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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

April 13, 2012

(FRIDAY MORNING SESSION)

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[COPY

Taken before *D'Lois L. Jones*, Certified
Shorthand Reporter in and for the State of Texas, reported
by machine shorthand method, on the 13th day of April,
2012, between the hours of 9:03 a.m. and 1:14 p.m., at the
State Bar of Texas, 1414 Colorado, Room 101, Austin, Texas
78701.

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INDEX OF VOTES

No votes were taken by the Supreme Court Advisory Committee during this session.

Documents referenced in this session

- 12-02 Protective Order Kit (2-17-12)
- 12-03 Protective Order Kit Memo from F. Gilstrap (4-6-12)
- 12-04 Divorce Kit - No minor children, no real property
- 12-05 Uniform divorce forms, SCAC subcommittee report (4-11-12)
- 12-06 Report to SCAC of Texas Access to Justice (4-6-12)
- 12-07 Brief of Access to Justice Commission (4-6-12)
- 12-08 Family Law Solutions 2012 Final Report
- 12-09 Family Law Groups' ideas for pro se litigants
- 12-10 Family Law Groups' response to proposed forms (4-10-12)
- 12-11a Letter from Bob Black (1-5-12)
- 12-11b Email from Lewis Kinard (4-3-12)
- 12-11c Email from Patricia Baca (4-11-12)
- 12-11d Letter from Hispanic Bar Association of Austin (4-5-12)
- 12-11e Letter from Hugh Lindsay (4-16-12)
- 12-11f Letter from several judges (4-12-12)
- 12-11g Letter from Timothy Daniels (4-9-12)

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- 12-11h Memo from Alicia Keys of AG's office to SCAC
(4-12-12)
- 12-11i Letter from P. Baca
- 12-11j Letter from P. Friday
- 12-11k Letter from Texas Advocacy Project
- 12-11L Written Statement of R. Shannon
- 12-12 Forms currently used in Travis County

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2 CHAIRMAN BABCOCK: I want to welcome
3 everybody to the August 13 and 14 meeting -- excuse me,
4 the April, getting ahead of ourselves, the April 13 and 14
5 meeting of the Supreme Court Advisory Committee. I sent
6 out what I referred to as a Statement of the Chair. I
7 didn't know what else to call it, so that's what I called
8 it, earlier this week, and I don't know if everybody has
9 had a chance to see it or not, but it tried to outline how
10 we're going to proceed today and tomorrow; and when I'm
11 done with my remarks Justice Hecht will give his report,
12 as is customary; and then we'll talk to Richard Orsinger,
13 the chair of the subcommittee, and Stewart Gagnon, about
14 the protective order kit; and I'm hoping we'll be done
15 with that by 10:15; and then we'll go into the family law
16 forms.

17 I should also introduce former Justice
18 O'Neill, who is with us at the front table, and she may
19 have some remarks for us today, which will be welcome. We
20 have some speakers, and they will talk to us about the
21 family law forms. They are Trish McAllister of the Access
22 to Justice Commission. She will speak for 20 minutes; and
23 then Tom Vick and Tim Belton of the State Bar of Texas
24 Solutions 2012 Committee will speak for 20 minutes, to be
25 divided between them as they see fit; and then finally

1 we'll hear from Steve Bresnen and Judge Judy Warne from
2 Harris County. They will speak for 20 minutes. Again,
3 they'll split the time as they see fit.

4 Those of you on the committee know that
5 typically I'm not very strict on time, but today I'm going
6 to have to be, so I've got my iPhone that has a stopwatch
7 feature to it, which I'm going to use for the first time
8 ever, so I'm going to hold the speakers to their 20
9 minutes. I had thought that we would go into our
10 substantive discussion about the rules right after we
11 heard from the speakers, although, in deference to their
12 schedules, if anybody has questions of the speakers, when
13 they're done with their presentations, which will take
14 about an hour or so, anybody -- any member of the
15 committee that has questions of them, let's ask them then
16 so that if they have to leave they can do so.

17 Also, I have received a number of e-mails
18 from people who wish to speak, and there will be a session
19 for that, and I'm going to hold those speakers to three to
20 five minutes maximum, absent questions. If there are
21 questions, we won't count that against their time. There
22 are a couple of people that have said that they have
23 scheduling issues, and so after we talk to our formal
24 speakers and ask them questions, if there's anybody that
25 has a really bona fide good faith scheduling problem that

1 wants to speak right at that point, I'll recognize them.
2 Try not to do it just because you want to get out of here,
3 because we all want to get out of here, but if you have a
4 scheduling problem, just let me know. And absent anything
5 else, I am anticipating and hoping that we can get to the
6 public comment session by 4:00 o'clock this afternoon, but
7 if not, we will be in session tomorrow morning, and we'll
8 hear from anybody that wants to speak on these issues
9 Saturday morning.

10 I'm repeating this for the benefit of some
11 of the people who are not members of this committee or new
12 members. The Court has charged us with looking at these
13 family law forms. We will no doubtedly have a discussion
14 about whether or not we think they're a good idea, but
15 regardless of whether everybody on this committee thinks
16 they're a bad idea, we are still, as is our custom, going
17 to go through the rules and vet them and try to give our
18 best advice, to the Supreme Court as to the substance of
19 these forms. So for the benefit of our visitors, if
20 anybody thinks that we're ignoring the issue about -- the
21 threshold issue about whether or not they're a good idea
22 or not, we're not, but we always at the direction of the
23 Court look at the substance of a rule even if ultimately
24 we think or ultimately the Court thinks that the rule or
25 the form may not be a good idea.

1 Finally, I want to repeat what I said in my
2 statement, which is how much of an honor it is to chair
3 this group. The Supreme Court Advisory Committee, I've
4 found over the years, is made up of some of the most
5 talented lawyers, judges, and, frankly, people in our
6 state; and even though we disagree about things from time
7 to time, it's always a good faith, lively discussion and
8 there's a great deal of mutual respect among our group,
9 which I think is terrific; and it's, as I say, an honor to
10 chair it, so with that said I will turn it over to Justice
11 Hecht for his report.

12 HONORABLE NATHAN HECHT: The Court issued a
13 few changes in the rules regarding parental rights
14 termination appeals, and those are now in effect; and one
15 of the parts of that rule-making was the change to Rule 6
16 of the Rules of Judicial Administration, which sets a time
17 limit on the processing of those appeals; and in the
18 process we worked with the Chiefs of the courts of appeals
19 and our own staff internally to be sure that these are
20 workable goals, deadlines; and we're very hopeful that
21 this will have the effect of speeding these cases along
22 and achieving finality for the children and the parents
23 and foster people and other who are involved, without
24 sacrificing careful attention to the merits, so those are
25 in effect.

1 We also put into effect Rule 16 of the Rules
2 of Judicial Administration, a new rule that was directed
3 by the Legislature to provide for additional judicial
4 resources for certain kinds of cases. So we have the
5 procedure now in effect for getting those resources to the
6 cases. The only thing we're missing is resources, but I'm
7 sure those are on the way. I'm sure the Legislature just
8 overlooked that and will be forthcoming soon. And then
9 the task force on rules in small claims and justice
10 proceedings, also directed by the Legislature, has
11 finished its work and has made a report; and these people,
12 chaired by Justice Russ Casey up in Fort Worth, have
13 really done a remarkable job. They have gone through all
14 of the justice court cases and proceedings and tried to
15 build a best case set of procedures for all of them; and
16 they have worked very hard, spent a lot of time on this;
17 and we were scheduled to take that up at this meeting,
18 because those rules have to be in place before May 1st of
19 next year, 2013, but we'll take them up at the June
20 meeting. But these are very important rules because they
21 impact far more cases than most of the ones -- most of the
22 rules we talk about here, literally hundreds of thousands
23 of cases, and so we'll turn to that in June.

24 The Court is working on your recommendations
25 regarding the dismissal rule and the expedited cases rule

1 that the committee has already finished work on and,
2 again, that we have been directed by the Legislature to
3 look at. Back on parental rights termination appeals, I
4 want to thank publicly Judge Rucker of Midland for heading
5 up that task force and all the good work he did on that;
6 for Richard Orsinger, and his participation on the task
7 force; and my colleagues, Justice Guzman and Justice
8 Lehrmann, who worked very hard on those rules also.

9 Finally, the vice-chairman of this
10 committee, Buddy Low, is receiving the Outstanding Alumnus
11 Award of the UT Law School a week from today.

12 (Applause)

13 HONORABLE NATHAN HECHT: So we congratulate
14 him on that. That's it.

15 CHAIRMAN BABCOCK: Okay. Richard.

16 MR. ORSINGER: Chip, the first order for us
17 is the protective order kit, and Stewart Gagnon is here.
18 He's the sponsor of that task force. Stewart can sit --
19 if you would, sit at the head table there so everyone can
20 see you. Just a little bit of background, and I want
21 Stewart to introduce himself, and then Frank Gilstrap is
22 going to take the lead of the discussion on this
23 particular set of forms, Chip, but this protective order
24 kit was developed through an initiative that was sponsored
25 by Justice Harriet O'Neill, who is here with us this

1 morning, when she was on the Supreme Court. They were
2 forwarded to the Supreme Court Advisory Committee
3 originally on February 14th of 2005, and then we had --
4 took them up in session on March 5th, 2005. It was a
5 Saturday session, and we had no subcommittee analysis of
6 the original kit, because there was not enough time. We
7 had the Saturday morning debate, and then the rules -- the
8 protective order kit went to the Supreme Court, and it was
9 promulgated on April 12th of 2005, and we had a robust
10 debate. I have a copy of it here if anybody wants it, but
11 they've -- that protective order kit has been out in the
12 field since that time, which would be approximately seven
13 years, I guess, wouldn't it? So it's been field-tested,
14 and we're not sure on the subcommittee because this was
15 added to our agenda item late. We actually had no
16 opportunity to have any meetings over the proposed
17 changes, 2012 changes to this seven-year-old protective
18 order kit.

19 Stewart Gagnon is on the task force that
20 worked on these. He's the spokesman for the task force,
21 and he's going to take us through these changes that are
22 proposed for us to evaluate to the original protective
23 order kit, but I would like for you to know a little bit
24 about Stewart before we got started, and, Stewart, rather
25 than doing your introduction, would you tell the members

1 of the committee your background a little bit and
2 especially some of the work that you've done on pro bono?

3 MR. GAGNON: I am a family law lawyer from
4 Houston. I'm a partner, senior partner, with the law firm
5 of Fulbright & Jaworski. Just as a background, Judge
6 Warne asked me today, I started at Fulbright on October
7 1st, 1971, when I started law school. I worked in their
8 mail room, and my first office was next to Judge David
9 Peeples, and judge -- Justice Jerry Smith, an interesting
10 hallway to say the least. I have practiced family law
11 almost all of my career. I specialize -- a specialist in
12 the area of family law, and I practice throughout the
13 state, so I've handled cases in just about every part of
14 the state and handled cases with a lot of people in this
15 room in different areas.

16 I was the chair of a committee of increasing
17 access to the courts by the Access to Justice Commission;
18 and as part of that, Justice O'Neill came to us and talked
19 to us about creating a tool to allow victims of family
20 violence better access to our court system, especially in
21 the areas where there wasn't the support of a county
22 attorney or district attorney or a pro bono program that
23 would provide them with assistance. That led to the
24 formation of the protective order task force appointed by
25 the Court, which included a legislator and some family law

1 lawyers as well as some people who are very familiar with
2 areas of victims of family violence. We prepared that
3 original kit, and just as for some information for you,
4 our preparation included -- included going and talking to
5 all the stakeholders that deal with the -- in the area of
6 domestic violence, including meeting with the District
7 Attorneys Association, meeting in three meetings of the
8 constitutional county courts, county judges, getting their
9 comments, and then placed before this committee and then
10 ultimately before the Court.

11 I will tell you that since its
12 implementation it has been translated into Spanish, it has
13 been translated into Vietnamese. Justice O'Neill and I
14 had the interesting experience of being interviewed on
15 Radio Vietnam in Houston. It was an interesting
16 experience. I'm not sure what I actually said to them,
17 but that's an area that -- and with these type of vehicles
18 is a good example of what we're going to talk about later
19 -- is needed to allow people to use whatever court tools
20 there may be for them to use, so we translated the
21 instructions into both of those languages. We have
22 continued as a task force to continue to meet on a twice a
23 year basis to monitor its acceptability, its use; if it's
24 not being used, why is it not being used; suggestions on
25 how we can make it a better tool; and as a result of

1 probably the first substantive changes in the protective
2 order provisions in the Family Code in the last seven or
3 eight years, this year we felt it necessary to make the
4 revisions that we're going to present before you today.

5 MR. ORSINGER: Stewart, before we get into
6 the details of the changes, you skipped over the part of
7 your biography that discusses your pro bono involvement,
8 and I know that you have received local and statewide
9 awards for your work as an individual in the pro bono
10 area. Can you outline that a little bit for the people
11 here?

12 MR. GAGNON: In 19 -- I'm sorry, last year I
13 handled 141 pro bono divorce cases and protective order
14 cases for the Houston Volunteer Lawyers program, ranging
15 from easy with no property, no kids, no name change
16 divorces to very complicated issues regarding property and
17 abuse. I founded with a lawyer from Exxon, a protective
18 order clinic that Exxon -- in fact, my law firm and Exxon
19 are staffing today. We trained 27 lawyers from Exxon as
20 well as corporate and labor lawyers from Fulbright &
21 Jaworski to handle protective order kits that are using
22 the vehicle that we are talking to you about today. They
23 would not have been able to do that and assist
24 approximately 15 to 20 ladies a month if they weren't able
25 to have a vehicle like this protective order kit.

1 At Justice Guzman's request when she was a
2 family court judge in Harris County, I established the
3 first Harris County pro se advice facility, which was a
4 small office in the courthouse that screened and discussed
5 with everyone, the pro se litigants who were trying to
6 prove up an uncontested divorce, their paperwork, making
7 sure it was correct, it was not correct, helping them
8 understand how they could get it correct.

9 MR. ORSINGER: Was that staffed with
10 volunteers, by the way?

11 MR. GAGNON: It was volunteer. Justice
12 Guzman volunteered me. It was staffed with a few
13 volunteers, volunteer lawyers, but not very many volunteer
14 lawyers. So, I mean, that's just some of the work that
15 I've done. You know, I don't like to brag about a lot of
16 the stuff. I received the James B. Sales Award for
17 Lifetime Achievement in Pro Bono. Last year I received
18 the Ken Fuller Award from the family law section for my
19 commitment and contributions in pro bono. I received a
20 national award from the ABA. I received two State Bar
21 awards, and my law firm has received the Frank Spurlock
22 Award twice for its work in pro bono.

23 MR. ORSINGER: Well, Stewart, you should be
24 commended for this incredible commitment that you've made
25 to helping people who are indigent trying to gain access

1 to the legal system. Before we get into the details of
2 the 2012 changes, can you share with the committee what
3 the use of the forms has been statewide, and particularly,
4 are counties using their own version, the county attorneys
5 and district attorneys have their own versions that they
6 use and the kit is usually in areas where they don't have
7 a government attorney representing the victims of
8 violence, and can you comment on the use of that?

9 CHAIRMAN BABCOCK: Before you do, Stewart,
10 Richard, you guys are having a nice conversation, but
11 nobody down there can hear you.

12 MR. GAGNON: Oh, I'm sorry, I'll try to
13 speak up because I probably couldn't hear you if you would
14 say something to me. Let me just say that there are some
15 counties that use the protective order kit. There are
16 some programs that use the protective order kit. There
17 are a lot of programs that I'm aware of that are
18 facilities or programs that assist victims of family
19 violence that find this kit, and it was put on a CD, and
20 it's been made available now online that they find this
21 kit is very helpful to them to work with their clients. A
22 prime example is the Houston Area Womens Center that is
23 now using this as an intake tool for most of their
24 clients, whether or not they're used for a protective
25 order.

1 There are -- there are programs -- and I
2 think Austin is even one of the programs that decided to
3 use their own type of tool rather than the protective
4 order kit that we have here. So we are aware of the fact
5 that they're used by a lot of the pro bono programs to
6 have their volunteer lawyers feel more comfortable in
7 representing these victims of family violence, and they
8 were originally designed to and are still used by people
9 who don't have resources available to assist them in
10 presenting their protective order, so it's not universally
11 used but it's widespread, and my understanding is that it
12 received the largest number of hits on lawhelp.org of any
13 of their kits or tools that are available on lawhelp.org,
14 which is an online service that primarily people who
15 choose to represent themselves because of their financial
16 circumstances go to to find some assistance. A lot of
17 courts refer people to texaslawhelp.org, a lot of clerks
18 refer people to texaslawhelp.org, and the information I
19 got last year was that the protective order kit was the --
20 probably the most used kit that they have available.

21 MR. ORSINGER: Well, since they were
22 originally adopted has the task force received feedback on
23 proposed changes, and have you made changes or --

24 CHAIRMAN BABCOCK: What did you say,
25 Richard?

1 MR. ORSINGER: Since they were originally
2 adopted for use officially by the Supreme Court has the
3 task force received any feedback from people in the field
4 suggesting changes, and have any changes been made?

5 MR. GAGNON: The only real feedback we ever
6 really received to make any type of changes to the kit was
7 to add what you see in this version, which is a passport
8 page. There is an effort nationally to have the front
9 page of protective orders look the same so that police
10 departments and law enforcement agencies, if they see a
11 document they will know that document is a protective
12 order. They may -- you know, what our pleadings look like
13 in Texas don't look what the pleadings look like in
14 Massachusetts or California, and these things are
15 enforceable across state lines, and so there was an
16 effort -- that effort came to our attention shortly after
17 we published the kit and translated it, but that was the
18 only real substantive change that we had received and,
19 quite frankly, we're not aware of any enforcement problems
20 with it either or aware of any problems where a court
21 really questioned whether they had to accept it.

22 MR. ORSINGER: Chip, do you think it would
23 be okay for us to ask the committee if they have any
24 questions about the existing kit and its use before we go
25 into the changes?

1 CHAIRMAN BABCOCK: Why don't we do that.
2 Anybody got any questions about the existing kit and its
3 use? And, by the way, don't anybody drool like you
4 usually do because we may be on television. Any
5 questions? Frank.

6 MR. GILSTRAP: Okay. As Richard has pointed
7 out, the subcommittees is in a difficult situation. We're
8 kind of like the people in the Panhandle who had this
9 experience, this freak hailstorm yesterday and which
10 blocked U.S. 287 south of Dumas with piles of -- drifts of
11 hail four feet deep. In the last two weeks we've been
12 bombarded with all of these documents having to do with
13 the divorce kit, and we've had really very little time --
14 and this includes the subcommittee -- to really sit down
15 and look at the protective order kit. That's unfortunate
16 since last time it didn't go to the subcommittee. In my
17 opinion, this could use more subcommittee work, but we may
18 not have the time, and so I was able to formulate a couple
19 of questions. I circulated a memo, got very, very helpful
20 responses from Judge Judy Warne, Harris County family law
21 judge, and Professor Jeana Lungwitz, who heads the
22 domestic violence clinic at UT Law School, and they
23 answered a lot of questions.

24 The questions I've got left, which went out
25 in a memo yesterday, have to do with an unpopular subject,

1 which is the rights of the respondent. They are often bad
2 actors, but they do have rights, and I have questions as
3 to whether or not the kit actually apprises the respondent
4 of his rights here. Here's the problem. The protective
5 law procedure is an intervention by the state in a private
6 relationship. It's a private relationship, usually a
7 domestic one, in which there has been a determination,
8 usually in an affidavit, that someone, usually a woman or
9 child, is in danger of physical harm. The response is
10 severe but -- appropriate but severe, and it's like a
11 temporary injunction. They issue out a temporary ex parte
12 order. The respondent is served and then he gets notice
13 of a hearing, which can be usually within two weeks. At
14 this hearing there can be a severe curtailment of his
15 rights.

16 If someone had brought one of these to me, I
17 would sit down and say, "Look, Jack, at this hearing next
18 Thursday the judge is going to issue an order that may
19 restrict your communication, restrict you from going
20 around certain sites, order you to pay support, kick you
21 out of your home," that's called a kick out order,
22 "restrict your access to your children, prohibit you from
23 possessing a gun, and suspend your concealed handgun
24 license." Nowhere in this procedure is there any clear
25 explanation to the respondent that that's about to happen

1 to him.

2 The answer I've gotten is, "Well, they can
3 read the application and protective order," and, yes, you
4 can. I'm a trained lawyer, and I've been working on this
5 a couple of weeks. I can read it and understand it. I
6 doubt seriously if they understand this, and so I don't --
7 there is already an application that's required, and I've
8 checked with the clerks and the clerks do -- in three
9 counties the clerks do know about this. They do put them
10 in the notice for citation, which tells the respondent
11 that they can hire a lawyer, they can file an answer, and
12 that if they receive the notice within 48 hours before the
13 time set for the hearing they can request the court to
14 reschedule the hearing. Those are important things to
15 know, but it never tells respondent these severe
16 consequences.

17 If you'll look at the protective order --
18 excuse me, at the temporary ex parte order, is a good
19 example. On the last page on paragraph 7, they've got
20 four warnings. These warnings come from state statute.
21 They're required for the state statute, and they spell out
22 in layman's terms various prohibitions on these people.
23 They have -- there is a two-edged sword. It lets the
24 respondent know that he's under these restrictions, but it
25 also establishes mens rea in case he's later prosecuted

1 for a crime. I don't see -- I think it would be helpful
2 to add something like this, this "Look, Jack" warning, to
3 the bottom of that. That's the first concern I have.

4 CHAIRMAN BABCOCK: Stewart, any reaction, or
5 Richard, to that comment?

6 MR. ORSINGER: Well, I would say that
7 although the subcommittee didn't discuss the protective
8 order kit, we did discuss the family law forms, and I
9 think we realized that there is a natural inclination to
10 focus on the perspective of the petitioner because we're
11 trying to create a set of forms here that would be an
12 avenue for people that are self-represented to get into
13 court, but by the same token, many of those respondents on
14 those cases will also be unrepresented pro ses, and
15 there's not a natural tendency to evaluate the forms from
16 the perspective of the respondent, and we wanted to be
17 sure -- I mean, I think we went through a realization
18 process ourselves. We wanted to be sure that the forms
19 were not somehow inherently biased in favor of the
20 petitioner because we were just focused on getting the
21 case into court and not on the people who were deciding to
22 allow default judgment to be taken or to sign a waiver or
23 not to show up for trial.

24 So one of the few votes that my subcommittee
25 took that was unanimous had to do with the fact that we

1 need to be sure that the forms that are promulgated by the
2 Supreme Court, particularly if their acceptance is
3 mandated, should be balanced and shouldn't be biased in
4 favor of the petitioner, and so warnings obviously are an
5 inexpensive way for us to somehow balance and protect the
6 rights and be sure that the respondents are knowledgeably
7 waiving rights that they may not understand if the form
8 doesn't tell them.

9 CHAIRMAN BABCOCK: Lisa.

10 MR. GAGNON: Let me _

11 CHAIRMAN BABCOCK: I'm sorry, Stewart.

12 MR. GAGNON: Let me just say, Richard, and
13 Frank, the warnings are statutorily required warnings. We
14 can't ignore what the Family Code says has to be in every
15 protective order.

16 MR. ORSINGER: But you could add to it.

17 MR. GAGNON: We could add to it if we needed
18 to, but, I mean, we say in very clear language, you know,
19 if you guys want -- if y'all want us to add something to
20 it, I'm sure we could add something to it, but we say that
21 the purpose of the hearing is to decide whether or not the
22 court is going to issue a protective order and other
23 relief requested in the application for the protective
24 order, and you know what, that respondent has received a
25 copy of that application for the protective order. So

1 from that standpoint -- I mean, I don't know what other
2 warnings you would want us to put in there other than the
3 fact that we are very explicit as to what relief is being
4 requested, that's clear in the application, and what
5 relief is granted in the ex parte protective order, and
6 that is clear in the ex parte protective order. That
7 respondent receives both. Frank, you're nodding your
8 head.

9 MR. GILSTRAP: Well, let me say I disagree
10 with that. First of all, with regard to the statutory
11 warnings, they are in both the temporary and final order.
12 However, in the final order I believe there are two extra
13 warnings that have been added that aren't required by
14 statute involving firearms. I guess that's my point. The
15 answer always is, "Well, he can read it." Read the
16 application, this is the application you want, and you can
17 wade through all these checkmarks, and, yeah, you can kind
18 of figure it out. I don't think -- you know, the idea has
19 been in the warnings to give it in layman's language. The
20 notice that the respondent receives as to what's about to
21 happen to him is not in layman's language. It's in
22 lawyerese. That's the problem.

23 CHAIRMAN BABCOCK: Lisa.

24 MS. HOBBS: I agree with those comments, and
25 I'm sympathetic to them, but I also -- and, Stewart, you

1 can correct me if I'm wrong here about how this works
2 statewide, but my understanding of how these forms work is
3 that if I were in a big county like Travis County and I
4 was in an abusive relationship that I needed to get out
5 of, I could go to the county attorney's office, and she
6 would help me do what we're trying to do with these forms,
7 and so mainly these forms are going to be used in a rural
8 area or maybe Harris County may be overwhelmed with the
9 numbers so maybe they're used in Harris County more, but
10 my point is, the system itself is already meant to be
11 somewhat more helpful to the person who is trying to leave
12 the abusive relationship, which I believe is the state's
13 function in trying to protect people who are being harmed
14 by other people, and so we're looking at these forms kind
15 of in that vacuum. It's already a system that helps the
16 person trying to leave and get into the court system, and
17 so it's hard to change that form, although I'm totally
18 sympathetic with you. When I look at these I don't even
19 know if the guy would understand who a respondent is. I
20 mean, that word right there is at its core not really
21 understandable to somebody. So I agree there is room for
22 improvement, but the larger issue concerns me less because
23 of the context of the entire system.

24 CHAIRMAN BABCOCK: Yeah, Justice
25 Christopher.

1 HONORABLE TRACY CHRISTOPHER: If a lawyer
2 was preparing the application and the temporary
3 restraining order, temporary protective order, we would
4 not require anything different than what's in this form,
5 so why would we require something different in this kit
6 than if the person was actually represented?

7 CHAIRMAN BABCOCK: Justice Moseley.

8 HONORABLE JAMES MOSELEY: Because we're
9 trying to put together a balance of the forms to apply to
10 both sides of this equation when someone comes in with a
11 complaint of family violence and an abusive relationship,
12 and if the Court is going to enter into this field to
13 provide information for these parties, we ought to try to
14 provide information for both sides of it.

15 CHAIRMAN BABCOCK: Justice Jennings.

16 HONORABLE TERRY JENNINGS: Just a point of
17 clarification here. I'm trying to understand the purpose
18 of these types of protective orders versus what you could
19 get through the district attorney's office. When I was a
20 prosecutor, been about 11 years now, we had a domestic
21 abuse section in Harris County, and we also had a citizen
22 complaint desk, and usually the way these things would
23 arise is a woman would file criminal charges for a Class A
24 assault or whatever and then a protective order was
25 usually kind of done not necessarily as a matter of

1 course, but in that regard. If the police officer didn't
2 accept criminal charges or if the police officer called
3 the prosecutor's office and they didn't accept criminal
4 charges they could go to the citizen complaint desk, which
5 was staffed by an assistant district attorney and talk to
6 the assistant district attorney themselves. If the
7 assistant district attorney thought that it had some merit
8 it would go to the domestic abuse section, and they would
9 swear out an information, have the person arrested for
10 Class A assault or whatever and then they do a protective
11 order. Is this protective order just to be used in civil
12 cases or -- I understand the problem is statewide, not all
13 the counties are equipped to do it this way.

14 MR. GAGNON: Protective orders are used in
15 civil courts, so they are issued by general jurisdiction
16 courts, but, for example, in Harris County you're talking
17 about the district attorney's office does have a domestic
18 violence unit. They file those protective orders in a
19 civil district court, and they prosecute them under the
20 Family Code and -- or they prosecute the application under
21 the Family Code asking for a civil protective order.

22 HONORABLE TERRY JENNINGS: And the violation
23 of a protective order is a crime.

24 MR. GAGNON: It could be.

25 HONORABLE TERRY JENNINGS: So I guess what

1 I'm getting at here, if there are counties that already
2 have a mechanism in place like I guess Travis County and
3 Harris County, is this geared more towards the rural areas
4 where maybe the DA's offices aren't providing that
5 service?

6 MR. GAGNON: It was originally designed to
7 be a tool available to people who did not have resources
8 like the Harris County district attorney's office or the
9 Travis County county attorney's office available to them,
10 but where it has evolved is it's being used in even the
11 counties where they have those resources because there may
12 be a reason why a person goes to the district attorney's
13 office because of their policies, the folks have
14 separated, they won't take a protective order case. The
15 district attorney's office may not take that protective
16 order case because they have separated, but a protective
17 order may be appropriate, and because of that they then go
18 to either volunteer lawyers program, Houston Area Women's
19 Center, Catholic Charities, all kinds of different support
20 groups that then make this type of tool available, so this
21 tool is being used in Harris County.

22 CHAIRMAN BABCOCK: Frank.

23 MR. GILSTRAP: I'll follow-up to Justice
24 Jennings' point. There is also another procedure called a
25 magistrate's order, a magistrate's emergency protective

1 order, a MEPO, magistrate's order of emergency protection,
2 MOEP, both bad acronyms. They are issued by -- when a
3 person is arraigned in a criminal proceeding and can be
4 issued up to 90 days. That's a separate procedure,
5 though, as I understand, from these. The protective order
6 procedure, as I understand, is the same all over the
7 state. It's just a question of which forms they use.

8 MR. GAGNON: That's correct. Let me just
9 comment that the family practice manual, which has a
10 section for protective orders, also has none of the stuff
11 that you're talking about today included. So, I mean,
12 it's not even in something that most lawyers use.

13 CHAIRMAN BABCOCK: Any other questions? Be
14 sure your question is in the form of a question. Just
15 kidding. Richard.

16 MR. MUNZINGER: I notice that the first part
17 of the application is not under oath. The only part of
18 the application that's under oath are the last 12
19 questions.

20 MR. GAGNON: The affidavit is under oath, or
21 it's now a declaration.

22 MR. MUNZINGER: That's the last 12
23 questions.

24 MR. GAGNON: There's actually a separate
25 document called "Declaration."

1 MR. MUNZINGER: Okay.

2 MR. GAGNON: And that's -- if you file an
3 application you include with that application the
4 declaration, used to be the affidavit.

5 MR. MUNZINGER: I understand, but the
6 material in the first -- I'm looking at the kit now that
7 was given to me, so I have an application for protective
8 order, page one, page two, page three. At the bottom of
9 page three the applicant signs it, but it's not under
10 oath. There is no promise that it's under penalty of
11 perjury and that the matter contained in it is true, so
12 help them God. Now, the declaration has that, and the
13 declaration obviously pertains to violence and the history
14 of violence, but, in fact, is, I would think, based in
15 part upon the application, and I'm curious why the
16 application shouldn't be under oath. You're taking away
17 someone's rights. You're entering an order that could
18 have a serious effect on a citizen, and you're doing so
19 without oath.

20 MR. GAGNON: Well, first of all, if you
21 just -- well, several responses. Family Code does not
22 require an application to be under oath. Okay. That's
23 one. Secondly, if you just file the application without
24 an affidavit, they're going to give you a hearing without
25 a temporary ex parte protective order, so you're going to

1 have to put on evidence before you have that -- a
2 protective order. You're going to have to put on evidence
3 under oath in front of the judge before you're going to
4 have that -- that court is going to be able to grant you
5 that protective order. In order to get a temporary ex
6 parte protective order, you have to file also along with
7 your application now the declaration, which is the form
8 provided by the Civil Practice and Remedies Code now that
9 says what happened and these are the events that we
10 believe -- I believe should justify me getting a temporary
11 ex parte protective order.

12 MR. MUNZINGER: If I am a person seeking a
13 temporary ex parte protective order, would I be able to
14 obtain the order with just the declaration, or would I be
15 required to fill out the other portion of the application?

16 MR. GAGNON: You have to fill out the
17 application and the declaration.

18 MR. MUNZINGER: And that's my point. Why
19 would you allow a citizen's rights to be affected by an
20 application that is not completely under oath to the
21 extent that the person can swear to the facts that are
22 within their personal knowledge. Just by way of example,
23 in paragraph one you identify certain people, other
24 adults. Paragraph three, "He's threatened my mother" or
25 "She's threatened my father" or whatever it might be.

1 These are facts that a judge reading this takes into
2 consideration in issuing the order, but none of it is
3 under oath, and that's troubling to me.

4 MR. GAGNON: Well, my response is the
5 application itself is not required to be under oath by the
6 Family Code. The declaration is required to be under oath
7 if you're going to get an ex parte protective order, and
8 they go together if you're going to get an ex parte
9 protective order.

10 CHAIRMAN BABCOCK: Frank, does the
11 declaration contain the same information that Richard is
12 concerned about, like "She's threatening my dad" or "He's
13 threatening my mom"?

14 MR. GAGNON: No. The declaration states the
15 facts of family violence and who committed the family
16 violence and what date it was committed on, whether
17 weapons were involved, whether children were involved,
18 whether the police were called, whether there was medical
19 treatment, has there ever been any other incidence of
20 family violence.

21 CHAIRMAN BABCOCK: And that's under oath.

22 MR. GAGNON: That's under oath.

23 CHAIRMAN BABCOCK: And, Richard Munzinger,
24 that's what you're worried about, is the factual predicate
25 for the order, which may not be in the petition, but it

1 sounds like it's in the declaration.

2 MR. MUNZINGER: Well, I understand that that
3 portion of it is under oath. It's the other portion that
4 isn't that troubles me because I do believe that a judge
5 would review the entire file, would make the judge's
6 decision based upon the entire file, and I understand that
7 the Family Code doesn't require that the application be
8 under oath, but it still troubles me that a citizen's
9 rights can be affected by unsworn material. If I were
10 seeking a temporary restraining order, an ex parte
11 temporary restraining order in a commercial dispute, I
12 would have to do so under oath, the rule so requires, and
13 the allegations would have to be supported under oath to
14 the extent that they are factual allegations. That's my
15 understanding of the law.

16 MR. GAGNON: But they could be under oath in
17 an affidavit rather than in the petition itself.

18 MR. MUNZINGER: I agree with that.

19 MR. GAGNON: Well, that's what we're doing
20 here.

21 MR. MUNZINGER: Well, I don't think you're
22 doing that here. You're doing the family violence portion
23 of it here but not the remainder, and that's my concern.

24 MR. GAGNON: Well, what gets you into court
25 is the family violence portion. If there's no family

1 violence, there's no protective order.

2 MR. MUNZINGER: I understand all that.

3 MR. GAGNON: If there's no family violence
4 -- in fact, I will tell you we screen on a monthly basis
5 ladies that come in and say, "I want a protective order,"
6 and we have to say, "You're not entitled to a protective
7 order because there's no family violence or there's no
8 threat of future family violence."

9 MR. MUNZINGER: I don't question anything
10 that you say. I only point out that there are facts that
11 apparently are presented to a judge in an application
12 which are not sworn to, and those facts become in part the
13 basis for an order affecting the freedom and the rights of
14 another citizen, and that troubles me.

15 MR. GAGNON: Okay.

16 CHAIRMAN BABCOCK: Justice Jennings.

17 HONORABLE TERRY JENNINGS: Question for
18 Richard as a family law practitioner, if the standard is
19 some kind of family violence, either assault, terroristic
20 threat, or harassment or something along those lines, is
21 there any reason why a family law practitioner wouldn't
22 send their client to law enforcement to swear out an
23 information to have the person arrested for the underlying
24 criminal offense?

25 MR. ORSINGER: I think so. Most people if

1 the client has come to the lawyer for assistance and the
2 lawyer is willing to help will provide that assistance
3 themselves rather than just refer them to a government
4 agency.

5 HONORABLE TERRY JENNINGS: But you have the
6 person arrested and charged with a crime.

7 MR. ORSINGER: I didn't understand what
8 you're saying there.

9 HONORABLE TERRY JENNINGS: Well, if the
10 standard is you have to have some kind of family violence,
11 which in my mind -- and I may be mistaken here about what
12 the standard is for obtaining the order. If someone has
13 committed assault or terroristic threat or harassment and
14 the family law practitioner is getting ready to do this
15 protective order, why wouldn't the family practitioner if
16 there is evidence of a crime refer the client to the law
17 enforcement or the district attorney's office to file a
18 criminal case against the person?

19 MR. GAGNON: I can answer that. It's a
20 policy of a lot of those -- it's a policy of a lot of
21 those law enforcement offices not to file anything on
22 requesting a protective order when a divorce is already
23 pending. So if have you a pending divorce and you have an
24 assault, yes, you can file criminal actions and you may
25 seek the magistrate's order and it may be given, but the

1 district attorney's office is not going to file that
2 request for a protective order because there is a divorce
3 already pending.

4 HONORABLE TERRY JENNINGS: Is law
5 enforcement concerned that maybe the protective order
6 might be being used as leverage in the civil case?

7 MR. GAGNON: You're going to have to talk to
8 each one of the DA's offices about what their concern was.
9 My understanding is some of the ones I've talked to is
10 it's just a matter of they already have a lawyer, we're
11 not -- we don't want to use our resources to -- when
12 somebody has available to them somebody to do that.

13 MR. ORSINGER: But can I --

14 MR. GAGNON: You know, that's just a
15 practical resolution.

16 MR. ORSINGER: Let me explore it for just a
17 second, because I sometimes have people come to me for
18 legal representation after a protective order has been
19 signed and now they want to file a divorce, and so it's
20 already -- it's already in the government wheel and no
21 divorce has been filed yet, now one is filed. Can you
22 comment on that, because I'm sure that must happen a lot,
23 Stewart.

24 MR. GAGNON: It does, and, you know, if
25 somebody has gone and gotten assistance and

1 gotten representation from a -- anybody, whether the
2 county attorney's office, district attorney's office, they
3 obtained a ex parte protective order or protective order,
4 then they go to get the divorce, the Family Code addresses
5 that procedure, but that's usually not a problem for
6 either the private practitioner or the governmental
7 lawyer.

8 MR. ORSINGER: Now, as a practical matter,
9 if there's an event of violence there's often an arrest by
10 a police officer and then there's a trip to the jailhouse.

11 MR. GAGNON: That's not true.

12 MR. ORSINGER: That's not true?

13 MR. GAGNON: That's not true. For all kinds
14 of different reasons. A lot of times they -- I mean, I'm
15 aware of situations where there is no arrest because the
16 investigating police officer comes out and says, "Well,
17 he's already left, so y'all are already separated, so
18 we're not going to use our resources to do anything."
19 Here's your -- they give them a packet because they have a
20 packet to give them for domestic violence. They give them
21 a packet and tell them how to file a protective order.

22 MR. ORSINGER: You're talking about the
23 protective order kit?

24 MR. GAGNON: No, there's a separate law
25 enforcement packet that all law enforcement agencies have

1 that is promulgated by -- and I can't tell you exactly
2 who, but it is a packet that all police officers carry
3 with them. So if they investigate a domestic violence
4 complaint or incident, they're going to hand that
5 person -- or they may investigate it. They have it in the
6 hospitals, too. If they suspect that the person is a
7 victim of family violence, they're going to give them a
8 packet of information.

9 MR. ORSINGER: Who issued the packet?

10 MR. GAGNON: I don't know.

11 MR. ORSINGER: Is it an official statewide
12 packet?

13 MR. GAGNON: I can find out for you.

14 MR. ORSINGER: Is it a statewide packet?

15 MR. GAGNON: I don't know, but I can find
16 out for you.

17 MR. ORSINGER: Okay. Does the packet
18 contain applications for protective orders?

19 MR. GAGNON: It has information on how to
20 obtain information. It doesn't have this.

21 CHAIRMAN BABCOCK: Roger.

22 MR. GAGNON: My understanding is it doesn't
23 have this.

24 CHAIRMAN BABCOCK: Roger.

25 MR. HUGHES: I was going to ask, following

1 up on what was just being talked about, the protective
2 order -- the ex parte order once it's issued, must it be
3 served by a peace officer or can they use a civil process
4 server? The reason I ask is one of the first wrongful
5 death cases I ever handled was one where the wife went to
6 the police, then got a protective order, and the civil
7 process server got to the guy to serve him before the
8 sheriffs could execute the warrant of arrest, and during
9 the delay he tracked his wife down and shot her to death,
10 and so what I saw was, is that sometimes it's easier to
11 find these people with a civil process server than for the
12 sheriff to find them to serve an arrest warrant, so my
13 question was, is are these ex parte orders -- can they be
14 served by a process server?

15 MR. GAGNON: They can be served by a process
16 server like any other -- I mean, that's a Rule of Civil
17 Procedure.

18 MR. HUGHES: Okay.

19 CHAIRMAN BABCOCK: Okay. Any other
20 questions?

21 MR. LOW: Chip?

22 CHAIRMAN BABCOCK: Frank.

23 MR. GILSTRAP: I've got a second question,
24 and this also involves the rights of respondent, and let
25 me say this. I don't have any illusions here. I talked

1 to several county and district attorneys about this, and
2 all of whom were very well-informed and very earnest, and
3 the real world is that most people don't show for the
4 hearing, and the ones that do are usually already under
5 some type of criminal prosecution and won't testify.
6 Nevertheless, as Richard Munzinger points out, citizens or
7 no, these people do have rights, and so that brings us to
8 the second topic which is unpopular, which is firearms.
9 If I were the Legislature and I were drawing a statute, I
10 would say in a perfect world I would like to get all guns
11 out of the house right away to eliminate the possibility
12 anybody is going to get shot. The only question would be
13 could I practically do it, and that seems to be a big
14 question.

15 The Legislature, however -- and the
16 Legislature made a call on this. The Legislature made a
17 call and gave discretion to the judge, and there's -- if
18 you'll look at the protective order, every single -- every
19 single provision has a checkmark and it's -- corresponds
20 to a provision of the Family Code that says the judge may
21 do this. The only one -- the only thing the judge is
22 required by the state statute to do is suspend the
23 concealed permit -- concealed permit license or concealed
24 handgun license if the person has one. That's automatic.
25 Everything else is not. However, when you look at the

1 temporary order and the permanent order and you go through
2 the checkmarks, you come to the one regarding firearms.
3 It is automatic. It's already checked on both the -- the
4 temporary order, which is on paragraph two, page 3(g), and
5 that's page six of the handout. Protective order,
6 paragraph three, page 4(j), which is page 10 of the hand
7 out. The judge doesn't have any discretion on this, and
8 that strikes me as contrary to state law, which says that
9 the judge does have discretion. I don't think that this
10 group or even the Supreme Court of Texas has the power to
11 take that discretion away from the judge, but by
12 promulgating this form we appear to do that.

13 The most common justification for this is,
14 well, look, it's a crime to have a gun if you're under a
15 protective order. That is true for the permanent order.
16 That is not true for the temporary order. It is not a
17 crime to be in possession of a gun if you've been served
18 with a temporary ex parte order. The reasons why are
19 complicated. I'll be glad to go into them if anybody has
20 a question, but the fact that it's a crime doesn't mean
21 that it is automatically restrained for the judge. There
22 are a lot of things that are crimes. If you'll look at
23 the very first paragraph of -- the very first checkmark is
24 that the judge has the power to prevent the respondent
25 from inflicting harm on the applicant. That's a crime,

1 but the judge has a discretion of whether or not to check
2 it. I don't see any basis for us automatically telling
3 the judge that he is required to prohibit the person from
4 having a gun. That's it.

5 CHAIRMAN BABCOCK: All right. Any other
6 questions? Buddy, and then Roger.

7 MR. LOW: There's talk about the -- you go
8 to the district attorney, and there's been violence, and
9 he files and has him arrested. Do the ladies sometimes
10 say, "Look, I don't want to lock him up, I just don't want
11 it to happen to me again"? Do you ever have that kind of
12 case where they --

13 MR. GAGNON: Sure. Sure. In fact, what we
14 heard initially when we were drafting this kit is the
15 primary need for victims of family violence is immediate
16 separation, that once they -- and I think Frank said that
17 most of the respondents don't show up or if they do show
18 up they just basically say, you know, "I'll agree to it,
19 I'm going to stay away from her," or "I've had it with
20 this lady." That's pretty common. What's needed is that
21 immediate relief for 14 to 20 days, and that's why the law
22 provides for that. What we find is most of the time --
23 what we've been told is most of the time that's a
24 sufficient relief, that issuing a final protective order
25 has no effect on anybody because they've gone away, except

1 he's right, they can't carry a handgun or gun.

2 MR. LOW: The next question is you can get
3 all kind of forms on the internet. Did y'all have
4 experience with people trying to use those forms that
5 don't comply with Texas law and so forth?

6 MR. GAGNON: Not as it relates to these
7 protective orders.

8 MR. LOW: Okay.

9 MR. GAGNON: And I think that is a -- that
10 is a result of what the Supreme Court did in 2005 and how
11 it's become available and people are aware that it's
12 available through things like texaslawhelp.org.

13 MR. LOW: Thank you.

14 CHAIRMAN BABCOCK: Roger, did you have a
15 question?

16 MR. HUGHES: The automatic check off
17 provision that you're talking about, is that all firearms
18 or just handguns?

19 MR. GILSTRAP: All firearms.

20 MR. GAGNON: Or ammunition.

21 MR. GILSTRAP: And ammunition.

22 CHAIRMAN BABCOCK: Or both. So you can't
23 have a bullet and throw it at somebody.

24 MR. HUGHES: Well, I'm just thinking, I
25 mean, I live down on the border and a number of people,

1 you know, go hunting on the weekends and the like, and, I
2 mean, a bullet is a bullet whether it comes out of the
3 barrel of a rifle or a handgun. I was just curious how
4 far this went.

5 MR. GILSTRAP: All -- everything.

6 MR. GAGNON: Let me respond to that. That
7 was a comment that I heard when I visited with the West
8 Texas group of constitutional county judges, that they are
9 reluctant to issue protective orders because under the
10 Violence Against Women's Act at the time, which is a
11 Federal act, those people would lose their ability to have
12 their deer rifle. That was their response, but the law is
13 the law.

14 MR. HUGHES: Well, I'm not criticizing. I
15 was just -- I can see the wisdom.

16 MR. GAGNON: That was a valid concern that
17 people expressed. That was a valid concern that judges
18 expressed.

19 CHAIRMAN BABCOCK: Richard Munzinger.

20 MR. MUNZINGER: My understanding is that
21 this requirement prohibiting possession of a gun or
22 ammunition is a statutory requirement. It is not left to
23 the discretion of the judge issuing the order. Is that
24 what you're saying?

25 MR. GAGNON: There's a violation of a

1 criminal law if you have it. If there's a protective
2 order, my understanding is there's -- and Frank was going
3 to explain this. I think there is a Federal law, Violence
4 Against Women's Act that prohibits that.

5 MR. MUNZINGER: But this order would be
6 issued -- could be issued regardless of whether there had
7 been a history of violence.

8 MR. GAGNON: No. This issue is only issued
9 -- a protective order -- I'm sorry, an ex parte protective
10 order is only issued if there is a finding by the court
11 that there has been family violence and a likelihood of
12 family violence to occur based upon an affidavit. It's
13 good for 14 to 20 days, depends on what county you're in.
14 A protective order, which is at a hearing, after a
15 hearing, only issued if the court finds there has been and
16 there is a threat of future family violence.

17 CHAIRMAN BABCOCK: Okay. Justice Jennings.

18 HONORABLE TERRY JENNINGS: And, again, maybe
19 my concern is with the statute. A crime is committed
20 against the peace and dignity of the state, and it just
21 seems to me that if a lawyer is aware that a crime has
22 been committed they have a duty to make sure that it's
23 prosecuted. When I worked under Johnny Holmes at the
24 Harris County DA's office, if there was credible evidence
25 that a crime has been committed, Class A misdemeanor,

1 terroristic threat, or whatever, we filed the charges; and
2 of course, if the charges are filed you can make it a
3 condition of their bond that they have no contact with the
4 person. You can make it a condition of their bond that
5 they surrender their firearm and so forth and so on. So I
6 guess my concern may be with how this is being treated
7 civilly because it seems to me that law enforcement may be
8 the better place to handle this, but --

9 CHAIRMAN BABCOCK: Just for the record,
10 Justices Wainwright and Medina have joined us, so we are
11 honored by their presence. Thank you. Go ahead.
12 Stewart, did you have something to say?

13 MR. GAGNON: Yes, sir. Over here.

14 CHAIRMAN BABCOCK: Yeah, Justice Gray.

15 HONORABLE TOM GRAY: One is a procedural
16 question and one is an observation on Frank and Richard's
17 comments about the -- what the respondent may or may not
18 understand. One, the mechanics I'm trying to understand,
19 because I heard somewhere in the conversation somebody
20 say, "if they are mandated," and so it's my understanding
21 that currently these forms, while promulgated, are not
22 mandated. Is that correct?

23 MR. GAGNON: Oh, no. A litigant or -- could
24 use the family practice manual protective order kit.

25 HONORABLE TOM GRAY: Okay.

1 MR. GAGNON: They're not required to use
2 these forms, but if these forms are submitted to the
3 court, there is a proof that supports the order, and they
4 are properly filled out by the litigant, the court can't
5 deny these because of technical issues or the check the
6 box form or something like that.

7 MR. ORSINGER: I think I need to interrupt.
8 When the Supreme Court promulgated the use of these forms
9 they issued an order dated April 12th of 2005, and the
10 last sentence of it says, "A trial court must not refuse
11 to accept the approved forms simply because the applicant
12 is not represented by counsel." So that, if you will, is
13 the mandatory component of the protective order kit that a
14 trial judge cannot reject a pro se litigant simply because
15 they're using the protective order kit. We'll discuss
16 later if they're free to reject it if they're using
17 someone else's form. That was one of our subcommittee's
18 recommendations on the divorce kit.

19 HONORABLE TOM GRAY: Because that was part
20 of my concern is -- and I apologize for reading ahead --
21 but that some judges are rejecting checkmark forms, and I
22 was wondering if that was going to be addressed or
23 overcome with regard to --

24 MR. GAGNON: Oh, I would guess it would be.

25 HONORABLE TOM GRAY: -- the promulgation.

1 MR. GAGNON: Yeah, I imagine it would be.

2 HONORABLE TOM GRAY: Because what you just
3 read does not overcome a trial court's ability to reject a
4 checkmark form.

5 MR. ORSINGER: It only addresses their
6 ability to reject the Supreme Court approved form, but --

7 HONORABLE TOM GRAY: If they're pro se.

8 MR. ORSINGER: If they're pro se.

9 HONORABLE JAMES MOSELEY: What about the
10 reason that they're pro se?

11 MR. ORSINGER: It just says "is not
12 represented by counsel." It doesn't go behind why they're
13 not. So this is something --

14 HONORABLE JAMES MOSELEY: Could you read
15 that one more time?

16 MR. ORSINGER: -- I hope we will discuss
17 later with the divorce forms in greater detail, but
18 there's the idea that the Supreme Court of Texas
19 promulgates a form for everyone to use if they want to.
20 That's one thing.

21 HONORABLE JAMES MOSELEY: Could you read
22 that one more time, the order part?

23 MR. ORSINGER: The 2005 order from the
24 Supreme Court said, last sentence, "A trial court must not
25 refuse to accept the approved forms simply because the

1 applicant is not represented by counsel." So that's --
2 that's the mandatory component of the adoption of the
3 forms, which is apart from the attraction that they're
4 Supreme Court approved, if you see the distinction I'm
5 making.

6 CHAIRMAN BABCOCK: Pete Schenkkan.

7 MR. SCHENKKAN: I would be interested in
8 hearing from Stewart and Richard and others here who could
9 be involved in this situation, these protective orders,
10 what the frequency is in which a trial judge rejects an
11 application for protective order complying with the order
12 that Richard just read not because the person is pro se,
13 but rejects it saying, "This is a form, and I don't like
14 checkmark forms, I refuse" --

15 MR. GAGNON: You're talking about this
16 document right now?

17 MR. SCHENKKAN: Yeah. Has that happened?

18 MR. GAGNON: I'll tell you in the last five
19 years we have not heard any reports on our task force of
20 any rejections of this check the box form. Before the
21 Court approved it we did hear a lot of reports of
22 rejection of forms similar to that.

23 MR. SCHENKKAN: Is there anybody else in the
24 room that has experience with this protective order
25 situation has a different experience on that issue where

1 there is a problem with trial courts rejecting the forms,
2 while complying, not saying I'm doing sufficient pro se,
3 not like that, but just because it's a form, as opposed to
4 a fully written out, you know, without the forms on it?
5 Same context. Nobody has had that experience? Thank you.

6 MR. ORSINGER: Justice Gray, we didn't --
7 that was just a predicate to your real question, right?

8 HONORABLE TOM GRAY: Predicate to the
9 observation I wanted to make. Richard and Frank and I've
10 heard Stewart reference that most of these are not
11 attended by the respondent or they're kind of --

12 MR. GAGNON: I don't want to represent
13 they're not attended by respondent. There is a lot that
14 aren't attended by the respondent.

15 HONORABLE TOM GRAY: Okay, a lot that
16 aren't, and that frequently if the respondent gets there
17 it's kind of like, you know, "Just get us separated, you
18 know, I just want really out of this relationship, give me
19 some distance here." From personal experience I will tell
20 you that the respondents frequently may not agree with the
21 allegations that they were engaged in any type of family
22 violence, but they are willing to walk away, but the
23 petition does not have that information in it about them
24 losing their guns, and they don't know about that until
25 they get that final order, and that is what really makes a

1 difference to whether or not they're going to show up or
2 not at the hearing and what level they're going to contest
3 the allegations, and that does concern me, and maybe
4 that's what the statute and the modifications that are
5 being made address, but I don't think it's in the
6 petition. It's in the order, and the order kind of comes
7 too late to show up for the hearing and contest the actual
8 allegations of family violence.

9 MR. GAGNON: I think it does have it in the
10 request. There's a request to suspend any license to
11 carry a concealed handgun. "The law requires a trial
12 court issue a protective order to prohibit the respondent
13 from possessing a firearm or ammunition, unless the
14 respondent is a peace officer," and yada, yada, yada. So,
15 I mean, it's there. Now, whether it's plain enough
16 language for most -- I think -- and I guess we'll get into
17 this debate later or discussion later. I think we're
18 selling a lot of these people a lot shorter than they need
19 to be sold. They understand what that means. They
20 understand who they are, and they go into it saying,
21 whether they admit that they did something or not, that
22 they're not going to do it again. That's their position.

23 CHAIRMAN BABCOCK: Richard.

24 MR. ORSINGER: Stewart, before we leave the
25 subject, we may not be leaving it right away, but Frank

1 was drawing a distinction between the mandatory
2 requirement that a final order prohibit possession of
3 firearms and ammunition and an ex parte order. Do you
4 agree with him that the Family Code does not require a
5 judge to impose that in an ex parte?

6 MR. GAGNON: I agree with him that the
7 Family Code doesn't require that.

8 MR. ORSINGER: Okay. Now, is there a
9 Federal law or another state law that requires that the
10 temporary order ban possession of all firearms and
11 ammunition?

12 MR. GAGNON: Violence Against Women's Act.

13 MR. ORSINGER: The Federal statute.

14 MR. GAGNON: Yeah.

15 MR. ORSINGER: So your answer to Frank's
16 concern that the Family Code doesn't require it --

17 MR. GAGNON: And actually there's a Penal
18 Code statute that says if you're -- it's a criminal act if
19 you possess it if you're under protective order.

20 MR. ORSINGER: So your response to the idea
21 that you should not precheck that box on the protective
22 order, ex parte protective order, is that if you don't
23 precheck the box, the respondent may inadvertently commit
24 the crime of possessing --

25 MR. GAGNON: Richard, you know we have that

1 situation in family law where people are subjected to a
2 temporary protective order -- temporary injunction that
3 precludes them from doing certain things and physical
4 contact, and that's been interpreted by case law as
5 applying Violence Against Women's Act, prohibiting you
6 from having your firearm.

7 MR. ORSINGER: So you're saying --

8 MR. GAGNON: And that doesn't tell you that
9 in the injunction.

10 MR. ORSINGER: So you're saying that it's
11 appropriate to precheck the box in the ex parte order
12 because it would be a crime for continued possession, but
13 the order is not giving the respondent that warning, first
14 of all, and secondly --

15 MR. GAGNON: If the court does not check
16 that box it still would be a violation of that Federal
17 law. It would be a violation of criminal law if the court
18 didn't check that box, so you don't give the court that
19 authority -- that chance that they're going to make a
20 mistake or they're going to decide not to check that box
21 for whatever reason and then allow that person to become a
22 victim of some kind of criminal prosecution that somebody
23 is creating. Give them that warning.

24 MR. ORSINGER: In --

25 CHAIRMAN BABCOCK: Frank, and then Elaine.

1 MR. GILSTRAP: Well, you know, I've been
2 asking now for several years. No one has ever shown me
3 anything to back up the statement in the application that
4 the law requires the judge to prohibit possession of the
5 guns. He just doesn't do it. There is a criminal statute
6 that says that if you're in possession of the gun after
7 the issuance of the final order it's a crime, and the
8 statement is in the warning. The warning says, this is
9 what the Legislature says, "It is unlawful for any person
10 other than a peace officer as defined by section 107 to
11 possess a firearm or ammunition." It's a violation of the
12 criminal law to do so. There's nothing requiring the
13 judge to do it. The judge -- the Legislature has made
14 this call. We're going to give the judge discretion, and
15 we're going to warn the guy that it's a crime, but there's
16 nothing that says the judge has to do it, and by checking
17 the box we're taking away the discretion of the judge.
18 The judge may want to do it, but it's his call, not this
19 committee's, not the Supreme Court's.

20 CHAIRMAN BABCOCK: Professor Carlson.

21 PROFESSOR CARLSON: Yeah, I wanted to
22 follow-up on the earlier comment about the desirability of
23 having a sworn application for the protective order and
24 the sufficiency of notice to the respondent in the
25 temporary ex parte protective order. This is not an area

1 I have any expertise in, but what comes to my mind is
2 United States Supreme Court decisions when we're dealing
3 with the ex parte seizure of personal property in *Fuentes*
4 *vs. Shevin* and *W. T. Grant* and *Sniadach* and those cases.
5 There were several things the Court said would be
6 necessary constitutionally to have the ex parte seizure of
7 personal property, including based upon a sworn petition,
8 you know, under the pains of perjury, and that the
9 defendant should be notified, in this case the respondent,
10 of their rights; and, of course, our rules now provide
11 that when a writ of attachment or a sequestration issues
12 to seize property prejudgment that the defendant must be
13 advised I think in 12 or 14-point font, "You have a right
14 to an early hearing to move to dissolve the writ." The
15 burden of proof is on the party who obtained it, and you
16 have a right to replevy if you put up your own bond. I'm
17 not here to defend the rights of respondent because I find
18 that somewhat troublesome, but I do think that Frank is
19 right, there are some constitutional concerns we might
20 think about.

21 CHAIRMAN BABCOCK: Frank.

22 MR. GILSTRAP: Well, that gets us to the
23 last point, and that is the -- as we all probably know,
24 the United States Supreme Court has now recognized that
25 Second Amendment right of an individual to possess a

1 firearm in his home for personal protection. In McDonald
2 against City of Chicago they've incorporated that in the
3 Fourteenth Amendment and say it now applies to states.
4 There are due process concerns here with regard to the
5 procedure for weapons. Once you get to the hearing and
6 the judge has a hearing and he says, "Here's an order.
7 You're prohibited from having a firearm," that probably --
8 there is no problem for due process there. He's had the
9 hearing. The problem is before the hearing. The ex parte
10 order is entered ex parte. It requires the court to
11 prohibit respondent from possessing firearms.

12 Now, look, this may be an exigent situation.
13 There may be some imminent danger. It would be helpful if
14 there was a finding that there's a danger that firearms
15 are about to be misused, but probably this will stand
16 constitutional muster if there is a prompt curative
17 hearing. The prompt curative hearing can be up to 20
18 days. In my opinion this has constitution -- this
19 procedure has constitutional infirmity. I just want to
20 put it in the record. Somebody is going to have to raise
21 it, but we don't know where the Supreme Court is going
22 with the Second Amendment right, but if the respondent has
23 a firearm in his home and he's given an ex parte order to
24 get rid of that firearm, there probably has been a facial
25 due process violation.

1 MR. GAGNON: Can I respond to that, just
2 that one question? Family Code section 83.004 provides
3 that a respondent when served does not have to wait the 14
4 or 20 days, and just to explain to everybody, it's --
5 there has to be a hearing within 14 days unless it's in
6 Harris County, and then it has to be within 20 days.
7 That's sort of a general rule. But if he's served he has
8 a right to file a request of the court who has to have a
9 hearing as soon as possible to dissolve that protective
10 order. So he doesn't have to wait the 14 or 20 days, and
11 I can tell you I have used that rule before to dissolve a
12 protective order and was successful in doing that. So
13 they have a right to go into court and do that if they
14 want to. They don't have to wait the two weeks or three
15 weeks.

16 MR. ORSINGER: Stewart, does the order say
17 that they have that right?

18 MR. GAGNON: I have to look. Probably not.

19 MR. ORSINGER: Is there any reason why we
20 shouldn't put in the order that served --

21 CHAIRMAN BABCOCK: You knew the answer to
22 that, didn't you? You're just setting him up.

23 MR. GAGNON: Listen, I've been doing that
24 for --

25 MR. ORSINGER: This is not a test.

1 MR. GAGNON: -- several years with Richard.

2 PROFESSOR CARLSON: We all have.

3 MR. ORSINGER: This is not a test. It seems
4 to me that if we're going to balance the process a little
5 bit that it might be advisable and is certainly not
6 harmful to say that this person has a right to get into
7 court to have this order modified or reconsidered, and
8 there is no danger of violence or anything. It's going to
9 be done by a judge after a hearing, so is there any harm
10 to including that in the form order?

11 MR. GAGNON: In the protective order, the ex
12 parte protective order?

13 MR. ORSINGER: Yes. Yes. That they have a
14 right to come into court to ask the court to set it aside.

15 MR. GAGNON: I don't think there is any
16 harm. I will tell you that's a -- my experience has been
17 the two or three times I've used it I've had to educate
18 the judge and the clerk that I was entitled to it.

19 MR. ORSINGER: Then it's a good reason to
20 put it in an official form because that will make it
21 easier to --

22 MR. GAGNON: It's in the Family Code.
23 That's how you educate the --

24 MR. MUNZINGER: We can't hear you.

25 MR. GAGNON: It's in the Family Code.

1 That's how you educate the judge, but as far as -- I mean,
2 I bet there's not six people out there other than Judge
3 Warne who deals with it all the time as a protective order
4 matter that really understands that that's available to
5 even lawyers.

6 MR. ORSINGER: If we put that in the form
7 itself then it's going to be hard for somebody to say they
8 don't understand that.

9 MR. GAGNON: If the Court wants us to do
10 that, we'll do that. We have no problem with it.

11 HONORABLE JAN PATTERSON: Stewart, is there
12 a place or a time when a respondent is informed what it
13 means to possess a firearm, and do they put them in their
14 safety deposit box, turn them over to a brother, turn them
15 over to their lawyer? What happens?

16 MR. GAGNON: Oh, they just can't possess
17 them.

18 HONORABLE JAN PATTERSON: Well --

19 MR. GAGNON: I mean, the answer is you can't
20 possess them. I mean, so --

21 HONORABLE JAN PATTERSON: There's a broad
22 Federal definition.

23 MR. GAGNON: I'm sorry?

24 HONORABLE JAN PATTERSON: There's a broad
25 Federal definition as to what possession means.

1 MR. GAGNON: There probably is.

2 CHAIRMAN BABCOCK: Okay. Frank, and then
3 Nina.

4 MR. GILSTRAP: Okay. Insofar as the
5 firearms are concerned, there is a problem with
6 surrendering the firearm. I mean, the guy is told he
7 can't possess the firearm. Okay, "What do I do with it?"
8 I've always questioned the wisdom of an order that tells
9 the respondent in a family violence case, "Okay, the first
10 thing you do is go get your guns and ammo," but that's
11 what he's supposed to do. Then what does he do with it?
12 It's not clear. There is something called the *Texas*
13 *Family Violence Bench Book*, which is an amazing
14 publication. I think it was funded by the Violence
15 Against Women Act. It's a thousand pages. It's really an
16 interesting document. It's a well-done document. They
17 point out that there have been places in some parts of the
18 state where they've set up programs to allow you to
19 surrender your gun to the police. Now, the problem with
20 surrendering your gun to the police is you're not going to
21 get them back, you know, but -- you know, and it will be
22 lawful for them to keep them, but, again, I want to
23 mention that that's a problem. We're telling -- they're
24 telling these people "Go get your guns and ammo, and you
25 can't possess them." Well, what do you do with them?

1 CHAIRMAN BABCOCK: Nina.

2 MS. CORTELL: We've spent a lot of time
3 talking about the rights of the respondent --

4 MR. GAGNON: I'm sorry, I can't hear.

5 MS. CORTELL: We've spent a lot of time
6 talking about the rights of the respondent, which I
7 understand, but I'm interested anecdotally from your
8 experience whether there's really any substantial abuse by
9 the applicants who seek these orders.

10 MR. GAGNON: Can you repeat it, Richard?

11 MR. ORSINGER: Yes, is there -- anecdotally
12 has there been any record or history of abuse of this
13 application process by applicants?

14 MR. GAGNON: We've got -- anecdotally you're
15 going to hear once in a while we'll hear sometimes where
16 people use it as a tactic in a divorce, but we're not
17 hearing a widespread use of either this protective order
18 kit or any other request for protective orders. I mean,
19 there are times and there were times before 2005 when
20 lawyers were sometimes counseling clients to file their
21 protective orders as a means to defeat somebody's right to
22 be a joint managing conservator, but that's sort of
23 gotten to be passe. People don't do that anymore. That's
24 not a common advantage you see out there. We didn't hear
25 a lot of reports, didn't hear any reports really, about

1 misuse. I think anecdotally we know it's out there.

2 CHAIRMAN BABCOCK: Buddy, then Justice
3 Jennings.

4 MR. LOW: Yeah, my question actually has
5 been answered, but so I'll waive.

6 CHAIRMAN BABCOCK: All right.

7 MR. LOW: I had Nina's.

8 CHAIRMAN BABCOCK: Justice Jennings.

9 HONORABLE TERRY JENNINGS: Anecdotal stuff
10 is dangerous because just because somebody has seen some
11 abuse doesn't mean it's widespread, but one of your
12 colleagues, Lynn Murato, represented an individual -- I
13 don't know if you were aware of this case. It was a
14 business dispute between a mother and her stepson after
15 the stepson's father had passed away, and it was business
16 litigation, and the sole issue on appeal was a protective
17 order because the stepson had a gun collection, and the
18 allegation according to Lynn was that the protective order
19 was sought solely because out of spite because she knew
20 that this man had this gun collection, and in a divided
21 opinion we said the evidence was legally sufficient to
22 support family violence, and I thought it was under City
23 of Keller so weak that it wasn't, so Lynn could tell you
24 better, give you a better example of that.

25 MR. GILSTRAP: You said it was insufficient?

1 HONORABLE TERRY JENNINGS: I thought it was
2 insufficient. My two colleagues thought it was
3 sufficient, but the fight on appeal was all about the
4 protective order, and it settled --

5 CHAIRMAN BABCOCK: So this is pay back, huh?

6 HONORABLE TERRY JENNINGS: Well, that was
7 the allegation.

8 CHAIRMAN BABCOCK: No, I'm talking about the
9 majority of justices.

10 HONORABLE TERRY JENNINGS: I'm often in the
11 dissent.

12 CHAIRMAN BABCOCK: All right. Do we have
13 anything more about this kit?

14 MR. ORSINGER: Well, we haven't -- I hate to
15 say this, given the time --

16 CHAIRMAN BABCOCK: Yeah, given the time that
17 you told me it would take, half an hour.

18 MR. ORSINGER: We haven't talked about the
19 changes. We've only talked about the underlying kit.

20 CHAIRMAN BABCOCK: Yeah.

21 MR. GAGNON: Let me just say the changes
22 have nothing to do with what we've talked about today.

23 MR. ORSINGER: Well, can you tell us about
24 them?

25 MR. GAGNON: The changes are legislatively

1 directed. I can hit you with the changes pretty quickly.
2 We've added a protection for pets. That's got a lot of
3 chuckling in the family law bar, but that's actually a
4 means of intimidation that's used for people in victims of
5 family violence. It's a pretty interesting concept. It's
6 been around and talked about for several years. The
7 Legislature added a protection of pets.

8 HONORABLE TOM GRAY: Stewart, when you talk
9 about a change could you direct us to the page of the form
10 that the change is on so we can follow along?

11 MR. GAGNON: Well, okay. I gave Richard a
12 set of the old protective order or the new protective
13 order kit that actually is highlighted in yellow. Did he
14 pass that out?

15 MR. ORSINGER: Yes, by e-mail.

16 MR. GAGNON: By e-mail out.

17 MR. ORSINGER: That was probably 1 out of
18 150 e-mails that Justice Gray got from me.

19 MR. GAGNON: With the errata?

20 CHAIRMAN BABCOCK: We have paper copies
21 today, I think.

22 MR. ORSINGER: I will share my packet with
23 you.

24 HONORABLE TOM GRAY: If you can just tell me
25 what page it's on.

1 MR. GAGNON: Page two of the kit, page two
2 of the application, and then it goes someplace else,
3 "Prohibit the respondent from harming, threatening, or
4 interfering with the care, custody, or control of the
5 following pet companion or animal" -- "assistance animal"
6 and then describe it. We expanded because the Legislature
7 expanded the definition of who a protective order may
8 apply to, to an applicant, someone who is dating or
9 married to who may be -- it gets a little complicated, may
10 be a victim of family violence. We changed the affidavit
11 to a declaration to comply with a new change in the law,
12 and that's in the application and is also in the
13 declaration itself.

14 We've updated -- this is just sort of
15 verbiage. We've given somebody a safety plan and
16 protective order information resources that allows them to
17 understand how to make arrangements to be safe and
18 protected, and Richard's right. These things are just a
19 piece of paper, and if somebody wants to say, "I don't
20 care what that piece of paper says," they go out and shoot
21 somebody, we -- that paper won't stop that bullet, so we
22 try to give them information on a safety plan and how to
23 create a safety plan. That's not a legislative directive,
24 but that's something we give them.

25 We added the passport page to the protective

1 order, which is what I talked about as having a uniform
2 front page of a protective order nationally, and that's an
3 effort that's done nationally. We modified the language
4 in the -- both in the protective order itself on the
5 duration of the protective order because the Legislature
6 has allowed for in repeat offenders a longer than two-year
7 protective order. And we've replaced the form, which is a
8 respondent information form, which was updated pursuant to
9 updating of the law enforcement agency that created that
10 form, so that's the changes in your kit.

11 CHAIRMAN BABCOCK: Those are all the
12 changes?

13 MR. GAGNON: Those are all the changes.

14 CHAIRMAN BABCOCK: Any brief comments about
15 the changes? Anybody have any? Yeah, Carl.

16 MR. HAMILTON: I have a comment about
17 paragraph 7.

18 MR. GAGNON: Paragraph 7 of what?

19 MR. HAMILTON: Of the order.

20 MR. GAGNON: Of the order?

21 MR. HAMILTON: It's a warning about the
22 first paragraph is a fine of \$500, the last paragraph says
23 \$4,000.

24 MR. GAGNON: Right.

25 MR. HAMILTON: And I suspect the last

1 paragraph is intended to relate just to the paragraph
2 above it, but I'm not sure.

3 MR. GAGNON: Those fines and description of
4 fines of violation of the order are both contained in the
5 Family Code and the Penal Code, so that's why there is two
6 different fines.

7 MR. HAMILTON: But the first one says a
8 person who violates the order may be punished as much as
9 \$500.

10 MR. GAGNON: Right.

11 MR. HAMILTON: The last paragraph says, "A
12 violation of this order may be punished by a fine of
13 \$4,000."

14 MR. GAGNON: The first one is punished by
15 contempt of court which includes a fine.

16 MR. HAMILTON: And the last one?

17 MR. GAGNON: The second one is a criminal
18 violation.

19 MR. HAMILTON: Well, that's really not
20 clear.

21 MR. GAGNON: It may not be, but that's what
22 the warning is required to say under the Family Code.
23 That may be a legislative thing. We wanted to make sure
24 that it was consistent with what the Family Code said
25 required to be -- required warnings in the Family Code.

1 Richard.

2 MR. ORSINGER: Is it possible for you to
3 state both numbers at the same time and say that one is
4 for contempt of court and one is for -- would this be a
5 state jail felony or what is the second fine?

6 MR. GAGNON: The Family Code is very
7 specific as to the language that needs to be included in
8 the protective order. That's the language.

9 MR. ORSINGER: Well --

10 MR. GAGNON: It says, "The protective order
11 shall include the following language," boldfaced,
12 capitalized, and it repeats the language. This is
13 repeating that language, so we have not deviated from that
14 mandated warning.

15 MR. ORSINGER: You don't have to change the
16 words to eliminate the confusion by stating two different
17 numbers in two different places. Couldn't you say that
18 "punishable \$500 for contempt of court" and then carry on
19 with the Family Code warning?

20 MR. GAGNON: I disagree with you, Richard.
21 I think that the Legislature says the order has to contain
22 the following warning and gives you that warning you have
23 to repeat that warning. We do that consistently through
24 family law forms.

25 CHAIRMAN BABCOCK: Judge Estevez, and then

1 Buddy.

2 HONORABLE ANA ESTEVEZ: I was just -- he had
3 asked about whether or not it was a state jail felony. It
4 says it's confinement by \$4,000 or as long as a year --
5 I'm sorry, \$4,000 and confinement in jail for as long as
6 one year, and that would be a Class A misdemeanor, but I
7 do think you can add to that. I think you could add to it
8 and say "if convicted," you know, "you can be charged with
9 and if convicted of violating this order," and you can
10 keep all the statutory language and then it still has the
11 last part of that warning is also being prosecuted as a
12 separate felony offense for whatever that separate act
13 was.

14 So you have violating the order going back
15 to your original judge and they finding -- finding you in
16 contempt. You have the district attorney filing or I
17 guess the county attorney filing something stating that
18 you violated your protective order, which would be another
19 misdemeanor offense, according to this a Class A
20 misdemeanor; and then whatever your violent act was that
21 proved that you violated the court order, if you did have
22 a separate act, because obviously if you just called them
23 on the phone it wouldn't be a criminal act, it would just
24 be the violation of the protective order. Then you have
25 that other one, but I do believe you should make it clear.

1 I would recommend that, using the statutory language but
2 making it clear that we're talking about different things
3 and different ways of getting those different punishments.

4 MR. GAGNON: Well, 85.026 says, "Each
5 protective order issued under this subtitle, including
6 temporary ex parte protective order, must contain the
7 following prominently displayed statement" and then it has
8 the exact quote.

9 MR. ORSINGER: I think what you're not
10 understanding, Stewart, is that it's fine to have the
11 Family Code language in there, but can we add some
12 language to help the confusion of why there's one number
13 in one place and another number in another place for what
14 appears to be the same event? Isn't there some way to add
15 language to clarify that it's not a conflict?

16 CHAIRMAN BABCOCK: Buddy has got an answer
17 to that, and then Sarah has the final answer.

18 MR. LOW: My comment is that even though you
19 comply with what the Legislature says there is no
20 prohibition in either act saying you can't explain it
21 further.

22 MR. GAGNON: No.

23 MR. LOW: Is there any prohibition?

24 MR. GAGNON: No.

25 MR. LOW: So would there be any reason then,

1 even though you follow the language, you say, "What we
2 mean in 2 and 4 is X." That's not prohibited, is it?

3 MR. GAGNON: No, it's not prohibited.

4 MR. LOW: Okay. I think that's what people
5 are getting at.

6 CHAIRMAN BABCOCK: Sarah.

7 HONORABLE SARAH DUNCAN: And it's not even
8 if it's a conviction. Under 17.229 of the Code of
9 Criminal Procedure, if you're even arrested for family
10 violence allegations, charges, that's where the 4,000
11 comes in. So it seems to me that whether the Legislature
12 made it clear in the statutory text of the warning, the
13 Court has a responsibility to make it clear to anybody
14 served with one of these that if you're even arrested,
15 when you go before the magistrate they may issue another
16 protective order against you, and if you violate that
17 order it can be a 4,000-dollar fine, and I think that's
18 regardless of whether the order also includes the
19 statutory language or not. I think the Court has an
20 obligation to the individual served with one of these to
21 make ramifications of the violation clear.

22 CHAIRMAN BABCOCK: Okay. Anybody else?
23 Anybody else on this? Justice Christopher.

24 HONORABLE TRACY CHRISTOPHER: I'd just like
25 to repeat my point that if the Court wanted to make

1 changes to give more rights to the respondent; doing it in
2 this protective order kit will not solve any problem,
3 because it would not apply to people who had a lawyer who
4 prepared an order and an application, so there would have
5 to be some other vehicle other than this kit to make a
6 wholesale change in requirements of certain wording in the
7 order or changes in the way the applications have to be
8 done for everybody or notices to the respondent.

9 CHAIRMAN BABCOCK: Okay. Well, thanks,
10 Judge. Richard, despite your misleading me grossly, as
11 you usually do, we're only 20 minutes -- 20 minutes
12 behind, and before we take our break, so don't everybody
13 stand up at one time, Justice O'Neill is here and I think
14 may have wanted to make some comments either about this or
15 about the topic we're about to get into, and, Justice
16 O'Neill, we would be honored to hear from you now.

17 MR. FULLER: I'm going to take the podium
18 because I have a very soft voice that doesn't carry very
19 well, so I think I'm going to need the microphone if
20 that's okay.

21 HONORABLE DAVID MEDINA: What did you say?

22 CHAIRMAN BABCOCK: I'm not sure it's on, but
23 anyway, you're centrally located.

24 HONORABLE HARRIET O'NEILL: How's that? Is
25 that better?

1 MR. ORSINGER: Wow.

2 HONORABLE HARRIET O'NEILL: All right.

3 Well, thank you, Justice Hecht, Mr. Babcock, and members
4 of the advisory committee for letting me be here to offer
5 some comments today. Justices Wainwright and Medina, I
6 feel like we're back in conference with this robust
7 discussion, which is a very good thing. My remarks today
8 will be brief. As you know, I have not been involved in
9 the process that has led up to the committee's
10 consideration of the actual pro se forms that are before
11 you here today. It will be up to the committee and
12 ultimately, of course, the Court to weigh the comments on
13 the substance of the forms themselves.

14 I can say, though, that I am extremely
15 impressed by the dedication and the commitment of time by
16 so many fine attorneys across the state to this pressing
17 issue. Everyone agrees that the poor need access to our
18 courts to address basic civil legal needs. Everyone
19 recognizes that the number of poor who need assistance has
20 dramatically grown and has far outpaced our ability to
21 meet the need through increased funding and pro bono
22 participation, and everyone agrees that something should
23 be done. We can and we must do better.

24 I'm encouraged by the strength of that
25 conviction by all the participants in this process. It

1 was that same conviction that led to the Court's creation
2 of the Access to Justice Commission, to which I was the
3 liaison for most of my nearly 12 years on the Court, and
4 it was in that capacity that I was involved in the work of
5 the Supreme Court Protective Order Task Force, a task
6 force that the Court constituted to address an unmet legal
7 need that a significant number of domestic violence
8 victims face. The result of that task force was hard
9 work, which was ably spearheaded by Stewart Gagnon, was
10 the domestic violence protective order kit.

11 Now, I was very involved in the roll out
12 effort and the commission's attempts to inform the public
13 about the availability of this self-help kit, and it was
14 my strong belief at the time that the kit would actually
15 increase legal representation because a broader array of
16 attorneys would be willing to offer pro bono assistance to
17 those seeking legal protection if they had this simple and
18 effective tool. It's my understanding that that has, in
19 fact, proven to be the case, as Stewart has told us about
20 the Exxon-Mobil lawyers who now volunteer to help these
21 victims, but for those unable to obtain legal assistance,
22 the kit has been an indispensable aid that has saved
23 lives.

24 Critical legal needs like these continue to
25 be unmet. You all know the statistics. They're

1 overwhelming. Recognizing that it's always best to have a
2 lawyer, Jim Sales and I spent most of our time trying to
3 get more, as he would say, boots on the ground by working
4 to increase funding for Legal Aid and getting more lawyers
5 to handle pro bono cases. I believe that we made
6 tremendous strides. We broadened the base of support,
7 more and more attorneys are doing pro bono, the array of
8 participants is broader, and we have managed to secure
9 unprecedented additional funding. These efforts are
10 ongoing, and they will continue, but it's unrealistic to
11 expect that they will meet the overwhelming and
12 ever-increasing need. Even now with all of our efforts
13 only one in five of the six million Texans who qualify for
14 Legal Aid can be helped. The rest are turned away to
15 figure it out as best they can on their own.

16 Court-approved legal forms in narrow subsets
17 of some types of cases, certainly not all, would go a long
18 way in helping those who don't have access to a lawyer.
19 They have surely helped victims of domestic violence.
20 Nearly every state in the country, all but Mississippi and
21 Illinois, have court-approved family law forms, and
22 Mississippi is in the drafting process even now. I am
23 confident that with the talent, the dedication, the good
24 faith, and the good will that the participants in this
25 process have demonstrated Texas will devise an appropriate

1 solution and will continue its nationally recognized
2 commitment to ensuring access to justice for all. Thank
3 you for your hard work on this project.

4 (Applause)

5 CHAIRMAN BABCOCK: Thank you, Justice
6 O'Neill. We will take our morning break.

7 (Recess from 10:38 a.m. to 10:56 a.m.)

8 CHAIRMAN BABCOCK: All right. We are back
9 on the record, and before we leave the protective order
10 kit issue, Judge Estevez pointed out something to me that
11 I think needs to be on the record, and she said I could do
12 it, but I wasn't quick enough to take notes on what she
13 was saying, and she has it at the tip of her finger, so,
14 Judge, put on the record the issue that I think is an
15 important one that, Richard, you, and Stewart once he
16 finishes his media tour, will have to consider. Go ahead,
17 Judge.

18 HONORABLE ANA ESTEVEZ: All right. At the
19 end of the temporary ex parte protective order on page
20 three in the last sentence in the order it states, "If the
21 act is prosecuted as a separate felony offense it is
22 punishable by confinement in prison for at least two
23 years." That was the law before, but I'm just concerned
24 that since 2009 the Legislature has made it a third-degree
25 felony for acts of violence in family situations in which

1 strangulation is claimed, and that would be up to -- a
2 minimum of two years in prison, a maximum of 10 years in
3 prison, with a fine up to \$10,000, if they had done it
4 before and they can then enhance, which you cannot do with
5 misdemeanors. So if it's a second strangulation, you
6 could go up to 20 years in prison, so 2 to 20 years in
7 prison, with a fine up to \$10,000.

8 I did speak to Stewart about it. He pointed
9 out that the Family Code, this is the statement that is
10 required by the Family Code, and so I think the Family
11 Code is going to need to be amended as well, but they are
12 wrong admonishments is the problem, because a lot has
13 changed since this was made, and it is not now the minimum
14 that you would get. You would get up to 10 years in
15 prison with your first type of domestic violence,
16 depending on what it was.

17 CHAIRMAN BABCOCK: Thanks very much for
18 bringing that up. Justice Hecht wants to introduce
19 somebody to us all.

20 HONORABLE NATHAN HECHT: I should have said
21 earlier, we welcome David Slayton this morning. He's been
22 named the new director of the Office of Court
23 Administration. Carl Reynolds has retired. David has
24 been the administrator for the courts out in Lubbock and
25 comes to us very well-qualified, and we look forward to

1 working with him, so thanks, David, for coming.

2 MR. SLAYTON: Thank you. Thank you very
3 much.

4 (Applause)

5 CHAIRMAN BABCOCK: All right. As I said in
6 my written statement that at this stage Richard will give
7 us a brief overview. Richard, brief overview --

8 MR. ORSINGER: No problem.

9 CHAIRMAN BABCOCK: -- of the forms and then
10 we'll hear from three groups who have an interest in this
11 issue. So, Richard, a brief overview.

12 MR. ORSINGER: It's no surprise to anyone
13 that the main point of interest right now is the proposed
14 set of nine forms that has been prepared by the Supreme
15 Court-appointed Task Force on Uniform Forms. They all
16 relate to divorce cases, and they're designed to handle
17 cases of self-represented indigents, people that have no
18 real estate and no children. It's my understanding, and
19 Stewart Gagnon is available, when he's giving his
20 presentation we'll confirm this. I believe there are more
21 family law forms on the way. From the minutes of the task
22 force, I believe they're working on divorce forms for
23 parties with children.

24 The -- even though we have standard forms
25 for the protective order kit, which has been out there for

1 seven years, as you know, we also have standard forms for
2 what they call parental bypass litigation, which is
3 underage pregnant mothers who are seeking permission to
4 terminate their pregnancy without their permission of
5 their parents. They're seeking court permission. The
6 Court has promulgated those rules and approved them.
7 They're available on the Court's website, but this is, in
8 my view, really the Supreme Court of Texas' first foray
9 into the idea of promulgating forms in a general practice
10 area; and it is a general practice area that probably
11 swamps the other general practice areas because it touches
12 so many lives, divorces and family law, and so we are kind
13 of at a crossroads here; and our -- while our ordinary
14 responsibility as a Supreme Court Advisory Committee is to
15 comment on specific rule changes that have been proposed
16 or that we've generated ourselves, because of the unique
17 and novel nature of the idea of undertaking forms for
18 widespread self-representation in divorce matters, policy
19 issues have come to the surface that we don't normally
20 deal with in the Supreme Court Advisory Committee; and in
21 recognition of that, we have three different, I guess,
22 perspectives that we're going to start the discussion
23 with; and the first presentation will be from Trish
24 McAllister, who is the executive director of the Texas
25 Access to Justice Commission, which has been about this

1 business for sometime; and she's going to talk for 20
2 minutes of overview perspective on the forms, the
3 self-representation problem, the pro se problem, and the
4 forms as a possible solution.

5 The second 20-minute presentation is going
6 to come from the chair or I should say co-chair of a
7 recently created State Bar committee. The State Bar of
8 Texas board -- pardon me, executive committee, and then
9 board of directors became very interested in the policy
10 questions associated with Supreme Court-promulgated
11 divorce forms in January. They may have been following it
12 before, but it came to the forefront in January. They
13 created -- the president created a committee called
14 Solutions 2012. The report of that committee has been
15 laid on your table, Solutions 2012 committee, and their
16 chair or co-chair, Tom Vick, a family lawyer from
17 Weatherford, is going to give a 20-minute presentation on
18 their perspective.

19 The third presentation is going to come from
20 another large I should say institutional group of
21 interest, and that is the family law section of the State
22 Bar of Texas, and they will have 20 minutes to share their
23 perspective of their leadership and membership. They have
24 designated two representatives. One is District Judge
25 Judy Warne, who is a family law district judge from

1 Houston, and she has been practicing family law -- she was
2 an associate judge and then a practitioner, so she's seen
3 this from many different perspectives; and she will be
4 sharing her time with Steve Bresnen, who is a sole
5 practitioner lawyer from Austin. As I understand, Steve
6 doesn't have a private practice. He is a lobbyist, and he
7 is a lobbyist for the Family Law Foundation in the
8 Legislature, and he's a spokesman for both the foundation
9 and the family law section today. We don't -- because the
10 presentations are so brief we don't have time to go into
11 the individual background of these representatives. So,
12 Chip, I would like to go ahead and invite Patricia
13 McAllister, who we call Trish, to start our presentations,
14 and based on some requests from the audience, I've asked
15 that the presentations be from the podium with the
16 magnification so that everyone can hear what they have to
17 say.

18 CHAIRMAN BABCOCK: Yeah, I think that's a
19 great idea, Richard, and while Trish is going to the
20 podium -- I hope Trish is here. There she is. Let's hold
21 questions. Hopefully our speakers will stick around so
22 that if anybody has questions we can ask after they're all
23 done, and, Trish, and the other speakers, I'm going to put
24 you on the clock. As I said at the outset, we don't
25 usually do that, as you can tell, but -- and I don't want

1 to be rude to anybody, but we've got to bring some order
2 to this, so whenever you're ready I'm going to hit my
3 little iPhone, which I've never used before, so I'm quite
4 excited about this. I'm also excited that the Supreme
5 Court Advisory Committee has hit another milestone in its
6 great history. We've never before had either a lobbyist
7 or a television camera come in to televise our
8 proceedings, so we have hit the big time. So go when
9 you're ready.

10 MS. McALLISTER: All right. Well, I want to
11 thank you all for giving us the opportunity to speak with
12 you today and for giving your valuable time to address
13 this important matter. I do want to give you a little bit
14 of a background of who I am. I was a Legal Aid lawyer at
15 Texas RioGrande Legal Aid for eight years, and I handled
16 mostly domestic violence cases. After that I was the
17 executive director of Volunteer Legal Services of Central
18 Texas, so that's a pro bono organization here in Austin,
19 and then about a year ago I became the executive director
20 of the Texas Access to Justice Commission, so I have been
21 working in the poverty world for about 17 years now.

22 I would like to spend a little bit of time
23 talking about the current situation that we have here in
24 Texas. There are over six million people who qualify for
25 Legal Aid, but Legal Aid and pro bono programs can only

1 help about 20 percent of those who need it. There is an
2 18 percent poverty rate in Texas. It's one of the highest
3 in the nation, so the number of poor are growing. Funding
4 has been decreased for Legal Aid, and what that means is
5 that there is fewer dollars available to hire Legal Aid
6 lawyers to help these folks. So what you're seeing, the
7 result is that there are more people who are coming to the
8 courthouse to represent themselves because they can't get
9 help from Legal Aid and they cannot afford a lawyer to do
10 the work for them, and although it's been suggested that
11 pro bono might be a solution to the situation, it really
12 is not a solution.

13 The Legal Aid programs closed over 120,000
14 cases last year. There are 90,000 lawyers that are
15 licensed to practice in Texas. Even if every one of them
16 took a case we would only be able to meet about 40 percent
17 of the need, so we still would have a huge need. There
18 are already a substantial number of pro se litigants that
19 are in the courts. We have some statistics on that. Data
20 from the Office of Court Administration shows that there
21 are about 22 percent of petitioners who file pro se in
22 family law cases, and that does not include pro se
23 respondents or people who become pro se at some point in
24 the case, nor does it include people who file pro se and
25 then subsequently hire a lawyer.

1 We have data from the Office of the Attorney
2 General which shows that over 461,000 parents were
3 unrepresented in Title IV-D cases, and that's about 95
4 percent of the litigants. Those cases involve child
5 support, child custody, visitation, and paternity
6 terminations, and about 50 percent of those are original
7 suits. The remaining 50 percent are a combination of
8 enforcements and modifications.

9 We also have county-specific data that
10 suggests that pro se representations is higher in divorce
11 cases. For example, in Lubbock County 44 percent of those
12 filing divorce have pro se litigants within the divorce
13 case at some point in time. In Travis County, there are
14 78 percent of the people who file for divorces without
15 children are pro se, 56 percent of the divorces that are
16 filed with children file pro se; and in Bell County 52
17 percent of the divorces are filed by a pro se litigant;
18 and that's up from 40 percent in 2010; and although it's
19 been suggested that that's due to military personnel at
20 Fort Hood, in speaking with both the district clerks there
21 and the judges there, the total increase could not be
22 explained by the military installation there. We also
23 know that the majority of pro se litigants are poor.

24 Texas Law Help, which has been mentioned
25 before by Stewart Gagnon, is a major online resource for

1 free legal information and free forms in Texas. 81
2 percent of the users of Texas Law Help qualify for food
3 stamps, and that's just for household. But even if you
4 take away household, 24 percent of the people who use that
5 website make less than \$10,000 a year, 62 percent make
6 less than \$29,000 per year; and if you haven't had the
7 opportunity to look at it, the one exhibit that I would
8 point you to that we produced is this exhibit, it's
9 Exhibit G; and it shows the number of people that go to
10 that website that are poor, but it also has the Legal Aid
11 guidelines on there as well as food stamp guidelines on
12 there, so it really gives you a good idea of what it means
13 to be poor and what is needed to qualify for free legal
14 services as well.

15 Also, the Attorney General also provided us
16 some data that the parents in the Title IV-D cases, an
17 overwhelming majority of them are poor. They qualify --
18 they're either recent or current recipients of Medicaid or
19 TANF, which is Temporary Aid for Needy Families. National
20 data also supports that the majority of people that are
21 pro se are poor, and a recent Wisconsin study that just
22 came out, I think it was in June, maybe it was in March,
23 I'm not sure, of this year, shows that there's a study of
24 divorce cases that shows that people who have assets and
25 can afford a lawyer do. The poor have no choice but to

1 represent themselves, and improving how they do it is one
2 of the few avenues that we have to increase the access to
3 the courts; and, of course, this is where standardized
4 forms come in.

5 Nationally standardized forms are the main
6 tool that is used by states to help increase access to the
7 courts. As Justice O'Neill pointed out, 48 states plus
8 the District of Columbia have some form of family law
9 forms. 37 states have divorce forms. States use forms
10 and continue to promulgate forms because they work. The
11 National Center for State Courts conducted a survey, which
12 is in your packet, that shows that forms are effective at
13 increasing access to the courts, and they're also
14 effective at increasing judicial efficiency and economy.
15 Right now judges are having to deal with forms from
16 multiple sources that have a varying degree of quality, so
17 they have to spend time reviewing the form itself to see
18 that it's legally sound.

19 Court-approved forms provide a reliable
20 standard form that would comport with Texas law. It
21 allows the judge to become familiar with the form and
22 spend less time reviewing that document. Judges also
23 state that litigants are better prepared with
24 court-approved forms, which in turn causes a decrease in
25 time expensed on the process. Clerks and court personnel

1 report that standardized forms reduce the number of trips
2 that pro se litigants make to the courthouse, which also
3 they wind up spending less time with each person and it
4 lessens the burden on court personnel.

5 National research also shows that forms have
6 not caused harm to litigants, they have not adversely
7 affected practicing lawyers, nor have they changed the
8 practice of law in those states. As for Texas, forms are
9 already prevalent. As you guys know, you can get them
10 anywhere on the web, you can get them from Office Depot,
11 Legal Zoom. The Texas Young Lawyers Association has a pro
12 se handbook, which is available for free on the Texas bar
13 website. The family law section has their manual of forms
14 available for \$645, available for sale on their website.
15 It's also available for free at law libraries across the
16 state, and they also have a link to Law Guru on their
17 website where you can click on that and go and get forms
18 of a variety of nature from simple no kids, no property
19 divorces all the way up to premarital agreements.

20 The problem is that the available forms are
21 often inadequate for use, and while no one would argue
22 that the family law practice manual is certainly a set of
23 forms that you could use for any conceivable situation,
24 the problem really is, is that it's written in a language
25 that no layperson could really use, and the other problems

1 are that some of the forms are just outdated. They don't
2 comply with Texas law, or they're just otherwise too
3 difficult to use. We did a short study of Craigslist
4 offerings recently and for a two-week period in February,
5 and it was really astounding the number of people who are
6 out there selling forms or offering their services to help
7 with forms from paralegals to disbarred attorneys. So
8 there's a lot of things out there, much of which is not
9 very good.

10 The situation is further complicated by the
11 fact that there are many courts who will not accept fill
12 in the blank pleadings or pleadings with check boxes or
13 pleadings that have both English and Spanish on them or
14 they will not accept a form that's just been downloaded
15 the internet and require each person to retype those
16 forms. As for court-approved forms we've seen from the
17 protective order kit that they already exist in Texas.
18 That kit has benefited, as Justice O'Neill pointed out,
19 thousands of -- or hundreds of victims of domestic
20 violence in the midst of a serious situation, and yet
21 they're simple, they're easy to use, and enforceable; and
22 it's important to remember at the time that kit was
23 promulgated there was no disagreement about these forms,
24 even though the circumstances were quite similar to those
25 today. There were people who were worried that the forms

1 would harm victims, and I'm talking about physical harm
2 versus simply financial harm to folks. I personally was
3 one of those folks that was worried about that. Everybody
4 wanted victims to have a lawyer, and there weren't enough
5 lawyers to help, and there weren't lawyers in the district
6 and county attorney's offices that working to do the
7 protective orders as they were supposed to do.

8 So now I'd like to spend a little bit of
9 time discussing why court-approved forms are needed. The
10 first is just a simple access to justice issue. We
11 require people to resolve certain matters in court like
12 divorce. For those that cannot afford an attorney, it's
13 important that the court as the entity entrusted with
14 ensuring access to justice be the entity that promulgates
15 forms rather than sort of allowing Craigslist and all
16 these other offerings be the ones that ensure access to
17 the courts, and access to the courts starts with forms.

18 The opponents of court-approved forms say
19 that advice from a lawyer is what is needed and advice
20 from a lawyer is certainly what everybody would like, but
21 advice from a lawyer does not get you into court. You
22 need a form to be able to start a lawsuit. Another reason
23 for court-approved forms is to provide safe harbor to the
24 poor. Although Rule 7 states that people are allowed to
25 represent themselves, there are a lot of barriers for

1 unrepresented to overcome, including the unnecessary
2 restraints that have been put on pro se litigants, as we
3 previously have discussed. Court-approved forms would
4 provide a safe harbor from these practices because we're
5 asking that courts be required to accept these forms when
6 a litigant chooses to present them, similar to what has
7 been done with the protective order kit.

8 Court-approved forms will also improve
9 public confidence in the legal sufficiency of the forms
10 and will help stop the current predatory forms sale and
11 advice practices that we see all over the internet.
12 Court-approved forms also have the potential to increase
13 pro bono attorneys' use of them just like we've seen with
14 the protective order kit, so we're hopeful that that would
15 happen if these forms were to be approved.

16 Now I'd like to address the issue of harm to
17 litigants. The family law leadership believes that forms
18 will do more harm than good and that the Court's
19 endorsement of these forms will lull people into a trap
20 for the unwary, and they also believe that the forms will
21 not lead to increased access and will not improve judicial
22 efficiency. While it's true that inaccurate or otherwise
23 bad forms can harm people, as we've seen here in Texas,
24 it's a fundamental reason that court reforms are needed.
25 Good forms will improve the status quo, not worsen it.

1 It's also important to remember that most
2 people use forms correctly. I mean, certainly we all hear
3 the anecdotal evidence and horror stories of people who
4 use forms to their detriment just like we hear stories of
5 people who have lawyers who have not done right by them,
6 but most people have a good experience with their lawyer,
7 just like most people use forms correctly. People who use
8 forms incorrectly often do so because the forms don't lack
9 instructions or they're so poor that nobody could really
10 use them very well. It seems to make more sense to create
11 good court-approved forms and instructions for people than
12 it does to ban them, which effectively bars many people
13 from taking care of their legal matters.

14 These particular proposed forms are narrowly
15 drawn for very limited situations to minimize the risk of
16 harm. The forms are for uncontested situations. The
17 instructions say when it's appropriate to use the form and
18 when it's not appropriate to use the form. They provide
19 warnings against using the form for reasons other than
20 they were designed, and they urge people to get a lawyer
21 if at all possible. Court-approved forms should not add
22 to the level of harm presently happening from forms that
23 are currently available. Better forms, again, will
24 improve the situation, not worsen it.

25 The other issue to consider is the amount of

1 harm that's being done by failing to provide
2 court-approved forms. The inability of the poor to
3 resolve their legal matters at the time that it is needed
4 causes problems further down the road. It is much more
5 complicated for a couple to get divorced 10 years after
6 the fact, after they have separated and gone their
7 separate ways, than it is for them to do it when it's
8 needed. For example, they may have acquired assets that
9 are presumed to be community property even though they
10 haven't lived together for years. More commonly, they may
11 have had children with another partner, and these children
12 are presumed to be children of the marriage because they
13 were born during the marriage, and a divorce with children
14 born during the marriage but not necessarily of the
15 marriage necessarily involves at least two respondents,
16 possibly more respondents, depending on the number of
17 children that have been born during the marriage by
18 different partners. There may need to be an additional
19 legal action to determine paternity, which is costly to
20 the litigants and burdensome to the courts.

21 Another common issue that happens -- and I'm
22 speaking from personal experience. We see this all the
23 time at Legal Aid, is the inability of spouses to locate
24 one another. So where you would originally have had a
25 situation where service would have been covered underneath

1 an affidavit of inability to pay costs for those who
2 qualify for it, now you may be looking at citation by
3 publication, which is much more expensive. Ultimately
4 what may have been able to be handled through the
5 provision of court-approved forms now is no longer
6 appropriate for this kind of relief at a later date. And
7 failing to provide court-approved forms just continues the
8 status quo where people are being taken advantage of by
9 people on the internet or by using forms that are from a
10 variety of various sources or they're even prevented from
11 using forms in certain courts.

12 There's a few other things that I would like
13 to address, which are more on the public policy aspect of
14 things. One thing I'd like to say is that at a time when
15 it is clear that there are not enough Legal Aid lawyers to
16 meet the needs of the poor it's important to look at the
17 most efficacious use of pro bono lawyers because they're
18 so few. While we recognize that court-approved forms will
19 increase the number of pro bono lawyers and make it easier
20 to recruit those folks, we must also state that as a
21 matter of public policy it doesn't make sense to use
22 scarce pro bono resources to handle simple, uncontested
23 divorce matters. It makes more sense to improve pro se
24 representation to the poor by providing easy to use,
25 legally sound forms and reserving those limited pro bono

1 resources to handle the more complex contested matters so
2 that they can bring their full knowledge of the law to
3 bear in these cases where no poor litigant could -- could
4 succeed.

5 The other thing that has been suggested,
6 there's been some discussion about whether or not the
7 forms should be restricted to the poor, and while the
8 forms have certainly been designed for use by the poor,
9 the commission does not recommend it, and by the way,
10 there's several reasons for this, but one thing is
11 nationally of the 48 states and the District of Columbia,
12 none attempt to restrict their statewide forms to low
13 income people, so such a restriction would make us far
14 outside the norm, and it would be somewhat remarkable for
15 us to do so.

16 Texans also have a right to
17 self-representation under Texas Rules of Civil Procedure
18 7, so it calls into question what the legitimate basis
19 could be for reserving these to the poor. These forms are
20 also available online, so it would be difficult to means
21 test them. If we were to means test them from some online
22 thing then they would just get around it. If we used a
23 human means test, the questions come into call about who
24 would be doing the means testing, and obviously that would
25 be expensive and lead to a lot of bureaucracy which the

1 Family Law Foundation has been concerned about with form
2 maintenance.

3 There has been another suggestion that we
4 might want to correlate the forms with our current
5 pauper's oath under Rule 145 at the time that they file
6 the forms, and there are multiple problems with this
7 approach that I just want to make you aware of. There are
8 several counties who automatically challenge all pauper's
9 oaths, and what we know from that is that the poor are the
10 most likely to default at those hearings, so what you
11 would have would be then a situation where we've got forms
12 that are designed for an indigent person who --

13 CHAIRMAN BABCOCK: Trish, you've got two
14 minutes.

15 MS. McALLISTER: Two minutes, well,
16 fortunately I'm almost done. So you have a situation
17 where the people who the forms are designed for are
18 ultimately banned from using them, so that's not the best
19 situation that we would want.

20 The other thing I want to make people aware
21 of is that, you know, people often ask me "What's the
22 definition of poor?" Well, there is no uniform definition
23 of poor across Texas in the courts or in the county, so
24 currently right now we have people who qualify under
25 pauper's oath in one county that are -- they qualify for

1 that, but if you took that exact same situation and went
2 to another county you wouldn't qualify. In fact, there
3 are multiple definitions of poor in our state and
4 throughout the nation to qualify for Legal Aid. At a
5 Texas Access to Justice Foundation organization you have
6 to be 125 percent of the Federal poverty guidelines;
7 however, if you are going to get food stamps or you're
8 going to a Legal Aid organization that's funded by the
9 Legal Services Corporation you can go up to 200 percent of
10 the Federal poverty guidelines.

11 For victims of crime at the Texas Access to
12 Justice funded organizations you can go up to 187.5
13 percent of the Federal poverty guideline. If you are
14 receiving housing benefits through Section 8, you have to
15 be 80 percent of the -- it's 80 percent of the median
16 income for the area in which the person lives as
17 determined by the Department of Housing and Urban
18 Development, and there are statewide housing guidelines
19 which for smaller family is 300 percent of the Federal
20 poverty guideline. For larger families it's 200 percent
21 of the Federal poverty guideline, but you can see there's
22 a wide variety of income tests. And it's also important
23 to note that these Federal and state income guidelines or
24 income and means testing allow someone to own a home. So,
25 in other words, you are allowed to own a home and you can

1 still qualify for these various food stamps and different
2 types of benefits.

3 CHAIRMAN BABCOCK: Trish, that's 20 minutes.
4 Thank you.

5 MS. McALLISTER: Okay. Thank you.

6 CHAIRMAN BABCOCK: Great. Thanks very much.
7 (Applause)

8 CHAIRMAN BABCOCK: Tom Vick and Tim Belton
9 of the State Bar of Texas Solutions.

10 MR. ORSINGER: Tim is not here today, Chip.
11 Tim is not here.

12 CHAIRMAN BABCOCK: Tim is not here, so it's
13 just Tom, huh? All right.

14 MR. VICK: Thank you, Mr. Babcock and
15 Justices. It's a pleasure to be here. I was thinking
16 about on my drive down yesterday that this is without a
17 doubt the most august body of people that I've ever
18 addressed. You are, in fact, the people that the Supreme
19 Court of Texas has assembled to give them legal advice,
20 and that's a daunting task. You're their lawyer.

21 As you've heard, the State Bar of Texas, the
22 executive committee, by unanimous vote asked the Supreme
23 Court to suspend work on these forms and then the State
24 Bar's board of directors by unanimous vote asked the Court
25 to do the same thing, and Justice Jefferson says, well --

1 the Chief says, "We're going to go on with it, but we
2 would be delighted to hear the bar's take on these forms
3 and any other solutions that you may have that might
4 remedy the problem at hand." So President Black appointed
5 Solutions 2012 after the bar board meeting in Bastrop and
6 asked me to co-chair that group with Tim Belton, who is a
7 public member of the bar from Bellaire, Texas, and frankly
8 one of the smartest men I've ever been in the presence of.
9 His address to you is in a letter that transmits this
10 report to the bar, and he's not able to be here today
11 because he's at the bar board meeting in Fort Worth.

12 We started our work on February the 10th,
13 and we had about 45 days to create the product that you
14 have in front of you, which was an incredibly short time
15 to do what I think is about two years' worth of work. We
16 had a tremendous cross-section of members, and there is a
17 tab under your report called "members," and you'll see
18 that not only do we have lawyers who do this kind of work
19 and who have actually represented poor people in our
20 courts, we have a district clerk, we have public members,
21 we have Lisa Davis, who is head of domestic relations
22 office in El Paso. We have district judges, we have court
23 of appeals judge, we have former judges. So we have the
24 players who play this game, and as I put in my letter to
25 President Black, for most of us this was not a theoretical

1 exercise. This is something that we are, in fact, very
2 familiar with, and so we had our initial meeting, and we
3 invited Trish McAllister, whom you just heard; Carl
4 Reynolds, who was at the time head of OCA; and Mr.
5 Bresden, whom you will hear from in just a few minutes.
6 They made a presentation to us. They provided documents
7 to us, and I don't know if Mr. Bresden has a point on this
8 or will point this out, but when the family law groups got
9 interested in this they did an open records request from
10 the Access to Justice Commission and so they have like
11 2,500 pages of documents, so fortunately, they didn't give
12 all of those documents to us, but they gave us a
13 tremendous amount of their findings.

14 Well, we were commanded and instructed then
15 to do two things. One was to look at the forms, and one
16 was to look at other solutions that might be helpful. The
17 Appendix 1 of this report really talks about the other
18 solutions to the pro bono issues in our state, and I
19 understand and respect the fact that this is probably
20 beyond your task here today to advise the Court about the
21 forms, but this report is addressed not only to you but to
22 the Court, and so I want to let you all know that we gave
23 tremendous thought to this, and we had a subcommittee that
24 met three or four times and then we all got together and
25 talked about these proposals, and the different proposals

1 you'll see in Exhibit 1 cover a variety of different
2 alternatives. Some are to create more incentives for
3 lawyers to do pro bono, some are regional approaches, some
4 are state approaches. Some are very controversial, and
5 I'll just hit that one at the end.

6 The last one is mandatory pro bono. Some of
7 our members didn't even want to discuss that. Certainly
8 you can't have a legitimate discussion about all the
9 alternatives to meeting the needs of the poor without at
10 least including that, and it's a very unpopular idea, but
11 there are some variations of that. One suggestion is that
12 we throw all this on the young lawyers coming out of law
13 school and make all of them take some pro bono cases; and
14 that's a very maternalistic, probably unfair, look; but
15 those people certainly know a lot about the law when they
16 get out of law school and have a lot of energy and have
17 the ability to do that. One of the ones I like, frankly,
18 is the requirement that to be board certified and to
19 become recertified in your area that you be required to do
20 some pro bono work. My guess is that if I had had the
21 time I could ask the Texas Academy of Family Law
22 Specialists, and they would probably endorse that idea.
23 It's certainly an honor to be board certified. It's
24 something that comes with a lot of work and a lot of
25 study, and there's not even reason why that couldn't be a

1 requirement of certification and recertification.

2 So I'll leave you with Appendix 1 to think
3 about and ponder in terms of what the other solutions for
4 meeting our pro bono needs are. So let's get to the
5 forms, and that's Appendix 2, and let's for a moment
6 narrow our view of this of what this is supposed to do and
7 what it was announced to be, and that is the beginning of
8 divorce forms that would have the imprimatur of our Texas
9 Supreme Court on it for the use by indigent litigants,
10 those who the pro bono community would serve. That was
11 the charge. So we're going to talk about people who are
12 poor and who can't afford a lawyer. Unfortunately, or
13 fortunately, I suppose, depending on your look, what
14 develops when you realize what's going on here is it's, in
15 fact, a bigger issue than that. What is going on here is
16 that the desire, as Ms. McAllister pointed out just a
17 moment ago, that these forms wouldn't be restricted to
18 poor people, that anybody can use these forms.

19 Now, there's a growing community of
20 self-represented litigants. There's a number of people --
21 we're in this do-it-yourself kind of whole attitude. I
22 see TV programs about fixing your own house and your
23 garden, so there's this big push to do it yourself, and
24 frankly, across the country and have been for years, a big
25 push for self-represented litigants, and there is a desire

1 in some orders to create a larger culture in our courts to
2 encourage that and to develop it and to make that happen.
3 What you see before you in these forms is the first step
4 in the creation of that self-represented litigant culture.
5 Now, I don't say that lightly. I'm going to send you a
6 letter next week in response to a letter that you've
7 already received from Mr. Reasoner that suggests that I've
8 acted in bad faith in my letter to the bar president, and
9 frankly, that was troublesome when he told me that. He
10 didn't send me a letter but I got a copy, and I'd like for
11 you to suspend your judgment about my bad faith until you
12 get that response. I've been elected as a public servant
13 five times in Parker County, and I have served as the
14 chair of all three major family law organizations in this
15 state, and nobody has ever accused me of acting in bad
16 faith. So if you'll suspend your judgment, I'll send you
17 the evidence that I have that this is a bigger part of a
18 larger plan. In fact, you can look in the September 2011
19 Texas Access to Justice Commission newsletter at his
20 president's column, and he'll tell you that the creation
21 of this task force, in his words, are part of a, quote,
22 "larger plan."

23 Nevertheless, we were tasked with looking at
24 these forms from the standpoint of their use by the
25 indigent, and so if you'll turn over to page one of

1 Appendix 2 we can talk about what this task force
2 discussed in terms of the problems with these forms.
3 First of all, who is going -- and let me say this before I
4 go launch into this part. It was not our task to look at
5 the substantive law issues or whether these forms were
6 good or bad or followed the law. Ours were more policy
7 questions about using forms for pro bono indigent
8 litigants because that's what it was represented at the
9 time to be. So the first issue is who is going to keep
10 these forms current. The law changes daily. Courts of
11 appeals write about family law. Texas Supreme Court
12 writes about family law. There are the occasional United
13 States Supreme Court cases in family law. Somebody has to
14 keep these forms current. Who is that going to be? Is
15 the Supreme Court going to do that? Is the Access to
16 Justice Commission going to be charged with doing that?
17 Are they going to try to farm this out to the family law
18 section to do? I don't know, but the forms are going to
19 have to be kept current.

20 Now, that may not sound like a big job, but,
21 in fact, there's a multivolume family law practice manual
22 that's been published by the family law section for 20 or
23 more years, and I can tell you that the lawyers who keep
24 that form book and those practice notes current spend
25 hundreds of hours every year, and the State Bar staff

1 spend thousands of hours keeping those forms current. In
2 the years that follow the legislative session they revamp
3 the forms and in the off years they revamp the practice
4 notes. It's a process that takes thousands of hours of
5 volunteer lawyer time, and no one has suggested here who
6 is going to keep these forms current once we head down
7 this road of having Supreme Court-approved divorce forms.

8 The next issue is on page two, and that has
9 to do with form eligibility. Well, if you're charged with
10 considering who is going to determine the eligibility to
11 use pro bono family law forms you would have to have this
12 discussion. That discussion may now be off the table, now
13 that I've heard Ms. McAllister say that anybody can use
14 these forms, then we don't, I suppose, have to worry about
15 eligibility for those to use. The fact of the matter is
16 the Access to Justice Commission was created by the
17 Supreme Court. It was their mandate. It's funded by our
18 donations and our bar dues to work on the needs of
19 indigent people in Texas, not to work on the needs of
20 everyone in Texas who decides they like to represent
21 themselves as opposed to hiring a lawyer. I think that's
22 a serious problem and is discussed a bit at the end of our
23 page, but if you're serious about it has to be an
24 eligibility test then someone is going to have to
25 determine who is eligible. Certainly the legal service --

1 legal service providers are the best and most adept at
2 doing that because they do it everyday, but there is not
3 any discussion about that.

4 Then you get to the issue of form usage.
5 Who is going to help people fill these forms out? Are
6 district clerks going to do it? I can promise you that
7 the district clerk who was on our task force says "no."
8 The district clerk in Parker County, who is also a lawyer,
9 says absolutely not. They're overworked. They don't have
10 liability insurance that would cover their work doing
11 that, and they can't be expected to be doing that. Are
12 law clerks going to do that? There are very few courts in
13 this state who have law clerks available, and, frankly,
14 the law clerks who are working probably already have
15 plenty to do to start out with. Most of the court staff,
16 court coordinators, assistant coordinators do not have the
17 time or ability to do that, and so the issue is are
18 lawyers going to be doing that? Are they going to be pro
19 bono lawyers? Who is going to hand -- who is going to
20 help these people fill out these forms?

21 My involvement, frankly, in pro bono started
22 when Justice O'Neill and Jim Sales called me one day and
23 asked me to work on a task force to deliver pro bono to
24 rural areas, and I ultimately became the chair of that
25 Supreme Court task force and then later was on the ATJ

1 Commission, and I can tell you that that's a real problem,
2 is how you do that and how you deliver pro bono legal
3 services out into the country. You can't say no when Jim
4 calls or when Justice O'Neill calls, and so I did that,
5 but it begs the question about how you get all of this
6 done. Are judges going to do this? There is going to be
7 a presentation I think by a member of the bar later today
8 about whether judicial immunity is going to be breached by
9 courts either promulgating or helping and working on these
10 forms. So then what happens if the forms aren't filled
11 out correctly? What happens if there's problems with
12 those forms on down the line? None of that is addressed.
13 Who is going to do that, and how is that going to be
14 handled? Are we going to have self-service kiosks?

15 Well, I can assure you if you look at the
16 plan for self-represented litigants that's out there,
17 that's the idea, that we have these self-service,
18 sometimes staffed by lawyers, sometimes phone-in kind of
19 places, so that we're going to fund a kiosk somewhere to
20 help people handle these forms. I don't know where that
21 money is going to come from. Every time I've been to the
22 Legislature, the budgets continue to be cut instead of
23 increase, and I don't know any counties that can afford to
24 do this, and so it really begs the question about how
25 that's all going to happen. There is some question -- I

1 would say this. Everybody in this room agrees there's a
2 growing problem with pro bono litigants, and everyone on
3 my task force agrees with that as well, but there's some
4 issues that have been taken about some of the research
5 that's been thrown out there.

6 As Ms. McAllister points out, we know that
7 self-represented litigants file a lot of cases, but we
8 don't know anything about the makeup of those people. Did
9 they do that because they're poor or because they didn't
10 want to hire a lawyer? The research in some of our areas
11 and by some of the people on our task force indicates that
12 some of those statistics that you hear are a bit
13 misleading. You may know that in El Paso County there is
14 a pro bono -- a mandatory pro bono requirement in the El
15 Paso bar. The member of our task force did some research
16 for us, and she found -- this is on the bottom of page
17 four at the Appendix 2, that in 2010 there were 204 pro
18 bono cases that were referred and in 2011, 275, and in El
19 Paso in both years there were 400 lawyers available to
20 take those cases. Now, I don't suggest to you there isn't
21 a pro bono crisis and there isn't a pro bono problem, but
22 I'm telling you you need to be careful when you hear the
23 broad-brushed statistics that are thrown out there.

24 Finally, there was an issue of authority,
25 and I'll just touch briefly on that. There were some

1 people who suggested that respectfully the Supreme Court
2 exceeds its authority under rule-making power to create
3 substantive law forms and that there's some issues about
4 whether the Access to Justice Commission has created its
5 mandate by now creating and starting down the road of
6 creating self-represented litigants for the entire world
7 to use as opposed to working on issues of pro bono work.
8 I talked to Jim Sales --

9 CHAIRMAN BABCOCK: Tom, you've got two
10 minutes left.

11 MR. VICK: Thank you, sir. I talked to
12 Mr. Sales before I started this, and he started and he
13 says, "Tom, we've got these hundreds of thousands,
14 millions of people who are poor and they can barely speak
15 English and they need help," and I said, "Mr. Sales, a set
16 of forms is not going to do those people any good," and he
17 had to agree with me about that. These forms are not the
18 answer, and, in fact, these forms are likely to do more
19 harm than good.

20 Finally, let me say that when we started
21 this project we wanted to get as much input as we could
22 from around the state, and so we asked the bar to create a
23 blog so that anybody could go to the State Bar's website
24 and comment on this whole issue, and in the back of this
25 report under a tab called "input" you will find that there

1 were dozens of people who wrote, some in favor of the
2 forms, some against the forms. Those include board
3 certified family law practitioners. They include judges
4 who handle these cases, and frankly, there is a letter
5 from one of the members on our task force who failed to
6 find consensus with most of what we did, so it's all
7 there, and I commend your reading, and I thank you very
8 much for your serious consideration of these issues.

9 (Applause)

10 CHAIRMAN BABCOCK: Thank you. Okay. Who is
11 next? Steve.

12 MR. BRESNEN: Yes, sir.

13 CHAIRMAN BABCOCK: And, Steve, are you going
14 to go for 10 minutes, 15? How are you splitting your
15 time?

16 MR. BRESNEN: If you would tell me when
17 we've got four minutes left, Judge Warne has some things
18 that she'd like to share, and she's told me that that
19 would be adequate time.

20 CHAIRMAN BABCOCK: Okay. So you're going to
21 go for 16 minutes?

22 MR. BRESNEN: Yes, sir, if you'll interrupt
23 me, it may take me a few seconds to finish up at that
24 point.

25 CHAIRMAN BABCOCK: I'll give you a

1 one-minute warning.

2 MR. BRESNEN: That would be great. Before
3 we start, I'm not sure what's in everybody's packet, but
4 did the letter from the Attorney General about their case
5 load and the pro se implications of that, was that
6 received by the whole committee?

7 MR. ORSINGER: When was that issued, Steve?

8 MR. BRESNEN: Sometime yesterday.

9 MR. ORSINGER: No, I didn't send it out. I
10 don't think Angie sent it out, so I don't think it got
11 sent out. I'm not aware of what you're talking about.

12 MR. BRESNEN: Okay. I'm not going to speak
13 for the Attorney General's office. I just know there's a
14 letter out there, so I commit it to you when it gets to
15 you.

16 CHAIRMAN BABCOCK: All right. Great.

17 MR. BRESNEN: Justice Hecht, Chairman
18 Babcock, members of the advisory committee, my name is
19 Steve Bresnen. I'm proud to be here today with the
20 Honorable Judy Warne of the 257th District Court in Harris
21 County and Mr. Tom Ausley, who is the chairman of the
22 family law section, and I'm going to rely on them to bail
23 me out if I get in over my head. I would like to briefly
24 give you an idea about where my perspective comes from,
25 why we object to court-approved forms, what the family law

1 bar wants, and then I would like to demonstrate that the
2 forms the task force approved are so riddled with errors
3 that they make the points that I'm about to give you, and
4 those are errors that will hurt people. It's odd for me
5 as a lobbyist to be here talking to you today, especially
6 since, although I've been a member of the bar since '88,
7 I've never practiced law in the conventional sense that
8 many of you have. On the other hand, that might give you
9 some fresh eyes to communicate about these issues to you.

10 What I have done in my career is work with
11 extremely poor people in the inner city schools of Dallas,
12 in developing school programs for children, very poor
13 children, in East Texas in my earlier career, and what
14 that taught me is that every individual counts. The
15 reason I'm so proud to represent the family law bar is
16 because they're standing up because they believe in
17 justice in every individual case. People aren't standard.
18 They're not uniform. They have individual needs. For
19 more than 30 years I've been involved in many, if not
20 most, of the major issues in Texas government, so I know
21 one when I see one, and this is a major issue. For 4 of
22 the 10 years I worked for Bob Bullock, and I was helping
23 run the comptroller's office. Part of my job was to
24 implement laws. If you collect taxes and pay bills for
25 the state you produce a lot of forms, so I knew a little

1 bit about form production and how they get implemented.

2 Before I came here today, it's my first time
3 looking at most of y'all, a couple of y'all I know, but I
4 was encouraged to use words like "with all due respect,"
5 or "well-intentioned," and people have advised us that
6 you're swimming upstream. Well, we would rather be salmon
7 than lemmings. I mean no disrespect to you, Justice
8 Hecht, or the Court or anyone involved in this project,
9 but I also mean to tell you the truth as we see it. My
10 experience tells me what it takes to do certain jobs and
11 that some things shouldn't even be started if you don't
12 have the wherewithal to do it right. I would get hurt if
13 I wired my own house. I would get really hurt if I
14 prepared my own taxes. I heard a great discussion earlier
15 on the protective order forms. I'm extremely impressed
16 with this group and the questions that were asked and the
17 values that were asserted, but the truth is that neither
18 this Court nor any of its sundry task forces or committees
19 has the institution or capacity for this job. The bar
20 does. Your committee is part of that system. I mean no
21 disrespect. We're asking you today to make an admission
22 against interest. Some people don't want to tell the
23 emperor he has no clothes. We're asking you to tell the
24 truth. That's what we ask and no less.

25 Why are lawyers against these forms? The

1 first reason the court-approved forms are a bad idea I've
2 already stated. This Court does not have the kind of
3 established, funded, managed capacity that would be
4 necessary to do this job even if it was a good idea, and
5 the results of this ad hoc experiment with the Uniform
6 Forms Task Force demonstrates that conclusively. Almost
7 everything I say from here on out will support that
8 statement. We think all this talk about bad forms, forms
9 from other states, all of that just shows the availability
10 of forms amounts to nothing more than a trap of nuisance.
11 Forms got built and people came. Do y'all realize the
12 Legislature a couple of sessions ago changed the
13 unauthorized practice of law statute to say that the
14 construction of these forms is not the unauthorized
15 practice of law? Maybe that's why there are so many of
16 them floating around out there.

17 We know forms aren't going away, but Supreme
18 Court-endorsed forms will be an even bigger lure than the
19 others and raises all kinds of questions that the
20 proponents haven't even deigned to talk about. They
21 seemed important to me, and I'm surprised that this
22 process is only now yielding those kinds of questions.
23 There's two reasons you don't hear about the harms that
24 the forms have caused in other states. There ain't no
25 mechanism to capture that data, and the second thing is 30

1 days after you've wrecked your life the damage is done.
2 It's extremely difficult under the law to undo what has
3 happened. Why is that? Because we respect finality in
4 the lives of people that involve their marriages and their
5 property and their children, and we should. That makes
6 the danger all the greater. Bad things happen all the
7 times to people who use forms. Our members see them.
8 People come from other states and they say, "Dig me out of
9 this hole." It's extremely difficult, and if it can be
10 done it's extremely expensive.

11 I don't know anyone who thinks forms or
12 self-representation are good things. Self-representation
13 is dangerous, and no form is going to eliminate the risk,
14 and the proposed warnings on these forms are going to be
15 about as useful as telling people not to put their feet
16 under a running lawn mower. I also represent the Texas
17 Trial Lawyers Association, and I can assure you people cut
18 their feet off with lawn mowers all the time. On Page 11
19 of Ms. McAllister's materials she stated, "It is true that
20 inaccurate or otherwise bad forms can cause harm to those
21 who use them." We have found agreement. After 10 months
22 of work the task force produced some bad forms. We should
23 all be able to agree that will harm people.

24 I'm going to get into the details of that in
25 a minute, but I want to be really clear about something.

1 No amount of op ed pieces or newspaper articles are going
2 to fix those forms. The forms will cause actual harm.
3 I'll demonstrate it here in just a second. With all due
4 respect, your subcommittee's report identifies some of the
5 blatant errors in the task force's product, but given the
6 time that was available to Mr. Orsinger, who has
7 forgotten more about the family law than 5,299 other
8 members of the family law bar, they didn't have the time,
9 and although they have identified many problems, there are
10 many, many, many problems that didn't get identified, and
11 some that did were only partially addressed. I think you
12 owe to it to the people of Texas and to the Court under
13 these circumstances to suggest that it find another way.
14 I know it's not your job, but we've put out a proposal
15 that constitutes another way, and maybe when we get into
16 the question period later we can elaborate on that.
17 Otherwise, if you don't do that, these well-intentioned
18 people are going to think they've accomplished something
19 for poor people.

20 Speaking of poor people, a person who can
21 afford a lawyer has access to justice. So I'd ask the
22 members of the Court when you're running that calculation
23 about are we expanding access to justice, don't count
24 those people in. They have access to justice. I made a
25 joke the other day, a person who can afford a lawyer and

1 represents himself is either an engineer or a doctor. We
2 get joked about all the time. I hope there was nobody who
3 got an undergraduate degree in engineering in here.

4 So what do we want? If somebody has got to
5 have forms to feel like they did something about pro se
6 issues, use forms that are approved by the bar or provided
7 by Legal Aid. I believe that if you'll look at
8 Ms. McAllister's materials she says they're legally
9 accurate. Ours are too complex apparently, the existing
10 ones. Life is complicated, y'all. People have
11 complicated matters. But the Legal Aid forms are much
12 simpler. I'm not -- I haven't examined them in quite the
13 detail that I've examined the forms before us today, but I
14 trust my Legal Aid friends, some of whom I used to work
15 with, to prepare forms that are legally accurate under the
16 circumstances of the case.

17 A simple amendment to Rule 7, two sentences,
18 would say that a form that's approved by the bar or one of
19 its sections or provided by Legal Aid is approved for use
20 in a court in this state. The second sentence would say
21 that no judge is required to accept the filing of any
22 kind, form or not, that's legally insufficient or that
23 would result in an unenforceable -- would produce an
24 unenforceable result. The task force's forms do exactly
25 that. They're legally insufficient, and they would

1 produce unenforceable results.

2 The second thing we need to do is put our
3 shoulders to the wheel and get lawyers for poor people.
4 We had a meeting last week with the Legal Aid groups.
5 We're not at all convinced that we've done a job of
6 providing poor people with lawyers in this state. It's
7 interesting that our priorities are to put the pro bono
8 lawyers that are available to work not on these simple
9 uncontested matters but only on contested cases. If you
10 didn't practice family law would you want to get into a
11 heavily contested family law case, or would you say, "Hey,
12 I can knock this one out, it's simple"? I don't
13 understand that.

14 People who can't afford a lawyer and go down
15 to the courthouse and cause delays and don't follow the
16 rules, show up five times in the courtroom, they should be
17 dealt with as any litigant who causes that kind of
18 problem. If it was you doing it or me doing it, we could
19 be sanctioned, and the judges have ways of making us
20 conform and so should they. All pro se litigants should
21 be made aware of the risks and the complexities of
22 representing themselves, and we're suggesting ways to
23 address that.

24 Now, what I'd like to do is shift a little
25 bit and focus on a couple of things where we differ

1 Ms. McAllister's document says the people have a
2 constitutional right to represent themselves in a civil
3 case. Your subcommittee disagrees with that. You can
4 compare page 16 of her paper with page 6, item 17, of
5 their paper. We think that ATJ's description of the
6 problem actually establishes the basis for distinguishing
7 between represented litigants and unrepresented litigants.
8 We think you can do that and you should do it because it
9 would be in their interests. You would be protecting
10 them, and you would also be preserving the system and its
11 efficient operation. We think you can do that. We think
12 you should do it. Ms. McAllister says the forms are
13 tailored to apply to extremely limited situations.
14 There's not a thing in the world that keeps these forms
15 from being used for a contested case. We've documented in
16 our paper that both the petition and the final decree
17 anticipate that they will be used in a contested case
18 despite the fact that the instructions say "uncontested
19 only." If the Court's going to adopt something, it's
20 going to exercise its power, and it says "don't," "don't"
21 should mean something. Otherwise, we're operating the
22 legal system out of our hip pockets. I, for one, aspire
23 to more than that.

24 Now, I just want to point out a couple of
25 things because I'm going to run out of time, and Judge

1 Warne has some things to say to you. The first thing I
2 want to say to you is these forms absolutely misstate the
3 law of separate property. I've cited in the paper to the
4 Family Code definition of separate property. They say,
5 "Money from a lawsuit during the marriage other than
6 recovery for lost wages is separate property." The Family
7 Code says, "Recovery for personal injuries during the
8 marriage, other than the amount for lost wages, is
9 community property." That's not even right, as the
10 subcommittee report states. It doesn't require a lawsuit,
11 number one. Number two, it's not limited -- their dealing
12 is not limited to personal injuries. It's recovering --
13 it's money from a lawsuit. That would cause a person who
14 relied on that to give up valuable legal rights to their
15 property, and it would put the Court in the position of
16 endorsing a change in the substantive law, which I hope we
17 agree cannot be done, at least without a case of
18 controversy before the Court. That's a direct conflict
19 with the Family Code.

20 Secondly, as documented in the
21 subcommittee's paper, they don't require a statement of
22 jurisdictional facts for someone who may not be a resident
23 of Texas who would be in the respondent's position. My
24 first year of law school, civil procedure, I believe the
25 very first thing we did was read a case called

1 International Shoe and the subsequent cases. That's just
2 a fundamental mistake, and it's really not acceptable.
3 There are numerous provisions in these rules and these
4 forms that conflict with the Family Code. Mr.
5 Gagnon stated in a debate I had with him in Houston the
6 other night that if a case became contested during the
7 pendency of the case that it would -- the court would go
8 ahead and divide the property.

9 CHAIRMAN BABCOCK: Steve, you've got one
10 minute.

11 MR. BRESNEN: Yes, sir. It's also been
12 stated by Ms. McAllister that real property could be
13 divided in a subsequent lawsuit. That's what she said to
14 Solutions 2012. Well, if the case is not required to be
15 uncontested, if that means nothing, then the limitation to
16 personal property and not real property means nothing, but
17 the Family Code requires all of those claims to be
18 brought, so if there's something like real property that's
19 actually in the case or, God forbid, a kid, these forms
20 used that way will be in direct contravention of the
21 Family Code.

22 I very much appreciate you letting me speak
23 to you today. I've sat on two law school classes recently
24 for friends of mine and then I heard y'all and, frankly,
25 the paper chase makes this look like a nightmare. Thank

1 you very much for having me today.

2 CHAIRMAN BABCOCK: Thank you.

3 (Applause)

4 HONORABLE JUDY WARNE: Good afternoon.

5 Thank you again for the opportunity to speak to you. I
6 just want to address a very few issues that have been
7 brought up this morning. One is the comment by
8 Ms. McAllister that most people use the forms correctly.
9 I am the only person presenting to you today who presides
10 over pro se divorces, and I can promise you if I can get
11 one correct pro se divorce on any given morning I will do
12 cartwheels down the hallway outside my courtroom. I have
13 been asked to do things like change the husband's name to
14 the maiden name because they don't know who petitioner and
15 respondent are. I have been told that the woman standing
16 in front of me seven months pregnant isn't pregnant of the
17 marriage because it's not her husband's child. They don't
18 understand the law. They don't need a form. They need
19 advice.

20 I have been told repeatedly through this
21 process that the lady at Wal-Mart who can't afford a
22 lawyer is entitled to a divorce, and that may be true, but
23 maybe the lady who works at Wal-Mart who can't afford a
24 lawyer should be told, "You don't need to file for
25 divorce, honey, until you finish your chemotherapy. Don't

1 let your insurance be dropped until your medical issue is
2 dealt with," or "Don't file for divorce until you've
3 secured some money in the bank to pay next month's rent."
4 There are advisory issues in complex family law matters
5 that need to be told to people instead of just throwing a
6 form at them and saying, "This will solve your problem."

7 I've been asked if there are so many forms
8 out there all over the country -- and, frankly, I don't
9 think it's 48 states. I would say 50 states have forms
10 because Office Depot and the Legal Zoom are available
11 everywhere. The difference is those state Supreme Courts
12 don't endorse the form, and the difference between --

13 (Phone ringing)

14 HONORABLE JUDY WARNE: If you were in my
15 court I would have the bailiff take your phone, but I
16 don't do that here. The difference between the Supreme
17 Court endorsing the forms is it's sending a message to
18 people that "You can do this, this is easy." It's
19 conveying an implicit message that this is not the most
20 significant financial decision you'll ever do and that
21 it's easy and you can do it yourself. Like Steve
22 referenced doing electricity at his home, I've tried to
23 take down wallpaper because the commercial said that
24 anybody can do it; and if any of you have tried to use
25 that Kaboom bath stuff that they say works and makes your

1 shower look like new, that doesn't work either, because
2 sometimes what people say is easy isn't easy if you don't
3 know what you're doing; and these poor folks are coming in
4 with these forms, and they don't understand the
5 significance of what they're doing.

6 I've been told that folks don't have any
7 retirement. They're both dressed in military. I said,
8 "Well, are you both still active duty military?"

9 "Well, yes."

10 "Well, there's nothing in here about
11 military retirement."

12 "Well, we don't have any." I said, "What do
13 you mean, you don't have any?"

14 "Well, we're not retired." They don't
15 understand that the asset is an asset and if they don't
16 divide it now they may never get the opportunity to divide
17 it.

18 CHAIRMAN BABCOCK: Judge, you've got one
19 minute.

20 HONORABLE JUDY WARNE: Thank you. Forms
21 aren't the answer. The ethics of asking judges to
22 practice law for one side of the case are very troubling.
23 I think I have huge problems with calling all of the pro
24 ses in my courtroom back into my office and saying, "Let
25 me help you with your forms." Why is it not the same

1 thing if I'm sitting on the bench and saying, "You're pro
2 se, so I'm going to help you with your forms, but you have
3 a lawyer, so I'm not, even though I may think your forms
4 are wrong."

5 The last point I want to make to you, since
6 you're representing the Supreme Court of Texas, is how
7 difficult it is for me to make that decision at the trial
8 court level and then an appellate court adjudicates
9 whether or not I treated the forms correctly, and then the
10 Supreme Court decides whether or not the forms that they
11 have promulgated are the ones that I should have used.
12 This is not the way the judicial process is supposed to
13 work. Please give some thought to those very important
14 questions. Thank you.

15 CHAIRMAN BABCOCK: Thank you, Judge.

16 (Applause)

17 CHAIRMAN BABCOCK: Okay. Let's -- while we
18 have these resources here, let's recognize Justice
19 Wainwright.

20 HONORABLE DALE WAINWRIGHT: I appreciate the
21 opportunity to join you today, and thank you, Justice
22 Hecht, to the members of the Court. I've got two quick
23 questions, then I've got to leave in a few minutes. First
24 for Judge Warne, if you don't mind. I was a civil
25 district judge in Harris County and across the street from

1 the family district judges, and I know that you guys are
2 inundated and work nearly dawn to dusk, and it's hard to
3 keep up, and you do an incredible job. I remember that,
4 and I assume it's probably similar.

5 HONORABLE JUDY WARNE: It's worse than ever.

6 HONORABLE DALE WAINWRIGHT: It's worse than
7 ever.

8 HONORABLE JUDY WARNE: But thank you for
9 your compliments.

10 HONORABLE DALE WAINWRIGHT: You make some
11 very good points, and I agree with all of them. I guess I
12 wonder if you assume that, as someone pointed out, that
13 every lawyer licensed in Texas takes a pro bono family law
14 case for an indigent that we're still going to have 40
15 percent, I believe, of that need addressed, so 60 percent
16 unaddressed, so if you assume that and you assume that the
17 pro ses who are indigent coming for divorces are not going
18 away, would you agree that that number is not going to get
19 lower by itself, that the pro ses are going to be there
20 tomorrow and next year as well?

21 HONORABLE JUDY WARNE: I agree that the pro
22 ses will always be there, but in Harris County the number
23 is less than 20 percent.

24 HONORABLE DALE WAINWRIGHT: Okay. So 20
25 percent will be there, next year, the year after. The

1 number may grow, it may not. So with those assumptions
2 what do we do? What's the best way to address this issue?
3 Every lawyer in Texas takes a case and we don't have
4 additional resources from the Legislature or money from
5 other sources. What's the best solution?

6 HONORABLE JUDY WARNE: Well, I think some of
7 the suggestions made in the Solutions 2012 report are good
8 ones, like establishing a 1-800 number. Figure out a way
9 that we can connect these folks to lawyers. There are
10 lawyers in Harris County that will do uncontested divorces
11 for \$500. The pro se litigants don't know who they are
12 because they don't carry malpractice insurance so they're
13 not allowed to sign up with Houston Lawyer Referral
14 Service. And I just think there are some things like that
15 that we can tweak that will allow us to connect the pro se
16 litigants who truly are indigent and can't afford a lawyer
17 with folks who are willing to give them advice and help
18 them through the process. There will always be people who
19 will represent themselves out of desire.

20 HONORABLE DALE WAINWRIGHT: Is it possible
21 in your opinion to address all of the needs of the
22 indigent through putting them in touch with lawyers and
23 having them get legal representation?

24 HONORABLE JUDY WARNE: Oh, I don't think so.

25 HONORABLE DALE WAINWRIGHT: Then what do we

1 do with the unaddressed need?

2 HONORABLE JUDY WARNE: They're going to come
3 in with the forms that they have now.

4 HONORABLE DALE WAINWRIGHT: Obviously it's
5 best that they have lawyers.

6 HONORABLE JUDY WARNE: I think they're going
7 to come in with the forms that they have now.

8 HONORABLE DALE WAINWRIGHT: The second
9 question, if I may, you said other state Supreme Courts do
10 not approve the forms. How many of the other 48, do you
11 know?

12 HONORABLE JUDY WARNE: I don't know how
13 many. You know, we did a survey of the American Academy
14 of Matrimonial Lawyers, and I thought the number was less
15 than 20 where the Supreme Court has had any participation
16 in the process at all.

17 HONORABLE DALE WAINWRIGHT: Is there a place
18 where we can get that information or does it need to be --

19 MS. McALLISTER: I have that information,
20 and all of the 48 states plus D.C. -- well, 47 states have
21 court-approved forms.

22 HONORABLE DALE WAINWRIGHT: Supreme Court
23 approved forms?

24 MS. McALLISTER: Supreme Court-approved
25 forms, and one state, Alabama, has State Bar approved

1 forms, really at the direction of the court, but they do
2 it, State Bar does it. It's not court-approved forms. So
3 the numbers that I'm saying are court-approved forms.

4 HONORABLE DALE WAINWRIGHT: If you believe
5 there is information to the contrary, if you would provide
6 that for us.

7 HONORABLE JUDY WARNE: Absolutely.

8 HONORABLE DALE WAINWRIGHT: Or have some of
9 the others. I know that you're doing justice in Harris
10 County. I would appreciate it.

11 HONORABLE JUDY WARNE: Absolutely, be happy
12 to.

13 HONORABLE DALE WAINWRIGHT: Thank you,
14 ma'am.

15 HONORABLE JUDY WARNE: Thank you.

16 HONORABLE DALE WAINWRIGHT: I have one
17 question for Mr. Bresnen, if I may.

18 CHAIRMAN BABCOCK: Sure, absolutely.

19 HONORABLE DALE WAINWRIGHT: I don't want to
20 take too much time.

21 CHAIRMAN BABCOCK: Take as much time as you
22 want.

23 MR. BRESNEN: I suspect they'll let you have
24 all you want.

25 HONORABLE DALE WAINWRIGHT: You mentioned

1 the commission subcommittee's task force report, page six,
2 item 17, about pro se representation. Which report? I
3 was looking for that, and I'm looking at the report again.

4 MR. BRESNEN: Let me grab my file and make
5 sure I'm giving you the right page.

6 HONORABLE DALE WAINWRIGHT: Because I want
7 to find that information. It had to do with the right of
8 self-representation.

9 MR. BRESNEN: Yes, sir.

10 HONORABLE DALE WAINWRIGHT: I think you
11 referenced page six, item 17.

12 MR. BRESNEN: Yes. In Ms. McAllister's
13 materials I have page 16. The quote is "Texans have a
14 constitutional right to represent themselves." On page
15 six, item 17, of the subcommittee's report it says, "It
16 does not appear there is an established constitutional
17 entitlement to self-representation in a civil court
18 proceeding." I think you'll find that's right with maybe
19 -- with a narrow exception, and I don't know if this is a
20 holding under the state constitution or Federally, but I
21 believe if somebody is going to take your kids away you
22 probably can get an appointed lawyer. I know under the
23 statute you can.

24 MR. ORSINGER: Justice Wainwright.

25 HONORABLE DALE WAINWRIGHT: When you say the

1 subcommittee's report, can you give me the full name of
2 that report?

3 MR. BRESNEN: Yes.

4 MR. ORSINGER: Justice Wainwright, can I
5 address the question?

6 HONORABLE DALE WAINWRIGHT: Just a second.
7 Let me get his answer.

8 MR. BRESNEN: Richard, would you give him
9 the title of your report so I don't spend all of our time
10 digging through my pile here.

11 MR. ORSINGER: Yeah, it's called "Report of
12 the Rules 15 to 165a Subcommittee of the Texas Supreme
13 Court Advisory Committee on Proposed Divorce-related
14 Forms."

15 HONORABLE DALE WAINWRIGHT: And it's what
16 tab in the form, Tab K in the advisory committee forms?

17 MR. ORSINGER: Judge, I don't know that
18 further research is necessary because I think that there
19 was a drafting error in Ms. McAllister materials, and I
20 think that she could explain that to you.

21 MS. McALLISTER: The original -- on Friday
22 we submitted our report, and it had been edited and
23 someone erroneously put in that there was a constitutional
24 right. We corrected that and submitted a second report
25 that took that language out. Unfortunately Mr. Bresnen

1 probably still has the prior report, so what we are saying
2 is there is not necessarily a constitutional right to
3 represent yourself, but there is Texas Rule of Civil
4 Procedure 7 which allows you to represent yourself.

5 HONORABLE DALE WAINWRIGHT: Okay. Thank
6 you. That's all I have.

7 MR. BRESNEN: Yes, sir.

8 HONORABLE DALE WAINWRIGHT: Thank you,
9 Mr. Chairman.

10 CHAIRMAN BABCOCK: You bet. Justice Medina,
11 do you have any questions? Not trying to slight you.
12 Justice Hecht, any right now?

13 Okay. Does anybody else have questions
14 while we have our speakers captive? Judge Christopher.

15 HONORABLE TRACY CHRISTOPHER: Do we have a
16 definitive number of judges that refuse to accept
17 pleadings with check boxes on it, or is that anecdotal?

18 CHAIRMAN BABCOCK: Well, I don't know the
19 answer. Does anybody?

20 HONORABLE TRACY CHRISTOPHER: I think
21 Ms. McAllister said that that was a fact.

22 MS. McALLISTER: No, it's anecdotal. We do
23 have some -- I mean, I know I can give you some counties
24 that don't. I need to get that spreadsheet out, but I
25 don't know particular judges, but I do know counties where

1 we're having problems. So --

2 CHAIRMAN BABCOCK: Judge Estevez.

3 HONORABLE ANA ESTEVEZ: I just came back
4 from a judicial conference that they had, and I was in the
5 family law section, and I would say it was anecdotal
6 because I asked all the family lawyers or family judges
7 there, you know, who wasn't accepting them, and I think
8 what we -- what I heard from all of them was that this
9 isn't necessarily the solution, but just like she stated,
10 our problem is not that there's an ineffective form but
11 that they're not filling it out correctly, that they need
12 advice to fill it out.

13 I had a problem yesterday, a lady who on her
14 petition -- I actually pulled out her petition, and she
15 had gotten it from one of the legal help part, and there
16 was a paragraph that says, "Do not use this form if you
17 have a child from someone who is not your spouse," and
18 sure enough, she had a child not only with her spouse but
19 also with someone else, and she's using this form. And so
20 I don't know what the solution is, but a form is not going
21 to solve the problem that the judges have; and I do --
22 while I have everyone's listening, I think I was surprised
23 to hear and I guess I never thought about it that they
24 felt left out of the process, the family law judges, that
25 actually apparently are the problem, because you're saying

1 that there's some of us that don't accept these forms.
2 They don't feel like they've been included to be part of
3 the solution, and I think that that's -- would be helpful
4 so that we really know what our solution should be if we
5 could really identify the problem. Because my problem is
6 not with the people that don't have any property. I don't
7 ever deny that. You know, do you have anything, no;
8 anybody pregnant, no; are your kids 20 or 30, yes; okay,
9 so we're done. It's the other situations, and you know,
10 we need good access to justice, not bad.

11 CHAIRMAN BABCOCK: Justice Patterson.

12 HONORABLE JAN PATTERSON: I have two
13 questions. One is, are there any statistics showing that
14 one party is represented and the other party is not, and
15 also, if you could address this whole notion of the kind
16 of a slippery slope. There seems to be a category of
17 cases that might lend themselves, the more simple, but
18 there's also a suspicion that this is a slippery slope
19 leading to all forms, and so where are we in that process
20 and --

21 MS. McALLISTER: I can answer the question
22 about whether or not there is information on the number of
23 pro se litigants within each case. OCA started collecting
24 data on unrepresented people in September of 2010, so we
25 just have that level of information for a little more than

1 a year now. It only collects the information on pro se
2 litigants. Individual counties may have that information,
3 but we don't have it on a statewide basis. It's pretty
4 difficult to know how many people are in a case that are
5 pro se. Some counties do track that, but not all counties
6 track that.

7 HONORABLE JAN PATTERSON: So do the
8 statistics consider a pro se litigant case if there is
9 one --

10 MS. McALLISTER: Yes.

11 HONORABLE JAN PATTERSON: -- pro se?

12 MS. McALLISTER: The statistics that I gave
13 you today from the Office of Court Administration are only
14 for pro se petitioners. There's no information about pro
15 se respondents because that information is not collected.
16 It also doesn't -- it also doesn't track people who file
17 with an attorney but then subsequently become pro se
18 because they can no longer afford it, but it also doesn't
19 track the number of people who file pro se and then
20 subsequently get a lawyer. There are some counties that
21 are more sophisticated in the way that they track their
22 data, like Lubbock County does track which -- you know,
23 whether it's petitioner, respondent, and that kind of
24 information, but even nationwide there is some -- there is
25 difficulty in tracking that information, so there's one

1 state that gets very accurate information but that's
2 because they require their counties to submit -- it's all
3 tied to funding, so they require them to submit a lot of
4 data, but they don't get their money if they don't do it,
5 and that's not the way it's set up here in Texas.

6 HONORABLE JAN PATTERSON: Thank you.

7 MS. McALLISTER: And then you had a second
8 question, and I'm sorry, what --

9 CHAIRMAN BABCOCK: I think that was directed
10 more to Steve, the slippery slope argument.

11 MS. McALLISTER: Okay.

12 HONORABLE JAN PATTERSON: Well, and, yeah,
13 and the difference in positions between parties as to
14 whether this is an evolving process or whether it's best
15 left to a certain category of cases.

16 MR. BRESNEN: Sure. Let me answer your
17 first question first just from an anecdotal basis. We
18 hear from lots of our members that they're in a case that
19 has a pro se litigant on the other side, and it's a
20 nightmare and that one of the things -- I think your
21 question really needs to be thought of in terms of are
22 we -- how are we going to address this without making one
23 side advantaged or their role in the adversary process
24 change versus those who are represented.

25 I'm sorry, your second question was the

1 slippery slope question. That 2,500 pages of material
2 that Tom Vick referred to shows that going back to
3 starting in 2008, led by the Office of Court
4 Administration, I'm -- this is going to sound like I'm
5 paranoid, need to go check in up the street at the State
6 Hospital, but it's all documented. I'll bring the whole
7 box over here and show you. Their intention is to do
8 family law cases of all kinds, kids, real property, you
9 name it, landlord/tenant, employment, guardianships,
10 wills. I'm probably leaving something out. There's a
11 whole long list. It's all in black and white. And if you
12 think about that, this point that I made about not having
13 any institutional capacity, think about the resources that
14 are being consumed on this one set of so-called simple,
15 narrow, extremely tailored forms and imagine expanding
16 that out. How in the world would this Court manage that,
17 and would you guys be willing to serve on this committee
18 if every other week we were having a new slew of forms
19 like this come in and a big uproar? We're just one
20 section of the bar, folks. The immigration and
21 nationality law section, the general practice solo and
22 small firm section is on record against this because they
23 can see the train coming down the track. I hope that's
24 responsive to your question.

25 HONORABLE JAN PATTERSON: Well, if it were

1 confined to a simple set of facts of simple category,
2 would that be -- would that answer part of the request?
3 Would that be palatable?

4 MR. BRESNEN: Our largest concern is Supreme
5 Court endorsement of the forms, because we think that
6 starts the upending of the traditional roles of an
7 adversarial system and what's an appropriate role for the
8 justices of the Supreme Court to serve in. So, and forms,
9 as was stated, it's, you know, some forms are better than
10 other forms, we admit that, but it's the use of forms
11 alone are dangerous, and there are other sources that do
12 have the institutional capability to produce these things
13 that don't have the imprimatur of the Court.

14 I might also observe, our polling of the
15 chapter presidents of the American Academy of Matrimonial
16 Lawyers shows that in all of these other states -- we
17 covered about 35 states with our poll, and all of these
18 other states that are using these forms, they've had,
19 according to them, quite a lot of increase in the number
20 of pro se litigants in the last five years. So, Justice
21 Wainwright, that's not going to get lawyers to people.
22 That's not going to solve the problem, and it's not going
23 to diminish the dimension of the pro se litigant problem
24 in the state of Texas.

25 CHAIRMAN BABCOCK: Munzinger.

1 MR. MUNZINGER: I had a question for
2 Ms. McAllister. You said there are 47 states whose
3 Supreme Courts have promulgated forms that have been
4 approved by those courts for this purpose, pro se
5 representation in divorce cases.

6 MS. McALLISTER: Correct.

7 MR. MUNZINGER: Thank you.

8 CHAIRMAN BABCOCK: Bobby Meadows.

9 MR. MEADOWS: No question.

10 CHAIRMAN BABCOCK: No questions. Jeff Boyd.

11 MR. BOYD: Follow-up to that, and I didn't
12 get through all of this material, so it may be in there.
13 Did anyone have statistics on whether the number of
14 divorce filings increased in those states once the Supreme
15 Court adopted the approved forms?

16 MS. McALLISTER: I don't have statistics on
17 that. I'm sorry. I don't know.

18 HONORABLE JUDY WARNE: On that issue, I
19 would like to point out that Travis County, which is
20 apparently over 50 percent of pro ses, have had forms for
21 five years. Harris County has no forms, and we're still
22 under 20 percent. So I think if you look at just the
23 counties in the state of Texas who have promulgated forms
24 locally the number of pro ses have increased.

25 MR. GAGNON: But the number of divorces have

1 increased.

2 MR. BOYD: I don't mean pro ses --

3 MR. GAGNON: The number of divorces have
4 increased.

5 MR. BOYD: Have not?

6 HONORABLE JUDY WARNE: Yes, they have,
7 everywhere. Absolutely.

8 MR. GAGNON: It's pretty static. It's
9 pretty static in most all counties.

10 CHAIRMAN BABCOCK: Richard Orsinger.

11 MR. ORSINGER: I was going to introduce her
12 later, but maybe now is the appropriate time. We have as
13 a guest Laurel Holland. Laurel, would you please stand
14 up? She is a reference attorney, law reference attorney,
15 right here in Travis County, works for the law library and
16 self-help center, and she works on a daily basis using the
17 Travis County forms for pro ses, and I didn't anticipate
18 that we would get this specific at the policy level, but
19 she's available if y'all would like to ask questions of
20 someone whose daily job it is to interface with a set of
21 local forms and pro se litigants.

22 CHAIRMAN BABCOCK: Well, if she can stick
23 around, that would be great.

24 MR. ORSINGER: Okay.

25 CHAIRMAN BABCOCK: Let's confine our

1 questions to the speakers right now. Roger.

2 MR. HUGHES: I have two questions and
3 perhaps they are related for both speakers. Do we have
4 any data that says that once a court or the state approves
5 forms for indigent use that essentially that drives out of
6 the marketplace the commercial forms like Zoom and forms
7 from, shall we say, on nonapproved services? And the
8 second is sort of related to it. Why is it -- I think I
9 heard a suggestion earlier that why not just require --
10 say it's enough to use forms approved by one of the
11 sections of the State Bar? Why is it necessary that the
12 Supreme Court approve the forms?

13 MR. GAGNON: Have you looked at the family
14 law section's divorce petition? It's 127 pages long and
15 just areas regarding property it probably has 25 to 30
16 pages of elections that people -- that most lawyers can't
17 figure out. Most lawyers can't figure out. I'm sure
18 Judge Warne will tell you there's mispleadings by lawyers
19 from that form book because they can't figure it out. How
20 do you expect a person who has a college education but is
21 not a trained lawyer to figure out those elections when
22 they don't need to make those elections?

23 CHAIRMAN BABCOCK: Judge Estevez, if you
24 have something on your point, right?

25 HONORABLE ANA ESTEVEZ: Yes. I had the

1 statistics, and I don't know where I got everything, so I
2 don't know if it's in everything because I was on the
3 subcommittee. So I don't know if everyone has this, but I
4 think it's been a little unclear about what they have
5 approved, and I want to make sure because they did send us
6 the report of all the states, and there are only 37 states
7 that have divorce forms. There's 48 -- 49 states that
8 have some sort of standardized forms and then they have
9 family law forms, 48, but then it says "Total states with
10 divorce forms, 37." So I'm just making that clear, so
11 I --

12 CHAIRMAN BABCOCK: Yeah, I think all those
13 statistics, whatever they say, are in the record. Roger,
14 I didn't mean to cut you off. Did you have another
15 question?

16 MR. HUGHES: No, those are the two
17 questions.

18 CHAIRMAN BABCOCK: All right. Frank
19 Gilstrap.

20 MR. GILSTRAP: I have a question initially
21 for Trish McAllister, but the opponents may want to
22 comment on this as well. From your presentation, you talk
23 about two different issues. One was poor or indigent
24 people who can't afford a lawyer. Two is the growth of
25 self-represented litigants. I got the impression from you

1 that it's your belief that there is a substantial overlap
2 here, that most of the people who are self-represented
3 litigants are poor people.

4 MS. McALLISTER: Correct.

5 MR. GILSTRAP: And, again, I was stunned by
6 the Travis County statistics, which I think you said 78
7 percent of the people represent themselves. I can't
8 believe that 78 percent of the people who get divorced in
9 Travis County or even a number near that close are
10 indigent. I mean, that doesn't seem to add up.

11 MS. McALLISTER: Right. And I don't know
12 what the statistics are specifically for poverty in Travis
13 County. All I can do is give you the information that we
14 do have, which is that the most -- most people -- I mean,
15 over 500,000 hits per year go to Texas Law Help, which is
16 the main resource for free legal information and free
17 forms in Texas. Most of the courts and clerks refer
18 people to that, so that seems to be a good indicator of
19 places that people -- a place that people go for forms,
20 and all I know is that 81 percent of those people are
21 qualified for food stamps that use that website.
22 Nationally they've done some studies, and it's very
23 difficult to track income levels and things like that, so
24 you can imagine the amount of resources it would take to
25 do that kind of study, but nationally they have done some

1 studies that indicate that the majority of people who use
2 pro se or go before the court pro se are poor. So we
3 don't suspect that Texas is different.

4 You know, Ms. Holland might be able to speak
5 to the statistics in Travis County, but I think that they
6 track the income levels for those -- for each pro se
7 litigant here in Travis County or in any other county as
8 far as I know.

9 CHAIRMAN BABCOCK: Okay. Yeah, Justice
10 Moseley.

11 MR. BRESNEN: Could I say something about
12 the data real quick?

13 CHAIRMAN BABCOCK: If Justice Moseley will
14 yield.

15 HONORABLE JAMES MOSELEY: Of course.

16 MR. BRESNEN: Well, I thought it was
17 directed to both of us.

18 HONORABLE JAMES MOSELEY: Please.

19 MR. BRESNEN: I'm happy to stand down if you
20 want.

21 HONORABLE JAMES MOSELEY: No, no, no.

22 MR. BRESNEN: We looked at the website.
23 There is a survey on the website that Trish is referring
24 to that a person may fill out, and it's self-reporting, so
25 the data is concerning there. I don't think there is any

1 good data. I was presented the other night in Houston
2 after my debate with Stewart with a petition from somebody
3 that had 1.5 million dollars in assets with no real
4 property stated in the petition, who was representing
5 themselves, so it's running the gamut. We don't doubt
6 that there's a lot of poor people in the courts
7 representing themselves.

8 CHAIRMAN BABCOCK: Justice Moseley.

9 HONORABLE JAMES MOSELEY: My question to
10 Ms. McAllister was you mentioned that in preparation for
11 this you had done a survey either of the internet in
12 general or Craigslist in particular and came across a
13 number of providers of forms. Is there something about
14 the private sector versus public sector that
15 institutionally inhibits the private sector from being
16 able to prepare --

17 MS. McALLISTER: No.

18 HONORABLE JAMES MOSELEY: -- correct,
19 update, maintain, and sell forms that the Supreme Court
20 can't do or otherwise?

21 MS. McALLISTER: No, and I didn't mean to
22 suggest that, because as a matter of fact, I mean, you
23 know, one of the things that states have seen when courts
24 approve forms is that there's an increase usually -- well,
25 not all states, but some states report that there's an

1 increase in the correlation between court-approved forms
2 and people going to a lawyer for limited scope type of
3 assistance and filling out the forms, and so I'm not
4 suggesting that simply because their forms are available
5 for sale or anything like that that there's something
6 untorrid happening. I'm simply saying that in a two-week
7 period where we were looking at stuff on Craigslist there
8 were a lot of people who were offering services that
9 involved out of date forms, disbarred attorneys, I mean,
10 not something that I don't think that, you know, is --
11 that necessarily indicates that all people who provide
12 private or sector forms are poor. I just wanted to point
13 that out that there is a lot of harm that comes to people
14 by accessing these forms and they don't know what they're
15 accessing. There are a lot of people who use out of date
16 forms.

17 HONORABLE JAMES MOSELEY: Are we creating
18 something that already exists, or are we -- would we be
19 better off trying to institute through information,
20 advertising, certifications, or some other means ways of
21 improving the market, the private sector market for those
22 kinds of forms, by allowing information out there so the
23 consumers can meaningfully choose between these kinds of
24 providers and allow the private sector to take care of
25 these drafting issues that we're going to be struggling

1 with now and perhaps in the future if the Supreme Court
2 approves these forms, as opposed to creating these forms
3 ourselves and then maintaining them, updating them, and
4 going through some of the issues and problems that are
5 being identified over here by the Family Bar Foundation.

6 HONORABLE JUDY WARNE: If I could respond to
7 that, obviously it's our position you are recreating the
8 forms. In the subcommittee report, it points out that the
9 State Bar, the family law section, Texas Young Lawyers,
10 there are a lot of forms out there, some of which are
11 really good, some of which, as Mr. Bresnen said, are
12 updated every two years; and Trish's referral to people
13 using outdated forms is going to be the same problem,
14 whether it says "Supreme Court" across the bottom or not.
15 It's like Steve said with the lawn mower example. You
16 know, saying these forms expired or these forms are no
17 longer valid, there is no mechanism once the forms are out
18 there to say, "Oops, the Legislature decided to change
19 that section of the Family Code, so this is no longer
20 valid," and to realistically expect family law judges to
21 read every word of the order or the petition and then I
22 guess we're going to be expected to correct it before we
23 sign it is just unrealistic. If the problem is that big,
24 then certainly it's overwhelming to expect the courts to
25 address it and fix it on a case by case basis.

1 MS. McALLISTER: I'd like to also make a
2 response, which is that, you know, what we can -- what we
3 do know is what's happened in other states, and so some of
4 these other concerns just haven't happened in other
5 states. They've seen increased judicial efficiency and
6 economy. They've seen increased access to courts. You
7 know, each court is probably up to -- it's up to them to
8 decide whether or not they're just only going to accept
9 these court-approved forms or, you know, whether they're
10 going to allow other forms. I don't know. I mean, that's
11 part of the conversation that I think is being had today,
12 but I do think that what they do see is a narrowing of the
13 forms that comes through their courts. So they see more
14 of the court-approved forms and fewer of the forms that
15 are more questionable coming through their courts. Now, I
16 don't know whether or not -- I don't know the detail as to
17 whether or not it's because the courts are only allowing
18 them to use those forms or not.

19 CHAIRMAN BABCOCK: Trish --

20 HONORABLE JAMES MOSELEY: May I follow up?

21 CHAIRMAN BABCOCK: Yeah, certainly, Judge.

22 HONORABLE JAMES MOSELEY: On this Craigslist
23 identification or internet identification process that you
24 went through, what percentage of the forms that were out
25 there did you find to be suspect or problematic?

1 MS. McALLISTER: Well, you know, I would
2 have to go through every single one of them. There was a
3 big stack, of course, Craigslist, often multiple posts
4 everyday. So I didn't look through it to see, to
5 eliminate the duplicates, and to look through it that way,
6 but there were a significant number that were
7 questionable, but there were also some that were
8 absolutely fine. I just don't know the exact answer for
9 you for that from that perspective.

10 CHAIRMAN BABCOCK: Trish, following up that
11 question, you said in your remarks that there are lots of
12 forms available, and you mentioned Law Guru, Texas Young
13 Lawyers, family law section, and texaslawhelp.org, and I
14 know that there's been comments about the family law
15 section that that's really for lawyers and it's really
16 complicated and not very user friendly if you're a pro se,
17 but what about these others? Why wouldn't Texas Young
18 Lawyers or texaslawhelp.org be sufficient?

19 MS. McALLISTER: Well, Texas Young Lawyers,
20 if you actually look at their forms they're pretty much
21 written in legalese, too, so it's one of the things that,
22 you know, over time they've been working to make it more
23 plain language, but it's still not plain language yet.

24 CHAIRMAN BABCOCK: Right.

25 MS. McALLISTER: I haven't downloaded Law

1 Guru or Legal Zoom forms, but I suspect that there are
2 more -- when I got on the Law Guru website and was just
3 kind of playing around on there, even the language that
4 they do their website in is a little bit more than like a
5 fifth grade reading level, so I don't know if that answers
6 your question.

7 CHAIRMAN BABCOCK: Well, what about
8 texaslawhelp.org?

9 MS. McALLISTER: Texaslawhelp.org does have
10 plain language forms. The main issue there is not so much
11 legal sufficiency but that some courts don't accept them.

12 CHAIRMAN BABCOCK: And that goes back to the
13 question that Justice Patterson asked or maybe Justice
14 Christopher, that's an anecdotal --

15 MS. McALLISTER: Well, there is anecdotal,
16 but actually there's been some study done recently I think
17 by Texas Law Help. I'm not sure if she's in here.

18 UNIDENTIFIED SPEAKER: I'm here.

19 MS. McALLISTER: They were recently going
20 through the various counties to see which ones accept the
21 forms, which ones don't accept the forms, and so that
22 information should be available soon.

23 CHAIRMAN BABCOCK: Okay. If you'll let me
24 ask just a couple of questions and then I'll get to
25 everybody. Tom Vick, I've got a couple for you. The

1 report that your organization, Solutions 2012, did was
2 stunning and especially with the time -- time constraints
3 that you were under. My question is, you have a laundry
4 list of things that could be done, should be done, to help
5 the pro se litigants. Are those things exclusive of
6 forms? I mean, it seems to me whatever we do about forms
7 you could do -- you could do both things.

8 MR. VICK: Some of those things contemplate
9 that there will be forms like the ones on Texas Law Help.
10 But the idea was to find some solutions that are better
11 than Supreme Court-approved forms and so that's where that
12 was geared.

13 CHAIRMAN BABCOCK: Okay. But even if the
14 Supreme Court approves some forms, you could still have
15 these, you know, kiosks, and you could still try to
16 increase pro bono representation.

17 MR. VICK: Absolutely.

18 CHAIRMAN BABCOCK: Okay. Second question
19 for you, and I want to ask Steve this one, too. As a
20 representative of State Bar and Steve as a representative
21 of a segment of the State Bar, it seems to me that the
22 Supreme Court has got to be concerned as sort of the final
23 body to be concerned about public perception; and Steve
24 mentioned lawyer jokes, which you know we all hear from
25 time to time. There is a whiff in some of these papers in

1 the record of self-protection, that, you know, these are
2 lawyers just trying to protect their own surf -- turf,
3 maybe to the detriment of some of our citizens. Can you
4 comment on that? Can you talk about that? And I would
5 like to hear Steve's comments, too.

6 MR. VICK: I would be delighted to, and I
7 know he would, too. First of all, I find it insulting
8 that --

9 CHAIRMAN BABCOCK: I didn't mean to do that.

10 MR. VICK: No, I'm not insulted by your
11 question at all, but that when the family law bar stood up
12 and said, "This is not good for the public," that the
13 response was "You guys are just trying to make money and
14 cover your territory," but the fact of the matter is if
15 all we were talking about were poor people who didn't have
16 any kids and any property, there is nobody making any
17 money on that divorce case. It would be ludicrous to
18 think that lawyers are losing money handling those cases,
19 and frankly, Northwest Legal Services, the last two cases
20 they asked me to take were supposed to be no kid, no
21 property. The most recent one I had has separate property
22 and a paid for car; but nevertheless, you always say "yes"
23 to that because that's the easiest case they're ever going
24 to send you; and I don't know any lawyers who won't take
25 that case; and so I find that argument rather disingenuous

1 when you're talking about these forms but the fact of the
2 matter is the forms are -- the family law practice manual
3 is complicated because it's a complicated area of the law.

4 Judge Warne said it best when she said, you
5 know, if we start saying, "Well, here's a bunch of divorce
6 forms, everybody go do this," it will make people think
7 that anybody can do this and that it is easy and that
8 their divorce and their property is not significant, and
9 the fact of the matter is these people have complicated
10 problems, and these forms aren't going to solve the
11 problem, and so whether lawyers do it or somebody else
12 does it, the fact -- I'm kind of getting away from the
13 question, and I apologize. The fact of the matter, it is
14 complicated, and the forms that are before you aren't
15 going to cause any private lawyer to lose a dollar, I can
16 promise you that, but the bigger question is when we start
17 moving on to these other forms. Then that gets to be a
18 problem not because lawyers are going to lose money. It's
19 because people's rights are not going to be protected and
20 everyday family lawyers see situations where people use
21 forms, they go to the courthouse, and someone is going to
22 abuse the forms, and I know they're going to abuse forms
23 whether we do these forms or other forms, but I think
24 these forms are subject to even more abuse because they
25 have our Supreme Court stamp of approval on them.

1 Well, what happens is, they -- husband says,
2 "I'm going to fight you for kids, and but I'll tell you
3 what, I'm going to keep my retirement because I'm the guy
4 who went to Lockheed everyday and earned it, and I won't
5 fight you for custody, but I'm only going to pay you \$500
6 for child support," and she says "okay" because she's most
7 worried about her children, and these people get divorced,
8 and 30 days goes by, and the court loses plenary power,
9 and that lady comes to my office, and I'm not making this
10 up because it's happened more than once to me, and it's
11 happened more than once to my colleagues who do this. We
12 say, "Well, we can probably go get your child support
13 issue fixed, but that \$200,000 worth of retirement that
14 got built up over your marriage, it's gone. It's
15 absolutely gone." The court has no authority to do
16 anything about that, and so we can fix some of your
17 problems, but we can't fix that problem. And those are
18 the kinds of horror stories that we get, and those are the
19 kinds of rights that people have that they give up when
20 they use forms and when they're being abused by their
21 spouses, and so family law is different than when banks
22 sue each other. There is an interpersonal relationship.
23 There is -- it's probably why most of you
24 don't do family law, frankly, you don't want to mess with
25 all of this, but these people know each other really well

1 and they push each other's buttons, and there's dominance,
2 and they've created all of these issues that typically
3 make someone want to get out and make someone else
4 subservient to that and will do anything to get the case
5 over with. So the issue is really about protection of
6 rights, and it has really nothing to do about lawyers
7 losing their income. We make a lot of money, frankly,
8 trying to pick up the pieces and fix the messes that
9 people create with their forms already.

10 CHAIRMAN BABCOCK: Steve, do you have any
11 comments about the self-interest, turf protecting
12 argument?

13 MR. BRESNEN: Yeah, a little bit, and maybe
14 slightly different from Tom's take on it, but probably not
15 a whole lot. I mean, it should be axiomatic that if
16 you're only serving low income people with these forms and
17 they're not spending money on lawyers that the syllogism
18 would say that you're not -- lawyers aren't losing any
19 money. It should also be axiomatic that about the two
20 easiest things today -- to do today in political life is
21 to blame the mainstream media or greedy lawyers. There's
22 been a cottage industry in this state for a good long
23 while that's wrecked the practices of many people in here
24 blaming lawyers for a host of deals from impetigo to you
25 name it. So I think that that's where it comes from.

1 Now, I will say to you if you want to do
2 some -- if you can't sleep some night and you want to go
3 to sleep, read some of the material that you'll see in
4 a -- that in a blog by a guy named Richard Zorga, Zorzaz,
5 have I got that right?

6 MS. McALLISTER: Zorza.

7 MR. ORSINGER: Zorza.

8 MR. BRESDEN: Zorza, Richard Zorza. There's
9 another guy whose last name is G-r-a-e-c-a-n, I believe.

10 MS. McALLISTER: Greacen.

11 MR. BRESNEN: And you will see -- Greacen.
12 You will see in the literature a jargon that Mr. Marx
13 could have delivered in an earlier era that's hostile to
14 lawyers, hostile to the complexities of the system,
15 hostile to the language of the law; and that gives me
16 great pause to think about what happens down the line.
17 You guys are doing wills, you guys are doing forms for
18 people, you know, to go probate their own wills and do all
19 that stuff. That lawyer in Dumas, Texas, that gets \$300
20 to do a simple estate and doesn't get that \$300, doesn't
21 pay his light bill that day. Now, you may not be
22 concerned about that. You may not think it's your
23 responsibility to worry about that, but I suggest to you
24 what part of our problem is we don't have a large enough
25 supply of legal services. That's what I'm hearing, and

1 you cannot have it both ways. So we're here fighting over
2 some people's rights who are poor, but there's a lot more
3 to this, a lot more to it, and I submit to you that it
4 will change the marketplace. It will change your role.
5 It will change your role, Justice Hecht. All of you
6 judges around here, it will change your role. I've seen
7 the traffic amongst the district clerks in the state.
8 There's a pretty hefty argument going on amongst the
9 district clerks in the state about all of this. You know,
10 we shouldn't all get too complacent. Just don't mess with
11 the lobby business, that's all I ask.

12 CHAIRMAN BABCOCK: That's a deal. Pete, I
13 think you had your hand up, and then, Richard, I'll get to
14 you, but some other people had their hands up. Pete.

15 MR. SCHENKKAN: I think this question goes
16 to Mr. Vick and --

17 THE REPORTER: Speak up, please.

18 CHAIRMAN BABCOCK: We can't hear what you're
19 saying.

20 MR. SCHENKKAN: I beg your pardon. I think
21 this question goes to the representative of the State Bar
22 and the family law section, and it's a question about your
23 Roman II, keeping forms current, and Roman IV, form usage,
24 a question, which I accept are very significant questions
25 and worthy of some attention in the question of should the

1 Court do this at all, and so what I want to do to clarify
2 the focus on that is to say let's assume that we have got
3 Texas Supreme Court-approved forms for -- that are
4 intended for no children, no real property, no retirement
5 plan divorces and leaving aside the questions about is the
6 decision to approve that a good idea given that some
7 people will try to use them for other things or when they
8 don't. Just focusing then on that assumption that the
9 Court cross that bridge, adopted forms for that --
10 intended for that set, you asked the question under Roman
11 II if they are to be utilized it's important that they be
12 updated, who will do it and who should do it; and my
13 question to you is who would you recommend be in charge of
14 saying these forms need to be updated? Because on behalf
15 at least of myself as a member of the Supreme Court
16 Advisory Committee, if at any time Justice Hecht tells Mr.
17 Babcock that we need to meet to consider some changes in
18 some forms, I'll come if I can and do the best I can to
19 help get any forms right. So the question in my mind is
20 who would you recommend tell people it's time to look
21 again at the form you approved last month or last year?

22 MR. VICK: Richard Orsinger.

23 MR. ORSINGER: Oh.

24 (Applause)

25 CHAIRMAN BABCOCK: We're unanimous on that.

1 We don't have to go any further.

2 MR. ORSINGER: My term is over in two and a
3 half years.

4 MR. VICK: It needs to be extended, but
5 honestly, if the Supreme Court creates this form and the
6 Supreme Court wants to do forms then I suppose their
7 advisory committee is going to bite that off.

8 MR. SCHENKKAN: And I'm assuming that, but
9 I'm saying the concern that we don't have the resources
10 because most of us are not family law lawyers or
11 participate in the family law system in any way, all true,
12 I'm just saying that I'm assuming that if the Texas
13 Supreme Court said, "We're going to go ahead and adopt
14 these forms for this purpose, but we do want help making
15 sure they are updated when they need to be and when they
16 need to be updated that the update is good not bad," that
17 you -- you and the organizations you're speaking from,
18 whether it's the group of family law judges or the family
19 law organization or the family law section, any of these
20 organizations, you would be in a better position to know
21 than we would who is a person or institution or
22 subcommittee or create one that would say your job is to
23 look for times when we need to send up a red flag and say,
24 "This form needs to be looked at again."

25 Now, maybe I'm asking the wrong question.

1 Maybe the question is, if the Court did this and asked you
2 to recommend who would be best put in charge of that,
3 would you come up with somebody for us from the family law
4 community that would say -- from the family law community,
5 back to Justice Hecht, "Time to look at this form."

6 MR. VICK: Well, the most obvious answer
7 would be the family law section of the State Bar would do
8 it. Now, the issue gets to be, you know, the Supreme
9 Court can order Access to Justice Commission to do
10 whatever it wants to do because they created them, and
11 they can ask Richard and this committee to do whatever
12 because they invited you and you said "yes." I'm not
13 exactly sure how they're going to order family lawyers to
14 show up and do this.

15 MR. SCHENKKAN: Not order. Request.

16 MR. VICK: Well, okay. And, you know, I
17 don't know how willing they're going to be or want to do
18 that. I don't know. But the very specific answer to your
19 specific question is the best and brightest family lawyers
20 are the people who are in the family law section and,
21 frankly, who are working on the family law practice manual
22 because they have the most up-to-date, active knowledge of
23 changes that need to be made.

24 CHAIRMAN BABCOCK: Levi.

25 HONORABLE LEVI BENTON: Yeah, I have just a

1 couple of questions, the first one directed to Judge
2 Warne. I think sometimes it makes an impression on people
3 that we have a judge from Harris County who will attend a
4 meeting and express an opinion, and I want to know without
5 regard to who it is, because if the answer is "yes" I
6 don't want that judge to catch the wrath of the family
7 bar, but my question is, is there one of your colleagues
8 in Harris County known to you to be a proponent of
9 developing Supreme Court-approved forms?

10 HONORABLE JUDY WARNE: No.

11 HONORABLE LEVI BENTON: Okay. My second
12 question is -- and this one might be struck.

13 CHAIRMAN BABCOCK: Now I'm sitting up
14 straight.

15 HONORABLE JUDY WARNE: Can I sit down then?
16 Are you going to frame that to somebody else?

17 HONORABLE LEVI BENTON: No, because you know
18 these two persons well. Justice Lehrmann and Justice
19 Guzman had a paper trail before they went to the Court,
20 and they've had a voice without regard to how they feel,
21 and I don't -- well, no, not without regard to how they
22 feel, do either of them favor or have they publicly
23 favored court-approved forms before today?

24 CHAIRMAN BABCOCK: Yeah, we'll strike that
25 question.

1 HONORABLE JUDY WARNE: I don't know about
2 Justice Lehrmann. I've had many, many, many conversations
3 with Justice Guzman. She favors some sort of form. She's
4 concerned about the process. At least that's what I've
5 been told. I haven't heard either one of them speak
6 publicly on the issue.

7 CHAIRMAN BABCOCK: Okay. Justice
8 Christopher, you had your hand up.

9 HONORABLE TRACY CHRISTOPHER: I think this
10 is for Tom. What -- like Texas Law Help's forms are very
11 similar to the forms that are under consideration here
12 today, and what would be the difference between those
13 forms that are readily available, you do a search and they
14 came up like the second -- second website behind a
15 commercial one on a Google search for "Texas free state
16 divorce forms," what would be the difference between
17 having that available versus the Supreme Court forms? Are
18 you afraid that more people would use them? I mean, we
19 understand that forms have problems, and there are going
20 to be consequences from using forms. Y'all have already
21 told us that now. What would be the difference?

22 MR. VICK: The biggest difference in my mind
23 and in the mind of the people that I talk to is that when
24 this form comes out that has the Texas Supreme Court's
25 stamp of approval, it will make it far easier and far more

1 prevalent we think for people to abuse the form, for the
2 controlling husband to say, "You don't have any choice.
3 This form's been approved by the Texas Supreme Court. We
4 have to use this form." That's the end of that
5 discussion.

6 CHAIRMAN BABCOCK: Okay. Orsinger, and then
7 Munzinger, and then Lamont.

8 MR. ORSINGER: I'll catch up on a couple of
9 things. To elaborate --

10 CHAIRMAN BABCOCK: Wait a minute. Okay,
11 yeah, you're Orsinger. Richard the younger.

12 MR. ORSINGER: Oh, did you mean Munzinger?

13 CHAIRMAN BABCOCK: We've got two Richards.
14 Richard the younger and then the older.

15 MR. ORSINGER: Will you let me go first?

16 MR. MUNZINGER: I just have a real quick
17 question, if I may. Is it proposed that these forms are
18 going to be printed and made available at district clerk's
19 office, or is it proposed that they simply are available
20 on the website or a website somewhere?

21 MR. GAGNON: Can I answer that question?

22 MR. MUNZINGER: Sure.

23 MR. GAGNON: That was one of my tasks of my
24 task force. We were instructed to try to figure out how
25 to disseminate them, and our recommendation to the courts

1 is going to be disseminate them through the internet with
2 some information to clerks and to courts and to other
3 organizations how to refer people to that resource.

4 MR. MUNZINGER: So at the moment at least
5 there's no plan that they're to be printed and made
6 available at district clerk offices for poor?

7 MR. GAGNON: That's correct.

8 MR. MUNZINGER: The poor are going to look
9 on their computers and find them.

10 HONORABLE TERRY JENNINGS: They're going to
11 pull out their iPad 2.

12 MR. GAGNON: They're going to go through
13 some kind of support system to find them as they do now.

14 MR. ORSINGER: On that last question,
15 Richard, my perspective is a little bit different from
16 Stewart's. The way forms are implemented locally in my
17 view is that they show up with the clerk's office with no
18 idea what to do or with the wrong idea of what to do and
19 they tell them to go to the law library or the county law
20 library in the courthouse or across the street where
21 they've got forms you can have. You can buy them in San
22 Antonio for \$8. It's a packet.

23 But I wanted to make some other points,
24 Chip. To follow up on Tom Vick's last comment, there is
25 an important dynamic that family lawyers are sensitive to

1 and that are concerned about Supreme Court imprimatur on
2 these forms, and that is that a dominant spouse may be
3 able to convince the other spouse to sign the waiver and
4 allow the default divorce to go through with because all
5 of these forms are Supreme Court-approved. That dynamic
6 exists even without official forms, but there are some
7 people I've talked to that are concerned that allowing the
8 forms to be official is going to strengthen the hand of
9 the people who are in a position to take advantage of
10 their weaker spouse.

11 Secondly, I've checked just a little bit,
12 and in the length of time we've had and with the amount of
13 work we had to do we couldn't check very much, but I
14 looked at the California-approved divorce forms, which I
15 think have been in there since the Sixties. Would you
16 agree with that?

17 MR. GAGNON: That's correct.

18 MR. ORSINGER: And I looked at the form
19 decree, because that's where the rubber meets the road,
20 and I looked through the property division that was in the
21 California form decree, and it says, "Property division is
22 attached on Exhibit A." So it didn't give you any help at
23 all on dividing your property. The form has been there
24 for 40 years, over 40 years, but it really doesn't tell
25 you how to divide your property, and maybe it shouldn't,

1 but it doesn't, so when we think of California having
2 these things for 40 years, I'm not sure that the people
3 out there are getting any guidance on how to fill the form
4 out.

5 And the last thing I wanted to say about
6 what's been said so far is that there's a subtlety here,
7 and it hasn't really been explicit. I'm going to stick my
8 neck out. I don't know that this is true, but I think
9 that part of the reason there is a desire to have the
10 Supreme Court endorse a set of official forms is because
11 there are some judges in this state that refuse to handle
12 pro se litigants with fill in the blank forms. I've heard
13 there are other judges in the state who refuse to sign
14 anything that's not 100 percent in English. So I don't
15 know if that's true. I don't have any statistics to back
16 that up, but let's just take for a second that we've got
17 some district judges that won't process the pro ses with
18 forms and we've got some district judges that insist
19 everything be in English before they'll sign it. How do
20 you get them to accept pro ses, if you're the Texas
21 Supreme Court? You get them to accept pro ses by
22 endorsing an official set of Supreme Court rules and then
23 issuing an order that says, "If you are a judge in this
24 state, district or county court at law, you must accept
25 these forms. You can not turn these people away."

1 Now then, if we were to do -- Justice
2 Moseley, you were exploring the possibility of referring
3 them to the same set of forms that's on a private website
4 or a quasi-public website like texaslawhelp.org. These
5 forms are there right now for anybody to look at, but
6 they're not -- they're not in a position -- or I don't
7 think the Supreme Court is in a position where they can
8 pass an order that says that every district judge and
9 county court at law judge in Texas must accept the forms
10 that are promulgated on this website of this organization.
11 I don't see how they can justify that order or enforce
12 that order against judges. So it seems to me that there's
13 a possibility that part of the impetus to adopt these
14 forms is to get them in a place where they can then be
15 enforced against judges who will not allow pro ses at this
16 time. Now, I may have misstated that, and I may have said
17 something that's not true. I can't tell you. I just
18 think it's a subtlety that I think is out there.

19 CHAIRMAN BABCOCK: Okay. We're going to go
20 to Lamont who has had his hand up for a long time, and
21 then we're going to go to Pete Schenkkan who's had his
22 hand up almost as long, and then we're going to finish
23 this part of our program with Justice Peeples. So,
24 Lamont, you're first.

25 MR. JEFFERSON: I guess my -- the overall

1 question is can we assume that Supreme Court-adopted forms
2 would presumptively be better than other forms; and if you
3 start with that presumption and if forms are going to be
4 used, doesn't the argument boil down to what's the harm of
5 having the Supreme Court-approved forms? And I start with
6 the position that the Supreme Court is in a position with
7 the help of all of us and the bar and everybody else to
8 ensure that the forms that are implemented, if forms are
9 to be implemented, are going to be better than
10 commercially available forms or forms available on
11 Craigslist or forms available by any other process. So,
12 you know, if you start with the presumption that Supreme
13 Court-approved forms would be the most accurate, the
14 Supreme Court would have the ability to limit the use of
15 the forms, to limit in what situations they are available.

16 Then you have to -- then the next argument
17 to me is what harm is it if the Supreme Court approves
18 forms? For that you have to look at evidence somewhere,
19 and although I understand the argument that it may be
20 difficult to gather information about harms caused by the
21 use of forms in general, not bad forms but just the use of
22 forms in general, it would be hard to gather evidence from
23 the public, but we're not seeing any evidence from any
24 nonlawyer who says, "I was harmed because I chose to use a
25 form." And the evidence to the contrary, the evidence

1 that exists, and admittedly it's not a full slate of
2 evidence, but the evidence that exists is the evidence
3 from all of these other states who have Supreme
4 Court-adopted forms where, at least based on the survey
5 that we see in the materials, have not created the sort of
6 harms that Richard talks about of spouses abusing other
7 spouses by threatening to use what they call a Supreme
8 Court sanctioned form; and we can come up with problems
9 that could possibly arise, but we don't have to write on a
10 clean slate because we have a nation full of states to
11 look at to decide whether or not the harms that we are
12 imagining would, in fact, come about if forms were
13 adopted.

14 So, I mean, I guess the question is can we
15 assume that if the Supreme Court decides to adopt forms,
16 those forms are going to be better than the forms that are
17 otherwise available?

18 MR. BRESNEN: Can I answer?

19 MR. JEFFERSON: Yes, sir.

20 MR. BRESNEN: No. No, you can't, because
21 you have some forms, but the process that the Court set up
22 has yielded some forms. The forms are ridiculed --
23 ridiculed, excuse me. I'm ridiculing the forms because
24 they are riddled with obvious defects, things that no
25 lawyer should ever have let get past them, and so you

1 cannot make that assumption.

2 MR. JEFFERSON: Well, but the forms aren't
3 approved.

4 MR. BRESNEN: I want to give you a very --
5 pardon? No, they're not, but this is your last meeting,
6 sir.

7 MR. JEFFERSON: No. Is that right, Chip?

8 MR. SCHENKKAN: He doesn't know us very
9 well.

10 MR. BRESNEN: Hey, listen, I represented
11 psychiatrists for 10 years. I know about meetings. The
12 letter from the Court said that they wanted you to
13 consider this now. Richard was crammed into a very short
14 time period to do his work. You're having one meeting,
15 and this will be the last meeting, as I understand it,
16 before the Court acts in May. That's the schedule that's
17 been laid out. But let me give you an example about why
18 these are not and why it makes a difference that the
19 Court -- I know who I'm speaking to, too, so I know I'm
20 going to give you this example so you'll understand
21 exactly what difference it makes that the Court's name is
22 on these documents.

23 The protective order kit was adopted by an
24 order of the Court, and it's cited in full in the
25 document, and it says that a court shall accept them. The

1 Court only has -- in my opinion the Court only has two
2 sources of power to do this, Article V, section 31(a) and
3 31(b). The order has the effect of law, and so here's
4 what happens. In the -- in a kit that's been before you
5 it tells the petitioner to give the answer to the
6 respondent. That is a complete upside down on our
7 adversarial nature system to begin with. It never says,
8 "If you're subject to a protective order, petitioner, or
9 if the respondent is subject to a protective order, ignore
10 that, don't give it to them." So an order of the Court
11 will direct a person to deliver a document to someone who
12 they're ordered to stay a thousand feet away from.

13 Secondly, so you've got two problems with
14 these forms that are very fundamental and very practical,
15 and if I'm the petitioner, we're already saying people
16 don't know what they're doing, so they get an order and
17 something says, "Supreme Court said I'm supposed to give
18 this to you." "Supreme Court said you're supposed to file
19 this answer." Next thing I know I'm in jail because it's
20 strict liability for a violation of a protective order.
21 I'm not going to get a chance to prove intent.

22 So you cannot accept the fact that these
23 forms are better than other forms because the process
24 established by this Court to produce these forms has
25 failed. There are other sources of forms, and the same

1 result could be achieved without having legal effect or
2 what the bar tells somebody to do, if it simply says -- A,
3 I need to throw TYLA in there so I don't short anybody.
4 "Here's three sources that are approved for use in this
5 state." Presumably the judges in this state would
6 recognize that if something is authorized in the rules to
7 be accepted that it will be accepted, and we know that
8 those forms are legally accurate because Mr. Orsinger's
9 subcommittee has said so in writing, Ms. McAllister has
10 said the same thing in writing. So why put the Court in
11 that position? I don't get it. Why use the Court's
12 resources and yours when there's an ongoing permanent
13 capability with money already being invested to keep those
14 forms up to date? You can avoid all of those problems
15 with two simple sentences amending the Rules of Civil
16 Procedure.

17 CHAIRMAN BABCOCK: Okay, Pete Schenkkan.

18 MR. SCHENKKAN: I wanted to follow-up on
19 part four, if you don't mind, of the Solutions 2012.

20 CHAIRMAN BABCOCK: Don't mumble.

21 MR. ORSINGER: That would be Tom Vick.

22 CHAIRMAN BABCOCK: And don't mumble, Pete.

23 MR. SCHENKKAN: On the form usage question,
24 and I want to start by asking for clarification, I assume
25 we're in agreement that this is a problem that has to be

1 wrestled with if people can use forms at all and are
2 choosing to do so. If there is a world in which people
3 come in there with forms, we have the problem did they
4 fill it out correctly, did they use it for something they
5 should have used a different form for or no form at all.
6 Would you agree with me that far?

7 MR. VICK: And are we talking about pro bono
8 indigent litigants?

9 MR. SCHENKKAN: Anybody who shows up saying,
10 "I am exercising what I claim to be my right," whether
11 they claim it under the constitution or Rule 7 or whatever
12 or don't claim -- or don't even know why they're doing it.
13 Just say, "I'm showing up self-represented, and I got a
14 form, and I got it off of Craigslist" or "I got it off of
15 Texas Law Help" or from Young Lawyers or wherever they got
16 it. They're showing up with a form. There's a possible
17 problem that they filled it out wrong. Right?

18 MR. VICK: I'm with you.

19 MR. SCHENKKAN: And that's not created by
20 whether the Texas Supreme Court approves the form or not.
21 We've got a problem with how you fill out the forms and
22 how do you keep filling them out wrong from messing things
23 up. If that's the starting point for form usage, I want
24 to just verify that whatever of these various options that
25 are mentioned at pages two and three of that part of the

1 appendix, that those are issues we're going to have to
2 wrestle with whether we have Texas Supreme Court forms or
3 not, and I want to make -- see if it's clear that two of
4 the possible solutions are okay with you-all whether it's
5 Texas Supreme Court-approved forms or TexasOnline help or
6 whatever it's called or anybody else. One is county staff
7 attorneys like Ms. Holland?

8 MS. HOLLAND: Holland.

9 MR. SCHENKKAN: Holland. That the family
10 law bar does not see a problem with a county choosing to
11 allocate some of their budget -- I'm not sure which pot of
12 the budget that comes out of -- to have somebody who is
13 competent to do so in there helping people fill out the
14 forms correctly. Is that a fair assumption?

15 MR. VICK: Well, it might be a fair
16 assumption, but let me go back about section four of this
17 work. Section four of this work presupposes that the
18 issue on the table, which was the one we were given, is
19 that the Supreme Court wants to create some forms to be
20 used by poor people, not by every self-represented
21 litigant in the world. Now, there's an answer to that
22 question. I'll get there in a minute, and so that's what
23 form usage is about. This presupposes the question we
24 were given, and that is who is going to help poor people
25 fill out these forms, and that's what these things are all

1 about. Now, if that's what you're talking about, poor
2 people, indigent people using forms promulgated to help
3 them, then certainly a lawyer working for the county could
4 do a good job of helping those people out. And so Travis
5 County, you're good to go. The other 253 of you, not sure
6 what you're going to do.

7 MR. SCHENKKAN: It's county by county.

8 MR. VICK: Right.

9 MR. SCHENKKAN: So that's a budget issue.
10 Now, can I turn to a different option?

11 MR. VICK: Yes.

12 MR. SCHENKKAN: I want to try and make sure
13 I understand is this okay in terms of trying to help
14 people fill out forms correctly regardless of whose form
15 it turns out to be. Is it okay to have an effort to
16 allocate some of this also scarce resource of pro bono
17 attorney volunteer time to what at least used to be in
18 Travis County the way we did it the last time I was doing
19 this stuff, we would hold a self-represented clinic every
20 other month and some of us would go there and try to help
21 people fill out these forms correctly, and I'm assuming
22 that the family law bar thinks that's fine, too, and that
23 the reasons for thinking that's fine would not be limited
24 to forms that haven't been approved by the Texas Supreme
25 Court. It would be equally fine if you're helping people

1 fill out court-approved forms.

2 MR. VICK: If there are lawyers involved
3 helping poor people do the right forms and figure out the
4 right way to go get their easy divorce, I don't think
5 anybody has got a problem with that.

6 MR. SCHENKKAN: Those were my questions,
7 Chip, I'm --

8 CHAIRMAN BABCOCK: Yeah, great. I know --
9 we're going to go to Justice Peeples. I know other people
10 want to talk, but Dee Dee is exhausted I can tell, and I'm
11 hungry. So Justice Peeples is next. Judge Peeples, go.

12 HONORABLE DAVID PEEPLES: I would be glad to
13 wait until after lunch.

14 CHAIRMAN BABCOCK: No, no, I want you to do
15 it now.

16 HONORABLE DAVID PEEPLES: Could someone
17 explain to me why it's a problem if a petition is, quote,
18 legally insufficient since it's so easy to amend pleadings
19 in Texas? Why should somebody be kept out of court
20 because their petition is not perfect when amendments are
21 just routine and easy later on in the case? Why would a
22 judge ever throw out something like that?

23 HONORABLE JUDY WARNE: I don't know that I
24 would throw it out, but I don't know that it's my job to
25 tell them it's legal insufficient. I mean, part of my

1 concern is that judges ought to not be doing this. We are
2 representing in some way and giving legal advice to one
3 half of the case, and I think that violates the Code of
4 Ethics that I took when I became a judge, and so that's my
5 concern, is once they get to the bench I don't know that I
6 can say, "Excuse me, do you have any separate property,
7 because you didn't plead it?" I think that's
8 inappropriate for me to do that.

9 HONORABLE DAVID PEEPLES: In all of these
10 simple cases that we're talking about, many of which are
11 uncontested, does it really matter what the pleadings say?
12 Let me tell you, I've tried maybe a thousand pro se cases
13 without ever looking at the pleadings.

14 HONORABLE JUDY WARNE: Well, I will tell you
15 that I got reversed for granting supervised visitation on
16 a pleading that didn't plead for it with the
17 most egregious evidence that was presented in a default
18 because -- and it was correct, the pleading --

19 HONORABLE DAVID PEEPLES: In a default.

20 HONORABLE JUDY WARNE: Well, but this
21 package covers defaults, and, you know, one of the things
22 I hope that you will think about is if these are
23 uncontested divorces and only agreed to, why do we have an
24 answer form if it's uncontested? And when you're
25 comparing to other states, you know, we're a community

1 property state. Every single thing, including the jacket
2 I'm wearing, is community property that has to be divided.
3 There's no such thing as a divorce with no property unless
4 there is a pre-nup.

5 CHAIRMAN BABCOCK: Well, we're not going to
6 let your husband get his hands on that jacket. We'll be
7 in recess until 2:00 o'clock. Thank you.

8 (Recess from 1:14 p.m. to 2:01 p.m., after
9 which the meeting continued as reflected in
10 the next volume.)

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2 **REPORTER'S CERTIFICATION**
 3 MEETING OF THE
 4 SUPREME COURT ADVISORY COMMITTEE
 (FRIDAY MORNING SESSION)

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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 13th day of April, 2012, 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 \$ 1,189.75 .

15 Charged to: The State Bar of Texas.

16 Given under my hand and seal of office on
 17 this the 28th day of April, 2012.

18

19

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