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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

MARCH 25, 2011

(FRIDAY SESSION)

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Taken before *D'Lois L. Jones*, Certified
Shorthand Reporter in and for the State of Texas, reported
by machine shorthand method, on the 25th day of March,
2011, between the hours of 9:00 a.m. and 4:02 p.m., at the
Texas Association of Broadcasters, 502 East 11th Street,
Suite 200, Austin, Texas 78701.

INDEX OF VOTES

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Documents referenced in this session

- 11-04 Ancillary Proceedings Task Force draft (January 2011)
- 11-05 Memo from Judge Peeples, legal effect of letter rulings (3-23-11)
- 11-06 Memo from Richard Orsinger, TRCP 116 (3-24-11)

1 *-*-*-*

2 MR. LOW: Chip can't be here, so you're
3 going to have to bear with me, and I'll tell you like I
4 tell the jury, I need your help. Really. First, welcome
5 to everyone. The session, we should be able to finish our
6 work today, and as you know, there's no meeting Friday.

7 MS. SENNEFF: Saturday.

8 MR. LOW: I mean Saturday. Boy, I started
9 out good, not even knowing what day it is. Here comes
10 Richard. I know he will keep us straight. Welcome,
11 Richard. All right, first, Justice Hecht will give us a
12 status report of what's going on and what's been going on
13 since we last met.

14 HONORABLE NATHAN HECHT: Just a couple of
15 things. The Court issued final amendments to Rule 281 and
16 284 and 226a of the Rules of Civil Procedure, and we -- it
17 looks like a little bit of language was inadvertently
18 omitted, some instructions, bracketed instructions to the
19 trial court and lawyers, so we'll put those back in. Judge
20 Christopher pointed that out this week, so that's a small
21 change that will be coming out.

22 And then we adopted rules for the appellate
23 courts to have electronic filing and also electronic copies
24 by e-mail. Our court has been getting electronic copies
25 for a long time, for a year or two, and then off and on

1 before that. So we're sort of moving, lurching, toward
2 electronic filing, but the -- one of the problems is that
3 the software that is going to handle the filings when they
4 get to the court side of the interface has not been
5 finished yet, so we're having to do that by hand, and
6 there's still some work to be done on that. The
7 Legislature seems to be receptive to the need for
8 electronic filing and has agreed to have some funding for
9 it if we can find the money, which we can only find it if a
10 fee bill passes, and it might, but that's the status of
11 that.

12 Then, of course, you know that we lost Chief
13 Justice Greenhill several weeks ago, and if you think about
14 it, you might want to drop Chief Justice Pope a note.
15 He'll be 98 three weeks from Monday on April the 18th, or
16 as he says "only 98," and that's all I have, but I'm happy
17 to answer any questions.

18 MR. LOW: All right. The next thing is the
19 legislative update.

20 HONORABLE NATHAN HECHT: I want to get your
21 help on a couple of bills that are pending and tell you
22 about one other. The one I want to tell you about is House
23 Bill 906, and the section of the Family Code that deals
24 with the rendition of judgment and the post-trial and the
25 pre-appellate part of parental termination cases, which I

1 think is section 263.405, has caused the appellate courts
2 and the trial courts quite a few problems because of
3 counsel who is appointed to represent an indigent parent
4 doesn't always want to take the case on appeal, and so
5 frequently the baton is not seamlessly passed off between
6 trial counsel and appellate counsel, and the Legislature
7 has tried over the last few sessions to speed this process
8 up to take the children out of limbo so that their
9 situation gets settled as quickly as the legal system will
10 reasonably allow, but a lot of times parents get caught in
11 this swivet and forfeit their issues on appeal before they
12 know it's even happened.

13 So we've written on it -- the Supreme Court
14 has written on it a couple of times, and the courts of
15 appeals have written on it several times, and there is a
16 bill, House Bill 906, that will take those provisions out
17 and require the Supreme Court to adopt rules to provide for
18 accelerated procedures, and we're -- the Court is in favor
19 of this, and we were actually going to appoint a task force
20 to try to come up with something like House Bill 906,
21 confident that this committee would then be able to adopt
22 these accelerated procedures that would move things along
23 without costing people their rights. But another group did
24 this on their own, so thank goodness for that; and if the
25 bill passes, and I hope it does, the Court will be required

1 to adopt rules no later than March 1st of 2012, so we'll
2 have to get high behind it; and I think Professor Dorsaneo
3 has worked on this some; and it's a difficult area, so it
4 may take a little bit of time.

5 I just wanted to alert you to that, but then
6 I want to get your counsel on two other bills so that we
7 can respond to the sponsors, and one is House Bill 3393 by
8 Representative Hughes. And they don't have copies, right?

9 MS. PETERSON: No.

10 HONORABLE NATHAN HECHT: It's very short, and
11 I'll just read it to you. The substantive provision amends
12 the Government Code to provide that, quote, "A court
13 reporter may not be required to file an official transcript
14 of a trial before the 60th day after the date a notice of
15 appeal is filed. To the extent this subsection conflicts
16 with the Texas Rules of Appellate Procedure or other rules
17 of procedure, this subsection controls. Notwithstanding
18 sections 22," some other statutes, "the Supreme Court or
19 the Court of Criminal Appeals may not amend or adopt a rule
20 in conflict with this section." So this would say that
21 very simply in no situation may a court reporter be
22 required to file an official transcript of a trial before
23 the 60th day after the date a notice of appeal is filed, no
24 matter what.

25 Now, Kennon has and I think Carl Reynolds at

1 the Office of Court Administration have pointed out to
2 Representative Hughes' office on the civil side this would
3 affect a number of proceedings that are required to be
4 expedited by law, and it says "transcript of a trial," so
5 I'm not sure if that includes like a hearing on a temporary
6 injunction, but it would certainly include parental
7 termination case, which we've just been talking about has
8 to be expedited quicker than that; and the concern, I take
9 it, is that lawyers sometimes wait till the last minute,
10 not just in general, but to decide whether to appeal; and
11 so then there's a lot of pressure on the court reporter to
12 get the court reporter's record done in time for the
13 appellate process to move on, but Representative Hughes
14 has -- his office has indicated that he is amenable to
15 exceptions, concerns, to hearing what input there might be
16 on this, and so I would like to get the committee's take on
17 that.

18 HONORABLE TOM GRAY: Is there any way we
19 could get Representative Hughes to let this subcommittee
20 know or this committee know what his primary concern is and
21 draft a rule to address that and other concerns regarding
22 reporters, because, frankly, my problem has not been at our
23 court of getting it in the -- that 60-day period. It's
24 getting it, you know, within a six-month period. It
25 just -- I mean, when we run into problems it can take a

1 long time. And I know that David and Dee Dee had nothing
2 to do with any of those situations.

3 HONORABLE NATHAN HECHT: I don't know the
4 answer.

5 HONORABLE TOM GRAY: Okay.

6 MS. PETERSON: And if I may, I don't know all
7 of the concerns, but one of the concerns expressed that
8 gave rise to this bill is that under 35.1 of the Rules of
9 Appellate Procedure the 60-day period begins to run after
10 the date the judgment is signed, but then you have people
11 waiting --

12 HONORABLE TOM GRAY: Until the 59th day.

13 MS. PETERSON: Right. Or even less. Maybe
14 they're waiting until like the 29th day, and the reporter
15 feels crunched for time, and so one of the potential
16 solutions that was tossed around, if you will, is to make
17 the 60-day period run not from the date the judgment is
18 signed but from the date the notice of appeal is signed,
19 but then there may be other implications that aren't
20 intended, so that's one potential solution, perhaps too
21 simple, but --

22 HONORABLE TOM GRAY: And I don't know if it's
23 the reporters -- if they have a problem with this, but I
24 know that we've run into it. There is no formal way in the
25 rules for a court reporter to get an extension of the

1 period of time; and if there was a way that they could get
2 an extension, that may alleviate the pressure on them, a
3 formal extension, if you will. But as far as the text of
4 the bill goes, I'm sure we could at least -- at the very
5 least, come up with with a list of exceptions.

6 MR. LOW: Justice Bland.

7 HONORABLE JANE BLAND: It seems like the
8 problem that the bill is intended to address is sort of a
9 case-specific problem, when a lawyer has failed to make --
10 timely make arrangements to pay for the record, and I'm not
11 aware of a problem with courts of appeals not being
12 sympathetic to that concern so that if a reporter sends in
13 a letter and says, "I haven't had adequate time to prepare
14 the record because the lawyer just made arrangements to pay
15 for it this week," our court grants those extensions
16 routinely, and I know the 14th does, and I don't know that
17 it's a formal process in the rules, but we treat those sort
18 of like motions for extensions of time by the party, and we
19 sign an order extending the deadline for a court reporter
20 to comply, and my concern is on the flip side where the
21 specifics of a case really require the court to act
22 promptly, and we can't do a thing until we get the record,
23 and I agree with Justice Gray that we have more problems
24 with trying to get the record well, well outside the 60-day
25 deadline than we do --

1 HONORABLE TOM GRAY: Giving an extension.

2 HONORABLE JANE BLAND: -- having some sort of
3 demand that it's the 61st day and where's the record. So I
4 also note that the courts of appeals, the intermediate
5 courts of appeals, are subject to legislative performance
6 measures, and the clock for us starts ticking when the
7 notice of appeal is filed, and any delay in preparing the
8 record to get to the court of appeals is subsumed within
9 that performance measure so that the entire timetable for
10 the time from the notice of appeal being filed to
11 disposition is then skewed out further by any long delays,
12 and it seems as though with prompt arrangement to pay for
13 the record and all of the technology that we have now for
14 realtime court reporting and scoping the record, and at
15 least in the courts in Houston and I think shortly in all
16 the other courts and probably the courts in Austin as well,
17 our court reporters are now electronically filing the
18 record. So, if anything, the time frame for preparing a
19 record I think because of the advances in technology is
20 shorter than it used to be, not longer. So those would be
21 my comments.

22 MR. LOW: Judge Evans.

23 HONORABLE DAVID EVANS: I think Justice Bland
24 hit a lot of issues, but this may be a problem that arose
25 in a smaller -- in a rural court as opposed to an urban

1 court. At this point the courts at least in Tarrant County
2 are wired to -- my reporter can send out her transcript
3 electronically while the trial is going on, and it gets
4 scoped by somebody in California, and then she has the
5 material back that evening. So it may be that they're not
6 having quite the support in that particular court that they
7 need to get the records turned around, and then on a few
8 times my reporter has come to me and said, "I've got to get
9 this up for an expedited review," and I bring in an extra
10 court reporter. My county allows me to bring in additional
11 reporters if the record is behind, and I have a budget for
12 that.

13 I can't see that -- and I would just be
14 curious -- I think the comment over here of what the
15 problem is trying to address, because I don't believe we
16 would have that problem in Tarrant County with our
17 reporting system.

18 MR. LOW: David.

19 HONORABLE DAVID PEEPLES: I like the
20 suggestion made a few minutes ago that somebody ought to go
21 to Representative Hughes and find out what this is aimed to
22 fix, number one. Number two, I think any time there is
23 language in a bill that says "and the Supreme Court doesn't
24 have any authority to change this by rule," it seems to me
25 that we, if we know people over there, ought to talk to

1 them about that, because I would hate for that to become
2 commonplace. I mean, without even talking to the Court or
3 anybody else to do that, it just seems to me is
4 something that ought to be nipped in the bud.

5 MR. LOW: Well, we have some legislators that
6 want to keep their territory, and they don't want anybody
7 nudging in on their territory, and so they -- that's
8 something I totally agree with you, and that's not I don't
9 think the majority of the legislators feel that way, but
10 some do.

11 Judge Gaultney, what do you think about your
12 experience on this matter? Do you -- can you give us some
13 comments?

14 HONORABLE DAVID GAULTNEY: Well, I agree with
15 the comments that have been made, and that is that
16 generally the court is very easy in granting extensions of
17 time. I think the difficulty comes not early on, but
18 getting the reporter record filed after the fourth or fifth
19 extension; and I think what happens is court reporters are
20 busy, and they're in court and getting the time to do it;
21 and often, frankly, it's certain court reporters, you know,
22 that you routinely see the request for extensions of time
23 from. Frankly, that's the way it works. So I'm not
24 exactly sure the problem that this is designed to address.
25 The rules provide that both the appellate court and the

1 trial court are jointly responsible for making sure that
2 the record gets filed timely and that I think is the way it
3 works.

4 You know, if a -- I think when we grant an
5 extension the trial court becomes aware that their record
6 has not been timely filed, and I think that allows the
7 trial court to work with the court reporter to ensure that
8 the docket is being handled in a way that the records are
9 being filed and you don't have five records that are --
10 have five extensions on them. So that's really the
11 problem, I think, that the appellate courts are dealing
12 with is actually getting records not filed within 60 days,
13 but filed fairly quickly.

14 Now, there are all types of exceptions. This
15 rule of 60 days with no exception strikes me as ignoring
16 all types of accelerated appeals, all types of issues that
17 we're presented with that require prompt attention and that
18 do require an exception, and you know, I don't know if it
19 would apply to election contest. I don't know if it would
20 apply to, like Judge Hecht said, a termination proceeding
21 or some type of other -- does it apply to mandamus
22 proceedings? Does it -- you know, what exactly is it
23 designed to do?

24 Now, if there has been a situation where some
25 court reporter has been placed in a tight situation in

1 order to produce a record and that has produced a harsh
2 result to the court reporter, it seems to me that that's
3 something that can be worked out and is probably routinely
4 worked out with the appellate clerks. I mean, you file a
5 motion, a request. Maybe there's not a formal proceeding
6 to do it, and maybe that could remedy some of the problem,
7 but I think it's routinely done in the courts where they
8 send a letter. They simply send a letter saying "I can't
9 have it done," and you know, if the clerks and the courts
10 are naturally trying to keep a gentle pressure on the
11 process, so that -- not a harsh pressure, but a gentle
12 pressure on the process to make sure that you're not a year
13 down the road without a reporter's record, so it's a
14 gradual process.

15 In my view the system works well, and when a
16 court reporter gets out of balance in his or her docket,
17 and they frankly have a backlog of records sometimes, as
18 the trial judge said, what -- I'm sorry, Judge Evans.

19 HONORABLE DAVID EVANS: I've been called
20 worse.

21 HONORABLE DAVID GAULTNEY: But the trial
22 court once they become aware -- the trial court, once they
23 become aware that there's that problem with their court,
24 they make arrangements to bring in a substitute reporter
25 until that reporter can get caught up.

1 MR. LOW: Richard, I believe you had your
2 hand up.

3 MR. ORSINGER: I have an experience as a
4 practitioner similar to what the appellate justices have
5 said, that the difficulty is getting the record in after a
6 long period of time with a number of extensions. That
7 makes me think that maybe the problem is not so much the
8 ordinary appeal, but it may be certain statutes that
9 require quick filing, and it may be a better way to address
10 that is to identify those statutes that are creating that
11 enormous pressure to do something too quickly and change
12 the timetable in the statute rather than adopting a statute
13 that's an exception to all known rules and statutes,
14 because there may be one or two statutes that are causing
15 this problem, that if we could affect the timetable in
16 those statutes we could avoid the unanticipated
17 consequences of affecting all other practices.

18 MR. LOW: It looks like this only affects --
19 and it can't be sooner, but there's no limit, it doesn't
20 affect how many extensions or anything like that. It's
21 just can't be sooner, and don't most of you find that this
22 is case-specific as well as type case-specific and need
23 requires, so I think your idea is certainly an excellent
24 one to look at the ones that are giving trouble.

25 HONORABLE SARAH DUNCAN: Buddy?

1 MR. LOW: Sarah. I'm sorry.

2 HONORABLE SARAH DUNCAN: That's okay. It's
3 hard for you to see in two directions.

4 MR. LOW: Well, I don't see as well as I used
5 to anyway.

6 HONORABLE SARAH DUNCAN: I think one of the
7 really remarkable attributes of this committee is the
8 breadth of the state that's represented, and the different
9 types of trial court circumstances around the state are so
10 varied, and the Court has worked very hard to work out very
11 detailed timetables for a lot of different kinds of cases,
12 and if we -- if this statute passes, it's going to mess
13 up -- it's going to mess up everything, that whole detailed
14 timetable, and I think if someone -- just a suggestion, if
15 someone or a group of someones talked to -- was it
16 Representative Hughes?

17 HONORABLE NATHAN HECHT: Uh-huh. Yes.

18 HONORABLE SARAH DUNCAN: -- and explained the
19 makeup of the committee and the varied circumstances around
20 the state, it might help him understand why the rules are
21 as they are and how they have to work with the statutes and
22 if there is a problem, the Court will be more than happy to
23 address that problem, but a blanket "not before the 60th
24 day after a notice of appeal is filed" is going to affect
25 too many types of cases that the Legislature itself has

1 said are a priority.

2 MR. LOW: Justice Jennings.

3 HONORABLE TERRY JENNINGS: I just want to
4 echo what Richard said a minute ago. Judge Cowen, who used
5 to be on our court, used to always say the quickest way to
6 slow down an appeal was to label it an accelerated appeal,
7 and I think what he meant by that was there are so many
8 accelerated appeals now that when the Legislature creates
9 all these accelerated appeals it's almost like an unfunded
10 mandate by analogy because you're creating more work and
11 you're putting that additional work on a single person, the
12 court reporter; and as Judge Gaultney said, that court
13 reporter is working everyday in the courtroom and then in
14 addition to that then they have to go back and make all
15 these records on accelerated appeals; whereas, you know,
16 many years ago you would wait until the final judgment, so
17 it's problematic to begin with.

18 MR. LOW: David.

19 MR. JACKSON: Well, this is the first I'm
20 hearing about this is this morning when Justice Hecht
21 mentioned it to me, so I don't see this as being a
22 groundswell of court reporter concern, because usually if
23 that's the problem I hear about it a long time before now.
24 So, I don't know, it would be interesting to find out where
25 this originated from and who is bringing it up, whether

1 it's just one court reporter somewhere off in some
2 district, but I really don't think it's an across the board
3 court reporter concern at all.

4 MR. LOW: Does anyone here know the
5 representative?

6 HONORABLE NATHAN HECHT: I know him.

7 MR. LOW: Pardon?

8 HONORABLE NATHAN HECHT: I know him. He's I
9 think a well-regarded trial lawyer.

10 MR. LOW: No, I just meant that he might
11 would listen to a group if we had a group going to talk to
12 him.

13 HONORABLE NATHAN HECHT: Well, he's receptive
14 to input. I mean --

15 MS. PETERSON: He called and asked for input.

16 MR. LOW: Okay. Judge, you need more input?

17 HONORABLE NATHAN HECHT: I think if that's --
18 I think that's helpful. But it sounds to me like that the
19 considered view is that there's so many twists and turns to
20 this that it would take -- if we knew exactly what the
21 concern was it would still take pretty careful rules
22 drafting to meet it, so that's what we'll tell him. So
23 but, as I say, he's receptive to it.

24 MR. LOW: Oh, Pam, I'm sorry.

25 MS. BARON: I just want to echo something

1 that was just said because I'm not unsympathetic to the
2 court reporters because I do think our rules, when you
3 parse through the three different sections for when the
4 record is due, is a pretty short time frame because in an
5 appeal where you file a motion for new trial your notice of
6 appeal is due 90 days after judgment, but the record is due
7 120 days. So that's a 30-day time frame. If it's an
8 accelerated appeal the record is due 10 days after the
9 notice of appeal, and we are getting a lot more
10 interlocutory appeals, all of which are considered
11 accelerated, all of these sovereign immunity appeals, all
12 of these doctor expert report appeals, and so I would think
13 that the burden on the court reporters especially in that
14 area is increasing, and in certain of those appeals I don't
15 think it's that critical that the record get there that
16 quickly. So we could try and identify particular appeals
17 where there could be a little more time to get the record
18 up. And then the third area is in restricted appeals the
19 record is due 30 days after notice of appeal, and there the
20 appellant has had six months to file their appeal, so I'm
21 not sure why we have to have a 30-day time limit on the
22 reporter in that situation, so I think there are some
23 things we could think about in response to this concern, if
24 it is a general concern.

25 HONORABLE NATHAN HECHT: Great. The other

1 one is House Bill 962 by Representative Hartnett, and it
2 simply says that the Supreme Court shall adopt Rules of
3 Civil Procedure requiring a person who serves process to
4 complete a return of service. I don't think there's
5 anything particularly controversial about that, but it
6 raises a bigger question, which is why do returns of
7 service -- why are they excepted from being electronically
8 filed as they are in our electronic filing rules templates
9 that we're using around the state. Why can't you use a
10 scanned version or some sort of electronic format for a
11 return of service, and we've talked about this before, is
12 the notary important or can it just be signed under penalty
13 of perjury or under oath, and then we have a representative
14 here from the industry that makes electronic signature,
15 digital signature equipment; is that right?

16 MR. RICE: Well, what we are is we are an
17 electronic signature and electronic notarization
18 technology. We're a software company that has the
19 capability of applying secure signatures, e-signatures as
20 well as the e-notarization of documents. For instance,
21 mortgage documents. We've been working the mortgage
22 industry for several years, and I brought by a signature
23 pad just for y'all to see. This is an electronic biometric
24 signature pad. It's different than what you sign at
25 Wal-Mart when you take a credit card and swipe it. In

1 fact, this, what it does, the -- it captures the data of
2 your signature just as a thumbprint. This also has a
3 thumbprint capture on the front of it, but a thumbprint
4 capture, what it does, it takes and digitizes that
5 signature or a thumbprint and it pulls specific data. That
6 data then renders the signature. It's not an image or a
7 cut and paste. Like I could take -- I was telling this
8 gentleman here while ago, I could take your signature, and
9 I can cut and paste, and I can apply it to another
10 document, you know. This you can't, because the data is
11 what creates the signature, and it's forensically
12 reproducible. So I could go into court five years from now
13 and have that individual sign the pad just like this and
14 compare the data, not the image of your signature. You're
15 comparing the data that created that signature.

16 It also applies the notary seal, all of the
17 requirements of electronic notarization. Texas allows for
18 electronic notarization. Many people don't know about this
19 technology. It's new stuff. I've been in it for seven
20 years and had my head beat in a long time. Yes, sir?

21 HONORABLE TOM GRAY: She's going to need a
22 name.

23 MR. RICE: I'm sorry.

24 THE REPORTER: I've got it. I've got it.

25 HONORABLE TOM GRAY: Oh, you do. I'm sorry.

1 THE REPORTER: Thank you.

2 HONORABLE TOM GRAY: I would like a name.

3 MR. RICE: Bob Rice, R-i-c-e. I am the CEO
4 of a company called Worldwide Notary, and we produce a
5 product called Digasign, D-i-g-a-s-i-g-n. We're also
6 working with several judges revolving around magistrations
7 documents where the magistrations are being done by
8 videoconferencing, but the documents need to be signed at
9 the jail and at the court, so the documents can be signed
10 simultaneously as the magistrations takes place. There's
11 lots of -- lots of applications in the legal industry for
12 the technology, and naturally my job is to take it there as
13 rapidly as possible.

14 HONORABLE NATHAN HECHT: So my question with
15 respect to Representative Hartnett's bill is about the
16 committee's view of whether returns of citation can be
17 electronically filed, can scanned copies be filed, how --
18 what is it -- what does the committee see as the importance
19 of the how close to an original a return of service is?

20 MR. RICE: If I may just explain something
21 there, in the electronic industry when you sign a document
22 in paper, I sign it in paper, and I scan that document, the
23 original still resides somewhere, and typically in law --
24 in legal that has to follow the scanned or the faxed copy.
25 With the electronic signature, the electronic copy or the

1 electronic document that you see in your computer is the
2 original. What you print out of it is a copy. Okay. If
3 you take a document, and you've signed -- I signed
4 electronically, he signs electronically, and he signs
5 electronically, and then the fourth person down there signs
6 it by paper it is no longer electronic. It is a paper
7 document because that chain ended. Yes, sir.

8 MR. HAMILTON: Is the bill designed to
9 prevent electronic filing? Is that the purpose of it?

10 HONORABLE NATHAN HECHT: No. It's -- the
11 bill does not address electronic filing.

12 MS. PETERSON: It addresses it to an extent.
13 It provides that the return may be electronically filed,
14 and it has a provision in there that says if you have a
15 certified private process server who is completing the
16 return that it doesn't have to be verified. It can be
17 signed under penalty of perjury, and the effect of that is
18 you wouldn't have to have a notary involved, and so one of
19 the questions is do we want to require the verification
20 process to continue for the private process servers.

21 HONORABLE TOM GRAY: When you first mentioned
22 it I was looking at this very myopically, I think, from the
23 appellate perspective, and obviously the return is already
24 part of the record and would be filed if we ever start
25 receiving electronic records as part of the electronic

1 record that comes to us, but what you're focused on, as I
2 understand it now, is the actual delivery of the return
3 from the process server to the trial court clerk.

4 MS. PETERSON: It's really two things, the
5 delivery, if it can be delivered electronically, and also
6 whether you have to have a notary involved to verify the
7 return.

8 HONORABLE NATHAN HECHT: Because the current
9 rule template, right, that we're working with excepts from
10 documents that can be electronically filed returns of
11 citation, and I'm just not sure where that came from. Some
12 of these things have been around long enough that it
13 escapes me why they were in the rule in the first place,
14 but maybe there was a good reason, and so, of course, the
15 courts I think generally that are moving toward electronic
16 filing would like as many things to be electronically filed
17 as possible, and why should we exclude returns of citation,
18 but maybe there's a reason, and maybe another solution is
19 that there's an electronic way of filing -- of signing a
20 return.

21 MR. LOW: Richard.

22 MR. ORSINGER: On the notarization
23 requirement, I don't really see why we should perpetuate
24 that. The U.S. government requires everyone to sign their
25 tax returns, and they're under the penalties of perjury

1 without a special memorial service to put it under, and
2 that seems to work well. I've never heard of anyone that
3 was acquitted of tax fraud because they didn't notarize
4 their tax return. I also remember years ago when we
5 adopted the Rules of Appellate Procedure, I think the
6 process before that was that all motions had to be
7 supported by verification or affidavit, if I vaguely recall
8 this, and then we decided that matters that were known to
9 the appellate lawyers didn't have to be sworn to on your
10 motions for extension, for example, and I feel like that
11 was very successful. I can remember in the old days having
12 to do affidavits on all these motions, and if it's routine
13 stuff why not just, you know, eliminate the requirement of
14 an oath; and if someone lies, someone else will call it to
15 the Court's attention and then you can have a fight over
16 it. So it seems to me like the notarization is an
17 unnecessary requirement that doesn't really add value.

18 On the issue of the electronic filing, I'm
19 trying to remember back what the debates were relating to
20 the whole electronic filing process, and perhaps there was
21 a concern at the time that there were some people that were
22 serving process with the approval of a local judge with no
23 training or no certification process that's statewide or
24 otherwise, and these service issues usually arise only when
25 there's a default judgment, because if they appear and file

1 an answer then the service of citation isn't a debate, and
2 I remember people having concerns that default judgments
3 could be taken on questionable returns of citation where
4 someone, you know, threw it at somebody or left it at the
5 door or something, and it was not really clear, and I think
6 there may have been a concern at the time that we want
7 somebody to go under oath, and we want the original
8 document. Sometimes it's signed by the recipient,
9 sometimes it's not.

10 We've changed that whole process service now,
11 and it's been upgraded. There are certain minimum
12 requirements. I think there's more screening of the people
13 that have the authority to do it, and so maybe that concern
14 is not so great anymore. Maybe we've addressed that
15 through the industry standards rather than having to
16 perpetuate this requirement that the original piece of
17 paper be filed.

18 MR. LOW: And on notarization, Justice
19 Jennings, didn't we have a proposal -- you know, there's a
20 statute that allows a prisoner to sign subject to perjury
21 without it being notarized.

22 HONORABLE TERRY JENNINGS: Right.

23 MR. LOW: And someone proposed -- the State
24 Bar or someone proposed that it's unnotarized affidavit or
25 something like that, and I think it was voted down. So we

1 have had some discussion on that, and I don't remember the
2 reasons, but most people kind of were against that, and
3 maybe, Terry, you can tell us.

4 HONORABLE TERRY JENNINGS: I can't remember
5 why, but, yeah, the extent of my recollection is what you
6 just said.

7 MR. LOW: Okay.

8 HONORABLE TERRY JENNINGS: Sorry.

9 MR. LOW: All right. Okay.

10 MS. PETERSON: Just an additional note about
11 the bill, my understanding is that the noncertified private
12 process server would still have to go through the
13 verification process, so the exception would be for the
14 certified private process server because he or she has been
15 vetted generally to a greater extent than the noncertified
16 private process server.

17 MR. ORSINGER: That makes perfect sense to
18 me, and it would also be an incentive for people to go
19 through the certification process, which would be good.

20 MR. LOW: Anybody have anything else --

21 MR. RICE: My only concern with that was that
22 the notarization of like a peace officer, an officer of the
23 court, does not have to be notarized. It was only the
24 private process server that had to be notarized under the
25 previous stuff.

1 HONORABLE SARAH DUNCAN: And I remember the
2 same discussion you remember, Chairman Low, and there does
3 seem to me to be some value, even though I'm -- when a
4 lawyer files a motion --

5 MR. LOW: Yeah.

6 HONORABLE SARAH DUNCAN: -- they are an
7 officer of the court.

8 MR. LOW: Right.

9 MR. RICE: Exactly.

10 HONORABLE SARAH DUNCAN: And that was the
11 discussion that led up to doing away with the verification
12 requirement for matters known to the lawyer, but with a
13 private process server we're not talking about an officer
14 of the court, and it gives me some pause to be in favor of
15 a rule or statute that would do away with that requirement
16 for a private process server, even if certified.

17 MR. LOW: I think one of the questions was
18 some of the people had been district attorneys or worked
19 for the district attorneys thought there would be some
20 problem prosecuting a person for perjury under those
21 circumstances. I don't know.

22 MS. PETERSON: I've heard that sentiment as
23 well.

24 MR. LOW: That was raised, and my knowledge
25 was so little I couldn't agree or disagree.

1 HONORABLE TERRY JENNINGS: Well, it's a
2 question of proving up the identity of who actually made up
3 the document.

4 MR. LOW: Yeah, right, but that was that --

5 HONORABLE TERRY JENNINGS: But in this case
6 it's --

7 MR. LOW: It's coming back to me now.

8 HONORABLE TERRY JENNINGS: -- the process
9 server who was signing it.

10 MR. LOW: Anything else? Kennon.

11 HONORABLE NATHAN HECHT: I think that's fine.

12 MR. LOW: Okay. All right. Appreciate --

13 HONORABLE NATHAN HECHT: You know, there are
14 a lot of other bills that would call upon the Court to make
15 rules, and some of them on a pretty quick time frame, and
16 we have encouraged that relationship with the Legislature,
17 and I think it's very productive, but this is even kind of
18 another step that we can give back to legislators in the
19 middle of a session with input from the committee that will
20 hopefully give them some positive direction.

21 MS. PETERSON: And on that note, House Bill
22 962, for what it's worth, is going to a committee hearing
23 on Monday starting at 2:00. The other bill has not been
24 set for a hearing yet about court reporters.

25 MR. LOW: That's much better than Richard

1 being over there until midnight being grilled by the
2 Senate.

3 MR. ORSINGER: That was fun.

4 MR. LOW: Yes, Steve.

5 HONORABLE STEPHEN YELENOSKY: One bill I have
6 a question about, I think it's perhaps in the same form as
7 it was proposed last time, involves requiring the court to
8 allow questions from jurors. I think it's Senator
9 Wentworth's bill. I'm not sure of the number. I think 297
10 or something. Do you have anything to update us about on
11 that?

12 MS. PETERSON: I do. We conferred with his
13 staff, because the proposed rules were out there addressing
14 the juror note-taking, which is also covered by the bill,
15 which is 297, and his staff then conferred with him and the
16 word we received is that he was fine with all the
17 note-taking provisions in the rule and was comfortable with
18 the rule going forward, and so the rule, as Justice Hecht
19 said, has been finalized in terms of the juror questions
20 during trial as of the last time I spoke with his staff
21 member he hadn't made a decision yet as to whether to
22 proceed with that part of the bill or not. It's -- the
23 bill still has note-taking provisions and juror questions
24 provisions.

25 HONORABLE STEPHEN YELENOSKY: And the

1 note-taking provisions are contrary to what was just
2 promulgated because they require you to take the notes away
3 before they deliberate. Is he conceding that point?

4 MS. PETERSON: Yes, and I pointed that out
5 specifically when speaking with his staff members so that
6 she would be sure to point it out to him. He's aware of
7 the difference, and she said generally he's in favor of
8 trial court discretion and in this case he was again.

9 HONORABLE STEPHEN YELENOSKY: But on juror
10 questions he hasn't decided.

11 MS. PETERSON: He hadn't as of a couple of
12 weeks ago. He may have a decision now that I don't know.

13 HONORABLE STEPHEN YELENOSKY: Do you know if
14 there will be hearings, because if there are, you know,
15 some of us may want to --

16 MS. PETERSON: What I can do, I'm going to
17 track that bill, and if it's set for a hearing I can notify
18 Angie so she can inform the committee.

19 HONORABLE STEPHEN YELENOSKY: I can only
20 speak for myself, but to say also some of the other Travis
21 County district judges that have read the bill were
22 concerned about the withdrawal of any discretion on the
23 part of the judge, other than this sort of catchall good
24 cause, which arguably isn't the kind of discretion that we
25 would want; and, secondly, even -- even while taking away

1 discretion as to whether and how, even if you took away
2 discretion as to whether you allow questions, then there's
3 the question of whether the trial judge has any discretion
4 as to how they're asked. I certainly support using juror
5 questions when appropriate, but I don't always do it the
6 same way. I don't always stop after every witness and
7 allow questions. Most trials I don't take questions at
8 all. There are a lot of issues that I think ought to be
9 considered, like how much that might lengthen the trial.
10 We've talked about that.

11 One of the things in the bill is it would
12 require the court to read the question verbatim, which if
13 you think about it could cut either way. If you take a
14 juror question verbatim and that's all can you do, a lot of
15 them are going to be knocked out on objections because
16 they're not asked in a proper way; and I'm sure Senator
17 Wentworth wouldn't like that; and on the other hand, there
18 are questions if asked verbatim, because they're not
19 lawyers asking them, could benefit from some rewording
20 while maintaining the spirit of the question. So all of
21 those things, I think, should be presented if, in fact,
22 it's going to go forward.

23 MS. PETERSON: Two things. One, I sent over
24 to his staff the Supreme Court Advisory Committee's
25 proposal for the rule on general jurors questions so they

1 would have that in hand. The other thing I wanted to note,
2 I don't know that the bill has changed too much from the
3 last session, and he did hear testimony during the last
4 session to the effect that a lot of judges would like for
5 there to be more discretion. If there's another hearing I
6 think it would be good to repeat all of that, but he has
7 heard it to an extent before.

8 HONORABLE STEPHEN YELENOSKY: Yeah, and I
9 certainly respect the role of the Legislature in empowering
10 jurors. I just think there are certain things that
11 certainly need to be brought to their attention.

12 MR. LOW: All right. Item No. 4, first,
13 Judge Peeples' memo I hope each of you have is March 23rd,
14 because in my opinion he made a great analogy of what we're
15 trying to do and what the problem is, so that's I think a
16 good point. Judge.

17 HONORABLE DAVID PEEPLES: Yeah. I think you
18 need to have in your hands the page and a half memo I did a
19 couple of days ago, which Angie sent out. I would just
20 make two points before we talk about it. Number one -- and
21 Bill Dorsaneo and I went over this. I think he just wasn't
22 able to get here today, but it's our understanding that
23 we're going to talk about this and then the Court will
24 decide whether they want something drafted, but it seemed
25 to me it had been unwise to try to draft something before

1 we even know what the committee wants to do.

2 And then second, take a look at page one
3 right in the middle. It seems to me the real policy clash
4 here is captured in paragraphs (1) and (2) in the middle of
5 the first page, finality and appealability and
6 effectiveness. To come up with one approach for those two
7 situations, it seems to me, we need to think about that.
8 It's a very serious thing when something triggers the
9 timetables for plenary power and appealability, and if
10 people don't know about it, rights can be lost, and that's
11 a very serious thing, and that's talked about in paragraph
12 (1).

13 Paragraph (2) is the converse of that. It
14 can be that the timetables are already running and the
15 letter might be interpreted to set that aside and stop them
16 from running, and the inadvertent stopping of timetables is
17 not as bad an evil as the inadvertent starting of
18 timetables, because for rights not to be lost, for the
19 jurisdiction to remain in the court to do what the court
20 thinks needs to be done, that's a better thing. So I -- it
21 seems to me that the concerns expressed in paragraphs (1)
22 and (2) are in tension with each other, and we need to keep
23 that in mind as we talk about it. That's all I have to
24 say.

25 MR. LOW: Okay.

1 HONORABLE DAVID PEEPLES: Right now.

2 MS. PETERSON: Reserve the right for
3 rebuttal.

4 MR. LOW: The Federal courts never use -- we
5 use the term rendition, render judgment. You won't find
6 that in Federal court, enter judgment. Clerk enters in a
7 civil jury trial, theoretically the clerk does. So then we
8 have a problem -- I was looking at an opinion by Justice
9 Guittard where a letter that was never filed, the record
10 didn't show it was filed with the clerk, so you have to
11 assume it wasn't at least for the record, and that started
12 time running, just the letter, so there's a whole line. I
13 mean, we have terminology and things the Feds don't have.
14 The Feds define a final judgment any judgment that's
15 appealable, any order that's appealable. We don't --
16 there's such a mixture of what we have as different from
17 the Fed, it would change many -- many terms and traditions.
18 I think the Feds have a good system. I'm not disagreeing
19 with their system, but we are where we are. Does anybody
20 else have -- Richard.

21 MR. MUNZINGER: Well, you know, Buddy, I just
22 think if there is a solution to the problem it may ought to
23 be limited to those orders that affect an appellate right
24 or an appellate timetable, because we all get a letter from
25 the judge overruling your motion for continuance,

1 overruling your motion for this or that, and for the
2 concerns expressed by Justice Gray and others, final appeal
3 rights and what have you are not generally affected by such
4 a letter order. The comment of the Lehmann language being
5 mandatorily incorporated into such an order that could have
6 an effect on a timetable may be a partial solution to the
7 problem. I don't know, but perhaps an appellate rule could
8 say no order affecting appealability or a time frame shall
9 do so unless it incorporates the intent of the judge that
10 it be such an order. That is what I understand Lehmann to
11 be or to say, and the requirement of the current rules,
12 except there's criticism of looking at the subjective
13 intent of the judge. I don't know, I'd hate to see a
14 blanket rule applying to all letter orders. I don't think
15 that's necessary.

16 MR. LOW: Yeah. But, I mean, first of all,
17 you need to know when your timetables start running for
18 anything, appeal, a motion for new trial, and everything;
19 and before you know that you've got to know what it takes
20 to do that, what is a judgment, what is ordered that does
21 that, then where does it have to be filed or what has to be
22 done so that each step -- we made each step to be definite
23 so you don't have misunderstandings of what to do and when,
24 and I -- I don't know, that's basically all I can say.
25 Judge.

1 HONORABLE TOM GRAY: I guess since I raised
2 the issue with Justice Hecht I'll kind of try to explain
3 some of the problems that we were dealing with, and it's
4 not a -- I won't say even a monthly recurring issue, but
5 periodically it does come up, I would say two or three
6 times a year; and we are obviously, you know, a very small
7 court in the state; and so I presumed that it was happening
8 with greater frequency on the larger courts; and they could
9 certainly weigh in; but we would see the parties trying to
10 raise the ruling that was embodied or potentially embodied
11 or the comments potentially embodied in a letter ruling --
12 or let me just say a letter from the trial court.

13 One of the cases was a series of letters from
14 the trial court that determined discrete issues in a family
15 law case, in particular the character of property, be it
16 community or separate. When we got to the final judgment,
17 the actual paper signed by the trial court, the judgment
18 really bore no resemblance to the letters that had been
19 issued, and it was a very large marital estate, and so they
20 were taking on discrete items of property as they went
21 through, and the argument was made that the letters
22 constituted effectively, you know, findings with regard to
23 the character of individual pieces of property and then
24 when you looked at the division of the property at the end
25 of the -- in the final judgment it was very different and

1 very skewed with regard to one party or the other if these
2 letters had any meaning.

3 The case that actually motivated me to go
4 ahead and write Justice Hecht was that a ruling was made on
5 an issue that was interlocutory appeal; and it's in what I
6 provided to him; and I don't remember exactly even what the
7 ruling was, but the winner of the ruling was instructed in
8 the letter to draft the order; and the loser of the ruling
9 that wanted to bring it up on interlocutory appeal was very
10 concerned about whether or not his timetable had already
11 commenced; and so they went through the considerable effort
12 at that juncture to step out of the process, do their
13 notice of appeal, begin their appellate process, and then
14 comes back to the actual piece of paper, the order, the
15 written order when the trial court signed it, and did it
16 all over again.

17 The -- in kind of the discussion that
18 followed the Supreme Court's notice that this committee was
19 going to at least discuss the issue, one of the trial
20 judges and I were having lunch and he said, well, at the
21 new judges school or, as they say, the baby judges school,
22 he said, "We were told to put the following phrase in our
23 letters and it says, 'This memorandum ruling shall not be
24 considered as an order or finding of fact and conclusion of
25 law, but shall have the same effect as if orally pronounced

1 in open court"; and apparently that got some traction and
2 a number of the judges use it; and, in fact, I asked the
3 new justice on our court who was a trial judge for 26 years
4 what he thought about this, you know, letter rulings and he
5 said, "I always thought they never had any more effect than
6 if I had announced the ruling from the bench," and I --
7 you know, okay, I'm still not sure that fully resolves all
8 of my concerns or questions and how people may either lose
9 their appellate rights or their ability to have something
10 reviewed on appeal, or if you're the benefactor of that and
11 it doesn't get appealed then obviously it works -- cuts
12 both ways, so to speak.

13 What was interesting is the order that he
14 sent me as an example is a classic as far as I'm concerned
15 in this whole appellate timetable issue because it says --
16 it references the date of the hearing and then in italics
17 it says, "Plaintiff's application for temporary injunction
18 is denied," which I believe it to be an appealable order,
19 interlocutory appeal, accelerated, and then it instructs
20 "the prevailing party will please prepare and present an
21 order which has been approved as to the form by opposing
22 counsel" and then has the tag line that this doesn't mean
23 anything other than if I had announced it from the bench.

24 So all I'm looking for is if there is a way
25 -- and the other area that it impacts a lot is in the

1 preservation of rulings on issues like summary judgment
2 evidence, because frequently the trial court letter order
3 or letter -- I won't call it an order, but the trial
4 court's letter saying that a summary judgment has been
5 granted or denied -- most often it will be impacted if it's
6 granted -- will also have some rulings on the summary
7 judgment evidence, and not uncommon, but those rulings
8 don't find their way into the final judgment or into a
9 separate order and then it goes up on appeal.

10 Well, we know what the trial judge was
11 thinking with regard to the objections, but if that letter
12 can't be used as the order then we've got the problem of no
13 ruling on the summary judgment objections, and so -- and I
14 realize that that's both an argument for and against the
15 use of the letters, but I am inclined to think that with
16 the excellent minds on this committee and an adequate
17 looking at the problem that we could come up with a rule
18 that would give greater certainty to what is going to
19 happen with regard to what's in a letter from a trial court
20 judge and give the parties greater certainty and,
21 therefore, reduce the cost of overall litigation.

22 MR. LOW: Let me ask, I mean, is the sole
23 issue a letter ruling by the court? Is that -- are we
24 going -- does your committee go further than that, Judge
25 Peeples? What's our real issue? Is it a letter ruling is

1 what's caused the problem, or are we trying to change
2 broader things than that?

3 HONORABLE DAVID PEEPLES: First of all, the
4 committee was me and Bill Dorsaneo.

5 MR. LOW: The committee.

6 HONORABLE DAVID PEEPLES: The way I've got
7 this stated it's limited to rulings because that's what Tom
8 Gray asked about, but Bill and I flirted with the idea of
9 broadening the discussion to Rule 11 agreements that are
10 handwritten and signed by the judge and just decided to
11 back off from that.

12 MR. LOW: Okay.

13 HONORABLE DAVID PEEPLES: So the answer is,
14 yes, it's limited to letter rulings.

15 HONORABLE TOM GRAY: Well, I will say this,
16 the concept that concerned me is broader than letter
17 rulings. It was just letter rulings that brought it up,
18 and it was the finality of judgments issue, because it --
19 and it wasn't to go back to that, but it's the whole
20 concept of when is it final, what -- what is indicia of
21 finality in light of Lehmann, but David is right that what
22 I am focused on and what I was thinking about is as an
23 appellate court what is the impact of a letter from a trial
24 court judge to the parties and how can we consider it or
25 treat it in the context of an appeal.

1 MR. LOW: But, see, finality, a couple of the
2 court of appeals opinions, one by Justice Guittard, which
3 says wasn't even filed and it's final. So are you saying
4 that we should have a rule that it must be filed, and did
5 you -- you know, it's final only when filed or should we
6 deal with that, or should we just deal with strictly letter
7 rulings and their effect?

8 HONORABLE TOM GRAY: Well, I'm not -- I'm not
9 going to presume to set the scope of what we look at, but
10 one of the things that does concern me about letters from
11 the trial judge, they are not generally distributed with
12 the level of attention to detail that a formal order is,
13 and they're really not controlled by the rules as to who
14 gets them. It -- while it may not be -- I mean, the rules
15 identify who is to receive formal copies of documents, lead
16 counsel.

17 MR. LOW: Right.

18 HONORABLE TOM GRAY: Not true with regard to
19 letters from the court. In some occasions I've seen
20 letters from the court where the trial judge says you're to
21 draft the order and it will be in effect a communication to
22 the person that's going to draft the order for the judge to
23 sign and may or may not copy all the parties in the
24 litigation, and so it's -- and it's not formally -- usually
25 it's not formally filed as part of the clerk's record but

1 can be made so.

2 MR. LOW: Sarah.

3 HONORABLE SARAH DUNCAN: Two things I just
4 want to say for the record, I don't think the letter you
5 read would be appealable if in the same letter the judge
6 says, "Temporary injunction is denied," but then also says,
7 "Go draft an order, Joe," then to me under Lehmann, that's
8 not appealable; and the second thing is I guess I am
9 getting really old.

10 MR. LOW: Don't talk about that.

11 HONORABLE SARAH DUNCAN: Because I am getting
12 sick of abbreviations, and I got a text message from my
13 brother the other day. I don't know if I'm invited to go
14 to dinner for his wife's birthday or not, and the point
15 that's made -- the point that's made on the reverse side of
16 David's memo is more and more of this is going to be
17 happening through e-mail instead of paper letters.

18 MR. LOW: Right.

19 HONORABLE SARAH DUNCAN: The thought that we
20 are going to get reduced to e-mail orders that aren't --
21 you know, form being approved by counsel, whether you agree
22 with the substance of it or not, is horrifying to me. I
23 just -- to me, maybe it's just being old, maybe I am too
24 fond of decorum -- exactly, I am very fond of clarity, but
25 just that we're talking about this confirms my view that

1 nothing in a letter to me should be an order.

2 MR. LOW: Elaine.

3 PROFESSOR CARLSON: I've got a question,
4 Judge Peeples. As a practical matter when these kind of
5 letter orders are signed, or perhaps the one that you
6 described Justice Gray, and they're not filed, is there any
7 corresponding notice given under Rule 306a to the litigants
8 besides that letter, or is that considered to be notice
9 from the clerk? Or does that back up the time frames
10 because you didn't get the notice from the clerk?

11 HONORABLE TOM GRAY: That's actually another
12 problem, because we -- you see these letters go out, and
13 they're appealable orders -- or if they were treated as
14 appealable orders they do not have the backup protections,
15 if you will, of the trial court -- trial court clerk
16 notification that an appealable order has been rendered and
17 entered in the record.

18 PROFESSOR CARLSON: Thank you.

19 HONORABLE STEPHEN YELENOSKY: Buddy?

20 MR. LOW: Yeah, Steve.

21 HONORABLE STEPHEN YELENOSKY: I agree with
22 everything Sarah Duncan said except the part about it being
23 because she or I are old.

24 HONORABLE SARAH DUNCAN: That's because
25 you're old, too.

1 HONORABLE STEPHEN YELENOSKY: I'm old, too,
2 right. And I sent an e-mail to Judge Peeples about this.
3 I think the question that we may have to face is --

4 HONORABLE NATHAN HECHT: Not an order,
5 though.

6 HONORABLE STEPHEN YELENOSKY: I'm sorry?

7 HONORABLE NATHAN HECHT: Not an order, just
8 an e-mail.

9 MR. LOW: Just an e-mail.

10 HONORABLE STEPHEN YELENOSKY: Yeah, right,
11 exactly. Is, yeah, if we draw some kind of bright line, I
12 mean, you could put in a letter exactly the same content
13 you put in an order, right? The difference then between
14 the letter and the order would be that it has letterhead at
15 the top instead of the style of the case and that I think,
16 as Justice Gray said or maybe that Peeples said, arguably
17 it wouldn't be governed by the rule if you have to file it
18 and all that stuff. So you would have the same Lehrmann
19 problem -- is it Lehrmann?

20 HONORABLE DAVID PEEPLES: Lehmann.

21 HONORABLE STEPHEN YELENOSKY: Lehmann, you
22 could have the same Lehmann problems with the content of
23 it, but do you draw a bright line on the form and say that
24 something with letterhead at the top that's not filed with
25 the court can never constitute a -- an order, period, or

1 can never constitute an order that starts or stops
2 appellate timetables. I think a lot of us judges who feel
3 like Justice Duncan treat letters that way, say in our
4 letters things that confirm that they're not orders either
5 to start or stop timetables, that they're not findings of
6 fact, that they shall not be used to be considered
7 incorporated into an order, do not limit the bases of
8 support for an order. We say things like that. We file
9 those letters, too, but we do everything possible to say to
10 the lawyers that if it's got a letterhead at the top it
11 ain't an order, and I think we might want to face the
12 question of that difference in form because, of course, the
13 content as I said could be exactly the same as an order and
14 simply say because of clarity if it doesn't have the style
15 at the top it ain't that -- it at least ain't that kind of
16 order and it ain't a judgment, excuse the slang, but -- and
17 as far as e-mail, as I wrote to Judge Peeples, I think
18 that's really bad form. Number one, it's typically not
19 filed. That raises questions about whether it's publicly
20 available.

21 We had a criminal case in which a judge was
22 questioned -- a high profile criminal case, was questioned
23 by the media about his use of e-mail with counsel because
24 the media couldn't see it. Secondly, with e-mail, the
25 problem that I see is that sometimes the court or the

1 counsel forget to copy all the parties. That's easy to do.
2 And then the other consideration that perhaps goes beyond
3 these considerations, it invites substantive discussion
4 from counsel, even if everybody is copied with the court
5 that really ought to be done through a motion and response
6 and hearing process.

7 So I'm all for pulling it back. I think we
8 really ought to consider a bright line on form for purposes
9 of delineating between an order and an expression of intent
10 to sign an order for clarity of the parties, for
11 transparency to the parties, and for openness to the
12 public.

13 MR. LOW: Justice Peeples, when all the Texas
14 cases appear to -- the magic word is rendering judgment,
15 rendition. Justice Guittard held that a letter was
16 rendition. The Corpus court held the same thing, and it
17 had to be -- had to be filed. So using that term and then
18 without addressing just strictly letter rulings, could
19 it -- would it be possible to define what is meant by
20 rendition and how judgment is rendered or rendition when
21 judgment is rendered when a formal order is filed and so
22 forth? Would that be a possible answer, or what do you
23 think?

24 HONORABLE DAVID PEEPLES: Yeah, I don't know,
25 I'm not sure I want to try to define rendition and to solve

1 this problem by defining rendition.

2 MR. LOW: Okay.

3 HONORABLE DAVID PEEPLES: But on the case
4 law, it seems to me that we shouldn't be bound or hung up
5 on what the cases have said. We ought to try to do
6 something that makes sense and that we can defend as an
7 original matter rather than trying to summarize or repeat
8 the case law. I know you're not suggesting that, but --

9 MR. LOW: No, but the cases have, how they've
10 interpreted it, I mean, it shows what a variation there is.

11 HONORABLE DAVID PEEPLES: Yeah. But I think
12 that if it was written by Justice Guittard there is
13 probably some Supreme Court law on oral rendition and
14 docket entries and things like that that come after that
15 that may undermine the pennings of his -- of what he said
16 in that older case. I don't know, but I do think that we
17 should not be fixated on what the cases have said. We can
18 look at the cases to see what kinds of problems have
19 arisen --

20 MR. LOW: Right.

21 HONORABLE DAVID PEEPLES: -- but I say if we
22 want to draft a rule, come up with something that we can
23 defend as a matter of policy and workability, regardless of
24 what the case law would be if you summarized it.

25 MR. LOW: But I was merely asking the

1 question should you approach it as -- as a letter ruling,
2 an e-mail ruling, or should you approach it something that
3 encompassed that.

4 HONORABLE DAVID PEEPLES: Well, of course,
5 e-mail, it doesn't have an ink signature on it. You can
6 have digital signatures and so forth, but that's different.
7 I want to repeat something I tried to say before. To me, I
8 would be opposed to a blanket rule because to start
9 timetables is a totally different thing from stopping
10 timetables. If you start timetables with a letter ruling,
11 somebody might not realize that that's happened and rights
12 will be lost, but if you stop timetables with a letter
13 ruling that sets aside an appealable order on which the
14 timetables are running, the only harm is it's still in the
15 trial court --

16 MR. LOW: Right.

17 HONORABLE DAVID PEEPLES: -- and the trial
18 court could do the same thing. So, I mean, starting and
19 stopping timetables to me are just vastly different, and it
20 would be hard to draft one rule that does justice in both
21 of those situations, I think.

22 MR. LOW: When Richard speaks I'm going to
23 then ask you if you want to make a motion or if you have
24 some suggestions whether we do something or do nothing.
25 Richard.

1 MR. ORSINGER: What David Peeples is talking
2 about, starting timetables and stopping, to me I would
3 phrase the issue is what constitutes an appealable judgment
4 versus when is a motion for new trial granted. In my view
5 they have to be discussed separately if they're going to be
6 discussed at all, because the formalities associated with
7 an appealable order I think are already thoroughly explored
8 in the summary judgment area, and I'm not sure that we've
9 found the ultimate solution there yet, and so we may go
10 through a similar process in trying to exactly define an
11 appealable judgment. I remember discussions in this
12 committee about what happens when you have several partial
13 judgments in the record that collectively dispose of all
14 relief, and do they constitute -- does the last one
15 constitute finality for all of them, or do you have to
16 restate them all as one judgment? Very complicated
17 drafting process. I think we've done a lot of work on
18 that. I don't think any of it has been adopted.

19 On the motion for new trial end, on the other
20 hand, I don't think that parties or lawyers expect that if
21 a judge signs a letter granting a new trial that there
22 needs to be another formal step of submitting an order
23 that's signed by the judge. I think most people think
24 that's good enough if you get a letter from the judge, so I
25 guess what I'm saying is, is that policy issue --

1 MR. LOW: And no timetable is keyed to that,
2 if he grants.

3 MR. ORSINGER: To me that's the distinction
4 that David Peeples was making. If it's a final judgment
5 question it starts timetables, and if it's a motion for new
6 trial it may -- but there is a procedural trap on motions
7 for new trial if you're unclear, which is that you may
8 think your motion for new trial got granted because you
9 have a letter signed by a judge granting it, but if that
10 doesn't constitute an order granting a new trial, you will
11 probably not take the necessary steps to preserve your
12 appeal, and so it's possible the granting of a motion for
13 new trial could be appeal preclusive as well, so I think
14 these problems are important ones, but truly we've been
15 drafting on these for a decade, and I don't know that we've
16 ever found the perfect solution.

17 MR. LOW: Steve.

18 HONORABLE STEPHEN YELENOSKY: Well, why --
19 why -- that may be right now, but if you had a rule that
20 said it's not an order unless it has the style at the top,
21 everybody would know that, and when the judge sends a
22 letter they would know it's not an order, and they would
23 rush in with an order or the judge could attach an order.
24 What's the hard thing that keeps us from requiring that
25 there be an order with the style at the top? I mean, if

1 you're writing a letter, write the same letter and put the
2 style at the top. That makes it an order.

3 MR. ORSINGER: What if the style is in the re
4 line? Does that constitute an order?

5 HONORABLE STEPHEN YELENOSKY: Well, we make
6 that clear in the rule. We make that clear in the rule. I
7 mean, I don't see what we're gaining by allowing things to
8 be ordered by letter where there's a lack of clarity about
9 whether they're orders or not. What are we gaining?

10 MR. LOW: Justice Bland, did you have your
11 hand --

12 HONORABLE JANE BLAND: No, but I don't think
13 that a rule is necessary to address letter rulings. I
14 think there are already so many different permutations of
15 what constitutes a final judgment that it ought to be
16 addressed on a case-specific basis, and we have the
17 rule the Texas Supreme Court gave us in Lehmann that sort
18 of gives us a test for finality, and I think you kind of
19 have to look at the record as a whole and decide whether
20 there was an intent for this to be some kind of binding
21 ruling or not.

22 HONORABLE TERRY JENNINGS: That's what I was
23 going to say. I mean, the bottom line is, is you're going
24 to look at the intent of the trial court judge and can you
25 determine from the document, and a lot of these things that

1 we're talking about as far as being problems, well, it
2 wasn't filed in the clerk's record and so forth, well, if
3 it wasn't filed in the clerk's record, that would show an
4 intent by the trial court that it's not an order or not
5 meant to be a final appealable order.

6 MR. LOW: Judge Peeples, do you have a
7 suggestion that --

8 HONORABLE TERRY JENNINGS: I mean, how
9 pervasive is this problem?

10 MR. LOW: We're going to vote to see if we do
11 anything or leave it be for now. Do you have a suggestion
12 as to what we do?

13 HONORABLE DAVID PEEPLES: If forced to give a
14 suggestion right now I could do it.

15 MR. LOW: No, I mean, do nothing or do
16 something?

17 HONORABLE DAVID PEEPLES: Not really. I was
18 hoping to get the sense of the house, but could I -- the --
19 I respectfully disagree with the notion that we ought to
20 look at the whole record or try to find the judge's intent
21 because that is the opposite of clarity and predictability
22 and knowing what your rights are. To me that would be a
23 horrible outcome. That's the last thing we should do.

24 MR. LOW: Carl.

25 MR. HAMILTON: Where I practice, I think

1 there's a general consensus by the judges and everyone that
2 letters are only rulings, and unless there is an order with
3 the style of the case on it in the file, there isn't an
4 order.

5 MR. LOW: All right. Does --

6 HONORABLE DAVID GAULTNEY: I guess I agree
7 that the problem is in stopping the appeal, not in starting
8 it. I mean, we've got Lehmann in terms of language of
9 unmistakable finality, and if you don't have that then the
10 trial court retains jurisdiction, and that's not a problem,
11 you don't lose your appeal rights, but the problem I see is
12 you do have language of unmistakable finality in the
13 judgment. Okay. It has the Lehmann language, and then the
14 trial court issues a letter ruling that clearly grants a --
15 well, clearly indicates he's granting a new trial. He
16 sends it to everyone. It ends up in the file, goes up on
17 appeal. We have a rule that says you don't consider letter
18 rulings, and the party has lost its appellate rights. So
19 there is something to be said that, you know, when you have
20 that situation you can determine that that does not
21 indicate that the judge intended finality despite the
22 language in the actual judgment that says so, so I think
23 there is a distinction between starting and stopping. I do
24 think that Lehmann provides a little bit of flexibility in
25 determining that, but I think the difficulty comes when the

1 order itself on its face has unmistakable finality and yet
2 everything else, all the parties understand that it was, in
3 fact, set aside.

4 MR. LOW: All right. I get the sense of the
5 committee that really we don't need to do anything further
6 on this. Does anybody suggest that you want to vote? How
7 many people think we should do something at this point,
8 regardless of what it is, we would have to get to that --

9 HONORABLE STEPHEN YELENOSKY: As opposed to
10 going to the subcommittee?

11 MR. LOW: -- or leave it as it is. Who wants
12 to do something? One, two, three, four, five, six.

13 All right. Who wants to leave the status quo
14 as it is? The vote. All right. That's 8 to 6, not many
15 people voting. It sounds like an election in East Texas,
16 so --

17 MR. ORSINGER: Except the votes are not in
18 alphabetical order.

19 MR. LOW: For the ones who voted to do
20 something, let's start out -- Mike, what should we do?

21 MR. HATCHELL: Well, we should do something.
22 There's a problem between letters that are rulings on --
23 that you could consider orders, and I've had to file those
24 letters before, but there's a serious problem of letters
25 that are interpreted as being dispositive rulings. I'll

1 give you two examples. I was consulted about three months
2 ago by a man that got a letter from the judge in a case
3 involving his son, which found that he was a coconspirator
4 in breach of fiduciary duty and would be -- and judgment
5 would be rendered against him for X amount of dollars. He
6 was not even a party to the lawsuit. The judgment that
7 came out six weeks later didn't even mention him.

8 Skip circulated a case yesterday that maybe
9 he could better describe in which a judge sent out a letter
10 saying that a monetary judgment was going to be rendered
11 against a party that didn't state an amount and yet that
12 was found to be a judgment. Skip, maybe you want to pick
13 up.

14 MR. WATSON: Well, we -- I was just talking
15 to Judge Jennings. Apparently the appellate courts don't
16 see a lot and don't see it as a problem, and I think that's
17 just perhaps a different perspective, because we see it on
18 the appellate practitioner end more than I would like to
19 see it, and it's very, very disconcerting when you see it.
20 The case that I was consulted on was one last October.
21 It's *Green vs. State of Texas*, 324 Southwest 3rd 276, was
22 one in which the letter that was sent out shortly before a
23 trial judge retired said that "I render judgment for the
24 state" but said no amount and further said, "The parties
25 are to prepare the form of judgment and send it to me for

1 signature," and everybody treated as -- even though it had
2 the magic word "render judgment for the state" the parties
3 treated it as, okay, we're going to send the real judgment
4 to the judge with the numbers in it and the attorney's fees
5 and everything else for signature.

6 Unfortunately, it didn't get signed until
7 seven days after the judge's term expired, and so the
8 question became, okay, did the judge even have jurisdiction
9 to sign this judgment, and the opinion that came down did
10 something that I'm, you know, not sure how I feel about,
11 except it gives me some heartburn. It was saying that the
12 letter order rendering judgment was the judgment and that
13 the act of signing the judgment that could be enforced was
14 a mere ministerial act, kind of like signing findings of
15 fact and conclusions of law, which the Civil Practice &
16 Remedies Code says can be done after a judge leaves office.
17 I'm just not sure I can quite get that down, the idea of
18 what we ordinarily view and is intended to be viewed as the
19 enforceable appealable order being signed -- being signed
20 after a term expires, but that's what the opinion held,
21 citing a 1957 Fort Worth no writ case.

22 I think it's -- I think it's a real problem,
23 and I think the problem goes not just to appealability, but
24 as Judge Peebles has identified, I think it's also a big
25 problem of enforceability. You know, how do I get a

1 supersedeas bond on that letter judgment, you know, that
2 has no amount in it? How does the sheriff go out and
3 execute on that judgment that was, quote, rendered? I'm
4 not sure that the term "render," which I agree with the
5 Chair, seems to be what most of these things turn on, is
6 necessarily the magic bullet. Is it an enforceable and
7 appealable judgment? And to answer Judge Jennings' private
8 question, yes, at least in our world it's a real problem,
9 and when it comes up the results are catastrophic.

10 I mean, Judge Hecht wrote an opinion once on
11 lawyer disqualification that had a line in it that I will
12 never forget, and it was simply this, that the odds of
13 being struck by lightning are incredibly remote, except
14 when it happens. Then the results are catastrophic, and I
15 think that's what we're dealing with here.

16 MR. LOW: But, Skip, in that case you had two
17 problems, the language sufficient to constitute a
18 judgment --

19 MR. WATSON: Correct.

20 MR. LOW: -- if that had been in an order. I
21 mean, an official order, style of the case and everything
22 filed, would that have constituted judgment when it had no
23 amount? And then you have the fact that it was a letter is
24 the second problem, it appears to me. I mean, you know, a
25 judgment, would it be a judgment if they say I sue somebody

1 for \$10 million, and they say, "I award money damages to
2 Buddy Low," filed, signed, is that -- I mean, you have what
3 it takes to constitute a judgment, and then you have what
4 form it's in, letter or order, and --

5 MR. WATSON: Buddy, my reaction to that would
6 be -- at least the argument that I would make and that I
7 think that I would listen to even if I were on the other
8 side of it would be that it's really not, because to my
9 mind it didn't actually dispose of all issues.

10 MR. LOW: I --

11 MR. WATSON: Even if it had magic language at
12 the bottom saying that "This disposes of all issues and all
13 parties," I would be --

14 MR. LOW: Right.

15 MR. WATSON: -- begging to differ, and I
16 would be in there not only with motion to clarify, et
17 cetera, et cetera, or to alter or amend, but I would also
18 be saying, "You're denying me the right to supersede this."

19 MR. LOW: Right. I agree. Richard.

20 MR. MUNZINGER: Small solace to the fellow
21 who pays Skip a quarter of a million dollars to handle the
22 appeal or 50,000. Or \$20,000.

23 MR. LOW: Or a million.

24 MR. WATSON: I've got a card here, Richard,
25 if you would like that.

1 MR. MUNZINGER: My only point is it's money
2 out of a citizen's pocket --

3 MR. LOW: Right.

4 MR. MUNZINGER: -- to take an appeal like
5 this. How can an appellate court say that a judgment is
6 appealable that doesn't set the amount of money in the
7 judgment? It begs the imagination that there could be such
8 a thing, and yet somebody has to appeal this and spend
9 money --

10 MR. LOW: Right. That's right.

11 MR. MUNZINGER: I mean, that's a travesty.

12 MR. WATSON: To the court's credit, I mean,
13 you know, it was a sales tax case, and the court said, you
14 know, the amount is readily calculable and the attorney's
15 fees were stipulated. Well, that's fine, but every single
16 one of us have had situations in which the letter comes out
17 and says, you know, whether it has the magic word "render"
18 in it or not, it says, "This is what I'm going to do," you
19 know, "prepare and submit the order," and yet the order
20 comes out, and it is quite different than the letter, and I
21 just -- the part of this that troubles me is the reasoning
22 that the order, the thing that's actually enforceable and
23 appealable, is a mere ministerial act. To me it is still a
24 judicial act. It is the judicial act. It's the ultimate
25 judicial act. It's the one that everything turns on, and I

1 have real trouble separating them.

2 I understand oral orders from the bench of
3 "Thou shalt not do this." I get it. You know, you're not
4 going to violate that, and bad things happen if you do, but
5 I really am having trouble with the concept that a letter
6 using the magic word "render" that is, in fact, still a
7 letter and still incomplete and can't be readily enforced
8 and I don't think can be appealed or certainly can't be
9 superseded, that that is the act and that everything that
10 we've written rules on on how to do it right that occurs
11 later is purely ministerial and, P.S., can be done after
12 the judge is out of office and has not been appointed back
13 in the case.

14 MR. LOW: All right. We've had quite a
15 discussion on what the problem is, and now we need to give
16 some guidance to the committee of what we want the
17 committee to go back and consider, and I'm all for -- I
18 would like suggestions from some of the people that --

19 HONORABLE DAVID PEEPLES: I'll put it out. I
20 think that what I want, I think, is to make a distinction
21 between the two things I've got in paragraphs (1) and (2),
22 and I would be in favor -- well, and maybe we need to get
23 the sense of the house as to whether we ought to come up
24 with a rule that has different rules for a letter being a
25 final itself, the final and appealable order, and whether

1 the letter is effective to set aside, you know, grant a new
2 trial, set aside some earlier order. To me that's a
3 meaningful distinction, and I would be interested in seeing
4 whether the committee likes that.

5 MR. LOW: All right. Why don't you put it in
6 a form that we can vote on? What do you move that we
7 consider, just only letter, you know, whether a letter at
8 all can be an order or a final judgment? Is that one of
9 the things?

10 MR. ORSINGER: Buddy, let me make a
11 suggestion.

12 MR. LOW: Sure.

13 MR. ORSINGER: I would like to vote on the
14 distinction between a rule that applies to judgments and a
15 rule that applies to orders other than appealable
16 judgments, because I think that the policies relating to
17 rulings on motions is different from the policies that are
18 relating on appealable judgments, so I'd prefer that they
19 be in different rules and that they maybe say different
20 things, so I would vote that distinction.

21 MR. LOW: All right. We're going to have
22 your proposal and we're going to vote yes or no. What is
23 your proposal?

24 MR. ORSINGER: That any rule that's drafted
25 for judgments should be a different rule in a different

1 place than a rule that's drafted for orders on motions.

2 MR. LOW: All right.

3 MR. MUNZINGER: Buddy?

4 HONORABLE DAVID PEEPLES: How about an
5 appealable order on a motion?

6 MR. ORSINGER: Okay. Okay. I'll take that.

7 MR. MUNZINGER: Before you vote, Judge
8 Peebles wants to have a rule that addresses orders that are
9 appealable, but the right to appeal can be affected by an
10 order that extends the time limits. For example, the
11 letter saying, "I grant Mr. Low's motion for new trial" and
12 it doesn't say "draw the order," that has the very same
13 effect on one of the parties. Did that or didn't that
14 extend the time of appeal? Did it affect the running of
15 the time for appeal? And my point being an order granting
16 a new trial stops everything and leaves the case in the
17 trial court. There is no need for a notice of appeal.
18 There is no need to do anything else to appeal the case.
19 Was that letter that did that, was that intended to do
20 that? It's the very same problem. In other words, I'm not
21 sure you can distinguish between an order that is
22 appealable and an order that affects my rights conversely,
23 so to speak. And --

24 MR. LOW: Sarah.

25 HONORABLE SARAH DUNCAN: I was going to make

1 a similar point and suggest that there's always a winner
2 and a loser, no matter what an order or judgment is --

3 HONORABLE STEPHEN YELENOSKY: Are you quoting
4 Charlie Sheen?

5 (Laughter)

6 HONORABLE SARAH DUNCAN: That isn't even a
7 sentence. And even though -- I mean, I certainly don't
8 want people to unnecessarily lose appellate rights, but an
9 order that sets aside a previous judgment does hurt the
10 party in whose favor that judgment was rendered, so there's
11 always going to be a winner and a loser, and I don't
12 think -- I know I can't distinguish between orders that
13 start appellate timetables and orders that stop them, for
14 that reason. Somebody is going to like the order, and
15 somebody is going to not like the order. Somebody is going
16 to be benefited by the order, and somebody is going to be
17 harmed by the order. So to me, as Professor Carlson and I
18 were just saying, we like Judge Yelenosky's approach.

19 MR. LOW: Okay. All right. David, do you --
20 oh, I'm sorry. Jane.

21 HONORABLE JANE BLAND: It seems as though
22 there's two different paths. One is the content of the
23 order or the communication from the trial judge, the
24 contents of the communication, and the other is the type of
25 communication. Are communications by letter more similar

1 to written orders, are they similar to oral pronouncements,
2 or are they similar to docket entries, which I think, in
3 the main we don't consider to be -- have any binding effect
4 on anybody. So it seems like we ought to address the type
5 of communication in this discussion and not the content of
6 the communication, because the content of the
7 communication, whether it constitutes a final judgment or
8 not, has a whole set of rules and problems associated with
9 it, and I don't think we should start drafting
10 content-specific rules for letter rulings that are
11 different than oral pronouncements and written orders.

12 MR. LOW: That was my point to Skip.

13 HONORABLE JANE BLAND: So the question is
14 should we treat letter rulings more like docket entries and
15 say they're of no moment, sort of as a blanket rule to get
16 to Justice -- Judge Peeples' concern about clarity,
17 basically define the communication and say how we're going
18 to consider it. And I would propose that we say they're
19 either more docket entries or they're more like oral
20 pronouncements, and that's kind of the call that we would
21 -- that's the choice. I wouldn't do anything, but that's
22 the choice we have if we want to put it into a rule.

23 MR. LOW: That was my point to Skip, was
24 would that have constituted a judgment, you know, the
25 content, is that sufficient, and then it was a letter.

1 Steve.

2 HONORABLE STEPHEN YELENOSKY: Did you want to
3 go?

4 HONORABLE DAVID EVANS: No, actually it's
5 been said now.

6 MR. LOW: Jim, did you have your hand raised?

7 HONORABLE STEPHEN YELENOSKY: I know he
8 was --

9 MR. LOW: Well, let Jim speak. We haven't
10 heard from him. Jim.

11 HONORABLE DAVID EVANS: Go ahead.

12 HONORABLE STEPHEN YELENOSKY: Well, yeah, I
13 mean, form versus content is the issue, right? I mean,
14 content is going to be the same thing as it is Lehmann
15 whether it's on the style or not, but, you know, at least I
16 have some supporters on the issue that we should draw a
17 bright line on the form; and, you know, if you had a rule
18 that was clearer on the form, I mean, you wouldn't need --
19 10 years from now after that rule has been in effect for 10
20 years, people would laugh at the idea that you thought you
21 had gotten a new trial when you got a letter because
22 everybody knows for 10 years now you didn't get a new trial
23 unless you had it on the style in a filed order any more
24 than anybody would think, well, you know, the judge said in
25 court, "I think I'm going to issue a judgment in your

1 favor" and nothing else happens. You would laugh at the
2 idea if somebody went up to the court of appeals and said
3 that's an appealable order and judgment. Some day if you
4 have a rule that's clear, you don't have a judgment unless
5 it's the style of the case filed with the court, people
6 will laugh at the idea that you thought you had a judgment
7 when you had a letter, and it will be clear.

8 MR. LOW: Richard, I believe you were the
9 next one to raise your hand, and then Gene.

10 MR. MUNZINGER: Well, the problem that I
11 have, and I agree with everything that Judge Yelenosky said
12 except it's a problem with definition. A letter comes to
13 me from judge X on his letterhead, chambers of judge X, re,
14 absolute complete caption, "In the 210th District Court of
15 El Paso County, Texas," so-and-so versus so-and-so. Every
16 party is named, et cetera. So there's the caption
17 generally. I do whatever, signed by the judge. He
18 automatically gives it to the clerk. I'm saying he
19 automatically does. He does. He gives it to the clerk.
20 It's filed. Arguably it has been served if he sent it to
21 everybody, it's been served on the parties to the
22 litigation, and it has the caption at the top, and it
23 embodies a ruling of the court. It's in the form of a
24 letter, but it has everything you want on it. Is that a
25 judgment?

1 MR. LOW: Okay. I think Gene was next, I
2 believe, and then Judge Evans.

3 MR. STORIE: I also agree with a bright line
4 rule on what a judgment is. It should have a caption. It
5 should say "judgment," and I think that the problem of
6 judicial capacity should be thought of as a different
7 issue, which was the problem in Green and also in the case
8 that Justice Gray notified us about earlier involving a
9 judicial assignment.

10 HONORABLE DAVID EVANS: Mostly, it's
11 letter -- in fact, I can't think of a letter I've sent out
12 meant as an interim nonappealable order until you get an
13 appealable order signed after all the parties have input,
14 but it is designed to control the playing field until you
15 get that order in. You know, they can have -- you can be
16 setting some parameters on what's going on in the case, and
17 so it's an interim step to getting a final appealable
18 order, and I would think any rule that a trial judge in a
19 letter ruling that states, "This is not intended as a final
20 appealable order" has just made it clear that he's waiting
21 on a draft or she is waiting on a draft of a final
22 appealable order, but yesterday I got in a block, a mental
23 block. I struck an opinion on a summary judgment, granted
24 the no evidence summary judgment, asked for a draft of the
25 order to come in, realized when I was looking at the order

1 that it disposed of all the issues except tax and costs and
2 then started reading all the cases trying to figure out
3 whether I was signing a final judgment or not and ended up
4 writing another letter saying, "If this disposes of all of
5 the issues then I want it captioned as a final judgment and
6 want you to write it back -- send it back in in that form,"
7 and I'm going to -- and "I will upon review tax the costs,"
8 and that way this letter is not a judgment.

9 You know, we just -- we need some guidance at
10 the trial court level as to what we're -- and, of course,
11 the lawyers do, as to what we're signing whether it's a
12 final appealable order. I've noticed they can do this in
13 probate court a little bit better than we do it in civil
14 litigation right now. They have a doctrine that tells them
15 what's final and appealable.

16 HONORABLE SARAH DUNCAN: Oh, oh, we don't
17 want to go there.

18 HONORABLE DAVID EVANS: Well, maybe not. I'm
19 sorry. That was 10 years ago, Sarah, sorry.

20 MR. LOW: Sarah.

21 HONORABLE SARAH DUNCAN: You know, Lehmann, I
22 believe, was intended to fix an existing problem, when is a
23 summary judgment a final appealable judgment. I know the
24 Supreme Court and Justice Hecht in particular struggled
25 with that, and it is what it is, but what it is not is

1 easy. It is not easy for the courts of appeals judges and
2 staffs to figure out what is and what isn't a final
3 appealable judgment in any given case, and to broaden the
4 application of that to me is about as misguided as we could
5 get. And as Judge Evans says, we just want a rule.

6 I mean, I'm still in favor of a final
7 judgment of trial courts having to say -- you know, review
8 the file and put in a piece of paper that wraps everything
9 up, but that failed, but at least if we're talking about
10 just this discrete area of what everybody is calling letter
11 rulings that I don't think are rulings, a re is not a
12 caption. A re is a re, a regards. A caption is a caption,
13 but I believe Judge Yelenosky's proposal actually makes
14 that a moot point, because I believe what Judge Yelenosky
15 is saying is if it's on letterhead it's a letter. If it's
16 not on letterhead and has a caption at the top, it might be
17 a judgment or order, and that's what I think we ought to
18 do.

19 MR. LOW: All right, Richard. And then I'm
20 going to ask the two of y'all to get together for some
21 proposal because we need -- we've heard all kind of
22 suggestions of all kind of problems, more problems than
23 answers, and we need to come up with something that will
24 help the committee go back and work on something, and we
25 need to tell them what. All right.

1 MR. ORSINGER: The debate has shifted, I
2 think, to a discussion about the content of the rule that
3 defines a judgment. We have spent years working on that,
4 and if we're going to work on it again, which is fine with
5 me, let's all go back and look and see what our ultimate
6 proposals were on that. I don't know that it's necessary.
7 Perhaps it is, but what I'd like to do is I'd like to make
8 a practical point or a procedural point.

9 MR. LOW: Okay.

10 MR. ORSINGER: The way I see it there are
11 three topics of concern, what constitutes an appealable
12 judgment, when is a motion for new trial granted, and when
13 is error preserved by securing a ruling on a motion or
14 objection. Those are three different times where you might
15 get letter rulings and probably all of us would agree that
16 you should be able to preserve error on appeal by having a
17 judge send a letter denying a motion, and maybe a lot of us
18 would appeal -- would agree that you can grant a new trial
19 by a letter without an order. I think all of us would
20 probably agree you can't grant a final judgment by a
21 letter. Those are all different things. They are covered
22 by different rules. The rules we write ought to be in the
23 rule relating to that kind of subject matter, not just one
24 rule like the statute we said before, no matter what -- no
25 matter what all the other rules say, this is an exception

1 to all of them. It must have a caption at the top. You go
2 figure out how that affects all your appellate rules and
3 all your other Rules of Civil Procedure, so what I'm urging
4 is, is that let's recognize that we have different kinds of
5 rulings that fit in the categories that require different
6 solutions. Now then, Buddy, are you saying that we should
7 come up with a good rule on what constitutes an appealable
8 judgment?

9 MR. LOW: No. I'm saying that I'm looking
10 for some help to the committee so that they don't go back
11 and have to just, well, we want to change this, we want to
12 change that. Let's focus on what we want the committee to
13 do. You've said that what constitutes the judgment has
14 been worked on for --

15 MR. ORSINGER: Over a decade.

16 MR. LOW: All right. And I don't disagree
17 with that, so you're not suggesting they do that. I'm not
18 either. Let's pinpoint what we want them to do, and if we
19 need them to expand that, they can do that later, but let's
20 pinpoint on a smaller problem and then vote and go from
21 there. Would that be helpful to you, David?

22 HONORABLE DAVID PEEPLES: It would, and I
23 like the idea of taking a short break so Richard and I can
24 talk, and anybody else.

25 MR. LOW: Okay, all right, are you ready for

1 -- oh, wait a minute. Nina, I'm sorry.

2 MS. CORTELL: That's all right. I'm kind of
3 behind you. Judge Peeples -- I keep waiting for you to say
4 -- has drafted a pretty recent rule on the form of a final
5 judgment, and I think we have a really good proposed rule
6 there. My thought would be just a very simple rule on
7 orders. I don't think we have to go into all the
8 particulars, just to put everybody on notice that to be an
9 order it has to be in this form. I would look at the form
10 and not address the content issue. That would be my vote.

11 MR. LOW: All right. I think that's what we
12 should do, is that, and not the content at this point. All
13 right. Let's take a break, and you and Richard get
14 together.

15 (Recess from 10:46 a.m. to 11:02 a.m.)

16 MR. LOW: All right. Here's what -- Richard,
17 do you have a proposal, or David, as to what the committee
18 should consider? Obviously the committee, David's
19 committee, can't consider everything. I mean, we've
20 discussed many different things. I think it --

21 MR. JACKSON: Are we on the record?

22 HONORABLE DAVID PEEPLES: We're on the
23 record. Buddy's talking.

24 MR. LOW: Gene, you ready? Okay. All right.
25 Obviously we've discussed a lot of different things. I

1 think we need -- the committee can't go back -- they
2 wouldn't come back for 10 years if they had to consider
3 everything that's been discussed. We need to focus on
4 letter rulings or letters from the court, whether they are
5 on motions or whether there could be from that final
6 judgment or what. Did y'all finally get together to see
7 what it was the committee should go back and consider?

8 HONORABLE DAVID PEEPLES: I don't think that
9 Richard and I and Mike Hatchell and Nina Cortell -- Carl
10 was there. David Gaultney. I don't think we reached
11 consensus.

12 MR. LOW: Okay.

13 MR. ORSINGER: I would have a proposal I
14 think is a simple vote.

15 MR. LOW: All right.

16 MR. ORSINGER: Is how many people are in
17 favor of us drafting rule language that deals with letter
18 renditions of appealable orders and judgments?

19 MR. LOW: All right. Who's in favor of that,
20 raise your hand?

21 HONORABLE SARAH DUNCAN: Only?

22 MR. ORSINGER: Only.

23 HONORABLE DAVID EVANS: What was that?

24 MR. ORSINGER: No, I mean, maybe not only,
25 but --

1 MR. LOW: State it again. It hadn't been
2 heard around the --

3 MR. ORSINGER: Who is in favor of us drafting
4 rule language regarding letter renditions or e-mail
5 renditions on appealable orders and judgments?

6 HONORABLE DAVID PEEPLES: I'd want to know if
7 Justice Hecht is still interested in this project.

8 MR. LOW: Yes, he is.

9 HONORABLE DAVID PEEPLES: Is he? Are you?

10 HONORABLE NATHAN HECHT: Yeah.

11 HONORABLE DAVID PEEPLES: Okay.

12 MR. ORSINGER: And by way of explanation, I'm
13 trying to distinguish that from rulings that would just
14 preserve error on appeal, a lot of pretrial rulings,
15 evidentiary rulings. I'm talking now about letter rulings
16 and e-mails that relate to appealable orders and judgments.
17 Should we --

18 HONORABLE DAVID EVANS: Can we -- I guess you
19 hooked me with e-mails. I realize a lot of judges are
20 using e-mails right now, but I don't, except in
21 extraordinary circumstances when we're in trial and we're
22 trying to move some charges around and things like that,
23 because of the problem that they don't get into the file.
24 I'm unaware of how a judge sends out a written
25 communication that doesn't go to the district clerk's file.

1 And if you look at the Rule 76a, and I -- and I can -- you
2 can't seal -- you can seal everything except for a judge's
3 order. I don't think you can seal a judge's
4 communications.

5 MR. ORSINGER: I think you're talking about
6 what the rule should say rather than whether we ought to
7 write it or not.

8 HONORABLE DAVID EVANS: I don't disagree.

9 MR. ORSINGER: The first question is should
10 we engage in the effort of trying to write rule language
11 that governs letters and e-mails that purport to be
12 appealable orders or judgments.

13 HONORABLE DAVID EVANS: I just wouldn't want
14 to bless e-mails in the order. That's --

15 MR. LOW: Steve, and then Richard is going to
16 make the proposal, and we're going to vote on it.

17 HONORABLE STEPHEN YELENOSKY: Yeah, my
18 question is I think the same as Sarah's question, is which
19 is to the exclusion of other orders because some of us
20 obviously want to do that, but some of us want to do more
21 than that.

22 MR. ORSINGER: Yeah. I think that I was
23 trying to start out with a narrow ruling and then if you
24 want to add more to it then you can propose let's expand
25 that out to exclude such and such kind of order.

1 MR. LOW: State your motion again, and we'll
2 vote.

3 MR. ORSINGER: Whether the committee ought to
4 consider rule language relating to letter and e-mail --
5 letters and e-mails that purport to be interlocutory --
6 pardon me, can I start over again?

7 MR. LOW: Start over.

8 HONORABLE STEPHEN YELENOSKY: No.

9 MR. ORSINGER: Sorry, Dee Dee. Whether the
10 committee ought to draft rule language that would apply to
11 letters and e-mails that purport to constitute appealable
12 orders or judgments.

13 HONORABLE DAVID EVANS: Yes.

14 MR. LOW: Okay. All right.

15 MR. ORSINGER: Or that could be construed as
16 constituting appealable orders or judgments.

17 MR. LOW: All right. All in favor of that,
18 raise your hand. 15 in favor.

19 All opposed? Two opposed. All right.
20 That -- that carries. All right. Now, do you --

21 MR. ORSINGER: Some people want to expand
22 that out, and let them articulate that.

23 MR. LOW: Okay. But I'm not through with you
24 yet. Do you propose something beyond that? Do you also
25 have a second thing you want to propose and consider?

1 MR. ORSINGER: No, I don't personally because
2 I feel like the real problem area is these adjudications
3 that are reviewable on appeal.

4 MR. LOW: No is a good answer.

5 MR. ORSINGER: Yes. No. No.

6 MR. LOW: Okay. Jane.

7 MR. ORSINGER: No, period.

8 HONORABLE JANE BLAND: I would just encourage
9 the subcommittee to consider whether being overly technical
10 about the requirements of an order could present the same
11 sort of problems that we might have with requirements of an
12 answer. In other words, we know what an answer is supposed
13 to look like, but we also have plenty of cases where
14 somebody has sent a letter, sent something, put something
15 on a legal pad and filed it with the court in an attempt to
16 answer a lawsuit, and we've looked at that and said that's
17 an answer, so I urge that whether something is on a
18 letterhead or not probably ought -- not ought to be the
19 test of the effect of the ruling.

20 MR. LOW: Any further urging? Sarah.

21 HONORABLE SARAH DUNCAN: Well, we construe
22 the filings of pro ses liberally so that they are found to
23 have responded, answered the lawsuit, or filed a motion for
24 new trial if that's what the question is, but here we're
25 talking about judges, and I don't have the same kind of

1 sympathies for judges that I might for unrepresented
2 parties.

3 I would answer the question, yes, obviously.
4 I believe Judge Yelenosky would as well. I think it ought
5 to -- the committee's work ought to go further than just
6 appealable orders and judgments and encompass all orders,
7 because you've got the same problem of what is the effect
8 of a letter that could be construed as encompassing an
9 order.

10 MR. LOW: Okay. Does anybody have -- I mean,
11 that's one suggestion and other. Because when we do this
12 it's not over once they come back. I mean, you know, it
13 can be, you know, expanded, but we need to give them
14 something to target and then can be expanded. Any other
15 suggestions or motions that they consider? Sarah, you want
16 to --

17 HONORABLE SARAH DUNCAN: Sure. I'll make a
18 motion that the subcommittee consider that whatever the
19 requirements are for appealable order or judgment be
20 expanded to any order or judgment.

21 MR. LOW: All right.

22 HONORABLE SARAH DUNCAN: And all orders and
23 judgments.

24 MR. LOW: Does everybody hear the motion?
25 All right. All in favor of Sarah's motion raise your --

1 HONORABLE DAVID PEEPLES: Buddy, I'm not sure
2 I understand it. I want to clarify what we just voted on
3 that Richard moved.

4 MR. LOW: All right.

5 HONORABLE DAVID PEEPLES: As I understand
6 what Richard was asking that was approved 15 to 2, address
7 when can the letter or e-mail itself be the appealable
8 order. No?

9 MR. WATSON: No, it was whether.

10 MR. ORSINGER: Well, when might be never. I
11 don't think we should assume --

12 HONORABLE DAVID PEEPLES: When, if ever.

13 MR. ORSINGER: When, if ever, yeah.

14 HONORABLE DAVID PEEPLES: You're talking
15 about the e-mail or the letter being the document that's
16 appealed from.

17 MR. LOW: Whether that can constitute such.

18 MR. ORSINGER: That's what I -- that's what I
19 meant, and that's where this discussion started originally
20 with Justice Gray's concern.

21 HONORABLE DAVID PEEPLES: And with that
22 understanding I would ask that Sarah repeat what she just
23 moved.

24 MR. LOW: Right. All right. Sarah repeat,
25 please.

1 HONORABLE SARAH DUNCAN: That the
2 subcommittee consider that whatever its decision,
3 conclusion is, on when a letter can be appealable order or
4 judgment, that it also consider whether a letter can be an
5 enforceable order or judgment.

6 HONORABLE DAVID PEEPLES: And that's item 3
7 in my letter, I think, my memo.

8 MR. LOW: All right. Now, all in favor of
9 that, raise your hand, please. Eleven in favor.

10 All opposed? Three. All right. 11 to 3.

11 HONORABLE TERRY JENNINGS: May I ask a
12 question?

13 MR. LOW: Sure, Terry.

14 HONORABLE TERRY JENNINGS: Of Richard. I'm
15 wondering if we're going about this the right way, and
16 again, I confess as I did to Skip, my perspective here is
17 limited as an appellate judge. You know, I don't see these
18 problems very much. I think Judge Gaultney has seen them,
19 and as far as *Lehmann vs. Har-Con* goes, I mean, I've never
20 really had a problem applying it, but just because I don't
21 think I have a problem applying it doesn't mean other
22 judges are going to agree with me as far as my
23 interpretation of whether something is final or not, but
24 doesn't all of this ultimately kind of beg the question of
25 do we need a separate document rule like in Federal court

1 where, you know, for an order to be final and appealable it
2 has to be appear in a separate document that has to be
3 labeled as such, you know, appealable order or final
4 judgment, doesn't this kind of beg the question? But by
5 saying what isn't final and appealable by, you know, ruling
6 out e-mails and letters and so forth, aren't we really kind
7 of getting to the point where we're saying, well, you need
8 a final -- I mean, you need some kind of a separate
9 document that says this that's filed with the clerk?

10 MR. ORSINGER: I think that's implied for
11 sure.

12 HONORABLE TERRY JENNINGS: I mean it's --

13 HONORABLE STEPHEN YELENOSKY: No, it's not.

14 MR. LOW: That's something they could
15 conclude when they're considering this. That's something
16 they very well could conclude, and then once they consider
17 this if someone thinks we should go beyond that, and we can
18 certainly do that. Steve.

19 HONORABLE STEPHEN YELENOSKY: Well, I mean,
20 that may be the result, but that's not compelled by saying
21 that if you were to decide that e-mails and letters aren't
22 part of the body of documents that you look at to determine
23 if you have a final judgment, that doesn't mean you would
24 necessarily still have to have one final document. You
25 still -- all the documents you consider would have to have

1 a caption at the top, but that doesn't compel a conclusion
2 that there be one final document like we rejected sometime
3 ago.

4 MR. LOW: David, do you think you need
5 further input, go back and have your committee -- and do
6 you need other people on the committee?

7 HONORABLE DAVID PEEPLES: I think the
8 committee is fine the way it is, the subcommittee. I don't
9 think I have input right now on letters and e-mails that
10 purport to say motion denied, motion granted, new trial
11 granted, my summary judgment is set aside.

12 MR. ORSINGER: See, my original motion that
13 we voted on specifically did not answer that question, nor
14 did it answer the question of whether a letter or an e-mail
15 constitutes preservation of error for admission of evidence
16 or ruling on pretrial motions. I was trying to deal with
17 the original presenting question, what's appealable, and so
18 the question was does somebody want to add to the scope?

19 MR. LOW: Right.

20 HONORABLE SARAH DUNCAN: I need to understand
21 why Judge Peeples -- I thought my suggestion would
22 encompass --

23 MR. LOW: That.

24 HONORABLE SARAH DUNCAN: -- that.

25 HONORABLE DAVID PEEPLES: Well, I just asked

1 you to rephrase it, Sarah, in light of the clarification
2 that I sought about Richard's motion.

3 HONORABLE SARAH DUNCAN: Mine is all orders
4 and judgments, whether appealable or not.

5 MR. ORSINGER: Should have the same standards
6 as appealable? Well, then we ought to have a vote on that,
7 because --

8 MR. LOW: On what?

9 MR. ORSINGER: Sarah is saying that she
10 thinks whatever the standards are that we apply to e-mails
11 and letters with regard to appealable orders and judgments,
12 the same standard should be applied to motions for new
13 trial and to rulings that preserve error for appeal.

14 HONORABLE SARAH DUNCAN: Did you say require
15 that?

16 MR. ORSINGER: Yes. That's what I understood
17 you to say.

18 HONORABLE SARAH DUNCAN: What I just said was
19 that you should consider whether that should be true, come
20 back to the committee with your conclusion, and then we can
21 all decide how each of us -- each of us can decide how he
22 or she feels about it.

23 MR. LOW: Yeah, we're not voting on what it's
24 going to be. We're trying to give input to the committee
25 to go back, and I think we've given them about all the

1 input --

2 MR. ORSINGER: The only mandate we have on
3 that vote is dealing with appealable orders and judgments,
4 so if somebody wants to tack motions for new trial onto
5 that, it takes a separate vote in my opinion, and if they
6 want to affect the ability to preserve error by letter or
7 e-mail they need to add another vote on top of that.

8 MR. LOW: No, let's just tell them --

9 HONORABLE SARAH DUNCAN: That's why I used
10 "any and all."

11 HONORABLE STEPHEN YELENOSKY: She said "any
12 and all."

13 MR. LOW: Let's just tell them to do that,
14 include whatever Richard --

15 HONORABLE SARAH DUNCAN: With unmistakable
16 clarity.

17 MR. LOW: Yeah. All right.

18 HONORABLE SARAH DUNCAN: Buddy, if I could
19 make one point.

20 HONORABLE DAVID PEEPLES: I think, Buddy,
21 we've got enough guidance, we're fine.

22 MR. LOW: Yeah, I think you do.

23 HONORABLE SARAH DUNCAN: In response to some
24 comments that were made earlier, I would just like to say
25 on the record --

1 HONORABLE DAVID PEEPLES: I'm ready to rule.

2 MR. LOW: Wait a minute. Sarah, I'm sorry.

3 HONORABLE SARAH DUNCAN: In response to some
4 comments that were made earlier I would just like to say
5 that it is not my view and I don't think it's the law that
6 a docket entry is of no moment. It is what --

7 HONORABLE JANE BLAND: I said in the main.

8 HONORABLE SARAH DUNCAN: -- it is, and it can
9 be considered if appropriate, but I just want it clear that
10 I don't think they're irrelevant.

11 MR. LOW: Okay. All right. We're ready for
12 Richard.

13 MR. ORSINGER: On the next subject matter?

14 MR. LOW: That's right.

15 MR. ORSINGER: Oh, we're moving onto the next
16 agenda item and --

17 MR. LOW: That's it.

18 MR. ORSINGER: We might get it done -- are we
19 striving to get it finished before lunch?

20 MR. LOW: No, we're just --

21 MR. HATCHELL: Yes.

22 MR. ORSINGER: We are? There's a memorandum.
23 I characteristically like to have background for the
24 discussion. I hope you got the memorandum by e-mail. I'm
25 sorry it was so late in the week, and there's a copy of it

1 over there. The proposition --

2 HONORABLE NATHAN HECHT: It's of publishable
3 quality.

4 MR. ORSINGER: Well, unfortunately it's got
5 some mistakes in it, but it's so hurried that I'm going to
6 have to correct them as we go, but in a sense everything we
7 submit in writing goes into some kind of permanent record
8 somewhere, and so you're going to be judged by it I guess
9 by anyone who ever reads these archives. Okay. So Justice
10 Hecht had sent a letter out saying that I believe that it
11 was a staff person, Michael Cruz, Deputy Clerk for the
12 Supreme Court of Texas, had suggested that we consider
13 electronic publication of citation of -- electronic
14 publication of -- citation by publication for purposes of
15 civil litigation. Or let me restate why.

16 Rule 116 as is currently written provides for
17 citation by publication to be effected by publishing it in
18 a newspaper, and the question is what do we do with
19 electronic newspapers and what do we do with the
20 possibility of publishing it on the internet outside the
21 context of even an electronic newspaper, and that's at the
22 forefront of the national consideration of the issue, but
23 it's certainly timely, and so what I attempted to do to
24 find out what was going on in terms of official notices
25 being published electronically or on the internet, both in

1 Texas and around the country. You can see the text of Rule
2 116 here at the beginning, and at the end you'll see some
3 proposals that have been worked up on how this might be
4 tweaked, depending on what we want to do with electronic
5 publishing notice instead of paper newspaper publishing
6 notice, and to help trigger some thoughts for discussion
7 purposes I listed issues that we might consider, and some
8 of these deal with the current rule even without rewriting
9 it.

10 For example, the current rule requires that
11 the citation be published once a week for four consecutive
12 weeks, the first publication to be at least 28 days before
13 the return day of citation, and the publication has to be
14 made in the county where the suit is pending if there's a
15 newspaper in the county, but if there's not a newspaper in
16 the county then a newspaper in an adjoining county where --
17 adjoining county where a newspaper is published. The rule
18 doesn't tell us what happens if the county and all
19 adjoining counties do not have a newspaper, so I don't know
20 what people do out there in West Texas if they don't have
21 one. If it involves title to land then it must be
22 published in a newspaper of the county where the land or a
23 portion is located or if there is none then a newspaper in
24 an adjoining county.

25 So the idea of published comes to us from the

1 traditional concept of newspapers, which are defined,
2 interestingly, I thought pretty well in -- on page eight in
3 Nichols Cyclopedia of Legal Forms, and I'll just skip there
4 for a second. They say there are several characteristics
5 that newspapers have in common. They are published
6 periodically, usually at short regular intervals not
7 exceeding a week. They are meant to appeal to a wide
8 spectrum of the general public. They usually contain
9 advertisements, and their purpose is to convey news or
10 advocate opinions. So that's more or less the traditional
11 concept of a newspaper. Those of you who subscribe to
12 local papers in big cities in Texas know that all of these
13 papers now have electronic versions of the newspaper, which
14 is not just a scan of the paper. It's actually an
15 electronic configuration that's designed for ease of use
16 and to emphasize their advertising and everything else, so
17 it looks different even though it may have the same
18 content.

19 HONORABLE SARAH DUNCAN: And it doesn't have
20 the same content.

21 MR. ORSINGER: Maybe it doesn't have exactly
22 the same content always, and then there are some newspapers
23 that have gone to pure publication -- like the *Christian*
24 *Science Monitor*. I don't know if any of you ever used to
25 read that, but it was a lengthy newspaper with worldwide --

1 of worldwide -- issues of worldwide interest that was
2 mailed by subscription to people. I subscribed to it
3 myself for many years, and it's now gone completely
4 electronic. They don't have a paper version anymore, but
5 they do have subscribers, and now they just get it purely
6 by e-mail, and then with the electronic readers we have
7 like the Kindle and things like that you can get
8 subscriptions now to newspapers that are sent to you by
9 e-mail and you never get the paper copy. So the
10 traditional concept of newspaper is in flux, and most of
11 the people that have looked at it, including people that
12 are in the industry, feel like ultimately the paper
13 paradigm of hand-delivery to your doorstep or the guy at
14 the stoplight selling them to you is eventually going to be
15 replaced by electronic delivery. At some point there is a
16 tipping point where they can no longer support the cost of
17 printing for the small number of people that want print.

18 Okay. So then the issue of what does the
19 term "publish" mean is something that we need to grapple
20 with either now or at some point in the future, and the
21 definition of newspaper is something we need to grapple
22 with either now or at some point in the future. The
23 requirement of published once a week may impair the
24 transition to electronic newspapers because they're not
25 published once a week. They're put up on the internet, and

1 they just remain there until they're replaced, so they
2 don't have a cycle of publish, deliver, and then replace
3 with something that's new that's published and delivered,
4 and so we may have a problem with even internet versions of
5 newspapers if we require them to be published once a week.

6 And then my proposal or issue No. 4 is let's
7 consider the purpose of citation by publication. This is
8 someone that's getting sued for something. It could be
9 trivial, or it could be serious. I mean, it could be as
10 serious as a money judgment that would wipe out all your
11 assets, or you could lose your parental rights to your
12 child, all the way down to just a suit for a hundred -- for
13 a few thousand dollars. So behind all of these publication
14 rules is a constitutional duty on the part of the
15 government to give people notice that they're being brought
16 into court, so we have to ask ourselves whether the idea of
17 a periodic paper edition of local interest that's
18 hand-delivered to people on a regular basis is the best way
19 to get notice out to someone that they're being sued or
20 whether there is a better way to do it using the internet,
21 such as prescribing notices being published on the internet
22 and maybe even prescribing internet sites, whether they
23 would be a county site or a statewide site where citations
24 by publication could be published.

25 Issue No. 5 for us to talk about I think is

1 whether we should do a rule change that allows you to add
2 electronic publication to the requirement of paper
3 publication in a periodic newspaper or whether we should go
4 even further and require dual publication so that the
5 subscribers that get the paper copy have exposure to it and
6 the ones who get only the electronic copy have exposure,
7 and that way we get all the subscribers included by
8 requiring dual publication, or do we permit the plaintiff
9 or the sheriff to decide whether to go paper or electronic
10 or both, or do we require that a government agency create a
11 web page where everyone knows they can go to to find out if
12 someone has been sued, and that could be at the county
13 level or it could be at the state level.

14 You could say in a rule, I think, although
15 maybe that would be stepping on the wrong toes, that every
16 county must maintain a website where it offers for viewers
17 all of the citations by publication, or you could even
18 maybe have the secretary of state do that for all of the
19 courts in Texas, and then anyone that wants to know if
20 they've been sued or someone they know has been sued and
21 cited by publication they can go to that one website and do
22 a search. So that would be Issue 5.

23 No. 6, if you're going to have a government
24 website, is it going to be local, or is it going to be
25 centralized on a statewide basis? No. 7 is how does cost

1 figure into this decision, because we have the cost to the
2 litigant, we have the revenue to the newspaper, and we have
3 the cost to the state if the state is going to provide an
4 internet publication service at no fee, or we could have
5 the fee go to the state to subsidize the cost of electronic
6 publication. Steve, you want to say something?

7 HONORABLE STEPHEN YELENOSKY: Yeah. Can we
8 add an issue, which is whether publication in the current
9 world that we have can meaningfully provide due process to
10 anyone? I mean, to me when you publish the publication is
11 irrelevant. What matters is you have an ad litem who goes
12 and looks for the person. I mean, which of us thinks,
13 "Hmm, I wonder today if I've been sued. I'm going to go to
14 a website and see."

15 MR. ORSINGER: Well, if that's true we can
16 never admit it's true because the Supreme Court has said
17 that this notice is a due process requirement, and so if we
18 did away with it because we know that it's really not
19 working then we have constitutional problems that are
20 encountered by just overturning a long term historical
21 requirement of publication.

22 HONORABLE STEPHEN YELENOSKY: Well, but I
23 said we do require an ad litem to look for the person.

24 MR. ORSINGER: I'm interpreting you to say
25 why don't we just forget publication and let's go with a

1 robust ad litem representation.

2 HONORABLE STEPHEN YELENOSKY: Yes.

3 MR. ORSINGER: And the good argument against
4 that is there are a lot of Supreme Court decisions that
5 talk about citation by publication, and I don't know that
6 we should try to overturn them in a rule. Okay. So,
7 anyway, I agree with you. I think in a lot of senses it's
8 a legal fiction and that the real protection might be the
9 appointment of the ad litem, but it's a legal fiction that
10 the fiction readers on the Supreme Court like to read for
11 some reason.

12 So, okay, so Item 8 is what does the -- what
13 does the litigant do when there's no newspaper -- no paper
14 newspaper in the county or the adjoining counties, because
15 I think that may -- if it's not already true it's coming
16 true, and our rule doesn't allow them to publish in a
17 county that's not adjoining. Okay. So those are just
18 thoughts for us to consider.

19 HONORABLE DAVID EVANS: Richard?

20 MR. ORSINGER: Yes.

21 HONORABLE DAVID EVANS: I think what we're
22 saying is it's been our experience that most ad litem
23 locate the people and that publication might be the
24 backdrop after the appointment of the ad litem. We don't
25 have any authority right now to go get an ad litem until

1 after publication has run, but once we appoint an ad litem
2 with the type tools that they have and the motive that they
3 have, they do a pretty good job of locating the defendants.

4 MR. ORSINGER: So what you're suggesting is
5 not to do away with the publication requirement, but defer
6 it until after there's been a --

7 HONORABLE DAVID EVANS: I'm just saying that
8 my experience has been -- where I handle it is on
9 foreclosure of real estate mostly right now and mineral
10 interest cases, is that we will locate these heirs, and the
11 ad litem comes back with a report that says they don't want
12 to be in the lawsuit, but I know where they are now, but we
13 don't have them actually served. Now we know exactly where
14 they are.

15 MR. ORSINGER: Let me try to translate that
16 into something concrete. Are you saying that we should do
17 away with notice, citation of publication by notice?

18 HONORABLE DAVID EVANS: I wouldn't do away
19 with it unless it was the only way to fulfill this due
20 process notice, but if the defendant comes in and says "We
21 can't locate the person" and substitute service wouldn't be
22 allowed, I'm not allowed to go to an ad litem first to
23 appoint an attorney ad litem to do -- to check -- to go
24 into the process. And it's been my experience that most of
25 them do locate the -- a lot of the unknown heirs.

1 MR. ORSINGER: Okay, so I'm trying to put
2 words into your mouth --

3 HONORABLE DAVID EVANS: That's fine.

4 MR. ORSINGER: -- and, you know, tell me if
5 they don't work. Are you -- you're wanting us to write the
6 rule so that citation by publication is not necessarily
7 required until after an ad litem has been appointed? Is
8 that what you're saying?

9 HONORABLE DAVID EVANS: That's a way to go
10 about it, yes.

11 MR. ORSINGER: Okay. Well, let's add that
12 onto the list. That wasn't the presenting question, but
13 let's put that on here as to a factor as to the timing of
14 it. Okay.

15 HONORABLE DAVID EVANS: Okay.

16 MR. ORSINGER: Now then, just a little more
17 background. I have a quotation here. I'm very sensitive
18 to the fact that we're the guests of the publishing
19 industry here in Texas frequently, and so they get the
20 first say on this question, and the *Houston Chronicle* just
21 a short time ago published an editorial I guess on this
22 whole issue about whether the Legislature should provide
23 for the publication of notices on the internet in lieu of
24 in newspapers, and this is the *Houston Chronicle* holding in
25 on this. It's there on page three and four, and this does

1 not involve citation by publication of individuals. This
2 involves bills that are in the current Texas Legislature
3 that's now meeting that are moving public notices about the
4 operation of government over to the internet, either on an
5 elective basis or on a mandatory basis, and so they are
6 pointing out the long and important history that newspapers
7 have provided for our democracy in informing voters and
8 taxpayers.

9 They also point out here in the middle of
10 page four that governments would have to spend thousands of
11 additional taxpayer dollars for secure servers,
12 programming, posting and auditing, which is an important
13 question when we're cutting back state benefits that are
14 core, although it might be ameliorated by just providing
15 that the filing fee or the service fee associated would be
16 paid to the county or the state secretary of state to
17 underwrite the cost; and down toward the end of the
18 *Chronicle* comment, second to last paragraph, they say, "A
19 majority of Texans rely on their local newspaper as the
20 primary source of information in their community"; and I'm
21 not sure whether that's right. They may know and I may not
22 know, but I certainly think that that will not be true in
23 10 years, and I'm not totally sure that it's true now. I
24 don't have any data on it, and I might be able to find
25 some, but that's what their feeling is, is the role of

1 newspapers as the traditional vehicle for which public
2 notice is to be given is historical and it's important and
3 it's justifiable even under current policies.

4 The next section of the memo talks about
5 pending legislation, and there are many, many bills that
6 involve internet publishing. I just selected some. The
7 first one mentioned is House Bill 1082, and it has to do
8 with school districts giving public notices, and it says --
9 you'll see there on the top of page five, this is a very
10 limited bill because it only allows internet publishing if
11 there's no daily, weekly, or biweekly newspaper published
12 in the school district and only if -- and only if the
13 population in the school district is less than 10 percent
14 of the population in the county. So that's a very
15 restrictive provision of internet publishing in an area
16 that doesn't have newspapers and in a district that's a
17 very small portion of the county, and in that situation
18 then the publication may be posted on the district's
19 internet website instead of in the newspaper, which seems
20 peculiar to me because the condition is there is no
21 newspaper. Steve.

22 HONORABLE STEPHEN YELENOSKY: Well, isn't
23 that a totally different circumstance? That's notice of a
24 meeting. That's notice to the whole haystack. That's not
25 looking for a needle in the haystack.

1 MR. ORSINGER: Yeah, I think that -- and
2 you'll see, each one of these is addressing slightly
3 different concerns. What I wanted to do was to show what
4 the Legislature is thinking in terms of electronic internet
5 publishing versus paper publishing, kind of pick up a trend
6 there. In this particular bill under (c) and (d) they
7 actually attempt to address content of the electronic
8 publication. They just adopt by reference whatever the
9 content requirements are for the newspaper notice, but they
10 require that there be a link on the home page of the
11 website that's prominent that links to this information and
12 then they say the newspaper requirements on page size and
13 print size doesn't apply to the electronic page. So that's
14 what that bill does. It's just limited to those areas
15 where it's a very small school district, and there are no
16 newspapers.

17 House Bill 1094 has to do with the
18 publication of political expenditures and contributions for
19 candidates for county and municipal offices, so that's not
20 a statewide election, and they talk about making electronic
21 reports available on the internet. The official report
22 still must be filed with the clerk that's specified in the
23 Election Code, but in addition to that they require -- they
24 require that that information be made available to the
25 public at the county's website within two days of when the

1 official report is filed with the official state agency.
2 So this is a mandatory requirement of internet publication
3 of election information that is filed with the state, not
4 very analogous to citation by publication, but I thought it
5 was interesting that that bill appears to reflect that
6 legislators believe that the word is going to get out
7 better if you put it on the internet than if you just leave
8 it with the clerk of the government agency in question.

9 House Bill 1153 on page six is much broader
10 in scope. It would be a mandate to the state comptroller's
11 office to establish an internet portal to the numbers on
12 Texas government finances, so they are directing this
13 department to create a web page. They even have details on
14 how it will operate. They say it must include a search
15 feature that retrieves information based on the address,
16 the user's entry of an address, and location. So if you
17 put in your name and -- pardon me, if you put your address
18 in there, it will feed back to you the financial
19 information that's relevant to the area of the state that
20 you live in. I believe that's what they are asking here,
21 and they also have operational specifications about the
22 content and how the website will work, which I thought was
23 interesting, that the Legislature is prescribing certain
24 minimum requirements about the way the information appears
25 on the web page and how it can be accessed to a user that

1 comes to the web page.

2 House Bill 2816 is another school district
3 legislative proposal, and it says that all school district
4 notices can be published on the internet instead of a
5 newspaper, so if you were required to publish the school
6 information in a newspaper you can -- your choice, put it
7 on the internet and not in a newspaper. So this is not a
8 requirement that they add it to the newspaper or an option
9 that they add it to a newspaper. This is that the
10 administrator can elect to go purely electronic without
11 going to a newspaper, and when they go electronic notice,
12 that it's at the district's internet website, not the
13 electronic newspaper. There are some of these bills that
14 say you can put it in the electronic version of the
15 newspaper. This says you can circumvent the newspaper,
16 paper or electronic, and go directly to your website if you
17 want to, and then they have some content requirements,
18 which they incorporate by reference other than page size
19 and font size; and they also require that it be placed
20 prominently on the home page. It doesn't get into any
21 greater detail about searching or what information should
22 trigger the information.

23 House Bill 3364 is an amendment to the
24 Property Code, and it says -- I wish that I had captured
25 enough to tell you which provision this -- what subject

1 matter is, I didn't, but that the -- if the county
2 maintains a website, it doesn't mandate it, then the county
3 must post a notice of sale filed with the county clerk on
4 the website page that is available free of charge to the
5 public. So what they're saying is that if you've got a
6 website you must put this information on the website in
7 addition to whatever legal requirements exist about notice.

8 Senate Bill 690 has to do with foreclosure on
9 storage contents to fulfill a lien, and it says that "The
10 notice required by this section may be given by publishing
11 the notice once in a print or electronic version of a
12 newspaper of general circulation in the county where the
13 vehicle or motor is located," so they're giving you the
14 option of publishing one time in the print or the
15 electronic version, it's your choice, so they've expanded
16 it out from print to electronic. I suppose the newspapers
17 charge the same whether the notice is in the electronic or
18 the print, I don't know, but anyway, that's interesting
19 because they gave you the option of the print or electronic
20 version, but you're still required to put it in a newspaper
21 of general circulation.

22 The next subsection is subsection (6) on the
23 legal cyclopedia. I already told you about what I thought
24 was very important, which is there's now a lot of vagueness
25 about what constitutes a newspaper. There used to be real

1 clarity on it because they always looked the same, but now
2 some newspapers are transitioning to purely electronic,
3 some are dual, and some are totally electronic without
4 paper. At the bottom of page eight you'll see this
5 practice note, "Due to the internet the very nature of what
6 may be considered a newspaper is changing, requiring that
7 practitioners review the effect of other laws. The online
8 addition of a newspaper is, in fact, an addition of the
9 newspaper has been accepted by many courts."

10 The next thing I want to call to your
11 attention is over a couple of pages on page 10, category 7
12 and that is that a search of the case law on this subject
13 matter indicates to me that the case law is in its infancy.
14 Some of the oldest cases are as long as seven or eight
15 years old, but there's been very little litigation to tell
16 us what a trend would be or even what the multiple choices
17 are that we have. One of the earliest that I could find
18 that was modern is a case out of the Virgin Islands there
19 on page 10, *Hernandez vs. Alcorta*; and this was a local
20 plaintiff was trying to get service on a bunch of
21 nonresidents of the Virgin Islands that had interest in a
22 condominium project; and they were attempting to justify
23 citation by publication through a purely internet newspaper
24 that had no paper delivery; but we -- they knew that the
25 defendants didn't live in the Virgin Islands to get their

1 paper copy of delivery anyway; and that particular court
2 ruled factors one, two, three, and four that were offered
3 to justify it that "internet newspapers reach a greater
4 number of people because they're free and available 24
5 hours a day." I might parenthetically say not all of them
6 are free. Number (2), "an internet newspaper's audience
7 potentially extends beyond the confines of the original
8 location." That's certainly true. (3), "the persons
9 reading an internet newspaper can easily forward
10 information to others, and (4), legal notices published in
11 internet newspapers are not relegated to the section" --
12 "to a section in the back pages"; and the court found that
13 to be persuasive, so that was one of the earliest courts in
14 America really to grapple with the idea of publication of
15 absent defendants, citation by notice in a purely
16 electronic newspaper might be preferable, in that case was
17 preferable, to a print version.

18 And so Washington State has a Washington
19 Supreme Court case decided 2006 called *Central Puget Sound*
20 *Regional Transit Authority vs. Miller*, and that had to do
21 with giving notice of a meeting of a company, I believe,
22 that had condemnation authority, and the question was
23 whether -- what constituted or would meet the
24 definitions of the minimum requirement of notice in
25 Washington statutes, and that court said there's very

1 little case law on the subject of sufficiency of web
2 posting for notice requirements, and they cited -- they say
3 that several cases have rejected web posting as a method to
4 apprise class members of a class action suit.

5 I think that the law is a little different
6 now, but that was their context, but they go on to say in
7 the second sentence of the second paragraph, just -- pardon
8 me, "Miller's argument that posting on a website does not
9 necessarily furnish notice to anyone is unfounded. Just as
10 it is impossible to assure that anyone will look at a
11 particular web page, it is equally impossible to assure
12 that anyone will purchase, much less read, a newspaper";
13 and in that particular situation there was a statute that
14 permitted internet notice as an acceptable notice; and they
15 ruled that that was constitutionally okay.

16 Subdivision (c) on page 11 is a Seventh
17 Circuit class action case, and class action cases are
18 different obviously than individual defendants, but they
19 present some of the same challenges of getting notice out
20 to real people about individual lawsuits, and in this
21 particular case the question was there was a settlement
22 where someone might have -- that was in the class might
23 want to object to the settlement terms or the amount of
24 fees or whatever, and the question is how do we get the
25 notice out to the people in the class. And so this

1 particular Seventh Circuit case in 2004, it says, "When
2 individual notice is infeasible, notice by publication in a
3 newspaper of national circulation is an acceptable
4 substitute." They go on to say "something is better than
5 nothing, but in this age of electronic communications
6 newspaper notice alone is not always an adequate
7 alternative to individual notice." I continue, "The
8 worldwide web is an increasingly important method of
9 communication, and," of particular pertinence here, "an
10 increasingly important substitute for newspapers."

11 In this particular situation the defendant,
12 or should I say the appellee, did not post a notice on its
13 own website, but they hired somebody to maintain the
14 website for the case, and the notice was posted on that
15 website, and the court said that that was an acceptable
16 substitute. So what's happening is, is that as time goes
17 on we're transitioning away from a feeling that a web
18 notice is not adequate for class action purposes to the
19 fact that in some instances or maybe in all instances web
20 notice is probably better than publishing in just the *New*
21 *York Times* or the *Los Angeles Times* or whatever.

22 Subdivision D, I list other class action
23 cases that have said that conventional newspaper publishing
24 coupled with internet publishing is an acceptable way to
25 give the notice requirement that the Federal -- Rules of

1 Federal Procedure require. That's dual. That's not
2 electronic to substitute for paper. That's electronic
3 added to paper. Page 12, paragraph VIII, deals with the
4 law reviews on the subject. Not surprisingly perhaps, most
5 of the law reviews are written by student authors who are
6 probably the ones that are on the internet all the time as
7 compared to the law professors and the older practitioners
8 like myself, and they were all very, I think, committed to
9 the idea that the world is moving away from a paper-based
10 paradigm to an electronic paradigm and that we need to
11 change our procedural rules that are all based on the paper
12 paradigm so that we can accept and use the breadth and
13 flexibility that's available in the internet world.

14 So I won't bother you with quotations from
15 each. I will say that I do have one law professor article
16 in here on page 15, and it's addressed to class actions as
17 opposed to -- several of these are class actions. Some
18 have to do with notice to individual defendants, but they
19 all recognize that the internet is a game changer and that
20 we need to reconsider our old paradigm. On page 15 is a
21 list of other publications that address the issue of
22 notice, electronic notice, e-mail notice, internet notice
23 versus paper notice, and then Roman IX is where we have
24 some proposals, which I might be able to cover briefly
25 before lunch, and we can discuss after lunch.

1 The first proposal -- and I guess I should
2 say at this point that my subcommittee, to the extent
3 anyone had an opinion, was of the view that we should
4 seriously consider offering internet publishing as an
5 alternative but not requiring that it be the mandatory way
6 to publish. In other words, allow internet publication as
7 an alternative, but do not rule out paper publication and
8 force internet publication, but that's a very tentative
9 assessment. I wouldn't say that it was a vote or that it
10 was firm. It was just an inclination that if we're going
11 to move to the electronic publication world we should go
12 through a period of dual option where you could go the
13 paper route and add to it the electronic or give you the
14 choice of going either paper or electronic.

15 So this first proposal here just adds on --
16 takes all the language as-is, whatever a newspaper is and
17 whatever publishing is in this day and time, the
18 publication requirement may also be met by publishing
19 citation at a newspaper's internet site for four continuous
20 weeks beginning 28 days -- at least 28 days before the
21 return day of citation, provided that the citation may be
22 accessed by using a search capability built into the
23 internet site. In other words, you can do continuous
24 publication for the same period of time rather than
25 periodic publication once a week, and it must be at the

1 website of a newspaper, whatever we define that to be or
2 whatever that's taken to be, and you must be able to find
3 it from searches on the front page, not just have to click
4 through to the legal notices. That's just one proposal for
5 discussion.

6 An alternative is the same thing, only say
7 that the publication -- a citation shall also be published
8 in the newspaper's internet site, so that means you still
9 have to publish by paper, but if there is an internet
10 newspaper, you are also required to publish in the internet
11 version of that newspaper. The third alternative would
12 take Rule 116 as-is and would just add "The publication
13 requirement may also be met by publishing citation at an
14 internet site maintained by the county" -- or substitute
15 "State of Texas" if you want to go statewide on it -- for
16 that same period of time. So basically that's moving away
17 from the internet newspaper to a government internet.

18 So we've -- we've got the paper paradigm of
19 the newspaper, we've got the electronic paradigm of the
20 newspaper, and then we've got the government website, which
21 could either be an add-on to the print or it could be
22 mandatory. And if we do go the government route we have to
23 decide whether it's the local government or whether it's
24 the state government, so these options basically are
25 putting this load at whatever speed you want to on whatever

1 burden.

2 The next, version D, is the publication
3 requirement shall also be met by publishing citation at an
4 internet site maintained by the government. So that's
5 newspaper publishing plus a mandatory publishing at the
6 government site, and the last one is that eliminates
7 newspaper publishing altogether by saying that "citation
8 shall be published at an internet site maintained by the
9 county or the State of Texas for the purpose of publishing
10 legal notices," and just as an add-on thought to the whole
11 thing, one of the things that makes the state site
12 attractive is that by aggregating them there may be revenue
13 opportunities, if the state would ever consider revenue
14 associated with legal notices. Newspapers certainly do,
15 and also, it might give the state more clout with a search
16 mechanism, search organization like Google, saying that we
17 want you to agree to list the individuals that are at our
18 government website as defendants cited by publication, we
19 want some kind of arrangement with you that if someone does
20 a Google search in the person's name it's going to find
21 that notice at our government website. That may be
22 unrealistic. Google may not be willing to do that, and
23 they probably wouldn't do it for every single political
24 subdivision in America, but if there's 52, 54 jurisdictions
25 that they're concerned with, they might be willing to agree

1 that if it conforms to their search format, that by putting
2 in an individual's name and searching that the Google
3 website will pull up this public notice, which would then
4 greatly increase the chances that the defendant would
5 actually find out about it or some friend or relative would
6 find out about it.

7 So, anyway, those are -- that's kind of what
8 the background suggests. Those are kind of the activities
9 going on in the area and some of the factors for us to
10 consider. Steve.

11 HONORABLE STEPHEN YELENOSKY: Are there any
12 studies in the modern era where individual defendants, not
13 class action plaintiffs, not people looking for a notice
14 about a meeting, have found out they were defendants by
15 publication? Are there any studies?

16 MR. ORSINGER: I wouldn't -- I haven't found
17 one, and I'll bet you that's because there isn't one.

18 HONORABLE STEPHEN YELENOSKY: Which leads me
19 to believe at some point if we're relying on this notice
20 somebody is going to have to analyze whether it's
21 constitutionally sufficient in any way, any -- electronic,
22 e-mail or whatever, because it's dependent on people
23 looking for being sued as opposed to somebody looking for a
24 notice or hearing about a notice of a meeting, so I
25 question whether the game is worth the candle.

1 MR. ORSINGER: Well, in response to that, and
2 I'm not defending the proposal, I'm just presenting it, but
3 it does seem to me that it is more likely that someone
4 would stumble on the fact they've been sued in some place
5 where they are, you know, not very connected, more likely
6 they'll stumble on that on the internet than they will
7 stumble on that by reading a local newspaper.

8 HONORABLE TERRY JENNINGS: Why?

9 MR. ORSINGER: Why? Because if it's a place
10 you don't live, you don't read that newspaper; and if it's
11 a place you do live, according to the declining
12 subscriptions, you don't read the newspaper either, even if
13 you live there.

14 HONORABLE TERRY JENNINGS: Well, the -- it's
15 problematic because, as has been pointed out, most people
16 aren't going to get their notice this way anyway, and it
17 occurs to me that there's a much larger problem here in
18 regard to the internet because it's so vast. I mean,
19 you're literally throwing up notice into the ether at some
20 point in time; and, you know, not to attack every premise
21 of what you just have kind of gone through, but, you know,
22 when you talk about people accessing the internet, more
23 people are accessing the internet, well, people are looking
24 for specific targets. More people are looking at websites
25 that they agree with and so forth and so on, and, you know,

1 just because you throw something up on the internet doesn't
2 mean it's going to be more likely seen there than it would
3 be in a newspaper; and then you go back to the fact that
4 even though there has been the decline in newspaper
5 readership there has been kind of a recent up kick lately,
6 and there's been some advertisement to that effect that
7 more people are starting to go back, albeit a very small
8 amount, to the print.

9 And it occurs to me as far as like a common
10 forum that although more people are looking at the internet
11 where you do have a newspaper, a wider variety of people
12 are looking at a newspaper; and when you're flipping
13 through a physical copy of a newspaper and you see that
14 notice section, of course, I never really pay a lot of
15 attention to it, but every now and then you'll see
16 something that jumps out at you; but you're more likely to
17 see something if you have a newspaper in front of you and
18 you're flipping through it and you see, oh, there's the
19 notice section you see all the time, you may see something
20 that strikes your eye; but you're more likely because of --
21 although there may be a larger audience looking at the
22 internet, it's -- what people are looking at is much more
23 targeted versus the newspaper where you have a wider
24 variety of people looking at a newspaper, maybe a smaller
25 audience but a wider variety who may be able to flip

1 through and see something. So I would go with your
2 proposal that keep newspapers and make the internet an
3 additional option.

4 MR. ORSINGER: You know, another interesting
5 thing that you point out is while people browse the
6 internet, there are statistics on a large number of what
7 they call vanity searches where people stick their own name
8 in the internet just to see what anyone is saying about
9 them.

10 HONORABLE TERRY JENNINGS: They Google
11 themselves, yeah.

12 MR. ORSINGER: Yeah. So most people are not
13 appearing on the internet. A few people are, but there are
14 statistics that I've read on that, not for this purpose,
15 and if the internet notices were somehow designed to plug
16 into the ability if you search your own name you'll find
17 out that somebody is suing you or did sue you, that might
18 be a great enhancement to the kind of serendipitous
19 discovery you're describing by reading through the
20 newspaper.

21 MS. PETERSON: Maybe you could have a
22 Facebook notice as well.

23 MR. ORSINGER: Well, see, I don't have a
24 Facebook account, but apparently everyone else in America
25 does --

1 MR. LOW: No, not everyone.

2 MR. ORSINGER: -- and so there's probably
3 some way to involve Facebook in giving notice, but I don't
4 have any friends on Facebook, and as far as I know my face
5 isn't on Facebook.

6 MR. LOW: Richard, you're asking that we
7 consider whether or not the internet should be a method, I
8 mean, in addition to the newspaper. In other words, you're
9 not suggesting to substitute it, whether we should even
10 consider that. Say you've got a place like Kountze where
11 they read the local paper to see who the sheriff arrested
12 and all of that, well, they'll see it, but in a place like
13 that it might not be necessary. In Houston there's so many
14 legal notices, who is going to read all the legal notices
15 in the Houston paper, so you're just considering this as
16 whether this should be an alternative, but if so, who
17 decides, the clerk, the judge, or who decides whether it
18 should be an alternative?

19 MR. ORSINGER: Well, we could write a rule
20 that makes the decision, and we have a couple of choices to
21 make. Is electronic publication mandatory or is it going
22 to be optional or is it going to be exclusive?

23 MR. LOW: Uh-huh.

24 MR. ORSINGER: I bet if we took a vote that
25 we wouldn't get anybody that supports that electronic is

1 the exclusive method. I think that still --

2 MR. LOW: I think we need to vote on it.

3 MR. ORSINGER: Yeah. But that's an option,
4 and we can put something like that in the rule, but on the
5 other hand, if you say that electronic publication can be
6 added, I don't know whether the plaintiff is ever going to
7 want to add something more that would increase the chances
8 that the defendant would be found. I mean, perhaps they do
9 have a motive to find the defendant, maybe they don't, but
10 the option may or may not be used, and so it may be we
11 ought to require it. I mean, if we're serious about having
12 this information disseminated on the internet then perhaps
13 we should require that it not just be published on page 23
14 of a section that no one ever reads, but is also put on the
15 internet where there's a chance somebody might actually
16 find it. And then the question becomes if we're going to
17 mandate electronic publication are we going to limit that
18 to privately-owned newspaper websites, or are we going to
19 say that government websites are permitted, or are we going
20 to require a government website.

21 MR. LOW: Well, we don't have government -- I
22 mean, right now we don't have a state website --

23 MR. ORSINGER: Yeah, we do.

24 MR. LOW: We do?

25 PROFESSOR CARLSON: TexasOnline.

1 MR. ORSINGER: Yeah, we have a state website
2 and then we also have departments that have websites, like
3 the comptroller, the secretary of state, the Legislature,
4 the Supreme Court, and yet I think --

5 MR. LOW: Okay.

6 MR. ORSINGER: Yeah. So, actually, you know,
7 maybe the best thing to do -- and I think this is beyond a
8 rule. I think this would require a statute, is to just say
9 that the secretary of state must maintain a permanent
10 electronic repository of all citations by publication that
11 can be searched from the front page with a name, and it
12 costs them nothing. Disk space is the cheapest thing you
13 can buy in the world, so, you know, you -- just the county
14 clerks or the district clerks are required to e-mail these
15 citations in or the plaintiff has to do it and then it gets
16 posted at this State of Texas website, and you can search
17 it for a name, and there's no reason to retire old cases.
18 If someone got sued 10 years ago, they can find out about
19 it whenever they do the search. If there's a cost
20 associated with that, there will be some costs, but it
21 won't be exorbitant. We can allocate part of the filing
22 fee for that cost.

23 You know, ultimately, it's probably more
24 effective to say there's one place in the state you can go
25 to find out if you've been sued, but then, you know, as

1 Justice Jennings has pointed out, that eliminates the
2 serendipitous discovery. If you're searching to see if
3 you've been sued, it's easy to do that if you only have to
4 go one place to search, but if you're just kind of randomly
5 reading and see, "Aha, my neighbor got sued," you won't do
6 that probably unless you know their name and put it in, but
7 you know, at least at this point we should probably open
8 the door to it and then whoever is on this committee in 20
9 years will probably be prepared to go away from print to
10 electronic.

11 MR. LOW: Oh, no, we're going to finish with
12 you. Carl.

13 MR. HAMILTON: Is this a problem now? Are
14 there a lot of cases that come up where defendants that
15 were served by publication file bills of review and say we
16 didn't know about it?

17 MR. LOW: I see it as something to keep up
18 with the present and the future.

19 MR. ORSINGER: The problem is not probably
20 the guys that file bills of review. The problem with guys
21 that could have had notice on the internet that didn't get
22 it --

23 MR. LOW: Yeah.

24 MR. ORSINGER: -- and I don't think that
25 there's going to be any statistics out there other than

1 just statistics on internet usage and the way people use
2 the internet. This is not a problem that the house is on
3 fire and we need to call the fire department. This is a
4 question of, you know, we're transitioning from a paper
5 society --

6 MR. LOW: Right.

7 MR. ORSINGER: -- to an electronic society
8 and do we want to continue to require that notices be
9 published in a newspaper of local distribution with
10 diminishing subscription or do we want to allow or require
11 that they go with the rest of the world that's
12 progressively electronic. That's the way I see it.

13 MR. LOW: I see the *Houston Chronicle*, I'll
14 read, and it says "For further details see website
15 such-and-such." I mean, they're using it in the papers.
16 So what guidance do you need from us?

17 MR. ORSINGER: There's other comments, I
18 guess.

19 MR. LOW: All right. Sarah.

20 HONORABLE SARAH DUNCAN: I think there's a
21 reason that the phrase needle in a haystack was invented.

22 HONORABLE LEVI BENTON: We can't hear, Sarah,
23 down here.

24 HONORABLE SARAH DUNCAN: I think there was a
25 reason the phrase needle in a haystack was invented, and I

1 think it applies perfectly to the internet. There's no
2 place easier to lose something than on the internet. You
3 can find a site -- I had this happen the other day -- find
4 exactly what you want on a particular site; and if you're
5 not careful to bookmark it, you can go back two weeks
6 later, three weeks later, and you can look for that site
7 all day long; but if you're on a different computer and you
8 don't have access to your history, you may not find it.
9 This -- I mean, default judgment by Facebook, this is --
10 you know, if you want to make it an option that people can
11 post notice on the internet so that those few people who
12 can't be found are served by regular service and don't read
13 the newspaper or can't read the newspaper but just happen
14 to have a computer and do what you call a vanity search on
15 a daily basis for the entire world, that's fine with me,
16 but I -- I think it's -- and I'm pretty -- you know,
17 relative to a lot of people in this room, I'm pretty wed to
18 my computer and digitally oriented, but I'm not in favor of
19 it being sufficient for legal purposes in and of itself.

20 MR. LOW: Elaine.

21 PROFESSOR CARLSON: Well, I think I am in
22 some circumstances, and I spend my life with principally 24
23 to 30-year-olds in law school, and I ask them in class,
24 "How many of you receive a newspaper, written newspaper?"
25 No hands go up. We get to citation by publication, "How

1 many of you have ever read the legal notices in the paper?"
2 Nothing. But I tell you what, I could Facebook and find
3 any of them, probably, the next day. Now, it's how you
4 fashion the service. Nothing in *Mullane vs. Central*
5 *Hanover*, the U.S. Supreme Court 7-0 case, said you have to
6 use the newspaper. It says you have to use a form of
7 service reasonably effective to give the defendant notice,
8 and there are United States Supreme Court cases that say
9 that doesn't mean you have to actually find the defendant
10 either, but you've got to use a method that's at least
11 calculated to attempt to give the defendant notice, and
12 you're supposed to start with in-hand service or service
13 via the mail. If you can't do that, you can go get
14 substituted service. I think you could get substituted
15 service by Facebook today. I do. I think you could get an
16 order from a court saying, "I would like to Facebook this
17 person and if they friend me I want to send them notice of
18 this lawsuit." And I think that would be reasonably
19 effective to give a lot of people notice. Now, not
20 everybody, because some people like me still cling to their
21 morning newspaper, but there are a lot of people who that
22 is their primary method of getting informed.

23 HONORABLE SARAH DUNCAN: And I didn't mean my
24 suggestion to preclude it.

25 PROFESSOR CARLSON: Right.

1 HONORABLE SARAH DUNCAN: I'm just saying I
2 don't want that to be in and of itself sufficient for legal
3 notice for all people.

4 PROFESSOR CARLSON: I understand, Sarah, but
5 what I'm saying is citation by publication might be -- and
6 our current method of serving via publishing in the
7 newspaper may offend due process as to a defendant --

8 HONORABLE SARAH DUNCAN: Right. Right.

9 PROFESSOR CARLSON: -- who could be located
10 by another method more readily. As far as citation by
11 publication, Judge Yelenosky, as you know, it's very
12 limited. I mean, you have to pretty much meet the
13 situation where the defendant's whereabouts are unknown or
14 you're dealing with an ad valorem tax, delinquent taxes,
15 something along that lines. So it's very limited; and our
16 rules are set up for a disdain for citation by publication
17 because the defendant gets two years to move for a new
18 trial instead of 30 days when they suffer a default
19 judgment when citation is by publication; and as you point
20 out, the court is required to appoint an ad litem for the
21 absent defendant.

22 A state can always afford more due process
23 than Federally required, so we could do away with citation
24 by publication, or we could keep -- it's really not the
25 only third method. It's constructive service. We have

1 actual service, we have substitute service and constructive
2 service, and we happen to choose newspapers. Why the
3 newspapers passed the due process test, because at the time
4 our rules were written that was the method by which most
5 citizens would get their local information, right? And now
6 that may or may not be true. I think the idea of
7 transitioning at this time to afford both is a very wise
8 idea.

9 HONORABLE STEPHEN YELENOSKY: To what?

10 PROFESSOR CARLSON: To afford both.

11 MR. LOW: Steve. A wise idea. Steve.

12 HONORABLE SARAH DUNCAN: To afford or
13 require?

14 PROFESSOR CARLSON: To -- well, I don't know,
15 I'm not sure where I come out, to require versus may,
16 versus shall, but I think incorporating both is a good idea
17 to transition. Richard is absolutely right. The key is
18 where do you find a spot where citizens would go, or do we
19 not even not want to do that and say you've got to find
20 this citizen by electronic means and then you can serve
21 them through electronic means, which is then a targeted
22 approach.

23 MR. LOW: Steve.

24 HONORABLE STEPHEN YELENOSKY: Well, as Judge
25 Evans has been saying to me over here, of course,

1 publication was constitutionally firm when you had a common
2 of some sort where people -- you might not read it
3 yourself, but other people in your community would read it
4 and would tell you. We don't have that common place any
5 more, so I question whether it can be constitutionally
6 firm. Where I see the future with the electronics and the
7 technology is, as we've been discussing in finding the
8 person, what I see is ad litem coming in saying, "I looked
9 here, here, and here," and all of these electronic searches
10 that don't really mean anything to me, some of them are --
11 they're paid searches. That's -- that's where I think the
12 electronics go the other way around saying that we can use
13 the electronics to notify people increasingly becomes
14 infirm as the multiplicity of sources of information -- or
15 the multiplication of sources of information continues. So
16 while I understand maybe the fiction needs to be
17 maintained, if I'm truly concerned about giving notice to
18 people, you know, it's sort of like, well, they're going to
19 post it at the courthouse, okay, check that box. That's
20 meaningless from a constitutional perspective. Now, what
21 else have you done?

22 MR. LOW: Terry.

23 HONORABLE TERRY JENNINGS: No, I was kind of
24 just going to say what he just said. I mean, it really
25 kind of exposes the idea that this really -- is this

1 really a -- does this really fulfill due process
2 requirements to begin with. The whole point about the
3 newspaper was -- and this rule has been in effect for as
4 long as anybody can remember and before that, because the
5 newspaper was the common forum for the community; and
6 because readership has declined it is no longer as
7 effective as it used to be; but was it really even
8 effective to begin with, because, frankly, most people, the
9 reason you're publishing it is because most people don't
10 want to be found to be served anyway; and in regard to the
11 internet, well, I have no objection at all to allowing that
12 in addition to newspaper publication; but you're really
13 just talking about a bigger haystack. And so, you know, at
14 some point, you know, is this really worth the candle.

15 MR. LOW: Gene.

16 MR. STORIE: I have a couple of thoughts.
17 One is that we've already had examples of people with tax
18 consulting services who would offer to file your exemption
19 for you. So I can see the possibility at least that some
20 sort of niche business would try to arise and search for
21 things like "tax sale" and then try to contact the people
22 who may be involved in that; and the second thing is in
23 terms of actual notice under the current rule, I had a
24 thought, which is, living in Round Rock, I do happen to
25 subscribe to the *Round Rock Leader*, but I think that the

1 majority of people in Williamson County subscribe to the
2 Austin paper. So if we're thinking of giving actual notice
3 maybe we at least should consider some broadening of the
4 rule to accomplish that.

5 MR. ORSINGER: Buddy, I think I could propose
6 a vote that would -- it wouldn't be an either-or, but we
7 can find out which ones of these proposals are supported.

8 MR. LOW: Yeah, that's what I was going to --
9 I think nobody is for exclusive.

10 Mr. ORSINGER: Let's have a showing of hands,
11 and let me set out the options this way and see if it's
12 acceptable to everyone for a vote. One would be we add the
13 option of electronic publication on top of the existing
14 rule for newspaper.

15 HONORABLE SARAH DUNCAN: Option or in
16 addition?

17 MR. ORSINGER: Yeah, in other words, we keep
18 the current newspaper requirement and add the option, which
19 is elective, I suppose, with the plaintiff.

20 HONORABLE SARAH DUNCAN: It would be in
21 addition to.

22 MR. LOW: He doesn't mean exclusive option
23 instead. He means that being another method.

24 MR. ORSINGER: Well, no --

25 HONORABLE SARAH DUNCAN: He needs to make

1 that clear because if we're going to vote on this.

2 MR. ORSINGER: It's more than just another
3 method. It will be clear if I can finish what my choices
4 are.

5 MR. LOW: Go ahead.

6 HONORABLE STEPHEN YELENOSKY: We'll be the
7 judge of that when you're done.

8 MR. ORSINGER: All right. Let me give you
9 the options and then see if they require further clarity.
10 Okay. Option one would be that we add on electronic
11 publication on top of the existing newspaper, which would
12 continue. The second option is that we mandate the
13 electronic publication in addition to the existing
14 newspaper, which would continue. The third option is we
15 would go to exclusive electronic publication, no more paper
16 publication. If we can do those three then I think we can
17 write a good rule.

18 Now, there's going to be a follow-up
19 question, and that is to the extent we do go to
20 publication, whether it's optional or mandatory or
21 whatever, is it only going to be for private newspaper
22 websites, or is it going to be government websites, or is
23 it going to be either?

24 MR. LOW: We need to get to that once we get
25 the initial vote and break it down.

1 MR. ORSINGER: So the idea is newspaper plus
2 optional electronic. The second one is newspaper and
3 required additional electronic, and the third option is
4 purely electronic, rule out newspaper.

5 MR. HAMILTON: Can I ask a question first?

6 MR. LOW: Carl.

7 MR. HAMILTON: On the second one when you say
8 mandatory electronic, who does that?

9 MR. ORSINGER: Well, the newspapers. I mean,
10 I think, according --

11 MR. HAMILTON: But who gets it to the
12 newspaper?

13 MR. ORSINGER: The plaintiff, whoever has to
14 get it to the newspaper --

15 MR. HAMILTON: Not the sheriff.

16 MR. ORSINGER: Now, wait a minute. And I
17 think -- maybe there are some very small newspapers that
18 don't have an internet presence, but all of the legislative
19 enactments that talk about it assume that the newspaper,
20 the traditional newspaper, has an electronic outlet in
21 addition. So when you deliver to the newspaper the law
22 will require that it be both put in the print version and
23 in the electronic version of that newspaper. See what I'm
24 saying?

25 MR. HAMILTON: The rule will require that.

1 HONORABLE TERRY JENNINGS: Don't newspapers
2 do that already? Like the *Houston Chronicle*, do they
3 already on their website have --

4 MR. ORSINGER: I don't have any idea. I
5 don't read these legal notices on the websites of
6 newspapers. Perhaps I should have, and I will by the next
7 meeting.

8 HONORABLE STEPHEN YELENOSKY: Every day.

9 MR. HAMILTON: That was getting to my
10 question, if the newspaper already has --

11 HONORABLE DAVID PEEPLES: Are we trying to
12 get this done before lunch?

13 MR. HAMILTON: -- an electronic version,
14 doesn't --

15 MR. LOW: I'm just trying to get it done.

16 MR. ORSINGER: I think that it should be
17 mandated. I mean, it shouldn't be optional with the
18 newspaper, if we're going to say that it's mandatory. If
19 it's elective and the newspaper doesn't have a website then
20 we have to shift over to whether we're going to require
21 them to stick with the newspaper or whether they can do it
22 at the county website or state website, assuming that the
23 government accepts that responsibility, but go ahead.

24 HONORABLE TERRY JENNINGS: How can you -- how
25 can we require it if we don't know if it's going to be

1 available? You're going to say "if available"?

2 MR. ORSINGER: Yes. If it's required as an
3 add-on or even an exclusive.

4 MR. LOW: All right. We're going to vote on
5 option one, but before we do state it again so we know what
6 we're voting on.

7 HONORABLE DAVID PEEPLES: Buddy, we haven't
8 talked about this enough. There are lots of issues here.
9 For one --

10 MR. ORSINGER: We can do it after lunch.

11 HONORABLE DAVID PEEPLES: I don't understand
12 why -- you know, it's been my experience the person who
13 wants to cite by publication wants a default judgment.
14 They don't want to find the person and have them come in
15 and fight it, and so why would they ever do an additional
16 option? I don't understand that.

17 MR. ORSINGER: I don't think they would. I
18 agree.

19 HONORABLE DAVID PEEPLES: This is surreal,
20 and I think we ought to do something that we can defend
21 with a straight face.

22 MR. LOW: Well, but do you have another
23 alternative?

24 HONORABLE DAVID PEEPLES: Well, yeah. Judge
25 Yelenosky hit the nail on the head and I think others. If

1 you're -- well, number one, I mean, we look backward -- we
2 look like a backward set of rules if we're talking about
3 newspapers that no one reads, and so I think we need to do
4 something that brings us into the 21st century, but Judge
5 Yelenosky said, you know, if you really want to find people
6 you focus on the inquiry that is made at the trial court
7 level, either by an ad litem or by asking questions.

8 Now, here's just an example: When I've had
9 people come in in a damage lawsuit wanting to cite by
10 publication, I say, "Hold on a minute, you want -- you're
11 saying right now you can't find this person and you want to
12 cite by pub. Once you get your judgment how are you going
13 to find the defendant to collect it?" And they never have
14 an answer for that. Never. Never. There's not a good
15 answer for that. Taxation, property tax cases have been
16 mentioned. There are cases where the probate court, you
17 know, wants to extinguish claims against the estate, and so
18 creditors are cited and so forth. That's a common thing.
19 My most common experience has been in family law cases
20 where a boy has gotten girl pregnant, happens a lot, okay,
21 and he's gone. Okay. One case --

22 MR. ORSINGER: Do you have a study on that?

23 HONORABLE DAVID PEEPLES: Yeah. One
24 situation, one situation where citation by publication is
25 about the best we can do is where it was a one night stand

1 and she doesn't even know his name, maybe his first name,
2 and she doesn't know his family, where his hometown is, but
3 she wants to terminate parental rights so that baby can be
4 adopted by her present husband or boyfriend. Okay. That
5 happens. It happens pretty commonly. Another situation is
6 where they had a relationship and, you know, months maybe,
7 and she knows his family, but she wants to cite by pub
8 because she wants him out of her life, and she hopes he
9 never answers, but if you really want to find him you say,
10 "Wait a minute, okay. Do you know his parents' name?"

11 "Yeah."

12 "Where do they live?"

13 "Well, they're a quarter mile down the
14 street." Well, substituted service on the parents would be
15 the way you go. I mean, this is a -- I mean, there are
16 many situations, and, Buddy, you mentioned Kountze --

17 MR. LOW: Well, are you wanting to do away
18 with citation by publication and all of that?

19 HONORABLE DAVID PEEPLES: What I'm wanting is
20 for us if we're really interested in getting notice to
21 people is focusing on the front end of it, the search that
22 is made to try to find people. I would ask now that
23 Facebook is so common, "Have you looked on Facebook?"

24 "Oh, I didn't think about that."

25 "Well, do it. Before I authorize citation by

1 publication, tell me what you found out when you were
2 trying to learn it." There's a statement in the Mullane
3 case, the landmark Supreme Court case, that says basically
4 what we ought to be looking for is did you do what you
5 would do if you really wanted to find the person, and I
6 submit that that usually doesn't happen until the ad litem
7 gets brought in. Now, I think to have newspaper only or
8 electronic only, I thought about -- you mentioned Kountze,
9 a small town in East Texas, if a guy gets a girl pregnant
10 in Kountze --

11 MR. LOW: His daddy finds him -- her daddy
12 finds him.

13 MR. ORSINGER: We can find him at the morgue.

14 HONORABLE DAVID PEEPLES: Citation on the
15 internet would not be calculated to find that guy, but if
16 it's in the local newspaper his family might see it or
17 friends might see it and then tell him, "Hey, listen, I saw
18 you mentioned in the newspaper the other day," but that
19 wouldn't happen in the *Houston Chronicle*. So it's just a
20 very different -- different kinds of cases and different
21 real world situations if you really want to find people.

22 MR. LOW: I think Richard's task was not to
23 weigh in on the merits of citation by publication. It was
24 not that. His task was -- and you're talking about maybe
25 rewriting and making it more rigid, maybe you have to do

1 other things before you can do that and so forth, but
2 basically his task was to see if we should even acknowledge
3 that there is a source of information in internet and make
4 use of it was basically -- isn't that correct, Richard?

5 MR. ORSINGER: Yes, but I think it's entirely
6 a question for Justice Hecht to tell us if he wants us to
7 explore predicate requirements to searches before citation
8 by publication is effected or whether we just want to
9 address what citation by publication is when we get to it.

10 HONORABLE NATHAN HECHT: No, I think you
11 should -- since this has brought it up, we should look at
12 that, too.

13 MR. LOW: All right.

14 MR. ORSINGER: Okay. Well, then I would like
15 to have some volunteers for my committee that have concerns
16 about that aspect of it, because the issues y'all are
17 presenting are daily occurrences for you, and they're not
18 things that I deal with very often.

19 MR. LOW: I think David and Steve would be
20 but --

21 HONORABLE DAVID EVANS: I mean, all of this
22 is -- I think that's right, and the problem even relates
23 back in some ways -- not to expand the scope, but depending
24 on what we do on substitute service right now, we are
25 hanging -- you know, the way these current process servers

1 approach it, you can hang a paper on the front of this gate
2 out here the way they draft it, and I'm concerned the way
3 we've got the rules drafted right now whether they're -- if
4 they really are --

5 HONORABLE STEPHEN YELENOSKY: Yeah.

6 HONORABLE DAVID EVANS: -- calculated to give
7 notice to the defendants. We're inundated with credit
8 litigation right now. All they want is a default running
9 against somebody, and we're inundated with property
10 litigation where they just want to get a property interest,
11 and they're not really interested in getting opposition, so
12 I'm sure I'd be happy to help or --

13 MR. ORSINGER: So will Steve. I see Steve
14 raising his hand.

15 HONORABLE STEPHEN YELENOSKY: No, no, no, not
16 in lieu of you. No, absolutely not.

17 MR. ORSINGER: No, in addition.

18 HONORABLE DAVID EVANS: I would be happy to
19 volunteer Steve.

20 MR. ORSINGER: I think that David makes an
21 important point, which is option one, which is that you can
22 just go internet if you want to, the plaintiffs will not go
23 internet because they don't want to accidentally find the
24 defendant. So the real vote to go electronic here is
25 probably option two, which is that if the newspaper has an

1 electronic website it must be published there as well as on
2 paper, or we have to make the other policy decision at the
3 end, are we going to either require or encourage that there
4 be government websites that contain this information in
5 instances where there's no private ones or in addition to.

6 MR. LOW: But I think it goes beyond that.
7 The Court wants us to go into a little deeper than that, as
8 Justice Hecht expressed, and your committee to look into
9 it, so we can vote on that, but until we know where we're
10 going what good will that do?

11 MR. ORSINGER: I don't think that the
12 predicate for citation by publication is required to know
13 for us to decide whether we're going to go electronic.

14 MR. LOW: Okay.

15 MR. ORSINGER: But if you feel like it is --

16 MR. LOW: No, no. All right.

17 MR. ORSINGER: I would kind of like to know
18 whether we're going to require parallel print and
19 electronic, and if we are then that probably will affect
20 what the run up is to citation by publication. Like we may
21 want to require that a diligent search is made on the
22 internet to locate the person or -- you know.

23 HONORABLE DAVID PEEPLES: How about --

24 MR. LOW: If that would help -- okay.

25 HONORABLE DAVID PEEPLES: How about telling

1 the trial judge that when you are considering the request
2 to issue citation by -- authorize citation by publication,
3 think about in your community what is best calculated to
4 reach the person in this kind of case, and I think in
5 Kountze it would be the local newspaper. In Houston I
6 doubt that it would be the *Houston Chronicle*.

7 MR. ORSINGER: Well, why not just say that it
8 gets published electronically if electronic is available?
9 That costs you nothing extra, and it might add to the
10 exposure.

11 HONORABLE DAVID PEEPLES: I find myself
12 thinking that the State of Texas website might be good.
13 There's a paternity registry. You know anything about it?

14 MR. ORSINGER: I don't know about being on
15 it.

16 (Laughter)

17 MR. ORSINGER: Everything I know is hearsay.

18 HONORABLE DAVID PEEPLES: Did that come out
19 wrong. As a family law specialist, do you -- as I
20 understand it, you know, a guy has gotten a girl pregnant
21 but wants to stay in -- you know, find out if there's a
22 lawsuit can log on and see if he has been sued for
23 paternity. I don't know if they do it, but, okay, some
24 guys do want to be fathers. Not all of them want to
25 abandon, but, I mean, the idea of having a website that is

1 there for people that have been sued and it becomes
2 commonly known if you think you might have been sued, you
3 can check here and see if you've been cited by publication.

4 HONORABLE TERRY JENNINGS: I mean, you can do
5 that on the Harris County website now. You can punch in
6 your name as a party and see if it comes up.

7 MR. ORSINGER: That would really require
8 more -- I mean, in a perfect world there will be some kind
9 of search mechanism that will tell you whether there's any
10 information in the universe that you want; and if you put
11 your name in, you'll find it, whether it's an old judgment,
12 a pending judgment, a claim, slanderous articles; but, you
13 know, okay, if we just say that these plaintiffs have the
14 option of publishing electronically, I don't think we've
15 accomplished anything. I think that if we want to actually
16 make the electronic world -- if you want to take advantage
17 of the electronic world to disseminate we need to require
18 it, but let's take a vote on that --

19 MR. LOW: All right.

20 MR. ORSINGER: -- and then once we do then
21 we've got to decide whether --

22 MR. LOW: Justice Gray, and then we're going
23 to vote on your proposal and then we're going to go to
24 lunch.

25 HONORABLE TOM GRAY: It seems to me that what

1 -- the difference sort of of what David Peeples is talking
2 about and Richard Orsinger is that with regard to what
3 Richard's original task was, is that do we want to do
4 something to enhance the base of due process that we are
5 willing to make as a rule as the ultimate fallback. What
6 Judge Peeples is talking about is what do we want to do in
7 the rules, possibly in Rule 108, in requiring something to
8 do with substituted service before we rely upon the base
9 ultimate fallback, and I think Richard is absolutely right
10 that anything that strengthens that base that is left as a,
11 quote-unquote, option for the plaintiff is simply not going
12 to be followed.

13 MR. LOW: Because Richard only looked at Rule
14 116. All right, Richard, make your proposal.

15 MR. ORSINGER: Okay. So proposal one is
16 whether we would introduce into the rule the option at the
17 election to the plaintiff to go electronic in addition to
18 newspaper; or, option two, put into the rule that if
19 electronic newspapers are available, they must be used in
20 addition to print; or option three is forget the print,
21 let's go with electronic.

22 MR. LOW: All right. Make your -- restate
23 one, and we'll vote them one at a time.

24 MR. ORSINGER: Okay. Do we add the election
25 for the plaintiff to publish electronically in addition to

1 the existing continuing requirement for print publication?

2 MR. LOW: All right. All in favor of that,
3 raise your hand.

4 HONORABLE JANE BLAND: Is that option two?

5 MR. ORSINGER: Option two is --

6 MR. LOW: No, no, option one.

7 HONORABLE JANE BLAND: I was asking what you
8 called the vote on. Sorry.

9 MR. LOW: No. Who votes "yes"?

10 MR. ORSINGER: Nobody.

11 MR. LOW: All right. It didn't look like it.

12 MR. ORSINGER: Yeah. Okay, so option two is
13 that we're going to require that if an electronic
14 dissemination is available, you must do it in addition to
15 meeting the print requirements.

16 MR. LOW: All in favor of that, raise your
17 hand.

18 MR. HAMILTON: You're not talking about the
19 newspaper.

20 MR. ORSINGER: I am not talking about that.
21 That's a different vote, is whether it's available at the
22 newspaper. What if it's available at a government site and
23 not at a newspaper?

24 MR. LOW: All right, raise your hand.

25 PROFESSOR CARLSON: Mandatory where, Richard?

1 MR. ORSINGER: We'll vote later on where it's
2 mandatory.

3 MR. LOW: 19 in favor, the Chair not voting.
4 All opposed?

5 MR. ORSINGER: Okay. And the third vote is
6 mandating electronic only and abandoning paper all
7 together, and that's a no-brainer.

8 MR. LOW: Yeah, we don't need to vote on
9 that.

10 MR. ORSINGER: The last thing we need to vote
11 out, though, is that when we're doing this mandating of
12 electronic do we mandate that it be with the print media
13 that maintains an electronic site, i.e., an electronic
14 newspaper, or do we allow it to be a government site in
15 addition and let the plaintiff choose, or do we require
16 that it be a government site? In other words, does it have
17 to be the electronic newspaper? Does it have to be the
18 government, or could it be either one?

19 HONORABLE TOM GRAY: Or both.

20 MR. ORSINGER: Or both.

21 MR. LOW: The first vote is allow it with the
22 newspaper, you know, if they had it, it should be the
23 newspaper. The second one would be -- what's the proposal?

24 MR. ORSINGER: To me it's either electronic
25 newspapers only --

1 MR. LOW: All right.

2 MR. ORSINGER: -- or government website only,
3 and pick state or county, or either or both. It would be
4 the option as long as you go electronic you could either be
5 the newspaper or the government, or we could require that
6 it be on both the government and the newspaper's.

7 MR. LOW: Okay. Option one, who is in favor
8 of option one?

9 MR. MUNZINGER: Buddy?

10 MR. ORSINGER: Newspaper only.

11 MR. MUNZINGER: How can the Supreme Court
12 adopt a rule that says that the county must offer
13 publication on its website? How can the Supreme Court
14 promulgate a rule saying the school district has to do the
15 same? I don't know that the Court has that kind of
16 authority, and another point would be do we know whether
17 the online addition of the *El Paso Times* is identical to
18 the print addition of the *El Paso Times* so that when we say
19 you must do it electronically with the newspaper you're
20 certain that the electronic version is publishing legal
21 notices? I don't know if they do or not, and I understood
22 Richard Orsinger to say that he didn't know if they did or
23 not. He wasn't sure --

24 HONORABLE TERRY JENNINGS: We could find out.

25 MR. MUNZINGER: -- that the online addition

1 was identical.

2 MR. WATSON: I would say that it's implicit
3 that all three options are "if available," all three of
4 those are "if available," and I would suggest starting with
5 both and then working down in your vote.

6 MR. LOW: All right. Carl.

7 MR. HAMILTON: Without knowing more about the
8 facts is this going to generate litigation over whether or
9 not an electronic newspaper was available for that? I
10 mean, let's take Starr County, for example. I know they
11 don't have an electronic newspaper there, but there might
12 be one in the adjoining county, or maybe there's two or
13 three newspapers in the county and you select one that
14 doesn't have electronic. Is that a bad service because you
15 didn't select the newspaper that did have electronic?

16 MR. LOW: I have no -- Elaine.

17 PROFESSOR CARLSON: You know, in picking
18 between your three choices, the inquiry would have to be
19 almost individualistic about which one would more likely
20 give a particular defendant notice. Maybe a compromise and
21 not going as far, since we can't identify or we haven't
22 identified one central place, although it could be
23 TexasOnline --

24 MR. LOW: Right.

25 PROFESSOR CARLSON: -- I mean, that's kind of

1 where we are going.

2 MS. PETERSON: No, texas.gov.

3 MR. WATSON: Or Justice Hecht's Twitter
4 account.

5 PROFESSOR CARLSON: What we could do as an
6 alternative is we could take Rule 244 that deals with the
7 ad litem appointment and finesse your suggestions, our
8 judge's suggestion, and then take Rule 106b, which deals
9 with alternate service, and change the comment to make
10 clear that you're not restricted to service by paper. In
11 appropriate circumstances notice, the best notice
12 practicable for substituted service, might be through
13 Facebook, which would be the substituter where you would
14 get onto the actual person. So you could just change those
15 two rules without picking a place where ultimately we think
16 service by publication should be made when we go pure
17 electronics, if we don't know what that should be.

18 MR. LOW: But all of those are good for them
19 to consider when they go back, but remember, what they
20 considered before they came was only Rule 116. All right.
21 And so that is what -- we're not going to vote on something
22 that wasn't considered by them. They will consider what
23 we're talking about, but if -- Richard, if you will make
24 the proposal again we're going to vote, and we'll have
25 lunch.

1 MR. ORSINGER: Okay.

2 MR. LOW: On 116, Rule 116.

3 MR. ORSINGER: The first option by popular
4 support is --

5 MR. LOW: State them one by one, and we vote.

6 MR. ORSINGER: Option one is that the
7 publication requirement, we voted to make it a requirement,
8 the electronic publication requirement is for both
9 newspaper and government website, if available.

10 MR. LOW: All right. All in favor of that
11 raise your hand.

12 Thirteen.

13 HONORABLE TERRY JENNINGS: I just did a
14 search for the *Houston Chronicle*, and they do have a -- if
15 you go into the full *Houston Chronicle* site they have a
16 legal and public notices section you can click on, but --

17 MR. LOW: Okay. All opposed?

18 HONORABLE TERRY JENNINGS: If you do it under
19 Android.

20 MR. LOW: Okay. All opposed, raise your
21 hand.

22 MR. WATSON: That's all we need.

23 MR. LOW: All right. Richard, you want to
24 make the other --

25 MR. ORSINGER: Don't need to. I mean

1 somebody that didn't vote --

2 MR. LOW: No. Well, if they didn't vote,
3 they should have.

4 MR. ORSINGER: Well, no, I mean, it's
5 possible that they don't -- let's just see if there's
6 anyone that wants to limit it to newspaper websites alone.
7 Nobody? And is there anybody that wants to limit it to
8 government websites and rule out newspaper websites? Okay.
9 So that's it.

10 MR. LOW: Let's go to lunch.

11 (Recess from 12:36 p.m. to 1:23 p.m.)

12 MR. LOW: Richard, do you need more time, or
13 you think you know where to go and how to get there?

14 MR. ORSINGER: The only thing is, is that I
15 would like anyone -- I can fully do what we voted on
16 relative to the publication component of it, but it does
17 appear that there's some interest in talking about what the
18 lead up is to citation by publication and how that's going
19 to interface with substitute service and whatnot, and so I
20 need some volunteers that will help me think some of those
21 through because I don't generally take the judgments by
22 citation, so I'm not too familiar, so someone like some law
23 professor that is knowledgeable on the subject might
24 volunteer to assist me.

25 PROFESSOR CARLSON: Can I do it, can I?

1 MR. LOW: Why don't you pick a couple or
2 three volunteers?

3 MR. ORSINGER: Okay. We'll do that, and I
4 think that that may take longer because that's going to get
5 us into a deeper swamp.

6 MR. LOW: And any volunteers get a point.

7 MR. ORSINGER: Okay. So we'll report back on
8 the electronic part of it and then later on maybe or at the
9 same time we'll have some suggestions about when you
10 progress from substitute service to citation by
11 publication.

12 MR. LOW: All right. Elaine, you're up.

13 PROFESSOR CARLSON: Well, actually, Dulcie
14 Wink is up. You might recall our last meeting we started
15 to look at the task force draft proposals on ancillary
16 proceedings; and we started to look at injunctions; and
17 Dulcie Wink is a very faithful member and hard-working,
18 intelligent, wonderful person who worked on this; and she
19 chaired the subcommittee on injunctions, so she is going to
20 be presenting again.

21 MR. LOW: Okay.

22 MS. WINK: Thank you.

23 PROFESSOR CARLSON: And do you want to switch
24 places so the court reporter can -- or are you good?

25 THE REPORTER: It's fine.

1 MS. WINK: Actually, I think this is probably
2 best. A couple of things, throughout the discussion the
3 last time I was here we almost got through the details of
4 Rule 1, but there were a number of things that came up that
5 got good consideration, and I have organized them into six
6 issues, and I have been able to organize how they apply
7 throughout the rest of the injunctive rules, and I think if
8 I bring these up one at a time, remind you of the issues,
9 then we can actually get voting on those changes to the
10 proposed rules, and it will make the rest of the day go a
11 bit quicker, if that's okay with you.

12 MR. LOW: I hope it works as well as it
13 sounds.

14 MS. WINK: It always sounds good and then
15 practical application happens.

16 MR. LOW: Okay.

17 MS. WINK: Now, the first issue -- and,
18 Mr. Orsinger, Richard, you brought this up. You had raised
19 concerns because the Family Code does have many provisions
20 that vary from the general rules of civil injunctions.
21 Now, the good news is Chris Wrampelmeier was on our
22 subcommittee, and he was also very concerned about that,
23 and he is a family law specialist, so throughout the rules
24 -- I knew we had covered it, but now I have very clear
25 issues. There are some clarifications I think we could use

1 today, but let me point out that in injunctive Rule 1(d)
2 and 1(h) they pertain to TROs, and they explicitly refer to
3 the Family Code exceptions, meaning Rule 1(h) says, "If
4 there's a conflict between a provision of this rule and the
5 Texas Family Code, the Texas Family Code shall prevail."
6 So it's brought up twice and specifically has the exception
7 to the Family Code. Injunctive Rule 2 has a parallel
8 provision as to temporary injunctions, and that's 2(h).
9 Injunctive Rule 3(c) addresses permanent injunctions and
10 has a parallel provision. Injunctive Rule 4(b) expressly
11 notes that the Family Code permits judges to issue TROs
12 without a bond, and it also mentions there are other
13 statutes that do provide similar exceptions, so we do have
14 that reference there already in the proposed rule. In
15 injunctive Rule 5(f) it addresses the specific requirements
16 for the contents of the writ of injunctions, and it does
17 also refer to the exceptions from the Family Code.

18 Now, I would recommend based on a draft that
19 we have a couple of clarifications, part of which was
20 brought up at our last meeting. In injunctive Rule 1(d),
21 as in David, (7), TROs, on page two of the draft where it
22 currently says, "State the amount and terms of the
23 applicant's bond," comma, "if a bond is required," I
24 suggest that we make that a little bit more explicit and
25 say, "State the amount in terms of the applicant's bond

1 unless a statute eliminates the requirements of a
2 bond." Okay. So I would propose that we make that
3 revision to put people on notice of it. Do you want to
4 address that real quick?

5 MR. LOW: Okay. Anybody have any comments on
6 that? Any objections? No objections.

7 MR. MUNZINGER: Is a statute exempting a
8 party from a bond the only way that you can avoid a bond?

9 MS. WINK: Yes. There are cases that are
10 very clear. In fact, even if you have an agreed temporary
11 restraining order, you must have a bond.

12 MR. MUNZINGER: Okay. Thank you.

13 MS. WINK: Or cash in lieu or other property
14 in lieu of the bond.

15 MR. MUNZINGER: Thank you.

16 MR. ORSINGER: Follow-up.

17 MS. WINK: With the exception of Family Code.

18 MR. ORSINGER: The government doesn't have to
19 post a bond, or does it, any government entity?

20 MS. WINK: It has separate statutes, and it
21 is specifically exempt, yes.

22 MR. ORSINGER: Okay. So every exemption for
23 every government entity that deserves one is a statute and
24 not a regulation or a rule, always a statute.

25 MS. WINK: The only ones I've come up against

1 have been statutory in nature.

2 MR. ORSINGER: Okay.

3 MR. LOW: Okay. Approval by silence.

4 MS. WINK: So be it. We will make that
5 change. The other explicit change that we would recommend
6 is in injunctive Rule 1(f), as in Frank, which is on page
7 three. At the beginning of the sentence we recommend
8 inserting "unless exempted by statute," and a comma, "no
9 temporary restraining order may be issued," et cetera, et
10 cetera, and that again refers to the bond. Does anybody
11 have any difference of opinion or exceptions to that?

12 MR. LOW: Silence is acception, so that is
13 accepted, so really, seriously, if somebody has a comment
14 I'm not trying to cut that off. If you have a comment or
15 an objection, you know, raise it. Okay.

16 MS. WINK: Perfect, and we would need
17 parallel changes in injunctive Rule 2(d), as in David, No.
18 (8), and injunctive Rule 2(f), as in Frank, so and those
19 relate to temporary injunctions, but have the same
20 provisions.

21 MR. LOW: Okay.

22 MS. WINK: So I'll check that off. The
23 second issue that came up and was discussed last time --
24 and, again, Richard Orsinger, this was one of yours. You
25 asked for additional clarification in the proposed rules or

1 the comments so that practitioners will understand that the
2 application for the injunctive order may be in the party's
3 pleading, and it's not necessarily required to be in a
4 separate document. Before I make a recommendation, let me
5 put one qualification out there. If a party's pleading
6 does not contain the magic language, let me just say, does
7 not have the general nature of the relief request, if you
8 don't have the specific elements in your pleading, then
9 you're not asking for injunctive relief and none can be
10 awarded. However, the more specific application where you
11 might put far more details as to facts and affidavits, et
12 cetera, can be separated and can be in a separate document.

13 So we would recommend that the current
14 comment that we have to existing proposed Rule 1(a),
15 injunctive Rule 1(a), we currently have a footnote there
16 that says "Throughout the injunction rules the term
17 'application' refers to an application or a motion." We
18 would recommend adding the following sentence: "The
19 application may be included in the party's petition,
20 counterclaim, third party petition, or other motion and is
21 not required to be presented in a separate
22 document." Would that provide enough clarity?

23 MR. ORSINGER: That's crystal clear.

24 MS. WINK: And I would also recommend that we
25 add this to the footnote, that regardless, the rules

1 require the, quote, "Plain and intelligible statement for
2 the grounds of injunctive relief be stated in a sworn
3 petition, counterclaim, or third party petition," end
4 quote, because, again, that gets back to the language that
5 must be put in the party's pleading.

6 MR. ORSINGER: And what you're envisioning
7 is, is that the rules themselves will have footnotes at
8 these locations?

9 MS. WINK: Yes, sir.

10 MR. ORSINGER: And the footnotes will be at
11 the end of the rule.

12 MS. WINK: They're more like comments as
13 opposed to -- they're written right now as footnotes, but
14 they can be made as comments, whichever you prefer.

15 MR. ORSINGER: Well, will they be correlated
16 to a particular phrase or sentence --

17 MS. WINK: Yes.

18 MR. ORSINGER: -- rather than just generally
19 stated at the end?

20 MS. WINK: I would recommend that, for
21 instance, this would be comments to injunction Rule 1(a),
22 for example, and that's where the word "application" is
23 used for the first time. We have a parallel set of
24 footnotes in injunctive Rule 2(a) for the same reason.

25 MR. ORSINGER: Well, I'm going to defer to

1 the professor, but my recollection of the footnotes in the
2 rules now are primarily editorial comments by West or
3 whoever clarifying that there's an erroneous
4 cross-reference or something, but I'm not aware of us
5 dropping comments in footnotes.

6 PROFESSOR CARLSON: We haven't.

7 MR. ORSINGER: I think that might be a great
8 idea, but I'm worried that the suggestion might -- when it
9 goes through the grinder all the footnotes may disappear
10 because there's no protocol.

11 PROFESSOR CARLSON: There might be some --

12 MR. MUNZINGER: We do so in discovery.

13 PROFESSOR CARLSON: -- in discovery, right.
14 In discovery there was.

15 MR. MUNZINGER: And they were considered
16 substantive. They were guidance to the bar that was
17 considered substantive and binding on the courts.

18 PROFESSOR CARLSON: And, Richard, I'm not
19 sure all -- and I can't speak because I'm not looking at
20 all of them, but the general consensus we had on the task
21 force was if you think something requires additional
22 explanation to someone who doesn't do this everyday let's
23 go ahead and put it in, and then we're going to have to
24 make a judgment call at the end what the Court would --
25 what goes in as a comment and what doesn't, but I don't

1 think we were trying to write the draft in a way that the
2 rules couldn't stand alone. It was really for
3 clarification, right?

4 MR. ORSINGER: Well, and I like these
5 clarifications, but all I want to know or just wanted to
6 mention is the possibility they may all get washed if the
7 Supreme Court doesn't go along with the footnote concept,
8 and that's just why I was inquiring. So there is precedent
9 for keeping footnotes in.

10 PROFESSOR CARLSON: In the discovery rules
11 there were, yeah.

12 MR. ORSINGER: I like the fact that footnotes
13 are pinpointed, whereas general comments you may not
14 remember -- you may not understand exactly what language
15 you're referring to.

16 MS. WINK: And, Richard, those in the
17 discovery rules are more explicit as to Rule 193.3 sub (a).
18 They are more explicit most often, and they are binding.

19 MR. LOW: Richard.

20 MR. MUNZINGER: Well, I think we ought to
21 have an operating understanding as we go through these
22 rules. If we're going to add footnotes and/or comments, is
23 it the sense of the committee to advise the Court that the
24 comments ought to be adopted by the Court, because we may
25 vote to approve a draft because we've just added something

1 to a comment. My personal belief is that the comments in
2 the discovery rules have been extremely helpful and that
3 the process ought to be followed in something as technical
4 as this area is. This is a very technical area. You don't
5 get an injunction if you don't cross the T and dot the I.
6 You shouldn't. And so my personal belief is we ought to at
7 least begin with the understanding, if that's the sense of
8 the committee, that any time a comment is dropped in here
9 or footnote it's intended to be a comment with the same
10 recommendation for binding effect as is done with the
11 discovery rules.

12 MR. ORSINGER: Well, I'm looking at the
13 discovery rules here in the West desk copy, and the only
14 footnotes are to cross-reference to a statute or something
15 like effective date of a -- I mean, the footnotes are not
16 used in the sense that they're used here as explanatory for
17 text connected to the footnote.

18 MS. PETERSON: Is there some language before
19 the rules? I think it's before.

20 MR. MUNZINGER: But there are comments in
21 there, Richard, and --

22 MR. ORSINGER: Yeah, they are numbered
23 comments. Well, I mean, this is the only thing I wanted
24 for us all to be aware of, is that this is very readable
25 and these footnotes really helped understand it, but when

1 this comes out as a rule these are not going to be
2 footnotes. These are going to be comments at the end of
3 the rule, unless we go into new territory. That's what I
4 thought, but I'm deferring to people that study these for a
5 living, but -- and I'm looking at the discovery rules, and,
6 yes, there are comments, but it seems to me like the only
7 time there is a footnote is when there is a cross-reference
8 to a rule, and I'm not sure whether that was the Supreme
9 Court that put that cross-reference or West Publishing
10 Company that put that cross-reference.

11 MS. WINK: If I may add something here,
12 throughout the drafts -- and I'm glad you brought it up.
13 Throughout the drafts, sometimes depending on who was the
14 original chairperson of the committee and what we thought
15 was easiest to do, bottom line is the different
16 subcommittees, some put suggested comments at the end.
17 Some of them like me did certain comments that are just for
18 you and for the Court perhaps and certain things that we
19 think would be more likely to be effective if made a
20 binding comment, much like these are in the discovery
21 rules. So why don't I make that a little more clear
22 through these rules, and I can make sure everyone else does
23 when going through attachment, garnishment, sequestration,
24 et cetera, so that we have a clear record of what we would
25 be recommending to the Court to be part of the permanent

1 comments and recommending that they be binding.

2 MR. ORSINGER: You know what, I'm the last
3 one here to try to add to someone else's committee work --

4 MS. WINK: It's our job.

5 MR. ORSINGER: -- but you might ought to go
6 ahead and make the decision for everyone as to what would
7 be appropriate for an end comment and what is going to be
8 an informational footnote for the drafter and the Court
9 analysis, because if what you're expecting Kennon or
10 whoever to do is to figure out which ones of these are just
11 kind of parenthetical asides for the committee process or
12 explanation to the Court and which ones are intended to be
13 published for the ultimate user, it would be helpful, I
14 think, to everybody if you-all would tell us what you think
15 the end comments should be, regardless of whether you
16 repeat them or don't include them in the footnotes. You
17 see what I'm saying?

18 MS. WINK: Absolutely.

19 MR. ORSINGER: I'm afraid that may be a lot
20 of work, but without your recommendation we don't know the
21 footnotes that we're getting comfortable with are going to
22 end up as end notes and what they'll say when they do.

23 MS. WINK: I agree, and I'll be happy to do
24 that. The good news is, having started with injunctions,
25 it's going to be straightforward, and I can even do that on

1 the fly as we go, so we won't have a problem there, and
2 what I do at the end of these meetings and before the next
3 one is I actually update so that I'm helping to keep track
4 with Kennon and we can compare notes to make sure we do it.

5 For the record, the current footnote No. 1 is
6 only just for information to the Court and to you guys
7 unless we also want to have -- well, here's -- let me back
8 up. One of the things that we discussed in the
9 subcommittees was the fact that a lot of the younger
10 puppies up in the world of law are doing most of their
11 research online, when all of the rest of us know that
12 sometimes the digest is the fastest way. That's another
13 story, but because of online researching and the
14 effectiveness of it, when we change our rules we don't
15 necessarily -- the electronic services, the Lexis and
16 Westlaw, with all due gratitude for all they do for us, we
17 don't necessarily get the past history from other rules
18 tied to the new rule.

19 So, for instance, in footnote No. 1 I'm
20 pointing out that this rule has been rewritten completely
21 and has information that's from Rule 680 and 683. We can
22 make that kind of information available as comments,
23 whether you want it binding or not, and what that does is
24 for the practitioners who are both electronically savvy and
25 digest savvy, we will be able to always go back to the old

1 volumes in the library to see what was specific as to those
2 rules, and we don't lose any pre-existing research. Does
3 this make sense? So I would recommend that we go ahead and
4 use these kinds of comments and recommend that we keep them
5 with the rules -- well, I would say this is specifically
6 for research information only. This is not one that I
7 would say should be binding on the parties, but it's for
8 research only. Would you agree?

9 MR. ORSINGER: Well --

10 PROFESSOR CARLSON: Richard, what I told the
11 task force, and my understanding was, is that the Court
12 from time to time uses comments, but we don't use comments
13 extensively, that we -- you know, for whatever reason, and
14 that we haven't really used footnotes, but because of the
15 technical nature of the work -- and you'll see this in some
16 of the subsequent drafts with other subcommittees --
17 there's both footnotes and comments. Here's what we think
18 should be a comment, here's just for information internally
19 for this group and the Supreme Court. We didn't do it that
20 way in this subcommittee, but it could be done that way.

21 MS. WINK: Yes.

22 MR. LOW: Elaine, is there some suggestion
23 that a comment, excuse me, has more weight than a footnote?
24 I mean, Footnote 9 in Easterwood has been cited a hundred
25 times. I mean, they site that more than they do the case,

1 that's -- the body of the case, so is there some
2 distinction that a footnote doesn't carry the weight that a
3 comment does? Because that's not the way I understand it.

4 PROFESSOR CARLSON: That wasn't the
5 intention. It was really me being controlling.

6 MR. LOW: Okay.

7 PROFESSOR CARLSON: Because I said a lot of
8 the folks on the advisory committee don't have a
9 background, as I don't, in collections, so as you go
10 through if you think it would be helpful from an
11 explanatory point of view so everybody can follow the --
12 because a lot of people don't do sequestration,
13 garnishment, distress warrants, things of that nature, so
14 that was really sort of my marching suggestions to the
15 committee.

16 MS. PETERSON: And one thing I think may be
17 helpful with these rules, if they are numbered to the
18 extent proposed, is to have a derivation table when it's
19 all said and done. That was done when the Rules of Civil
20 Procedure were moved into a separate body of the Rules of
21 Appellate Procedure, and it's really helpful for research
22 purposes.

23 PROFESSOR CARLSON: It's going to be
24 essential.

25 MS. PETERSON: Yeah.

1 MS. WINK: That helps, Kennon, for the hard
2 copy book purpose, but it's not all-consumingly helpful for
3 electronic research.

4 MS. PETERSON: I think the electronic world
5 needs to be updated so that rules are treated like statutes
6 and they're easier to research, but that's a different
7 issue.

8 HONORABLE TOM GRAY: Well, I think that would
9 be one advantage that we dinosaurs should be able to
10 retain.

11 MS. WINK: Keeping the cutting edge over my
12 opponents.

13 MR. LOW: Richard.

14 MR. ORSINGER: A couple of comments, maybe
15 not directly germane, but I think the Court of Criminal
16 Appeals has said that footnotes are not stare decisis as
17 far as they're concerned, so I'm not sure that footnotes
18 don't have an inferior status, although I agree some
19 footnotes are famous and treated as precedent.
20 Additionally, when we have adopted some uniform laws in our
21 Legislature but varied from the norm, sometimes they have
22 issued committee reports of the working lawyers and judges
23 who adopted -- put the package together for the
24 Legislature, and in the annotated statutes they include
25 those after the uniform act, and they are extremely

1 helpful, particularly we've been through so many
2 transitions on the entity statutes and now we have a
3 Combined Organizations Code, but before we had revised
4 limited partnership acts, and so we had a lot of committee
5 explanations, in fact, all the way back to the Uniform
6 Partnership Act we had committee explanation that
7 following, and they're incredibly helpful to those of us
8 who have had to litigate those issues.

9 So I think a committee report written down
10 somehow, somewhere, might be something for you to consider,
11 and then the question is how do we motivate the electronic
12 publishers to connect it up with the rule, because they
13 apparently already do that with the statute, but they don't
14 do it so much with the rule, and the last thing I would say
15 is that you should take your work product and put it in a
16 law review article and get it published with a Texas law
17 school in a law journal that says that it is the committee
18 work and thoughts for these rules.

19 Now, you should wait until the Supreme Court
20 is finished rewriting them and deleting and adding to, but
21 that at least is a research for the capable researchers to
22 go back, and it's not binding, it's not even as strong as a
23 footnote, but it's a way for you to communicate with the
24 future on what your thoughts were, and there will be
25 researchers out there that will find that. Whether it's

1 Texas Tech, St. Mary's, South Texas, I don't care, as long
2 as it's a *Texas Law Review* they will find it and go to it,
3 and you can help guide the courts and the briefing lawyers
4 on what you want, and it's your own words, and you don't
5 have to have anyone else to approve it, so I would
6 recommend that you-all do that.

7 MS. WINK: Just so that I could point out,
8 Mr. Orsinger, I think that great and modest minds work
9 alike in this covert because I had that idea, too, and it
10 has been discussed among the whole task force, so a number
11 of us do have that plan. Why don't I make this practical
12 recommendation here? Footnote 1, I think would be that the
13 current Footnote 1 in injunction Rule 1, I think is
14 appropriate for a committee report as well as law review
15 material, and if we ask the Court to -- in presenting the
16 rules or in adopting the rules, to order that the committee
17 reports be published with the rules then the committee
18 reports will at least make it there. We can put more in
19 the law review. Does that sound agreeable to everyone? By
20 knowing I can make sure that the others help us get ready
21 for the other parts of the rules.

22 PROFESSOR CARLSON: Could I add one thing? I
23 think, Dulcie, correct me if I'm wrong, I think every
24 author on the *Texas Collections Manual* that's published by
25 the State Bar of Texas -- have you ever used that resource?

1 MR. ORSINGER: Yes.

2 PROFESSOR CARLSON: Is on the committee and
3 they, therefore, will also be the ones who go and rewrite
4 that body of work, which is a very helpful body of work.
5 So you'll see some of this carry forward in that direction.

6 MR. LOW: Jane, I'm sorry.

7 MS. WINK: In that regard I would say that
8 currently proposed footnote No. 2 I think should be
9 something that we comment and request that the Court use as
10 part -- as a binding part of the rule just like the
11 comments in the discovery rules.

12 MR. LOW: Jane.

13 HONORABLE JANE BLAND: I think the comments
14 and the reports are great, but I don't think they should be
15 published as part of the rule, and I think we should keep
16 that kind of thing to a very minimum. The rules ought to
17 be self-explanatory enough that somebody can read the rule
18 and understand it, and if you add a bunch of comments or
19 commentary to a rule people instantly become suspicious of
20 the rule, that it's difficult, complicated, means more than
21 what it says, that kind of thing, and although I think all
22 the commentary would be very helpful during that transition
23 phase from the old rules to the new rules, I don't think
24 publishing it within the rules themselves is necessary or
25 even very helpful, especially as you move further and

1 further away from the re-entry into the rules and as they
2 become familiar.

3 MS. WINK: And I would especially agree with
4 you with respect to the kinds of things we have in footnote
5 1 right now. I don't think it belongs with the rule. It
6 doesn't have to be with the rule. The part that we just
7 talked about that is really in footnote 2, making sure that
8 people know that by application, it could be a motion, all
9 these other things, would you agree that that needs to be
10 with the rule so that people will know?

11 MR. LOW: But don't a lot of the rules have
12 history, and it says originally was such-and-such? You
13 know, they have a history, so this Rule 1 is kind of like a
14 history where it came from.

15 MS. WINK: It is history, yes, sir.

16 PROFESSOR CARLSON: Well, look, Dulcie, over
17 on page three. I think we've done this before. Look at
18 the proposed comment. I think we pulled out what we
19 thought needed to go in the comments in the comments.

20 MS. PETERSON: We did.

21 PROFESSOR CARLSON: So what you see in the
22 footnotes is what we thought the committee needed to know.

23 MS. WINK: Right. I was just going in order,
24 so there are things further along that I haven't gotten to
25 yet that I would feel differently about.

1 PROFESSOR CARLSON: Okay.

2 MS. PETERSON: At least that was the intent.

3 PROFESSOR CARLSON: Yes.

4 MS. PETERSON: And I tried to reflect the
5 drafter's intent in doing that but may not have always
6 succeeded if the intent wasn't clear to me.

7 MS. WINK: Right. In fact, what is currently
8 drafted as footnote 3 to injunction Rule 1, I believe that
9 lives in the world of law review and not as comments to the
10 rule. It's just for information for all of you. Okay?

11 All right. Let me make sure I'm following
12 and staying on task. All right. The third issue that came
13 up at the last meeting, Judge Christopher and others noted
14 that the proposed Rule 1(b), as in boy, says that the
15 verification -- that the facts supporting the application
16 must be verified or supported by affidavits of one or more
17 persons having, quote, "personal knowledge of the relevant
18 facts that are admissible in evidence," and Judge
19 Christopher raised the question of whether TROs can be
20 based on affidavits that contain hearsay. Judge Yelenosky,
21 I remember you had a lot of input on that, among other
22 people, and Chip Babcock did ask whether this was existing
23 in the current rules or in case law, so I have a report
24 back on that.

25 If we begin -- we begin in this situation

1 with existing Rule 682, existing Rule 682 requires verified
2 allegations, whether it's an affidavit or verified for all
3 writs of injunctions, and TROs are writs of injunctions, so
4 that doesn't answer the question, but that's where we
5 begin. Then let's take what I believe is the closest
6 analogy to be existing in the case law to answer this
7 question. The reason the question doesn't come up very
8 often is we're dealing with TROs that with only a few
9 exceptions were just not appealable. So the closest
10 analogy in the case law is the question of whether a TRO
11 can be based on, quote, information and belief, and there
12 is some existing published case law on that. A couple of
13 cases have explained that a temporary restraining order
14 cannot be issued on an affidavit stating the elements for
15 an injunctive pleading based on information and belief.
16 That comes from *Ex Parte Rodriguez*, 568 SW 2d 894 and 897.
17 That's a Fort Worth court of civil appeals case in 1978.
18 It is no writ. It also cites Durrett, D-u-r-r-e-t-t,
19 versus I believe it's Boger, B-o-g-e-r, 234 SW 2d 898, that
20 is a Texarkana Texas civil appeals case in 1950, no writ.

21 And the background here is that because the
22 TRO proceedings are often going to be based on the argument
23 of attorneys and the affidavits or sworn pleadings, it's
24 very preliminary in nature, so the judges would be more
25 reticent about focusing on information and belief. We can

1 take that to hearsay issues if you want to, but there are
2 cases that also say that even a temporary injunction or
3 permanent injunction cannot be issued based on information
4 and belief. However, these cases go farther and say that
5 can be waived because we end up in an evidentiary hearing
6 and the issue is overcome by evidence presented and
7 accepted into evidence, and that would come from the
8 following cases: *Schwartz vs. Traveler's Insurance*
9 *Company*, 1989 Texas App. Lexis case, 1891, that's a Houston
10 14th District court of appeals. That's no writ. It also
11 comes from *Zanes vs. Mercantile Bank and Trust Company*, 49
12 SW 2d 922 and 927. That's a Dallas appellate court case,
13 1932, writ refused.

14 HONORABLE STEPHEN YELENOSKY: Did you say
15 that that's essentially remedied by a later evidentiary
16 hearing? And if so, obviously that would never excuse the
17 granting of a TRO --

18 MS. WINK: True.

19 HONORABLE STEPHEN YELENOSKY: -- on
20 information and belief because you don't have it.

21 MS. WINK: True, but I wanted to make sure
22 you guys knew that both of these issues have actually come
23 up on the TRO as well as the injunctive case, temporary or
24 permanent, and have been addressed somewhat. Now, as a
25 task force and as our subcommittee on injunctions, we have

1 recommended -- and you'll see this when we get to the Rule
2 2 on temporary injunctions and Rule 3 on permanent
3 injunctions. We are recommending that parties be allowed
4 to plead on information and belief as long as the grounds
5 for the belief are stated, and specifically because it can
6 be overcome at the hearing, but that's going to be up to
7 you guys later.

8 Coming back to the TRO issue and the thing we
9 need to decide, the issue before us is whether we want to
10 revise the currently proposed language of 1(b) to say, "All
11 facts supporting the application must be verified or
12 supported by an affidavit of one or more persons with
13 knowledge of relevant facts" and just leave off the rest.
14 It doesn't --

15 MR. LOW: Now, you left out the word
16 "personal knowledge."

17 MS. WINK: I did leave out the word "personal
18 knowledge," because that's going to bring up the hearsay
19 issue.

20 MR. LOW: Okay.

21 MS. WINK: That's going to bring up the
22 hearsay issue.

23 MR. LOW: Okay. All right.

24 MR. MUNZINGER: Do you ever contemplate that
25 a temporary restraining order could be issued on sworn

1 evidence without an affidavit?

2 MS. WINK: The rules require that all
3 injunctive orders be -- that all injunctions be based on a
4 verified petition, whether it's supported by affidavits or
5 it's just a verified petition, so we're stuck with existing
6 law on that in that respect.

7 MR. ORSINGER: Okay. I'd like to ask two
8 questions. One is do you equate information and belief
9 with hearsay, or are they different things? Because --

10 MS. WINK: They're different things.

11 MR. ORSINGER: -- I know that a lot of people
12 plead and say, "On information and belief X, Y and Z," but
13 when I'm pleading hearsay I say that "So-and-so said
14 such-and-such" so you can identify the source and you can
15 convict me for perjury if I lie, and to me there's a
16 difference between globally saying something is based on
17 information and belief and saying that I had a report from
18 an employee of the company that they're about to do
19 so-and-so, and state the name. Are you making a
20 distinction between those two, and should we consider them
21 separately, or are they equal to you?

22 MS. WINK: From a technical standpoint I
23 think you can look at pleading on information and belief
24 when you state the grounds for the belief to be exactly
25 what you brought up. It could be a hearsay issue, meaning

1 I heard, I was told by, you know, Jim Jones, X, Y, and Z.
2 It happens to be hearsay as well, but by identifying in the
3 affidavit from whom I heard I'm satisfying the
4 information -- the basis of my information and belief,
5 right. So I think you can have both under the same words.
6 The reason I left out the word "personal knowledge" is
7 because it goes directly to the hearsay issue.

8 MR. ORSINGER: All right, so are you
9 recommending we take "personal" out or leave it in?

10 MS. WINK: I think -- well, I'm more
11 comfortable leaving it in because all of our affidavits are
12 supposed to be based on personal knowledge true or correct.

13 MR. ORSINGER: Well, maybe that's true. I
14 don't know. I mean, I wouldn't question that that's your
15 assessment, but it seems to me that in a temporary
16 restraining order where we're typically trying to fix
17 emergencies for a very short period of time that if
18 somebody is willing to swear under oath where the source of
19 their information is from so they can be prosecuted or sued
20 if they mislead the court, that perhaps we should allow the
21 reliance on specifically identified hearsay sources for the
22 limited purpose of getting a temporary restraining order
23 for a short period of time until we can get into court with
24 witnesses, and if we go on the record with very language
25 that's extremely inflexible and ungiving that you must

1 produce someone with personal knowledge to support your
2 TRO, no matter if 25 people that work for a company say
3 that a company is about to do something or another person
4 is about to do something, we are not going to give you a
5 TRO unless they have personal knowledge of it, so I feel
6 like we're stepping a little bit further.

7 You know, information and belief is a vague
8 claim that I think something, but I'm not necessarily going
9 to tell you why I think it. Whereas, somebody that offers
10 you hearsay that's inadmissible but is sourced is more
11 reliable in the sense that you can subpoena them or if they
12 lie about it you can put them in jail. So are they the
13 same thing, and are we really truly saying that you can't
14 get a TRO unless every single fact or every necessary fact
15 or all facts supporting it are based on personal knowledge?
16 That concerns me, and I think that's a policy change.

17 MR. LOW: And you're saying that information
18 and belief, identifying the source, okay, it shouldn't be
19 generally, you should identify the source of your
20 information.

21 MR. ORSINGER: I don't think you should give
22 TROs based on information and belief because that's an
23 unsworn statement. That's somebody I just allege so-and-so
24 based on information and belief. There is case law on it.
25 It's -- you can't be prosecuted for perjury. It's not an

1 oath. What I'm saying, though, is if someone swears that
2 this individual witness told me the following things --

3 MR. LOW: That's your source of information
4 and belief.

5 MR. ORSINGER: Yes, you're identifying the
6 source of the inadmissible -- yes. That's why I would
7 distinguish personal knowledge from information and belief.

8 MR. LOW: All right. Steve is going to have
9 a stroke. Let's let him go.

10 HONORABLE STEPHEN YELENOSKY: Yeah, sure, but
11 identifying the source, if the source is an employee of the
12 company that's supposedly about to do the bad thing, you
13 can at least argue that that would constitute an admission
14 and would not be hearsay, but just to say, well, because I
15 identified the source somehow that gets by everything, I
16 mean, that would be saying, "Well, this guy named Tom Jones
17 told me that company was about to do it." How does -- how
18 does that provide personal knowledge simply because you
19 identified the source?

20 MR. ORSINGER: It doesn't. The question is
21 whether we're going to leave the word "personal" in or not.
22 I admit it doesn't guarantee personal knowledge. All I'm
23 saying is I'm not sure that personal knowledge is required.
24 All of the case law I've read over the years -- and I have
25 not done near as much work as the task force -- is an

1 indication that affidavit on information and belief is not
2 really an affidavit, and I agree, and I don't think we
3 should be doing anything based on information and belief
4 that requires swearing.

5 To me there's a distinction, though, an
6 important one, between saying that "I allege this on
7 information and belief" and that "I allege this because I
8 have a witness here that tells me this, but I can't get him
9 to sign an affidavit, but he told me that this is about to
10 happen, and I need to stop it"; and it's a quick -- it's a
11 short period of time until it gets fixed, and you can be
12 sued if you get a wrongful issuance of a TRO, and you can
13 be prosecuted if you lie under oath. So to me being sued
14 for a wrongful TRO and being prosecuted for lying under
15 oath is a good assurance of reliability if you don't
16 require that the person have personal knowledge, but that
17 you do require them to specify the exact source of their
18 information so that we have some assurance.

19 Now, I think adding the word "personal" here
20 changes the law. That's my personal opinion. I didn't
21 research it, and I certainly haven't served on a task force
22 for six months or a year, so I'm just a little concerned
23 about putting the word "personal" in there.

24 MR. LOW: All right.

25 HONORABLE R. H. WALLACE: To me if you've got

1 a situation where the person who signs the affidavit says,
2 "I received a telephone call from John Doe. He told me
3 that my ex-employee was out recruiting people to come work
4 for his new company," that's personal knowledge. I mean,
5 he has personal knowledge that he received that phone call,
6 and he could swear to that. If it's offered for the truth
7 of it, it would be hearsay, but is there a requirement that
8 you can only issue TROs on add -- on evidence that would be
9 admissible at trial? I don't think so.

10 MR. MUNZINGER: But this rule says that.

11 HONORABLE R. H. WALLACE: No, I don't think
12 personal knowledge -- it doesn't say --

13 MR. MUNZINGER: "Knowledge of relevant facts
14 that are admissible in evidence."

15 HONORABLE R. H. WALLACE: Where? Oh, okay.
16 I see. Okay.

17 MR. ORSINGER: But, wait, on your original
18 point, the person --

19 HONORABLE R. H. WALLACE: Oh, yeah. It does.

20 MR. ORSINGER: The person that's on the phone
21 has to be --

22 HONORABLE R. H. WALLACE: That's what needs
23 to come out.

24 MR. ORSINGER: The person that's on the phone
25 has to be the one to sign the affidavit. If your

1 vice-president gets a phone call from a friend saying, "I
2 think they're stealing your data and using it to start a
3 new company," unless the person who knows that comes in and
4 signs the affidavit, your vice-president putting in an
5 affidavit isn't good enough because he doesn't have
6 personal knowledge.

7 HONORABLE R. H. WALLACE: He had personal
8 knowledge that he got a phone call.

9 MR. ORSINGER: Well, but this says the facts
10 supporting --

11 HONORABLE R. H. WALLACE: You're right.
12 Maybe it's the "admissible in evidence" that needs to come
13 out.

14 MR. ORSINGER: Well, I'm arguing something
15 that's different from that, because that raises a whole
16 issue of waiver of objections to hearsay. If there's
17 nobody else there to object to hearsay is it fair to say
18 it's waived? I think that's a different issue, and I don't
19 want to make too much of this issue, but I just wanted to
20 be clear that I'm not entirely sure that all the existing
21 body of law that you can't issue a TRO on information and
22 belief is the same thing as saying every fact supporting
23 your TRO must be based on an affidavit from someone with
24 personal knowledge. I think you're changing the law.

25 MR. LOW: Richard.

1 MR. MUNZINGER: I think Richard's hit it
2 right on the head. There's a difference between what I
3 offer in proof at the hearing 13 days after the temporary
4 restraining order is issued and what I can say in the
5 application for the temporary restraining order. I get a
6 telephone call from my client. He has a secret formula.
7 "Did you know that Joe Schmoe Hawkin is going to take your
8 secret formula and publish it on the internet?" I didn't
9 know that. "I'm telling you right now I work with him, and
10 he hates you because you did A, B, C."

11 Well, now I can't get a temporary restraining
12 order to stop that because the way this is written because
13 I would have to say either "I've been informed," which is
14 hearsay, or "Joe Schmoe told me about this," and Joe Schmoe
15 is an employee of mine who works with this guy, et cetera,
16 et cetera, but that's hearsay and I couldn't get it, so I
17 am deprived of my temporary restraining order. A rule that
18 is set up to, as you point out, Richard, preserve the
19 status quo for a brief period of time, you can't get the
20 protection that you need for the brief period of time, even
21 though at the hearing you might have to call Joe Schmoe and
22 have Joe Schmoe so testify and you might have to subpoena
23 the witness who you're threatening. You may have other
24 evidence that you could prove it, but you could never get
25 the temporary restraining order the way this is written.

1 And this isn't just limited to collection cases.

2 MR. LOW: All right. What suggestions are
3 you and Richard making as to changes we should make on
4 what's been proposed? Let's have language.

5 MR. MUNZINGER: "An affidavit by one or more
6 persons having personal knowledge of relevant facts,"
7 period, and the relevant fact would be "I, Richard
8 Munzinger, manager of the ABC Office, have been told by my
9 fellow employee."

10 MR. LOW: I understand, because a lot of
11 times they've already done it before you can prove it.
12 Then you can take bankruptcy. It's already done to you.
13 You don't need an injunction. All right. That's the
14 language you would add. What about you, Richard?

15 MR. ORSINGER: I would take the word
16 "personal" out because I think some people might construe
17 the rule to mean that the only meaningful affidavit is
18 someone that's swearing to a fact they have personal
19 knowledge of.

20 MR. LOW: That was taken out the way read,
21 and I asked the question whether it was taken out
22 intentionally, and the answer was "yes."

23 MR. ORSINGER: Oh, I misunderstood that. I
24 didn't realize you --

25 MR. LOW: Right when we started I said, "You

1 deleted the word 'personal,' was that intentional?"

2 MS. WINK: That was my recommendation.

3 MR. LOW: Yeah. You could learn a lot
4 listening.

5 HONORABLE DAVID PEEPLES: I think that the
6 requirements in sub (b) are too strong, and I think TROs
7 should -- the judge's authority to grant a TRO shouldn't be
8 limited as much as this would do it.

9 Now, look back up to that list of five
10 things. Before the judge can do this he's got to be
11 convinced that there's an immediate and irreparable injury,
12 no adequate remedy of law, and if it's done without notice
13 to the other side, that there will be substantial damage
14 before anything happens. That's a pretty tough showing,
15 and I would point out that in the recusal rule, 18a, this
16 is to recuse a judge, we don't require personal knowledge.
17 The very last sentence in sub (a) says you can ask for
18 recusal on information and belief if the grounds of such
19 belief are specifically stated, and you know, somebody is
20 going to bulldoze a building, I mean, serious things can
21 happen, and a TRO has a short, limited life span, and you
22 can get it dissolved instantly.

23 MR. LOW: Yeah. Is there a limit in time
24 when you have to hear the permanent injunction?

25 MS. WINK: Yes.

1 MR. LOW: Isn't it limited to --

2 MR. ORSINGER: Hear the temporary injunction.

3 HONORABLE DAVID PEEPLES: Temporary.

4 MR. ORSINGER: TRO is 14 days and can be
5 extended once --

6 MR. LOW: Yeah.

7 MR. ORSINGER: -- and then after that I think
8 you have to --

9 MS. WINK: Parties must agree thereafter.

10 MR. ORSINGER: -- get a new TRO or get a
11 hearing.

12 MR. LOW: Okay.

13 HONORABLE DAVID PEEPLES: I think I would
14 take the word "insufficient" out of that last sentence in
15 (b). I mean, frankly, I think an awful lot of trial judges
16 would look at that and say, "You know what, I don't care
17 what the rule says, I'm going to keep the building from
18 being bulldozed without a permit until we can have a
19 hearing on this."

20 MR. LOW: Right.

21 HONORABLE DAVID PEEPLES: And so if you make
22 it too strong you're going to have judges basically saying,
23 "I don't care what the law says, I'm going to do what has
24 to be done even if this affidavit is not really
25 sufficient," and I think we ought to try to correspond with

1 what I think is the practice and with, you know, what needs
2 to be done sometimes -- I think a good long-term movement
3 in the law has been away from strict requirements for
4 equitable relief and toward a little bit more easy to get
5 equitable relief. I think that's a good thing, and I think
6 we should not make it too hard to get a TRO, which just
7 freezes the status quo for a short time.

8 MR. LOW: So the -- you would be more
9 strenuous when you talk about a temporary injunction --

10 HONORABLE DAVID PEEPLES: Of course, yes.

11 MR. LOW: -- which lasts a long time. We are
12 speaking in terms of a temporary injunction, and really
13 that's temporary restraining order is the technical term.

14 HONORABLE DAVID PEEPLES: We're on page one,
15 aren't we?

16 MR. ORSINGER: Yes.

17 HONORABLE DAVID PEEPLES: TRO.

18 MR. LOW: Yeah, temporary restraining order,
19 that's what I say, instead of temporary --

20 MS. WINK: May I make -- before you go on, I
21 think I can make one recommendation that will help
22 something you said there, and then the rest of the comment
23 can go on. In (a)(5), those points in (a)(5)(A) and (B),
24 those are not current practice across the state as a whole.
25 In order to take that out of the issues, really (a)(1)

1 through (4) are what you have to plead. Okay. And you
2 must. That's existing law. So I would recommend that what
3 is now in (a)(5), that that becomes (B), and (B) becomes
4 (C), et cetera.

5 The reason we put the language that you see
6 in (a)(5)(A) and (B) in the rule is because many of the
7 most populous counties say if you're going to go without
8 notice I want some information about, you know, why, good
9 reasons why, so that the judges know ahead of time what
10 they're dealing with.

11 MR. LOW: So what you're talking about is
12 deleting (5) and having (A), (B), (C)?

13 MS. WINK: No, sir. I'm suggesting that what
14 is currently (1)(a) --

15 MR. LOW: Right.

16 MS. WINK: -- sub numbers (1) through (4)
17 stay where they are.

18 MR. LOW: I understand.

19 MS. WINK: That we turn what is currently
20 (a)(5) into (B).

21 MR. LOW: Oh, okay, I see.

22 MS. WINK: And in the verification part,
23 which would become (C) --

24 MR. LOW: (C), okay.

25 MS. WINK: Right, in the verification

1 language, then all facts supporting the application, you've
2 got it. Right? The facts supporting the application are
3 there in (a)(1) through (4).

4 MR. LOW: So (1) through (4) would be the way
5 it is now.

6 MS. WINK: Yes. Would that help?

7 HONORABLE DAVID PEEPLES: Well, I think
8 (5)(A) and (B) is an excellent addition to this. I think a
9 lot of counties and a lot judges have that practice.
10 They'll just ask, "Have you talked to the other side?"

11 "Well, yeah, they won't talk to me."

12 "Well, let's get them on the phone," and they
13 answer the phone for the judge. So that's a healthy thing,
14 and to put that in the rule is good. I just think that
15 (b), verification, if judges follow that, it just seems to
16 me out of the question somebody comes in and says they
17 didn't even go to city council to get this building torn
18 down or whatever they're going to do, and the judge says,
19 "Oh, sorry, the law requires personal knowledge."

20 MS. WINK: Oh, I agree. We're still
21 addressing the personal knowledge, information and belief
22 issues separately. I agree with you there are issues to
23 decide there, and this is the group to decide them and then
24 the Court thereafter, but for purposes of saying, you know,
25 what has to be supported by verification or an affidavit,

1 period, it's going to have to be what is currently 1(a)(1)
2 through (4). What you currently see as (5)(A) and (B)
3 won't be there. We're going to revise that.

4 MR. LOW: But what about the last sentence,
5 if you took out "personal knowledge," having knowledge, and
6 then you relate what that knowledge is and then it says
7 information and belief is insufficient?

8 MS. WINK: Actually, that's what I think we
9 should go back to discussing. The -- more discussion on
10 (C) itself, what is now (B) and will become (C),
11 verification --

12 MR. LOW: Right.

13 MS. WINK: -- I'm hearing that it should say
14 -- instead of what you see now it should say, "All facts
15 supporting the application must be verified or supported by
16 an affidavit by one or more persons having knowledge of
17 relevant facts," period, end of story.

18 MR. LOW: All right.

19 PROFESSOR CARLSON: Strike the rest of the
20 sentence.

21 MS. WINK: Strike the rest -- well, I
22 actually think the last sentence should stay there, but can
23 we just start with the first sentence?

24 MR. LOW: How is that different, information
25 and belief? I've told you my information and what my

1 belief. It's not personal knowledge, but it's the source,
2 so how isn't that inconsistent?

3 MS. WINK: It's going to go -- I'm sorry,
4 sticking with the issue on pleading in the information and
5 belief, we just have existing case law that says we can't
6 plead on information and belief. I think what's been
7 discussed in this room where someone is saying, "I got a
8 telephone call from my subcontractor, John Smith, who
9 explained that he is seeing people on the ground lifting
10 things off the property and setting dynamite so they can
11 blow up my property," okay, I think that's sufficient, you
12 know.

13 MR. LOW: But that's not sufficient to
14 support the facts. You're trying to prove certain facts in
15 order to get it, and there's personal knowledge of those
16 facts, or there's some hearsay of those facts.

17 MS. WINK: Right, but I'm suggesting we take
18 out the word "personal" so it's not personal.

19 MR. LOW: I understand.

20 MS. WINK: Yes, sir.

21 MR. LOW: I just see it as inconsistent.

22 Richard.

23 HONORABLE TERRY JENNINGS: Buddy?

24 MR. ORSINGER: I wanted to say two things,
25 but, Buddy, in my mind information and belief is different

1 from stating hearsay with an attributed source, because
2 information and belief is a catchall clause that liberates
3 the pleader from any specific information at all, and I
4 think that's really been the deficiency over the years. So
5 I don't -- as long as we're real precise about what we're
6 doing, I don't think -- I think we can get out of the
7 conflict you're talking about.

8 MR. LOW: But let me ask you this. What if I
9 got a phone call that so-and-so is about to destroy a
10 bridge or something, okay, and there's talk about it, and I
11 can't swear that I don't have personal knowledge, but the
12 information I got says that, and I give the source of my
13 information. Isn't that still information and I have to
14 believe it to get it?

15 MR. ORSINGER: Yes, but I don't think that's
16 what the term "information and belief" means as used
17 traditionally.

18 MR. LOW: Well, it might not mean it, but it
19 says it.

20 MR. ORSINGER: Yeah, but I don't think it
21 means that, and I think that you need to -- just because
22 words are used in English for different purposes doesn't
23 mean you can't use the words. You just have to use them in
24 a way that's clear, but at any rate, I have a problem with
25 making (b) a statewide practice; and the inquiry I did

1 after this last meeting was just among family lawyers, but
2 in this respect the Family Code doesn't alter the
3 standards; but in Houston, for example, if you want to get
4 a temporary restraining order from a family law judge as
5 long as the restraining order is mutual, they will sign it,
6 if it is not mutual, they will not sign it no matter how
7 many affidavits are attached. In Dallas, you can't get a
8 temporary restraining order with a divorce petition because
9 they've adopted a standing rule that you're required to
10 attach to the back of your petition informing the
11 respondent that these are standing orders that they are now
12 subject to because a suit was filed and their name is the
13 respondent.

14 So you get a reference to a standing set of
15 injunctive -- temporary -- pardon me, temporary restraining
16 orders that were passed down as a local rule without the
17 permission of the Texas Supreme Court, and the only time
18 that they'll give you a temporary restraining order is if
19 you're asking for something more than is in their standing
20 order, and then you go back to the San Antonio practice,
21 which is what I think is more what I envisioned as normal
22 around the state, is that you don't have to advise the
23 other side that you're going to get a TRO. You just go
24 down there, and if you can meet the requirements in the
25 Rules of Procedure, one of which is not to get them on the

1 phone talking to the judge, you can get your TRO.

2 So what I've decided is TRO practice varies
3 from locale to locale because there's no appellate review
4 to standardize it, and so what you guys would be doing or
5 what we would be doing if we make this a requirement, this
6 subdivision (5)(A) and (B), in my opinion is that you're
7 going to change the way that TRO practice is practiced in a
8 whole lot of the state, and I'm not sure that those people
9 know that you're going to do that, and I'm not sure that
10 they would want to do that. Judges and clients.

11 So I'm a little bit concerned about (5)(A)
12 and (B) as I think it comports with the Travis County
13 practice that Judge Yelenosky described, but I've just
14 named the three largest urban centers in Texas that don't
15 follow this practice, at least in family law, which
16 probably represents a huge part of their TRO practice. So
17 I'm just wondering if that -- where are you guys -- did you
18 go through that process and decide to standardize in that
19 way notwithstanding?

20 MS. WINK: Well, here's what we did. That's
21 an outstanding question. So setting (c) aside for a
22 moment, verification --

23 MR. ORSINGER: Right.

24 MS. WINK: -- and let's go through this soon
25 to be (b). First, this entire rule says when there's

1 conflict with the Family Code --

2 MR. ORSINGER: It doesn't. The Family Code
3 doesn't get this detailed.

4 MS. WINK: Right. And I think you're right
5 in that county by county there are local rules out there
6 that may or may not comply with the law in the world of
7 injunctions, and nobody has fought that yet, and I don't
8 want to take on that case personally, but it's out there.
9 It's an issue. In Houston, where I live, I rarely can go
10 to court -- of all the TROs I've ever done I've been
11 required to talk to the other party ahead of time, with one
12 exception, and that was because there was the imminent
13 danger that we couldn't prevent the harm otherwise. So the
14 standard practice, the judges do require us in Harris
15 County civil courts, other than family courts, the district
16 courts anyway, that they want us to have talked to the
17 opposing side.

18 MR. LOW: Terry.

19 HONORABLE TERRY JENNINGS: Is your concern
20 basically, okay, the difference between information and
21 belief and hearsay, based on information and belief alone
22 without any supporting facts that's conclusory, right?

23 MR. ORSINGER: Right.

24 HONORABLE TERRY JENNINGS: That's no
25 evidence.

1 MR. ORSINGER: That's what I think is really
2 behind that rule.

3 HONORABLE TERRY JENNINGS: Right, and, of
4 course, hearsay is evidence. It wouldn't be admissible at
5 trial, but it is evidence; and by analogy, like in a
6 criminal context, an arrest warrant, a search warrant, can
7 by law be based on hearsay. They usually are based only on
8 hearsay, so would it solve the problem to say something
9 along the lines within (b), taking out "personal
10 knowledge," adding a sentence something along the lines of
11 "Hearsay evidence may be considered in determining whether
12 or not to grant the application" and then changing the next
13 sentence to "Pleading on information and belief alone is
14 insufficient to support the granting of the application."
15 Would that satisfy your concerns?

16 MR. ORSINGER: Most of them. I guess what
17 I'm left with after that point is if you have some other
18 rule of evidence that would be objectionable, so we -- you
19 know, could be authentication, could be -- so we definitely
20 need to take out any reference to admissibility.

21 HONORABLE TERRY JENNINGS: Yeah, that's why I
22 would say, "Hearsay evidence may be considered." You know,
23 it's -- it wouldn't necessarily rise to the level where the
24 application should be granted, but it can be considered and
25 then pleading on information and belief alone.

1 MR. ORSINGER: I like that.

2 MS. WINK: Okay.

3 MR. LOW: Jane.

4 HONORABLE JANE BLAND: Maybe since the first
5 sentence says you've got to have knowledge of relevant
6 facts in your affidavit, that encompasses what's required
7 by the rule. That sentence about information and belief is
8 what doesn't meet the rule. I don't know that we need to
9 include in the rule everything that doesn't meet the rule.
10 So, in other words, I don't think we need that second
11 sentence. If we have -- if there are enough -- if there is
12 enough facts alleged or verified to to warrant the issuance
13 of the TRO then the rest of it's just -- so maybe the
14 second sentence we don't even need to have. And I don't
15 think there are many judges that grant TROs based on
16 information and belief, because sometimes they're without
17 notice and for all the reasons that we've talked about.

18 PROFESSOR CARLSON: So should we vote on
19 that?

20 MS. WINK: I think we should -- if I may make
21 a suggestion, I think we should vote on this issue, like
22 whether we even want to discuss within these rules
23 information and belief. It's going to come out not just
24 here but throughout the other sets of rules, and in most of
25 the other sets of rules it was really clear existing law

1 required things. In the world of injunctions it's never
2 been explicitly put in the rules. There's just case law
3 that applies, and we've been trying to bring that forward.

4 MR. LOW: But I hear a number of the
5 committee members thinking it should be easier to get a
6 TRO, but on other things it might be more rigid, and so I
7 don't know that you can address one sentence that hits both
8 of them because it depends on what you're doing, I think.
9 Richard.

10 MR. MUNZINGER: Well, just an observation,
11 pleading on information and belief is to some extent a
12 response to Rule of Civil Procedure 13 and Rule 11 of the
13 Federal rules where a lawyer has since the enactment of
14 those rules the obligation not to plead things that the
15 lawyer doesn't know or have good reason to believe, et
16 cetera; and I know I've been in cases in state and Federal
17 court where I've gone out of my way to plead certain things
18 on information and belief for that very reason, because
19 I've had adversaries who were very adept and prepared to
20 seek contempt orders and what have you for the pleadings,
21 the nature of the animal and the fight between the parties.
22 That doesn't obviate the need, however, for situations
23 where you have to plead something like that.

24 Now, pleading on information and belief is
25 far different from a -- from winning the case in a

1 temporary injunction, for example. The 14-day period of
2 the temporary restraining order is a short period,
3 admittedly, or the 28 days. The only other thing I would
4 say is any time you give a right to one person you're
5 taking away a right from another person, and so the concern
6 that we're all focusing on is Richard is focusing on the
7 family deal, husband is going to beat up the wife or the
8 wife is going to shoot the husband or whatever it might be.
9 Maybe so.

10 If you don't let me do -- I had a case where
11 I was a -- my partner, one of my client's partner did
12 something and the partnership got into a dispute, and
13 they're suing each other. Well, a great sum of money may
14 be lost because of temporary restraining order, and so
15 protecting the movant's or the applicant's right has an
16 adverse effect, could have an adverse effect as well on the
17 side. An observation only.

18 MR. LOW: Next, but -- Sarah.

19 HONORABLE SARAH DUNCAN: That's part of the
20 point I wanted to make, is my understanding is that if you
21 want a temporary restraining order or a temporary
22 injunction that those facts do have to be sworn to, every
23 one of them, and the personal knowledge of it to me is not
24 the point. It's the swearing that's the point, and I would
25 simply delete "personal" from this what is now (b) and make

1 it "knowledge of relevant facts." But as Richard was
2 saying, temporary restraining orders restrain what might be
3 legal, proper, permissible conduct, and I don't think you
4 ought to be restraining legal, proper, permissible conduct
5 without somebody swearing that it's not legal, proper, or
6 permissible, and this talk of issuing temporary restraining
7 orders just because some -- "I heard" and "somebody said,"
8 that gives me great pause, concern.

9 MR. LOW: But it probably came about because
10 they want to preserve the status quo and --

11 HONORABLE SARAH DUNCAN: Well, that's what
12 they say, Buddy.

13 MR. LOW: Yeah, I understand.

14 HONORABLE SARAH DUNCAN: But they're just
15 saying it, and people don't always know the truth, and even
16 if they know the truth, they don't always tell it.

17 MR. LOW: I've heard that. Jane.

18 HONORABLE JANE BLAND: I agree with Sarah. I
19 don't think temporary restraining orders ought to be easier
20 to get. They ought to be extraordinary. My thinking of it
21 is the two sentences are sort of repetitive. You've got to
22 swear to personal -- you've got to swear to knowledge of
23 facts. The second one is this isn't knowledge of facts.
24 Well, we already know that something on information is --
25 but when people put that in front of you in front of the

1 TRO, they haven't put in front of you enough to get a TRO
2 granted. We don't need to incorporate it in the rule.
3 There's lots of reasons why a TRO won't be granted. One of
4 them is if you haven't sworn to enough facts to get one.

5 MR. LOW: All right. Steve.

6 HONORABLE STEPHEN YELENOSKY: Yeah. What
7 Sarah said I think is certainly true. Some of the examples
8 given -- oh, they're about to tear down the building --
9 well, I mean, those are rare, I think, number one. Usually
10 it's about they're about to steal the secrets or not, and
11 part of the thing is you're asked to -- you're asked to put
12 in place a TRO which tells somebody not to commit a crime.
13 Well, there's little downside to that when that's the
14 question. "Tell him not to steal my secrets," but that's
15 rarely the issue.

16 It's rarely the issue that somebody says, "I
17 heard that the guy across the street is about to bulldoze
18 my house." Okay. Well, if he says that and I order him
19 not to bulldoze your house, there's little downside there,
20 but that's rarely the question as well. There usually is
21 some question as to whether or not what a person is about
22 to do is legal, and if you're going to stop them from doing
23 it simply because somebody states facts they don't know
24 themselves that would make it illegal, that's problematic.
25 I mean, with the kind of restraining orders we get is

1 "Don't let them open their business because they're opening
2 it with my confidential information." That's the kind of
3 question. It's not wondering about whether or not they're
4 going to commit an illegal act.

5 And so I agree with Judge Peeples there are
6 times when you are going to say the harm is so great that
7 maybe I am stepping beyond the strict requirements of the
8 rule, but I think those are sufficiently rare that if we
9 put -- if we concretize that in the rule I think we support
10 what I think used to be the practice somewhat, which was
11 attorneys go to the courthouse to find a judge to sign
12 their TRO, not to go to court to appear before a judge to
13 establish the basis for a TRO. They just find a judge to
14 get a judge to sign, as if there's never a downside to
15 that, and I've seen plenty of downside that itself can't
16 necessarily be remedied by law.

17 MR. LOW: Terry.

18 HONORABLE TERRY JENNINGS: Aren't the
19 concerns y'all are expressing covered by (1) through (4)?
20 I mean, you have to prove up (1) through (4), and the
21 question really is, is what's sufficient, what type of
22 evidence is sufficient to prove up (1) through (4); and if
23 the law has been that hearsay evidence in this context is
24 sufficient to prove up (1) through (4), yeah, I'm having a
25 hard time understanding what the concern is.

1 MR. LOW: One more and then we're going to
2 form a vote. We're fixing to vote. We've heard quite a
3 bit. Okay.

4 HONORABLE R. H. WALLACE: Well, I was just
5 going to say, I mean, I think if you take out the
6 "personal" -- everybody knows now that verification has to
7 be based upon personal knowledge and true and correct, and
8 if you take out "personal," when I read that rule I'm
9 thinking "Hmm, the rule has changed. It doesn't have to be
10 personal knowledge anymore. It has to be knowledge of
11 relevant facts."

12 Well, the discovery rules allow us to
13 designate witnesses with knowledge of relevant facts, and
14 that could be anything. So I'm all -- I'm still for
15 keeping "personal" in there because I think there's a
16 difference between personal knowledge and hearsay.

17 MR. LOW: What vote would you propose that
18 would be helpful?

19 MS. WINK: I would first say all in favor of
20 taking out the word "personal" say so.

21 MR. LOW: All in favor of taking out the word
22 "personal." All right. Ten for.

23 All against? Eleven, Chair not voting.

24 HONORABLE TOM GRAY: I'll vote now on the
25 first one, and that way it will be eleven to eleven. I

1 didn't vote for either of them.

2 MR. LOW: You're allowed to do that.

3 HONORABLE TOM GRAY: Okay. Now you're going
4 to have to vote.

5 MR. LOW: I vote with you. I never go wrong
6 voting with you, would I?

7 HONORABLE TOM GRAY: I don't know. A lot of
8 other people do.

9 MR. LOW: Okay.

10 MS. WINK: So if I understand correctly,
11 "personal" is now stricken from the proposed rule. Okay.
12 Then the second thing --

13 MR. LOW: By very slightly stricken.

14 HONORABLE R. H. WALLACE: By a scintilla.

15 MR. ORSINGER: By the Chair's deciding vote.
16 It's all on your shoulders, Buddy.

17 MS. WINK: Then taking this in baby steps,
18 because it just seems to work so much better that way,
19 before I add the hearsay issue, which we can bring up in a
20 moment I say we should vote on whether or not we strike the
21 rest of what is in the currently drafted proposed rule.

22 MR. LOW: Strike the rest of what now?

23 PROFESSOR CARLSON: After (b).

24 MS. WINK: What is in current Rule 1(b),
25 everything after the words "relevant facts" be stricken.

1 Can we hear on that one?

2 MR. LOW: Okay.

3 MR. ORSINGER: This is what now?

4 MR. LOW: All right, let me --

5 MS. WINK: The question -- the question is,
6 to be considered for vote, is whether the existing draft of
7 Rule 1(b) after the words "relevant facts," if we can agree
8 to strike the rest of that part of the rule.

9 MR. LOW: I mean, that "are admissible in
10 evidence" and all of that.

11 MS. WINK: We take that out, and we take out
12 the "pleading on information and belief."

13 MR. LOW: Okay. Who's in favor of
14 stopping --

15 MR. HAMILTON: Can I say something, Buddy?

16 MR. LOW: Sure, Carl.

17 MR. HAMILTON: When you do that, isn't that
18 contrary to having taken "personal" out? Because now if
19 you take "personal" out that means you can have I guess
20 hearsay evidence.

21 MS. WINK: We're going to have a -- we're
22 going to have a separate question of whether or not to add
23 an explicit comment on hearsay evidence.

24 MR. HAMILTON: Okay.

25 MR. LOW: All right. We're going to -- all

1 right.

2 MS. WINK: But first go back to the proposal
3 that in what is current draft of Rule 1(b) that we strike
4 everything after the words "relevant facts."

5 MR. LOW: Put a period after "relevant
6 facts," and that ends it. Who's in favor of that? 15. I
7 don't even get to vote. 15 in favor.

8 Against? Five. Five against.

9 MS. WINK: And then finally, finally should
10 we add a sentence to say that "Hearsay evidence may be
11 considered in determining whether to grant a TRO"?

12 MR. LOW: Everybody understand? We add
13 another sentence that "Hearsay may be considered in
14 granting TRO" or in -- is that --

15 MS. WINK: "In considering whether or not to
16 grant."

17 MR. LOW: All right. All in favor of that
18 sentence raise your -- okay. Raise your hand. Six in
19 favor.

20 All opposed? One. Okay, 14, 14 to 6. Okay.

21 MS. WINK: Okay. Great.

22 MR. LOW: Okay. Now, what's next?

23 MS. WINK: Next is back to issue -- this
24 actually is resolving a lot of things. The fourth issue
25 that was brought up last time is Judge Yelenosky brought up

1 -- and he was correct -- what is in currently proposed Rule
2 1(d)(8), so everybody turn to (1), David, (8) on page two.
3 Let me see if this is right. Sub (b), 1(d)(8) sub (b),
4 that language comes from the existing rules but says that
5 you've got to set the hearing for the temporary injunction
6 at the earliest possible date, taking precedence over all
7 matters except older matters of the same character, and
8 there was much discussion that that just doesn't happen and
9 it's not manageable and it's not realistic on any court.
10 Frankly, I don't know any court that's doing that, so can
11 we all agree to take out at least the language that begins
12 with "taking precedence over" through the end of that
13 sentence?

14 MR. LOW: All right. Where would you put the
15 period? You say it ends with "date"?

16 MS. WINK: Well, for right now I would say we
17 strike everything after "date" and then I'm also going to
18 make a recommendation for softening the language before
19 that, but I think we could get agreement --

20 MR. LOW: Does everybody understand what
21 she's proposing? On page two, (8), you would put a period
22 after "possible date." Period.

23 MS. WINK: At least that, yes.

24 MR. LOW: All right. Richard, question.

25 MR. MUNZINGER: Is -- Rule (a)(5)(A) and (B),

1 it remains in the rule. Richard Orsinger said that he
2 didn't want it on, and I don't remember if we took a vote,
3 but that may influence my vote on this question if (5)(A)
4 and (B) remain in the draft rule, we're now being asked to
5 delete language from (8)(b), but my assumption is (5)(A)
6 and (B) remain in the rule.

7 MS. WINK: We didn't get to -- we should come
8 back -- can we address -- do you want to take that first?

9 MR. MUNZINGER: I don't care how we do that,
10 but it will affect my vote.

11 MS. WINK: Okay. That's fair enough. Why
12 don't I suggest that we back up and address the issue that
13 Richard brought up earlier?

14 MR. LOW: Let me ask you one question before
15 we do that. I have a note here you said something about
16 seven unless such and such, that is something you're going
17 to need to add.

18 MS. WINK: We already got that. We already
19 got that.

20 MR. LOW: Okay. All right. Let's don't
21 cover it again. Let's go back.

22 MS. WINK: Okay. What is in your current
23 draft as Rule 1(a) No. (5) including sub (A) and (B).

24 MR. LOW: Okay.

25 MS. WINK: The first question is do we want

1 to keep that in the rule as a new -- 1 sub (b), period, or
2 do we want to toss it?

3 MR. ORSINGER: Where did that language come
4 from?

5 MS. WINK: It comes from some of the local
6 rules. It comes from Dallas or Tarrant County's local
7 rules, and it comes from what we are being asked to do in
8 the Harris County civil district courts other than family.

9 MR. ORSINGER: And the local rules that
10 you're referring to in the other counties are civil courts
11 and not family law courts?

12 MS. WINK: Yes, sir. Yes.

13 MR. ORSINGER: Okay. Did y'all check to see
14 whether this was consistent with the local rules in the
15 family law courts statewide?

16 MS. WINK: I can't -- I don't remember
17 whether or not we did that.

18 MR. ORSINGER: Okay. Well, I'm afraid that
19 you're going to change the practice in most of the state of
20 Texas on TROs in family law matters, and I'm a little
21 concerned because I don't know -- I don't know how bad the
22 collection business is right now, but I know that the TROs
23 in divorces are frequent, maybe more frequent than in
24 collection matters or in foreclosures or whatever, and I'm
25 really concerned about us taking a practice that may

1 represent a minority of the TROs that are granted in Texas
2 day in and day out, and that's to completely ignore the
3 sensitivity of the fact that in the family law matters
4 sometimes you're trying to get a writ to keep someone from
5 taking a kid out of state or from taking all the money out
6 of a joint bank account or things that if you call them on
7 the phone and say, "You've got 45 minutes to get down here
8 for this TRO," you're going to find that they're already in
9 Oklahoma or the money is already gone.

10 So the public policy that is involved in
11 getting TROs in family law matters, which is not governed
12 in my opinion by the Family Code, is not being adequately
13 addressed by this, and I'm not sure that the task force has
14 vetted this among the family law judges and the family
15 lawyers in Texas.

16 MS. WINK: Okay. Let me respond to that in
17 two ways. First of all, Chris Wrampelmeier was on our
18 subcommittee to address the family law issues, and he did
19 not have objection to that. I do remember that coming up,
20 but more importantly, I think the things that you're
21 concerned about are addressed in the rule and protected by
22 the rule. For instance, if somebody is worried that -- if
23 I'm representing the wife and she's in fear that she's
24 going to be beaten up if the husband finds out that, you
25 know, they're filing a lawsuit then clearly, you know, the

1 applicant would sustain substantial damage before notice
2 and a hearing could be heard, notice could be served and a
3 hearing could be heard. So that would be one of the
4 exceptions when I'm not required to call the other side.

5 This also -- this provides for situations, if
6 we can't get hold of the other side for all practical
7 purposes or if somebody is going to be beaten up or
8 somebody is being threatened with a gun, taking the
9 children out of jurisdiction.

10 MR. ORSINGER: It's not the before notice.
11 It's because of the notice. In other words, the woman is
12 going to get beaten up because the husband found out that
13 she filed the divorce, or the person is going to drain the
14 bank account because they found out. So it's not a
15 question of before, it's --

16 MS. WINK: Okay.

17 MR. ORSINGER: What I'm concerned about is
18 the way it works now if you want to get a temporary
19 restraining order to stop something that's irreparable, you
20 do it secretly, meaning you don't give notice to the other
21 side and then they get served, and then if they go do it,
22 they go to jail; but what you're saying is, is that we've
23 got to call them on the phone and tell them that we're down
24 at the courthouse and want you to come down or I have to
25 show somehow that I'm afraid the child will leave the state

1 or the money will disappear before I can serve the TRO. I
2 can't ever prove that, because it isn't going to happen
3 until they find out that the lawsuit is filed, so the
4 danger of the policy problem here is the time period
5 between knowing that the suit is filed and getting service
6 of the TRO so that the law protects you. You've now handed
7 the potential wrongdoer a window of opportunity to do the
8 wrongful act before a TRO is signed, and in the family law
9 arena that's disturbing to me, and I don't know why Chris
10 wasn't concerned about it, and maybe I'm not representative
11 of the family lawyers.

12 MR. LOW: Kennon.

13 MS. PETERSON: I just wanted to point out
14 that existing Rule 680 of the Rules of Civil Procedure
15 provides that "No TRO shall be granted without notice to
16 the adverse party unless it clearly appears from specific
17 facts shown by affidavit or by the verified complaint that
18 immediate and irreparable injury, loss, or damage will
19 result to the applicant before notice can be served and a
20 hearing had thereon." So in the existing rule it has that
21 standard "before notice" in here as well, and my experience
22 from looking at proposed local rules is that we have had
23 some come through for approval that would be inconsistent
24 with this in the sense that they would require more notice,
25 and I've expressed concern because there's inconsistency

1 with the statewide Rule of Civil Procedure about that, that
2 there are some approved local rules on the books that would
3 require more notice and there are also some standing orders
4 in place that would require more notice. And so there's an
5 inconsistent procedure, I think, across the state for TROs
6 issued without notice, and I think the question should
7 really be what's the best way to proceed rather than what's
8 happening now.

9 MR. LOW: All right, Gene.

10 MR. STORIE: Richard, can you just say that
11 under (a)(5)(A) that the notice would not be practicable
12 because giving notice would destroy the whole purpose of
13 trying to get a TRO in that situation? I mean, you're
14 never going to be able to state as a fact what the ultimate
15 conclusion of the action is because you're trying to stop
16 the action, so whenever you're getting a TRO you're laying
17 the predicate for it and saying, you know, "We've got to
18 stop them from taking that next step, and if I tell what he
19 is going on they're going to take it before we can do
20 anything about it."

21 MR. ORSINGER: To me the practicable means
22 that giving notice is not easy or not readily achieved --

23 MR. STORIE: Could be.

24 MR. ORSINGER: -- so to me that wouldn't
25 address that.

1 MR. LOW: Okay. What would you do, delete,
2 or what would you put something in there? What would you
3 put?

4 MS. PETERSON: I mean, I think what you're
5 saying, Richard, is that there may be harm or damage as a
6 result of notice.

7 MR. LOW: Of the notice.

8 MS. PETERSON: So --

9 MR. ORSINGER: Before you have --

10 MS. PETERSON: Right.

11 MR. ORSINGER: We're -- this rule, I think --
12 you tell me it's already in there, but I have never
13 practiced that way in 35 years, but I could have been wrong
14 all these times.

15 MR. LOW: There's 36 coming up.

16 MR. ORSINGER: This creates a new time frame
17 now, which is the difference -- the time that expires
18 between notice that a TRO may be granted and the time the
19 TRO becomes binding. To me in my practice the value of a
20 TRO was the first time they find out the act is prohibited
21 and might be motivated to do it, they are now prohibited
22 from doing it, but if you call them and say, "We might
23 prohibit you from leaving town with that kid" or "taking
24 all that money out of the retirement and moving back to a
25 foreign country, so why don't you come on down here in 45

1 minutes," and what's going to happen is for some people
2 during that 45-minute period the harmful act will occur,
3 and it will not be illegal or improper or a violation of
4 TRO, and so we're creating a new early warning to permit a
5 wrongdoer to do wrong before it's prohibited, and that
6 concerns me.

7 HONORABLE TOM GRAY: It seems to me that it's
8 real easy to fix with the addition of a subsection (c) that
9 says, "The applicant will likely sustain damage if notice
10 is provided before the TRO is in effect."

11 MR. ORSINGER: I like that a lot.

12 MR. LOW: All right. You get that?

13 MS. WINK: I almost got it.

14 MR. LOW: All right. Be sure we get it.

15 MS. WINK: Could you repeat it one more time?

16 HONORABLE TOM GRAY: It will require the
17 striking of "or" at the end of (A) and put it at the end of
18 (B), add (C) that says, "The applicant will likely sustain
19 damage if notice is provided before the TRO is in effect."

20 MS. WINK: Got it.

21 MS. PETERSON: Is it just "damage" or is it
22 "substantial damage"?

23 MR. LOW: All right, Richard.

24 MR. MUNZINGER: Just a question about the
25 words "will likely." Is that intended to be near

1 possibility? Would it be better to say "may sustain"? I
2 don't know that there's a substantive difference in the
3 words, but --

4 MR. LOW: Or "could likely" or --

5 MR. MUNZINGER: Richard's point is very
6 valid.

7 MR. LOW: Yeah.

8 MR. MUNZINGER: At the same time, my clients
9 have been hurt by people who take advantage and ignore the
10 local rules that require notice. When you know that
11 somebody is represented by a lawyer you're supposed to give
12 notice; and our judges, or at least some, ignore that rule
13 consistently; and I've had clients lose a substantial sum
14 of money because that rule was ignored; and this pleading
15 requirement, had it been in there and had been required to
16 be satisfied by a judge, might have done some good in my
17 circumstances. Richard's is far more important, some kid
18 could be stolen or somebody could be hurt; but in any
19 event, my question was "will likely," is it the equivalent
20 of "may," which seems to me to be clearly a relaxed element
21 of proving that it's possible only.

22 MR. LOW: If we're putting that in there, how
23 would you put it, if we're putting that sentence?

24 MR. MUNZINGER: I'd say "may."

25 MR. LOW: "May likely." Okay.

1 MR. MUNZINGER: It just seems to me that's a
2 lesser standard.

3 MR. LOW: How does that --

4 MS. WINK: I had actually -- I don't
5 necessarily disagree, but I'd like to hear Judge
6 Yelenosky's take on that, too.

7 MR. LOW: All right. Steve.

8 HONORABLE STEPHEN YELENOSKY: Well, I'm a
9 little concerned. I think this may be an instance in which
10 the existing rule has the same problem, but nonetheless you
11 get those TROs, Richard, when we judges are convinced that
12 somebody is going to abscond. Perhaps the reason the
13 existing rule doesn't say what you want this one to say is
14 because it's problematic on a due process grounds. You're
15 saying, "I could give this party notice, but I'm not going
16 to because on an ex parte basis I've decided that they're
17 going to act badly if I give them notice." That's a little
18 problematic to me to put in a rule.

19 I realize as a pragmatic there are times when
20 we're convinced that somebody is going to abscond. I think
21 usually what we'll try to do is, you know, talk to the
22 other party, if the child is in a place where they couldn't
23 abscond at that moment, like the child is in school. You
24 can even perhaps reset the TRO to a time when the child is
25 somewhere where you know they couldn't abscond, but I think

1 we should at least think about whether we want to put it in
2 a rule that we are on an ex parte basis deciding that we're
3 not giving you notice because we have determined on an ex
4 parte basis that you're going to be bad if we give you
5 notice.

6 MR. LOW: Carl.

7 MR. HAMILTON: I've always thought that the
8 rule meant you could file an application for temporary
9 injunction and give notice to the other side and the court
10 sets it for a hearing, but if you go under Rule 680 and you
11 have a situation where you can't give notice, there's no
12 time for notice and a hearing, i.e., the temporary
13 injunction type proceeding, then you can get a temporary
14 restraining order. So it's not just the notice, but it's
15 you don't have time for a hearing either, and I think that
16 that rule says both. It says that if there's "immediate
17 loss or damage will result before notice can be served and
18 a hearing had," which to me means the temporary injunction
19 notice and a hearing. On this rule you can have an
20 immediate injunction if there's not time to do both of
21 those things.

22 MR. LOW: All right. What are you suggesting
23 we should do on this particular sentence or suggestion of
24 Judge Gray?

25 MR. HAMILTON: Well, it's according to how

1 that's construed. If that's construed the way I think it
2 is, I don't think we need to do anything.

3 MS. PETERSON: There's a separate Rule 681
4 for temporary injunctions specifically.

5 MR. HAMILTON: Correct.

6 MS. PETERSON: And so are you saying that the
7 hearing referenced in the TRO rule is in regard to the TRO
8 hearing or to the TI hearing?

9 MR. HAMILTON: I'm saying that 680 says if
10 you don't have time to do a temporary injunction and give
11 the notice and have a hearing, then you're entitled to get
12 a TRO.

13 MS. WINK: May I address that? Actually, we
14 were concerned about making sure we didn't step on the law.
15 First of all, the language that you're seeing in (5)(B), in
16 what is currently (a)(5)(B) is existing language in the
17 existing rules. Okay. So not saying there isn't a problem
18 we can't address, but that's existing language in existing
19 rules. In the rules that we're providing to you further in
20 for the temporary injunction and in permanent injunction
21 they do specify evidentiary hearing, notice of an
22 evidentiary hearing. This one, this is not an evidentiary.
23 The TRO is not an evidentiary hearing necessarily.

24 The court can, you know, put on -- can let
25 people put on evidence, but it's not required to be a full

1 evidentiary hearing, and it can be ex parte.

2 MR. ORSINGER: So you think "hearing" in Rule
3 680 means hearing on the TRO, not hearing on the temporary
4 injunction?

5 MS. WINK: Yes, sir.

6 MR. LOW: Okay. All right. What would you
7 like a vote on, Justice Gray's proposal, or what would
8 you --

9 MS. WINK: Well, I think we need to decide
10 whether or not we leave the existing (5)(B) and add what
11 has been proposed, which is the applicant -- as a (C), "The
12 applicant will likely sustain damage if notice is provided
13 before the TRO is in effect." If we're going to do that I
14 think we should keep the language parallel, "substantial
15 damage."

16 MR. LOW: Okay. All right. Everybody
17 understand the proposal? All right. All in favor, raise
18 your hand.

19 MS. WINK: Of adding sub (C).

20 MR. LOW: Of adding.

21 HONORABLE DAVID PEEPLES: Tom Gray's
22 language.

23 MS. WINK: Yes, sir.

24 MR. ORSINGER: Did you get Mike's vote?
25 Buddy, I'm not sure you got Mike's vote. He put up his

1 hand up a little bit late.

2 MR. LOW: All right, I'm sorry. Let's go, so
3 we can do it, give me one more chance.

4 MR. HAMILTON: Can you restate what we're
5 voting on?

6 MS. WINK: Yes, sir.

7 MR. LOW: Well, I'm not sure I can count.

8 MS. WINK: Let me restate it so everybody is
9 clear. Should we add a sub (C) that says, "The applicant
10 will likely sustain substantial damage if notice is
11 provided before the TRO is in effect."

12 MR. LOW: All right. All right. In favor?
13 17 in favor.

14 Against? Two. Okay. 17 to 2. All right.

15 HONORABLE SARAH DUNCAN: Maybe three.

16 MR. LOW: Maybe three. Okay. Still carries.
17 All right, go on to the next.

18 MS. WINK: Okay. That brings us back -- let
19 me get back. That brings us back to what is in existing
20 proposed Rule 1(d), as in David, (8) sub (B). Should we
21 take out the language after "possible date"? And we
22 might -- we might make the language a little better too
23 before that, but let's just see if we should get rid of
24 everything after "possible date."

25 MR. LOW: All right. Everybody understand?

1 You're on page two. Are you voting or raising a question?

2 HONORABLE DAVID PEEPLES: I wanted to make a
3 comment, I think.

4 MR. LOW: Oh, all right.

5 HONORABLE DAVID PEEPLES: Well, on (8)(A) and
6 (B) you're talking about there's a no notice TRO and should
7 there be a fast hearing. It seems to me on the next page
8 "Motion to dissolve or modify" is really the important
9 thing here. What I have seen just happen a bunch of times
10 is, you know, the request comes in, you grant the TRO on
11 some representations, and then within 24 hours the
12 respondent has got a lawyer or maybe comes in and says, you
13 know, "We need to talk about this, did you know so-and-so,"
14 and you dissolve the thing. Or you maybe get both sides in
15 and have a little, you know, nonevidentiary hearing, a
16 lawyer here and a lawyer there, and decide we're going to
17 preserve the status quo or I'm not and I'll set you for a
18 quick hearing, and in my experience that's what happens a
19 lot rather than a quick contested hearing while the TRO
20 stays in place. So I see this (8) as being unnecessary.

21 MR. LOW: Okay. Judge.

22 HONORABLE DAVID EVANS: I don't think the --
23 I worry about (B). You can't set them outside of 14 days.
24 Setting anything within 14 days, you might get something
25 set 11, 12, 13 days, but setting something 5 days away

1 doesn't even get a process issued and served. I don't know
2 how I would interpret this except to say, well, we have
3 three hours available on Friday, which is four days away,
4 and you can't get anybody served, and invariably the
5 defendant will come in and say, "I want some more time to
6 prepare for this," they'll have worked out something. I
7 think on this short a hearing 14 days is pretty quick, and
8 they could come in, as Judge Peeples noted, with a quick
9 motion to dissolve, and you're there.

10 MS. WINK: Exactly why this existing language
11 is troublesome. This is existing rule language, so --

12 HONORABLE DAVID EVANS: Yeah.

13 MS. WINK: So perhaps what we just want to
14 leave in (B) is say "set a hearing of the application for
15 temporary injunction," period, and let the rest of the rule
16 -- which says it can only be for 14 days, right, and
17 extended once by the court and thereafter only on agreement
18 of the parties.

19 HONORABLE DAVID EVANS: You've sold me.

20 MR. LOW: All right. Richard.

21 MR. ORSINGER: I would echo I guess what
22 David said. In San Antonio, perhaps uniquely around the
23 state, you can get a hearing any day of the week, so the
24 first earliest possible date in San Antonio is tomorrow.
25 The problem, though, is that you take your TRO to the

1 district clerk, and they're going to have to issue the
2 process, and you're going to have to get it out and get it
3 served. So the problem in getting a TRO is always how do I
4 put the TRO -- how do I put the temporary hearing out long
5 enough to assure that I have service, because if it's
6 before then my TRO and my notice is no good because the
7 date specified has already come and gone, so we can't
8 squeeze these guys down too much or you're going to be
9 constantly reaching a situation where the TRO expires
10 before it's even served, and by the time it's served notice
11 is for a day in the past.

12 So I didn't realize this was in the rule. I
13 think what's happening is that on the TRO practice around
14 the state we've all been doing what makes sense and not
15 what the rules say. That's all I can figure, but at any
16 rate, we definitely should not perpetuate it now that we're
17 aware of it and we're all together and we're trying to get
18 a uniform practice. So I agree totally that the 14 days is
19 its own limit, and the judge -- although Judge Yelenosky
20 can make you call them on the phone if he wants to, I mean,
21 the judge can -- but we're talking about what's mandatory,
22 and it should be no quickness should be mandated short of
23 14 days.

24 MR. LOW: Gene.

25 MR. STORIE: I agree with Dulcie's latest

1 suggestion because I think the earliest possible date in
2 particular is horrific.

3 MR. LOW: Okay. Richard.

4 MR. MUNZINGER: I don't have any problem with
5 deleting (8)(B), but I find (8)(A) to be salutary. Again,
6 I hate to make the state victim to what I have been
7 victimized by, but a lot of judges ignore rules that look
8 to the benefit of the absent party who isn't represented.
9 So you go down there, and you've got a local rule that says
10 if you know there is a lawyer involved on the other side
11 you're supposed to give him notice that you're coming here
12 with this TRO, and they don't do it. So the judge now is
13 faced with a rule that says you've got to say why if you
14 know there's a lawyer on the other side you didn't give him
15 notice or why I should grant this without notice. Now, if
16 that is honored and Rule 13 is enforced, the other lawyer
17 is going to have to plead, "I know that Richard Munzinger
18 is involved in this case, but I didn't give him notice
19 because he's old and stupid" or whatever it might be, but
20 he's got a reason for it.

21 So now here's a judge who is going to grant a
22 temporary restraining order, which changes a citizen's
23 rights dramatically, albeit for 14 days, but it still can
24 be highly injurious to the person bound by the order, and
25 the judge now has to say why he did that. It's similar to

1 saying, "Why did you grant a new trial," because, again,
2 there's two parties involved here, or more. Everybody has
3 got equal rights. We're all equal, and they're not all
4 divorce cases, and they're not all people who are going to
5 steal a child and go to Oklahoma. Some of them have some
6 money involved or what have you, and we're writing a rule
7 for all cases. So I like (8)(A). I agree about (8)(B). I
8 think (8)(B) is a pain in the neck and ought to be deleted,
9 but (8)(A) I like.

10 MR. LOW: All right. From Richard to
11 Richard.

12 MR. ORSINGER: From a practical standpoint
13 I'm troubled by that process because normally you type the
14 TRO up before you go down to the courthouse, and so if the
15 TRO is going to have to say why the judge granted it
16 without notice I'm either going to have to make that up in
17 advance, or I'm going to have to leave in a blank in there
18 and let the judge pen in what his thinking or her thinking
19 was in granting the -- so are we now going to take TROs to
20 the courthouse that have blanks, or are we going to go take
21 a TRO to the judge and say, "Would you consider this, and
22 if you would, tell me why so I can go back to my office and
23 type it up with your finding"?

24 MR. MUNZINGER: I agree with Richard's
25 comments.

1 MR. ORSINGER: How are we going to --

2 MR. MUNZINGER: I agree with Richard's
3 comments.

4 MS. WINK: May I address that? Actually, I
5 do this all the time. I go with a temporary restraining
6 order, and it has the various findings that I hope the
7 judge will find, and often the judge says, "Well, Dulcie, I
8 like this first part, I find that, but I'm going to strike
9 this last part, and I'm going to modify it here." They red
10 pen it. I leave blanks for the amount that they're going
11 to find for purposes of the bond, so I think for purposes
12 of most practice in the world of injunctions we're doing
13 this ahead of time, and I'm certainly going to put in the
14 proposed order why I think the judge is going to be
15 granting it without notice.

16 PROFESSOR CARLSON: Richard, I hate to tell
17 you, but it's in the rule now.

18 MR. ORSINGER: I know that. I've even served
19 on the committee to help write the family law practice
20 manual. You know, this is not -- I think what happened, I
21 realized this last time, is that we all do what we want
22 around the state on this TRO stuff because it's not
23 reviewable by an appellate court.

24 PROFESSOR CARLSON: You've gone rogue.

25 MS. PETERSON: Rogue Richard.

1 MR. ORSINGER: But I'm going to forward this
2 part of the transcript to the family law form book
3 committee so they can draft their A through Z's of why it
4 was granted without notice to the other side, and you can
5 strike out the ones you don't want.

6 MS. WINK: Well, you'll especially like the
7 fact that we've put in here forms for what should be the
8 content of the writ later on.

9 MR. ORSINGER: Okay. Fabulous.

10 MR. LOW: Richard predicated his statements
11 by we're doing what's practical and what's right and not
12 what's in the rule. Didn't you say that?

13 MR. ORSINGER: I'm afraid that's what we've
14 been doing.

15 PROFESSOR CARLSON: We're trying to bring
16 things together.

17 MR. LOW: All right. Carl.

18 MR. HAMILTON: Why are we taking out the
19 "takes precedence over all other matters"?

20 MS. WINK: For all practical effect, it isn't
21 being honored. The courts don't have any way practically
22 to do it, and from all the comments we got last time the
23 judges are saying it isn't happening, I wouldn't know how
24 to apply it if I could docket my cases that way.

25 MR. LOW: Judge.

1 HONORABLE DAVID EVANS: The precedence, you
2 know, there's Government Code sections on what cases take
3 precedence, and there's statutory law that says cases take
4 precedence. We've got enough preferences out there, but
5 what I will tell you is if it's a problem I'm unaware of
6 it. Everybody knows you have to try your temporary
7 injunctions within 14 days, and you've got to set them, and
8 you've got to bump something off the docket and get it
9 done. The only -- I guess you can extend it for 14 more
10 days if you have some other problem, but most of -- most of
11 the judges I'm aware of, we're trying to try them within 14
12 days unless the parties agree they want a little extra time
13 on it.

14 MR. LOW: We were about to vote, and would
15 you make the proposal as to what we vote on?

16 MS. WINK: Yes. Yes, sir. For what is
17 currently drafted as Rule 1(d), as in David, No. (8). I
18 would recommend that it be stated this way: "If granted
19 without notice to the adverse party or its attorney," sub
20 (A), "State why it was granted without notice," semicolon,
21 and sub (B), "Set a hearing of the application for a
22 temporary injunction," period.

23 MR. LOW: All right. Instead of "date," we
24 would put the period --

25 MS. WINK: You're right, semicolon.

1 MR. LOW: -- after "injunction" right?

2 MS. WINK: Yes, sir.

3 MR. LOW: Okay. All right.

4 HONORABLE DAVID GAULTNEY: One question.

5 MR. LOW: All right. We've got some
6 questions.

7 HONORABLE DAVID GAULTNEY: Doesn't (6) --

8 MR. LOW: Okay, question one.

9 HONORABLE DAVID GAULTNEY: Doesn't (6)
10 already require the setting? Why couldn't it just read,
11 "If granted without notice to the adverse party or
12 attorney, state why it was granted without notice" because
13 (6) already picks up the date and time.

14 MS. WINK: I think you're right.

15 HONORABLE SARAH DUNCAN: (6), uh-huh.

16 MR. LOW: All right, you want to change your
17 vote, your statement as to what we vote on?

18 MS. WINK: Yes, sir.

19 MR. LOW: All right.

20 MS. WINK: Now it's proposed that Rule 1(d)
21 sub (8) say, "If granted without notice to the adverse
22 party or its attorney," comma, "state why it was granted
23 without notice," semicolon, end of that rule.

24 MR. LOW: And that ends that -- that's the
25 end of (8)?

1 MS. WINK: Yes, sir.

2 MR. LOW: Okay. All right, Gene.

3 MR. STORIE: All right. One more, you said,
4 "its attorney," so how about "the party's attorney" because
5 we could have real people involved.

6 MS. WINK: Okay.

7 MR. LOW: Yeah, that's --

8 HONORABLE STEPHEN YELENOSKY: Not anymore.

9 MR. LOW: You don't like to be called "it"?

10 MR. STORIE: Depends.

11 MR. LOW: All right. All in favor of that,
12 raise your hand.

13 PROFESSOR CARLSON: Wait, wait, wait, wait.

14 HONORABLE SARAH DUNCAN: Wait.

15 PROFESSOR CARLSON: No, I didn't think, David
16 did.

17 MR. LOW: All right, whoa. All right. 18 in
18 favor.

19 All right. All opposed? And later it gets,
20 the better we get. Oh, two opposed. Nina, I'm not going
21 to be able to see that far.

22 MS. CORTELL: I'm sorry. I need to move down
23 over there.

24 MR. LOW: I'm sorry.

25 MS. CORTELL: That's all right.

1 MR. HATCHELL: We're in the cheap seats.

2 MR. LOW: Okay. What next?

3 MS. WINK: Next is the fifth issue that came
4 up in the last meeting, and Judge Christopher brought it
5 up. She noted that proposed Rule 1(d), as in David, sub
6 (10) should have the words "only upon" inserted on the
7 first line between "binding" and "on." So sub (10) should
8 start, "State that the order is binding only upon the
9 parties to the action," and that would be in existing rule
10 language. Do we have agreement on that?

11 MR. LOW: Does anybody disagree with that? I
12 don't think --

13 MR. MUNZINGER: The remainder of subsection
14 (10) is still there, so it would say "only upon the parties
15 to the action, their officers," all the way to the end of
16 the sentence.

17 MS. WINK: Yes, sir. It would.

18 MR. LOW: All right. I don't think that's
19 very controversial. All right. What next?

20 MS. WINK: And similarly there are other
21 places in the rule that are parallel to that, and we'll
22 make sure that's the same change. We would also suggest if
23 we look at issue six, Chip Babcock suggested we need to
24 consider a change in what is proposed Rule 1(e).

25 MR. LOW: 1 what?

1 MS. WINK: 1(e) sub (2), in light of some
2 discussion about the -- the current existing rule says that
3 the court may grant -- the court can issue a temporary --
4 the temporary restraining order can only be 14 days long
5 and then the current rule says that the court can extend
6 the duration of the TRO for a, quote, "like period"; and
7 just in case the judge only set the first one for 10 days,
8 from what I understood at our last meeting, we wanted to
9 give the judges maximum flexibility and let them grant an
10 extension for as much as 14 days, which, really, they
11 should be able to do. So we would just propose in (e)(2),
12 1(e)(2), instead of saying "for a like period" it would say
13 "for one period not to exceed 14 days."

14 MR. LOW: All right. For a period?

15 MS. PETERSON: A period?

16 MS. WINK: "For one period" is what I had
17 suggested. It should be one. Everything after that must
18 be by agreement of the parties.

19 MR. ORSINGER: What if the first extension is
20 only three days long and they come back for another three
21 and you're still less than 14? Are you only entitled to
22 one extension so you better get -- it better be 14 days and
23 late?

24 MS. WINK: The court may only grant one
25 extension. After that the parties must agree. Otherwise

1 you have appellate review because it's no longer a TRO,
2 it's become a temporary injunction.

3 MR. LOW: You just strike out "a like"

4 MS. WINK: Yes, sir, and insert "one."

5 MR. LOW: Insert "one" before "period,"
6 right?

7 MS. PETERSON: Just slight tweak, can we just
8 say, "The court may extend the duration of a temporary
9 restraining order for no more than 14 days," or "for a
10 maximum of 14 days"? Do we need "period" in there?

11 HONORABLE STEPHEN YELENOSKY: Well, then that
12 would allow successive extensions, which current law
13 doesn't.

14 MS. WINK: I still think, Kennon, I think
15 Judge Yelenosky is right. I really do think we have to say
16 "for one period not to exceed 14 days" or we would be
17 changing the law.

18 MR. LOW: All right. Let's vote on that.

19 MR. ORSINGER: Well, can I -- I have a
20 comment.

21 MR. LOW: All right, short comment.

22 MR. ORSINGER: The current rule on 680 says,
23 "No more than one extension may be granted unless
24 subsequent extensions are unopposed." I think we've just
25 dropped the concept of unopposed as an exception --

1 MR. LOW: Right.

2 MR. ORSINGER: -- and why?

3 MS. WINK: We haven't. It's just that we've
4 said in (3), you know, the parties may agree.

5 MR. ORSINGER: Well, there's a difference
6 between not opposing something and agreeing to something,
7 and that's a really important difference. So I think
8 you're changing it.

9 MS. WINK: Well, okay. Well, I hear that.
10 Here's the problem, is we have existing cases that say --
11 we have existing case law that says the parties must agree,
12 unopposed will not do it as a matter of law. We have too
13 many cases that say it has to -- I'm just being honest with
14 you.

15 MR. ORSINGER: So it's not just the trial
16 lawyers that don't read this rule. It's also the appellate
17 courts.

18 MS. WINK: Probably -- actually, I think
19 that's one reason that we were trying to put so much detail
20 in the rules, because a lot of people get caught up by
21 folks like me that are real nitpicky and can really take
22 you out on a technicality instead of facing the merits,
23 which is what everybody should be focusing on. So were it
24 not for existing case law that we would be obliterating I
25 would say great, great.

1 MR. ORSINGER: Well, let me argue in favor of
2 overruling the case law that misinterpreted the clear
3 language in the existing rule, because there are a lot of
4 times when you -- you're not willing to agree to something
5 that's adverse to your client's interests, but you're
6 willing to say that it's unopposed or tell the judge,
7 "Judge, I can't agree to it, but I don't oppose it." If
8 you do not allow that and require agreement, I think you're
9 forcing some lawyers to say "no" when they would otherwise
10 say nothing and allow it to happen, and the courts of
11 appeals can adapt if we carry the language forward. Maybe
12 we ought to drop a comment in there so it's a little
13 clearer what we mean, but the fact that they've
14 misinterpreted the existing rule is no reason why we need
15 to eliminate clear language and replace it with language
16 that we don't like.

17 MS. WINK: I have one more comment there.
18 That's beautifully said. Let me add one more comment. If
19 we follow your suggestion, this will be -- if we followed
20 your suggestion, this would be yet one more way in which
21 Texas law of TROs differs from Federal. Don't even get me
22 started. We could have a whole law review article on it,
23 I've done that, but if we do that we really will have
24 another area of distinction. Federal law --

25 HONORABLE TOM GRAY: You just convinced me of

1 a good reason to do it.

2 MS. WINK: I'm just putting it all out. You
3 guys get to decide. I'm just putting it all out there.

4 MR. LOW: Okay. Any other comments than
5 Richard's suggestion? Judge.

6 HONORABLE TOM GRAY: I just had a question.
7 I wanted to make sure that I understood that the reason
8 that you don't want to make the change that Kennon
9 suggested in making the No. 2 read "restraining order for
10 no more than 14 days" is simply existing case law? And the
11 way that the current rule is written.

12 MS. WINK: No -- well --

13 HONORABLE TOM GRAY: I mean, there's no
14 statute that says a trial court judge can only give one
15 extension on a TRO.

16 MS. WINK: No, there is existing rule.

17 HONORABLE TOM GRAY: Okay.

18 MS. WINK: Where a court cannot give more
19 than an extension for one period, one extension. The rule
20 says "one extension for a like period" and so --

21 HONORABLE TOM GRAY: But, see, the beauty of
22 what we're doing is we can change that.

23 MS. WINK: Yes. Yes. Actually, and that's
24 what we're trying to do, but I don't -- here's the danger.
25 This is a TRO, and it is supposed to be extraordinary, but

1 it's also supposed to be very temporary, and we have
2 existing case law that says -- and I think it's right in
3 urging principle that if we do something that's going to be
4 beyond the maximum of what we've all known to be 28 days,
5 absent agreement, it no longer becomes a temporary
6 restraining order. It literally becomes an appealable
7 temporary injunction, and we don't want -- I don't think we
8 want it to be --

9 HONORABLE STEPHEN YELENOSKY: He's making a
10 different point.

11 HONORABLE TOM GRAY: Yeah, there's no way you
12 could do that, because you're going to grant no more than
13 14 days. It can all be granted at one time or in pieces,
14 but --

15 MS. WINK: Okay.

16 HONORABLE TOM GRAY: -- you're still going to
17 be limited to 28 days.

18 MR. LOW: All right. Save you're thoughts
19 because we're fixing to take a break. The court reporter
20 needs a break. I've gone too long, and I'm sure you'll
21 have more thoughts during the break, and we'll be back.

22 (Recess from 3:13 p.m. to 3:26 p.m.)

23 MR. LOW: All right, while we convened, or
24 recessed rather, before reconvening Richard did have more
25 thoughts.

1 MR. ORSINGER: I wanted to make a motion.

2 MR. LOW: All right. That's what he wants to
3 do. Okay.

4 MR. ORSINGER: And my motion would be that we
5 reintroduce the concept of allowing an extension after the
6 first one if it is unopposed, as opposed to agreed to, and
7 where that would best be introduced I'm not trying to say,
8 but I just think the concept of unopposed should be in
9 there.

10 MR. LOW: Okay. All right. All in favor of
11 that? As I understand his argument, like if you have a
12 client who's violent and you say, "Judge, I agree, but I
13 can't verbally agree to that, but I won't oppose it"
14 because, you know, you just don't want to say "yes" to some
15 things that you know -- that you know isn't right.

16 All right. All in favor of using the term
17 being an -- and substituting "unopposed" for "agreed to."
18 Is that what you're talking about?

19 MR. ORSINGER: Yes, although they may think
20 it's better to rewrite more words than just one. I'm not
21 trying to tie their hands.

22 PROFESSOR CARLSON: Just one concept for the
23 other.

24 MR. ORSINGER: Yes. Yes.

25 MR. LOW: Yeah, one concept, yeah. All

1 right. All in favor of the unopposed concept as opposed to
2 the agreed-to concept, raise your hand. 18, I believe. Is
3 that correct? 18 in favor.

4 All opposed to that vote? One. Next time I
5 want something I'm going to get you to make the motion.

6 HONORABLE TOM GRAY: Buddy, could I propose
7 that the language would be "The court may extend the
8 duration beyond the above-referenced time period if not
9 opposed by the parties."

10 MS. WINK: Can we make it "only if
11 unopposed"?

12 MR. LOW: Yes. "Only if unopposed." All in
13 favor of that, raise your hand. All right, raise your
14 hand.

15 MR. ORSINGER: Can I ask if "unopposed"
16 includes agreed or not?

17 MR. MUNZINGER: Buddy, can I ask a question
18 about that?

19 MR. LOW: Sure.

20 MR. MUNZINGER: I think if you put language
21 like that in here then you make people wonder why you have
22 a subparagraph (3) that talks about the parties agreeing.
23 I've never understood the distinction between me agreeing
24 to it and me not opposing it. Richard has a reason for it.
25 I don't know why. I'm not as smart as he is, and I mean

1 that sincerely, but I don't know what the reason is to --

2 HONORABLE SARAH DUNCAN: It's doctors and
3 dentists, Buddy.

4 MR. MUNZINGER: -- be able to say I don't
5 oppose it, Judge, but I can't agree to it. You just agree
6 to it.

7 MR. LOW: Yeah, but it doesn't work that way.
8 I've had things I knew they were right, but I couldn't
9 agree that my client was that bad on the record. I didn't
10 want to do it on the record. I say I won't oppose that.

11 MR. MUNZINGER: Well, but what do you do to a
12 rule if you say "unopposed" and then the next one you say
13 "unless it's unopposed" and then the next one it says "the
14 parties may agree"? It seems to me it's almost
15 self-conflicting. Like I said, but why? This is a rule.
16 It's made for people like me that can barely read English
17 that need help.

18 HONORABLE SARAH DUNCAN: I don't think we're
19 going to have unopposed and agreed. It's that agreed is
20 out, unopposed is in, and unopposed includes agreed.

21 MR. MUNZINGER: Well, I didn't hear --

22 HONORABLE SARAH DUNCAN: Agreed is a subset
23 of unopposed.

24 MR. MUNZINGER: I didn't hear that as part of
25 Richard's motion.

1 MR. ORSINGER: Could you rewrite (3) to say
2 that "A temporary restraining order may not be extended
3 beyond the duration" -- I hate "above-referenced" --
4 "beyond the above-referenced time periods except when
5 unopposed or by agreement" or "by agreement or unopposed"
6 or something?

7 MS. WINK: Yes. We can do that language if
8 you guys agree to it. Something that gets that concept.

9 MR. LOW: Okay. All right. Anybody want to
10 change their vote with this amendment or does it stick the
11 same? Anybody opposed to that?

12 MR. MUNZINGER: Could you read the amendment
13 for us?

14 MR. LOW: Read it again. Go ahead.

15 MS. WINK: Okay. Sub (3) would say, "The
16 court may not extend the duration beyond the
17 above-referenced time periods unless unopposed or agreed by
18 the parties."

19 MR. ORSINGER: Or you could say "unless the
20 extension is agreed to or unopposed."

21 MS. WINK: That works.

22 MR. LOW: The concept, we voted "yes" on the
23 concept, and that's not inconsistent with the concept we've
24 approved. Okay. What else?

25 MS. WINK: That is the end of that one. The

1 last --

2 MR. LOW: Wait just a minute.

3 HONORABLE DAVID EVANS: I had a new issue.

4 It has to do with the mandatory contents of the temporary
5 restraining order and the later effect of mandatory content
6 of a temporary injunction. There are cases out there that
7 hold that if that content is not present, these elements
8 aren't present, the order is void. It cannot be waived.
9 In other words, failure to object to the absence of it
10 doesn't waive it, but there's also some couple of cases out
11 there that say that it's even void even if the parties
12 agreed to the form and the substance of the order, and it
13 leaves you in the unusual circumstance of a contempt motion
14 that was agreed to by the parties that can't be -- an
15 injunction that can't be enforced even though it was a
16 negotiated injunction, and the reason that the parties
17 don't -- that the defendants don't want to have all of the
18 elements in there, they don't want the judge to state the
19 immediate injury or loss or damage. They want to agree to
20 it and let the status quo stay while they get the case
21 ready, but it leaves you with this problem.

22 I pulled up a couple of cases on it, and so I
23 wanted to just say that if -- I hate to get into the word
24 "unopposed" or "agreed to." After that discussion I could
25 think of a better time, but it seems to me that this

1 mandatory language that says "must contain," it could also
2 be modified to say, "must, unless agreed otherwise, contain
3 these elements" and then you'll allow the parties a greater
4 freedom to negotiate a temporary restraining order or
5 temporary injunction that's enforceable and may not
6 necessarily carry all these bad -- these harmful
7 recitations as they see it in the record. So that was my
8 suggestion

9 MR. LOW: All right. What about that?

10 MS. WINK: Those two things to consider, and
11 I think you've pointed one of them out, which is there is
12 much existing case law that says if we do not specify the
13 elements, the immediate and irreparable injury, no adequate
14 remedy at law, et cetera, if we do not specify those, it is
15 void ab initio. So you're absolutely right.

16 Now, I have been in situations, one darn
17 recently, where, you know, you're sitting and talking to
18 somebody who's not injunctive specialist and maybe you're
19 trying to work out an agreement to solve a whole case, but
20 they want an injunctive thing, just one issue to be mutual,
21 and they don't have pleadings to support it. They don't
22 have anything that would make it stand up at all. I can't
23 make that happen necessarily under the existing rules. The
24 best I can do is what you have done, or close to what you
25 have suggested, say that specifically these issues would

1 have to be -- the parties would have to agree that those
2 specific elements are met. I think that's as close as we
3 can get and give fair justice to existing law and standing
4 law. Does that get close enough for you?

5 MR. ORSINGER: Well, why do we have to give
6 fair justice to that? Can't we just make a policy
7 recommendation?

8 MS. WINK: I think -- well, you have the
9 right to do that. That's what this committee is here to
10 do. I think it's dangerous when we're talking about
11 extraordinary writs and injunctive writs in particular if
12 we allow people to be willy-nilly. The reason we're making
13 so much explicit language in the rules of what has to be in
14 the orders under existing case law is so that people won't
15 be caught unaware of that.

16 HONORABLE DAVID EVANS: I had an injunction
17 this morning -- yesterday before I left that sets where a
18 loved one is going to be buried and then reburied after a
19 certain period of time. Don't figure out how that
20 happened. There are no reasons recited into that, but all
21 the parties negotiated it and agreed to it, and it would be
22 a shame if I couldn't enforce that five years from now when
23 the eldest party passes away.

24 MS. WINK: If I may, I think what we can do
25 to get around that is to have an agreed judgment as opposed

1 to an agreed injunction. An agreed partial judgment.
2 Parties can agree to those kinds of things and take it out
3 of the world of injunctive.

4 HONORABLE DAVID EVANS: This is a terrible
5 trap for --

6 MS. WINK: It is.

7 HONORABLE DAVID EVANS: It just leads to --
8 you know, you get down to contempt and somebody hasn't
9 obeyed a court order, yeah, I agreed to it, but, you know,
10 didn't hit the technical spots; and, you know, every other
11 order I enforce the findings of facts and conclusions of
12 law in a separate document. These are just findings and
13 conclusions, and to say the order is void because of that
14 really strikes me as putting the wrong emphasis on the --
15 that the case law, the policy, is wrong behind that,
16 especially when it's agreed to.

17 MS. WINK: And, by the way, this doesn't just
18 stop at our intermediate appellate courts. There are Texas
19 Supreme Court authorities on this.

20 MS. CORTELL: That say if it's agreed?

21 MS. WINK: Yes.

22 MR. LOW: Judge, all right, what are you
23 suggesting?

24 HONORABLE DAVID EVANS: Well, my suggestion
25 was, is that there be --

1 MR. LOW: Okay. If we can get some language
2 that we can --

3 HONORABLE DAVID EVANS: -- or agreement.

4 MR. LOW: If I can understand it everybody
5 else can.

6 HONORABLE DAVID EVANS: Yeah, "Unless
7 otherwise provided by the Texas Family Law Code," comma,
8 "statute, or by agreement, every order must provide for" --
9 I think that would do it.

10 MR. LOW: Let's let her write it so we can
11 see.

12 MR. MUNZINGER: May I ask a question of the
13 Judge?

14 HONORABLE DAVID EVANS: Yes.

15 MR. MUNZINGER: How do you memorialize the
16 agreement, and should the agreement be memorialized in some
17 way? Rule 11 says, "No agreement of the parties" -- as I
18 recall it, I don't have it in front of me, but "No
19 agreement of the parties is enforceable unless made of
20 record, signed by the parties, or otherwise reduced in the
21 record," et cetera. So if we're going to say that this
22 order can be entered and the parties have agreed to it and
23 it's binding and it's overturning all of this case law and
24 that's the reason for it, how are we going to have the
25 formality of that agreement or should we have the formality

1 of that agreement referenced in the rules? Even if only to
2 say unless -- or agreed to as provided in Rule 11 of these
3 rules.

4 MS. WINK: I believe what the judge is
5 referring to --

6 HONORABLE DAVID EVANS: "Unless otherwise
7 provided for in these rules." I guess, Richard, I just saw
8 it as a pretty simple matter. You have parties in there
9 getting ready to tee up a temporary injunction or they're
10 on temporary restraining order, and they say, "We've
11 reached an agreement, Judge. We've agreed to this
12 restraining order language. I don't want all of this
13 language in here about my guy being a bad guy." You say,
14 "Oh, don't worry about that. I'm not going to let the jury
15 hear that."

16 "I know you aren't, but they're going to
17 publicize it everywhere. I'll agree to the injunction, but
18 I don't want this set of findings out here."

19 MR. LOW: Justice Gaultney, I believe, did
20 you have your hand up?

21 HONORABLE DAVID GAULTNEY: Isn't the reason
22 those cases are saying it's void is because the rule did
23 provide for an agreement?

24 HONORABLE DAVID EVANS: Exactly.

25 HONORABLE DAVID GAULTNEY: And if the rule

1 provides for an agreement then that would eliminate that
2 concern.

3 MS. WINK: There are some cases, however --
4 and the one I'm most familiar with is when the parties
5 enter into an agreed temporary restraining order, for
6 instance, and let's assume that they complied otherwise
7 with everything else. If they did not specify and agree to
8 the bond, to bonds, if they didn't have bonds in there,
9 they say, "Oh, I'll agree not to have a bond," void.
10 Absolute void.

11 HONORABLE DAVID GAULTNEY: But isn't that
12 because the rule doesn't provide that you can agree not to
13 have --

14 MS. WINK: No. It's unwritten. You know,
15 the statutes tell -- or the rules and the statutes tell us
16 that we have to post a bond or now we're expanding that to
17 other security.

18 MR. LOW: Sarah.

19 HONORABLE DAVID GAULTNEY: The rules provide
20 it.

21 MS. WINK: The rules provide that.

22 HONORABLE DAVID GAULTNEY: But if the rules
23 provide that you can agree to be bound by an order then it
24 seems to me that that fixes that problem.

25 MR. LOW: Sarah.

1 HONORABLE SARAH DUNCAN: Well, I was just
2 going to say I think the reason the rules have been
3 interpreted as they have, at least what the courts have
4 written is that this is really a rather extraordinary thing
5 to restrain someone from doing something or to make
6 somebody do something, depending on whether it's a
7 mandatory or obligatory injunction or TRO; and it's for
8 that reason that the Supreme Court has said the rules have
9 to be strictly construed and completely complied with; and
10 we might want to fix your problem in some way, the parties'
11 problem; but I don't know that we want to do it through
12 this vehicle, which is a rather extraordinary thing.

13 HONORABLE DAVID EVANS: I just think you get
14 parties that enter into orders everyday now where they
15 agree to them, and they want to enforce them, and they come
16 to court and find out that they're unenforceable and then,
17 you know, it then falls on some lawyer who didn't draft it
18 properly to handle it to the judge. It won't come back on
19 the judge's head. It comes on the party's head and
20 attorney's head for not meeting the requirement, and that's
21 just pretty harsh.

22 MR. LOW: Well, what language, what would
23 you --

24 HONORABLE DAVID EVANS: I think Elaine has
25 got some here.

1 MR. LOW: All right. Read some language so
2 we can intelligently vote.

3 HONORABLE DAVID EVANS: All right. Well,
4 looking at subparagraph (d) which starts off with "The
5 court may grant the application." After the word "Texas
6 Family Code," strike the word "or," strike the word
7 "other," place a comma after "statute," and add the words
8 "or by written agreement," and that's it.

9 HONORABLE STEPHEN YELENOSKY: By written
10 agreement or by agreed order?

11 MR. LOW: All right. Everybody --

12 MR. MUNZINGER: Did you say "or by
13 agreement"?

14 HONORABLE DAVID EVANS: She said "or by
15 written agreement," and I could live with that.

16 MR. LOW: All right.

17 HONORABLE STEPHEN YELENOSKY: Not by written
18 order or not by agreed order?

19 MR. MUNZINGER: Yeah, if I signed an order
20 that said "approved and agreed to" --

21 HONORABLE STEPHEN YELENOSKY: Yeah, you would
22 have to have a separate written agreement.

23 MR. MUNZINGER: That would be an agreed order
24 I bound myself by it when I said --

25 HONORABLE DAVID EVANS: "Or by agreed order"

1 would be fine. I was figuring we were going to get a draft
2 back and have some fun debating at the next meeting anyway,
3 so but maybe I was being realistic.

4 MR. LOW: Read what we're going to -- read
5 what we're going to present to the committee to vote on.

6 PROFESSOR CARLSON: Well, I want to hear from
7 you guys.

8 MR. LOW: All right. Steve.

9 HONORABLE STEPHEN YELENOSKY: Well, Sarah, I
10 think people agree to things all the time that if granted
11 over their objection would be extraordinary and obviously
12 support all the protections in there for TROs and TIs when
13 they're granted, either ex parte or without somebody there,
14 but it is hard for me to see the policy reason for
15 undermining the enforcement of an order that somebody
16 agreed to, and the only intent of that order could have
17 been to bind them, and so I don't really see that any of
18 the policy reasons for strict construction of the temporary
19 injunction requirements makes sense in that context, and I
20 don't see why we would have to have a separate written
21 agreement and an agreement -- it should say "by agreed
22 order" and not suggest that they need a separate Rule 11
23 agreement.

24 HONORABLE DAVID EVANS: Yeah. "By agreed
25 order" would probably do it. I would just think that the

1 motion would be should the parties be able to agree to an
2 order and thus waive the --

3 MR. LOW: I understand.

4 HONORABLE DAVID EVANS: -- requirements.

5 MR. LOW: How else would they agree
6 officially other than the order? If they agree, the judge
7 is going to show by order they've agreed, wouldn't he?

8 HONORABLE DAVID EVANS: "An agreed order"
9 would probably take care of it.

10 MR. LOW: Otherwise it would be a Rule 11,
11 and we don't want to get into that.

12 HONORABLE DAVID EVANS: "An agreed order."

13 MR. LOW: "Agreed order." All right. Does
14 everybody understand the amendment? All right. All in
15 favor of the suggested amendment -- Gene, you have a
16 question?

17 MR. STORIE: I think I have one, which is why
18 not just say "statute" rather than "Family Code or other
19 statute"? I mean, is there a reason, Richard, or anyone,
20 we need to single out the Family Code?

21 MS. WINK: The only reason I would say so is
22 throughout the rest of the rules we have been explicit to
23 the Family Code. That's going to be true with injunctions
24 as opposed to all the others, simply because the most often
25 you're going to have a tug and a pull is with the Family

1 Code, so to be consistent with the rest of the injunctive
2 rules I would say let's go ahead and say "unless exempted
3 by the Family Code or statute." So I would recommend -- I
4 agree with your analysis, but I think to be --

5 MR. LOW: All right. All right. Elaine,
6 read so we know exactly how it reads, and we'll vote.

7 PROFESSOR CARLSON: Okay. Page two under
8 (d), order, second sentence, "Unless provided otherwise by
9 the Texas Family Code," comma, "statute," comma, "or by
10 agreed order," comma, "every order granting an application
11 for a temporary restraining order must" --

12 MR. LOW: All in favor of that raise your
13 hand. 18 in favor.

14 All opposed? Okay. One opposed. Okay.
15 Now, where do you want to go for the next 15 minutes or so?

16 MS. WINK: Let me see if that gets all of
17 our --

18 HONORABLE TOM GRAY: Buddy, just where it's
19 on the record if somebody reads this later, one of the
20 problems that I see with the agreement that I anticipate
21 seeing as a result of a mandamus will be when they do not
22 agree on a date, but the -- and the order does not specify
23 a date for a temporary injunction hearing or even a final
24 injunction hearing and one party then starts trying to
25 avoid that hearing because they got what they want in the

1 TRO and perpetually postpone it, and then you wind up not
2 being able to get them there.

3 So there are some problems with some of the
4 individual factors not being in a TRO that may not be
5 immediately evident when everybody is down there facing it;
6 and I'm very sympathetic to David's problem of, you know,
7 here they've got an agreement. Well, yeah, they've got an
8 agreement, but how far out are they thinking with regard to
9 that agreement, and so that's why I didn't vote at all. I
10 couldn't think of a way to fix it.

11 MR. LOW: All right, but my next question is
12 do you have a solution?

13 HONORABLE TOM GRAY: See, sometimes it helps
14 to listen. Last words, I didn't know a way to fix it.

15 MR. LOW: Don't accuse me of listening.

16 HONORABLE DAVID EVANS: I think that -- well,
17 I seriously doubt anybody would sign an agreed order
18 without a trial date in it.

19 HONORABLE TOM GRAY: That's the number one
20 reason I see TROs busted.

21 HONORABLE DAVID EVANS: But having said that,
22 if there was an unlimited TRO signed or a temporary
23 injunction signed, I would think that the party who's not
24 getting to trial would be there and ask the court to
25 dissolve it because their parties are dragging their feet

1 and not going to --

2 HONORABLE SARAH DUNCAN: But there's no
3 appeal.

4 HONORABLE DAVID EVANS: Well, it can be on
5 interlocutory appeal. It doesn't keep you from going on
6 permanent injunction, though.

7 MS. WINK: TROs don't go interlocutory
8 appeal.

9 HONORABLE DAVID EVANS: I mean, sorry, not
10 TROs, but temporary injunctions.

11 HONORABLE SARAH DUNCAN: That's part of the
12 reason I voted "no," is sometimes parties are represented
13 not by the best lawyers at the beginning of the lawsuit and
14 sometimes they get better, the lawyers, and sometimes they
15 get worse; and because this is not appealable, none of
16 these things, these requirements, may be met in any given
17 situation; and yet someone could find themselves under a
18 perpetual nonappealable TRO; and I don't think that's a
19 good idea.

20 PROFESSOR CARLSON: Well, I think under the
21 Quest case the Court interpreted them because it was
22 ongoing as a temporary injunction and allowed the appeal.

23 HONORABLE SARAH DUNCAN: Yes, but it wasn't
24 just -- the Court was explicit that just because it was
25 open-ended at the end, in time, was not -- it was the

1 nature of the relief. The time was part of it, but that
2 was not all of it. That was not the sole consideration.

3 PROFESSOR CARLSON: No, it wasn't.

4 MR. LOW: Okay. What next do you -- I
5 understand you have to leave at 4:00.

6 MS. WINK: Actually --

7 MR. LOW: What next would you like to briefly
8 cover?

9 MS. WINK: Next we start picking up or
10 actually moving forward to where we left off last time.

11 MR. LOW: Oh, my goodness.

12 MS. WINK: I know, it's frightening, isn't
13 it?

14 PROFESSOR CARLSON: Where are we?

15 MS. WINK: We're on Rule 1(f).

16 PROFESSOR CARLSON: Wouldn't it be nice at
17 the end if we moved to adopt them?

18 MR. LOW: 1(f). All right. I've got
19 something written, "unless" --

20 MS. WINK: And we've already agreed that
21 there will be a change to 1(f), so it will say "unless
22 exempted by statute" --

23 MR. LOW: Right.

24 MS. WINK: -- "no temporary restraining order
25 may be issued," so I think we're good with 1(f) unless

1 someone has any other discussion about it.

2 Then I would say we move on to 1(g), and
3 there's already been some discussion that came up about the
4 motion to modify or dissolve with respect to a TRO that is
5 granted without hearing. That language comes directly from
6 Rule 680. All right. Where 1(g) does not -- does not
7 require that it's only in a without notice TRO, so I think
8 we need some guidance from you as to whether you want the
9 motion to modify or dissolve to be addressed only if it's
10 without notice. Before you go there, let me give you some
11 thoughts that came from the subcommittee, okay.

12 Sometimes that order got issued and had that
13 a technical flaw in it, and in order to save it if it was
14 brought to the -- brought to the court's attention quickly
15 within a few days on a motion to modify the court could
16 modify the TRO so that it would comply with law, right? So
17 that was one of the reasons that we didn't want to limit it
18 to only in cases when the TRO was issued without notice the
19 way it is currently in Rule 680. It gives the court a
20 quick opportunity to say, "Ah, we forgot to put a date in
21 there," or "Ah, it's not agreed and we didn't say why there
22 was irreparable injury or no adequate remedy at law"; and
23 if the court is able to address that quickly and fix an
24 order so that it doesn't go on as a void ab initio order we
25 just thought that would be in the best interest of justice.

1 HONORABLE SARAH DUNCAN: But if it's void, it
2 can't be fixed. It's just void.

3 MS. WINK: There are some cases that talk --
4 you're right, there are void from the beginning, but again,
5 if we're catching it early and the court reissues the
6 order, you can issue another injunction. Sometimes --

7 HONORABLE SARAH DUNCAN: You can issue a new
8 TRO.

9 MS. WINK: Yes.

10 HONORABLE SARAH DUNCAN: But it doesn't make
11 the first TRO not void.

12 MS. WINK: Correct, but there are some things
13 where it's not void when voidable. For instance --

14 HONORABLE SARAH DUNCAN: Yeah.

15 MS. WINK: -- like if the court granted a
16 bond and the other party thought, "Judge, really we didn't
17 have enough evidence for you the other day, but that bond
18 is not sufficient to protect the enjoined party," and if
19 the court is willing to hear that, that could be fixed. So
20 I agree with you. I agree with you. It's not perfect, and
21 maybe we need to recraft it in some way.

22 HONORABLE SARAH DUNCAN: I think there's
23 enough confusion already about void and voidable that if
24 it's voided I think the rules should be correct, and if
25 it's void, it's void, and it can't be fixed.

1 MR. LOW: This speaks only in terms of being
2 voided by the party against whom the injunction is granted.
3 What if the husband or wife got one, say, and then they
4 kind of get together and he wants to come in and he's the
5 one that got the injunction and say, "Okay, I agree, we'll
6 dissolve it." I mean, he couldn't file a motion?

7 MS. WINK: Not under the current practice.
8 Under the current rule, Rule 680, the motion to modify or
9 dissolve is only in situations where the party who is being
10 enjoined did not get notice, and that's the party filing.

11 MR. LOW: Huh. So that party that got it
12 couldn't say, "Well, I made a mistake, I'm sorry, dissolve
13 it, please." He can't -- he created a mess, and I can't
14 clean it up. Okay.

15 MR. ORSINGER: They might be able to do that
16 by agreement. I don't know.

17 MR. LOW: Well, I guess. Then you could tell
18 him, say, "Well, you know, you got it, you do it." I mean,
19 you know, or you're the one against whom the injunction was
20 granted. It just seemed like any party to it ought to be
21 able to move to dissolve it.

22 MR. ORSINGER: I would be okay with that.
23 Can the parties dissolve it by agreement, or do you think
24 that even that is not allowed?

25 MS. WINK: Parties don't get to -- we don't

1 get to overrule judges by agreement. We've still got to
2 take it back to the judge and ask the judge to -- as I
3 understand it. I'm not a judge, but that's my
4 understanding.

5 HONORABLE DAVID EVANS: I'll sign anything
6 with two other signatures on it.

7 MR. LOW: Only the person against whom the
8 injunction was granted, not the one who sought it, can seek
9 to dissolve it. If that's the law then I guess we live
10 with it.

11 HONORABLE SARAH DUNCAN: But --

12 MS. WINK: Well, we're recommending that
13 either party, a party, either party, gets to move to modify
14 or dissolve, so --

15 MR. LOW: It says on two days notice to a
16 party, you've got to give notice to a party who obtained --

17 MS. WINK: Oh, fair enough. Okay. Good
18 point. I misinterpreted that.

19 MR. LOW: So who is that? I mean, you're
20 going to give notice to yourself? I mean, it says two days
21 notice to the party who obtained it, means the other party
22 is the one, and they speak of the other party. They don't
23 speak in terms of the party who granted it --

24 MS. WINK: Fair enough.

25 MR. LOW: -- or who obtained it.

1 MS. WINK: Why don't we strike the language
2 that says "to the party"? In other words, make it say "On
3 two days notice, or shorter if the court directs" and leave
4 the rest of it.

5 MR. LOW: The party may move, and either
6 party could do it.

7 MS. WINK: Correct.

8 MR. LOW: Okay.

9 MR. ORSINGER: Well, and there may be third
10 parties that are entitled to notice of any motion, and this
11 doesn't really require that they get notice, so why don't
12 we just say "on reasonable notice"?

13 MS. WINK: They are a party. If they are
14 parties they can move. If they are not a party to the case
15 they can't --

16 MR. LOW: Right, if they're not a party they
17 can't move that.

18 MR. ORSINGER: No, but it's not required you
19 give notice to anyone but the party who obtained the
20 injunction, but in a three-party lawsuit, out of which one
21 party obtained the injunction and the other one is relying
22 on it, they're not entitled to notice because they didn't
23 get it. That's not right. Every party is entitled to
24 notice of every motion, so I don't think the notice should
25 be limited just to the party who secured the injunction.

1 MS. WINK: Right. And that's why we're
2 striking that language.

3 MR. LOW: We're not doing that. We'll say "a
4 party."

5 MS. WINK: We're knocking out the language.
6 It's now going to say "On two days notice, or shorter if
7 the court directs, a party can move."

8 MR. LOW: All right. Sarah.

9 HONORABLE SARAH DUNCAN: I think it assumes
10 incorrectly that the only people who may want to dissolve
11 or modify a TRO are people who are parties or entities who
12 are parties to a lawsuit. The case I was mentioning at the
13 break actually purported to enjoin, restrain a Mexican
14 corporation that was not a party to a lawsuit, and so I
15 think that might be a little limiting when it says "a
16 party."

17 MR. ORSINGER: Let me follow that up with
18 back on Rule 1 subdivision (d)(10) the TRO is actually
19 effective on parties, officers, agents, servants,
20 employees, and attorneys, so maybe the test ought to be if
21 the TRO is effective on you, you have the right to move to
22 dissolve it. So let's say I represent someone and this TRO
23 reaches out and keeps me from doing something as a lawyer
24 that I ought to be able to do. My client may not care to
25 move to dissolve it, but I might. So is there a way for us

1 to coordinate that so that anyone who is adversely or
2 anyone who is impacted by the TRO can move to dissolve it?

3 MS. WINK: If you were going to go there
4 perhaps the good language would be "a party or a person
5 affected by" -- "a person enjoined by a TRO."

6 MR. LOW: Well, the person --

7 MR. ORSINGER: "Bound by." "Affected by"
8 could be way downstream.

9 MS. WINK: You like "bound by"?

10 MR. ORSINGER: Could you say "bound by"?

11 MR. LOW: Yeah.

12 MS. WINK: Uh-huh. That's good.

13 HONORABLE SARAH DUNCAN: Well, except they
14 may not be bound by it. They may just be purported to be
15 bound by it.

16 MS. WINK: Under the language they're bound
17 by it. The order is binding upon the parties to the action
18 and all of these others, including persons in concert.

19 HONORABLE SARAH DUNCAN: Right. That's the
20 way it's written, but I will guarantee you the judge in
21 this case believed her order was binding on the Mexican
22 corporation that was not a party to the lawsuit and would
23 continue to under this rule. That would be her view, and I
24 think you make a good point. All of the people affected
25 adversely. Maybe it should be all the people and entities

1 named in the order, any of those can, because if you start
2 naming attorneys and agents and nonparties to the lawsuit,
3 anybody who is restrained from -- I mean, I might know -- I
4 mean, we did know in this case that a nonparty to the
5 lawsuit who wasn't served with the TRO or the temporary
6 injunction wasn't bound by it, but when you try to convince
7 prudent corporate officers and counsel that you're really
8 not bound by this and you can completely disregard it,
9 they're not going there. They are not going to violate a
10 court order just on the say-so of a lawyer.

11 MR. LOW: What if you had an agreement that
12 you're going to pay your -- you're buying -- you're in a
13 business deal, and it has to be done in a few days and then
14 they are restrained from withdrawing money from the bank,
15 but they have to do that for that. Could a business
16 partner who's affected by that say, "Look, we want the bank
17 not to be bound by it"? You know, "It's going to affect
18 us." I mean, it's a question of -- a lot of people are
19 affected directly, indirectly, and remotely. How directly
20 do they have to be affected when you say first? Richard.

21 MR. MUNZINGER: Well, the circumstance that
22 Richard mentioned is obvious when it says "or
23 participation." The rule says "or participation." It
24 doesn't say I have to be a conspirator.

25 MR. LOW: Right.

1 MR. MUNZINGER: It doesn't say I have to do
2 something evil.

3 MR. LOW: Right.

4 MR. MUNZINGER: I'm just participating.

5 MR. LOW: Right.

6 MR. MUNZINGER: And that can come up, for
7 example, in an antitrust case. You can sue one party. The
8 other may or may not be a necessary party. If it's a
9 necessary party, obviously you've got a problem, but if I
10 enjoin A, and A's price-fixing scheme involves B, B is
11 working with him in participation. He's bound by the
12 injunction. I've had that very fact circumstance, and I
13 chose to sue the party who didn't have a lot of money, for
14 obvious reasons, because he wasn't going to fight me as
15 hard as the guy that had all the money. So that is a --
16 it's a bona fide situation.

17 HONORABLE SARAH DUNCAN: Same with breach of
18 fiduciary duty.

19 MR. MUNZINGER: Yeah. And here's another
20 problem. I'm the plaintiff, and I get this temporary
21 injunction, and under this rule as it's now written it says
22 "the party who obtained the temporary restraining order" --
23 on notice to that party you can change it, and now we're
24 contemplating changing it on the motion of any party to
25 include the plaintiff.

1 MR. LOW: Right.

2 MR. MUNZINGER: I get the order on Monday.
3 On Thursday I want to change it, and I send notice to the
4 person who was enjoined, who may or may not have been
5 served. May or not. I'm not so sure that's a good rule.
6 I mean, suppose I do that because -- you know, there are
7 people that can be pretty dadgum creative in this business.
8 That's a real problem here. So which order am I defending,
9 the first one I got, Judge, or the second one that I
10 haven't been served with yet? And you've got a hearing
11 coming up here, and this guy's changed it. There's some
12 nuances here that we may not have thought through.

13 MR. LOW: All right. Be thinking about this
14 because -- as you're in the bar tonight because you won't
15 have forgotten it because in a couple of months we'll be
16 convening again.

17 PROFESSOR CARLSON: Thank you, Dulcie.

18 MR. LOW: Next meeting is May 13th, and that
19 is a Friday.

20 MS. SENNEFF: I hope so.

21 (Adjourned at 4:02 p.m.)

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 4 SUPREME COURT ADVISORY COMMITTEE

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13 I further certify that the costs for my
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