

MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

OCTOBER 22, 1999

(AFTERNOON SESSION)

Taken before William F. Wolfe,

Certified Court Reporter and Notary Public in

Travis County for the State of Texas, on the

22nd day of October, A.D. 1999, between the

hours 1:35 o'clock p.m. and 5:45 o'clock p.m.,

at the Texas Association of Broadcasters, 502

East 11th Street, Suite 200, Austin, Texas

78701.

INDEX OF VOTES

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

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(Meeting reconvened at 1:35 p.m.)

CHAIRMAN BABCOCK: Back on the record. All right. This afternoon -- everybody is going to want to hear this. We're going to finish off with this 1.3(b).

And it's been brought to my attention that we have not quite covered two pages out of 19, and that the subcommittee has got some specific areas that they need help and direction on and they want discussion and think that the Supreme Court would benefit from discussion.

So after we finish 1.3(b), we're going to go into specific areas that Justice McClure wants to discuss which are outlined in the Report of the Special Subcommittee on Implementation of Family Code Chapter 33. And Ann and I have divided them up into areas of importance.

So back to 1.3(b), Version A, and Richard Orsinger had a comment.

MR. ORSINGER: I would like to remove the word "opinion" from (b)(3) so that the appellate courts are free to issue opinions about their appellate decisions that

maintain the anonymity of whoever is to be anonymous. And I'm not trying to take a position on whether that ought to include judges or not. I'm just trying to protect the common law concept of stare decisis in developing case law.

CHAIRMAN BABCOCK: Well, is that opinion a court document pertaining to the proceedings?

MR. ORSINGER: Definitely.

CHAIRMAN BABCOCK: Well, then if that's true, doesn't that run afoul of subparagraph (k) of Section 1?

MR. ORSINGER: I hate to say yes because that concedes my point, but it does appear to conflict.

MR. PEMBERTON: Richard, in fairness, the appellate provisions refer only to rulings. They don't have -- there's not the counterpart to what you see in 1.3(b).

MR. ORSINGER: Good point. Thank you. Bob has kept me from hitting the ground hard.

MR. PEMBERTON: I'm not taking a position either. I'm just trying to make sure

1 we're accurate.

2 MR. ORSINGER: Under 33.004(c),  
3 which appears to be a separate rule that  
4 applies to appeals, they only talk about  
5 rulings. And rulings arguably include just  
6 judgments, and judgments at the appellate  
7 level are separate from opinions. And  
8 opinions are the guidance we all look to  
9 anyway.

10 CHAIRMAN BABCOCK: So do you think  
11 subparagraph (k) is only applicable to the  
12 trial court notwithstanding that they refer to  
13 court proceedings?

14 MR. ORSINGER: Well, they separately  
15 refer to appeals, so I think an argument can  
16 be made that Section 33.003 does not relate to  
17 what's in Section 33.004.

18 CHAIRMAN BABCOCK: Judge Brister.

19 HON. SCOTT A. BRISTER: My proposal  
20 would be, if you look at both the statute,  
21 33.003(k), and this one side by side, as I  
22 understand it, nobody has a problem with  
23 (b)(1). Then I would just pick up from (k),  
24 and (b)(2) would be the second sentence of  
25 (k), "The court proceedings shall be conducted

1 in a manner that protects the anonymity of the  
2 minor." Part (3) is the next sentence, "The  
3 application and all other court documents,"  
4 dropping out the stuff about the reporter  
5 notes. And (4) would be an order of the  
6 court, the person of -- (l) would be (4), an  
7 order of the court issued under these rules,  
8 can be released only to the people, quoting  
9 from the statute.

10 The reason for that is, again, that when  
11 the hypothetical attorney stands up to  
12 challenge the constitutionality of any of  
13 these rules and says, "You all just adopted  
14 them," the response is, "We just adopted what  
15 the Legislature told us to adopt," or "We just  
16 approved rules that said exactly what the  
17 Legislature said to say, no more and no  
18 less."

19 And then the same indication that arises  
20 from adding things to this clarifying it. I  
21 understand it's kind of chicken just to quote  
22 it. But again, if you add to it, clarify it,  
23 then I think that's a different thing. And  
24 then it's hard to say we weren't making a  
25 policy decision when you added to or clarified

1 stuff. I think you have made a policy  
2 decision when you adopt it.

3 CHAIRMAN BABCOCK: Justice McClure,  
4 what's your reaction to that?

5 HON. ANN CRAWFORD McCLURE: Well,  
6 part of this discussion involves the appellate  
7 procedure, which, as I mentioned before, there  
8 is little or no guidance in the statute itself  
9 as to how these are to be conducted. We know  
10 that the notice of appeal will be filed in  
11 fact to the appellate clerk. We know that the  
12 appellate court is expected to rule within  
13 approximately 48 hours.

14 The decisions on confidentiality, though,  
15 also apply in the appellate court. For  
16 example, if we're not going to distinguish  
17 between rulings and opinions, and the court  
18 decides they want to issue a written opinion,  
19 number one, it's going to reflect the county,  
20 in all likelihood, that the lawsuit came from  
21 or the application came from. It's going to  
22 identify the trial judge. It's going to  
23 identify the panel of the court of appeals  
24 that is rendering the order.

25 We're also being unrealistic to expect

1 the appellate courts to issue written opinions  
2 within 48 hours. Most of the courts have --  
3 in both the Judicial Conference and in calls  
4 to my office -- have been worried about how  
5 this process is going to take place.

6 It's also problematic to think that the  
7 Supreme Court, in instances where we affirmed  
8 the trial court's denial, is going to have the  
9 benefit of any sort of analysis of our  
10 decision making process if all they get is a  
11 little one-page, two-paragraph order, check  
12 here affirm, check here reverse.

13 So I want everyone to understand that  
14 clearly the statute itself contains none of  
15 these proceedings on the appellate process.  
16 What we tried to do was bring reality to the  
17 project and figure out what we're supposed to  
18 do with it. And that's the main issue, when  
19 we get to that subject, that I want everybody  
20 to consider for guidance, because we're not  
21 going to have briefing opportunities or oral  
22 argument opportunities or well-researched,  
23 reasoned written opinions coming out on this.

24 HON. SCOTT A. BRISTER: Can't you  
25 do -- for instance, what was the case with the

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1 temporary injunction at the Republican  
2 contention? You issue the order saying the  
3 Log Cabin Republicans have no right to be  
4 there at the convention, opinion to follow.

5 HON. ANN CRAWFORD McCLURE: Well,  
6 that's what these rules implicate. What we've  
7 suggested was this: You rule by your order  
8 within the time frame in the statute. If you  
9 are reversing the trial court's denial so that  
10 there is a grant of her right, there will be  
11 no appeal to the Supreme Court. So the time  
12 frame is not so critical.

13 If you are affirming the denial and it's  
14 going to go to the Supreme Court, we created  
15 an arbitrary deadline in our subcommittee of  
16 10 business days after the notice of appeal  
17 was filed. That was after a rather lengthy  
18 discussion with Judge Baker, who had been on  
19 the Dallas court; on my court; we had input  
20 from Judge Schneider; we had input from the  
21 Austin court on is it realistic to expect that  
22 these courts can circulate and get a consensus  
23 of opinion within 10 business days? A lot of  
24 courts have a full circulation policy, which  
25 means the opinion circulates to every member

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1 of the court regardless of whether they're on  
2 the panel. In the larger courts that can be a  
3 problem.

4 So the overwhelming consideration you  
5 have to make first is, do we want to create  
6 unique appellate rules that are going to apply  
7 to these proceedings to give guidance to the  
8 intermediate courts? Or do you want to be  
9 silent, and then figure out what we're going  
10 to do with the time frame? You have to decide  
11 what your purpose is, or what you expect the  
12 purpose to be.

13 HON. SCOTT A. BRISTER: But not  
14 necessarily in this provision. I'm not saying  
15 there shouldn't be some appellate timetable,  
16 I'm just saying this section on  
17 confidentiality, in my view, just ought to  
18 quote from the statute.

19 HON. ANN CRAWFORD McCLURE: But what  
20 I understood Richard's comment to be was to  
21 leave opinions in there. Richard, isn't that  
22 what you said?

23 CHAIRMAN BABCOCK: No, he wanted to  
24 take it out.

25 MR. ORSINGER: I want to take it

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1 out. And maybe what we ought to do, as Scott  
2 says, is break it down into sections and have  
3 a separate paragraph relating to the appellate  
4 procedure where we use the language in the  
5 statute, subsection (c), that the ruling of a  
6 court of the appeals is confidential and  
7 privileged, and we go ahead and later on  
8 permit a delayed publication of the opinion.

9 HON. ANN CRAWFORD McCLURE: But that  
10 is contained within the rules relating to the  
11 appellate process.

12 MR. ORSINGER: Well, except if you  
13 leave "opinion" in here, right here, it  
14 arguably doesn't allow the appellate courts to  
15 publish an opinion.

16 MR. PEMBERTON: It is set up that  
17 way.

18 CHAIRMAN BABCOCK: That's the way  
19 it's set up.

20 MR. ORSINGER: I think you need to  
21 take the word "opinion" out of here to leave  
22 that prospect.

23 HON. ANN CRAWFORD McCLURE: Well,  
24 Version A contemplates that the opinion will  
25 not be published.

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1 MR. ORSINGER: I know. That's why I  
2 would like to remove the word "opinion." That  
3 way we're free to do something sensible to  
4 have appellate review of trial courts that  
5 develop some kind of law about how the trial  
6 courts ought to discharge their  
7 responsibility.

8 CHAIRMAN BABCOCK: Alex Albright.

9 PROFESSOR ALBRIGHT: How do you  
10 publish an opinion and make the ruling  
11 confidential?

12 MR. PEMBERTON: That's what bothered  
13 the subcommittee.

14 PROFESSOR ALBRIGHT: I think to  
15 follow the statute, you can't do that. And I  
16 think we've got to follow the statute.

17 HON. SCOTT A. BRISTER: On a lot of  
18 issues they could.

19 PROFESSOR ALBRIGHT: And then Paul  
20 Wattler and his client can sue whoever to get  
21 a copy of the opinion, and then the Supreme  
22 Court has to deal with it.

23 HON. SCOTT A. BRISTER: All these  
24 questions about case or controversy, about  
25 does ruling mean opinion, you could write that

1 opinion without saying how this case comes  
2 out. You could write about the procedure and  
3 say that this is what the procedure is going  
4 to be and this part of the procedure is  
5 unconstitutional without saying how this case  
6 came out.

7 PROFESSOR ALBRIGHT: Well, then it's  
8 not an opinion. Then you're really doing what  
9 Scott McCown has been saying, which is true,  
10 that this is not a case and opinion deal, this  
11 is an agency administrative proceeding. And  
12 you have the second level of administrative  
13 people then issuing guidelines.

14 Mr. Edwards points out in Rule 47, it  
15 says if you're going to write an opinion, it  
16 has to address every issue.

17 HON. SCOTT A. BRISTER: That doesn't  
18 mean you can't -- I've had opinions where the  
19 part where I was reversed was published and  
20 the part where I was affirmed was not  
21 published, which I think ought to be  
22 unconstitutional. But you could write about  
23 all the opinions and publish the part that has  
24 to do with how these rules apply without  
25 showing how anything came out. I'm convinced

1 the appellate judges in this room could do  
2 it. Don't shake your head, Sarah.

3 CHAIRMAN BABCOCK: Well, it seems to  
4 me that the question is whether or not  
5 striking the word "opinion" runs afoul of the  
6 Legislature, either its precise language or  
7 the intent of the legislation.

8 MR. ORSINGER: I think that the  
9 statutory provision that a ruling is  
10 confidential and privileged means you can't  
11 get a copy of the judgment. I don't think  
12 that that means that the reasoning that goes  
13 into their arriving at the decision can't ever  
14 be revealed. I think that's a defensible  
15 interpretation of this.

16 PROFESSOR ALBRIGHT: Yeah. But you  
17 can't write an opinion that we always know of  
18 and publish the opinion without disclosing the  
19 ruling. You have to do it in some very  
20 different fashion. And it seems to me that we  
21 need to make it -- we have to say in here the  
22 ruling is confidential. And then if the  
23 San Antonio Court of Appeals wants to have  
24 some rules where they issue guidelines based  
25 upon cases that have come before them, they

1 can do that.

2 CHAIRMAN BABCOCK: Well, Justice  
3 McClure, do you accept Richard's request to  
4 strike the word "opinion"?

5 HON. ANN CRAWFORD McCLURE: No.

6 CHAIRMAN BABCOCK: Okay. Let's have  
7 a quick vote on that. How many people are in  
8 favor of Richard's proposal to strike the word  
9 "opinion" from subsection (b)(3)?

10 How many against?

11 24 to six against, it fails.

12 Okay. Now, what about Judge Brister's  
13 idea of tracking the language of the statute  
14 in subparagraphs (k) and (c), rather than the  
15 somewhat different language that is found in  
16 our draft, subparagraph (b) on  
17 confidentiality? Justice McClure, do you  
18 accept or reject that idea?

19 HON. ANN CRAWFORD McCLURE: I reject  
20 it.

21 CHAIRMAN BABCOCK: Okay. How many  
22 people are in favor of --

23 HON. TOM LAWRENCE: Could you  
24 restate how it's going to be phrased?

25 CHAIRMAN BABCOCK: Judge Brister,

1 let me try, or you can try yourself. Go  
2 ahead.

3 HON. SCOTT A. BRISTER: Well (b)(1)  
4 would be as is. (b)(2) would be the second  
5 sentence of 33.004, subparagraph (k), "Court  
6 proceedings shall be conducted in a manner  
7 that protects the anonymity of the minor."  
8 Then part (b)(3) would be the application  
9 language continuing in that subparagraph (k),  
10 "The application and all other court  
11 documents pertaining to the proceedings are  
12 confidential and privileged and not subject to  
13 disclosure under Chapter 552, Government Code,  
14 or to discovery, subpoena, or other legal  
15 process."

16 And then (4) would be from subparagraph  
17 (I), "An order of the court issued under this  
18 section is confidential and privileged and is  
19 not subject to disclosure under 552,  
20 Government Code, or discovery, subpoena, or  
21 other legal process. The order may not be  
22 released" -- or "the order may be released  
23 only to" -- and then leaving the (A), (B),  
24 (C), (D) and (E) as they are in the  
25 subcommittee draft.



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1 CHAIRMAN BABCOCK: And are you going  
2 to also have the ruling of the court of  
3 appeals issued under this section? You  
4 wouldn't do that?

5 HON. SCOTT A. BRISTER: I would  
6 track the statute. Because again, the idea is  
7 not to -- I don't think we should be giving  
8 our interpretation of whether "ruling" means  
9 "opinion" or not. I think that ought to be  
10 decided after somebody has more time to brief  
11 and think about it. We ought to just quote a  
12 new paragraph from (c), "A ruling of the court  
13 of appeals is confidential and privileged."  
14 Just quote from the statute. And then when  
15 people have time -- I assume what will happen  
16 is then, in that instance, the court of  
17 appeals, some might give notice that they were  
18 going to publish it; some might not.  
19 Obviously, nobody would publish it in any way  
20 that would disclose who the minor was, because  
21 the rules and the statute will be clear about  
22 that, but as to whether people could fight out  
23 on mandamuses, or whatever they wanted to,  
24 about whether that means the opinion is  
25 published or not.

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1 CHAIRMAN BABCOCK: All right. Is  
2 everybody clear on what Judge Brister is  
3 proposing? Justice McClure does not accept  
4 it, so what we're doing is voting on whether  
5 or not we like Judge Brister's proposal and  
6 will so advise the Supreme Court.

7 MR. ORSINGER: Chip, can I ask one  
8 thing? It appears that the statute does not  
9 require that the Supreme Court not issue an  
10 opinion or even keep its judgment  
11 confidential, unless I'm misreading this. And  
12 if that's correct, that the statute doesn't  
13 require this kind of confidentiality at the  
14 Supreme Court level, then we shouldn't have a  
15 rule that imposes that requirement on the  
16 Supreme Court.

17 HON. ANN CRAWFORD McCLURE: In  
18 subsection (f), "An expedited confidential  
19 appeal shall be available to any pregnant  
20 minor to whom a court of appeals denies an  
21 order authorizing the minor to consent to the  
22 performance of an abortion without  
23 notification."

24 MR. ORSINGER: Does that mean to you  
25 the same thing that (c) means about how the

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1 ruling is confidential and privileged?

2 HON. ANN CRAWFORD McCLURE: It  
3 doesn't even refer to the Supreme Court, but  
4 that is obviously the implication. It is  
5 33.004(f).

6 MR. ORSINGER: I think it's a  
7 stretch to say that (f) means that (c) applies  
8 to the Supreme Court. And your rule  
9 definitely treats the Supreme Court the same  
10 as the court of appeals.

11 HON. SCOTT A. BRISTER: My point is  
12 just that either one of you may be right, but  
13 we shouldn't try to vote on that today. The  
14 statute is ambiguous. We ought to leave it  
15 ambiguous, and let the process work it out.

16 MR. TIPPS: But the mandate of the  
17 Legislature was that the Supreme Court come up  
18 with rules that will ensure confidentiality.  
19 And my response to Judge Brister would be that  
20 we have had a committee that has sat down and  
21 thought about it, and that's Judge McClure's  
22 committee.

23 CHAIRMAN BABCOCK: Yes. And that's  
24 why we're giving substantial deference to her  
25 accepting or rejecting. So this is really

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1 only a vote on what we put into our report to  
2 the Court. We're not going to physically  
3 change the language of the rule, even if Judge  
4 Brister's proposal is accepted. Yes, sir.

5 MR. HAMILTON: Section 2 also says  
6 "such rules as may be necessary," and if  
7 they're not necessary, we ought not do them.

8 CHAIRMAN BABCOCK: Yes, Bonnie.

9 MS. WOLBRUECK: I just noted on  
10 number (1) where it says, "Court personnel  
11 must ensure that the minor's contact with the  
12 clerk and court remains confidential." Could  
13 that be interpreted as placing additional  
14 duties on other court personnel like bailiffs  
15 or court reporters to ensure that the clerk or  
16 the court are handling things confidentially?

17 HON. ANN CRAWFORD McCLURE: That was  
18 not the intention.

19 MS. WOLBRUECK: I'm just wondering,  
20 the way the wording is, could it be  
21 interpreted like that? I'm just questioning  
22 if it needs to be reworded.

23 HON. ANN CRAWFORD McCLURE: There  
24 was some concern about -- particularly in more  
25 rural areas, if you've got additional people

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1 in the clerk's office, ensuring that the clerk  
2 takes steps to ensure the deputy clerks also  
3 understand the nature of the proceeding. That  
4 was the intent.

5 MS. WOLBRUECK: Yeah. And I was  
6 wondering if court personnel must ensure,  
7 wondering if that's placing additional duties  
8 maybe on other court personnel besides the  
9 clerk's office.

10 HON. ANN CRAWFORD McCLURE: There  
11 was also some concern, based on the incidents  
12 in Tarrant County, that if we allowed these to  
13 be filed with the local court coordinator,  
14 that we wanted the language to be broad enough  
15 so that the court coordinator, who may not be  
16 a deputy clerk, would also be responsible to  
17 ensure the confidentiality, if it is filed  
18 with her.

19 MR. ORSINGER: Chip, over on Page 8,  
20 Paragraph 2.2(a), Bonnie, on where you file,  
21 they list under "Clerk's Duties," they say  
22 "The clerk or other court personnel with whom  
23 the application is to be filed," so you could  
24 literally hand one of these to a bailiff and  
25 probably be filing it.

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1 MS. WOLBRUECK: Yeah. And we have  
2 questioned that also, and I know that Justice  
3 McClure has a concern also.

4 CHAIRMAN BABCOCK: Okay. Let's vote  
5 on Judge Brister's proposal. Everybody in  
6 favor of it raise their hand, please.  
7 All against, please.

8 Judge Brister's proposal passes 18 to 12.

9 So Bob, we'll have to note that it's the  
10 recommendation of this committee that  
11 Paragraph 1.3(b) be revised in accordance with  
12 what Judge Brister articulated, which was to  
13 leave (b)(1) the same, and to replace the  
14 language in (b)(2), (3) and (4) with the  
15 language that tracks from the statute.

16 All right. Richard.

17 MR. ORSINGER: I'd like to draw  
18 attention to (b)(4), if in fact it stays in  
19 there. In the first line, where we talk about  
20 guardian, throughout these rules they use the  
21 word "guardian," but in the form they use the  
22 word "legal guardian" when they say "without  
23 requiring the consent of the parents or legal  
24 guardian or managing conservator."

25 I think it clarifies to call it a legal

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1 guardian to differentiate from guardian ad  
2 litem. And I would move that we substitute  
3 "legal" everywhere that we're talking about  
4 the probate court appointed guardian.

5 HON. ANN CRAWFORD McCLURE: That's  
6 fine.

7 CHAIRMAN BABCOCK: Justice McClure  
8 accepts that. Is anybody opposed to that? So  
9 we'll insert the word "legal" in subparagraph  
10 1.3(b)(4) and anywhere else in the rule that  
11 similar language appears. Okay, Bob? Good.  
12 Richard.

13 MR. ORSINGER: Since you're going to  
14 submit the minority report to the Supreme  
15 Court, can we comment on drafting issues in  
16 Alternative B, the minority report?

17 CHAIRMAN BABCOCK: Briefly.

18 MR. ORSINGER: Okay. On Paragraph  
19 (5), you talk about the public is entitled to  
20 secure records. And since there is no such  
21 thing as "the public," I think you ought to  
22 you say something like a person, any person.

23 And throughout this provision they talk  
24 about the judgment entry, like in (5)(C), "The  
25 judgment entry." I think it's used on four

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1 different pages in here. But in other parts  
2 we use "judgment," and in other parts we use  
3 "order." I think we need to be consistent  
4 throughout. It's either a judgment, which is  
5 what the form says it is, or it's an order.  
6 And I've never heard of a "judgment entry,"  
7 and this must be Ohio law or something, but I  
8 would suggest that we be consistent and use  
9 the Texas phrase.

10 And then over on Page 5, paragraph (iii),  
11 "If disclosure is unavoidable." It says,  
12 "If, in the judgment of the court," and that  
13 gets very confusing to me, because the  
14 judgment of the court in this context is  
15 usually the written decision. And I would  
16 just suggest that we say, "If the court  
17 determines that it's impossible to release an  
18 opinion." And then furthermore on paragraph  
19 (iii), where, if the court decides you can't  
20 preserve anonymity, you never tell the court  
21 then to deny the request to publish. And it  
22 seems to me the first thing you ought to do is  
23 tell the court, then, deny publication, and at  
24 the same time put in there the grounds for why  
25 you denied it.

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1 I'm not putting that up for a vote, I'm  
2 just putting that in the record.  
3 CHAIRMAN BABCOCK: Okay.  
4 MR. HAMILTON: Did Judge Brister's  
5 motion include 33.004(c) or not?  
6 CHAIRMAN BABCOCK: Yes, it did.  
7 MR. HAMILTON: I thought it did not.  
8 CHAIRMAN BABCOCK: No, it did.  
9 MR. HAMILTON: About the ruling in a  
10 court of appeals?  
11 CHAIRMAN BABCOCK: Right.  
12 MR. HAMILTON: It did include that  
13 also?  
14 CHAIRMAN BABCOCK: I believe it  
15 did.  
16 HON. SCOTT A. BRISTER: Well, I  
17 intended it to.  
18 CHAIRMAN BABCOCK: Okay. Anybody  
19 else? Yes, Justice Duncan.  
20 HON. SARAH B. DUNCAN: 1.3(b)(2),  
21 the last sentence, was that intended to give  
22 the court reporter discretion as to where his  
23 or her notes are to be filed?  
24 HON. ANN CRAWFORD McCLURE: It's to  
25 ensure that they're not inadvertently

1 record and they would be kept confidential.  
2 But they did not want it to be a requirement  
3 of the court order to file that with the  
4 clerk, because some court reporters want to  
5 maintain the security of their own notes. So  
6 that's why we chose the word "may" there  
7 instead of "must."

8 CHAIRMAN BABCOCK: Is that  
9 acceptable?

10 MR. EDWARDS: I'm not sure that's  
11 satisfactory, because I've run into court  
12 reporters that are pretty loose with their  
13 notes.

14 HON. F. SCOTT McCOWN: But the  
15 contrary problem is that a lot of clerks  
16 offices can't be trusted. They lose them. I  
17 mean, lots of things are lost in our clerk's  
18 office and can never be found again.

19 MR. EDWARDS: They only have to keep  
20 it for 48 hours when it makes any difference.

21 HON. SARAH B. DUNCAN: They have to  
22 keep it for two years after majority, or the  
23 termination of the proceeding.

24 HON. ANN CRAWFORD McCLURE: Yeah, we  
25 opposed retention requirements in here.

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1 disclosed, that they're kept with the  
2 proceedings.

3 HON. SARAH B. DUNCAN: But it says  
4 "may," and my question is, is it intended to  
5 convey "may" or "must"?

6 CHAIRMAN BABCOCK: Or shall?

7 HON. SARAH B. DUNCAN: We can't use  
8 "shall" anymore. We have to use "must."

9 HON. ANN CRAWFORD McCLURE: My  
10 thinking is that we meant to say must. But  
11 Cindy is not in here, and she actually drafted  
12 that language, but that was -- oh, there you  
13 are.

14 CHAIRMAN BABCOCK: Quit moving  
15 around.

16 HON. ANN CRAWFORD McCLURE: Wasn't  
17 that your intention, so that it would be kept  
18 with the records?

19 MS. GROOMER: The court reporters  
20 had a concern that some of the confidentiality  
21 did not expressly extend to them through the  
22 rules. And by them being able to file their  
23 court reporter notes with the clerk, similar  
24 to the way they file them in criminal cases,  
25 that would annex those reporter notes into the

1 CHAIRMAN BABCOCK: Must or may?

2 HON. ANN CRAWFORD McCLURE: May.

3 CHAIRMAN BABCOCK: Okay. Does  
4 anybody want to put a vote on "must"? Sarah,  
5 do you want to? Okay. So it stays "may."

6 MR. JACKSON: Chip, can I bring  
7 something up just while we're on this?

8 CHAIRMAN BABCOCK: Sure.

9 MR. JACKSON: The "court reporter's  
10 notes" is really sort of an old term now. I  
11 mean, those notes that I write on my machine,  
12 I often leave them in New York, if I'm taking  
13 depositions there, or whenever I am. The  
14 important thing is not what's in that tray,  
15 it's what's in that box on the disk. And the  
16 court reporter's notes don't mean anything.

17 HON. F. SCOTT McCOWN: Well, but  
18 they do for an official, because the statute  
19 requires the official to keep those notes.

20 MR. JACKSON: But I haven't looked  
21 at a piece of paper in 15 years.

22 HON. F. SCOTT McCOWN: But the  
23 officials keep them. I mean, we've got them  
24 in a locker. They're in a whole file and  
25 they're locked up. So to the official court

1 reporter, that may mean something there.

2 HON. SAMUEL A. MEDINA: Chip, I  
3 don't remember if we said something to that  
4 effect, but I think that was brought up.  
5 Court reporter's notes, I don't know if it's  
6 in a comment or something, something about it  
7 meant anything that they would record, whether  
8 it be a disk, whether it be -- I remember some  
9 things, some discussion about that. And the  
10 reason we didn't want to say just a disk was  
11 because who know what we'll have a year from  
12 now, three years from now, five years from  
13 now. And so the comment -- I think there was  
14 something about a comment, wasn't there, Bob?

15 HON. ANN CRAWFORD McCLURE: We  
16 discussed it, but we didn't put it in the  
17 comment.

18 HON. SAMUEL A. MEDINA: Okay. We  
19 discussed it, but we did not put it in a  
20 comment. But we discussed that issue, and to  
21 limit, say, something else that we might have  
22 now, but what about three years from now?  
23 Five years from now? Do we come back and redo  
24 it?

25 CHAIRMAN BABCOCK: David, is there a

1 opposed to that, if it reads, "To assure  
2 confidentiality, court reporter notes, in  
3 whatever form, may be filed with other court  
4 documents in the proceeding?" Does that solve  
5 your problem, David?

6 MR. JACKSON: Sure. Well, it gets  
7 you what you want.

8 CHAIRMAN BABCOCK: Okay. Does  
9 anybody have any problem with that? Okay.  
10 Anything else about that rule that anybody  
11 wants to talk about?

12 MR. PEMBERTON: So we're tracking  
13 the statute --

14 CHAIRMAN BABCOCK: No. No, we're  
15 not.

16 MR. PEMBERTON: -- but adding the  
17 court reporter notes by using this language.

18 CHAIRMAN BABCOCK: What we're doing  
19 is we're telling the Supreme Court that a  
20 majority of this committee disagrees with the  
21 subcommittee with respect to 1.3(b),  
22 subparagraph (b), in that this committee, by  
23 an 18 to 12 vote, believes that, rather than  
24 the language that's here, the language ought  
25 to track the statute in the way that Judge

1 broader term that court reporters would  
2 understand?

3 MR. JACKSON: Well, we got into this  
4 debate on the discovery process, appellate  
5 process, the TRAP process, about the court  
6 reporter's record. And you know, "the record"  
7 conflicts with what Bonnie is putting together  
8 as the the record. But "the record" in our  
9 sense means whatever we're preparing for that  
10 statement of facts, whether it be the disk or  
11 the paper. However the court reporter puts it  
12 together, it's his record. His record is in  
13 his box on that disk. His record is not in  
14 that tray.

15 CHAIRMAN BABCOCK: What if we said,  
16 "To assure confidentiality, court reporter  
17 notes, in whatever form," how does that  
18 sound?

19 HON. ANN CRAWFORD McCLURE: That's  
20 fine. The court reporter that visited with  
21 our subcommittee wanted to be sure that, if  
22 the diskette happened to be put with the court  
23 files, that there was still some precaution  
24 for the other notes to ensure confidentiality.

25 MR. BABCOCK: Is anybody

1 Brister articulated.

2 All right. If you all will take out the  
3 eight-page report on the Special Subcommittee,  
4 there are topics that the subcommittee needs  
5 input from us on, and accordingly, the Supreme  
6 Court would as well. And to ensure that we  
7 deal with all these topics and don't get  
8 bogged down in other issues of lesser  
9 importance, given our time constraints, let's  
10 go to Page 5, which has Paragraph D, "Where an  
11 Application May Be Filed." And while you're  
12 looking over those couple or three paragraphs,  
13 Ann will tell us what the issue is here.

14 HON. ANN CRAWFORD McCLURE: Under  
15 the statute, the application can be filed in  
16 the district court, county court at law, a  
17 court having probate jurisdiction. A number  
18 of the probate judges have expressed their  
19 personal opinion that, unless the minor is  
20 involved in a guardianship proceeding or some  
21 other proceeding in their probate court, that  
22 they are not to be involved in these  
23 decisions. As you might expect, the general  
24 jurisdiction judges don't think that is an  
25 appropriate reading of the statute.

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1 So the concept of the rule was to clarify  
2 that any of these particular judges have  
3 jurisdiction to make these rulings, a district  
4 judge, a family district judge, county court  
5 at law, and a court having probate  
6 jurisdiction. And we put that point into the  
7 comment to the probate judges.

8 The other issue that we had to address is  
9 associate judges that are routinely used in  
10 all the major metropolitan areas with the  
11 exception, I think, of San Antonio. I don't  
12 know if you all are using associate judges.  
13 Lots of locations are. They hear  
14 traditionally all of the temporary hearings in  
15 divorce, if it's affecting the parent-child  
16 relationship; they can hear contempt matters.  
17 Under the new statute, they can now hear jury  
18 trials. They have a number of roles that they  
19 play under the Family Code, but they are only  
20 authorized by the code itself to handle  
21 matters arising under Title 1, 4 or 5. This  
22 is a Title 2 proceeding. So our rules do not  
23 contemplate that associate judges will be  
24 making these decisions.

25 There was also some concern about how you

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1 go about handling the filing of the  
2 application. Are we going to mandate a  
3 statewide implementation scheme, or allow the  
4 local administrative judicial councils to make  
5 that decision?

6 And we have left that decision making  
7 process to the local areas. Whether they want  
8 them all filed with the district clerk,  
9 whether they want them all filed with the  
10 county clerk, whether they will let them be  
11 filed with the individual judge's clerk, it  
12 needs to be made on a local basis. And so we  
13 have not defined exactly where the application  
14 will be filed. We refer to the clerk or other  
15 court personnel.

16 And I want you to be aware that that was  
17 the thought process of the committee.

18 CHAIRMAN BABCOCK: Let's just stick  
19 with where the application may be filed, and  
20 that applies to Rule 2.1, does it not?

21 HON. ANN CRAWFORD McCLURE: Uh-huh.  
22 Well, it says "courts in which applications  
23 may be filed." It doesn't designate a  
24 facility, and that's why.

25 CHAIRMAN BABCOCK: That's why.

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1 Okay. If everybody will turn to Rule 2.1 of  
2 Rule 2, Application to Trial Court for Order  
3 Bypassing Parental Notification Requirement.  
4 Rule 2.1 is "How to File an Application."

5 Given what Justice McClure has said, does  
6 anybody have comments on Rule 2.1?

7 MR. EDWARDS: On the first part,  
8 (a), where it says "may be filed in," it  
9 probably makes sense that, if we're going to  
10 follow the statute, we ought to insert "any"  
11 after "in," just like the statute says.

12 CHAIRMAN BABCOCK: So it would read,  
13 Bill, under your proposal, "An application may  
14 be filed in any: (1), District court,  
15 including family district court; (2)" --

16 MR. EDWARDS: Which is the exact  
17 language of 33.003(b).

18 CHAIRMAN BABCOCK: Justice McClure.

19 HON. ANN CRAWFORD McCLURE: I'm not  
20 opposed to that. We reference it "any  
21 county," but we don't reference multiple  
22 courts within a county. And I don't object to  
23 that.

24 CHAIRMAN BABCOCK: Okay. Does  
25 anybody have opposition? Do you have

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1 opposition to that, Alex?

2 PROFESSOR ALBRIGHT: No, I just have  
3 a different comment.

4 CHAIRMAN BABCOCK: Okay. Is  
5 everybody okay with that? Judge Rhea.

6 HON. BILL RHEA: Well, that doesn't  
7 really address the issue which I think was  
8 raised in one of these subparagraphs. In our  
9 filing system in Dallas County, you file it at  
10 the desk downstairs where it's randomly  
11 assigned. Is there a suggestion here that you  
12 can pick the court that you want it to be  
13 filed in?

14 HON. ANN CRAWFORD McCLURE: We  
15 debated that. And I think clearly the  
16 intention of the subcommittee was that it can  
17 be filed with any court. You have the option  
18 to file with any court, but that doesn't  
19 guarantee that the judge of that particular  
20 court will be the judge that will hear the  
21 case. That will be decided on a local basis  
22 by either local rule approved by the Supreme  
23 Court or administrative proceedings in the  
24 individual areas.

25 CHAIRMAN BABCOCK: But Bill's point

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1 is that, if you insert the word "any," that  
2 means that I could go up to Judge Rhea's court  
3 in either Dallas or Harris County, actually,  
4 with a different spelling, and file it if I  
5 wanted to get Judge Rhea.

6 HON. BILL RHEA: That's right. And  
7 it would completely totally make a mess of our  
8 automated filing system, which has got  
9 preassigned numbers for cases that have to be  
10 filed and randomly assigned.

11 HON. ANN CRAWFORD McCLURE: Do your  
12 local proceedings not allow you to have  
13 another judge hear that if it's assigned to  
14 your court?

15 HON. BILL RHEA: Well, any sitting  
16 judge can sit for any other sitting judge.  
17 But why would we do that? How are we going to  
18 make that random then?

19 HON. SCOTT A. BRISTER: It depends  
20 on whether you think "any" in the statute  
21 modifies "court" or "any district courts." I  
22 agree with Judge Rhea. I think we ought to  
23 stick with the committee's original idea.  
24 It's any, but it's filed in district court,  
25 it's not filed -- I don't know even in Harris

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1 County if you can file in the 333rd District  
2 Court. I think you just file it in the  
3 district court.

4 HON. BILL RHEA: It would have to be  
5 very expressly stated that we are to do that  
6 for us to do that.

7 PROFESSOR ALBRIGHT: It seems to me  
8 that the statute is a jurisdictional statute.  
9 But where you file things under the Rules of  
10 Procedure is with the clerks office. And then  
11 different counties have local rules about how  
12 cases are assigned to different judges or  
13 different courts within that county. So if  
14 distric courts, county courts at law, and  
15 courts having probate jurisdiction including  
16 county courts, have jurisdiction, then it  
17 seems that different counties could have  
18 different arrangements for how those cases are  
19 assigned to all those courts with  
20 jurisdiction.

21 HON. ANN CRAWFORD McCLURE: That's  
22 exactly what I tried to say not nearly as  
23 articulately as you did. I can tell you in  
24 El Paso County what they're going to do. It's  
25 filed with the district courts and they're

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1 going to be kicked to the family courts.  
2 Those are the only judges that are going to  
3 hear these cases. Other counties may address  
4 it differently. So all of these courts have  
5 the jurisdiction to make the decision, but by  
6 local rule you can decide how that's going to  
7 be processed with who is going to hear it and  
8 in what court it is going to be assigned.

9 PROFESSOR ALBRIGHT: So isn't it a  
10 function of the rule to say that it should be  
11 filed with the clerk of the court? Or maybe  
12 we don't even have to address it, because  
13 those are in the Procedural Rules that are  
14 already in place about filing. And then  
15 there's also a rule, isn't there, that says  
16 you can file it with a judge?

17 HON. ANN CRAWFORD McCLURE: That was  
18 Tarrant County's concern. They did not want  
19 to specify filing it with the clerk or the  
20 clerk's office because of the problem they  
21 have there. They wanted the flexibility to  
22 allow for filing in the particular court.

23 PROFESSOR ALBRIGHT: So maybe we  
24 should leave it alone and not talk about where  
25 to file, because jurisdiction is established

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1 by statute, and you file where you file under  
2 the regular rules. Does that -- I don't  
3 know.

4 CHAIRMAN BABCOCK: Paula.

5 MS. SWEENEY: Well, there are a lot  
6 of things that can be filed that go straight  
7 to the court. With an injunction or a TRO or  
8 a motion to perpetuate testimony or pretrial  
9 discovery, prefilng discovery, you don't go  
10 to the district clerk, you can go straight in  
11 and select your judge and get your injunction.

12 CHAIRMAN BABCOCK: Not in every  
13 county.

14 MR. ORSINGER: That's not true with  
15 every filing system.

16 HON. ANN CRAWFORD McCLURE: That's  
17 the problem.

18 HON. BILL RHEA: It's the deputy  
19 district clerk who sits in our court who takes  
20 that filing, not the court.

21 MS. SWEENEY: You can walk the halls  
22 and find a judge to give you pretrial  
23 discovery or prefilng discovery. You walk in  
24 and you say, "I want this order."

25 CHAIRMAN BABCOCK: Judge McCown and

1 then Richard.

2 HON. F. SCOTT McCOWN: The statute,  
3 it seems to me, is pretty clear that you can  
4 file it in any court. And I would point out  
5 that even the counties that have  
6 administratively set up a random filing  
7 system, as we have, on occasion break that  
8 system.

9 For example, bill of reviews have to be  
10 filed in the district court that rendered the  
11 original judgment. If a litigant walks in  
12 with a bill of review, they say, "File this in  
13 the 345th," and the clerk has to do it,  
14 regardless of the random assignment process  
15 that's been set up.

16 And I'll also point out that the Rules of  
17 Procedure allow a judge to accept a document  
18 and file it and then require the judge to  
19 promptly transmit it to the clerk. So I think  
20 they can walk into any court in the state and  
21 say, "I want to file this with you."

22 CHAIRMAN BABCOCK: Yeah. If you  
23 take all the commas and the paragraphs and  
24 everything, this statute says, "The  
25 application may be filed in any district court

1 in this state."

2 HON. SCOTT A. BRISTER: No, that's  
3 not right. See, if you put "any" before a  
4 colon, like in the committee draft, then the  
5 "any" goes to any district court, any county  
6 court or any court with probate.

7 CHAIRMAN BABCOCK: Right.

8 HON. SCOTT A. BRISTER: But that's  
9 not what the statute does. The statute in  
10 33.003(b) says it can be filed in any county  
11 court, court having probate jurisdiction, or  
12 district court. That could be construed as  
13 just any one of the following types of court.  
14 That's different from having "any" in front of  
15 each one of those items.

16 CHAIRMAN BABCOCK: Well, what do you  
17 do with the phrase "in this state" then?  
18 That's the one that catches you.

19 HON. F. SCOTT McCOWN: I think what  
20 the Legislature envisioned is pretty clear,  
21 and it's wishful thinking on our part to try  
22 to rewrite it. I think Judge McClure's point  
23 is, it doesn't matter where it's filed. You  
24 can set up by local procedure what judge is  
25 going to hear it, and we're going to have to

1 do that, but I don't think we can deprive them  
2 of their filing rights.

3 PROFESSOR ALBRIGHT: If they have  
4 jurisdiction and somebody walks in and they  
5 decide it, they have jurisdiction to do it,  
6 right?

7 CHAIRMAN BABCOCK: Did the  
8 Legislature in a macro sense envision forum  
9 shopping? They did, didn't they?

10 HON. ANN CRAWFORD McCLURE: Yes.

11 CHAIRMAN BABCOCK: Because you can  
12 go to El Paso, if you want to, even if you're  
13 from Dallas. So why wouldn't a reading of  
14 this be consistent with "any district court"  
15 in this case if that was their intent?

16 HON. SCOTT A. BRISTER: My guess is  
17 the judges in Harris County will be very  
18 opposed to this.

19 CHAIRMAN BABCOCK: You don't have to  
20 guess about that.

21 HON. SCOTT A. BRISTER: This is why  
22 we had to change all of our ancillary rules,  
23 because of the perception that attorneys file  
24 when they know which one of the 59 judges  
25 they're going to get and that that is a bad

1 perception and we shouldn't, unless we  
2 absolutely -- I mean, if the Legislature says  
3 we have to, we have to. But I don't see  
4 that. This is broad enough language, we don't  
5 have to read it that way. And to go back to a  
6 system where all of these show up -- I mean,  
7 in Harris County we have one Democratic judge  
8 left. If these are all filed in her court, we  
9 have a political problem we don't need. This  
10 ought to be handled randomly like everything  
11 else.

12 HON. F. SCOTT McCOWN: It doesn't  
13 mean she has to hear them, if you have a local  
14 procedure that determines how they get heard.

15 HON. SCOTT A. BRISTER: But then she  
16 or somebody has got to make a ruling. I've  
17 got to either reach in her court and grab it  
18 or transfer it somewhere. I mean, we're  
19 getting into a political problem.

20 MR. YELENOSKY: And all within  
21 48 hours.

22 CHAIRMAN BABCOCK: Bill Dorsaneo.

23 PROFESSOR DORSANEO: Well, sometimes  
24 we want to embrace the statutory ambiguity and  
25 sometimes we don't. A fair reading of this is



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1 that it can be filed in any of the enumerated  
2 courts, specific courts, in this state. And I  
3 frankly would have a hard time saying that  
4 that only is paperwork.

5 We had venue legislation, you know,  
6 sometime back, and we tried to improve on it  
7 in the Rules of Civil Procedure. And when the  
8 matters got argued in the Supreme Court at  
9 some point later, when the Court's personnel  
10 was different, many of us were surprised that  
11 the statutory language seemed to be the most  
12 important language to the Court, even though  
13 the Court's rules said otherwise. And I just  
14 think it's a silly idea to try to be changing  
15 this from what it says and probably what it  
16 means.

17 HON. BILL RHEA: Well, I have to say  
18 amen to Scott's interpretation. I think it's  
19 plain on its face that it means any of these  
20 different types of courts. I think you're  
21 going to have a problem in El Paso if you  
22 relegate it to only family courts. They have  
23 the right to have it in civil court or  
24 criminal district court or probate court.  
25 There are several discrete areas, but it's

1 that.

2 HON. SARAH B. DUNCAN: Can you tell?

3 CHAIRMAN BABCOCK: Yeah, I could  
4 tell that. Richard.

5 MR. ORSINGER: I agree that there  
6 ought to be a lot of local autonomy, and I  
7 disagree that you could say only district  
8 courts can accept them in this county and not  
9 county courts and not probate courts, but the  
10 language in this rule really doesn't say  
11 that. It doesn't say you can do that, nor  
12 does it say that you can't do that.

13 CHAIRMAN BABCOCK: Right.

14 MR. ORSINGER: And either we ought  
15 to just stick with vague language like this or  
16 we ought to use the statutory language. But  
17 are we really debating something of substance  
18 here?

19 HON. ANN CRAWFORD McCLURE: Well,  
20 apparently.

21 CHAIRMAN BABCOCK: Apparently we  
22 are.

23 MR. ORSINGER: I'm not sure I  
24 understand. Are we arguing over the  
25 interpretation of these words, or are we

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1 not -- this whole idea that there's this  
2 absolute forum shopping and you can do  
3 anything you want to in any court you want to  
4 in the state, that's ridiculous.

5 We have a system of jurisprudence in  
6 place that's working, and this one issue I  
7 don't think was intended to destruct the whole  
8 thing.

9 CHAIRMAN BABCOCK: Justice Duncan.

10 HON. SARAH B. DUNCAN: Just  
11 grammatically, if the intent were to say this  
12 type of application can be filed in these  
13 types of courts, that's what would have been  
14 said. What it does say is, "The application  
15 may be filed in any court at law, court having  
16 probate jurisdiction, or district court,  
17 including family district court, in this  
18 state."

19 CHAIRMAN BABCOCK: Are you reversing  
20 and remanding to those guys?

21 HON. BILL RHEA: She wouldn't remand  
22 it to me, I don't think.

23 HON. SARAH B. DUNCAN: I'm agreeing  
24 with Professor Dorsaneo.

25 CHAIRMAN BABCOCK: Yeah, I knew

1 trying to change specific words?

2 CHAIRMAN BABCOCK: What I think the  
3 fight is about is, if we insert the word "any"  
4 as it is in the statute into 2.1(a), the  
5 introductory sentence, then Judge Rhea and  
6 Judge Brister are concerned, and rightly so,  
7 that somebody would view this as license to go  
8 down to Katie Kennedy's court in Harris County  
9 and file it with her, because she's the only  
10 Democratic judge, as opposed to filing it with  
11 the clerk and having it randomly assigned.  
12 That's what they're concern is.

13 The counter to that is that the statute,  
14 in some people's view, is clear and that this  
15 rule should track the statutory language which  
16 would permit that very thing. So that's what  
17 the fight is over.

18 MR. ORSINGER: If we track the  
19 statutory language, then we could just leave  
20 it to litigation to decide whether the local  
21 presiding system is overridden or not  
22 overridden.

23 CHAIRMAN BABCOCK: Buddy.

24 MR. LOW: Chip, most people don't  
25 care where their lawsuit is filed, they care



1 where it's heard.

2 HON. ANN CRAWFORD McCLURE: That's  
3 right.

4 MR. LOW: And the Legislature may  
5 say it's got to be filed there, but it doesn't  
6 say that that court has to hear it. So I  
7 don't think they intended to circumvent what  
8 the judges are doing, so I think it can be  
9 done and heard by anybody. How it's filed  
10 doesn't matter.

11 CHAIRMAN BABCOCK: Okay. I think  
12 this issue has been fully explored. Let's  
13 vote on it. The issue was raised by Bill  
14 Edwards, so --

15 HON. HARVEY G. BROWN, JR.: Can I  
16 just ask about one point?

17 CHAIRMAN BABCOCK: Yes, sir.

18 HON. HARVEY G. BROWN, JR.: We've  
19 said the local rules can administer who hears  
20 it, et cetera. Well, if we think that, maybe  
21 we should say that, because otherwise, I think  
22 it appears that the court is compelled to hear  
23 it in which it's filed. It's not saying that  
24 it can be filed in this court but another court  
25 can hear it. Maybe we should say that to tell

1 all the local regions that they can adopt  
2 their own rules under this statute.

3 CHAIRMAN BABCOCK: Okay. How we  
4 vote on "any" may impact whether we do that,  
5 so let's vote on that.

6 Everybody who is in favor of inserting  
7 the word "any" after "An application may be  
8 filed in" in Rule 2.1(a) raise their hand.

9 All right. Everybody opposed. The  
10 insertion of "any" carries 19 to 12.

11 Did you accept that or not?

12 HON. ANN CRAWFORD McCLURE: I did.

13 CHAIRMAN BABCOCK: Okay. So it will  
14 be inserted.

15 Now, Judge Brown, do you want to raise an  
16 issue of adding some language about local  
17 autonomy?

18 HON. HARVEY G. BROWN, JR.: Yes. I  
19 don't have it in front of me, but something  
20 along the lines of "Subject to the local rules  
21 determining the particular court that shall  
22 hear the matter" -- in other words, if we're  
23 going to treat filing as just the act of  
24 filing, I want to make that separate from  
25 hearing.

1 CHAIRMAN BABCOCK: So you would  
2 propose in 2.1(a) putting a semicolon after  
3 "to be performed" and saying, "Subject to any  
4 local rules regarding or regulating who hears  
5 the matter."

6 HON. ANN CRAWFORD McCLURE: You  
7 might, if you want some suggested language,  
8 you might look at Comment 1. We addressed it  
9 by comment, not by rule.

10 HON. F. SCOTT McCOWN: Well, didn't  
11 we address it by rule? Doesn't Rule 1.1  
12 already say that local rules apply to the  
13 extent they're not consistent?

14 CHAIRMAN BABCOCK: Right.

15 MR. PEMBERTON: Right. And then we  
16 cross-referenced back to that in Comment 1 to  
17 Rule 2, because that's a particularly  
18 important issue, that it may need to be  
19 addressed by local rule.

20 HON. F. SCOTT McCOWN: The only  
21 reason I would hesitate to reference the local  
22 rules specifically here is because I think the  
23 local rules apply throughout to everything,  
24 which is what we said in 1.1. And if we  
25 reference them specifically here, then that

1 would seem to imply that maybe they don't  
2 govern anywhere but there.

3 CHAIRMAN BABCOCK: Okay. Does that  
4 solve your problem, Judge Brown?

5 HON. HARVEY G. BROWN, JR.: I think  
6 so. At first blush it does.

7 CHAIRMAN BABCOCK: Okay. While  
8 you're looking, Buddy Low has got a comment.

9 MR. LOW: It's not just the local  
10 rule. One judge without local rule has the  
11 power to assign to another judge, and that's  
12 not a local rule. So if you're going to refer  
13 to assignments, you don't want to limit it to  
14 local rules.

15 MR. PEMBERTON: Comment 1 covers  
16 that. It talks about Chapter 74 of the  
17 Government Code, which is the provision for  
18 assignment of -- one distinction that the  
19 subcommittee focused on that really hasn't  
20 been brought up here and I just want to focus  
21 on now, there's a distinction between a court  
22 and a judge. Just because a case is in a  
23 court doesn't mean that a judge other than the  
24 one ordinarily assigned to the court couldn't  
25 hear the matter.

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1 MR. HAMILTON: By inserting the  
2 world "any," do we need to change the form  
3 now? Because that top part was to be filled  
4 out by court personnel as to the court. Does  
5 that now mean the applicant can fill out what  
6 court the application gets filed in?

7 CHAIRMAN BABCOCK: Justice McClure.

8 HON. ANN CRAWFORD McCLURE: The  
9 subcommittee didn't take a position on that.  
10 I suspect if it were brought blank to the  
11 court to be filed, then the court personnel in  
12 that individual court would fill it out.

13 CHAIRMAN BABCOCK: But you have the  
14 instructions there that it's only to be filled  
15 out by court personnel.

16 HON. ANN CRAWFORD McCLURE: But  
17 whether it's the court clerks office or --

18 CHAIRMAN BABCOCK: -- the deputy  
19 clerk of Judge Rhea's court.

20 HON. ANN CRAWFORD McCLURE: Right.  
21 I think they're the individual that would fill  
22 it out.

23 CHAIRMAN BABCOCK: By the way, we're  
24 talking about 14-year-old kids here. I'm not  
25 sure that --

1 have random assignment, there is no random  
2 assignment on these petitions anymore?

3 HON. F. SCOTT McCOWN: Do you  
4 randomly assign bills of review?

5 MR. ORSINGER: You know what you're  
6 doing --

7 HON. SCOTT A. BRISTER: You randomly  
8 assign --

9 MR. YELENOSKY: Because of a  
10 specific rule --

11 CHAIRMAN BABCOCK: Whoa, whoa, whoa,  
12 guys. Don't talk over each other. Bill can't  
13 get any of this.

14 Okay, Judge Brown, you were musing about  
15 this?

16 HON. HARVEY G. BROWN, JR.: I think  
17 we can make it work.

18 CHAIRMAN BABCOCK: All right. So  
19 we're okay on that. Does anybody --

20 MR. ORSINGER: Well, I'd still like  
21 to know whether it was the committee's vote  
22 that the applicant can pick the court in which  
23 it is filed, separate and apart from whether  
24 they can pick the court in which it's heard.

25 CHAIRMAN BABCOCK: The committee's

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1 MR. HAMILTON: Well, but they may  
2 have a lawyer.

3 CHAIRMAN BABCOCK: Yeah, they may  
4 have a lawyer. That's true. Richard.

5 MR. ORSINGER: It's not clear to me  
6 whether the local random assignment for filing  
7 process is still in place. I know that it's  
8 the consensus that the random assignment  
9 hearing is in place, but in some counties you  
10 walk in and they randomly assign the court.  
11 Are we allowing that to continue? Or can you  
12 pick your court but you just can't pick who  
13 hears you?

14 CHAIRMAN BABCOCK: That's exactly  
15 what Judge Rhea and Judge Brister were worried  
16 about. That's what we just voted on.

17 MR. ORSINGER: You can pick your  
18 court to file in? In other words --

19 HON. BILL RHEA: That's what this  
20 says.

21 MR. YELENOSKY: I don't think it  
22 says that.

23 MR. ORSINGER: Okay. So that means  
24 that in Dallas, where they do have random  
25 assignment, and even in San Antonio, where we

1 vote was 19 to 12 to insert the word "any,"  
2 which some people are worried, on both sides  
3 of that vote, it might mean just what you  
4 said.

5 MR. ORSINGER: So we're not taking a  
6 position on that?

7 CHAIRMAN BABCOCK: I don't think  
8 that we're taking a position on that, nor  
9 should we. Yeah, Nina Cortell.

10 MS. CORTELL: I just want to raise a  
11 question, and that is whether the El Paso  
12 practice that's being proposed of immediately  
13 channeling all the cases to the family court  
14 is really contrary to at least the apparent  
15 intent of the statute, which is to provide an  
16 array of courts to hear it.

17 I understand there's going to have to be  
18 some judicial flexibility, but to have this  
19 automatic channeling, I think that you're  
20 effectively depriving them of the forum.

21 HON. ANN CRAWFORD McCLURE: That's  
22 probably going to be litigated. That was done  
23 by local rule. Our family courts, all but one  
24 of our family courts are not statutorially  
25 designated family courts.

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1 CHAIRMAN BABCOCK: If there's  
2 nothing further about this, then if you'll  
3 turn to Page 6 of the report, Paragraph F,  
4 dealing with guardians ad litem. Richard,  
5 you'll love this one. And Justice McClure has  
6 got something to say about this, too.

7 HON. ANN CRAWFORD McCLURE: I just  
8 wanted to relate the thinking of the  
9 subcommittee. The statute provides that the  
10 court can appoint a person who may consent to  
11 treatment for the minor, psychologists or  
12 psychiatrists, an appropriate employee of  
13 DPRS, clergy or other appropriate person as  
14 the guardian ad litem.

15 We had some concerns about whether any  
16 one of those individuals that would fit into  
17 those categories must otherwise be qualified,  
18 as we think in terms of qualified guardians ad  
19 litem to represent children. It was our  
20 consensus that we anticipated they would still  
21 be qualified. In other words, they need to  
22 have some understanding of what the role of an  
23 ad litem is, what the responsibilities are.  
24 We refer in the comments to the other  
25 provisions of the Family Code that outline

1 if there was some notion of abuse, because we  
2 would want them involved anyway, they're going  
3 to be notified, they're going to be  
4 investigating, et cetera. Yet that's exactly  
5 where they would be following up, where they  
6 would be involved in a SAPCR, either  
7 simultaneously or at some other time following  
8 after that.

9 And the lawyers who are commonly  
10 appointed as attorney as litem for parents  
11 or -- I mean, attorneys for parents or  
12 something like that, saw this as a clear  
13 conflict. So I asked somebody in the  
14 legislative perspective why they wanted DPRS  
15 included. And there was some thought,  
16 possibly mistaken, that DPRS often serves in  
17 the role of guardian ad litem.

18 So I just added a note, a paragraph in  
19 the comment that pointed out that caution must  
20 be exercised because of the conflict problem,  
21 which may not be apparent. The agency itself  
22 may be the managing conservator that the child  
23 is hoping to avoid. And then, you know, I  
24 just wanted to point out that that potential  
25 conflict exists at a time when a judge has to

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1 those requirements, and the fact that the ABA  
2 has also implemented a stack of guidelines  
3 that's about that thick (indicating). I have  
4 them with me, if you want to see them.

5 We also had some concern as to what an  
6 appropriate person from DPRS meant. And  
7 Marilyn, did you want to address that issue?

8 MS. SCHRAMM: Thank you. I  
9 contributed to the comment that pointed out --

10 THE REPORTER: Could you identify  
11 her, please.

12 HON. ANN CRAWFORD McCLURE: I'm  
13 sorry. This is Marilyn Schramm from the  
14 Department of Protective and Regulatory  
15 Services.

16 MS. SCHRAMM: I'm a policy attorney  
17 for CPS. And in discussing the statute with  
18 our personnel, as well as interacting with  
19 some of the regional attorneys that do family  
20 law cases, SAPCRs that we're involved with,  
21 suits affecting parent-child relationship,  
22 they -- a lot of people saw it as a conflict.  
23 So I raised the issue with -- I guess the  
24 opinion is, well, probably the most  
25 appropriate place for DPRS to get involved is

1 make a quick decision to appoint a guardian ad  
2 litem, and yet it won't see the conflict until  
3 after the fact.

4 HON. ANN CRAWFORD McCLURE: And  
5 you'll find her paragraph that she drafted on  
6 the top of Page 22 of the annotated rules,  
7 followed by some of the factors that a  
8 guardian ad litem might want to consider.

9 Some of the other states that have these  
10 parental notification statutes have  
11 implemented guidelines for their ad litem to  
12 use. Rather than mandate them and specify  
13 them in the rules, we opted to include  
14 reference to some of those in the guidelines.

15 CHAIRMAN BABCOCK: These are  
16 Comments 3 and 4 to Rule 2.3. Alex Albright.

17 PROFESSOR ALBRIGHT: I have a  
18 question. If a minor has an attorney, she  
19 comes with the attorney to the court, does the  
20 court have to appoint an additional guardian  
21 ad litem?

22 HON. ANN CRAWFORD McCLURE: Yes.  
23 Now, the court has the option to make it the  
24 same person.

25 PROFESSOR ALBRIGHT: So that

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1 attorney could volunteer to be the guardian  
2 ad litem them, or not volunteer, sorry, or  
3 suggest someone who might be an appropriate  
4 guardian ad litem.

5 HON. ANN CRAWFORD McCLURE: Right.

6 CHAIRMAN BABCOCK: Justice McClure  
7 is nodding her head, which in depositions we  
8 always say "answer out loud."

9 HON. ANN CRAWFORD McCLURE: Also,  
10 when we drafted the form for the application,  
11 we wanted to give the applicant the  
12 opportunity to say if there was someone she  
13 wanted to serve as her guardian. Is there a  
14 grandmother? You may recall, when this was  
15 being debated in the Legislature, there were  
16 secondary and third-level bypasses that were  
17 discussed. Should we let a grandmother  
18 consent? Should we let an adult older sister  
19 consent? And that was not approved, but the  
20 concept was, by allowing these other  
21 individuals to be appointed as ad litem, we  
22 could accomplish much of that same effort.

23 CHAIRMAN BABCOCK: Steve.

24 MR. YELENOSKY: Just a point of  
25 order or a question. I know we've moved from

1 faith and trust in, that we want that brought  
2 to the trial court's attention to facilitate  
3 that process of getting as much information to  
4 the applicant as we have to make sure that we  
5 get an appropriate determination of maturity  
6 and informed consent. That is the thinking.  
7 And I think, while the statute may not reflect  
8 that, that was the thinking in gathering the  
9 legislative intent of what they were trying to  
10 accomplish.

11 MR. LOW: Because it can have a  
12 pretty chilling effect if the judge wanted to.

13 HON. SARAH B. DUNCAN: But isn't  
14 that built into the statute?

15 HON. ANN CRAWFORD McCLURE: It is  
16 built into the statute.

17 CHAIRMAN BABCOCK: Carl, did you  
18 have something.

19 MS. SCHRAMM: May I please make one  
20 other comment, though, on Comment 4. In the  
21 event that the agency is pulled into these  
22 proceedings through an appointment as guardian  
23 ad litem, when I read Comment 4, I thought  
24 this prescription of duties was extremely  
25 unrealistic. There were questions raised in

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1 going section to section to going through the  
2 Subcommittee Report as you indicated at the  
3 beginning. Are we going to come back to the  
4 sections that may have less important points?

5 CHAIRMAN BABCOCK: We're going to  
6 try.

7 MR. YELENOSKY: Some of us are  
8 reserving points, though.

9 CHAIRMAN BABCOCK: We're going to  
10 try. But the reason we're doing this is  
11 because there are big issues that need to be  
12 discussed for sure. Buddy.

13 MR. LOW: Chip, let me ask a  
14 question: A minor comes in, and the judge  
15 says, "Okay, I'm going to appoint your Aunt  
16 Susie." And she says, "God, I'd rather my  
17 mother know about it than her."

18 Does the minor have any choice at that  
19 point other than to say, "Wait, a minute, I'll  
20 just tell my mama. I won't go through this  
21 procedure." Has that ever been discussed?

22 HON. ANN CRAWFORD McCLURE: Well,  
23 it's been discussed. I can tell you, the  
24 thinking of the subcommittee was, to the  
25 extent there is an adult that the minor has

1 my mind as to relevance. And maybe that could  
2 be solved by changing "should" to "may." But  
3 it seemed extremely prescriptive, unrealistic  
4 in light of the time frame between  
5 appointment as guardian ad litem and when the  
6 hearing is likely to take place, within  
7 48 hours.

8 And I guess I was a little bit concerned,  
9 too, in looking at it, that having this as a  
10 comment in the rules would be a clear sort of  
11 prescription to judges that these are some of  
12 the things they should be considering in  
13 making this determination. So I just wanted  
14 to make that comment, because there are many  
15 more judges in this room than there were on  
16 our subcommittee.

17 CHAIRMAN BABCOCK: Justice McClure,  
18 what do you think about Comment 4, third line,  
19 where it says, "guardians ad litem in  
20 Chapter 33 proceedings should address and  
21 consider"?

22 HON. ANN CRAWFORD McCLURE: I don't  
23 mind changing that to "may." These came from  
24 those guidelines in other states and that was  
25 a drafting process, so I don't mind changing

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1 it.

2 MS. SCHRAMM: It actually started  
3 out, as we considered it, as a form.  
4 Everybody rejected it. It ended up somehow in  
5 the comment. I don't recall us agreeing that  
6 all of that should be in the comment. And I  
7 guess I saw it as a little bit too  
8 prescriptive for guardian ad litem, when we  
9 had said maybe we can't get into defining  
10 exactly what their duties should be.

11 HON. ANN CRAWFORD McCLURE: Yes. We  
12 voted against a checklist, of having a  
13 checklist that would actually become part of  
14 the court record. And I don't mind changing  
15 the "should" to "may."

16 CHAIRMAN BABCOCK: Is anybody  
17 opposed to changing the "should" to "may"?  
18 Scott McCown.

19 HON. F. SCOTT McCOWN: I would like  
20 to change it to "might" and have it say,  
21 "Chapter 33 proceedings might consider, among  
22 other factors."

23 And then I think on Page 23, I would say,  
24 "These considerations may not be relevant in  
25 every case and are not exclusive," to make it

1 would be my suggestion.

2 CHAIRMAN BABCOCK: Richard.

3 MR. ORSINGER: We give the guardian  
4 ad litem immunity for acts or omissions that  
5 are committed in good faith. We're not  
6 setting up a checklist, are we, that if you  
7 don't meet it, you're not in good faith?

8 CHAIRMAN BABCOCK: I think that was  
9 the point of Judge McCown's language.

10 MR. ORSINGER: Well, I don't know if  
11 that language cures my problem.

12 HON. ANN CRAWFORD McCLURE: We  
13 specifically rejected a checklist.

14 MR. ORSINGER: Well, I don't know  
15 that that's the same issue either. I would  
16 like the record to reflect whether anyone  
17 thinks that, by having any articulated  
18 standards in here, we're setting up what  
19 constitutes that, if you don't do these things  
20 in the case, that you have not made a good  
21 faith -- you have not operated in good faith.

22 In other words, there are checklists here  
23 where these guardians are supposed to decide  
24 for themselves, I suppose, whether there's a  
25 medical danger to the child; a lot of

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1 clear that these are things you might  
2 consider; they may not be relevant in every  
3 case.

4 HON. ANN CRAWFORD McCLURE: I'm not  
5 opposed to that either.

6 CHAIRMAN BABCOCK: Is anybody  
7 opposed?

8 HON. MICHAEL H. SCHNEIDER: How  
9 about may instead of might?

10 CHAIRMAN BABCOCK: May instead of  
11 might?

12 HON. MICHAEL H. SCHNEIDER: Right.

13 CHAIRMAN BABCOCK: Justice Schneider  
14 says may instead of might.

15 HON. F. SCOTT McCOWN: Well, I don't  
16 have any problem with "may," as long as on  
17 Page 23 we say, "These considerations may not  
18 be relevant in every case."

19 HON. ANN CRAWFORD McCLURE: And I  
20 accepted that.

21 CHAIRMAN BABCOCK: Justice McClure,  
22 is that okay? Okay. We're agreed on that.  
23 Have you got that language?

24 HON. ANN CRAWFORD McCLURE: We do.

25 HON. F. SCOTT McCOWN: "Might could"

1 subjective things like the family  
2 relationships and stuff like that. And this  
3 isn't going to happen in 48 hours, I don't  
4 think.

5 And I would just want to be sure that  
6 nobody thinks that we're creating a standard  
7 where experts are going to get up and say,  
8 "This guardian failed to comply with enough  
9 on this list, and therefore, is not operating  
10 in good faith." Because if there's any remote  
11 fear of that, I would rather that we take out  
12 all of the standards.

13 CHAIRMAN BABCOCK: Joe Latting has  
14 got a comment on that.

15 MR. LATTING: My question is, why do  
16 you oppose a checklist? Are we supposed to  
17 give any guidance to guardians? Do they have  
18 any duties at all? Or do we contemplate that  
19 they'll have no duties and that they're just a  
20 formal, sort of a needless touching of the  
21 cap, so to speak? Does the guardian have a  
22 duty in this situation, and if so, what is the  
23 least his duty is?

24 HON. ANN CRAWFORD McCLURE: Well,  
25 the statute didn't tell us. And the

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1 Legislature has repeatedly in family law cases  
2 told us by giving us guidance in Title 5 as to  
3 what they are to consider, or that they are to  
4 become familiar with the ABA guidelines for  
5 ad litem representation of children. They  
6 didn't do that. They didn't even cross-  
7 reference it.

8 So the consensus of the subcommittee was  
9 we should not, by rule, set those forth. What  
10 we wanted to do was, by comment, indicate some  
11 of the things that might be considered,  
12 reference the other places in the Family Code  
13 where those responsibilities are outlined,  
14 understanding that ad litem representation in  
15 a custody case is not necessarily the same  
16 thing as ad litem representation in a judicial  
17 bypass to parental notification.

18 That's why we didn't put it in the  
19 rules. And that's why we don't want to really  
20 craft a checklist and give an indication to  
21 either the judge or the ad litem that you must  
22 consider these in every case.

23 CHAIRMAN BABCOCK: Does anybody  
24 think that this list in Comment 4 is a litmus  
25 test for good faith, which is what Richard's

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1 concern is?

2 MR. ORSINGER: Well, the Rules of  
3 Ethics has a specific statement that these do  
4 not set a standard for behavior. This  
5 doesn't. And the Supreme Court, if they adopt  
6 this comment, is engaging in what is arguably  
7 legislation or what is arguably giving  
8 opinions about what guardians ad litem should  
9 be doing. And I can easily foresee an expert  
10 witness getting on the witness stand and  
11 saying that "There were 17 factors that the  
12 Supreme Court said that they may consider, and  
13 they only considered five of them, and  
14 something bad happened to this girl, and that  
15 was not good faith in my opinion."

16 And here the Supreme Court is rendering  
17 an advisory opinion or quasi-legislating or  
18 whatever, and we've got ourselves really in  
19 the soup.

20 CHAIRMAN BABCOCK: Isn't that cured,  
21 though, by Scott's language that says they're  
22 not necessarily relevant in every case?

23 MR. ORSINGER: No, because then  
24 there's an argument over what is irrelevant in  
25 the case. If we're going to have a checklist,

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1 which the Legislature did not authorize us to  
2 come up with and which is not pulled out of  
3 Texas case law, then we ought to have some  
4 provision in here that we're not setting a  
5 standard by which anyone's behavior can be  
6 measured for liability purposes or other  
7 purposes.

8 CHAIRMAN BABCOCK: Is your  
9 suggestion, Richard, that we should delete  
10 Comment 4, or that we should just have some  
11 more clarifying language?

12 MR. ORSINGER: I think it's helpful  
13 to have direction in here. But I would like  
14 it if we could borrow some language like we  
15 have in the rules, in the Code of Ethics that  
16 governs lawyers, that this does not set a  
17 standard for liability. And we can use the  
18 exact language, if you want. Just stick it in  
19 there for what it's worth. And then if an  
20 expert gets up there and tries to run this as  
21 a checklist, you can check them with that.

22 HON. ANN CRAWFORD McCLURE: I don't  
23 think that's a bad idea.

24 MR. PEMBERTON: I think that's a  
25 good idea.

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1 CHAIRMAN BABCOCK: Okay. Judge  
2 McCown.

3 HON. F. SCOTT MCCOWN: Well, it's  
4 not worth anything. I think we either ought  
5 to take them out -- which would be fine with  
6 me. I really don't have any problem with  
7 Richard's language, except that in the Ethics  
8 Rules, which he cites as a precedent, courts  
9 routinely ignore that language and still base  
10 liability on the Ethics Rules.

11 And I'm just -- this constant concern  
12 about lawyers' liability. Either we want the  
13 guardians to do it or we don't want them to do  
14 it. It either ought to be in or it ought to  
15 be out, but we ought not make decisions based  
16 on lawyer liability.

17 CHAIRMAN BABCOCK: Spoken by someone  
18 with official immunity. Nina.

19 MS. CORTELL: If you want to keep  
20 any of the list in, I have a problem with it.  
21 It's repetitive. I think some of it is highly  
22 unrealistic. For example, whether the  
23 applicant has given an accurate and complete  
24 statement of her medical history to her  
25 physician. There are just certain things in

1 here, there's no way a 48-hour guardian is  
2 going to be able to opine on certain of  
3 these.

4 So if we're going to have a checklist, I  
5 think it ought to be three to five items. It  
6 can be more globally written. It should pick  
7 up, I think, some of the same subject matter  
8 area. I'm not concerned about that. But this  
9 particular list I do think is unrealistic.

10 CHAIRMAN BABCOCK: Judge Patterson.

11 HON. JAN PATTERSON: I agree with  
12 that. I compare it to broad-form submissions,  
13 and I think that would serve the interest of  
14 justice much better than some of these, which  
15 I have problems with as well.

16 CHAIRMAN BABCOCK: Well, as I see  
17 it, we've got two issues: One, whether we  
18 have these factors at all; and then two, if we  
19 have the factors, whether we have an  
20 additional sentence that Richard is  
21 proposing. And as I understand it, you're  
22 willing to accept some language from Richard  
23 further clarifying Comment 4, and that you  
24 would not accept deletion of Comment 4?

25 HON. ANN CRAWFORD McCLURE: Correct.

1 CHAIRMAN BABCOCK: So that being the  
2 case, let's first vote on whether or not our  
3 Advisory Committee believes that Richard's  
4 language, which is --

5 HON. F. SCOTT McCOWN: Could we vote  
6 on deletion first? That's easier.

7 CHAIRMAN BABCOCK: Okay. Let's vote  
8 on deletion first. But that, of course,  
9 hasn't been accepted by Justice McClure.

10 HON. F. SCOTT McCOWN: But just to  
11 advise the Supreme Court.

12 CHAIRMAN BABCOCK: Right, to advise  
13 the Supreme Court. Everybody who thinks  
14 Comment 4 should be deleted in its entirety,  
15 raise their hand.

16 Everybody that thinks Comment 4 should be  
17 retained raise their hand.

18 HON. SARAH B. DUNCAN: In some form?

19 HON. DAVID PEEPLES: In some form,  
20 yeah. Which is it, Chip?

21 MS. SWEENEY: Wait, is it in some  
22 form, or is it as is?

23 CHAIRMAN BABCOCK: Judge McCown was  
24 trying to make it easy on us. We're going to  
25 talk about how we revise it.

1 So in some form, should it be retained?

2 By a vote of 23 to 11, Comment 4 in some form  
3 is going to be retained, or at least that's  
4 our recommendation.

5 And now Richard's language, which is?

6 MR. ORSINGER: I wish I had a set of  
7 rules, but I would be willing to borrow.

8 PROFESSOR CARLSON: I have a rule  
9 book. "These rules do not undertake to define  
10 standards of civil liability of lawyers' for  
11 professional conduct."

12 MR. ORSINGER: Say "persons." Same  
13 language, only persons serving as guardians ad  
14 litem under this rule.

15 CHAIRMAN BABCOCK: Did everybody  
16 hear that? Read it again, Elaine.

17 PROFESSOR CARLSON: These rules do  
18 not undertake to define standards of civil  
19 liability of --

20 MR. ORSINGER: -- persons serving as  
21 guardians ad litem under this rule --

22 PROFESSOR CARLSON: -- for  
23 professional product.

24 HON. DAVID PEEPLES: Chip, I'm not  
25 sure I understand why anybody would oppose

1 that. Can I hear it again? Is there some  
2 reason for opposing that language?

3 HON. ANN CRAWFORD McCLURE: I  
4 accepted it. I did not oppose it.

5 CHAIRMAN BABCOCK: Elaine, Judge  
6 Peeples wants to hear it again, I think.

7 HON. DAVID PEEPLES: No, I want to  
8 hear why anybody would oppose putting that in  
9 this rule.

10 CHAIRMAN BABCOCK: Okay. Is anybody  
11 opposed to that?

12 MR. LATTING: I'm opposed to that.

13 CHAIRMAN BABCOCK: One person is  
14 opposed. Anybody else?

15 CHAIRMAN BABCOCK: Okay. Then that  
16 will be --

17 MS. SWEENEY: Could I hear why Joe  
18 is opposed to that? He might have figured  
19 something out that we haven't.

20 MR. LATTING: Because I'm opposed to  
21 anything that will make it easier for the  
22 abortions to occur. I think anything that can  
23 impede that and give more people more pause to  
24 think before this event occurs guides me in  
25 every one of these decisions.



1 MR. ORSINGER: You're just going to  
2 get more people sued and make it harder to do,  
3 and the Legislature is going to --

4 CHAIRMAN BABCOCK: Now, now.

5 MR. LATTING: That would be a small  
6 price to pay.

7 CHAIRMAN BABCOCK: All right. That  
8 language has been approved and accepted by  
9 Justice McClure.

10 Now, any other -- yeah, Judge Peeples.

11 HON. DAVID PEEPLES: I thought Jan  
12 Patterson had an interesting suggestion that  
13 we make it more general and less specific.

14 CHAIRMAN BABCOCK: That's where  
15 we're turning to now. Does anybody have any  
16 suggestions on how to revise this in that  
17 fashion?

18 MR. ORSINGER: Can I throw out one  
19 suggestion? I think we ought to say whether  
20 or not these people are supposed to testify as  
21 witnesses or whether they're supposed to make  
22 unsworn statements to the court about their  
23 opinions, because that's a pertinent question.

24 CHAIRMAN BABCOCK: Do you think we  
25 ought to do that in a comment, Richard?

1 MR. ORSINGER: Well, if we don't,  
2 we're going to get to litigate it, although  
3 there isn't going to be any knowledge of what  
4 the results of the lawsuits are.

5 CHAIRMAN BABCOCK: Hold that  
6 thought. Justice Duncan.

7 HON. SARAH B. DUNCAN: The reason  
8 I'm in favor to include this type of comment  
9 is that, if I were appointed a guardian ad  
10 litem in this situation, I would like some  
11 advice that these are factors that have been  
12 considered by the courts in other  
13 jurisdictions or courts in general, just so  
14 that I will have, for my own use, a checklist  
15 to go through. There may be things on here  
16 that I really hadn't thought about before.

17 So I would propose saying, rather than  
18 the second sentence of Paragraph 4, "Factors  
19 that have been considered in other  
20 jurisdictions include:" And then, if this is  
21 an accurate list, it's an accurate list, which  
22 I assume it is. "In this or other  
23 jurisdictions," something like that.

24 HON. SAMUEL A. MEDINA: Where would  
25 you put that?

1 HON. SARAH B. DUNCAN: Instead of  
2 "However, as a general matter," I would say,  
3 "Factors that have been considered in other  
4 jurisdictions include the following:"

5 CHAIRMAN BABCOCK: Justice McClure,  
6 do you accept that?

7 HON. ANN CRAWFORD McCLURE: I do.

8 MS. LOPEZ GARCIA: I have a  
9 question, because if you have in here that we  
10 should address and consider among other  
11 factors, are we saying there that they should  
12 be prepared to address to the court, or what  
13 does that mean?

14 HON. F. SCOTT MCCOWN: Justice  
15 Duncan's formulation solves that property. I  
16 would like the record to reflect, since I  
17 seldom agree with Justice Duncan, that I think  
18 that's a great idea.

19 CHAIRMAN BABCOCK: Justice McClure  
20 accepts that. Does anybody oppose? Yes,  
21 Linda Eads.

22 MS. EADS: I would like us to  
23 rethink this about having the list here. And  
24 I think the discussion points out the reason I  
25 want this. It's from other jurisdictions.

1 These lists get set in stone. And what we  
2 really want is, we want the guardian to be  
3 thinking about the individual girl rather than  
4 just a checklist. And I'm afraid that's all  
5 they'll do, is do the checklist.

6 And I really agree with Judge Patterson  
7 that it would be better to have some global  
8 qualities; for example, for the guardian to  
9 look at the medical history, the family  
10 history. I mean, that gives the guardian an  
11 idea that there are subject matters that need  
12 to be inquired to, but not a checklist. And  
13 they think that if they just go through the  
14 checklist, they've done their job. And that  
15 gets carried on from one jurisdiction to  
16 another. So I'm in favor of a more global  
17 approach to these.

18 CHAIRMAN BABCOCK: Judge Patterson.

19 HON. JAN P. PATTERSON: I think the  
20 categories that bear on the findings that the  
21 court has to make specifically would be  
22 helpful, whether the minor is mature, whether  
23 the minor is sufficiently well informed, and  
24 either couch the categories in those terms, to  
25 facilitate the findings by the court, or broad



categories that might be helpful so that they can make the findings by the court. But I don't quite see the relationship between the two. And somebody is going to get -- I mean, it's confusing for me to relate those criteria.

CHAIRMAN BABCOCK: Okay. Let's try to -- if we could do one thing at a time.

There is a discussion in progress about whether or not we ought to change the second sentence in Comment 4 to say basically that these are factors that have been considered in other jurisdictions. Justice McClure has accepted that.

HON. JAN A. PATTERSON: And list Iowa and whatever? I mean, what's the point?

CHAIRMAN BABCOCK: Well, that's what we're about to vote on. Justice McClure says that she would accept that change to Comment 4, and so now this committee has got to decide whether or not that would be something we would do. Yeah, Wendell.

MR. HALL: I was just thinking, if, you know, Judge Peeples grabbed me in the hallway and said, "You're going to be guardian

as to having the list. I agree with Sarah, that if I had one of these cases, I would love to have a list about what I might want to ask my client and things to consider. But I think maybe that's not the role of the comments in the rules. I think that may be the role of some agency, whether it be Planned Parenthood or Child Protective Services or whatever, to have pamphlets or booklets--

HON. JAN P. PATTERSON: Or Family Law Seminar checklists.

PROFESSOR ALBRIGHT: Or just have them available, you know, if I get pulled down the hall. Maybe the judge will have some of these in the office or something. But the more we're talking about it, this is not a rule thing.

CHAIRMAN BABCOCK: Judge Medina.

HON. SAMUEL A. MEDINA: It's great for us to think about what would help us or what wouldn't. But you go to, you know, Crosbyton and somebody appointed a nonlawyer as guardian or a member of the clergy or anybody else. I just think they need some help. And I don't know about some global idea

ad litem in this thing." And I walk in and I'm a new attorney, new to this area and haven't been exposed to it, I would be very thankful to have these factors, if I just had three or four global topics. I'm not sure I would get in as much detail as what's provided.

CHAIRMAN BABCOCK: Bill and then Alex.

PROFESSOR DORSANEO: I don't think you can fix this list without going through the list and ask, you know, what do you do if you find out the applicant's means of financial support are at a high level? What do I do then? Do I then consider whether she lives with her parents? What does that have to do with it? I'm not helped by this list. I'm just given a lot of things to take into account, and then I have to decide what that all means. And I think the list is more trouble than some more general directives would be.

CHAIRMAN BABCOCK: Alex.

PROFESSOR ALBRIGHT: I think I'm becoming convinced that I should have voted no

that they're going to have to interpret what that means.

PROFESSOR ALBRIGHT: But are they going to read the rules for it then?

HON. SAMUEL A. MEDINA: I think we can correct that by something akin to what you're doing. I don't have any precise language, but it's not a checklist. Maybe we have to say it's not a checklist, I don't know, but some type of guidance, something that gives them an add idea of where to start from.

HON. SARAH B. DUNCAN: Maybe I've been misunderstanding what's going to happen. I have been assuming, perhaps erroneously, that when Judge Peeples calls Wendell in and says, "You are now appointed as the ad litem on this case," that there will be a pamphlet that will have the rules and the statute that he can give him. Because there are going to be a lot of lawyers that are not at all familiar with this area of the law or with family law at all.

HON. SAMUEL A. MEDINA: And nonlawyers.

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1 HON. SARAH B. DUNCAN: And  
 2 nonlawyers. And it's not going to be a large  
 3 pamphlet to include the rules and the statute  
 4 in one place, but it could be a primer.  
 5 CHAIRMAN BABCOCK: Christina.  
 6 MS. CRAIN: Having served as an ad  
 7 litem for about five years now in family  
 8 court, I will say that every three years there  
 9 is one seminar that all of us that do this in  
 10 the family court go to. And we know that when  
 11 that seminar comes, we cancel everything else  
 12 because that's the only training we get for  
 13 this type of work. We get certified. We get  
 14 a book that we use for the next three years  
 15 until the next seminar comes out. And that is  
 16 the only thing that we get.  
 17 And every court is different. Every  
 18 court has the way they like to do it and what  
 19 their guidelines are. What I'm thinking is,  
 20 and I like what Jan said and what Nina said,  
 21 is that we come up with some more broad,  
 22 global, you're looking at what's in the best  
 23 interest of the child, these kinds of things.  
 24 They're already spelled out in the Family  
 25 Code.

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1 HON. ANN CRAWFORD MCCLURE: No,  
 2 they're not spelled out in the Family Code.  
 3 "Best interest" is not spelled out in the  
 4 Family Code, unless you want to take the  
 5 position that we want to quantify that as  
 6 guidelines.  
 7 MS. CRAIN: I think that would be  
 8 great, if we could do it in conjunction with  
 9 what we've been doing.  
 10 MS. SCHRAMM: May I just offer a  
 11 point of clarification. Remembering my  
 12 discussions in the subcommittee, I do recall  
 13 that we discussed getting rid of this in the  
 14 form, and I do recall some reference to  
 15 hopefully bar associations will step in,  
 16 somebody will come in and develop guidelines,  
 17 as they have done in the family law area. And  
 18 I remember that discussion, and that's why I  
 19 was a little bit surprised to see us  
 20 incorporate it in the comments so  
 21 specifically. Because some of these points  
 22 that have been made, I think we just referred  
 23 to that as we expect others will come in and  
 24 make sure that the people in their  
 25 jurisdictions are properly qualified, know

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1 what to do, et cetera.  
 2 CHAIRMAN BABCOCK: I don't want to  
 3 make a habit of this, but I think that enough  
 4 people have expressed different views than the  
 5 vote they just took, so we'll vote again.  
 6 Just a second, Bill.  
 7 And the vote this time will be whether --  
 8 and this may be advisory, because I don't  
 9 think Justice McClure is willing to accept  
 10 Judge Patterson's more generalized statement,  
 11 but I think we ought to be on record about  
 12 it. We're going to vote on whether or not to  
 13 keep Comment 4, with this list of factors,  
 14 with some softening language as Justice Duncan  
 15 proposed, or whether or not we're going to go  
 16 to more generalized, specific categories as  
 17 Judge Patterson suggests.  
 18 MR. LOW: I just want to point to  
 19 one thing for the record. 173, pertaining to  
 20 guardian ad litem, says nothing other than  
 21 appoint a guardian ad litem. No standard. So  
 22 then we're going to have one rule that does  
 23 and one that doesn't. And I know we voted,  
 24 but I just wanted to go on the record with  
 25 that.

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1 CHAIRMAN BABCOCK: Well, we're about  
 2 to vote again. Judge Rhea.  
 3 HON. BILL RHEA: Well, before we  
 4 make that vote, let me make another  
 5 suggestion. It seems to me that it's clear  
 6 that this -- it probably has been from the  
 7 beginning of the day and before today that  
 8 this is an issue about which, the broad issue  
 9 about which everybody in this room has a  
 10 strong opinion. And we're treading on  
 11 dangerous ground here. Some people are  
 12 expressing their opinions about it more openly  
 13 than others. There are suggestions that,  
 14 during the course of the conversation today,  
 15 that make it pretty clear where people stand  
 16 on this issue. And I'm concerned that we're  
 17 kind of losing the focus of, you know, a  
 18 proper judicious approach to this issue.  
 19 We've got a recommendation from the  
 20 subcommittee that deals with specific issues.  
 21 We've had a vote that approved it in some  
 22 form. Nina Cortell has suggested that there  
 23 are some factors listed here that probably  
 24 aren't so appropriate.  
 25 I think it would be a much better

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1 procedure to ask Nina or Bill or whoever to  
2 say, "X, Y and Z items aren't helpful." We've  
3 got others that are helpful and could be  
4 helpful. It's helpful to me as a judge to  
5 have an ad litem that's got some direction.

6 And I don't want to wait for CPS or  
7 Planned Parenthood to come in and tell the  
8 guardian ad litem what those proper guidelines  
9 are. We've got some good suggestions here.  
10 Maybe some of them don't need to be in there  
11 at all. I would suggest that we go through  
12 those, and if we can eliminate some that  
13 aren't helpful or offensive or irrelevant or  
14 something, let's do that and see what we wind  
15 up with.

16 CHAIRMAN BABCOCK: I think that's  
17 where I'm headed, Bill, because I think  
18 Justice McClure is unwilling to accept a  
19 change to Comment 4 that would go to Judge  
20 Patterson's more general category. So all  
21 we're doing now by this vote is to advise the  
22 Court how the committee feels about the issue  
23 of Comment 4 with a list of factors, and we'll  
24 work on the list in a minute, versus a comment  
25 with very generalized issues, as Judge

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1 Patterson proposes.

2 And we already voted on that, and as I  
3 said, I don't want to make a habit of this,  
4 but enough people have raised the issue that  
5 I'm going to do it this time.

6 So everybody that wants to retain in some  
7 form Comment 4, which has list of some  
8 18 factors, raise their hand.

9 HON. DAVID PEEPLES: As opposed to  
10 general?

11 CHAIRMAN BABCOCK: Yes, as opposed  
12 to a more general, kind of generic.

13 MS. CORTELL: Chip, I'm sorry, but  
14 I'm not sure it's that far apart. I mean, I  
15 can't speak for Judge Patterson, but a more  
16 global grouping, let's say, of four would  
17 probably encompass some of these specifics.  
18 In other words, I don't see them -- I'm not  
19 sure I see the big difference between the two  
20 proposals.

21 CHAIRMAN BABCOCK: It may not be,  
22 Nina. And all we're doing is, if a majority  
23 of this committee says yes, then we're going  
24 to note that in the report, and then we're  
25 going to get down to -- and it may be that if

1 Justice McClure says, "Yeah, I accept deletion  
2 of Nos. 4, 6 and 7," we may be where you want  
3 to go and where everybody wants to go. But  
4 for right now, we're just talking about the  
5 two things. So everybody who is in favor --

6 HON. PHIL HARDBERGER: Chip.

7 CHAIRMAN BABCOCK: Yes, Justice  
8 Hardberger.

9 HON. PHIL HARDBERGER: You know, it  
10 really wouldn't be difficult to have both in  
11 this. You could have a general statement on  
12 what you're looking for, the global thing of  
13 Justice Patterson. And then you could  
14 incorporate the language Justice Duncan said,  
15 some of the other factors that have been taken  
16 into account in other jurisdictions are, and  
17 all these won't be appropriate in every case.  
18 And then you've got them all. You really  
19 don't have to make a choice here.

20 CHAIRMAN BABCOCK: Well, that's  
21 another way to do it. In other words,  
22 subtraction by addition.

23 So Justice McClure, what do you think  
24 about that?

25 HON. ANN CRAWFORD McCLURE: I'm not

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1 opposed to the broad concept of putting it in  
2 there, but I think it's in there. I mean, I  
3 think it's in the statute that you are to  
4 consider maturity, a well informed decision,  
5 and best interest of the child. I don't think  
6 that in a broad global statement you can  
7 quantify the factors that go into that. I  
8 think that's in there. I don't mind putting a  
9 general proviso in the rules. What I'm not in  
10 favor of doing is deleting these factors from  
11 the comment.

12 HON. PHIL HARDBERGER: And I can  
13 live with the factors as stated as the  
14 committee has recommended. But if there's  
15 enough feeling that we need the global, we can  
16 certainly put it in.

17 CHAIRMAN BABCOCK: Okay. I think we  
18 owe it to the Court to give a sense of whether  
19 a majority of this committee disagrees with  
20 Justice McClure, what she just said. So  
21 that's what we're voting on.

22 How many people think we should not have  
23 these 18 factors or some variation thereof,  
24 these 18 factors in Comment 4, raise your  
25 hand.

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1 How many people think we should? By  
2 almost the same vote, 21 to 13.

3 HON. SARAH B. DUNCAN: Chip, can I  
4 say something?

5 CHAIRMAN BABCOCK: Yes.

6 HON. SARAH B. DUNCAN: There seems  
7 to be a suggestion that that was a vote on  
8 one's view on the abortion issue. And I just  
9 want to make it clear that my vote at least  
10 was not at all related to what my views may or  
11 may not be on that issue.

12 CHAIRMAN BABCOCK: So noted.

13 HON. SARAH B. DUNCAN: Thank you.

14 CHAIRMAN BABCOCK: Yes, Richard.

15 MR. ORSINGER: It seems to me that  
16 the Supreme Court promulgating this comment is  
17 unprecedented and far beyond the legislative  
18 mandate that we have. And I would propose  
19 that the Supreme Court consider treating this  
20 as a committee comment and not a Supreme Court  
21 comment, because this is what should really be  
22 in a court opinion, not part of the  
23 legislative rules. If we want to have it in  
24 there, let's have it in there, but let's not  
25 say this has the imprimatur of the Texas

1 seem to be talking about something else other  
2 than what's the guardian's job.

3 Richard suggested talking about what the  
4 guardian ad litem is going to do, and that  
5 would at least help me. What is that role?  
6 And then I would be able to decide a little  
7 better what factors ought to be considered.

8 CHAIRMAN BABCOCK: Carl, I think,  
9 had his hand up.

10 MR. HAMILTON: I agree with Joe. I  
11 would like to do everything to prevent  
12 abortions that we can. But this list, it  
13 seems to me, and the duty of the guardian ad  
14 litem is to answer the question about whether  
15 or not there is consent. And if the minor  
16 can't give it, I guess the guardian gives the  
17 consent. But I don't see anything in the list  
18 that relates to any considerations for  
19 adoption or the rights of the baby. I think  
20 there needs to be something in there about  
21 that, if this is going to relate to the  
22 consent question. I think the list is totally  
23 incomplete.

24 CHAIRMAN BABCOCK: Justice Duncan.

25 HON. SARAH B. DUNCAN: I guess that

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1 Supreme Court on it.

2 CHAIRMAN BABCOCK: That comment is  
3 noted. Bill.

4 PROFESSOR DORSANEO: Well, I guess  
5 I'm not sure what the guardian's role exactly  
6 is, the guardian ad litem's role exactly is  
7 here. Aren't we trying to decide under this  
8 statute whether you can bypass the parents,  
9 isn't that the idea, not whether the abortion  
10 is a good idea or isn't?

11 This list is about whether it's a good  
12 idea to have an abortion or not, in my view.  
13 And the suggestion was made earlier that some  
14 sort of list that relates to the findings that  
15 the court is supposed to make about the minor  
16 being well informed, whether there will be a  
17 problem if the parents are notified, physical  
18 violence problem or whatever, seems to be the  
19 pertinent question.

20 I go back again to, what does it have to  
21 do with anything, the applicant's means of  
22 financial support? Does that mean that it's  
23 not okay to have abortions if you're rich? It  
24 is okay? That if you're poor, that it's a  
25 good idea? I don't like these factors. They

1 points out my concern on this vote, and my  
2 concern has become even greater. In my view,  
3 the question before the court, trial or  
4 appellate, is whether one of the avenues for  
5 bypass has been met on the facts of the case  
6 given the statute. Whether a child has  
7 considered the financial consequences of her  
8 decision one way or the other, or her desire,  
9 whether there are medical aspects or  
10 indications to the decision, could go to  
11 maturity, could go to meeting one of the other  
12 bases for bypass.

13 And that's why I just don't understand  
14 this list to be a pro- or anti-abortion list.  
15 It is, to me, a list that's designed to help  
16 an ad litem, whether attorney or otherwise,  
17 talk to the applicant and try to help the  
18 court in making the decision required by the  
19 statute.

20 MR. PEMBERTON: Can I just throw  
21 something out? Perhaps it would be useful, in  
22 consideration of all these comments, and I  
23 think Justice Hardberger was suggesting  
24 something along these lines, to break this  
25 down into a generalized list of factors going

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1 to the maturity, how well the minor is  
2 informed, such as, and throw in whatever of  
3 these factors are appropriate. Same thing for  
4 best interest. Maybe have a catchall for  
5 catching the things like sexual abuse of a  
6 minor.

7 You could do it that way, and that  
8 perhaps would take some of the inferences or  
9 implications, the charge out of this list  
10 here, focus it back where it belongs.

11 HON. F. SCOTT McCOWN: I think a lot  
12 of us wouldn't mind having a list. But let me  
13 point out, if it's a list for the guardian  
14 ad litem, it's also automatically a list for  
15 the judge. Because if you're saying the  
16 guardian should consider these things in  
17 making a recommendation to the judge, you're  
18 saying the judge should consider these things  
19 in making his or her decision. My problem is  
20 not the idea of having a list. I think it  
21 would be good to have general direction with  
22 some level of specificity to the ad litem.

23 I think this list does not correspond to  
24 our statute. And I think that's the real  
25 problem here; that what we're called upon to

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1 decide is a maturity question, alternatively a  
2 best interest question, alternatively an abuse  
3 question. And this list doesn't capture or  
4 correlate very well. I'm not saying it  
5 doesn't correlate at all, but it doesn't  
6 correlate in my mind very well. And I don't  
7 know if we can write that kind of list now or  
8 in a group this large.

9 I would just say we ought to say to the  
10 Supreme Court, "We recommend you give some  
11 general direction. We recommend it have this  
12 language that Richard wants about no civil  
13 liability attaching. But we don't think this  
14 is the right direction, and it needs some  
15 work."

16 MR. LATTING: Haven't we voted on  
17 this twice?

18 CHAIRMAN BABCOCK: Well, we have  
19 voted twice. Judge Rhea.

20 MR. YELENOSKY: Well, as a point of  
21 order on that, I think you started to announce  
22 the results of the last one. You said 21 to  
23 13, but I don't think you said which was  
24 which.

25 CHAIRMAN BABCOCK: Yeah, I'm sorry.

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1 The vote was 21 in favor of the list and 13  
2 against. Sorry.

3 HON. F. SCOTT McCOWN: In some  
4 form.

5 CHAIRMAN BABCOCK: In some form,  
6 right.

7 MR. MEADOWS: A list.

8 CHAIRMAN BABCOCK: I did want to get  
9 to that, but --

10 HON. SAMUEL A. MEDINA:  
11 Mr. Chairman, I heard, and I don't know if you  
12 meant that or not, but you said what we're  
13 saying is that they should follow this list.  
14 I thought we disagreed with that. I thought  
15 it wasn't "should follow," but that you might,  
16 that it's something you might look at. And I  
17 think we're getting off base.

18 HON. F. SCOTT McCOWN: Well, okay, I  
19 didn't mean "should," that's correct. But I  
20 meant that these are things that they ought to  
21 consider whether they're applicable or not.

22 HON. SARAH B. DUNCAN: Not ought.  
23 "Ought" means should.

24 HON. F. SCOTT McCOWN: They ought to  
25 consider whether they are or are not

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1 applicable. You have to consider whether they  
2 are or are not applicable.

3 CHAIRMAN BABCOCK: Hold it. Where  
4 we are right now is we changed "should" to  
5 "may." That has currently been approved.  
6 And there was a further request to amend it to  
7 say that these are factors from other  
8 jurisdictions, and just say that and not that  
9 you ought to follow them or anything else,  
10 just that these are other factors.

11 And then we were going to have the  
12 language that Judge McClure has written down  
13 and then also the language that Elaine Carlson  
14 read at the end of it.

15 And now what I thought we were doing,  
16 having voted twice that we were going to have  
17 a list, I thought we were going to go over  
18 these things and find what the committee  
19 thought was inappropriate to be on the list,  
20 present that to Justice McClure for her up or  
21 down, and then vote if we had to.

22 That's where I thought we were. I may be  
23 wrong. Does everybody think we're kind of  
24 there? We're not there.

25 HON. JAN P. PATTERSON: Chip.

1 CHAIRMAN BABCOCK: Yes.

2 HON. JAN P. PATTERSON: I would like  
3 to resurrect Justice Hardberger's suggestion,  
4 because I think we can do both. And I would  
5 like to preface it with, I agree with Sarah,  
6 that I don't think it's a vote for or against  
7 abortion, and I didn't take it as that. And I  
8 think that, however we come out on that issue,  
9 that we could agree upon some general  
10 statements.

11 And just to give you an example, because  
12 I don't think perhaps I refined it enough for  
13 the presentation, but whether the child is  
14 under medical care, instead of, you know, a  
15 series of aftercare procedures; whether she is  
16 given accurate information; whether it's  
17 voluntary; whether there is prior history of  
18 sexual -- you know, I think that some of those  
19 factors, they don't have to be loaded, and  
20 they can get you to the same place however you  
21 feel about the issue. But they are not as  
22 either specific or -- they're generalized.  
23 And I think they are factors that everybody  
24 could agree upon.

25 And these just seem to be kind of a

1 helter-skelter list. I mean, several of them  
2 have to do with voluntariness and informed  
3 consent in various forms. And I think that  
4 perhaps maybe both might be helpful to  
5 identify this for what it is, but also to have  
6 some that relate to the criteria.

7 CHAIRMAN BABCOCK: What do you think  
8 about Pemberton's idea that you take the  
9 general categories and then put what fits  
10 under each?

11 HON. F. SCOTT MCCOWN: That's a good  
12 idea, but these don't fit under the general  
13 categories.

14 HON. PHIL HARDBERGER: I think it's  
15 a good idea, but I doubt if you're going to be  
16 able to do it in this room.

17 CHAIRMAN BABCOCK: That's for sure.

18 HON. PHIL HARDBERGER: I think it  
19 needs to go back to the drawing board.

20 CHAIRMAN BABCOCK: Okay. Judge  
21 Medina.

22 HON. SAMUEL A. MEDINA: Help me out  
23 here, folks. But when we say "may consider,"  
24 does it not also mean that you may not  
25 consider? In other words, I don't see that

1 we're making it a list. The very purpose of  
2 this is to say these are some things that you  
3 may consider. If they don't fit, don't  
4 consider them. If you want to add something  
5 else like may or may not.

6 HON. PHIL HARDBERGER: That's  
7 exactly my idea. Maybe we ought to say that  
8 in English, may or may not consider depending  
9 upon the circumstances.

10 CHAIRMAN BABCOCK: Justice McClure,  
11 what's your solution?

12 HON. ANN CRAWFORD McCLURE: Well, I  
13 want, and I think our subcommittee wanted,  
14 some guidance in here of some of the  
15 appropriate things that you might want to take  
16 into consideration to gear people in a very  
17 short time frame of what they need to be  
18 addressing with their young client who might  
19 not be real talkative. I don't mind trying to  
20 restructure it into some sort of order of what  
21 might relate to informed consent, what might  
22 relate to her levels of maturity.

23 I know that there was some concern  
24 expressed by some of the medical care  
25 providers on the subcommittee to ensure that

1 she had given some thought to "If I don't tell  
2 my mother that I've had this and I go stay  
3 with a friend, what if there are severe  
4 bleeding problems after the abortion?" Has  
5 she given thought to "If I have complications  
6 afterwards, will I have access to medical  
7 care? Will I have the finances to be able to  
8 pay for that medical care?" Those were some  
9 of the issues that they felt needed to be  
10 addressed by the ad litem as far as making  
11 sure the child understood the consequences of  
12 not just the decision that she wanted to  
13 bypass parental approval.

14 And remember, you all heard the word  
15 "consent" before. The guardian ad litem is  
16 not going to be in a position to give  
17 consent. That's not what this is about. The  
18 ad litem is going to be in a position of  
19 either presenting to the court, maybe or maybe  
20 not making a recommendation to the court as to  
21 whether the minor can consent without  
22 notifying her parents. It's not a question of  
23 the judge or the guardian giving that consent.

24 CHAIRMAN BABCOCK: I always tell the  
25 witnesses that I'm presenting for a deposition

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1 that 3:00 o'clock is a very dangerous time in  
2 the deposition because people have been going  
3 all day and they've been going hard and they  
4 get tired. We cannot lose sight of the fact  
5 that it is just after 3:00 o'clock, number  
6 one; and number two, this subcommittee has had  
7 the benefit of a tremendous amount of  
8 expertise that is extra-judicial, extra-  
9 illegal, that we don't have the benefit of.  
10 And that's why we set up the procedure the way  
11 we have for this, recognizing that, if we go  
12 back to the drawing board, this committee is  
13 never going to see this again.

14 So what I think we should do is, as soon  
15 as I'm finished speaking, take our afternoon  
16 break. But with respect to this, I think we  
17 should note to the Supreme Court that there is  
18 considerable concern within our committee  
19 about Comment 4; and there's concern about the  
20 appropriateness of some and perhaps all of the  
21 factors that have been set forth here; and  
22 there have been some recommended changes in  
23 language, which we have approved, and which we  
24 will incorporate into the rule and leave it at  
25 that, because this committee cannot rewrite

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1 this comment this afternoon. Otherwise, we're  
2 never going to do everything else. So that's  
3 where I think we ought to leave it.

4 And since Nina is such a dear friend of  
5 mine, she can say one more thing before we  
6 take our afternoon break.

7 MS. CORTELL: Well, I won't be after  
8 this comment. If I could, I have just a quick  
9 sort of drafting thought. Let me just throw  
10 it out and people can think about it.

11 It seems to me you can group a lot of  
12 these into three or four items. One goes to  
13 mental capacity. That would cover the  
14 education piece, the employment piece, you  
15 know, that sort of thing. Another category  
16 would be considering risks, and that will hold  
17 with the procedure, after the procedure. The  
18 third would be the circumstances that led to  
19 the pregnancy. That would pick up the abuse,  
20 incest. Fourth, advisability of further  
21 counseling, picking up all the several  
22 different ones here about counseling. And  
23 then fifth, the consideration of the medical  
24 history.

25 HON. ANN CRAWFORD McCLURE: I didn't

1 hear the fifth one, I'm sorry, Nina.

2 MS. CORTELL: Consideration of  
3 medical history. So I guess what I'm thinking  
4 is, one can make this non-litmus-testy, if  
5 there is such a word, and eliminate a lot of  
6 the duplication and take out some of the  
7 irrelevant items, just a quick stab at it.

8 CHAIRMAN BABCOCK: Thanks, Nina.  
9 After our afternoon break, which is going to  
10 be for 10 minutes, we're going to take up the  
11 always exciting appellate issues.

12 (10-minute recess.)

13 CHAIRMAN BABCOCK: Okay. We're back  
14 on the record. Everybody should have a folder  
15 that has subcommittee issues and assignments.  
16 And my experience is that late in the day  
17 sometimes we see people drift off for various  
18 reasons. So Justice Hecht wanted me to go  
19 over this right now while we have just about  
20 everybody here.

21 We have, as I said at the outset, made  
22 assignments to the subcommittees. And the  
23 subcommittees are organized by rule. And  
24 there's nothing particularly magic about how  
25 they're organized, although some things are

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1 self-evident like the Evidence Subcommittee,  
2 the Discovery Subcommittee, the Sanctions  
3 Subcommittee, that type of thing.

4 Does anybody have any questions or  
5 comments? And for those of you who came in  
6 late, if you have a particular interest or  
7 experience in a particular area of the rules  
8 and you want to be on that subcommittee,  
9 you're welcome to do that. Just come to me  
10 and let me know what subcommittee that is that  
11 you're interested in. As I said earlier  
12 today, that does not mean that you necessarily  
13 can get off the one that you're on. But we're  
14 certainly always willing to accept more work  
15 from everybody. So with that said, does  
16 anybody have any questions? Yes, Sarah  
17 Duncan.

18 HON. SARAH B. DUNCAN: Issues to be  
19 addressed, is that exclusive or preclusive?  
20 Or is that just, "Here are these, and if you  
21 want to do more, you can"?

22 CHAIRMAN BABCOCK: That is issues  
23 that are pending before our committee as of  
24 today. Justice Hecht sent a letter out that  
25 had a whole big laundry list of things, and he



1 and I have assigned them now to the  
2 subcommittees. And then there are other  
3 letters, like David Jackson wrote one that  
4 raises three or four issues, that have come in  
5 over the past two years.

6 HON. SARAH B. DUNCAN: For instance,  
7 a Law Review article has been written. We  
8 might consider adopting or not adopting what  
9 was written in that Law Review article.

10 CHAIRMAN BABCOCK: We could  
11 obviously consider that. Yes, Judge.

12 HON. SCOTT A. BRISTER: Or the Jury  
13 Task Force proposals that aren't on the list.

14 CHAIRMAN BABCOCK: Okay. Bill  
15 Dorsaneo.

16 PROFESSOR DORSANEO: Chip, how does  
17 this relate to the recodification draft? We  
18 spent a large part of the last two years that  
19 we were in session going over that draft. And  
20 I guess I'm wondering whether the subcommittee  
21 arrangements wouldn't involve the enumeration  
22 in that draft as well as in the current Civil  
23 Procedure Rules.

24 CHAIRMAN BABCOCK: I'll pitch that  
25 to Justice Hecht.

1 JUSTICE HECHT: Of course, we've got  
2 the committee's recommendation on the entire  
3 recodification. But as we're continuing to  
4 consider that in-house at the Court, these are  
5 some other issues that have come up that we  
6 need to look at at the same time. So that as  
7 things progress, we can either work them in  
8 or, if the committee feels like they're more  
9 important and they should get done sooner,  
10 then we can go ahead and do them while the  
11 other work is pending.

12 CHAIRMAN BABCOCK: Alex.

13 PROFESSOR ALBRIGHT: In previous  
14 years we've gotten these big notebooks with  
15 all these letters. This year, is the  
16 committee chair just going to keep the stuff  
17 for that particular committee and make sure  
18 that the committee members have the  
19 information before the meeting?

20 JUSTICE HECHT: It's in the back.  
21 All the stuff we have that my letter refers  
22 to, there's a copy of it for everybody in the  
23 back.

24 PROFESSOR ALBRIGHT: Oh, okay. So  
25 we still have to schlepp around all this

1 stuff. I was trying to offer an alternative  
2 to that.

3 HON. SARAH B. DUNCAN: Aren't you  
4 glad you drive a van?

5 CHAIRMAN BABCOCK: You have to  
6 schlepp it around. Paula.

7 MS. SWEENEY: Two things. We have  
8 had the procedure of "Okay. You're up next  
9 Friday. You all have a meeting. It's time."

10 CHAIRMAN BABCOCK: We're going to  
11 talk about that in a minute.

12 MS. SWEENEY: Okay. So we'll have  
13 specific sort of deadlines and mini-deadlines  
14 and subdeadlines and continuances.

15 Secondly, was there any attempt made --  
16 or how was the composition of the  
17 subcommittees arrived at? And is it set in  
18 concrete? Was there any eye to balance either  
19 geographic, political or otherwise?

20 CHAIRMAN BABCOCK: It was darts.  
21 Darts was the way we did it.

22 MS. SWEENEY: Do we get some darts  
23 to throw? Can we add to our committees?

24 CHAIRMAN BABCOCK: Yeah. It is not  
25 set in concrete, Paula. And there was,

1 however, some thought that went into it. And  
2 in your case, I think maybe we've got you  
3 overloaded a little bit.

4 MS. SWEENEY: It don't look like a  
5 fair fight to me.

6 CHAIRMAN BABCOCK: And there are  
7 some people that we would entertain shifting  
8 responsibilities because you're so overloaded,  
9 so that's the answer to that. What else?  
10 Anybody else?

11 JUSTICE HECHT: If you have  
12 questions about my September 24th letter,  
13 you're welcome to call. Please call Bob, if  
14 you would. But what we tried to do was just  
15 go through all of the letters we've received,  
16 some of the legislation that was introduced  
17 during the last term, the last session of the  
18 Legislature, comments that have been made.  
19 And we've all -- I see we've left out  
20 something already. The Jury Charge Task Force  
21 proposals should be in here.

22 And this is not an exclusive list. If a  
23 subcommittee comes up with other things that  
24 they think the committee ought to think about,  
25 they should add those to the agenda.



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1 CHAIRMAN BABCOCK: Okay. In terms  
2 of deadlines, there is an issue of whether or  
3 not any of these subcommittees has something  
4 that they are far enough along with that they  
5 would be ready to report to the full committee  
6 by November. That's a month from now. If  
7 there is, then we'll meet in November. If  
8 there isn't, we won't meet until January. And  
9 we will take either volunteers or assign  
10 projects for the January meeting.

11 So the first question is, is there any  
12 subcommittee that has something that is far  
13 enough along that it could be ready within a  
14 couple of weeks to send out to everybody on  
15 this committee and then meet sometime in  
16 November to discuss it?

17 HON. F. SCOTT McCOWN: No.

18 CHAIRMAN BABCOCK: The answer to  
19 that is no. That's what we thought. But we  
20 didn't want to slight anybody, if you've been  
21 busily working away the last month or so.

22 PROFESSOR ALBRIGHT: Is there any  
23 truth to the rumors that we're going to have  
24 new Sanctions and Jury Trial Rules out soon?

25 JUSTICE HECHT: Well, we're working

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1 on it. They're probably going to come back --  
2 because time has passed -- they're probably  
3 going to come back to committee, but I don't  
4 know that for sure.

5 PROFESSOR ALBRIGHT: Okay. So we  
6 couldn't do that?

7 JUSTICE HECHT: I don't think we  
8 could do that in November, no.

9 CHAIRMAN BABCOCK: Okay. So it  
10 looks like January for our next meeting. And  
11 we need to set that now so that we can reserve  
12 hotel space and don't run into the problem  
13 that we did this time.

14 So does anybody have any particular  
15 preference in January 2000?

16 HON. SCOTT A. BRISTER: The later  
17 the better.

18 PROFESSOR CARLSON: How about the  
19 28th?

20 CHAIRMAN BABCOCK: Excuse me?

21 PROFESSOR CARLSON: The 28th.

22 CHAIRMAN BABCOCK: The 28th is a  
23 Friday and the 29th is a Saturday. What do  
24 people think about that? All right. Hearing  
25 no dissent, then January 28th --

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1 HON. SARAH B. DUNCAN: Can I point  
2 out that the 30th is the Super Bowl? It  
3 doesn't make any difference at all to me, but  
4 there may be people in the room that are not  
5 going to be available.

6 MR. YELENOSKY: Because they're  
7 preparing to watch?

8 CHAIRMAN BABCOCK: Super Bowl is on  
9 Sunday, isn't it?

10 HON. SARAH B. DUNCAN: But it's in  
11 Atlanta. There are going to be some people  
12 traveling.

13 CHAIRMAN BABCOCK: Do you really  
14 think the Cowboys are going to be in it?

15 HON. SARAH B. DUNCAN: I don't  
16 know. It never even occurred to me. I'm not  
17 even sure what sport it is. All I know is  
18 it's on the 30th.

19 CHAIRMAN BABCOCK: We'll take our  
20 chances on that. So the next meeting will be  
21 January 28th and the morning of the 29th. And  
22 I believe, Carrie, that we have a block of  
23 rooms at The Four Seasons? We do. We have a  
24 block of rooms at The Four Seasons. If you  
25 tell them promptly that you're with the

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1 Supreme Court Advisory Committee, we get a  
2 better rate, too, don't we? We get a good  
3 rate, or a better rate, and a nice hotel and a  
4 good room, so make your reservations quickly.  
5 So that takes care of that.

6 Anything else on subcommittees? Okay.  
7 Let's go to appellate issues. And Justice  
8 McClure is going to tell us about appellate  
9 issues, and then we're going to sit back and  
10 watch Richard and Sarah fight each other for a  
11 couple of hours.

12 HON. ANN CRAWFORD McCLURE: We had  
13 some discussion at the subcommittee level  
14 concerning the appropriate appellate standard  
15 of review. The statute does not prescribe a  
16 standard of review. Some of the other states  
17 that have adopted these provisions have  
18 incorporated a standard; others have not.

19 We came to the conclusion that it was  
20 better if we remained silent on that issue,  
21 except but to say that de novo in our view was  
22 not the appropriate standard of review.

23 Part of the difficulty that we faced is  
24 in a nutshell this: The trial judges on our  
25 subcommittee took the position, a number of

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1 them did, that because the statute allows for  
2 so little discretion, if they find sufficient  
3 evidence to support a conclusion that she is  
4 mature enough to make this decision without  
5 parental involvement, that they are very much  
6 opposed to an abuse of discretion standard.  
7 They would prefer that we utilize traditional  
8 sufficiency review. That is problematic for a  
9 couple of reasons. One, the intermediate  
10 courts are not consistent in what we do with  
11 traditional sufficiency review and overlapping  
12 abuse of discretion.

13 Justice Duncan has written a dissenting  
14 opinion on that subject. I've written a  
15 majority opinion on the subject incorporating  
16 some of Mike Hatchell's comments in an article  
17 that he wrote on that issue. And the Supreme  
18 Court has not addressed it directly.

19 So rather than fight that battle here or  
20 at the subcommittee level, we simply noted the  
21 disparity of opinions and did not express a  
22 specific standard of review.

23 Does anybody have any questions on that?

24 CHAIRMAN BABCOCK: Any questions on  
25 that? Comments? Suggestions? Next.

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1 HON. ANN CRAWFORD McCLURE: Filing  
2 deadlines was next. Now, the subcommittee  
3 took the position that we needed to come up  
4 with something that could be practically  
5 applied in the intermediate courts because  
6 we've got a 48-hour -- in some instances a  
7 little better than 48 hours, but for purposes  
8 of our discussion, let's call it 48 hours of  
9 turnaround time between the time the notice  
10 was filed and the time the ruling must occur.

11 We had a debate over does ruling give  
12 rise to a conclusion that is referencing the  
13 opinion? Is it not referencing the opinion?  
14 That is highlighted for you in the footnotes,  
15 those discussions.

16 We did decide to adopt some appellate  
17 timetables, and we have implemented some  
18 rules. Given this group's decision to remove  
19 the time frames from the trial court process  
20 and merely refer to the statute, I suspect  
21 that that will be a point you might want to  
22 vocalize --

23 HON. F. SCOTT McCOWN: We didn't  
24 vote that way. I thought that's the opposite  
25 of what we decided.

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1 HON. ANN CRAWFORD McCLURE: We took  
2 the rules -- my understanding of what you did  
3 is you took out the specific references in the  
4 rules that the committee drafted --

5 HON. F. SCOTT McCOWN: No. Exactly  
6 the opposite.

7 HON. ANN CRAWFORD McCLURE: -- and  
8 simply wanted to incorporate the statutory  
9 language.

10 HON. F. SCOTT McCOWN: No. I  
11 thought we made exactly the opposite decision,  
12 that we decided to agree to leave it just the  
13 way the committee had it.

14 HON. ANN CRAWFORD McCLURE: I did  
15 not hear that. That's fine.

16 All right. Well, we came up with some of  
17 these time frames. We have crafted some  
18 distinctions between rulings and opinions that  
19 everybody may not agree on.

20 Obviously, whatever the intermediate  
21 court does, should there be a situation in  
22 which the intermediate court affirms the trial  
23 court's denial, there can be an appeal to the  
24 Supreme Court. The Supreme Court would need  
25 the benefit of the intermediate court's

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1 analysis in order to consider those issues, so  
2 there is obviously a more stringent time  
3 constraint in the event of an affirmance than  
4 in the event of a denial, because the denial  
5 is not appealable.

6 So we tried to come up with some  
7 realistic deadlines, and I'll let you debate  
8 the wisdom of our conclusions on that.

9 CHAIRMAN BABCOCK: What rule is that  
10 in?

11 HON. ANN CRAWFORD McCLURE: We're in  
12 Rule 3.3.

13 HON. F. SCOTT McCOWN: It's on Page  
14 25 of the big draft.

15 HON. ANN CRAWFORD McCLURE: It's  
16 Rule 3, and then the time frame is 3.3(b). On  
17 the annotated version, it's Page 25.

18 CHAIRMAN BABCOCK: If we can, before  
19 we get on to the record, let's talk about  
20 these deadlines, 3.3(b). Does anybody have  
21 any comments or suggestions about these?

22 Were you finished, Ann? I didn't mean to  
23 cut you off.

24 HON. ANN CRAWFORD McCLURE: Yes.

25 MS. SWEENEY: Chip.

1 CHAIRMAN BABCOCK: Paula.  
 2 MS. SWEENEY: What are the  
 3 underpinnings of the continuance section?  
 4 Where did that come from?  
 5 HON. ANN CRAWFORD McCLURE: It comes  
 6 from the statute.  
 7 MS. SWEENEY: Okay. Well, what are  
 8 the underpinnings -- I know you all didn't  
 9 write the statute, but why is that sort of odd  
 10 looking clause in there?  
 11 HON. ANN CRAWFORD McCLURE: What we  
 12 concluded ultimately was it would give the  
 13 opportunity for additional investigation, if  
 14 the ad litem or the applicant wanted to bring  
 15 other information to the trial court; that  
 16 they couldn't get the doctor up here in  
 17 48 hours and it was imperative in their view  
 18 that that doctor be here to give some  
 19 insight.  
 20 From the appellate standpoint, the  
 21 opportunity is briefing an oral argument. If  
 22 the applicant wants, or her lawyer wants to  
 23 brief it in the court of appeals, that is a  
 24 mechanism in which to do that.  
 25 CHAIRMAN BABCOCK: Justice Duncan.

1 HON. SARAH B. DUNCAN: Haven't we  
 2 already discussed requiring an opinion? The  
 3 statute speaks in terms of a ruling.  
 4 HON. ANN CRAWFORD McCLURE: We  
 5 debated that at the subcommittee. As to  
 6 whether confidentiality would apply, we  
 7 haven't discussed the distinctions between  
 8 ruling and opinion.  
 9 CHAIRMAN BABCOCK: Richard tried to  
 10 make it public, but that failed.  
 11 HON. SARAH B. DUNCAN: Whatever it  
 12 was.  
 13 CHAIRMAN BABCOCK: Yeah. The  
 14 opinion as opposed to the ruling.  
 15 MR. ORSINGER: There's just going to  
 16 be this universe of unknown law that's  
 17 developing out there.  
 18 CHAIRMAN BABCOCK: Representative  
 19 Dunnam, yeah.  
 20 REPRESENTATIVE DUNNAM: In regard to  
 21 if the trial court does not rule, there is a  
 22 provision for automatic instantan  
 23 certification to be issued by the clerk.  
 24 There is not a similar paragraph with regard  
 25 to if the court of appeal does not rule.

1 CHAIRMAN BABCOCK: In the statute or  
 2 in the rules?  
 3 REPRESENTATIVE DUNNAM: In the  
 4 rule. In the rule, under two point something  
 5 (f), it says that the applicant can go to the  
 6 clerk, if there has not been a ruling within  
 7 48 hours, and the clerk will give them a  
 8 certificate. There's not a similar provision  
 9 in regards to the court of appeals' failure to  
 10 rule.  
 11 HON. ANN CRAWFORD McCLURE: It's in  
 12 3.3(b)(3), the last sentence, upon the minor's  
 13 request, the court of appeals or its clerk  
 14 must issue a certification that the appeal was  
 15 not ruled on in accordance with 33.004(b),  
 16 and, therefore, that the application is deemed  
 17 to be granted.  
 18 REPRESENTATIVE DUNNAM: Never mind.  
 19 HON. SARAH B. DUNCAN: Is it also  
 20 upon request in the trial court?  
 21 MS. LOPEZ GARCIA: Yes. Upon  
 22 request, the court of appeals or its clerk  
 23 must issue a certification.  
 24 HON. ANN CRAWFORD McCLURE: And the  
 25 forms include both for the trial court and the

1 appellate court, a format that might want to  
 2 be utilized to accomplish that.  
 3 CHAIRMAN BABCOCK: Richard.  
 4 MR. ORSINGER: Technically this  
 5 isn't on the table, but it's so close I'm  
 6 going to ask permission to raise it.  
 7 On Rule 4.1, you provide that the notice  
 8 of appeal from the court of appeals to the  
 9 Supreme Court is to be filed in the Supreme  
 10 Court, and I think that's ill-advised. I  
 11 think that the notice of appeal from the court  
 12 of appeals to the Supreme Court should be  
 13 filed in the court of appeals, and then the  
 14 court of appeals will have the obligation to  
 15 notify the Supreme Court and forward the  
 16 record within 48 hours.  
 17 I can foresee a lot of frantic activity  
 18 when the Supreme Court Clerk gets a notice and  
 19 doesn't have a record of trying to get the  
 20 clerk of the court of appeals to get the  
 21 record over there within the next 12 hours so  
 22 that the Supreme Court -- so anyway, it seems  
 23 logical to me that, like the notice of appeal  
 24 to the court of appeals is filed in the trial  
 25 court, the notice of appeal to the Supreme

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1 Court should be filed in the court of appeals  
2 and then forwarded.

3 HON. ANN CRAWFORD McCLURE: We  
4 talked about that. In fact, the first draft  
5 was that.

6 MR. ORSINGER: Why did you all  
7 change it?

8 HON. ANN CRAWFORD McCLURE: Because  
9 right now all of the notices are filed in the  
10 Supreme Court and there hasn't been any  
11 difficulty with getting notice to the clerk of  
12 the intermediate court. It's been filed again  
13 as the record. We make a provision of  
14 forwarding the file in 4.2(b). In order to  
15 facilitate the delivery, we've utilized the  
16 language "must instantan have forwarded to the  
17 Supreme Court the portions of the record."

18 MR. ORSINGER: But the timetable you  
19 guys are operating on is not a 48-hour  
20 timetable. So when somebody drops this by at  
21 4:30 in the afternoon on a Friday at the  
22 Supreme Court, somebody in the Supreme Court  
23 is going to desperately try to get ahold of  
24 the clerk of the court of appeals to tell them  
25 they need to pull the record together and get

1 known legal term, "got to be humping."  
2 Justice Duncan.

3 HON. SARAH B. DUNCAN: This goes  
4 back to my earlier question. Why does the  
5 applicant have to request a judgment, which is  
6 basically what this certification is? In no  
7 other circumstance that I'm aware of do we  
8 require a party to ask us to issue a  
9 judgment. We simply do. And I don't  
10 understand.

11 HON. ANN CRAWFORD McCLURE: Well, in  
12 this instance, there hasn't been the issuance  
13 of a judgment adjudicating. It's the  
14 failure -- what you're talking about is what  
15 you were talking about before. It is some  
16 sort of certification that the court did not  
17 act within the time constraints, which can be  
18 prepared by the clerk.

19 HON. SARAH B. DUNCAN: But it's sort  
20 of like void ab initio. If it is deemed to be  
21 granted, then it is granted, and there is a  
22 judgment entered or an order.

23 HON. ANN CRAWFORD McCLURE: The  
24 medical providers wanted to have a piece of  
25 paper in their hands by which they could say,

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1 it to the Supreme Court so they can rule  
2 within 48 hours. Is that not right? Or how  
3 long does the Supreme Court have to rule? Oh,  
4 is it -- how many business days?

5 MR. TIPPS: There's no deadline with  
6 the Supreme Court.

7 MR. ORSINGER: Two business days.  
8 Okay. Well, I don't mean 48 hours, I mean two  
9 business days. But as a practical matter,  
10 shouldn't the party who has the duty to pull  
11 the record together and get it out that same  
12 day be the one that gets notice of the appeal,  
13 and not the recipient, who then has to contact  
14 the party that has to get it out to send it  
15 back to the recipient.

16 CHAIRMAN BABCOCK: Could you say  
17 "with a copy to the clerk of the court of  
18 appeals"?

19 MR. ORSINGER: That would be okay  
20 with me too. I don't care about that. But it  
21 seems to me like the court of appeals is the  
22 one that needs to be humping, not the Supreme  
23 Court. You're okay now because you've got  
24 weeks and weeks and weeks to do it.

25 CHAIRMAN BABCOCK: That's a well

1 "Yes, I have authority to go forward," and  
2 some means to compare identity in the order or  
3 the certificate from the clerk that it was  
4 deemed granted to match it up with the  
5 identity of the minor.

6 HON. SARAH B. DUNCAN: But that's  
7 what I'm saying. Why does the minor have to  
8 request that? The usual thought is that until  
9 the appellate court renders a final judgment  
10 in the matter, there is nothing that will  
11 merge with and obviate the trial court's  
12 order, and we're all of a sudden in this one  
13 context requiring a party to request a  
14 judgment so that it will then be merged  
15 into --

16 HON. F. SCOTT McCOWN: It's not a  
17 judgment. It's a certificate from the clerk  
18 that there was no judgment within the time  
19 allotted by law.

20 HON. SARAH B. DUNCAN: But if it's  
21 deemed to be granted, then it is granted.

22 HON. F. SCOTT McCOWN: But the  
23 provider has to have a piece of paper to go  
24 forward.

25 CHAIRMAN BABCOCK: Elaine Carlson.

1 PROFESSOR CARLSON: I agree with  
2 Sarah. I think you just strike the words  
3 "Upon the minor's request," and tie it in  
4 with the first sentence. Make it obligatory  
5 to issue the certificate.

6 HON. SARAH B. DUNCAN: Otherwise  
7 there is no judgment. We have trial court  
8 order, appeal, and no judgment. It's like it  
9 just vanishes into thin air somewhere and  
10 there's no resolution of the proceeding if  
11 there is no appellate court order, no  
12 judgment.

13 MR. PEMBERTON: I think part of the  
14 problem is, the reason you don't have a ruling  
15 is trial court inaction, and so there was a  
16 provision for a party, there having been  
17 inaction, to go to the clerk and get something  
18 out of them. I mean, otherwise, you'd have  
19 people similarly waiting for their  
20 certification that never comes.

21 HON. SARAH B. DUNCAN: But that's  
22 what I'm saying. I think inaction is action.

23 HON. F. SCOTT McCOWN: But it's not  
24 a record of inaction. The certificate is a  
25 record of inaction.

1 between the court and the clerk. But the  
2 clerk is our appointed employee and in large  
3 measure does what we suggest that he or she  
4 do.

5 HON. F. SCOTT McCOWN: With  
6 independent statutory duties. If we went in  
7 to the clerk and said, "Destroy all the  
8 records," I'm assuming the clerk wouldn't do  
9 it. This is an independent statutory duty, by  
10 rule, placed on the clerk, to issue a  
11 certificate that you haven't done what the law  
12 told you to do.

13 PROFESSOR CARLSON: And if the minor  
14 doesn't ask for the certificate, then where is  
15 the judgment?

16 MS. LOPEZ GARCIA: There won't be  
17 one because there is no mechanism set up.  
18 There's no tickler system or anything where  
19 the clerk could know when the 48 hours had  
20 passed or whatever time has passed that they  
21 would know to issue an order or a certificate  
22 saying that it's granted as a matter of law  
23 because the judge failed to rule on it.

24 HON. SARAH B. DUNCAN: That's an  
25 easy things to know. We time stamp things

1 HON. SARAH B. DUNCAN: But the  
2 point, it seems to me, is not to make a record  
3 of the inaction, but to make a record, the  
4 judgment or order, of the effect of the  
5 inaction. That application is granted at that  
6 point in time.

7 HON. F. SCOTT McCOWN: And who  
8 certifies to that?

9 HON. SARAH B. DUNCAN: We issue a  
10 judgment, is what we do.

11 HON. F. SCOTT McCOWN: Put here is  
12 the problem: You've got two different  
13 actors. The court doesn't act within the time  
14 required. Now, the doctor needs a piece of  
15 paper saying, "I can do this." The court  
16 hasn't acted. It doesn't do any good to say  
17 that the court will issue a record that it  
18 hasn't acted, because if the court is ignoring  
19 its duty to act and hasn't acted once, it can  
20 ignore its duty to act and not act twice. So  
21 you have a second party, which is the clerk,  
22 that issues the piece of paper that says the  
23 court didn't act.

24 HON. SARAH B. DUNCAN: Why do you do  
25 that? The court -- maybe this is semantics

1 when they're filed. We note that they were  
2 filed and they have a date and time stamp on  
3 them.

4 HON. F. SCOTT McCOWN: But if I'm a  
5 doctor, I don't know if there's an order in  
6 the file or not. I need a piece of paper from  
7 the clerk telling me that there is no order in  
8 the file.

9 HON. SARAH B. DUNCAN: No. What you  
10 need is -- it seems to me, what I would need,  
11 as the doctor, is a piece of paper that is the  
12 order granting the application because the  
13 court failed to act on it.

14 MR. YELENOSKY: Signed by?

15 HON. SARAH B. DUNCAN: Signed by the  
16 court.

17 MR. YELENOSKY: But the court  
18 doesn't do it.

19 HON. SARAH B. DUNCAN: The court has  
20 acted by failing to act.

21 HON. F. SCOTT McCOWN: But they  
22 refused to sign it, or they don't sign. They  
23 didn't sign the first time. You're acting  
24 like how could that possibly happen, yet  
25 they've already been told to do it within

1 48 hours. They've already failed once. So  
2 assuming they failed once, we're not going to  
3 let them fail again.

4 CHAIRMAN BABCOCK: Judge Rhea.

5 HON. BILL RHEA: If you take out  
6 that language "upon the minor's request," it  
7 seems to me that you're making it more  
8 difficult for the minor to get the piece of  
9 paper. Because if you take it out, then the  
10 clerk has got the obligation to certify it.  
11 What are we going to do? Where is the clerk  
12 going to get the information that the judge  
13 hasn't acted? It may just sit there for a  
14 week or two. And then if the minor comes up  
15 and asks for it, the clerk says, "What are you  
16 talking about?" Then here is this rule that  
17 says upon the minor's request the clerk shall  
18 do it. It seems to me the minor is at least  
19 as well off and probably better off with this  
20 on it.

21 PROFESSOR CARLSON: And what if the  
22 minor doesn't ever ask?

23 HON. BILL RHEA: Well, she's got an  
24 attorney.

25 HON. F. SCOTT McCOWN: If she didn't

1 granted, then it is granted. And if I'm a  
2 provider out there, I don't want to know that  
3 you didn't act. I want this statute to be  
4 implemented, and I want an order that says  
5 that application is granted. That's  
6 completely different from saying the court  
7 failed to act.

8 CHAIRMAN BABCOCK: That's what the  
9 clerk's form says. That's what the clerk's  
10 form is supposed to say, right?

11 HON. SARAH B. DUNCAN: Yes, deemed  
12 granted.

13 PROFESSOR CARLSON: I understood the  
14 legislative intent was that there had to be a  
15 judgment granted in the event of inaction.

16 PROFESSOR DORSANEO: There is a form  
17 here, isn't there? 3D? Why don't we look at  
18 it and see if it would make any sense to a  
19 doctor.

20 MS. LOPEZ GARCIA: Form 2D.

21 MR. PEMBERTON: The term "deemed  
22 granted" comes from the statute.

23 CHAIRMAN BABCOCK: It's like a  
24 motion for new trial, deemed overruled, no  
25 order.

1 ask, then she didn't want it. She's changed  
2 her mind.

3 PROFESSOR CARLSON: Where is the  
4 judgment? In every other instance, I agree  
5 with Justice Duncan, you end up with a  
6 judgment of the court, and that defines the  
7 date and the time and --

8 CHAIRMAN BABCOCK: Well, if this  
9 plays out the way that it's kind of playing  
10 out, the 48 hours passes, the minor, either by  
11 herself or through her attorney, gets her  
12 certificate from the clerk. That certificate  
13 is taken to the doctor and the procedure is  
14 performed. The court may sometime later  
15 decide something, although by then it's moot.  
16 I mean, you can come up with another piece of  
17 paper if you want, but you will have a file  
18 that won't be finished in the traditional  
19 sense, but what does it matter, because all of  
20 the relief that's requested is granted. And  
21 it's not like the media is going to come get  
22 you, because they can't see it.

23 HON. SARAH B. DUNCAN: I don't know,  
24 I maybe we're not communicating. If the  
25 statute says the application is deemed

1 HON. F. SCOTT McCOWN: I mean, as a  
2 trial judge, I can sleep at night even knowing  
3 there are so many motions for new trial out  
4 there that have been overruled by operation of  
5 law and I've not tied up the paperwork.

6 HON. SARAH B. DUNCAN: I'm sorry,  
7 but that's completely different. Because if a  
8 motion for new trial is overruled by operation  
9 of law, there is an extant judgment. It  
10 exists. We can look at it. We can touch it.  
11 But what we're talking about is a judgment  
12 that isn't.

13 PROFESSOR ALBRIGHT: There is no  
14 judgment.

15 HON. ANN CRAWFORD McCLURE: It is  
16 legislatively granted realistically. It  
17 wasn't by the judge. It was deemed granted by  
18 the Legislature, because the judge didn't act  
19 within the time frame. That's realistically  
20 what it is. And I understand your confusion.

21 HON. SARAH B. DUNCAN: But is that  
22 in and of itself a judgment? I mean, what  
23 we've got here is a clerk issuing what is, in  
24 legal effect, a judgment. No, it's a  
25 judgment. The application is deemed to be

1 granted. That's a judgment.

2 CHAIRMAN BABCOCK: That's what the  
3 statute says. Richard.

4 MR. ORSINGER: Both at the trial  
5 court level and the court of appeals, and now  
6 the court of appeals to the Supreme Court  
7 level, we're saying that the passage of time  
8 is tantamount to a grant. It doesn't say that  
9 it's tantamount to a signed order. And it  
10 says that the physician is entitled to go  
11 ahead and perform the abortion. So the  
12 legislation says that if the court doesn't  
13 act, the operation goes forward. And there's  
14 no requirement that there be a piece of paper  
15 for the operation to go forward, if this  
16 clause applies.

17 And let me say as an aside that I'm  
18 bothered by the forms because they don't  
19 identify the woman. So if we take this form  
20 into the hospital and it's "Jane Doe" and her  
21 name isn't anywhere on here, how the hell do  
22 they know it's the right Jane Doe?

23 HON. ANN CRAWFORD McCLURE: Now,  
24 there is a verification page, and I know you  
25 all didn't get these in time to thoroughly

1 appeals fails to act, the operation goes  
2 forward. It doesn't say that there is any  
3 appeal to the Supreme Court and that the  
4 operation is delayed because of the appeal to  
5 the Supreme Court or anything else.

6 HON. ANN CRAWFORD McCLURE: There is  
7 a provision that says, "An expedited  
8 confidential appeal shall be available to any  
9 pregnant minor to whom a court of appeals  
10 denies an order authorizing the minor to  
11 consent." Now, if it's not the Supreme Court,  
12 I don't know who it is.

13 JUSTICE HECHT: The Court of  
14 Criminal Appeals, I hope.

15 CHAIRMAN BABCOCK: It's 33.004(f).

16 HON. ANN CRAWFORD McCLURE: It's  
17 kind of buried in the intermediate paragraph.

18 MR. ORSINGER: And this means to the  
19 Supreme Court of Texas?

20 HON. ANN CRAWFORD McCLURE: Well,  
21 our subcommittee decided that that was  
22 probably the best thing we could recommend.

23 HON. F. SCOTT McCOWN: Unless it's  
24 any court in Texas.

25 CHAIRMAN BABCOCK: That's right. In

1 analyze it, but the concept is there is a  
2 verification page that she has to fill out  
3 that gives her identity, that is marked with  
4 the docket number. It is removed from the  
5 court file and placed under seal or in a vault  
6 or someplace secure and separate. She is  
7 given a certified copy of her verification  
8 page that has her name on it and the docket  
9 number. What the doctors asked for was, "We  
10 want some document from the court showing it's  
11 either been granted or he didn't act in time  
12 and it's deemed to be granted, and some  
13 mechanism by which we can match identity."  
14 And that's what we tried to do.

15 MR. ORSINGER: Okay. So the  
16 document the woman has, they can match the  
17 cause number up with the order and realize  
18 it's the same woman?

19 HON. ANN CRAWFORD McCLURE: Yes.

20 MR. ORSINGER: Okay. Then my next  
21 question is, who says she has the right to  
22 appeal to the Supreme Court? If you read the  
23 statute, it only provides for an appeal to the  
24 court of appeals, and it doesn't provide for  
25 any -- it just says that if the court of

1 this state. Okay. Does that solve your  
2 problem?

3 MR. ORSINGER: Yeah.

4 CHAIRMAN BABCOCK: All right. Now,  
5 Sarah, have you still got -- yeah, you're  
6 bemused by all of this.

7 HON. SARAH B. DUNCAN: It's just  
8 never-never land.

9 CHAIRMAN BABCOCK: All right.  
10 Richard had raised a point earlier --

11 HON. SARAH B. DUNCAN: How can you  
12 not have --

13 MR. ORSINGER: You can by being a  
14 legislature and passing a law like this.

15 HON. SARAH B. DUNCAN: But all the  
16 statute says is, "If the court of appeals  
17 fails to rule on the appeal within the period  
18 specified by this subsection, the appeal is  
19 deemed to be granted and the physician may  
20 perform the abortion as if the court had  
21 issued an order authorizing the minor to  
22 consent to the performance of the abortion  
23 without notification under Section 33.002."  
24 And that's fine. All they're saying is that  
25 it's deemed granted by failure to act.



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1 They don't say that the court, by rule,  
2 is going to create a class of cases in which  
3 the only order in existence is an order that's  
4 been reversed.

5 MR. YELENOSKY: Well, it doesn't say  
6 that.

7 MR. ORSINGER: No, it gets murky.

8 MR. YELENOSKY: Presumably you would  
9 issue a judgment. But in those courts where  
10 you can't get a signed judgment because the  
11 court won't do it in a timely manner, you need  
12 somebody who has administrative duty to issue a  
13 piece of paper for the doctor, and that's the  
14 clerk.

15 HON. SARAH B. DUNCAN: I'm not  
16 disagreeing with that.

17 MR. YELENOSKY: Then what are you  
18 doing?

19 HON. SARAH B. DUNCAN: The court  
20 must issue an order granting the application  
21 if they fail to act within the time specified  
22 by the statute.

23 MR. YELENOSKY: And if they don't,  
24 the clerk can't make the court do that.

25 HON. SARAH B. DUNCAN: Well, I would

1 is another mechanism where the child can go to  
2 the clerk. And the clerk will issue this  
3 piece of paper, which the doctors are saying,  
4 "For our protection, we've got to have it."

5 Right?

6 HON. ANN CRAWFORD McCLURE: Right.  
7 Part of our concern also was on this time  
8 frame. Let's suppose it's filed in the middle  
9 of July and everybody is on vacation or  
10 they're all attending the Economic Institute  
11 in Lawrence, Kansas, or wherever all of the  
12 judges happen to be, and there is inaction.  
13 And now she's got a legislative grant to go  
14 forward, and there's no judge to sign it.

15 HON. SARAH B. DUNCAN: And I'm not  
16 suggesting there should not be a procedure by  
17 which the clerk certifies for a lack of  
18 action. All I'm suggesting is, in every other  
19 kind of case we are required to issue a final  
20 order or a judgment disposing of that matter.  
21 I'm not even sure how the Office of Court  
22 Administration is going to let us dispose of  
23 these statistically.

24 MR. HATCHELL: One reason you have a  
25 judgment as opposed to a record of inaction is

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1 say regardless of whether the court does that  
2 or not, fulfills that obligation, of course,  
3 you can always go to the clerk and get a  
4 certified copy of something that exists or a  
5 certification by the clerk that it does not  
6 exist.

7 CHAIRMAN BABCOCK: And that's kind  
8 of what they're trying to do. I think maybe  
9 we're arguing about that less-than-one-percent  
10 of the cases where the court of appeals does  
11 not do what the statute and the rules require  
12 them to do that.

13 HON. SARAH B. DUNCAN: These rules  
14 don't require us to issue an order.

15 CHAIRMAN BABCOCK: Well, but the  
16 statute does. The statute gives you two days  
17 to do something. And these rules, as I  
18 understand it, say that if the court itself  
19 does not provide the minor with a piece of  
20 paper that she can take to the doctor and say,  
21 "See, I win on this," and then the doctor  
22 says, "Great, okay, let's go," then in that  
23 instance, in that rare instance, which would  
24 never happen in the San Antonio Court of  
25 Appeals, but in that rare instance, then there

1 because the only extant judgment is a judgment  
2 that contains findings. The only findings  
3 made by anybody authorized to make findings in  
4 this case --

5 THE REPORTER: Mr. Hatchell, could  
6 you please speak up.

7 MR. HATCHELL: I was saying the  
8 reasons we have a judgment of a case on  
9 appeal, as opposed to just an order of  
10 inaction, is because you have a live,  
11 unsuperseded judgment that denies the  
12 application, which, under the statute,  
13 contains findings which are contrary to the  
14 right which is being sought.

15 There are many cases that hold that if  
16 your last judgment is set aside, it is a  
17 binding judgment. So basically what you end  
18 up with, under our procedure, is something  
19 that says, "We have failed to take an action,  
20 and we deem it's granted," but on the other  
21 hand, this judgment is still alive. And there  
22 are cases in Texas which will recognize the  
23 existence of two live judgments at the same  
24 time.

25 And this procedure which the legislators



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1 set up is impossible. The only way you can  
2 solve Sarah's dilemma is to amend our rules to  
3 say, you used to on the judgment, but at least  
4 setting aside the trial court's judgment.

5 MR. ORSINGER: But Mike, by that  
6 time, it's mooted because the abortion is  
7 over, and all you should do at that point is  
8 dismiss the whole proceeding.

9 MR. HATCHELL: That's probably  
10 right.

11 MR. ORSINGER: So you shouldn't be  
12 issuing an order, because it's going to be  
13 moot by the time you issue it.

14 PROFESSOR CARLSON: So when does the  
15 plenary power of the court of appeals expire?  
16 It could run, under Rule 19, from the day of  
17 the judgment. What you have is a certificate  
18 from the clerk saying that, well, they didn't  
19 act in time. Now what? I'm not worried about  
20 the minor getting the abortion. That's taken  
21 place with the certificate. What I'm  
22 concerned about is our judicial process and  
23 having a judgment of the court.

24 HON. SARAH B. DUNCAN: It's the  
25 conceptual basis of the proceeding. And I

1 just a defense to a criminal action? It's not  
2 really -- I mean, you can say it's consent,  
3 whether or not it's deemed consent or whether  
4 or not you obtained consent. When this really  
5 becomes relevant is when you go to a criminal  
6 trial and a doctor is charged with this. So  
7 we may be arguing about something that really  
8 doesn't add that much value.

9 HON. ANN CRAWFORD McCLURE: This  
10 whole scheme was set up at the request of the  
11 medical care providers on the subcommittee who  
12 made it quite clear that they were not going  
13 to perform the abortions unless they had  
14 something indicating inaction resulting in a  
15 deemed granting of the application.

16 MR. ORSINGER: They wanted a piece  
17 of paper they can look at. They don't want to  
18 just count calendar days.

19 HON. SARAH B. DUNCAN: Well, why  
20 aren't there alternatives? We can certainly  
21 provide for certification and also a final  
22 order.

23 CHAIRMAN BABCOCK: The voice of the  
24 clerk is speaking.

25 PROFESSOR DORSANEO: And it's not

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1 don't think it's inconsistent. I rarely  
2 scream at Michael Hatchell, but I don't think  
3 it's necessarily inconsistent with the words  
4 of the statute to tell the court of appeals  
5 that in this case, like in any other, you will  
6 render a judgment. And regardless of whether  
7 you do or not, the applicant can go get a  
8 certification from the clerk as to whether you  
9 acted or not in a timely fashion.

10 MR. EDWARDS: Why don't you just put  
11 in there that if the court doesn't act within  
12 the time prescribed, the court will dismiss  
13 the case as moot?

14 MR. ORSINGER: Better dismiss the  
15 trial court proceeding as moot, not the  
16 appellate proceeding.

17 HON. F. SCOTT McCOWN: These are  
18 stand-alone rules. We're not creating  
19 precedent for other cases or other  
20 procedures. They are stand-alone rules to  
21 meet a legislative mandate of a particular  
22 problem, and it's just a very practical a lot  
23 way to get it done.

24 HON. MICHAEL H. SCHNEIDER:  
25 Shouldn't we also keep in mind that this is

1 possible to hear at this end of the room.

2 CHAIRMAN BABCOCK: Speak up,  
3 everybody.

4 MS. GROOMER: I have one other  
5 observation with regard to the clerk  
6 certificate that we discussed. One thing that  
7 the doctors were very concerned about was the  
8 ability to marry up the verification page that  
9 is removed from the application and never  
10 proceeds with the case from the trial court  
11 level. If it goes up to appeal, the  
12 verification page is not sent up. It only  
13 resides with the trial court clerk.

14 And the doctors were very concerned about  
15 having access to that verification page,  
16 matching it up with the correct minor to do  
17 the procedure on the correct person. So the  
18 certificate is a way to marry up the  
19 verification page with a written record from  
20 the court that there is no order entered, so  
21 it's deemed granted, and here is your  
22 verification. And they wanted both of those,  
23 of course, a certified copy of the  
24 verification page under seal and the notice  
25 under seal. There has to be a way to get back

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1 to them the verification of the identity.

2 CHAIRMAN BABCOCK: Justice McClure,  
3 having heard these concerns, is there anything  
4 that you want us to propose, suggest?

5 HON. ANN CRAWFORD McCLURE: How  
6 about legislative amendments?

7 CHAIRMAN BABCOCK: Short of  
8 legislative amendments.

9 HON. ANN CRAWFORD McCLURE: I think  
10 it's important that -- and we tried to do that  
11 by footnote and comment. The difficulty was  
12 implementing the scheme at the appellate level  
13 certainly, and I don't disagree with the  
14 problems that both of you are expressing, and  
15 perhaps it would be appropriate for this  
16 committee to reinforce those difficulties to  
17 the Supreme Court to try and resolve some of  
18 the issues.

19 This was a long process in my committee  
20 to come up with something that everybody could  
21 sign on to, and I'm uncomfortable at this  
22 point making alterations in that scheme on  
23 behalf of my subcommittee. So I would  
24 encourage you, if you could reach a consensus  
25 that you can support, that you do it by way of

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1 expressing your opinion.

2 CHAIRMAN BABCOCK: Okay. I think  
3 what we should do is this: Bob, if you could  
4 note for the Court that there is considerable  
5 consternation among some of the appellate  
6 specialists on our committee concerning this  
7 never-never land proceeding; that it is just  
8 going to be out there in the ether; and that,  
9 while we won't propose any particular concrete  
10 solutions, we think that there's a potential  
11 problem there. Is that a fair analysis?

12 HON. F. SCOTT McCOWN: Well, I'm not  
13 sure what you mean by the word "considerable."  
14 Are you talking about the strength of their  
15 individual feeling or the strength of their  
16 numbers?

17 CHAIRMAN BABCOCK: I was confining  
18 it to a small group of lawyers on our Advisory  
19 Committee that specialize in appellate  
20 practice. So I would not say that the concern  
21 is shared by Anne McNamara, just to pick  
22 somebody. Have I got that straight, Anne?

23 MS. McNAMARA: You've got it right.

24 MR. ORSINGER: A few are concerned;  
25 the rest don't care.

1 CHAIRMAN BABCOCK: Well, we wouldn't  
2 want to say that we're uncaring either.  
3 Bill and then Carl.

4 PROFESSOR DORSANEO: Well, I'm back  
5 on Form 3D, and I would like that form to say  
6 what it means, that the application is  
7 granted. Well, I'm looking at 3D, and Nina  
8 tells me 2D is the same thing.

9 CHAIRMAN BABCOCK: 2D is the trial  
10 court and 3D is the court of appeals.

11 PROFESSOR DORSANEO: All right. I  
12 guess I'm really talking about 2D and then  
13 also talking about 3D. I don't like language,  
14 even though the statute uses the language  
15 "deemed to be granted," I mean, it either is  
16 granted or it isn't granted. Let's have it be  
17 granted. And let's say what that means, so  
18 somebody reading it can know that it means  
19 that you can perform the abortion on getting  
20 the consent of the right person. And it might  
21 be a good idea to indicate how you ascertain  
22 who the right person is.

23 CHAIRMAN BABCOCK: You would say  
24 "granted by operation of law" or something  
25 like that?

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1 PROFESSOR DORSANEO: "Granted" is  
2 fine with me.

3 CHAIRMAN BABCOCK: Okay. Carl.

4 MR. HAMILTON: I just wondered if  
5 any thought was given to this question of how  
6 the trial court transmits the notice of record  
7 to the court of appeals. Because if this  
8 happens, let's say, Monday afternoon at 4:30  
9 and the notice of appeal is filed, then the  
10 appellate court has to rule by 5:00 o'clock on  
11 Wednesday. They're not even going to have the  
12 record in most cases or the notice by that  
13 time.

14 CHAIRMAN BABCOCK: That's the next  
15 issue on our checklist here, the record on  
16 appeal. We'll get to that in one second  
17 here. Any other comments? Richard, do you  
18 have a comment?

19 MR. ORSINGER: Bill's suggestion  
20 that we turn the "deemed granted" to "granted"  
21 troubles me a little bit, especially if it's  
22 signed by a clerk. I think a clerk could sign  
23 something that by operation of law is deemed  
24 granted, but I don't know. If the court  
25 doesn't act and the clerk is certifying that

1 the court didn't act, it seems to me like we  
2 shouldn't that the court is acting, we should  
3 just say that by law it's as if the court  
4 acted. I know it sounds bizarre.

5 CHAIRMAN BABCOCK: Ann, do you  
6 accept Bill's recommendation?

7 HON. ANN CRAWFORD McCLURE: No.

8 CHAIRMAN BABCOCK: Okay. So we  
9 don't need to discuss that.

10 PROFESSOR DORSANEO: Why don't we  
11 write it in Chinese.

12 CHAIRMAN BABCOCK: We could do that  
13 too.

14 HON. ANN CRAWFORD McCLURE: Well, we  
15 address Vietnamese, English and Spanish. We  
16 can put it in Chinese too.

17 CHAIRMAN BABCOCK: Justice Duncan.

18 HON. SARAH B. DUNCAN: Well, I would  
19 defer to Chief Justice Hardberger on this, but  
20 our clerks don't even want to tell you when a  
21 brief is due. Now, it's just beyond my  
22 imagination that clerks are going to be  
23 comfortable with basically granting an  
24 application to bypass parental notification.

25 CHAIRMAN BABCOCK: Well, it's an

1 probably going to be in the city where the  
2 woman lives or at least close by to it, why  
3 don't we file it with the court of appeals and  
4 send a copy to the Supreme Court instead of  
5 filing it in the Supreme Court. You're going  
6 to lose another two days if you mail it to the  
7 Supreme Court, and then they're going to  
8 contact back to the court of appeals, which is  
9 then going to have to mail something back to  
10 the Supreme Court. And we've lost five or  
11 seven days, and we've got everybody else  
12 running around on a 48-hour or two-business-  
13 day timetable, and I don't see the logic.

14 HON. F. SCOTT McCOWN: Does the  
15 Supreme Court have fax filing?

16 MR. PEMBERTON: Not at the present  
17 time.

18 CHAIRMAN BABCOCK: Do you accept  
19 that change, Justice McClure?

20 HON. ANN CRAWFORD McCLURE: Not on  
21 behalf of the subcommittee, I can't, because  
22 we had that debate.

23 CHAIRMAN BABCOCK: So we'll add the  
24 language "with a copy to the clerk of the  
25 court of appeals," unless anybody objects.

1 administerial duty for sure.

2 MR. ORSINGER: By a non-elected  
3 official, I might add.

4 CHAIRMAN BABCOCK: A district clerk?

5 MR. ORSINGER: No. The clerk of the  
6 court of appeals who is going to be signing  
7 all of these when the court of appeals never  
8 rules on them.

9 HON. ANN CRAWFORD McCLURE: We did  
10 have one appellate court clerk on the  
11 committee who was comfortable with this  
12 language.

13 CHAIRMAN BABCOCK: Justice McClure,  
14 Richard's point, made several hours ago, that  
15 on Rule 4.1 the notice should be filed with  
16 the Supreme Court with a copy to the clerk of  
17 the court of appeals, is that something you  
18 can accept or not?

19 HON. ANN CRAWFORD McCLURE: Sure.  
20 With a copy to the court of appeals, I think.

21 CHAIRMAN BABCOCK: To the clerk of  
22 the court of appeals. Is that okay with you,  
23 Richard?

24 MR. ORSINGER: Yeah. But I would  
25 make a plea, since the court of appeals is

1 Does anybody object? No objections.

2 MR. ORSINGER: Can I make a comment  
3 on record, or have you moved on from record?

4 CHAIRMAN BABCOCK: No, we're going  
5 to the record, but let's let Justice McClure  
6 tell us what their thinking was on that.

7 HON. ANN CRAWFORD McCLURE: There  
8 was a great deal of interest in whether we  
9 would permit audiotape recordings of the trial  
10 proceeding in the event that the recorder's  
11 record could not be prepared. After a  
12 considerable amount of debate and a great deal  
13 of input from appellate judges, who are  
14 adamantly opposed almost universally to  
15 disallowing audiotapes, and after consultation  
16 with the court reporters that the record could  
17 be transcribed immediately after the  
18 proceeding, we opted to require the  
19 preparation of a formal reporter's record  
20 instant after the proceedings, at which  
21 point no one yet will know whether there is  
22 going to be an appeal. Now, obviously, if  
23 there's a denial, you can pretty much  
24 guarantee that there will be.

25 But in any event, the reporters are going

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1 to go ahead, in our version of the rules, and  
2 prepare a reporter's record for transmission  
3 to the court of appeals.

4 CHAIRMAN BABCOCK: Richard.

5 MR. ORSINGER: My first comment is  
6 that under Rule 3.2(b), the trial clerk has to  
7 forward the reporter's record, but there's no  
8 duty on the reporter to prepare the reporter's  
9 record. And so I can foresee that there's a  
10 conflict there where the district clerk is the  
11 one who has the duty to comply and no power to  
12 comply. And should we not have a sentence in  
13 here that requires the court reporter to  
14 prepare it?

15 HON. ANN CRAWFORD McCLURE: There  
16 is. Let me find it for you.

17 PROFESSOR ALBRIGHT: 2.4(d).

18 MR. ORSINGER: 2.4(d) just says that  
19 the court reporter has to make a record. It  
20 doesn't say it has to transcribe it.

21 HON. F. SCOTT McCOWN: It says the  
22 recording must be transcribed.

23 MR. ORSINGER: Well, I'm reading  
24 something that says, "The hearing must be  
25 transcribed." What are you looking at?

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1 HON. F. SCOTT McCOWN: "The hearing  
2 must be transcribed."

3 MR. ORSINGER: In my view that means  
4 that the court reporter makes a record of  
5 what's said. That doesn't mean that you type  
6 it. You only type it up in the event that  
7 there's going to be an appeal.

8 HON. F. SCOTT McCOWN: "Transcribe"  
9 means to type it up.

10 MR. ORSINGER: So this means that  
11 every time there's a hearing, they have to  
12 type it up, even if it's granted?

13 HON. ANN CRAWFORD McCLURE: Yes.

14 MR. ORSINGER: Why?

15 HON. ANN CRAWFORD McCLURE: Because  
16 there is a provision that, to the extent  
17 there's sexual assault on the child or abuse,  
18 the court has a duty to refer that for  
19 investigation and potential prosecution. And  
20 the concept was those notes may be necessary  
21 in order to facilitate that provision of the  
22 statute.

23 MR. ORSINGER: So because of the  
24 instances in which we have suspected sexual  
25 abuse, we're going to transcribe all of them

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1 that have no sexual abuse and no dispute, and  
2 the court reporters are going to all do that?

3 HON. HARVEY G. BROWN, JR.: And the  
4 State of Texas is going to have to pay for  
5 it. The court reporters are paid by the State  
6 of Texas under the statute.

7 HON. ANN CRAWFORD McCLURE: Under  
8 the statute, the Department of Health is going  
9 to be responsible for payment of the ad litem  
10 and the reporters. We've drafted forms to  
11 that effect. The Department of Health did not  
12 receive explicit appropriations in the budget  
13 process for that. They do have the ability  
14 under their budget to juggle. I have gotten a  
15 letter from the director of the department.  
16 They are trying to come up with some sort of  
17 uniformity.

18 They had asked our subcommittee to draft  
19 some sort of guideline on ascertaining fees  
20 for ad litem and for the guardians and for  
21 the court reporters, which we declined to do,  
22 but we put them in touch with the people that  
23 keep those records, OCA in particular.

24 CHAIRMAN BABCOCK: Judge Rhea.

25 HON. BILL RHEA: I think that's

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1 potentially a very large expense. I have no  
2 idea how many of these will be filed, but if  
3 it's any significant number, and then we  
4 could -- I could envision getting into a long  
5 hearing on it and having a long record.

6 JUSTICE HECHT: The estimates are  
7 2,000 cases a year statewide. Our state  
8 agency people project that, and that the  
9 average hearing is 15 minutes.

10 HON. ANN CRAWFORD McCLURE: Fifteen  
11 to 30, I think, is what they predicted.

12 JUSTICE HECHT: So you would have  
13 probably a 15- or 20-page record, that would  
14 be the average. If you had 2,000 cases, it  
15 might be \$100 for the record, so you're  
16 looking at \$20,000 -- \$200,000.

17 HON. F. SCOTT McCOWN: Could we  
18 limit it? Could we say the hearing must be  
19 transcribed when there is any concern about  
20 physical, sexual or emotional abuse, tracking  
21 the language of the statute? Instead of  
22 transcribing it in every single case, just  
23 transcribe it in those cases where that has  
24 been an issue.

25 MR. YELENOSKY: Or where there has

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1 been a denial.

2 MR. ORSINGER: Where it's been  
3 denied or where the court finds reason to be  
4 concerned about the safety of the child or  
5 something.

6 HON. F. SCOTT McCOWN: Because one  
7 problem, particularly in a county where by  
8 local rule you're going to maybe limit the  
9 number of judges who are hearing these cases,  
10 is you're going to tie your court reporter up  
11 in the preparation. These are presumably  
12 shorter records, but you're going to be tying  
13 your court reporter up in the preparation of  
14 those records. And \$200,000 is not an  
15 inconsiderable sum, particularly since the  
16 Department of Health is taking it out of some  
17 important line items. So why can't we limit  
18 it to when we need it?

19 CHAIRMAN BABCOCK: Judge Medina.

20 HON. SAMUEL A. MEDINA: One of the  
21 other concerns, Scott, was the fact that often  
22 times court reporters have their own  
23 shorthand, and if they don't get it done now,  
24 if they put it up, something results later,  
25 where maybe they found abuse and they want to

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1 know more about it in this hearing, and for  
2 whatever reason, that court reporter is no  
3 longer there, you can't find them, they die,  
4 something, and it's very difficult to  
5 transcribe their notes with their shorthand.

6 HON. F. SCOTT McCOWN: Well, I  
7 understand that.

8 HON. SAMUEL A. MEDINA: So it says  
9 they need to get it done like that.

10 HON. F. SCOTT McCOWN: But I hear a  
11 regular docket of child abuse cases where all  
12 we're talking about are allegations of  
13 physical, sexual and emotional abuse, and  
14 there's no requirement that those hearings be  
15 transcribed. And yet here, where it might  
16 come up, we're requiring that they all be  
17 transcribed.

18 CHAIRMAN BABCOCK: Judge Rhea.

19 HON. BILL RHEA: And didn't we hear  
20 somewhere that these records were destroyed  
21 after 60 days? Is that right?

22 HON. ANN CRAWFORD McCLURE: No.  
23 There is a retention period for a minor, two  
24 years past the age of majority. I forget  
25 precisely what the other language is.

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1 Cindy, do you recall explicitly what the  
2 other language was on retention, records  
3 retention? It was two years past majority  
4 and --

5 MS. GROOMER: And then 60 days after  
6 the retention period has expired after the age  
7 of majority.

8 MR. YELENOSKY: What's the purpose  
9 of that? If it's been granted, the abortion  
10 has been performed, it's moot, why are we  
11 retaining -- why did we transcribe them, and  
12 why are we retaining them?

13 HON. ANN CRAWFORD McCLURE: There  
14 was a concern expressed about liability  
15 issues, ad litem liability issues.

16 MS. SWEENEY: What about doctor  
17 liability issues?

18 HON. ANN CRAWFORD McCLURE: And  
19 doctor liability issues, too.

20 MS. GROOMER: And also the need of  
21 the record for potential criminal  
22 proceedings.

23 MR. ORSINGER: Where is the  
24 retention requirement?

25 MR. PEMBERTON: It's 1.6.

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1 CHAIRMAN BABCOCK: Okay. To the  
2 extent that Judge McCown is making a proposal  
3 to limit the number of cases that are  
4 transcribed by the clerk, does the  
5 subcommittee accept that suggestion?

6 HON. ANN CRAWFORD McCLURE: No.

7 CHAIRMAN BABCOCK: Anything else.

8 MR. ORSINGER: I'm sure going to  
9 second that. I think that's important.

10 CHAIRMAN BABCOCK: Do we want to  
11 have a vote? Okay. How many people think  
12 that the number of cases that should be  
13 transcribed by the court reporter should be  
14 limited in some fashion to cases of denial and  
15 allegations of abuse? Raise your hand.

16 MR. YELENOSKY: I mean, we were just  
17 told, sort of as an afterthought, that the  
18 doctors wanted this, and I've just heard that  
19 now. Originally, it was because there may be  
20 sexual abuse that we would need to refer. In  
21 mulling that over, I couldn't see why to keep  
22 it. But now there's an argument that we do  
23 need them in every instance because the  
24 doctors, the providers, are saying that. And  
25 so I want to --

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CHAIRMAN BABCOCK: Well, that's what Judge Medina was saying.

HON. SAMUEL A. MEDINA: No. I'm saying that the court reporters -- what happens if you need it later on and you don't have that same court reporter? It's not -- I mean, this court reporter may not be able to transcribe somebody else's notes because they all have their own shorthand.

MR. YELENOSKY: Well, I understand that. But unless I misunderstood, I thought the reason why we needed a transcription in retention was because of potential liability, which is a problem or a potential in every case, and so that would persuade me to transcribe it in every instance, if in fact that's a good argument. But it was just thrown out as an afterthought. So I feel kind of caught up without a chance to even discuss that to understand where that came from, and if in fact that was the providers saying that we need this protection or we're not going to do the procedure.

HON. ANN CRAWFORD MCCLURE: There was some concern expressed by the providers to

MS. SWEENEY: The concern on liability, I think, is that the doctors may have thought that they were protecting themselves. But with all due respect, it goes other way, and you're building in malpractice cases by creating all these records.

HON. SAMUEL A. MEDINA: But the minor has a right. I would rather -- if she has a basis for it, there ought to be a record there. If she doesn't, there shouldn't be. It cuts both ways.

CHAIRMAN BABCOCK: Judge Rhea.

HON. BILL RHEA: And to add in, I think it's still the rule, at least it used to be, but the court reporter standard, and I don't see David still here, was that they, by statute, could destroy their records after three years. So if we're talking seven years down the line, those records may not only be untranscribable; they may not exist anymore.

PROFESSOR DORSANEO: Well, they would be destroyed in three years, unless somebody tells the court reporter not to do that under the case law, I believe.

CHAIRMAN BABCOCK: Buddy Low and

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that effect, a record of the proceeding.

MR. ORSINGER: What difference does it make to the doctors?

HON. BILL RHEA: They have the order.

CHAIRMAN BABCOCK: Hang on, hold on. One at a time. Judge Medina.

HON. SAMUEL A. MEDINA: Okay. And so this child is 13. She's going to be -- what, two years after she's 18, she's now 20. That's seven years. You've got that record there. It's already transcribed. It's been there for seven years. Something happens. That court reporter is no longer available. It's transcribed. It's there.

CHAIRMAN BABCOCK: Is that two years meant to tie to the statute of limitations for medical negligence?

MR. YELENOSKY: And what about the proceeding concerned them that it be preserved?

HON. SCOTT A. BRISTER: The claim against the doctor is going to be by the minor that "You forced me into getting this abortion."

then Judge Peeples and then Richard.

MR. LOW: Well, it doesn't matter what we vote to do. But if the doctors say they're not going to perform an abortion without a record being typed, and some of them take that, the girl is not going to get one. So I mean, it's not just a question -- it might be more than just the legal issues involved. And I know a lot of doctors, if they're going to do something like that, they want a record. They want a lot more than just one piece of paper, if they get sued civilly or criminally.

CHAIRMAN BABCOCK: Judge Peeples.

HON. DAVID PEEPLES: I support the McCown motion because I'm very concerned that trial judges, who need their court reporters to be in court reporting, are going to have to make arrangements for the reporter to be preparing these records that are absolutely useless unless there is denial or abuse.

CHAIRMAN BABCOCK: Okay. Richard.

MR. ORSINGER: It seems to me like the medical professionals ought to be secure in getting a ruling from the court, or a

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1 deemed ruling from the court, without having  
2 to be concerned about going back and second  
3 guessing the court's ruling by looking at the  
4 evidence that led to the court's ruling. Why  
5 doesn't the ruling of the court answer the  
6 questions about whether the doctor should be  
7 able to do the abortion. I think it's a false  
8 issue. I really wonder if doctors really care  
9 about this.

10 And I can see court reporters having to  
11 stay around until 7:30 or 8:00 at night typing  
12 up useless transcripts because somebody walks  
13 in at 4:30 and wants to have one of these  
14 hearing for 15 minutes. Why should we do that  
15 when we don't need it?

16 HON. DAVID PEEPLES: Amen.

17 CHAIRMAN BABCOCK: I think the  
18 sentiments have been fully expressed. Justice  
19 McClure does not accept this amendment, so  
20 what we're doing now is advising the Supreme  
21 Court about the sense of this committee as to  
22 Judge McCown's suggestion that the  
23 transcription should be limited to cases of  
24 denial and abuse.

25 So everybody that's in favor of that

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1 raise their hand.

2 Everybody against. By 25 to five, it is  
3 the sense of this committee that it should be  
4 so limited. And so we'll need to report that  
5 to the Court. Richard.

6 MR. ORSINGER: Can I ask about this  
7 retention period? I may be just having  
8 trouble thinking at this late hour.

9 CHAIRMAN BABCOCK: Are you limiting  
10 it to this late hour?

11 MR. ORSINGER: When will we ever  
12 have one year after the conclusion of an  
13 action that occurs more than two years after  
14 the child obtains majority? In other words,  
15 you don't need this if you're already 18. And  
16 if you add 18 plus two, and if all of this is  
17 going to happen in seven days anyway, we're  
18 never going to be more -- I mean, aren't we  
19 always going to be destroying it two years  
20 after the child turns 18 and not one year  
21 after the proceeding goes final? Why do we  
22 even need (a)(2)?

23 HON. SARAH B. DUNCAN: What if you  
24 had an ongoing criminal proceeding that  
25 extended past, more than two years past

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1 attainment of majority?

2 MR. ORSINGER: No. It's an action  
3 arising from a proceeding under these rules.  
4 Are you talking about derivative lawsuits, or  
5 are you talking about this court proceeding,  
6 which lasts 15 minutes in the courtroom,  
7 48 hours in the court of appeals, and two  
8 business days in the Supreme Court?

9 HON. SARAH B. DUNCAN: I guess I  
10 don't read "in this proceeding" as narrowly as  
11 you do.

12 MR. ORSINGER: So this records  
13 retention requirement on the clerk or the  
14 court reporter is they have to somehow figure  
15 out whether a lawsuit has been filed or  
16 whether there's a criminal investigation or a  
17 criminal proceeding, and then they have to be  
18 sure that they don't destroy while any of  
19 that's going on? That's not reasonable.

20 The only thing that the employees of the  
21 government are going to know is when this  
22 proceeding is over. And it seems to me like  
23 you're always going to have the proceeding  
24 terminate less than two years after the child  
25 turns 18. We're talking about -- it's going

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1 to terminate within seven to 10 days of when  
2 it's filed, and then it will be all over in  
3 the Texas Supreme Court. So how are we ever  
4 going to be more than two years out after the  
5 18th birthday? Let's just take (a)(2) out of  
6 there, because it shouldn't be in there.

7 CHAIRMAN BABCOCK: Justice McClure?

8 HON. ANN CRAWFORD McCLURE: It is my  
9 recollection that it was put in there at the  
10 request of DPRS and the Department of Health.

11 CHAIRMAN BABCOCK: That's what the  
12 annotations indicate.

13 HON. ANN CRAWFORD McCLURE: And I'm  
14 uncomfortable removing it.

15 MR. ORSINGER: Okay. Good.

16 CHAIRMAN BABCOCK: Does anyone else  
17 feel strongly about that?

18 Okay. Then let's move on quickly to  
19 rulings, Justice McClure, and that would be  
20 Paragraph 4 on Page 7 of our memo.

21 MR. HAMILTON: I still have a  
22 question on forwarding the record. It just  
23 says forwarded instanter. It doesn't say how  
24 it is to be forwarded.

25 CHAIRMAN BABCOCK: Let's back up.



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1 Sorry, Carl. I forgot about that.  
 2 MR. HAMILTON: And if you mail it  
 3 from Hidalgo County or Starr County, it will  
 4 take two or three days to get there, so that  
 5 makes the whole point moot.  
 6 HON. ANN CRAWFORD McCLURE: Our  
 7 concept of using "instanter" was to allow for  
 8 fax transmission and email transmission. To  
 9 the counties that have electronic filing, it  
 10 can be forwarded to the court of appeals if  
 11 the capability exists. We tried to draft  
 12 these somewhat broadly, recognizing the  
 13 limitations of our imagination as to what  
 14 technology might come up with next. But the  
 15 concept is it's got to get there and be  
 16 transmitted in whatever form and how quickly  
 17 in whatever medium is necessary to facilitate  
 18 that.  
 19 MR. HAMILTON: Could we put a  
 20 requirement in there that it has to be  
 21 transmitted so that it's received within  
 22 24 hours?  
 23 HON. ANN CRAWFORD McCLURE: I'm not  
 24 opposed to that.  
 25 CHAIRMAN BABCOCK: What rule are you

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1 talking about, Carl?  
 2 MR. HAMILTON: 3.2(b).  
 3 MR. PEMBERTON: At one point we did  
 4 have some language in there specifying fax or  
 5 email or hand delivery, but we took that out  
 6 because we thought "instanter" kind of covered  
 7 that.  
 8 HON. MICHAEL H. SCHNEIDER: I share  
 9 his concern. I know exactly, because we want  
 10 to get the record as quickly as possible. I  
 11 just wonder if we couldn't word it in a way  
 12 where it doesn't look like we're giving them  
 13 24 hours to get it there.  
 14 MR. HAMILTON: The sooner the  
 15 better.  
 16 CHAIRMAN BABCOCK: That's instanter.  
 17 HON. ANN CRAWFORD McCLURE: That's  
 18 why we chose instanter.  
 19 MR. HAMILTON: But I don't know what  
 20 it means to a lot of clerks, but to a lot of  
 21 clerks that means put it in the mail as soon  
 22 as you can.  
 23 HON. ANN CRAWFORD McCLURE: That was  
 24 not the analysis of the clerks that were on  
 25 the subcommittee.

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1 MS. WOLBRUECK: I believe in our  
 2 training to the clerks we will definitely tell  
 3 them what "instanter" means. And I think the  
 4 intent is that we will probably fax it. The  
 5 court of appeals will accept a fax, you know.  
 6 The last alternative would be overnight mail.  
 7 CHAIRMAN BABCOCK: Richard.  
 8 MR. ORSINGER: The statute only  
 9 requires an expedited appeal from the court of  
 10 appeals to the Supreme Court. The  
 11 subcommittee has decided that "expedited"  
 12 means that the record should be shipped  
 13 instanter. I'm not sure what the deadline is  
 14 for the opinion, and then the Supreme Court  
 15 has two business days after it receives the  
 16 opinion. So we really have to -- under your  
 17 rule, we have to get both the record and the  
 18 opinion up there, and then the Supreme Court  
 19 has got two business days to act.  
 20 And do we have a timing requirement on  
 21 when the opinion by the court of appeals has  
 22 to be issued and forwarded? Because there's  
 23 no reason to get the record up there in  
 24 24 hours if the opinion isn't up there for  
 25 three or four days. What's the time limit on

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1 the opinion?  
 2 HON. ANN CRAWFORD McCLURE: You'll  
 3 find it on Page 26 of the annotated rules.  
 4 It's 3.3(c). The opinion must issue not later  
 5 than ten business days after the day on which  
 6 a notice of appeal is filed in the Supreme  
 7 Court, if an appeal is taken to the Supreme  
 8 Court; or 60 days after the day on which the  
 9 court of appeals issued its order under 3.3(a)  
 10 if no appeal is taken.  
 11 MR. ORSINGER: Okay. Well, there's  
 12 no point in getting the record up there in  
 13 24 hours if the opinion doesn't have to be up  
 14 there for 10 days and the Supreme Court isn't  
 15 going to rule until it gets an opinion.  
 16 MR. HAMILTON: How about from the  
 17 trial court, from the trial court to the court  
 18 of appeals?  
 19 MR. ORSINGER: Well, I don't know  
 20 about that. I thought we were talking about  
 21 from the court of appeals to the Supreme  
 22 Court.  
 23 CHAIRMAN BABCOCK: We're talking  
 24 about 3.2(b). We're talking about the trial  
 25 court record now. That's what Carl was

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1 talking about.  
 2 PROFESSOR DORSANEO: I don't know  
 3 what "instanter" means. I suspect, if I went  
 4 and looked it up, it would say right away,  
 5 don't go to lunch, and not within 24 hours.  
 6 And I would rather use English words that we  
 7 maybe have a shot at understanding --  
 8 CHAIRMAN BABCOCK: Bill, before  
 9 Scott leaves, Scott, I think that it's  
 10 unlikely that we're going to be meeting  
 11 tomorrow.  
 12 HON. F. SCOTT McCOWN: Okay. Well,  
 13 now that you've called attention to me  
 14 sneaking out, I'm a single dad today, and I've  
 15 got to take my boy to the Halloween Hoot.  
 16 CHAIRMAN BABCOCK: I tried to do it  
 17 to Latting, but he didn't stop. Okay.  
 18 MR. HAMILTON: You have a lot of  
 19 places that don't even have faxes or  
 20 electronic transmission. So if they put it in  
 21 the mail, it's going to be two days or more  
 22 before it gets to them.  
 23 CHAIRMAN BABCOCK: Well, there is  
 24 Federal Express or UPS or other --  
 25 MR. HAMILTON: Well, I know. That's

1 CHAIRMAN BABCOCK: Buddy says no.  
 2 MR. ORSINGER: And also, Chip,  
 3 they're talking about changing it from  
 4 "forward" to "be received by." That's  
 5 another change. To send it instanter could  
 6 take three days, or you can have it received  
 7 within 24 hours. Two different things.  
 8 CHAIRMAN BABCOCK: Okay. That's a  
 9 good point. Where do you want to go with  
 10 that, Judge?  
 11 HON. ANN CRAWFORD McCLURE: Well,  
 12 given the direction of the clerks who  
 13 participated in this discussion, that they  
 14 were comfortable with instanter, I'm  
 15 comfortable leaving it instanter.  
 16 MR. ORSINGER: Are you comfortable  
 17 leaving it "forward" and not "received," or do  
 18 you want, since we have -- since the court of  
 19 appeals clock is running from the date the  
 20 notice of appeal is given, not the date the  
 21 record is received, should the deadline be  
 22 when it's received and not when it's sent?  
 23 HON. ANN CRAWFORD McCLURE: No, I  
 24 don't think so.  
 25 MR. ORSINGER: A lot of these, then,

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1 what I'm saying. There needs to be something  
 2 in here that ensures that it gets there no  
 3 later than.  
 4 MR. YELENOSKY: I second the motion  
 5 to use language that Bill Dorsaneo and the  
 6 clerks would understand.  
 7 HON. ANN CRAWFORD McCLURE: The  
 8 "instanter" came from the clerks.  
 9 MR. YELENOSKY: I thought you were  
 10 saying, Bonnie, that you would have to train  
 11 on that.  
 12 MS. WOLBRUECK: No. We would do  
 13 training to the clerks explaining instanter.  
 14 MR. LOW: If we do put two days,  
 15 what would be the effect if the record didn't  
 16 get there in three days then? Is it moot?  
 17 What's the effect?  
 18 MR. ORSINGER: It's deemed granted  
 19 at the end of two days.  
 20 MR. LOW: Well, that would be crazy  
 21 just because it got lost in the mail a day.  
 22 CHAIRMAN BABCOCK: Well, here is the  
 23 question: Do we want to change "instanter" to  
 24 "within 24 hours"?  
 25 MR. LOW: No.

1 are going to be deemed granted because the  
 2 record isn't there on time.  
 3 CHAIRMAN BABCOCK: Does everybody  
 4 feel so strongly about it that we should vote  
 5 on that issue?  
 6 MR. ORSINGER: No.  
 7 CHAIRMAN BABCOCK: Okay.  
 8 MR. HATCHELL: Chip, I have a  
 9 comment that dovetails with this and Carl's  
 10 comment in particular. Does the mailing rule  
 11 apply to the notice of appeal?  
 12 HON. ANN CRAWFORD McCLURE: No. We  
 13 have -- Bob, do you remember the footnote  
 14 number?  
 15 HON. SARAH B. DUNCAN: But footnotes  
 16 are just footnotes.  
 17 HON. ANN CRAWFORD McCLURE: I  
 18 understand that.  
 19 MR. PEMBERTON: At some point this  
 20 issue comes up and we draw up a footnote to  
 21 explain.  
 22 CHAIRMAN BABCOCK: A footnote or a  
 23 comment?  
 24 MR. PEMBERTON: A footnote referring  
 25 back to whatever text we have, and I can't

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1 remember exactly where it is, to clarify that  
2 you can't get an appeal deemed granted by  
3 virtue of the mailbox rule. We have language  
4 in there that basically trumps 21a.

5 HON. SARAH B. DUNCAN: That's just a  
6 footnote, right, and we have otherwise  
7 incorporated the Rules of Civil Procedure?

8 CHAIRMAN BABCOCK: The footnotes  
9 aren't going to be available to people, so  
10 it's got to be either a comment or in the  
11 rule.

12 JUSTICE HECHT: It's Footnote 57 on  
13 Page 20.

14 HON. ANN CRAWFORD McCLURE: It says,  
15 "For purposes of this subsection (f), the  
16 date the application is received by the clerk  
17 is the date on which the application is  
18 filed."

19 CHAIRMAN BABCOCK: That needs to go  
20 in a comment, it seems to me.

21 HON. ANN CRAWFORD McCLURE: But that  
22 was rule.

23 CHAIRMAN BABCOCK: Oh, I'm sorry.

24 HON. SARAH B. DUNCAN: But under the  
25 Rules of Procedure --

1 MR. HAMILTON: I would think that we  
2 at least ought to have a requirement that they  
3 forward it by overnight delivery.

4 HON. HARVEY G. BROWN, JR.: Could we  
5 have a comment here? Leave the word  
6 "instanter" in here, but a comment explaining  
7 that, where available, it should be faxed to  
8 the court of appeals? And then, I don't know,  
9 maybe even some distance, if fax isn't  
10 available and you're within 60 miles, it  
11 should be taken by courier? At least  
12 something that gives some direction and  
13 guidance to what we mean by instanter that's a  
14 comment and not as a binding rule?

15 MR. ORSINGER: What about a  
16 courier?

17 HON. ANN CRAWFORD McCLURE: I don't  
18 want to broaden it to include a requirement to  
19 do that. I'm comfortable with it. I mean, it  
20 may not work, but as it stands now, the  
21 committee was comfortable with it.

22 MS. WOLBRUECK: Chip, I think to me,  
23 and I think that we will do the best that we  
24 can to train all of the clerks, that means do  
25 it now; that it needs to get there now. So

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1 HON. ANN CRAWFORD McCLURE: And  
2 Footnote 57 says it's intended to clarify the  
3 mailbox rule.

4 MR. PEMBERTON: And I guess we need  
5 counterpart language for the rules governing  
6 the intermediate courts of appeal and the  
7 Supreme Court. We probably don't have that,  
8 or I'm not sure we do.

9 HON. SARAH B. DUNCAN: Don't the  
10 Appellate Rules actually say that if it's  
11 mailed and received within 10 days, it's  
12 deemed filed on the date that it's mailed?

13 MR. PEMBERTON: Right.

14 HON. SARAH B. DUNCAN: Super.

15 MR. HAMILTON: But the statute runs  
16 from the time of the filing of the notice. In  
17 the statute, the court of appeals has to act  
18 within two business days after the filing of  
19 the notice, regardless of any mailing rule or  
20 anything else.

21 MR. EDWARDS: Filing of the notice  
22 in the court that denied the application.

23 MR. HAMILTON: The trial court.

24 HON. SARAH B. DUNCAN: But it's  
25 deemed filed on the date it was mailed.

1 that means you find a fax machine and you fax  
2 it to the court of appeals now. And if you  
3 can't do that, you get in your car -- or you  
4 take it upstairs, if the court of appeals is  
5 in the same courthouse, as it is in many  
6 counties, or it's down the street or  
7 something, but it's to be delivered  
8 immediately. Because as long as the clerks  
9 know that the time is again tracking and it's  
10 happening, that there's only two days again, I  
11 think that that's just going to have to be  
12 understood.

13 CHAIRMAN BABCOCK: Nina.

14 MS. CORTELL: I have a question. It  
15 covers this and it sort of covers a lot of  
16 other things, and that is the cost aspect of  
17 everything. I mean, couriers, fax, court  
18 reporters, getting the record up, the ad  
19 litem, everybody, I mean, how -- are costs at  
20 all covered here? I mean, the court reporter  
21 is just going to do this not getting paid?

22 HON. ANN CRAWFORD McCLURE: They  
23 will be paid through the Department of  
24 Health.

25 HON. SARAH B. DUNCAN: 33.007.

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1 HON. ANN CRAWFORD McCLURE: There  
 2 was a fiscal note attached to the legislation.  
 3 CHAIRMAN BABCOCK: Yeah. But that's  
 4 not our concern.  
 5 MS. CORTELL: It's only our  
 6 concern -- I mean, I'm not worried about the  
 7 funding so much as, obviously, a lot of court  
 8 reporters, just as a practical matter, don't  
 9 like to give you their record, et cetera,  
 10 until they're paid. I mean, is this an  
 11 exception to that? I mean, that's built into  
 12 the Appellate Rules.  
 13 HON. ANN CRAWFORD McCLURE: What was  
 14 presented to the LBD was that, at the trial  
 15 court level, total court costs incurred by TDH  
 16 for minors would be \$259,200 for the fiscal  
 17 year. As for the appellate process, they  
 18 envision 207,360 per year. Total estimated  
 19 fiscal impact, 466,650.  
 20 MS. CORTELL: So this will be, then,  
 21 an exception to the normal Appellate Rules  
 22 where you have to arrange for payment and all  
 23 that? That's automatically provided for?  
 24 HON. ANN CRAWFORD McCLURE: Well,  
 25 the minor cannot be charged anything. She

1 get the record to you? I mean, you're sitting  
 2 there in appeals court and it just doesn't get  
 3 there. It happens all the time.  
 4 MR. ORSINGER: It gets deemed  
 5 granted.  
 6 HON. MICHAEL H. SCHNEIDER: Well, I  
 7 know that. But I'm just saying at some point  
 8 in time it seems to me that the appellate  
 9 court needs to protect its jurisdiction after  
 10 so many hours of not having a transcript. I  
 11 don't want to superimpose that on this  
 12 committee, but I think it is an issue.  
 13 HON. ANN CRAWFORD McCLURE: We have  
 14 some real concerns about it. Representations  
 15 to us by representatives of the court  
 16 reporters association was that it would not be  
 17 difficult having those transcripts prepared  
 18 and filed instant.  
 19 CHAIRMAN BABCOCK: And maybe in a  
 20 lot of cases it won't, but there will be some  
 21 that it will, I bet.  
 22 HON. ANN CRAWFORD McCLURE: I'm sure  
 23 that's true.  
 24 CHAIRMAN BABCOCK: Nina.  
 25 MS. CORTELL: I guess, again, the

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1 cannot be charged filing fees, court costs.  
 2 There can be no requirement of any payment for  
 3 her for the reporter's record or any of it.  
 4 It is all done by court order process through  
 5 a request to TDH.  
 6 CHAIRMAN BABCOCK: Justice Duncan.  
 7 HON. SARAH B. DUNCAN: I thought  
 8 what Nina was referring to, the Appellate  
 9 Rules that would have been incorporated by  
 10 reference, do not even require the court  
 11 reporter to start working on the record until  
 12 the requesting party has paid or made  
 13 arrangements to pay.  
 14 JUSTICE HECHT: But the statute  
 15 requires that the court reporter be paid in  
 16 state money every time.  
 17 MR. HALL: But who is going to train  
 18 the court reporters, if that's what they have  
 19 to be doing?  
 20 HON. BILL RHEA: The arrangement has  
 21 been made by the statute.  
 22 CHAIRMAN BABCOCK: Judge Schneider.  
 23 HON. MICHAEL H. SCHNEIDER: Well, I  
 24 think that's a good point. What's the  
 25 practical effect when a reporter just doesn't

1 issue of the Appellate Rules and how they  
 2 contemplate arrangements being made for  
 3 payment of the appellate record. I don't know  
 4 whether we need a footnote or a comment that  
 5 this operates outside of this mechanism.  
 6 HON. ANN CRAWFORD McCLURE: I'm not  
 7 uncomfortable with that in a comment.  
 8 CHAIRMAN BABCOCK: Don't we already  
 9 have that? That's what we talked about this  
 10 morning, and there's going to be language  
 11 added to that effect. Buddy.  
 12 MR. LOW: Chip, could I ask a  
 13 question? Why does the court of appeals time  
 14 start when the notice is filed in the trial  
 15 court rather than when received? The statute  
 16 requires that?  
 17 JUSTICE HECHT: Yes.  
 18 MR. LOW: Oh, well, that makes  
 19 sense.  
 20 CHAIRMAN BABCOCK: If there's  
 21 nothing else on the record on appeal, let's  
 22 quickly move to rulings.  
 23 MR. EDWARDS: While you're on  
 24 rulings, could I get you to look at 2.4(e)(2),  
 25 because I think it could create a problem.

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1 CHAIRMAN BABCOCK: 2.4(e)(2),  
2 Conduct of hearing, denial. "If the minor  
3 fails to establish any of these grounds by a  
4 preponderance of the evidence, the court must  
5 deny the application."

6 MR. EDWARDS: Okay. You could  
7 interpret that to mean that the minor has to  
8 establish all three. And it should say, I  
9 think, if the minor fails to establish at  
10 least one of these grounds, because the (A),  
11 (B) and (C) are alternatives.

12 CHAIRMAN BABCOCK: Justice McClure,  
13 do you accept that?

14 HON. ANN CRAWFORD McCLURE: Yes.

15 CHAIRMAN BABCOCK: Has anybody got a  
16 problem with that?

17 HON. DAVID PEEPLES: Did you say if  
18 you fail to establish one?

19 CHAIRMAN BABCOCK: At least one. If  
20 you fail to prove one.

21 MR. EDWARDS: This could be  
22 interpreted, the way it was, that it requires  
23 you to establish all three.

24 CHAIRMAN BABCOCK: Good point.  
25 Okay. What else about rulings, Judge

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1 McClure?

2 HON. ANN CRAWFORD McCLURE: Well,  
3 the debate obviously is over the opinions,  
4 whether ruling is tantamount to an opinion.  
5 We took the position that, in order to  
6 facilitate review realistically, the Supreme  
7 Court needed the benefit of the intermediate  
8 court's analysis, and we have tailored rules  
9 to that effect, whether you agree or disagree.

10 CHAIRMAN BABCOCK: All right.  
11 That's the issue.

12 REPRESENTATIVE DUNNAM: I would just  
13 point out that that gives you up to a 24-day  
14 time period from the initial application. It  
15 could be longer if you have holidays on  
16 Mondays or Fridays or whenever. But ten  
17 working days is two weeks, and then if you've  
18 got two four-day weekends, that's a long time.

19 HON. ANN CRAWFORD McCLURE: The  
20 ruling will come within the statutory time  
21 frame.

22 REPRESENTATIVE DUNNAM: But the  
23 Supreme Court does not have to act for  
24 10 days, at least 10 days, so you've got a  
25 24-day potential window, maybe up, no more

1 than 30, but I appreciate you all's -- I heard  
2 the same thing from the appellate judges at  
3 home. That's an awful lot to ask. And I  
4 don't have much consolation -- I mean, I don't  
5 know what to say about that. 24 days is a  
6 long time.

7 HON. ANN CRAWFORD McCLURE: Well,  
8 the debate that we had internally was, do we  
9 want to facilitate the development of some  
10 sort of a body of law that will be  
11 transmitting confidentially to the Supreme  
12 Court, and in their wisdom, they can  
13 incorporate into guidelines, comments, however  
14 they want to implement it, if that's the  
15 overriding concern behind the legislation?

16 And we heard some indications that there  
17 was an interest in that. Then we tried to  
18 come up with a way that we could fulfill that  
19 while still ruling within the window that was  
20 created by the statute. That was about the  
21 best our committee could do.

22 REPRESENTATIVE DUNNAM: Well, the  
23 statute doesn't really speak to time limits on  
24 the Supreme Court, does it?

25 HON. ANN CRAWFORD McCLURE: No, not

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1 to the Supreme Court, it doesn't.

2 REPRESENTATIVE DUNNAM: The Supreme  
3 Court has as much time as they want.

4 HON. ANN CRAWFORD McCLURE: Yes.

5 REPRESENTATIVE DUNNAM: So it  
6 probably should encompass them.

7 CHAIRMAN BABCOCK: Bill.

8 PROFESSOR DORSANEO: Well, I guess  
9 somebody will look this over carefully, but  
10 I'm noticing the word "petition" kind of  
11 appearing here occasionally. On Page 11, it  
12 appears in the clean draft, (e)(3) and  
13 (f)(1). Unless that is something different  
14 from the application, it probably ought to say  
15 application.

16 JUSTICE HECHT: But you like that,  
17 don't you? The more petitions, the merrier.  
18 You want it to go to fewer applications.

19 MR. ORSINGER: Well, if you say  
20 petition, it's scary, because we have petition  
21 provisions in other parts of the Rules of  
22 Civil Procedure. I would rather use the word  
23 application so that no one confuses it with an  
24 original petition.

25 HON. ANN CRAWFORD McCLURE: I'm not

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1 opposed to that at all.

2 MR. PEMBERTON: It was our intent to  
3 use "application." I'll run a word search and  
4 get it fixed.

5 CHAIRMAN BABCOCK: Okay. That's  
6 good. Sarah Duncan.

7 HON. SARAH B. DUNCAN: Does everyone  
8 else agree that ruling includes opinion?

9 MR. ORSINGER: No.

10 HON. SARAH B. DUNCAN: To me a  
11 ruling is a judgment or order. It is not at  
12 all an opinion. And I don't see that the  
13 statute requires anything more or less than a  
14 ruling.

15 MR. PEMBERTON: And I guess the  
16 subcommittee takes somewhat inconsistent  
17 positions. On one hand they say for purposes  
18 of confidentiality the appellate level ruling  
19 encompasses opinion. And yet for purposes of  
20 what the court of appeals has to do, we're  
21 saying ruling and opinion.

22 CHAIRMAN BABCOCK: That was  
23 Richard's point this morning.

24 MR. PEMBERTON: Well, it stuck. It  
25 was good.

1 PROFESSOR ALBRIGHT: Well, couldn't  
2 a court of appeals write an opinion if they  
3 wanted to, but without requiring it?

4 HON. ANN CRAWFORD McCLURE: That was  
5 the second draft. In the third draft, the  
6 consensus was, if we give them a choice, they  
7 aren't going to do it. And if the legislative  
8 intent was to develop that, have the Supreme  
9 Court have the benefit of it, then we needed  
10 to make it a requirement. That's what the  
11 subcommittee's consensus was.

12 CHAIRMAN BABCOCK: Bill Dorsaneo.

13 PROFESSOR DORSANEO: These opinions  
14 will be dealing, I suppose, in a number of  
15 cases, with factual insufficiency complaints,  
16 so they won't be easy to write necessarily  
17 under the Poole standard. I really wonder  
18 whether it's worth the trouble to go to that  
19 much work.

20 PROFESSOR ALBRIGHT: I would move to  
21 either -- I would go for either deleting or  
22 making it an option.

23 CHAIRMAN BABCOCK: Do you accept  
24 that, Judge McClure?

25 HON. ANN CRAWFORD McCLURE: No. I

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1 CHAIRMAN BABCOCK: Alex.

2 PROFESSOR ALBRIGHT: I'd like to  
3 know why we need an opinion. I mean, this  
4 says an opinion is required. The statute only  
5 refers to a ruling, so it seems like all this  
6 does is kind of slow down the process of  
7 getting to the Supreme Court.

8 HON. ANN CRAWFORD McCLURE: The  
9 original draft that was presented was simply a  
10 ruling, that we would rule up or down on  
11 affirming or denying. In meeting with the  
12 representatives of Senator Shapiro and  
13 Representative Delisi's office, there was a  
14 great deal of interest in developing in Texas  
15 the case law that we have coming out of other  
16 jurisdictions on these issues. The only way  
17 we could think of to accomplish that is  
18 through an opinion process.

19 Additionally, if we're going to be ruling  
20 on issues of constitutionality or statutory  
21 interpretation and it goes forward to the  
22 Supreme Court, then perhaps there was some  
23 interest in having the benefit of the analysis  
24 behind those decisions available to the  
25 Supreme Court for consideration.

1 understand the motivation, and keep debating  
2 it, but I cannot accept that.

3 MR. EDWARDS: How about having the  
4 Supreme Court act on the basis of the order,  
5 but still requiring opinions so you get your  
6 body of law?

7 CHAIRMAN BABCOCK: I think under  
8 these rules, the Court has that option,  
9 doesn't it?

10 MR. EDWARDS: I think it does, yeah.

11 CHAIRMAN BABCOCK: Steve.

12 MR. YELENOSKY: Well, I just wanted  
13 to make the point about the legislative intent  
14 that there be a body of law. That sounds to  
15 me to be an indication that the Legislature  
16 did not intend the confidentiality that we  
17 were talking about earlier. How can it be  
18 that they intended a body of law yet all of  
19 this was to be secret?

20 HON. ANN CRAWFORD McCLURE: I asked  
21 them that.

22 MR. YELENOSKY: That seems to me to  
23 relate very directly to our conversation  
24 earlier today and to argue strongly that maybe  
25 the judges' names could be confidential, but I

1 don't see how, consistent with that  
2 legislative intent, anything else could be,  
3 except the anonymity of the girl.

4 REPRESENTATIVE DUNNAM: I would urge  
5 that we try to find the legislative intent of  
6 that nature on the record somewhere, I agree,  
7 because I don't think you will find it on it.

8 CHAIRMAN BABCOCK: Richard.

9 MR. ORSINGER: If you don't have an  
10 opinion, then the Supreme Court is going to  
11 operate as a de novo review. In other words,  
12 they will not be sitting in review of a court  
13 of appeals error. They will be looking at the  
14 underlying record and they will be making  
15 their own decision. That's not the way the  
16 Constitution has set our judicial system up.  
17 And an important part of the opinion process  
18 is for the court of appeals to state what law  
19 it's applying and how it's applying it to the  
20 facts. And if you don't have that and you  
21 just have the record, then the Supreme Court  
22 is basically serving as a court of appeals.

23 HON. MICHAEL H. SCHNEIDER: We have  
24 that in mandamuses now. We do not mandamus,  
25 we don't write -- well, I guess we can write

1 one down but it's not --

2 MR. ORSINGER: But if you deny a  
3 mandamus, the Supreme Court looks at  
4 mandamuses the same way they --

5 HON. MICHAEL H. SCHNEIDER: They  
6 look at a record. We don't have to write an  
7 opinion.

8 MR. ORSINGER: But it's not an  
9 appeal either, it's an original proceeding.

10 HON. MICHAEL H. SCHNEIDER: But this  
11 isn't an appeal either, if you really want to  
12 know the truth.

13 CHAIRMAN BABCOCK: Judge Patterson.

14 HON. JAN P. PATTERSON: I don't  
15 think the courts of appeals are going to avoid  
16 writing if it's called for, and I would like  
17 to propose that we say "may issue a memorandum  
18 opinion," and that way it kind of gives the  
19 full spectrum of opportunity, but not the  
20 requirement.

21 CHAIRMAN BABCOCK: Yeah. We're  
22 headed for a vote on that in a minute.

23 HON. SARAH B. DUNCAN: I guess  
24 Richard and I have a differing view on yet  
25 another topic, and that is what de novo review

1 is. I don't think whether the court of  
2 appeals writes an opinion or not or discloses  
3 its reasoning has anything to do with whether  
4 the Supreme Court exercises de novo review  
5 powers. The Supreme Court can, with or  
6 without a court of appeals opinion, defer to  
7 findings of fact made by the trial court and  
8 review the questions of law de novo.

9 CHAIRMAN BABCOCK: John Martin, do  
10 you have an opinion about this?

11 MR. MARTIN: Not a strong one. I do  
12 not think the court of appeals ought to be  
13 required to write an opinion. I don't see any  
14 point in having that discussion.

15 CHAIRMAN BABCOCK: Well, Justice  
16 McClure has not accepted this friendly  
17 amendment, so we're going to vote. And the  
18 first thing we'll vote on is whether or not we  
19 should recommend to the Supreme Court that the  
20 court of appeals' opinion should be in its  
21 discretion. In other words, they can write  
22 one if they want to and they don't have to  
23 write one if they don't want to. So everybody  
24 who is in favor of that raise their hand.  
25 Discretionary. The opinion is discretionary

1 with the court of appeals.

2 All right. And against. That passes 23  
3 to five, so our report will indicate to the  
4 Court that by a vote of 23 to five, this  
5 committee believes that the court of appeals  
6 should have the discretion to write an opinion  
7 or not.

8 Okay. Anything else on the rulings?

9 MR. ORSINGER: Then we need to  
10 change the timetable in the Supreme Court if  
11 we're not going to have an opinion now,  
12 because right now it's triggered by --

13 CHAIRMAN BABCOCK: That's right.  
14 And that's why, this rule that's going up to  
15 them, this is just something that we're going  
16 to tell the Court that, although the  
17 subcommittee wouldn't agree to it, we think by  
18 that margin that discretionary --

19 HON. ANN CRAWFORD McCLURE: -- that  
20 we were arbitrary and unreasonable.

21 CHAIRMAN BABCOCK: Capricious is the  
22 word that I would use. Alex.

23 PROFESSOR ALBRIGHT: I'd just like  
24 to make one more comment that these opinions,  
25 if they're going to be on factual sufficiency,



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1 it would be virtually impossible to have an  
2 opinion that gives any guidance to anybody  
3 without giving a whole lot of facts that are  
4 specifically prohibited from being  
5 disseminated to the public.

6 MR. ORSINGER: But we voted this  
7 morning that no one is going to read the  
8 opinions but the nine justices on the Supreme  
9 Court anyway, so what difference does it  
10 make?

11 CHAIRMAN BABCOCK: That's right.  
12 That was the other point. Nobody much is  
13 going to read them. Mike.

14 MR. HATCHELL: As I understand  
15 Rule 3.3(a), if an appeal is successful, when  
16 the court of appeals reverses, it has no power  
17 to remand. So in the situations we have  
18 discussed today, if a judge is  
19 constitutionally disqualified, his order is  
20 void, you appeal that and you win, or it's not  
21 filed in the proper court. All basic remand  
22 issues, including against the weight and the  
23 preponderance of the evidence, are basically  
24 halted. Where is the authority in the statute  
25 to do that?

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1 HON. ANN CRAWFORD McCLURE: There  
2 isn't any. There isn't any. But it does not  
3 give us the option of reversing and  
4 remanding. It gives us the option to reverse  
5 and grant.

6 HON. SARAH B. DUNCAN: It says to  
7 rule.

8 HON. ANN CRAWFORD McCLURE: I think  
9 there's language to the extent of reverse and  
10 grant the application.

11 CHAIRMAN BABCOCK: 33.004(b).

12 HON. SARAH B. DUNCAN: It just says  
13 rule.

14 MR. ORSINGER: Just as an aside, if  
15 they decide that this is not a case or  
16 controversy, they're going to reverse and  
17 dismiss anyway regardless.

18 CHAIRMAN BABCOCK: So Mike, restate  
19 your point again.

20 MR. HATCHELL: It was really more a  
21 point of clarification. I've read the statute  
22 three times. I can't find this language that  
23 limits the power of an appellate court to  
24 remand. I just can't find it. And it's fine  
25 if that's the way they want to do it, and if

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1 everybody agrees that's what they should do.  
2 But it seems to me like there are inherent  
3 errors that you can complain about. We talked  
4 about two today. One, the judge is  
5 constitutionally disqualified; two, you filed  
6 it in the wrong court --

7 MR. EDWARDS: You can't file it in  
8 the wrong court.

9 MR. HATCHELL: Yes, you can. So  
10 that's an issue.

11 MR. EDWARDS: Well, it says any  
12 court.

13 MR. HATCHELL: Well, but that's an  
14 issue.

15 HON. SARAH B. DUNCAN: But over  
16 there, they're saying that "any court" doesn't  
17 mean any court.

18 MR. EDWARDS: Well, the other final  
19 thing is that if it isn't ruled on within two  
20 days after the thing has been filed, 48 hours  
21 after it's been filed, you know, it's  
22 granted. So if you remand it, it's going to  
23 take you more than two days. It's already  
24 moot.

25 HON. ANN CRAWFORD McCLURE: What

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1 they're saying is that is a ruling.

2 HON. SARAH B. DUNCAN: To reverse  
3 and remand would be ruling, and it would avoid  
4 the default ruling of grant.

5 MR. EDWARDS: Now, if it's remanded,  
6 it hasn't been decided in the trial court  
7 within the time specified.

8 HON. SARAH B. DUNCAN: But all the  
9 statute says is if the court of appeal fails  
10 to rule on the appeal.

11 MR. EDWARDS: I understand that.  
12 But the other one says if the trial court  
13 doesn't rule within the time -- well, not if  
14 it's remanded, he didn't. Well, but there's  
15 no provision for an extension of time in the  
16 trial court by virtue of a remand.

17 CHAIRMAN BABCOCK: The point is that  
18 you start the clock ticking again perhaps if  
19 you remand.

20 MR. EDWARDS: It doesn't say that.

21 CHAIRMAN BABCOCK: It doesn't say  
22 that, but that's arguably the effect of it, so  
23 that's something you've got to think about.  
24 It may be, as you say, that the effect of  
25 reversing and remanding has no effect because

1 48 hours have passed and now it's just  
2 granted, but that's not necessarily so.  
3 HON. ANN CRAWFORD McCLURE: We got  
4 into this in talking about the standard of  
5 review. And one of the reasons we didn't want  
6 to get into the standard of review was that  
7 very issue in terms are we going to advocate  
8 facile sufficiency review, which the remedy  
9 for is review.

10 CHAIRMAN BABCOCK: Okay. Mike, did  
11 you have a fix for this, or was this just --

12 MR. HATCHELL: No. I'm just raising  
13 the question. We need to be very certain that  
14 we are limiting the power of the courts of  
15 appeals which they would otherwise have. And  
16 as far as I can determine, it's not authorized  
17 by the statute.

18 CHAIRMAN BABCOCK: Well, that's  
19 always a problem.

20 HON. SARAH B. DUNCAN: If there is  
21 constitutional disqualification, the order, at  
22 least according to Texas case law, would be  
23 void ab initio. So how can you not vacate  
24 that order and remand the case for further  
25 consideration?

1 CHAIRMAN BABCOCK: Bill's point is,  
2 if it's a void order, then they haven't gotten  
3 it done within 48 hours, so it's granted if  
4 it's a void order.

5 MR. EDWARDS: If it's a void order,  
6 they haven't ruled.

7 HON. SARAH B. DUNCAN: But if it's  
8 filed in the wrong court, it's only voidable.

9 MR. EDWARDS: But how can you get it  
10 in the wrong court?

11 CHAIRMAN BABCOCK: He's just fixing  
12 one problem at a time.

13 HON. SARAH B. DUNCAN: They're going  
14 to transfer it to some other court.

15 HON. ANN CRAWFORD McCLURE: We  
16 talked about transfer.

17 CHAIRMAN BABCOCK: Okay. Well,  
18 we're not talking about transfer now. We're  
19 not going to get into transfer right now.

20 HON. SARAH B. DUNCAN: An exchange  
21 of benches.

22 CHAIRMAN BABCOCK: Do you want to  
23 entertain a fix for this, or do you want to  
24 merely note it for the Court and dump it in  
25 their lap, which I have always thought was a

1 great idea.

2 HON. DAVID PEEPLES: Let's leave one  
3 or two imperfections.

4 CHAIRMAN BABCOCK: Sarah.

5 HON. SARAH B. DUNCAN: This is one  
6 that I would actually vote in favor of the  
7 suggestion to the Court that it not decide,  
8 because it's a fairly serious, not just a  
9 little technical problem if you're going to  
10 limit the court's ability to either reverse  
11 and render or affirm.

12 CHAIRMAN BABCOCK: Did you want to  
13 vote on something, Sarah? Do you want our  
14 committee to vote on it?

15 HON. SARAH B. DUNCAN: Yes.

16 CHAIRMAN BABCOCK: Okay. Tell us  
17 what you want to vote on.

18 HON. SARAH B. DUNCAN: The deletion  
19 of the second sentence in 3.3(a).

20 CHAIRMAN BABCOCK: Okay. This is  
21 only advisory, because Justice McClure does  
22 not accept this amendment.

23 HON. SARAH B. DUNCAN: I  
24 understand.

25 CHAIRMAN BABCOCK: Okay. So

1 everybody who votes to delete the second  
2 sentence in Rule 3.3(a) raise their hand.  
3 Okay. Hang on, keep them up. Some hands  
4 started popping up there all of a sudden.

5 All against. 13. It loses 13 to 12.

6 Do you want me to count again?

7 PROFESSOR DORSANEO: Yes.

8 CHAIRMAN BABCOCK: Okay. Let's do  
9 it again.

10 HON. SARAH B. DUNCAN: First can we  
11 hear the reasoning for leaving it in?

12 MR. EDWARDS: Prompt disposition.

13 PROFESSOR ALBRIGHT: And this is a  
14 different proceeding. I don't think this has  
15 the impact that you think it does on regular  
16 appellate procedure.

17 CHAIRMAN BABCOCK: Okay. All in  
18 favor raise their hand. This is in favor of  
19 taking it out. Everybody who wants to take it  
20 out raise your hand. You guys lost a vote.

21 Okay. All in favor of leaving it in.

22 By a 14-11 vote, the vote is to leave it  
23 in. 14 to 11 the sentence stays in, is the  
24 recommendation of this committee.

25 Okay. Anything else?

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1 HON. ANN CRAWFORD McCLURE: No,  
 2 nothing more. You've pooped me out.  
 3 CHAIRMAN BABCOCK: Yeah, Scott.  
 4 HON. SCOTT A. BRISTER: We never  
 5 did -- we discussed it a lot, but we never did  
 6 vote, and we need to, on whether the hearing  
 7 has to be closed to the public and in  
 8 chambers. I, for one, don't want to hold -- I  
 9 don't want a rule that says you can't hold it  
 10 in chambers, and I don't want a rule that says  
 11 you have to hold it in chambers. It appears  
 12 to me this says I have to do it in chambers.  
 13 I'm concerned for all kinds of reasons about  
 14 that. That's 2.4(b) and (c). 2.4(b) and (c).  
 15 CHAIRMAN BABCOCK: And that gets  
 16 back to the argument that we had earlier under  
 17 (k), that the court proceedings should be  
 18 conducted in a manner.  
 19 HON. SCOTT A. BRISTER: Yeah. We  
 20 kind of discussed that, and I don't know that  
 21 we need to vote again. My recommendation is  
 22 that you just say what the statute says. The  
 23 court must make proceedings -- court  
 24 proceedings shall be conducted in a manner  
 25 that protects the anonymity of the minor, and

1 to bring it to a vote, Scott?  
 2 HON. SCOTT A. BRISTER: Sure.  
 3 CHAIRMAN BABCOCK: Okay. The  
 4 proposition which we're going to vote on is  
 5 that the provisions of section -- what number  
 6 is that?  
 7 HON. SCOTT A. BRISTER: 2.4(b) and  
 8 (c) be replaced by the second sentence from  
 9 the statute, 33.003(k), the second sentence of  
 10 that subparagraph.  
 11 CHAIRMAN BABCOCK: All in favor of  
 12 that raise your hands.  
 13 Everybody against. That fails by a vote  
 14 of 14 to eight. Yeah, Steve.  
 15 MR. YELENOSKY: I think I've got  
 16 just a typo, but then I also have a point, if  
 17 we're allowed to bring up extraneous little  
 18 things.  
 19 CHAIRMAN BABCOCK: Bring the typos  
 20 up to Bob later.  
 21 MR. YELENOSKY: Okay. Well, the  
 22 other point that I alluded to earlier was that  
 23 in the rules, and I'm looking at Page 14 of  
 24 the annotated, the contents of the application  
 25 adds two things, one thing which is fine, it's

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1 let case law work out whether it has to be in  
 2 chambers, whether it has to be in secret.  
 3 You know, the DA can't be there under  
 4 this. Should that be an exception? There's  
 5 nothing in the statute that says the DA can't  
 6 be there, but this rule will say you can't.  
 7 CHAIRMAN BABCOCK: It strikes me as  
 8 incredible that you could have your court of  
 9 appeals opinion and the identity of the judges  
 10 confidential, and yet you could have a  
 11 proceeding in open court. They would know who  
 12 the judge was, for one thing.  
 13 HON. SCOTT A. BRISTER: In fact, it  
 14 doesn't say the judge is confidential.  
 15 MR. ORSINGER: Maybe we could  
 16 conduct it in such a way you can't identify  
 17 the judge.  
 18 CHAIRMAN BABCOCK: Richard Orsinger  
 19 has a smart-a remark about this, but we're not  
 20 going to get into that right now on the  
 21 record.  
 22 Okay. Do you accept Judge Brister's  
 23 recommendation?  
 24 HON. ANN CRAWFORD McCLURE: No.  
 25 CHAIRMAN BABCOCK: No. Do you want

1 informational. The other thing is (3)(F). It  
 2 refers to a statement of the grounds or  
 3 grounds for which the minor is seeking the  
 4 order.  
 5 I don't see that requirement in the  
 6 statute, and when you put it in the  
 7 application, in the form, it's either  
 8 meaningless because they're just checking it  
 9 off, or it may be something that has to be  
 10 explained to the applicant. And in every  
 11 instance where an applicant is seeking this,  
 12 presumably they think it's in their best  
 13 interest. So I don't see the point of making  
 14 that pleading, what I see as a pleading  
 15 requirement in the application that I meet one  
 16 of these grounds. So I was wondering why the  
 17 subcommittee put that in there?  
 18 HON. ANN CRAWFORD McCLURE: There  
 19 was some consideration given to, by  
 20 identifying the grounds in the application, it  
 21 would give the trial court the benefit of some  
 22 wisdom in what type of individual to appoint  
 23 as an ad litem.  
 24 MR. YELENOSKY: But the form doesn't  
 25 have you specify which of the grounds. It

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1 just has a checkpoint for one of the following  
2 grounds, so it doesn't provide any  
3 information, except that you have one of the  
4 following grounds, which is statutorially --  
5 well, presumably they proved up. But it  
6 doesn't have a check for which of those three  
7 grounds.

8 HON. ANN CRAWFORD McCLURE: I  
9 thought it did.

10 MR. YELENOSKY: Not in the one I'm  
11 looking at, which is Form 2A. It just has a  
12 checkmark, "I am requesting this order for one  
13 or more of the following reasons," one, two,  
14 three. And that seems to me to be a  
15 meaningless hoop to jump through. If you want  
16 them to check off the others, I guess you  
17 could. But my concern is also presumably at  
18 this point most of them will not be  
19 represented by an attorney, and I don't know  
20 what information you would get that would  
21 necessarily be that meaningful. And again,  
22 it's not required by the statute, so I would  
23 suggest eliminating that.

24 MR. PEMBERTON: The subcommittee  
25 went back and forth on that. In the original

1 CHAIRMAN BABCOCK: They do vote.  
2 PROFESSOR DORSANEO: There is no  
3 2.4(e)(2)(A), by the way.

4 MR. YELENOSKY: That was my typo.  
5 It refers to (e)(1) instead of (2)(A). But I  
6 guess if that's not to be accepted, and I  
7 don't see it as that big of a point, but it's  
8 just a meaningless hoop to jump through, a  
9 check spot. And the footnotes say that  
10 technical violations will not be overlooked,  
11 so presumably an application where they  
12 haven't checked this is defective, and I just  
13 find that to be putting form over substance.  
14 They wouldn't be there putting an application  
15 in if they didn't think one of these three  
16 things existed.

17 CHAIRMAN BABCOCK: Should we vote on  
18 it, Steve?

19 MR. YELENOSKY: I would suggest we  
20 do.

21 CHAIRMAN BABCOCK: Okay. Let's vote  
22 on this, and the vote is to delete  
23 subparagraph (F) from 2.1(b)(3). So  
24 2.1(b)(3)(F), the vote is to delete it. All  
25 in favor of deleting that provision raise your

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1 version of this Form 2A there was a checkmark  
2 or check blank beside each of the three  
3 enumerated grounds. I think there was a  
4 concern with arguments or problems with  
5 technically waiving some ground if the minor  
6 didn't check the right one and having to  
7 amend, and so just to simplify things, we  
8 moved back toward just one check off --

9 MR. YELENOSKY: Well, I understand  
10 why you went from a check for each one to  
11 something else, but what I don't understand is  
12 why you didn't go to just eliminating it.

13 CHAIRMAN BABCOCK: All right. So  
14 the proposal is to eliminate (F). And Judge,  
15 what do you think about that?

16 HON. ANN CRAWFORD McCLURE: The  
17 forms, I didn't have a great hand in the  
18 forms. The forms were done predominantly by  
19 the trial judges in our community, and I'm not  
20 going to deviate from their recommendations.

21 CHAIRMAN BABCOCK: Sarah.

22 HON. SARAH B. DUNCAN: Chip, as a  
23 procedural matter, I guess I'm confused. Do  
24 ex officio members vote or not vote?

25 JUSTICE HECHT: They vote.

1 hand. All against.

2 Mike, do you have your hand up or not?

3 By a vote of 19 to eight, the Advisory  
4 Committee is in favor of deleting it. By a  
5 vote of 19 to nine, the Advisory --

6 REPRESENTATIVE DUNNAM: No, I'm not  
7 voting. I've got a comment.

8 CHAIRMAN BABCOCK: Hang on, let me  
9 just finish reporting the vote. By a vote of  
10 19 to eight, the Advisory Committee advises  
11 the Court that this provision should be  
12 deleted. Okay.

13 REPRESENTATIVE DUNNAM: Along that  
14 line, this is an application, and there's no  
15 requirement that I see in the statute that  
16 requires that the minor personally make the  
17 application as opposed to the attorney filing  
18 it for them, like you would do with an  
19 application for writ of garnishment or  
20 application for injunction. Those are all  
21 applications too. The statute does not say  
22 that the minor -- and you all can see it.  
23 I've read it a couple of times. I don't see  
24 where it says that the minor has to personally  
25 sign the application. It also specifically

1 does not say that the oath has to be made by  
2 the minor. It simply has to be made like in  
3 any other case by a person with personal  
4 knowledge and able to swear under oath.

5 The application form you have requires  
6 that the minor sign it. It requires that the  
7 minor be the one that makes the statements  
8 under oath. The reason I think this might  
9 be -- and I did not draft this and I wouldn't  
10 claim it, but under 33.003(c), one of the  
11 things that you have to have in the  
12 application that is noticeably missing is the  
13 minor's name. And obviously, I'm not speaking  
14 for the Legislature on this, but this rule, as  
15 you all are proposing it, requires the minor's  
16 name to be stated, requires the minor to sign  
17 the application, requires the minor to do it  
18 under oath, and I don't see that in the  
19 statute.

20 HON. ANN CRAWFORD McCLURE: What we  
21 did in drafting these was to look to the other  
22 jurisdictions additionally that have  
23 implemented them. The doctors had some  
24 concern about there being a verification page  
25 which did contain the name, and that's where

1 that is going to be listed. Under oath was  
2 something that we talked about to some  
3 extent.

4 It was, as I recall, Sam who developed it  
5 in the subcommittee, the editorial committee,  
6 and drafted it. So if you want to address  
7 that?

8 HON. SAMUEL A. MEDINA: Well, it was  
9 basically more out of concern of trying to  
10 marry people up, and if you're going to try  
11 to -- you know, the same individual here as  
12 there, and that's what came out of it.

13 REPRESENTATIVE DUNNAM: I  
14 understand. Well, there was some talk about  
15 you stamp the verification or something with  
16 the same number and this and that, but I was  
17 just -- my personal reading of this was that I  
18 could file this on behalf -- absent the rule  
19 that's being proposed, I could file this on  
20 behalf of a client, I could have a friend of  
21 theirs verify it under oath, and I could  
22 proceed under this statute. That's the way I  
23 read the statute, just like I could for any  
24 other writ of garnishment or anything else.

25 HON. SAMUEL A. MEDINA: I don't

1 disagree with you.

2 REPRESENTATIVE DUNNAM: I think  
3 that's a substantive change from the statute.

4 CHAIRMAN BABCOCK: Well, the only  
5 thing I would say is that if you look at 3(C),  
6 it says, "A statement that the minor wishes to  
7 have an abortion." It's very subjective. I  
8 suppose an attorney could sign under oath  
9 saying, "She told me that she wanted it."

10 REPRESENTATIVE DUNNAM: Well, a  
11 friend could do it. Anybody with personal  
12 knowledge. We do that all the time. Every  
13 time we have somebody sign an affidavit,  
14 they're saying what other people want,  
15 generally, or what other people did. That's a  
16 fair point. Linda.

17 MS. EADS: I think if you're going  
18 to require the minor to verify under oath,  
19 you're not taking into account a lot of  
20 different kinds of minors you're going to be  
21 dealing with. Some of them will be  
22 incompetent mentally. I think the statute is  
23 a better way of having this, which is the  
24 application is verified, rather than requiring  
25 the minor be the one who verifies it.

1 CHAIRMAN BABCOCK: Do you accept  
2 accept that, Judge?

3 HON. ANN CRAWFORD McCLURE: No.

4 REPRESENTATIVE DUNNAM: The other  
5 thing I'd like to point out, if you all decide  
6 to make this change, then I would sure urge  
7 that something be put on the application in  
8 pretty big letters informing the minor, "Your  
9 name will not be released to anybody"  
10 somewhere.

11 CHAIRMAN BABCOCK: Let's do it one  
12 at a time. Let's have a vote on whether or  
13 not -- the suggestion that the minor should  
14 not be required to file the application under  
15 oath but just somebody with personal  
16 knowledge.

17 REPRESENTATIVE DUNNAM: I think  
18 there are two issues. One, does the applicant  
19 have to file that application? The  
20 application is signed, not by a lawyer, not  
21 by -- so if somebody comes in to see me, I'm  
22 not signing the application. Fine. And then  
23 the second point is the oath. Does the oath  
24 have to be made by the minor? I think there  
25 are two things that are being added to the

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1 statute that aren't there.

2 CHAIRMAN BABCOCK: Okay. I  
3 understand the oath part. But what's the  
4 first part again?

5 REPRESENTATIVE DUNNAM: The first  
6 part, the application, the formal application,  
7 is to be signed by the minor under the rule.  
8 Under the rule the minor signs the  
9 application.

10 CHAIRMAN BABCOCK: Right. Under  
11 oath.

12 REPRESENTATIVE DUNNAM: Right. So I  
13 think there's two issues. One, does the minor  
14 have to be given the oath; and number two,  
15 does the minor have to sign the application.

16 CHAIRMAN BABCOCK: Let's split it  
17 into two, though, so we're clear about what  
18 we're voting on. The first proposal is that  
19 we should delete the requirement from the  
20 rules and the form that the minor must sign  
21 the application. Everybody in favor of that  
22 raise their hand.

23 HON. BILL RHEA: Chip, can I make a  
24 comment first? I think we're missing perhaps  
25 33.003(a), which to me is very specific. It

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1 says a pregnant minor may file an  
2 application. In the Rules of Civil Procedure,  
3 for the most part it's very clear that it's  
4 the attorney who can file on behalf in this or  
5 that type of action, but that's real  
6 explicit.

7 REPRESENTATIVE DUNNAM: If we look  
8 at the garnishment statute, the Civil  
9 Procedure rule on garnishment, it says the  
10 plaintiff may file an application for writ of  
11 garnishment. But in every garnishment, I'm  
12 signing it. It's not my client's signature.  
13 I think it's a drafting problem in the  
14 statute.

15 MR. MEADOWS: Before I vote on this,  
16 there have been a number of votes today, and  
17 in many instances I've been guided by what the  
18 subcommittee decided because they had more  
19 opportunity to think about it and hear from  
20 other people. The points that I found to be  
21 most significant were when we voted on things  
22 that really seemed like departures, when the  
23 rule departed from the statute. And so I've  
24 been interested in what the subcommittee had  
25 to say about it. In this instance, what I've

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1 heard is that it's been done this way because  
2 other jurisdictions did it that have similar  
3 statutes. I can't --

4 HON. ANN CRAWFORD McCLURE: Well,  
5 there's another issue, too, that I thought I  
6 made clear and perhaps I didn't. The  
7 application has to be under oath by statute.  
8 The question is, who is going to do the oath?  
9 Is it going to be the lawyer on behalf of the  
10 minor, or must it be the minor?

11 We took the position at the subcommittee  
12 level that in all likelihood these are going  
13 to be filed before the attorney is appointed.  
14 The number of instances in which she has  
15 sought independent counsel before she files it  
16 is going to be in our view less frequent. In  
17 order to come up with forms, which we were  
18 required, the two forms we were required to  
19 come up with, one of them is the application;  
20 that if we had an application, that it ought  
21 to be providing for her verification.

22 The doctors expressed some concern about  
23 having the verification by something other  
24 than the minor.

25 CHAIRMAN BABCOCK: Could the father

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1 file the application?

2 MS. EADS: What are you going to do  
3 about the retarded 14-year-old who has been  
4 raped by the father? I mean, this rule  
5 requires that that retarded 14-year-old sign  
6 the application. That makes no sense to me.  
7 Why is it mandatory that that's the person who  
8 signs it, when the statute just says the  
9 application has to be verified? I mean, that  
10 puts an enormous burden on the system, and I  
11 don't see any reason for it.

12 PROFESSOR DORSANEO: It's the same  
13 as the civil procedure rule saying that a next  
14 friend can institute the proceeding on behalf  
15 of a minor. It isn't going to apply to this.

16 HON. ANN CRAWFORD McCLURE:  
17 Depending on how you construe the next friend,  
18 depending on the nature of their ability to  
19 act on behalf of the minor, it may implicate.

20 PROFESSOR DORSANEO: Well, our  
21 next-friend law generally doesn't impose any  
22 particular requirements on somebody to be the  
23 next friend. It may not be a good idea for  
24 somebody who might want to be in this business  
25 to be acting as a next friend. Then again,

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1 you know, that's kind of prejudging  
2 circumstances that aren't present.

3 REPRESENTATIVE DUNNAM: One thing  
4 that was discussed, in this situation, I'm  
5 informed that many of these girls don't come  
6 from traditional families. They live with  
7 grandparents and things like that. I envision  
8 most of these applications being things where  
9 another family member is the one that assists  
10 the minor in filing this application. I know  
11 there will be other times where various  
12 organizations will assist them. But with  
13 regard to the other bypasses that were  
14 discussed, I can see a grandmother who has  
15 basically raised the child go in, either to a  
16 lawyer or on their own. Not many young women  
17 are going to be able to do this by themselves  
18 without assistance from somebody.

19 CHAIRMAN BABCOCK: Judge Lawrence.

20 HON. TOM LAWRENCE: It seems like  
21 we're trying to expand the statute  
22 unnecessarily. If the judge is going to have  
23 the applicant perform for the hearing, I don't  
24 see that having the applicant swear to the  
25 affidavit gives it any more weight or

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1 credibility.

2 HON. SAMUEL A. MEDINA:

3 Mr. Chairman, may I say something?

4 CHAIRMAN BABCOCK: Yes.

5 HON. SAMUEL A. MEDINA: For what  
6 it's worth to the rest of committee, basically  
7 some judges from Harris County, myself and  
8 others, and a judge from Austin, basically  
9 that was taken from Section A, I believe. And  
10 it was not a matter of, oh, it's got to be  
11 this way. There was not a whole lot of  
12 discussion. I don't know if that makes any  
13 difference. It was more like, okay, we have  
14 to look at it. A pregnant minor. Okay.  
15 We're we go. But there was not debate over  
16 this. So take that for whatever it's worth to  
17 you. You make decisions.

18 CHAIRMAN BABCOCK: Judge Brown.

19 HON. HARVEY G. BROWN, JR.: I do  
20 think we're adding to the statute a little bit  
21 by saying the application has to be sworn to  
22 and signed completely by the minor. But I  
23 don't think we're adding to it when we say  
24 that subpart (3) needs to be sworn to by the  
25 minor. Only the minor can say if the minor

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1 wishes this. An attorney doesn't have  
2 personal knowledge of what the minor wants.  
3 If the attorney is told what the minor wants,  
4 that is still, it seems to me, hearsay, not  
5 personal knowledge. It can only be the person  
6 who says they want it.

7 MS. SWEENEY: But we speak for our  
8 clients on a fairly regular basis on things  
9 like that when we say what they say they want.

10 CHAIRMAN BABCOCK: I can envision a  
11 situation where the teenage father goes in  
12 there and files the application and swears to  
13 it because the girl has told him that's what  
14 she wants, and then they go before the judge  
15 and there's some potential for abuse there,  
16 particularly if there's a snafu and there's no  
17 actual hearing but it's deemed granted by  
18 operation of law, so that the young woman is  
19 never before the judge, so he never really  
20 gets to ask the woman himself. That strikes  
21 me as potential for abuse. So that's my  
22 comment, Judge.

23 JUSTICE HECHT: Or the incestuous  
24 father, like Linda raised. What if the  
25 father, who has abused the child, he makes the

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1 application?

2 CHAIRMAN BABCOCK: Of course, that  
3 would be somewhat incongruous since it's  
4 parental notification.

5 JUSTICE HECHT: Well, the stepfather  
6 or the boyfriend or uncle.

7 MR. LOW: Any part of the affidavit  
8 that's signed by somebody mentally  
9 incompetent, I don't know that they want  
10 that. How can somebody incompetent sign an  
11 affidavit, no matter what it is? That's the  
12 first thing.

13 MR. YELENOSKY: But that's always an  
14 issue, and there are all kinds of requirements  
15 that people sign an affidavit to something  
16 that they have to take into account that  
17 potentially someone is incompetent, and then a  
18 guardian is appointed or some other  
19 accommodation is made as somebody requires it.

20 HON. JAN PATTERSON: What is  
21 meaningful to me is the face-to-face, the  
22 hearing, the judge and the girl. The  
23 application gets them there. And so I think  
24 we ought to facilitate getting them to the  
25 judge as soon as possible so that the judge



1 can make an informed decision.

2 CHAIRMAN BABCOCK: Judge Rhea.

3 HON. BILL RHEA: I agree with Chip,  
4 and that's that it never happens. That's the  
5 danger. This could be so easy for some family  
6 member, either the abuser or just somebody who  
7 doesn't want the trouble, to push something on  
8 a girl who may not want it. We have to leave  
9 that option open to the minor as well.

10 MS. EADS: Well, there's abuse on  
11 both sides. And the statute says  
12 "application," it doesn't say "applicant  
13 verifies," so I mean, we can argue abuse on  
14 both sides of this question obviously.

15 CHAIRMAN BABCOCK: Yeah. This is a  
16 very interesting issue at 5:15. Bill  
17 Dorsaneo.

18 PROFESSOR DORSANEO: Frankly, the  
19 statute doesn't say -- I don't find it in the  
20 statute anywhere, although I think it's a good  
21 idea, that the minor would appear at this  
22 hearing, but I don't see that the statute says  
23 anything about that. I mean, we're  
24 embroidering on the statute quite a bit.

25 CHAIRMAN BABCOCK: Well, let's stick

1 All right. And all those who believe to  
2 the contrary, that the rule and form as  
3 drafted should include or require the minor to  
4 sign it under oath, raise their hand.

5 By a vote of 13 to 14, the sense of this  
6 committee is that it should be dropped, that  
7 the minor should not be required to sign it  
8 under oath. Did you got that, Bob?

9 MR. PEMBERTON: Got it.

10 MR. ORSINGER: The very last rule in  
11 here, about when the Supreme Court exercises  
12 its rule making authority, I think is negated  
13 by our decision to make all of the opinions in  
14 private, because it says the Supreme Court  
15 should promulgate rules in cases where there's  
16 no appeal from the court of appeals to the  
17 Supreme Court, but that the court of appeals  
18 interpreted this Family Code provision as  
19 otherwise. But in light of the fact that it's  
20 never going to be published or revealed to  
21 anybody, the Supreme Court will never know  
22 about that category of cases, and shouldn't we  
23 delete that now?

24 MR. PEMBERTON: There's a provision  
25 in Rule 3 for forwarding a court of appeals

1 to this issue. Judge Dorsaneo raises a great  
2 point. Okay. Is it still the sense of the  
3 subcommittee that they don't wish to entertain  
4 this amendment?

5 HON. ANN CRAWFORD McCLURE: Yes.

6 CHAIRMAN BABCOCK: Okay. So we're  
7 going to vote first on whether or not the  
8 application must be signed by the minor. And  
9 so the issue will be if you are in favor of  
10 deleting the requirement in the rule, in the  
11 form, that the minor must sign the  
12 application, raise your hand.

13 All right. All those who are in favor of  
14 the rule in the form as drafted, which  
15 requires the minor to sign the form, raise  
16 your hand.

17 By 16 to 12, the sense of this committee  
18 is that the application should not -- it  
19 should not be a requirement that the minor  
20 sign.

21 All right. Now, the next issue is, all  
22 those who believe that the rule and the form  
23 should be changed to delete that the minor  
24 swear to the application under oath raise  
25 their hand.

1 opinion to the Supreme Court, even -- well,  
2 assuming that at the time we provided there  
3 would be an opinion in every court of appeals  
4 case. It would always be forwarded, whether  
5 the case went up or not, to the Supreme Court,  
6 so they would take it into account in issuing  
7 their guidelines.

8 CHAIRMAN BABCOCK: I think that's  
9 the answer to that. Paula.

10 MS. SWEENEY: In those two votes,  
11 did we solve the problem of the mentally  
12 incompetent minor? If the Court would follow  
13 that suggestion, then somebody else could  
14 speak for the mentally incompetent?

15 CHAIRMAN BABCOCK: If the Court  
16 followed that suggestion, that's right.

17 Okay. I think the sense of Justice Hecht  
18 and myself and Justice McClure is that we have  
19 answered the major substantive issues with  
20 respect to these rules, thus obviating the  
21 need for a meeting tomorrow morning, which I  
22 know will disappoint many of you. However, if  
23 anyone spots something in these rules that  
24 needs to be fixed, either a substantive issue,  
25 or the thing I worry about is that there's

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1 some word dropped out or there's a typo or  
2 there's some inconsistency, please tell either  
3 myself or Justice McClure or Bob Pemberton  
4 just as soon as you can.

5 And I think for my sake, this level of  
6 discussion has been on a very high plain, and  
7 I thank everybody for it, and I hope my first  
8 meeting hasn't been a disaster as I feared it  
9 might.

10 MS. SWEENEY: You did really good.

11 JUSTICE HECHT: Let me tell you that  
12 we appreciate, Judge Baker and I, appreciate  
13 your looking at this on such short notice.  
14 And the Court is going to expedite its own  
15 consideration of this, and then almost  
16 immediately, as soon as we can finish, ask for  
17 public comment, since we have such a short  
18 time. And that request will probably go out  
19 about the same time that you get the product  
20 of all of these comments and reworks that we  
21 heard today. So we're not going to be able to  
22 come back to you with a revised version ahead  
23 of the time that we ask for public comment.  
24 That doesn't mean that we don't want your  
25 comments during that period. It's just that

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1 we have such a short time to get these  
2 finished that that's the way we'll have to do  
3 it.

4 CHAIRMAN BABCOCK: And I think we  
5 probably, as long as we're clapping, ought to  
6 clap for Judge McClure and her subcommittee.

7 Thanks. We're adjourned.

8 (Meeting adjourned at 5:45 p.m.)  
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# Condenselt™

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# CondenseIt™

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# Condenselt™

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