blanket order
24 that covers the group of cases or does it have to be filed
25 in the record of each particular case?

1 CHAIRMAN BABCOCK: I think Kent's thought
2 was that it had to be case-specific, could not be a
3 blanket order; is that right?

4 HONORABLE KENT SULLIVAN: I think it's a
5 decision you have to make, in all candor. In other
6 words --

7 CHAIRMAN BABCOCK: As written?

8 HONORABLE KENT SULLIVAN: -- that's a policy
9 decision that has to be made by the Court, and I'm not
10 sure which is the best answer for that.

11 CHAIRMAN BABCOCK: But the proposal you
12 have, Kent, is that it's a case-specific. Subpart (4) is
13 case-specific, right?

14 HONORABLE KENT SULLIVAN: My original intent
15 was case-specific, and certainly it would be my intent
16 that if there were to be exceptions larger than that
17 blocks of cases that they ought to be as narrow as
18 possible. They ought to be narrowly crafted, but it's a
19 policy decision.

20 PROFESSOR ALBRIGHT: And then second, okay,
21 there are TRO and injunction rules that -- with different
22 time periods that would apply as opposed to this, so if
23 you did have an injunction, which would take care of a lot
24 of these --

25 HONORABLE KENT SULLIVAN: Yeah, the intent

1 in No. (1) is to cross-reference all of those rules, and I
2 would certainly accept Pete's proposed amendment that
3 would broaden it and say "as otherwise provided for by
4 law." The TRO/TI rules deal with different time lines.
5 The summary judgment rules deal with different time lines,
6 the venue rules deal with different time lines. There are
7 many rules that are explicit about such things, and it was
8 attempted to just categorically exempt all of those.

9 PROFESSOR ALBRIGHT: Then the next thing I'd
10 like to bring up, you know, somebody mentioned it earlier,
11 but we have the faxing problem that if you fax you have to
12 add on three days. I probably get four phone calls a year
13 kind of in spurts of just lawyers who call me and say,
14 "Why in the world is there this fax rule? That's the
15 craziest thing I've ever heard of," and then the next
16 question is why haven't we dealt with e-mail?

17 I tend to say Judge Yelenosky's idea is
18 better for now, if we want to now just extend the time
19 from 3 days to 10 days as the default rule. I think Rule
20 21a, Rule 5, they all have a lot of issues that need to be
21 addressed, and I think it's -- to rewrite a chunk of Rule
22 21, and I don't have the rules right in front of me, but
23 there is all of these rules that are related. They are
24 very hard to find which rules applies, and we have to keep
25 cross-referencing each other, and I think it would not be

1 difficult to have a -- to have a rewrite of those rules;
2 and that's another one, as Judge Peeples says, I think
3 we've done it before, if we can unearth it and see what we
4 did. I would just hate to rewrite one chunk and still
5 leave some of these glaring problems out there. We still
6 have the three-day rule, you know, you count weekends if
7 it's less -- if it's three days or not, but it doesn't
8 apply to something --

9 HONORABLE STEPHEN YELENOSKY: Five days or
10 less.

11 PROFESSOR ALBRIGHT: And all that.

12 CHAIRMAN BABCOCK: Thanks, Alex. Richard
13 Munzinger.

14 MR. MUNZINGER: I was going to say the same
15 thing she did. If the problem is that we believe that
16 three days is insufficient time, why not just change the
17 number from 3 to 10 and not have unintended consequences.
18 I agree that the rule is perhaps archaically expressed,
19 but we may be causing problems that we don't anticipate,
20 and I think Judge Yelenosky's idea of just changing 3 to
21 10 accomplishes the immediate purpose and leaves us free
22 to study any side effects. Obviously the bar statewide
23 has gotten along with the three-day rule, and there aren't
24 any problems or we would have been told about it or the
25 Court would have been told about it. I think Judge

1 Yelenosky's suggestion is a good one.

2 CHAIRMAN BABCOCK: Tommy.

3 MR. JACKS: Two things. One, I agree with
4 all of that. Two, I have read (4), and I think (4) should
5 be read not to require that it be a particular -- directed
6 at a particular case. One issue we haven't talked about
7 is that in the urban counties it's common to consolidate
8 classes of cases, particularly mass torts, in one or a few
9 courts, be it Vioxx cases or asbestos cases or what have
10 you, and frequently those courts will issue an order that
11 applies to a broader category of cases, and everyone
12 understands that those are the rules for those cases, and
13 that shouldn't -- it's not a standing order in the sense
14 that it ought to be sent to the Supreme Court or anything
15 --

16 HONORABLE STEPHEN YELENOSKY: Right, I
17 didn't mean that. Standing orders that apply to either
18 one case or a class of cases I think are true standing
19 orders.

20 MR. JACKS: Right.

21 HONORABLE STEPHEN YELENOSKY: But what I
22 don't think are standing orders are something that says --

23 MR. JACKS: Countywide orders --

24 HONORABLE STEPHEN YELENOSKY: -- "In this
25 county you have so many days."

1 MR. JACKS: Right. And so just to the
2 extent we're making a record here, I wouldn't want the
3 record to be read as being that (4) applies only to a
4 single cause number.

5 CHAIRMAN BABCOCK: Okay. Good. Pete.

6 MR. SCHENKKAN: Let me say, if all we do is
7 change it from 3 to 10 I still think that's a good thing,
8 and I wouldn't want to have the perfect be the enemy of
9 the good and keep us from doing that, but there are a
10 couple more things that Kent's proposal addresses that
11 that doesn't do that are deliberately consciously
12 considered and proposed and we've discussed to some
13 extent, and I just would like us to think carefully which
14 way we really want to go on that.

15 One difference is as Rule 21 is presently
16 worded the shortening of the time is "unless otherwise
17 provided by these rules," which has a counterpart here
18 even broader, "or shortened by the court" with no
19 requirement for cause shown. I think it is better to
20 require a cause shown to shorten it below the default.

21 The second, which I know was a significant
22 portion of the original presentation for the proposal, was
23 to try to get people to put with their motion a
24 substantial whatever they're going to say, which is
25 overlaps with what's already in the rule and require a

1 response with the exceptions noted to try to facilitate,
2 if there is not an exception that's appropriate under the
3 circumstances, proper motions briefing on both sides
4 before the motion is heard by the court, which I do think
5 is in the -- is of a benefit to the administration of
6 justice.

7 Now, again, I don't want the perfect to be
8 the enemy of the good if the sentiment of this group is
9 that 10 days alone is the only change we're prepared to
10 make or 10 days and shorten only for cause shown, those
11 would both be good even if we don't do the briefing as
12 well, but I personally favor all three.

13 CHAIRMAN BABCOCK: Alistair, then Kent, and
14 then Tommy.

15 MR. DAWSON: I guess I have a question for
16 Kent. There are other provisions in Rule 21 that are not
17 addressed here. For example, certificate of service and
18 serving all the parties and what have you. Did you intend
19 to not include those in your rule or were you really
20 focused on the notice requirement, the 10-day notice
21 requirement?

22 HONORABLE KENT SULLIVAN: I'm sorry, which
23 rules are you talking about? 21(a), (b), (c)?

24 MR. DAWSON: There are other provisions in
25 Rule 21 that are left out of your rule. My question is

1 was that intentional or inadvertent?

2 HONORABLE KENT SULLIVAN: You have to be
3 more specific.

4 MR. DAWSON: For example, it lays out that
5 you've got to serve all the attorneys in the charge. The
6 third and fourth paragraphs, for example, of Rule 21, are
7 not addressed in your --

8 CHAIRMAN BABCOCK: Yeah, there are five
9 paragraphs in the current Rule 21, and the question
10 Alistair is asking is do you intend to replace all five
11 paragraphs or only paragraph (2)?

12 HONORABLE KENT SULLIVAN: The intent was
13 only to replace those comparable -- the comparable
14 portions of it.

15

16 MR. DAWSON: Paragraph (2).

17 CHAIRMAN BABCOCK: That would be paragraph
18 (2).

19 HONORABLE KENT SULLIVAN: I thought that was
20 clear, but it was perhaps in the very first draft we put
21 out the time before that had I think a redlined version.

22 CHAIRMAN BABCOCK: Yeah, I think that was
23 clear last meeting. This June 1 draft would suggest that
24 you're trying to ditch all five paragraphs and replace it
25 with this, so that's a fair comment. It's only to replace

1 paragraph (2).

2 MR. DAWSON: I would also point out that --

3 MR. LOW: It does replace paragraph (1),
4 too.

5 MR. DAWSON: -- if you only change the 3
6 days to 10 days and you don't --

7 HONORABLE KENT SULLIVAN: It would replace
8 paragraph -- I'm looking at Rule 21 now. It would replace
9 paragraph (1) and (2).

10 MR. LOW: Right.

11 HONORABLE KENT SULLIVAN: The remainder,
12 there are, I guess, what, three other paragraphs,
13 beginning with "if there is more than one other party
14 represented." That was not intended to be affected.

15 MR. DAWSON: Okay.

16 MR. LOW: It just shortens -- excuse me.

17 HONORABLE KENT SULLIVAN: It talks about who
18 you serve, certificate, etc., as I recall.

19 CHAIRMAN BABCOCK: Are you -- paragraph (1)
20 has got a bunch of stuff in it.

21 MR. DAWSON: I would think you would only
22 want to replace paragraph (2), Kent.

23 HONORABLE KENT SULLIVAN: I'm sorry, did I
24 misstate it? You're right. It's paragraph (2), excuse
25 me.

1 PROFESSOR ALBRIGHT: Part of paragraph (1).

2 MR. LOW: There is part overlap.

3 CHAIRMAN BABCOCK: Tommy, did you have
4 something?

5 MR. JACKS: I did, and this is responsive to
6 Pete's and Kent's advocacy for a response -- written
7 response provision in the rule. I mean, it seems to me,
8 one, as has been pointed out, in counties where the judges
9 want that they've done it by local rule. Certainly in
10 most all cases now of any complexity there is a level
11 three discovery control plan, which many courts broaden to
12 be a scheduling order which includes things that go beyond
13 the discovery control plan, and certainly a judge in any
14 case could impose such a requirement in such an order, and
15 so it's a need that if felt by the judge can be met in
16 other ways it seems to me, and the more I think about it
17 the more I'm drawn to Judge Yelenosky's suggestion that we
18 simply replace the number 3 with 10.

19 CHAIRMAN BABCOCK: Yeah, Pete, and then Judge
20 Christopher.

21 MR. SCHENKKAN: Let me just respond briefly
22 to Tommy's point. Of course that's right that if the
23 judge in a particular case wants it, the judge can solve
24 it. My concern is the flip side, the judge who does not
25 want it or not -- I don't think the judge actually cares

1 much one way or the other, but the practitioners in the
2 county are perfectly happy to take advantage of the
3 practitioners from elsewhere. By the fact that there is
4 no requirement of a response it doesn't seem important to
5 allow real notice and meaningful time for the respondent
6 to even hear that the motion has been filed. If the rules
7 contemplate there will be a time for response it's a lot
8 harder to say, well, you know, it got there 24 hours
9 before we actually had the hearing.

10 And so, again, I don't think it's going to
11 stop the abuses. I don't think it goes, Tommy, to the
12 situation you're talking about where the judge who has a
13 large complex case with many parties well-represented and
14 hears, you know, proposal for a comprehensive docket
15 control order, it's not going to interfere with that in
16 any way, but it sets a better default rule that says the
17 assumption is there is going to be time for the respondent
18 to respond. That's what we're expecting.

19 CHAIRMAN BABCOCK: Judge Christopher, then
20 Tom Riney.

21 HONORABLE TRACY CHRISTOPHER: Well, as I
22 read through the local rule book I really felt sorry for
23 lawyers because it was --

24 CHAIRMAN BABCOCK: For the first time.

25 HONORABLE TRACY CHRISTOPHER: -- so

1 difficult.

2 MR. DAWSON: Make sure that's on the record.

3 HONORABLE TRACY CHRISTOPHER: Because it was
4 so difficult to find out how to do anything in any
5 particular county; and, you know, I don't know what the
6 solution is, but in terms of -- because we have by local
7 rule extended time and then we're going to by local rule
8 shorten time and then we're going to have these standing
9 orders in counties where the judges think, you know, 10
10 days is too long, you know, it's going to be seven in my
11 court, it's going to be three in my court, and we're going
12 to have the flip of what we have now; and although I
13 require 10 days in my own court, and even though it's not
14 required in Harris County to have 10 days, so I'm one of
15 those judges that's, you know, not playing by the rules,
16 and occasionally I'll have lawyers say to me, "Well, but,
17 Judge, the rule only requires three days." And I'm just
18 like, "Well, hmm, I want 10," so, and --

19 CHAIRMAN BABCOCK: "And I don't feel sorry
20 for you a bit."

21 HONORABLE TRACY CHRISTOPHER: But I do feel
22 sorry for the lawyers that we have institutionalized such
23 chaos through our local rules. Just getting a hearing, if
24 you read that local rule book, just getting a hearing,
25 depending on what county you're in and what court you're

1 in, you might call the clerk, you might call the bailiff,
2 you might call the court coordinator, you might call the
3 secretary; and I assume in some counties you call the
4 judge to find out, you know, what dates the judge is
5 available because he has none of those other four people
6 helping him, you know, set anything; and it's -- if you're
7 only asking, you know, when can I have a hearing, that,
8 you know, can be exempted from the ex parte rules because
9 you're just asking for a technical thing.

10 I don't really know what the answer is, but
11 I just -- as I started to look through this project and I
12 sort of support what other people have said, that we have
13 so many conflicting time rules and notice rules already
14 that I'm not really sure this is going to help us.

15 CHAIRMAN BABCOCK: Okay. Tom.

16 MR. RINEY: I think the purpose of the
17 proposed amendment is a good one, and I think most good
18 lawyers would certainly try to comply with that purpose,
19 but even good lawyers occasionally are going to, I think,
20 do something that's going to result in some unintended
21 consequences. For example, as I see it the movant has to
22 file any materials in support of the motion 10 days
23 before, and we've got four exceptions. Well, if the
24 movant gets the response and realizes there is additional
25 authorities that need to be presented to the court, as I

1 am reading rule, and I may be overlooking something, the
2 movant would then have to jump through one of the four
3 exceptions to even present a written reply to the
4 response.

5 Secondly, we have four exceptions for the
6 10-day notice for the motion, but with the exceptions, as
7 I read it, and I may be overlooking it, but they don't
8 apply to the three-day response time. So it doesn't seem
9 fair to have exceptions for one and not the other; and
10 finally, again, good lawyers are going to -- may discover
11 a good argument that needs to be presented to the trial
12 court, and I would think if I were the trial judge I would
13 want to hear all the pertinent authority even if someone
14 had missed a deadline, whether it be -- sometimes it could
15 be due to carelessness, but I still think the trial court
16 would want to hear it. Well, one of them is that the
17 court can do that, but for cause stated and entered of
18 record. Now, if I'm the trial judge I'm thinking if it
19 has to be entered of record that implies that someone gets
20 to take a look at it and see whether that was a good
21 reason or whether I did the appropriate thing, so I think
22 it presents an additional problem for the trial court.

23 I think that, again, the purpose is good,
24 but we're going to complicate it to the point we're going
25 to take away from what the purpose is, which is people

1 ought to be able to present all the pertinent authority to
2 the trial court so the trial court can make the correct
3 decision.

4 HONORABLE STEPHEN YELENOSKY: And if we
5 don't have it at the time of the hearing we're likely to
6 say, "Okay, submit something after the hearing. I'll take
7 it under advisement." So it doesn't even stop after the
8 hearing.

9 CHAIRMAN BABCOCK: In the situation that Tom
10 poses you would have a motion with supporting affidavits
11 and materials filed with the court, a hearing set 10 days
12 thereafter. Three days before the hearing the nonmovant
13 would file their papers and then you would see something
14 and say, "Whoa, I need to tell the judge another case" or
15 something else and so you a day before the hearing file a
16 reply brief or whatever you may file. Would it not be
17 incumbent on the nonmovant then to say, "Hey, I haven't
18 had my requisite 10 days notice with this reply brief" and
19 then the judge either agrees or not, sets the hearing off
20 or not?

21 MR. ORSINGER: Or strikes the response. You
22 don't give the judge the authority to permit filing like
23 that. In other words, I think someone would try to use
24 that to get the movant's response stricken because we
25 don't specifically authorize the court to allow either --

1 CHAIRMAN BABCOCK: Yeah, the movant's reply.

2 MR. ORSINGER: -- a late filed response or a
3 late filed reply to a response.

4 CHAIRMAN BABCOCK: Right.

5 MR. ORSINGER: If you're going to give the
6 -- I don't think you ought to impair the court's
7 discretion at all, but if you're going to impair the
8 court's discretion and create the exceptions, the
9 exceptions ought to apply to the reply and response as
10 well as the original motion.

11 CHAIRMAN BABCOCK: Hugh Rice Kelly.

12 MR. KELLY: First of all, with regard to
13 whether we have the written motion, leave of court to
14 shorten the time, if you don't have a provision like that
15 you're not really going to have the 10-day be your default
16 because a lot of judges are going to say, "Well, I think
17 three days is fine" and will always approve it, so you get
18 back to what Judge Christopher said. If you make people
19 do it one-by-one and show cause, 10 days really will be
20 your default, just administratively. The second thing
21 about it, this is not really a briefing rule. It says
22 you've got three days to supply your response. Well, it
23 doesn't say you can't also supply one more brief.

24 CHAIRMAN BABCOCK: Yeah.

25 MR. KELLY: Or that you can't hand one at

1 the time of the hearing or that you can't have a rebuttal
2 brief and a surrebuttal and all that other stuff, and
3 while I don't appear in front of judges anymore, the ones
4 I did will take the briefs anyway, and nobody is going to
5 reverse them on it no matter when they come in.

6 CHAIRMAN BABCOCK: I think I missed
7 somebody. Judge Sullivan had his hand up first and then
8 Judge Yelenosky, then Harvey, and then Justice Duncan.

9 HONORABLE KENT SULLIVAN: Well, I think the
10 issue had been raised by earlier comment to the effect of,
11 oh -- of a concern that you couldn't do anything, again,
12 that somehow it would restrict your ability to point out
13 the existence of a case or something that had been, you
14 know, raised by something filed and that there would be
15 some argument, I guess, that you hadn't filed it on time
16 in terms of it meeting the deadline for filing a response,
17 or I guess perhaps even filing it on time in terms of the
18 10-day notice provision for the filing of the motion, and
19 I guess the quick comment that I wanted to make is you've
20 already got that issue. In other words, you have the
21 issue with respect to the three-day notice rule.

22 If someone is doing something that is truly
23 a surprise and someone is doing something that someone can
24 argue should have been a part of the motion and is a core
25 point of the motion and affects the issue as to what

1 relief the court might consider or might grant or
2 otherwise, that it should have been the subject of the
3 notice provision, and the notice provision is currently
4 three days. If you change it to 10 days, if you change it
5 to include some sort of notice provision relative to the
6 response, it just -- it carries with it the same issue
7 that you already have.

8 That's my point, is that whenever anyone
9 appears on the day of the hearing, even under the current
10 rule, and hands something to the judge, there is an issue
11 as to whether one or more of the parties really should
12 have gotten notice that that was going to happen and if it
13 truly affects the hearing, as the notice requirement
14 contemplates, the affecting of the hearing, and so it
15 doesn't change anything in my view. That's an issue that
16 you're always going to have with respect to any notice
17 provision for any motion or any response. And to state on
18 the record, it's certainly not something I contemplate
19 that you couldn't hand somebody a case or that, you know,
20 sort of supplementation. Again, it's only an attempt to
21 provide some more orderly administration of justice.
22 That's all.

23 CHAIRMAN BABCOCK: Judge Yelenosky.

24 HONORABLE STEPHEN YELENOSKY: Well, I don't
25 know what kind of motions we're talking about, but the

1 ones where I would be concerned about a response getting
2 to the movant ahead of time are already taken care of,
3 dispositive motions, motion for summary judgment, another
4 rule deals with that. If it's evidentiary they need to
5 see what you've got, but the idea that -- I mean, you've
6 already conceded you could hand somebody something. Well,
7 even if you didn't concede that, the respondent clearly
8 can say whatever they want. I mean, they can cite cases
9 orally.

10 I just don't see the point of -- I mean,
11 it's inherently arbitrary because there is a response and
12 then there is a potential for reply to the response and a
13 surreply and blah-blah-blah. At some point you need to
14 get before the judge and argue about it. I mean, we're
15 always talking about -- lawyers talking about the good old
16 days without discovery, just go to court and try the case.
17 Now we're setting up a cumbersome mechanism for motions
18 which largely are not motions where you need to have such
19 a cumbersome mechanism of response ahead of time, and
20 where you do it's taken care of by the summary judgment
21 rule.

22 CHAIRMAN BABCOCK: Harvey, then Justice
23 Duncan, then Justice Bland.

24 HONORABLE HARVEY BROWN: I -- when I was in
25 Harris County as a judge I thought requiring a response

1 was a good idea. I now don't think that because I've been
2 in small counties where things are done very informally,
3 and sometimes it's easier just to have the hearing,
4 because we'll hear five or six things, and it's very
5 simple, it shortens the time, it saves money. But I think
6 the rule accomplishes that, and I like the way it's worded
7 where it says "any desired written response" because that
8 means I don't have to spend that money to file a response,
9 but it also means that if I do the other side is entitled
10 to some notice I'm going to do it.

11 I get phone calls from lawyers on Daubert
12 hearings and discovery hearings asking my advice about
13 things someitmes, and they'll say, "I have my response
14 ready. Should I file it today or should I file it the
15 night before so the other side doesn't see it, or they get
16 it late and they don't have time to do something?"
17 Daubert is not covered by the rules on that. Discovery
18 isn't covered by the rules on that, and that just invites
19 gamesmanship, and then for the lawyer who gets it without
20 a default rule there is tremendous stress.

21 I think the judge will probably give me some
22 time to respond, but I don't know the judge will give me
23 more time to respond, so that night I pull an all-nighter,
24 and I do the best I can in the circumstances, hoping I'll
25 get time to do more and do it better later, but I better

1 do something just in case the judge doesn't give me that
2 time. So I just think the sanity of practice should
3 suggest that three days is minimally fair, but if you
4 don't want to file anything this takes care of that by
5 saying "any desired response."

6 CHAIRMAN BABCOCK: Justice Duncan.

7 HONORABLE SARAH DUNCAN: I'm confused.

8 CHAIRMAN BABCOCK: Justice Duncan, not
9 usually confused.

10 HONORABLE SARAH DUNCAN: Frequently,
11 perpetually confused, and I am so glad I don't practice in
12 the trial courts because I don't -- all of the local
13 rules -- I was just using Judge Christopher's local rules
14 book. All of those rules that have different time periods
15 than the Rules of Civil Procedure, were those approved by
16 the Supreme Court?

17 HONORABLE TRACY CHRISTOPHER: If they are in
18 that book they were approved.

19 HONORABLE SARAH DUNCAN: I guess I'm very
20 literal. When I read Rule 3a and it says a local rule
21 can't alter a time period in the Rules of Civil Procedure,
22 I read that literally. I think that's a huge problem,
23 because if the Supreme Court is going to continue
24 approving local rules, and I'm not here trying to tell the
25 Supreme Court what to do --

1 HONORABLE NATHAN HECHT: God bless you.

2 HONORABLE SARAH DUNCAN: But if the past
3 practice prevails in the future and it's going to continue
4 to approve local rules that vary the time periods in the
5 Rules of Civil Procedure, this is as meaningless as the
6 current rule is and just as misleading.

7 The other, as much as I agree with Judge
8 Yelenosky that the unintended consequences of chockablock
9 amending rules are very concerning, if we change 3 to 10
10 in the existing rule we're going to run right back up into
11 Judge Martin and Orsinger's concerns in family law cases,
12 so that as much as I agree with I think the motivation of
13 your comment --

14 HONORABLE STEPHEN YELENOSKY: Well, then
15 that problem --

16 HONORABLE SARAH DUNCAN: -- I'm not sure
17 it's achieving anything.

18 HONORABLE STEPHEN YELENOSKY: That problem
19 should be addressed by addressing that problem, which is
20 to add something about family law, not to rewrite the
21 words that apply to everything else; but as far as this
22 not making a big change, the Court, as far as I know, has
23 never approved a local rule which shortens the time period
24 below three days, so if you create a civil procedure rule
25 that's 10 days, it is going to make a difference because

1 they aren't going to be able to have local rules less than
2 10 days. They might be able to have them, if the Court
3 continues its practice, of 12 days or 15 days, but they
4 won't have them less than 10.

5 HONORABLE SARAH DUNCAN: But if "alter"
6 really means "shorter," can we please amend Rule 3a to say
7 "shorter" and not "alter"?

8 CHAIRMAN BABCOCK: Justice Hecht.

9 HONORABLE NATHAN HECHT: Let me just say
10 that some of the rules probably predate the approval
11 process, which is only about 15 years old, I think, or 12,
12 15 years old. But then, also, you know, as we have heard,
13 there's 650 trial judges in the state and 254 counties,
14 and most of them -- I'd say right at 99 percent -- think
15 that the way they do it is the best way to do it on any
16 given subject.

17 CHAIRMAN BABCOCK: 99 percent?

18 HONORABLE NATHAN HECHT: Yeah.

19 CHAIRMAN BABCOCK: May be short.

20 HONORABLE NATHAN HECHT: And so rather than
21 try to push one or appeal, I mean, there just has to be
22 some accommodation to legitimate varieties in practice;
23 and, you know, some of the local rules, as you've heard,
24 call for setting hearings by agreement. Well, I would
25 think that there would be areas in the state where that

1 would be fairly difficult to do, but by the same token
2 there are lots of other areas in the state where it would
3 be outrageous if you didn't, and so I mean, to the extent
4 that we can sort of at least normatively but maybe a
5 minimum or some -- move people toward thinking in terms of
6 this is sort of the period that I'm looking at, that's a
7 good thing. Whether we can make a rule across the state,
8 I don't know.

9 CHAIRMAN BABCOCK: Justice Duncan.

10 HONORABLE SARAH DUNCAN: The third thing is
11 I haven't heard any discussion of what Justice Hecht was
12 talking about, the seven versus -- 7 or 14 days versus 10
13 days, which I thought was a good comment.

14 CHAIRMAN BABCOCK: Yeah. My sense was that
15 the number of days was almost still sort of on the table
16 in light of our vote.

17 HONORABLE SARAH DUNCAN: Okay.

18 CHAIRMAN BABCOCK: But others may feel
19 differently. Justice Bland had her hand up a minute ago,
20 but now she's --

21 HONORABLE JANE BLAND: I'll stand down.

22 CHAIRMAN BABCOCK: -- whispering to Judge
23 Sullivan. Richard.

24 Let the record reflect.

25 MR. ORSINGER: Chip, I've got a couple of

1 things I'd like to share and be sure are in the record. I
2 think that the proposal represents a shifting in a focus
3 from oral persuasion to written persuasion in our civil
4 state litigation, which is something that's already
5 occurred in Federal courts. There has been a shift toward
6 Federal to written persuasion.

7 CHAIRMAN BABCOCK: Not all Federal courts.
8 Northern District of Illinois is totally an oral docket.

9 MR. ORSINGER: Well, I don't think that's
10 representative, but it's certainly not representative of
11 the Texas Federal practice.

12 CHAIRMAN BABCOCK: Fair enough.

13 MR. ORSINGER: In my opinion written
14 persuasion is more expensive than oral persuasion. It
15 requires more preparation in advance, it requires that you
16 look your cases up in advance, think your arguments
17 through in advance, and --

18 CHAIRMAN BABCOCK: Heaven forbid.

19 HONORABLE STEPHEN YELENOSKY: You mean you
20 don't prepare before you speak?

21 MR. ORSINGER: I know that the lawyers
22 around here don't go to a hearing --

23 CHAIRMAN BABCOCK: Let the record reflect
24 that Justice Hecht has left the room.

25 HONORABLE JAN PATTERSON: As we have

1 suspected, Richard.

2 MR. ORSINGER: The lawyers around this table
3 probably don't have a problem with having four or five
4 hearings in a day with different clients, each of which
5 have paid you a retainer and you'll never get paid any
6 more than your retainer, but that's family law practice
7 for a lot of lawyers.

8 CHAIRMAN BABCOCK: Yeah.

9 MR. ORSINGER: And I think that it's bad
10 policy to move this state litigation to a written
11 practice, and it's especially bad policy to move family
12 law litigation to a written practice, and I don't think
13 people will voluntarily go there. They will only go there
14 if the judges refuse to let their positions be heard
15 because they haven't put everything in writing, and I
16 really -- that's a very philosophical question, but I
17 don't think it's a wise thing for the bulk of the state
18 court cases.

19 The judges don't have the power to read
20 these in advance. I don't know how Judge Sullivan does,
21 but the judges I'm in front of call a docket that have --
22 well, in San Antonio they have 125 cases and the presiding
23 judge may handle 30 of those. Other judges may handle
24 three or four in the first two hours of the day before
25 they start back into their jury trial. In Dallas the

1 typical docket for family law is, you know, a dozen to two
2 dozen cases; and I think it is imaginary to think that any
3 of those judges are going to read any applications or any
4 responses before the hearing because they don't know which
5 lawyers are going to show up, who is going to reset, who
6 is not going to be ready; and if they read all those
7 responses they would be reading probably 60 motions and 60
8 responses and may end up having a hearing on three of
9 them. They're just not going to do that, so I think
10 that's an illusion.

11 There is also another philosophical point
12 that this proposed change is encroaching on the trial
13 court's discretion by introducing a requirement that cause
14 be shown or cause be stated. Under Rule 21 as it now
15 exists the three-day rule can be shortened by the court.
16 That's all it says, "shortened by the court." We're now
17 going to require cause. Why are we requiring cause?
18 There isn't going to be any appellate review of good
19 cause. In fact, we're not even calling it "good cause,"
20 so I suppose bad cause would be just as justifiable as
21 good cause.

22 CHAIRMAN BABCOCK: As long as you call it
23 cause.

24 MR. ORSINGER: But why are we creating a
25 potential argument over whether there is good cause or not

1 good cause when the trial judge is the final arbiter of
2 whether the cause is justified or not? I just don't like
3 that philosophically either, and then if you apply this
4 whole process to the injunction issue, right now -- I
5 think Elaine pointed out -- there is no explicit
6 indication that a temporary restraining order that sets a
7 temporary hearing is not under Rule 21, but Rule 680,
8 which is the TRO, when it talks about setting the
9 temporary hearing it says, "The application for a
10 temporary injunction shall be set down for hearing at the
11 earliest possible date and takes precedence over all
12 matters except older matters of the same character," so
13 you have a charge to the court to set the temporary
14 hearings quickly when they've issued a TRO.

15 Now, if you go back to Rule 21, since the
16 court is setting the hearing by TRO then I think it
17 complies with Rule 21 that this -- it says, "not less than
18 three days unless otherwise provided by these rules or
19 shortened by the court." We don't litigate this now
20 because three days is so short, but we may start
21 litigating it when you get to 10 days. I would assume the
22 TRO signed by a judge setting a temporary hearing is a
23 shortening of the response deadline or the filing
24 deadline, notice deadline, by the court, but then it's
25 going to be for good cause shown or stated.

1 CHAIRMAN BABCOCK: For cause.

2 MR. ORSINGER: Or cause. I'm sorry. Cause
3 shown or stated. I'm sure the committee that drafts the
4 family law practice manual, which is the real way that
5 this rule is going to get implemented, is through the
6 family law practice manual, is going to want to know what
7 cause must be shown in a temporary restraining order to
8 justify setting a temporary hearing with less than 10 days
9 notice on the respondent when you don't even know when the
10 respondent is going to get served, and if you file on a
11 certain day, you get your TRO signed that day.

12 The clerk usually won't get the TRO out
13 until the next day. So the process goes out, you're
14 already down to 13 days left and if you've got to give 10
15 days before the 14th hearing, you really have three days
16 to get service or you're not in compliance with Rule 21.
17 So I think the TROs are all going to have to find -- the
18 order signed by the judge are all going to have to find
19 cause to have less than 10 days notice or else we're
20 always going to have to be resetting our temporary
21 injunction hearings and reissuing our subpoenas, so I wish
22 somebody would tell us what you have to show to show
23 cause.

24 CHAIRMAN BABCOCK: We're going to take a
25 10-minute break and then Justice Bland will start with her

1 comments.

2 (Recess from 10:29 a.m. to 10:51 a.m.)

3 CHAIRMAN BABCOCK: Okay. First up is going
4 to be Justice Bland, but before she speaks, here is the
5 plan, and actually, you're going to have to defer to a
6 couple of announcements. Judge Yelenosky wants to correct
7 the record on something, and Lonny wants to put something
8 on the record and then Justice Bland, but as you can see,
9 Justice Hecht had to duck out to go participate in a panel
10 at the appellate conference; and as I understand it, a
11 number of people have got to leave at 11:40 for the
12 judiciary luncheon, so what Judge Hecht would like us to
13 do is complete our discussion about this rule by 11:40;
14 and he would like to hear people's thoughts about the 7
15 days versus 10 days issue, so we'll talk about that, but,
16 Judge Yelenosky, you want to say something?

17 HONORABLE STEPHEN YELENOSKY: Yes. Lonny,
18 as you suggested, I didn't know what I was talking about
19 or I would admit that I didn't, but in a particular area,
20 not everything. As usual, it's family law, which is my
21 Achilles tendon and why I wish somebody here practiced
22 family law in Travis County. I called our court
23 coordinator, and it is true that family law is on our
24 central docket for things that are over three hours, but
25 it is not true -- well, it's still central docket, but the

1 announcement requirement does not exist for family law
2 matters of three hours or less such that they can get a
3 hearing on three days notice, and our court coordinator
4 says there does seem to be more reason or at least more
5 demand for such in the family law context. Everything
6 else I said was absolutely on point, but I did want to
7 correct that because it supports the suggestion that the
8 default period for family law perhaps should be a shorter
9 period.

10 CHAIRMAN BABCOCK: Okay. Lonny, did you
11 want to second that?

12 PROFESSOR HOFFMAN: Sure. I'll second that
13 he said something that he doesn't know. I would also like
14 to say it seems to me -- I made the comment to Richard at
15 the end of our last meeting that the glaring omission of
16 e-mail and how we deal with e-mail transmissions, is that
17 we don't deal with it, seems to be much more glaring and
18 that now building on Alex's point from before, it would
19 seem to me anomalous for us to make this change to the
20 rule and not address what are the more kind of glaring
21 things that are left out, and I want to add to that by
22 saying not only do we not address e-mail but I think the
23 rules currently deal with fax transmission incorrectly.

24 It seems to me fax is immediate in the same
25 way that e-mail is immediate in the same way that personal

1 service is immediate and that we ought to treat them that
2 way. Again, I'm not suggesting we ought to open the
3 debate further to that, but I do think that Alex's
4 instinct is just dead on right that we ought not to make
5 this change until we have thought about that as one other.
6 If we are going to make this change, though, today in one
7 form or another, or propose this change, I think we do
8 need to be very -- give some attention to the effect of
9 the fax and mail added rule because what it does, as
10 Richard has said before, is it probably turns the 10 into
11 a 13 and the 3 into a 6, and so we ought to be cognizant
12 of that.

13 CHAIRMAN BABCOCK: What we're going to drive
14 toward is a discussion about whether or not it be 7 days,
15 10 days, or 14. That seemed to be the range that Justice
16 Hecht was interested in; and the second point, whether
17 it's the sense of this committee that we ought to just
18 change one word in Rule 21 as has been suggested by some
19 people or whether we should have the more robust change to
20 the second paragraph of Rule 21 as suggested by Judge
21 Sullivan with a few friendly amendments today. So that's
22 what we need to be focused on, and with that, Justice
23 Bland, sorry to delay your comments so long.

24 HONORABLE JANE BLAND: Well, I propose that
25 you refer to Professor Albright and Professor Hoffman the

1 task of crafting rules that would help us address e-mail
2 and facsimile.

3 CHAIRMAN BABCOCK: Well, I talked to
4 Professor Hoffman about that, and they're going to talk to
5 Justice Hecht and Jody and make sure that the Court wants
6 them to spend the time doing that, and if the Court does
7 then there is no better people to do that, so --

8 HONORABLE JANE BLAND: Well, and to our
9 discussion before the break, I think that there are lots
10 of very important motions that are considered under the
11 rule that are separate from family law motions that need
12 more time for people to gather evidence and affidavits and
13 that kind of thing. Motions to strike all of your
14 experts, motions to dismiss under 4590i, motions to compel
15 arbitration, motions for sanctions, motions to disqualify,
16 you know, there are just a lot of really important motions
17 out there that would benefit from a judge having the
18 opportunity to review the materials and having both sides
19 afforded the opportunity to get to the judge as complete a
20 record as possible and then allowing, you know, for a
21 hearing to go forward after there has been time to sort of
22 set up the issue in a way for a judge that is interested
23 in reading the materials to have that opportunity to do
24 so.

25 So I think there is important concerns on

1 the family law side, but I also think there is some
2 important concerns for lengthening the time period, and it
3 would seem like the family law concerns really deal with
4 ancillary relief, equitable relief that's already taken
5 care of under TROs. And if you get a TRO you're required
6 to then set a hearing date, and it just, you know, seems
7 like -- if the hearing date has to be extended because the
8 other side hasn't gotten service and they're complaining
9 that they haven't had adequate notice, well, maybe they
10 need some time to prepare for the TI; and if that's the
11 case then the judge can extend the TRO; but, you know, I
12 think that in the system that we have right now we're sort
13 of saying, well, everything has to be done within three
14 days and it's the exception for it to be longer; and it
15 really probably should be the opposite.

16 CHAIRMAN BABCOCK: Given those comments,
17 Judge Bland, are you a 7, 10, or 14 person?

18 HONORABLE JANE BLAND: I don't feel strongly
19 about that.

20 CHAIRMAN BABCOCK: Okay. Are you a one word
21 change in paragraph (2) or are you a let's rewrite
22 paragraph (2)?

23 HONORABLE JANE BLAND: I think I'm with
24 Pete. If we can get -- if the one word change is what the
25 committee thinks is what they're prepared to do right now,

1 then the one word change. If the committee feels
2 comfortable with what's written I think it's clearer and
3 probably doesn't really -- you know, it's clearer, and I
4 think it provides for the response, which is good, so that
5 would be my preference, but --

6 CHAIRMAN BABCOCK: Okay. Good. Judge
7 Christopher.

8 HONORABLE TRACY CHRISTOPHER: Well, I would
9 be in favor of 10 versus 7 based on practicalities. I
10 think it's ashame that a lot of the trial judges don't
11 have the opportunity or ability to read what lawyers
12 spend, you know, their time and effort writing; and the
13 reason why I started with a 10-day requirement was
14 because -- and I have hearings on a Monday, so that means
15 the lawyers can file something on Friday, you know, 10
16 days before that Monday, so that he will file it Friday at
17 5:00, and the clerk's office will look at it on Monday,
18 and they will process it, and it will go into a bin that
19 in a day or so before my own clerk picks it up and ever
20 gets it into my courtroom. Okay.

21 So from just a practical paper handling
22 matter I urge the 10-day versus the 7 days because the 7
23 days we're getting much shorter in terms of trying to get
24 the paper to the judge. With respect to the 3 days
25 mentioned here in the -- in Kent's rule, I like what some

1 of the local rules say, which is, you know, two business
2 days or two working days or, you know, something like that
3 so that you don't have to cross-reference three days. It
4 doesn't really mean you can file it Friday at 5:00 p.m.
5 for the Monday hearing in terms of a response because a
6 response filed Friday at 5:00 p.m. is not useful to me,
7 and even though lawyers should know that Friday at 5:00
8 p.m. isn't three days before Monday under our rules
9 because of the holidays I think it makes it a lot clearer
10 if we say two business days or three business days before
11 the date of the hearing.

12 CHAIRMAN BABCOCK: Okay. So you're a 10-day
13 Sullivan --

14 HONORABLE TRACY CHRISTOPHER: Yes.

15 CHAIRMAN BABCOCK: -- with modifications
16 perhaps.

17 HONORABLE TRACY CHRISTOPHER: But I'll take
18 just the one word.

19 CHAIRMAN BABCOCK: Stephen Tipps.

20 MR. TIPPS: I'm a 10-day Sullivan proponent
21 as well. Largely because I think that it's a good thing
22 to have a rule that at least creates a presumption that
23 the parties will file a response sufficiently in advance
24 of the hearing so that the other side gets to see it and
25 the judge gets to see it.

1 I am a little troubled by this draft,
2 though, because it would seem to preclude the judge from
3 considering a late filed response under any circumstances,
4 and I'm not sure that that's a good idea, and so I would
5 suggest we consider the Sullivan draft but append to the
6 end of the second paragraph something like "except with
7 leave of court," so that the party -- the would be
8 respondent would have to worry about whether or not
9 anything that was filed late would be considered because
10 the judge might not grant a leave of court, but on the
11 other hand, the judge would have the discretion to
12 consider something filed late if that seemed to be the
13 right thing to do.

14 HONORABLE KENT SULLIVAN: Accepted.

15 CHAIRMAN BABCOCK: Alistair.

16 MR. DAWSON: I think the one word change
17 from 3 to 10 in the rule loses a lot of the advantages
18 that we're trying to accomplish here. It doesn't -- as
19 others have pointed out, it doesn't provide for a response
20 to be filed sometime in advance of the hearing, so you're
21 going to have at least some lawyers are going to continue
22 the practice of potentially waiting to the last minute to
23 give you a response, and that's one of the things we're
24 trying to avoid with this proposed language.

25 The other thing is, is that it doesn't

1 require some kind of cause to shorten the time period, so
2 you could have around the state judges just issue standing
3 orders that say, you know, you can have shorter hearings,
4 or shorter notice requirements in my court, so you've lost
5 that opportunity; and so if we agree that as a general
6 rule it's good to have a procedure where there is a motion
7 and all the stuff is filed and the other side gets notice
8 of it and then you file your response and so the court has
9 a chance to read it and what have you before the hearing,
10 if that's part of what we're trying to achieve, then you
11 should replace all of I think paragraph (2) with some
12 variation or modification to what Kent had proposed.

13 And my second comment is that with respect
14 to 7, 10, or 14, given that there is a three-day -- if you
15 go with the 3-day response requirement, I think 10 is
16 better than 7 or 14.

17 CHAIRMAN BABCOCK: Okay. Jim, do you have
18 your hand up?

19 MR. PERDUE: I did, and I joined Judge
20 Sullivan in this rule last time, but I raised the issue of
21 waiver on this response language, and I keep coming back
22 to that, but I thought that Mr. Orsinger raised a great
23 point, which was the extension concept is one thing, but
24 this now has this idea of a written response, which moves
25 the whole motion practice into a theory of written

1 advocacy versus hearing advocacy, which is a different
2 change from the concept of more notice to a hearing such
3 that the issues can be fully joined at the hearing, and
4 I -- the more I sit and chew on this idea that regardless
5 of how you write the language, and the express intent
6 stated by Judge Sullivan is that there is not a waiver
7 created by this second paragraph of the proposed rule, I
8 continue to be very concerned at this idea that you're not
9 going to truly be able to join the issue in an oral
10 hearing, but for essentially having this thing fully
11 briefed, and that does not seem to permit a practice
12 within the flexibility across the state.

13 Harris County doesn't look like Bexar
14 County, doesn't look like Travis County, doesn't look like
15 Tarrant County, and we've heard about all different
16 experiences throughout the state. This is the way you
17 practice in Harris County, but I don't know that it is
18 applicable across the state, so I'm coming back to the
19 idea of 10 days, but a one word change as opposed to the
20 overall proposal here because I think there is two policy
21 ideas. There is extended notice, which is a good one, but
22 this move to a full written practice for every single
23 motion is concerning, and I don't know how to write it. I
24 haven't been able to figure out how to write it to resolve
25 that concern.

1 CHAIRMAN BABCOCK: All right. Thanks, Jim.
2 Judge Sullivan.

3 HONORABLE KENT SULLIVAN: Quickly, I am very
4 comfortable with both the ideas expressed by Stephen Tipps
5 and by Judge Christopher in terms of justifying business
6 days as opposed to just saying three days. Three business
7 days or two business days.

8 CHAIRMAN BABCOCK: Okay.

9 HONORABLE KENT SULLIVAN: With respect to
10 Jim's question, I went back and looked at some of the
11 language that Pam proposed last time, I think. Would it
12 be solved if the language was changed to something like as
13 follows -- again, I am stealing this from her, but
14 something like, quote, "If a respondent desires to submit
15 a written response in addition to oral argument," comma,
16 "such response must" whatever. Does that deal with your
17 problem or is your problem more significant than that?

18 MR. PERDUE: That does seem to address the
19 problem. The thing that I got -- I kept getting caught up
20 with was this idea of "or other materials." I mean, I
21 understand the idea of briefs and evidence, but other
22 materials that need to be three days in advance of the
23 hearing and then my consistent concern of the movant's
24 argument, I didn't get that three days in advance,
25 therefore, the court should not be able to consider that,

1 and therefore, regardless of how relevant it is and
2 regardless of how controlling it is, it is not
3 appropriately before the court on the day of the hearing;
4 and as long as you can deal with that issue, and that's
5 the primary concern that I continue to come back to, then
6 if there is language that can address that that would get
7 there; and the idea here is to -- I know you keep talking
8 about encouraging a written response so that the issues
9 are at least joined to some idea, but --

10 HONORABLE KENT SULLIVAN: And if I can
11 interject this, because this is really important and we've
12 said it a couple of times, but I think it's very
13 significant. This is not a paper work proposal at all.
14 It is really intended to suggest if you are going to file
15 a written response then do it and do it by a timetable so
16 that everyone knows what's going to be done. This is the
17 Harvey Brown issue, when he talked about somebody who had
18 it ready, it was going to be very substantial, and they
19 decided, as is a commonplace issue now I think in our
20 courts, with increasingly sophisticated and consequential
21 motions being filed under a three-day time period you are
22 dealing with "I will file it at the last moment in an
23 attempt to lie behind the log and gain some advantage of
24 surprise." I do think that's an issue, but it's not
25 intended to require anybody to file anything if they don't

1 want to.

2 MR. PERDUE: Well, and the 3-day notice,
3 moving 3 to 7 or 10 days for the movant deals with that
4 gamesmanship and now you have the issue of the reply being
5 used as a gamesmanship process of essentially handing it
6 to the judge the day of.

7 HONORABLE KENT SULLIVAN: But isn't that
8 always the issue?

9 MR. PERDUE: And that's always the issue,
10 but my concern is just the reality of practice. Let's say
11 you have 10 days, you work up a response but then
12 something else comes up, more evidence comes in, a case
13 that you just find, and then all of the sudden the
14 argument is "We can't hear that" or "I'm not going to
15 entertain that," and that seems to encourage kind of a
16 form over substance issue to deal with the gamesmanship
17 issue but doesn't seem to achieve the other overall goal
18 of teeing the whole thing up properly, and so the "if"
19 language being the most permissive seems to at least get
20 there, my concern is out there.

21 CHAIRMAN BABCOCK: Okay. Carlos and then
22 Richard and then Pete.

23 MR. LOPEZ: I guess there is some concern
24 being expressed that perhaps the problem is more -- that
25 the solution is bigger than the problem, and I think if

1 you're going to analyze it that way then it's helpful to
2 figure out how bad is the problem, so I want to echo what
3 Kent is saying. I can't speak for everywhere else, but I
4 can speak for Dallas, and it's got an epidemic. I mean,
5 it happens all the time. People have their response ready
6 to go, and they sit on it, and they don't send it to you,
7 and they hand it to you when you walk in the courtroom,
8 and it's a farce. Everyone knows that's what's happening.
9 You prepare for it, and you don't go in there thinking
10 you've got them now, they didn't file a response. You
11 know you're going to get handed a response as you walk
12 into the courtroom. So what I do, I get there 20 minutes
13 early hoping that opposing counsel is there 20 minutes
14 early, and I'll ask him, "Where is the response?" And
15 sure enough, he'll go "Here it is." At least I get 20
16 minutes.

17 MR. GARCIA: Well, then you're lucky,
18 because I'm sitting there for three hours and they hand it
19 to me when it's my turn. "Here it is."

20 MR. LOPEZ: Again, I can only speak for my
21 personal experience, but both off the bench and on the
22 bench, but the real problem is, is that the trial court's
23 interest in, quote, doing the right thing and making the
24 most intelligent decision is aligned with the person who
25 is abusing and filing it at the last minute, because if

1 it's just law -- I mean, if it's evidence that's one
2 thing, but if it's just law and it's just argument, well,
3 then the trial court is not doing themselves any favors by
4 ignoring it because the appellate court is not going to
5 ignore it.

6 HONORABLE STEPHEN YELENOSKY: Exactly.
7 That's the problem.

8 MR. LOPEZ: So you're never going to get a
9 real hammer or teeth into this until -- and I know it's
10 controversial, until we say, you know what, you purposely
11 do it and you just lie behind the log because you know you
12 can get away with it then you've created some kind of
13 waiver, and I realize that creates probably as many
14 problems as it solves, but the rest of it is just dressing
15 until you do that because --

16 HONORABLE STEPHEN YELENOSKY: But what about
17 another penalty --

18 MR. LOPEZ: I know --

19 HONORABLE STEPHEN YELENOSKY: -- other than
20 waiver? Fine them.

21 MR. LOPEZ: I know one judge out of 13 that
22 would look at them and say "What part of that rule" -- we
23 have a local rule in Dallas, as you mentioned, that it
24 said -- the local rule says if you file it less than the
25 three days it likely will not be considered. There is

1 only one judge out of 13 that followed that rule, and
2 everybody knew it, so, you know, it was just everybody
3 knew that was a farce.

4 HONORABLE STEPHEN YELENOSKY: Penalty won't
5 be imposed. A different penalty might. "Give me your
6 brief and that will be a thousand dollars," but "Don't
7 give me your brief" is not going to happen.

8 CHAIRMAN BABCOCK: Richard.

9 MR. MUNZINGER: Addressing the 7 or 10-day
10 question, if you have this rule that says the reply must
11 be served three days before the time specified for the
12 hearing, if you serve by fax that means you must serve
13 your reply six days prior to the hearing. If you have a
14 seven-day notice period, the party who is served the
15 motion has one day to prepare the response, if my math is
16 correct; and if you have a 10-day period he has four days
17 to prepare a response, which brings me back to my support
18 of Judge Yelenosky's position. I'm unaware that we're
19 dealing with a crisis in the trial courts about doing
20 justice, and I think that doing all of this amendment to
21 the rule is going to create more problems and more
22 uncertainty than simply changing the word from 3 to 10 or
23 whatever number of days we choose.

24 CHAIRMAN BABCOCK: Okay. Pete. Pete, then
25 Hugh had his hand up.

1 MR. SCHENKKAN: I do think there is a real
2 world need for flexibility for the case that the movant
3 finds, having now read the response that the movant gets
4 sometime before the hearing as opposed to when they walk
5 up to counsel table because it's their turn, and that
6 could be a case that they just didn't find before because
7 they didn't look in the right place and respondent did a
8 good job of finding a line of attack, a line of reasoning,
9 that they hadn't covered; or it could be what somebody
10 suggested, that a brand new case just came out or
11 whatever; and in that case the judge is going to want to
12 hear the case, of course; and the practicality is, is it
13 the kind of new case or material that really ought to be
14 that's the end of the matter, regardless of the fact that
15 they found it this late, should have found it earlier, or
16 whatever; but, actually it's a Texas Supreme Court case
17 and it's on point, what difference is further discussion
18 going to make? It's going to get accepted as brought in,
19 or is it the kind of thing it's from one of the courts of
20 appeals, it's 20 years ago, it's not quite on point but
21 the language is very good.

22 Well, maybe we ought to hear -- maybe the
23 movant ought to have a chance to respond to that. The
24 flexibility to handle that is I believe contemplated by
25 Kent's proposal, except as -- "except upon agreement of

1 the parties," in a lot of case what the judge is going to
2 do is look at the two lawyers and say, "Anybody see any
3 problem here with my giving this lawyer -- you know, with
4 no hurry, right, we can take three more days and give him
5 a chance to respond to this"; or the other way around,
6 say, "Well, I know this is a surprise to you, but don't
7 you agree it looks pretty well on point? Do you want more
8 time to do look at it or do you think we're ready to go
9 ahead and move to a decision on this?" A lot of them are
10 going to get worked out that way on the spot because of
11 the nature of whatever it is is brought in at the last
12 moment by the movant in reply to the response; and if not
13 then "upon order of the court for good cause shown," I
14 believe the judge says, "I think this is all I need to
15 hear about this. This looks dispositive to me. I don't
16 think I need any response." That's the cause for saying
17 we're not going to do anything else.

18 CHAIRMAN BABCOCK: Okay. Hugh Rice Kelly.

19 MR. KELLY: The concern about late filed
20 authorities -- and so many of us have seen motions where
21 the lawyer will come in, and he's got the Xeroxed cases
22 and wants to argue those cases, and that's in substance
23 the answer. Wouldn't Stephen Tipps' amendment that said
24 "except by leave of court" cover it? I just think it
25 would be a rare judge that would say, "No, I don't want to

1 see the case law," so, or hear, you know, very basically
2 informal kinds of arguments. I'm just thinking that
3 Stephen's additional clause on what Judge Sullivan said
4 ought to address most of your problems.

5 CHAIRMAN BABCOCK: Okay. Judge Patterson,
6 then Judge Gaultney.

7 HONORABLE JAN PATTERSON: Well, that's part
8 of my point. I do think that's a good addition, Stephen's
9 suggestion, because we deal with deadlines all of the
10 time, and it has never prohibited any court, whether an
11 appellate court or district court, from accepting a case
12 or an argument, but I am convinced there is a waiver
13 aspect that we want to take care of while we can. I'm
14 actually persuaded by all of you every time you speak
15 because I think that there is a lot to say for this rule,
16 there is a lot to say for just the one word, but I think
17 where I come out is I do like the rule and I like the 10
18 days. I think there is a lot to say to throw out a
19 default time of 10 days that is sort of an institutional
20 speak in favor of a little bit of length of time and
21 sanity.

22 I am concerned about family court cases,
23 though, and I think that we really need to keep in mind
24 that an increasing number of our cases deal with family
25 law cases, a huge, huge, amount, and probably motions

1 other than temporary orders as well. I think there is
2 another aspect of this that speaks in favor of the 10
3 days, and that is that I think we've all had clients who
4 have said in the courtroom, "Can they do that?" when
5 something is popped at the last minute and -- or a
6 surprise this or that, "Can they do that?" And I think
7 the perception of fairness in the courts and orderliness
8 is very important for the sake of the lawyers and judges,
9 but also for the sake of the litigants.

10 So I think that this adds that notion that
11 it's not -- we're not going to leave it to gamesmanship or
12 last minute or your lawyer has more resources than I.
13 There is an element of preparation to it. I think it
14 reduces the amount of chaos in our lives, whether it
15 allows the judges to prepare, the lawyers to prepare a
16 little bit, or the litigants to have a period of 7 to 10
17 days to deal with something that's dumped in their lives.
18 I think we don't always keep in mind of how disruptive and
19 chaotic something like that can be in the life of a
20 litigant to have a three-day response.

21 I also think it doesn't -- I mean, we
22 haven't spoken to this issue, but certainly going from 3
23 to 10 days does not introduce any amount of delay in the
24 process. I think we can all agree that the system is not
25 delayed for that reason, so I -- I do worry about what

1 Richard said. I don't want this to be viewed as
2 increasing costs, but I don't view it as increasing costs.
3 I do view it as another option. I mean, if nothing else,
4 you can list your points and it gets there in writing if
5 you need to. I think our system is not oral friendly for
6 other reasons besides this, and I think that probably has
7 to be addressed in other ways, and I do worry about that
8 quite a bit.

9 CHAIRMAN BABCOCK: Judge Gaultney.

10 HONORABLE DAVID GAULTNEY: Hugh made one of
11 the points I was going to make, and I was particularly
12 interested in your comment about other materials, not case
13 law because I think that's -- the court is going to
14 consider that routinely probably, but other materials,
15 like you mentioned depositions or something like that.
16 And I was wondering does the "upon leave of court" satisfy
17 your concern on that in terms of giving the court
18 discretion to consider it?

19 And I guess my second question is, Rule 5
20 anticipates that -- because I think what this three-day
21 deadline is, I think it's a deadline. It gives you time
22 by which you have to do something, and so I think Rule 5
23 says, well, if you've got a deadline under our rules in
24 which you've got to do something and you don't get it done
25 then on motion -- and it doesn't require a written motion

1 -- on motion and good cause the court can enlarge the
2 time. So if you show up at a hearing and you've got that
3 dispositive thing that really can't be disputed by the
4 other party, would the language that Steve suggests and
5 also Rule 5 solve the problem?

6 MR. PERDUE: I've written it, and I'm
7 getting -- for example, on a big Daubert motion where you
8 come in with a Power Point or something to help explain
9 it. Is that inappropriate because you didn't send the
10 slides to the opposing counsel? That's other materials,
11 and that just seems to increase the game, and I'm -- both
12 sides have issues here, and I understand it. I can show
13 you what I wrote, but I mean, I'm working through it.

14 CHAIRMAN BABCOCK: Buddy.

15 MR. LOW: Let me ask --

16 MR. PERDUE: Well, you say that until the
17 objection comes up.

18 MR. LOW: Kent, as I understand it, you've
19 agreed that No. 1 should be "by these rules or by law." I
20 mean --

21 HONORABLE KENT SULLIVAN: Right.

22 MR. LOW: That's not in there, and as I
23 understand, you've also agreed that No. (4) could be
24 written three days upon order of the court or for cause
25 entered, in other words copy the same exception, not

1 change the language, just put it there; and that seems to
2 be addressing what most are concerned about. I mean,
3 you've agreed to that, did you not?

4 HONORABLE KENT SULLIVAN: Yes.

5 MR. LOW: That's all.

6 CHAIRMAN BABCOCK: Sarah, and then Tommy.

7 HONORABLE SARAH DUNCAN: What if -- I don't
8 think that the one word change to Rule 21 is going to cut
9 it in light of the concerns expressed by Richard and Judge
10 Martin, but what if -- and this is a three-step process,
11 so stay with me. What if we change 3 to 7 or 10? I don't
12 care about the number of days in 21, add supporting
13 materials, to get those filed within the 10 or 7 days, add
14 to 21 "if in addition to presenting oral argument at the
15 hearing a party plans to file a written response, it must
16 be filed and served no less than three days," or "three
17 business days," whatever. I don't care about the number
18 of days. "Before the time specified for the hearing
19 unless it's filed later with leave of court," and then
20 amend 3a to say that the local rules can't shorten the
21 time in the Rules of Civil Procedure except as the Court
22 deems necessary in family law matters in either
23 case-specific or standing court order that's filed in the
24 record of the case.

25 CHAIRMAN BABCOCK: Okay.

1 HONORABLE SARAH DUNCAN: I think that
2 resolves --

3 HONORABLE STEPHEN YELENOSKY: Make a motion.
4 You've got 10 minutes.

5 HONORABLE SARAH DUNCAN: -- all the problems
6 except what Jim was just talking about about the Power
7 Point presentation, defining "supporting materials."

8 CHAIRMAN BABCOCK: Tommy.

9 MR. JACKS: Well, until Jim Perdue raised it
10 I hadn't focused as carefully as I should have on this
11 business of "written response including other materials,"
12 and when I think of so many hearings where neither side
13 submits briefs but both sides show up with -- certainly
14 with cases, frequently with -- I know Mike McKetta shows
15 up with a flip book which has his cases and kind of his
16 cavilization of what he wants them to say. There may be
17 at some hearings a need for brief evidence and exhibits,
18 and lawyers just show up and do this stuff, and if you
19 introduce the idea that that has to be served three, and
20 three really means six, days in advance of the hearing,
21 you're drastically altering the practice in a broad swap
22 of cases, and I think that's a colossally bad idea.

23 CHAIRMAN BABCOCK: Richard.

24 MR. GARCIA: Could you change "material"
25 just to "evidence," because I don't think anyone is

1 suggesting demonstrative aids or Power Points or case --
2 excerpts of cases need to be produced ahead of time, but
3 if you've got evidence, you really should produce that
4 ahead of time.

5 HONORABLE STEPHEN YELENOSKY: In what
6 instance would it be evidence? It's not summary judgment,
7 it's not presented live. Affidavit evidence?

8 MR. GARCIA: Affidavit, deposition excerpts,
9 whatever, just evidence. Not arguments.

10 MR. ORSINGER: So now we have to put all of
11 our evidence in writing before the hearing?

12 HONORABLE STEPHEN YELENOSKY: It's going to
13 be oral live testimony.

14 MR. ORSINGER: Well, what does evidence
15 mean? Does that mean that I have to premark all my
16 exhibits and give them to the other side three days before
17 every hearing? Does that mean that I have to summarize
18 what my witnesses are going to say? I thought we had the
19 rules of discovery to allow people to figure out who the
20 witnesses were and let them figure out on their own, take
21 a deposition or something. Why would we have to submit
22 our evidence in advance of the hearing?

23 CHAIRMAN BABCOCK: Well, that's what this
24 rule requires as proposed.

25 MR. ORSINGER: I don't think so.

1 CHAIRMAN BABCOCK: Well, it says "affidavits
2 or other materials."

3 MR. ORSINGER: Well, you know, that's fine
4 if you're going to have an affidavit practice. Even the
5 discovery rules require you to do that a little bit before
6 the hearing, but "evidence" is broader than affidavits.

7 CHAIRMAN BABCOCK: Broader than "other
8 materials"?

9 MR. ORSINGER: Evidence is exhibits that get
10 marked and authenticated by witnesses, and if you say that
11 we're going to have to include all of our evidence in
12 writing delivered to the other side three days before the
13 hearing then I don't even want to be in this state when
14 this rule gets issued.

15 CHAIRMAN BABCOCK: Justice Bland.

16 HONORABLE JANE BLAND: I agree with Richard.
17 I never thought that this was intended to include evidence
18 that would be presented at an evidentiary hearing, and if
19 it is then I'm out.

20 CHAIRMAN BABCOCK: Well, it says
21 "affidavits." That's evidence, right?

22 HONORABLE JANE BLAND: Well, affidavits
23 aren't evidence usually. They're not admissible as
24 evidence, and they're used in support for various sorts of
25 motions and briefs; but I think when you get to an

1 evidentiary hearing, you know, you're submitting
2 documents, depositions, testimony; and none of that stuff
3 is to me a response to a motion. That's your evidence,
4 and you might make a response, and you might include
5 affidavits, and if you're just going to decide it on the
6 affidavits you probably should put those into the record
7 three days in advance of the hearing, but --

8 CHAIRMAN BABCOCK: Can you see that someone
9 would make the argument that "other materials" would --

10 HONORABLE JANE BLAND: Yes, and --

11 CHAIRMAN BABCOCK: -- include evidence?

12 HONORABLE JANE BLAND: -- maybe we should
13 just say --

14 MR. ORSINGER: Sure.

15 HONORABLE JANE BLAND: -- "response."

16 CHAIRMAN BABCOCK: Okay. A lot of hands up.
17 We'll just go around this way. Justice Duncan.

18 HONORABLE SARAH DUNCAN: I know we're just
19 showing our various focuses in law. As long as we're
20 going to do evidence, if I'm going to be up against a
21 motion to dismiss my med mal case because an expert report
22 hadn't been filed, I want to know what cases from what
23 court you're relying on as to when that time period is
24 going to pass and what the trial court's options are and
25 what the other party's options are in that 120, 180 days,

1 depending under what statute we're under. I want to know
2 your cases, and I think that's all that really matters in
3 that dismissal hearing and motion for extension hearing.

4 This is getting really complicated.

5 CHAIRMAN BABCOCK: As only we can. Judge
6 Yelenosky. Wait, wait a minute. Alex had her hand up.
7 Sorry. We're going to go around the room and then we're
8 going to vote.

9 PROFESSOR ALBRIGHT: Well, one thing, I
10 don't know if you-all have ever been defendants personally
11 in a lawsuit, but there is nothing more terrifying than
12 the thought of your lawyer having to write responses to
13 every motion because it's going to cost you a fortune.
14 So, you know, moving to this written practice, as
15 everybody said, is just terrifying; but then just, you
16 know, in my rules mongering way, don't use the word
17 "business days." We don't use "business days" anywhere
18 else, and that then -- how does that fold into 21a and 5?
19 It just doesn't work.

20 And then you also have to remember response.
21 Remember there are rules that require responses at
22 different times other than three days, like summary
23 judgment and venue, so you need a proviso "unless as
24 provided" --

25 HONORABLE KENT SULLIVAN: It's in there.

1 That was the very first exception noted.

2 PROFESSOR ALBRIGHT: On the response?

3 HONORABLE KENT SULLIVAN: Yeah.

4 PROFESSOR ALBRIGHT: It's not in there.

5 It's not in here.

6 MR. ORSINGER: It clearly doesn't apply to
7 the response. It's worse than not clear. It clearly
8 doesn't apply to the response.

9 PROFESSOR ALBRIGHT: It's further up on the
10 page, and it looks like it's just for the motion.

11 MR. SCHENKKAN: That would be addressed if
12 we moved all the response stuff up above where it excepts
13 so that the exceptions apply in parallel to both motion
14 and response, all four exceptions.

15 PROFESSOR ALBRIGHT: Yeah, and then I've
16 been playing with the, you know, if you mail all this
17 stuff how that works, and I'm not really sure how it would
18 work in practice, but it's something to be thought about.
19 I don't want to get into it.

20 CHAIRMAN BABCOCK: Thanks, Alex. Alistair.

21 MR. DAWSON: Yeah, my interpretation was
22 that the filing the supporting briefs, affidavits, and
23 other materials was intended to whatever you attach to
24 your response -- you know, if you had a brief that was
25 supporting it, if you had deposition testimony or

1 documents or exhibits, and the notion was that all of that
2 ought to be filed at the same time, and I support that,
3 because otherwise then, you know, lawyers that want to
4 engage in gamesmanship, they'll file their response but
5 they'll keep, you know, all of their, you know, briefs or
6 they'll keep their evidence or they'll -- and they'll hand
7 that up at the hearing, and really you haven't
8 accomplished anything, and so I'm not sure what the
9 language should be, but, you know, any material -- you
10 know, supporting materials or other materials submitted
11 therewith or some kind of language.

12 I'm sure Judge Sullivan and others can
13 figure that out, but I don't think it should be nor do I
14 think it was intended to cover live testimony or, if
15 you're having an evidentiary hearing, the exhibits that
16 would be introduced at an evidentiary hearing. I think
17 it's intended to cover those -- and it should cover those
18 materials that one party believes are supportive of the
19 positions asserted in the response.

20 CHAIRMAN BABCOCK: Who was next? Judge
21 Yelenosky.

22 HONORABLE STEPHEN YELENOSKY: Well, let me
23 just ask, what are we trying to accomplish in the next
24 five minutes? A vote, an ultimate vote, or some straw
25 vote?

1 CHAIRMAN BABCOCK: Yeah, we're going to take
2 two votes, two series of votes.

3 HONORABLE STEPHEN YELENOSKY: But it won't
4 get us to the end of the game?

5 CHAIRMAN BABCOCK: The first is going to be
6 how many people think it ought to be more than 10 days and
7 how many people think it ought to be less than 10 days,
8 how many people are happy with 10. That would be one set
9 of votes. The second set of votes will be how many people
10 think there ought to be a one word change in this
11 paragraph.

12 MR. BOYD: Chip, to clarify on the record
13 then, we're not going to vote whether there ought to be a
14 change at all?

15 CHAIRMAN BABCOCK: We did that last time.

16 MR. BOYD: Right.

17 CHAIRMAN BABCOCK: We did that last time.

18 MR. BOYD: So for purposes of this vote --

19 HONORABLE STEPHEN YELENOSKY: Will we get a
20 vote on a one word change plus an exception for family
21 law?

22 HONORABLE SARAH DUNCAN: A slight
23 modification, how about a one word change plus an
24 amendment to 3a to permit a local rule for shorter periods
25 of time in family law matters as the Court deems

1 necessary?

2 HONORABLE STEPHEN YELENOSKY: Or some
3 mechanism for family law matters.

4 CHAIRMAN BABCOCK: Okay. We can take some
5 additional votes but those are the two --

6 HONORABLE STEPHEN YELENOSKY: I just want to
7 know --

8 CHAIRMAN BABCOCK: Those are the two that
9 the Court wanted to hear what the results were.

10 HONORABLE STEPHEN YELENOSKY: Okay. Just
11 because we're about to end I just wanted to know what
12 would be most advantageous to speak to.

13 CHAIRMAN BABCOCK: Yeah. Unless anybody has
14 any strongly held views that they want to express on those
15 issues maybe we could vote now.

16 HONORABLE JAN PATTERSON: Or other
17 materials.

18 CHAIRMAN BABCOCK: Huh?

19 HONORABLE JAN PATTERSON: Or other
20 materials.

21 CHAIRMAN BABCOCK: Or other materials that
22 they may want to --

23 HONORABLE STEPHEN YELENOSKY: Well, I just
24 want to --

25 CHAIRMAN BABCOCK: Although that should have

1 been done three days ago.

2 HONORABLE STEPHEN YELENOSKY: I just wanted
3 to know what we are going to be talking about so I can
4 make this short. One word change with some accommodation
5 for family law. The response issue is obviously a
6 quagmire that requires more time than we have to address
7 here.

8 CHAIRMAN BABCOCK: Yeah. Yeah.

9 HONORABLE STEPHEN YELENOSKY: But the bottom
10 line on that is judges want the law; and if the other side
11 has a response that's dispositive and you can't say
12 anything about it, you ought to lose; and if you need some
13 time to say something about it, a good judge will give you
14 that time; and we shouldn't be writing rules for bad
15 judges.

16 CHAIRMAN BABCOCK: Although -- Richard.

17 MR. ORSINGER: I looked at Rule 120(a) on
18 special appearance, and subdivision (3) says, "The
19 affidavits, if any, shall be served at least seven days
20 before the hearing," so let's be sensitive to the fact
21 that we'll have a conflict between 120(a), and I hope that
22 the specific would prevail over the general, but I know
23 that it will probably take a bunch of mandamuses to figure
24 that out. And then I don't know what the venue response
25 deadlines are, and I wasn't able to read them. Elaine,

1 maybe you remember. I don't know if there is a different
2 time --

3 PROFESSOR CARLSON: 45, 30, 7.

4 MR. ORSINGER: Okay. So we probably need to
5 admit on the record that we either should specifically
6 except other deadlines or reconcile which one will prevail
7 or fall back on the specific controls over the general,
8 which would be the worst choice, I think.

9 CHAIRMAN BABCOCK: Okay. First vote is
10 going to be how many people think it should be more than
11 10 days, raise your hand.

12 HONORABLE TOM GRAY: That's if it's done?

13 CHAIRMAN BABCOCK: Yeah, if it's done how
14 many people think it should be more than 10 days? That's
15 one vote.

16 How many people think it should be less than
17 10 days? That's all right. Multiple volting is fine.
18 Six and a half for less than 10 days.

19 HONORABLE STEPHEN YELENOSKY: Splitting the
20 vote?

21 CHAIRMAN BABCOCK: And how many people think
22 10 days is like Goldilocks, just right?

23 Okay. There are 26 votes for 10 days.

24 Now, how many people favor a one word change
25 to paragraph (2) of Rule 21, inserting the word "ten"

1 where now the word is "three"? Everybody that's in favor
2 of that.

3 HONORABLE SARAH DUNCAN: All by itself, no
4 other --

5 CHAIRMAN BABCOCK: Yes. We'll get to family
6 law in a minute.

7 PROFESSOR ALBRIGHT: This is assuming there
8 is going to be a change, right?

9 CHAIRMAN BABCOCK: Yes. All right. There
10 are 20 hands raised for that.

11 How many people favor some version of the
12 Sullivan expansion on that second paragraph?

13 HONORABLE STEPHEN YELENOSKY: He's
14 multiplying his vote.

15 CHAIRMAN BABCOCK: Okay. There are 14 votes
16 for that, the chair not voting, so the majority of our
17 committee thinks that a one word change.

18 Now, how many people think that family law
19 should be exempted from our proposed 10-day limit?

20 MR. ORSINGER: Can we make it not as rigid
21 as exempted because Sarah wants to give local option to
22 the family law judges, for example, and that might be
23 perfectly acceptable?

24 CHAIRMAN BABCOCK: Okay. How about we put
25 it this way?

1 HONORABLE TRACY CHRISTOPHER: But, Chip, but
2 doesn't Rule 21 if we just make that one change already
3 allow that, because it says "or shortened by the court"?
4 I mean --

5 HONORABLE STEPHEN YELENOSKY: Well, except
6 for the problem that I said, which is that if that's your
7 interpretation it invites shortening for all kinds of
8 purposes.

9 HONORABLE TRACY CHRISTOPHER: Well, yes,
10 which is why we wanted the change.

11 HONORABLE STEPHEN YELENOSKY: Which I think
12 is a bad thing.

13 CHAIRMAN BABCOCK: Let's frame the issue
14 this way. Assuming the rule, Rule 21, is going to be
15 as-written with only one change, that being 10 days
16 instead of 3 days, how many people think that the family
17 -- the family practice ought to be accommodated in some
18 way? Okay. How many are in favor of that?

19 MR. GARCIA: You mean in addition to the way
20 it already is?

21 CHAIRMAN BABCOCK: 16 raised their hands for
22 that.

23 How many people disagree with that
24 proposition? 14 on that, so 16 people think that
25 family -- the family practice ought to be accommodated

1 because of this one word change that we're suggesting and
2 14 people think it should not, so that will take care of
3 it.

4 I think there is some judges that have to go
5 to -- as Sarah Duncan leaves the room and other judges
6 leaving the room, and thanks, everybody, for being here,
7 and we'll see everybody in August, and I appreciate the
8 discussion today. It was great as always.

9 (Adjourned at 11:38 a.m.)

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THE SUPREME COURT ADVISORY COMMITTEE

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