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8 MEETING OF THE SUPREME COURT ADVISORY COMMITTEE  
9 OCTOBER 22, 1999  
10 (MORNING SESSION)  
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18 Taken before William F. Wolfe,  
19 Certified Court Reporter and Notary Public in  
20 Travis County for the State of Texas, on the  
21 22nd day of October, A.D. 1999, between the  
22 hours 8:35 o'clock a.m. and 1:00 o'clock p.m.,  
23 at the Texas Association of Broadcasters,  
24 502 East 11th Street, Suite 200, Austin, Texas  
25 78701.

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1 INDEX OF VOTES  
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4 Votes taken by the Supreme Court Advisory  
5 Committee during this session are reflected on  
6 the following pages:  
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1 (Session convened at 8:35 a.m.)  
2 CHAIRMAN BABCOCK: I want to welcome  
3 everybody to the first session of the new  
4 Supreme Court Advisory Committee. My name is  
5 Chip Babcock, and I was telling people that  
6 Justice Hecht and Justice Phillips got me  
7 totally inebriated and then at the end of the  
8 conversation said would I do this, and I  
9 accepted under those circumstances. But I'm  
10 deeply honored to have been asked to chair  
11 this, following a great leader in Luke Soules,  
12 who couldn't be here. And as a result of  
13 that, the roast of Luke, which was scheduled  
14 for immediately after today's session, is  
15 going to be postponed but not canceled. So we  
16 will have a session to roast Luke Soules at a  
17 later meeting but not today.  
18 The person here with the laptop is Carrie  
19 Gagnon, who is my secretary in Houston, and  
20 she is going to help me with this project.  
21 And if anybody has questions about anything  
22 about the committee, about our dates, about  
23 getting documents, call her. Her number is  
24 713/752-4210.  
25 MS. SWEENEY: Give it again, please.

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1 CHAIRMAN BABCOCK: Did everybody get  
2 that? 713/752-4210. At the back table there  
3 should be some expense reimbursement forms,  
4 and there also are some folders with your  
5 names on it that have subcommittee  
6 assignments. Those subcommittee assignments  
7 have been made by myself and Justice Hecht,  
8 but they're not certainly set in stone. And  
9 if anybody feels they have any particular  
10 expertise to add to a particular subcommittee,  
11 let me know. We would be delighted to add you  
12 although possibly not subtract you from your  
13 subcommittee assignments.  
14 We are hoping to get through the Parental  
15 Notification Rules today, thus obviating the  
16 necessity for a session tomorrow, but we're  
17 not going to shortcut our discussion of the  
18 rules either. Our work has to be finished at  
19 this session. And as a result of that, our  
20 procedure today is going to be different than  
21 it typically is. For those of you who have  
22 served on this committee before, you know that  
23 we typically beat these rules to death and  
24 will talk about them for a minimum of a year.  
25 That has always been my understanding. But on

1 these, we're going to finish it today so that  
 2 as we go through the rules we will have  
 3 discussion, and then if there is a proposed  
 4 change in language to the rule, we will talk  
 5 about that, and this committee will vote up or  
 6 down. And then Justice McClure, who is  
 7 sitting to my right and who is the chair of  
 8 the subcommittee, will either accept or not  
 9 the proposed change in language. If she  
 10 accepts it, then we will incorporate it into  
 11 the rules that we transmit to the Court. If  
 12 she does not accept it, we will write a  
 13 separate report advising the Supreme Court  
 14 that there's been this discussion, and our  
 15 committee, by a majority vote -- and we'll  
 16 record what it was -- has recommended this  
 17 change but the subcommittee does not accept  
 18 the change. And we'll go forward in that  
 19 manner.

20 There was one minority report to the  
 21 rules, and I don't think Mr. Watler -- is  
 22 Judge Medina here? Did he come in?

23 HON. ANN CRAWFORD McCLURE: He was  
 24 planning to come in. I'm not sure what time  
 25 his plane arrives.

1 CHAIRMAN BABCOCK: Okay. Well,  
 2 Judge Medina, as I understand it, was a member  
 3 of the minority on the confidentiality --

4 HON. ANN CRAWFORD McCLURE: As was  
 5 I.

6 CHAIRMAN BABCOCK: As you were.

7 HON. ANN CRAWFORD McCLURE: I was.

8 CHAIRMAN BABCOCK: Okay. Well, I  
 9 was going to have you speak for the majority,  
 10 but you can speak for the majority and the  
 11 minority on that. And since we have proposed  
 12 language for both, both a Version A and a  
 13 Version B, and that would be on Rule 1.3(b)  
 14 dealing with confidentiality relating to the  
 15 identity of the judge and the decision and  
 16 order that the judges in the various courts  
 17 make, then we'll discuss those, have an up or  
 18 down on any proposed amendments to either the  
 19 majority rule or the minority rule, and then  
 20 we'll vote on which version we think is  
 21 appropriate.

22 I should say before we proceed any  
 23 further that we are indebted to the Texas  
 24 Association of Broadcasters for providing this  
 25 beautiful facility to us free of charge, and

1 Ann Arnold is in the back in the green jacket  
 2 there. She's the executive director of this  
 3 organization and has made this available to us  
 4 while the State Bar facility is being  
 5 remodeled. Thank you so much.

6 MS. ARNOLD: You're welcome. And  
 7 anytime you want to use our facilities, we're  
 8 glad to have you. If you need to take a  
 9 smoking break, all the doors here open out to  
 10 the balcony, front and back. And if you need  
 11 to go to the rest rooms, you need to go out  
 12 this door and down the long hallway. That's  
 13 where the rest rooms are. We're delighted to  
 14 have you, and let us know if there is anything  
 15 we can do to help.

16 CHAIRMAN BABCOCK: Thank you.  
 17 Okay. The subcommittee dealing with the  
 18 Parental Notification Rules was appointed by  
 19 order of the Texas Supreme Court, and the  
 20 effort was made to ensure that all points of  
 21 view relating to these rules were represented  
 22 on the subcommittee. The committee in a very  
 23 short period of time has done an extraordinary  
 24 amount of work, and my reading of the rules is  
 25 that they are very polished and very far along

1 and have thoroughly considered a number of  
 2 very difficult, both constitutional and  
 3 practical, problems with the rules.

4 Justice McClure was the chair of that  
 5 subcommittee. And before we get into it, do  
 6 you have anything you want to say about the  
 7 rules?

8 HON. ANN CRAWFORD McCLURE: I want  
 9 to first of all thank the committee members.  
 10 I was anticipating that there might be some  
 11 extremely spirited debates during this process  
 12 and was delighted to find that everyone came  
 13 with a diligent and working attitude. Both of  
 14 the meetings that we had, and all of the  
 15 conferences that we had, were productive and  
 16 well reasoned.

17 And I also want to thank Bob Pemberton --  
 18 I don't know where he's sitting, I saw him  
 19 come in, there he is -- for all of his hard  
 20 work in finalizing the product that you have  
 21 before you today. Thank you, Bob.

22 CHAIRMAN BABCOCK: Let's start out  
 23 with Rule 1.1, Application. Does anybody have  
 24 any comments on that?

25 HON. F. SCOTT McCOWN: Chip, has

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1 everybody really read them? Or would it be  
 2 faster to take a few minutes and just let  
 3 people read through them?  
 4 CHAIRMAN BABCOCK: I don't know if  
 5 everybody has read them or not, Judge.  
 6 HON. F. SCOTT McCOWN: Well, maybe  
 7 we don't want to ask that question, but maybe  
 8 we might want to ask if people want to take a  
 9 few minutes to review them and refresh their  
 10 recollection.  
 11 CHAIRMAN BABCOCK: That would be  
 12 fine. We'll take four or five minutes here  
 13 for people to just do what I'm sure they've  
 14 already done. Unfortunately, the process  
 15 imposed upon us by the Legislature has been so  
 16 quick that the final typed-up clean version  
 17 was only prepared late Wednesday night and we  
 18 got it yesterday, so that's why you got it  
 19 yesterday.  
 20 And I might say that one of the reasons  
 21 we have to finish our work today is that the  
 22 Court is going to have to digest what we give  
 23 them and then I think send it out for public  
 24 comment and get this all done by January 2.  
 25 JUSTICE HECHT: December 15th.

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1 CHAIRMAN BABCOCK: December 15th.  
 2 So we're on an extraordinarily tight  
 3 schedule. So by the clock everybody has five  
 4 minutes to refresh their recollection.  
 5 (Five-minute pause.)  
 6 CHAIRMAN BABCOCK: Okay. Your five  
 7 minutes is up. We were just commenting about  
 8 how much legal talent is in this room, and for  
 9 all this legal talent to be quiet for five  
 10 minutes is remarkable.  
 11 I should have mentioned that Justice  
 12 Baker, who is with us and talking to Mike  
 13 Hatchell over there, was the liaison to the  
 14 subcommittee and is going to be with us today.  
 15 We're delighted that Justice Baker has joined  
 16 us.  
 17 Let's go to Rule 1.1, Application. Any  
 18 comments? No comments from our committee, so  
 19 we will move to 1.2, Expedited Proceedings --  
 20 HON. SCOTT A. BRISTER: Well, could  
 21 I suggest that we just have -- there are a lot  
 22 of words on here. Maybe if we could have  
 23 Justice McClure just give us a one-minute  
 24 synopsis of why they did what they did on  
 25 Rule 1.1.

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1 CHAIRMAN BABCOCK: And Justice  
 2 McClure can also tag Bob Pemberton, too, if  
 3 she wants to. But sure, that's a great idea.  
 4 HON. SCOTT A. BRISTER: I didn't  
 5 mean to put her on the spot.  
 6 HON. ANN CRAWFORD McCLURE:  
 7 Understood. Well, first of all, we were  
 8 mandated by the legislation to ensure two  
 9 things with regard to implementation of these  
 10 rules: Confidentiality being foremost;  
 11 secondarily, it has to be conducted in an  
 12 expeditious manner. The time frame imposed by  
 13 the legislation itself can only be described  
 14 as a rocket docket, so we had to do something  
 15 in order to ensure that when these cases are  
 16 filed, they get brought to the immediate  
 17 attention of the judge, whichever judge may be  
 18 assigned to consider them.  
 19 We also discussed whether we wanted to  
 20 include these rules, fold them over into  
 21 another body of rules, or allow them to be  
 22 freestanding on their own. And we decided  
 23 that, because it's necessary to have them  
 24 implemented so quickly, we needed to have them  
 25 as freestanding rules. That having been said,

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1 there are some circumstances in which some of  
 2 the ideas that we came up with might be in  
 3 conflict with the Rules of Civil Procedure and  
 4 the Rules of Appellate Procedure. We wanted  
 5 to ensure that, to the extent these rules were  
 6 in conflict with those rules, these rules  
 7 would apply. But we also did not want to  
 8 leave the impression -- understanding that a  
 9 number of these cases at least originally are  
 10 going to be filed by minors that may not have  
 11 attorneys appointed at that particular time,  
 12 that they would have to understand the nature  
 13 of the proceedings as well.  
 14 And as one example, the statute gives no  
 15 timetable for the filing of a notice of appeal  
 16 in the event the trial court denies the  
 17 application. We had an extensive debate about  
 18 whether we wanted to impose an arbitrary  
 19 deadline. Did we want it filed within  
 20 24 hours? 48 hours? The consensus of the  
 21 subcommittee was, if the application is  
 22 denied, perhaps the minor would take that  
 23 opportunity to reflect on her decision and  
 24 consider other options. We did not want to  
 25 impose an arbitrary deadline upon her.

1 That having been said, we decided we  
2 would leave these rules silent as to any  
3 appellate deadline, and by their silence  
4 implicate the TRAP rules, meaning that the  
5 30-day time frame would be a default. And we  
6 include that in the annotated version. And I  
7 think it's in the rules itself, Bob, if I'm  
8 not mistaken, that the 30-day rule would  
9 apply?

10 MR. PEMBERTON: Right. We have a  
11 comment to Rule 1.1. And by the way, these  
12 rules do continue the practice of what the  
13 Court has done in recent promulgations of  
14 having substantive comments to the rules.  
15 It's proved to be very useful and helpful for  
16 practitioners to state the rule and then have  
17 sort of a practice commentary that follows.  
18 This sort of jumpstarts what otherwise would  
19 be the concepts that would be brought out  
20 through case law. We can jump ahead a little  
21 bit and avoid the need for litigation to  
22 define what's in the text of the rules.

23 And by way of example, like Justice  
24 McClure said, we mention that because these  
25 rules don't state the filing deadline for an

1 there is nothing on our docket that we've been  
2 referred by the Court on that renumbering  
3 project. And I believe that it was studied  
4 and thought by the subcommittee that these had  
5 to be freestanding at least for the time  
6 being. And I don't think that there's any  
7 prospect that we can fold these into the --

8 HON. SCOTT A. BRISTER: That's  
9 because of the notification deadlines, Bar  
10 Journal, and that kind of thing?

11 HON. ANN CRAWFORD McCLURE:  
12 Partially. These must be implemented by  
13 December the 15th because the statute applies  
14 to abortions performed after the first of the  
15 year. I think it's reasonable to expect there  
16 will be some further tinkering with the  
17 statute in the next session. And I would  
18 envision that, if we kept them at least  
19 freestanding for the first couple of years to  
20 see how the process is working, that it would  
21 make them much more easy to amend, modify or  
22 supplement as we get some experience with the  
23 process.

24 JUSTICE HECHT: But in answer to  
25 your question, Scott, there's a big hole in

1 appeal, you default back to the TRAP rules,  
2 which is the 30-day deadline. And we envision  
3 that other rules, other situations will be  
4 addressed similarly.

5 HON. ANN CRAWFORD McCLURE: Did you  
6 want me to provide you with an overview as far  
7 as the confidentiality issues or the anonymity  
8 issues that are raised in Rule 1?

9 CHAIRMAN BABCOCK: Well, let's wait  
10 until we get to that.

11 HON. ANN CRAWFORD McCLURE: That's a  
12 freestanding topic.

13 CHAIRMAN BABCOCK: Yeah.

14 HON. SCOTT A. BRISTER: Just on 1.1,  
15 maybe Bob or one of the justices, is there  
16 still a long-term plan to renumber and  
17 reorganize all the Rules of Civil Procedure?  
18 Is this something that might eventually one  
19 day be -- I know there was some discussion  
20 about doing the same numbers as the Federal  
21 Rules to the extent we can. Is there some  
22 advantage to making these Rules 800 through  
23 whatever of the Rules of Civil Procedure  
24 rather than a stand-alone?

25 CHAIRMAN BABCOCK: Well, I know

1 the middle of the rules, as you know, and --

2 HON. SCOTT A. BRISTER: Between 300  
3 and 700.

4 JUSTICE HECHT: Right. There are  
5 plenty of numbers in there, if the committee  
6 felt like we ought to stick them in there. So  
7 if not -- but I don't think it should await  
8 the longer term rules revision process. We  
9 just can't.

10 HON. SCOTT A. BRISTER: Remind me  
11 where we left off on the Justice Court Rules,  
12 or maybe Tom Lawrence can. Are those still  
13 going to be part of these rules, just a  
14 different numbered set?

15 JUSTICE HECHT: I don't think we  
16 ever firmly resolved that issue.

17 CHAIRMAN BABCOCK: That was left  
18 open when we retired last time. Judge Rhea.  
19 I'm sorry, Bill.

20 HON. BILL RHEA: On Rule 1.1, this  
21 language, "appeals from denials of  
22 applications," just raises a question to me.  
23 I'm wondering whether or not there might be a  
24 factual situation where there might indeed be  
25 an appeal from a grant of an application. And



1 I may be off, I haven't thought this through,  
 2 but let me just ask the question. In the  
 3 event -- I guess I can envision a situation  
 4 where we might have a 16-year-old who has run  
 5 away from home, become pregnant, and the  
 6 physician who intends to perform the abortion  
 7 gives parental notification to the parents,  
 8 and those parents oppose the action but have  
 9 no control over the child. It seems to me  
 10 that there might be a circumstance where those  
 11 parents might legitimately intervene in that  
 12 proceeding. I know we've got a  
 13 confidentiality issue. I don't know how that  
 14 would happen. But they might come to know of  
 15 the proceeding, intervene in it, and then the  
 16 grant of that application, it seems to me, may  
 17 at least possibly form the basis of an  
 18 appeal.

19 HON. ANN CRAWFORD McCLURE: Well,  
 20 first of all, the statute specifically grants  
 21 the right of appeal only if the application is  
 22 denied, not if it is granted. And  
 23 secondarily, this is a parental notification  
 24 statute, not a parental consent statute. So  
 25 their consent is really irrelevant to this

1 proceeding.  
 2 MR. PEMBERTON: And we do address  
 3 the issue of whether you can appeal the grant  
 4 in Comment 1 to Rule 3. Rule 3 is the  
 5 appellate rule. The way these rules are  
 6 structured, Rule 1 is just the general stuff,  
 7 general admonishment of confidentiality and  
 8 anonymity. Rule 2 governs trial court  
 9 proceedings, including how these concepts of  
 10 confidentiality and expedition are applied in  
 11 particular. Rule 3 is appeal to the  
 12 intermediate courts of appeals; and 4 is to  
 13 the Supreme Court proceedings. In Comment 1  
 14 we clarify that you can't appeal a grant.  
 15 It's a one-way street.

16 HON. SCOTT A. BRISTER: Does it bar  
 17 appeal? Or the only thing it grants is appeal  
 18 by the applicant?

19 MR. PEMBERTON: The latter.

20 HON. SCOTT A. BRISTER: I couldn't  
 21 find that it barred appeal.

22 HON. ANN CRAWFORD McCLURE: It  
 23 specifically grants the right of appeal only  
 24 in the event of a denial.

25 MR. PEMBERTON: Other states have

1 construed these types of statutes to bar the  
 2 type of intervention we were talking about a  
 3 moment ago.

4 CHAIRMAN BABCOCK: Bill Dorsaneo.  
 5 Professor Dorsaneo.

6 PROFESSOR DORSANEO: 1.1 raises a  
 7 lot of issues for me. We could approach these  
 8 rules as if they were essentially stand-alone,  
 9 separate rules, not influenced very much by  
 10 the Rules of Civil Procedure and not drafted  
 11 in any kind of attempt to borrow concepts from  
 12 the procedural rules. And I gather that's the  
 13 main thrust of this.

14 What I'm thinking about, for example, is  
 15 that the statute talks about the pleading  
 16 that's being filed as an application. And a  
 17 number of general uniform acts talk about  
 18 things being filed as applications as well.  
 19 The uniform acts normally do that because they  
 20 don't take a position on what will be filed in  
 21 a given jurisdiction, whether you're going to  
 22 file a petition or a complaint or a motion.

23 "Application" is not a term that has any  
 24 particular meaning other than the meaning  
 25 prescribed by this document. That's fine with

1 me, but it seems at least there's a choice to  
 2 be made as to whether we might try to  
 3 assimilate this to perhaps a motion practice  
 4 rather than to set up some completely separate  
 5 procedural mechanism that somehow relates to  
 6 the Rules of Civil Procedure but we don't  
 7 exactly know how. I guess what I'm saying is,  
 8 I need to know what kind of attitude I should  
 9 have about this. Is this going to be  
 10 something that's completely separate and  
 11 stand-alone, or should we try to make it like  
 12 things that we do now with appropriate  
 13 adjustments?

14 HON. ANN CRAWFORD McCLURE: Well,  
 15 first and foremost, the subcommittee had quite  
 16 a discussion about whether we wanted to  
 17 entitle it an application or a petition. We  
 18 didn't get much into the motion practice. Our  
 19 thinking was, these forms and these rules will  
 20 be made available to children, and at the time  
 21 they get these materials, either from their  
 22 health care provider, from the district clerk,  
 23 off of the Internet or whatever, they will  
 24 likely not be represented by an attorney. We  
 25 wanted them to understand it. And we thought

1 we had a greater likelihood of their  
 2 understanding what an application is because  
 3 some of them have applied for part-time jobs  
 4 while they're in high school; whereas a  
 5 petition, at least for my teenager, they  
 6 envision somebody standing out on the street  
 7 corner taking names in order to get something  
 8 that they want for a political purpose or  
 9 whatever. So that was the reason we chose the  
 10 phrase "application."

11 And "application" is used to some extent,  
 12 although not extensively, in other areas of  
 13 the Family Code.

14 CHAIRMAN BABCOCK: Bill Edwards.

15 MR. EDWARDS: Section 33.003 says  
 16 that either the child or whoever may file an  
 17 application. I think the Legislature has  
 18 taken care of it for us.

19 PROFESSOR DORSANEO: But the  
 20 Legislature didn't tell us what an application  
 21 is.

22 MR. EDWARDS: Yes, they did. They  
 23 said that we're going to make a form for it.

24 MR. LATTING: Chip, I've got a  
 25 question, a housekeeping question. If this is

1 is, what is the objection to putting it in as  
 2 part the Rules of Procedure, since they are  
 3 rules of procedure?

4 HON. ANN CRAWFORD McCLURE: One was  
 5 to make them user friendly, understanding that  
 6 these girls would need to get a copy of them.  
 7 And if we could put them in some sort of a  
 8 pamphlet form and make them available, that it  
 9 would expedite the process. That was our  
 10 thinking. There's no legal reason why we  
 11 shouldn't. It was a situation of making these  
 12 as easily accessible to those individuals who  
 13 wanted them.

14 MR. LATTING: Okay.

15 MR. PEMBERTON: There's also a  
 16 notice problem here.

17 CHAIRMAN BABCOCK: Do you want to  
 18 tell them about that.

19 MR. PEMBERTON: Well, it's mentioned  
 20 in one of the annotations to the rule, and I  
 21 think Judge Brister brought this up earlier,  
 22 that if we style these, for example, Rules of  
 23 Judicial Administration, there's a 120-day  
 24 notice requirement before they become  
 25 effective; for Rules of Procedure, you have

1 not going to be a part of the Rules of Civil  
 2 Procedure, where is it going to be published?  
 3 Where am I going to find it in my office? Is  
 4 it going to be in the Family Code book or is  
 5 it going to be in part of the rule book?  
 6 Where do I go to find this?

7 HON. ANN CRAWFORD McCLURE: First of  
 8 all, they'll be available in all of the  
 9 district clerks offices, county clerks  
 10 offices. They will be available on the  
 11 Internet and --

12 MR. LATTING: No, I mean eventually,  
 13 though, when West publishes it. Where is it?  
 14 What book is it going to wind up in in  
 15 practitioners' offices?

16 HON. ANN CRAWFORD McCLURE: Our  
 17 concept was, the West publication that has all  
 18 of the Rules of Judicial Conduct, the  
 19 Disciplinary Rules, all of those that are  
 20 published in that West book would also include  
 21 it.

22 I think Justice Hecht had a comment.

23 CHAIRMAN BABCOCK: And that was Joe  
 24 Latting that was asking that question.

25 MR. LATTING: I guess my question

1 60 days. And that wouldn't work under the  
 2 time crunch we're under to even call them  
 3 Rules of Civil Procedure or to purport to  
 4 amend the Rules of Civil Procedure. Of  
 5 course, we can incorporate these rules into  
 6 existing bodies of rules later on.

7 CHAIRMAN BABCOCK: Judge Brown.

8 HON. HARVEY G. BROWN, JR.: I wanted  
 9 to ask about incorporating the Rules of  
 10 Evidence into the rules. It seems to me that  
 11 with the time frames that we're working under,  
 12 one issue might be the availability of getting  
 13 a doctor to testify about the minor being well  
 14 informed, which is one of the statutory  
 15 issues. Doctors might not be available. We  
 16 might want to allow flexibility for affidavits  
 17 and other types of evidence that would  
 18 normally be permitted under Rule 104a of the  
 19 Rules of Evidence but is strictly not  
 20 admissible; and therefore, it seemed to me  
 21 there was an issue about whether we should  
 22 incorporate the Rules of Evidence into these  
 23 proceedings.

24 HON. ANN CRAWFORD McCLURE: We also  
 25 had a discussion about whether we should

1 permit the entire thing to be considered on  
 2 submission. But the consensus of the trial  
 3 judges on the subcommittee was that they  
 4 wanted people in their courtroom in order to  
 5 be able to assess all circumstances of  
 6 maturity, demeanor, credibility and those  
 7 issues. And that's the reason we opted to  
 8 implement the evidence rules to that extent.

9 CHAIRMAN BABCOCK: Judge Brown, I  
 10 think you raise a very good point. I'm not  
 11 sure it's applicable to 1.1, but with your  
 12 permission, if we can defer that, unless  
 13 somebody else thinks it should be.

14 HON. HARVEY G. BROWN, JR.: Well, it  
 15 says other Texas rules, including Rules of  
 16 Evidence, also apply. That's why I ask.

17 CHAIRMAN BABCOCK: Okay.

18 MR. PEMBERTON: Some states do have  
 19 a rule that would typically show up in the  
 20 rule governing trial court proceedings, that  
 21 basically you can have more informality in  
 22 these these types of proceedings. The  
 23 committee rejected that, however, in the  
 24 belief that under the Texas statute, unlike  
 25 other states, a minor will have a lawyer

1 offered into evidence, and if there's no  
 2 objection, they support a default judgment.  
 3 So affidavits could be offered here; there's  
 4 no objection; they support the record. So I  
 5 think affidavit proof is still possible even  
 6 under the Rules of Evidence.

7 CHAIRMAN BABCOCK: That probably  
 8 cures that problem, I would guess. Nina  
 9 Cortell -- oh, go ahead, Judge Brown.

10 HON. HARVEY G. BROWN, JR.: A  
 11 similar issue was on recusal. By adopting the  
 12 Rules of Civil Procedure in 1.1, we adopt  
 13 Rule 18a, which means that motions to recuse  
 14 have to be filed 10 days before the hearing,  
 15 which is an impossibility here. So I'm not  
 16 sure what I do as a trial judge. Do I say,  
 17 "Well, it's too late; the rule specifically  
 18 says 10 days," or do I say, "Well, that's  
 19 inconsistent with the rules"?

20 HON. ANN CRAWFORD McCLURE: Well, we  
 21 had a very lengthy debate on the recusal  
 22 issue. The legislative intent was absolutely  
 23 that recusals should not be permitted. One of  
 24 your attachments is a letter from Senator  
 25 Shapiro, who was the sponsor of Senate Bill

1 appointed early in the proceeding and you  
 2 shouldn't cut lawyers slack in the same way  
 3 you would if just the minor were going pro  
 4 se. So that issue did come up.

5 CHAIRMAN BABCOCK: But Judge Brown's  
 6 comment is that when you have that 48-hour  
 7 time limit, and doctors sometimes have  
 8 schedules that don't comport with that, should  
 9 there be flexibility? And I'm just trying to  
 10 see, is there anywhere else in these rules  
 11 where that issue was addressed or could be  
 12 addressed?

13 HON. ANN CRAWFORD McCLURE: Well, I  
 14 think especially to the extent that there's  
 15 also going to be a guardian ad litem  
 16 appointed, with the understanding that the  
 17 ad litem would have access to the medical  
 18 records of the minor and be in a position to  
 19 make a recommendation to the court without  
 20 regard to whether the underlying records were  
 21 admissible or inadmissible.

22 HON. F. SCOTT McCOWN: Chip, we have  
 23 to keep in mind this isn't an adversarial  
 24 proceeding. And for example, the Supreme  
 25 Court has already said that affidavits can be

1 30. And there is a representative from her  
 2 office that is here. But it was quite  
 3 explicit that the judges would not be in a  
 4 position of making a decision that could be  
 5 classified as either pro-abortion or anti-  
 6 abortion. They're looking specifically to  
 7 make fact findings, whether she is well  
 8 informed, whether she is sufficiently mature  
 9 to make this decision without parental  
 10 involvement, whether notification is not in  
 11 her best interest or whether there is a  
 12 likelihood of abuse, and given those specific  
 13 fact findings, that recusal should not be an  
 14 option.

15 Now, I will tell you that all of the  
 16 trial judges that were on the committee felt  
 17 very strongly that it would have to be an  
 18 option; that there are in some jurisdictions  
 19 trial judges who have been actively involved  
 20 in anti-abortion proceedings, demonstrations.  
 21 Several of the Houston judges referred to a  
 22 particular judge in Houston where that was  
 23 true. And they felt that it would be  
 24 necessary.

25 Now, realistically, if a judge were to

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1 self-recuse, I doubt seriously -- and this is  
 2 covered as an explanation in the report -- I  
 3 doubt seriously that there would be any  
 4 complaint if the application is granted,  
 5 because she can't appeal from that. If the  
 6 application is denied, then they can be  
 7 appealed, and the question as to whether the  
 8 judge should have recused or not would be an  
 9 issue for appeal. But if the judge self-  
 10 recuses, I don't see that it would come up on  
 11 appeal.

12 We chose to leave the rule silent as to  
 13 that. I think it's going to be something that  
 14 has to be fleshed out. I would welcome input  
 15 from anybody who has an idea. But certainly  
 16 the time parameters will not permit the  
 17 traditional recusal process. Self-recusal is  
 18 another question.

19 CHAIRMAN BABCOCK: Judge Brown's  
 20 point, though, I think, is that procedurally  
 21 you can't comply with the rules on recusal and  
 22 still meet the timetable mandated by the  
 23 statute and mandated by these rules.

24 MR. EDWARDS: Yes, you can.

25 CHAIRMAN BABCOCK: Okay. Good.

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1 MR. EDWARDS: Because Rule 18a(e)  
 2 says, "If, within 10 days of the date set for  
 3 trial or other hearing, a judge is assigned to  
 4 the case, the motion shall be filed at the  
 5 earliest practicable time." So there's not  
 6 going to be a judge assigned more than  
 7 48 hours before the hearing, so that 10-day  
 8 rule is out.

9 CHAIRMAN BABCOCK: That solves that  
 10 problem. Justice Duncan.

11 HON. SARAH B. DUNCAN: That does  
 12 bring up a concern of mine. Did someone on  
 13 the subcommittee go through the rules that are  
 14 being incorporated wholesale to determine that  
 15 there weren't some unintended consequences of  
 16 applying any of those rules?

17 HON. ANN CRAWFORD McCLURE: Not rule  
 18 by rule, we have not. What we tried to do was  
 19 focus on what we felt would likely be  
 20 realistic scenarios that would arise under  
 21 these circumstances, and those were the ones  
 22 that we tried to address.

23 Now, you may want to decide that you  
 24 don't want to make any reference to these  
 25 rules and to have them be completely

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1 freestanding and trump anything else that  
 2 might possibly be considered or be confused,  
 3 and that's certainly an option. It just  
 4 presents some significant implementation  
 5 problems if we don't address it to some  
 6 extent.

7 CHAIRMAN BABCOCK: Justice Duncan.

8 HON. SARAH B. DUNCAN: That's why  
 9 I'm wondering about a phrase like "to the  
 10 extent appropriate or applicable" or "in  
 11 keeping with the purpose of these rules," just  
 12 something that would give a reviewing court  
 13 the ability to say, "This particular rule of  
 14 civil procedure or evidence or appellate  
 15 procedure should not be applied in this  
 16 context because it would defeat the  
 17 confidentiality or defeat the expedited review  
 18 process."

19 HON. ANN CRAWFORD McCLURE: In  
 20 Footnote 4 we address that to some extent. We  
 21 used the phrase "are inconsistent" to denote  
 22 not only direct conflict but other situations  
 23 where the application of court rules would be  
 24 inconsistent with the general framework or  
 25 policy. And certainly that could be moved

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1 from a footnote to a comment.

2 PROFESSOR DORSANEO: I think that  
 3 should be done. Comments are useful, but it's  
 4 better for the rule to say what it means.

5 CHAIRMAN BABCOCK: So Justice  
 6 Duncan, what language do you propose, then,  
 7 for Rule 1.1?

8 HON. SARAH B. DUNCAN: To the extent  
 9 they are consistent with the general framework  
 10 and policy of the parental notification  
 11 statutes and these rules, something like  
 12 that.

13 CHAIRMAN BABCOCK: Do you want to  
 14 read that again, Carrie?

15 MS. GAGNON: "To the extent they are  
 16 consistent with the general framework and  
 17 policy of the parental notification statutes  
 18 and these rules, something like that."

19 HON. SARAH B. DUNCAN: Take  
 20 "something like that" out.

21 MR. EDWARDS: I think you could just  
 22 take the footnote, can't you, and say the term  
 23 as used -- the term "are inconsistent" is used  
 24 to denote not only direct conflict between the  
 25 Parental Notification Rules and other rules of

1 the court, but also situations where the  
 2 application of another rule of the court would  
 3 be inconsistent with the general framework and  
 4 policy of the Parental Notification Rules.  
 5 HON. ANN CRAWFORD McCLURE: I'm not  
 6 opposed to that at all.  
 7 MR. EDWARDS: Just make that a  
 8 comment.  
 9 CHAIRMAN BABCOCK: Make it a comment  
 10 or put it in the rule?  
 11 MR. EDWARDS: Or put it in the  
 12 rule. Either one.  
 13 CHAIRMAN BABCOCK: I think Professor  
 14 Dorsaneo suggests putting it in the rule.  
 15 Justice Duncan, what do you opine on  
 16 that, put it in the rule or have it as a  
 17 comment?  
 18 HON. SARAH B. DUNCAN: I would  
 19 rather it in be in the rule. It's easier to  
 20 say "that's the rule" if it's in the rule.  
 21 CHAIRMAN BABCOCK: Justice McClure?  
 22 HON. ANN CRAWFORD McCLURE: That's  
 23 fine.  
 24 CHAIRMAN BABCOCK: So the language  
 25 from Footnote 4, which would say, "also apply,

1 agreement with that? Okay. We'll make that  
 2 change to 1.1.  
 3 Bobby, you keep track of how that's going  
 4 to read.  
 5 MR. PEMBERTON: I have it.  
 6 CHAIRMAN BABCOCK: Are there any  
 7 more comments on 1.1? Yes.  
 8 HON. BILL RHEA: Do you want to talk  
 9 about recusals now or later, since that came  
 10 up?  
 11 CHAIRMAN BABCOCK: I think recusals  
 12 are handled elsewhere, aren't they, in this  
 13 rule? The silence is elsewhere.  
 14 MR. PEMBERTON: That's pretty much  
 15 where it comes up.  
 16 CHAIRMAN BABCOCK: It is? Okay.  
 17 Well, Judge Rhea, Bob Pemberton says now is  
 18 the time to talk about recusals.  
 19 HON. BILL RHEA: Well, it seems to  
 20 me that there's a great danger in being silent  
 21 on the issue of recusals. There are any  
 22 number of reasons that one could recuse. My  
 23 best friend's daughter may be the applicant.  
 24 My political opponent's daughter may be the  
 25 applicant. There are any number of situations

1 but to the extent they are inconsistent with  
 2 these rules, these rules control" -- now, how  
 3 does that work, Justice Duncan?  
 4 MR. EDWARDS: I just took the  
 5 footnote, is what I was reading.  
 6 MR. TIPPS: Starting with the words  
 7 "The phrase 'are inconsistent' is used to  
 8 denote."  
 9 HON. SARAH B. DUNCAN: Or it could  
 10 say "'inconsistent' denotes."  
 11 CHAIRMAN BABCOCK: Okay.  
 12 MR. PEMBERTON: Or you could  
 13 stick the phrase in with hyphens after  
 14 "inconsistent."  
 15 CHAIRMAN BABCOCK: Okay. So after  
 16 "but to the extent they are inconsistent -"  
 17 MR. PEMBERTON: "- either directly  
 18 conflicting or inconsistent with the general  
 19 framework or policy of Chapter 33 or these  
 20 rules --". You could do it that way.  
 21 CHAIRMAN BABCOCK: What's  
 22 everybody's preference on that?  
 23 HON. ANN CRAWFORD McCLURE: I think  
 24 that makes it clear as far as the definition.  
 25 CHAIRMAN BABCOCK: Is everybody in

1 where that could arise that are completely  
 2 divorced from the issue of whether I'm  
 3 pro-life or pro-choice.  
 4 My concern is that if a situation were to  
 5 come in where I would feel compelled to recuse  
 6 myself, the temptation may be, depending upon  
 7 the circumstances, to just go ahead and let  
 8 that go by the wayside, go into the ordinary  
 9 rules, I refer to Judge McDowell, and those  
 10 two days will pass real quick and I won't have  
 11 to deal with the issue. And that may be  
 12 something I want accomplished or just want to  
 13 avoid publicity on. All sorts of scenarios  
 14 arise out of that.  
 15 It seems to me that it would be a much  
 16 better situation to tailor recusal rules to  
 17 this particular circumstance and this  
 18 particular situation; for instance, requiring  
 19 a judge who did recuse to immediately notify a  
 20 local administrative district judge for  
 21 reassignment or, I guess depending upon the  
 22 county and the size of the county, some other  
 23 circumstance for an immediate referral and  
 24 putting an obligation on the judge to  
 25 immediately refer it to somebody else and not

1 just to let inaction be the word of the day.  
 2 Because that inaction itself can be used by  
 3 the judge, and again, there would be a big  
 4 temptation to use it that way under particular  
 5 circumstances.  
 6 HON. ANN CRAWFORD McCLURE: Well, I  
 7 certainly understand that thought. In fact,  
 8 Judge Medina, who was on our subcommittee,  
 9 expressed almost identical concerns about the  
 10 daughter of a friend or perhaps his godchild  
 11 or whoever it might be, having the application  
 12 filed in his court. I agree with you that the  
 13 preference would be to try to incorporate  
 14 something to that extent.  
 15 It was the consensus of the subcommittee  
 16 that, because we were supposed to implement to  
 17 in large extent the legislative intent, and it  
 18 was real clear what the legislative intent  
 19 was, we did not do that. I am not opposed if  
 20 this group wants to craft some sort of  
 21 specific rule to address that issue. I think  
 22 it's a significant issue.  
 23 CHAIRMAN BABCOCK: Justice Duncan.  
 24 HON. SARAH B. DUNCAN: When you say  
 25 the legislative intent was clear, is it

1 on it also.  
 2 HON. ANN CRAWFORD McCLURE: There  
 3 are situations, too, where one judge has  
 4 jurisdiction over several counties, and he may  
 5 be the only judge within a certain number of  
 6 miles' radius. That's just one of the  
 7 inherent problems with the statute in and of  
 8 itself.  
 9 REPRESENTATIVE DUNNAM: I have a  
 10 question.  
 11 CHAIRMAN BABCOCK: Representative  
 12 Dunnam.  
 13 REPRESENTATIVE DUNNAM: I may have  
 14 been asleep, but I don't recall anything about  
 15 recusal ever being mentioned on the House  
 16 floor when we voted on this issue. And we had  
 17 a lengthy debate, and I don't -- I was going  
 18 to ask, other than the senator's letter, is  
 19 there anything else in the committee  
 20 transcript or discussion that talks about  
 21 legislative intent? Because I'm not going to  
 22 say it didn't happen, but I sure don't recall  
 23 it.  
 24 HON. ANN CRAWFORD McCLURE: Bob, you  
 25 have all of those tapes.

1 clearly that that was the view of all voting  
 2 on the statutes, or the view of one or more  
 3 senators?  
 4 HON. ANN CRAWFORD McCLURE: Do you  
 5 want to respond to what the discussion was at  
 6 the time?  
 7 MS. CUNNINGHAM: Well, I wasn't a  
 8 part of the discussion, but I did --  
 9 THE REPORTER: Ma'am, identify  
 10 yourself, please.  
 11 MS. CUNNINGHAM: Oh, I'm sorry. My  
 12 name is Stacy Cunningham. I work for Senator  
 13 Florence Shapiro, who was the author of SB30.  
 14 I was attending the subcommittee meeting, and  
 15 the issue came up, so I took the question back  
 16 to Senator Shapiro. And her response was that  
 17 the conversations that she was involved with  
 18 that recusal -- having free rein to recuse  
 19 could potentially cause problems. And if  
 20 you're in a small district, you know, if one  
 21 or more judges recuse themselves, it could end  
 22 up having where the child could not get a  
 23 hearing within the time frame. And she  
 24 reported that back to the subcommittee.  
 25 And I don't know if you have any opinions

1 MR. PEMBERTON: What we've looked at  
 2 so far, and it's kind of an ongoing process,  
 3 there are a lot of tapes, is the entirety of  
 4 the 12-hour hearing on this in the House State  
 5 Affairs; and we've been in contact with both  
 6 Senator Shapiro's office and Representative  
 7 Delisi's office, who, of course, was the House  
 8 sponsor, just antidotally, if any of these  
 9 issues came up in the discussion.  
 10 REPRESENTATIVE DUNNAM: But if it  
 11 didn't come up on the floor of the House or  
 12 Senate and was not read in as some type of  
 13 legislative intent, I don't know that just a  
 14 discussion and one member's opinion expressed  
 15 in a committee hearing establishes the intent  
 16 for all 181 members.  
 17 HON. F. SCOTT McCOWN: I've got a  
 18 solution. It seems to me that we could add a  
 19 sentence that says, "In the event a judge  
 20 recuses, the application shall be referred  
 21 immediately by local rules or the local  
 22 administrative judge to another judge." And  
 23 then -- I can't remember where it is, Judge  
 24 McClure, but perhaps you can point it out to  
 25 me. It seems to me that, as I recall, the

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1 rules addressed what you had to say if an  
 2 application was denied. You couldn't  
 3 judge-shop to another forum. Isn't that  
 4 correct?

5 HON. ANN CRAWFORD McCLURE: No, it  
 6 doesn't say that. It raises the question of  
 7 what you do with it. Because unless she  
 8 self-discloses, there is no ability -- because  
 9 of the anonymity -- there is no ability for  
 10 the trial judge to find that out, if she  
 11 chooses to lie.

12 HON. F. SCOTT McCOWN: Well, it  
 13 seems to me that the way you could do this to  
 14 solve the speed problem is that, if a judge  
 15 recuses, then the application shall be  
 16 referred immediately by local rule, if they  
 17 want to set up what happens by local rule, or  
 18 by the local administrative judge to another  
 19 judge.

20 Then the problem arises, well, what if  
 21 you deny recusal? Well, in that situation it  
 22 seems to me that we ought to authorize the  
 23 minor to simply go to another judge disclosing  
 24 that she moved for recusal and it was denied  
 25 and seeking that judge to review whether she

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1 should or shouldn't have to have parental  
 2 notification, which is all you get in a  
 3 recusal situation anyway, is another district  
 4 judge coming in and saying whether you should  
 5 or shouldn't have recused, and we just let the  
 6 minor go find another judge.

7 Or we could even put that in this rule.  
 8 We could say that, in the event a judge  
 9 refuses to recuse, the application shall be  
 10 referred immediately by the local rules or the  
 11 local administrative judge to another judge to  
 12 review either the -- I would just -- instead  
 13 of having them review the recusal, I would  
 14 just have them review whether in their opinion  
 15 the minor should have to notify her parents.  
 16 It gives them two bites at the apple, if they  
 17 move for recusal and recusal is denied. But  
 18 that would be a very fast way to do it.

19 CHAIRMAN BABCOCK: How do you  
 20 incorporate the recusal procedure with the  
 21 legislative mandate that this all happen  
 22 within 48 hours?

23 HON. F. SCOTT McCOWN: Well, I think  
 24 it was pointed out that there are going to be  
 25 cases where you may need to self-recuse. So

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1 if the minor comes in and you self-recuse,  
 2 they're at the courthouse for the proceeding,  
 3 and then either by local rule or the local  
 4 administrative judge, you go down and either  
 5 by the rule or by the judge they get you  
 6 another judge immediately.

7 For example, in Travis County, we've  
 8 determined that we're going to have the duty  
 9 judge do it. We're duty judge for a week. If  
 10 I'm the duty judge that week and somebody  
 11 comes in and I know the minor and I know the  
 12 minor's parents and I have to self-recuse,  
 13 then the local administrative judge can just  
 14 pull some other judge off the bench to do it  
 15 and can do it immediately. And so you could  
 16 just say they have to provide for that, either  
 17 in the local rules or have the local  
 18 administrative judge do it.

19 It seems to me the trick is, if they move  
 20 for recusal -- and by the way, I don't think  
 21 that will happen very often, because I think  
 22 they're going to pick their forum. But if  
 23 they move for recusal and I've denied recusal  
 24 and then I grant the application, it becomes  
 25 moot. If I deny recusal and I deny the

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1 application, then my solution was that they  
 2 just simply go immediately to another judge.

3 HON. SAMUEL A. MEDINA: They would  
 4 have that right.

5 HON. ANN CRAWFORD McCLURE: Well,  
 6 that will work in metropolitan areas. It  
 7 won't work in Marfa or Alpine where we don't  
 8 have another judge immediately accessible.  
 9 But the reality is that if it's not ruled upon  
 10 within the 48 hours, it's deemed granted  
 11 anyway.

12 HON. F. SCOTT McCOWN: Yeah. But  
 13 there are going to be very few jurisdictions,  
 14 the way this is set up, where you don't have a  
 15 county court at law, a district judge, a  
 16 probate judge. I mean, there's going to be  
 17 admittedly some counties, but chances are  
 18 they're not going to be in those counties  
 19 anyway because there isn't going to be a  
 20 provider.

21 HON. ANN CRAWFORD McCLURE: I agree  
 22 with that.

23 HON. F. SCOTT McCOWN: So these are  
 24 all going to be in counties that have more  
 25 than one judge.

1 HON. ANN CRAWFORD McCLURE: Part of  
 2 this discussion, though, is also impacting on  
 3 the res judicata issue. Theresa Collett --  
 4 oh, hello, Judge Medina, I didn't see you come  
 5 in -- Theresa Collett from South Texas was on  
 6 our subcommittee, and she prepared a memo that  
 7 is attached in your materials as Exhibit G, I  
 8 think, Appendix G, where, in her mind, once  
 9 there is a ruling that res judicata would  
 10 apply, that it would be a ruling on the  
 11 merits. That would prohibit her from the  
 12 second bite at the apple, prohibit her from  
 13 going to another court and filing yet another  
 14 application in lieu of an appellate  
 15 procedure.

16 But again, realistically speaking, there  
 17 is a question as to -- although we ask in the  
 18 form, the application form that we've  
 19 prepared, "Have you previously filed an  
 20 application with regard to this pregnancy?"  
 21 one of our members was quite blunt in saying  
 22 his experience dealing with these girls is  
 23 they're not likely to tell the truth in  
 24 response to that question anyway.

25 CHAIRMAN BABCOCK: Justice Duncan.

1 HON. SARAH B. DUNCAN: I'm concerned  
 2 about not providing for recusal and leaving  
 3 the rule silent, particularly given Senator  
 4 Shapiro's letter. I don't know how to square  
 5 mandatory recusal under the Code of Judicial  
 6 Conduct with precluding recusal in any  
 7 particular context based on substance. If I  
 8 have a duty to recuse under the Code of  
 9 Judicial Conduct, I really think the rules  
 10 have to give me an avenue by which I recuse.  
 11 I cannot fulfill my responsibilities to the  
 12 Code of Judicial Conduct and handle this  
 13 proceeding.

14 CHAIRMAN BABCOCK: Well, the way  
 15 these rules are now, as I understand it, the  
 16 silence gives you that right to self-recuse,  
 17 so that problem is taken care of. The issue  
 18 that Judge Rhea first raised is in the  
 19 circumstance where there is either  
 20 self-recusal or there has been a demand to  
 21 recuse and a denial. How do you comply with  
 22 the legislative mandate of 48 hours and  
 23 procedurally get that recusal issue decided?

24 HON. SARAH B. DUNCAN: But I don't  
 25 understand why it's limited to self-recusal.

1 If a judge is disqualified under the  
 2 Constitution or if there is a mandatory  
 3 recusal under the Code of Judicial Conduct, I  
 4 don't know how we can have a proceeding by  
 5 which that can't be raised.

6 CHAIRMAN BABCOCK: Well, and I think  
 7 the rule as written right now does not  
 8 preclude that from being raised. Is that  
 9 right?

10 HON. ANN CRAWFORD McCLURE: That was  
 11 one reason we did it that way, because every  
 12 judge on the committee -- Judge Medina  
 13 certainly had some concerns about that. We  
 14 are in a position where we have to allow  
 15 that. But if we don't have a procedure to  
 16 implement it within the time constraints --

17 CHAIRMAN BABCOCK: -- that's the  
 18 problem. Richard Orsinger.

19 MR. ORSINGER: It seems to me that  
 20 the debate here is not whether there will be a  
 21 procedure, but who will write it. Either this  
 22 committee writes it, or if this committee  
 23 doesn't write it, then the courts of appeals  
 24 and the Supreme Court are going to write it on  
 25 a case-by-case basis. But initially all of

1 the districts all over Texas are going to have  
 2 to have some kind of de facto policy. So  
 3 would we rather sit down and debate these  
 4 issues and come up with a procedure that's  
 5 streamlined and meets the timetable of the  
 6 Legislature, or do nothing and then turn it  
 7 over to the local judges or the courts of  
 8 appeals and the Supreme Court to do it over a  
 9 period of time?

10 CHAIRMAN BABCOCK: Judge Medina.

11 HON. SAMUEL A. MEDINA: That's  
 12 exactly part of what we discussed. I think  
 13 the reason it's silent is because we know we  
 14 have a 48-hour time limit. Surely our local  
 15 administrative judges and others would come  
 16 together and say, "If this happens and there  
 17 is recusal, what do we have in place?" And if  
 18 it's done by local rule, it's got to be passed  
 19 on by the Supreme Court anyway, saying, okay,  
 20 we want some type of uniformity across the  
 21 state.

22 So if you handle it by local rule, you've  
 23 got some things the Supreme Court can either  
 24 okay or not okay. And that's another reason  
 25 it's silent. It's hard for me to tell



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1 Houston, Harris County, "Here is how you will  
2 do it."  
3 HON. F. SCOTT McCOWN: May I make a  
4 complete proposal now?  
5 CHAIRMAN BABCOCK: As opposed to an  
6 incomplete proposal?  
7 HON. F. SCOTT McCOWN: I propose  
8 that we add a paragraph that says, "In the  
9 event a judge recuses, the application shall  
10 be referred immediately pursuant to the local  
11 rules or by order of the local administrative  
12 judge to another judge." That preserves the  
13 locality working out how they want to handle  
14 it.  
15 Second sentence: "In the event a judge is  
16 asked to recuse and refuses, the minor can  
17 make an application to another judge pursuant  
18 to the local rules or assigned by order of the  
19 local administrative judge, who shall review  
20 the question of recusal, and if the second  
21 judge determines that the first judge should  
22 have recused, shall rehear the application."  
23 Right now, in the recusal rules, if I'm  
24 asked to recuse and time is of the essence, I  
25 don't have to recuse. I mean, if I determine

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1 that I shouldn't recuse, I don't have to  
2 recuse. I can go ahead and decide the  
3 matter. So this would be consistent with what  
4 the rule of procedure is now. If I'm asked to  
5 recuse and I refuse to recuse, I decide the  
6 application. If I grant it, there's no  
7 further proceedings. If I deny it, the minor  
8 then, pursuant to the local rule or by order  
9 of the local administrative judge, can go to a  
10 second judge who would review the propriety of  
11 my decision. If the second judge decides that  
12 I should have recused, then the second judge  
13 rehears the application. If the second judge  
14 decides that I shouldn't have recused, the  
15 application stands, the order of the first  
16 judge stands, and the minor can take an  
17 appeal.  
18 CHAIRMAN BABCOCK: How long is all  
19 this going to take?  
20 HON. F. SCOTT McCOWN: It shouldn't  
21 take more than 48 hours.  
22 CHAIRMAN BABCOCK: How long does  
23 your proposal allow?  
24 HON. F. SCOTT McCOWN: It says  
25 immediately. I mean, I'm assuming that we're

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1 only going to have one hearing on these, that  
2 they're going to be at the courthouse, and  
3 that they're going to go immediately from the  
4 denial to wherever the local rule refers them  
5 or wherever the administrative judge sends  
6 them.  
7 I admit that there may be some counties  
8 that lack the judge power to implement this,  
9 but we can't fix that problem. There's no  
10 rule you can write. But what I would say to  
11 you is that these applications aren't going to  
12 come up in those counties very often. And at  
13 least this rule would give everybody guidance  
14 on what their local rule or their local  
15 administrative council of judges need to  
16 decide how we're going to handle this,  
17 recognizes that there may be instances of  
18 recusal, and gives a general outline for how  
19 you resolve it.  
20 CHAIRMAN BABCOCK: Buddy Low, then  
21 Judge Brister, then Judge Medina.  
22 MR. LOW: One of the things I  
23 understand that Judge Underwood is going to --  
24 like in Beaumont, we've got three retired  
25 judges. He's going to refer all that on a

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1 rotating basis. Now, if I'm not mistaken,  
2 there's something that gives you one shot at  
3 where you assign a judge aside from your  
4 regular judge. So was that discussed in  
5 reference to -- I'm raising the question  
6 rather than an answer. I have a lot of  
7 questions and not too many answers. Was that  
8 discussed in reference to why, with the time  
9 element involved, that we don't address  
10 recusal? Or was that discussed at all, that  
11 they might assign not the regular judge but  
12 just some visiting judge?  
13 HON. ANN CRAWFORD McCLURE: We did  
14 discuss it to the extent that a number of  
15 local administrative regions have already  
16 decided that's how they're going to handle  
17 it. Houston wants to do it that way. I've  
18 heard some discussion from other judges as  
19 well. Fort Worth is talking about it. So if  
20 we're going to allow that type of strike, then  
21 I think if we're going to involve a rule that  
22 addresses the recusal issue, you're going to  
23 have to incorporate the rule that addresses  
24 that issue.  
25 MR. LOW: But wouldn't they

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1 automatically -- if we don't address it, it's  
 2 not inconsistent, then they would be granted  
 3 that strike, would they not, unless we take it  
 4 away?  
 5 HON. ANN CRAWFORD McCLURE: That's  
 6 my interpretation. I don't know whether  
 7 everybody would --  
 8 MR. LOW: And so therefore, by not  
 9 addressing it, I mean, we either say, okay,  
 10 there is none, or we've written it into it.  
 11 And that's one of the things that we might  
 12 want to avoid.  
 13 CHAIRMAN BABCOCK: Judge Brister.  
 14 HON. SCOTT A. BRISTER: Without  
 15 getting into the visiting judge issue, I'm  
 16 assuming recusal only arises because the  
 17 applicant has a lawyer. You would not  
 18 assume -- the judge might do it, but the judge  
 19 would just do that because they were going to  
 20 recuse personally. But the applicant is not  
 21 going to know what the word "recusal" means.  
 22 So they have got a lawyer. It seems to me  
 23 what all lawyers would do in that situation is  
 24 you nonsuit when the judge declines to recuse,  
 25 and you file it again. There's no argument

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1 that that's res judicata. You haven't gotten  
 2 to the merits. So I'm not sure we need to --  
 3 I'm tending to think we may not need to  
 4 address it. The lawyer who doesn't like this  
 5 particular judge will know what to do, which  
 6 is, you nonsuit when recusal is declined and  
 7 you file it in front of another judge.  
 8 Now, that works fine with the "I happen  
 9 to know this person," unless -- in most big  
 10 urban counties, all of the judges are not  
 11 going to know this person and you're  
 12 eventually going to get to somebody who is  
 13 not. In a small county, if everybody knows  
 14 the applicant, that's just going to be a  
 15 problem and you may have to drive to another  
 16 county. But again, it's only going to arise,  
 17 I would think, when you've got an applicant's  
 18 attorney there who can figure out how to do  
 19 that.  
 20 CHAIRMAN BABCOCK: Judge Medina.  
 21 HON. SAMUEL A. MEDINA: I tend to  
 22 agree. That's what I wanted to address. You  
 23 start addressing recusal and you start making  
 24 a rule and then you get another rule, and  
 25 perhaps if we're going to do that, then you

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1 have to add, just so we don't confuse them,  
 2 let's limit that to 48 hours, although they  
 3 know it's 48 hours, so let's add that to it,  
 4 and you have to link it somehow.  
 5 I mean, honestly, I think the practical  
 6 effect of what's going to happen is each one  
 7 of these -- in Lubbock, for example, we've  
 8 been talking about having visiting judges take  
 9 care of a lot of this. We've talked about the  
 10 issue of, well, that helps us with the recusal  
 11 issue somewhat. But what if one of the  
 12 visiting judges decides, "Well, I can't take  
 13 it"? Well, the administrative judge says, "I  
 14 want you to take this case." And he says,  
 15 "No, I can't take it." Well, he's going to  
 16 find a judge that will come in and take it.  
 17 Then what's the basis for someone saying,  
 18 "Well, I don't want this judge"? Well,  
 19 they're not going to know that he  
 20 traditionally denies or traditionally doesn't  
 21 deny those, because it's not published. So  
 22 how are they going to know? I don't know.  
 23 They better not, because they've violated  
 24 confidentiality, then, according to this law.  
 25 HON. F. SCOTT McCOWN: Well, the

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1 providers will tell them.  
 2 CHAIRMAN BABCOCK: Justice McClure,  
 3 I sense that Judge McCown has a specific,  
 4 concrete proposal that our full committee can  
 5 vote on or not.  
 6 HON. F. SCOTT McCOWN: Well, there  
 7 is some wisdom to what Judge Brister says  
 8 about nonsuit.  
 9 CHAIRMAN BABCOCK: Do you want to  
 10 withdraw your proposal?  
 11 HON. F. SCOTT McCOWN: Well, I just  
 12 don't know, though, if the -- I think he's  
 13 right technically, but I'm not sure that it  
 14 works practically.  
 15 MR. EDWARDS: The first thing the  
 16 court is supposed to do after it gets one of  
 17 these applications -- actually it's the second  
 18 thing. After he appoints an ad litem, it says  
 19 the second thing he does is appoint an  
 20 attorney for the minor. So the minor is going  
 21 to have an attorney in every case. So you're  
 22 not dealing with somebody that isn't going to  
 23 know. So from a pragmatic standpoint, it also  
 24 gives the minor the right to postpone the  
 25 hearing as long as she wants to forever. And

1 so if there's a recusal, if they don't like  
2 the judge and I'm the lawyer, I say postpone  
3 the hearing. There's no res judicata issue.  
4 I don't even have to nonsuit. I go to the  
5 next county or I go to the county court, if  
6 I'd been in the district court.

7 Every county, as I understand these  
8 rules, has at least two people qualified to  
9 hear these motions or applications. One of  
10 them is the county judge, either statutory or  
11 whatever, and the other is the district  
12 judge. There's going to be at least two  
13 people in every county. And if there's people  
14 with no preference on that sort of thing, they  
15 can pick and choose district court or county  
16 court in these small counties and pick their  
17 people or go to another county.

18 CHAIRMAN BABCOCK: Bill Dorsaneo and  
19 then Judge Rhea.

20 PROFESSOR DORSANEO: Judge McCown's  
21 proposal sounded like it was headed in the  
22 right direction to me, particularly the first  
23 sentence, because that would be in play  
24 regardless of whether there was -- the  
25 self-recusal sentence -- that would be in play

1 started, about the political pressure of some  
2 of these decisions, and that's definitely  
3 involved in it. It may be that the concern  
4 that I originally raised and much of what we  
5 talked about may be solved with 1.2, Expedited  
6 Proceedings, if we could view that as a rule  
7 that requires expedited handling of all  
8 matters including what is still in the recusal  
9 rule.

10 But just as a thought, I quickly drafted  
11 a second sentence to that rule that may or may  
12 not add value to what's already there. It  
13 says something like this: Time periods  
14 otherwise established by the TRCP may be  
15 shortened to comply with this paragraph and  
16 these rules.

17 MR. EDWARDS: May or must?

18 HON. BILL RHEA: Well, I think  
19 there's discretion that's necessary there.

20 MR. EDWARDS: You lose your time  
21 frame if you make it discretionary. And if it  
22 doesn't happen within 48 hours, it's over  
23 with.

24 HON. F. SCOTT MCCOWN: On the  
25 recusal, I think that I've decided, as I've

1 regardless of the attorney circumstances. I'm  
2 perfectly willing to follow the district  
3 judges on these issues of recusal because  
4 they're the ones that are going to have to  
5 work it out. I'd rather see it in the main  
6 rule than just be the subject of local  
7 practice, if that's possible.

8 I'm not sure the district judges would  
9 have the same point of view as the rest of us  
10 on the issue of self-recusal, and I wonder if  
11 that isn't really perhaps the larger problem.  
12 If it isn't, you could just say that it isn't  
13 going to be a problem. But I could see that  
14 somebody might not like to be doing this and  
15 might like to avoid this job and that that's  
16 perhaps the larger problem in this whole  
17 area.

18 I guess if I knew the parents or the  
19 person, I would be inclined to not want to be  
20 involved, but that may not be so apparent as a  
21 basis for recusal, an appropriate basis for  
22 recusal, and maybe that ought to be  
23 addressed. What do you think about that?

24 HON. BILL RHEA: That's a real  
25 issue. Chip asked me that before we got

1 thought about it, that Judge Brister is right  
2 about recusals that are denied. Either you  
3 withdraw your application and go somewhere  
4 else, or you take an appeal. But what if we  
5 kept the first sentence, and on this problem  
6 of striking judges, just say if a judge is --  
7 is it stricken or struck? If a judge is  
8 struck or recuses, the application shall be  
9 referred immediately pursuant to the local  
10 rules or by order of the local administrative  
11 judge to another judge, just to indicate that  
12 we thought about this problem of recusal or  
13 being struck; that it may happen, and that the  
14 local rules or the local administrative judge  
15 need to be geared up to move on it if it  
16 does.

17 HON. SAMUEL A. MEDINA: That's  
18 basically a commentary on what we would have  
19 to do anyway locally. I don't have any  
20 problem with that.

21 HON. F. SCOTT MCCOWN: And then just  
22 leave it to the localities to work it out.  
23 And in the event a judge refuses to recuse,  
24 you either withdraw your application and go  
25 somewhere else or take your appeal.

1 CHAIRMAN BABCOCK: Do you want to  
 2 say the language again, Judge?  
 3 HON. F. SCOTT McCOWN: "If a judge  
 4 is struck or recuses, the application shall be  
 5 referred immediately pursuant to the local  
 6 rules or by order of the local administrative  
 7 judge to another judge," which merely  
 8 indicates that we've thought about it and they  
 9 need to think about it.  
 10 MR. BABCOCK: What do you think  
 11 about that, Judge?  
 12 HON. ANN CRAWFORD McCLURE: I  
 13 think if we're going to address it all, it has  
 14 to be left to the discretion of the local  
 15 judges. Part of the whole original debate was  
 16 to what extent were we going to allow those  
 17 types of decisions to be made on a local  
 18 basis, and I can accept that.  
 19 CHAIRMAN BABCOCK: Is everybody  
 20 happy with Judge McCown's suggestion? And you  
 21 would add that as a sentence to 1.1, Judge?  
 22 HON. F. SCOTT McCOWN: Either 1.1 or  
 23 1.2.  
 24 HON. ANN CRAWFORD McCLURE: 1.2.  
 25 CHAIRMAN BABCOCK: Judge McClure

1 like a voluntary recusal.  
 2 HON. F. SCOTT McCOWN: Well, at  
 3 least it ought to be either. Either a motion  
 4 was granted or he voluntarily recused. It  
 5 would cover both.  
 6 CHAIRMAN BABCOCK: Right. I agree  
 7 with Justice Duncan. I don't see how you can  
 8 preclude a judge from self-recusal.  
 9 MS. CORTELL: Now, does that cover a  
 10 motion to recuse being granted?  
 11 HON. F. SCOTT McCOWN: Yes, if you  
 12 recuse.  
 13 MS. CORTELL: Okay. That's clear to  
 14 you?  
 15 HON. F. SCOTT McCOWN: Yes.  
 16 CHAIRMAN BABCOCK: Alex Albright.  
 17 PROFESSOR ALBRIGHT: What it doesn't  
 18 cover is the denial of a recusal, which is  
 19 probably more problematic.  
 20 HON. F. SCOTT McCOWN: Well, but  
 21 that's what I'm saying I was convinced by  
 22 Judge Brister. If there's a denial of your  
 23 recusal, they have a lawyer, they're either  
 24 going to immediately withdraw their  
 25 application and go somewhere else or they're

1 says 1.2.  
 2 HON. F. SCOTT McCOWN: Yeah, 1.2.  
 3 That would be probably the better place for  
 4 it.  
 5 CHAIRMAN BABCOCK: Okay. Do we have  
 6 Judge McCown's language? Bob, do you have  
 7 that?  
 8 MR. PEMBERTON: I was sort of  
 9 relying on the reporter.  
 10 CHAIRMAN BABCOCK: Okay. The court  
 11 reporter has got it, so we'll vote. Is  
 12 everybody in favor of that? Is anybody  
 13 against it? Okay. That will be --  
 14 HON. SAMUEL A. MEDINA: Can you  
 15 restate that one more time?  
 16 HON. F. SCOTT McCOWN: If a judge is  
 17 struck or recuses, the application shall be  
 18 referred immediately pursuant to the local  
 19 rules or by order of the local administrative  
 20 judge to another judge.  
 21 CHAIRMAN BABCOCK: That will be  
 22 added to 1.2.  
 23 MS. CORTELL: Can I ask one  
 24 question? Does that contemplate a motion for  
 25 either being granted? I mean, that sounds

1 going to proceed and take their chances and  
 2 hope that they've misestimated the judge and  
 3 it's granted. And if they go that route and  
 4 it's denied, then they have their appeal.  
 5 HON. SAMUEL A. MEDINA: Or they can  
 6 ask, as you said, for an extension of time.  
 7 CHAIRMAN BABCOCK: Judge Brown.  
 8 HON. HARVEY G. BROWN, JR.: I was  
 9 just going to say that I think that's probably  
 10 true for the good lawyers, but there will be  
 11 lawyers who won't think about the nonsuit  
 12 issue and they will get a new lawyer to look  
 13 at the appeal and say, well, the judge didn't  
 14 refer to the local administrative judge under  
 15 Rule 18a(e) or (d), something like that, so  
 16 they missed the procedure, so we've got an  
 17 automatic reversal on that point. So if  
 18 that's what we're going say, is they have the  
 19 appeal or nonsuit, maybe we should say that  
 20 and let the practitioners know and let  
 21 everybody know what the rules are ahead of  
 22 time instead of guessing.  
 23 CHAIRMAN BABCOCK: Judge Peeples.  
 24 HON. DAVID PEEPLES: How does this  
 25 work in those counties which say once the

1 plaintiff has filed in a court and doesn't  
2 like it and you nonsuit, you can't go to  
3 another court? Aren't there some local rules  
4 that say that like in Houston or Dallas?

5 HON. SCOTT A. BRISTER: Yeah. But  
6 that doesn't work if you file it in county  
7 court as opposed to district court, probate  
8 court as opposed to either of the  
9 aforementioned.

10 MR. EDWARDS: Or another county.

11 HON. SCOTT A. BRISTER: Or another  
12 county.

13 CHAIRMAN BABCOCK: Buddy Low.

14 MR. LOW: Is there no requirement  
15 that you file an affidavit saying, "I'm not  
16 judge shopping. I haven't filed this before,"  
17 when you file it? There are some rules that  
18 require that.

19 HON. ANN CRAWFORD McCLURE: I  
20 couldn't hear your question, sorry.

21 MR. LOW: Is there no requirement,  
22 when I file, that I have to give an affidavit  
23 that I have not filed this in some other court  
24 prior to then?

25 HON. ANN CRAWFORD McCLURE: There is

1 have questions as a result of that. But if  
2 the application is filed before an attorney is  
3 appointed, so no attorney has done the forum  
4 shopping that we're talking about, and there  
5 are procedures in some courts that would then  
6 restrict forum shopping, that's a problem.

7 HON. SAMUEL A. MEDINA: But you see,  
8 the problem that we have is that our local  
9 rules can't contravene what the law is. If  
10 this law says they have a right to file in  
11 different courts, they have a right to file in  
12 different courts. Our local rules are our  
13 local rules, but this is the law.

14 MR. YELENOSKY: As long as that's  
15 understood. I'm not sure, based on the  
16 questions I think perhaps from Gilbert, that  
17 it may be interpreted that, if you file in a  
18 court, because of the local rules, that you've  
19 already filed there and you can't nonsuit and  
20 go elsewhere. Maybe we need to make it clear  
21 that you can.

22 CHAIRMAN BABCOCK: Well, Judge  
23 McCown has got some language on the table, and  
24 the question is whether or not -- he's  
25 constantly rethinking it.

1 a question on the application form to that  
2 effect, and the application is signed under  
3 oath by the minor.

4 MR. LOW: Okay. Then that's all you  
5 can do. You can't force somebody to tell the  
6 truth.

7 CHAIRMAN BABCOCK: Is there a -- I'm  
8 sorry, Judge Medina.

9 HON. SAMUEL A. MEDINA: As far as  
10 the concern you have, Judge, remember that the  
11 judges are going to appoint the attorney. If  
12 they've hired their own, that's the only place  
13 that you would have a problem, is when they  
14 hire one. Because typically a judge is going  
15 to have a pool of attorneys that they're going  
16 to appoint that hopefully would be well versed  
17 in this issue. Now, I see your concern if  
18 they hire their own, if the one they've hired  
19 has no idea.

20 CHAIRMAN BABCOCK: Steve.

21 MR. YELENOSKY: But as I read this,  
22 the application is filed before the attorney  
23 is appointed.

24 And there are some other points, like  
25 when we get to a point in Section 2, where I

1 HON. F. SCOTT McCOWN: Well, Judge  
2 Brown has persuaded me that Judge Brister was  
3 wrong.

4 CHAIRMAN BABCOCK: Would you Harris  
5 County guys get together.

6 HON. F. SCOTT McCOWN: Because what  
7 happens if I'm a judge out in the sticks who  
8 hasn't been privy to all this high thinking  
9 done by these committees, and somebody comes  
10 in and they move to recuse me and I deny it?  
11 Well, then do I send it to the administrative  
12 judge and stop proceedings like I would under  
13 a regular recusal motion? Do we need to give  
14 them -- like Judge Brown is saying -- do we  
15 need give them some direction?

16 HON. SCOTT A. BRISTER: Anybody  
17 savvy enough, any attorney savvy enough to  
18 know about how to file a motion to recuse and  
19 that this judge is not going to be favorable  
20 to this issue is savvy enough to know I can  
21 nonsuit and file somewhere else. That's the  
22 thing that's first in this statute. You can  
23 file it anywhere. There's no restriction. If  
24 you can't figure that out, you shouldn't be  
25 representing people in these kinds of cases.

1 MS. SWEENEY: But you're talking  
 2 about requiring that they perjure themselves  
 3 by saying, "I haven't previously asked."  
 4 HON. SCOTT A. BRISTER: I don't see  
 5 that. That's not on that particular form  
 6 anywhere.  
 7 MS. SWEENEY: Well, I saw it. Where  
 8 is that? I've lost it now.  
 9 HON. ANN CRAWFORD McCLURE: Well,  
 10 that's what Bob was just talking to me about.  
 11 That was deleted off of the last draft without  
 12 the blessing of the subcommittee. It was  
 13 inadvertent.  
 14 MR. PEMBERTON: A misunderstanding  
 15 of the will of the subcommittee. There should  
 16 be a blank on the application asking the minor  
 17 to say if she's filed somewhere else  
 18 previously.  
 19 CHAIRMAN BABCOCK: Judge Schneider.  
 20 HON. MICHAEL A. SCHNEIDER: Isn't  
 21 there a practical issue here, though, if you  
 22 dismiss in one case where an attorney has been  
 23 appointed and you go to another court?  
 24 There's nothing that says that that attorney  
 25 is appointed forever. So really a person is

1 contemplate the fact that you can't get a  
 2 judge to hear it, particularly in West Texas,  
 3 which I'm pretty familiar with. So there's no  
 4 requirement that there be a hearing. I think  
 5 the avenue of relief is the minor has the  
 6 opportunity to request, and the forms include  
 7 a request, that the hearing not be commenced  
 8 until within 48 hours after a date that she  
 9 either specifies or her attorney specifies.  
 10 HON. F. SCOTT McCOWN: I've got a  
 11 motion now.  
 12 HON. ANN CRAWFORD McCLURE: Did you  
 13 withdraw your last one?  
 14 CHAIRMAN BABCOCK: Yes.  
 15 HON. F. SCOTT McCOWN: Well, I'm  
 16 keeping the first sentence, but I'm melding  
 17 Brister and Brown here.  
 18 If a judge is asked to recuse and  
 19 refuses, the judge shall promptly decide the  
 20 application, unless it is voluntarily  
 21 dismissed (hint, hint). If the application is  
 22 denied, a minor can make a second application  
 23 to another judge assigned pursuant to the  
 24 local rules, or by order of the local  
 25 administrative judge, who shall review the

1 going to be without counsel when they go to  
 2 another court.  
 3 CHAIRMAN BABCOCK: Possibly. Bill  
 4 Dorsaneo.  
 5 PROFESSOR DORSANEO: Well, Judge  
 6 Brister is assuming that you're going to have  
 7 an absolute right to nonsuit in this context,  
 8 and I'm not completely sure that's right.  
 9 There are some cases that provide judicial  
 10 discretion to disallow a nonsuit, and I would  
 11 worry about that in this context.  
 12 CHAIRMAN BABCOCK: Richard.  
 13 MR. ORSINGER: I have a question  
 14 about if we don't provide for a ruling on the  
 15 recusal within a 48-hour period. Does the  
 16 default clause that the failure to react  
 17 within 48 hours is deemed granting, does that  
 18 still apply? And as a practical matter, if  
 19 there's a recusal that hasn't been resolved in  
 20 48 hours, do we default the grant? Or do you  
 21 have to have a hearing and no ruling before  
 22 the default clause goes into effect?  
 23 HON. ANN CRAWFORD McCLURE: There's  
 24 no requirement that there be a hearing  
 25 conducted, because the default provisions also

1 question of recusal and, if the second judge  
 2 determines the first judge should have  
 3 recused, shall rehear the application. Third  
 4 sentence: This rule controls instead of Texas  
 5 Rule of Civil Procedure 18a.  
 6 And I would move that we add that either  
 7 as a separate paragraph or to the "Expedited"  
 8 paragraph.  
 9 CHAIRMAN BABCOCK: Judge Peeples.  
 10 HON. DAVID PEEPLES: I want to  
 11 suggest something different. I don't have  
 12 language, and what I want to suggest is, I  
 13 think there are some principles that we can  
 14 agree on, and then either have the committee  
 15 draft some language, in other words, agree on  
 16 principles and have them draft, or move on to  
 17 something else and have some people here draft  
 18 some language.  
 19 The principles I think we can agree on  
 20 are, number one, you ought to have the right  
 21 to self-recuse. Number two, if the motion to  
 22 recuse is granted, no problem. If it's  
 23 denied, I think the burden ought to be on the  
 24 judge who denies it, that the 48 hours ought  
 25 to keep ticking, and the judge who denies a

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1 motion to recuse ought to have the burden to  
2 get someone else to hear it. And if it  
3 doesn't get done in 48 hours, it's deemed  
4 permitted.

5 HON. F. SCOTT McCOWN: You want the  
6 tainted judge to be in charge of recruiting  
7 his replacement?

8 HON. DAVID PEEPLES: Well, he ought  
9 to have to go through channels, and we know  
10 what those channels are. And if he wants to  
11 get it done within 48 hours, he ought to know  
12 how to do it. And if he can't get it done in  
13 48 hours, it's deemed permitted.

14 CHAIRMAN BABCOCK: Does anybody  
15 disagree with those principles? All right. I  
16 think we're at --

17 MR. LATTING: I disagree with the  
18 principle of having the judge that refused to  
19 recuse himself be in charge of the process of  
20 carrying the process forward.

21 CHAIRMAN BABCOCK: Well, I think  
22 Judge Peeples amended that to say he's got to  
23 go through the normal channels.

24 HON. DAVID PEEPLES: Well, yeah. If  
25 he doesn't pick someone, he's got to go to the

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1 presiding judge and get it done.

2 MR. LATTING: As opposed to the  
3 lawyer?

4 HON. DAVID PEEPLES: And if the guy  
5 is out of town and he can't get it done, the  
6 clock continues to tick, and permission is  
7 granted within 48 hours.

8 CHAIRMAN BABCOCK: Okay. I think  
9 we're at a crossroads here, and I think Judge  
10 Peeples has got an excellent suggestion. The  
11 crossroads we're at -- and Judge Medina, I  
12 said this before you and some others came into  
13 the room. Because of the time constraints  
14 that the Legislature has imposed upon us, we  
15 are considering, this committee is considering  
16 this under a slightly different standard than  
17 is our normal process to take a year to decide  
18 a rule. So we are -- hang on for a second,  
19 Judge. We are going to -- if there's a  
20 suggestion made by this committee, Judge  
21 McClure is going to either accept it or not on  
22 behalf of the subcommittee. If she doesn't  
23 accept it, then we're going to try to put  
24 together what we think, a majority of this  
25 committee thinks the Supreme Court should do,

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1 and submit that to them separately.

2 So my question here is -- well, my  
3 proposal is to get an expression from Judge  
4 McClure as to whether or not she would like to  
5 accept language along the McCOWN, Brister,  
6 Brown, Peeples line or whether or not Justice  
7 McClure believes that the silence on the  
8 recusal issue as in the rules that we've  
9 proposed is preferable. If she believes that  
10 the silence is the preferable way to go, then  
11 we will work either over lunch or at some  
12 other time with a small group, and I know the  
13 four people that are going to do it, to come  
14 up with some language that we can propose to  
15 the Supreme Court. And if Justice McClure  
16 says that she wants to incorporate our  
17 language, then we'll still do that and just  
18 put it into the rule. Judge.

19 HON. F. SCOTT McCOWN: One problem  
20 with Judge Peeples' approach is that, thinking  
21 of it from the point of view of the doctor,  
22 the minor has come and asked to skip parental  
23 notification. The minor has moved to recuse  
24 the judge. The judge has denied recusal. The  
25 judge has denied the right to skip parental

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1 notification, and the judge says, "I'm not  
2 doing anything else."

3 And now I'm the doctor. 48 hours pass,  
4 and I have a lawyer telling me, with no piece  
5 of paper, that because the judge didn't get  
6 another judge to review the recusal, that I  
7 can perform an abortion even though I've got  
8 an order from some judge denying that?

9 CHAIRMAN BABCOCK: I think that's  
10 taken care of in the rules, isn't it? There's  
11 a certificate from the clerk, right?

12 HON. F. SCOTT McCOWN: But you don't  
13 get that under Judge Peeples' situation. He's  
14 got denial of recusal, denial of permission.

15 HON. ANN CRAWFORD McCLURE: I didn't  
16 understand that to be the principle.

17 HON. DAVID PEEPLES: Well, with  
18 denial of recusal, under the present law, the  
19 judge has no authority to do anything else.

20 HON. F. SCOTT McCOWN: You would  
21 have him put it all on hold?

22 HON. DAVID PEEPLES: Yeah. And the  
23 clock continues to tick.

24 HON. F. SCOTT McCOWN: Unless he  
25 gets it heard by another judge.

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1 HON. DAVID PEEPLES: That's right.  
 2 HON. F. SCOTT McCOWN: Okay. All  
 3 right.  
 4 HON. HARVEY G. BROWN, JR.: Not to  
 5 overly complicate it, but the rule does have  
 6 an emergency provision in it. The judge can  
 7 deny a motion to recuse and he still acts for,  
 8 quote, good cause, which he has to state in  
 9 the record. So the judge could, under  
 10 Rule 18a, still act if he thought there was,  
 11 quote, good cause.  
 12 CHAIRMAN BABCOCK: Okay. Justice  
 13 McClure, what's your will as to whether or not  
 14 to retain the silence regarding recusal in the  
 15 rule or whether to send Judge Peeples and  
 16 Judge McCown and others off to draft?  
 17 HON. ANN CRAWFORD McCLURE: Well, I  
 18 think you can understand why our committee had  
 19 trouble with this issue too. I am not opposed  
 20 to the principles as Judge Peeples has spelled  
 21 them out. My position, and I can tell you the  
 22 position of the subcommittee would be to large  
 23 extent that we believe it imperative that  
 24 local rules address these issues and to defer  
 25 to the local jurisdictions to do that. And if

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1 that's the concept, that he or she go through  
 2 local channels in order to secure a  
 3 replacement judge to hear the proceedings, I  
 4 can agree with that.  
 5 CHAIRMAN BABCOCK: Well, do we need  
 6 more language?  
 7 HON. ANN CRAWFORD McCLURE: Why  
 8 don't you let us work on some language over  
 9 lunch. I've got several of my subcommitte  
 10 members that are here today. And let us take  
 11 a run at it, and if you like the direction  
 12 we're going, fine. If not, you all can have  
 13 at it.  
 14 CHAIRMAN BABCOCK: Okay. We're  
 15 going to take our first vote, because the full  
 16 committee needs to have an expression on  
 17 this. The question is going to be, should we  
 18 retain the silence regarding recusal in the  
 19 rule or not? And if not, then we will  
 20 continue this effort of draftsmanship. So  
 21 those in favor of retaining the rules as they  
 22 are, silent as to recusal, raise your hand.  
 23 Two votes.  
 24 Those against. Just about everybody.  
 25 So we will over lunch try to come up with

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1 some language on that. Is there any other  
 2 comment to -- yes, Judge Brown.  
 3 HON. HARVEY G. BROWN, JR.: To 1.1?  
 4 CHAIRMAN BABCOCK: Yes.  
 5 HON. HARVEY G. BROWN, JR.: Yes. I  
 6 want to go back to this issue about the Rules  
 7 of Evidence briefly. Scott says that it's not  
 8 an adversarial proceeding; therefore,  
 9 affidavits would be admissible. But it's  
 10 conceivable that the attorney ad litem and the  
 11 guardian ad litem might have different views  
 12 on whether the minor should notify the  
 13 parent. Therefore, it could be an adversarial  
 14 proceeding; therefore, there may be objections  
 15 to affidavits, which I would feel somewhat  
 16 compelled to follow the Rules of Evidence and  
 17 to sustain as the rules are currently  
 18 promulgated.  
 19 CHAIRMAN BABCOCK: Judge McClure or  
 20 Judge Medina, do you want to respond to that?  
 21 HON. ANN CRAWFORD McCLURE: Go  
 22 ahead.  
 23 HON. SAMUEL A. MEDINA: We did  
 24 discuss that very issue. The attorney is to  
 25 represent his client or her client, and the

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1 guardian may not be in agreement. That's why  
 2 we did it the way it is exactly.  
 3 HON. HARVEY G. BROWN, JR.: But it  
 4 seems like to me we should give the judge  
 5 discretion.  
 6 CHAIRMAN BABCOCK: Judge McCown.  
 7 HON. F. SCOTT McCOWN: Well,  
 8 normally a guardian is not a party and  
 9 wouldn't have the right to object to  
 10 evidence. A guardian could certainly express  
 11 an opinion through testimony that was  
 12 different than what the minor's position was.  
 13 But in regular family law, a guardian wouldn't  
 14 have an independent ability to be a party and  
 15 make evidentiary objections, I wouldn't  
 16 think. There may be disagreement on that.  
 17 CHAIRMAN BABCOCK: Richard Orsinger.  
 18 MR. ORSINGER: If the guardian is an  
 19 attorney, I think the Family Code permits him  
 20 to examine witnesses, but doesn't permit him  
 21 to strike on the jury and things of that  
 22 nature. If the guardian is not an attorney,  
 23 the Family Code doesn't say what they can and  
 24 can't do really.  
 25 HON. F. SCOTT McCOWN: An attorney



1 for whom?  
 2 MR. ORSINGER: A guardian ad litem  
 3 who is an attorney under the Family Code is  
 4 specifically given the right to examine  
 5 witnesses.  
 6 CHAIRMAN BABCOCK: Can he make  
 7 objections to evidence?  
 8 MR. ORSINGER: I think so. If you  
 9 can -- I mean, who knows. But if you can  
 10 participate in examinations, could you not  
 11 also object to questions that are  
 12 impermissible?  
 13 CHAIRMAN BABCOCK: Nina.  
 14 MS. CORTELL: Could we back up? I  
 15 have kind of a global question. I have tried  
 16 to envision what the hearing looks like from  
 17 an evidentiary standpoint. What is it that  
 18 the subcommittee thought that would look  
 19 like?  
 20 HON. ANN CRAWFORD McCLURE: It's an  
 21 in chambers discussion generally with the  
 22 judge in a position to ask questions of the  
 23 minor. We have devised sort of a checklist of  
 24 ideas that the guardian ad litem or the  
 25 attorney ad litem should produce in terms of

1 48 hours, that was our concept.  
 2 CHAIRMAN BABCOCK: Judge Brown, is  
 3 your problem solved by the amendment we've  
 4 already made to 1.1, talking about how the  
 5 rules are going to be construed so as to  
 6 comply with the general framework or policy of  
 7 the Parental Notification Rules? Would that  
 8 give you in your mind discretion to admit an  
 9 affidavit? I mean, hearsay is sometimes  
 10 admissible.  
 11 HON. HARVEY G. BROWN, JR.: At least  
 12 it will give an argument, I guess.  
 13 CHAIRMAN BABCOCK: Mr. Tipps.  
 14 MR. TIPPS: What about the  
 15 possibility of incorporating language like  
 16 that which you find in arbitration rules with  
 17 regard to the Rules of Evidence? I don't have  
 18 any in mind, but those standard rules talk  
 19 about arbitrators using some discretion to  
 20 consider evidence. That might provide the  
 21 judge with the kind of discretion that he  
 22 needs. For example, if you're talking about  
 23 medical records, well, under the evidence  
 24 rules, you have to get a deposition on written  
 25 questions and prove up medical records, and

1 background information. It is to be as  
 2 informal and nonintimidating as possible, and  
 3 that was the conception. Everyone else is to  
 4 be excluded except those that are necessary to  
 5 participate. So it was not envisioned that it  
 6 would be in the courtroom with miscellaneous  
 7 bystanders participating.  
 8 MS. CORTELL: And medical testimony  
 9 is something that is envisioned as well as the  
 10 report of the guardian ad litem?  
 11 HON. ANN CRAWFORD McCLURE: Well,  
 12 certainly it would be possible. We envisioned  
 13 and had a discussion about the guardian having  
 14 the opportunity to gather psychological  
 15 records or medical records. Certainly the  
 16 emotional health of the minor would be an  
 17 issue. Perhaps substance abuse problems,  
 18 emotional problems, would be something that  
 19 the trial judge would want to look at. Given  
 20 the time frames, we were uncertain as to  
 21 whether we would have live testimony, whether  
 22 it would be done through medical records, or  
 23 through testimony of the child herself. But  
 24 to the extent that we can gather all of that  
 25 information and produce it in chambers within

1 that's obviously not practicable.  
 2 CHAIRMAN BABCOCK: Yeah.  
 3 HON. ANN CRAWFORD McCLURE: Our  
 4 thinking was that it would provide a basis for  
 5 the guardian ad litem to make a recommendation  
 6 to the court based on those medical records,  
 7 which wouldn't necessarily meet the evidence  
 8 rules in order to have that before the judge.  
 9 CHAIRMAN BABCOCK: You could add a  
 10 sentence that said something like "Affidavit  
 11 testimony of witnesses other than the  
 12 applicant is admissible in the court's  
 13 discretion." That would solve your problem.  
 14 Bill Dorsaneo.  
 15 PROFESSOR DORSANEO: Well, I'm back  
 16 at the same point. What Rules of Civil  
 17 Procedure or Rules of Evidence do we need to  
 18 have applicable? We should approach it that  
 19 way. I think there will be an enormous number  
 20 of issues that could be raised concerning  
 21 inconsistency and incompatibility. And I'm  
 22 becoming persuaded that it would just be  
 23 better for this to just kind of operate on its  
 24 own basis and not be kind of in between.  
 25 CHAIRMAN BABCOCK: Has anybody else

1 got any other comments? Yes, Richard  
 2 Orsinger.  
 3 MR. ORSINGER: If you don't allow  
 4 medical evidence by affidavit, you can expect  
 5 no doctors are going to be able to participate  
 6 in this, because these are going to be  
 7 hurriedly scheduled, awaiting the appointment  
 8 of an ad litem, which may occur in 30 minutes  
 9 or may occur in half a day, and doctors are  
 10 going to be doing rounds in the morning and  
 11 everything else. I think if you don't have  
 12 affidavits from doctors, you're not going to  
 13 have medical testimony at all. And if you're  
 14 serious about evaluating the medical risks to  
 15 the mother, I think you ought to encourage  
 16 medical input. So I would be in favor of  
 17 allowing affidavits from doctors.  
 18 CHAIRMAN BABCOCK: That was Judge  
 19 Brown's point which kicked off this  
 20 discussion. All right. Justice McClure, what  
 21 do you feel about it?  
 22 HON. ANN CRAWFORD McCLURE: I think  
 23 the overriding concern from the standpoint of  
 24 the subcommittee was to not allow affidavit  
 25 testimony from the minor. There was some

1 permissible under the rules now?  
 2 MR. ORSINGER: I don't know.  
 3 CHAIRMAN BABCOCK: Can you do that  
 4 right now in a court hearing?  
 5 HON. SCOTT A. BRISTER: Yeah. The  
 6 rule says it doesn't matter where the notary  
 7 is. You don't have to be with the notary.  
 8 MR. ORSINGER: That's for a  
 9 deposition rule. This is trial testimony.  
 10 Can you do that in trial?  
 11 CHAIRMAN BABCOCK: I've had it done;  
 12 I don't know whether you can do it or not.  
 13 HON. ANN CRAWFORD McCLURE: Unless  
 14 there's an objection to it.  
 15 MR. TIPPS: Following up on  
 16 Professor Dorsaneo's question, the only part  
 17 of these other rules that I've heard mentioned  
 18 as being needed is the 30-day notice of appeal  
 19 rule, which quite frankly I can't imagine that  
 20 that's going to come into play very often,  
 21 because people are not going to wait 30 days.  
 22 So I wonder if the committee really believes  
 23 that we need to incorporate the other court  
 24 rules by reference at all, rather than just  
 25 letting this be a stand-alone set of rules.

1 discussion about should we permit telephone  
 2 hearings, should we provide for it to be just  
 3 on submission on the basis of the affidavits,  
 4 and we felt that it was extremely important  
 5 for the judge to have the benefit of the  
 6 minor.  
 7 As regards the medical testimony, it's my  
 8 position that it would not damage the  
 9 proceedings to have it done by affidavits.  
 10 CHAIRMAN BABCOCK: Okay. So my  
 11 language would solve the problems that you  
 12 talked about: "Affidavit testimony of  
 13 witnesses other than the applicant is  
 14 admissible in the court's discretion." That  
 15 would give the judges discretion or not.  
 16 MR. ORSINGER: Can I make a  
 17 suggestion that we also allow for third party  
 18 witnesses, or maybe just limit it to medical  
 19 people, to be put under oath over the  
 20 telephone to testify? Because as a practical  
 21 matter, that's more likely than an affidavit.  
 22 Call the doctor on the phone, put him under  
 23 oath. Everybody can direct examine the  
 24 doctor. The judge can ask questions.  
 25 CHAIRMAN BABCOCK: Is that

1 CHAIRMAN BABCOCK: Justice Duncan.  
 2 HON. SARAH B. DUNCAN: That gets  
 3 back to my unintended consequences. There are  
 4 a lot of rules in the Rules of Civil Procedure  
 5 and Appellate Procedure, and unless and until  
 6 someone goes through them and makes sure that  
 7 they're not going to have adverse unintended  
 8 consequences, it's a little scary to just  
 9 wholesale do this.  
 10 CHAIRMAN BABCOCK: Yeah, but if we  
 11 are silent on that question, then the rules  
 12 are going to apply in any event. So we would  
 13 have to be prepared to make an affirmative  
 14 statement that they don't apply.  
 15 HON. SARAH B. DUNCAN: Well, we  
 16 could make the statement simply that we can  
 17 look to the Rules of Civil and Appellate  
 18 Procedure for guidance.  
 19 MR. BABCOCK: Well, I think that's  
 20 what we've done by putting Footnote 4 in  
 21 there. We can tinker with that language. But  
 22 I think it would be dangerous to be silent.  
 23 And I think it would be more dangerous to say  
 24 they don't apply.  
 25 HON. SARAH B. DUNCAN: It seems to

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1 me there's a distinction between saying they  
 2 apply when appropriate versus you may look to  
 3 them for guidance. They don't necessarily --  
 4 there's no presumption that they apply unless  
 5 inconsistent. The presumption is they don't  
 6 apply, but you can look to them for guidance.  
 7 It seems to me that's the flipside.

8 HON. PHIL HARDBERGER: Chip, I have  
 9 one comment on your language, which I  
 10 generally like, and I think putting in there  
 11 "in the discretion of the trial judge,"  
 12 sounds good, makes an added step. But the  
 13 parties are not going to know whether they can  
 14 or can't get the affidavit in, or can or can't  
 15 get the doctor on the phone. I wouldn't have  
 16 that in there. Let's make up our mind whether  
 17 they can or they can't do it. Otherwise,  
 18 you've basically got to have another decision  
 19 making process. Will the judge allow me to do  
 20 that?

21 CHAIRMAN BABCOCK: Bill Rhea.  
 22 HON. BILL RHEA: I think I have to  
 23 agree with that, because the judge can always  
 24 say, "All right. Here is the affidavit. It's  
 25 admissible, but it's not enough for me. I

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1 need to hear from the doctor live." So if  
 2 that's where my discretion comes in with that  
 3 rule, I would take that language out.

4 CHAIRMAN BABCOCK: So you would  
 5 agree that that language should come out, the  
 6 discretion language?

7 HON. BILL RHEA: Just say they're  
 8 admissible. It's always going to be at my  
 9 discretion when considering how much weight to  
 10 give it anyway.

11 CHAIRMAN BABCOCK: All right.  
 12 Justice McClure, do you accept that statement  
 13 that affidavit testimony of witnesses other  
 14 than the applicant is admissible?

15 HON. ANN CRAWFORD McCLURE: I'm  
 16 comfortable with it if the trial judges are  
 17 comfortable with it.

18 Judge Medina, you were sort of the vocal  
 19 person on the subcommittee.

20 HON. SAMUEL A. MEDINA: Can we hear  
 21 from Judge Duncan again?

22 HON. SARAH B. DUNCAN: It just  
 23 occurred to me, what if we reverse and remand  
 24 for a new hearing on evidentiary grounds? It  
 25 seems to me that the trial judge is going to

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1 have to have virtually absolute discretion to  
 2 decide what the record is going to be, and  
 3 give the appellate court discretion to  
 4 consider or not consider parts of the record  
 5 in its review process. We can't have a remand  
 6 of the situation and come anywhere close to  
 7 the time constraints imposed by the statute or  
 8 by the constitutional parameters that were  
 9 established of 16 or 17 days.

10 CHAIRMAN BABCOCK: So you would put  
 11 the "in the discretion" back in?

12 MR. ORSINGER: Chip, I would point  
 13 out that I don't think the rules permit you to  
 14 remand for new evidence. If you look on  
 15 Page 15, the court of appeals either affirms  
 16 or it reverses and grants the application. If  
 17 you look on Paragraph 3.3(a), it appears to me  
 18 that you either affirm, or you reverse and  
 19 grant the application.

20 HON. SARAH B. DUNCAN: That's a good  
 21 instance of incorporating the Rules of  
 22 Appellate Procedure, because I think it's very  
 23 conceivable that the court will interpret that  
 24 as not being inconsistent with the general  
 25 rule, the disposition rule, and say yes, but

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1 if there's an evidentiary error, the Rules of  
 2 Appellate Procedure provide that we must  
 3 remand for a new hearing.

4 MR. EDWARDS: It says in here that  
 5 it must also state in its order that the  
 6 application is granted.

7 MR. ORSINGER: You don't have the  
 8 opportunity to remand. You either affirm or  
 9 you reverse and grant.

10 CHAIRMAN BABCOCK: Okay. Let's get  
 11 this affidavit thing straightened out. How  
 12 many people think that the affidavit testimony  
 13 of witnesses other than the applicant is  
 14 admissible in the court's discretion? How  
 15 many are in favor of that, raise their hand.

16 MS. SWEENEY: What's our other  
 17 choice?

18 MR. ORSINGER: As opposed to  
 19 mandatory admission, or as opposed to no  
 20 admission?

21 CHAIRMAN BABCOCK: Yeah, there are  
 22 three choices. Right now we're just trying to  
 23 get the judge's discretion in or out, because  
 24 there has been a proposal to take it out. I'm  
 25 trying to see how many people want it in.

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1 How many people want "judge's discretion"  
 2 in. Affidavit testimony of witnesses other  
 3 than the applicant is admissible in the  
 4 court's discretion, how many people are in  
 5 favor of that? Eight people.  
 6 How many against? The language would be  
 7 only affidavit testimony of witnesses other  
 8 than the applicant is admissible, period,  
 9 taking out the judge's discretion.  
 10 MS. SWEENEY: So we're voting if we  
 11 want the language you just said?  
 12 MR. ORSINGER: It's either  
 13 mandatory, it's discretionary, or it's  
 14 prohibited. Those are the three choices.  
 15 PROFESSOR DORSANEO: But we're just  
 16 voting between the two right now.  
 17 CHAIRMAN BABCOCK: Right, just for  
 18 the two right now.  
 19 So a majority of the committee, by a vote  
 20 of 17 to eight, is in favor of having the  
 21 language be "Affidavit testimony of witnesses  
 22 other than the applicant is admissible,"  
 23 period. So that's what we're going to vote on  
 24 now.  
 25 Should we include that in Rule 1.1 as a

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1 parenthetical after "Rules of Evidence," so  
 2 that we would say, "Rules of Evidence (except  
 3 affidavit testimony of witnesses other than  
 4 the applicant is admissible)"? How many in  
 5 favor of that? 21 in favor. How many  
 6 against? Nobody against.  
 7 Do you accept that, Justice McClure?  
 8 HON. ANN CRAWFORD McCLURE: Sure  
 9 do.  
 10 MR. TIPPS: As a point of order,  
 11 isn't there some better place to put that?  
 12 Isn't there a section over here about the  
 13 hearing and when you can hear the -- that the  
 14 applicant has to be present?  
 15 CHAIRMAN BABCOCK: Yeah, there may  
 16 be. If we come upon it, we'll insert it  
 17 there.  
 18 HON. ANN CRAWFORD McCLURE: There is  
 19 a structural rule on conducting it.  
 20 CHAIRMAN BABCOCK: For now we'll put  
 21 it here. So those two changes are approved as  
 22 to 1.1, the parenthetical after "Rules of  
 23 Evidence" and then the language from  
 24 Footnote 4. Are there any other changes that  
 25 people want to make to 1.1? Go ahead, Judge

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1 Medina.  
 2 HON. SAMUEL A. MEDINA: What happens  
 3 when -- it says it is admissible -- when you  
 4 get some judge saying, "I understand it is  
 5 admissible, unless" -- you know, what do we  
 6 gain?  
 7 CHAIRMAN BABCOCK: Well, judges will  
 8 be judges.  
 9 MR. ORSINGER: You can't make them  
 10 follow the law.  
 11 HON. SAMUEL A. MEDINA: But they're  
 12 going to think they are.  
 13 CHAIRMAN BABCOCK: Bill Dorsaneo.  
 14 PROFESSOR DORSANEO: Well,  
 15 perversely, and I think you've already  
 16 probably decided to put that language  
 17 somewhere else, but the more you make  
 18 adjustments to eliminate Rules of Evidence  
 19 from play, you suggest that the other rules  
 20 are applicable.  
 21 CHAIRMAN BABCOCK: Right. And  
 22 that's what we're going to talk about right  
 23 now.  
 24 PROFESSOR DORSANEO: And I think  
 25 it's a slippery slope here; that we would be

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1 better off not incorporating all other things  
 2 by cross-reference and then eliminating some  
 3 things we can think of here today.  
 4 CHAIRMAN BABCOCK: Right. I haven't  
 5 forgotten Justice Duncan's point, and I think  
 6 that we need to hear from Justice McClure on  
 7 this one.  
 8 Justice McClure, would you accept a  
 9 variation of what the language is that you  
 10 have so that either you're silent on whether  
 11 the other rules apply, or Justice Duncan's  
 12 suggestion that we have language saying that  
 13 the spirit of the rules can be looked to  
 14 but -- what was your phrase, Justice Duncan?  
 15 HON. SARAH DUNCAN: Guidance.  
 16 CHAIRMAN BABCOCK: Guidance. The  
 17 other rules could be looked to for guidance.  
 18 HON. ANN CRAWFORD McCLURE: I am  
 19 more comfortable with that language than I am  
 20 with just a complete elimination or a  
 21 statement that they're not applicable.  
 22 Understand that in some instances these  
 23 records are going to be referred for other  
 24 proceedings. To the extent there has been  
 25 sexual assault of a child, there has been any

1 sort of familial dysfunction that would give  
 2 rise to criminal prosecution or investigation  
 3 by DPRS, this record is going to be referred  
 4 for that as well.

5 MS. SWENEY: I had a question about  
 6 that. How does that happen if everything is  
 7 confidential?

8 HON. ANN CRAWFORD McCLURE: Because  
 9 there's a specific provision in the statute  
 10 that mandates that the trial judge will refer  
 11 and investigate. It's a statutory obligation  
 12 that is not covered in the rules. Well, I  
 13 mean, it's mentioned in the rules, but it's a  
 14 statutory obligation.

15 CHAIRMAN BABCOCK: Steve.

16 MR. YELENOSKY: Well, I was just  
 17 going to suggest, considering Bill Dorsaneo's  
 18 comment, that if we do talk about going to the  
 19 spirit of the rules yet we identify the use of  
 20 affidavits as a particular example, that we  
 21 just say it's an example. And then you  
 22 eliminate the problem that Bill has pointed  
 23 out by saying that the spirit of the rules  
 24 would be such that, given the unavailability  
 25 of the doctor, that affidavits would generally

1 HON. SARAH B. DUNCAN: Actually it's  
 2 Professor Dorsaneo's proposal.

3 CHAIRMAN BABCOCK: Five. How many  
 4 opposed? Eight. So that will be defeated  
 5 eight to five. Any other suggestions on 1.1?

6 MR. EDWARDS: On Rule 1.4(b), Rule  
 7 1.4(b) says "electronic," and I don't know  
 8 whether electronic includes telephonic. It  
 9 may be that the issues concerning telephonic  
 10 evidence would be eliminated if we say  
 11 "hearings by electronic or telephonic  
 12 means."

13 CHAIRMAN BABCOCK: And there's an  
 14 annotation on that, and I think there was a  
 15 discussion about telephone versus video.

16 MR. ORSINGER: Yeah. But that  
 17 provision only relates to the minor not being  
 18 present with the judge. It doesn't relate to  
 19 the witnesses not being present with the  
 20 judge.

21 MR. EDWARDS: That's what I'm  
 22 saying. It still says that the minor has to  
 23 be there where the judge can -- either be  
 24 there or be seen by the judge, but the others  
 25 don't have to be. If you changed to it

1 be admissible and that's an example.

2 CHAIRMAN BABCOCK: We have approved  
 3 language from Footnote 4 that says that these  
 4 rules apply over and above the normal Rules of  
 5 Civil Procedure, Evidence, Rules of Appellate  
 6 Procedure, when they conflict with the general  
 7 framework or policy of the Parental  
 8 Notification Rules. I personally think we've  
 9 taken care of it, but we're going to vote on  
 10 this.

11 How many people want to come up with  
 12 stronger language than Footnote 4, which says  
 13 that the Parental Notification Rules trump  
 14 these other rules when the other rules are  
 15 inconsistent with the general framework or  
 16 policy of the Parental Notification Rules?  
 17 Basically that's Justice Duncan's proposal,  
 18 that 1.1 should say something like, "The other  
 19 rules provide guidance, but they don't  
 20 apply." So how many people are in favor of  
 21 that? Raise your hand.

22 HON. SARAH B. DUNCAN: I understand  
 23 what you're saying.

24 CHAIRMAN BABCOCK: Yeah. You ought  
 25 to vote it.

1 telephonic, it would just say any other  
 2 witness can be heard by telephonic or other  
 3 electronic means. It could be email or any  
 4 other way they wanted to use.

5 MR. ORSINGER: As long as they're  
 6 under oath.

7 CHAIRMAN BABCOCK: That's a good  
 8 point. Okay. We're going to take a 10-minute  
 9 break. It's about 20 after right now. We'll  
 10 be seated back here again at 10:30. Rule 1.1,  
 11 with those two modifications, we're done with,  
 12 and we'll get to Rule 1.2.

13 (10-minute recess.)

14 CHAIRMAN BABCOCK: All right. We're  
 15 back on the record. I should have said at the  
 16 conclusion of that that 1.1 is finished with  
 17 the exception of the language that the judges  
 18 to our left and Justice McClure are working  
 19 on.

20 Well, if people would be quiet, they  
 21 could hear. We need a sergeant of arms back  
 22 there.

23 Okay. So we're on to Rule 1.2. Justice  
 24 McClure, do you want to say anything about  
 25 Rule 1.2?

1 HON. ANN CRAWFORD McCLURE: I'd like  
 2 a refill on my coffee, just a second, since I  
 3 didn't get a break.  
 4 CHAIRMAN BABCOCK: All right. While  
 5 we're waiting, does anybody have any comments  
 6 on 1.2? Justice Hecht.  
 7 JUSTICE HECHT: The Court  
 8 has some tentative concerns about the  
 9 constitutionality of the time limits in the  
 10 statute; and specifically, whether a statute  
 11 can prescribe the time in which to rule and  
 12 can also prescribe the consequences by failing  
 13 to rule within that time. For example, in the  
 14 statute, if the court of appeals does not act  
 15 within a certain amount of time, the trial  
 16 court is automatically reversed, and that's a  
 17 fairly unusual provision.  
 18 And one thing I wish you would keep in  
 19 mind, as you discuss this provision and  
 20 others, is whether the rule could be silent on  
 21 the subject of time limits and just let the  
 22 statute govern. And then, if there ever is a  
 23 challenge to the statute, then the Court would  
 24 not be in the position of looking as if it had  
 25 already prejudged the issue by writing a rule

1 the time deadlines, we as a committee did not  
 2 feel it was our assignment to address those  
 3 constitutional issues.  
 4 We did try to tackle the confidentiality  
 5 stance, but certainly to the extent that you  
 6 have suggestions on whether we should  
 7 implement that or not, we would be happy to  
 8 hear them.  
 9 CHAIRMAN BABCOCK: Richard.  
 10 MR. ORSINGER: I was just going to  
 11 comment that I think that the Legislature has  
 12 run afoul of the Court of Criminal Appeals on  
 13 this very issue on when a judgment goes final  
 14 on bond revocations. I've looked at this a  
 15 long time, but I believe they've declared  
 16 several statutes in a row unconstitutional on  
 17 separation of powers grounds. And the Court  
 18 needs to jealously protect its prerogative  
 19 under the Constitution. And if the Court --  
 20 if an argument can be made that the Court has  
 21 compromised its position by enacting rules  
 22 that endorse or affirm what the Legislature  
 23 did that might be unconstitutional, I would  
 24 favor trying to draft around it.  
 25 MR. EDWARDS: Could you handle that

1 that incorporates the statutory limits. We  
 2 had this concern also on confidentiality, and  
 3 I'll mention that when we get to it. But we  
 4 don't necessarily propose that as a solution.  
 5 But if a challenge to the statute was made on  
 6 that grounds, we wouldn't want to look as if  
 7 we had already decided it by writing the  
 8 rule. And there's no clear answer to it that  
 9 we know of that says, yes, this is okay, or  
 10 no, it's flat not okay. There are arguments  
 11 that go both ways.  
 12 CHAIRMAN BABCOCK: Justice McClure.  
 13 HON. ANN CRAWFORD McCLURE: Well, I  
 14 just want to respond that those issues came up  
 15 in the subcommittee. Our mandate under the  
 16 order appointing the subcommittee was to  
 17 implement the rules, implement the statute  
 18 through the rules. And although we had some  
 19 discussions about, first of all, is this even  
 20 a justiciable controversy and the  
 21 constitutional ramifications of that. And  
 22 exactly as Justice Hecht just suggested,  
 23 separation of powers and the Legislature  
 24 mandating the outcome of a particular  
 25 proceeding as a result of noncompliance with

1 in a comment, say, Comment No. 1, if you said  
 2 in there, whether abortion in general is legal  
 3 as governed by the law, nothing in the  
 4 adoption of these rules is meant to comment on  
 5 the constitutionality of the act, or something  
 6 like that?  
 7 MR. PEMBERTON: Some states do it  
 8 that way.  
 9 HON. F. SCOTT McCOWN: It seems to  
 10 me that if we go down that road it really  
 11 becomes unraveling. And I think the  
 12 suggestion of a comment, a general comment  
 13 that by adopting these rules the Court is not  
 14 prejudging or passing on any constitutional  
 15 question might be the better way to handle  
 16 it. Because if you start leaving out some and  
 17 not others, then it looks as if like the ones  
 18 you haven't left out you're deciding.  
 19 For example, where is the case or  
 20 controversy? Why is this a thing that courts  
 21 can constitutionally do at all? But if you  
 22 get over the hurdle that, yes, courts can do  
 23 things like this, well, then the time limit --  
 24 if it's administrative, then the time limit  
 25 becomes kind of irrelevant. If we're doing

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1 something that's administrative, the  
 2 Legislature can tell us how quick to do it, if  
 3 it's not judicial. So I think they're so  
 4 entwined that if you pick one to be silent  
 5 about and not the other, it suggests you  
 6 prejudged the other.  
 7 HON. SCOTT A. BRISTER: What does  
 8 1.2 add if it wasn't there? An actual notice  
 9 requirement?  
 10 MR. EDWARDS: Prompt actual notice  
 11 is one thing.  
 12 CHAIRMAN BABCOCK: That would be  
 13 something it would add.  
 14 MR. ORSINGER: What if you said  
 15 "required by law" rather than required by  
 16 Rules 2, 3 and 4, and then be vague about what  
 17 law it is?  
 18 CHAIRMAN BABCOCK: Justice McClure,  
 19 what's your reaction to that?  
 20 HON. ANN CRAWFORD McCLURE: Well, my  
 21 personal preference is to leave the rule the  
 22 way it is and address it by comment. If you  
 23 want to expand the comment to the extent that  
 24 by drafting the rules and implementing the  
 25 statute, the Court expresses no comment on

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1 constitutionality of any of the provisions, I  
 2 think that would accomplish the purpose with  
 3 the least amount of difficulty.  
 4 CHAIRMAN BABCOCK: Is Rule 2.4(a)  
 5 and Rule 2.4(f) basically just a repetition of  
 6 the statute, the timing issue?  
 7 HON. ANN CRAWFORD McCLURE: Yes.  
 8 MR. PEMBERTON: Yes. It's right  
 9 from the statute.  
 10 CHAIRMAN BABCOCK: Because Justice  
 11 Hecht's comment, it seems to me, you've got to  
 12 read in conjunction with the reference to  
 13 2.4(a) in the rule we're now discussing, 1.2,  
 14 and Rule 2.4(f). If we're going to go silent  
 15 on the timing issue, then probably Rule 2.4(a)  
 16 and (f) are going to go away.  
 17 HON. ANN CRAWFORD McCLURE: Oh, they  
 18 would have to. They'd have to.  
 19 CHAIRMAN BABCOCK: Justice Duncan.  
 20 HON. SARAH B. DUNCAN: And that's  
 21 one of the problems we've had in the Rules of  
 22 Civil and Appellate Procedure.  
 23 CHAIRMAN BABCOCK: Could you speak  
 24 up? The court reporter can't hear you.  
 25 HON. SARAH B. DUNCAN: I'm talking

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1 about the difficulty for lawyers going between  
 2 and among statutes and rules. And to the  
 3 extent we can incorporate, either by comment  
 4 or by rule language, the statutory  
 5 constraints, we've done a better job of  
 6 actually getting people to go look at the  
 7 statutes and comply with them.  
 8 CHAIRMAN BABCOCK: Bill Dorsaneo.  
 9 PROFESSOR DORSANEO: Well, there's  
 10 kind of a tension both ways here, because when  
 11 we repeat what the statute says and the  
 12 statute gets changed, as it invariably does,  
 13 that creates difficulties. I really think  
 14 that happens more often than most of us  
 15 recognize. There are a lot of  
 16 incompatibilities right now.  
 17 HON. SARAH B. DUNCAN: It seems like  
 18 last time we resolved that by putting into the  
 19 comment, "Look to other law," and we listed  
 20 examples.  
 21 PROFESSOR DORSANEO: Our normal  
 22 procedure is to identify the statutory  
 23 provision in a comment and not to reiterate it  
 24 in the text of the procedural rules, at least  
 25 in recent years.

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1 CHAIRMAN BABCOCK: I think this  
 2 timing issue is an overarching issue of  
 3 concern to the Court. So even though we're  
 4 talking about 1.2, I think we should try to  
 5 fully explore whether or not we should take  
 6 the timing elements out of the rules, so that  
 7 it would not only be applicable to the trial  
 8 court but the court of appeals as well. So I  
 9 would entertain additional discussion on  
 10 that. Paula Sweeney.  
 11 MS. SWEENEY: If the vision is to  
 12 have a pamphlet to give to the minor that sort  
 13 of explains it all and you take all the  
 14 timelines out, then how does she find that  
 15 out?  
 16 CHAIRMAN BABCOCK: Put the statute  
 17 in the pamphlet.  
 18 MR. ORSINGER: Or put it in the  
 19 comment. You could put it in the comment,  
 20 what the statute says the time deadline is,  
 21 and the woman won't know the difference  
 22 between the statute and the comment. She  
 23 won't understand the statute anyway. She'll  
 24 be reading the comment.  
 25 MR. EDWARDS: Refer to the statute

1 in 1.2.  
 2 JUSTICE HECHT: Well, the pamphlet  
 3 is going to be written in more user friendly  
 4 language to the minor. It won't have either,  
 5 I don't imagine, the rule or the statute in  
 6 it.  
 7 MR. ORSINGER: The lawyers might  
 8 need to see the rule and the statute.  
 9 CHAIRMAN BABCOCK: Yeah. Judge  
 10 McCown.  
 11 HON. F. SCOTT McCOWN: I guess I'm  
 12 just repeating myself, since you all didn't  
 13 agree with me the first time, but this is a  
 14 stand-alone procedure. It's going to be very  
 15 difficult for courts and clerks and doctors  
 16 and providers and minors to implement. And  
 17 Judge McClure's committee has done a great job  
 18 of developing rules that you can start on  
 19 Page 1 and read to the end and understand the  
 20 whole thing, whether you're a layperson or a  
 21 lawyer.  
 22 And anytime you say, "We want to take  
 23 something out because we're not prejudging  
 24 it," you're in fact offering an invitation and  
 25 suggesting an inclination. And if you decide

1 And I think if you start taking these things  
 2 out, it's not going to be a self-standing,  
 3 clear guide. And if our problem is not taking  
 4 a position of constitutionality, I think that  
 5 can also be covered by a comment in this  
 6 situation, or we may want put it in the  
 7 preamble or something. I mean, you can hedge  
 8 that bet that way. But to obfuscate this just  
 9 to accomplish that other goal doesn't work for  
 10 me very well.  
 11 CHAIRMAN BABCOCK: Buddy Low.  
 12 MR. LOW: I think any rule we have  
 13 now, like notice, it doesn't prevent somebody  
 14 from coming in and saying it violates the  
 15 process or something like that. I don't  
 16 interpret any of the rules as having been  
 17 decided a constitutional issue by the Court.  
 18 But that's the way I interpret it.  
 19 JUSTICE HECHT: Well, as far as I  
 20 know, the U.S. Supreme Court has never held a  
 21 rule that it promulgated unconstitutional.  
 22 HON. F. SCOTT McCOWN: That's  
 23 untrue, by the way.  
 24 JUSTICE HECHT: Is that right?  
 25 HON. F. SCOTT McCOWN: Yeah, they

1 to say, "We're not prejudging some things,"  
 2 then you're saying, "We are prejudging other  
 3 things," and inviting attacks.  
 4 It seems to me that a simple comment at  
 5 the beginning that just says we're  
 6 promulgating these rules pursuant to the  
 7 statute, we're not passing or prejudging the  
 8 constitutionality of anything in the statute  
 9 or anything in the rules, and we'll work all  
 10 that out case by case as it comes, that covers  
 11 the Court and the jurisprudential process  
 12 without messing up the practicalities for  
 13 those of us who have got to implement these  
 14 things.  
 15 CHAIRMAN BABCOCK: Is there anything  
 16 you need to say to that? No comment here.  
 17 JUSTICE HECHT: We're interested in  
 18 exactly those reactions.  
 19 CHAIRMAN BABCOCK: Does anybody else  
 20 have a comment about taking several sections,  
 21 2.4(a), 2.4(f), 3.3(b) and (c), to the extent  
 22 it deals with timing, out of the rule, and  
 23 4.3(d), I guess, 4.3(d) as well?  
 24 MS. CORTELL: I agree with those  
 25 comments that this has to be a clear guide.

1 have. They have declared a Rule of Civil  
 2 Procedure unconstitutional. If you can help  
 3 me out, Professor, I'll get you the cite. But  
 4 no, they have. They have declared one of  
 5 their own rules unconstitutional.  
 6 JUSTICE HECHT: Well, I was under  
 7 the impression they hadn't. And we have not  
 8 ever declared a rule unconstitutional, except  
 9 that one little phrase in the Ethics Rules  
 10 about contact with jurors after the trial,  
 11 whatever case that was. I forgot the name of  
 12 the case.  
 13 MR. TIPPS: But is there not a  
 14 certain distinction here in that most of the  
 15 rules are not promulgated as expressly to  
 16 implement a particular statute? They're more  
 17 general. I think you'd have a little more  
 18 cover here given the fact that you have been  
 19 directed by the Legislature to implement a  
 20 particular statute.  
 21 HON. SCOTT A. BRISTER: But taken  
 22 out of context of this, let's say the  
 23 Legislature passes a tort reform measure that  
 24 caps damages and that somehow we need to  
 25 implement that by rule and we pass a rule. It



1 just seems to me, you know, to pass a rule  
2 implementing something and then within a year  
3 or two declare the whole thing  
4 unconstitutional under open court provisions  
5 or something is just silly. I mean, I'm not a  
6 big proponent for passing rules that  
7 contravene what the Legislature has just said  
8 to do, but I'm a little nervous about just  
9 putting it directly into the rules and then  
10 entertaining constitutional questions on them  
11 immediately thereafter.

12 JUSTICE HECHT: I don't suggest for  
13 a moment that we have a rule that's in  
14 conflict with the statute or that this  
15 committee try to decide the substantive issue,  
16 because we would need briefing and a full  
17 presentation. But query, do we need to track  
18 the statute, or does that add anything, or  
19 should we just refer to the statute and let it  
20 be what it is?

21 CHAIRMAN BABCOCK: On the one side  
22 of the coin, you have Judge McCown's and Nina  
23 Cortell's point that it would be more  
24 convenient and it would be easier, it would be  
25 more user friendly. But on the other side, it

1 seems to me, is a more weighty concern that  
2 the Court may very well be called upon to  
3 decide these issues, and it should not be  
4 burdened by having a deliberate review process  
5 like we're undertaking right now and then  
6 affirmatively voting to pass a rule when it's  
7 in many ways surplusage. It's something  
8 that's already in the statute. And as  
9 somebody has pointed out, our trend on this  
10 committee over the past few years has been  
11 trying to avoid just duplicating in our rules  
12 what is already in the statute. So I think  
13 that -- yes, Judge McCown.

14 HON. F. SCOTT McCOWN: I thought  
15 that the strongest argument against the  
16 constitutionality of the rules is the whole  
17 process. It's that there's no case or  
18 controversy. So if we adopt your principle,  
19 the Court shouldn't adopt the rules at all,  
20 because that would prejudge the issue of  
21 whether, by adopting the rules, they were  
22 suggesting courts could do these kinds of  
23 things. And to say, "Well, we're going to  
24 take some questions out and leave other  
25 questions in" is to make the very prejudgment

1 that you've said you don't want to make.  
2 CHAIRMAN BABCOCK: Well, I think  
3 not, because the case or controversy issue has  
4 been decided initially by the Legislature,  
5 just as the timing issue has been done. I  
6 don't think anything in these rules speaks --  
7 in fact, there was briefing by the  
8 subcommittee that dealt with the case or  
9 controversy issue. There's nothing in these  
10 rules that says, hey, this is a case or  
11 controversy. There is something in these  
12 rules right now that says we've got to decide  
13 this within 48 hours.

14 HON. F. SCOTT McCOWN: But the rules  
15 tell me I have to decide it, and yet I can't  
16 decide things if there's no case or  
17 controversy.

18 CHAIRMAN BABCOCK: Well, and you may  
19 be called upon to decide whether you can  
20 decide upon it. That's true. Judge Rhea.

21 HON. BILL RHEA: Bearing on this  
22 issue, I have a question about the comment  
23 Bill Dorsaneo just made, I think I heard him  
24 right, saying that there is some  
25 incompatibility as it exists in this draft

1 versus the statute?

2 PROFESSOR DORSANEO: No, I meant in  
3 other places.

4 HON. BILL RHEA: Oh, okay.

5 PROFESSOR DORSANEO: It's inevitable  
6 that the statutes will change and that the  
7 rules will be behind schedule whenever they  
8 are meant to be congruent.

9 CHAIRMAN BABCOCK: That's something  
10 we've learned. Judge Brown.

11 HON. HARVEY G. BROWN, JR.: Related  
12 to the same issue, it seems to me that there's  
13 been arguments both ways about the timing, but  
14 the confidentiality of the proceedings is  
15 definitely subject to some constitutional  
16 challenge. And there courts really do need  
17 direction, a lot of direction. We don't need  
18 direction really on the timing. That's really  
19 something that could be handled by pamphlet or  
20 could be kept in the rules. But the courts do  
21 need some direction on the confidentiality and  
22 what that means. That would have the same  
23 problem, so it seems like to me we're going to  
24 need a footnote on that, too, or skip that,  
25 too.

1 CHAIRMAN BABCOCK: Well, we're  
 2 getting a little bit ahead of ourselves,  
 3 although I think that the statute says, quote,  
 4 "All other court documents pertaining to the  
 5 proceedings are confidential." And to me  
 6 that's pretty clear. But anyway, that's  
 7 getting ahead of ourselves.

8 Any more comments on this, because we're  
 9 going to vote here in a second. Yeah, Bill.

10 MR. EDWARDS: I'd like to suggest  
 11 that we include a comment that would go right  
 12 at the very beginning that would be a comment  
 13 to the Texas Parental Notification Rules, and  
 14 I would suggest it say something like "By the  
 15 adoption of the Texas Parental Notification  
 16 Rules, the Court is in no way commenting on  
 17 the constitutionality or validity of any  
 18 provision of Chapter 33, Texas Family Code.  
 19 These rules are adopted to implement the  
 20 intent of the Legislature in passing  
 21 Chapter 33, Texas Family Code."

22 MR. YELENOSKY: But that replicates  
 23 the problem that Judge McCown has pointed out  
 24 that every time the Supreme Court promulgates  
 25 rules pursuant to a statute, it doesn't say

1 that. And so are they suggesting that this  
 2 one is more subject to constitutional  
 3 challenge than all the others?

4 MR. EDWARDS: Well, they have  
 5 expressed a concern of the constitutionality  
 6 about this particular one.

7 MR. YELENOSKY: But that's  
 8 prejudging it.

9 MR. EDWARDS: They haven't  
 10 prejudged; they've just said we don't know.

11 MR. YELENOSKY: Well, why don't they  
 12 say that with respect to every statute?

13 MR. EDWARDS: Well, maybe they  
 14 should.

15 HON. SARAH B. DUNCAN: We already  
 16 know there is litigation around the country on  
 17 the constitutionality of these types of  
 18 statutes and procedures, so this is -- we  
 19 don't know that with every other rule that the  
 20 Court chooses to adopt.

21 CHAIRMAN BABCOCK: Yeah. Whether we  
 22 have six hours for depositions is not  
 23 generally a constitutional question. Yes,  
 24 Skip Watson.

25 MR. WATSON: I'm a little confused

1 on what the Court wants. I mean, the gist I'm  
 2 getting is that the Court does not want -- and  
 3 I understand it -- does not want to have to  
 4 face this issue now.

5 JUSTICE HECHT: They can't.

6 MR. WATSON: Yeah. So we refuse to  
 7 adopt a rule because we don't think that we  
 8 can or should. On the other hand, I'm hearing  
 9 that the Court doesn't want to be hampered by  
 10 the rules that are adopted. And I'm a little  
 11 unclear on how -- on what the options are to  
 12 help the Court, I guess.

13 And what I've heard so far, I guess, is,  
 14 one, change specific rule numbers to just "the  
 15 law," and I don't quite see how that gets us  
 16 there. And two, I've heard drop a comment  
 17 saying specific parts or none of this should  
 18 prejudge the constitutionality. Both of those  
 19 are still a little fuzzy for me. I'm  
 20 wondering if there are other options, or if  
 21 those two options can be clarified a bit?

22 JUSTICE HECHT: Well, we don't have  
 23 a solution. We're interested in the  
 24 committee's view of this.

25 MR. WATSON: And I'm not just

1 addressing Justice Hecht.

2 JUSTICE HECHT: We would never  
 3 knowingly adopt an unconstitutional rule or  
 4 any rule that we thought there were serious  
 5 constitutional arguments about. Now, it might  
 6 happen, but we certainly wouldn't go into it  
 7 thinking that. And as Sarah points out,  
 8 there's already litigation about -- I don't  
 9 know that the case or controversy issue is too  
 10 much, since we've got a U.S. Supreme Court  
 11 opinion that says this might be a good  
 12 procedure. So that's a little bit of cover.  
 13 I wouldn't characterize that as the whole  
 14 thing, but it's some language.

15 But the timing issue, the confidentiality  
 16 issue, and then on the other side, whether  
 17 this entire process is too great a burden on  
 18 the constitutional right to abortion as it  
 19 exists under the jurisprudence, those are  
 20 issues that we know are out there.

21 MR. WATSON: Well, I'm just trying  
 22 to get to what I see as the sheer between the  
 23 Court saying it will never knowingly adopt an  
 24 unconstitutional rule and then the desire to,  
 25 okay, we'll address that later. And I'm not

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1 sure that we can help do that dance, you know,  
 2 of whether it has to be addressed in the stage  
 3 of we are not going to knowingly adopt an  
 4 unconstitutional rule or this is not  
 5 unconstitutional.  
 6 CHAIRMAN BABCOCK: I think, Skip,  
 7 that one answer is that we surely are not in a  
 8 position, I don't think, to advise the Court  
 9 about whether or not this is or is not  
 10 constitutional, although I think there is a  
 11 sharply raised issue of constitutionality on  
 12 portions of the confidentiality provision.  
 13 But we certainly can advise the Court or give  
 14 the Court our view on, number one, the more  
 15 mundane issue of should we be in the business  
 16 of passing rules that merely repeat what's  
 17 already in the statute. So that's one issue  
 18 that we can express an opinion on to the  
 19 Court.  
 20 And we can also discuss and debate an  
 21 opinion as to the issues of convenience to the  
 22 users or friendliness to the users; and Judge  
 23 McCown's point of why not put them in there to  
 24 have a complete package, and to have a  
 25 comment, which I think Judge McCown was in

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1 favor of, saying we're not deciding anything  
 2 about constitutionality, but you can't have a  
 3 uniform, whole body of rules unless we have  
 4 the time limits in there. And those are all  
 5 things I think we can and should advise the  
 6 Court on.  
 7 MR. WATSON: Thanks, Chip.  
 8 CHAIRMAN BABCOCK: Representative  
 9 Dunnam.  
 10 REPRESENTATIVE DUNNAM: I would just  
 11 point out that there are really two things  
 12 that the Legislature asked the Court to do.  
 13 One is to adopt forms -- this is in Section 6  
 14 and Section 2 of the statute -- to adopt  
 15 forms, which is easy to understand. And two,  
 16 which I also think is easy, to ask the Court  
 17 to adopt rules to do two things: One, ensure  
 18 confidentiality, and two, to ensure sufficient  
 19 precedence and ensure promptness of  
 20 disposition. So I think that goes  
 21 specifically to what the Legislature asked be  
 22 done. And to leave out the things to ensure  
 23 timeliness and promptness, I don't know, that  
 24 seems to be contrary to what was requested.  
 25 CHAIRMAN BABCOCK: You said

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1 something after "ensure confidentiality,"  
 2 Representative Dunnam?  
 3 REPRESENTATIVE DUNNAM: Yeah. It  
 4 says, "to ensure" -- look at Section 2, the  
 5 last page of the statute. The Supreme Court  
 6 shall issue rules...to ensure confidentiality  
 7 and to ensure sufficient precedence over  
 8 pending matters to ensure promptness of  
 9 disposition.  
 10 Now, I didn't write that, but it sounds  
 11 to me like we need to have the time limits in  
 12 there.  
 13 HON. ANN CRAWFORD McCLURE: And if I  
 14 could follow up with that, what our  
 15 subcommittee was tasked with doing was just  
 16 that, address the expediency issue of getting  
 17 these pushed through; second of all, the  
 18 confidentiality issue. That's why our  
 19 subcommittee only addressed those particular  
 20 issues in the rules. And that's what our  
 21 version of implementation of the rules meant.  
 22 And that's why you find the time frame  
 23 specified and the confidentiality issue  
 24 specified in the rules with the draft.  
 25 CHAIRMAN BABCOCK: Representative,

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1 the language is two-fold: One,  
 2 confidentiality; and then "sufficient  
 3 precedence over all pending matters to ensure  
 4 promptness of disposition."  
 5 Is your reading of that language more  
 6 than they've got to put these matters up to  
 7 the top of the queue? In other words, don't  
 8 tell me, "I'm in a two-week jury trial and I  
 9 can't do it." You've got to reset your jury  
 10 trial and do this. Or does it mean something  
 11 more than that in your view?  
 12 REPRESENTATIVE DUNNAM: Well, I can  
 13 tell you that we talked about priority quite a  
 14 bit in all the debate and giving priority and  
 15 those types of things. And the 48-hour limits  
 16 was talked about repeatedly.  
 17 CHAIRMAN BABCOCK: Right. And  
 18 that's in the statute, and that's clear. Bill  
 19 Dorsaneo.  
 20 PROFESSOR DORSANEO: It strikes me  
 21 that it would be very easy to write a simple  
 22 rule that talks about giving precedence. And  
 23 one wonders why the Legislature didn't amend  
 24 the statutes to talk about priority and  
 25 precedence of one type of case over another

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1 generally. What is in here, that doesn't just  
 2 repeat the statute, that perhaps adds to the  
 3 assurance that there will be prompt  
 4 treatment. If we're just repeating the  
 5 statute, it makes me wonder why that's what  
 6 the rules are doing.

7 CHAIRMAN BABCOCK: Judge Brister.  
 8 HON. SCOTT A. BRISTER: Because  
 9 that's what they tell us. I mean, it seems to  
 10 me you've got to do -- you create a  
 11 constitutional crisis if the Supreme Court  
 12 doesn't issue rules to ensure this, right?  
 13 Because then you've got -- the Legislature is  
 14 strong. The Legislature doesn't suggest. The  
 15 Legislature instructs the Court to issue these  
 16 rules. And if you don't, then we're all in a  
 17 mess, and who knows how that turns out. So it  
 18 seems, number one, this is a different rule  
 19 making authority from the general statutory  
 20 rule making authority.

21 This takes me back to maybe rethink where  
 22 we started about whether this should be part  
 23 of the Rules of Civil Procedure. If it's not  
 24 going through the regular publishing in the  
 25 Bar Journal, et cetera, it shouldn't be a part

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1 of the Rules of Civil Procedure; and whether  
 2 it might not be best to go ahead and do a  
 3 comment, "These are issued pursuant to  
 4 Section 2 of this statute," you know, with the  
 5 understanding stated in the comment or not  
 6 that in due course -- I don't like the idea of  
 7 having five different sets of rules.

8 I think of the Rules of Procedure as the  
 9 Rules of Procedure, and at some point these  
 10 ought to move into the Rules of Procedure.  
 11 But maybe the appropriate point to do that is  
 12 after this has been around for a couple of  
 13 years and the Court has seen what develops on  
 14 the constitutional challenge front, how these  
 15 work, so that then, by making it stand alone  
 16 with a comment that this is pursuant to this  
 17 instruction, in compliance with that, without  
 18 making it a part of the regular Rules of Civil  
 19 Procedure or issuing any opinion on  
 20 constitutionality.

21 CHAIRMAN BABCOCK: Any other  
 22 comments about this?  
 23 PROFESSOR DORSANEO: I haven't  
 24 studied this line by line or word by word, but  
 25 it seems to me the most important thing to

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1 tell lawyers or whoever is to go read the  
 2 statute, because the statute is very detailed  
 3 on a lot of these matters. I don't like a  
 4 procedural rule that reiterates a statute in  
 5 different verbal formulations, because I'm not  
 6 sure that that's going to be an accurate  
 7 representation of the statute. That gives me  
 8 then two things that I have to read and try to  
 9 figure out what I'm supposed to do. So my  
 10 question, again, would be, where do these  
 11 rules do what the legislation asks?

12 HON. ANN CRAWFORD McCLURE: In our  
 13 viewpoint, it was emphasis, and it embodied  
 14 everything in one set of rules that they could  
 15 look to for guidance on how to process these  
 16 things as quickly as possible. And if it's  
 17 going to fall in a county in which they may  
 18 only get one in the next 10 years, in my view  
 19 it facilitates that process. You may disagree  
 20 with that, but that was our intention in  
 21 trying to put everything into one package to  
 22 get it started.

23 CHAIRMAN BABCOCK: Steve.  
 24 MR. YELENOSKY: Well, this is  
 25 jumping ahead, but on that point, I've

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1 noticed, for example, that the statute  
 2 prescribes four things that need to be in the  
 3 application.

4 HON. ANN CRAWFORD McCLURE: I can't  
 5 hear you, I'm sorry.

6 MR. YELENOSKY: The statute  
 7 prescribes four things that have to be in the  
 8 application, and the rules prescribe six. So  
 9 there's an inconsistency right there.

10 CHAIRMAN BABCOCK: Okay. Let's  
 11 not --

12 MR. YELENOSKY: So we need to hammer  
 13 that out. But that's a danger that Bill  
 14 Dorsaneo is pointing out.

15 CHAIRMAN BABCOCK: Let's not jump  
 16 ahead, but keep that thought. Buddy Low.

17 MR. LOW: If the Legislature had  
 18 thought everything needed was in the statute,  
 19 they wouldn't be calling on the Court to draw  
 20 something else. So we can't just refer it  
 21 back to them. I mean, I think what the  
 22 Legislature probably intended -- and I never  
 23 have run for the Legislature and certainly  
 24 have not been in it -- would be that within  
 25 these guidelines you fine-tune these things so

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1 they come within these limits. And a lot of  
 2 time we set deadlines, we set dates and so  
 3 forth, within legislative limits. And that  
 4 would appear to me to be what they're asking  
 5 us to do, rather than saying, "Well, we just  
 6 refer back to you."  
 7 CHAIRMAN BABCOCK: Richard  
 8 Orsinger.  
 9 MR. ORSINGER: I think what Bill is  
 10 saying is that right now it's helpful to have  
 11 everything in the rules, but as soon as the  
 12 Legislature changes anything, then it's not  
 13 helpful to have it in the rules if they're  
 14 inconsistent with the Legislature. If we put  
 15 it in the rules now where everything is  
 16 parallel, then I think we need to make a  
 17 commitment to be flexible. And as the  
 18 Legislature changes the procedures or the time  
 19 elements, then we need to pretty quickly react  
 20 to these rules. If we do that, then we're not  
 21 going to be creating too much confusion. But  
 22 I think we do have it parallel here, and we  
 23 have to be flexible and keep up with the  
 24 Legislature.  
 25 CHAIRMAN BABCOCK: Representative

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1 Dunnam has pointed out something that I did  
 2 not appreciate in Section 2 of the Act, which  
 3 is the enabling language. It says that the  
 4 Court shall issue promptly such rules as may  
 5 be necessary in order that the process  
 6 established by the section may be conducted in  
 7 a manner that will, one, ensure  
 8 confidentiality; and two, sufficient  
 9 precedence over all pending matters to ensure  
 10 promptness of disposition.  
 11 To me, that second requirement is not for  
 12 these rules to regurgitate or refine the  
 13 legislative structure of the 48 hours,  
 14 et cetera; but rather, for the Court to  
 15 mandate that the lower courts will grant these  
 16 proceedings precedence over other  
 17 proceedings. Does anybody read this  
 18 differently?  
 19 HON. F. SCOTT McCOWN: Yes. I can  
 20 think right off the bat of half a dozen, and  
 21 there's probably many more, statutes that tell  
 22 me this is the most important thing, do it  
 23 first. And you call a docket, and you've got  
 24 half a dozen to a dozen things all waving  
 25 their preferential statutes. The Legislature

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1 developed a timeline they wanted this done in,  
 2 and I just want to come back and emphasize  
 3 something.  
 4 I was at the Judicial Conference two or  
 5 three weeks ago. This is the worry of every  
 6 trial judge in the state. This is going to be  
 7 a nightmare logistically in every  
 8 courthouse. This subcommittee, which I was  
 9 not on, has done a great job of putting  
 10 together consistent uniform rules that solve  
 11 almost all of the problems that we're going to  
 12 have. I mean, it's in one place, it's easy to  
 13 read, it puts it together for the people that  
 14 are going to use it. I don't think we should  
 15 hold it to the standards of other Rules of  
 16 Procedure. It is a stand-alone proceeding.  
 17 It's a particular stand-alone problem, and we  
 18 ought to leave it the way it is.  
 19 CHAIRMAN BABCOCK: Paula.  
 20 MS. SWEENEY: I would like to move  
 21 that we vote on this and go on, or we're going  
 22 to have a whole lot longer than a day and a  
 23 half meeting. I'd like to move that we adopt  
 24 the rule as written by the subcommittee,  
 25 including the time limits envisioned by the

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1 subcommittee, if it is in order.  
 2 CHAIRMAN BABCOCK: It is in order.  
 3 And if nobody else has any comments, I think  
 4 that in trying to keep with the procedure that  
 5 we talked about before, and we will vote one  
 6 way or the other, but Justice McClure, what do  
 7 you feel about the issue of incorporating the  
 8 time lines in the rule?  
 9 HON. ANN CRAWFORD McCLURE: I think  
 10 it's important that they stay there. I think  
 11 the subcommittee felt it was important that  
 12 they stay there. But I don't want to sit here  
 13 and tell you that we don't care what your  
 14 thought processes are, because we do. All I  
 15 was asked to do was to bring our  
 16 recommendations to you for your  
 17 consideration. And in most instances, we're  
 18 willing to talk with you on redrafting  
 19 language that is of concern. But as far as  
 20 this particular format structure is concerned,  
 21 it's going to be my position that we keep this  
 22 portion of the rules intact.  
 23 CHAIRMAN BABCOCK: Judge Brister.  
 24 HON. SCOTT A. BRISTER: Let me ask  
 25 Justice McClure for her opinion on and comment

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1 about, you know, that this is pursuant to  
 2 legislative mandate without respect to  
 3 constitutional questions and the normal rule  
 4 making processes of the Court.  
 5 HON. ANN CRAWFORD McCLURE: Well,  
 6 I'm certainly not opposed to it. I think that  
 7 is something that the Supreme Court needs to  
 8 answer for itself, whether it wants to draw  
 9 attention to that issue or not draw attention  
 10 to the issue. And my understanding in my  
 11 discussions with Justice Hecht is they do have  
 12 some considerable concerns about it that they  
 13 may want to have briefed and presented to the  
 14 Court and adopt that. Our subcommittee would  
 15 have no difficulty with a comment to that  
 16 effect.  
 17 CHAIRMAN BABCOCK: Okay. So in  
 18 keeping with our kind of procedure here, in  
 19 light of Justice McClure's comments, we're  
 20 going to keep these in the rules. But I think  
 21 to advise the Court, we ought to vote on  
 22 Paula's motion. And would you accept Judge  
 23 Brister's friendly amendment that we keep the  
 24 time limits in with a comment that this is not  
 25 a prejudging on constitutionality of any

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1 issue?  
 2 HON. BILL RHEA: That's really a  
 3 separate issue.  
 4 MS. SWEENEY: I think it is. I  
 5 think we might have to paste that to the front  
 6 of the whole book of the Rules of Civil  
 7 Procedure.  
 8 MR. ORSINGER: And some people might  
 9 vote for that with the comment and against it  
 10 without. So I'm not sure that it's a separate  
 11 issue. For me it may not be.  
 12 MS. SWEENEY: Well, I decline to  
 13 accept your friendly amendment.  
 14 CHAIRMAN BABCOCK: She doesn't  
 15 accept that, so we'll do it without.  
 16 HON. SCOTT A. BRISTER: Or should I  
 17 move to amend the motion so we get a vote on  
 18 that issue? Whichever way you want to do it.  
 19 CHAIRMAN BABCOCK: That would be  
 20 fine. You want to move to amend. Does  
 21 anybody second that?  
 22 MR. ORSINGER: I'll second it.  
 23 CHAIRMAN BABCOCK: Okay. And the  
 24 amendment is not accepted by Paula. So is the  
 25 right way to do it to go ahead and vote to see

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1 if the amendment -- okay. How many people are  
 2 in favor of the amendment?  
 3 MR. EDWARDS: Could I ask what we're  
 4 amending?  
 5 CHAIRMAN BABCOCK: Yeah. Paula  
 6 Sweeney is moving that we give an expression  
 7 to the Court that, whether or not, how many  
 8 people on this committee are in favor of  
 9 retaining the time limits that are contained  
 10 in the rules. And Richard Orsinger or Judge  
 11 Brister says, "I want to amend that to say  
 12 that, yes, we've retained the time limits, but  
 13 there's a comment which says we're not  
 14 prejudging the constitutionality of any  
 15 issue." Have I got that right?  
 16 HON. SCOTT A. BRISTER: Right.  
 17 CHAIRMAN BABCOCK: Okay. So what  
 18 we're voting on now is whether or not we're  
 19 going to accept the amendment to Paula  
 20 Sweeney's motion. So all in favor of the  
 21 amendment, raise your hand.  
 22 MS. CORTELL: I have a question,  
 23 Chip, sorry. Does the preamble modify the  
 24 entire set of rules, or just the time limits?  
 25 CHAIRMAN BABCOCK: That was my

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1 understanding of what Judge Brister intended.  
 2 HON. SCOTT A. BRISTER: Yeah. You  
 3 could put it in the order, I suppose. The  
 4 Court signs an order adopting the attached  
 5 rules normally, I believe. I suppose you  
 6 could put it in the order, or you could put it  
 7 in the comment itself to Rule No. 1.1  
 8 probably.  
 9 CHAIRMAN BABCOCK: All right. Does  
 10 that answer that, Nina?  
 11 All right. So everybody in favor of the  
 12 amendment raise their hand, please. 19.  
 13 All against. Nine. Nine against. So  
 14 the amendment will carry.  
 15 So what we're going to vote on now is  
 16 Paula Sweeney's motion that the time limits be  
 17 retained in the rule, but with a comment as  
 18 outlined by Judge Brister.  
 19 HON. F. SCOTT McCOWN: A comment not  
 20 about the time limits, but about --  
 21 CHAIRMAN BABCOCK: Constitutionality  
 22 globally.  
 23 HON. F. SCOTT McCOWN: Right.  
 24 MR. HAMILTON: A general question.  
 25 CHAIRMAN BABCOCK: Yes.

1 MR. HAMILTON: When you say "time  
2 limits," are you talking about portions of the  
3 rule that just restate the statute?

4 CHAIRMAN BABCOCK: Yes, sir.

5 MR. WATSON: In other words, you're  
6 saying as drafted, we're voting on this  
7 wording as drafted?

8 CHAIRMAN BABCOCK: No, we're not  
9 voting on -- we're going to get to 2.4(a) and  
10 2.4(f) and discuss that specific language.  
11 We're talking conceptually about having the  
12 time limits in the rules.

13 MR. MEADOWS: Is it correct that it  
14 should be our understanding that the rule  
15 doesn't say anything more or different than  
16 what the statute says? I know that question  
17 was put to the table. And the way the last  
18 comment was made, I'm assuming that we're all  
19 in agreement that it is surplusage; it doesn't  
20 say anything different than what the statute  
21 says?

22 CHAIRMAN BABCOCK: That was the  
23 intent, I think, of the subcommittee.

24 HON. ANN CRAWFORD McCLURE: On that  
25 provision. On the timetables in the appellate

1 the pamphlet that's going to be published and  
2 circulated can draw from the rule as well as  
3 the statute in terms of informing the  
4 applicant?

5 HON. ANN CRAWFORD McCLURE: Sure.

6 CHAIRMAN BABCOCK: Okay. Just so  
7 we're clear, just because Justice McClure, on  
8 behalf of the subcommittee which we are giving  
9 deference to, has declined to remove the rules  
10 dealing with time limits, we're going to  
11 discuss them. So don't anybody vote because  
12 they think they're going to save some time.

13 But what we are voting on now is an  
14 expression to the Court to advise them as to  
15 what this committee believes on whether the  
16 time limits ought to be in there or not. And  
17 the motion which Paula Sweeney has put forth  
18 as amended is in the affirmative; that the  
19 time limits should be in the rules. Is that  
20 right, Paula?

21 MS. SWEENEY: Yes.

22 CHAIRMAN BABCOCK: Okay. So that's  
23 what we're voting on. The time limits should  
24 be in the rules, with a comment indicating, as  
25 Judge Brister said, that there's no

1 section, there are some distinctions between  
2 what the rules do and what the statute does.  
3 The 48 hours that are incorporated in those  
4 two particular subsections do track the  
5 statute.

6 MR. MEADOWS: Can I ask a very quick  
7 question then? Given the Court's sensitivity  
8 to this whole issue and the proposed rule  
9 language that doesn't say anything different  
10 than what the statute says, why would we have  
11 it? I mean, why would we want the rule?

12 HON. ANN CRAWFORD McCLURE: My  
13 concern as an appellate judge was that the  
14 language in the statute as to the appellate  
15 process was extremely vague. There was very  
16 little guidance to the appellate courts, how  
17 to process it. Their concept of a ruling by  
18 the appellate courts does not fit neatly into  
19 any concept of appellate procedure that I'm  
20 aware of. And so to address part of those  
21 issues, we felt it at least necessary to  
22 insert some of the similar time requirements  
23 at the trial court level. That's what began  
24 that whole process of discussion.

25 MR. MEADOWS: Okay. But obviously

1 predetermination on constitutionality  
2 generally. All right? So that's what we're  
3 voting on.

4 All in favor of that raise your hand. 25  
5 in favor.

6 All opposed. Nine opposed. So Paula's  
7 motion will carry, and that will be  
8 reflected.

9 Can we be sure we reflect that in the  
10 report, that by a vote of 25 to nine the  
11 recommendation of this Advisory Committee was  
12 to include the time limits in the rules with  
13 the comment, Bob?

14 MR. PEMBERTON: Yes.

15 CHAIRMAN BABCOCK: Thanks. Okay.  
16 So on Rule 1.2 then, there is no -- I would  
17 think there would be no controversy about  
18 specifically referring to Rules 2.4(a),  
19 3.3(b), et cetera, et cetera. But if there  
20 is, speak now or forever hold your peace.

21 An issue that I see raised by what  
22 Representative Dunnam pointed out is whether  
23 or not there should be language borrowed from  
24 Section 2 about giving precedence. It  
25 probably is unnecessary, because how many

1 cases do we have where you've got to dispose  
2 of it in 48 hours? That in and of itself, I  
3 would think, would be enough expression of  
4 precedence. But do we need to add anything  
5 more? Judge Rhea.

6 HON. BILL RHEA: Well, I'm not sure  
7 I'm addressing your particular question. It  
8 just occurred to me that Section 2 says "all  
9 other pending matters" and our Section 1.2  
10 says "other pending matters." It seems to me  
11 we ought to be consistent and have "all other  
12 pending matters."

13 HON. ANN CRAWFORD McCLURE: That's  
14 fine.

15 CHAIRMAN BABCOCK: Does anybody  
16 disagree with that? Add the word "all." Did  
17 you get that, Bobby?

18 MR. PEMBERTON: Got it.

19 CHAIRMAN BABCOCK: Okay. I take it  
20 nobody disagrees with that?

21 HON. ANN CRAWFORD McCLURE: I  
22 don't.

23 CHAIRMAN BABCOCK: Okay. Anything  
24 else about Rule 1.2? Any other comment?

25 MR. JEFFERSON: That comment on

1 HON. SARAH B. DUNCAN: Now, wait a  
2 minute, we do have pending before our court  
3 the question of gender.

4 CHAIRMAN BABCOCK: Would "her" be  
5 the appropriate word? "Her" is correct. Who  
6 raised this?

7 HON. SCOTT A. BRISTER: How about  
8 "the recipient or the recipient's attorney"?

9 MR. TIPPS: That would be okay.

10 CHAIRMAN BABCOCK: Bob, do you know  
11 what we just did?

12 MR. PEMBERTON: We changed "their  
13 attorney" in the last line of the rewritten  
14 version to "her attorney."

15 HON. SCOTT A. BRISTER: No, "the  
16 recipient."

17 CHAIRMAN BABCOCK: All right.  
18 Somebody read it the way we changed it.

19 HON. ANN CRAWFORD McCLURE: "And  
20 notices required under these rules in a manner  
21 designed to giving the recipient or the  
22 recipient's attorney prompt actual notice."

23 MR. ORSINGER: Can I ask the  
24 question why we're using the word "recipient"  
25 when what we're talking about is the woman who

1 Comment 6, I think there's a typo. It think  
2 it ought to be 33.003(h) on the second line  
3 rather than 2(h).

4 HON. ANN CRAWFORD McCLURE: Thank  
5 you.

6 MR. PEMBERTON: And it's not  
7 envisioned that the footnotes will end up in  
8 the final version of the rules. These are  
9 just annotations for you all's benefit. But  
10 we'll correct it.

11 CHAIRMAN BABCOCK: Thank you.  
12 Anything else about 1.2? Yes.

13 MR. TIPPS: On the last line, the  
14 word "their" should be "his or her," according  
15 to my high school English teacher.

16 MR. ORSINGER: Or just her. I don't  
17 think there's a his in this situation.

18 MR. TIPPS: Well, the recipient  
19 could be a lawyer.

20 HON. ANN CRAWFORD McCLURE: It could  
21 be a male lawyer.

22 MR. ORSINGER: The recipient or her  
23 attorney. There's not going to be -- unless  
24 somebody has come up with something new, it's  
25 not going to be anyone else but her.

1 is applying for this relief? Why don't we  
2 call her an applicant?

3 CHAIRMAN BABCOCK: Good question.  
4 Why?

5 HON. ANN CRAWFORD McCLURE: Under  
6 the rules, the notice can be provided to an  
7 individual that the minor designates to get in  
8 touch with her, which may not necessarily be  
9 the minor. If she's trying to maintain  
10 anonymity, she doesn't want them to come into  
11 her house, she may specify somebody else.

12 HON. F. SCOTT McCOWN: So it should  
13 be "the recipient or the applicant's  
14 attorney."

15 MR. ORSINGER: It's never going to  
16 be the recipient's attorney. It's always the  
17 applicant's attorney, even though the  
18 recipient may be receiving the notices from  
19 the attorney.

20 HON. ANN CRAWFORD McCLURE: That's  
21 true.

22 MR. ORSINGER: It's always the  
23 applicant, isn't it?

24 CHAIRMAN BABCOCK: Good catch. All  
25 right. The recipient or the applicant's



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1 attorney.

2 MR. ORSINGER: There is never going  
3 to be a recipient's attorney. The only  
4 attorney is for the applicant.

5 CHAIRMAN BABCOCK: Quit while you're  
6 ahead, Richard.

7 HON. ANN CRAWFORD McCLURE: He goes  
8 into attack mode and he can't back off.

9 PROFESSOR ALBRIGHT: Excuse me, I  
10 hate to beat a technicality, but isn't the  
11 recipient always just the recipient? You have  
12 a designated recipient, whether or not it's  
13 the applicant, the attorney or somebody else.

14 MR. YELENOSKY: Why don't you just  
15 say "to give prompt actual notice"? I mean,  
16 the rules say who it goes to.

17 HON. ANN CRAWFORD McCLURE: All  
18 right. What if we say "in a manner designed  
19 to give prompt actual notice" and delete  
20 everything else in between?

21 CHAIRMAN BABCOCK: Another good  
22 point. We're making progress. Anything else  
23 on 1.2? Okay. 1.2 then is approved with  
24 those two changes, inserting the word "all" in  
25 front of "other pending matters" on Line 2,

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1 and deleting the language in the last line,  
2 "the recipient or their attorney."

3 Moving on to 1.3, there is a dispute on  
4 subparagraph (b), which we'll get to in a  
5 minute, but let's focus on 1.3(a) to start  
6 with. Any comments on 1.3(a), Anonymity?  
7 Richard Orsinger.

8 MR. ORSINGER: On subdivision  
9 (a)(3)(B), I would make a special plea for us  
10 practicing lawyers that we not use the word  
11 "attorney" when we're talking about the  
12 attorney ad litem, and that we use "the  
13 attorney ad litem" every time we're talking  
14 about the court appointed attorney. I can  
15 foresee that someone is going to be appointed  
16 an attorney ad litem for a girl who has a lot  
17 of problems besides just this one. And I want  
18 to be sure that when we're designating the  
19 person that's appointed as the attorney ad  
20 litem that the scope of their representation  
21 is limited to this particular proceeding. And  
22 I would prefer that we use the word "attorney  
23 ad litem" rather than "the attorney appointed  
24 for the applicant."

25 So my suggestion would be to say, "When

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1 an attorney ad litem is appointed under  
2 Rule 2.3(b)." And then everywhere else in  
3 here that we talk about the minor's attorney,  
4 I've added minor's attorney, meaning personal  
5 hired attorney who has many duties, or  
6 attorney ad litem, whose duties are limited to  
7 representing her in the lawsuit.

8 HON. ANN CRAWFORD McCLURE: I  
9 understand your comment. The statute doesn't  
10 refer to an attorney ad litem. The statute  
11 refers to "The court shall appoint an  
12 attorney."

13 MR. HAMILTON: There's a guardian  
14 ad litem.

15 HON. ANN CRAWFORD McCLURE: And you  
16 and I well know the debate and the difficulty  
17 between those implications. But that's why  
18 the forms track the statute, because the  
19 statute does not refer to an attorney  
20 ad litem.

21 MR. ORSINGER: But would you agree,  
22 if the court appoints an attorney to represent  
23 someone in a lawsuit, that they are an  
24 attorney ad litem? Or do you think that they  
25 are something other than an attorney ad litem?

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1 HON. ANN CRAWFORD McCLURE: I may  
2 have to write on that.

3 MR. ORSINGER: Okay. I can't ask  
4 that. Well, my proposal is a practical one.  
5 It is an attorney ad litem, but I -- these  
6 situations are fuzzy situations, but when  
7 you're appointed to be a minor's attorney, I  
8 would like it to be clear that your duty is  
9 limited to this particular proceeding and  
10 nothing broader.

11 HON. ANN CRAWFORD McCLURE: Well,  
12 Paula Sweeney raised that issue with me during  
13 the break as well to make it clear,  
14 particularly if we're going to be giving  
15 implications that a nonsuit is an appropriate  
16 remedy to the recusal problem, that the  
17 responsibilities of the attorney terminate  
18 when that application is withdrawn. And if it  
19 is filed yet in another court, there will need  
20 to be the appointment of another attorney.

21 MR. ORSINGER: Well, as long as  
22 you're going to go that far, you probably  
23 ought to be sure, because traditionally the  
24 appointment of an ad litem cuts off before the  
25 appeal obligation, doesn't it? You're

1 appointed for trial and not appeal. And if  
2 we're going to say that you're appointed all  
3 the way through the Texas Supreme Court, and  
4 hopefully not the U.S. Supreme Court, then  
5 maybe we ought to say when it cuts off.

6 HON. SARAH B. DUNCAN: Richard and I  
7 have been having this debate now for four  
8 years. I would be very hesitant to try to  
9 write into the rule the scope of a  
10 representation that in all likelihood is going  
11 to be governed by the Disciplinary Rules and  
12 common law.

13 CHAIRMAN BABCOCK: So if I  
14 understand it, Justice McClure, although you  
15 feel Richard's pain, you don't accept it?

16 HON. ANN CRAWFORD McCLURE: I  
17 understand the concern. It has been an  
18 ongoing concern in the family law community  
19 for years. I can envision a number of  
20 circumstances where liability is going to  
21 arise as a result of these proceedings. And I  
22 am as concerned as Sarah is about our trying  
23 to overdo our efforts to define what the scope  
24 of liability is.

25 MR. LOW: Chip.

1 which are repeated in this Title 2 chapter.

2 MR. LOW: But do you envision that  
3 the court would appoint somebody as attorney  
4 for her and somebody else attorney ad litem in  
5 the same proceeding?

6 HON. ANN CRAWFORD McCLURE: No.  
7 There would be one attorney for her. But the  
8 attorney may not be the guardian ad litem.  
9 Now, what Richard is saying is that,  
10 technically speaking under the Family Code,  
11 when an attorney is representing for a child,  
12 it is in an ad litem role, but the statute  
13 doesn't define it that way.

14 CHAIRMAN BABCOCK: Okay. So Justice  
15 McClure has not accepted the proposal by  
16 Richard. We still should vote to see whether  
17 or not we need to include this in our report.  
18 If a majority accepts Richard's position, then  
19 it will be included in the report. And if  
20 they don't, then it will just be in the  
21 record. Yes, Paula.

22 MS. SWEENEY: The question that I  
23 had asked at the break, and it follows on what  
24 Richard said, is just from a practical  
25 standpoint. Follow the hypothetical for a

1 CHAIRMAN BABCOCK: Yes, Buddy Low.

2 MR. LOW: Isn't it true that  
3 ordinarily, under the rules or statutes, when  
4 you appoint an attorney ad litem, it's because  
5 of a potential conflict? Otherwise, like you  
6 appoint an attorney to represent somebody in a  
7 criminal case or something. So how would an  
8 attorney ad litem arise in a situation like  
9 this?

10 HON. ANN CRAWFORD McCLURE: For not  
11 representing the best interests of the child,  
12 which is the reason they're appointed under  
13 the Family Code. They are appointed to  
14 represent the best interest of the child,  
15 especially to the extent, you know, that the  
16 attorney does not have to follow through  
17 necessarily, and there is some debate over  
18 that, with the minor's wishes.

19 And you get conflicts when you have an  
20 attorney who is appointed as an attorney ad  
21 litem and a guardian ad litem. You get  
22 conflicts when the attorney ad litem takes one  
23 position and the guardian ad litem takes  
24 another. We have provisions in the Family  
25 Code that specify certain obligations, none of

1 second. If you appoint an ad litem and you  
2 draw, you know, that judge in Houston, I mean,  
3 and everybody says, "Well, we've got to go  
4 someplace else." And the minor has to say, "I  
5 haven't been anyplace else," at least the way  
6 the form is written right now, as opposed to  
7 "I haven't had a final decision anyplace  
8 else," which would solve the problem. But the  
9 minor is going to do that in all likelihood,  
10 "No, I haven't been anyplace else."

11 If the lawyer has to follow her to that  
12 other court, the lawyer then is tasked with  
13 supporting her perjury? Does the lawyer, the  
14 ad litem who is appointed, stay appointed for  
15 purposes of trying to get judicial consent, or  
16 does the lawyer stay appointed for purposes of  
17 having the proceeding in the court in which he  
18 or she was appointed?

19 If the minor then bails and goes to  
20 county court or goes to the next county or  
21 whatever, you've got a whole new lawyer  
22 appointed? Or is the lawyer that's been  
23 appointed the first time, the ad litem,  
24 responsible to follow her?

25 HON. ANN CRAWFORD McCLURE: No, not

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1 in my interpretation. You and I talked about  
 2 changing the form, and I agree with you,  
 3 instead of requiring a disclosure as to  
 4 whether the application has been filed,  
 5 whether the application has been denied  
 6 previously, which would resolve that  
 7 difficulty.  
 8 HON. F. SCOTT McCOWN: Wait, I'm  
 9 sorry. I didn't mean to interrupt.  
 10 HON. ANN CRAWFORD McCLURE: That's  
 11 all right.  
 12 HON. F. SCOTT McCOWN: But it seems  
 13 to me that when the Supreme Court -- or when  
 14 the Legislature asks the Supreme Court to  
 15 write rules, that there is some ability to  
 16 fill in the interstices. And I think that we  
 17 need at least a comment, if not a rule,  
 18 because this would be easy to clarify.  
 19 Under the family law, this appointed  
 20 attorney I don't think can have any scope for  
 21 the minor beyond this proceeding, because the  
 22 parents or guardian ad litem presumably has  
 23 the legal authority to control their legal  
 24 affairs except for this proceeding. And so  
 25 what I think we need to just say is the

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1 attorney is appointed for this case. If the  
 2 case concludes, the attorney's duties  
 3 conclude, knowing that if she files another  
 4 application, she gets another attorney  
 5 wherever she files it. And we need to say,  
 6 "And the attorney is responsible for the  
 7 entire process all the way through the  
 8 appeal," because traditionally your obligation  
 9 terminates at the trial court, and just  
 10 clarify it. Just step out and clarify it.  
 11 Easy to do.  
 12 HON. ANN CRAWFORD McCLURE: And that  
 13 raises the distinction between the attorney  
 14 ad litem and the role as attorney. Because if  
 15 there is an appellate process for the denial,  
 16 it is anticipated that that is going to be  
 17 brought by an attorney, but there is no  
 18 provision in the statute to appoint another  
 19 appellate attorney.  
 20 HON. F. SCOTT McCOWN: Just keep the  
 21 same attorney.  
 22 HON. ANN CRAWFORD McCLURE: Well,  
 23 that's why I'm hesitant to further define it  
 24 by saying it's an ad litem.  
 25 HON. F. SCOTT McCOWN: Don't call it

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1 an ad litem. I'm saying --  
 2 HON. ANN CRAWFORD McCLURE: I agree  
 3 with you. It's Richard I disagree with.  
 4 HON. F. SCOTT McCOWN: But I think  
 5 I've solved Richard's problem. I mean, he's  
 6 worried. Like all lawyers, they have this  
 7 paranoid fear of being sued. I've never seen  
 8 one of them get sued yet by a child.  
 9 HON. ANN CRAWFORD McCLURE: I have.  
 10 HON. F. SCOTT McCOWN: But you're  
 11 the attorney for just this proceeding. The  
 12 parent controls their legal affairs for all  
 13 other proceedings.  
 14 HON. HARVEY G. BROWN, JR.: Could we  
 15 clarify that not only by the language in the  
 16 rule but by the form? Do we have a form?  
 17 MR. ORSINGER: We have no form for  
 18 appointment. We should for both the guardian  
 19 and the ad litem. It seems to me we could  
 20 really help a lot of people if we do a form.  
 21 MR. PEMBERTON: I think there's a  
 22 proposed form along those lines in the  
 23 Alternative Forms. There's an alternative  
 24 version of the form that's the last attachment  
 25 that you have. Those were suggested by some

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1 of the Harris County judges, Judge Elizabeth  
 2 Ray and Judge Sharolyn Wood, and they do have  
 3 a form in there, I think, if I'm not mistaken.  
 4 HON. F. SCOTT McCOWN: But we should  
 5 say somewhere, either as a rule or a comment  
 6 on the order, that you're the attorney for  
 7 this case. When the case is over, your  
 8 obligations end, but you're obligated to also  
 9 pursue the appeal.  
 10 CHAIRMAN BABCOCK: Justice Duncan.  
 11 HON. SARAH B. DUNCAN: There again,  
 12 attorneys don't end with the conclusion of the  
 13 proceeding. We have continuing duties. For  
 14 instance, you do need to reveal that you have  
 15 made a misrepresentation to the client as a  
 16 continuing duty. To say that the obligation  
 17 to represent, or the duties that go along with  
 18 that representation, expire with the  
 19 proceeding may be inaccurate.  
 20 HON. F. SCOTT McCOWN: Well, you may  
 21 have duties, but you couldn't take any legal  
 22 action on behalf of a minor.  
 23 HON. SCOTT A. BRISTER: No. I think  
 24 on publication, can't you -- the attorney ad  
 25 litem sometimes has the duty to appeal service

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<p>1 by publication.</p> <p>2 CHAIRMAN BABCOCK: Richard, do you</p> <p>3 wish to pursue your ad litem issue?</p> <p>4 MR. ORSINGER: I would be willing to</p> <p>5 live with what Scott is saying. But I wish it</p> <p>6 would be written in the rule, and not the</p> <p>7 comment, that the scope of the responsibility</p> <p>8 has to do with the court proceeding all the</p> <p>9 way through the Texas Supreme Court, and I'm</p> <p>10 happy; that if you're appointed in the trial</p> <p>11 court, you're appointed -- or if you don't</p> <p>12 want to do it that way, I'm happy with that.</p> <p>13 But I just don't like the loose use of</p> <p>14 the word "attorney." Because if a person is</p> <p>15 appointed to be an attorney for a minor child,</p> <p>16 you are guaranteed she will have more problems</p> <p>17 in her life than just this one when she comes</p> <p>18 into your office.</p> <p>19 CHAIRMAN BABCOCK: Justice McClure</p> <p>20 has been unwilling to accept that as an</p> <p>21 amendment, so we need to vote on something.</p> <p>22 Do you wish to vote that as a specific</p> <p>23 language change to 1.3(a)(3)(B)?</p> <p>24 MR. ORSINGER: Yes. But it will</p> <p>25 occur elsewhere. But I just would like to</p>	<p>1 means.</p> <p>2 CHAIRMAN BABCOCK: Steve, could we</p> <p>3 hold on until I see what Justice McClure's</p> <p>4 thought about that is.</p> <p>5 What do you think about that?</p> <p>6 HON. ANN CRAWFORD McCLURE: I'm</p> <p>7 uncomfortable in doing that, because I think</p> <p>8 it begins to define the scope. And there are</p> <p>9 all sorts of scenarios that can arise under</p> <p>10 this statute that we can't even imagine yet,</p> <p>11 and I'm uncomfortable defining or in any way</p> <p>12 trying to limit the reference, because I think</p> <p>13 when we begin to do that, then we start to</p> <p>14 define it ourselves.</p> <p>15 CHAIRMAN BABCOCK: We're going to</p> <p>16 vote on that in a second, Judge McCown, but</p> <p>17 Steve first.</p> <p>18 MR. YELENOSKY: Well, turning for a</p> <p>19 minute from the attorney's paranoia about</p> <p>20 being sued to the girl's interests, and this</p> <p>21 may be taken care of, but assuming that the</p> <p>22 adolescent girl gets an appointed attorney and</p> <p>23 the advice of that attorney is, "You need to</p> <p>24 go file this somewhere else," because they're</p> <p>25 in a county where they're never going to get</p>
<p>Page 158</p> <p>1 make it clear that when we're talking about an</p> <p>2 appointed attorney, that we identify them, and</p> <p>3 I don't care if we call them appointed lawyer</p> <p>4 or attorney ad litem or some other lingo, but</p> <p>5 something to indicate that their</p> <p>6 responsibility is somehow different from</p> <p>7 someone who has accepted voluntary appointment</p> <p>8 and probably has greater duties to advise the</p> <p>9 client on a broader scope of things.</p> <p>10 CHAIRMAN BABCOCK: For the purpose</p> <p>11 of the vote, why don't we go with your initial</p> <p>12 language, that is to say, when the attorney ad</p> <p>13 litem is appointed, et cetera.</p> <p>14 HON. F. SCOTT McCOWN: But rather</p> <p>15 than do that, can't we just add in these</p> <p>16 general provisions a new one point -- whatever</p> <p>17 the last number is, and I guess it would be</p> <p>18 1.7 -- and just say that the attorney that is</p> <p>19 appointed is to represent the minor in this</p> <p>20 proceeding only, and that their obligation is</p> <p>21 to carry any appeal through the Texas Supreme</p> <p>22 Court?</p> <p>23 MR. ORSINGER: I'd prefer that.</p> <p>24 HON. F. SCOTT McCOWN: Just do that,</p> <p>25 and skip these debates about what "ad litem"</p>	<p>Page 160</p> <p>1 it approved. And the prudent advice is to go</p> <p>2 file it in some other county, which you're</p> <p>3 entitled to do. So is the assumption that</p> <p>4 that appointed counsel's responsibility ends</p> <p>5 at the point that he advises the client of</p> <p>6 that, she accepts the advice, and he dismisses</p> <p>7 it voluntarily? Or does he have any</p> <p>8 continuing obligation to get her to somebody</p> <p>9 in a different county and get the process</p> <p>10 started again?</p> <p>11 CHAIRMAN BABCOCK: So you are</p> <p>12 supportive of Justice McClure's concern?</p> <p>13 MR. YELENOSKY: Well, yes.</p> <p>14 CHAIRMAN BABCOCK: Justice Duncan.</p> <p>15 HON. SARAH B. DUNCAN: Just to point</p> <p>16 out, we're having a problem in San Antonio</p> <p>17 right now with the San Antonio plan where you</p> <p>18 pay to get out of criminal appointments. I</p> <p>19 think it's limited to criminal appointments,</p> <p>20 and I'm not quite sure if it's going to</p> <p>21 complicate events or not, but one of the</p> <p>22 concerns that's been brought up recently is</p> <p>23 the continuing duty on appeal. And people are</p> <p>24 filing motions to withdraw so that they can</p> <p>25 get out of the proceeding, and they simply</p>

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1 say, "I'm incompetent." And of course, then  
 2 they have a duty to withdraw, and they can  
 3 evade paying their \$500. So defining the  
 4 continuing duty on appeal is also, I think, a  
 5 problem.

6 CHAIRMAN BABCOCK: Okay. We're  
 7 going to vote on the Orsinger/McCown proposal  
 8 of adding a Section 1.7 which makes the  
 9 responsibilities and duties of the attorney in  
 10 this proceeding clear. We'll come up with  
 11 language later if it passes. So all in  
 12 favor --

13 HON. F. SCOTT McCOWN: Could I  
 14 understand again why Justice McClure thinks we  
 15 shouldn't say anything about this?

16 HON. ANN CRAWFORD McCLURE: Because  
 17 I think it opens a can of worms, is the short  
 18 answer. I don't think that -- in order to  
 19 accomplish what I hear you wanting to  
 20 accomplish and Richard wanting to accomplish,  
 21 we would need to graft on to this bill all of  
 22 the outlines of the liabilities of the  
 23 attorney ad litem and the guardian ad litem  
 24 that are in Title 5 of the code. They didn't  
 25 do that. We went through and debated, our

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1 subcommittee, whether we ought to do that.  
 2 Should we outline what the responsibilities of  
 3 the ad litem are? Should we outline what the  
 4 qualifications of the ad litem should be? And  
 5 we opted not to do that.

6 HON. F. SCOTT McCOWN: But I guess  
 7 I'm still not understanding, then, what's the  
 8 disadvantage of simply saying that the  
 9 attorney is appointed only to represent the  
 10 applicant in this proceeding?

11 MR. YELENOSKY: Does that extend to  
 12 my question, then, about if the advice of that  
 13 attorney is to file it somewhere else, does he  
 14 then have any obligation to assist that  
 15 applicant?

16 HON. F. SCOTT McCOWN: No. Because  
 17 my assumption would be that when she files it  
 18 somewhere else, she gets a lawyer in that  
 19 somewhere else.

20 CHAIRMAN BABCOCK: Justice Duncan.  
 21 HON. SARAH B. DUNCAN: For the South  
 22 Texas College of Law, Richard and I and  
 23 several other people debated this kind of  
 24 question. It's not clear under the current  
 25 Disciplinary Rules what a "matter" consists

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1 of. And we know you cannot withdraw from a  
 2 matter. If you do so, it would prejudice your  
 3 client.

4 So in this instance, in this context, is  
 5 "matter" limited to the proceeding that is  
 6 that particular docket number? Or is "matter"  
 7 limited by the subject matter, which is this  
 8 young woman's pregnancy? I don't think we as  
 9 a committee can decide those things.

10 CHAIRMAN BABCOCK: And what we're  
 11 doing now is solely to give the sense of this  
 12 committee to the Supreme Court, because in  
 13 light of Justice McClure's reluctance to  
 14 change the language, we're not going to change  
 15 the language of the rule that we send to the  
 16 Court. We're only going to give the Court the  
 17 sense of our committee on this issue. And  
 18 it's going to be under the procedural vehicle  
 19 that Richard Orsinger has proposed, with Judge  
 20 McCown's amendment, that we add a Section 1.7  
 21 defining the responsibility of the attorney  
 22 with respect to this. So all in favor of that  
 23 please raise your hand.

24 HON. F. SCOTT McCOWN: But just hold  
 25 on one more second. Let me just point out one

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1 thing.

2 CHAIRMAN BABCOCK: One last-ditch --

3 HON. F. SCOTT McCOWN: It's going to  
 4 be very difficult to recruit attorneys to this  
 5 effort, and I think it behooves us to provide  
 6 them some clarity about what their  
 7 responsibility is.

8 HON. HARVEY G. BROWN, JR.: I was  
 9 just getting ready to make the same point. I  
 10 think when we try to put together some lists,  
 11 one of the questions is going to be from the  
 12 attorneys: "What's my role? What's my  
 13 duty?" Well, I don't know, and nobody knows,  
 14 and it's whatever you want to make it be. And  
 15 by the way, whatever you make it be, the  
 16 taxpayers have to pay for it, which, it seems  
 17 to me, throws another red shoe into this.

18 If the duty is beyond the scope of this  
 19 matter and taxpayers are paying for it, well,  
 20 maybe they'll suggest they should do a whole  
 21 lot of this free, pro bono work that goes to  
 22 their drug problems or whatever problems they  
 23 have. So I do think we need to think about  
 24 how we're going to get appointments.

25 CHAIRMAN BABCOCK: Buddy Low.

1 MR. LOW: If it's not limited to  
2 this bypass, what if she has a bad result with  
3 the doctor? Do you represent her against the  
4 doctor then? I mean, where does it stop, if  
5 it's not limited to the bypass?  
6 CHAIRMAN BABCOCK: Judge Rhea.  
7 HON. BILL RHEA: Well, it seems to  
8 me that you've got that problem already in any  
9 number of circumstances. We have attorneys  
10 ad litem we appoint for purposes of service by  
11 publication. That attorney at litem has  
12 ill-defined duties. It's unclear as to  
13 whether they're even going to get paid. It  
14 seems to me it's a risk that goes with the  
15 territory.  
16 MS. SWEENEY: But here is an  
17 opportunity to not have that problem.  
18 HON. BILL RHEA: This issue with the  
19 dismissal and the refile, it seems to me  
20 that's largely mooted by the fact that the new  
21 judge is compelled to appoint an attorney.  
22 MR. YELENOSKY: But time could be of  
23 the essence. And if you're dealing with a  
24 young person who may not be that intelligent,  
25 she's managed to get to a lawyer in this

1 is a little narrower than what you stated,  
2 Chip. I think the way I interpret what Scott  
3 is saying is that we're just saying that the  
4 responsibilities of the lawyer are limited to  
5 this proceeding. We're not attempting to say  
6 what those responsibilities are in this  
7 proceeding, but we're just saying that the  
8 appointment is for purposes of this proceeding  
9 and not any broader than that. And we're not  
10 saying when it cuts off or even how broad it  
11 is.  
12 But you read the language later on in  
13 here, and you're going to find out a lawyer  
14 appointed -- an attorney appointed for the  
15 minor, and that language is so broad I can  
16 tell you right now there's going to be a lot  
17 of lawyers like Paula that are going to be  
18 suing all of us because we were appointed --  
19 Paula wouldn't do it -- but because we were  
20 the attorney appointed for the minor --  
21 MS. SWEENEY: Martin is going to  
22 branch out and do it.  
23 MR. ORSINGER: -- and we are now the  
24 attorney for the minor.  
25 CHAIRMAN BABCOCK: All right. You'd

1 county, and he says, "Go somewhere else," and  
2 if he knows that time is of the essence,  
3 either medically or otherwise, legally  
4 perhaps, given the state of law, I don't know  
5 that he doesn't have an obligation to expedite  
6 her getting into another court.  
7 HON. BILL RHEA: If she's gone to  
8 that lawyer, then that's a private attorney,  
9 not one appointed by the court, and that  
10 attorney has got the usual --  
11 MR. YELENOSKY: No, I'm talking  
12 about an appointed counsel. She gets into  
13 court, she files her application, an attorney  
14 is appointed. That attorney's advice, and  
15 good advice, is to file elsewhere. But time  
16 is of the essence, either medically or  
17 legally, given the state of constitutional law  
18 on abortion. I would hate to say that just  
19 ipso facto, by virtue of this rule, his  
20 obligation or her obligation to expedite the  
21 filing of an application in another court is  
22 not his or her responsibility.  
23 CHAIRMAN BABCOCK: Richard  
24 Orsinger.  
25 MR. ORSINGER: I think the proposal

1 define it as "responsibility of the attorney  
2 is limited to this proceeding including  
3 appeals"?  
4 MR. ORSINGER: I think that you  
5 ought to have one appointment all the way  
6 through the Texas Supreme Court but not to the  
7 U.S. Supreme Court. That's my feeling.  
8 CHAIRMAN BABCOCK: Judge McCown, do  
9 you accept what Richard just said?  
10 HON. F. SCOTT MCCOWN: I would add,  
11 "Unless a motion to substitute counsel is  
12 granted," so if they want to get off or claim  
13 that they're incompetent for appeal that they  
14 would have a way to do it, but that it's their  
15 obligation. They're responsible unless  
16 relieved.  
17 MR. YELENOSKY: And does that  
18 encompass my concern? Or do you not see it as  
19 a concern?  
20 MR. ORSINGER: When that dismissal  
21 occurs in the trial court, that appointment is  
22 over, because the court proceeding is gone,  
23 there's no jurisdiction, there's no client,  
24 there's no lawyer. And if she's going to go  
25 to another county, she gets in the car and

1 drives over there and she's appointed a lawyer  
2 in the other county. I don't think that  
3 because you're appointed in this county you've  
4 got to follow the minor all over the state  
5 until you find a judge that will grant the  
6 relief.

7 CHAIRMAN BABCOCK: O. C. Hamilton.

8 MR. HAMILTON: That's what I was  
9 going to say. It would be the proceeding in  
10 the court in which the appointment was made,  
11 and not the proceeding that would be the same  
12 in another court.

13 CHAIRMAN BABCOCK: Is everybody  
14 clear on what we're voting on? All in favor  
15 of that raise their hands.

16 MS. SWEENEY: All in favor of  
17 putting in a provision limiting --

18 CHAIRMAN BABCOCK: Right. What they  
19 just said.

20 HON. SARAH B. DUNCAN: Defining the  
21 scope of it.

22 CHAIRMAN BABCOCK: Does anybody else  
23 in that row have their hand up after Anne?

24 MR. ORSINGER: Bill raised his hand,  
25 didn't he?

1 notation, Bob, that by a vote of 21 to 11, the  
2 Advisory Committee recommends that that should  
3 be included in the rule, but that the chair of  
4 the subcommittee would not accept the change.  
5 Okay.

6 MR. ORSINGER: Chip, I think there  
7 were some people that voted in favor because  
8 they understood that there would be an effort  
9 to do a form as well.

10 HON. SAMUEL A. MEDINA: If that's  
11 the case, then I change my vote.

12 MR. ORSINGER: No. I mean, we were  
13 voting to do a form, too, weren't we, Ann?

14 HON. ANN CRAWFORD McCLURE: Well,  
15 that was my comment. It seems to me if you're  
16 going to put it in the rule, you ought to at  
17 least tip the judges off that they might want  
18 to put it in the order.

19 MR. ORSINGER: Let's add that on  
20 there then.

21 CHAIRMAN BABCOCK: Okay. So you're  
22 going to do a form?

23 MR. ORSINGER: We'll do the form.  
24 We ought to do one for the guardians as well,  
25 I think, as long as we're doing one for the

1 HON. ANN CRAWFORD McCLURE: I have a  
2 question. For purposes of this discussion,  
3 given your viewpoint on this, do you want to  
4 draft a form for the appointment and include  
5 in that order the restraints that you want to  
6 impose by the rules?

7 HON. F. SCOTT McCOWN: Yes.

8 HON. ANN CRAWFORD McCLURE: Fine.

9 CHAIRMAN BABCOCK: Hang on, let's  
10 finish the vote, okay? Because we may have  
11 missed somebody.

12 MR. ORSINGER: I think Bill raised  
13 his hand after you swept past.

14 CHAIRMAN BABCOCK: I think he did  
15 too. So raise your hands again and everybody  
16 raise them high. Sorry.

17 HON. SAMUEL A. MEDINA: Well, in  
18 that case.

19 CHAIRMAN BABCOCK: 21. Everybody  
20 against now. 21 to 11 it passes. But it's  
21 not going to be in the rule. It's another  
22 drafting assignment that we're going to come  
23 up with language -- and Judge McCown and  
24 Richard can do this -- language of a proposed  
25 1.7 to transmit to the Court with the

1 lawyers.

2 CHAIRMAN BABCOCK: All right. Let's  
3 see if we can -- is there anything else  
4 about -- Richard.

5 MR. ORSINGER: Right after that  
6 language, I would suggest we strike "and the  
7 minor is given notice," because this provision  
8 says the clerk has to direct information to  
9 the minor's attorney when the attorney is  
10 appointed and the minor is given notice. So  
11 the clerk will never know when the minor is  
12 given notice, but the clerk will always know  
13 when the attorney is appointed.

14 HON. SAMUEL A. MEDINA: Richard,  
15 where are you reading from? I'm sorry.

16 MR. ORSINGER: I'm on (B), the same  
17 sentence. It's 1.3(a)(3)(B). I'm suggesting  
18 that we just strike "and the minor is given  
19 notice," because the clerk will never know  
20 when the minor is given notice. And really  
21 does it matter that the minor is given notice,  
22 or does it only matter that the attorney has  
23 been appointed?

24 MR. PEMBERTON: I think it was  
25 written to comprehend the notice going in both

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1 directions. The attorney who was appointed  
2 knows about it. The minor knows that their  
3 attorney is so and so and they can call them.  
4 And (B) just refers to that entire sequence of  
5 steps that effectuates the attorney's  
6 representation of the kid.  
7 MR. ORSINGER: Yeah. But the  
8 problem you've got is that it says basically  
9 that this is a duty on the clerk to  
10 communicate to the minor's attorney, whether  
11 that duty occurs when an attorney appears on  
12 behalf or when an attorney is appointed and  
13 the minor is given notice. How on Earth does  
14 the clerk ever know when the minor is given  
15 notice and therefore can start mailing only to  
16 the lawyer?  
17 MR. PEMBERTON: Well, I guess in  
18 practice this refers to when the attorney gets  
19 involved and starts showing up in court with  
20 the kid.  
21 MR. ORSINGER: Well, my suggestion  
22 then would be -- well, maybe there's only one  
23 court hearing. But the clerk is never going  
24 to know when the second half of your sentence  
25 has occurred; and therefore, it's going to

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1 create a problem. What you really want is  
2 notices to go to the lawyer at any point. I'm  
3 worried, because who is going to inform the  
4 clerk that the minor has been notified of the  
5 appointment?  
6 PROFESSOR ALBRIGHT: Richard, the  
7 provision that's referred to has the clerk  
8 giving the notice, so it's just the clerk who  
9 has given this notice.  
10 MR. ORSINGER: No. The clerk is  
11 required to give notice to the minor's  
12 attorney in two instances: Number one, when  
13 the attorney, a private attorney, has appeared  
14 on behalf of the minor; or number two, when an  
15 attorney has been appointed for the minor and  
16 the attorney has communicated with the minor.  
17 So the clerk's duty to advise the minor  
18 continues until they become aware that the  
19 lawyer and the minor have talked.  
20 MR. YELENOSKY: No. It's referring  
21 to 2.3(d)(1), which is the clerk's notice to  
22 the minor.  
23 HON. F. SCOTT McCOWN: That should  
24 read, "When the attorney" -- what it means is  
25 when the attorney is appointed and the clerk

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1 has given the notice to the minor of the  
2 attorney's appointment.  
3 MR. YELENOSKY: Right.  
4 MR. ORSINGER: Okay. I see. If it  
5 reads that way, then I understand it. It  
6 doesn't mean that to me, though, the way it's  
7 written.  
8 HON. F. SCOTT McCOWN: You have to  
9 go back and incorporate Rule 2.3(d)(1).  
10 CHAIRMAN BABCOCK: Which this rule  
11 references.  
12 MR. ORSINGER: Okay. Well, I'll let  
13 go of that if everybody else understands it.  
14 PROFESSOR ALBRIGHT: Well, I think  
15 you're correct that it should say something  
16 instead of "the minor is given notice." That  
17 seems to indicate the actual notice being  
18 handed to the minor. The way the rule refers  
19 to it, the clerk has given notice. Make the  
20 subject the clerk instead of the minor.  
21 MR. YELENOSKY: Using the active  
22 voice instead of the passive voice. The clerk  
23 has given notice to the minor.  
24 CHAIRMAN BABCOCK: Anything else on  
25 1.3?

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1 MR. PEMBERTON: What about the use  
2 of "Jane Doe" as opposed to the initials?  
3 CHAIRMAN BABCOCK: Say it again,  
4 Bob.  
5 MR. PEMBERTON: The rules require  
6 the use of the pseudonym "Jane Doe." That's a  
7 little bit different than the statute. The  
8 statute literally gives the minor the right to  
9 use either initials or a pseudonym. Well, A,  
10 we are inconsistent with the statute. Is that  
11 a problem? B, should we be using "Jane Doe"  
12 uniformly? I think the thinking was that  
13 applications are filed by the minor and  
14 sometimes they'll use initials. Particularly  
15 in a small-town setting, that might be a dead  
16 giveaway of who it is. And so for their  
17 protection maybe we can just mandate a uniform  
18 pseudonym. How does the committee feel about  
19 that?  
20 MR. ORSINGER: I like it.  
21 CHAIRMAN BABCOCK: Orsinger likes  
22 it, for the record. Bill Rhea.  
23 HON. BILL RHEA: I don't like that.  
24 Molestation cases get filed often times with  
25 the initials. People choose to use that in a



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1 large community like Dallas. Obviously, it  
 2 seems to me, that's perfectly adequate. And  
 3 one reason I like it is that I don't want to  
 4 give up entirely on this idea of fighting  
 5 forum shopping on this. If there's an In Re:  
 6 J. B. filed in my court, and a week later  
 7 there's an In Re: J. B. filed in the 160th, I  
 8 may come to find out about that and be  
 9 concerned about that, as may be the judge of  
 10 the 160th. It's not mandated by the statute,  
 11 so I think we ought to keep in step with the  
 12 statute.

13 CHAIRMAN BABCOCK: Paula.  
 14 MS. SWEENEY: Doesn't the statute  
 15 intend forum shopping to happen?  
 16 CHAIRMAN BABCOCK: It seems to.  
 17 HON. BILL RHEA: Nonsuits and  
 18 reapply.  
 19 MR. YELENOSKY: Yeah, as long as  
 20 it's not adjudicated.  
 21 CHAIRMAN BABCOCK: And Bob, I think  
 22 the enabling section gets around your problem,  
 23 because it instructs us to pass rules that  
 24 will ensure confidentiality. And for the very  
 25 reason that Judge Rhea may be able to identify

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1 J. B., big town or small town, you know, those  
 2 initials are some indicia of who that person  
 3 is.

4 HON. SAMUEL A. MEDINA: We really  
 5 struggled with that, and we thought about,  
 6 okay, what about clerks, you know. Sometimes  
 7 they may have other Jane Doe cases that have  
 8 nothing to do with bypasses. But it got down  
 9 to what we saw in our mandate, and that was  
 10 confidentiality and promptness.

11 Confidentiality, Jane Doe, they would  
 12 assume -- and we're going to talk about this  
 13 maybe later, but there's some guidance from  
 14 the Supreme Court or courts of appeal on these  
 15 issues. They're all Jane Does all over the  
 16 state. Confidentiality was the key issue.  
 17 And that's why we said Jane Doe; it keeps it  
 18 confidential.

19 HON. BILL RHEA: Doesn't the statute  
 20 allow for initials or any other form on the  
 21 application?  
 22 HON. SAMUEL A. MEDINA: Yes, it  
 23 does. Again, the reason we went with Jane Doe  
 24 was we emphasized confidentiality.  
 25 HON. BILL RHEA: So we're supposed

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1 to enhance what the Legislature has already  
 2 done?

3 HON. F. SCOTT McCOWN: That's what  
 4 they asked us to do. They said, "We'd like  
 5 you to write rules to ensure confidentiality."  
 6 HON. SAMUEL A. MEDINA: And  
 7 promptness. Those were the two key issues  
 8 that we were looking at.

9 CHAIRMAN BABCOCK: I'm very loathe  
 10 to do anything different from the Legislature,  
 11 and so I think Bob raises a very legitimate  
 12 point. I'm comfortable myself with the  
 13 enabling language to have Jane Doe, but I  
 14 think it's certainly a legitimate issue.

15 HON. ANN CRAWFORD McCLURE: We had  
 16 two district clerks on our committee, both of  
 17 whom are here today.  
 18 Cindy, I remember there being some other  
 19 concerns expressed by you as far as using the  
 20 Jane Doe as opposed to the initials. Am I  
 21 right or wrong about that?  
 22 This is Cindy Groomer, District Clerk of  
 23 Potter County, Amarillo.  
 24 MS. GROOMER: In our discussions in  
 25 the subcommittee, we were concerned about

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1 anonymity within the records, as opposed to  
 2 confidentiality, meaning you don't give out  
 3 records and you hold the file secret. The  
 4 anonymity issue was best addressed and more  
 5 easily addressed through our indexing  
 6 mechanism and what have you just using a  
 7 strict Jane Doe reference. Then they all just  
 8 appear as all Jane Does without initials. And  
 9 that was in an effort to protect the anonymity  
 10 issue.

11 CHAIRMAN BABCOCK: Richard.  
 12 MR. ORSINGER: I would make a  
 13 suggestion that would also add historical  
 14 continuity, and that is that we use "Jane Roe"  
 15 instead of "Jane Doe." And then we'll tie  
 16 into the history, plus all the Does that are  
 17 in there for Doe reasons will be separate from  
 18 the Roes that will be in there for the  
 19 abortion issue. And then --

20 HON. F. SCOTT McCOWN: That's a  
 21 horrible idea.  
 22 CHAIRMAN BABCOCK: And it was said  
 23 tongue in cheek. All right. Richard, are you  
 24 making -- the Jane Roe thing aside, are you  
 25 making -- or I guess, Bob, this is how -- you

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1 kicked this off, Bob. Why did you do this?  
 2 MR. PEMBERTON: I simply wanted to  
 3 get the committee's input because I thought it  
 4 was a serious issue.  
 5 CHAIRMAN BABCOCK: It is a serious  
 6 issue. Do you have a proposal, or did you  
 7 just want a discussion?  
 8 MR. PEMBERTON: I don't know if I  
 9 have standing to make any motions.  
 10 CHAIRMAN BABCOCK: We're all friends  
 11 here.  
 12 MR. PEMBERTON: I simply wanted to  
 13 have the benefit of the committee's thoughts  
 14 on a discussion of that.  
 15 CHAIRMAN BABCOCK: Justice McClure,  
 16 are you persuaded that the Jane Roe -- now  
 17 you've got me going -- Doe, that Jane Doe  
 18 should be changed to initials?  
 19 HON. ANN CRAWFORD McCLURE: No. Our  
 20 subcommittee discussed it extensively and took  
 21 a very strong position. So on behalf of them,  
 22 my vote included, I recommend the Jane Doe.  
 23 CHAIRMAN BABCOCK: Does anybody want  
 24 to force a vote on that, or can we move on?  
 25 HON. BILL RHEA: That's all right.

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1 CHAIRMAN BABCOCK: Okay. Moving on,  
 2 anything else on 1.3?  
 3 MS. SWEENEY: Well, does that  
 4 indicate the sense of the committee to you? I  
 5 mean, do you have a sense of this committee  
 6 now sufficiently to go forward?  
 7 HON. ANN CRAWFORD McCLURE: My  
 8 subcommittee, yes.  
 9 CHAIRMAN BABCOCK: No, no, no,  
 10 judge. Do we have a sense of this committee?  
 11 MR. PEMBERTON: We do.  
 12 MS. SWEENEY: What is it?  
 13 CHAIRMAN BABCOCK: Okay. Richard.  
 14 MR. ORSINGER: On the very last  
 15 paragraph of (b), there's a reference to  
 16 guardian. This is (4), (b)(4), "Court  
 17 personnel must not disclose" --  
 18 CHAIRMAN BABCOCK: No, we're not on  
 19 (b) yet.  
 20 MR. ORSINGER: Oh, you're not on  
 21 (b)? I'm sorry.  
 22 CHAIRMAN BABCOCK: Confidentiality  
 23 you're talking about?  
 24 MR. ORSINGER: Forget it. I  
 25 withdraw it.

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1 CHAIRMAN BABCOCK: Okay. We're on  
 2 1.3(a) now. Anything else on 1.3(a)? Okay.  
 3 1.3(a) is adopted without change.  
 4 Now we're on (b), and we're going to talk  
 5 about this for half an hour and then break for  
 6 lunch at 12:30. There is, as you can see, a  
 7 minority report. And the minority report is  
 8 going to be defended by Judge Medina, although  
 9 Judge McClure, I think, was also in the  
 10 minority, but she's going to defend the  
 11 majority.  
 12 The issue here is not the anonymity or  
 13 confidentiality of the applicant, but rather  
 14 the confidentiality of the judicial process.  
 15 Should the identity of the judge who is  
 16 deciding this be confidential? Should the  
 17 reasons that the judge is advancing, be it at  
 18 the trial court level or the court of appeals  
 19 or indeed in the Supreme Court, be  
 20 confidential? And should the order, to the  
 21 extent it does not contain identifying  
 22 characteristics, be confidential? That's the  
 23 issue raised by these two competing  
 24 proposals.  
 25 On the side of the proposal that carried

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1 a majority of the subcommittee, the  
 2 subcommittee in large part felt bound by the  
 3 statutory language in Section 1, subparagraph  
 4 (k), that says, "The application and all other  
 5 court documents pertaining to the proceedings  
 6 are confidential and privileged," et cetera,  
 7 et cetera, et cetera. And it was the  
 8 majority's view that the Legislature had  
 9 spoken on this issue and that the Rules  
 10 Committee could not circumvent that.  
 11 I'll let Judge Medina speak to the  
 12 minority view in a minute.  
 13 There is a third possibility which we  
 14 should discuss, and that is, as with the time  
 15 limits, I think the Court wants us to consider  
 16 and discuss whether we should be silent on  
 17 this issue in light of the obvious  
 18 constitutional problems raised by having a  
 19 whole judicial proceeding and process  
 20 conducted in secret. So we really have three  
 21 provisions in front of us, one the majority  
 22 view, one the minority view, and one the  
 23 "let's not speak to it at all in these rules"  
 24 view.  
 25 Judge Medina, do you want to articulate

1 what the minority view was?  
 2 HON. SAMUEL A. MEDINA: Well, in a  
 3 nutshell, the minority felt like we could  
 4 accomplish what the statute basically wanted  
 5 with limited public disclosure. And quite  
 6 frankly, the only other reason that we could  
 7 come up with for the public not knowing what a  
 8 judge does is mostly political, you know, and  
 9 that's the very reason it's a difficult  
 10 issue. This is a difficult situation, and  
 11 that's the very reason that we ought to let it  
 12 be known. I think you can argue the same  
 13 thing and come up with two different  
 14 conclusions.

15 CHAIRMAN BABCOCK: Judge McClure, do  
 16 you want to add something?

17 HON. ANN CRAWFORD McCLURE: The  
 18 proposition that I presented to the  
 19 subcommittee was this: I gave them the choice  
 20 of three votes that they could make. One was  
 21 to submit the proposal with pros and cons,  
 22 both ways, without making a recommendation to  
 23 this committee or to the Supreme Court. One  
 24 was to adopt Version A with the minority  
 25 report of B. And the third choice was adopt B

1 violates the confidentiality.  
 2 So my thinking is it's either all got to  
 3 be confidential, including the identity of the  
 4 trial judge, the county in which the  
 5 proceeding was filed, and the basis for the  
 6 trial court's ruling, the basis for the court  
 7 of appeals' ruling. If we are to implement it  
 8 as mandated, then the entire process has to be  
 9 confidential. That destroys the purpose of  
 10 trying to identify those factors to give  
 11 guidance to the bench and bar as to how we go  
 12 about deciding these issues.

13 I can tell you Paul Watler drafted the  
 14 minority report. He is an attorney in Dallas  
 15 with Jenkins & Gilchrist and president of the  
 16 Freedom of Information Foundation, I think is  
 17 the name of the group. What he wanted was to  
 18 be able to track a score card for trial judges  
 19 as to how many of these applications are you  
 20 granting, how many of these are you denying.  
 21 We did inquire of the Office of Court  
 22 Administration as far as tracking the number  
 23 of these cases that are processed in the  
 24 counties. They are required to submit  
 25 information to OCA on various types of

1 with the minority report of A. So our  
 2 subcommittee explicitly chose not to remain  
 3 silent on the issue. They wanted their voices  
 4 heard on the subject. The vote was 12 to 4 in  
 5 favor of Version A, which is absolute strict  
 6 confidentiality.

7 Certainly the statute speaks in terms of  
 8 express confidentiality. Our investigation,  
 9 to the extent possible in the time constraints  
 10 of legislative intent, was they envisioned the  
 11 identity of the trial judge to be  
 12 confidential.

13 What got convoluted in the discussions  
 14 was this: My understanding was the  
 15 Legislature wanted there to be some body of  
 16 law to develop, obviously through appellate  
 17 decisions, as to the parameters that ought to  
 18 be considered. What are the factors judges  
 19 should be looking at in deciding maturity?  
 20 What are the factors judges should be looking  
 21 at in deciding whether parental notification  
 22 is or is not in the child's best interest?  
 23 The only way we can do that through published  
 24 appellate decisions is to publish. And  
 25 certainly to publish an opinion completely

1 lawsuits. It will not be difficult to create  
 2 a separate category for these so that we can  
 3 track how many of these the system is  
 4 absorbing every year. They wanted to be able  
 5 to break that down into trial judges and  
 6 rulings. And it was the consensus of the  
 7 subcommittee that they did not want to do  
 8 that.

9 CHAIRMAN BABCOCK: Justice Hecht,  
 10 did you want to add anything about the point  
 11 of the third option of just not talking about  
 12 this in these rules?

13 JUSTICE HECHT: Well, it's the same  
 14 as I alluded to earlier. The Court is aware  
 15 that there are constitutional arguments that  
 16 can be made that some of this information,  
 17 particularly the identity of the judge and the  
 18 substance and basis of rulings, should not be  
 19 confidential and cannot be. And I don't know  
 20 of another proceeding, frankly, where this  
 21 much information is completely secret.

22 We don't propose to decide this issue  
 23 without an adversarial proceeding, and we  
 24 don't propose to ignore what the statute says,  
 25 because the Legislature can read the

1 Constitution, too. But query again, should we  
2 be silent on this and let the issue come up so  
3 that it does not appear that we have prejudged  
4 ourselves? Or should we put something in here  
5 that basically tracks the statute? And you  
6 have already taken a vote on that basic  
7 approach which seems to me to affect this  
8 debate. But this is another problem that we  
9 have with the statute.

10 CHAIRMAN BABCOCK: Representative  
11 Dunnam, did you have anything to add in terms  
12 of what -- we got a letter from Senator  
13 Shapiro to the effect that the issue of  
14 judicial confidentiality had really not been  
15 something that she recalled.

16 REPRESENTATIVE DUNNAM: First of  
17 all, anytime I say anything, I'm just going by  
18 my memory and I don't want to ever imply that  
19 I speak for anybody.

20 CHAIRMAN BABCOCK: Understood.

21 REPRESENTATIVE DUNNAM: I don't  
22 remember that. To me, this entire issue is  
23 really one of politics and of -- I mean, as  
24 someone that really doesn't like this law, I'd  
25 like the judges to be confidential, because I

1 think that, if they don't get a score card  
2 that is going to be run against them in the  
3 next election, they're more likely to do what  
4 they think is the right thing. That's what I  
5 think this is all about.

6 I personally don't think the Legislature  
7 thought -- I don't think that keeping the  
8 judge confidential really protects the  
9 applicant any one way or the other. I think  
10 it's whether or not the judges want cover.  
11 And I don't blame them for wanting it. As  
12 someone who is more on the left on this issue,  
13 I'd like the judges to have cover. But that's  
14 the only sense that I remember it being  
15 discussed.

16 CHAIRMAN BABCOCK: Judge Medina.

17 HON. SAMUEL A. MEDINA: But see,  
18 that's one of the issues that I have a problem  
19 with. If I can do it all in secret, then I  
20 may not be necessarily intellectually honest  
21 with what's before me as a judge. I might  
22 start voting my ideology.

23 REPRESENTATIVE DUNNAM: Well, I  
24 don't know how the judges work, but in the  
25 Texas House there are a lot of members that

1 will vote against their personal beliefs  
2 because of fear of the fringes of their party,  
3 Democrat and Republican.

4 HON. SAMUEL A. MEDINA: I guess  
5 that's what I'm saying.

6 REPRESENTATIVE DUNNAM: And they  
7 don't vote their conscience; they vote what is  
8 going to affect the next election. And I had  
9 to vote on the record on this issue. I would  
10 just as soon the judges not have to, because I  
11 think they will decide it properly based on  
12 what they feel in here (indicating), if we  
13 take politics out of the issue.

14 HON. SAMUEL A. MEDINA: I understand  
15 what you're saying, and I appreciate it as a  
16 judge, but --

17 REPRESENTATIVE DUNNAM: I think  
18 you're more likely to get a true sense of  
19 justice if the judges don't have a score card  
20 run against them by either Planned Parenthood  
21 or the religious right.

22 CHAIRMAN BABCOCK: Nina Cortell.

23 MS. CORTELL: To me, this is very  
24 serious, and the issue goes beyond a political  
25 score card, because this is an issue over

1 which people have been killed. And so my  
2 concern, which I've expressed earlier in some  
3 of the conversations, is if it becomes public  
4 and judges' names are put on web sites. It's  
5 a very serious issue, and so I would like to  
6 hear from the judges on whether they are  
7 concerned about that, because I'm concerned  
8 for them on that.

9 HON. ANN CRAWFORD McCLURE: I can  
10 tell you that we had several trial judges on  
11 our subcommittee. I was the only appellate  
12 judge on the subcommittee. I have been  
13 threatened. I have been stalked. I have had  
14 tires slashed. I have experienced that fear  
15 of unlocking my car door which parks in a  
16 public parking space on the side of the  
17 courthouse that says "State Court Judge of  
18 Appeals Only." And every time you turn the  
19 ignition on, you worry about it. But my  
20 concept is that that comes with the  
21 territory. And if I'm going to run for  
22 office, then I better be prepared to accept  
23 those risks. And I sure better be prepared to  
24 look at myself in the mirror the next morning  
25 and know that I made my decision based on the

1 case before me and not fear, whether it's fear  
 2 for my safety or fear for political  
 3 repercussions. And the day that comes that I  
 4 can't do that, then I should resign my bench.  
 5 Does that mean I don't worry about it? Uh-uh,  
 6 no. Sure, I do. I worry about it every time  
 7 I open my car door every single day.

8 And this bill provides for no security,  
 9 extra security at the courthouse. Our county  
 10 sheriffs are scared to death about it,  
 11 absolutely scared to death about it. But  
 12 whether or not the name of the trial judge is  
 13 published is not going to change the security  
 14 issues themselves at the courthouse in my  
 15 view. And I did vote for the minority report  
 16 as a judge.

17 MR. JEFFERSON: Well, we've already  
 18 talked about separation of powers once, and  
 19 the Legislature may be encroaching upon the  
 20 judicial power. I wonder on this issue  
 21 whether there may be an interest on someone  
 22 doing the other thing, having the courts  
 23 intrude on the legislative prerogative.  
 24 Because to me, the way the legislation was  
 25 written is pretty clear, that this is to

1 remain confidential. In all the proceedings  
 2 from beginning to end, there's no way that  
 3 this can become public at all. I don't happen  
 4 to think that's a good way to do legislation,  
 5 and I think it's probably suspect  
 6 constitutionally, but that's what it says.  
 7 And if that's what it says, well, then my view  
 8 is that's how we put it out there.

9 And then let the challenge come, and  
 10 they're going to come probably pretty  
 11 quickly. We've got a pretty aggressive media  
 12 in San Antonio, and I think the challenges  
 13 will come fast. And we'll know whether it's  
 14 good legislation or not constitutionally.

15 CHAIRMAN BABCOCK: Steve Yelenosky.

16 MR. YELENOSKY: Well, first of all,  
 17 I just want to say I admire you, Judge  
 18 McClure, for your courage in this. And I  
 19 think it is a courageous position, but it's  
 20 the right one. And I won't hide my position,  
 21 Representative Dunnam. I'm pro-choice.

22 But I think when we start going down the  
 23 road of saying, "Because this is a  
 24 controversial issue, we're going to make it  
 25 secretive," we can continue to apply that to

1 opinion after opinion or issue after issue.  
 2 And I just don't see us going down that road,  
 3 and I do think it would be an unconstitutional  
 4 road to take.

5 And I don't know, given the other  
 6 constitutionality questions raised here,  
 7 whether this is the biggest one or we can just  
 8 say overall that these are questions that we  
 9 have. But this one in particular is the one  
 10 that in some way I just hope that we're able  
 11 to say as lawyers and judges that we can't  
 12 look for either political cover or even the  
 13 kind of cover from the kind of threats that  
 14 you're describing because that would be the  
 15 expedient thing to do. And the fact of that  
 16 kind of attack on people and political threats  
 17 and physical threats or violent threats, I  
 18 think, is something that the public needs to  
 19 work out in the political process, but we  
 20 don't drive it underground by making it  
 21 secret.

22 CHAIRMAN BABCOCK: Judge McCown.

23 HON. F. SCOTT MCCOWN: Well, I want  
 24 to follow up on a comment made across the room  
 25 that the Legislature has said what the rule

1 is. The Legislature has asked the Supreme  
 2 Court to write rules to implement the  
 3 legislative rule. Legislation is presumed to  
 4 be constitutional, and that is a very heavy  
 5 presumption. And we've already suggested that  
 6 the Court have a comment at the beginning that  
 7 they're not in any way prejudging any issue or  
 8 passing on the constitutionality of anything.

9 It seems to me that what the Court needs  
 10 to do is to adopt rules that faithfully  
 11 implement the statute and then leave it for  
 12 litigation to determine in any particular way  
 13 that those rules might be infirm. That has  
 14 the advantage of both according the  
 15 Legislature the deference it's entitled as a  
 16 coequal branch of government and that it's  
 17 legislation is presumed to be constitutional,  
 18 giving us some time to work through these  
 19 problems and to get this system up and running  
 20 before we decide these very difficult  
 21 individual questions about confidentiality.

22 My main concern are the minors who come  
 23 into court and to make sure that they get a  
 24 decision out of the judiciary that reflects  
 25 exactly what the law and the facts are. I

1 tend to think -- I understand that if the  
2 public is looking over your shoulder, you may  
3 do the right thing. But if the public is  
4 looking over your shoulder, you also may do  
5 the wrong thing. And I tend to think that the  
6 more protection we provide the trial judges,  
7 at least particularly at the beginning, the  
8 better the process is going to be for the  
9 minors, even if there's a change 6 or 12 or  
10 24 months down the road.

11 I really want to strongly go with  
12 Version A. The only concession that I'm  
13 wondering about is whether we would want to  
14 report cumulatively for the entire state on  
15 how many applications there were and how many  
16 were withdrawn and how many were granted and  
17 how many were denied and provide a cumulative  
18 report, which I think meets the legitimate  
19 needs of everybody to know what we're doing as  
20 a judiciary with these applications without  
21 providing individual score cards.

22 HON. SAMUEL A. MEDINA: Can I speak  
23 to that?

24 CHAIRMAN BABCOCK: Yes.

25 HON. SAMUEL A. MEDINA: And I

1 understand there are differing views. I take  
2 the opposite approach that secrecy then allows  
3 me to vote pro-choice or pro-life because then  
4 it's my ideology. Everything else I do as a  
5 judge I'm basing on facts that are there.  
6 It's open. I'm basing it on that. And then I  
7 have to stand in public, and I don't have to  
8 defend what I did, I just did it. And I think  
9 that secrecy then -- it doesn't work for that  
10 minor so much. I'm promoting my ideology  
11 instead of what's before me.

12 HON. F. SCOTT McCOWN: Secrecy works  
13 for the minor because the minor, under the way  
14 the Legislature has set it up, can forum  
15 shop. And in any county the minor can find  
16 the judge that the minor thinks is going to  
17 decide their application fairly.

18 HON. SAMUEL A. MEDINA: Which is  
19 going to happen eventually.

20 HON. F. SCOTT McCOWN: Right. If  
21 you have no secrecy, however, then you may  
22 have literally in some counties no forum where  
23 the minor can get a fair shake.

24 HON. SAMUEL A. MEDINA: Well, okay.

25 CHAIRMAN BABCOCK: Elaine Carlson.

1 PROFESSOR CARLSON: I would just say  
2 that I understand why in this particular  
3 instance protection of the trial judge seems  
4 particularly expedient, but I would share  
5 Steve Yelenosky's concern. I think that to  
6 ask the Supreme Court to adopt provisions of  
7 the rules that clearly have constitutional  
8 questions is inequitable. And I think it  
9 sends the wrong message to the Legislature, so  
10 I would vote in favor of Option 3, and that  
11 does not include Version A or B.

12 CHAIRMAN BABCOCK: Joe Latting.

13 MR. LATTING: I try not to agree

14 with Chip Babcock on too many issues, but I  
15 just can't believe that we're talking about  
16 requesting the Supreme Court to pass a rule  
17 that says that the public doesn't have a right  
18 to know what its judiciary is doing and why.  
19 It's really Starr Chamber like. Nobody gets  
20 to know anything about this on the theory that  
21 people can't deal with that? Surely we're not  
22 going down that road. Surely we're not.

23 CHAIRMAN BABCOCK: Buddy Low.

24 MR. LOW: Chip, I have trouble with  
25 the same thing, with the Court passing a rule

1 saying that we might have an opinion on  
2 interpretation of this statute, or you know,  
3 whether it follows, and they always interpret  
4 it but they can't even publish it. I mean,  
5 I've just never heard of a Supreme Court  
6 opinion that they couldn't publish. Some of  
7 them I wish they might not have, but...

8 CHAIRMAN BABCOCK: Richard  
9 Orsinger.

10 MR. ORSINGER: I agree with Joe's  
11 comment. I mean, historically, having an  
12 accountable judiciary is one of the really  
13 important safeguards of personal freedom.  
14 Now, we've already compromised that in Texas,  
15 as I understand it, in adoption proceedings,  
16 because the adoption decrees are secret. And  
17 I don't know that it's impossible to develop  
18 statistics on whether judges grant or deny  
19 adoptions. They almost always grant them.  
20 But I think we have made the decision in the  
21 adoption area that we're going to elevate  
22 secrecy over public accountability of the  
23 judiciary, but that's a noncontroversial  
24 issue.

25 The issue of abortion is probably the

1 most controversial issue of our time. And we  
2 have an elected judiciary. And I don't know  
3 what Representative Dunnam's position is on  
4 the abortion issue. I couldn't tell that from  
5 the comments, but --

6 REPRESENTATIVE DUNNAM: Good.

7 MR. ORSINGER: -- I do think an  
8 elected representative really probably is more  
9 expected to be responding to the people that  
10 vote, and judges are less expected to be  
11 responsive to the people that vote, but we  
12 have an elected judiciary nonetheless. And  
13 the decisions of the judges in Texas ought to  
14 be something that people know about and can  
15 vote on.

16 And I could foresee, for example, that  
17 there might be someone elected who will  
18 routinely deny all of these applications. And  
19 if their identity is never known, then it will  
20 only be the local lawyers who appear  
21 repeatedly or the guardians ad litem who will  
22 know that this judge is willfully and  
23 consciously disregarding the law.

24 And I'm also concerned about the stare  
25 decisis issue or the building of common law.

1 One of the strengths of the English and  
2 American system is that law incrementally is  
3 created through judicial decisions. We have  
4 some discretionary calls here about best  
5 interests of the minor and medical risks to  
6 the minor that we can't solve by just  
7 promulgating revised Rules of Procedure. And  
8 if the only appellate overview we have is to  
9 change a rule of procedure, and the problem  
10 we're having is that there are no uniformly  
11 articulated standards of when a minor is at  
12 risk medically or when something is in the  
13 best interests of a minor, we won't have any  
14 appellate review here. We're just going to  
15 move all of our trial activity to the court of  
16 appeals secretly, where they'll make a secret  
17 decision that gets moved to the Supreme Court,  
18 where I guess they'll make a secret decision.  
19 And this is really --

20 HON. SAMUEL A. MEDINA: The most we  
21 get is guidelines. We talked about that. And  
22 eventually, if that's the net effect, if the  
23 appeals court makes its decision secretly and  
24 then secretly gives it to the Supreme Court,  
25 then the most we could ever get would be

1 hopefully some guideline from the Supreme  
2 Court. But based on what?

3 MR. ORSINGER: Would it be an  
4 administrative ruling or would it be an  
5 adjudication of the case? Because if it's an  
6 administration ruling, this is not the way we  
7 build the law in America.

8 HON. F. SCOTT McCOWN: But Chip, let  
9 me point out -- and this is where I think it's  
10 very important on confidentiality to come to a  
11 decision on this issue. These are not  
12 judicial cases. This is not case or  
13 controversy. This is the judiciary being  
14 tasked with an administrative process. And  
15 there are many administrative processes where  
16 you have confidentiality. This is also not a  
17 Starr Chamber, because the government is not  
18 bringing the litigant in secret and  
19 adjudicating. The litigant is coming and  
20 asking for confidentiality and protection -- I  
21 should say the applicant, they're not really a  
22 litigant -- is coming and asking for  
23 confidentiality and protection. And that's  
24 what we've been tasked to ensure.

25 As an individual judge, if you develop a

1 system where a score card can be kept, because  
2 of confidentiality, my hands are tied. I  
3 can't defend myself about my decisions, why I  
4 denied them, why I granted them. I'm just at  
5 the mercy of the score card, and I think  
6 that's -- I don't mind a cumulative score card  
7 for the state, for people to know what's  
8 happening in terms of public policy, but an  
9 individual score card is not fair to the  
10 applicant minor. It's not fair to the judge.  
11 And the system I don't think can work if we  
12 have that kind of scrutiny.

13 CHAIRMAN BABCOCK: Justice McClure.

14 HON. ANN CRAWFORD McCLURE: One  
15 other thing that hasn't been mentioned yet  
16 that needs to be mentioned, and it's important  
17 to the comments that you just made, Scott, is  
18 the statute does not give discretion to the  
19 trial court. The statute mandates that if the  
20 trial court finds by a preponderance of the  
21 evidence that the minor is sufficiently mature  
22 to make the decision without notification of a  
23 parent, it must grant the judicial bypass. So  
24 a number of the trial judges have expressed  
25 the position that since I have no real

1 discretion in this case, if I can only make an  
2 adjudication of maturity, then I ought not  
3 have to be faced with the score card situation  
4 that is making a decision of my accomplishment  
5 or incompetency as a trial judge on whether I  
6 grant or whether I deny, because I really  
7 don't have the discretion to do it on the  
8 basis of anything other than her level of  
9 maturity. So I wanted everyone to understand  
10 how the statute itself limits the trial  
11 court's discretion in this process.

12 There was also a request at the  
13 subcommittee for us to define in the rules or  
14 set out guidelines of how you determine best  
15 interest. And I will tell you that the  
16 overriding concern in the Family Code is that  
17 these decisions will be made on the best  
18 interests of the child, but nowhere in the  
19 Code is it defined. And the only place that  
20 we have it defined is in a published Supreme  
21 Court opinion in a termination proceeding that  
22 lists certain criteria that the courts must  
23 consider in making that determination.

24 So that's a little bit of the tension on  
25 both sides of this issue that I want to be

1 sure you have that information on when you  
2 make this vote.

3 CHAIRMAN BABCOCK: Bill Dorsaneo.

4 PROFESSOR DORSANEO: I'm looking at  
5 the statute, and you know, people can argue  
6 about the meaning of any words, I suppose, but  
7 this Release of Records provision in (5) on  
8 Page 4 of the B proposal, it looks to me like  
9 it is at variance with the statute. At least  
10 it goes way beyond the statute. Judge  
11 McClure, is that your view as well?

12 HON. ANN CRAWFORD McCLURE:  
13 Everything in B is in direct expansion,  
14 commentary and violation of the statute.  
15 Absolutely. I agree with that.

16 PROFESSOR DORSANEO: As a member of  
17 this committee, I'm not going to advise the  
18 Court to do something at variance with the  
19 statute, because it jeopardizes everything we  
20 do here.

21 HON. ANN CRAWFORD McCLURE: That is  
22 absolutely true, that the statute pronounces  
23 confidentiality.

24 CHAIRMAN BABCOCK: Judge Brown.

25 HON. HARVEY G. BROWN, JR.: I wanted

1 to make the same point. Most of these  
2 arguments are good public policy arguments  
3 both ways. That's not our task. We're  
4 supposed to follow the mandate of the  
5 Legislature. Here the Legislature has chosen  
6 to provide additional judicial independence.  
7 Essentially you're making this almost like a  
8 federal judge for this one appointment. You  
9 cannot be reviewed by politics. That's what  
10 they chose to do. They chose to depoliticize  
11 it. You may not agree; you may agree. That's  
12 not our task to decide. They've decided it.

13 HON. SAMUEL A. MEDINA: Can I ask  
14 Bob a question, Mr. Chairman?

15 CHAIRMAN BABCOCK: Sure.

16 HON. SAMUEL A. MEDINA: Bob,  
17 Version B was pretty much -- if I'm not  
18 mistaken -- that was taken out of the Ohio  
19 statute based on the Lindsey case?

20 MR. PEMBERTON: That is correct.

21 HON. SAMUEL A. MEDINA: Would you  
22 address that?

23 MR. PEMBERTON: Sure. Version B  
24 came about, and it is what's advocated in the  
25 minority report, out of an Ohio Supreme Court

1 decision which cited in that long footnote  
2 annotating Rule 1.3(b), relying on that  
3 state's open courts provision, which is  
4 similar to Texas' open courts provision,  
5 holding that that provision required those  
6 items enumerated in Version B to be open to  
7 the public. And that text is derived from the  
8 Ohio Supreme Court rule. I have the backup  
9 text if anybody is interested.

10 CHAIRMAN BABCOCK: Steve.

11 MR. YELENOSKY: Maybe this is a  
12 question -- Justice Hecht, I think you said  
13 earlier that the Supreme Court would never  
14 knowingly issue a rule that it believed to be  
15 unconstitutional. You've also said in this  
16 instance that you're not prepared to make that  
17 determination. But if I understand you  
18 correctly, in those instances in which the  
19 Legislature might prescribe something which  
20 the Court determined up front was  
21 unconstitutional, you would either not  
22 promulgate a rule consistent with that  
23 statute, or you would promulgate one  
24 inconsistent with the statute and there would  
25 be some kind of constitutional dispute at that



1 point. If that's true, then it wouldn't be  
2 inappropriate for this body to recommend that  
3 we believe this is unconstitutional to the  
4 Supreme Court. Is that not true?

5 CHAIRMAN BABCOCK: Well, I'm  
6 instructing him not to answer, unless he wants  
7 to.

8 JUSTICE HECHT: Well, I can't speak  
9 for the whole Court, but I can't conceive that  
10 any of us would want to decide an issue of  
11 this magnitude in anything but a fully  
12 adversarial setting with plenty of briefs and  
13 arguments of counsel, just like you would in  
14 any other context. So I don't anticipate that  
15 there is any thought on our Court that we  
16 would decide that the statute was  
17 unconstitutional in any respect going in.

18 But if you have reservations about it and  
19 they're fairly serious, query, have you put  
20 your thumb on the scale by passing a rule that  
21 takes a position on it? The lawyer, when the  
22 day comes, is going to stand up in the well of  
23 the Court and say, "Your rule that you  
24 adopted, with the vote of your committee 30 to  
25 six, is unconstitutional, may it please the

1 confidential when there are life threatening  
2 circumstances. And I at least would like to  
3 know the extent of that case law before I  
4 would vote on this issue, because I don't  
5 think the Court should promulgate rules that  
6 it thinks may be unconstitutional.

7 CHAIRMAN BABCOCK: Bonnie.

8 MS. WOLBRUECK: Yes. Justice  
9 McClure, regarding the recording issues for  
10 the Office of Court Administration, my concern  
11 would be that those reports would come from  
12 the clerks within the county, as we do now,  
13 the normal reporting. If there's only one or  
14 two in that county during a recording year,  
15 maybe the score card is going to be kept if  
16 that recording from each county is made  
17 public. So you have to consider the fact  
18 that, if that portion of the report is a  
19 public document to the Office of Court  
20 Administration and anyone can get that  
21 information from OCA and maybe, by local rule,  
22 there's a determination of which judges would  
23 be hearing this, that score card may be kept  
24 during that recording year.

25 HON. PHIL HARDBERGER: I believe

1 Court." And that's a pretty tough position to  
2 take.

3 CHAIRMAN BABCOCK: Justice Duncan.

4 HON. SARAH B. DUNCAN: But that's a  
5 position apparently part of the committee at  
6 least -- not this part -- but part of the  
7 committee thinks the Court should follow.

8 I do think there's a difference between  
9 this issue and any other that I at least face  
10 as an appellate judge. There is always an  
11 inherent risk of being stalked, of being  
12 killed, whatever, when you're deciding issues  
13 that are important to people. We  
14 unfortunately have seen that very  
15 graphically. This issue, unlike any other,  
16 has caused death. And we have also all pretty  
17 much agreed that we will have the right of  
18 self-recusal. Self-recusal and giving these  
19 matters precedence may conflict when it comes  
20 to knowingly putting your name out in public  
21 to get put up on a web site to be a target.

22 And I think there are instances, and this  
23 is my memory and I may be wrong, but I believe  
24 there is federal case law that the identity of  
25 the judge and the jury can be kept

1 this presents a great dilemma. I think we  
2 have an obligation to follow the Legislature's  
3 true intent of what they did. If we do that  
4 in this rule, we may well be putting the  
5 Supreme Court or all the courts in a tenable  
6 position by passing a rule that's  
7 unconstitutional, that might well be  
8 unconstitutional, which would be Version A.  
9 If we go with Version B, then I think we are  
10 clearly tampering with what the Legislature  
11 said. None of those two alternatives are  
12 desirable. In fact, they're highly  
13 undesirable, it seems to me.

14 If I had to do one of the two, I would go  
15 with what the Legislature said, because that,  
16 I think, is our obligation. But I also think  
17 that would not be smart in this case. I  
18 believe we should not have this in the rules.  
19 Let the statute stand for itself. It will be  
20 challenged and challenged quickly. That will  
21 give the courts, then, an opportunity to  
22 interpret the Constitution without putting the  
23 Court in a terrible bind.

24 HON. ANN CRAWFORD McCLURE: I just  
25 have a question. If we adopt that, what are

1 the appellate courts to do? Are they just to  
 2 issue a ruling as an order either affirming or  
 3 reversing? Are we to write written opinions?  
 4 Or do we make that a decision at each  
 5 intermediate court level?  
 6 HON. PHIL HARDBERGER: My own  
 7 opinion on that is that, if it comes to us,  
 8 that we would make a crack at it, obviously to  
 9 be reviewed by the Supreme Court on whether we  
 10 said what they would have said or not.  
 11 HON. ANN CRAWFORD McCLURE: So in  
 12 your view, the rules should not address  
 13 opinions at all?  
 14 HON. PHIL HARDBERGER: That is  
 15 correct.  
 16 HON. ANN CRAWFORD McCLURE: Okay.  
 17 HON. SARAH B. DUNCAN: Under the  
 18 current TRAPS, we must identify the members of  
 19 the panel.  
 20 MS. SWEENEY: I'm sorry, you must  
 21 what?  
 22 HON. SARAH B. DUNCAN: Identify the  
 23 members of the panel.  
 24 HON. JAN P. PATTERSON: I'm  
 25 generally a big believer in openness in

1 ought to be able to walk into a courthouse and  
 2 not worry whether that judge thinks, "Do I  
 3 have too many this month or this year, or has  
 4 so and so done as many as I have?"  
 5 In fact, if we want to have openness, it  
 6 ought to be the criteria and the adjudication  
 7 that are public, that the findings are public  
 8 in some fashion. But that's the part that the  
 9 Legislature has sought to keep from the  
 10 public. And that traditionally is what has  
 11 maintained our system from being a Starr  
 12 Chamber, so that is an important part of the  
 13 process. And to have the only public part  
 14 just the judge's name, to me that sabotages  
 15 any openness argument.  
 16 CHAIRMAN BABCOCK: Bill Dorsaneo.  
 17 PROFESSOR DORSANEO: When Section 2  
 18 of the bill speaks about rule making and it  
 19 talks about the Supreme Court shall make rules  
 20 to ensure confidentiality, I'm kind of  
 21 wondering, well, what in the world could that  
 22 be about? It seems to me it's likely about  
 23 what's covered in (b)(1) of both versions,  
 24 which is not very detailed at all. It just  
 25 says, "Court personnel must ensure that the

1 courts, and I think that whenever you tamper  
 2 with openness in courts that it skews the  
 3 system and it is harmful to the system. On  
 4 the other hand, what we have here turns  
 5 openness on its head, because the only thing  
 6 we have open is the judge's name.  
 7 Traditionally, whether you have criminal  
 8 trials or whatever trials, it is the process  
 9 and the procedure that the public is entitled  
 10 to see so that they know and have the comfort  
 11 that a procedure is a fair one. Here the  
 12 Legislature has made a decision that the  
 13 procedure is not going to be available to the  
 14 public. That is their choice. It is not a  
 15 desirable one. It will be challenged. But I  
 16 would urge that we go with that procedure as  
 17 one of the undesirable options.  
 18 But I don't think that it's completely a  
 19 matter of openness. I also don't think it's a  
 20 matter of judicial safety. I would like to  
 21 underscore what Judge McCown said, and I think  
 22 that we always have to look at the purpose of  
 23 this Act; and that we always have to keep the  
 24 minors who are the subject of this Act  
 25 uppermost in our minds, because every girl

1 minor's contact with the clerk and court is  
 2 confidential and expeditious." I think  
 3 there's considerably more work that could be  
 4 done on how that's to be accomplished, and I  
 5 think that's probably what a fair reading of  
 6 the legislation would indicate that we're  
 7 supposed to be talking about, not about  
 8 whether it's only going to be  
 9 semi-confidential or not.  
 10 Is it sensible just to say that, just "be  
 11 confidential"? In my experience, that means  
 12 that everyone who knows something about it can  
 13 tell one other person. Maybe some sort of  
 14 procedures for files and behavior of court  
 15 personnel would be appropriate, rather than  
 16 just tracking the statute and then going on to  
 17 this judge identification issue, which seems  
 18 out of bounds to me.  
 19 HON. ANN CRAWFORD McCLURE: I must  
 20 tell you that I did have a phone call while I  
 21 was in the judicial conference from the  
 22 administrative judge of Tarrant County, who  
 23 told me they have a peculiar problem up there  
 24 with a lot of supposedly confidential  
 25 information being leaked out of the clerk's

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1 office.

2 PROFESSOR DORSANEO: What Bonnie

3 talked about, too, is that we know there are

4 ways that this information could be

5 ascertained that she knows about that we

6 should guard against. Presumably that's what

7 the job involves at least in part.

8 CHAIRMAN BABCOCK: Judge Brister.

9 HON. SCOTT A. BRISTER: That's the

10 question I had. The court administration

11 gathers data, I know our clerk does, on the

12 number of temporary injunctions filed, the

13 number granted, the number denied, summary

14 judgments the same thing. I don't see that in

15 the statute. The statute -- and secondly, the

16 statute makes the court reporter's notes of

17 the hearings, the statute makes court orders,

18 the application -- the statute doesn't say the

19 hearing is secret, does it?

20 HON. ANN CRAWFORD McCLURE: It

21 restricts who can be there.

22 HON. SCOTT A. BRISTER: Where is

23 that?

24 HON. ANN CRAWFORD McCLURE: Does it

25 not? It does not.

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1 MR. ORSINGER: Look at (k).

2 HON. SCOTT A. BRISTER: Really it

3 doesn't say that a judge is confidential, that

4 my name is confidential.

5 HON. ANN CRAWFORD McCLURE: Well,

6 subsection (k) says, "The court proceedings

7 shall be conducted in a manner that protects

8 the anonymity of the minor. The application

9 and all court documents pertaining to the

10 proceedings are confidential and privileged

11 and are not subject to disclosure."

12 HON. SCOTT A. BRISTER: My point is

13 this: I would be very concerned about the

14 problem of drafting a rule that might be

15 unconstitutional; but I'm more concerned about

16 drafting a rule that adds something not

17 required by the statute that would be

18 unconstitutional.

19 CHAIRMAN BABCOCK: The argument that

20 was advanced at the subcommittee, as I

21 understand it and correct me if I'm wrong, was

22 that this subparagraph (k) did not preclude

23 the Version B, but rather that the intent of

24 the Legislature was not to protect the

25 confidentiality of the judges and the judicial

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1 process, but rather it was the intent of the

2 Legislature to protect the anonymity of the

3 minor, so that one has to read in

4 subparagraph (k) the two sentences together;

5 that "The court proceedings shall be conducted

6 in a manner that protects the anonymity of the

7 minor," and then the second section, "The

8 application and all other court documents

9 pertaining to the proceedings are confidential

10 and privileged and are not subject to

11 disclosure," et cetera, et cetera, et cetera;

12 reading those together to the extent necessary

13 to protect the confidentiality and anonymity

14 of the minor.

15 That was the statutory construction

16 argument that was advanced in the subcommittee

17 by some people, principally Paul Watler.

18 HON. ANN CRAWFORD McCLURE: The

19 other issue is, we were asked to look to the

20 laws in other states and the rules that have

21 been implemented in other states that have a

22 similar statute. And a number of the other

23 states provide for proceedings conducted in

24 chambers, limiting the individuals who may be

25 present; restricting, if we have it in the

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1 courtroom, who is in the courtroom. And so we

2 have grafted some of that at the request of

3 the Supreme Court in their order appointing

4 the subcommittee.

5 MR. ORSINGER: Ann, how do they

6 handle the appellate problem of secrecy at the

7 appellate level?

8 HON. ANN CRAWFORD McCLURE: Well, in

9 Ohio, they ruled it was open. That's the

10 basis of the Version B.

11 MR. ORSINGER: Has any state

12 implemented a secret appellate procedure?

13 HON. ANN CRAWFORD McCLURE: Bob is

14 going to answer that.

15 MR. PEMBERTON: We don't know. A

16 number of states do have published appellate

17 opinions, but I don't know whether all of them

18 do. I've not found any indication that any

19 state has expressly or in any published form

20 addressed the issue of whether their appellate

21 procedures shall be open. Perhaps internally

22 they have. And we easily, or maybe not so

23 easily, could just contact states individually

24 and see what they've done.

25 CHAIRMAN BABCOCK: Paula Sweeney.

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1 MS. SWEENEY: Well, so much of this  
 2 is public policy and is something that, as  
 3 Justice Hecht put it, I can't imagine  
 4 decisions being made without a full  
 5 exploration of the issues and full discussion  
 6 and briefing and debate with all of the tools  
 7 that we have available to us in this system.  
 8 To me, that supports that we really must go  
 9 with Option 3, which is to be silent on this  
 10 and not -- I don't think we can take a vote  
 11 here and be as deliberative and as fully  
 12 elaborated as we must be on such an issue  
 13 that -- you know, yes, it should be, or no, it  
 14 shouldn't be, you know, what should be public,  
 15 exactly where the lines are and how it should  
 16 be done. I don't think the statute tells us  
 17 exactly what that is. I do not think we can  
 18 write that or even make a recommendation to  
 19 the committee in, you know, what did you say,  
 20 we have a half hour for this discussion and  
 21 then we're going to take lunch. And so I  
 22 strongly advocate Option 3.  
 23 CHAIRMAN BABCOCK: Judge McCown.  
 24 HON. F. SCOTT MCCOWN: Let me point  
 25 out an additional reason. I'll agree with

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1 most of what Paula said. I think we either go  
 2 with Option A or we go silent.  
 3 I don't think we can go with Option B  
 4 constitutionally, and let me explain why. The  
 5 Legislature passed a statute. Part of that  
 6 statute included confidentiality and was voted  
 7 for on the basis that it included  
 8 confidentiality. If the Supreme Court says  
 9 confidentiality cannot constitutionally be  
 10 provided, I don't think they get to substitute  
 11 another statute that has no constitutionality.  
 12 I think they have to strike the whole thing  
 13 down, or at least there would be a very good  
 14 constitutional question about it. And so if  
 15 we went with B, we would be falling into the  
 16 same trap as those who advocate not going with  
 17 A.  
 18 CHAIRMAN BABCOCK: I think that  
 19 there is a nonfrivolous legitimate argument  
 20 that the Legislature was concerned about  
 21 anonymity and confidentiality for the minor  
 22 and not for the judges or the judicial  
 23 process. However, I think that the language  
 24 in subsection (k) which says, "The application  
 25 and all other court documents pertaining to

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1 the proceedings," is not ambiguous. And it  
 2 would be a strained reading of the statute to  
 3 suggest that the Legislature clearly only  
 4 intended to protect the anonymity of the  
 5 minor. So I think that we do not have -- we  
 6 should not, in the face of that language --  
 7 even though Senator Shapiro doesn't recall  
 8 that as being a matter discussed -- we should  
 9 not, in the face of that language, adopt  
 10 Version B of this statute.  
 11 Having said that, I want the record to be  
 12 clear about my views on this. I think that  
 13 that provision of the statute is repugnant in  
 14 a democracy such as ours. The most  
 15 controversial issues and the decisions made by  
 16 our elected officials on those controversial  
 17 issues are the ones that are most subject to  
 18 being open, the most compelling reasons for  
 19 them to be open, for the very reason that they  
 20 are controversial.  
 21 I think that there are serious questions  
 22 about the constitutionality of Proposal A. I  
 23 think this is different than what we talked  
 24 about before where we are merely tracking the  
 25 language of the statute in terms of timing. I

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1 think this is fundamental to our democracy,  
 2 and I feel very strongly that we should pursue  
 3 Option No. 3 and be silent on this matter.  
 4 That's my own personal view.  
 5 And we'll take three more comments, and  
 6 then we're going to vote, first on Option 3,  
 7 and if that doesn't pass, then we will vote on  
 8 Option A and Option B. Mr. Hall.  
 9 MR. HALL: Mr. Chairman, I would  
 10 just agree with your comments. I think that  
 11 when I read the statute, what came to my mind  
 12 was protection of the confidentiality of the  
 13 minor, not of the judge or necessarily the  
 14 outcome of the case.  
 15 And it is my understanding in adoption  
 16 proceedings, for instance, the judge's name  
 17 isn't a secret matter. The protection of the  
 18 adopted child and the parents whose rights are  
 19 terminated through that process are what have  
 20 been protected. And I think what we're trying  
 21 to do is draw a line in an area where it's an  
 22 incredibly emotional issue, and I think that's  
 23 where you get into trouble with drawing  
 24 lines.  
 25 Think back. If this had been tried -- if

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1 you had tried to protect judges who were  
 2 trying to make tough decisions during the  
 3 Civil Rights Era, during the Civil Rights  
 4 struggle, you know, that kind of openness or  
 5 that kind of secrecy, I think, ultimately  
 6 might have killed the Civil Rights Movement.  
 7 I don't know. But I just don't think you can  
 8 protect judges in just one area, as you so  
 9 eloquently said already, and I won't reiterate  
 10 that again.

11 CHAIRMAN BABCOCK: Alex.

12 PROFESSOR ALBRIGHT: I think that  
 13 Section A tracks the intent of the statute,  
 14 and I think by not putting anything in there  
 15 the Supreme Court is abdicating its  
 16 responsibility because the statute says that  
 17 the Supreme Court shall promptly issue rules  
 18 that will ensure confidentiality. So that's  
 19 one of the two things the Legislature has said  
 20 that the Supreme Court is supposed to do. And  
 21 it's very clear in here that the application  
 22 and all the court's documents, the court  
 23 orders, shall be confidential. If we have  
 24 nothing in these rules, then all we're doing  
 25 is punting the issues to the trial courts,

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1 punting the issues to the courts of appeals,  
 2 who then will have the same discussion with  
 3 nothing whatsoever to guide them.

4 CHAIRMAN BABCOCK: Judge Patterson.

5 HON. JAN P. PATTERSON: And in  
 6 addition to (k), (l) speaks independently to  
 7 it, "An order of the court issued under this  
 8 section is confidential." Again, in addition,  
 9 (c), on the same page, a ruling of the court  
 10 of appeals is confidential. It doesn't speak  
 11 to the body of the order. It doesn't speak to  
 12 any portion. So the Legislature has clearly  
 13 spoken to this. And I couldn't quite hear  
 14 everything Alex said, but I think when they  
 15 divide anonymity into one issue and  
 16 confidentiality into a second issue, that also  
 17 speaks to -- is that what you were saying --  
 18 that also speaks to the confidentiality of the  
 19 proceeding or whatever.

20 CHAIRMAN BABCOCK: Paula.

21 MS. SWEENEY: I don't think much of  
 22 this discussion. Maybe I'm lost here, but I  
 23 don't think we're talking about anonymity of  
 24 the minor, are we?

25 CHAIRMAN BABCOCK: No, we're not.

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1 MS. SWEENEY: I don't see that there  
 2 are any choices there.

3 CHAIRMAN BABCOCK: There's no  
 4 question.

5 MR. TIPPS: With all due respect to  
 6 the Chair, I think that Option 3 is really  
 7 asking the Supreme Court to get ahead of  
 8 itself and make a decision on confidentiality  
 9 without the benefit of adjudication, which is  
 10 the context in which the court is supposed to  
 11 make constitutional decisions. And it seems  
 12 to me that the better course is to grant the  
 13 Legislature the presumption that what it  
 14 passed was constitutional and to implement the  
 15 Legislature's intent, appropriately reserving  
 16 in a comment the fact that the Court is not  
 17 making an adjudication, and then have the  
 18 Court deal with that issue when it comes up  
 19 through the normal course of litigation.

20 CHAIRMAN BABCOCK: Judge Brister,  
 21 and then we're going to vote. Judge Brister.

22 HON. SCOTT A. BRISTER: Well, I  
 23 guess I'm for Option 4.

24 CHAIRMAN BABCOCK: Uh-huh.

25 MR. TIPPS: It's too close to lunch

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1 for that.

2 CHAIRMAN BABCOCK: Right.

3 HON. SCOTT A. BRISTER: It seems to  
 4 me you're in constitutional crisis if you do  
 5 nothing. You've got a direct statute saying  
 6 the Supreme Court shall do this. The Supreme  
 7 Court can say, "No, we refuse," but then  
 8 you've got the problem inherent in American  
 9 government and that's why you try never to do  
 10 that.

11 Number two, the second thing you try  
 12 never to do is declare stuff unconstitutional.  
 13 Whenever you do, someone will say, well, it  
 14 says ruling. I'm not saying that I would rule  
 15 this way. But it doesn't really say opinion,  
 16 or it says you will keep the minor  
 17 confidential. It doesn't really say that the  
 18 hearing is closed to the public.

19 So my Option 4 is you put in the statute  
 20 the things with the exact words --

21 CHAIRMAN BABCOCK: You mean you put  
 22 in the rule.

23 HON. SCOTT A. BRISTER: You put in  
 24 the rule the exact words that the Legislature  
 25 says you shall do this. And most, but not

1 all, of this B is exact words. There are a  
 2 couple of things I've noted, like the  
 3 reporter's record, that's new. But if you  
 4 just put -- most of it is the exact words.  
 5 If you drop those and just leave it the  
 6 exact words, then you avoid that  
 7 constitutional crisis of we didn't do what the  
 8 Legislature says. You leave the things open  
 9 like -- okay. So this hearing comes up.  
 10 Somebody wants to be at the hearing. One  
 11 trial judge excludes them. One does not.  
 12 Then you do the things we do, which is, people  
 13 bring lawsuits and injunctions against the  
 14 judge who did not or the judge who did, and  
 15 you sort that out. What does "ruling" mean?  
 16 What does "confidential minor" mean? And you  
 17 have time to brief and work these things out.  
 18 So my proposal is that we -- so for  
 19 instance, I would be against B, because it  
 20 does add something. I'm not saying I don't  
 21 think -- I think probably you would have a  
 22 good argument that you've got a right to the  
 23 name of the judge and how the judge ruled,  
 24 though you don't have a right to the order.  
 25 Are there ways you can do that so you can

1 avoid the constitutional problems? Maybe so,  
 2 if you have to, if the Constitution requires  
 3 that.  
 4 So I would be in favor of Version A,  
 5 dropping anything that is not a direct quote  
 6 from the statute, and again, with something  
 7 either in the comment or more probably in the  
 8 Supreme Court order adopting the rules saying  
 9 this is pursuant to rule making direction of  
 10 the Legislature without prejudice to saying  
 11 whether it's constitutional.  
 12 CHAIRMAN BABCOCK: Justice McClure,  
 13 as the chair, has prevailed upon me for one  
 14 last comment before we vote, and eat, I might  
 15 add.  
 16 HON. ANN CRAWFORD McCLURE: Real  
 17 briefly, if what you're contemplating is  
 18 letting this work its way up through the  
 19 appellate courts and we have full briefing and  
 20 the opportunity to have argument, remember  
 21 that that maximum or little bit better than  
 22 48-hour time window operates in the appellate  
 23 court, too. The appellate court must rule by  
 24 5:00 o'clock on the second business day after  
 25 the notice of appeal is filed. So unless the

1 minor asks for the continuance that she's  
 2 allowed to ask for, there won't in all  
 3 likelihood be briefing or arguments.  
 4 CHAIRMAN BABCOCK: Judge Brister.  
 5 HON. SCOTT A. BRISTER: But I'm  
 6 thinking Chip's clients -- this is going to  
 7 come up not in one of these proceedings, but  
 8 when Chip's clients sue me, and then there's  
 9 going to be plenty of time.  
 10 HON. ANN CRAWFORD McCLURE: That's  
 11 right.  
 12 CHAIRMAN BABCOCK: Or when Watler's  
 13 client is suing you.  
 14 Okay. We're going to vote first on  
 15 Option 3, and Option 3 is to be silent on this  
 16 issue. All in favor of Option 3 raise your  
 17 hand.  
 18 MR. LATTING: Can we eat first?  
 19 CHAIRMAN BABCOCK: No, we can't eat  
 20 first. Ten.  
 21 All against Option 3.  
 22 Option 3 fails by a 22 to 10 vote.  
 23 All for Option B.  
 24 PROFESSOR ALBRIGHT: Why are we  
 25 voting in reverse?

1 CHAIRMAN BABCOCK: Because it would  
 2 be easier if Option 3 had passed. Then we  
 3 don't have to get to Brister's point. Anybody  
 4 in favor of Option B?  
 5 MR. ORSINGER: Is that Version B,  
 6 you mean?  
 7 CHAIRMAN BABCOCK: Version B,  
 8 sorry. Everybody in favor of Option B. Six  
 9 is what I've got.  
 10 Against Option B.  
 11 HON. ANN CRAWFORD McCLURE:  
 12 Overwhelming opposition.  
 13 CHAIRMAN BABCOCK: Option B fails 25  
 14 to six.  
 15 Option A without the Brister gloss, as  
 16 written. Option A as written.  
 17 Okay. Option A against. Against Option  
 18 A as written.  
 19 HON. SAMUEL A. MEDINA: How many  
 20 times can you vote?  
 21 CHAIRMAN BABCOCK: You can vote on  
 22 each item.  
 23 Option A passes 25 to eight.  
 24 Judge Brister, do you wish to suggest  
 25 amendments to Option A, or do you want to

1 leave it where it is?  
2 HON. SCOTT A. BRISTER: Well, I  
3 suppose, yeah. The only things I've noted  
4 would be the court reporter's notes and  
5 whatever "documents relating to appeal" means.  
6 MR. YELENOSKY: What about the word  
7 "opinion"?  
8 MR. ORSINGER: Oh, I want to add the  
9 word "opinion" to that, because --  
10 CHAIRMAN BABCOCK: Okay. Then we're  
11 going to talk about that --  
12 MR. ORSINGER: We're going to have a  
13 ruling here, and opinions are what we do to  
14 regulate the trial courts --  
15 CHAIRMAN BABCOCK: Okay. We know  
16 what we're dealing with now. We know the  
17 language we're dealing with. So we'll talk  
18 about amendments to that language after  
19 lunch. We'll take a half an hour for lunch.  
20 (Lunch recess from 1:00 p.m. to 1:45 p.m.)  
21  
22  
23  
24  
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