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**MEETING OF THE SUPREME COURT ADVISORY COMMITTEE**

April 27, 2007

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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 27th day of April, 2007, between the hours of 9:01 a.m. and 4:51 p.m., at the Texas Association of Broadcasters, 502 E. 11th Street, Suite 200, Austin, Texas 78701.

# INDEX OF VOTES

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



## Documents referenced in this session

07-5 Rocket Docket, subcommittee report (4-26-07)

07-6 Memo from Prof. Dorsaneo, TRAP changes (4-25-07)

07-7 Letter from Gilstrap, proposal to amend garnishment rules (4-19-07)

07-8 Rules affected, service of writs of garnishments by private process

07-9 Proposed amendment to Rule 226a (two drafts)

07-10 Proposed amendment to Rule 904 (4-20-07)

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CHAIRMAN BABCOCK: Welcome, everybody. Thanks for coming, beautiful spring day, which the court reporter is recording all my comments here. We'll start with the report from Justice Hecht.

HONORABLE NATHAN HECHT: Let's see, not much to report. Chief Justice Gray had a grandson, so you might notice a change in the tone of his dissents.

CHAIRMAN BABCOCK: Become whiny?

HONORABLE NATHAN HECHT: And some guy named Robert Schenkkan, age 90, was celebrated for his many years of work with public broadcasting. Where's Pete?

MR. SCHENKKAN: I'm right here. Yeah, it was a really great event, just wonderful.

HONORABLE NATHAN HECHT: And he's 90?

MR. SCHENKKAN: He is.

HONORABLE NATHAN HECHT: So that's good. That's all the gossip I know, but I'm not always the first one to know. Otherwise, we are watching the Legislature's progress, and about the only thing that looks like is a -- is likely to require rule-making for us is a bill that would require us to adopt rules for e-filing in the justice courts by the first of the year. That will be quite an undertaking, but we'll have to draw on a lot of outside expertise from the JPs and technology people that

are helping them and then kind of look over their recommendations toward the end of that process. So I think that will probably be in the fall if that bill passes, but it's quite a lot of work to allow e-filing in all these justice courts. What are there, four hundred and some of them?

HONORABLE TOM LAWRENCE: 830.

HONORABLE NATHAN HECHT: 830, and they do things, as you might expect, in 254 counties a lot differently around the state. Otherwise, that's all we know, right?

MR. HUGHES: Yeah. There are other ones that could pass, but it's hard to say at this point.

HONORABLE NATHAN HECHT: Yeah. There are several other things, but the big court restructuring bill has been pared down quite a bit, and I don't know whether there will be any rules involved in that.

CHAIRMAN BABCOCK: Is that Senate Bill 1204?

HONORABLE NATHAN HECHT: Yeah.

CHAIRMAN BABCOCK: I know Judge Christopher and I gave a talk at the Houston Bench/Bar Conference and I spoke about the Court's impending rules on electronic access to court files. Any update on that?

HONORABLE NATHAN HECHT: We've pretty well worked through the sensitive data rule, although, we would

still like to solicit some input from the people in the trench, the clerks and others, about it; and we have not finished work on the internet part of the rule. I think there's been some consternation up in Tarrant County about their filing. I think the judges and the commissioners are at odds or something, and so we're just -- we're moving along, but sort of cautiously.

CHAIRMAN BABCOCK: Very good. On Senate Bill 1204, we received a lengthy letter and memo from Frank Branson, who, as most of you know, is a lawyer who practices predominantly on the plaintiff's side of the docket from Dallas, and did we put this on the website, Angie?

MS. SENNEFF: No.

CHAIRMAN BABCOCK: We probably should. Maybe we ought to call and make sure he knows it will be widely disseminated, but it's very thoughtful. It may have been overstripped by events now because it's a couple of weeks old, but it's interesting reading. I don't think there's anything for us to do with respect to it, other than it's just -- it's just interesting. Anything else that we need to talk about?

HONORABLE NATHAN HECHT: I think that's it.

CHAIRMAN BABCOCK: All right. Well, let's get into today's agenda. I don't know if you-all have had

a chance to see the work that Jeff Boyd and his subcommittee did. It was just posted yesterday, day before, yesterday, but it's terrific work, Jeff, and if you could fill us in.

MR. BOYD: Sure. Thank you. The legislative mandates subcommittee has been focused on what we call the rocket docket issue, and there is a written report that was posted yesterday, and I believe copies are available. If you don't have one, it would be useful for everybody to have a copy of the report so we don't have to read everything that's in there in order to get the message across, but you may recall that we last addressed this full committee on this issue was at the December meeting and there really kind of focused on the preliminary work we had done and what we understood our charge to be; and after good discussion from this group and guidance from Justice Hecht, one of the things we went back and did since then was to reconsider our charge and find a different way of expressing what we now understood our charge to be as a subcommittee on this rocket docket issue; and so I want to spend just a few minutes telling you how we understand that to be and allow for your input and comment on that and then describing what we've done as we've addressed what we've identified as the three tasks or issues that we see involved in this process, the first

one of which is based on our charge we thought it would be useful to go back and try and identify what could be the problem or problems that a rocket docket would be intended to solve and how do those problems manifest themselves within the Texas court system. We'll talk a little more about that today.

The second task or issue was a more in-depth review of literature, articles from law reviews, law journals, bar journals, other places, a more in-depth review of those to identify and sort of categorize various rules, procedures, factors, that other jurisdictions who have implemented rocket dockets or similar processes have used, and so that we'll talk a little about today as well, and then our third step in the process, depending on where we go after today and how we choose to go there, having focused on understanding whether there's a problem and, if so, what is the problem, and then looking at what others have done to address that problem or similar problems, then really focusing on what we would be recommending Texas do in the way of implementing any kind of rocket docket.

That third step, actually recommending as to what Texas would do, we've still postponed getting there because we want to make sure we know what the problem we're trying to address and how others have successfully

or unsuccessfully addressed it before we start getting there. So with that kind of overview of what we'll talk about today, we'll start with our charge, and the subcommittee's charge as we perceive it -- and it's much like what we discussed in December, the charge of exploring, evaluating, and advising this committee on whether and how the implementation of a rocket docket or fast track proceeding could reduce costs and delays within the Texas state court system and to make recommendations to this committee on how that proceeding could be implemented within the Texas courts and how it would work and make recommendations on the benefits and liabilities of such a system in Texas.

That's very similar to what we understood our charge to be in December, except that you'll recall at that point it was articulated within the context of the attention that was being given to the vanishing jury trial concept, vanishing tort filings, vanishing jury trials; and we left that meeting in December with the understanding, though, we were to make things simpler, if for no other reason -- forget about vanishing jury trials, just look at the question of whether a rocket docket, if a rocket docket were implemented in the Texas courts, what would be the pros and cons and particularly within the context of cost and delay; and so we really began focusing

on the idea if there's a purpose for a rocket docket, you want to design that system to address an issue or to either solve a problem or improve a factor in the process and what would that be; and so we began inherently sort of thinking it was a matter of -- the purpose of an expedited fast track system was to reduce delays within the system; and so that's really how we characterize the purpose for our focus, is on delay and cost within the system; and we've omitted any effort on our part to try and understand or evaluate this vanishing jury trial phenomenon or how it relates to the rocket docket, so we can spend time discussing that if necessary.

The one issue within our charge that came up was whether and the extent to which we ought to be looking at and perhaps making recommendations on some form of rocket docket or fast track system within the appellate courts; and as you know, there are already some rules that address expedited appeals in particular circumstances; but, so, in fact, we contacted both Chip and Justice Hecht and said, "Do you see a need for -- is this an area that you want us to consider"; and their response, was, "Yeah, while you're looking at it, you should look at this as well"; but we thought that might be worth some time for discussion today as well. So that's kind of where we are and what we see our charge as being.

As I say, we then turned and focused on trying to gather information to help understand, if the purpose here is to address issues with cost and delay of litigation, what are those issues? And so we focused then on gathering data to address that, and the report provides information about that, and I'm going to let Pete Schenkkan really go over that process and the results of that process and then we'll come back to talking about summarizing what we've seen in other jurisdictions who have implemented rocket docket systems.

MR. SCHENKKAN: Sure. Of the three possible reasons for the court system to lose business to alternative dispute resolution systems, delay, costs, and perceived arbitrariness and risks of outcomes, the rocket docket appeared like it might be or might not be a good solution to two of them, delay and cost; and so we were looking for data on that; and we went to the Office of Court Administration, a government agency of the State of Texas which has been collecting data, maintaining data reported by the district clerks of the counties for 25 years, and got their data in a database form that goes back to '93; and it's possible to get some of the same data in a different way farther back; and the data itself is in your packet, starting with Exhibit A, looks like this, to see what they -- what the data that's available

shows; and Exhibit A appears to us to show a modest statewide trend in district courts, civil cases, of less delay.

If you measure it by the disposition time that takes more than 18 months and the first number of years covered in this table, it was at 23 to 24 percent, and in the last several years it's been 19 to 20 percent; and there's been a reduction as well in the next category or the next oldest category that they collect the data on, 12 to 18-month category from the 10 to 12 percent range to the 9 to 10 percent range; and there's been conversely an increase in the very rapid disposition category, the three months or less category, from 27 percent or so to the 32, 33 percent.

So the statewide data do not suggest -- at this aggregate level do not suggest that we have a worsening problem of overall delay in civil cases in district courts. We have to qualify this by saying that they only have this disposition data, this time to disposition data by these big groups of cases, in this case civil cases in district courts, and there are, of course, many different kinds of civil cases. At the end of this report you have an exhibit that is one of their actual reports, starts with this, the one that says "Exhibit C" and has some columns you can't read that are

grayed out alternating with columns you can read, and this gives you -- shows you what the reports look like that this data comes from, and you will see in there that there is a category "divorce" and then to the immediate right of it there is a category, "all other family matters" is gray, very hard to read, and those two categories between them account for 350,000 of the dispositions during this time period that this particular report covered out of a total of 550,000 and thus, you could perfectly well have, let's say, some speeding up of the disposition of family law cases taken as a group, masking the increase in delays in other cases.

We don't know that you do. I'm not saying you do. We just don't know one way or the other, and the same could be true if you wanted to get more granular, you know, get into business law cases or something like that. You can't tell from the OCA data whether business law cases as a category have gotten faster to disposition, slower to disposition, or staying about the same. They do also have this data on a county by county basis, and we looked at the -- what we asked for were the ten largest counties. I was a little surprised to find some counties in the list of the top ten, and that's reproduced here as well, and they show different trends for different counties.

Harris County is showing a very marked shortening of the time to disposition at 18, taking more than 18 months category went all the way from the 30 -- low thirties as a percent of the dispositions to the 9 to 13 percent range in the last couple of years. And some less dramatic but significant improvements in some other counties, some worsening situations in still other counties. There are some others that are about the same, and also you'll note as you get into some of these individual counties that there are some quite wide year to year fluctuations that, at least, make you want to stop and ask why did that happen.

HONORABLE STEPHEN YELENOSKY: And I would just point out in Travis County that precipitous drop from 2004 to 2006, which just happens to coincide with my tenure on the bench, not that that has anything to do with it.

Actually, that is a good example. It doesn't have anything to do with me, but one of the things you can't tell from this is obviously why. In the last couple of years, besides the local administrative Judge Dietz has put in place an aggressive dismissal for want of prosecution system that by this summer will have essentially caught up with the backlog and then we'll be on a routine DWOP, D-W-O-P, that is, Dee Dee, that

hopefully keeps the backlog down, so that's just one example of how you can't really tell what's going on.

MR. SCHENKKAN: And we've listed in Jeff's excellent summary memo the work we did, and I guess it's the third page, second sheet, bottom of the second page top of the third page a number of the different specific questions about changes in the law, substantive or procedural, or changes in management procedures, including the mass torts panel in Harris County, that could easily account for significant portions of these changes in specific counties or statewide and that just illustrate the limitations we have on our knowledge with the OCA data, both in terms of if we have a problem of delay and, if so, in what cases and counties that problem exists. These questions that we are not able to answer from -- look like plausible candidates for explanations for some reductions in times to disposition. We just don't know whether they are, in fact, the reasons, and if so, to what extent.

There is, of course, no OCA data on the costs of litigation, and that is our second possible problem in the system that a rocket docket might, again, or might not, appropriately be designed to address, and so one of our recommendations we want to at least call to people's attention was it might be a good idea to work

with the OCA to change the data collection system if it can be done in a way that's not too burdensome on the courts or the district clerks or the practitioners and see if we can't use the OCA to generate better data, not just for our purpose for this rocket docket study, but for all sorts of tasks of the court system including the ones that the full SCAC has addressed from time to time or may address in the future. And this would be a wonderful time to do that. They are on their 25th anniversary. They are in the process of making some recommendations to the governing body which they report to, which is the --

MR. BOYD: Judicial Council.

MR. SCHENKKAN: Which is the Judicial Council, which we should be well-represented on, to make changes in that. So it's kind of a good time to make suggestions to them for suggestions in changes in the data collection process, and that may be the single most useful thing we've learned out of this process; but in short, we don't see any signs of a global, you know, statewide civil case worsening delay problem; and down below that level of detail we don't know whether we have a specific category of cases with a delay problem, either statewide or in particular counties, that the rocket docket might or might not help with.

MR. BOYD: Let me add to that a little bit.

A couple of points. One, on the OCA, and we should say that the staff at the Office of Court Administration was great to work with, continue to be great to work with. When we e-mailed over there, their -- who was it, their executive director. He's not here today. I'm losing all their names from my memory at this moment, but their executive director and two of their senior staff folks, one of whom often attends these meetings --

MR. SCHENKKAN: Let's give them credit. Carl Reynolds, the director; Angela Garcia, who is the judicial information officer. This is her job, working with this data. She's just excellent. And Ted Wood, their special counsel for trial. All three of them really pitched in.

MR. BOYD: And Ted actually coincidentally was here at our meeting in December, and so he kind of knew and they kind of cleared their calendar for an afternoon, let us come over and pick their brain and have been very helpful following up, but their ability to help us is limited by the data they have, and the reality is the data that they have is not very useful for our purpose except for the kind of big 10,000-foot picture that is shown in Exhibit A, because beyond that you get the county by county and you see it works -- some have worse problems with delay than others, but there is no reason without

anecdotal information to know why. The data doesn't tell you.

They are in this process of -- they are about to make recommendations to the Judicial Council for new rule-making that would -- could potentially, for example, result in a civil cover sheet requirement like you see in Federal court. When you file a case in state district court, the plaintiff's lawyer has to fill out a sheet so that the burden is on the attorneys and not on the clerks who don't know anything about the case to come up with the data. They're looking at those issues, and the Judicial Council has a committee that is advising them as they prepare to make these recommendations, and Bonnie happens to be on that committee, and so this committee already has some involvement in that process, but Ted and the folks at OCA made it very clear they would love to have whatever input this committee would want to give to them for how to make that -- how to make that better so that ten years from now when we're looking at issues like this there will be better data to work off of for our purposes.

But, in terms of this subcommittee's purpose, I mean, frankly, we kind of sat around and said anecdotally "I don't think delay is an issue, and if rocket dockets are supposed to address delay, you know, in

Travis County you can get a trial pretty much as quick as you want to. Well, yeah, and Harris County too, and here, too." And as we kind of vetted through all of that, really cost is probably the issue that would be better addressed, but, you know, all my clients would love to figure out a way to pay me a lot less. I mean, so then it becomes a real -- I mean, the reality is you get into a dispute over a 7,500-dollar roofing bill or whatever and you can't afford to litigate the dispute, and so cost becomes a bigger factor, and yet as we looked at the literature -- and we'll talk about that in a little bit -- rocket dockets don't -- you know, intuitively you think, well, if we're going to get it resolved quicker it's going to cost less, but the reality is at least some of the literature tells us that's not true.

It costs more because you're having to go to more hearings to keep it on track, and basically what you're doing is you're taking all of the time that you would spend out over a longer period of years and you're combining it into one short period of time where you do nothing but that case, and I think in December I told you I had that kind of case where by agreement we rushed everything to a quick resolution, and the bill was a lot larger than -- it was large enough that my client wouldn't tell you that it was a cost-saving measure. We were able

to get it resolved more quickly, which we had to do, but it wasn't cheaper.

So that's sort of the dilemma we find ourselves in as we try to identify what problems to try to solve, because if we're going to make recommendations on what a rocket docket ought to look like -- because there are different varieties. There are mandatory, voluntary, those that shoot for resolution in six months and those that shoot for resolution in a year. A lot of the varieties we've talked about, but bottom line, we're having a hard time as a subcommittee of pinpointing what problems we're trying to solve here so that we know how to design the solution, but that's sort of where we are in terms of that background.

I don't know, Chip, whether it's useful to talk about a reconstituted charge for a little bit or to talk about the data issues for a little bit or whether you would like for me to go on to that next part, which is the summary of the literature and what other rocket docket systems have looked like.

CHAIRMAN BABCOCK: Yeah, let's stick with the data for a minute and if anybody has questions --

MR. BOYD: Okay.

CHAIRMAN BABCOCK: And I'll start off by asking one, or a couple maybe. One thing that was alluded

to here but wasn't fleshed out -- and I suspect because there are not statistics -- but is the correlation between delay and case load; and to take two examples, the filings in Harris County, I think, are down over the last few years where the filings --

HONORABLE JANE BLAND: They're not. They're not.

CHAIRMAN BABCOCK: They're not?

HONORABLE JANE BLAND: No.

CHAIRMAN BABCOCK: Are they about the same or have they increased? About the same?

HONORABLE JANE BLAND: About the same, and they're about the same or slightly higher, not including the MDL cases that have been extracted.

CHAIRMAN BABCOCK: Excluding MDL. Okay. In the Eastern District of Texas I think they're up, aren't they? Maybe I shouldn't assume that.

HONORABLE JANE BLAND: We just got data about that.

MR. BOYD: Yeah, and actually, did we include Eastern or was it Virginia that we put in here?

CHAIRMAN BABCOCK: You've got both. I was very surprised to see the disposition time in the Eastern District of Texas as being virtually no different than our state court system on average.

HONORABLE JANE BLAND: That's right. For civil cases.

CHAIRMAN BABCOCK: For civil cases. Because the perception in the legal community is not that at all. The perception is if you go to the Eastern District of Texas, you will zip through that system in a heartbeat.

MR. SCHENKKAN: We did get the data on the quantities, too. Did you find it?

HONORABLE JANE BLAND: We did. What we got was average pending case load, which doesn't answer the question of how much is that -- of that is cases that have been taking a while to resolve and how much of it is new filings, and new filings would indicate nothing about whether or not delay is a cause for the backlog or an increase in the number of pending cases, if there's a lot of new filings.

CHAIRMAN BABCOCK: Yeah.

HONORABLE JANE BLAND: But I think it was something like 350 per court. Total cases.

MR. SCHENKKAN: This is what I have. I didn't have the one with the average in there.

HONORABLE JANE BLAND: Yeah, it was 3,000 case -- 3,100 cases in eight courts, and you do the math. Somebody can divide eight into 3,100. 360, something like that.

MR. SCHENKKAN: Just under 400.

CHAIRMAN BABCOCK: Just under 400. And that's in the Eastern District of Texas?

HONORABLE JANE BLAND: Correct.

MR. SCHENKKAN: And it's been steady at somewhere near that level, 400 to 500, or just under 400 to 450 for however far back this goes.

CHAIRMAN BABCOCK: 387, but who's counting. We have somebody with a calculator. And that's been consistent for how long, Pete?

HONORABLE JANE BLAND: We have the first number as 2001.

MR. BOYD: There's a lot more --

HONORABLE JANE BLAND: They added a court in 2002, and that -- they had a little bit of a, you know, drop in pending cases because of that and -- but that is not, you know -- I don't know about case loads from county to county in Texas, but that's quite a few -- that's quite -- that's fewer cases, I think, than the average district judge in an urban county in Texas is handling.

CHAIRMAN BABCOCK: Yeah. Yeah. The other question about the data, I noticed that in both Bexar and Travis Counties, which have central docket systems, which is supposedly designed to lead to quicker resolution, that both those counties were much higher than the -- in the

pending more than -- both in the 12 to 18-month category and the over 18-month category than some of their -- some of the other counties, particularly in the over 18-month. Any explanation for that?

MR. SCHENKKAN: Yes. I don't know about Bexar County, but certainly in Travis County, this is, again, anecdotal. We don't have the court administration data on it, but I would bet a hundred dollars against a hole in a donut that the administrative law cases are a very large component of those that take more than 18 months to resolution, and there are good reasons -- well, there are reasons for that, and one can debate what they are, but they are distinctive reasons.

CHAIRMAN BABCOCK: Judge Yelenosky, did you have a --

HONORABLE STEPHEN YELENOSKY: Well, I have talked to Judge Dietz, and we have statistics, but they don't help really figure out much more than the statistics from OCA, so I would echo just the comment that we don't have very helpful statistics. Two things other than that are, as I said, DWOP is an issue. And you don't know, for instance, you know, whether these are over 18 months and active or over 18 months and inactive.

The other thing is that with a central docket it's a demand-driven docket, demand of attorneys,

and so the capacity may be there, but the will may not. Either neither attorney may want to move it forward or one may and the other may not, which is why when coming to solutions we need to understand whether there's a capacity problem or not; and if so, where, because I really don't think there's a capacity problem in Travis County. Our court administrators say they can guarantee if you want a jury trial you can get one within six months from the day you ask for it and probably within three to four months, so it's not a capacity issue. It may be a will issue, and if that's -- if it's considered a problem, with our central docket anyway, that some things are taking longer, the solution there may be simply a signal that we are to entertain scheduling orders from one side against the resistance of the other to do things more quickly.

MR. BOYD: Chip, on that point, anecdotal again, but I agree with Judge Yelenosky that what the central docket does is it -- it's even more effective in allowing the attorneys to control the pace of the case, which is philosophically in contradiction to what a rocket docket is all about, and if you read the literature, one of the consistencies in all different jurisdictions that have imposed a rocket docket is it only works if the judge grabs a hold of the case and imposes strict case management rules and deadlines and makes the case keep

moving and sanctions parties when they stop that from happening. That works -- well, it's ironic that one of the articles -- and I have to dig back to remember, but I show it on the -- in the report here. One of the ways to make it work according to one jurisdiction is you quit the central docket and you go to an individualized management docket per judge so that each judge can stay on top of his or her case. Another one of the articles says in order to make it work you've got to quit the individualized docket and go to the central docket so that you can have other judges who are available to step in and resolve things when they come up, and that kind of gets us back to the problem of what's the problem we're trying to solve.

The irony here is rocket dockets were established going way back into the Sixties, but then at the state court level more in the Eighties, not so much to get quicker dispositions but to clean off backlogs of cases. There were too many cases pending and they couldn't get to them, and so they started putting them on rocket dockets to get rid of them, and the irony is that we're now looking at rocket dockets as a way to attract more cases back into the courts. And so, again, you've got to define what you're trying to achieve in order to design a system that's going to achieve it, but I do think the issue in Travis County -- and I can list cases that

we've rushed through, and Judge Yelenosky is at least familiar with one or two of mine that have just been sitting there for several months because the clients aren't ready to get back to war against each other --

HONORABLE STEPHEN YELENOSKY: I'll set a scheduling order.

MR. BOYD: -- for a variety of reasons.

MR. SCHENKKAN: On the central docket issue, I want to add some further admittedly anecdotal support for what Jeff just said. I think the assumption was that you needed -- when we started this was that you needed a central docket to make a rocket docket work, and Jeff has given some indication that that's not so. There's people writing on this who say you need the central docket and people who say you need the opposite. The Eastern District of Virginia falls in the category of some of my friends think we need central docket and some of them think we need individually assigned, and I'm in favor of my friends. They have done it both ways during the time they've had the rocket docket. They started out with the central docket and then they had a change in their presiding judge, and he didn't like the central docket, and they now have it assigned, and they still have the rocket docket.

The key, either way, is what Jeff says. It

is judges who are insistent, regardless of the parties' desires, that the case will be moveed at a certain pace. That's the key. And you can do that in a central docket system or you can do that in an assignment system, but you can only do it in either system if you have judges who are willing and able to do that.

HONORABLE STEPHEN YELENOSKY: But that points out also the difference between the attorneys and possibly the clients, because if a rocket docket is designed to help litigants who want to go more quickly, and their attorneys don't want to go more quickly, then who are we -- who are we answering to, essentially, because if their clients want to go more quickly and it's a demand-driven system where the attorneys can do that then either they're not doing what their clients want or there's some other problem.

CHAIRMAN BABCOCK: Yeah, Judge Christopher. And Judge Peeples had his hand up a minute ago, and I'd like his thoughts on Bexar County, but Judge Christopher.

HONORABLE TRACY CHRISTOPHER: Well, of course, this is -- a lot of this is anecdotal, but Harris County used to have a huge backlog when we were in a central docket system, and then we went to an individual docket system, and that really dramatically decreased our case load, and there is a lot of reasons for that. You

are more on top of dismissals for want of prosecution, you're more on top of, you know, bankruptcy dismissals, you're more on top of a lot of things in terms of managing your docket because all of the sudden everyone knows how many cases are on your docket, and you pay attention to it to try and get your numbers down. Some people thought some judges kind of went overboard in trying to get their numbers down, and, you know, so that caused some problems.

But what we have found now is kind of a combination of the individual docket/central docket, so I can understand why there is this dichotomy in the literature; and what we have been doing sort of internally, if one of us gets involved in a fairly long trial, but we still have other cases that are, you know, set during a two-week time period, we'll e-mail around and say, you know, "Who's got some time this week for a trial?" And people -- you know, people will volunteer, and so then you start assigning out cases that were on your court to someone else, and that just happened to me recently. I had gotten kind of bogged down in a couple of cases and I had like three or four car wrecks that claimed they were ready to go, but if you don't have a judge ready to try them, they just sit there. So I called around. Two judges said, "Yeah, send me your car wreck." Well, three immediately settled, and the fourth one went to

trial.

So, truthfully, I think a combination of the two systems works well because you've got that individual management of your docket and, you know, you know your case, but, you know, sometimes you do get stuck doing one thing and you've got to have the other judge backing you up, the central docket type system to back you up.

CHAIRMAN BABCOCK: Judge Peeples.

HONORABLE DAVID PEEPLES: Well, Tracy and Pete and Stephen and Jeff said what I was going to say, which is, you know, individual dockets are amenable to judicial control and central dockets are for the lawyers, and the lawyers a lot of times don't push, and the judges in a central docket don't push them to trial, and I think that explains a lot.

At some point, this is a different point, I would like to talk about the mix of these cases, because I think these statistics treat a tax case and a big commercial case both as one case, and that's just totally inaccurate to do that. My guess is that Dallas and Houston have much more complicated commercial litigation than anywhere else in Texas, certainly more than we do in Bexar County, which makes their numbers even more impressive, because those are huge cases and they've got a lot of them. And then, you know, Collin County, which is

on here, is not a place that a plaintiff would choose to file a lawsuit, if you've got a choice.

CHAIRMAN BABCOCK: To put it mildly.

HONORABLE DAVID PEEPLES: Hidalgo County or Jefferson County is not on here, but those are good places to file cases. And so we need to deal with that, too, the attractiveness of the place to file, and Collin County looks like real good here, and there may be a lot of reasons for that, but I'll bet you they don't have a whole bunch of big PI cases there.

CHAIRMAN BABCOCK: Great point.

MR. BOYD: Chip, can I just address one of Judge Peeples' points, which is the type of case, the complicated tax case and all that? And we're aware of that. All these different factors are what make it difficult to figure out how to address the solution, how to design a solution. Exhibit C shows the best data we could find that tries to break it down by type of case, and that's those columns that are difficult to read. The first is "injury or damage involving motor vehicle" and "injury or damage other than motor vehicle," then "worker's comp," then "tax cases, condemnation, accounts." I can't even read the next one.

MR. SCHENKKAN: "Reciprocals."

MR. BOYD: "Reciprocals, divorce, all other

family matters," and then the big one, "all other civil cases." That's useful data on a statewide basis looking at this information, but you can't then turn and connect that data to a category by category disposition rate. You can't -- you can't look and see does it take longer to resolve one of these types of cases than another, nor can you say does it take longer to resolve one of these types of cases in any particular county.

MR. SCHENKKAN: Because they don't collect the data that way.

MR. BOYD: Simply because they don't collect it that way.

MR. PERDUE: How do they get this data?

MR. BOYD: The clerks.

MR. SCHENKKAN: The clerk fills out a form, and the form and reporting instructions are 30, 40 pages long from the Office of Court Administration.

CHAIRMAN BABCOCK: Frank had his hand up next, but before we get to Frank, Judge Peeples, the Bexar County number that's got in the over 18 months, 30 percent, as opposed to a much lower percentage in other major metropolitan counties, is that just because it's a lawyer demand-driven docket or --

HONORABLE DAVID PEEPLES: I don't know.

CHAIRMAN BABCOCK: Are you surprised by that

number?

HONORABLE DAVID PEEPLES: Yes, I am.

CHAIRMAN BABCOCK: Yeah, I was, too.

HONORABLE DAVID PEEPLES: Well, somebody made the point, another way of looking at this is can people who want to get to trial get to trial with a trial setting that will be reached, and in Bexar County and I think in Travis you have a 99 percent chance of being reached. I mean, you get a trial date and you know you're going to trial with a certainty of about 99 percent. That means a lot to lawyers. It doesn't show up in these stats, and I don't know what the numbers are elsewhere, but I have no explanation for the bad numbers in Bexar County.

HONORABLE SARAH DUNCAN: Well, isn't it true that Bexar County had -- I remember looking at -- when Bexar County was asking for more judges, I remember seeing statistics on the number of cases disposed of by a judge in Bexar County. Bexar County doesn't have the number of judges per case. I mean, if you look at a population of cases, Bexar County has significantly fewer judges to handle that population of cases than does Dallas and Houston. At least it did at one point. I don't know if the two additional judges rectified that or not, but it's a consideration obviously.

CHAIRMAN BABCOCK: Yeah. Frank.

MR. GILSTRAP: I think we're doing something here that the committee has probably told us we shouldn't be doing, and that is we're looking at this data and we're generalizing about, well, gosh, two of these counties have higher numbers, they have central docket systems, therefore, central docket system doesn't move cases. Tarrant County has similar numbers except in '06 to Bexar and Travis, and they don't have a central docket system. Yes, they do have a lawyer-driven system, not a judge-driven system, but the point is none of these statistics should be used to support any argument, because as the committee told us -- and I want to compliment them for going in and making this effort and reaching an important conclusion, which is that the data from the OCA is utterly useless for our purposes.

If you'll look at Exhibit C over here and, you know, just my quick math, I come up with 730,000 total cases. 70 percent of those are family law and tax law cases. If you take all of the personal injury cases, it's less than ten percent. So if the data in a county is going down, it may be -- or is going up, it may be the economy is forcing a whole lot more tax cases into the court. We don't know. Hidalgo County, the numbers are down. Look at those numbers. It's there, and there's

been a dramatic decrease in cases over 18 -- over 18 months.

Candidly, this whole thing kind of strikes me as a solution in search of a problem, and that doesn't mean there's not a problem. Certainly there are problems. We're just not sure what they are. We've got a solution that has solved problems in some areas, but I don't see any -- any basis in these numbers for connecting this solution to some problem in Texas. That doesn't mean we shouldn't do it, but I think we need to stay away from these statistics in trying to support our arguments.

CHAIRMAN BABCOCK: Yeah. The other thing, the flip side of that, Frank, is that these statistics could support any argument.

MR. GILSTRAP: Yeah. Okay. I forgot I was with lawyers.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: That's a good point. When you were talking about numbers in Eastern District, they go by weighted numbers. A patent case is a three or a four. The clerk gives those numbers by weighted numbers, so it's not like -- it hits what David's talking about it. It analyzes it more than just this is a case.

MR. BOYD: They actually do both, and I didn't bring that with me, but I had my legal assistant

have the -- I think it was Eastern District of Virginia faxed us one of their reports yesterday, and it shows raw numbers and then weighted numbers where certain types of cases are a 1.46 instead of a 1 because they take more resources to resolve.

MR. LOW: But, see, the Eastern District does it to see how the load is between judges. I mean, that's the reason the weighted number.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: I'm on this subcommittee, and one of our discussions I think when we realized that the data wasn't going to help us much, one of the things I suggested ironically is that we go to what is effectively anecdotal information, and I think there was some appeal of this or this was appealing to some. If you want to find out if there's a problem, you survey lawyers in these different counties and ask them, "Do you have a problem getting to trial and what type of cases?" And maybe we could ask around here anecdotally if that's the case, because the question is not in the statistics, but "Do you have a hard time getting your case disposed of within what you consider to be a reasonable time?"

And if uniformly across the state the vast majority of the lawyers say "no" right now, but yet we're hearing somewhere in the background that people think

things are taking too long, then again, that may mean a difference of opinion between lawyers and their clients or it may mean, as often is the case, that the reputation lags way behind the reality, because the literature we're reading, at one time that certainly was true.

I read the California stuff. For a while there it was taking five years to get to trial, and that stopped sometime in the Nineties, but it may take five or ten years for people to realize it.

CHAIRMAN BABCOCK: Okay. Kent and then Carlos.

HONORABLE KENT SULLIVAN: I think when you talk about a rocket docket inherently you focus on speed, but I really wonder if that's what we ought to be focusing on. To me the question is efficacy, and it really is one in which speed is a substantial component of that because something that has long delay, of course, is problematic to say the least, but leaving out the question of quality of disposition misses the point entirely, it seems to me. You can create fast dockets that dispose of cases in fashions that are completely unsatisfactory to everyone if speed is your only component of a potential solution.

If I could make one observation that my experience, such as it is, has led me to, is that in this state we have a problem that -- I don't know how unique it

is, but when our courts of plenary jurisdiction have threshold jurisdiction beginning at a few hundred dollars, we have a problem. We have a problem because you are asking judges in courts to be both small claims courts and courts with unlimited and complex jurisdiction. Those pose two very different sets of problems for people trying to manage dockets. In fact, I think those are totally different dockets. In one case you have small cases that may be nearly generic cases. Those are like Judge Christopher's car wrecks that she mentioned a while ago in every urban county -- well, indeed every county I think has cases like that, and those really are probably very capable of a central docket type of disposition where speed is probably a more significant component of efficacy. There are probably few great jurisprudential decisions to be made in a car wreck case.

At the same time, when you get a case that is complex and it may involve, you know, tens or hundreds of millions of dollars and all of the moving parts that go with that, I think it is probably more likely to work well with an individualized docket where someone can create a coherent case management plan and the litigants know that the plan, such as it is, such as it has been designed, will be enforced by the person who either designed it or mandated it on a coherent basis and on a consistent basis,

presumably. And the lawyers and the litigants have an opportunity to educate the judge in the best sense of that term by their constant appearances, as you normally get an increased number of appearances with a complex docket.

Anyway, the point I'm trying to make and I'm being too longwinded about it is just to say I think the historical circumstances that brought us our courts of plenary jurisdiction where we ask them to be small claims courts at the same time are a real problem. They affect the sort of solution that we need, and we need to acknowledge it.

CHAIRMAN BABCOCK: Carlos, then Pete, then Buddy.

MR. LOPEZ: The reason I think that no matter how well-intentioned our effort is, is it may end up being futile, is that it depends on a lot of things; but its successful implementation, I think one of the most common denominators we saw, if not the most common denominator, was the willingness of the judge -- and willingness and ability, I guess, of the judge to have real settings that everybody -- like Kent just said -- real settings that everyone knows is a real setting and that, in fact, will be a real setting; and there are things that undermind the judge's ability to do that, even where there's a willingness to do it, for example.

And I think this is where the number of cases, the sheer mass volume of cases on the docket or cases that are set for trial on the docket, may be a problem. I went to a seminar, I don't know, five years ago when I was still a judge, and Lamar McCorkle was talking about something, you know, down there. He kind of said -- he said something that was interesting. He said in Dallas at the time what everybody wanted to do is they said you want to get it done fast, set it all for trial. Just, you know, case gets filed, answer gets filed, scheduling order, set for trial. You've just gone a very long way towards congesting your trial docket because every case, no matter if it's two years away from being ready for trial, is now set on that trial docket getting in the way of every other case that is set on that trial docket, which is, of course, every other case on that docket because the minute you file an answer you get set for trial.

And so he mentioned that some places had kind of thought of this idea of what about letting the case percolate, not let it be on your docket, but not have it set for trial until it's ready to be tried, and then only the ones that really are ready to be tried are, in fact, on the trial docket getting in the way of all the other cases. What happens is it helps do what Judge

Christopher said, which is -- and in my experience it was the same way. You've got four cases set for trial and the reason you still have four cases set for trial is because you've got three other cases keeping that one case from settling. The minute those people realize they really are going to get reached they settle, but until they get to that point they don't. So just the mere fact that there is other cases there just makes the problem worse, and so that's just one comment that -- so it kind of goes to what was said over here, which is just because we can't design the perfect solution doesn't necessarily mean that we can't at least pick the low hanging fruit, you know, which is you've got to have the judges that are willing to do it and capable of doing it and a system that's set up to make that be able to happen, to be able to happen.

And my other comment was just from reading those -- you know, the Virginia articles and just my own experience, I guess, was that it's really -- the other common denominator is pretty simple. If you want a rocket docket you need a rocket judge. Any docket that has a rocket judge is going to become a rocket docket, and there's different ways to get there, none of which will work unless you have a rocket judge who is ready, willing, and able to tell people, "You know what, I don't care, you know, what the lawyers think about the case. I don't care

what the clients think about the case. I say it's ready for trial, so call your first witness," and that's easier -- I'm just going to go ahead and say it. That's easier for a Federal judge with a lifetime appointment to do than for a state judge who is responsive to a public electorate.

Maybe that's good thing. I'm not saying it's a bad thing. You know, we kind of joke about it. Maybe that's what's -- you know, maybe that's good about our state system. I mean, I'm not passing that judgment, but those are factors that are there that I think overlay all of the statistical detail, you know.

CHAIRMAN BABCOCK: Pete, and then Buddy.

MR. SCHENKKAN: I want to follow-up on a few things that both Kent and Carlos have said. I have a college friend who I have recently gotten back in touch with who has practiced in the Eastern District of Virginia for 30 years, and he made exactly the point you're making about the speed versus the broader definition of efficacy. He says the way the Eastern District of Virginia gets things done so fast is it doesn't matter how meritorious your discovery motion is, it's denied.

MR. MUNZINGER: That's exactly right.

MR. SCHENKKAN: Because that's how you can stay on the schedule, and thus, there is an enormous price

paid in terms of what at least all of us who sometimes do these kinds of cases might have thought was really an important motion and really unfair to have it be denied; and your comfort, if there is any, is if the other side had a similarly meritorious motion, it would also be denied. But, of course, that's not much comfort if you're the one with the meritorious motion and it's been denied, and then that gets me to Carlos' point, which is at least in the Eastern District of Virginia with lifetime tenure of Federal district judges you do have pretty good confidence of regardless of who the client is on either side and regardless of who the lawyer is, even the meritorious discovery motion will be denied.

Question, do have you that same degree of confidence with elected judges all over the state? And if you don't have that degree of confidence, if the perception -- and I will not talk about the reality. Just the perception is I can't count on that then have -- by instituting a rocket docket somewhere in the state of Texas system have you actually made the underlying problem of people fleeing the judicial system for alternatives worse because they know they're going to get to trial really quickly and really unfairly, with the people with the local political advantage having the upper hand, that only one side's discovery motions will be granted, and it

won't be theirs. So, I mean, that's where I am on the rocket docket so far.

Now, that's not to say we couldn't talk about designing a rocket docket that was by agreement where both sides wanted a rocket docket, or maybe it would be possible, especially if there are other reforms in the court system so that there are different Texas courts for different sizes and types of cases, maybe even possibly a system that can be triggered by one side in certain circumstances, but as a general across the board proposition, you're in the teeth of this basic problem of the way you get this done is by the judges, politically protected from any criticism, saying, "I don't care whether you need more information or not and whether it would make a difference to the outcome or not, we're not going to do it so that we can get to trial on my original scheduled date."

CHAIRMAN BABCOCK: Buddy, then Richard, then Sarah, then Nina.

MR. LOW: Chip, I think one thing we need to look at is to analyze the demands on the court. What are the demands? Back in the early years land cases, you know, mostly involving land, then finally other things, the car wreck, the comp, those things are gone. Then came products liability, medical mal, and each of those have

different aspects, and so you need to analyze the demand. Then we came along with the mass tort cases, and where are we going next? You know, I don't know, but we need to see what the real demands on the courts are, how many of these cases are what, and then we can deal with them, I think, better once we know what the demand of the court is.

CHAIRMAN BABCOCK: Well, and Jeff made a good point, that the genesis of this project was to create more demand.

MR. LOW: Right.

CHAIRMAN BABCOCK: And not to solve what rocket dockets were traditionally designed to solve, which was to eliminate backlog.

MR. LOW: But I'm talking about categories.

CHAIRMAN BABCOCK: It's a totally different thing.

MR. LOW: Categories of the cases. We see what the demand, that's what people are demanding and they will demand more of that --

CHAIRMAN BABCOCK: Yeah.

MR. LOW: -- if it's inviting to them.

CHAIRMAN BABCOCK: Gotcha. Richard, and then Sarah.

MR. MUNZINGER: I just wanted to look at the system, and I asked myself the -- I'm a quaint person.

What's the system for? Oh, my, to find out what the truth is and to find out what justice would be between two parties who have differing views of the same transaction. The rocket dockets ignore all that. In Federal court my personal belief is it's because the judges see themselves compared to people nationwide and are concerned that if their docket numbers are -- show delay that they're viewed as less than their fellows who show a faster docket.

The rocket docket is a joke. I was in the Eastern District of Virginia. I shared this with you last time. I go down, and I have seven or eight cases, four square in point. I get shuttled to a magistrate, who was a very pleasant woman, who told me that my seven cases made no sense, to her. They were four square in point. I said, "Ma'am, the other side didn't cite a single case on that."

"I understand, Mr. Munzinger. Your objections are overruled. It's very hard to find cases on point on this subject matter." I said, "Yes, ma'am. I found seven."

"Your objection is overruled, Mr. Munzinger. I'm not going to sanction you because you had cases in support of your position." Now, I was like five months away from trial according to their docket. I appealed to the United States district judge; and my adversary, who

was a Washington, D.C., lawyer, laughed at me. He laughed at me. Because I sought to take advantage of rules and law for my client. Well, we settled the case, and that was the message I tried to deliver last time.

Everybody, you lose sight of what the purpose of these rules are for. The purpose of the rules, you have real living human beings, people who have put their lives and souls into creating their businesses. It's not all General Motors, and even if it is General Motors, as Buddy once said, General Motors is just a bunch of people, human beings, who have done what they want to do. So you come to court and you think, gee, I'm going to get justice in the greatest republic democracy, whatever you want to call it, in the history of the world and I'm going to get justice and you're told "Go fly a kite, son. The law means nothing."

"I want a summary judgment, your Honor."

"You're not going to get a summary judgment in this court, Bud," or he may not say that to you. What he says is, "I'll carry your motion through the trial and consider it a motion for directed verdict or notwithstanding the verdict when the case is over," and at that point in time you're sitting there looking at a multimillion-dollar verdict that you can't bond your appeal on, and you've got people in your client's business

who have lost their jobs because they made bad judgments because they believed in the law? They read the law?

The law doesn't make any difference in rocket docket. What makes a difference -- I have lived through this in the Western District of Texas. What makes a difference is that the judge wants his case -- now, I'm not talking about a living judge. I'm talking about and we've spoke about --

CHAIRMAN BABCOCK: One who recently died?

MR. MUNZINGER: He had to clear his docket. He had to move on, but Judge Bunton gave you three days to try a case, and he didn't care what the case was. I've shared this with you-all. I said, "Gee, I had this securities fraud case and I say to the judge, 'Judge, my expert is going to take the better part of a morning and the afternoon to testify.'" He laughed at me. He said, "You get ten minutes to summarize your expert's testimony, Richard." You didn't put expert witnesses on the stand in Judge Bunton's court. You stood up and you said, "If called as a witness Professor X would testify to the following," and you sat down. Your adversary stood up and did the same thing, and the Fifth Circuit let him get away with it, and that's justice? That's not justice.

In all -- I'm sorry to be emotional about it, but I've been victimized by it and I've seen clients

victimized by it. Don't lose sight of what this is all about. The truth of the matter is truth counts, justice counts, and if you start adopting rules -- and I don't mean to to be ugly, but some politician says, "Well, we need to have a rocket docket," he doesn't know what he's talking about. He thinks he is going to get elected to something for it. Be careful, because you're dealing with truth, you're dealing with justice, and those things do count. They should.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: I believe in justice, too.

CHAIRMAN BABCOCK: A second for justice.

HONORABLE SARAH DUNCAN: And I'm thrilled with this discussion. It's the discussion I wanted to have at our last meeting because I just wasn't convinced that the statistics were going to support a rocket docket, but listening to everybody talk has caused me to realize what I want a rocket docket for. My background is in commercial law. You're talking about, Richard, securities fraud. I don't know what Pete's case was, but I think -- and you know, I listened to what Judge Sullivan talks about, efficacy and the quality of the decision matters.

I wonder -- this is so politically incorrect. I remember that letter, I think that was in

our materials the last -- at the last meeting that we're going to create two tiers of judges, and I understand that that's a very unpopular idea, but I think we need two tiers of judges. I think we need a tier of judges who can handle that half billion-dollar commercial construction case or the half billion securities fraud case, because those types of cases take extreme expertise in that area of the law, and I wouldn't expect every single trial court judge in this state -- I have no expertise in securities fraud, and if I were a district judge you shouldn't give me that case because I don't have that expertise, and to learn about that area of the law is going to take enormous amounts of my time and, if I had an assistant, my assistant's time. So I'm wondering if the type of rocket docket we should be talking about is specialized dockets for extremely complex types of cases.

CHAIRMAN BABCOCK: Jeff, you might -- Nina, we'll get to you in two seconds, but you might note that what Sarah describes exists in Philadelphia. Their Court of Common Pleas has different divisions. They have a class action --

HONORABLE SARAH DUNCAN: Class actions are a good example.

CHAIRMAN BABCOCK: -- division. They have a complex commercial division, and I know in the class

action area they had a judge, he's now retired, who was recognized as one of the nation's leading authorities in class actions.

HONORABLE SARAH DUNCAN: Can I make one other small point?

CHAIRMAN BABCOCK: Yeah. Yeah.

HONORABLE SARAH DUNCAN: I think you would also be doing the courts of appeals and the Supreme Court enormous relieving them of a great deal of their docket burden because the cleaner decisions you get from the trial court, the less there is to do on appeal.

CHAIRMAN BABCOCK: Nina.

MS. CORTELL: It seems --

CHAIRMAN BABCOCK: Do you believe in justice first?

MS. CORTELL: I do. I do.

CHAIRMAN BABCOCK: Everybody is going to have to swear to that before they make a comment.

MS. CORTELL: Let the record reflect. My goodness. It seems to me whether or not we go rocket docket route with this committee, we all are interested in increased efficiencies, and what has been very exciting to me in listening to the discussion today is that we've certainly identified certain things that would facilitate greater efficiency in the court, I think without sacrifice

for quality. Just by way of example, one of the historically difficult problems in Dallas are the multiple trial settings. You get ready, you don't get reached, and then you get reset six months later.

And toward that end, Judge Christopher's thought about some combination of the central docket with the assigned docket, if we could somehow fashion the best practices -- and I don't know if that's possible within our format -- but that would legitimize that concept that a Dallas district judge could then find a substitute judge to take that case and provide coverage of that Dallas district judge to do so, that would be a great thing.

Now, I will give a footnote that we have a new Dallas judiciary, so I can't say what's going to be happening there right now. We don't really know, but historically this has been a problem, so if we could provide some framework for best practices or for a combination of some of the things we've heard, that certainly seems to me that that would be a good thing whether or not we as a group say we should go forward with rocket docket.

CHAIRMAN BABCOCK: Carlos had his hand up and then Judge Yelenosky and then Judge Christopher.

MR. LOPEZ: I don't think that we should back away or be ashamed of basing the decisions on

anecdotal evidence, because at the end of the day I think it might be the best information we're going to have, and I'm not quite sure, it may end up being the only information that really is helpful because the statistics are such that you don't know what to do with them because there is always some other variable that you can't tie down. An economist can tell you real easy, well, everything else being equal, you know, an individual docket works better than a central docket. Well, they're never equal, and even if they were, they change from this county to this county, so you're shooting at multiple moving targets, so I don't see how you get there from the information.

I think it's helpful to visit. I think it's more helpful to have it than to not have it, but I think that we have to -- it's going to take a healthy dose of anecdotal evidence from the right sources, and I can't think of a better group than this one for that. I just think we -- you know, it is what it is. When three new county court judges in Dallas came on the scene back in like '97 they came up with this idea of a melded docket. I don't remember exactly what they called it. I wasn't one of them. It was publicly announced in the Dallas Bar Headnotes and some other places and at the CLEs that the judges put on that in these three courts if you're set for

trial in this court, you're set for trial in any of these three courts and so if any of those three judges is available, you're going to trial, period; and what we found -- what they found, I was watching from the sidelines because I'm a cautious person -- was that the mere threat of having -- of just people knowing that that was possible kept the cases settling and kept them moving and made it less likely that you would even need to actually do it, which is what I was talking about with Judge Christopher, which is she sends an e-mail. We did that too in district court, you know, but it's sort of ad hoc. You know, you just kind of send an e-mail and, you know, everybody knew who were the four judges that were willing to do it on a Friday even though it wasn't their case and everybody knew who the eight judges were that weren't going to do it. You know, every county is going to have their nuances like that way unless we legislate something that makes it official. Anyway, so that's my two cents on that.

The issue that Justice Duncan brought up about sort of the -- I call it a qualifications of the judges issue, you know, in district court you have the only qualification for being elected is you have to have been a lawyer for five years, period, doesn't matter what kind of lawyer, doesn't matter what kind of law you did,

doesn't matter how good a lawyer you were. If the public decides they want to put you there, they can put you there with all of the good or bad that that entails. So, I mean, I just think we need to be cognizant of how much we're biting off to chew if we import that subpart sort of into the rocket thing. I think it's a good idea to analyze it, but as a member of the subcommittee, just be real clear about -- we already had some issues about what is exactly our charge here, so let's just be real clear about how much we're biting off to chew and then let's be real clear for the subcommittee so we know what to do, because there is so many moving parts to this beast it just ends up it's unbelievable.

CHAIRMAN BABCOCK: Judge Yelenosky, will you yield for a quick counterpoint?

HONORABLE STEPHEN YELENOSKY: Sure.

HONORABLE SARAH DUNCAN: And I was suggesting something more like the MDL judges, that we have a process where we certify this as a complex commercial half billion-dollar potentially case and get it to somebody with expertise in commercial law of whatever sort it is. Sorry.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Two things. One, on the combination issue Judge Christopher talked

about and Nina talked about, that can go from either end. You could have a default that is an assigned docket or a default that's a central docket and still have a combination. In Travis County we have a local rule that takes you out of the central docket with approval of the local administrative judge, and moreover, all administrative appeals of agency decisions are automatically assigned to a particular judge. So there is that fail safe, and every one of the district judges has his or her docket of assigned cases.

Now, one may say it should be more than it is or less than it is, but you can go in either direction. With a default on a central docket, though, combined with assigned cases, as Judge Peeples said, 99 percent sure you're going to go. I think we missed five jury trials total last year, and that was all in one crazy week, so you do have that certainty there. I just want to say you could go either way on that.

With respect to specialized judges and all, I think there is a fundamental problem with those proposals as long as you have a constitutional system that has elected judges, and there are arguments -- and I'm sympathetic with the arguments for appointment of judges, but we don't have appointed judges, and when you start talking about assigning things to particular judges then

you have to ask, well, did they have to be judges from the jurisdiction in which --

HONORABLE SARAH DUNCAN: We do it in MDL.

HONORABLE STEPHEN YELENOSKY: The venue in which it was elected or not. Anyway, I'm just saying there's a fundamental issue there that I don't think can ignore -- can be ignored when talking about whether cases should go to a particular judge or another.

CHAIRMAN BABCOCK: Judge Christopher.

HONORABLE TRACY CHRISTOPHER: I don't want to talk on that issue. What I wanted to talk about is something that I think that might be useful, and again, it's anecdotal information, but at the Harris County Bench/Bar conference we were talking about how to make cases more efficient or cheaper, and a continuing theme in a lot of -- we were in little breakout groups, lawyers and judges sitting around talking, and a consistent theme in those breakout groups was more early hands-on management by the judge. Similar to the Federal pretrial conference, come in, you know, lay out what your case is about, do your -- you know, what time you need, how many interrogatories, et cetera, kind of what we anticipated with the level three cases; but judges are not doing that, okay, and lawyers are not asking judges to do that early on; and I was saying, well, you know, it would be a total

waste of my time and lawyers' time if I sent out a notice like that in every single one of my cases, total waste, because there are so many cases that couldn't possibly need a pretrial conference and it would just be, you know, a waste of everybody's time if they came down for it.

So the question is, how would you identify the cases on your docket that would benefit from such, you know, sort of early hands-on management; and I said to the lawyers, "Well, you-all can just schedule a pretrial conference in front of me if you want one." Well, that's not in -- that's not in most state court lawyers' vocabulary, that, whoa, you know, I'm going to come down and schedule a pretrial conference with the judge, but it's in our rules, it's certainly allowed; and perhaps, you know, we could strengthen that area of the rule in terms of -- it would be sort of a simple fix that might lead to more efficiency, efficacy, that you come into the judge and say, you know, maybe "This case is a small case, I want to limit discovery, I want to limit the costs. Will you help me do it, Judge?" Or, you know, "This is a complicated case, but I still, you know -- we want to sit down and get it ironed out really early on."

For a lot of cases, you know, the level one is working fine. It's the level twos and the level threes where you kind of get into this level two case that

suddenly expands like crazy or a level three case that takes forever and forever and forever because nobody is pushing it to sort of keeping it moving. So, you know, I think that that might be a -- something that we could get our hands around and propose to -- you know, like I said, I'm pretty sure it's in the rule, but nobody really does it in terms of coming in and asking the court for the assistance.

MR. AGOSTO: I just wanted to add, Chip, as a follow-up to what Tracy is saying, I have customarily filed what's called a status conference, motion for status conference, and I use it kind of to do exactly what she's saying, which is we're stuck. You know, most judges in Harris County will force a docket control order on us or ask us to agree to one, but where there is a problem either with the trial or the discovery or whatever -- and I don't call it a pretrial conference per se, but I do it early enough in the game so that if we have to go from level two to three or there are issues, we have a just motion for status conference. I notice it, the court gives me a date, and we go down there and we have a discussion with the judge, and that gets the case going, whether we're not going to meet the six to nine-month trial date or we are or there are issues. And that, you know, of course, it's a lawyer who is pushing it, but

maybe some hybrid where the judge has the option to set a status conference to discuss issues may be a way to get us moving.

CHAIRMAN BABCOCK: Gene.

HONORABLE TRACY CHRISTOPHER: It's just really hard for a judge to be able to -- even if I read every case that got filed in my court, it's very hard with our pleading requirements to know whether this is a big case. I mean, you can look at something, you can think this is a big case and, you know, a month later, motion for arbitration, case goes away. You know, I don't have to worry about it anymore.

CHAIRMAN BABCOCK: Yeah.

HONORABLE TRACY CHRISTOPHER: Or, you know, grievously injured, well, you know, is that a sore back or is that a brain injury? So you can't really tell just from reading your petition whether the case would benefit from that kind of management.

CHAIRMAN BABCOCK: Yeah. Benny. I mean, I'm sorry, Gene.

MR. STORIE: Yeah, I just wonder, Jeff or other members of the subcommittee, does the literature have anything about surveys of clients, participants in the system, or like exit poll data because it seems if we're thinking of this as a kind of customer service

problem in the judicial system being able to do a better job or being more attractive, then we should do what any business would do, which is we ask the customers what they want, what they're happy with or unhappy with; and I suspect, of course, that they're going to be all unhappy with delay; and I suspect that's going to be a problem of getting your lawyer's time and attention more than a capacity of the system; but I would expect also that's a good place to start with a question.

HONORABLE SARAH DUNCAN: Uh-huh.

MR. BOYD: I don't remember seeing any that talked about any kind of objective statistical summary of survey of people's views on the systems. There are articles written by judges who were instrumental in implementing the system and them talking about how it worked. There are lawyers who write their experiences with it, and so, as you might imagine, there is a mix of opinions. There are Frank Gilstraps -- or Richard Munzingers, I'm thinking of, who believe that it's all about speed over justice and it's a terrible system. There are others who are praising how effective it was in diminishing the backlog in particular.

HONORABLE STEPHEN YELENOSKY: Are any of those clients, though?

MR. BOYD: But they're not -- they're not

from the clients. They're from the lawyers and judges.

CHAIRMAN BABCOCK: Carlos.

MR. LOPEZ: Part of the issue, I won't say part of the problem, is that we kind of engage in the ultimate legal fiction, which is it's argued that our system of elected judges is the ultimate customer survey and the ultimate power of decision and that if a judge isn't doing it right they won't be a judge for very long, or if a judge isn't doing it the way the people who he or she supposedly is responsive to, that they will find somebody else, and on paper that's true. I think everybody sitting around this table knows that as a practical matter that's bologna.

So, you know, again, how much -- how big a problem do we want to bite off, you know, when we do this because I do think there are limits to how well you can implement even the best structured program in the realities of our, you know -- like Stephen said, of our system, which so far mandates, you know, elected judges and here's the issues and constitution says that.

I mean, the MDL issue, some people argue -- I'm not sure I agree with them, but some people argue that's the first step down that road, which is I file my case because I like the judges in this county, and it's -- you know, I'm one step farther removed from being able to

know who my judge is going to be and much less someone who I can go to the ballot and vote against if I don't like them. So it's a big -- philosophically it's a much bigger -- they're all -- all those issues are interconnected, and we're biting off a pretty big chunk, so --

CHAIRMAN BABCOCK: Harvey.

HONORABLE HARVEY BROWN: I was going to comment on Judge Christopher's suggestion, if we have this change in form for filing a petition that the Office of Court Administration dictates, it seems to me that a good thing to put on there would be request for status conference or pretrial. It will at least make the lawyers have to look at the box and think about it ahead of time, and that would be a good thing, because, as she said, as a judge you don't know whether they need it or not, but the best way to find out is if the parties tell you.

The second thing is, it does seem to me that we're guessing a lot, so I would strongly urge us to talk with the Office of Court Administration to see if we can get better data in the future. You know, we have in this room talked about problems sometimes for five, six, seven, eight years and in that five or six years we could be gathering new data where we break down cases by, you know, business dispute, tax dispute, et cetera, so that maybe

five years from now we can do a better job of analyzing this, but I do think that's important to start with.

CHAIRMAN BABCOCK: Pete, then Bonnie.

MR. SCHENKKAN: Yeah, I really want to follow up on what Harvey just said. I think it is certainly true that there are going to be grave limitations in any data collection system on this large scale, especially any system that we can tolerate the cost and burdens of, but there is some low hanging fruit here. A system that puts all the different kinds of cases we are interested in in the category "other civil cases" is not a helpful system. We need to break that down into the categories of interest to us and get subcategories, and it shouldn't have to be done by the clerks. It shouldn't be added to their burden. It ought to be done by the lawyers with a choice of categories that OCA gives them, and then we ought to look at that opportunity when we have a draft of that form, a draft of the form that the lawyer filing the case or filing the answer, require it of the defendants as well, has to, you know, look at certain boxes and pick "yes" or "no" or fill in some number. Let's look at what those boxes ought to be, and maybe they ought to include, you know, things like request for status conferences.

CHAIRMAN BABCOCK: Bonnie, then Carl. Then

we'll take a break.

MS. WOLBRUECK: Just a little bit about the OCA new report that is being worked on. The committees have been working for probably over a year in trying to change this report, and we've had subcommittees working in all of the different divisions of the courts, and the committee that I work on is one of the committees that will be submitting the report to the Texas Judicial Council, and we have met this past week. We're meeting again next week, so the completion of this work is coming near to where the goal of the OCA is to have the report completely finished and ready for the clerks to start using in September of 2008, but just to give you an idea of, yes, there are many more breakdowns already on the proposed report.

There will be a separate family law report that pulls all the family law completely out of the civil data. The civil report will be a separate report that I think right now there are probably ten or twelve breakdowns and are still -- the committee is still requesting additional information on any additional breakdowns that may be necessary for data collection, so this is an important time for you to get that information to OCA, to me.

The Texas Judicial Council will be getting

it in the next month or so for their approval, so that there is an awful lot of effort that has to be done after it's actually approved in order for the courts and the clerks to implement it. So that's the reason the time frame is rather lengthy here until its actual implementation, but anyway, I'm going next Tuesday to the meeting, would be happy to take any information that you would have or recommendations. Judge Sterling Wood from Harris County is chair of that committee. Judge McCorkle from Harris County also serves on our committee, so any of us would be more than happy to take that data in. It will be looked at, again, probably by the judges at their judicial conference in September possibly. There is an opportunity there for judges' input again before the formal and final report is adopted, but we are getting close to looking at some final data, so this is very timely. So if you have any recommendations, please let us know.

HONORABLE STEPHEN YELENOSKY: Can I just make a quick point on the data issue? The one big picture I think we understand is that the number of family law filings is strictly a function of population growth; and so we do have to pull that out; and what I've also heard is while divorce filings are going down, family law filings aren't, because, of course, fewer people may be

getting married, but they're still having kids, so you still have suits affecting the parent-child relationship; but one fundamental thing is the connection between population growth and number of family law cases, which is not true for the civil cases, which, of course, are much more affected by, for example, tort reform.

CHAIRMAN BABCOCK: Carl and then Ralph, and then we'll take a break.

MR. HAMILTON: Can we be reminded what the legislative mandate is in connection with this?

CHAIRMAN BABCOCK: I don't think there is any particular mandate other than Senator Wentworth and Justice Hecht were talking about --

MR. HAMILTON: Okay.

CHAIRMAN BABCOCK: -- ways to do things like this, but I kind of put it into that subcommittee just because there was no rule particularly that it applied to.

Ralph.

MR. DUGGINS: Does this data include ancillary proceedings or contested proceedings in the probate courts?

MS. WOLBRUECK: The new report will actually be a separate probate report. They're breaking that out also as a separate report, and I'm not sure of all of the information that's on that report. The new reporting will

have -- Andy, would you know if the current report breaks any of that out in probate?

MR. HARWELL: No, I don't know, but I will find out.

MR. SCHENKKAN: I think we do know that whatever data there may be on the probate, it's in a different report than the one we've been working from today. The one we've been working from today is just the district courts civil. There is also district court criminal and there's, I think, two more, and maybe the probate is in its own category.

CHAIRMAN BABCOCK: Let's take our morning break.

(Recess from 10:32 a.m. to 10:53 a.m.)

CHAIRMAN BABCOCK: I thought that was a terrific discussion, and I had an idea, but like most of my ideas it's probably a bad one, but I'll throw it out anyway. Since we're going to necessarily have to rely on some anecdotal information and since I think that there is a little bit of a disconnect, hopefully not too much, but some disconnect between lawyers and judges on the one hand and our clients on the other and since this project is designed to make our system more palatable or attractive to clients on both sides of the docket, I wonder if it might not be interesting at our next session to invite

some clients to our meeting and just hear what they have to say.

They really don't have much of a voice in our system other than filtered through us, and we all have a stake -- we all have a stake in how the system works from our own interests, although we're always trying to vindicate the clients' and public interest, and I'm thinking about, you know, somebody like -- I know Justice Hecht has been in touch with Jack Balagia, who is the head of litigation for Exxon Mobil. That would be somebody on the mostly getting sued side and maybe we could, you know, find some people that represent groups that -- of people that are traditionally plaintiffs, and anyway, if you get a panel of people to come talk to us, something different than we've ever done before, but that doesn't mean we shouldn't do it. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: I was just going to say at the local bench/bar last week we had -- I don't know if he was the general counsel, but perhaps, of Dell speaking about arbitration versus court.

CHAIRMAN BABCOCK: Uh-huh. Yeah.

HONORABLE STEPHEN YELENOSKY: Just something to note.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Well, we have client

panels fairly regularly at lots of CLEs in Houston and around the state, and I'm just not sure bringing a client panel to a rules meeting -- I mean, we would certainly get the perspective of those people we invited to come talk, but --

MR. BOYD: Yeah, my thought on --

CHAIRMAN BABCOCK: Doesn't excite you? Jeff.

MR. BOYD: I could bring you a panel of people who have nothing but complaints about how the system works for them or I could bring you a panel of people who love how the system works for them, either on a one-time case the one and only time they were involved or people who are involved all the time, and so which panel do you want? I mean --

CHAIRMAN BABCOCK: Well, what if we could get a mixture maybe?

MR. BOYD: Well, you know, we might could, but I'm not sure that would reflect -- you know, I mean, we talked about that as a subcommittee. If the data don't give us the full picture -- the data don't, that doesn't sound right, but I guess that's right. Pete's been training me to use "data" as a plural noun, so I'll try real hard.

CHAIRMAN BABCOCK: Somehow "the data don't"

doesn't sound right.

MR. BOYD: The data do not tell us what we need to know, we talked as a subcommittee should we in essence do a survey of some type, if not a written then -- or a series of interviews of people in a variety of significant communities around the state, judges, lawyers, litigants to the extent you can figure out who to talk to, and get a better anecdotal picture of what's working and what's not working, because our view is from the data that there's not a problem here to be solved if we think rocket dockets are supposed to solve a problem of delay.

CHAIRMAN BABCOCK: Right.

MR. BOYD: So maybe -- and that may be a better way to do it, is to charge our subcommittee, with apologies to my fellow members, with the job of going out and gathering that kind of information and bringing it back to us.

I mean, bringing a panel, I'm not sure a panel could be large enough to be effective to really kind of give a statewide picture, which is not to say -- I mean, I know that as a subcommittee -- and by the way, I should say I think you've heard Carlos, Justice Patterson, Justice Pemberton, Judge Yelenosky, Pete, and Judge Bland are on the subcommittee, and they've done a great job and given up lunches more often than they would like to --

HONORABLE STEPHEN YELENOSKY: No, I was eating during those phone calls.

MR. SCHENKKAN: Some of us need to give up lunch -- me.

MR. BOYD: And, by the way, we interviewed -- I interviewed Kent Sullivan, and Professor Hoffman was very helpful to us on the data, so a lot of people have helped get us where we are now, but we definitely need some direction, because I think the sense of the subcommittee is we don't know how to design a solution when we don't know for sure what problem we're trying to fix. I think the issue of justice that Richard has shared with us is a legitimate concern, and any solution you develop needs to address -- needs to be careful about that. On the other hand, cost and delay deny justice just as often probably as an overzealous commitment to speed. So there may be a problem to address. We just need a better sense of what it is.

CHAIRMAN BABCOCK: Munzinger and I talked at the break. We've decided it's just him. The judge just didn't like him in that case.

MR. BOYD: Well, I think, you know, Kent was -- I guess he's gone. Kent expressed the exact same concerns when I visited with him, and I think that he toned down his articulation of his concerns this morning

from what he and I talked about, but it's the same sense, which was, look, if you design your system to get speed, you're going to get speed, but you may not get justice, and that is a real concern we have to consider.

CHAIRMAN BABCOCK: Yeah. Justice Patterson and then Justice Bland. Somebody over here, Ralph, and then somebody over there had their hand -- Harvey. Okay. Justice Patterson.

HONORABLE JAN PATTERSON: I agree with Jane that I think that we could probably not get the type of sampling that would be useful to this committee, so you could either target it with a group of people who habitually select arbitration and get their take on why they select arbitration over litigation and what would bring them back to the system. That's a possibility, but otherwise, I also think that the committee could conduct a more meaningful survey of a wider variety of -- it would still be anecdotal, but it would be wider than this committee could do as a whole and might be helpful because we could talk to a wide variety of groups of people, and I don't think that it would be the same rant as that that might occur if it were a selected group targeted for this whole body.

CHAIRMAN BABCOCK: Yeah. That's a good point, that, Jeff, talk to the people who are opting out

of the system to see what their thinking is. Okay. Justice Bland.

HONORABLE JANE BLAND: Well, if what we're trying to decide is whether or not to offer a rocket docket then maybe what we should ask potential users of rocket dockets -- and that would be plaintiffs' lawyers who would be filing the cases if it was something that could not be agreed -- if that would be something attractive to them, or if it was going to have to be agreement of the parties, plaintiffs' lawyers, clients, defense lawyers, to see if this product is even attractive to them. Because I think if we ask their opinion about what's wrong with our current system we're going to get all the same sorts of answers and lots of differing opinions about cost, delay, and the reasons behind it, but if we ask them, you know, sort of instead of "What's wrong with the current system," ask them instead "Is this a product that you would be interested in as a user if it were developed?"

Maybe we would get a sense of that, because I could see people saying, "Well, there's a lot of things wrong with the system, but I don't want to -- I'm more afraid of a rocket docket, so I don't want to try that," or I could see just the opposite. "I'm happy with the system, but, you know, for some kinds of cases my clients

might be interested in using a rocket docket."

CHAIRMAN BABCOCK: Yeah. Ralph and then Harvey, then Frank. In fairness, Frank, because you got your hand up late.

MR. DUGGINS: If you're going to do -- come back and ask for some reports from constituent groups, I would like to suggest you consider checking in, say, the top ten counties, what's the situation there by types of case. I mean, Frank and I, for example, could report on Tarrant County where in my own view I think there is a problem in family law where people are held hostage, and we talk about plaintiff and defendant. Divorce cases shouldn't be lasting two and three years, but they do, so I'd like to suggest that we try to take the top counties and just check and come back with some better anecdotal data.

Second, I think that we have to take into account this bill that could make family law judges district judges and vice versa. I don't know whether that's likely to pass, but it's certainly a topic of a lot of conversation in Fort Worth, so I just wanted to mention that.

CHAIRMAN BABCOCK: Okay, Ralph, thanks. Harvey.

HONORABLE HARVEY BROWN: I was going to say

something very similar to Justice Bland, which is I think the question for the client isn't whether they like the system now. Everybody in this room would have ways to improve the system now. The question really is "Would this other system be, in your view, a better system," and I think that we need to be careful, too, because some of the client's view is based on one or two experiences. I mean, if you ask the client who's been in certain counties who was set for a rocket docket, they might be totally and completely against it, but if they were in another county with a certain judge, they might be very, very happy with it.

So I think that Carlos was talking about the complexities here, and I think just getting some clients to talk about generalities might not be as helpful. I mean, I've seen that with clients who would talk about delays and they don't want delays, but then you're two months from trial, you get a hundred thousand documents from the other side, and they want you to move for a continuance for six months, but they would generally say, "I'm against delay."

CHAIRMAN BABCOCK: Right.

HONORABLE HARVEY BROWN: So I think it's something that we would have to be very careful how we use what the clients told us.

CHAIRMAN BABCOCK: Yeah. Good point. Frank.

MR. GILSTRAP: As I understand, this whole exercise is being driven by the perception that people aren't using the court system as much, that there is some alternative way to do it, and that we've got to make our, quote, "product," close quote, more, quote, "user-friendly," close quote. Is that anecdotal or did your investigation of the statistics find anything to support that? In other words, are filings up, are filings down? You know, where is that idea coming from, that filings are down?

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: As I understand it, and I wish Justice Hecht -- did he leave, because he knows way more about this, but it's not that filings are down so much, although, I think, you know, I think -- it's not that filings are down so much. They're not growing at the same pace that they used to be, but it's that jury trials are down. So the numbers of filings are still high, but the numbers of jury trials have --

MR. GILSTRAP: Is there data on that?

CHAIRMAN BABCOCK: Way down.

HONORABLE STEPHEN YELENOSKY: We were told last time to ignore the vanishing jury trial.

HONORABLE JANE BLAND: I know.

MR. GILSTRAP: Is there data on that?

MR. BOYD: There is. The OCA has data, but Justice Hecht published an article in the *South Texas Law Review* late '05, and it followed on the heels of an article by a guy named Galanter who had done it on the Federal court system, and it was basically Justice Hecht's contribution looking specifically at the Texas system, and it's entitled "Vanishing Jury Trials," something. I can give you the cite, and in his article he recognizes that there are gaps in the OCA data that just make it hard to know for sure, but generally speaking -- and I forget which subcommittee reported on that particular article --

HONORABLE JANE BLAND: It was Bob.

HONORABLE STEPHEN YELENOSKY: Bob.

MR. BOYD: Bob, but the bottom line is filings continue to increase some, and if there are fewer jury trials, why is that, and then he goes on to opine as to various reasons; but the other bottom line for our committee's purposes is that's what we talked about in December, is there really a vanishing jury trial phenomenon, is it an unstoppable decline or is it just an ebb and flow, and ultimately decided we weren't going to overcomplicate our task because to the extent that what we're looking at even addresses that issue, it would still

address it because either cost or delay or arbitrary results in the system, and the rocket docket might solve two of those issues.

CHAIRMAN BABCOCK: Yeah, and, Pete, if I could just add, Jeff, I think what is driving this effort is a combination of a lot of things, and there are sort of catch phrases for them all. "Vanishing jury trial" is certainly one, and I saw a speech at the American College about a month or six weeks ago from a guy who claims that it's even worse than what Justice Hecht said in his article in the *South Texas*, but who knows. I mean, he was flipping back and forth with charts that it's very hard to follow at some point.

MR. BOYD: Are they lies or damn lies?

CHAIRMAN BABCOCK: Yeah, right, exactly, but the perception and we may -- maybe at the end of the road here we're going to debunk it and tell the Court that this is not anything to worry about, but the perception is that our -- you know, what our courts are in business to do is vanishing. It's not just jury trials, but it's the kind of cases that have traditionally been filed, and there's no question that some of our traditional docket in my career has vanished. I mean, I grew up trying comp cases, and you don't see them anymore, and that's a legislative mandate that we can't do anything about, shouldn't do

anything about.

Medical malpractice has unquestionably been affected by what the Legislature has done in that area, so in that -- to that extent it's vanishing, but I think what Justice Hecht and the Court and Senator Wentworth are worried about or thinking about, want us to think about, is whether or not over a period of time, 10 years, 15 years, whatever it is, that there are consumers of the justice system that are opting out of the system and not using it. Either they're not filing suits because it's too expensive or they're going to alternative methods of dispute resolution like arbitration or informal ADRs or whatever, and if so, is there a way that we can capture that business so to speak, without sacrificing the things that are important to all of us that Richard articulated so well.

And so that's in my understanding -- Justice Hecht had to go pinch hit for Justice Green, who I think is ill or otherwise occupied today, but he'll be back and he can probably articulate it better than I can, but that's my understanding of what the impetus for this whole thing was, and we labeled -- we put another label on it. We've got vanishing jury trial, we have shrinking dockets, and now we've got rocket docket. Those are all too simplistic to describe what is going on here, but that's

my understanding of the overall picture.

MR. BOYD: But more specifically for us, as Justice Hecht described to me and I think you described to me, is in that broader context there are a variety of groups looking at a variety of issues --

CHAIRMAN BABCOCK: Right.

MR. BOYD: -- that are intended to address those questions or problems, but you are not aware of -- Justice Hecht was not aware of anybody who was looking at the question of delays and rocket dockets within the context of this diminished use of the judicial system, and that's why we were asked to do that.

CHAIRMAN BABCOCK: That's exactly right, although, I'll broaden that a little bit to say that a lot of the things that have been brought up today, like Sarah's idea of, you know, of a Philadelphia Court of Common Pleas type expertise judges, that would be within our ambit, I would think, if we thought that was a good idea, even though that's not technically a rocket docket. Justice Bland.

HONORABLE JANE BLAND: Chip, what is it that you want our subcommittee to do? Because I don't mind -- we don't mind and I'm just saying it because --

MR. BOYD: She likes lunch.

CHAIRMAN BABCOCK: No, no, no. I think --

HONORABLE JANE BLAND: I'd like to eat lunch on Thursday if I can, and I'm happy not to, but I --

HONORABLE STEPHEN YELENOSKY: If there's a good reason.

HONORABLE JANE BLAND: -- need a direction or our committee needs a direction. We found a lot of information about, you know, what's available out there, about how long it takes to get to trial in Texas versus how long it takes to get to trial under some of these other schemes, but, you know, okay, so we provided that, and we are trying to figure out what exactly we're supposed to be doing.

CHAIRMAN BABCOCK: Yeah, well, there are two -- three answers. One, I don't know; two, we want you to spend countless hours producing a massive, impressive product that the Court will ignore; and three, three, keep on doing what you're doing. I think when you get to page seven of this interim report, this is -- you know, this is exactly the type of -- and I talked to Nathan about this this morning. This is exactly the type of thing that I think the Court's interested in and would be useful; and, frankly, my whole thinking on this subject has been changed somewhat by our discussion today. I don't know if Justice Hecht's thinking has been changed or not, which is the important one to consult, but I think what you're

doing is terrific, and I think there is a next stage, and we ought to -- sorry, and we ought to --

HONORABLE JANE BLAND: And the next stage --

CHAIRMAN BABCOCK: Is what is discussed at page seven, but we can -- and we ought to talk about --

HONORABLE JANE BLAND: But don't we need to decide first whether we think a rocket docket is something we want?

MR. BOYD: Yeah, the issue is -- our third task is on page seven.

CHAIRMAN BABCOCK: Right.

MR. BOYD: That's the ultimate task, is to then sit down as a subcommittee and say, all right, regardless of whether there's a need for it, regardless of whether it will affect vanishing jury trials, regardless of any of that, if we were going to recommend a rocket docket what would it look like, and et cetera. The problem with that we have in the committee is -- well, it's what I said earlier. You have to design the solution to address a problem. How you design a rocket docket is going to depend on what problem you're wanting it to solve, and we've had a hard time figuring out what problem we're trying to solve.

HONORABLE JANE BLAND: Yes.

CHAIRMAN BABCOCK: Yeah. And I keep saying

that -- and we can ask Justice Hecht when he gets back for more direction on this, but the impetus for this and I think what continues to be the driving focus and force, is not necessarily to reduce backlog, although that's always a useful thing, but rather to create a system that is more attractive to customers, to users, to potential litigants in the system, and is there a way to do that? It may be that you get to page six and you say, okay, "Here are the pros," and you flip over to page seven and you say, "Here are the cons, and here is one that's a push, a pro or a con," and you may say, "We're done, we've had as much lunch at the desk on Thursdays as we can stand because the cons so overwhelmingly override the pros that our recommendation to the Court is forget about this, this is a bad idea, we ought not to pursue it."

What we might get in return, as we do sometimes, is "Thank you very much. Now, go finish, you know, page seven because the Court still wants to see what you come up with as a system"; and as I was looking at page seven I saw all sorts of possibilities that could be devised and that may not be very helpful, but that's the best I can say; and we can maybe get Justice Hecht to elaborate on that without having the benefit of your question.

MR. BOYD: I think the question -- and so it

will be in the transcript, which was helpful to me, because as you know I had to leave early in December and I'm about to leave early again today, but I'll read the transcript and see what Justice Hecht says this afternoon or I'll follow up with you and him.

CHAIRMAN BABCOCK: Yeah.

MR. BOYD: But do we -- do you -- do you and he want us to further explore whether there is a problem that rocket dockets can address and if so, what is it? For example, panels or surveys or whatever, or do you want us to move straight to, okay, based on what you do know, give us your best shot at Task No. 3, which is what would you recommend? Or do we say, great, that was very insightful, thanks a lot, and we'll let you know your next assignment when it comes up?

CHAIRMAN BABCOCK: I think Justice -- speaking for myself only, I think Justice Patterson's thought was a really good one, which is to try to investigate or survey the groups that are opting out of our system, and primarily the known group is the people that are going to arbitration and writing in these elaborate arbitration -- as Judge Christopher said, you know, you get a complex case that's filed in your court and you say, "Ooh, this is a level three, and it's going to require a lot of time and management," and the next

thing you know you get a motion to arbitrate, which gets granted, and that case leaves our system. Well, why are people doing that? Judge Patterson.

HONORABLE JAN PATTERSON: Well, now you're going to get me in trouble with my committee, but -- Pete's nodding his head.

CHAIRMAN BABCOCK: You know, for someone so thin she's awfully hungry.

HONORABLE JAN PATTERSON: Well, but let me also suggest, I think our concern, the committee's concern, is that we respond to a real need and that we're not imposing some arbitrary rule coercively on lawyers and litigants, but I wonder whether we could do that in a slightly different fashion, and that is I really like the idea of pretrial conferences that Tracy mentioned and Carlos is mentioning about the importance of the Judge, and I wonder if we could better spend our time coming up with best practices and try to learn these types of things that can speed up the docket if judges will use them, and then it becomes a matter of judicial education.

But there's just not -- we also have to respond to the whole culture of different districts, and we're not formulating something for -- but I do agree also with the comment earlier that whatever system we do as part of those best practices, if we do come up with a

system, that it be voluntary and that we try that, because I think we have enough heavy-handed rules.

CHAIRMAN BABCOCK: Bunch of hands up, and I don't know who's first, so I'll just go around the table. Andy.

MR. HARWELL: I just have some information. Ralph, you and Bonnie asked earlier about the OCA breakdown on the probate. The report is called "Monthly Report Probate and Mental Health," total of probate cases filed, which includes deceased estates and guardianships. Then it has total of probate hearings held, and that includes dismissed and granted cases, and then it further breaks it down into mental health cases, which includes total of mental health cases filed and total of mental hearings held, and I'm not aware of any further breakdowns that are in the discussion at this time. I know they're working on the OCA reports, and so I just wanted to give you that information in case you wanted to look into it further.

HONORABLE JAN PATTERSON: Chip, can I have one other thing?

CHAIRMAN BABCOCK: Yeah.

HONORABLE JAN PATTERSON: Because I don't think family law cases are down. They may be down in Travis County. I know they're up in Bell County.

HONORABLE STEPHEN YELENOSKY: I don't think they're down. Divorces are down, but that's because marriages are down.

HONORABLE JAN PATTERSON: But the appeals are up 20 percent, which leads me to another point. If, for example, we have the same filings but fewer jury trials, it may be that what we also kind of need to look at is, I mean, if you have a pretrial conference and a case settles, that's one thing; but if you have a case that falls out of the system because of fear of the jury and fear of lengthy appeals, that's another thing. So it's not as though you can avoid looking at the whole system.

CHAIRMAN BABCOCK: Okay. Sarah.

HONORABLE SARAH DUNCAN: I don't have any problem with looking at the best practices area. I mean, that might be great. I don't know that it really helps us with the problem of people leaving the system and -- because part of leaving the system is never filing the case to get to those best practices, or filing the case and very quickly being sent to arbitration where those best practices aren't going to make any difference. I would really like to know why people are leaving the system. I don't think it's just arbitration, but I think that's a big part of it. I think a big part of it is

unexpected jury verdicts that don't get corrected on appeal or take six or seven years to get corrected on appeal.

Tracy, Judge Christopher, was saying, car wrecks, you know, you really can't afford to go try a car wreck case anymore. I would like identified the types of cases that are leaving the system, because as Jeff says, there is no point in anybody at this table spending a lot of time designing a solution if that person doesn't know what the problem is, and I think it's who's leaving the system that will generate a solution to that problem.

CHAIRMAN BABCOCK: Yeah. That's a great point, in my opinion. Ralph.

HONORABLE SARAH DUNCAN: Thank you. And I believe in justice, by the way.

CHAIRMAN BABCOCK: Ralph, did you have your hand up?

MR. DUGGINS: No.

CHAIRMAN BABCOCK: No? Who -- Skip did. Sorry.

MR. WATSON: Yeah, I sympathize with the committee because what I hear everyone saying is that their charge was very specific. It's look at this particular solution. I mean, if you look at the first page instead of the seventh page, it's whether and how to

implement a rocket docket, not this other stuff, and I think that all they're asking is simply to say, "We've answered that question." I mean, that answer is clear from this discussion. It was clear after ten minutes. The answer is, no, don't implement a rocket docket, and that may sneak back in once the charge is redefined, but we are spinning our wheels until the charge is redefined.

We need to look at it in terms of the question has been asked and answered. Now, what are we going to do? We have identified a problem, people fleeing the system. We've had people go right to the number of it and say, first, we've got to identify why they are fleeing the system before we start defining solutions. That's what we need to do, and I just would respectfully suggest that if I were on this subcommittee, I would -- which I do not want to be --

MR. BOYD: We have another --

CHAIRMAN BABCOCK: There is an opening, isn't there, Jeff?

HONORABLE SARAH DUNCAN: And he doesn't eat lunch, so it's good.

MR. WATSON: I really would like a clear course of direction and some extent on how far I'm to go. Chip, I think we were both together on the Northern District Cost and Delay Reduction Plan Committee of --

CHAIRMAN BABCOCK: Right.

MR. WATSON: -- the Civil Justice Reform Act back in '90; and my strong feeling is, is that the rocket docket part of this -- I mean, somebody hit the nail on the head, I think it was Steve, that it is the lag between reality and perception; and it's just -- you know, we went through this 17 years ago on that committee and got into it very deeply; and part of the Biden Bill's charge to these committees was not only get the numbers, but go out and interview the clients. I mean, remember that, going out and interviewing clients. Not just interviewing Judge McBride, but interviewing the clients on what the problem was, and there were memorable moments from both of those aspects, and in doing that we got this kind of data together, the anecdotal of why they're fleeing Federal court.

I mean, someone said, "Federal litigation has become the province of the wealthy." You know, I will never forget that phrase as long as I live because it just nailed it, a part of what the problem was; but we also got it down to specific judges, you know, what the problems there and, you know, not granting dispositive motions, carrying them, all of the things that have been discussed today; but we couldn't have done that without a proper charge. We couldn't have gotten to those answers without

the goal of what we were supposed to do being very clearly annunciated rather than pointing at a specific solution of saying, "Don't you think we ought to go to the Eastern District of Virginia's type of program?" It's not going to work until page one is redefined.

CHAIRMAN BABCOCK: Yeah. Judge Peeples.

HONORABLE DAVID PEEPLES: Three brief points. I think we ought to commend Jeff and this committee for not only a good paper report but for a great discussion that they led, and it's just been excellent.

Point two, one way to handle this issue of where should they go would be to let them decide. Let Jeff, Justice Hecht, and maybe the committee decide. They've got a better handle on it than we do, especially after this good discussion, but that would be one way to do it, instead of us trying to come up with a committee decision.

Point three, I keep thinking about the common law history. You've got the law courts and people who weren't getting what they wanted there and directly went to the chancellor, and the equity courts grew up because the law courts were not meeting their needs, and we run the risk of doing the same thing in Texas and in America if we don't step back and look at our system, not just rocket docket, but what is it about our system that

can be better, and we can't do it as a committee so well, but I think you and Justice Hecht and the Supreme Court can decide what can be done by rule, and that's not everything, but what can we do by rule that would make this a better system that people wouldn't want to leave, whether they're going to arbitration, rocket docket, or whatever.

CHAIRMAN BABCOCK: Yeah.

HONORABLE DAVID PEEPLES: At some point that ought to be done.

CHAIRMAN BABCOCK: Yeah, great point. Justice Pemberton. I'm sorry, Pete, I missed you. Go ahead, Pete.

MR. SCHENKKAN: I don't want to decide what we ought to do. I want to get some guidance on what we ought to do. If what we ought to do is to be determined by some information, which seems to me, a sensible starting point, I want it understood that the kind of information that is needed, the members of the subcommittee don't have and are not qualified to get and don't have the staffs to get.

If what you want to know is -- I want to endorse Ralph's suggestion. If what you want to know is in Tarrant County we have one specific identifiable large scale problem that involves delay, it's family law, don't

ask me to do that. I don't have any -- that was the first I'd heard of that. I have no idea about that and no idea how to go about looking into it, but if it's a true, it's a real problem it sounds like, and it would be a big one, and it would be a great service to the people of at least Tarrant County if someone looked at it and figured out if that was a real problem and a solution that might not have any resemblance to a rocket docket.

So on the big picture level I want to endorse Ralph's suggestion that a system be devised for getting small group of people, like what you're talking about, Skip, apparently that you and Chip were on together years ago for the Northern District of Texas Federal court, and look into the problem in that area. Is there a problem here, in which kind of cases or is it by judges or is it in the management system at the clerk's office or is it some combination of those; and let those folks report back if there is a problem and what it is; and we may discover that there are three problems, there are 17 problems, there are 173 problems; and it might be that for three of those problems or 30 of those problems or none of those problems a rocket docket would be an appropriate solution or partly an appropriate solution.

Then at the bigger picture level statewide what we're talking about is this notion of people fleeing

the judicial system for the resolution of their disputes. I want to suggest there's actually been not just one such shift from the common law to the chancellor's courts. There have been two more, from the courts of law in equity to administrative law, something I specialize in.

Justice Hecht's article on the vanishing jury trial manages to find one concrete explanation for a big part of the big drop in jury trials, the 1989 reform of worker's compensation that took lawyers largely out of the process of litigating whether an injury occurred to a worker in the scope and the course of his or her employment, because that reform was made because the involvement of lawyers was costing so much money, eating up so much total money out of the system that the premiums were such that employers decided they didn't want to buy worker's comp insurance if it cost that much. Our costs, the system costs of our system of providing jury trials drove our customers out of that business to the point where the Legislature declared it was a crisis and the only way to solve it was to give it to an administrative agency.

And then there's the fourth way, which is to arbitration, which is the one we've been talking about a lot of us here anecdotally. I think it's happening; and I also think it's now starting to turn back the other way as

people are realizing that arbitration -- at least that the, you know, AAA kind of system with no appeal works too far to the other side, you get too much speed and not enough justice and no assurance of justice; and the opportunity is open for us as a judicial system to offer those folks a streamlined in time and cost and targeted in venue or other assurances of other reliability of outcome choice that these businesses can make when they're negotiating these big contracts.

We might or might not want to offer that system, but if you told me, "Pete, I'm interested in that idea if, but only if, you've got some data on the number of people who have left the system and gone to arbitration and why they've left and whether they would come back if we offered that," I can't get you that data, and I am skeptical of the notion that -- the idea I'm very much in favor of doing, that Ralph was talking about county-by-county for the problems in those counties is going to get you that data. I don't know how you get data on how many -- you could certainly collect data -- and maybe Bonnie can tell us if we're planning to start in the future through OCA -- how many cases go out of the system on an arbitration motion, but that, of course, never tells you the ones that never really went into the system in the first place because the parties agreed they did, too, have

a binding arbitration clause and one of them promptly invoked it and nobody said "boo." I don't know how you get that data, but if that's the issue we're supposed to grapple with and we ought to have data before we do it, the subcommittee shouldn't be asked to do that. Someone else should.

CHAIRMAN BABCOCK: Justice Pemberton and then Judge Yelenosky, Harvey.

HONORABLE BOB PEMBERTON: Just a historical observation kind of from my rules attorney days. This concern, big picture concern, with cases moving out of the system, has been something I believe the committee or at least task forces of the Supreme Court have been concerned with probably for 20 years. As I recall, and Judge Hecht can speak to this, on the heels of the Legislature's enactment of the ADR statute there was a concern of a push at least in the Legislature that the system is not working and we need to think of other ways of getting disputes resolved. The Court appointed various task forces on things like discovery rules reform. There was some process, some thinking that went into what are the problems and how do we fix them. That was the origins of those task forces. They did reports. I know this committee studied these issues extensively, so some of this ground we're talking about today may well have been

plowed, and it might be useful to consult those resources.

CHAIRMAN BABCOCK: Yeah. Good point. Harvey.

HONORABLE HARVEY BROWN: It seems to me we either have to go the route of anecdotally deciding this -- and if we do it anecdotally, I think we've heard a pretty strong consensus that this is not the solution. If we don't want to do it anecdotally then I echo Pete's comments. This really needs careful study, and I don't think we're equipped even within a subcommittee to do that. It seems to me that you're going to have to have a survey done, which is almost going to have to be professionally done, and finding the people for that survey is not going to be easy. It's not like the AAA is going to say, "Here's our list. We want you to come take all our customers." I mean, we're going to have to dig to get that data, and it's going to be hard to dig that data up.

So I think that's something the Court needs to decide, does the Court want that type of data. If so, somebody is going to have to pay for it. It's going to have to come out of somebody's budget. I don't think it's something that we can just have somebody flippantly or quickly do. I think there are a lot of reasons people go to arbitration. That's really what we're talking about,

it seems to me at the end of day, is why are people going to arbitration. You can read lots of articles about them, but not many of them really give strong statistical reasons as to why people are going to arbitration, so if we're going to have a major change in the system, I think it needs a major study that is funded.

CHAIRMAN BABCOCK: Good point. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, as I understood our charge and the term "rocket docket," it ends with trial, and as Sarah mentioned --

HONORABLE SARAH DUNCAN: It ends with what?

HONORABLE STEPHEN YELENOSKY: Trial.

HONORABLE SARAH DUNCAN: Trial.

HONORABLE STEPHEN YELENOSKY: Yeah. I mean, as Sarah mentioned, there is the appellate system; and we didn't even understand we were looking at that, although we talked about it and supposed surveys show that people going to arbitration have a love/hate relationship with appeal, which is they like it, but they don't like perhaps the time that it's taking; and I don't know anything about capacity in the appellate courts; but that's a completely different issue that we hadn't been asked to look at. Is that right, Jeff?

MR. BOYD: Well, we talked about whether

that was within the charge. It had not been discussed. Some committee members thought it ought to be looked at, others thought it -- subcommittee members thought it ought to be looked at, others thought it shouldn't, and I contacted Chip and Justice Hecht at the subcommittee's request, and both of them said, yeah, include it, but we have not looked at it as a subcommittee.

CHAIRMAN BABCOCK: Yeah, to be more precise, Jeff contacted me, I contacted Justice Hecht. Justice Hecht said, "Yes, look at it."

HONORABLE STEPHEN YELENOSKY: Well, we haven't, and the second thing was I had mentioned the lag between reality and the continuing belief of reputation. There is also a lag between our studying and actually implementing anything, and our understanding of people going to arbitration is some people are saying now, well, that's shifting back. By the time we study this and make recommendation we may want a rocket docket because we have too much again, so I mean, we're operating on an old reputation and belief that is old and we're having to predict the future because anything we do is going to be sometime from now.

CHAIRMAN BABCOCK: I was told the other day, but this is truly anecdotal, I don't know if it's fact or not, but that the AAA was considering trying to get some

legislation or some way of creating a right of appeal from an arbitration award. Anybody heard that?

MR. HAMILTON: Part of 1204, isn't it?

MR. FULLER: No. There is a bill pending in the Legislature that's basically trying to amend the Texas statute pertaining to arbitration to apply for a right of appeal.

CHAIRMAN BABCOCK: All right. And then, of course, that's one of the big complaints against arbitration, is that you can get this bizarre, crazy, nutty award and there's nothing you can do about it, and that may be a reaction to that, which, if true -- do you know who's behind that bill?

MR. FULLER: TADC.

CHAIRMAN BABCOCK: Really?

MR. FULLER: With support from -- I'm not sure where TTLA is on that or not. I think at least they're not opposed to it.

MR. PERDUE: What's the bill number of that?

MR. FULLER: There was hearing -- I think it's Dan Gattis -- no, in the Senate I think Royce West is looking at it. In the House it may be Gattis, but I think they had a hearing on it last week. Katie Babellini from Houston went in and testified on it.

HONORABLE STEPHEN YELENOSKY: Well, I hope

we have a discussion about that, because that poses the whole philosophical issue if we're going to have a different parallel system where arbitration decisions are reviewed just like an elected judge's decision and who would want that. They have something like that in California, but I hope we have a long discussion about that because that's a fundamental issue.

MR. LOW: When you start looking at reasons why people leave, I mean, look around the table. How many lawyers in their contingent fee contract have an agree to arbitrate? It started with lawyer bashing. I wouldn't feel comfortable going before a jury a client suing me. I would rather arbitrate, unless it's in Jefferson County, and so why would you -- so everybody is going to have their own reasons, and it's going to be self-interest.

HONORABLE JAN PATTERSON: But you believe in justice, right, Buddy?

MR. LOW: Oh, above all.

CHAIRMAN BABCOCK: Carlos.

MR. LOPEZ: It's funny because I'm afraid to say it in this room, but, you know, I do a lot of arbitration, a lot of AAA arbitration, too, and they're having the same catharsis about how can we improve our system, what's good about what we do, what's bad about what we do, and how can we get more people; and some of it

is philosophical and benign. Other is just profit-driven of just it's business, how do we get more users. That system is going through the same thing everybody else is going through. That's just a comment.

I don't necessarily disagree that our charge -- I mean, we assumed I think that our charge was a rocket docket may or may not be one way to improve justice generally, go look at it, or is our charge -- is our subcommittee the improvement of justice generally in the subcommittee, one possible way of which among many might be a rocket docket, because the second one is huge; and there's all kinds of different things you can do to improve justice that don't have a darn thing to do with rocket docket. I have got a bunch of goofy ideas about court-appointed experts rather than the battle of, you know, paid, you know, experts who may or may not be prostituting themselves for the opinion they've been asked to provide, as an example. Should that be talked about or is that -- or are we just rocket docket? See what I'm saying?

CHAIRMAN BABCOCK: Yeah.

MR. LOPEZ: And if it's the second, if it's the latter, which is a huge deal, then let's just acknowledge that we're biting off a pretty big chunk, and let's figure out whether this tiny little subcommittee is

equipped to do that.

CHAIRMAN BABCOCK: Yeah. Fair enough. Sarah.

HONORABLE SARAH DUNCAN: And I would like to add to it, Carlos, I would like to get the family law cases out of litigation, the litigation context, which is highly controversial and would probably never fly, but I think Carlos put it very well. Is this subcommittee and this committee supposed to figure out how to improve the justice system or is it just supposed to figure out how to design and implement a rocket docket to cure a problem that we don't know exists?

MR. BOYD: And I'd rather do the latter.

HONORABLE SARAH DUNCAN: Of course you would.

MR. BOYD: As hard as that would be. I want to make one comment just because I haven't heard anyone else make it, and that is even to the extent that the broader issue isn't delay but is why aren't people using the system like they used to, I want us to hesitate calling that a problem and push back a little on that concept, because I'm not sure that the fact that people are resolving issues without litigation is necessarily a bad fact. Now, if it's because they're getting cheap, poor justice through some alternative system then that's a

problem, because our government and our judicial system ought to be helping provide that.

CHAIRMAN BABCOCK: Or expensive, poor justice.

MR. BOYD: Well, and it may be expensive, poor justice.

HONORABLE STEPHEN YELENOSKY: Or if it's costing the common law, because we don't have --

MR. BOYD: But, you know, the reality is -- and I -- through this process I've come to the conclusion that the problem with the system, quote-unquote, isn't delay, it's cost, and that's not always the case. I've got clients that can pay me as much as they need, but they've got to get it solved right away because the project's got to get finished. So it's not always, but for the most part it's cost, and I always like to ask the question of others in private practice, "How many of you could afford yourself?" Because I could not afford myself, and I make a lot of money, but I certainly wouldn't want to afford myself, want to have to afford myself, and so a lot of what I do in practice is help clients find a way to solve the problem without going to litigation because it's usually the better business judgment or family decision or whatever.

That's not necessarily a bad thing, and I

don't think we should automatically assume that it is, but to the extent that in a case-by-case situation, not being able to find -- not being able to get a good resolution through the judicial system, and I think I'd like to see us figure out a way to address costs, but as I think through that in my mind I think, boy, you talk about a big issue, I don't know that there is a way to address costs, much less that this subcommittee or this committee could find that way and implement it, but to me that shows kind of how broad the issue is, at least in my mind.

CHAIRMAN BABCOCK: Pete.

MR. SCHENKKAN: I think the issue, cost is often a bigger issue than delay, and I think fear of an arbitrary outcome is often even bigger than cost, but that any one, two, or all three could be factors in any particular case in terms of people having reasons for leaving the system. If what we want to do is get some more data before we try to figure out if there is a problem that a rocket docket might be a solution to or before we decide if we have a problem that maybe needs some other solution, I hate to offer Justice Hecht and you, Chip, no suggestions about how to do that other than we don't want to, we don't think we're qualified. I don't want to, and I don't think I'm qualified, but --

CHAIRMAN BABCOCK: Well, we'll stipulate

then.

MR. SCHENKKAN: Thank you then. How about this as a possibility? Could we get the cooperation from maybe two sections of the State Bar, the litigation section and the corporate law section, and do an appropriate survey to their membership? Maybe they can even do it with e-mail. I mean, everybody has e-mail lists for those sections, and it's obviously voluntary, and it will be self-selection in terms of who chooses to answer, but ask some questions about -- you know, questions like are you experiencing delays in cases in your practice; what categories of cases are those; choices as to what the causes of those, lack of capacity on the judges or whatever some selected other ones are; for the corporate lawyers especially, maybe are you and your clients, you know, choosing arbitration clauses instead of letting it go to litigation; and why is that, is it fear of delay, cost, uncertainty of outcome?

Maybe you could ask if you were offered a voluntary choice that would only apply if you and the other -- you know, the business entity on the other side of the deal represented by the other lawyer agreed to it in the contract in the first place that it went to a rocket docket in the Texas court system in the following parameters, would you prefer that to the arbitration

options or would you like to have that as a possibility? I could see designing some surveys like that, but that needs the help of somebody with a big membership list and the right kinds of people and the ability to send it to them. Of course, ideally they ought to take ownership of the project and just give us the results.

CHAIRMAN BABCOCK: Yeah, Sarah.

HONORABLE SARAH DUNCAN: And I think part of -- two comments. One, people won't vote for who they want to be State Bar president. I don't have high hopes of a high turnout on the survey, but, two, if there's going to be a survey, which might be a very good idea despite low turnout, I think part of the question needs to be delay in the appellate courts. It may be that everybody is getting a trial right when they want to get a trial. It's just that when you've got a case where the record is -- you know, when I got to Locke Liddell I thought there was a supply room across from my office. Actually, it's the record in one case, and it reminds me of a case I used to work on. I was looking at condos in the Brown Building where the entire discovery was one whole office in the Brown Group Building.

When you dump something like that on Justice Jennings' doorstep to decide on appeal and consume him and his staff for the better part of a year, you're going to

get enormous delay in your case, and it has nothing to do with whether you could get a jury trial timely.

HONORABLE TERRY JENNINGS: My docket is current, by the way.

HONORABLE SARAH DUNCAN: Just wait, you're going to get this case.

CHAIRMAN BABCOCK: There's an appeal coming that you don't know about.

HONORABLE TERRY JENNINGS: May I make a comment?

CHAIRMAN BABCOCK: Yeah, Justice Jennings.

HONORABLE TERRY JENNINGS: Well, in response to some things that Jeff said, some other comments that were made, I wonder if we're kind of looking at this backwards in that, you know, we're trying to find out what the problem is. I think we all know that this is a multifaceted problem. There is, you know, delay, cost, expense. Maybe we ought to be studying what does seem to be working, and, again, I know there is apples and oranges here between the criminal system and the civil system because there are so many different causes of actions and so forth and we are dealing with the common law, not penal statutes, which are pretty easy to follow and you can get that kind of stuff before a jury fairly easily, but cases are being tried in criminal courts.

And, you know, as far as this idea of, you know, is this a system worth saving, Yelenosky pointed out, well, you know, what's really happening here is when you're not having jury trials -- and Justice Hecht said this at our bench/bar conference. When you're not having jury trials those things are not being appealed to the appellate courts; and if they're not going up to the appellate courts, that's what's hurting the growth of the common law. So, I mean, do we want to have a system where juries make the important decisions, fact findings, and do we want to preserve the common law?

I would hope that everyone here agrees that, you know, in addition to being all for justice, we're for preserving the common law and preserving the idea that juries make these important decisions, and my point is, is I don't know that a rocket docket is going to do that. I think we need to look at streamlining the system to make it -- one of the things we heard at our bench/bar conference in our breakout sessions was fighting over discovery disputes, that, you know, you could spend months, if not years, fighting over discovery matters and going in over sanctions hearings and things like this.

So a lot of this, you know, blame comes right back to us in how we conduct our practice and our business, and the judges are as guilty as well as far as

delay and not getting things done. Some judges get cases to trial a lot more efficiently than others. Some judges have reputations for not trying cases, but I certainly think it's definitely worth looking into. I don't know that we're the right committee to do it, but I would hope that we all in addition to being for truth and justice we're for preserving the common law, preserving jury trials, and maybe looking at other systems and how they are working efficiently, and maybe we can streamline our system to make it less expensive and to decrease delay.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: But there's a lot to be said about reducing discovery, a lot to be said about discovery. We fought months over discovery and ended up with a document where the defendant says that this is serious problem, don't worry, the customer will think it's his mistake. That was a critical document. We don't know it exists, so sometimes it does take a lot of discovery and effort to get the truth. I mean, you can't overlook that.

CHAIRMAN BABCOCK: Yeah. Yeah. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, I just wanted to expand on that point. I mean, I did mention the cost of the common law. I want to tie it in with earlier there was some talk about getting the business back in the

courts, and I know that that hopefully is alluding to that, because it certainly is judges -- I mean, purely from a purely personal perspective we're better off if there's less coming in; but we get paid the same, not like an arbitrator; and our concern is, is that, is the common law; and if it turns out, as Jeff says, that there's less in the courts because people are finding ways to resolve things understanding what the common law is, and to quote the word "common," that we have some sort of universal sense of justice, but they know what it is and they go out and resolve it without coming to court, that's one thing; but instead if what's happening is that we're getting all different kinds of decisions that aren't common across the state because they're not appealed, then that's a different problem that is a significant cost to justice.

CHAIRMAN BABCOCK: Okay. Judge Christopher.

HONORABLE TRACY CHRISTOPHER: Well, just on the little bit on the idea of surveys. I mean, if you take a survey of clients, any client, personal injury client, corporate client, and said, you know -- they would say it takes too long to get a case to trial, even if the case goes to trial in a year. I mean, that's too long to them. To most lawyers, a year is, you know, perfect, because, you know, I've got other cases, I've got to do this, I've got to do that. You know, maybe nine months,

but a year, that's perfect, but the clients will not think that. It's the same thing with discovery. All right. Clients for the most part don't like discovery. They don't like to spend their people's resources to produce documents, but it's a necessary evil, as Buddy points out, sometimes, to, you know, find the smokeing gun.

So I'm not really sure what we're going to accomplish with a survey, but if we do do it, I would definitely suggest not doing an e-mail survey, having just done one recently. I got 10 responses out of 450 judges, so, you know, my suggestion is that you like take a survey to the advanced civil trial seminar where there is 400 civil trial lawyers and just kind of beat on them through the three days to turn it in.

CHAIRMAN BABCOCK: Your ticket to leave the room is your completed survey.

HONORABLE TRACY CHRISTOPHER: Right. Right.

MR. SCHENKKAN: Get one extra hour of CLE credit.

HONORABLE TRACY CHRISTOPHER: There is probably some, you know, corresponding, you know, business meeting that would be more useful. We get flooded with e-mails now, and, you know, it's a cheap way to do things, but it --

HONORABLE STEPHEN YELENOSKY: And it's worth

the cost.

HONORABLE TRACY CHRISTOPHER: Your response rate is going to be really low.

CHAIRMAN BABCOCK: Yeah. Well, I've got a couple of thoughts. One, it seems to me we all have a stake and to some extent are stewards of the common law jury system, and we ought to collectively, whether we're on this committee or not, want to ensure its continuation and its viability, because I think we would all agree that the jury system is a unique feature of our democracy and has served us very, very well for hundreds of years; but the Court, of course, is the true -- the Supreme Court is the true steward and guardian of this system; and if there is huge flight of participants from the system, not only the users, but prospective jurors are fleeing the system, as has been well-documented, it seems to me that the Court has a vital interest in trying to figure out -- just as the AAA and the arbiters are trying to figure out -- how to make their system better and more attractive to users, and that in a broad sense is what this is about.

Second point, which is related but not the same point, is that this committee and the -- and our Court has done work over the past 15, 20 years, that really is some of the best stuff that's done in the country. I mean, I'm on another committee with a group in

Colorado that studies rules all over the country, and Justice Hecht is on the Federal rules committee, and our discovery, that project that we did, is widely held up as a very, very effective, good way to conduct discovery, a step -- a generational leap in how you do discovery. Our un -- our rule on unpublished opinions was the model for what finally the Federal courts have now implemented, so I mean, we do really good stuff, and I think that the Court is looking to our committee as a resource to see if there's a way we can fundamentally change in a good way the system to make it better for users.

Now, I can understand the subcommittee's frustration because you say, well, what's our charge. Well, we sort of don't know what the charge is in one sense. We sense that there's a problem, and we label it the solution is rocket docket, let's look at that, and you have three questions, which you kind of have answered, although you say there's pros, there's cons, the data doesn't really support anything. Let me suggest this to try to move this process along, and I think this will synthesize everybody's comments. Why don't I suggest that, Jeff, you and maybe Justice Patterson, who is the cochair, or Pete or Justice Bland, whoever wants to do it, why don't we sit down with Justice Hecht and Jody and the Chief and see if the Court can refine better what we're

looking at? I think it's important what you-all have done.

I think this discussion today has been terrific and really helpful and enlightening, and you know, if we can turn it into action, even if our action is to recommend inaction, I think that's a valuable service to the Court that we've done. So, Jane, you can go back to eating lunch for the next week or two and on Thursdays, and we'll try to set up, Jeff, something soon, and let the Chief have the benefit of reading this and Justice Hecht, the parties that have not been able to attend, and we'll go from there. Does that strike you as an okay way of proceeding?

MR. BOYD: That's great. Thanks.

HONORABLE SARAH DUNCAN: Chip?

CHAIRMAN BABCOCK: Yeah, Sarah.

HONORABLE SARAH DUNCAN: Something that just occurred to me just for you-all to consider is talking to the section chairs. Talk to the chair of the family law section, talk to the chair of --

CHAIRMAN BABCOCK: Does that mean we've got to talk to Orsinger?

HONORABLE SARAH DUNCAN: Yeah. No, I don't think he's the chair anymore.

CHAIRMAN BABCOCK: Okay, good.

HONORABLE SARAH DUNCAN: And they might know the best way to survey their members or -- because it's that type of evidence that I think is going to inform you-all's discussion.

CHAIRMAN BABCOCK: Yeah. That's a great idea.

HONORABLE TERRY JENNINGS: Can I make a suggestion?

CHAIRMAN BABCOCK: Justice Jennings.

HONORABLE TERRY JENNINGS: The Court has used blue ribbon panels before to check into things, and it just occurs to me that what the subcommittee is being asked to do might be beyond the resources they have to do it. This might be a project that the Court might consider appointing a blue ribbon panel to look into.

CHAIRMAN BABCOCK: This is a blue ribbon panel.

HONORABLE TERRY JENNINGS: I know.

HONORABLE SARAH DUNCAN: What resources do you think they're going to have?

HONORABLE TERRY JENNINGS: You know, like there was the Jamail panel that made those suggestions a few years ago, and something along those lines, because that's an awful lot to ask these folks timewise.

CHAIRMAN BABCOCK: Well, as a member of the

Jamail committee, I will tell you that these guys have done as much work already as we did, so --

HONORABLE TERRY JENNINGS: Just a suggestion.

CHAIRMAN BABCOCK: Yeah, okay. Any other comments? Jane, you hungry?

HONORABLE JANE BLAND: Yes.

CHAIRMAN BABCOCK: Let's have lunch then.

HONORABLE JANE BLAND: You always wait until after noon. I'm so excited, it's noon.

(Recess from 11:59 a.m. to 12:48.)

CHAIRMAN BABCOCK: Bill Dorsaneo is absent by illness.

HONORABLE SARAH DUNCAN: He's under the weather, uh-huh.

CHAIRMAN BABCOCK: Not feeling great, but he has tagged Sarah Duncan to take his place, and she will do it, as he's told me, better than he would.

HONORABLE SARAH DUNCAN: He didn't tell you that, and if he did, it was a lie.

CHAIRMAN BABCOCK: I got that vibe from him.

HONORABLE SARAH DUNCAN: It will at least be quicker because I know so much less than he does about what has been done. As a for instance, on page two of his memorandum of April 25th, you-all all have that, all that

was done on 20, TRAP 20, was to further conform it to TRAP 145, and one of the members of the subcommittee can volunteer what that change was because I don't know. This was Bill's further tinkering.

Well, moving on...

CHAIRMAN BABCOCK: Yeah, we talked about this a lot.

HONORABLE SARAH DUNCAN: We talked about it a lot, and I think he may have changed like one word. Maybe it's "not contestable." I'm not sure if that's spelled correctly.

MR. HUGHES: And it's not spelled correctly.

HONORABLE SARAH DUNCAN: Which we might could fix, but I think that may be the only change from our last meeting.

CHAIRMAN BABCOCK: Okay. Any -- yeah, Justice Gaultney.

HONORABLE DAVID GAULTNEY: Are you on page two of Rule 20, you say?

HONORABLE SARAH DUNCAN: 20.1.

CHAIRMAN BABCOCK: Rule 20, when party is indigent.

HONORABLE SARAH DUNCAN: 20.1.

HONORABLE DAVID GAULTNEY: Right.

HONORABLE SARAH DUNCAN: And, Jody, you

think that was all that was changed?

MR. HUGHES: No.

HONORABLE DAVID GAULTNEY: There was an addition to this to conform in (12) that just references 38.5(b) which applies to court recorders. It's just trying to merge the two rules. Jody just mentioned this to me earlier that perhaps the committee ought to look at -- we didn't do it this time -- mentioning court recorders in 20.1(d) and (e) as well, but we would also have to look at the costs definition because the cost definition between 38.5 and 20.1 are different, so I just wanted to put that on the record so to speak, but that is what that change is there, is 20.1(b)(12) is simply a reference to the court recorder rules.

HONORABLE SARAH DUNCAN: But that's talking about the parties' lack of skill.

HONORABLE DAVID GAULTNEY: No, you were asking if there were any changes on page two other than the "not contestable."

HONORABLE SARAH DUNCAN: Oh, I see.

HONORABLE DAVID GAULTNEY: And so I was simply pointing out that there was one additional change, and that's the additional change.

CHAIRMAN BABCOCK: Do you have a problem with the change?

HONORABLE DAVID GAULTNEY: No, no. I suggested it.

HONORABLE SARAH DUNCAN: I see.

HONORABLE DAVID GAULTNEY: I'm just making the committee aware of the change.

CHAIRMAN BABCOCK: Okay. Anybody have any comments about these two changes? All right. Well, then let's -- Jody, do you have any comment about it?

MR. HUGHES: I have one comment, which is to pass on -- I got an e-mail last night from David Dubose and Alessandra Ziek, two staff attorneys, long-time staff attorneys of the Third Court of Appeals, both very knowledgeable and thoughtful about appellate issues, and I brought some copies of this to the meeting, and I have just had a chance to kind of read through these. They had comments about 20.1 that were sort of unsolicited, not directly related to this, but they were saying if you-all are going to be changing this rule, here's some things to think about.

Their comments deal more with the Higgins issue and sort of what I think is maybe an intractable problem of setting a deadline for filing something but at the same time saying, "But really, if you don't meet it by the deadline then the court has to remind you, and we can't dismiss it without it," but I think their comments

might be worth thinking about, or if this was something to -- I'm not saying necessarily to push it till next time, but --

CHAIRMAN BABCOCK: Well, we talked about Higgins a lot. We beat Higgins almost to death, but maybe there's still life in it. Do you think is it so fundamentally different than our discussion that we ought to talk about it some more, or would you just propose providing the Court with this additional input that came after our discussion?

MR. HUGHES: I would suggest just providing the input. My analysis of their suggestions about Higgins is I'm not sure that there's any way to address them, consistent with what we've talked about, just because they're basically saying -- one of the comments is if you're -- they're suggesting taking the deadline out of this, because really there is no deadline after Higgins, but I'm not sure that's -- my own thought is I'm not sure that's workable. I think it's still better to put a deadline in there so you have a default that most people follow rather than just put in the rule "file it within a reasonable time" because you're not going to have a --

HONORABLE SARAH DUNCAN: Well, and the clerks can't calendar "reasonable time."

MR. HUGHES: Right.

CHAIRMAN BABCOCK: Right.

HONORABLE SARAH DUNCAN: If there's a deadline they can calendar, it will generate a letter saying, "You need to do something about this."

CHAIRMAN BABCOCK: And we way talked about that, so --

MR. HUGHES: I just wanted to bring it to you.

CHAIRMAN BABCOCK: No, no, no, that's good.

HONORABLE TOM GRAY: You can respond by sending them back to the discussion from last time.

CHAIRMAN BABCOCK: Well, and obviously the Court might be interested in what they have to say. Just because we recommend something doesn't mean the Court is going to go along with our recommendation, so --

MR. HUGHES: And this is unrelated to the two changes that were made that are new in this version.

CHAIRMAN BABCOCK: Right. Good. All right. What's next? What's next, Sarah?

HONORABLE SARAH DUNCAN: Page four, back to supersedeas. Elaine's note is at the bottom, and you might want to read it if you haven't, it basically says that these proposals haven't been voted on by the full -- presented to or voted on by the full committee; and the problem, as I'm sure Bonnie can attest, is the clerks do

not want to be charged with measuring the sufficiency of an affidavit in support of a motion to set alternative security or to reduce the amount of security that's required; and what some of them are now doing is just saying, "Everything is good enough because I'm not competent or comfortable measuring the sufficiency of the net worth affidavit." Others I think have said, "Just go to the judge and get an order, because I'm not going to do it." But either way -- or in the first way, if they just automatically accept the net worth affidavit, then supersedeas enforcement of the judgment is going to be suspended even when it shouldn't have been.

I think Elaine's view is that that is the better alternative, and she says in that last sort of paragraph, "The trial court always has the authority pursuant to TRAP 24.2(d) to enjoin the judgment debtor from dissipating or transferring assets outside the normal course of business, and TRAP 24.1(e) empowers the court to make any other necessary orders -- orders that are necessary to protect the judgment creditor against loss or damage that the appeal might cause," and so that's why (1) now has been rewritten to say a trial court clerk has to receive and file a net worth affidavit. They can't say, "I'm not going to file it because I deem it insufficient." They have to receive it and they have to file it. If it's

filed, it's prima fascia evidence of net worth, but that's subject to someone filing a contest pursuant to subsection (2) at the bottom of page five.

CHAIRMAN BABCOCK: Okay. Any discussion about (1) or (2)? Yeah, Harvey.

HONORABLE HARVEY BROWN: I think this is very good. I mean, I have been through this fight, and there was a lot of uncertainty, and I commend the effort.

HONORABLE SARAH DUNCAN: And that was one of Elaine's points, is that when you're in this situation what you need more than anything else is certainty. You need to know if it's -- if enforcement is suspended or it's not.

CHAIRMAN BABCOCK: Gene.

MR. STORIE: I think this is maybe a related question, but would you be able to execute on the bond if there's a challenge and the court determines that the bond was insufficient? Because I don't think it's in the conditions of liability now in subsection (d)(1). See what I'm saying?

HONORABLE SARAH DUNCAN: Huh-uh.

MR. STORIE: Suppose you have a judgment for 100 million. Defendant says, "I'm only worth 20 million, here's my 10 million-dollar bond." It's contested by the plaintiff, and the court says, "No, you're really worth

50," so you would need to put up 25, but do you get to execute on the original 10 million?

HONORABLE SARAH DUNCAN: No. Because execution is suspended so long as that bond is in place, absent further order of the court.

MR. STORIE: Right. And so if the court orders that that is not sufficient to supersede the judgment --

HONORABLE SARAH DUNCAN: If the judgment debtor doesn't comply with the trial court's order within the time provided, the judgment can be enforced.

MR. STORIE: Right.

HONORABLE SARAH DUNCAN: Now, whether the bond is still in place is between the judgment debtor and the bonding company. Right?

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: But you have -- under this proposed rule you have 20 days before anybody can enforce the judgment, period. It's for you to seek further relief and seek a stay, so I don't think there will be a time -- you're worried about there being some sort of a gap where they might be able to come out and execute? But I think if the trial court's order is not -- is one that you're going to contest, whether it denied you any relief or just gave you part relief, that order's

suspended for 20 days, that it will let you go and get further relief.

MR. STORIE: It's maybe not a problem at all. I guess it's more of a question. I'm just thinking if you have a defendant who's able to get a 10 million-dollar bond and you're the plaintiff and you want to -- and, again, that was insufficient to supersede the judgment and we'll say that no corrective action was taken, what happens to the 10 million-dollar bond? Does it just go away? Because right now it seems to me the plaintiff cannot look to that as part of the satisfaction of the judgment in the meantime.

HONORABLE SARAH DUNCAN: Well, if I were the defendant and I found out my 10 million-dollar bond wasn't going to suspend enforcement on a 25 million-dollar judgment and I can't put up the additional security that the trial court orders, I'm not going to continue paying premiums for a bond that won't suspend enforcement.

MR. STORIE: Right. So then the plaintiff has lost the opportunity, perhaps, to go after $10 million because --

HONORABLE SARAH DUNCAN: That's a whole different problem. That's partial supersedeas, and that's a whole different problem that this committee has -- subcommittee has never been asked to take on.

MR. STORIE: Okay.

HONORABLE SARAH DUNCAN: But we could.

MR. STORIE: Well, never mind.

HONORABLE SARAH DUNCAN: Partial supersedeas has been a problem ever since I have been looking at supersedeas.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: I don't think the plaintiff has an opportunity to go after the 10 million-dollar bond period until the entire setting of the bond is concluded.

MR. STORIE: Right.

HONORABLE JANE BLAND: So I don't think they're losing anything because I don't think they could -- they can't yank the 10 million, you know, and I guess what parties usually do is move to withdraw the bond, don't they? I mean, so --

HONORABLE SARAH DUNCAN: I'm sorry. What was that last part?

HONORABLE JANE BLAND: Well, what they usually do if the bond is no longer needed or is not enough or whatever it is, they move to withdraw it.

HONORABLE SARAH DUNCAN: That's what I mean. If I'm the defendant and the bond is not going to protect me from enforcement of the judgment, I'm not paying the

premiums anymore. I'm going to make arrangements for it to be withdrawn and -- or for it just not to be -- I guess withdrawn is the right word.

MR. STORIE: Okay.

HONORABLE SARAH DUNCAN: But the partial supersedeas is a whole different problem.

CHAIRMAN BABCOCK: Any other comments on this Rule 24? Excuse me, not 24.

MR. HAMILTON: I have a question.

CHAIRMAN BABCOCK: Yeah.

MR. HAMILTON: Are we also changing 24.1(b)(1) where it says it has to be approved by the clerk? Is it (2), to be effective a bond must be approved by the trial court clerk?

CHAIRMAN BABCOCK: Carl, what -- say again what the rule --

HONORABLE SARAH DUNCAN: But that's talking about the bond. This is talking about the net worth affidavit. Right?

MR. HAMILTON: Yeah, you're right, but the bond still has to be approved by the clerk, though.

HONORABLE SARAH DUNCAN: This isn't changing anything other than what is right here. Now, it may change what the clerk will ultimately approve for a bond, right? If the clerk is required by this rule to receive

and file a net worth affidavit no matter pretty much what it says, then that net worth affidavit is -- can be a basis for a reduced bond, and it may be that that net worth affidavit will enable the judgment debtor to file a bond that is significantly less than the judgment that the judgment debtor is trying to supersede.

MR. HAMILTON: Okay. But if the clerks don't want to approve the net worth affidavit --

HONORABLE SARAH DUNCAN: What we're saying is you don't have to -- there is no approval process that's going to be going on.

MR. HAMILTON: I know, but so if they have abandoned that and all we have to do is file it, then whether it's good or not good affidavit they're still going to go ahead and approve the bond.

HONORABLE SARAH DUNCAN: Whether it's sufficient.

MR. HAMILTON: Sufficient.

HONORABLE SARAH DUNCAN: It will be sufficient if -- from the clerk's perspective it will be sufficient if it's -- if there's a net worth affidavit that supports the amount of bond that is filed, and if you as the judgment creditor disagree with that amount then you'll need to file a contest. But it will not be up to Bonnie to do anything other than look at the judgment,

look at the net worth affidavit, and compute whether this is the right percentage.

CHAIRMAN BABCOCK: Other comments? Okay. Next?

HONORABLE SARAH DUNCAN: We'll do anything for Bonnie.

MS. WOLBRUECK: Good.

CHAIRMAN BABCOCK: Did you get that? Bonnie said "good."

HONORABLE SARAH DUNCAN: What Bonnie wants, Bonnie gets. And you know why that it is. It's like that little sign above my mother's sink that says, "If mama ain't happy, ain't nobody happy." If Bonnie's not happy, nobody's happy.

Who is JDH?

MR. HUGHES: That would be me.

HONORABLE SARAH DUNCAN: Oh.

MR. HUGHES: And I was going to ask you a question, Sarah. I think there's two places on here where I was making notes on this. The committee had asked Elaine to go back and draft some new language, and to my knowledge she hasn't had a chance to do that, and the subcommittee hasn't had a chance to --

HONORABLE SARAH DUNCAN: That's my understanding.

MR. HUGHES: -- consider anything, and I actually wasn't sure if we were going to address 24 today at all until after her changes she was going to come back with. I mean, there may be some particular things to consider, but I thought it was all going to be part of --

HONORABLE SARAH DUNCAN: I think it's waiting on Elaine and she's in Prague, so --

MR. HUGHES: Right.

HONORABLE SARAH DUNCAN: So I don't think we can do that.

MR. HUGHES: That was my understanding, yeah, and I think Bill was planning to just kick it till next time until Elaine gets here.

CHAIRMAN BABCOCK: Okay. So we're kicking 24 to next time? Is that what you're saying? Okay.

HONORABLE SARAH DUNCAN: So that takes us up to seven and 34.6 and 35, which should be pretty inconsequential. It's just putting in "court recorder," and then the one that might actually be controversial I will turn over to Justice Jennings.

HONORABLE TERRY JENNINGS: Now?

HONORABLE SARAH DUNCAN: Yeah, go for it.

HONORABLE TERRY JENNINGS: Well, thank you.

HONORABLE SARAH DUNCAN: I just don't want any controversy.

HONORABLE TERRY JENNINGS: Well, hopefully it won't be too controversial. As everyone here knows, we voted to -- under Judge Bland's suggestion to study changing the rules to somehow either to, first of all, provide the litigants with a chance to tell the court why or how oral argument would be helpful to the court, hopefully with the idea that the more judges seeing that and being persuaded by such a statement that they might be more inclined to have an oral argument. Then we went further and studied the idea of the Federal rule, which requires that the court in appellate panel before it actually rejects having an oral argument, that the appellate panel itself unanimously agree upon denying oral argument.

And just a little background here, to try to keep it short as possible, as you may recall, when Judge Bland sent her letter to the committee we also had some statistics in front of us. I don't think we have those now, but just very briefly, there has been a steady decline in oral arguments from 2001 to 2006, and just to pick on our court, we went from 135 oral arguments in 2001 to a low of 47 arguments in 2004. Our sister court, the 14th Court of Appeals went from 429 oral arguments in 2001 to a low of about -- to a low of 94 arguments in 2005. There were some other courts with more dramatic drops. As

some people may recall, Corpus Christi went from 172 oral arguments in 2001 to 11 oral arguments in 2005.

There is a number of caveats in these numbers and what they mean and how cases are counted and so forth. When OCA does its statistics it doesn't really count the number of arguments that were actually heard. What it does is it counts the number of cases in which argument was granted. So these numbers may be inflated one way or another. One way they may be inflated in favor of the courts, making the courts look better like they're having more arguments, is that, well, if you count cases, for example in Harris County, in criminal cases we don't have counts. We have cause numbers. So if a criminal defendant is charged with five different offenses, there may be five cases. Well, the court, if the court sets that case for argument, the court is going to get credit for five arguments when really it only had one, so and that's an OCA deal. That's how they count it. They just count cases. Also, argument may be granted and then at the last minute it's either waived or a party may ask for a reset and the reset might be denied and then the case submitted without argument.

Well, why are we having this problem? One theory is -- at least one theory I have is we got away from the old rule. Under the old rule you had a right to

an argument obviously, and that was back in 1997, but we have a lot of new judges who have never operated under the old rule and have a different mindset about argument; you know, whereas some of the older judges who have been around a lot longer who operated under the old rule might be more argument-friendly. Another point is, is that we have a very heavy workload. We're a very high volume business, and there is a legitimate concern by a lot of judges that having arguments slows down the process, especially when the arguments are adequately handled in the briefing and so forth, that if it's well laid out in the briefs why do we need to have an argument, because that's just going to take more time away from, you know, accomplishing the task of moving cases and so forth.

So there is some legitimate reasons not to have argument, but there is also some other things that may be factoring into why we're not having argument that might be of some concern, and one is the growing idea of along the lines of, "Well, we're so busy." Well, yes, we're busy, but it's our job to read the briefs and it's our job -- it's in our job description to have arguments. But one thing that may be factoring into this is how different courts approach argument, and not just different courts, but also the judges within the courts may have different philosophies on arguments, and so there is a

wide variety of, you know, the results here as far as the numbers go.

You know, for example, in Dallas and Fort Worth, I bet a lot of lawyers in there, in Dallas/Fort Worth area, are not even aware that there's an oral argument problem because those courts have been pretty steady across the board as far as having a high percentage of arguments, much higher than throughout the rest of the state, but through the remainder of the state there has been this dramatic decline in the arguments. So you not only have a difference of what's happening between the courts but also within the courts, and let me tell you what I mean by that.

For example, on our court under our internal operating procedure, a case is assigned to a judge when the notice of appeal is filed, and it's basically that judge's responsibility to kind of carry the ball until the case is submitted. Now, that judge may lose the assignment of the case if that judge wants one disposition and the other two judges want another disposition. Well, then they will take over the majority and that judge will lose the case. This is significant here because that initial judge who is assigned to the case makes the initial determination about whether to have argument or not. And after that judge makes that initial

determination after talking with our staff lawyer, the 21-day notice letter will go out saying, well, argument has been denied. The problem with that system is the other two judges aren't really involved in the decision on having an argument.

Now, under our rules and under the way this works, is that each judge, each judge on a panel has an equal vote and an equal say in how an opinion comes out, but a practical problem arises when, you know, you have this one judge making that initial determination. The letter has gone out, and then we will meet, you know, for the submission conference after the judge -- the other two judges on the panel have the briefs, and one of those judges may come in and say, "You know what, argument really would have been helpful to me in this case." Now, at that point in time the case is already set for submission, it's on the docket, and the court's ready to discuss the case. The three judge panel is ready to discuss the case.

There have been occasions on our court where, you know, we do have that submission conference, a judge makes that suggestion, you know, "Argument really would have been helpful to me," and then usually what will happen is the other two panel members will kind of defer to that; but then you have to reset the case again and

notify the parties, "Guess what, we are going to have an argument in your case," and so it really slows down the process; but there's kind of a, you know, collegialty problem here as well because that judge, the one judge who wants to have an argument, may feel they're imposing upon their other two colleagues that the argument may not be helpful to them. So often what happens is, is someone will say, "You know what, I wish we had had an argument," but then if the other two judges don't really buy into that, then that judge will just kind of say, "Well, okay, we'll go ahead and decide this case."

So that creates a practical problem because under the Federal rule, which we looked at, each judge has a say in not only having an argument, but if one judge wants to have argument, if argument would help that judge, there is going to be an argument in the case. So we studied that rule; and we made an attempt here to adopt it in regard to our rules, incorporating it; and I guess the place to start discussion would be with the first proposal, which to the extent there is any controversy would be less controversial, which is the idea that I think we all agreed on. Well, I think it was like thirty something to one, but we pretty much all agreed on the idea of including a statement within a brief telling the court how argument would be helpful to the court without

taking that out of the page numbers allotted to the party. So if you want to discuss that first and then go into the next one.

So we proposed on page eight -- there are two versions here at the bottom of page eight. I think the subcommittee basically felt -- we talked about where would we put such a statement, and I don't think there was any objection to the idea that the statement ought to come after the statement of the case, which would be a good place to put it, but before the issues presented, so we were talking about placing such a statement regarding oral argument as a new subdivision (e). It just seems to make sense there as far as the placement goes.

Now, there are two versions here. Actually, at the last minute when we were discussing this Jody pointed out some inconsistencies between the first version, which is entitled "Request for Oral Argument," and the second version, which is entitled "Statement Regarding Oral Argument." I agreed with Jody that he was correct that there were some inconsistencies, and I think the only reason the first version is in here is because we didn't have time to communicate it to all the other subcommittee members, but is that correct, Jody?

MR. HUGHES: Yes.

HONORABLE TERRY JENNINGS: So I think what

we should be studying is the second proposal. I don't know that anybody really has any disagreement that the second proposal is the better proposal, more consistent with the initial language in Rule 38.1. So with that in mind, unless anybody wants to discuss the first proposal, just going into the second proposal, it would be entitled "Statement Regarding Oral Argument. The brief may include a statement explaining why oral argument should or should not be permitted. The statement should address how the court's decisional process would or would not be aided by oral argument. Any such statement must not exceed one page."

There is an alternative there as to how to go -- you may remember, Stephen Tipps recommended last time that that language maybe "should seldom exceed one page," but I think the subcommittee generally agreed that there ought to be at least a page limit on that, one page, but that's open to discussion, and then we have in this additional language which refers the parties back to Rule 39.7. "As required by Rule 39.7, any party requesting the oral argument must note that request on the front cover of his brief."

CHAIRMAN BABCOCK: Okay. Any comments about this second subparagraph (e) of Rule 38.1? Yeah, Frank.

MR. GILSTRAP: I don't have any comments

about the language. I think in the earlier drafts we had moved up the -- in the Federal courts, either the Fifth Circuit rule or the Federal Rules of Appellate Procedure, they put it right after the identities of parties and counsel, and the idea is that you can flip it open and find it quick. Now, you know, I'm not the one reading this thing from the bench, so I think the judges might want to talk about that, but it seems to me, you know, the idea is that you look at this without reading the whole brief, so you may want to have it earlier in the brief. I just don't know.

CHAIRMAN BABCOCK: It does have to be on the cover.

MR. GILSTRAP: Yeah, but I'm talking about the -- it has to be on the cover, but the same statement. In other words, the reasons why they think our oral argument would or would not be helpful. Where is that in the brief? Is it buried in the brief or is it the first part of the brief or does it make any difference?

CHAIRMAN BABCOCK: Okay. Richard Munzinger.

MR. MUNZINGER: I don't do a lot of appellate work, but I'm just curious what "decisional process" means and why would you say that instead of just saying "state how the the court would or would not be aided by oral argument" as distinct from saying

"decisional process," which to me says -- "decisional process" is how you get to the decision, and I'm not sure what it means, just kind of threw me when I read it because I'm not, by God's good grace, in this business too often.

CHAIRMAN BABCOCK: Okay. Any other comments? Yeah, Judge Christopher.

HONORABLE TRACY CHRISTOPHER: I just don't understand why you would make people say why it's not useful? Because the way you-all have it written here somebody has to put it in every brief, right, either yes or no?

HONORABLE TERRY JENNINGS: Well, they have to state on the cover whether argument is requested. Within the brief --

HONORABLE TRACY CHRISTOPHER: But suppose they said on the cover --

HONORABLE TERRY JENNINGS: Within the brief they may make a statement. They don't have to make a statement.

HONORABLE TRACY CHRISTOPHER: Yeah, but when you put in "should not be permitted," and I wanted to waive oral argument, I would feel like I've got to say something.

HONORABLE TERRY JENNINGS: Well, one party

may -- one party may want argument and the other party may feel strongly that argument is not necessary here. It would at least give the judges a chance to look at, okay, well, this particular party is making a big deal out of this one issue and then you turn to the other side's brief and they say, "You know what, that's decided authority, therefore you don't need an argument." The other side is just trying to get an argument. Just more information. So if one side wants it and the other side doesn't, at least it gives you the chance to have -- the judge, in front of them at least within one page, you know, a short argument for it and a short argument against it if somebody wants to be opposed to it. It's basically tracking language from the Federal rule.

CHAIRMAN BABCOCK: Gene.

MR. STORIE: Yeah, in our practice we do some administrative appeals that frankly don't need oral argument, but we try to sort of conditionally ask for it. In other words, we don't want to waive it either in case the court grants argument. So would that be a permissible practice under the rule?

CHAIRMAN BABCOCK: I think so.

MR. STORIE: I think so.

CHAIRMAN BABCOCK: Yeah, I would think so. Yeah, Justice Gray.

Masquerading as Honorable Kent Sullivan. Yeah, I wouldn't want to be him either.

HONORABLE TOM GRAY: Given the lead-in sentence to Rule 38.1 that the items should be in the order here indicated, we need to move the requirement for the request to item (a), because it is on -- a requirement to have it on the cover, and I lost my argument of why we didn't need to change the rule and expand it, and I won't redo that, but it will not matter to me as an appellate judge whether it comes after the statement of the case or right after the identity of the parties. There's some logic for either place, but I do think that item (a) in here needs to be request for oral argument.

HONORABLE TERRY JENNINGS: Well, as Jody pointed out to the subcommittee, there's a difference between the request for oral argument, which must be on the cover of the brief, if you want an argument you must put that on the cover of the brief, and as Jody pointed out, the statement regarding oral argument, which may be made but doesn't have to be made, is a different matter entirely.

HONORABLE SARAH DUNCAN: Well, then why is it in the same subsection?

HONORABLE TERRY JENNINGS: I'm sorry?

HONORABLE SARAH DUNCAN: Then why is it in

the same -- why isn't there an (e), request for oral argument that must be stated on the cover of the brief, and an (f), a statement regarding oral argument which may or may not be included in the brief.

HONORABLE TERRY JENNINGS: The request for oral argument is covered by Rule 39.7, which states that, you know, it talks about waiver of argument and requesting argument, 39.7, and 39.7 says the request must be on the cover of the brief.

HONORABLE SARAH DUNCAN: But that's not true under this proposal. This proposal, the first sentence of the first alternative (e) is "The brief must state on its front cover whether oral argument is requested or waived."

HONORABLE TERRY JENNINGS: I think we've universally rejected because Jody pointed out that (e) did have those inconsistencies. That's why we're talking about the second proposal.

HONORABLE SARAH DUNCAN: Well, I haven't rejected it.

HONORABLE TERRY JENNINGS: Okay.

HONORABLE SARAH DUNCAN: I thought what we were trying to do is conform the rule to get everything in 38 that has to be in the brief, and if people have to have oral argument requested on the front cover of the brief, that, in my view, ought to be in 38, which is entitled

"Requisites of Briefs." If we also want to say, "You may include in your brief a statement regarding oral argument," that's fine, but it's something different.

CHAIRMAN BABCOCK: Well, Sarah, it is here in Rule 38 in the second version that we're looking at because it says, "As required by Rule 39.7, any party requesting oral argument must note that request on the front cover of its brief."

HONORABLE SARAH DUNCAN: That's right, but they were differentiating between the request --

CHAIRMAN BABCOCK: Right.

HONORABLE SARAH DUNCAN: -- which must be noted on the front cover --

CHAIRMAN BABCOCK: Right.

HONORABLE SARAH DUNCAN: -- and the statement, which is a statement for reasons for permitting or not permitting oral argument, and my point is it's two different things, let's treat it as two different things. One is required. That's the request. One is permitted. That's the statement. So it seems to me we ought to separate them, and both of them should be in Rule 38.

CHAIRMAN BABCOCK: I understand. Yeah. Nina.

MS. CORTELL: I think that there is some tension here because we're adopting something from the

Federal rules pretty much the same regarding oral argument, but I don't think in the Federal court we have the same point that you've got to put the request on the cover. So in particular going to the conditional, you know, where you really think there ought not be argument in this case but you certainly don't want the circumstance of the other side getting argument and you're not. The tension then comes up when I'm writing a statement, but now I've got to put also something on the cover, which I don't have to do in Federal court, so is it conditional request for oral argument on the cover or what are we thinking?

HONORABLE TERRY JENNINGS: I mean, we could delete the requirement that the request be on the cover.

HONORABLE SARAH DUNCAN: No.

HONORABLE TERRY JENNINGS: I don't like that idea because one of the first things that the staff attorney or whoever is screening this case is going to have to do is see whether argument's been requested or not. The easiest thing to do is look at the front cover and if a party has requested argument they can put it on one stack as opposed to if argument has been waived by both parties in another stack. I mean, we don't have to have that requirement, but I think it's -- I think it helps the intermediate appellate court --

MS. CORTELL: Right.

HONORABLE TERRY JENNINGS: -- as far as, you know, where does this case fit into the system.

MS. CORTELL: If we do that -- and I don't have a problem putting it on the cover -- what would be the recommended practice for the advocate who thinks they don't need argument, but doesn't want to be stuck having waived it? Should they put on the cover "conditional request"?

HONORABLE TERRY JENNINGS: Well, I think usually that's what happens, is somebody will put oral argument -- if I remember correctly, just, you know, glancing at a lot of these briefs over the years, people will often put "Oral argument waived unless requested by," you know, "the opponent." But that's kind of been my experience.

MR. LOW: Terry, what happens if one party puts on there, you know, oral -- or they don't request oral argument. The other one doesn't put it on the cover, but he puts good reasons in there why and the court says, "Well, wait a minute, there should be oral argument," and the other side says, "No, he waived it because he didn't put it on the cover."

HONORABLE TERRY JENNINGS: Well, I don't think that's a problem. I think if they request --

MR. LOW: I'm not saying -- what would happen theoretically?

HONORABLE TERRY JENNINGS: I think for all practical purposes -- and Jody pointed this out. I think there may be some inconsistency here about where you place this because I would think that if it's requested anywhere --

MR. LOW: Okay.

HONORABLE TERRY JENNINGS: -- it's requested. It's not waived.

MR. LOW: Right.

HONORABLE TERRY JENNINGS: The idea of putting it on the cover is really for the benefit of the court as far as processing the paper work. So --

CHAIRMAN BABCOCK: Ralph.

MR. DUGGINS: Well, given the lead-in sentence in 38.1, it seems to me that it's inconsistent to have an optional statement in that 38.1. I think if you're going to use -- add this statement regarding oral argument, why not put it under 39.7?

HONORABLE TERRY JENNINGS: I think the committee at the last -- go ahead, Jody.

MR. HUGHES: I was just going to say we talked about this. The problem is that language in the beginning of the 38. It's sort of the part that organizes

the structure of the brief; and for better or for worse, it uses the "must" language; but it's what people look to when they're putting the brief together for the order of where things go; and I think the problem is, yes, if you want to put something in as a permissive rather than mandatory, it makes sense in one way to get it out of 38.1; but then you're also getting out of the structure that's imposed by 38.1; and I think we also talked about this -- as a practical matter people look to Rule 38 to see what should or must go in the brief and don't tend to look at 39 as much.

Maybe they should, and particularly they should to know that they waive the right to oral argument by not putting it on the cover, but that was also why we wanted to put this reminder in here about putting the request on, recognizing that people tend to look to Rule 38 to see what should go in the brief, and we didn't think that the slight inconsistency about "must' and "may" -- that's kind of cleaned up by the fact that it clearly -- you know, it does say "may," and we recognize that there is some inconsistency there, but it's just driven by the way the structure is laid out.

CHAIRMAN BABCOCK: Ralph, did you -- is it --

MR. DUGGINS: Well, I just think that the

first sentence says, "The brief must contain the following," and then you've got something that it really doesn't, that's an option that --

CHAIRMAN BABCOCK: Yeah, "must," "may," and "should." Justice Gaultney, then Sarah.

HONORABLE TERRY JENNINGS: We can maybe fix that with, "If requested by a party," you know, "the brief may include the statement" or something like that. We can -- we could qualify it.

CHAIRMAN BABCOCK: You could also say if you wanted to really get complicated, "The appellant's brief must," comma, "except as under subsection (e)," comma.

HONORABLE TERRY JENNINGS: Right.

CHAIRMAN BABCOCK: You could do it that way. Justice Gaultney.

HONORABLE DAVID GAULTNEY: I think there is a simple way to do it, and I think the problem is, is there is a "must" requirement here, and so someone reading it is going to say, "Well, why are you making me say why" -- so the problem is we've got an optional requirement within a "must" deal. Hear me out, hear me out.

The -- here is the problem. I don't think it's going to be a situation where somebody puts a request for oral argument and the court is going to say they

waived this inside. I think here is the more likely problem: The clerk getting it looks on the front page of the brief and it doesn't say "Request for oral argument." Let's say it's overlooked, the person intended to put it on the front page of the brief and it wasn't, but there's a statement of it in. Well, that brief might be considered waiver by the clerk that's accepting it for filing.

So because of that problem and also because you want to have the attorney reading the brief requirements understanding that these are two separate things, one, you must have it on the front page of the brief and then, secondly, an optional requirement, you may. I was going to suggest that Sarah had a good idea to separate them out; that is, to put the "must" as an item, a separate item, and then after the statement regarding oral argument simply put in parentheses "optional" or something like that, so that you have clearly a mandatory deal and you have clearly something that's described as optional next, but have them separate.

CHAIRMAN BABCOCK: Yeah. Sarah.

HONORABLE SARAH DUNCAN: Well, the truth is, it's said "must" for how many years? 20 something years? And not every brief conforms to this or necessarily should conform to this. What is the -- I have several points.

One, what is the problem with requiring a statement regarding oral argument in every case, and, two, I thought it was in the Fourth Court of Appeals local rules, but apparently it's in the internal operating procedures for the handling of cases, but our -- their IOPs set out what happened if somebody requests and somebody else doesn't think oral argument is needed and oral argument is granted, that the court's IOPs say the other party necessarily gets an opportunity to argue.

I don't understand really why this has gotten so complicated. I mean, where this started was just let's have a section of Rule 38 that says if you want to include a statement regarding oral argument you can, because some people felt like if it wasn't in 38 they couldn't do it. I never thought that was a correct view, but that was some people's view.

HONORABLE TERRY JENNINGS: Well, and I understood that to be our charge, was to craft a rule regarding a statement regarding oral argument for Rule 38 because people felt that since it's going to be in the brief it should be in the briefing rule as opposed to the oral argument rule. The issue of 39.7, which states, "A party desiring oral argument must note that request on the front cover of the party's brief," well, that's a separate issue entirely. You know, if the committee wants to study

that issue and the idea of taking it off the table, that's a separate issue, but what we were trying to do is include this statement in the briefing portion so that a party would know where to put such a statement, and it should be in the brief, and they shouldn't have to like file a separate statement or something outside of the brief and all that.

There should be a statement in the brief, and -- but we didn't want to mislead people, and so we included that sentence about, well, we want to refer them back to 39.7 so that when they read this rule, when they make their statement, they're also reminded that they have to put the request on the cover. So, I mean, we were just really trying to address the simple proposition of, okay, if you want to you can tell the court how argument would help the court. By the way, you need to remember that if you make such a request, put it on your front cover, see 39.7.

HONORABLE SARAH DUNCAN: My one substantive comment is the "must not exceed one page," I think that's a simplistic way of looking at the cases in the courts. Some cases it's just going to take more than a page to explain why you need oral argument. It just is.

CHAIRMAN BABCOCK: Frank, did you -- you look like you're waiting to say something.

MR. GILSTRAP: Well, let me respond to that. The problem is, is the statement regarding oral argument is argumentative; and if you say it should seldom exceed a page, well, this is my case and it's one of those cases where it should exceed a page and I want to do five pages. I mean, there's no limit, and aggressive litigants are going to stretch it out till they -- you know, and that was the reason we had a hard and fast limit, because it's argument and you're telling the court not only why it wants to hear your case, but why it should rule for you.

CHAIRMAN BABCOCK: Yeah, good point. Anybody else have comments? Jody.

MR. HUGHES: Just one thought on that, is I guess if you wanted to give people the option to do it, you could have it count toward your page limits and then if they wanted to spend their dime on it, so to speak, have at it, and it wouldn't, you know -- if that's where they thought their briefing pages were best spent then -- but we drafted it so that it doesn't count, as Frank said.

CHAIRMAN BABCOCK: Gotcha. Any other comments? Sarah, where do you want to go? You know, it looks to me like both versions have support in the comments from everybody. Or Justice Jennings. I mean, whichever of you.

HONORABLE SARAH DUNCAN: I was going to

say --

HONORABLE TERRY JENNINGS: Well, I think the second version, which Jody drafted to make consistent with Rule 38.1 as best we could, I think that's the better version.

MR. GILSTRAP: The first one's off the table I think.

HONORABLE TERRY JENNINGS: Right.

CHAIRMAN BABCOCK: The first one's off the table. Okay.

MR. AGOSTO: And I'd like to add Justice Gaultney's "optional" in parentheses or something to that effect, not that I practice appellate work, but it would make it clear that this is the order where you want it if you're going to include it, but it's optional, and the last sentence clarifies the rule as far as where you want it on the cover for purposes of the clerk.

CHAIRMAN BABCOCK: Judge Christopher. And then Sarah.

HONORABLE TRACY CHRISTOPHER: How about like (a) be "cover of the brief," and, you know, this is where you put oral argument rather than hiding it down in (e) or putting it in 39? Just, you know, that seems the most logical way to present it in my mind, while we're changing it.

HONORABLE SARAH DUNCAN: But, gee, Tracy, we don't have a subsection entitled "Cover of the Brief."

HONORABLE TRACY CHRISTOPHER: I'm asking you to put one on.

HONORABLE SARAH DUNCAN: We can't possibly put it there.

CHAIRMAN BABCOCK: Nina, did you have your hand up?

MS. CORTELL: I'm just in favor of it being mandatory. I think it's a good idea, it's helpful to the court, so I would resolve the discrepancy between "must" and "may" that it just should be "must."

CHAIRMAN BABCOCK: Okay.

HONORABLE SARAH DUNCAN: I second that.

CHAIRMAN BABCOCK: Any other comments?

HONORABLE TERRY JENNINGS: Well, unless waived. "Unless argument is waived, the brief must include"?

MS. CORTELL: Well, it's a statement regarding argument, so either way.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: I think the problem we've got here is that in state court I believe the approach is, well, these guys waived argument, we're not going to hear it. In Federal court it's not your call. You know, they

-- well, we may want to hear oral argument in this case, so it's kind of a fundamental distinction of the way the courts approach it. You know, again, maybe the appellate judges could tell us. But if, in fact, the real world is that here's appellant's, appellee's brief, they both waived it, we're not going to hear it, then I think we ought to stay with the current approach.

CHAIRMAN BABCOCK: Okay.

HONORABLE TERRY JENNINGS: Now, just for clarification, under 39.7, even if the parties have waived argument the court can still order it here. I have only done that in one case in the over six years I have been on the court. I have only seen one case where I've done that, but, I mean, the --

CHAIRMAN BABCOCK: Proves it can happen.

HONORABLE TERRY JENNINGS: -- Federal they do it a lot more often than we do.

CHAIRMAN BABCOCK: Sarah, any final comments?

HONORABLE SARAH DUNCAN: No.

CHAIRMAN BABCOCK: No final comments. So the question is whether or not we're in favor of this rule as drafted at the bottom of page eight and the top of page nine with respect to Rule 38.1, subsection (c). So everybody in favor of it as drafted raise your hand. You

got your hand up?

MR. LOPEZ: No, no, no.

CHAIRMAN BABCOCK: Everybody opposed?

MR. DUGGINS: Is that --

HONORABLE TRACY CHRISTOPHER: Can we have a separate vote on "decisional process"?

CHAIRMAN BABCOCK: It's 12 to 8 in favor.

HONORABLE TRACY CHRISTOPHER: Please.

CHAIRMAN BABCOCK: Tracy, what did you say? I'm sorry.

HONORABLE TRACY CHRISTOPHER: I said can we have a separate vote on the words "decisional process" because I also find that --

HONORABLE TERRY JENNINGS: Well, some of this refers to the -- some of this is going to refer to the next proposed rule regarding under what circumstances can the court deny argument. The reason -- and this is my fault. The reason this sentence is in is because I requested it. The statement should address how the court's decisional process would or would not be aided by oral argument. The point there was, was to -- not only should a party make such a statement, but to give them guidance on what they really should be addressing in this short statement.

Yes, people are going to use the statement

argumentatively, you know, not just to give argument, but also to get their point across in regard to why they think they should prevail, but this is what the litigant really should be focusing on, how is oral argument going to help the court make up its mind about your case.

CHAIRMAN BABCOCK: Ralph.

MR. DUGGINS: Can we have a straw vote on that same language except change the word "may" to "must"?

CHAIRMAN BABCOCK: Well, I think that -- I bet you that's why a lot of people voted against it, and the Court's got the benefit of our discussion, if they think "must" ought to be the word. Carl.

MR. HAMILTON: I think you said it was 12 to 8 in favor.

CHAIRMAN BABCOCK: I did.

MR. HAMILTON: In favor of the wording?

CHAIRMAN BABCOCK: Yes.

MR. HAMILTON: I thought it was the other way around.

CHAIRMAN BABCOCK: No. The first vote was -- people were voting in favor the first time and against the second time, and 12 people voted the first time and 8 the second time.

MR. GILSTRAP: The Chair not voting.

CHAIRMAN BABCOCK: Huh?

MR. GILSTRAP: The Chair not voting.

CHAIRMAN BABCOCK: Chair not voting, sorry. Harvey.

HONORABLE HARVEY BROWN: Well, I think the phrase "decisional process" is also awkward, but in talking to Justice Jennings earlier I understand why he wants it. If you turn to page 10 you'll see that the (b)(4) uses the exact same phrase, and he was explaining to me that this is designed to give the court a little more discretion, and so if you have it in 39.1(b)(4) then at least you understand the context for why the court wants it in 38.1.

CHAIRMAN BABCOCK: And for what it's worth, "decisional process" is used in the Federal rule.

HONORABLE HARVEY BROWN: Okay.

HONORABLE TERRY JENNINGS: Right. We stole it straight from them.

MR. LOW: It is a process. Every time you read the brief, the argument is a process. You don't just make your mind up. There's processes.

CHAIRMAN BABCOCK: Yeah. You're walking down a long road.

MR. LOW: That's right.

CHAIRMAN BABCOCK: Okay. Which brings us to 39.1.

HONORABLE JAN PATTERSON: Chip, is there --

CHAIRMAN BABCOCK: Yes, I'm sorry, Judge.

HONORABLE JAN PATTERSON: Is there an appetite or have we decided the order of these or was that included within the vote? Whether it should be (e) or (a) or (b)?

CHAIRMAN BABCOCK: We didn't decide that because I didn't think that was on the table, but we can talk about it if you want.

HONORABLE JAN PATTERSON: Well, a couple of people mentioned it. It is a -- if you're flipping open the brief --

CHAIRMAN BABCOCK: Yeah, that wasn't the vote. That was not the vote, to vote on whether it should be (e) or (a). Sarah.

HONORABLE SARAH DUNCAN: Well, then I'll just make a -- can I just try to shortcut this?

CHAIRMAN BABCOCK: Yes.

HONORABLE SARAH DUNCAN: I'll just second Judge Christopher's motion, if she would incorporate it in that formal vehicle, that there be -- that (a) be entitled "Cover of the Brief" and that the --

HONORABLE TRACY CHRISTOPHER: I think only Chip makes motions, but to the extent that we need one, I'm for that. I'll make a motion for an (a), cover.

HONORABLE SARAH DUNCAN: And the last sentence of what we just voted on be put in that (a), "Cover of the Brief," since logically the cover of the brief is the first thing these people who are writing a brief need to be worried about.

CHAIRMAN BABCOCK: Okay.

HONORABLE SARAH DUNCAN: And you want me to make this a two-part motion, or do you think that's too controversial?

CHAIRMAN BABCOCK: It might be too hard for the Chair to follow, but give it a shot.

HONORABLE SARAH DUNCAN: And then as we are renumbering we will have (a); (b) will be "Identity of Parties and Counsel"; (c), Table of Contents.

HONORABLE TERRY JENNINGS: Well --

HONORABLE SARAH DUNCAN: It was too controversial. I withdraw that.

HONORABLE TERRY JENNINGS: My concern is, is there a rule dealing with what must be on the cover of the brief, because obviously the style and all that's going to be on the cover of the brief? If we say "Cover of the Brief" and that's all that is required to be on the cover of the brief is whether or not oral argument is requested --

HONORABLE TRACY CHRISTOPHER: Well, I asked

Jane, how do I know what to put on the cover, and she said, "You just do," you know.

HONORABLE SARAH DUNCAN: I think it would be a good idea to tell people what should be on the cover.

HONORABLE TERRY JENNINGS: Style of the case, cause number.

HONORABLE SARAH DUNCAN: Well, from writing opinions, I would like the trial court case number, but that may be too controversial.

CHAIRMAN BABCOCK: Yeah, you were the one that predicted this whole appellate thing was going to take 20 minutes.

HONORABLE SARAH DUNCAN: Right. Forget it. I have no suggestions.

CHAIRMAN BABCOCK: Okay. Justice Gaultney.

HONORABLE DAVID GAULTNEY: There is a Rule 9.4(g) which goes over the --

THE REPORTER: I'm sorry, speak up, please.

MR. GILSTRAP: What was that again?

HONORABLE DAVID GAULTNEY: 9.4(g).

HONORABLE BOB PEMBERTON: That's how we know we can't use red paper on the cover.

HONORABLE SARAH DUNCAN: No, that's Federal court.

HONORABLE BOB PEMBERTON: I think we have

that, too. There is a paper color rule in there somewhere, I could have sworn.

MR. HUGHES: Yeah, (f) is the --

HONORABLE TERRY JENNINGS: Also, it's interesting to note that in (g) it does say, "If a party requests oral argument in the court of appeals, the request must appear on the front cover of that party's brief." So it's already in -- the problem is, is 38 deals with the contents of the brief, whereas 9 deals with the contents -- literally, quote-unquote, contents of the cover.

CHAIRMAN BABCOCK: Yeah. So we've got it covered nine different ways. Justice Gaultney.

HONORABLE DAVID GAULTNEY: I still think Sarah's point is well. It's just what you could entitle it, "Request for Oral Argument," but right at the front because that's where you start, you start with the cover. Put it right at the beginning, request must be on the front page, front cover of the brief, period, see whatever.

HONORABLE SARAH DUNCAN: In addition to what's -- in addition to the requirements of 9.4(g), take the last sentence of 9.4(g) and put it over there, "if a party requests."

HONORABLE DAVID GAULTNEY: Just instead of

entitling it "Cover," just entitle it "Request" and then when you come down to wherever you want to put the statement where your -- your optional statement, then it could be a separate --

HONORABLE TERRY JENNINGS: Right.

HONORABLE DAVID GAULTNEY: Separate deal.

CHAIRMAN BABCOCK: Justice Jennings.

HONORABLE TERRY JENNINGS: Well, I wanted to go back to the "must" versus "may" include a statement. There are a number of cases where you wouldn't want to put a party through the trouble of making a statement for oral argument. One would be an Anders case obviously, a criminal case that the lawyer has concluded this is a frivolous appeal. Do we really want to require that lawyer to include in their Anders brief a statement why oral argument is not requested, I mean, to take up more space? Well, it's not requested because it's a frivolous appeal, but --

CHAIRMAN BABCOCK: Let me just tell you one more time.

HONORABLE SARAH DUNCAN: What's wrong with a one-sentence statement, "Oral argument is not required in this Anders case"? What's wrong with requiring that if the benefit is we get a statement regarding oral argument in the other 99 cases?

HONORABLE TERRY JENNINGS: Well, then you have a general rule where you're listing, well, except in these circumstances.

CHAIRMAN BABCOCK: Justice Gaultney.

HONORABLE DAVID GAULTNEY: I don't think it's only Anders cases. I mean, I think there -- I don't think we should -- if an attorney feels like, for whatever reason, that he or she doesn't want to request oral argument, I'm not sure we should require the attorney to argue why oral argument is not -- will not aid the decisional process. I think that ought to be optional. You could use it if you want. If you want to argue that it's not helpful, you have that opportunity, but I think there's an advantage to the advocate for having it as an optional requirement.

CHAIRMAN BABCOCK: Yeah. Yeah, we just voted to make it optional. The Court's got the benefit of our discussion if the Court thinks it ought to be otherwise.

Let's go to 39.1, Justice Jennings.

HONORABLE TERRY JENNINGS: The current rule reads "Right to Oral Argument," and I wasn't on the committee obviously in '97 when the rule was changed, but my understanding was, is if you requested oral argument you got an oral argument. You literally had a right to

oral argument if you properly requested it, and then, of course, the rule changed in 1997, and I'm guessing that was due to the high volume of cases and so forth and appellate courts just couldn't hear -- well, you lay out the history.

HONORABLE SARAH DUNCAN: My understanding -- my understanding is that what happened in '97, the rule in civil cases had always been that the court had the discretion to deny oral argument.

HONORABLE TERRY JENNINGS: Only in criminal?

HONORABLE SARAH DUNCAN: When I got to the court there was no discretion to deny oral argument in a criminal case, and in '97 it was made discretionary with the court to have oral argument in a criminal case.

HONORABLE TERRY JENNINGS: But, nevertheless, you look at the phrase "Right to Oral Argument," but obviously it's a very limited right. Under the old rule, except as provided in 39.8 -- or the current rule, I should say, "any party who has filed a brief and has timely requested oral argument may argue the case to the court," with the exceptions listed in 39.8, which was obviously segregated out. And then 39.8 under it basically says, "In its discretion the court of appeals may decide a case without oral argument if oral argument would not significantly aid the court in determining the

legal and factual issues presented in the appeal."

There are a number of concerns with the old rule that I had and discussed with the subcommittee. One is the simple fact that if you look at this rule and you compare it to the Federal rule, which basically we've incorporated under standards with some changes right below on page 10. We have the proposed 39.1. If you look at 39.8, you know, "argument would not significantly aid the court in determining the legal and factual issues presented in the appeal," how that works out on a court, as I mentioned before, is usually -- and I'm talking about my court, and I know the 14th Court of Appeals does this, and I think some of the other appellate courts do this kind of routinely. No matter when a case is assigned it's usually a single judge that makes that initial determination to have argument or not.

Now, the way the rule reads now, well, that's subject to different interpretations. What I might find would significantly aid me in understanding the facts or a law might be quite different than what Judge Gaultney would feel in a case. We could have a good faith disagreement about whether or not argument in this particular case would significantly aid us individually. The problem with the rule and how it's used in the courts -- and I'm saying how it's used, when deference is given

to that initial judge, well, there are some judges who feel, quite frankly, that, well, if I don't have to do something, I'm not going to do it. There are other judges who feel quite legitimately that, you know what, if it's covered in the brief, I don't need an argument. There are other judges who are going to be more generous with argument.

The problem with deferring to one judge is basically that judge is making a decision to deny argument in a case that might be helpful to one of their colleagues, and if you believe that each judge on a panel, each judge on a three-judge panel, has an equal say in the outcome of that case and they have a right to, you know, write their own separate opinion if they need to, that's a problem.

And if you look at the statistics, you know, there is a significant variation, as I said, between Dallas and Fort Worth, which are very generous with arguments, and our court and the Corpus Christi court, who at least through 2005 we were not as generous with our arguments, but I bet if you look within each court -- and I don't have stats because I don't think they're kept, but I bet if you look within each court there is going to be a significant difference between the judges individually who grants argument and who doesn't.

So one reason -- and just starting out the conversation here, one reason in looking at the Federal rule, I think the Federal rule articulates the way it should be and the way theoretically it is, which is that if argument is going to help one judge, one judge, the collegiality -- the deference should go to that judge that argument is going to help as opposed to that judge deferring to the other judge who doesn't want to hear an argument. You know, if argument is going to help one judge, that judge ought to have an argument; and that's the way the Federal rule is constructed, because if you look at the Federal rule it basically says "if requested by any party"; and this is not directly from the Federal rule, but this language is, "oral argument must be allowed in the case unless a panel of three judges who examined the briefs unanimously agrees that oral argument is unnecessary."

So under the Federal rule, which we're proposing adopting some of that language, if one judge on the panel wants to have an argument after they've examined the briefs and looked at the statements and so forth, that judge will get an argument.

CHAIRMAN BABCOCK: Okay. Justice Pemberton.

HONORABLE BOB PEMBERTON: Question for Judge Jennings. Would those goals be significantly compromised

by changing that unanimity requirement to a majority of the panel?

HONORABLE TERRY JENNINGS: I think so, because --

HONORABLE BOB PEMBERTON: Because, you know, that's just personalities of individual appellate courts and two judges getting mad at each other and what happens, is one trying to slow up the other's work, that sort of thing.

HONORABLE TERRY JENNINGS: Well, hopefully we're not using argument or anything else to slow up our colleague's work.

HONORABLE BOB PEMBERTON: Yeah.

HONORABLE TERRY JENNINGS: And I would hate to draft a rule along those lines, but if one judge, if argument would significantly aid a judge in the decisional process, if it would help them understand the law or the facts, that judge ought to have an argument.

One of the criticisms is not just the sheer drop in numbers of the arguments that have occurred throughout the state, just the sheer drop, but in the kind of cases that are not being argued. There are -- I have heard criticisms from the bar that there are significant cases, you know, termination of parental rights cases that aren't being argued, significant criminal cases that

aren't being argued. The criminal bar is really upset, because as bad as the stats are for civil arguments, they are really very, very low for criminal cases, getting arguments in criminal cases.

Also, you have significant no evidence points which are basically being decided without argument when that area of the law is at least in development right now about what is no evidence, what is not no evidence, after City of Keller and things like that. There are significant decisions being made where, you know, jury verdicts are being either taken away or whatever. A lot of things happening without argument where litigants are feeling like they don't have --

CHAIRMAN BABCOCK: Pemberton just cried "uncle."

HONORABLE BOB PEMBERTON: No, I didn't.

HONORABLE TERRY JENNINGS: But, again, you either believe that each judge has an equal vote and an equal say, and if that's the case and argument would help one judge then I think the Federal rule is --

CHAIRMAN BABCOCK: Buddy. And then Judge Pemberton can say he doesn't cry "uncle."

MR. LOW: You have an (a) and a (b). What is covered in (a) that's not covered in (b)?

HONORABLE TERRY JENNINGS: Right. What's

covered in (a) is generally some language from the rule as it exists now. The problem was or part of the problem was, is that 39.1 and 39.8 are separated, although they are related; and so this is an attempt to combine those two together and say, look, if you requested it, you may argue the case subject to paragraph (b). Now, we don't have -- we don't have to have an (a) or (b).

MR. LOW: (b) says "if requested." Up there it says "timely filed a brief." It says, "If requested by any party, oral argument must be allowed." You state that "unless" and that covers your point.

HONORABLE STEPHEN YELENOSKY: Well, (a) is either redundant or it says something very strange, which is you can have oral argument, but the only people who get to argue are the ones who request it.

HONORABLE TERRY JENNINGS: Right. Well, I -- this is procedurally how it went through the subcommittee. I didn't think we needed "if requested by any party" under subdivision (b) because I thought (a) stated the rule generally and then (b) stated basically the standards for denying arguments, but some people felt that "if requested by any party" should be there.

MR. LOW: But (b) says all of that.

HONORABLE STEPHEN YELENOSKY: We're saying get rid of (a).

CHAIRMAN BABCOCK: Yeah. Buddy is saying get rid of (a) and have (b) stand alone.

HONORABLE TERRY JENNINGS: We can combine the two sentences and make them consistent.

CHAIRMAN BABCOCK: Justice Pemberton.

HONORABLE BOB PEMBERTON: I was just going to say I think the idea of having some better fleshing out of objective standards of when oral argument should not be -- now, I agree the default ought to be to grant argument -- should not be granted or is helpful because, as Judge Jennings noted, judges are all over the place on this, and the problem is not in and of itself that not enough argument is being granted. That's a simpler thing. It's that, you know, the judge -- cases that really ought to be argued are not getting argued, and I think having these parameters and at least for judges' internal discussion, whether it's a majority of a panel or unanimity or whatever, will be very helpful.

HONORABLE TERRY JENNINGS: Right. Well, the reason they are listed out is at least in my mind it provides context. Here are circumstances that are legitimate reasons for a panel not to have argument, and again, there could be a good faith disagreement --

HONORABLE BOB PEMBERTON: Yeah.

HONORABLE TERRY JENNINGS: -- between judges

about, you know, whether or not this case would help them. But at least if you try to have some kind of a list, you know, obviously if the appeal is frivolous, you don't need an argument if the appeal is frivolous. You don't need an argument if the law has already been decided on a pertinent issue under these particular facts. Number three is kind of a tip of the hat, if you will, to the judges who feel, well, basically, if it's adequately covered in the briefing and so forth, we don't need an argument, at least gives the judges something to talk about in making their vote and working collegially together, hopefully not using argument to delay someone else's docket. But the whole point here is to at least give some reason why argument can be and maybe even in certain circumstances should be denied and then basically to provide guidance.

CHAIRMAN BABCOCK: Okay.

HONORABLE TERRY JENNINGS: And it also not only provides guidance to the judges but to the litigants reading the rule, if they're going to make a statement. Well, you know, maybe they should include in their statement, you know what, this isn't a decided area of the law, there's something unique about the facts here that you need to understand that an interaction between the court might help you understand either the facts or the

law, so it provides guidance not to the court, but I think the reason for a list is to also provide guidance to the litigants to say, "Okay, here's what you need to show the court to get a argument."

CHAIRMAN BABCOCK: You would agree to the collapsing (a) into (b)?

HONORABLE TERRY JENNINGS: Yes. I think we had a version like that at one time. The only reason I think I like the idea of separating them out was because it was easy to say "except as provided in paragraph (b)," but that's simply a matter of style.

CHAIRMAN BABCOCK: Okay.

MR. LOW: Then you wouldn't have to say certain things about (b) that you've already said in (a).

HONORABLE TERRY JENNINGS: Yeah. For example, we could say -- if we could collapse them together and say something along the lines of "If any party who has filed a brief and who has timely requested oral argument must be allowed to argue the case unless a panel of three judges --"

CHAIRMAN BABCOCK: Skip, and then Sarah.

MR. WATSON: Judge Jennings, it's been a long time since I was a law clerk, but -- and I may be under a false premise here, but as I read this, it sounds like we're assuming that all three judges have read the

briefs to determine if the legal arguments are adequately presented in the briefs and the record before a decision is made to grant oral argument, and that was not my experience.

HONORABLE TERRY JENNINGS: Well, this rule would require -- and I have heard that basically sometimes some judges will decide cases by circulation without even seeing the briefs. This rule would actually require the judges before they vote to have examined the briefs to make an intelligent decision on whether or not they have argument.

MR. WATSON: And then examine them again before the argument to prepare for it?

HONORABLE TERRY JENNINGS: Well, hopefully they would read it a lot more thoroughly.

CHAIRMAN BABCOCK: Sarah.

HONORABLE TERRY JENNINGS: This would at least require the judges to examine the brief, hopefully looking at the statement we just voted on that, hopefully, you know, the brief would be distributed timely to the judges, they could examine the statement on whether oral argument should or should not be permitted, and then make a vote up or down on having an argument.

CHAIRMAN BABCOCK: Sarah, then Kent.

HONORABLE SARAH DUNCAN: I have three

points.

CHAIRMAN BABCOCK: Number one.

HONORABLE SARAH DUNCAN: Number one, as I read (b)(4), which is basically the current rule, it incorporates (1), (2), and (3). "If an appeal is frivolous then oral argument will not significantly aid the decisional process" and on down the list. Number two, any time you make a list people are going to argue that list is exclusive and that these are the only reasons oral argument can be granted, and I just --

HONORABLE TERRY JENNINGS: Denied.

HONORABLE SARAH DUNCAN: Can be denied. I just heard one that if the dispositive issue or issues have been authoritatively decided we shouldn't be having oral argument. That's simply not true. There are times when an issue has been authoritatively decided, and that is exactly the case you want to hear oral argument in because this is a new twist or that authoritative decision was 130 years ago and it was about, you know, carts and we're talking about supersonic trains.

Number three, why do we want to incorporate into the rule burdens on judges who don't have time to do the job they already have, and we're giving them additional duties? This is a matter if you can get this passed at your court, that's great. The Fourth Court, if

one judge requests oral argument, we have oral argument. At the Fourth Court all three judges have the opportunity to look at the briefs before that decision is made. It is -- certainly a 21-day notice doesn't go out until the other judges have acquiesced to this decision. I am totally against this rule, in case you couldn't tell by my tone of voice. Sorry.

CHAIRMAN BABCOCK: So when we vote you're voting "no"?

HONORABLE SARAH DUNCAN: I could be.

CHAIRMAN BABCOCK: Or "hell no." Buddy.

MR. LOW: But if one judge -- all of them have agreed. If one judge looks at it and says, "I need oral argument," then the other two say, "I don't have to worry about it because it's out." I mean, we're not going to have all three agreeing.

HONORABLE SARAH DUNCAN: I forgot my third point. I had three.

CHAIRMAN BABCOCK: You said your third.

HONORABLE SARAH DUNCAN: I had another one supersede that one.

CHAIRMAN BABCOCK: Number four.

HONORABLE SARAH DUNCAN: The third point is that if anybody in this room thinks that a judge will not use this rule to delay another judge's docket, there is a

bridge I would like to sell you.

MR. LOW: In Arizona?

HONORABLE SARAH DUNCAN: Could be.

HONORABLE TERRY JENNINGS: That's a frightening thought. I can't imagine that occurring. That's a frightening thought.

HONORABLE SARAH DUNCAN: And I'm sure none of us at this table can.

HONORABLE TRACY CHRISTOPHER: Doesn't it delay your own docket, too, if you have to go to it?

HONORABLE SARAH DUNCAN: I'm sorry?

HONORABLE TRACY CHRISTOPHER: Doesn't it delay your own docket, too, if you have to go to the oral argument? If you vote for it, you have to go to it?

HONORABLE SARAH DUNCAN: No, not if you don't have the opinion. Just because you're going to the oral argument doesn't mean you've read any briefs or looked at the record or read any cases. It just means you show up at oral argument.

HONORABLE TRACY CHRISTOPHER: But, I mean, it's delaying all of you 30 minutes, right?

HONORABLE TERRY JENNINGS: Well, one point I do tend to agree with what you said is about dispositive issue or issues have been authoritatively decided. Obviously a party can make a good faith argument for a

change in the law and so forth. Hopefully that party would make such a statement in their statement regarding oral argument and maybe persuade someone on the court that, you know what, yes, the other side says these issues have been authoritatively decided, but we want to argue for that good faith.

CHAIRMAN BABCOCK: By the way, this is exactly the Federal rule.

HONORABLE TERRY JENNINGS: Correct.

CHAIRMAN BABCOCK: I mean, word for word.

MR. GILSTRAP: No, (4) is new.

HONORABLE TERRY JENNINGS: There is some slight differences, and we did break out the last (d).

CHAIRMAN BABCOCK: Yeah, they have a three-part thing, but our (4) is in their (3).

HONORABLE TERRY JENNINGS: They combined (3) and (4) together, and we broke them out.

CHAIRMAN BABCOCK: Right. Kent.

HONORABLE KENT SULLIVAN: I just want to make a brief philosophical comment, and that is we talked and the standard for our debate and discussion seems to be what will aid the court, and I at least wanted to add to ask the question of whether we shouldn't be talking about what might aid the litigants. That is, the question of, if you don't mind the phrase, adequate customer service is

something that we ought to consider.

The question of the perception that the litigants have of the fairness and thoroughness of the process is something we ought to consider. The question of the litigants' credibility -- or the credibility of the process in the minds of the litigant is something we ought to consider, and I think it is effective. I think people feel better when they get their say or they watch their lawyer get their say, because -- and you do deal with issues that come up that I think we all have to acknowledge. You do hear people grumble saying, "I question whether the court ever read what I submitted." I question -- you know, "I question this, I question that." We talk about the vanishing jury trial a lot, well, vanishing jury trials become vanishing appeals, it seems to me, and that this is all part of much the same thing.

CHAIRMAN BABCOCK: So you're in favor of the rule?

HONORABLE KENT SULLIVAN: Well, I'm in favor of the notion of some customer service and that we give some eye towards who the clients or customers of the process really are.

HONORABLE TERRY JENNINGS: Well, that's a different approach obviously because --

HONORABLE KENT SULLIVAN: I agree.

HONORABLE TERRY JENNINGS: -- our approach is, is to -- okay, oral arguments are on decline, what can we do as far as getting the attention of the interimmediate appellate court judges as far as having a uniform rule. You know, there is this wide variety as far as, you know, argument being granted in some courts and not granted in other courts. Within courts there is a wide discrepancy, so the idea is to have some uniform standards as in the Federal rule of, okay, if a court unanimously agrees that argument would be unnecessary in this case for these reasons -- so in a way it's a way to tie the hands of the court, you know, recognizing -- recognizing that it is the right to oral argument and to take away that right the court ought to have some good reasons and it ought to unanimously agree on one of those reasons.

CHAIRMAN BABCOCK: Okay. Justice Gray.

HONORABLE TOM GRAY: That was a perfect ending to where I wanted to begin, because --

CHAIRMAN BABCOCK: We've come full circle? Is that it?

HONORABLE TOM GRAY: Yeah. I think Justice Jennings and I, if we had to write opinions on this, there would be a split decision, and I want to do this with regard to -- or without regard to the procedure that's

used at the Tenth Court, and I say "procedure" because there is actually different ways within our own court of how a case is decided to be argued or not.

HONORABLE JAN PATTERSON: Three different versions?

HONORABLE TOM GRAY: No, just two. But the intermediate appellate courts decide over 10,000 appeals a year. The large majority are now currently decided based upon the briefs, and I think the presumption should be that the brief adequately presents the issues and the case for decision. The statement regarding oral argument that we've agreed to include in the rules or recommend to the Supreme Court be included in the rules should be the -- should be to show why there's some reason that this appeal cannot be adequately presented in the briefs.

To me that means that the default should be that there is no oral argument unless you show me a reason why there should be in this case; and that's a motion basically like any other motion that should be decided by majority, and what -- which is philosophically the way I approach it; and my response to a request, whether it's made under the current rules or just on the brief is, is oral argument going to help me decide this appeal; and in response to the litigants that appear at us or before our court, my question is how many results have been affected

by oral argument and isn't that kind of scary if you think that number is pretty high? Because if you think it's oral argument that is affecting it, that means it's something that happens on the day of submission, not something that you got to prepare for, brief for, and really, the fundamental difference between the appellate process and the trial process --

CHAIRMAN BABCOCK: You think it is high?

HONORABLE TOM GRAY: No, I think it's very low.

CHAIRMAN BABCOCK: That's conventional wisdom.

HONORABLE TOM GRAY: Yeah, I mean, I think the number of the results of appeals that are differentiated because of oral argument is extraordinarily low. I have no empirical data to support that, just anecdotal.

CHAIRMAN BABCOCK: But it does make the customers feel better, Kent's point.

HONORABLE SARAH DUNCAN: But --

HONORABLE TERRY JENNINGS: I agree with that --

HONORABLE TOM GRAY: Wait, wait, wait. I'm not done.

HONORABLE SARAH DUNCAN: Wait, yeah.

HONORABLE TOM GRAY: I'm not done.

CHAIRMAN BABCOCK: Sorry.

HONORABLE TOM GRAY: I want to add one other comment with regards specifically to the proposed text of the rule, and I know this is probably unintentional, but it would mean that a panel of three could prevent oral argument in an en banc review.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: I would like to respond. I agree with everything Chief Justice Gray has said, and I would like to respond specifically to Judge Sullivan's comment and the concept of the customer. I think everybody around this table should be very careful about how you define who the customer is.

I had people say I had constituents. In my view I had no constituents. We had a customer satisfaction survey done at the Fourth Court, and there was a level of dissatisfaction on oral argument. Well, I did not consider the lawyers to be the customers of the Fourth Court of Appeals. The customers of the Fourth Court of Appeals were the residents of the State of Texas. That's what the judicial system -- is the genesis of our state judicial system, and as I tried to tell lawyers, there is an inherent tension and always will be between getting oral argument in every case where one of the

lawyers wants oral argument and getting decisions out quickly.

At the Fourth Court we had an internal operating procedure that once a case was submitted a draft opinion would issue within three months, and when I left, every single person at the court was in compliance with that rule. I was always the late one, so nobody else at the court was late, but there is an incredible tension between those two goals, and I would hate to see oral argument granted in every single case because one lawyer wants to get board certified in civil appellate law than to have all the cases on the court's docket get decided in a timely manner, and that's what you-all are messing with here. That's what we're messing with.

CHAIRMAN BABCOCK: Frank. Quit messing with us.

MR. GILSTRAP: I think we've strayed too far into the area of philosophy. You know, yes --

HONORABLE SARAH DUNCAN: Well, it's not going your way, is it?

MR. GILSTRAP: Well, okay. But the problem is that, yes, the courts should have some discretion in granting oral argument, but apparently in some courts it's just gone too far. I mean, there's a court in the state of Texas that hears one oral argument a year, and that's

just not enough. Apparently there needs to be some way -- and there is apparently a lot of dissatisfaction among a lot of lawyers about this, you know, and yes, oral argument may not affect that many cases, but we can go too far there. I remember sitting in a seminar and a Fifth Circuit judge said telling me -- telling the audience that he didn't think the lawyers really made any difference in the outcome of a case. I swear that happened.

The point is this: It's gone too far. We need a rule that will curtail that. You know, a rule something like this will help. Maybe we can disagree on whether or not it should be unanimous or just two members of the panel, but this will help. Why don't we decide it and move on?

CHAIRMAN BABCOCK: Buddy.

MR. LOW: I just had a question so I'll know, were you talking about if one member -- it didn't have to be one member, it needs two members to vote in order to get oral argument? In other words, unanimous. It didn't have to be just one. One couldn't get it? You say it takes two?

HONORABLE TOM GRAY: As long as you're not talking about the procedure in my court.

MR. LOW: No. Well --

HONORABLE TOM GRAY: I mean, what I'm

talking about would be an appropriate process would be that a majority of the judges deciding the case -- because it may be an en banc decision such that a majority of the members of the court should decide.

MR. LOW: I'm not addressing the en banc, but I'm talking about just a three-member court like yours. The way the rule is, that if any one judge requests they get it, you would say it would be two, if two judges, majority. I just wanted to see what was the real difference in what you suggest and what's here.

CHAIRMAN BABCOCK: Skip.

MR. WATSON: This is real important to the few of us who make our living doing exactly this. Because that's the way I try to make a living, I ask judges when I have the chance "How do I do this better," you know, what makes a difference, not in a particular case, but just "What do you need from me that I'm not giving you or that I am giving you?" It was one of those conversations I had with a Fifth Circuit judge some years ago that was enlightening to me that creates what I think is a misconception of what the Federal rule does. I asked, "Since you're reading the briefs, you know, a month ahead of time to make the decision on whether to grant oral argument or whether it would contribute to the decisional process, why can't you send us a letter -- I mean, when

you send us the letter saying argument is granted saying 'It's granted on this one issue, focus on this, don't prepare on all eight issues. We're granting it for one purpose, to decide this, come prepared to speak on everything in the record and everything in the case law on this tiny point.'" That's what I need as an officer of the court to serve you.

The answer was, "Well, Skip, that's decided on the basis of a staff memo. We haven't read the briefs. You know, I'll read the briefs if I'm lucky the weekend before the appeal." You know --

HONORABLE TERRY JENNINGS: So they don't even follow their own rule, is what you're saying.

MR. WATSON: Surprise. I mean, that's the way it works, and that's the way -- I know you will read the briefs, but my earlier comment was I think -- I mean, I'm being very respectful in saying this, Justice Jennings, but I think this is very well-intentioned and that not all justices are necessarily as eager to read the briefs a month ahead of time as you are.

HONORABLE TERRY JENNINGS: It's a matter of conscience then. If one judge is going to read the briefs and make a decision that, you know what, argument would be helpful to me in this case, therefore, I vote for argument, and the other two judges decide not to read the

briefs and automatically knee-jerk say, "I vote to reject argument in this case," well, that's a matter of conscience, but at least you've gotten through to that one judge who is going to follow the rule and examine the briefs.

CHAIRMAN BABCOCK: Our three-judge panel of Justice Bland, Patterson, and Gaultney will speak in that order.

HONORABLE JANE BLAND: Okay. On the single judge versus the majority, the single judge works so much better because if we made this a majority it would be harder than what we have to do now. Because right now if the judge that initially looks at the case and has handled it, you know, in the presubmission stage decides there's argument, there's argument. He or she doesn't have to go find another vote, and, you know, it's just -- that's just another step in the process that we don't need, and all this rule is saying is if that judge at first pass says, "I don't think any argument," but one of the other judges looks at it and says, "Yeah, argument would help me," they can do the same thing. They can just put it on the argument calendar, and that's all we're talking about is putting it on the argument calendar.

As far as changing decisions, the decision-making process is collaborative at the appellate

level, so instead of the lawyers arguing and the judge deciding, you have the judges arguing with each other and then deciding, and I think it is helpful for the lawyers in a case to have at least a glimpse into that collaborative process and some ability to participate, and that's what oral argument provides. It may not change the outcome, but it allows the judges to test their various theories of the case with the lawyers' input.

And so I would propose -- I mean, I would vote for the rule that Justice Jennings proposes as it is, but I would not vote for it if it required a majority, because that would just require another vote, and I think it's -- I think we're better off with what we have now than we would if we incorporated something that would -- I think that would slow down the process if we had to get a majority.

CHAIRMAN BABCOCK: Justice Patterson, do you vote with Justice Bland or --

HONORABLE JAN PATTERSON: I do. I do.

CHAIRMAN BABCOCK: Okay. So it doesn't matter what Gaultney says?

HONORABLE JAN PATTERSON: I'm sure that --

HONORABLE DAVID GAULTNEY: But I do get oral argument.

HONORABLE JAN PATTERSON: I'm sure he

agrees. Remember how we got to this point. It was by adding the statement regarding oral argument, which originally I had opposed but I think is helpful to this process now because it is a shorthand way to make this decision, and it gives the judges some additional information. So having added the statement, I understand why the Fifth Circuit judge would say to hone it any finer requires so much more time, but I think this is probably a decision that's made by judges, by the way, in most of our courts, because it's a very important one. So I think by adding that statement that gets us there.

I don't think we have to get into the whole subject of and philosophy of oral argument today to address the importance of this rule, but I will add one other thing. With limited oral argument what you see is that the large cases get argued, in our court the administrative cases, the -- and the criminal cases suffer and the smaller family business cases suffer, so there are a lot of categories of cases that suffer under more limited oral argument.

I would say that this does not slow down the process, because the way it works in our court is that when the briefs first come in and you see on the briefs "request oral argument," that is when this would be circulated and a decision made about whether the judges

agree to oral argument. The way it's made now is that there's a default until a later time of submission so that if the other two judges, they've never seen the briefs or the opinion or anything about the case until some later date now, so the decision is defered now because the authoring judge makes the decision about oral argument initially. So to me this would speed up the process, and it would not allow people to -- you know, I can't imagine the slowing docket business down, but this would move it up front, and I think it would be transparent, and I support this rule.

CHAIRMAN BABCOCK: Justice Gaultney.

HONORABLE DAVID GAULTNEY: I support the proposal, too, and essentially it's the way our court works on this issue, and we're a small court, so, you know, applying the way we do it may not be appropriate throughout the state, but the system works, and we've done exactly what you suggested. So, for example, we take up oral argument review as part of our weekly conference, and if one judge wants oral argument, we set it. And we had a case, a criminal case, where there were 18 issues, you know, you know, excellent attorneys involved. We wanted argument on essentially three, and we told them that. So the rule, I think, can work.

As far as the comment that -- and I know

it's a drafting error that Tom is referring to. I think we could -- as far as en banc consideration, I think maybe it should read something like "After examination of the brief, the justices who will decide the case unanimously agree," but, you know, with that one clarification I support the rule.

CHAIRMAN BABCOCK: Okay. Justice Jennings. You know, they teach you when you're winning you ought to quit.

HONORABLE TERRY JENNINGS: Oh. May I just make two points for the record, and hopefully I won't blow it? In regard to this whole idea of delay, for example, and I'm going to pick on my court just because it's my court, and I can face my colleagues if I have to. We had -- for example, in 2005 we had 52 arguments. Now, we're a nine-member court. If each judge on our court -- you know, we do six cases a week basically. We set panels of three and each judge has two cases a week, generally speaking; but just on a nine-member court, if each judge on a panel set two arguments a month, two arguments a month; and now I'm starting to sound like Sally Struthers, but if we set two arguments a month times three judges, that would be six arguments per panel. Well, over ten months that we hear arguments that would be 180 arguments. So we would go from 52 arguments to 180 arguments. How

much time of the court would that take? If you're sitting in panels of three, two judges each, for one month, assuming 30-minute arguments, that would be three hours per panel. I have three hours to hear argument every month.

CHAIRMAN BABCOCK: You wrote this closing ahead of time, didn't you?

HONORABLE SARAH DUNCAN: That is not a fair assessment of how much time oral argument takes, Terry --

HONORABLE TERRY JENNINGS: Well --

HONORABLE SARAH DUNCAN: -- and you know it, because you've prepared for oral argument.

HONORABLE TERRY JENNINGS: Well, you prepare for your cases as well. I hate to do this, but I'm going to pull out John Marshall Harlan.

MR. GILSTRAP: All right. Go for it.

HONORABLE TERRY JENNINGS: And there is a --

CHAIRMAN BABCOCK: You did write this ahead of time.

HONORABLE TERRY JENNINGS: There is a philosophical difference -- and I'm going to shut up after this. This is John Marshall Harlan, II. "I think that there is some tendency to regard the oral arguments as little more than a traditionally tolerated part of the appellate process. The view is widespread that when a

court comes to the hard business of a decision it is the briefs and not the oral arguments which count. I think that view is a greatly mistaken one," and he lists a number of reasons why, and the final reason is the most important. "The most important reason that that concept is wrong is the job of the courts is not merely one of an umpire in disputes between the litigants. Their job is to search out the truth, both as to the facts and the law, and that is ultimately the job of the lawyers, too."

So the point is, as Kent Sullivan was saying, the lawyers have a say in this, and the only way to get that interaction -- and, yes, a judge's mind may or may not be changed, but argument may be helpful if for no other reason, it increases your comfort level with your decision. It doesn't have to necessarily change your mind but increase your comfort level, but the point is, is you're either going to have a right to oral argument in this state or you're not. There's one philosophy that says, no, you don't have a right to oral argument. The presumption is, is you have to tell me why you have to have an argument, but the way the rule is titled, "Right to Argument," unless we want to change that title, you know, we ought to have good reasons for denying that right.

CHAIRMAN BABCOCK: Okay. Rebuttal?

HONORABLE SARAH DUNCAN: I just want to say a couple of things. If anybody around this table thinks that this iteration of the rule is going to change the number of oral arguments, I think you're, again, being very naive.

CHAIRMAN BABCOCK: You think it will or won't?

HONORABLE SARAH DUNCAN: I think it absolutely will not. I mean, in a court that's down to four oral arguments maybe this will make a point with some of those judges that they ought to hear more arguments. For those courts like the Fourth Court that if one judge requests oral argument it's going to get granted and the court really tries to follow the "significantly aided" language, no, I don't think it's going to change the number of oral arguments at all.

I would like to change the title, because I don't think there is a right to oral argument, and what I'd like to change is the time limits on oral argument. If the case is worth being argued, was always what I -- and I didn't win this one at the Fourth Court -- then let's have something more than a token 20 minutes. Let's really get into it, but nobody wanted to do that. That's why I think this is all political. It's all political. It's a function of having elected judges, and I think it's

very unfortunate.

CHAIRMAN BABCOCK: Okay. Stephen.

HONORABLE STEPHEN YELENOSKY: Well, I was going to let this drop, but because Justice Jennings brought it up, I don't think your proposal establishes a right to oral argument, either. It establishes the right on the part of any one court of appeals judge to impose or require oral argument. The litigant has no right whatsoever. There is nothing reviewable about the decision of three judges to forego it, so let's be honest. The moment 39.8 was put in, the right to oral argument went away.

HONORABLE SARAH DUNCAN: (Applauding)

CHAIRMAN BABCOCK: With applause. Okay. We're going to vote on this. And we're going to vote on the rule, and Jody is going to fix collapsing (a) into (b) if the vote's in favor, if we vote in favor, and he'll work on the en banc thing, I'm sure.

So everybody, with those two caveats, everybody who is in favor of rule -- the proposed Rule 39.1, raise your hand. Carlos you up or down?

MR. LOPEZ: I couldn't tell which one was which.

CHAIRMAN BABCOCK: Okay. All those opposed? Sarah gets two votes because she feels strongly.

By a vote of 22 to 4 -- 5 if Sarah gets two votes -- the Chair not voting, it passes, so let's go on to 41, I think, Sarah. Is that next?

HONORABLE SARAH DUNCAN: Yeah. This one, I think the controversy is over.

CHAIRMAN BABCOCK: Yeah, that's what we thought about the last one.

HONORABLE SARAH DUNCAN: But I sure wouldn't guarantee it at this point. All the subcommittee was trying to do on motions for rehearing -- there are two points. In 41, we're just trying to get the language right about who the Chief Justice of the Supreme Court can appoint to decide if two remaining judges on a panel or a court sitting en banc is unable to reach a decision. There are two alternatives, maybe we should just vote on the alternatives.

The first is an "active court of appeals justice from another court of appeals, a qualified retired or former appellate justice or appellate judge, or a qualified active district court judge." That's option one.

Option two is "an active court of appeals justice from another court of appeals, a retired or former appellate justice or appellate judge," note that "qualified" isn't in there, "or an active district judge"

-- "district court judge to sit on the panel to consider the case as provided in Chapter 74 and 75 of the Government Code." That's option two.

My concern with option two is a not well-researched concern that there are provisions other than in Chapter 74 and 75 of the Government Code for appointing a tie-breaking judge. Does anybody else have any knowledge about that?

HONORABLE TOM GRAY: You asked if there were other provisions than this rule for appointment of a tie-breaking judge?

HONORABLE SARAH DUNCAN: Constitutional or statutory.

CHAIRMAN BABCOCK: Yeah, other than 74 or 75 of the Government Code.

HONORABLE SARAH DUNCAN: Uh-huh.

CHAIRMAN BABCOCK: Other than Chapter 74 or 75 of the Government Code.

HONORABLE STEPHEN YELENOSKY: Why can't you just say "where provided by law"? Maybe there will be in the future.

CHAIRMAN BABCOCK: Yeah.

HONORABLE SARAH DUNCAN: Yeah. If not now then maybe in the future.

HONORABLE STEPHEN YELENOSKY: I mean,

whenever you put a statute in the rules you risk that problem.

HONORABLE SARAH DUNCAN: It just seems like there is something for a particular type of case out there.

CHAIRMAN BABCOCK: Well, wasn't a private attorney once appointed by the Governor to sit on the Supreme Court? Wasn't it Tom Luce?

MR. HAMILTON: Woodmen of the World.

HONORABLE NATHAN HECHT: Yeah.

CHAIRMAN BABCOCK: So how did that happen?

HONORABLE TOM GRAY: Well, there's a --

HONORABLE NATHAN HECHT: I don't know.

HONORABLE TOM GRAY: There is a difference in the power of appointment and where it rests, depending on whether or not the issue is recusal or disqualification; and there is a view that it depends on whether or not a majority of the court, I believe it is, whether or not they are disqualified; and in that case, for example, if there were two members of our court that were disqualified, the decision and the appointments would be by the Governor.

HONORABLE SARAH DUNCAN: That's what's been concerning me.

HONORABLE TOM GRAY: And if there is only a

recusal of two then that is filled by the Chief Justice, and so there's some -- there are some issues there, but having examined those rather closely, I don't know that that would impact what we're trying to do here. There's a lot of other --

HONORABLE SARAH DUNCAN: No, this limits it to appointments by the Chief Justice.

HONORABLE TOM GRAY: I'm not sure that we by rule can modify that problem or address that problem that's created by the constitution in the -- when the issue is disqualification of a majority of the members of a court.

HONORABLE SARAH DUNCAN: Does somebody remember, anybody, this has not been a problem, has it? Why are we even messing with this?

MR. HUGHES: The whole genesis of this was the addition of the active district court judge because that was new from the Legislature, and so -- and as part of doing that we then realized that the language in the existing language was actually inconsistent. In some of the provisions it says "qualified" and some of them it doesn't. Then there were people who were -- introduced the idea of, well, the rule should reference the statutory provision, but the response to that was, well, it's generally that it's the Chief Justice making this and as

long as the Chief Justice is aware of the -- he doesn't need to be reminded that it's Chapter 74 and 75 or elsewhere, but that was where it came from.

CHAIRMAN BABCOCK: Justice Gaultney.

HONORABLE DAVID GAULTNEY: I think, Jody, am I correct, that really the choice is between using the word "qualified," which some members of the committee thought was ambiguous, what does that mean, or use -- referencing the exact statutes that would provide the qualification, provide the statutory authorization, so the people who thought that "qualified" was fine thought, well, whoever is going to be doing the appointment will know what the requirements are, so we really don't need to spell it out. The people who were troubled by the use of the word "qualified" wanted more specificity. I think that was the distinction, right?

MR. HUGHES: That's a better arcticulation.

HONORABLE TERRY JENNINGS: I don't know if this -- I can't seem to remember. I thought Bill was concerned about the idea of the individuals affected by this, that they would know what they were dealing with, the litigants.

HONORABLE SARAH DUNCAN: I think I'd like to propose an alternative view, and that is that we just put "active district court judge" in here and not mess with

the rest of it.

CHAIRMAN BABCOCK: Forget about everything else?

MR. LOW: That we include what, Sarah?

HONORABLE SARAH DUNCAN: That we just -- if the problem we're trying to address was that the Legislature has said that an active district court judge can now be appointed --

MR. LOW: Uh-huh.

HONORABLE SARAH DUNCAN: -- to hear a case in an appellate court, then given that the rest of the language hasn't caused a problem up till now, that that's all we do.

CHAIRMAN BABCOCK: What do you think, Jody?

MR. HUGHES: The only -- I think that's a good idea except I would say that 41 is currently -- the word "qualified" appears in subsection (a). Let me get it in front of me. It appears in one of the two provisions and not the other one. I don't think there's any -- we were just trying to make it consistent.

HONORABLE SARAH DUNCAN: But that's part of what I'm saying, is that hasn't caused a problem, right?

MR. HUGHES: Not that I know of, but I don't know -- I mean, I'm not sure what would be the problem of just making it consistent, either taking "qualified"

completely out of both of it or putting it in both. It just seems to me if we're going to take the trouble to fix the rule at this point, it should probably be consistent, but I agree that it's not causing --

CHAIRMAN BABCOCK: So there are two things, make "qualified" consistent throughout the rule or not, either leave it in or take it out, and two, add "active district court judge"; is that right? Those are the two changes that the rule needs, right?

HONORABLE SARAH DUNCAN: We could actually not -- instead of putting "qualified" in the other one we could take "qualified" out of the one.

CHAIRMAN BABCOCK: Right. Right.

HONORABLE SARAH DUNCAN: Two ways of making it consistent.

CHAIRMAN BABCOCK: Anybody got any preference? Buddy.

MR. LOW: No, I'm ready to vote. I'm voting, and you haven't even called for a vote.

CHAIRMAN BABCOCK: You feel strongly both ways.

MR. LOW: I'm voting.

CHAIRMAN BABCOCK: Well, it seems to me redundant to say "qualified." I mean, what's the chief going to do, appoint an unqualified person?

MR. HUGHES: The rule can't give -- is not trumping the statutory at all.

HONORABLE SARAH DUNCAN: Right. That's my point about taking it out.

CHAIRMAN BABCOCK: Yeah, so take it out and put "active district judge" in. Richard.

MR. MUNZINGER: Is "eligible" a satisfactory substitute for "qualified"? Does that help solve the problem?

HONORABLE SARAH DUNCAN: That's the same problem. Why do we need it at all? The Chief Justice is going to appoint from a list.

MR. WATSON: We need to take "qualified" out of the other one so people can argue, okay, now he can appoint an unqualified, that was the reason they took it out.

CHAIRMAN BABCOCK: Yeah, they took it out.

HONORABLE SARAH DUNCAN: Skip is saying exactly, exactly, why I don't want to change what doesn't need to be changed, because he will make this argument.

MR. WATSON: I didn't mean to set her off.

HONORABLE SARAH DUNCAN: And Terry will accept it.

CHAIRMAN BABCOCK: Anybody --

HONORABLE SARAH DUNCAN: And we're laughing

on the record.

CHAIRMAN BABCOCK: Anybody feel strongly about "qualified" or Richard's substitute "eligible," anybody feel strongly about that one way or the other?

HONORABLE TERRY JENNINGS: Just one caveat. I think Bill's point --

CHAIRMAN BABCOCK: You do know you won the last one?

HONORABLE TERRY JENNINGS: I know. Bill's not here, but I think Bill's point was, well, this would educate the litigants so that if a mistake were made it would refer them to a place where they could make the appropriate challenge.

CHAIRMAN BABCOCK: But Sarah's point, which is well-taken, is that, hey, there may be something else that it may change. That's what Judge Yelenosky said, so --

HONORABLE SARAH DUNCAN: Well, and further, the Chief Justice doesn't make mistakes.

CHAIRMAN BABCOCK: Good point.

HONORABLE SARAH DUNCAN: Not this one or any other one.

HONORABLE TERRY JENNINGS: Now who's being political.

CHAIRMAN BABCOCK: Okay. Let's go to 49.

HONORABLE SARAH DUNCAN: Okay. Against my recommendation, on this one what the subcommittee is trying to do is eradicate the further motion for rehearing, although it left it in the title, so you might want to -- to help you understand what the subcommittee is trying to do, take out "further motion" in the title of the rule.

MR. HUGHES: We took it out.

HONORABLE SARAH DUNCAN: Huh?

MR. HUGHES: It is out in here, isn't it?

HONORABLE SARAH DUNCAN: On page 12, Rule 49?

CHAIRMAN BABCOCK: No. It's not in the draft we have, Jody.

HONORABLE SARAH DUNCAN: The title of the rule.

HONORABLE STEPHEN YELENOSKY: It's in my draft.

HONORABLE NATHAN HECHT: We've got a secret draft.

CHAIRMAN BABCOCK: Yeah, they have a secret draft.

HONORABLE SARAH DUNCAN: Oh, well, I didn't get the secret draft, so I'll let Jody talk.

MR. HUGHES: No, I'm sorry. I just --

HONORABLE SARAH DUNCAN: No, go ahead. You have the secret draft. Go for it.

MR. HUGHES: Hopefully the draft isn't different, but I guess it is. It's just consolidating -- the procedure is the same, but the problem is throughout Rule 49 there are some references to motion for rehearing that appear to implicitly include further motions, and there are other places where further motion is separately referenced, which kind of makes it hard to understand if you're looking through the rule which ones we're really talking about to include further motions and which ones are not, so Bill had the idea of getting rid of the language "further motion for rehearing" in 49.5, moving the procedure for filing a further motion into Rule 49.1 and then just making it -- collapsing it and making it clear that it's just a new -- it's just a different motion for rehearing under limited circumstances.

HONORABLE SARAH DUNCAN: Instead of a further motion for rehearing -- you've got to be quick to catch this -- it's another motion for rehearing.

MR. HUGHES: Yes.

CHAIRMAN BABCOCK: Okay.

HONORABLE SARAH DUNCAN: And it also treats a motion for reconsideration en banc like a motion for rehearing and collapses 49, and is that 51? 53? 53, I

think. Because if you'll look at the bottom of page 13, subsection 49 -- new subsection 49.6 is entitled "En Banc Reconsideration," and onto page 14 it's moving the en banc into the motion for rehearing rule. And I think part of the thought here was that we -- part of this comes from the plenary power rule and part of it comes from the motion for rehearing that overlaps with the Supreme Court's jurisdiction.

CHAIRMAN BABCOCK: In 53.7(b)?

MR. HUGHES: Right.

HONORABLE SARAH DUNCAN: That's where it comes from, right.

CHAIRMAN BABCOCK: All right. Do we have discussion on the changes to 49.1, 2, 3, 4, and 5? Anybody?

HONORABLE SARAH DUNCAN: See, this isn't as sexy as oral argument.

CHAIRMAN BABCOCK: No. You called this one. All right. Any -- there is no discussion. Any problems with doing what the subcommittee proposes? Seeing no dissent, then it passes by acclamation.

HONORABLE SARAH DUNCAN: And that would, as far as I know, conclude the subcommittee's report.

CHAIRMAN BABCOCK: Man, are you good. Well, that's great. Then we move on to the next agenda item,

which Gilstrap and Judge Lawrence have, which is the proposed amendment to rule --

HONORABLE SARAH DUNCAN: Oh, I'm sorry. I'm sorry. There are a couple of more things. I just looked at my notes. I think the original petitions we did last time, didn't we?

MR. HUGHES: And it was sort of -- it was a vote for it -- you're talking about the verification thing?

HONORABLE SARAH DUNCAN: Uh-huh. Uh-huh.

MR. HUGHES: There was a reversal in the Duncan/Baron --

HONORABLE SARAH DUNCAN: We lost.

MR. HUGHES: No, it won and then --

HONORABLE SARAH DUNCAN: We lost on the reversal.

MR. HUGHES: And then there was a vote to not change the rule, period, so that's where it stands.

HONORABLE SARAH DUNCAN: Big mistake. Big mistake.

MR. HUGHES: 53.2 is new, though, since last time.

HONORABLE SARAH DUNCAN: Yeah.

CHAIRMAN BABCOCK: 53.2? Okay. I don't see that on my --

HONORABLE SARAH DUNCAN: 53.2 in my mind is part of the motion for rehearing rule.

MR. HUGHES: Okay.

HONORABLE SARAH DUNCAN: If a motion for rehearing is pending in a court of appeals at the time a petition for review is filed in the Supreme Court, you need to include that in your statement of the case.

CHAIRMAN BABCOCK: Yeah.

HONORABLE SARAH DUNCAN: And I guess I --

CHAIRMAN BABCOCK: Okay. Any discussion on that? 53.2, subpart (9), subpart (d)(9).

HONORABLE SARAH DUNCAN: There is one other maybe more difficult problem that we might could get a straw vote on.

CHAIRMAN BABCOCK: Okay.

HONORABLE SARAH DUNCAN: We talked at the last meeting about using initials in cases involving termination of parental rights rather than the names of the children, and Jody had made a fine proposal on this, but I think some people, including Bill, have decided it's really more complicated than that proposal encompasses, and I think part of the reason Bill thinks it's more complicated is that in his mind using initials rather than names is not restricted to opinions.

CHAIRMAN BABCOCK: Not restricted to what?

HONORABLE SARAH DUNCAN: Opinions. That it would be a pervasive requirement to use initials. I guess the reason in my simplistic mind it wasn't all that complicated is I was only thinking of opinions that would be more available for public view. Do other members of the committee -- did they have a view of when we were going to require litigants to use initials versus names of children when we were talking about terminating parental rights?

CHAIRMAN BABCOCK: Sarah, what rule are we talking about?

HONORABLE SARAH DUNCAN: We're not talking about a rule.

MR. HUGHES: There isn't one, is part of the problem.

HONORABLE SARAH DUNCAN: That's part of the problem.

CHAIRMAN BABCOCK: Was that part of the charge?

HONORABLE SARAH DUNCAN: Yeah. That's part of Justice Hecht's letter.

CHAIRMAN BABCOCK: Which letter is that?

MR. HUGHES: I think it was the February. It was either February or March.

HONORABLE SARAH DUNCAN: From my

perspective, I have not perceived that there was a problem with strangers to the case going into a court and looking at the court's paper file to find out the names of these children. It's certainly possible, and with our work on the internet, the dumping of all of these case files onto the internet, it's going to be more and more possible.

MR. LOW: Sarah, did we discuss that when we were sometime back discussing a sheet of confidential information? Was that one of the things? I know it was driver's license, Social Security, and did we discuss children's names in connection with that?

HONORABLE SARAH DUNCAN: We did in the context of the dumping of the files onto the internet.

MR. LOW: Right. So --

HONORABLE SARAH DUNCAN: The public access. I remember Bonnie raising it, I believe, in one of our marathon conference calls, and maybe that's why I was thinking we were just talking about opinions. I don't know. But --

MR. LOW: I think we did, but what we did was -- the sheet was called confidential information sheet.

CHAIRMAN BABCOCK: Sensitive information. That's the electronic access rules.

MR. LOW: Was it?

HONORABLE SARAH DUNCAN: Right.

CHAIRMAN BABCOCK: We talked about that a lot. This rule, though --

HONORABLE SARAH DUNCAN: Jody is shaking his head, which worries me.

MR. HUGHES: Well, I think it's the -- go ahead.

CHAIRMAN BABCOCK: This rule, which I've now located, was part of the February 5th, 2007, referral. It was not on the agenda today for some reason. Jody, was it --

MR. HUGHES: It wasn't because, as Sarah said, Bill had asked me to do up a draft on it. I did a draft, sent it to him, and I don't think he liked it, and so -- and his comment to me -- and he may have had other concerns, too -- was there wasn't -- I couldn't find a place to put it under one single rule, and so I tried to put it under each, under 38 for courts of appeals, for the briefs under 53, for the Supreme Court under Rule 52 for original proceedings, and they all kind of looked the same.

And I agree it's awkward to do it in different places. I just couldn't -- looking through the index, couldn't find a single place where there was an empty rule vacancy, particularly in the general rules at

the beginning, to say any time you mention minors' names you need to put their initials. And then I started wondering, well, if the parents' names are known and the kids are LBN and ABC, it's not going to be too hard to figure out who they are anyway to the extent anybody cares, but --

CHAIRMAN BABCOCK: Yeah. I mean, you can find out some of these kids like that if you want to.

MR. HUGHES: Particularly when the parents' last name is in the --

CHAIRMAN BABCOCK: Exactly.

HONORABLE STEPHEN YELENOSKY: If the last name is something like Yelenosky, not going to be too many of those.

CHAIRMAN BABCOCK: Sarah, we can talk about it some more. Do you think --

HONORABLE SARAH DUNCAN: Well, just a straw vote. Do people want to propose a rule that encompasses all phases of the proceeding; and that would be a series, I think, at least a series of rules between the Rules of Civil Procedure and the Rules of Appellate Procedure? Do you want to restrict it to the Rules of Appellate Procedure; and if so, do you want it just to cover opinions or do you want it to cover anything that's filed in the appellate court?

I mean, I think what Bill is struggling with is this could pervade the entire judicial process. Isn't that your feeling?

MR. HUGHES: And that was I guess one reason at least doing it at the appellate level may not address the full problem, but it's easier in the sense that if you do it at the trial level you're really restricting what people are actually filing, which kind of goes more to the sensitive data rule, which may eventually -- you know, that could be part of that, but --

CHAIRMAN BABCOCK: The letter from Justice Hecht says --

MR. LOW: There is no Family Code provision dealing with it?

HONORABLE SARAH DUNCAN: There is a Family Code provision, if I remember correctly, that expresses -- I'm looking at Terry and David and Jane and Jan. Isn't there a Family Code provision that expresses a preference for using initials?

HONORABLE JAN PATTERSON: There is.

HONORABLE SARAH DUNCAN: I tried to follow it, but I know there are a lot of opinions that doesn't.

HONORABLE JAN PATTERSON: There is, and it's not going to come to me right now. I think we've got two categories of topics. One is the whole sensitive data,

which opens up kind of data search files and court files and all that, which is very difficult and something that I think is much simpler, and that is our request to avoid these being searchable on any computer like Lexis. And so to the extent victims of crimes or children can be referred to by initial -- and Jody's right, to some extent you're going to know who they are, but they're still not necessarily searchable, and it is protection of some degree, so I think that's a more limited issue and is easier to deal with.

HONORABLE SARAH DUNCAN: So you're suggesting that we just do an opinion rule, put it in the opinion rule?

HONORABLE JAN PATTERSON: I think initially we were talking about an opinion rule just so that we don't contribute to the naming of these people on worldwide computer information, which is what Lexis and Westlaw do. I think that's a -- an initial concern and a big one, I think, a significant one.

CHAIRMAN BABCOCK: Yeah, just reading this synopsis of the issue, it's a pretty big issue. I wouldn't feel qualified to vote right now without talking about it.

HONORABLE JAN PATTERSON: It is a big issue.

CHAIRMAN BABCOCK: So why don't we put it on

the agenda for next time? But, Sarah, anybody else want to talk about any more right now?

MR. JACKSON: Are we going even as far as the reporter's record?

CHAIRMAN BABCOCK: That's not what this charge had to do. Do with, I should say.

HONORABLE SARAH DUNCAN: So you're saying you don't even want to do a straw vote on whether it's going to be limited to the opinion, as Justice Patterson says, or whether it's going to extend throughout some part of the process?

CHAIRMAN BABCOCK: Well, Justice Hecht asked us to look at whether the appellate rules should include a provision that requires parties in parental rights termination cases to identify minor children only by their initials, and that would allow courts to strike any appendices or exhibits containing minors' names, so that strikes me as broader than opinions.

HONORABLE SARAH DUNCAN: Yeah. Me, too. Sorry.

HONORABLE NATHAN HECHT: And it overlaps the sensitive data rule, the Rule 15, which we haven't decided whether to make minors' names sensitive data or not, and the inclination is to do so, but still not sure what effect that has on all these different kinds of cases.

MR. JACKSON: Didn't we have a little bit of this debate in the parental notification rule?

CHAIRMAN BABCOCK: Well, yeah, but we were hamstrung there by the Legislature --

MR. JACKSON: Right.

CHAIRMAN BABCOCK: -- which voted to not permit anybody's names, including the judge who decided the case to be released, which I had a problem with, but the Legislature got elected, and I didn't. Yeah, Sarah.

HONORABLE SARAH DUNCAN: Did we adopt a sealing rule for the appellate courts?

HONORABLE STEPHEN YELENOSKY: What?

HONORABLE SARAH DUNCAN: I know we worked on one, but did we adopt it?

CHAIRMAN BABCOCK: No. No, I don't think so.

MR. HUGHES: That was actually referred recently, also.

CHAIRMAN BABCOCK: Yeah. Okay. Anything else? Sarah?

HONORABLE SARAH DUNCAN: Not from me, not from us.

CHAIRMAN BABCOCK: So your prediction of 20 to 30 minutes --

HONORABLE SARAH DUNCAN: Fell by the

wayside, huh?

CHAIRMAN BABCOCK: All right. Now, let's go to Gilstrap and Judge Lawrence.

MR. GILSTRAP: All right. Once upon a time all writs, processes, citations, and the such were served by the sheriff or constable, and there was a lot of statutory law back before the rules were adopted that incorporated this and expressly referenced the sheriff or constable. This language was all brought forward into the rules back when they were adopted in 1941, particularly back in part six, which deals with ancillary proceeding. It shot through with reference to the sheriff or constable serving writs and that type of thing.

In the first part of the rules this appeared in two places. Rule 103 said, "Citation and other notices may be served anywhere by any sheriff or constable," dealt with citation and notices, and then Rule 15 said -- dealt with all writs and processes and it said that "unless otherwise specially provided by the law or these rules, every such writ and process shall be directed to any sheriff and any constable" and then other rules said the sheriff and constable should serve it.

Then in the 1980's we began to see private process servers, and there was a long battle there. I'm going to go back and read a case that Bill Dorsaneo came

up with, Lawyers Civil Process, Inc. against Vines, 690 S.W.2d 939. That will give you some of the background, and so in 1988 Rule 103 was amended, and it said, "citation and other notices shall be served by any sheriff or constable" and then it said, "or a person appointed by court order." So we began to see the process of having private process servers appointed by the court. You would go down, you would get your order to the court, "I want this served privately." The judge would sign it. You would have a process server sign it.

Then this got to be a business, and there was activity in the Legislature, a certain turf war between the private process servers and sheriffs or constables, still going on; and in 2005 the rule, Rule 103, was amended by the Court after this committee discussed it; and it presently reads "process, including citation and other notices, writs, orders, and other papers, shall be served by any person authorized by law or any person certified by the Supreme Court" under the new program that was installed at that time, and it had an exception. "Unless otherwise authorized by written court order, only a sheriff or constable may serve a citation in an action of forcible entry and detainer; a writ that requires the actual taking of possession of a person, property, or thing; or process requiring that an

enforcement action be physically enforced by the person delivering the process." This was important because it -- the amendment to Rule 103 was important because it allowed the service of writs.

Now, basically if you'll recall, a writ is something more than notice. A writ is an order of the court, and there is basically two types of writs. One type of writ we're all familiar with was where you tell the sheriff to go out and seize property, like a sequestration or an attachment, but there is other types of writs like an injunction or a garnishment that when served upon the recipient direct the person not to do something. When a bank is garnished, it is directed not to let the funds go, so it is under a court order, so that's kind of an important distinction, but clearly the call was made back in '05 that all writs and orders and citations could be served, except in these cases that were carved out.

Now, more recently, apparently a controversy has arisen over the writ of garnishment. The writ of garnishment is clearly a writ within Rule 103, but it doesn't require the taking of property. It just requires a person not to let go of the property, and I just learned that writ of garnishment is used for something more than money. It can be used to garnish property. Again, the

recipient of the writ of garnishment can't let the property go, although in almost all cases it's used merely to trap money. So a proposal came and, as I understand, it originated with a query from Carl Weeks with the private process servers about whether or not the writ of garnishment could be served by a private process server.

Now, remember, in garnishment there is a twofold procedure. First of all, you have the writ issue, and it's served on the bank, and that traps the money. Then you have citation issued, and it's served on the debtor, and if you're the creditor, you want to have the bank served first obviously so the debtor won't go jerk the money out of the bank. That question arose, and it was sent to the subcommittee that deals with Rule 103, which Richard heads, and we conferred with it, I think mainly by e-mail. We didn't have a big turnout. Richard is having a seminar. He asked me to present this. It didn't seem like a controversial item, and basically everyone kind of said, "Well, gee, I mean, there's no process being -- there is no property being seized, it's a simple matter, let's go ahead and report it on favorably to the full committee," and he asked me to do it.

I started thinking, I said, you know, this really falls within the bailiwick -- could fall within the bailiwick of Judge Lawrence because he deals with part

six, which deals with all the writs, attachment, that type thing, garnishment. So I kicked it over to him. He then I think circulated it and got some response from the constables. There is a very interesting exchange in here between Carl Weeks and Ron Hickman, and you can read that. There are some issues involved that I wasn't understanding, and I think Judge Lawrence can help us on this.

However, my feeling is -- and again, we didn't have a large turnout on this, my feeling is if we change this I don't know that we should do it merely by amending Rule 103 to say, hey, this includes garnishments, too. There's just -- there's just so much language back in the garnishment rules that expressly speaks to the sheriff or constable that we probably need to change that language; and, yes, it does raise the question of do you change the language involving an eviction or the language involving an injunction; but there are problems here. All of the rules, 66 -- let's see, I think it's 661, 662, 663, and 664 talk about the sheriff or constable levying the writ of garnishment; and so I think we need to decide, first of all, if we want to make it clear that a private process server can serve or execute a writ of garnishment, as it's called in the rules; and secondly, to do that, do we just want to -- if we want to do something, do we

simply want to tinker with Rule 103 or do we want to go in and try to address the garnishment rules? And with that I think I'll pass it on to Tom Lawrence because that's his bailiwick.

CHAIRMAN BABCOCK: Gotcha. Thanks, Frank.

HONORABLE TOM LAWRENCE: Well, the threshold issue under 103 -- and when I say 103 I also mean Rule 536, 536 being the service rule for the justice courts, but the rules are written identically. The threshold is whether or not the writ will require the actual taking of possession of a person, property, or thing. If it does require it, then a private process server under 103 would not be able to serve it. If it does not then presumably they could, but that's not the only rule you have to look at, because we've got a lot of other rules, and I really want to -- I think we need to discuss this in the context of some of the other writs because it's not just the garnishment issue. There's more to it than that, I think.

There's three categories. One is what can a private process server serve, and that clearly is citations, other notices, orders, and other papers. Second category is what can a process server not serve. Evictions, that's clearly excluded in 103; writs of attachment, sequestration, and execution, because those do require the immediate taking of persons or property; and

writs of possession, which are really not within our bailiwick because a writ of possession, which is the writ that's issued to physically evict somebody, is actually in the Texas Property Code, and the Legislature has already decided that an officer or sheriff or constable needs to serve that.

Now, what is unclear, perhaps, is writs of garhishment or injunction. No immediate taking of property or person, but in a garnishment the bank account is frozen; and after the trial if it's found that the judgment debtor is the person that owns that account then it is going to be taken; and an injunction, of course, doesn't lead to anything immediate, but one of the next steps could be contempt of the person. Citation and eviction, although 103 requires a sheriff or constable to serve that, it really is not a citation that requires the immediate taking of a person, property, or a thing. So if you look at the broad threshold, the bright line between what a private process server can and can't serve, then you would presume that a private process server could serve an eviction, citation, not the writ of possession. We have that as clearly excluded in the rule for whatever the reason the Court did that.

The letter from Justice Hecht references an inquiry from Carl Weeks, who is a private process server,

and asking really why a private process server can't serve garnishment since it doesn't require the immediate taking. Well, 103 would presume to allow it, but then you've got Rule 15, and Rule 15 says that "all writs of process shall be directed to any sheriff and constable." Then the specific garnishment rules -- and correct me if I'm wrong, but it's always been my impression that if you have a specific rule that applies to something, that that would generally take precedence over some general rule. Is that -- I've always understood that to be the rule, so Rule 662 in the garnishment rules -- and there are two different things that are served. One is the writ of garnishment itself which is served on the bank, and the other is the notice of the writ, the citation, which is served on the defendant.

Now, under the current rules, the citation actually can be served -- and that's Rule 663a, "The defendant shall be served in any manner prescribed for service of citation or as provided in Rule 21a." So presumably the citation of garnishment could be served by a private process server, but Rule 662 says that "the writ of garnishment shall be dated and may be delivered to the sheriff or constable by the officer who issued it." Rule 663 says that "the sheriff or constable receiving the writ of garnishment shall immediately proceed to execute." So

there is clear language in the garnishment rules themselves that talk in terms of sheriff or constable.

There also could be a question as to -- I guess if you consider that a garnishment is not the immediate taking of property, and if that's the justification or termination then I guess you would say that a garnishment could be served by a process server, but I think you would have to change the other rules in the garnishment section. If you consider that while it's not an immediate taking, it's certainly something that's going to happen pretty quick, as soon as it's determined that the bank account is owned by the -- and you may decide that it is -- if not an immediate taking it's something that's going to be taken.

So the question is which rule prevails? Is it Rule 15, which says that all writs are directed to the sheriff and constable? Is it Rule 103, which we've talked about? 662 and 663, which say only sheriff or constable? Carl Weeks' response, he sent an e-mail to Jody, and his response is that he considered Rule 663 to be archaic, and therefore, basically it should not be given any credence because 103 would have done away with that. God knows if we're going to do away with all the archaic rules that we've got we've got a lot to look at, but that was his theory on that.

The rules can be written really to accomplish either result. It's a very simple fix. It's just a matter of policy as to what you want to do. Carl Weeks also cited a case, and there really haven't been any cases on this issue. All the cases that talk about who serves garnishment that I've been able to find or anybody has mentioned are before the change in the rules in 205, they all clearly say the sheriff or constable serves the garnishment. There are no dissents on that that I ever saw, but there was a case out of a County Court at Law No. 4 in Dallas, and in that County Court at Law case it was a garnishment case, and that County Court at Law judge said that a private process server could serve a garnishment and cited two things. One, the change in Rule 103, and the justification was that it was not an immediate taking of property, and, two, cited the ultimate authority of the deliberations of this committee and went back and enclosed a transcript where he says that in January of 2005 when we discussed this at some length that we declined to remove the writs.

Well, I went back and read word for word that, and that's not what it says at all. In fact, generally the comments say that we should remove the writs from 103, but we didn't take a vote on that, and so --

HONORABLE STEPHEN YELENOSKY: And since when

is anything we say here authoritative?

HONORABLE TOM LAWRENCE: Well, I mean, I was impressed that our statements were even cited. And injunction presents a similar issue. Although the private process servers are not today asking that they be able to serve injunctions, you really have the same conflict. An injunction is not something that's going to result in an immediate taking of person, property, or thing. You've got the conflict between Rule 15 and 103. Rule 686 says, "The citation shall be served and returned in like manner as ordinary citations issued from said court," so presumably a process server could serve that. 688 says, "The clerk shall issue the TRO or temporary injunction and deliver the same to sheriff or constable." 689 says, "The officer receiving the writ shall execute and return it to the court."

Again, it's a policy question. We don't really have to decide that, but if the logical distinction is the immediate taking then that's something that logically we would want to address. Now, the service of citation in an eviction, again, doesn't necessitate the immediate taking. Nothing happens. It's just a citation in a lawsuit. It's an eviction, which has expedited time schedules. A few years ago when we looked at the eviction rules and we sent up to the Court some proposals to change

the eviction rules, this was one of the things that the committee recommended, is that private process servers be allowed to serve evictions. The Court hasn't acted on that and, of course, 103 specifically excludes it, but it may be something that we would want to talk about.

HONORABLE STEPHEN YELENOSKY: Didn't you say that was by statute, though, the citation?

HONORABLE TOM LAWRENCE: No, the citation is under the rules. The writ of possession for the move out is by statute under the Property Code.

And there's another -- another issue that we may want to address even, if we don't do anything about the question of garnishment, and that is the conflicts with the particular rules and the language. You've got the obvious conflict with Rule 15 and 103. You've also got in part six, which of the service rules for garnishsment, attachment, sequestration, injunctions, exclusions, trial over right of property, you've got the term "sheriff and constable" used interchangeably with the term "officer." Now, sheriff and constable is pretty easy. I don't think there is much discussion about what that means, but an "officer" certainly has broader implications. That could be a municipal officer, police officer, DPS trooper, Texas Ranger. There are a lot of people that are considered officers that may not be

sheriff or constable. So do we want to go back and try to clean up some of that language?

In the service rules for executions and trials over the right of property, the term "officer" is used, but not "sheriff or constable." In distress warrants "sheriff and constable" is used but not "officers," and in some, like garnishments, both are used. So we're all over the gamut in the terminology we use as to who can serve these, and then last, if we want to recommend that private process servers be able to serve garnishments and then by implication maybe some of the other things, I guess the question is how -- who do you want serving that? Do you want a certified process server, or do you want somebody that is under part two, which is anybody 18 years or older who the court simply appoints to do it? It could be anyone.

One consideration may be that you might want to create a different class of certified process servers, somebody that has some special endorsement that has received some special training, to the extent that you feel they may need special training for a writ of garnishment, that would then allow them to have an endorsement or some type of special certification for serving these special processes, and then only those could serve it. So that's kind of where we stand. It's really

a policy matter. It can be drafted flat or it can be drafted round. It's just how we want to do it.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Chip, I noticed that the garnishment rules all came from civil statutes which were repealed. Were they repealed by the Property Code or by something else that still exists, or were they repealed by these rules? Because if they were repealed by a statute, they're still in existence. Then, you know, we've got to deal with that. Do you know?

HONORABLE TOM LAWRENCE: I don't know the answer to that.

MR. LOW: Because every one of these rules came from in the forties, like 40, 29. And, secondly, are there any constitutional provisions pertaining to any garnishment or any of these things?

HONORABLE TOM LAWRENCE: Not that I know of.

MR. LOW: Okay. I don't know, but I know a lot of times I find things in the constitution that I'm surprised, but I get surprised pretty often.

The other thing is, are you saying that really first we need to consider whether or not to add the private process servers and, secondly, to clean up language so it's consistent to officer, sheriff, and all that? That's basically what you're saying?

HONORABLE TOM LAWRENCE: Well, I'm not suggesting that we add them or not.

MR. LOW: No, no, no. I'm not saying you're suggesting anything. I'm suggesting those are the questions that are raised.

HONORABLE TOM LAWRENCE: The immediate question is garnishment. If you consider garnishment, you may want to also consider writ of injunction and then you may also want to consider citation and eviction, if you want to look at that, but if you don't do anything, I think we ought to go in and clean up this language where it talks about who can do the service so it's a little clearer and remove all these conflicts between the rules.

CHAIRMAN BABCOCK: Carl Hamilton.

MR. HAMILTON: One other consideration on Rule 664. 664 says that the officer who serves the writ of garnishment has to approve the replevy bond, and I'm not sure that that approval of the bond is something that ought to be limited to constables or sheriff or whether process servers ought to be allowed also to approve the bonds.

HONORABLE TOM LAWRENCE: Constable Hickman's memo referenced that, and I looked at that, and I know it says "officer," but as a practical matter -- and other judges that do these, but I think almost always these

replevy bonds go back to the court that issues the writ of garnishment. I've not ever seen an officer actually do that, but that is clearly what the rule says.

One of the other things that the constables point out is that the constables, if something is done wrong and there is some liability on the part of who serves it, that the constables have a bond and they're employed by the county, so there would be someone to look at in that regard, and they argue that that wouldn't necessarily be the case with a process server.

CHAIRMAN BABCOCK: Well -- yeah, Frank.

MR. GILSTRAP: You know, I think those are pretty much the issues. On what Carl said, I'm a little concerned about, you know, the notion that a private person could approve the bond, but again, maybe we could just simply solve that by saying that, in fact, the court should approve the bond. I mean, there's a lot of ways to fix this; but I think the way to proceed is, you know, question A, do we want to allow private process servers to serve the writ of garnishment; and then, B, if so, how do we fix it? Do we try to go in and merely tinker with 103, or do we have Tom and his group, subcommittee, go in and try to do a more global fix involving starting with the garnishment rules?

CHAIRMAN BABCOCK: When we worked on 103 and

536, maybe Judge Lawrence knows the answer to this, we allowed private process servers to serve writs. I mean, that's right in the rule, right?

MR. GILSTRAP: Yes.

HONORABLE TOM LAWRENCE: Well, as I recall, and Justice Hecht can correct my faulty memory, but I don't remember that we talked about writs when we first sent it up. That was something that was added to it that we talked about in January of '05, as I recall.

HONORABLE STEPHEN YELENOSKY: You mean writs generally? Don't you have to specify which?

HONORABLE TOM LAWRENCE: I don't think writs was in the rule that we sent up.

CHAIRMAN BABCOCK: Okay. Well, Rule 103 says -- and the same language is in 536, says, "process including citations and other notices, writs, orders, and other papers issued by the court may be served anywhere" and then it goes on, and then later in the rule it excludes private process servers serving writs -- I just lost my place, but requiring immediate possession of property basically.

HONORABLE STEPHEN YELENOSKY: And some writs do.

CHAIRMAN BABCOCK: I know.

MR. GILSTRAP: I don't think we approved

that language. I think the Court added that language. You know, I think we discussed it. I don't know that we ever really approved it, but it's clear that 103 does include writs.

CHAIRMAN BABCOCK: Yeah.

MR. GILSTRAP: And it can include the writ of garnishment. The problem is that what you're relying on is this carve-out language in 103 to kind of prevent you from getting in trouble, but when you start applying it to specific cases it's kind of vague, and I think we might be pushing the limits here on garnishment, you know, but maybe we do need to tinker with the garnishment rules and not say, well -- because look at Rule 15. It says -- it says that unless -- that "every writ and process shall be served by the constable unless otherwise specially provided by these laws or these rules."

Well, what we've got is an exception here that's kind of swallowed up all the rest of the Rules of Civil Procedure, and that might be a short-term fix, but I don't think it's a long-term fix.

CHAIRMAN BABCOCK: Well, Rule 103, and I think the same language is in 53, the language I was searching for says, "Only a sheriff or constable may serve a citation in an action of FED, a writ that requires" -- "and a writ that requires the actual taking of possession

of a person, property, or thing." So they give private process servers the right to serve writs but then take it away in certain circumstances. And my point is, was this oversight or did the Court intend that private process servers have the right to serve such things as writs of garnishment, which we all agree wouldn't fall within this exception, because it doesn't require the actual taking of possession of a person, property, or thing?

MR. GILSTRAP: If you find the intent of the Court and the language of the rule, I think they did. I think they did intend to include a lot of private process servers to serve writs of garnishment, but apparently it's unclear enough that a lot of people are having problems with it.

CHAIRMAN BABCOCK: And here's where I'm going on this. If Rule 103 and 536 -- and this is what I'm not clear about, but that was amended specifically with private process servers in mind more recently than these other rules, like 663, which would seem to not allow private process servers to do it. Fair enough?

HONORABLE TOM LAWRENCE: I believe that's correct.

CHAIRMAN BABCOCK: Okay. So the question, I guess we can either ask the Court or we can fumble along in the dark.

MR. GILSTRAP: Maybe some court somewhere will decide it, you know.

CHAIRMAN BABCOCK: I mean, it could be an issue for a court to decide, but is the thought that we should try to harmonize rules like 663, 664, et cetera, with 103, 536, or should we make a policy decision on, whoa, that was a bad idea what you guys did to begin with?

HONORABLE NATHAN HECHT: Well, the rule I think as we published it did not have the exception to it, and it had just writs. There was no exception in 103 about this; is that right?

MR. HUGHES: This predated me.

HONORABLE NATHAN HECHT: Okay. And so then there was public comment, and it was suggested by I think some -- I think maybe from Harris County someplace, but I may be vague on this, that that exception was a good one because if you're seizing property and people, there's more chance of altercation or some problem that may better be handled by a law enforcement officer rather than a process server, a private person; and so the language, the exception language, was suggested; and I think we thought it was good and we told -- I believe I reported to the committee that we were going to do that; and I think that was probably the January meeting because it was shortly after that that we did it or that we indicated we were

going to do it; and that's what we did. So -- but if there's questions now about all these other rules then we probably ought to try to clear it up.

CHAIRMAN BABCOCK: Yeah. But how do we clear it up? We could clear it up by taking writs out of 103 and 536. That would be one way to clear it up, and the other way to clear it up would be to harmonize 663 and 664 and these writ of garnishment rules to say, "Oh, by the way, it could be a private process server."

HONORABLE NATHAN HECHT: Well, we started from the position that they could serve all writs, and then -- so I think when we published that rule we were thinking that that meant everything. Anything that required service could be served by a private process server, and then the comment to that was, well, but maybe not these things.

CHAIRMAN BABCOCK: Yeah.

HONORABLE NATHAN HECHT: And so I think the presumption, subject to being informed that this is not working or it's not going to work, is that it still means all the other writs except these, and it seems to me ultimately clear that writ of garnishment does not fall within that exception, so -- but if we've got all these other rules that say these things then it seems to me we should make them consistent with 103.

CHAIRMAN BABCOCK: Yeah. David Jackson.

MR. JACKSON: Well, the thing that scares me is will that let you carry all the way to 706, the disposition of property by the officer, which would be the process server disposing of the property? That could create some big problems if you let it slide all that way.

CHAIRMAN BABCOCK: Well, service of writ of a garnishment doesn't --

MR. JACKSON: Well, 706 allows for a court to let the officer dispose of the property.

HONORABLE TOM LAWRENCE: That's sequestration.

CHAIRMAN BABCOCK: That's not garnishment. That's sequestration, which is different, I think, isn't it?

HONORABLE TOM LAWRENCE: Yeah.

HONORABLE NATHAN HECHT: Yeah.

CHAIRMAN BABCOCK: So that wouldn't be a problem, would it?

HONORABLE NATHAN HECHT: Huh-uh, shouldn't.

HONORABLE TOM LAWRENCE: Well, as long as you assume that a sequestration is the immediate taking of property, therefore, a private process server can't do it --

CHAIRMAN BABCOCK: Wouldn't do that, right.

HONORABLE TOM LAWRENCE: -- there's not an issue.

CHAIRMAN BABCOCK: Yeah, Frank.

MR. GILSTRAP: I think the Court's basic approach when it adopted Rule 103 was sound, and that is -- you know, an extreme case, you know, if you're going to seize property, if you're going to do something that involves more than handing someone a piece of paper, you want the guy with a badge, you don't want Dog the Bounty Hunter doing that. And so, I know they're not like that, but just an extreme example. Well, that's the type of case that could arise. That's the type of case where you have people seizing people's property and they don't have a badge on. So I think the basic approach is fine, and I think that, you know, I was straining real hard to find some situation involving a writ of garnishment that would be more than that, and there are a couple of bothersome things.

I mean, you know, it does tell the person you can't do anything with the property, you know, again, and it does apply to more than money. There is this business about the replevy, but I think we can clean that up. So I think in general I think consistent with the approach that the Court took, which was a sound one, we could go ahead and include garnishments in this. That's

where the need is. So my suggestion would be let's go ahead and simply tell Judge Lawrence's committee to try to fix garnishment.

CHAIRMAN BABCOCK: That was clever, moving it from your committee to their committee.

HONORABLE TOM LAWRENCE: Sneaky.

MR. GILSTRAP: And, you know, rather than say, "Well, this is how we interpret Rule 103, you guys should know this," and that strikes me as a sound approach, and that's where the demand is. We can fix garnishment and then if something else comes up we will at least have a track record here, but it seems to me that works.

CHAIRMAN BABCOCK: How do you feel? Go ahead, Judge.

HONORABLE NATHAN HECHT: And the other thing is there is even an exception to the exception because it was pointed out, well, but there may be times, even though immediate detention of a person or property is required, that you really need a private person to do it because you can't find them and they're hiding and running off and so it's going to be hard to get the officer to dog them until they get really, you know -- until they get it served. So there's even an exception to the exception, so I think the idea was pretty clear that private process servers ought

to be able to serve all this stuff.

CHAIRMAN BABCOCK: Judge Lawrence, are you okay with that?

HONORABLE TOM LAWRENCE: Well, clarify this. So you want us to draft it so that private process servers can serve garnishments?

HONORABLE NATHAN HECHT: Well, yes, but I think while you're looking at it you might see if there is other problems that are going to come up, so that we don't get these dribbled out over the next ten years.

HONORABLE TOM LAWRENCE: What do you want to do about 664 that talks about a replevy bond being filed by the -- being filed with the officer? You just want to change that to "court"? That would fix the problem.

HONORABLE NATHAN HECHT: Yeah.

HONORABLE TOM LAWRENCE: Do district courts have any problem with that?

MS. WOLBRUECK: I doubt it. The district judges want to be able to deal with replevying a bond.

CHAIRMAN BABCOCK: Right. And so I guess for the -- I don't know if you can do it by the next meeting, but maybe suggest some language for whatever rules are affected to harmonize the thing so that we don't have an inconsistency in the rule.

HONORABLE TOM LAWRENCE: What about

injunctions?

HONORABLE NATHAN HECHT: Well, I think the same thing. I mean, I think the Court so far is -- has endorsed the language that's in 103. I think that should be the test, unless the committee thinks that that's not a good test going forward. But for now I think that's the test we should work with. But, of course, you know, it's important to make this as clear as possible because you don't want somebody arguing that garnishment wasn't effective because the person that served it didn't have the authority to do it, or anything else for that matter, so it's better to have this absolutely clear than murky.

HONORABLE TOM LAWRENCE: And Rule 15, you want to expand that so it's not just sheriff or constable?

HONORABLE NATHAN HECHT: Well, I think we should think about that, yes. I think we should think about adding something to 15 that says, you know, "or other person authorized by these rules" or "law" or something.

MR. GILSTRAP: I think --

HONORABLE TOM LAWRENCE: My last question is the term "officer," which is used so often in these rules, that is more or less synonymous with sheriff or constable, is there a reason we need the word "officer," or can we just say "sheriff or constable or other authorized

person"?

HONORABLE NATHAN HECHT: I just don't know enough. We would just have to look at the context.

CHAIRMAN BABCOCK: Yeah, I would be careful about that.

HONORABLE NATHAN HECHT: Yeah, I just don't know.

CHAIRMAN BABCOCK: "Sheriff" may be a defined term under the statutes and might only mean the elected sheriff, whereas one of his deputies would be an officer. Carl.

MR. HAMILTON: What about the eviction notice? That's sort of like a garnishment or an injunction. It doesn't seize properties. It's just like a citation, but yet in 103 we've excepted eviction notices.

HONORABLE NATHAN HECHT: Again, I don't recall why we did that.

CHAIRMAN BABCOCK: Let's not go looking for problems.

MR. GILSTRAP: Well, I think there's --

HONORABLE STEPHEN YELENOSKY: There's a reason you won't find in anything written, from my experience at Legal Aid, which is people getting evicted often don't know what they're getting. They get notices

of eviction, et cetera, and we would routinely tell them, "Until you get something from a constable, you know, you really haven't been sued," because they know the difference between a constable and a private person, but that's just the reality of the difficulty some of these people have in understanding what's going on.

CHAIRMAN BABCOCK: Okay. I think we're good on that. Why don't we take our afternoon break, but before we do that, we've got two more items on the agenda. Judge Christopher has got the first one, and Buddy has got the second one, and I know Judge Christopher's will be very short, I suspect. Well, Alex is not here, but anyway, we're going to finish today. I don't think we're going to need tomorrow for anybody that's making travel plans. So let's take about a 10-minute break.

(Recess from 3:35 p.m. to 3:47 p.m.)

CHAIRMAN BABCOCK: Uh-oh, we've got a Supreme Court justice amending his opening statement, so everybody be sure to listen up to this.

HONORABLE NATHAN HECHT: I neglected to point out in opening this morning --

CHAIRMAN BABCOCK: You're supplementing.

HONORABLE NATHAN HECHT: I'm supplementing. That Justice Lawrence has been appointed to the State Commission on Judicial Conduct.

(Applause)

HONORABLE NATHAN HECHT: Once again demonstrating how membership on this committee is nothing but a road to greatness.

CHAIRMAN BABCOCK: If you think about it, look at it, you know, Brister now on the Supreme Court, Jefferson, Pemberton. We don't know what's in store for you, Jody, but -- Yelenosky.

HONORABLE NATHAN HECHT: Yeah.

CHAIRMAN BABCOCK: Okay. Judge Christopher, all yours.

HONORABLE TRACY CHRISTOPHER: Okay.

CHAIRMAN BABCOCK: Don't sound so enthusiastic about this.

HONORABLE TRACY CHRISTOPHER: Last meeting Chip threw me onto this subcommittee with Alistair, which came about from a letter written by David Beck asking us to insert language into Rule 226a about the role of lawyers. The purpose of the language was to try to improve the reputation, status, et cetera, of the lawyers. We've looked at two different drafts here in the committee. We've sort of narrowly voted them down both times, but we keep getting sent back to try another draft again, which is how I got thrown to the committee.

So we have two different drafts for you to

look at, one which has absolutely nothing on it to indicate what it is other than it starts out with "Those who are selected as jurors in this case will resolve the disputes between the parties" and one from the pattern jury charge committee, which I've got a little comment about that, because we're also looking at Rule 226a in an attempt to make our instructions to the jury this plain language, and I thought we were actually going to try to present the entire project to the committee this week, but apparently we didn't quite get there. So the long and the short of it is what we're looking at right now I've nicknamed the "lawyers are great" section, and we have kind of a --

CHAIRMAN BABCOCK: A nice, neutral phrase.

HONORABLE TRACY CHRISTOPHER: -- longer version and a shorter, simpler version for you to look at. One is the e-mail and one is just the plain piece of paper, and Justice Bland has given me a lot of editorial help with respect to the longer version, typos and, you know, case problems, which I'll be glad to incorporate into the longer version if people like the longer version to clean up the problems with it. But we are hoping to come back to the Supreme Court Advisory Committee -- the Pattern Jury Charge Committee is hoping to come back to the Supreme Court Advisory and ask them to approve sort of

wholesale revisions to Rule 226a, because as part of our plain language initiative in the Pattern Jury Charge Committee we did some field testing of the Rule 226a instructions and some of the pattern jury charges and, lo and behold, found out that the jurors didn't really understand what they were reading or having being read to them.

So the easiest thing for the Pattern Jury Charge Committee to do was to start out with the Rule 226a instructions, and so we've done that. I thought we had it finished, but not quite finished, and so probably the next time, next June, we'll ask the entire Supreme Court committee or maybe have to refer it to the 226a committee of our group. I don't know how that works, but so this would be just one insert into what we hope is a total revision of 226a to make it more understandable to jurors.

So we have -- as I said, we have two versions. One is a little longer, a little more flowery, a little more flag-waving, I think. The other, shorter, simpler, perhaps doesn't quite convey as much "lawyers are great," but we thought it was -- I'm here under two committees. We, the Pattern Jury Charge Committee, liked our plainer, simpler version; and we in the subcommittee that Chip put me on likes the flag-waving version. So those are the two versions for people to look at.

The previous reasons why people didn't want it were problems when we had pro ses. We could cure that issue by making a little optional notation to the judge, perhaps a problem when it was a lawyer malpractice case as to whether this would somehow nudge people in favor of lawyers. Again, we could cure that issue with a little optional instruction to the trial judge not to read this particular section. So that's what I have. That's our report.

CHAIRMAN BABCOCK: Okay. Thanks, Judge. Buddy.

MR. LOW: A little bit of history. David Beck is the one that came to us with this. He wanted to do something that would help us with, quote, lawyer bashing, you know, how lawyers do these things and they think they're bad. So Alistair brought something, and I don't know, I made some suggestions, and so you said, "Why don't you and Alistair get together?" So Alistair wrote me or e-mailed me and said, "I'm busy, draft something," so I just drafted something, sent it to him. We corrected it and basically what the longer version -- which Alistair took mine and, you know, added to it and helped it, so I have mine, but I don't propose it. I propose his.

It was to show that each lawyer is working for their jurors, that they are working for them to bring

them the best evidence they can, and if each side represents vigorously his client under the Rules of Evidence and so forth then they will have all the relevant facts so they can do their job, so that kind of the lawyers are working for the jury, that was the thing I wanted to get over, and the fact that the jury is important and the lawyers are really working for them so they can do their job.

So that was basically what Alistair and I were conveying in the longer one. I don't know, I haven't read the shorter one, I just got it, what it does for lawyer bashing. I don't know. That's what we were trying to accomplish.

CHAIRMAN BABCOCK: Yeah. Okay.

HONORABLE TRACY CHRISTOPHER: Well, the shorter one also includes the provision that, you know, this is what the lawyers are supposed to do and the lawyers will help the jurors do their job.

MR. LOW: Okay.

HONORABLE TRACY CHRISTOPHER: We just kind of distilled it and made it a little simpler.

MR. LOW: I'm not saying I'm against it. I just haven't read it.

MR. GILSTRAP: Chip?

CHAIRMAN BABCOCK: Yeah, Frank.

MR. GILSTRAP: Well, you know, the problem here is to seek to become less controversial we become innocuous, and at the same time, you know, this short version has got -- look at the first two sentences. "The reason we are having this trial is the parties disagree. This trial will be the process we use to resolve this disagreement." Well, that's not right. We're having a trial because my client is lying here in a wheelchair. That's why we're having this trial.

I mean, anything you do is going to a certain extent comment on the process that's going on, and I think that's the danger we've got, we have here. It's either -- it's going to affect the plaintiff or defendant's interest in some way, and I'm not sure that this really is a fruitful exercise.

CHAIRMAN BABCOCK: Yeah. I think that sentiment has been -- carried the day with a majority, albeit slim, in the two votes we've taken, but -- and I think this is the end of our road. We just need to have this language and either tell the Court that we really think it's a bad idea or not. And we've got two versions to choose from, but I hear what you're saying.

Yeah, Ralph.

MR. DUGGINS: Is the other version this one that's got four paragraphs?

CHAIRMAN BABCOCK: Yes.

MR. WATSON: And we have to choose between them or we have to choose one of them?

CHAIRMAN BABCOCK: No. You can continue to vote and say it's a horrible idea or you can choose between them. Jim, what did you just -- did you raise your hand? I'm sorry.

MR. PERDUE: Oh, no, you made a comment about it being a horrible idea, and I was just nodding my head.

CHAIRMAN BABCOCK: I thought you kind of involuntarily raised your hand, too. Yeah, Ralph.

MR. DUGGINS: I was going to say, my view is that we should not do anything, but if we are, the four paragraph version is too long, and I think the jury already is apprehensive about the length of the boilerplate instructions, and the one that has "Alex, perhaps your notes," the only comment I have there is what do you do when a party is pro se? I mean, does it somehow disparage the pro se party where it says "parties have" -- "the parties have lawyers"?

CHAIRMAN BABCOCK: Yeah. Yeah. Somebody brought up the other day, too, what if it's an attorney malpractice case. I mean, there are some issues there. Buddy.

MR. LOW: Let me set the record straight. I voted against the whole thing, but I made the same statement, if we're going to have something, then we ought to do it a certain way.

CHAIRMAN BABCOCK: Right.

MR. LOW: So don't put on the record that I'm for it just because I wrote it.

CHAIRMAN BABCOCK: Okay. Yeah, Nina.

MS. CORTELL: It seems to me on the short version we could address the comment just by deleting the first two sentences.

CHAIRMAN BABCOCK: I'm sorry. I didn't hear the last part.

MS. CORTELL: The e-mail version, if you just struck the first two sentences and start, "In a trial," then I think you have captured what you need to and you have resolved the problem raised. I don't remember who made the comment. I think that was Frank.

MR. GILSTRAP: I agree. We could pass that and just put a note in saying "leave this out if one of the parties is pro se." You know, that would work. That would give us something, and it's something we could all agree on.

HONORABLE TERRY JENNINGS: Well --

CHAIRMAN BABCOCK: Yeah, Judge.

HONORABLE TERRY JENNINGS: I was at the conference where David Beck spoke with Justice Hecht about this whole concept of trying to boost our image with people, and one of the few chances we get is with juries who actually come in, and most of whom leave with a positive attitude after they have actually participated in a trialed, but I kind of think that language is important, and I'm looking at the e-mail version, "The reason we are having a trial is that the parties disagree."

And I would suggest incorporating language that "The parties disagree about facts of the case. Under our constitution or our system of government it is juries that decide these important factual issues," or something like that, because I think that's what Beck was trying to get across, is that, you know, talking about system of government here that you-all are deeply involved in, there is a reason why you people are here, because under our system of government it's the juries who decide these important factual issues, not some, you know, administrative bureaucrat somewhere.

CHAIRMAN BABCOCK: Yeah. And Tracy presented this -- Judge Christopher presented this at the Houston Bench/Bar and as I reminded her there, she left out a sentence that said, "If you need a lawyer, call David Beck, 1-800." Okay. Any other comments about this?

Why don't we take a vote one more time on whether or not we think it is a good or a bad idea to have some language and then we'll pick between the two versions here. How many people think there should be some "lawyers are great" language? How many are in favor of that?

How many against? 13 to 2 against. Okay. But if we're going to have some language, which of these versions, the e-mail shorter version or the longer version? How many for the e-mail shorter version?

MR. GILSTRAP: With the --

MR. LOW: With the amendment?

CHAIRMAN BABCOCK: With a friendly amendment.

MR. GILSTRAP: Just taking the first two sentences out?

CHAIRMAN BABCOCK: Yeah, whatever.

HONORABLE TRACY CHRISTOPHER: And adding in the constitution again?

MR. STORIE: Yeah.

CHAIRMAN BABCOCK: How many are for the shorter version?

Longer version? 13 to 1, the shorter version. Thank you, your Honor.

Now we go to Buddy, Rule 904.

MR. LOW: This time I'm not going to vote

against myself.

CHAIRMAN BABCOCK: You're doing so well.

MR. LOW: This shows how fair I am. All right. 904, nothing new here. This has come up -- this is the third time, and basically this came from the State Bar Committee on Evidence. They worked on this the last couple of years, and they really have some outstanding people. Came back, there were some suggestions, some criticisms, so forth. They went back, worked it again, did that, and now we're back again.

I asked them to give me the reasons why we should do this, and first of all, we have a Rule 18.001 in the Remedies Code that leaves a lot to be desired. The State Bar committee was trying to get together. They show that form of the affidavit, not the -- the form of the counter-affidavit. The State Bar committee does both. It makes it clear that this does not purport to show -- or you can't do this by affidavit that the treatment was necessitated by reason of the accident.

It's only -- there is a lot of hearsay in here, but the purpose was so people wouldn't have to bring witnesses. Well, it ended up where the defendant could just say they object, and that's it. Under this form they have to object, showing you specifically what they object to and why, and you can still use your affidavit, the

plaintiff can, and they can use their affidavit.

Now, the only criticism of this I've heard I think was from Benny, and Benny was concerned -- well, let me go back. There was some concern about whether this would be construed to mean that, you know, you wouldn't have to bring a doctor to prove, you know, causation, and that's made clear. I think that's made clear. Benny had a problem with the fact that somebody then files a counter-affidavit by someone not qualified and then they can introduce that counter-affidavit.

The answer to that is if somebody filed a counter-affidavit by someone not qualified, you can move to strike that counter-affidavit, I mean, just like you can any other affidavit. So it's just a question of whether you want to correct some of the problems they see with the present statute, and I got an e-mail a couple of days ago as to reasons why the State Bar says this -- their committee says this is good.

It says, "It addresses matters of evidence properly included and that should be found in the Texas Rules of Evidence," so I guess they're saying it ought to be in the Rules of Evidence. "Secondly, it contains a form that practitioners may use in drafting counter-affidavits," which is not in 18.001 or 2, "reduce the cost of trial to plaintiffs. In the event a

counter-affidavit is filed not requiring testimony from the expert provider you can show what you object to and why," and these others, we've been over the reasons. So do we want it? It's a better thing than what we've got, and I think it's good.

CHAIRMAN BABCOCK: Okay. Carl.

MR. HAMILTON: Paragraph (g) there says the rule supersedes any Rule of Evidence, Rule of Procedure, or statute.

MR. LOW: Yes, the reason --

MR. HAMILTON: Including 18.001.

MR. LOW: No, not including -- well, sure, it would be that, but the reason for that is Government Code 22.004. We discussed this before, that under 22.004, the Supreme Court on any procedural rule can pass something, and if the Legislature, you know, doesn't do something about it, it supersedes that. The Legislature can do something about it, but as a practical matter, the Court, if they chose to do this, they would go to the Legislature and talk to the legislative leaders. We wouldn't just pass it, and I mean, you know, we would have to explain to them why it's better, so we wouldn't be just overruling the Legislature without -- the Court knows how to handle that if they want this rule.

CHAIRMAN BABCOCK: And yeah, Benny.

MR. AGOSTO: I still haven't heard what's wrong with 18.001.

MR. LOW: All right.

MR. AGOSTO: I have been practicing with it. I've taught it. It is -- if we go back to the legislative intent of the statute itself, the reason why it was passed is to save money, save litigants having to bring down doctors and experts and witnesses on small cases. The case law that we have before us tells us two things. One, on the causation side, that you need a doctor to prove certain damages when the damages are within reasonable medical probability or some other phrase, if that's the probability that's required, or the plaintiff's own testimony with medical records can be used to prove causation on cases wherein there is -- you know, the reasonable person would understand that if my back didn't hurt before the car wreck and it hurts now, that evidence is enough to prove causation, when combined with medical records pursuant to 18.001.

That presumes that it is a small case that we're wasting money if we have to bring down experts to prove those damages. So that's one way to do it. Through the affidavit way, we would prove reasonable necessity of the medical records, and we were discussing earlier -- and I'll get to the counter-affidavit in a minute, what I

think about that, but with a counter-affidavit that would argue that it's unreasonable and make it evidence, which is what I have a big problem with under the proposed 904, then the trip to the emergency room on the ambulance ride would be argued as not related to the accident, and then that's evidence without bringing an expert, without designating an expert.

I mean, there's a lot of problems with then having to litigate that case and go counter to the original intent of the drafters when that statute was implemented, and so when I hear people say, you know -- and, Buddy, I know you're kind of following along with what's been told to you, but, you know, I don't see a problem with 18.001 for the cases by which it was created for. To say that now we're going to be able to allow an affidavit, a counter-affidavit from a doctor, you know, presumably it's going to have all the qualifications, you know, 702 qualifications that that doctor's going to have, to allow that affidavit saying that the treatment from the ambulance ride is not reasonable and necessary, and now that becomes evidence for the jury to look at.

That piece of the affidavit is going to bear evidence, very heavy evidence, for the jury to decide without the plaintiffs then being able to cross-examine that doctor, without the plaintiff having

that doctor designated as an expert, because the statute as I read it says either you designate an expert or you file a counter-affidavit. You can do one or the other. Of course, it also says that you can then if you file it 60 days before trial before the first evidence in the case then you can presumably reopen discovery, the way it's read -- the way it's written, and take depositions of those people that are now, right, signing this affidavit, the affiant. That doesn't save money. That adds. Now we're taking depositions of a doctor who 60 days before trial has signed an affidavit. So I see a lot of problems in a case where there's small damages.

Of course, if there's broken bones or a quadriplegic injury then there's going to be doctors of all kinds and there's going to be depositions of all kinds proving up certain damages, but on a soft tissue case where there is a dispute and trial is eminent, then I have a major problem, and I think a lot of the people that represent litigants coming to trial and are trying to save money have a major problem with that becoming evidence, and that's just one of the parts of 904.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: First of all, the present rule doesn't say that you have to designate an expert. 18.001, 18.002 doesn't address that. But, secondly, it doesn't

make it clear. It says the counter-affidavit must give reasonable notice of the basis, so people are just objecting because "I don't think it's right." All right. Now, you have to be specific, and if they just give you that notice then you can't file your affidavit. You've got to bring a custodian or a doctor or somebody to prove those bills once they do that.

So this makes the affidavit admissible for the plaintiff and -- but it also says that counter-affidavit must be specific, you must give -- if it's going to be a doctor, you must give his qualifications and things like that; and if you don't like that, you can strike it, if it doesn't mean the Daubert test or something like that. It goes much further than 18.001 and 18.002, which is not -- it's not very clear, and it's been cited for everything. This clears up what you can do, what you can't do, what your affidavit ought to be and your counter-affidavit.

CHAIRMAN BABCOCK: Benny's argument, as I understand it, is that if we pass this, if we do this --

MR. LOW: Yeah.

CHAIRMAN BABCOCK: -- if we have this affidavit, it's gong to make it more expensive, and I hear your argument is it's going to make it less expensive.

MR. LOW: That's exactly what I'm arguing.

MR. AGOSTO: I'll add something to that argument. The Turner vs. Peril case, which is the law concerning counter-affidavit case or scenario, clearly articulates and spells out for us what the counter-affidavit should say and how it should be written, by whom, and what the qualifications should be. It clearly articulates that. It has to fit the 702 qualifications, and the counter-affidavit, you know, the general rules of affidavit, can't be speculative, it must be direct to the issue by the person who's qualified, and if not then you can move to strike and the court then can strike. So we have a case that under 18.001 and the Peril vs. Turner case, or Turner vs. Peril, gives us the guidance on how to deal with it, and that's the way we've been dealing with it.

So going back to my original question, if we have a statute that works, and the intent and purpose of it was to save money for the litigants and has been working so far, we have a clarification by the court of appeals with a specific case on point with what happens when a counter-affidavit is deficient or defective and how to strike it, then what is wrong with 18.001 and the law that we have?

CHAIRMAN BABCOCK: So you say it's not broken, so don't fix it.

MR. AGOSTO: That's what I'm saying.

CHAIRMAN BABCOCK: Richard.

MR. LOW: Well --

CHAIRMAN BABCOCK: Well, get Richard first and then you.

MR. MUNZINGER: I just was curious why subsection (b) lets an unqualified person certify that a medical service -- I'm applying this to a medical case.

MR. LOW: Oh, okay.

MR. MUNZINGER: Subsection (b) would let a chiropractor's high school-educated clerk under oath certify that auricular therapy to treat paralysis was necessary, but if I were to contest that, I can't do it under subsection (c) with my clerk because my clerk doesn't have a degree in medicine or something. I don't understand why you treat these differently.

MR. LOW: Well, first of all, I didn't draft it, but secondly, and I'm giving you hearsay, and this whole thing is hearsay, and I'm giving you what I hear from the State Bar or their committee, but as I understood it, there are -- I mean, all the clerk or somebody that is not an expert, all they can do is say that these bills are reasonable, the costs, and necessary for the treatment. I don't understand -- maybe I don't understand your point. You're saying --

MR. MUNZINGER: Well, the point is subparagraph (b) of Rule 904, "An affidavit that the amount a service provider charged for a service was reasonable at the time and place that the service was provided and that the service was necessary under the circumstances."

MR. LOW: Is that affidavit of custodian?

MR. MUNZINGER: Well, it's the affidavit of whoever is certifying to this, so --

MR. LOW: We've got two. We've got one, affidavit of service provider, and another one. Which one are you looking under?

MR. MUNZINGER: I'm looking at Rule 904, "Affidavit Concerning Costs and Necessity of Service."

MR. LOW: Okay.

MR. MUNZINGER: "Applies to civil actions only, but not to an action on a sworn account," and as I read subparagraph (b), the horrible that I just described, a person with less than a high school education is now swearing to an oath that auricular therapy of a chiropractor, which is where they take a picture of a fetus, put it on the patient's ear, and select -- upside down and select the point where the elbow was on the ear for sticking a needle in the ear, and that's going to cure that particular process. Now, that's a true fact. That's

going to be admitted as having been a necessary service, all $40,000 of it.

CHAIRMAN BABCOCK: Could we have a less creepy hypothetical about sticking things in your ear?

MR. MUNZINGER: I only base these things on personal experience, Chip. That's a true story.

CHAIRMAN BABCOCK: Carlos, Carl, and then Judge Christopher.

MR. LOPEZ: I don't have any explanation that's going to make Richard happy about 18.001. I mean, it all goes back to the -- when I was on county court I used to get these all the time, you-all know that, and my response to defense lawyers who would make that argument was, "I didn't write the statute, but it looks pretty clear, and it allows a custodian who doesn't have apparently any other training to make an affidavit, but the counter-affidavit has got to be done by someone who actually knows what he's talking about. It doesn't sound fair to me, either, but go write your Legislature." That was my answer from the bench consistently, and I think it was the right answer for a judge to give. It may not have made you feel any better.

That's a very different issue than the one Benny brings up, which is we have this case that tells us how to strike it. What I don't -- I haven't done these in

years, thankfully, but what I don't know -- and, Benny, I'm asking you not rhetorically -- is does that case address the practical effect of what the trial judge is supposed to do when the trial judge says, "You're right, defense lawyer. I am going to strike the counter -- I am going to -- I agree that the counter-affidavit is proper. I'm going to" -- then what?

And back in the old days you had a split. I don't know about, you know, in your jurisdiction, but at least in Dallas, and I don't know about anywhere else, you had a split. Some judges would do it one way, other judges would do it a different way, and regardless of which way is right or wrong, it probably isn't good to have two different outcomes based on which judge you're in front of, and so I don't really care which way it ends up, but I do care that it end up some way that allows if that counter-affidavit is valid, then what.

And I think the compromise -- I'm speculating. The compromise was, "Hey, plaintiff's lawyer, would you rather just let me have both affidavits go to the jury, or would you rather make me make you spend more money than your case is worth, more money than is actually in controversy, trying to prove your case?" And some plaintiffs would say, "I'd rather have both affidavits go to the jury so that I don't have to bring a

doctor because I can't afford to pay this doctor $3,000 to come testify in my case where there's only $1,500 in controversy." So it's just a practical problem.

CHAIRMAN BABCOCK: Carl.

MR. AGOSTO: Can I respond to his comments since he said it wasn't rhetorical? Just briefly, and it's okay. I appreciate the question. The Turner vs. Peril is a first impression case, and what it articulated was the judge is going to do the gatekeeper's job, which is under the Robinson/Daubert analysis look at the affidavit, look at the credentials or qualification of the person who signed it, and if it meets Broaders vs. Wise then it's in.

It's not that it's evidence. It's controverting affidavit information that now at trial we can argue that the treatment was not reasonable and necessary. That's all that we're facing in a trial. We have a properly filed plaintiff's affidavit and a defendant who has a counter-affidavit in that trial, the argument without expenses, without experts, the cross-examination is going to be, "Well, it's not really reasonable and necessary because" and go on into it.

MR. LOPEZ: So but in that scenario did -- what happened, did the affidavits go back to the jury?

MR. AGOSTO: No, the affidavits don't go

back to the jury. The medical records and bills go back to the jury.

MR. LOPEZ: And the defendant is then allowed to argue --

MR. AGOSTO: Controverting affidavit allows the defense lawyer to argue all those bills may not have been necessary because of something else. That's what made the trial a trial of antagonistic, you know, plaintiff against defense. If you don't follow the procedure under the statute you can't then at trial say -- because now it's been admitted, pre-admitted, right, you can't now say, "Oh, no, this was related to something else" without any substance. So the controverting affidavit allows the adversarial process to continue at a low expense.

If now you bring the defense or controverting affidavit in as evidence, plaintiff has some bills that they probably proved up, no doctor, nobody on the other side to controvert it except some affidavit the jury is going to sit there and read without cross-examination, without anything else. That is blatantly unfair.

MR. LOPEZ: But so what is the -- let me ask the million-dollar question. What is the evidence on which the argument is based that they somehow aren't

related or they somehow shouldn't be given by the jury if the only evidence of it was this affidavit from this doctor that the jury never saw?

MR. AGOSTO: You get the bills, and you can can go through the bills and argue them.

MR. LOPEZ: Right. So you've got the lawyer making an argument without --

HONORABLE TRACY CHRISTOPHER: Cross-examination.

MR. AGOSTO: Cross-examination.

MR. LOPEZ: Who does he cross-examine?

MR. AGOSTO: The witness.

MR. LOPEZ: It's all done by affidavit. I mean, the doctor's not there.

MR. AGOSTO: There's no doctor. It's the plaintiff who claims "I had a stiff neck, but I had it ten years ago, too," so the defense lawyer in his wisdom and zealousness will argue, "You had it before," and present all that to the jury, and the jury decides whether the injury was related to the accident or not, and it's all within the reasonable expense, and the trial is had. Everybody has their day in court.

MR. LOPEZ: So if the affidavit, the defense affidavit, is valid --

MR. AGOSTO: It's valid to make the

argument.

MR. LOPEZ: It allows them to make the argument. If it's not valid, then what?

MR. AGOSTO: You can't controvert the medical bills that were proven up by affidavit by the plaintiff.

MR. LOPEZ: They can't then ask the plaintiff on the stand -- they can't cross-examine the plaintiff?

MR. AGOSTO: They can cross-examine the plaintiff, but not against the reasonable and necessity of the bills. They can impeach the witness any way they want to, according to the rules of impeachment.

MR. LOPEZ: Causation and all that stuff. Okay.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: I may have been doing it wrong, but based on the statute we always assumed that prior to that the plaintiffs had the burden of proving reasonableness and necessity of the medical bills.

CHAIRMAN BABCOCK: Right.

MR. HAMILTON: Statute comes along and says if you do this affidavit that's going to be enough to go to the jury unless you get a controverting affidavit. If you get a controverting affidavit, it wipes everything out

and you go back to square one, but then the way this rule is written it shifts the burden now because it makes that affidavit, that first affidavit, admissible enough to support the verdict even if you get a controverting affidavit.

So it changes -- I think it changes the statute, changes the result, and now the burden is shifted to the defendant to prove that it's not reasonable and necessary when it ought to be on the plaintiff.

CHAIRMAN BABCOCK: Judge Christopher.

MR. LOW: Well, but first --

CHAIRMAN BABCOCK: Buddy.

MR. LOW: First of all, Richard, the statute as read does exactly what you say. The present statute says that "Unless a controverting affidavit is filed as provided with this section, an affidavit that the amount a person is charged for a service was reasonable at the time and place of service provided and the service is necessary and sufficient evidence to support a finding," the language is the same from the statute to the language you read.

Now, on the counter-affidavit, the statute says, "Counter-affidavit must be made by a person who's qualified by knowledge, skill, expertise, training, education, to testify," so forth. So that's not changed

from the statute. Basically, if I understand what they're doing, what they are trying to do is make -- Benny cited one case. There are a bunch of cases under this. There are some of them talking about whether you can prove a medical necessity and so forth, and Benny I'm sure is aware of there are number of cases, not just the case he cites. There are a number of them.

So there's been some confusion, and from what I understand they're trying to do here is make it so that you can't just object and just -- you don't have to state as specifically as what this proposed rule does. You can just say, well, because it's not fair in the community. You don't have to -- and then you're back to square one. You've got to bring the medical director down there to prove it. This way you're going to have your medical bills proved, not that's caused by this accident, but to be fair on the other side, they can introduce their counter-affidavit by a custodian or what -- so that's basically the difference.

CHAIRMAN BABCOCK: Judge Christopher.

HONORABLE TRACY CHRISTOPHER: I think this is a significant change in the law, and I don't think that -- and I think it favors the defendants the way it's written, and I don't think that there is a problem that needs fixing. Okay. So I think it's a significant change

in the law because it now makes the affidavits admissible in evidence, which they haven't been before, and the reason why I think it favors the defendant is because the plaintiff's affidavit is going to be by a custodian, all right, because that's who fills out those affidavits.

Then the defendant is going to come in with some doctor with their CV that's going to have all sorts of reasons for why these bills are not reasonable and necessary. So at that point if both of those affidavits go back to the jury, you've got a custodian of the records versus a doctor, and you can just hear the argument involved. Okay. So that's why this proposal favors this defendant when you allow both affidavits to go back.

And then my third point is I don't think there is a problem that needs fixing, and I think that we emasculate the 18.0001 purposes by this change because the purpose of the statute was to provide a cheap way for people to get their medical bills proved up and into evidence.

CHAIRMAN BABCOCK: Jim.

MR. PERDUE: The statute was passed in 1985 --

CHAIRMAN BABCOCK: I'm sorry, Hayes. Hayes, you're next. Sorry.

MR. PURDUE: I'm sorry.

MR. FULLER: Go ahead.

MR. PERDUE: It was a unique opportunity to follow and agree with Judge Christopher, so I jumped in.

HONORABLE TRACY CHRISTOPHER: I'm in trouble now.

MR. PERDUE: The statute was passed in 1985. When this thing was first laid out I think Judge Hecht pointed out that there is -- if you've got a case with a thousand dollars in medical expenses, there was a legislative consideration on how can you get those medical records proven up in a cheap and efficient way. I think it's unique that we're having this conversation at the end of the day, given the way that we spent the morning with almost unanimous consideration that one of the problems that we're facing in the system and one of the concerns within the entire system and people not having access to the system or leaving the system is not just because of delay but also because of cost.

18.001 is clearly, and it was intended, as a cost-cutting measure as far as litigation. That was what it was designed to do. This -- and so here's philosophically the reason why it's concerning that the committee is taking this up. This is by its own terms and admits it is a change in the law. It is a change in a legislative enactment. It is a change from a standard of

a legislative enactment, and that to me as far as rule-making -- and I know I raised this last time when it was laid out by Bruce, and you pointed out that sometimes the Court does that, but I mean, there is a Federal court case that says 18.001, in fact, is not a procedural provision. It's a substantive right to a plaintiff in the State of Texas.

Now, if you've got a statute on the books that is substantive and you've got a rule now that is by its own terms designed to change that standard, and -- I wholly agree with Judge Christopher. This is -- regardless of the merits of being pro-defendant or pro-plaintiff, you've got a statute on the books that's designed to limit costs involved in litigation. This rule I think unavoidably will increase those costs and change a legislative enactment to a totally different standard, and that, just to me, plaintiff, defendant, is a dangerous thing to weight into, and so that's why I think -- Buddy, I know I've talked to you twice about this. I got off the phone, I talked to a bunch of members of the State Bar committee on the proposed rule, and they did, they worked real hard on this thing, and I know they went around and around on a bunch of these issues, but I keep reading this provision on counter-affidavit form, but the problem is, is that what this is doing is it's taking a form, but it

makes it evidentiary. It moves these affidavits into evidence --

MR. LOW: It does.

MR. PERDUE: -- as opposed to being what they are now, is essentially a notice kind of standard level, and that is just a whole wholesale change, and it's -- I second all the concerns.

CHAIRMAN BABCOCK: Hayes, and then Justice Duncan.

MR. FULLER: I would agree with two of Judge Christopher's points. I think it is a significant change in the law, and I think it does tend to favor the defendant. I'm not sure I agree with the "If it's not broke, don't fix it." I'm not sure all courts are applying it the way Benny says they are applying it. Filing the controverting affidavit doesn't mean that you get to debate an issue. Some courts are taking the approach that I think the statute would indicate and Carl says, is that when the controverting affidavit is filed the plaintiff better bring their witnesses down there to prove up their bills or there is no proof of those bills, and I think that's the specific issue that the court or that the committee, the State Bar's committee --

MR. LOPEZ: Is trying to fix.

MR. FULLER: -- is trying to deal with in

order to try to preserve some semblance of a low-cost trial. If you file your affidavits and they are then controverted, instead of having to go get your witnesses and now prove up your initial -- the plaintiff's affidavits on medical expenses of reasonableness and necessity, both affidavits can then go to the court or to the jury as proof, and the jury can decide which affidavits are best.

I think it does -- I'm not sure -- I think that in that sense this proposal may be better than what we have, but not much, because the way that affidavit is set up the counter -- the controverting affidavit is going to say something along the lines of "These aren't reasonable and necessity" -- or "necessary because none of this was caused by the accident" or something along those lines, and it's going to be signed by a doctor, and the defense lawyer is going to stand up there in front of the jury and say, "Folks, there's two affidavits here. One of them is signed by, you know, the 18-year-old clerk who did the bills, and this is signed by Dr. Huttado, you know, and, you know, the reason why this isn't reasonable and necessary is because there is no causation, and there is not one witness in this courtroom who will say they are, other than the plaintiff who has got something to gain."

To that extent, like I say, you're back to

where you started, because if you don't want to get caught with that the plaintiff still has to go get their witnesses to controvert the controverting affidavit. So, you know, I think it's arguably better. I don't think it's that much better. I think it's a problem, but I don't think we've got the solution yet.

CHAIRMAN BABCOCK: Sarah, then Judge Peeples, then Carlos, and then Ralph.

HONORABLE SARAH DUNCAN: I just have a ticky little problem with this. I don't want to take sides on the plaintiff/defendant debate.

CHAIRMAN BABCOCK: Well, you're going to have to soon.

HONORABLE SARAH DUNCAN: I'm against the rule because it makes what I think can only be called incompetent evidence competent and legally sufficient, and that cannot be. That cannot be. You can't take a record custodian and have them testify on reasonable and necessary medical costs of which they have no personal knowledge and no expertise and make that legally sufficient evidence that will withstand a JNOV, and that's what this rule does. You can't -- that can't work in the system that we have.

CHAIRMAN BABCOCK: Judge Peeples.

HONORABLE DAVID PEEPLES: This is a question

for Benny and Jim. It does seem to me that under the proposal if you've got your affidavit, even if it gets controverted, you know you're going to get to the jury on your medical bills. They may not give them to you, but you have raised a fact issue on that then, and that doesn't seem to be the case under 18.001, and I just question why that's such a defense thing.

HONORABLE TRACY CHRISTOPHER: Well, can I answer that question, because the defense -- the defendants, you know, defend a million of these little car wreck cases, and they're mostly small car wreck cases. They don't spend the money to hire a doctor to do these controverting affidavits, okay, because all it does is put the plaintiff back to square one where the plaintiff then has to go get their doctor to come down. But if they hire -- if they now can spend the money to hire a doctor to do these affidavits and somehow that becomes affirmative evidence for them for the price of the affidavit from the doctor, that's how it's a benefit to the defendant.

HONORABLE SARAH DUNCAN: Yeah.

HONORABLE DAVID PEEPLES: Then why does a defendant need affirmative evidence when it doesn't have the burden of proof on the issue?

HONORABLE TRACY CHRISTOPHER: They don't.

It's just a cheap way to have evidence.

HONORABLE DAVID PEEPLES: To get something before the jury.

HONORABLE TRACY CHRISTOPHER: Yeah.

MR. AGOSTO: Because all that comes into evidence on the plaintiff's side is the bills and the records. If you prove them up, that's all that comes in. You still have to prove up causation. The statute talks about it. So all we're doing is saving time to get the records admitted and the bills admitted and then somebody has to prove up causation. If it's a plaintiff or the doctor, the jury still has to weigh it.

Now, without doing anything else but hiring an expert, a medical doctor that we all know is going to be quick to sign an affidavit prepared by the defense counsel, and put into the jury room, that's pretty cheap defense to destroy the case on the plaintiffs's side if all the plaintiff has is a plaintiff who says, "My neck hurts" and an 18-year-old who signed an affidavit.

CHAIRMAN BABCOCK: Carlos.

MR. LOPEZ: But, okay, my question is, but right now under the current statute, I think is what Judge Peeples said, if the defendant goes out and gets that doctor who signs it quickly and cheaply to destroy the case and they do that under the current rule the way it's

written, what happens now?

HONORABLE TRACY CHRISTOPHER: The plaintiff brings the doctor.

MR. AGOSTO: Plaintiff brings the doctor, the plaintiff gets a deposition by written questions of the custodian. There's a lot of ways, you know --

HONORABLE TRACY CHRISTOPHER: But the defendant doesn't have any controverting evidence unless they bring the big bucks to bring their doctor, and we're allowing it to do that.

MR. LOPEZ: I have two situations it raises for me. One is -- and this shows the regional differences, and I won't name names because we're on the record, but --

CHAIRMAN BABCOCK: Oh, go ahead.

MR. LOPEZ: When this first came out, I mean, there was a law firm that did volume defense of these small car wrecks, and if you had that law firm defending you, you were going to have an affidavit by doctor so-and-so, a counter-affidavit, in every single little car wreck, every one of them. There were hundreds of them, and so that's why we had this issue coming up all the time, which is now what do we do? Here is the affidavit, and does it knock out your evidence? Does it keep -- does it force the plaintiff to do it? You know,

then we had the ancillary issue of if they don't file a counter-affidavit and you've told them that by law they can't controvert that, then isn't that a directed verdict? Why isn't the plaintiff entitled to a directed verdict on the reasonableness and necessity of the bills if there is no counter-affidavit on file from which they can argue against it?

CHAIRMAN BABCOCK: Ralph, then Justice Gray, and then Jim and Judge Peeples.

MR. LOPEZ: It's complicated.

CHAIRMAN BABCOCK: Ralph.

MR. DUGGINS: Now, I don't practice in this area, but what's -- why couldn't the plaintiff be required to have the same -- the person who's signing the affidavit have the same qualifications that the defense has to have and then you've got -- you don't have the issue of the clerk versus the doctor? That may seem to be a stupid question, but --

MR. AGOSTO: We can answer the question.

CHAIRMAN BABCOCK: Jim.

MR. PERDUE: It goes to part of that answer and it goes I think to Carlos's question. The Legislature passed a statute that said that's what you can do, because that's how you can do it cheapest. The way to -- and this is a confusion that we got -- I know that Dorsaneo kept

asking me about the idea of necessity being causation. Necessity is not causation. It's not proximate cause. There's a case on that. Proving up an affidavit by an -- an 18.001 affidavit does not get you a per se showing of proximate cause. It gets you a per se showing that overcomes an old line of cases as far as medical expenses that have to be reasonable and necessary, and that's all it does.

So you've -- so what this rule does -- and, Buddy, I keep thinking I can figure out a way to make it a little bit more than a little better or a little bit better than worse, but if you've got a case on point that says if a insurance company goes and hires a chiropractor to sign a thousand counter-affidavits, and that chiropractor has absolutely no education, training, or experience in orthopedics and orthopedic bills, that doesn't qualify as a counter-affidavit.

So the way this gets into litigation and the way it's answered by Turner vs. Peril -- and maybe I'm just blessed to have Judge Christopher in Harris County, but that affidavit doesn't get you anywhere as a defendant because it is an unqualified -- it is an unqualified challenge by case law and by the statute. And so, you're right, there were a lot of defendants doing that, but the case law says that you can.

MR. LOPEZ: This guy was an M.D.

MR. PERDUE: Well, and I think that one of my concerns about -- and, Buddy, one of my concerns about the language in the rule that keeps coming back to it is there's really almost no guidance in this rule that is consistent with what I think Turner vs. Peril says, which is a counter-affidavit need be by somebody who is clearly qualified within the area of medical specialty at issue.

Combine that with the new requirement in this rule that the affidavit becomes evidentiary as opposed to what it is now, which basically is just a notice requirement that you're going to challenge the reasonable and necessity, now you've got a piece of evidence by somebody who may or may not be, you know, fully qualified on the issue that is, according to this, mandatorily going to come in; and, you know, there are -- there may be ways to make it better, but I don't know -- and if there is an issue, I don't know of a big complaint of the 18.001 is not working; and when you talk about changing a legislative enactment or changing a standard that's on the books plus common law that informs it, and it seems to be working, I don't know how we get to the idea of essentially changing the standard through a rule.

CHAIRMAN BABCOCK: Justice Gray, did I miss you before? I think I did. Sorry.

HONORABLE TOM GRAY: That's okay. It fits better now. I don't know about the -- and Jim raises the issues on the validity of what we can do in light of a Federal case, and I won't get into that, but there's obviously some dispute about what happens, and so I think there needs to be a fix, and I'm like Ralph that I don't practice in this area. I'm sorry about that, Ralph. I couldn't remember the name right off, but I don't see this a lot, but I thought -- and that makes the use of case law dangerous because it becomes somewhat regional, as evidenced by the difference between Dallas and Houston on how these get treated, but --

HONORABLE TRACY CHRISTOPHER: No, no. We follow the Dallas case.

HONORABLE TOM GRAY: Well, there seems to be some disagreement as to whether or not you-all follow that or whether or not Dallas is following the Dallas case. But Benny I thought touched on something that seemed to me to be the fix, that if the controverting affidavit simply allows you to contest and talk about during the course of the trial with the plaintiff, with whatever witnesses are there, to controvert and talk about the issue, that's what the defendant really wants to do.

The plaintiff still has the documents in evidence, but the affidavits need not go to the jury, and

as a result, it still has the benefits of the cheap presentation, but it doesn't have that kind of damning effect, if you will, on the plaintiff's case of having the expert counter-affidavit go back to the jury. The defendant can still get up there and cross-examine the witness, "Isn't it true that you hurt your back 14 times before the date of the injury that you're suing me for?" And that seems to me, if you just didn't let the affidavits go to the jury would eliminate a lot of these problems.

MR. PERDUE: That is a statement of present law.

HONORABLE TOM GRAY: Well, but that is not what Buddy and Carl and Carlos have said is happening in practice when you file an affidavit that the judge may or may not determine to be adequately controverting of what happens.

MR. PERDUE: Well, but that would still be -- the sufficiency of the counter-affidavit would still be an issue.

MR. LOPEZ: But the committee -- I mean, here is the assumption the committee made. The assumption the committee made was that plaintiffs were having a real problem -- and maybe the assumption is wrong, that plaintiffs are having a real problem in cases where the

defense affidavit is a proper, good, you know, competent affidavit. It knocks out -- a term they use, it knocks out the plaintiff's affidavit. Now the plaintiff is screwed and has to spend more money on their case than its worth to try to prove it up, and they're screwed, and so there was an attempt to say in the case where a defense affidavit is not being stricken, it's there, what do we do? How do we -- now what do we do with 18.001?

HONORABLE TOM GRAY: How do we preserve the cheap trial?

MR. PERDUE: That is not my understanding of where the State Bar committee started from.

MR. LOPEZ: That's where it is, and we're on it.

MR. PERDUE: That is not where they started from, and that was not the issue they were addressing. The issue they started from was the idea of plaintiffs sneaking in causation language into affidavits.

MR. LOW: That's not true, Jim.

MR. PERDUE: I have talked to a bunch of people on the committee, Buddy, and you can't -- you can't do that by case law. I mean, that's equally --

HONORABLE SARAH DUNCAN: That's how it was presented to us.

MR. PERDUE: -- one of the things that --

this is another problem with the rule, just there's a comment at the end of it that says if there's superfluous language in the affidavits then that should be stricken, which kind of goes to Justice Duncan's question, is how are we getting into the idea of incompetent evidence becoming competent and a judge essentially having to weigh in on line-by-line of an affidavit, which is, as I read the comment, exactly what may become an issue.

CHAIRMAN BABCOCK: Justice Bland has had her hand up patiently.

HONORABLE JANE BLAND: You know, I think we've debated this the last two or three meetings, and it sounds to me like people are saying that this Turner vs. Peril case -- which I haven't recently read, but it sounds like it has a scheme for how the statute should work and how the rule should work, and I haven't heard anybody say that that scheme is bad. I've just heard that, you know, not all courts are doing it, so could we draft something more like that instead of trying to --

MR. LOW: Yeah, could.

HONORABLE JANE BLAND: Instead of trying to maybe do too -- I think we're maybe trying to do too much, and if we just started with something simple like that we would be, you know, more consistent with the statute and less likely to have -- you know, for there to be criticism

by either side.

MR. LOW: You could be right, but this thing started out before Jim was on this committee, before the chairman of the State Bar was chairman. It started out with the idea that they were getting their doctor bills knocked out by just kind of an objection, "I object, it's not reasonable" by some custodian or something and getting them knocked out. So, therefore, they were having to go -- that's how it started and then the committee went into the question of the counter-affidavit, and it's expanded, but that was the way it started. That was the whole start of this process.

Now, you've raised a point that knocks the whole thing to head. If there is a case that says this is substantive, we can't do one thing about it. I don't know of that case. Do you have the case, because I'd like to cite it to them?

MR. PERDUE: I have a cite, and this is -- I'm always hesitant to cite something that somebody gave me without having done it myself, but --

MR. LOW: No, no, no, but I'm certainly interested.

MR. PERDUE: It's Rahimi versus U.S., 474 Fed. Supp. 2d 825.

MR. LOW: 474 Fed. Supp.?

HONORABLE SARAH DUNCAN: 2d.

MR. PERDUE: Fed. Supp. 2d 825, and I got that by e-mail last night, Buddy, and I need to read it.

MR. LOW: Under the Government Code the Supreme Court can't change anything if it's substantive, that ends it, but I would like to answer Sarah's concern. The way the present statute reads, it says the affidavit must be made by -- there's a number of people, the person in charge of records showing the services provided, so forth, so --

HONORABLE SARAH DUNCAN: But the statute doesn't make that affidavit admissible into evidence, does it?

MR. LOW: Yes, it is admissible unless it's controverted and --

MR. LOPEZ: The current --

HONORABLE TRACY CHRISTOPHER: The records are admissible, not the affidavit.

HONORABLE SARAH DUNCAN: It doesn't say anything about it being --

MR. LOW: Oh, okay. I see what --

HONORABLE SARAH DUNCAN: It's the "sufficient to support a finding" that concerns me.

MR. LOW: Okay.

HONORABLE SARAH DUNCAN: Sorry.

CHAIRMAN BABCOCK: Okay. Before -- Carlos, go ahead.

MR. LOPEZ: I just want to -- because I want to take the -- part of the whole interplay between having the State Bar committee do some of this kind of background work was to try to get the feel of what this committee felt about it, so I want to ask you guys, I want to make sure I understood the sentiment, and then I'm going to take it back there and say, "Look, this is what we're hearing," that -- I'm going to see if I'm accurate here. You guys agree that if the defense affidavit is proper it knocks out the plaintiff affidavit and the plaintiff is left to -- they're going to have to prove up their bills the old-fashioned way. True?

MR. AGOSTO: True, by written questions or bringing the custodian or somehow.

HONORABLE TRACY CHRISTOPHER: Right.

MR. LOPEZ: True. Some way other than 18.001.

HONORABLE TRACY CHRISTOPHER: Right.

MR. AGOSTO: Granted.

MR. LOPEZ: Okay. And if that's the preferable approach, regardless of how that may hinder or mess up a plaintiff's costs advantage of 18.001, that's still preferable to the sort of dueling affidavits going

back to the jury and setting up that argument that I agree is -- you're going to get, which is "Hey, our affidavit is by a real doctor, their affidavit is by a custodian."

MR. AGOSTO: Absolutely.

MR. LOPEZ: Okay.

MR. AGOSTO: Plus, like the justices said, we're making an affidavit now evidence, which is counter to everything that we've done in trial.

MR. LOPEZ: I don't disagree with that at all.

MR. AGOSTO: And I really would encourage Buddy and -- the Turner vs. Peril case is the case on point, because as you said, this whole issue started when the defense counsel was just bringing any old affidavit and knocked the affidavits out.

MR. LOW: They just kind of object more.

MR. AGOSTO: That's exactly what Turner vs. Peril is talking about. It's on point exactly the facts. The objection was done, they brought the affidavit, the affidavit was not qualified, and the court said, "This is the steps you have to follow if you're going to have a counter-affidavit."

CHAIRMAN BABCOCK: Okay. We're going to take a little vote here. Everybody in favor of -- I'll call it Buddy's rule.

MR. LOW: I've not drafted one word, but I don't carry -- I'm carrying the water, and the more I hear the more I'm --

CHAIRMAN BABCOCK: Everybody in favor of the rule that Buddy didn't draft, raise your hand.

Everybody opposed? 13 opposed, none in favor. So we'll send that to the Court for its consideration, and I think that takes us to the end of our agenda. Another terrific day.

MR. LOW: Could I have -- I did promise them that we would get their version to the Court for whatever consideration the Court --

CHAIRMAN BABCOCK: Yeah. I mean, they can send whatever they want to the Court, but thanks a lot. Next meeting is June 8th, and is it at the Bar or here?

MS. SENNEFF: I think it's here.

CHAIRMAN BABCOCK: We think it's here, but anyway, check the website. Thanks a lot, everybody. We're in recess.

(Meeting adjourned at 4:51 p.m.)

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REPORTER'S CERTIFICATION
MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

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I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 27th day of April, 2007, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are $_____.

Charged to: The Supreme Court of Texas.

Given under my hand and seal of office on this the _____ day of _____, 2007.

_____
**D'LOIS L. JONES, CSR**
Certification No. 4546
Certificate Expires 12/31/2008
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