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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

September 25, 2009

(FRIDAY SESSION)

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Taken before *D'Lois L. Jones*, Certified Shorthand Reporter in Travis County for the State of Texas, reported by machine shorthand method, on the 25th day of September, 2009, between the hours of 9:00 a.m. and 5:01 p.m., at the Texas Association of Broadcasters, 502 E. 11th Street, Suite 200, Austin, Texas 78701.

INDEX OF VOTES

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

Documents referenced in this session

09-19 NICS Improvement Act & HB 3352

09-20 Poverty Law - subcommittee follow-up report 9-23-09

09-21 Poverty Law - memo from Judge Lawrence 9-9-09

09-22 Civil case cover sheets - subcommitte report 9-7-9

09-23 Proposed/sample civil case cover sheets

09-24 9-9-09 memo from OCA, civil case cover sheets.

09-25 Judicial foreclosure revised proposed amendments to Rules 735 and 736

09-26 Recusal - memo from Mr. Orsinger, 8-24-09

09-27 Recusal - memo from Judge Peeples, 9-23-09

09-28 Recusal - Rule 18a strikeout version

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09-30 Recusal - Second region statistics

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CHAIRMAN BABCOCK: Welcome, everybody. We need to recognize on the record that Bobby Meadows was the first person here today for the first time in 17 years, so kudos to Bobby for being early for once.

HONORABLE STEPHEN YELENOSKY: He was still on another time zone.

CHAIRMAN BABCOCK: He is on another time zone. So we will go right into the agenda, which starts as usual with a status report from Justice Hecht.

HONORABLE NATHAN HECHT: Well, the big news of the Court is that Justice Brister has retired; and just before he left, the Court had set a record serving together longer -- the nine members, longer than any nine-member court since September of 1945 when the Court -- people changed the Court from three members to nine. Justice Willett has the distinction of being the junior judge the longest in history, so we gave him the Breyer award the other night, but as Greg Coleman pointed out, it's not really Breyer that has the record at the U.S. Supreme Court. It's Justice Story back then.

CHAIRMAN BABCOCK: Back in the Story days.

HONORABLE NATHAN HECHT: Yes. And as usual, the leading contenders to replace Justice Brister are members of this committee, so steppingstone to glory, as

usual.

We have -- we were working a lot on the disciplinary rules for the Bar, and we've been working on them since the winter, I guess, and it has been an ennormous amount of work that Kennon and Justice Johnson and two other committees as well as several other groups following in the wake of the American Bar Association and lots of interest around the country in changing the disciplinary rules. So we expect to have a draft completed and ready for comment we hope next month, and we're doing everything we can to stay on that schedule. So that has taken the Court just scores of hours through the spring and the summer, but doesn't involve this committee, but there will be a big slug of rules that will be put out for comment before the referendum with the Bar on them in the spring, and there are a lot of changes in them, and no doubt they'll get a lot of interest in the Bar.

We formed a task force, as required by Senate Bill 1448, to look at orders requiring improvements to property by landlords, and Justice Lawrence is heading that up for us, and they have been at work, and we hope to have something for the next meeting, and I believe the statute requires that the rules take effect in January, so as before when we've had that situation and we didn't have

enough time between the end of the session and the effective date to get them out for comment and wait on the comment before putting them in place, this time as in those other instances, we will work on them here, try to get something final, go ahead and put it in place, then get comments back and may change the rules in the spring based on the comments. So as between the general procedure that the Rules Enabling Act requires and any specific deadlines that the Legislature imposes on rules that they want in place, we honor the specific deadlines over the more general ones and then try to honor the general ones as time passes. So we think that will be coming at the next meeting.

We did make one minor change in the Rules of Disciplinary Procedure, which has to do with the confidentiality of grievance proceedings. The rules suggested and the chief disciplinary counsel has taken the position in the past that even complainants are obliged to keep confidential grievance proceedings, at least up to a point in the proceeding, and we got a complaint from a person involved in the process that that might be inconsistent with the First Amendment, and we had a decision from the Supreme Court of Louisiana that had already reached that conclusion, so we asked the chief disciplinary counsel to look at it, and she ultimately

agreed as did the Bar, and so we've got that change coming, and that should be out shortly.

MS. PETERSON: It's in an order, Miscellaneous Docket No. 099150, effective date in January 2010.

HONORABLE NATHAN HECHT: So you'll see that, and then finally we have a new referral, referrals, I guess. The Court thought about the discussions that the committee had last time about whether there should be a rule on procedures for jury members to ask questions of the judge during the deliberations, and the committee talked about whether a rule was appropriate and to a less degree what it should be; and thinking about that, the Court said we should come up with a rule so that we can see whether it would really be -- do good or not, because there doesn't seem to be any practice, meaning much guidance, on how questions get asked. So that's the reaction to the discussion at the last meeting.

And then there is a procedure in Rule 5.1 of the Federal Rules of Civil Procedure implementing Section 2403 of Title 28 of the U.S. Code, which requires notice to Federal -- the Federal attorney general and state attorneys general on questions -- cases involving questions that call into -- involve the construction of statutes or the constitutionality of statutes, and there

is no similar procedure in state law, and so the attorney general asked the Legislature to consider such a procedure during the last session, and the Legislature declined, but the attorney general still thinks it's a good idea for that office to get notice when there are private lawsuits calling statutes into question, and so the Court would like the committee to look at that, and a lot of the work has already been done in Rule 5.1 of the Federal rules, and we would need to take a look also at the legislation that was offered and the reactions to it during the last session.

CHAIRMAN BABCOCK: And I guess on the first question, Judge Christopher, I believe you led the charge, or the retreat, however you characterize it, on the --

HONORABLE TRACY CHRISTOPHER: I'd be glad to work on it.

CHAIRMAN BABCOCK: Okay. That would be great, and I think the notice to the attorney general would fall in Richard Orsinger's committee, so will you look at that?

MR. ORSINGER: Now that we've gotten all the -- the rest of our work done that will be easy.

CHAIRMAN BABCOCK: Well, I don't think this is going to be too hard because there's a Federal rule that works pretty -- well, okay.

MR. ORSINGER: I'm not one to just automatically do what the Federal people do.

CHAIRMAN BABCOCK: I know. Anyway, if your subcommittee will look at it.

MR. ORSINGER: I was born and raised and lived my entire life in Texas.

CHAIRMAN BABCOCK: That would be great. Thank you. Well, Justice Hecht doesn't get much of a break here because the first agenda item goes to him in the absence of Professor Dorsaneo, who is absent, I think.

HONORABLE NATHAN HECHT: The National Instant Criminal Background Check System, National Instant Criminal Background Check System, which is an amendment I think to the Brady Act, is an effort by the Federal government to obtain information from law enforcement officials around the country regarding persons who are involved in and charged with handgun -- gun crimes, and they have -- the Federal government has directed the states to come up with a process where the law enforcement agencies will make this information available to Federal law enforcement people and specifically the NICS, and the -- there are regulations regarding how this information is to be provided by the states to the Federal government and not much of those regulations concerns us.

However, if in that reporting a person is

included as someone who has been -- has had a firearms disability imposed on the person, that person under Federal regulations must have some way of getting off the list that is being sent to the Federal government, and the Federal regulations require that that process involve a hearing at which the person can appear and present his position and whatever evidence he has, and then an appeal that is de novo, that he can try again, and so the reason that we care about this as much as we do is because there are Federal funds attendant on our compliance with these regulations.

Well, people who are charged with worrying about this went to the Legislature the last session and got a bill which was --

MS. PETERSON: It was House Bill 3352.

HONORABLE NATHAN HECHT: House Bill 3352, which is supposed to cover the whole thing, and the bright idea that they had was that we would start in the trial court rather than in an agency. The problem with that is that then we have to have a de novo appeal, and right now we don't have any specific rules or statutes permitting a de novo appeal to the court of appeals, and the de novo appeal under the Federal regulations must specifically include the possibility of presenting additional evidence.

HONORABLE STEPHEN YELENOSKY: Well, we can

do it twice.

HONORABLE NATHAN HECHT: Yeah.

MR. ORSINGER: Let's have the regional presiding administrative judge handle the de novo appeal.

CHAIRMAN BABCOCK: Right.

HONORABLE NATHAN HECHT: So we have on our statute books now section 574.088 of the Health & Safety Code, which was included by the House bill during the last session, and it sets all of this out, and it's short, and so I'm just going to tick off the elements and show you what the problem is, and the elements of the statute are these: "A person who is furloughed or discharged from court-ordered mental health services," so he's had mental health -- court-ordered mental health services, but he's furloughed or discharged, that person "may petition the court that entered the commitment order for an order stating that the person qualifies for relief from a firearms disability." So you go back to the trial court that entered the order in the first place and you ask for an order of relief.

"In determining whether to grant the relief the court must hear and consider evidence about circumstances, the mental history, the criminal history, and the person's reputation." That's fine, the trial court can do all of that. Then the statute provides

"Court may not grant relief unless it makes and enters in the record the following affirmative findings: The person is no longer likely to do the same thing and removing the person's disability to purchase the firearm is in the public interest." So far so good.

So you go back to the court that ordered you to get mental services, you ask to have that disability removed in light of the Federal statute that makes that a firearms disability. You put on your case. The trial judge says "yes" or "no," makes the specific findings or doesn't make them, and that's a final order and then you can appeal. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Justice Hecht, would that always be a probate court then?

HONORABLE NATHAN HECHT: I don't know.

HONORABLE STEPHEN YELENOSKY: If it's the court that -- I don't have it in front of me. Is it the court that found that the person was committed?

HONORABLE NATHAN HECHT: It's the court that ordered mental health services.

HONORABLE STEPHEN YELENOSKY: Then that's going to be a probate court always, isn't it? And it may be significant because of this de novo issue.

HONORABLE NATHAN HECHT: Right.

HONORABLE STEPHEN YELENOSKY: Does the state

statute specify which level of trial court?

HONORABLE NATHAN HECHT: No.

HONORABLE STEPHEN YELENOSKY: So if, in fact, the first one is the probate court, I guess you could have probate court and then de novo in district or county court at law or something.

PROFESSOR ALBRIGHT: Could you start in the -- could you start in the JP court?

HONORABLE STEPHEN YELENOSKY: No, just --

HONORABLE NATHAN HECHT: No, you would have to go back to whichever court it was that ordered it. Yes.

HONORABLE DAVID GAULTNEY: If this would include not guilty by reason of insanity it might not only be probate.

HONORABLE NATHAN HECHT: Right.

HONORABLE DAVID GAULTNEY: It could be other courts that are involved.

HONORABLE DAVID PEEPLES: And I think there could be some criminal and family courts that would order mental examination, too.

HONORABLE STEPHEN YELENOSKY: Mental examination or mental commitment? Because it --

HONORABLE NATHAN HECHT: Mental health services.

HONORABLE STEPHEN YELENOSKY: Yeah. Isn't that an actual commitment or no?

HONORABLE DAVID PEEPLES: Is anger management, does that qualify?

HONORABLE STEPHEN YELENOSKY: I don't think that triggers the Federal law, does it, if somebody is just sent to those things?

CHAIRMAN BABCOCK: Did you remember what Justice Hecht last said? "So far so good."

HONORABLE NATHAN HECHT: Right.

MS. PETERSON: He hasn't gotten to the problem yet.

CHAIRMAN BABCOCK: He hasn't even gotten to the hard part.

HONORABLE NATHAN HECHT: I don't know the answer to that.

HONORABLE STEPHEN YELENOSKY: This does not bode well for your committee, Richard, on that other.

MR. ORSINGER: This is not my rule. I don't have a probate.

HONORABLE NATHAN HECHT: But when there is an order then it seems that there could be an appeal from it to an appropriate court, but it -- the anticipation is that some of the orders will come out of trial courts from which ordinarily the only appeal is to the court of

appeals.

So, query, can we have a special rule for the appellate court that in considering these appeals, which would be an appeal as from any other order, they will consider the evidence de novo, and there already is a rule that permits the court of appeals to direct the trial court or master to obtain additional evidence if that's necessary. While we can't be sure, it seems like almost always the evidence would be written. It would be an affidavit, or it's unlikely to be testimony, but it's possible it could be testimony, but to obtain that evidence and file it in the court of appeals, and then the court of appeals would consider the appeal de novo.

Now, Kennon has proposed this to Professor Dorsaneo, who didn't see any immediate problems with that, but because of the Federal funding issue we thought we would present the concept this morning and see what problems the committee thinks there might be so that we can get a draft of this and get it to you next time.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Would that then mean that you have an automatic right of appeal to the Supreme Court because that's the first level of true appellate review?

HONORABLE NATHAN HECHT: No.

HONORABLE STEPHEN YELENOSKY: Is that --

HONORABLE NATHAN HECHT: That's an easy question.

HONORABLE STEPHEN YELENOSKY: Is that a problem then, that you get a de novo, so you really -- really you have no appellate review then. I'm not saying that's a problem necessarily, but is it a jurisprudential problem that there's no appellate review?

HONORABLE NATHAN HECHT: Well, we already have, obviously as everybody knows, a rule that legal matters are reviewed by the appellate court de novo. They recite all the time, "because this is a legal question, we review the trial court's determination de novo," which means a nondeferential re-examination of the legal issue. I'm not aware of that in the court of appeals on a factual issue, and with respect to credibility issues I don't even know how you could do it, but I'm not -- there doesn't seem to be an anticipation that there will be many of those credibility type issues.

HONORABLE STEPHEN YELENOSKY: My follow-up question is, if what you're suggesting is basically the automatic right to submit additional evidence at the court of appeals, does that meet the definition of de novo, because a de novo could involve not introducing something that you introduced the first time, and we see that, for

example, you know, in the family law context before an associate judge. If you lose the hearing and you introduce some evidence that turned out to be harmful to you, when you get before the district court you don't introduce it. So does it meet the definition of de novo to permit only additional evidence?

CHAIRMAN BABCOCK: Professor Albright, then Skip.

PROFESSOR ALBRIGHT: Well, I guess I was thinking -- I don't have any idea practically as to what kind of evidence this is, but I would think that there would be lots of times when they'd have a lawyer for the de novo and not for the first one or a better lawyer or whatever, and they might well want to introduce more evidence, and having it all in affidavit form might be problematic. Could you have a motion for new trial that was a different kind of motion for new trial that you had to provide the opportunity to present additional evidence? It doesn't solve your problem of don't consider --

HONORABLE STEPHEN YELENOSKY: Well, it would solve it -- it would solve it if it were an automatic right to a new trial, which basically you start over, and as I jokingly said originally, we can do it twice. Does it meet the definition of de novo? Does it violate anything that any law, Federal or constitutional or

otherwise, to say basically you get two trials at the trial level?

PROFESSOR ALBRIGHT: Does it matter if it's the same judge?

CHAIRMAN BABCOCK: Skip, and then Judge Christopher, and then Richard.

MR. WATSON: Can the -- do the courts of appeals have jurisdiction to make fact findings?

MR. ORSINGER: No, they don't.

MR. WATSON: That would appear to be a bit of a hurdle.

CHAIRMAN BABCOCK: Judge Christopher.

HONORABLE TRACY CHRISTOPHER: I would suggest that we have a different trial judge review it, similar to the procedure that we have in place when a judge holds a lawyer in contempt and they're entitled to an automatic appeal in front of another judge before they're actually found in contempt. I'm pretty sure you go up to the presiding regional judge to get the appointment of a second judge, because I can actually see how it would be possible that the person who made the original decision to put somebody into the mental health system might have, you know, kind of not a bias, but they have their own feelings about this person already.

HONORABLE STEPHEN YELENOSKY: We call it a

prejudice.

HONORABLE TRACY CHRISTOPHER: They're the ones who sent them off to the mental health facility, so it seems like we could make that kind of a system.

HONORABLE NATHAN HECHT: So that there would be maybe before the judgment became final or something you would have an opportunity to request a review by another judge.

HONORABLE TRACY CHRISTOPHER: Right.

HONORABLE STEPHEN YELENOSKY: It couldn't be just a review. It would have to be de novo.

HONORABLE TRACY CHRISTOPHER: Right. But, I mean, it is de novo in the contempt. I mean, they have to --

HONORABLE STEPHEN YELENOSKY: Right.

HONORABLE TRACY CHRISTOPHER: They put on all the evidence again.

HONORABLE STEPHEN YELENOSKY: I don't see a problem with that, particularly in the jurisdictions where we have multiple judges, and if most of these are coming from the probate court at least you could have a different type of court hearing it, and so you're reviewing the probate judge, which might be a little uncomfortable, but may be the best way to handle this.

PROFESSOR ALBRIGHT: It sure seems better

than doing it in the appellate court.

CHAIRMAN BABCOCK: Richard. Richard, then Justice Pemberton, then Justice Gray.

MR. ORSINGER: To follow up on Skip's comment, even a cursory reading of the constitutional provision giving the -- describing the jurisdiction for the court of appeals would indicate that they can not conduct a de novo appeal, and that was thoroughly examined in *Poole vs. Ford Motor Company*.

CHAIRMAN BABCOCK: Oh, show-off.

MS. PETERSON: What's the exact cite on that?

MR. ORSINGER: Those of us --

HONORABLE STEPHEN YELENOSKY: Wait. I have Google here.

MR. ORSINGER: If anybody wants to see the ins and outs of it three or four times, go read Poole. My suggestion is entirely different, and that is what we should do is use rule -- Texas Rule of Civil Procedure 171 for a master in chancery. A district court and the county court has the authority to appoint a master in chancery in exceptional cases for good cause, and you can delegate the entire judicial responsibility of the proceeding to the master in chancery, who then is empowered to issue subpoenas, take sworn testimony, et cetera, et cetera, and

then they report back their findings or their rulings.

If anybody objects -- the rule doesn't say this, but the case law does, if anybody objects to the master in chancery's ruling you get a de novo proceeding in front of the district judge. It's automatic. You could waive it in advance or at least I believe you can by contract, but if it's not waived by agreement, I think you get a de novo review by the district judge and then you would have a true court of appeals appellate review from the trial judge's finding, and we could perhaps be compliant with the statute without --

HONORABLE STEPHEN YELENOSKY: But doesn't the statute say that in the first instance it has to go back to the judge who heard it -- who issued it?

MR. ORSINGER: I think it says to the court, not to the judge. It wouldn't make any sense to say the judge. What if the judge has moved on to the court of appeals or even the Supreme Court?

HONORABLE STEPHEN YELENOSKY: Well, I don't know. I don't know exactly what it says.

MR. ORSINGER: If it goes back to court, the court has the power to appoint a master in chancery, so I don't see that we have any kind of procedural limitation. The only flaw in the whole theory is, is a proceeding in front of the master in chancery enough of a trial to

comply with the statute, but, you know, masters in chanceries make rulings. Usually they're appointed for limited purposes like discovery but they can be appointed to try a whole case. I mean, I've tried entire cases to a master in chancery.

HONORABLE STEPHEN YELENOSKY: But is it advisory, though? I mean, you know family law --

MR. ORSINGER: It's not advisory, unless somebody objects to it within the time allowed, in which event it's negated, not just advisory. So I think the trial judge is required to enter a judgment based on the master's finding unless somebody objects. I don't know, Justice Hecht, or any of the other procedure hounds in here might know better than I, but --

HONORABLE DAVID EVANS: Richard, I don't know how many we would see of these, but how is it financed? Does the county pay for the master? Because in the situation that was suggested by Tracy where the presiding judge would appoint another judge, there's funds already available for that, and it's probably going to be a sitting judge already who is already on payroll, so your master in chancery works in cases where parties have the funds to pay for the master on a cost basis.

CHAIRMAN BABCOCK: Justice Pemberton.

HONORABLE BOB PEMBERTON: I was just going

to echo the concerns about jurisdiction in the courts of appeal, and even if we had jurisdiction, I think you would find a lot of courts of appeals, at least ours probably, just referring these things to some trial court to have the fact findings heard so you can get you that in a court of appeals. It needs to be in some kind of trial type court.

CHAIRMAN BABCOCK: Justice Gray, was it you or Jeff that had your hand up?

HONORABLE TOM GRAY: I think both of us did. I was going to make reference back to the United States Supreme Court's original jurisdiction, and my understanding of what they normally do is abate them out to a trial judge to develop the record before they take it back up under Article 3 when they do the ambassador's trials, and so notwithstanding Richard's aversion to the Federal procedures, we might be able to find something there that would give us a procedural vehicle so that they can develop a fact record and basically let the appellate court pick some other district judge to do that, and that, you know, may be disassociated with the other judge.

CHAIRMAN BABCOCK: Jeff, then Richard.

MR. BOYD: I'm trying to look at the statute here, Chapter 574, real quick, but there's one provision that says, "The county judge may appoint a full-time or

part-time master to preside over the proceedings for court-ordered mental health services if the commissioners court of a county in which the court has jurisdiction authorizes the appointment," so it is an option, but statutorily it requires the county commissioners court approval, but going back to what Judge Yelenosky said -- and particularly those of y'all that do criminal law are going to be more understanding of this, but the statute says the jurisdiction, a proceeding under subchapter (c) or (e), which are those orders for health services must be held in the statutory or constitutional county court that has the jurisdiction of a probate court or mental illness matters, which sounds like statutorily it has to be in the probate court, and if that is the case then I think Judge Yelenosky is onto something about possible de novo review in the district court, but I think I heard others say a minute ago that it can also come from a district court in a criminal proceeding, although that's not what I'm finding in a statute.

CHAIRMAN BABCOCK: Richard Munzinger, and then Judge Yelenosky.

MR. MUNZINGER: I was just going to point out that Richard Orsinger's proposed solution may not work if the probate court is the court of original jurisdiction, for example, and appoints a master in

chancery to hear the case. It doesn't require de novo review unless some person complains, the person who has been disqualified from having a firearm. So if I complain to the master in chancery's ruling, I'm complaining back to the court that appointed the master in chancery. Does that mean that that court is at a de novo review? I would question that it is, because the master in chancery is not a free-standing court so to speak that would have original jurisdiction.

I don't know that that solution would work for that reason. You don't run into the problem of needing a de novo review unless the person complains, so you're complaining back to the court that appointed the master, and it is that court which is going to enter the judgment, it would seem to me, that would say you can or can't carry a gun or whatever it is that the judgment says.

CHAIRMAN BABCOCK: Okay. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Were you intending to send this to subcommittee or have you already done that?

HONORABLE NATHAN HECHT: Well, Dorsaneo was conscripted to look at it.

HONORABLE STEPHEN YELENOSKY: Okay. Well, I guess I would suggest sending it to some type of committee

because I think a number of people have said that they, including me, have concerns that you can do a true de novo by admission of additional evidence. I don't know, but I don't think you can. I don't know that it's truly de novo if you just take additional evidence, and then secondly, we can get answers to some of our questions about this from somebody like Judge Herman of the probate court here, who is very knowledgeable about this kind of stuff.

HONORABLE NATHAN HECHT: He was involved in the legislation.

HONORABLE STEPHEN YELENOSKY: Oh, he was?

HONORABLE NATHAN HECHT: Yeah.

HONORABLE STEPHEN YELENOSKY: Okay. Well, so, I don't know, we may have exhausted what we can do without more input.

CHAIRMAN BABCOCK: Is anybody -- what's wrong with Judge Christopher's idea? It seems to me it's got a lot to recommend. As Judge Evans points out, you've already got the funding in place. You don't have to worry about paying for somebody like Orsinger.

HONORABLE DAVID EVANS: We have some de novo review already. The licensing of alcohol comes from county court jurisdiction over to district court jurisdiction. We conduct a de novo. There's some models out there that we might look at, and as Judge Christopher

pointed out, the contempt model is one, and the presiding judge picks a neutral judge to come in and try it de novo and would have the funds to do it.

CHAIRMAN BABCOCK: Yeah.

HONORABLE DAVID EVANS: And those facilities are more -- are better equipped to receive evidence. Justice Hecht, I think the affidavit practice in this type of area would just lead to the perfect storm over the perfect affidavit as to what was legally conclusionary and objections, and eventually you would end up with a reporter present taking evidence.

HONORABLE NATHAN HECHT: Well, this is very helpful, and maybe instead of Professor Dorsaneo looking at it, maybe Judge Evans or somebody could look at it. Or another group. But we do need to --

HONORABLE DAVID EVANS: That's what I was afraid of. Justice, you need to speak up, I didn't quite catch that.

HONORABLE NATHAN HECHT: You don't need to here this. You don't need to hear this part, Judge Evans.

HONORABLE STEPHEN YELENOSKY: You'll get a letter.

HONORABLE NATHAN HECHT: And draft something, draft something up.

CHAIRMAN BABCOCK: I hear a motion,

seconded, all in favor. Okay, Judge Evans, it's you.

HONORABLE DAVID EVANS: Gee, thanks.

CHAIRMAN BABCOCK: You can draft whoever you want to assist.

HONORABLE NATHAN HECHT: There's been quite a bit of work done on this in the -- up to this snafu, which we have, but Judge Herman has worked on it, and OCA has done a bunch of work on it, and they have all the background and stuff, so I'll provide all of that to you later.

HONORABLE DAVID EVANS: Yes, sir.

HONORABLE NATHAN HECHT: Maybe we can get something done. Thank you.

HONORABLE DAVID EVANS: May I be excused, Mr. Babcock, for fear of anything else happening at this point?

CHAIRMAN BABCOCK: Actually, when you leave it's worse. You'll be working on poverty law issues before you know it, which brings us to our next agenda item and Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, I missed the last meeting, but I read the transcript, and Kennon and I, together at Justice Hecht's request, put together a follow-up report, which basically is an edited version of the original report and incorporating what we were able to

glean from the transcript plus some other stuff I guess that's happened since the last meeting. And I think we can do this relatively quickly. I'm looking at what says, "SCAC subcommittee follow-up report on poverty law problems and proposals," dated September 23rd, 2009, and then in bold it says "The following report is edited version," et cetera, so that's what I'm looking at.

Problems 1 to 3 and 6, as it states there, were that indigent litigants are charged by some of the clerks' offices for fees arising after the filing fee. There's no provision for exemption from e-filing fees, and some courts require affidavits of indigence to include unnecessary and sensitive information. There was then proposed language for 145(a) and (b). The full committee approved the proposed language as modified to replace "charge with advanced payment."

There was a conclusion that the proposed last sentence regarding e-filings failed to fix the problem. The subcommittee in response to that acknowledges that it fails to fix the problem, but that's all that we thought we could do, which was to facilitate transfer of information should there be a negotiated waiver for indigent clients.

Since then, as late as yesterday evening, I've got information from one of the parties who is

involved in the negotiations with the department -- Texas Department of Information Resources regarding a waiver for clients of IOLTA-funded organizations, and it changes things somewhat, because I learned from that that they believe they may come up with a system that would, in fact, be hampered by this proposed language because it's dependent upon the clerk sending out notice, and I don't know exactly what they have in mind, but the bottom line is the Legal Aid folks involved in this -- and we do have Nelson Mock here, I noticed, who may have more to say about this. The e-mail was not from him but from Robert Doggett. But Robert said that --

CHAIRMAN BABCOCK: Robert's also here, Judge.

HONORABLE STEPHEN YELENOSKY: Oh, is he?

CHAIRMAN BABCOCK: Down here, snuck down in the corner.

MR. DOGGETT: Just fighting with the landlords.

HONORABLE STEPHEN YELENOSKY: Well, so he can speak for himself, but his e-mail says that they'd rather that we not propose a change in the rule regarding e-filing at all and let them do their work on negotiation; is that right?

MR. DOGGETT: Yes, your Honor.

HONORABLE STEPHEN YELENOSKY: Okay. And I told him in reply, well, if that's what you're asking for, since this is intended to benefit the clients of the people he represents, then I don't know that anybody would object to not proposing anything right now, but obviously stranger things have happened, so I don't know, Chip, if you want to take a vote on that or what.

CHAIRMAN BABCOCK: Yeah, just let's be clear about the language we're talking about. Is it on the first page of your 18-page memo?

HONORABLE STEPHEN YELENOSKY: Yes. And it is the last sentence that's underlined there, "The clerk must also immediately notify."

CHAIRMAN BABCOCK: Okay. And the proposal would be to delete that language?

HONORABLE STEPHEN YELENOSKY: Yes, and the comment regarding that would be not that we've rejected it in substance, but that it's not a ripe issue.

CHAIRMAN BABCOCK: Okay. Anybody have any views on that?

PROFESSOR ALBRIGHT: I just have a question. If they can't use electronic filing, they can file with paper, right?

HONORABLE STEPHEN YELENOSKY: Well --

PROFESSOR ALBRIGHT: When we talk about all

of these electronic filing rules, we have not gotten anywhere where you can't file with paper.

HONORABLE STEPHEN YELENOSKY: Well, it's not required anywhere except, what, Travis County now?

MS. PETERSON: Uh-huh.

HONORABLE STEPHEN YELENOSKY: And in Travis County you can file by paper, right?

MR. DOGGETT: Judge Dietz signed an administrative order, I'm going to say a month ago roughly, allowing IOLTA-funded organizations to avoid the requirement of e-filing.

HONORABLE STEPHEN YELENOSKY: And if you're pro se they will allow you to -- it's either written or understood that you can file. Nobody is being denied the ability to file because they can't afford e-filing in Travis County.

CHAIRMAN BABCOCK: In most of the Federal districts that's the way it works, isn't it? If you're indigent or pro se you can file it in paper, right?

MR. DOGGETT: Yes. Yes, your Honor.

CHAIRMAN BABCOCK: I'm not an Honor.

MR. DOGGETT: Sorry. Too many judges in here.

MR. ORSINGER: You're honorable.

MR. DOGGETT: I'm just not going to take any

chances.

CHAIRMAN BABCOCK: Just say "Yes, hey, you." Professor Albright.

PROFESSOR ALBRIGHT: Should the rule say something like "no court shall prevent filing"? I mean, I'm not saying it right, but "no court shall prevent a indigent person from filing by paper" or something like that.

MS. PETERSON: I think one of the concerns that you, Nelson, raised during the last meeting is having a fix like that, if I understand correctly, the idea would be to open up the e-filing system to indigent filers, so if there were something in there saying you can file on paper that would be good because you would have access to the courts, but it wouldn't be good because then the e-filing system wouldn't be open to the indigent filers.

PROFESSOR ALBRIGHT: So it's trying to encourage the e-filing people to let them file.

MS. PETERSON: Yes.

CHAIRMAN BABCOCK: Mr. Mock.

MR. MOCK: Yeah, the idea of not creating a two-tier system, which may be what we go with.

HONORABLE STEPHEN YELENOSKY: So my motion would be to eliminate that sentence and address this again some other -- at some other point when hopefully they've

negotiated some kind of waiver system that has a mechanism.

CHAIRMAN BABCOCK: Yeah, okay. Anybody opposed to that motion?

Okay. It passes unanimously.

HONORABLE STEPHEN YELENOSKY: I do want to just touch on one thing I said at the end on -- I will go back to the contents of the affidavit in it, but I want to touch upon the incontestability of the affidavit, and I talked to Richard Munzinger just before the meeting about this, and I think he and I are on the same page, but wanted to make that of record because when we originally vetted Rule 145 with an incontestability provision for IOLTA certificates, we did have a long discussion -- well, when have we not had a long discussion, so that's rather redundant. We had a discussion about Rule 145, and it obviously went to the Supreme Court, obviously was passed by the Supreme Court as they constituted.

After reading the transcript, I was just concerned that we might have lost a little institutional memory because something wasn't said at that time, and so I just wanted to say it at this time, and, Richard, obviously you can tell me if, in fact, I reported correctly we agree on this. There was talk about the right of a litigant to challenge whether or not the

alleged indigent is, in fact, indigent, and my point that I made way back when we did Rule 145 was there is no common law, statutory, or constitutional right that a litigant has standing to assert to challenge whether or not his or her opponent in court has somehow defrauded the county of its filing fee. The right, to the extent that it exists, putting aside the JP context for a minute because there is a statute there, comes only from the rule and, therefore, can be limited by the rule.

It is a question of essentially defrauding the government, as a taxpayer standing issue or a private attorney general issue, but it's not pertinent to any right the litigant has in a matter before the court any more than somebody before a court, as they tried to do when I was at Legal Aid, can litigate in the district court whether or not the Legal Aid office should have accepted representation of that person based on their income. So I just wanted to make the point that you may disagree, and I know Richard and I do about the policy question of whether IOLTA certificates ought to be incontestable, but I don't believe and I don't think Richard believes -- and I'll turn it over to him in a minute -- that there's any right of a litigant that's violated by making it incontestable. Richard.

MR. MUNZINGER: I think he stated the law

correctly. I haven't briefed it. I do question -- I don't think it's only the county that is deprived or is defrauded. I think the litigant against whom the person brings the case also has an interest in recovering costs and avoiding someone using the judicial system improperly against them, but it is a matter of policy. I don't believe there is a right of a litigant to say that the Supreme Court can't make these IOLTA rulings binding when they're done by a poverty law office. I think Judge Yelenosky stated the law correctly. I just don't like the policy.

HONORABLE STEPHEN YELENOSKY: And that's the only point I want to make, it's a policy issue, and just to add, the policy consideration I think that carried the day on that is the likelihood of recovering more in fees by frequent contests to IOLTA-certified indigents is far exceeded by the expense to governmental entities in terms of salaried employee time, including the judge's time, the taxpayer-funded IOLTA attorney potentially. I think Judge Christopher pointed out others. I think in Harris County you had like the IOLTA certificates or rather the indigent certificates, affidavits being challenged routinely.

HONORABLE TRACY CHRISTOPHER: By the county attorney.

HONORABLE STEPHEN YELENOSKY: Right. And so

you can make a policy judgment strictly on the bottom line. It's -- the game is not worth the candle, or at least that's a consideration there. Now, I know Richard feels that the game may be worth the candle because he thinks -- he's not confident that the IOLTA organizations will always be truthful about their certification, and that's a policy issue.

The next thing that I wanted to address is on the contents of the affidavit, by a vote of 18 to 3 the SCAC decided the rule should not forbid any particular information from being required in the affidavit. The subcommittee acknowledges that the listed -- if the listed information were provided in -- only in a sensitive data form, that would at least mitigate or eliminate concerns about identity theft, but that's not the only concern I think that's being brought forward, and I may let -- or I guess I'll suggest that Robert or Nelson talk about the concern, but let me jump to another point that wasn't made last time, which is there seemed to be an assumption that if you get somebody's Social Security number and you know who they are, that either you or the court can somehow go to Medicaid or AFDC or somebody else and they're going to tell you if the person's on the program.

That's no more true than you can go and get my tax return by knowing my Social Security number. As

long as you don't misrepresent who you are, you're not going to get that without a release. So a useful list of the information is certainly doubtful, but Robert or Nelson, did you want to speak to your concern about -- if I may, Chip, ask them to speak to the concern about that information?

MR. DOGGETT: Our concern was that -- that the information on the affidavit should be prima facie showing their financial status; and if the court questions that or a party questions that then obviously there's an opportunity for hearing; and we're talking about obviously a non-IOLTA-funded affidavit, if you will, someone who is pro se, files an affidavit; and our position was that the -- the information in the affidavit should just relate to their actual financial status. If there's a question about that, then that's what the court is for, to have a hearing on. To the extent that their Social Security information or place of birth, that is obviously not their financial status in and of itself, in other words, their assets, their income, their debts; and we believe that the affidavit itself should limit itself to that information that's relevant.

And if there is a further inquiry desired then obviously that's still possible; but to have that information recorded on any document, whether it be

somehow sealed, it's still in a document; and it still has to be safeguarded somehow; and it's, frankly, unnecessary unless there is a question. If there's a question, then that information can be delved into to arrive at that.

HONORABLE STEPHEN YELENOSKY: Is there any concern --

CHAIRMAN BABCOCK: Judge, can you hang on for a second?

HONORABLE STEPHEN YELENOSKY: Yes.

HONORABLE NATHAN HECHT: Robert, Dee Dee doesn't know who you are since you're not on the committee. Could you just for the record identify who you are?

MR. DOGGETT: My name is Robert Doggett, D-o-g-g-e-t-t, Texas RioGrande Legal Aid.

CHAIRMAN BABCOCK: Thanks. Now, Judge. Sorry.

HONORABLE STEPHEN YELENOSKY: Is there any concern that the requirement that people list that dissuades them from proceeding?

MR. DOGGETT: Well, obviously our concern is that there are a lot of affidavits out there; and we were hopeful at some point we would have one that we could rely upon that, you know, that way we wouldn't have hundreds of different affidavits and so we could use one; and I'll

tell you the truth, you know, if we comply with the rules and provide an affidavit listing all the information that the court requires in currently 145, for example, Rule 145, that sometimes is still rejected because they have their own form; and when there is a five-day turnaround or there's some sort of extreme emergency, that is a lot of time because you've already had your client come in and sign it, let's say, or let's say you've given this affidavit to a pro se party; and the time involved to try to fix that sometimes is -- causes a problem, and so we --

HONORABLE STEPHEN YELENOSKY: And that comes about because you litigate in multiple jurisdictions and so you don't always know what that jurisdiction's form is when the client comes in?

MR. DOGGETT: And, of course, you-all are going to address some of that, I hope, if Rule 749a adopts that allows an affidavit, you know, for example in an eviction, that the IOLTA certificate will avoid the contest. So my own problem, if you will, hopefully can be fixed as far as eviction cases, but for a pro se party it would be good if there was one form that we could all agree on, so that way courts across the state would have one form and we could distribute that form and so could everybody else. But the alternative, of course, is let's try to at least limit the form that's used by the courts

to just this financial information rather than going farther afield on things that would be nice or I'm curious about where he lives or I'm curious about his employer's boss's name and phone number that someone could call and possibly embarrass with. "Did you know this gentleman's being sued and he's trying to appeal?" You know, "That's your employee, just thought I'd let you know. Is that true, is he your employee?" You know, that kind of thing, which could cause him to lose his job.

I mean, and he's already in trouble, if you will. He's already possibly unemployed or underemployed with the family, and so what we were hoping to do when we brought this matter to the Court's attention was let's try to limit the information that's required of an indigent filer to the actual financial information of interest, and then if there was more information needed or curious that can be done at a hearing, and that's sort of where we came from, but the current rule being proposed at least limits -- or at least prohibits stuff that is, you know, clearly not a part of someone's financial status at that point.

CHAIRMAN BABCOCK: Judge Christopher.

HONORABLE TRACY CHRISTOPHER: Well, two things. Rule 143 does allow a private person to ask for costs, a cost deposit, security for costs. So, I mean,

there is something in our rules now in terms of a person contesting these affidavits of indigency.

HONORABLE STEPHEN YELENOSKY: Oh, I was just saying it's rule-based, is all I was saying.

HONORABLE TRACY CHRISTOPHER: Right. Right. But I really think that we might need the county attorneys and/or the district clerks who say they want this information to give their opinion on it as to why they want the information. I mean, certainly they ask for it, they want it. You know, maybe it's not for a good reason. Maybe they're doing something wrong with it, but they all say it's necessary for their contest, and it is an issue for the clerk's office when they have to provide all of these services for free. So although I appreciate your point of view, I'm not sure we're getting the opposing point of view here on this particular point.

CHAIRMAN BABCOCK: Okay. David Jackson.

MR. JACKSON: It's still an issue for the court reporter, too. I mean, they wind up with a three-week trial and have to turn out a record for free, they need some ability to make sure they're doing the right thing.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, nobody is suggesting that they be denied the right to a hearing,

and they get a hearing. The question is what do you have to show right out of the box in order to establish a prima facie case, and again, I would draw the analogy to tax returns. They are very hard to get under Supreme Court case law, and if somebody is able to swear to their net worth in a case where they're being sued for punitive damages, they can at least start with that and then there may be a hearing, but you don't get to go right to somebody's tax return. Why in an affidavit do you have to provide information, even if it were able to provide access to your -- to your bailiwicks, and again, I don't know what the court reporters, the county clerk, or anybody else can do with that Social Security number without a release.

CHAIRMAN BABCOCK: Okay. So to bring this issue to a head, Judge Yelenosky, it is the sentence in subsection (b) that the subcommittee proposes adding "The affidavit must not contain a Social Security number, a checking account number, or a place of birth."

HONORABLE STEPHEN YELENOSKY: Well, we did last time, and to be fair, it was voted down heavily, and it's not y'all's fault that I wasn't here to say this then, so basically I'm asking for a revote and entirely at your discretion.

CHAIRMAN BABCOCK: Well, we certainly in

deference to all your hard work on this take a revote, so that's not an issue. The question is whether you've convinced anybody other than Judge Hecht's computer, which apparently has endorsed your proposal. Any more discussion?

Okay. Everybody that is in favor of including the language in subsection (b), the language being, quote, "The affidavit must not contain a Social Security number, a checking account number, or a place of birth," raise your hand.

All those opposed? That passes by a vote of 17 to 8, so the Court now has it both ways, 18 to 3 against and 17 to 8 in favor, so --

HONORABLE STEPHEN YELENOSKY: Well, it has a record as well.

MR. ORSINGER: That was a de novo appeal, wasn't it?

CHAIRMAN BABCOCK: That was a de novo appeal.

HONORABLE NATHAN HECHT: Which is why we always pay careful attention to the vote.

HONORABLE STEPHEN YELENOSKY: Exactly. Of course, the discussion is what's important, and that's on the record.

CHAIRMAN BABCOCK: Yeah. Okay. Let's go to

the next one.

HONORABLE STEPHEN YELENOSKY: Okay. This is what I was alluding to, that the -- there is a -- there's no parallel provision for the justice rules that allows or provides that an IOLTA certificate is incontestable. The follow-up to that was that Justice Hecht asked the subcommittee to respond to his question as to whether we believe the JP rule should conform to Rule 145, assuming that the statute in the Property Code were not an obstacle, and our report on that is four out of five subcommittee members believe the two rules should conform to one another, not being able to find a principle reason for them to differ. Judge Lawrence dissented from that, believes that the justices of the peace should continue to have discretion.

HONORABLE DAVID PEEPLES: Are we supposed to be looking at a certain page?

HONORABLE STEPHEN YELENOSKY: I was right at the bottom of page three, the last paragraph.

HONORABLE DAVID PEEPLES: Okay.

HONORABLE STEPHEN YELENOSKY: I don't know if there is anything more to be done on that.

CHAIRMAN BABCOCK: Yeah, Frank.

MR. GILSTRAP: I voted with the majority on the subcommittee, but in deference to Judge Lawrence, he

did have a section from the Property -- was it the Property Code?

HONORABLE STEPHEN YELENOSKY: Yes. And that's what we're referring to. Justice Hecht's question was putting that aside.

MR. GILSTRAP: Okay. Putting the statute aside.

HONORABLE STEPHEN YELENOSKY: Putting the statute aside.

MR. GILSTRAP: Okay.

CHAIRMAN BABCOCK: Judge Peeples.

HONORABLE DAVID PEEPLES: I see one great big difference between JP court and the district and county courts. For one thing, if a free record after a trial is at stake here, that's a big thing. Free filing, getting into court, that's a very minor issue to me, but the consequences if it's hard to change or if it won't get changed once there's an unchallenged affidavit and then there is a good long trial and it's got to be a free record.

HONORABLE STEPHEN YELENOSKY: In the JP court?

HONORABLE DAVID PEEPLES: No, I'm saying if we're going to have 145 conform to the JP rules.

HONORABLE STEPHEN YELENOSKY: Well, the JP

rules do not -- in the JP court they can contest an IOLTA certificate, correct? And so the conformity would be to preclude contest of IOLTA certificates in the JP court.

HONORABLE DAVID PEEPLES: I'm just saying there's a big difference between a district court case and a JP court case.

HONORABLE STEPHEN YELENOSKY: And the difference would argue for --

HONORABLE DAVID PEEPLES: Different rules, if there need to be.

HONORABLE STEPHEN YELENOSKY: Right, but what you're saying to me would argue for it being contestable in the district court and not in the JP court.

HONORABLE DAVID PEEPLES: And maybe --

HONORABLE STEPHEN YELENOSKY: Because there's no record in the JP court.

HONORABLE DAVID PEEPLES: And maybe other instances, too.

CHAIRMAN BABCOCK: Yeah, Justice Gray.

HONORABLE TOM GRAY: And I think we covered this when we made the rule or suggested the rule in connection with the district court proceedings, but does this the way it's worded take into effect that the actual source of IOLTA funding has virtually dried up and has been replaced by $20 million in general revenue

appropriations?

HONORABLE STEPHEN YELENOSKY: Good point. Nothing we've considered.

HONORABLE TOM GRAY: Because it talks about "IOLTA-funded." The large part of funding of these organizations is now through general revenue and not through the IOLTA funds because it's --

HONORABLE STEPHEN YELENOSKY: Robert, do you know whether these general funds still are characterized legally as -- well, if they're not characterized as IOLTA funds, the organization that's getting them is probably an IOLTA recipient as well, and so it would seem that the certificates coming from an IOLTA-funded organization, even if it's also getting these general provisions, are there organizations that are just getting this 20 million and not getting IOLTA?

MR. DOGGETT: It's possible, and I wouldn't want to comment until I would find out for sure for the committee. Could be a comment, though, maybe that would make that clear that it's really the Texas Access to Justice Foundation is essentially the body that distributes all of these funds, whether that be the, quote, IOLTA fund or the general appropriation fund, but it's possible that some get some pop and some get another. It's entirely possible. I'm not sure they make any

distinction.

HONORABLE STEPHEN YELENOSKY: Well, if that's correct then it may justify a change in the reference to IOLTA certificate in Rule 145 as well as anywhere else.

CHAIRMAN BABCOCK: Judge Yelenosky or Frank Gilstrap, in Judge Lawrence's absence can one of you or both of you articulate his opposition to this change?

HONORABLE STEPHEN YELENOSKY: I can read you his e-mail, if you'll give me one second.

CHAIRMAN BABCOCK: In his own words.

HONORABLE STEPHEN YELENOSKY: In his own words. While I'm pulling it up I'll see if I can paraphrase it just from memory. Two things. One, he reiterates that he thinks the statute is an impediment, but, of course, that was to be put aside in response to Justice Hecht's question; and, two, he thinks that judges should have discretion in that matter; and I took that to mean that he doesn't think that justices of the peace should have any more discretion than any other judge, but if all judges can't have discretion, he wants to keep his discretion. That's how I understood it. I don't mean that as a criticism. That's a fair position to take, but I don't think he drew a distinction between JP judges and other judges.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Well, it seems like the IOLTA folks are in the best position to evaluate these people about whether they meet the criteria, and I think the same reasoning that applied to us allowing a certificate to substitute for the trial courts applies to the JP courts, particularly when you think about the JP courts and access to the JP courts commonly having to do with a basic need of shelter. So I don't see any -- I don't think giving the JPs discretion -- you know, there's any need for them to have discretion more than any other judge, and when you add to it the fact that it's a nonrecord court, so we're not even talking about the expense of a court reporter or anything. It just doesn't -- to me it's a no-brainer.

CHAIRMAN BABCOCK: A no-brainer in favor of this language?

HONORABLE JANE BLAND: In favor of conforming the JP courts with Rule 145.

MR. GILSTRAP: Chip, and I think in deference to Judge Lawrence, I think he's relying heavily on the statute. I don't know that I agree with his reading of the statute, but he's relying -- he says, you know, we have that right under statute and that can't be changed by rule.

HONORABLE STEPHEN YELENOSKY: Right. And that's the first point I made, and that we're not answering the question of whether it's -- the statute is a problem. We've pointed that out, and Justice Hecht asked us to ignore that in answering the question.

CHAIRMAN BABCOCK: Kennon or Justice Hecht, was it -- was it the Court's desire that we not make a determination one way or the other whether the statute is an obstacle in framing this debate?

HONORABLE NATHAN HECHT: Well, I mean, we'd like your views on it, but it kind of is what it is.

CHAIRMAN BABCOCK: Yeah.

HONORABLE NATHAN HECHT: I mean, I think we see the problem.

CHAIRMAN BABCOCK: Okay.

HONORABLE STEPHEN YELENOSKY: I can read you verbatim what he wrote, if you want to hear his two sentences.

CHAIRMAN BABCOCK: Yeah, that would be helpful.

HONORABLE STEPHEN YELENOSKY: Okay. "I still feel Rule 145 automatic approval for IOLTA certificates should not apply" -- and, Dee Dee, this is Judge Lawrence. "I believe this is a matter of judicial discretion and courts should decide the issue of

indigency, not an attorney not subject to examination by the court or the adverse party. Also, the Legislature has already spoken when they set forth the procedure for JP courts to review pauper's appeals when they established Section 24.0052 in the Property Code, which in my opinion must be given preference," unquote.

CHAIRMAN BABCOCK: Okay. There we have it. Anybody else want to talk about this? Yeah, Justice Gaultney.

HONORABLE DAVID GAULTNEY: I just have a question. Would the effect of this in part be to make the appeal automatic in the sense that doesn't the pauper's affidavit serve as the perfecting instrument for the appeal to county court?

HONORABLE STEPHEN YELENOSKY: I believe it does serve as the perfecting instrument. It would only apply, of course, when you have an IOLTA certificate or Texas Access to Justice certificate.

HONORABLE DAVID GAULTNEY: So essentially by filing that certificate you don't have a hearing requirement to perfect your appeal to county court?

HONORABLE STEPHEN YELENOSKY: Would that be right, Robert?

MR. DOGGETT: That's correct. Essentially there won't be an ability to make us go back to court

again for another hearing on whether or not they say their income is what it is.

CHAIRMAN BABCOCK: Okay. Any other discussion? Then we're ready for a vote. We're talking about -- we're voting on Rule 749a, paragraph (3), and adding the underlined language in paren (4), language being found at 3 of 18 of the subcommittee follow-up report on poverty law problems.

MR. MUNZINGER: Chip?

CHAIRMAN BABCOCK: Yes, sir.

MR. MUNZINGER: Before you call for the vote may I ask Judge Yelenosky a question?

CHAIRMAN BABCOCK: Certainly. If it's a good question.

MR. MUNZINGER: I understand you to say that the language in Rule 145 is essentially the same of that which is underlined in the proposed changes to Rule 749a, paragraph (3).

HONORABLE STEPHEN YELENOSKY: It should be.

MR. MUNZINGER: And now there seems to be a question as to whether or not the programs are, in fact, funded by the interest on lawyers' trust and accounts as distinct from another source. If we adopt this language and the funding is not as stated, have we created a problem? I understood you to say that that may be a

problem with current Rule 145 as well, and so it doesn't seem to me that we ought to be voting to adopt a rule, the source of which is already under question because the funds are not IOLTA funds.

HONORABLE STEPHEN YELENOSKY: Well, they are -- the vast majority of these organizations have been and will continue to get IOLTA funds, just drastically reduced. So they would still be IOLTA-funded organizations. It would be preferable to change the language to refer to the Access to Justice Fund because there may be now or in the future organizations that get only other funds through that, and so all I'd say about that is that the vote is taken with the understanding that if a change is justified on the two words "IOLTA certificate" or "IOLTA-funded program" then that change should apply both here and in Rule 145.

CHAIRMAN BABCOCK: Eduardo.

MR. RODRIGUEZ: I just wanted to clarify whether or not this would be -- the agencies that get money funded through Congress would be covered under this rule, because, you know, they may be working on a particular case with funding from the Congress versus from direct IOLTA funding, although they may be receiving IOLTA funding for other programs, and I just want to be sure that we covered it -- that this rule covers an

organization that gets funded both ways.

HONORABLE STEPHEN YELENOSKY: Well, I believe it does because it says "IOLTA-funded," and my understanding -- and Robert or Nelson can -- at least at one point if you were IOLTA-funded didn't you have to screen all of your clients, even if you got funds from elsewhere?

MR. DOGGETT: Yes, and but I think your point is that it's possible that there's a group that only receives LSC funding. That's the congressional funding source, if you will, Congress funds.

HONORABLE STEPHEN YELENOSKY: Oh, I'm sorry.

MR. DOGGETT: An organization called the Legal Services Corporation. There are three of those organizations in Texas, and it looks like that will be the case for a very long time in all likelihood. There were eleven, and they've been reduced to three some years ago. I mean, right now those three organizations do receive IOLTA funding and have for -- since the inception of the program, but it's possible obviously that a program would only receive, if you will, LSC funding and not receive IOLTA. I guess it's possible.

HONORABLE STEPHEN YELENOSKY: So obviously what we're defining as the organizations to which this applies may need some work, but the principle is still

presented here, should it be the same in JP court as it is in the trial court.

MR. RODRIGUEZ: Can we amend it by just adding, "and/or organizations that receive funding from Legal Services Corporation"?

HONORABLE STEPHEN YELENOSKY: Well, what I would propose doing, and the record already reflects this, because this is going to the Supreme Court or not, depending on the vote, is merely the caveat of record here for the Supreme Court that -- and they know because they're in charge of these organizations or at least the funding, they know what word to use and that they use that word.

CHAIRMAN BABCOCK: Yeah. Because if you're going to make them parallel you're going to not -- and you're going to make that change in 749a, you're going to have to make it in the district court rule as well, so --

HONORABLE STEPHEN YELENOSKY: Rule 145.

CHAIRMAN BABCOCK: Yeah. Carl.

MR. HAMILTON: If the funding comes from another source is there a different certificate that would have to be made by somebody else?

CHAIRMAN BABCOCK: Yeah, I don't know the answer to that, but I would guess so. I would bet.

HONORABLE STEPHEN YELENOSKY: Well, the way

I propose it is this language, with the understanding that programs funded by whichever organizations the Supreme Court deems are appropriate, and we suspect that's going to be something like Equal Access to Justice, but I'm not sure of the exact words, so I'd rather not try to come up with the exact words.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: Well, I think there's a risk to the committee that the committee adopts language that may or may not be applicable to the facts on the ground, and I would suggest that before we vote we maybe just vote on the matter of principle, but this last discussion raises another question. Judge Yelenosky points out that IOLTA-funded agencies are required to screen for certain criteria.

CHAIRMAN BABCOCK: Right.

MR. MUNZINGER: None of us knows the criteria for somebody else, and as much as my heart says people should have access to the courthouse, my mind tells me that there are people who abuse this and that there's a lot of politics that goes on in this and a lot of, from my point of view at least, things that I don't approve of. I sure don't want to vote in blind that I'm going to say, "Well, if you get money from Legal Services Corporation you're certified." Why? I don't know what the Legal

Services Corporation asks, and I don't trust the people who are suing me. I shouldn't trust them. They've sued me. "Oh, but you can't ask that question." Why? Well, because Congress said you can't or we said. It's not a good rule, in my opinion.

MR. RODRIGUEZ: And I may be wrong and maybe somebody can help me, but my understanding in having been going for the last six or seven years, five years, to lobby Congress on behalf of the State Bar, that their criteria are no different than the criteria that is used by IOLTA-funded organizations. Is that -- maybe somebody can -- I defer to somebody that does that kind of work.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: I'm confident that the Supreme Court will put in a word that applies only to organizations that have to screen along the criteria that IOLTA does, and that doesn't solve Richard's concern that, well, yeah, but he doesn't trust the screening. All I'm saying is that our vote should not be taken as approving any organization other than those that the Supreme Court considers like IOLTA-certified organizations; and it is true that, as I understand it, everybody is getting money through this process, otherwise they wouldn't be getting the money, is going to have to demonstrate that they're screening.

But to address Richard's concern, you can either vote in principle that the JP rule ought to conform to 145 without voting on specific language or just vote the 145 language with the caveat that should it need to be changed because funding has changed, it should be changed as appropriately determined or as determined by the Supreme Court.

CHAIRMAN BABCOCK: Okay. Before we take a vote on this, if anyone is driving a black Ford Explorer, there is a issue with that car in the parking lot. Anybody driving one of those?

HONORABLE JAN PATTERSON: I'm not the complaining party, though.

CHAIRMAN BABCOCK: Yeah, Judge Patterson isn't complaining about it. Okay. I think to solve this voting dilemma, what we're voting on is whether or not Rule 749a should be -- should add this language to make it consistent with 145 so that in JP court there would be this concept of incontestability, the same as there is in district court.

We will put a flag at this point in the transcript for the Court that the issue of whether IOLTA -- an IOLTA-funded program is the only program is an issue that we're not voting on on this vote. This vote is just whether we should include this language, which is

designed to be parallel to the language in the other rule, 145. So everybody that is in favor of that, raise your hand.

Everybody against? 30 to zip, the Chair not voting.

HONORABLE STEPHEN YELENOSKY: Well, I think you could record Justice -- if he can vote by proxy, Judge Lawrence would vote against it.

CHAIRMAN BABCOCK: He can't vote by proxy.

HONORABLE STEPHEN YELENOSKY: All right. Well, let the record reflect, Judge Lawrence, I tried on your behalf.

CHAIRMAN BABCOCK: Yeah, you've got to be here to win.

HONORABLE STEPHEN YELENOSKY: The next one, which begins on page four and is labeled as problem five is very long, but I think we can address it quickly. If you go to page 11 and look at the first paragraph that's not underlined that begins "The SCAC Chair" and read that sentence because it characterizes the prior four or five pages, or those -- that paragraph, and says basically the four or five prior pages are sort of the rewrite of the JP rules that has already been proposed to the Court and Justice Hecht indicated was unnecessary to reengage in that discussion, and so the next paragraph basically says

what I think, given that instruction, the subcommittee is proposing, and that is essentially the converse of what we've just been dealing with.

We have a difference between the statute and the current rule, and the statute is more favorable to litigants who are attempting to make an appeal, I guess, than the rule is if -- at least as the rule can be read, and the point is to conform the rule to the statute. Robert, would that be right?

MR. DOGGETT: And I would say that the legislative enactment was worked on by both groups. In fact, a representative of the apartment association here to my right; and I'm not sure if we individually worked on it, but organizations, if you will, working representing both parties worked on that legislation recently; and the rule that's under discussion today has been -- was enacted quite awhile ago, if you will; and so this legislative enactment is very recent. And her name, by the way, is Wendy Wilson.

MS. WILSON: Yeah, and just -- and for the record, my name is Wendy Wilson, general counsel for the Texas Apartment Association, and I just wanted to appear before the committee today to make a brief comment on the issue of making the rule in line with what the Chapter 24.0053 of the Property Code is, and we certainly are in

favor of that. With respect to the language that has been proposed in Rule 749b, taking out the five-day reference, you know, I don't think that -- you know, I think that resolves the problem that you-all have been discussing.

The only question that I have that may come into play here is that by taking that language out there may be some ambiguity about what happens in the context of if the rent has continued to be -- has remained unpaid. And we certainly aren't trying to as a matter of appeal requiring double payment of rent, but I think if the reason that the eviction has occurred in the first place is due to unpayment of rent, and the question that maybe the subcommittee addressed is -- already is whether there should be some portion of the unpaid rent that has been at issue in the eviction paid into the court and then as it becomes due, because it would have already been due under the contract at issue.

I just wanted to raise that point, and, again, maybe, Judge Yelenosky, that has been addressed during the subcommittee's deliberations, but other than that, we certainly are in favor of making the Chapter 24 provision similar and work with the rule.

HONORABLE STEPHEN YELENOSKY: Well, looking at page 4 of 18, is there different language that you suggest? What we're proposing is to eliminate paragraph

(1) and then to add paragraph (2) or the new paragraph (2).

MS. WILSON: And I guess my -- what my concern is, is what happens when there has -- an eviction has occurred and rent continues to remain unpaid. It doesn't direct -- in the current rule within five days of the judgment being issued by the justice court has to be paid into the -- into the court registry or in order to perfect the appeal, but what happens if the rent, which has never been paid in the first place -- I mean, how is that to be handled? And I don't know what was contemplated by taking out that five-day reference.

HONORABLE STEPHEN YELENOSKY: I was going to ask Robert to respond to that, but Chair's choice, because Richard's got his hand up.

CHAIRMAN BABCOCK: Richard can go and then Robert, if he has something to say. He doesn't have anything to say, so Richard.

MR. DOGGETT: Whatever you want me to say.

MR. ORSINGER: I'm a little at a disadvantage because I don't know what the Property Code says exactly, but just reading your proposition here from the subcommittee report, it seems to me because you can find one instance where the general rule is not good you're trying to eliminate the general rule. I would

think that the general rule is, is that the rent has not been paid at all rather than the general rule is, is that the rent has been paid in some instances or most instances. Why don't -- why don't you craft language for those situations where the rent has been paid, but still leave the rule in where the rent hasn't been paid?

If I understand what Wendy is saying, which has been my personal experience, which admittedly is quite old, these evictions occur because their rent is behind, and so if you take (1) out altogether then you don't even have a rule right for the one whose rent is behind to have the rent brought current. By eliminating (1) you take away everyone's right, even the ones where the rent is delinquent; isn't that right?

HONORABLE STEPHEN YELENOSKY: Well, my understanding is, first of all, the first paragraph of 749b is in a nonpayment of rent FED, forcible detainer, that's what it applies to. A person may stay in the home by paying -- what they would have to do under the rule is they may end up with a double payment because they have to pay within five days under the current rule of the date they file the pauper's affidavit, and they've got to pay rent when it becomes due, so those things could end up in a double payment.

MR. ORSINGER: I understand.

HONORABLE STEPHEN YELENOSKY: So we eliminate that, and so the intent is that they pay rent as it becomes due under the contract during the pendency of the appeal process, and so I guess I don't understand the question.

MR. ORSINGER: Well, tell me the process of how it works if we take (1) out of there.

HONORABLE STEPHEN YELENOSKY: Yes.

MR. ORSINGER: And let's assume that somebody hasn't paid anything. Where are they required to pay something in order to conduct this --

HONORABLE STEPHEN YELENOSKY: Well, but obviously that may be the dispute. They may say they did, and the other side says they didn't. That's what the dispute is.

MR. ORSINGER: Well, I'm asking you to assume for hypothetical purposes that the rent has not been paid and that we take (1) out of here.

HONORABLE STEPHEN YELENOSKY: Right.

MR. ORSINGER: Okay. So what rule applies when the tenant hasn't paid anything and we take (1) out? Then where does the landlord get protected for that month's rent?

HONORABLE STEPHEN YELENOSKY: Okay. And I'm going to need help from them because it's been almost 20

years since I've had this. Robert, or, I'm sorry, your name again?

MS. WILSON: Wendy Wilson.

HONORABLE STEPHEN YELENOSKY: Wendy or Nelson.

MR. MOCK: And I'm happy to see if I can address that.

CHAIRMAN BABCOCK: Nelson, before you start, would you identify yourself for the record?

MR. MOCK: Yes, of course. Nelson Mock, M-o-c-k, and I'm a attorney with Texas RioGrande Legal Aid. I'm also vice-chair of the poverty law section.

CHAIRMAN BABCOCK: Great, thank you.

MR. MOCK: I want to say thank you again for addressing all these issues. We really appreciate it. Specifically with regard to this rule, I don't think anybody is saying that there's not going to be a requirement to pay rent into the court registry if a tenant wants to appeal and stay in possession of the unit. I don't think that's the issue, and there is going to be a mechanism clearly because it already exists both in the Property Code and the rules to get a default if someone fails to pay rent into the court registry, but what -- I think what this does, the problem is, is that -- I'll give you a hypothetical so that you understand it.

On the 20th of the month your client gets a judgment against them, and let's say that the issue is that your client is contesting whether or not the landlord can assess late fees, and, in fact, there's a way to do that now if the tenant believes the late fees are unreasonable, you know, they can argue that they're unreasonable, that they shouldn't have been assessed. The judge doesn't agree, the justice of the peace doesn't agree, and believes that there is a nonpayment of rent issue. There's still clearly an issue. Now, bear in mind that of the 250,000 eviction cases that are filed approximately in the course of the year in Texas only about 2,500 are appealed, so we're not talking about huge number of appeals.

Now, but your client is -- or the tenant in this case is one of those people who chooses to appeal the decision of the justice of the peace. The issue -- the judgment, the order is signed on the 20th of the month. That would mean that your client or the tenant would have to pay -- would have to appeal within five days, which would put him at the 25th of the month, and then within five days of that, which would put them at the 30th of the month, would have to pay one month's rent into the court registry.

Now, here's where the problem arises. You

now have a tenant who has paid one month's rent into the court registry by the 30th of the month and then the law also says within five days of when it's due you have to pay another month's rent into the court registry, so you have a tenant who has paid -- who contests that they owe rent, who is appealing, one of the few that's appealing, has paid one month's rent into the court registry, and now under the Rules of Civil Procedure has to pay one more month's rent in the course of about five days, and that's the problem.

The statute is very clear that you pay rent when rent is due, and I think that's absolutely fair if they intend to stay in possession, but that's the problem it's trying to address, and there is definitely a mechanism there, and there's definitely a mechanism in the Property Code whereby the landlord can choose to ask for a default for failure to pay the rent into the court registry.

CHAIRMAN BABCOCK: Thanks, Mr. Mock. Richard.

MR. ORSINGER: Again, I apologize if the Property Code solves the problem that I see, but if we take this rule out, we do eliminate the problem for the people who are paying double rent, but we also eliminate the right of the landlord to receive one payment of rent,

and it would seem to me that the better approach is to have some statement in here that no one can be forced to pay rent twice rather than to take out the rule that requires someone to pay rent once. I know there's a problem when someone's required to pay rent twice, but the solution to avoiding paying rent twice to me is not to eliminate the right of the rule to get paid once.

MR. MOCK: And I don't think this eliminates it. I mean, I don't think this eliminates because it makes No. (2) into No. (1), which says "During the appeal process as rents become due under the rental agreement the tenant shall pay rent into the county court registry," and the way that it works on appeals to justice of the peace -- from JP to county court, it's usually a period of time as short as a week where the case is transferred from the justice of the peace to the county court. It's a pretty quick process, and if rent becomes due within a couple of days obviously then they would have to pay that.

MR. ORSINGER: Okay. Well, what about if rent is already due? See, I'm concerned about the situation where the tenant is behind, not caught up, and you're talking about a situation where a tenant is current and then goes behind. So let's assume that they haven't paid rent for three months or something like that, and we take out subdivision (1), and now we're falling back on

what used to be subdivision (2). Does the landlord -- is he entitled to get one month's rent while this appeal is going on?

MR. MOCK: And I think the county court is going to make that decision in terms of a judgment against the tenant. If the tenant has appealed the decision to county court and finds that, in fact, there is a lot of back rent owed, the county court judge is going to say, "You've got to pay this up."

MR. ORSINGER: Well, the judgment is not an adequate substitute for one month's rent in the court because --

HONORABLE STEPHEN YELENOSKY: Well, but you have a judgment just like in any other case. The question is what you need to do while the appeal is pending. Are you saying that just in order to appeal a landlord should always get one month's rent, even if the question of the owing that, the whole judgment, has been appealed and is de novo review?

MR. ORSINGER: First of all, it's going into the registry of the court, so the landlord doesn't get it unless they're entitled to it; and, second of all, I haven't read the Property Code, but this rule requires that if you're going to appeal you should put up one month's rent if you haven't paid it. I understand why you

don't want somebody to put up two months' rent, and I agree with that, but by eliminating the possibility that someone has to pay two months' rent, you're taking away the requirement that they pay one month's rent; and to say that, well, they'll get a judgment for that later on, there's more going on here than just eliminating double payment. It's also taking someone who is entitled to have one month paid into the registry of the court in case they win --

HONORABLE STEPHEN YELENOSKY: Why does that entitlement come from?

MR. ORSINGER: It exists in this rule.

HONORABLE STEPHEN YELENOSKY: Where?

MR. ORSINGER: In paragraph (1), it says "within five days of" --

HONORABLE STEPHEN YELENOSKY: Oh. Oh, well, you are taking that out, because when you read the statute it says "as it becomes due."

MR. ORSINGER: Well, what if it's past due, Steve, is my point?

HONORABLE STEPHEN YELENOSKY: They didn't put in the statute anything that says that. The statute says "as it becomes due."

MR. ORSINGER: Okay. Well, I'm at a disadvantage because I don't have the version of the

Property Code in front of me, but it seems to me that y'all are making a substantive change by finding a possible exception, which I consider to be very rare, and wiping out what will happen in the normal case, which is that someone will not have paid the current month's rent, and if they're going to appeal according to --

HONORABLE STEPHEN YELENOSKY: We're pulling up the Property Code, but the quote is -- and obviously you want the whole quote, and she's pulling it up because I couldn't. "As it becomes due" is reflected in the rule. As rent -- it says "as rent becomes due" under the new (1).

CHAIRMAN BABCOCK: Judge Peeples.

HONORABLE DAVID PEEPLES: I want to be sure I understand. I'm looking in the middle of page four, the language before the stricken language. There has already been a trial, as I understand it, in a nonpayment of rent case.

HONORABLE STEPHEN YELENOSKY: Yes.

HONORABLE DAVID PEEPLES: I mean, the JP has heard the evidence and found presumably that rent is owing. It could be that fees haven't been paid, and whether there is going to be a free appeal is the issue. I mean, an affidavit of indigency.

HONORABLE STEPHEN YELENOSKY: Well --

HONORABLE DAVID PEEPLES: But if there's already been a trial and the judge has -- I mean, there wouldn't be an appeal by the tenant in most cases, I would think, unless the judge had found you haven't paid the rent.

HONORABLE STEPHEN YELENOSKY: Right.

HONORABLE DAVID PEEPLES: So why shouldn't the default rule here be what Richard Orsinger is arguing for, which is the language in present sub (1)?

HONORABLE DAVID EVANS: Well, is Richard --

HONORABLE STEPHEN YELENOSKY: Because it's contrary to the statute.

HONORABLE DAVID PEEPLES: That's a different argument than they might have to pay double rent. Very different argument.

CHAIRMAN BABCOCK: Judge Evans.

HONORABLE DAVID EVANS: Is an appeal, Richard, that is on de novo appeal, is it as enforceable as a final judgment out of a trial court? Does de novo appeal suspend the judgment and its enforceability? I don't recall.

MR. MOCK: I can answer that. It does.

HONORABLE DAVID EVANS: And that's what I think is the issue, Richard, on the back due rent, is that it's not enforceable because it's on de novo appeal.

HONORABLE STEPHEN YELENOSKY: Right.

HONORABLE DAVID EVANS: And so what they really built in is you've got to keep the rent current in order to have your trial in county court, and so the judgment is suspended by the de novo appeal, is not enforceable, and that's why you don't require them to bring the rent current.

HONORABLE STEPHEN YELENOSKY: I'm sorry. I forget your name -- the apartment --

MS. WILSON: Wendy Wilson.

HONORABLE STEPHEN YELENOSKY: Wendy. Is that your understanding?

MS. WILSON: I'm sorry?

HONORABLE STEPHEN YELENOSKY: Is that your understanding?

MS. WILSON: I mean, certainly that the -- I mean, it is a de novo appeal, and once an appeal is perfected it would not be enforceable, but this is part of the perfecting of an appeal, I guess, in this rule.

HONORABLE STEPHEN YELENOSKY: Right.

CHAIRMAN BABCOCK: Justice Gaultney.

HONORABLE DAVID GAULTNEY: Well, I mean, this rule, though, simply deals with the staying in possession of the property, right?

HONORABLE STEPHEN YELENOSKY: Uh-huh.

HONORABLE DAVID GAULTNEY: So I'm not sure that I see the problem with eliminating rule (1) for that purpose as long as you're requiring that the rent be paid as it becomes due.

CHAIRMAN BABCOCK: Professor Hoffman.

PROFESSOR HOFFMAN: I'd like to note that even though I like sitting close to you, it's very difficult to get your attention.

CHAIRMAN BABCOCK: Sorry about that. We'll give you a bowl of jellybeans that you can throw.

PROFESSOR HOFFMAN: I think the relevant part of the Property Code is 24.0053(b).

HONORABLE STEPHEN YELENOSKY: Yes.

PROFESSOR HOFFMAN: I think it reads as follows, "If an eviction case is based on nonpayment of rent and the tenant appeals by filing a pauper's affidavit, the tenant shall pay the rent as it becomes due in the justice court or the county court registry, as applicable, during the pendency of appeal in accordance with the Rules of Civil Procedure and subsection (a)."

CHAIRMAN BABCOCK: Skip.

MR. WATSON: Just out of curiosity, what happens if they don't or if they're a day late, if one of them comes in after it is due?

HONORABLE STEPHEN YELENOSKY: Well, part (3)

is "the tenant fails to pay the rent into the court registry within the time limits prescribed appellee may file a notice of default."

MR. WATSON: Well, what does that do to the appeal?

HONORABLE STEPHEN YELENOSKY: "Upon sworn motion and a showing of default to the judge, the court shall immediately issue a writ of possession." They get possession of the property.

MR. WATSON: Which moots the appeal.

HONORABLE STEPHEN YELENOSKY: I think so. Doesn't it moot the appeal?

CHAIRMAN BABCOCK: It says a notice of default.

MR. WATSON: That's where I'm hung up, and I don't mean to be technical about it, but obviously they're out of place, but is there still an appeal that goes through that says, "Whoops, you shouldn't have been put out of the place"? Because this is to --

HONORABLE STEPHEN YELENOSKY: Well, the issue -- yeah, I mean, maybe there still is appeal about whether they owe the back rent, but they have lost the right to remain in possession, which is the concern, because they're allowed to remain in possession during appeal only if they continue to pay rent during that. In

other words, you don't get free rent because you're on appeal. You lose your ability to stay in there if you don't pay rent as it becomes due, because that's not part of what's being contested. That's future rent.

And ultimately I didn't think this was controversial because I thought even the landlords agreed that the statute doesn't allow you to impose a one month payment because of what was just read.

CHAIRMAN BABCOCK: Justice Gaultney.

HONORABLE DAVID GAULTNEY: I'm not sure it necessarily moots the possession issue. I guess it depends on what issues are being litigated.

CHAIRMAN BABCOCK: Yeah.

HONORABLE DAVID GAULTNEY: But I think you would also have the right to -- as the judge said, you probably are dealing with back payments as well.

HONORABLE STEPHEN YELENOSKY: Yeah, well, whether it moots it or not, it addresses the landlord's concern, which is he or she or it has somebody in this property who hasn't paid rent. This allows them to get them out and re-rent it.

CHAIRMAN BABCOCK: Pam.

MS. BARON: I have a question, I guess. In section (3) it talks about the time limits prescribed by the rules for paying rent, and it looks like we've taken

all the time limits out. Because now it doesn't say within five days of the date required in the rental agreement. So are you saying that "as it becomes due" would be the time limit under the rule, and what does that mean?

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: I'm sorry. My mistake. I was talking to -- your fault. Alex's fault. I'm sorry.

MS. BARON: Here's my question. It's section (3) says -- talks about "payment of rent within the time limits prescribed by these rules."

HONORABLE STEPHEN YELENOSKY: Yes.

MS. BARON: And we did have a five-day time limit before, which is now gone, so it's unclear to me what the time limits are now.

HONORABLE STEPHEN YELENOSKY: I don't -- yeah, well --

MR. GILSTRAP: Chip?

HONORABLE STEPHEN YELENOSKY: Go ahead.

CHAIRMAN BABCOCK: Yeah, Wendy.

MS. WILSON: And I think that it is whatever the contract says, I mean, is my understanding. So if rent's due on the 1st, that would mean that as it becomes due, which would be the 1st, it needs to be paid.

MS. BARON: Well, then I think we need to take out the time limits prescribed by these rules, because that is now meaningless.

HONORABLE TOM GRAY: I think that is addressed in another part of the proposal of 748b where you have to make required findings if it's a judgment for eviction of the date that the payment's due and the amount of the payment, so that's why the time requirements can be taken out.

CHAIRMAN BABCOCK: Okay. Last comment, Richard.

MR. ORSINGER: Yes, having heard the Property Code, I agree that the new number (1) would conform to the statute.

HONORABLE STEPHEN YELENOSKY: Thank you.

CHAIRMAN BABCOCK: Okay. Everybody --

HONORABLE STEPHEN YELENOSKY: And I apologize that I didn't have it at hand earlier.

MR. ORSINGER: Well, I would have not wasted 10 minutes of everybody's time. I apologize.

CHAIRMAN BABCOCK: 20.

HONORABLE STEPHEN YELENOSKY: We're thankful it was just 10 minutes.

CHAIRMAN BABCOCK: Everybody in favor of the proposed changes to 749b that are found on pages four and

five of the subcommittee follow-up report, raise your hand.

Everybody opposed? Nobody opposed. It passes 24 to nothing, the Chair not voting. So we're going to skip forward, are we not, Judge Yelenosky, to page 12?

HONORABLE STEPHEN YELENOSKY: Yes. And we only have two issues left, just to give you a preview. One is closing time at the JP courts, and the other, I don't know whether we're really returning to that or not. That's the issue of sanctions, which Pete Schenkkan addressed thoroughly last time, and maybe I'll just jump to that to see if we're even going to address that. At the end, if you read the last paragraph of this whole document, page 18 of 18, Pete Schenkkan -- it states that Pete had pointed out there's a bigger question of what measures are within the Court's inherent rule-making authority and could be used to fund legal services for the indigents in civil matters, and it reports that Chip had said that the SCAC would caucus about that and determine how to proceed, but that's where we left it. So --

CHAIRMAN BABCOCK: Yeah, I will defer to Justice Hecht, but my recollection is that Justice Hecht indicated, apparently not on the record, that we -- the discussion was fulsome enough for the Court's purposes.

HONORABLE STEPHEN YELENOSKY: Okay. Then that leaves just one issue, and we'll turn back to page 12, and what I would do on that is just remind you that before turning to Judge Lawrence's memorandum, which is a separate document, we had anecdotal information and concern about closing time at JP courts because they do not all remain open all day every workday, and therefore, what does that do to a litigant who attempts to appeal and finds the JP court closed.

Justice Lawrence did a great amount of work in polling the JP courts, and that is found along with his recommendation in a separate document that says "Memorandum" at the top, that's all it says, September 9th, 2009, from Judge Tom Lawrence to Supreme Court Advisory Committee; and for the executive summary of the statistics and what's not shown by the statistics I would recommend turning to the recommendations on page six in which he recommends no change. I think the Legal Aid folks here feel otherwise, but what he recites in terms of statistics are that 95.5 percent based on the response he's got, which is I think -- let me turn back.

I think he got about a 16 percent, yeah, 16 percent response from JP courts, so we're dealing with a sample of 16 percent of JP courts. Of those he's estimating because some of the answers are qualitative

that 95.5 percent would probably accept an appeal filed the next business day, and at least 93.5 percent would definitely accept a late filing.

Obviously that raises two questions about the statistics. We have 6.5 percent that may not accept the late appeal even if they closed the day before, and the whole day or part of the day, and that's of the JP courts that responded, and so 84 percent of them did not respond. We don't know if this is a representative sample or if we can characterize it as a self-selected sample in any way, which is inclined to be more likely to accept than the norm or not.

I think the Legal Aid folks' position on it is -- and they can correct me if I'm wrong -- almost there doesn't help if you're in the 5 percent that missed your appeal because the JP office was closed. Is that your position?

MR. MOCK: No, absolutely, that's the problem.

HONORABLE STEPHEN YELENOSKY: And I think if the full committee feels that that's a legitimate concern, then we still have to address how it would be fixed, and Judge Lawrence on page seven lays out a couple of concerns or a few concerns, even assuming you wanted to do something, which he doesn't recommend, how do you do it,

what does it do to the time periods for writ of possession, et cetera, if -- and I don't know that we have an answer to that, but we have his recommendation.

Frankly, this came September 9th. The subcommittee felt that we should just bring the whole thing here, so we don't have a subcommittee vote on it.

CHAIRMAN BABCOCK: Okay. It was Judge Lawrence's view that this is not a big problem and we don't need to change.

HONORABLE STEPHEN YELENOSKY: That's right. It's not a big problem in the sense of widespread.

CHAIRMAN BABCOCK: Okay.

HONORABLE SARAH DUNCAN: With 16 percent reporting.

CHAIRMAN BABCOCK: Right. Professor Hoffman.

PROFESSOR HOFFMAN: I mean, even if it were a hundred percent, I mean, there is a Lake Wobegone effect going on here. I assume that every judge asked is likely to say that he runs his court above average in terms of being open, you know, Monday through Friday, and I suspect that, you know, if the polling were of a different group, set of groups, those numbers wouldn't have come out the same. So I have --

CHAIRMAN BABCOCK: People who missed the

appeal?

PROFESSOR HOFFMAN: I think there's little reason to feel confident that there is little problem based on the numbers.

CHAIRMAN BABCOCK: Good point.

HONORABLE DAVID PEEPLES: Another way to look at that is if 95 percent are willing to give an extra day anyway, this rule wouldn't hurt a whole lot of people, wouldn't change a whole lot, and it's a good thing to do.

MR. GILSTRAP: Chip?

CHAIRMAN BABCOCK: Yeah, Frank.

MR. GILSTRAP: The one problem I think from what I've read from what Judge Lawrence said is that if you adopt this rule then in every JP court for -- which is closed -- which closes maybe at 4:00 o'clock on Friday instead of 5:00, you're automatically going to give them one extra day on all appeals, and you know, there is apparently a problem with that if -- when you're having this wholesale extension of one day, given the fact that there's almost nobody that's been hurt by it. I mean, I think that's what Judge Lawrence is trying to say. What he said, what I'm trying to say.

CHAIRMAN BABCOCK: Yeah, cost benefit. Jim, are you scratching or --

MR. PERDUE: I'm sorry.

CHAIRMAN BABCOCK: Elaine.

PROFESSOR CARLSON: Steve, does this proposal extend only to appeals or to any document or motion or motion for new trial, anything that's filed?

HONORABLE STEPHEN YELENOSKY: When you say proposal, proposal to do something? Because Judge Lawrence recommends not doing anything.

PROFESSOR CARLSON: Right. I guess I'm looking at the language on page 12.

HONORABLE STEPHEN YELENOSKY: Okay.

PROFESSOR CARLSON: That's underlined.

HONORABLE STEPHEN YELENOSKY: On page 12, let's see.

PROFESSOR CARLSON: "Proposed redraft of 523a."

MR. GILSTRAP: Yeah, but the proposal was if they're closed for any part of the last day we're going to add a day.

HONORABLE STEPHEN YELENOSKY: Yeah, it's not just -- well, filing of any document.

PROFESSOR CARLSON: And I read Judge Lawrence's memo to express great concern of extending it beyond appeals because it implicates -- he lists 9 or 10 other rules.

CHAIRMAN BABCOCK: Yeah.

PROFESSOR CARLSON: I don't know if the subcommittee looked at those rules.

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: I have a problem with the cost benefit decision. You've got people who go to justice court, admittedly their claims are small, and yet to them it's impacting their lives, it's impacting their rights. They come to a state court, and the state court is closed. It's 3:00 o'clock on Friday. My goodness gracious, the state court is closed. Yeah. And I can't file my appeal, I can't do what I want, I can't seek justice. Yes, because we closed at 3:00 o'clock on Friday, and that's your problem. I don't think that's justice, and I don't think that we ought to approve a rule that says, well, it only happens every once in a while. It's justice.

That's the problem with courts that run their dockets to clear their docket. It's not justice, it's docket control. Let's do justice and say, "Come on, guys, if you're not going to have a rule that keeps the courts open for the working guy from 9:00 to 5:00 then give him another day."

CHAIRMAN BABCOCK: Alex.

PROFESSOR ALBRIGHT: I think the statistics in the memo are a little misleading because when you look

at the question that was asked it was "What would happen if your courthouse was closed when" -- "on the day to file," which I think -- so when I looked -- I just glanced through all of these, but it looked like a lot of the judges were treating it as what if it was a holiday, which the rules would say that it goes to the next day when the court was open. So I'm not sure all of these judges who said you could file on the next day were focusing on it being what if you were closed at 3:00 or 4:00 o'clock and they came after you were closed on a day that you were open. So I think it may be of somewhat greater concern than the statistics from this questionnaire indicate.

CHAIRMAN BABCOCK: Okay. Yeah, Richard. Sorry.

MR. ORSINGER: Not having a JP court practice I really don't know, but does the law require a JP court to be open --

CHAIRMAN BABCOCK: You're a big time lawyer, I know.

MR. ORSINGER: -- all day?

MS. PETERSON: No.

MR. ORSINGER: It doesn't, okay. So I would expect that a lot of them close for lunch. What do you think? A lot of them close for lunch?

MS. PETERSON: Probably.

MR. ORSINGER: Okay. Well, if they close for lunch, if all of them close for lunch, then this rule would be triggered because they were closed or inaccessible during regular hours. So it's not just somebody that shows up at 4:59 to file something. It's somebody that shows up on their lunch hour, and I think probably -- I mean, I'm just guessing, but I think probably all the justice of the peace courts close for lunch, so we're essentially adding another day to the deadline, aren't we?

HONORABLE STEPHEN YELENOSKY: Well, we could have a lunch -- we could specify that regular hours includes -- includes or does not include the lunch period or something like that.

MR. ORSINGER: Well, that might be the most active period of the day for filing stuff in the JP court and I don't know whether --

HONORABLE STEPHEN YELENOSKY: Well, but if you come and it's closed for lunch, you come back after lunch. The problem is you come at 3:05, they closed at 3:00, you can't come back.

MR. ORSINGER: Well, the virtue of this language is that it matches the appellate rules and trial rules and it's kind of consistent, but since we all know that the appellate court clerk and the trial court clerk

is always going to be there all day long, it's only unusual situations like floods or hurricanes or, you know, unexpected things; whereas in the JP court I think we might routinely expect that it's going to be closed for a little bit on just about any day.

CHAIRMAN BABCOCK: Gene.

MR. STORIE: My comment actually is similar to Richard's. My question is what are "regular hours," and would it be part of any individual or any litigant's responsibility to know the local rules, including what the regular hours of the courts are?

MS. PETERSON: I think that was one of Judge Lawrence's concerns. A lot of JP courts don't have regular hours as they're traditionally understood for a court, which would be 8:00 to 5:00 hours. A lot of justice courts are open, you know, during part of the day but not all the day because these judges have other jobs, and some of them don't have clerks that would stay there during, for example, lunch hour or after 3:00 p.m., and so one of the things that makes it difficult in crafting a rule is that a lot of these courts don't have regular hours.

CHAIRMAN BABCOCK: Eduardo.

MR. RODRIGUEZ: Well, I agree with the comments that were made earlier. I mean, we ought to be

drafting these rules to accommodate the people that are using the courts rather than the court personnel, and a lot of people that use these courts may be only able to go during the lunch hour, and they can't come back at 1:00 o'clock because, you know, they took their lunch hour to go and file something that needed to be filed and they've got to get back to work, and so I think, you know, in considering these rules, especially rules that apply to those people that are -- I mean, if you're in a lot of these situations you're in a bad situation. We ought to accommodate them more than trying to figure out some way that accommodates the courts.

CHAIRMAN BABCOCK: Yeah. And so, Eduardo, you would say that this rule is okay because somebody could say, "hey," by their own affidavit, "I came by at noon, but you were closed. It was the only time I could come by, so wasn't accessible, so I'm filing it the following day."

MR. RODRIGUEZ: And they might -- you know, they might know when they get there at noon that they're closed, so they might make arrangements to get to work 15 or 20 minutes late the next day so they can be there. Yes.

CHAIRMAN BABCOCK: Yeah. Okay. I saw Frank first.

HONORABLE STEPHEN YELENOSKY: I think there's an easy solution to that problem, but go ahead.

CHAIRMAN BABCOCK: Okay. Frank.

MR. GILSTRAP: Well, you know, as a matter of principle I'm for giving them more time. I mean, the appellate rules let's everybody be 15 days late, no harm. You know, what's the difference? The problem is I don't know in the real world of how the JP court, you know, in some small county where it's located in the guy's home on the ranch, I mean, I don't know what kind of -- and where they're dealing with things like evictions. I don't know what kind of disruption this is going to occur if we give everybody an extra day. I just don't know, and I don't think anybody here knows either.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: I completely agree that it would be a good thing for nobody to miss a filing date because the JP court is closed, but it sort of smacks of an unfunded mandate because the JP courts are not funded by the state and yet we're proposing a statewide rule without supplying the funds to staff the office so that people can go and file them.

HONORABLE STEPHEN YELENOSKY: Well, they don't have to change their hours. They just have to give the extra day.

HONORABLE SARAH DUNCAN: Well, except that we're causing an -- I mean, as you said, your subcommittee haven't addressed all of the interplay of the rules if we give them an extra day to file, or four days if it's a weekend.

HONORABLE STEPHEN YELENOSKY: Well, two things. One, I would say if it's a question of, oh, everybody is going to say they were closed for lunch then I would propose changing it "If the court or the clerk's office where a document is to be filed closed prior to 5:00 p.m. on the last day for filing the document," blah, blah, blah. And my answer to the other things is, well, take any one case where the individual came to file at 4:00 o'clock and found the JP court closed, any one case. Should that individual as a matter of due process be able to file the next day? If so, as a matter of due process, then whatever the consequences are of making this clear that it goes to the next day, we have to live with them.

MR. GILSTRAP: I don't think it reaches the level of due process. I mean, I don't think it's a constitutional right, but it's just a question of is this how we want to do it.

HONORABLE STEPHEN YELENOSKY: Well, it's a constitutional right to know what you have to do in order to exercise your rights, and if you're told you have so

many days to appeal, maybe it's not written anywhere that that means till 5:00 o'clock, but it's certainly true that everybody expects it's till 5:00 o'clock if it's the state court. So what is one to know? Is it vague that what that means is you have until that day, assuming the JP court decides to remain open for however long the JP court decides to be open that day? I think it does rise to the constitutional level. What's your deadline?

CHAIRMAN BABCOCK: Okay. The -- your proposed amendment to say "where the document is to be filed is closed prior to 5:00 p.m." is going to run afoul of Eduardo's thinking that, hey, noon is an important time for a lot of these people to file their documents, so that he would, I think, be opposed to your --

HONORABLE STEPHEN YELENOSKY: Well, I understand that, but I think -- I think you would have a hard time making the constitutional argument that --

CHAIRMAN BABCOCK: Yeah.

HONORABLE STEPHEN YELENOSKY: Because it's the deadline. If you understand that you've got to file this before 5:00 o'clock and you come in and the office is closed for an hour for lunch or the JP went to the doctor or whatever, I think you have a hard time making a constitutional argument that due process was denied to you because you had to come back. So I'm just saying -- I'm

saying the strongest argument is there's no clear deadline to file your appeal if it's left up to the JP office. If you establish a clear deadline, I'm not concerned about intermittent closure up to that deadline.

CHAIRMAN BABCOCK: Okay. Yeah, Richard.

MR. MUNZINGER: Well, the rule as drafted talks about regular hours, and again, the people that come to the justice courts -- mechanic, let's pretend, whatever his problem is. His boss says, "If you leave here before 5:00 o'clock you're fired." State Constitution says the courts shall be open to hear causes of action and what have you. Does that apply to the justice court? No, I went fishing on that Friday, so I closed it.

MR. GILSTRAP: What if he said, "The law says if you leave before 5:00 you're fired"?

MR. MUNZINGER: Well, same problem. The guys' got a problem. He's a citizen, and I'm not worried about courts and their convenience. To heck with the courts and their convenience.

HONORABLE SARAH DUNCAN: We just need 24-hour JP courts.

MR. MUNZINGER: Tend to the citizens.

CHAIRMAN BABCOCK: Sarah thinks we ought to have 24-hour JP courts, a 7-11 kind of thing. By rule.

HONORABLE SARAH DUNCAN: Drive-through.

CHAIRMAN BABCOCK: Yeah, drive-through.

MR. GILSTRAP: Constitutional right.

CHAIRMAN BABCOCK: Let's vote on the rule as drafted.

HONORABLE TRACY CHRISTOPHER: On page 13?

CHAIRMAN BABCOCK: Everybody in proposed --

MR. ORSINGER: No, we're on page 12, not 13. If 12, passes it will be the foundation.

HONORABLE STEPHEN YELENOSKY: Yeah, this is the rule specific to JP court.

CHAIRMAN BABCOCK: Yeah, this is JP court. We're not going to talk about changing Rule 4. This is the rule as drafted on page 12, Rule 523a. Everybody that's in favor of this redraft, raise your hand.

Everybody opposed? By a vote of 25 to 5, the Chair not voting, it passes. So this is a great time to take our morning break.

(Recess from 11:02 a.m. to 11:19 a.m.)

CHAIRMAN BABCOCK: All right. We're back in session, and we're moving quickly to the always exciting topic of civil cover sheets, and Richard Orsinger, Mr. Excitement himself, will take over.

MR. ORSINGER: Okay. You thought eviction was exciting, just get ready for this. We have actually visited this subject before several times, and I hope you

all had the opportunity to pick up the civil cover sheets that are in the expando folders back here. I want to give you an outline, but I don't want to necessarily cut anybody off from anything they think is important, but it seems to me in our discussion today we have to discuss and decide the following things: The form is fairly well fixed. It's been vetted with clerks, it's got the approval of the Office of Court Administration. The form has been examined by us. My subcommittee has made subsequent comments, and so they're pretty happy with their form. I don't think that the content of the form so much is the issue for us today.

The formulated questions are should we require a signature and what do we do if a lawsuit is filed and the form is not filed. That's, to me, the debate we need about the filing of the form. The second is, we need a requirement in the Rules of Procedure. I think we all have agreed on that in the past, and so the question is if we are going to have a Rule of Procedure, where do we put it in the rules. The placement is the second question.

The third question is the wording of the rule, and the fourth question is do we have any comments to the rule to help be sure that it doesn't get misinterpreted or misused. That's what I think the

outline of the discussion ought to be, and if other people want to add to that, that's fine. We have Mary Cowherd is here with us from the Office of Court Administration. She's the one that spearheaded the design of this form. She's also done surveys and inquiries about the practices around the country and in Federal courts, so she's here to answer any questions you may have about that, and this -- I think this form we ought to -- unless somebody has a strong feeling, I think we should just take the design of the form as a given, and let's move on to the questions of do we require a signature of a lawyer or a party on the form, and I want Mary to respond to her view from the institutional point of view, but I think my subcommittee's view is they do not want this to be considered to be anything like a pleading or written discovery. They don't want any kind of sanctions striking pleadings or anything like that, and so they don't really want to require a signature. And so, Mary, on the signature issue, can you talk to us a little about your --

MS. COWHERD: Sure. The reason that our office is supportive of a signature by the attorney is that we believe that with attorney oversight and the completion of the form that it will result in greater accuracy of identification of the case type. We're not inclined to say that if there's not a signature then the

case cannot be filed. In fact, I believe in the packet of information that was sent to you before the meeting, there actually is an attorney general opinion that says a clerk cannot refuse to file a pleading if it has not been signed, and we believe this would fall under that opinion, so for us --

CHAIRMAN BABCOCK: Could you repeat that, Mary? I didn't quite catch what you said, about the attorney general.

MS. COWHERD: There is an attorney general opinion that says if an attorney has not signed the pleading, a clerk cannot refuse to file it, and we believe a cover sheet would fall under that opinion as well. So we're not saying -- our stand is not to refuse to file a case, but just to have the attorney's signature so that there would be greater likelihood that an attorney would over see the completion of the cover sheet resulting in a -- in greater accuracy of identification of the case type.

MR. ORSINGER: Can you comment on what the practice is around this country and in Federal court?

MS. COWHERD: Sure. About 27 states currently require cover sheets. Of those, slightly more than half require that a -- an attorney's signature be on the cover sheet. Of the 14 that require an attorney

signature, seven say that you cannot file the case. In the Federal courts, they require a signed cover sheet. The clerk's office -- and this is in the Western District. I talked to the guy here in the Austin division, the chief of operations. He said it's their practice that they go ahead and file a case even if a cover sheet has not been submitted and that it's at the discretion of the judge whether the case will move forward.

MR. ORSINGER: So we don't -- in light of the attorney general opinion, we really don't have the prerogative to say you can't file and go forward with your suit. We're just considering whether we should impose the requirement that can't be sanctioned by denying the pleading or denying requested relief.

MS. COWHERD: Correct. We're just wanting a signature, which we believe would not cause a clerk not to file the case.

MR. ORSINGER: Now, could a local area like Harris County adopt a local rule that were to impose a sanction on a lawyer who filed a lawsuit without the civil cover sheet or without the lawyer's signature?

MS. COWHERD: Well, that's something for this committee to consider, if by local rule some sort of consequence could be imposed.

MR. ORSINGER: But the attorney general just

says you can't prohibit someone from proceeding with their litigation, but it doesn't say you couldn't sanction a lawyer for failure to comply with the requirement; is that right?

MS. COWHERD: That is correct. This particular opinion. I haven't looked at that issue in depth.

MR. ORSINGER: Yeah. Well, that whole concept applies to there could be -- if the proposal is to have a rule that requires as cover sheet. Then there's a further extension of that that requires a signature on the cover sheet. You could try to impose or specify some sanction in the rule if you don't file the cover sheet or if you don't sign the cover sheet, but we know that if we tried to do that, we can't stop the lawsuit from going forward. We can only punish the lawyer probably for not doing it, and so I think one of the questions we have is that should there be -- and we're kind of assuming as a given that we're going to require the cover sheet.

If we require a signature on the cover sheet then probably it's up to the local people to support a sanction against the lawyer unless we as a committee want to recommend that the Supreme Court put some kind of sanction against the lawyer in the rule. The subcommittee is not even in favor really of requiring a signature, and

I don't think the subcommittee would be in favor of specifying a sanction for the failure to file it in the rule, but if the local judges wanted to adopt a rule that sanctioned a lawyer for not signing it then that would be I guess up to them.

CHAIRMAN BABCOCK: Well, before we get to sanctions, let's -- why don't we talk about why you would or would not want a lawyer -- I mean, in Federal court the lawyer signs it, for sure. Why do you not -- why does the subcommittee not believe that if a lawyer is filing the case they shouldn't sign the civil cover sheet?

MR. ORSINGER: I think the view is, is that this is just kind of an informational document for the government's purposes, and it's really not a pleading, and it's really not subject to any of the kind of standards of documents that are signed in the existing Rules of Procedure, and if you require a signature in here then you're going to probably have to have some very cautionary language to be sure that Rule 13 doesn't apply, that someone can't argue that it's admission of a party opponent. When you start creating a lawyer's signature on a filing with a court you start opening doors, and I think that those doors don't want to be opened. So you can either not open them by saying this is just a statistical certificate, it hasn't got a signature on it. If a

signature is required then I think our feeling is we want a lot of safeguards to be sure this isn't treated like a pleading or discovery.

CHAIRMAN BABCOCK: Roger, can I ask just one more question on this line?

MR. HUGHES: Go ahead.

CHAIRMAN BABCOCK: Richard, I think you're right about everything on this page, with the exception of question No. 3, "Has this case been previously filed or does it relate to a case previously filed in this county or in another county or state," and I have heard of and actually seen examples where a lawyer will try to judge shop a case by claiming a related case in that court, and under some county procedures the case might automatically go to that court or at least there would be a greater likelihood that would go to that court. So that would be substantive and not just administrative statistical, would it not?

MR. ORSINGER: Well, I agree, and it seems to me that the better response to that problem is to preclude consideration of this information in the assignment process rather than to sanction a lawyer for misrepresenting it, because this is really strictly to collect data for the state in the aggregate, and it shouldn't be used to dispose of an individual case.

CHAIRMAN BABCOCK: Well, that's not true in the Federal system. In the Federal system that related case line will be considered by the judge who has the related case and by the clerk.

MR. ORSINGER: Okay. Well, I think that takes us into a whole realm that we've not really explored. I think that everyone that's been involved in this discussion is looking at this as being informational only for purposes of gathering statistics, and it was not contemplated that any of the information on here would influence the process of a particular case, and I personally -- and I can go back to my people and come back with an official position. I would rather stay away from any reliance on this form for disposition of a particular case or where it's assigned rather than to try to beef up the accuracy of it because we know it's going to be used for that purpose.

CHAIRMAN BABCOCK: Roger.

MR. HUGHES: Well, let me give you some practical insight on how these civil cover sheets are really done in Federal court. First, were you actually to -- most everything is electronic filing, so the lawyer never signs the cover sheet. The legal secretary types backslash "S, Roger Hughes." That's the lawyer's signature.

Now, the second thing of it is, aside from the lawyer dictating to the highly skilled paraprofessional or legal secretary what to fill in on the civil cover sheet, everything is electronically filed, and when you file your Federal case for the first time they make you go through on the screens everything that is put on the civil cover sheet. That is, you must go through and not only -- on the screen you give them the information that you're putting on the civil cover sheet.

Now, in most law offices that I know of, once again, a paralegal or a highly skilled legal secretary is the one who's actually logging in and filling out the form online to then electronically file that lawsuit for the first time. Now, I say that because when I read through the committee statement here for the reason for having a lawyer's signature is accuracy for statistical, all I can say is -- and for the most part in the Federal system, yes, they do require your signature, which gives the lawyer responsibility, but in practicality it's being done by the legal staff.

CHAIRMAN BABCOCK: Or an associate or something, yeah.

MR. HUGHES: Based, of course, by close supervision by the attorney.

CHAIRMAN BABCOCK: Right. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, I agree with Richard that this ought to serve the purpose for which it was created, as I understand it, and only that purpose, which is OCA's statistics. I would not include the third question. I would not include the question as to discovery level. What are you going to do if they check level one but the pleading says level three? That creates problems. I don't feel strongly about the signature issue, but if it's a data collecting instrument then those things ought to be removed. We have somewhat of an analogy, I think. In the family law context you have to file certain vital statistics forms, right, Richard?

MR. ORSINGER: At the end of the case.

HONORABLE STEPHEN YELENOSKY: Well, it's a good example, because in our courts they have to file them much earlier than that. I'm not sure when, but maybe when they file it. In any event, maybe it's at uncontested. That's what happens. When they come in at uncontested they have it filed.

MR. ORSINGER: I think the Family Code requires that the decree be accompanied by a husband-wife certificate and parent-child certificate.

HONORABLE STEPHEN YELENOSKY: Okay. So there may be a statutory basis for that, but it seems to

me that if this is statistic gathering it should be kept as that. It should not have any effect, and if that means leaving the signature off then we're doing something different than the Federal cover sheet, and we should acknowledge that and be consistent with it, and to get them to do it, you know, clerks can say -- it may be against the law to say you can't file something, but there's nothing that prevents the clerk from saying "You need to fill out this form here, you know, while I take your paperwork," and if there's a lawyer who routinely refuses to do that then that will be addressed, but do we really want to be having sanction hearings on every time somebody doesn't file a cover sheet? I don't think so.

CHAIRMAN BABCOCK: Okay. Judge Christopher.

HONORABLE TRACY CHRISTOPHER: We've had cover sheets in Harris County for a long time now. We include the discovery level. We include the related case information. I've never had anyone -- there's never been a problem created by the cover sheet having one discovery level versus the pleading having another discovery level. The advantage of putting it on the cover sheet is that my trial coordinator can look at the cover sheet, and if they see it's a level one case then they can set it for trial in a shorter period of time than a level two or a level three case.

As far as the related case, we do not use that for any automatic transfer in the county. We have a computer system that automatically searches for related cases and so, for example -- and then the administrative judge of the particular divisions will get an -- a transfer order because under our local rules we transfer back to a previous -- previously filed case, but what I will do is if the cover sheet provision is checked then I know that our computer is correct, that the two cases are related. Otherwise, I have to look at the petition of the new case and the old case, so I guess I do take the representation of the attorney that it is related, but I've never had a problem with that either. I've never had anyone claim it's related when it wasn't.

CHAIRMAN BABCOCK: Justice Hecht.

HONORABLE NATHAN HECHT: And are they signed?

HONORABLE TRACY CHRISTOPHER: I don't think they are.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: I think that -- I think Judge Christopher's comment pretty much says --

CHAIRMAN BABCOCK: Hang on, Frank. Correcting, Jim thinks they're signed.

MR. PERDUE: I sign them.

HONORABLE TRACY CHRISTOPHER: He files more petitions.

MR. PERDUE: There's a place for you to sign it. I mean, it calls for attorney's signature.

CHAIRMAN BABCOCK: Frank. Sorry to interrupt.

MR. GILSTRAP: In the real world, I can't imagine the court looking here, saying, "You checked discovery level one, so therefore you don't get a deposition" or something like that, but the clerks are going to go through this. And is there a TRO requested, they're going to look at the cover sheet, you know. There's -- you know, and I could easily see that they could use it to decide whether there's a related case. I mean, the clerks are going to go to this information rather than thumb through the pleadings for probably a lot of things, and I think we're -- I think we're kidding ourselves if we say it's not going to be used for that.

CHAIRMAN BABCOCK: Yeah, Mary.

MS. COWHERD: One thing I wanted to point out to you, when the Judicial Council approved this for the proposed consolidated cover sheet for comments they specifically designated certain items on the cover sheet, two of which that you've been discussing, service type, discovery level, family law case management, whether the

case has been previously filed or relates to a case previously filed, and the type of procedure or remedy, they designated those as optional items. We heard from district and county clerks that not all of them want or need that information. It will be up to the local jurisdiction whether to include those two particular items on the cover sheet.

CHAIRMAN BABCOCK: Okay. Richard.

MR. ORSINGER: Mary, can I ask you a question? I know that the impetus for this form was to collect data on the system as a whole back at the capital, but is there a perception that the district -- that the local clerks will also use this information in doing their work, and was that part of the input into the design of the form?

MS. COWHERD: Part of it. Some of those items, those optional items, some of the clerks think are helpful, so we're going to leave it -- you know, the idea from the council was to leave it to local jurisdictions to include that information or not. What we're primarily concerned about is the identification of the case type.

MR. ORSINGER: And that's --

MS. COWHERD: At the state level.

MR. ORSINGER: At the state level, okay. And how do we tell by looking at this form what's required

from all clerks and what's optional with clerks?

MS. COWHERD: Well, what the Judicial Council has said would be the required minimum information, it would be the style of the case, the name and contact information of the attorney or party filing the suit, the State Bar number of the attorney if it's applicable, the names of the parties, and case types.

MR. ORSINGER: Okay.

MS. COWHERD: And the case types will be selected by the local jurisdictions. It varies among the counties how much granularity within the case type information that they want. Harris County, for example, gets a lot of very detailed information within the different case type categories.

MR. ORSINGER: And are you going to follow and keep those statistics of the local add-ons, or are you just going to enter your core information in your state database?

MS. COWHERD: We're just going to -- the clerks, they have a chart showing them if they have really granulated case types where those fit in the OCA case management categories, and they would fit those into our categories when they submit their monthly case activity reports.

MR. ORSINGER: So basically the local clerk

will take the form that's used locally, and they're going to have to key in the information in the form you prescribe for OCA.

MS. COWHERD: Correct.

MR. ORSINGER: So you're not actually going to be reading this or entering this data yourself?

MS. COWHERD: No.

MR. ORSINGER: I see.

HONORABLE STEPHEN YELENOSKY: Well, with e-filing it clearly could be done at some point, that would be one step. They fill it out online and it goes to OCA. The clerk doesn't need to be involved.

MS. COWHERD: Well, they have pretty extensive case activity reports where it's just not this information but tracking what happens to the case at disposition and some other information.

CHAIRMAN BABCOCK: Justice Gray, did you have a comment?

HONORABLE TOM GRAY: I did. We've had some experience with this at the intermediate appellate level with regard to the docketing statements that have been required now for a decade or more, and we've run -- I mean, there's some pluses and minuses with regard to their use from a purely judicial standpoint. If someone -- because they are required at the appellate level; and if

you fail to complete this in a civil case, at least at our court, we will ultimately dismiss your case because it's failure to comply with a order of -- order of the clerk demanding some type of response; and so you can actually wind up with a DWOP at the appellate level if you're unwilling to complete one of these.

On the other side, we are running into more and more cases where there are multiple pro se parties trying to appeal together, and the problem that we are having is that if you have multiple pro se parties because you can't -- one pro se party can't represent another pro se party, if these are considered pleadings, which we considered them that at the -- because they're required, one party can't file one for another, and so we either have to get two or two signatures on it. Otherwise you've got the problem of unauthorized practice of law. So there are some real benefits to requiring a signature, but there are also some real problems at the same time, and so that's just some of the information that we've -- you know, or the issues that have come up at the court of appeals level.

CHAIRMAN BABCOCK: Anybody have any other thoughts about the signature issue, pro or con?

HONORABLE JAN PATTERSON: I have a question.

CHAIRMAN BABCOCK: Yes, Judge Patterson.

HONORABLE JAN PATTERSON: Mary, am I correct that from OCA's perspective the justification for a signature is that you're more likely to get accurate information from an attorney than from a legal assistant?

MS. COWHERD: Or just that there's attorney oversight of the completion of the cover sheet, and, yes, we're wanting to -- we would believe in most cases that the attorney would be in a better position to identify the case type than the legal assistant.

HONORABLE JAN PATTERSON: But it's more accuracy than accountability or any other issue?

MS. COWHERD: Yes.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, I guess I would just disagree with the premise. I don't think that attorney signature means they're going to look over this, because it has no consequence for the case. It seems appropriate if you have a well-qualified paralegal or legal secretary to fill this out. I don't see unless you consider it a pleading how it could be considered the practice of law if all this has is categorizing the case for statistical purposes. I don't really think the signature is going to make one whit of difference as to whether you get an accurate form.

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: If the rule is silent as to whether or not the form is admissible in evidence or may be considered for purposes of a court, why would something signed by an attorney not constitute a judicial admission? It's a formal document. It's filed with the clerk of the court. It describes the law signed by the lawyer. In essence he admits that there's a related case, and he may have admitted himself out of jurisdiction if there is a dispute over which court had the jurisdiction over the case first, just by way of example, and that raises problems with the rule as to whether or not -- if the intent of the rule is statistical only then we may want to recommend to the Court that it craft some kind of protection or protector language.

If the real intent is to get statistics, that the form can't be used for some judicial purpose or something else, we may want to discuss that and debate it. As to whether or not it's signed by the attorney, my memory, when I first got on this committee someone told me -- we were having a debate -- that my e-mails were enforceable against me under Rule 11 because of the Uniform Electronic Transactions Act, which had been adopted by the State of Texas which is part of the Business & Commerce Code; and I was dumbstruck; and I went back and read the dadgum thing, and I think they may be

right.

So that if I -- I'm going to give you my sophomoric understanding of that statute that if I routinely and intend that my electronic signature is my signature, it is; and so the fact that I put "S Richard Munzinger" or my legal assistant does, I'm the person who signed it. My client is potentially affected by what I have described as the lawsuit, and I could make statements that affect rights and that could be relied upon by a court if I offered into evidence. So I think we need to -- whatever rule we adopt, we need to recognize that those -- I certainly would make the argument if it behooved me to make the argument with the judge, "He signed the dadgum form and said there was another case filed first in the other county. You don't have any jurisdiction of this case. I would rather be in front of judge so-and-so in so-and-so county." Now that raises a problem.

CHAIRMAN BABCOCK: Yeah, Richard. Then Justice Gaultney.

MR. ORSINGER: Rule 13 on sanctions says, "The signatures of attorneys or parties constitute a certificate by them that they have read the pleading, motion, or other paper," and it goes on to prescribe what's required before you sign the other paper. The

proposed rule that we submitted is on the assumption that this is not a pleading and won't have a signature and, therefore, we're not worried about Rule 13 and all these other admissions against interest and that kind of thing. If it's going to have a signature then that makes it more plausible that it's subject to the Rules of Procedure that are governed by whether they're signed or not; and if we're going to go that route then I think we need to build in more safeguards than the subcommittee has to be sure that this doesn't blossom into a whole other sanction potential.

CHAIRMAN BABCOCK: Justice Gaultney.

HONORABLE DAVID GAULTNEY: On the form there's an underlined sentence at the very top that says, "This information does not constitute a discovery request, response, or a supplementation, and is not admissible at trial." I assume that whoever drafted this form was trying to address some of those concerns that are being voiced. So I don't think -- it doesn't look to me like whoever is proposing signature of the form anticipates that it was going to be used as part of the trial but more as an administrative function.

HONORABLE STEPHEN YELENOSKY: But if --

HONORABLE DAVID GAULTNEY: And if the rule could be drafted to clarify that, I think it should.

CHAIRMAN BABCOCK: Yeah. Steve.

HONORABLE STEPHEN YELENOSKY: Well, but if the only reason being advanced for a signature is to get a more accurate report and whether the box is checked as eminent domain, condemnation, or partition, and you don't believe -- I don't believe, anybody here believe, that the attorney's signature is going to assure that the correct box is checked or more likely the correct box is checked then why do we want to take on all the unintended consequences of a signature?

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: I've been perusing docketing statements in the courts of appeals. It seems that most courts are using a form that does require an attorney's signature. I am proud to report that the Fourth Court of Appeals requires an attorney's signature, but only for a certificate of service that the docketing statement was served on the other parties. I'm respectful, of course, of Chief Justice Gray, but considering this a pleading is -- I mean, I've been trying to figure out this week exactly what is a pleading, plea, or motion. I know what a paper is. That's helpful.

MR. ORSINGER: Unless it's electronically filed.

HONORABLE SARAH DUNCAN: Actually, that

doesn't present a problem for me. But calling these things -- I mean, we spent a long time talking about our docketing sheet, and we have one of the few that actually looks different from the others. They have one of the few. I don't want to sanction people for checking the wrong box. I don't want to -- I agree with Steve. I don't think there's a chance in hell that an attorney's signature on one of these things is going to indicate anything other than the attorney signed it. I don't think it's going to indicate supervision. I don't think -- and at $725 do you really want to bill a client your hourly rate to fill out a docketing sheet? I don't think so.

CHAIRMAN BABCOCK: Justice Gaultney.

HONORABLE DAVID GAULTNEY: Well, I did want to say something in response to the practices of the various appellate courts because I think they are different. You know, it's my understanding that the docket sheet -- I don't want to speak for how our clerk does it, but I suspect there's an effort when the -- and I think this was based on a comment she made to me, but I don't want to speak for her. I think there's an effort that when the attorneys do not file the necessary docket sheet, which is maybe often, that the effort -- the information comes from the clerk of the trial court.

Okay. So there's an exchange between -- and

the clerk of the trial court may actually fill out information that the appellate clerk can then use, so it's part of the administrative process, and perhaps even the appellate rules could be modified at some point to make it the trial court clerk that provides the docket information rather than the attorneys and the parties at the appellate level, but still, I don't -- I guess to speak directly to the signature issue, I don't think requiring a signature on an administrative form necessarily has to bring it into the category of pleadings and sanctions and all that, everything else.

I think there can be a sufficient clarification of the function simply of the form as an administrative function that would remove it from that process, and there is something about something I'm signing that I do pay particular attention to. It's just as a matter of form, whether I'm going to be sanctioned for it or not. So I do see some advantage for purposes of making sure the information is as accurate as we can hope for in the process. Whether or not as a practical matter the trial clerks will have any greater success than the appellate clerks have had in getting the documents actually signed is another issue, but I don't see any problem with at least making an effort to get it done.

CHAIRMAN BABCOCK: Okay. R. H.

MR. WALLACE: Well, let me speak on behalf of the trial Bar. I think there's a lot of lawyers that if they sign it that will ensure more likely than not that they have looked at it and it is accurate. I mean, now, whether or not you require signature or not, I don't really matter, but I think if you want to help ensure accuracy, some lawyers are going to look at that and read it before they sign it. I've never seen sanctions issues litigated in Federal court over cover sheets, but that may be because I don't think that's a pleading under the Federal court definition of a pleading, so if you're worried about turning this into some kind of a sanctions battle I think you can solve that fairly easily if you want to add the signature of the attorneys to it, but I don't have strong feelings about requiring the signature one way or the other, but if you do require it -- if they're going to sign it, a lot of lawyers will read it.

CHAIRMAN BABCOCK: The Federal form is the JS-44, and accompanying it is a document that says, "Instructions for attorneys completing civil cover sheet form JS-44," and then goes on to say that the attorney has to sign it and do all these things, and, of course, there's a place at the bottom for the attorney to sign it, and it does say that it -- it "neither replaces nor supplements the filings and service of pleadings or other

papers as required by the law, except as provided by local rules of court." Whatever that means.

MR. WALLACE: Well, you know, the Federal rules define "pleadings" as "complaint, answer, first" -- so I don't know, I think they're narrower than what people consider state pleadings to be.

CHAIRMAN BABCOCK: And to the point that Sarah and Richard made, I would not think that a paralegal would make a decision without attorney involvement about what discovery level it was going to be. I would not think that they would file out the -- fill out the third question about related cases without asking an attorney.

HONORABLE STEPHEN YELENOSKY: I agree, but I was assuming that we might be reducing this to the statistical matters, and if we did, that a signature would be unnecessary. I agree with you, it would be necessary if you have those questions, and it is necessary in the Federal context because it's used for other purposes.

CHAIRMAN BABCOCK: Yeah. Well, and even on the statistical stuff, Steve, if we're filling -- if we're filing a trade secret case, my paralegal is going to come to me and say, "What do I say about trade secrets, because trade secrets isn't on here," and so you're going to have to make a judgment about what type of -- you know, what type of case a trade secrets case is.

HONORABLE STEPHEN YELENOSKY: And there's a lot more variability in how people are going to interpret this, I think, than incorrectness, because that's a big issue with all of these; and what do you do with pro ses, who are increasingly a significant -- more than 50 percent of our family cases filed --

CHAIRMAN BABCOCK: Yeah.

HONORABLE STEPHEN YELENOSKY: -- as I understand it. What are they supposed to do?

CHAIRMAN BABCOCK: Yeah, Sarah.

HONORABLE SARAH DUNCAN: I think there are plenty of paralegals around the state that would know how to fill one of these out. It would depend on -- I mean, I had a meeting the other day with a board certified paralegal in family law. She knew I bet more than most of us around the table --

CHAIRMAN BABCOCK: I'd accept that.

HONORABLE SARAH DUNCAN: -- about the ins and outs of community property and prenuptial agreements, everything else, and I used to be a paralegal so I'm going to say that in defense of paralegals it depends on the practice and it depends on the paralegal as to whether they can fill this out, and that's not something we can know in advance or mandate, I don't think. I just -- this is a form.

CHAIRMAN BABCOCK: Yeah, Judge Evans.

HONORABLE DAVID EVANS: Well, I don't have a a real problem with no signature on it, but it's not going to make the lawyer any less accountable for malpractice or for disciplinary matters if it's not signed, and the one that concerns me most, I would warn almost anybody on why I would probably want to supervise anything that was filed is the one on service type. If the paralegal accidentally checks "no service required at this time," the lawyer is in the ditch, and so you may be giving a false sense of security to lawyers when you tell them about that, because they're going to be liable for super -- under the disciplinary context and in a malpractice context from supervision of a paralegal, and so it is a real form. It's going to be on record, and if there's an adverse consequence from the information to the client or to the court, there's going to be accountability.

HONORABLE STEPHEN YELENOSKY: You think there's any possibility of that -- if the form is just case type, doesn't include level, service type, related case, TRO, just, you know, they put down assault and battery and it's actually a trade secrets case?

HONORABLE DAVID EVANS: There may be some form that has no adverse consequence to it in the world, but I can't think of much of anything that goes into the

court in any kind of letter that you couldn't have some adverse consequence come out of it and doesn't invoke your professional duties. We have one set of lawyers that when they have multiple plaintiffs rotate the lead name so that they can file in different courts alphabetically, and so when we get that set of lawyers we go and search to see if they've rotated the pleadings. So if it's Able, Baker, Cane, we go look and see if Baker filed -- if we've got a Baker versus Jones case out there and a Cane versus Jones case, and that goes against a local rule and local order about trying to forum shop.

So, you know, if a form came in on this, I'm sure our local judges would want to know about related cases, and if the form came in and it was improperly formed, I think even if it was executed by a paralegal there would be some accountability issues with the judge.

CHAIRMAN BABCOCK: Yeah, Justice Gray.

HONORABLE TOM GRAY: Just to follow up, you know, so that Sarah doesn't have to lose sleep at night about what's going on at the Tenth Court, you know, the docketing statement is required by the rules. If we do not get one, we notify the parties and give them the opportunity to cure it, and then if they fail to cure it in a timely manner then their appeal will be dismissed for want of prosecution because we would take the position

that if they're not interested enough to fill out this form then they probably are not interested in the rest of the appeal either.

But with all that said, we spend a lot of time doing that and getting compliance with that aspect of the rule, and I don't think there's a corresponding benefit to us to do that other than compliance with the rules, and it has -- our relatively strict enforcement of it has reduced the noncompliance rate in civil cases. I mean, we pretty much, you know, get them with the filing of the notice of appeal; but with that said, the benefit that we get out of them usually relates to the ADR as far as to us, if the appellate thinks they're appropriate for ADR; but at the trial court level I don't think that the signature of the attorney is going to add any benefit that would justify its requirement in the context of everything we've said here at the trial court level. So I just don't think it's there.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: I just remembered where this came from in the appellate courts, and, Tom, correct me if I'm misremembering, or David. It was the deputy clerks who wanted one piece of paper that would have the attorneys' names, the parties' names, the type of case, ADR was a big part of it, but it was their need to

not have to go through a 25 volume clerk's record to ferret out the names, addresses, and phone numbers of the attorneys. If this -- if this is to simplify the lives of clerks and attorneys, to some extent, and to collect data for a state agency or a judicial system, I don't understand -- I mean, like this question about "Has this case been previously filed or does it relate to a case previously filed in this county or in another county or the state," that could really trip a lot of people up completely unknowingly if they have to sign this, if it's going to be considered a pleading, and if it's just for -- if it's just to collect data for the convenience of the attorneys and the judicial system, I just don't think it ought to be -- have to be signed.

CHAIRMAN BABCOCK: Jim.

MR. PERDUE: We have them in Harris County. It does have a signature line, but that's -- that was -- the purpose, as I recall, that they came up in Harris County was it's a data collection tool. It's just a -- it's just a means to collect the data so you can -- you can have the data in an analyzable form, and as I recall this conversation from a couple of meetings ago, we had the people from OCA here and they were explaining that this would be a means for them to collect better data.

Well, if the presumption is -- I just think

it's a false presumption that having an attorney sign it creates any more accurate level of data than you would get from the form as I read it, whether it be completed by a good paralegal, good legal secretary, or the attorney himself; and the unintended consequences as it was first presented by Mr. Orsinger of having a signature is you start doing the whole concept of it being required by rule and a pleading and something that could potentially get you in trouble, even if there is a disclaimer on it. I mean, you can put a disclaimer on it all the time. That won't prevent a lawyer from arguing that it means something else. So I don't see it as anything other than a data tool, and it just needs to be considered that.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: Are we all on the same page there needs to be a disclaimer? I mean, we don't want it used for anything else, and we're all mindful of Judge Evans' comment that, yeah, if you check don't have it served on the last day before limitations run you're probably committing malpractice and they can probably use it, but I think we're all in agreement that let's put a disclaimer on it. So then let's just vote up or down on the signature or no, and we can decide it.

CHAIRMAN BABCOCK: Steve.

HONORABLE STEPHEN YELENOSKY: Well, I think

there -- I mean, I think maybe we're conflating two things because we're filing it with the pleading, and the two things are statistics for which the name of the parties, everything else, is irrelevant. OCA doesn't need to know who the case is from. They want an accurate statistic, was this a family case. They want accurate statistics, blah, blah, blah, blah. That could be filed technologically completely independent of filing the pleadings. We could have a rule that at the end of every week attorneys need to fill out a form that says, "I filed this many cases this week" without any names whatsoever. That's one thing we're trying to accomplish here.

The other thing, which is different and that implicates all these other issues, are questions that are asked for the benefit of the clerk or the court; and we're conflating the two, I think; and if we either decide that we want to do that or we decide we don't, we go in different directions, because if all we're doing is collecting statistics, it should have no effect on the individual case because statistics are not identifiable.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: So what are we going to do when I say in my petition, "I want Richard, Roger, and Carl served at these addresses"; but for me, myself, and I, if you want me to get me to fill this out

more accurately make the type bigger. But if I check "no service is required" on the docket sheet but I request service in my petition, is somebody suggesting that the docket sheet would control and no service would be issued, even though I put it where traditionally I'm supposed to put it?

MR. GILSTRAP: I could see a clerk saying "no service."

HONORABLE DAVID EVANS: They would charge for no service. They would use it to calculate the fee, and you would have to -- the second leg of the malpractice would be that you didn't actually go down and get the clerk to get the service out, but the first step on it would be I think on this one right here, is how they're going to charge you going in and how it's going to be served, and it would be other things going on. It just would be one part of the puzzle in getting service out.

CHAIRMAN BABCOCK: There was a case in Federal court where there was a race to the courthouse, and the one case was purportedly filed a day before the court obtained subject matter jurisdiction and then the second case was filed on the day the court did have jurisdiction, and the civil cover sheet was signed on the earlier day and was admitted into evidence.

HONORABLE SARAH DUNCAN: I don't understand.

What was the basis for subject matter jurisdiction?

CHAIRMAN BABCOCK: Patent. Patent wasn't issued until a day later.

HONORABLE SARAH DUNCAN: Oh, okay.

MR. MUNZINGER: And that illustrates the point --

CHAIRMAN BABCOCK: Yeah.

MR. MUNZINGER: -- that these can be judicial admissions and have judicial effect on our clients so that the rule has got to be written with care to put a disclaimer on a form, "This can't be used at trial."

"Well, I'm not using it at trial, Judge. I'm using it in motion for summary judgment." I mean, "motion for continuance."

CHAIRMAN BABCOCK: Or I'm using it in a battle of the race to the courthouse.

MR. GILSTRAP: Put it in the rule, too.

MR. MUNZINGER: The restrictions have to be in the rule, and the rule needs to state "This is for statistical purposes only," et cetera, et cetera, or we're all going to -- any good lawyer is going to try to use it.

CHAIRMAN BABCOCK: Well, whether it's a lawyer or paralegal that fills out the civil cover sheet and dates it a particular date, isn't that probative of

when the thing was filed? It's at least somewhat probative.

HONORABLE STEPHEN YELENOSKY: How does the disclaimer that it's for statistical purposes anyway make any sense when the question is "Is this a related case? Do you want it served?" Those are not the questions that go to statistics.

CHAIRMAN BABCOCK: Yeah. Yeah, that's informational for somebody, for the clerk or --

HONORABLE STEPHEN YELENOSKY: Yeah, I don't think you can deal with both in the same manner.

CHAIRMAN BABCOCK: But just for informational purposes, I've got the Harris County civil case information sheet in front of me. A couple of things, it does have that same language at the top underlined as our proposed form has. "This information does not constitute a discovery request, response, or supplementation, and is not admissible at trial." And then it does have a large block for a signature of attorney or pro se filing cover sheet, name, printed, phone number, and Bar number. Judge Christopher.

HONORABLE TRACY CHRISTOPHER: You know, I'm just saying we've had that cover sheet for 20 years, probably, and it has never come up as an issue, and plenty of times the lawyers don't fill out that related case

information, because, you know, on a daily basis I sign as administrative judge 5 to 10 transfers that transfer a case back to the first filed case, and the vast majority of time it's not mentioned on the civil cover sheet, and I don't get bent out of shape, and I don't go running around sanctioning people, and I just don't.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Chip, I have a question on whether or not service is requested. I don't care what kind of disclaimer you put, if that is checked and the clerk goes off on that, even though you put it in your petition, and you get busy in something and then you don't use due diligence, that's going to be in evidence, that you didn't use due diligence, and that's the only thing I really -- whether or not service is requested ought to be not on there and should be some other place.

CHAIRMAN BABCOCK: Okay. Lonny.

No, I'm just calling on you because you're over there. Keep you on your toes. Anybody else? Yeah, Justice Gaultney. Then Tom.

HONORABLE DAVID GAULTNEY: Well, I'm persuaded by what Judge Evans said, that the issue is -- really, I mean, I think there is going to be some responsibility for the filing of the docket sheet even if there's no signature by the attorney if these -- she's

required to file it with the original petition by the rules. I mean, unless we have something that tracks, you know, it's not admissible at trial, it's not -- it says it doesn't affect the commencement in district or county court, but as a practical matter we're told it may.

So I think whether or not you sign it or not it's probably going to be an impact that the attorney is going to want to be aware of, and maybe the rule ought to make clear, as clear as we can, regardless of signature that this is simply an administrative fact -- I mean, information gathering for filing purposes, not for affecting the substance of the litigation.

CHAIRMAN BABCOCK: Okay. Tom.

MR. RINEY: I've completed a lot of civil cover sheets in both state and Federal court. More and more state courts are requiring them now, too, and it's just never been a problem. But I do think there is a point with respect to the service issue. It would seem to me the only purpose of having this thing filled out is presumably the attorney that's completing this has a little more information than the clerk that is receiving it, but if it comes to service there's no point for the lawyer to be doing that. Either the lawyer requests service or they don't, and I would assume that the clerks ought to be submitting some type of supplemental

information, and they can fill that part out and then that removes it as a problem.

The signature is just not that big a deal to me one way or the other. I mean, the other side doesn't get it. I mean, someone is going to have to really be hunting to want to go down and track down a civil cover sheet and try to use it against you. It's not that big a deal to me.

HONORABLE TOM GRAY: You've presumed the other side doesn't get it, but if it's a document that has to be filed it should be served.

MR. RINEY: Well, I have never been served with one.

MR. LOW: Yeah.

MR. RODRIGUEZ: My question is, would a person be prohibited from filing a lawsuit if this weren't attached to it. I mean, you send -- you know, it's close to the statute. You send, you know, your runner down to file -- file the pleading, and all of the sudden you forget this. Is the clerk going to say, "I can't file it, and the guy says, "I don't know what to put on here," and pretty soon it's, you know, what happens?

CHAIRMAN BABCOCK: Back in the old days there have been clerks in Federal court that said "You don't have a civil cover sheet. Go back home and get

one."

MR. RODRIGUEZ: That's right.

MR. RINEY: But you typically don't make that mistake the second time.

CHAIRMAN BABCOCK: That's true. That's true. Richard.

MR. ORSINGER: The proposed language for the rule, which may not be any good after this debate and the vote. The last sentence is an effort to make it clear that the failure to file the cover sheet doesn't -- I'm on page two, paragraph five. The failure to file a cover sheet doesn't determine whether the action was commenced. It was our view that if you meet the other filing requirements except for this cover sheet, you have a suit on file; and, therefore, if somebody tenders it without it, that's more in the nature of whether there should be a sanction against the lawyer, but it's certainly not going to impair the litigants' rights. That was our desire to put in that sentence, backed up by the old Jim Mattox AG opinion saying that some of these preliminary filing requirements shouldn't defeat someone's act of filing something. That's kind of a general way of saying what that AG opinion said, which we can get a copy of that for you if you want.

CHAIRMAN BABCOCK: Okay.

MR. ORSINGER: This is in keeping with our philosophy that we thought this was starting out to be a statistical certificate. I now that see that it's probably as or more useful for the local management of cases, but if we're going to start letting it affect substantive rights we've got to write a different rule with a whole lot of precautionary language and maybe a long comment.

HONORABLE SARAH DUNCAN: That's like the with 166a(i) comment. Right.

CHAIRMAN BABCOCK: By the way, on the signature issue --

MR. ORSINGER: Yeah.

CHAIRMAN BABCOCK: -- on the proposed cover sheet there is a box that has to be checked that says "Person completing cover sheet is attorney or the plaintiff himself." Those are the choices.

MR. RODRIGUEZ: Where is that?

MR. ORSINGER: That is the front sheet.

CHAIRMAN BABCOCK: Up at the top on the right.

MR. ORSINGER: Oh, okay.

CHAIRMAN BABCOCK: So maybe you don't sign it, but maybe you check it.

MR. ORSINGER: Well, if you look at the

district civil case cover sheet, it may be slightly different.

CHAIRMAN BABCOCK: I'm looking at your Tab D, civil family case cover sheet. Anyway, neither here nor there. What do you want to do with this, Richard, in light of this discussion?

MR. ORSINGER: I would like to see how many people here are serious about requiring a signature, because it certainly would prompt me, subject to whatever the committee says, to go back and be more cautious about the way we describe the status of this and maybe to make it clear that you can't extend it and apply Rule 13 and other rules. I really don't think we want this to be treated as a pleading or discovery in any sense of the word, unless someone feels differently.

CHAIRMAN BABCOCK: Yeah, Sarah.

HONORABLE SARAH DUNCAN: I would also like it not to be variable by local rule.

MR. ORSINGER: Well, the problem, Sarah, is that the Office of Court Administration wants certain core information, which I suspect, although I don't know -- Mary could tell us whether that might have been the impetus for this whole cover sheet in the first place and then the local people have their own needs. They might want to keep track of different things from what other

counties do. So the form is not mandated for the local clerks to include all of this information. They can drop all of the extra stuff, or they can add their own extra stuff. It was designed to fit the needs of the local community. Hudspeth County doesn't have the same needs that Harris County does, just to use a county that someone mentioned to me before. I've never actually been there, but their needs are different from Harris County, and so they would probably want a different civil cover sheet.

HONORABLE SARAH DUNCAN: And if it's available online, that would be fine with me, but I'm concerned about them only being available --

CHAIRMAN BABCOCK: Sarah's worried about her Hudspeth County docket. It's obvious.

HONORABLE SARAH DUNCAN: Where is Hudspeth County? Do you know where it is?

HONORABLE JAN PATTERSON: It's where "No Country For Old Men" took place. It's far West Texas.

MR. GILSTRAP: Sanderson.

HONORABLE JAN PATTERSON: Important aquifer is there.

MR. GILSTRAP: Let's have a disclaimer in the rule, a disclaimer in the form, and no signature.

HONORABLE SARAH DUNCAN: I second that motion.

MS. PETERSON: I have a question about the placement, the proposed placement of the rule, which is --

MR. ORSINGER: We haven't taken that up, but we can if you want to.

MS. PETERSON: Well, I think it's relevant to the discussion in terms of how is this form going to be construed.

MR. ORSINGER: Okay.

MS. PETERSON: We've been talking about if it's going to be construed as a form for statistical purposes or as a pleading, and the proposed placement of the rule is in section (c) -- sorry, not (c), (b), pleadings of plaintiff, and I'm just wondering why it wouldn't be more appropriate to put it back at the 22 area, institution of suit or something along those lines, to not convey to some that it is a pleading if that's not what we intend it to be.

HONORABLE SARAH DUNCAN: I think Kennon makes an excellent point.

MR. ORSINGER: You know, the reason that we ended up placing it where we put it was because we wanted lawyers to see it.

CHAIRMAN BABCOCK: Even though they're not filling it out.

MR. ORSINGER: But, you know, if you put it

right next to Rule 22, commencement of petition, that makes logical sense, as long as we don't accidentally insinuate that it has anything to do with commencing the lawsuit.

CHAIRMAN BABCOCK: There you go. Judge Patterson.

HONORABLE JAN PATTERSON: Well, Pete, I have some recollection that we looked at this earlier form, and one of the problems and really the origin of the project -- Mary, correct me if I'm wrong -- but there really were like half a dozen or ten or so imprecise descriptions of causes of action. It was a very confusing form, and so what we've done is just sort of improved for statistical purposes the gathering and made the categories much more precise and identifiable and modernized and at the same time tried to accommodate the local jurisdictions. But, I mean, this is such an improvement over its predecessor that really gave no meaningful information to OCA.

MS. COWHERD: We had three different forms and --

HONORABLE JAN PATTERSON: Where's she at?

MS. COWHERD: -- and at the suggestion of this committee we consolidated the forms into this to make it easier for everybody to use.

CHAIRMAN BABCOCK: Okay. So we seem to be

talking about whether an attorney's signature should be included or not.

MR. ORSINGER: And we haven't yet talked about whether a pro se's signature should be required if attorney's signature is required.

CHAIRMAN BABCOCK: Should there be a signature, whether attorney or pro se. So everybody that thinks there should be, raise your hand.

HONORABLE STEPHEN YELENOSKY: On this particular form?

CHAIRMAN BABCOCK: On this form.

HONORABLE STEPHEN YELENOSKY: On this particular form as presented?

CHAIRMAN BABCOCK: Yes.

HONORABLE DAVID EVANS: Can I ask something?

CHAIRMAN BABCOCK: Everybody raise your --

HONORABLE DAVID EVANS: Does not requiring a signature mean that they could not require the identity of the person providing the information as opposed to a signature?

MR. ORSINGER: No. Block No. 1 would require the identity of the person completing the information sheet.

HONORABLE DAVID EVANS: That just takes care of -- that's all I needed -- that's what I wanted to know.

CHAIRMAN BABCOCK: Tell me about that. "Contact information for person completing case information sheet."

MR. ORSINGER: Yeah. So if you have a question about the case information sheet or if we later vote you can sanction somebody for all of this, you know who to go after because it's in block No. 1.

CHAIRMAN BABCOCK: Okay. So Mary Smith, paralegal for Sarah Duncan, fills her name out in block No. 1, the highly skilled Mary Smith.

HONORABLE SARAH DUNCAN: Well, except that if you go over two blocks, the person completing the cover sheet is "attorney for plaintiff, petitioner" or "the plaintiff or petitioner."

CHAIRMAN BABCOCK: So there could be an inconsistency between having Mary Smith in block 1 --

HONORABLE SARAH DUNCAN: Or Bruce Holbrook.

CHAIRMAN BABCOCK: Or Bruce Holbrook, to get him in the record. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, the reason I ask that question is because if on the form there is the question, "Do you want service or not," I think that it ought to be signed by an attorney because the clerk is going to rely on that, but I don't think that question should be in there, and so I would vote

differently if it were just statistics gathering.

CHAIRMAN BABCOCK: By the way, Bruce Holcomb, if he's a paralegal, or Mary Smith, my hypothetical paralegal, probably doesn't have a State Bar number, which this signature block requires. It says "signature" and then a State Bar number.

MR. ORSINGER: If you look at the second page, Chip, these are all alternative forms.

CHAIRMAN BABCOCK: Right.

MR. ORSINGER: And the district civil case cover sheet is more conventionally structured with the name of the party --

CHAIRMAN BABCOCK: And that doesn't have a signature block.

MR. ORSINGER: You've got everything -- this looks like a lawyer is going to be signing this. It doesn't make that necessarily that clear, but name, address, city, telephone, fax, e-mail, State Bar number, and signature, that implies to me they're expecting to see a lawyer's name there and whether they're for the plaintiff or whether they're pro se.

HONORABLE STEPHEN YELENOSKY: Could we separate it out and have two different pages? One is statistical and one is if the local jurisdiction wants to ask those kind of questions?

CHAIRMAN BABCOCK: Professor Albright.

PROFESSOR ALBRIGHT: Well, any time you have a secretary or paralegal doing something for you, they are acting for you.

CHAIRMAN BABCOCK: That's right.

PROFESSOR ALBRIGHT: And I can't imagine that you would really put the secretary or paralegal's name on the cover sheet. It's always the lawyer who is doing things like this, and you have to be responsible for it.

CHAIRMAN BABCOCK: Judge Christopher.

PROFESSOR ALBRIGHT: So I don't understand why the signature issue.

HONORABLE TRACY CHRISTOPHER: Well, I was looking at the appellate rule on the docketing statements, and it doesn't really say whether it has to be signed or anything, and it has the purpose of that statement is for administrative purposes and does not affect jurisdiction. So, I mean, it seems like we can have a similar sort of language over with respect to a trial court cover sheet that we have in the appellate rule without a problem. It doesn't sound like it's been causing a lot of problems in the appellate courts where docketing statements have existed. It's not causing problems in Harris County that has seen thousands and thousands of cases since we started

using it 20 years ago.

HONORABLE SARAH DUNCAN: Well, with the one exception of the Tenth Court of Appeals, which is DWOPing people's cases for not filing an administrative form.

HONORABLE TOM GRAY: No, we are not DWOPing them for not filing it. We are DWOPing for not responding to an order of the clerk to file it, which is a specific provision under the DWOP rule that we can do that.

HONORABLE SARAH DUNCAN: I know.

CHAIRMAN BABCOCK: But back to Richard's point that the alternative sheets don't require a signature --

MR. ORSINGER: No, no. I'm saying that it's apparent that it's the lawyer's identity, not the assistant identity.

CHAIRMAN BABCOCK: Yeah. Right, right, right.

MR. ORSINGER: I think the other forms make it clear that we're looking for a lawyer's name because you have to click whether you're the attorney for the plaintiff or whether you're the plaintiff pro se. That was responsive to the question of whether some paralegal might be going to jail for filling it out wrong.

CHAIRMAN BABCOCK: All three of these forms that you propose require a lawyer's signature if the

lawyer is representing the party, unless it's pro se.

MR. ORSINGER: These forms were not designed by or endorsed by any particular subcommittee of this committee. They were the product of a long effort involving a lot of people over a period of time with plenty of feedback from the Office of Court Administration, district and county clerks, probate clerks, and so this is their proposal.

CHAIRMAN BABCOCK: Okay.

MR. ORSINGER: And if you'll read the memo, we very politically said that we're assuming this is the most desirable form.

CHAIRMAN BABCOCK: Okay. Notwithstanding all that long effort and hard work and great input, how many people think that we should not require a signature of the attorney? Not.

All right. How many people think we should? 19 people think we should not, 9 people think we should. 10.

HONORABLE NATHAN HECHT: No. But just in case we do, I think the subcommittee ought to look at whatever rule language they think would be appropriate as a, quote, disclaimer.

MR. GILSTRAP: I think that needs to be in there whether we sign it or not.

HONORABLE NATHAN HECHT: That may be.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: Just one point of clarification. These three that are marked district civil, county level, and family case are all proposed to be replaced by the single cover sheet, and I wanted to make sure that everybody knew that while we were engaged in this discussion, because that's what I was talking about and proceeding on and just clarified that with Mary. These three are the existing sheets that are out there, and they're being proposed to be replaced with the single sheet that in the papers has "proposed" stamped on the upper lefthand corner.

CHAIRMAN BABCOCK: Right. That's what I was thinking, too. So Richard confused me. Buddy.

MR. LOW: There seem to be a number of people that don't believe that the service, type service or whether service or not should be in there. In some forms they are, some they're not, and I think the general one there is. So maybe it would be appropriate to see how the committee feels about whether that should be a part of it, without rewriting the whole thing. That particular one seems to have been brought up. Service.

CHAIRMAN BABCOCK: Yeah.

MR. RODRIGUEZ: You know, I think that we're

really trying to cover or take care of a responsibility of a lawyer. I mean, the lawyer is -- has got to take some responsibility, and if he knows -- he or she knows that this is going there, he's got to be sure that it's got the correct signature or the correct block is identified if he wants service. I mean, you know, we can't just say, you know, well, we're going to -- you know, if the lawyer makes a mistake and doesn't ask for service then, you know, are you putting the onus on the clerk to be responsible for the service?

I mean, it's always been my practice, you know, if I want service, I'm the one that's got to make sure that the clerk gets done whatever needs to be done, and I don't see anything wrong with having that there, and, you know, just, I mean, that's the responsibility of the lawyer. I mean, we've got to be responsible for something sometimes.

HONORABLE STEPHEN YELENOSKY: But isn't that inconsistent with the disclaimer?

CHAIRMAN BABCOCK: Judge Christopher.

HONORABLE TRACY CHRISTOPHER: I understood that we -- we, the local counties, were allowed to modify the form, which is what is on the first page of this. So I think, for example, Harris County wants three, you know, different forms. I don't know if we've gotten to that

point of making that decision.

HONORABLE NATHAN HECHT: Goes without saying.

HONORABLE TRACY CHRISTOPHER: Yeah, of course. Of course, because we can't agree on anything, but so I don't think you should look just at the consolidated form if you're going to go back and relook at the forms unless you're going to take away the ability of the locals to change the form, which is in the -- it's my understanding that was OCA and the Judicial Council's approval that the local jurisdictions could modify the form. So that's -- you know, maybe you don't want us to be able to modify the form, but that's an issue.

CHAIRMAN BABCOCK: Okay. Let's take our lunch break since lunch is here, and, Richard, I assume that after lunch we would go into discussing this rule -- proposed new Rule 78a, even if we renumber it.

MR. ORSINGER: We want to discuss placement and then the wording of the rule and then whether we should have any comments to limit or help the interpretation of the rule.

CHAIRMAN BABCOCK: Okay. So let's break for lunch. Be back at 1:30.

(Recess from 12:31 p.m. to 1:30 p.m.)

CHAIRMAN BABCOCK: Richard, let's see if we

can write a new rule, 76a or 22z or whatever.

MR. ORSINGER: All right. We'll take them up, but it does seem to me, though, Chip, that we ought to at least consider whether we want to get a sense of the committee on a pro se litigant being required to file the form.

CHAIRMAN BABCOCK: Right.

MR. ORSINGER: It's probably -- you know, the old form, which might end up being some local form, contemplates that a plaintiff might be checking the box rather than the attorney for the plaintiff, and so then the question becomes is it only lawyers that are required to sign or would a pro se litigant who's also required to file one of these, is the pro se required to sign, and if we all just say, "No, go on," that's fine, but somebody may feel like if a signature requirement is important for a lawyer it would be important for a pro se, too.

CHAIRMAN BABCOCK: Yeah. Nobody can hear you, Richard, down there.

MR. ORSINGER: I'm sorry.

CHAIRMAN BABCOCK: The issue that he was discussing was if there's going to be a signature, do pro se litigants have to sign it, and of course, we just voted overwhelmingly that a lawyer did not have to sign it, so there wouldn't be any signature, but I think it would be

better to go forward --

MR. ORSINGER: Okay, we'll go on.

CHAIRMAN BABCOCK: -- on the next issue.

MR. ORSINGER: Okay. The next issue I think logically is the placement of the proposed rule, and I'm sorry that Kennon is gone, but -- or anyway, she suggested instead of putting it in the area where the plaintiff's pleadings are that we consider putting it way back up under Rule 22 where you have the commencement of the petition; and if I understood from her suggestion, it was because it got it further away from the pleadings rules and, therefore, it would be less persuasive to argue that it was a pleading.

Now, the subcommittee's view was -- and let me -- as a disclosure, let me tell you that my subcommittee is dominated by law professors and, therefore, we are very aware of the structure of the rules, which probably doesn't concern anybody else but law professors, but I've been around them so long it bothers me, too. And Rule 22 is in the part of the rules that are rules for the clerks, the way the clerks handle the filing of lawsuits, and Rule 78 is at the beginning of the part of the rules that talks about the pleadings of the plaintiff and the rules that the lawyers are going to follow about the filing of pleadings, and it's been our

desire for years on this subcommittee, as well as Professor Dorsaneo's long, long rewrite, to keep rules in the place where the people who are using it are likely to see it.

So the rules for the sheriffs ought to be in places where the sheriffs look, and the rules for the clerks ought to be in places where the clerks look, and the rules for the lawyers ought to be in places where lawyers look, and so it was our view that the lawyers are going to be more inclined to look to this subsection (b) where it's instructions on what the lawyers put in the pleadings than it is on this area on section (2), Rule 22, about what the clerks do about accepting and processing petitions. That is really probably the only justification for selecting subdivision (b) and trying to get as close to the front of it as you can, because it's not -- it's not going to be -- I mean, on page two of my memo you'll see all of these different places it could be. It could be in counterclaims, could be in cross-claims, could be in third party claims. It could be in intervenor's rules.

There are rules on initial pleadings throughout these rules; but the only one that Office of Court Administration wants to capture is the original plaintiff who files the original lawsuit, doesn't matter cross-claims, interventions, nothing; and it just seemed

to us that the best place to put it was as close to the front and right next to the rule that tells you what you have to have in your pleading. If you go there to look at that you might accidentally also see 78a that tells you what has to be in your cover sheet. So that's really kind of the long and the short of why we decided to put it near the front of the part of the rules talking to the lawyers about the contents of the petition.

CHAIRMAN BABCOCK: Okay. Any comments about that? Yeah, Justice Gray.

HONORABLE TOM GRAY: I believe it's Rule 202, presuit deposition. Would it require a cover sheet?

MR. ORSINGER: No, I've mentioned that in my memo here, and Mary and I have discussed that. Mary, you're still here. I don't think so. Or what is your view of that? If you file a prelawsuit request for a deposition, do you file a cover sheet?

MS. COWHERD: No.

MR. ORSINGER: Okay. There was a discouragement of the kind of odd and ancillary complex litigation, and basically they wanted to capture the mainstream plaintiff comes into court, files a lawsuit, we'll collect that data. If that works, maybe they'll come back later and try to get more data.

HONORABLE TOM GRAY: And the reason I ask

that is because that answer tends to put it more towards the 76 section, pleading section, than the 20, the clerk's section, at least for me.

CHAIRMAN BABCOCK: Any other comments about that?

MR. ORSINGER: Okay. Well, I'm sorry that Kennon wasn't here for that discussion, but I'm going to take that at least as a tentative indication that we would be placing it here right after Rule 78, so then let's go to the wording of the rule.

CHAIRMAN BABCOCK: Yep.

MR. ORSINGER: It's there, everybody has a copy of the memo, but basically the cover sheet contains the core information I think that OCA is wanting to see; is that right, Mary?

MS. COWHERD: Say that again. I'm sorry.

MR. ORSINGER: That the proposed Rule 78a prescribes the information that's to be included.

MS. COWHERD: That's correct.

MR. ORSINGER: That's to be considered mandatory, and no matter what else you do with your local form you've got to include this data.

MS. COWHERD: That is correct.

MR. ORSINGER: So part of the function of this listing in this Rule 78a is to signal to everybody

the minimum required disclosure with the filing, and then if you're going to have a local rule you can add on, but you can't take away. So we need -- we need this core information, plus some additional information, and we mentioned specifically in there that local rules can embellish that or that, I guess, a judge can just provide a form and say, "You're required to sign this when you file it," and the clerk can try to enforce it.

CHAIRMAN BABCOCK: Okay. Well, here's Kennon back. We're leaving it in Rule 78a, Kennon. Too bad. You missed it.

MS. PETERSON: I'm sure there's a really good reason.

MR. ORSINGER: Well, if there's a really good reason to put it up by 22 we can certainly consider that, but the point I was making while you were gone is that the early part, 22 part, is more instructions to the clerk, Rule 76 is more instructions to the lawyers, and we were afraid that the lawyers might not ever look back as far as 22, and if there's a local rule then they won't even look to this set of rules at all. They'll just follow the local rules presumably.

CHAIRMAN BABCOCK: Okay. Let's talk about the language that's here on page two of this memo.

MR. ORSINGER: Okay. This disclaimer is

really important for those of us who are concerned that the cover sheet might somehow affect someone's rights, and I'll go ahead and put on the record without permission here a conversation I was having with Carl during the break. Under the service type, if he was going to get private process service, he would check "none" on this form because he doesn't want the district clerk to be involved in -- we're not delivering anything to the constable or the sheriff, just give me a citation, I'll handle it. Well, if he checks "none" because he doesn't want service but he's planning to have private process service, then this form is going to be, you know, number one, misleading; number two, which one do you check if you want private process; and number three, it raises the question of do we really want the administration of these cases to be driven by what's on this form rather than having somebody look inside the pleading and say that this is citation by publication or this is going to be citation by personal service?

So knowing that we probably haven't even imagined all the possibilities of problems that could happen to people because of misfilling out or mishandling or misconstruing these forms, I think we should be very serious about our comment that these forms are to be used only for certain purposes and not other purposes, and that

sentence is designed to do that, but I don't know that it does it well enough in light of this discussion. "The filing of a cover sheet is for administrative purposes and does not affect or determine how the action is commenced in district or county court."

Now, that's consistent with the AG opinion that you can't say that the lawsuit wasn't commenced merely because you didn't attach or didn't file your cover sheet. That covers the commencement issue, but it doesn't cover the issue of whether this -- I shouldn't use the word -- it doesn't relate to the issue of whether the cover sheet can be used to determine whether you have related proceedings that were pending in another court or in the same court or anything else that affects the merits of the case or the processing of the case in any way, and now that I find out that court clerks are making executive decisions about how to handle an original petition based on what's on the cover sheet, I'm now concerned that this is not enough protective language and that people might be doing harmful things inadvertently, so --

CHAIRMAN BABCOCK: Okay, how does everybody feel about that? Frank.

MR. GILSTRAP: It needs to be beefed up. I think that was where we came down in our prior discussion. It needs to have some reference to admissions, that type

of thing. You know, we need to beef it up as much as possible and at the same time realize that clerks are probably going to use it for administrative purposes regardless of what we say.

PROFESSOR CARLSON: Well, it is.

CHAIRMAN BABCOCK: Yeah, Richard.

MR. MUNZINGER: Does the Supreme Court contemplate issuing an order specifying the information that is to be solicited in the form?

HONORABLE NATHAN HECHT: I hope. I was talking to Mary about this earlier -- I hope that the Court will come close to promulgating a standard form that just like JS-44, just applicable throughout the state, easy to get, post it on everybody's website. If counties want to do more, they can, but the Judicial Council has an input into this, too. It started over there, and so I don't know exactly where it will go.

MR. MUNZINGER: The reason I ask is because the rule says you get the names of the parties, the type, the case type, et cetera, and it might be a lot easier if it were to say "gathering information as prescribed by order of the Supreme Court," "at least the information as prescribed by order of the Supreme Court, and such other information as particular counties or district clerks might require," and the last sentence, this may be too

broad, but it seems to me it could say, "The filing of a cover sheet is for administrative purposes and does not affect the substantive or procedural rights of the parties to the litigation."

Now, the only problem with that is it seems to me to be so broad that if you answer the question "Is there another case related to this one," and the clerk were to, say, transfer it or assign it to a particular court in a case where you have random selection of courts, so that arguably affects the procedural rights of a party, and I don't know that the breadth of my language suffices, but I don't think the language that we have here is sufficiently broad.

CHAIRMAN BABCOCK: Okay. Anybody else have any comments on this? Any idea about broadening the language, Richard?

MR. MUNZINGER: Other than what I just said, no, sir.

CHAIRMAN BABCOCK: Okay.

MR. ORSINGER: Justice Hecht, if the Supreme Court were to promulgate a standard form, would a local form that requested additional information have to be a separate form, or would it be a modification of the main form?

HONORABLE NATHAN HECHT: I don't know yet.

MR. ORSINGER: Because if it's a modification of the same form then we're right back into the soup, which is that we have a rule requiring certain things about the form, but we don't really know what's in the form. We're sitting here thinking we know what's in the form, but the form could be completely different and ask for information that we don't even imagine, and yet we're putting it in the rule that it has to be done, and so I know this would be administratively a problem, but if the local form was required by a local rule and not by this rule, then they could probably do anything they wanted for their own administrative convenience and we wouldn't be troubled by it because they wouldn't be colliding with Rule 13 and other things like that.

It's just a thought, but if local practices are going to put a lot of stuff in this form and we don't know for sure what it is, then I feel like it's really incumbent on us to be sure that we don't promote those local practices, which may be irregular all over the state, inadvertently to being important in how the case is handled.

CHAIRMAN BABCOCK: Richard, could you say, "The filing of a cover sheet is for administrative purposes only," period? Just not try to imagine all the horribles that could otherwise flow from filing the thing?

Yeah, Judge Patterson.

HONORABLE JAN PATTERSON: But I would worry that a clerk would deem related cases as administrative purposes only, and they might take action based on that. I worry about the phrase, "administrative purposes." I'm not quite sure what all that encompasses.

CHAIRMAN BABCOCK: Yeah, but what you're saying is that no matter what we say it may not be for administrative purposes.

HONORABLE JAN PATTERSON: Well, I agree with beefing up that sentence that essentially it should be only for statistical purposes and for -- and not affect substantive rights, but I'm not sure "administrative" gets us there.

CHAIRMAN BABCOCK: I see what you're saying, but what if the form has related cases on it? Can a clerk or administrative judge take that form and transfer the case without notice to the parties?

HONORABLE JAN PATTERSON: Well, what I would hope the form would do, would put people on notice to make further inquiry only, because I don't think it's adequate information upon which they should act, but I also am confident that some clerks will act on that. So that does give me pause about that question and that process.

MR. ORSINGER: And, you know, for me,

"administrative" could be a problem also because if my original petition requested that citation be issued and process gets served and then this gets clicked none, if it's an administrative decision whether you're going to send the process down to the sheriff's office or not, so my petition requested it and I paid for it, and I requested it orally with the person that I was filing it with, but then they passed it on to whoever is doing this data entry, and they look at it and say, "Oh, we don't have to forward this citation anywhere because it says 'no service,' so they must be going to do personal service," and it sits there not going to the sheriff, even though my pleading requested it.

Or as Justice Christopher -- Judge Christopher said, an administrator might decide to put you on a fast-track trial in 90 days or however quick your fast track is because somebody says it's level one discovery, whereas the pleading says it's level two discovery and you've really got a nine-month discovery window. So now we have an administrative decision made by someone to set the trial very quickly even though the pleading wasn't worded that way.

CHAIRMAN BABCOCK: Pete Schenkkan, and then Carl, and then Justice Bland.

MR. SCHENKKAN: I think we've got three

different things going on here. One is state rule, that we get a cover sheet filed that has the information that the Office of Court Administration needs to collect for state administrative purposes, which is statistics. Then we have information that the clerk locally wants for administrative purposes that are neutral and not likely to be rights-affecting, and then there is information that the clerk may want that runs the stretch, and there are at least two categories that have been identified. The service category, I assume the Office of Court Administration does not care and would not be collecting data on who has ticked any one of these service boxes. Is that --

HONORABLE NATHAN HECHT: No, I think we might.

MR. SCHENKKAN: You think they do care?

HONORABLE NATHAN HECHT: Particularly as we go to e-filing, I think it would be useful, at least it could be useful, to have some information on how -- what kind of service people are using these days; and, you know, the Federal courts have basically gone to discourage service altogether. You can still get service in Federal court, but you better have a good reason, and is that a good idea or not? So there would be some statistical relevance to both that and how many times people say they

are filing related lawsuits as opposed to amending their pleadings.

MR. SCHENKKAN: In that case then we really do have the problem of how do we reconcile these two desires, one, to collect the data and, two, not to get people in trouble with their representation that they've made about that particular entry.

CHAIRMAN BABCOCK: Carl.

MR. SCHENKKAN: I'm not sure those are solving the problems, but part of it could be helped with the wording. I think we can get away from "file," find a verb other than "file," which sounds to me like filing a lawsuit, filing a pleading. We can instead of "the filing of the cover sheet," just say, "The cover sheet is not a pleading. It is for state judicial administrative purposes" and then whatever the disclaimer is. "It does not affect any party's substantive or procedural rights." And we may mean -- instead of the cover sheet we may mean simply the failure to file the cover sheet doesn't affect anybody's rights.

You know, that the cover sheet is not a pleading, it's for state judicial administrative statistical purposes, and failure to not file or whatever the word is chosen to submit the cover sheet does not affect anybody's substantive rights. That still leaves

you with the problem of you've ticked the box "no service," and somebody uses that to conclude something that gets you in trouble.

CHAIRMAN BABCOCK: Okay. Great. Carl.

MR. HAMILTON: If we're just collecting data for OCA, why can't we just call the form "information requested by OCA" and not -- not file it in the case, just send it to OCA or let the clerk put it somewhere else in their office if they want to do so, but don't make it a part of the file. It's just data information being collected and with no instructions thereon for the clerk to do anything except transmit that information.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Well, I think that the way the rule is drafted is fine, because it tracks what people have been doing in practice for 20 years in Harris County, probably in Dallas County, what the appellate courts have been doing with the docketing statement, and we haven't heard one reported account even anecdotally of somebody getting in trouble because of what they -- because of an error that they made on their cover sheet or their docketing statement. So it seems like in the 20 years that courts have been doing this there probably have been errors made on the civil cover sheet and on the docketing statement, and the way to correct it

is just to have a human being correct it, either amend the cover sheet and file a new one or explain to the judge that "We checked level one, but we meant to have level two," but I think that us trying to, you know, craft some sort of a rule is -- we don't need it. There's no problem. There hasn't ever been a reported problem of it.

And as far as trying to say it's just for OCA and not really filing and those kind of things, well, OCA is an arm of the courts. The courts are going to use this information for administrative purposes, and OCA is going to use it, the clerk's office is going to use it. You know, lots of people are going to use it, and we want the information to be accurate to the extent that it can be accurate, and so to say, oh, you know, it's nothing to worry about in a rule seems to me to sort of -- is not really accurate because we are -- we are wanting that information for specific purposes, and it's going to be used throughout the courts, so it seems like the way the rule's drafted right now is perfect, and this concern about people getting in trouble for making mistakes on the civil cover sheet at least so far seems to be unfounded.

CHAIRMAN BABCOCK: Justice Gray, I think you had your hand up, and then Judge Yelenosky.

HONORABLE TOM GRAY: Well, and I was thinking about the same thing Pete and Carl were about are

we really filing this document or are we presenting it, and that would be a potential adjective to use with regard to it, that it's presented, but at first when I thought about it I thought it would make a good joke and then it occurred to me that it might actually work. I don't remember what we were going to do with the hot pink sensitive data form, whether it was going to be filed or presented or received in some other way.

CHAIRMAN BABCOCK: Framed.

HONORABLE TOM GRAY: Framed, yeah, whatever. But, I mean, this could be done the same way. To me the problem with designating it as a filed document or a document that must be filed is presented by the fact that Tom said that he had never been served with one of these, Tom Riney, and, I mean, the rules clearly require that anything that gets filed is supposed to be served on the other parties, and so, you know, that seems to me to be a fundamental failing of that aspect of it, and maybe it's not intended to be served on everybody like other filings, and maybe that's where the term "presented to the clerk" would make a different result appropriate --

CHAIRMAN BABCOCK: Judge Yelenosky, then Judge Christopher.

HONORABLE TOM GRAY: -- to be more in line with what we do.

HONORABLE STEPHEN YELENOSKY: Oh, I didn't have anything.

CHAIRMAN BABCOCK: Judge Christopher.

HONORABLE TRACY CHRISTOPHER: Oh, I was just speaking on behalf of my district clerk. He does not want any sensitive data form, and he sure doesn't want to have to mess with another sheet of paper that sits somewhere other than in our electronic file because he wants everything electronically filed, and he wants this case sheet electronically filed, too. So I would really be opposed to something that puts it somewhere else, on his behalf.

CHAIRMAN BABCOCK: Good point. Richard.

MR. ORSINGER: Possible language was "When a party files an original petition that party must also submit a civil case cover sheet," and then let's have an understanding with everybody that it's not filed in the case file, but it's filed in the statistical file, and I'll just have to tell you, I haven't hung around long enough after a divorce decree was signed by the judge to find out what they do with the statistical forms that we are required in a divorce and in a custody case to fill out, but having looked at closed divorce files, I don't recall ever seeing one of those statistical forms in the file. I think that the clerk's office in the counties

where I practice take the statistical form away from the divorce decree and then send the divorce decree to go into the minutes of the court and the statistical form goes to the bureau of -- bureau of --

CHAIRMAN BABCOCK: Statistics.

MR. ORSINGER: Bureau of Vital Statistics. Bureau of Vital Statistics. And I don't think that it's considered to be a case-related document or a case document, and so it's attractive to me if we break it up and the petition is what's filed and it's what we all recognize and what we're all familiar with and the statistical form goes directly to OCA. Then that takes care of that, and then if Houston wants to have their own elaborate case file information form that goes in the jacket --

HONORABLE TRACY CHRISTOPHER: Well, we're not the only ones. Dallas does, all the major --

HONORABLE DAVID EVANS: Fort Worth, Fort Worth.

CHAIRMAN BABCOCK: Even Fort Worth.

HONORABLE TRACY CHRISTOPHER: Sorry, Fort Worth does, Dallas does, San Antonio does. I mean, you know, this is pretty commonplace, these cover sheets, and they've been filed for a long time.

CHAIRMAN BABCOCK: Richard, Mary wants to

talk in opposition to what you just said.

HONORABLE TRACY CHRISTOPHER: I keep repeating myself. Sorry.

MS. COWHERD: I just want to throw out, A, our office doesn't want all the cover sheets from all the courts. We don't have enough storage space. Maybe the committee could consider once the clerk enters the data into their case management system then the form can be destroyed. You know, it's served its purpose.

CHAIRMAN BABCOCK: Just caused us another hour of discussion with that.

MR. ORSINGER: How about recycled?

HONORABLE DAVID EVANS: How about a representative --

CHAIRMAN BABCOCK: Hang on, guys.

HONORABLE DAVID EVANS: I think you have to have a representative of the clerk present to discuss or to consult with with regard to what you can do with documents received by the clerk. Besides the Rules of Civil Procedure there's a whole statutory scheme in existence as to what they can do and cannot do with documents received, and so I think it's past the Rules of Civil Procedure to go into that.

CHAIRMAN BABCOCK: Yeah.

HONORABLE DAVID EVANS: If it's an

alternative we should investigate it, but it's going to require other people to be involved and consider it.

HONORABLE STEPHEN YELENOSKY: It should go wherever juror notes go.

HONORABLE DAVID EVANS: As the juror notes, yeah, they go with juror notes.

CHAIRMAN BABCOCK: Now we're up to three hours of additional discussion. Okay. What else? Yeah, Gene, I'm sorry. You had your hand up earlier.

MR. STORIE: I'm just hiding from you here.

CHAIRMAN BABCOCK: You're in a bad line of sight.

MR. STORIE: Maybe I should, but -- because this is confessional. I actually have had some experience with a docket sheet that went wrong. It was in Federal court, and I had to attend a show cause hearing because I did not check the box for a related case, or I think it actually was the person under my supervision, but in any event I was on the line for that and then got to show up in front of Judge Smith, who wondered why he was not advised about the other two dozen cases pending on this particular issue that were before Judge Nowlin. The sad truth, of course, was we just forgot to check the stupid box because we were trying to answer -- you know, two guys are trying to answer two or three dozen suits for a few

tens of millions of dollars, and so anyway, we didn't get sanctioned for that, but to me it's not frivolous --

HONORABLE JANE BLAND: I rest my case.

MR. STORIE: To me it's not frivolous to think that it could be in there, but at the same time I was one of the people who voted for signatures because I think, you know, you're out there whether you like it or not or whether you screw up or not or how serious it was or whatever, and I also think it's important that it be filed and be served because that's an early opportunity to see that, you know, things appear to be on the right track, whether it's your discovery level or whatever. So if we're going to combine things that to me are obviously different problems in terms of just getting statistics or getting something that the clerks can use for case management, I think the rule as it is is on a good track, proposed rule.

CHAIRMAN BABCOCK: Okay. Is there any sentiment for the rule as written? Besides Justice Bland.

MR. STORIE: Me.

CHAIRMAN BABCOCK: Alex, you're in favor of the rule as written. Well, why don't we take a little straw vote on that, Richard? How many people like proposed Rule 78a as currently written, raise your hand?

How many people don't like it as written?

You wrote it.

MR. ORSINGER: That was before I found out how it could be misinterpreted.

HONORABLE JAN PATTERSON: He was for it before he was against it.

CHAIRMAN BABCOCK: This is exciting because it's 14-14, which means the Chair can vote.

MR. GILSTRAP: Vote, vote. I see a vote. Come on, Chip, step up.

MR. SCHENKKAN: It's okay if we don't determine any substantive rights.

MR. ORSINGER: Would you like a few moments to think?

CHAIRMAN BABCOCK: No, I don't like it as written, so I would tilt the balance into the don't like it category.

MR. ORSINGER: So now we need to find out what we don't like about it.

CHAIRMAN BABCOCK: What we don't like about it. Justice Gaultney.

HONORABLE DAVID GAULTNEY: I voted for the rule as it is. I wonder if those that voted against it would like it better if the language that's underlined on the form were included in the rule, something that said something to the effect of "This cover sheet is not a

pleading, does not constitute a discovery request, response, or supplementation, and is not admissible at trial." I mean, the rule is in the pleadings of plaintiff's section, so it might be good to say it's not a pleading. Otherwise, the assumption might be that --

MR. JACKSON: The form doesn't say it's not a pleading, though.

HONORABLE DAVID GAULTNEY: Oh, I added that.

CHAIRMAN BABCOCK: Elaine.

PROFESSOR CARLSON: You know, Richard, Justice Gaultney makes a good point. You're putting this under Rule 78a under "pleading," because that's where lawyers look for pleadings, but it sounds like this is really the lawyer's responsibility. I would like to see it in Rule 25. I thought Kennon's idea was good except that I like 25 better because we're trying to keep this to clerk's responsibilities. You know, can you rely upon the statement of service requested in your pleading or is it your responsibility as a lawyer to get this box checked correctly? If it really is a responsibility of the lawyer to take over these functions of the clerk that they used to have to determine after they read the pleadings or read the document, then I like it better in the pleading section, but if it really is for information gathering purposes now, such as Rule 25 places upon the clerk, then

it should go over there.

CHAIRMAN BABCOCK: Not to explain my vote, but I voted against the rule as written because I would drop the last sentence altogether, altogether because I don't think you can imagine all the circumstances where it might come up that the civil cover sheet might have some impact on something that's going on in the case, and to try to think about it ahead of time is to me not productive, so I would drop the last sentence and then otherwise I would be fine with it. Judge Christopher.

HONORABLE TRACY CHRISTOPHER: Well, probably Jim can speak to this because he files plaintiffs lawsuits, but when you file one in Harris County, if you want to request service it's not enough that it's in your pleading. You've got another form that you fill out that requests service. So the fact that you've checked this off is not important, and I'm pretty sure that that happens in other counties, that there's another form that you fill out that, you know, puts where you want served, how you want served, you know, to get the whole ball rolling on the service of citation. I could be wrong, but I know at least in Harris County we've got to do that. Jim probably files all over the state and can tell us.

MR. PERDUE: I don't know of anywhere that doesn't have a civil process request form.

HONORABLE TRACY CHRISTOPHER: Right.

HONORABLE DAVID EVANS: Exactly.

HONORABLE TRACY CHRISTOPHER: So the whole process, civil process issue, is a nonissue.

MR. HAMILTON: They're not used in Hidalgo or Cameron or Starr County.

MR. ORSINGER: They're not used in Bexar County either.

CHAIRMAN BABCOCK: Just to name three or four.

MR. PERDUE: But you still would have to proactively institute efforts at service.

MR. ORSINGER: When you file your petition in Bexar County, they will flip to the service paragraph and underline what you want and then they charge you for what you ask for. If you do not plead for process to be issued, you do not pay for process to be issued. If you want the sheriff to serve the process, you pay for the sheriff. If you're going to have a private process server, you pay less. So in Bexar County they decide what services you're getting from your petition with you standing there when they tell you how much your check is going to be, and I don't know how they do it in Harris County with the form, but that's a communication that's directly between the filing person, the pleading, and the

person taking the pleading and taking the check. I don't see how you can figure out the filing fee unless you know whether you're paying for process.

HONORABLE DAVID EVANS: Well, or, Richard, you've got one other circumstance. You have a cover letter that says "no service is needed at this time" or "notwithstanding what's in the pleadings, issue these but don't issue those," but these are all precalculated for the most part by the staff before they ever get filed because they have to get the check cut from the firm before they go down there. There's no credit system in a clerk's office. I just think that, you know, as Tracy has pointed out, these are never -- it's just like what you say in court. You may make a -- you may say that something happens in court. All judges let you come back and freely admit it. Very rarely are you trapped by your own remarks, and certainly I've never been trapped by a ruling. I come back and change them all the time. I flip-flop everyday.

CHAIRMAN BABCOCK: Justice Patterson.

HONORABLE JAN PATTERSON: Yeah, I agree with those points that usually something more is involved to accomplish service, and essentially I think what we want is that nothing substantive should flow from this form, and I can't imagine that the service type is adequate

information for anything to flow from that, but I wonder if we could simplify that last sentence and come up with some phrase. I don't know whether it's this, but "The filing of a cover sheet is for recordkeeping purposes only" or some description that is a little bit more accurate than "administrative" but is confining in some way or descriptive, and I don't know whether "recordkeeping" is it, but --

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: Can't we just say that it cannot be used for any other purpose in the litigation?

HONORABLE JAN PATTERSON: Than --

MR. HAMILTON: Just it's for information. "For administrative information only and cannot be used for any other purpose in the litigation."

CHAIRMAN BABCOCK: If the judge -- if Judge Evans sees this thing and says, "You know, I don't think Carl's been candid with the court about other cases filed in Tarrant County that involved the very same issue," he can't call you up and say, "Carl, get down here and tell me why you didn't" --

MR. HAMILTON: Well, that's administrative.

CHAIRMAN BABCOCK: So he can do that.

MR. HAMILTON: I think so. That would be administrative.

CHAIRMAN BABCOCK: Okay.

MR. HAMILTON: But it doesn't have anything to do with the actual litigation.

CHAIRMAN BABCOCK: Well, sure, because Judge Evans may say, "Look, you know, I'm going to, you know, transfer this case to Judge Walker because he's got all these other cases, and you didn't tell me about it, and I'm very irritated about that and so now I'm transferring."

HONORABLE TRACY CHRISTOPHER: That's administrative.

HONORABLE DAVID EVANS: You know, I think "administrative" works, but my experience is that with the preamble of the Rules of Professional Conduct and the attempt to grant immunity that the Rules of Professional Conduct did not set standards for liability, and it's almost impossible to draft an immunity and a use rule in any kind of Rule of Procedure or Rule of Professional Conduct. Just it never -- you never can see the end consequences of what you're writing.

MR. LOW: That's right.

HONORABLE DAVID EVANS: And it's regrettable that that's true. The only one that I think probably works pretty well is the rule on jury deliberations, but that's just a continuation of the common law about using

it as evidence. If you want to put something in here it's not admissible as evidence, I guess you could do that. But that's -- I don't know that there's even a Rule of Civil Procedure that can grant immunity, and that's what you're talking about.

CHAIRMAN BABCOCK: Okay. What else? Okay. We're out of ideas on this.

MR. ORSINGER: Well, it was a tie vote on changing it, and I found out that your vote that made it a tie was -- is that you didn't even want the last sentence, so it looks like there's a slight preference to kind of leave it the way it is.

CHAIRMAN BABCOCK: Yeah.

MR. ORSINGER: If we change it, I'm not sure that there's a consensus on what the change should be.

CHAIRMAN BABCOCK: I agree. So let's go on to the next issue.

MR. ORSINGER: The last topic on this is whether we want to put anything in a comment to the rule that might make anybody feel better about adopting this and sticking it in either the pleading section or the clerk section of the rules. You could completely replace that last sentence, demote it from being a rule to being a comment, and have a little more conversational tone, a few more words saying "The purpose of this rule is to gather

information, and it should not prejudice the rights of parties" or something, and that might do more for you or assuage concerns than the last sentence, or maybe added to the last sentence.

CHAIRMAN BABCOCK: Not a bad idea. What do people think about that?

HONORABLE JAN PATTERSON: I like that.

CHAIRMAN BABCOCK: Have a comment? Judge Patterson.

HONORABLE JAN PATTERSON: I like that.

CHAIRMAN BABCOCK: Did you get that, Dee Dee? Judge Patterson likes that.

THE REPORTER: Yes.

MR. ORSINGER: Would that be in lieu of or in addition?

CHAIRMAN BABCOCK: I would say in lieu of.

MR. ORSINGER: In lieu of? What is the sense there?

MR. GILSTRAP: Chip?

CHAIRMAN BABCOCK: Yeah, Frank.

MR. GILSTRAP: Does this rule the way it is -- I mean, we're talking about a form that's promulgated by the Court or by the Office of Court Administration, but this really doesn't refer to it. I mean, I could read this rule, I could fill out a handwritten cover sheet with

this information and say that's my cover sheet.

CHAIRMAN BABCOCK: Right.

MR. GILSTRAP: I mean, do we want to connect it to some rule that -- I mean, that's what we've been talking about the whole time.

MR. ORSINGER: But, see, we can't. We can't really use the OCA form per se because the localities are going to vary the form we know for sure.

CHAIRMAN BABCOCK: Maybe. I think what I heard Justice Hecht say was that's an open issue.

MR. ORSINGER: Oh, the Court might -- well, gosh, we have very rigid rules about local rules that are dishonored constantly. I have to obey all kinds of local rules that have never been approved by the Supreme Court.

HONORABLE STEPHEN YELENOSKY: Or do you?

MR. ORSINGER: Well, I might get my writ of -- my writ of habeas corpus might be granted, but --

CHAIRMAN BABCOCK: Judge Patterson. That's the line of the day, by the way.

HONORABLE JAN PATTERSON: Can I suggest that of the 15 who voted against the rule --

CHAIRMAN BABCOCK: Yeah.

HONORABLE JAN PATTERSON: -- that we see how many would be in favor of deleting that sentence and reforming it as a comment?

CHAIRMAN BABCOCK: Okay. Sure. That okay with you, Richard?

MR. ORSINGER: Sure.

CHAIRMAN BABCOCK: All right. We're going to vote now. People who like the rule, if you delete the last sentence and take that concept and put it into a comment, so everybody that's in favor of that, raise your hand.

MR. MUNZINGER: So we would be approving the text of the rule but for the last sentence?

CHAIRMAN BABCOCK: Yes, sir. Which would wind up in some form or fashion in a comment. All right. Everybody that's in favor of that rule, raise your hand.

Okay, everybody against?

MR. ORSINGER: That's an unpopular idea.

CHAIRMAN BABCOCK: 5 in favor, 16 against.

MR. ORSINGER: Now, can we take a vote if we leave the last sentence in whether anyone wants a comment in addition to that or whether that's sufficient to make everyone comfortable?

CHAIRMAN BABCOCK: Okay. Everybody hear that? Everybody in favor of -- everybody who's in favor of the rule as written on this page but who want an additional comment.

MR. HAMILTON: Comment or part of the rule?

MR. ORSINGER: No, a comment. Just a comment.

MS. BARON: Are people who originally voted for the rule as it was written supposed to be voting in these sets of votes?

CHAIRMAN BABCOCK: Yeah.

HONORABLE JAN PATTERSON: Well, that was not my proposal, but that's what he did.

MS. BARON: Okay. Well, I didn't vote.

CHAIRMAN BABCOCK: Okay. Rule as written with a comment. Everybody in favor?

Everybody against? 8 in favor, 11 against.

MR. ORSINGER: What does that mean? Does that mean leave the last sentence in but don't have a comment? More people would prefer not to --

CHAIRMAN BABCOCK: I think the Court is going to have to sort through all this.

MS. PETERSON: Oh, really?

MR. ORSINGER: Well, maybe I ought to write a comment just for idle interest.

CHAIRMAN BABCOCK: Yeah.

MR. MUNZINGER: Chip?

CHAIRMAN BABCOCK: Yes, sir.

MR. MUNZINGER: Did I misunderstand, the first vote was 15, the one you broke the tie in?

CHAIRMAN BABCOCK: Right. It was 14-14.

MR. MUNZINGER: And you voted 15 against the rule as drafted.

CHAIRMAN BABCOCK: Correct.

MR. MUNZINGER: So the committee has told the subcommittee "We don't like your rule as drafted, for whatever reason."

CHAIRMAN BABCOCK: Right. And I'm sure that the --

MR. MUNZINGER: I wanted to make sure I understood. Thank you.

HONORABLE JAN PATTERSON: The record will reflect.

MR. RODRIGUEZ: But have we not just voted to submit the rule as drafted? Because we're not having comments.

MS. PETERSON: We just voted on the last sentence.

MR. ORSINGER: No, I think people -- more people wanted comments than didn't want comments, and Justice Hecht indicated let's go ahead and write a comment, see what it looks like, but it's up to you to decide whether our official promulgation is with or without the last sentence because your vote confuses the issue, I think, because everybody else that voted against

it didn't want it -- probably didn't want the first part.

CHAIRMAN BABCOCK: Now, I'm the only one that stated on the record the reason for voting against the rule as written.

MR. ORSINGER: A good example of why you shouldn't do that.

CHAIRMAN BABCOCK: You know, silly me. But if we need more discussion, we need more discussion, but I don't think we do. So if you would write a comment, Richard, then we'll -- we'll deal with that, but in the meantime we will go on to judicial foreclosure because Tommy Bastian has been sitting here patiently listening to our discussion on civil cover sheets when the pressing problems of the Judicial Foreclosure Task Force are awaiting our discussion, and once again, Judge Yelenosky is leading this discussion.

HONORABLE STEPHEN YELENOSKY: Our subcommittee looked at this and ultimately -- looked at the task force work and ultimately suggested really just one change, which is at the very end, but I wanted to start by saying that at least some on the subcommittee felt that the task force draft reflects some decisions that were made by the task force that at least some members of the subcommittee viewed as sort of quasi-legislative decisions, either because they attempted

to define terms that are in a statute and/or they made a decision to create mechanisms for procedures that aren't sourced to a statute and are the result of a give and take among the task force. I just say that up-front, because we as a subcommittee didn't think it was our role to make any sort of legislative or quasi-legislative decisions. We took the task force report with the decisions that it embodies as a given as our starting point and then made some recommendations based on what we saw there without going back into any of the policy decisions, to the extent that policy -- policy decisions that were made.

The second thing I'd say is that this is a very long rule and complicated, at least for those of us who don't practice or haven't practiced in this area, and so I think most of your questions, to the extent you have them, might have to be directed to Tommy, and that's why he's here. Tommy, do you want to say anything up-front right now?

MR. BASTIAN: No. I think I'll take your spears and arrows later.

HONORABLE STEPHEN YELENOSKY: Okay. Let me tell you what the subcommittee did, and you'll find it at the very end, pages 26 and 27. What came to us from the task force is what is in strike-through 736.18, beginning at line 1140 on the left, and you'll see that that's

stricken all the way down to line 1166 and then is followed by a replacement Rule 736.18 and a new rule, 736.19. The reason there are two out of one, even though it addresses the same subject matter, is that we felt -- I guess I can say "we." I don't know that we actually took a vote on this, but that the rule they proposed addressed abatement and dismissal of a lawsuit prior to any order permitting foreclosure to go forward being signed and also addressed voiding -- an automatic voiding of that order after it's signed under certain circumstances; and so the subcommittee's proposal, which went back to the task force, as I understand it through Tommy, was accepted as a change, makes those two separate rules because we thought it was clearer.

I guess the second thing it does overall, the main significant thing it does, is it strikes a paragraph at the end, which was the paragraph (c) of 736.18, that the subcommittee felt was creating a cause of action in order to enforce the desire that a party filing a lawsuit, an affirmative suit, or rather the desire of those drafting the rules to be sure that anybody who files an affirmative suit that would stop a foreclosure from going forward acts promptly to give notice to the party that is actually proceeding with the foreclosure.

The way the task force had it drafted it was

that the respondent shall be -- in that instance it would be the party opposing the foreclosure -- "shall be liable for all claims of any kind made against the applicant, owner," et cetera, et cetera, et cetera, "by a purchaser of a foreclosed property at a void sale under (a) or (b)." In other words, it sort of created an indemnity provision for any claim that might be made by virtue of the fact that the -- and then it goes on to say when that party could have reasonably prevented the foreclosure from going forward by promptly notifying the foreclosing entity.

What we suggested in its place, because we thought that that -- we had real questions about whether you could create a cause of action in that fashion. We used language, which you'll find on page 27 at line 1195, which basically says you need to act promptly to give notice before the foreclosure or you may be subject to sanctions. Since this draft was out Tommy is suggesting one slight change to that, but it's a separate one, so I'll put that aside for a moment.

I'm not going to go through this rule by rule. I've talked beforehand with Justice Hecht and stand ready to do whatever else you want us to do at this point, but my understanding is that the Supreme Court is also planning to go back to the task force if it has any questions. So there are some minor things that Tommy has

brought up that we could identify now or simply pass those along, the task force can pass those along to the Supreme Court. They're not anything that the subcommittee has vetted. I don't think they're substantive. The only substantive thing is what I've just talked about as far as the subcommittee is concerned.

CHAIRMAN BABCOCK: Okay. Judge Yelenosky, it was the subcommittee that -- it was our subcommittee that spotted perceived problems with the task force 736.18?

HONORABLE STEPHEN YELENOSKY: Yes.

CHAIRMAN BABCOCK: And then proposed this?

HONORABLE STEPHEN YELENOSKY: Yes.

CHAIRMAN BABCOCK: And it's already gone back to the task force?

HONORABLE STEPHEN YELENOSKY: Yes. Tommy, I don't know if that was by e-mail. I don't know that they reconvened, but Tommy --

MR. BASTIAN: By e-mail and then everybody was to respond. There was one person that had a question about it, but it was a matter of just the communication going back and forth, what did it really mean.

CHAIRMAN BABCOCK: And so the task force is now accepting of what our subcommittee thought would be a better way to do it; is that right?

HONORABLE STEPHEN YELENOSKY: That's my understanding. I talked personally to Tommy, and I talked personally to Fred Fuchs, who was on the task force as a representative of Legal Aid people who are opposing foreclosure, and if you want me to say briefly what this is all -- what this is all about is under the current rule it clearly says that a lawsuit under 736, which is sort of an expedited judicial foreclosure, stops automatically, is abated, and shall be dismissed if the party with the home -- that's the easiest way to describe it -- files an affirmative suit, but it says if that's done before the order is signed. And this carries through with that, first of all, in 736.18, but what I suggested adding was to make very clear that for that to happen the affirmative suit -- a copy of it needs to be filed under the cause number of the 736 suit, because from the perspective of a judge, anyway, if there's going to be a suit that voids my order it should be right next to it in the file.

The old rule said you had to file it in the court where the 736 was, but it didn't make it clear in my mind that it needs to be filed in that cause number. So that's one thing it does. The second thing is -- and this is where you get to the issue of, well, is this legislative or not -- well, Tommy's first point would be I guess that to the extent this is legislative, so was the

first rule, but the first rule said if -- it would void and abate the action if it was filed before the order was signed. What the practice has been, typically a Legal Aid attorney gets in a case the day before the foreclosure, finds out an order for foreclosure has been signed, assume in good faith that there's something that they can file an affirmative case on. They file it, and then they go and seek a TRO, and that stops the foreclosure.

This procedure would say as long as they file it by 5:00 p.m. the day before the foreclosure -- and this comes from the task force. It's just sort of reworded by the subcommittee. They don't need to get a TRO. They file it, and that is sufficient to void the order before the foreclosure.

Tommy, do you want to speak to what the understanding of the law was under the old rule and why some people don't consider that a change?

MR. BASTIAN: Yes.

HONORABLE STEPHEN YELENOSKY: Or they consider it a change maybe, but --

MR. BASTIAN: Well, let me speak to the legislative, whether this is a legislative agenda or something like that. The genesis for this rule is in the Constitution that directed the Supreme Court to write an expedited rule for foreclosure. That's the authority.

There wasn't anything -- there's nothing around that says how you do an expedited foreclosure, and I think, in my view, the Supreme Court did the right thing. They got all the stakeholders except for the district clerks and the court coordinators, which was probably a mistake the first time around, but they got all the stakeholders that are actually involved in this process in the same room, and they hashed out this rule so that you could come through and have this expedited foreclosure that did one thing, and that was a change to the foreclosure process as it existed right now.

What he's talking about here is about the lawsuit. The whole idea is any time you file a lawsuit you can stop the foreclosure process, and we wanted to make sure that that was always available to anybody to be able to file the lawsuit. The whole idea behind when it says "expedited," that's exactly what it meant, expedited. Let me just tell you where that idea came from. It really comes from the eviction statutes. We basically kind of pulled that same concept, where you file in a JP court, and you can have your day in court. You decide one issue in an eviction suit, is whether you can go forward and evict somebody. In this particular case it's whether you can go forward with the foreclosure, and then if somebody had a complaint you had a trial de novo in the

county court on the eviction side. This says if you have a complaint you go file your regular lawsuit like you always did.

So I guess when it comes back when you say are we legislating, you could certainly make that argument, but I would come back and say it is the constitutional amendment that directed the Supreme Court to write a rule, and the way the Supreme Court put together a task force of people that really deal with this day-in, day-out, came up with a rule to expedite these foreclosure -- or getting this order. It's really a matter of getting an order so you could proceed with the foreclosure sale like it's always been done in Texas.

One of the interesting things that we found in talking when we put the court administrator on this last task force was that there were a number of judges that thought when they signed this order under Rule 736 that was the foreclosure. They didn't realize that all that order did was allow somebody to then go through the process of posting the property for sale and complying with all the requirements under 51.002. So there was lots of misinformation about how the rule worked and all those other kind of things.

This rule is basically designed to get an application filed, to get the court order that's required

by the Constitution, and then let the foreclosure process go on down the pike. It's really designed -- is to keep the courts from being clogged up when somebody doesn't file an answer. So if they don't file an answer, if they don't object to the application, the judge can sign the order and the foreclosure can go on down the road. The file is closed, and everybody is done with it. That's kind of the genesis behind the rule.

If that's legislation I guess you could make that argument. I would make the argument the Constitution was set up from the people that directed the Supreme Court to write the rule. Supreme Court picked the people who really deal with this day-in and day-out and said, "You tell us how to do it," and a group of people sat down and argued it, cussed and discussed and came up with a rule that seemed to work pretty well.

CHAIRMAN BABCOCK: Okay. Great. Thank you. Any questions? Yeah, Carl.

MR. HAMILTON: Well, what is the difference in filing a response to the application and contesting the foreclosure and then filing a separate lawsuit in another district court?

MR. BASTIAN: Well, in the response it gives you your day in court so you can come in and tell the judge. You may have a real good reason. It gives the

judge the opportunity to hear your reason why you think that order shouldn't be signed. The judge then has the discretion to say, "Yeah, I'm going to grant that." It may not even be a good legal reason, but if the judge denies the application then that means that that -- basically it's going to be the lender. Lender, you have to turn around and file a new application to cure whatever the problem that was raised by this borrower or you, Mr. Lender, are going to have to go file a regular lawsuit in the court of competent jurisdiction. The response is to give that person the opportunity to come to court if they want to and express their concerns, just like the JP. It's kind of that same idea. Anybody can come in, express their concerns. If they file a response, there's a hearing date. They come to the court, they can give their reasons, and then the court can decide from there whatever you told me whether I'm going to grant the order or not. Kind of puts the pressure back on the judge to decide, well, did you give me a good enough reason where I can either deny it or let it go on.

MR. HAMILTON: But if they're going to file a separate lawsuit wouldn't they have to file it as part of that same proceeding?

MR. BASTIAN: No. No.

HONORABLE STEPHEN YELENOSKY: You can't file

it.

MR. BASTIAN: You can't file it as a separate suit.

HONORABLE STEPHEN YELENOSKY: 736 doesn't --

MR. BASTIAN: Again, this was an expedited. That's the magic word. This is supposed to be an expedited proceeding so the court's docket wouldn't be clogged up. If somebody really has a complaint and wanted to do something, go file the lawsuit that you would have always done in Texas. In this particular process if you have a real complaint, you have your day in court. There there's going to be the communication kind of back and forth between you and the judge, and you, if you're the borrower or the lender you're going to find out what's wrong with your case and then you may have to go file the lawsuit.

The problem is most of these cases there is no response filed, and the courts' dockets are just clogged with these cases because you can't get the order, and this is trying to create a process because the Constitution says you've got to have an order. You can't go do a foreclosure without the order. So this is what we're trying to do, is have a very expedited way to get that order, and if you have a problem with that foreclosure process, you go file the lawsuit like you

would always have done.

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

MR. GILSTRAP: I just want to mention this. We mentioned it last time, and we discussed it on the subcommittee. I don't think there was any problem with it, but, you know, this rule is real long. It would be by far the longest rule in the whole rule book. We talked about the possibility of maybe carving the forms out, which take up a significant part of it, and maybe having those approved separately by the Court, not as part of the rule-making process but just part of the administrative order. Just an order so that if there is some mistake in them they could be changed without going through the whole rule-making process again. I can envision a day when, you know, we get so many of these that maybe we have an appendix like the Federal Rules of Civil Procedure do, but -- and I thought we talked about that on the committee. I didn't think there was any problem with doing it that way.

MR. BASTIAN: No, absolutely not. In fact, we've come up with a couple of options to discuss. There is a provision in the Nonprofit Corporation Act that really has to do with the secretary of state where they go through this litany about here is the form, it's on

Secretary of State's website. Here's the form that you use, go to the website, and there it is. And something along that same line. Kind of depends on how big a font you use and how it's formatted. This rule is 26 pages long, but 16 and 17 pages is basically the promulgated forms, and the whole idea of the forms is to -- well, there's another thing that kind of overlays, and maybe I need to discuss that.

Lots of people don't realize, but securitization has completely changed the foreclosure process in Texas. It's changed it everywhere, but the law -- and most of the folks haven't caught up with how securitization has changed the process. This particular document takes into consideration how securitization has changed the process, and if you go through the pleadings or the application here, it puts the right -- it tells you exactly who does what in a securitization, who's responsible for what, so that it's transparent. You have full disclosure of what everybody is doing. You won't have an instance -- and I can see some of the judges wondering what in the world are you talking about -- where somebody comes and tells you that MERS is the owner and holder of the note, just because MERS happens to be the mortgagee of record. MERS never was the owner of the note. They never were the holder of the note and never

will and never going to be, but a lot of lawyers who don't know what they're doing say MERS is the owner and holder of the note, number one, because they're using legacy pleadings that are 10 years old, and number two, they haven't done their homework, and, number three, this is going to tell you that the -- MERS is really the mortgagee of record and it gives a definition. So that everybody now -- it's kind of like a teaching tool. This is what MERS is, folks.

CHAIRMAN BABCOCK: Okay. Judge Christopher.

HONORABLE TRACY CHRISTOPHER: Are we going to get a chance to make any comments on the rule? Because I do have some comments.

CHAIRMAN BABCOCK: Absolutely.

HONORABLE TRACY CHRISTOPHER: Okay. You want me to just start?

CHAIRMAN BABCOCK: Fire away.

HONORABLE TRACY CHRISTOPHER: Okay. Starting at 736.1(a) and (b). Okay. And here's where I see a potential conflict, in my mind. The rule requires "notices required by law," doesn't really tell me what law that I need to look at, as a condition precedent really before this lawsuit is filed.

HONORABLE DAVID PEEPLES: What line, what page?

HONORABLE TRACY CHRISTOPHER: Page four, line 158. And it seems -- and I'm just trying to understand from my point of view reviewing these things on a default basis, which I do on a weekly basis; and thanks to our civil cover sheet, I can tell you that in 2004 there were 1,726 expedited foreclosures in Harris County, and they have increased every year. In 2008 there were 2,395 expedited foreclosure cases in Harris County. I currently have on my docket 40 cases that an order has not been signed in, some of which are old. Under -- and I certainly understand the frustration of the industry that a lot of judges are not processing these cases, because these cases are kind of overwhelming to people who are not familiar with them, and I think a lot in the rule is great. I love the forms, and if everybody -- you know, if they don't follow the forms, we're just going to sign a little order saying "You're out of here, you didn't follow the form" and off you go. So, I mean, there's a lot of really good things in this new version. I like it, but there are just some problems that I saw.

So the concept of 736.1, before filing an application notices have to go out according to law in a certain form and to a certain address, and that's (a) and (b). Okay, well, as a judge when I'm on the default situation, am I going to have to review every single

notice to make sure they were sent properly according to whatever law is not listed here in 736.1 and sent to the proper notices according to (b); or, or, am I going to assume because there's something further on down here that says I can assume that this is prima facie evidence when they tell me notices were sent properly that they were sent properly and that I don't have to go back and double-check that the notices were sent properly and to the proper address before this application ever got filed? So that's a big conflict in my mind. Requiring me to do that is something that I'm not doing now.

HONORABLE STEPHEN YELENOSKY: That was going to be my question, what do you do now?

HONORABLE TRACY CHRISTOPHER: I don't do that now in terms of making sure that the prenotices have been sent to the proper address. Okay. They just tell me in their current application that they did, and if everything else matches up, I sign the expedited foreclosure.

HONORABLE STEPHEN YELENOSKY: Do you look to see if they even have attached the notice --

HONORABLE TRACY CHRISTOPHER: No.

HONORABLE STEPHEN YELENOSKY: -- whether or not you determine it's the proper address?

HONORABLE TRACY CHRISTOPHER: No. So I just

-- the way this is written it appears that I should do that, which is okay, but it seems to contradict the other part of the rule later on that I'll get to that says, you know, if everything looks right, it's prima facie evidence that it was done right. Okay. And I know y'all thought this was all very amusing, but I sent you five examples of what the security instruments look like that we get on a routine basis, some of which, you know, you can't read at all. So if I'm going to have to go and double-check notices, it's going to be a lot of work, and, you know, all of these things that are not readable are going to get bounced out pretty fast, but I'm willing to do that, and a lot of my fellow judges would be willing to bounce them all out as not being legible. So that's my first problem with the concept of what's in 736.1(a) and (b). Is that really a condition precedent, is that my job as a judge to make sure I review the petition to see that it was all done properly? I'm not a hundred percent sure of that.

CHAIRMAN BABCOCK: Okay. Before you go on to the next issue, what does everybody think about that? Do you think the district judge is required to -- and we're talking about a default situation, right?

HONORABLE TRACY CHRISTOPHER: In a default situation.

CHAIRMAN BABCOCK: In a default situation is

the district judge required to go behind the prima facie proof to see if it's accurate?

HONORABLE NATHAN HECHT: What's the task force's intention?

CHAIRMAN BABCOCK: Yeah. What's the task force intention?

MR. BASTIAN: Let me -- if I can treat that issue, if you go and look at the application itself it means that every one of those instruments that she's talking about have to be attached. They have to be attached to the application; and my suggestion to judges, if it's not, you deny it, because when you start denying those things the lenders' lawyers are going to have to get their act together; and they'll start doing that.

HONORABLE TRACY CHRISTOPHER: Well, but --

MR. BASTIAN: It just takes a couple of times, and so the way this rule is set up -- again, we go back to the philosophy is we didn't want to change the foreclosure process like it's always been in the -- like it's always been in Texas. This rule, this expedited rule, came in after you accelerated the maturity of the debt then you filed the application. That application then was filed, and you finally got an order. After you got the order then you would have to go post it, so we wanted to make sure that when the judge had the

application that the judge at that point in time says, "Mr. Lender, you're playing games. You haven't sent the notices," and the way you can check is that application better have all of the notices that are supposed to be sent.

Oh, by the way, this rule is also written so that the application has to direct to the clerk exactly who's supposed to get the notice, at what address. It's a very specific place where they have to send it. The onus is on the attorney to do all of that. If the attorney doesn't do that, the judge ought to deny it.

HONORABLE TRACY CHRISTOPHER: No, I'm talking about 736.1(a) and (b) are the presuit notices. I can certainly understand double-checking the procedure notices itself to make sure that the actual expedited foreclosure proceeding got sent to the correct address and notice, just like I do now when I double-check the citation before I grant a default. (a) and (b) here of 736.1 are talking about the presuit notices that have to be in the sequence and time required by law. I'm not exactly sure what those are, because it doesn't refer me to the law to look at, and, number one and I thought was difficult, it says they "may be combined into one notice unless the loan agreement provides otherwise."

So for me to accurately check this I have to

know what law I'm going to reference. If it's one notice, then I need to read through every single one of the loan agreements to see if there's a paragraph in there that says there have to be two notices. It's more work than I'm doing now. I'm willing to do it if that's what they want us to do. I just am not sure that's what they want us to do, so that's my first comment about 736.1(a) and (b) in terms of presuit notices.

CHAIRMAN BABCOCK: And, Judge, what would be the -- what would be the two rationales? What would be the rationale for not doing it? Would it be, "Hey, this is a default. They've sent it to me. They say that they've done it, and that's good enough for me." If it was a contested proceeding then the other side would have the opportunity to say, "No, they didn't do it," and then I'd rule, but here since it's a default I don't need to check --

HONORABLE TRACY CHRISTOPHER: Right.

CHAIRMAN BABCOCK: -- so I just take their word.

HONORABLE TRACY CHRISTOPHER: It's just a matter of philosophy as to which way -- I mean, whenever I do a default there are certain things I check through. I always check through that, you know, citation was done properly. I always check that time has elapsed properly.

I always check, you know, the names of the parties are correct, and then depending on whether it's liquidated or unliquidated damages, but here I'm checking presuit things that I don't normally check.

CHAIRMAN BABCOCK: Right. Yeah. Judge Yelenosky, and then Richard Munzinger.

HONORABLE STEPHEN YELENOSKY: But it isn't any different from any other default situation in my mind. The requirement is there, and yes, is it the judge's responsibility, yes. But in a default situation, typically a number of factors are considered. You check certain things. In this context one thing I would consider, is this somebody I see routinely who brings in these mortgage things and have I checked this person before and can this person stand in front of me and say "Exhibit A is so-and-so, and B is so-and-so and C," and I've got a level of confidence that it is all there. Certainly not going to check and see if the address they put is a correct address. I think that would go beyond any responsibility I have on a default. But whatever you do, I don't see where it makes a difference in what the rule says.

HONORABLE TRACY CHRISTOPHER: Well, this is -- you know, double-checking presuit notices as a condition precedent to the filing of expedited foreclosure

is not something I check now. If I'm going to check it, if I'm required to check it under the rule, fine. I just need to know that that's the intent --

CHAIRMAN BABCOCK: Yeah.

HONORABLE TRACY CHRISTOPHER: -- of 736.1(a) and (b).

CHAIRMAN BABCOCK: Yeah, and the argument on the other side, the counter-argument to the default argument would be, look, you check things all the time before you grant a default judgment, and now Judge Christopher is faced with a rule, 736.1(a) and (b), that talk about things that should have been done.

HONORABLE STEPHEN YELENOSKY: Well, but that's true under current law.

CHAIRMAN BABCOCK: I know, but you check certain things. You always know that process is supposed to issue. You always know it's supposed to be served, supposed to be on file a certain amount of time, and you always check that.

HONORABLE STEPHEN YELENOSKY: No, but my point is under current law if we have an obligation -- I mean, if there's an obligation under this rule there's an obligation under current law to check for those things. I mean, some of those things have to be -- the presuit notification, I mean, isn't that required now, Tommy?

It's not required to be attached.

MR. BASTIAN: No. Now it isn't. I mean, you just basically say --

HONORABLE STEPHEN YELENOSKY: Not required to be attached, but giving the notice.

HONORABLE TRACY CHRISTOPHER: I don't check it. I don't look at it.

MR. BASTIAN: That's exactly right.

HONORABLE STEPHEN YELENOSKY: But giving the notice is required, so, you know, arguably under the current rule somebody comes in with a default, you could say, "Well, we have an obligation to say, 'Well, prove to me that you sent presuit notice.'"

CHAIRMAN BABCOCK: Richard.

MR. BASTIAN: 51.001 says -- this is the foreclosure statute, says that to do a foreclosure, if it's somebody's residence, and most of these are home equity, it's going to be -- it's secured by somebody's homestead, except for the property tax, which is a different deal, but you have to send a demand to cure 20 days before you can send the posting notice. I mean, those are requirements.

HONORABLE TRACY CHRISTOPHER: I know they're requirements. I'm just saying that this is making the rule harder than it is now, which is okay, as long as we

understand that's what we're doing.

CHAIRMAN BABCOCK: Richard Munzinger.

MR. BASTIAN: Well, would it help if -- the rule is designed to take care of the default situation so that you're real comfortable when it comes to you, nobody files a response, and you sign the order because nobody defaulted. If somebody files a response then that's an issue and then somebody can come in and tell you, "Well, you didn't send this letter" and so forth and so on?

MR. MUNZINGER: Does the application for the default order include an allegation that the requisite notices were to be given?

MR. BASTIAN: Yes.

MR. MUNZINGER: And the application itself is under oath, so help me God, that these things are true and correct?

MR. BASTIAN: That is correct, and there is also a promulgated form that is a declaration that the mortgage servicer -- which, by the way, is the entity that has all the loan level information about this particular loan -- has to sign an affidavit under penalty of perjury or it has to be notarized.

MR. MUNZINGER: So the trial court is presented with an application that includes sworn statement by the attorney that these things have taken

place.

MR. BASTIAN: The attorney has signed the application, that is correct.

MR. MUNZINGER: That the presuit notifications and what have you --

MR. BASTIAN: That is correct.

MR. MUNZINGER: -- that the judge is concerned about have been given in the order, form, et cetera, required by law.

MR. BASTIAN: That is correct.

MR. MUNZINGER: Why is that insufficient proof of the fact?

HONORABLE TRACY CHRISTOPHER: I think it is sufficient proof of the fact. What I'm pointing out is by putting (a) and (b) in this rule versus the affidavit saying and, you know, prima facie proof of everything, it appears that I have to double-check that, too. It's just it's not in the current rule, and it just seems to me that if I was looking at it I would be a little nervous. I would spend a lot of time double-checking all the presuit notices, but so that's just my comment on that part.

HONORABLE NATHAN HECHT: All right. But the intention is that that not happen?

HONORABLE TRACY CHRISTOPHER: Well, I hope so.

HONORABLE NATHAN HECHT: Well, I'm asking.

CHAIRMAN BABCOCK: He's asking -- he's looking over your head.

HONORABLE NATHAN HECHT: I'm asking Tommy or Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, my understanding was that the intent was that not happen except to the extent it happens in all default situations where you have a lawyer you can't trust and has failed a time before, and you ask tough questions.

HONORABLE NATHAN HECHT: Well, I understand.

HONORABLE STEPHEN YELENOSKY: That's the exception.

HONORABLE NATHAN HECHT: Okay, you could do it if you wanted to.

HONORABLE STEPHEN YELENOSKY: Right, but you don't have to.

HONORABLE NATHAN HECHT: All right.

HONORABLE STEPHEN YELENOSKY: That was my understanding.

MR. SCHENKKAN: And isn't the point of the change to make them attach the documents instead of just the assertion --

HONORABLE STEPHEN YELENOSKY: Yes.

MR. SCHENKKAN: -- that they've complied, is

to give anybody that might oppose it the information they need to efficiently oppose it. That's the reason for the change. It's not to make your life tougher, Judge. It's to make the actual ability of the system to work to protect whatever the number of people may be that might be victimized by it. The first step they need toward --

HONORABLE TRACY CHRISTOPHER: I agree.

MR. BASTIAN: You said it exactly.

HONORABLE TRACY CHRISTOPHER: But putting (a) and (b) in the rule makes it look like my job. That's all I'm saying about it.

CHAIRMAN BABCOCK: Harvey, and then Judge Evans.

HONORABLE HARVEY BROWN: I was just going to point out, I could be mistaken on this, but I would think some of these are done by submission where you don't have a lawyer you can --

HONORABLE TRACY CHRISTOPHER: All done by -- and, in fact, as we go further in here that's another thing I have a problem with. We have an automatic mandatory 10-day must do so. No hearing, no nothing.

HONORABLE HARVEY BROWN: That's all the more reason the judge feels some responsibility to go back and kind of do this on his or her own, so that is putting a pretty high duty on a judge; and at least in Harris County

or the major counties you'll become slowly an expert on this because you do a lot of it, but what about the small counties? They only see one of these a year or every two years. We've got to at least lay out what the law is, what we want them to look at, and how to do it a lot more than it seems like this does right now.

CHAIRMAN BABCOCK: Judge Evans.

HONORABLE DAVID EVANS: I think Harvey made the point. I just want to point out, too, we don't know the people who are filing these. Often their addresses for me are in Harris County and in Dallas County, far away land.

HONORABLE STEPHEN YELENOSKY: Then you better look at them really carefully.

HONORABLE DAVID EVANS: Then I look at them real carefully. We use -- in Tarrant County we use a check sheet that is legal-sized and is two pages long and -- the judges on my floor, and it's small-typed, and we have the staff prepares that before they even come into judgment to see if they conform with the rule, and they're very difficult to go through. It's not a -- it's not the typical sworn account default judgment with service on something to look through them. It doesn't present itself to be judged on that fashion.

CHAIRMAN BABCOCK: Judge Evans, where do you

fall down on this issue that --

HONORABLE DAVID EVANS: Well, I've been wanting to use the -- there's an unfunded mandate, but Tracy is going to come to that at 736.13, and that is that within 2 to 10 days after the due response I have a duty to sign a default order. I don't have case management software that will tell me when this is due.

CHAIRMAN BABCOCK: Yeah.

HONORABLE DAVID EVANS: I'd have to go get the county to build me a case management software that will pop that up.

CHAIRMAN BABCOCK: Yeah. But back to 736.1(a) and (b), does your reading of it --

HONORABLE DAVID EVANS: It imposes a greater duty. I look through all the attachments on these foreclosures, every one of them, to check them for legibility and to make sure that they're incorporated directly, and I think it imposes a greater duty.

CHAIRMAN BABCOCK: So your interpretation is it's not that it's discretionary, it's that it does impose a duty on you as a judge to check these things?

HONORABLE DAVID EVANS: I think most of us that sign defaults, all the judges have a sense that they have a duty to make sure that the rule has been complied with and that they're the only person doing it. And I do

have a sense that this puts a greater burden on us.

HONORABLE STEPHEN YELENOSKY: And do you feel you have the same obligation to make sure the statute's been complied with?

HONORABLE DAVID EVANS: Yes.

HONORABLE STEPHEN YELENOSKY: Well, because the statute has that presuit notice requirement, so why wouldn't you be checking that now?

HONORABLE DAVID EVANS: You know, you learn something every time you come to a meeting, and especially if you open your mouth as much as I do.

HONORABLE STEPHEN YELENOSKY: I know wherefrom you speak.

HONORABLE DAVID EVANS: I know, and, you know, I'm going back to talk to the judges on my floor about, well, what are we going to do about these presuit notices?

HONORABLE STEPHEN YELENOSKY: Yeah. Well, my point would just be that I think that to the extent there's an obligation it comes from the statute, and the rule, if anything, lays it out more clearly to at least what all the documents are, they're all there you can check as much as you want, but the obligation hasn't changed. It's --

HONORABLE TRACY CHRISTOPHER: But they never

had to provide the presuit notices before or allege that they were sent to the correct property address or contain a copy of the change of address in writing if somehow the notice didn't go to the property address but instead went to a different address. I mean, the notices that get attached, sometimes they're sent to three or four different addresses, property address, two or three apartments, you know, a fourth house. We have no idea.

HONORABLE STEPHEN YELENOSKY: Well, I would ask Tommy, were there judges on the task force?

MR. BASTIAN: Yes.

HONORABLE STEPHEN YELENOSKY: Okay.

MR. BASTIAN: Two.

HONORABLE STEPHEN YELENOSKY: What did they say? What did they say?

MR. BASTIAN: They wanted a promulgated rule that was very specific and very precise so in the default situation they could sign it, and if a TV camera was put in their face they could say, "Here's the rule. They followed the rule, and that's why I signed it, and they didn't file a response."

And speaking to Judge Christopher's comment, we probably could take that out, because if that is a concern and you're thinking that's putting a duty on the judge, the reason that's in there is to make sure that the

lenders' lawyers don't play games and that you have that stuff done before somebody does a foreclosure. That's something that the task force was very interested in and wanted to make sure that it was balanced, that that borrower got all those notices that they were supposed to get under the law before somebody went and filed one of these applications. So that's the reason why those notices are in an exhibit in a particular order that have to be attached to the application so that you can see, Judge, that they were done. And it also makes sure, because that's required, that somebody is not going to be playing games with the foreclosure process and not do that.

CHAIRMAN BABCOCK: Okay. Thanks, Tommy. Judge Christopher, I think we've had a good --

HONORABLE TRACY CHRISTOPHER: I'm just giving you my comments.

CHAIRMAN BABCOCK: No, no, no.

HONORABLE TRACY CHRISTOPHER: I don't have to have a vote or whatever.

CHAIRMAN BABCOCK: I want you to keep going, that's my point.

HONORABLE TRACY CHRISTOPHER: Yeah, keep going. Okay.

HONORABLE JAN PATTERSON: May I ask a

question?

CHAIRMAN BABCOCK: You can.

HONORABLE JAN PATTERSON: Tommy, just to make sure I understand, on (a)(1) if there's one notice included, can we assume that that's the only notice, or does the judge have to look at the loan agreement to see if it requires otherwise? I assume that if you attach one notice, that that's the representation that only one notice is required under the loan agreement. Is that --

MR. BASTIAN: No. What's attached to the application is the notice that has to be sent under 51.002 to the obligor of the debt. Before you can do a foreclosure, before you -- to do a foreclosure so it's not a lawful foreclosure under 51.002 you have to send notice to the person who's obligated for the debt. All of those notices that have to be sent certified mail to the person obligated for the debt have to be attached to the application.

HONORABLE JAN PATTERSON: Right.

MR. BASTIAN: This is trying to enforce that, "Lender counsel, you don't play a game with that. You don't come to this court and you file an application and you haven't done that." It's kind of self-enforces that you're not going to go file one of these or you're not going to start the foreclosure process where somebody

in the light of day can come in and see whether you did it or not. That's kind of the background.

HONORABLE JAN PATTERSON: Well, that's my question is whether it is self-enforcing and by attaching whatever notice they're representing that that's all that's required, or does the judge have to make further inquiry to determine the extent of the notice?

MR. BASTIAN: In my view, no, because all the notices that you have to do under the law, under 51.002, and in some instances -- can't think of any because most of -- at least in the residential arena where most of this is working, it's going to be all forms, standard security agreements, and so it's going to be 51.002 that just says you send a notice to the obligor, you can go back and look and see if they were sent. In fact, the way the application is prepared it basically forces you to have all of that information to have a good foreclosure attached to the application before it -- before you can even file it.

HONORABLE JAN PATTERSON: Okay. And if (1) and (2) are attached and there is no other notice other than under (1) and (2), do you then assume that no other notice under No. (3) is required, or does the judge have to make further inquiry about --

MR. BASTIAN: Well, to be real honest, No.

(3), why it's there, is because when that part was drafted the Legislature had all of these foreclosure bills in front of them, and we didn't know what kind of new notices were going to come out. For example, there was a bill that went through the legislative and Governor Perry vetoed it so you didn't have to do it, but there was a reporting requirement that you had to send when you posted the sale -- when you posted your -- it's called posting. When you file the notice of the foreclosure sale with the clerk there was a certain form that had to go be filed with the Texas Department of Community Affairs, for example. That was in there to cover those situations that we didn't know what the Legislature was going to do, frankly. That's why that was in there.

HONORABLE STEPHEN YELENOSKY: And on page seven you'll see that the application has a recitation that tracks the rule that says, "Prior to filing this application the notice of demand to cure the default, notice of intent to accelerate, notice of acceleration," blah, blah, blah, "and any other notice required by law as of the date of acceleration was sent to each debtor or obligator," so there has to be -- they have to attest that they did that.

HONORABLE JAN PATTERSON: Okay.

CHAIRMAN BABCOCK: Okay. Judge Christopher,

we have been talking up until now about Rule 736.1(a) and (b). Could you go on to your next concern?

HONORABLE TRACY CHRISTOPHER: Okay. My next point is on page six, and we're in one of the forms, the first form, 736.2, form (a), under paragraph 2, respondent, okay, we -- they're supposed to have citation mailed to the last known address of each debtor. Okay. Now, we've -- now we have introduced a third address into the system. We've got the property address, the last known address, we have any proper change of address that was back there in 736.1(b), so I'm okay with last known address, but it's just going to -- could possibly introduce a very different address, because we've got the property address. Maybe the debtor failed to send the proper notices, you know, in terms of the change of address, and now we have last known address. Well, I can't -- you know, I don't know that they have failed to send this proper notices and suddenly have a new address here. That's just an issue. We've got a new address added there on page six.

On page eight, line 312, the proof of mailing by certified mail of all notices described in (5-c). If there was a change of address I need to -- I need to know the change of address, too. Otherwise if I'm double-checking this I'm going to see -- I'm going to

check to see if it's the property address. Then I've got to check to see to if there was a change of address to double-check where the notices were sent. So if there was an appropriate change of address, it needs to be sent there. If there's no change of address, indicated and they've sent the notices to the last known address that, that's insufficient as best I can tell. I'm not positive, but I think so.

Line 322, (5-f), the Servicemember's Civil Relief Act, I would like something in there that it needs to be current, okay, because sometimes these mills, they churn out these civil service -- Civil Relief Act, and it will be three, four, five months old. I would like something that says that it's within 30 days of the date of filing of the petition or something like that, whatever you think would be an appropriate time.

CHAIRMAN BABCOCK: Is there anything in the act, in the Serviceman's Civil Relief Act, that requires that?

HONORABLE TRACY CHRISTOPHER: Not that I know of, but a lot of us won't accept something that's old just because --

CHAIRMAN BABCOCK: Yeah.

HONORABLE TRACY CHRISTOPHER: -- at the time we're doing the default, you know, we want to know at the

time we're doing the default they're not in the service. We don't want something that says six months ago they weren't in the service.

HONORABLE STEPHEN YELENOSKY: But that's true of any default, right?

HONORABLE TRACY CHRISTOPHER: Yeah.

HONORABLE STEPHEN YELENOSKY: So why would we put it in this rule as opposed --

HONORABLE TRACY CHRISTOPHER: Well, because we -- we're being specific. You know, we're being really detailed and specific. I'd like to be specific here so that if it's more than 30 days old, I check it off in my order that tells them what they did wrong.

Okay. Last known address issue shows up there in (5-g) again. I mean, we're just throwing around a lot of different addresses at this point.

Oh, I did have to laugh about the legibility issue, and that was -- I forgot to mention that one. (5-b) at line 305, page seven. And really my question was does the indexing have to be legible, or does the whole document have to be legible? And I -- I sent you some examples of what we see in terms of the liens and legibility of indexing, so, for example, the first document that I labeled document A involves the Mexia home. Well, I know that's Beverly Kaufman's signature

there, but it's not really -- it's not clearly legible. So same thing with this little RP number off to the side. You know, I know that's a -- that's their number, but it's not legible, and, you know, so "clearly legible" is in the eye of the beholder, and I expect it to be really good if it's clearly legible, and just none of the ones that I looked at in the past two weeks were clearly legible. We get --

CHAIRMAN BABCOCK: So what do you propose? To change the form to say that it can be a scrawl if it wants to be?

HONORABLE TRACY CHRISTOPHER: You know, I'm just presenting it as an issue to you. Okay. That's all. I mean -- I mean, my favorite, of course, is that whenever anything is wrong with anything that gets filed there's a big old stamp that says, "This thing isn't very legible." And it's on almost every single thing that gets filed, "Recorder's memorandum at the time of recordation this instrument was found to be inadequate for the best photographic reproduction." I mean, that is on -- maybe Beverly Kaufman is just really stamp happy, but it is on just about every single lien that I look at.

Well, if that's there, it's not clearly legible, you know, in my opinion, so, you know, I'm going to have fun denying these. I'm just -- you know, "clearly

legible" strikes me as a whole lot of problems. Anyway.

CHAIRMAN BABCOCK: Got it.

HONORABLE TRACY CHRISTOPHER: This one here, Exhibit E, was the best where you could not read a single possible word of the whole document. So no matter how much I blew it up, you know, I could make it 200 percentage on my computer, and it was not readable or legible. Okay. That was fun, not substantive, but fun, but, you know, it will make my life easy in terms of denying, if that's what we want.

Okay. The one that Judge Evans was talking about, most important, 736.13(f), page 24, line 1057. This is where it says, "All matters alleged in the application are prima facie evidence of the truth of the matters asserted," but then it also says, "Within 10 days after the due date for the respondent's response, the court shall sign a default order without hearing." Okay, provided that all the forms are done correctly. All right. And it will require us to actually -- to calendar when the petition is filed and what the due date is and what 10 days after that is.

I just think that's extremely unworkable for the district judges that do these. I mean, that's not our business. That's not our job as -- we don't do that now on defaults. We don't -- you know, Monday after 20 days

we're not sitting there ready to sign a default order if somebody hasn't answered a case that's in our court. I mean, we wait for somebody to ask us to sign a default, and I'm not saying it has to be anything fancy, but I would like a request for default that says the due date has passed.

HONORABLE DAVID EVANS: And motion for default by the attorney says that everything's been done and the 10 days has passed, either that or they -- in the old country practice you just come into court on default and say, "I want to have it," but the lawyer would be there, and the initiative should be upon the applicant here to notify the court that all the prerequisites have now been met on notice and that they're ready for you to rule on default.

CHAIRMAN BABCOCK: Tommy, that sounds reasonable. What do you think?

MR. BASTIAN: Yeah, I mean, if we can do something like that, that's reasonable. I mean, if that's the triggering mechanism, and there appears to be a triggering mechanism. To speak to a lot of this that Judge Christopher has raised about putting the responsibility on -- responsibility on the judge's shoulders, I'm not sure we looked at it quite that way about that it's the judge's responsibility to go to quite

that degree. What we were trying to do was make that whole process self-enforcing --

CHAIRMAN BABCOCK: Right.

MR. BASTIAN: -- in that the respondent would have in their hands all the evidence they would need if they needed to go file that lawsuit we were talking about because the lender was playing games. That's why all of this is in here, because that's the self-enforcing part. We didn't expect the judge to have to go through, you know, all of that kind of checklist before they would sign a default order, but it has it available there for the person who's really concerned about if the respondent -- that after you see that stuff, because you get served with the application, and you can go through and vet it and see if it was right.

HONORABLE DAVID EVANS: If you follow this literally, if (a) says, "The record shows the application and declaration conform to 736.2," I've got to go over and look at the exhibits, which have to be properly numbered, 5-a, 5-b, 5-c, and make sure that they're there in that form, in that fashion. That's not simply reading the pleading to see if it states a matter of liability that's either liquidated or unliquidated and that there's a sworn account attached to it. This takes real clerical time and it takes -- my clerk gathers up these on a weekly basis or

my court coordinator gathers them up on a weekly basis and mutters my name kindly while she goes through the checklist and hands it to me. This is some work.

CHAIRMAN BABCOCK: Yeah. Yeah. Richard. Judge Patterson, did you have your hand up?

HONORABLE JAN PATTERSON: Yes.

CHAIRMAN BABCOCK: Okay. Judge Patterson and then Richard.

HONORABLE JAN PATTERSON: If you added the simple words, "upon request" wouldn't that --

HONORABLE DAVID EVANS: That would take it out of our burden to calendar.

HONORABLE JAN PATTERSON: Yeah. Because then if they really wanted to expedite and wanted it to be efficient, they would reflect those things in the record, but it seems to me it would trigger the -- be a triggering mechanism, and it could be simple or more, whatever -- however --

HONORABLE TRACY CHRISTOPHER: I would definitely like more than 10 days. Okay. Like the request for findings of facts and conclusions of law, it gives me 20 days. So request for default order, at least 20 days to, you know, get it, pour through it, double-check it, you know, get my little copy of the law, have my five-page checklist. You know, I mean, 10 days,

that's tough.

CHAIRMAN BABCOCK: It could say "10 days after the due date for the respondent's response the applicant may request the court to sign an order."

HONORABLE TRACY CHRISTOPHER: That's fine, but, I mean, I think they wanted to put, you know, our feet to the fire here to make us rule on it.

HONORABLE STEPHEN YELENOSKY: Right.

HONORABLE TRACY CHRISTOPHER: Which I understand. I'm just asking for 20 days for some of these.

CHAIRMAN BABCOCK: "Which shall be ruled on in 20 days."

MR. BASTIAN: This provision doesn't have to do with signing the defaults. It is whether you have to have a hearing if nobody has filed a response, because when you started seeing all the foreclosure headlines, all the sudden judges wanted to have a hearing, and the borrower never filed a response and never showed up, and now you had to go through this whole process of having a full-blown hearing, and the borrower still didn't show up.

I mean, that's the key to that statute. I mean, this is easy to do. It just imposes a duty on the attorney that when it -- if they haven't filed their default like right now, file your motion.

CHAIRMAN BABCOCK: Yeah. Richard.

MR. ORSINGER: There's two timetables here that are involved. One is when is the default ripe to be harvested, if you will; and the other one is what length of time does the judge have to rule on the default; and it seems to me like you should say something like "At any time after the due date for the respondent's response when one is not filed, the plaintiff may request," give yourself -- I mean, you should be able to request it the 8:00 o'clock a.m. on the day after the response was due and wasn't filed; and then the question is how long does the judge have to respond to that; and in the Rule 296 findings, which are the post-judgment findings that Judge Christopher referred to, that timetable is run from the date that the request is filed; and in the old days you used to have to call that to the attention of the judge. Now it's the clerk's duty to call it to the attention of the judge. Sounds like the clerks can accept that responsibility of calling it to the attention, say, "Uh-oh, now I've got a clock running." And so the question is, is it really important whether the judge has 10 days or can they have 15 days or can they have 20 days.

MR. BASTIAN: It wasn't important on the days.

MR. ORSINGER: Well, then we ought to give

them, you know, a comfortable amount of time. Of course, the way it is for you guys, don't you have these on a rolling basis? You've got the Monday ones you've got to look at and the Tuesday ones you've to look at or you just look at them once a week or once a month?

HONORABLE TRACY CHRISTOPHER: For me, I ask my lawyers to do a notice of submission, so that tells me that they want to proceed with the foreclosure. I mean, the reason why I have 44 cases on my docket right now that are active is some of them will fall back in 2008, and they've never asked me for a default, and usually it's because the people get served with the expedited foreclosure, they finally wake up that they're going to lose their house, they get in touch with the lender, and they start working on it. So, you know, that's why some of these cases that are just sitting here are old because when the lawyer wants the order I say, "Please put it on my submission docket" because we have that in Harris County. So it's 10 days notice, and it's a Monday, and then I rule on it, you know, within the week. You know, other people -- and I do understand what Tommy was saying, that a lot of judges were requiring an oral hearing for a default, which shouldn't have to be done.

MR. ORSINGER: Well, is there a deadline right now? Do you have a deadline?

HONORABLE TRACY CHRISTOPHER: No.

MR. ORSINGER: Okay. So you want a deadline because some judges just never get around to signing it?

MR. BASTIAN: We were just trying to have it very specific, laid out, so you could just do it like clockwork. The time wasn't important. It was kind of, again, the self-enforcing mechanism to make the rule work, so whether it was 10 days or 20 days really wouldn't make any difference. Whether you had to send in a motion probably wouldn't make any difference. It is having the clarity for all -- what is there, 482 judges? So that all the judges would do the same thing.

Our firm happens to have a matrix. There's 482 judges, and we have a matrix of 103 judges that have special requirements on home equities, and the idea was to have something very specific so you didn't have all of those kind of idiosyncrasies by the judge so everybody could have this standard that was very specific and very precise. And sometimes it was kind of arbitrary like on the 10 days. Probably doesn't make any difference whether it's 10, 15, 20 days. Probably easier to do the motion, but the idea is to have it very specific so everybody knows when something is supposed to happen. So, I mean, I think we could accommodate Judge Christopher's, or both judges, Judge Evans, and say, you know, "You, Mr.

Applicant, or your attorney has to give the court notice that, oh, the response date is due, it's time for the default."

HONORABLE DAVID EVANS: And request entry of the default.

MR. BASTIAN: Yeah.

HONORABLE DAVID EVANS: All conditions precedent have been met. I mean, that would be the great thing that would be present.

MR. BASTIAN: Right. In fact, it almost has that element in here, is because when the lawyer files the application they don't necessarily have to file the default order because the default order is a promulgated form, but what we could do is that applicant has to file at some time the promulgated form for the judge to sign so the judge doesn't have to go create it, and they just sign the form, but that might be it. You send in your promulgated form, you know, so that it matches up with -- that in itself would be the notice that the response date has passed and nobody has filed a response.

HONORABLE DAVID EVANS: But if you want a clerk to do it -- and Richard's analogy to 296 findings in the old procedure, you put it in there real clearly that you're requesting action under Rule of Civil Procedure and that -- and identify it, and the clerk should give notice,

and you get it over to the judge so that they will put it on a calendar, and I DWOP a bunch of these because the applicants do work them out, and I just issue show cause orders of why it shouldn't be DWOPed, and they just go out the door. So a number of these are worked out or lenders decide they don't want to go forward on the property for whatever reason.

HONORABLE TRACY CHRISTOPHER: And if we do change that and go back to the process of the lawyer requesting a default, then we might run -- and sending in the order at that point, then we're going to run into the stale Servicemember's Relief Act affidavit, okay, so I'm kind of opposed to having that filed initially with the petition. I'd really rather have a current Servicemember's Relief Act affidavit filed with the default order so that I know at the time they're seeking the default the person's not in the service.

MR. BASTIAN: Easy enough.

CHAIRMAN BABCOCK: Good. Judge Christopher, do you have any other comments about the --

HONORABLE TRACY CHRISTOPHER: Yes.

HONORABLE STEPHEN YELENOSKY: Well, can I ask you just about that? If we put in a 30-day period for the court to sign, then the servicemember's affidavit could be as old as 30 days by the time you sign.

HONORABLE TRACY CHRISTOPHER: True.

HONORABLE STEPHEN YELENOSKY: So that builds in time there, and my predicate question to that is, is the act intended to protect servicemembers if they have defaulted and then been deployed or to protect them against default when they are deployed? And I don't know the statute, but I don't think it's intended to protect somebody who was here, didn't answer, and then two weeks later is deployed, but if it was, then my question is also don't we have a problem by extending the time period that's on the desk?

HONORABLE TRACY CHRISTOPHER: Well, but the due date is like 38 days and something. You know, I don't know why we ever did a 38 days, but it's a 38-day when they're supposed to answer, so they're not in default until the 38 days has passed.

HONORABLE STEPHEN YELENOSKY: Right.

HONORABLE TRACY CHRISTOPHER: Okay. So, I mean, at that point you send in your default order with a current civil servicemember's affidavit. Then I'll be signing it within the next 20 days. Okay. So at the time he defaulted, he didn't answer, he wasn't in the service, so I think that's okay.

HONORABLE STEPHEN YELENOSKY: Right, and I guess what I'm saying is it's whether they were in the

service up to or proximate to the time of their answer date, not when you happen to -- you know, because suppose they wait and seek a default much later.

HONORABLE TRACY CHRISTOPHER: Well, that's a good question.

CHAIRMAN BABCOCK: Yeah, Richard.

MR. ORSINGER: I'd like to ask a question since I'm not familiar with the numbers here, but have either of you or any of the judges ever had one of these come back where it comes back there truly wasn't notice and someone was thrown out of their house and they didn't find out about the lawsuit until they were thrown out?

HONORABLE DAVID EVANS: I've had contested come back. They don't generally come back to your court because, remember, there's no new trial on these items, but they come back. You see them in other lawsuits where they claim --

HONORABLE STEPHEN YELENOSKY: Wrongful.

HONORABLE DAVID EVANS: Where they attempt to -- and, of course, a lot of people just seek bankruptcy protection, so that's where a lot of it goes, but you do see these come back. Not many, though. I mean, it's rare enough --

MR. ORSINGER: I wonder if there are -- are there instances where the lenders are really simply

denying these people due process and throwing them out of their home, or are they almost always making the effort to give notice, or can we even know?

HONORABLE TRACY CHRISTOPHER: Well, I had one recently, it wasn't an expedited foreclosure, it was a regular foreclosure, where they filed to stop -- they filed for a TRO to stop the foreclosure, and the whole actual notice given was an incredible maze because the attorney who files -- there were like five different entities involved in the giving of notices to the proper -- to the property owner, so you had to like piece together -- there were no certified mail receipts, there were nothing, and no one with personal knowledge to swear, "I actually put in the mail the notice to the guy," so I granted the TRO.

Now, whether that's happened in the expedited foreclosures, I don't know. Certainly in the regular foreclosures we get a lot of tales of -- because these mortgages, they go from hand to hand to hand to hand to hand; and, you know, the property owners will get their little coupon books; and, you know, some of them will say, "I've been sending them according the coupon book." Well, then, you know, the person you're sending it to has since sold the mortgage three or four times down the road; and the person down at the very end says, "Well, you haven't

been paying me." Well, I've been paying mortgage company No. 1, so, I mean, there are issues. A lot of them they're just not paying, but there are some.

HONORABLE DAVID EVANS: We see a number of pro se people appear. They'll file a response. They come in, and they want to talk to somebody about trying to work out the debt, and I want to say that the people that represent the lenders always work with them, never push on the rule to take advantage of them, but we see a fair number of -- I see a fair number of pro ses who file responses, and they claim they can't find somebody to talk to about working out the debt.

CHAIRMAN BABCOCK: Okay.

HONORABLE DAVID EVANS: Now, that's not the default we've been visiting about, but there's a number of them come in.

CHAIRMAN BABCOCK: Judge Christopher, what else? What other comments do you have about the rule?

HONORABLE TRACY CHRISTOPHER: 736.15, the order, this is just I'm supposed to provide a reason why I denied the application, which is fine, but can I just do one reason, or do I have to do all 20 on my checklist? That's all I'm asking. Because I don't want to be -- I mean, I know the understanding behind this is I'm supposed to tell them what they did wrong so they can refile and

correct it.

CHAIRMAN BABCOCK: Right.

HONORABLE TRACY CHRISTOPHER: But, I mean, really, I start going down the checklist and I find one thing wrong, can't I just stop, deny, and say, "Try again"?

CHAIRMAN BABCOCK: Well, the counter to that would be if you've spotted 10 things --

HONORABLE TRACY CHRISTOPHER: No, I'm going to stop at the first one I come to --

CHAIRMAN BABCOCK: Oh, okay.

HONORABLE TRACY CHRISTOPHER: -- that's wrong.

CHAIRMAN BABCOCK: Gotcha.

HONORABLE STEPHEN YELENOSKY: Tommy would say --

MR. ORSINGER: But you get 10 more or nine more.

HONORABLE TRACY CHRISTOPHER: Right.

MR. BASTIAN: Again, I have to be real careful, but if you find something like that, you ought to deny it because until you start denying some of these things and making it somebody accountable when they file it and do it right, then all you're going to get is slop.

HONORABLE STEPHEN YELENOSKY: That's what I

thought you would say, and it's not our obligation to say, "Oh, and here are the other nine that you're going to need to correct." They could come through another nine times and tough to them.

HONORABLE TRACY CHRISTOPHER: Okay.

MR. BASTIAN: I guarantee because the way the mortgage industry is set up, when that lawyer files one of these and gets denied, that lender is going to be on his back or her back, and they will be taking all sorts of flak, and I guarantee the next time they file one of those things they're going to have their act together because they really can't get around it because the way the application is set up they've got to have all their ducks in the row.

CHAIRMAN BABCOCK: Yeah.

MR. BASTIAN: I mean, it tries to make it self-enforcing so that all the ducks are in the row and then if the judge denies it and then they have to come back to the court the second time or third time, that lender client is not going to be hiring that law firm anymore, again the self-enforcing part of it. This rule was designed kind of as a practical behind-the-scenes to make this thing work.

CHAIRMAN BABCOCK: Judge Christopher, next.

HONORABLE TRACY CHRISTOPHER: 736.18, abate

and dismiss.

HONORABLE DAVID PEEPLES: What page?

HONORABLE TRACY CHRISTOPHER: Page 26. Although I understand this is what the rule is now, is there any real reason to abate and dismiss? I mean, can't we just dismiss?

CHAIRMAN BABCOCK: As opposed to abate?

HONORABLE TRACY CHRISTOPHER: Yeah, abate and dismiss. I mean, just dismiss. That's my suggestion on that while we're making changes.

CHAIRMAN BABCOCK: Sounds like a movie.

HONORABLE STEPHEN YELENOSKY: The only thing I would say on that is dismissal, the way I saw that is it's automatically abated without an order of the court. Dismissal is the order of the court that would be signed.

HONORABLE TRACY CHRISTOPHER: Okay. 736.19, the automatically vacated and voiding of an order. I'm a little worried with that, although I understand the process behind it and the idea behind it, that it's a good thing, but first of all, there is nothing in my file that shows when the property is posted for foreclosure. All right. Because if you look back in my order, my order just says you're allowed to post for foreclosure. All right. The actual posting of foreclosure never gets back in my file in connection with this procedure, so there's

really absolutely no way for anyone to know whether the filing of the separate lawsuit or the notice in my application, that the timetable was met, because the actual date of the foreclosure is nowhere in my file.

HONORABLE STEPHEN YELENOSKY: But if you have the order in there and then you have the filing of the lawsuit, one of two things happens, I think, just thinking out loud. It either voids that order by operation of this rule, or it's moot because they already foreclosed before it was filed.

HONORABLE TRACY CHRISTOPHER: Well, I think it could cause problems. Because there's nothing from the face of my file that indicates when the foreclosure happened, and I mean, I --

HONORABLE STEPHEN YELENOSKY: When it happened or when it's scheduled.

HONORABLE TRACY CHRISTOPHER: When it happened or when it's scheduled for, and I just think it's going to cloud people's titles perhaps with this automatic voiding and a missing date.

HONORABLE STEPHEN YELENOSKY: Well, again, if the foreclosure has happened then there will eventually be documents showing that that happened before the lawsuit gets filed because -- and they only happen once a month, right?

MR. BASTIAN: That's exactly right. Once a month.

HONORABLE STEPHEN YELENOSKY: So there would be a document eventually saying, "Well, that happened last month or two or three months ago," and so the filing of this suit under this rule couldn't have been effective because it didn't happen by 5:00 p.m. before that foreclosure that's already happened. The other possibility is the foreclosure hadn't happened yet, in which case there won't be anything except looking forward to the possibility of a foreclosure, and there shouldn't be any foreclosure. I don't see where it's going to cloud title except when it should.

MR. BASTIAN: Plus these orders are only good for 180 days, so that cuts out that staleness where something is sitting here forever and ever.

CHAIRMAN BABCOCK: Judge Evans.

HONORABLE DAVID EVANS: To void the order granting the right to foreclose all the homeowner has to do is file suit and give the notice, then go nonsuit the second lawsuit, and put the lender in the process of refiling.

"Void and automatically vacated," just as a separate matter, if something is void, it's void, and automatically vacated, I don't do anything automatically.

Do you mean that I'm going to sign something automatically? It's this nonsuit problem that we have on final judgments right now. If somebody takes a nonsuit against a party during the middle of a lawsuit and you move on to verdict and you sign the judgment and you don't include the magic language that the nonsuit was granted, which you can't grant anyway, we now get a note back that we don't have a final judgment, and then I've got to sign an order of nonsuit.

HONORABLE TRACY CHRISTOPHER: I mean, this is --

HONORABLE DAVID EVANS: But, I mean, these orders like this one on 736.19 about automatically vacated and dismissed just don't happen. They've got to be submitted and requested.

HONORABLE STEPHEN YELENOSKY: Well, I think that's right. I don't think anything is really added by "automatically vacated." That came from the task force, and I think it says -- and we carried it forward, but "is void" I think does everything that can be done and nothing less, so I'm not wedded to that.

HONORABLE DAVID EVANS: But just remember, the borrower is going to game you because all they've got to do now is file the lawsuit, put the notice in the file, and the order of foreclosure is void.

HONORABLE STEPHEN YELENOSKY: Well, but they can game now by doing the same thing before the order is signed.

HONORABLE DAVID EVANS: I understand, but this is better. This is like filing multiple bankruptcies. If you want it, you got it. They'll just refile it. They'll just have to refile it.

HONORABLE STEPHEN YELENOSKY: Well, Tommy is the one that will suffer that. You worried about that?

MR. BASTIAN: Well, I don't care what we do or what anybody does, it can be gamed. There's going to be somebody that's going to figure it out. But in essence, when somebody has to go file that lawsuit that respondent has to go through the hassle of getting a lawyer or doing it pro se and pay some money, that almost self-enforces that that's not going to happen. They're not going to do that unless they're a real con artist, and the real con artist, you're going to be dealing with them whether it's this or something else.

CHAIRMAN BABCOCK: Judge Christopher, do you have any other comments about that?

HONORABLE TRACY CHRISTOPHER: That's it.

CHAIRMAN BABCOCK: That's terrific insight into this. I had a question, Judge Yelenosky --

HONORABLE STEPHEN YELENOSKY: Yeah.

CHAIRMAN BABCOCK: -- about 736.19, the last paragraph about monetary sanctions.

HONORABLE STEPHEN YELENOSKY: Yes, and that's one where Tommy has a suggestion, but go ahead. What's your --

CHAIRMAN BABCOCK: Well, if he's got a suggestion it's probably better than mine.

HONORABLE STEPHEN YELENOSKY: Well, I don't know, your problem may be different than his.

CHAIRMAN BABCOCK: Well, when you say "monetary sanctions" is that the type of sanctions that we think about for discovery abuse under the civil rules, or is it damage kind of sanctions, or what is meant by "monetary sanctions" there?

HONORABLE STEPHEN YELENOSKY: Well, first, quickly, his proposal was "sanctions to include monetary sanctions" because Tommy doesn't want it limited to monetary sanctions, but the idea was, you know, we had this whole debate, I should just turn to Pete and say, "What does it mean, Pete, on sanctions?" It wasn't intended to be compensatory. It was intended to be sanctions within the meaning of "directed to deter behavior and proportionate to the behavior," that standard. That's all I was thinking of.

CHAIRMAN BABCOCK: Well, who gets the money

if it's money?

HONORABLE STEPHEN YELENOSKY: Yeah, the other side. The other side gets it.

CHAIRMAN BABCOCK: The other side?

HONORABLE STEPHEN YELENOSKY: Yeah. Yeah. That's right.

CHAIRMAN BABCOCK: Tommy.

MR. BASTIAN: The reason I suggested just "sanctions to include monetary sanctions," because the people that would abuse this, they don't have any money to begin with, so having a monetary sanction is not going to do any good. The people that are going to abuse this are going to be the Republic of Texas type folks, and in that particular case where the judge could come in and see a real abuse that they could threaten to put somebody in jail or something like that, because monetary sanctions in the real world really isn't going to work because they're judgment proof.

CHAIRMAN BABCOCK: Okay. And, again, this would be sanctions -- the derivation of the sanctions would be under the Rules of Civil Procedure, or would it be inherent authority or what would it --

HONORABLE STEPHEN YELENOSKY: I don't know the answer to that, but it's one or the other. It's nothing more than that, and although the sanction money

would go to the other side, it's not compensatory. I mean, we have sanctions now that go to the other side, but they're not compensatory.

CHAIRMAN BABCOCK: Okay.

MR. BASTIAN: This is trying to prevent the gamesmanship.

CHAIRMAN BABCOCK: Right. Right. Okay. Well, yeah, Jeff.

MR. BOYD: I just had a question. When I first read new .18 and .19, I read that to be changing the previous version by basically saying because we're no longer going to require actual notice prior to the sale. You just have to make a good faith effort to give notice, and what that raises in my mind is the question -- I'm imagining a scenario where there's a sale tomorrow morning. I'm representing the lender. The borrower files another lawsuit in another venue, files the necessary notice with the court, sends it by -- makes a good faith effort, but I don't get it.

HONORABLE STEPHEN YELENOSKY: Right.

MR. BOYD: I'm going to go forward with the sale tomorrow.

HONORABLE STEPHEN YELENOSKY: Right.

MR. BOYD: What happens now?

HONORABLE STEPHEN YELENOSKY: Yeah, you

clearly have a problem -- I know the task force wrestled with this. We wrestled with it somewhat. Let me back up a little bit. If it's before an order's signed, it's clear under the rule that when you file something it's automatically abated and shall be dismissed --

MR. BOYD: And the order won't get signed.

HONORABLE STEPHEN YELENOSKY: -- and with a notice or whatever, so we start from that. With the order, one of the problems I had with saying it's void if they get actual notice is you can't tell from the record whether it's void. The way it's written here you can tell by comparing -- although your point about you don't know when it's set for foreclosure, that aside, but you can tell when the order was signed and when the lawsuit was filed, and they're in the same case file, presumably right next to one another. You can look at the two and tell if it's void as opposed to having a factual issue where they -- did they get actual notice, determining whether or not an order is void, but, Tommy, you can have that situation, right?

MR. BASTIAN: That's exactly right. And, really, that's why we said the order is void if they file it. I mean, it's void. But we were also trying to track on so you stop the gamesmanship, because what happens is that order is void, nobody told the trustee. They had the

opportunity to tell the trustee. The trustee went on and conducted the sale. Now you have a third party buyer that came in and bought it. The third buyer wants specific performance and everybody's gotten sued. So this was in there basically to put kind of a gun to the head as much as you could to the respondent that you've got to stop that foreclosure sale. You've got to get your lawsuit filed by 5:00 p.m. on Monday. These sales start at 10:00 o'clock on Tuesday. It's always the first Tuesday, so you have that time frame where you can go track down that trustee and stop the sale to keep the other stuff from blowing up.

HONORABLE STEPHEN YELENOSKY: But his question is you've tried in good faith, but you failed, the foreclosure is done to some third party without knowledge. What happens?

MR. BASTIAN: What happens is you're going to have the lawsuit, and somebody is going to come in and say the order was void under this rule. The foreclosure should have never taken place. You've got a specific -- I mean, you're going to have the specific performance fight. I don't know what the answer is. That's why we were trying to put some kind of pressure on the respondent who controls that situation where you maybe as the judge could say, "Okay, you didn't in good faith try to do that. I'm

going to do something to you." Because what happens is in the industry it kind of filters down that Judge Christopher is going to enforce that if you play games, and it doesn't happen -- it happens once and maybe twice and then it doesn't happen again.

MR. BOYD: But I read this, at least as far as .19 is concerned, to be relieving the pressure off the respondent rather than putting pressure, because as it is in the original version, it only voids the order if you actually effect notice before 5:00 p.m. on Monday.

HONORABLE STEPHEN YELENOSKY: That's right.

MR. BOYD: If you try to and aren't successful, sorry, but the order is not void, and now you're saying, well, let's change it to just say all you've got to do is make a good faith effort, and if it doesn't work well -- I mean, it sounds like we're inviting all those lawsuits by taking that pressure off.

MR. BASTIAN: We don't want to take the pressure off. If that's the way it's interpreted, we don't want to take the pressure off the respondent to try to stop that sale if they filed the lawsuit, so maybe it needs to be redrafted a little bit. That's the point. I mean, that provision, that number provision about good faith is trying to prevent a foreclosure sale from going forward. The only person that can control that is the

respondent. We need some kind of mechanism, whatever that mechanism is, to make sure that they get to the trustee or the attorney for the other side to say, "I filed this lawsuit, don't go forward," so you have the consequences of a bad sale.

MR. BOYD: But if you'll look at page 26, line 1158, if I'm looking at the same thing you are, that's the original proposed version, I guess --

MR. BASTIAN: Yes.

MR. BOYD: -- that says it's void only if you file a separate suit and you "deliver a copy to the trustee, substitute trustee, or attorney by hand-delivery, courier, fax, e-mail, or other" -- there's actual service.

HONORABLE STEPHEN YELENOSKY: Or actual notice.

MR. BOYD: Actual notice -- well, yeah, actual notice.

HONORABLE STEPHEN YELENOSKY: Because e-mail --

MR. BOYD: And unless you actually deliver the copy by one of those methods, the order is not void, but then if we skip down to the next page, 27 --

HONORABLE STEPHEN YELENOSKY: No, you're correct, it's different.

MR. BOYD: -- it looks like you're relaxing

that --

HONORABLE STEPHEN YELENOSKY: It is.

MR. BOYD: -- to say, well, you don't have to give actual notice. You just have to make a good faith effort to and that will void it, which seems to me to be inviting those lawsuits, those specific performance.

HONORABLE STEPHEN YELENOSKY: Well, you're right that it does from that version to this version relax it, and some may prefer going back to the other. Part of my problem with the other was having an order voided by something that is clearly -- is going to require a factual determination, did they get notice beforehand or not.

Tommy had also said that -- and correct me if I'm wrong, Tommy -- you and others representing mortgage holders had always felt if a lawsuit were filed, that stopped everything if you found out about it before the order.

MR. BASTIAN: That was the theory.

HONORABLE STEPHEN YELENOSKY: And there was some question at least what the law was -- despite the rule, what the law was as to the effect of filing an affirmative suit before the foreclosure but after the order.

MR. BASTIAN: Yes. It was a little bit ambiguous in the old rule about -- the way the old rule

was written is that -- I've got to sit back here and think.

HONORABLE STEPHEN YELENOSKY: We'll get it for you.

MR. BASTIAN: It was void only if the order had been signed. What we were trying to do is make sure that it went back to the way foreclosure has always been. If you have a complaint about the foreclosure process, you can go file your lawsuit, and you don't have to get embroiled in whether you've lost your house in eviction or something like that. That's what we were trying to -- that's the way we were writing the rule, that that is the way to stop your house from being sold at the courthouse steps on Tuesday, starting at 10:00 o'clock. If you filed that lawsuit like you could have always done in the past, that would stop the foreclosure, and, oh, by the way, if you did that you didn't have to go get a TRO. It was just a matter of filing the lawsuit. That was kind of the quid pro quo going back and forth, the lawsuit.

But, again, what we were trying to do was make sure that pressure was put on the respondent, who control filing that lawsuit, to get it to the trustee to stop the foreclosure sale so that you wouldn't have all of these specific performance, and I guarantee you the foreclosure hounds, is what they're called, they get a

property that they think they're going to get 100,000 or $125,000 then you're going to have a lawsuit on your hands.

HONORABLE STEPHEN YELENOSKY: Well, the other part about the 5:00 o'clock cut-off is it at least enables the foreclosing party on the morning of the foreclosure sale, if they are concerned about it, to check and see if a lawsuit was filed by 5:00 o'clock the day before, assuming they can get to the file. They'd have to be proactive about that, but --

MR. BOYD: If the notice was filed.

HONORABLE STEPHEN YELENOSKY: But it is a policy question as to whether you require actual notice. It does require that it be filed, and to the extent on Tuesday morning you have access to everything that was filed by 5:00 o'clock the day before, you as the foreclosing party can determine whether you can go forward or not.

MR. BOYD: Yeah.

MR. BASTIAN: But that kind of has its flaws, too, because a lot of times that lawsuit may not have been filed in your county. I mean, a lot of times if it was filed in -- it may be filed in another county. I mean, we kind of had to write this rule that it was -- it was the 80 -- 90/10 rule, that it covered 90 percent of

the situations, and if it was an aberration then the judge and the lawyers were just going to have to handle it. That's the way this rule was written. It wasn't written to cover every aberration and every circumstance. It was trying to be a general rule that all of these cases that come through the pipeline -- I mean, she told you how many cases are being filed in her court. I mean, there's a lot of them, and we don't want to have the court system clogged up if you can get 90 percent of those things out where you don't have to worry about it. Then you can focus on that 10 percent in the situation you're talking about. Frankly, I really liked the way the old rule was written that says, "You, Mr. Respondent, have to get something to the trustee or the lender's attorney that says it was filed" because then that stops the gamesmanship, too. That's what we were trying to do, is stop the gamesmanship. I mean, it's probably a combination of both. I mean, that's an example where we could rewrite it maybe.

MR. BOYD: Well, I like the prior version, too, and would recommend that change back for at least .19 because, number one, you're basically talking about a party that's trying to stop something that's already in the works about to happen because of a court order, and I don't -- it doesn't make sense to me to then put it on the

burden of the other party to go make sure you check the filings and see if anything got filed. I mean, if you're going to file something and take those steps then you need to take the final step.

But, number two, you are now allowing for the possibility that a party would go forward with a foreclosure sale under a void order, and yet they have no idea that that order is void.

HONORABLE STEPHEN YELENOSKY: Right, that's possible.

MR. BOYD: You're allowing for that. Number three, you're creating all these issues about what is and isn't good faith and how do you handle sanctions and it seems to me the cleanest way to do it is to say you give actual notice by 5:00 or the order is not void, and so I would think you would just delete that last paragraph about good faith, add a new subsection (3), and bring down the language from the original rule that you took out, the subsection (2) about the third element required, the third step required, is actual notice.

HONORABLE STEPHEN YELENOSKY: Well, would it be actual notice by 5:00 or actual notice prior to the sale?

MR. BOYD: Well, as written it says by 5:00, "If no later than 5:00 p.m. the Monday prior to the posted

foreclosure sale date the respondent," colon, "(1), (2), and (3)."

HONORABLE STEPHEN YELENOSKY: Right. Which means then that you effectively don't have until 5:00 because you've got to get them served by 5:00, or you've got to get them noticed by 5:00.

MR. BASTIAN: For whatever it's worth, we probably spent four hours going around whether it should be Monday at 5:00 p.m. or should it have been the Friday before. That kind of just shows you we tried to move it up as far as we could but still take care of that situation that, okay -- because what really happens in the real world, everybody waits until the last minute.

MR. BOYD: But the other thing you do, is your lender --

MR. BASTIAN: Absolutely.

MR. BOYD: -- up in Dallas sends their substitute trustee on the road at 6:30 a.m. --

MR. BASTIAN: That's exactly right.

MR. BOYD: -- to get here and you wait, and so I would say 5:00 p.m. the day before.

CHAIRMAN BABCOCK: Okay. Judge Christopher has got the last comment, and then we're going to take our afternoon break because our court reporter's fingers are about to fall off. Judge Christopher.

HONORABLE TRACY CHRISTOPHER: I definitely agree that the respondent needs to give notice, because in a normal stopping of foreclosure somebody runs in on Monday or runs in on Tuesday morning and gets a TRO from me, they've got to go find that trustee to stop it --

MR. BOYD: Right.

HONORABLE TRACY CHRISTOPHER: -- and, you know, tag them with it or it's not good, and this just strikes me as leaving all sorts of problems if notice is not required before.

CHAIRMAN BABCOCK: Okay. We're going to take our afternoon break, and when we come back -- hold on for a second, though. When we come back we're going to talk about recusal. We're flipping Item 8 before Item 7, for reasons -- for good and sufficient reasons. The second thing is there is confusion that is my fault about when our next meeting is. It is November 20 and 21 here, not November 13th and 14th. So it's the 20th and the 21st of November, not the prior week, and it will be at the TAB, and now we're on our afternoon break. Thanks.

(Recess from 3:47 p.m. to 4:04 p.m.)

CHAIRMAN BABCOCK: We're back, talking about recusal, and this is a topic, if those veterans of the Supreme Court Advisory Committee will recall, that eight or nine or maybe ten years ago we went through recusal and

disqualification at some length and some detail and sent a proposal to the Court that was not acted upon because at some point in time *Republican Party of Minnesota vs. White* came along, which convinced people that maybe the recusal rules needed to take that into account, and now we have the Caperton decision involving campaign finance, which we tried to anticipate in our proposals or our recommendations last time, and the ever-present -- the omnipresent recodification draft had some thoughts about recusal. So pulling all this together is the -- one of the oldest veterans of this committee, Richard Orsinger, and he's going to lead our way out of the maze.

MR. ORSINGER: Okay. The assignment was actually a narrow assignment to consider the situation of our recusal rule under the Supreme Court decision in *Caperton vs. Massey Coal Company* that found that there was a 14th Amendment requirement that a justice on the West Virginia court of appeals recuse himself; but in the ensuing discussions and analysis it was apparent that we needed to kind of recapitulate what this committee has done before, to have that context in our present discussions.

And as Chip pointed out, the prior work on the committee was scattered in time and space; and it took the effort of a lot of people to reconstruct this, but

basically, there's a memo, like 65-page memo, that gathers together these constituent parts to put them together to make it easy to analyze; and I'm going to go through the introduction by going through the memo and telling you what's there. Some of you may have read it. I'm sure most of you have not, and I'm going to try to cut the explanation short just so we can start hearing some comment, but the very first thing to look at is the present grounds for recusal, which are cited there on page four, and then the so-called recodification draft, which was a multiyear effort on the part of the subcommittee led by Professor Dorsaneo and with the participation of Chief Justice Guittard and others that were on the committee at that time, to restructure the rules in a more rational way and to use modernized language and to be more accurate about what the rules said.

And, for example, those of us who have studied it, or maybe those of you who have not, know that disqualification is a condition that exists under the Texas Constitution, but recusal are grounds that exist under case law, statute, or rule, and they actually do different things, and they do them differently, and our existing rule mixed them up a little bit. You know, a disqualification under Supreme Court interpretations, the Constitution's listing of grounds is complete and

exclusive, can't add to, can't take from, an act by a disqualified judge is void. None of that's true with recusals. Recusals are something that you have to ask for or you waive. The things that the judge does up to the point that they're recused are not necessarily invalid, and so there are differences.

So the recodification draft broke a few that were combined -- a few grounds for recusal that were combined and should have been stated separately, reoriented a few, and made clear that certain grounds were disqualification grounds and others were recusal grounds. I lay that out there just because a lot of hard work for good people were put into that.

Then on item 3 are the suggestions that this committee made in 2001, so that was eight years ago, but the process began before that, so it's probably been at least two, maybe three committee cycles since we evaluated that, and if you'll look on page five you'll see what this committee eventually ended up doing, and I have attached as an exhibit the actual technical document that was sent, but the bottom line is, at the time the committee was concerned about two things, about recusing a judge where the opposing lawyer or his law firm was representing the judge, a judge's spouse, or a judge's child in current litigation, other than in their capacity as a public

attorney, like a district attorney or something, attorney general.

And just to recapitulate the long discussion, I think this recommendation came from a task force that if the lawyer on the other side was close enough to the judge that they were representing their family in personal litigation, that it would be better if the judge didn't hear cases while that representation was going on. That language was fought over, it was voted over, it was included in the recommendation, and it went to the Supreme Court back in 2001.

The other subject had to do with excess campaign contributions, and it was a way to codify, only it was in a rule, the Judicial Campaign Fairness Act, which had been enacted by the Texas Legislature, that said specific cash limitations on -- or I should say specific dollar limitations on the amount of contributions that could be made to judicial campaigns, and I am not an expert in that, and I do think that experts are necessary if you're going to get into the real details of it, so if I say something wrong, I apologize, if someone here knows better, but the Judicial Campaign Fairness Act essentially caps the contributions that individual lawyers or their law firms or close members of their family can make to specific campaigns, and it also attempts to have

aggregation rules for members of a law firm, and it also attempts to control political action committees that are affiliated with law firms in an effort to try to put some restraint on the amount of money that individuals or a particular law firm can put into a judicial race.

Now, I wasn't particularly able to discern any serious enforcement mechanism built into the statute, and when we were first -- originally, I should say, debating this recusal rule, some of what I heard or maybe the committee heard publicly was from members of the House of Representatives, saying that "Wait a minute, I voted for these caps because there was no serious enforcement mechanism, and now you guys are coming in and you're saying that you can recuse somebody for violating these, and I would have never voted for them in the first place." So it was obvious that we had gotten into a political issue there, but at any rate, what this committee did at the time was to propose that there would be a specific ground of recusal if a judge accepted a campaign contribution in excess of what the Judicial Campaign Fairness Act permitted and did not return the excess contribution as provided in the statute.

And the statute has a mechanism that, gosh, you know, judges will not know, they get their contributions in different reporting periods. They won't

necessarily know that someone has overcontributed, and they find out, and they have a grace period to return the money, and it's no harm, no foul, and that was built into the recusal rule, but the bottom line was that the statute has a specific monetary limit, it's a bright line, and under this proposed rule if you cross the bright line, what happened was that anybody on the other side of you could recuse the judge in a case involving you or your law firm for the remainder of that judicial term that the contribution related to. So that's a very severe disincentive to making contributions in excess of the statutory limit.

The other enforcement mechanism, which I want to thank Bob Pemberton for reminding me about this morning, is on the very last -- page 68 of this packet, is Canon 5 of the Texas Code of Judicial Conduct about inappropriate political activity, and subdivision (4) of that canon says, "A judge or judicial candidate subject to the Judicial Campaign Fairness Act shall not knowingly commit an act for which he or she knows the act imposes a penalty. Contributions returned in accordance with section 253," so-and-so, "of the act are not a violation of this paragraph." So it appears to me -- and Justice Hecht or others whose memory or awareness is better than mine -- that this was an effort to say that a judge who

accepted a political contribution in excess of the statutory caps could be subject to sanction from the Judicial Conduct Commission. Did I say that right, Judge?

HONORABLE NATHAN HECHT: Yes.

MR. ORSINGER: Okay. So we've got a statutory limit. It is a bright line. We have the Supreme Court adopting a Code of Judicial Conduct that says a judge can be anywhere from private reprimand all the way up for taking and keeping contributions in excess of the statutory limit, and we had a recommendation from this committee that if that limit was exceeded that it would be grounds for recusal, not some subjective issue or some debate over how much is too much or how much is overwhelming. It was a bright line. If you're a dollar over that, they're recused. That was where we were in 2001. At the time the campaign limitations were new, the limits, the constitutional limits, on controlling spending were kind of in flux, and it's my understanding the Supreme Court decided not to take action on those rule recommendations at that time.

Much time has passed, we've had a number of campaigns under the statute. We've had some more constitutional litigation. Unfortunately there is some right now in the U.S. Supreme Court. There is some constitutional litigation on spending in campaigns

involving the notorious or infamous film about Hillary Clinton and whatnot, and we'll probably get some more U.S. Supreme Court wisdom on the degree to which the government can attempt to limit the amount of money that's spent on campaigns. Be that as it may, we've already made a recommendation one time that contained a bright line.

Now then, when we come along, the ABA model Code of Judicial Conduct came out in 2002 -- 2007, and you'll see that on page seven, paragraph 10, regarding contributions; and mind you, the ABA is operating in an environment of some states that don't have any articulated standards for recusal. Some states have statutory standards for recusal, and a number of states have adopted their Code of Judicial Conduct as a more or less approximation of when recusal is appropriate, and the component of that relating to the campaign, you'll see there at the bottom of page seven, this 2007 model code says that a judge should disqualify -- we would use the word "recusal" here in Texas because of our constitutional concept of disqualification, judge shall recuse any time the judge's impartiality might be questioned. We already say "might reasonably be questioned," and they list a number of circumstances, and they include No. (4), "When the judge knows or learns by means of a timely motion that a party, party's lawyer, or law firm of the party's lawyer

has within the previous" -- and then you insert a number of years -- "made aggregate contributions to the judge's campaign in an amount that is greater than" and you insert a dollar amount.

So the ABA recommendation, which is attached as Exhibit 6, which is on page -- my exhibit numbers got dropped off the left. ABA model code is on page 44. They're actually out there as a model for the whole country suggesting a bright line test -- look on page 44, Carl.

HONORABLE JAN PATTERSON: 43.

MR. RODRIGUEZ: 43.

MR. ORSINGER: 43? I apologize, look on page 43. And they're proposing a bright line test. In Texas we already have kind of a generic statement, two actually. We have a so-called subjective test and we have an objective test. The subjective test is recusal when the judge has a personal bias or prejudice concerning the subject matter of the party, and that is a standard that involves this particular judge and how they actually think and feel. So if you're litigating recusal under that ground, you're talking about "This judge has a bias and I allege that I can prove it."

(a), 18b(2)(a) is if the judge's impartiality might reasonably be questioned. That's an

objective test. It has nothing to do with the individual judge. You don't go into their thinking or what they said or what they wrote. You take a third party observer, and you assess the facts and then decide whether a third party reasonably could question their impartiality, so I say it's objective because it doesn't depend on the thinking of the judge. Subjective test does depend on the thinking of the judge. So we have both the objective and the subjective test already built into our law, but the former committee recommendation was a bright line as far as contributions were concerned.

The ABA suggestion was a bright line as far as contributions is concerned, and that brings us to page eight, paragraph 11, the *Caperton vs. Massey* case explained in detail in the back, but just as a thumbnail sketch, this defendant was found liable for fraudulent behavior and given a large -- suffered a large monetary judgment. At that time as the case was moving out of the trial court to the intermediate appellate court there was a Supreme Court of West Virginia campaign that was going on that was very controversial, and there was an independent political campaign committee that was created to campaign against an incumbent. They raised a lot of money, and they spent a lot of money. They spent two-thirds of the money, I think, that was spent on that

particular campaign was spent by that one committee, and it was running, if you will, attack ads against the incumbent judge.

And Judge Caperton was the new candidate, the one who was trying to take over that position, so he benefited indirectly by this advertising campaign, but the advertising campaign was not for him. It did not mention his name. It was not run by him. It did not consult him on any expenditures. It was out there to get rid of the incumbent, and he just happened to be the challenger. So this money got pumped into this campaign while this case was in the trial court level, and the election came out in favor of the challenger replacing the incumbent, and then the case moves up the appellate ladder, and it gets to the West Virginia Supreme Court, and they split in a five to four vote, and they overturned this large judgment against this defendant for their allegedly fraudulent behavior, and there was dissenting opinion that was signed by two justices that was very critical of the potential of influence over Judge Caperton's vote.

There was a motion to recuse that was filed by the party that was opposing Massey Coal Company, and then under their procedure Judge Caperton decided his own recusal motion, and he wrote a couple of opinions on it, and they are thoughtfully written, so those of us who look

at it probably think the situation is a very bad situation, but if you look at it, he did articulate defensible grounds for why he should stay in the case.

Part of the problem was, though, the influence of this company overall on the court, and this decision came down five-four. There was a motion for rehearing. There was another motion for recusal, and a couple of these judges, one in particular, called this issue of the influence of the campaign contribution on the court a cancer on the court. He was so strong in the media that he decided to recuse himself. He was in the minority. He was in favor of not overturning the verdict. He felt like his impartiality could be reasonably questioned and so he recused himself. He was in the minority.

While the rehearing was pending a photograph surfaced on the internet that appeared to show the president of the defendant company on his yacht off the coast of France with the president -- with the Chief Justice of the West Virginia Supreme Court sharing an alcoholic beverage, and that created a very large public reaction, and so the chief justice recused himself. So we now had two judges, one in the majority, one in the minority, that have recused themselves. The remaining judges somehow -- I have never understood how -- ended up

with Judge Caperton became the acting chief justice. Even though he was the junior judge, after all these recusals he was now the acting chief justice, so he picked the two replacements for the recusing judges, and they had another vote, and lo and behold, the verdict was still overturned.

So this went all the way to the U.S. Supreme Court, and in a five-four decision a majority of the Supreme Court said that due process of law required that Justice Caperton not participate in the decision, and the Supreme Court of the United States, none of the justices really paid attention to the fact that these were not campaign contributions to Judge Caperton or to his campaign committee. It was to another political committee. Now, maybe that's a ruse or maybe that's not a ruse, but we're talking about millions of dollars of contribution that probably had a dominant effect on the outcome of the case.

So the U.S. Supreme Court majority said when it's so extreme, the money is so dominant, and you can so clearly tie an election to the political contributions, that the objective test would support or even require a recusal, and they went way out of their way to say, "We're not accusing Judge Caperton of any kind of bias or that he's dishonest in any way or that he was, in fact, influenced. We're just saying when the money is that big

and that prominent, that an objective test would require recusal." So that's really what prompted the referral to the subcommittee, and we have that in the context of the work that we've already done, and let me go on briefly and touch on one other topic.

Since we are examining the recusal rule, we probably should -- and I think we have the permission from Justice Hecht to consider the old issue of *Republican Party of Minnesota vs. White*, where the kind of conventional canons of ethics prohibited judges from making -- not only making promises on the campaign trail, but even expressing really strong opinions on issues that were going to come before them. It used to be prohibited. Well, in a five-four decision in *Minnesota vs. White*, the U.S. Supreme Court says, no, that's regulation of speech based on content, it goes to a core of a First Amendment freedom which is knowing who to vote for in judicial elections, didn't pass constitutional muster.

Shortly after that a candidate for the Texas Supreme Court, Stephen Wayne Smith, filed a lawsuit to have the Code of Judicial Conduct in Texas declared unconstitutional as to its regulation of speech, and the Federal district Judge Nowlin here in Austin actually did declare that. If I have my sequencing right, I think the Supreme Court of Texas very quickly issued a replacement

Canon 5, which eliminated the prohibition on issue speeches during the campaign. Justice Hecht wrote kind of a concurring statement to this order, which is on page 13, in which he discusses the significance of the concern about how to balance maintaining a perception of the impartiality of the judiciary against protecting the First Amendment freedoms of speech and other core issues, and so Justice Hecht said, "I join with the code amendments approved today, although I remain in doubt whether they're sufficient to comply with the First Amendment."

Now then, the revised provision is set out here on page 14, and it's much looser, but if you look at the existing Canon 5 of the Code of Professional Responsibility -- or pardon me, the Code of Judicial Conduct, which is the last page in this packet, page 69, you'll see that there's sort of a comment at the end of the code, Canon 5, which includes this, if you will, loose restriction on what judges say while they're running for office, and this is a comment in our canon and it says, "A statement made during a campaign for judicial office, whether or not prohibited by this canon may cause a judge's impartiality to be reasonably questioned in the context of a particular case and may result in recusal."

Now, that should go without saying, but it's actually been said that there's some things you can say on

the campaign trail that maybe we can't prohibit it because of the First Amendment, but if you say them, you may be reflecting a perception or a predisposition as a judge that people could reasonably question your impartiality. So as long as we're examining the recusal rule we should consider if the Code of Judicial Conduct says there's certain points at which you go too far you can be recused, do we just want to leave it there in the Code of Judicial Conduct, or do we want to mention it as a ground for recusal, or do we want to put it in a comment to Rule 18b? Do we just leave it alone?

And the last thing I want to say is that --

CHAIRMAN BABCOCK: Before you go on to that, Richard, I should say parenthetically I think it was Justice Kennedy in the White case that raised the issue of recusal based on comments of judges running for elective office, and it was Kennedy, of course, who was the majority writer in Caperton.

MR. ORSINGER: Right. And for those who have read Kennedy's writings on this subject, he also I think espouses the view that you can't regulate the content of speech at all, or you can't regulate speech based on content, which is probably why his picture is on your credenza. But at any rate --

CHAIRMAN BABCOCK: The Canon 5, which was

revised by the Court shortly after White but not before Judge Nowlin ruled, was the subject of a task force, and the task force was split on whether the so-called promises clause, which is Canon 5, 5(1)(i), is constitutional or not, and I think Justice Hecht's concurring note was a tip of the hat to that dispute.

MR. ORSINGER: Okay.

CHAIRMAN BABCOCK: About the constitutionality of the promises.

MR. ORSINGER: If we purport to get into that in the recusal rule we will be treading on that very sensitive ground.

CHAIRMAN BABCOCK: Right.

MR. ORSINGER: So if we can keep that we might could save ourselves a couple of weeks of debate if we just decide not to do that. The last thing I want to say is while all of this was on -- they brought the patient in for examination and we started seeing more and more stuff. The presiding judges, the presiding administrative judges who have to do this for a living, it's -- they probably have to do as many of these as Judge Christopher has to look at those foreclosure papers. Some of them I understand get one or two a day in their administrative district, and they have really dealt with this.

We amended our procedures. Part of it was pushed on us by Senator Harris passing a bill about tertiary recusals. You may remember that, Chip. So we had to change up the procedures about 10 years ago, and we now had a track record, and I think we even have some statistical information that has come to us from the administrative judges, and they have some very important recommendations to make, not about the grounds for recusal, but about ways that we can tweak the process so that it makes it not only does it guarantee the kind of due process of law, but it also allows the system to move forward effectively in the face of people that are constantly filing or maybe excessively filing these recusals, and so part of our discussion I think needs to include the proposals that the Council of Presiding Judges have, and they're concrete. They have proposed sample language. It was not in the memo that I e-mailed out because it wasn't ready to go until this week, but it is in the package over there, and they look to me to be very valid. I think they're backed up by all those administrative judges who have the last responsibility for this, and so we're proposing that those also be contemplated.

CHAIRMAN BABCOCK: Richard, one thing in your memo, my pages printed out with different numbers

than yours, so I'll just say it was under the common law, no recusal for campaign contribution.

MR. ORSINGER: Okay.

CHAIRMAN BABCOCK: And you cited three intermediate appellate decisions, one from El Paso, one from Dallas, and one from San Antonio, saying Texas courts have rejected the argument that campaign contributions can be used to establish a bias that would warrant recusal, and my question is, has the Supreme Court never ruled on that? Because my recollection was there was an old Texas Supreme Court case that held the same thing. Am I wrong about that?

MR. ORSINGER: I don't know. I didn't see it cited in those cases, and when the cases came down they were all resolved not -- at the time that they were decided, which I was practicing and watching, one of them was a San Antonio case, they didn't cite to Supreme Court precedence so much, I think, so --

CHAIRMAN BABCOCK: They would have, if there was some.

MR. ORSINGER: -- it may be out there, and I just don't know about it.

CHAIRMAN BABCOCK: Well, nevertheless, there is this line of cases that say you don't consider campaign contributions, and that would seem to run afoul of the

Caperton decision, I would think.

MR. ORSINGER: Well, and just so you know the context, at the time those cases were decided was the period of time when the politics in democrat -- in Texas was shifting from Democrat to Republican, and particularly there were large campaign contributions to Texas Supreme Court races and to court of appeals races, and there was even an investigation in the Texas Senate related to that, and there was a lot of controversy, and I'm not entirely sure that that controversy isn't what led to the legislation that we now have, because the Texaco case came out, and there were accusations on the national scale that justice was for sale in Texas and whatnot.

And so there were very hefty political contributions back in those days in the 1980s, and in my personal opinion it led to the pendulum swinging the other way to now we have regulations in place, but at any rate, those cases came out, and those recusals were made at a time when individual law firms could dominate a court of appeals race by a single contribution, and there was no price to pay to anybody. So --

CHAIRMAN BABCOCK: Okay. Yeah, Pete.

MR. SCHENKKAN: I don't mean to go back to look at the three that Richard cited, but one of the other cases, again at the intermediate appellate court level, as

Richard says, comes from that era, 1983, 1984, is the River Road case out of the Fourth Court of Appeals, and it involved Clinton Manges, who in those days was writing really, really, really big checks, and the facts of that particular case and recited by the San Antonio court of appeals were that Manges -- and I forget who the other party was who was the co-owner of this enterprise, Sports Enterprises something or other, that was a party to the case.

One of them Manges had written checks totaling 21 percent of the judge's contributions, and the other one had written the checks totaling 17 percent of the other appellate -- it was an appellate judge recusal -- contributions and held that's not a standard for recusal because the Texas Constitution doesn't list it, and if that's the ground in these other cases as well, clearly that falls under *Caperton vs. Massey*, because if it's a Federal due process issue, we don't care that it's not mentioned in the Texas constitutional list of grounds. So you have to at least move on to the issue of do we want to do anything in our rules about the Caperton issue. The fact that these intermediate courts said so if they said it on similar grounds is neither here nor there.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: Before we kind of jump off

the abyss into the recusal issue, whether we're talking about recusal on the basis of campaign contribution or recusal on the basis of the judge's political statement that's kind of issue bias, which is a completely different thing, I'd like maybe some guidance. You know, are we supposed to simply take the existing recusal -- the proposed recusal rule that's been pending before the Court and build on it, which is one thing, or do we just need maybe to write a stand-alone rule to deal with Caperton, which would be a somewhat different thing and maybe simpler, and maybe we need some guidance on that.

HONORABLE NATHAN HECHT: Well, no, I think we should look at the whole panoply of issues that Richard has outlined, including the White issues. It's just Caperton that's brought it to a head, and it was not so clear in the past that it was a good idea in a state that holds ardently to the election of judges, despite the best efforts of lots of people to shake them of those convictions, it was not clear that it was a good idea to make it a grounds for recusal or for it to even be a consideration, but I think after Caperton the public and the judiciary want a re-examination of that.

I doubt that Caperton is more than a one-shot deal. The judges sort of indicated that themselves. Chief Justice Roberts said maybe this is just

a one-shot deal, you know, and it's just something that is so unusual. I don't know if it was Justice Frankfort called it a one-way ticket, the train is never coming back, but we don't know that, and now that I think people see the problem again and are more inclined to think about it in this new light it's a good time to revisit the rule.

And we have White, and at first the question was, is this really going to change anything as a practical matter, and as time has passed you can see it changes some things, and maybe not so much, but again, it's a time to look at that again, and meanwhile, we have the concerns of the presiding judges that procedurally we need to take a look at how it works. So I think it's time to -- I think the Court thinks -- well, I know they think that it's time to look at it top to bottom and get the best advice on this subject.

We do that with some reluctance because when I was practicing law, now too many years ago, you never filed a motion to recuse because might as well apply to the Bar in some other state if you were going to move to recuse a judge, but those days are over, and now there are lots of motions to recuse. So I think there's some sentiment we don't want to encourage this practice by talking about it. The more you talk about it, the more people think, "Ah, a brand new rule, that's great, let me

see how many times I can use it," and so you're sort of hesitant to do that.

On the other hand, again, the world has changed, and maybe we should think more carefully about cases in which judges should recuse, and so I think we have to take that into consideration and, again, in a state that elects judges and is going to elect judges obviously the rest of my life and maybe forever, and how does that -- how can we make that fit together in a good way. So my colleagues were interested in a top to bottom relook at the subject.

MR. ORSINGER: Chip, I need to correct the record in my description. I said Judge Caperton, and that was the litigant. It was Judge Benjamin who was the judge who didn't recuse himself, and I misspoke, so I would like to retroactively change the name.

HONORABLE NATHAN HECHT: And the West Virginia court was three to two. There are only five judges on the West Virginia court.

CHAIRMAN BABCOCK: Did he screw anything else up? Roger.

MR. ORSINGER: That's probably at least a passing grade, isn't it?

CHAIRMAN BABCOCK: Yeah, right. Two out of 20 wrong.

MR. HUGHES: Well, yesterday DRI had a webcast on the Caperton decision, and in listening to it I was reminded what my procedure professor, Gus Hodges, used to say, "An appearance of fairness is everything," and one of the things that several of the speakers touched upon was that West Virginia literally had no procedures in place, that each of the judges -- that they just followed a practice of deciding their own motions. They had no procedures in place for handling this, and I think if anything we would do best to reinforce the procedures for handling the motions that we've got first, because by having a procedure in place and having rules I think we have gone a long way towards making the whole system look fair.

I think part of what -- a great deal of what contributed to the apparent unfairness of what went on in Virginia -- and I say "apparent" because the Supreme Court went out of its way in its opinion to say that they were looking at this objectively rather than passing upon the subjective or actual personal biases that might have been at issue, is that they just didn't have anything in place. They had no rules, and it just lent itself to a bad -- a situation where the public could say, "Well, you're just making this thing up as you go along, and that was very unfair," and of course, you had an unprecedented situation

where almost half of the money spent to unseat the opponent and help Judge Benjamin came from one litigant and that all that money was given after the litigant had suffered a huge verdict that was destined to go to that court.

So personally I think beefing up the procedural rules for handling the motions would go a long way. I'm concerned about trying to address the grounds for recusal because right now there is that decision that's been argued twice before the Supreme Court, and at the last oral argument several justices indicated that they're willing to go back and examine fundamental assumptions about whether you can regulate campaign expenditures at all, and if that's going to be the law then it's -- then truly we are in a new world, and we would have to look at it not merely from the point of view of an expression of bias, but if you're going to have a bright line rule that says, "Give more than this to a judge and that judge can never sit on your case," there may be First Amendment problems we haven't even dreamed of yet.

CHAIRMAN BABCOCK: Yeah, and it's further complicated by the fact that Kennedy's concurrence -- or I think it was concurrence or at least he wrote an opinion in White, was that there are less restrictive alternatives

to a prohibition on speech through the canons, and so that it would be a First Amendment-friendly thing to have recusal as opposed to preventing judges from speaking, and that plays into -- you're quite right that the Court may well rule in favor of the filmmakers in the Hillary case on First Amendment grounds, which would have the effect of invalidating portions of the finance act, and they may be going in that direction, but it's not clear that recusal would be First Amendment-friendly or First Amendment-unfriendly.

MR. HUGHES: Exactly.

CHAIRMAN BABCOCK: So Judge Christopher.

HONORABLE TRACY CHRISTOPHER: Richard, do we have any idea on how many judges don't comply with the Judicial Campaign Fairness Act? Because I get the impression that most judges do. I could be wrong, but --

MR. ORSINGER: It's been my experience, but I don't have any statistics. I don't know if anyone here knows.

HONORABLE NATHAN HECHT: You don't have to if the other side doesn't.

HONORABLE TRACY CHRISTOPHER: Right.

HONORABLE NATHAN HECHT: And I don't know how often that happens.

MR. ORSINGER: I would bet you that they

have that statistic. Don't you think they would keep track of that?

HONORABLE NATHAN HECHT: I don't know who would, because --

CHAIRMAN BABCOCK: Who is they?

MR. ORSINGER: The election --

HONORABLE NATHAN HECHT: You have to sign a statement that you will, and if your opponent won't agree to it then you don't have to agree to it, and -- but whether anybody keeps track of it, I don't know.

CHAIRMAN BABCOCK: Pete. Or, Judge Yelenosky, did you have your hand up?

MR. SCHENKKAN: I think that looking at, you know, how the judicial campaign contribution standards work is certainly worth looking at, but it is not the problem in *Caperton vs. Massey,* and it is a problem that could occur in Texas as well, perfectly legally even if both candidates to a particular judicial campaign fully subscribed to and complied with our rules, because the main thing that happened in *Caperton vs. Massey* is that Massey or the CEO spent $2.5 million of the $3 million that -- and for the sake of the kids spent attacking Judge Benjamin's opponent, and because those were not contributions to Justice Benjamin, if Justice Benjamin had been a Texas justice he would not have been in any

violation. He would not have been receiving any campaign contributions by the Texas equivalent of the Massey Corporation CEO writing a 2.5 million-dollar to a PAC that spends $3 million to beating his opponent, and, you know, I think it is a separate question. I agree completely with the comments. The separate question is there -- is the game worth the candle of getting in there and trying to make a substantive rule for this situation. Maybe not, but it could arise in Texas, and the Judicial Campaign Fairness Act doesn't solve it.

HONORABLE NATHAN HECHT: That reminded me of one more thing, and what you said reminded me of one more thing, but we are also interested in exhaustively looking at this because I think that it is likely that it will receive legislative attention in the next few years, and we should know what the best ideas are to be able to inform that process as well. There was a bill, of course, this last session that would have required recusal of any judge on the Supreme Court or the Court of Criminal Appeals who had received I think it was a thousand dollars from a lawyer, law firm, party, party's employee, PAC, or anybody associated with them during the last four years, which we were all for, because we could just go on vacation now, and that would be the end of it. It was a great way to use visiting judges, but I just say that to

indicate that having dipped their toe in once they may come again, and so like the offer of judgment rule and other things that we've worked on in the past, we need to be thoroughly acquainted with this whole set of issues.

The second thing is that recusal is not a magic wand, and Chip says it may be First Amendment-friendly or it may not be, and there -- another side to that, too, is that judges have some duty and would probably argue some right to sit on the cases that they've been elected to hear, and a imposition on that because of something they've said is not necessarily -- it doesn't foster free speech. It may be viewed as curtailing it, and we're not going to let you do your job because you exercised your First Amendment rights. So it's -- it is a very delicate issue on all sides. There's no easy way to just go in and say, oh, well, this, this, this, and we're done.

CHAIRMAN BABCOCK: Yeah, Frank.

MR. GILSTRAP: Well, I think we've got to separate out pretty clearly this issue bias problem that's in White. I mean, you know, when a guy says, "Elect me because I think child molestation should be punished in Draconian fashions" and then he's elected and then the defendant says, "You've got to be recused because you want to punish the alleged crime in Draconian fashions," that's

a lot different from campaign contributions, which I think are in that way a lot simpler, so I think maybe we need to kind of break the two apart.

On the campaign contributions it seems like almost anything we do would meet the standard of White. I mean, you know, having a judge -- another judge consider the recusal motion would go a long way. I don't think that was the case in White.

CHAIRMAN BABCOCK: Caperton you mean.

MR. GILSTRAP: I'm sorry, Caperton. The judge considered his own recusal motion. We've got a standard in Texas, like $5,000 for an appellate judge, I think you can't give more than that. Well, if we're going to adopt a bright line rule, it seems to me it has to be that number. I mean, we're not going to say, "Well, $5,000 is required by the statute, but you're not going to have to recuse unless you get 10,000." I mean, it seems to me that if you're going to pick a bright line it's got to be that number. So that actually might be a fairly simple way to approach it, say, "Look, this is if number and if you give more than that, you have to -- you can be recused," and that's the end of it.

CHAIRMAN BABCOCK: Yeah, the -- one of the things from our last debate, for those of you who weren't here, which is a lot of you, that we got some push back

from the Legislature when we were debating having different levels than what the Legislature had created, and the thought was that we were just really legislating. If they said 5 and we said 10, well, wait a minute, where are you getting 10 from? Or if we said two, where are you getting two from? So there's that issue. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, I just wanted to ask you, Chip, since it's your area of expertise, when you referred to the pending case in the U.S. Supreme Court involving the Clinton film --

CHAIRMAN BABCOCK: Yeah.

HONORABLE STEPHEN YELENOSKY: Whatever they do on that isn't necessarily going to be dispositive of the question of limits on campaign contributions for judges, is it? Because there's an -- obviously there's a different state interest involved; is that right?

CHAIRMAN BABCOCK: That's right.

MR. ORSINGER: Well, it depends on which justice you're talking about, I might say, because for some of these people content regulation has no justification, and you've got a lot of different opinions written by these people, and their perspectives are individual, so I'm not entirely sure that we have a pass to do something different on judges than what they do for

campaigns in general.

CHAIRMAN BABCOCK: I think that's right, but the holding in the case, whichever way it goes, can't directly impact what judges accept.

MR. ORSINGER: Yeah, but we need to read the opinions, because the more those guys gravitate toward a First Amendment prohibits state impairment or even Federal government legislative impairment on campaign spending, the closer they're getting to what we're doing.

HONORABLE STEPHEN YELENOSKY: We have to read the opinions?

MR. ORSINGER: Yeah.

HONORABLE STEPHEN YELENOSKY: There's a little syllabus at the beginning.

CHAIRMAN BABCOCK: Well, and, I mean, Scalia wrote White, and he dissented in Caperton, so it's not crystal clear what the individual judges' thoughts are about this.

MR. ORSINGER: No, right.

CHAIRMAN BABCOCK: Roger.

MR. HUGHES: The other thing is, and I'm just not sure I like a bright line dollar rule because it just seems to me there are numerous ways to get around that. One of the ones they discussed yesterday is something in the valley -- well, not in the Valley, in a

lot of places. What about the person who doesn't actually dig into their own pocket, they just call 10 people, each one of whom comes up with $5,000, and then they give him -- they give that person the check, and they're delivered. They're not his checks or her checks, but judge so-and-so knows that that person -- you call that person, that person can get you a hundred thousand dollars in donations all in small bills, or small checks.

CHAIRMAN BABCOCK: Never hurts.

MR. HUGHES: And, you know, is that kind of brokerage going to be -- I mean, what I see is with a bright line tied to the statute, which I think it has its own problems, you run the risk of being both underinclusive and overinclusive. The underinclusive is what about the people who are brokers? You know, they are the ones who are going to scare them up for you.

And then the other thing was in Caperton was -- and why the issue ended up being an objective how much dollars was, is the issue was originally framed that Benjamin owed a debt of gratitude to the coal company in that case, and they kept pitching it on the basis that it was a debt of gratitude. Well, one of the things I heard argued is, well, you know, debts of gratitude can come from all sorts of ways, one of which is many judges first enter office by appointment, then to stand election.

Well, are we going to go looking for the debts of gratitude to the big supporters who dropped the right words in certain politicians' ears to make sure that that person's application would be more favorably looked at or considered? Is that also going to be it? Because, like I said, that's kind of like the equivalent of the person you call to get all those small checks. Well, what about the person you call to get -- you know, to get in to have an appointment, to be even considered for an appointment. Are we going to consider that as well along with it, or are we just going to do it on a dollar basis? That's one of the problems I see with it.

CHAIRMAN BABCOCK: Yeah. Good point. What else? Frank's looking at his watch. Pete.

MR. SCHENKKAN: On the process point, I really don't think we can make a rule on the substance of this, because you have to deal with bundlers and you have to deal with the independent PACs that are attacking the opponent, and you can't do either, subject to check, but probably you can't do either, except take the case up when it comes on its facts and see if the ticket doesn't turn out to be just for this day and this train only, but to be for one other train and one other day, but you can look at the process, and I guess can we get a reality check on that?

I thought that we've solved the issue of the process at the trial court level by putting it in the presiding judge's hands, and we've solved it at the court of appeals level by saying that if the judge doesn't recuse himself then it's up to the remainder of the judges of that court sitting en banc without him or her participating. I'm not -- is there more that needs to be done on the process level or have we done what we can?

CHAIRMAN BABCOCK: Well, that's the question. I mean, if Caperton had been a Texas litigant instead of a West Virginia litigant and had presented the same fact pattern, could he have obtained recusal under our current rules? Judge Peeples, you deal with this all the time.

HONORABLE DAVID PEEPLES: Well, he was on an appellate court, so, you know, the rest of the court would decide it in this state.

CHAIRMAN BABCOCK: So this procedure would have been different.

HONORABLE DAVID PEEPLES: But as a trial judge, an outside judge would have been appointed and would have applied the standard of impartiality might reasonably be questioned. And a judge in the Valley was recused about a month ago for taking much less than two and a half million dollars or whatever it was.

CHAIRMAN BABCOCK: Under our current structure.

HONORABLE DAVID PEEPLES: Yeah.

PROFESSOR ALBRIGHT: That was post-Caperton, right?

HONORABLE STEPHEN YELENOSKY: Yeah, but they're just asking if procedurally it would --

MR. ORSINGER: That was under impartiality might reasonably be questioned.

CHAIRMAN BABCOCK: Yeah. And how did they get around -- but based on campaign contributions, right? How did they get around the line of cases like the Aguillar and other cases in that line?

HONORABLE DAVID PEEPLES: The judge who comes from the outside to hear the recusal motion makes an unappealable decision. If you grant it, it's never appealable. If you deny it, it goes up with the main case, and those cases do not prevent the judge from deciding based upon what the hearing shows, this person ought to be recused or not.

MR. SCHENKKAN: And those cases are just wrong under Caperton. It's just not the law, I mean, anymore. You may not like that, but it's the case, and so it's not just that they can get away from things also. I think they're doing their job.

HONORABLE DAVID PEEPLES: Well, it's also the Rule 18b tells the recusal judge to decide based upon all the facts at that hearing would a reasonable objective observer think this person can't be impartial. I mean, that is enough warrant for recusing somebody who has taken a whole bunch of money.

CHAIRMAN BABCOCK: Buddy, and then Judge Christopher.

MR. LOW: And no party is entitled to any particular judge. They're going to have a qualified judge, so there's no appeal. I'd like to bring up another thing that's happening, and it's created by lawyers. When we first back in '79 when we passed 18b we patterned it after 144 and 455, I believe it was, and that addresses not lawyers, only parties. Well, what the problem we were having then was lawyers were filing a motion to disqualify right before trial.

CHAIRMAN BABCOCK: Right.

MR. LOW: And so they were getting a continuance. So we had to put something in play so that we put a process, so they had to allege specifically and then that's when this thing started, about '79. And then we rocked along, and something that's happening now, created by the lawyers, is the -- some of the lawyers -- and I know of two cases, and I'm sure there are more,

where they want to disqualify the judge so they file a motion to disqualify, subpoena his telephone records, everything, you know, about conversations, and they subpoena him and going to take his deposition. Another case where they subpoenaed him to the hearing, and the judge -- they call the other lawyer and he testified, and then when they called the judge he just stood up and he said, "Oh, I recuse." He didn't want to go through it. That's what happened in the other case I was telling you about.

So there's got to be some procedure, because lawyers are going to -- you're going to see that. They just move to disqualify, and they put all of these things out, and nobody wants all his personal life -- every judge I'm sure lives a perfect personal life, but you don't want that, and so we have to have some gauge. Like one of the cases they wanted to take the judge's deposition because a drunk had killed this person, and the judge's daughter had been killed by a drunk, and they wanted to question him and his wife about his attitude about that, and there are a number of cases on that, and there's one case that the judge hires a lawyer, then he's disqualified because he's now a party if he's hired a lawyer in a proceeding. So that's just one of the things I'd like for the committee to consider, how we can protect judges from harassment.

CHAIRMAN BABCOCK: Fair enough. Judge Christopher.

HONORABLE TRACY CHRISTOPHER: I can wait till tomorrow. Are we going to continue?

CHAIRMAN BABCOCK: No, if you can wait till tomorrow, I can, too, so let's start up at 9:00 tomorrow. Thanks, everybody.

(Meeting recessed at 5:01 p.m.)

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REPORTER'S CERTIFICATION
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SUPREME COURT ADVISORY COMMITTEE

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I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 25th day of September, 2009, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are $_____.

Charged to: The Supreme Court of Texas.

Given under my hand and seal of office on this the _____ day of _____, 2009.

_____
D'LOIS L. JONES, CSR
Certification No. 4546
Certificate Expires 12/31/2010
3215 F.M. 1339
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