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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

August 25, 2007

(SATURDAY SESSION)

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Taken before *D'Lois L. Jones*, Certified Shorthand Reporter in Travis County for the State of Texas, reported by machine shorthand method, on the 25h day of August, 2007, between the hours of 9:05 a.m. and 11:57 a.m., at the Texas Law Center, 1414 Colorado, Room 101, Austin, Texas 78701.

INDEX OF VOTES

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

Documents referenced in this session

07-21 Proposed revisions to TRAP 9.8

07-22 Proposed revisions to garnishment rules

07-23 PJC Oversight Committee report

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CHAIRMAN BABCOCK: All right. Everybody, let's get started. I've had a number of suggestions on how we should proceed today, most of them lighthearted, but I've decided we'll just go by the agenda, which leads us to Dorsaneo, who's not here, but in his absence, Jody is going to take us through a proposed rule, TRAP Rule 9.8, right, Jody?

MR. HUGHES: Yes. This is the proposed rule dealing with redacting or otherwise camouflaging minors' names, and the previous draft dealt only with the parental rights termination appeals. The heading of this one is still styled the same way, although we might want to change it, and basically, this draft has just been after the group's discussion from last time. There weren't any specific votes that I could see in the transcript, but there was discussion of some ideas of broadening the rule, giving the courts some discretion, loosening the language in the rule a little bit as to how exactly the court should -- I'm sorry, the parties or the court should camouflage the identity of the child, and so that's reflected here.

Just walking through it, an appeal of a suit, the first change is this draft broadens considerably the types of cases to which the rule would apply. The

draft last time just talked about parental rights termination cases, and this is a number of items under the Family Code, including the Juvenile Justice Code, which was suggested last time, protective orders and family violence under Title 4, and then Title 5 are the SAPCR suits. And the rule specifies that the "minor child shall be identified by only one or more of the initial letters of the minor's name or by a pseudonym in any party's brief, petition, motion, or other submission to the appellate court or in any opinion issued by an appellate court, unless the court orders otherwise."

In that sentence the pseudonym provision is new from last time. There was discussion about the initials, and Justice Patterson had suggested, I believe, that the court might want to just call them by one initial, they might want to use two or three. Last time it was very specific, and this is loosening it up some to give the court more discretion as to how exactly to disguise the name or use a pseudonym, and then this draft also broadens it to include opinions issued by the appellate court.

It doesn't include judgments, and I was talking with Bill about that a little bit yesterday. My initial thought, and I wanted to hear the -- the subcommittee has not had a chance to review this, but my

assumption was the court would probably want to use the full name of the child in the judgment, if necessary, but we were more concerned about opinions at this stage until judgments would be dealt with somewhere else. So this just leaves it as opinions written by the court of appeals.

And then continuing, "An appellate court may order the parties to substitute initials or pseudonyms for minors' names in other appropriate cases involving minor children not included in the case categories identified above, and a court may make such substitutions in opinions or other cases where substitution of initials or pseudonyms is not required by this rule." So that just says -- there was a suggestion last time that there might be other appropriate cases where a court should have the power to either do it on its own or to order the parties to disguise the child's identity, and this provision doesn't attempt to delineate all the categories where that might be the case, but just gives the court the discretion to do so. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Did you consider -- and maybe this is addressed -- the pseudonyms where the parent's name is used in the opinion and it's not Smith, something more like Yelenosky? Putting initials for the child's name is not going to make it

anonymous.

MR. HUGHES: And Bill actually pointed out the same thing, and I didn't have a chance to incorporate it in the draft, but he raised the same point, and I thought it was a good point as well, so I think that this -- that would be a good idea.

HONORABLE STEPHEN YELENOSKY: For the record, I'm not involved in any lawsuit involving any children.

MR. HUGHES: Well, and that was -- I think your point is it kind of defeats the purpose of the rule if the parents' names are out there in the style of the case and everywhere else for all the world to see. It's not too hard to figure out who the kids are.

HONORABLE STEPHEN YELENOSKY: It may not be in the style --

MR. HUGHES: Or just in the opinion.

HONORABLE STEPHEN YELENOSKY: -- and initialed, but in the body of the opinion they might be named, and that would defeat the purpose.

MR. HUGHES: And then another new -- so I think that's a good suggestion. I think the last new -- or the last difference between this draft and the prior draft is a sanctions provision. I think Justice Gray was interested in being able to enforce the provisions of this

in that last sentence authorizing an appellate court to sanction a party or an attorney for willful or persistent violations of either the rule or an order issued pursuant to the rule; and the distinction between the rule or the order is just that the rule provides, kind of as we just went through, that both of the -- there are some categories where the parties have to take them out and there are some categories where the court has discretion to order camouflaging the names, and that would be a court order pursuant to this rule.

HONORABLE STEPHEN YELENOSKY: Could it just add "The court may use initials for a parent"?

MR. HUGHES: Yeah. Where would --

HONORABLE SARAH DUNCAN: We've already got that.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: We've already got that. "A court may make such substitutions in opinions in such other cases." "In such other cases."

MR. HUGHES: I think he's talking about the parent, though, right? Adding the parent?

HONORABLE STEPHEN YELENOSKY: I just scanned it, but as I read it, it only talks about the child's name, which in the case where a parent's name or both parents' names are the same and unusual, that child is not

going to have any anonymity.

MR. HUGHES: But you're suggesting that only -- not as the default mandatory provision but only as the court may order it, right, or do you think it should be both?

HONORABLE STEPHEN YELENOSKY: I don't care, but if the name is Smith, there's less concern.

CHAIRMAN BABCOCK: Yeah, Justice Gaultney.

HONORABLE DAVID GAULTNEY: I think on the parents I think that's a good idea, but I would urge that it be optional. I mean, sometimes you do have a situation with parents. On other occasions the parents could be referred to generically as "mother," "father," whatever, and so perhaps leaving some discretion on the -- of course, that doesn't deal with the briefing problem. That deals with the opinion.

CHAIRMAN BABCOCK: Okay. Anybody -- Sarah.

HONORABLE SARAH DUNCAN: I still think we've already got -- just take out -- make that next "a court may make other substitutions in opinions not required by this rule," just change it to read that, because there are other types of cases -- types of cases other than parent/child cases where substitution of initials for names is needed.

CHAIRMAN BABCOCK: For example?

HONORABLE SARAH DUNCAN: We had -- the Fourth Court had one in which the defendant in a child abuse case was a police officer who had put a substantial number of people in the prison he was getting ready to be in, and he asked for his own protection that we substitute initials for his name, and we did that.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: And although we're not used to dealing with rules that involve criminal proceedings, these are the TRAPs and they do involve the criminal cases as well, and my argument for broadening the use of it last time -- and I will support it as written or any further broadening of it, because as I had said before, it's the victims of criminal cases, while we can write around it at times, sometimes there needs to be references, particularly when there is multiple victims, they're tried together, and you've got to use something to distinguish the facts of the case, and there is absolutely no need to parade a victim's -- what happened to them out by name. I recognize there is some need for publicity of trials and that that is to be protected as well, but for the pleading process and the opinion process we need the ability to protect that person's identity.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: Well, you know, what we're

doing is giving the court of appeals broad discretion not to put names in the opinion, and I mean, maybe there ought to be some limits on that. What if the people are too important in the community, they don't want -- you know, the court doesn't think it's a good idea that their dirty linen be aired. You know, I just don't know. What's the limits on that?

I certainly understand the limits to protect a minor, the identity of a minor child or the victim of a crime, but, you know, you're giving very broad power to the court. Maybe you want to might put something in there that kind of says the reason for or at least maybe we should be able to articulate the reason for not putting names in the opinion, because it could be abused.

CHAIRMAN BABCOCK: Yeah, I'm worried about that myself. I mean, we do have a public court system, and that's served us well for many, many years, and as we sit here today I'm sure most of the people are well-intentioned, but sometimes, you know, people get hidden from public view when they shouldn't be. I would argue that your police officer, if he committed a crime and is going to prison, he doesn't -- he didn't get his initials in an opinion, I would think. I would want to know as a member of the public when the guy gets out. I would want to know who he is if he moves in next door to

me.

HONORABLE SARAH DUNCAN: You would. You would. It was a completely public trial and open.

CHAIRMAN BABCOCK: If it was public and open then why do you put initials in your opinion?

HONORABLE SARAH DUNCAN: Because our opinions are on the web.

CHAIRMAN BABCOCK: If he moves in next door to me I want to go on the web and check the guy out.

HONORABLE STEPHEN YELENOSKY: Well, I hope I didn't send us down this road, because my intent was to limit it to what I understood the proposed rule addresses and the charge to, I guess, the subcommittee was, which is parental rights termination appeals; and within that context I don't see -- because we've already gone to the point and everybody seems to accept that the minor's initials are perfectly appropriate; and I don't think Chip has an objection or First Amendment argument that we need the child's -- children identified in parental rights termination cases.

I was merely extending that to the parent's name in a parental rights termination case where the parent's name would essentially give away the child's name, and I wasn't suggesting any expansion into any other type of case nor do I think that was the charge in

drafting this rule.

CHAIRMAN BABCOCK: Jeff.

MR. BOYD: By definition, do the case categories go beyond parental rights termination cases? Appeal of any suit under Title 2, Title 3, Title 4, Title 5.

MR. ORSINGER: The answer to your question is, yes, it goes far beyond it.

MR. BOYD: So the title of this rule ought to be changed if the text is going to stay this.

MR. ORSINGER: No, the content of the rule ought to be changed to conform to the title.

MR. BOYD: Well, yeah, either/or.

CHAIRMAN BABCOCK: Okay. Richard.

MR. ORSINGER: I'm -- wasn't here for the policy debate, and I assume it was debated, but I'm disturbed that juvenile prosecutions, that we're giving confidentiality to people who have been adjudicated as having committed serious felonies. You know, some of these juveniles commit rape and murder and other serious crimes, and I would sure as heck like to know who they are.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: Chief Justice Gray will correct me, but I believe that's statutory.

MR. ORSINGER: The statute requires that?

HONORABLE SARAH DUNCAN: Yeah. The court's been doing that for years.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: Why don't we start modestly and pass the rule for termination cases and then, you know, I think everybody is comfortable with that, and then, you know, maybe at some point we can come back and look at something else, you know, when we see how this works. That's kind of the incremental approach, but I think we're all on the same page about termination, the parents' names and children's names in parental termination cases so that someone can't read the opinion and know who the kid is. I mean, that's the goal, right?

HONORABLE STEPHEN YELENOSKY: Well, I agree. It should be "shall" for the children, but it should be "may" for the parent because of Chip's point, which is if the Yelenosky who's parent Yelenosky, whose termination rights -- is my cousin in California, maybe the court chooses to make that anonymous, but if it were my rights being terminated as a district judge I imagine they would want to print my name.

MR. GILSTRAP: But I think we're on the same page on that. Maybe -- the concern is maybe going on criminal cases, too, and that's a much bigger subject.

HONORABLE STEPHEN YELENOSKY: Right. Right.

CHAIRMAN BABCOCK: Judge Christopher.

HONORABLE TRACY CHRISTOPHER: Well, the way this is written in connection with it has to be in briefs and motions, not just orders, it would seem to me then that you wouldn't know if you had a conflict with respect to the parties. If, you know, parent Yelenosky was suddenly parent Y.

CHAIRMAN BABCOCK: Good point. Sarah.

HONORABLE SARAH DUNCAN: I didn't understand the concern to be the briefs and the motions, although the more briefs are on the internet, maybe that is true. The concern was, I thought, as Judge Christopehr -- I thought it was opinions.

HONORABLE TRACY CHRISTOPHER: Well, the way it's written it says "brief, motion," et cetera.

HONORABLE STEPHEN YELENOSKY: Couldn't that information be conveyed, though, or dealt with by internal rules or whatever, just a separate document?

HONORABLE TRACY CHRISTOPHER: What about that sensitive data form?

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

HONORABLE DAVID GAULTNEY: I have a couple. One is, as it's currently written the brief would just

protect the minor child, so it looks as though that at some point the appellate court may order the parties to substitute names, and perhaps this is enough at a point at which the court realizes there's a need for protecting or identifying other parties by initials, including adults, that it could be done that way.

I was going to suggest that we -- I know there might be some resistance to this, but the second sentence that goes "An appellate court may order the parties to substitute initials and pseudonyms," we could say "for the parties' names in appropriate cases involving minor children," and then if you wanted to further restrict it you could say something like "for the protection of the minor" or something like that, but I'm actually in favor of having some ability of the court to protect the identities of the -- or to identify the parents differently than as the parent of the minor whose identity you're trying to protect.

CHAIRMAN BABCOCK: I'm worried about this rule from the place where you were, "An appellate court may order the parties to substitute initials or pseudonyms in other appropriate cases," all the way through the end of that paragraph. Surely the court of appeals has that authority now and does so in appropriate cases and all sorts of cases, as Sarah points out, and I think this is

just creating mischief, because this is a "By the way, why don't you think about -- you know, about this type of thing?" It's suggestive when that's beyond what the Court asked us to do, which was limited to one particular type of case.

And on the other thing about sanctions, I mean, doesn't the court have -- the way it would work, Justice Gray, it seems to me, is that if somebody put a name in there when they shouldn't the court would say, "Hey, don't do this and don't do it again" and then if they persisted in that you would sanction them. I'm not sure that you have to have this in this rule to sanction a party.

HONORABLE TOM GRAY: I was just thinking that we would probably just tell the clerk not to accept the filing.

CHAIRMAN BABCOCK: Well, that would be another way to do it.

HONORABLE DAVID GAULTNEY: I agree with your sanction point. I think we have that authority anyway, and I'm really not in favor of adding a sanction statement in response to every rule that we have, because --

CHAIRMAN BABCOCK: Yeah.

HONORABLE DAVID GAULTNEY: But the other thing is I was wondering if you have a specific rule that

says the appellate court can do it under this circumstance, by implication does that suggest that's the limit?

HONORABLE SARAH DUNCAN: Yes.

CHAIRMAN BABCOCK: Well, but, you know, not necessarily. I mean, there are -- there are many cases in all sorts of circumstances, not limited to parental termination, where the court in a discretionary way puts in initials. There is a Texas Supreme Court case that's got initials for a party in a privacy case and in the court of appeals the party was identified, so I don't think just because you say it should happen in every case involving termination of parental rights that you then necessarily say that the court doesn't have any discretion in other kinds of cases.

Frank.

MR. GILSTRAP: Well, I mean, I'll just for the purpose of being argumentative, I'll throw out maybe -- you know, maybe there shouldn't be anonymity in all parental right termination cases. Let's suppose the case is very high profile. Let's suppose the parents have been sent to prison for abusing the child. It's been a huge public trial in the community and the state then is terminating the rights of the parents. Maybe you want to have those names out there so people will know how that

particular high profile case was disposed of.

HONORABLE STEPHEN YELENOSKY: Well, it's not the appellate opinion that's going to prevent it from getting out there. In that instance it's going to be out there.

CHAIRMAN BABCOCK: Well, I mean, here's a real life, real world example. Remember that guy Walker Railey, the Dallas minister who was accused of killing his wife? Well, there was some things that went on with his children, but the whole thing was sealed, and there was a huge public interest. Ultimately the file got unsealed because of the public interest in Walker Railey, and it turned out that there was some bad stuff going on with him and his kids. Yeah.

HONORABLE STEPHEN YELENOSKY: Well, my specific suggestion is to -- just eliminate the second sentence so we're not talking about anything but parental rights termination and just say "a minor child shall be identified" and so as to not preclude it because we're mentioning -- because we have a specific rule dealing with parental rights that says "and by order of the court" -- or I don't know the specific language, "by order of the court," "may order that the parents be identified anonymously as well."

CHAIRMAN BABCOCK: Okay. Justice Pemberton.

HONORABLE BOB PEMBERTON: Is this mainly driven by a concern with appellate briefs being posted online? Because I'm not aware in an opinion -- certainly our court doesn't just divulge the identity of minors involved in these kind of cases. We have used initials when there have been witnesses in cases and other ways to preserve their anonymity. I mean, it seems like if it's a problem with appellate briefs being posted online it may be more productively and appropriately tackled through our general policies about private information getting online, just something directed to this narrow cases.

CHAIRMAN BABCOCK: Jody, do you remember? I've forgotten the impetus.

MR. HUGHES: The impetus of this came from the clerk of the Supreme Court who just, I mean, basically pointed out that as we were -- you know, the Court is considering the privacy rules and the access to court records rules, but that really goes to what is -- one rule goes to what is being put into the record in the trial court and another -- the other goes into what the clerks are making available online in the record in the trial court, and this would go to -- so when those rules go into effect, that will serve as the gatekeeper for what is getting into the trial record to begin with.

This, the issue was raised that, well, that

doesn't deal with what's out there on appeals right now, and it was recognized that most of the courts of appeals, although they're not required to do this, do protect the privacy of minor children in parental rights and some other cases, but that it might be better to have a rule to make it clear and to make it consistent.

And, secondly, it was recognized that that goal is sometimes defeated by the increasing availability of parties' briefs online through either Westlaw or Lexis, or like in our court they're available through the Court's website, and so when this -- the initial draft of this -- and I left the title of it the same as an error, but at the last meeting I thought the instruction was to go back and add these other categories of cases, and it sounds like maybe the committee is thinking that's too far at this point, but that was where the idea came from.

CHAIRMAN BABCOCK: Yeah. Well, Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, I mean, for those of us who still have a three-day rule for faxes it may not be all that apparent, but any ten-year-old child right now could get on the internet and if a minor child's name is out there in a brief or opinion find out if their classmate's parental -- the rights of their parent had been terminated, so it's out there unless we

make sure that initials are used.

CHAIRMAN BABCOCK: Well, let's -- it seems to me we've got three issues. One is whether or not it should be limited to parental termination cases and not broadened as it is. That's one issue. The second issue is the sentence that suggests that appellate courts may order this in other appropriate cases, and the third is the sanctions. Those are the three issues as I see it to this rule. Jeff.

MR. BOYD: Before you get to that, I want to make sure I understand. What is the current practice? Is it just there's no rule? I remember filing -- in fact, I think it was an appellate brief in the Third Court where for an adult client I chose to try to use initials because there was a privacy claim case. In these juvenile contexts, the Family Code has a provision about the juvenile justice information, some JJIC or something, that requires kids in that system to be private, identities can't be disclosed, but in termination cases is it just sort of whatever the parties are doing?

HONORABLE SARAH DUNCAN: It's discretionary. For the court it's discretionary, and I don't think the Family Code makes any statement about what the parties are to do in their filings.

MR. HUGHES: The only provision I could find

was that Family Code provision that said the appellate court may, and I think that's the one under that it seems like most of the courts of appeals currently do that.

HONORABLE SARAH DUNCAN: I think --

CHAIRMAN BABCOCK: Judge Patterson.

HONORABLE JAN PATTERSON: I think the practice is all over the place, but I do think that the predominant practice in briefing is to include the full names, and I think that may be the -- one of the problems was that once the Supreme Court started putting the briefs online that broadened the problem, and I think that we ought to be -- my guiding principle in dealing with this is best interest of the child, but also that we can't do too much. And I'm not sure, Chip, that there's a problem about public disclosure because we're not saying that all of these proceedings are under seal. We're just addressing really a fairly narrow online Lexis/Westlaw problem, because this does not prevent the parties from going to the press or the underlying -- or the press from covering the proceeding. We're just not aiders and abettors of computer research.

CHAIRMAN BABCOCK: Yeah, I understand that, but it's where somebody who is a public figure or public official that doesn't want anybody to know about this, we may be aiding and abetting that. I mean, if I'm running

for president and I -- you know, and I had a termination proceeding, I mean, that's an extreme example, but, you know, you cut away at public access in little bits and pieces, and there is an issue in my mind about that.

But anyway, how about -- why don't we take a vote on whether or not people think it's a good idea to broaden it to the, you know, various Family Code, Title 2, Title 3, Title 4 and Title 5 or whether -- well, everybody who is in favor of doing it as the draft, the subcommittee's draft, has it, raise your hand.

HONORABLE STEPHEN YELENOSKY: This is limiting it?

CHAIRMAN BABCOCK: No, this broadens. This is the broad way.

MS. BARON: Could you explain that?

MR. RINEY: Chip, there's some confusion.

CHAIRMAN BABCOCK: Okay. You're voting for the way it is drafted now.

HONORABLE DAVID GAULTNEY: The first sentence?

CHAIRMAN BABCOCK: Yeah, the first sentence. Right.

MR. GILSTRAP: Which does not limit it to termination cases.

CHAIRMAN BABCOCK: That's right. So

everybody in favor of that raise your hand.

HONORABLE SARAH DUNCAN: Well, actually, no. I'm sorry.

CHAIRMAN BABCOCK: Okay. No?

HONORABLE SARAH DUNCAN: No.

CHAIRMAN BABCOCK: Okay. Well, Let me try it again.

MR. TIPPS: Make sure Sarah has made up her mind before you ask for a vote.

HONORABLE SARAH DUNCAN: I apologize.

CHAIRMAN BABCOCK: Everybody who's in favor of keeping it broad, the way it is drafted here in this rule, raise your hand.

HONORABLE JANE BLAND: When you say "broad" you mean just the Family Code?

HONORABLE TRACY CHRISTOPHER: Just sentence one.

HONORABLE JANE BLAND: You're not meaning --

HONORABLE TRACY CHRISTOPHER: Just sentence one.

HONORABLE JANE BLAND: -- non-Family Code.

CHAIRMAN BABCOCK: That's right. No, I'm sorry. It's the first sentence, Title 2, Title 3, Title 4, Title 5.

HONORABLE BOB PEMBERTON: Family Code beyond

termination.

CHAIRMAN BABCOCK: Right.

PROFESSOR ALBRIGHT: Can I ask one question? This is so out of my area that I feel somewhat uncomfortable even voting on this, but do all of these require some kind of confidentiality or do they not? In the statutes.

HONORABLE BOB PEMBERTON: I think only juvenile justice require it; isn't that right?

MS. WOLBRUECK: That's correct, only juvenile justice.

HONORABLE SARAH DUNCAN: Yeah, just Title 3.

HONORABLE BOB PEMBERTON: Title 3 is the only one.

PROFESSOR ALBRIGHT: It's the only one that requires it, so what we're doing here is we're requiring some kind of anonymity in cases that the statute does not.

HONORABLE SARAH DUNCAN: The statute makes it discretionary in opinions.

PROFESSOR ALBRIGHT: But we're making it mandatory.

HONORABLE SARAH DUNCAN: In opinions and briefs and motions and everything else.

CHAIRMAN BABCOCK: Okay. So everybody who is in favor of the first sentence, the breadth of the

first sentence as written, raise your hand.

All right. Everybody who is opposed?

Well, it's one of our rare instances where it's 12 to 12.

MR. TIPPS: What say the chair?

CHAIRMAN BABCOCK: The chair votes against it. I'm opposed.

HONORABLE SARAH DUNCAN: Can I make a statement explaining my vote? I voted against it not because I don't want to see opinions and briefs use initials in all of these categories, but out of concern that certain First Amendment lawyers will argue or others will argue that by adopting 9.8(a) we will be limiting the appellate court's ability to use initials or pseudonyms in other cases.

CHAIRMAN BABCOCK: That's a good argument. I hadn't thought of that. Okay. The next thing, there is a follow-on sentence that says, "An appellate court may order the parties to substitute initials or pseudonyms for minors' names in other appropriate cases." How many people think --

MR. GILSTRAP: Wait a second, Chip.

CHAIRMAN BABCOCK: Yeah, Frank.

MR. GILSTRAP: I mean, I think we just voted to limit it to termination cases.

CHAIRMAN BABCOCK: That's right.

MR. GILSTRAP: Now, when you say "other appropriate cases," that's got to mean other appropriate termination cases, right? It can't mean other appropriate cases involving divorce.

HONORABLE SARAH DUNCAN: We just voted not to have a rule.

CHAIRMAN BABCOCK: No, I don't think we voted not to have a rule.

HONORABLE SARAH DUNCAN: Well, I'm sorry, I misunderstood.

MR. ORSINGER: It seems to me like the other appropriate cases would be beyond those that are explicitly listed, which in itself is broader than termination cases, so this could be personal injury suits or you name it.

CHAIRMAN BABCOCK: Yeah, this is a little different than the last vote we took, because the last vote we took, which was very close, was about various titles in the Family Code.

MR. GILSTRAP: Okay.

CHAIRMAN BABCOCK: But now I'm seeking expression on -- a vote on the sentence that says, okay, even if we keep the Family Code stuff in there, now it could be even broader than that. It could be other

appropriate cases involving minor children.

MR. GILSTRAP: And we're still talking about the children's names only. We're not talking about the parents.

CHAIRMAN BABCOCK: That's the way this is drafted. Okay. So everybody that thinks that's a good idea, raise your hand.

All right. Everybody opposed?

That fails by a vote of 11 in favor to 13 against.

Everybody that thinks having a sanctions provision in this rule is a good idea raise your hand.

Everybody that's opposed raise your hand.

The sanctions rule had three in favor, 20 opposed. Okay. Sarah, my sense was not that we were not going to have a rule, but that with these votes, which we didn't take last time, Jody and his subcommittee could go back and rework the rule in accordance with what --

MR. HUGHES: This is more helpful because the problem was last time there was a lot of discussion, but I didn't know what the whole committee's view was.

CHAIRMAN BABCOCK: Right.

HONORABLE STEPHEN YELENOSKY: Chip?

CHAIRMAN BABCOCK: Yes.

HONORABLE STEPHEN YELENOSKY: Just as an

experiment for the record, I won't read the names, but just doing quick Google searches I'm pulling termination cases from all over the country with full names in them. It can be done.

CHAIRMAN BABCOCK: Yeah. Part of this effort to be concerned about the internet is a little bit like putting the genie back in the bottle, but Justice Gaultney.

HONORABLE DAVID GAULTNEY: Jody, was there any thought to a cross-reference, if there is going to be a rule requiring briefing in a certain way, that 38.1, identity of parties, somehow could reference to that?

MR. HUGHES: I hadn't thought about that, but that seems logical.

CHAIRMAN BABCOCK: Uh-huh. Okay. Any other comments about this rule?

Okay. Judge Lawrence, this is sort of your meeting, I guess.

HONORABLE TOM LAWRENCE: Lucky me. The charge was to change the garnishment rules so that private process servers could serve garnishments. There are actually several aspects of garnishments that we have to look at. One is the service of the garnishment itself on the garnishee, that is, the party that holds the property. The other is the service of the notice of the garnishment

on the defendant. When you docket the case it's docketed as the original plaintiff in the lawsuit is the plaintiff in the garnishment, but the defendant in the garnishment action is the garnishee, not the defendant in the original case, and that causes some confusion in the rules a little bit later.

We've also got the approval of the replevy bond. Then you've got an execution of the garnishment if the garnishee fails to pay, and then you've got a sale of the effects. All of this is done by, up until now, the sheriff or constable. In looking at these garnishment rules, we talked about this last time that in all of these ancillary rules, garnishments, executions, injunctions, attachments, distress warrants, there are inconsistencies. The term "officer" is used interchangeably. Sometimes it means sheriff or constable, sometimes it means the clerk of the court. There is some archaic language in some of these garnishment rules. Carl Hamilton suggested in one e-mail that we go in and try to fix everything that's wrong with the garnishments.

CHAIRMAN BABCOCK: Can you do that, Carl?

MR. HAMILTON: Not me.

HONORABLE TOM LAWRENCE: And my response was that we hadn't been charged to do that. That's a little more global and will take a lot more time and then, too, I

was tied up on these e-filing rules and didn't really have the time, but there are some problems and I'm not trying to fix everything wrong with the garnishments. I'm only trying to fix what we were charged with, but in doing that, the issue of "officer" is a problem that also had to be resolved.

I got feedback from Karen Matken, who is I think the district clerk in Waco. She wants a bond form for these replevy bonds. She actually wants a bond form I guess both for the replevy bond and for the plaintiff's bond. Dianne Wilson, who is the county clerk in Fort Bend County, she brought up the problem that one of the things that has to be calculated in these replevy bonds is interest, and, of course, as we all know, the interest rate changes. It's been fairly stable the last month or two, but for a while the interest rate was changing almost daily, and she wanted to put "current interest rate" on it. And then she also raised a question that we'll get to in Rule 664, which is how is a district or county clerk supposed to know how to set a replevy bond when they don't see the property, and that's really the problem with these garnishment rules.

Fixing it so that the private process server can serve the writ of garnishment or the notice on the defendant is pretty easy. The problem is in Rule 664, and

I don't have the perfect solution to that, but if you'll take out the handout, Rule 658a, and I tried not to reprint every rule in this, only the rules that I am suggesting some change to. 658a, I guess I should -- I'm assuming that everybody is familiar with garnishments, but basically what you're doing is the -- either at the time the lawsuit is filed or at any point during the lawsuit, including after the judgment has been rendered, you can have -- you can -- the plaintiff can request a garnishment where you go in and garnish property that is owned by the defendant that is held by some third party.

Most of the garnishments are probably bank accounts, but there also is a provision that you can garnish specific items, a car or a hay baler or whatever property somebody may have, and that's where it gets a little more complicated when you're doing specific items, but you've got a prejudgment garnishment and then a post-judgment garnishment or anywhere in between.

Rule 658a is the -- is where it's the plaintiff's bond where "no writ of garnishment shall issue before final judgment until the party applying has filed," and here they use the term "officer." I don't believe that they mean sheriff or constable here. I think by "officer" there they mean the clerk of a district or county court or a justice of the peace, and so that would

be the proposal to amend that. I think that that's what the word "officer" means in that context. So that would be the first proposal, is to change "officer" there in 658a.

CHAIRMAN BABCOCK: Okay. Let's talk about that real quickly. Anybody got any comments on that?

Richard Munzinger.

MR. MUNZINGER: Is there a reason why you repeat "of a district or county court or justice of the peace court" instead of just saying "clerk of the court authorized"?

HONORABLE TOM LAWRENCE: Well, because, you know, we ran into this problem yesterday that a JP doesn't have an official clerk. The JP has employees that serve as clerks, so when you're wanting a clerk to do something as a justice court you really need to say "justice of the peace" because there is no official entity known as a clerk of the justice court in the Rules of Procedure.

CHAIRMAN BABCOCK: Justice Pemberton.

HONORABLE BOB PEMBERTON: I just wanted to clarify that, that your intent was the filing would be with a justice of a peace and not a clerk of a justice of the peace, because that's the way --

HONORABLE TOM LAWRENCE: With the justice of the peace, yes.

HONORABLE BOB PEMBERTON: Yeah.

HONORABLE TOM LAWRENCE: Sometimes JPs don't actually have employees or clerks. It's just the JP.

CHAIRMAN BABCOCK: Okay. Frank.

MR. GILSTRAP: And we're satisfied that the universe of courts that can issue a writ of garnishment are the district courts, county courts, and justice of the peace courts? No other courts?

HONORABLE TOM LAWRENCE: I don't think so.

MR. GILSTRAP: Okay.

HONORABLE STEPHEN YELENOSKY: Can't we just take care of that by just saying "clerk of the court or with the justice of the peace," because I think he is right, right now it sounds like the clerk of the justice of the peace grammatically, and using "district or county" might leave out a court that really does have it, so you just say "with the clerk of the court or with a justice of the peace authorized."

CHAIRMAN BABCOCK: What do you think about that, Judge Lawrence?

HONORABLE TOM LAWRENCE: Well, I'm not married to any particular language. I'm just trying to clarify the term "officer" here.

CHAIRMAN BABCOCK: Yeah. I must say the first time I read it I thought you were talking about

clerk of the JP. When I went back and read it I could see the distinction.

MR. RINEY: You need two writs.

HONORABLE TOM LAWRENCE: Are you writing this down, Jody?

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

HONORABLE TOM GRAY: What are you going to do in the JP courts that are big enough to have a clerk? Is that going to affect this?

HONORABLE TOM LAWRENCE: No, because there is no official entity known as a JP clerk.

CHAIRMAN BABCOCK: Okay. Any other comments? Okay. Let's move onto the next one.

HONORABLE TOM LAWRENCE: All right. 661 is the form of the writ, and I put that in there just to show what the writ looks like, not because there are any changes to that, but I did get a comment yesterday from Elaine Carlson. She suggests that the last line of 661, that we replace the last line with language like in Rule 99(c), which is -- 99(c) is the notice on a citation. "You have been sued. You may appoint an attorney. If you or your attorney do not file a written answer with the clerk who issued the citation by 10:00 a.m. on the Monday next following the expiration of 20 days after you were

served this citation and petition, default judgment may be taken against you," and that was her suggestion. We actually have -- I'm not sure where she was coming from on that. She just handed me something in writing, but that was her recommendation.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, if we're not going to touch this, fine, but if we're going to touch it, why don't we change it into English instead of Old English. That last sentence is not understandable by anyone who's not a lawyer, and the word "said" is used throughout and "said" has absolutely no purpose and it doesn't define anything.

CHAIRMAN BABCOCK: You're talking about the "herein fail not" sentence?

MR. MUNZINGER: I'm opposed to that, Chip. We need to have beauty in the law. "Herein fail not," by God, does that get your attention?

HONORABLE STEPHEN YELENOSKY: Beauty is in the eye of the beholder.

HONORABLE TOM GRAY: It's traditional.

CHAIRMAN BABCOCK: "Herein fail not," that's a turn of a phrase, isn't it? Richard.

MR. ORSINGER: One of the advantages to the language the way it is, it may cause somebody to call a

lawyer, which would be a good thing.

HONORABLE STEPHEN YELENOSKY: If they can afford one.

CHAIRMAN BABCOCK: All right. Well, since Tom hadn't looked at this let's not dally on this particular rules, but go forth without day.

HONORABLE TOM GRAY: Without day.

HONORABLE TOM LAWRENCE: Rule 662, this is the delivery of the writ of garnishment. This is what is served on the garnishee, and I simply mimicked the language in Rule 103 and changed it from "any sheriff or constable" to use the utilized language in 103. I guess we could have referenced Rule 103, but typically we don't do that. Typically we prefer to write it out.

CHAIRMAN BABCOCK: Any comments about this? Frank.

MR. GILSTRAP: I think in deference to Judge Yelenosky, I mean, this is a place where the existing language, "tested," is probably so archaic that nobody knows what they mean.

HONORABLE TOM LAWRENCE: Well, let me speak to that, because I actually -- yeah, I forgot to mention that. "Dated and tested," I was trying to figure out where "tested" came from. It only appears in Rule 596, which is attachment, and two places in the garnishment

rules, 662 and 675. I haven't found it in any other rule of procedure or any other statute or law in Texas, and it comes from an Old English practice of teste meipso, which is something signed by the sovereign when they were issuing an order out of chancery, which I guess the King of England did at one time, or they were signing something that came from the crown, and then you've got teste from the court, which means that it was looked at and signed by a judge, and this is sort of language that went from that.

Everywhere else where we have a similar rule we use -- we tend to use "attested," so "tested" really, you know, literal translation would be means that it is looked at and signed by the judge of that court.

CHAIRMAN BABCOCK: Kent had a question.

HONORABLE KENT SULLIVAN: No, I just couldn't resist, and that is we're talking about writs issuing from JP courts. I think we made the point yesterday that disproportionately the litigants will be pro se. It just occurs to me that while I'm a big believer in the use of plain language and being user-friendly with respect to all of our rules in any mandated format, it would be a particular priority with respect to anything that was going to be used in the JP court, so I think if we're mandating a form it ought to be a plain language form, and I think we ought to

consistently apply those principles.

CHAIRMAN BABCOCK: Okay. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, it's bad enough that we use the term "writ." I mean, that's not going to change, I guess. "Garnishment" is also problematic for most people, but I don't have a solution to that right now, but at least the writ of garnishment ought to be enough because it's not a writ of garnishment if it's not properly signed, et cetera, so just "the writ of garnishment may be delivered to."

CHAIRMAN BABCOCK: Okay. Carl.

MR. HAMILTON: To be consistent with the previous change I think it should read "attested with the seal of office of the clerk," as we've said "clerk" there. Then down later on we say "clerk of the district or county court." Perhaps we ought to just say "clerk" there as well and then in the last sentence, "or he may deliver it," I think it should say "or it may be delivered to the plaintiff." It might be a she that's going to do it.

CHAIRMAN BABCOCK: Gene.

MR. STORIE: I had a comment similar to that one about the masculine pronouns because I think they need to be changed on both of them.

CHAIRMAN BABCOCK: Yeah, Richard.

MR. ORSINGER: I'm a little bit puzzled by

the repeating in (1) and (2) of "other person authorized by law." It seems to me like that would be -- the second time would be redundant. It ought to say something like "sheriff, constable or other person authorized by law or written order."

MR. FULLER: Yeah. It seems to me one encompasses the other.

HONORABLE TRACY CHRISTOPHER: Isn't that the exact same language that we just passed in the other rule?

HONORABLE TOM LAWRENCE: That's what Rule 103 says.

HONORABLE TRACY CHRISTOPHER: So that's why we were trying to use 103's language.

MR. HAMILTON: Actually, you could just say "delivered to any person authorized by Rule 103 or to the plaintiff, his agent or attorney."

HONORABLE TOM LAWRENCE: Well, I thought about doing that, and we can do that. We don't normally reference other rules, do we? Don't we normally just spell it out? It doesn't matter to me.

CHAIRMAN BABCOCK: What's everybody's preference?

MR. ORSINGER: Not to cross-refer.

CHAIRMAN BABCOCK: Not to cross-refer?

HONORABLE TRACY CHRISTOPHER: Not to

cross-refer.

CHAIRMAN BABCOCK: Okay. All right. What other comments? Anything else? Okay. 663.

HONORABLE TOM LAWRENCE: 663. This is the execution and return of the writ, and obviously that language, too, is going to mimic Rule 103.

CHAIRMAN BABCOCK: Any comments on 663?

HONORABLE STEPHEN YELENOSKY: Change "the same" to "it."

HONORABLE TOM LAWRENCE: I'm sorry. Where are you, in the last sentence?

HONORABLE STEPHEN YELENOSKY: "Person receiving the writ of garnishment shall immediately proceed to execute it by delivering a copy to the garnishee." No "thereof" needed.

CHAIRMAN BABCOCK: Seems reasonable. Any other comments on 663?

MR. ORSINGER: But this is -- are we serving a copy of the writ on the garnishee, or are we serving the original of the writ on the garnishee? I think process you serve the original on the respondent or the defendant.

HONORABLE STEPHEN YELENOSKY: Doesn't that go back to the clerk?

MS. WOLBRUECK: The original goes back to the clerk.

HONORABLE STEPHEN YELENOSKY: Goes back to the clerk.

MS. WOLBRUECK: With the service information, the return information goes back to the clerk.

MR. ORSINGER: Well, but that's not what this says. This says that you execute a writ by delivering a copy to the garnishee.

HONORABLE STEPHEN YELENOSKY: Right.

MR. ORSINGER: And that's true?

MS. WOLBRUECK: Yes.

MR. ORSINGER: I see blue stuff on my citations and things that get served. Is that just local practice then? I mean, I see stamps that make them look like they're original documents.

HONORABLE STEPHEN YELENOSKY: In the court file or --

MR. ORSINGER: No. When you have the -- never mind.

CHAIRMAN BABCOCK: Stephen.

MR. TIPPS: Well, if we're going to promote plain language I would change the last phrase to "and shall return it as with other citations."

HONORABLE STEPHEN YELENOSKY: Yeah.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: Isn't there a difference between returning it and making a return?

MR. TIPPS: I don't know that there is.

HONORABLE SARAH DUNCAN: Making a return is where you fill out -- Bonnie will -- and, Andy, help me here, is filling out the blanks on a return of service.

MR. TIPPS: Right. I mean, I would think --

HONORABLE SARAH DUNCAN: It's not just returning it -- the original to the court. It's making a return on the writ and filing.

MR. TIPPS: I was thinking that "as with other citations" would capture that concept, but perhaps not.

HONORABLE SARAH DUNCAN: I think we need to tell them to make a return.

MR. TIPPS: And maybe that's too much of a term of art. Sorry, Stephen. I tried.

HONORABLE STEPHEN YELENOSKY: What's that?

MR. TIPPS: I tried.

CHAIRMAN BABCOCK: Everybody named Stephen has a plain language agenda today.

CHAIRMAN BABCOCK: What's next?

HONORABLE TOM LAWRENCE: Well, 663a, I put that in there just to show the form of the writ. I do have a typo in "dissolve" in the last line. I'll correct

that, and then 664 is where the problem is. The first part, there is three paragraphs to 664. The first part of that paragraph is where the -- where the defendant can try to have the amount -- well, let me rephrase that. It's not clear. It says "defendant," comma, "garnishee," comma, "can try to have the amount of the replevy bond lowered." What may happen is that you have a judgment for $50,000 and the amount of the replevy bond presumably would be the $50,000, but you go out and they garnish a car, let's say, that's worth $20,000 that is being driven by a third party that's actually owned by the original defendant in the lawsuit. Well, the issue is, is that replevy bond going to have to be for $50,000, which was the amount of the original judgment, or is the replevy bond to be for the $20,000, which is the value of the car?

So the first paragraph of 664 allows you to have that replevy bond reduced to be able to show what the -- consistent with the value of the property garnished. The second paragraph is where there can be a hearing, a review by the court on the value of the bond, and then the third paragraph, which we don't get into at all, is where you can actually substitute some other property for what was garnished.

Well, the problem in the first paragraph -- and I've got two potential ways to solve that. The

problem is that the rules now allow the sheriff or constable to go out and to serve this garnishment, and the sheriff or constable actually under this rule, as I read and understand this, the sheriff or constable can look at the property and decide if the property is worth less. They can estimate the value and accept a replevy bond for a lesser amount. So if you have a private process server serve this then the private process server is not going to be able to do that, so the only person that actually sees the property now under the current practice is the sheriff or constable who goes out to serve the garnishment.

Well, if there's no sheriff or constable involved in that then there's not going to be anybody that's going to actually see the property except the private process server, so instead of having the sheriff or constable be able to say, "That's only worth $20,000. I'll approve a replevy bond for less than that," nobody is going to be able to do that. So the question is who is going to be able to immediately without having to request a hearing at some point in the future, who is going to be able to determine the value of the property and to lower the replevy bond?

Well, one way is that it goes back to the court. The other way is it goes back to the court -- and that's my version one. Version two is that it would go

back -- the court can either reduce the replevy bond based on something. I don't know what, because the court would not have seen it, or it could be the clerk, and I don't know what Bonnie and Andy think about this. It could be the clerk of the county or district court that could reduce that replevy bond, but as Dianne Wilson, the county clerk of Fort Bend County, pointed out, you're suggesting that the clerk of a county or district court reduce a replevy bond of an item they have not seen and, therefore, have no way to value.

To have the court only do it, which is version two, means that there may be a delay. If the judge is not available, is gone or not immediately available, then there's going to be a delay, and that person, that garnishee, is going to have that property presumably tied up and not be able to use it. So I prefer -- I prefer the version where you allow the clerk to do it, but there is no perfect solution to this.

HONORABLE STEPHEN YELENOSKY: Where is the authority for anybody to lower the replevy bond if the court order sets it?

HONORABLE TOM LAWRENCE: Well, Rule 664, the first paragraph, "to be approved by the officer." I'm looking at -- now, if I'm interpreting this correctly, if you look at the middle of the first paragraph of 664, "to

be approved by the officer who levied the writ, payable to plaintiff, in the amount fixed by the court's order, or at the defendant's option, for the value of the property or indebtedness sought to be replevied, to be estimated by the officer."

HONORABLE STEPHEN YELENOSKY: Well, maybe "officer" there means something different than I thought, but I thought when I set a replevy bond nobody else could lower it.

HONORABLE TOM LAWRENCE: Well, you know, I used to think that, too, but if you look at Rule 658, the last paragraph of Rule 658, there is some language that says toward the middle of that last paragraph, "The court shall further find in its order the amount of bond required of defendant to replevy, which, unless, defendant exercises his option as provided under Rule 664, shall be in the amount of the plaintiff's claim, one year's accrual of interest as allowed by law on the claim, and the estimated cost of court."

HONORABLE STEPHEN YELENOSKY: Well, that just refers you to 664, so all that does is takes us back to what does 664 mean when it says "officer who levied the writ."

HONORABLE TOM LAWRENCE: Well, I don't -- you know, that's the way I interpreted it, and talking to

the constable in my precinct that does this, that is the practice apparently. I don't know. Andy, Bonnie, can you-all interpret that?

MS. WOLBRUECK: This has always been interpreted here as the officer being the sheriff or constable, and I will strongly recommend that it remain at that and not put the clerk in that position. I think that that seems to be proper format to continue with this process.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: I don't know if this is true everywhere or not, but I think when our constables serve a writ of garnishment they just serve it like they do a citation. They don't look at any property, they don't ask the garnishee about any property. They just serve it, so I don't really think the sheriff or the constable serving this really knows anything about any property at that point. I think the solution to it is since the opposing party can ask for a hearing even less than three days, I think that the defendant in the main suit who wants to replevy ought to have to file a motion and just let the court set the replevy bond at that time.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: I like Carl's suggestion because if we allow the court to reduce or to set a

replevy bond on the application of the defendant then we're setting up an ex parte proceeding in a case where the plaintiff is represented by a lawyer, and that conflicts with my notion of what's ethical, and it could lead to a lot of practices where somebody goes in with supposed information on the value of an asset and then there is a hearing on the part of the plaintiff to get the bond back up and by then the vehicle is removed or whatever. I would much prefer to have an accelerated hearing with notice to the plaintiffs or the plaintiff's lawyer.

HONORABLE STEPHEN YELENOSKY: Well, has it been --

THE REPORTER: I can't hear you. I can't hear you.

CHAIRMAN BABCOCK: Stephen, you've got to talk up.

HONORABLE STEPHEN YELENOSKY: I was just asking has it been other judges' experience or belief that the replevy bond you set can be lowered by the sheriff or constable who serves it?

HONORABLE TRACY CHRISTOPHER: I have no idea what happens after that writ goes off.

HONORABLE STEPHEN YELENOSKY: That would be the only example I know of where an order does that.

CHAIRMAN BABCOCK: Justice Hecht.

HONORABLE NATHAN HECHT: Well, does the officer ever take into possession property on a garnishment? The writ just says don't give it to the defendant.

HONORABLE TOM LAWRENCE: Well, if you get over to 670 and 672, that's where if the officer -- if the garnishee fails to deliver those effects then those effects can be sold and the officer can take those and sell them, but normally if something is garnished, it stays where it is.

HONORABLE NATHAN HECHT: Right.

HONORABLE TOM LAWRENCE: And I have never done a garnishment personally in my court that hasn't been for a bank account. The problem is where you've got a garnishment for other effects, which means other personal property other than a bank account; and if I'm misinterpreting 664 in some way, and I may be, then I don't understand the language, because the language to me only has one potential implication, which is that the sheriff or constable can estimate a value --

HONORABLE STEPHEN YELENOSKY: Well, it has estimated in there --

HONORABLE TOM LAWRENCE: -- and then reduce it, and I don't know what the other -- you know, I've

never had that happen to me, but my constable tells me that they do that.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: As I understand, the writ of garnishment can theoretically be used to seize something besides a bank account.

HONORABLE TOM LAWRENCE: Yes.

MR. GILSTRAP: And that's the source of the problem here, although it is almost never used for that. What you use for other property is an attachment or distress warrant --

HONORABLE TOM LAWRENCE: Or a turnover.

MR. GILSTRAP: -- which do have replevy bond provisions as well and which I suspect anybody's experience with a replevy bond involves those chapters.

So I guess where I'm coming down is whatever we do, first of all, whatever experience we have with replevy bonds is going to be for, say, attachments and if we monkey with the replevy bond here it seems like we've got to do the same thing for those other provisions as well.

CHAIRMAN BABCOCK: Kent.

HONORABLE KENT SULLIVAN: Does it trouble anybody that you have a member of the executive branch making what appears to be a judicial determination

unilaterally?

HONORABLE TOM LAWRENCE: Well, let me make the point I tried to make yesterday. I did not actually write these garnishment rules.

HONORABLE STEPHEN YELENOSKY: You can't get out of that. You are our whipping boy.

HONORABLE TOM LAWRENCE: There are some other problems with these, too, but this is the problem that the private process server -- there is no easy way around. I mean, we can do away with this provision allowing a replevy bond to be set by someone in a lower amount, but there's a consequence to that, if you think about it, which is that somebody that's got a piece of property worth much less than the judgment is going to have to pony up a replevy bond for the full amount of the judgment. I mean, that's what this is designed to prevent, so --

HONORABLE STEPHEN YELENOSKY: I mean, in court we don't allow somebody to estimate the value of something unless they're an expert or they own it.

CHAIRMAN BABCOCK: Carl, then Tom.

MR. HAMILTON: I think there's also a difference if the writ of garnishment is served before judgment, it's just served and the property remains in the hand of the garnishee. If it's served after judgment in

the main case it operates like an execution, so the sheriff or constable actually takes possession of it at that time.

CHAIRMAN BABCOCK: Tom.

MR. RINEY: Well, I think Judge Lawrence's comment that he didn't draft these rules is really kind of significant, especially taken with Frank's comment, and that is we've got a larger problem here than just this one rule. I have very limited experience in this area, but it troubles me greatly that a sheriff or someone can estimate the value of personal property. Think about the situation where the debtor has leased out a farm and you're talking about going out and getting an irrigation pivot or a piece of farm equipment or industrial equipment in any other type of situation.

I mean, there is whole lawsuits about what the value of those things are, and it's very complicated, and I think that is really kind of an application of the judicial system to the executive branch, and I think it's fraught with problems. We can't solve that today because that's going to involve, I think, what I'm told, other rules that need to be looked at. I don't think we want to clarify -- take a step to clarify it's okay for the sheriff to do that in one rule.

CHAIRMAN BABCOCK: Kent.

HONORABLE KENT SULLIVAN: I think somebody needs to use the U word, unconstitutional.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: Why is it that Judge Yelenosky's setting of the replevy bond amount in the order granting the application for a writ of garnishment isn't the value until it's litigated and another value is proved? That makes it easy for purposes of 664. It's what's in the court's order unless you get it changed, and I don't know about writ of garnishment, so I'm actually asking somebody who does know about writ of garnishment to tell me why can't it just be the amount of the replevy bond set in the court's order?

CHAIRMAN BABCOCK: Carl, then Judge Christopher.

MR. HAMILTON: I think the answer is that when the writ of garnishment is filed you don't know what the garnishee has, so the court always just sets the replevy bond as the amount of the debt that's being sought. We don't know what property the garnishee has.

HONORABLE SARAH DUNCAN: And then the officer goes out and --

MR. HAMILTON: Serves the writ.

HONORABLE SARAH DUNCAN: -- serves the writ and only gets, you know, a setting of china that's worth

$50 and the debt is a hundred thousand.

MR. HAMILTON: He really doesn't get that at that time either. He doesn't know what the garnishee has either. He just hands him a piece of paper.

HONORABLE SARAH DUNCAN: Right, but if all he gets is a setting of china and the debt is for a hundred thousand and the replevy bond is set by Judge Yelenosky for a hundred thousand, and all the person has that's subject to the writ is a hundred-dollar place setting of china then they're going to have to put up a hundred thousand dollars to meet the replevy bond requirement in the order, even though what they have is only a hundred dollars; is that right?

MR. HAMILTON: That's right.

HONORABLE SARAH DUNCAN: Then this is really significant --

CHAIRMAN BABCOCK: Judge Christopher.

HONORABLE SARAH DUNCAN: -- and I'm not willing to --

HONORABLE TRACY CHRISTOPHER: Well, almost the exact same language is used in -- well, in fact, the exact same language is used in Rule 599, which is defendant may replevy on attachment. Then on defendant may replevy after a distress warrant, which is Rule 614, it does not have the same language in terms of the officer

re-estimating the value of the property. So I agree that we probably ought to look at all of them if we're going to start making changes. I think we were originally tasked with, you know, making it clear that private process servers could serve the writ. Then the question was, you know, what happened after that if a private process server is the only one who went out there and saw the property?

CHAIRMAN BABCOCK: Frank, then Sarah, then Judge Yelenosky.

MR. GILSTRAP: Well, another problem, the problem is that the writ is issued ex parte and the garnishee has no input; and the garnishee comes in and he's got to post a hundred thousand-dollar bond for this 20,000-dollar tractor and he needs his tractor; and the question is, how do you reconsider it; and the only issue is can the sheriff do it on the spot or should we make the garnishee go back to the judge? I think we ought to make the garnishee go back to the judge, but I think that's the issue we're talking about.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: This probably isn't my place, but I think there needs to be a task force for all of the post- and the prejudgment attachment, sequestration, garnishment rules. They're not understandable to people, but they affect people's

property and livelihoods, and we're not experts in this area.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: And I could probably throw in turnover orders in there, too, and yeah, but I mean, I think it seems rather fundamental to me if you've got a court order that sets something, what you're saying is this rule implicitly writes into that court order, "You may replevy this for $50,000 or whatever the sheriff thinks." That's what this rule says, and that can't be right, and we have mechanisms for dealing with emergencies. Probably getting the tractor back may be very important, but it's probably something you can deal with tomorrow rather than on the spot.

Now, obviously if the sheriff is stupid enough to be trying to take something that involves somebody's life, like their life support system, that would be an emergency, but the law provides for that. We don't just let somebody else decide that the order is wrong.

MR. GILSTRAP: Your respirator.

MR. ORSINGER: "We're taking your oxygen tank."

HONORABLE NATHAN HECHT: Get that paid up.

CHAIRMAN BABCOCK: Yeah, right. Alex.

PROFESSOR ALBRIGHT: I was just reading the execution rules for the hearing I'm going to have to go to next week and --

CHAIRMAN BABCOCK: Alex, can you speak up?

PROFESSOR ALBRIGHT: I was just reading the execution rules just now, and I was struck by how there are some things that are not consistent with some changes that we've made over the years in some of the other rules. You can tell where it's been updated in little pieces over the years, but I think 1988 may have been the last time, and so I agree with Sarah that it's probably time for us to take a good look at all of those rules.

CHAIRMAN BABCOCK: Judge Christopher, then Buddy.

HONORABLE TRACY CHRISTOPHER: I know at least one of these -- and I can't remember which one it is right off the top of my head, maybe turnover -- has a CPRC provision that you have to look at, and the CPRC provision really seems quite different from the language in our rule, the procedure, too. So I agree that it would be nice to have it all sort of redone.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Yeah, isn't there -- the bank account usually is garnishment, but attachment, isn't that usually what -- like if you want to attach property

somebody owns, you go out and attach it and so forth, because the only one I had involved was Marvin Zindler was working for the sheriff, and Marvin went out there and got -- he attached an oil rig. They were going to disassemble it, he said he didn't even own, didn't make a difference. He had his friend out there hauling it all off. That was attachment, but that was also Marvin, who was different, but isn't there typically --

HONORABLE TOM LAWRENCE: Garnishment is property that's held by a third party.

MR. LOW: Oh, okay. Okay.

HONORABLE TOM LAWRENCE: Like a bank.

MR. LOW: What ended up, this property was held by a third party and owned by them, too.

CHAIRMAN BABCOCK: Judge Peeples, did you have something?

HONORABLE DAVID PEEPLES: Yeah. I think almost always the judgment defendant who goes to replevy, this is going to happen a day or two or three or four after the garnishment was served, and the sheriff or whoever it is is -- probably doesn't anybody remember three or four days later or what it was worth or anything, and if the judgment defendant has to go find someone and ask them about something several days ago it makes more sense for him or her to go to the court than to go to the

sheriff, so we ought to change it, but in the context of all these rules.

HONORABLE STEPHEN YELENOSKY: Not to mention the sheriff is not a judicial officer.

HONORABLE DAVID PEEPLES: Right. Sure. Yeah.

CHAIRMAN BABCOCK: Bill.

MR. WADE: Didn't we decide that the private processers these -- process servers could serve these things, and the problem was that they would run into this problem, never being able to reduce the bond? Well, if now if we can make them go back to the court that will remove that problem because nobody will be able to do it. It will have to be -- a constable or sheriff neither one could go it.

MR. GILSTRAP: Well, I just have to echo Sarah about -- you know, repeat my ignorance of exactly how this works, but I was under the impression that the constable goes out, tries to seize the tractor, and if the guy doesn't put up the bond he takes the tractor.

MR. ORSINGER: No.

MR. HAMILTON: No.

MR. GILSTRAP: That's not how it works?

MR. LOW: That's attachment.

HONORABLE DAVID PEEPLES: Garnishment just

freezes the property in the hands of the garnishee.

MR. GILSTRAP: But on an attachment he could just pick the tractor up.

HONORABLE TOM LAWRENCE: Right.

MR. GILSTRAP: And if the sheriff doesn't have the authority to reduce the amount of the bond on the spot because it's obviously a piece of junk, it's worth $100,000, the guy is going to lose his tractor, and he's going to have to go to court to get it back.

MR. FULLER: Well, a better example of that would be you've got a hundred thousand-dollar debt, and somebody goes out and garnishes your three million-dollar bank account. Okay. Unless you have the ability to post a bond and get that account working again, you know, you may default on all kinds of stuff because you cannot use $3 million, even though the debt is a hundred, because really the garnishment is directed at a third party who is holding the debtor's property.

MR. WADE: The bank will freeze it.

CHAIRMAN BABCOCK: Bonnie.

MS. WOLBRUECK: I just wanted to make another comment. Judge Lawrence had mentioned something about the setting of the interest rate, that Dianne Wilson had suggested that be at the current rate. The statute now says "legal rate," and I believe it needs to remain at

that because the legal rate is the one set by statute that's allowed in the judgment, and I believe that's my understanding of legal rate, and so that's the same amount that statute allows for a judgment.

HONORABLE TOM LAWRENCE: Well, would you set the rate based on the date of the replevy bond or -- because the rate changes.

MS. WOLBRUECK: It says here from the date of the bond. And legal rate right now I think is five percent, isn't it, in judgment?

HONORABLE TOM LAWRENCE: No, 8.25.

HONORABLE TRACY CHRISTOPHER: 8.25.

MS. WOLBRUECK: Okay. So it's gone up to 8.25. But whatever the --

HONORABLE TOM LAWRENCE: So you don't want to put "current" in there?

MS. WOLBRUECK: No. I want it to remain at what is allowed in the judgment, which is the legal rate.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: Just trying to figure out where we are, I think that, you know, the work that Judge Lawrence and his subcommittee have done up to the replevy bond is work that we're all satisfied with. I think we ought to maybe stop short of revising the replevy bond until we look at these other things, but that still leaves

the question open that, you know, can the private process servers serve the writ, and I think the answer is he can't serve it if it involves property. Is that where we are?

HONORABLE TOM LAWRENCE: Well, no. No. He can serve it regardless of what it is.

MR. GILSTRAP: Okay.

HONORABLE TRACY CHRISTOPHER: It's just a bond problem.

HONORABLE TOM LAWRENCE: The problem is in reducing a replevy bond where a private process server served the writ, then there is nobody to immediately reduce that replevy bond, so you're losing that option. Now, if the sheriff or constable serves the writ then everybody's fine, everything stays exactly as-is, and there is no problem. The sheriff or constable can do that. Now, whether or not that's a good practice is another matter, but that's what the rule currently provides.

CHAIRMAN BABCOCK: Richard, then Frank.

MR. ORSINGER: It seems to me like we could solve everybody's complaint by just deleting this kind of ad hoc reduction of the bond at the scene of the garnishment and just go with the paragraph that says, "On reasonable notice any party can get prompt judicial review of the bond." Doesn't that solve everybody's problem?

HONORABLE STEPHEN YELENOSKY: Yes. In this particular rule, but apparently not --

MR. ORSINGER: Okay. Well, then I would propose that we fix this rule now and then we look at those other rules some other day.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: Well, are we -- we're going to allow the private process server to serve the writ on personal property. Are we going to allow him to take it into his possession?

MR. ORSINGER: That's not the point on a typical writ of garnishment. On a typical writ of garnishment is a freeze possession in the garnishee. If it's a post-judgment garnishment, however, it really does function as an execution, because if the garnishee doesn't -- well, there's a rule on that.

HONORABLE TOM LAWRENCE: Well, it can.

HONORABLE TRACY CHRISTOPHER: There still has to be an order for sale.

HONORABLE TOM LAWRENCE: Yeah, it doesn't immediately function as an execution, but that's the logical result down the road, but the initial service of the writ does not result in any immediate taking of the property.

MR. GILSTRAP: Aren't we all in agreement

that the private process server can't take personal property into his possession? Isn't that where we all are?

CHAIRMAN BABCOCK: Yeah.

MR. GILSTRAP: Okay.

HONORABLE NATHAN HECHT: And they don't want to.

MR. GILSTRAP: I understand.

MR. WADE: I want to raise, I had a problem with them serving it in the first place because if a private process server goes out there and serves it and he comes up with this problem, the constable who's been beaten out of the opportunity to serve that ain't going to come over and help him. "You served it, you deal with it."

HONORABLE TOM LAWRENCE: Yeah, and that's exactly what's going to happen. You know, this rule has been in effect since 1977, '78 according to the caption. We haven't had much in the way of comments about these garnishment rules at all. I talked to a couple of collections attorneys trying to figure out how this worked, and the two collections attorneys I talked to say that they don't use garnishments that much except for bank accounts. They use turnovers for the most part now, but I'm a little concerned. We've got something that's been

in effect for 30 years, and we're going to after a short discussion do away with this first paragraph of 664. I think that requires some further thought before we do that.

CHAIRMAN BABCOCK: Yeah, Sarah.

HONORABLE SARAH DUNCAN: And I think what it's convinced me of, at least, is that letting private process servers serve writs of garnishment requires further thought, and I'm against -- I'm against it until we're able to write all of the rules that are going to affect people's property so immediately in an understandable, clear, cogent, judicial way; and we're not even close to that.

CHAIRMAN BABCOCK: Alex, then Justice Gray, then Judge Christopher.

PROFESSOR ALBRIGHT: I just wanted to let you-all know this is a bigger problem than garnishment. Just looking here, the same language about the officer serving the writ, setting the replevy bond is in the attachment rules and in the --

MR. GILSTRAP: Distress warrant.

PROFESSOR ALBRIGHT: Well, no, distress warrant has that the bond has to be approved by the court having jurisdiction of the amount in controversy payable to the plaintiff. But the -- well, I had it all here and

now I'm losing it. Attachment definitely, and there was another one here.

MR. FULLER: Sequestration.

PROFESSOR ALBRIGHT: They all have the same language, so I think if we fix it in garnishment we're going to still leave it in other places, so I'm not sure that we should make a change here without looking at these other rules as well.

HONORABLE STEPHEN YELENOSKY: Well, then we shouldn't change the rule at all because we will have touched it right now and changed it without fixing what a number of us think is an unconstitutional problem.

CHAIRMAN BABCOCK: Justice Gray and then Judge Christopher.

HONORABLE TOM GRAY: Although he said he would never return to it, in deference to Bill Dorsaneo in his absence today, I'm sure this is dealt with in the recodification.

CHAIRMAN BABCOCK: Yeah. He went home to work on the recodification. Judge Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I'd just like to -- I mean, the private process people were here the last time to talk about how serving the writ and the need to serve the writ on a real short notice to freeze the bank account or to freeze the property, so that's

why -- some of them do it already. They read 103 into this rule, but they wanted to make sure that it was in this rule. That's why we started monkeying with that language in the other two rules, 662 and 663, but you have to remember, property doesn't go anywhere until there is an order of sale. Okay. So it's not -- I don't think it's unconstitutional if it's not going anywhere. I mean, it's frozen by this order and --

HONORABLE STEPHEN YELENOSKY: Well, what about the attachment situation?

HONORABLE TRACY CHRISTOPHER: Well, I mean, we're just talking about garnishment here and fixing this particular point and whether they ought to be able to serve a garnishment, and we all know that in some counties you can't get your sheriff or constable to get to the bank that day to freeze the account, and that's why the private process servers -- the lawyers want the private process server to be able to get to the bank that day and freeze the account. So there was a good policy reason to change the service of the actual writ part, so I would hate to see that, you know, put off for two years while we study the whole issue.

CHAIRMAN BABCOCK: Yeah. Frank, then Judge Lawrence.

MR. GILSTRAP: Don't we solve the problem by

simply allowing private process servers to serve writs of garnishments on financial institutions for money and not letting them serve everything else, and wouldn't that solve the short-term problem and we could go back and consider the garnishment and attachment rules without the press of the current problem?

CHAIRMAN BABCOCK: Judge Lawrence.

HONORABLE TOM LAWRENCE: Well, the -- if you went ahead and changed the earlier part of the rules to allow private process servers and you didn't do anything to Rule 664, there still is a proposed comment that we haven't gotten to yet, and the comment would explain -- I have got a version one and two, but the comment would explain that if you have a sheriff or constable serve it then they can amend the replevy bond, but if it's a private process server they can't. So it's possible that the marketplace will take care of the problem. It's possible that if someone is going to do a garnishment on the bank they get a private process server because this changing in the replevy bond probably won't come into effect. It could, but it probably won't, and if they're going to serve a garnishment where there is some effect or some personal property that they might just go with the sheriff or constable.

So the marketplace may sort the problem out,

and that would be a way to do it. If the Court wanted to do something now then you could do that and leave 664 alone, I guess, because there really wouldn't be a problem if the sheriff or constable continued to serve it.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: I don't think there's a problem with the private process servers because garnishment is another lawsuit. It's just like any lawsuit that you file except that instead of a citation we call it a writ of garnishment, and it gets served on the garnishee. There's no property involved at that time. It's just notice to him. He has to come in and file an answer or he gets defaulted, and it's not until after all that occurs that a judgment is entered against the garnishee. That's where the property comes into play at that point, so there's no problem with having a private process server serve the initial writ. It's just like a citation.

HONORABLE DAVID PEEPLES: That's exactly right, and I just don't understand how the concept of replevy applies to a bank account garnishment. Does anybody? A thousand dollars been garnished, you wouldn't replevy with a bond for a thousand dollars. That just doesn't make sense.

HONORABLE STEPHEN YELENOSKY: Well, a

sheriff might think a thousand dollars is worth five hundred.

HONORABLE TOM LAWRENCE: If you've got a bank account and you have $50,000 in it, you might need that cash; whereas you can replace that with a bond and it doesn't cost you, what, how much? So, yeah, you might want to do a replevy bond for the bank account so you can get the cash.

CHAIRMAN BABCOCK: This may be a good place for our morning break, huh, Dee Dee?

THE REPORTER: I think so.

(Recess from 10:33 a.m. to 10:50 a.m.)

CHAIRMAN BABCOCK: Okay. Justice Hecht I think has figured out the solution, so you want to say it for the record?

HONORABLE NATHAN HECHT: Yeah. I think we'll report back to the Court that if we think this is a big enough issue to fix just for the time being to have private process servers serve garnishments then we'll consider doing that and not get into all of the other problems, but I do think it's pretty clear from the discussion this morning that we should look at the other ancillary proceedings, at least attachments, distress warrants, garnishment, and sequestration, but maybe the others as well.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: One of the things then, Justice Hecht, if you-all are going to revisit that, is in our court we've had about eight or nine of these proceedings, and I know that Texarkana had one and Amarillo had one, where the clerks have attempted to garnish the inmate trust accounts, and there's -- the problem in most of those garnishment proceedings is that there is a judgment entered in a case for a certain amount. Subsequently they attempt to change it for the amount of additional cost and the court-appointed attorney's fees cost, and it changes the amount of the judgment, and how you get from the original judgment to the garnishment notice needs to be closely looked at because whatever task force or whatever process it goes through needs to look at that because that is a recurring problem at this time in a number of the courts of appeals.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: And I would just reiterate what Judge Christopher said, that this all started with -- was it 108?

HONORABLE TRACY CHRISTOPHER: 103.

HONORABLE SARAH DUNCAN: 103, that the private process servers believe they now have the power to do this.

CHAIRMAN BABCOCK: Right.

HONORABLE JAN PATTERSON: And it sounded to me like there were some volunteers to serve on that committee.

HONORABLE TOM LAWRENCE: So what's going to happen on these rules now? Is Jody going to work up just the changes on the service and that be it or what?

HONORABLE NATHAN HECHT: Well, we'll either do that or maybe just have a separate sentence someplace that just says "Writs of garnishment can be served by anybody under Rule 103." I understand the problem of cross-reference, but just for now, you know. Garnishments are time-sensitive, and minutes matter when you're trying to stop somebody from withdrawing money, so if that's perceived to be a big enough problem maybe we just do that, but I don't think we do any more than that, and then make sure that the Court thinks that this is something -- I think certainly they will -- is worth the effort to go through here and look at all of it, but that's going to be a major undertaking.

CHAIRMAN BABCOCK: Yeah. Frank.

MR. GILSTRAP: Well, I think if the Court takes that approach it would seem very sensible to me. I think the Court ought to consider limiting it to bank accounts. Carl had suggested, well, there's no harm in

letting the constable serve a writ on property because that doesn't involve seizure of the property. I think the answer to that is that it can later on in the process, and you have to remember the judge's comment that the constables -- once the private processer starts, the constable is not going to come bail him out.

CHAIRMAN BABCOCK: Fair enough. Yeah, Hayes.

MR. FULLER: Along the lines of what Justice Hecht was saying, maybe just to clarify in my own mind, it seems to me where we were kind of is, is the clerk going to be involved or not, and if the clerk is -- that's looking at the comments, version one and two. Version one has a reference to the clerk, version two does not have a reference to the clerk. That might be your starting point as far as saying what they can and cannot do.

HONORABLE NATHAN HECHT: Okay.

CHAIRMAN BABCOCK: Great. Well, Judge Lawrence, thanks very much for all the work that you put into not only this, but the e-filing in the JP court.

Why don't we turn to the last agenda item, and that's Alex Albright with respect to the plain language project for jury instructions.

PROFESSOR ALBRIGHT: Okay. There is some long history to this that I'll acquaint you-all with.

Kent Sullivan, what, two, three years ago, wanted to start looking at plain language effect on juries about whether juries understand our jury charges and would better understand our jury charges if they were in plain language, and so through the State Bar committee, I guess it was the PJC Oversight Committee funded a test of -- with mock jurors of plain language charges versus the current PJC charges for cases, and what we found is that jurors often do not understand some of the words that are used in our pattern jury charges.

One interesting word that they tend not to understand is "unanimous." "Preponderance of the evidence," 75 percent, I can't remember exactly, but something like 75 percent think that it means you have to prove your case by, you know, 75 percent versus 25 percent. Most jurors think preponderance of the evidence is a much higher burden of proof than it really is.

HONORABLE KENT SULLIVAN: Some, as I recall, wanted to know why they needed to preponder it, they could just ponder it.

PROFESSOR ALBRIGHT: But this was also tested before the lawyers argued; and so some of this is worked out during the lawyer arguing; but anyway, so we discovered in this test that it would be a good idea for us to look at our jury charges and try to start putting

them into plain language. The different pattern jury charge committees that put together the volumes on the substantive law attempt to do this to the extent they can while they're rewriting the questions. Sometimes you are limited by statutory language or some case law, but to the extent that they can they're trying to put it into plain language.

What we attempted to do on our committee was to work with the admonitory instructions, which are part of every jury charge in the state. So what you have before you is a plain language rewrite of the admonitory instructions. The admonitory instructions are in a combination of the orders following Rule 226a and some instructions that are only in the PJC. One thing we talked about was is it okay to keep this in two different places, would it be better to have it in one place or the other. The pattern jury charge oversight committee felt that it was -- it worked well to have it as it is, with some of these more important admonitory instructions kept in the Supreme Court order and other ones that are just in the PJC.

The report that I've given you is the report that was given to the Pattern Jury Charge Oversight Committee, and it contains all of the admonitory instructions. Only some of them are a part of the order

under 226a.

Also, on this committee, the way we did this is we had the -- we took the old instructions. We had Wayne Schiess, who teaches legal writing at the University of Texas Law School, and he's a member of the committee, we had him rewrite it in plain language. He did this plain language rewrite with doing the best he could to make absolutely no substantive change, only a language change. Then the committee -- and David Peeples is on the committee, Tracy Christopher is on the committee, Kent is on the committee, I'm on the committee. This is our subcommittee that was working on the plain language rewrite. Tom Riney was on the oversight committee as well. Is there anybody else on the oversight committee here?

Anyway, so in our discussions there were some things that we thought needed to be addressed substantively in the admonitory instructions as well, so we did make a few substantive changes, and I'll point those out as we go through, and I've tried to point them out in this draft, so what you have is a side-by-side draft. It's difficult in some places to compare them because there has been a change in organization as well as language, so sometimes you have to just -- you have to read parts of it and see where all these things

transferred over. So if any of you-all have -- Tracy is the chair of the Pattern Jury Charge Oversight Committee.

HONORABLE TRACY CHRISTOPHER: Well, and just one other thing, I don't know if you mentioned it and I missed it. We actually tested the old 226a and the new 226a instructions and gave them a little test at the end just as to those admonitory instructions, and they understood the new plain language version better than the old one, and I think Wayne said we went from what's considered an 11th grade language in the old 226a to a --

PROFESSOR ALBRIGHT: Third or fourth grade.

HONORABLE TRACY CHRISTOPHER: No, no, no. It was 7th or 8th grade language for the new 226a. They have certain ways that they, you know, measure what it is. I would just like to say that, for example, our *Newsweek* and *Time Magazine* used to be written at the 11th grade level, and now it's not. It's down to the 8th or 9th grade level. Many of our major newspapers are also, so --

HONORABLE BOB PEMBERTON: Geez.

HONORABLE TRACY CHRISTOPHER: You know, it's kind of sad, but unfortunately, that is what we're aiming for, to get sort of maximum comprehension.

PROFESSOR ALBRIGHT: So does anybody have any questions about the process, and then I'll go into the words? Yes.

MR. GILSTRAP: Could -- so what we have here is the draft that attempted to make no substantive changes, followed by a few substantive changes suggested by the subcommittee, right?

PROFESSOR ALBRIGHT: Correct.

MR. GILSTRAP: And as we go through you'll be pointing out the substantive changes?

PROFESSOR ALBRIGHT: Exactly. And this went through the subcommittee on the admonitory instructions, then to the Pattern Jury Charge Oversight Committee, which is a larger committee, and then that went through a few changes in that group and now it's been sent to the advisory panel.

CHAIRMAN BABCOCK: Can you remind me, Alex, why the Court's request of us to look at it was more narrow than what the pattern jury committee did?

PROFESSOR ALBRIGHT: Well, the Court's order -- the part that is in the rules and the court order is only a part of the admonitory instructions. If you look -- if you look at the table of contents --

CHAIRMAN BABCOCK: Right.

PROFESSOR ALBRIGHT: -- that's on page one, you'll see that the 1, 2, 3, 4, 5 has 226a and then there's part one, part two, part three, and part four.

CHAIRMAN BABCOCK: Right.

PROFESSOR ALBRIGHT: These are in a Supreme Court order that follows 226a. 226a says that the Supreme Court shall issue an order with admonitory instructions. Okay. These other instructions -- and, I'm sorry, they don't have the name by them -- the shorter instructions that tend to apply to not every case.

HONORABLE STEPHEN YELENOSKY: Like dynamite.

PROFESSOR ALBRIGHT: Dynamite instructions, bifurcated trial.

HONORABLE DAVID PEEPLES: Note-taking.

PROFESSOR ALBRIGHT: Note-taking, direct and indirect evidence, circumstantial evidence. Those sorts of things are in the pattern jury charge but not in the Supreme Court order.

CHAIRMAN BABCOCK: Okay.

PROFESSOR ALBRIGHT: So --

HONORABLE TRACY CHRISTOPHER: Well, and the members of the Supreme Court that are on the oversight committee were behind these changes and were interested in our making the changes. I don't think we've actually gotten a charge from the Supreme Court justices that are involved on this committee to make these changes, so this is really the Pattern Jury Charge Oversight Committee coming to you-all and asking you-all to consider the changes.

CHAIRMAN BABCOCK: Okay.

PROFESSOR ALBRIGHT: And I believe also when we first started this there was a meeting with members of the Supreme Court about whether they were behind a pattern jury charge -- a plain language rewrite, and there was substantial support from the Supreme Court justices. Didn't you go to -- you and --

HONORABLE KENT SULLIVAN: I attended meetings. I defer to Justice Hecht on statements on behalf of the Court.

HONORABLE NATHAN HECHT: No, there's -- the Court was concerned about how much work it would be, but we were hoping to see this first, and this is good.

PROFESSOR ALBRIGHT: So, okay, let's --

MR. MEADOWS: But --

PROFESSOR ALBRIGHT: Go ahead.

MR. MEADOWS: Alex, Chip, we have an hour for something that's obviously very important, maybe a little bit longer, but can we talk about how we're going to spend the hour, because I think we really should resist what may be the temptation to go through this sentence-by-sentence and look at -- at least in the first instance, wouldn't it be better to talk about where we think there are substantive changes or should be substantive changes and talk about those, or is it the

preference of the chair and the committee to literally take what has been an effort to not change ideas and concepts, to just put it in plain language, and examine that sort of as a body and not as an attempt for us to rewrite it, just starting at the beginning and finishing at the end? So I'm just raising a process question and indicating a preference for talking about, at least in the first instance, the substantive or material changes.

PROFESSOR ALBRIGHT: And if I can -- we do have somewhat of a deadline on this. If we want these plain language rewrites to appear in the next edition of the pattern jury charge, we need to have these approved and the Supreme Court needs to approve them by May?

HONORABLE TRACY CHRISTOPHER: May.

PROFESSOR ALBRIGHT: Otherwise, it waits another year.

CHAIRMAN BABCOCK: Okay. Bobby, I'll respond to that in a second, but, Frank, go ahead.

MR. GILSTRAP: I mean, we don't have to be done with this today because we can't get this done. I mean, I don't think we ought to do this in an hour, and there is no suggestion we have to have this done today, is there?

CHAIRMAN BABCOCK: No.

PROFESSOR ALBRIGHT: And what I would --

MR. MEADOWS: And that's my point.

PROFESSOR ALBRIGHT: Yeah, what I would like to do is point out to you-all where we made some changes, and you-all take this back and read it more carefully. If you have some suggestions you want to e-mail to me, I'm very happy to compile all those and then we'll have it for a better discussion next meeting.

CHAIRMAN BABCOCK: Yeah. My plan, Bobby and Frank, was not to zip through this in, you know, 50 minutes, because we're going to end at noon today, but rather to get started on this and then take it up at our next meeting and, yeah, this is -- how you communicate with jurors is very important and what you say to them, what the judge says to them, has to be neutral and fair because otherwise you're going to tilt the process one way or the other. So it's not anything we could do today, and I defer to Alex as to how she wants to go through it today, but ultimately I think we need to go through it from, you know, the front end of it to the back end of it and everything in between.

MR. MEADOWS: I agree, and it's just -- and maybe Alex just said that what she intended to do was to highlight the points of material change, and I just think that would be the most helpful in the time we have remaining of this meeting.

CHAIRMAN BABCOCK: Yeah. Yeah, Buddy.

MR. LOW: If there's time, would there also be a few minutes for things that are omitted, to have them consider it? You know, somebody suggested, well, this is not addressed, would you-all consider that, not writing it, but give some input back to them of things that are omitted from it?

CHAIRMAN BABCOCK: Oh, I think so, and I think, you know, we're not addressing them so much as we are the Court.

MR. LOW: Right.

CHAIRMAN BABCOCK: If our advice is that something material has been left out then we definitely should say that. Judge Peeples.

PROFESSOR ALBRIGHT: Yeah, and if anybody has ideas of things that should be included, we are very open to that. Judge Christopher sent an e-mail to all of the district judges of the state and got their input on whether there were some instructions that they typically used in cases that we should include, and one of those that you'll see is the interpreter instruction and then the note-taking instruction.

MR. LOW: Chip, perhaps we can even do that by mail. We don't have to do it today. If somebody has a suggestion, they can address it to Alex, say this is

omitted, I just think there are certain things --

CHAIRMAN BABCOCK: Yeah.

MR. LOW: -- and maybe that will move it forward if anybody would make suggestions of omissions directly by mail or e-mail to her.

PROFESSOR ALBRIGHT: That would be great.

CHAIRMAN BABCOCK: Yeah. Judge Peeples.

HONORABLE DAVID PEEPLES: As a member of the subcommittee I'm interested in doing what Bobby Meadows and Buddy said about using our time and not getting bogged down on the words.

MR. ORSINGER: Well, at what point are we allowed to discuss the wording? What if we don't like the wording? Do we put that in an e-mail, or do you not want an e-mail on your wording?

CHAIRMAN BABCOCK: Well, Richard, we're going to -- not today, but at the next meeting we're going to do what we always do, which is nitpick the words and to pore over the --

PROFESSOR ALBRIGHT: However, however, to have the nitpicking perhaps condensed a little bit at the next meeting, if anyone has any nitpicking, we would be delighted to hear your nitpicking early rather than later and then we can incorporate it or report reasons why we did not incorporate it.

CHAIRMAN BABCOCK: Yeah. And that would be helpful so we don't do it on the fly.

PROFESSOR ALBRIGHT: Maybe we should have a rule of all nitpicking has to be done by e-mail.

MR. ORSINGER: As long as this only applies to her projects and not mine.

MR. RINEY: I think nitpicking needs to be handled a little bit differently here than we normally do because the original language that we're now trying to straighten out was written by lawyers. We've now tested language that can be understood by laypeople, and if we lawyerize it by going through and doing too much nitpicking then I think we may have defeated the purpose.

I think it would be appropriate to submit it by e-mail ahead of time and we all kind of carefully consider, but we must resist the temptation to turn it back to something that cannot be understood by the average juror.

CHAIRMAN BABCOCK: No, I agree with that, and one man's nitpicking may be another man's substance, but there will -- I predict, having read this, that there will be input from our members that think that the language, albeit plain and understandable, is inappropriate to tell a jury at this stage or any stage. I may be wrong about that, but that's my hunch.

MR. ORSINGER: I want to clarify something that Tom just said. Has this new language been tested on hypothetical juries, or is it just the old language that was tested on the hypothetical jury?

CHAIRMAN BABCOCK: Lab rats, actually.

HONORABLE TRACY CHRISTOPHER: Both. The old and the new was tested.

MR. ORSINGER: And do we have any kind of report on the results or outcome of that?

PROFESSOR ALBRIGHT: We do have a report. I can send it to --

MR. ORSINGER: I'd like to get a copy.

PROFESSOR ALBRIGHT: -- anyone who wants it. I didn't include it because I didn't know --

MR. ORSINGER: Can you e-mail that?

CHAIRMAN BABCOCK: Yeah, we actually even did a mock trial with some jury instructions, and, Kent, you -- I wasn't there for that, but how did that -- what was the protocol on that?

HONORABLE KENT SULLIVAN: We, through a grant from the State Bar, paid for a jury consultant to help put together the questionnaires and tabulate results, and it was exactly as Alex outlined earlier, and that is consistently the plain language version was both better understood on an objective basis and just sort of more

satisfying.

CHAIRMAN BABCOCK: Yeah. But didn't you try a case for a day or a half day or something?

HONORABLE KENT SULLIVAN: Yes.

CHAIRMAN BABCOCK: A mock trial?

HONORABLE KENT SULLIVAN: Yeah, it was a mock trial, so it wasn't purely an abstraction about, you know, do you like these words better than those words? It was something that was tested against some real facts. In fact, it was a case that had been a real case, although long ago resolved, so it was an attempt to put, you know, the system through its paces, so to speak, to see how things came out.

CHAIRMAN BABCOCK: Judge Christopher.

HONORABLE TRACY CHRISTOPHER: Well, one other point which I found really fascinating and I've already started to make the change, and I've told people about it, was we submitted the standard pattern jury charge fraud question to the jury, and they did not understand for the most part that it was "and," "and," "and," "and." So when we write "1, 2, 3 and 4," they do not understand it to be "1 and 2 and 3 and 4," so I have since said "and" after every single one of my sentences in the fraud cases that I've tried. So that was, you know, obviously grammatically correct for us to go "1, 2, 3, and

4" in our jury charge, but not something that people understood apparently anymore.

I've also added in more ors, so when it's, you know, "1, 2, or 3," I do "1 or 2 or 3," in any pattern jury charge where we have those sort of elements listed.

MR. GILSTRAP: What did they think the current charge meant?

HONORABLE STEPHEN YELENOSKY: 1 or 2 or 3 and 4.

HONORABLE TRACY CHRISTOPHER: Uh-huh. If you met one of those elements that you were good to go on fraud.

CHAIRMAN BABCOCK: Judge Bland.

HONORABLE JANE BLAND: I just want to ask Alex, how is the best way to e-mail you? In other words, can we get a graph of this that we can use to track changes with or would you rather us just mark it up by hand and fax it to you?

PROFESSOR ALBRIGHT: I guess we could do it either way. I can send to Angie the Word document and then the Word document could be posted on the website that you-all could download and track changes and send it to me, or you can print it out and mark it up, however anybody wants to do it.

HONORABLE BOB PEMBERTON: Private process

servers would be okay, too?

PROFESSOR ALBRIGHT: That's right. I will only accept ones that are served. You have to serve it on me. I have three days added to the response time, so --

CHAIRMAN BABCOCK: Hayes just made a good suggestion, but nobody heard it, so --

MR. FULLER: If you'll just e-mail the Word document to Angie, Angie can forward it to all of us, a copy, I guess copy you, and then we can make our changes and get them all back to you.

PROFESSOR ALBRIGHT: Okay. That would be great. And then if we could have a subject line that's consistent then it's easy for me to find everybody's through all my e-mail. So I'll put a subject line on the e-mail that's forwarded that you-all can just keep it.

HONORABLE TRACY CHRISTOPHER: Nitpicking comments.

CHAIRMAN BABCOCK: Judge Yelenosky. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, I just wonder if given Tom's suggestion that maybe we don't want to have the Word version because people will suggest word changes without necessarily thinking about whether they're plain language as opposed to making substantive arguments.

PROFESSOR ALBRIGHT: They're going to do

that anyway. I'll run it through Wayne.

HONORABLE STEPHEN YELENOSKY: Do you have access to your plain language --

PROFESSOR ALBRIGHT: Oh, yeah. Wayne Schiess is just down the hall from me, and so I'll run everything by him, and he could probably -- next time we talk about this I'm sure he could come.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: Let me say this. If people think the fact that it's plain language is going to exempt this from scrutiny by lawyers who try cases in front of juries, I think you're wrong. I mean, I think most lawyers believe that the most important part of the trial is what the judge says to the jury; and there are plenty of lawyers out there who are going to be scrutinizing this and saying this is -- and thinking this is some type of secret attempt to tilt this one way or the other; and, you know, this thing is going to be, and it should be, scrutinized by lawyers.

PROFESSOR ALBRIGHT: Absolutely. Absolutely. And there were a lot of changes, plain language changes, that Wayne suggested that the committee said, you know, there are times when you've just got to use the legal word because that's what we -- that's the word that we all understand and it has some legal

significance, and it may be that the lawyers explain that in the course of the trial, and that's what we're supposed to do.

HONORABLE TRACY CHRISTOPHER: Yeah, particularly the preponderance of the evidence, which, you know, Wayne said very low comprehension by jurors, and he really wanted to put "more likely than not" and, you know, we went -- the lawyers and judges on there, we went back and forth as to whether that was really our law or not, that does preponderance of the evidence mean more likely than not, and ultimately we considered that a substantive change and didn't change it and left the word "preponderance of the evidence" in there, even though jurors -- you know, people indicated a lack of comprehension of that term.

PROFESSOR ALBRIGHT: And Wayne is a lawyer. He's not a nonlawyer.

CHAIRMAN BABCOCK: The other thing I heard from the jury consultant who was leading this project from the jury consulting side was that -- was somewhat counter-intuitive but that when there are legal terms of art used that sometimes that many jurors pay more attention to that because they thought, "Well, this is the law stuff the judge has given me and even though if I may not think that's right I've got to follow that because

it's a technical term and the judge is telling me what it means and so I've got to follow it," as opposed to a word that is commonly used by everybody like "fraud," where they all had their own ideas of what fraud was; and it played into what Tracy was saying about how they were eliminating the "and," "and" and "and," and they're saying, "Well, I know what fraud is, and it's making a misrepresentation." If they made a misrepresentation, then, you know, then that's fraud, because that was a commonly understood word; whereas more technical words, they would suspend their own belief system and follow what the judge said.

PROFESSOR ALBRIGHT: So you have to watch for words that people use in common life, and if we have a different meaning of that that's where we need to put -- it's real important for us to put plain language in because we don't want them to substitute their meaning, which is different than ours.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, I agree with Frank on the pattern jury charges, but on these admonitory instructions, I mean, I read the current ones now with some modification where allowed. I read this, and I gave input on it. I mean, other than preponderance of the evidence what we're talking about here is don't

mingle with or talk to, don't discuss, all the instructions. Of course, there are some instances in which I think, Frank, you're right, there would be disagreement about it substantively, but there's a lot here that's not.

PROFESSOR ALBRIGHT: Can we move forward with the -- and make sure we get through the changes?

CHAIRMAN BABCOCK: Yeah.

PROFESSOR ALBRIGHT: Okay. The first thing, change -- and you-all pipe in if I miss something. If you look on page two, the last full paragraph on the right starts, "Jurors sometimes ask what it means when I say we want jurors who do not have any bias or prejudice." This is an attempt to define "bias or prejudice." There is a thought that we tell jurors we don't want jurors that are biased or prejudiced and we don't tell them what it is. So it's a very short version of what bias or prejudice is.

There has been substantial discussion about whether this needs to be more complete or not, based on some recent Texas Supreme Court opinions, but nobody could come up with language that they were really happy with, so this is something that I think we'll probably want to discuss, is this paragraph.

HONORABLE STEPHEN YELENOSKY: Now?

PROFESSOR ALBRIGHT: Well, let's go through

all of these and then we can.

HONORABLE TRACY CHRISTOPHER: The only thing, just for cross-references, like Alex said, sometimes it's sort of difficult to figure out where we said it before. Old 226a contained only this sentence, "We are trying to select fair and impartial jurors who are free from any bias or prejudice in this particular case." So that's the old language that we had about bias and prejudice versus that new concept there.

CHAIRMAN BABCOCK: Kent.

HONORABLE KENT SULLIVAN: Just a quick comment, and I think this is indicative of some other issues about change. I think it is kind of a fork in the road and perhaps it is an area which would be appropriate for some guidance because we could probably spend a lot of time both working on and discussing some possible change, but -- and I will say from my point of view, I thought it was important that we consider a change and explain to jurors, because I think, practically speaking, a big part of the voir dire process and dealing with the venire panel is in part a self-selection process; that is, the potential jurors are trying to figure out whether in all candor and honesty they belong on this case and what they need to disclose and not disclose, because it is a process that is utterly unfamiliar to them.

And I think personally, again, consistent with plain language, consistent with user-friendliness, that the more they understand about what they're being asked to do, the better we all are and the higher the satisfaction level is of the people who are participating in the process, and I think that is not inconsequential. At the same time I acknowledge, as I think we all did on this subcommittee, that there would be substantial disagreement on exactly where to go, a lot of work involved; and I think there is a threshold question about do we want to go there at all, or more precisely perhaps, does the Court want to go there and really entertain that; and I think that would be appropriate.

PROFESSOR ALBRIGHT: Another thing that you-all should think about was just Google "Texas jury duty" or something like that. You will find lots of websites now where former jurors say, "I now know all about this. If you're wondering what it's like to be on a jury and what the judge means by all of this stuff, let me tell you," and a lot of it is not right, so I think it is important for us to have some instructions that jurors understand because they may have looked at these websites where other people have told them what this process is about, which is not correct.

HONORABLE TRACY CHRISTOPHER: Well, and I

have also gathered, or my law clerk did, the sort of beginning instructions to the jury kind of across the country, and so I have those available if anybody wants to look at those to kind of compare what other states say, and I can -- it's in a zip drive, and I can e-mail it to people if they want it or give it to Angie.

HONORABLE KENT SULLIVAN: My view is that if you leave a vacuum someone or something will fill it. If we know, and I think we do know, that jurors are thinking about these questions as this -- or potential jurors are thinking about these questions as this process goes forward and no one with authority explains it to them or answers the questions we know are in their heads, we have made a significant mistake. But historically we've really not done that, and I think we have to acknowledge that and decide, you know, whether it is the right time, right circumstances to move that forward.

CHAIRMAN BABCOCK: Well, Alex, despite your admonition everybody's got thoughts. Judge Yelenosky, then Buddy, then Carl.

PROFESSOR ALBRIGHT: No, these aren't nitpicks. That's good.

HONORABLE STEPHEN YELENOSKY: Hopefully this isn't a nitpick. This is one of the comments I think gave in my e-mail, too. If that's right, I think the old

instructions and the new instructions don't explain peremptories and do we want to. Some jurors know, lots of jurors know, if they're in the back of the room they're probably not going to get picked. Some attorneys refer to that. Peremptories have nothing to do with challenges for cause, but we ignore them in our instructions. Do we want to continue to do that?

PROFESSOR ALBRIGHT: Can you put that in an e-mail?

HONORABLE STEPHEN YELENOSKY: It's already in an e-mail.

PROFESSOR ALBRIGHT: Oh, I didn't get that one.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Chip, I think we also need to consider that there are certain things that the lawyers are going to tell. I don't think you've got to just fill in everything, because the lawyers are going to fill in, you know, and say, "Well, if you were a juror or if you were a party would you want to know such and such," so we can't put all of that in the charge or the charge is going to be longer than the case.

HONORABLE STEPHEN YELENOSKY: Let me just say I think there may be something in the old rule that refers to striking for any reason, but it doesn't explain

the role of peremptories; and it makes, I think, some jurors think that the only thing that's going on in the voir dire should be about bias and prejudice; and, of course, there is some debate about whether that should be or not; and, of course, the case law is very complicated about what is bias versus prejudice; but if we're going to start going down that road explaining it to them even when it's not necessarily a question they have to answer ever, I mean, maybe they need to divulge something, then we may have to look at the whole picture rather than just part of it.

CHAIRMAN BABCOCK: Carl. Carl, didn't you want to say something earlier?

MR. HAMILTON: It was just details, but go on.

CHAIRMAN BABCOCK: Okay. Richard.

MR. ORSINGER: I'm a little concerned that we're elevating simplistic language to too high a status without considering the consequences. From my perspective the most important thing about these instructions is to get the jurors to open up and tell you the truth in response to your questions. This definition of prejudice is written in such a way that everyone on the venire panel is going to say, "I'm not prejudice because I don't prejudge things before I receive all the evidence," and I

don't really think that that captures what my understanding of the term "prejudice" is.

And so I feel and then Skip -- Chip made a point that I'm not sure was clear, that if we substitute a simple word for a complex legal term we may be inviting jurors to use their misconceptions of what the simple term means, whereas if we left a more legalistic term they would say, "Well, this is somehow different from the word I use all the time, so I have to be careful to be sure I understand what they mean in this context." So it may be we ought to have more formalistic words in some areas and because it protects us.

PROFESSOR ALBRIGHT: Yeah, I think this was discussed. So I think, you know, it was an issue of what language to use. So I think if you have -- I mean, it may be that you don't want to include this at all, and we can talk about that. I just want to make sure I can get through this whole thing before we leave today. I think that's going to be something we're going to talk about, and if you-all have any other suggested language, it would be great. We have not been able to come up with any other language.

CHAIRMAN BABCOCK: Judge Christopher.

HONORABLE KENT SULLIVAN: Could I say one thing about Richard's comment very briefly, and that is --

CHAIRMAN BABCOCK: If you want to just jump right over Judge Christopher.

HONORABLE TRACY CHRISTOPHER: That's okay. I told him he could.

CHAIRMAN BABCOCK: Go ahead.

HONORABLE KENT SULLIVAN: She let me intervene here. The thing I want to say before we moved on from Richard's point is that speaking only for myself the thought was, though, you ought to either come up with a term that is readily understandable or a definition of the term that's readily understandable, one or the other. Too often what we were finding, I think, was that you had neither. The potential jurors could understand neither the term nor the definition, and it's that that I think is just unacceptable.

CHAIRMAN BABCOCK: Judge Christopher.

HONORABLE TRACY CHRISTOPHER: And I just wanted to point out, and this does make a big difference, too, so part of 226a is only an oral instruction by the judge and part of it is the written instruction that the jurors get before the trial starts, and part of it is the written instructions they get attached to the actual jury questions, and from a comprehension point of view, the oral instructions have to be the simplest. So just kind of keep that in mind when you're looking through these.

PROFESSOR ALBRIGHT: Because these are the oral instructions, part one. Now, let's move to page three. At the end of the first full paragraph this is where we tell jurors that they have to obey instructions and then we say if you don't obey them we kind of say something bad will happen to you, but we don't tell them what could happen to them, so this was an attempt to tell them what could happen to them, but not in such a way that it gets too scary.

So it says, "It is also possible" -- because we tell them the trial would be a waste of time and money. "It's also possible that you may be held in contempt or punished in some other way, so please listen carefully to these instructions." So there's lots of discussion about whether this was a good idea or a bad idea, and we can have that discussion.

MR. LOW: One of the things, you don't tell them what they may be punished for, for not following these instructions. It's kind of broad, "You may be punished," so, whoa, wait a minute, what for?

PROFESSOR ALBRIGHT: Yeah, we're just trying to -- the purpose of this was to tell them, you know, it's not just that the system is going to lose time and money and the litigants are going to lose time and money, but there is something that, you know, it's important that you

follow the instructions.

Okay. So then we move to page six, No. 2, instruction No. 2. This is a new electronic device instruction. "Please turn off all cell phones and electronic devices. Do not record or photograph any part of these court proceedings." We realized that anybody could have their cell phone on and be taking a videotape of the trial, and we don't deal with that.

The next one that I have is on page 10. We have the term "preponderance of the evidence," and we use the same words that we've used before, and we have a note here, "Testing revealed a lack of comprehension, but at this time the committee recommends no change." This is what Tracy was just talking about with more plain language would be "more likely than not," but we felt like we needed to leave this the same.

On page 11 in the paragraph following the bullet points we have the contempt instruction again, so we put that contempt instruction in a second time, so this is when they are getting ready to go back into -- going to go back to deliberate.

Okay. Then on page 12 you'll see a note. This is where we tell the jurors that the presiding juror has to read allowed the complete charge. There was a big discussion about if you give each juror a copy of this

charge this is not required, but some courts give each juror a copy of the charge, some courts do not, and so we left this open.

HONORABLE TRACY CHRISTOPHER: I mean, the rule does now require people to do it, but we understand that it's not necessarily being done.

PROFESSOR ALBRIGHT: And another thing that this does, with all of these four points we give a further explanation of what the presiding juror does. In the old rules it just says you're going to select your own presiding juror, the first thing the presiding juror will do is have the complete charge read aloud, and then you will deliberate. So this delineates all the things that the presiding juror --

HONORABLE STEPHEN YELENOSKY: Quick point on that, I mean, the court, of course, is reading the charge to them; and it seems to me it's more important that they get the written charge; and if that's not happening, that's a bigger problem than having it read again. I mean, sometimes these charges are quite long and it takes quite a long time to read them to a jury and then what they have to do is go back to the jury room and have them read to them again because they may not have a written copy? So they need to be getting written copies.

PROFESSOR ALBRIGHT: So that was a question

as to whether we wanted to require written copies. These rules were written before there were Xerox machines, so --

HONORABLE STEPHEN YELENOSKY: Absolutely.

PROFESSOR ALBRIGHT: Okay. Then on the exemplary damages, these were a little difficult and we talked about making some changes on these and ultimately ended up leaving the exemplary damages and questions the same as the previous version, which is fairly new in the 226a order, but what we did was define "unanimous."

MR. BOYD: Which page? I'm sorry.

PROFESSOR ALBRIGHT: Oh, I'm sorry. We're on page 14. So what we say is "In the instructions you are instructed that in order to answer 'yes' to any part of the question 2, you must unanimously agree," paren, "all of you," close paren, "to your answer." So we're explaining in two places that unanimously means all of you.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: Alex, can I ask for a clarification? The top part up here, that's not shown to the jury. That's the Supreme Court talking to the judge, right?

HONORABLE TRACY CHRISTOPHER: Right.

PROFESSOR ALBRIGHT: Right. Yeah, No. 3, part 3 of the order is different from the other parts of

the order. This is the exemplary damage questions in the tort reform, and it is the Supreme Court saying to judges, "This is how your -- you should submit these" and so there are instructions to the judge. It's not just to the jury. These are actually substantive jury questions as opposed to admonitory instructions, but they're in the order.

Then on page 16 there are certificates in part 3 to the 226a, and what we realized is that the certificates are a little bit confusing, especially for situations when you have a unanimous verdict or partially unanimous verdict, and so we divided this up into three different certificates. One is when you have a regular verdict, a ten-two verdict. The second part you have a mixed unanimous and nonunanimous verdict where some questions are ten-two, other questions require a unanimous verdict, and then the third part is a certificate when you have bifurcated the trial and the bifurcated second part is a unanimous verdict.

So this, again, is more helping the judge out as opposed to the instructions, although, I believe we did try to make it more clear about who had to sign the verdict certificate. Okay. So that's on 17 and 18; 16, 17, and 18.

19 is -- page 19 is just a pattern jury charge. It's an additional instruction for bifurcated

trial. We felt like this was confusing because it had the certificate on it. We removed the certificate and then just it's a instruction that just says to the jury, "pay attention to all of the other instructions that you received from me, and here's some additional instructions for the second part of this bifurcated trial."

Part 4, which is on page 20, I don't think there are any changes here other than just a plain language rewrite. Same for pattern jury charge, the PJC, if you're permitted to separate it on page 21.

22, that's also a PJC which is not part of the order. Instead of just quoting the rule we wrote "disagreement about testimony" into plain language. Page 23 is the PJC on direct and indirect evidence and circumstantial evidence. This was something that jurors tend not to understand, so we included an example of circumstantial evidence. The plain language would be direct and indirect evidence, but we felt it was important to continue to use the word "circumstantial evidence" because lawyers and judges use that word, and then we gave an example, which is pretty much the typical one that's used in evidence classes about, you know, whether it's raining outside and somebody brings in a wet umbrella.

The page 24 is just the PJC on the deadlocked jury, the dynamite instruction. It's just put

into plain language. On page 25 we have instructions on the jurors' note-taking. This is an instruction that we propose to be included in the Supreme Court's order because right now it is not absolutely clear whether it is appropriate for jurors to take notes or not, and so we thought it would be -- the easiest way to clarify that would be to have this optional instruction in the Supreme Court's order.

HONORABLE TRACY CHRISTOPHER: Yeah, I just wanted to say on the juror note-taking, there is actually a Court of Criminal Appeals opinion that discourages juror note-taking in criminal cases unless, you know, certain instruction -- it's a complicated case and, you know, the judge is convinced that this is going to be really good for the jurors and if these kind of Draconian instructions are given to the jury. So that's why I think most of us on the civil side, you know, routinely do it, but some people are, you know -- people or judges that have general jurisdiction and are familiar with the Court of Criminal Appeals language and they're not allowing note-taking in criminal cases or rarely, they might not be as open to letting their jurors in civil cases take notes. So that's why we thought it would be important to have sort of the blessing of the Supreme Court through Rule 226a on the note-taking in civil cases.

PROFESSOR ALBRIGHT: Okay. No. -- okay. This is a new one also that we want to propose to be included in the 226a order, page 27, the instruction to the jury on language interpreters, and this would be an optional one. This is one that we found that different judges treat it in different ways. Tracy, you want to talk about it since you know about it?

HONORABLE TRACY CHRISTOPHER: Sure. The main issue on the language interpreters is what to do with a juror who understands the language being interpreted, because it's not unusual for us to have a juror either stop the trial through raising their hand or mentioning it to the bailiff at the next break that the interpreter is not correctly interpreting the testimony of the witness. So the question then becomes how do you handle that situation, and we discuss sort of at length -- in Houston you get it with Spanish and Vietnamese primarily where you'll have people saying, "Ooh, that's not right, that's the wrong word," interruptions in the trial, and it's -- depending on the part of the state you're in, you may get a different language that pops up.

The debate among the judges was whether to ask the jury to let us know if they were hearing something different or to just instruct them, "I don't care if you're hearing something different. Listen only to the

official English translation." Okay. And so -- I mean, that was the debate. Do we want some way for everyone in the process to know that the juror is hearing something different? Some judges thought that that was a good idea, that, you know, if there is a problem with the interpretation and, you know, the Spanish-speaking person is hearing something different, that we would want to know that. Some judges think it's better not to know; it would raise a whole can of worms; it would, you know, make the juror who understands the language, you know, more important than a juror who doesn't understand the language. It might make lawyers say, well, if a juror can do that, I'm going to strike all the Spanish speakers from the panel because I don't want some Spanish speaker that -- raising their hand and letting me know that the translation is incorrect.

I mean, it's a real thorny issue, and it happens a lot. So we went back and forth, back and forth on it, back and forth on it. I mean, that probably raised the most interest among jurors -- judges across the state. We even had a three-hour discussion at -- about it at one of our judicial conferences, just the whole how do you handle translators and what's the best way and what happens. And sometimes depending upon dialects, the interpretation is terrible, and everyone knows the

interpretation is terrible, and, you know, how do you handle that sort of situation? But in terms of what we tell the jurors we ultimately decided on this, which is "You might be hearing something different, but the English translation is the only thing that you should be considering and the only thing you should be discussing with your fellow jurors."

CHAIRMAN BABCOCK: Kent.

HONORABLE TRACY CHRISTOPHER: That's the history.

HONORABLE KENT SULLIVAN: I want to second the thought that this really is a big deal in practice across the state, and I think your view about how the rule should come out also may be affected by the practical issue of to what extent judges consistently across the state use only certified translators for that purpose of providing the official interpretation of the witness testimony. The Federal courts have a different process in my experience from the state courts.

HONORABLE STEPHEN YELENOSKY: Isn't there a statute that requires it?

HONORABLE TRACY CHRISTOPHER: We are required to use the certified translators now, but sometimes it's just not possible to find them in some languages.

HONORABLE KENT SULLIVAN: This I think is not unlike the discussion a few minutes ago about the requirement that everyone be provided with a written copy of the charge. There is a requirement. It is not consistently applied.

HONORABLE STEPHEN YELENOSKY: And the only way to completely resolve the problem I guess would be to have the person testifying in the other language, to somehow have that muted so they couldn't even hear the other language, could hear only the translation, but that's not going to happen.

HONORABLE TRACY CHRISTOPHER: So this was, you know, hotly debated and discussed, and there are two real opposing viewpoints on whether you want to know what jurors are hearing.

PROFESSOR ALBRIGHT: But I think ultimately the reason we came down to what we had is that if you have a case where there is a translation and it's essential and you don't trust the translation, maybe you need to have somebody in there to listen to the translation, and then it's up to the litigants to bring it up to the judge as opposed to the jurors.

HONORABLE TRACY CHRISTOPHER: But it kind of dovetails into juror note-taking or juror questions, which we haven't addressed in this proposal, but obviously was

something that was in, oh, that Wentworth bill that didn't go anywhere but, you know, had a lot of sort of jury innovations in it. I can't remember the bill number. One of which was to establish a procedure for jurors to ask questions.

Well, you know, if we establish a procedure for jurors to ask questions, you know, then why couldn't a Spanish speaker say, you know, "Would you please re-ask this question because I thought the translation was poor?" Which was the fix that we were going to recommend with respect to a juror hearing it differently, you know, if we wanted to do a fix, that they would -- they would not tell the jury that's wrong or, you know, "They said this or that," but just, "I was unclear with that translation. Can you go over that question and answer again?" So that was the way we were proposing to handle it if we did handle it.

CHAIRMAN BABCOCK: Richard, then Carl.

MR. ORSINGER: I think you-all should re-assess including documents in this instruction. The interpreting of live testimony in court is one entire process, and translating documents that are in a foreign language is an entirely different process, and to my knowledge there is not going to be in most trials or maybe any trials an official interpretation of the document.

Like if you're involved in a contract dispute in a contract that's written in Spanish, unless there is a summary judgment granted, there is no official translation of that document; and it's been my experience in dealing with foreign language statutes and documents that the biggest problem is to try to translate a concept that's familiar in one language that doesn't have an identical counterpart in English; and you can have enormous disputes about what the meaning of a word is in a foreign language that doesn't have an identical equivalent in this language; and we have a Rule of Evidence that permits you to file your translations in advance; and you have expert witnesses that you expect to testify. That's an entirely different process of translating foreign documents. I think you ought to just take that out of this rule and let this rule govern interpreters who are interpreting live testimony or deposition testimony and not documents.

HONORABLE TRACY CHRISTOPHER: Okay.

CHAIRMAN BABCOCK: Bobby.

MR. MEADOWS: I mainly have a question for Judge Christopher on this. This is a very interesting discussion, and I see the tension on this whole issue about juror participation with an interpreter, but did you come down the way you did in this admonition because you

believe it will be obeyed?

MR. FULLER: Good point.

HONORABLE TRACY CHRISTOPHER: You know, I just -- I was at an advanced civil trial -- or advanced PI, and Judge Sam Medina from Lubbock gives this wonderful 45-minute presentation on what jurors really think and do, and unfortunately the fact of the matter is that jurors do not obey the vast majority of our instructions. They talk about the case before the end of it. They talk about things they shouldn't be talking about, which is actually one of the reasons why we wanted to put in that contempt blank or punished in some other way in there to try and get people to really think we really want you to do what we're telling you to do. So that's my best answer.

I think it would prevent them from telling -- it could prevent them from telling the other jurors that interpretation was wrong. Especially if the other jurors could then say, "Well, the judge says, you know, we're not supposed to consider your interpretation, we're only supposed to consider the English that we all heard." So I think having it and giving it would give people in the jury discussion a little more feeling on what they should do. Now, do I think it's realistic that a Spanish speaking person is going to ignore what they heard in Spanish? Probably not, but at least in their

interaction with the other jurors, we'll stick with the English interpretation as to what they actually talk about.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: I don't know -- I don't have an answer to the problem, but down in Hidalgo County we almost at every trial where we have an interpreter they get something wrong, especially in like construction cases or cases that involve medical terms or something. They just don't get it right, and frequently there will be a Spanish-speaking lawyer in the case, and he will object to the interpretation and then we have a discussion over what it really means. It seems sort of odd that if the lawyer can do that and get it straight that we're not going to let a juror say, "Well, you know, that isn't what they said."

HONORABLE TRACY CHRISTOPHER: But, of course, I've had lawyers object, and I don't let them get it straight in terms of an interpretation. I just make them, you know, re-ask the question again. I don't let some Spanish-speaking lawyer tell me that my official interpreter is giving the wrong word, because that gives a leg up to the Spanish-speaking lawyer and somehow makes him more important than the English-speaking lawyer in the process, and that was another thing that we talked about

in connection with this, you know, bringing it to your attention that, you know, something is going wrong with the interpretation.

Now, if both sides are Spanish-speaking, then, you know, I guess we don't have to worry about it, but, you know, why should one -- and that happens a lot in Vietnamese because it's very, very difficult to interpret; and if you have Vietnamese lawyers listening or Vietnamese clients, you know, tugging on their lawyer's coat tail saying, "This interpretation is wrong," then the lawyer jumps up and says, "My client says the interpretation is wrong," the best you can do is say, "Re-ask the" --

CHAIRMAN BABCOCK: "Sit down."

HONORABLE TRACY CHRISTOPHER: -- "question." I mean, it is. It's a big, big issue in our state. It happens a lot. I mean, it comes up a lot.

CHAIRMAN BABCOCK: Okay. Alex, are we at the end of the road?

PROFESSOR ALBRIGHT: We're at the end of the road, so what I would propose I do for next time is make a list of discussion points, and I'll add the ones -- put the ones that I've brought up here and if anybody wants to add discussion points. I do not propose that we go through the plain language rewrite line-by-line, so if people want to talk about specific parts of it.

CHAIRMAN BABCOCK: Well, I think we can certainly follow that template, but if you think it's going to slow this group down by --

PROFESSOR ALBRIGHT: Try. Try.

CHAIRMAN BABCOCK: I think you're wrong. All right. We're in recess. Thanks, everybody. Good meeting.

(Meeting adjourned at 11:57 a.m.)

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MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

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I further certify that the costs for my services in the matter are $_____.

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