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7 MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

8 March 5, 2005

9 (SATURDAY SESSION)

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18 Taken before D'Lois L. Jones, Certified

19 Shorthand Reporter in Travis County for the State of

20 Texas, reported by machine shorthand method, on the 5th

21 day of March, 2005, between the hours of 8:58 a.m. and

22 11:48 a.m., at the Texas Law Center, 1414 Colorado, Room

23 101, Austin, Texas 78701.

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Documents referred to in this session

05-5 Protective order task force application and
forms

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2 CHAIRMAN BABCOCK: Okay. Saturday morning,
3 we're on the record. Welcome, everyone, and we have two
4 distinguished members of the Bar here to assist us today:
5 Stewart Gagnon, who is chair of the protective order task
6 force, who is over to my right over here, and Professor
7 Jeana Lungwitz, who is the clinical professor of domestic
8 violence at the University of Texas, and she'll be
9 available as a resource for us, and I anticipate that this
10 project will take us most of the morning.

11 And, Stewart, do you want to give us sort of
12 an overview or, Jeana, whoever prefers, on the project and
13 how we got to where we are today?

14 MR. GAGNON: Sure. About two years ago the
15 Texas Equal Access to Justice Commission's committee on
16 access to the courts, together with the family law section
17 of the State Bar requested that the Supreme Court appoint
18 a task force to prepare a protective order kit that could
19 be utilized by self-represented clients in need of
20 assistance with protective orders. The Supreme Court made
21 that appointment and we became official in September of
22 2003, and they asked us to submit our report by August of
23 2004. That was actually extended until about November of
24 2004 when we completed our work project.

25 The people on that committee represented

1 people who work with victims of domestic violence, we have
2 some legal services lawyers, we have a law professor. We
3 have a legislator, Representative Tony Goodman that
4 assisted us. We expanded the group a little bit after its
5 initial appointment to include a constitutional county
6 judge, and there were other people consulted including
7 district attorneys, defense attorneys, criminal defense
8 attorneys.

9 As we worked through this project, our goal
10 was to create a document that would allow a person who
11 could not find representation, either private
12 representation or governmental representation, for
13 whatever reason -- and the statistics show that that type
14 of representation is really not available to a lot of
15 people in the state of Texas who need this type of
16 assistance, that our goal was to create something that was
17 easily usable but legally correct.

18 We are now in the process of translating
19 this document. I will tell you this as an aside that our
20 group worked very hard to what we would call dumb down the
21 documents so that it was written in language that a person
22 with an elementary school education could understand.
23 What we found after we did all that great work was that we
24 had written it at about an 11th grade level and it wasn't
25 quite where we wanted to it be. We have since engaged a

1 organization who does this type of translation for us, and
2 they are now in the process of completing that
3 translation, not changing any of the forms themselves,
4 because we thought the forms, the pleadings and the
5 orders, it was necessary to be in legal -- legally
6 correct, but the instructions and the general descriptions
7 of a protective order process are being written in a way
8 that we now understand is going to be on like the fourth
9 grade level. I think that's where we are right now.

10 They've actually come back to us, and I have
11 a sample of some of their work if anybody wants to see
12 that. They have come back to us and suggested some
13 different formats for the instructions, and we can talk
14 about that today if that's part of your job, or we're
15 going to do that on the committee probably in the next
16 couple of weeks.

17 Our goal is that the Supreme Court will
18 issue an order that the pleadings and orders that are
19 included in the kit are, in fact, approved for use by the
20 Supreme Court and that courts are instructed that if they
21 are presented with an order in this format, in this form,
22 that they will accept that, if the evidence provides for
23 the awarding of a protective order, that there won't be
24 any problems with the form itself.

25 One of my functions was to get some input

1 throughout the state. I visited with -- in various
2 judicial conferences with a large variety of district
3 court judges who do this type of work as well as
4 constitutional county court judges. In all three of their
5 organizational meetings we got their input. I will tell
6 you there is a lot of excitement among the constitutional
7 county courts that we would be able to provide them with
8 an approved form that someone could use that they could
9 provide out of their office and they could use and they
10 could rely upon it as being legally correct.

11 So that was our function in that, and I'm
12 here to answer any questions or to -- and Lisa actually
13 forwarded to me only one question in advance of this
14 meeting, and it had to do with inclusion of -- in the
15 introduction about the availability of perhaps
16 governmental lawyers turning to -- district attorneys or
17 county attorneys or a private attorney in helping someone
18 with this type of problem. We are trying to include that
19 into those instructions right now.

20 CHAIRMAN BABCOCK: Okay. Stewart, thank
21 you.

22 MR. GAGNON: Sure.

23 CHAIRMAN BABCOCK: There is an issue, from
24 what I understand, as to whether or not the Court thinks
25 it advisable or I guess we think it advisable to go

1 through the instructions in addition to the forms
2 themselves, and I don't know how everybody on our
3 committee feels about it. Stewart, what's your -- you're
4 on the task force. Is the Court going to approve the
5 instruction as well or just the form?

6 MR. GAGNON: Well, I hope we don't flyspeck
7 the instructions that much because we're still trying --
8 that's where we're doing the translation. I mean, my
9 feeling is that if you'll approve the application, the ex
10 parte temporary restraining order, and the temporary
11 restraining order, which are the three forms that a court
12 will see, our duty and the duty of the translating
13 organization that we're working with would be to make sure
14 that the instructions are clear enough that people can
15 complete the forms, and so I would hope you-all would only
16 focus on the pleadings themselves.

17 CHAIRMAN BABCOCK: Okay. Bill Dorsaneo.

18 PROFESSOR DORSANEO: I think that's a good
19 idea. I might say some of the instructions might be
20 included in the forms or some of the language from the
21 instructions might be started. I'm thinking, for example,
22 the affidavit just has a blank in the first thing, and you
23 have to go read over the instructions what you're supposed
24 to put in that blank.

25 MR. GAGNON: Right.

1 PROFESSOR DORSANEO: That seems like an odd
2 way to do things if you're trying to get somebody to be
3 able to fill in that blank, and your instructions
4 occasionally seem to me to read as if a lawyer wrote
5 them --

6 MR. GAGNON: Well, they did.

7 PROFESSOR DORSANEO: -- trying to be a
8 fourth grade -- trying to be a fourth grader. I mean,
9 like, "Applicant is you."

10 MR. GAGNON: That's why I brought the sample
11 of the drafts of what we got from our organization in
12 California that I think we're improving the instructions a
13 lot.

14 PROFESSOR DORSANEO: Okay.

15 MR. GAGNON: Let me just as an aside also
16 indicate that -- well, two things. First of all, we hope
17 that these forms are actually disseminated by people who
18 have a little bit of experience in providing advice to
19 victims of domestic violence who may need assistance. We
20 know they're going to be provided through the district
21 attorneys' office, county attorneys' office, a lot of the
22 shelters where they are available, and I imagine they will
23 be available on the web, they will be available through
24 libraries, but our hope is that someone who is actually
25 seeking out some assistance, they will go to someone who

1 actually can tell them, "Hey, listen, you can get a lawyer
2 to help you" -- maybe you can't because of the county
3 you're in -- or assist them in filling out these forms in
4 a way that makes sure that the affidavit is complete.

5 Secondly, we have included throughout the
6 instructions specifically a reference back to lawhelp.org
7 and the Womens Advocacy Project hotline, which is a
8 domestic violence hotline, and they can get assistance to
9 make sure that those forms are completed in a proper way
10 that they have filled out their affidavit and
11 substantially what is going to be needed to get that
12 protective order, ex parte protective order. So there is
13 some collateral assistance that we're thinking is going to
14 happen.

15 Secondly, it is our intention that there
16 will be a more expansive description of protective orders
17 and availability of help and this type of thing on
18 lawhelp.org, which is already in existence, and we're
19 trying to improve that as much as possible, so there is a
20 source that someone can go to if they're really looking
21 for a broad information regarding protective orders.

22 CHAIRMAN BABCOCK: Okay.

23 MR. GAGNON: I would say also that what we
24 have found is that in talking to a lot of the defense
25 lawyers and a lot of the lawyers who are advocates for

1 womens groups, domestic violence, they like this form and
2 they hope we approve it because they're going to start
3 using it, too. So we think that providing a simplified
4 kit like this may provide more pro bono assistance for
5 victims than exists right now because there is a fear that
6 it's so technically correct that we're not sure we can get
7 through the process. Providing this type of kit to a
8 volunteer lawyer through a program that would assist these
9 victims is probably going to enhance the availability of
10 pro bono systems for some of these people where it doesn't
11 already exist.

12 CHAIRMAN BABCOCK: Okay. Any more comment
13 on the instructions? Anybody think that we ought to
14 dabble with the instructions? Yeah, Justice Gaultney.

15 HONORABLE DAVID GAULTNEY: I don't think we
16 ought to dabble with them, but I think No. 9 on "Request
17 for temporary ex parte protective order," should that be
18 20 days instead of 14 days?

19 MR. GAGNON: The 20 days is for
20 governmental. The 14 days is for private, so it would be
21 14.

22 HONORABLE DAVID GAULTNEY: So the answer is
23 I don't think we ought to dabble with them.

24 CHAIRMAN BABCOCK: Okay. So we're 2-0 on
25 not dabbling for the moment. Anybody else?

1 Okay. Stewart, as I understand it or as I
2 read it, there are five forms. One is an application for
3 protective order, second is an affidavit, third is the
4 temporary ex parte protective order, fourth is the
5 protective order, and the fifth is respondent's
6 information; is that correct?

7 MR. GAGNON: That's correct. Right. And
8 respondent's information is more of a DPS -- is it DPS?

9 PROFESSOR LUNGWITZ: Yeah.

10 MR. GAGNON: It's a standardized form, and
11 we just attached it. It's required to get on the service
12 that's provided to everybody about the existence of this
13 protective order.

14 CHAIRMAN BABCOCK: And, Stewart, just, you
15 know, pipe up any time we're --

16 MR. GAGNON: Sure.

17 CHAIRMAN BABCOCK: -- getting off track, but
18 let's start with the application for protective order,
19 which is the first form in the kit, and let's just go
20 down, you know, 1 through 12. Anybody have any comments
21 with respect to the first subject matter, which is the
22 parties?

23 PROFESSOR DORSANEO: I have one question.

24 CHAIRMAN BABCOCK: Yeah, Bill.

25 PROFESSOR DORSANEO: I presume this is a

1 special purpose proceeding that doesn't require compliance
2 with the Rules of Civil Procedure with respect to
3 identification of discovery levels and that kind of
4 business. This is just a separate stand-alone procedure
5 to get a protective order, wouldn't perhaps be regarded as
6 the subject matter of a plaintiff's original petition?

7 MR. GAGNON: I view it that way, and I think
8 all our courts view it that way.

9 PROFESSOR DORSANEO: Okay. But it tends to
10 operate servicewise like an initiated lawsuit, but it's
11 distinct. We're not trying to make this comply with
12 everything.

13 PROFESSOR LUNGWITZ: I don't think so,
14 because the hearing is going to occur within 14 days in
15 most counties, except for Harris County. I don't think
16 there is going to be a whole of lot of discovery done, and
17 there is actually case law that the court can't continue
18 it to allow discovery to be done.

19 PROFESSOR DORSANEO: What I'm getting at,
20 does this lead anywhere, or does this kind of start and
21 you get a protective order and then that's the end of it?

22 PROFESSOR LUNGWITZ: That's it.

23 PROFESSOR DORSANEO: Okay. All right. So
24 it's not like a regular lawsuit.

25 CHAIRMAN BABCOCK: Yeah. Okay. Anything

1 else on the "Parties" paragraph? Let's go down to
2 "Children." That seems fairly self-explanatory. Any
3 comments on that, Bill?

4 PROFESSOR DORSANEO: Again, I'm not going to
5 say this over and over again, but it would, I think, be
6 useful for the person filling -- for the person who is
7 filling this out to know whether to fill this out or not.
8 Okay. And the instructions would presumably say something
9 about that, and I think that would be so for the blanks,
10 too, like for all these check things. Maybe it's easier
11 to make the point with respect to "Request for a
12 protective order."

13 "Check one or more of the following blanks."
14 You know, "If relief is sought on behalf of children in
15 your household fill in the following," something like
16 that, but I don't think -- that may be -- you may regard
17 that as quibbling and it might be, but it might help
18 later.

19 CHAIRMAN BABCOCK: Okay. Any other comments
20 on this? Yeah, Nina.

21 MS. CORTELL: I just have a question. I
22 guess there is no age limitation on children?

23 PROFESSOR LUNGWITZ: No what?

24 MR. GAGNON: No age.

25 MS. CORTELL: Do you mean minor child?

1 PROFESSOR DORSANEO: Do you mean minor
2 children or all of us?

3 PROFESSOR LUNGWITZ: It would be for minor
4 children.

5 PROFESSOR DORSANEO: Change it.

6 MS. CORTELL: I just typically -- I don't
7 know whether we need to put an age qualifier in there or
8 not. That's all.

9 CHAIRMAN BABCOCK: I would think the intent
10 would be for minor children, wouldn't it?

11 PROFESSOR LUNGWITZ: Yeah, it's minor
12 children. An adult can seek a protectiveive order on
13 behalf of another adult in the household, and that's
14 provided for in No. 3.

15 HONORABLE TRACY CHRISTOPHER: I'm sorry? I
16 can't hear.

17 PROFESSOR LUNGWITZ: I said an adult can
18 seek a protective order on behalf of another adult in
19 their household, but that's covered by No. 3.

20 HONORABLE TRACY CHRISTOPHER: Thank you.

21 HONORABLE STEPHEN YELENOSKY: You can just
22 put "Children under 18" there, right?

23 PROFESSOR LUNGWITZ: Yeah.

24 CHAIRMAN BABCOCK: So in the caption put
25 "Children under 18"?

1 MR. ORSINGER: Well, "Applicant seeks
2 petition for the following children under 18." Put that
3 in the instruction.

4 MS. HOBBS: That's right.

5 MR. LOW: Chip, what if you had a
6 25-year-old non compos who was really --

7 PROFESSOR DORSANEO: Still an adult.

8 MR. LOW: Still considered -- you couldn't
9 get a --

10 CHAIRMAN BABCOCK: Well, you get to them in
11 the next paragraph, I think.

12 MR. LOW: Oh, okay.

13 CHAIRMAN BABCOCK: Yeah, Richard.

14 MR. ORSINGER: Stewart, if there is already
15 a custody case pending and someone went to the courthouse
16 to fill out one of these --

17 MR. GAGNON: Right.

18 MR. ORSINGER: -- is there any complication
19 that it has to be in the same cause number or you have to
20 note it?

21 MR. GAGNON: Depends on the county. Depends
22 on the county. Some counties will actually send them to a
23 county court rather than a district court hearing, because
24 the county courts hear the protective orders.

25 MR. ORSINGER: Well, is there any reason we

1 should ask them to disclose whether there is a pending
2 custody case and what court or cause number?

3 PROFESSOR LUNGWITZ: We do.

4 MR. ORSINGER: You do?

5 PROFESSOR LUNGWITZ: We do. If you look
6 under "Children" --

7 MR. ORSINGER: Yeah.

8 PROFESSOR LUNGWITZ: "The children are the
9 subject of a court order affecting conservatorship."

10 MR. ORSINGER: Well, that's a past custody
11 decree maybe or maybe a temporary order.

12 PROFESSOR LUNGWITZ: And then also --

13 MR. ORSINGER: I guess my question is more
14 jurisdictional. In other words, is it perfectly okay if
15 Court No. 1 has some kind of order relating to these
16 children and then we open up a new proceeding in Court
17 No. 2 and don't tell them about Court No. 1? Is that
18 okay?

19 MR. GAGNON: From a Family Code standpoint
20 it is; and, in fact, for example, we could have a divorce
21 pending in Bexar County and file a protective order in
22 Travis County.

23 MR. ORSINGER: And there's no reason to
24 tell --

25 MR. GAGNON: It's not a mandatory transfer.

1 MR. ORSINGER: You don't need to tell the
2 court about that?

3 MR. GAGNON: From a Family Code standpoint
4 you don't need to.

5 CHAIRMAN BABCOCK: Carl, then Judge
6 Christopher.

7 MR. HAMILTON: Well, under this Chapter 82
8 it says that "A person who wishes to apply for protective
9 order with respect to the person's spouse who is a party
10 to a suit for resolution or affecting parent-child that is
11 pending must style the application as required by Chapter
12 85." My question is, is it still free if you file it
13 pursuant to Chapter 85, or do you have to pay the fees
14 there or --

15 PROFESSOR LUNGWITZ: Chapter 85 is still
16 part of the protective order provisions, and there
17 wouldn't be any kind of fee.

18 MR. HAMILTON: No fees --

19 PROFESSOR LUNGWITZ: No fees.

20 MR. HAMILTON: -- have to be paid even if
21 you file it in the existing lawsuit?

22 MR. GAGNON: If you come into a divorce case
23 you can file a protective order, like Richard says, at the
24 same time that you want to file a divorce petition. You
25 don't have to pay an additional fee for filing the

1 protective order.

2 CHAIRMAN BABCOCK: Judge Christopher.

3 HONORABLE TRACY CHRISTOPHER: I'm sorry to
4 go back to No. 1, "Parties," on a copy of the divorce
5 decree you have a box that says "attached" or "currently
6 unavailable but will be filed with the court," and I
7 reference back to the instructions that says "take it to
8 the hearing." Shouldn't we just say that in the form,
9 "will be brought to the hearing" so that they will
10 understand they can reference back and forth between the
11 two things? Because they might not understand what, you
12 know, "currently unavailable but will be filed with the
13 court" means. And so I don't know whether that's an
14 instruction problem or a form problem.

15 CHAIRMAN BABCOCK: Right.

16 MS. HOBBS: So you would --

17 HONORABLE TRACY CHRISTOPHER: I would just
18 make the language the same in both spots.

19 PROFESSOR LUNGWITZ: Okay. And the reason
20 it's like that is it's following straight out of the code
21 language, you know, that says you either have to file it
22 with it or you have to file it later --

23 HONORABLE TRACY CHRISTOPHER: Okay.

24 PROFESSOR LUNGWITZ: -- before the court.

25 MR. GAGNON: Again, one of the things we're

1 trying to do is making sure that the pleadings themselves
2 track the code without really focusing on a client --
3 we're not trying to translate this to fourth grade
4 language. Let's put it that way.

5 The instructions in the introductory
6 provision is where we're really focusing on making sure
7 that the client understands what they have to do, and one
8 of the things they have to do is if they don't have it
9 attached to this they have to bring to it the hearing,
10 make sure the judge knows it's there. Well, that's why it
11 says it in the instructions.

12 HONORABLE TRACY CHRISTOPHER: I guess I just
13 just -- on your instructions sort of cross-reference what
14 it means, if we want to leave that the same.

15 CHAIRMAN BABCOCK: Carlos and then Judge
16 Sullivan and then Richard Munzinger.

17 MR. LOPEZ: I don't know the genesis of the
18 background here, so my comments may be inappropriate, but
19 we kind of sloughed off the idea of telling the other
20 judge or perhaps a prior judge about it because it wasn't
21 required by the Family Code, but I know if I was the judge
22 of that other court I might want to know that this was
23 going on. I mean I realize we're trying to make this, I
24 assume, as streamlined as possible, so we may not want to
25 put anything in there that isn't really required to be in

1 there, but it certainly isn't required, but it sounds like
2 it's a pretty decent idea.

3 CHAIRMAN BABCOCK: What do you-all think
4 about that?

5 PROFESSOR LUNGWITZ: Well, one of the big
6 issues in this packet is that -- there was a packet for a
7 long time that was really, really thick, and so
8 streamlining it was a real important part of the task
9 force and just putting in here what is required. I know
10 that when divorces are filed or when suits affecting the
11 parent-child relationship is filed, if there is a
12 protective order or if there is an application pending,
13 that is required to be in those pleadings.

14 CHAIRMAN BABCOCK: Okay. Judge Sullivan.

15 HONORABLE KENT SULLIVAN: I understand that
16 there is an attempt to write this in plain English and
17 understandable language. I was curious, and maybe I
18 missed this, whether or not there had been any testing of
19 it, that is field testing to find out --

20 MR. GAGNON: Testing of the pleadings
21 itself?

22 HONORABLE KENT SULLIVAN: To determine
23 whether average users, laypersons who are of the type of
24 background and experience who would likely use this,
25 whether they run into any problems in comprehension or

1 use, because otherwise a group like this group, while we
2 are going to try and guess about, oh, this might be an
3 issue or this might be a problem, we are hardly a
4 representative sample of the folks who will be actually
5 filling it out and using it.

6 MR. GAGNON: We did two processes. One is
7 ongoing right now. The first process was that we -- it
8 was rather informal. My wife took it to her birthday
9 club. None of those people are lawyers. Most of them
10 have graduated from college, but they are people who may
11 be -- you know, they may want a protective order sometime
12 in their life. We did the same thing throughout our
13 organization because we had a diverse group from The
14 Valley, from the Panhandle, those type of things, of just
15 taking it out and informally putting it into the community
16 and then, you know, "What's the problem with this?" And
17 as we were going through the process, that's what we did.

18 The second thing is ongoing right now, is
19 that the people from California who have written our
20 translation, are helping us with our translation, have
21 actually come back and suggested some format changes to us
22 to make the document easier for someone at their level,
23 and they've gone through this process before in California
24 to make it easier to fill out, easier to understand,
25 actually suggested some format changes for our

1 instructions, but they haven't suggested any text changes
2 for the order themselves, and they know that that's
3 something they can't do.

4 HONORABLE KENT SULLIVAN: Well, just by way
5 of example, I just look at the first few lines and I see,
6 "Respondent's address for service is." Now, service is
7 something that you get in a restaurant.

8 MR. GAGNON: Look at the instructions.

9 HONORABLE KENT SULLIVAN: Okay. And I was
10 going to say, if it cross-references it and people
11 actually understand what they're being asked, I just think
12 there is nothing better than having some objective
13 verification.

14 PROFESSOR LUNGWITZ: And the packet that we
15 started with, this is actually a revision of a packet that
16 was developed by a nonprofit in 1992 because shelters
17 would call this legal -- it's a nonprofit legal
18 organization, Women's Advocacy Project, located here in
19 Austin, and they would call them and say, "We need some
20 forms, we need some help. Our prosecuting attorney is not
21 doing these, and we need some help."

22 And so that kind of was the -- how this
23 originated, and that was sent out over and over, and they
24 would call us back and give us feedback. You know, "We
25 don't know what this means, help us with this," and so

1 this is kind of a streamlining of that packet, a
2 streamlining of having lots and lots of people look at it.

3 HONORABLE KENT SULLIVAN: So you're saying
4 in form there's been a lot of it?

5 PROFESSOR LUNGWITZ: Yes. Since 1992.

6 CHAIRMAN BABCOCK: Munzinger had his hand
7 up.

8 MR. GAGNON: Judge, see, what we say in the
9 application -- in the instructions is "Respondent's
10 address for service," which is in italics, "is where
11 respondents lives, works, or regularly spends time."

12 MR. MUNZINGER: Carlos spoke to my point. I
13 don't need to --

14 CHAIRMAN BABCOCK: Okay. And then I think
15 Justice Gaultney had his hand up and then Judge Yelenosky.

16 HONORABLE DAVID GAULTNEY: I just wanted to
17 -- I know it's been asked three times already. I wanted
18 to revisit the concept of if you've got a pending divorce
19 proceeding somewhere, this says that this informs the
20 court that you're asking for the protective order in
21 whether or not there is an actual order pending, but are
22 you saying there is no requirement under the Family Code
23 to inform the court that there is a proceeding pending
24 somewhere in which -- and the court has jurisdiction, has
25 the ability to enter a custody order, a protective order,

1 a support order, and just hasn't done so yet?

2 MR. GAGNON: Not if you're asking for a
3 protective order and there is a pending divorce or SAPCR,
4 but if there is a protective order and you're asking for a
5 divorce or SAPCR, you have to advise the court of that.

6 HONORABLE DAVID GAULTNEY: If there is a --
7 the court that enters the protective order, that enters
8 this order that's being asked for here, has the
9 discretion, does it not, under the Family Code to transfer
10 the protective order proceeding to the other court that
11 has the divorce proceeding or whatever or the proceeding
12 involving the child?

13 I think there is an interesting
14 jurisdictional issue if you have conflicting orders, one
15 coming from a court that has the divorce proceeding
16 pending, maybe hasn't entered an order yet, and then you
17 have, say, the mother take the children and moves to
18 another county, applies for a protective order. The code,
19 as I understand it, specifically says that the ex parte
20 order takes precedence over any order that's entered in
21 the other proceeding. And my question is if an order has
22 not been entered is there any requirement in the Family
23 Code to at least tell the court that has discretion to
24 transfer that protective order back to the other court
25 that there is, in fact, a pending proceeding in which the

1 court may have jurisdiction to enter such an order?

2 MR. GAGNON: I'm not aware of anything in
3 the Family Code that requires that notification of the
4 court. Now, in a practical sense, you know, if you've got
5 a respondent that gets served with this thing, he or she
6 is going to come in and say, "Hey, listen, wait a minute,
7 we've got a divorce pending in Collin County," and Richard
8 may have to correct me on this.

9 I'm aware of one case that I think was an
10 appellate court case last year where just this situation
11 arose, the divorce pending in someplace in North Texas and
12 the parties -- one party went into another county court,
13 another county's court, and got a protective order that
14 precluded the visitation that was awarded in the first
15 court, and that was upheld. There was an appellate issue
16 about that. I don't have have the cite on me.

17 CHAIRMAN BABCOCK: Judge Yelenosky, Judge
18 Peeples, and then Bill.

19 HONORABLE STEPHEN YELENOSKY: I think judge
20 Judge Peeples was before me. I'll defer to him.

21 HONORABLE DAVID PEEPLES: A couple of
22 observations and then I want to try to make this better.
23 We're trying not to fine-tune and change the law of
24 protective orders, but to make it easier for pro ses; am I
25 right about that?

1 MR. GAGNON: Right.

2 HONORABLE DAVID PEEPLES: Okay. I think
3 you-all have done a fantastic job on this. This is very
4 good work. Okay.

5 Now, on the "Parties" section here, I think
6 one way to make it better -- and Judge Sullivan alluded to
7 this -- is to help find the respondent for service. My
8 experience has been in San Antonio when you call the
9 docket, you've got a regular docket -- and, by the way,
10 the D.A. has a special office that does these, and even
11 with paralegals and lawyers helping applicants, you call
12 the docket and maybe 12 or 15 cases are called, half of
13 them have to be dropped for lack of service. And I think
14 one of the most helpful things you can do is on the line
15 that says "Respondent's address for service" say something
16 like "place where respondent can be located," and then
17 they ought to be encouraged to say, "He works here, he
18 lives there," and then have them put the time that he's
19 likely to be found there and maybe, you know, "He drives a
20 green pickup truck," all kinds of things like that.

21 I know you've got it on page 22 on the
22 respondent's information, but the more you can do to make
23 it easy to locate the respondent is possibly the most
24 helpful thing that can be done, and so I would look on the
25 parties section, and that's something that seems to me

1 would pay great dividends if you can get it done.

2 MR. GAGNON: Okay.

3 CHAIRMAN BABCOCK: You don't think it's
4 enough, Judge, to have it in the instructions?

5 HONORABLE DAVID PEEPLES: Well, as I look at
6 this, you know, the times I fill out forms I usually look
7 at the form itself and try to work my way through it, and
8 then if I need help I go to the instructions, and I think
9 that people ought to be encouraged to do that, and so the
10 better we can make the instructions --

11 CHAIRMAN BABCOCK: You mean the form?

12 HONORABLE DAVID PEEPLES: I think a lot of
13 people are going to look at the form and go to the
14 instructions maybe, but we shouldn't assume that they're
15 going to read the instructions first and then go to the
16 form, and I think the more you can help them on the front
17 end on the form itself, the better it is, but this
18 locating the respondent it seems to me is just major.

19 CHAIRMAN BABCOCK: Judge Yelenosky, did you
20 have something?

21 HONORABLE STEPHEN YELENOSKY: Well, I just
22 want to follow up on that and then I will go back to my
23 other question. Even if you do rely on the instructions,
24 the form would need to be changed because it only calls
25 for an address, and Judge Peeples is calling for

1 potentially a lot more information, so the form would
2 still need to be changed.

3 What I had raised my hand for was there has
4 been an allusion to Travis County where I am, and Judge
5 Peeples just referred to the San Antonio D.A.'s office. I
6 think this is great, too, for pro se litigants. I'm just
7 wondering what is the variation across the state? And
8 maybe I should know this, but I don't. Why is it that in
9 Travis County the county attorney's office does these,
10 apparently the D.A.'s office does it in San Antonio, but
11 there are parts of the state where nobody will do -- no
12 official will do these?

13 MR. GAGNON: That's right.

14 HONORABLE STEPHEN YELENOSKY: And if so, has
15 that question been asked, has anybody looked at that
16 issue?

17 MR. GAGNON: Well, that's one of the things
18 we found. I guess it's sort of anecdotal, but in meeting
19 with the constitutional county judges, many of whom are
20 the only judicial officer in their county on a full-time
21 basis, they tell me their staff will sit down and help
22 these people fill these forms out. Then they will approve
23 them. The county attorney's office is maybe one or two
24 people, and they don't do it. The district attorney's
25 office doesn't do it.

1 HONORABLE STEPHEN YELENOSKY: So it's just
2 up to them?

3 MR. GAGNON: It's up to them. It's a matter
4 of policy. They've got jurisdiction and they're required
5 to assist these people, but they don't come around to
6 assist them. They don't have time to assist them.

7 HONORABLE STEPHEN YELENOSKY: Is that a
8 legislative issue?

9 MR. GAGNON: You know, I guess it would be,
10 if you can tell a district attorney to treat this as a
11 number one priority situation.

12 PROFESSOR LUNGWITZ: And every county is
13 done differently. There is a section of the Family Code
14 that says, "The county attorney or the criminal district
15 attorney is the prosecuting attorney responsible for
16 filing applications under this subtitle, unless the
17 district attorney assumes the responsibility by giving
18 notice of that," and this and that.

19 In a lot of counties there are all kinds of
20 restrictions put on this, and I think it's a funding
21 issue, frankly. They have a lot of different things to
22 do, so they say, "Okay, if you haven't separated from the
23 person we aren't going to assist you in getting a
24 protective order." Or if you haven't lived with -- the
25 violence wasn't in the last -- "if you don't come to us

1 within seven days of the violence we aren't going to help
2 you."

3 There are all kinds of restrictions that are
4 policy restrictions in offices to keep the number reduced
5 so they don't have as much work to do. So there are a lot
6 of people falling through the cracks. And there are some
7 counties where they don't do it at all, and there have
8 been groups who have formed who have talked about doing
9 some kind of mandamus or some kind of constitutional
10 challenge.

11 HONORABLE STEPHEN YELENOSKY: Well, this has
12 been brought to us as an important public policy issue
13 with a lot of urgency, and so it just occurred to me, why
14 are we skipping over that? Or it's not for us to deal
15 with that, but --

16 PROFESSOR LUNGWITZ: Right.

17 HONORABLE STEPHEN YELENOSKY: -- to at least
18 raise the question as to isn't there another place where
19 part of the problem can be addressed?

20 PROFESSOR LUNGWITZ: And that has been
21 closely looked at in meetings in this very room.

22 MR. GAGNON: Let me just tell you that in my
23 work with the Legislature over the last 20 years I have
24 probably seen more bills on protective orders than I've
25 seen on just about anything else, and they still can't get

1 it enforced. I mean, even to the point of, well, the
2 constitutional county judges sometimes aren't lawyers and
3 so they're not enforcing these things in West Texas. We
4 need to find somebody to do it. They go to the district
5 courts. Then they come back the next time and they want
6 constitutional county court to do it. I mean, they can't
7 get anybody to push them all the time.

8 CHAIRMAN BABCOCK: Bill, you had your hand
9 up and then Carlos.

10 PROFESSOR DORSANEO: Well, just making the
11 same point over and over again.

12 CHAIRMAN BABCOCK: Carlos and then Judge
13 Christopher.

14 MR. LOPEZ: Can I get a copy of whatever
15 you-all have in Spanish?

16 MR. GAGNON: In Spanish?

17 MR. LOPEZ: Yeah.

18 MR. GAGNON: As soon as it gets translated.
19 It's being translated.

20 MR. LOPEZ: Okay.

21 MR. GAGNON: We got a grant from the Bar
22 Foundation to translate into Spanish initially and then
23 move on to Vietnamese, but yeah, our thoughts are that
24 instructions and the predicate are going to be done in
25 translation. We're not going to do the form itself in

1 translation.

2 MR. ORSINGER: You need to do the form in
3 translation even if you have English and then Vietnamese
4 underneath it.

5 MR. GAGNON: It may be that that's what
6 we're going to have to do, but we're working with a
7 translation organization.

8 MR. ORSINGER: Well, I understand the
9 pleading has to be in English.

10 MR. GAGNON: Right.

11 MR. ORSINGER: But couldn't you put right
12 underneath a sentence? Because otherwise they can't fill
13 this out.

14 MR. GAGNON: You're right.

15 MR. LOPEZ: I'll do the form pro bono if you
16 want.

17 MR. GAGNON: Well, we've actually got
18 funding from the Bar Foundation to pay for that.

19 CHAIRMAN BABCOCK: So you can get paid,
20 Carlos.

21 MR. GAGNON: We could use the funding for
22 something else.

23 MR. LOPEZ: I've seen some incredibly poor
24 translation that you would have thought they paid people
25 doing it looked like they would have done a better job.

1 So it's amazing to me how bad they are.

2 MR. GAGNON: Well, we'll be glad to let you
3 flyspeck our draft and see where we are.

4 CHAIRMAN BABCOCK: Judge Christopher.

5 HONORABLE TRACY CHRISTOPHER: On the parents
6 of the same child or children part in the "Parties," does
7 it matter under the statute -- do you have to identify
8 which of your children the respondent is the father of?

9 MR. GAGNON: No.

10 HONORABLE TRACY CHRISTOPHER: Or the parent
11 of?

12 MR. GAGNON: No.

13 HONORABLE TRACY CHRISTOPHER: Okay. And
14 then my second question is --

15 MR. GAGNON: They just have to be a member
16 of the household.

17 HONORABLE TRACY CHRISTOPHER: Do you think
18 that that might confuse someone that they would only list
19 the children that the respondent is the parent of?

20 Back to the instructions? I mean, I
21 understand they can get protection for all of the children
22 in the household or other adults in the household, and I
23 just wanted to make sure that someone wouldn't get
24 confused about that, that it does not have to be a child
25 of the --

1 MR. GAGNON: Right.

2 HONORABLE TRACY CHRISTOPHER: -- respondent.

3 MR. GAGNON: Right.

4 MR. MUNZINGER: It would seem that No. 2
5 solves the problem.

6 MR. GAGNON: I'm sorry?

7 MR. MUNZINGER: It seems to me that No. 2
8 solves the problem that the judge raises because the
9 person is apparently required to identify all children who
10 are to be subject of the protective order, in which event
11 it would not depend upon who the parent is.

12 HONORABLE TRACY CHRISTOPHER: I just ask
13 that in the instructions it says that these children do
14 not have to be the children of the respondent.

15 MR. GAGNON: Okay.

16 HONORABLE TRACY CHRISTOPHER: Just to make
17 it clearer.

18 CHAIRMAN BABCOCK: Carl.

19 MR. HAMILTON: Where in the form does it
20 identify if there's a pending matter already in a court?

21 MR. GAGNON: It doesn't.

22 MR. HAMILTON: It doesn't.

23 MR. GAGNON: But we just addressed that
24 issue.

25 MR. HAMILTON: I thought somebody said it

1 was in the form.

2 CHAIRMAN BABCOCK: Okay. Judge Peeples.

3 HONORABLE DAVID PEEPLES: A couple of
4 practical things. The transmittal letter from Stewart
5 Gagnon says that they strongly encourage the Supreme Court
6 to tell judges that these forms have to be accepted, I
7 mean if they're filled out. I think that's a good idea.
8 In other words, these horror stories of judges that won't
9 do it, I think for the Supreme Court to say these forms
10 are per se okay would be helpful, and I think the Court
11 might want to go further and say if there are little
12 details that are left out, you don't dismiss or deny for
13 that reason. I'm not sure how you would word that, but I
14 think that might need to be said also.

15 And a second thing, on the realities, I see
16 this as not so much a law matter, change the law, as how
17 do we get things done in the real world, and I think that
18 if you-all can talk to the district and county clerks and
19 just encourage them to have somebody there who can take
20 the time to have someone sit down and fill this out. "If
21 you have questions, come ask me and I'll help you do it,"
22 because the people -- a lot of the people dealing with
23 these are not -- they don't read the newspaper, they don't
24 read books. They have trouble getting through a form like
25 this, and I think that as a practical matter if somebody

1 in the clerk's office can be sort of the go-to person to
2 just help them. You know, big counties I think a lot of
3 times do this, but sometimes --

4 MR. GAGNON: Well, you know, it's funny
5 because the anecdotal evidence that we have is that big
6 counties don't do this. Bexar may do it and Travis
7 County. I know Harris County doesn't do it. They will
8 send you to the law library or they'll send you over to
9 the district attorney's office, who won't do it for you,
10 or they will give you the names of several clerks who do
11 it. But you know who does it is Angelina County. It's
12 the small counties that have a constitutional county judge
13 that hears most of these things, and somebody in his
14 office will sit down and help these people fill it out,
15 and that's why they were so excited about this type of
16 document.

17 HONORABLE DAVID PEEPLES: I'm just saying if
18 you really want to get things done, I think if clerks can
19 be encouraged to have somebody who is authorized to do it
20 and it's okay for them to do it, they're not going to get
21 docked or have to work overtime, that would be very
22 helpful.

23 CHAIRMAN BABCOCK: Okay. Let's keep going.
24 Richard, you had a comment, and then Justice Hecht.

25 MR. ORSINGER: Yeah. I'm actually tying

1 three things together. The application apparently must be
2 under oath because your affidavit swears not only to the
3 evidence inside the affidavit, but also swears to the
4 application.

5 MR. GILSTRAP: Where does it swear to the
6 application? I couldn't find that.

7 MR. ORSINGER: Say what?

8 MR. GILSTRAP: Where does it swear to the
9 application? I couldn't find that.

10 MR. MUNZINGER: It's in the oath portion of
11 the affidavit.

12 MR. ORSINGER: At the very end of the
13 affidavit --

14 MR. MUNZINGER: Page four of four.

15 MR. ORSINGER: -- you swear not only to the
16 affidavit, but you swear to the application.

17 MR. GILSTRAP: Okay.

18 MR. ORSINGER: And so I think you should
19 find that out before you fill out this form and not after
20 that it's under oath, so that you should say, "Application
21 for protective order" and then put in parenthesis "under
22 oath," close parenthesis.

23 MR. GAGNON: On the title, Richard?

24 MR. ORSINGER: Yes. Because I think that
25 it's going to be very difficult for an uneducated person

1 to know what's personal knowledge and what's not. I mean,
2 your affidavit ought to discuss that when you get to the
3 affidavit, and your instruction really doesn't tell them
4 what it means to be filling this out.

5 The instruction I think should tell them
6 that you must -- the things you put on this application
7 must be true based on things you saw or things that
8 happened to you, because they're not going to know what
9 personal knowledge is, they're not going to know what
10 hearsay is; and admittedly probably nothing bad will
11 happen either way, but I think we ought to just at least
12 inform them that we're expecting them to be telling the
13 truth based on something that they really know.

14 PROFESSOR DORSANEO: Well, they don't really
15 have to know.

16 MR. ORSINGER: Well, they don't have to know
17 it? It's on the affidavit.

18 PROFESSOR DORSANEO: Knowledge and belief.

19 MR. GILSTRAP: It doesn't say that.

20 MR. ORSINGER: That's what the affidavit
21 says.

22 MR. MUNZINGER: That's the affidavit.
23 That's not the law.

24 MR. ORSINGER: If the law requires it to be
25 sworn --

1 PROFESSOR LUNGWITZ: The code says that they
2 have to state under oath that the facts and circumstances
3 contained in the application are true to the best
4 knowledge and belief of each applicant.

5 MR. ORSINGER: Okay. Well, I can't do
6 anything about the Legislature, but the case law says that
7 if it's on information and belief it's not under oath.

8 PROFESSOR DORSANEO: Unless it can be on
9 information and belief, like New York, and then it's fine.

10 MR. ORSINGER: But it's not under oath.

11 PROFESSOR DORSANEO: Richard, you're not
12 right.

13 MR. ORSINGER: If you look at the Texas case
14 law on TROs and summary judgment affidavits, if it's on
15 information and belief, it's not sworn. Now, the Family
16 Code says it's an affidavit, so I guess it's an affidavit.

17 PROFESSOR DORSANEO: Some Rule 93 denials
18 are on information and belief.

19 CHAIRMAN BABCOCK: Okay, you two, take it
20 outside.

21 HONORABLE STEPHEN YELENOSKY: But we want to
22 come watch.

23 MR. ORSINGER: At any rate, I think we ought
24 to say "under oath," and I think we ought to put something
25 in the instructions about the fact that it's under oath.

1 CHAIRMAN BABCOCK: Justice Hecht.

2 HONORABLE NATHAN HECHT: Just to pick up on
3 themes around the room and to follow up on something Judge
4 Peeples said, that one of the benefits it seems to me of
5 having the Court approve the application form is that you
6 can depart from the statutory language and put it in
7 clearer terms and have that blessed and have the Court say
8 that's what that means. In other words, if the statute
9 says "service," we can put in the form, in the application
10 form, the kinds of things that Judge Peeples outlined and
11 then the imprimatur would have the effect of saying that
12 complies with the statute. Otherwise, there is not a
13 whole lot of point in the Court approving it because
14 people can obviously do whatever they want to to try to
15 comply with the statute, but this is kind of a safe harbor
16 that if you fill this out then you finished step No. 1, no
17 matter what.

18 MR. GAGNON: One of the things we have to
19 realize is that we have a lot of audiences for this form.
20 One of the audiences is the district or county clerk
21 that's going to be filing these things, and they had a
22 little bit of input of how we drafted this. They've got
23 to know what we're talking about when we say these people
24 live someplace, so they say, "That's nice," you know. But
25 I don't have a problem with changing that.

1 HONORABLE NATHAN HECHT: I mean, throughout
2 the idea ought to be whatever we can do to make it
3 plainer.

4 MR. GAGNON: Right.

5 HONORABLE NATHAN HECHT: Even if it's not in
6 the in height verbi of the statute, the blessing takes
7 care of that.

8 CHAIRMAN BABCOCK: Frank and then Elaine.

9 MR. GILSTRAP: Along the lines of trying to
10 make it accessible and understandable to the people
11 involved, is there a form for the notice to the
12 respondent?

13 MR. GAGNON: No, that -- not other than the
14 normal -- well, first of all, there is a form for the ex
15 parte protective order, which is the notice for the
16 respondent to be served with. Other than that it's
17 citation and --

18 PROFESSOR LUNGWITZ: And the code is real
19 clear on exactly what words have to be in that citation,
20 and the citation is actually pretty clear.

21 MR. GILSTRAP: Because I'm thinking I'm a
22 respondent, and you know, if I'm just served with a copy
23 of this application and the order, I've got to sit down
24 and figure out for a little while exactly how I'm
25 restrained, and that has two issues. One is the

1 respondent does have due process rights, and two, if you
2 want to put him in jail you've got to make sure he had
3 notice. But if you're telling me that there is some type
4 of statutorily mandated form then I understand.

5 The affidavit, why do we have these
6 questions in the middle of the affidavit instead of in the
7 middle of the application? Is there some requirement of
8 that in the law? The affidavit starts out with "My name
9 is so-and-so. I'm making an affidavit." Then he or she
10 has some more questions to fill in, then he or she signs
11 it, then there is an oath. I just wondered why those
12 questions are in the middle of the affidavit as opposed to
13 the application itself.

14 MR. GAGNON: Go ahead, Jeana.

15 PROFESSOR LUNGWITZ: I was just going to say
16 that because this is the chance for the applicant to write
17 the facts that support family violence occurred and is
18 likely to occur again and we were concerned that they may
19 leave out whether there was a weapon involved. They may
20 leave out whether children were present, whether the
21 police were called, whether medical treatment was sought,
22 and also, we took these -- we used also a lot of the
23 prosecuting attorneys' forms for this. We kind of gleaned
24 what we thought was the best information from those and
25 put them in here. It just gives them a chance to tell

1 their story, and we thought if they didn't talk about
2 those things that most judges think are pretty important
3 that we'll make sure that they talk about them here.

4 MR. GILSTRAP: I understand, although I
5 found it confusing to find the questions in the affidavit
6 as opposed to the application. On -- and I presume with
7 -- you have these findings of grounds for protective order
8 in four, committed family violence or violated a prior
9 protective order. Do both those under the law allow
10 issuance of an ex parte order?

11 MR. GAGNON: With an affidavit supporting
12 it.

13 MR. GILSTRAP: I understand. I understand,
14 but if they swear to either one of those that allows ex
15 parte relief, right?

16 MR. GAGNON: As long as you have -- yes, as
17 long as you have the supporting affidavit.

18 MR. GILSTRAP: I understand. I understand.
19 And then so all the relief in this, that's referred to in
20 this application, can be requested ex parte?

21 PROFESSOR LUNGWITZ: All the relief
22 requested ex parte can be granted ex parte.

23 MR. GILSTRAP: Can be granted ex parte,
24 that's what I was trying to say. Finally, over on page
25 two, you have one item checked, "possessing a firearm or

1 ammunition." Can that be restrained ex parte? I mean,
2 does the law have -- the state have the right to ex parte
3 restrain possession of ammunition?

4 MR. GAGNON: Yes.

5 HONORABLE STEPHEN YELENOSKY: Yeah.

6 MR. GAGNON: In fact, Professor Dorsaneo's
7 compadre, Jack Sampson, will tell you that they can tell
8 you you can't have bullets or they can tell you you don't
9 have a gun, but he didn't understand what the importance
10 of a gun is without bullets. It ought to be both, but the
11 statute says --

12 PROFESSOR DORSANEO: You could hit somebody
13 in the head with it.

14 MR. GAGNON: I guess you could. They can
15 preclude you from ammunition without a gun.

16 MR. GILSTRAP: On an ex parte basis?

17 MR. GAGNON: Right.

18 CHAIRMAN BABCOCK: Elaine.

19 PROFESSOR CARLSON: Is there somewhere in
20 the directions, instructions that advises the applicant
21 what court or what clerk to go to? What is the
22 jurisdictional scheme on this? Can you go to a JP, since
23 they can't issue injunctions?

24 PROFESSOR LUNGWITZ: It's the county court.

25 PROFESSOR CARLSON: Is it only the county

1 court?

2 PROFESSOR LUNGWITZ: No, or a district
3 court. Jurisdictionally, county courts, district courts,
4 juvenile courts all have jurisdiction to hear protective
5 orders.

6 CHAIRMAN BABCOCK: Could you speak up? She
7 can't hear you.

8 PROFESSOR LUNGWITZ: I'm sorry. I was just
9 saying jurisdictionally almost every court except a JP
10 court can hear a protective order.

11 PROFESSOR CARLSON: Should we tell them
12 that?

13 PROFESSOR LUNGWITZ: I think that is
14 somewhere in there.

15 MR. GAGNON: It depends upon what they do in
16 each county. Some counties go -- they go automatically to
17 the family district court. Some counties they go to any
18 court.

19 PROFESSOR CARLSON: So how does the
20 applicant figure that out?

21 MR. GAGNON: They don't. That's what the
22 clerk does. In fact --

23 PROFESSOR CARLSON: Which clerk?

24 CHAIRMAN BABCOCK: Judge Yelenosky, do you
25 have something on this issue?

1 HONORABLE STEPHEN YELENOSKY: Well, I don't
2 know if you moved on. We have been visiting over here
3 about possessing of firearms.

4 CHAIRMAN BABCOCK: No, we're trying to find
5 out where to file this thing first.

6 HONORABLE STEPHEN YELENOSKY: Okay.

7 CHAIRMAN BABCOCK: Bill, do you have
8 something on that?

9 PROFESSOR DORSANEO: I wanted to talk about
10 the affidavit.

11 CHAIRMAN BABCOCK: Okay. We'll get there in
12 a minute.

13 MS. HOBBS: I don't know the solution here
14 either, but I raised that same problem, and also when you
15 talk about "the clerk," I get -- I mean, I get a lot of
16 calls about this, and if you say something about a clerk,
17 they just -- you know, they don't know if it means the
18 Supreme Court clerk. There is a lot of confusion. I
19 don't know the solution either, but I do know that some
20 precision may need to be included in here in at least the
21 instructions on where they're going to go, but I know with
22 254 counties it's almost hard to be too precise, but maybe
23 we could tweak that a little bit.

24 CHAIRMAN BABCOCK: Okay.

25 MR. ORSINGER: Chip?

1 CHAIRMAN BABCOCK: Yeah, Richard.

2 MR. ORSINGER: Doesn't every county have a
3 district clerk and every county has a county clerk, and
4 they can go to either one of those, and someone in that
5 office can tell them where to go? Can't we just say "take
6 this to the district clerk or the county clerk in the
7 county where you are"?

8 PROFESSOR CARLSON: And don't go to the JP,
9 because some people would think that.

10 MR. ORSINGER: Well, I'm saying go to the
11 district clerk or the county clerk and then whoever is
12 there is going to know where you're supposed to send them;
13 isn't that right?

14 MR. GAGNON: Right.

15 MR. ORSINGER: Couldn't we just tell them
16 that and then it doesn't matter?

17 PROFESSOR CARLSON: That would help.

18 CHAIRMAN BABCOCK: Good idea. Judge
19 Yelenosky and then Bill.

20 HONORABLE STEPHEN YELENOSKY: Well, Judge
21 Peeples and I were talking about the statutory requirement
22 that the respondent is not allowed to possess firearms or
23 ammunition. I had not really looked at it closely before,
24 but I'm wondering does the statute make it clear whether
25 that's possession on the person?

1 MR. GILSTRAP: No. That's the problem.

2 HONORABLE STEPHEN YELENOSKY: Once you own a
3 gun in your home --

4 MR. GAGNON: That is possession.

5 PROFESSOR LUNGWITZ: That's possession.

6 MR. GAGNON: There's also a Federal statute
7 that applies to that also.

8 HONORABLE STEPHEN YELENOSKY: So that's
9 possession. So subject to this order if you owned a gun,
10 you're supposed to dispossess it from your home?

11 PROFESSOR LUNGWITZ: Yes.

12 HONORABLE STEPHEN YELENOSKY: During that
13 period? Okay.

14 MR. GILSTRAP: What do you do with it?

15 MR. ORSINGER: When you're served with it
16 and you have to get rid of it, you have to carry it to
17 someone to get rid of it.

18 MR. GILSTRAP: So the first thing they say
19 is, "If you've got a gun, the first thing we want you to
20 do is go get your gun."

21 MR. ORSINGER: And how do you get rid of it
22 without possessing it?

23 HONORABLE STEPHEN YELENOSKY: I'm just
24 asking what the -- apparently this is addressed by a
25 Federal law.

1 MR. GAGNON: VAWA, Violence Against Women
2 Act, addresses that.

3 PROFESSOR LUNGWITZ: 18 U.S.C. 922(g).

4 CHAIRMAN BABCOCK: Carlos.

5 MR. LOPEZ: We're getting into an area that
6 I hope will only come up once in a million, but one of the
7 defendants back when I was a prosecutor for the state
8 Penal Code charge for carrying a weapon was traveling.
9 The fact intensive scenario was if you had your toothbrush
10 and your underwear in the car you were traveling, and that
11 was an exception to unauthorized carrying of a weapon. So
12 I mean, if the guy can prove somehow that he's just trying
13 to comply with the judge's order by taking the gun to the
14 trash bin, I guess it's a defense.

15 CHAIRMAN BABCOCK: Yeah. We're getting a
16 little far afield.

17 HONORABLE JAN PATTERSON: It's not an issue.

18 CHAIRMAN BABCOCK: Let's get back to --

19 MR. GAGNON: Now I know why Representative
20 Goodman didn't come this morning.

21 CHAIRMAN BABCOCK: Let's get back to the
22 form itself. We've gotten through the first two parts of
23 the first of five forms, so let's go to the third part,
24 "Other adults." Does anybody see any issues on that?

25 Okay. How about "Grounds for protective

1 order"? Any issues on that part of the form? Richard
2 Munzinger.

3 MR. MUNZINGER: The applicant is asked to
4 check whether a person -- or that a person has committed
5 family violence, and when I review the instructions I
6 didn't find a definition of family violence. It may have
7 been that I missed it. I don't practice in this area, and
8 I wonder if family violence is a word of art or a
9 statutory term that is defined somewhere.

10 PROFESSOR LUNGWITZ: It is a statutory term
11 that is defined, and I think case law has kind of made it
12 evolve to be defined as we have tried to write it in
13 regular words, "hurt or threaten to hurt you or your
14 children."

15 MR. MUNZINGER: Well, if we're dealing with
16 people that we have to translate instructions down to the
17 fourth grade level, in all respect, the person who is the
18 subject matter of this application, the man presumptively
19 who is doing the violence, most of it's generally a man,
20 has a reputation and has an interest that when the state
21 comes after him somebody ought to be making specific
22 allegations; and I think it would be fairer to the subject
23 of the order and also fairer to all of us if the person
24 who is making the application says, "He threatened me" or
25 "He hit me," instead of "He has committed family

1 violence." Hell, if they don't know where they live, how
2 can they say he committed family violence?

3 PROFESSOR LUNGWITZ: And in the affidavit
4 that's where they're going to put the particular facts.

5 MR. MUNZINGER: I understand that they may
6 put the particular facts, but is the judge going to read
7 the entire thing? We hope he will.

8 MR. GAGNON: Practically speaking, they read
9 the affidavit. That's all they read. Judge Peeples will
10 tell you that. That's what they look at.

11 MR. MUNZINGER: I would recommend that if
12 the Supreme Court of Texas is going to say to judges, "You
13 may or must accept this form," that the form require the
14 applicant to state which of the two or three forms of
15 family violence was committed in the application early on
16 and support it in the affidavit. It doesn't make sense to
17 me, and it can harm people's reputation. It doesn't make
18 sense to me, and I will say that again.

19 CHAIRMAN BABCOCK: Judge Yelenosky.

20 HONORABLE STEPHEN YELENOSKY: Well, we see
21 these -- I mean, this is essentially what we're seeing in
22 Travis County now, and you know, in six weeks on the bench
23 I've seen enough of these, but yeah, I mean, just because
24 the form is blessed doesn't mean that the affidavit is
25 going to be adequate.

1 MR. GAGNON: Right.

2 HONORABLE STEPHEN YELENOSKY: I mean, we go
3 through the particulars in the affidavit, and if there's
4 nothing there, if that box is checked or if it says
5 "family violence" and then there is nothing but conclusory
6 statements then it's not enough.

7 PROFESSOR LUNGWITZ: In the State Bar of
8 Texas forms they do put the facts within the pleading
9 itself. My experience when I have filed those the judge
10 is always like "Now, where in this am I supposed to find
11 what happened? Where is the clear and present danger?"
12 And so because of that that's why I and the prosecutors
13 offices that we consulted about this put it at the end,
14 because that's what I find, is the judges go straight to
15 the back. They rarely look at the front. They go
16 straight to the back and read the affidavit and make a
17 decision about the ex parte.

18 CHAIRMAN BABCOCK: Richard Munzinger.

19 MR. MUNZINGER: I would only recommend that
20 instead of saying "has committed family violence" that
21 your form have a block that says "has threatened," "has
22 physically harmed," or what have you, so that in the
23 application itself the specific form of family violence
24 recognized by law, the applicant is required to indicate
25 what it is.

1 CHAIRMAN BABCOCK: Bill Dorsaneo.

2 MR. MUNZINGER: Frankly, that would have a
3 prophylactic effect because it would make the person
4 understand that at some point in time they're going to
5 have to say that anyway and say it under oath when they
6 say it in their affidavit.

7 CHAIRMAN BABCOCK: Bill Dorsaneo.

8 PROFESSOR DORSANEO: Well, if the -- in the
9 same spirit as what Richard is saying and Stephen, too,
10 with respect to the importance of the affidavit, maybe the
11 affidavit could provide a little -- the affidavit form
12 could provide a little more help by asking questions that
13 would match the allegations in the grounds for protective
14 order part of the application. You know, "Has respondent
15 committed family violence," check that, or maybe "Has
16 respondent hurt or threatened to hurt you," check that.

17 MR. GAGNON: But, Professor, my experience
18 is that judges want more fact-specific information rather
19 than those conclusions.

20 PROFESSOR DORSANEO: Well, then --

21 MR. GAGNON: That's why we've listed.

22 PROFESSOR DORSANEO: I understand what
23 you're saying, but then say "Describe," okay, and
24 factually describe the events that involved family
25 violence or whatever. I mean, I like the idea that you

1 say, "Was a weapon involved? Were any children present?"
2 But it seems to be between the devil in the deep blue sea,
3 you ask some questions as if they're the really important
4 things and then the main questions are left to somebody
5 being able to figure out the instructions to see what it
6 is they need to say. And they need to say that there was
7 family violence, that it's likely to happen again, that
8 there was -- or there was a violation of a protective
9 order, and then they need to describe in factual terms
10 what those check marks mean.

11 And that -- and, Stephen, you would go look
12 at the affidavit to see what it says, right?

13 HONORABLE STEPHEN YELENOSKY: Yeah. And I
14 was just asking Jeana, I mean, I said this is essentially
15 what we deal with in Travis County, but I thought in
16 Travis County it is actually a little more like what
17 you're saying. What I remember reading is broken down
18 more and then in the person's own handwriting the
19 responses that laid out the details, "He typically did
20 this" and "Beforehand he had done this" and such and such
21 and "He told me he would" kind of thing, and there is a
22 lot more space than this at least, and I thought it went
23 over a couple of pages.

24 PROFESSOR DORSANEO: If this --

25 HONORABLE STEPHEN YELENOSKY: And that's

1 typically what -- that's what I've looked at.

2 CHAIRMAN BABCOCK: Nina, did you want to say
3 something?

4 MS. CORTELL: I just agree that it belongs
5 in the affidavit, some more leading questions there.

6 CHAIRMAN BABCOCK: Could you say that a
7 little louder?

8 MS. CORTELL: I was just following up on
9 what's already being suggested. I'm okay with the family
10 violence checkoff on page one, but in the affidavit, see
11 how we start with the questions, sort of a leading
12 question in the second box. We don't have a counterpart
13 in the first box. I think we should have some sort of
14 leading question, if you will, to describe what they're
15 supposed to do in this first box to help them.

16 It seems like the two things we've heard
17 from those with experience is the problems have been with
18 the service and then inadequate description of the
19 problem. So those do need to be the two things I think we
20 need to target.

21 CHAIRMAN BABCOCK: Yeah. I noticed that,
22 too. Frank, was that your point?

23 MR. GILSTRAP: That's my point. It looks
24 like that first box is just out there floating.

25 CHAIRMAN BABCOCK: Yeah.

1 MR. GAGNON: What?

2 MR. GILSTRAP: "Has the person committed
3 family violence" there?

4 CHAIRMAN BABCOCK: You would say something
5 like "Please describe."

6 HONORABLE TOM GRAY: Elaine, Frank, you-all
7 are creating problems for the court reporter.

8 CHAIRMAN BABCOCK: You would say something
9 like, "Please describe the family violence that you have
10 alleged in paragraph four," something like that. Okay.
11 Anything more about the grounds for protective order?

12 CHAIRMAN BABCOCK: Justice Duncan.

13 HONORABLE SARAH DUNCAN: I found the wording
14 in the second ground --

15 CHAIRMAN BABCOCK: You've got to say it
16 louder, Sarah.

17 HONORABLE SARAH DUNCAN: I found the wording
18 of the second ground confusing, and when I read the
19 instructions, I'm like Judge Peeples. I try to fill out
20 forms first without the instructions. I realize, I think,
21 what it's trying to say, and I would suggest that it be
22 reworded to say, "Respondent violated a prior protective
23 order that is now expired" because when I first read it it
24 sounded like it was asking if the respondent had violated
25 an expired protective order, and I sat there for about 45

1 seconds thinking, wondering how do you violate an expired
2 protective order.

3 PROFESSOR LUNGWITZ: "That has now expired"?

4 PROFESSOR DORSANEO: Why does it matter that
5 it's expired?

6 PROFESSOR LUNGWITZ: Well, you can re-apply
7 for a new protective order after the first one expires if
8 the first one was violated while it was in effect.

9 PROFESSOR DORSANEO: Okay. So this is a new
10 one.

11 PROFESSOR LUNGWITZ: Now, if there's no new
12 family violence or anything --

13 HONORABLE SARAH DUNCAN: You just get a
14 renewal. Take out the first "has" and replace the second
15 "has" with "is now."

16 MS. HOBBS: I'm sorry. Replace the second
17 "has" with what?

18 HONORABLE SARAH DUNCAN: "Is now."

19 MS. HOBBS: Okay.

20 CHAIRMAN BABCOCK: Carlos.

21 MR. LOPEZ: Mine is a policy comment, not
22 details of the form, so once we're done with everything
23 else.

24 CHAIRMAN BABCOCK: Okay. Hold that policy
25 thought.

1 MR. LOPEZ: Hold that thought.

2 CHAIRMAN BABCOCK: All right. Anything else
3 on this paragraph? Let's go to paragraph five, "Request
4 for protective order, preventing family violence." Any
5 comments on this? Yeah, Bill.

6 PROFESSOR DORSANEO: Only to say again that
7 you need to tell people that they can check some of these
8 blocks, none of these blocks.

9 PROFESSOR CARLSON: It says "Check all that
10 apply."

11 MR. GAGNON: "Check all that apply" doesn't
12 say that?

13 HONORABLE STEPHEN YELENOSKY: He has his
14 glasses on.

15 CHAIRMAN BABCOCK: You've got to read the
16 fine print.

17 PROFESSOR DORSANEO: That's pretty small
18 there.

19 CHAIRMAN BABCOCK: Presumably these people
20 with young children will have better eyes than you.

21 Carl.

22 MR. HAMILTON: On the box on possessing a
23 firearm or ammunition, the statute says "possessing a
24 firearm" only. It doesn't say anything about ammunition.

25 PROFESSOR LUNGWITZ: It's the Federal law.

1 The Federal law covers ammunition.

2 MR. GILSTRAP: Haven't there been
3 constitutional challenges to VAWA?

4 MR. GAGNON: Yeah, and they were upheld.

5 CHAIRMAN BABCOCK: The VAWA was or the
6 constitutional challenge?

7 MR. GAGNON: The VAWA was upheld. It's the
8 Emerson case out of Texas, and it went to the Fifth
9 Circuit, and that condition was upheld.

10 CHAIRMAN BABCOCK: Okay. Any other comments
11 about paragraph five? Yeah, Judge Peeples.

12 HONORABLE DAVID PEEPLES: The first three
13 boxes there, Stewart --

14 MR. GAGNON: Yes.

15 HONORABLE DAVID PEEPLES: The second one I
16 think you ought to just say "threatening or harassing" and
17 then the third box is when they communicate it through
18 someone else. I mean, I think it's confusing to have both
19 of them say "communicate" because really the second box
20 there you're talking about they threatened or harassed and
21 then the third box is they had it done through somebody
22 else.

23 MR. GAGNON: Okay. So the third box would
24 stay the same?

25 MR. ORSINGER: Yes.

1 HONORABLE DAVID PEEPLES: Pardon?

2 MR. GAGNON: The third box would stay the
3 same?

4 HONORABLE DAVID PEEPLES: Yes.

5 MR. GAGNON: Okay. I understand what you're
6 doing.

7 HONORABLE DAVID PEEPLES: And then toward
8 the end of paragraph five, "requiring respondent to
9 complete a battering intervention course," I would break
10 that into two or three sentences. That's just a lot for a
11 person.

12 MS. HOBBS: What one? I'm sorry, Judge.

13 HONORABLE DAVID PEEPLES: Non-skillful
14 people to read.

15 CHAIRMAN BABCOCK: What are you talking
16 about, Judge?

17 HONORABLE DAVID PEEPLES: Right at the end
18 of box six on page seven, I think. That's just a big long
19 sentence, and I would make it more reader-friendly.

20 CHAIRMAN BABCOCK: You're in paragraph five,
21 "Request for protective order, preventing family violence"
22 and which box is it that you're --

23 HONORABLE DAVID PEEPLES: I'll just show
24 him.

25 MR. ORSINGER: Second box on the whole

1 thing.

2 CHAIRMAN BABCOCK: The one that says
3 "Requiring respondent to complete a battering
4 intervention"?

5 MS. HOBBS: Got it.

6 HONORABLE STEPHEN YELENOSKY: Is that in the
7 order?

8 MR. GAGNON: Yes. Is that in the order?

9 HONORABLE STEPHEN YELENOSKY: Yeah.

10 MR. GAGNON: Oh, the ex parte order?

11 HONORABLE STEPHEN YELENOSKY: Yeah.

12 PROFESSOR LUNGWITZ: This would be in the
13 final order.

14 MR. GAGNON: Yeah. That's in part of the
15 final order, not the ex parte order.

16 HONORABLE STEPHEN YELENOSKY: Yeah, I was
17 going to say that obviously couldn't be completed.

18 CHAIRMAN BABCOCK: Lisa, are you following?

19 MS. HOBBS: I got that one, yes.

20 CHAIRMAN BABCOCK: As long as you've got it.
21 Justice Duncan.

22 HONORABLE SARAH DUNCAN: On the stalking
23 box, the misplaced "that" bothers me, and I'm wondering if
24 it says the same thing to say, "Stalking, i.e., engaging
25 in conduct that is reasonably likely to harass, annoy,

1 alarm, abuse, torment, or embarrass, including following
2 the applicant, children, or other adults." Does that say
3 the same thing? You see how the "that" is misplaced? I
4 mean, "that" refers to that that immediately precedes it.

5 CHAIRMAN BABCOCK: Are you following this?
6 You can hear her?

7 THE REPORTER: Yes.

8 CHAIRMAN BABCOCK: Okay.

9 MR. GAGNON: "Stalking, i.e." --

10 HONORABLE SARAH DUNCAN: "Conduct that is
11 reasonably likely" --

12 MR. GAGNON: And then you move the
13 "directed" to "following"?

14 HONORABLE SARAH DUNCAN: "Including
15 following the applicant, children, or other adults."

16 PROFESSOR LUNGWITZ: I think that's an
17 improvement.

18 HONORABLE SARAH DUNCAN: Since I don't
19 otherwise know what I'm talking about on protective
20 orders, I'm glad I could find something.

21 CHAIRMAN BABCOCK: Okay. Anything else
22 about this paragraph? Justice Gray.

23 HONORABLE TOM GRAY: I apologize. I was out
24 of the room at the point that you-all discussed why the
25 firearms was checked to begin with. Can you not make an

1 application for a protective order without requesting that
2 relief?

3 MR. GAGNON: No. If a protective order is
4 granted that is an automatic. That is mandated, and the
5 reason we checked it is so judges don't think they have
6 the option, because in West Texas they think they have an
7 option.

8 MR. ORSINGER: In West Texas.

9 MR. GAGNON: "You mean I'm going to sign one
10 of these things and he can't go deer hunting?" You know.

11 MR. GILSTRAP: Well, that's a problem.

12 MR. GAGNON: That's common there.

13 HONORABLE TOM GRAY: Why are you going to
14 make the applicant ask for that then?

15 PROFESSOR LUNGWITZ: Regardless of whether
16 it's asked for, under both state and Federal law if there
17 is a protective order, even an ex parte protective order,
18 even a restraining order that restrains threatening
19 communication, by law you're automatically --

20 MR. GAGNON: It applies.

21 PROFESSOR LUNGWITZ: -- dispossessed.

22 HONORABLE TOM GRAY: That may be the fact,
23 but you don't have to ask for it, and I'm saying that the
24 person -- you're putting the person who is making the
25 request in a position of asking for it when they don't

1 have to.

2 MR. GAGNON: Yeah.

3 HONORABLE TOM GRAY: And their response to
4 the person who is standing in front of them with some
5 other weapon saying, "Why can I not go deer hunting" is
6 "You asked for it." You take that argument away. It's "I
7 didn't ask for it. That's what the court is required to
8 do." And I think you've put the person in an untenable
9 position by making it part of the application. I would
10 not make it part of the application. You get it
11 automatically. I understand that maybe in the
12 instructions you need to tell the person that one of the
13 consequences of the protective order, whether you agree
14 with it or not, is that the person's guns are going to be
15 taken away.

16 PROFESSOR LUNGWITZ: I see, so you're saying
17 leave it in the order but take it out of the application.

18 HONORABLE TOM GRAY: Well, as I understand
19 it I don't have a choice of arguing whether or not it
20 needs to be in the order. That's a different issue, but
21 it doesn't have to be in the application, but yet you've
22 made it part of the form package, and I wouldn't.

23 PROFESSOR LUNGWITZ: And I think the reason
24 we made it part of the package is because it's in the
25 statute. For some reason, you know, the Legislature -- we

1 can discuss that another day, but that's one of the things
2 you can request as part of it.

3 CHAIRMAN BABCOCK: Yeah. It doesn't seem to
4 make much sense if you're always going to have it
5 checked --

6 PROFESSOR LUNGWITZ: Right.

7 CHAIRMAN BABCOCK: -- to always have it in
8 there.

9 PRORFESSOR LUNGWITZ: Right.

10 CHAIRMAN BABCOCK: And I can well see what
11 Justice Gray says, is "I didn't take away your gun, the
12 judge did."

13 "No, no, no. You asked for my gun to be
14 taken away." Which could lead to more antagonism between
15 parties.

16 MR. GAGNON: I'll make a note of that.

17 MR. GILSTRAP: Especially when they're going
18 to get their gun to get rid of it.

19 CHAIRMAN BABCOCK: Right, in the heat of the
20 moment. Judge Yelenosky.

21 HONORABLE STEPHEN YELENOSKY: I was just
22 going to say we agree with that, and if you're concerned
23 about instructing the judges, presumably it will be in the
24 form order and also in the instructions to which the judge
25 could refer, but eliminate the appearance that the person

1 is seeking that.

2 MR. GAGNON: We have it automatically
3 checked in each one of the orders.

4 HONORABLE STEPHEN YELENOSKY: But they don't
5 -- the person getting this may not know that that was
6 automatically checked. They may think that the applicant
7 checked it. Oh, I'm sorry. You're saying in the order?

8 MR. GAGNON: In the order. Yeah.

9 CHAIRMAN BABCOCK: Richard, then Carl.

10 MR. ORSINGER: I think there is some benefit
11 to having it clear in the application, even to the
12 applicant, that this relief is automatically granted; and
13 maybe instead of having a check maybe you ought to just
14 have a statement in here, "The law requires that such
15 protective orders will include a dispossess" or whatever
16 the language, so the applicant knows that it automatically
17 happens.

18 MR. GAGNON: Well, it actually says in the
19 "About protective orders," which is sort of an
20 introductory part, that "A protective order against family
21 violence takes away respondent's guns and licenses to
22 carry guns."

23 MR. ORSINGER: I don't know that anybody
24 will read that instruction. I think it's beneficial to
25 have it in the application, but I agree with Justice Gray

1 that it kind of makes it look like the person requested
2 it, and that may create separate issues with the target of
3 the application. So if you just say in here the law
4 requires that, it's informational to everyone.

5 HONORABLE SARAH DUNCAN: Or you might
6 instead of putting a check mark in that box make the box
7 black and then after subdivision put in parentheses,
8 "required." Right, Richard?

9 MR. ORSINGER: That's okay.

10 CHAIRMAN BABCOCK: Carl.

11 MR. HAMILTON: I have a question about the
12 stalking thing. Stalking is really not in the statute. I
13 guess you could sort of interpret it, but it's really
14 talking about family violence, so this would have to be
15 stalking but one family member to another?

16 PROFESSOR LUNGWITZ: Yeah.

17 MR. GAGNON: Anybody that's qualified for
18 a -- the focus of a protective order, and that's why it
19 says the stalking is specifically towards people who are
20 the subject of the protective order.

21 MR. HAMILTON: But the respondent has to be
22 a family member.

23 MR. GAGNON: Member of the household.

24 MR. HAMILTON: Member of the household,
25 yeah.

1 CHAIRMAN BABCOCK: Justice Duncan.

2 HONORABLE SARAH DUNCAN: I just have a
3 question because I don't know the substantive law. What
4 does one do if the respondent is a peace officer with a
5 gun?

6 MR. HAMILTON: Can't hear you.

7 PROFESSOR LUNGWITZ: If they're full-time
8 paid, they get to keep their gun.

9 MR. MUNZINGER: They couldn't hear the
10 question.

11 HONORABLE SARAH DUNCAN: My question was
12 what does one do with a respondent who is a peace officer?

13 MR. GAGNON: And the law provides that they
14 can keep it.

15 PROFESSOR LUNGWITZ: If they're full-time
16 and they're paid.

17 MR. GAGNON: You can't take away their
18 firearm.

19 PROFESSOR DORSANEO: Do they have a right to
20 keep it?

21 MR. GAGNON: Yes.

22 PROFESSOR DORSANEO: Period? Even if
23 they've shot somebody with it?

24 PROFESSOR LUNGWITZ: Now, the police
25 department can do whatever they want to. They can take

1 the gun away, but the protective order will not take that
2 away. I haven't had cases like that.

3 CHAIRMAN BABCOCK: Okay. Any more comments
4 on -- yeah, Judge Patterson.

5 HONORABLE JAN PATTERSON: Yes, I read the
6 "All about protective orders," and I thought at first that
7 it did take care of this problem about the gun because it
8 does say it takes away respondent's guns, but it says, "A
9 protective order can."

10 MR. GAGNON: Yeah.

11 HONORABLE JAN PATTERSON: And so I think
12 that someplace it is useful to say, "If this order is
13 granted, it automatically," or "this is one," because it
14 looks like one of the options as the other things are
15 options. So I think it is not clear, and you know, the
16 more I hear this conversation, in certain parts of the
17 state, 254 counties, I would guess it is such an important
18 aspect of the relationship in the family with the violence
19 whether there are firearms, and so I think all of these
20 comments are very important, and it ought to be clear that
21 if this is granted this is automatic, because that does --
22 that doesn't say that. It says it can.

23 CHAIRMAN BABCOCK: Buddy.

24 MR. LOW: But in the police situation, so
25 it's not true. We had a deputy sheriff who had been

1 enjoined and shot his wife on the courthouse steps because
2 he's still carrying his gun.

3 HONORABLE JAN PATTERSON: Well, that's the
4 law.

5 MR. LOW: I understand, but what if you put
6 that in the form? What if she had put that and she thinks
7 that his gun is automatically taken? That's what it
8 tells, but it's not true in that situation.

9 HONORABLE JAN PATTERSON: Well, I mean, the
10 way you phrase it it can say "except peace officers."

11 MR. LOW: Yeah. That's an isolated case,
12 but it's an actual case.

13 HONORABLE JAN PATTERSON: Well, it's not an
14 unusual case. It's a good point, but I think this doesn't
15 speak to that exception.

16 MR. GAGNON: Well, I think anybody will tell
17 you if they advise victims like this, the first thing they
18 tell them is that these protective orders are a piece of
19 paper, and I have a family situation where the guy is, you
20 know, "I don't care what this order says. I'm going to do
21 what I want to do," and all you can do is put them in
22 jail. It's a piece of paper.

23 MR. LOPEZ: It's a piece of paper that
24 misleads possibly someone into thinking something is going
25 to happen. I mean, what if the main purpose she got a

1 protective order was to get his gun taken away?

2 HONORABLE STEPHEN YELENOSKY: It just needs
3 to say "order" as the first one does.

4 MR. GAGNON: I'm sorry?

5 HONORABLE STEPHEN YELENOSKY: Well, your
6 first bullet point says "order respondent," you can get an
7 order. So you can't -- you do get an order that he not
8 possess guns unless he's a peace officer. Whether or not
9 the order will be complied with is the issue, but you're
10 mixing orders and facts.

11 CHAIRMAN BABCOCK: Okay. Let's go on to the
12 next paragraph, "Request for a protective order, use of
13 property." Any comments on paragraph six? Lisa.

14 MS. HOBBS: The, let's see, third box under
15 "Applicant requests a protective order," "Awarding
16 applicant the exclusive use and possession of the
17 following jointly owned property," I assume that means
18 cars and the like, but we might want to -- in the effort
19 to make this not down to fourth or fifth grade level but
20 just make sense to whoever is filling it out, it seems
21 like we might want to do something -- track the language
22 in your "How to do this section" in that, because I read
23 it the first time and thought, "What are we talking
24 about?" It made me pause, and I'm a lawyer, some days.

25 CHAIRMAN BABCOCK: Okay. Justice Duncan.

1 HONORABLE SARAH DUNCAN: The third box under
2 "Residence" where it says "or the children in applicant's
3 possession," it doesn't have to be all the children, does
4 it?

5 MR. GAGNON: Where is this?

6 HONORABLE SARAH DUNCAN: The third box under
7 "Residence" in section six.

8 MR. GAGNON: Oh, "solely owned or leased by
9 respondent; and respondent is obligated to support" --

10 HONORABLE SARAH DUNCAN: "The applicant or
11 the children."

12 PROFESSOR LUNGWITZ: Right.

13 MR. ORSINGER: Can you take the "the" out of
14 there so it would apply to one or more?

15 PROFESSOR LUNGWITZ: "One or more."

16 MR. ORSINGER: Can you just take the "the"
17 out of there?

18 HONORABLE SARAH DUNCAN: Or just say "a
19 child."

20 MR. GAGNON: "A child."

21 HONORABLE SARAH DUNCAN: If it's one or
22 more.

23 MR. GAGNON: "A child."

24 CHAIRMAN BABCOCK: Okay. All right,
25 Richard.

1 MR. ORSINGER: Back to Lisa's comment under
2 the property, third blank, "Awarding applicant the use and
3 possession of the following jointly owned," could you say
4 "items," "physical items"? Or "physical property" or
5 something to somehow differentiate that we're talking
6 about what we would call personal property?

7 MS. HOBBS: Right.

8 MR. ORSINGER: Could you just say "physical
9 items"? Maybe that's too sophisticated, but --

10 CHAIRMAN BABCOCK: "Stuff."

11 PROFESSOR CARLSON: "Stuff."

12 MR. ORSINGER: "Possessions."

13 PROFESSOR LUNGWITZ: I think we had that
14 same discussion about words.

15 MR. ORSINGER: How about "the following
16 possessions"?

17 MR. GAGNON: "Items" is fine. I think
18 "items" would probably be better, don't you?

19 CHAIRMAN BABCOCK: Yeah. "Stuff" is a
20 little too informal. Justice Gray.

21 HONORABLE TOM GRAY: Are there enough of
22 those items that are standard that it would be helpful to
23 put subboxes, for the lack of a better term, under that?
24 For example, subbox, "automobile"?

25 MR. GAGNON: Well, you have to describe it.

1 HONORABLE TOM GRAY: I know, but if you have
2 like the two or three major items that you're always going
3 to deal with under the box, I just thought -- in following
4 up on Lisa's comment I thought it would be helpful.

5 MR. GAGNON: This is a formatting issue, but
6 our goal was to have it in a certain amount of pages.

7 HONORABLE TOM GRAY: Okay.

8 MR. GAGNON: And the boxes would cause that
9 formatting problem a little bit, but we could add
10 parenthetically examples and then they could fill in the
11 line and that would probably save us a little space.

12 PROFESSOR LUNGWITZ: There was some
13 discussion about making the forms not having directions
14 and forms, having forms where we instruct everything, but
15 it got unruly and so that's when we separated it out.

16 CHAIRMAN BABCOCK: More comments on
17 paragraph six? Justice Duncan.

18 HONORABLE SARAH DUNCAN: The last line of
19 the last paragraph, shouldn't that be "jointly owned by
20 the parties"? "Owned or leased"?

21 PROFESSOR LUNGWITZ: Yeah. Shouldn't it be
22 what now?

23 HONORABLE SARAH DUNCAN: After jointly
24 shouldn't it say "owned or leased"?

25 PROFESSOR LUNGWITZ: Mine does.

1 MR. GAGNON: Mine doesn't. "Vehicle owned
2 or possessed by the applicant or jointly owned or leased."
3 "Owned or possessed"? Okay.

4 CHAIRMAN BABCOCK: Okay. Good. Anything
5 else?

6 Okay. Paragraph seven, "Request for
7 protective order, spousal support." Doesn't look like
8 there's much to fill out here.

9 MR. ORSINGER: There should be a check box
10 on that, shouldn't there?

11 MR. GILSTRAP: You're supposed to check over
12 the number. That's how you do it. You check over the
13 number. Like look at nine, they have a check mark over
14 it.

15 MR. ORSINGER: Oh, that's not at all -- I
16 see. Well, that's a little confusing.

17 CHAIRMAN BABCOCK: That's the first time
18 where you've had to check a box as opposed to stuff under
19 the box.

20 MR. ORSINGER: Well, No. 1 is checked. I
21 didn't notice that until right now. No. 4 is checked, No.
22 5 is checked.

23 MR. GAGNON: You don't have to check on
24 things that are required.

25 MR. GILSTRAP: But the problem is the people

1 have to know if they want seven do they have to put a
2 check in No. 7.

3 CHAIRMAN BABCOCK: Lisa.

4 MS. HOBBS: I talked to the women at Texas
5 Lawyer Care, and this is one of the recommendations that
6 the California form -- the company has made, is that the
7 boxes are confusing, and so I think that problem is going
8 to resolve itself.

9 CHAIRMAN BABCOCK: Okay. Any other comments
10 about seven? Paragraph eight, "Request for protective
11 order, child-related concerns." Any comments about
12 paragraph eight?

13 MR. ORSINGER: Where are the children
14 listed? Is there a place where we -- oh, it's No. 2,
15 these are the same ones that are on No. 2?

16 MR. GAGNON: Right.

17 MR. ORSINGER: And they don't have to be
18 shared children in order to be protected, or do they?

19 MR. GAGNON: They don't have to be. They
20 have to be a member of the household to be protected.

21 MR. ORSINGER: Okay.

22 MR. GAGNON: To give him any type of
23 visitation rights it has to be his choice, applied by him.

24 CHAIRMAN BABCOCK: Any other comments about
25 paragraph eight? Bill.

1 PROFESSOR DORSANEO: Just listening to what
2 Richard said, and this says, "Respondent is a parent of
3 the following of applicant's children." What children are
4 we talking about? Are we talking about the children in
5 two or the children in eight?

6 MR. ORSINGER: What if he's not the father
7 of any of them? What difference does it make if he's the
8 father? All that matters is if they're in the same
9 household, right?

10 MR. GAGNON: Then you can get a protective
11 order, but you can't get SAPCR orders, Richard. This is a
12 request for SAPCR orders.

13 MR. ORSINGER: Well, then your paragraph two
14 includes children that are not -- over which he has no
15 duty of support.

16 MR. GAGNON: That's correct, and you-all had
17 asked us to in some way amplify which one he is a parent
18 of.

19 MR. ORSINGER: Okay.

20 MR. GAGNON: To identify those two.

21 PROFESSOR DORSANEO: So it's in eight? It's
22 the children listed in eight?

23 MR. GAGNON: It's the children listed in
24 eight that he may be available for some form of suit
25 affecting parent-child relationship.

1 MR. ORSINGER: Why couldn't you prohibit him
2 from taking a stepchild from a child care facility? Why
3 does it have to be only a blood child? In other words,
4 everything --

5 MR. GAGNON: You can under a protective
6 order, but you can't under the SAPCR because he's not a
7 party in the SAPCR.

8 MR. ORSINGER: Well, in other words, the
9 first two blocks apply whether they're blood children or
10 not, and the last two only apply if he's the father.
11 Isn't that right? The first two blocks could be any
12 child, even if it's a stepchild.

13 PROFESSOR LUNGWITZ: Right.

14 MR. ORSINGER: But you don't enter a
15 schedule of possession or order of child support unless
16 it's a legal parent-child relationship, so I'm confused as
17 to why --

18 MR. GAGNON: You get the protection under
19 the protective order, which is statutorily similar to what
20 you might be able to get under a SAPCR or injunction.

21 MR. ORSINGER: Stewart, what I'm saying is
22 the relief in the first two blocks on eight is available
23 for any child that's a member of the household. The
24 second two are only --

25 MR. GAGNON: Not in that manner.

1 MR. ORSINGER: Not right?

2 MR. GAGNON: You prohibit somebody from
3 going within 200 feet -- or 200 yards of a location, which
4 may include a daycare facility or school, but you're not
5 under the statute allowed under protective orders to
6 prohibit somebody from removing a child from somebody's
7 possession.

8 PROFESSOR LUNGWITZ: Because they don't have
9 that right anyway.

10 MR. GAGNON: Right. They don't have the
11 right anyway.

12 MR. ORSINGER: Well, they don't have the
13 right to commit a physical assault either. I'm not sure
14 I'm following this. Are you telling me that in the Family
15 Code you can't stop this target of family violence from
16 wrongfully taking possession of a child that's not theirs?

17 MR. GAGNON: Right. It's not provided for
18 in the protective order statute.

19 MR. ORSINGER: Okay. We need to fix the
20 statute.

21 MR. GAGNON: You've got a hundred days to do
22 that.

23 HONORABLE JAN PATTERSON: You actually have
24 a week.

25 CHAIRMAN BABCOCK: Justice Duncan.

1 HONORABLE SARAH DUNCAN: On the third block
2 where it says "establishing a schedule for respondent's
3 possession"?

4 MR. GAGNON: Right.

5 HONORABLE SARAH DUNCAN: If there's already
6 a schedule in place shouldn't it be "establishing or
7 revising a schedule"? I mean, the current custody
8 order --

9 MR. GAGNON: Right.

10 HONORABLE SARAH DUNCAN: -- may give much
11 more possession than this person ought to get given what's
12 happened.

13 PROFESSOR LUNGWITZ: "Modifying."

14 MR. GAGNON: "Modifying."

15 HONORABLE SARAH DUNCAN: Yeah, "modifying."

16 CHAIRMAN BABCOCK: Good comment. What else,
17 paragraph eight?

18 Paragraph nine, "Request for temporary ex
19 parte protective order." Any comments on paragraph nine?

20 MR. GILSTRAP: It's checked, so that means
21 if you use this you have to get ex parte relief.

22 PROFESSOR LUNGWITZ: That's right. We had
23 lots of discussion about that within the group, but
24 because nine times out of ten if you need a protective
25 order then you need it immediately we decided that most

1 people will need it immediately.

2 CHAIRMAN BABCOCK: Anything else on this?
3 Judge Sullivan.

4 HONORABLE KENT SULLIVAN: What about the
5 legalese? I mean, I see here and elsewhere a constant
6 reference to "ex parte." Down at the bottom it talks
7 about "pro se" and the like, which obviously is, you know,
8 very routine for people in the legal business but --

9 MR. GAGNON: Let me just respond by saying
10 we'll accept your guidance on that. The folks that are
11 doing our translation have actually come back to us and
12 said that we should use something other than ex parte. We
13 were kind of uncomfortable in doing that because of the
14 statutory norm and what judges are more used to, I guess,
15 more than anything else; but if you come back and say,
16 "Hey, listen, we're okay with translating it to be 'an
17 order without notice to the other party'" or however you
18 want to describe it, that's fine with our committee. We
19 have no pride of authorship there.

20 HONORABLE KENT SULLIVAN: I was just trying
21 to think about if you request in the clerk's office and
22 that sort of thing.

23 MR. GAGNON: The people that were doing the
24 translation made some suggestions like that.

25 CHAIRMAN BABCOCK: Carl.

1 MR. HAMILTON: I'm still having a problem
2 with the children aspect. If you list five or six
3 children under two and some are only eligible for the not
4 coming within 200 yards and some are eligible for other
5 orders because they're blood-related --

6 MR. GAGNON: All of them would be eligible
7 for not coming within 200 yards.

8 MR. HAMILTON: But do we need to identify
9 which children come under which order?

10 MR. GAGNON: That's why under eight you have
11 a place to list the children that would apply to any of
12 the SAPCR orders. That's why there is a line under eight
13 to fill in for those specific children.

14 MR. HAMILTON: So if something is checked
15 under five then that just automatically applies to all of
16 them?

17 MR. GAGNON: All the members of the
18 household.

19 CHAIRMAN BABCOCK: Okay. Any more comments
20 on nine?

21 MS. CORTELL: I do, Chip.

22 CHAIRMAN BABCOCK: Nina. I'm sorry.

23 MS. CORTELL: That's all right. This may be
24 resolved through however we handle the boxes and the
25 checking off, but we are sort of in a couple of things.

1 For the most part it looks like a form we fill out and
2 then 7, 9, 10, 11 and 12 are presumably things that
3 they're going to agree to or sign off on, but we're not
4 really asking them to fill anything in, and I think that
5 could be really confusing. It could just look like a
6 generic form that they don't have to read or anything.

7 So I don't know. I'm not suggesting we put
8 a blank by each one, but I would hope that when we address
9 the numbering issue that it's somehow made clear to the
10 applicant that they're signing off on all of this,
11 although it looks like form language. Does that make
12 sense? In other words, the whole first part of the form
13 they're filling it out. They're giving you information,
14 and the back end of this is pretty much just form language
15 that they're not asked to take ownership of, and I just
16 hope that when we address the numbering issue that we make
17 it clear that they're agreeing to all of that.

18 MR. GAGNON: Okay.

19 CHAIRMAN BABCOCK: Okay. Richard.

20 MR. ORSINGER: Two things. Does the law
21 require a finding of clear and present danger of family
22 violence before an order can be issued ex parte?

23 PROFESSOR LUNGWITZ: Yes.

24 MR. ORSINGER: Okay. And secondly --

25 MR. GAGNON: And for the threat for future.

1 MR. ORSINGER: Say what?

2 MR. GAGNON: Threat for future.

3 MR. ORSINGER: Okay. Well, I don't know if
4 the clear and present danger allegation is accurate. I
5 don't have a copy of the Family Code with me. Is the
6 concept of future supposed to be folded into that finding
7 and should be folded into that allegation?

8 PROFESSOR LUNGWITZ: Not for the ex parte.
9 Just for the permanent.

10 MR. ORSINGER: Okay. And then let me ask
11 you this. Are we on 10 yet? Can I comment on 10?

12 CHAIRMAN BABCOCK: Let's transition into 10,
13 unless Buddy and Judge Patterson have something on nine.

14 MR. LOW: No, I just have a question on 10.

15 CHAIRMAN BABCOCK: Okay. Judge Patterson,
16 anything about nine?

17 HONORABLE JAN PATTERSON: Well, I just had a
18 question about Nina's comment, because why wouldn't the
19 signature at the bottom of that page just take care of
20 that? I'm not sure you can make it more explicit than
21 signing off because in the first place, this is an
22 approximate practical form, so it's -- you are having them
23 to swear to both on the next page, and here you're having
24 them sign it, but the form is kind of a compromise between
25 checkoffs, which don't lend themselves to ultimate

1 swearing issues, and in fact, there is a Federal law on
2 checkoff forms and whether that's a false statement and
3 all that. So there is a whole body of law on that.

4 So I just wonder whether that doesn't
5 suffice for the purpose of this form because nobody is
6 going to -- I wouldn't think that a check would be the
7 basis of a prosecution. I don't think that's --

8 CHAIRMAN BABCOCK: Lisa has got an answer to
9 that.

10 MS. HOBBS: Well, I don't have an answer to
11 that, but what if somewhere where they're signing their
12 name we just state, you know, "By signing your name you
13 are acknowledging that you read this" or something that's
14 dumbed down.

15 MR. GAGNON: Well, you have to go back to
16 the affidavit. Richard raised the issue about swearing to
17 both the facts in the affidavit as well as in the
18 application, so --

19 MS. HOBBS: And you say we don't have to
20 swear to the application, but you do want them to at least
21 know that they're --

22 HONORABLE JAN PATTERSON: But they are
23 swearing.

24 MR. GAGNON: You have to swear that the
25 facts stated in the application are to the best of your

1 knowledge true and correct.

2 MS. HOBBS: But not based on personal
3 knowledge.

4 MR. GAGNON: Not based on personal
5 knowledge.

6 CHAIRMAN BABCOCK: Richard Munzinger.

7 MR. MUNZINGER: Paragraph nine is a
8 mandatory paragraph for the issuance of the relief sought;
9 is that correct?

10 PROFESSOR LUNGWITZ: Yes.

11 MR. MUNZINGER: And still up to this point
12 in time the applicant has never been told to my knowledge
13 what family violence is. How can a fourth grader swear
14 that family violence is a clear and present danger if they
15 don't know what family violence is? It bothers me that
16 once again -- I know I said this earlier and no one seemed
17 to agree with me, but it bothers me that --

18 CHAIRMAN BABCOCK: No, I think everybody
19 agreed with you, Richard, and the fix was -- or what I
20 heard the fix was going to be was in the affidavit where
21 we were going to say in that first box, "Please describe
22 the details of the family violence," paren, "that is," and
23 then, you know, "beating, killing, threatening," whatever.

24 MR. MUNZINGER: And I heard that discussion,
25 but my personal belief was that it certainly didn't

1 satisfy my concerns, which is neither here nor there
2 because they are just my concerns, but it troubles me that
3 I have a person who comes to court who raises their hand
4 and says, "I sign this form to the best of my knowledge
5 that Bill has committed family violence."

6 "What do you mean?"

7 "I don't know."

8 MR. GAGNON: Well, okay, let me deal with it
9 this way. I'm sure we have got 50 people in this room.
10 We can go around and we can have a long debate about
11 whether or not that's family violence. We have got nine
12 family judges in Harris County. Five of them will tell
13 you that is family violence, four of them will tell you
14 that it's not.

15 MR. MUNZINGER: No, I understand.

16 MR. GAGNON: It's a fact-specific situation,
17 and if it's a fact-specific situation, then that's where
18 the affidavit comes into play, and it's up to the judge to
19 decide does this affidavit state enough facts for me to
20 find that there was family violence and grant an ex parte
21 protective order, or have a hearing, listen to the
22 evidence, and decide whether or not there is family
23 violence.

24 MR. MUNZINGER: When I asked earlier what
25 family violence was she was able to summarize it in less

1 than 25 words based upon case law. It wasn't even 15
2 words. What is the problem with either in the
3 instructions or somewhere early on in this form letting a
4 person know that when they are talking about family
5 violence they are talking about a threat of harm or actual
6 harm to a member of the family? I don't understand it.

7 PROFESSOR LUNGWITZ: There is not --

8 MR. MUNZINGER: I don't understand the
9 reluctance to require that. That's what I don't
10 understand.

11 PROFESSOR LUNGWITZ: Well, the very first
12 thing in here, "All about protective orders," "You can get
13 a protective order if there has been violence or a threat
14 of violence in your family or household or dating
15 relationship and violence is likely to occur again." And
16 then it talks about who you can get it against.

17 I think one of the issues is there are so
18 many different forms. I mean, I have a three-page form
19 that my clients fill out, has this happened, has this
20 happened, you know, over and over, and I think it would be
21 hard to list all the ways that people do that.

22 MR. MUNZINGER: And I agree with that, and I
23 won't say this again because I don't want to repeat
24 myself. I just am concerned that several times in a form
25 judicial action is being sought in a court under a formal

1 oath, and someone with a fourth grade education that we're
2 so worried about understanding these things that we've
3 hired a law firm or another firm to change English into
4 fourth grade English, and we're using a phrase "family
5 violence" that isn't defined in any way to the person who
6 is swearing under oath and triggering formal governmental
7 action. It doesn't make sense to me.

8 CHAIRMAN BABCOCK: Carlos.

9 MR. LOPEZ: To some extent related to what
10 Richard is saying, I think -- did we come to -- I know we
11 kind of joked about it. Did we come to a final decision
12 about whether the application itself is sworn or not?

13 MR. GAGNON: I thought we did.

14 CHAIRMAN BABCOCK: Yeah, we talked about
15 that.

16 MR. LOPEZ: Okay. Then it should be called
17 an application --

18 MR. GAGNON: "Under oath." Actually it was
19 called "Application for protective order under oath."

20 MR. LOPEZ: We're going to change that.
21 Okay.

22 CHAIRMAN BABCOCK: Justice Jennings.

23 HONORABLE TERRY JENNINGS: I was just going
24 to say, maybe one way to address what Richard is saying is
25 to say right up front in the instructions, "The purpose of

1 a protective order is to protect you or your" -- you know,
2 "a spouse or a child from physical violence" and then
3 maybe say something to --

4 MR. GAGNON: Well, it's not limited to
5 physical violence. That's the problem. That's the
6 problem with trying to get -- we don't want to impose our
7 bias as to what we think family violence is, and we've got
8 however many district and county courts in the state of
9 Texas who all have their own views as to what family
10 violence is.

11 HONORABLE TERRY JENNINGS: Well, it's going
12 to be actual physical harm or the threat of physical harm.
13 Just say that in plain English up front, "The purpose of
14 this is to stop this from happening," and maybe give an
15 example of what isn't family violence, and I was going to
16 ask these judges over here, Judge Peeples had mentioned
17 before one of the main reasons you don't grant relief or
18 you don't get that far is because there is not service.
19 Are there other reasons as well that people are trying to
20 accomplish something through a protective order they
21 shouldn't be trying to accomplish? Does that happen?

22 HONORABLE DAVID PEEPLES: That does happen.

23 HONORABLE TERRY JENNINGS: And then maybe
24 you spell out some of those examples of, you know, "A
25 protective order is not to be used for certain purposes."

1 CHAIRMAN BABCOCK: Richard's point is well
2 made, and whether we implement it or not the point has
3 been well made, and it's a quarter of 11:00, almost a
4 quarter of 11:00, and we're not done with the first form
5 yet, and we've got four more to go.

6 HONORABLE STEPHEN YELENOSKY: Can I just say
7 one thing on that real quick?

8 CHAIRMAN BABCOCK: Sure.

9 HONORABLE STEPHEN YELENOSKY: To me this is
10 a mixture of fact and pleading, and you can look at it
11 like a TRO. I mean, one of the things you're swearing to
12 is irreparable injury. I don't know that corporate
13 clients who swear in their affidavits that there is
14 irreparable injury know what that mean, and I would be
15 concerned about it if you weren't required to detail what
16 happened, but if somebody details what happens and the
17 court decides that as a matter of law that's not family
18 violence, I don't think they've sworn a lie. They've
19 sworn to the facts and then there is a legal conclusion as
20 to whether that's family violence or not. This is a
21 pleading requirement.

22 CHAIRMAN BABCOCK: Okay. Let's see if we
23 can --

24 MR. ORSINGER: Let's move on to paragraph
25 10.

1 CHAIRMAN BABCOCK: Yeah. We've been talking
2 about 10. What have you got on 10?

3 MR. ORSINGER: I'm concerned about this
4 whole concept that we're going to keep the applicant's
5 residence hidden from the respondent and we're filling in
6 a form here that has their address in it. Is the
7 application served on the respondent?

8 PROFESSOR LUNGWITZ: It is, and we don't
9 have their address in here.

10 MR. ORSINGER: "Applicant currently resides
11 at," blank, "the residence," so you fill in that blank.

12 MR. GAGNON: That's only in the paragraph
13 that tells them they've got to get out of the residence.
14 So if they're in the residence, and they don't know where
15 the residence is I guess you've got to -- there is some
16 logic here, Richard.

17 MR. ORSINGER: No, there is no logic here.
18 I'm filling out this form, and I don't know all of the
19 stuff that you know.

20 CHAIRMAN BABCOCK: The guy is living there.
21 He's living there.

22 MR. ORSINGER: Maybe he is living there or
23 maybe he's not. Show me where it says here that you don't
24 put your application in if the guy isn't living there.
25 This is a blank that asks me to put my address down there.

1 You don't tell me don't put my address down there if he's
2 not living there. You're just asking somebody to
3 reveal --

4 MR. GAGNON: Instruction says, "Fill out
5 this section only if you want respondent immediately
6 kicked out of a home you share."

7 MR. LOPEZ: Where is that?

8 MR. ORSINGER: Okay. Well, I guess it all
9 turns on whether they read that instruction.

10 CHAIRMAN BABCOCK: Buddy.

11 MR. LOW: But the question I asked is, and
12 this perhaps is taken care of by the law, but you talk
13 about 30 days. Okay. What if this lady is threatened and
14 she and her kids just go at night and they go to
15 California and stay with her mother, thinking things will
16 cool off. 40 days passes and her mother says, "You can't
17 live here any longer." Here it says she has to have
18 resided there within 30 days and the violence committed 30
19 days. So is she without any remedy because she didn't do
20 something within 30 days?

21 PROFESSOR LUNGWITZ: She can still get a
22 protective order ordering him out of the house, but she
23 can't get an ex parte protective order kicking him out
24 today without a hearing.

25 MR. LOW: Okay.

1 MR. LOPEZ: Because she's not there with
2 him.

3 MR. GAGNON: Right.

4 MR. LOW: All right. I understand.

5 CHAIRMAN BABCOCK: Okay. Yes, Justice
6 Duncan.

7 HONORABLE SARAH DUNCAN: In the last
8 paragraph, the last line, just for clarity sake I would
9 change it to "while applicant either takes possession of
10 the residence or removes necessary personal property from
11 the residence."

12 CHAIRMAN BABCOCK: Makes sense to me.

13 PROFESSOR LUNGWITZ: Yeah, that's good.

14 CHAIRMAN BABCOCK: Okay. Anything else?
15 Bill.

16 PROFESSOR DORSANEO: Well, you're not going
17 to like this, but did you ever consider putting the
18 application and affidavit in the same document?

19 MR. GAGNON: We did. And actually, it is
20 actually the same document. You have it as a big group,
21 but actually it's the fourth page of the application. And
22 it is from a formatting standpoint, page one, two, three,
23 four. That's going to be one document, and it will be
24 stapled just like that. If you look at the numbering,
25 it's one.

1 CHAIRMAN BABCOCK: Judge Christopher.

2 PROFESSOR DORSANEO: Yeah, it's stapled
3 together as one document and paginated that way, but
4 somebody fills out the first thing and then they're
5 filling out the next thing, and it would seem to me at the
6 very least it would be a good idea, like Richard's point
7 on the family violence paragraph, to maybe say "Family
8 violence by," "as detailed or described in the affidavit
9 which appears on page four," something like that, so
10 somebody filling this out has to know what they're doing.

11 CHAIRMAN BABCOCK: Judge Christopher.

12 MR. GAGNON: Actually, most of the affidavit
13 is applicable for ex parte protective orders and most of
14 the paragraphs, the one paragraph I'm looking at right
15 now, says "Based on the information provided in the
16 attached affidavit."

17 CHAIRMAN BABCOCK: Judge Christopher.

18 HONORABLE TRACY CHRISTOPHER: I'm looking
19 back at our Rule 14 of Judicial Administration, which
20 requires that the name and address of a minor child not be
21 pled and be put in a separate sensitive data form. How
22 can we reconcile that rule with these documents?

23 MR. GAGNON: Well, we've got name and county
24 of residence. We don't have an address for the child.

25 HONORABLE TRACY CHRISTOPHER: Yes, you do.

1 In the order.

2 MR. GAGNON: I'm sorry? I'm sorry?

3 HONORABLE TRACY CHRISTOPHER: In the order
4 you have a provision that says where the child's address
5 is so the respondent can't come near them.

6 HONORABLE TOM GRAY: That was one of the
7 first things I thought Professor Dorsaneo was --

8 MR. GAGNON: How do you effectively provide
9 for enforcement by a police officer?

10 HONORABLE TRACY CHRISTOPHER: I agree with
11 you.

12 MR. GAGNON: The statute requires certain
13 things.

14 HONORABLE TRACY CHRISTOPHER: We have to
15 have the name and address of the minor child in your
16 order. I'm just pointing out the problem if we don't
17 address that in Rule 14, or if we want to create this form
18 in some way different so that there is a sensitive data
19 form attached to it in compliance with the new rule that
20 we think we're going to enact.

21 PROFESSOR LUNGWITZ: Because that's also
22 true in all sorts of family law documents where you're
23 required to state the name and address of where the
24 children reside and all that.

25 HONORABLE SARAH DUNCAN: That's what we

1 spent yesterday on.

2 MR. GAGNON: The protective order requires
3 that information filed.

4 HONORABLE TRACY CHRISTOPHER: I'm pointing
5 out a huge problem if we don't correlate these two rules.
6 That's all I'm doing at this point.

7 CHAIRMAN BABCOCK: Lisa thinks that because
8 of one of the exceptions that we talked about yesterday in
9 Rule 14 for family law cases --

10 HONORABLE TRACY CHRISTOPHER: No, that's
11 only remote access. The sensitive data form is required
12 for every case.

13 CHAIRMAN BABCOCK: Yeah. That's a good
14 point. Okay. Thank you. That's what we need, more
15 problems right now.

16 HONORABLE TRACY CHRISTOPHER: I mean, if
17 we're going to pass the sensitive data form for all cases,
18 every single one of these forms that we're working on
19 right now would have to be redone.

20 MR. HATCHELL: Yeah. Most of the
21 information on the face of this form should not be there.

22 HONORABLE TRACY CHRISTOPHER: Right. So I
23 mean --

24 MR. GAGNON: Well, you know, you understand
25 the problems with not -- you have to specifically identify

1 them. I mean, somebody will tell you you can't hold
2 somebody in contempt for going to a Kroger's when you tell
3 them they can't come within 200 yards of Kroger's because
4 that's where she works.

5 HONORABLE TRACY CHRISTOPHER: Well, I
6 believe that the name and address of a minor child should
7 not be on a sensitive data form, but we have this whole
8 task force that spent months and months on it and said it
9 should be. And I've kind of gotten the impression from
10 the Supreme Court that they were going to go with the task
11 force recommendation on what is and what is not sensitive
12 data, so I'm just pointing out a problem we are going to
13 have.

14 CHAIRMAN BABCOCK: No, that's a great point,
15 and I don't -- we haven't gotten yet to what is or is not
16 going to be on the sensitive data form. That's for next
17 meeting, and I don't think the Court has made up its mind.

18 HONORABLE TRACY CHRISTOPHER: I kind of got
19 the impression that we were sort of stuck with what the
20 task force had done.

21 CHAIRMAN BABCOCK: No, absolutely not. No,
22 no, no. Hatchell is trying to include it for discussion
23 purposes because the Court wants our input on what the
24 task force did.

25 MR. HATCHELL: We didn't feel like we could

1 throw anything out.

2 CHAIRMAN BABCOCK: The subcommittee didn't
3 want to just willy-nilly throw stuff out. Even though
4 they are power hungry.

5 HONORABLE STEPHEN YELENOSKY: Unlike us.

6 CHAIRMAN BABCOCK: Richard.

7 MR. ORSINGER: Can we talk about the
8 affidavit yet?

9 HONORABLE SARAH DUNCAN: Can we talk about
10 11?

11 CHAIRMAN BABCOCK: Yeah. Let's talk about
12 11. Justice Duncan.

13 HONORABLE SARAH DUNCAN: Change the "or" to
14 "and."

15 CHAIRMAN BABCOCK: You've got to say it a
16 little louder.

17 HONORABLE SARAH DUNCAN: Change the "or" to
18 "and."

19 CHAIRMAN BABCOCK: Lisa.

20 MS. HOBBS: Do you-all know about there's a
21 bill pending right now that would allow a domestic -- a
22 victim of domestic violence to use the address of the
23 Secretary of State instead of her own address in all forms
24 so that everything is communicated through the Secretary
25 of State as a form of protection? Do you-all know about

1 that bill?

2 Okay. It's not even out of committee yet,
3 but I'm following it, so I'll kind of keep that in mind.

4 CHAIRMAN BABCOCK: What does 11 mean? What
5 does it mean to request that address?

6 MR. ORSINGER: This is something that's not
7 on an ex parte. It's something that's done in the final
8 order, right?

9 MR. GAGNON: Right. And there can be -- the
10 court can by specific order, order that certain
11 information be kept that would normally be part of a
12 disclosure form or an order. For example, somebody raised
13 the issue of a residence. She lived in a different
14 residence from him. She doesn't have to disclose where
15 her residence is if the court makes that.

16 CHAIRMAN BABCOCK: And that's pursuant to
17 the Family Code?

18 MR. GAGNON: Right.

19 PROFESSOR LUNGWITZ: Yes.

20 CHAIRMAN BABCOCK: Okay. All right. Let's
21 go to 12. Richard.

22 MR. ORSINGER: No, I want to talk about the
23 affidavit.

24 MR. GAGNON: Richard doesn't care about
25 getting paid.

1 PROFESSOR CARLSON: I have a question on 12.

2 CHAIRMAN BABCOCK: Stewart, my colleague
3 here just said that I should clarify that it was the
4 judicial administration task force subcommittee that was
5 power hungry, not your task force subcommittee.

6 MR. GAGNON: We never thought that.

7 CHAIRMAN BABCOCK: They never thought that.
8 They knew what I meant.

9 MR. GILSTRAP: I thought you were talking
10 about our subcommittee.

11 CHAIRMAN BABCOCK: Yeah, it was our
12 subcommittee. Richard.

13 MR. ORSINGER: I'm on affidavit.

14 CHAIRMAN BABCOCK: We got any comment on
15 fees? Elaine.

16 PROFESSOR CARLSON: I have a question. I
17 notice in the instruction you tell them that seeking a
18 protective order is free, service is free.

19 MR. GAGNON: Right.

20 PROFESSOR CARLSON: Ultimately that gets
21 taxed against someone or how does that work?

22 MR. GAGNON: Yes. Yes. The court can order
23 -- the applicant doesn't have to pay for it. The court
24 could order the respondent to pay for service costs, for
25 filing fees, reimburse the district clerk for the filing

1 fee most likely.

2 PROFESSOR CARLSON: Do you think you should
3 advise that in the instruction? I mean, for some people a
4 hundred bucks is like all their money.

5 MR. GAGNON: We tell them they don't have to
6 pay anything.

7 PROFESSOR CARLSON: Yeah, but the respondent
8 has to, if they file.

9 MR. GAGNON: It doesn't -- whether or not
10 the respondent has to pay, they don't have to pay
11 anything.

12 PROFESSOR CARLSON: I know.

13 MR. GAGNON: They'll never have to pay
14 anything for filing the application.

15 PROFESSOR CARLSON: But that could be a
16 consideration.

17 HONORABLE SARAH DUNCAN: That the respondent
18 may have to pay?

19 PROFESSOR CARLSON: Yeah.

20 MS. HOBBS: Because if he only makes \$200 a
21 month and half of this is going to go to this, she's not
22 going to get as much money ultimately in support.

23 PROFESSOR CARLSON: Uh-huh.

24 PROFESSOR LUNGWITZ: And what the law says
25 on that is that the court will order them to pay, and

1 you're just saying they should be aware of that.

2 PROFESSOR CARLSON: Yes. Yes. Because that
3 may result in more family violence.

4 MR. GAGNON: Well, we say --

5 PROFESSOR LUNGWITZ: We say that in the
6 instructions.

7 MR. GAGNON: Yeah, "This box is checked
8 because the law says the respondent must pay costs."

9 CHAIRMAN BABCOCK: Okay. Affidavit. We've
10 already talked about how the first box maybe ought to have
11 a --

12 MR. GAGNON: Right. I made that note.

13 CHAIRMAN BABCOCK: Okay. What new comments,
14 Richard?

15 MR. ORSINGER: You don't have to be over 18
16 to sign an affidavit and file a request for a protective
17 order, right? So why don't we either just take out the
18 "age 18" or say, "I am blank years of age and otherwise
19 competent to make this affidavit." I mean a 17-year-old
20 wife or a 17-year-old mother of a child who is not married
21 can request this relief, right?

22 HONORABLE TOM GRAY: But can a 16-year-old
23 that has been dating someone request this relief?

24 MR. GAGNON: Actually there is a new statute
25 that Lisa is tracking probably that allows for minors that

1 are dating to file an application for protective order
2 against another minor.

3 MR. ORSINGER: Well, you know, the women who
4 are getting parental bypass, I think they're swearing to
5 their application under oath, aren't they? These are
6 minor pregnant women.

7 CHAIRMAN BABCOCK: Yeah.

8 MR. ORSINGER: I don't think we should set
9 this form up so that you have to be 18 years old to do it.

10 MR. GAGNON: I don't have a problem with
11 that.

12 MR. ORSINGER: I don't know whether we want
13 to know their age or not. Maybe we should because if
14 they're 12 maybe somebody needs to call the district
15 attorney's office or something. But then in that first
16 box under there, the date, is that the date of the event
17 or the date that the form is being filed, affidavit is
18 being sworn to, in the first box?

19 MR. GAGNON: It was designed to be the date
20 of the event. The last event.

21 MR. ORSINGER: There is no description of
22 what you put in the blank area.

23 CHAIRMAN BABCOCK: We've covered that.

24 MR. ORSINGER: Oh, you did?

25 CHAIRMAN BABCOCK: Yeah.

1 MR. ORSINGER: Then down on the bottom of
2 the form, I think this is still true, but I think that
3 most of the county and district clerks are not notary
4 publics, but they have the authority under the Government
5 Code or otherwise to take oaths, and this affidavit is
6 assumed it's going to be signed by a notary, and I think
7 we should at least allow for it to be used because it's
8 probably more likely it will be a county or district clerk
9 who probably won't be a notary, so I'm suggesting that
10 somehow we loosen this up so that you don't, you know,
11 attempt to exclude a county clerk or a district clerk from
12 doing it.

13 CHAIRMAN BABCOCK: Justice Duncan.

14 HONORABLE SARAH DUNCAN: Is it still true
15 that one is not competent to make an affidavit if one has
16 been convicted of a felony?

17 PROFESSOR DORSANEO: No.

18 HONORABLE SARAH DUNCAN: That's no longer
19 true?

20 PROFESSOR DORSANEO: I don't think it is.

21 HONORABLE SARAH DUNCAN: I think it's pretty
22 important whether it's true or not. What happens if
23 somebody for some reason is not competent to make an
24 affidavit under Texas law? What does that person do?
25 Because there are a lot of people probably that aren't

1 competent to make an affidavit.

2 PROFESSOR LUNGWITZ: You mean -- do you mean
3 not mentally competent? Other than what you just
4 described, someone who has been convicted of a felony,
5 what would that be?

6 HONORABLE SARAH DUNCAN: I don't know.

7 PROFESSOR LUNGWITZ: Okay.

8 HONORABLE SARAH DUNCAN: I'm just wondering
9 what do those people do?

10 MR. GILSTRAP: They get someone else.

11 MR. GAGNON: Yeah, someone else to file an
12 application on their behalf.

13 PROFESSOR LUNGWITZ: Right. Another adult
14 in the household can do it.

15 MR. ORSINGER: You know, Sarah, if you
16 applied the rules of someone who is called to testify,
17 felons can testify in court. They are put under oath.
18 I'm not sure why you would be incompetent to sign an
19 affidavit.

20 CHAIRMAN BABCOCK: Any more comments on the
21 affidavit? Justice Gray.

22 HONORABLE TOM GRAY: Just a quick comment
23 that the jurat part of it has the same age requirement as
24 the lead-in, and so if you fix the one, you need to fix
25 the other, the reference to 18 years of age.

1 CHAIRMAN BABCOCK: We're going to give our
2 court reporter a five-minute break and then get back at
3 it. Let's try to confine our comments on the rest of the
4 form to like real heavy duty stuff and --

5 MR. GAGNON: Can I make a brief comment
6 before we do that? We designed -- our intention was that
7 the ex parte protective order and the protective order
8 itself would actually be, except for some biographical
9 information, completed by the judge. So the judge gets to
10 make the decision whether or not to make certain decisions
11 regarding the application of the protective order,
12 checking which ones apply and which one doesn't apply.

13 CHAIRMAN BABCOCK: Okay. Five minutes.
14 Let's just get back here at five minutes, make it 11:00
15 o'clock.

16 (Recess from 10:53 a.m. to 11:01 a.m.)

17 CHAIRMAN BABCOCK: We're back on the record.
18 Let's talk about the ex parte temporary order. As Stewart
19 said, most of these things are filled in by the judge.
20 Does anybody have any comments about the order itself?

21 Carlos.

22 MR. LOPEZ: I'm trying to find where I was,
23 but I think it was paragraph 14 of the order.

24 CHAIRMAN BABCOCK: Yes, sir.

25 MR. LOPEZ: Page five of six. Am I in the

1 right --

2 CHAIRMAN BABCOCK: No.

3 MR. GAGNON: Are we talking about the ex
4 parte protective order, the one that --

5 CHAIRMAN BABCOCK: Yeah. We're talking
6 about the temporary ex parte protective order, which is a
7 three-page document.

8 MR. GAGNON: I don't care. I'm just asking.

9 CHAIRMAN BABCOCK: Excuse me?

10 MR. LOPEZ: No, I'm on the next one.

11 CHAIRMAN BABCOCK: All right. Never mind.

12 MR. ORSINGER: Stewart, do I understand that
13 this is served with the citation that has instructions
14 about --

15 MR. GAGNON: The temporary ex parte?

16 MR. ORSINGER: Yeah.

17 MR. GAGNON: It is served with the citation.
18 That's what he's served with that tells him what he can or
19 cannot do.

20 MR. ORSINGER: In ordinary emergency
21 hearings you have a hearing before your appearance day.
22 Is that true here? Do they have an appearance day?

23 MR. GAGNON: There is no appearance day.
24 The statute says that if it's filed by a private person
25 you have to have a hearing within 14 days. If it's filed

1 by a governmental agency, which is defined as the district
2 attorney or county attorney, they can do it in 20 days.

3 MR. ORSINGER: And does the citation tell
4 them to appear --

5 MR. GAGNON: Yes.

6 MR. ORSINGER: -- and respond and all that?

7 MR. GAGNON: It tells them they have to
8 appear on a specific date, but it does -- let me just say
9 it does --

10 MR. ORSINGER: I mean, my question is --

11 MR. GAGNON: Right. If you --

12 MR. ORSINGER: Do we need to advise the
13 respondent of their rights to appear or their duty to
14 appear?

15 MR. GAGNON: Well, look at paragraph seven
16 on page three, and actually one of the recommendations
17 from our translation people is that we move that hearing
18 date to the front of it, and if you-all are okay --

19 MR. ORSINGER: But this doesn't say, which
20 is what I'm driving at, that if you don't appear an order
21 will be entered by default, unless the citation tells you.

22 MR. GAGNON: Citation will say that.

23 MR. ORSINGER: Okay.

24 MR. GAGNON: It's a standard just like any
25 other citation.

1 CHAIRMAN BABCOCK: Stewart, let me follow up
2 on Richard Munzinger's point, which is that family
3 violence may be satisfied to the judge's satisfaction by
4 the affidavit which lists the facts, but now this order
5 that's going to be entered and the respondent is receiving
6 it and he's being told "You can't commit family violence."
7 Is he told with any more specificity what family violence
8 is that he cannot commit?

9 MR. GAGNON: Other than what's amplified
10 below that first check box, you know, the answer is "no."

11 MR. ORSINGER: That's not very good. You
12 ought to say, "You're prohibited from threatening or
13 causing physical injury" and stuff, shouldn't you?

14 MR. GAGNON: You know, the statute says you
15 can't commit family violence, you can be ordered not to
16 commit family violence, and so that's what we did here.

17 MR. ORSINGER: Can't we do something like
18 take your definition or whatever about causing physical
19 harm or threatening harm or something? I mean --

20 MR. GAGNON: Right. I understand what
21 you're saying.

22 CHAIRMAN BABCOCK: You get the point.

23 MR. GAGNON: Right.

24 CHAIRMAN BABCOCK: Which I think frankly is
25 a -- Lisa, is a significant point.

1 MS. HOBBS: Right. I got it.

2 CHAIRMAN BABCOCK: In fairness to the
3 respondent. Yeah, Nina.

4 MS. CORTELL: Is it asking too much just to
5 impose on the judges the responsibility for filling out
6 the orders so that that's not another complication for the
7 applicant?

8 CHAIRMAN BABCOCK: I think Stewart said that
9 the judge would fill out the order.

10 MS. CORTELL: Well, these instructions say
11 that the applicant is supposed to fill out certain
12 information on these orders.

13 MR. GAGNON: Right. The applicant fills out
14 most of the biographical information.

15 MS. CORTELL: I'm just wondering why we
16 can't -- and I'll let the judges answer this, but why we
17 can't eliminate any responsibility on the part of the
18 applicant when it comes to the orders.

19 MR. GAGNON: Well, I guess some of it is a
20 matter of --

21 MS. CORTELL: I mean, we're giving --

22 MR. GAGNON: -- court or county. I mean,
23 we're going to have I guess Justice Peeples filling out
24 the person's name and the names of the persons that are
25 subject to the protective order. I mean, they ought to

1 bring you some basic format, and this judge ought to
2 decide what applies and what doesn't apply based upon the
3 affidavit.

4 MS. CORTELL: It seems to me the judge has
5 the application and then the judge has the checklist
6 order. I just think it would be a lot simpler if we could
7 -- and the judges may disagree -- and not ask that the
8 applicants also have responsibility with regard to the
9 order because there is a lot of things where we say the
10 judge fills this in, you fill this in, the judge fills
11 this in, you fill this in. It would just be a whole lot
12 simpler if they could just come in with a form order and
13 it was the judge's responsibility.

14 MR. GAGNON: They wouldn't have to bring it
15 in.

16 MS. CORTELL: Well, just have it in the
17 courts. Even better. Even better.

18 MR. GAGNON: Right.

19 CHAIRMAN BABCOCK: Carl Hamilton.

20 MR. HAMILTON: How is it envisioned that the
21 applicant here gets before the court, or does the
22 applicant, or do just the papers go to the court?

23 MR. GAGNON: The procedure normally is,
24 whether it's a pro se applicant or a lawyer, you file it;
25 and as they say, the clerk then processes it and gives it

1 to the judge. It depends upon what county. You go to
2 Fort Bend County the clerk actually walks it up to the
3 judge right then. If you go to Harris County -- and these
4 are the counties I'm aware of. You go to Harris County,
5 you've got to wait and have the clerk walk it up to the
6 court at that time and the associate judge looks at it.

7 MR. HAMILTON: Is the clerk going to tell
8 the applicant you've got to wait --

9 MR. GAGNON: Right. Right.

10 MR. HAMILTON: -- and go before the judge
11 and all that?

12 MR. GAGNON: They do. They do.

13 CHAIRMAN BABCOCK: Justice Gaultney.

14 HONORABLE DAVID GAULTNEY: Just on the blank
15 form I think it's good like you have it currently with the
16 applicant filling out as much as she can.

17 MR. GAGNON: Right.

18 HONORABLE DAVID GAULTNEY: Simply because I
19 agree it's the judge's ultimate responsibility to make
20 sure that the entire order is filled out, but we've seen
21 cases -- not protective order cases, but we've seen fill
22 in the blank forms where the blanks aren't filled in, and
23 we don't know what the order says.

24 MR. GAGNON: Right.

25 CHAIRMAN BABCOCK: Okay. Lisa.

1 MS. HOBBS: The problem arises, though, if
2 the applicant has misunderstood the instructions and then
3 the applicant fills out the order improperly, too. For
4 instance, I'm just thinking one off the top of my head,
5 she doesn't understand the difference between the minor
6 children in her house and the adult children in her house,
7 and so she writes in the -- you know, fills out -- puts
8 the names in the wrong boxes or something, so that's why I
9 kind of was leaning towards why are we getting the
10 applicant to fill out the order. Not because -- mainly
11 because I'm worried that the applicant fills out the
12 application wrong and then that error is also transferred
13 into the order.

14 MR. GAGNON: If you could convince all of
15 the judges, district and county court judges, to have
16 their staff do that or they do that themselves, that would
17 be great. You know, my personal experience is you're not
18 going to get that done.

19 MR. LOPEZ: Well --

20 MS. HOBBS: If the Supreme Court --

21 MR. GAGNON: It's going to become standard
22 "provisions of the order granted."

23 MR. LOPEZ: If the Supreme Court tells them
24 to do it, they'll do it.

25 MR. GAGNON: To fill out the form? I guess

1 if they do, they do.

2 CHAIRMAN BABCOCK: Well, and the converse of
3 that is if the Supreme Court sanctions a procedure where
4 the applicant fills it out then the judges are darn sure
5 not going to do it. They say, "Look, the Court has
6 already spoken on this. You fill this thing out."

7 So, okay, we got that point covered.
8 Richard.

9 MR. ORSINGER: First line, "hearing date," I
10 think you ought to put "time" there, although I do notice
11 that you have the time and place here on the third page.

12 MR. GAGNON: Time and place it was signed.

13 MR. ORSINGER: Oh, those are two different
14 hearings?

15 MR. GAGNON: No.

16 MS. HOBBS: I think it's confusing, but is
17 the first hearing the hearing where you're having the ex
18 parte hearing?

19 MR. GAGNON: The first hearing is the
20 hearing when the ex parte is granted, and it's actually
21 signed on a certain date with the time.

22 MR. ORSINGER: Okay. That is totally
23 unclear to me.

24 MS. HOBBS: I know. It needs to be
25 clarified.

1 MR. GAGNON: I understand. That may be --
2 we may not need that.

3 HONORABLE STEPHEN YELENOSKY: You don't need
4 it all.

5 MR. GAGNON: Yeah, we may not need that.

6 HONORABLE STEPHEN YELENOSKY: You're just
7 forcing them to fill out two blanks. You've got the time.
8 They've got the date at the top and the bottom. It's the
9 same date, and you've got the sign date, and that's what
10 counts.

11 CHAIRMAN BABCOCK: Okay. What else?
12 Richard.

13 MR. ORSINGER: Okay. On paragraph two I
14 think we need to revise that we're relying on the sworn
15 application and attached affidavit rather than just the
16 sworn affidavit.

17 And then let me be sure that I'm clear.
18 Does everyone agree that this ex parte order constitutes a
19 judicial finding of family violence? Is that true? Is
20 that what we're saying, that based on that affidavit we're
21 going to put into the public record a finding that family
22 violence has been committed?

23 MR. GAGNON: The court has to make a finding
24 in order to issue that, and if you'll remember, Richard,
25 when we had it in the Legislature the discussions

1 regarding precluding any visitation from somebody that's
2 been convicted or found to be a perpetrator of family
3 violence, we pointed out to the Legislature before it
4 passed that bill that ex parte protective orders are
5 granted as a matter of course in a lot of counties, just
6 as matter of protection --

7 MR. ORSINGER: Right.

8 MR. GAGNON: -- and it requires that finding
9 and that would then automatically preclude visitation, and
10 they didn't pass that statute.

11 CHAIRMAN BABCOCK: Richard Munzinger.

12 MR. MUNZINGER: Did I understand the
13 colloquy between you two to state that there must be a
14 finding that family violence has occurred in the past to
15 warrant the entry of this order?

16 MR. GAGNON: An ex parte protective order.

17 PROFESSOR LUNGWITZ: No. There is a clear
18 and present danger that there will be family violence.

19 MR. MUNZINGER: Okay. That's good. Thank
20 you.

21 CHAIRMAN BABCOCK: What other comments about
22 the order? All right. Let's move on.

23 MR. ORSINGER: Well, on paragraph five we
24 made a change in the way we were describing property. It
25 was going to be "physical items" or something.

1 MR. GAGNON: Right. Make that corresponding
2 change.

3 MR. ORSINGER: And we need to repeat that.
4 And then the next paragraph you prohibit transferring
5 assets that are jointly owned other than in ordinary
6 course of business, but what about for necessary living
7 expenses? Like if someone wants to spend \$500 to buy new
8 clothes because they can't get theirs or move into an
9 apartment or something? Is that allowed or prohibited by
10 that clause?

11 MR. GAGNON: What are you looking at,
12 Richard?

13 MR. ORSINGER: The very last box above six.
14 You prohibit the transfer of jointly owned property, which
15 I assume includes money.

16 MR. GAGNON: Right.

17 MR. ORSINGER: And you except only "ordinary
18 course of business" but not for necessary living expenses.

19 MR. GAGNON: Okay.

20 MR. ORSINGER: Is that intended?

21 CHAIRMAN BABCOCK: No. I think he's saying
22 "okay," we can --

23 MR. GAGNON: We can make that change.
24 Obviously we're not going to preclude somebody from making
25 those necessary living expenses. That would be the same

1 as a temporary restraining order or a temporary
2 injunction.

3 CHAIRMAN BABCOCK: Richard Munzinger.

4 MR. MUNZINGER: It's my understanding that
5 for an order to be enforceable by way of contempt that the
6 contemnee must have had fair notice of what was forbidden
7 and not forbidden. Does that rule apply to these orders
8 so that, for example, if a person is brought to court now
9 for having violated the ex parte order and he says,
10 "Judge, hey, I didn't understand I couldn't do X" and
11 somebody represents him and takes it up to the appellate
12 courts, can he be held in contempt if the order is not
13 clear or does not delineate the conduct forbidden?

14 CHAIRMAN BABCOCK: I made that point on your
15 behalf while you were out of the room.

16 MR. MUNZINGER: Thank you.

17 CHAIRMAN BABCOCK: They agreed, so they are
18 going to fix it. Okay. What else? Richard.

19 MR. ORSINGER: Last paragraph of page six.

20 MR. GAGNON: Six?

21 MR. ORSINGER: Yeah, I mean paragraph. The
22 last paragraph of paragraph six. It's been a long time
23 since I've looked at this, but there used to be a
24 situation where a small city had a marshal instead of a
25 chief of police. I don't know if that's been changed or

1 not, but if it hasn't been then you may want to say "chief
2 of police or marshal."

3 PROFESSOR DORSANEO: It has not. There are
4 marshals.

5 MR. ORSINGER: Okay. Then these small
6 bedroom communities don't have chiefs of police. They
7 have marshals and deputy marshals, so just -- I think just
8 for completeness you should say "Sheriff, constable, chief
9 of police and/or marshal."

10 MR. LOPEZ: Where is that?

11 MR. ORSINGER: That's in the last paragraph
12 of six.

13 PROFESSOR CARLSON: Page 13.

14 MR. ORSINGER: Then on seven, let me ask you
15 this. Now, you're ordered to appear and your warning says
16 if you violate the order you could be held in contempt.
17 If somebody fails to appear do they just suffer a default
18 judgment? Can you issue a writ of capeus for immediate
19 possession or can you hold them for contempt or cite them
20 for contempt for failing to come? Which of those three or
21 all three?

22 PROFESSOR LUNGWITZ: I know you can default
23 them.

24 MR. ORSINGER: Okay.

25 PROFESSOR LUNGWITZ: So --

1 MR. ORSINGER: Now, if they don't show up
2 can you say, "You violated my court order and I can send
3 you to jail for six months because you didn't show"?

4 PROFESSOR LUNGWITZ: I don't know if you
5 can. I know most of my clients are happy when the other
6 side doesn't show up.

7 MR. ORSINGER: We're at the Supreme Court
8 here, and we're helping the Supreme Court endorse the
9 legality and legitimacy of these forms.

10 PROFESSOR LUNGWITZ: Right.

11 MR. ORSINGER: I don't want to have a
12 statement in here that it's a misdemeanor to fail to show
13 up in court if it's not. It seems to me like that's
14 pretty important for us to be accurate on. So is it like
15 if you fail to show up you're going to have a default
16 order entered against you, or if you fail to show up are
17 you in contempt of court? And like in an ordinary -- like
18 a child support contempt, if you are ordered to appear for
19 a child support contempt and you don't, they can issue a
20 capias for your arrest right then and there. Is that true
21 here or not? Do you know?

22 PROFESSOR LUNGWITZ: I don't think they can
23 issue a capias.

24 MR. GAGNON: The capias is under the child
25 support enforcement action.

1 MR. ORSINGER: Okay. So you couldn't issue
2 a capias if they fail to appear. Okay. Can they be held
3 in contempt for failure to appear?

4 MR. GAGNON: Well, I understand the logic of
5 your analysis, Richard. The problem is that the warnings
6 are statutory. The warnings are statutory, so how do you
7 include a hearing date that orders somebody to appear at a
8 hearing, and you've got a catch 22 on that situation.

9 MR. ORSINGER: I don't know. Maybe you
10 could say, "You are directed to appear."

11 CHAIRMAN BABCOCK: Carlos has got the
12 answer.

13 MR. LOPEZ: Well, Justice Hecht already told
14 us if this thing has to override a statute, then so be it,
15 No. 1.

16 HONORABLE NATHAN HECHT: No, I didn't.

17 CHAIRMAN BABCOCK: I don't think he quite
18 went that far.

19 HONORABLE NATHAN HECHT: I'm in the room and
20 I didn't say that.

21 MR. LOPEZ: I was paraphrasing, maybe
22 embellishing.

23 CHAIRMAN BABCOCK: Nice try, though, because
24 he just stepped out for a second.

25 MR. LOPEZ: And the second thing being, I

1 think the way you fix that potentially, I don't think --
2 you say that it doesn't mean that, but if you violate a
3 court order to appear --

4 MR. GAGNON: Well, I mean, Richard says why
5 can't we just tell them they're directed to appear, and I
6 think that's fine.

7 MR. LOPEZ: Okay. That's fine.

8 PROFESSOR LUNGWITZ: And just for
9 clarification, it says on the notice, on the citation
10 notice that they'll receive, "If you do not attend the
11 hearing, a default judgment may be taken and a protective
12 order may be issued against you." It doesn't say anything
13 about it's contemptible not to, so I think "directed" is a
14 good positive change.

15 MR. GILSTRAP: When does the hearing have to
16 occur?

17 PROFESSOR LUNGWITZ: Within 14 days.

18 MR. GAGNON: Unless it's a governmental
19 agency and it's 20.

20 MR. ORSINGER: Well, I mean, the law doesn't
21 require the hearing. It just says the order expires if
22 you don't have the hearing by then, right?

23 MR. GAGNON: It requires the court to set
24 it.

25 (Multiple speakers.)

1 CHAIRMAN BABCOCK: Judge Sullivan. Let's
2 talk one at a time.

3 HONORABLE KENT SULLIVAN: I defer to the
4 practitioners in this area, but want to raise one
5 question. I note there is no fee, there is no bond, and
6 in that sense it's unlikely there are similar proceedings.
7 So we are obviously trying to facilitate and make as easy
8 as possible the filing of these, which is a very good
9 thing. At the same time, is there any language in here
10 that tries to ensure that this is never used as a vehicle
11 simply to embarrass or punish someone?

12 MR. GAGNON: Is there any language in the
13 documents themselves? No.

14 HONORABLE KENT SULLIVAN: And I just raise
15 it in passing in terms of trying to make sure that the
16 message and the format is balanced, because I presume --
17 and, again, I defer to the practitioners to the extent
18 this is really an issue.

19 MR. GAGNON: That's a pretty valid point,
20 and some of the county judges organizations raised that
21 point with us, too, that they are concerned they are going
22 to see a real spike in applications from people who are
23 trying to gain advantage either in a relationship or in a
24 divorce or something like that.

25 HONORABLE KENT SULLIVAN: Well, and as a

1 practical matter, I mean, is there some sanction that
2 would apply here? I mean, normally you would think in
3 terms of Rule 13 or Section 10 of the Civil Practice &
4 Remedies Code or various other ones.

5 MR. GAGNON: Obviously if you file a false
6 affidavit you've got a perjury situation that you can be
7 charged with.

8 HONORABLE KENT SULLIVAN: But my point was
9 just to try and ensure that the message was one where it
10 might effectively ensure that no one who at least takes
11 the time to read it would provide some disincentive for
12 that to happen.

13 HONORABLE TOM GRAY: Would you be suggesting
14 like on the affidavit at the top, "Lying on this affidavit
15 is a criminal penalty"?

16 HONORABLE KENT SULLIVAN: I don't have a
17 specific suggestion. I really defer to the practitioners
18 as to what really happens and whether or not it happens
19 with such frequency.

20 HONORABLE STEPHEN YELENOSKY: How is it any
21 different from people who misuse discovery? I mean, any
22 number of things that we wouldn't like to have happen
23 and --

24 HONORABLE TOM GRAY: Because they don't get
25 my guns when they misuse discovery.

1 HONORABLE STEPHEN YELENOSKY: Well, for 14
2 days.

3 CHAIRMAN BABCOCK: Back on track, we're
4 going to move to the protective order if there are no more
5 comments about the temporary orders.

6 MR. GILSTRAP: If the respondent is entitled
7 to a hearing within 14 days doesn't there need to be a
8 note on here that tells the judge to set it within 14
9 days?

10 MR. GAGNON: They know. They know.

11 MR. GILSTRAP: I thought we were using this
12 on people who weren't issuing -- for judges who weren't
13 necessarily --

14 CHAIRMAN BABCOCK: Munzinger.

15 MR. MUNZINGER: Is there something to be
16 gained in paragraph eight by having the judge insert the
17 actual day on which the order expires unless renewed? If
18 we're dealing with people of the educational level that
19 we've discussed, both the person protected and the person
20 being protected against would be given notice of the day
21 on which the order is no longer valid, which affects one
22 person's freedom and one person's sense of security and
23 protection.

24 MR. GAGNON: Well, we don't do that in
25 temporary retraining orders.

1 MR. MUNZINGER: This is not a temporary
2 restraining order.

3 MR. GAGNON: I understand that, but that's
4 just another line for the judge to fill in.

5 HONORABLE DAVID GAULTNEY: Well, duration of
6 order.

7 MR. GAGNON: Duration of order, you're
8 really saying 20 days from the date the order is signed,
9 which is right below that, and you would have to figure
10 out what the 20 days is.

11 MR. MUNZINGER: Well, does a person with a
12 fourth grade education know how to count days in law?
13 They don't. We have a Rule of Civil Procedure on it. Why
14 wouldn't you have a judge say, "This order is valid until
15 so-and-so." The judge knows how to compute time and tell
16 the citizens what the time is.

17 CHAIRMAN BABCOCK: Lisa, you got that point?

18 MS. HOBBS: I got the point.

19 CHAIRMAN BABCOCK: Okay. Carl, do have you
20 something on --

21 MR. HAMILTON: Yeah. In paragraph six, the
22 first line after the boxes, "The court finds applicant
23 currently resides or has resided within 30 days." Is that
24 the "or" that we changed to an "and" a while ago?

25 MR. GAGNON: Where is it?

1 MR. HAMILTON: That Sarah wanted to change
2 to "and" or --

3 PROFESSOR DORSANEO: No, it was different.

4 MR. HAMILTON: So it's either one, they
5 either now reside or have resided within 30 days?

6 PROFESSOR LUNGWITZ: Yeah. It can be
7 either/or. They could have moved out within the last 30
8 days and still get the ex parte order.

9 CHAIRMAN BABCOCK: Okay. Richard, if you've
10 got a comment about the temporary order --

11 MR. ORSINGER: No, I have a comment about
12 the protective order.

13 CHAIRMAN BABCOCK: Okay. We're on to the
14 protective order. Anybody else that's got comments about
15 the temporary order, get it to Lisa.

16 All right. The protective order.

17 MR. ORSINGER: On paragraph four, because I
18 think what's going to happen is that some of these are
19 going to be entered by default and then the guy is going
20 to go hire a lawyer, I would suggest that you indicate who
21 the court reporter was that made the record because, I
22 don't know, this may be handled in a court different from
23 the one it's docketed in and it could be a real mess to
24 try to find out where that record is, so I'm suggesting on
25 four you just say "The record was made by" and have a

1 blank line --

2 MR. GAGNON: Sure.

3 MR. ORSINGER: -- and fill in the court
4 reporter.

5 MR. GAGNON: Sure.

6 CHAIRMAN BABCOCK: Carlos.

7 MR. LOPEZ: Paragraph 14, I know that it
8 used to be the case and might still be the case in some
9 counties where the district attorney has a direct file
10 policy where they actually decide whether to file charges
11 or not. Given that this will apply in some cases where
12 not only is it threatened but in fact he already beat her
13 up last week and, in fact, committed a penal violation,
14 shouldn't these copies also go to the D.A.? They may not
15 do any good, but it won't do any harm. Can we add
16 district attorney to one of the possible categories there
17 in paragraph 14?

18 MR. GAGNON: Actually, we could. That's
19 fine. The statute requires us to notify certain people
20 for enforcement purposes, and that's the purpose of the --

21 MR. LOPEZ: And I would argue the district
22 attorney is one of them.

23 MR. GAGNON: No, because they are not going
24 to go out and arrest somebody. The enforcement is going
25 to be the sheriff, constable. Somebody is going to have

1 to have it in their possession to know that this person
2 has been violating the protective order.

3 MR. LOPEZ: But I'm saying that if he's
4 pushed her around a little bit, that's one thing, but if
5 he's beaten her to the point of death he needs to be
6 arrested and put in jail, not just for this protective
7 order but for a criminal penal violation, and the district
8 attorney in some counties is the one that starts that.

9 MR. GAGNON: Okay.

10 MR. LOPEZ: And I'm just saying it's a --
11 you know, just think about it.

12 PROFESSOR LUNGWITZ: If we're making them
13 like not just absolutely according to the statute.

14 CHAIRMAN BABCOCK: Do we have to add that
15 thing about the marshal here?

16 MR. ORSINGER: Yes. I think that belongs
17 over on paragraph 14.

18 CHAIRMAN BABCOCK: Right. Okay.

19 MR. ORSINGER: Just stick it in "chief of
20 police or marshal of the city."

21 PROFESSOR DORSANEO: They're called
22 townships when they're marshals. Maybe not.

23 MR. ORSINGER: Okay.

24 CHAIRMAN BABCOCK: All right. Any other
25 comments about the protective order? Richard.

1 MR. ORSINGER: General question. If this is
2 sticking on top of some kind of permanent custody order or
3 even some temporary orders in another court, do we need to
4 do anything to indicate that this trumps the other?

5 MR. GAGNON: The case law that I'm aware of
6 it does not.

7 MR. ORSINGER: In other words, do we --
8 should we or can we say that this order supersedes any
9 prior order on the same subject, or is that, in fact, not
10 true and you have two individual orders that coexist?

11 MR. GAGNON: I think it lays over any order
12 that was a prior existing order.

13 MR. ORSINGER: Well, I'm just going to
14 propose that you think about the possibility of including
15 a paragraph that says that, and then maybe have a blank
16 line in there for the court number and court of the order
17 that's being supplanted. That's just going to, I think,
18 help everybody figure out what's what and certainly will
19 help you on enforcement because if you've got two
20 inconsistent orders somebody has got a due process
21 argument.

22 CHAIRMAN BABCOCK: The comments that we made
23 previously about the temporary order I think are
24 applicable here; that is, that the respondent is being
25 restrained from committing, quote, "family violence," and

1 that that requires more --

2 MR. GAGNON: Right. You want a definition
3 of family violence.

4 CHAIRMAN BABCOCK: Right. And that should
5 have a definitional component to it, and the second thing
6 is Judge Christopher's point about the deeming certain
7 things confidential by law. The Court is going to have to
8 think about how that's going to interplay with the
9 sensitive data form that our task force has been talking
10 about, because there are multiple places here where that
11 would intersect. Carlos.

12 MR. LOPEZ: This one is real minor. In the
13 warning section on all of these I'm guessing it's just
14 tracking the statute, but why are we putting the monetary
15 fine, which to me would seem relatively minor compared to
16 the jail time? I would put the jail time first when
17 you're warning people about what's going to happen if they
18 violate the order.

19 MR. GAGNON: Well, that was taken straight
20 out of the statute.

21 MR. LOPEZ: That's what I figured.

22 CHAIRMAN BABCOCK: All right. Frank.

23 MR. GILSTRAP: Page two near the bottom, are
24 you telling us that the judge has to enter an order
25 suspending the license to carry a concealed gun? It's

1 checked there. On the protective order.

2 MS. HOBBS: Yes. It's statutory.

3 CHAIRMAN BABCOCK: Richard.

4 MR. ORSINGER: On paragraph 12 I'm troubled
5 by the fact that they're ordered to pay the attorney's
6 fees. I think this has been litigated by the Austin court
7 of appeals because there was a lawyer here who kept doing
8 this. I think you can only grant a judgment.

9 MR. GAGNON: No. You can enforce a
10 protective order or an order to pay attorney's fees by
11 contempt.

12 MR. ORSINGER: You can?

13 MR. GAGNON: I'll send you the stuff on
14 that.

15 PROFESSOR LUNGWITZ: You can.

16 MR. ORSINGER: Is that in the statute or has
17 some court of appeals said that? Because the only thing
18 you're allowed to do, I mean, the imprisonment for debt
19 barrier doesn't apply to child support obligations and
20 enforcement of child support obligations, but I've not
21 heard that it doesn't apply to a family violence order
22 that doesn't involve child support, and I'm skeptical that
23 it does, and I think the Austin court of appeals has
24 written on it but not in the context of a protective
25 order.

1 PROFESSOR LUNGWITZ: The statute says, "The
2 court may assess reasonable attorney's fees against a
3 party found to have committed family violence or a party
4 against whom an agreed protective order is rendered,"
5 blah-blah-blah, "as compensation for the services of a
6 private or prosecuting attorney or attorney employed by
7 DPRS."

8 MR. ORSINGER: That does not say you can
9 order them to pay it.

10 MR. GAGNON: There is a provision --

11 MR. ORSINGER: In the last paragraph it says
12 you can go to jail for not violating -- for violating the
13 order, so I think we've got an issue there. I think we
14 ought to have a judgment for attorney's fees.

15 PROFESSOR DORSANEO: Just the first
16 sentence.

17 MR. ORSINGER: I think you ought to use the
18 words "a judgment." "A judgment of blank dollars is the
19 attorney's fees for the service of" so-and-so.

20 And you need to make it clear who gets the
21 judgment. Is it the woman who gets the judgment or is it
22 the lawyer who gets the judgment?

23 PROFESSOR LUNGWITZ: It's the lawyer.

24 MR. ORSINGER: Okay. You need to say who
25 gets the judgment, and then who is it against? I mean --

1 MR. GAGNON: Well, the judgment --

2 MR. ORSINGER: "Lawyer gets judgment of
3 blank dollars against respondent" and then, you know, you
4 can put "for which execution might issue" or whatever you
5 want, but I just don't think you can order it paid.

6 MR. MUNZINGER: Can you give a judgment to a
7 person who is not a party in the lawsuit?

8 MR. ORSINGER: In the Family Code provision,
9 there's a general provision in the Family Code that
10 permits you to award the judgment directly to the lawyer
11 representing the children. I don't know that it does that
12 for spouses, and I don't know that it addresses it for
13 protective orders.

14 HONORABLE STEPHEN YELENOSKY: I thought it
15 was always to the party.

16 MR. ORSINGER: In the suits affecting there
17 is a specific clause on attorney's fees that lets you give
18 judgment to the lawyer.

19 MR. GAGNON: Right.

20 MR. ORSINGER: I don't think that's true for
21 divorces, though.

22 HONORABLE STEPHEN YELENOSKY: That makes
23 sense with children, but --

24 MR. ORSINGER: Well, this may or may not
25 involve children, so I guess we've got to be sensitive

1 about whether we're awarding the judgment directly to the
2 lawyer if it doesn't involve children.

3 HONORABLE STEPHEN YELENOSKY: Or it may
4 involve children, but the lawyer is representing an adult.

5 MR. ORSINGER: No, I think that if you're
6 bringing an enforcement action typically on behalf of the
7 custodial parent you can -- under the provisions of the
8 Family Code that govern parent-child relationships you can
9 give the judgment directly to the lawyer and not to the
10 custodial parent, but I don't think you can do that just
11 between a husband and wife.

12 MR. GAGNON: Richard, section 81.004, it
13 says, "The person who is ordered to pay fees and costs can
14 be held in contempt for nonpayment."

15 MR. ORSINGER: Okay. You guys want to write
16 it up because the Legislature said it or do you want to
17 not write it up because the Constitution doesn't permit
18 it?

19 MR. GAGNON: Do I get a choice?

20 MR. ORSINGER: I don't know. That's not my
21 call.

22 CHAIRMAN BABCOCK: The issue has been
23 raised.

24 MR. ORSINGER: Okay.

25 MR. GAGNON: We'll take the guidance of the

1 Court on that. Okay.

2 CHAIRMAN BABCOCK: Okay. What other
3 comments about the protective order itself? Judge
4 Patterson.

5 MR. ORSINGER: I would like to add --

6 CHAIRMAN BABCOCK: You're being a ball hog
7 here, Richard. Judge Patterson.

8 HONORABLE JAN PATTERSON: I just want to
9 make sure the comment about the marshal is -- that you're
10 going to look into that.

11 MR. GAGNON: Well, we'll add them unless --

12 HONORABLE JAN PATTERSON: Well, I'm
13 concerned about an automatic adding. I wish you would
14 check with law enforcement people, because a marshal is
15 uniquely a Federal person, and that's what most people
16 think about. Well, there are state marshals, but they are
17 few and far between, and it's not the automatic law
18 enforcement person that people go to, and so before you
19 make that change automatically I think that law
20 enforcement people ought to be consulted on that.

21 PROFESSOR DORSANEO: A whole lot in Texas.

22 HONORABLE JAN PATTERSON: It adds confusion
23 to me.

24 MR. ORSINGER: Well, the only thing I'm
25 saying, and I haven't researched this recently --

1 HONORABLE JAN PATTERSON: Well, that's all
2 I'm suggesting.

3 MR. ORSINGER: Small communities have
4 marshals instead of chiefs of police.

5 HONORABLE JAN PATTERSON: Well, I'm
6 suggesting it be researched before we add it on there.
7 That's all I'm suggesting.

8 HONORABLE STEPHEN YELENOSKY: Amen.

9 CHAIRMAN BABCOCK: Richard.

10 MR. ORSINGER: On paragraph 15, the duration
11 of the order, is it not true that this order can be
12 modified, so once it's signed it's effective for two
13 years, or should we say "or if it's modified"? Is there a
14 jurisdiction to modify this order, or once you sign does
15 it last for two years no matter what?

16 PROFESSOR LUNGWITZ: It can be modified, or
17 a judge can say it's good for a year or six months.

18 MR. ORSINGER: Well, can we add on here that
19 "or modified" like you did on the earlier one?

20 CHAIRMAN BABCOCK: Okay. Richard Munzinger.

21 MR. MUNZINGER: I want to show my ignorance
22 here. Let's assume that there is a divorce case pending
23 between Mr. and Mrs. Y in any county, and this proceeding
24 is brought either in the same or a different county but in
25 a court different from the divorce court. What's the

1 interplay between this protective order and the ultimate
2 custody and support provisions and what have you of the
3 divorce court? Is there something that --

4 PROFESSOR LUNGWITZ: Well, the last order is
5 going to prevail.

6 MR. MUNZINGER: So that this protective
7 order is entered by the ex parte court in January. In
8 March the parties' divorce is final and an order of the
9 divorce court contravenes the terms of this order. This
10 order is no longer valid.

11 MR. GAGNON: As relates to the SAPCR order,
12 the visitation order.

13 PROFESSOR LUNGWITZ: To the extent that it
14 contradicts it's not valid.

15 MR. GAGNON: It doesn't eliminate the
16 protective order. It just provides for any SAPCR orders
17 different from this protective order, which may be
18 visitation, may be child support, may be those type of
19 things.

20 MR. MUNZINGER: Well, but this order has
21 portions in it that says you can't go to school, you can't
22 go here, you can't go there, you can't come near the
23 child. So 60 or 90 days later Daddy has cooled off and
24 Mommy has, too, and they say, "Yes, we can be divorced
25 Mommy and Daddy now, and the kids -- you can go see me,"

1 this, that, and so forth. This order is no longer valid
2 to the extent that it is contravened by the divorce court
3 order.

4 PROFESSOR LUNGWITZ: That's right.

5 MR. GAGNON: To that extent.

6 MR. MUNZINGER: Do we want to have any
7 communication between these courts or anything that's
8 required, or does the Family Code require anything like
9 that?

10 MR. GAGNON: Actually, if they are in the
11 same county it requires them to be consolidated or some
12 nature of consolidation, and I would imagine most
13 courts -- I mean, I'm seeing Travis County nodding their
14 head, that they all have those working rules that requires
15 that consolidation when you have like issues and like
16 facts and like parties.

17 HONORABLE STEPHEN YELENOSKY: I think so.

18 MR. GAGNON: Where you get to a problem is
19 where you've got a Dallas County and Collin County and
20 you've got two competing orders, and that protective order
21 stays in place to the extent it's not superseded by
22 subsequent order. That's under case law.

23 MR. MUNZINGER: Well, my memory was that
24 when we addressed whether we wanted to ask in the
25 application is there a Family Code proceeding involving

1 these parties in another court, I don't remember what -- I
2 don't think we said, "Yes, you're supposed to include that
3 in the application."

4 MR. GAGNON: My understanding was that's
5 what the committee wanted to do.

6 MR. MUNZINGER: It is to be put in there?

7 MR. GAGNON: That's what my notes show, that
8 we were going to add that notification part, if there is a
9 proceeding that is either in a different county court,
10 court of that county, or in a different county.

11 CHAIRMAN BABCOCK: Okay.

12 MR. MUNZINGER: Well, and that is part of
13 the question on the duration of the order, I guess,
14 because this form order that the Supreme Court is going to
15 say everybody should use does not address the eventuality
16 that I just discussed in terms of the duration of the
17 order.

18 CHAIRMAN BABCOCK: I thought we were going
19 to add the phrase "unless modified."

20 HONORABLE STEPHEN YELENOSKY: Right.

21 CHAIRMAN BABCOCK: But that would be
22 suggestive of this judge --

23 MR. MUNZINGER: That's right.

24 CHAIRMAN BABCOCK: -- in this court is going
25 to modify it, and what Richard says is it may be modified

1 by another judge in another later order, so to be clearer
2 perhaps it should say "unless modified by this court or
3 superseded by the order of somebody else."

4 MR. LOPEZ: Right.

5 CHAIRMAN BABCOCK: Maybe that's what --
6 Judge Yelenosky.

7 HONORABLE STEPHEN YELENOSKY: Well, I just
8 wondered, isn't that always true? I mean, don't we
9 sometimes have to figure out whether one order supersedes
10 another, and "unless modified" just sort of refers to
11 that? I mean, it's either true or it isn't that it's
12 superseded.

13 CHAIRMAN BABCOCK: We're going to get
14 Sarah's finality subcommittee to work on this.

15 HONORABLE SARAH DUNCAN: That would present
16 a problem for law enforcement trying to enforce the
17 protective order.

18 CHAIRMAN BABCOCK: Yeah, because you've got
19 an order that on its face says "Stay 200 yards away from
20 the kids."

21 MR. GAGNON: Yeah. And you don't know
22 whether it's final or not.

23 PROFESSOR LUNGWITZ: In reality what happens
24 in that situation is that the person who's about to be
25 arrested usually presents an order saying, "But, look,

1 this is later," and so law enforcement will usually say,
2 "I don't know what to do. We'll go back and figure this
3 out."

4 MR. ORSINGER: I wish the word was "always"
5 rather than "usually" because if it's usual that means
6 that some people are getting arrested when they shouldn't
7 be.

8 CHAIRMAN BABCOCK: Well, this order is --
9 you know, is a two-year weapon if things all the sudden go
10 bad between the parties. You know, you can always whip it
11 out even though it has been superseded.

12 MR. GAGNON: Well, you know, there is -- and
13 part of the warning is basically even if you're the
14 protected party in a protective order, you can't just
15 excuse a violation of protective order. You can't say,
16 "Let's get back together and move in together." You've
17 got to do something about that. Now, that's in a boldface
18 warning, and you would hope that anybody going through a
19 divorce who has some form of superseding orders is going
20 to come in and try and correct that and make sure that's
21 taken care of.

22 CHAIRMAN BABCOCK: The situation I was
23 thinking of, Stewart, was they get divorced, they're
24 separated, but there are obviously ongoing issues with
25 respect to the children, and one side or the other is

1 dissatisfied with how the other spouse is -- or ex-spouse
2 is dealing with it and uses this as a weapon to gain some
3 leverage.

4 MR. GAGNON: I'm not going to tell you that
5 people don't use these things as weapons inappropriately.

6 CHAIRMAN BABCOCK: Sarah.

7 HONORABLE SARAH DUNCAN: Is there not a
8 statewide registry for protective orders?

9 PROFESSOR LUNGWITZ: Supposed to be, yes.

10 HONORABLE SARAH DUNCAN: Well, it seems like
11 if someone is in a statewide registry for protective
12 orders then any other order that changes the terms of that
13 protective order ought to be in the statewide registry,
14 and then law enforcement could go to the statewide
15 registry and find out what --

16 MR. GAGNON: You would think so, wouldn't
17 you?

18 CHAIRMAN BABCOCK: Anne McNamara.

19 MS. McNAMARA: One way to get at this issue
20 might be in the application to ask if there is a divorce
21 decree in effect or if there is a divorce proceeding filed
22 somewhere.

23 CHAIRMAN BABCOCK: Yeah, I think we were
24 going to try to do that.

25 MS. McNAMARA: That might ascertain

1 something to at least tell you there is another court.

2 CHAIRMAN BABCOCK: Justice Gaultney, you've
3 been patient. Sorry.

4 HONORABLE DAVID GAULTNEY: First of all, I
5 think the statute requires the clerk be told that there is
6 a pending proceeding, a divorce proceeding, so I think the
7 application should say that.

8 Secondly, I'm not so sure that the -- an
9 order entered by that divorce court subsequently
10 necessarily invalidates that protective order, because the
11 protective order statute in which a family violence
12 protective order has been entered says that that court
13 "may transfer." It's permissive. It's not mandatory.
14 "May transfer" that proceeding, the protective order
15 proceeding, to the court of continuing jurisdiction. It's
16 not a requirement.

17 So -- and so there are some things that the
18 trial court must consider in doing that. There are some
19 factors that the court can -- findings that the court
20 makes before making that transfer. So I'm not so sure if
21 the trial court does not make those findings that a
22 subsequent order necessarily -- I mean, I think it's an
23 interesting jurisdictional question, as I mentioned
24 earlier. That's why it's important for there to be in the
25 application a notice to the trial court that there is

1 other pending proceedings.

2 Finally, I would urge that the order not
3 include the -- the trial court has the authority that
4 enters the protective order in two years to modify it, to
5 shorten it, whatever. I would urge that the order
6 maintain its appearance of finality and not include
7 anything in it that suggests the possibility that the
8 court has already entered something modifying it for
9 purposes of enforcement, among other reasons.

10 CHAIRMAN BABCOCK: Okay. Carlos.

11 MR. LOPEZ: Couple of things. Just one to
12 point out, it does say in the warning section that the
13 order, second paragraph, "is in full force and effect
14 unless a court changes the order."

15 HONORABLE STEPHEN YELENOSKY: It doesn't
16 matter.

17 MR. LOPEZ: Yeah. And then just real quick
18 there is a typo. Is this a final draft? There is a typo
19 in one, two, three, fourth paragraph of the warning
20 section. It says "confinment" rather than "confinement."
21 I know it's minor, but --

22 CHAIRMAN BABCOCK: Okay. Justice Duncan,
23 then Mike Hatchell.

24 HONORABLE SARAH DUNCAN: Studies have shown
25 that it's more difficult to read things that are printed

1 in all capitals, and I know you said that the statute sets
2 out the language that has to be here. Does it also say it
3 has to be in all caps?

4 PROFESSOR LUNGWITZ: It's in all caps in the
5 statute. Let's see, it says "prominently display in
6 boldface type, capital letters, or underlined."

7 MR. ORSINGER: "Or underlined."

8 MR. GAGNON: Right.

9 HONORABLE SARAH DUNCAN: You might want to
10 see if it's easier to read if it's underlined because
11 studies show that all capitals are much more difficult to
12 read.

13 MR. GAGNON: Okay.

14 CHAIRMAN BABCOCK: Hatchell.

15 MR. HATCHELL: The very last line on page 21
16 says that the order is enforceable in tribal lands. I
17 suspect that that needs to be researched. If the child is
18 an Indian child subject to the Indian Child Welfare &
19 Protection Act, the Federal courts and state courts are
20 excluded and this order is probably void.

21 CHAIRMAN BABCOCK: Now, who would know that?

22 MR. HATCHELL: I just had a case on that.

23 CHAIRMAN BABCOCK: You were just showing
24 off. You were just showing off.

25 MR. LOPEZ: That's the Hatchell exception.

1 MR. HATCHELL: This is actually a very
2 important -- this is a very serious game that's being
3 played now. There are Indian -- special Indian people
4 specialists, and they claim that -- well, I mean, the act
5 is what it is.

6 CHAIRMAN BABCOCK: Yeah.

7 MR. HATCHELL: This is being litigated
8 widely, and it is being used to defeat these kinds of
9 orders, so we just need to look at that.

10 CHAIRMAN BABCOCK: So what's the fix?

11 MR. HATCHELL: There isn't any fix if it's
12 an Indian child.

13 PROFESSOR CARLSON: On tribal land.

14 CHAIRMAN BABCOCK: Do we care? Because if
15 it's void, it's void.

16 MR. LOPEZ: "This order is meant to be
17 enforceable."

18 CHAIRMAN BABCOCK: Yeah. And if it's not
19 void, you can't take a non-Indian child onto tribal land
20 and hope that --

21 MR. HATCHELL: One would think you would not
22 want to go all the way down the road to get this order if
23 it's going to be void. I don't want to get into the long
24 stories, the horror stories about Indian children in the
25 Indian court system, but it is actively being used to

1 defeat orders like this.

2 CHAIRMAN BABCOCK: Justice Duncan.

3 HONORABLE SARAH DUNCAN: And there is the
4 risk that if it's not enforceable, it is void, that
5 someone could get --

6 PROFESSOR CARLSON: Set aside.

7 HONORABLE SARAH DUNCAN: Well, someone could
8 feel secure when they're not.

9 CHAIRMAN BABCOCK: Could what?

10 HONORABLE SARAH DUNCAN: Someone could feel
11 secure when they're not.

12 CHAIRMAN BABCOCK: Oh, I see. Yeah.

13 MR. MUNZINGER: Well, the other point, too,
14 is the Texas Supreme Court is going to have to give its
15 imprimatur to this order, and we don't want the Court
16 saying we can get you on tribal lands if we can't.

17 HONORABLE STEPHEN YELENOSKY: Isn't this
18 statutory language?

19 MR. GAGNON: It came out of Federal law.

20 CHAIRMAN BABCOCK: But I think the issue is
21 it's a false sense of security. If somebody reads this
22 and says, "Oh, man, I'm done. I can go home." You know,
23 "Even though my child is an Indian, you know, this is good
24 on tribal lands."

25 MR. ORSINGER: It's not just a false sense

1 of security. It may create a false security, because the
2 person on the other side may read it and think it applies
3 to them until they wind up thrown in jail and they find
4 out --

5 MR. GAGNON: It's a false sense of behaving.

6 MR. ORSINGER: So you have to wonder whether
7 we want to just go ahead and try to run it by everybody.

8 CHAIRMAN BABCOCK: Okay. Any other comments
9 on the protective order?

10 Let's go to the respondent information, and
11 I want to know if anybody here has ever met somebody who
12 has black eyes, or maybe it's black and blue.

13 MR. GAGNON: It's on the form.

14 PROFESSOR LUNGWITZ: This is the Department
15 of Public Safety form. We didn't make it.

16 MR. LOPEZ: Chip, I bet many people who are
17 seeking this form have black eyes.

18 CHAIRMAN BABCOCK: Yeah. It's the result of
19 domestic violence.

20 MR. ORSINGER: I've never seen maroon eyes
21 either.

22 MR. GAGNON: Maroon eyes? Maybe they've got
23 contacts. This is a DPS form.

24 PROFESSOR LUNGWITZ: We don't take
25 responsibility for what they --

1 MR. GAGNON: This is what they use to enter
2 the information. You've got to fill this form out and
3 provide them with a copy of the order plus this form to
4 get into the computer system that is shared throughout the
5 nation.

6 MR. MUNZINGER: Is all of the information
7 required by law?

8 MR. GAGNON: They won't enter it in the
9 database until you fill this form out.

10 HONORABLE TOM GRAY: Does it have to be
11 filed?

12 MR. GAGNON: Does it have to be filed?

13 PROFESSOR LUNGWITZ: No, I don't think it's
14 filed.

15 PROFESSOR CARLSON: I hope not.

16 MR. GAGNON: In Harris County you have to
17 give it to the clerk.

18 MR. MUNZINGER: Does the law require that
19 this be completed?

20 PROFESSOR LUNGWITZ: I don't think there is
21 a statute that requires it. I think the Department of
22 Public Safety requires it.

23 MR. MUNZINGER: Under what legal authority
24 do they require it? I don't mean to be discourteous, but
25 I'm a free citizen. Why should government demand this of

1 me, and if it doesn't, why should you?

2 MR. GAGNON: Because you want to get it
3 entered into their --

4 MR. MUNZINGER: I don't want it entered that
5 I'm not Hispanic. I don't want it entered. My ethnicity
6 is none of the government's business. My point to all of
7 this is why are we requiring this information if the law
8 doesn't; and if the law does, let's do it. If it doesn't,
9 this is a Supreme Court advisory committee. We are not
10 sociologists.

11 MR. LOPEZ: This is the applicant filling
12 this out, right?

13 MR. GAGNON: The applicant fills that out.
14 It is part of the kit that we give them that tells them
15 this is what you've got to do to protect yourself.

16 CHAIRMAN BABCOCK: The underlying issue is
17 whether this is going to be a Supreme Court-sponsored
18 form.

19 MR. GAGNON: This is not really -- this is
20 part of the kit. This is not part of the form.

21 PROFESSOR LUNGWITZ: The problem with it not
22 being, though, a part of the kit is that if this
23 information is not registered then a law enforcement
24 officer then going out on a call may not have any
25 information about that protective order and may not --

1 MR. GAGNON: And I don't know about Travis
2 or Bexar County. I can tell you in Harris and Dallas
3 County they won't process your protective order once it's
4 signed until you have filled this form out. In fact, if
5 you get an ex parte protective order, you come back and
6 get a final protective order, you've got to fill out the
7 form twice.

8 CHAIRMAN BABCOCK: But the Court is not
9 being asked to sponsor this form, correct?

10 MR. GAGNON: No. This is just part of the
11 kit.

12 CHAIRMAN BABCOCK: All right. Because --
13 that's good to know. Angie points out that under eye
14 color there is a missing category for her today,
15 bloodshot.

16 MR. LOPEZ: That's under "multicolor."

17 CHAIRMAN BABCOCK: Carlos.

18 MR. LOPEZ: It sure would be a lot easier to
19 find these people to serve them with if all of this --

20 MR. GAGNON: That's exactly -- it's not
21 service. It's enforcing the order. They use it for
22 enforcing the order.

23 MR. LOPEZ: How about getting them served
24 with in the first place?

25 PROFESSOR LUNGWITZ: In Travis County we

1 have to fill this out before they're served.

2 MR. LOPEZ: Okay.

3 MR. GAGNON: There's another answer to that.

4 CHAIRMAN BABCOCK: Stewart, Jeana, this is
5 remarkable work, and I don't know if we have helped you at
6 all or the Court, but I hope we have.

7 MR. GAGNON: Thank you very much.

8 CHAIRMAN BABCOCK: As first witnesses to
9 this process that we go through every other month, I can
10 see you were amazed at what we could think of.

11 MR. GAGNON: I'm just amazed that you-all
12 only have a two-day meeting with Richard Orsinger here.

13 MR. ORSINGER: Hey, man, I'm over here
14 minding my own business.

15 CHAIRMAN BABCOCK: Some of us have to suffer
16 in silence. Thank you, everybody, for coming, and we're
17 back April 1, and we think here, but we'll send out a
18 notice.

19 (Adjourned at 11:48 a.m.)

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