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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

September 25, 2009

(FRIDAY SESSION)

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COPY

Taken before *D'Lois L. Jones*, Certified
Shorthand Reporter in Travis County for the State of
Texas, reported by machine shorthand method, on the 25th
day of September, 2009, between the hours of 9:00 a.m. and
5:01 p.m., at the Texas Association of Broadcasters, 502
E. 11th Street, Suite 200, Austin, Texas 78701.

INDEX OF VOTES

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

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Documents referenced in this session

09-19 NICS Improvement Act & HB 3352

09-20 Poverty Law - subcommittee follow-up report 9-23-09

09-21 Poverty Law - memo from Judge Lawrence 9-9-09

09-22 Civil case cover sheets - subcommittee report 9-7-9

09-23 Proposed/sample civil case cover sheets

09-24 9-9-09 memo from OCA, civil case cover sheets.

09-25 Judicial foreclosure revised proposed amendments to Rules 735 and 736

09-26 Recusal - memo from Mr. Orsinger, 8-24-09.

09-27 Recusal - memo from Judge Peoples, 9-23-09

09-28 Recusal - Rule 18a strikeout version

09-29 Recusal - Rule 18a clean version

09-30 Recusal - Second region statistics

1 usual.

2 We have -- we were working a lot on the
3 disciplinary rules for the Bar, and we've been working on
4 them since the winter, I guess, and it has been an
5 enormous amount of work that Kennon and Justice Johnson
6 and two other committees as well as several other groups
7 following in the wake of the American Bar Association and
8 lots of interest around the country in changing the
9 disciplinary rules. So we expect to have a draft
10 completed and ready for comment we hope next month, and
11 we're doing everything we can to stay on that schedule.
12 So that has taken the Court just scores of hours through
13 the spring and the summer, but doesn't involve this
14 committee, but there will be a big slug of rules that will
15 be put out for comment before the referendum with the Bar
16 on them in the spring, and there are a lot of changes in
17 them, and no doubt they'll get a lot of interest in the
18 Bar.

19 We formed a task force, as required by
20 Senate Bill 1448, to look at orders requiring improvements
21 to property by landlords, and Justice Lawrence is heading
22 that up for us, and they have been at work, and we hope to
23 have something for the next meeting, and I believe the
24 statute requires that the rules take effect in January, so
25 as before when we've had that situation and we didn't have

1 enough time between the end of the session and the
2 effective date to get them out for comment and wait on the
3 comment before putting them in place, this time as in
4 those other instances, we will work on them here, try to
5 get something final, go ahead and put it in place, then
6 get comments back and may change the rules in the spring
7 based on the comments. So as between the general
8 procedure that the Rules Enabling Act requires and any
9 specific deadlines that the Legislature imposes on rules
10 that they want in place, we honor the specific deadlines
11 over the more general ones and then try to honor the
12 general ones as time passes. So we think that will be
13 coming at the next meeting.

14 We did make one minor change in the Rules of
15 Disciplinary Procedure, which has to do with the
16 confidentiality of grievance proceedings. The rules
17 suggested and the chief disciplinary counsel has taken the
18 position in the past that even complainants are obliged to
19 keep confidential grievance proceedings, at least up to a
20 point in the proceeding, and we got a complaint from a
21 person involved in the process that that might be
22 inconsistent with the First Amendment, and we had a
23 decision from the Supreme Court of Louisiana that had
24 already reached that conclusion, so we asked the chief
25 disciplinary counsel to look at it, and she ultimately

1 agreed as did the Bar, and so we've got that change
2 coming, and that should be out shortly.

3 MS. PETERSON: It's in an order,
4 Miscellaneous Docket No. 099150, effective date in January
5 2010.

6 HONORABLE NATHAN HECHT: So you'll see that,
7 and then finally we have a new referral, referrals, I
8 guess. The Court thought about the discussions that the
9 committee had last time about whether there should be a
10 rule on procedures for jury members to ask questions of
11 the judge during the deliberations, and the committee
12 talked about whether a rule was appropriate and to a less
13 degree what it should be; and thinking about that, the
14 Court said we should come up with a rule so that we can
15 see whether it would really be -- do good or not, because
16 there doesn't seem to be any practice, meaning much
17 guidance, on how questions get asked. So that's the
18 reaction to the discussion at the last meeting.

19 And then there is a procedure in Rule 5.1 of
20 the Federal Rules of Civil Procedure implementing Section
21 2403 of Title 28 of the U.S. Code, which requires notice
22 to Federal -- the Federal attorney general and state
23 attorneys general on questions -- cases involving
24 questions that call into -- involve the construction of
25 statutes or the constitutionality of statutes, and there

1 is no similar procedure in state law, and so the attorney
2 general asked the Legislature to consider such a procedure
3 during the last session, and the Legislature declined, but
4 the attorney general still thinks it's a good idea for
5 that office to get notice when there are private lawsuits
6 calling statutes into question, and so the Court would
7 like the committee to look at that, and a lot of the work
8 has already been done in Rule 5.1 of the Federal rules,
9 and we would need to take a look also at the legislation
10 that was offered and the reactions to it during the last
11 session.

12 CHAIRMAN BABCOCK: And I guess on the first
13 question, Judge Christopher, I believe you led the charge,
14 or the retreat, however you characterize it, on the --

15 HONORABLE TRACY CHRISTOPHER: I'd be glad to
16 work on it.

17 CHAIRMAN BABCOCK: Okay. That would be
18 great, and I think the notice to the attorney general
19 would fall in Richard Orsinger's committee, so will you
20 look at that?

21 MR. ORSINGER: Now that we've gotten all the
22 -- the rest of our work done that will be easy.

23 CHAIRMAN BABCOCK: Well, I don't think this
24 is going to be too hard because there's a Federal rule
25 that works pretty -- well, okay.

1 MR. ORSINGER: I'm not one to just
2 automatically do what the Federal people do.

3 CHAIRMAN BABCOCK: I know. Anyway, if your
4 subcommittee will look at it.

5 MR. ORSINGER: I was born and raised and
6 lived my entire life in Texas.

7 CHAIRMAN BABCOCK: That would be great.
8 Thank you. Well, Justice Hecht doesn't get much of a
9 break here because the first agenda item goes to him in
10 the absence of Professor Dorsaneo, who is absent, I think.

11 HONORABLE NATHAN HECHT: The National
12 Instant Criminal Background Check System, National Instant
13 Criminal Background Check System, which is an amendment I
14 think to the Brady Act, is an effort by the Federal
15 government to obtain information from law enforcement
16 officials around the country regarding persons who are
17 involved in and charged with handgun -- gun crimes, and
18 they have -- the Federal government has directed the
19 states to come up with a process where the law enforcement
20 agencies will make this information available to Federal
21 law enforcement people and specifically the NICS, and
22 the -- there are regulations regarding how this
23 information is to be provided by the states to the Federal
24 government and not much of those regulations concerns us.

25 However, if in that reporting a person is

1 included as someone who has been -- has had a firearms
2 disability imposed on the person, that person under
3 Federal regulations must have some way of getting off the
4 list that is being sent to the Federal government, and the
5 Federal regulations require that that process involve a
6 hearing at which the person can appear and present his
7 position and whatever evidence he has, and then an appeal
8 that is de novo, that he can try again, and so the reason
9 that we care about this as much as we do is because there
10 are Federal funds attendant on our compliance with these
11 regulations.

12 Well, people who are charged with worrying
13 about this went to the Legislature the last session and
14 got a bill which was --

15 MS. PETERSON: It was House Bill 3352.

16 HONORABLE NATHAN HECHT: House Bill 3352,
17 which is supposed to cover the whole thing, and the bright
18 idea that they had was that we would start in the trial
19 court rather than in an agency. The problem with that is
20 that then we have to have a de novo appeal, and right now
21 we don't have any specific rules or statutes permitting a
22 de novo appeal to the court of appeals, and the de novo
23 appeal under the Federal regulations must specifically
24 include the possibility of presenting additional evidence.

25 HONORABLE STEPHEN YELENOSKY: Well, we can

1 do it twice.

2 HONORABLE NATHAN HECHT: Yeah.

3 MR. ORSINGER: Let's have the regional
4 presiding administrative judge handle the de novo appeal.

5 CHAIRMAN BABCOCK: Right.

6 HONORABLE NATHAN HECHT: So we have on our
7 statute books now section 574.088 of the Health & Safety
8 Code, which was included by the House bill during the last
9 session, and it sets all of this out, and it's short, and
10 so I'm just going to tick off the elements and show you
11 what the problem is, and the elements of the statute are
12 these: "A person who is furloughed or discharged from
13 court-ordered mental health services," so he's had mental
14 health -- court-ordered mental health services, but he's
15 furloughed or discharged, that person "may petition the
16 court that entered the commitment order for an order
17 stating that the person qualifies for relief from a
18 firearms disability." So you go back to the trial court
19 that entered the order in the first place and you ask for
20 an order of relief.

21 "In determining whether to grant the relief
22 the court must hear and consider evidence about
23 circumstances, the mental history, the criminal history,
24 and the person's reputation." That's fine, the trial
25 court can do all of that. Then the statute provides

1 "Court may not grant relief unless it makes and enters in
2 the record the following affirmative findings: The person
3 is no longer likely to do the same thing and removing the
4 person's disability to purchase the firearm is in the
5 public interest." So far so good.

6 So you go back to the court that ordered you
7 to get mental services, you ask to have that disability
8 removed in light of the Federal statute that makes that a
9 firearms disability. You put on your case. The trial
10 judge says "yes" or "no," makes the specific findings or
11 doesn't make them, and that's a final order and then you
12 can appeal. Judge Yelenosky.

13 HONORABLE STEPHEN YELENOSKY: Justice Hecht,
14 would that always be a probate court then?

15 HONORABLE NATHAN HECHT: I don't know.

16 HONORABLE STEPHEN YELENOSKY: If it's the
17 court that -- I don't have it in front of me. Is it the
18 court that found that the person was committed?

19 HONORABLE NATHAN HECHT: It's the court that
20 ordered mental health services.

21 HONORABLE STEPHEN YELENOSKY: Then that's
22 going to be a probate court always, isn't it? And it may
23 be significant because of this de novo issue.

24 HONORABLE NATHAN HECHT: Right.

25 HONORABLE STEPHEN YELENOSKY: Does the state

1 statute specify which level of trial court?

2 HONORABLE NATHAN HECHT: No.

3 HONORABLE STEPHEN YELENOSKY: So if, in
4 fact, the first one is the probate court, I guess you
5 could have probate court and then de novo in district or
6 county court at law or something.

7 PROFESSOR ALBRIGHT: Could you start in the
8 -- could you start in the JP court?

9 HONORABLE STEPHEN YELENOSKY: No, just --

10 HONORABLE NATHAN HECHT: No, you would have
11 to go back to whichever court it was that ordered it.
12 Yes.

13 HONORABLE DAVID GAULTNEY: If this would
14 include not guilty by reason of insanity it might not only
15 be probate.

16 HONORABLE NATHAN HECHT: Right.

17 HONORABLE DAVID GAULTNEY: It could be other
18 courts that are involved.

19 HONORABLE DAVID PEEPLES: And I think there
20 could be some criminal and family courts that would order
21 mental examination, too.

22 HONORABLE STEPHEN YELENOSKY: Mental
23 examination or mental commitment? Because it --

24 HONORABLE NATHAN HECHT: Mental health
25 services.

1 HONORABLE STEPHEN YELENOSKY: Yeah. Isn't
2 that an actual commitment or no?

3 HONORABLE DAVID PEEPLES: Is anger
4 management, does that qualify?

5 HONORABLE STEPHEN YELENOSKY: I don't think
6 that triggers the Federal law, does it, if somebody is
7 just sent to those things?

8 CHAIRMAN BABCOCK: Did you remember what
9 Justice Hecht last said? "So far so good."

10 HONORABLE NATHAN HECHT: Right.

11 MS. PETERSON: He hasn't gotten to the
12 problem yet.

13 CHAIRMAN BABCOCK: He hasn't even gotten to
14 the hard part.

15 HONORABLE NATHAN HECHT: I don't know the
16 answer to that.

17 HONORABLE STEPHEN YELENOSKY: This does not
18 bode well for your committee, Richard, on that other.

19 MR. ORSINGER: This is not my rule. I don't
20 have a probate.

21 HONORABLE NATHAN HECHT: But when there is
22 an order then it seems that there could be an appeal from
23 it to an appropriate court, but it -- the anticipation is
24 that some of the orders will come out of trial courts from
25 which ordinarily the only appeal is to the court of

1 appeals.

2 So, query, can we have a special rule for
3 the appellate court that in considering these appeals,
4 which would be an appeal as from any other order, they
5 will consider the evidence de novo, and there already is a
6 rule that permits the court of appeals to direct the trial
7 court or master to obtain additional evidence if that's
8 necessary. While we can't be sure, it seems like almost
9 always the evidence would be written. It would be an
10 affidavit, or it's unlikely to be testimony, but it's
11 possible it could be testimony, but to obtain that
12 evidence and file it in the court of appeals, and then the
13 court of appeals would consider the appeal de novo.

14 Now, Kennon has proposed this to Professor
15 Dorsaneo, who didn't see any immediate problems with that,
16 but because of the Federal funding issue we thought we
17 would present the concept this morning and see what
18 problems the committee thinks there might be so that we
19 can get a draft of this and get it to you next time.

20 CHAIRMAN BABCOCK: Judge Yelenosky.

21 HONORABLE STEPHEN YELENOSKY: Would that
22 then mean that you have an automatic right of appeal to
23 the Supreme Court because that's the first level of true
24 appellate review?

25 HONORABLE NATHAN HECHT: No.

1 HONORABLE STEPHEN YELENOSKY: Is that --

2 HONORABLE NATHAN HECHT: That's an easy
3 question.

4 HONORABLE STEPHEN YELENOSKY: Is that a
5 problem then, that you get a de novo, so you really --
6 really you have no appellate review then. I'm not saying
7 that's a problem necessarily, but is it a jurisprudential
8 problem that there's no appellate review?

9 HONORABLE NATHAN HECHT: Well, we already
10 have, obviously as everybody knows, a rule that legal
11 matters are reviewed by the appellate court de novo. They
12 recite all the time, "because this is a legal question, we
13 review the trial court's determination de novo," which
14 means a nondeferential re-examination of the legal issue.
15 I'm not aware of that in the court of appeals on a factual
16 issue, and with respect to credibility issues I don't even
17 know how you could do it, but I'm not -- there doesn't
18 seem to be an anticipation that there will be many of
19 those credibility type issues.

20 HONORABLE STEPHEN YELENOSKY: My follow-up
21 question is, if what you're suggesting is basically the
22 automatic right to submit additional evidence at the court
23 of appeals, does that meet the definition of de novo,
24 because a de novo could involve not introducing something
25 that you introduced the first time, and we see that, for

1 example, you know, in the family law context before an
2 associate judge. If you lose the hearing and you
3 introduce some evidence that turned out to be harmful to
4 you, when you get before the district court you don't
5 introduce it. So does it meet the definition of de novo
6 to permit only additional evidence?

7 CHAIRMAN BABCOCK: Professor Albright, then
8 Skip.

9 PROFESSOR ALBRIGHT: Well, I guess I was
10 thinking -- I don't have any idea practically as to what
11 kind of evidence this is, but I would think that there
12 would be lots of times when they'd have a lawyer for the
13 de novo and not for the first one or a better lawyer or
14 whatever, and they might well want to introduce more
15 evidence, and having it all in affidavit form might be
16 problematic. Could you have a motion for new trial that
17 was a different kind of motion for new trial that you had
18 to provide the opportunity to present additional evidence?
19 It doesn't solve your problem of don't consider --

20 HONORABLE STEPHEN YELENOSKY: Well, it would
21 solve it -- it would solve it if it were an automatic
22 right to a new trial, which basically you start over, and
23 as I jokingly said originally, we can do it twice. Does
24 it meet the definition of de novo? Does it violate
25 anything that any law, Federal or constitutional or

1 otherwise, to say basically you get two trials at the
2 trial level?

3 PROFESSOR ALBRIGHT: Does it matter if it's
4 the same judge?

5 CHAIRMAN BABCOCK: Skip, and then Judge
6 Christopher, and then Richard.

7 MR. WATSON: Can the -- do the courts of
8 appeals have jurisdiction to make fact findings?

9 MR. ORSINGER: No, they don't.

10 MR. WATSON: That would appear to be a bit
11 of a hurdle.

12 CHAIRMAN BABCOCK: Judge Christopher.

13 HONORABLE TRACY CHRISTOPHER: I would
14 suggest that we have a different trial judge review it,
15 similar to the procedure that we have in place when a
16 judge holds a lawyer in contempt and they're entitled to
17 an automatic appeal in front of another judge before
18 they're actually found in contempt. I'm pretty sure you
19 go up to the presiding regional judge to get the
20 appointment of a second judge, because I can actually see
21 how it would be possible that the person who made the
22 original decision to put somebody into the mental health
23 system might have, you know, kind of not a bias, but they
24 have their own feelings about this person already.

25 HONORABLE STEPHEN YELENOSKY: We call it a

1 prejudice.

2 HONORABLE TRACY CHRISTOPHER: They're the
3 ones who sent them off to the mental health facility, so
4 it seems like we could make that kind of a system.

5 HONORABLE NATHAN HECHT: So that there would
6 be maybe before the judgment became final or something you
7 would have an opportunity to request a review by another
8 judge.

9 HONORABLE TRACY CHRISTOPHER: Right.

10 HONORABLE STEPHEN YELENOSKY: It couldn't be
11 just a review. It would have to be de novo.

12 HONORABLE TRACY CHRISTOPHER: Right. But, I
13 mean, it is de novo in the contempt. I mean, they have
14 to --

15 HONORABLE STEPHEN YELENOSKY: Right.

16 HONORABLE TRACY CHRISTOPHER: They put on
17 all the evidence again.

18 HONORABLE STEPHEN YELENOSKY: I don't see a
19 problem with that, particularly in the jurisdictions where
20 we have multiple judges, and if most of these are coming
21 from the probate court at least you could have a different
22 type of court hearing it, and so you're reviewing the
23 probate judge, which might be a little uncomfortable, but
24 may be the best way to handle this.

25 PROFESSOR ALBRIGHT: It sure seems better

1 than doing it in the appellate court.

2 CHAIRMAN BABCOCK: Richard. Richard, then
3 Justice Pemberton, then Justice Gray.

4 MR. ORSINGER: To follow up on Skip's
5 comment, even a cursory reading of the constitutional
6 provision giving the -- describing the jurisdiction for
7 the court of appeals would indicate that they can not
8 conduct a de novo appeal, and that was thoroughly examined
9 in *Poole vs. Ford Motor Company*.

10 CHAIRMAN BABCOCK: Oh, show-off.

11 MS. PETERSON: What's the exact cite on
12 that?

13 MR. ORSINGER: Those of us --

14 HONORABLE STEPHEN YELENOSKY: Wait. I have
15 Google here.

16 MR. ORSINGER: If anybody wants to see the
17 ins and outs of it three or four times, go read Poole. My
18 suggestion is entirely different, and that is what we
19 should do is use rule -- Texas Rule of Civil Procedure 171
20 for a master in chancery. A district court and the county
21 court has the authority to appoint a master in chancery in
22 exceptional cases for good cause, and you can delegate the
23 entire judicial responsibility of the proceeding to the
24 master in chancery, who then is empowered to issue
25 subpoenas, take sworn testimony, et cetera, et cetera, and

1 then they report back their findings or their rulings.

2 If anybody objects -- the rule doesn't say
3 this, but the case law does, if anybody objects to the
4 master in chancery's ruling you get a de novo proceeding
5 in front of the district judge. It's automatic. You
6 could waive it in advance or at least I believe you can by
7 contract, but if it's not waived by agreement, I think you
8 get a de novo review by the district judge and then you
9 would have a true court of appeals appellate review from
10 the trial judge's finding, and we could perhaps be
11 compliant with the statute without --

12 HONORABLE STEPHEN YELENOSKY: But doesn't
13 the statute say that in the first instance it has to go
14 back to the judge who heard it -- who issued it?

15 MR. ORSINGER: I think it says to the court,
16 not to the judge. It wouldn't make any sense to say the
17 judge. What if the judge has moved on to the court of
18 appeals or even the Supreme Court?

19 HONORABLE STEPHEN YELENOSKY: Well, I don't
20 know. I don't know exactly what it says.

21 MR. ORSINGER: If it goes back to court, the
22 court has the power to appoint a master in chancery, so I
23 don't see that we have any kind of procedural limitation.
24 The only flaw in the whole theory is, is a proceeding in
25 front of the master in chancery enough of a trial to

1 comply with the statute, but, you know, masters in
2 chanceries make rulings. Usually they're appointed for
3 limited purposes like discovery but they can be appointed
4 to try a whole case. I mean, I've tried entire cases to a
5 master in chancery.

6 HONORABLE STEPHEN YELENOSKY: But is it
7 advisory, though? I mean, you know family law --

8 MR. ORSINGER: It's not advisory, unless
9 somebody objects to it within the time allowed, in which
10 event it's negated, not just advisory. So I think the
11 trial judge is required to enter a judgment based on the
12 master's finding unless somebody objects. I don't know,
13 Justice Hecht, or any of the other procedure hounds in
14 here might know better than I, but --

15 HONORABLE DAVID EVANS: Richard, I don't
16 know how many we would see of these, but how is it
17 financed? Does the county pay for the master? Because in
18 the situation that was suggested by Tracy where the
19 presiding judge would appoint another judge, there's funds
20 already available for that, and it's probably going to be
21 a sitting judge already who is already on payroll, so your
22 master in chancery works in cases where parties have the
23 funds to pay for the master on a cost basis.

24 CHAIRMAN BABCOCK: Justice Pemberton.

25 HONORABLE BOB PEMBERTON: I was just going

1 to echo the concerns about jurisdiction in the courts of
2 appeal, and even if we had jurisdiction, I think you would
3 find a lot of courts of appeals, at least ours probably,
4 just referring these things to some trial court to have
5 the fact findings heard so you can get you that in a court
6 of appeals. It needs to be in some kind of trial type
7 court.

8 CHAIRMAN BABCOCK: Justice Gray, was it you
9 or Jeff that had your hand up?

10 HONORABLE TOM GRAY: I think both of us did.
11 I was going to make reference back to the United States
12 Supreme Court's original jurisdiction, and my
13 understanding of what they normally do is abate them out
14 to a trial judge to develop the record before they take it
15 back up under Article 3 when they do the ambassador's
16 trials, and so notwithstanding Richard's aversion to the
17 Federal procedures, we might be able to find something
18 there that would give us a procedural vehicle so that they
19 can develop a fact record and basically let the appellate
20 court pick some other district judge to do that, and that,
21 you know, may be disassociated with the other judge.

22 CHAIRMAN BABCOCK: Jeff, then Richard.

23 MR. BOYD: I'm trying to look at the statute
24 here, Chapter 574, real quick, but there's one provision
25 that says, "The county judge may appoint a full-time or

1 part-time master to preside over the proceedings for
2 court-ordered mental health services if the commissioners
3 court of a county in which the court has jurisdiction
4 authorizes the appointment," so it is an option, but
5 statutorily it requires the county commissioners court
6 approval, but going back to what Judge Yelenosky said --
7 and particularly those of y'all that do criminal law are
8 going to be more understanding of this, but the statute
9 says the jurisdiction, a proceeding under subchapter (c)
10 or (e), which are those orders for health services must be
11 held in the statutory or constitutional county court that
12 has the jurisdiction of a probate court or mental illness
13 matters, which sounds like statutorily it has to be in the
14 probate court, and if that is the case then I think Judge
15 Yelenosky is onto something about possible de novo review
16 in the district court, but I think I heard others say a
17 minute ago that it can also come from a district court in
18 a criminal proceeding, although that's not what I'm
19 finding in a statute.

20 CHAIRMAN BABCOCK: Richard Munzinger, and
21 then Judge Yelenosky.

22 MR. MUNZINGER: I was just going to point
23 out that Richard Orsinger's proposed solution may not work
24 if the probate court is the court of original
25 jurisdiction, for example, and appoints a master in

1 chancery to hear the case. It doesn't require de novo
2 review unless some person complains, the person who has
3 been disqualified from having a firearm. So if I complain
4 to the master in chancery's ruling, I'm complaining back
5 to the court that appointed the master in chancery. Does
6 that mean that that court is at a de novo review? I would
7 question that it is, because the master in chancery is not
8 a free-standing court so to speak that would have original
9 jurisdiction.

10 I don't know that that solution would work
11 for that reason. You don't run into the problem of
12 needing a de novo review unless the person complains, so
13 you're complaining back to the court that appointed the
14 master, and it is that court which is going to enter the
15 judgment, it would seem to me, that would say you can or
16 can't carry a gun or whatever it is that the judgment
17 says.

18 CHAIRMAN BABCOCK: Okay. Judge Yelenosky.

19 HONORABLE STEPHEN YELENOSKY: Were you
20 intending to send this to subcommittee or have you already
21 done that?

22 HONORABLE NATHAN HECHT: Well, Dorsaneo was
23 conscripted to look at it.

24 HONORABLE STEPHEN YELENOSKY: Okay. Well, I
25 guess I would suggest sending it to some type of committee

1 because I think a number of people have said that they,
2 including me, have concerns that you can do a true de novo
3 by admission of additional evidence. I don't know, but I
4 don't think you can. I don't know that it's truly de novo
5 if you just take additional evidence, and then secondly,
6 we can get answers to some of our questions about this
7 from somebody like Judge Herman of the probate court here,
8 who is very knowledgeable about this kind of stuff.

9 HONORABLE NATHAN HECHT: He was involved in
10 the legislation.

11 HONORABLE STEPHEN YELENOSKY: Oh, he was?

12 HONORABLE NATHAN HECHT: Yeah.

13 HONORABLE STEPHEN YELENOSKY: Okay. Well,
14 so, I don't know, we may have exhausted what we can do
15 without more input.

16 CHAIRMAN BABCOCK: Is anybody -- what's
17 wrong with Judge Christopher's idea? It seems to me it's
18 got a lot to recommend. As Judge Evans points out, you've
19 already got the funding in place. You don't have to worry
20 about paying for somebody like Orsinger.

21 HONORABLE DAVID EVANS: We have some de novo
22 review already. The licensing of alcohol comes from
23 county court jurisdiction over to district court
24 jurisdiction. We conduct a de novo. There's some models
25 out there that we might look at, and as Judge Christopher

1 pointed out, the contempt model is one, and the presiding
2 judge picks a neutral judge to come in and try it de novo
3 and would have the funds to do it.

4 CHAIRMAN BABCOCK: Yeah.

5 HONORABLE DAVID EVANS: And those facilities
6 are more -- are better equipped to receive evidence.
7 Justice Hecht, I think the affidavit practice in this type
8 of area would just lead to the perfect storm over the
9 perfect affidavit as to what was legally conclusionary and
10 objections, and eventually you would end up with a
11 reporter present taking evidence.

12 HONORABLE NATHAN HECHT: Well, this is very
13 helpful, and maybe instead of Professor Dorsaneo looking
14 at it, maybe Judge Evans or somebody could look at it. Or
15 another group. But we do need to --

16 HONORABLE DAVID EVANS: That's what I was
17 afraid of. Justice, you need to speak up, I didn't quite
18 catch that.

19 HONORABLE NATHAN HECHT: You don't need to
20 here this. You don't need to hear this part, Judge Evans.

21 HONORABLE STEPHEN YELENOSKY: You'll get a
22 letter.

23 HONORABLE NATHAN HECHT: And draft
24 something, draft something up.

25 CHAIRMAN BABCOCK: I hear a motion,

1 seconded, all in favor. Okay, Judge Evans, it's you.

2 HONORABLE DAVID EVANS: Gee, thanks.

3 CHAIRMAN BABCOCK: You can draft whoever you
4 want to assist.

5 HONORABLE NATHAN HECHT: There's been quite
6 a bit of work done on this in the -- up to this snafu,
7 which we have, but Judge Herman has worked on it, and OCA
8 has done a bunch of work on it, and they have all the
9 background and stuff, so I'll provide all of that to you
10 later.

11 HONORABLE DAVID EVANS: Yes, sir.

12 HONORABLE NATHAN HECHT: Maybe we can get
13 something done. Thank you.

14 HONORABLE DAVID EVANS: May I be excused,
15 Mr. Babcock, for fear of anything else happening at this
16 point?

17 CHAIRMAN BABCOCK: Actually, when you leave
18 it's worse. You'll be working on poverty law issues
19 before you know it, which brings us to our next agenda
20 item and Judge Yelenosky.

21 HONORABLE STEPHEN YELENOSKY: Well, I missed
22 the last meeting, but I read the transcript, and Kennon
23 and I, together at Justice Hecht's request, put together a
24 follow-up report, which basically is an edited version of
25 the original report and incorporating what we were able to

1 glean from the transcript plus some other stuff I guess
2 that's happened since the last meeting. And I think we
3 can do this relatively quickly. I'm looking at what says,
4 "SCAC subcommittee follow-up report on poverty law
5 problems and proposals," dated September 23rd, 2009, and
6 then in bold it says "The following report is edited
7 version," et cetera, so that's what I'm looking at.

8 Problems 1 to 3 and 6, as it states there,
9 were that indigent litigants are charged by some of the
10 clerks' offices for fees arising after the filing fee.
11 There's no provision for exemption from e-filing fees, and
12 some courts require affidavits of indigence to include
13 unnecessary and sensitive information. There was then
14 proposed language for 145(a) and (b). The full committee
15 approved the proposed language as modified to replace
16 "charge with advanced payment."

17 There was a conclusion that the proposed
18 last sentence regarding e-filings failed to fix the
19 problem. The subcommittee in response to that
20 acknowledges that it fails to fix the problem, but that's
21 all that we thought we could do, which was to facilitate
22 transfer of information should there be a negotiated
23 waiver for indigent clients.

24 Since then, as late as yesterday evening,
25 I've got information from one of the parties who is

1 involved in the negotiations with the department -- Texas
2 Department of Information Resources regarding a waiver for
3 clients of IOLTA-funded organizations, and it changes
4 things somewhat, because I learned from that that they
5 believe they may come up with a system that would, in
6 fact, be hampered by this proposed language because it's
7 dependent upon the clerk sending out notice, and I don't
8 know exactly what they have in mind, but the bottom line
9 is the Legal Aid folks involved in this -- and we do have
10 Nelson Mock here, I noticed, who may have more to say
11 about this. The e-mail was not from him but from Robert
12 Doggett. But Robert said that --

13 CHAIRMAN BABCOCK: Robert's also here,
14 Judge.

15 HONORABLE STEPHEN YELENOSKY: Oh, is he?

16 CHAIRMAN BABCOCK: Down here, snuck down in
17 the corner.

18 MR. DOGGETT: Just fighting with the
19 landlords.

20 HONORABLE STEPHEN YELENOSKY: Well, so he
21 can speak for himself, but his e-mail says that they'd
22 rather that we not propose a change in the rule regarding
23 e-filing at all and let them do their work on negotiation;
24 is that right?

25 MR. DOGGETT: Yes, your Honor.

1 HONORABLE STEPHEN YELENOSKY: Okay. And I
2 told him in reply, well, if that's what you're asking for,
3 since this is intended to benefit the clients of the
4 people he represents, then I don't know that anybody would
5 object to not proposing anything right now, but obviously
6 stranger things have happened, so I don't know, Chip, if
7 you want to take a vote on that or what.

8 CHAIRMAN BABCOCK: Yeah, just let's be clear
9 about the language we're talking about. Is it on the
10 first page of your 18-page memo?

11 HONORABLE STEPHEN YELENOSKY: Yes. And it
12 is the last sentence that's underlined there, "The clerk
13 must also immediately notify."

14 CHAIRMAN BABCOCK: Okay. And the proposal
15 would be to delete that language?

16 HONORABLE STEPHEN YELENOSKY: Yes, and the
17 comment regarding that would be not that we've rejected it
18 in substance, but that it's not a ripe issue.

19 CHAIRMAN BABCOCK: Okay. Anybody have any
20 views on that?

21 PROFESSOR ALBRIGHT: I just have a question.
22 If they can't use electronic filing, they can file with
23 paper, right?

24 HONORABLE STEPHEN YELENOSKY: Well --

25 PROFESSOR ALBRIGHT: When we talk about all

1 of these electronic filing rules, we have not
2 gotten anywhere where you can't file with paper.

3 HONORABLE STEPHEN YELENOSKY: Well, it's not
4 required anywhere except, what, Travis County now?

5 MS. PETERSON: Uh-huh.

6 HONORABLE STEPHEN YELENOSKY: And in Travis
7 County you can file by paper, right?

8 MR. DOGGETT: Judge Dietz signed an
9 administrative order, I'm going to say a month ago
10 roughly, allowing IOLTA-funded organizations to avoid the
11 requirement of e-filing.

12 HONORABLE STEPHEN YELENOSKY: And if you're
13 pro se they will allow you to -- it's either written or
14 understood that you can file. Nobody is being denied the
15 ability to file because they can't afford e-filing in
16 Travis County.

17 CHAIRMAN BABCOCK: In most of the Federal
18 districts that's the way it works, isn't it? If you're
19 indigent or pro se you can file it in paper, right?

20 MR. DOGGETT: Yes. Yes, your Honor.

21 CHAIRMAN BABCOCK: I'm not an Honor.

22 MR. DOGGETT: Sorry. Too many judges in
23 here.

24 MR. ORSINGER: You're honorable.

25 MR. DOGGETT: I'm just not going to take any

1 chances.

2 CHAIRMAN BABCOCK: Just say "Yes, hey, you."

3 Professor Albright.

4 PROFESSOR ALBRIGHT: Should the rule say
5 something like "no court shall prevent filing"? I mean,
6 I'm not saying it right, but "no court shall prevent a
7 indigent person from filing by paper" or something like
8 that.

9 MS. PETERSON: I think one of the concerns
10 that you, Nelson, raised during the last meeting is having
11 a fix like that, if I understand correctly, the idea would
12 be to open up the e-filing system to indigent filers, so
13 if there were something in there saying you can file on
14 paper that would be good because you would have access to
15 the courts, but it wouldn't be good because then the
16 e-filing system wouldn't be open to the indigent filers.

17 PROFESSOR ALBRIGHT: So it's trying to
18 encourage the e-filing people to let them file.

19 MS. PETERSON: Yes.

20 CHAIRMAN BABCOCK: Mr. Mock.

21 MR. MOCK: Yeah, the idea of not creating a
22 two-tier system, which may be what we go with.

23 HONORABLE STEPHEN YELENOSKY: So my motion
24 would be to eliminate that sentence and address this again
25 some other -- at some other point when hopefully they've

1 negotiated some kind of waiver system that has a
2 mechanism.

3 CHAIRMAN BABCOCK: Yeah, okay. Anybody
4 opposed to that motion?

5 Okay. It passes unanimously.

6 HONORABLE STEPHEN YELENOSKY: I do want to
7 just touch on one thing I said at the end on -- I will go
8 back to the contents of the affidavit in it, but I want to
9 touch upon the incontestability of the affidavit, and I
10 talked to Richard Munzinger just before the meeting about
11 this, and I think he and I are on the same page, but
12 wanted to make that of record because when we originally
13 vetted Rule 145 with an incontestability provision for
14 IOLTA certificates, we did have a long discussion -- well,
15 when have we not had a long discussion, so that's rather
16 redundant. We had a discussion about Rule 145, and it
17 obviously went to the Supreme Court, obviously was passed
18 by the Supreme Court as they constituted.

19 After reading the transcript, I was just
20 concerned that we might have lost a little institutional
21 memory because something wasn't said at that time, and so
22 I just wanted to say it at this time, and, Richard,
23 obviously you can tell me if, in fact, I reported
24 correctly we agree on this. There was talk about the
25 right of a litigant to challenge whether or not the

1 alleged indigent is, in fact, indigent, and my point that
2 I made way back when we did Rule 145 was there is no
3 common law, statutory, or constitutional right that a
4 litigant has standing to assert to challenge whether or
5 not his or her opponent in court has somehow defrauded the
6 county of its filing fee. The right, to the extent that
7 it exists, putting aside the JP context for a minute
8 because there is a statute there, comes only from the rule
9 and, therefore, can be limited by the rule.

10 It is a question of essentially defrauding
11 the government, as a taxpayer standing issue or a private
12 attorney general issue, but it's not pertinent to any
13 right the litigant has in a matter before the court any
14 more than somebody before a court, as they tried to do
15 when I was at Legal Aid, can litigate in the district
16 court whether or not the Legal Aid office should have
17 accepted representation of that person based on their
18 income. So I just wanted to make the point that you may
19 disagree, and I know Richard and I do about the policy
20 question of whether IOLTA certificates ought to be
21 incontestable, but I don't believe and I don't think
22 Richard believes -- and I'll turn it over to him in a
23 minute -- that there's any right of a litigant that's
24 violated by making it incontestable. Richard.

25 MR. MUNZINGER: I think he stated the law

1 correctly. I haven't briefed it. I do question -- I
2 don't think it's only the county that is deprived or is
3 defrauded. I think the litigant against whom the person
4 brings the case also has an interest in recovering costs
5 and avoiding someone using the judicial system improperly
6 against them, but it is a matter of policy. I don't
7 believe there is a right of a litigant to say that the
8 Supreme Court can't make these IOLTA rulings binding when
9 they're done by a poverty law office. I think Judge
10 Yelenosky stated the law correctly. I just don't like the
11 policy.

12 HONORABLE STEPHEN YELENOSKY: And that's the
13 only point I want to make, it's a policy issue, and just
14 to add, the policy consideration I think that carried the
15 day on that is the likelihood of recovering more in fees
16 by frequent contests to IOLTA-certified indigents is far
17 exceeded by the expense to governmental entities in terms
18 of salaried employee time, including the judge's time, the
19 taxpayer-funded IOLTA attorney potentially. I think Judge
20 Christopher pointed out others. I think in Harris County
21 you had like the IOLTA certificates or rather the indigent
22 certificates, affidavits being challenged routinely.

23 HONORABLE TRACY CHRISTOPHER: By the county
24 attorney.

25 HONORABLE STEPHEN YELENOSKY: Right. And so

1 you can make a policy judgment strictly on the bottom
2 line. It's -- the game is not worth the candle, or at
3 least that's a consideration there. Now, I know Richard
4 feels that the game may be worth the candle because he
5 thinks -- he's not confident that the IOLTA organizations
6 will always be truthful about their certification, and
7 that's a policy issue.

8 The next thing that I wanted to address is
9 on the contents of the affidavit, by a vote of 18 to 3 the
10 SCAC decided the rule should not forbid any particular
11 information from being required in the affidavit. The
12 subcommittee acknowledges that the listed -- if the listed
13 information were provided in -- only in a sensitive data
14 form, that would at least mitigate or eliminate concerns
15 about identity theft, but that's not the only concern I
16 think that's being brought forward, and I may let -- or I
17 guess I'll suggest that Robert or Nelson talk about the
18 concern, but let me jump to another point that wasn't made
19 last time, which is there seemed to be an assumption that
20 if you get somebody's Social Security number and you know
21 who they are, that either you or the court can somehow go
22 to Medicaid or AFDC or somebody else and they're going to
23 tell you if the person's on the program.

24 That's no more true than you can go and get
25 my tax return by knowing my Social Security number. As

1 long as you don't misrepresent who you are, you're not
2 going to get that without a release. So a useful list of
3 the information is certainly doubtful, but Robert or
4 Nelson, did you want to speak to your concern about -- if
5 I may, Chip, ask them to speak to the concern about that
6 information?

7 MR. DOGGETT: Our concern was that -- that
8 the information on the affidavit should be prima facie
9 showing their financial status; and if the court questions
10 that or a party questions that then obviously there's an
11 opportunity for hearing; and we're talking about obviously
12 a non-IOLTA-funded affidavit, if you will, someone who is
13 pro se, files an affidavit; and our position was that
14 the -- the information in the affidavit should just relate
15 to their actual financial status. If there's a question
16 about that, then that's what the court is for, to have a
17 hearing on. To the extent that their Social Security
18 information or place of birth, that is obviously not their
19 financial status in and of itself, in other words, their
20 assets, their income, their debts; and we believe that the
21 affidavit itself should limit itself to that information
22 that's relevant.

23 And if there is a further inquiry desired
24 then obviously that's still possible; but to have that
25 information recorded on any document, whether it be

1 somehow sealed, it's still in a document; and it still has
2 to be safeguarded somehow; and it's, frankly, unnecessary
3 unless there is a question. If there's a question, then
4 that information can be delved into to arrive at that.

5 HONORABLE STEPHEN YELENOSKY: Is there any
6 concern --

7 CHAIRMAN BABCOCK: Judge, can you hang on
8 for a second?

9 HONORABLE STEPHEN YELENOSKY: Yes.

10 HONORABLE NATHAN HECHT: Robert, Dee Dee
11 doesn't know who you are since you're not on the
12 committee. Could you just for the record identify who you
13 are?

14 MR. DOGGETT: My name is Robert Doggett,
15 D-o-g-g-e-t-t, Texas RioGrande Legal Aid.

16 CHAIRMAN BABCOCK: Thanks. Now, Judge.
17 Sorry.

18 HONORABLE STEPHEN YELENOSKY: Is there any
19 concern that the requirement that people list that
20 dissuades them from proceeding?

21 MR. DOGGETT: Well, obviously our concern is
22 that there are a lot of affidavits out there; and we were
23 hopeful at some point we would have one that we could rely
24 upon that, you know, that way we wouldn't have hundreds of
25 different affidavits and so we could use one; and I'll

1 tell you the truth, you know, if we comply with the rules
2 and provide an affidavit listing all the information that
3 the court requires in currently 145, for example, Rule
4 145, that sometimes is still rejected because they have
5 their own form; and when there is a five-day turnaround or
6 there's some sort of extreme emergency, that is a lot of
7 time because you've already had your client come in and
8 sign it, let's say, or let's say you've given this
9 affidavit to a pro se party; and the time involved to try
10 to fix that sometimes is -- causes a problem, and so we --

11 HONORABLE STEPHEN YELENOSKY: And that comes
12 about because you litigate in multiple jurisdictions and
13 so you don't always know what that jurisdiction's form is
14 when the client comes in?

15 MR. DOGGETT: And, of course, you-all are
16 going to address some of that, I hope, if Rule 749a adopts
17 that allows an affidavit, you know, for example in
18 an eviction, that the IOLTA certificate will avoid the
19 contest. So my own problem, if you will, hopefully can be
20 fixed as far as eviction cases, but for a pro se party it
21 would be good if there was one form that we could all
22 agree on, so that way courts across the state would have
23 one form and we could distribute that form and so could
24 everybody else. But the alternative, of course, is let's
25 try to at least limit the form that's used by the courts

1 to just this financial information rather than going
2 farther afield on things that would be nice or I'm curious
3 about where he lives or I'm curious about his employer's
4 boss's name and phone number that someone could call and
5 possibly embarrass with. "Did you know this gentleman's
6 being sued and he's trying to appeal?" You know, "That's
7 your employee, just thought I'd let you know. Is that
8 true, is he your employee?" You know, that kind of thing,
9 which could cause him to lose his job.

10 I mean, and he's already in trouble, if you
11 will. He's already possibly unemployed or underemployed
12 with the family, and so what we were hoping to do when we
13 brought this matter to the Court's attention was let's try
14 to limit the information that's required of an indigent
15 filer to the actual financial information of interest, and
16 then if there was more information needed or curious that
17 can be done at a hearing, and that's sort of where we came
18 from, but the current rule being proposed at least
19 limits -- or at least prohibits stuff that is, you know,
20 clearly not a part of someone's financial status at that
21 point.

22 CHAIRMAN BABCOCK: Judge Christopher.

23 HONORABLE TRACY CHRISTOPHER: Well, two
24 things. Rule 143 does allow a private person to ask for
25 costs, a cost deposit, security for costs. So, I mean,

1 there is something in our rules now in terms of a person
2 contesting these affidavits of indigency.

3 HONORABLE STEPHEN YELENOSKY: Oh, I was just
4 saying it's rule-based, is all I was saying.

5 HONORABLE TRACY CHRISTOPHER: Right. Right.
6 But I really think that we might need the county attorneys
7 and/or the district clerks who say they want this
8 information to give their opinion on it as to why they
9 want the information. I mean, certainly they ask for it,
10 they want it. You know, maybe it's not for a good reason.
11 Maybe they're doing something wrong with it, but they all
12 say it's necessary for their contest, and it is an issue
13 for the clerk's office when they have to provide all of
14 these services for free. So although I appreciate your
15 point of view, I'm not sure we're getting the opposing
16 point of view here on this particular point.

17 CHAIRMAN BABCOCK: Okay. David Jackson.

18 MR. JACKSON: It's still an issue for the
19 court reporter, too. I mean, they wind up with a
20 three-week trial and have to turn out a record for free,
21 they need some ability to make sure they're doing the
22 right thing.

23 CHAIRMAN BABCOCK: Judge Yelenosky.

24 HONORABLE STEPHEN YELENOSKY: Well, nobody
25 is suggesting that they be denied the right to a hearing,

1 and they get a hearing. The question is what do you have
2 to show right out of the box in order to establish a prima
3 facie case, and again, I would draw the analogy to tax
4 returns. They are very hard to get under Supreme Court
5 case law, and if somebody is able to swear to their net
6 worth in a case where they're being sued for punitive
7 damages, they can at least start with that and then there
8 may be a hearing, but you don't get to go right to
9 somebody's tax return. Why in an affidavit do you have to
10 provide information, even if it were able to provide
11 access to your -- to your bailiwicks, and again, I don't
12 know what the court reporters, the county clerk, or
13 anybody else can do with that Social Security number
14 without a release.

15 CHAIRMAN BABCOCK: Okay. So to bring this
16 issue to a head, Judge Yelenosky, it is the sentence in
17 subsection (b) that the subcommittee proposes adding "The
18 affidavit must not contain a Social Security number, a
19 checking account number, or a place of birth."

20 HONORABLE STEPHEN YELENOSKY: Well, we did
21 last time, and to be fair, it was voted down heavily, and
22 it's not y'all's fault that I wasn't here to say this
23 then, so basically I'm asking for a revote and entirely at
24 your discretion.

25 CHAIRMAN BABCOCK: Well, we certainly in

1 deference to all your hard work on this take a revote, so
2 that's not an issue. The question is whether you've
3 convinced anybody other than Judge Hecht's computer, which
4 apparently has endorsed your proposal. Any more
5 discussion?

6 Okay. Everybody that is in favor of
7 including the language in subsection (b), the language
8 being, quote, "The affidavit must not contain a Social
9 Security number, a checking account number, or a place of
10 birth," raise your hand.

11 All those opposed? That passes by a vote of
12 17 to 8, so the Court now has it both ways, 18 to 3
13 against and 17 to 8 in favor, so --

14 HONORABLE STEPHEN YELENOSKY: Well, it has a
15 record as well.

16 MR. ORSINGER: That was a de novo appeal,
17 wasn't it?

18 CHAIRMAN BABCOCK: That was a de novo
19 appeal.

20 HONORABLE NATHAN HECHT: Which is why we
21 always pay careful attention to the vote.

22 HONORABLE STEPHEN YELENOSKY: Exactly. Of
23 course, the discussion is what's important, and that's on
24 the record.

25 CHAIRMAN BABCOCK: Yeah. Okay. Let's go to

1 the next one.

2 HONORABLE STEPHEN YELENOSKY: Okay. This is
3 what I was alluding to, that the -- there is a -- there's
4 no parallel provision for the justice rules that allows or
5 provides that an IOLTA certificate is incontestable. The
6 follow-up to that was that Justice Hecht asked the
7 subcommittee to respond to his question as to whether we
8 believe the JP rule should conform to Rule 145, assuming
9 that the statute in the Property Code were not an
10 obstacle, and our report on that is four out of five
11 subcommittee members believe the two rules should conform
12 to one another, not being able to find a principle reason
13 for them to differ. Judge Lawrence dissented from that,
14 believes that the justices of the peace should continue to
15 have discretion.

16 HONORABLE DAVID PEEPLES: Are we supposed to
17 be looking at a certain page?

18 HONORABLE STEPHEN YELENOSKY: I was right at
19 the bottom of page three, the last paragraph.

20 HONORABLE DAVID PEEPLES: Okay.

21 HONORABLE STEPHEN YELENOSKY: I don't know
22 if there is anything more to be done on that.

23 CHAIRMAN BABCOCK: Yeah, Frank.

24 MR. GILSTRAP: I voted with the majority on
25 the subcommittee, but in deference to Judge Lawrence, he

1 did have a section from the Property -- was it the
2 Property Code?

3 HONORABLE STEPHEN YELENOSKY: Yes. And
4 that's what we're referring to. Justice Hecht's question
5 was putting that aside.

6 MR. GILSTRAP: Okay. Putting the statute
7 aside.

8 HONORABLE STEPHEN YELENOSKY: Putting the
9 statute aside.

10 MR. GILSTRAP: Okay.

11 CHAIRMAN BABCOCK: Judge Peeples.

12 HONORABLE DAVID PEEPLES: I see one great
13 big difference between JP court and the district and
14 county courts. For one thing, if a free record after a
15 trial is at stake here, that's a big thing. Free filing,
16 getting into court, that's a very minor issue to me, but
17 the consequences if it's hard to change or if it won't get
18 changed once there's an unchallenged affidavit and then
19 there is a good long trial and it's got to be a free
20 record.

21 HONORABLE STEPHEN YELENOSKY: In the JP
22 court?

23 HONORABLE DAVID PEEPLES: No, I'm saying if
24 we're going to have 145 conform to the JP rules.

25 HONORABLE STEPHEN YELENOSKY: Well, the JP

1 rules do not -- in the JP court they can contest an IOLTA
2 certificate, correct? And so the conformity would be to
3 preclude contest of IOLTA certificates in the JP court.

4 HONORABLE DAVID PEEPLES: I'm just saying
5 there's a big difference between a district court case and
6 a JP court case.

7 HONORABLE STEPHEN YELENOSKY: And the
8 difference would argue for --

9 HONORABLE DAVID PEEPLES: Different rules,
10 if there need to be.

11 HONORABLE STEPHEN YELENOSKY: Right, but
12 what you're saying to me would argue for it being
13 contestable in the district court and not in the JP court.

14 HONORABLE DAVID PEEPLES: And maybe --

15 HONORABLE STEPHEN YELENOSKY: Because
16 there's no record in the JP court.

17 HONORABLE DAVID PEEPLES: And maybe other
18 instances, too.

19 CHAIRMAN BABCOCK: Yeah, Justice Gray.

20 HONORABLE TOM GRAY: And I think we covered
21 this when we made the rule or suggested the rule in
22 connection with the district court proceedings, but does
23 this the way it's worded take into effect that the actual
24 source of IOLTA funding has virtually dried up and has
25 been replaced by \$20 million in general revenue

1 appropriations?

2 HONORABLE STEPHEN YELENOSKY: Good point.

3 Nothing we've considered.

4 HONORABLE TOM GRAY: Because it talks about
5 "IOLTA-funded." The large part of funding of these
6 organizations is now through general revenue and not
7 through the IOLTA funds because it's --

8 HONORABLE STEPHEN YELENOSKY: Robert, do you
9 know whether these general funds still are characterized
10 legally as -- well, if they're not characterized as IOLTA
11 funds, the organization that's getting them is probably an
12 IOLTA recipient as well, and so it would seem that the
13 certificates coming from an IOLTA-funded organization,
14 even if it's also getting these general provisions, are
15 there organizations that are just getting this 20 million
16 and not getting IOLTA?

17 MR. DOGGETT: It's possible, and I wouldn't
18 want to comment until I would find out for sure for the
19 committee. Could be a comment, though, maybe that would
20 make that clear that it's really the Texas Access to
21 Justice Foundation is essentially the body that
22 distributes all of these funds, whether that be the,
23 quote, IOLTA fund or the general appropriation fund, but
24 it's possible that some get some pop and some get another.
25 It's entirely possible. I'm not sure they make any

1 distinction.

2 HONORABLE STEPHEN YELENOSKY: Well, if
3 that's correct then it may justify a change in the
4 reference to IOLTA certificate in Rule 145 as well as
5 anywhere else.

6 CHAIRMAN BABCOCK: Judge Yelenosky or Frank
7 Gilstrap, in Judge Lawrence's absence can one of you or
8 both of you articulate his opposition to this change?

9 HONORABLE STEPHEN YELENOSKY: I can read you
10 his e-mail, if you'll give me one second.

11 CHAIRMAN BABCOCK: In his own words.

12 HONORABLE STEPHEN YELENOSKY: In his own
13 words. While I'm pulling it up I'll see if I can
14 paraphrase it just from memory. Two things. One, he
15 reiterates that he thinks the statute is an impediment,
16 but, of course, that was to be put aside in response to
17 Justice Hecht's question; and, two, he thinks that judges
18 should have discretion in that matter; and I took that to
19 mean that he doesn't think that justices of the peace
20 should have any more discretion than any other judge, but
21 if all judges can't have discretion, he wants to keep his
22 discretion. That's how I understood it. I don't mean
23 that as a criticism. That's a fair position to take, but
24 I don't think he drew a distinction between JP judges and
25 other judges.

1 CHAIRMAN BABCOCK: Justice Bland.

2 HONORABLE JANE BLAND: Well, it seems like
3 the IOLTA folks are in the best position to evaluate these
4 people about whether they meet the criteria, and I think
5 the same reasoning that applied to us allowing a
6 certificate to substitute for the trial courts applies to
7 the JP courts, particularly when you think about the JP
8 courts and access to the JP courts commonly having to do
9 with a basic need of shelter. So I don't see any -- I
10 don't think giving the JPs discretion -- you know, there's
11 any need for them to have discretion more than any other
12 judge, and when you add to it the fact that it's a
13 nonrecord court, so we're not even talking about the
14 expense of a court reporter or anything. It just
15 doesn't -- to me it's a no-brainer.

16 CHAIRMAN BABCOCK: A no-brainer in favor of
17 this language?

18 HONORABLE JANE BLAND: In favor of
19 conforming the JP courts with Rule 145.

20 MR. GILSTRAP: Chip, and I think in
21 deference to Judge Lawrence, I think he's relying heavily
22 on the statute. I don't know that I agree with his
23 reading of the statute, but he's relying -- he says, you
24 know, we have that right under statute and that can't be
25 changed by rule.

1 HONORABLE STEPHEN YELENOSKY: Right. And
2 that's the first point I made, and that we're not
3 answering the question of whether it's -- the statute is a
4 problem. We've pointed that out, and Justice Hecht asked
5 us to ignore that in answering the question.

6 CHAIRMAN BABCOCK: Kennon or Justice Hecht,
7 was it -- was it the Court's desire that we not make a
8 determination one way or the other whether the statute is
9 an obstacle in framing this debate?

10 HONORABLE NATHAN HECHT: Well, I mean, we'd
11 like your views on it, but it kind of is what it is.

12 CHAIRMAN BABCOCK: Yeah.

13 HONORABLE NATHAN HECHT: I mean, I think we
14 see the problem.

15 CHAIRMAN BABCOCK: Okay.

16 HONORABLE STEPHEN YELENOSKY: I can read you
17 verbatim what he wrote, if you want to hear his two
18 sentences.

19 CHAIRMAN BABCOCK: Yeah, that would be
20 helpful.

21 HONORABLE STEPHEN YELENOSKY: Okay. "I
22 still feel Rule 145 automatic approval for IOLTA
23 certificates should not apply" -- and, Dee Dee, this is
24 Judge Lawrence. "I believe this is a matter of judicial
25 discretion and courts should decide the issue of

1 indigency, not an attorney not subject to examination by
2 the court or the adverse party. Also, the Legislature has
3 already spoken when they set forth the procedure for JP
4 courts to review pauper's appeals when they established
5 Section 24.0052 in the Property Code, which in my opinion
6 must be given preference," unquote.

7 CHAIRMAN BABCOCK: Okay. There we have it.
8 Anybody else want to talk about this? Yeah, Justice
9 Gaultney.

10 HONORABLE DAVID GAULTNEY: I just have a
11 question. Would the effect of this in part be to make the
12 appeal automatic in the sense that doesn't the pauper's
13 affidavit serve as the perfecting instrument for the
14 appeal to county court?

15 HONORABLE STEPHEN YELENOSKY: I believe it
16 does serve as the perfecting instrument. It would only
17 apply, of course, when you have an IOLTA certificate or
18 Texas Access to Justice certificate.

19 HONORABLE DAVID GAULTNEY: So essentially by
20 filing that certificate you don't have a hearing
21 requirement to perfect your appeal to county court?

22 HONORABLE STEPHEN YELENOSKY: Would that be
23 right, Robert?

24 MR. DOGGETT: That's correct. Essentially
25 there won't be an ability to make us go back to court

1 again for another hearing on whether or not they say their
2 income is what it is.

3 CHAIRMAN BABCOCK: Okay. Any other
4 discussion? Then we're ready for a vote. We're talking
5 about -- we're voting on Rule 749a, paragraph (3), and
6 adding the underlined language in paren (4), language
7 being found at 3 of 18 of the subcommittee follow-up
8 report on poverty law problems.

9 MR. MUNZINGER: Chip?

10 CHAIRMAN BABCOCK: Yes, sir.

11 MR. MUNZINGER: Before you call for the vote
12 may I ask Judge Yelenosky a question?

13 CHAIRMAN BABCOCK: Certainly. If it's a
14 good question.

15 MR. MUNZINGER: I understand you to say that
16 the language in Rule 145 is essentially the same of that
17 which is underlined in the proposed changes to Rule 749a,
18 paragraph (3).

19 HONORABLE STEPHEN YELENOSKY: It should be.

20 MR. MUNZINGER: And now there seems to be a
21 question as to whether or not the programs are, in fact,
22 funded by the interest on lawyers' trust and accounts as
23 distinct from another source. If we adopt this language
24 and the funding is not as stated, have we created a
25 problem? I understood you to say that that may be a

1 problem with current Rule 145 as well, and so it doesn't
2 seem to me that we ought to be voting to adopt a rule, the
3 source of which is already under question because the
4 funds are not IOLTA funds.

5 HONORABLE STEPHEN YELENOSKY: Well, they
6 are -- the vast majority of these organizations have been
7 and will continue to get IOLTA funds, just drastically
8 reduced. So they would still be IOLTA-funded
9 organizations. It would be preferable to change the
10 language to refer to the Access to Justice Fund because
11 there may be now or in the future organizations that get
12 only other funds through that, and so all I'd say about
13 that is that the vote is taken with the understanding that
14 if a change is justified on the two words "IOLTA
15 certificate" or "IOLTA-funded program" then that change
16 should apply both here and in Rule 145.

17 CHAIRMAN BABCOCK: Eduardo.

18 MR. RODRIGUEZ: I just wanted to clarify
19 whether or not this would be -- the agencies that get
20 money funded through Congress would be covered under this
21 rule, because, you know, they may be working on a
22 particular case with funding from the Congress versus from
23 direct IOLTA funding, although they may be receiving IOLTA
24 funding for other programs, and I just want to be sure
25 that we covered it -- that this rule covers an

1 organization that gets funded both ways.

2 HONORABLE STEPHEN YELENOSKY: Well, I
3 believe it does because it says "IOLTA-funded," and my
4 understanding -- and Robert or Nelson can -- at least at
5 one point if you were IOLTA-funded didn't you have to
6 screen all of your clients, even if you got funds from
7 elsewhere?

8 MR. DOGGETT: Yes, and but I think your
9 point is that it's possible that there's a group that only
10 receives LSC funding. That's the congressional funding
11 source, if you will, Congress funds.

12 HONORABLE STEPHEN YELENOSKY: Oh, I'm sorry.

13 MR. DOGGETT: An organization called the
14 Legal Services Corporation. There are three of those
15 organizations in Texas, and it looks like that will be the
16 case for a very long time in all likelihood. There were
17 eleven, and they've been reduced to three some years ago.
18 I mean, right now those three organizations do receive
19 IOLTA funding and have for -- since the inception of the
20 program, but it's possible obviously that a program would
21 only receive, if you will, LSC funding and not receive
22 IOLTA. I guess it's possible.

23 HONORABLE STEPHEN YELENOSKY: So obviously
24 what we're defining as the organizations to which this
25 applies may need some work, but the principle is still

1 presented here, should it be the same in JP court as it is
2 in the trial court.

3 MR. RODRIGUEZ: Can we amend it by just
4 adding, "and/or organizations that receive funding from
5 Legal Services Corporation"?

6 HONORABLE STEPHEN YELENOSKY: Well, what I
7 would propose doing, and the record already reflects this,
8 because this is going to the Supreme Court or not,
9 depending on the vote, is merely the caveat of record here
10 for the Supreme Court that -- and they know because
11 they're in charge of these organizations or at least the
12 funding, they know what word to use and that they use that
13 word.

14 CHAIRMAN BABCOCK: Yeah. Because if you're
15 going to make them parallel you're going to not -- and
16 you're going to make that change in 749a, you're going to
17 have to make it in the district court rule as well, so --

18 HONORABLE STEPHEN YELENOSKY: Rule 145.

19 CHAIRMAN BABCOCK: Yeah. Carl.

20 MR. HAMILTON: If the funding comes from
21 another source is there a different certificate that would
22 have to be made by somebody else?

23 CHAIRMAN BABCOCK: Yeah, I don't know the
24 answer to that, but I would guess so. I would bet.

25 HONORABLE STEPHEN YELENOSKY: Well, the way

1 I propose it is this language, with the understanding that
2 programs funded by whichever organizations the Supreme
3 Court deems are appropriate, and we suspect that's going
4 to be something like Equal Access to Justice, but I'm not
5 sure of the exact words, so I'd rather not try to come up
6 with the exact words.

7 CHAIRMAN BABCOCK: Richard.

8 MR. MUNZINGER: Well, I think there's a risk
9 to the committee that the committee adopts language that
10 may or may not be applicable to the facts on the ground,
11 and I would suggest that before we vote we maybe just vote
12 on the matter of principle, but this last discussion
13 raises another question. Judge Yelenosky points out that
14 IOLTA-funded agencies are required to screen for certain
15 criteria.

16 CHAIRMAN BABCOCK: Right.

17 MR. MUNZINGER: None of us knows the
18 criteria for somebody else, and as much as my heart says
19 people should have access to the courthouse, my mind tells
20 me that there are people who abuse this and that there's a
21 lot of politics that goes on in this and a lot of, from my
22 point of view at least, things that I don't approve of. I
23 sure don't want to vote in blind that I'm going to say,
24 "Well, if you get money from Legal Services Corporation
25 you're certified." Why? I don't know what the Legal

1 Services Corporation asks, and I don't trust the people
2 who are suing me. I shouldn't trust them. They've sued
3 me. "Oh, but you can't ask that question." Why? Well,
4 because Congress said you can't or we said. It's not a
5 good rule, in my opinion.

6 MR. RODRIGUEZ: And I may be wrong and maybe
7 somebody can help me, but my understanding in having been
8 going for the last six or seven years, five years, to
9 lobby Congress on behalf of the State Bar, that their
10 criteria are no different than the criteria that is used
11 by IOLTA-funded organizations. Is that -- maybe somebody
12 can -- I defer to somebody that does that kind of work.

13 CHAIRMAN BABCOCK: Judge Yelenosky.

14 HONORABLE STEPHEN YELENOSKY: I'm confident
15 that the Supreme Court will put in a word that applies
16 only to organizations that have to screen along the
17 criteria that IOLTA does, and that doesn't solve Richard's
18 concern that, well, yeah, but he doesn't trust the
19 screening. All I'm saying is that our vote should not be
20 taken as approving any organization other than those that
21 the Supreme Court considers like IOLTA-certified
22 organizations; and it is true that, as I understand it,
23 everybody is getting money through this process, otherwise
24 they wouldn't be getting the money, is going to have to
25 demonstrate that they're screening.

1 But to address Richard's concern, you can
2 either vote in principle that the JP rule ought to conform
3 to 145 without voting on specific language or just vote
4 the 145 language with the caveat that should it need to be
5 changed because funding has changed, it should be changed
6 as appropriately determined or as determined by the
7 Supreme Court.

8 CHAIRMAN BABCOCK: Okay. Before we take a
9 vote on this, if anyone is driving a black Ford Explorer,
10 there is a issue with that car in the parking lot.
11 Anybody driving one of those?

12 HONORABLE JAN PATTERSON: I'm not the
13 complaining party, though.

14 CHAIRMAN BABCOCK: Yeah, Judge Patterson
15 isn't complaining about it. Okay. I think to solve this
16 voting dilemma, what we're voting on is whether or not
17 Rule 749a should be -- should add this language to make it
18 consistent with 145 so that in JP court there would be
19 this concept of incontestability, the same as there is in
20 district court.

21 We will put a flag at this point in the
22 transcript for the Court that the issue of whether
23 IOLTA -- an IOLTA-funded program is the only program is an
24 issue that we're not voting on on this vote. This vote is
25 just whether we should include this language, which is

1 designed to be parallel to the language in the other rule,
2 145. So everybody that is in favor of that, raise your
3 hand.

4 Everybody against? 30 to zip, the Chair not
5 voting.

6 HONORABLE STEPHEN YELENOSKY: Well, I think
7 you could record Justice -- if he can vote by proxy, Judge
8 Lawrence would vote against it.

9 CHAIRMAN BABCOCK: He can't vote by proxy.

10 HONORABLE STEPHEN YELENOSKY: All right.
11 Well, let the record reflect, Judge Lawrence, I tried on
12 your behalf.

13 CHAIRMAN BABCOCK: Yeah, you've got to be
14 here to win.

15 HONORABLE STEPHEN YELENOSKY: The next one,
16 which begins on page four and is labeled as problem five
17 is very long, but I think we can address it quickly. If
18 you go to page 11 and look at the first paragraph that's
19 not underlined that begins "The SCAC Chair" and read that
20 sentence because it characterizes the prior four or five
21 pages, or those -- that paragraph, and says basically the
22 four or five prior pages are sort of the rewrite of the JP
23 rules that has already been proposed to the Court and
24 Justice Hecht indicated was unnecessary to reengage in
25 that discussion, and so the next paragraph basically says

1 what I think, given that instruction, the subcommittee is
2 proposing, and that is essentially the converse of what
3 we've just been dealing with.

4 We have a difference between the statute and
5 the current rule, and the statute is more favorable to
6 litigants who are attempting to make an appeal, I guess,
7 than the rule is if -- at least as the rule can be read,
8 and the point is to conform the rule to the statute.
9 Robert, would that be right?

10 MR. DOGGETT: And I would say that the
11 legislative enactment was worked on by both groups. In
12 fact, a representative of the apartment association here
13 to my right; and I'm not sure if we individually worked on
14 it, but organizations, if you will, working representing
15 both parties worked on that legislation recently; and the
16 rule that's under discussion today has been -- was enacted
17 quite awhile ago, if you will; and so this legislative
18 enactment is very recent. And her name, by the way, is
19 Wendy Wilson.

20 MS. WILSON: Yeah, and just -- and for the
21 record, my name is Wendy Wilson, general counsel for the
22 Texas Apartment Association, and I just wanted to appear
23 before the committee today to make a brief comment on the
24 issue of making the rule in line with what the Chapter
25 24.0053 of the Property Code is, and we certainly are in

1 favor of that. With respect to the language that has been
2 proposed in Rule 749b, taking out the five-day reference,
3 you know, I don't think that -- you know, I think that
4 resolves the problem that you-all have been discussing.

5 The only question that I have that may come
6 into play here is that by taking that language out there
7 may be some ambiguity about what happens in the context of
8 if the rent has continued to be -- has remained unpaid.
9 And we certainly aren't trying to as a matter of appeal
10 requiring double payment of rent, but I think if the
11 reason that the eviction has occurred in the first place
12 is due to unpayment of rent, and the question that maybe
13 the subcommittee addressed is -- already is whether there
14 should be some portion of the unpaid rent that has been at
15 issue in the eviction paid into the court and then as it
16 becomes due, because it would have already been due under
17 the contract at issue.

18 I just wanted to raise that point, and,
19 again, maybe, Judge Yelenosky, that has been addressed
20 during the subcommittee's deliberations, but other than
21 that, we certainly are in favor of making the Chapter 24
22 provision similar and work with the rule.

23 HONORABLE STEPHEN YELENOSKY: Well, looking
24 at page 4 of 18, is there different language that you
25 suggest? What we're proposing is to eliminate paragraph

1 (1) and then to add paragraph (2) or the new paragraph
2 (2).

3 MS. WILSON: And I guess my -- what my
4 concern is, is what happens when there has -- an eviction
5 has occurred and rent continues to remain unpaid. It
6 doesn't direct -- in the current rule within five days of
7 the judgment being issued by the justice court has to be
8 paid into the -- into the court registry or in order to
9 perfect the appeal, but what happens if the rent, which
10 has never been paid in the first place -- I mean, how is
11 that to be handled? And I don't know what was
12 contemplated by taking out that five-day reference.

13 HONORABLE STEPHEN YELENOSKY: I was going to
14 ask Robert to respond to that, but Chair's choice, because
15 Richard's got his hand up.

16 CHAIRMAN BABCOCK: Richard can go and then
17 Robert, if he has something to say. He doesn't have
18 anything to say, so Richard.

19 MR. DOGGETT: Whatever you want me to say.

20 MR. ORSINGER: I'm a little at a
21 disadvantage because I don't know what the Property Code
22 says exactly, but just reading your proposition here from
23 the subcommittee report, it seems to me because you can
24 find one instance where the general rule is not good
25 you're trying to eliminate the general rule. I would

1 think that the general rule is, is that the rent has not
2 been paid at all rather than the general rule is, is that
3 the rent has been paid in some instances or most
4 instances. Why don't -- why don't you craft language for
5 those situations where the rent has been paid, but still
6 leave the rule in where the rent hasn't been paid?

7 If I understand what Wendy is saying, which
8 has been my personal experience, which admittedly is quite
9 old, these evictions occur because their rent is behind,
10 and so if you take (1) out altogether then you don't even
11 have a rule right for the one whose rent is behind to have
12 the rent brought current. By eliminating (1) you take
13 away everyone's right, even the ones where the rent is
14 delinquent; isn't that right?

15 HONORABLE STEPHEN YELENOSKY: Well, my
16 understanding is, first of all, the first paragraph of
17 749b is in a nonpayment of rent FED, forcible detainer,
18 that's what it applies to. A person may stay in the home
19 by paying -- what they would have to do under the rule is
20 they may end up with a double payment because they have to
21 pay within five days under the current rule of the date
22 they file the pauper's affidavit, and they've got to pay
23 rent when it becomes due, so those things could end up in
24 a double payment.

25 MR. ORSINGER: I understand.

1 HONORABLE STEPHEN YELENOSKY: So we
2 eliminate that, and so the intent is that they pay rent as
3 it becomes due under the contract during the pendency of
4 the appeal process, and so I guess I don't understand the
5 question.

6 MR. ORSINGER: Well, tell me the process of
7 how it works if we take (1) out of there.

8 HONORABLE STEPHEN YELENOSKY: Yes.

9 MR. ORSINGER: And let's assume that
10 somebody hasn't paid anything. Where are they required to
11 pay something in order to conduct this --

12 HONORABLE STEPHEN YELENOSKY: Well, but
13 obviously that may be the dispute. They may say they did,
14 and the other side says they didn't. That's what the
15 dispute is.

16 MR. ORSINGER: Well, I'm asking you to
17 assume for hypothetical purposes that the rent has not
18 been paid and that we take (1) out of here.

19 HONORABLE STEPHEN YELENOSKY: Right.

20 MR. ORSINGER: Okay. So what rule applies
21 when the tenant hasn't paid anything and we take (1) out?
22 Then where does the landlord get protected for that
23 month's rent?

24 HONORABLE STEPHEN YELENOSKY: Okay. And I'm
25 going to need help from them because it's been almost 20

1 years since I've had this. Robert, or, I'm sorry, your
2 name again?

3 MS. WILSON: Wendy Wilson.

4 HONORABLE STEPHEN YELENOSKY: Wendy or
5 Nelson.

6 MR. MOCK: And I'm happy to see if I can
7 address that.

8 CHAIRMAN BABCOCK: Nelson, before you start,
9 would you identify yourself for the record?

10 MR. MOCK: Yes, of course. Nelson Mock,
11 M-o-c-k, and I'm a attorney with Texas RioGrande Legal
12 Aid. I'm also vice-chair of the poverty law section.

13 CHAIRMAN BABCOCK: Great, thank you.

14 MR. MOCK: I want to say thank you again for
15 addressing all these issues. We really appreciate it.
16 Specifically with regard to this rule, I don't think
17 anybody is saying that there's not going to be a
18 requirement to pay rent into the court registry if a
19 tenant wants to appeal and stay in possession of the unit.
20 I don't think that's the issue, and there is going to be a
21 mechanism clearly because it already exists both in the
22 Property Code and the rules to get a default if someone
23 fails to pay rent into the court registry, but what -- I
24 think what this does, the problem is, is that -- I'll give
25 you a hypothetical so that you understand it.

1 On the 20th of the month your client gets a
2 judgment against them, and let's say that the issue is
3 that your client is contesting whether or not the landlord
4 can assess late fees, and, in fact, there's a way to do
5 that now if the tenant believes the late fees are
6 unreasonable, you know, they can argue that they're
7 unreasonable, that they shouldn't have been assessed. The
8 judge doesn't agree, the justice of the peace doesn't
9 agree, and believes that there is a nonpayment of rent
10 issue. There's still clearly an issue. Now, bear in mind
11 that of the 250,000 eviction cases that are filed
12 approximately in the course of the year in Texas only
13 about 2,500 are appealed, so we're not talking about huge
14 number of appeals.

15 Now, but your client is -- or the tenant in
16 this case is one of those people who chooses to appeal the
17 decision of the justice of the peace. The issue -- the
18 judgment, the order is signed on the 20th of the month.
19 That would mean that your client or the tenant would have
20 to pay -- would have to appeal within five days, which
21 would put him at the 25th of the month, and then within
22 five days of that, which would put them at the 30th of the
23 month, would have to pay one month's rent into the court
24 registry.

25 Now, here's where the problem arises. You

1 now have a tenant who has paid one month's rent into the
2 court registry by the 30th of the month and then the law
3 also says within five days of when it's due you have to
4 pay another month's rent into the court registry, so you
5 have a tenant who has paid -- who contests that they owe
6 rent, who is appealing, one of the few that's appealing,
7 has paid one month's rent into the court registry, and now
8 under the Rules of Civil Procedure has to pay one more
9 month's rent in the course of about five days, and that's
10 the problem.

11 The statute is very clear that you pay rent
12 when rent is due, and I think that's absolutely fair if
13 they intend to stay in possession, but that's the problem
14 it's trying to address, and there is definitely a
15 mechanism there, and there's definitely a mechanism in the
16 Property Code whereby the landlord can choose to ask for a
17 default for failure to pay the rent into the court
18 registry.

19 CHAIRMAN BABCOCK: Thanks, Mr. Mock.
20 Richard.

21 MR. ORSINGER: Again, I apologize if the
22 Property Code solves the problem that I see, but if we
23 take this rule out, we do eliminate the problem for the
24 people who are paying double rent, but we also eliminate
25 the right of the landlord to receive one payment of rent,

1 and it would seem to me that the better approach is to
2 have some statement in here that no one can be forced to
3 pay rent twice rather than to take out the rule that
4 requires someone to pay rent once. I know there's a
5 problem when someone's required to pay rent twice, but the
6 solution to avoiding paying rent twice to me is not to
7 eliminate the right of the rule to get paid once.

8 MR. MOCK: And I don't think this eliminates
9 it. I mean, I don't think this eliminates because it
10 makes No. (2) into No. (1), which says "During the appeal
11 process as rents become due under the rental agreement the
12 tenant shall pay rent into the county court registry," and
13 the way that it works on appeals to justice of the peace
14 -- from JP to county court, it's usually a period of time
15 as short as a week where the case is transferred from the
16 justice of the peace to the county court. It's a pretty
17 quick process, and if rent becomes due within a couple of
18 days obviously then they would have to pay that.

19 MR. ORSINGER: Okay. Well, what about if
20 rent is already due? See, I'm concerned about the
21 situation where the tenant is behind, not caught up, and
22 you're talking about a situation where a tenant is current
23 and then goes behind. So let's assume that they haven't
24 paid rent for three months or something like that, and we
25 take out subdivision (1), and now we're falling back on

1 what used to be subdivision (2). Does the landlord -- is
2 he entitled to get one month's rent while this appeal is
3 going on?

4 MR. MOCK: And I think the county court is
5 going to make that decision in terms of a judgment against
6 the tenant. If the tenant has appealed the decision to
7 county court and finds that, in fact, there is a lot of
8 back rent owed, the county court judge is going to say,
9 "You've got to pay this up."

10 MR. ORSINGER: Well, the judgment is not an
11 adequate substitute for one month's rent in the court
12 because --

13 HONORABLE STEPHEN YELENOSKY: Well, but you
14 have a judgment just like in any other case. The question
15 is what you need to do while the appeal is pending. Are
16 you saying that just in order to appeal a landlord should
17 always get one month's rent, even if the question of the
18 owing that, the whole judgment, has been appealed and is
19 de novo review?

20 MR. ORSINGER: First of all, it's going into
21 the registry of the court, so the landlord doesn't get it
22 unless they're entitled to it; and, second of all, I
23 haven't read the Property Code, but this rule requires
24 that if you're going to appeal you should put up one
25 month's rent if you haven't paid it. I understand why you

1 don't want somebody to put up two months' rent, and I
2 agree with that, but by eliminating the possibility that
3 someone has to pay two months' rent, you're taking away
4 the requirement that they pay one month's rent; and to say
5 that, well, they'll get a judgment for that later on,
6 there's more going on here than just eliminating double
7 payment. It's also taking someone who is entitled to have
8 one month paid into the registry of the court in case they
9 win --

10 HONORABLE STEPHEN YELENOSKY: Why does that
11 entitlement come from?

12 MR. ORSINGER: It exists in this rule.

13 HONORABLE STEPHEN YELENOSKY: Where?

14 MR. ORSINGER: In paragraph (1), it says
15 "within five days of" --

16 HONORABLE STEPHEN YELENOSKY: Oh. Oh, well,
17 you are taking that out, because when you read the statute
18 it says "as it becomes due."

19 MR. ORSINGER: Well, what if it's past due,
20 Steve, is my point?

21 HONORABLE STEPHEN YELENOSKY: They didn't
22 put in the statute anything that says that. The statute
23 says "as it becomes due."

24 MR. ORSINGER: Okay. Well, I'm at a
25 disadvantage because I don't have the version of the

1 Property Code in front of me, but it seems to me that
2 y'all are making a substantive change by finding a
3 possible exception, which I consider to be very rare, and
4 wiping out what will happen in the normal case, which is
5 that someone will not have paid the current month's rent,
6 and if they're going to appeal according to --

7 HONORABLE STEPHEN YELENOSKY: We're pulling
8 up the Property Code, but the quote is -- and obviously
9 you want the whole quote, and she's pulling it up because
10 I couldn't. "As it becomes due" is reflected in the rule.
11 As rent -- it says "as rent becomes due" under the new
12 (1).

13 CHAIRMAN BABCOCK: Judge Peeples.

14 HONORABLE DAVID PEEPLES: I want to be sure
15 I understand. I'm looking in the middle of page four, the
16 language before the stricken language. There has already
17 been a trial, as I understand it, in a nonpayment of rent
18 case.

19 HONORABLE STEPHEN YELENOSKY: Yes.

20 HONORABLE DAVID PEEPLES: I mean, the JP has
21 heard the evidence and found presumably that rent is
22 owing. It could be that fees haven't been paid, and
23 whether there is going to be a free appeal is the issue.
24 I mean, an affidavit of indigency.

25 HONORABLE STEPHEN YELENOSKY: Well --

1 HONORABLE DAVID PEEPLES: But if there's
2 already been a trial and the judge has -- I mean, there
3 wouldn't be an appeal by the tenant in most cases, I would
4 think, unless the judge had found you haven't paid the
5 rent.

6 HONORABLE STEPHEN YELENOSKY: Right.

7 HONORABLE DAVID PEEPLES: So why shouldn't
8 the default rule here be what Richard Orsinger is arguing
9 for, which is the language in present sub (1)?

10 HONORABLE DAVID EVANS: Well, is Richard --

11 HONORABLE STEPHEN YELENOSKY: Because it's
12 contrary to the statute.

13 HONORABLE DAVID PEEPLES: That's a different
14 argument than they might have to pay double rent. Very
15 different argument.

16 CHAIRMAN BABCOCK: Judge Evans.

17 HONORABLE DAVID EVANS: Is an appeal,
18 Richard, that is on de novo appeal, is it as enforceable
19 as a final judgment out of a trial court? Does de novo
20 appeal suspend the judgment and its enforceability? I
21 don't recall.

22 MR. MOCK: I can answer that. It does.

23 HONORABLE DAVID EVANS: And that's what I
24 think is the issue, Richard, on the back due rent, is that
25 it's not enforceable because it's on de novo appeal.

1 HONORABLE STEPHEN YELENOSKY: Right.

2 HONORABLE DAVID EVANS: And so what they
3 really built in is you've got to keep the rent current in
4 order to have your trial in county court, and so the
5 judgment is suspended by the de novo appeal, is not
6 enforceable, and that's why you don't require them to
7 bring the rent current.

8 HONORABLE STEPHEN YELENOSKY: I'm sorry. I
9 forget your name -- the apartment --

10 MS. WILSON: Wendy Wilson.

11 HONORABLE STEPHEN YELENOSKY: Wendy. Is
12 that your understanding?

13 MS. WILSON: I'm sorry?

14 HONORABLE STEPHEN YELENOSKY: Is that your
15 understanding?

16 MS. WILSON: I mean, certainly that the -- I
17 mean, it is a de novo appeal, and once an appeal is
18 perfected it would not be enforceable, but this is part of
19 the perfecting of an appeal, I guess, in this rule.

20 HONORABLE STEPHEN YELENOSKY: Right.

21 CHAIRMAN BABCOCK: Justice Gaultney.

22 HONORABLE DAVID GAULTNEY: Well, I mean,
23 this rule, though, simply deals with the staying in
24 possession of the property, right?

25 HONORABLE STEPHEN YELENOSKY: Uh-huh.

1 HONORABLE DAVID GAULTNEY: So I'm not sure
2 that I see the problem with eliminating rule (1) for that
3 purpose as long as you're requiring that the rent be paid
4 as it becomes due.

5 CHAIRMAN BABCOCK: Professor Hoffman.

6 PROFESSOR HOFFMAN: I'd like to note that
7 even though I like sitting close to you, it's very
8 difficult to get your attention.

9 CHAIRMAN BABCOCK: Sorry about that. We'll
10 give you a bowl of jellybeans that you can throw.

11 PROFESSOR HOFFMAN: I think the relevant
12 part of the Property Code is 24.0053(b).

13 HONORABLE STEPHEN YELENOSKY: Yes.

14 PROFESSOR HOFFMAN: I think it reads as
15 follows, "If an eviction case is based on nonpayment of
16 rent and the tenant appeals by filing a pauper's
17 affidavit, the tenant shall pay the rent as it becomes due
18 in the justice court or the county court registry, as
19 applicable, during the pendency of appeal in accordance
20 with the Rules of Civil Procedure and subsection (a)."

21 CHAIRMAN BABCOCK: Skip.

22 MR. WATSON: Just out of curiosity, what
23 happens if they don't or if they're a day late, if one of
24 them comes in after it is due?

25 HONORABLE STEPHEN YELENOSKY: Well, part (3)

1 is "the tenant fails to pay the rent into the court
2 registry within the time limits prescribed appellee may
3 file a notice of default."

4 MR. WATSON: Well, what does that do to the
5 appeal?

6 HONORABLE STEPHEN YELENOSKY: "Upon sworn
7 motion and a showing of default to the judge, the court
8 shall immediately issue a writ of possession." They get
9 possession of the property.

10 MR. WATSON: Which moots the appeal.

11 HONORABLE STEPHEN YELENOSKY: I think so.
12 Doesn't it moot the appeal?

13 CHAIRMAN BABCOCK: It says a notice of
14 default.

15 MR. WATSON: That's where I'm hung up, and I
16 don't mean to be technical about it, but obviously they're
17 out of place, but is there still an appeal that goes
18 through that says, "Whoops, you shouldn't have been put
19 out of the place"? Because this is to --

20 HONORABLE STEPHEN YELENOSKY: Well, the
21 issue -- yeah, I mean, maybe there still is appeal about
22 whether they owe the back rent, but they have lost the
23 right to remain in possession, which is the concern,
24 because they're allowed to remain in possession during
25 appeal only if they continue to pay rent during that. In

1 other words, you don't get free rent because you're on
2 appeal. You lose your ability to stay in there if you
3 don't pay rent as it becomes due, because that's not part
4 of what's being contested. That's future rent.

5 And ultimately I didn't think this was
6 controversial because I thought even the landlords agreed
7 that the statute doesn't allow you to impose a one month
8 payment because of what was just read.

9 CHAIRMAN BABCOCK: Justice Gaultney.

10 HONORABLE DAVID GAULTNEY: I'm not sure it
11 necessarily moots the possession issue. I guess it
12 depends on what issues are being litigated.

13 CHAIRMAN BABCOCK: Yeah.

14 HONORABLE DAVID GAULTNEY: But I think you
15 would also have the right to -- as the judge said, you
16 probably are dealing with back payments as well.

17 HONORABLE STEPHEN YELENOSKY: Yeah, well,
18 whether it moots it or not, it addresses the landlord's
19 concern, which is he or she or it has somebody in this
20 property who hasn't paid rent. This allows them to get
21 them out and re-rent it.

22 CHAIRMAN BABCOCK: Pam.

23 MS. BARON: I have a question, I guess. In
24 section (3) it talks about the time limits prescribed by
25 the rules for paying rent, and it looks like we've taken

1 all the time limits out. Because now it doesn't say
2 within five days of the date required in the rental
3 agreement. So are you saying that "as it becomes due"
4 would be the time limit under the rule, and what does that
5 mean?

6 CHAIRMAN BABCOCK: Judge Yelenosky.

7 HONORABLE STEPHEN YELENOSKY: I'm sorry. My
8 mistake. I was talking to -- your fault. Alex's fault.
9 I'm sorry.

10 MS. BARON: Here's my question. It's
11 section (3) says -- talks about "payment of rent within
12 the time limits prescribed by these rules."

13 HONORABLE STEPHEN YELENOSKY: Yes.

14 MS. BARON: And we did have a five-day time
15 limit before, which is now gone, so it's unclear to me
16 what the time limits are now.

17 HONORABLE STEPHEN YELENOSKY: I don't --
18 yeah, well --

19 MR. GILSTRAP: Chip?

20 HONORABLE STEPHEN YELENOSKY: Go ahead.

21 CHAIRMAN BABCOCK: Yeah, Wendy.

22 MS. WILSON: And I think that it is whatever
23 the contract says, I mean, is my understanding. So if
24 rent's due on the 1st, that would mean that as it becomes
25 due, which would be the 1st, it needs to be paid.

1 MS. BARON: Well, then I think we need to
2 take out the time limits prescribed by these rules,
3 because that is now meaningless.

4 HONORABLE TOM GRAY: I think that is
5 addressed in another part of the proposal of 748b where
6 you have to make required findings if it's a judgment
7 for eviction of the date that the payment's due and the
8 amount of the payment, so that's why the time requirements
9 can be taken out.

10 CHAIRMAN BABCOCK: Okay. Last comment,
11 Richard.

12 MR. ORSINGER: Yes, having heard the
13 Property Code, I agree that the new number (1) would
14 conform to the statute.

15 HONORABLE STEPHEN YELENOSKY: Thank you.

16 CHAIRMAN BABCOCK: Okay. Everybody --

17 HONORABLE STEPHEN YELENOSKY: And I
18 apologize that I didn't have it at hand earlier.

19 MR. ORSINGER: Well, I would have not wasted
20 10 minutes of everybody's time. I apologize.

21 CHAIRMAN BABCOCK: 20.

22 HONORABLE STEPHEN YELENOSKY: We're thankful
23 it was just 10 minutes.

24 CHAIRMAN BABCOCK: Everybody in favor of the
25 proposed changes to 749b that are found on pages four and

1 five of the subcommittee follow-up report, raise your
2 hand.

3 Everybody opposed? Nobody opposed. It
4 passes 24 to nothing, the Chair not voting. So we're
5 going to skip forward, are we not, Judge Yelenosky, to
6 page 12?

7 HONORABLE STEPHEN YELENOSKY: Yes. And we
8 only have two issues left, just to give you a preview.
9 One is closing time at the JP courts, and the other, I
10 don't know whether we're really returning to that or not.
11 That's the issue of sanctions, which Pete Schenkkan
12 addressed thoroughly last time, and maybe I'll just jump
13 to that to see if we're even going to address that. At
14 the end, if you read the last paragraph of this whole
15 document, page 18 of 18, Pete Schenkkan -- it states that
16 Pete had pointed out there's a bigger question of what
17 measures are within the Court's inherent rule-making
18 authority and could be used to fund legal services for the
19 indigents in civil matters, and it reports that Chip had
20 said that the SCAC would caucus about that and determine
21 how to proceed, but that's where we left it. So --

22 CHAIRMAN BABCOCK: Yeah, I will defer to
23 Justice Hecht, but my recollection is that Justice Hecht
24 indicated, apparently not on the record, that we -- the
25 discussion was fulsome enough for the Court's purposes.

1 HONORABLE STEPHEN YELENOSKY: Okay. Then
2 that leaves just one issue, and we'll turn back to page
3 12, and what I would do on that is just remind you that
4 before turning to Judge Lawrence's memorandum, which is a
5 separate document, we had anecdotal information and
6 concern about closing time at JP courts because they do
7 not all remain open all day every workday, and therefore,
8 what does that do to a litigant who attempts to appeal and
9 finds the JP court closed.

10 Justice Lawrence did a great amount of work
11 in polling the JP courts, and that is found along with his
12 recommendation in a separate document that says
13 "Memorandum" at the top, that's all it says, September
14 9th, 2009, from Judge Tom Lawrence to Supreme Court
15 Advisory Committee; and for the executive summary of the
16 statistics and what's not shown by the statistics I would
17 recommend turning to the recommendations on page six in
18 which he recommends no change. I think the Legal Aid
19 folks here feel otherwise, but what he recites in terms of
20 statistics are that 95.5 percent based on the response
21 he's got, which is I think -- let me turn back.

22 I think he got about a 16 percent, yeah, 16
23 percent response from JP courts, so we're dealing with a
24 sample of 16 percent of JP courts. Of those he's
25 estimating because some of the answers are qualitative

1 that 95.5 percent would probably accept an appeal filed
2 the next business day, and at least 93.5 percent would
3 definitely accept a late filing.

4 Obviously that raises two questions about
5 the statistics. We have 6.5 percent that may not accept
6 the late appeal even if they closed the day before, and
7 the whole day or part of the day, and that's of the JP
8 courts that responded, and so 84 percent of them did not
9 respond. We don't know if this is a representative sample
10 or if we can characterize it as a self-selected sample in
11 any way, which is inclined to be more likely to accept
12 than the norm or not.

13 I think the Legal Aid folks' position on it
14 is -- and they can correct me if I'm wrong -- almost there
15 doesn't help if you're in the 5 percent that missed your
16 appeal because the JP office was closed. Is that your
17 position?

18 MR. MOCK: No, absolutely, that's the
19 problem.

20 HONORABLE STEPHEN YELENOSKY: And I think if
21 the full committee feels that that's a legitimate concern,
22 then we still have to address how it would be fixed, and
23 Judge Lawrence on page seven lays out a couple of concerns
24 or a few concerns, even assuming you wanted to do
25 something, which he doesn't recommend, how do you do it,

1 what does it do to the time periods for writ of
2 possession, et cetera, if -- and I don't know that we have
3 an answer to that, but we have his recommendation.

4 Frankly, this came September 9th. The
5 subcommittee felt that we should just bring the whole
6 thing here, so we don't have a subcommittee vote on it.

7 CHAIRMAN BABCOCK: Okay. It was Judge
8 Lawrence's view that this is not a big problem and we
9 don't need to change.

10 HONORABLE STEPHEN YELENOSKY: That's right.
11 It's not a big problem in the sense of widespread.

12 CHAIRMAN BABCOCK: Okay.

13 HONORABLE SARAH DUNCAN: With 16 percent
14 reporting.

15 CHAIRMAN BABCOCK: Right. Professor
16 Hoffman.

17 PROFESSOR HOFFMAN: I mean, even if it were
18 a hundred percent, I mean, there is a Lake Wobegone effect
19 going on here. I assume that every judge asked is likely
20 to say that he runs his court above average in terms of
21 being open, you know, Monday through Friday, and I suspect
22 that, you know, if the polling were of a different group,
23 set of groups, those numbers wouldn't have come out the
24 same. So I have --

25 CHAIRMAN BABCOCK: People who missed the

1 appeal?

2 PROFESSOR HOFFMAN: I think there's little
3 reason to feel confident that there is little problem
4 based on the numbers.

5 CHAIRMAN BABCOCK: Good point.

6 HONORABLE DAVID PEEPLES: Another way to
7 look at that is if 95 percent are willing to give an extra
8 day anyway, this rule wouldn't hurt a whole lot of people,
9 wouldn't change a whole lot, and it's a good thing to do.

10 MR. GILSTRAP: Chip?

11 CHAIRMAN BABCOCK: Yeah, Frank.

12 MR. GILSTRAP: The one problem I think from
13 what I've read from what Judge Lawrence said is that if
14 you adopt this rule then in every JP court for -- which is
15 closed -- which closes maybe at 4:00 o'clock on Friday
16 instead of 5:00, you're automatically going to give them
17 one extra day on all appeals, and you know, there is
18 apparently a problem with that if -- when you're having
19 this wholesale extension of one day, given the fact that
20 there's almost nobody that's been hurt by it. I mean, I
21 think that's what Judge Lawrence is trying to say. What
22 he said, what I'm trying to say.

23 CHAIRMAN BABCOCK: Yeah, cost benefit. Jim,
24 are you scratching or --

25 MR. PERDUE: I'm sorry.

1 CHAIRMAN BABCOCK: Elaine.

2 PROFESSOR CARLSON: Steve, does this
3 proposal extend only to appeals or to any document or
4 motion or motion for new trial, anything that's filed?

5 HONORABLE STEPHEN YELENOSKY: When you say
6 proposal, proposal to do something? Because Judge
7 Lawrence recommends not doing anything.

8 PROFESSOR CARLSON: Right. I guess I'm
9 looking at the language on page 12.

10 HONORABLE STEPHEN YELENOSKY: Okay.

11 PROFESSOR CARLSON: That's underlined.

12 HONORABLE STEPHEN YELENOSKY: On page 12,
13 let's see.

14 PROFESSOR CARLSON: "Proposed redraft of
15 523a."

16 MR. GILSTRAP: Yeah, but the proposal was if
17 they're closed for any part of the last day we're going
18 to add a day.

19 HONORABLE STEPHEN YELENOSKY: Yeah, it's not
20 just -- well, filing of any document.

21 PROFESSOR CARLSON: And I read Judge
22 Lawrence's memo to express great concern of extending it
23 beyond appeals because it implicates -- he lists 9 or 10
24 other rules.

25 CHAIRMAN BABCOCK: Yeah.

1 PROFESSOR CARLSON: I don't know if the
2 subcommittee looked at those rules.

3 CHAIRMAN BABCOCK: Richard Munzinger.

4 MR. MUNZINGER: I have a problem with the
5 cost benefit decision. You've got people who go to
6 justice court, admittedly their claims are small, and yet
7 to them it's impacting their lives, it's impacting their
8 rights. They come to a state court, and the state court
9 is closed. It's 3:00 o'clock on Friday. My goodness
10 gracious, the state court is closed. Yeah. And I can't
11 file my appeal, I can't do what I want, I can't seek
12 justice. Yes, because we closed at 3:00 o'clock on
13 Friday, and that's your problem. I don't think that's
14 justice, and I don't think that we ought to approve a rule
15 that says, well, it only happens every once in a while.
16 It's justice.

17 That's the problem with courts that run
18 their dockets to clear their docket. It's not justice,
19 it's docket control. Let's do justice and say, "Come on,
20 guys, if you're not going to have a rule that keeps the
21 courts open for the working guy from 9:00 to 5:00 then
22 give him another day."

23 CHAIRMAN BABCOCK: Alex.

24 PROFESSOR ALBRIGHT: I think the statistics
25 in the memo are a little misleading because when you look

1 at the question that was asked it was "What would happen
2 if your courthouse was closed when" -- "on the day to
3 file," which I think -- so when I looked -- I just glanced
4 through all of these, but it looked like a lot of the
5 judges were treating it as what if it was a holiday, which
6 the rules would say that it goes to the next day when the
7 court was open. So I'm not sure all of these judges who
8 said you could file on the next day were focusing on it
9 being what if you were closed at 3:00 or 4:00 o'clock and
10 they came after you were closed on a day that you were
11 open. So I think it may be of somewhat greater concern
12 than the statistics from this questionnaire indicate.

13 CHAIRMAN BABCOCK: Okay. Yeah, Richard.
14 Sorry.

15 MR. ORSINGER: Not having a JP court
16 practice I really don't know, but does the law require a
17 JP court to be open --

18 CHAIRMAN BABCOCK: You're a big time lawyer,
19 I know.

20 MR. ORSINGER: -- all day?

21 MS. PETERSON: No.

22 MR. ORSINGER: It doesn't, okay. So I would
23 expect that a lot of them close for lunch. What do you
24 think? A lot of them close for lunch?

25 MS. PETERSON: Probably.

1 MR. ORSINGER: Okay. Well, if they close
2 for lunch, if all of them close for lunch, then this rule
3 would be triggered because they were closed or
4 inaccessible during regular hours. So it's not just
5 somebody that shows up at 4:59 to file something. It's
6 somebody that shows up on their lunch hour, and I think
7 probably -- I mean, I'm just guessing, but I think
8 probably all the justice of the peace courts close for
9 lunch, so we're essentially adding another day to the
10 deadline, aren't we?

11 HONORABLE STEPHEN YELENOSKY: Well, we could
12 have a lunch -- we could specify that regular hours
13 includes -- includes or does not include the lunch period
14 or something like that.

15 MR. ORSINGER: Well, that might be the most
16 active period of the day for filing stuff in the JP court
17 and I don't know whether --

18 HONORABLE STEPHEN YELENOSKY: Well, but if
19 you come and it's closed for lunch, you come back after
20 lunch. The problem is you come at 3:05, they closed at
21 3:00, you can't come back.

22 MR. ORSINGER: Well, the virtue of this
23 language is that it matches the appellate rules and trial
24 rules and it's kind of consistent, but since we all know
25 that the appellate court clerk and the trial court clerk

1 is always going to be there all day long, it's only
2 unusual situations like floods or hurricanes or, you know,
3 unexpected things; whereas in the JP court I think we
4 might routinely expect that it's going to be closed for a
5 little bit on just about any day.

6 CHAIRMAN BABCOCK: Gene.

7 MR. STORIE: My comment actually is similar
8 to Richard's. My question is what are "regular hours,"
9 and would it be part of any individual or any litigant's
10 responsibility to know the local rules, including what the
11 regular hours of the courts are?

12 MS. PETERSON: I think that was one of Judge
13 Lawrence's concerns. A lot of JP courts don't have
14 regular hours as they're traditionally understood for a
15 court, which would be 8:00 to 5:00 hours. A lot of
16 justice courts are open, you know, during part of the day
17 but not all the day because these judges have other jobs,
18 and some of them don't have clerks that would stay there
19 during, for example, lunch hour or after 3:00 p.m., and so
20 one of the things that makes it difficult in crafting a
21 rule is that a lot of these courts don't have regular
22 hours.

23 CHAIRMAN BABCOCK: Eduardo.

24 MR. RODRIGUEZ: Well, I agree with the
25 comments that were made earlier. I mean, we ought to be

1 drafting these rules to accommodate the people that are
2 using the courts rather than the court personnel, and a
3 lot of people that use these courts may be only able to go
4 during the lunch hour, and they can't come back at 1:00
5 o'clock because, you know, they took their lunch hour to
6 go and file something that needed to be filed and they've
7 got to get back to work, and so I think, you know, in
8 considering these rules, especially rules that apply to
9 those people that are -- I mean, if you're in a lot of
10 these situations you're in a bad situation. We ought to
11 accommodate them more than trying to figure out some way
12 that accommodates the courts.

13 CHAIRMAN BABCOCK: Yeah. And so, Eduardo,
14 you would say that this rule is okay because somebody
15 could say, "hey," by their own affidavit, "I came by at
16 noon, but you were closed. It was the only time I could
17 come by, so wasn't accessible, so I'm filing it the
18 following day."

19 MR. RODRIGUEZ: And they might -- you know,
20 they might know when they get there at noon that they're
21 closed, so they might make arrangements to get to work 15
22 or 20 minutes late the next day so they can be there.
23 Yes.

24 CHAIRMAN BABCOCK: Yeah. Okay. I saw Frank
25 first.

1 HONORABLE STEPHEN YELENOSKY: I think
2 there's an easy solution to that problem, but go ahead.

3 CHAIRMAN BABCOCK: Okay. Frank.

4 MR. GILSTRAP: Well, you know, as a matter
5 of principle I'm for giving them more time. I mean, the
6 appellate rules let's everybody be 15 days late, no harm.
7 You know, what's the difference? The problem is I don't
8 know in the real world of how the JP court, you know, in
9 some small county where it's located in the guy's home on
10 the ranch, I mean, I don't know what kind of -- and where
11 they're dealing with things like evictions. I don't know
12 what kind of disruption this is going to occur if we give
13 everybody an extra day. I just don't know, and I don't
14 think anybody here knows either.

15 CHAIRMAN BABCOCK: Sarah.

16 HONORABLE SARAH DUNCAN: I completely agree
17 that it would be a good thing for nobody to miss a filing
18 date because the JP court is closed, but it sort of smacks
19 of an unfunded mandate because the JP courts are not
20 funded by the state and yet we're proposing a statewide
21 rule without supplying the funds to staff the office so
22 that people can go and file them.

23 HONORABLE STEPHEN YELENOSKY: Well, they
24 don't have to change their hours. They just have to give
25 the extra day.

1 HONORABLE SARAH DUNCAN: Well, except that
2 we're causing an -- I mean, as you said, your subcommittee
3 haven't addressed all of the interplay of the rules if we
4 give them an extra day to file, or four days if it's a
5 weekend.

6 HONORABLE STEPHEN YELENOSKY: Well, two
7 things. One, I would say if it's a question of, oh,
8 everybody is going to say they were closed for lunch then
9 I would propose changing it "If the court or the clerk's
10 office where a document is to be filed closed prior to
11 5:00 p.m. on the last day for filing the document," blah,
12 blah, blah. And my answer to the other things is, well,
13 take any one case where the individual came to file at
14 4:00 o'clock and found the JP court closed, any one case.
15 Should that individual as a matter of due process be able
16 to file the next day? If so, as a matter of due process,
17 then whatever the consequences are of making this clear
18 that it goes to the next day, we have to live with them.

19 MR. GILSTRAP: I don't think it reaches the
20 level of due process. I mean, I don't think it's a
21 constitutional right, but it's just a question of is this
22 how we want to do it.

23 HONORABLE STEPHEN YELENOSKY: Well, it's a
24 constitutional right to know what you have to do in order
25 to exercise your rights, and if you're told you have so

1 many days to appeal, maybe it's not written anywhere that
2 that means till 5:00 o'clock, but it's certainly true that
3 everybody expects it's till 5:00 o'clock if it's the state
4 court. So what is one to know? Is it vague that what
5 that means is you have until that day, assuming the JP
6 court decides to remain open for however long the JP court
7 decides to be open that day? I think it does rise to the
8 constitutional level. What's your deadline?

9 CHAIRMAN BABCOCK: Okay. The -- your
10 proposed amendment to say "where the document is to be
11 filed is closed prior to 5:00 p.m." is going to run afoul
12 of Eduardo's thinking that, hey, noon is an important time
13 for a lot of these people to file their documents, so that
14 he would, I think, be opposed to your --

15 HONORABLE STEPHEN YELENOSKY: Well, I
16 understand that, but I think -- I think you would have a
17 hard time making the constitutional argument that --

18 CHAIRMAN BABCOCK: Yeah.

19 HONORABLE STEPHEN YELENOSKY: Because it's
20 the deadline. If you understand that you've got to file
21 this before 5:00 o'clock and you come in and the office is
22 closed for an hour for lunch or the JP went to the doctor
23 or whatever, I think you have a hard time making a
24 constitutional argument that due process was denied to you
25 because you had to come back. So I'm just saying -- I'm

1 saying the strongest argument is there's no clear deadline
2 to file your appeal if it's left up to the JP office. If
3 you establish a clear deadline, I'm not concerned about
4 intermittent closure up to that deadline.

5 CHAIRMAN BABCOCK: Okay. Yeah, Richard.

6 MR. MUNZINGER: Well, the rule as drafted
7 talks about regular hours, and again, the people that come
8 to the justice courts -- mechanic, let's pretend, whatever
9 his problem is. His boss says, "If you leave here before
10 5:00 o'clock you're fired." State Constitution says the
11 courts shall be open to hear causes of action and what
12 have you. Does that apply to the justice court? No, I
13 went fishing on that Friday, so I closed it.

14 MR. GILSTRAP: What if he said, "The law
15 says if you leave before 5:00 you're fired"?

16 MR. MUNZINGER: Well, same problem. The
17 guys' got a problem. He's a citizen, and I'm not worried
18 about courts and their convenience. To heck with the
19 courts and their convenience.

20 HONORABLE SARAH DUNCAN: We just need
21 24-hour JP courts.

22 MR. MUNZINGER: Tend to the citizens.

23 CHAIRMAN BABCOCK: Sarah thinks we ought to
24 have 24-hour JP courts, a 7-11 kind of thing. By rule.

25 HONORABLE SARAH DUNCAN: Drive-through.

1 CHAIRMAN BABCOCK: Yeah, drive-through.

2 MR. GILSTRAP: Constitutional right.

3 CHAIRMAN BABCOCK: Let's vote on the rule as
4 drafted.

5 HONORABLE TRACY CHRISTOPHER: On page 13?

6 CHAIRMAN BABCOCK: Everybody in proposed --

7 MR. ORSINGER: No, we're on page 12, not 13.
8 If 12, passes it will be the foundation.

9 HONORABLE STEPHEN YELENOSKY: Yeah, this is
10 the rule specific to JP court.

11 CHAIRMAN BABCOCK: Yeah, this is JP court.
12 We're not going to talk about changing Rule 4. This is
13 the rule as drafted on page 12, Rule 523a. Everybody
14 that's in favor of this redraft, raise your hand.

15 Everybody opposed? By a vote of 25 to 5,
16 the Chair not voting, it passes. So this is a great time
17 to take our morning break.

18 (Recess from 11:02 a.m. to 11:19 a.m.)

19 CHAIRMAN BABCOCK: All right. We're back in
20 session, and we're moving quickly to the always exciting
21 topic of civil cover sheets, and Richard Orsinger, Mr.
22 Excitement himself, will take over.

23 MR. ORSINGER: Okay. You thought eviction
24 was exciting, just get ready for this. We have actually
25 visited this subject before several times, and I hope you

1 all had the opportunity to pick up the civil cover sheets
2 that are in the expando folders back here. I want to give
3 you an outline, but I don't want to necessarily cut
4 anybody off from anything they think is important, but it
5 seems to me in our discussion today we have to discuss and
6 decide the following things: The form is fairly well
7 fixed. It's been vetted with clerks, it's got the
8 approval of the Office of Court Administration. The form
9 has been examined by us. My subcommittee has made
10 subsequent comments, and so they're pretty happy with
11 their form. I don't think that the content of the form so
12 much is the issue for us today.

13 The formulated questions are should we
14 require a signature and what do we do if a lawsuit is
15 filed and the form is not filed. That's, to me, the
16 debate we need about the filing of the form. The second
17 is, we need a requirement in the Rules of Procedure. I
18 think we all have agreed on that in the past, and so the
19 question is if we are going to have a Rule of Procedure,
20 where do we put it in the rules. The placement is the
21 second question.

22 The third question is the wording of the
23 rule, and the fourth question is do we have any comments
24 to the rule to help be sure that it doesn't get
25 misinterpreted or misused. That's what I think the

1 outline of the discussion ought to be, and if other people
2 want to add to that, that's fine. We have Mary Cowherd is
3 here with us from the Office of Court Administration.
4 She's the one that spearheaded the design of this form.
5 She's also done surveys and inquiries about the practices
6 around the country and in Federal courts, so she's here to
7 answer any questions you may have about that, and this --
8 I think this form we ought to -- unless somebody has a
9 strong feeling, I think we should just take the design of
10 the form as a given, and let's move on to the questions of
11 do we require a signature of a lawyer or a party on the
12 form, and I want Mary to respond to her view from the
13 institutional point of view, but I think my subcommittee's
14 view is they do not want this to be considered to be
15 anything like a pleading or written discovery. They don't
16 want any kind of sanctions striking pleadings or anything
17 like that, and so they don't really want to require a
18 signature. And so, Mary, on the signature issue, can you
19 talk to us a little about your --

20 MS. COWHERD: Sure. The reason that our
21 office is supportive of a signature by the attorney is
22 that we believe that with attorney oversight and the
23 completion of the form that it will result in greater
24 accuracy of identification of the case type. We're not
25 inclined to say that if there's not a signature then the

1 case cannot be filed. In fact, I believe in the packet of
2 information that was sent to you before the meeting, there
3 actually is an attorney general opinion that says a clerk
4 cannot refuse to file a pleading if it has not been
5 signed, and we believe this would fall under that opinion,
6 so for us --

7 CHAIRMAN BABCOCK: Could you repeat that,
8 Mary? I didn't quite catch what you said, about the
9 attorney general.

10 MS. COWHERD: There is an attorney general
11 opinion that says if an attorney has not signed the
12 pleading, a clerk cannot refuse to file it, and we believe
13 a cover sheet would fall under that opinion as well. So
14 we're not saying -- our stand is not to refuse to file a
15 case, but just to have the attorney's signature so that
16 there would be greater likelihood that an attorney would
17 over see the completion of the cover sheet resulting in
18 a -- in greater accuracy of identification of the case
19 type.

20 MR. ORSINGER: Can you comment on what the
21 practice is around this country and in Federal court?

22 MS. COWHERD: Sure. About 27 states
23 currently require cover sheets. Of those, slightly more
24 than half require that a -- an attorney's signature be on
25 the cover sheet. Of the 14 that require an attorney

1 signature, seven say that you cannot file the case. In
2 the Federal courts, they require a signed cover sheet.
3 The clerk's office -- and this is in the Western District.
4 I talked to the guy here in the Austin division, the chief
5 of operations. He said it's their practice that they go
6 ahead and file a case even if a cover sheet has not been
7 submitted and that it's at the discretion of the judge
8 whether the case will move forward.

9 MR. ORSINGER: So we don't -- in light of
10 the attorney general opinion, we really don't have the
11 prerogative to say you can't file and go forward with your
12 suit. We're just considering whether we should impose the
13 requirement that can't be sanctioned by denying the
14 pleading or denying requested relief.

15 MS. COWHERD: Correct. We're just wanting a
16 signature, which we believe would not cause a clerk not to
17 file the case.

18 MR. ORSINGER: Now, could a local area like
19 Harris County adopt a local rule that were to impose a
20 sanction on a lawyer who filed a lawsuit without the civil
21 cover sheet or without the lawyer's signature?

22 MS. COWHERD: Well, that's something for
23 this committee to consider, if by local rule some sort of
24 consequence could be imposed.

25 MR. ORSINGER: But the attorney general just

1 says you can't prohibit someone from proceeding with their
2 litigation, but it doesn't say you couldn't sanction a
3 lawyer for failure to comply with the requirement; is that
4 right?

5 MS. COWHERD: That is correct. This
6 particular opinion. I haven't looked at that issue in
7 depth.

8 MR. ORSINGER: Yeah. Well, that whole
9 concept applies to there could be -- if the proposal is to
10 have a rule that requires as cover sheet. Then there's a
11 further extension of that that requires a signature on the
12 cover sheet. You could try to impose or specify some
13 sanction in the rule if you don't file the cover sheet or
14 if you don't sign the cover sheet, but we know that if we
15 tried to do that, we can't stop the lawsuit from going
16 forward. We can only punish the lawyer probably for not
17 doing it, and so I think one of the questions we have is
18 that should there be -- and we're kind of assuming as a
19 given that we're going to require the cover sheet.

20 If we require a signature on the cover sheet
21 then probably it's up to the local people to support a
22 sanction against the lawyer unless we as a committee want
23 to recommend that the Supreme Court put some kind of
24 sanction against the lawyer in the rule. The subcommittee
25 is not even in favor really of requiring a signature, and

1 I don't think the subcommittee would be in favor of
2 specifying a sanction for the failure to file it in the
3 rule, but if the local judges wanted to adopt a rule that
4 sanctioned a lawyer for not signing it then that would be
5 I guess up to them.

6 CHAIRMAN BABCOCK: Well, before we get to
7 sanctions, let's -- why don't we talk about why you would
8 or would not want a lawyer -- I mean, in Federal court the
9 lawyer signs it, for sure. Why do you not -- why does the
10 subcommittee not believe that if a lawyer is filing the
11 case they shouldn't sign the civil cover sheet?

12 MR. ORSINGER: I think the view is, is that
13 this is just kind of an informational document for the
14 government's purposes, and it's really not a pleading, and
15 it's really not subject to any of the kind of standards of
16 documents that are signed in the existing Rules of
17 Procedure, and if you require a signature in here then
18 you're going to probably have to have some very cautionary
19 language to be sure that Rule 13 doesn't apply, that
20 someone can't argue that it's admission of a party
21 opponent. When you start creating a lawyer's signature on
22 a filing with a court you start opening doors, and I think
23 that those doors don't want to be opened. So you can
24 either not open them by saying this is just a statistical
25 certificate, it hasn't got a signature on it. If a

1 signature is required then I think our feeling is we want
2 a lot of safeguards to be sure this isn't treated like a
3 pleading or discovery.

4 CHAIRMAN BABCOCK: Roger, can I ask just one
5 more question on this line?

6 MR. HUGHES: Go ahead.

7 CHAIRMAN BABCOCK: Richard, I think you're
8 right about everything on this page, with the exception of
9 question No. 3, "Has this case been previously filed or
10 does it relate to a case previously filed in this county
11 or in another county or state," and I have heard of and
12 actually seen examples where a lawyer will try to judge
13 shop a case by claiming a related case in that court, and
14 under some county procedures the case might automatically
15 go to that court or at least there would be a greater
16 likelihood that would go to that court. So that would be
17 substantive and not just administrative statistical, would
18 it not?

19 MR. ORSINGER: Well, I agree, and it seems
20 to me that the better response to that problem is to
21 preclude consideration of this information in the
22 assignment process rather than to sanction a lawyer for
23 misrepresenting it, because this is really strictly to
24 collect data for the state in the aggregate, and it
25 shouldn't be used to dispose of an individual case.

1 CHAIRMAN BABCOCK: Well, that's not true in
2 the Federal system. In the Federal system that related
3 case line will be considered by the judge who has the
4 related case and by the clerk.

5 MR. ORSINGER: Okay. Well, I think that
6 takes us into a whole realm that we've not really
7 explored. I think that everyone that's been involved in
8 this discussion is looking at this as being informational
9 only for purposes of gathering statistics, and it was not
10 contemplated that any of the information on here would
11 influence the process of a particular case, and I
12 personally -- and I can go back to my people and come back
13 with an official position. I would rather stay away from
14 any reliance on this form for disposition of a particular
15 case or where it's assigned rather than to try to beef up
16 the accuracy of it because we know it's going to be used
17 for that purpose.

18 CHAIRMAN BABCOCK: Roger.

19 MR. HUGHES: Well, let me give you some
20 practical insight on how these civil cover sheets are
21 really done in Federal court. First, were you actually
22 to -- most everything is electronic filing, so the lawyer
23 never signs the cover sheet. The legal secretary types
24 backslash "S, Roger Hughes." That's the lawyer's
25 signature.

1 Now, the second thing of it is, aside from
2 the lawyer dictating to the highly skilled
3 paraprofessional or legal secretary what to fill in on the
4 civil cover sheet, everything is electronically filed, and
5 when you file your Federal case for the first time they
6 make you go through on the screens everything that is put
7 on the civil cover sheet. That is, you must go through
8 and not only -- on the screen you give them the
9 information that you're putting on the civil cover sheet.

10 Now, in most law offices that I know of,
11 once again, a paralegal or a highly skilled legal
12 secretary is the one who's actually logging in and filling
13 out the form online to then electronically file that
14 lawsuit for the first time. Now, I say that because when
15 I read through the committee statement here for the reason
16 for having a lawyer's signature is accuracy for
17 statistical, all I can say is -- and for the most part in
18 the Federal system, yes, they do require your signature,
19 which gives the lawyer responsibility, but in practicality
20 it's being done by the legal staff.

21 CHAIRMAN BABCOCK: Or an associate or
22 something, yeah.

23 MR. HUGHES: Based, of course, by close
24 supervision by the attorney.

25 CHAIRMAN BABCOCK: Right. Judge Yelenosky.

1 HONORABLE STEPHEN YELENOSKY: Well, I agree
2 with Richard that this ought to serve the purpose for
3 which it was created, as I understand it, and only that
4 purpose, which is OCA's statistics. I would not include
5 the third question. I would not include the question as
6 to discovery level. What are you going to do if they
7 check level one but the pleading says level three? That
8 creates problems. I don't feel strongly about the
9 signature issue, but if it's a data collecting instrument
10 then those things ought to be removed. We have somewhat
11 of an analogy, I think. In the family law context you
12 have to file certain vital statistics forms, right,
13 Richard?

14 MR. ORSINGER: At the end of the case.

15 HONORABLE STEPHEN YELENOSKY: Well, it's a
16 good example, because in our courts they have to file them
17 much earlier than that. I'm not sure when, but maybe when
18 they file it. In any event, maybe it's at uncontested.
19 That's what happens. When they come in at uncontested
20 they have it filed.

21 MR. ORSINGER: I think the Family Code
22 requires that the decree be accompanied by a husband-wife
23 certificate and parent-child certificate.

24 HONORABLE STEPHEN YELENOSKY: Okay. So
25 there may be a statutory basis for that, but it seems to

1 me that if this is statistic gathering it should be kept
2 as that. It should not have any effect, and if that means
3 leaving the signature off then we're doing something
4 different than the Federal cover sheet, and we should
5 acknowledge that and be consistent with it, and to get
6 them to do it, you know, clerks can say -- it may be
7 against the law to say you can't file something, but
8 there's nothing that prevents the clerk from saying "You
9 need to fill out this form here, you know, while I take
10 your paperwork," and if there's a lawyer who routinely
11 refuses to do that then that will be addressed, but do we
12 really want to be having sanction hearings on every time
13 somebody doesn't file a cover sheet? I don't think so.

14 CHAIRMAN BABCOCK: Okay. Judge Christopher.

15 HONORABLE TRACY CHRISTOPHER: We've had
16 cover sheets in Harris County for a long time now. We
17 include the discovery level. We include the related case
18 information. I've never had anyone -- there's never been
19 a problem created by the cover sheet having one discovery
20 level versus the pleading having another discovery level.
21 The advantage of putting it on the cover sheet is that my
22 trial coordinator can look at the cover sheet, and if they
23 see it's a level one case then they can set it for trial
24 in a shorter period of time than a level two or a level
25 three case.

1 As far as the related case, we do not use
2 that for any automatic transfer in the county. We have a
3 computer system that automatically searches for related
4 cases and so, for example -- and then the administrative
5 judge of the particular divisions will get an -- a
6 transfer order because under our local rules we transfer
7 back to a previous -- previously filed case, but what I
8 will do is if the cover sheet provision is checked then I
9 know that our computer is correct, that the two cases are
10 related. Otherwise, I have to look at the petition of the
11 new case and the old case, so I guess I do take the
12 representation of the attorney that it is related, but
13 I've never had a problem with that either. I've never had
14 anyone claim it's related when it wasn't.

15 CHAIRMAN BABCOCK: Justice Hecht.

16 HONORABLE NATHAN HECHT: And are they
17 signed?

18 HONORABLE TRACY CHRISTOPHER: I don't think
19 they are.

20 CHAIRMAN BABCOCK: Frank.

21 MR. GILSTRAP: I think that -- I think Judge
22 Christopher's comment pretty much says --

23 CHAIRMAN BABCOCK: Hang on, Frank.

24 Correcting, Jim thinks they're signed.

25 MR. PERDUE: I sign them.

1 HONORABLE TRACY CHRISTOPHER: He files more
2 petitions.

3 MR. PERDUE: There's a place for you to sign
4 it. I mean, it calls for attorney's signature.

5 CHAIRMAN BABCOCK: Frank. Sorry to
6 interrupt.

7 MR. GILSTRAP: In the real world, I can't
8 imagine the court looking here, saying, "You checked
9 discovery level one, so therefore you don't get a
10 deposition" or something like that, but the clerks are
11 going to go through this. And is there a TRO requested,
12 they're going to look at the cover sheet, you know.
13 There's -- you know, and I could easily see that they
14 could use it to decide whether there's a related case. I
15 mean, the clerks are going to go to this information
16 rather than thumb through the pleadings for probably a lot
17 of things, and I think we're -- I think we're kidding
18 ourselves if we say it's not going to be used for that.

19 CHAIRMAN BABCOCK: Yeah, Mary.

20 MS. COWHERD: One thing I wanted to point
21 out to you, when the Judicial Council approved this for
22 the proposed consolidated cover sheet for comments they
23 specifically designated certain items on the cover sheet,
24 two of which that you've been discussing, service type,
25 discovery level, family law case management, whether the

1 case has been previously filed or relates to a case
2 previously filed, and the type of procedure or remedy,
3 they designated those as optional items. We heard from
4 district and county clerks that not all of them want or
5 need that information. It will be up to the local
6 jurisdiction whether to include those two particular items
7 on the cover sheet.

8 CHAIRMAN BABCOCK: Okay. Richard.

9 MR. ORSINGER: Mary, can I ask you a
10 question? I know that the impetus for this form was to
11 collect data on the system as a whole back at the capital,
12 but is there a perception that the district -- that the
13 local clerks will also use this information in doing their
14 work, and was that part of the input into the design of
15 the form?

16 MS. COWHERD: Part of it. Some of those
17 items, those optional items, some of the clerks think are
18 helpful, so we're going to leave it -- you know, the idea
19 from the council was to leave it to local jurisdictions to
20 include that information or not. What we're primarily
21 concerned about is the identification of the case type.

22 MR. ORSINGER: And that's --

23 MS. COWHERD: At the state level.

24 MR. ORSINGER: At the state level, okay.

25 And how do we tell by looking at this form what's required

1 from all clerks and what's optional with clerks?

2 MS. COWHERD: Well, what the Judicial
3 Council has said would be the required minimum
4 information, it would be the style of the case, the name
5 and contact information of the attorney or party filing
6 the suit, the State Bar number of the attorney if it's
7 applicable, the names of the parties, and case types.

8 MR. ORSINGER: Okay.

9 MS. COWHERD: And the case types will be
10 selected by the local jurisdictions. It varies among the
11 counties how much granularity within the case type
12 information that they want. Harris County, for example,
13 gets a lot of very detailed information within the
14 different case type categories.

15 MR. ORSINGER: And are you going to follow
16 and keep those statistics of the local add-ons, or are you
17 just going to enter your core information in your state
18 database?

19 MS. COWHERD: We're just going to -- the
20 clerks, they have a chart showing them if they have really
21 granulated case types where those fit in the OCA case
22 management categories, and they would fit those into our
23 categories when they submit their monthly case activity
24 reports.

25 MR. ORSINGER: So basically the local clerk

1 will take the form that's used locally, and they're going
2 to have to key in the information in the form you
3 prescribe for OCA.

4 MS. COWHERD: Correct.

5 MR. ORSINGER: So you're not actually going
6 to be reading this or entering this data yourself?

7 MS. COWHERD: No.

8 MR. ORSINGER: I see.

9 HONORABLE STEPHEN YELENOSKY: Well, with
10 e-filing it clearly could be done at some point, that
11 would be one step. They fill it out online and it goes to
12 OCA. The clerk doesn't need to be involved.

13 MS. COWHERD: Well, they have pretty
14 extensive case activity reports where it's just not this
15 information but tracking what happens to the case at
16 disposition and some other information.

17 CHAIRMAN BABCOCK: Justice Gray, did you
18 have a comment?

19 HONORABLE TOM GRAY: I did. We've had some
20 experience with this at the intermediate appellate level
21 with regard to the docketing statements that have been
22 required now for a decade or more, and we've run -- I
23 mean, there's some pluses and minuses with regard to their
24 use from a purely judicial standpoint. If someone --
25 because they are required at the appellate level; and if

1 you fail to complete this in a civil case, at least at our
2 court, we will ultimately dismiss your case because it's
3 failure to comply with a order of -- order of the clerk
4 demanding some type of response; and so you can actually
5 wind up with a DWOP at the appellate level if you're
6 unwilling to complete one of these.

7 On the other side, we are running into more
8 and more cases where there are multiple pro se parties
9 trying to appeal together, and the problem that we are
10 having is that if you have multiple pro se parties because
11 you can't -- one pro se party can't represent another pro
12 se party, if these are considered pleadings, which we
13 considered them that at the -- because they're required,
14 one party can't file one for another, and so we either
15 have to get two or two signatures on it. Otherwise you've
16 got the problem of unauthorized practice of law. So there
17 are some real benefits to requiring a signature, but there
18 are also some real problems at the same time, and so
19 that's just some of the information that we've -- you
20 know, or the issues that have come up at the court of
21 appeals level.

22 CHAIRMAN BABCOCK: Anybody have any other
23 thoughts about the signature issue, pro or con?

24 HONORABLE JAN PATTERSON: I have a question.

25 CHAIRMAN BABCOCK: Yes, Judge Patterson.

1 HONORABLE JAN PATTERSON: Mary, am I correct
2 that from OCA's perspective the justification for a
3 signature is that you're more likely to get accurate
4 information from an attorney than from a legal assistant?

5 MS. COWHERD: Or just that there's attorney
6 oversight of the completion of the cover sheet, and, yes,
7 we're wanting to -- we would believe in most cases that
8 the attorney would be in a better position to identify the
9 case type than the legal assistant.

10 HONORABLE JAN PATTERSON: But it's more
11 accuracy than accountability or any other issue?

12 MS. COWHERD: Yes.

13 CHAIRMAN BABCOCK: Judge Yelenosky.

14 HONORABLE STEPHEN YELENOSKY: Well, I guess
15 I would just disagree with the premise. I don't think
16 that attorney signature means they're going to look over
17 this, because it has no consequence for the case. It
18 seems appropriate if you have a well-qualified paralegal
19 or legal secretary to fill this out. I don't see unless
20 you consider it a pleading how it could be considered the
21 practice of law if all this has is categorizing the case
22 for statistical purposes. I don't really think the
23 signature is going to make one whit of difference as to
24 whether you get an accurate form.

25 CHAIRMAN BABCOCK: Richard Munzinger.

1 MR. MUNZINGER: If the rule is silent as to
2 whether or not the form is admissible in evidence or may
3 be considered for purposes of a court, why would something
4 signed by an attorney not constitute a judicial admission?
5 It's a formal document. It's filed with the clerk of the
6 court. It describes the law signed by the lawyer. In
7 essence he admits that there's a related case, and he may
8 have admitted himself out of jurisdiction if there is a
9 dispute over which court had the jurisdiction over the
10 case first, just by way of example, and that raises
11 problems with the rule as to whether or not -- if the
12 intent of the rule is statistical only then we may want to
13 recommend to the Court that it craft some kind of
14 protection or protector language.

15 If the real intent is to get statistics,
16 that the form can't be used for some judicial purpose or
17 something else, we may want to discuss that and debate it.
18 As to whether or not it's signed by the attorney, my
19 memory, when I first got on this committee someone told me
20 -- we were having a debate -- that my e-mails were
21 enforceable against me under Rule 11 because of the
22 Uniform Electronic Transactions Act, which had been
23 adopted by the State of Texas which is part of the
24 Business & Commerce Code; and I was dumbstruck; and I went
25 back and read the dadgum thing, and I think they may be

1 right.

2 So that if I -- I'm going to give you my
3 sophomoric understanding of that statute that if I
4 routinely and intend that my electronic signature is my
5 signature, it is; and so the fact that I put "S Richard
6 Munzinger" or my legal assistant does, I'm the person who
7 signed it. My client is potentially affected by what I
8 have described as the lawsuit, and I could make statements
9 that affect rights and that could be relied upon by a
10 court if I offered into evidence. So I think we need
11 to -- whatever rule we adopt, we need to recognize that
12 those -- I certainly would make the argument if it
13 behooved me to make the argument with the judge, "He
14 signed the dadgum form and said there was another case
15 filed first in the other county. You don't have any
16 jurisdiction of this case. I would rather be in front of
17 judge so-and-so in so-and-so county." Now that raises a
18 problem.

19 CHAIRMAN BABCOCK: Yeah, Richard. Then
20 Justice Gaultney.

21 MR. ORSINGER: Rule 13 on sanctions says,
22 "The signatures of attorneys or parties constitute a
23 certificate by them that they have read the pleading,
24 motion, or other paper," and it goes on to prescribe
25 what's required before you sign the other paper. The

1 proposed rule that we submitted is on the assumption that
2 this is not a pleading and won't have a signature and,
3 therefore, we're not worried about Rule 13 and all these
4 other admissions against interest and that kind of thing.
5 If it's going to have a signature then that makes it more
6 plausible that it's subject to the Rules of Procedure that
7 are governed by whether they're signed or not; and if
8 we're going to go that route then I think we need to build
9 in more safeguards than the subcommittee has to be sure
10 that this doesn't blossom into a whole other sanction
11 potential.

12 CHAIRMAN BABCOCK: Justice Gaultney.

13 HONORABLE DAVID GAULTNEY: On the form
14 there's an underlined sentence at the very top that says,
15 "This information does not constitute a discovery request,
16 response, or a supplementation, and is not admissible at
17 trial." I assume that whoever drafted this form was
18 trying to address some of those concerns that are being
19 voiced. So I don't think -- it doesn't look to me like
20 whoever is proposing signature of the form anticipates
21 that it was going to be used as part of the trial but more
22 as an administrative function.

23 HONORABLE STEPHEN YELENOSKY: But if --

24 HONORABLE DAVID GAULTNEY: And if the rule
25 could be drafted to clarify that, I think it should.

1 CHAIRMAN BABCOCK: Yeah. Steve.

2 HONORABLE STEPHEN YELENOSKY: Well, but if
3 the only reason being advanced for a signature is to get a
4 more accurate report and whether the box is checked as
5 eminent domain, condemnation, or partition, and you don't
6 believe -- I don't believe, anybody here believe, that the
7 attorney's signature is going to assure that the correct
8 box is checked or more likely the correct box is checked
9 then why do we want to take on all the unintended
10 consequences of a signature?

11 CHAIRMAN BABCOCK: Sarah.

12 HONORABLE SARAH DUNCAN: I've been perusing
13 docketing statements in the courts of appeals. It seems
14 that most courts are using a form that does require an
15 attorney's signature. I am proud to report that the
16 Fourth Court of Appeals requires an attorney's signature,
17 but only for a certificate of service that the docketing
18 statement was served on the other parties. I'm
19 respectful, of course, of Chief Justice Gray, but
20 considering this a pleading is -- I mean, I've been trying
21 to figure out this week exactly what is a pleading, plea,
22 or motion. I know what a paper is. That's helpful.

23 MR. ORSINGER: Unless it's electronically
24 filed.

25 HONORABLE SARAH DUNCAN: Actually, that

1 doesn't present a problem for me. But calling these
2 things -- I mean, we spent a long time talking about our
3 docketing sheet, and we have one of the few that actually
4 looks different from the others. They have one of the
5 few. I don't want to sanction people for checking the
6 wrong box. I don't want to -- I agree with Steve. I
7 don't think there's a chance in hell that an attorney's
8 signature on one of these things is going to indicate
9 anything other than the attorney signed it. I don't think
10 it's going to indicate supervision. I don't think -- and
11 at \$725 do you really want to bill a client your hourly
12 rate to fill out a docketing sheet? I don't think so.

13 CHAIRMAN BABCOCK: Justice Gaultney.

14 HONORABLE DAVID GAULTNEY: Well, I did want
15 to say something in response to the practices of the
16 various appellate courts because I think they are
17 different. You know, it's my understanding that the
18 docket sheet -- I don't want to speak for how our clerk
19 does it, but I suspect there's an effort when the -- and I
20 think this was based on a comment she made to me, but I
21 don't want to speak for her. I think there's an effort
22 that when the attorneys do not file the necessary docket
23 sheet, which is maybe often, that the effort -- the
24 information comes from the clerk of the trial court.

25 Okay. So there's an exchange between -- and

1 the clerk of the trial court may actually fill out
2 information that the appellate clerk can then use, so it's
3 part of the administrative process, and perhaps even the
4 appellate rules could be modified at some point to make it
5 the trial court clerk that provides the docket information
6 rather than the attorneys and the parties at the appellate
7 level, but still, I don't -- I guess to speak directly to
8 the signature issue, I don't think requiring a signature
9 on an administrative form necessarily has to bring it into
10 the category of pleadings and sanctions and all that,
11 everything else.

12 I think there can be a sufficient
13 clarification of the function simply of the form as an
14 administrative function that would remove it from that
15 process, and there is something about something I'm
16 signing that I do pay particular attention to. It's just
17 as a matter of form, whether I'm going to be sanctioned
18 for it or not. So I do see some advantage for purposes of
19 making sure the information is as accurate as we can hope
20 for in the process. Whether or not as a practical matter
21 the trial clerks will have any greater success than the
22 appellate clerks have had in getting the documents
23 actually signed is another issue, but I don't see any
24 problem with at least making an effort to get it done.

25 CHAIRMAN BABCOCK: Okay. R. H.

1 MR. WALLACE: Well, let me speak on behalf
2 of the trial Bar. I think there's a lot of lawyers that
3 if they sign it that will ensure more likely than not that
4 they have looked at it and it is accurate. I mean, now,
5 whether or not you require signature or not, I don't
6 really matter, but I think if you want to help ensure
7 accuracy, some lawyers are going to look at that and read
8 it before they sign it. I've never seen sanctions issues
9 litigated in Federal court over cover sheets, but that may
10 be because I don't think that's a pleading under the
11 Federal court definition of a pleading, so if you're
12 worried about turning this into some kind of a sanctions
13 battle I think you can solve that fairly easily if you
14 want to add the signature of the attorneys to it, but I
15 don't have strong feelings about requiring the signature
16 one way or the other, but if you do require it -- if
17 they're going to sign it, a lot of lawyers will read it.

18 CHAIRMAN BABCOCK: The Federal form is
19 the JS-44, and accompanying it is a document that says,
20 "Instructions for attorneys completing civil cover sheet
21 form JS-44," and then goes on to say that the attorney has
22 to sign it and do all these things, and, of course,
23 there's a place at the bottom for the attorney to sign it,
24 and it does say that it -- it "neither replaces nor
25 supplements the filings and service of pleadings or other

1 papers as required by the law, except as provided by local
2 rules of court." Whatever that means.

3 MR. WALLACE: Well, you know, the Federal
4 rules define "pleadings" as "complaint, answer, first" --
5 so I don't know, I think they're narrower than what people
6 consider state pleadings to be.

7 CHAIRMAN BABCOCK: And to the point that
8 Sarah and Richard made, I would not think that a paralegal
9 would make a decision without attorney involvement about
10 what discovery level it was going to be. I would not
11 think that they would file out the -- fill out the third
12 question about related cases without asking an attorney.

13 HONORABLE STEPHEN YELENOSKY: I agree, but I
14 was assuming that we might be reducing this to the
15 statistical matters, and if we did, that a signature would
16 be unnecessary. I agree with you, it would be necessary
17 if you have those questions, and it is necessary in the
18 Federal context because it's used for other purposes.

19 CHAIRMAN BABCOCK: Yeah. Well, and even on
20 the statistical stuff, Steve, if we're filling -- if we're
21 filing a trade secret case, my paralegal is going to come
22 to me and say, "What do I say about trade secrets, because
23 trade secrets isn't on here," and so you're going to have
24 to make a judgment about what type of -- you know, what
25 type of case a trade secrets case is.

1 HONORABLE STEPHEN YELENOSKY: And there's a
2 lot more variability in how people are going to interpret
3 this, I think, than incorrectness, because that's a big
4 issue with all of these; and what do you do with pro ses,
5 who are increasingly a significant -- more than 50 percent
6 of our family cases filed --

7 CHAIRMAN BABCOCK: Yeah.

8 HONORABLE STEPHEN YELENOSKY: -- as I
9 understand it. What are they supposed to do?

10 CHAIRMAN BABCOCK: Yeah, Sarah.

11 HONORABLE SARAH DUNCAN: I think there are
12 plenty of paralegals around the state that would know how
13 to fill one of these out. It would depend on -- I mean, I
14 had a meeting the other day with a board certified
15 paralegal in family law. She knew I bet more than most of
16 us around the table --

17 CHAIRMAN BABCOCK: I'd accept that.

18 HONORABLE SARAH DUNCAN: -- about the ins
19 and outs of community property and prenuptial agreements,
20 everything else, and I used to be a paralegal so I'm going
21 to say that in defense of paralegals it depends on the
22 practice and it depends on the paralegal as to whether
23 they can fill this out, and that's not something we can
24 know in advance or mandate, I don't think. I just -- this
25 is a form.

1 CHAIRMAN BABCOCK: Yeah, Judge Evans.

2 HONORABLE DAVID EVANS: Well, I don't have a
3 a real problem with no signature on it, but it's not going
4 to make the lawyer any less accountable for malpractice or
5 for disciplinary matters if it's not signed, and the one
6 that concerns me most, I would warn almost anybody on why
7 I would probably want to supervise anything that was filed
8 is the one on service type. If the paralegal accidentally
9 checks "no service required at this time," the lawyer is
10 in the ditch, and so you may be giving a false sense of
11 security to lawyers when you tell them about that, because
12 they're going to be liable for super -- under the
13 disciplinary context and in a malpractice context from
14 supervision of a paralegal, and so it is a real form.
15 It's going to be on record, and if there's an adverse
16 consequence from the information to the client or to the
17 court, there's going to be accountability.

18 HONORABLE STEPHEN YELENOSKY: You think
19 there's any possibility of that -- if the form is just
20 case type, doesn't include level, service type, related
21 case, TRO, just, you know, they put down assault and
22 battery and it's actually a trade secrets case?

23 HONORABLE DAVID EVANS: There may be some
24 form that has no adverse consequence to it in the world,
25 but I can't think of much of anything that goes into the

1 court in any kind of letter that you couldn't have some
2 adverse consequence come out of it and doesn't invoke your
3 professional duties. We have one set of lawyers that when
4 they have multiple plaintiffs rotate the lead name so that
5 they can file in different courts alphabetically, and so
6 when we get that set of lawyers we go and search to see if
7 they've rotated the pleadings. So if it's Able, Baker,
8 Cane, we go look and see if Baker filed -- if we've got a
9 Baker versus Jones case out there and a Cane versus Jones
10 case, and that goes against a local rule and local order
11 about trying to forum shop.

12 So, you know, if a form came in on this, I'm
13 sure our local judges would want to know about related
14 cases, and if the form came in and it was improperly
15 formed, I think even if it was executed by a paralegal
16 there would be some accountability issues with the judge.

17 CHAIRMAN BABCOCK: Yeah, Justice Gray.

18 HONORABLE TOM GRAY: Just to follow up, you
19 know, so that Sarah doesn't have to lose sleep at night
20 about what's going on at the Tenth Court, you know, the
21 docketing statement is required by the rules. If we do
22 not get one, we notify the parties and give them the
23 opportunity to cure it, and then if they fail to cure it
24 in a timely manner then their appeal will be dismissed for
25 want of prosecution because we would take the position

1 that if they're not interested enough to fill out this
2 form then they probably are not interested in the rest of
3 the appeal either.

4 But with all that said, we spend a lot of
5 time doing that and getting compliance with that aspect of
6 the rule, and I don't think there's a corresponding
7 benefit to us to do that other than compliance with the
8 rules, and it has -- our relatively strict enforcement of
9 it has reduced the noncompliance rate in civil cases. I
10 mean, we pretty much, you know, get them with the filing
11 of the notice of appeal; but with that said, the benefit
12 that we get out of them usually relates to the ADR as far
13 as to us, if the appellate thinks they're appropriate for
14 ADR; but at the trial court level I don't think that the
15 signature of the attorney is going to add any benefit that
16 would justify its requirement in the context of everything
17 we've said here at the trial court level. So I just don't
18 think it's there.

19 CHAIRMAN BABCOCK: Sarah.

20 HONORABLE SARAH DUNCAN: I just remembered
21 where this came from in the appellate courts, and, Tom,
22 correct me if I'm misremembering, or David. It was the
23 deputy clerks who wanted one piece of paper that would
24 have the attorneys' names, the parties' names, the type of
25 case, ADR was a big part of it, but it was their need to

1 not have to go through a 25 volume clerk's record to
2 ferret out the names, addresses, and phone numbers of the
3 attorneys. If this -- if this is to simplify the lives of
4 clerks and attorneys, to some extent, and to collect data
5 for a state agency or a judicial system, I don't
6 understand -- I mean, like this question about "Has this
7 case been previously filed or does it relate to a case
8 previously filed in this county or in another county or
9 the state," that could really trip a lot of people up
10 completely unknowingly if they have to sign this, if it's
11 going to be considered a pleading, and if it's just for --
12 if it's just to collect data for the convenience of the
13 attorneys and the judicial system, I just don't think it
14 ought to be -- have to be signed.

15 CHAIRMAN BABCOCK: Jim.

16 MR. PERDUE: We have them in Harris County.
17 It does have a signature line, but that's -- that was --
18 the purpose, as I recall, that they came up in Harris
19 County was it's a data collection tool. It's just a --
20 it's just a means to collect the data so you can -- you
21 can have the data in an analyzable form, and as I recall
22 this conversation from a couple of meetings ago, we had
23 the people from OCA here and they were explaining that
24 this would be a means for them to collect better data.

25 Well, if the presumption is -- I just think

1 it's a false presumption that having an attorney sign it
2 creates any more accurate level of data than you would get
3 from the form as I read it, whether it be completed by a
4 good paralegal, good legal secretary, or the attorney
5 himself; and the unintended consequences as it was first
6 presented by Mr. Orsinger of having a signature is you
7 start doing the whole concept of it being required by rule
8 and a pleading and something that could potentially get
9 you in trouble, even if there is a disclaimer on it. I
10 mean, you can put a disclaimer on it all the time. That
11 won't prevent a lawyer from arguing that it means
12 something else. So I don't see it as anything other than
13 a data tool, and it just needs to be considered that.

14 CHAIRMAN BABCOCK: Frank.

15 MR. GILSTRAP: Are we all on the same page
16 there needs to be a disclaimer? I mean, we don't want it
17 used for anything else, and we're all mindful of Judge
18 Evans' comment that, yeah, if you check don't have it
19 served on the last day before limitations run you're
20 probably committing malpractice and they can probably use
21 it, but I think we're all in agreement that let's put a
22 disclaimer on it. So then let's just vote up or down on
23 the signature or no, and we can decide it.

24 CHAIRMAN BABCOCK: Steve.

25 HONORABLE STEPHEN YELENOSKY: Well, I think

1 there -- I mean, I think maybe we're conflating two things
2 because we're filing it with the pleading, and the two
3 things are statistics for which the name of the parties,
4 everything else, is irrelevant. OCA doesn't need to know
5 who the case is from. They want an accurate statistic,
6 was this a family case. They want accurate statistics,
7 blah, blah, blah, blah. That could be filed
8 technologically completely independent of filing the
9 pleadings. We could have a rule that at the end of every
10 week attorneys need to fill out a form that says, "I filed
11 this many cases this week" without any names whatsoever.
12 That's one thing we're trying to accomplish here.

13 The other thing, which is different and that
14 implicates all these other issues, are questions that are
15 asked for the benefit of the clerk or the court; and we're
16 conflating the two, I think; and if we either decide that
17 we want to do that or we decide we don't, we go in
18 different directions, because if all we're doing is
19 collecting statistics, it should have no effect on the
20 individual case because statistics are not identifiable.

21 CHAIRMAN BABCOCK: Sarah.

22 HONORABLE SARAH DUNCAN: So what are we
23 going to do when I say in my petition, "I want Richard,
24 Roger, and Carl served at these addresses"; but for me,
25 myself, and I, if you want me to get me to fill this out

1 more accurately make the type bigger. But if I check "no
2 service is required" on the docket sheet but I request
3 service in my petition, is somebody suggesting that the
4 docket sheet would control and no service would be issued,
5 even though I put it where traditionally I'm supposed to
6 put it?

7 MR. GILSTRAP: I could see a clerk saying
8 "no service."

9 HONORABLE DAVID EVANS: They would charge
10 for no service. They would use it to calculate the fee,
11 and you would have to -- the second leg of the malpractice
12 would be that you didn't actually go down and get the
13 clerk to get the service out, but the first step on it
14 would be I think on this one right here, is how they're
15 going to charge you going in and how it's going to be
16 served, and it would be other things going on. It just
17 would be one part of the puzzle in getting service out.

18 CHAIRMAN BABCOCK: There was a case in
19 Federal court where there was a race to the courthouse,
20 and the one case was purportedly filed a day before the
21 court obtained subject matter jurisdiction and then the
22 second case was filed on the day the court did have
23 jurisdiction, and the civil cover sheet was signed on the
24 earlier day and was admitted into evidence.

25 HONORABLE SARAH DUNCAN: I don't understand.

1 What was the basis for subject matter jurisdiction?

2 CHAIRMAN BABCOCK: Patent. Patent wasn't
3 issued until a day later.

4 HONORABLE SARAH DUNCAN: Oh, okay.

5 MR. MUNZINGER: And that illustrates the
6 point --

7 CHAIRMAN BABCOCK: Yeah.

8 MR. MUNZINGER: -- that these can be
9 judicial admissions and have judicial effect on our
10 clients so that the rule has got to be written with care
11 to put a disclaimer on a form, "This can't be used at
12 trial."

13 "Well, I'm not using it at trial, Judge.
14 I'm using it in motion for summary judgment." I mean,
15 "motion for continuance."

16 CHAIRMAN BABCOCK: Or I'm using it in a
17 battle of the race to the courthouse.

18 MR. GILSTRAP: Put it in the rule, too.

19 MR. MUNZINGER: The restrictions have to be
20 in the rule, and the rule needs to state "This is for
21 statistical purposes only," et cetera, et cetera, or we're
22 all going to -- any good lawyer is going to try to use it.

23 CHAIRMAN BABCOCK: Well, whether it's a
24 lawyer or paralegal that fills out the civil cover sheet
25 and dates it a particular date, isn't that probative of

1 when the thing was filed? It's at least somewhat
2 probative.

3 HONORABLE STEPHEN YELENOSKY: How does the
4 disclaimer that it's for statistical purposes anyway make
5 any sense when the question is "Is this a related case?
6 Do you want it served?" Those are not the questions that
7 go to statistics.

8 CHAIRMAN BABCOCK: Yeah. Yeah, that's
9 informational for somebody, for the clerk or --

10 HONORABLE STEPHEN YELENOSKY: Yeah, I don't
11 think you can deal with both in the same manner.

12 CHAIRMAN BABCOCK: But just for
13 informational purposes, I've got the Harris County civil
14 case information sheet in front of me. A couple of
15 things, it does have that same language at the top
16 underlined as our proposed form has. "This information
17 does not constitute a discovery request, response, or
18 supplementation, and is not admissible at trial." And
19 then it does have a large block for a signature of
20 attorney or pro se filing cover sheet, name, printed,
21 phone number, and Bar number. Judge Christopher.

22 HONORABLE TRACY CHRISTOPHER: You know, I'm
23 just saying we've had that cover sheet for 20 years,
24 probably, and it has never come up as an issue, and plenty
25 of times the lawyers don't fill out that related case

1 information, because, you know, on a daily basis I sign as
2 administrative judge 5 to 10 transfers that transfer a
3 case back to the first filed case, and the vast majority
4 of time it's not mentioned on the civil cover sheet, and I
5 don't get bent out of shape, and I don't go running around
6 sanctioning people, and I just don't.

7 CHAIRMAN BABCOCK: Buddy.

8 MR. LOW: Chip, I have a question on whether
9 or not service is requested. I don't care what kind of
10 disclaimer you put, if that is checked and the clerk goes
11 off on that, even though you put it in your petition, and
12 you get busy in something and then you don't use due
13 diligence, that's going to be in evidence, that you didn't
14 use due diligence, and that's the only thing I really --
15 whether or not service is requested ought to be not on
16 there and should be some other place.

17 CHAIRMAN BABCOCK: Okay. Lonny.

18 No, I'm just calling on you because you're
19 over there. Keep you on your toes. Anybody else? Yeah,
20 Justice Gaultney. Then Tom.

21 HONORABLE DAVID GAULTNEY: Well, I'm
22 persuaded by what Judge Evans said, that the issue is --
23 really, I mean, I think there is going to be some
24 responsibility for the filing of the docket sheet even if
25 there's no signature by the attorney if these -- she's

1 required to file it with the original petition by the
2 rules. I mean, unless we have something that tracks, you
3 know, it's not admissible at trial, it's not -- it says it
4 doesn't affect the commencement in district or county
5 court, but as a practical matter we're told it may.

6 So I think whether or not you sign it or not
7 it's probably going to be an impact that the attorney is
8 going to want to be aware of, and maybe the rule ought to
9 make clear, as clear as we can, regardless of signature
10 that this is simply an administrative fact -- I mean,
11 information gathering for filing purposes, not for
12 affecting the substance of the litigation.

13 CHAIRMAN BABCOCK: Okay. Tom.

14 MR. RINEY: I've completed a lot of civil
15 cover sheets in both state and Federal court. More and
16 more state courts are requiring them now, too, and it's
17 just never been a problem. But I do think there is a
18 point with respect to the service issue. It would seem to
19 me the only purpose of having this thing filled out is
20 presumably the attorney that's completing this has a
21 little more information than the clerk that is receiving
22 it, but if it comes to service there's no point for the
23 lawyer to be doing that. Either the lawyer requests
24 service or they don't, and I would assume that the clerks
25 ought to be submitting some type of supplemental

1 information, and they can fill that part out and then that
2 removes it as a problem.

3 The signature is just not that big a deal to
4 me one way or the other. I mean, the other side doesn't
5 get it. I mean, someone is going to have to really be
6 hunting to want to go down and track down a civil cover
7 sheet and try to use it against you. It's not that big a
8 deal to me.

9 HONORABLE TOM GRAY: You've presumed the
10 other side doesn't get it, but if it's a document that has
11 to be filed it should be served.

12 MR. RINEY: Well, I have never been served
13 with one.

14 MR. LOW: Yeah.

15 MR. RODRIGUEZ: My question is, would a
16 person be prohibited from filing a lawsuit if this weren't
17 attached to it. I mean, you send -- you know, it's close
18 to the statute. You send, you know, your runner down to
19 file -- file the pleading, and all of the sudden you
20 forget this. Is the clerk going to say, "I can't file it,
21 and the guy says, "I don't know what to put on here," and
22 pretty soon it's, you know, what happens?

23 CHAIRMAN BABCOCK: Back in the old days
24 there have been clerks in Federal court that said "You
25 don't have a civil cover sheet. Go back home and get

1 one."

2 MR. RODRIGUEZ: That's right.

3 MR. RINEY: But you typically don't make
4 that mistake the second time.

5 CHAIRMAN BABCOCK: That's true. That's
6 true. Richard.

7 MR. ORSINGER: The proposed language for the
8 rule, which may not be any good after this debate and the
9 vote. The last sentence is an effort to make it clear
10 that the failure to file the cover sheet doesn't -- I'm on
11 page two, paragraph five. The failure to file a cover
12 sheet doesn't determine whether the action was commenced.
13 It was our view that if you meet the other filing
14 requirements except for this cover sheet, you have a suit
15 on file; and, therefore, if somebody tenders it without
16 it, that's more in the nature of whether there should be a
17 sanction against the lawyer, but it's certainly not going
18 to impair the litigants' rights. That was our desire to
19 put in that sentence, backed up by the old Jim Mattox AG
20 opinion saying that some of these preliminary filing
21 requirements shouldn't defeat someone's act of filing
22 something. That's kind of a general way of saying what
23 that AG opinion said, which we can get a copy of that for
24 you if you want.

25 CHAIRMAN BABCOCK: Okay.

1 MR. ORSINGER: This is in keeping with our
2 philosophy that we thought this was starting out to be a
3 statistical certificate. I now that see that it's
4 probably as or more useful for the local management of
5 cases, but if we're going to start letting it affect
6 substantive rights we've got to write a different rule
7 with a whole lot of precautionary language and maybe a
8 long comment.

9 HONORABLE SARAH DUNCAN: That's like the
10 with 166a(i) comment. Right.

11 CHAIRMAN BABCOCK: By the way, on the
12 signature issue --

13 MR. ORSINGER: Yeah.

14 CHAIRMAN BABCOCK: -- on the proposed cover
15 sheet there is a box that has to be checked that says
16 "Person completing cover sheet is attorney or the
17 plaintiff himself." Those are the choices.

18 MR. RODRIGUEZ: Where is that?

19 MR. ORSINGER: That is the front sheet.

20 CHAIRMAN BABCOCK: Up at the top on the
21 right.

22 MR. ORSINGER: Oh, okay.

23 CHAIRMAN BABCOCK: So maybe you don't sign
24 it, but maybe you check it.

25 MR. ORSINGER: Well, if you look at the

1 district civil case cover sheet, it may be slightly
2 different.

3 CHAIRMAN BABCOCK: I'm looking at your Tab
4 D, civil family case cover sheet. Anyway, neither here
5 nor there. What do you want to do with this, Richard, in
6 light of this discussion?

7 MR. ORSINGER: I would like to see how many
8 people here are serious about requiring a signature,
9 because it certainly would prompt me, subject to whatever
10 the committee says, to go back and be more cautious about
11 the way we describe the status of this and maybe to make
12 it clear that you can't extend it and apply Rule 13 and
13 other rules. I really don't think we want this to be
14 treated as a pleading or discovery in any sense of the
15 word, unless someone feels differently.

16 CHAIRMAN BABCOCK: Yeah, Sarah.

17 HONORABLE SARAH DUNCAN: I would also like
18 it not to be variable by local rule.

19 MR. ORSINGER: Well, the problem, Sarah, is
20 that the Office of Court Administration wants certain core
21 information, which I suspect, although I don't know --
22 Mary could tell us whether that might have been the
23 impetus for this whole cover sheet in the first place and
24 then the local people have their own needs. They might
25 want to keep track of different things from what other

1 counties do. So the form is not mandated for the local
2 clerks to include all of this information. They can drop
3 all of the extra stuff, or they can add their own extra
4 stuff. It was designed to fit the needs of the local
5 community. Hudspeth County doesn't have the same needs
6 that Harris County does, just to use a county that someone
7 mentioned to me before. I've never actually been there,
8 but their needs are different from Harris County, and so
9 they would probably want a different civil cover sheet.

10 HONORABLE SARAH DUNCAN: And if it's
11 available online, that would be fine with me, but I'm
12 concerned about them only being available --

13 CHAIRMAN BABCOCK: Sarah's worried about her
14 Hudspeth County docket. It's obvious.

15 HONORABLE SARAH DUNCAN: Where is Hudspeth
16 County? Do you know where it is?

17 HONORABLE JAN PATTERSON: It's where "No
18 Country For Old Men" took place. It's far West Texas.

19 MR. GILSTRAP: Sanderson.

20 HONORABLE JAN PATTERSON: Important aquifer
21 is there.

22 MR. GILSTRAP: Let's have a disclaimer in
23 the rule, a disclaimer in the form, and no signature.

24 HONORABLE SARAH DUNCAN: I second that
25 motion.

1 MS. PETERSON: I have a question about the
2 placement, the proposed placement of the rule, which is --

3 MR. ORSINGER: We haven't taken that up, but
4 we can if you want to.

5 MS. PETERSON: Well, I think it's relevant
6 to the discussion in terms of how is this form going to be
7 construed.

8 MR. ORSINGER: Okay.

9 MS. PETERSON: We've been talking about if
10 it's going to be construed as a form for statistical
11 purposes or as a pleading, and the proposed placement of
12 the rule is in section (c) -- sorry, not (c), (b),
13 pleadings of plaintiff, and I'm just wondering why it
14 wouldn't be more appropriate to put it back at the 22
15 area, institution of suit or something along those lines,
16 to not convey to some that it is a pleading if that's not
17 what we intend it to be.

18 HONORABLE SARAH DUNCAN: I think Kennon
19 makes an excellent point.

20 MR. ORSINGER: You know, the reason that we
21 ended up placing it where we put it was because we wanted
22 lawyers to see it.

23 CHAIRMAN BABCOCK: Even though they're not
24 filling it out.

25 MR. ORSINGER: But, you know, if you put it

1 right next to Rule 22, commencement of petition, that
2 makes logical sense, as long as we don't accidentally
3 insinuate that it has anything to do with commencing the
4 lawsuit.

5 CHAIRMAN BABCOCK: There you go. Judge
6 Patterson.

7 HONORABLE JAN PATTERSON: Well, Pete, I have
8 some recollection that we looked at this earlier form, and
9 one of the problems and really the origin of the project
10 -- Mary, correct me if I'm wrong -- but there really were
11 like half a dozen or ten or so imprecise descriptions of
12 causes of action. It was a very confusing form, and so
13 what we've done is just sort of improved for statistical
14 purposes the gathering and made the categories much more
15 precise and identifiable and modernized and at the same
16 time tried to accommodate the local jurisdictions. But, I
17 mean, this is such an improvement over its predecessor
18 that really gave no meaningful information to OCA.

19 MS. COWHERD: We had three different forms
20 and --

21 HONORABLE JAN PATTERSON: Where's she at?

22 MS. COWHERD: -- and at the suggestion of
23 this committee we consolidated the forms into this to make
24 it easier for everybody to use.

25 CHAIRMAN BABCOCK: Okay. So we seem to be

1 talking about whether an attorney's signature should be
2 included or not.

3 MR. ORSINGER: And we haven't yet talked
4 about whether a pro se's signature should be required if
5 attorney's signature is required.

6 CHAIRMAN BABCOCK: Should there be a
7 signature, whether attorney or pro se. So everybody that
8 thinks there should be, raise your hand.

9 HONORABLE STEPHEN YELENOSKY: On this
10 particular form?

11 CHAIRMAN BABCOCK: On this form.

12 HONORABLE STEPHEN YELENOSKY: On this
13 particular form as presented?

14 CHAIRMAN BABCOCK: Yes.

15 HONORABLE DAVID EVANS: Can I ask something?

16 CHAIRMAN BABCOCK: Everybody raise your --

17 HONORABLE DAVID EVANS: Does not requiring a
18 signature mean that they could not require the identity of
19 the person providing the information as opposed to a
20 signature?

21 MR. ORSINGER: No. Block No. 1 would
22 require the identity of the person completing the
23 information sheet.

24 HONORABLE DAVID EVANS: That just takes care
25 of -- that's all I needed -- that's what I wanted to know.

1 CHAIRMAN BABCOCK: Tell me about that.

2 "Contact information for person completing case
3 information sheet."

4 MR. ORSINGER: Yeah. So if you have a
5 question about the case information sheet or if we later
6 vote you can sanction somebody for all of this, you know
7 who to go after because it's in block No. 1.

8 CHAIRMAN BABCOCK: Okay. So Mary Smith,
9 paralegal for Sarah Duncan, fills her name out in block
10 No. 1, the highly skilled Mary Smith.

11 HONORABLE SARAH DUNCAN: Well, except that
12 if you go over two blocks, the person completing the cover
13 sheet is "attorney for plaintiff, petitioner" or "the
14 plaintiff or petitioner."

15 CHAIRMAN BABCOCK: So there could be an
16 inconsistency between having Mary Smith in block 1 --

17 HONORABLE SARAH DUNCAN: Or Bruce Holbrook.

18 CHAIRMAN BABCOCK: Or Bruce Holbrook, to get
19 him in the record. Judge Yelenosky.

20 HONORABLE STEPHEN YELENOSKY: Well, the
21 reason I ask that question is because if on the form there
22 is the question, "Do you want service or not," I think
23 that it ought to be signed by an attorney because the
24 clerk is going to rely on that, but I don't think that
25 question should be in there, and so I would vote

1 differently if it were just statistics gathering.

2 CHAIRMAN BABCOCK: By the way, Bruce
3 Holcomb, if he's a paralegal, or Mary Smith, my
4 hypothetical paralegal, probably doesn't have a State Bar
5 number, which this signature block requires. It says
6 "signature" and then a State Bar number.

7 MR. ORSINGER: If you look at the second
8 page, Chip, these are all alternative forms.

9 CHAIRMAN BABCOCK: Right.

10 MR. ORSINGER: And the district civil case
11 cover sheet is more conventionally structured with the
12 name of the party --

13 CHAIRMAN BABCOCK: And that doesn't have a
14 signature block.

15 MR. ORSINGER: You've got everything -- this
16 looks like a lawyer is going to be signing this. It
17 doesn't make that necessarily that clear, but name,
18 address, city, telephone, fax, e-mail, State Bar number,
19 and signature, that implies to me they're expecting to see
20 a lawyer's name there and whether they're for the
21 plaintiff or whether they're pro se.

22 HONORABLE STEPHEN YELENOSKY: Could we
23 separate it out and have two different pages? One is
24 statistical and one is if the local jurisdiction wants to
25 ask those kind of questions?

1 CHAIRMAN BABCOCK: Professor Albright.

2 PROFESSOR ALBRIGHT: Well, any time you have
3 a secretary or paralegal doing something for you, they are
4 acting for you.

5 CHAIRMAN BABCOCK: That's right.

6 PROFESSOR ALBRIGHT: And I can't imagine
7 that you would really put the secretary or paralegal's
8 name on the cover sheet. It's always the lawyer who is
9 doing things like this, and you have to be responsible for
10 it.

11 CHAIRMAN BABCOCK: Judge Christopher.

12 PROFESSOR ALBRIGHT: So I don't understand
13 why the signature issue.

14 HONORABLE TRACY CHRISTOPHER: Well, I was
15 looking at the appellate rule on the docketing statements,
16 and it doesn't really say whether it has to be signed or
17 anything, and it has the purpose of that statement is for
18 administrative purposes and does not affect jurisdiction.
19 So, I mean, it seems like we can have a similar sort of
20 language over with respect to a trial court cover sheet
21 that we have in the appellate rule without a problem. It
22 doesn't sound like it's been causing a lot of problems in
23 the appellate courts where docketing statements have
24 existed. It's not causing problems in Harris County that
25 has seen thousands and thousands of cases since we started

1 using it 20 years ago.

2 HONORABLE SARAH DUNCAN: Well, with the one
3 exception of the Tenth Court of Appeals, which is DWOPing
4 people's cases for not filing an administrative form.

5 HONORABLE TOM GRAY: No, we are not DWOPing
6 them for not filing it. We are DWOPing for not responding
7 to an order of the clerk to file it, which is a specific
8 provision under the DWOP rule that we can do that.

9 HONORABLE SARAH DUNCAN: I know.

10 CHAIRMAN BABCOCK: But back to Richard's
11 point that the alternative sheets don't require a
12 signature --

13 MR. ORSINGER: No, no. I'm saying that it's
14 apparent that it's the lawyer's identity, not the
15 assistant identity.

16 CHAIRMAN BABCOCK: Yeah. Right, right,
17 right.

18 MR. ORSINGER: I think the other forms make
19 it clear that we're looking for a lawyer's name because
20 you have to click whether you're the attorney for the
21 plaintiff or whether you're the plaintiff pro se. That
22 was responsive to the question of whether some paralegal
23 might be going to jail for filling it out wrong.

24 CHAIRMAN BABCOCK: All three of these forms
25 that you propose require a lawyer's signature if the

1 lawyer is representing the party, unless it's pro se.

2 MR. ORSINGER: These forms were not designed
3 by or endorsed by any particular subcommittee of this
4 committee. They were the product of a long effort
5 involving a lot of people over a period of time with
6 plenty of feedback from the Office of Court
7 Administration, district and county clerks, probate
8 clerks, and so this is their proposal.

9 CHAIRMAN BABCOCK: Okay.

10 MR. ORSINGER: And if you'll read the memo,
11 we very politically said that we're assuming this is the
12 most desirable form.

13 CHAIRMAN BABCOCK: Okay. Notwithstanding
14 all that long effort and hard work and great input, how
15 many people think that we should not require a signature
16 of the attorney? Not.

17 All right. How many people think we should?
18 19 people think we should not, 9 people think we should.
19 10.

20 HONORABLE NATHAN HECHT: No. But just in
21 case we do, I think the subcommittee ought to look at
22 whatever rule language they think would be appropriate as
23 a, quote, disclaimer.

24 MR. GILSTRAP: I think that needs to be in
25 there whether we sign it or not.

1 HONORABLE NATHAN HECHT: That may be.

2 CHAIRMAN BABCOCK: Justice Gray.

3 HONORABLE TOM GRAY: Just one point of
4 clarification. These three that are marked district
5 civil, county level, and family case are all proposed to
6 be replaced by the single cover sheet, and I wanted to
7 make sure that everybody knew that while we were engaged
8 in this discussion, because that's what I was talking
9 about and proceeding on and just clarified that with Mary.
10 These three are the existing sheets that are out there,
11 and they're being proposed to be replaced with the single
12 sheet that in the papers has "proposed" stamped on the
13 upper lefthand corner.

14 CHAIRMAN BABCOCK: Right. That's what I was
15 thinking, too. So Richard confused me. Buddy.

16 MR. LOW: There seem to be a number of
17 people that don't believe that the service, type service
18 or whether service or not should be in there. In some
19 forms they are, some they're not, and I think the general
20 one there is. So maybe it would be appropriate to see how
21 the committee feels about whether that should be a part of
22 it, without rewriting the whole thing. That particular
23 one seems to have been brought up. Service.

24 CHAIRMAN BABCOCK: Yeah.

25 MR. RODRIGUEZ: You know, I think that we're

1 really trying to cover or take care of a responsibility of
2 a lawyer. I mean, the lawyer is -- has got to take some
3 responsibility, and if he knows -- he or she knows that
4 this is going there, he's got to be sure that it's got the
5 correct signature or the correct block is identified if he
6 wants service. I mean, you know, we can't just say, you
7 know, well, we're going to -- you know, if the lawyer
8 makes a mistake and doesn't ask for service then, you
9 know, are you putting the onus on the clerk to be
10 responsible for the service?

11 I mean, it's always been my practice, you
12 know, if I want service, I'm the one that's got to make
13 sure that the clerk gets done whatever needs to be done,
14 and I don't see anything wrong with having that there,
15 and, you know, just, I mean, that's the responsibility of
16 the lawyer. I mean, we've got to be responsible for
17 something sometimes.

18 HONORABLE STEPHEN YELENOSKY: But isn't that
19 inconsistent with the disclaimer?

20 CHAIRMAN BABCOCK: Judge Christopher.

21 HONORABLE TRACY CHRISTOPHER: I understood
22 that we -- we, the local counties, were allowed to modify
23 the form, which is what is on the first page of this. So
24 I think, for example, Harris County wants three, you know,
25 different forms. I don't know if we've gotten to that

1 point of making that decision.

2 HONORABLE NATHAN HECHT: Goes without
3 saying.

4 HONORABLE TRACY CHRISTOPHER: Yeah, of
5 course. Of course, because we can't agree on anything,
6 but so I don't think you should look just at the
7 consolidated form if you're going to go back and relook at
8 the forms unless you're going to take away the ability of
9 the locals to change the form, which is in the -- it's my
10 understanding that was OCA and the Judicial Council's
11 approval that the local jurisdictions could modify the
12 form. So that's -- you know, maybe you don't want us to
13 be able to modify the form, but that's an issue.

14 CHAIRMAN BABCOCK: Okay. Let's take our
15 lunch break since lunch is here, and, Richard, I assume
16 that after lunch we would go into discussing this rule --
17 proposed new Rule 78a, even if we renumber it.

18 MR. ORSINGER: We want to discuss placement
19 and then the wording of the rule and then whether we
20 should have any comments to limit or help the
21 interpretation of the rule.

22 CHAIRMAN BABCOCK: Okay. So let's break for
23 lunch. Be back at 1:30.

24 (Recess from 12:31 p.m. to 1:30 p.m.)

25 CHAIRMAN BABCOCK: Richard, let's see if we

1 can write a new rule, 76a or 22z or whatever.

2 MR. ORSINGER: All right. We'll take them
3 up, but it does seem to me, though, Chip, that we ought to
4 at least consider whether we want to get a sense of the
5 committee on a pro se litigant being required to file the
6 form.

7 CHAIRMAN BABCOCK: Right.

8 MR. ORSINGER: It's probably -- you know,
9 the old form, which might end up being some local form,
10 contemplates that a plaintiff might be checking the box
11 rather than the attorney for the plaintiff, and so then
12 the question becomes is it only lawyers that are required
13 to sign or would a pro se litigant who's also required to
14 file one of these, is the pro se required to sign, and if
15 we all just say, "No, go on," that's fine, but somebody
16 may feel like if a signature requirement is important for
17 a lawyer it would be important for a pro se, too.

18 CHAIRMAN BABCOCK: Yeah. Nobody can hear
19 you, Richard, down there.

20 MR. ORSINGER: I'm sorry.

21 CHAIRMAN BABCOCK: The issue that he was
22 discussing was if there's going to be a signature, do pro
23 se litigants have to sign it, and of course, we just voted
24 overwhelmingly that a lawyer did not have to sign it, so
25 there wouldn't be any signature, but I think it would be

1 better to go forward --

2 MR. ORSINGER: Okay, we'll go on.

3 CHAIRMAN BABCOCK: -- on the next issue.

4 MR. ORSINGER: Okay. The next issue I think
5 logically is the placement of the proposed rule, and I'm
6 sorry that Kennon is gone, but -- or anyway, she suggested
7 instead of putting it in the area where the plaintiff's
8 pleadings are that we consider putting it way back up
9 under Rule 22 where you have the commencement of the
10 petition; and if I understood from her suggestion, it was
11 because it got it further away from the pleadings rules
12 and, therefore, it would be less persuasive to argue that
13 it was a pleading.

14 Now, the subcommittee's view was -- and let
15 me -- as a disclosure, let me tell you that my
16 subcommittee is dominated by law professors and,
17 therefore, we are very aware of the structure of the
18 rules, which probably doesn't concern anybody else but law
19 professors, but I've been around them so long it bothers
20 me, too. And Rule 22 is in the part of the rules that are
21 rules for the clerks, the way the clerks handle the filing
22 of lawsuits, and Rule 78 is at the beginning of the part
23 of the rules that talks about the pleadings of the
24 plaintiff and the rules that the lawyers are going to
25 follow about the filing of pleadings, and it's been our

1 desire for years on this subcommittee, as well as
2 Professor Dorsaneo's long, long rewrite, to keep rules in
3 the place where the people who are using it are likely to
4 see it.

5 So the rules for the sheriffs ought to be in
6 places where the sheriffs look, and the rules for the
7 clerks ought to be in places where the clerks look, and
8 the rules for the lawyers ought to be in places where
9 lawyers look, and so it was our view that the lawyers are
10 going to be more inclined to look to this subsection (b)
11 where it's instructions on what the lawyers put in the
12 pleadings than it is on this area on section (2), Rule 22,
13 about what the clerks do about accepting and processing
14 petitions. That is really probably the only justification
15 for selecting subdivision (b) and trying to get as close
16 to the front of it as you can, because it's not -- it's
17 not going to be -- I mean, on page two of my memo you'll
18 see all of these different places it could be. It could
19 be in counterclaims, could be in cross-claims, could be in
20 third party claims. It could be in intervenor's rules.

21 There are rules on initial pleadings
22 throughout these rules; but the only one that Office of
23 Court Administration wants to capture is the original
24 plaintiff who files the original lawsuit, doesn't matter
25 cross-claims, interventions, nothing; and it just seemed

1 to us that the best place to put it was as close to the
2 front and right next to the rule that tells you what you
3 have to have in your pleading. If you go there to look at
4 that you might accidentally also see 78a that tells you
5 what has to be in your cover sheet. So that's really kind
6 of the long and the short of why we decided to put it near
7 the front of the part of the rules talking to the lawyers
8 about the contents of the petition.

9 CHAIRMAN BABCOCK: Okay. Any comments about
10 that? Yeah, Justice Gray.

11 HONORABLE TOM GRAY: I believe it's Rule
12 202, presuit deposition. Would it require a cover sheet?

13 MR. ORSINGER: No, I've mentioned that in my
14 memo here, and Mary and I have discussed that. Mary,
15 you're still here. I don't think so. Or what is your
16 view of that? If you file a prelawsuit request for a
17 deposition, do you file a cover sheet?

18 MS. COWHERD: No.

19 MR. ORSINGER: Okay. There was a
20 discouragement of the kind of odd and ancillary complex
21 litigation, and basically they wanted to capture the
22 mainstream plaintiff comes into court, files a lawsuit,
23 we'll collect that data. If that works, maybe they'll
24 come back later and try to get more data.

25 HONORABLE TOM GRAY: And the reason I ask

1 that is because that answer tends to put it more towards
2 the 76 section, pleading section, than the 20, the clerk's
3 section, at least for me.

4 CHAIRMAN BABCOCK: Any other comments about
5 that?

6 MR. ORSINGER: Okay. Well, I'm sorry that
7 Kennon wasn't here for that discussion, but I'm going to
8 take that at least as a tentative indication that we would
9 be placing it here right after Rule 78, so then let's go
10 to the wording of the rule.

11 CHAIRMAN BABCOCK: Yep.

12 MR. ORSINGER: It's there, everybody has a
13 copy of the memo, but basically the cover sheet contains
14 the core information I think that OCA is wanting to see;
15 is that right, Mary?

16 MS. COWHERD: Say that again. I'm sorry.

17 MR. ORSINGER: That the proposed Rule 78a
18 prescribes the information that's to be included.

19 MS. COWHERD: That's correct.

20 MR. ORSINGER: That's to be considered
21 mandatory, and no matter what else you do with your local
22 form you've got to include this data.

23 MS. COWHERD: That is correct.

24 MR. ORSINGER: So part of the function of
25 this listing in this Rule 78a is to signal to everybody

1 the minimum required disclosure with the filing, and then
2 if you're going to have a local rule you can add on, but
3 you can't take away. So we need -- we need this core
4 information, plus some additional information, and we
5 mentioned specifically in there that local rules can
6 embellish that or that, I guess, a judge can just provide
7 a form and say, "You're required to sign this when you
8 file it," and the clerk can try to enforce it.

9 CHAIRMAN BABCOCK: Okay. Well, here's
10 Kennon back. We're leaving it in Rule 78a, Kennon. Too
11 bad. You missed it.

12 MS. PETERSON: I'm sure there's a really
13 good reason.

14 MR. ORSINGER: Well, if there's a really
15 good reason to put it up by 22 we can certainly consider
16 that, but the point I was making while you were gone is
17 that the early part, 22 part, is more instructions to the
18 clerk, Rule 76 is more instructions to the lawyers, and we
19 were afraid that the lawyers might not ever look back as
20 far as 22, and if there's a local rule then they won't
21 even look to this set of rules at all. They'll just
22 follow the local rules presumably.

23 CHAIRMAN BABCOCK: Okay. Let's talk about
24 the language that's here on page two of this memo.

25 MR. ORSINGER: Okay. This disclaimer is

1 really important for those of us who are concerned that
2 the cover sheet might somehow affect someone's rights, and
3 I'll go ahead and put on the record without permission
4 here a conversation I was having with Carl during the
5 break. Under the service type, if he was going to get
6 private process service, he would check "none" on this
7 form because he doesn't want the district clerk to be
8 involved in -- we're not delivering anything to the
9 constable or the sheriff, just give me a citation, I'll
10 handle it. Well, if he checks "none" because he doesn't
11 want service but he's planning to have private process
12 service, then this form is going to be, you know, number
13 one, misleading; number two, which one do you check if you
14 want private process; and number three, it raises the
15 question of do we really want the administration of these
16 cases to be driven by what's on this form rather than
17 having somebody look inside the pleading and say that this
18 is citation by publication or this is going to be citation
19 by personal service?

20 So knowing that we probably haven't even
21 imagined all the possibilities of problems that could
22 happen to people because of misfilling out or mishandling
23 or misconstruing these forms, I think we should be very
24 serious about our comment that these forms are to be used
25 only for certain purposes and not other purposes, and that

1 sentence is designed to do that, but I don't know that it
2 does it well enough in light of this discussion. "The
3 filing of a cover sheet is for administrative purposes and
4 does not affect or determine how the action is commenced
5 in district or county court."

6 Now, that's consistent with the AG opinion
7 that you can't say that the lawsuit wasn't commenced
8 merely because you didn't attach or didn't file your cover
9 sheet. That covers the commencement issue, but it doesn't
10 cover the issue of whether this -- I shouldn't use the
11 word -- it doesn't relate to the issue of whether the
12 cover sheet can be used to determine whether you have
13 related proceedings that were pending in another court or
14 in the same court or anything else that affects the merits
15 of the case or the processing of the case in any way, and
16 now that I find out that court clerks are making executive
17 decisions about how to handle an original petition based
18 on what's on the cover sheet, I'm now concerned that this
19 is not enough protective language and that people might be
20 doing harmful things inadvertently, so --

21 CHAIRMAN BABCOCK: Okay, how does everybody
22 feel about that? Frank.

23 MR. GILSTRAP: It needs to be beefed up. I
24 think that was where we came down in our prior discussion.
25 It needs to have some reference to admissions, that type

1 of thing. You know, we need to beef it up as much as
2 possible and at the same time realize that clerks are
3 probably going to use it for administrative purposes
4 regardless of what we say.

5 PROFESSOR CARLSON: Well, it is.

6 CHAIRMAN BABCOCK: Yeah, Richard.

7 MR. MUNZINGER: Does the Supreme Court
8 contemplate issuing an order specifying the information
9 that is to be solicited in the form?

10 HONORABLE NATHAN HECHT: I hope. I was
11 talking to Mary about this earlier -- I hope that the
12 Court will come close to promulgating a standard form that
13 just like JS-44, just applicable throughout the state,
14 easy to get, post it on everybody's website. If counties
15 want to do more, they can, but the Judicial Council has an
16 input into this, too. It started over there, and so I
17 don't know exactly where it will go.

18 MR. MUNZINGER: The reason I ask is because
19 the rule says you get the names of the parties, the type,
20 the case type, et cetera, and it might be a lot easier if
21 it were to say "gathering information as prescribed by
22 order of the Supreme Court," "at least the information as
23 prescribed by order of the Supreme Court, and such other
24 information as particular counties or district clerks
25 might require," and the last sentence, this may be too

1 broad, but it seems to me it could say, "The filing of a
2 cover sheet is for administrative purposes and does not
3 affect the substantive or procedural rights of the parties
4 to the litigation."

5 Now, the only problem with that is it seems
6 to me to be so broad that if you answer the question "Is
7 there another case related to this one," and the clerk
8 were to, say, transfer it or assign it to a particular
9 court in a case where you have random selection of courts,
10 so that arguably affects the procedural rights of a party,
11 and I don't know that the breadth of my language suffices,
12 but I don't think the language that we have here is
13 sufficiently broad.

14 CHAIRMAN BABCOCK: Okay. Anybody else have
15 any comments on this? Any idea about broadening the
16 language, Richard?

17 MR. MUNZINGER: Other than what I just said,
18 no, sir.

19 CHAIRMAN BABCOCK: Okay.

20 MR. ORSINGER: Justice Hecht, if the Supreme
21 Court were to promulgate a standard form, would a local
22 form that requested additional information have to be a
23 separate form, or would it be a modification of the main
24 form?

25 HONORABLE NATHAN HECHT: I don't know yet.

1 MR. ORSINGER: Because if it's a
2 modification of the same form then we're right back into
3 the soup, which is that we have a rule requiring certain
4 things about the form, but we don't really know what's in
5 the form. We're sitting here thinking we know what's in
6 the form, but the form could be completely different and
7 ask for information that we don't even imagine, and yet
8 we're putting it in the rule that it has to be done, and
9 so I know this would be administratively a problem, but if
10 the local form was required by a local rule and not by
11 this rule, then they could probably do anything they
12 wanted for their own administrative convenience and we
13 wouldn't be troubled by it because they wouldn't be
14 colliding with Rule 13 and other things like that.

15 It's just a thought, but if local practices
16 are going to put a lot of stuff in this form and we don't
17 know for sure what it is, then I feel like it's really
18 incumbent on us to be sure that we don't promote those
19 local practices, which may be irregular all over the
20 state, inadvertently to being important in how the case is
21 handled.

22 CHAIRMAN BABCOCK: Richard, could you say,
23 "The filing of a cover sheet is for administrative
24 purposes only," period? Just not try to imagine all the
25 horrors that could otherwise flow from filing the thing?

1 Yeah, Judge Patterson.

2 HONORABLE JAN PATTERSON: But I would worry
3 that a clerk would deem related cases as administrative
4 purposes only, and they might take action based on that.
5 I worry about the phrase, "administrative purposes." I'm
6 not quite sure what all that encompasses.

7 CHAIRMAN BABCOCK: Yeah, but what you're
8 saying is that no matter what we say it may not be for
9 administrative purposes.

10 HONORABLE JAN PATTERSON: Well, I agree with
11 beefing up that sentence that essentially it should be
12 only for statistical purposes and for -- and not affect
13 substantive rights, but I'm not sure "administrative" gets
14 us there.

15 CHAIRMAN BABCOCK: I see what you're saying,
16 but what if the form has related cases on it? Can a clerk
17 or administrative judge take that form and transfer the
18 case without notice to the parties?

19 HONORABLE JAN PATTERSON: Well, what I would
20 hope the form would do, would put people on notice to make
21 further inquiry only, because I don't think it's adequate
22 information upon which they should act, but I also am
23 confident that some clerks will act on that. So that does
24 give me pause about that question and that process.

25 MR. ORSINGER: And, you know, for me,

1 "administrative" could be a problem also because if my
2 original petition requested that citation be issued and
3 process gets served and then this gets clicked none, if
4 it's an administrative decision whether you're going to
5 send the process down to the sheriff's office or not, so
6 my petition requested it and I paid for it, and I
7 requested it orally with the person that I was filing it
8 with, but then they passed it on to whoever is doing this
9 data entry, and they look at it and say, "Oh, we don't
10 have to forward this citation anywhere because it says 'no
11 service,' so they must be going to do personal service,"
12 and it sits there not going to the sheriff, even though my
13 pleading requested it.

14 Or as Justice Christopher -- Judge
15 Christopher said, an administrator might decide to put you
16 on a fast-track trial in 90 days or however quick your
17 fast track is because somebody says it's level one
18 discovery, whereas the pleading says it's level two
19 discovery and you've really got a nine-month discovery
20 window. So now we have an administrative decision made by
21 someone to set the trial very quickly even though the
22 pleading wasn't worded that way.

23 CHAIRMAN BABCOCK: Pete Schenkkan, and then
24 Carl, and then Justice Bland.

25 MR. SCHENKKAN: I think we've got three

1 different things going on here. One is state rule, that
2 we get a cover sheet filed that has the information that
3 the Office of Court Administration needs to collect for
4 state administrative purposes, which is statistics. Then
5 we have information that the clerk locally wants for
6 administrative purposes that are neutral and not likely to
7 be rights-affecting, and then there is information that
8 the clerk may want that runs the stretch, and there are at
9 least two categories that have been identified. The
10 service category, I assume the Office of Court
11 Administration does not care and would not be collecting
12 data on who has ticked any one of these service boxes. Is
13 that --

14 HONORABLE NATHAN HECHT: No, I think we
15 might.

16 MR. SCHENKKAN: You think they do care?

17 HONORABLE NATHAN HECHT: Particularly as we
18 go to e-filing, I think it would be useful, at least it
19 could be useful, to have some information on how -- what
20 kind of service people are using these days; and, you
21 know, the Federal courts have basically gone to discourage
22 service altogether. You can still get service in Federal
23 court, but you better have a good reason, and is that a
24 good idea or not? So there would be some statistical
25 relevance to both that and how many times people say they

1 are filing related lawsuits as opposed to amending their
2 pleadings.

3 MR. SCHENKKAN: In that case then we really
4 do have the problem of how do we reconcile these two
5 desires, one, to collect the data and, two, not to get
6 people in trouble with their representation that they've
7 made about that particular entry.

8 CHAIRMAN BABCOCK: Carl.

9 MR. SCHENKKAN: I'm not sure those are
10 solving the problems, but part of it could be helped with
11 the wording. I think we can get away from "file," find a
12 verb other than "file," which sounds to me like filing a
13 lawsuit, filing a pleading. We can instead of "the filing
14 of the cover sheet," just say, "The cover sheet is not a
15 pleading. It is for state judicial administrative
16 purposes" and then whatever the disclaimer is. "It does
17 not affect any party's substantive or procedural rights."
18 And we may mean -- instead of the cover sheet we may mean
19 simply the failure to file the cover sheet doesn't affect
20 anybody's rights.

21 You know, that the cover sheet is not a
22 pleading, it's for state judicial administrative
23 statistical purposes, and failure to not file or whatever
24 the word is chosen to submit the cover sheet does not
25 affect anybody's substantive rights. That still leaves

1 you with the problem of you've ticked the box "no
2 service," and somebody uses that to conclude something
3 that gets you in trouble.

4 CHAIRMAN BABCOCK: Okay. Great. Carl.

5 MR. HAMILTON: If we're just collecting data
6 for OCA, why can't we just call the form "information
7 requested by OCA" and not -- not file it in the case, just
8 send it to OCA or let the clerk put it somewhere else in
9 their office if they want to do so, but don't make it a
10 part of the file. It's just data information being
11 collected and with no instructions thereon for the clerk
12 to do anything except transmit that information.

13 CHAIRMAN BABCOCK: Justice Bland.

14 HONORABLE JANE BLAND: Well, I think that
15 the way the rule is drafted is fine, because it tracks
16 what people have been doing in practice for 20 years in
17 Harris County, probably in Dallas County, what the
18 appellate courts have been doing with the docketing
19 statement, and we haven't heard one reported account even
20 anecdotally of somebody getting in trouble because of what
21 they -- because of an error that they made on their cover
22 sheet or their docketing statement. So it seems like in
23 the 20 years that courts have been doing this there
24 probably have been errors made on the civil cover sheet
25 and on the docketing statement, and the way to correct it

1 is just to have a human being correct it, either amend the
2 cover sheet and file a new one or explain to the judge
3 that "We checked level one, but we meant to have level
4 two," but I think that us trying to, you know, craft some
5 sort of a rule is -- we don't need it. There's no
6 problem. There hasn't ever been a reported problem of it.

7 And as far as trying to say it's just for
8 OCA and not really filing and those kind of things, well,
9 OCA is an arm of the courts. The courts are going to use
10 this information for administrative purposes, and OCA is
11 going to use it, the clerk's office is going to use it.
12 You know, lots of people are going to use it, and we want
13 the information to be accurate to the extent that it can
14 be accurate, and so to say, oh, you know, it's nothing to
15 worry about in a rule seems to me to sort of -- is not
16 really accurate because we are -- we are wanting that
17 information for specific purposes, and it's going to be
18 used throughout the courts, so it seems like the way the
19 rule's drafted right now is perfect, and this concern
20 about people getting in trouble for making mistakes on the
21 civil cover sheet at least so far seems to be unfounded.

22 CHAIRMAN BABCOCK: Justice Gray, I think you
23 had your hand up, and then Judge Yelenosky.

24 HONORABLE TOM GRAY: Well, and I was
25 thinking about the same thing Pete and Carl were about are

1 we really filing this document or are we presenting it,
2 and that would be a potential adjective to use with regard
3 to it, that it's presented, but at first when I thought
4 about it I thought it would make a good joke and then it
5 occurred to me that it might actually work. I don't
6 remember what we were going to do with the hot pink
7 sensitive data form, whether it was going to be filed or
8 presented or received in some other way.

9 CHAIRMAN BABCOCK: Framed.

10 HONORABLE TOM GRAY: Framed, yeah, whatever.
11 But, I mean, this could be done the same way. To me the
12 problem with designating it as a filed document or a
13 document that must be filed is presented by the fact that
14 Tom said that he had never been served with one of these,
15 Tom Riney, and, I mean, the rules clearly require that
16 anything that gets filed is supposed to be served on the
17 other parties, and so, you know, that seems to me to be a
18 fundamental failing of that aspect of it, and maybe it's
19 not intended to be served on everybody like other filings,
20 and maybe that's where the term "presented to the clerk"
21 would make a different result appropriate --

22 CHAIRMAN BABCOCK: Judge Yelenosky, then
23 Judge Christopher.

24 HONORABLE TOM GRAY: -- to be more in line
25 with what we do.

1 HONORABLE STEPHEN YELENOSKY: Oh, I didn't
2 have anything.

3 CHAIRMAN BABCOCK: Judge Christopher.

4 HONORABLE TRACY CHRISTOPHER: Oh, I was just
5 speaking on behalf of my district clerk. He does not want
6 any sensitive data form, and he sure doesn't want to have
7 to mess with another sheet of paper that sits somewhere
8 other than in our electronic file because he wants
9 everything electronically filed, and he wants this case
10 sheet electronically filed, too. So I would really be
11 opposed to something that puts it somewhere else, on his
12 behalf.

13 CHAIRMAN BABCOCK: Good point. Richard.

14 MR. ORSINGER: Possible language was "When a
15 party files an original petition that party must also
16 submit a civil case cover sheet," and then let's have an
17 understanding with everybody that it's not filed in the
18 case file, but it's filed in the statistical file, and
19 I'll just have to tell you, I haven't hung around long
20 enough after a divorce decree was signed by the judge to
21 find out what they do with the statistical forms that we
22 are required in a divorce and in a custody case to fill
23 out, but having looked at closed divorce files, I don't
24 recall ever seeing one of those statistical forms in the
25 file. I think that the clerk's office in the counties

1 where I practice take the statistical form away from the
2 divorce decree and then send the divorce decree to go into
3 the minutes of the court and the statistical form goes to
4 the bureau of -- bureau of --

5 CHAIRMAN BABCOCK: Statistics.

6 MR. ORSINGER: Bureau of Vital Statistics.
7 Bureau of Vital Statistics. And I don't think that it's
8 considered to be a case-related document or a case
9 document, and so it's attractive to me if we break it up
10 and the petition is what's filed and it's what we all
11 recognize and what we're all familiar with and the
12 statistical form goes directly to OCA. Then that takes
13 care of that, and then if Houston wants to have their own
14 elaborate case file information form that goes in the
15 jacket --

16 HONORABLE TRACY CHRISTOPHER: Well, we're
17 not the only ones. Dallas does, all the major --

18 HONORABLE DAVID EVANS: Fort Worth, Fort
19 Worth.

20 CHAIRMAN BABCOCK: Even Fort Worth.

21 HONORABLE TRACY CHRISTOPHER: Sorry, Fort
22 Worth does, Dallas does, San Antonio does. I mean, you
23 know, this is pretty commonplace, these cover sheets, and
24 they've been filed for a long time.

25 CHAIRMAN BABCOCK: Richard, Mary wants to

1 talk in opposition to what you just said.

2 HONORABLE TRACY CHRISTOPHER: I keep
3 repeating myself. Sorry.

4 MS. COWHERD: I just want to throw out, A,
5 our office doesn't want all the cover sheets from all the
6 courts. We don't have enough storage space. Maybe the
7 committee could consider once the clerk enters the data
8 into their case management system then the form can be
9 destroyed. You know, it's served its purpose.

10 CHAIRMAN BABCOCK: Just caused us another
11 hour of discussion with that.

12 MR. ORSINGER: How about recycled?

13 HONORABLE DAVID EVANS: How about a
14 representative --

15 CHAIRMAN BABCOCK: Hang on, guys.

16 HONORABLE DAVID EVANS: I think you have to
17 have a representative of the clerk present to discuss or
18 to consult with with regard to what you can do with
19 documents received by the clerk. Besides the Rules of
20 Civil Procedure there's a whole statutory scheme in
21 existence as to what they can do and cannot do with
22 documents received, and so I think it's past the Rules of
23 Civil Procedure to go into that.

24 CHAIRMAN BABCOCK: Yeah.

25 HONORABLE DAVID EVANS: If it's an

1 alternative we should investigate it, but it's going to
2 require other people to be involved and consider it.

3 HONORABLE STEPHEN YELENOSKY: It should go
4 wherever juror notes go.

5 HONORABLE DAVID EVANS: As the juror notes,
6 yeah, they go with juror notes.

7 CHAIRMAN BABCOCK: Now we're up to three
8 hours of additional discussion. Okay. What else? Yeah,
9 Gene, I'm sorry. You had your hand up earlier.

10 MR. STORIE: I'm just hiding from you here.

11 CHAIRMAN BABCOCK: You're in a bad line of
12 sight.

13 MR. STORIE: Maybe I should, but -- because
14 this is confessional. I actually have had some experience
15 with a docket sheet that went wrong. It was in Federal
16 court, and I had to attend a show cause hearing because I
17 did not check the box for a related case, or I think it
18 actually was the person under my supervision, but in any
19 event I was on the line for that and then got to show up
20 in front of Judge Smith, who wondered why he was not
21 advised about the other two dozen cases pending on this
22 particular issue that were before Judge Nowlin. The sad
23 truth, of course, was we just forgot to check the stupid
24 box because we were trying to answer -- you know, two guys
25 are trying to answer two or three dozen suits for a few

1 tens of millions of dollars, and so anyway, we didn't get
2 sanctioned for that, but to me it's not frivolous --

3 HONORABLE JANE BLAND: I rest my case.

4 MR. STORIE: To me it's not frivolous to
5 think that it could be in there, but at the same time I
6 was one of the people who voted for signatures because I
7 think, you know, you're out there whether you like it or
8 not or whether you screw up or not or how serious it was
9 or whatever, and I also think it's important that it be
10 filed and be served because that's an early opportunity to
11 see that, you know, things appear to be on the right
12 track, whether it's your discovery level or whatever. So
13 if we're going to combine things that to me are obviously
14 different problems in terms of just getting statistics or
15 getting something that the clerks can use for case
16 management, I think the rule as it is is on a good track,
17 proposed rule.

18 CHAIRMAN BABCOCK: Okay. Is there any
19 sentiment for the rule as written? Besides Justice Bland.

20 MR. STORIE: Me.

21 CHAIRMAN BABCOCK: Alex, you're in favor of
22 the rule as written. Well, why don't we take a little
23 straw vote on that, Richard? How many people like
24 proposed Rule 78a as currently written, raise your hand?
25 How many people don't like it as written?

1 You wrote it.

2 MR. ORSINGER: That was before I found out
3 how it could be misinterpreted.

4 HONORABLE JAN PATTERSON: He was for it
5 before he was against it.

6 CHAIRMAN BABCOCK: This is exciting because
7 it's 14-14, which means the Chair can vote.

8 MR. GILSTRAP: Vote, vote. I see a vote.
9 Come on, Chip, step up.

10 MR. SCHENKKAN: It's okay if we don't
11 determine any substantive rights.

12 MR. ORSINGER: Would you like a few moments
13 to think?

14 CHAIRMAN BABCOCK: No, I don't like it as
15 written, so I would tilt the balance into the don't like
16 it category.

17 MR. ORSINGER: So now we need to find out
18 what we don't like about it.

19 CHAIRMAN BABCOCK: What we don't like about
20 it. Justice Gaultney.

21 HONORABLE DAVID GAULTNEY: I voted for the
22 rule as it is. I wonder if those that voted against it
23 would like it better if the language that's underlined on
24 the form were included in the rule, something that said
25 something to the effect of "This cover sheet is not a

1 pleading, does not constitute a discovery request,
2 response, or supplementation, and is not admissible at
3 trial." I mean, the rule is in the pleadings of
4 plaintiff's section, so it might be good to say it's not a
5 pleading. Otherwise, the assumption might be that --

6 MR. JACKSON: The form doesn't say it's not
7 a pleading, though.

8 HONORABLE DAVID GAULTNEY: Oh, I added that.

9 CHAIRMAN BABCOCK: Elaine.

10 PROFESSOR CARLSON: You know, Richard,
11 Justice Gaultney makes a good point. You're putting this
12 under Rule 78a under "pleading," because that's where
13 lawyers look for pleadings, but it sounds like this is
14 really the lawyer's responsibility. I would like to see
15 it in Rule 25. I thought Kennon's idea was good except
16 that I like 25 better because we're trying to keep this to
17 clerk's responsibilities. You know, can you rely upon the
18 statement of service requested in your pleading or is it
19 your responsibility as a lawyer to get this box checked
20 correctly? If it really is a responsibility of the lawyer
21 to take over these functions of the clerk that they used
22 to have to determine after they read the pleadings or read
23 the document, then I like it better in the pleading
24 section, but if it really is for information gathering
25 purposes now, such as Rule 25 places upon the clerk, then

1 it should go over there.

2 CHAIRMAN BABCOCK: Not to explain my vote,
3 but I voted against the rule as written because I would
4 drop the last sentence altogether, altogether because I
5 don't think you can imagine all the circumstances where it
6 might come up that the civil cover sheet might have some
7 impact on something that's going on in the case, and to
8 try to think about it ahead of time is to me not
9 productive, so I would drop the last sentence and then
10 otherwise I would be fine with it. Judge Christopher.

11 HONORABLE TRACY CHRISTOPHER: Well, probably
12 Jim can speak to this because he files plaintiffs
13 lawsuits, but when you file one in Harris County, if you
14 want to request service it's not enough that it's in your
15 pleading. You've got another form that you fill out that
16 requests service. So the fact that you've checked this
17 off is not important, and I'm pretty sure that that
18 happens in other counties, that there's another form that
19 you fill out that, you know, puts where you want served,
20 how you want served, you know, to get the whole ball
21 rolling on the service of citation. I could be wrong, but
22 I know at least in Harris County we've got to do that.
23 Jim probably files all over the state and can tell us.

24 MR. PERDUE: I don't know of anywhere that
25 doesn't have a civil process request form.

1 HONORABLE TRACY CHRISTOPHER: Right.

2 HONORABLE DAVID EVANS: Exactly.

3 HONORABLE TRACY CHRISTOPHER: So the whole
4 process, civil process issue, is a nonissue.

5 MR. HAMILTON: They're not used in Hidalgo
6 or Cameron or Starr County.

7 MR. ORSINGER: They're not used in Bexar
8 County either.

9 CHAIRMAN BABCOCK: Just to name three or
10 four.

11 MR. PERDUE: But you still would have to
12 proactively institute efforts at service.

13 MR. ORSINGER: When you file your petition
14 in Bexar County, they will flip to the service paragraph
15 and underline what you want and then they charge you for
16 what you ask for. If you do not plead for process to be
17 issued, you do not pay for process to be issued. If you
18 want the sheriff to serve the process, you pay for the
19 sheriff. If you're going to have a private process
20 server, you pay less. So in Bexar County they decide what
21 services you're getting from your petition with you
22 standing there when they tell you how much your check is
23 going to be, and I don't know how they do it in Harris
24 County with the form, but that's a communication that's
25 directly between the filing person, the pleading, and the

1 person taking the pleading and taking the check. I don't
2 see how you can figure out the filing fee unless you know
3 whether you're paying for process.

4 HONORABLE DAVID EVANS: Well, or, Richard,
5 you've got one other circumstance. You have a cover
6 letter that says "no service is needed at this time" or
7 "notwithstanding what's in the pleadings, issue these but
8 don't issue those," but these are all precalculated for
9 the most part by the staff before they ever get filed
10 because they have to get the check cut from the firm
11 before they go down there. There's no credit system in a
12 clerk's office. I just think that, you know, as Tracy has
13 pointed out, these are never -- it's just like what you
14 say in court. You may make a -- you may say that
15 something happens in court. All judges let you come back
16 and freely admit it. Very rarely are you trapped by your
17 own remarks, and certainly I've never been trapped by a
18 ruling. I come back and change them all the time. I
19 flip-flop everyday.

20 CHAIRMAN BABCOCK: Justice Patterson.

21 HONORABLE JAN PATTERSON: Yeah, I agree with
22 those points that usually something more is involved to
23 accomplish service, and essentially I think what we want
24 is that nothing substantive should flow from this form,
25 and I can't imagine that the service type is adequate

1 information for anything to flow from that, but I wonder
2 if we could simplify that last sentence and come up with
3 some phrase. I don't know whether it's this, but "The
4 filing of a cover sheet is for recordkeeping purposes
5 only" or some description that is a little bit more
6 accurate than "administrative" but is confining in some
7 way or descriptive, and I don't know whether
8 "recordkeeping" is it, but --

9 CHAIRMAN BABCOCK: Carl.

10 MR. HAMILTON: Can't we just say that it
11 cannot be used for any other purpose in the litigation?

12 HONORABLE JAN PATTERSON: Than --

13 MR. HAMILTON: Just it's for information.
14 "For administrative information only and cannot be used
15 for any other purpose in the litigation."

16 CHAIRMAN BABCOCK: If the judge -- if Judge
17 Evans sees this thing and says, "You know, I don't think
18 Carl's been candid with the court about other cases filed
19 in Tarrant County that involved the very same issue," he
20 can't call you up and say, "Carl, get down here and tell
21 me why you didn't" --

22 MR. HAMILTON: Well, that's administrative.

23 CHAIRMAN BABCOCK: So he can do that.

24 MR. HAMILTON: I think so. That would be
25 administrative.

1 CHAIRMAN BABCOCK: Okay.

2 MR. HAMILTON: But it doesn't have anything
3 to do with the actual litigation.

4 CHAIRMAN BABCOCK: Well, sure, because Judge
5 Evans may say, "Look, you know, I'm going to, you know,
6 transfer this case to Judge Walker because he's got all
7 these other cases, and you didn't tell me about it, and
8 I'm very irritated about that and so now I'm
9 transferring."

10 HONORABLE TRACY CHRISTOPHER: That's
11 administrative.

12 HONORABLE DAVID EVANS: You know, I think
13 "administrative" works, but my experience is that with the
14 preamble of the Rules of Professional Conduct and the
15 attempt to grant immunity that the Rules of Professional
16 Conduct did not set standards for liability, and it's
17 almost impossible to draft an immunity and a use rule in
18 any kind of Rule of Procedure or Rule of Professional
19 Conduct. Just it never -- you never can see the end
20 consequences of what you're writing.

21 MR. LOW: That's right.

22 HONORABLE DAVID EVANS: And it's regrettable
23 that that's true. The only one that I think probably
24 works pretty well is the rule on jury deliberations, but
25 that's just a continuation of the common law about using

1 it as evidence. If you want to put something in here it's
2 not admissible as evidence, I guess you could do that.
3 But that's -- I don't know that there's even a Rule of
4 Civil Procedure that can grant immunity, and that's what
5 you're talking about.

6 CHAIRMAN BABCOCK: Okay. What else? Okay.
7 We're out of ideas on this.

8 MR. ORSINGER: Well, it was a tie vote on
9 changing it, and I found out that your vote that made it a
10 tie was -- is that you didn't even want the last sentence,
11 so it looks like there's a slight preference to kind of
12 leave it the way it is.

13 CHAIRMAN BABCOCK: Yeah.

14 MR. ORSINGER: If we change it, I'm not sure
15 that there's a consensus on what the change should be.

16 CHAIRMAN BABCOCK: I agree. So let's go on
17 to the next issue.

18 MR. ORSINGER: The last topic on this is
19 whether we want to put anything in a comment to the rule
20 that might make anybody feel better about adopting this
21 and sticking it in either the pleading section or the
22 clerk section of the rules. You could completely replace
23 that last sentence, demote it from being a rule to being a
24 comment, and have a little more conversational tone, a few
25 more words saying "The purpose of this rule is to gather

1 information, and it should not prejudice the rights of
2 parties" or something, and that might do more for you or
3 assuage concerns than the last sentence, or maybe added to
4 the last sentence.

5 CHAIRMAN BABCOCK: Not a bad idea. What do
6 people think about that?

7 HONORABLE JAN PATTERSON: I like that.

8 CHAIRMAN BABCOCK: Have a comment? Judge
9 Patterson.

10 HONORABLE JAN PATTERSON: I like that.

11 CHAIRMAN BABCOCK: Did you get that, Dee
12 Dee? Judge Patterson likes that.

13 THE REPORTER: Yes.

14 MR. ORSINGER: Would that be in lieu of or
15 in addition?

16 CHAIRMAN BABCOCK: I would say in lieu of.

17 MR. ORSINGER: In lieu of? What is the
18 sense there?

19 MR. GILSTRAP: Chip?

20 CHAIRMAN BABCOCK: Yeah, Frank.

21 MR. GILSTRAP: Does this rule the way it is
22 -- I mean, we're talking about a form that's promulgated
23 by the Court or by the Office of Court Administration, but
24 this really doesn't refer to it. I mean, I could read
25 this rule, I could fill out a handwritten cover sheet with

1 this information and say that's my cover sheet.

2 CHAIRMAN BABCOCK: Right.

3 MR. GILSTRAP: I mean, do we want to connect
4 it to some rule that -- I mean, that's what we've been
5 talking about the whole time.

6 MR. ORSINGER: But, see, we can't. We can't
7 really use the OCA form per se because the localities are
8 going to vary the form we know for sure.

9 CHAIRMAN BABCOCK: Maybe. I think what I
10 heard Justice Hecht say was that's an open issue.

11 MR. ORSINGER: Oh, the Court might -- well,
12 gosh, we have very rigid rules about local rules that are
13 dishonored constantly. I have to obey all kinds of local
14 rules that have never been approved by the Supreme Court.

15 HONORABLE STEPHEN YELENOSKY: Or do you?

16 MR. ORSINGER: Well, I might get my writ
17 of -- my writ of habeas corpus might be granted, but --

18 CHAIRMAN BABCOCK: Judge Patterson. That's
19 the line of the day, by the way.

20 HONORABLE JAN PATTERSON: Can I suggest that
21 of the 15 who voted against the rule --

22 CHAIRMAN BABCOCK: Yeah.

23 HONORABLE JAN PATTERSON: -- that we see how
24 many would be in favor of deleting that sentence and
25 reforming it as a comment?

1 CHAIRMAN BABCOCK: Okay. Sure. That okay
2 with you, Richard?

3 MR. ORSINGER: Sure.

4 CHAIRMAN BABCOCK: All right. We're going
5 to vote now. People who like the rule, if you delete the
6 last sentence and take that concept and put it into a
7 comment, so everybody that's in favor of that, raise your
8 hand.

9 MR. MUNZINGER: So we would be approving the
10 text of the rule but for the last sentence?

11 CHAIRMAN BABCOCK: Yes, sir. Which would
12 wind up in some form or fashion in a comment. All right.
13 Everybody that's in favor of that rule, raise your hand.

14 Okay, everybody against?

15 MR. ORSINGER: That's an unpopular idea.

16 CHAIRMAN BABCOCK: 5 in favor, 16 against.

17 MR. ORSINGER: Now, can we take a vote if we
18 leave the last sentence in whether anyone wants a comment
19 in addition to that or whether that's sufficient to make
20 everyone comfortable?

21 CHAIRMAN BABCOCK: Okay. Everybody hear
22 that? Everybody in favor of -- everybody who's in favor
23 of the rule as written on this page but who want an
24 additional comment.

25 MR. HAMILTON: Comment or part of the rule?

1 MR. ORSINGER: No, a comment. Just a
2 comment.

3 MS. BARON: Are people who originally voted
4 for the rule as it was written supposed to be voting in
5 these sets of votes?

6 CHAIRMAN BABCOCK: Yeah.

7 HONORABLE JAN PATTERSON: Well, that was not
8 my proposal, but that's what he did.

9 MS. BARON: Okay. Well, I didn't vote.

10 CHAIRMAN BABCOCK: Okay. Rule as written
11 with a comment. Everybody in favor?

12 Everybody against? 8 in favor, 11 against.

13 MR. ORSINGER: What does that mean? Does
14 that mean leave the last sentence in but don't have a
15 comment? More people would prefer not to --

16 CHAIRMAN BABCOCK: I think the Court is
17 going to have to sort through all this.

18 MS. PETERSON: Oh, really?

19 MR. ORSINGER: Well, maybe I ought to write
20 a comment just for idle interest.

21 CHAIRMAN BABCOCK: Yeah.

22 MR. MUNZINGER: Chip?

23 CHAIRMAN BABCOCK: Yes, sir.

24 MR. MUNZINGER: Did I misunderstand, the
25 first vote was 15, the one you broke the tie in?

1 CHAIRMAN BABCOCK: Right. It was 14-14.

2 MR. MUNZINGER: And you voted 15 against the
3 rule as drafted.

4 CHAIRMAN BABCOCK: Correct.

5 MR. MUNZINGER: So the committee has told
6 the subcommittee "We don't like your rule as drafted, for
7 whatever reason."

8 CHAIRMAN BABCOCK: Right. And I'm sure that
9 the --

10 MR. MUNZINGER: I wanted to make sure I
11 understood. Thank you.

12 HONORABLE JAN PATTERSON: The record will
13 reflect.

14 MR. RODRIGUEZ: But have we not just voted
15 to submit the rule as drafted? Because we're not having
16 comments.

17 MS. PETERSON: We just voted on the last
18 sentence.

19 MR. ORSINGER: No, I think people -- more
20 people wanted comments than didn't want comments, and
21 Justice Hecht indicated let's go ahead and write a
22 comment, see what it looks like, but it's up to you to
23 decide whether our official promulgation is with or
24 without the last sentence because your vote confuses the
25 issue, I think, because everybody else that voted against

1 it didn't want it -- probably didn't want the first part.

2 CHAIRMAN BABCOCK: Now, I'm the only one
3 that stated on the record the reason for voting against
4 the rule as written.

5 MR. ORSINGER: A good example of why you
6 shouldn't do that.

7 CHAIRMAN BABCOCK: You know, silly me. But
8 if we need more discussion, we need more discussion, but I
9 don't think we do. So if you would write a comment,
10 Richard, then we'll -- we'll deal with that, but in the
11 meantime we will go on to judicial foreclosure because
12 Tommy Bastian has been sitting here patiently listening to
13 our discussion on civil cover sheets when the pressing
14 problems of the Judicial Foreclosure Task Force are
15 awaiting our discussion, and once again, Judge Yelenosky
16 is leading this discussion.

17 HONORABLE STEPHEN YELENOSKY: Our
18 subcommittee looked at this and ultimately -- looked at
19 the task force work and ultimately suggested really just
20 one change, which is at the very end, but I wanted to
21 start by saying that at least some on the subcommittee
22 felt that the task force draft reflects some decisions
23 that were made by the task force that at least some
24 members of the subcommittee viewed as sort of
25 quasi-legislative decisions, either because they attempted

1 to define terms that are in a statute and/or they made a
2 decision to create mechanisms for procedures that aren't
3 sourced to a statute and are the result of a give and take
4 among the task force. I just say that up-front, because
5 we as a subcommittee didn't think it was our role to make
6 any sort of legislative or quasi-legislative decisions.
7 We took the task force report with the decisions that it
8 embodies as a given as our starting point and then made
9 some recommendations based on what we saw there without
10 going back into any of the policy decisions, to the extent
11 that policy -- policy decisions that were made.

12 The second thing I'd say is that this is a
13 very long rule and complicated, at least for those of us
14 who don't practice or haven't practiced in this area, and
15 so I think most of your questions, to the extent you have
16 them, might have to be directed to Tommy, and that's why
17 he's here. Tommy, do you want to say anything up-front
18 right now?

19 MR. BASTIAN: No. I think I'll take your
20 spears and arrows later.

21 HONORABLE STEPHEN YELENOSKY: Okay. Let me
22 tell you what the subcommittee did, and you'll find it at
23 the very end, pages 26 and 27. What came to us from the
24 task force is what is in strike-through 736.18, beginning
25 at line 1140 on the left, and you'll see that that's

1 stricken all the way down to line 1166 and then is
2 followed by a replacement Rule 736.18 and a new rule,
3 736.19. The reason there are two out of one, even though
4 it addresses the same subject matter, is that we felt -- I
5 guess I can say "we." I don't know that we actually took
6 a vote on this, but that the rule they proposed addressed
7 abatement and dismissal of a lawsuit prior to any order
8 permitting foreclosure to go forward being signed and also
9 addressed voiding -- an automatic voiding of that order
10 after it's signed under certain circumstances; and so the
11 subcommittee's proposal, which went back to the task
12 force, as I understand it through Tommy, was accepted as a
13 change, makes those two separate rules because we thought
14 it was clearer.

15 I guess the second thing it does overall,
16 the main significant thing it does, is it strikes a
17 paragraph at the end, which was the paragraph (c) of
18 736.18, that the subcommittee felt was creating a cause of
19 action in order to enforce the desire that a party filing
20 a lawsuit, an affirmative suit, or rather the desire of
21 those drafting the rules to be sure that anybody who files
22 an affirmative suit that would stop a foreclosure from
23 going forward acts promptly to give notice to the party
24 that is actually proceeding with the foreclosure.

25 The way the task force had it drafted it was

1 that the respondent shall be -- in that instance it would
2 be the party opposing the foreclosure -- "shall be liable
3 for all claims of any kind made against the applicant,
4 owner," et cetera, et cetera, et cetera, "by a purchaser
5 of a foreclosed property at a void sale under (a) or (b)."
6 In other words, it sort of created an indemnity provision
7 for any claim that might be made by virtue of the fact
8 that the -- and then it goes on to say when that party
9 could have reasonably prevented the foreclosure from going
10 forward by promptly notifying the foreclosing entity.

11 What we suggested in its place, because we
12 thought that that -- we had real questions about whether
13 you could create a cause of action in that fashion. We
14 used language, which you'll find on page 27 at line 1195,
15 which basically says you need to act promptly to give
16 notice before the foreclosure or you may be subject to
17 sanctions. Since this draft was out Tommy is suggesting
18 one slight change to that, but it's a separate one, so
19 I'll put that aside for a moment.

20 I'm not going to go through this rule by
21 rule. I've talked beforehand with Justice Hecht and stand
22 ready to do whatever else you want us to do at this point,
23 but my understanding is that the Supreme Court is also
24 planning to go back to the task force if it has any
25 questions. So there are some minor things that Tommy has

1 brought up that we could identify now or simply pass those
2 along, the task force can pass those along to the Supreme
3 Court. They're not anything that the subcommittee has
4 vetted. I don't think they're substantive. The only
5 substantive thing is what I've just talked about as far as
6 the subcommittee is concerned.

7 CHAIRMAN BABCOCK: Okay. Judge Yelenosky,
8 it was the subcommittee that -- it was our subcommittee
9 that spotted perceived problems with the task force
10 736.18?

11 HONORABLE STEPHEN YELENOSKY: Yes.

12 CHAIRMAN BABCOCK: And then proposed this?

13 HONORABLE STEPHEN YELENOSKY: Yes.

14 CHAIRMAN BABCOCK: And it's already gone
15 back to the task force?

16 HONORABLE STEPHEN YELENOSKY: Yes. Tommy, I
17 don't know if that was by e-mail. I don't know that they
18 reconvened, but Tommy --

19 MR. BASTIAN: By e-mail and then everybody
20 was to respond. There was one person that had a question
21 about it, but it was a matter of just the communication
22 going back and forth, what did it really mean.

23 CHAIRMAN BABCOCK: And so the task force is
24 now accepting of what our subcommittee thought would be a
25 better way to do it; is that right?

1 HONORABLE STEPHEN YELENOSKY: That's my
2 understanding. I talked personally to Tommy, and I talked
3 personally to Fred Fuchs, who was on the task force as a
4 representative of Legal Aid people who are opposing
5 foreclosure, and if you want me to say briefly what this
6 is all -- what this is all about is under the current rule
7 it clearly says that a lawsuit under 736, which is sort of
8 an expedited judicial foreclosure, stops automatically, is
9 abated, and shall be dismissed if the party with the home
10 -- that's the easiest way to describe it -- files an
11 affirmative suit, but it says if that's done before the
12 order is signed. And this carries through with that,
13 first of all, in 736.18, but what I suggested adding was
14 to make very clear that for that to happen the affirmative
15 suit -- a copy of it needs to be filed under the cause
16 number of the 736 suit, because from the perspective of a
17 judge, anyway, if there's going to be a suit that voids my
18 order it should be right next to it in the file.

19 The old rule said you had to file it in the
20 court where the 736 was, but it didn't make it clear in my
21 mind that it needs to be filed in that cause number. So
22 that's one thing it does. The second thing is -- and this
23 is where you get to the issue of, well, is this
24 legislative or not -- well, Tommy's first point would be I
25 guess that to the extent this is legislative, so was the

1 first rule, but the first rule said if -- it would void
2 and abate the action if it was filed before the order was
3 signed. What the practice has been, typically a Legal Aid
4 attorney gets in a case the day before the foreclosure,
5 finds out an order for foreclosure has been signed, assume
6 in good faith that there's something that they can file an
7 affirmative case on. They file it, and then they go and
8 seek a TRO, and that stops the foreclosure.

9 This procedure would say as long as they
10 file it by 5:00 p.m. the day before the foreclosure -- and
11 this comes from the task force. It's just sort of
12 reworded by the subcommittee. They don't need to get a
13 TRO. They file it, and that is sufficient to void the
14 order before the foreclosure.

15 Tommy, do you want to speak to what the
16 understanding of the law was under the old rule and why
17 some people don't consider that a change?

18 MR. BASTIAN: Yes.

19 HONORABLE STEPHEN YELENOSKY: Or they
20 consider it a change maybe, but --

21 MR. BASTIAN: Well, let me speak to the
22 legislative, whether this is a legislative agenda or
23 something like that. The genesis for this rule is in the
24 Constitution that directed the Supreme Court to write an
25 expedited rule for foreclosure. That's the authority.

1 There wasn't anything -- there's nothing around that says
2 how you do an expedited foreclosure, and I think, in my
3 view, the Supreme Court did the right thing. They got all
4 the stakeholders except for the district clerks and the
5 court coordinators, which was probably a mistake the first
6 time around, but they got all the stakeholders that are
7 actually involved in this process in the same room, and
8 they hashed out this rule so that you could come through
9 and have this expedited foreclosure that did one thing,
10 and that was a change to the foreclosure process as it
11 existed right now.

12 What he's talking about here is about the
13 lawsuit. The whole idea is any time you file a lawsuit
14 you can stop the foreclosure process, and we wanted to
15 make sure that that was always available to anybody to be
16 able to file the lawsuit. The whole idea behind when it
17 says "expedited," that's exactly what it meant, expedited.
18 Let me just tell you where that idea came from. It really
19 comes from the eviction statutes. We basically kind of
20 pulled that same concept, where you file in a JP court,
21 and you can have your day in court. You decide one issue
22 in an eviction suit, is whether you can go forward
23 and evict somebody. In this particular case it's whether
24 you can go forward with the foreclosure, and then if
25 somebody had a complaint you had a trial de novo in the

1 county court on the eviction side. This says if you have
2 a complaint you go file your regular lawsuit like you
3 always did.

4 So I guess when it comes back when you say
5 are we legislating, you could certainly make that
6 argument, but I would come back and say it is the
7 constitutional amendment that directed the Supreme Court
8 to write a rule, and the way the Supreme Court put
9 together a task force of people that really deal with this
10 day-in, day-out, came up with a rule to expedite these
11 foreclosure -- or getting this order. It's really a
12 matter of getting an order so you could proceed with the
13 foreclosure sale like it's always been done in Texas.

14 One of the interesting things that we found
15 in talking when we put the court administrator on this
16 last task force was that there were a number of judges
17 that thought when they signed this order under Rule 736
18 that was the foreclosure. They didn't realize that all
19 that order did was allow somebody to then go through the
20 process of posting the property for sale and complying
21 with all the requirements under 51.002. So there was lots
22 of misinformation about how the rule worked and all those
23 other kind of things.

24 This rule is basically designed to get an
25 application filed, to get the court order that's required

1 by the Constitution, and then let the foreclosure process
2 go on down the pike. It's really designed -- is to keep
3 the courts from being clogged up when somebody doesn't
4 file an answer. So if they don't file an answer, if they
5 don't object to the application, the judge can sign the
6 order and the foreclosure can go on down the road. The
7 file is closed, and everybody is done with it. That's
8 kind of the genesis behind the rule.

9 If that's legislation I guess you could make
10 that argument. I would make the argument the Constitution
11 was set up from the people that directed the Supreme Court
12 to write the rule. Supreme Court picked the people who
13 really deal with this day-in and day-out and said, "You
14 tell us how to do it," and a group of people sat down and
15 argued it, cussed and discussed and came up with a rule
16 that seemed to work pretty well.

17 CHAIRMAN BABCOCK: Okay. Great. Thank you.
18 Any questions? Yeah, Carl.

19 MR. HAMILTON: Well, what is the difference
20 in filing a response to the application and contesting the
21 foreclosure and then filing a separate lawsuit in another
22 district court?

23 MR. BASTIAN: Well, in the response it gives
24 you your day in court so you can come in and tell the
25 judge. You may have a real good reason. It gives the

1 judge the opportunity to hear your reason why you think
2 that order shouldn't be signed. The judge then has the
3 discretion to say, "Yeah, I'm going to grant that." It
4 may not even be a good legal reason, but if the judge
5 denies the application then that means that that --
6 basically it's going to be the lender. Lender, you have
7 to turn around and file a new application to cure whatever
8 the problem that was raised by this borrower or you, Mr.
9 Lender, are going to have to go file a regular lawsuit in
10 the court of competent jurisdiction. The response is to
11 give that person the opportunity to come to court if they
12 want to and express their concerns, just like the JP.
13 It's kind of that same idea. Anybody can come in, express
14 their concerns. If they file a response, there's a
15 hearing date. They come to the court, they can give their
16 reasons, and then the court can decide from there whatever
17 you told me whether I'm going to grant the order or not.
18 Kind of puts the pressure back on the judge to decide,
19 well, did you give me a good enough reason where I can
20 either deny it or let it go on.

21 MR. HAMILTON: But if they're going to file
22 a separate lawsuit wouldn't they have to file it as part
23 of that same proceeding?

24 MR. BASTIAN: No. No.

25 HONORABLE STEPHEN YELENOSKY: You can't file

1 it.

2 MR. BASTIAN: You can't file it as a
3 separate suit.

4 HONORABLE STEPHEN YELENOSKY: 736 doesn't --

5 MR. BASTIAN: Again, this was an expedited.
6 That's the magic word. This is supposed to be an
7 expedited proceeding so the court's docket wouldn't be
8 clogged up. If somebody really has a complaint and wanted
9 to do something, go file the lawsuit that you would have
10 always done in Texas. In this particular process if you
11 have a real complaint, you have your day in court. There
12 there's going to be the communication kind of back and
13 forth between you and the judge, and you, if you're the
14 borrower or the lender you're going to find out what's
15 wrong with your case and then you may have to go file the
16 lawsuit.

17 The problem is most of these cases there is
18 no response filed, and the courts' dockets are just
19 clogged with these cases because you can't get the order,
20 and this is trying to create a process because the
21 Constitution says you've got to have an order. You can't
22 go do a foreclosure without the order. So this is what
23 we're trying to do, is have a very expedited way to get
24 that order, and if you have a problem with that
25 foreclosure process, you go file the lawsuit like you

1 would always have done.

2 CHAIRMAN BABCOCK: Okay. Any other
3 questions? Yeah, Frank.

4 MR. GILSTRAP: I just want to mention this.
5 We mentioned it last time, and we discussed it on the
6 subcommittee. I don't think there was any problem with
7 it, but, you know, this rule is real long. It would be by
8 far the longest rule in the whole rule book. We talked
9 about the possibility of maybe carving the forms out,
10 which take up a significant part of it, and maybe having
11 those approved separately by the Court, not as part of the
12 rule-making process but just part of the administrative
13 order. Just an order so that if there is some mistake in
14 them they could be changed without going through the whole
15 rule-making process again. I can envision a day when, you
16 know, we get so many of these that maybe we have an
17 appendix like the Federal Rules of Civil Procedure do,
18 but -- and I thought we talked about that on the
19 committee. I didn't think there was any problem with
20 doing it that way.

21 MR. BASTIAN: No, absolutely not. In fact,
22 we've come up with a couple of options to discuss. There
23 is a provision in the Nonprofit Corporation Act that
24 really has to do with the secretary of state where they go
25 through this litany about here is the form, it's on

1 Secretary of State's website. Here's the form that you
2 use, go to the website, and there it is. And something
3 along that same line. Kind of depends on how big a font
4 you use and how it's formatted. This rule is 26 pages
5 long, but 16 and 17 pages is basically the promulgated
6 forms, and the whole idea of the forms is to -- well,
7 there's another thing that kind of overlays, and maybe I
8 need to discuss that.

9 Lots of people don't realize, but
10 securitization has completely changed the foreclosure
11 process in Texas. It's changed it everywhere, but the law
12 -- and most of the folks haven't caught up with how
13 securitization has changed the process. This particular
14 document takes into consideration how securitization has
15 changed the process, and if you go through the pleadings
16 or the application here, it puts the right -- it tells you
17 exactly who does what in a securitization, who's
18 responsible for what, so that it's transparent. You have
19 full disclosure of what everybody is doing. You won't
20 have an instance -- and I can see some of the judges
21 wondering what in the world are you talking about -- where
22 somebody comes and tells you that MERS is the owner and
23 holder of the note, just because MERS happens to be the
24 mortgagee of record. MERS never was the owner of the
25 note. They never were the holder of the note and never

1 will and never going to be, but a lot of lawyers who don't
2 know what they're doing say MERS is the owner and holder
3 of the note, number one, because they're using legacy
4 pleadings that are 10 years old, and number two, they
5 haven't done their homework, and, number three, this is
6 going to tell you that the -- MERS is really the mortgagee
7 of record and it gives a definition. So that everybody
8 now -- it's kind of like a teaching tool. This is what
9 MERS is, folks.

10 CHAIRMAN BABCOCK: Okay. Judge Christopher.

11 HONORABLE TRACY CHRISTOPHER: Are we going
12 to get a chance to make any comments on the rule? Because
13 I do have some comments.

14 CHAIRMAN BABCOCK: Absolutely.

15 HONORABLE TRACY CHRISTOPHER: Okay. You
16 want me to just start?

17 CHAIRMAN BABCOCK: Fire away.

18 HONORABLE TRACY CHRISTOPHER: Okay.
19 Starting at 736.1(a) and (b). Okay. And here's where I
20 see a potential conflict, in my mind. The rule requires
21 "notices required by law," doesn't really tell me what law
22 that I need to look at, as a condition precedent really
23 before this lawsuit is filed.

24 HONORABLE DAVID PEEPLES: What line, what
25 page?

1 HONORABLE TRACY CHRISTOPHER: Page four,
2 line 158. And it seems -- and I'm just trying to
3 understand from my point of view reviewing these things on
4 a default basis, which I do on a weekly basis; and thanks
5 to our civil cover sheet, I can tell you that in 2004
6 there were 1,726 expedited foreclosures in Harris County,
7 and they have increased every year. In 2008 there were
8 2,395 expedited foreclosure cases in Harris County. I
9 currently have on my docket 40 cases that an order has not
10 been signed in, some of which are old. Under -- and I
11 certainly understand the frustration of the industry that
12 a lot of judges are not processing these cases, because
13 these cases are kind of overwhelming to people who are not
14 familiar with them, and I think a lot in the rule is
15 great. I love the forms, and if everybody -- you know, if
16 they don't follow the forms, we're just going to sign a
17 little order saying "You're out of here, you didn't follow
18 the form" and off you go. So, I mean, there's a lot of
19 really good things in this new version. I like it, but
20 there are just some problems that I saw.

21 So the concept of 736.1, before filing an
22 application notices have to go out according to law in a
23 certain form and to a certain address, and that's (a) and
24 (b). Okay, well, as a judge when I'm on the default
25 situation, am I going to have to review every single

1 notice to make sure they were sent properly according to
2 whatever law is not listed here in 736.1 and sent to the
3 proper notices according to (b); or, or, am I going to
4 assume because there's something further on down here that
5 says I can assume that this is prima facie evidence when
6 they tell me notices were sent properly that they were
7 sent properly and that I don't have to go back and
8 double-check that the notices were sent properly and to
9 the proper address before this application ever got filed?
10 So that's a big conflict in my mind. Requiring me to do
11 that is something that I'm not doing now.

12 HONORABLE STEPHEN YELENOSKY: That was going
13 to be my question, what do you do now?

14 HONORABLE TRACY CHRISTOPHER: I don't do
15 that now in terms of making sure that the prenotices have
16 been sent to the proper address. Okay. They just tell me
17 in their current application that they did, and if
18 everything else matches up, I sign the expedited
19 foreclosure.

20 HONORABLE STEPHEN YELENOSKY: Do you look to
21 see if they even have attached the notice --

22 HONORABLE TRACY CHRISTOPHER: No.

23 HONORABLE STEPHEN YELENOSKY: -- whether or
24 not you determine it's the proper address?

25 HONORABLE TRACY CHRISTOPHER: No. So I just

1 -- the way this is written it appears that I should do
2 that, which is okay, but it seems to contradict the other
3 part of the rule later on that I'll get to that says, you
4 know, if everything looks right, it's prima facie evidence
5 that it was done right. Okay. And I know y'all thought
6 this was all very amusing, but I sent you five examples of
7 what the security instruments look like that we get on a
8 routine basis, some of which, you know, you can't read at
9 all. So if I'm going to have to go and double-check
10 notices, it's going to be a lot of work, and, you know,
11 all of these things that are not readable are going to get
12 bounced out pretty fast, but I'm willing to do that, and a
13 lot of my fellow judges would be willing to bounce them
14 all out as not being legible. So that's my first problem
15 with the concept of what's in 736.1(a) and (b). Is that
16 really a condition precedent, is that my job as a judge to
17 make sure I review the petition to see that it was all
18 done properly? I'm not a hundred percent sure of that.

19 CHAIRMAN BABCOCK: Okay. Before you go on
20 to the next issue, what does everybody think about that?
21 Do you think the district judge is required to -- and
22 we're talking about a default situation, right?

23 HONORABLE TRACY CHRISTOPHER: In a default
24 situation.

25 CHAIRMAN BABCOCK: In a default situation is

1 the district judge required to go behind the prima facie
2 proof to see if it's accurate?

3 HONORABLE NATHAN HECHT: What's the task
4 force's intention?

5 CHAIRMAN BABCOCK: Yeah. What's the task
6 force intention?

7 MR. BASTIAN: Let me -- if I can treat that
8 issue, if you go and look at the application itself it
9 means that every one of those instruments that she's
10 talking about have to be attached. They have to be
11 attached to the application; and my suggestion to judges,
12 if it's not, you deny it, because when you start denying
13 those things the lenders' lawyers are going to have to get
14 their act together; and they'll start doing that.

15 HONORABLE TRACY CHRISTOPHER: Well, but --

16 MR. BASTIAN: It just takes a couple of
17 times, and so the way this rule is set up -- again, we go
18 back to the philosophy is we didn't want to change the
19 foreclosure process like it's always been in the -- like
20 it's always been in Texas. This rule, this expedited
21 rule, came in after you accelerated the maturity of the
22 debt then you filed the application. That application
23 then was filed, and you finally got an order. After you
24 got the order then you would have to go post it, so we
25 wanted to make sure that when the judge had the

1 application that the judge at that point in time says,
2 "Mr. Lender, you're playing games. You haven't sent the
3 notices," and the way you can check is that application
4 better have all of the notices that are supposed to be
5 sent.

6 Oh, by the way, this rule is also written so
7 that the application has to direct to the clerk exactly
8 who's supposed to get the notice, at what address. It's a
9 very specific place where they have to send it. The onus
10 is on the attorney to do all of that. If the attorney
11 doesn't do that, the judge ought to deny it.

12 HONORABLE TRACY CHRISTOPHER: No, I'm
13 talking about 736.1(a) and (b) are the presuit notices. I
14 can certainly understand double-checking the procedure
15 notices itself to make sure that the actual expedited
16 foreclosure proceeding got sent to the correct address and
17 notice, just like I do now when I double-check the
18 citation before I grant a default. (a) and (b) here of
19 736.1 are talking about the presuit notices that have to
20 be in the sequence and time required by law. I'm not
21 exactly sure what those are, because it doesn't refer me
22 to the law to look at, and, number one and I thought was
23 difficult, it says they "may be combined into one notice
24 unless the loan agreement provides otherwise."

25 So for me to accurately check this I have to

1 know what law I'm going to reference. If it's one notice,
2 then I need to read through every single one of the loan
3 agreements to see if there's a paragraph in there that
4 says there have to be two notices. It's more work than
5 I'm doing now. I'm willing to do it if that's what they
6 want us to do. I just am not sure that's what they want
7 us to do, so that's my first comment about 736.1(a) and
8 (b) in terms of presuit notices.

9 CHAIRMAN BABCOCK: And, Judge, what would be
10 the -- what would be the two rationales? What would be
11 the rationale for not doing it? Would it be, "Hey, this
12 is a default. They've sent it to me. They say that
13 they've done it, and that's good enough for me." If it
14 was a contested proceeding then the other side would have
15 the opportunity to say, "No, they didn't do it," and then
16 I'd rule, but here since it's a default I don't need to
17 check --

18 HONORABLE TRACY CHRISTOPHER: Right.

19 CHAIRMAN BABCOCK: -- so I just take their
20 word.

21 HONORABLE TRACY CHRISTOPHER: It's just a
22 matter of philosophy as to which way -- I mean, whenever I
23 do a default there are certain things I check through. I
24 always check through that, you know, citation was done
25 properly. I always check that time has elapsed properly.

1 I always check, you know, the names of the parties are
2 correct, and then depending on whether it's liquidated or
3 unliquidated damages, but here I'm checking presuit things
4 that I don't normally check.

5 CHAIRMAN BABCOCK: Right. Yeah. Judge
6 Yelenosky, and then Richard Munzinger.

7 HONORABLE STEPHEN YELENOSKY: But it isn't
8 any different from any other default situation in my mind.
9 The requirement is there, and yes, is it the judge's
10 responsibility, yes. But in a default situation,
11 typically a number of factors are considered. You check
12 certain things. In this context one thing I would
13 consider, is this somebody I see routinely who brings in
14 these mortgage things and have I checked this person
15 before and can this person stand in front of me and say
16 "Exhibit A is so-and-so, and B is so-and-so and C," and
17 I've got a level of confidence that it is all there.
18 Certainly not going to check and see if the address they
19 put is a correct address. I think that would go beyond
20 any responsibility I have on a default. But whatever you
21 do, I don't see where it makes a difference in what the
22 rule says.

23 HONORABLE TRACY CHRISTOPHER: Well, this is
24 -- you know, double-checking presuit notices as a
25 condition precedent to the filing of expedited foreclosure

1 is not something I check now. If I'm going to check it,
2 if I'm required to check it under the rule, fine. I just
3 need to know that that's the intent --

4 CHAIRMAN BABCOCK: Yeah.

5 HONORABLE TRACY CHRISTOPHER: -- of 736.1(a)
6 and (b).

7 CHAIRMAN BABCOCK: Yeah, and the argument on
8 the other side, the counter-argument to the default
9 argument would be, look, you check things all the time
10 before you grant a default judgment, and now Judge
11 Christopher is faced with a rule, 736.1(a) and (b), that
12 talk about things that should have been done.

13 HONORABLE STEPHEN YELENOSKY: Well, but
14 that's true under current law.

15 CHAIRMAN BABCOCK: I know, but you check
16 certain things. You always know that process is supposed
17 to issue. You always know it's supposed to be served,
18 supposed to be on file a certain amount of time, and you
19 always check that.

20 HONORABLE STEPHEN YELENOSKY: No, but my
21 point is under current law if we have an obligation -- I
22 mean, if there's an obligation under this rule there's an
23 obligation under current law to check for those things. I
24 mean, some of those things have to be -- the presuit
25 notification, I mean, isn't that required now, Tommy?

1 It's not required to be attached.

2 MR. BASTIAN: No. Now it isn't. I mean,
3 you just basically say --

4 HONORABLE STEPHEN YELENOSKY: Not required
5 to be attached, but giving the notice.

6 HONORABLE TRACY CHRISTOPHER: I don't check
7 it. I don't look at it.

8 MR. BASTIAN: That's exactly right.

9 HONORABLE STEPHEN YELENOSKY: But giving the
10 notice is required, so, you know, arguably under the
11 current rule somebody comes in with a default, you could
12 say, "Well, we have an obligation to say, 'Well, prove to
13 me that you sent presuit notice.'"

14 CHAIRMAN BABCOCK: Richard.

15 MR. BASTIAN: 51.001 says -- this is the
16 foreclosure statute, says that to do a foreclosure, if
17 it's somebody's residence, and most of these are home
18 equity, it's going to be -- it's secured by somebody's
19 homestead, except for the property tax, which is a
20 different deal, but you have to send a demand to cure 20
21 days before you can send the posting notice. I mean,
22 those are requirements.

23 HONORABLE TRACY CHRISTOPHER: I know they're
24 requirements. I'm just saying that this is making the
25 rule harder than it is now, which is okay, as long as we

1 understand that's what we're doing.

2 CHAIRMAN BABCOCK: Richard Munzinger.

3 MR. BASTIAN: Well, would it help if -- the
4 rule is designed to take care of the default situation so
5 that you're real comfortable when it comes to you, nobody
6 files a response, and you sign the order because nobody
7 defaulted. If somebody files a response then that's an
8 issue and then somebody can come in and tell you, "Well,
9 you didn't send this letter" and so forth and so on?

10 MR. MUNZINGER: Does the application for the
11 default order include an allegation that the requisite
12 notices were to be given?

13 MR. BASTIAN: Yes.

14 MR. MUNZINGER: And the application itself
15 is under oath, so help me God, that these things are true
16 and correct?

17 MR. BASTIAN: That is correct, and there is
18 also a promulgated form that is a declaration that the
19 mortgage servicer -- which, by the way, is the entity that
20 has all the loan level information about this particular
21 loan -- has to sign an affidavit under penalty of perjury
22 or it has to be notarized.

23 MR. MUNZINGER: So the trial court is
24 presented with an application that includes sworn
25 statement by the attorney that these things have taken

1 place.

2 MR. BASTIAN: The attorney has signed the
3 application, that is correct.

4 MR. MUNZINGER: That the presuit
5 notifications and what have you --

6 MR. BASTIAN: That is correct.

7 MR. MUNZINGER: -- that the judge is
8 concerned about have been given in the order, form, et
9 cetera, required by law.

10 MR. BASTIAN: That is correct.

11 MR. MUNZINGER: Why is that insufficient
12 proof of the fact?

13 HONORABLE TRACY CHRISTOPHER: I think it is
14 sufficient proof of the fact. What I'm pointing out is by
15 putting (a) and (b) in this rule versus the affidavit
16 saying and, you know, prima facie proof of everything, it
17 appears that I have to double-check that, too. It's just
18 it's not in the current rule, and it just seems to me that
19 if I was looking at it I would be a little nervous. I
20 would spend a lot of time double-checking all the presuit
21 notices, but so that's just my comment on that part.

22 HONORABLE NATHAN HECHT: All right. But the
23 intention is that that not happen?

24 HONORABLE TRACY CHRISTOPHER: Well, I hope
25 so.

1 HONORABLE NATHAN HECHT: Well, I'm asking.

2 CHAIRMAN BABCOCK: He's asking -- he's
3 looking over your head.

4 HONORABLE NATHAN HECHT: I'm asking Tommy or
5 Judge Yelenosky.

6 HONORABLE STEPHEN YELENOSKY: Well, my
7 understanding was that the intent was that not happen
8 except to the extent it happens in all default situations
9 where you have a lawyer you can't trust and has failed a
10 time before, and you ask tough questions.

11 HONORABLE NATHAN HECHT: Well, I understand.

12 HONORABLE STEPHEN YELENOSKY: That's the
13 exception.

14 HONORABLE NATHAN HECHT: Okay, you could do
15 it if you wanted to.

16 HONORABLE STEPHEN YELENOSKY: Right, but you
17 don't have to.

18 HONORABLE NATHAN HECHT: All right.

19 HONORABLE STEPHEN YELENOSKY: That was my
20 understanding.

21 MR. SCHENKKAN: And isn't the point of the
22 change to make them attach the documents instead of just
23 the assertion --

24 HONORABLE STEPHEN YELENOSKY: Yes.

25 MR. SCHENKKAN: -- that they've complied, is

1 to give anybody that might oppose it the information they
2 need to efficiently oppose it. That's the reason for the
3 change. It's not to make your life tougher, Judge. It's
4 to make the actual ability of the system to work to
5 protect whatever the number of people may be that might be
6 victimized by it. The first step they need toward --

7 HONORABLE TRACY CHRISTOPHER: I agree.

8 MR. BASTIAN: You said it exactly.

9 HONORABLE TRACY CHRISTOPHER: But putting
10 (a) and (b) in the rule makes it look like my job. That's
11 all I'm saying about it.

12 CHAIRMAN BABCOCK: Harvey, and then Judge
13 Evans.

14 HONORABLE HARVEY BROWN: I was just going to
15 point out, I could be mistaken on this, but I would think
16 some of these are done by submission where you don't have
17 a lawyer you can --

18 HONORABLE TRACY CHRISTOPHER: All done by --
19 and, in fact, as we go further in here that's another
20 thing I have a problem with. We have an automatic
21 mandatory 10-day must do so. No hearing, no nothing.

22 HONORABLE HARVEY BROWN: That's all the more
23 reason the judge feels some responsibility to go back and
24 kind of do this on his or her own, so that is putting a
25 pretty high duty on a judge; and at least in Harris County

1 or the major counties you'll become slowly an expert on
2 this because you do a lot of it, but what about the small
3 counties? They only see one of these a year or every two
4 years. We've got to at least lay out what the law is,
5 what we want them to look at, and how to do it a lot more
6 than it seems like this does right now.

7 CHAIRMAN BABCOCK: Judge Evans.

8 HONORABLE DAVID EVANS: I think Harvey made
9 the point. I just want to point out, too, we don't know
10 the people who are filing these. Often their addresses
11 for me are in Harris County and in Dallas County, far away
12 land.

13 HONORABLE STEPHEN YELENOSKY: Then you
14 better look at them really carefully.

15 HONORABLE DAVID EVANS: Then I look at them
16 real carefully. We use -- in Tarrant County we use a
17 check sheet that is legal-sized and is two pages long and
18 -- the judges on my floor, and it's small-typed, and we
19 have the staff prepares that before they even come into
20 judgment to see if they conform with the rule, and they're
21 very difficult to go through. It's not a -- it's not the
22 typical sworn account default judgment with service on
23 something to look through them. It doesn't present itself
24 to be judged on that fashion.

25 CHAIRMAN BABCOCK: Judge Evans, where do you

1 fall down on this issue that --

2 HONORABLE DAVID EVANS: Well, I've been
3 wanting to use the -- there's an unfunded mandate, but
4 Tracy is going to come to that at 736.13, and that is that
5 within 2 to 10 days after the due response I have a duty
6 to sign a default order. I don't have case management
7 software that will tell me when this is due.

8 CHAIRMAN BABCOCK: Yeah.

9 HONORABLE DAVID EVANS: I'd have to go get
10 the county to build me a case management software that
11 will pop that up.

12 CHAIRMAN BABCOCK: Yeah. But back to
13 736.1(a) and (b), does your reading of it --

14 HONORABLE DAVID EVANS: It imposes a greater
15 duty. I look through all the attachments on these
16 foreclosures, every one of them, to check them for
17 legibility and to make sure that they're incorporated
18 directly, and I think it imposes a greater duty.

19 CHAIRMAN BABCOCK: So your interpretation is
20 it's not that it's discretionary, it's that it does impose
21 a duty on you as a judge to check these things?

22 HONORABLE DAVID EVANS: I think most of us
23 that sign defaults, all the judges have a sense that they
24 have a duty to make sure that the rule has been complied
25 with and that they're the only person doing it. And I do

1 have a sense that this puts a greater burden on us.

2 HONORABLE STEPHEN YELENOSKY: And do you
3 feel you have the same obligation to make sure the
4 statute's been complied with?

5 HONORABLE DAVID EVANS: Yes.

6 HONORABLE STEPHEN YELENOSKY: Well, because
7 the statute has that presuit notice requirement, so why
8 wouldn't you be checking that now?

9 HONORABLE DAVID EVANS: You know, you learn
10 something every time you come to a meeting, and especially
11 if you open your mouth as much as I do.

12 HONORABLE STEPHEN YELENOSKY: I know
13 wherefrom you speak.

14 HONORABLE DAVID EVANS: I know, and, you
15 know, I'm going back to talk to the judges on my floor
16 about, well, what are we going to do about these presuit
17 notices?

18 HONORABLE STEPHEN YELENOSKY: Yeah. Well,
19 my point would just be that I think that to the extent
20 there's an obligation it comes from the statute, and the
21 rule, if anything, lays it out more clearly to at least
22 what all the documents are, they're all there you can
23 check as much as you want, but the obligation hasn't
24 changed. It's --

25 HONORABLE TRACY CHRISTOPHER: But they never

1 had to provide the presuit notices before or allege that
2 they were sent to the correct property address or contain
3 a copy of the change of address in writing if somehow the
4 notice didn't go to the property address but instead went
5 to a different address. I mean, the notices that get
6 attached, sometimes they're sent to three or four
7 different addresses, property address, two or three
8 apartments, you know, a fourth house. We have no idea.

9 HONORABLE STEPHEN YELENOSKY: Well, I would
10 ask Tommy, were there judges on the task force?

11 MR. BASTIAN: Yes.

12 HONORABLE STEPHEN YELENOSKY: Okay.

13 MR. BASTIAN: Two.

14 HONORABLE STEPHEN YELENOSKY: What did they
15 say? What did they say?

16 MR. BASTIAN: They wanted a promulgated rule
17 that was very specific and very precise so in the default
18 situation they could sign it, and if a TV camera was put
19 in their face they could say, "Here's the rule. They
20 followed the rule, and that's why I signed it, and they
21 didn't file a response."

22 And speaking to Judge Christopher's comment,
23 we probably could take that out, because if that is a
24 concern and you're thinking that's putting a duty on the
25 judge, the reason that's in there is to make sure that the

1 lenders' lawyers don't play games and that you have that
2 stuff done before somebody does a foreclosure. That's
3 something that the task force was very interested in and
4 wanted to make sure that it was balanced, that that
5 borrower got all those notices that they were supposed to
6 get under the law before somebody went and filed one of
7 these applications. So that's the reason why those
8 notices are in an exhibit in a particular order that have
9 to be attached to the application so that you can see,
10 Judge, that they were done. And it also makes sure,
11 because that's required, that somebody is not going to be
12 playing games with the foreclosure process and not do
13 that.

14 CHAIRMAN BABCOCK: Okay. Thanks, Tommy.
15 Judge Christopher, I think we've had a good --

16 HONORABLE TRACY CHRISTOPHER: I'm just
17 giving you my comments.

18 CHAIRMAN BABCOCK: No, no, no.

19 HONORABLE TRACY CHRISTOPHER: I don't have
20 to have a vote or whatever.

21 CHAIRMAN BABCOCK: I want you to keep going,
22 that's my point.

23 HONORABLE TRACY CHRISTOPHER: Yeah, keep
24 going. Okay.

25 HONORABLE JAN PATTERSON: May I ask a

1 question?

2 CHAIRMAN BABCOCK: You can.

3 HONORABLE JAN PATTERSON: Tommy, just to
4 make sure I understand, on (a)(1) if there's one notice
5 included, can we assume that that's the only notice, or
6 does the judge have to look at the loan agreement to see
7 if it requires otherwise? I assume that if you attach one
8 notice, that that's the representation that only one
9 notice is required under the loan agreement. Is that --

10 MR. BASTIAN: No. What's attached to the
11 application is the notice that has to be sent under 51.002
12 to the obligor of the debt. Before you can do a
13 foreclosure, before you -- to do a foreclosure so it's not
14 a lawful foreclosure under 51.002 you have to send notice
15 to the person who's obligated for the debt. All of those
16 notices that have to be sent certified mail to the person
17 obligated for the debt have to be attached to the
18 application.

19 HONORABLE JAN PATTERSON: Right.

20 MR. BASTIAN: This is trying to enforce
21 that, "Lender counsel, you don't play a game with that.
22 You don't come to this court and you file an application
23 and you haven't done that." It's kind of self-enforces
24 that you're not going to go file one of these or you're
25 not going to start the foreclosure process where somebody

1 in the light of day can come in and see whether you did it
2 or not. That's kind of the background.

3 HONORABLE JAN PATTERSON: Well, that's my
4 question is whether it is self-enforcing and by attaching
5 whatever notice they're representing that that's all
6 that's required, or does the judge have to make further
7 inquiry to determine the extent of the notice?

8 MR. BASTIAN: In my view, no, because all
9 the notices that you have to do under the law, under
10 51.002, and in some instances -- can't think of any
11 because most of -- at least in the residential arena where
12 most of this is working, it's going to be all forms,
13 standard security agreements, and so it's going to be
14 51.002 that just says you send a notice to the obligor,
15 you can go back and look and see if they were sent. In
16 fact, the way the application is prepared it basically
17 forces you to have all of that information to have a good
18 foreclosure attached to the application before it --
19 before you can even file it.

20 HONORABLE JAN PATTERSON: Okay. And if (1)
21 and (2) are attached and there is no other notice other
22 than under (1) and (2), do you then assume that no other
23 notice under No. (3) is required, or does the judge have
24 to make further inquiry about --

25 MR. BASTIAN: Well, to be real honest, No.

1 (3), why it's there, is because when that part was drafted
2 the Legislature had all of these foreclosure bills in
3 front of them, and we didn't know what kind of new notices
4 were going to come out. For example, there was a bill
5 that went through the legislative and Governor Perry
6 vetoed it so you didn't have to do it, but there was a
7 reporting requirement that you had to send when you posted
8 the sale -- when you posted your -- it's called posting.
9 When you file the notice of the foreclosure sale with the
10 clerk there was a certain form that had to go be filed
11 with the Texas Department of Community Affairs, for
12 example. That was in there to cover those situations that
13 we didn't know what the Legislature was going to do,
14 frankly. That's why that was in there.

15 HONORABLE STEPHEN YELENOSKY: And on page
16 seven you'll see that the application has a recitation
17 that tracks the rule that says, "Prior to filing this
18 application the notice of demand to cure the default,
19 notice of intent to accelerate, notice of acceleration,"
20 blah, blah, blah, "and any other notice required by law as
21 of the date of acceleration was sent to each debtor or
22 obligator," so there has to be -- they have to attest that
23 they did that.

24 HONORABLE JAN PATTERSON: Okay.

25 CHAIRMAN BABCOCK: Okay. Judge Christopher,

1 we have been talking up until now about Rule 736.1(a) and
2 (b). Could you go on to your next concern?

3 HONORABLE TRACY CHRISTOPHER: Okay. My next
4 point is on page six, and we're in one of the forms, the
5 first form, 736.2, form (a), under paragraph 2,
6 respondent, okay, we -- they're supposed to have citation
7 mailed to the last known address of each debtor. Okay.
8 Now, we've -- now we have introduced a third address into
9 the system. We've got the property address, the last
10 known address, we have any proper change of address that
11 was back there in 736.1(b), so I'm okay with last known
12 address, but it's just going to -- could possibly
13 introduce a very different address, because we've got the
14 property address. Maybe the debtor failed to send the
15 proper notices, you know, in terms of the change of
16 address, and now we have last known address. Well, I
17 can't -- you know, I don't know that they have failed to
18 send this proper notices and suddenly have a new address
19 here. That's just an issue. We've got a new address
20 added there on page six.

21 On page eight, line 312, the proof of
22 mailing by certified mail of all notices described in
23 (5-c). If there was a change of address I need to -- I
24 need to know the change of address, too. Otherwise if I'm
25 double-checking this I'm going to see -- I'm going to

1 check to see if it's the property address. Then I've got
2 to check to see to if there was a change of address to
3 double-check where the notices were sent. So if there was
4 an appropriate change of address, it needs to be sent
5 there. If there's no change of address, indicated and
6 they've sent the notices to the last known address that,
7 that's insufficient as best I can tell. I'm not positive,
8 but I think so.

9 Line 322, (5-f), the Servicemember's Civil
10 Relief Act, I would like something in there that it needs
11 to be current, okay, because sometimes these mills, they
12 churn out these civil service -- Civil Relief Act, and it
13 will be three, four, five months old. I would like
14 something that says that it's within 30 days of the date
15 of filing of the petition or something like that, whatever
16 you think would be an appropriate time.

17 CHAIRMAN BABCOCK: Is there anything in the
18 act, in the Serviceman's Civil Relief Act, that requires
19 that?

20 HONORABLE TRACY CHRISTOPHER: Not that I
21 know of, but a lot of us won't accept something that's old
22 just because --

23 CHAIRMAN BABCOCK: Yeah.

24 HONORABLE TRACY CHRISTOPHER: -- at the time
25 we're doing the default, you know, we want to know at the

1 time we're doing the default they're not in the service.
2 We don't want something that says six months ago they
3 weren't in the service.

4 HONORABLE STEPHEN YELENOSKY: But that's
5 true of any default, right?

6 HONORABLE TRACY CHRISTOPHER: Yeah.

7 HONORABLE STEPHEN YELENOSKY: So why would
8 we put it in this rule as opposed --

9 HONORABLE TRACY CHRISTOPHER: Well, because
10 we -- we're being specific. You know, we're being really
11 detailed and specific. I'd like to be specific here so
12 that if it's more than 30 days old, I check it off in my
13 order that tells them what they did wrong.

14 Okay. Last known address issue shows up
15 there in (5-g) again. I mean, we're just throwing around
16 a lot of different addresses at this point.

17 Oh, I did have to laugh about the legibility
18 issue, and that was -- I forgot to mention that one.
19 (5-b) at line 305, page seven. And really my question was
20 does the indexing have to be legible, or does the whole
21 document have to be legible? And I -- I sent you some
22 examples of what we see in terms of the liens and
23 legibility of indexing, so, for example, the first
24 document that I labeled document A involves the Mexia
25 home. Well, I know that's Beverly Kaufman's signature

1 there, but it's not really -- it's not clearly legible.
2 So same thing with this little RP number off to the side.
3 You know, I know that's a -- that's their number, but it's
4 not legible, and, you know, so "clearly legible" is in the
5 eye of the beholder, and I expect it to be really good if
6 it's clearly legible, and just none of the ones that I
7 looked at in the past two weeks were clearly legible. We
8 get --

9 CHAIRMAN BABCOCK: So what do you propose?
10 To change the form to say that it can be a scrawl if it
11 wants to be?

12 HONORABLE TRACY CHRISTOPHER: You know, I'm
13 just presenting it as an issue to you. Okay. That's all.
14 I mean -- I mean, my favorite, of course, is that whenever
15 anything is wrong with anything that gets filed there's a
16 big old stamp that says, "This thing isn't very legible."
17 And it's on almost every single thing that gets filed,
18 "Recorder's memorandum at the time of recordation this
19 instrument was found to be inadequate for the best
20 photographic reproduction." I mean, that is on -- maybe
21 Beverly Kaufman is just really stamp happy, but it is on
22 just about every single lien that I look at.

23 Well, if that's there, it's not clearly
24 legible, you know, in my opinion, so, you know, I'm going
25 to have fun denying these. I'm just -- you know, "clearly

1 legible" strikes me as a whole lot of problems. Anyway.

2 CHAIRMAN BABCOCK: Got it.

3 HONORABLE TRACY CHRISTOPHER: This one here,
4 Exhibit E, was the best where you could not read a single
5 possible word of the whole document. So no matter how
6 much I blew it up, you know, I could make it 200
7 percentage on my computer, and it was not readable or
8 legible. Okay. That was fun, not substantive, but fun,
9 but, you know, it will make my life easy in terms of
10 denying, if that's what we want.

11 Okay. The one that Judge Evans was talking
12 about, most important, 736.13(f), page 24, line 1057.
13 This is where it says, "All matters alleged in the
14 application are prima facie evidence of the truth of the
15 matters asserted," but then it also says, "Within 10 days
16 after the due date for the respondent's response, the
17 court shall sign a default order without hearing." Okay,
18 provided that all the forms are done correctly. All
19 right. And it will require us to actually -- to calendar
20 when the petition is filed and what the due date is and
21 what 10 days after that is.

22 I just think that's extremely unworkable for
23 the district judges that do these. I mean, that's not our
24 business. That's not our job as -- we don't do that now
25 on defaults. We don't -- you know, Monday after 20 days

1 we're not sitting there ready to sign a default order if
2 somebody hasn't answered a case that's in our court. I
3 mean, we wait for somebody to ask us to sign a default,
4 and I'm not saying it has to be anything fancy, but I
5 would like a request for default that says the due date
6 has passed.

7 HONORABLE DAVID EVANS: And motion for
8 default by the attorney says that everything's been done
9 and the 10 days has passed, either that or they -- in the
10 old country practice you just come into court on default
11 and say, "I want to have it," but the lawyer would be
12 there, and the initiative should be upon the applicant
13 here to notify the court that all the prerequisites have
14 now been met on notice and that they're ready for you to
15 rule on default.

16 CHAIRMAN BABCOCK: Tommy, that sounds
17 reasonable. What do you think?

18 MR. BASTIAN: Yeah, I mean, if we can do
19 something like that, that's reasonable. I mean, if that's
20 the triggering mechanism, and there appears to be a
21 triggering mechanism. To speak to a lot of this that
22 Judge Christopher has raised about putting the
23 responsibility on -- responsibility on the judge's
24 shoulders, I'm not sure we looked at it quite that way
25 about that it's the judge's responsibility to go to quite

1 that degree. What we were trying to do was make that
2 whole process self-enforcing --

3 CHAIRMAN BABCOCK: Right.

4 MR. BASTIAN: -- in that the respondent
5 would have in their hands all the evidence they would need
6 if they needed to go file that lawsuit we were talking
7 about because the lender was playing games. That's why
8 all of this is in here, because that's the self-enforcing
9 part. We didn't expect the judge to have to go through,
10 you know, all of that kind of checklist before they would
11 sign a default order, but it has it available there for
12 the person who's really concerned about if the respondent
13 -- that after you see that stuff, because you get served
14 with the application, and you can go through and vet it
15 and see if it was right.

16 HONORABLE DAVID EVANS: If you follow this
17 literally, if (a) says, "The record shows the application
18 and declaration conform to 736.2," I've got to go over and
19 look at the exhibits, which have to be properly numbered,
20 5-a, 5-b, 5-c, and make sure that they're there in that
21 form, in that fashion. That's not simply reading the
22 pleading to see if it states a matter of liability that's
23 either liquidated or unliquidated and that there's a sworn
24 account attached to it. This takes real clerical time and
25 it takes -- my clerk gathers up these on a weekly basis or

1 my court coordinator gathers them up on a weekly basis and
2 mutters my name kindly while she goes through the
3 checklist and hands it to me. This is some work.

4 CHAIRMAN BABCOCK: Yeah. Yeah. Richard.
5 Judge Patterson, did you have your hand up?

6 HONORABLE JAN PATTERSON: Yes.

7 CHAIRMAN BABCOCK: Okay. Judge Patterson
8 and then Richard.

9 HONORABLE JAN PATTERSON: If you added the
10 simple words, "upon request" wouldn't that --

11 HONORABLE DAVID EVANS: That would take it
12 out of our burden to calendar.

13 HONORABLE JAN PATTERSON: Yeah. Because
14 then if they really wanted to expedite and wanted it to be
15 efficient, they would reflect those things in the record,
16 but it seems to me it would trigger the -- be a triggering
17 mechanism, and it could be simple or more, whatever --
18 however --

19 HONORABLE TRACY CHRISTOPHER: I would
20 definitely like more than 10 days. Okay. Like the
21 request for findings of facts and conclusions of law, it
22 gives me 20 days. So request for default order, at least
23 20 days to, you know, get it, pour through it,
24 double-check it, you know, get my little copy of the law,
25 have my five-page checklist. You know, I mean, 10 days,

1 that's tough.

2 CHAIRMAN BABCOCK: It could say "10 days
3 after the due date for the respondent's response the
4 applicant may request the court to sign an order."

5 HONORABLE TRACY CHRISTOPHER: That's fine,
6 but, I mean, I think they wanted to put, you know, our
7 feet to the fire here to make us rule on it.

8 HONORABLE STEPHEN YELENOSKY: Right.

9 HONORABLE TRACY CHRISTOPHER: Which I
10 understand. I'm just asking for 20 days for some of
11 these.

12 CHAIRMAN BABCOCK: "Which shall be ruled on
13 in 20 days."

14 MR. BASTIAN: This provision doesn't have to
15 do with signing the defaults. It is whether you have to
16 have a hearing if nobody has filed a response, because
17 when you started seeing all the foreclosure headlines, all
18 the sudden judges wanted to have a hearing, and the
19 borrower never filed a response and never showed up, and
20 now you had to go through this whole process of having a
21 full-blown hearing, and the borrower still didn't show up.

22 I mean, that's the key to that statute. I
23 mean, this is easy to do. It just imposes a duty on the
24 attorney that when it -- if they haven't filed their
25 default like right now, file your motion.

1 CHAIRMAN BABCOCK: Yeah. Richard.

2 MR. ORSINGER: There's two timetables here
3 that are involved. One is when is the default ripe to be
4 harvested, if you will; and the other one is what length
5 of time does the judge have to rule on the default; and it
6 seems to me like you should say something like "At any
7 time after the due date for the respondent's response when
8 one is not filed, the plaintiff may request," give
9 yourself -- I mean, you should be able to request it the
10 8:00 o'clock a.m. on the day after the response was due
11 and wasn't filed; and then the question is how long does
12 the judge have to respond to that; and in the Rule 296
13 findings, which are the post-judgment findings that Judge
14 Christopher referred to, that timetable is run from the
15 date that the request is filed; and in the old days you
16 used to have to call that to the attention of the judge.
17 Now it's the clerk's duty to call it to the attention of
18 the judge. Sounds like the clerks can accept that
19 responsibility of calling it to the attention, say,
20 "Uh-oh, now I've got a clock running." And so the
21 question is, is it really important whether the judge has
22 10 days or can they have 15 days or can they have 20 days.

23 MR. BASTIAN: It wasn't important on the
24 days.

25 MR. ORSINGER: Well, then we ought to give

1 them, you know, a comfortable amount of time. Of course,
2 the way it is for you guys, don't you have these on a
3 rolling basis? You've got the Monday ones you've got to
4 look at and the Tuesday ones you've to look at or you just
5 look at them once a week or once a month?

6 HONORABLE TRACY CHRISTOPHER: For me, I ask
7 my lawyers to do a notice of submission, so that tells me
8 that they want to proceed with the foreclosure. I mean,
9 the reason why I have 44 cases on my docket right now that
10 are active is some of them will fall back in 2008, and
11 they've never asked me for a default, and usually it's
12 because the people get served with the expedited
13 foreclosure, they finally wake up that they're going to
14 lose their house, they get in touch with the lender, and
15 they start working on it. So, you know, that's why some
16 of these cases that are just sitting here are old because
17 when the lawyer wants the order I say, "Please put it on
18 my submission docket" because we have that in Harris
19 County. So it's 10 days notice, and it's a Monday, and
20 then I rule on it, you know, within the week. You know,
21 other people -- and I do understand what Tommy was saying,
22 that a lot of judges were requiring an oral hearing for a
23 default, which shouldn't have to be done.

24 MR. ORSINGER: Well, is there a deadline
25 right now? Do you have a deadline?

1 HONORABLE TRACY CHRISTOPHER: No.

2 MR. ORSINGER: Okay. So you want a deadline
3 because some judges just never get around to signing it?

4 MR. BASTIAN: We were just trying to have it
5 very specific, laid out, so you could just do it like
6 clockwork. The time wasn't important. It was kind of,
7 again, the self-enforcing mechanism to make the rule work,
8 so whether it was 10 days or 20 days really wouldn't make
9 any difference. Whether you had to send in a motion
10 probably wouldn't make any difference. It is having the
11 clarity for all -- what is there, 482 judges? So that all
12 the judges would do the same thing.

13 Our firm happens to have a matrix. There's
14 482 judges, and we have a matrix of 103 judges that have
15 special requirements on home equities, and the idea was to
16 have something very specific so you didn't have all of
17 those kind of idiosyncrasies by the judge so everybody
18 could have this standard that was very specific and very
19 precise. And sometimes it was kind of arbitrary like on
20 the 10 days. Probably doesn't make any difference whether
21 it's 10, 15, 20 days. Probably easier to do the motion,
22 but the idea is to have it very specific so everybody
23 knows when something is supposed to happen. So, I mean, I
24 think we could accommodate Judge Christopher's, or both
25 judges, Judge Evans, and say, you know, "You, Mr.

1 Applicant, or your attorney has to give the court notice
2 that, oh, the response date is due, it's time for the
3 default."

4 HONORABLE DAVID EVANS: And request entry of
5 the default.

6 MR. BASTIAN: Yeah.

7 HONORABLE DAVID EVANS: All conditions
8 precedent have been met. I mean, that would be the great
9 thing that would be present.

10 MR. BASTIAN: Right. In fact, it almost has
11 that element in here, is because when the lawyer files the
12 application they don't necessarily have to file the
13 default order because the default order is a promulgated
14 form, but what we could do is that applicant has to file
15 at some time the promulgated form for the judge to sign so
16 the judge doesn't have to go create it, and they just sign
17 the form, but that might be it. You send in your
18 promulgated form, you know, so that it matches up with --
19 that in itself would be the notice that the response date
20 has passed and nobody has filed a response.

21 HONORABLE DAVID EVANS: But if you want a
22 clerk to do it -- and Richard's analogy to 296 findings in
23 the old procedure, you put it in there real clearly that
24 you're requesting action under Rule of Civil Procedure and
25 that -- and identify it, and the clerk should give notice,

1 and you get it over to the judge so that they will put it
2 on a calendar, and I DWOP a bunch of these because the
3 applicants do work them out, and I just issue show cause
4 orders of why it shouldn't be DWOPed, and they just go out
5 the door. So a number of these are worked out or lenders
6 decide they don't want to go forward on the property for
7 whatever reason.

8 HONORABLE TRACY CHRISTOPHER: And if we do
9 change that and go back to the process of the lawyer
10 requesting a default, then we might run -- and sending in
11 the order at that point, then we're going to run into the
12 stale Servicemember's Relief Act affidavit, okay, so I'm
13 kind of opposed to having that filed initially with the
14 petition. I'd really rather have a current
15 Servicemember's Relief Act affidavit filed with the
16 default order so that I know at the time they're seeking
17 the default the person's not in the service.

18 MR. BASTIAN: Easy enough.

19 CHAIRMAN BABCOCK: Good. Judge Christopher,
20 do you have any other comments about the --

21 HONORABLE TRACY CHRISTOPHER: Yes.

22 HONORABLE STEPHEN YELENOSKY: Well, can I
23 ask you just about that? If we put in a 30-day period for
24 the court to sign, then the servicemember's affidavit
25 could be as old as 30 days by the time you sign.

1 HONORABLE TRACY CHRISTOPHER: True.

2 HONORABLE STEPHEN YELENOSKY: So that builds
3 in time there, and my predicate question to that is, is
4 the act intended to protect servicemembers if they have
5 defaulted and then been deployed or to protect them
6 against default when they are deployed? And I don't know
7 the statute, but I don't think it's intended to protect
8 somebody who was here, didn't answer, and then two weeks
9 later is deployed, but if it was, then my question is also
10 don't we have a problem by extending the time period
11 that's on the desk?

12 HONORABLE TRACY CHRISTOPHER: Well, but the
13 due date is like 38 days and something. You know, I don't
14 know why we ever did a 38 days, but it's a 38-day when
15 they're supposed to answer, so they're not in default
16 until the 38 days has passed.

17 HONORABLE STEPHEN YELENOSKY: Right.

18 HONORABLE TRACY CHRISTOPHER: Okay. So, I
19 mean, at that point you send in your default order with a
20 current civil servicemember's affidavit. Then I'll be
21 signing it within the next 20 days. Okay. So at the time
22 he defaulted, he didn't answer, he wasn't in the service,
23 so I think that's okay.

24 HONORABLE STEPHEN YELENOSKY: Right, and I
25 guess what I'm saying is it's whether they were in the

1 service up to or proximate to the time of their answer
2 date, not when you happen to -- you know, because suppose
3 they wait and seek a default much later.

4 HONORABLE TRACY CHRISTOPHER: Well, that's a
5 good question.

6 CHAIRMAN BABCOCK: Yeah, Richard.

7 MR. ORSINGER: I'd like to ask a question
8 since I'm not familiar with the numbers here, but have
9 either of you or any of the judges ever had one of these
10 come back where it comes back there truly wasn't notice
11 and someone was thrown out of their house and they didn't
12 find out about the lawsuit until they were thrown out?

13 HONORABLE DAVID EVANS: I've had contested
14 come back. They don't generally come back to your court
15 because, remember, there's no new trial on these items,
16 but they come back. You see them in other lawsuits where
17 they claim --

18 HONORABLE STEPHEN YELENOSKY: Wrongful.

19 HONORABLE DAVID EVANS: Where they attempt
20 to -- and, of course, a lot of people just seek bankruptcy
21 protection, so that's where a lot of it goes, but you do
22 see these come back. Not many, though. I mean, it's rare
23 enough --

24 MR. ORSINGER: I wonder if there are -- are
25 there instances where the lenders are really simply

1 denying these people due process and throwing them out of
2 their home, or are they almost always making the effort to
3 give notice, or can we even know?

4 HONORABLE TRACY CHRISTOPHER: Well, I had
5 one recently, it wasn't an expedited foreclosure, it was a
6 regular foreclosure, where they filed to stop -- they
7 filed for a TRO to stop the foreclosure, and the whole
8 actual notice given was an incredible maze because the
9 attorney who files -- there were like five different
10 entities involved in the giving of notices to the
11 proper -- to the property owner, so you had to like piece
12 together -- there were no certified mail receipts, there
13 were nothing, and no one with personal knowledge to swear,
14 "I actually put in the mail the notice to the guy," so I
15 granted the TRO.

16 Now, whether that's happened in the
17 expedited foreclosures, I don't know. Certainly in the
18 regular foreclosures we get a lot of tales of -- because
19 these mortgages, they go from hand to hand to hand to hand
20 to hand; and, you know, the property owners will get their
21 little coupon books; and, you know, some of them will say,
22 "I've been sending them according the coupon book." Well,
23 then, you know, the person you're sending it to has since
24 sold the mortgage three or four times down the road; and
25 the person down at the very end says, "Well, you haven't

1 been paying me." Well, I've been paying mortgage company
2 No. 1, so, I mean, there are issues. A lot of them
3 they're just not paying, but there are some.

4 HONORABLE DAVID EVANS: We see a number of
5 pro se people appear. They'll file a response. They come
6 in, and they want to talk to somebody about trying to work
7 out the debt, and I want to say that the people that
8 represent the lenders always work with them, never push on
9 the rule to take advantage of them, but we see a fair
10 number of -- I see a fair number of pro ses who file
11 responses, and they claim they can't find somebody to talk
12 to about working out the debt.

13 CHAIRMAN BABCOCK: Okay.

14 HONORABLE DAVID EVANS: Now, that's not the
15 default we've been visiting about, but there's a number of
16 them come in.

17 CHAIRMAN BABCOCK: Judge Christopher, what
18 else? What other comments do you have about the rule?

19 HONORABLE TRACY CHRISTOPHER: 736.15, the
20 order, this is just I'm supposed to provide a reason why I
21 denied the application, which is fine, but can I just do
22 one reason, or do I have to do all 20 on my checklist?
23 That's all I'm asking. Because I don't want to be -- I
24 mean, I know the understanding behind this is I'm supposed
25 to tell them what they did wrong so they can refile and

1 correct it.

2 CHAIRMAN BABCOCK: Right.

3 HONORABLE TRACY CHRISTOPHER: But, I mean,
4 really, I start going down the checklist and I find one
5 thing wrong, can't I just stop, deny, and say, "Try
6 again"?

7 CHAIRMAN BABCOCK: Well, the counter to that
8 would be if you've spotted 10 things --

9 HONORABLE TRACY CHRISTOPHER: No, I'm going
10 to stop at the first one I come to --

11 CHAIRMAN BABCOCK: Oh, okay.

12 HONORABLE TRACY CHRISTOPHER: -- that's
13 wrong.

14 CHAIRMAN BABCOCK: Gotcha.

15 HONORABLE STEPHEN YELENOSKY: Tommy would
16 say --

17 MR. ORSINGER: But you get 10 more or nine
18 more.

19 HONORABLE TRACY CHRISTOPHER: Right.

20 MR. BASTIAN: Again, I have to be real
21 careful, but if you find something like that, you ought to
22 deny it because until you start denying some of these
23 things and making it somebody accountable when they file
24 it and do it right, then all you're going to get is slop.

25 HONORABLE STEPHEN YELENOSKY: That's what I

1 thought you would say, and it's not our obligation to say,
2 "Oh, and here are the other nine that you're going to need
3 to correct." They could come through another nine times
4 and tough to them.

5 HONORABLE TRACY CHRISTOPHER: Okay.

6 MR. BASTIAN: I guarantee because the way
7 the mortgage industry is set up, when that lawyer files
8 one of these and gets denied, that lender is going to be
9 on his back or her back, and they will be taking all sorts
10 of flak, and I guarantee the next time they file one of
11 those things they're going to have their act together
12 because they really can't get around it because the way
13 the application is set up they've got to have all their
14 ducks in the row.

15 CHAIRMAN BABCOCK: Yeah.

16 MR. BASTIAN: I mean, it tries to make it
17 self-enforcing so that all the ducks are in the row and
18 then if the judge denies it and then they have to come
19 back to the court the second time or third time, that
20 lender client is not going to be hiring that law firm
21 anymore, again the self-enforcing part of it. This rule
22 was designed kind of as a practical behind-the-scenes to
23 make this thing work.

24 CHAIRMAN BABCOCK: Judge Christopher, next.

25 HONORABLE TRACY CHRISTOPHER: 736.18, abate

1 and dismiss.

2 HONORABLE DAVID PEEPLES: What page?

3 HONORABLE TRACY CHRISTOPHER: Page 26.

4 Although I understand this is what the rule is now, is
5 there any real reason to abate and dismiss? I mean, can't
6 we just dismiss?

7 CHAIRMAN BABCOCK: As opposed to abate?

8 HONORABLE TRACY CHRISTOPHER: Yeah, abate
9 and dismiss. I mean, just dismiss. That's my suggestion
10 on that while we're making changes.

11 CHAIRMAN BABCOCK: Sounds like a movie.

12 HONORABLE STEPHEN YELENOSKY: The only thing
13 I would say on that is dismissal, the way I saw that is
14 it's automatically abated without an order of the court.
15 Dismissal is the order of the court that would be signed.

16 HONORABLE TRACY CHRISTOPHER: Okay. 736.19,
17 the automatically vacated and voiding of an order. I'm a
18 little worried with that, although I understand the
19 process behind it and the idea behind it, that it's a good
20 thing, but first of all, there is nothing in my file that
21 shows when the property is posted for foreclosure. All
22 right. Because if you look back in my order, my order
23 just says you're allowed to post for foreclosure. All
24 right. The actual posting of foreclosure never gets back
25 in my file in connection with this procedure, so there's

1 really absolutely no way for anyone to know whether the
2 filing of the separate lawsuit or the notice in my
3 application, that the timetable was met, because the
4 actual date of the foreclosure is nowhere in my file.

5 HONORABLE STEPHEN YELENOSKY: But if you
6 have the order in there and then you have the filing of
7 the lawsuit, one of two things happens, I think, just
8 thinking out loud. It either voids that order by
9 operation of this rule, or it's moot because they already
10 foreclosed before it was filed.

11 HONORABLE TRACY CHRISTOPHER: Well, I think
12 it could cause problems. Because there's nothing from the
13 face of my file that indicates when the foreclosure
14 happened, and I mean, I --

15 HONORABLE STEPHEN YELENOSKY: When it
16 happened or when it's scheduled.

17 HONORABLE TRACY CHRISTOPHER: When it
18 happened or when it's scheduled for, and I just think it's
19 going to cloud people's titles perhaps with this automatic
20 voiding and a missing date.

21 HONORABLE STEPHEN YELENOSKY: Well, again,
22 if the foreclosure has happened then there will eventually
23 be documents showing that that happened before the lawsuit
24 gets filed because -- and they only happen once a month,
25 right?

1 MR. BASTIAN: That's exactly right. Once a
2 month.

3 HONORABLE STEPHEN YELENOSKY: So there would
4 be a document eventually saying, "Well, that happened last
5 month or two or three months ago," and so the filing of
6 this suit under this rule couldn't have been effective
7 because it didn't happen by 5:00 p.m. before that
8 foreclosure that's already happened. The other
9 possibility is the foreclosure hadn't happened yet, in
10 which case there won't be anything except looking forward
11 to the possibility of a foreclosure, and there shouldn't
12 be any foreclosure. I don't see where it's going to cloud
13 title except when it should.

14 MR. BASTIAN: Plus these orders are only
15 good for 180 days, so that cuts out that staleness where
16 something is sitting here forever and ever.

17 CHAIRMAN BABCOCK: Judge Evans.

18 HONORABLE DAVID EVANS: To void the order
19 granting the right to foreclose all the homeowner has to
20 do is file suit and give the notice, then go nonsuit the
21 second lawsuit, and put the lender in the process of
22 refiling.

23 "Void and automatically vacated," just as a
24 separate matter, if something is void, it's void, and
25 automatically vacated, I don't do anything automatically.

1 Do you mean that I'm going to sign something
2 automatically? It's this nonsuit problem that we have on
3 final judgments right now. If somebody takes a nonsuit
4 against a party during the middle of a lawsuit and you
5 move on to verdict and you sign the judgment and you don't
6 include the magic language that the nonsuit was granted,
7 which you can't grant anyway, we now get a note back that
8 we don't have a final judgment, and then I've got to sign
9 an order of nonsuit.

10 HONORABLE TRACY CHRISTOPHER: I mean, this
11 is --

12 HONORABLE DAVID EVANS: But, I mean, these
13 orders like this one on 736.19 about automatically vacated
14 and dismissed just don't happen. They've got to be
15 submitted and requested.

16 HONORABLE STEPHEN YELENOSKY: Well, I think
17 that's right. I don't think anything is really added by
18 "automatically vacated." That came from the task force,
19 and I think it says -- and we carried it forward, but "is
20 void" I think does everything that can be done and nothing
21 less, so I'm not wedded to that.

22 HONORABLE DAVID EVANS: But just remember,
23 the borrower is going to game you because all they've got
24 to do now is file the lawsuit, put the notice in the file,
25 and the order of foreclosure is void.

1 HONORABLE STEPHEN YELENOSKY: Well, but they
2 can game now by doing the same thing before the order is
3 signed.

4 HONORABLE DAVID EVANS: I understand, but
5 this is better. This is like filing multiple
6 bankruptcies. If you want it, you got it. They'll just
7 refile it. They'll just have to refile it.

8 HONORABLE STEPHEN YELENOSKY: Well, Tommy is
9 the one that will suffer that. You worried about that?

10 MR. BASTIAN: Well, I don't care what we do
11 or what anybody does, it can be gamed. There's going to
12 be somebody that's going to figure it out. But in
13 essence, when somebody has to go file that lawsuit that
14 respondent has to go through the hassle of getting a
15 lawyer or doing it pro se and pay some money, that almost
16 self-enforces that that's not going to happen. They're
17 not going to do that unless they're a real con artist, and
18 the real con artist, you're going to be dealing with them
19 whether it's this or something else.

20 CHAIRMAN BABCOCK: Judge Christopher, do you
21 have any other comments about that?

22 HONORABLE TRACY CHRISTOPHER: That's it.

23 CHAIRMAN BABCOCK: That's terrific insight
24 into this. I had a question, Judge Yelenosky --

25 HONORABLE STEPHEN YELENOSKY: Yeah.

1 CHAIRMAN BABCOCK: -- about 736.19, the last
2 paragraph about monetary sanctions.

3 HONORABLE STEPHEN YELENOSKY: Yes, and
4 that's one where Tommy has a suggestion, but go ahead.
5 What's your --

6 CHAIRMAN BABCOCK: Well, if he's got a
7 suggestion it's probably better than mine.

8 HONORABLE STEPHEN YELENOSKY: Well, I don't
9 know, your problem may be different than his.

10 CHAIRMAN BABCOCK: Well, when you say
11 "monetary sanctions" is that the type of sanctions that we
12 think about for discovery abuse under the civil rules, or
13 is it damage kind of sanctions, or what is meant by
14 "monetary sanctions" there?

15 HONORABLE STEPHEN YELENOSKY: Well, first,
16 quickly, his proposal was "sanctions to include monetary
17 sanctions" because Tommy doesn't want it limited to
18 monetary sanctions, but the idea was, you know, we had
19 this whole debate, I should just turn to Pete and say,
20 "What does it mean, Pete, on sanctions?" It wasn't
21 intended to be compensatory. It was intended to be
22 sanctions within the meaning of "directed to deter
23 behavior and proportionate to the behavior," that
24 standard. That's all I was thinking of.

25 CHAIRMAN BABCOCK: Well, who gets the money

1 if it's money?

2 HONORABLE STEPHEN YELENOSKY: Yeah, the
3 other side. The other side gets it.

4 CHAIRMAN BABCOCK: The other side?

5 HONORABLE STEPHEN YELENOSKY: Yeah. Yeah.
6 That's right.

7 CHAIRMAN BABCOCK: Tommy.

8 MR. BASTIAN: The reason I suggested just
9 "sanctions to include monetary sanctions," because the
10 people that would abuse this, they don't have any money to
11 begin with, so having a monetary sanction is not going to
12 do any good. The people that are going to abuse this are
13 going to be the Republic of Texas type folks, and in that
14 particular case where the judge could come in and see a
15 real abuse that they could threaten to put somebody in
16 jail or something like that, because monetary sanctions in
17 the real world really isn't going to work because they're
18 judgment proof.

19 CHAIRMAN BABCOCK: Okay. And, again, this
20 would be sanctions -- the derivation of the sanctions
21 would be under the Rules of Civil Procedure, or would it
22 be inherent authority or what would it --

23 HONORABLE STEPHEN YELENOSKY: I don't know
24 the answer to that, but it's one or the other. It's
25 nothing more than that, and although the sanction money

1 would go to the other side, it's not compensatory. I
2 mean, we have sanctions now that go to the other side, but
3 they're not compensatory.

4 CHAIRMAN BABCOCK: Okay.

5 MR. BASTIAN: This is trying to prevent the
6 gamesmanship.

7 CHAIRMAN BABCOCK: Right. Right. Okay.
8 Well, yeah, Jeff.

9 MR. BOYD: I just had a question. When I
10 first read new .18 and .19, I read that to be changing the
11 previous version by basically saying because we're no
12 longer going to require actual notice prior to the sale.
13 You just have to make a good faith effort to give notice,
14 and what that raises in my mind is the question -- I'm
15 imagining a scenario where there's a sale tomorrow
16 morning. I'm representing the lender. The borrower files
17 another lawsuit in another venue, files the necessary
18 notice with the court, sends it by -- makes a good faith
19 effort, but I don't get it.

20 HONORABLE STEPHEN YELENOSKY: Right.

21 MR. BOYD: I'm going to go forward with the
22 sale tomorrow.

23 HONORABLE STEPHEN YELENOSKY: Right.

24 MR. BOYD: What happens now?

25 HONORABLE STEPHEN YELENOSKY: Yeah, you

1 clearly have a problem -- I know the task force wrestled
2 with this. We wrestled with it somewhat. Let me back up
3 a little bit. If it's before an order's signed, it's
4 clear under the rule that when you file something it's
5 automatically abated and shall be dismissed --

6 MR. BOYD: And the order won't get signed.

7 HONORABLE STEPHEN YELENOSKY: -- and with a
8 notice or whatever, so we start from that. With the
9 order, one of the problems I had with saying it's void if
10 they get actual notice is you can't tell from the record
11 whether it's void. The way it's written here you can tell
12 by comparing -- although your point about you don't know
13 when it's set for foreclosure, that aside, but you can
14 tell when the order was signed and when the lawsuit was
15 filed, and they're in the same case file, presumably right
16 next to one another. You can look at the two and tell if
17 it's void as opposed to having a factual issue where they
18 -- did they get actual notice, determining whether or not
19 an order is void, but, Tommy, you can have that situation,
20 right?

21 MR. BASTIAN: That's exactly right. And,
22 really, that's why we said the order is void if they file
23 it. I mean, it's void. But we were also trying to track
24 on so you stop the gamesmanship, because what happens is
25 that order is void, nobody told the trustee. They had the

1 opportunity to tell the trustee. The trustee went on and
2 conducted the sale. Now you have a third party buyer that
3 came in and bought it. The third buyer wants specific
4 performance and everybody's gotten sued. So this was in
5 there basically to put kind of a gun to the head as much
6 as you could to the respondent that you've got to stop
7 that foreclosure sale. You've got to get your lawsuit
8 filed by 5:00 p.m. on Monday. These sales start at 10:00
9 o'clock on Tuesday. It's always the first Tuesday, so you
10 have that time frame where you can go track down that
11 trustee and stop the sale to keep the other stuff from
12 blowing up.

13 HONORABLE STEPHEN YELENOSKY: But his
14 question is you've tried in good faith, but you failed,
15 the foreclosure is done to some third party without
16 knowledge. What happens?

17 MR. BASTIAN: What happens is you're going
18 to have the lawsuit, and somebody is going to come in and
19 say the order was void under this rule. The foreclosure
20 should have never taken place. You've got a specific -- I
21 mean, you're going to have the specific performance fight.
22 I don't know what the answer is. That's why we were
23 trying to put some kind of pressure on the respondent who
24 controls that situation where you maybe as the judge could
25 say, "Okay, you didn't in good faith try to do that. I'm

1 going to do something to you." Because what happens is in
2 the industry it kind of filters down that Judge
3 Christopher is going to enforce that if you play games,
4 and it doesn't happen -- it happens once and maybe twice
5 and then it doesn't happen again.

6 MR. BOYD: But I read this, at least as far
7 as .19 is concerned, to be relieving the pressure off the
8 respondent rather than putting pressure, because as it is
9 in the original version, it only voids the order if you
10 actually effect notice before 5:00 p.m. on Monday.

11 HONORABLE STEPHEN YELENOSKY: That's right.

12 MR. BOYD: If you try to and aren't
13 successful, sorry, but the order is not void, and now
14 you're saying, well, let's change it to just say all
15 you've got to do is make a good faith effort, and if it
16 doesn't work well -- I mean, it sounds like we're inviting
17 all those lawsuits by taking that pressure off.

18 MR. BASTIAN: We don't want to take the
19 pressure off. If that's the way it's interpreted, we
20 don't want to take the pressure off the respondent to try
21 to stop that sale if they filed the lawsuit, so maybe it
22 needs to be redrafted a little bit. That's the point. I
23 mean, that provision, that number provision about good
24 faith is trying to prevent a foreclosure sale from going
25 forward. The only person that can control that is the

1 respondent. We need some kind of mechanism, whatever that
2 mechanism is, to make sure that they get to the trustee or
3 the attorney for the other side to say, "I filed this
4 lawsuit, don't go forward," so you have the consequences
5 of a bad sale.

6 MR. BOYD: But if you'll look at page 26,
7 line 1158, if I'm looking at the same thing you are,
8 that's the original proposed version, I guess --

9 MR. BASTIAN: Yes.

10 MR. BOYD: -- that says it's void only if
11 you file a separate suit and you "deliver a copy to the
12 trustee, substitute trustee, or attorney by hand-delivery,
13 courier, fax, e-mail, or other" -- there's actual service.

14 HONORABLE STEPHEN YELENOSKY: Or actual
15 notice.

16 MR. BOYD: Actual notice -- well, yeah,
17 actual notice.

18 HONORABLE STEPHEN YELENOSKY: Because
19 e-mail --

20 MR. BOYD: And unless you actually deliver
21 the copy by one of those methods, the order is not void,
22 but then if we skip down to the next page, 27 --

23 HONORABLE STEPHEN YELENOSKY: No, you're
24 correct, it's different.

25 MR. BOYD: -- it looks like you're relaxing

1 that --

2 HONORABLE STEPHEN YELENOSKY: It is.

3 MR. BOYD: -- to say, well, you don't have
4 to give actual notice. You just have to make a good faith
5 effort to and that will void it, which seems to me to be
6 inviting those lawsuits, those specific performance.

7 HONORABLE STEPHEN YELENOSKY: Well, you're
8 right that it does from that version to this version relax
9 it, and some may prefer going back to the other. Part of
10 my problem with the other was having an order voided by
11 something that is clearly -- is going to require a factual
12 determination, did they get notice beforehand or not.

13 Tommy had also said that -- and correct me
14 if I'm wrong, Tommy -- you and others representing
15 mortgage holders had always felt if a lawsuit were filed,
16 that stopped everything if you found out about it before
17 the order.

18 MR. BASTIAN: That was the theory.

19 HONORABLE STEPHEN YELENOSKY: And there was
20 some question at least what the law was -- despite the
21 rule, what the law was as to the effect of filing an
22 affirmative suit before the foreclosure but after the
23 order.

24 MR. BASTIAN: Yes. It was a little bit
25 ambiguous in the old rule about -- the way the old rule

1 was written is that -- I've got to sit back here and
2 think.

3 HONORABLE STEPHEN YELENOSKY: We'll get it
4 for you.

5 MR. BASTIAN: It was void only if the order
6 had been signed. What we were trying to do is make sure
7 that it went back to the way foreclosure has always been.
8 If you have a complaint about the foreclosure process, you
9 can go file your lawsuit, and you don't have to get
10 embroiled in whether you've lost your house in eviction or
11 something like that. That's what we were trying to --
12 that's the way we were writing the rule, that that is the
13 way to stop your house from being sold at the courthouse
14 steps on Tuesday, starting at 10:00 o'clock. If you filed
15 that lawsuit like you could have always done in the past,
16 that would stop the foreclosure, and, oh, by the way, if
17 you did that you didn't have to go get a TRO. It was just
18 a matter of filing the lawsuit. That was kind of the quid
19 pro quo going back and forth, the lawsuit.

20 But, again, what we were trying to do was
21 make sure that pressure was put on the respondent, who
22 control filing that lawsuit, to get it to the trustee to
23 stop the foreclosure sale so that you wouldn't have all of
24 these specific performance, and I guarantee you the
25 foreclosure hounds, is what they're called, they get a

1 property that they think they're going to get 100,000 or
2 \$125,000 then you're going to have a lawsuit on your
3 hands.

4 HONORABLE STEPHEN YELENOSKY: Well, the
5 other part about the 5:00 o'clock cut-off is it at least
6 enables the foreclosing party on the morning of the
7 foreclosure sale, if they are concerned about it, to check
8 and see if a lawsuit was filed by 5:00 o'clock the day
9 before, assuming they can get to the file. They'd have to
10 be proactive about that, but --

11 MR. BOYD: If the notice was filed.

12 HONORABLE STEPHEN YELENOSKY: But it is a
13 policy question as to whether you require actual notice.
14 It does require that it be filed, and to the extent on
15 Tuesday morning you have access to everything that was
16 filed by 5:00 o'clock the day before, you as the
17 foreclosing party can determine whether you can go forward
18 or not.

19 MR. BOYD: Yeah.

20 MR. BASTIAN: But that kind of has its
21 flaws, too, because a lot of times that lawsuit may not
22 have been filed in your county. I mean, a lot of times if
23 it was filed in -- it may be filed in another county. I
24 mean, we kind of had to write this rule that it was -- it
25 was the 80 -- 90/10 rule, that it covered 90 percent of

1 the situations, and if it was an aberration then the judge
2 and the lawyers were just going to have to handle it.
3 That's the way this rule was written. It wasn't written
4 to cover every aberration and every circumstance. It was
5 trying to be a general rule that all of these cases that
6 come through the pipeline -- I mean, she told you how many
7 cases are being filed in her court. I mean, there's a lot
8 of them, and we don't want to have the court system
9 clogged up if you can get 90 percent of those things out
10 where you don't have to worry about it. Then you can
11 focus on that 10 percent in the situation you're talking
12 about. Frankly, I really liked the way the old rule was
13 written that says, "You, Mr. Respondent, have to get
14 something to the trustee or the lender's attorney that
15 says it was filed" because then that stops the
16 gamesmanship, too. That's what we were trying to do, is
17 stop the gamesmanship. I mean, it's probably a
18 combination of both. I mean, that's an example where we
19 could rewrite it maybe.

20 MR. BOYD: Well, I like the prior version,
21 too, and would recommend that change back for at least .19
22 because, number one, you're basically talking about a
23 party that's trying to stop something that's already in
24 the works about to happen because of a court order, and I
25 don't -- it doesn't make sense to me to then put it on the

1 burden of the other party to go make sure you check the
2 filings and see if anything got filed. I mean, if you're
3 going to file something and take those steps then you need
4 to take the final step.

5 But, number two, you are now allowing for
6 the possibility that a party would go forward with a
7 foreclosure sale under a void order, and yet they have no
8 idea that that order is void.

9 HONORABLE STEPHEN YELENOSKY: Right, that's
10 possible.

11 MR. BOYD: You're allowing for that. Number
12 three, you're creating all these issues about what is and
13 isn't good faith and how do you handle sanctions and it
14 seems to me the cleanest way to do it is to say you give
15 actual notice by 5:00 or the order is not void, and so I
16 would think you would just delete that last paragraph
17 about good faith, add a new subsection (3), and bring down
18 the language from the original rule that you took out, the
19 subsection (2) about the third element required, the third
20 step required, is actual notice.

21 HONORABLE STEPHEN YELENOSKY: Well, would it
22 be actual notice by 5:00 or actual notice prior to the
23 sale?

24 MR. BOYD: Well, as written it says by 5:00,
25 "If no later than 5:00 p.m. the Monday prior to the posted

1 foreclosure sale date the respondent," colon, "(1), (2),
2 and (3)."

3 HONORABLE STEPHEN YELENOSKY: Right. Which
4 means then that you effectively don't have until 5:00
5 because you've got to get them served by 5:00, or you've
6 got to get them noticed by 5:00.

7 MR. BASTIAN: For whatever it's worth, we
8 probably spent four hours going around whether it should
9 be Monday at 5:00 p.m. or should it have been the Friday
10 before. That kind of just shows you we tried to move it
11 up as far as we could but still take care of that
12 situation that, okay -- because what really happens in the
13 real world, everybody waits until the last minute.

14 MR. BOYD: But the other thing you do, is
15 your lender --

16 MR. BASTIAN: Absolutely.

17 MR. BOYD: -- up in Dallas sends their
18 substitute trustee on the road at 6:30 a.m. --

19 MR. BASTIAN: That's exactly right.

20 MR. BOYD: -- to get here and you wait, and
21 so I would say 5:00 p.m. the day before.

22 CHAIRMAN BABCOCK: Okay. Judge Christopher
23 has got the last comment, and then we're going to take our
24 afternoon break because our court reporter's fingers are
25 about to fall off. Judge Christopher.

1 HONORABLE TRACY CHRISTOPHER: I definitely
2 agree that the respondent needs to give notice, because in
3 a normal stopping of foreclosure somebody runs in on
4 Monday or runs in on Tuesday morning and gets a TRO from
5 me, they've got to go find that trustee to stop it --

6 MR. BOYD: Right.

7 HONORABLE TRACY CHRISTOPHER: -- and, you
8 know, tag them with it or it's not good, and this just
9 strikes me as leaving all sorts of problems if notice is
10 not required before.

11 CHAIRMAN BABCOCK: Okay. We're going to
12 take our afternoon break, and when we come back -- hold on
13 for a second, though. When we come back we're going to
14 talk about recusal. We're flipping Item 8 before Item 7,
15 for reasons -- for good and sufficient reasons. The
16 second thing is there is confusion that is my fault about
17 when our next meeting is. It is November 20 and 21 here,
18 not November 13th and 14th. So it's the 20th and the 21st
19 of November, not the prior week, and it will be at the
20 TAB, and now we're on our afternoon break. Thanks.

21 (Recess from 3:47 p.m. to 4:04 p.m.)

22 CHAIRMAN BABCOCK: We're back, talking about
23 recusal, and this is a topic, if those veterans of the
24 Supreme Court Advisory Committee will recall, that eight
25 or nine or maybe ten years ago we went through recusal and

1 disqualification at some length and some detail and sent a
2 proposal to the Court that was not acted upon because at
3 some point in time *Republican Party of Minnesota vs. White*
4 came along, which convinced people that maybe the recusal
5 rules needed to take that into account, and now we have
6 the Caperton decision involving campaign finance, which we
7 tried to anticipate in our proposals or our
8 recommendations last time, and the ever-present -- the
9 omnipresent recodification draft had some thoughts about
10 recusal. So pulling all this together is the -- one of
11 the oldest veterans of this committee, Richard Orsinger,
12 and he's going to lead our way out of the maze.

13 MR. ORSINGER: Okay. The assignment was
14 actually a narrow assignment to consider the situation of
15 our recusal rule under the Supreme Court decision in
16 *Caperton vs. Massey Coal Company* that found that there was
17 a 14th Amendment requirement that a justice on the West
18 Virginia court of appeals recuse himself; but in the
19 ensuing discussions and analysis it was apparent that we
20 needed to kind of recapitulate what this committee has
21 done before, to have that context in our present
22 discussions.

23 And as Chip pointed out, the prior work on
24 the committee was scattered in time and space; and it took
25 the effort of a lot of people to reconstruct this, but

1 basically, there's a memo, like 65-page memo, that gathers
2 together these constituent parts to put them together to
3 make it easy to analyze; and I'm going to go through the
4 introduction by going through the memo and telling you
5 what's there. Some of you may have read it. I'm sure
6 most of you have not, and I'm going to try to cut the
7 explanation short just so we can start hearing some
8 comment, but the very first thing to look at is the
9 present grounds for recusal, which are cited there on page
10 four, and then the so-called recodification draft, which
11 was a multiyear effort on the part of the subcommittee led
12 by Professor Dorsaneo and with the participation of Chief
13 Justice Guittard and others that were on the committee at
14 that time, to restructure the rules in a more rational way
15 and to use modernized language and to be more accurate
16 about what the rules said.

17 And, for example, those of us who have
18 studied it, or maybe those of you who have not, know that
19 disqualification is a condition that exists under the
20 Texas Constitution, but recusal are grounds that exist
21 under case law, statute, or rule, and they actually do
22 different things, and they do them differently, and our
23 existing rule mixed them up a little bit. You know, a
24 disqualification under Supreme Court interpretations, the
25 Constitution's listing of grounds is complete and

1 exclusive, can't add to, can't take from, an act by a
2 disqualified judge is void. None of that's true with
3 recusals. Recusals are something that you have to ask for
4 or you waive. The things that the judge does up to the
5 point that they're recused are not necessarily invalid,
6 and so there are differences.

7 So the recodification draft broke a few that
8 were combined -- a few grounds for recusal that were
9 combined and should have been stated separately,
10 reoriented a few, and made clear that certain grounds were
11 disqualification grounds and others were recusal grounds.
12 I lay that out there just because a lot of hard work for
13 good people were put into that.

14 Then on item 3 are the suggestions that this
15 committee made in 2001, so that was eight years ago, but
16 the process began before that, so it's probably been at
17 least two, maybe three committee cycles since we evaluated
18 that, and if you'll look on page five you'll see what this
19 committee eventually ended up doing, and I have attached
20 as an exhibit the actual technical document that was sent,
21 but the bottom line is, at the time the committee was
22 concerned about two things, about recusing a judge where
23 the opposing lawyer or his law firm was representing the
24 judge, a judge's spouse, or a judge's child in current
25 litigation, other than in their capacity as a public

1 attorney, like a district attorney or something, attorney
2 general.

3 And just to recapitulate the long
4 discussion, I think this recommendation came from a task
5 force that if the lawyer on the other side was close
6 enough to the judge that they were representing their
7 family in personal litigation, that it would be better if
8 the judge didn't hear cases while that representation was
9 going on. That language was fought over, it was voted
10 over, it was included in the recommendation, and it went
11 to the Supreme Court back in 2001.

12 The other subject had to do with excess
13 campaign contributions, and it was a way to codify, only
14 it was in a rule, the Judicial Campaign Fairness Act,
15 which had been enacted by the Texas Legislature, that said
16 specific cash limitations on -- or I should say specific
17 dollar limitations on the amount of contributions that
18 could be made to judicial campaigns, and I am not an
19 expert in that, and I do think that experts are necessary
20 if you're going to get into the real details of it, so if
21 I say something wrong, I apologize, if someone here knows
22 better, but the Judicial Campaign Fairness Act essentially
23 caps the contributions that individual lawyers or their
24 law firms or close members of their family can make to
25 specific campaigns, and it also attempts to have

1 aggregation rules for members of a law firm, and it also
2 attempts to control political action committees that are
3 affiliated with law firms in an effort to try to put some
4 restraint on the amount of money that individuals or a
5 particular law firm can put into a judicial race.

6 Now, I wasn't particularly able to discern
7 any serious enforcement mechanism built into the statute,
8 and when we were first -- originally, I should say,
9 debating this recusal rule, some of what I heard or maybe
10 the committee heard publicly was from members of the House
11 of Representatives, saying that "Wait a minute, I voted
12 for these caps because there was no serious enforcement
13 mechanism, and now you guys are coming in and you're
14 saying that you can recuse somebody for violating these,
15 and I would have never voted for them in the first place."
16 So it was obvious that we had gotten into a political
17 issue there, but at any rate, what this committee did at
18 the time was to propose that there would be a specific
19 ground of recusal if a judge accepted a campaign
20 contribution in excess of what the Judicial Campaign
21 Fairness Act permitted and did not return the excess
22 contribution as provided in the statute.

23 And the statute has a mechanism that, gosh,
24 you know, judges will not know, they get their
25 contributions in different reporting periods. They won't

1 necessarily know that someone has overcontributed, and
2 they find out, and they have a grace period to return the
3 money, and it's no harm, no foul, and that was built into
4 the recusal rule, but the bottom line was that the statute
5 has a specific monetary limit, it's a bright line, and
6 under this proposed rule if you cross the bright line,
7 what happened was that anybody on the other side of you
8 could recuse the judge in a case involving you or your law
9 firm for the remainder of that judicial term that the
10 contribution related to. So that's a very severe
11 disincentive to making contributions in excess of the
12 statutory limit.

13 The other enforcement mechanism, which I
14 want to thank Bob Pemberton for reminding me about this
15 morning, is on the very last -- page 68 of this packet, is
16 Canon 5 of the Texas Code of Judicial Conduct about
17 inappropriate political activity, and subdivision (4) of
18 that canon says, "A judge or judicial candidate subject to
19 the Judicial Campaign Fairness Act shall not knowingly
20 commit an act for which he or she knows the act imposes a
21 penalty. Contributions returned in accordance with
22 section 253," so-and-so, "of the act are not a violation
23 of this paragraph." So it appears to me -- and Justice
24 Hecht or others whose memory or awareness is better than
25 mine -- that this was an effort to say that a judge who

1 accepted a political contribution in excess of the
2 statutory caps could be subject to sanction from the
3 Judicial Conduct Commission. Did I say that right, Judge?

4 HONORABLE NATHAN HECHT: Yes.

5 MR. ORSINGER: Okay. So we've got a
6 statutory limit. It is a bright line. We have the
7 Supreme Court adopting a Code of Judicial Conduct that
8 says a judge can be anywhere from private reprimand all
9 the way up for taking and keeping contributions in excess
10 of the statutory limit, and we had a recommendation from
11 this committee that if that limit was exceeded that it
12 would be grounds for recusal, not some subjective issue or
13 some debate over how much is too much or how much is
14 overwhelming. It was a bright line. If you're a dollar
15 over that, they're recused. That was where we were in
16 2001. At the time the campaign limitations were new, the
17 limits, the constitutional limits, on controlling spending
18 were kind of in flux, and it's my understanding the
19 Supreme Court decided not to take action on those rule
20 recommendations at that time.

21 Much time has passed, we've had a number of
22 campaigns under the statute. We've had some more
23 constitutional litigation. Unfortunately there is some
24 right now in the U.S. Supreme Court. There is some
25 constitutional litigation on spending in campaigns

1 involving the notorious or infamous film about Hillary
2 Clinton and whatnot, and we'll probably get some more U.S.
3 Supreme Court wisdom on the degree to which the government
4 can attempt to limit the amount of money that's spent on
5 campaigns. Be that as it may, we've already made a
6 recommendation one time that contained a bright line.

7 Now then, when we come along, the ABA model
8 Code of Judicial Conduct came out in 2002 -- 2007, and
9 you'll see that on page seven, paragraph 10, regarding
10 contributions; and mind you, the ABA is operating in an
11 environment of some states that don't have any articulated
12 standards for recusal. Some states have statutory
13 standards for recusal, and a number of states have adopted
14 their Code of Judicial Conduct as a more or less
15 approximation of when recusal is appropriate, and the
16 component of that relating to the campaign, you'll see
17 there at the bottom of page seven, this 2007 model code
18 says that a judge should disqualify -- we would use the
19 word "recusal" here in Texas because of our constitutional
20 concept of disqualification, judge shall recuse any time
21 the judge's impartiality might be questioned. We already
22 say "might reasonably be questioned," and they list a
23 number of circumstances, and they include No. (4), "When
24 the judge knows or learns by means of a timely motion that
25 a party, party's lawyer, or law firm of the party's lawyer

1 has within the previous" -- and then you insert a number
2 of years -- "made aggregate contributions to the judge's
3 campaign in an amount that is greater than" and you insert
4 a dollar amount.

5 So the ABA recommendation, which is attached
6 as Exhibit 6, which is on page -- my exhibit numbers got
7 dropped off the left. ABA model code is on page 44.
8 They're actually out there as a model for the whole
9 country suggesting a bright line test -- look on page 44,
10 Carl.

11 HONORABLE JAN PATTERSON: 43.

12 MR. RODRIGUEZ: 43.

13 MR. ORSINGER: 43? I apologize, look on
14 page 43. And they're proposing a bright line test. In
15 Texas we already have kind of a generic statement, two
16 actually. We have a so-called subjective test and we have
17 an objective test. The subjective test is recusal when
18 the judge has a personal bias or prejudice concerning the
19 subject matter of the party, and that is a standard that
20 involves this particular judge and how they actually think
21 and feel. So if you're litigating recusal under that
22 ground, you're talking about "This judge has a bias and I
23 allege that I can prove it."

24 (a), 18b(2)(a) is if the judge's
25 impartiality might reasonably be questioned. That's an

1 objective test. It has nothing to do with the individual
2 judge. You don't go into their thinking or what they said
3 or what they wrote. You take a third party observer, and
4 you assess the facts and then decide whether a third party
5 reasonably could question their impartiality, so I say
6 it's objective because it doesn't depend on the thinking
7 of the judge. Subjective test does depend on the thinking
8 of the judge. So we have both the objective and the
9 subjective test already built into our law, but the former
10 committee recommendation was a bright line as far as
11 contributions were concerned.

12 The ABA suggestion was a bright line as far
13 as contributions is concerned, and that brings us to page
14 eight, paragraph 11, the *Caperton vs. Massey* case
15 explained in detail in the back, but just as a thumbnail
16 sketch, this defendant was found liable for fraudulent
17 behavior and given a large -- suffered a large monetary
18 judgment. At that time as the case was moving out of the
19 trial court to the intermediate appellate court there was
20 a Supreme Court of West Virginia campaign that was going
21 on that was very controversial, and there was an
22 independent political campaign committee that was created
23 to campaign against an incumbent. They raised a lot of
24 money, and they spent a lot of money. They spent
25 two-thirds of the money, I think, that was spent on that

1 particular campaign was spent by that one committee, and
2 it was running, if you will, attack ads against the
3 incumbent judge.

4 And Judge Caperton was the new candidate,
5 the one who was trying to take over that position, so he
6 benefited indirectly by this advertising campaign, but the
7 advertising campaign was not for him. It did not mention
8 his name. It was not run by him. It did not consult him
9 on any expenditures. It was out there to get rid of the
10 incumbent, and he just happened to be the challenger. So
11 this money got pumped into this campaign while this case
12 was in the trial court level, and the election came out in
13 favor of the challenger replacing the incumbent, and then
14 the case moves up the appellate ladder, and it gets to the
15 West Virginia Supreme Court, and they split in a five to
16 four vote, and they overturned this large judgment against
17 this defendant for their allegedly fraudulent behavior,
18 and there was dissenting opinion that was signed by two
19 justices that was very critical of the potential of
20 influence over Judge Caperton's vote.

21 There was a motion to recuse that was filed
22 by the party that was opposing Massey Coal Company, and
23 then under their procedure Judge Caperton decided his own
24 recusal motion, and he wrote a couple of opinions on it,
25 and they are thoughtfully written, so those of us who look

1 at it probably think the situation is a very bad
2 situation, but if you look at it, he did articulate
3 defensible grounds for why he should stay in the case.

4 Part of the problem was, though, the
5 influence of this company overall on the court, and this
6 decision came down five-four. There was a motion for
7 rehearing. There was another motion for recusal, and a
8 couple of these judges, one in particular, called this
9 issue of the influence of the campaign contribution on the
10 court a cancer on the court. He was so strong in the
11 media that he decided to recuse himself. He was in the
12 minority. He was in favor of not overturning the verdict.
13 He felt like his impartiality could be reasonably
14 questioned and so he recused himself. He was in the
15 minority.

16 While the rehearing was pending a photograph
17 surfaced on the internet that appeared to show the
18 president of the defendant company on his yacht off the
19 coast of France with the president -- with the Chief
20 Justice of the West Virginia Supreme Court sharing an
21 alcoholic beverage, and that created a very large public
22 reaction, and so the chief justice recused himself. So we
23 now had two judges, one in the majority, one in the
24 minority, that have recused themselves. The remaining
25 judges somehow -- I have never understood how -- ended up

1 with Judge Caperton became the acting chief justice. Even
2 though he was the junior judge, after all these recusals
3 he was now the acting chief justice, so he picked the two
4 replacements for the recusing judges, and they had another
5 vote, and lo and behold, the verdict was still overturned.

6 So this went all the way to the U.S. Supreme
7 Court, and in a five-four decision a majority of the
8 Supreme Court said that due process of law required that
9 Justice Caperton not participate in the decision, and the
10 Supreme Court of the United States, none of the justices
11 really paid attention to the fact that these were not
12 campaign contributions to Judge Caperton or to his
13 campaign committee. It was to another political
14 committee. Now, maybe that's a ruse or maybe that's not a
15 ruse, but we're talking about millions of dollars of
16 contribution that probably had a dominant effect on the
17 outcome of the case.

18 So the U.S. Supreme Court majority said when
19 it's so extreme, the money is so dominant, and you can so
20 clearly tie an election to the political contributions,
21 that the objective test would support or even require a
22 recusal, and they went way out of their way to say, "We're
23 not accusing Judge Caperton of any kind of bias or that
24 he's dishonest in any way or that he was, in fact,
25 influenced. We're just saying when the money is that big

1 and that prominent, that an objective test would require
2 recusal." So that's really what prompted the referral to
3 the subcommittee, and we have that in the context of the
4 work that we've already done, and let me go on briefly and
5 touch on one other topic.

6 Since we are examining the recusal rule, we
7 probably should -- and I think we have the permission from
8 Justice Hecht to consider the old issue of *Republican*
9 *Party of Minnesota vs. White*, where the kind of
10 conventional canons of ethics prohibited judges from
11 making -- not only making promises on the campaign trail,
12 but even expressing really strong opinions on issues that
13 were going to come before them. It used to be prohibited.
14 Well, in a five-four decision in *Minnesota vs. White*, the
15 U.S. Supreme Court says, no, that's regulation of speech
16 based on content, it goes to a core of a First Amendment
17 freedom which is knowing who to vote for in judicial
18 elections, didn't pass constitutional muster.

19 Shortly after that a candidate for the Texas
20 Supreme Court, Stephen Wayne Smith, filed a lawsuit to
21 have the Code of Judicial Conduct in Texas declared
22 unconstitutional as to its regulation of speech, and the
23 Federal district Judge Nowlin here in Austin actually did
24 declare that. If I have my sequencing right, I think the
25 Supreme Court of Texas very quickly issued a replacement

1 Canon 5, which eliminated the prohibition on issue
2 speeches during the campaign. Justice Hecht wrote kind of
3 a concurring statement to this order, which is on page 13,
4 in which he discusses the significance of the concern
5 about how to balance maintaining a perception of the
6 impartiality of the judiciary against protecting the First
7 Amendment freedoms of speech and other core issues, and so
8 Justice Hecht said, "I join with the code amendments
9 approved today, although I remain in doubt whether they're
10 sufficient to comply with the First Amendment."

11 Now then, the revised provision is set out
12 here on page 14, and it's much looser, but if you look at
13 the existing Canon 5 of the Code of Professional
14 Responsibility -- or pardon me, the Code of Judicial
15 Conduct, which is the last page in this packet, page 69,
16 you'll see that there's sort of a comment at the end of
17 the code, Canon 5, which includes this, if you will, loose
18 restriction on what judges say while they're running for
19 office, and this is a comment in our canon and it says, "A
20 statement made during a campaign for judicial office,
21 whether or not prohibited by this canon may cause a
22 judge's impartiality to be reasonably questioned in the
23 context of a particular case and may result in recusal."

24 Now, that should go without saying, but it's
25 actually been said that there's some things you can say on

1 the campaign trail that maybe we can't prohibit it because
2 of the First Amendment, but if you say them, you may be
3 reflecting a perception or a predisposition as a judge
4 that people could reasonably question your impartiality.
5 So as long as we're examining the recusal rule we should
6 consider if the Code of Judicial Conduct says there's
7 certain points at which you go too far you can be recused,
8 do we just want to leave it there in the Code of Judicial
9 Conduct, or do we want to mention it as a ground for
10 recusal, or do we want to put it in a comment to Rule 18b?
11 Do we just leave it alone?

12 And the last thing I want to say is that --
13 CHAIRMAN BABCOCK: Before you go on to that,
14 Richard, I should say parenthetically I think it was
15 Justice Kennedy in the White case that raised the issue of
16 recusal based on comments of judges running for elective
17 office, and it was Kennedy, of course, who was the
18 majority writer in Caperton.

19 MR. ORSINGER: Right. And for those who
20 have read Kennedy's writings on this subject, he also I
21 think espouses the view that you can't regulate the
22 content of speech at all, or you can't regulate speech
23 based on content, which is probably why his picture is on
24 your credenza. But at any rate --

25 CHAIRMAN BABCOCK: The Canon 5, which was

1 revised by the Court shortly after White but not before
2 Judge Nowlin ruled, was the subject of a task force, and
3 the task force was split on whether the so-called promises
4 clause, which is Canon 5, 5(1)(i), is constitutional or
5 not, and I think Justice Hecht's concurring note was a tip
6 of the hat to that dispute.

7 MR. ORSINGER: Okay.

8 CHAIRMAN BABCOCK: About the
9 constitutionality of the promises.

10 MR. ORSINGER: If we purport to get into
11 that in the recusal rule we will be treading on that very
12 sensitive ground.

13 CHAIRMAN BABCOCK: Right.

14 MR. ORSINGER: So if we can keep that we
15 might could save ourselves a couple of weeks of debate if
16 we just decide not to do that. The last thing I want to
17 say is while all of this was on -- they brought the
18 patient in for examination and we started seeing more and
19 more stuff. The presiding judges, the presiding
20 administrative judges who have to do this for a living,
21 it's -- they probably have to do as many of these as Judge
22 Christopher has to look at those foreclosure papers. Some
23 of them I understand get one or two a day in their
24 administrative district, and they have really dealt with
25 this.

1 We amended our procedures. Part of it was
2 pushed on us by Senator Harris passing a bill about
3 tertiary recusals. You may remember that, Chip. So we
4 had to change up the procedures about 10 years ago, and we
5 now had a track record, and I think we even have some
6 statistical information that has come to us from the
7 administrative judges, and they have some very important
8 recommendations to make, not about the grounds for
9 recusal, but about ways that we can tweak the process so
10 that it makes it not only does it guarantee the kind of
11 due process of law, but it also allows the system to move
12 forward effectively in the face of people that are
13 constantly filing or maybe excessively filing these
14 recusals, and so part of our discussion I think needs to
15 include the proposals that the Council of Presiding Judges
16 have, and they're concrete. They have proposed sample
17 language. It was not in the memo that I e-mailed out
18 because it wasn't ready to go until this week, but it is
19 in the package over there, and they look to me to be very
20 valid. I think they're backed up by all those
21 administrative judges who have the last responsibility for
22 this, and so we're proposing that those also be
23 contemplated.

24 CHAIRMAN BABCOCK: Richard, one thing in
25 your memo, my pages printed out with different numbers

1 than yours, so I'll just say it was under the common law,
2 no recusal for campaign contribution.

3 MR. ORSINGER: Okay.

4 CHAIRMAN BABCOCK: And you cited three
5 intermediate appellate decisions, one from El Paso, one
6 from Dallas, and one from San Antonio, saying Texas courts
7 have rejected the argument that campaign contributions can
8 be used to establish a bias that would warrant recusal,
9 and my question is, has the Supreme Court never ruled on
10 that? Because my recollection was there was an old Texas
11 Supreme Court case that held the same thing. Am I wrong
12 about that?

13 MR. ORSINGER: I don't know. I didn't see
14 it cited in those cases, and when the cases came down they
15 were all resolved not -- at the time that they were
16 decided, which I was practicing and watching, one of them
17 was a San Antonio case, they didn't cite to Supreme Court
18 precedence so much, I think, so --

19 CHAIRMAN BABCOCK: They would have, if there
20 was some.

21 MR. ORSINGER: -- it may be out there, and I
22 just don't know about it.

23 CHAIRMAN BABCOCK: Well, nevertheless, there
24 is this line of cases that say you don't consider campaign
25 contributions, and that would seem to run afoul of the

1 Caperton decision, I would think.

2 MR. ORSINGER: Well, and just so you know
3 the context, at the time those cases were decided was the
4 period of time when the politics in democrat -- in Texas
5 was shifting from Democrat to Republican, and particularly
6 there were large campaign contributions to Texas Supreme
7 Court races and to court of appeals races, and there was
8 even an investigation in the Texas Senate related to that,
9 and there was a lot of controversy, and I'm not entirely
10 sure that that controversy isn't what led to the
11 legislation that we now have, because the Texaco case came
12 out, and there were accusations on the national scale that
13 justice was for sale in Texas and whatnot.

14 And so there were very hefty political
15 contributions back in those days in the 1980s, and in my
16 personal opinion it led to the pendulum swinging the other
17 way to now we have regulations in place, but at any rate,
18 those cases came out, and those recusals were made at a
19 time when individual law firms could dominate a court of
20 appeals race by a single contribution, and there was no
21 price to pay to anybody. So --

22 CHAIRMAN BABCOCK: Okay. Yeah, Pete.

23 MR. SCHENKKAN: I don't mean to go back to
24 look at the three that Richard cited, but one of the other
25 cases, again at the intermediate appellate court level, as

1 Richard says, comes from that era, 1983, 1984, is the
2 River Road case out of the Fourth Court of Appeals, and it
3 involved Clinton Manges, who in those days was writing
4 really, really, really big checks, and the facts of that
5 particular case and recited by the San Antonio court of
6 appeals were that Manges -- and I forget who the other
7 party was who was the co-owner of this enterprise, Sports
8 Enterprises something or other, that was a party to the
9 case.

10 One of them Manges had written checks
11 totaling 21 percent of the judge's contributions, and the
12 other one had written the checks totaling 17 percent of
13 the other appellate -- it was an appellate judge recusal
14 -- contributions and held that's not a standard for
15 recusal because the Texas Constitution doesn't list it,
16 and if that's the ground in these other cases as well,
17 clearly that falls under *Caperton vs. Massey*, because if
18 it's a Federal due process issue, we don't care that it's
19 not mentioned in the Texas constitutional list of grounds.
20 So you have to at least move on to the issue of do we want
21 to do anything in our rules about the Caperton issue. The
22 fact that these intermediate courts said so if they said
23 it on similar grounds is neither here nor there.

24 CHAIRMAN BABCOCK: Frank.

25 MR. GILSTRAP: Before we kind of jump off

1 the abyss into the recusal issue, whether we're talking
2 about recusal on the basis of campaign contribution or
3 recusal on the basis of the judge's political statement
4 that's kind of issue bias, which is a completely different
5 thing, I'd like maybe some guidance. You know, are we
6 supposed to simply take the existing recusal -- the
7 proposed recusal rule that's been pending before the Court
8 and build on it, which is one thing, or do we just need
9 maybe to write a stand-alone rule to deal with Caperton,
10 which would be a somewhat different thing and maybe
11 simpler, and maybe we need some guidance on that.

12 HONORABLE NATHAN HECHT: Well, no, I think
13 we should look at the whole panoply of issues that Richard
14 has outlined, including the White issues. It's just
15 Caperton that's brought it to a head, and it was not so
16 clear in the past that it was a good idea in a state that
17 holds ardently to the election of judges, despite the best
18 efforts of lots of people to shake them of those
19 convictions, it was not clear that it was a good idea to
20 make it a grounds for recusal or for it to even be a
21 consideration, but I think after Caperton the public and
22 the judiciary want a re-examination of that.

23 I doubt that Caperton is more than a
24 one-shot deal. The judges sort of indicated that
25 themselves. Chief Justice Roberts said maybe this is just

1 a one-shot deal, you know, and it's just something that is
2 so unusual. I don't know if it was Justice Frankfort
3 called it a one-way ticket, the train is never coming
4 back, but we don't know that, and now that I think people
5 see the problem again and are more inclined to think about
6 it in this new light it's a good time to revisit the rule.

7 And we have White, and at first the question
8 was, is this really going to change anything as a
9 practical matter, and as time has passed you can see it
10 changes some things, and maybe not so much, but again,
11 it's a time to look at that again, and meanwhile, we have
12 the concerns of the presiding judges that procedurally we
13 need to take a look at how it works. So I think it's time
14 to -- I think the Court thinks -- well, I know they think
15 that it's time to look at it top to bottom and get the
16 best advice on this subject.

17 We do that with some reluctance because when
18 I was practicing law, now too many years ago, you never
19 filed a motion to recuse because might as well apply to
20 the Bar in some other state if you were going to move to
21 recuse a judge, but those days are over, and now there are
22 lots of motions to recuse. So I think there's some
23 sentiment we don't want to encourage this practice by
24 talking about it. The more you talk about it, the more
25 people think, "Ah, a brand new rule, that's great, let me

1 see how many times I can use it," and so you're sort of
2 hesitant to do that.

3 On the other hand, again, the world has
4 changed, and maybe we should think more carefully about
5 cases in which judges should recuse, and so I think we
6 have to take that into consideration and, again, in a
7 state that elects judges and is going to elect judges
8 obviously the rest of my life and maybe forever, and how
9 does that -- how can we make that fit together in a good
10 way. So my colleagues were interested in a top to bottom
11 relook at the subject.

12 MR. ORSINGER: Chip, I need to correct the
13 record in my description. I said Judge Caperton, and that
14 was the litigant. It was Judge Benjamin who was the judge
15 who didn't recuse himself, and I misspoke, so I would like
16 to retroactively change the name.

17 HONORABLE NATHAN HECHT: And the West
18 Virginia court was three to two. There are only five
19 judges on the West Virginia court.

20 CHAIRMAN BABCOCK: Did he screw anything
21 else up? Roger.

22 MR. ORSINGER: That's probably at least a
23 passing grade, isn't it?

24 CHAIRMAN BABCOCK: Yeah, right. Two out of
25 20 wrong.

1 MR. HUGHES: Well, yesterday DRI had a
2 webcast on the Caperton decision, and in listening to it I
3 was reminded what my procedure professor, Gus Hodges, used
4 to say, "An appearance of fairness is everything," and one
5 of the things that several of the speakers touched upon
6 was that West Virginia literally had no procedures in
7 place, that each of the judges -- that they just followed
8 a practice of deciding their own motions. They had no
9 procedures in place for handling this, and I think if
10 anything we would do best to reinforce the procedures for
11 handling the motions that we've got first, because by
12 having a procedure in place and having rules I think we
13 have gone a long way towards making the whole system look
14 fair.

15 I think part of what -- a great deal of what
16 contributed to the apparent unfairness of what went on in
17 Virginia -- and I say "apparent" because the Supreme Court
18 went out of its way in its opinion to say that they were
19 looking at this objectively rather than passing upon the
20 subjective or actual personal biases that might have been
21 at issue, is that they just didn't have anything in place.
22 They had no rules, and it just lent itself to a bad -- a
23 situation where the public could say, "Well, you're just
24 making this thing up as you go along, and that was very
25 unfair," and of course, you had an unprecedented situation

1 where almost half of the money spent to unseat the
2 opponent and help Judge Benjamin came from one litigant
3 and that all that money was given after the litigant had
4 suffered a huge verdict that was destined to go to that
5 court.

6 So personally I think beefing up the
7 procedural rules for handling the motions would go a long
8 way. I'm concerned about trying to address the grounds
9 for recusal because right now there is that decision
10 that's been argued twice before the Supreme Court, and at
11 the last oral argument several justices indicated that
12 they're willing to go back and examine fundamental
13 assumptions about whether you can regulate campaign
14 expenditures at all, and if that's going to be the law
15 then it's -- then truly we are in a new world, and we
16 would have to look at it not merely from the point of view
17 of an expression of bias, but if you're going to have a
18 bright line rule that says, "Give more than this to a
19 judge and that judge can never sit on your case," there
20 may be First Amendment problems we haven't even dreamed of
21 yet.

22 CHAIRMAN BABCOCK: Yeah, and it's further
23 complicated by the fact that Kennedy's concurrence -- or I
24 think it was concurrence or at least he wrote an opinion
25 in White, was that there are less restrictive alternatives

1 to a prohibition on speech through the canons, and so that
2 it would be a First Amendment-friendly thing to have
3 recusal as opposed to preventing judges from speaking, and
4 that plays into -- you're quite right that the Court may
5 well rule in favor of the filmmakers in the Hillary case
6 on First Amendment grounds, which would have the effect of
7 invalidating portions of the finance act, and they may be
8 going in that direction, but it's not clear that recusal
9 would be First Amendment-friendly or First
10 Amendment-unfriendly.

11 MR. HUGHES: Exactly.

12 CHAIRMAN BABCOCK: So Judge Christopher.

13 HONORABLE TRACY CHRISTOPHER: Richard, do we
14 have any idea on how many judges don't comply with the
15 Judicial Campaign Fairness Act? Because I get the
16 impression that most judges do. I could be wrong, but --

17 MR. ORSINGER: It's been my experience, but
18 I don't have any statistics. I don't know if anyone here
19 knows.

20 HONORABLE NATHAN HECHT: You don't have to
21 if the other side doesn't.

22 HONORABLE TRACY CHRISTOPHER: Right.

23 HONORABLE NATHAN HECHT: And I don't know
24 how often that happens.

25 MR. ORSINGER: I would bet you that they

1 have that statistic. Don't you think they would keep
2 track of that?

3 HONORABLE NATHAN HECHT: I don't know who
4 would, because --

5 CHAIRMAN BABCOCK: Who is they?

6 MR. ORSINGER: The election --

7 HONORABLE NATHAN HECHT: You have to sign a
8 statement that you will, and if your opponent won't agree
9 to it then you don't have to agree to it, and -- but
10 whether anybody keeps track of it, I don't know.

11 CHAIRMAN BABCOCK: Pete. Or, Judge
12 Yelenosky, did you have your hand up?

13 MR. SCHENKKAN: I think that looking at, you
14 know, how the judicial campaign contribution standards
15 work is certainly worth looking at, but it is not the
16 problem in *Caperton vs. Massey*, and it is a problem that
17 could occur in Texas as well, perfectly legally even if
18 both candidates to a particular judicial campaign fully
19 subscribed to and complied with our rules, because the
20 main thing that happened in *Caperton vs. Massey* is that
21 Massey or the CEO spent \$2.5 million of the \$3 million
22 that -- and for the sake of the kids spent attacking Judge
23 Benjamin's opponent, and because those were not
24 contributions to Justice Benjamin, if Justice Benjamin had
25 been a Texas justice he would not have been in any

1 violation. He would not have been receiving any campaign
2 contributions by the Texas equivalent of the Massey
3 Corporation CEO writing a 2.5 million-dollar to a PAC that
4 spends \$3 million to beating his opponent, and, you know,
5 I think it is a separate question. I agree completely
6 with the comments. The separate question is there -- is
7 the game worth the candle of getting in there and trying
8 to make a substantive rule for this situation. Maybe not,
9 but it could arise in Texas, and the Judicial Campaign
10 Fairness Act doesn't solve it.

11 HONORABLE NATHAN HECHT: That reminded me of
12 one more thing, and what you said reminded me of one more
13 thing, but we are also interested in exhaustively looking
14 at this because I think that it is likely that it will
15 receive legislative attention in the next few years, and
16 we should know what the best ideas are to be able to
17 inform that process as well. There was a bill, of course,
18 this last session that would have required recusal of any
19 judge on the Supreme Court or the Court of Criminal
20 Appeals who had received I think it was a thousand dollars
21 from a lawyer, law firm, party, party's employee, PAC, or
22 anybody associated with them during the last four years,
23 which we were all for, because we could just go on
24 vacation now, and that would be the end of it. It was a
25 great way to use visiting judges, but I just say that to

1 indicate that having dipped their toe in once they may
2 come again, and so like the offer of judgment rule and
3 other things that we've worked on in the past, we need to
4 be thoroughly acquainted with this whole set of issues.

5 The second thing is that recusal is not a
6 magic wand, and Chip says it may be First
7 Amendment-friendly or it may not be, and there -- another
8 side to that, too, is that judges have some duty and would
9 probably argue some right to sit on the cases that they've
10 been elected to hear, and a imposition on that because of
11 something they've said is not necessarily -- it doesn't
12 foster free speech. It may be viewed as curtailing it,
13 and we're not going to let you do your job because you
14 exercised your First Amendment rights. So it's -- it is a
15 very delicate issue on all sides. There's no easy way to
16 just go in and say, oh, well, this, this, this, and we're
17 done.

18 CHAIRMAN BABCOCK: Yeah, Frank.

19 MR. GILSTRAP: Well, I think we've got to
20 separate out pretty clearly this issue bias problem that's
21 in White. I mean, you know, when a guy says, "Elect me
22 because I think child molestation should be punished in
23 Draconian fashions" and then he's elected and then the
24 defendant says, "You've got to be recused because you want
25 to punish the alleged crime in Draconian fashions," that's

1 a lot different from campaign contributions, which I think
2 are in that way a lot simpler, so I think maybe we need to
3 kind of break the two apart.

4 On the campaign contributions it seems like
5 almost anything we do would meet the standard of White. I
6 mean, you know, having a judge -- another judge consider
7 the recusal motion would go a long way. I don't think
8 that was the case in White.

9 CHAIRMAN BABCOCK: Caperton you mean.

10 MR. GILSTRAP: I'm sorry, Caperton. The
11 judge considered his own recusal motion. We've got a
12 standard in Texas, like \$5,000 for an appellate judge, I
13 think you can't give more than that. Well, if we're going
14 to adopt a bright line rule, it seems to me it has to be
15 that number. I mean, we're not going to say, "Well,
16 \$5,000 is required by the statute, but you're not going to
17 have to recuse unless you get 10,000." I mean, it seems
18 to me that if you're going to pick a bright line it's got
19 to be that number. So that actually might be a fairly
20 simple way to approach it, say, "Look, this is if number
21 and if you give more than that, you have to -- you can be
22 recused," and that's the end of it.

23 CHAIRMAN BABCOCK: Yeah, the -- one of the
24 things from our last debate, for those of you who weren't
25 here, which is a lot of you, that we got some push back

1 from the Legislature when we were debating having
2 different levels than what the Legislature had created,
3 and the thought was that we were just really legislating.
4 If they said 5 and we said 10, well, wait a minute, where
5 are you getting 10 from? Or if we said two, where are you
6 getting two from? So there's that issue. Judge
7 Yelenosky.

8 HONORABLE STEPHEN YELENOSKY: Well, I just
9 wanted to ask you, Chip, since it's your area of
10 expertise, when you referred to the pending case in the
11 U.S. Supreme Court involving the Clinton film --

12 CHAIRMAN BABCOCK: Yeah.

13 HONORABLE STEPHEN YELENOSKY: Whatever they
14 do on that isn't necessarily going to be dispositive of
15 the question of limits on campaign contributions for
16 judges, is it? Because there's an -- obviously there's a
17 different state interest involved; is that right?

18 CHAIRMAN BABCOCK: That's right.

19 MR. ORSINGER: Well, it depends on which
20 justice you're talking about, I might say, because for
21 some of these people content regulation has no
22 justification, and you've got a lot of different opinions
23 written by these people, and their perspectives are
24 individual, so I'm not entirely sure that we have a pass
25 to do something different on judges than what they do for

1 campaigns in general.

2 CHAIRMAN BABCOCK: I think that's right, but
3 the holding in the case, whichever way it goes, can't
4 directly impact what judges accept.

5 MR. ORSINGER: Yeah, but we need to read the
6 opinions, because the more those guys gravitate toward a
7 First Amendment prohibits state impairment or even Federal
8 government legislative impairment on campaign spending,
9 the closer they're getting to what we're doing.

10 HONORABLE STEPHEN YELENOSKY: We have to
11 read the opinions?

12 MR. ORSINGER: Yeah.

13 HONORABLE STEPHEN YELENOSKY: There's a
14 little syllabus at the beginning.

15 CHAIRMAN BABCOCK: Well, and, I mean, Scalia
16 wrote White, and he dissented in Caperton, so it's not
17 crystal clear what the individual judges' thoughts are
18 about this.

19 MR. ORSINGER: No, right.

20 CHAIRMAN BABCOCK: Roger.

21 MR. HUGHES: The other thing is, and I'm
22 just not sure I like a bright line dollar rule because it
23 just seems to me there are numerous ways to get around
24 that. One of the ones they discussed yesterday is
25 something in the valley -- well, not in the Valley, in a

1 lot of places. What about the person who doesn't actually
2 dig into their own pocket, they just call 10 people, each
3 one of whom comes up with \$5,000, and then they give
4 him -- they give that person the check, and they're
5 delivered. They're not his checks or her checks, but
6 judge so-and-so knows that that person -- you call that
7 person, that person can get you a hundred thousand dollars
8 in donations all in small bills, or small checks.

9 CHAIRMAN BABCOCK: Never hurts.

10 MR. HUGHES: And, you know, is that kind of
11 brokerage going to be -- I mean, what I see is with a
12 bright line tied to the statute, which I think it has its
13 own problems, you run the risk of being both
14 underinclusive and overinclusive. The underinclusive is
15 what about the people who are brokers? You know, they are
16 the ones who are going to scare them up for you.

17 And then the other thing was in Caperton
18 was -- and why the issue ended up being an objective how
19 much dollars was, is the issue was originally framed that
20 Benjamin owed a debt of gratitude to the coal company in
21 that case, and they kept pitching it on the basis that it
22 was a debt of gratitude. Well, one of the things I heard
23 argued is, well, you know, debts of gratitude can come
24 from all sorts of ways, one of which is many judges first
25 enter office by appointment, then to stand election.

1 Well, are we going to go looking for the
2 debts of gratitude to the big supporters who dropped the
3 right words in certain politicians' ears to make sure that
4 that person's application would be more favorably looked
5 at or considered? Is that also going to be it? Because,
6 like I said, that's kind of like the equivalent of the
7 person you call to get all those small checks. Well, what
8 about the person you call to get -- you know, to get in to
9 have an appointment, to be even considered for an
10 appointment. Are we going to consider that as well along
11 with it, or are we just going to do it on a dollar basis?
12 That's one of the problems I see with it.

13 CHAIRMAN BABCOCK: Yeah. Good point. What
14 else? Frank's looking at his watch. Pete.

15 MR. SCHENKKAN: On the process point, I
16 really don't think we can make a rule on the substance of
17 this, because you have to deal with bundlers and you have
18 to deal with the independent PACs that are attacking the
19 opponent, and you can't do either, subject to check, but
20 probably you can't do either, except take the case up when
21 it comes on its facts and see if the ticket doesn't turn
22 out to be just for this day and this train only, but to be
23 for one other train and one other day, but you can look at
24 the process, and I guess can we get a reality check on
25 that?

1 I thought that we've solved the issue of the
2 process at the trial court level by putting it in the
3 presiding judge's hands, and we've solved it at the court
4 of appeals level by saying that if the judge doesn't
5 recuse himself then it's up to the remainder of the judges
6 of that court sitting en banc without him or her
7 participating. I'm not -- is there more that needs to be
8 done on the process level or have we done what we can?

9 CHAIRMAN BABCOCK: Well, that's the
10 question. I mean, if Caperton had been a Texas litigant
11 instead of a West Virginia litigant and had presented the
12 same fact pattern, could he have obtained recusal under
13 our current rules? Judge Peeples, you deal with this all
14 the time.

15 HONORABLE DAVID PEEPLES: Well, he was on an
16 appellate court, so, you know, the rest of the court would
17 decide it in this state.

18 CHAIRMAN BABCOCK: So this procedure would
19 have been different.

20 HONORABLE DAVID PEEPLES: But as a trial
21 judge, an outside judge would have been appointed and
22 would have applied the standard of impartiality might
23 reasonably be questioned. And a judge in the Valley was
24 recused about a month ago for taking much less than two
25 and a half million dollars or whatever it was.

1 CHAIRMAN BABCOCK: Under our current
2 structure.

3 HONORABLE DAVID PEEPLES: Yeah.

4 PROFESSOR ALBRIGHT: That was post-Caperton,
5 right?

6 HONORABLE STEPHEN YELENOSKY: Yeah, but
7 they're just asking if procedurally it would --

8 MR. ORSINGER: That was under impartiality
9 might reasonably be questioned.

10 CHAIRMAN BABCOCK: Yeah. And how did they
11 get around -- but based on campaign contributions, right?
12 How did they get around the line of cases like the
13 Aguillar and other cases in that line?

14 HONORABLE DAVID PEEPLES: The judge who
15 comes from the outside to hear the recusal motion makes an
16 unappealable decision. If you grant it, it's never
17 appealable. If you deny it, it goes up with the main
18 case, and those cases do not prevent the judge from
19 deciding based upon what the hearing shows, this person
20 ought to be recused or not.

21 MR. SCHENKKAN: And those cases are just
22 wrong under Caperton. It's just not the law, I mean,
23 anymore. You may not like that, but it's the case, and so
24 it's not just that they can get away from things also. I
25 think they're doing their job.

1 HONORABLE DAVID PEEPLES: Well, it's also
2 the Rule 18b tells the recusal judge to decide based upon
3 all the facts at that hearing would a reasonable objective
4 observer think this person can't be impartial. I mean,
5 that is enough warrant for recusing somebody who has taken
6 a whole bunch of money.

7 CHAIRMAN BABCOCK: Buddy, and then Judge
8 Christopher.

9 MR. LOW: And no party is entitled to any
10 particular judge. They're going to have a qualified
11 judge, so there's no appeal. I'd like to bring up another
12 thing that's happening, and it's created by lawyers. When
13 we first back in '79 when we passed 18b we patterned it
14 after 144 and 455, I believe it was, and that addresses
15 not lawyers, only parties. Well, what the problem we were
16 having then was lawyers were filing a motion to disqualify
17 right before trial.

18 CHAIRMAN BABCOCK: Right.

19 MR. LOW: And so they were getting a
20 continuance. So we had to put something in play so that
21 we put a process, so they had to allege specifically and
22 then that's when this thing started, about '79. And then
23 we rocked along, and something that's happening now,
24 created by the lawyers, is the -- some of the lawyers --
25 and I know of two cases, and I'm sure there are more,

1 where they want to disqualify the judge so they file a
2 motion to disqualify, subpoena his telephone records,
3 everything, you know, about conversations, and they
4 subpoena him and going to take his deposition. Another
5 case where they subpoenaed him to the hearing, and the
6 judge -- they call the other lawyer and he testified, and
7 then when they called the judge he just stood up and he
8 said, "Oh, I recuse." He didn't want to go through it.
9 That's what happened in the other case I was telling you
10 about.

11 So there's got to be some procedure, because
12 lawyers are going to -- you're going to see that. They
13 just move to disqualify, and they put all of these things
14 out, and nobody wants all his personal life -- every judge
15 I'm sure lives a perfect personal life, but you don't want
16 that, and so we have to have some gauge. Like one of the
17 cases they wanted to take the judge's deposition because a
18 drunk had killed this person, and the judge's daughter had
19 been killed by a drunk, and they wanted to question him
20 and his wife about his attitude about that, and there are
21 a number of cases on that, and there's one case that the
22 judge hires a lawyer, then he's disqualified because he's
23 now a party if he's hired a lawyer in a proceeding. So
24 that's just one of the things I'd like for the committee
25 to consider, how we can protect judges from harassment.

1 CHAIRMAN BABCOCK: Fair enough. Judge
2 Christopher.

3 HONORABLE TRACY CHRISTOPHER: I can wait
4 till tomorrow. Are we going to continue?

5 CHAIRMAN BABCOCK: No, if you can wait till
6 tomorrow, I can, too, so let's start up at 9:00 tomorrow.
7 Thanks, everybody.

8 (Meeting recessed at 5:01 p.m.)

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2 **REPORTER'S CERTIFICATION**
 3 MEETING OF THE
 4 SUPREME COURT ADVISORY COMMITTEE

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 7
 8 I, D'LOIS L. JONES, Certified Shorthand
 9 Reporter, State of Texas, hereby certify that I reported
 10 the above meeting of the Supreme Court Advisory Committee
 11 on the 25th day of September, 2009, and the same was
 12 thereafter reduced to computer transcription by me.

13 I further certify that the costs for my
 14 services in the matter are \$2,019.25.

15 Charged to: The Supreme Court of Texas.

16 Given under my hand and seal of office on
 17 this the 14th day of October, 2009.

18

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