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**MEETING OF THE SUPREME COURT ADVISORY COMMITTEE**

April 14, 2006

(FRIDAY SESSION)

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Taken before *D'Lois L. Jones*, Certified  
Shorthand Reporter in Travis County for the State of  
Texas, reported by machine shorthand method, on the 14th  
day of April, 2006, between the hours of 9:03 a.m. and  
4:45 p.m., at the Texas Law Center, 1414 Colorado, Room  
101, Austin, Texas 78701.

**INDEX OF VOTES**

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

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Parental Notification Rules	14498
Parental Notification Rules	14499
Process Server Review Board	14627
Rule 21	14666
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**Documents referenced in this session**

06-1 April 14, 2006 Outline - Parental Notification  
06-2 Process Server Review Board matters  
06-3 Potential Amendment of Rule 21, Judge Sullivan

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CHAIRMAN BABCOCK: Welcome, everybody. This is the 68th year of the Texas Supreme Court Advisory Committee, and it's great to be back together with people who have been on this committee for a number of years, and we have a bunch of new members, which we'll get to in a second. We have a new rules attorney, Jody Hughes, who is on our left here and taking over for the great Lisa Hobbs, who is still with the Court, right?

HONORABLE NATHAN HECHT: Yep.

CHAIRMAN BABCOCK: And you'll get to know Jody. I thought since we do have a number of new members I might go through some of the things that this committee has done and is hopefully going to do. This committee was formed in 1938 by the Legislature, although, as you know, largely appointed by the Court. Angus Winn of Dallas was the first chair of this committee back in 1938.

Although the Court appoints almost everybody on the committee, there are other ex officio members appointed by such people as the Lieutenant Governor, the Governor, the State Bar, the Court of Criminal Appeals. We generally meet six times a year. Every meeting has the possibility of a Friday and Saturday morning meeting, although in this session our agenda does not require us to meet this Saturday. We almost always meet in Austin,

1 although in past years we have I think on one occasion met  
2 in Dallas.

3               We advise the Court, and our advice is just  
4 that, advice. Many years ago I think because of perhaps  
5 the longevity of the committee, which has served longer  
6 than any then sitting member of the Supreme Court, I think  
7 that some people thought that they were the Court, even  
8 though they hadn't run in any statewide elections; but the  
9 Court is obviously free to take our advice, which  
10 sometimes they do, or leave it, which they often do; and  
11 nobody should take umbrage if the Court doesn't accept  
12 what we think is the right way to go.

13              We are organized into subcommittees, and I  
14 thought I'd just read who those subcommittees are, but the  
15 way we operate is that the Court will assign an issue to  
16 me that they think should be studied by our group and I'll  
17 assign it to a subcommittee, which will meet by itself and  
18 study the problem and then come to a meeting such as this  
19 and report their findings and their suggestions, and then  
20 the full committee will study and discuss what the  
21 subcommittee has done.

22              You know about Jody, who is the rules  
23 attorney. I'm the chair. Buddy Low, from Beaumont is the  
24 vice-chair of this committee. We have a subcommittee that  
25 covers Rules 1 through 14c consisting of Pam Baron, who is



1 the subcommittee chair. Pam, you're here somewhere.

2 MS. BARON: I'm here.

3 CHAIRMAN BABCOCK: Justice Bland is the  
4 vice-chair. She's somewhere here, too. There she is.  
5 Roland Garcia, who may not be here today. Justice  
6 Pemberton is on this subcommittee. Where is Bob? There  
7 he is. And Bonnie Wolbrueck from the district clerk of  
8 Williamson County down there.

9 The subcommittee on Rule 15 through -- Rules  
10 15 through 165a, a very active subcommittee with chair  
11 Richard Orsinger, to my left, Frank Gilstrap from  
12 Arlington, the subcommittee chair, and then Professor Alex  
13 Albright down there, Carl Hamilton from McAllen down here,  
14 Professor Carlson from South Texas over here, Tommy Jacks,  
15 who I don't think is here today.

16 MR. ORSINGER: No, Tommy is here.

17 CHAIRMAN BABCOCK: Oh, sorry, Tommy. You  
18 came in late. Nina Cortell, Pete Schenkkan, down there,  
19 and Bill Dorsaneo. Now, I don't think Dorsaneo is here,  
20 is he? His presence usually looms, so -- Bonnie is also  
21 on that subcommittee.

22 The next subcommittee covers Rules 166  
23 through 166a, and here is the looming presence of Bill  
24 Dorsaneo, having just walked in. Judge Peeples is the  
25 chair of this subcommittee. Richard Munzinger from El

1 Paso -- is Richard here -- is the vice-chair. Jeff Boyd  
2 is on this committee. Professor Carlson, Nina Cortell.  
3 Benny Agosto, who is a new member --

4 MR. AGOSTO: I'm here.

5 CHAIRMAN BABCOCK: -- right there, is here,  
6 and Bill Storie --

7 MR. STORIE: Gene.

8 CHAIRMAN BABCOCK: -- is also a new member  
9 of our Supreme Court Advisory Committee. Subcommittee on  
10 Rules 171 through 205. Bobby Meadows is the chair. Judge  
11 Christopher from Houston is the vice-chair. I don't know  
12 if Tracy is here. The subcommittee members consist of  
13 Professor Albright, Justice Bland, Harvey Brown, who is  
14 not here, David Jackson, who is a court reporter and  
15 long-time member of this committee. Rodney Satterwhite,  
16 who is I don't think here, is a new member and wanted to  
17 be on this particular subcommittee, and Steve Susman, who  
18 is not here.

19 Subcommittee on Texas Rules of Civil  
20 Procedure 215, Ralph Duggins is the chair. Pete Schenkkan  
21 is the vice-chair. Pam Baron is on this committee. Judge  
22 Benton from Houston, I don't think is here. Judge  
23 Christopher, Carlos Lopez -- is Carlos here -- a former  
24 judge from Dallas County. Bobby Meadows and Jim Perdue,  
25 and Jim is somewhere.

1 MR. PERDUE: Morning.

2 CHAIRMAN BABCOCK: New member of the SCAC.  
3 The subcommittee 216 through 299a, the chair is Elaine  
4 Carlson. Judge Peeples is the vice-chair. George  
5 Chandler, who is a new member of the SCAC, right here.  
6 Thank you, George.

7 MR. CHANDLER: Thank you.

8 CHAIRMAN BABCOCK: Tommy Jacks, who is here.  
9 Alistair Dawson down at the end of the table. Bobby  
10 Meadows, Carl Hamilton, Tom Riney, who left Amarillo this  
11 morning and got here, and Judge Kent Sullivan from Harris  
12 County, over on the left.

13 Subcommittee on Rules 300 through 330, the  
14 subcommittee chair is Sarah Duncan, Justice Duncan, from  
15 the San Antonio court of appeals. Ralph Duggins is  
16 vice-chair. Frank Gilstrap, a member of that committee,  
17 Mike Hatchell down here. Lamont Jefferson is over there,  
18 Steve Tipps, who is not here today, Kathryn Green, a new  
19 member of the Supreme Court Advisory Committee, is not  
20 here.

21 And then subcommittees on Rules 523 through  
22 734, a choice appointment, as Elaine Carlson will tell  
23 you. These are the JP rules. Judge --

24 HONORABLE STEPHEN YELENOSKY: That's what  
25 you told them.

1                   CHAIRMAN BABCOCK:  -- Lawrence, who is not  
2 here, but he's the chair.  No one was willing to serve as  
3 vice-chair of this subcommittee, so we don't have one, but  
4 Jeff Boyd.  Hayes Fuller is here.  Hayes, thanks, is on  
5 this, and Carl Hamilton.  Elaine, having completely redone  
6 the JP rules with Judge Lawrence several years ago, you  
7 guys mercifully probably will not have a lot to do on that  
8 subcommittee.

9                   PROFESSOR CARLSON:  You never know.

10                  CHAIRMAN BABCOCK:  Rules 725 through 822,  
11 Judge Yelenosky from Austin.  Lamont Jefferson is the  
12 vice-chair.  Steve Yelenosky is the chair.  Frank  
13 Gilstrap, Andy Harwell.  Is Andy here?  County clerk from  
14 McClennan County.  Tom Lawrence and Pete Schenkkan.

15                  We have a subcommittee on the Texas Rules of  
16 Evidence.  Buddy Low is the chair over here.  Harvey  
17 Brown, former judge from Harris County is the vice-chair.  
18 Judge Benton from Houston is on that committee, Professor  
19 Carlson, Lonny Hoffman, who is right here on our left.  
20 Are you visiting here in Austin?

21                  PROFESSOR HOFFMAN:  I am.  About to leave.

22                  CHAIRMAN BABCOCK:  About to leave, okay.  A  
23 visiting professor at UT, but generally you're a  
24 University of Houston guy, right?

25                  PROFESSOR HOFFMAN:  Right.

1                   CHAIRMAN BABCOCK: Bill Wade is on this  
2 committee, down here, new member. Justice Terry Jennings,  
3 First Court of Appeals, down there, and the ever present  
4 Tommy Jacks.

5                   (Laughter)

6                   MR. JACKS: That a boy.

7                   CHAIRMAN BABCOCK: We have a subcommittee on  
8 appellate procedure, which is chaired by Professor  
9 Dorsaneo from SMU, Justice Duncan from the Fourth Court of  
10 Appeals as a vice-chair, and Pam Baron, Frank Gilstrap,  
11 and Mike Hatchell, Justice Jennings, Richard Orsinger,  
12 Justice Patterson, right here. Skip Watson from, now,  
13 Austin I see in his address, is not here today. Justice  
14 Gaultney down at the end. Professor Carlson.

15                  PROFESSOR DORSANEO: Justice Jennings.

16                  CHAIRMAN BABCOCK: And Justice Jennings.  
17 Did I say that? I thought I did. The subcommittee on  
18 Rules of Judicial Administration, Mike Hatchell is the  
19 chair. Ralph Duggins the vice-chair. Professor Albright,  
20 Justice Duncan, Justice Tom Gray, who is right here, is on  
21 this subcommittee. Andy Harwell, Hugh Rice Kelly, a new  
22 member over here on my left, Justice Peeples, Steve Tipps,  
23 and Bonnie Wolbrueck.

24                  And, finally, we have a new subcommittee,  
25 which I just titled legislative mandates. In the last two

1 sessions of the Legislature, maybe the last three  
2 sessions, the Legislature has -- in passing statutes has  
3 inserted sentences that the "Texas Supreme Court shall  
4 promulgate rules in such and such an area"; and you  
5 usually have 15 days or so to do it, being facetious, but  
6 not too facetious; and some of the statutes that are  
7 passed don't naturally fit into our existing  
8 subcommittees, so we established this where Jeff Boyd is  
9 the chair. Justice Patterson is the vice-chair, and  
10 consisting of Justice Bland, Carlos Lopez, Pete Schenkkan,  
11 and Judge Yelenosky.

12               So those are our subcommittees, and that  
13 really is where the guts of the work of this Supreme Court  
14 Advisory Committee is done. We are open to the public and  
15 are -- we have a website that I think you get to, Angie,  
16 by going to [jw.com](http://jw.com) and going down to the bottom and there  
17 is a little thing to click on called "SCAC," and that will  
18 have many of the documents that will -- or the core  
19 documents, base documents that we're going to be talking  
20 about at our meetings. It will also have an agenda posted  
21 as to what's going to happen, who is going to be  
22 responsible for it.

23               I think we looked at this a number of years  
24 ago, and I think technically we're not subject to the  
25 Texas Open Meetings Act, although it's our view that we

1 are going to post notice of our meetings and everybody is  
2 welcome. We sometimes hear from people who want to speak  
3 on various topics and within reason, and we've never  
4 really had any problem with people wanting to speak more  
5 than was appropriate, and we don't swear them in as  
6 witnesses, but we assume they're going to be telling the  
7 truth as best they know it.

8           We are on the record. There is a transcript  
9 of these proceedings that is available for any -- for our  
10 use and for members of the public, and that transcript is  
11 posted on our website. When we did some research we  
12 thought although we weren't technically covered by the  
13 Open Meetings Act we are most assuredly covered by the  
14 Texas Open Records Act, and I don't -- in my memory, we  
15 have never had a request under the Open Records Act for  
16 any information, but if someone were to do so, I think we  
17 would be obliged to comply with that statute.

18           Our discussions, I think you will find, are  
19 always respectful of everybody's opinions. They -- to me  
20 anyway, they are at a very high level. You're in a room  
21 with some of the smartest legal minds in this state and,  
22 frankly, any state. I tell people all the time, this is  
23 the most enjoyable, exciting thing that I do as a lawyer,  
24 and I hope at the end of this -- at the end of the  
25 three-year term you all feel the same way.

1           We have literally led the nation in some of  
2 the things that we have done. Our discovery rules have  
3 been talked about and discussed as a model of how to  
4 conduct discovery in a state court system. Two days ago  
5 the United States Supreme Court issued a ruling on  
6 unpublished opinions, adopting the approach that we took  
7 four years ago amidst much gnashing of teeth and  
8 controversy in the Federal court system, but the Federal  
9 courts are now going to do what we have been doing for the  
10 last four years in the unpublished opinion rule area, Rule  
11 47.

12           As for expenses, Angie -- this is Angie  
13 Senneff, by the way, who many of you know, but she works  
14 with me at Jackson Walker's office in Houston, and she  
15 spends maybe 30 or 40 percent of her time on Supreme Court  
16 Advisory Committee work, and on expenses, how do they get  
17 compensated for that?

18           MS. SENNEFF: There is -- I made a sheet  
19 over here that Jan Evans, who is the chief accountant for  
20 the Supreme Court, has approved. What you're going to  
21 need to do is just attach copies of your receipts to that  
22 sheet and mail it to her. Her address is on the sheet.  
23 Then she will fill out the official form, which she will  
24 then have to send back to you for your signature, and then  
25 you send it back to her and she'll get you paid. She said



1 there are parts of the form that only she can fill out,  
2 but it has to have your original signature, so that's the  
3 steps that we have to take.

4           CHAIRMAN BABCOCK: That's a little change  
5 because our funding has changed. We are now jointly  
6 funded between the Bar and the Legislature, whereas it  
7 used to be the Bar picked up a hundred percent of the tab  
8 of this committee. There has been a tradition on this  
9 committee that people who can afford to pay for their  
10 travel and meals and lodging while they're here should do  
11 so, but no one is obligated to do that. You're  
12 contributing an enormous amount of time and energy to this  
13 committee, and no questions asked if you submit your  
14 expense report, but there are many members of this  
15 committee who it's not too much of an economic burden to  
16 also pick up their expenses, and many have done so over  
17 the years.

18           One of the things that -- this is my  
19 third -- beginning of my third term as chair. I think I'm  
20 only the fourth chair of this committee in 68 years, and  
21 one of the things that I hope I will never do is waste  
22 your time. I don't think we need to meet just to be  
23 meeting. If we've got something to do, we'll do it and  
24 try to do it in as expeditious a manner as we can, but  
25 we're not going to take any more time than we need to.

1           There has been frustration over the years  
2 when we have worked as a committee very, very hard on  
3 rules and have come up with what we thought was a good  
4 solution to the problem that the Court has addressed to  
5 us, and we have sent it on to the Court, and month after  
6 month after month nothing happens. Well, get used to  
7 that. But the Court has got a lot of things on its plate,  
8 and this is only one small piece of it, and some of the  
9 rules that we send up there, they will promulgate it in a  
10 quick and expeditious manner and others take a lot more  
11 time for a variety of reasons that have nothing to do with  
12 us.

13           But in an effort to deal with what has been  
14 frustration from time to time, we have by custom over the  
15 past six years started our meeting with Justice Hecht  
16 giving us a report on sort of where the Court is in terms  
17 of our rules, and he's going to do that in a minute, and  
18 he's also going to tell us just historically how it came  
19 to be that the Legislature decided to pick up some of our  
20 expenses this year, and before I turn it over to him,  
21 Justice Brister is here down at the end of the table, and  
22 before he was elevated to the Texas Supreme Court he was a  
23 long-time active member of this committee and is still a  
24 member of the committee, and the more you can participate  
25 the better. Great. But having -- and I don't usually

1 talk this long at the beginning, but I thought it might be  
2 interesting to give some historical perspective on what we  
3 do and how we do it, mostly for our new members, but with  
4 that, Justice Hecht.

5           HONORABLE NATHAN HECHT: Well, thank you,  
6 Chip, and thanks for being here this morning. As Chip has  
7 said, this is our only standing committee that has been in  
8 existence since the Legislature passed the Rules Enabling  
9 Act back in 1937, I guess it was, or '39, and our charter  
10 has grown over the years to include the separate appellate  
11 rules, the separate evidence rules, and the Rules of  
12 Judicial Administration and then some other ancillary  
13 matters that have arisen as our practice has changed and  
14 as we have gotten different directives from the  
15 Legislature, including the parental notification rules,  
16 which we'll talk some about today.

17           We -- the Court is very grateful for your  
18 service. It has great respect for the counsel of this  
19 group. The reason that you were chosen is because the  
20 Court believes that you represent well an expertise part  
21 of the state, a part of our practice that will contribute  
22 to the overall product that this group produces, and so  
23 we -- we talk internally of picking the best and brightest  
24 of our state practice to do this work because it is so  
25 important, so I thank you for being here.

1           The -- our relationship with the Legislature  
2 has been a dance of different steps over the years, and  
3 some toes have been bruised in the process, but we're in a  
4 very -- in a good relationship right at this moment, and  
5 Chip alluded to two things I want to mention to you. One  
6 is that in the last two sessions and beginning the session  
7 before that thanks to Governor Ratliff, the speaker -- the  
8 speakers, Speaker Laney and Speaker Craddock, the  
9 Governors themselves, Governor Bush and Governor Perry,  
10 there has been an idea that has developed in the  
11 Legislature that it is very workable for them to try to  
12 set policy -- make policy decisions that can then be  
13 implemented by this group that is concerned with details  
14 and practicalities and how to really make the system  
15 function, and so for the first time in the last three  
16 sessions they have -- the Legislature has asked us to  
17 implement legislation in a way that really has been  
18 unprecedented in the, as Chip says, 68 years that the  
19 committee has been in existence, and we -- the Court  
20 regards that as a very good development because more and  
21 more the Legislature is interested in substantive law, and  
22 that takes them into procedure to some extent, and so it's  
23 good for the Court and this committee to have as much  
24 input into that as we can, and so that has worked very  
25 well, and we hope that that cooperation will continue.

1                   As a result of that partially the  
2 Legislature decided in the last session to provide funding  
3 for this committee, which is the first time that it has  
4 been funded as far as I know, in its existence. It may  
5 have been funded at the very beginning, but I'm not sure.  
6 So we are grateful for that, and previously, as Chip said,  
7 the Bar picked up the tab for the committee, which  
8 includes a transcript of all of its proceedings, which are  
9 available to you and are kept on the website, and there  
10 are copies at the Supreme Court and also in the State Law  
11 Library and as well as travel expenses and other expenses  
12 of members attending meetings, but because the source of  
13 funding has changed, we must -- the Court must administer  
14 the funds, and so we're bound by the Comptroller's  
15 guidelines on how to do that, and that is -- that  
16 occasions the change in your reporting.

17                   Please be patient with us. We're working  
18 through this and trying to figure out the best way to do  
19 this, but when you submit expense statements you may get a  
20 call from Jan Evans, our chief accountant, asking you  
21 about this or that, and please don't think you're being  
22 ragged around on. We are just trying to work through the  
23 accounting requirements that the state imposes on its  
24 funding, and there will be some incidental funding also  
25 still coming from the Bar, and so we hope that -- we hope

1 that continues for -- for the future.

2           We welcome the new members and thank you for  
3 agreeing, and for those who re-upped, thank you for your  
4 continued service. We have a new liaison, Justice  
5 Brister, who was a member of this committee, as Chip said,  
6 our former assistant liaison having become Chief Justice.  
7 This committee incidentally is just a stair step to  
8 greatness. I'm sure you will experience that as time  
9 passes.

10           We also have a new rules attorney, our  
11 former rules attorney having become general counsel of the  
12 Court, Lisa Hobbs. Jody Hughes is the fourth rules  
13 attorney that we have had, and he is a honors graduate of  
14 the UT Law School and Rice University. He worked a while  
15 at Manor Day Caldwell and Keeton here in Austin and then  
16 in the solicitor general's office here in Texas, and we  
17 stole him from there. He is a motorcycle aficionado, but  
18 has good sense anyway, and so we are glad to have his  
19 help, and you should feel free to contact him at any time  
20 regards to substance, procedure, expenses, anything that  
21 has to do with the committee.

22           We -- in November the Court amended Rule 13  
23 of the Rules of Judicial Administration to accommodate the  
24 recent legislation that creates an inactive docket for --  
25 in essence for asbestos and silica-related injury cases.

1 The asbestos cases are before Judge Davidson of Harris  
2 County, and the silica cases are before Judge Christopher  
3 of Harris County, and as far as I know those changes,  
4 which this committee discussed in September and October,  
5 have been working okay. So there may be some additional  
6 changes that need to be made there, but as far as I know  
7 those are doing pretty well.

8           We will take up -- the Court will take up  
9 pretty quickly e-filing rules, which we have previously  
10 discussed but which have been in a sort of transition as  
11 e-filing has evolved in this state, but the state,  
12 including its IT department and the direct -- Department  
13 of Information, or whatever it's called, and the OCA,  
14 Office of Court Administration, and the Court are anxious  
15 to make changes to the Rules of Civil Procedures, the  
16 statewide rules, that will basically expand what has up  
17 until now been pilot projects in various different  
18 counties around the state. So this is all a move toward  
19 universal e-filing in all of the courts of Texas, and,  
20 frankly, that's a ways off because we have about 650 trial  
21 courts of general jurisdiction and then, of course, lots  
22 of constitutional county courts, justice courts, all sorts  
23 of other courts as well, but we're -- but we're trying to  
24 move in that direction, and probably we will ask the  
25 advisory committee to take another look at those before we

1 finalize them.

2           Then we have some very important rules  
3 regarding electronic access to court information that the  
4 committee discussed a couple or three times last year that  
5 involved a number of policy issues as well as practical  
6 issues, and we'll be working on those this spring, and of  
7 course, we have some other things, some appellate rules  
8 changes, and some various other changes that you have sent  
9 over to us.

10           We are also going to appoint, I hope fairly  
11 soon, a jury assembly task force that I guess I should  
12 start by saying has nothing to do with voir dire, so we  
13 can calm down about that. This has to do with assembly of  
14 jurors, and it has been pointed out in various newspapers  
15 around the state, including Dallas and Houston as well as  
16 other places, that the methods of selecting the jury pool,  
17 sending out the notices, and getting jurors to the pool  
18 may be -- may not meet constitutional standards, may be  
19 ineffective in some places, and that the practices and how  
20 that's done varied across the state very widely, and so we  
21 want to put together a task force that will look at that  
22 problem across the state and see what can be done by rule  
23 and what should -- what recommendations should be made to  
24 the Legislature regarding the uniform selection of the  
25 jury pool around the state, so that is a -- that's been a



1 suggestion of Judge Benton of Harris County and Judge  
2 Davidson of Harris County, and so we will be looking at  
3 that, and I hope they have a report by the end of this  
4 year, although this is a very difficult subject to  
5 research. It may take a while to get there.

6           Then you see on the agenda that we have some  
7 questions about the parental notification rules in  
8 response to recent changes in the statutes to change to  
9 parental consent, and we have asked your advice on that.  
10 We have some issues regarding Process Server Review Board  
11 that we have talked about in the past, and then Judge  
12 Sullivan has raised an issue about the three-day notice  
13 requirement in Rule 21, which we should look at, and Jody  
14 was digging through our files and found a memo from me to  
15 Luke Soules, the former chair of this group, January 15,  
16 1990, that begins "Some members of the Court have  
17 questioned whether the three-day notice provision really  
18 affords enough time generally for a matter to be prepared  
19 for hearing," so every 16 years or so we should look at  
20 these issues and make sure we've got them right, and I  
21 look forward to the discussion.

22           Oh, and we also are deeply grateful to Chip  
23 and his leadership and service on this committee. He  
24 keeps us together with a light but firm touch and keeps  
25 our discussions moving, and the Court has a great deal of

1 confidence in his work on this committee. Thank you.

2 CHAIRMAN BABCOCK: Thank you. I'm glad you  
3 didn't forget that.

4 HONORABLE NATHAN HECHT: Yeah.

5 MR. HATCHELL: Since you rode him out.

6 CHAIRMAN BABCOCK: I was kind of kicking him  
7 under the table, if nobody noticed. Well, it is an honor  
8 to do this. We will go right into Jeff Boyd, who has met  
9 with his subcommittee and will report on the potential  
10 changes in parental notification rules.

11 MR. BOYD: Thank you. Let me start, I want  
12 to apologize for wearing a Saturday uniform. Looks like  
13 I'm the only one who did so. I have to leave early for a  
14 family road trip, and those are hard enough in a golf  
15 shirt, much less in a suit, so I want to say thanks to  
16 Chip for letting this be first on the agenda so I can  
17 leave early and begin that trip.

18 I brought with me today and you should  
19 all -- you all had access to many documents, but I  
20 actually brought another one today, and so if you didn't  
21 stop at the table and pick up a two-page outline that  
22 summarizes, I think it will be a lot easier to get through  
23 that outline than it will all the many documents that were  
24 already made available. Sorry. I should have told you.

25 I apologize for not getting that earlier,

1 but the subcommittee just met Wednesday evening by  
2 telephone conference, and this is at least a draft of our  
3 preliminary report to the committee and I think will help  
4 carry us through the discussion more efficiently. So let  
5 me begin with kind of the background and what lays the  
6 foundation for what the issue is.

7           In 1999 the Texas Legislature passed a  
8 parental notification law, which became effective on  
9 January 1st of 2000, and it's in Chapter 33 of the Texas  
10 Family Code. Section 33.002 provides that a physician may  
11 not perform an abortion on a pregnant unemancipated minor  
12 unless one of four conditions exists, the first one being  
13 that the physician has to give at least 48 hours notice,  
14 in person or by telephone, to a parent or managing  
15 conservator of the minor, or -- and this is the judicial  
16 bypass provision, "a court issues an order authorizing the  
17 minor to consent to the abortion without notification to  
18 the parent or conservator," and that order is provided for  
19 at the trial court level in 33.003 and in the appellate  
20 courts at 33.004, and then there are two other alternative  
21 grounds for the physician to perform that abortion, the  
22 third being if the court under 003 fails to issue its  
23 ruling timely, and there is a specific time period  
24 required in order to expedite that.

25           Under 33.003 if the court fails to do so

1 then the court is deemed to have constructively granted  
2 that order, and then finally, the physician can  
3 independently conclude and certify that an immediate  
4 abortion is necessary to avert the minor's death or  
5 irreversible physical impairment.

6           33.003 and 04 provide the process and  
7 standards for the minor to seek the judicial bypass order,  
8 and the standards there provide for -- consistent with  
9 33.002 provide for that order to be issued to allow for  
10 the abortion to be performed in the absence of  
11 notification to the parent or guardian conservator. So,  
12 for example, 33.003(i) says that "The Court shall enter  
13 such an order" -- and these are the standards that are set  
14 -- "if the Court finds that the minor is mature and  
15 sufficiently well-informed to make the decision without  
16 notification to the parent or conservator or notification  
17 would not be in the minor's best interest or notification  
18 may lead to physical or sexual abuse of the minor."

19           So that law was passed effective January 1,  
20 2000, and that was one of the ones in which the  
21 Legislature directed the Court to adopt rules for that  
22 procedure, which the Court did. Those rules are the Texas  
23 Parental Notification Rules and Forms, which also became  
24 effective January 1, 2000, and they are -- they cover a  
25 wide variety of things, such as requirement to expedite

1 the decision, requirement of anonymity for the petitioner,  
2 confidentiality of the process, judicial disqualification  
3 and recusal, appointment of attorneys ad litem, filing of  
4 amicus briefs, so on and so forth, all intended to provide  
5 for an expedited anonymous procedure as required by  
6 Chapter 33.003.

7           Last year the Legislature passed a new law  
8 amending not the Family Code but the Occupations Code,  
9 adding a new subsection to section 164.052(a) of the  
10 Occupations Code. 164.052(a) is the laundry list of  
11 prohibited practices for physicians, and subsection (19)  
12 is the new section that makes one of the prohibited  
13 practices is if a physician performs an abortion on an  
14 unemancipated minor without the written consent of the  
15 child's parent, managing conservator, or legal guardian,  
16 so now we have a consent requirement, not just a  
17 notification requirement, "or without a court order as  
18 provided by section 33.003 and 004 of the Family Code."  
19 So the bypass provision of the new law incorporates --  
20 expressly incorporates by reference the bypass provisions  
21 of the old law.

22           The Legislature did not revise, amend, or  
23 remove the notification requirements under 33.002. They  
24 merely added the consent requirement under the Occupations  
25 Code, but provided for the continued existence of the

1 bypass procedure under the old law in the Family Code, and  
2 then it still includes this other alternative where the  
3 physician independently can conclude that the immediate  
4 abortion is necessary to avert the minor's death or  
5 irreversible impairment.

6           In March of this year -- and on the outline  
7 the date is incorrect. March 7th, 2006, should be the  
8 date. In March of this year, Justice Hecht sent a letter  
9 on behalf of the Court to this committee raising the issue  
10 does the enactment of subsection (19) with a new written  
11 consent requirement require that this Court revise the  
12 Texas Parental Notification Rules and Forms which govern  
13 the procedure for the bypass under the notification  
14 statute and in that letter informed us that the Supreme  
15 Court has tentatively concluded that it does not, but they  
16 request our committee's -- our committee to provide any  
17 counsel that it may offer on the matter.

18           The subcommittee reviewed the statutes, the  
19 rules. Bob Pemberton, who is on that subcommittee, was  
20 the Court's rules committee when the rules were adopted in  
21 2000 and had some background information to provide us.  
22 The subcommittee -- other than Carlos and Pete and I the  
23 subcommittee are all judges or justices, and so we had a  
24 lot of input from the courts' view on the issue, and we  
25 discussed it on Wednesday, and here in front of you is a

1 brief summary of our analysis.

2           First, the enactment of this new provision  
3 probably raises some interesting issues for physicians to  
4 deal with. For example, if a minor comes to a physician  
5 and says, "I want an abortion and here is the written  
6 consent that my parent has already signed," must the  
7 physician still call or in person give 48 hours notice as  
8 required under 33.002? The notification requirement that  
9 the physician must give notice in person or by telephone  
10 at least 48 hours in advance of the abortion has not been  
11 removed. Interesting legal issue. That's only one of  
12 several legal issues that physicians may have to face and  
13 courts may ultimately have to resolve.

14           There are also -- the other example  
15 specifically for the courts to decide at the trial court  
16 level is what happens if a minor comes in and says, "I  
17 have -- my physician has given notification to my parents  
18 more than 48 hours ago" -- and perhaps even has the  
19 written form from the doctor saying, "Yes, I gave this  
20 required notification" -- "but my parents won't consent"  
21 and so now is there any process by which a bypass could  
22 even be permitted because notification has already been  
23 given and notification is the standard for the bypass  
24 decision to be made on. That, too, is an interesting  
25 issue that we discussed, but in the end we concluded that

1 for purposes of this committee the new law does not in any  
2 way change the standard or the procedure for a bypass to  
3 be granted. Instead it expressly incorporates the 33.003  
4 standard and procedure for which the rules that currently  
5 exist were adopted.

6           So our recommendations, preliminary to this  
7 committee, are it's not -- number one, it's not necessary  
8 or appropriate to revise the parental notification rules  
9 and forms just to make sure they refer to this new  
10 provision. Throughout the rules there are a number of  
11 places where it refers to Chapter 33, and our first  
12 question was, well, do we need to go back and make sure it  
13 refers to both 33 and subsection (19), and the conclusion  
14 was no because all of those references are to the  
15 notification bypass procedure in 33, which is the  
16 procedure that still governs under subsection (19).

17           Number two, it's not necessary or  
18 appropriate to revise the rules and forms to refer to the  
19 requirement of written consent instead of or in addition  
20 to the requirement of notification because, as I said,  
21 it's still the requirement of notification and the  
22 question of whether notification might lead to abuse or  
23 notification would not be in the minor's best interest.  
24 That's still the standard that governs.

25           Third, we concluded it's not necessary to



1 revise the comments to the parental notification rules,  
2 but it might be advisable to add an explanatory note, not  
3 to explain any of what I have just explained but just to  
4 make reference to the fact that subsection (19) now  
5 exists, merely so that if there is a judge or practitioner  
6 who is dealing with this for the first time, pulls up the  
7 rules, we felt like they probably ought to know that  
8 section (19) is out there as well as section -- Chapter  
9 33, and so our only proposal would be to consider adding  
10 something like the paragraph that is presented here that  
11 basically advises them that subsection (19) is there and  
12 this is what it says.

13           Four, it's not within our current charge to  
14 consider issues that subsection (19) might raise for  
15 physicians or also whether there are any other revisions  
16 to the rules that might be necessary totally unrelated to  
17 the adoption of subsection (19). That wasn't what we were  
18 asked to consider. We didn't feel like it was within our  
19 current charge to address those issues. Although they  
20 will be interesting issues to be resolved someday, and  
21 many of you on the court -- on the courts may be involved  
22 in that process, we didn't feel like it was this  
23 committee's charge at this time.

24           And finally, because it's not necessary or  
25 appropriate to revise the rules, it's also at this time

1 not necessary to solicit input from the public or  
2 practitioners outside of this committee. Five years, six  
3 years ago when the rules were adopted the subcommittee  
4 brought in a whole lot of outside input to help prepare  
5 those rules, and we talked about should we solicit that  
6 same kind of input now and concluded that if we were going  
7 to be recommending amendments or revisions to the existing  
8 rules that might be advisable, but because our  
9 recommendation is they don't need to be amended because  
10 the standard hasn't changed then there is no need to  
11 solicit that input.

12 CHAIRMAN BABCOCK: Great. Thanks, Jeff.  
13 Comments about what Jeff has to say or contrary feelings  
14 that people think we do need that? Professor Dorsaneo.

15 PROFESSOR DORSANEO: Well, I read Justice  
16 Hecht's letter, and it starts out by saying we probably  
17 don't need to do anything and then it starts pointing out  
18 a lot of problems --

19 CHAIRMAN BABCOCK: That's his style.

20 PROFESSOR DORSANEO: -- as it gets rolling,  
21 and the memo identifies a lot of questions. I don't know  
22 what the answers to those questions are in the  
23 subcommittee analysis, but it seems to me the fit does  
24 need to be perfect, at least from the standpoint of  
25 physicians. They need to know what's required before they

1 engage in behavior that could get them into a lot of  
2 difficulty.

3                   Now, I don't know why it's not the  
4 committee's charge to consider issues that -- under four  
5 that the adoption of subsection (19) may raise for  
6 physicians. I'm not sure I understand why that's not in  
7 the charge. If it would be in the charge, would  
8 something -- or should something be done to the rules?  
9 I'm no longer familiar with the interstices of the  
10 parental notification rules, so I don't know what needs to  
11 be done or where there would need something to be done,  
12 but this seems too much like it doesn't want to work on a  
13 problem that's really there.

14                   CHAIRMAN BABCOCK: Buddy, then Carl.

15                   MR. LOW: Chip, it looks like what Jeff is  
16 saying is that the Legislature in 2005 recognized Section  
17 33, so they are aware of it. They didn't intend -- there  
18 is nothing in the history apparently that shows it's  
19 inconsistent, so if it is consistent and our rules were  
20 proper for Section 33, they would be proper now except he  
21 said we may put something in the note so as to give  
22 physicians notice. There is nothing in the legislative  
23 history to show that they intend to be inconsistent or  
24 something, was there, Jeff?

25                   MR. BOYD: No.

1 MR. LOW: So that's the way I look at it.

2 CHAIRMAN BABCOCK: Carl.

3 MR. HAMILTON: There is an additional  
4 section, 33.002(b), which says that even though the -- if  
5 you can't give the actual notice to the parents you send a  
6 certified letter to them, but even if they don't get it,  
7 it's okay to go ahead with this bypass provision, and I  
8 see the new legislation as an attempt to correct the  
9 notification situation and require actual consent, and if  
10 that's true, then to the extent that our rules under 33  
11 imply that notification alone is enough, they need to be  
12 changed.

13 Secondly, if the new statute requires an  
14 actual order, which is what it says, it may be impliedly  
15 saying that we're not going to go along with this  
16 provision that's -- what do they call that -- implied  
17 authorization or something, if the court doesn't act  
18 timely then there is going to be a deemed granting of it,  
19 but there is no order issued. It's just a certificate  
20 that comes out of the clerk's office, and so if that's not  
21 an order under the new statute then our rules need to be  
22 revised because they incorporate those deemed granted  
23 situations, and there may have to be an order for that, so  
24 I think there is a conflict between the new statute and  
25 the old statute that we need to resolve.

1 CHAIRMAN BABCOCK: Justice Gray and then  
2 Frank.

3 HONORABLE TOM GRAY: I noticed that on one  
4 of the documents that was distributed regarding Chapter  
5 164 subsection (c) it said that the -- this is in the  
6 legislation, "The board shall adopt the forms necessary  
7 for physicians to obtain the consent required for an  
8 abortion to be performed on an unemancipated minor under  
9 subsection (a)." Do we know if the board has adopted such  
10 forms and do we have them and were anybody involved in the  
11 court side of it working with the board on those forms?

12 MR. BOYD: Alex can address that.

13 CHAIRMAN BABCOCK: Alex, do you know the  
14 answer to that?

15 PROFESSOR ALBRIGHT: Yeah. I was a resource  
16 witness at the Legislature on some of these bills, and so  
17 I was involved in that, and there was a bill to  
18 amend section 33 that didn't get through, so you-all need  
19 to know that. The Legislature knew what it was doing.  
20 The medical examiners are working on forms right now.

21 We also have Rita Lucido and Susan Hays here  
22 from Jane's Due Process who work with these rules all the  
23 time, and I think they may be able to answer some of your  
24 questions as well, but I know that they are working on  
25 those, and in my view, these are issues that I don't think

1 can be resolved in the notification rules, and we sure  
2 need to wait to see what the medical examiner form looks  
3 like, and it seems to me like most of these issues are  
4 judicial issues and not rules issues.

5 CHAIRMAN BABCOCK: Frank and then Judge  
6 Yelenosky.

7 MR. GILSTRAP: Well, this -- I mean, I think  
8 there is a temptation to think this is just kind of a  
9 minor change and we can fit it into the old system. This  
10 is a huge change. There is an enormous difference between  
11 notification and consent. As I understand under the prior  
12 law, the minor can come in and say, "Look, I want an  
13 abortion, my parents don't approve, get on the phone and  
14 tell them, but if they say 'no' I'm going ahead." Now,  
15 under the new law, they have to get on the phone and say,  
16 "Do you consent" and if they say "no," the physician  
17 cannot give the abortion, and that's -- and that is such a  
18 big change probably it's not going to pass constitutional  
19 muster. I don't know. It's my impression that the  
20 notification provisions are -- have passed constitutional  
21 muster, although I don't know, but this is a much bigger  
22 step; and since one of our jobs is to alert the Court to  
23 problems, even though we may not be able to solve the  
24 problem, we might need to note that there is another  
25 problem with this new provision that -- and I don't want

1 to jump off into the abortion briar patch, but it's there.

2           It says that the physician commits a  
3 prohibited practice if he or she performs an abortion on  
4 an unemancipated minor without the written consent of the  
5 child's parents, and what does child mean? Well, you  
6 think that means unemancipated minor, but they don't say  
7 it. Moreover, in the prior section, (18), they talk about  
8 prohibiting third trimester abortions on an unborn child,  
9 and finally, in 33 they define fetus as a -- from birth --  
10 from conception to birth.

11           Somebody is going to look at that and argue  
12 that that gives the father a right to consent. I believe  
13 that probably will not pass constitutional muster. I  
14 think there may have been some cases on that, although I  
15 am not conversant, but -- and I think we need to note  
16 those severe problems in passing. We may not be able to  
17 solve them, but just to start with the one that I began  
18 with, there is a difference between consent and  
19 notification.

20           The business about certified letter doesn't  
21 mean anything here. I mean, so you sent them a certified  
22 letter. That's not consent, and there are -- and while  
23 the judicial bypass is fairly broad, including the  
24 language "minor's best interest," you are not  
25 automatically entitled to a judicial bypass; and under

1 this statute if you're not entitled to judicial bypass and  
2 the parents don't consent, you can't give the abortion;  
3 and it's -- the physician can't do it.

4 CHAIRMAN BABCOCK: Judge Yelenosky.

5 HONORABLE STEPHEN YELENOSKY: I just want to  
6 respond to Professor Dorsaneo, but these are not rules for  
7 the doctors. These are rules for the court, and the way I  
8 look at this is there are various things that a doctor may  
9 have which authorize the doctor to go forward. One of  
10 those is this particular order that existed before the  
11 change in law and that exists now. That order is exactly  
12 the same, the standard for getting that order is exactly  
13 the same, so the rules to get that order should not  
14 change. What the effect of that order is, how it relates  
15 to the two statutes, are questions of statutory and  
16 constitutional interpretation, but the order is the same.

17 CHAIRMAN BABCOCK: Buddy.

18 MR. LOW: That's all we -- our procedure was  
19 to draw a procedure for getting a court order, not about  
20 abortions, and the court order is the thing we're  
21 concerned about now.

22 CHAIRMAN BABCOCK: Yeah. Bill.

23 PROFESSOR DORSANEO: What exactly is the  
24 court order?

25 MR. LOW: Well, the court order is to allow



1 the abortion, isn't it?

2 PROFESSOR DORSANEO: Isn't anybody troubled,  
3 isn't the judge troubled, for example, by the fact that  
4 you're going to make that kind of an order without written  
5 consent, the statute might mean you need to get written  
6 consent? Doesn't that trouble anybody?

7 HONORABLE STEPHEN YELENOSKY: Well, I can  
8 tell you what the order says. The order says -- and this  
9 is something that came up, of course, when the law  
10 changed. The order -- and I'm looking at a form order,  
11 which I believe these actual orders were approved. Were  
12 they approved by the Court?

13 HONORABLE BOB PEMBERTON: There was a form  
14 sent over to the Court.

15 HONORABLE STEPHEN YELENOSKY: Right. Right.

16 CHAIRMAN BABCOCK: People down at that end  
17 like Judge Pemberton, speak up.

18 HONORABLE BOB PEMBERTON: I was just saying,  
19 yes, there were form orders and all kinds of forms crafted  
20 at the time the Court responded to the legislative mandate  
21 to create these notification rules.

22 HONORABLE JAN PATTERSON: And approved by  
23 the committee I think, right, Bob?

24 HONORABLE BOB PEMBERTON: I believe it did  
25 come through the committee and the Court signed off.

1 HONORABLE STEPHEN YELENOSKY: And we did  
2 discuss it in the subcommittee, and specifically the order  
3 language is therefore, "if it's granted, therefore, it is  
4 ordered the application is granted and the applicant is  
5 authorized to consent to the performance of an abortion  
6 without notifying either of her parents or managing  
7 conservator or guardian," and the statute refers to  
8 consent. The notification, the old statute refers to  
9 consent without notification, so the current form order  
10 gives the minor authority through the court order to  
11 consent without notification.

12 CHAIRMAN BABCOCK: But what if there is  
13 notification but no consent? Is that order still okay?

14 HONORABLE STEPHEN YELENOSKY: Well, that  
15 isn't -- I mean, if there is notification but by the  
16 doctor?

17 CHAIRMAN BABCOCK: If there is notification  
18 of the parents of the pregnant under 18-year-old young  
19 woman, but the parents don't consent, they say  
20 specifically, "We withhold consent."

21 HONORABLE STEPHEN YELENOSKY: Well, you're  
22 asking what a doctor -- you're saying the order was issued  
23 and what a doctor does. Is that your question?

24 CHAIRMAN BABCOCK: Well, does that order  
25 cover that situation?

1 HONORABLE STEPHEN YELENOSKY: Well, whether  
2 it does or not, how does that have anything to do with the  
3 process for getting the order, which is the question for  
4 us?

5 MR. LOW: Right.

6 MR. ORSINGER: Chip, if I might say, it's my  
7 understanding that parental consent is not  
8 constitutionally permitted but parental notice is  
9 constitutionally permitted, so the Legislature, which  
10 might have wanted to require parental consent knew it  
11 couldn't, so they require parental notice which then  
12 allows the parents to have conversations with their  
13 daughter about whether she ought to make this decision.  
14 That's my understanding of why we have a parental notice  
15 statute, but someone else here may know better than I.

16 CHAIRMAN BABCOCK: Yeah, Alex.

17 PROFESSOR ALBRIGHT: I believe the consent  
18 is constitutional.

19 CHAIRMAN BABCOCK: The requirement of  
20 consent is constitutionally permitted?

21 PROFESSOR ALBRIGHT: Yeah.

22 MR. BOYD: If you have a --

23 MS. LUCIDO: As long as there is a bypass.

24 PROFESSOR ALBRIGHT: As long as there is a  
25 bypass and an exception for the --

1 CHAIRMAN BABCOCK: Okay. Bill.

2 PROFESSOR DORSANEO: What about the -- Carl  
3 raised two things. What about the part of the statute  
4 that's -- that talks about constructive authorization? I  
5 mean, this isn't -- this doesn't fit right to me.

6 MR. BOYD: Well --

7 PROFESSOR DORSANEO: At least we need to ask  
8 somebody else to -- maybe not the world at large, but some  
9 people who are in this domain academically or otherwise,  
10 my colleague Tom Mayo at SMU, for example, what their  
11 views are on this subject. It doesn't seem to me that  
12 it's so simple that we could just say, "not a problem."

13 CHAIRMAN BABCOCK: Pete and then Justice  
14 Jennings.

15 MR. SCHENKKAN: The form that Judge  
16 Yelenosky called our attention to is form 2D, and it is  
17 expressly referred to in our existing rules, 2.5(a), which  
18 reads "The court's ruling on the application must include  
19 a signed order and written findings of fact and  
20 conclusions of law. The findings and conclusions may be  
21 included in the order. The court may use form 2D, but is  
22 not required to do so," and then when you look at the form  
23 it has the ordering paragraphs, which would only be  
24 applicable if the court has made appropriate findings and  
25 conclusions to support the order under those

1 circumstances, but the findings and conclusions section of  
2 the form are blank.

3           In other words, it is the court's job on the  
4 facts of that case to determine if the evidence and the  
5 law support findings and conclusions that justify that  
6 order. That seems to me to be appropriate even given this  
7 change in the law and maybe especially given this change  
8 in the law about parental consent and physicians. These  
9 things are going to have to be sorted out by trial courts  
10 on those facts, and findings and conclusions are going to  
11 have to be entered. I don't see how this committee could  
12 advise the Supreme Court or why the Supreme Court should  
13 try to say in advance what the comprehensive set of  
14 findings and conclusions that would apply in all cases  
15 are.

16           That really does seem to me to be quite  
17 different from the process notion of notice that is the  
18 Supreme Court's only duty in its capacity as a rulemaker.  
19 The Court is going to have to wrestle with some of these  
20 issues in specific cases when some trial court has made  
21 some findings and conclusions and issued some order and  
22 somebody disagrees.

23           CHAIRMAN BABCOCK: Justice Jennings.

24           HONORABLE TERRY JENNINGS: I was just going  
25 to ask in relation to what Pete just said, also pointing

1 out rule -- Parental Notification Rule 2.1(c), the  
2 application form, consists of two pages and consists of a  
3 cover page. The cover page must state a number of things  
4 including that the minor wishes to have an abortion  
5 without notifying either of her parents and so forth and  
6 so on. I was wondering what the subcommittee's -- did  
7 they address these particular rules that Pete just  
8 mentioned and this rule in regard to see if the  
9 legislative changes require any tinkering with some of  
10 this language?

11 MR. BOYD: We did, and we concluded that no  
12 tinkering is required, and the reason is because this  
13 application is intended to show the basis for getting the  
14 bypass order under 33.003, and under the Occupations Code  
15 it's still 33.003 that provides the standard and procedure  
16 for getting that bypass order. So there is not anything  
17 in this rule or any of them that we could -- had  
18 identified that was changed at all by this new standard.

19 I mean one -- you have to look at this, I  
20 think, from the physician's perspective first because  
21 that's what both statutes govern. The physician is there  
22 and a minor comes and says, "I want an abortion," and in  
23 order for that physician to be able to do that legally,  
24 the physician -- the minor has to provide the right token,  
25 and there are four tokens that will make it legal. One is

1 notification and consent, both, when you combine the two  
2 statutes. One is arguably -- and this is an issue out  
3 there -- is this constructive authorization from a court  
4 that has failed to timely issue the order, and there is an  
5 issue there about whether that still applies or not.

6           One is the physician's independent  
7 determination that the abortion is immediately necessary  
8 to prevent death or physical impairment, and then the last  
9 one is a court order. Nothing in this new statute changes  
10 anything about the basis for that court order, what the  
11 court has to find; and when you think about it, it kind of  
12 makes sense, because even though the law now requires  
13 parental consent -- I don't want to argue on behalf of the  
14 Legislature here, but there is a commonsense approach.

15           Even though the law now requires parental  
16 consent, the risk of abuse or the acting in -- not in the  
17 best interest of the minor, the level of maturity  
18 necessary to not require, that risk -- all of that occurs  
19 not by whether or not you get consent, but merely whether  
20 you give notice or not. The mere -- the parent merely  
21 finding out that the minor is pregnant and wants an  
22 abortion creates all of those risks, so obviously you  
23 can't get consent unless you give notice first, and so the  
24 standard for the judge to determine is still is there a  
25 risk that this minor will be abused if the parent is

1 notified or is it not in the best interest of this minor  
2 for the parent to be notified, and so --

3 HONORABLE STEPHEN YELENOSKY: Or is the  
4 minor sufficiently mature and well-informed.

5 MR. BOYD: Yeah, there's three of them.  
6 Yeah. All of which, at least to me there are -- there are  
7 a whole lot of things that don't fit still, and I agree  
8 the courts are going to have to flesh through some of  
9 those, and my -- our memos pointed that out, but in terms  
10 of why the standard for the court to consider is still  
11 notification that makes sense in a lot of ways to me.

12 CHAIRMAN BABCOCK: Justice Hecht.

13 HONORABLE NATHAN HECHT: Bill Dorsaneo noted  
14 some ambivalence in my letter, and it's there purposefully  
15 because we did reach a tentative conclusion, but we were  
16 interested in the committee's advice; but just to take the  
17 rule we were last looking at, which is 2.1(c)(1), it says,  
18 "The cover page must state" -- this is the page that the  
19 minor must file. "The cover page must state," subsection  
20 (c), "that the minor wishes to have an abortion without  
21 notifying either of her parents," but the -- one of the  
22 lacunae noticed in the letter is that she may have  
23 noticed -- notified her parents and they know about it but  
24 they won't consent; and if that's true, she can't make the  
25 statement in (c). She can't do what the rule says she has



1 to do to proceed, so does something like that -- I mean,  
2 does something like that have to be fixed, or is it just  
3 too clear beyond words that it really means now consent or  
4 it's never going to happen, or I mean, it does kind of  
5 raise a problem.

6 CHAIRMAN BABCOCK: Jeff.

7 MR. BOYD: And we discussed that, and  
8 that's -- you know, the two real world issues that we  
9 identified -- of the two that we identified and focused on  
10 the most, that's the one that's hardest, I think, to  
11 resolve; and I think our ultimate conclusion was probably  
12 if the minor -- if the minor comes and has the proof that  
13 the physician gave 48 hours notice, the parent has already  
14 been notified, but I'm standing here before the court to  
15 say my parents won't consent. We think there is no  
16 statutory basis on which a bypass order can now be issued  
17 because the court cannot find that giving notice would  
18 create a risk of abuse or that it's in the best interest  
19 of the minor not to give notice or that the minor is  
20 sufficiently mature and knowledge -- I forget the words,  
21 so that notice is not required.

22 In other words, the fact that notice has  
23 already been given moots the basis under which the bypass  
24 order could be granted. Now, whether that represents a  
25 policy decision by the Legislature that, look, parents

1 ought to be making this decision and if they've got notice  
2 and have said "no," then the courts can't do it. I don't  
3 know whether that's what led to that or not, but we think  
4 that's probably the result.

5           Having said all that, for purposes of the  
6 charge to this committee and the question being whether  
7 the rules need to be amended, the statute that the  
8 Legislature expressly incorporated into this new law for  
9 purposes of the bypass is still 33.003, which is based on  
10 notice, and so the rule still has to require the minor to  
11 say, "I want to do it without giving notice," because  
12 that's what the statute requires.

13           CHAIRMAN BABCOCK: Why is -- Jeff, if what  
14 you're saying is that the doctor, the physician, cannot  
15 perform a notice if consent is withheld --

16           MR. BOYD: Cannot perform an abortion.

17           CHAIRMAN BABCOCK: Cannot perform an  
18 abortion if consent is withheld, why is there the  
19 reference then to section 33 in the -- in section (19) of  
20 the Occupation Code?

21           MR. BOYD: Because -- well, no, I'm not  
22 saying that the doctor cannot ever perform an abortion if  
23 consent is withheld. If there is no notification or  
24 consent then that ground is gone. The doctor can't  
25 perform it based on notification and consent because

1 there's not any. So then you have these three other  
2 grounds, one of which is the bypass order; and the issue  
3 that Justice Hecht has raised is can you get the bypass  
4 order if there's been notification but no consent; and I  
5 think the answer is probably "no," but I think the courts  
6 will have to resolve that in the end.

7 CHAIRMAN BABCOCK: Okay. Judge Yelenosky.

8 HONORABLE STEPHEN YELENOSKY: Well, I was  
9 just going to say I think that is a question not for us  
10 and not for the rules and the process for getting a bypass  
11 under the Family Code. It's a question as to whether or  
12 not statutory interpretation or constitutional  
13 interpretation requires some bypass of the denial of  
14 consent, but that's not what's at issue here. That's a  
15 judicial question.

16 CHAIRMAN BABCOCK: Gene.

17 MR. STORIE: I had some confusion when I  
18 looked at some of this stuff because of section 33.003(j),  
19 which says, "If the court finds that the minor does not  
20 meet the requirements of subsection (i)," that's the  
21 maturity and so forth, "the court may not authorize the  
22 minor to consent to an abortion without the notification  
23 authorized under section 33.002(a)(1)," so to me that  
24 looked like a situation where you would have notification  
25 and implicitly some possibility of an order.

1 CHAIRMAN BABCOCK: Yeah, Carl.

2 MR. HAMILTON: If I were representing a  
3 doctor under section (19) that was charged with violating  
4 that provision because he did an abortion with no actual  
5 court order and no consent but maybe one of these  
6 certificates from the clerk, why couldn't I argue to the  
7 body, the court, whoever, that, well, you know, I've got  
8 the Supreme Court rules here that tell me all that  
9 application had to say was that the minor wanted an  
10 abortion without notification, didn't say anything about  
11 consent, and the rules even provide over here in section  
12 2.2(g) and 2.5(d) that we don't even need an order. We  
13 can have this certificate from the court, so you can't  
14 fault me for performing this abortion. I followed the  
15 court rules. Court rules under 33, but they're still the  
16 court rules.

17 HONORABLE STEPHEN YELENOSKY: You may argue  
18 that, but you wouldn't be arguing that to me when the  
19 minor is in there requesting the order. You would be  
20 arguing that I guess in the criminal court --

21 MR. HAMILTON: Correct.

22 HONORABLE STEPHEN YELENOSKY: -- and that's  
23 the point.

24 MR. HAMILTON: Correct.

25 HONORABLE STEPHEN YELENOSKY: That's the

1 point. What we're doing is devising rules for the trial  
2 judge who is presented with the minor who wants a bypass.  
3 What you're talking about is what happens later and what  
4 arguments might be made by the doctor or what advice you  
5 give to the doctor, and that has nothing to do with what  
6 I'd do when I'm presented with the minor who wants the  
7 order.

8 MR. HAMILTON: Well, but it's confusing to  
9 the doctor.

10 HONORABLE STEPHEN YELENOSKY: Well, it may  
11 be, but is it our role to resolve that confusion?

12 CHAIRMAN BABCOCK: Pete.

13 MR. SCHENKKAN: That was -- the possibility  
14 of that confusion to the doctor is why we did want to at  
15 least flag the existence of this change in the Occupations  
16 Code and its potential very grave implication for the  
17 physicians to, you know, do what tiny bit can be done  
18 through these rules that, as Judge Yelenosky says, are  
19 really about something else. To improve the odds that the  
20 physician or the physicians' lawyers will bear this in  
21 mind and make sure the physician does what the physician  
22 needs to do; but reading the two statutes together, the  
23 new statute, the Occupations Code is aimed at the  
24 physicians, not at the courts giving the bypass orders;  
25 and it says there are three circumstances in which you can

1 escape the definition that the abortion is a prohibited  
2 practice, and one is the written consent.

3           If you've got the written consent, we don't  
4 have a problem for the physician. Two is without the  
5 court order as provided under these two sections, and the  
6 court order is an order in circumstances in which you  
7 don't even have to give notice to the parents, but if  
8 you've already given notice to the parents, as you said,  
9 you've taken that case out of the you don't have to give  
10 notice category; and the third is the immediate abortion  
11 is necessary to prevent the minor's death or irreversible  
12 impairment and there is insufficient time to obtain the  
13 parent's consent.

14           Again, in this hypothetical in which the  
15 minor has notified the parents already and the parents do  
16 not consent, as I read the Occupations Code, the  
17 physician, even if the physician concludes that an  
18 immediate abortion is necessary to prevent the death or  
19 irreversible impairment, the physician commits a  
20 prohibited practice under the Occupations Code by  
21 performing that abortion. Now, is that constitutional? I  
22 don't know. I doubt it, but whether it is or not is a  
23 matter that is not for the parental notification statute.  
24 That would be a matter for that physician and that  
25 physician's lawyer.

1                   CHAIRMAN BABCOCK: All right. And, Pete,  
2 under your analysis, if the parents are notified and  
3 withhold consent then section 33 is out of the picture?

4                   MR. SCHENKKAN: It sure looks like it to me.

5                   CHAIRMAN BABCOCK: Okay. And that's the way  
6 our rules are drafted right now, so our rules are taking  
7 -- implicitly taking a position on the reconciliation of  
8 these two statutes that it's consistent with what you just  
9 said.

10                  MR. SCHENKKAN: Well, they're taking a  
11 position only in the sense that they were drafted to be a  
12 notification statute and it's the only thing the Court's  
13 been told to draft rules on and they are a notification  
14 statute and they cover situations in which the minor  
15 doesn't want to give notice to the parents. They're  
16 well-designed for that purpose, and we do have this other  
17 reconciliation, but it is not for the notice rules. It is  
18 a substantive reconciliation of enormous potential impact  
19 to both minors and physicians.

20                  CHAIRMAN BABCOCK: Is there a way to  
21 reconcile the two statutes in a different way so that  
22 they -- the result comes out differently or not? Is this  
23 pretty plain?

24                  MR. BOYD: Well, I think it's pretty -- I  
25 mean, if you're the judge and the minor appears before you

1 and says, "I need a bypass order under 33.003" and you,  
2 the judge, say, "Okay, on what ground am I supposed to  
3 find, that you're sufficiently mature and knowledgeable,  
4 that notice -- that I should authorize you to consent to  
5 this abortion without notifying your parent or  
6 conservator, or am I supposed to find that giving notice  
7 is not in your best interest, or am I supposed to find  
8 that giving notice may lead to your abuse" and your  
9 response is, "Oh, well, Judge, I've already given notice".

10 CHAIRMAN BABCOCK: Yeah, "I've told them.  
11 They don't want me to do that."

12 MR. BOYD: I think as a judge there is no  
13 way I can find any of those three grounds at that point,  
14 and so I can't give you the order.

15 CHAIRMAN BABCOCK: And we've given the  
16 judges a pretty good hint that that's the way these two  
17 statutes get reconciled because we haven't changed our --  
18 we haven't changed our rules after discussing it, or the  
19 Court hasn't, and that's because we interpret these  
20 statutes the way that you and Pete have just articulated.

21 HONORABLE SARAH DUNCAN: I would like to  
22 speak out against what you just said.

23 CHAIRMAN BABCOCK: Okay.

24 HONORABLE SARAH DUNCAN: I don't think this  
25 committee is charged with, capable of, or has interpreted



1 the legal -- has construed the fit between the two  
2 statutes, and that's for a court to do. That's not for  
3 this committee to do in my view. There are -- I have  
4 learned in 20 years of practicing law there are always  
5 constructions of statutes that I can't think of and I  
6 can't see that somebody else can, and they end up  
7 prevailing sometimes.

8           So I think it's a little bit premature for  
9 this committee or members of this committee to say what  
10 these statutes mean and how they fit together. We can say  
11 what our own opinion is, but that's not authoritative, and  
12 I don't think the minutes of today's meeting should be  
13 taken by anyone as being authoritative.

14           CHAIRMAN BABCOCK: Sarah, the point that I  
15 was making was that by inaction you're speaking, and  
16 Justice Hecht's point I thought was if we leave it the way  
17 it is then there cannot be a good faith pleading in the  
18 situation where consent -- notice has been given and  
19 consent has been withheld to have a judicial bypass.

20           HONORABLE SARAH DUNCAN: And that's what I'm  
21 saying is your interpretation. I think by not changing  
22 the current rules we're saying the new statute deals with  
23 what the physician must have before performing an  
24 abortion. The rules deal with implementing the bypass  
25 statute, and those are two different things.

1                   CHAIRMAN BABCOCK:   Steve.

2                   HONORABLE STEPHEN YELENOSKY:   Well, I agree  
3 with Justice Duncan, and I hope everything I said is  
4 consistent with --

5                   HONORABLE SARAH DUNCAN:   Everything you have  
6 said is.

7                   HONORABLE STEPHEN YELENOSKY:   Okay.   And the  
8 point I would make is if the question as to whether when  
9 the minor comes and says, "I've already told my parents,"  
10 whether or not the judge says it's moot, the answer can be  
11 "yes" or "no," and it doesn't change the procedure.  
12 That's a judicial question, and if the Supreme Court wants  
13 to answer that by rule obviously that's the Court's  
14 prerogative, but it doesn't -- whatever the answer is, it  
15 does not change the procedure.   It's an answer to a  
16 judicial question that doesn't require a change in  
17 procedure.

18                  MR. SCHENKKAN:   I just want to say I don't  
19 think we, in fact, do disagree with that.   I mean, we mean  
20 exactly that, the issue of how you try to reconcile these  
21 substantive statutes and if you can't how you deal with  
22 any constitutional issues that may be presented is going  
23 to be fought out case-by-case and even our existing rule  
24 doesn't provide any guidance.   There are blanks for  
25 findings and conclusions.   That's the way it --

1 HONORABLE SARAH DUNCAN: Yeah, I think we  
2 completely agree. My only point is I don't think by not  
3 amending the parental notification rules, I don't think  
4 that is a statement of interpretation of the new statute,  
5 which is what you had said on the record. I believe that  
6 the subcommittee chair very eloquently explained why  
7 that's not true.

8 MR. BOYD: And, in fact, I think, Chip, if  
9 you'll look, like the provision that you're referring to,  
10 Rule 2.1(c)(1), which requires the cover page and the  
11 verification page that has to include statements that the  
12 minor is pregnant, unmarried, under 18, and wishes to have  
13 an abortion without notifying, the statute itself, 33.003,  
14 expressly requires that those statements be made in the  
15 application before the court. "The application must be  
16 made under oath and include a statement that the minor is  
17 pregnant, is unmarried, is under 18, and wishes to have an  
18 abortion without notification."

19 So all the rules do is require what the  
20 statute requires, and the new statute expressly  
21 incorporates that statute by reference.

22 HONORABLE STEPHEN YELENOSKY: And in  
23 response to -- even if the statute -- I agree. It tracks  
24 the statute, and in response to Justice Hecht's question  
25 of are we requiring this, if somebody wants to address the

1 question of whether or not once notice has been given a  
2 court bypass is moot, they're going to figure out how to  
3 get that before the court either by challenging the  
4 statute directly or pleading artfully or whatever, but  
5 otherwise we have the answer to that question now without  
6 it having been judicially addressed.

7 CHAIRMAN BABCOCK: Yeah. Justice Jennings.

8 HONORABLE TERRY JENNINGS: Just my final  
9 comment. I think the subcommittee's report is well-taken,  
10 and just look at the title of what our rules are. They're  
11 the Texas Parental Notification Rules. Rule 1.1 says,  
12 "Applicability of these rules. These rules govern  
13 proceedings for obtaining a court order authorizing a  
14 minor to consent to an abortion without notice to either  
15 of her parents or her managing conservator." So that's  
16 the whole point of the rules, is when there is no notice,  
17 and what we're talking about is the situation where there  
18 is notice and the parents have not consented. The  
19 Legislature has removed that possibility, and I don't see  
20 a need for a change either.

21 CHAIRMAN BABCOCK: Yeah, Nina.

22 MS. CORTELL: I just had a question. It may  
23 have come up already. I just want to make clear that when  
24 we get an order under the current protocol is it clear  
25 that it will authorize the minor to consent to the --

1 HONORABLE STEPHEN YELENOSKY: Yes.

2 HONORABLE SARAH DUNCAN: Yes.

3 MS. CORTELL: Okay.

4 HONORABLE BOB PEMBERTON: That, in fact, is  
5 what the notification statute says already, that it is a  
6 order authorizing consent without notification.

7 CHAIRMAN BABCOCK: Okay. Any further --  
8 Carl.

9 MR. HAMILTON: Maybe at the very least under  
10 the current rule under the explanatory statement there  
11 could be some reference to the new statute.

12 CHAIRMAN BABCOCK: Yeah. Well, I think that  
13 was one of their recommendations.

14 MR. HAMILTON: Okay.

15 CHAIRMAN BABCOCK: Any other discussions?  
16 All right. Just for the sake of the record let's vote in  
17 two parts, first on whether we should accept the  
18 subcommittee's recommendation that no change be made to  
19 the parental notification rules. Everybody in favor of  
20 that raise your hand. You've got your hand up, Kent?

21 Okay. Everybody opposed? By a vote of 31  
22 to 2 that passes. Now let's go on to the issue of whether  
23 there should be a commentary or a note to the parental  
24 notification rules along the lines suggested by the  
25 subcommittee. All in favor of recommending to the Court

1 that we include a commentary or a note to the parental  
2 notification rules referencing section 164.052,  
3 subparagraph (19), of the Occupation Code, raise your  
4 hand.

5 All those opposed? By a vote of 27 to 6  
6 that passes, and that brings us up to our morning break,  
7 so we'll take ten minutes. Thank you.

8 (Recess from 9:28 a.m. to 9:43 a.m.)

9 CHAIRMAN BABCOCK: All right. We're back on  
10 the record, and we're on to our second agenda item, which  
11 has to do with Process Server Review Board matters; and  
12 Richard Orsinger, our subcommittee chair, is going to  
13 report on that; and there are two handouts, which Angie is  
14 going to pass around so everybody doesn't have to get up  
15 and go to the table. Richard.

16 MR. ORSINGER: Okay. Thank you, Mr. Chair.  
17 I'm going to start out by giving the entire committee  
18 background on the situation to remind those of us who went  
19 through this discussion before and for those of you who  
20 were not on the committee when we considered this  
21 initially. There has been a desire in the process serving  
22 field to have private process servers for a long time.  
23 You know, 25 years ago we were confined to constables and  
24 sheriffs, and in some communities it was very difficult to  
25 get quick service, and so at some point in the past, I

1 think in the late 1980s, the Rules of Procedure were  
2 amended to allow a court to authorize private process  
3 serving, and that authorization is under Rule 103 of the  
4 Rules of Civil Procedure.

5           Rule 103 is titled "Who May Serve," and it  
6 describes who can make lawful service of process in civil  
7 litigation in Texas courts. Now, I want to distinguish  
8 that from Rule 106, which has to do with methods of  
9 service and substitute service. We are not talking about  
10 the decision of a court to allow substitute service,  
11 something to the alternative of personal service. That's  
12 not part of this discussion. We're under Rule 103, which  
13 is the identity of people who can make service of process  
14 in Texas court proceedings; and if you look at 103 or if  
15 you just listen I'll tell you there are three categories  
16 of people that can make service of process. One is a  
17 sheriff or constable or other person authorized by law,  
18 and that will, of course, include deputy sheriffs and  
19 constables as well as some other people maybe. Maybe  
20 probation officers. I don't know who all under all the  
21 authorizations are permitted, but for our purposes it's  
22 going to the sheriff or constable's office.

23           The second category of people authorized to  
24 serve process in Texas lawsuits is any person authorized  
25 by law or by written order of the court who is not less

1 than 18 years of age, and that is the rule we've had for  
2 some years where you can go and get a court order  
3 authorizing a particular private process server to serve  
4 and then that is the authority of that private process  
5 server to act in the official capacity to give someone  
6 notice, serve whatever paperwork it is.

7           Now, in 2005 this issue came to a head, and  
8 the Supreme Court of Texas acted and added a subdivision  
9 (3) to Rule 103 and included in the list of people who are  
10 entitled to serve process any person certified under order  
11 of the Supreme Court. So our discussions today will  
12 concern ourselves with that subpart (3) about a person  
13 certified under an order of the Supreme Court, who is  
14 certified, who can be certified, what are the grounds for  
15 certification, who is the certifying authority, what are  
16 the grounds for revoking a certification, what is the  
17 necessity of a certification, etc.

18           Now, the Rule 103 makes it clear that  
19 subdivision (3) of certification does not apply to certain  
20 what we might call sensitive instances where service is  
21 being made in a tense situation. One would be service of  
22 a citation of an FE&D, which is an eviction proceeding  
23 where somebody is going to be thrown out of their  
24 residence or business. Subdivision (2) is a writ of  
25 possession of a person, property, or thing, so the



1 certification aspect of substitute -- of private process  
2 serving is not available if you're serving a writ of  
3 possession to take -- certainly a writ of attachment for a  
4 person to take possession of a premises or take a physical  
5 item of personal property.

6           And also, if there is process requiring an  
7 enforcement action that be physically enforced on the  
8 person, that is excluded from this third category of a  
9 person certified for private process, so the instances  
10 that are likely to result in a physical confrontation, the  
11 way I view it, are your -- you're excluded. The  
12 certification does not permit you by virtue of being  
13 certified to make that kind of personal service.

14           A little background on how the rule got to  
15 where it is today, for some years segments of the private  
16 process serving community have wanted to create a  
17 licensing environment or professional environment or some  
18 kind of controls where there are standards and the persons  
19 who are engaged in this business have to meet certain  
20 criteria, minimum criteria, either for education, honesty,  
21 or whatever. They have been unable to get the Legislature  
22 to adopt any kind of licensing arrangement or establish  
23 any agency or assign this particular field to any overall  
24 existing agency of the State of Texas, and I didn't -- I  
25 was not personally involved in any of those politics. It

1 is my general understanding that there was a disagreement  
2 between the constables and the private process servers,  
3 but the details of that, perhaps someone else can inform  
4 you, but at any rate the Legislature never acted.

5           Eventually, the activists in the area came  
6 to the Supreme Court, as an alternative could the Supreme  
7 Court use its rule-making authority to bring some  
8 regulation or some organization or standardization to the  
9 area since the Legislature was not willing to impose a  
10 licensing scheme or adopt a statute that set uniform  
11 standards across the state, and that is in fact eventually  
12 what happened.

13           The Supreme Court actually did use its  
14 rule-making authority to create kind of a quasi-agency  
15 that really has no home, really has no funding, and yet  
16 it's operating through volunteer services, some by  
17 individuals of the private sector, some with the  
18 assistance of the clerk of the Supreme Court, and some  
19 with the assistance of the Office of Court Administration,  
20 all of which I think have to come out of their budget  
21 because it's not an item that's financed by the  
22 Legislature.

23           So in our discussions in the last committee  
24 term one proposal we considered but was never adopted was  
25 to piggyback onto the notary public environment. Notary

1 public's have a statutory framework. They have a  
2 licensing agency. There are requirements in terms of  
3 prior convictions, you have to make application, you have  
4 to have a 5,000-dollar bond, I believe. One proposal was,  
5 well, maybe we say you have to be a notary public in order  
6 to serve private process, but that was not what was  
7 adopted. Instead the Supreme Court adopted a process that  
8 would require the creation of the Texas Process Service  
9 Review Board, which never existed before; and even today,  
10 although it does exist, it doesn't exist by any  
11 legislative authority. It exists solely by virtue of a  
12 Court order signed by all nine justices of the Supreme  
13 Court, although perhaps it may have just been seven at the  
14 time that order was signed, but it was signed by all the  
15 justices of the Supreme Court.

16           You need to understand that apart from the  
17 certification process the framework for private process  
18 serving is not geographical. In other words, the judges  
19 in Harris County don't control the service of process in  
20 Harris County. The judges in Dallas County don't control  
21 the services of process in Dallas County. A Harris County  
22 judge can control service of process of cases in his or  
23 her court, and the Dallas judge can control service of  
24 process in the cases of his or her court, so we tend to  
25 think of these areas like Houston or Dallas or El Paso as

1 having rules or protocols for service of process in that  
2 county, and in reading the minutes of this review board I  
3 even see people talking -- people who are on the  
4 commission or on the review board, talking in terms of  
5 geographical foundation for rules, but it's not really a  
6 geographical foundation.

7           It's a court by court foundation, and one of  
8 the consequences of that is if all the judges in Harris  
9 County decide to adopt a rule, which it's my understanding  
10 they have, that rule is not really just a rule that  
11 applies in Harris County. It is a rule that applies -- if  
12 it relates to private process serving, it applies to the  
13 service of process in a Houston case anywhere in Texas, so  
14 if the Houston judges all have some agreed requirement for  
15 private process serving of process issued out of their  
16 court, that requirement applies to service of a defendant  
17 in Dallas County or Travis County or El Paso County or  
18 Potter County, or wherever you are in Texas.

19           So if the judges in Houston agree that  
20 they're going to do X, it doesn't just affect Houston, it  
21 affects the whole state, and there are various counties  
22 that had different requirements about private process  
23 serving. Bexar County, San Antonio, had a requirement of  
24 a substantial bond, much more than a 5,000-dollar notary  
25 bond, and it had to be an approval process through the

1 district clerk and whatnot. Harris County had its own  
2 standards, including an education requirement that was  
3 fairly unique in the state, and there were some other  
4 communities, some other districts or counties, that had  
5 rules, local rules that they adopted that you had to  
6 comply with in order to serve process in their court.

7           Well, the result of that was that there was  
8 not uniformity in private process serving across the  
9 state. In fact, there wasn't even uniformity in private  
10 process serving in Harris County because if you had a  
11 Dallas County lawsuit that was being served in Harris  
12 County it obeyed the rules of the Dallas County or the  
13 Dallas County district court that issued the process, so  
14 the complaint was that the people who are in the business  
15 of serving process statewide had to comply with each local  
16 rule. There was not a standard approach, and so in order  
17 to -- in a big county like Dallas or Harris County, you  
18 really had to qualify in these various individual counties  
19 in order to be able to serve process on a routine basis.  
20 That was why they want standardization, and that was what  
21 the Supreme Court gave them in the form of this  
22 certificate, this subdivision (3) on Rule 103.

23           The reason that it created standardization  
24 was that you could either be a government official like a  
25 sheriff or constable or deputy and you're authorized to

1 serve or you could have a court order that authorized you  
2 to serve or you could be certified by the Supreme Court to  
3 serve. If you were certified by the Supreme Court to  
4 serve, you had the authority to serve process out of any  
5 Texas court, even though you might not have complied with  
6 whatever local rules previously existed that would require  
7 that you had to meet, if it was a Bexar County court,  
8 Harris County court, or whatever.

9           There is a notable exception, though, which  
10 we will talk about not now but in a minute, and that is  
11 the educational requirement. The standard across the  
12 state under the certification program is seven hours of  
13 continuing education as a prerequisite to being certified,  
14 and the courses that will qualify you to be certified have  
15 to be approved by the Texas Supreme Court, and the Texas  
16 Supreme Court has approved, to my knowledge, three  
17 courses, but the Harris County district judges, I believe  
18 as a whole -- someone from Houston that knows differently  
19 correct me -- they require that service of process of  
20 Harris County district court process can only be done on  
21 substitute service by someone who has attended the  
22 educational course offered by the Houston Young Lawyers  
23 Association.

24           It does not matter for Harris County  
25 district courts if you have attended a course elsewhere

1 that's been approved by the Texas Supreme Court. If you  
2 have not attended the HYL A process server course, I  
3 believe that you cannot serve process out of the Harris  
4 County district courts. Now, anybody here, will you  
5 confirm me, Kent or somebody, can confirm that that's  
6 countywide rule for --

7 CHAIRMAN BABCOCK: Kent Sullivan has left  
8 the room.

9 MR. ORSINGER: Judge Sullivan left the room.  
10 All right.

11 CHAIRMAN BABCOCK: Not wanting to confirm  
12 you.

13 MR. ORSINGER: Is Judge Bland still here?

14 CHAIRMAN BABCOCK: She's here.

15 MR. ORSINGER: Do you remember?

16 HONORABLE JANE BLAND: Well, to get on the  
17 list of approved private process servers you have to take  
18 the course, and it is a course that's put on by the Young  
19 Lawyers, in connection, though, with the civil district  
20 judges.

21 MR. ORSINGER: Okay. So is it actually  
22 countywide for all of the district judges in Harris  
23 County?

24 HONORABLE JANE BLAND: Well, I don't know  
25 about the county, though, county courts, though.

1                   MR. ORSINGER: Among all the district  
2 courts, though? All the district courts abide by this  
3 standard?

4                   HONORABLE JANE BLAND: The district courts,  
5 yes, I think adopted a local rule that you go to the --

6                   MR. ORSINGER: Okay.

7                   HONORABLE JANE BLAND: -- course, but as far  
8 as whether or not you can serve, you probably can get an  
9 order from a judge allowing you to serve process not being  
10 on the list, but I think if you're on the list then you're  
11 approved to serve process in any case without going, you  
12 know, through any other steps.

13                  MR. ORSINGER: Okay. So there may be a kind  
14 of a case-by-case opportunity to serve even if you haven't  
15 taken the Hyla course, but to be on the approved routine  
16 list where you can routinely serve process issued out of  
17 Harris County district courts you must take the Hyla  
18 course even if you've taken one of the other courses  
19 that's been approved by the Supreme Court. Whether that  
20 exception --

21                  HONORABLE JANE BLAND: That part I don't  
22 know. I don't know that you cannot have taken another  
23 course. That would be new since I left.

24                  MR. ORSINGER: Yeah, I believe that -- yes,  
25 sir. This is Carl Weeks, by the way, who is the chair --



1 is that the name, chair?

2 MR. WEEKS: Correct.

3 MR. ORSINGER: Of the Texas Process Service  
4 Review Board.

5 MR. WEEKS: I can elaborate just a little  
6 bit. Substantially that's all correct with the exception  
7 of if you attend a TCLEOSE. There was a provision in the  
8 miscellaneous order that was issued by the Court that if  
9 you attend a TCLEOSE civil process course -- that's the  
10 Texas Commission on Law Enforcement Standards and  
11 Education that approves the civil process training for  
12 constables and sheriffs. If you took one of those courses  
13 as well you would be authorized to deliver process out of  
14 Harris County.

15 MR. ORSINGER: Okay. So I'm going to amend  
16 my statement then. Carl is the chair of this board that  
17 the Supreme Court has created, and he just pointed out  
18 that there is a course that is required for sheriffs and  
19 constables and deputy sheriffs and deputy constables who  
20 are going to serve process, and it's sponsored by the  
21 state, and it's called the Texas Commission on Law  
22 Enforcement, which I think provides this course, and if  
23 you attend that course then you are qualified in Harris  
24 County. So if you -- to be qualified for Harris County  
25 process, district court process, you have to either attend

1 the TYLA course or the course sponsored by the Texas  
2 Commission on Law Enforcement or you can't get on the  
3 routinely approved list; is that right, Carl?

4 MR. WEEKS: That's correct. To be clear,  
5 the course was not offered by TCLEOSE. They just approve  
6 courses for various education providers around the state.

7 MR. ORSINGER: Okay.

8 MR. WEEKS: Any approved academy, and at  
9 this time Harris County is not accepting applications for  
10 their list. They're out of the approval of private  
11 process server business, and they're referring everyone to  
12 Supreme Court for application process to be approved to  
13 serve process out of Harris County.

14 So at this time -- that was in times past.  
15 At this time they're not accepting new applications to  
16 apply to the Harris County district courts for approval  
17 locally there. They're deferring to the Supreme Court  
18 process.

19 MR. ORSINGER: Well, Carl, let me get a  
20 point of clarification then. If you're a private process  
21 server applying for certification and you have taken a  
22 private course that's neither offered by the TYLA nor is  
23 it approved by the Texas Commission on Law Enforcement,  
24 can you serve process for Harris County district courts  
25 based on a certification through this board, but also

1 based on a private course approved by the Supreme Court,  
2 but not those two we enumerated?

3 MR. WEEKS: No, you cannot. Those are the  
4 only two that are enumerated, that you mentioned, that are  
5 provided to get the H endorsement, what we call the H  
6 endorsement, on your certification number that's issued by  
7 the board.

8 CHAIRMAN BABCOCK: Okay. Thank you. So  
9 what that means then basically is there are two courses --  
10 pardon me, there are two sources of authority for your  
11 education to be certified, one is the Supreme Court and  
12 one is the Texas Process Servers Association, and Harris  
13 County will recognize only the HYL A or one approved by the  
14 Texas Commission on Law Enforcement, but not a private  
15 course that's been approved by the Supreme Court by all  
16 other counties.

17 HONORABLE JANE BLAND: Judge Sullivan is  
18 here, and he needs to update you because I think -- and  
19 Judge Benton, because, Judge Sullivan, the confusion is  
20 what Harris County is approving for private process  
21 servers.

22 CHAIRMAN BABCOCK: Calling on Justice Bland  
23 was unfair since she's been elevated to the court of  
24 appeals.

25 HONORABLE JANE BLAND: I'm always willing to

1 give my opinion, but it may not be based on good  
2 information.

3 CHAIRMAN BABCOCK: Judge Sullivan and Judge  
4 Benton are here, however, and they can enlighten us  
5 perhaps.

6 HONORABLE KENT SULLIVAN: We can attempt to  
7 do that. We can misinform everyone as well as anyone else  
8 can.

9 HONORABLE LEVI BENTON: I would defer to  
10 you, Kent.

11 HONORABLE KENT SULLIVAN: My recollection is  
12 that we -- now that there is a statewide process that we  
13 simply are standardized consistent with the statewide  
14 process. That is my recollection.

15 MR. ORSINGER: Well, there is -- Kent, let  
16 me say that they have certificates the Supreme Court is  
17 now issuing -- I guess it's the Supreme Court technically  
18 that issues them, maybe it's not, and you can either have  
19 an H designation or not. If you have an H designation you  
20 can serve private process issued by all of these district  
21 courts. If you don't have an H designation you can't  
22 serve the Houston originations, and it was my  
23 understanding that whether you got an H designation or not  
24 depended on whether you took a course that was approved by  
25 the Harris County district judges.

1           If you took a course approved by the Harris  
2 County district judges then you got an H designation, but  
3 if it was a private course other than the HYL A course, you  
4 didn't get your H designation and, therefore, couldn't  
5 make service of process on Houston district court paper  
6 work.

7           MR. WEEKS: That's correct.

8           MR. ORSINGER: That's right. So Carl Weeks,  
9 who is the chair of the board, is saying that, so it may  
10 appear to you as a judge that we have -- that the Harris  
11 County has kind of bought into the overall certification  
12 process, but there is an exception on the education side,  
13 which is one of the points for discussion today.

14           Okay. Now, to move on, on June 29th of  
15 2005, which was less than a year ago, the Supreme Court  
16 amended Rule 103 and then issued two miscellaneous court  
17 orders that sort of put this framework in place, and as I  
18 said, it's kind of a quasi-agency. It sort of has a  
19 headquarters, which is the clerk of the Supreme Court, but  
20 if you go to the website they ask you to please don't call  
21 and ask us any questions. You can see an e-mail to the  
22 following e-mail address and if you have to call you can  
23 leave a voice mail and somebody will get back with you,  
24 and so they're like a mailbox drop, basically, for all of  
25 this stuff and then to the extent that some administrative

1 support is required, I think that's offered gratis by the  
2 Office of Court Administration; is that not true, Carl?

3 MR. WEEKS: That's correct.

4 MR. ORSINGER: And then I noticed in the  
5 minutes of your second meeting, I think, that if, in fact,  
6 a database was going to be maintained for this -- for the  
7 board to do its evaluative work that a constable in Harris  
8 County had offered up the use of his computer system, or  
9 did I get that right?

10 MR. WEEKS: For the complaint system?

11 MR. ORSINGER: I think so.

12 MR. WEEKS: He's using his personal laptop.  
13 He's the chair of our complaint committee for -- he's the  
14 chairman of our complaint committee, and as he  
15 investigates the complaints for our board he maintains and  
16 opens those files and then forwards them to Meredith  
17 Musick, who is the clerk for the board for OCA.

18 MR. ORSINGER: And so if he use loses his  
19 laptop I guess we're in trouble.

20 MR. WEEKS: We have a copy here in Austin as  
21 well. The originals are maintained here.

22 MR. ORSINGER: Okay. We're trying to run a  
23 quasi-agency here with no money and no staff. But at any  
24 rate, there is -- it is important to remember that this is  
25 not a licensing system. Although there is a dispute

1 whether some of the proposals today wouldn't move us into  
2 a quasi-licensing environment, this is a voluntary  
3 application process, and you don't have to apply for it if  
4 you want to, and you don't have to be certified in order  
5 to be a private process server, but if you're not  
6 certified, then you're going to have to have the authority  
7 of a court order in order to do private process serving.

8           Now, some of the proposals we'll talk about  
9 today from reading the correspondence, I think members of  
10 the field feel like it moves us away from a voluntary  
11 certification process and more into kind of a licensing  
12 board environment where the board of review has the  
13 authority to take away your license, quote-unquote, and  
14 therefore put you out of business, quote-unquote, even  
15 though there really isn't a license. It's just a  
16 certificate, but at any rate, those appear to be the  
17 perceptions on the issue.

18           If you are certified then you are assigned a  
19 number, and the Supreme Court website, someone at the  
20 Supreme Court, I believe, or the OCA will put your name  
21 and your certificate number up at the website which has  
22 alphabetical listings of everyone that's certified, and  
23 that, if you will, is the way to confirm whether a private  
24 process server has properly been certified. That's the  
25 source of authority. There is no agency really that you

1 can call on the telephone, so you just look at the website  
2 and figure it out.

3           Now, under the current two orders that are  
4 in place that were issued on June 29th of last year, in  
5 order to be certified you have to -- there are really four  
6 criteria that must be met. You have to make a sworn  
7 application, you have to make a statement in that  
8 application that you have not been convicted of a felony  
9 or a misdemeanor involving moral turpitude. You must  
10 submit a Department of Public Safety criminal history  
11 record issued within the last 90 days to show that you  
12 have -- to show what your conviction history is and you  
13 must submit a certificate of attendance at an approved  
14 civil process course, and when I say "approved" I mean  
15 approved by the Supreme Court.

16           I told you that HYL A has been approved, the  
17 course offered by the Texas Process Server Association is  
18 approved for all purposes except Harris County courts, or  
19 a course, it says here, "offered or approved by the Texas  
20 Commission on Law Enforcement." If you have those four  
21 things, then so far as I can tell by reading the order  
22 you're entitled to be certified.

23           Now, the same order of June 29th, 2005,  
24 talks about when you can lose a certification, and  
25 paragraph (4) says "Certification may be revoked for good



1 cause, including a conviction of a felony or a misdemeanor  
2 involving moral turpitude." It is not limited to  
3 conviction of a felony or misdemeanor of moral turpitude.  
4 It says "good cause including" and then it enumerates  
5 felony or misdemeanor of moral turpitude. Good cause is  
6 not defined in this order, so we don't have any authority  
7 at this point on what constitutes good cause to revoke a  
8 certification. Do you agree with that, Carl?

9 MR. WEEKS: That's correct.

10 MR. ORSINGER: Okay. Now, it's my  
11 understanding that about half of the people in the field  
12 have chosen to become certified and about half not. Is  
13 that right or wrong, Carl?

14 MR. WEEKS: Well, that's one number we don't  
15 have a good handle on to be real accurate because we don't  
16 know how many people are in the field serving civil  
17 process. We right now have about 1,900 people, private  
18 process servers on the statewide order under the Supreme  
19 Court to serve process. We don't know the total number of  
20 private process servers in the state, so that percentage  
21 is hard to speculate on.

22 MR. ORSINGER: Okay. Well, my perception  
23 reading the correspondence, which admittedly is limited  
24 information, is that there is a segment of the private  
25 process field that has not chosen to apply for

1 certification because they're still mistrustful of the  
2 regulation, who is regulating, what the standards for  
3 regulation are, and what the effect would be if they got  
4 certified and lost their certification; and this board has  
5 been in place for less than a year and we don't have very  
6 concrete standards for what they're -- what -- how they  
7 will exercise their judgment; and so it doesn't surprise  
8 me that in a field that's previously been unregulated that  
9 there may be some practitioners who are a little wary of  
10 this new authority that came from the Supreme Court and is  
11 by appointment of the Supreme Court, and that is -- has  
12 some control perhaps over their ability to make a living  
13 as a private process server, and perhaps we'll have some  
14 comments reflecting that point of view a little bit later;  
15 but what I'd like to do is leave this background and step  
16 into the first specific issue before us for discussion and  
17 that is the board's proposal to either adopt or have the  
18 Supreme Court adopt a code of professional conduct for  
19 private process servers, certified private process  
20 servers; and this is in the materials that were e-mailed  
21 to you, and it's Appendix A to the agenda and also I think  
22 to the board minutes, or actually this is a refinement of  
23 the board minutes; and so what I would like to do is talk  
24 about it a little bit generally and then talk about it  
25 specifically.

1 HONORABLE JAN PATTERSON: Richard, may I ask  
2 a question?

3 MR. ORSINGER: Yes.

4 HONORABLE JAN PATTERSON: Do we assume that  
5 the unregulated are perhaps operating out of one court  
6 alone and that they may be in some of the rural areas, or  
7 do we just not know?

8 MR. WEEKS: I think the presumption is that  
9 they are the folks that really aren't in the business full  
10 time that are serving papers everyday. They're what we  
11 call in the business the mom and pops that may be in rural  
12 West Texas or wherever that serve, you know, three or four  
13 papers a month, and it's not worth it to them to go  
14 through the process to do this application and that type  
15 of thing. They can be approved still on a local order by  
16 a local judge for that limited amount of process that they  
17 serve.

18 MR. ORSINGER: Okay. The context of this  
19 code of professional conduct, because we operate one as  
20 lawyers, we all know, there is a backdrop, of course, of  
21 criminal law that governs all of our activities. Whether  
22 we're lawyers, doctors, or private process servers, if we  
23 violate the law in conjunction with our work we can be  
24 prosecuted by the government, so the backdrop of the Penal  
25 Code is out there whether or not there is a code of

1 conduct that's applied to the profession.

2           There's also tort law. Any of us who commit  
3 a tort in the conduct of our work can be made to answer in  
4 a suit for damages if we injure a person, damage personal  
5 property or real estate, and so the backdrop of tort law  
6 exists in this field of private process serving, whether  
7 or not there is a code of conduct.

8           I would also point out something to you that  
9 you may not know, and I found this to be an eye-opener,  
10 the Court of Criminal Appeals on March 22 of 2006 in a  
11 case called State vs. Basilas, B-a-s-i-l-a-s, ruled, I  
12 believe without dissent that filing a pleading or a  
13 document in a civil case that you know is false is a  
14 crime.

15           Now, before that a lot of people thought  
16 that the crime of tampering with the government record  
17 meant that you went to the county clerk's office and tried  
18 to alter a document or you altered a pleading or a  
19 judgment that was in the court's jacket. That's certainly  
20 what I thought tampering with a government record was, but  
21 the Court of Criminal Appeals has said that if you file a  
22 pleading, a lawyer who files a pleading and knows that it  
23 has misstatements of fact is violating that statute of  
24 tampering with a government record, and they go into all  
25 their statutory analysis, but the bottom line is that they

1 reversed a quashal of an indictment against a lawyer who  
2 filed a petition for expunction on behalf of a client that  
3 contained misstatements of fact.

4           And so it will probably take a little while  
5 for us to figure out exactly what is the difference  
6 between a Rule 13 sanctionable behavior and behavior that  
7 can result in you being prosecuted. If the -- let's see,  
8 it's a Class A misdemeanor, unless there is intent to  
9 defraud or harm another, in which event the offense is a  
10 state jail felony. Now, this applies to lawyers who file  
11 pleadings, but it would obviously also apply to a private  
12 process server who filed a return that misrepresented  
13 personal service when personal service had not actually  
14 been effected. So probably the act of filing a false  
15 return is going to be at least a misdemeanor and maybe a  
16 felony.

17           MR. GILSTRAP: Do you have a cite on that,  
18 Richard?

19           MR. ORSINGER: Yes. The cite on that is  
20 2006 Westlaw 709324; again, 2006 Westlaw 709324, State vs.  
21 Basilas. So I knew that we would all be interested in  
22 reading that case, but I mention that because --

23           HONORABLE NATHAN HECHT: There will be a lot  
24 more associates filing papers.

25           (Laughter)

1                   MR. ORSINGER: I wanted to have that  
2 background in this discussion about professional standards  
3 because even if there are no professional standards we  
4 have the Penal Code, which apparently could apply with a  
5 vengeance to a false return, and we have tort law. Both  
6 of those are covered in this proposed code, but then also  
7 some other aspects, too.

8                   Okay. Moving on then to the specifics, this  
9 code contains some very concrete concepts and then some  
10 very, very general concepts, and if the code is just going  
11 to be a voluntary statement of things we all agree we  
12 should aspire to do then generality in concepts is not  
13 harmful and, in fact, may even be beneficial because  
14 you're maybe getting to the thrust of a point rather than  
15 trying to define it so that it can be enforced.

16                  However, if this code is going to be a  
17 foundation for finding good cause to revoke  
18 certifications, an argument can be made that general  
19 concepts or general statements or vague statements are not  
20 fair to the certified individuals, or even to the board,  
21 which has to pass judgment on somebody if the terms are so  
22 general or the standards are so vague that it's very  
23 subjective when someone has violated the code and when  
24 they have not. And as lawyers, of course, we know that  
25 our code has -- our code of ethics has a lot of

1 generalities in it, but it also has some clearly  
2 prohibited black and white behavior and so I tend to  
3 evaluate this in terms of what I have been living with for  
4 30 years as a code of professional responsibility.

5           Now, the very first category here is to  
6 treat people with respect, and of course, that's everyone  
7 here at the table, if we were asked to describe what that  
8 meant would probably describe it differently, but we could  
9 probably all agree that that would be a good idea; but  
10 could we all agree that if someone did not treat someone  
11 with respect that they should lose their certification;  
12 and if so, how do you distinguish a frivolous complaint of  
13 lack of respect from a meritorious one that should invoke  
14 an investigation and maybe even a hearing or the  
15 revocation of a certification. You can see the problem.

16           Trespassing, number two, is more concrete,  
17 because we have a Penal Code definition of criminal  
18 trespass and we have a tort code, tort standard, of  
19 trespass as well, but it says, "Do not trespass in a way  
20 that could subject you to a criminal conviction," so I'm  
21 thinking that that's the criminal trespass statute that  
22 you can't violate. While we're on the subject, I will say  
23 that if you do violate the criminal statute on trespass,  
24 you could be prosecuted, so there is a remedy for a  
25 private process server that commits a criminal trespass,

1 and that is to go file a complaint against him with the  
2 government rather than filing a complaint with the board  
3 to revoke his certification.

4           Number three is truthfulness, completely  
5 candid and truthful concerning all process service  
6 matters, and that's very broad because "all process  
7 service matters" could include all manner of things,  
8 including telling a white lie to somebody at the front  
9 door of the building in order to get inside to serve  
10 process. I had one case some years ago where I couldn't  
11 get process served on a doctor, so my private process  
12 server made an appointment to go in as a patient and when  
13 the doctor came in to examine him he handed the process to  
14 him. That worked. That was the only way I could get  
15 service on that guy, but it was not candid --

16           CHAIRMAN BABCOCK: "What's your complaint?"  
17 "Here it is." Totally candid.

18           MR. ORSINGER: He was not completely candid  
19 and truthful concerning all process service matters, so I  
20 think that perhaps we need to consider how extensive the  
21 requirement of candidness and truthfulness is going to be.

22           Returns is that the returns have to comply  
23 with the Rules of Civil Procedure and have to be accurate,  
24 and if it -- if the return -- if the service doesn't  
25 actually fit the actual form then you need to add or



1 delete information so that it is accurate, and we all  
2 agree that there should be accurate returns, but perhaps a  
3 better way to do it is to have a standardized return,  
4 which, in fact, is one of the proposals for us to  
5 consider, that the board wants a better standardized  
6 return that everybody has to use.

7           Next one, disclosure of dual capacity.  
8 Apparently there are some people in the field who have a  
9 government job but who also do private process serving,  
10 and there is a concern which maybe someone can explain to  
11 us how it will be harmful, but where someone may be using  
12 their apparent authority as a government employee somehow  
13 in connection with private process serving, and this would  
14 prohibit that.

15           The next one, wearing official uniforms or  
16 displaying a badge or emblem of office, seems to me to be  
17 the same thing, that if you're acting in your private  
18 process server capacity, you shouldn't be pretending to be  
19 under the authority of some other part of the state other  
20 than the private process serving part of it. It does  
21 permit identification issued by the Supreme Court. So far  
22 none is, but there is a proposal for us to discuss today  
23 about the Supreme Court adopting an identification card  
24 process that would be, if you will, an official card  
25 identifying this person as certified by the Texas Supreme

1 Court to serve process.

2 HONORABLE TOM GRAY: Richard, hold that  
3 thought while the court reporter turns over her tape.

4 MR. ORSINGER: Okay.

5 CHAIRMAN BABCOCK: Because we don't want to  
6 miss a thing.

7 PROFESSOR DORSANEO: We're not.

8 MR. ORSINGER: This is early in the  
9 committee process, Chip.

10 CHAIRMAN BABCOCK: That's what I was afraid  
11 of.

12 MR. ORSINGER: The next one is service by  
13 law firm employees, and this standard would require or  
14 prohibit you from serving anything other than a subpoena  
15 where you work for the law firm which has issued the  
16 service. The next one prohibits exaggerating your  
17 authority. The next one is comply with the CLE, or pardon  
18 me, continuing education requirements of the Supreme  
19 Court. The next one prohibits misrepresenting your  
20 qualifications. The next one is maintaining a current  
21 address with the board. The next one is cooperation with  
22 the complaint investigation, and exactly right now there  
23 is kind of a de facto complaint process in effect,  
24 although there are no, I think, published standards for  
25 it; and that's one of the things to discuss today; but the

1 board is proposing or maybe inferring from the existing  
2 Supreme Court order that it has the responsibility of  
3 conducting investigations to see whether standards have  
4 been violated by process servers; and, Carl, it's my  
5 understanding that you-all have actually done four  
6 investigations already.

7 MR. WEEKS: That's correct.

8 MR. ORSINGER: Okay. And of the four  
9 investigations they've done they were all compliants by  
10 members of the public left at the website, or how did they  
11 get to you?

12 MR. WEEKS: The total number of complaints  
13 we've have been where the person fills out a -- there is a  
14 complaint form, to answer your question first, that the  
15 Court approved that's on the process server review board  
16 website. It does require the complainant to sign before a  
17 notary and state the facts of the complaint, and they  
18 submit that to our office here, or actually OCA handles  
19 the mail, and the Process Servers Review Board, they come  
20 into our office and then there -- I asked Constable  
21 Hickman, who we talked about earlier who chairs our  
22 complaint committee, has been working those. We are a  
23 little overloaded right now. We have got five we are  
24 actively working. I'm working two of those because he had  
25 the other three, so about 15 total sworn complaints we've

1 had submitted to the Process Server Review Board in the  
2 last eight months.

3 MR. ORSINGER: Okay. And I have seen four  
4 acted on in your minutes.

5 MR. WEEKS: Correct.

6 MR. ORSINGER: Is that right? And of the  
7 four acted on two were complaints against certified  
8 servers and two were complaints against noncertified  
9 servers; is that right?

10 MR. WEEKS: I believe that's correct, yes,  
11 sir.

12 MR. ORSINGER: Okay. Thank you. There has  
13 been some reaction in the letters that I have seen as to  
14 what the authority of the board is to review the behavior  
15 of people who are not certified since the board exists as  
16 part of the certification process and decertification  
17 process and has nothing to do with the noncertified  
18 process servers, and there -- for lack of a technical word  
19 I'm going to call it -- or maybe I saw it written  
20 somewhere it's mission creep that the board has been  
21 created to monitor the certification process, but it was  
22 natural, if you will, for it to monitor also the  
23 activities of people in the field who are not certified  
24 but where complaints come before the board. What did I  
25 say that you disagree with?

1 MR. WEEKS: Could I clarify on that?

2 MR. ORSINGER: Yes.

3 MR. WEEKS: Those two that were not  
4 certified that we did investigate were folks that had  
5 applications pending before our board.

6 MR. ORSINGER: Okay.

7 MR. WEEKS: We have routinely denied to this  
8 point because we have -- the Attorney General has  
9 graciously given us general counsel, a fellow by the name  
10 of Jim Krausen, who advises the board, and based on advice  
11 of counsel we have not pursued investigations on folks  
12 that were either not certified or applied to our board for  
13 certification.

14 MR. ORSINGER: Okay.

15 MR. WEEKS: To be clear on those other two.

16 MR. ORSINGER: Thanks for that clarification  
17 because there is at least the tie of an application  
18 pending that would bring them within the purview of your  
19 board.

20 MR. WEEKS: Correct.

21 MR. ORSINGER: But if there is no tie  
22 whatsoever you-all have not undertaken to do an  
23 investigation even?

24 MR. WEEKS: That's correct. We've turned  
25 those down.

1                   MR. ORSINGER: Okay. Now then, this  
2 cooperation with the complaint investigation requires  
3 notice to the -- let's see, I might be mixing two of these  
4 together. "Provide any requesting person the necessary  
5 information to file complaints" and that's done, of  
6 course, because the state -- the Supreme Court website has  
7 the actual form on it, and then there is a description of  
8 what would be reportable events under these standards, and  
9 that would be a conviction or imposition of community  
10 supervision or deferred adjudication, so it doesn't matter  
11 how you get out of it unless you're acquitted you're  
12 snared here; felony or crime involving fraud, dishonesty;  
13 crime involving moral turpitude; or a crime related to the  
14 qualifications, functions, or duties of a process server;  
15 and the crimes that would fall into category two are  
16 probably well known under the case law, but under category  
17 three those are probably not well known unless we define  
18 them.

19                   Any disciplinary action, you have to --  
20 shall report in writing any disciplinary action, refusal  
21 by another authority to grant or renew a license or a  
22 finding of contempt by a state or Federal court.  
23 Paragraph (14) says you have a requirement to expose  
24 corruption or dishonest conduct of another licensee.

25                   Paragraph (15) attempts to list the

1 misconduct that no doubt would be seen as good cause to  
2 deny certification or revoke it, and one is a violation of  
3 the code or knowingly assisting someone else to; next,  
4 fraud or deceit; next, representing a certificate, degree,  
5 or title you don't have; committing a criminal act that  
6 reflects adversely on honesty, trustworthiness, or  
7 fitness; engaging in conduct involving dishonesty, fraud,  
8 deceit, or misrepresentation; obstruction of justice;  
9 subjecting behavior -- or being held in contempt by a  
10 state or Federal court; engaging in a practice, or should  
11 I say process serving when the process -- the status is on  
12 inactive status or the authorization to serve process has  
13 been suspended or terminated.

14 I guess, Carl, I need to get some  
15 clarification of that. If we have a noncertified person  
16 who has never applied, never been rejected, they are not  
17 on inactive status?

18 MR. WEEKS: No, sir. That's correct. It  
19 would be one --

20 MR. ORSINGER: But if someone did apply and  
21 got certified and then did something wrong and then their  
22 status was suspended, have they just lost their  
23 certification or have they lost their ability to serve  
24 private process under a court order?

25 MR. WEEKS: No. They have just lost their

1 certification. We have one of those in effect now where  
2 they're still serving on a local order.

3 MR. ORSINGER: Okay. Category (i), don't  
4 hire somebody on an inactive status; category (j), don't  
5 violate the laws of the State of Texas or the U.S., or  
6 these professional standards; (k), don't violate rules of  
7 the Supreme Court; (l), in connection with a felony or  
8 crime involving fraud, dishonesty, or moral turpitude, the  
9 process server will be considered to have engaged in  
10 misconduct when finally convicted or imposed community  
11 supervision or deferred adjudication. It is also  
12 misconduct if a court makes a finding of a false return,  
13 and it says you "shall not comply with the final order of  
14 a state or Federal court unless it's been stayed."

15 (O) is repeated failure to respond to a  
16 board inquiry without good cause will be considered  
17 misconduct. "The certified process server cannot threaten  
18 or commit assault or retaliation, make libelous or  
19 slanderous statements, or make public allegations of lack  
20 of mental capacity regarding parties that cannot be  
21 supported in fact." So I guess if it's true, you can say  
22 it no matter how bad it is, but don't say it if it's not  
23 true, and then the last one here is breach the security of  
24 the process server examination.

25 So the proposal is to adopt this code of



1 professional conduct, which evidently will be some  
2 standard by which your certification will be accepted or  
3 rejected or your certification will be revoked if it's  
4 been granted, and then also it contains provisions that  
5 may not be contemplated as being specifically enforceable  
6 but are just good moral, ethical judgments that people  
7 should aspire to. Can we ask Carl to explain why they  
8 feel this is necessary?

9 CHAIRMAN BABCOCK: Absolutely.

10 MR. ORSINGER: Carl, would you, if you will,  
11 defend the board's proposition that this be approved by  
12 the Supreme Court?

13 MR. WEEKS: I'd be glad to. My committee,  
14 this work product was brought forth out of an exhaustive  
15 number of hours, and there are obviously issues that are  
16 addressed in here that aren't articulated in the Penal  
17 Code or the Code of Criminal Procedure or the Texas rules,  
18 and we felt like that these items, as some of them have  
19 already come up before our board with regard to conduct of  
20 process servers, needed to be articulated so the board  
21 would in essence have some basis or guidelines to work  
22 from when considering these complaints that have come up,  
23 and they have come up already in numerous nature and of  
24 different kinds.

25 They are not all straightforward, and

1 combined with that we wanted to have some further  
2 supporting guidelines to go by where we were going to be  
3 considering -- we're not obviously operating from the  
4 principle that everybody would be summarily revoked. It  
5 could be a suspension, it could be a letter of reprimand,  
6 it could be a temporary probation, whatever the case may  
7 be with regard to their certification.

8 I'm glad to go through and answer any  
9 specific questions rather than me going through each one.  
10 Is that what you'd like?

11 MR. ORSINGER: No, I just wanted you to --  
12 why do you feel that a code is necessary? Let's say, for  
13 example, could you get by with a more concrete list of  
14 criteria for being certified and decertified beyond just a  
15 felony or misdemeanor of moral turpitude?

16 MR. WEEKS: We'll get by with what we have  
17 to get by with obviously. We could, I assume. The  
18 feeling of the board was that we needed as much covered as  
19 we could; and to be quite frankly, we had some basic items  
20 that we started out with in our committee; and the three  
21 folks that were on that committee that started this  
22 process brought forward a work product that was fairly  
23 substantial; and then at that time we as a full committee  
24 started looking at the other options of what's in place  
25 with a similar circumstance that may be applicable; and

1 one of the things where we drew a great deal of this, to  
2 be quite candid with you, is from the Court Reporters  
3 Certification Board.

4           Some of this may -- I think there is a court  
5 reporter down here shaking his head, which is a board that  
6 obviously operates under the authority of the Supreme  
7 Court, Court Reporters Certification Board; and we felt  
8 like that many of these things that were articulated in  
9 the Court Reporters Certification Board, because there  
10 were issues that had come up and I met with those folks  
11 that run that board and the executive director of that  
12 agency, and these complaints that come in are many times  
13 not clear-cut and very ambiguous, and you need these. I  
14 guess to explain, we felt like because they worked well  
15 for that agency and had been in place, and according to  
16 the executive director of the Court Reporters  
17 Certification Board, they had been through hundreds of  
18 hearings, and they have recently revised even last year, I  
19 believe, their code of professional conduct, if you will.  
20 I think they may call it a different name, and it was a  
21 product that worked well, and I think the Court Reporters  
22 Certification Board and the court reporting industry  
23 functions very well, and personally I thought it was a  
24 good standard to subscribe to for our board.

25           MR. ORSINGER: Okay. Thank you.

1                   CHAIRMAN BABCOCK: How much overlap -- how  
2 much does this code track the court reporters, David? Do  
3 you know?

4                   MR. JACKSON: Well, I don't. I haven't  
5 really studied everything that you're asking for, but  
6 we're still tuning ours. I think the Supreme Court has  
7 some adjustments that the Court Reporters Certification  
8 Board passed two years ago on (a) through (h) on  
9 contracting issues and that type of thing, so we're still  
10 in limbo on some of those issues.

11                  CHAIRMAN BABCOCK: Okay.

12                  MR. WEEKS: I think maybe 50 percent, if I  
13 could answer your question, 50 to 60 percent range,  
14 somewhere in there. We came up with half and then we went  
15 and looked at some of the things the Court Reporters  
16 Certification Board had done, and I met with Michele  
17 Henricks, the executive director of that agency. She  
18 informed me that they had through a series of revisions  
19 over the number of years -- this last two years they made  
20 the most recent revisions and indeed it was an ongoing  
21 work in progress, but they were pretty happy and it was  
22 working pretty well with their code of conduct that they  
23 were operating under at this time.

24                  MR. ORSINGER: Okay. Is Tod Pendergrass  
25 with us?

1 MR. WEEKS: He is. There, just walked in  
2 the door.

3 MR. ORSINGER: Tod?

4 MR. PENDERGRASS: Yes.

5 MR. ORSINGER: I'm Richard Orsinger. I'm  
6 the chair of the subcommittee that's been evaluating these  
7 proposals. It's my understanding that you're a private  
8 process server, and you may have views that would  
9 recommend against the adoption of the proposed code; is  
10 that correct?

11 MR. PENDERGRASS: Yes, sir.

12 MR. ORSINGER: Would you mind stating those  
13 briefly to us what your concerns are and whether you think  
14 they represent -- or even if they're not personal, can you  
15 share concerns of other people you know in the industry  
16 why they would oppose such a thing?

17 MR. PENDERGRASS: There is many, many  
18 reasons. A lot of the items in the code are redundant,  
19 perjury, assault, falsifying a return, all of that stuff  
20 is already against the law. Basically, I have just been  
21 asking for proof that any of these changes need to be  
22 made. For instance, if you were to say that last year 50  
23 process servers were convicted of filing a false return or  
24 committing perjury or assaulting someone or trespassing,  
25 or even five process servers. So the numbers don't

1 support the need for all of this regulation.

2 I'd also like to clarify that at the last  
3 legislative session the fiscal note for the Senate bill  
4 that would have licensed us, Senate Bill 165, used an  
5 estimate -- an estimate that was provided by the Texas  
6 Process Servers Association, of which Chairman Weeks is  
7 the vice-president, of approximately 3,000 process servers  
8 in Texas, and by last count on the website there's only  
9 about 16 or 1,700, so maybe they're just catching up, but  
10 there's estimated 3,000 servers, so that's quite a few  
11 that have chosen not to be certified.

12 And as far as mom and pop servers go, I  
13 don't know what the estimate is, but the majority of  
14 private process servers in Texas, including myself, are  
15 mom and pop servers. There is a very small number of  
16 large companies of process servers.

17 Also, concerning complaints, it's my  
18 personal opinion that this Process Servers Review Board is  
19 acting in a rogue manner, and the only instance that I can  
20 tell you right now is there is a process server in Texas  
21 by the name of Alex Londolf, L-o-n-d-o-l-f. He is not a  
22 certified process server, and he has not applied to be a  
23 certified process server; however, he just recently  
24 received a letter from Ron Hickman, the complaint chair on  
25 the committee of the Process Server Review Board,

1 concerning a complaint that was filed against him.

2           So I don't know if that falls under  
3 investigation or not, but a letter has been sent to him  
4 about conduct involving some incident, so I don't know if  
5 that -- if they are investigating stuff, but the board is  
6 actively doing things to address incidents about  
7 noncertified process servers and not just process servers  
8 who have applied and are yet to be certified, and that's  
9 the only one I know about.

10           CHAIRMAN BABCOCK: What is the complaint  
11 made against this individual?

12           MR. PENDERGRASS: I don't know what the  
13 complaint is. I haven't seen the letter. I just got off  
14 of the phone with Mr. Longdolf to verify that before I  
15 spoke about it.

16           MR. WEEKS: I can answer the question. He  
17 was -- charges were brought at the local level by the  
18 district attorney's office that he, I believe, filled out  
19 a fraudulent return, and subsequent investigation revealed  
20 that he was a convicted sex offender and obviously a crime  
21 of moral turpitude. There were some other issues that  
22 were brought. Criminal charges, there is a case pending  
23 at the district attorney's office in Collin County with  
24 regard to his ability to even serve civil process under  
25 the provisions of Rule 103.

1 HONORABLE SARAH DUNCAN: And why is your  
2 board investigating it if he hasn't applied or isn't  
3 certified?

4 MR. WEEKS: We were contacted by the  
5 district attorney's office, and which we routinely get  
6 calls from folks that want to understand the business.  
7 When the criminal side -- we're not actively  
8 investigating. We're just offering assistance to the  
9 criminal district attorney's office in that county. They  
10 have an open, active case investigation, and for the most  
11 part criminal investigators don't understand civil process  
12 obviously, and now that there is a resource for them we  
13 have gotten other calls from folks that are trying to find  
14 out what, you know, the issues of maybe perjury or  
15 aggravated perjury are with regard to the return or  
16 tampering with a government record or those other  
17 applications of criminal law as they affect civil process  
18 servers.

19 MR. ORSINGER: Well, Carl, do you know  
20 whether someone on behalf of the board sent a letter  
21 indicating that the board was somehow making an  
22 investigation or an inquiry?

23 MR. WEEKS: I am not aware.

24 MR. ORSINGER: Would it surprise you if a  
25 letter went out from the committee that's charged with



1 investigations?

2 MR. WEEKS: That we were contacted about his  
3 private process server activities? It would not surprise  
4 me at all.

5 MR. ORSINGER: But you would be surprised if  
6 they were undertaking an investigation, but not if they  
7 just said, "We have been contacted about your activities"?

8 The impression I got from Mr. Pendergrass's  
9 statement was that there was a letter of inquiry, kind of  
10 like there was an investigation. Do you know anything  
11 about the specifics of the letter?

12 MR. PENDERGRASS: I do not.

13 MR. ORSINGER: Okay. So it may have been  
14 nothing more than "We have been contacted"?

15 MR. WEEKS: I apologize, I don't know  
16 either, so I don't want to give you incorrect information.

17 MR. ORSINGER: Okay. Got anything else?

18 MR. PENDERGRASS: Yes. According to what I  
19 have learned about Mr. Longdolf, he pled no contest to a  
20 charge and is currently on probation, so if he completes  
21 his probation he will be dismissed of all that. So it  
22 depends on what your definition of conviction is. It's my  
23 understanding he has not been convicted.

24 I'd also like to point out that just many of  
25 you know that there are many, many different types of

1 process. There is subpoenas, Federal summonses, Federal  
2 subpoenas as well, and this Process Service Review Board  
3 and this whole certification only covers citations and  
4 other notices that are not enforceable writs. So you  
5 cannot be certified and serve all subpoenas in the State  
6 of Texas, all Federal summonses, all Federal subpoenas,  
7 all citations that come out of the child support cases,  
8 which are some of the most sensitive ones, and all process  
9 from any other state that you receive, so the  
10 certification actually covers a very specific type of  
11 process.

12 MR. ORSINGER: Should I ask, does it require  
13 a court order for private process serving on all of those  
14 other state things?

15 MR. PENDERGRASS: No. No court order is  
16 required except on citations and other nonenforceable  
17 notices. So all subpoenas can be served by anyone over 18  
18 who is not a party to the case, which is a mirror of the  
19 Federal rule, which anybody can serve a Federal system  
20 summons or subpoena if they are over 18 and not a party to  
21 the case. So there is no kind of criminal requirement.  
22 You can be a convicted criminal and serve all Federal  
23 summonses, not that there is a lot of convicted criminals  
24 out there doing this, but you can have those convictions  
25 and serve many, many types of process, because evidently

1 the courts don't really care about the person's  
2 background, just that the person is of age and not a party  
3 to the case.

4 MR. ORSINGER: Do you know what the Federal  
5 procedure is for substitute service, if any, of the  
6 Federal citation, the citation of the initiation of a  
7 Federal lawsuit?

8 MR. PENDERGRASS: Yes, it's referred to as a  
9 summons, same as state court. Substituted service in  
10 Federal court, if you go to a person's residence and you  
11 have a summons for the initiation of the case and the  
12 person is not home, you can leave that summons with a  
13 person of suitable age that resides therein at the house  
14 on the very first try. It works beautifully for Federal  
15 process and for the majority of all the other states, and  
16 I have a letter in my packet addressing that, although  
17 that's, I don't think, on the agenda.

18 MR. ORSINGER: So let me clarify, the  
19 initiation of a Federal lawsuit is served with a summons,  
20 and under the Federal Rules of Civil Procedure any adult  
21 can serve the summons.

22 MR. PENDERGRASS: As long as they're over 18  
23 and not a party to the case.

24 MR. ORSINGER: Again, okay, it doesn't  
25 require any court approval, and it doesn't matter if they

1 have 15 felony convictions?

2 MR. PENDERGRASS: That's correct.

3 MR. ORSINGER: And that's in all of the  
4 district courts of the United States across the country?

5 MR. PENDERGRASS: Yes, sir, and that's why I  
6 make reference to there are just no numbers to support as  
7 in convictions of process servers fouling up the system,  
8 and I put some percentages in one of the letters that I  
9 wrote that even if this board has ten substantiated  
10 complaints, that's less than one half of one percent of  
11 the 1,600, is what I estimate process servers that are  
12 certified. It's even less of the 3,000 that are  
13 certified, and if you assume that each of us have served  
14 about a hundred papers, which is a low estimate, since  
15 this certification program has been enacted almost a year  
16 ago, that's about 300,000 papers. Each paper we serve is  
17 a possibility of a complaint being filed against us.  
18 That's less than one -- three one-thousandths of a  
19 percent. I mean, we're squeaky clean.

20 MR. ORSINGER: Okay. Anything else?

21 MR. PENDERGRASS: Not at this time.

22 MR. ORSINGER: Okay. Thank you.

23 MR. PENDERGRASS: You're welcome.

24 MR. ORSINGER: But wait a minute, before you  
25 sit down, is there anything -- I know generally you don't

1 feel like this is required regulation, but is there  
2 anything specific about this code that bothers you other  
3 than that it's redundant, or is it just the idea that we  
4 will have a code imposed that you object to?

5 MR. PENDERGRASS: Quite honestly,  
6 specifically what bothers me about this code is I see an  
7 attempt by many of the board members -- I don't know if  
8 it's a majority, but they are powerful influences on this  
9 Process Servers Review Board that were for licensing at  
10 the last session, and they seem to be trying to license us  
11 through this certification program that is set up to be  
12 nothing more than a statewide blanket order.

13 MR. ORSINGER: Okay. Now, that's an  
14 objection to adopting a code at all.

15 MR. PENDERGRASS: Correct.

16 MR. ORSINGER: But assume for a second that  
17 we want to consider this code. Are there specific parts  
18 of this code, not the code as a concept or the code in its  
19 totality, but specific parts of this code that bother you  
20 more so than other parts?

21 MR. PENDERGRASS: Nearly every single item  
22 in the code. I mean, I have no problem with being  
23 respectful when I serve papers.

24 MR. ORSINGER: Okay. Well, I understand.  
25 In other words, your objection is to the entirety and not

1 to specific sections of it?

2 MR. PENDERGRASS: Right. I'm afraid that  
3 the board is going to --

4 CHAIRMAN BABCOCK: I think he said both.

5 MR. ORSINGER: Okay. That's fine. Thank  
6 you.

7 MR. PENDERGRASS: -- enforce these --

8 MR. ORSINGER: Okay. So, now, probably we  
9 ought to remember that we have another issue here about  
10 how we're going to enforce this if it's adopted, and some  
11 people might decide that maybe they don't like some of  
12 these generalities once they see what the enforcement  
13 mechanism is, but it seems to make sense to me to have  
14 some discussion or a vote or a show of hands or whatever  
15 on this whole idea of whether to adopt the code, and if  
16 so, do we want to do it verbatim or whether we want to  
17 consolidate paragraphs or cut some things out.

18 CHAIRMAN BABCOCK: Yeah. Let's talk about  
19 that a little bit. Justice Jennings.

20 HONORABLE TERRY JENNINGS: Can I ask the  
21 gentleman a question? How will this negatively affect  
22 your business?

23 MR. PENDERGRASS: I could be -- I have had  
24 complaints filed against me from the general public by  
25 people who are just mad that I got them served. I have

1 not broken any laws. I have had the cops called on me  
2 when I am sitting out in front of somebody's house. The  
3 cop shows up and they say, "What are you doing?"

4 I say, "I'm trying to serve a paper, waiting  
5 for this guy to come home." The cop knocks on the door  
6 and says, "Mr. Johnson, this guy is out here with some  
7 papers." I served the guy, and the cop had made a  
8 determination that I'm not doing anything wrong. The  
9 board is going to be able to take those complaints and  
10 re-review what the police officer has already shown up and  
11 done and possibly might revoke my certification on  
12 unfounded complaints, which I believe there are some  
13 instances of certification being revoked already on  
14 unfounded --

15 CHAIRMAN BABCOCK: Judge Lawrence.

16 HONORABLE TERRY JENNINGS: Why would they do  
17 something like that?

18 MR. PENDERGRASS: There are some negative  
19 influences on the board, is my only opinion.

20 HONORABLE SARAH DUNCAN: So you are  
21 certified?

22 MR. PENDERGRASS: I am certified with an H  
23 designation.

24 CHAIRMAN BABCOCK: Judge.

25 HONORABLE TOM LAWRENCE: For the record, I

1 would like to point out that when you're saying Rule 103  
2 you also mean Rule 536, correct?

3 MR. ORSINGER: Yes, and would you append  
4 that, because there is an interface between this first  
5 part of the rules and the latter part of the rules that I  
6 didn't explain?

7 HONORABLE TOM LAWRENCE: Well, 536 is kind  
8 of a recodification of 103 for the justice courts, so  
9 although you really don't have to change 536 to make it  
10 consistent with 103, it makes sense to do that; and I  
11 think we would want to keep those consistent; but my  
12 question is, if this code is aspirational, if it merely is  
13 a statement saying that we want to operate professionally  
14 and politely and do a good job and there is no penalty,  
15 well, that's one thing; but what I'm not understanding is  
16 what is the purpose of doing this? Is there another  
17 purpose? Is there going to be a link to this code and  
18 enforcement, or is someone going to ask the Court after  
19 this code has been adopted, okay, the code has been  
20 adopted, we want an order saying that from now on we can  
21 use a violation of the code to go against or investigate  
22 or withdraw the certification? Is that the next step, or  
23 is this merely aspirational and that's going to be the end  
24 of it?

25 MR. WEEKS: If I may.



1 CHAIRMAN BABCOCK: Yeah.

2 MR. WEEKS: It's already addressed in the  
3 Court's miscellaneous docket that the board has the  
4 authority to revoke certifications for good cause or --  
5 and sort of where we have been with that and we're asking  
6 for further clarification on that in these rules, that the  
7 propositions that we would have would be to not maybe  
8 summarily revoke but simply suspend or certify or issue a  
9 letter of reprimand or whatever the case may be. I would  
10 certainly not anticipate that every certain situation  
11 would be a revocation flat out of certification.

12 We haven't revoked anybody's certification  
13 yet. We have temporarily revoked one person's  
14 certification because it's a pending criminal  
15 investigation going on that we felt was very material.  
16 He's still serving process under a local standing order,  
17 so we haven't impaired his ability to make a living.

18 HONORABLE TOM LAWRENCE: So this is going to  
19 be good cause. If you violate any provision of this code,  
20 that's going to constitute good cause and that can be  
21 revoked.

22 MR. WEEKS: Or suspended or a letter of  
23 not -- or no action. It would be ability for the board to  
24 consider the complaint, and a perfect example is -- to  
25 follow up, is one that we've already had this come before

1 our board recently wherein the police were called on the  
2 process server and the folks filed a complaint. They came  
3 to our board, filed numerous sworn complaints, had an  
4 attorney and, you know, exhaustive issues about knocking  
5 on the door too late, and they were, you know, being  
6 impolite and rude and whatever. We investigated, we put a  
7 lot of hours into investigating that specific complaint.  
8 We interviewed the police officers, the witnesses,  
9 everybody, and we found the complaint unsubstantiated and  
10 we found it unfounded and we dismissed it. It was a  
11 reasonableness standard.

12 HONORABLE TOM LAWRENCE: Can I ask a  
13 question on (15)(i), page six, "A CPPS shall not engage  
14 the services of a CPPS who is on inactive status or whose  
15 process server certification to deliver process has been  
16 suspended or terminated"? Why would that be in there if  
17 it would be legal for him to serve process under court  
18 order?

19 MR. WEEKS: Well, if he had been suspended  
20 under our board and we had -- it rose to the level that we  
21 suspended his certification, we would not want that  
22 person -- that person, really, there would be good cause  
23 and would be findings of our board that that person should  
24 not -- and we have been asked already to notify the local  
25 courts when our board takes an action of a revocation or

1 suspension of a person that the local court is notified  
2 about our complaint here in Austin of what's going on.

3 HONORABLE TOM LAWRENCE: But the Supreme  
4 Court says that it is okay to serve process if a court  
5 approves it. Well, you're saying in essence that that's  
6 not correct anymore, that if that person has been  
7 suspended by your board that they no longer -- that you're  
8 going to also suspend the person that hires them. You're  
9 taking punishment against somebody that may legally be  
10 able to serve process under a court order.

11 MR. WEEKS: Well, we would not necessarily  
12 suspend them or decertify them, but it would say you  
13 shouldn't use those services of a person that has been  
14 suspended or decertified by our board.

15 HONORABLE TOM LAWRENCE: Well, but if it's  
16 in your rules that a violation constitutes good cause that  
17 you can then -- you know, it seems to me you're penalizing  
18 somebody for doing something which is otherwise legal.

19 MR. WEEKS: Otherwise allowed by a judge,  
20 you certainly have that local jurisdiction to do that.  
21 Absolutely correct.

22 CHAIRMAN BABCOCK: Judge Sullivan, did you  
23 have a question? And then Professor Hoffman.

24 HONORABLE KENT SULLIVAN: No.

25 CHAIRMAN BABCOCK: Professor Hoffman.

1                   PROFESSOR HOFFMAN: I have got two  
2 questions. One is to get a little more history about what  
3 was proposed to the Legislature and they chose not to do.  
4 In other words, what regulation was that? The second  
5 question I had is --

6                   MR. ORSINGER: I'll get Carl to do this.

7                   PROFESSOR HOFFMAN: The second question I  
8 had is this is kind of a bizarre situation that I feel  
9 like I'm coming into and the horse is a bit out of the  
10 barn on, but we have got a Supreme Court order that says,  
11 you know, this is what we need for certification. There  
12 will be this statewide process on that, and then you go to  
13 the Harris County website and it says, "We're not going to  
14 listen to you," and so I'm wondering what's going on in  
15 Harris County and either what does Harris County know that  
16 we don't know and then, secondly, what does Harris  
17 County -- why do they think they can do this?

18                  MR. ORSINGER: Well, no, the Supreme  
19 Court --

20                  PROFESSOR HOFFMAN: And I'm from Houston. I  
21 don't get it.

22                  MR. ORSINGER: The Supreme Court has allowed  
23 them to do that, but one of the proposals in here is to  
24 eliminate the special treatment of Harris County as far as  
25 the educational requirements.

1                   PROFESSOR HOFFMAN: So they have been given  
2 an exemption right now?

3                   MR. ORSINGER: Well, that's right because  
4 when you first put things in place you're building a  
5 consensus.

6                   HONORABLE NATHAN HECHT: The second question  
7 is out of order.

8                   (Laughter)

9                   PROFESSOR HOFFMAN: That is for sure.

10                  MR. WEEKS: If I may answer the first one --

11                  CHAIRMAN BABCOCK: Yeah.

12                  MR. WEEKS: -- exactly on the legislation,  
13 and for those of you that don't know, when the order was  
14 initially activated in July of last year there was 1,300  
15 and -- I can't remember the exact number or so, private  
16 process servers that were on the Harris, Dallas, and  
17 Denton County orders that pretty much met the standards of  
18 what the Supreme Court was going to adopt. Those folks  
19 were grandfathered on the order. Okay. So all of those  
20 people you're talking about in Harris County that were on  
21 the Harris County order were automatically grandfathered  
22 under the Supreme Court order because the Harris County  
23 standards, if you will, criminal history background check,  
24 training, and those things, were the same standard as what  
25 the Court basically adopted in their miscellaneous docket

1 order.

2                   Now, with regard to the legislative history  
3 in your first question, I was very involved the last two  
4 sessions, and specifically this last one, and I really  
5 needed to clarify one thing that Mr. Orsinger made in his  
6 opening statement that was a little bit incorrect. For 10  
7 sessions now the private process server industry,  
8 literally 20 years, has tried to bring forward a statewide  
9 licensing bill to get the statewide authority for private  
10 process servers. We never until this last session had the  
11 cooperation or the support of the constables association,  
12 and this last time the constables did get on board and  
13 supported the board, SB 165, that Mr. Pendergrass earlier  
14 referenced. It was brought forward by Senator Wentworth  
15 in the Senate, SB 165, and it was co-sponsored by Chairman  
16 Hartnett in the House side.

17                   It was a good bill. We put a lot of work  
18 into it, and we would have gone -- the bill provided for  
19 pretty much similar basic requirements of the order, and  
20 we would have been under Texas Department of Licensing and  
21 Regulation. TDLR is where process servers would have  
22 been. There was some what folks thought were erroneous  
23 provisions for requirements of insurance and those type of  
24 things that folks objected to because of the cost. They  
25 thought it was going to be a thousand dollars a year or

1 whatever to be a licensed process server because there was  
2 a requirement that a process server under the TDLR issue  
3 of the bill, if you will, 165, would have been required to  
4 have insurance.

5           Through negotiations at the very end that  
6 bill was dropped. The constables for the first time,  
7 JPCA, 2,700-member, very powerful organization in the  
8 state of Texas, supported this bill for the first time in  
9 20 years, SB 165. It would have passed, but there were a  
10 group of folks, private process servers that thought that  
11 the provisions of that bill were too erroneous, and it was  
12 too much government regulation, and that's what killed SB  
13 165, private process servers.

14           I wanted to be clear on Mr. Orsinger's  
15 statement. It was not the constables. This last time  
16 around SB 165 would have passed if it were not for a group  
17 of private process servers that didn't want any form of  
18 regulation or oversight or control over the private  
19 process serving business. They had been basically free to  
20 run and do whatever they wanted to do for the last 20  
21 years or whenever private process servers were authorized.

22           MR. ORSINGER: With court approval, I might  
23 add.

24           MR. WEEKS: With court approval, you might  
25 add, yes.

1                   CHAIRMAN BABCOCK: Mr. Pendergrass had his  
2 hand up and then Bill. Yeah, go ahead.

3                   MR. PENDERGRASS: That is true. The  
4 constables have always opposed the licensing bills in the  
5 past. They have always pretty much been the ones that  
6 killed it. I have also been there, too, and fought  
7 against these bills but for different reasons than the  
8 constables.

9                   Initially when the Supreme Court wrote its  
10 order it left the word "writs" into what we would be able  
11 to serve. The constables saw that as a threat. The  
12 argument was made that process servers were going to start  
13 taking possession of children and property and doing all  
14 this stuff that we don't want to do. It would be silly  
15 for us to get into that. That forced the constables to  
16 the table to support a licensing bill. When the licensing  
17 bill failed the Supreme Court changed that and took the  
18 word "writs" out before it enacted the certification  
19 program.

20                  CHAIRMAN BABCOCK: Bill Dorsaneo and then  
21 you.

22                  PROFESSOR DORSANEO: I'm probably behind the  
23 curve here, but is the Supreme Court order we're talking  
24 about the one of June 29th, 2005?

25                  MR. ORSINGER: There are two of them on that



1 date, and if you're looking in this book, that's them.

2 PROFESSOR DORSANEO: Okay. Well, what part  
3 of this order gives this board rule-making power? My  
4 first question. Then my second question would be it does  
5 say in paragraph (4) that certification may be revoked for  
6 good cause, but it doesn't say who does that, and I need  
7 answers to those questions before I can get started.

8 MR. WEEKS: If I may, we were just making --  
9 we're not -- as our board have never felt we had any  
10 rule-making authority. We make recommendations to the  
11 Court. Our recommendations for this code of conduct and  
12 the other proposals you have before you today were  
13 submitted to the Court for the Court to adopt or issue, if  
14 you will, or promulgate, and the Court has submitted them  
15 to this body for further consideration and study, not our  
16 board would not be the authority.

17 CHAIRMAN BABCOCK: Yes, sir. Would you  
18 identify yourself?

19 MR. MCMICHAEL: Dana McMichael, Assured  
20 Civil Process Agency, 19 years in the industry, and I am  
21 the ringleader of the people, this group of process  
22 servers that's been killing the licensing bill every  
23 session for the last eight sessions. I'm very proud of  
24 that fact.

25 CHAIRMAN BABCOCK: So you should be in the

1 record as ringleader?

2 MR. MCMICHAEL: Ringleader works for me.

3 MR. ORSINGER: Okay.

4 MR. MCMICHAEL: There is a fundamental  
5 conflict on the perception of certification program, and  
6 this is where the real problem lies. The PSRB is behaving  
7 as though the orders that established them created them as  
8 a regulatory commission. The very fact that you're  
9 considering this proposal for a code of conduct is  
10 strongly indicative of the fact that they feel like they  
11 have the authority to impose standards that were not in  
12 the Court order upon the process serving community.

13 They don't have that authority. The section  
14 that was referred to earlier about revoking certifications  
15 for good cause, that section says, "including convictions  
16 of felonies and misdemeanors involving moral turpitude."  
17 Now, I don't have to explain to this distinct body that  
18 when the word "includes" is used in a statute it means  
19 specifically the items that follow. This provision, the  
20 second half of that, stipulates that if a process server  
21 who has been certified is subsequently convicted of a  
22 felony or misdemeanor involving moral turpitude that  
23 immediately report it to the board, they immediately stop  
24 serving process. That is the good cause.

25 From this not ambiguous term "good cause"

1 has sprung all this issue about how to file complaints,  
2 how to investigate complaints, what standards do we use to  
3 say, "yes, you can serve," "yes, you can suspend."

4           Mr. Weeks is telling you that they don't  
5 believe that they have rule-making authority and yet where  
6 is the authority to suspend that one person, where is the  
7 authority to investigate those people, where is the  
8 authority that they have? They're asking you to give them  
9 the authority, but they've already done it. They've got  
10 the cart before the horse.

11           The fundamental conflict is the vast  
12 majority of the process serving community views the  
13 certification as exactly what the Supreme Court set forth,  
14 and that is a statewide blanket order. Now, I have over a  
15 hundred blanket orders in counties around the state of  
16 Texas. I'm not certified. I will never submit an  
17 application for certification under this board. I don't  
18 trust it, and I would expect probably to be disapproved if  
19 for no other reason than the fact that I am the ringleader  
20 that killed their licensing.

21           The complaints have no basis in these  
22 orders. They don't have the authority to investigate  
23 complaints. They don't have the authority to even create  
24 a committee on investigating complaints. They are a  
25 statewide blanket order.

1                   Now, with my 105 plus blanket orders around  
2 the state of Texas most of them -- and this is a fact,  
3 like 99 of those blanket orders it says "Assured Civil  
4 Process Service Agency, its agents or officers thereof,  
5 not less than 18 years of age, not a party to the suit  
6 that they will serve process in." The judge signs it and  
7 sends it back, done deal. On the four or five that aren't  
8 worded that carte blanche "Go ahead and do it, we don't  
9 care. If you're of age, if you're not a party to the  
10 suit, you satisfy our understanding of Rule 103."

11                   The others started throwing in -- like Bexar  
12 County, insurance, Harris County, Dallas County, Denton  
13 County, training programs, and it began to muddy up the  
14 industry which used to be basically a Federal Rule 4  
15 qualification, age, not a party to the suit, but they  
16 added the fact -- they gave the judges the authority to  
17 look at it and say "yes" or "no" on the guy, sort of a  
18 thumb up, thumb down, on somebody who is otherwise  
19 qualified by a Federal Rule 4 qualification.

20                   These handful of courts muddled the whole  
21 system, created the disparity in authorization of process  
22 servers, which is a very highly identified quote in the  
23 paper work that we're dealing with today, and so in order  
24 to make it possible to simply fill out one application and  
25 get a blanket order that will satisfy all 254 counties in

1 Texas the certification program was created. With its  
2 inception a person who is certified by following the basic  
3 regulations, the application format, the PSRB is supposed  
4 to rubber stamp that application and you go off and serve  
5 papers and you don't have to worry about satisfying  
6 blanket orders in 254 different counties. That's what  
7 this program is. The PSRB is behaving as though they now  
8 have the authority to regulate the industry, and over half  
9 the industry has chosen not to get a certification. I,  
10 for one. Yes, sir.

11 HONORABLE TERRY JENNINGS: Are members of  
12 the board still in the business?

13 MR. MCMICHAEL: I think there is only, what,  
14 two process servers on the board?

15 MR. WEEKS: Three of us are in the business.

16 HONORABLE TERRY JENNINGS: I mean, do  
17 you-all have some fear that some people are going to use  
18 this in such a way to put you-all out of business and so  
19 they can get other business or --

20 MR. MCMICHAEL: I have a fundamental  
21 position on the whole thing, irrespective of my personal  
22 opinion of what might happen if I were to apply. Yes, I  
23 believe that there is a possibility, given the current  
24 staff on the PSRB, that there will be repercussions  
25 against me personally because they are the primary

1 proponents of the licensing bills, I am the primary person  
2 who has killed those bills every session.

3           The industry doesn't need to be licensed, as  
4 Mr. Pendergrass has already explained. Without a license,  
5 without a 103 order, I can serve every form of subpoena in  
6 Texas whether it's from a justice court, county court,  
7 district court, Federal court. I can serve all Federal  
8 process. I can serve all citations and process issued by  
9 the Attorney General's office child support enforcement  
10 division, all process that's issued in other states for  
11 service. I can do that because I'm 18 and not a party to  
12 the suit. I could have any number of convictions, I  
13 could have no education by taking a training course. It  
14 doesn't matter if I'm 18 or 78. It's a Federal Rule 4  
15 qualification.

16           All of that process, and so this PSRB is  
17 trying to create a regulatory commission and govern us  
18 because they couldn't get it in Senate Bill 165 or all the  
19 other equal bills in prior sessions. It's irrelevant.  
20 All of this is irrelevant because the vast majority of the  
21 process that's issued out there, anybody off the street  
22 who is 18 years of age and not a party to the suit can  
23 already serve it.

24           CHAIRMAN BABCOCK: Richard, do you have a  
25 question for --

1 MR. ORSINGER: No, but I wanted to say two  
2 things.

3 CHAIRMAN BABCOCK: Okay.

4 MR. ORSINGER: One, I wanted to say, David,  
5 that I think that the legal basis for your argument that  
6 "including" limits the grounds for denial of certification  
7 or removal of the certification is not a good legal  
8 argument. I just happened to bring a case here today that  
9 involves statutory interpretation, State vs. Basilas,  
10 which I'll show to you, but it refers to the Code  
11 Construction Act here in Texas about how you interpret  
12 statutes and says that "'includes' and 'including' are  
13 terms of enlargement and not of limitation or exclusive  
14 enumeration, and use of the terms does not create a  
15 presumption that components not expressed are excluded,"  
16 so I think there has been a traditional rule of law --

17 CHAIRMAN BABCOCK: Everybody follow that?

18 MR. ORSINGER: There is a traditional rule  
19 of law that to start a list makes the list exclusive, but  
20 interpreting Texas statutes it doesn't. Now, admittedly  
21 we're interpreting a court rule here and not a statute, so  
22 does that apply, I don't know.

23 Secondly, I think there is a complete  
24 difference in perspective here. I think the people that  
25 would like to see this industry as a profession, like,

1 say, real estate appraisers were struggling for so many  
2 years to -- you know, they're kind of quasi under the  
3 authority of Federal law now, but they're still not  
4 licensed as such necessarily. They would like to see a  
5 profession develop, a sense of profession. They would  
6 like to have professional standards, they would like to  
7 have a grievance mechanism, they would like to have the  
8 ability to punish and remove from their field the people  
9 that are violating these standards, just like lawyers and  
10 doctors and psychologists and everyone else.

11           There is another perspective, though, which  
12 is that the Federal district courts around the country  
13 don't require this professionalism. All they require is  
14 that you not be a child, that you not be a minor, and that  
15 you not be a party to the lawsuit, and that's working in I  
16 don't know how many courts because a great number of the  
17 state courts have that approach. So from that perspective  
18 this amendment and this order that the Supreme Court  
19 granted is nothing but just like a court approval to serve  
20 process on steroids. Instead of having to get the order  
21 out of each judge, you get the order out of the Supreme  
22 Court and that substitutes for an order from each judge,  
23 and from that perspective that's really all this did.

24           All this did is to give you one Supreme  
25 Court order that lets you serve in all courts instead of



1 going around to each court and getting an order from each  
2 court or in some courts, like Harris County, you can get  
3 on the list if you meet all their requirements to be on  
4 their list.

5           Those are both valid perspectives, and  
6 we're -- and I have always felt that we're being asked to  
7 legislate in an area where the Legislature wouldn't  
8 legislate, and if this experiment is less than a year old  
9 -- and I don't personally think that the members of the  
10 board are going to refuse to certify someone because of  
11 their political position. If I find that out I will be  
12 very disappointed, not that my opinion makes any  
13 difference, but I think these people have been appointed  
14 by the Supreme Court, and we can assume that they will  
15 discharge their responsibilities in a fair manner.

16           I think that it's kind of come to us because  
17 we're the only venue that's responsive as to whether this  
18 idea of making this a profession with professional  
19 standards and professional enforcement is something we're  
20 going to do or the Supreme Court is going to do under its  
21 rule-making authority or whether the Supreme Court is  
22 going to just simply allow blanket approvals to serve  
23 private process and get on with business as usual, and I  
24 guess something I learned this morning is a whole lot of  
25 the process that's served in this state is not served

1 under the authority of this order already. So if that's  
2 broken, then a whole lot of what's going on is broken, and  
3 to me it's just a a very simple position, or for us a  
4 choice, whether we want to move forward with this idea of  
5 professionalizing the field and regulating it under the  
6 de facto rule-making authority of the Supreme Court or  
7 whether we just want to say this is just a super-powered  
8 103 order and let's move on down the road.

9 CHAIRMAN BABCOCK: Bill, then Skip, and then  
10 Justice Duncan and then Buddy.

11 PROFESSOR DORSANEO: Richard, all these  
12 appendices that are attached, they came from the --

13 MR. ORSINGER: Board?

14 PROFESSOR DORSANEO: Yeah.

15 MR. ORSINGER: Appendix B would be the  
16 procedures by which you would decide to investigate a  
17 complaint; and Appendix C is the educational curriculum,  
18 which is semi already articulated by the Supreme Court;  
19 and Appendix D is a policy statement, which I'm not sure  
20 exactly how it fits into the whole picture; but what's  
21 happened here, Bill, is that the board has tried to put  
22 some concrete or semiconcrete standards out there to deal  
23 with what I consider to be the good cause issue on  
24 certification and decertification.

25 PROFESSOR DORSANEO: But now they're

1 bringing it to the committee to ask us to ratify --

2 MR. ORSINGER: No. No.

3 PROFESSOR DORSANEO: -- since they didn't  
4 have authority to promulgate it to begin with.

5 MR. ORSINGER: They took it to the Supreme  
6 Court. They did not come to the committee.

7 PROFESSOR DORSANEO: All right.

8 MR. ORSINGER: These gentlemen are not here  
9 because they want to be here. They are here because they  
10 submitted it to the Supreme Court, and the Supreme Court  
11 bounced it down to us.

12 PROFESSOR DORSANEO: Okay.

13 MR. ORSINGER: And so the Supreme Court is  
14 now asking us to build a record and make a recommendation  
15 about whether to go with what the board says or reject  
16 what the board says or edit what the board says.

17 PROFESSOR DORSANEO: Well, we're here before  
18 the full committee here. I mean, did your subcommittee go  
19 through this and does it have --

20 MR. ORSINGER: You know, Bill, my  
21 subcommittee, my subcommittee's view is that they don't --  
22 they are not sufficiently conversant with the issues to be  
23 able to reach a recommendation to make to the full  
24 committee.

25 PROFESSOR DORSANEO: So the full committee

1 ought to go through this inch by inch?

2 MR. ORSINGER: Well, no, that was not Chip  
3 Babcock's intent when he referred it to us, but you can  
4 only work with your subcommittee to the extent that  
5 they'll work with you, right, and you're on that  
6 subcommittee, Bill.

7 (Laughter)

8 PROFESSOR DORSANEO: I would never --

9 MR. ORSINGER: Right. Okay.

10 CHAIRMAN BABCOCK: All right. You guys quit  
11 bantering with each other. Skip.

12 MR. WATSON: Richard, I think you're close  
13 to doing it, but for those of us with -- that aren't as  
14 close to this as you are and that don't have your  
15 attention span, can you please take the policy  
16 considerations that you were just talking about and for me  
17 bring them down in two or three sentences to the decision  
18 before us today? I got the policy, but I don't get what  
19 we're being asked to decide, to implement either way on  
20 that policy.

21 MR. ORSINGER: I think what we're being  
22 asked to do is to put more concrete standards for the  
23 definition of good cause and some procedures in place by  
24 which investigations are done that result in a good cause  
25 determination that result in either approval or rejection

1 of an application or removal of a -- or suspension of a  
2 certification.

3 MR. WATSON: Now, are we voting on to vote  
4 yes or no on that, what you just said?

5 MR. ORSINGER: Well, literally we're here to  
6 decide whether we want to approve a work product that's  
7 been forwarded to the Supreme Court by a board that had  
8 input, but, you know, before my subcommittee spends 50  
9 hours editing this --

10 MR. WATSON: I understand.

11 MR. ORSINGER: -- I would like to know  
12 whether the committee even wants to spend the time on  
13 that, because it's a lot of time, and it's not anything  
14 that practicing lawyers or law professors are necessarily  
15 expert at.

16 MR. WATSON: Okay. You're getting where I  
17 need to go. Now, are we being asked to then give you sort  
18 of a proceed or don't proceed because we like the idea or  
19 we don't like the idea kind of vote?

20 MR. ORSINGER: That's Chip's call.

21 MR. WATSON: Where are we, Chip?

22 CHAIRMAN BABCOCK: Well, it's never my call,  
23 but the letter that I received --

24 MR. WATSON: I understand.

25 CHAIRMAN BABCOCK: -- from the Supreme Court

1 asked us to consider without limitation, for example, the  
2 proposed code of professional conduct, which is Appendix  
3 A, and then, you know, the other appendices and the  
4 request of the board to expand its jurisdiction.

5 MR. WATSON: Did it really say without  
6 limitation?

7 CHAIRMAN BABCOCK: There is no limitation on  
8 the letter.

9 MR. WATSON: Oh, god.

10 CHAIRMAN BABCOCK: So what I think Richard  
11 -- and I agree with him -- is winding up to do shortly, is  
12 to suggest after full discussion whether we have a vote on  
13 is this really a good idea to --

14 MR. WATSON: Good.

15 CHAIRMAN BABCOCK: -- go full bore and then  
16 if it is a good idea, we say it is a good idea, and the  
17 Court still wants us to, then to slug through Appendix A  
18 and say, man, this is great or it's not great or it needs  
19 to be modified.

20 MR. WATSON: Thanks. I'm sorry, Richard. I  
21 just -- I wasn't sure where we were or where we were  
22 trying to go.

23 CHAIRMAN BABCOCK: In our typical snail-like  
24 fashion. Justice Duncan.

25 HONORABLE SARAH DUNCAN: It seems to me

1 there are some discrete questions that we need to vote on.  
2 The first question I have is should the certification  
3 experiment be continued or should we go the way of the  
4 Federal system. The second question is if we're going to  
5 continue --

6 CHAIRMAN BABCOCK: Judge Benton cannot hear  
7 you, Justice Duncan.

8 HONORABLE SARAH DUNCAN: Sorry.

9 MR. JACKSON: We heard the first question  
10 and the second question, but we didn't hear the other  
11 part.

12 HONORABLE LEVI BENTON: If you would stand  
13 to make your argument, perhaps.

14 HONORABLE SARAH DUNCAN: Okay, yes, Judge,  
15 I'll be happy to do that. Question one, should the  
16 certification experiment be continued or should we go the  
17 way of the Federal system. If we're going to continue the  
18 certification experiment, should there be a code of  
19 conduct.

20 Professor Carlson let me see one of the  
21 letters of complaint about the board, and if -- and I have  
22 to say after reading that letter, if I were on the board I  
23 would want a code of conduct because a lot of --  
24 apparently a lot of the criticism of the board is that it  
25 is acting beyond the powers enumerated in the

1 miscellaneous docket orders.

2           So if we're going to have a code of conduct  
3 it seems to me the first question that has to be asked is  
4 who is going to have the power to revoke a certification.  
5 One of my concerns about the board doing so is that as far  
6 as I know there is no review process, which makes me very  
7 uncomfortable. Or should the Court be the entity that has  
8 the power to revoke.

9           MR. ORSINGER: Or a district judge?

10           HONORABLE SARAH DUNCAN: Or a district  
11 judge. See, I don't think of all of them. And then --

12           HONORABLE TOM GRAY: In Harris County, that  
13 wouldn't have approved them in the first place.

14           HONORABLE SARAH DUNCAN: Yeah, the Harris  
15 County issue has to be addressed.

16           MR. ORSINGER: You know, a natural choice is  
17 the judge whose court issued the process that's in  
18 dispute. That's a natural choice in my book.

19           HONORABLE TOM GRAY: Right.

20           HONORABLE SARAH DUNCAN: Well, that's kind  
21 of loaded with baggage, too, but if there is going to be a  
22 code I feel very strongly that it should be modeled after  
23 the old code of professional conduct, and it should be  
24 divided into those things that are aspirational and cannot  
25 be the subject of a disciplinary action, those that are



1 rules that are subject to discipline, and then the whole  
2 disciplinary procedure, because there are things in here  
3 that -- treat with respect all persons? My idea of  
4 respect and Angie's idea of respect might be very  
5 different, and I don't think that's enforceable.

6 CHAIRMAN BABCOCK: Angie says you guys are  
7 like that.

8 HONORABLE SARAH DUNCAN: I don't think that  
9 should be -- that should be aspirational. That's my  
10 pitch.

11 CHAIRMAN BABCOCK: Buddy and then Frank and  
12 then Carl.

13 MR. LOW: I think of this just like our own  
14 code of professional conduct, and when we go through one  
15 it takes a lot of review, committee work, and when you  
16 start drawing it you better be very careful. For  
17 instance, here "engage in conduct that's not a  
18 misrepresentation." Well, we just got his service  
19 processer right there, and there's sometimes that's a  
20 misrepresenttation, that you want to see the doctor and  
21 you serve him. Sometimes you have to do things when  
22 people -- so I'm not just picking on that. I'm saying we  
23 have to be very, very careful that these things are  
24 studied out, each one of them, and requires a lot of study  
25 if we're going to have one, and that's basically it.

1 CHAIRMAN BABCOCK: Okay. Frank, will you  
2 yield to Justice Brister for a moment?

3 MR. GILSTRAP: Certainly.

4 HONORABLE SCOTT BRISTER: I will wait my  
5 turn.

6 CHAIRMAN BABCOCK: No, no, no. You always  
7 get to go to the end of the line.

8 MR. GILSTRAP: I'll pass, Chip.

9 HONORABLE SCOTT BRISTER: Just briefly, the  
10 reason -- the rule has always been 103. You come in, want  
11 to serve, sign the order and you can serve. If I didn't  
12 want you to serve it, no. That was it. That's what 103  
13 is. I and other judges in Harris County got tired of  
14 doing six of those every week, so we did them countywide  
15 and somebody with the county said, "Everybody does it and  
16 if we didn't like what you did, you don't do it."

17 And then all these process servers got tired  
18 of having to get that in Harris County and Fort Bend  
19 County and Dallas County and said, "Why doesn't the  
20 Supreme Court do this"? That's why we have the rule.  
21 It's just so you can grant it, and if you want to take it  
22 back, take it back.

23 Now, the licensing and administrative  
24 remedies, and this is what you've got to do for the  
25 procedures if you want to -- that's never been the deal on

1 private process servers. If you want to do that, that's  
2 fine, but generally those kind of investigations are where  
3 there is some expertise. My position as a trial judge was  
4 always anybody wants to serve process, as long as they're  
5 not a party to the case they ought to do it; and this  
6 thing about, well, they can't be a felon, I said, look,  
7 some of these people that need to be served are felons.  
8 It may take one to serve them.

9           It's not that much expertise in this, and  
10 the problem was in Harris County 15 years ago it took you  
11 six weeks to get service by a constable; and you could  
12 call the constable and they had no idea where it was, no  
13 idea when it was back. I said, look, we just need some --  
14 anybody can do it, and if you do it bad, I'm going to take  
15 it back. Remember, the people receiving process have a  
16 strong incentive to complain. If they didn't get it and  
17 get a default for \$2 million they're going to say  
18 something, so it's going to show up and, you know, if  
19 you -- I would think twice about a whole big process about  
20 people who think somebody is being rude. Then we have got  
21 to have this whole hearing procedure and then they're  
22 going to come up to us and then we're all going to get  
23 sued because it's not a good process. Remember what this  
24 was is just if a judge signed it, you could do it; and if  
25 a judge took it back, it was gone, and that was it. Keep

1 that in mind on where you want to go.

2 CHAIRMAN BABCOCK: Thank you. Frank, back  
3 to you.

4 MR. GILSTRAP: Well, somebody just help  
5 refresh my recollection, and we're not writing on a clean  
6 slate. We do have the comment after Rule 103 which is  
7 something more than just a statewide Federal regime and  
8 does have -- you know, does seem to suggest this whole  
9 where we're going with this thing. What was the genesis  
10 of that? I was here, but I don't remember.

11 HONORABLE NATHAN HECHT: Well, just, I mean,  
12 Scott basically set it out, and that is that there was --  
13 there were essentially no requirements or they were court  
14 by court by court and then courts in Harris County and  
15 Bexar County and Dallas County and Denton County wanted to  
16 not have to look at those every week and have a general  
17 clearinghouse, a general certification system so they  
18 didn't have to fool with anything.

19 And some judges, including I think Judge  
20 Lindsay in Harris County, but also others, felt like there  
21 should be standards and that there should be a fairly high  
22 standard of reliability and credibility involved in  
23 process serving; and so everybody, all the judges went off  
24 and did their own thing; and the process servers were  
25 complaining that they had not -- they had to go around and

1 comply with all these different requirements county by  
2 county by county and why should they have to do that when  
3 the issue was really statewide. As Richard pointed out  
4 earlier, you know, a Bexar County case may have defendants  
5 all over the state or maybe even all over the country, and  
6 so you're serving elsewhere, and so why should the Bexar  
7 County judges be deciding who can serve process in  
8 Texarkana.

9           And so to solve all those problems this  
10 setup was made to have a statewide clearinghouse and get  
11 on the list, and no judge can turn you down. Then if the  
12 judge out in Kenedy County wants to put somebody -- have  
13 somebody else serve process, then he can do that.

14           MR. GILSTRAP: But in the process there was  
15 a certification revocation and good cause mechanism that  
16 was adopted?

17           HONORABLE NATHAN HECHT: Well, there's got  
18 to be some way to get on the list.

19           MR. GILSTRAP: I understand, and so that's  
20 kind of -- we're playing that out now.

21           HONORABLE NATHAN HECHT: Yeah.

22           MR. GILSTRAP: What is certification,  
23 revocation, and good cause, what are the standards for  
24 that. That seems to be where we're going with that.

25           HONORABLE NATHAN HECHT: And, you know, the

1 trial judges felt differently about that. Judge Lindsay  
2 took a very strong position that there had to be training  
3 and a particular kind of training and background checks  
4 and the fee paid and so on. Other of the judges in Bexar  
5 County thought there should be an insurance component or  
6 bonding. The judges in Dallas County didn't agree with  
7 that. So, I mean, it was different views around the state  
8 about how you got on the list, how you got off the list.

9 CHAIRMAN BABCOCK: Carl.

10 MR. HAMILTON: I just have a question. Are  
11 process servers considered to be officers of the court?

12 MR. ORSINGER: I don't know.

13 HONORABLE SCOTT BRISTER: To some degree,  
14 yeah. When you make -- I mean, when you make the return,  
15 that's given special recognition.

16 MR. WEEKS: And if I may, we have had --  
17 that's one of the issues we're trying to get clarification  
18 on, because prior to this we had one court in one county  
19 saying process servers were officers of the court and in  
20 another county if you represent yourself as being an  
21 officer of the court you were in big trouble. It's not a  
22 clear issue, never has been.

23 CHAIRMAN BABCOCK: Judge Lawrence.

24 HONORABLE TOM LAWRENCE: This is at least I  
25 think twice we have brought up this private process

1 certification, and the most extensive discussion was last  
2 year; and as I recall it, and I could be wrong, it seems  
3 like the biggest problem or the biggest issue was the  
4 education, the training, to make sure that there was  
5 sufficient training; and a secondary consideration was the  
6 criminal history, and there were several others, the  
7 bonding and other things that were lesser consideration;  
8 but that was the focus and the main justification for  
9 having a certification process, and the fact that the  
10 Legislature wasn't going to do it; but what we have today  
11 is, for whatever reason, a quantum leap beyond all of  
12 that.

13               We're going way beyond what was the initial  
14 scope of why we needed the certification process and going  
15 to a lot of other issues. I would be more comfortable if  
16 we -- if we initially concentrated on the things that  
17 concerned us initially, which is the education to make  
18 sure that these people have some degree of training and  
19 then maybe to a lesser degree the criminal history, to the  
20 extent that that's significant; and maybe that's not as  
21 significant, but certainly the education, I think you can  
22 make a strong case for that; but there is an awful lot  
23 here that to me is too much too soon.

24               We're fairly new in this process, and I  
25 would like to see them concentrate on the things that

1 concerned us the most last year when we first talked about  
2 this, and these may be necessary at some point, but it  
3 seems like we're getting ahead of the game.

4 CHAIRMAN BABCOCK: Well, with that comment  
5 we'll stew over this over lunch and be back in an hour.

6 (Recess from 12:35 p.m. to 1:36 p.m.)

7 CHAIRMAN BABCOCK: All right. We're back on  
8 the record after lunch, and, Richard, where do you think  
9 we are?

10 MR. ORSINGER: Well, what I would like to do  
11 is kind of get a sense of the committee, but before we do  
12 that, we have the unusual opportunity to get a fiscal note  
13 on this whole code because I did not realize this, but  
14 Carl Reynolds is sitting over there. He's the director of  
15 the Office of Court Administration, and they have more or  
16 less been providing the infrastructure for this board and  
17 no doubt would provide the infrastructure for any kind of  
18 grievance system or comprehensive oversight, and I thought  
19 if Carl is willing to stand up and tell us what kind of  
20 support have you been providing, what kind of time is it  
21 demanding from your department, and if we were to put a  
22 more robust system with procedures and hearings maybe or  
23 investigations or whatever, what kind of demands would  
24 that put on your agency.

25 MR. REYNOLDS: Okay. Nice to see you all.



1 I'm Carl Reynolds. I'm the director of OCA. I have been  
2 there for about a year, and last June I found out about  
3 the Process Service Review Board and the order that said  
4 the OCA will provide clerical support for this new entity.  
5 I didn't have anybody to give that to except for my  
6 executive assistant, and she's the one that's been  
7 staffing the Process Service Review Board for the most  
8 part, and I'd say she spends anywhere from 30 to 50  
9 percent of her time on this. In fact, she has hired a  
10 temporary to help her do some data entry to get a database  
11 together for the PRSB.

12               So that gives you some sense of what we're  
13 dealing with right now. I also have in my office the  
14 Court Reporters Certification Board, which is attached --  
15 it's called administratively attached to OCA. That  
16 happened in 2003 by the Legislature, and that board has a  
17 staff of three, a sort of higher level program person and  
18 a couple of clerical people, and they are in the business  
19 of regulating court reporters and certifying them and  
20 investigating complaints about them and so forth.

21               I would say they are buried with a staff of  
22 three, so I think you would -- I would want to have  
23 something that looks at least something like that to do  
24 the full-blown process service procedure. I also have the  
25 Guardianship Certification Board, which was given to me

1 last session by the Legislature, a new entity that was  
2 created to be housed in my office. It has its first  
3 meeting on May 6th, and I think eventually this group will  
4 see some policy emulations from that body that will be  
5 headed towards the Supreme Court. The Legislature gave me  
6 one person, but they didn't let me hire the person yet.  
7 They passed a law that says I have to ask the board if  
8 they want to tell me who to hire. So all told, I have  
9 four people that are dedicated to certification type  
10 stuff, plus my assistant, who is spending half her time on  
11 the Process Service Review Board.

12               What I'm going to ask the Legislature for  
13 next session is a director to govern a certification  
14 division. I do have a new attorney on board, that's  
15 coming on board, that's going to be dedicated in large  
16 part to these three certification functions, so that will  
17 help quite a bit, but that's not going to be someone going  
18 out and investigating things or anything like that. It  
19 will not be clerical, obviously, so we're trying to get  
20 more of an infrastructure for these new certification and  
21 licensure type functions, but we don't have it yet.

22               MR. ORSINGER: Okay, Carl. Does anybody  
23 have any questions they want to ask Carl Reynolds?

24               Thank you very much.

25               MR. AGOSTO: I have.

1 MR. ORSINGER: Yes.

2 MR. AGOSTO: The certifications that you  
3 handle, are they assigned by the Legislature?

4 MR. REYNOLDS: The other two, yes.

5 MR. AGOSTO: So the Legislature looked at a  
6 bill, passed the bill, and empowered you to handle it?

7 MR. REYNOLDS: The court reporters were a  
8 stand-alone entity and a couple of sessions ago they  
9 attached them to us, as part of their Sunset Bill, I  
10 believe; but the Guardianship Certification Board was part  
11 of Senate Bill 6, a big giant Adult Protective Services,  
12 Child Protective Services Reform Bill with a guardianship  
13 piece to it, but again, legislative.

14 MR. SCHENKKAN: Carl, on the court reporter  
15 model as a go-by, who came up with the standards for what  
16 counts as a good court reporter and for what you can be  
17 kicked out of being a court reporter for, and what is the  
18 process other than the three staff people you have and the  
19 board? What else is there?

20 MR. REYNOLDS: Well, I haven't really lived  
21 through that process too much, but I think that the Court  
22 Reporter Certification Board is similar to what you have  
23 been discussing in that they are expected to give the  
24 Supreme Court things to adopt, so the Supreme Court is  
25 really the rule-making authority, with the CRCB just like

1 it would be for the PSRB. Does that answer --

2 MR. SCHENKKAN: And then are they themselves  
3 making standards and without any -- you said this earlier  
4 was a free-standing agency. Did it have its own statute  
5 then?

6 MR. REYNOLDS: Yeah. It's Chapter 52 of the  
7 Government Code. It's still there. It just now says it's  
8 administratively attached to OCA. I think that they have  
9 some things that they adopt as their own standards and  
10 some things that they propose as rules, but I'm not  
11 entirely clear. Do you know, Jody?

12 MR. HUGHES: I don't.

13 CHAIRMAN BABCOCK: David Jackson.

14 MR. JACKSON: We originally started out in  
15 1978 under the Office of Court Administration and then a  
16 few years later we were kind of separated out on our own  
17 and operated on our own for several years and then through  
18 Sunset they thought it would be more cost feasible to  
19 incorporate us back into the Office of Court  
20 Administration, and our original model was developed from  
21 our national association guidelines and then tweaked from  
22 there.

23 MR. ORSINGER: Do you have a code of ethics?

24 MR. JACKSON: Yes.

25 MR. ORSINGER: Similar to this?

1 MR. JACKSON: Yes, our code of ethics is 14  
2 points.

3 MR. ORSINGER: And is it enforceable by  
4 suspension?

5 MR. JACKSON: Yes.

6 MR. ORSINGER: And is it concrete, or does  
7 it have a lot of aspirational generalities?

8 MR. JACKSON: It's pretty concrete. I mean,  
9 there are some vague ones like this, but for the most part  
10 they address, you know, mischarging attorneys, like if I  
11 was to take a deposition for you and I cut a deal with you  
12 to take a deposition for three dollars a page, I can't  
13 then incorporate charges to other parties that weren't  
14 part of our negotiation and make up the difference by  
15 charging them more than a third. We have a one-third  
16 rule, so that keeps me from cost-shifting to get your  
17 business.

18 MR. ORSINGER: And what's the grievance  
19 mechanism like? Who files a complaint with who and what  
20 kind of investigation do they have and what recourse is  
21 there to higher review?

22 MR. JACKSON: Whoever is aggrieved can file.  
23 A lawyer can file, another court reporter that finds out  
24 that something is not being done according to the Uniform  
25 Format Manual or something like that, somebody is

1 contracting and not disclosing it. You know, for a number  
2 of reasons they find out that there is something going on  
3 that are against our rules, they can file a grievance with  
4 the Court Reporters Certification Board. The Court  
5 Reporters Certification Board can then investigate that  
6 grievance and set it for a formal hearing and then they  
7 can take whatever action from there they want to take from  
8 a reprimand all the way up to pulling their license.

9 MR. ORSINGER: Does the hearing permit --

10 MR. SCHENKKAN: Pulling their license, you  
11 do a sanction like --

12 MR. JACKSON: They can't be a reporter in  
13 Texas.

14 MR. SCHENKKAN: Is there any judicial  
15 review?

16 MR. REYNOLDS: Yes.

17 MR. JACKSON: Yeah. They have to file a --  
18 they can take the test again if -- under certain  
19 circumstances they can take it again after a while, but --

20 MR. REYNOLDS: But there is also judicial  
21 review possible --

22 CHAIRMAN BABCOCK: Judge Sullivan.

23 MR. REYNOLDS: -- just like any other  
24 administrative.

25 HONORABLE KENT SULLIVAN: I was appointed to

1 serve on the Court Reporters Certification Board and did  
2 serve a couple of years. There is judicial review. In  
3 fact, at that time, I don't know whether it's been  
4 amended, but there is de novo review by --

5 THE REPORTER: Speak up, please.

6 CHAIRMAN BABCOCK: Can you speak up, Judge  
7 Sullivan?

8 HONORABLE KENT SULLIVAN: I am almost never  
9 asked to do that. There is a de novo judicial review by  
10 simply filing a petition in a district court in Texas.  
11 That's at least the process that was in existence at the  
12 time that I served, that is several years ago.

13 MR. REYNOLDS: That's still like that. That  
14 board has -- it's going to meet on April 28th, and they  
15 have a -- I have looked at their agenda. There is  
16 probably five or ten disciplinary actions in a preliminary  
17 mode and five or ten disciplinary actions in a full-blown  
18 hearing on each agenda that they have. They are getting  
19 more and more into the business of trying to regulate the  
20 profession through disciplinary; and by the way, the staff  
21 that we have isn't getting out there and investigating.  
22 We don't have any investigative staff.

23 Frankly, I'm not sure how they're doing it.  
24 I guess some of those board members are volunteering like  
25 some of the PSRB members to go out and find out and

1 interview people, but they're doing a lot of it in their  
2 meetings. They're having these full-blown meetings of the  
3 whole board where they air these issues and make  
4 decisions.

5 MR. ORSINGER: Is there an opportunity for  
6 the person being targeted to appear with a lawyer --

7 MR. REYNOLDS: Yes.

8 MR. ORSINGER: -- and present evidence, or  
9 are they -- do witnesses come, are they subject to  
10 cross-examination?

11 MR. REYNOLDS: Yes.

12 CHAIRMAN BABCOCK: Judge Sullivan.

13 HONORABLE KENT SULLIVAN: One quick comment  
14 and then perhaps a suggestion. There was a discussion of  
15 the Federal system as an analog here.

16 CHAIRMAN BABCOCK: Right.

17 HONORABLE KENT SULLIVAN: And I will say  
18 that I have some discomfort with that. My recollection is  
19 that service of process, service of the summons is allowed  
20 by way of certified mail as well as the more routine  
21 personal service, and I think a great deal of service of  
22 summons occurs that way. I think they're dealing with  
23 substantially lower volumes than the state system would  
24 deal with, and also, of course, you're dealing with a  
25 jurisdictional threshold of \$75,000 plus.



1           I think it is at least in part potentially a  
2 different animal and an imprecise analogy. The suggestion  
3 that I might make, because I confess I am uncomfortable in  
4 this area, I do not know what the right answer is, but  
5 perhaps some best practice analysis is in order; and by  
6 that I mean to look to states of similar size, similar  
7 litigation volume, and see what their practices are and to  
8 the extent that we find good ideas then steal them.

9           At least it would provide us perhaps with a  
10 more precise analog of what other states -- if they have  
11 indeed grappled with this recently, what would be a good  
12 yardstick.

13           HONORABLE NATHAN HECHT: Just for  
14 information, we've got the handy-dandy Thompson West rules  
15 pamphlet. Standards and rules for certification of  
16 certified shorthand reporters is in the back, but not  
17 their ethic. I don't think the -- Page 647 of the 2005  
18 version, which is all the Court can afford, but there is  
19 an ethical code that's not in here.

20           MR. JACKSON: There is also a Uniform Format  
21 Manual that was adopted by the Supreme Court that's not in  
22 there, and it's a little harder for a lawyer to find, but  
23 the web page -- your web page has it on it.

24           MR. REYNOLDS: Correct.

25           CHAIRMAN BABCOCK: Just a question. This

1 I'm sure was answered, but as I understand the order that  
2 we're operating under now, there can be certification and  
3 there can be revocation of certification for good cause.  
4 Did I hear earlier that there are investigations going on  
5 of people that never applied for certification? Richard,  
6 is that right?

7 MR. ORSINGER: I think that what  
8 Mr. Pendergrass said was that he was on the telephone with  
9 somebody who had received a letter saying they received a  
10 complaint relating to him, which means that they're at  
11 least forwarding the information, but we didn't know  
12 enough to say that they were investigating, and I think  
13 that Carl Weeks says he's not aware of an investigation  
14 being brought against someone who is not licensed and not  
15 applied.

16 CHAIRMAN BABCOCK: Not certified.

17 MR. ORSINGER: Pardon me. Not certified and  
18 not applied. A Freudian slip.

19 CHAIRMAN BABCOCK: All right. Any other  
20 comments? It seems to me that the first order of business  
21 is whether -- as the referral letter to me says, what do  
22 we think about this attachment A, Appendix A, which is the  
23 code of professional conduct that certified process  
24 servers exists conceptually without regard to the  
25 subparts, but is this a matter that we recommend the Court

1 consider in some fashion sanctioning, and if the answer to  
2 that is yes, then we can go through the subparts. Carl.

3 MR. HAMILTON: Can't Appendix A stand on its  
4 own, or do we have to consider Appendix B along with it?  
5 Do they go together? Because if they have to go together  
6 then we ought to look at B also.

7 MR. ORSINGER: Well, I made a reference to  
8 that, Chip, when I said Appendix A, your reaction to that  
9 may be completely different if it's merely aspirational  
10 than if it's part of the implemented grievance system; and  
11 Appendix B is, if you will, the procedure associated with  
12 evaluating whether good cause exists; and so I agree that  
13 how you vote may be influenced by B, but I hate to go  
14 through B with such a fine-toothed comb if we don't have  
15 very much support for the idea of endorsing this code.  
16 Maybe we could just assume that if we adopt a code that  
17 there is going to be a possibility or probability that it  
18 will be enforced through some mechanism.

19 CHAIRMAN BABCOCK: For whatever reason, and  
20 this may have not have been intentional by Justice Hecht  
21 or by Jody, but the letter -- referral letter to me  
22 separated A and B, but I agree that they sort of -- it's  
23 all part of the bigger picture. Buddy.

24 MR. LOW: I would feel more comfortable  
25 rather than a code of conduct, grounds for revocation,

1 make it shorter and simpler rather than just aspire,  
2 because you remember one time in our contracts we had  
3 certain basic rules and we had what you really aspired  
4 to --

5 CHAIRMAN BABCOCK: Right.

6 MR. LOW: -- and so forth. That's just an  
7 idea.

8 CHAIRMAN BABCOCK: Yeah. Yeah, Elaine.

9 PROFESSOR CARLSON: I agree with Buddy, and  
10 I understand there is a Texas Process Servers Association,  
11 which I assume serves to educate and promote the  
12 professionalism of process servers, and it would seem to  
13 me that would be the appropriate body to deal with  
14 aspirational behavior of process servers.

15 CHAIRMAN BABCOCK: Is the -- my read of this  
16 is that this is not -- I tend to say it's not intended to  
17 be aspirational but rather intended to be regulatory.

18 PROFESSOR CARLSON: Well, it kind of has --

19 CHAIRMAN BABCOCK: Regulatory tool.

20 MR. ORSINGER: It all depends on how you  
21 enforce it. This code itself doesn't say you'll be  
22 decertified if you do something, or maybe it does. I  
23 don't think it does. I don't think it's that explicit. I  
24 think we can infer that if Appendix A or something like it  
25 is adopted that it will be the standard for good cause.

1 And that could be good and bad. If what Buddy is saying  
2 what we need is a concrete list of five things that if you  
3 do this you lose your certification --

4 MR. LOW: Yeah.

5 MR. ORSINGER: -- that's really all you need  
6 to have a standard of good cause. Right now we know  
7 felony or misdemeanor with moral turpitude, plus whatever  
8 the board thinks is good cause, and they have no standard  
9 to go by.

10 MR. LOW: Yeah. I mean --

11 CHAIRMAN BABCOCK: Yeah. Yeah. Hayes  
12 Fuller.

13 MR. FULLER: What do you need to be  
14 certified? What do you need to do to be certified now?

15 MR. ORSINGER: Well, you do four things.  
16 You have to fill out an application under oath, and in it  
17 you have to swear that you haven't been convicted of a  
18 felony or a misdemeanor involving moral turpitude. You  
19 have to submit your Department of Public Safety criminal  
20 history record, which is based on having sent your prints  
21 in, and they will verify that you do or don't have  
22 convictions, and then you have to have certification that  
23 you have attended seven hours from an approved course.  
24 With those four things you get certified; is that not  
25 right, Carl?

1 MR. FULLER: And if that's all that's  
2 required to be certified, why are we going through this  
3 long list of things to determine whether or not you get to  
4 stay certified, be certified, or whatever? I mean, it  
5 seems to me that we can't require anything more by way of  
6 certification than what it took to get you there.

7 CHAIRMAN BABCOCK: Well, I think the  
8 argument, Hayes, is that paragraph (1) of the order talks  
9 about what you need to do to be certified, but paragraph  
10 (4) says how you get decertified, and that's for good  
11 cause, and the language of the order says "including" and  
12 it talks about this, but Orsinger's complicated statutory  
13 order construction argument is that "including" means  
14 including but not everything, and the question is whether  
15 there is some more everything to it. Did I read you right  
16 on that, Richard?

17 MR. ORSINGER: Yes.

18 CHAIRMAN BABCOCK: Yeah, Buddy.

19 MR. LOW: And in addition to what I was  
20 saying, grounds for being decertified, I'd think you would  
21 have to have then a next section which is hearing, in  
22 other words some short process for hearing and then  
23 appeals process should go through it rather than -- and if  
24 they want to have rules of conduct and so forth like that,  
25 then that would be up to them, but I would think ours

1 should be cut to just those bare bones.

2 MR. ORSINGER: But how does the Supreme  
3 Court issue a rule saying there is judicial review for  
4 this quasi-administrative determination that really  
5 doesn't exist except by virtue of Rule 103?

6 MR. LOW: Well, I question sometimes how the  
7 Supreme Court does several things, but -- no, really, I  
8 don't know. Judge, you didn't hear that. No, but if we  
9 can draw and say how they can be -- how can you decertify  
10 somebody, draw a rule without providing some appellate  
11 procedure, would it be constitutional? Some procedure for  
12 it.

13 CHAIRMAN BABCOCK: Pete.

14 MR. SCHENKKAN: This looks to me like a fine  
15 statute, the proposed statute, but barring some showing  
16 that there is something so badly broken that we can't wait  
17 for the Legislature, to buy the possibility that the  
18 Legislature would remain so deadlocked and won't pass a  
19 statute on this subject, I mean, it's obviously for the  
20 Court to decide, but as a committee recommending to the  
21 Court, I don't see what is in it that encourages us to  
22 recommend to the Court that they adopt this entire  
23 structure by rule when the Legislature won't do it by  
24 statute and with no staff to enforce it.

25 MR. LAMONT JEFFERSON: Second.

1           MR. SCHENKKAN: This just doesn't seem to me  
2 like a good situation. We ought to stop right here unless  
3 there is some aspects of the thing that is broken now that  
4 it can't wait and then we ought to target that one  
5 specific thing and see how we can solve it, and if we're  
6 comfortable on a consensus for it that it is within  
7 rule-making power, fine, but this big picture thing, let's  
8 leave it as a statute and say "Legislature, sure hope you  
9 take this up in the next session," maybe even encourage  
10 the governor to add it to the call after they fix the  
11 taxes.

12           CHAIRMAN BABCOCK: Justice Duncan.

13           HONORABLE SARAH DUNCAN: I think the problem  
14 is that the Court has created certification. It's created  
15 a board, and the board has decided that it has the  
16 authority to investigate and discipline certified process  
17 servers with no standards; and I think the Court needs to  
18 decide, one, if it wants the board rather than itself or  
19 some other entity to be in the disciplinary business; and  
20 if it's going to be in the disciplinary business, it needs  
21 to have rules governing its disciplinary process.

22           I mean, that's the problem. If you read  
23 these letters, the complaints of what the board is doing,  
24 I think that's a problem for the Court, because the Court  
25 is the one that created the certification process and the



1 board.

2 MR. SCHENKKAN: Sounds like a friendly  
3 amendment. You're saying in addition that the Court  
4 shouldn't adopt this by rule. Court should tell the  
5 board, "This isn't what we wanted you to do. Don't do  
6 that unless you get a statute."

7 HONORABLE SARAH DUNCAN: I think the first  
8 decision the Court has to make is whether it wants the  
9 board to be in the disciplinary process, and I think  
10 that's a big decision, and we could certainly offer an  
11 opinion on it, but I don't know that Chip thinks that's  
12 within our referral letter.

13 CHAIRMAN BABCOCK: The order right now gives  
14 the board or asks the board to review and approve or  
15 reject for good cause applications. That's one thing  
16 they're supposed to do, and then paragraph (4) says  
17 "Certification may be revoked for good cause."

18 HONORABLE SARAH DUNCAN: A great passive  
19 construction. It proves the point of the value of the  
20 passive voice.

21 CHAIRMAN BABCOCK: I'm sure that's right.

22 MR. ORSINGER: Why do you think it was  
23 written in the passive in the first place?

24 CHAIRMAN BABCOCK: But it doesn't say  
25 explicitly, I don't think, who is supposed to do the

1 revoking.

2 HONORABLE SARAH DUNCAN: That's what I'm  
3 saying by referencing the passive voice.

4 CHAIRMAN BABCOCK: Okay.

5 HONORABLE SARAH DUNCAN: There is no actor  
6 in that sentence.

7 MR. ORSINGER: I'm suggesting that wasn't an  
8 accident.

9 HONORABLE SARAH DUNCAN: And I'm not  
10 disagreeing.

11 CHAIRMAN BABCOCK: Okay.

12 HONORABLE NATHAN HECHT: And I'm not saying.  
13 (Laughter)

14 CHAIRMAN BABCOCK: Well, is --

15 HONORABLE SARAH DUNCAN: So there.

16 CHAIRMAN BABCOCK: Yeah, so there. Justice  
17 Gray.

18 HONORABLE TOM GRAY: I don't know how or if  
19 this fits, but I recall that at one of the judicial  
20 conferences I went to there was a great hue and cry raised  
21 because of a Federal case that was going on involving  
22 something about a juvenile justice board or something like  
23 that being conducted out of Tarrant County and they wound  
24 up in a Federal lawsuit without judicial immunity, and  
25 before the Supreme Court goes forward on this, I would

1 want to at least inquire of the Attorney General whether  
2 or not this is an area that we can send the Supreme Court  
3 off into without judicial immunity.

4 MR. ORSINGER: You're talking about the  
5 Supreme Court members or are you talking about the board  
6 members?

7 HONORABLE TOM GRAY: It was judges who were  
8 serving on some kind of board.

9 MR. REYNOLDS: It was the Adult Probation  
10 Board of Tarrant County.

11 HONORABLE TOM GRAY: There you go.

12 MR. GILSTRAP: They all got sued.

13 MR. REYNOLDS: It was the judges in Tarrant  
14 County that governed the adult probation -- the CSCD is  
15 what it's referred to, and the plaintiff's name was  
16 Alexander, and basically the court issued an opinion,  
17 Judge Means -- Federal Judge Means issued an opinion that  
18 denied the Attorney General's argument for judicial  
19 immunity because the judges in Tarrant County were so  
20 involved in the running of the probation department that  
21 they were not -- that the court deemed it an  
22 administrative function and something that was not  
23 entitled to judicial immunity.

24 Eventually I think that story ended happily  
25 for those judges, but as a result the Legislature passed a

1 a bill last session that really tried to narrow what  
2 judges are supposed to do with respect to running  
3 probation departments, but to the extent that judges are  
4 in the business of doing administrative things and  
5 litigation ensues, I think there is a looming issue out  
6 there.

7 MR. ORSINGER: What about the members of the  
8 of the board? Are they subject to being sued and have no  
9 judicial immunity?

10 MR. WEEKS: That was my first question to  
11 the Attorney General, as we had representation from the  
12 Attorney General, does the board have immunity? Our  
13 Attorney General representative did a little research,  
14 came back to me and clearly said that we do. Whatever  
15 type of immunity that may be, the Attorney General has  
16 made that representation.

17 MR. ORSINGER: Okay.

18 HONORABLE TOM GRAY: Which is probably the  
19 same attorney that was representing the judges in front of  
20 Judge Means. He had a consistent argument.

21 HONORABLE SARAH DUNCAN: The Attorney  
22 General's view of immunity is quite broad.

23 CHAIRMAN BABCOCK: Well, it seems to me  
24 maybe there are at least two issues. One is who should do  
25 the revoking, if there is going to be revocation; and two,

1 whether -- if good cause means more than being convicted  
2 of a felony or misdemeanor involving moral turpitude, what  
3 is that additional thing or is it just supposed to come up  
4 on a case-by-case basis and you sort of know it when you  
5 see it, and I don't know how we come to a vote on those  
6 things. Richard, do you have any suggestions?

7 MR. ORSINGER: Well, we could have an up or  
8 down vote on our recommendation as to who should do the  
9 revoking. I mean, the problem with the board doing the  
10 revoking is that the board really doesn't have any  
11 authority, although maybe they have derivative authority  
12 from the Court.

13 CHAIRMAN BABCOCK: That was Sarah's point, I  
14 think.

15 MR. ORSINGER: Yeah. But you don't want the  
16 Supreme Court to do the revoking because if somebody does  
17 have a right of judicial review, which probably they have  
18 under the United States Constitution if not under Rule 103  
19 and Texas statutes, it eventually is going to go back to  
20 the Supreme Court, so I guess the Supreme Court would be  
21 reviewing its own revocation, which I am sure that they  
22 would be capable of doing that in a fair way, but it might  
23 look to the average person like --

24 CHAIRMAN BABCOCK: Well, you earlier,  
25 Richard, suggested --

1 MR. ORSINGER: A district judge.

2 CHAIRMAN BABCOCK: -- the trial court from  
3 where the process was issued.

4 MR. ORSINGER: Well, my thought is as  
5 follows. If somebody does something wrong in serving  
6 process, that process issued out of some court; and if  
7 there is a complaint about what that process server did  
8 with that process, a logical place to take it is to the  
9 court the process issued out of by filing some kind of  
10 motion; and I don't know that it has to be a motion that  
11 we have to include in a rule. You know, first of all, we  
12 all know now that you can file a criminal complaint. If  
13 what happened here was somebody alleged in a return that  
14 they had personal service and they didn't, they'll go to  
15 jail for it now. You know, filing a false return  
16 according to the Court of Criminal Appeals probably is a  
17 crime.

18 HONORABLE SARAH DUNCAN: That's this week.

19 CHAIRMAN BABCOCK: Exactly.

20 MR. ORSINGER: Okay, that's this week.

21 HONORABLE NATHAN HECHT: But let me point  
22 out, let me remind us, which maybe we're thinking about it  
23 anyway, and I know substantive due process property rights  
24 is not a perfectly clear area of the law, but if we just  
25 go back to square one, Rule 103 does not have to include

1 private citizens in it, period. Just you can take them  
2 out and there is no appeal of that, and nobody has a right  
3 to be in Rule 103, so we put individuals in 103 and we  
4 say, "but it's got to be up to the trial judge," and so if  
5 I were -- before all of this happened if I were the trial  
6 judge and somebody came in and said, "I want Richard  
7 Orsinger to serve this process," I would just say "no" for  
8 the heck of it. I don't have to have a reason. You know,  
9 maybe he -- maybe I don't like Richard, and so I don't do  
10 it for that reason, but the law doesn't require me to give  
11 him a hearing or he has no right to do this. I can just  
12 tell him "no."

13                   And so the genesis of this, as Judge Brister  
14 pointed out earlier, is that judges -- and I remember this  
15 when I was on the trial bench. Judges are getting five or  
16 six of these orders a week or maybe more, and they're  
17 always the same, "Lawyer X wants private citizen Y to  
18 serve this process rather than the constable" and so you,  
19 you know, just routinely signed all of those.

20                   One of your colleagues raises concerns that  
21 maybe that's not a good idea, maybe somebody should take a  
22 look at who's doing this because the consequences can be  
23 rather severe for someone who is not reputable returning  
24 service of process. So, well, that's a good idea as long  
25 as I don't have to do it, somebody else can do it. So we

1 all agreed that in a big county that judge X can screen  
2 all of this and set up a list and so on.

3 I'm having trouble figuring out why you have  
4 a right to be on that list, why the judge couldn't just  
5 tell you "no" to start with, why the judge couldn't just  
6 say, "Well, we're only going to use these five people and  
7 that's it." And if everybody agrees to that, I'm having  
8 trouble seeing what the problem is, so given -- and maybe  
9 there aren't -- maybe it's more complicated than that, but  
10 if what is only being done here is trying to set up that  
11 list for trial judges all over the state and if they want  
12 to buy into it, fine, if they don't want to buy into it,  
13 they don't have to. They can put anybody on their own  
14 list that they want to, and as one representative here  
15 says, you can go around and get a hundred orders from a  
16 hundred judges and you're on all those lists, but if --  
17 how much do we think is involved in just saying you can be  
18 on the list or you cannot be on the list?

19 I mean, maybe there is some sort of -- maybe  
20 we are creating some sort of property interest here, but  
21 surely it's not very much of one; and even if we don't  
22 have a full-blown grievance process, because the worst  
23 thing that can happen to you is you're not on this list  
24 and you have to go see judge X yourself, and he can still  
25 let you off or he can say, no, I'm going to do what the



1 Supreme Court thinks I should do, and he could do that  
2 anyway, then how much process is really going to be  
3 involved here? I'm just wondering if this problem is that  
4 big. I don't know. I'm just asking.

5 CHAIRMAN BABCOCK: Judge Patterson had her  
6 hand up.

7 HONORABLE JAN PATTERSON: Well, I think  
8 that's a very useful exercise, because I hate to see a  
9 good idea taken to some extreme and thrown out here, and I  
10 think it would be useful for the committee to examine what  
11 part of it might be useful. There are other lists such as  
12 mediators, maybe even defense lawyer, whether for  
13 appellate or appointed that are similar that -- where  
14 people get on a list and can get bounced off by judges.

15 It seems to me that we ought to look beyond  
16 the interests of certain groups and to the court system  
17 where there is some -- something to say for uniformity and  
18 the availability of uniformity throughout the state so  
19 that it doesn't become a fiefdom of people in certain  
20 areas or so that the standards are not so different across  
21 the state, although you could still have that under this  
22 system, it would seem to me. You could have the  
23 uniformity plus those who want to do it in a different  
24 way, but it does -- there are problems with service, and  
25 it seems to me that we do have lots of cases that are

1 started by this system, and as I recall one of the values  
2 of looking at this originally was that we wanted to be  
3 able to put the process servers on sort of an equal  
4 footing with the constables, that we didn't want to have  
5 the constables monopolize that area to such an extent that  
6 other people couldn't do it, and so that led us to examine  
7 how to do that.

8                   But I think there are interests to be served  
9 here, and I think Judge Hecht's -- I mean, I think there  
10 is something short of a property interest and  
11 certification and disqualification and all this, but I'm  
12 not quite sure where that point is.

13                   CHAIRMAN BABCOCK: Okay. Justice Duncan.

14                   HONORABLE SARAH DUNCAN: My concern is not  
15 constitutional. My concern is just fairness, fairness to  
16 the board who wants to feel good about what it's doing and  
17 feel comfortable that it's operating within the parameters  
18 that the Court wants it to operate in and fair to the  
19 process servers who are subject to the board's  
20 disciplinary review.

21                   HONORABLE JAN PATTERSON: Well, and to  
22 provide some certainty.

23                   HONORABLE SARAH DUNCAN: Yeah.

24                   HONORABLE JAN PATTERSON: That would be  
25 helpful for people to know what the rules are.

1                   CHAIRMAN BABCOCK:   Buddy.

2                   MR. LOW:   As I understand what Justice Hecht  
3 is saying, is we have two other than the constables and  
4 the sheriff. One is preapprove. If you are able to get  
5 on that preapproved you don't have go through the hoops.  
6 It doesn't keep anybody else from being there. You can  
7 still be approved by the court, so if you want to go the  
8 easy route where you won't have to do that, then you have  
9 this, but you have two choices you can make, and it would  
10 be -- is that what -- well, that sounds all right.

11                  CHAIRMAN BABCOCK:   Yeah, Professor Hoffman.

12                  PROFESSOR HOFFMAN:   I think that point goes  
13 to the getting on, and I think what seems to be the place  
14 we're having this is the getting off, which is where the  
15 process review board, on the one hand in the order, it  
16 makes it seem like they may be the people who are supposed  
17 to be deciding good cause, and so, again, I would go back  
18 to what Justice Duncan said.

19                  We have got an order that says that you can  
20 be kicked off for good cause and includes these things, so  
21 one way to get out of this thicket would be to have the  
22 rules committee recommend or the Court to consider taking  
23 that language out entirely, and that would leave us with a  
24 process by which you get on the list. You can also get  
25 off the list by a judge. To be precise, you wouldn't be

1 off the list, but you would be off the list for that case  
2 if a judge either quashed the process or had some other  
3 sanctions for you in that proceeding.

4           So it seems to me one solution is the  
5 language could just simply be taken out entirely. There  
6 is no good cause for getting off the list. There is how  
7 you get on the list, and there may be an annual renewal  
8 list. I take it the continuing education is an annual?

9           MR. ORSINGER: No. At the present time it's  
10 one time to get certified and your certificate is good for  
11 three years, but a proposal that we'll discuss later, if  
12 we get to it, is to make it a one-year requirement. The  
13 board is recommending an annual education course.

14           PROFESSOR HOFFMAN: So that could be another  
15 way of sort of dealing with good cause in much more  
16 certainty. It turns the process review board's  
17 responsibilities into a much more defined, in some senses,  
18 ministerial responsibility of kind of going through the  
19 records, making sure they did what they did and they did  
20 it, and anything after that is outside the purview of the  
21 board, and the Court's order doesn't speak to that at all.  
22 So that's one solution to the problem, it seems to me.

23           CHAIRMAN BABCOCK: Justice Hecht.

24           HONORABLE NATHAN HECHT: Could I -- I don't  
25 know that this question has ever been asked. We talked

1 about private process serving several times, but the  
2 problem arose from judges, trial judges, being concerned  
3 that they were not getting reliable returns on service.  
4 That's what the Court reacted to. Do the lawyers think  
5 that's a problem or not?

6 MR. HAMILTON: That is a problem.

7 MR. ORSINGER: I haven't personally had the  
8 problem, but you can see the problem if you have a 10  
9 million-dollar default judgment against you based on  
10 personal service that's fraudulent. Whether you get a new  
11 trial or not depends on whether the judge believes you or  
12 the process server.

13 HONORABLE NATHAN HECHT: I mean, do lawyers  
14 think it's not a problem?

15 CHAIRMAN BABCOCK: Carl, you and Hayes were  
16 quick pretty quick to say it was a problem.

17 MR. HAMILTON: Well, it's like one of these  
18 letters, somebody in some course or something was telling  
19 process servers that if the defendant wasn't there all you  
20 had to do was leave it, and you know, we get that all the  
21 time down south. They just leave it, but then they make  
22 the return saying that we personally served, and they  
23 really didn't.

24 MR. FULLER: I'm aware of a situation  
25 involving a firm in Houston in toxic tort litigation where

1 for a year and a half they had a process server serving  
2 petitions on the Secretary of State. They had returns in  
3 their office indicating that service had been  
4 accomplished. In fact, it had not been, and it came up  
5 when trial settings started popping up and they started  
6 calling various defendants and saying, you know, "Why have  
7 you not filed an answer?" "Well, it wasn't served," and  
8 they checked with the Secretary of State and that's  
9 exactly correct. So it's a huge problem, and they were  
10 most upset about it.

11 CHAIRMAN BABCOCK: Judge Lawrence and then  
12 Mr. Weeks.

13 HONORABLE TOM LAWRENCE: Well, under the  
14 current system if you're on the list of approved servers,  
15 you have a certificate, then the judge is not going to  
16 know that you served that citation until it comes into his  
17 court. So if the judge becomes concerned about a private  
18 process server that has not been decertified, so to speak,  
19 therefore, the judge doesn't personally approve it, then  
20 there is really no mechanism now for the judge to review  
21 that or to not allow service by a process server who maybe  
22 there is some publicity about fraudulent service or  
23 something, and you have to have some means to get them off  
24 the list fairly quickly, I would think, or have the judge  
25 be able to act to remove them, from his court; otherwise,

1 depending on how long it takes to decertify after this  
2 process you could have a problem that continues on for a  
3 period of time and no way to address it or control it.

4           HONORABLE NATHAN HECHT: Well, I assume what  
5 would happen, if you were trying to serve -- if you were  
6 the lawyer and you wanted somebody served, if you didn't  
7 pick somebody off that list or go get a court order under  
8 103, then you're risking that your service is no good, and  
9 the judge is not going to be -- is not going to know one  
10 way or the other. If the service comes back and something  
11 happens as a consequence, a missed deadline or perhaps a  
12 default, then the lawyer on the other side is going to  
13 look on that list the first thing and see if that name is  
14 on the list; and if the name is not on the list and there  
15 is not an order appointing the person in the file, he's  
16 going to say, "No authorized service, King's X," and so I  
17 think that's how it would come up. I don't think the  
18 judges would ever know, at least I wouldn't have known as  
19 a trial judge whether somebody had been served or not or  
20 whether anybody cared.

21           CHAIRMAN BABCOCK: Mr. Weeks had his hand  
22 up, Richard.

23           MR. WEEKS: I just wanted to -- I had one on  
24 my desk -- the two that I'm working this week just came in  
25 out of Waco where the person hadn't delivered -- they

1 called, we got the complaint in. Four cases they hadn't  
2 filed an answer on. They started examining it. We  
3 didn't, the people on the other end in Waco, the law firm  
4 out there, and they figured out that these papers weren't  
5 properly served, and this is exactly the case. It's a  
6 person that's on our order that we're investigating a  
7 complaint on right now where four situations where he left  
8 it with, you know, a three-year-old kid or put it in the  
9 screen door or whatever it was. It wasn't good service  
10 obviously, and as you all probably know, under Craddock  
11 there is no valid -- there is no presumption of valid  
12 service in any case. You know, there is no valid  
13 presumption of any proof of return on a case.

14 CHAIRMAN BABCOCK: Who else had their hand  
15 up? Richard.

16 MR. ORSINGER: I did earlier.

17 CHAIRMAN BABCOCK: And then Pete.

18 MR. ORSINGER: The return problem can be  
19 ameliorated, if not fixed, by fixing the return  
20 requirement; and, for example, when we get to it, because  
21 the board has proposed a new and improved form of return,  
22 but I was going to suggest the following where this would  
23 be a requirement in Rule 107 for what the return has to  
24 say: "Where the person being served does not take  
25 physical possession of the citation or other process the



1 return shall contain detailed information on how process  
2 was served."

3           That's my effort to bring legal sanctions  
4 against a process server who is trying to make it look  
5 like they had personal service when they didn't, and if we  
6 make them detail it and all they did was leave it in the  
7 mailbox and they claim personal service, then either you  
8 file a criminal complaint under this new Court of Criminal  
9 Appeals case or you file a motion for contempt or you file  
10 -- you know, whatever, you want to get injunction against  
11 them or whatever.

12           There are remedies, but our returns right  
13 now are not standardized, and they're so vague that  
14 someone can get away with it. So we don't necessarily  
15 have to have a code of conduct in order to protect  
16 ourselves better against a fraudulent return. What we  
17 need to do is make people who sign fraudulent returns go  
18 to prison for 10 years. If we do that for a while then  
19 there won't be anymore filed.

20           CHAIRMAN BABCOCK: That's kind of harsh,  
21 isn't it?

22           MR. ORSINGER: Okay, then seven years.

23           HONORABLE TOM GRAY: 20 years.

24           CHAIRMAN BABCOCK: Pete, then Justice Bland.

25           MR. SCHENKKAN: I think that we're

1 overlapping two different issues that are related, and  
2 there are important relations in both of them.

3 CHAIRMAN BABCOCK: I counted three, but go  
4 ahead.

5 MR. SCHENKKAN: Defects in particular  
6 service and the list, and what they could have in common  
7 or overlap is the defects in particular service are  
8 because the particular server doesn't do it right, he just  
9 refuses to, you know, he's a bad guy, he's not actually  
10 trying to serve it the way it's supposed to be done. He's  
11 just taking advantage of money, but we need remedies  
12 tailored to in particular cases things haven't been  
13 properly served so that the people who depend on the  
14 service being proper can have their rights properly  
15 protected.

16 I assume we already -- I haven't encountered  
17 these issues in my own practice. I'm pretty ignorant of  
18 them except the sense of overcoming hearing, about  
19 overcoming default when you haven't gotten notice, but  
20 that's a separate question at the big picture level from  
21 -- moving from getting on the list by one judge has put  
22 you on the -- on his list or to being on the list for the  
23 whole county because the judges for that county have  
24 gotten tired of doing this one by one or where we are now,  
25 we're a statewide list. You can still be on the list and

1 have the problem of a bad service in a particular case or  
2 a bad server.

3           The question for the bad server is do you  
4 want the remedy to be that this board itself or the  
5 Supreme Court on a recommendation from the board is in the  
6 business of taking people off the list as the sanction for  
7 the bad service, and this seems to me to be a bad idea for  
8 both reasons. It's a very ineffective way of dealing with  
9 the bad service, and it gets you in the problem that any  
10 removal from the list is a removal of a somewhat valuable  
11 right.

12           And, Justice Hecht, I understand the notion  
13 that nobody has a right to -- there is no right to even  
14 have such a list, there is no right for private servers to  
15 be out there at all unless the Supreme Court continues to  
16 say so in the rule, but once you say so, we have already  
17 talked about just how valuable a right it is because it  
18 saves that process server from having to go around and get  
19 a hundred of these individual orders, and that's why this  
20 fight over Harris County versus the rest of the state is  
21 so important to the process servers. So it is a valuable  
22 privilege to be on this list, and the notion that you're  
23 going to have that privilege revoked arbitrarily, is not  
24 acceptable, isn't going to fly.

25           I'm sorry Judge Yelenosky is not still here.

1 He just entered a temporary injunction last week against  
2 the division of workers compensation for taking the  
3 position that just because the Legislature struck the  
4 provision for a contested case and sold out of a statute  
5 didn't mean that you could actually deny these people  
6 their position without a contested case hearing.  
7 Constitutionally you've got to give them a hearing, and I  
8 think the temptation for someone, some district judge  
9 confronted by a lawsuit about this to say, yeah, that's  
10 the right answer constitutionally is pretty strong or --  
11 and I'm assuming the board wants to give people due  
12 process and intends to try to do that and they are not  
13 trying to run their own court. They are going to set up  
14 some rules that say, "We get a complaint. You get this  
15 opportunity to respond. You get to come to the board and  
16 make your case, and we'll hear you out." That looks like  
17 an opportunity for adjudicative hearing.

18           The Administrative Procedure Act says if you  
19 have a matter of rights or privileges as a party or you  
20 are determined to have an opportunity for adjudicative  
21 hearing, you have to hold a contested case under the APA,  
22 and you have substantial evidence on the agency for  
23 judicial review. Do you really want to impose that by a  
24 rule here?

25           And so I'm thinking that for the list level

1 of the problem as opposed to the in a particular case  
2 service was bad or in a particular case a particular  
3 server is really a bad guy and shouldn't be in this  
4 business, for just the list part of the problem I'm not --  
5 absent a statute that sets it up right and with funding,  
6 just have it be you apply and we'll let you on and then  
7 you have to apply again in three years when it expires,  
8 and that's all that the board does.

9 CHAIRMAN BABCOCK: Okay.

10 MR. SCHENKKAN: And then as a remedy for the  
11 particular server or service go to a specific judge and  
12 say, "This service wasn't right." It's a crime if you can  
13 make out a criminal case, or it's -- I don't know what it  
14 would be, malicious prosecution or abuse of process or  
15 something, some kind of civil action, or just, "Judge,  
16 take this guy off the list for all cases in this county.  
17 Here's my proof of what he's done. He shouldn't be on  
18 this list."

19 CHAIRMAN BABCOCK: Okay. Justice Bland and  
20 then Judge Lawrence and then let's subtly shift to another  
21 topic in the same genre that the Court is interested in.  
22 Justice Bland.

23 HONORABLE JANE BLAND: I agree with Pete. I  
24 think when Harris County started this whole thing -- and I  
25 think it began because Harris County got this idea of

1 handling it -- it was because we perceived not that there  
2 are a bunch of people trying to commit fraud but the  
3 number of people who were wanting to be private process  
4 servers was growing exponentially, and many of these  
5 people had no training or any legal background and thus  
6 were making lots of mistakes because they didn't know what  
7 a proper return of service should look like. They didn't  
8 know what needed to be in an affidavit, and so it was a  
9 purely educational purpose. It was not designed to root  
10 out people who were intentionally defrauding a court, and  
11 it never was used to police people for that.

12           It was mainly to educate, and I think, you  
13 know, there became interest; and partly because I think  
14 these education programs raise revenues for various  
15 organizations that hold the programs, it became of  
16 interest statewide; and I don't think that -- you know, I  
17 think now it's snowballing into way more than what it was  
18 intended to be at the outset.

19           CHAIRMAN BABCOCK: Okay. Judge Lawrence.

20           HONORABLE TOM LAWRENCE: I still think one  
21 of the problems is getting someone off the list. If you  
22 don't have a mechanism to remove somebody from the list  
23 then they can continue on even where there is a  
24 demonstrated list of problems that they've had. Now, if a  
25 judge under 103 and 536 can separately approve somebody in

1 his court to serve process, why couldn't you have the  
2 judge unapprove somebody that's been certified to serve  
3 process? Could you do that? Would that solve the  
4 problems? Because now there is no mechanism to prevent  
5 somebody from serving process if they're on the list, and  
6 if you have no effective means to get them off the list, I  
7 don't think we want that situation, and we can avoid it.

8           CHAIRMAN BABCOCK: Let me, Richard, if it's  
9 all right with you, and even if it isn't, let me shift the  
10 discussions slightly to the second bullet point that the  
11 Court was interested in, and that is the board has  
12 requested an amendment to the order of June 29th to expand  
13 the Court's approval to all of Texas' 254 counties, and as  
14 you all -- as you know, right now the order applies to 253  
15 counties but not to Harris County in certain  
16 circumstances, and there has been a response on behalf of  
17 the Harris County judges by Judge Lindsay that should be  
18 in your materials, an October 29th, 2005, letter asking  
19 that the order not be changed, but that Harris County be  
20 permitted to have its own -- its own system of meeting  
21 requirements for certification. So if we could talk about  
22 that --

23           MR. ORSINGER: I think I have laid the  
24 groundwork for that, and let me point out that the Texas  
25 Process Servers Review Board has recommended that the same

1 educational standards that apply to other counties apply  
2 to Harris County, and the only dissenting vote was Judge  
3 Lindsay; is that not right, Carl?

4 MR. WEEKS: That's correct.

5 MR. ORSINGER: And so Judge Lindsay, who is  
6 on the board and who is also in charge of the HYLA  
7 education program for process serving in Houston is the  
8 only member of the board that doesn't want Houston to have  
9 the same educational requirements as any other county.

10 I don't know how widespread that support is  
11 among all the district judges in Houston, but as you -- if  
12 you will think back to my comment about how it's not just  
13 a Houston problem, because process in Houston cases is  
14 getting served in Dallas and Amarillo and El Paso and  
15 everywhere, so could maintaining Houston as an exception  
16 and allowing them to require attendance at their HYLA  
17 course or now attendance at a government-approved course  
18 for constables and sheriffs is not warranted; and I  
19 frankly don't know what the -- I know that the people in  
20 Houston, the defendants say that their course is better  
21 than the other courses, but then I read that they haven't  
22 run the course since the certification program was adopted  
23 and that if it hadn't have been for the fact that the  
24 state sponsored courses were available, we wouldn't have  
25 had anyone even had the opportunity to become certified



1 with an H; is that right, Carl?

2 MR. WEEKS: That's correct.

3 MR. ORSINGER: Okay. So if, in fact,  
4 Houston is going to require you to attend a Houston course  
5 at least they ought to run the Houston course.

6 CHAIRMAN BABCOCK: It's catch 22.

7 MR. ORSINGER: I'm sure the HYL A makes some  
8 money. I know that they do a lot of good things because I  
9 belong to the -- I read their stuff in the *Bar Journal* and  
10 everything.

11 CHAIRMAN BABCOCK: Well, let's hold on for a  
12 second. Judge Benton, is he still here? There he is.

13 MR. ORSINGER: You caught him in the middle  
14 of dessert.

15 CHAIRMAN BABCOCK: Sorry. Judge Benton or  
16 Judge Sullivan, was Judge Lindsay speaking on behalf of  
17 all of the Harris County judges, or is she a lone voice in  
18 the wilderness?

19 HONORABLE LEVI BENTON: Candidly, Chip, I  
20 was just telling Alistair off of the record I don't have  
21 any recollection that we formally discussed this or said  
22 that "you're speaking for us" or "you're not speaking for  
23 us on this issue," but it might be because I just was  
24 occupied with something else and missed the meeting. I  
25 just don't have a recollection, but the record should note

1 she has done good service to the state over the years on  
2 this issue, and she should be commended for it.

3 CHAIRMAN BABCOCK: Judge Sullivan. What  
4 part of that don't you agree with?

5 HONORABLE KENT SULLIVAN: Absolutely  
6 nothing. I think that Judge Benton is extremely  
7 articulate and able to respond for the judges of Harris  
8 County.

9 CHAIRMAN BABCOCK: Okay.

10 MR. DAWSON: Objection, nonresponsive.

11 HONORABLE LEVI BENTON: You know, in my own  
12 personal experience, when I have written the Court I have  
13 said either "I'm speaking for all of us" or "I'm not," and  
14 I don't know what Judge Lindsay's letter says, and so I  
15 don't have any recollection of any -- we meet monthly, but  
16 I don't have a recollection that we took this up at a  
17 meeting. We may well have and I just can't remember it.

18 CHAIRMAN BABCOCK: Well, the letter is  
19 somewhat ambiguous about whether she's speaking for  
20 everybody or just herself, but one of her points is that,  
21 look, we just got started with this, why are you going to  
22 go mess with it, you know, five or six months or less than  
23 a year after you started with this system, and we don't --  
24 we don't like that.

25 HONORABLE LEVI BENTON: And --

1 MR. ORSINGER: Are we allowed to use that  
2 same argument against Exhibit A?

3 HONORABLE LEVI BENTON: I am surprised to  
4 hear -- and I can't say Richard is incorrect. I am  
5 surprised to hear that -- the statement the Harris County  
6 course has not been offered. That's news to me, but I  
7 can't say it's incorrect because I have never been  
8 involved in teaching the course.

9 MR. ORSINGER: Carl knows.

10 MR. WEEKS: And I have spoke just recently  
11 this last -- about two weeks ago to Lisa Rodriguez, who is  
12 in the Harris County Court Administration Office about the  
13 course, and they have not had a course indeed since the  
14 order went into effect. That is correct.

15 HONORABLE LEVI BENTON: Okay.

16 MR. WEEKS: They usually hold one once a  
17 year in the spring, has been their standard, and I did  
18 call Judge Lindsay about this a few weeks ago because I  
19 was going to have it put up on the Supreme Court website  
20 if indeed they were going to have a course, and she  
21 indicated to me that they had not picked a date for a  
22 course, they were going to have one this summer, this  
23 spring sometime, they had not settled on a date, but that  
24 they didn't feel quite so under pressure because so many  
25 folks had been going through the TCLEOSE course to get the

1 H endorsement. We have been putting probably 20 people on  
2 the list each month with the H endorsement by their name  
3 because they are attending TCLEOSE civil process courses.

4 CHAIRMAN BABCOCK: Okay, Lonny.

5 PROFESSOR HOFFMAN: I'm a little bit  
6 hesitant because I was out of order the last time I  
7 brought up Harris County.

8 CHAIRMAN BABCOCK: That won't be the last  
9 time.

10 PROFESSOR HOFFMAN: But that said, I mean,  
11 it seems to me whether there is agreement among the judges  
12 or not on this issue, it seems to me that the argument  
13 that Judge Lindsay makes is not a compelling reason -- is  
14 not even close to a compelling reason to exempt Harris  
15 County out.

16 If Judge Lindsay or someone else thinks that  
17 they're teaching something at a course that's wrong or  
18 incomplete, well, that's another thing that the Process  
19 Review Board ought to be alerted to, and they are  
20 presumably in touch with the people who run these  
21 education programs, and they can pass that along, and that  
22 can be included in the materials. It seems to me that  
23 that's a quick, easy fix, or at least a way to deal with  
24 that, and we ought not to exempt Harris County if this is  
25 the only reason.

1 HONORABLE SARAH DUNCAN: Why don't you make  
2 that in the form of a motion?

3 PROFESSOR HOFFMAN: And so I do.

4 HONORABLE SARAH DUNCAN: And I second it.

5 MR. WEEKS: If I could add, Mr. Chairman, we  
6 did have Judge Lindsay on our educational committee as we  
7 drafted some minimum guidelines for educational providers  
8 that are in your packets today and Judge Lindsay was a  
9 very active participant in that effort.

10 CHAIRMAN BABCOCK: Trying to get her under  
11 the tent, right?

12 MR. WEEKS: Yes, sir. I think all of her  
13 concerns were addressed in that.

14 MR. ORSINGER: You can tell why he's chair.

15 CHAIRMAN BABCOCK: Yeah, right. Okay.  
16 Well, there has been a motion and a second, and the motion  
17 as I understand it is that everyone who is in favor of  
18 including Harris County in the statewide rules, thus  
19 bringing it into --

20 MR. RATLIFF: Point of order, Mr. Chairman.

21 CHAIRMAN BABCOCK: Yeah, Shannon.

22 MR. RATLIFF: If you vote on this do you  
23 have to go on and vote on this whole question? It seems  
24 to me we're taking something that was done for the  
25 administrative convenience of district judges and we are

1 now erecting this giant edifice on top of it. If I vote  
2 on this motion am I committed on the motion about whether  
3 we --

4 CHAIRMAN BABCOCK: No, you are not committed  
5 on the other stuff. There was a secret motion to remand  
6 to the Court that was granted by the gentleman to my left,  
7 so this is just giving the Court direction on certain  
8 discrete issues.

9 HONORABLE JAN PATTERSON: We never commit to  
10 consistency, Shannon.

11 MR. RATLIFF: Okay. All right.

12 CHAIRMAN BABCOCK: So those in favor of  
13 including Harris County and not excluding them as they  
14 currently are, raise your hand.

15 HONORABLE NATHAN HECHT: Several  
16 abstentions.

17 CHAIRMAN BABCOCK: All right. Those  
18 opposed? Oh, yeah, there are some abstentions. Now raise  
19 your hand up high now, everybody.

20 HONORABLE LEVI BENTON: I want the record to  
21 reflect Benton present, not voting.

22 CHAIRMAN BABCOCK: All right. 27 to 1, the  
23 chair not voting as customary, Judge Sullivan not in the  
24 room, Judge Benton not voting, and so there you have an  
25 expression from this committee.

1 HONORABLE JANE BLAND: Judge Bland not  
2 voting either.

3 CHAIRMAN BABCOCK: I was -- Richard, I was  
4 serious about the fact that I think the Court feels that  
5 there is need for it to study this question further before  
6 we dabble in it anymore, so we might pick it up at our  
7 next meeting.

8 MR. ORSINGER: Let me ask you this, Chip.

9 CHAIRMAN BABCOCK: Yeah.

10 MR. ORSINGER: We also have the opportunity  
11 to point out to everyone that the board would like to fix  
12 the prescribed information for a return, and maybe we  
13 don't want to take the time to do that this afternoon, but  
14 it seems to me like many of the uncertainties or even  
15 irregularities could be helped if we had a more robust  
16 return requirement, so maybe we could revisit that at a  
17 future meeting, and then there is the issue of identity  
18 cards which you may not want to take up now. Those are  
19 really independent from the previous discussions we have  
20 been having.

21 CHAIRMAN BABCOCK: We'll take that up at a  
22 future meeting.

23 MR. ORSINGER: Okay.

24 CHAIRMAN BABCOCK: Thank you for that. We  
25 have another potential rule amendment to Rule 21 that,

1 Richard, is also under your purview, although I think  
2 Judge Sullivan is the mover in this -- in this regard, and  
3 that basically is suggesting that the three-day notice  
4 requirement for motions be expanded to some degree. Are  
5 you going to talk about this?

6 MR. ORSINGER: I'll introduce it and then  
7 let Judge Sullivan explain his proponent. This really  
8 involves Rule 21 of the Rules of Civil Procedure, relating  
9 to the amount of notice that's required for a hearing on a  
10 motion, but it also interfaces with Rule 4, which adds on  
11 notice for service of facts, and it seems to me like we're  
12 talking about notice and we need to remember that notice  
13 can be served in different ways and, therefore, the length  
14 of notice is different.

15 My subcommittee did not have a very unified  
16 view on this proposal. One person favored reasonable  
17 notice instead of the minimum three days. Several people  
18 preferred to leave it at three days. One person pointed  
19 out that the Federal rules require five days, and that  
20 person preferred five days. Then several people thought  
21 it was a good idea to lengthen it. We wanted to lengthen  
22 it to seven days notice. Judge Sullivan's proposal was to  
23 move to it 10 days notice.

24 Now, in the appellate rules there is a Rule  
25 10.3 that has to do with notice, but it's not -- it's not



1 a required notice to the other side. It just says that  
2 the appellate court should not act on a motion until at  
3 least 10 days has passed from filing, and I think that's  
4 because they are allowing the other parties to have the  
5 opportunity to file a response, so the way I see TRAP 10.3  
6 is that it's a 10-day notice rule.

7           If you're going to move to 10 days then  
8 maybe you want to think differently about adding  
9 three-days for service by fax, because so many lawyers  
10 serve by fax, and that converts a 10-day rule into a  
11 13-day rule. On the other hand, there is a groundswell of  
12 support to say that fax is no different than hand-delivery  
13 because you know that either the fax went through at that  
14 time or it didn't. There is no uncertainty like with mail  
15 that it may or may not show up or might show up two or  
16 three days later, so it seems to me that in the context of  
17 length of notice for a motion we should also decide  
18 whether we want to require an additional three days to be  
19 added for service by fax.

20           And as long as we're talking about the fax  
21 rule, another part of it is that if fax is served after  
22 5:00 o'clock in the afternoon, it's treated as if the fax  
23 is served the next morning, and then I had one person that  
24 said as long as we're going to be talking about modes of  
25 giving notice, would you please discuss e-mail notice and

1 whether we have reached the point that we're comfortable  
2 with the idea of either allowing or mandating service by  
3 e-mail and if there is service by e-mail how will it fit  
4 into the timetable. So without saying any more than that,  
5 Judge Sullivan, do you want to explain?

6 HONORABLE KENT SULLIVAN: Well, after  
7 hearing from Justice Hecht that apparently the issue was  
8 raised 16 years ago, perhaps this comes under the heading  
9 of an idea whose time has come, if that's enough time for  
10 it to have --

11 MR. DAWSON: Percolated.

12 HONORABLE KENT SULLIVAN: Percolated.  
13 Ripened, perhaps. I tried to set out my thoughts in the  
14 brief memo that came with the proposal, and in large part,  
15 as Richard points out, this ended up on the agenda this  
16 time and really I guess did not go through the process of  
17 having everyone take a look at the drafting involved; and  
18 as I'll get to in a minute, I think there are one or two  
19 issues that have already been identified that would need  
20 to be addressed in terms of drafting; but conceptually I  
21 think this is something that is important, relative to the  
22 statewide administration of justice and I wanted to start  
23 with that point because I really do think this type of an  
24 amendment for a statewide rule is important; and as I'll  
25 mention in a moment, I readily acknowledge, of course,

1 that there are many areas in which the current practice  
2 may be adequate; but we are trying to establish a minimum  
3 standard and a baseline for statewide application.

4           My thought process was that we need a  
5 process that provides a timetable for a court and the  
6 parties to be able to receive and digest any written  
7 motion and response to be taken up at a hearing in advance  
8 of the hearing. In short, I think you need a timetable  
9 that contemplates everyone actually being prepared and  
10 prepared to address the issues that are before the court.  
11 I think a three-day notice period on its face does not  
12 allow for that. I think three days is inadequate to  
13 provide any meaningful opportunity to write a response of  
14 any sophistication to a motion that has been filed against  
15 you. I think it disproportionately burdens litigants and  
16 lawyers who may be out of town. I think that is  
17 particularly troublesome.

18           Commerce is -- I don't think it's much of a  
19 stretch to say that it's increasingly interstate and  
20 international. I think that means that our disputes are  
21 as well. It means that litigants and lawyers are as well,  
22 and, again, I think a three-day minimum notice period is  
23 simply inconsistent with some fair acknowledgement of  
24 those facts.

25           I also think that if you are in a situation

1 where there is routine use of three days notice, and  
2 particularly if you are dealing with persons who are out  
3 of town, while it may meet the technical requirement of  
4 the rule, it creates an unfortunate appearance of  
5 parochialism and can perhaps even arise to some appearance  
6 of impropriety; and speaking as I do, from the perspective  
7 of a trial judge, it's very important to create a process  
8 where everyone will have a fair opportunity to have the  
9 written terms that they want the court to consider all up  
10 in the end, so to speak, in advance of the hearing so the  
11 judge can review them and be prepared so that the hearing  
12 can be a more meaningful event and it can be as efficient  
13 as possible as opposed to having the judge being handed,  
14 as happens to me more than a few times, something as the  
15 hearing begins, literally having it -- well,  
16 metaphorically having it thrown over the transom, so to  
17 speak, at the last second, often a very significant  
18 document with, of course, no expectation, no hope the  
19 judge can do anything about digesting what may be included  
20 in it.

21           My proposal is not intended to affect the  
22 practice of areas that on a collegial basis may work on  
23 shorter time periods routinely because it explicitly  
24 acknowledges exceptions that you can see there, allowing  
25 the orders to operate on shorter time periods, of course,

1 by agreement and allowing -- let me put it this way.  
2 There is no attempt to divest control from -- or to divest  
3 the discretion of individual courts to shorten time  
4 periods when appropriate. It just attempts to formalize  
5 some clear process for that when it is indeed appropriate.

6 I had a little bit of research done about  
7 what some other jurisdictions -- what practices they  
8 employ. You see a smattering of the results in the chart  
9 that accompanied this, and I do believe we are on a fairly  
10 extreme end of this notice spectrum, if you will.

11 With respect to the specific drafting that  
12 was done, I want to acknowledge a couple of changes that I  
13 think will need to be made, assuming that we go forward  
14 after today. One is there was in the language of the  
15 specific proposal that I included some implication that  
16 was not intended, quite frankly, of a requirement of  
17 simultaneously filing a motion and notice of hearing. In  
18 fact, I think it implies really that the notice is an  
19 inherent part of the motion. That was not intentional on  
20 my part. The intent was and remains to require that both  
21 a notice and the motion be in the hands of opposing  
22 counsel 10 days in advance of the intended date of  
23 disposition of the motion. That was whether they were  
24 filed together or whether they were filed independently.

25 The reason that I bring that up is someone

1 has already pointed out to me that apparently some courts  
2 require that the motion be filed before the court or the  
3 clerk will give a hearing on that motion, and so custom  
4 and practice may require that those two documents be filed  
5 at separate times and served separately. As long as each  
6 would meet the 10-day requirement, that, of course, would  
7 be I think perfectly fine.

8           Also, there is one oversight that's included  
9 in the drafting, and that is it does not say explicitly,  
10 although this is easily remedied, that it would not apply  
11 to any motion made during a trial. That, I think, was  
12 hopefully self-evident, but the rule should be amended to  
13 reflect that, and I think I may even already have an  
14 amended version that would achieve those objectives.  
15 That's largely my intent, Mr. Chairman, and my motion.

16           CHAIRMAN BABCOCK: Justice Hecht.

17           HONORABLE NATHAN HECHT: And let me just add  
18 one other thing. As his draft indicates in subparagraph  
19 (1), as otherwise provided for by these rules there are  
20 about a dozen other rules that have three-day notice  
21 requirements. Most of them are for garnishments,  
22 sequestration, receivers, and injunctions and stuff like  
23 that. One is for recusal, but they are scattered all  
24 through the rules.

25           CHAIRMAN BABCOCK: Judge Sullivan, did -- I

1 may have missed it. In the old rule the trial court has  
2 discretion to shorten the time. Is there a parallel  
3 provision in this?

4 HONORABLE KENT SULLIVAN: "Upon written  
5 motion and leave of court for good cause shown."

6 MR. LOW: Good cause.

7 CHAIRMAN BABCOCK: Sorry. Okay. Yeah,  
8 Frank.

9 MR. GILSTRAP: Okay. I think Judge Sullivan  
10 has raised two issues, and I think they are separate  
11 issues. First of all, there is an inherent capacity for  
12 abuse in this rule, and it's been there for a long time,  
13 and everybody understands it. It's three days notice, and  
14 they can shorten it, and, you know, on one day's notice  
15 you can be on an airplane for a shootout on the border. I  
16 mean, it can be abused that way, and everybody has  
17 understood that.

18 My question is, is it being abused that way,  
19 and I don't know the answer to that. Is there someplace  
20 in the state where you do surprise people regularly and  
21 give them three days notice of hearings on important  
22 motions? I don't know the answer to that, but -- and I  
23 guess my question is, with regard to that issue are the  
24 concerns theoretical, which are definitely in the rule, or  
25 are they practical?

1           The second issue is that there is not  
2 enough -- that the longer notice period would produce a  
3 better decision because the parties would be able to brief  
4 it and get the briefs to the judge ahead of time. And  
5 again, it seems to me the individual judge can just cure  
6 this by telling the clerk not to set things on three days  
7 notice. I mean, it seems to me that might be one answer  
8 there. There is, however -- and I think I didn't  
9 understand that.

10           The more you extend the time limit the more  
11 cumbersome and expensive you make the motion. The classic  
12 example is the Northern District of Texas. Every motion  
13 there has -- you have the response due in 20 days and  
14 reply brief is due in 15 days. For ordinary motions the  
15 briefing limits are 25 pages for principal briefs and 10  
16 pages for reply briefs, except for summary judgment  
17 motions where it's 50 pages and 25 pages.

18           Once it's fully briefed you have no  
19 entitlement to the hearing, and it's just ripe and it just  
20 sits there on the judge's desk while -- and while some  
21 motions do get heard quickly, a lot of motions just sit  
22 there, and they are very expensive, and the Northern  
23 District of Texas is the classic place where if you write  
24 briefs and you have a defendant who's prepared to pay a  
25 whole lot of money you do real well, but nobody else does



1 well. And I know we won't get to that point, but I just  
2 want to point out that to the extent that we extend it you  
3 make every motion more expensive, and my question is, are  
4 we doing this -- do we want to do this for practical  
5 concerns or theoretical concerns.

6 CHAIRMAN BABCOCK: Yeah, Buddy.

7 MR. LOW: All right. One of the things we  
8 want to -- you look at it just as a three-day rule alone  
9 and it looks okay, but for instance, the Eastern District  
10 has 12, but you know what else the Eastern District has?  
11 It has a hotline. You have a magistrate there available.

12 TRAP Rule 10.3 Richard pointed out provides  
13 for an emergency. This doesn't provide for an emergency.  
14 Federal rule that provides for five days provides for ex  
15 parte when necessary. This rule doesn't provide for that.  
16 This rule provides that with leave of court. How can you  
17 get leave of court to have a hearing without a hearing? I  
18 mean --

19 HONORABLE KENT SULLIVAN: People do it all  
20 the time. They do it constantly --

21 MR. LOW: Does this rule allow where they do  
22 it ex parte?

23 HONORABLE KENT SULLIVAN: They file  
24 something. I insist that something be filed, and I sign  
25 orders all the time for -- to allow for some emergency

1 hearing of something.

2           HONORABLE LEVI BENTON: Buddy, we routinely  
3 get requests for emergency hearings in writing served on  
4 the other side, and so the -- your concerns are addressed  
5 in part (3), and it's not theoretical. It is very  
6 practical. It's not just about the judge being prepared.  
7 It's about one side or the other having a fair opportunity  
8 to know what arguments are being advanced by the other  
9 side, to know -- to know that Buddy Low -- or, no, not  
10 Buddy Low wouldn't do this, but let's say somebody else  
11 might show up and urge to Judge Sullivan that some case  
12 that Judge Hecht -- Justice Hecht wrote some years ago  
13 stands for X, and because he knows he's not telling Buddy  
14 Low he is going to talk about that case when it really  
15 stands for Y. So you're standing there before the court  
16 because the papers aren't served timely and so -- and what  
17 we don't -- what we're really ignoring, and every one of  
18 you trial lawyers in this room has done this, is the  
19 motion to reconsider, which is a real cost, too, and so I  
20 really don't understand practically any trial lawyer's  
21 opposition to this.

22           MR. LOW: But see, the problem is you're  
23 going to have a judge like you and you're not going to  
24 just haul off and rule right then. It doesn't say when  
25 you've got to rule, you've got to rule in three days, and

1 a judge like you is going to say, "Wait a minute, I need  
2 more knowledge on this before I can rule," and you can so  
3 order it.

4 HONORABLE LEVI BENTON: Okay. Well, then --

5 MR. LOW: What I'm saying is I don't think  
6 this rule has precautions that others do because when  
7 you're talking about leave of court, good cause shown,  
8 what is good cause? I think you're overlooking a lot.

9 CHAIRMAN BABCOCK: Alistair and then Judge  
10 Sullivan.

11 MR. DAWSON: I think I agree with Judge  
12 Sullivan that we need to extend the time frame. Three  
13 days is not sufficient for a number of reasons. I agree  
14 with him that it creates an inefficient process by which  
15 one party files a motion and then, you know, eight, nine  
16 times out of ten the response is given to the court at the  
17 hearing so that the party who filed the motion doesn't get  
18 to see it. You know, as Judge Benton points out, I can't  
19 analyze the cases that, you know, are included in the  
20 response and distinguish them. The judge is not going to  
21 be as well prepared.

22 So for that reason I think we do need to  
23 extend it, and I would point out if you are going to do  
24 that and you want to achieve that then you need to include  
25 in the rule a mechanism whereby responses, if they're

1 going to be filed, have to be filed in advance of the  
2 hearing, because under the current rule even if you say  
3 it's 10 days, the other party, responding party, could  
4 wait and hand you the response at the hearing.

5 HONORABLE LEVI BENTON: No, it says three  
6 days.

7 HONORABLE KENT SULLIVAN: It says three  
8 days.

9 MR. DAWSON: Oh, is it? I'm sorry, I missed  
10 that. The other thing is the current three-day rule does  
11 permit parties, if they're so inclined, to game the  
12 system. They can and I have experienced times where  
13 people have obviously put a lot of time and thought into a  
14 motion, it's a big motion with exhibits and attachments,  
15 and it gets filed on Monday and set for hearing on Friday,  
16 and, you know, they may have spent two or three weeks  
17 preparing it and I have got to respond to it in two or  
18 three days, and in my experience, if you're not -- if  
19 you're an out of town lawyer, there -- and you're dealing  
20 with someone who is not particularly a professional  
21 lawyer, they don't agree to move the hearing.

22 You know, if I have got a case in some other  
23 part of the state and, you know, I'm dealing with someone  
24 that is not as professional, say, as the people in this  
25 room they'll set it for three days hearing because they

1 know they've got a strategic advantage, and the rules  
2 ought not to be gamed that way. So I think we do need to  
3 extend it. I think 10 days is probably a good system.

4           You know, in terms of Buddy's comments, I  
5 agree you do need to have provisions in there where, you  
6 know, you can have exceptions. If there's a discovery  
7 dispute that needs an immediate ruling for whatever  
8 reason, you know, the court can address that, so I think  
9 we ought to adopt this.

10           CHAIRMAN BABCOCK: Judge Sullivan and then  
11 Pete Schenckan.

12           HONORABLE KENT SULLIVAN: I wanted to speak  
13 to the point that Frank raised about burden and cost and  
14 his analogy I guess to the Northern District because what  
15 I see on a routine basis is much more like what Judge  
16 Benton pointed to, and it goes something like this. A  
17 respondent -- can be the movant as well because of just  
18 the shortened time period, but one or more of the parties  
19 say, "I had no idea that this issue was going to be raised  
20 or this authority was going to be argued" and inevitably  
21 that quickly leads to, "Judge, I want more time to  
22 respond. Will you give me time to file -- to do the  
23 research and file some response?"

24           And inevitably, of course, if there is any  
25 legitimacy at all to the notion that they had been

1 blindsided then, of course, you do give them more time,  
2 which then leads to the response from the other side, "We  
3 want to come back, because we've never we've now seen what  
4 their response is and we want to have an opportunity to  
5 hash through this again," all of which relates to just one  
6 fundamental problem, there was no organized process by  
7 which everyone would have adequate notice of what was  
8 truly going to be at issue at the time of the hearing and  
9 had in their hands some document that summarized what  
10 positions would be taken by the parties at the time of the  
11 hearing; and of course, the judge, please remember the  
12 judge, didn't have any opportunity to digest this in  
13 advance of the hearing so as to have any intelligent  
14 questions ready and assist with respect to the  
15 decision-making. So I really do question the extent to  
16 which this rule, the current rule, somehow is less  
17 expensive. My experience is really quite the contrary.

18           As to Buddy's point, I am very sensitive to  
19 the question of having some failsafe mechanisms, and  
20 again, on a point of comparison this one explicitly  
21 incorporates some failsafe mechanisms and gives a lawyer  
22 some idea of how to invoke them. Our current rule I think  
23 is much more ambiguous as to exactly how you might deal  
24 with unusual circumstances. I think the specificity and  
25 clarity is good. Again, that was one of the driving

1 thoughts I had behind this.

2 CHAIRMAN BABCOCK: Pete and then Lamont.

3 MR. SCHENKKAN: I want to address the  
4 question of does this actually happen? Yes, it does. I  
5 live in Austin, and that's where my practice is based, but  
6 I am regularly called down to go to the Rio Grande Valley  
7 for hearings, and three times in the last 18 months on  
8 token nominally three days notice when, in fact, designed  
9 cleverly to ensure that it was practically less than three  
10 days notice, including one that was set, if I have the  
11 date and the day of the week exactly right, Thursday,  
12 December 23rd, a motion to compel, great urgency about  
13 that motion that was subsequently abandoned. So, yes,  
14 this continues to be a problem.

15 I think we can also make the seven day  
16 extension -- expanding the time to seven days more  
17 acceptable by requiring faxes and by requiring the  
18 three-day adder for fax service. If I have the fax today  
19 of the motion, I have a real seven days to look at them,  
20 at the matter, and then I would hope -- I know this is  
21 outside the immediate scope of this proposal -- that we  
22 would turn at some point to Rule 680, the temporary  
23 restraining order rule, and make sure that even when  
24 someone believes he has the case that entitles him to a  
25 TRO ex parte that he has to fax it when he knows who

1 opposing counsel is, the same time he sets out to walk  
2 over to the courthouse to get it granted ex parte, so that  
3 if I'm quick enough and can reach my local counsel, in  
4 fact someone will be there to oppose it. Two and three  
5 were tiers.

6 CHAIRMAN BABCOCK: Lamont.

7 MR. LAMONT JEFFERSON: I think this is a  
8 very refreshing discussion because in Bexar County it is  
9 absolutely the exception that the judge has read whatever  
10 gets filed whenever gets filed before you're actually  
11 standing in front of the judge. I don't know what the  
12 practice is in Austin, which also has the central docket.

13 MR. DAWSON: That's because you've got the  
14 rotating system there.

15 MR. LAMONT JEFFERSON: I know.

16 MR. DAWSON: They can't have read it.

17 MR. LAMONT JEFFERSON: Well, they can if  
18 they can make provisions to read it, at least Judge Massey  
19 does. If a motion for summary judgment gets filed in her  
20 court, she'll have the parties come before her, give a  
21 little talk and then reset it, but generally speaking you  
22 go in front of the judge and the judge will not have read  
23 it, so the three days doesn't make a huge bit of  
24 difference at least as far as educating the judge goes.

25 The other point I want to make about the



1 three days -- and I don't have a problem with it if it's  
2 three or seven or ten. In my practice, at least in my  
3 experience, I haven't been abused by the three-day system  
4 even in Bexar County where you can get a setting, you  
5 know, literally in three days with no problem. It's not  
6 been a significant problem or trap in our practice, and in  
7 the jurisdictions where it is a problem you're going to  
8 have scheduling problems regardless of what the rule is  
9 because there are -- you know, you could always get gamed  
10 in a bad jurisdiction, but the one point I want to make  
11 about whatever the time period is, is that the three-day  
12 rule has been around for, I don't know, since the  
13 beginning of the rules. I mean, it's been around a long  
14 time, at least since I have been practicing in 1984, and  
15 now technology has made it possible -- it has enabled  
16 parties to respond much quicker and much more thoroughly  
17 to whatever gets filed on you.

18 I mean, you have not only access to  
19 technology that gives you the research that you need, but  
20 you have the ability to turn out a response in fair -- in  
21 quick order, and you have the opportunity to -- I mean, to  
22 have instant access when things get filed and served as  
23 opposed to waiting in the mail or even waiting for it to  
24 be distributed in the office. It often just pops up on  
25 your desktop, whatever it is that got filed.

1           So we have the skills and the technology to  
2 respond very quickly to whatever motions have been filed  
3 at whatever time, which, you know, given that we have  
4 lived with the three-day rule for as long as we have --  
5 and I don't know the extent of the problems others have  
6 experienced, I've not had those problems, but given the  
7 time period that we've had -- we have lived with the  
8 three-day rule and given now our enhanced ability to react  
9 quicker, it seems a little inconsistent to move the other  
10 direction and lengthen the three-day notice.

11           CHAIRMAN BABCOCK: Nina. And then -- I'm  
12 sorry, Judge Patterson. Did you have your hand up a  
13 minute ago?

14           HONORABLE JAN PATTERSON: I'll go after.

15           CHAIRMAN BABCOCK: You'll yield to Nina?

16           HONORABLE JAN PATTERSON: That's fine.

17           MS. CORTELL: I guess on balance I'm okay  
18 with extending the time out and creating the order and  
19 gaining the benefits that have been talked about, but I  
20 think the overall picture I think we want to be sensitive  
21 to -- and this was sort of all alluded to in what Frank  
22 said and Buddy -- we don't want to lose the responsiveness  
23 of our state court system that I think at least compared  
24 often to the Northern District Federal in Dallas is really  
25 -- it works much better generally speaking, our state

1 court, our ability to be responsive to clients' needs, and  
2 as we are in an environment where it seems to me that  
3 trial filings are down because people are choosing  
4 alternative forms of dispute resolution, be it arbitration  
5 or whatever, I mean, I do think the public is telling us  
6 that they are not satisfied in many ways with how our  
7 court system works.

8               So my only regret of letting go of the  
9 three-day is that it is a responsiveness that often does  
10 work, although it can be abused and it can cause the kind  
11 of waste that Judge Sullivan spoke to, so while I would  
12 probably on balance be in favor of extending it out and  
13 creating this protocol I don't want to lose sight of our  
14 desire to have a responsive trial system.

15               CHAIRMAN BABCOCK: Justice Patterson.

16               HONORABLE JAN PATTERSON: My only point is I  
17 think the practices among the judges vary to such an  
18 extent in the state and there are some rules that are for  
19 the benefit of lawyers, some for the whole system, some  
20 for judges. To me this is a rule that speaks to the  
21 lawyers, what's efficient and helpful for them, and  
22 really, that's the main concern here. What makes for an  
23 efficient service and responsiveness and quality of life,  
24 perhaps, and all of those things, so to me I would want us  
25 to defer to what the lawyer sense is on this.

1                   CHAIRMAN BABCOCK:  Buddy and then Carl, two  
2 lawyers right down the hallway from you.

3                   MR. LOW:  I would point out this came to the  
4 Court's attention in 1990, and it was of such a problem it  
5 didn't come up until 16 years later, but a lot of times  
6 people give notice of a deposition, give you about four  
7 days notice, and I'm in this or that, so I've got to have  
8 a three-day hearing, and I don't know if I can prove that  
9 the way we've got it here, good cause, or what is good  
10 cause or so forth, so and I think that the three-day thing  
11 can be taken care of by the different judges if they do  
12 their jobs.

13                  CHAIRMAN BABCOCK:  If you have been  
14 convicted of a felony involving moral turpitude, that's  
15 good cause.

16                  MR. LOW:  Wait a minute.  I don't even want  
17 to think about that.

18                  MR. ORSINGER:  You mean you file the  
19 pleading to --

20                  CHAIRMAN BABCOCK:  Carl.

21                  MR. HAMILTON:  I favor the extension to five  
22 days, but what I am troubled with is this -- another  
23 motion for leave to shorten it for good cause.  I think  
24 that in the main motion or whatever you present to the  
25 court for hearing it ought to be accompanied by an

1 affidavit or something saying why you need a shorter  
2 hearing, and based on that the judge ought to decide. I  
3 don't think we need a separate motion and another hearing  
4 on that.

5           The other thing is that this written notice,  
6 I assume that's notice of the hearing, and some judges  
7 don't work on the notice principle. They say you've got  
8 to send an order. Without the order, there's no notice,  
9 so we might need to consider notice or order or whatever  
10 the court requires.

11           CHAIRMAN BABCOCK: I don't want to get off  
12 the train here, but in my experience, number one, even if  
13 I want or my opponent wants a hearing in three days, it's  
14 very hard to get one set --

15           MR. LOW: Right.

16           CHAIRMAN BABCOCK: -- in three days. The  
17 docket is crowded and, you know, sometimes it will take  
18 you a month to get a hearing.

19           The second thing is that those motions that  
20 are set, at least in my practice, on three days notice,  
21 are not the kind of case -- not the kind of motions that  
22 are going to materially affect the rights of the parties.  
23 I mean, they're typically discovery motions or they're the  
24 guy is horsing you around because you're trying to do a  
25 deposition the day after Christmas or things like that;

1 and as Nina says, there is something to be said for a  
2 system where you can theoretically get to the court  
3 quickly without having to file a second motion.

4 MR. LOW: Right.

5 CHAIRMAN BABCOCK: You know, I'm sensitive  
6 to all these things that are being said, but one of the  
7 big pushes the last ten years that we have seen in this  
8 committee and in the Legislature is to try to make -- try  
9 to make our litigation practice quicker and more  
10 efficient, and extending the time out seems to me to  
11 potentially run counter of both of those things.  
12 Alistair.

13 MR. DAWSON: My experience, Chip, in Harris  
14 County, since we're picking on Harris County today, it is  
15 hard to get a hearing within three days. Most of the  
16 judges you can call up -- and all of this is administered  
17 by the clerk, as we all know. You may be two weeks out or  
18 what have you. That's also true in Dallas, but for the  
19 rest of the state it's been my experience that you can get  
20 hearings in three days, five days notice, pretty  
21 routinely, and not being able to get a hearing is more the  
22 exception to the rule, so I think it does happen, and I  
23 don't think -- I agree with Judge Sullivan that putting a  
24 system in place where everyone shows up, you know what the  
25 arguments are, judge has the chance to read it, at least

1 an opportunity to read it beforehand, is a lot more  
2 efficient; and I would want to argue you would get your  
3 cases to trial or get that issue resolved a lot more  
4 efficiently under this proposed system than we do under  
5 the current system.

6 CHAIRMAN BABCOCK: Justice Gaultney.

7 HONORABLE DAVID GAULTNEY: There is one key  
8 advantage to my looking at it, is that it does provide a  
9 deadline for a response in advance of the hearing. You  
10 know, at least at that point the movant knows what is  
11 going to be argued in response before the hearing and you  
12 do have notice of what -- both sides have notice of what  
13 is going to be presented.

14 CHAIRMAN BABCOCK: Buddy.

15 MR. LOW: But generally it doesn't involve a  
16 lot of case law. It involves like you're talking about,  
17 just kind of an emergency situation and the more -- the  
18 longer you give people to brief, the more you're going to  
19 cost the client, the more expensive litigation gets, and  
20 that's what's our problem right now. You know, Lucius  
21 Bunton had what he called the rocket docket. He didn't  
22 get things. It's less expensive and people appreciated  
23 that.

24 CHAIRMAN BABCOCK: Judge Sullivan.

25 HONORABLE KENT SULLIVAN: Again, to the

1 Northern District analogy and the suggestion that  
2 extending time somehow adds cost, I'm not sure that I  
3 follow that. There is no requirement here, as apparently  
4 there is at least implicitly in requirements like the  
5 Northern District requirement, that there be a lot of  
6 paper work. There is no paper work requirement  
7 contemplated here whatsoever. If someone doesn't want to  
8 file a response there is no requirement that they file a  
9 response. The intent is simply to create some certainty  
10 as to a timetable. That's all.

11 CHAIRMAN BABCOCK: Yeah. You know, I was  
12 smiling when you talked about people handing stuff on the  
13 day of the hearing. I was in a hearing in Fort Worth  
14 Wednesday. It's a special appearance which has been on  
15 file a little over a year. It got set for hearing  
16 Wednesday. On the day of the hearing -- and I wasn't  
17 involved. I was codefendant, but on the day of the  
18 hearing the movant filed a motion to strike portions of  
19 the -- his opponent's affidavit; and the plaintiff, who is  
20 the nonmovant, filed a -- gave the judge across the  
21 transom three cases, and his opponent; and the cases were,  
22 you know, pretty on point, too, but I mean, it just  
23 happens. Yeah, Pete.

24 MR. SCHENKKAN: And if you're in a --

25 CHAIRMAN BABCOCK: I'm sorry. There was



1 somebody over here.

2 MR. PERDUE: I was going to weigh in.

3 CHAIRMAN BABCOCK: Yeah, Jim.

4 MR. PERDUE: Unfortunately my personal  
5 experience, there was a call for whether there is a  
6 problem, is that it is -- it is used and abused, and it is  
7 serious issues. In medical malpractice we see motions to  
8 dismiss the case on an expert report with three days  
9 notice. That is a very substantial motion. I see very  
10 extensive Daubert motions on motions to strike experts  
11 with three days notice, and so just anecdotally I've seen  
12 it gamed. I've seen it used, and it is a problem, and  
13 just from my personal perspective, I agree with the judge  
14 that the opportunity to have a response that will be read  
15 prior to the hearing as opposed to handing the response  
16 and having the judge essentially try to multitask and then  
17 usually take it under advisement is -- it may not be  
18 quicker, but it is more efficient. It does expedite from  
19 a lawyer's perspective the moving of the issue, and so I  
20 agree with the proposal.

21 CHAIRMAN BABCOCK: Pete.

22 MR. SCHENKKAN: If you're -- you're saying  
23 in Dallas and Houston it can be very hard to get a hearing  
24 on these motions in less than a month. If that's true  
25 then what's the harm in requiring seven days notice of the

1 motion and giving the other side definitely a chance to  
2 respond and requiring them if you file a response it be  
3 three days ahead of time. It seems to me in those  
4 counties we're better off with this rule. And then in the  
5 counties where you can get one in three days and it can be  
6 used in this way, that's where we need it, and this  
7 particular one, yes, it was a discovery motion.

8           The discovery motion would have required  
9 every one of 17 insurance companies to search all their  
10 files of a certain type. Some insurance companies had  
11 10,000 such files. If granted on December 23rd with  
12 essentially no notice, you know, lawyers flying in from  
13 Chicago to the Rio Grande Valley for this hearing that  
14 would have required relief by mandamus over Christmas,  
15 which was exactly, of course, what it was designed to do;  
16 and I don't see that that is something that commends  
17 itself to the legal system and the judiciary's efforts to  
18 make litigation a more attractive alternative than  
19 arbitration. To the contrary it's exactly the kind of  
20 thing that makes people put arbitration clauses in  
21 everything they can so that they at least know their  
22 mandamus is good. It's a mandamus to require arbitration.

23           CHAIRMAN BABCOCK: Bill.

24           MR. WADE: Well, I was just going to share a  
25 little bit of humor. This happened just within the last

1 couple of weeks on a products case pending in a county out  
2 near the New Mexico line, and it involved two Houston  
3 lawyers and one of them trying to do just the same thing  
4 we are talking about. The movant got it heard, or got it  
5 set, but he forgot to take into consideration it was the  
6 end of spring break and he couldn't get an airplane into  
7 Lubbock, so he had to drive from Houston all the way out  
8 there for a hearing at 9:00 o'clock on Monday morning and  
9 then the other lawyer attended by telephone.

10 CHAIRMAN BABCOCK: That will teach him.

11 MR. WADE: So it happens.

12 CHAIRMAN BABCOCK: Tommy.

13 MR. JACKS: Well, I mean, as I listen to  
14 this, I am reminded of Gib Lewis' saying that it all  
15 depends upon whose ox is being doored in the ditch, which  
16 is to say that, yeah, I think there can be some abuses. I  
17 do think that the flexibility and ability to get rulings  
18 in little time and little cost is a feature of our state  
19 court system that I loathe to see sacrificed, and I do  
20 believe that the more time you give lawyers to do stuff,  
21 the longer the motions become, the longer responses  
22 become, and there is a lot to be said for handing the  
23 judge a couple of highlighted cases during the hearing and  
24 getting the job done and moving on down the road.

25 Having said all that, I'm not offended by

1 the idea of changing the brief to seven or perhaps even  
2 ten. I do think that Buddy's point is critical, and that  
3 is that you've got to have a safety valve. I like the  
4 simplicity of our current language "unless shortened by  
5 the court." I don't like the good cause requirement. I  
6 think you shouldn't have to litigate and, frankly, have  
7 much argument about the issue of whether the time is going  
8 to be shortened or not. I think that just ought to be  
9 something the court can do without thinking about it very  
10 much. I think that the -- and so I guess I can take  
11 almost any of these provisions as long as there is the  
12 ability always to get a hearing on the spot and get your  
13 case moved along.

14 CHAIRMAN BABCOCK: Richard.

15 MR. ORSINGER: I think that this is not  
16 going to work real well in family law cases. The  
17 litigation part of --

18 CHAIRMAN BABCOCK: We just exempt family  
19 law.

20 MR. ORSINGER: Well, I mean, the problem is  
21 that if it's too terrible we'll just run to the  
22 Legislature and fix it. My goal here is to try to avoid  
23 that as much as possible, but on the litigation related  
24 stuff, a few extra days isn't going to matter, but on  
25 personal issues that arise inside a family where there is

1 a divorce where they are constantly dealing with each  
2 other on visitation, and child support is late or what  
3 have you. Somebody finds out somebody is about to, you  
4 know, enter a business deal or sell a car or buy a house  
5 or whatever. I'm afraid what's going to happen if we have  
6 a 10-day period is that we're going to end up having two  
7 hearings. We're going to have a motion filed and the  
8 setting secured ten days out and then another motion filed  
9 and a hearing on shortening that hearing to less than 10  
10 days.

11 I don't think that's going to happen on  
12 discovery objections or, you know, any of the routine  
13 litigation stuff, but on the personal stuff where the  
14 client just doesn't have the same kind of dispassionate  
15 perspective about their problem that you do, you're going  
16 to have to do something sooner than 10 days a lot of  
17 times. So I think we're condemning many family law cases  
18 to having dual hearings instead of single hearings when  
19 single could.

20 Now, five days might not make as much  
21 difference. I was just calculating it that it depends on  
22 when you file your motion. If you file your motion on  
23 Wednesday and we use 10 days, then you really have to give  
24 12 days notice because 10 days hits on a Saturday or  
25 Sunday. If you file on a Thursday, you're going to give

1 11 days notice, but if you file on a Friday or a Tuesday  
2 or Wednesday, it's actually 10 days notice on a 5 days  
3 rule. On a five-day rule if you file on a Monday, it's  
4 really a minimum seven days; on a Tuesday it's a minimum  
5 of six days. So either one of these rules for two days  
6 out of the week is really an 11-day rule or a 12-day rule.  
7 Now, I practice both in South Texas --

8 CHAIRMAN BABCOCK: Only you would think of  
9 that, you know.

10 MR. ORSINGER: Well --

11 HONORABLE SARAH DUNCAN: And we're grateful  
12 that you did.

13 CHAIRMAN BABCOCK: And we're grateful.  
14 Thank you.

15 MR. ORSINGER: More problems tend to happen  
16 on Friday afternoon, or is it just that I remember those?  
17 I practice in both South Texas and North Texas, and the  
18 only place in Texas -- so I go to the big cities like  
19 Houston and Austin. The only place I get hearings on  
20 three days notice is San Antonio. In the Hill Country the  
21 judge is in your county about once every three to five  
22 weeks, and so you can either get a hearing once every  
23 three to five weeks or you can go follow him to wherever  
24 he is, but his docket is already full because he hadn't  
25 been there for five weeks. So it's hard to get a hearing

1 quickly in the Hill Country.

2           In most of the family law courts that I'm  
3 in, whether it's in Dallas, Fort Worth, or Houston, you're  
4 looking out weeks to get a hearing on anything, it doesn't  
5 matter, and if you do get a hearing it will be with the  
6 associate judge, which is going to get appealed to the  
7 district judge anyway by whoever the loser is, so we have,  
8 you know, problems -- and I have also a problem with the  
9 requirement of 10 days notice on a countermotion.

10           If someone files a motion and gets a setting  
11 10 days later and you get it at 5:00 in the afternoon or  
12 one minute to 5:00 and you want to file a motion for  
13 sanctions on that motion, you can't set your motion for  
14 sanctions on the same day as the motion on the merits if  
15 they didn't give you 11 or more days notice. In three  
16 days it's more likely if I have a countermotion that the  
17 hearing is 5, 7, 8, 10, 12 days out, and I have a couple  
18 of days to file a countermotion or two motions to set at  
19 the same time.

20           I think that if you -- if you're not careful  
21 here, you may require that a responsive motion is going to  
22 end up having to be heard on the same day that the motion  
23 is; and the longer your period of time is, the more  
24 trouble you have with that; and I'm also troubled by the  
25 three-day requirement of a written response. First of

1 all, it's not my experience that any of my judges ever  
2 look at anything in advance, and that's all over Texas.  
3 Occasionally if I file a really long summary judgment with  
4 a stack of cases and exhibits that's so big that they'll  
5 get -- they'll know about it in advance and they'll look  
6 at it, not in San Antonio, but in other places because in  
7 San Antonio they get no advance notice; but there is a lot  
8 of times where for one reason or another, I'm not  
9 necessarily going to have my written response ready three  
10 days in advance; and so that's going to force me to --  
11 especially if they accelerate it, if I still have to have  
12 my written response three days in advance for something  
13 that's going to be off four days then I've got one day to  
14 do it.

15 I don't like that three-day rule. I can  
16 understand why a judge would like it because if he's going  
17 to have to make a complicated ruling and he wants to see  
18 both sides on paper and study it and get a leg up on it  
19 and everything, that's great. As a practicing lawyer the  
20 three-day requirement to have a written response before  
21 the hearing is problematic for me and I think it's going  
22 to be problematic for a lot of family law practitioners,  
23 and then I also --

24 HONORABLE KENT SULLIVAN: Now you won't have  
25 the motion for more than three days, but --



1 MR. ORSINGER: Well, see, I --

2 HONORABLE KENT SULLIVAN: I don't see how  
3 filing a response three days in advance is too short.

4 MR. ORSINGER: I can file a written response  
5 on the day I walk into court on three days notice. And if  
6 you're going to give me five days or ten days --

7 HONORABLE KENT SULLIVAN: I understand, but  
8 you get seven under the rule. Anyway, I'm just not  
9 following.

10 MR. ORSINGER: Yeah, that's right. If you  
11 give me 10 days notice, that leaves me 7 days to come up  
12 with the response. If it's five days then it leaves me  
13 only two days to come up with the response. A lot of  
14 lawyers in family law are not going to file the response  
15 in advance. They're used to bringing it to the hearing  
16 and filing it if they file a written response at all.

17 And then I hope no one infers from this that  
18 you have to file a written response in order to make a  
19 contrary argument, because we certainly don't want people  
20 to be precluded from walking into a hearing with nothing  
21 on file and raising whatever legal arguments, fact  
22 arguments, or case law that they want to. So at any rate,  
23 I myself am attracted to five days, but anything longer  
24 than five days I think is going to result in two hearings  
25 for most motions in family law.

1 CHAIRMAN BABCOCK: Okay. Buddy.

2 MR. LOW: Could I ask Judge Sullivan, did  
3 you look at the Federal rule, the language? I like the --

4 HONORABLE KENT SULLIVAN: Are you talking  
5 about the current?

6 MR. LOW: The current Federal rule, five-day  
7 rule? You didn't list it in your -- in the appendix or  
8 something. Did you look at the language of it?

9 HONORABLE KENT SULLIVAN: I believe the  
10 reality of hearing practice in Federal court is that each  
11 district, practically speaking, sets their own time limits  
12 and rules --

13 MR. LOW: No. No.

14 HONORABLE KENT SULLIVAN: -- for disposition  
15 of motions. I understand what you're saying about with  
16 the Federal Rules of Civil Procedure, but that's why what  
17 we showed in the chart was the other districts in the  
18 state of Texas.

19 MR. LOW: I'm not talking about -- excuse  
20 me. I'm not talking about the time. I'm talking about  
21 the language they use where -- I think that the committee  
22 ought to consider that language. It's superior language  
23 to what we have. It says, "a written motion other than  
24 one which may be heard ex parte," and when you call the  
25 clerk to get a hearing or something, that's ex parte, or

1 "notice of a hearing shall be served not later than five  
2 days before the time specified, unless a different period  
3 is fixed by these rules or by order of the court." It  
4 doesn't show good cause. It goes to what Tommy is talking  
5 about.

6 HONORABLE KENT SULLIVAN: That is the issue  
7 contemplated by what's in here. "As otherwise provided  
8 for by the rules," that deals with ex parte hearings.

9 MR. LOW: Right.

10 HONORABLE KENT SULLIVAN: "Upon agreement of  
11 the parties or upon written motion," et cetera.

12 MR. LOW: Yeah, but --

13 HONORABLE KENT SULLIVAN: So it's intended  
14 to take care of the same points that you covered, although  
15 the language I understand is different.

16 MR. LOW: It doesn't say by -- it just says  
17 "by order of the court." It doesn't put good cause and  
18 all that. "Such an order may be made ex parte." "When a  
19 motion is supported by the affidavit," and then they go  
20 through a different thing, if there's affidavit then you  
21 have to counteraffidavit one day. I think that language  
22 itself -- I'm not talking about the time -- is superior to  
23 the language in the rule, and I think that ought to be  
24 considered before we do anything.

25 MR. GILSTRAP: Buddy, what rule are you

1 citing from there?

2 MR. LOW: It's Rule 5, let's see, (d). I  
3 only have one page, I guess it's 5(d).

4 HONORABLE NATHAN HECHT: It's 6(d).

5 MR. LOW: 6(d), is it? Okay. I just --  
6 yeah.

7 MR. GILSTRAP: Thank you.

8 MR. LOW: And I think it eliminates this --  
9 the word "good cause" just means so many different things,  
10 and it says "by order of the court." It doesn't say, you  
11 know, you have discretion. I think it's just superior.  
12 I'm not arguing with you the number of days, and I'm not  
13 arguing about the fact that, you know, it's not in there,  
14 because, as you say, every district has its own.

15 CHAIRMAN BABCOCK: Okay. Before we take our  
16 break let's vote because it will make us feel good. The  
17 vote would be on whether or not we change the three-day  
18 notice requirement to some other requirement, and this is  
19 not a vote on what you've just been talking about, Buddy.

20 MR. LOW: I understand.

21 CHAIRMAN BABCOCK: Response dates and all  
22 that type of thing, just whether we're going to change  
23 three days to some other time. So everybody who is in  
24 favor of changing our three-day hearing notice requirement  
25 to some other time period, raise your hand.

1 All opposed? By a vote of 26 to 6 that  
2 passes, so let's take a 10-minute break. Then we'll come  
3 back and finish this rule off.

4 (Recess from 3:29 p.m. to 3:51 p.m.)

5 CHAIRMAN BABCOCK: All right. We're  
6 rolling. All right. Everybody, let's go. Levi. We've  
7 got two issues left on this rule. The first issue is how  
8 many days is it going to be. Is it going to be 5, 7, 10,  
9 20?

10 HONORABLE JAN PATTERSON: I move five.

11 CHAIRMAN BABCOCK: So Justice Patterson says  
12 five.

13 HONORABLE TOM GRAY: Second.

14 MR. ORSINGER: I'll second, third. Third.

15 MR. GILSTRAP: Oh, come one. Let's do a  
16 straw vote by numbers.

17 CHAIRMAN BABCOCK: Is there any more  
18 discussion we want to talk about the number of days?  
19 We've talked a lot about it already, or are we ready to  
20 vote? And I would propose -- yeah.

21 MR. STORIE: The only thing I would ask is  
22 that we consider business days rather than calendar days,  
23 which I think the Western District uses business days.

24 CHAIRMAN BABCOCK: Do our rules say that for  
25 any period less than ten it's --

1 MR. ORSINGER: No. If it's less than five  
2 days you don't count the weekend. If it's more than five  
3 days you do count; isn't that right?

4 HONORABLE TOM GRAY: It can't be less than  
5 five you do one and more than five you do the other, so if  
6 it's five what do we do?

7 MR. ORSINGER: It's Rule 4.

8 CHAIRMAN BABCOCK: Don't count the weekend.  
9 Justice Hecht says it's complicated.

10 MR. KELLY: Doesn't that mean five days is  
11 always seven?

12 CHAIRMAN BABCOCK: Something like that.

13 MR. ORSINGER: It's "Saturdays, Sundays, and  
14 legal holidays shall not be counted for any purpose in any  
15 time period of five days or less."

16 HONORABLE SARAH DUNCAN: "Except Saturdays,  
17 Sundays, and legal holidays shall be counted for purposes  
18 of three-day periods in Rule 21 and 21a, extending other  
19 periods by three days when service is made by registered  
20 or certified mail or by telephonic" --

21 MR. ORSINGER: So if we adopt a five-day  
22 rule and not change Rule 4 then --

23 MR. HAMILTON: You don't count Saturday.

24 MR. GILSTRAP: No, you do.

25 HONORABLE SARAH DUNCAN: You do.

1 MR. HAMILTON: I mean, you do.

2 HONORABLE JAN PATTERSON: The court reporter  
3 is having trouble. It's late in the afternoon.

4 MR. ORSINGER: She's not having as much  
5 trouble as the lawyers. This is the math part that's so  
6 difficult.

7 CHAIRMAN BABCOCK: Well, you had it smoked a  
8 minute ago.

9 MR. GILSTRAP: Well, Chip, why don't we  
10 amend the motion to say five days, but you don't count the  
11 weekends and we can change Rule 4 in the process?

12 MR. ORSINGER: Well, that makes it a  
13 seven-day rule. So, I mean, is that going to fool anybody  
14 here?

15 MR. GILSTRAP: Uh-huh.

16 CHAIRMAN BABCOCK: Well, I propose since  
17 Judge Sullivan advanced 10 days, I think that's what we  
18 ought to vote on first. Now, the question is whether 10  
19 days is going to include or exclude the weekends, and I  
20 think under the current rules it would include the  
21 weekends.

22 MR. ORSINGER: Yes, sir, it would.

23 HONORABLE NATHAN HECHT: Unless the last day  
24 falls on a weekend or a holiday.

25 MR. GILSTRAP: If you give notice on a

1 Friday then you're going to have two weekends to add to  
2 this, Thursday also.

3 CHAIRMAN BABCOCK: Yeah, Alistair.

4 MR. DAWSON: I think as people are  
5 contemplating the appropriate number of days, remember,  
6 part of the reason to do this is to have responses if they  
7 are going to be filed, filed in Judge Sullivan's proposal  
8 three days before the hearing, which I think is a sensible  
9 amount of time. If you have a five-day rule, that means  
10 you've got to file your response two days after you get  
11 the motion, and I don't think that's a reasonable amount  
12 of time, but as people think about these time frames I  
13 think we should keep that in mind.

14 CHAIRMAN BABCOCK: Yeah. Yeah. Good point.  
15 Anybody else? All right. Let's -- yeah, Justice  
16 Patterson.

17 HONORABLE JAN PATTERSON: I'd love to have  
18 the lawyers thoughts on this, but we have trouble getting  
19 appellate briefs filed in advance of argument day and by a  
20 date certain, and I would find it very hard to believe  
21 that that's a practical thing to do in district court to  
22 file three days before. As Richard suggested, I think  
23 it's not practicable in most types of cases to always have  
24 it filed three days in advance.

25 CHAIRMAN BABCOCK: Alex.



1                   PROFESSOR ALBRIGHT: If you're requiring  
2 three days in advance then that doesn't count weekends; is  
3 that right? So really it could be six days in advance? I  
4 mean, once you throw the three days in there then you  
5 change your rule.

6                   MR. ORSINGER: Chip, my ultimate proposal  
7 would be five days with no advanced filing requirement on  
8 a response.

9                   CHAIRMAN BABCOCK: Well, okay. If Judge  
10 Sullivan wants you to yield on that then he can --

11                  MR. ORSINGER: If we're going to have a  
12 three-day filing requirement for a response then you just  
13 about make five days unworkable.

14                  CHAIRMAN BABCOCK: Okay. Everybody who is  
15 in favor of 10 days as proposed by Judge Sullivan, the  
16 head of your subcommittee's attention to this proposal,  
17 everybody who is in favor of 10 days, raise your hand.

18                  All opposed? Whoa, a close one today. The  
19 10-dayers win 14 to 13, with the chair not voting.

20                  MR. GILSTRAP: The chair should vote.

21                  MR. ORSINGER: You vote to make the tie, not  
22 to break a tie.

23                  CHAIRMAN BABCOCK: I don't vote to make a  
24 tie. I vote to break a tie, so 14 to 13. Judge Sullivan.

25                  HONORABLE KENT SULLIVAN: Just a quick

1 comment. My thought about the 10 days, any time period  
2 picked is, of course, by its very nature somewhat  
3 arbitrary; but my thought is, as Alistair pointed out, is  
4 it was about the minimum amount of time by which you could  
5 set up a timetable for the filing of a response.

6 CHAIRMAN BABCOCK: Kent, you know you won,  
7 right?

8 MR. ORSINGER: But the response deadline is  
9 under attack, so he's protecting that.

10 HONORABLE KENT SULLIVAN: And my thought  
11 was, is that we should structure the rule or the essence  
12 of the proposal in terms of calendar days, in terms of  
13 responding to the point made previously; and on clarity,  
14 if we need clarity on that point then we should do so.

15 CHAIRMAN BABCOCK: All right. So we're at  
16 10 days now, and now what about the response? The  
17 proposal is to do it three days before the hearing.  
18 What's everybody else think about that? Yeah, Shannon.

19 MR. RATLIFF: Can I ask a question? Is the  
20 idea that you are -- it is mandatory that you file the  
21 response?

22 MR. DAWSON: No.

23 HONORABLE KENT SULLIVAN: No, in fact --

24 MR. RATLIFF: Or if you are going to file a  
25 response --

1 HONORABLE KENT SULLIVAN: I think if  
2 desired, any desired response.

3 MR. DAWSON: That's right.

4 HONORABLE KENT SULLIVAN: There is no intent  
5 to require paper work.

6 MR. RATLIFF: That's all I would --

7 CHAIRMAN BABCOCK: All right. Carl.

8 MR. HAMILTON: Well, I don't know of any  
9 judge that's going to not consider your response if you  
10 file it on the day of the hearing, and if there is no  
11 penalty for not doing it here then the judge is probably  
12 going to consider it just like he would an oral  
13 presentation, so I don't know that it really accomplishes  
14 a lot to have that requirement in the rule.

15 CHAIRMAN BABCOCK: Okay. Yeah, Lamont.

16 MR. LAMONT JEFFERSON: One other thing that  
17 strikes me about having a deadline for a response is if  
18 you have the deadline, you're going to have a response.

19 MR. AGOSTO: To a reply.

20 MR. LAMONT JEFFERSON: If a lawyer sees that  
21 there is a deadline, if you see there is a deadline for a  
22 response, you're going to put one together and make sure  
23 you beat the deadline. So you're encouraging -- when  
24 otherwise you might not file a response, but knowing that  
25 if you don't you waive it, you're going to file a

1 response.

2 CHAIRMAN BABCOCK: Richard. Back in the  
3 count again, are you?

4 MR. ORSINGER: I want to be clear. If I  
5 want to file a brief discussing cases, I have to file that  
6 three days in advance, but if I just bring the cases to  
7 the hearing I can give them to the judge and argue them  
8 and the other side won't know about them until -- and the  
9 Court won't know about them until the hearing. I can do  
10 that, right?

11 CHAIRMAN BABCOCK: You can do that today.

12 HONORABLE LEVI BENTON: Yes.

13 MR. ORSINGER: There is no -- there is no  
14 provision here that I can't make a written response at the  
15 time of the hearing. We're about to adopt that for the  
16 first time, and I want to be sure what's included in a  
17 written response. You know, I mean, if I have -- I want  
18 to file some written objections, I guess they have to be  
19 filed three days in advance, but I can make them orally or  
20 I can make an oral motion to strike a setting or oral  
21 motion to quash or I can bring the cases to the hearing  
22 and that's okay, but if I want to say anything in writing  
23 about them I have to do that three days in advance.

24 I want to be clear because everybody is  
25 assuming that there's no response required, but I don't

1 want somebody saying that you can't bring your cases here  
2 because they're in writing and show them to the judge,  
3 they had to be filed three days in advance, which somebody  
4 is going to make that argument.

5 CHAIRMAN BABCOCK: Okay. Justice Gaultney.

6 HONORABLE DAVID GAULTNEY: Well, the reply  
7 is filed for its persuasive effect, and the concept is  
8 that the judge is going to take it and read it at some  
9 point. The disadvantage to the movant is if it's filed  
10 the day of, is that they don't get to read it; and so I  
11 think the advantage of having the deadline, if you're  
12 going to file something in writing for persuasive effect  
13 on a judge, is that the movant at least have notice of  
14 that.

15 CHAIRMAN BABCOCK: Yeah.

16 MR. ORSINGER: Does that include copies of  
17 cases?

18 HONORABLE DAVID GAULTNEY: I would not  
19 interpret it to include copies of cases. I would  
20 interpret it to include a document like a brief or reply  
21 that's intended to have persuasive written effect to  
22 gather your written arguments together so that at least  
23 the other side has notice that that's the presentation  
24 they made.

25 CHAIRMAN BABCOCK: Okay. Yeah, Justice

1 Gray.

2 HONORABLE TOM GRAY: Are you going to be  
3 able to argue at the motion -- the hearing, things that  
4 aren't raised in a reply? I mean, are we going to summary  
5 judgment practice here on motions?

6 CHAIRMAN BABCOCK: So if you didn't file a  
7 written response, you would be limited in what you could  
8 argue?

9 HONORABLE TOM GRAY: I mean, can you only  
10 argue that the other side's grounds for the motion are  
11 ill-founded, or can you argue other reasons not to grant  
12 their motion? In other words, right now in response to a  
13 summary judgment, if you don't file any response you're  
14 limited to defeating the grounds that the motion is argued  
15 on. Is that where we're going here? I mean, I hope not,  
16 but that sort of sounds like the drift.

17 CHAIRMAN BABCOCK: Judge Sullivan.

18 HONORABLE KENT SULLIVAN: That's -- you  
19 know, that's not the intent, and in both situations you  
20 would have precisely the same record before the court. In  
21 that regard I see it as no change whatsoever. In other  
22 words, if someone has decided not to file a response, it  
23 doesn't matter what the timetable is. They have no  
24 response on file at the time of the hearing, and so the  
25 record in terms of the written record is identical.

1 HONORABLE TOM GRAY: So why change the rule  
2 at all?

3 HONORABLE KENT SULLIVAN: Because I think  
4 that as a practical matter there are many people who know  
5 from the very beginning that they intend to file a written  
6 response; and it is helpful, I think, and more efficient  
7 if there is a timetable for the response; and I think that  
8 a judge can probably at least raise the level of  
9 expectation that if this is a serious matter, if it's  
10 going to involve some request for a significant amount of  
11 time, for example, from the court, that someone file their  
12 written response in advance so that the court can be ready  
13 and the other side can be on notice of what's going to be  
14 before the court.

15 CHAIRMAN BABCOCK: Okay. So --

16 HONORABLE KENT SULLIVAN: I don't think it's  
17 going to change routine motion practice at all, routine in  
18 the sense that it is essentially unopposed or some matter  
19 for which the parties are largely in agreement as to the  
20 timetable for the hearing or otherwise.

21 CHAIRMAN BABCOCK: Justice Gaultney.

22 HONORABLE DAVID GAULTNEY: You know, I think  
23 an argument was made earlier about, well, we've had this  
24 three-day rule forever. Well, that's true. Our practice  
25 has changed over the years, though. You know, there is

1 more discovery, there is more motion practice, more so  
2 than, I'm told, in the days where you would just go down  
3 there and try your lawsuit.

4           Well, as a result a lot of the litigation is  
5 resolved in motion practice, and so I think that if there  
6 is going to be -- I think there is in most cases going to  
7 be a reply filed. The only question is, is the movant  
8 going to be able to read it before the hearing, and I  
9 think the proposal that Judge Sullivan has has the added  
10 advantage of not only moving back the time, but providing  
11 a process by which that reply will be served timely on the  
12 opponent so they don't -- so they know what's being  
13 argued.

14           CHAIRMAN BABCOCK: Okay. Yeah, Jim.

15           MR. PERDUE: The one -- I don't know if it's  
16 a friendly amendment, but the one -- I do get concerned  
17 about the concept of waiver, that a failure to file a  
18 response or a timely response somehow waives an argument  
19 or something that could be presented to the court at  
20 hearing, and I would rather than just trusting the intent  
21 like to see something explicit in any final version, just  
22 something that -- a concern that I raise.

23           HONORABLE KENT SULLIVAN: That's careful.

24           CHAIRMAN BABCOCK: Yeah. Richard, then  
25 Lonny.



1 MR. ORSINGER: I'm curious whether this rule  
2 will apply to motions for continuance. Is this going to  
3 require that a motion for continuance be filed 10 days in  
4 advance of the hearing that you're trying to continue?

5 CHAIRMAN BABCOCK: Well, it says, "except as  
6 otherwise provided in the rules."

7 MR. ORSINGER: Well, the motion for  
8 continuance rule, I don't think, has any kind of exemption  
9 from timetables, does it?

10 CHAIRMAN BABCOCK: It's seven days, isn't  
11 it? Justice Bland.

12 HONORABLE JANE BLAND: I think it would  
13 apply unless you filed an emergency motion for  
14 continuance, we're going to have to say, because the most  
15 common emergency motions I think any trial judge sees.

16 CHAIRMAN BABCOCK: Lonny, sorry. I went out  
17 of turn, but Justice Bland looked urgent.

18 PROFESSOR HOFFMAN: I wonder whether  
19 imposing a three-day in advance response requirement will  
20 have a disincentive on the filing of responses because the  
21 lawyer filing the response will be afraid that that will  
22 then give an opportunity to the movant that doesn't exist  
23 now to file a reply because they'll have three more days  
24 to do it, which will have the effect of, one, increasing  
25 loads of paper and fees in a case.

1           It is true it may also lead to better  
2 briefing, though I've always wondered why you wouldn't  
3 have put all your best arguments in your motion to begin  
4 with, but I think we probably shouldn't doubt that this  
5 could have that strange perverse effect. So although I  
6 voted for the additional time on the filing at the front  
7 end, I would be concerned -- I am concerned about adding  
8 time on the response.

9           CHAIRMAN BABCOCK: Richard.

10           MR. ORSINGER: I've looked at Rules 251(2)  
11 and (3), and I don't see that there is any special  
12 timetable for motions for continuance. I can tell you in  
13 my practical experience that many people request a  
14 continuance for the first time on the day of the hearing,  
15 and often they do it orally, but, of course, an oral  
16 motion for continuance is not reviewable on appeal, so it  
17 seems to me like the motions for continuance are going to  
18 have to be filed 10 days in advance of hearing now, and I  
19 can see a potential trap here.

20           If somebody serves you with a note with the  
21 hearing at 5:00 o'clock p.m. for a 9:00 a.m. hearing 10  
22 days later you can't file your motion for continuance 10  
23 days in advance of the hearing on their motion. So we've  
24 got to make it clear that you are not precluded from  
25 filing a motion for continuance simply because you don't

1 have 10 days notice to do it.

2 I, furthermore, think as a matter of policy  
3 we shouldn't require a motion for continuance to be filed  
4 in advance at all, because frequently the real problem --  
5 okay, well, over in Buddy's neck of the woods in Beaumont  
6 you can file continuance during trial, but that's not in a  
7 rule. That's just their decision, but anyway, I think we  
8 should not require a motion for continuance to be filed so  
9 many days before a hearing or a trial. So if we go with  
10 this I think we ought to except motions for continuance.

11 CHAIRMAN BABCOCK: Carl.

12 MR. HAMILTON: I agree with Richard. There  
13 is another problem, though, on the three days. The way  
14 this is worded it says "shall be served on other parties  
15 three days before the hearing" and under the service rules  
16 that could be by mail, so they're still not going to get  
17 it in time for the haering.

18 MR. ORSINGER: But you add three days. If  
19 your only service is by mail, under Rule 4 you have to add  
20 three days to the advance notice, so that's six days. Am  
21 I not right?

22 HONORABLE TOM GRAY: You add three days to  
23 when the -- under the mailbox rule it's served when it's  
24 dropped in the mailbox.

25 MR. DAWSON: Right.

1 HONORABLE TOM GRAY: If there is a response  
2 due then you add three days in which to give them to  
3 respond.

4 MR. ORSINGER: If you are giving somebody  
5 three days notice of a hearing and that notice is served  
6 by U.S. mail, you must give them six days notice of the  
7 hearing.

8 CHAIRMAN BABCOCK: Justice Duncan.

9 HONORABLE SARAH DUNCAN: Well, my  
10 understanding of what we're doing here is deciding  
11 discrete issues.

12 CHAIRMAN BABCOCK: Right.

13 HONORABLE SARAH DUNCAN: We're not deciding  
14 to adopt this language of the rule; is that correct?

15 CHAIRMAN BABCOCK: We're -- I was --

16 HONORABLE SARAH DUNCAN: The proposed  
17 language?

18 CHAIRMAN BABCOCK: -- hoping we were talking  
19 about three days --

20 HONORABLE SARAH DUNCAN: Because I still  
21 think the exception that's in that little box labeled  
22 "deleted" still needs to be in the rule, so I'm not  
23 agreeing to this language.

24 HONORABLE KENT SULLIVAN: I mentioned that  
25 up front.

1 HONORABLE SARAH DUNCAN: I know.

2 HONORABLE KENT SULLIVAN: I stated that.

3 HONORABLE SARAH DUNCAN: I know, but I just  
4 wanted to clarify with the chair what we're doing here.  
5 We're voting on discrete issues --

6 CHAIRMAN BABCOCK: Right.

7 HONORABLE SARAH DUNCAN: -- as the chair  
8 raises them.

9 CHAIRMAN BABCOCK: That's what I was hoping  
10 we were doing.

11 HONORABLE SARAH DUNCAN: Okay.

12 CHAIRMAN BABCOCK: And this issue is whether  
13 or not we require any desired response, that is you don't  
14 have to file one, but if you're going to file one it's got  
15 to be three days before the hearing. That's what we're  
16 talking about, right? You don't have to do it, but if  
17 you're going to do it, it has to be three days before the  
18 hearing.

19 MR. ORSINGER: Yeah. If you define a motion  
20 for continuance as a response instead of a motion then you  
21 can file your motion for continuance up to three days  
22 before the hearing rather than 10 days before the hearing.  
23 Even though it's called a motion, if you consider a motion  
24 for continuance the response.

25 CHAIRMAN BABCOCK: Why do I have this strong

1 thought that you have got to file a motion for continuance  
2 seven days before --

3 MR. ORSINGER: It's not in the rules.

4 CHAIRMAN BABCOCK: Yeah, I can't find it.

5 MR. ORSINGER: Yeah, it's not there.

6 CHAIRMAN BABCOCK: Maybe it's a local rule.

7 Yeah, Frank.

8 MR. GILSTRAP: All right. Richard, will you  
9 clarify? You're saying that if I have to file a response  
10 three days before the hearing and I want to file it by  
11 mail I have to put it in six days ahead?

12 MR. ORSINGER: That's what Rule 4 says.  
13 Guys, come on, I have been practicing law 30 years. No  
14 one has ever questioned that. Tommy, what do you think?  
15 If you give notice of a hearing by mail only --

16 MR. GILSTRAP: No, I'm not giving notice of  
17 the hearing. I'm filing a response.

18 MR. ORSINGER: Oh.

19 MR. GILSTRAP: See, and that's not notice.

20 MR. ORSINGER: All right.

21 MR. GILSTRAP: And I don't think it adds.

22 MR. ORSINGER: Since we don't have a  
23 response requirement for motions, and I don't think  
24 there's case law on that --

25 MR. GILSTRAP: That's what I'm saying.

1 That's what we're talking about, is do we have a three-day  
2 response, period. And if -- since we're not giving  
3 anybody notice, we're just filing a response, if you do  
4 drop it in three days ahead of time by mail I think you  
5 have met the three-day response requirement. Now, and  
6 that's a problem, because the other side is not going to  
7 get it, and that's the whole point of filing responses, I  
8 understand, is so they will get it. I mean, what they do  
9 is they will take it to the judge and then mail it to the  
10 other side.

11 MR. ORSINGER: It says under Rule 4 "in  
12 computing in any period of time prescribed or allowed by  
13 these rules." It doesn't say that it's just for motions.  
14 So if we for the first time create a response deadline  
15 then we have to apply Rule 4 to the response deadline, so  
16 it seems to me that if the deadline is three days before  
17 hearing and you do mail then you're going to have to add  
18 the three days, meaning you mail it six days before the  
19 hearing.

20 PROFESSOR HOFFMAN: When you file your  
21 response to the summary judgment motion, which has to be  
22 seven days before the hearing, I think I agree with  
23 Richard, if the way you read that is if you do it by mail  
24 that response actually has to get to them 10 days.

25 MR. ORSINGER: And by fax also, I might add,

1 which hopefully we're going to knock that in the head  
2 today.

3 CHAIRMAN BABCOCK: We're doing that today?

4 MR. ORSINGER: We've got to.

5 CHAIRMAN BABCOCK: We've got to?

6 MR. ORSINGER: Yeah, because if we don't --  
7 if you don't, to address the problem of the interstate  
8 practitioners. If everybody has got a fax or a mail they  
9 can't hand-deliver something across the state in 30  
10 minutes, so at some point we've got to deal with this fax  
11 rule and realize that faxes are contemporaneously  
12 delivered.

13 HONORABLE TOM GRAY: Hold that thought while  
14 we change the tape. This is my designated job today.

15 MR. HAMILTON: Is the failure to file a  
16 written response subject to any kind of objection on the  
17 part of the movant that the court shouldn't consider it  
18 because it wasn't timely filed?

19 CHAIRMAN BABCOCK: Say that again, Carl.  
20 I'm sorry.

21 MR. HAMILTON: Can the movant object to the  
22 failure to file a written response within three days?

23 MR. ORSINGER: If you try to file one on the  
24 day of hearing --

25 MR. HAMILTON: Yeah.



1                   MR. ORSINGER: Obviously you're in violation  
2 of the Rules of Procedure, but then if you just make your  
3 argument orally you're not in violation of the Rules of  
4 Procedure.

5                   CHAIRMAN BABCOCK: If the nonmovant tries to  
6 file something in writing on the day of the hearing the  
7 movant can say, "Judge, I object, because the rule quite  
8 plainly says you shall do it three days before the hearing  
9 and he hasn't done that," at which point the judge is  
10 going to say one of two things. "Well, I'll grant him  
11 leave to do it," or "We'll just continue this thing for  
12 another three or seven days and then we'll get it all  
13 straight."

14                  MR. ORSINGER: No, some of them will deny  
15 you that right.

16                  CHAIRMAN BABCOCK: And that's another  
17 possibility. "No, you can't file your response, but I'll  
18 listen to you, so read it to me."

19                  MR. ORSINGER: This is all going to lead to  
20 an argument that it should have been made in writing and  
21 it wasn't made in writing so you shouldn't be able to make  
22 it orally at the hearing. That's what this is setting up.  
23 You just wait for the briefs to come, Judge.

24                  CHAIRMAN BABCOCK: Okay. Bobby.

25                  MR. MEADOWS: I think I'm against having a

1 due date for the response. I think there are just too  
2 many problems with it. I think extending the time, too,  
3 is probably a good idea. It facilitates a better practice  
4 of getting things on file with the court and in the hands  
5 of the other lawyer and a suitable time to go a good job.  
6 So I like the idea of extending the time, but I'm opposed  
7 to a due date for the response.

8 CHAIRMAN BABCOCK: Judge Benton or Judge  
9 Sullivan, isn't there a local rule in Harris County that  
10 requires responses three days before a hearing?

11 HONORABLE LEVI BENTON: I believe so, and I  
12 think the local rules there say that the failure to file a  
13 response might be -- may be regarded as no opposition.

14 HONORABLE KENT SULLIVAN: But this is the  
15 written submission rule.

16 HONORABLE LEVI BENTON: Yeah.

17 HONORABLE KENT SULLIVAN: In other words,  
18 for disposition of --

19 MR. ORSINGER: I think you just said that if  
20 you don't file a written response you default on the  
21 motion?

22 HONORABLE LEVI BENTON: No. That's not what  
23 I said.

24 MR. ORSINGER: Oh, what did you say?

25 MR. LOW: As no opposition.

1                   MR. ORSINGER: No opposition, what does that  
2 mean?

3                   HONORABLE LEVI BENTON: The local rule says  
4 something like "the failure to file a response" -- "The  
5 trial court may consider the respondent's failure to file  
6 a response as an indication of no opposition."

7                   But I want to say something else. In  
8 response to what you have been bantering about today and  
9 what Bobby just said, you know, you don't file a response,  
10 you show up, you argue. The other side is going to say,  
11 "Well, no, they can't do that because they filed a  
12 response," and my response from the bench to that is,  
13 what, seriously do you think the court of appeals is not  
14 going to consider the law that's out there even though  
15 there is no response filed? I'm sensitive to your  
16 concerns about a requirement for the response, but the  
17 rule should address it somehow, either by way of footnote  
18 because it's just such a disservice to the bar and bench  
19 not to urge people to be professional and to put the other  
20 side on notice of what their arguments are.

21                   That's all this is about, and, you know, you  
22 talked about the efficiency. There is another party --  
23 there are some other folks affected by this inefficiency  
24 of not filing the response and -- the motion, the  
25 response, and the notice timely. The parties that are

1 affected are those parties who could not get a hearing  
2 that date because your motion was set.

3 MR. MEADOWS: Well, I agree that it's best  
4 practice, and I think allowing additional time to file a  
5 response accommodates that best practice, but I think just  
6 this discussion here at 4:00 o'clock on Good Friday seems  
7 to me that it's pretty common that it's sorting out this  
8 whole business about a precise due date for response and  
9 everything that goes into filing it, how it gets filed,  
10 and consequences of it.

11 So, you know, again, I think it's a good  
12 idea. If you've got a response that you want to have  
13 considered by the judge at the hearing you ought to file  
14 it three days in advance of the hearing, but I don't think  
15 you ought to be prohibited from making an argument or  
16 handing up cases or --

17 HONORABLE LEVI BENTON: Right. I agree with  
18 that, because if I grant relief the court of appeals is  
19 not going to ignore the law that wasn't urged in some  
20 brief that was timely filed, but you know, if we fail to  
21 address it, we -- the current practice of handing it to  
22 the court the day of the hearing will just continue to  
23 persist.

24 MR. MEADOWS: Well, maybe we ought to impose  
25 upon ourselves the same thing that we are requiring of the

1 process servers, and that is aspirational goals.

2 HONORABLE LEVI BENTON: I'm fine with that.  
3 I think I'm fine with that.

4 CHAIRMAN BABCOCK: Nina.

5 MS. CORTELL: If we extend the period of  
6 time before the hearing and do not provide a due date for  
7 the reply then we have prevented ambush by the movant but  
8 we have allowed ambush by the respondent, and that doesn't  
9 seem to me to be very fair, so, I mean, I would almost  
10 undo my vote if we don't have some kind of protocol here,  
11 and I agree there shouldn't be waiver, and I agree it  
12 doesn't waive the right to bring cases to the attention.

13 The other point, I think, I'm pretty sure  
14 the new local rules in Dallas require this now.

15 CHAIRMAN BABCOCK: I think so, too.

16 MS. CORTELL: We have a requirement that the  
17 response must be on file I think two or three days before  
18 the hearing. It might be two days.

19 CHAIRMAN BABCOCK: Yeah. Judge Benton  
20 points out that in Harris County there has been --  
21 although it's changing a submission docket so that it's  
22 done on the papers, but Dallas has always had an oral  
23 document.

24 HONORABLE JAN PATTERSON: So you would vote  
25 against 10 days, Nina?

1 MS. CORTELL: Well, I would if we don't do  
2 this. I had thought the whole idea was to set up a  
3 protocol for notice before hearing and then notice of the  
4 response. I mean, I sort of voted for it all together.

5 MR. MEADOWS: Well, Nina, if you don't  
6 actually change your vote and just pull it down you'll  
7 require Chip to vote.

8 MS. CORTELL: I will say the other reason  
9 it's hard to use the Federal court as the paradigm is  
10 because often you don't have hearings, and you know that  
11 if you don't get something written in that you have waived  
12 your response basically.

13 CHAIRMAN BABCOCK: Judge Peeples.

14 HONORABLE DAVID PEEPLES: I think we're  
15 under the misimpression that the motion is always going to  
16 have a lot of law in it. There is no requirement I know  
17 of that the movant has to lay out the law. The movant is  
18 going to put out grounds and relief requested and might  
19 show up with his cases, too.

20 MR. GILSTRAP: Or with a written brief.

21 HONORABLE DAVID PEEPLES: People will show  
22 up with their law at the hearing, but if you've got to  
23 have grounds in writing that's going to have to be in the  
24 motion.

25 CHAIRMAN BABCOCK: Yeah, Frank.

1 MR. GILSTRAP: I think the judge is onto  
2 something there. I mean, you know, in a summary judgment  
3 motion you file your motion and then you show up. You can  
4 show up two days -- file a brief two days ahead of time.  
5 There is nothing that prevents that. I mean, you know,  
6 are we talking about a motion or a motion and a brief,  
7 because if it's just the motion, they can still show up at  
8 the hearing with a brief.

9 CHAIRMAN BABCOCK: Dallas County requires a  
10 brief on summary judgments now.

11 MR. ORSINGER: Well, you're not going to be  
12 filing your brief -- if this rule is adopted you're not  
13 going to be filing your brief on the day of the hearing.

14 MR. GILSTRAP: It says "motion."

15 MR. ORSINGER: No, the response. If your  
16 brief is --

17 MR. GILSTRAP: No, I'm the movant.

18 MR. ORSINGER: Oh, okay. All right.

19 CHAIRMAN BABCOCK: Pam.

20 MS. BARON: Well, I have some language to  
21 suggest that probably doesn't take care of the problem but  
22 it might. "If a respondent to a motion desires to submit  
23 a written response in addition to oral argument, such  
24 response must be on file three days before the hearing."

25 CHAIRMAN BABCOCK: What do you think about

1 that, Judge Sullivan?

2 HONORABLE KENT SULLIVAN: I think that's  
3 fine.

4 CHAIRMAN BABCOCK: Justice Bland.

5 HONORABLE JANE BLAND: Well, I'm a little  
6 concerned about this whole idea of waiver, because I think  
7 that if the trial judge rules for you and you're the  
8 respondent, then you're probably okay, but if the trial  
9 judge rules against you and you're the respondent, the  
10 first thing -- the first thing that many courts of  
11 appeals, including ours, you know, sort of fall back on,  
12 well, it wasn't waived? And, you know, I think that's a  
13 risk.

14 CHAIRMAN BABCOCK: The first thing I look at  
15 in my opponent's briefs in the appellate courts is is the  
16 word "waiver" in there.

17 MR. MEADOWS: Yeah, me, too.

18 HONORABLE JANE BLAND: That's too bad, but  
19 that certainly shouldn't be the intent of this, and so we  
20 probably need to say that.

21 MS. BARON: Well, I was hoping to finesse  
22 that with the language I suggested because it suggests  
23 that the written response is optional. It contemplates  
24 that you will have oral argument at the hearing and that  
25 if you have something in writing it should be there three



1 days before. That was kind of what I was trying to work  
2 around without having to get into the "W" word.

3 MR. PERDUE: I don't know that finesse does  
4 it when it comes to waiver, which is my concern, and  
5 second sentence to what's proposed saying "the failure to  
6 file a written response shall not be construed as a waiver  
7 of any argument that may be made" might solve what is  
8 really my explicit problem as far as a due date; but you  
9 know, we started this conversation about this rule being  
10 helpful for the judges or helpful for the lawyers and  
11 whether there is a lawyer perspective on it or a judge  
12 perspective on it; and there has been a lot of different  
13 perspectives on it; but, you know, from my -- the reason  
14 why extending the time line seems important from my  
15 perspective is it gives you the opportunity to do a  
16 response and it gives you an opportunity to get a response  
17 timely filed that the judge can see and an opportunity to  
18 get to the court, you know, with everything marshalled  
19 that you want to be able to have.

20 So that's why it makes sense from my  
21 perspective, and so to suggest that you're -- that by  
22 extending the time you are now essentially gaming it for  
23 the respondent, I think is exactly contrary to at least my  
24 perception of it, which is it is assisting the respondent  
25 in putting everything out to the court; and so the idea

1 that Richard has repeatedly kind of touched on from this  
2 idea of wanting to be able to show up and bring it, as  
3 long as you don't have a waiver issue I think that's  
4 provided for; but from best practices standpoint at least  
5 in my -- I want a written response, and I want it timely  
6 on file so that the judge can read it. That just seems to  
7 me to be from a lawyer's perspective the way you would  
8 want to practice.

9 CHAIRMAN BABCOCK: Judge Sullivan, then  
10 Alistair, and then Buddy.

11 HONORABLE KENT SULLIVAN: Just a quick  
12 comment. It was not my intent to change the law with  
13 respect to issues of waiver. In other words, there was no  
14 intent to inject anything new by way of this proposal. If  
15 indeed the unique circumstances of a particular motion  
16 imposed a requirement to file a written response for a  
17 face waiver, under this proposal the respondent is still  
18 in a much better situation than under a three-day rule.

19 That's -- again, that was in part my  
20 purpose. To the extent that the law would impose no  
21 requirement of any written response, that doesn't change,  
22 and the written record would be whatever it was before the  
23 court on the day of the hearing.

24 CHAIRMAN BABCOCK: Alistair.

25 MR. DAWSON: My suggestion is we decide

1 whether we're going to have a deadline for the filing of  
2 the responses and are we going to have it three days or  
3 some other day, and then once we've decided that then let  
4 the committee go back and draft what they think is  
5 appropriate to address all the issues between waiver and  
6 service and all this stuff and come back at the next  
7 meeting and present us with something and then we can  
8 start shooting at that.

9 CHAIRMAN BABCOCK: Buddy.

10 MR. LOW: All right. If we do go with a  
11 three-day response, what if that response is an affidavit?  
12 Then what about the one that filed the motion? The  
13 Federal rule does address affidavits. Does that mean they  
14 have -- how many days they have then to file a  
15 counteraffidavit? It doesn't address it at all. I mean,  
16 if you leave it like it is, then it means that's it. They  
17 couldn't file a counteraffidavit.

18 CHAIRMAN BABCOCK: Judge Sullivan.

19 HONORABLE KENT SULLIVAN: Under the current  
20 rule you're worse off. You've got three days, no time, no  
21 guidance.

22 MR. LOW: I didn't say worse off, but we're  
23 trying to get this thing right, and I'm saying we ain't  
24 there.

25 HONORABLE KENT SULLIVAN: Oh, okay.

1 CHAIRMAN BABCOCK: Okay. Yeah.

2 MR. RINEY: The idea that it is best  
3 practice to have the response filed three days in advance  
4 is based on assumption that the judge is going to have it,  
5 going to read it, and going to study it. I'm sorry,  
6 that's just not my experience in the majority of the cases  
7 in which I'm in front of the judge.

8 Most of the time, 80 percent of the time  
9 when you stand up and say, "Okay, what are we here about  
10 today," and my job as a lawyer, as a respondent, is to do  
11 what I think is most persuasive in response to the motion;  
12 and I'm telling you in front of some judges the most  
13 persuasive thing that I can do is stand up with the case  
14 with language highlighted in yellow, and I'm either going  
15 to win on that or I'm not; but if I have a response,  
16 particularly if it's filed in advance, I'm not going to  
17 win with some judges or I'm not as likely to win as I am  
18 with a case with something highlighted. In Lubbock  
19 County, and I'm not exaggerating one bit, I have filed  
20 responses -- I do file responses, depending on the judge,  
21 depending upon the motion. In Lubbock County if you file  
22 something and it's been about three days in advance, the  
23 judge says -- you say something about your response, and  
24 they're looking through the file and they go, you know,  
25 "If it's been filed in the last three or four days it's

1 not going to be in here yet."

2                   And so it really -- I know we're trying to  
3 be persuasive, we're trying to be efficient, but it  
4 doesn't work that way in every court just to say it has to  
5 be filed three days in advance and we can't solve all  
6 those problems with a rule.

7                   CHAIRMAN BABCOCK: Shannon.

8                   MR. RATLIFF: Well, but it occurs to me that  
9 if you've got that situation then the judge is going to  
10 say, "Fine, haul off and give me the best thing you've  
11 got. I haven't read it before, I'll read it now." If  
12 you're in front of a judge who does read in advance of the  
13 hearing, I think most people would think you're not being  
14 a very good advocate if you've got a busy trial judge  
15 sitting there who says, "Why didn't you file this stuff  
16 three days before the hearing so I would have had a decent  
17 chance to look at it," you're going to break even.

18                   If you put it in a way to guard against  
19 waiver, and I agree a hundred percent, let's don't turn  
20 this thing into a game about that, but if we can guard  
21 against the waiver, it seems to me that in the courts that  
22 don't read it, like Travis County, they not only ask you  
23 what the case is about, they ask what you're doing there,  
24 you know, because they get the files the day it's spun out  
25 on the docket.

1           So it's not going to help in terms of what a  
2 judge or -- it will help the advocate who has received the  
3 response who can be prepared to address it with the judge,  
4 but it seems to me the worst that happens is a judge says,  
5 "Well, I don't have it, so everybody take the best hold  
6 they've got and come on and I'll listen to it." If they  
7 do read it in advance you ought to be hopefully down the  
8 road looking at it, but I don't know, that's just me.

9           CHAIRMAN BABCOCK: Judge Benton.

10           HONORABLE LEVI BENTON: I was going to  
11 re-urge Alistair's suggestion that we take an up or down  
12 vote on whether we want a deadline on the response, and if  
13 that passes by a majority then we take an up or down vote  
14 on whether the sense of the body is three days or five  
15 days and then punt back to Judge Sullivan and Richard's  
16 subcommittee on language.

17           CHAIRMAN BABCOCK: Yeah. I think what I  
18 heard Kent and Pam agree on was some language that we  
19 could vote on. Are there too many moving parts in that  
20 language? You want to read it again, Pam?

21           MS. BARON: I think it could just go to the  
22 subcommittee and they could come up with something  
23 probably better.

24           CHAIRMAN BABCOCK: Okay.

25           MS. BARON: Would be my thought, but

1 something along these lines.

2 CHAIRMAN BABCOCK: So, Judge Sullivan, what  
3 do you want to vote on?

4 HONORABLE KENT SULLIVAN: I thought that was  
5 a good --

6 HONORABLE LEVI BENTON: I don't know that we  
7 have a sense of the body whether there is support for a  
8 deadline on the response, and so I thought maybe an up or  
9 down vote on that issue, because if the majority says no,  
10 game is over. There is no reason for the subcommittee to  
11 work on Pam's language, which I support and would urge  
12 everyone to vote for.

13 CHAIRMAN BABCOCK: I gotcha. Okay. So  
14 everybody who is in favor of having a deadline for a  
15 written response raise your hand.

16 MR. PERDUE: With the understanding there is  
17 no waiver?

18 CHAIRMAN BABCOCK: Right.

19 MR. DAWSON: Yes, no waiver.

20 CHAIRMAN BABCOCK: All right. All opposed?

21 All right. The no's have it by a vote of 14  
22 to 11. So you saved Pam some time and trouble. All  
23 right. The final issue we've got to talk about on this  
24 rule --

25 HONORABLE NATHAN HECHT: Could I ask one

1 other question?

2 CHAIRMAN BABCOCK: Sure.

3 HONORABLE NATHAN HECHT: We've had some  
4 discussion about whether there are local rule requirements  
5 for responses, I think you said it was in Dallas.

6 CHAIRMAN BABCOCK: I think the Dallas rules  
7 require a brief on summary judgment. Maybe on other  
8 motions, too.

9 HONORABLE NATHAN HECHT: Is there a sense --  
10 I don't want to -- I don't want to keep us from the other  
11 issue -- whether it's a good idea or a bad idea to let  
12 that be done by local rule? Because Tom says, well, you  
13 know, Lubbock County is this and Potter County is that and  
14 now we have Harris County saying, "Well, this is the way  
15 we do it," and is there an advantage or disadvantage to  
16 letting Harris County require a response by some deadline  
17 that, assuming it was fair, assuming it could be heard, is  
18 that a bad idea or a good idea?

19 CHAIRMAN BABCOCK: Justice Duncan.

20 HONORABLE SARAH DUNCAN: It's a bad idea.

21 HONORABLE LEVI BENTON: Great idea.

22 HONORABLE SARAH DUNCAN: I think it's a bad  
23 idea. We already have a rule that says you can't have a  
24 local rule that's in conflict with a Rule of Civil  
25 Procedure. We just voted to recommend to the Court that



1 there not be a deadline for filing a response. If the  
2 Court goes with that recommendation, there will be a  
3 conflict between something this rule doesn't say and the  
4 local rule, and that's -- that's going to set a lot of  
5 people up for getting their responses deemed untimely and  
6 not considered, and I always think that's a bad idea,  
7 which is why I voted against having a deadline for  
8 response. I think whatever anybody wants to say ought to  
9 be heard, to the extent practicable.

10 CHAIRMAN BABCOCK: Judge Benton.

11 HONORABLE LEVI BENTON: Well, we've already  
12 heard there is a great difference in the practice of  
13 judiciary across the state. I think most people who  
14 practice in Harris County find that more often than not  
15 the judge has read pending matters, although there are  
16 cases where we have not, and it's -- to prohibit us in  
17 Harris County from having such a rule only -- is just  
18 punitive to those folks in Harris County.

19 CHAIRMAN BABCOCK: Alex.

20 PROFESSOR ALBRIGHT: I voted against the  
21 response rule, and I don't agree with Justice Duncan that  
22 we voted that there should never be any response rule. I  
23 don't think we have given that dictum. I think we voted  
24 it shouldn't be in this rule. I think it's probably a  
25 good idea to have local rules with response rules because

1 the practice is so different in different counties.

2           We've already heard that in some counties  
3 you can't get a hearing for two or three weeks and then  
4 it's reasonable then to require a response three days  
5 before, but you know, I think every place is different and  
6 there are different kinds of practice. I think practice  
7 in little bitty counties is very different from Dallas and  
8 Houston, and I think sometimes we tend to think about  
9 practice as in Dallas, Houston, Austin, San Antonio, big  
10 cities, and there are some places that practice very  
11 efficiently in a very different way.

12           CHAIRMAN BABCOCK: Justice Duncan.

13           HONORABLE SARAH DUNCAN: And if all the  
14 local rules were collected, you know, the project that  
15 never came to be, if all the local rules were collected  
16 and published somewhere, I think that would be fine. The  
17 problem is they're not, and they are sometimes very  
18 difficult to get; and as we've all agreed today in  
19 expanding 3 days to 10 days, the practice around the state  
20 is more and more a statewide practice, more and more  
21 involves lawyers from out of state; and those lawyers are  
22 going to be caught by local rules that are different from  
23 the Rules of Civil Procedure.

24           So if somebody wants to take on the project  
25 that Luke and Elaine took on 20 years ago to collect all

1 the local rules and publish them, that would be great.

2 HONORABLE LEVI BENTON: West actually now  
3 has a separate publication on local rules.

4 HONORABLE KENT SULLIVAN: Right. They are  
5 published.

6 MR. ORSINGER: How comprehensive is it?

7 HONORABLE KENT SULLIVAN: And the other  
8 issue is that the local rules are submitted to the Supreme  
9 Court for approval, so if a Rule of Civil Procedure is  
10 silent and you have a local rule that speaks to some issue  
11 on which the other applicable rule is silent, it's a rule  
12 that -- absolutely it's the case.

13 CHAIRMAN BABCOCK: Richard.

14 HONORABLE KENT SULLIVAN: You have deadlines  
15 now with respect to local rules that apply. I mean, I  
16 don't think there is any doubt about them. They have been  
17 approved by the Supreme Court, and they are not  
18 inconsistent with the Rules of Civil Procedure.

19 CHAIRMAN BABCOCK: Justice Duncan.

20 HONORABLE SARAH DUNCAN: I think that's not  
21 an accurate interpretation of what the Supreme Court does  
22 in the approval process, but I'm not involved in that  
23 process, so I will just say that there have been --

24 HONORABLE KENT SULLIVAN: I defer to Justice  
25 Hecht on that.

1 HONORABLE SARAH DUNCAN: -- local rules that  
2 conflicted with Rules of Civil Procedure ever since the  
3 second year I started practicing law 18 years ago.

4 The publication of the local rules by West,  
5 does that cover all the counties of Texas? That's been  
6 the problem.

7 MR. KELLY: I just got it. I'm pretty sure  
8 it covers every county that's got local rules. I'm going  
9 to have to put a footnote on that because I haven't looked  
10 at it in a long time.

11 HONORABLE SARAH DUNCAN: But it's never been  
12 -- it hasn't been a terrible problem to get the local  
13 rules of Dallas County, Harris County, Bexar County.  
14 Bexar County has been tough at times, but to get all of  
15 the local rules in all of the counties in which a lawyer  
16 might be practicing has been difficult; and if there is  
17 such a publication, great, I don't have a problem with it.

18 CHAIRMAN BABCOCK: Pam.

19 HONORABLE SARAH DUNCAN: A local rule.

20 CHAIRMAN BABCOCK: Pam.

21 MS. BARON: Well, you know, I guess when  
22 I -- on the 10-day rule, moving it to 10 days is a long  
23 time given that there is no requirement that a reply be on  
24 file. I mean, I think we're voting on things separately  
25 that are connected and that 10 days may be too long if

1 there is no obligation on the respondent in the motion to  
2 do anything in those 10 days, so we're slowing things down  
3 but not making an improvement on the back end.

4 CHAIRMAN BABCOCK: Both votes were close.

5 MS. BARON: Right. I'm just saying that  
6 they are connected, and we voted separately.

7 HONORABLE TOM GRAY: Does that mean you'll  
8 change your vote, too, if we go back and revote on the  
9 first one?

10 MS. BARON: Yeah.

11 HONORABLE TOM GRAY: So we would be back to  
12 the three-day rule, and I have got Nina and you, and we're  
13 looking good now.

14 CHAIRMAN BABCOCK: No, we --

15 MS. BARON: I would want to vote on a  
16 seven-day rule.

17 MR. SCHENKKAN: Seven days without a reply  
18 or 10 days with a reply. Those are really the two  
19 choices.

20 MR. JACKS: Five as well. Don't forget  
21 five.

22 MR. SCHENKKAN: No. Five is -- because of  
23 the rule on counting doesn't really mean five.

24 MR. JACKS: It was five because of the  
25 three-day reply rule.

1 MR. DAWSON: There was no traction for five.

2 HONORABLE DAVID PEEPLES: However these  
3 votes come out we will come back another time and see  
4 something drafted, see some language before we vote  
5 finally, will we? I'm going to insist on that.

6 Let me say this. What we're talking about  
7 pervades all of civil litigation. This is one of the most  
8 important things we've done recently in terms of the  
9 day-to-day practice, and to just vote on a bunch of  
10 disconnected votes and not see the final product and how  
11 it looks I think would be utterly irresponsible. We need  
12 to send this back to the committee with some direction,  
13 let them draft something, think it through, and bring it  
14 back to us.

15 CHAIRMAN BABCOCK: Okay.

16 HONORABLE DAVID PEEPLES: I strongly feel  
17 that way.

18 CHAIRMAN BABCOCK: Kent.

19 HONORABLE KENT SULLIVAN: Mr. Chairman, what  
20 about coming up with two alternatives and let all of  
21 the -- the expert draftsmen take a crack at those two, one  
22 with some contemplation of a response deadline and one  
23 without, and try, you know, to get two alternatives that  
24 are of the highest quality that we can obtain.

25 CHAIRMAN BABCOCK: Okay. I think that's a

1 good idea, Judge. Let's take a vote on what Justice Hecht  
2 was asking about, which is should this -- should this be a  
3 matter of a statewide rule or should it be -- or can it be  
4 left to the individual counties by local rule? We know  
5 how Justice Duncan and Judge Benton feel, but how does  
6 everybody else feel?

7 MR. GILSTRAP: Local rules to do what?

8 MR. SCHENKKAN: You're talking about local  
9 rules on the response only?

10 CHAIRMAN BABCOCK: On the response, right.  
11 Local rules on the response.

12 MS. CORTELL: Well, but wait a minute.

13 MR. DAWSON: As currently drafted you mean?

14 MS. CORTELL: Yeah.

15 MR. DAWSON: Or without taking into  
16 consideration what's being proposed? Under our current  
17 system is it okay to do it locally versus --

18 CHAIRMAN BABCOCK: Yeah. Current system.

19 MR. MEADOWS: I guess the question assumes  
20 that there's not a statewide rule calling for a response  
21 day. That's the foundation for it.

22 CHAIRMAN BABCOCK: That's true.

23 HONORABLE DAVID PEEPLES: I'm interested in  
24 knowing if these local rules can create waiver. I mean,  
25 it's one thing for the local people to say, "We strongly

1 urge you to get your responses in. If you want the judge  
2 to read them, get them here in three days," but for that  
3 to be a waiver situation is a little different.

4 HONORABLE DAVID GAULTNEY: I think it's  
5 extremely problematic to have a general rule applicable  
6 throughout the state, have a local rule that requires a  
7 response, and then on top of that have a waiver  
8 possibility. I think you've got a problem.

9 CHAIRMAN BABCOCK: Nina.

10 MS. CORTELL: At least the way it's worked  
11 in Dallas so far is no one has urged this has a waiver  
12 ground, and it has allowed the judiciary to exercise some  
13 control over hearings and get the responses in; and I  
14 think the Dallas judiciary is to be commended for this  
15 because we have a lot of judges who, unlike some of the  
16 stories we've heard today, are committed to reading  
17 everything before you get down there; and this allows them  
18 to do that.

19 So if we did not have a statewide rule,  
20 which I am in favor of, but if we did not and you had  
21 local judiciary that wanted to try at least to move that  
22 direction to allow them to be better prepared for the  
23 hearing without waiver consequence, I think it should be  
24 lotted and enforced and allowed.

25 CHAIRMAN BABCOCK: Judge Sullivan, then



1 Frank, and then Tommy.

2 HONORABLE KENT SULLIVAN: Very quick  
3 clarification as to the Harris County rule that we  
4 discussed earlier. The Harris County rule that's been  
5 referenced is a rule for the written submission docket.  
6 That is, when the movant does not contemplate an oral  
7 hearing for the motion, the motion must be on file 10 days  
8 in advance of the submission date. If the submission date  
9 is on a Monday and the response is due the Wednesday prior  
10 to the submission date, and the failure to file a response  
11 -- and this is in the rule -- can be taken as a statement  
12 of no opposition.

13 CHAIRMAN BABCOCK: Okay. Frank and then --

14 MR. GILSTRAP: Aside from that particular  
15 provision and aside from the summary judgment rule, when  
16 is the failure to file a response under the Rules of Civil  
17 Procedure a waiver? I don't know the answer. I can't  
18 think of any instances.

19 MS. CORTELL: Summary judgment.

20 MR. GILSTRAP: Summary judgment, yes, we  
21 know that.

22 MR. ORSINGER: What about venue transfers?  
23 What about venue transfers? Don't have you a deadline to  
24 respond?

25 MR. GILSTRAP: Okay. And if you don't file

1 a response what happens?

2 MR. ORSINGER: I think you make your  
3 venue --

4 HONORABLE SARAH DUNCAN: You have to deny --

5 MR. GILSTRAP: Okay.

6 HONORABLE SARAH DUNCAN: Specifically deny  
7 venue facts.

8 MR. GILSTRAP: So there are some instances  
9 we should have to say, "I don't want this to be done. Are  
10 you waiving," right? But in other -- aside from that if  
11 you don't file a response you don't waive, right? I'm  
12 just trying to get a feel for it.

13 MR. JACKS: Well, in answer to Justice  
14 Hecht's question, it does seem to me there is good reason  
15 to have this done by local rule. As Shannon has pointed  
16 out, here in Austin a three-day response wouldn't mean  
17 much in almost all cases that are on the central docket.  
18 The same is true in Bexar County, and I gather the same is  
19 true in Lubbock, but -- and so I think it makes a lot of  
20 sense to have it done by local rule.

21 CHAIRMAN BABCOCK: Justice Patterson.

22 HONORABLE JAN PATTERSON: I think the only  
23 reason to have a reply is for notice to the opponent.  
24 That way you have your met issue, and there is no ambush  
25 at that point because the practices among the judges vary

1 so much as to who prepares and who doesn't, and it would  
2 seem to me if you have judges who prepare and who read  
3 things in advance there would be an incentive to get the  
4 response there so that they would not be reading only the  
5 motion and initial brief, but I think for notice to  
6 lawyers that that's the main role of that response,  
7 whichever way we go.

8 CHAIRMAN BABCOCK: Okay.

9 HONORABLE SARAH DUNCAN: Take a vote on  
10 Judge Peeples' proposal.

11 CHAIRMAN BABCOCK: I don't remember what  
12 Judge Peeples' proposal --

13 HONORABLE SARAH DUNCAN: Local rules are  
14 fine as long as they don't involve any waiver. I think  
15 probably everybody in here would agree with that. Maybe  
16 not, but probably.

17 CHAIRMAN BABCOCK: Okay.

18 HONORABLE SARAH DUNCAN: Isn't that pretty  
19 much your proposal, David?

20 HONORABLE DAVID PEEPLES: Yes. I think it's  
21 fine for local judges to encourage and to strong-arm  
22 people to file things beforehand, but I have got a problem  
23 if you waive rights by not getting it done.

24 CHAIRMAN BABCOCK: Yeah, Pete.

25 MR. SCHENKKAN: And it seems to me what we

1 want on that is "except as otherwise provided by law there  
2 is no waiver by not filing this response." Now, there are  
3 sometimes when it is specifically provided by law. We  
4 just had some help here calling my attention to the venue  
5 deal. You don't have to file any response to the venue  
6 challenge unless you plan to challenge the venue facts, in  
7 which case there is a deadline. There is a response  
8 required for that.

9           You can see how that would interact with  
10 this rule, and then the Harris County written submissions  
11 is another example, so unless otherwise provided by law  
12 the rule would be this response deadline if we ultimately  
13 wind up with some people changing their minds and it is  
14 not waived.

15           CHAIRMAN BABCOCK: Is there consensus on  
16 that, that putting aside the waiver issue or otherwise  
17 required by law that local rules are okay, given --

18           HONORABLE SARAH DUNCAN: If there is no  
19 waiver.

20           CHAIRMAN BABCOCK: If there is no waiver,  
21 right. Consensus on that? Anybody disagree with that?  
22 Okay. Well, there's your answer on that.

23           MR. ORSINGER: You're talking about local  
24 rules in the absence of a statewide rule.

25           CHAIRMAN BABCOCK: Yeah. I'm talking about

1 the situation as it exists today.

2 MR. LOW: But when it says it shall be  
3 deemed as no opposition, is that waiver? I don't know  
4 what a waiver is.

5 MR. ORSINGER: That is a waiver for the  
6 written submission docket.

7 MR. LOW: That's -- but then Judge Benton  
8 says it's not, that they go ahead.

9 HONORABLE JAN PATTERSON: Seems like waiver  
10 to me.

11 CHAIRMAN BABCOCK: Anybody that practices in  
12 Harris County and wants to contest a motion and doesn't  
13 file a written response on a submission docket case is  
14 nuts. And I hope I never forget.

15 MR. DAWSON: Be sure that's in the record.

16 MR. ORSINGER: They're going to read that to  
17 the jury in open court.

18 CHAIRMAN BABCOCK: All right. The only  
19 other issue -- and let's just talk about it really  
20 briefly, if anybody has got anything to say about it since  
21 we're sending our people back to draft, and that is this  
22 part that Judge Sullivan is talking about before, "upon  
23 written motion and leave of court for good cause shown it  
24 can be less than 10 days." How do people feel about that?

25 MR. LOW: That language I'd rather just be

1 "order of the court" rather than putting the good cause --

2 CHAIRMAN BABCOCK: You're an "order of the  
3 court" guy.

4 MR. LOW: -- like the Federal rule.

5 CHAIRMAN BABCOCK: Anybody else have any  
6 comments on that?

7 HONORABLE SARAH DUNCAN: I'm an "order of  
8 the court" guy.

9 CHAIRMAN BABCOCK: Excuse me?

10 HONORABLE SARAH DUNCAN: I'm an "order of  
11 the court" guy.

12 CHAIRMAN BABCOCK: Justice Duncan is an  
13 "order of the court" type person. How many people would  
14 prefer that rather than say "a motion for good cause  
15 shown," pick up the language from the current rule and the  
16 Federal rules that just says "shorten by the court" or  
17 "order of the court"? How many people in favor of that?

18 MR. JACKS: I think Judge Sullivan may  
19 accept that as a friendly amendment.

20 HONORABLE KENT SULLIVAN: Yeah, that's fine.  
21 I don't care.

22 CHAIRMAN BABCOCK: Opposed?

23 Okay. So when you guys are drafting you now  
24 know that by a 22 to 0 vote, the chair not voting, "the  
25 order of the court" is preferred by this committee.

1                   So that concludes our fun day, and when Hugh  
2 Rice Kelly said we can't possibly spend a whole day  
3 talking about all of these things, you've been proven  
4 wrong on that.

5                   MR. KELLY: I have been proved wrong.

6                   CHAIRMAN BABCOCK: Thank you very much.

7                   (Meeting adjourned at 4:45 p.m.)

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CERTIFICATION OF THE MEETING OF  
THE SUPREME COURT ADVISORY COMMITTEE

I, D'LOIS L. JONES, Certified Shorthand  
Reporter, State of Texas, hereby certify that I reported  
the above meeting of the Supreme Court Advisory Committee  
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same was thereafter reduced to computer transcription by  
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I further certify that the costs for my  
services in the matter are \$\_\_\_\_\_.

Charged to: Jackson Walker, L.L.P.

Given under my hand and seal of office on  
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