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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

OCTOBER 22, 1999

(AFTERNOON SESSION)

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Taken before William F. Wolfe, Certified Court Reporter and Notary Public in Travis County for the State of Texas, on the 22nd day of October, A.D. 1999, between the hours 1:35 o'clock p.m. and 5:45 o'clock p.m., at the Texas Association of Broadcasters, 502 East 11th Street, Suite 200, Austin, Texas 78701.

INDEX OF VOTES

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

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(Meeting reconvened at 1:35 p.m.)

CHAIRMAN BABCOCK: Back on the record. All right. This afternoon -- everybody is going to want to hear this. We're going to finish off with this 1.3(b).

And it's been brought to my attention that we have not quite covered two pages out of 19, and that the subcommittee has got some specific areas that they need help and direction on and they want discussion and think that the Supreme Court would benefit from discussion.

So after we finish 1.3(b), we're going to go into specific areas that Justice McClure wants to discuss which are outlined in the Report of the Special Subcommittee on Implementation of Family Code Chapter 33. And Ann and I have divided them up into areas of importance.

So back to 1.3(b), Version A, and Richard Orsinger had a comment.

MR. ORSINGER: I would like to remove the word "opinion" from (b)(3) so that the appellate courts are free to issue opinions about their appellate decisions that

maintain the anonymity of whoever is to be anonymous. And I'm not trying to take a position on whether that ought to include judges or not. I'm just trying to protect the common law concept of stare decisis in developing case law.

CHAIRMAN BABCOCK: Well, is that opinion a court document pertaining to the proceedings?

MR. ORSINGER: Definitely.

CHAIRMAN BABCOCK: Well, then if that's true, doesn't that run afoul of subparagraph (k) of Section 1?

MR. ORSINGER: I hate to say yes because that concedes my point, but it does appear to conflict.

MR. PEMBERTON: Richard, in fairness, the appellate provisions refer only to rulings. They don't have -- there's not the counterpart to what you see in 1.3(b).

MR. ORSINGER: Good point. Thank you. Bob has kept me from hitting the ground hard.

MR. PEMBERTON: I'm not taking a position either. I'm just trying to make sure

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we're accurate.
MR. ORSINGER: Under 33.004(c), which appears to be a separate rule that applies to appeals, they only talk about rulings. And rulings arguably include just judgments, and judgments at the appellate level are separate from opinions. And opinions are the guidance we all look to anyway.
CHAIRMAN BABCOCK: So do you think subparagraph (k) is only applicable to the trial court notwithstanding that they refer to court proceedings?
MR. ORSINGER: Well, they separately refer to appeals, so I think an argument can be made that Section 33.003 does not relate to what's in Section 33.004.
CHAIRMAN BABCOCK: Judge Brister.
HON. SCOTT A. BRISTER: My proposal would be, if you look at both the statute, 33.003(k), and this one side by side, as I understand it, nobody has a problem with (b)(1). Then I would just pick up from (k), and (b)(2) would be the second sentence of (k), "The court proceedings shall be conducted

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in a manner that protects the anonymity of the minor." Part (3) is the next sentence, "The application and all other court documents," dropping out the stuff about the reporter notes. And (4) would be an order of the court, the person of -- (l) would be (4), an order of the court issued under these rules, can be released only to the people, quoting from the statute.
The reason for that is, again, that when the hypothetical attorney stands up to challenge the constitutionality of any of these rules and says, "You all just adopted them," the response is, "We just adopted what the Legislature told us to adopt," or "We just approved rules that said exactly what the Legislature said to say, no more and no less."
And then the same indication that arises from adding things to this clarifying it. I understand it's kind of chicken just to quote it. But again, if you add to it, clarify it, then I think that's a different thing. And then it's hard to say we weren't making a policy decision when you added to or clarified

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stuff. I think you have made a policy decision when you adopt it.
CHAIRMAN BABCOCK: Justice McClure, what's your reaction to that?
HON. ANN CRAWFORD McCLURE: Well, part of this discussion involves the appellate procedure, which, as I mentioned before, there is little or no guidance in the statute itself as to how these are to be conducted. We know that the notice of appeal will be filed in fact to the appellate clerk. We know that the appellate court is expected to rule within approximately 48 hours.
The decisions on confidentiality, though, also apply in the appellate court. For example, if we're not going to distinguish between rulings and opinions, and the court decides they want to issue a written opinion, number one, it's going to reflect the county, in all likelihood, that the lawsuit came from or the application came from. It's going to identify the trial judge. It's going to identify the panel of the court of appeals that is rendering the order.
We're also being unrealistic to expect

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the appellate courts to issue written opinions within 48 hours. Most of the courts have -- in both the Judicial Conference and in calls to my office -- have been worried about how this process is going to take place.
It's also problematic to think that the Supreme Court, in instances where we affirmed the trial court's denial, is going to have the benefit of any sort of analysis of our decision making process if all they get is a little one-page, two-paragraph order, check here affirm, check here reverse.
So I want everyone to understand that clearly the statute itself contains none of these proceedings on the appellate process. What we tried to do was bring reality to the project and figure out what we're supposed to do with it. And that's the main issue, when we get to that subject, that I want everybody to consider for guidance, because we're not going to have briefing opportunities or oral argument opportunities or well-researched, reasoned written opinions coming out on this.
HON. SCOTT A. BRISTER: Can't you do -- for instance, what was the case with the

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temporary injunction at the Republican contention? You issue the order saying the Log Cabin Republicans have no right to be there at the convention, opinion to follow.

HON. ANN CRAWFORD McCLURE: Well, that's what these rules implicate. What we've suggested was this: You rule by your order within the time frame in the statute. If you are reversing the trial court's denial so that there is a grant of her right, there will be no appeal to the Supreme Court. So the time frame is not so critical.

If you are affirming the denial and it's going to go to the Supreme Court, we created an arbitrary deadline in our subcommittee of 10 business days after the notice of appeal was filed. That was after a rather lengthy discussion with Judge Baker, who had been on the Dallas court; on my court; we had input from Judge Schneider; we had input from the Austin court on is it realistic to expect that these courts can circulate and get a consensus of opinion within 10 business days? A lot of courts have a full circulation policy, which means the opinion circulates to every member

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of the court regardless of whether they're on the panel. In the larger courts that can be a problem.

So the overwhelming consideration you have to make first is, do we want to create unique appellate rules that are going to apply to these proceedings to give guidance to the intermediate courts? Or do you want to be silent, and then figure out what we're going to do with the time frame? You have to decide what your purpose is, or what you expect the purpose to be.

HON. SCOTT A. BRISTER: But not necessarily in this provision. I'm not saying there shouldn't be some appellate timetable, I'm just saying this section on confidentiality, in my view, just ought to quote from the statute.

HON. ANN CRAWFORD McCLURE: But what I understood Richard's comment to be was to leave opinions in there. Richard, isn't that what you said?

CHAIRMAN BABCOCK: No, he wanted to take it out.

MR. ORSINGER: I want to take it

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out. And maybe what we ought to do, as Scott says, is break it down into sections and have a separate paragraph relating to the appellate procedure where we use the language in the statute, subsection (c), that the ruling of a court of the appeals is confidential and privileged, and we go ahead and later on permit a delayed publication of the opinion.

HON. ANN CRAWFORD McCLURE: But that is contained within the rules relating to the appellate process.

MR. ORSINGER: Well, except if you leave "opinion" in here, right here, it arguably doesn't allow the appellate courts to publish an opinion.

MR. PEMBERTON: It is set up that way.

CHAIRMAN BABCOCK: That's the way it's set up.

MR. ORSINGER: I think you need to take the word "opinion" out of here to leave that prospect.

HON. ANN CRAWFORD McCLURE: Well, Version A contemplates that the opinion will not be published.

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MR. ORSINGER: I know. That's why I would like to remove the word "opinion." That way we're free to do something sensible to have appellate review of trial courts that develop some kind of law about how the trial courts ought to discharge their responsibility.

CHAIRMAN BABCOCK: Alex Albright.

PROFESSOR ALBRIGHT: How do you publish an opinion and make the ruling confidential?

MR. PEMBERTON: That's what bothered the subcommittee.

PROFESSOR ALBRIGHT: I think to follow the statute, you can't do that. And I think we've got to follow the statute.

HON. SCOTT A BRISTER: On a lot of issues they could.

PROFESSOR ALBRIGHT: And then Paul Wattler and his client can sue whoever to get a copy of the opinion, and then the Supreme Court has to deal with it.

HON. SCOTT A. BRISTER: All these questions about case or controversy, about does ruling mean opinion, you could write that

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opinion without saying how this case comes out. You could write about the procedure and say that this is what the procedure is going to be and this part of the procedure is unconstitutional without saying how this case came out.

PROFESSOR ALBRIGHT: Well, then it's not an opinion. Then you're really doing what Scott McCown has been saying, which is true, that this is not a case and opinion deal, this is an agency administrative proceeding. And you have the second level of administrative people then issuing guidelines.

Mr. Edwards points out in Rule 47, it says if you're going to write an opinion, it has to address every issue.

HON. SCOTT A. BRISTER: That doesn't mean you can't -- I've had opinions where the part where I was reversed was published and the part where I was affirmed was not published, which I think ought to be unconstitutional. But you could write about all the opinions and publish the part that has to do with how these rules apply without showing how anything came out. I'm convinced

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the appellate judges in this room could do it. Don't shake your head, Sarah.

CHAIRMAN BABCOCK: Well, it seems to me that the question is whether or not striking the word "opinion" runs afoul of the Legislature, either its precise language or the intent of the legislation.

MR. ORSINGER: I think that the statutory provision that a ruling is confidential and privileged means you can't get a copy of the judgment. I don't think that that means that the reasoning that goes into their arriving at the decision can't ever be revealed. I think that's a defensible interpretation of this.

PROFESSOR ALBRIGHT: Yeah. But you can't write an opinion that we always know of and publish the opinion without disclosing the ruling. You have to do it in some very different fashion. And it seems to me that we need to make it -- we have to say in here the ruling is confidential. And then if the San Antonio Court of Appeals wants to have some rules where they issue guidelines based upon cases that have come before them, they

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can do that.

CHAIRMAN BABCOCK: Well, Justice McClure, do you accept Richard's request to strike the word "opinion"?

HON. ANN CRAWFORD McCLURE: No.

CHAIRMAN BABCOCK: Okay. Let's have a quick vote on that. How many people are in favor of Richard's proposal to strike the word "opinion" from subsection (b)(3)?

How many against?

24 to six against, it fails.

Okay. Now, what about Judge Brister's idea of tracking the language of the statute in subparagraphs (k) and (c), rather than the somewhat different language that is found in our draft, subparagraph (b) on confidentiality? Justice McClure, do you accept or reject that idea?

HON. ANN CRAWFORD McCLURE: I reject it.

CHAIRMAN BABCOCK: Okay. How many people are in favor of --

HON. TOM LAWRENCE: Could you restate how it's going to be phrased?

CHAIRMAN BABCOCK: Judge Brister,

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let me try, or you can try yourself. Go ahead.

HON. SCOTT A. BRISTER: Well (b)(1) would be as is. (b)(2) would be the second sentence of 33.004, subparagraph (k), "Court proceedings shall be conducted in a manner that protects the anonymity of the minor." Then part (b)(3) would be the application language continuing in that subparagraph (k), "The application and all other court documents pertaining to the proceedings are confidential and privileged and not subject to disclosure under Chapter 552, Government Code, or to discovery, subpoena, or other legal process."

And then (4) would be from subparagraph (l), "An order of the court issued under this section is confidential and privileged and is not subject to disclosure under 552, Government Code, or discovery, subpoena, or other legal process. The order may not be released" -- or "the order may be released only to" -- and then leaving the (A), (B), (C), (D) and (E) as they are in the subcommittee draft.

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CHAIRMAN BABCOCK: And are you going to also have the ruling of the court of appeals issued under this section? You wouldn't do that?

HON. SCOTT A. BRISTER: I would track the statute. Because again, the idea is not to -- I don't think we should be giving our interpretation of whether "ruling" means "opinion" or not. I think that ought to be decided after somebody has more time to brief and think about it. We ought to just quote a new paragraph from (c), "A ruling of the court of appeals is confidential and privileged." Just quote from the statute. And then when people have time -- I assume what will happen is then, in that instance, the court of appeals, some might give notice that they were going to publish it; some might not. Obviously, nobody would publish it in any way that would disclose who the minor was, because the rules and the statute will be clear about that, but as to whether people could fight out on mandamuses, or whatever they wanted to, about whether that means the opinion is published or not.

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CHAIRMAN BABCOCK: All right. Is everybody clear on what Judge Brister is proposing? Justice McClure does not accept it, so what we're doing is voting on whether or not we like Judge Brister's proposal and will so advise the Supreme Court.

MR. ORSINGER: Chip, can I ask one thing? It appears that the statute does not require that the Supreme Court not issue an opinion or even keep its judgment confidential, unless I'm misreading this. And if that's correct, that the statute doesn't require this kind of confidentiality at the Supreme Court level, then we shouldn't have a rule that imposes that requirement on the Supreme Court.

HON. ANN CRAWFORD McCLURE: In subsection (f), "An expedited confidential appeal shall be available to any pregnant minor to whom a court of appeals denies an order authorizing the minor to consent to the performance of an abortion without notification."

MR. ORSINGER: Does that mean to you the same thing that (c) means about how the

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ruling is confidential and privileged?

HON. ANN CRAWFORD McCLURE: It doesn't even refer to the Supreme Court, but that is obviously the implication. It is 33.004(f).

MR. ORSINGER: I think it's a stretch to say that (f) means that (c) applies to the Supreme Court. And your rule definitely treats the Supreme Court the same as the court of appeals.

HON. SCOTT A. BRISTER: My point is just that either one of you may be right, but we shouldn't try to vote on that today. The statute is ambiguous. We ought to leave it ambiguous, and let the process work it out.

MR. TIPPS: But the mandate of the Legislature was that the Supreme Court come up with rules that will ensure confidentiality. And my response to Judge Brister would be that we have had a committee that has sat down and thought about it, and that's Judge McClure's committee.

CHAIRMAN BABCOCK: Yes. And that's why we're giving substantial deference to her accepting or rejecting. So this is really

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only a vote on what we put into our report to the Court. We're not going to physically change the language of the rule, even if Judge Brister's proposal is accepted. Yes, sir.

MR. HAMILTON: Section 2 also says "such rules as may be necessary," and if they're not necessary, we ought not do them.

CHAIRMAN BABCOCK: Yes, Bonnie.

MS. WOLBRUECK: I just noted on number (1) where it says, "Court personnel must ensure that the minor's contact with the clerk and court remains confidential." Could that be interpreted as placing additional duties on other court personnel like bailiffs or court reporters to ensure that the clerk or the court are handling things confidentially?

HON. ANN CRAWFORD McCLURE: That was not the intention.

MS. WOLBRUECK: I'm just wondering, the way the wording is, could it be interpreted like that? I'm just questioning if it needs to be reworded.

HON. ANN CRAWFORD McCLURE: There was some concern about -- particularly in more rural areas, if you've got additional people

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in the clerk's office, ensuring that the clerk takes steps to ensure the deputy clerks also understand the nature of the proceeding. That was the intent.

MS. WOLBRUECK: Yeah. And I was wondering if court personnel must ensure, wondering if that's placing additional duties maybe on other court personnel besides the clerk's office.

HON. ANN CRAWFORD McCLURE: There was also some concern, based on the incidents in Tarrant County, that if we allowed these to be filed with the local court coordinator, that we wanted the language to be broad enough so that the court coordinator, who may not be a deputy clerk, would also be responsible to ensure the confidentiality, if it is filed with her.

MR. ORSINGER: Chip, over on Page 8, Paragraph 2.2(a), Bonnie, on where you file, they list under "Clerk's Duties," they say "The clerk or other court personnel with whom the application is to be filed," so you could literally hand one of these to a bailiff and probably be filing it.

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MS. WOLBRUECK: Yeah. And we have questioned that also, and I know that Justice McClure has a concern also.

CHAIRMAN BABCOCK: Okay. Let's vote on Judge Brister's proposal. Everybody in favor of it raise their hand, please. All against, please.

Judge Brister's proposal passes 18 to 12.

So Bob, we'll have to note that it's the recommendation of this committee that Paragraph 1.3(b) be revised in accordance with what Judge Brister articulated, which was to leave (b)(1) the same, and to replace the language in (b)(2), (3) and (4) with the language that tracks from the statute.

All right. Richard.

MR. ORSINGER: I'd like to draw attention to (b)(4), if in fact it stays in there. In the first line, where we talk about guardian, throughout these rules they use the word "guardian," but in the form they use the word "legal guardian" when they say "without requiring the consent of the parents or legal guardian or managing conservator."

I think it clarifies to call it a legal

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guardian to differentiate from guardian ad litem. And I would move that we substitute "legal" everywhere that we're talking about the probate court appointed guardian.

HON. ANN CRAWFORD McCLURE: That's fine.

CHAIRMAN BABCOCK: Justice McClure accepts that. Is anybody opposed to that? So we'll insert the word "legal" in subparagraph 1.3(b)(4) and anywhere else in the rule that similar language appears. Okay, Bob? Good. Richard.

MR. ORSINGER: Since you're going to submit the minority report to the Supreme Court, can we comment on drafting issues in Alternative B, the minority report?

CHAIRMAN BABCOCK: Briefly.

MR. ORSINGER: Okay. On Paragraph (5), you talk about the public is entitled to secure records. And since there is no such thing as "the public," I think you ought to you say something like a person, any person.

And throughout this provision they talk about the judgment entry, like in (5)(C), "The judgment entry." I think it's used on four

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different pages in here. But in other parts we use "judgment," and in other parts we use "order." I think we need to be consistent throughout. It's either a judgment, which is what the form says it is, or it's an order. And I've never heard of a "judgment entry," and this must be Ohio law or something, but I would suggest that we be consistent and use the Texas phrase.

And then over on Page 5, paragraph (iii), "If disclosure is unavoidable." It says, "If, in the judgment of the court," and that gets very confusing to me, because the judgment of the court in this context is usually the written decision. And I would just suggest that we say, "If the court determines that it's impossible to release an opinion." And then furthermore on paragraph (iii), where, if the court decides you can't preserve anonymity, you never tell the court then to deny the request to publish. And it seems to me the first thing you ought to do is tell the court, then, deny publication, and at the same time put in there the grounds for why you denied it.

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I'm not putting that up for a vote, I'm just putting that in the record.

CHAIRMAN BABCOCK: Okay.

MR. HAMILTON: Did Judge Brister's motion include 33.004(c) or not?

CHAIRMAN BABCOCK: Yes, it did.

MR. HAMILTON: I thought it did not.

CHAIRMAN BABCOCK: No, it did.

MR. HAMILTON: About the ruling in a court of appeals?

CHAIRMAN BABCOCK: Right.

MR. HAMILTON: It did include that also?

CHAIRMAN BABCOCK: I believe it did.

HON. SCOTT A. BRISTER: Well, I intended it to.

CHAIRMAN BABCOCK: Okay. Anybody else? Yes, Justice Duncan.

HON. SARAH B. DUNCAN: 1.3(b)(2), the last sentence, was that intended to give the court reporter discretion as to where his or her notes are to be filed?

HON. ANN CRAWFORD McCLURE: It's to ensure that they're not inadvertently

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disclosed, that they're kept with the proceedings.

HON. SARAH B. DUNCAN: But it says "may," and my question is, is it intended to convey "may" or "must"?

CHAIRMAN BABCOCK: Or shall?

HON. SARAH B. DUNCAN: We can't use "shall" anymore. We have to use "must."

HON. ANN CRAWFORD McCLURE: My thinking is that we meant to say must. But Cindy is not in here, and she actually drafted that language, but that was -- oh, there you are.

CHAIRMAN BABCOCK: Quit moving around.

HON. ANN CRAWFORD McCLURE: Wasn't that your intention, so that it would be kept with the records?

MS. GROOMER: The court reporters had a concern that some of the confidentiality did not expressly extend to them through the rules. And by them being able to file their court reporter notes with the clerk, similar to the way they file them in criminal cases, that would annex those reporter notes into the

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record and they would be kept confidential. But they did not want it to be a requirement of the court order to file that with the clerk, because some court reporters want to maintain the security of their own notes. So that's why we chose the word "may" there instead of "must."

CHAIRMAN BABCOCK: Is that acceptable?

MR. EDWARDS: I'm not sure that's satisfactory, because I've run into court reporters that are pretty loose with their notes.

HON. F. SCOTT McCOWN: But the contrary problem is that a lot of clerks offices can't be trusted. They lose them. I mean, lots of things are lost in our clerk's office and can never be found again.

MR. EDWARDS: They only have to keep it for 48 hours when it makes any difference.

HON. SARAH B. DUNCAN: They have to keep it for two years after majority, or the termination of the proceeding.

HON. ANN CRAWFORD McCLURE: Yeah, we opposed retention requirements in here.

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CHAIRMAN BABCOCK: Must or may?

HON. ANN CRAWFORD McCLURE: May.

CHAIRMAN BABCOCK: Okay. Does anybody want to put a vote on "must"? Sarah, do you want to? Okay. So it stays "may."

MR. JACKSON: Chip, can I bring something up just while we're on this?

CHAIRMAN BABCOCK: Sure.

MR. JACKSON: The "court reporter's notes" is really sort of an old term now. I mean, those notes that I write on my machine, I often leave them in New York, if I'm taking depositions there, or whenever I am. The important thing is not what's in that tray, it's what's in that box on the disk. And the court reporter's notes don't mean anything.

HON. F. SCOTT McCOWN: Well, but they do for an official, because the statute requires the official to keep those notes.

MR. JACKSON: But I haven't looked at a piece of paper in 15 years.

HON. F. SCOTT McCOWN: But the officials keep them. I mean, we've got them in a locker. They're in a whole file and they're locked up. So to the official court

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reporter, that may mean something there.
HON. SAMUEL A. MEDINA: Chip, I don't remember if we said something to that effect, but I think that was brought up. Court reporter's notes, I don't know if it's in a comment or something, something about it meant anything that they would record, whether it be a disk, whether it be -- I remember some things, some discussion about that. And the reason we didn't want to say just a disk was because who know what we'll have a year from now, three years from now, five years from now. And so the comment -- I think there was something about a comment, wasn't there, Bob?
HON. ANN CRAWFORD McCLURE: We discussed it, but we didn't put it in the comment.
HON. SAMUEL A. MEDINA: Okay. We discussed it, but we did not put it in a comment. But we discussed that issue, and to limit, say, something else that we might have now, but what about three years from now? Five years from now? Do we come back and redo it?
CHAIRMAN BABCOCK: David, is there a

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broader term that court reporters would understand?
MR. JACKSON: Well, we got into this debate on the discovery process, appellate process, the TRAP process, about the court reporter's record. And you know, "the record" conflicts with what Bonnie is putting together as the the record. But "the record" in our sense means whatever we're preparing for that statement of facts, whether it be the disk or the paper. However the court reporter puts it together, it's his record. His record is in his box on that disk. His record is not in that tray.
CHAIRMAN BABCOCK: What if we said, "To assure confidentiality, court reporter notes, in whatever form," how does that sound?
HON. ANN CRAWFORD McCLURE: That's fine. The court reporter that visited with our subcommittee wanted to be sure that, if the diskette happened to be put with the court files, that there was still some precaution for the other notes to ensure confidentiality.
MR. BABCOCK: Is anybody

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opposed to that, if it reads, "To assure confidentiality, court reporter notes, in whatever form, may be filed with other court documents in the proceeding?" Does that solve your problem, David?
MR. JACKSON: Sure. Well, it gets you what you want.
CHAIRMAN BABCOCK: Okay. Does anybody have any problem with that? Okay. Anything else about that rule that anybody wants to talk about?
MR. PEMBERTON: So we're tracking the statute --
CHAIRMAN BABCOCK: No. No, we're not.
MR. PEMBERTON: -- but adding the court reporter notes by using this language.
CHAIRMAN BABCOCK: What we're doing is we're telling the Supreme Court that a majority of this committee disagrees with the subcommittee with respect to 1.3(b), subparagraph (b), in that this committee, by an 18 to 12 vote, believes that, rather than the language that's here, the language ought to track the statute in the way that Judge

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Brister articulated.
All right. If you all will take out the eight-page report on the Special Subcommittee, there are topics that the subcommittee needs input from us on, and accordingly, the Supreme Court would as well. And to ensure that we deal with all these topics and don't get bogged down in other issues of lesser importance, given our time constraints, let's go to Page 5, which has Paragraph D, "Where an Application May Be Filed." And while you're looking over those couple or three paragraphs, Ann will tell us what the issue is here.
HON. ANN CRAWFORD McCLURE: Under the statute, the application can be filed in the district court, county court at law, a court having probate jurisdiction. A number of the probate judges have expressed their personal opinion that, unless the minor is involved in a guardianship proceeding or some other proceeding in their probate court, that they are not to be involved in these decisions. As you might expect, the general jurisdiction judges don't think that is an appropriate reading of the statute.

So the concept of the rule was to clarify that any of these particular judges have jurisdiction to make these rulings, a district judge, a family district judge, county court at law, and a court having probate jurisdiction. And we put that point into the comment to the probate judges.

The other issue that we had to address is associate judges that are routinely used in all the major metropolitan areas with the exception, I think, of San Antonio. I don't know if you all are using associate judges. Lots of locations are. They hear traditionally all of the temporary hearings in divorce, if it's affecting the parent-child relationship; they can hear contempt matters. Under the new statute, they can now hear jury trials. They have a number of roles that they play under the Family Code, but they are only authorized by the code itself to handle matters arising under Title 1, 4 or 5. This is a Title 2 proceeding. So our rules do not contemplate that associate judges will be making these decisions.

There was also some concern about how you

go about handling the filing of the application. Are we going to mandate a statewide implementation scheme, or allow the local administrative judicial councils to make that decision?

And we have left that decision making process to the local areas. Whether they want them all filed with the district clerk, whether they want them all filed with the county clerk, whether they will let them be filed with the individual judge's clerk, it needs to be made on a local basis. And so we have not defined exactly where the application will be filed. We refer to the clerk or other court personnel.

And I want you to be aware that that was the thought process of the committee.

CHAIRMAN BABCOCK: Let's just stick with where the application may be filed, and that applies to Rule 2.1, does it not?

HON. ANN CRAWFORD McCLURE: Uh-huh. Well, it says "courts in which applications may be filed." It doesn't designate a facility, and that's why.

CHAIRMAN BABCOCK: That's why.

Okay. If everybody will turn to Rule 2.1 of Rule 2, Application to Trial Court for Order Bypassing Parental Notification Requirement. Rule 2.1 is "How to File an Application."

Given what Justice McClure has said, does anybody have comments on Rule 2.1?

MR. EDWARDS: On the first part, (a), where it says "may be filed in," it probably makes sense that, if we're going to follow the statute, we ought to insert "any" after "in," just like the statute says.

CHAIRMAN BABCOCK: So it would read, Bill, under your proposal, "An application may be filed in any: (1), District court, including family district court; (2)" --

MR. EDWARDS: Which is the exact language of 33.003(b).

CHAIRMAN BABCOCK: Justice McClure.

HON. ANN CRAWFORD McCLURE: I'm not opposed to that. We reference it "any county," but we don't reference multiple courts within a county. And I don't object to that.

CHAIRMAN BABCOCK: Okay. Does anybody have opposition? Do you have

opposition to that, Alex?

PROFESSOR ALBRIGHT: No, I just have a different comment.

CHAIRMAN BABCOCK: Okay. Is everybody okay with that? Judge Rhea.

HON. BILL RHEA: Well, that doesn't really address the issue which I think was raised in one of these subparagraphs. In our filing system in Dallas County, you file it at the desk downstairs where it's randomly assigned. Is there a suggestion here that you can pick the court that you want it to be filed in?

HON. ANN CRAWFORD McCLURE: We debated that. And I think clearly the intention of the subcommittee was that it can be filed with any court. You have the option to file with any court, but that doesn't guarantee that the judge of that particular court will be the judge that will hear the case. That will be decided on a local basis by either local rule approved by the Supreme Court or administrative proceedings in the individual areas.

CHAIRMAN BABCOCK: But Bill's point

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is that, if you insert the word "any," that means that I could go up to Judge Rhea's court in either Dallas or Harris County, actually, with a different spelling, and file it if I wanted to get Judge Rhea.

HON. BILL RHEA: That's right. And it would completely totally make a mess of our automated filing system, which has got preassigned numbers for cases that have to be filed and randomly assigned.

HON. ANN CRAWFORD McCLURE: Do your local proceedings not allow you to have another judge hear that if it's assigned to your court?

HON. BILL RHEA: Well, any sitting judge can sit for any other sitting judge. But why would we do that? How are we going to make that random then?

HON. SCOTT A. BRISTER: It depends on whether you think "any" in the statute modifies "court" or "any district courts." I agree with Judge Rhea. I think we ought to stick with the committee's original idea. It's any, but it's filed in district court, it's not filed -- I don't know even in Harris

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County if you can file in the 333rd District Court. I think you just file it in the district court.

HON. BILL RHEA: It would have to be very expressly stated that we are to do that for us to do that.

PROFESSOR ALBRIGHT: It seems to me that the statute is a jurisdictional statute. But where you file things under the Rules of Procedure is with the clerks office. And then different counties have local rules about how cases are assigned to different judges or different courts within that county. So if distric courts, county courts at law, and courts having probate jurisdiction including county courts, have jurisdiction, then it seems that different counties could have different arrangements for how those cases are assigned to all those courts with jurisdiction.

HON. ANN CRAWFORD McCLURE: That's exactly what I tried to say not nearly as articulately as you did. I can tell you in El Paso County what they're going to do. It's filed with the district courts and they're

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going to be kicked to the family courts. Those are the only judges that are going to hear these cases. Other counties may address it differently. So all of these courts have the jurisdiction to make the decision, but by local rule you can decide how that's going to be processed with who is going to hear it and in what court it is going to be assigned.

PROFESSOR ALBRIGHT: So isn't it a function of the rule to say that it should be filed with the clerk of the court? Or maybe we don't even have to address it, because those are in the Procedural Rules that are already in place about filing. And then there's also a rule, isn't there, that says you can file it with a judge?

HON. ANN CRAWFORD McCLURE: That was Tarrant County's concern. They did not want to specify filing it with the clerk or the clerk's office because of the problem they have there. They wanted the flexibility to allow for filing in the particular court.

PROFESSOR ALBRIGHT: So maybe we should leave it alone and not talk about where to file, because jurisdiction is established

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by statute, and you file where you file under the regular rules. Does that -- I don't know.

CHAIRMAN BABCOCK: Paula.

MS. SWEENEY: Well, there are a lot of things that can be filed that go straight to the court. With an injunction or a TRO or a motion to perpetuate testimony or pretrial discovery, prefiling discovery, you don't go to the district clerk, you can go straight in and select your judge and get your injunction.

CHAIRMAN BABCOCK: Not in every county.

MR. ORSINGER: That's not true with every filing system.

HON. ANN CRAWFORD McCLURE: That's the problem.

HON. BILL RHEA: It's the deputy district clerk who sits in our court who takes that filing, not the court.

MS. SWEENEY: You can walk the halls and find a judge to give you pretrial discovery or prefiling discovery. You walk in and you say, "I want this order."

CHAIRMAN BABCOCK: Judge McCown and

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then Richard.

HON. F. SCOTT McCOWN: The statute, it seems to me, is pretty clear that you can file it in any court. And I would point out that even the counties that have administratively set up a random filing system, as we have, on occasion break that system.

For example, bill of reviews have to be filed in the district court that rendered the original judgment. If a litigant walks in with a bill of review, they say, "File this in the 345th," and the clerk has to do it, regardless of the random assignment process that's been set up.

And I'll also point out that the Rules of Procedure allow a judge to accept a document and file it and then require the judge to promptly transmit it to the clerk. So I think they can walk into any court in the state and say, "I want to file this with you."

CHAIRMAN BABCOCK: Yeah. If you take all the commas and the paragraphs and everything, this statute says, "The application may be filed in any district court

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in this state."

HON. SCOTT A. BRISTER: No, that's not right. See, if you put "any" before a colon, like in the committee draft, then the "any" goes to any district court, any county court or any court with probate.

CHAIRMAN BABCOCK: Right.

HON. SCOTT A. BRISTER: But that's not what the statute does. The statute in 33.003(b) says it can be filed in any county court, court having probate jurisdiction, or district court. That could be construed as just any one of the following types of court. That's different from having "any" in front of each one of those items.

CHAIRMAN BABCOCK: Well, what do you do with the phrase "in this state" then? That's the one that catches you.

HON. F. SCOTT McCOWN: I think what the Legislature envisioned is pretty clear, and it's wishful thinking on our part to try to rewrite it. I think Judge McClure's point is, it doesn't matter where it's filed. You can set up by local procedure what judge is going to hear it, and we're going to have to

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do that, but I don't think we can deprive them of their filing rights.

PROFESSOR ALBRIGHT: If they have jurisdiction and somebody walks in and they decide it, they have jurisdiction to do it, right?

CHAIRMAN BABCOCK: Did the Legislature in a macro sense envision forum shopping? They did, didn't they?

HON. ANN CRAWFORD McCLURE: Yes.

CHAIRMAN BABCOCK: Because you can go to El Paso, if you want to, even if you're from Dallas. So why wouldn't a reading of this be consistent with "any district court" in this case if that was their intent?

HON. SCOTT A. BRISTER: My guess is the judges in Harris County will be very opposed to this.

CHAIRMAN BABCOCK: You don't have to guess about that.

HON. SCOTT A. BRISTER: This is why we had to change all of our ancillary rules, because of the perception that attorneys file when they know which one of the 59 judges they're going to get and that that is a bad

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perception and we shouldn't, unless we absolutely -- I mean, if the Legislature says we have to, we have to. But I don't see that. This is broad enough language, we don't have to read it that way. And to go back to a system where all of these show up -- I mean, in Harris County we have one Democratic judge left. If these are all filed in her court, we have a political problem we don't need. This ought to be handled randomly like everything else.

HON. F. SCOTT McCOWN: It doesn't mean she has to hear them, if you have a local procedure that determines how they get heard.

HON. SCOTT A. BRISTER: But then she or somebody has got to make a ruling. I've got to either reach in her court and grab it or transfer it somewhere. I mean, we're getting into a political problem.

MR. YELENOSKY: And all within 48 hours.

CHAIRMAN BABCOCK: Bill Dorsaneo.

PROFESSOR DORSANEO: Well, sometimes we want to embrace the statutory ambiguity and sometimes we don't. A fair reading of this is

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that it can be filed in any of the enumerated courts, specific courts, in this state. And I frankly would have a hard time saying that that only is paperwork.

We had venue legislation, you know, sometime back, and we tried to improve on it in the Rules of Civil Procedure. And when the matters got argued in the Supreme Court at some point later, when the Court's personnel was different, many of us were surprised that the statutory language seemed to be the most important language to the Court, even though the Court's rules said otherwise. And I just think it's a silly idea to try to be changing this from what it says and probably what it means.

HON. BILL RHEA: Well, I have to say amen to Scott's interpretation. I think it's plain on its face that it means any of these different types of courts. I think you're going to have a problem in El Paso if you relegate it to only family courts. They have the right to have it in civil court or criminal district court or probate court. There are several discrete areas, but it's

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not -- this whole idea that there's this absolute forum shopping and you can do anything you want to in any court you want to in the state, that's ridiculous.

We have a system of jurisprudence in place that's working, and this one issue I don't think was intended to destruct the whole thing.

CHAIRMAN BABCOCK: Justice Duncan.

HON. SARAH B. DUNCAN: Just grammatically, if the intent were to say this type of application can be filed in these types of courts, that's what would have been said. What it does say is, "The application may be filed in any court at law, court having probate jurisdiction, or district court, including family district court, in this state."

CHAIRMAN BABCOCK: Are you reversing and remanding to those guys?

HON. BILL RHEA: She wouldn't remand it to me, I don't think.

HON. SARAH B. DUNCAN: I'm agreeing with Professor Dorsaneo.

CHAIRMAN BABCOCK: Yeah, I knew

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that.

HON. SARAH B. DUNCAN: Can you tell?

CHAIRMAN BABCOCK: Yeah, I could tell that. Richard.

MR. ORSINGER: I agree that there ought to be a lot of local autonomy, and I disagree that you could say only district courts can accept them in this county and not county courts and not probate courts, but the language in this rule really doesn't say that. It doesn't say you can do that, nor does it say that you can't do that.

CHAIRMAN BABCOCK: Right.

MR. ORSINGER: And either we ought to just stick with vague language like this or we ought to use the statutory language. But are we really debating something of substance here?

HON. ANN CRAWFORD McCLURE: Well, apparently.

CHAIRMAN BABCOCK: Apparently we are.

MR. ORSINGER: I'm not sure I understand. Are we arguing over the interpretation of these words, or are we

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trying to change specific words?

CHAIRMAN BABCOCK: What I think the fight is about is, if we insert the word "any" as it is in the statute into 2.1(a), the introductory sentence, then Judge Rhea and Judge Brister are concerned, and rightly so, that somebody would view this as license to go down to Katie Kennedy's court in Harris County and file it with her, because she's the only Democratic judge, as opposed to filing it with the clerk and having it randomly assigned. That's what they're concern is.

The counter to that is that the statute, in some people's view, is clear and that this rule should track the statutory language which would permit that very thing. So that's what the fight is over.

MR. ORSINGER: If we track the statutory language, then we could just leave it to litigation to decide whether the local presiding system is overridden or not overridden.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Chip, most people don't care where their lawsuit is filed, they care

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where it's heard.
HON. ANN CRAWFORD McCLURE: That's right.
MR. LOW: And the Legislature may say it's got to be filed there, but it doesn't say that that court has to hear it. So I don't think they intended to circumvent what the judges are doing, so I think it can be done and heard by anybody. How it's filed doesn't matter.
CHAIRMAN BABCOCK: Okay. I think this issue has been fully explored. Let's vote on it. The issue was raised by Bill Edwards, so --
HON. HARVEY G. BROWN, JR.: Can I just ask about one point?
CHAIRMAN BABCOCK: Yes, sir.
HON. HARVEY G. BROWN, JR.: We've said the local rules can administer who hears it, et cetera. Well, if we think that, maybe we should say that, because otherwise, I think it appears that the court is compelled to hear it in which it's filed. It's not saying that it can filed in this court but another court can hear it. Maybe we should say that to tell

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all the local regions that they can adopt their own rules under this statute.
CHAIRMAN BABCOCK: Okay. How we vote on "any" may impact whether we do that, so let's vote on that.
Everybody who is in favor of inserting the word "any" after "An application may be filed in" in Rule 2.1(a) raise their hand.
All right. Everybody opposed. The insertion of "any" carries 19 to 12.
Did you accept that or not?
HON. ANN CRAWFORD McCLURE: I did.
CHAIRMAN BABCOCK: Okay. So it will be inserted.
Now, Judge Brown, do you want to raise an issue of adding some language about local autonomy?
HON. HARVEY G. BROWN, JR.: Yes. I don't have it in front of me, but something along the lines of "Subject to the local rules determining the particular court that shall hear the matter" -- in other words, if we're going to treat filing as just the act of filing, I want to make that separate from hearing.

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CHAIRMAN BABCOCK: So you would propose in 2.1(a) putting a semicolon after "to be performed" and saying, "Subject to any local rules regarding or regulating who hears the matter."
HON. ANN CRAWFORD McCLURE: You might, if you want some suggested language, you might look at Comment 1. We addressed it by comment, not by rule.
HON. F. SCOTT McCOWN: Well, didn't we address it by rule? Doesn't Rule 1.1 already say that local rules apply to the extent they're not consistent?
CHAIRMAN BABCOCK: Right.
MR. PEMBERTON: Right. And then we cross-referenced back to that in Comment 1 to Rule 2, because that's a particularly important issue, that it may need to be addressed by local rule.
HON. F. SCOTT McCOWN: The only reason I would hesitate to reference the local rules specifically here is because I think the local rules apply throughout to everything, which is what we said in 1.1. And if we reference them specifically here, then that

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would seem to imply that maybe they don't govern anywhere but there.
CHAIRMAN BABCOCK: Okay. Does that solve your problem, Judge Brown?
HON. HARVEY G. BROWN, JR.: I think so. At first blush it does.
CHAIRMAN BABCOCK: Okay. While you're looking, Buddy Low has got a comment.
MR. LOW: It's not just the local rule. One judge without local rule has the power to assign to another judge, and that's not a local rule. So if you're going to refer to assignments, you don't want to limit it to local rules.
MR. PEMBERTON: Comment 1 covers that. It talks about Chapter 74 of the Government Code, which is the provision for assignment of -- one distinction that the subcommittee focused on that really hasn't been brought up here and I just want to focus on now, there's a distinction between a court and a judge. Just because a case is in a court doesn't mean that a judge other than the one ordinarily assigned to the court couldn't hear the matter.

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MR. HAMILTON: By inserting the world "any," do we need to change the form now? Because that top part was to be filled out by court personnel as to the court. Does that now mean the applicant can fill out what court the application gets filed in?

CHAIRMAN BABCOCK: Justice McClure.

HON. ANN CRAWFORD McCLURE: The subcommittee didn't take a position on that. I suspect if it were brought blank to the court to be filed, then the court personnel in that individual court would fill it out.

CHAIRMAN BABCOCK: But you have the instructions there that it's only to be filled out by court personnel.

HON. ANN CRAWFORD McCLURE: But whether it's the court clerks office or --

CHAIRMAN BABCOCK: -- the deputy clerk of Judge Rhea's court.

HON. ANN CRAWFORD McCLURE: Right. I think they're the individual that would fill it out.

CHAIRMAN BABCOCK: By the way, we're talking about 14-year-old kids here. I'm not sure that --

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MR. HAMILTON: Well, but they may have a lawyer.

CHAIRMAN BABCOCK: Yeah, they may have a lawyer. That's true. Richard.

MR. ORSINGER: It's not clear to me whether the local random assignment for filing process is still in place. I know that it's the consensus that the random assignment hearing is in place, but in some counties you walk in and they randomly assign the court. Are we allowing that to continue? Or can you pick your court but you just can't pick who hears you?

CHAIRMAN BABCOCK: That's exactly what Judge Rhea and Judge Brister were worried about. That's what we just voted on.

MR. ORSINGER: You can pick your court to file in? In other words --

HON. BILL RHEA: That's what this says.

MR. YELENOSKY: I don't think it says that.

MR. ORSINGER: Okay. So that means that in Dallas, where they do have random assignment, and even in San Antonio, where we

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have random assignment, there is no randon assignment on these petitions anymore?

HON. F. SCOTT McCOWN: Do you randomly assign bills of review?

MR. ORSINGER: You know what you're doing --

HON. SCOTT A. BRISTER: You randomly assign --

MR. YELENOSKY: Because of a specific rule --

CHAIRMAN BABCOCK: Whoa, whoa, whoa, guys. Don't talk over each other. Bill can't get any of this.

Okay, Judge Brown, you were musing about this?

HON. HARVEY G. BROWN, JR.: I think we can make it work.

CHAIRMAN BABCOCK: All right. So we're okay on that. Does anybody --

MR. ORSINGER: Well, I'd still like to know whether it was the committee's vote that the applicant can pick the court in which it is filed, separate and apart from whether they can pick the court in which it's heard.

CHAIRMAN BABCOCK: The committee's

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vote was 19 to 12 to insert the word "any," which some people are worried, on both sides of that vote, it might mean just what you said.

MR. ORSINGER: So we're not taking a position on that?

CHAIRMAN BABCOCK: I don't think that we're taking a position on that, nor should we. Yeah, Nina Cortell.

MS. CORTELL: I just want to raise a question, and that is whether the El Paso practice that's being proposed of immediately channeling all the cases to the family court is really contrary to at least the apparent intent of the statute, which is to provide an array of courts to hear it.

I understand there's going to have to be some judicial flexibility, but to have this automatic channeling, I think that you're effectively depriving them of the forum.

HON. ANN CRAWFORD McCLURE: That's probably going to be litigated. That was done by local rule. Our family courts, all but one of our family courts are not statutorially designated family courts.

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CHAIRMAN BABCOCK: If there's nothing further about this, then if you'll turn to Page 6 of the report, Paragraph F, dealing with guardians ad litem. Richard, you'll love this one. And Justice McClure has got something to say about this, too.

HON. ANN CRAWFORD McCLURE: I just wanted to relate the thinking of the subcommittee. The statute provides that the court can appoint a person who may consent to treatment for the minor, psychologists or psychiatrists, an appropriate employee of DPRS, clergy or other appropriate person as the guardian ad litem.

We had some concerns about whether any one of those individuals that would fit into those categories must otherwise be qualified, as we think in terms of qualified guardians ad litem to represent children. It was our consensus that we anticipated they would still be qualified. In other words, they need to have some understanding of what the role of an ad litem is, what the responsibilities are. We refer in the comments to the other provisions of the Family Code that outline

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those requirements, and the fact that the ABA has also implemented a stack of guidelines that's about that thick (indicating). I have them with me, if you want to see them.

We also had some concern as to what an appropriate person from DPRS meant. And Marilyn, did you want to address that issue?

MS. SCHRAMM: Thank you. I contributed to the comment that pointed out --

THE REPORTER: Could you identify her, please.

HON. ANN CRAWFORD McCLURE: I'm sorry. This is Marilyn Schramm from the Department of Protective and Regulatory Services.

MS. SCHRAMM: I'm a policy attorney for CPS. And in discussing the statute with our personnel, as well as interacting with some of the regional attorneys that do family law cases, SAPCRs that we're involved with, suits affecting parent-child relationship, they -- a lot of people saw it as a conflict. So I raised the issue with -- I guess the opinion is, well, probably the most appropriate place for DPRS to get involved is

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if there was some notion of abuse, because we would want them involved anyway, they're going to be notified, they're going to be investigating, et cetera. Yet that's exactly where they would be following up, where they would be involved in a SAPCR, either simultaneously or at some other time following after that.

And the lawyers who are commonly appointed as attorney as litem for parents or -- I mean, attorneys for parents or something like that, saw this as a clear conflict. So I asked somebody in the legislative perspective why they wanted DPRS included. And there was some thought, possibly mistaken, that DPRS often serves in the role of guardian ad litem.

So I just added a note, a paragraph in the comment that pointed out that caution must be exercised because of the conflict problem, which may not be apparent. The agency itself may be the managing conservator that the child is hoping to avoid. And then, you know, I just wanted to point out that that potential conflict exists at a time when a judge has to

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make a quick decision to appoint a guardian ad litem, and yet it won't see the conflict until after the fact.

HON. ANN CRAWFORD McCLURE: And you'll find her paragraph that she drafted on the top of Page 22 of the annotated rules, followed by some of the factors that a guardian ad litem might want to consider.

Some of the other states that have these parental notification statutes have implemented guidelines for their ad litems to use. Rather than mandate them and specify them in the rules, we opted to include reference to some of those in the guidelines.

CHAIRMAN BABCOCK: These are Comments 3 and 4 to Rule 2.3. Alex Albright.

PROFESSOR ALBRIGHT: I have a question. If a minor has an attorney, she comes with the attorney to the court, does the court have to appoint an additional guardian ad litem?

HON. ANN CRAWFORD McCLURE: Yes. Now, the court has the option to make it the same person.

PROFESSOR ALBRIGHT: So that

attorney could volunteer to be the guardian ad litem them, or not volunteer, sorry, or suggest someone who might be an appropriate guardian ad litem.

HON. ANN CRAWFORD McCLURE: Right.

CHAIRMAN BABCOCK: Justice McClure is nodding her head, which in depositions we always say "answer out loud."

HON. ANN CRAWFORD McCLURE: Also, when we drafted the form for the application, we wanted to give the applicant the opportunity to say if there was someone she wanted to serve as her guardian. Is there a grandmother? You may recall, when this was being debated in the Legislature, there were secondary and third-level bypasses that were discussed. Should we let a grandmother consent? Should we let an adult older sister consent? And that was not approved, but the concept was, by allowing these other individuals to be appointed as ad litems, we could accomplish much of that same effort.

CHAIRMAN BABCOCK: Steve.

MR. YELENOSKY: Just a point of order or a question. I know we've moved from

going section to section to going through the Subcommittee Report as you indicated at the beginning. Are we going to come back to the sections that may have less important points?

CHAIRMAN BABCOCK: We're going to try.

MR. YELENOSKY: Some of us are reserving points, though.

CHAIRMAN BABCOCK: We're going to try. But the reason we're doing this is because there are big issues that need to be discussed for sure. Buddy.

MR. LOW: Chip, let me ask a question: A minor comes in, and the judge says, "Okay, I'm going to appoint your Aunt Susie." And she says, "God, I'd rather my mother know about it than her."

Does the minor have any choice at that point other than to say, "Wait, a minute, I'll just tell my mama. I won't go through this procedure." Has that ever been discussed?

HON. ANN CRAWFORD McCLURE: Well, it's been discussed. I can tell you, the thinking of the subcommittee was, to the extent there is an adult that the minor has

faith and trust in, that we want that brought to the trial court's attention to facilitate that process of getting as much information to the applicant as we have to make sure that we get an appropriate determination of maturity and informed consent. That is the thinking. And I think, while the statute may not reflect that, that was the thinking in gathering the legislative intent of what they were trying to accomplish.

MR. LOW: Because it can have a pretty chilling effect if the judge wanted to.

HON. SARAH B. DUNCAN: But isn't that built into the statute?

HON. ANN CRAWFORD McCLURE: It is built into the statute.

CHAIRMAN BABCOCK: Carl, did you have something.

MS. SCHRAMM: May I please make one other comment, though, on Comment 4. In the event that the agency is pulled into these proceedings through an appointment as guardian ad litem, when I read Comment 4, I thought this prescription of duties was extremely unrealistic. There were questions raised in

my mind as to relevance. And maybe that could be solved by changing "should" to "may." But it seemed extremely prescriptive, unrealistic in light of the time frame between appointement as guardian ad litem and when the hearing is likely to take place, within 48 hours.

And I guess I was a little bit concerned, too, in looking at it, that having this as a comment in the rules would be a clear sort of prescription to judges that these are some of the things they should be considering in making this determination. So I just wanted to make that comment, because there are many more judges in this room than there were on our subcommittee.

CHAIRMAN BABCOCK: Justice McClure, what do you think about Comment 4, third line, where it says, "guardians ad litem in Chapter 33 proceedings should address and consider"?

HON. ANN CRAWFORD McCLURE: I don't mind changing that to "may." These came from those guidelines in other states and that was a drafting process, so I don't mind changing

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it.

MS. SCHRAMM: It actually started out, as we considered it, as a form. Everybody rejected it. It ended up somehow in the comment. I don't recall us agreeing that all of that should be in the comment. And I guess I saw it as a little bit too prescriptive for guardian ad litems, when we had said maybe we can't get into defining exactly what their duties should be.

HON. ANN CRAWFORD McCLURE: Yes. We voted against a checklist, of having a checklist that would actually become part of the court record. And I don't mind changing the "should" to "may."

CHAIRMAN BABCOCK: Is anybody opposed to changing the "should" to "may"? Scott McCown.

HON. F. SCOTT McCOWN: I would like to change it to "might" and have it say, "Chapter 33 proceedings might consider, among other factors."

And then I think on Page 23, I would say, "These considerations may not be relevant in every case and are not exclusive," to make it

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clear that these are things you might consider; they may not be relevant in every case.

HON. ANN CRAWFORD McCLURE: I'm not opposed to that either.

CHAIRMAN BABCOCK: Is anybody opposed?

HON. MICHAEL H. SCHNEIDER: How about may instead of might?

CHAIRMAN BABCOCK: May instead of might?

HON. MICHAEL H. SCHNEIDER: Right.

CHAIRMAN BABCOCK: Justice Schneider says may instead of might.

HON. F. SCOTT McCOWN: Well, I don't have any problem with "may," as long as on Page 23 we say, "These considerations may not be relevant in every case."

HON. ANN CRAWFORD McCLURE: And I accepted that.

CHAIRMAN BABCOCK: Justice McClure, is that okay? Okay. We're agreed on that. Have you got that language?

HON. ANN CRAWFORD McCLURE: We do.

HON. F. SCOTT McCOWN: "Might could"

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would be my suggestion.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: We give the guardian ad litems immunity for acts or omissions that are committed in good faith. We're not setting up a checklist, are we, that if you don't meet it, you're not in good faith?

CHAIRMAN BABCOCK: I think that was the point of Judge McCown's language.

MR. ORSINGER: Well, I don't know if that language cures my problem.

HON. ANN CRAWFORD McCLURE: We specifically rejected a checklist.

MR. ORSINGER: Well, I don't know that that's the same issue either. I would like the record to reflect whether anyone thinks that, by having any articulated standards in here, we're setting up what constitutes that, if you don't do these things in the case, that you have not made a good faith -- you have not operated in good faith.

In other words, there are checklists here where these guardians are supposed to decide for themselves, I suppose, whether there's a medical danger to the child; a lot of

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subjective things like the family relationships and stuff like that. And this isn't going to happen in 48 hours, I don't think.

And I would just want to be sure that nobody thinks that we're creating a standard where experts are going to get up and say, "This guardian failed to comply with enough on this list, and therefore, is not operating in good faith." Because if there's any remote fear of that, I would rather that we take out all of the standards.

CHAIRMAN BABCOCK: Joe Latting has got a comment on that.

MR. LATTING: My question is, why do you oppose a checklist? Are we supposed to give any guidance to guardians? Do they have any duties at all? Or do we contemplate that they'll have no duties and that they're just a formal, sort of a needless touching of the cap, so to speak? Does the guardian have a duty in this situation, and if so, what is the least his duty is?

HON. ANN CRAWFORD McCLURE: Well, the statute didn't tell us. And the

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Legislature has repeatedly in family law cases told us by giving us guidance in Title 5 as to what they are to consider, or that they are to become familiar with the ABA guidelines for ad litem representation of children. They didn't do that. They didn't even cross-reference it.

So the consensus of the subcommittee was we should not, by rule, set those forth. What we wanted to do was, by comment, indicate some of the things that might be considered, reference the other places in the Family Code where those responsibilities are outlined, understanding that ad litem representation in a custody case is not necessarily the same thing as ad litem representation in a judicial bypass to parental notification.

That's why we didn't put it in the rules. And that's why we don't want to really craft a checklist and give an indication to either the judge or the ad litem that you must consider these in every case.

CHAIRMAN BABCOCK: Does anybody think that this list in Comment 4 is a litmus test for good faith, which is what Richard's

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concern is?

MR. ORSINGER: Well, the Rules of Ethics has a specific statement that these do not set a standard for behavior. This doesn't. And the Supreme Court, if they adopt this comment, is engaging in what is arguably legislation or what is arguably giving opinions about what guardians ad litem should be doing. And I can easily foresee an expert witness getting on the witness stand and saying that "There were 17 factors that the Supreme Court said that they may consider, and they only considered five of them, and something bad happened to this girl, and that was not good faith in my opinion."

And here the Supreme Court is rendering an advisory opinion or quasi-legislating or whatever, and we've got ourselves really in the soup.

CHAIRMAN BABCOCK: Isn't that cured, though, by Scott's language that says they're not necessarily relevant in every case?

MR. ORSINGER: No, because then there's an argument over what is irrelevant in the case. If we're going to have a checklist,

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which the Legislature did not authorize us to come up with and which is not pulled out of Texas case law, then we ought to have some provision in here that we're not setting a standard by which anyone's behavior can be measured for liability purposes or other purposes.

CHAIRMAN BABCOCK: Is your suggestion, Richard, that we should delete Comment 4, or that we should just have some more clarifying language?

MR. ORSINGER: I think it's helpful to have direction in here. But I would like it if we could borrow some language like we have in the rules, in the Code of Ethics that governs lawyers, that this does not set a standard for liability. And we can use the exact language, if you want. Just stick it in there for what it's worth. And then if an expert gets up there and tries to run this as a checklist, you can check them with that.

HON. ANN CRAWFORD McCLURE: I don't think that's a bad idea.

MR. PEMBERTON: I think that's a good idea.

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CHAIRMAN BABCOCK: Okay. Judge McCown.

HON. F. SCOTT McCOWN: Well, it's not worth anything. I think we either ought to take them out -- which would be fine with me. I really don't have any problem with Richard's language, except that in the Ethics Rules, which he cites as a precedent, courts routinely ignore that language and still base liability on the Ethics Rules.

And I'm just -- this constant concern about lawyers' liability. Either we want the guardians to do it or we don't want them to do it. It either ought to be in or it ought to be out, but we ought not make decisions based on lawyer liability.

CHAIRMAN BABCOCK: Spoken by someone with official immunity. Nina.

MS. CORTELL: If you want to keep any of the list in, I have a problem with it. It's repetitive. I think some of it is highly unrealistic. For example, whether the applicant has given an accurate and complete statement of her medical history to her physician. There are just certain things in

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here, there's no way a 48-hour guardian is going to be able to opine on certain of these.

So if we're going to have a checklist, I think it ought to be three to five items. It can be more globally written. It should pick up, I think, some of the same subject matter area. I'm not concerned about that. But this particular list I do think is unrealistic.

CHAIRMAN BABCOCK: Judge Patterson.

HON. JAN PATTERSON: I agree with that. I compare it to broad-form submissions, and I think that would serve the interest of justice much better than some of these, which I have problems with as well.

CHAIRMAN BABCOCK: Well, as I see it, we've got two issues: One, whether we have these factors at all; and then two, if we have the factors, whether we have an additional sentence that Richard is proposing. And as I understand it, you're willing to accept some language from Richard further clarifying Comment 4, and that you would not accept deletion of Comment 4?

HON. ANN CRAWFORD McCLURE: Correct.

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CHAIRMAN BABCOCK: So that being the case, let's first vote on whether or not our Advisory Committee believes that Richard's language, which is --

HON. F. SCOTT McCOWN: Could we vote on deletion first? That's easier.

CHAIRMAN BABCOCK: Okay. Let's vote on deletion first. But that, of course, hasn't been accepted by Justice McClure.

HON. F. SCOTT McCOWN: But just to advise the Supreme Court.

CHAIRMAN BABCOCK: Right, to advise the Supreme Court. Everybody who thinks Comment 4 should be deleted in its entirety, raise their hand.

Everybody that thinks Comment 4 should be retained raise their hand.

HON. SARAH B. DUNCAN: In some form?

HON. DAVID PEEPLES: In some form, yeah. Which is it, Chip?

MS. SWEENEY: Wait, is it in some form, or is it as is?

CHAIRMAN BABCOCK: Judge McCown was trying to make it easy on us. We're going to talk about how we revise it.

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So in some form, should it be retained? By a vote of 23 to 11, Comment 4 in some form is going to be retained, or at least that's our recommendation.

And now Richard's language, which is?

MR. ORSINGER: I wish I had a set of rules, but I would be willing to borrow.

PROFESSOR CARLSON: I have a rule book. "These rules do not undertake to define standards of civil liability of lawyers' for professional conduct."

MR. ORSINGER: Say "persons." Same language, only persons serving as guardians ad litem under this rule.

CHAIRMAN BABCOCK: Did everybody hear that? Read it again, Elaine.

PROFESSOR CARLSON: These rules do not undertake to define standards of civil liability of --

MR. ORSINGER: – persons serving as guardians ad litem under this rule --

PROFESSOR CARLSON: – for professional product.

HON. DAVID PEEPLES: Chip, I'm not sure I understand why anybody would oppose

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that. Can I hear it again? Is there some reason for opposing that language?

HON. ANN CRAWFORD McCLURE: I accepted it. I did not oppose it.

CHAIRMAN BABCOCK: Elaine, Judge Peeples wants to hear it again, I think.

HON. DAVID PEEPLES: No, I want to hear why anybody would oppose putting that in this rule.

CHAIRMAN BABCOCK: Okay. Is anybody opposed to that?

MR. LATTING: I'm opposed to that.

CHAIRMAN BABCOCK: One person is opposed. Anybody else?

CHAIRMAN BABCOCK: Okay. Then that will be --

MS. SWEENEY: Could I hear why Joe is opposed to that? He might have figured something out that we haven't.

MR. LATTING: Because I'm opposed to anything that will make it easier for the abortions to occur. I think anything that can impede that and give more people more pause to think before this event occurs guides me in every one of these decisions.

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MR. ORSINGER: You're just going to get more people sued and make it harder to do, and the Legislature is going to --

CHAIRMAN BABCOCK: Now, now.

MR. LATTING: That would be a small price to pay.

CHAIRMAN BABCOCK: All right. That language has been approved and accepted by Justice McClure.

Now, any other -- yeah, Judge Peeples.

HON. DAVID PEEPLES: I thought Jan Patterson had an interesting suggestion that we make it more general and less specific.

CHAIRMAN BABCOCK: That's where we're turning to now. Does anybody have any suggestions on how to revise this in that fashion?

MR. ORSINGER: Can I throw out one suggestion? I think we ought to say whether or not these people are supposed to testify as witnesses or whether they're supposed to make unsworn statements to the court about their opinions, because that's a pertinent question.

CHAIRMAN BABCOCK: Do you think we ought to do that in a comment, Richard?

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MR. ORSINGER: Well, if we don't, we're going to get to litigate it, although there isn't going to be any knowledge of what the results of the lawsuits are.

CHAIRMAN BABCOCK: Hold that thought. Justice Duncan.

HON. SARAH B. DUNCAN: The reason I'm in favor to include this type of comment is that, if I were appointed a guardian ad litem in this situation, I would like some advice that these are factors that have been considered by the courts in other jurisdictions or courts in general, just so that I will have, for my own use, a checklist to go through. There may be things on here that I really hadn't thought about before.

So I would propose saying, rather than the second sentence of Paragraph 4, "Factors that have been considered in other jurisdictions include:" And then, if this is an accurate list, it's an accurate list, which I assume it is. "In this or other jurisdictions," something like that.

HON. SAMUEL A. MEDINA: Where would you put that?

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HON. SARAH B. DUNCAN: Instead of "However, as a general matter," I would say, "Factors that have been considered in other jurisdictions include the following:"

CHAIRMAN BABCOCK: Justice McClure, do you accept that?

HON. ANN CRAWFORD McCLURE: I do.

MS. LOPEZ GARCIA: I have a question, because if you have in here that we should address and consider among other factors, are we saying there that they should be prepared to address to the court, or what does that mean?

HON. F. SCOTT McCOWN: Justice Duncan's formulation solves that property. I would like the record to reflect, since I seldom agree with Justice Duncan, that I think that's a great idea.

CHAIRMAN BABCOCK: Justice McClure accepts that. Does anybody oppose? Yes, Linda Eads.

MS. EADS: I would like us to rethink this about having the list here. And I think the discussion points out the reason I want this. It's from other jurisdictions.

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These lists get set in stone. And what we really want is, we want the guardian to be thinking about the individual girl rather than just a checklist. And I'm afraid that's all they'll do, is do the checklist.

And I really agree with Judge Patterson that it would be better to have some global qualities; for example, for the guardian to look at the medical history, the family history. I mean, that gives the guardian an idea that there are subject matters that need to be inquired to, but not a checklist. And they think that if they just go through the checklist, they've done their job. And that gets carried on from one jurisdiction to another. So I'm in favor of a more global approach to these.

CHAIRMAN BABCOCK: Judge Patterson.

HON. JAN P. PATTERSON: I think the categories that bear on the findings that the court has to make specifically would be helpful, whether the minor is mature, whether the minor is sufficiently well informed, and either couch the categories in those terms, to facilitate the findings by the court, or broad

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categories that might be helpful so that they can make the findings by the court. But I don't quite see the relationship between the two. And somebody is going to get -- I mean, it's confusing for me to relate those criteria.

CHAIRMAN BABCOCK: Okay. Let's try to -- if we could do one thing at a time.

There is a discussion in progress about whether or not we ought to change the second sentence in Comment 4 to say basically that these are factors that have been considered in other jurisdictions. Justice McClure has accepted that.

HON. JAN A. PATTERSON: And list Iowa and whatever? I mean, what's the point?

CHAIRMAN BABCOCK: Well, that's what we're about to vote on. Justice McClure says that she would accept that change to Comment 4, and so now this committee has got to decide whether or not that would be something we would do. Yeah, Wendell.

MR. HALL: I was just thinking, if, you know, Judge Peeples grabbed me in the hallway and said, "You're going to be guardian

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ad litem in this thing." And I walk in and I'm a new attorney, new to this area and haven't been exposed to it, I would be very thankful to have these factors, if I just had three or four global topics. I'm not sure I would get in as much detail as what's provided.

CHAIRMAN BABCOCK: Bill and then Alex.

PROFESSOR DORSANEO: I don't think you can fix this list without going through the list and ask, you know, what do you do if you find out the applicant's means of financial support are at a high level? What do I do then? Do I then consider whether she lives with her parents? What does that have to do with it? I'm not helped by this list. I'm just given a lot of things to take into account, and then I have to decide what that all means. And I think the list is more trouble than some more general directives would be.

CHAIRMAN BABCOCK: Alex.

PROFESSOR ALBRIGHT: I think I'm becoming convinced that I should have voted no

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as to having the list. I agree with Sarah, that if I had one of these cases, I would love to have a list about what I might want to ask my client and things to consider. But I think maybe that's not the role of the comments in the rules. I think that may be the role of some agency, whether it be Planned Parenthood or Child Protective Services or whatever, to have pamphlets or booklets--

HON. JAN P. PATTERSON: Or Family Law Seminar checklists.

PROFESSOR ALBRIGHT: Or just have them available, you know, if I get pulled down the hall. Maybe the judge will have some of these in the office or something. But the more we're talking about it, this is not a rule thing.

CHAIRMAN BABCOCK: Judge Medina.

HON. SAMUEL A. MEDINA: It's great for us to think about what would help us or what wouldn't. But you go to, you know, Crosbyton and somebody appointed a nonlawyer as guardian or a member of the clergy or anybody else. I just think they need some help. And I don't know about some global idea

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that they're going to have to interpret what that means.

PROFESSOR ALBRIGHT: But are they going to read the rules for it then?

HON. SAMUEL A. MEDINA: I think we can correct that by something akin to what you're doing. I don't have any precise language, but it's not a checklist. Maybe we have to say it's not a checklist, I don't know, but some type of guidance, something that gives them an add idea of where to start from.

HON. SARAH B. DUNCAN: Maybe I've been misunderstanding what's going to happen. I have been assuming, perhaps erroneously, that when Judge Peeples calls Wendell in and says, "You are now appointed as the ad litem on this case," that there will be a pamphlet that will have the rules and the statute that he can give him. Because there are going to be a lot of lawyers that are not at all familiar with this area of the law or with family law at all.

HON. SAMUEL A. MEDINA: And nonlawyers.

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HON. SARAH B. DUNCAN: And nonlawyers. And it's not going to be a large pamphlet to include the rules and the statute in one place, but it could be a primer.

CHAIRMAN BABCOCK: Christina.

MS. CRAIN: Having served as an ad litem for about five years now in family court, I will say that every three years there is one seminar that all of us that do this in the family court go to. And we know that when that seminar comes, we cancel everything else because that's the only training we get for this type of work. We get certified. We get a book that we use for the next three years until the next seminar comes out. And that is the only thing that we get.

And every court is different. Every court has the way they like to do it and what their guidelines are. What I'm thinking is, and I like what Jan said and what Nina said, is that we come up with some more broad, global, you're looking at what's in the best interest of the child, these kinds of things. They're already spelled out in the Family Code.

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HON. ANN CRAWFORD McCLURE: No, they're not spelled out in the Family Code. "Best interest" is not spelled out in the Family Code, unless you want to take the position that we want to quantify that as guidelines.

MS. CRAIN: I think that would be great, if we could do it in conjunction with what we've been doing.

MS. SCHRAMM: May I just offer a point of clarification. Remembering my discussions in the subcommittee, I do recall that we discussed getting rid of this in the form, and I do recall some reference to hopefully bar associations will step in, somebody will come in and develop guidelines, as they have done in the family law area. And I remember that discussion, and that's why I was a little bit surprised to see us incorporate it in the comments so specifically. Because some of these points that have been made, I think we just referred to that as we expect others will come in and make sure that the people in their jurisdictions are properly qualified, know

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what to do, et cetera.

CHAIRMAN BABCOCK: I don't want to make a habit of this, but I think that enough people have expressed different views than the vote they just took, so we'll vote again.

Just a second, Bill.

And the vote this time will be whether -- and this may be advisory, because I don't think Justice McClure is willing to accept Judge Patterson's more generalized statement, but I think we ought to be on record about it. We're going to vote on whether or not to keep Comment 4, with this list of factors, with some softening language as Justice Duncan proposed, or whether or not we're going to go to more generalized, specific categories as Judge Patterson suggests.

MR. LOW: I just want to point to one thing for the record. 173, pertaining to guardian ad litem, says nothing other than appoint a guardian ad litem. No standard. So then we're going to have one rule that does and one that doesn't. And I know we voted, but I just wanted to go on the record with that.

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CHAIRMAN BABCOCK: Well, we're about to vote again. Judge Rhea.

HON. BILL RHEA: Well, before we make that vote, let me make another suggestion. It seems to me that it's clear that this -- it probably has been from the beginning of the day and before today that this is an issue about which, the broad issue about which everybody in this room has a strong opinion. And we're treading on dangerous ground here. Some people are expressing their opinions about it more openly than others. There are suggestions that, during the course of the conversation today, that make it pretty clear where people stand on this issue. And I'm concerned that we're kind of losing the focus of, you know, a proper judicious approach to this issue.

We've got a recommendation from the subcommittee that deals with specific issues. We've had a vote that approved it in some form. Nina Cortell has suggested that there are some factors listed here that probably aren't so appropriate.

I think it would be a much better

procedure to ask Nina or Bill or whoever to say, "X, Y and Z items aren't helpful." We've got others that are helpful and could be helpful. It's helpful to me as a judge to have an ad litem that's got some direction.

And I don't want to wait for CPS or Planned Parenthood to come in and tell the guardian ad litem what those proper guidelines are. We've got some good suggestions here. Maybe some of them don't need to be in there at all. I would suggest that we go through those, and if we can eliminate some that aren't helpful or offensive or irrelevant or something, let's do that and see what we wind up with.

CHAIRMAN BABCOCK: I think that's where I'm headed, Bill, because I think Justice McClure is unwilling to accept a change to Comment 4 that would go to Judge Patterson's more general category. So all we're doing now by this vote is to advise the Court how the committee feels about the issue of Comment 4 with a list of factors, and we'll work on the list in a minute, versus a comment with very generalized issues, as Judge

Patterson proposes.

And we already voted on that, and as I said, I don't want to make a habit of this, but enough people have raised the issue that I'm going to do it this time.

So everybody that wants to retain in some form Comment 4, which has list of some 18 factors, raise their hand.

HON. DAVID PEEPLES: As opposed to general?

CHAIRMAN BABCOCK: Yes, as opposed to a more general, kind of generic.

MS. CORTELL: Chip, I'm sorry, but I'm not sure it's that far apart. I mean, I can't speak for Judge Patterson, but a more global grouping, let's say, of four would probably encompass some of these specifics. In other words, I don't see them -- I'm not sure I see the big difference between the two proposals.

CHAIRMAN BABCOCK: It may not be, Nina. And all we're doing is, if a majority of this committee says yes, then we're going to note that in the report, and then we're going to get down to -- and it may be that if

Justice McClure says, "Yeah, I accept deletion of Nos. 4, 6 and 7," we may be where you want to go and where everybody wants to go. But for right now, we're just talking about the two things. So everybody who is in favor --

HON. PHIL HARDBERGER: Chip.

CHAIRMAN BABCOCK: Yes, Justice Hardberger.

HON. PHIL HARDBERGER: You know, it really wouldn't be difficult to have both in this. You could have a general statement on what you're looking for, the global thing of Justice Patterson. And then you could incorporate the language Justice Duncan said, some of the other factors that have been taken into account in other jurisdictions are, and all these won't be appropriate in every case. And then you've got them all. You really don't have to make a choice here.

CHAIRMAN BABCOCK: Well, that's another way to do it. In other words, subtraction by addition.

So Justice McClure, what do you think about that?

HON. ANN CRAWFORD McCLURE: I'm not

opposed to the broad concept of putting it in there, but I think it's in there. I mean, I think it's in the statute that you are to consider maturity, a well informed decision, and best interest of the child. I don't think that in a broad global statement you can quantify the factors that go into that. I think that's in there. I don't mind putting a general proviso in the rules. What I'm not in favor of doing is deleting these factors from the comment.

HON. PHIL HARDBERGER: And I can live with the factors as stated as the committee has recommended. But if there's enough feeling that we need the global, we can certainly put it in.

CHAIRMAN BABCOCK: Okay. I think we owe it to the Court to give a sense of whether a majority of this committee disagrees with Justice McClure, what she just said. So that's what we're voting on.

How many people think we should not have these 18 factors or some variation thereof, these 18 factors in Comment 4, raise your hand.

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How many people think we should? By almost the same vote, 21 to 13.

HON. SARAH B. DUNCAN: Chip, can I say something?

CHAIRMAN BABCOCK: Yes.

HON. SARAH B. DUNCAN: There seems to be a suggestion that that was a vote on one's view on the abortion issue. And I just want to make it clear that my vote at least was not at all related to what my views may or may not be on that issue.

CHAIRMAN BABCOCK: So noted.

HON. SARAH B. DUNCAN: Thank you.

CHAIRMAN BABCOCK: Yes, Richard.

MR. ORSINGER: It seems to me that the Supreme Court promulgating this comment is unprecedented and far beyond the lesgislative mandate that we have. And I would propose that the Supreme Court consider treating this as a committee comment and not a Supreme Court comment, because this is what should really be in a court opinion, not part of the legislative rules. If we want to have it in there, let's have it in there, but let's not say this has the imprimatur of the Texas

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Supreme Court on it.

CHAIRMAN BABCOCK: That comment is noted. Bill.

PROFESSOR DORSANEO: Well, I guess I'm not sure what the guardian's role exactly is, the guardian ad litem's role exactly is here. Aren't we trying to decide under this statute whether you can bypass the parents, isn't that the idea, not whether the abortion is a good idea or isn't?

This list is about whether it's a good idea to have an abortion or not, in my view. And the suggestion was made earlier that some sort of list that relates to the findings that the court is supposed to make about the minor being well informed, whether there will be a problem if the parents are notified, physical violence problem or whatever, seems to be the pertinent question.

I go back again to, what does it have to do with anything, the applicant's means of financial support? Does that mean that it's not okay to have abortions if you're rich? It is okay? That if you're poor, that it's a good idea? I don't like these factors. They

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seem to be talking about something else other than what's the guardian's job.

Richard suggested talking about what the guardian ad litem is going to do, and that would at least help me. What is that role? And then I would be able to decide a little better what factors ought to be considered.

CHAIRMAN BABCOCK: Carl, I think, had his hand up.

MR. HAMILTON: I agree with Joe. I would like to do everything to prevent abortions that we can. But this list, it seems to me, and the duty of the guardian ad litem is to answer the question about whether or not there is consent. And if the minor can't give it, I guess the guardian gives the consent. But I don't see anything in the list that relates to any considerations for adoption or the rights of the baby. I think there needs to be something in there about that, if this is going to relate to the consent question. I think the list is totally incomplete.

CHAIRMAN BABCOCK: Justice Duncan.

HON. SARAH B. DUNCAN: I guess that

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points out my concern on this vote, and my concern has become even greater. In my view, the question before the court, trial or appellate, is whether one of the avenues for bypass has been met on the facts of the case given the statute. Whether a child has considered the financial consequences of her decision one way or the other, or her desire, whether there are medical aspects or indications to the decision, could go to maturity, could go to meeting one of the other bases for bypass.

And that's why I just don't understand this list to be a pro- or anti-abortion list. It is, to me, a list that's designed to help an ad litem, whether attorney or otherwise, talk to the applicant and try to help the court in making the decision required by the statute.

MR. PEMBERTON: Can I just throw something out? Perhaps it would be useful, in consideration of all these comments, and I think Justice Hardberger was suggesting something along these lines, to break this down into a generalized list of factors going

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to the maturity, how well the minor is informed, such as, and throw in whatever of these factors are appropriate. Same thing for best interest. Maybe have a catchall for catching the things like sexual abuse of a minor.

You could do it that way, and that perhaps would take some of the inferences or implications, the charge out of this list here, focus it back where it belongs.

HON. F. SCOTT McCOWN: I think a lot of us wouldn't mind having a list. But let me point out, if it's a list for the guardian ad litem, it's also automatically a list for the judge. Because if you're saying the guardian should consider these things in making a recommendation to the judge, you're saying the judge should consider these things in making his or her decision. My problem is not the idea of having a list. I think it would be good to have general direction with some level of specificity to the ad litems.

I think this list does not correspond to our statute. And I think that's the real problem here; that what we're called upon to

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decide is a maturity question, alternatively a best interest question, alternatively an abuse question. And this list doesn't capture or correlate very well. I'm not saying it doesn't correlate at all, but it doesn't correlate in my mind very well. And I don't know if we can write that kind of list now or in a group this large.

I would just say we ought to say to the Supreme Court, "We recommend you give some general direction. We recommend it have this language that Richard wants about no civil liability attaching. But we don't think this is the right direction, and it needs some work."

MR. LATTING: Haven't we voted on this twice?

CHAIRMAN BABCOCK: Well, we have voted twice. Judge Rhea.

MR. YELENOSKY: Well, as a point of order on that, I think you started to announce the results of the last one. You said 21 to 13, but I don't think you said which was which.

CHAIRMAN BABCOCK: Yeah, I'm sorry.

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The vote was 21 in favor of the list and 13 against. Sorry.

HON. F. SCOTT McCOWN: In some form.

CHAIRMAN BABCOCK: In some form, right.

MR. MEADOWS: A list.

CHAIRMAN BABCOCK: I did want to get to that, but --

HON. SAMUEL A. MEDINA: Mr. Chairman, I heard, and I don't know if you meant that or not, but you said what we're saying is that they should follow this list. I thought we disagreed with that. I thought it wasn't "should follow," but that you might, that it's something you might look at. And I think we're getting off base.

HON. F. SCOTT McCOWN: Well, okay, I didn't mean "should," that's correct. But I meant that these are things that they ought to consider whether they're applicable or not.

HON. SARAH B. DUNCAN: Not ought. "Ought" means should.

HON. F. SCOTT McCOWN: They ought to consider whether they are or are not

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applicable. You have to consider whether they are or are not applicable.

CHAIRMAN BABCOCK: Hold it. Where we are right now is we changed "should" to "may." That has currently been approved. And there was a further request to amend it to say that these are factors from other jurisdictions, and just say that and not that you ought to follow them or anything else, just that these are other factors.

And then we were going to have the language that Judge McClure has written down and then also the language that Elaine Carlson read at the end of it.

And now what I thought we were doing, having voted twice that we were going to have a list, I thought we were going to go over these things and find what the committee thought was inappropriate to be on the list, present that to Justice McClure for her up or down, and then vote if we had to.

That's where I thought we were. I may be wrong. Does everybody think we're kind of there? We're not there.

HON. JAN P. PATTERSON: Chip.

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CHAIRMAN BABCOCK: Yes.
HON. JAN P. PATTERSON: I would like to resurrect Justice Hardberger's suggestion, because I think we can do both. And I would like to preface it with, I agree with Sarah, that I don't think it's a vote for or against abortion, and I didn't take it as that. And I think that, however we come out on that issue, that we could agree upon some general statements.
And just to give you an example, because I don't think perhaps I refined it enough for the presentation, but whether the child is under medical care, instead of, you know, a series of aftercare procedures; whether she is given accurate information; whether it's voluntary; whether there is prior history of sexual -- you know, I think that some of those factors, they don't have to be loaded, and they can get you to the same place however you feel about the issue. But they are not as either specific or -- they're generalized. And I think they are factors that everybody could agree upon.
And these just seem to be kind of a

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helter-skelter list. I mean, several of them have to do with voluntariness and informed consent in various forms. And I think that perhaps maybe both might be helpful to identify this for what it is, but also to have some that relate to the criteria.
CHAIRMAN BABCOCK: What do you think about Pemberton's idea that you take the general categories and then put what fits under each?
HON. F. SCOTT McCOWN: That's a good idea, but these don't fit under the general categories.
HON. PHIL HARDBERGER: I think it's a good idea, but I doubt if you're going to be able to do it in this room.
CHAIRMAN BABCOCK: That's for sure.
HON. PHIL HARDBERGER: I think it needs to go back to the drawing board.
CHAIRMAN BABCOCK: Okay. Judge Medina.
HON. SAMUEL A. MEDINA: Help me out here, folks. But when we say "may consider," does it not also mean that you may not consider? In other words, I don't see that

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we're making it a list. The very purpose of this is to say these are some things that you may consider. If they don't fit, don't consider them. If you want to add something else like may or may not.
HON. PHIL HARDBERGER: That's exactly my idea. Maybe we ought to say that in English, may or may not consider depending upon the circumstances.
CHAIRMAN BABCOCK: Justice McClure, what's your solution?
HON. ANN CRAWFORD McCLURE: Well, I want, and I think our subcommittee wanted, some guidance in here of some of the appropriate things that you might want to take into consideration to gear people in a very short time frame of what they need to be addressing with their young client who might not be real talkative. I don't mind trying to restructure it into some sort of order of what might relate to informed consent, what might relate to her levels of maturity.
I know that there was some concern expressed by some of the medical care providers on the subcommittee to ensure that

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she had given some thought to "If I don't tell my mother that I've had this and I go stay with a friend, what if there are severe bleeding problems after the abortion?" Has she given thought to "If I have complications afterwards, will I have access to medical care? Will I have the finances to be able to pay for that medical care?" Those were some of the issues that they felt needed to be addressed by the ad litem as far as making sure the child understood the consequences of not just the decision that she wanted to bypass parental approval.
And remember, you all heard the word "consent" before. The guardian ad litem is not going to be in a position to give consent. That's not what this is about. The ad litem is going to be in a position of either presenting to the court, maybe or maybe not making a recommendation to the court as to whether the minor can consent without notifying her parents. It's not a question of the judge or the guardian giving that consent.
CHAIRMAN BABCOCK: I always tell the witnesses that I'm presenting for a deposition

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that 3:00 o'clock is a very dangerous time in the deposition because people have been going all day and they've been going hard and they get tired. We cannot lose sight of the fact that it is just after 3:00 o'clock, number one; and number two, this subcommittee has had the benefit of a tremendous amount of expertise that is extra-judicial, extra-illegal, that we don't have the benefit of. And that's why we set up the procedure the way we have for this, recognizing that, if we go back to the drawing board, this committee is never going to see this again.

So what I think we should do is, as soon as I'm finished speaking, take our afternoon break. But with respect to this, I think we should note to the Supreme Court that there is considerable concern within our committee about Comment 4; and there's concern about the appropriateness of some and perhaps all of the factors that have been set forth here; and there have been some recommended changes in language, which we have approved, and which we will incorporate into the rule and leave it at that, because this committee cannot rewrite

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this comment this afternoon. Otherwise, we're never going to do everything else. So that's where I think we ought to leave it.

And since Nina is such a dear friend of mine, she can say one more thing before we take our afternoon break.

MS. CORTELL: Well, I won't be after this comment. If I could, I have just a quick sort of drafting thought. Let me just throw it out and people can think about it.

It seems to me you can group a lot of these into three or four items. One goes to mental capacity. That would cover the education piece, the employment piece, you know, that sort of thing. Another category would be considering risks, and that will hold with the procedure, after the procedure. The third would be the circumstances that led to the pregnancy. That would pick up the abuse, incest. Fourth, advisability of further counseling, picking up all the several different ones here about counseling. And then fifth, the consideration of the medical history.

HON. ANN CRAWFORD McCLURE: I didn't

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hear the fifth one, I'm sorry, Nina.

MS. CORTELL: Consideration of medical history. So I guess what I'm thinking is, one can make this non-litmus-testy, if there is such a word, and eliminate a lot of the duplication and take out some of the irrelevant items, just a quick stab at it.

CHAIRMAN BABCOCK: Thanks, Nina. After our afternoon break, which is going to be for 10 minutes, we're going to take up the always exciting appellate issues.

(10-minute recess.)

CHAIRMAN BABCOCK: Okay. We're back on the record. Everybody should have a folder that has subcommittee issues and assignments. And my experience is that late in the day sometimes we see people drift off for various reasons. So Justice Hecht wanted me to go over this right now while we have just about everybody here.

We have, as I said at the outset, made assignments to the subcommittees. And the subcommittees are organized by rule. And there's nothing particularly magic about how they're organized, although some things are

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self-evident like the Evidence Subcommittee, the Discovery Subcommittee, the Sanctions Subcommittee, that type of thing.

Does anybody have any questions or comments? And for those of you who came in late, if you have a particular interest or experience in a particular area of the rules and you want to be on that subcommittee, you're welcome to do that. Just come to me and let me know what subcommittee that is that you're interested in. As I said earlier today, that does not mean that you necessarily can get off the one that you're on. But we're certainly always willing to accept more work from everybody. So with that said, does anybody have any questions? Yes, Sarah Duncan.

HON. SARAH B. DUNCAN: Issues to be addressed, is that exclusive or preclusive? Or is that just, "Here are these, and if you want to do more, you can"?

CHAIRMAN BABCOCK: That is issues that are pending before our committee as of today. Justice Hecht sent a letter out that had a whole big laundry list of things, and he

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and I have assigned them now to the subcommittees. And then there are other letters, like David Jackson wrote one that raises three or four issues, that have come in over the past two years.

HON. SARAH B. DUNCAN: For instance, a Law Review article has been written. We might consider adopting or not adopting what was written in that Law Review article.

CHAIRMAN BABCOCK: We could obviously consider that. Yes, Judge.

HON. SCOTT A. BRISTER: Or the Jury Task Force proposals that aren't on the list.

CHAIRMAN BABCOCK: Okay. Bill Dorsaneo.

PROFESSOR DORSANEO: Chip, how does this relate to the recodification draft? We spent a large part of the last two years that we were in session going over that draft. And I guess I'm wondering whether the subcommittee arrangements wouldn't involve the enumeration in that draft as well as in the current Civil Procedure Rules.

CHAIRMAN BABCOCK: I'll pitch that to Justice Hecht.

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JUSTICE HECHT: Of course, we've got the committee's recommendation on the entire recodification. But as we're continuing to consider that in-house at the Court, these are some other issues that have come up that we need to look at at the same time. So that as things progress, we can either work them in or, if the committee feels like they're more important and they should get done sooner, then we can go ahead and do them while the other work is pending.

CHAIRMAN BABCOCK: Alex.

PROFESSOR ALBRIGHT: In previous years we've gotten these big notebooks with all these letters. This year, is the committee chair just going to keep the stuff for that particular committee and make sure that the committee members have the information before the meeting?

JUSTICE HECHT: It's in the back. All the stuff we have that my letter refers to, there's a copy of it for everybody in the back.

PROFESSOR ALBRIGHT: Oh, okay. So we still have to schlepp around all this

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stuff. I was trying to offer an alternative to that.

HON. SARAH B. DUNCAN: Aren't you glad you drive a van?

CHAIRMAN BABCOCK: You have to schlepp it around. Paula.

MS. SWEENEY: Two things. We have had the procedure of "Okay. You're up next Friday. You all have a meeting. It's time."

CHAIRMAN BABCOCK: We're going to talk about that in a minute.

MS. SWEENEY: Okay. So we'll have specific sort of deadlines and mini-deadlines and subdeadlines and continuances.

Secondly, was there any attempt made -- or how was the composition of the subcommittees arrived at? And is it set in concrete? Was there any eye to balance either geographic, political or otherwise?

CHAIRMAN BABCOCK: It was darts. Darts was the way we did it.

MS. SWEENEY: Do we get some darts to throw? Can we add to our committees?

CHAIRMAN BABCOCK: Yeah. It is not set in concrete, Paula. And there was,

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however, some thought that went into it. And in your case, I think maybe we've got you overloaded a little bit.

MS. SWEENEY: It don't look like a fair fight to me.

CHAIRMAN BABCOCK: And there are some people that we would entertain shifting responsibilities because you're so overloaded, so that's the answer to that. What else? Anybody else?

JUSTICE HECHT: If you have questions about my September 24th letter, you're welcome to call. Please call Bob, if you would. But what we tried to do was just go through all of the letters we've received, some of the legislation that was introduced during the last term, the last session of the Legislature, comments that have been made. And we've all -- I see we've left out something already. The Jury Charge Task Force proposals should be in here.

And this is not an exclusive list. If a subcommittee comes up with other things that they think the committee ought to think about, they should add those to the agenda.

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CHAIRMAN BABCOCK: Okay. In terms of deadlines, there is an issue of whether or not any of these subcommittees has something that they are far enough along with that they would be ready to report to the full committee by November. That's a month from now. If there is, then we'll meet in November. If there isn't, we won't meet until January. And we will take either volunteers or assign projects for the January meeting.

So the first question is, is there any subcommittee that has something that is far enough along that it could be ready within a couple of weeks to send out to everybody on this committee and then meet sometime in November to discuss it?

HON. F. SCOTT McCOWN: No.

CHAIRMAN BABCOCK: The answer to that is no. That's what we thought. But we didn't want to slight anybody, if you've been busily working away the last month or so.

PROFESSOR ALBRIGHT: Is there any truth to the rumors that we're going to have new Sanctions and Jury Trial Rules out soon?

JUSTICE HECHT: Well, we're working

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on it. They're probably going to come back -- because time has passed -- they're probably going to come back to committee, but I don't know that for sure.

PROFESSOR ALBRIGHT: Okay. So we couldn't do that?

JUSTICE HECHT: I don't think we could do that in November, no.

CHAIRMAN BABCOCK: Okay. So it looks like January for our next meeting. And we need to set that now so that we can reserve hotel space and don't run into the problem that we did this time.

So does anybody have any particular preference in January 2000?

HON. SCOTT A. BRISTER: The later the better.

PROFESSOR CARLSON: How about the 28th?

CHAIRMAN BABCOCK: Excuse me?

PROFESSOR CARLSON: The 28th.

CHAIRMAN BABCOCK: The 28th is a Friday and the 29th is a Saturday. What do people think about that? All right. Hearing no dissent, then January 28th --

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HON. SARAH B. DUNCAN: Can I point out that the 30th is the Super Bowl? It doesn't make any difference at all to me, but there may be people in the room that are not going to be available.

MR. YELENOSKY: Because they're preparing to watch?

CHAIRMAN BABCOCK: Super Bowl is on Sunday, isn't it?

HON. SARAH B. DUNCAN: But it's in Atlanta. There are going to be some people traveling.

CHAIRMAN BABCOCK: Do you really think the Cowboys are going to be in it?

HON. SARAH B. DUNCAN: I don't know. It never even occurred to me. I'm not even sure what sport it is. All I know is it's on the 30th.

CHAIRMAN BABCOCK: We'll take our chances on that. So the next meeting will be January 28th and the morning of the 29th. And I believe, Carrie, that we have a block of rooms at The Four Seasons? We do. We have a block of rooms at The Four Seasons. If you tell them promptly that you're with the

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Supreme Court Advisory Committee, we get a better rate, too, don't we? We get a good rate, or a better rate, and a nice hotel and a good room, so make your reservations quickly. So that takes care of that.

Anything else on subcommittees? Okay. Let's go to appellate issues. And Justice McClure is going to tell us about appellate issues, and then we're going to sit back and watch Richard and Sarah fight each other for a couple of hours.

HON. ANN CRAWFORD McCLURE: We had some discussion at the subcommittee level concerning the appropriate appellate standard of review. The statute does not prescribe a standard of review. Some of the other states that have adopted these provisions have incorporated a standard; others have not.

We came to the conclusion that it was better if we remained silent on that issue, except but to say that de novo in our view was not the appropriate standard of review.

Part of the difficulty that we faced is in a nutshell this: The trial judges on our subcommittee took the position, a number of

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them did, that because the statute allows for so little discretion, if they find sufficient evidence to support a conclusion that she is mature enough to make this decision without parental involvement, that they are very much opposed to an abuse of discretion standard. They would prefer that we utilize traditional sufficiency review. That is problematic for a couple of reasons. One, the intermediate courts are not consistent in what we do with traditional sufficiency review and overlapping abuse of discretion.

Justice Duncan has written a dissenting opinion on that subject. I've written a majority opinion on the subject incorporating some of Mike Hatchell's comments in an article that he wrote on that issue. And the Supreme Court has not addressed it directly.

So rather than fight that battle here or at the subcommittee level, we simply noted the disparity of opinions and did not express a specific standard of review.

Does anybody have any questions on that?

CHAIRMAN BABCOCK: Any questions on that? Comments? Suggestions? Next.

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HON. ANN CRAWFORD McCLURE: Filing deadlines was next. Now, the subcommittee took the position that we needed to come up with something that could be practically applied in the intermediate courts because we've got a 48-hour -- in some instances a little better than 48 hours, but for purposes of our discussion, let's call it 48 hours of turnaround time between the time the notice was filed and the time the ruling must occur.

We had a debate over does ruling give rise to a conclusion that is referencing the opinion? Is it not referencing the opinion? That is highlighted for you in the footnotes, those discussions.

We did decide to adopt some appellate timetables, and we have implemented some rules. Given this group's decision to remove the time frames from the trial court process and merely refer to the statute, I suspect that that will be a point you might want to vocalize --

HON. F. SCOTT McCOWN: We didn't vote that way. I thought that's the opposite of what we decided.

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HON. ANN CRAWFORD McCLURE: We took the rules -- my understanding of what you did is you took out the specific references in the rules that the committee drafted --

HON. F. SCOTT McCOWN: No. Exactly the opposite.

HON. ANN CRAWFORD McCLURE: -- and simply wanted to incorporate the statutory language.

HON. F. SCOTT McCOWN: No. I thought we made exactly the opposite decision, that we decided to agree to leave it just the way the committee had it.

HON. ANN CRAWFORD McCLURE: I did not hear that. That's fine.

All right. Well, we came up with some of these time frames. We have crafted some distinctions between rulings and opinions that everybody may not agree on.

Obviously, whatever the intermediate court does, should there be a situation in which the intermediate court affirms the trial court's denial, there can be an appeal to the Supreme Court. The Supreme Court would need the benefit of the intermediate court's

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analysis in order to consider those issues, so there is obviously a more stringent time constraint in the event of an affirmance than in the event of a denial, because the denial is not appealable.

So we tried to come up with some realistic deadlines, and I'll let you debate the wisdom of our conclusions on that.

CHAIRMAN BABCOCK: What rule is that in?

HON. ANN CRAWFORD McCLURE: We're in Rule 3.3.

HON. F. SCOTT McCOWN: It's on Page 25 of the big draft.

HON. ANN CRAWFORD McCLURE: It's Rule 3, and then the time frame is 3.3(b). On the annotated version, it's Page 25.

CHAIRMAN BABCOCK: If we can, before we get on to the record, let's talk about these deadlines, 3.3(b). Does anybody have any comments or suggestions about these?

Were you finished, Ann? I didn't mean to cut you off.

HON. ANN CRAWFORD McCLURE: Yes.

MS. SWEENEY: Chip.

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CHAIRMAN BABCOCK: Paula.
MS. SWEENEY: What are the underpinnings of the continuance section? Where did that come from?
HON. ANN CRAWFORD McCLURE: It comes from the statute.
MS. SWEENEY: Okay. Well, what are the underpinnings -- I know you all didn't write the statute, but why is that sort of odd looking clause in there?
HON. ANN CRAWFORD McCLURE: What we concluded ultimately was it would give the opportunity for additional investigation, if the ad litem or the applicant wanted to bring other information to the trial court; that they couldn't get the doctor up here in 48 hours and it was imperative in their view that that doctor be here to give some insight.
From the appellate standpoint, the opportunity is briefing an oral argument. If the applicant wants, or her lawyer wants to brief it in the court of appeals, that is a mechanism in which to do that.
CHAIRMAN BABCOCK: Justice Duncan.

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HON. SARAH B. DUNCAN: Haven't we already discussed requiring an opinion? The statute speaks in terms of a ruling.
HON. ANN CRAWFORD McCLURE: We debated that at the subcommittee. As to whether confidentiality would apply, we haven't discussed the distinctions between ruling and opinion.
CHAIRMAN BABCOCK: Richard tried to make it public, but that failed.
HON. SARAH B. DUNCAN: Whatever it was.
CHAIRMAN BABCOCK: Yeah. The opinion as opposed to the ruling.
MR. ORSINGER: There's just going to be this universe of unknown law that's developing out there.
CHAIRMAN BABCOCK: Representative Dunnam, yeah.
REPRESENTATIVE DUNNAM: In regard to if the trial court does not rule, there is a provision for automatic instanter certification to be issued by the clerk. There is not a similar paragraph with regard to if the court of appeal does not rule.

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CHAIRMAN BABCOCK: In the statute or in the rules?
REPRESENTATIVE DUNNAM: In the rule. In the rule, under two point something (f), it says that the applicant can go to the clerk, if there has not been a ruling within 48 hours, and the clerk will give them a certificate. There's not a similar provision in regards to the court of appeals' failure to rule.
HON. ANN CRAWFORD McCLURE: It's in 3.3(b)(3), the last sentence, upon the minor's request, the court of appeals or its clerk must issue a certification that the appeal was not ruled on in accordance with 33.004(b), and, therefore, that the application is deemed to be granted.
REPRESENTATIVE DUNNAM: Never mind.
HON. SARAH B. DUNCAN: Is it also upon request in the trial court?
MS. LOPEZ GARCIA: Yes. Upon request, the court of appeals or its clerk must issue a certification.
HON. ANN CRAWFORD McCLURE: And the forms include both for the trial court and the

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appellate court, a format that might want to be utilized to accomplish that.
CHAIRMAN BABCOCK: Richard.
MR. ORSINGER: Technically this isn't on the table, but it's so close I'm going to ask permission to raise it.
On Rule 4.1, you provide that the notice of appeal from the court of appeals to the Supreme Court is to be filed in the Supreme Court, and I think that's ill-advised. I think that the notice of appeal from the court of appeals to the Supreme Court should be filed in the court of appeals, and then the court of appeals will have the obligation to notify the Supreme Court and forward the record within 48 hours.
I can foresee a lot of frantic activity when the Supreme Court Clerk gets a notice and doesn't have a record of trying to get the clerk of the court of appeals to get the record over there within the next 12 hours so that the Supreme Court -- so anyway, it seems logical to me that, like the notice of appeal to the court of appeals is filed in the trial court, the notice of appeal to the Supreme

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Court should be filed in the court of appeals and then forwarded.

HON. ANN CRAWFORD McCLURE: We talked about that. In fact, the first draft was that.

MR. ORSINGER: Why did you all change it?

HON. ANN CRAWFORD McCLURE: Because right now all of the notices are filed in the Supreme Court and there hasn't been any difficulty with getting notice to the clerk of the intermediate court. It's been filed again as the record. We make a provision of forwarding the file in 4.2(b). In order to facilitate the delivery, we've utilized the language "must instanter have forwarded to the Supreme Court the portions of the record."

MR. ORSINGER: But the timetable you guys are operating on is not a 48-hour timetable. So when somebody drops this by at 4:30 in the afternoon on a Friday at the Supreme Court, somebody in the Supreme Court is going to desperately try to get ahold of the clerk of the court of appeals to tell them they need to pull the record together and get

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it to the Supreme Court so they can rule within 48 hours. Is that not right? Or how long does the Supreme Court have to rule? Oh, is it -- how many business days?

MR. TIPPS: There's no deadline with the Supreme Court.

MR. ORSINGER: Two business days. Okay. Well, I don't mean 48 hours, I mean two business days. But as a practical matter, shouldn't the party who has the duty to pull the record together and get it out that same day be the one that gets notice of the appeal, and not the recipient, who then has to contact the party that has to get it out to send it back to the recipient.

CHAIRMAN BABCOCK: Could you say "with a copy to the clerk of the court of appeals"?

MR. ORSINGER: That would be okay with me too. I don't care about that. But it seems to me like the court of appeals is the one that needs to be humping, not the Supreme Court. You're okay now because you've got weeks and weeks and weeks to do it.

CHAIRMAN BABCOCK: That's a well

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known legal term, "got to be humping." Justice Duncan.

HON. SARAH B. DUNCAN: This goes back to my earlier question. Why does the applicant have to request a judgment, which is basically what this certification is? In no other circumstance that I'm aware of do we require a party to ask us to issue a judgment. We simply do. And I don't understand.

HON. ANN CRAWFORD McCLURE: Well, in this instance, there hasn't been the issuance of a judgment adjudicating. It's the failure -- what you're talking about is what you were talking about before. It is some sort of certification that the court did not act within the time constraints, which can be prepared by the clerk.

HON. SARAH B. DUNCAN: But it's sort of like void ab initio. If it is deemed to be granted, then it is granted, and there is a judgment entered or an order.

HON. ANN CRAWFORD McCLURE: The medical providers wanted to have a piece of paper in their hands by which they could say,

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"Yes, I have authority to go forward," and some means to compare identity in the order or the certificate from the clerk that it was deemed granted to match it up with the identity of the minor.

HON. SARAH B. DUNCAN: But that's what I'm saying. Why does the minor have to request that? The usual thought is that until the appellate court renders a final judgment in the matter, there is nothing that will merge with and obviate the trial court's order, and we're all of a sudden in this one context requiring a party to request a judgment so that it will then be merged into --

HON. F. SCOTT McCOWN: It's not a judgment. It's a certificate from the clerk that there was no judgment within the time allotted by law.

HON. SARAH B. DUNCAN: But if it's deemed to be granted, then it is granted.

HON. F. SCOTT McCOWN: But the provider has to have a piece of paper to go forward.

CHAIRMAN BABCOCK: Elaine Carlson.

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PROFESSOR CARLSON: I agree with Sarah. I think you just strike the words "Upon the minor's request," and tie it in with the first sentence. Make it obligatory to issue the certificate.

HON. SARAH B. DUNCAN: Otherwise there is no judgment. We have trial court order, appeal, and no judgment. It's like it just vanishes into thin air somewhere and there's no resolution of the proceeding if there is no appellate court order, no judgment.

MR. PEMBERTON: I think part of the problem is, the reason you don't have a ruling is trial court inaction, and so there was a provision for a party, there having been inaction, to go to the clerk and get something out of them. I mean, otherwise, you'd have people similarly waiting for their certification that never comes.

HON. SARAH B. DUNCAN: But that's what I'm saying. I think inaction is action.

HON. F. SCOTT McCOWN: But it's not a record of inaction. The certificate is a record of inaction.

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HON. SARAH B. DUNCAN: But the point, it seems to me, is not to make a record of the inaction, but to make a record, the judgment or order, of the effect of the inaction. That application is granted at that point in time.

HON. F. SCOTT McCOWN: And who certifies to that?

HON. SARAH B. DUNCAN: We issue a judgment, is what we do.

HON. F. SCOTT McCOWN: Put here is the problem: You've got two different actors. The court doesn't act within the time required. Now, the doctor needs a piece of paper saying, "I can do this." The court hasn't acted. It doesn't do any good to say that the court will issue a record that it hasn't acted, because if the court is ignoring its duty to act and hasn't acted once, it can ignore its duty to act and not act twice. So you have a second party, which is the clerk, that issues the piece of paper that says the court didn't act.

HON. SARAH B. DUNCAN: Why do you do that? The court -- maybe this is semantics

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between the court and the clerk. But the clerk is our appointed employee and in large measure does what we suggest that he or she do.

HON. F. SCOTT McCOWN: With independent statutory duties. If we went in to the clerk and said, "Destroy all the records," I'm assuming the clerk wouldn't do it. This is an independent statutory duty, by rule, placed on the clerk, to issue a certificate that you haven't done what the law told you to do.

PROFESSOR CARLSON: And if the minor doesn't ask for the certificate, then where is the judgment?

MS. LOPEZ GARCIA: There won't be one because there is no mechanism set up. There's no tickler system or anything where the clerk could know when the 48 hours had passed or whatever time has passed that they would know to issue an order or a certificate saying that it's granted as a matter of law because the judge failed to rule on it.

HON. SARAH B. DUNCAN: That's an easy things to know. We time stamp things

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when they're filed. We note that they were filed and they have a date and time stamp on them.

HON. F. SCOTT McCOWN: But if I'm a doctor, I don't know if there's an order in the file or not. I need a piece of paper from the clerk telling me that there is no order in the file.

HON. SARAH B. DUNCAN: No. What you need is -- it seems to me, what I would need, as the doctor, is a piece of paper that is the order granting the application because the court failed to act on it.

MR. YELENOSKY: Signed by?

HON. SARAH B. DUNCAN: Signed by the court.

MR. YELENOSKY: But the court doesn't do it.

HON. SARAH B. DUNCAN: The court has acted by failing to act.

HON. F. SCOTT McCOWN: But they refused to sign it, or they don't sign. They didn't sign the first time. You're acting like how could that possibly happen, yet they've already been told to do it within

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48 hours. They've already failed once. So assuming they failed once, we're not going to let them fail again.

CHAIRMAN BABCOCK: Judge Rhea.

HON. BILL RHEA: If you take out that language "upon the minor's request," it seems to me that you're making it more difficult for the minor to get the piece of paper. Because if you take it out, then the clerk has got the obligation to certify it. What are we going to do? Where is the clerk going to get the information that the judge hasn't acted? It may just sit there for a week or two. And then if the minor comes up and asks for it, the clerk says, "What are you talking about?" Then here is this rule that says upon the minor's request the clerk shall do it. It seems to me the minor is at least as well off and probably better off with this on it.

PROFESSOR CARLSON: And what if the minor doesn't ever ask?

HON. BILL RHEA: Well, she's got an attorney.

HON. F. SCOTT McCOWN: If she didn't

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ask, then she didn't want it. She's changed her mind.

PROFESSOR CARLSON: Where is the judgment? In every other instance, I agree with Justice Duncan, you end up with a judgment of the court, and that defines the date and the time and --

CHAIRMAN BABCOCK: Well, if this plays out the way that it's kind of playing out, the 48 hours passes, the minor, either by herself or through her attorney, gets her certificate from the clerk. That certificate is taken to the doctor and the procedure is performed. The court may sometime later decide something, although by then it's moot. I mean, you can come up with another piece of paper if you want, but you will have a file that won't be finished in the traditional sense, but what does it matter, because all of the relief that's requested is granted. And it's not like the media is going to come get you, because they can't see it.

HON. SARAH B. DUNCAN: I don't know, I maybe we're not communicating. If the statute says the application is deemed

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granted, then it is granted. And if I'm a provider out there, I don't want to know that you didn't act. I want this statute to be implemented, and I want an order that says that application is granted. That's completely different from saying the court failed to act.

CHAIRMAN BABCOCK: That's what the clerk's form says. That's what the clerk's form is supposed to say, right?

HON. SARAH B. DUNCAN: Yes, deemed granted.

PROFESSOR CARLSON: I understood the legislative intent was that there had to be a judgment granted in the event of inaction.

PROFESSOR DORSANEO: There is a form here, isn't there? 3D? Why don't we look at it and see if it would make any sense to a doctor.

MS. LOPEZ GARCIA: Form 2D.

MR. PEMBERTON: The term "deemed granted" comes from the statute.

CHAIRMAN BABCOCK: It's like a motion for new trial, deemed overruled, no order.

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HON. F. SCOTT McCOWN: I mean, as a trial judge, I can sleep at night even knowing there are so many motions for new trial out there that have been overruled by operation of law and I've not tied up the paperwork.

HON. SARAH B. DUNCAN: I'm sorry, but that's completely different. Because if a motion for new trial is overruled by operation of law, there is an extant judgment. It exists. We can look at it. We can touch it. But what we're talking about is a judgment that isn't.

PROFESSOR ALBRIGHT: There is no judgment.

HON. ANN CRAWFORD McCLURE: It is legislatively granted realistically. It wasn't by the judge. It was deemed granted by the Legislature, because the judge didn't act within the time frame. That's realistically what it is. And I understand your confusion.

HON. SARAH B. DUNCAN: But is that in and of itself a judgment? I mean, what we've got here is a clerk issuing what is, in legal effect, a judgment. No, it's a judgment. The application is deemed to be

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granted. That's a judgment.
CHAIRMAN BABCOCK: That's what the statute says. Richard.
MR. ORSINGER: Both at the trial court level and the court of appeals, and now the court of appeals to the Supreme Court level, we're saying that the passage of time is tantamount to a grant. It doesn't say that it's tantamount to a signed order. And it says that the physician is entitled to go ahead and perform the abortion. So the legislation says that if the court doesn't act, the operation goes forward. And there's no requirement that there be a piece of paper for the operation to go forward, if this clause applies.
And let me say as an aside that I'm bothered by the forms because they don't identify the woman. So if we take this form into the hospital and it's "Jane Doe" and her name isn't anywhere on here, how the hell do they know it's the right Jane Doe?
HON. ANN CRAWFORD McCLURE: Now, there is a verification page, and I know you all didn't get these in time to thoroughly

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analyze it, but the concept is there is a verification page that she has to fill out that gives her identity, that is marked with the docket number. It is removed from the court file and placed under seal or in a vault or someplace secure and separate. She is given a certified copy of her verification page that has her name on it and the docket number. What the doctors asked for was, "We want some document from the court showing it's either been granted or he didn't act in time and it's deemed to be granted, and some mechanism by which we can match identity." And that's what we tried to do.
MR. ORSINGER: Okay. So the document the woman has, they can match the cause number up with the order and realize it's the same woman?
HON. ANN CRAWFORD McCLURE: Yes.
MR. ORSINGER: Okay. Then my next question is, who says she has the right to appeal to the Supreme Court? If you read the statute, it only provides for an appeal to the court of appeals, and it doesn't provide for any -- it just says that if the court of

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appeals fails to act, the operation goes forward. It doesn't say that there is any appeal to the Supreme Court and that the operation is delayed because of the appeal to the Supreme Court or anything else.
HON. ANN CRAWFORD McCLURE: There is a provision that says, "An expedited confidential appeal shall be available to any pregnant minor to whom a court of appeals denies an order authorizing the minor to consent." Now, if it's not the Supreme Court, I don't know who it is.
JUSTICE HECHT: The Court of Criminal Appeals, I hope.
CHAIRMAN BABCOCK: It's 33.004(f).
HON. ANN CRAWFORD McCLURE: It's kind of buried in the intermediate paragraph.
MR. ORSINGER: And this means to the Supreme Court of Texas?
HON. ANN CRAWFORD McCLURE: Well, our subcommittee decided that that was probably the best thing we could recommend.
HON. F. SCOTT McCOWN: Unless it's any court in Texas.
CHAIRMAN BABCOCK: That's right. In

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this state. Okay. Does that solve your problem?
MR. ORSINGER: Yeah.
CHAIRMAN BABCOCK: All right. Now, Sarah, have you still got -- yeah, you're bemused by all of this.
HON. SARAH B. DUNCAN: It's just never-never land.
CHAIRMAN BABCOCK: All right. Richard had raised a point earlier --
HON. SARAH B. DUNCAN: How can you not have --
MR. ORSINGER: You can by being a legislature and passing a law like this.
HON. SARAH B. DUNCAN: But all the statute says is, "If the court of appeals fails to rule on the appeal within the period specified by this subsection, the appeal is deemed to be granted and the physician may perform the abortion as if the court had issued an order authorizing the minor to consent to the perfomrance of the abortion without notificaion under Section 33.002." And that's fine. All they're saying is that it's deemed granted by failure to act.

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They don't say that the court, by rule, is going to create a class of cases in which the only order in existence is an order that's been reversed.

MR. YELENOSKY: Well, it doesn't say that.

MR. ORSINGER: No, it gets murky.

MR. YELENOSKY: Presumably you would issue a judgment. But in those courts where you can't get a signed judgment because the court won't do it in a timely manner, you need somebody who has administerial duty to issue a piece of paper for the doctor, and that's the clerk.

HON. SARAH B. DUNCAN: I'm not disagreeing with that.

MR. YELENOSKY: Then what are you doing?

HON. SARAH B. DUNCAN: The court must issue an order granting the application if they fail to act within the time specified by the statute.

MR. YELENOSKY: And if they don't, the clerk can't make the court do that.

HON. SARAH B. DUNCAN: Well, I would

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say regardless of whether the court does that or not, fulfills that obligation, of course, you can always go to the clerk and get a certified copy of something that exists or a certification by the clerk that it does not exist.

CHAIRMAN BABCOCK: And that's kind of what they're trying to do. I think maybe we're arguing about that less-than-one-percent of the cases where the court of appeals does not do what the statute and the rules require them to do that.

HON. SARAH B. DUNCAN: These rules don't require us to issue an order.

CHAIRMAN BABCOCK: Well, but the statute does. The statute gives you two days to do something. And these rules, as I understand it, say that if the court itself does not provide the minor with a piece of paper that she can take to the doctor and say, "See, I win on this," and then the doctor says, "Great, okay, let's go," then in that instance, in that rare instance, which would never happen in the San Antonio Court of Appeals, but in that rare instance, then there

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is another mechanism where the child can go to the clerk. And the clerk will issue this piece of paper, which the doctors are saying, "For our protection, we've got to have it." Right?

HON. ANN CRAWFORD McCLURE: Right. Part of our concern also was on this time frame. Let's suppose it's filed in the middle of July and everybody is on vacation or they're all attending the Economic Institute in Lawrence, Kansas, or wherever all of the judges happen to be, and there is inaction. And now she's got a legislative grant to go forward, and there's no judge to sign it.

HON. SARAH B. DUNCAN: And I'm not suggesting there should not be a procedure by which the clerk certifies for a lack of action. All I'm suggesting is, in every other kind of case we are required to issue a final order or a judgment disposing of that matter. I'm not even sure how the Office of Court Administration is going to let us dispose of these statistically.

MR. HATCHELL: One reason you have a judgment as opposed to a record of inaction is

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because the only extant judgment is a judgment that contains findings. The only findings made by anybody authorized to make findings in this case --

THE REPORTER: Mr. Hatchell, could you please speak up.

MR. HATCHELL: I was saying the reasons we have a judgment of a case on appeal, as opposed to just an order of inaction, is because you have a live, unsuperseded judgment that denies the application, which, under the statute, contains findings which are contrary to the right which is being sought.

There are many cases that hold that if your last judgment is set aside, it is a binding judgment. So basically what you end up with, under our procedure, is something that says, "We have failed to take an action, and we deem it's granted," but on the other hand, this judgment is still alive. And there are cases in Texas which will recognize the existence of two live judgments at the same time.

And this procedure which the legislators

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set up is impossible. The only way you can solve Sarah's dilemma is to amend our rules to say, you used to on the judgment, but at least setting aside the trial court's judgment.

MR. ORSINGER: But Mike, by that time, it's mooted because the abortion is over, and all you should do at that point is dismiss the whole proceeding.

MR. HATCHELL: That's probably right.

MR. ORSINGER: So you shouldn't be issuing an order, because it's going to be moot by the time you issue it.

PROFESSOR CARLSON: So when does the plenary power of the court of appeals expire? It could run, under Rule 19, from the day of the judgment. What you have is a certificate from the clerk saying that, well, they didn't act in time. Now what? I'm not worried about the minor getting the abortion. That's taken place with the certificate. What I'm concerned about is our judicial process and having a judgment of the court.

HON. SARAH B. DUNCAN: It's the conceptual basis of the proceeding. And I

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don't think it's inconsistent. I rarely scream at Michael Hatchell, but I don't think it's necessarily inconsistent with the words of the statute to tell the court of appeals that in this case, like in any other, you will render a judgment. And regardless of whether you do or not, the applicant can go get a certification from the clerk as to whether you acted or not in a timely fashion.

MR. EDWARDS: Why don't you just put in there that if the court doesn't act within the time prescribed, the court will dismiss the case as moot?

MR. ORSINGER: Better dismiss the trial court proceeding as moot, not the appellate proceeding.

HON. F. SCOTT McCOWN: These are stand-alone rules. We're not creating precedent for other cases or other procedures. They are stand-alone rules to meet a legislative mandate of a particular problem, and it's just a very practical a lot way to get it done.

HON. MICHAEL H. SCHNEIDER: Shouldn't we also keep in mind that this is

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just a defense to a criminal action? It's not really -- I mean, you can say it's consent, whether or not it's deemed consent or whether or not you obtained consent. When this really becomes relevant is when you go to a criminal trial and a doctor is charged with this. So we may be arguing about something that really doesn't add that much value.

HON. ANN CRAWFORD McCLURE: This whole scheme was set up at the request of the medical care providers on the subcommittee who made it quite clear that they were not going to perform the abortions unless they had something indicating inaction resulting in a deemed granting of the application.

MR. ORSINGER: They wanted a piece of paper they can look at. They don't want to just count calendar days.

HON. SARAH B. DUNCAN: Well, why aren't there alternatives? We can certainly provide for certification and also a final order.

CHAIRMAN BABCOCK: The voice of the clerk is speaking.

PROFESSOR DORSANEO: And it's not

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possible to hear at this end of the room.

CHAIRMAN BABCOCK: Speak up, everybody.

MS. GROOMER: I have one other observation with regard to the clerk certificate that we discussed. One thing that the doctors were very concerned about was the ability to marry up the verification page that is removed from the application and never proceeds with the case from the trial court level. If it goes up to appeal, the verification page is not sent up. It only resides with the trial court clerk.

And the doctors were very concerned about having access to that verification page, matching it up with the correct minor to do the procedure on the correct person. So the certificate is a way to marry up the verification page with a written record from the court that there is no order entered, so it's deemed granted, and here is your verification. And they wanted both of those, of course, a certified copy of the verification page under seal and the notice under seal. There has to be a way to get back

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to them the verification of the identity.
CHAIRMAN BABCOCK: Justice McClure, having heard these concerns, is there anything that you want us to propose, suggest?
HON. ANN CRAWFORD McCLURE: How about legislative amendments?
CHAIRMAN BABCOCK: Short of legislative amendments.
HON. ANN CRAWFORD McCLURE: I think it's important that -- and we tried to do that by footnote and comment. The difficulty was implementing the scheme at the appellate level certainly, and I don't disagree with the problems that both of you are expressing, and perhaps it would be appropriate for this committee to reinforce those difficulties to the Supreme Court to try and resolve some of the issues.
This was a long process in my committee to come up with something that everybody could sign on to, and I'm uncomfortable at this point making alterations in that scheme on behalf of my subcommittee. So I would encourage you, if you could reach a consensus that you can support, that you do it by way of

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expressing your opinion.
CHAIRMAN BABCOCK: Okay. I think what we should do is this: Bob, if you could note for the Court that there is considerable consternation among some of the appellate specialists on our committee concerning this never-never land proceeding; that it is just going to be out there in the ether; and that, while we won't propose any particular concrete solutions, we think that there's a potential problem there. Is that a fair analysis?
HON. F. SCOTT McCOWN: Well, I'm not sure what you mean by the word "considerable." Are you talking about the strength of their individual feeling or the strength of their numbers?
CHAIRMAN BABCOCK: I was confining it to a small group of lawyers on our Advisory Committee that specialize in appellate practice. So I would not say that the concern is shared by Anne McNamara, just to pick somebody. Have I got that straight, Anne?
MS. McNAMARA: You've got it right.
MR. ORSINGER: A few are concerned; the rest don't care.

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CHAIRMAN BABCOCK: Well, we wouldn't want to say that we're uncaring either.
Bill and then Carl.
PROFESSOR DORSANEO: Well, I'm back on Form 3D, and I would like that form to say what it means, that the application is granted. Well, I'm looking at 3D, and Nina tells me 2D is the same thing.
CHAIRMAN BABCOCK: 2D is the trial court and 3D is the court of appeals.
PROFESSOR DORSANEO: All right. I guess I'm really talking about 2D and then also talking about 3D. I don't like language, even though the statute uses the language "deemed to be granted," I mean, it either is granted or it isn't granted. Let's have it be granted. And let's say what that means, so somebody reading it can know that it means that you can perform the abortion on getting the consent of the right person. And it might be a good idea to indicate how you ascertain who the right person is.
CHAIRMAN BABCOCK: You would say "granted by operation of law" or something like that?

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PROFESSOR DORSANEO: "Granted" is fine with me.
CHAIRMAN BABCOCK: Okay. Carl.
MR. HAMILTON: I just wondered if any thought was given to this question of how the trial court transmits the notice of record to the court of appeals. Because if this happens, let's say, Monday afternoon at 4:30 and the notice of appeal is filed, then the appellate court has to rule by 5:00 o'clock on Wednesday. They're not even going to have the record in most cases or the notice by that time.
CHAIRMAN BABCOCK: That's the next issue on our checklist here, the record on appeal. We'll get to that in one second here. Any other comments? Richard, do you have a comment?
MR. ORSINGER: Bill's suggestion that we turn the "deemed granted" to "granted" troubles me a little bit, especially if it's signed by a clerk. I think a clerk could sign something that by operation of law is deemed granted, but I don't know. If the court doesn't act and the clerk is certifying that

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the court didn't act, it seems to me like we shouldn't that the court is acting, we should just say that by law it's as if the court acted. I know it sounds bizarre.

CHAIRMAN BABCOCK: Ann, do you accept Bill's recommendation?

HON. ANN CRAWFORD McCLURE: No.

CHAIRMAN BABCOCK: Okay. So we don't need to discuss that.

PROFESSOR DORSANEO: Why don't we write it in Chinese.

CHAIRMAN BABCOCK: We could do that too.

HON. ANN CRAWFORD McCLURE: Well, we address Vietnamese, English and Spanish. We can put it in Chinese too.

CHAIRMAN BABCOCK: Justice Duncan.

HON. SARAH B. DUNCAN: Well, I would defer to Chief Justice Hardberger on this, but our clerks don't even want to tell you when a brief is due. Now, it's just beyond my imagination that clerks are going to be comfortable with basically granting an application to bypass parental notification.

CHAIRMAN BABCOCK: Well, it's an

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administerial duty for sure.

MR. ORSINGER: By a non-elected official, I might add.

CHAIRMAN BABCOCK: A district clerk?

MR. ORSINGER: No. The clerk of the court of appeals who is going to be signing all of these when the court of appeals never rules on them.

HON. ANN CRAWFORD McCLURE: We did have one appellate court clerk on the committee who was comfortable with this language.

CHAIRMAN BABCOCK: Justice McClure, Richard's point, made several hours ago, that on Rule 4.1 the notice should be filed with the Supreme Court with a copy to the clerk of the court of appeals, is that something you can accept or not?

HON. ANN CRAWFORD McCLURE: Sure. With a copy to the court of appeals, I think.

CHAIRMAN BABCOCK: To the clerk of the court of appeals. Is that okay with you, Richard?

MR. ORSINGER: Yeah. But I would make a plea, since the court of appeals is

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probably going to be in the city where the woman lives or at least close by to it, why don't we file it with the court of appeals and send a copy to the Supreme Court instead of filing it in the Supreme Court. You're going to lose another two days if you mail it to the Supreme Court, and then they're going to contact back to the court of appeals, which is then going to have to mail something back to the Supreme Court. And we've lost five or seven days, and we've got everybody else running around on a 48-hour or two-business-day timetable, and I don't see the logic.

HON. F. SCOTT McCOWN: Does the Supreme Court have fax filing?

MR. PEMBERTON: Not at the present time.

CHAIRMAN BABCOCK: Do you accept that change, Justice McClure?

HON. ANN CRAWFORD McCLURE: Not on behalf of the subcommittee, I can't, because we had that debate.

CHAIRMAN BABCOCK: So we'll add the language "with a copy to the clerk of the court of appeals," unless anybody objects.

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Does anybody object? No objections.

MR. ORSINGER: Can I make a comment on record, or have you moved on from record?

CHAIRMAN BABCOCK: No, we're going to the record, but let's let Justice McClure tell us what their thinking was on that.

HON. ANN CRAWFORD McCLURE: There was a great deal of interest in whether we would permit audiotape recordings of the trial proceeding in the event that the recorder's record could not be prepared. After a considerable amount of debate and a great deal of input from appellate judges, who are adamantly opposed almost universally to disallowing audiotapes, and after consultation with the court reporters that the record could be transcribed immediately after the proceeding, we opted to require the preparation of a formal reporter's record instanter after the proceedings, at which point no one yet will know whether there is going to be an appeal. Now, obviously, if there's a denial, you can pretty much guarantee that there will be.

But in any event, the reporters are going

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to go ahead, in our version of the rules, and prepare a reporter's record for transmission to the court of appeals.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: My first comment is that under Rule 3.2(b), the trial clerk has to forward the reporter's record, but there's no duty on the reporter to prepare the reporter's record. And so I can foresee that there's a conflict there where the district clerk is the one who has the duty to comply and no power to comply. And should we not have a sentence in here that requires the court reporter to prepare it?

HON. ANN CRAWFORD McCLURE: There is. Let me find it for you.

PROFESSOR ALBRIGHT: 2.4(d).

MR. ORSINGER: 2.4(d) just says that the court reporter has to make a record. It doesn't say it has to transcribe it.

HON. F. SCOTT McCOWN: It says the recording must be transcribed.

MR. ORSINGER: Well, I'm reading something that says, "The hearing must be transcribed." What are you looking at?

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HON. F. SCOTT McCOWN: "The hearing must be transcribed."

MR. ORSINGER: In my view that means that the court reporter makes a record of what's said. That doesn't mean that you type it. You only type it up in the event that there's going to be an appeal.

HON. F. SCOTT McCOWN: "Transcribe" means to type it up.

MR. ORSINGER: So this means that every time there's a hearing, they have to type it up, even if it's granted?

HON. ANN CRAWFORD McCLURE: Yes.

MR. ORSINGER: Why?

HON. ANN CRAWFORD McCLURE: Because there is a provision that, to the extent there's sexual assault on the child or abuse, the court has a duty to refer that for investigation and potential prosecution. And the concept was those notes may be necessary in order to facilitate that provision of the statute.

MR. ORSINGER: So because of the instances in which we have suspected sexual abuse, we're going to transcribe all of them

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that have no sexual abuse and no dispute, and the court reporters are going to all do that?

HON. HARVEY G. BROWN, JR.: And the State of Texas is going to have to pay for it. The court reporters are paid by the State of Texas under the statute.

HON. ANN CRAWFORD McCLURE: Under the statute, the Department of Health is going to be responsible for payment of the ad litems and the reporters. We've drafted forms to that effect. The Department of Health did not receive explicit appropriations in the budget process for that. They do have the ability under their budget to juggle. I have gotten a letter from the director of the department. They are trying to come up with some sort of uniformity.

They had asked our subcommittee to draft some sort of guideline on ascertaining fees for ad litems and for the guardians and for the court reporters, which we declined to do, but we put them in touch with the people that keep those records, OCA in particular.

CHAIRMAN BABCOCK: Judge Rhea.

HON. BILL RHEA: I think that's

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potentially a very large expense. I have no idea how many of these will be filed, but if it's any significant number, and then we could -- I could envision getting into a long hearing on it and having a long record.

JUSTICE HECHT: The estimates are 2,000 cases a year statewide. Our state agency people project that, and that the average hearing is 15 minutes.

HON. ANN CRAWFORD McCLURE: Fifteen to 30, I think, is what they predicted.

JUSTICE HECHT: So you would have probably a 15- or 20-page record, that would be the average. If you had 2,000 cases, it might be $100 for the record, so you're looking at $20,000 -- $200,000.

HON. F. SCOTT McCOWN: Could we limit it? Could we say the hearing must be transcribed when there is any concern about physical, sexual or emotional abuse, tracking the language of the statute? Instead of transcribing it in every single case, just transcribe it in those cases where that has been an issue.

MR. YELENOSKY: Or where there has

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been a denial.
MR. ORSINGER: Where it's been denied or where the court finds reason to be concerned about the safety of the child or something.
HON. F. SCOTT McCOWN: Because one problem, particularly in a county where by local rule you're going to maybe limit the number of judges who are hearing these cases, is you're going to tie your court reporter up in the preparation. These are presumably shorter records, but you're going to be tying your court reporter up in the preparation of those records. And $200,000 is not an inconsiderable sum, particularly since the Department of Health is taking it out of some important line items. So why can't we limit it to when we need it?
CHAIRMAN BABCOCK: Judge Medina.
HON. SAMUEL A. MEDINA: One of the other concerns, Scott, was the fact that often times court reporters have their own shorthand, and if they don't get it done now, if they put it up, something results later, where maybe they found abuse and they want to

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know more about it in this hearing, and for whatever reason, that court reporter is no longer there, you can't find them, they die, something, and it's very difficult to transcribe their notes with their shorthand.
HON. F. SCOTT McCOWN: Well, I understand that.
HON. SAMUEL A. MEDINA: So it says they need to get it done like that.
HON. F. SCOTT McCOWN: But I hear a regular docket of child abuse cases where all we're talking about are allegations of physical, sexual and emotional abuse, and there's no requirement that those hearings be transcribed. And yet here, where it might come up, we're requiring that they all be transcribed.
CHAIRMAN BABCOCK: Judge Rhea.
HON. BILL RHEA: And didn't we hear somewhere that these records were destroyed after 60 days? Is that right?
HON. ANN CRAWFORD McCLURE: No. There is a retention period for a minor, two years past the age of majority. I forget precisely what the other language is.

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Cindy, do you recall explicitly what the other language was on retention, records retention? It was two years past majority and --
MS. GROOMER: And then 60 days after the retention period has expired after the age of majority.
MR. YELENOSKY: What's the purpose of that? If it's been granted, the abortion has been performed, it's moot, why are we retaining -- why did we transcribe them, and why are we retaining them?
HON. ANN CRAWFORD McCLURE: There was a concern expressed about liability issues, ad litem liability issues.
MS. SWEENEY: What about doctor liability issues?
HON. ANN CRAWFORD McCLURE: And doctor liability issues, too.
MS. GROOMER: And also the need of the record for potential criminal proceedings.
MR. ORSINGER: Where is the retention requirement?
MR. PEMBERTON: It's 1.6.

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CHAIRMAN BABCOCK: Okay. To the extent that Judge McCown is making a proposal to limit the number of cases that are transcribed by the clerk, does the subcommittee accept that suggestion?
HON. ANN CRAWFORD McCLURE: No.
CHAIRMAN BABCOCK: Anything else.
MR. ORSINGER: I'm sure going to second that. I think that's important.
CHAIRMAN BABCOCK: Do we want to have a vote? Okay. How many people think that the number of cases that should be transcribed by the court reporter should be limited in some fashion to cases of denial and allegations of abuse? Raise your hand.
MR. YELENOSKY: I mean, we were just told, sort of as an afterthought, that the doctors wanted this, and I've just heard that now. Originally, it was because there may be sexual abuse that we would need to refer. In mulling that over, I couldn't see why to keep it. But now there's an argument that we do need them in every instance because the doctors, the providers, are saying that. And so I want to --

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CHAIRMAN BABCOCK: Well, that's what Judge Medina was saying.

HON. SAMUEL A. MEDINA: No. I'm saying that the court reporters -- what happens if you need it later on and you don't have that same court reporter? It's not -- I mean, this court reporter may not be able to transcribe somebody else's notes because they all have their own shorthand.

MR. YELENOSKY: Well, I understand that. But unless I misunderstood, I thought the reason why we needed a transcription in retention was because of potential liability, which is a problem or a potential in every case, and so that would persuade me to transcribe it in every instance, if in fact that's a good argument. But it was just thrown out as an afterthought. So I feel kind of caught up without a chance to even discuss that to understand where that came from, and if in fact that was the providers saying that we need this protection or we're not going to do the procedure.

HON. ANN CRAWFORD McCLURE: There was some concern expressed by the providers to

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that effect, a record of the proceeding.

MR. ORSINGER: What difference does it make to the doctors?

HON. BILL RHEA: They have the order.

CHAIRMAN BABCOCK: Hang on, hold on. One at a time. Judge Medina.

HON. SAMUEL A. MEDINA: Okay. And so this child is 13. She's going to be -- what, two years after she's 18, she's now 20. That's seven years. You've got that record there. It's already transcribed. It's been there for seven years. Something happens. That court reporter is no longer available. It's transcribed. It's there.

CHAIRMAN BABCOCK: Is that two years meant to tie to the statute of limitations for medical negligence?

MR. YELENOSKY: And what about the proceeding concerned them that it be preserved?

HON. SCOTT A. BRISTER: The claim against the doctor is going to be by the minor that "You forced me into getting this abortion."

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MS. SWEENEY: The concern on liability, I think, is that the doctors may have thought that they were protecting themselves. But with all due respect, it goes other way, and you're building in malpractice cases by creating all these records.

HON. SAMUEL A. MEDINA: But the minor has a right. I would rather -- if she has a basis for it, there ought to be a record there. If she doesn't, there shouldn't be. It cuts both ways.

CHAIRMAN BABCOCK: Judge Rhea.

HON. BILL RHEA: And to add in, I think it's still the rule, at least it used to be, but the court reporter standard, and I don't see David still here, was that they, by statute, could destroy their records after three years. So if we're talking seven years down the line, those records may not only be untranscribable; they may not exist anymore.

PROFESSOR DORSANEO: Well, they would be destroyed in three years, unless somebody tells the court reporter not to do that under the case law, I believe.

CHAIRMAN BABCOCK: Buddy Low and

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then Judge Peeples and then Richard.

MR. LOW: Well, it doesn't matter what we vote to do. But if the doctors say they're not going to perform an abortion without a record being typed, and some of them take that, the girl is not going to get one. So I mean, it's not just a question -- it might be more than just the legal issues involved. And I know a lot of doctors, if they're going to do something like that, they want a record. They want a lot more than just one piece of paper, if they get sued civilly or criminally.

CHAIRMAN BABCOCK: Judge Peeples.

HON. DAVID PEEPLES: I support the McCown motion because I'm very concerned that trial judges, who need their court reporters to be in court reporting, are going to have to make arrangements for the reporter to be preparing these records that are absolutely useless unless there is denial or abuse.

CHAIRMAN BABCOCK: Okay. Richard.

MR. ORSINGER: It seems to me like the medical professionals ought to be secure in getting a ruling from the court, or a

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deemed ruling from the court, without having to be concerned about going back and second guessing the court's ruling by looking at the evidence that led to the court's ruling. Why doesn't the ruling of the court answer the questions about whether the doctor should be able to do the abortion. I think it's a false issue. I really wonder if doctors really care about this.

And I can see court reporters having to stay around until 7:30 or 8:00 at night typing up useless transcripts because somebody walks in at 4:30 and wants to have one of these hearing for 15 minutes. Why should we do that when we don't need it?

HON. DAVID PEEPLES: Amen.

CHAIRMAN BABCOCK: I think the sentiments have been fully expressed. Justice McClure does not accept this amendment, so what we're doing now is advising the Supreme Court about the sense of this committee as to Judge McCown's suggestion that the transcription should be limited to cases of denial and abuse.

So everybody that's in favor of that

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raise their hand.

Everybody against. By 25 to five, it is the sense of this committee that it should be so limited. And so we'll need to report that to the Court. Richard.

MR. ORSINGER: Can I ask about this retention period? I may be just having trouble thinking at this late hour.

CHAIRMAN BABCOCK: Are you limiting it to this late hour?

MR. ORSINGER: When will we ever have one year after the conclusion of an action that occurs more than two years after the child obtains majority? In other words, you don't need this if you're already 18. And if you add 18 plus two, and if all of this is going to happen in seven days anyway, we're never going to be more -- I mean, aren't we always going to be destroying it two years after the child turns 18 and not one year after the proceeding goes final? Why do we even need (a)(2)?

HON. SARAH B. DUNCAN: What if you had an ongoing criminal proceeding that extended past, more than two years past

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attainment of majority?

MR. ORSINGER: No. It's an action arising from a proceeding under these rules. Are you talking about derivative lawsuits, or are you talking about this court proceeding, which lasts 15 minutes in the courtroom, 48 hours in the court of appeals, and two business days in the Supreme Court?

HON. SARAH B. DUNCAN: I guess I don't read "in this proceeding" as narrowly as you do.

MR. ORSINGER: So this records retention requirement on the clerk or the court reporter is they have to somehow figure out whether a lawsuit has been filed or whether there's a criminal investigation or a criminal proceeding, and then they have to be sure that they don't destroy while any of that's going on? That's not reasonable.

The only thing that the employees of the government are going to know is when this proceeding is over. And it seems to me like you're always going to have the proceeding terminate less than two years after the child turns 18. We're talking about -- it's going

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to terminate within seven to 10 days of when it's filed, and then it will be all over in the Texas Supreme Court. So how are we ever going to be more than two years out after the 18th birthday? Let's just take (a)(2) out of there, because it shouldn't be in there.

CHAIRMAN BABCOCK: Justice McClure?

HON. ANN CRAWFORD McCLURE: It is my recollection that it was put in there at the request of DPRS and the Department of Health.

CHAIRMAN BABCOCK: That's what the annotations indicate.

HON. ANN CRAWFORD McCLURE: And I'm uncomfortable removing it.

MR. ORSINGER: Okay. Good.

CHAIRMAN BABCOCK: Does anyone else feel strongly about that?

Okay. Then let's move on quickly to rulings, Justice McClure, and that would be Paragraph 4 on Page 7 of our memo.

MR. HAMILTON: I still have a question on forwarding the record. It just says forwarded instanter. It doesn't say how it is to be forwarded.

CHAIRMAN BABCOCK: Let's back up.

Sorry, Carl. I forgot about that.
MR. HAMILTON: And if you mail it from Hidalgo County or Starr County, it will take two or three days to get there, so that makes the whole point moot.
HON. ANN CRAWFORD McCLURE: Our concept of using "instanter" was to allow for fax transmission and email transmission. To the counties that have electronic filing, it can be forwarded to the court of appeals if the capability exists. We tried to draft these somewhat broadly, recognizing the limitations of our imagination as to what technology might come up with next. But the concept is it's got to get there and be transmitted in whatever form and how quickly in whatever medium is necessary to facilitate that.
MR. HAMILTON: Could we put a requirement in there that it has to be transmitted so that it's received within 24 hours?
HON. ANN CRAWFORD McCLURE: I'm not opposed to that.
CHAIRMAN BABCOCK: What rule are you

talking about, Carl?
MR. HAMILTON: 3.2(b).
MR. PEMBERTON: At one point we did have some language in there specifying fax or email or hand delivery, but we took that out because we thought "instanter" kind of covered that.
HON. MICHAEL H. SCHNEIDER: I share his concern. I know exactly, because we want to get the record as quickly as possible. I just wonder if we couldn't word it in a way where it doesn't look like we're giving them 24 hours to get it there.
MR. HAMILTON: The sooner the better.
CHAIRMAN BABCOCK: That's instanter.
HON. ANN CRAWFORD McCLURE: That's why we chose instanter.
MR. HAMILTON: But I don't know what it means to a lot of clerks, but to a lot of clerks that means put it in the mail as soon as you can.
HON. ANN CRAWFORD McCLURE: That was not the analysis of the clerks that were on the subcommittee.

MS. WOLBRUECK: I believe in our training to the clerks we will definitely tell them what "instanter" means. And I think the intent is that we will probably fax it. The court of appeals will accept a fax, you know. The last alternative would be overnight mail.
CHAIRMAN BABCOCK: Richard.
MR. ORSINGER: The statute only requires an expedited appeal from the court of appeals to the Supreme Court. The subcommittee has decided that "expedited" means that the record should be shipped instanter. I'm not sure what the deadline is for the opinion, and then the Supreme Court has two business days after it receives the opinion. So we really have to -- under your rule, we have to get both the record and the opinion up there, and then the Supreme Court has got two business days to act.
And do we have a timing requirement on when the opinion by the court of appeals has to be issued and forwarded? Because there's no reason to get the record up there in 24 hours if the opinion isn't up there for three or four days. What's the time limit on

the opinion?
HON. ANN CRAWFORD McCLURE: You'll find it on Page 26 of the annotated rules. It's 3.3(c). The opinion must issue not later than ten business days after the day on which a notice of appeal is filed in the Supreme Court, if an appeal is taken to the Supreme Court; or 60 days after the day on which the court of appeals issued its order under 3.3(a) if no appeal is taken.
MR. ORSINGER: Okay. Well, there's no point in getting the record up there in 24 hours if the opinion doesn't have to be up there for 10 days and the Supreme Court isn't going to rule until it gets an opinion.
MR. HAMILTON: How about from the trial court, from the trial court to the court of appeals?
MR. ORSINGER: Well, I don't know about that. I thought we were talking about from the court of appeals to the Supreme Court.
CHAIRMAN BABCOCK: We're talking about 3.2(b). We're talking about the trial court record now. That's what Carl was

talking about.
PROFESSOR DORSANEO: I don't know what "instanter" means. I suspect, if I went and looked it up, it would say right away, don't go to lunch, and not within 24 hours. And I would rather use English words that we maybe have a shot at understanding --
CHAIRMAN BABCOCK: Bill, before Scott leaves, Scott, I think that it's unlikely that we're going to be meeting tomorrow.
HON. F. SCOTT McCOWN: Okay. Well, now that you've called attention to me sneaking out, I'm a single dad today, and I've got to take my boy to the Halloween Hoot.
CHAIRMAN BABCOCK: I tried to do it to Latting, but he didn't stop. Okay.
MR. HAMILTON: You have a lot of places that don't even have faxes or electronic transmission. So if they put it in the mail, it's going to be two days or more before it gets to them.
CHAIRMAN BABCOCK: Well, there is Federal Express or UPS or other --
MR. HAMILTON: Well, I know. That's

what I'm saying. There needs to be something in here that ensures that it gets there no later than.
MR. YELENOSKY: I second the motion to use language that Bill Dorsaneo and the clerks would understand.
HON. ANN CRAWFORD McCLURE: The "instanter" came from the clerks.
MR. YELENOSKY: I thought you were saying, Bonnie, that you would have to train on that.
MS. WOLBRUECK: No. We would do training to the clerks explaining instanter.
MR. LOW: If we do put two days, what would be the effect if the record didn't get there in three days then? Is it moot? What's the effect?
MR. ORSINGER: It's deemed granted at the end of two days.
MR. LOW: Well, that would be crazy just because it got lost in the mail a day.
CHAIRMAN BABCOCK: Well, here is the question: Do we want to change "instanter" to "within 24 hours"?
MR. LOW: No.

CHAIRMAN BABCOCK: Buddy says no.
MR. ORSINGER: And also, Chip, they're talking about changing it from "forward" to "be received by." That's another change. To send it instanter could take three days, or you can have it received within 24 hours. Two different things.
CHAIRMAN BABCOCK: Okay. That's a good point. Where do you want to go with that, Judge?
HON. ANN CRAWFORD McCLURE: Well, given the direction of the clerks who participated in this discussion, that they were comfortable with instanter, I'm comfortable leaving it instanter.
MR. ORSINGER: Are you comfortable leaving it "forward" and not "received," or do you want, since we have -- since the court of appeals clock is running from the date the notice of appeal is given, not the date the record is received, should the deadline be when it's received and not when it's sent?
HON. ANN CRAWFORD McCLURE: No, I don't think so.
MR. ORSINGER: A lot of these, then,

are going to be deemed granted because the record isn't there on time.
CHAIRMAN BABCOCK: Does everybody feel so strongly about it that we should vote on that issue?
MR. ORSINGER: No.
CHAIRMAN BABCOCK: Okay.
MR. HATCHELL: Chip, I have a comment that dovetails with this and Carl's comment in particular. Does the mailing rule apply to the notice of appeal?
HON. ANN CRAWFORD McCLURE: No. We have -- Bob, do you remember the footnote number?
HON. SARAH B. DUNCAN: But footnotes are just footnotes.
HON. ANN CRAWFORD McCLURE: I understand that.
MR. PEMBERTON: At some point this issue comes up and we draw up a footnote to explain.
CHAIRMAN BABCOCK: A footnote or a comment?
MR. PEMBERTON: A footnote referring back to whatever text we have, and I can't

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remember exactly where it is, to clarify that you can't get an appeal deemed granted by virtue of the mailbox rule. We have language in there that basically trumps 21a.

HON. SARAH B. DUNCAN: That's just a footnote, right, and we have otherwise incorporated the Rules of Civil Procedure?

CHAIRMAN BABCOCK: The footnotes aren't going to be available to people, so it's got to be either a comment or in the rule.

JUSTICE HECHT: It's Footnote 57 on Page 20.

HON. ANN CRAWFORD McCLURE: It says, "For purposes of this subsection (f), the date the application is received by the clerk is the date on which the application is filed."

CHAIRMAN BABCOCK: That needs to go in a comment, it seems to me.

HON. ANN CRAWFORD McCLURE: But that was rule.

CHAIRMAN BABCOCK: Oh, I'm sorry.

HON. SARAH B. DUNCAN: But under the Rules of Procedure --

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HON. ANN CRAWFORD McCLURE: And Footnote 57 says it's intended to clarify the mailbox rule.

MR. PEMBERTON: And I guess we need counterpart language for the rules governing the intermediate courts of appeal and the Supreme Court. We probably don't have that, or I'm not sure we do.

HON. SARAH B. DUNCAN: Don't the Appellate Rules actually say that if it's mailed and received within 10 days, it's deemed filed on the date that it's mailed?

MR. PEMBERTON: Right.

HON. SARAH B. DUNCAN: Super.

MR. HAMILTON: But the statute runs from the time of the filing of the notice. In the statute, the court of appeals has to act within two business days after the filing of the notice, regardless of any mailing rule or anything else.

MR. EDWARDS: Filing of the notice in the court that denied the application.

MR. HAMILTON: The trial court.

HON. SARAH B. DUNCAN: But it's deemed filed on the date it was mailed.

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MR. HAMILTON: I would think that we at least ought to have a requirement that they forward it by overnight delivery.

HON. HARVEY G. BROWN, JR.: Could we have a comment here? Leave the word "instanter" in here, but a comment explaining that, where available, it should be faxed to the court of appeals? And then, I don't know, maybe even some distance, if fax isn't available and you're within 60 miles, it should be taken by courier? At least something that gives some direction and guidance to what we mean by instanter that's a comment and not as a binding rule?

MR. ORSINGER: What about a courier?

HON. ANN CRAWFORD McCLURE: I don't want to broaden it to include a requirement to do that. I'm comfortable with it. I mean, it may not work, but as a stands now, the committee was comfortable with it.

MS. WOLBRUECK: Chip, I think to me, and I think that we will do the best that we can to train all of the clerks, that means do it now; that it needs to get there now. So

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that means you find a fax machine and you fax it to the court of appeals now. And if you can't do that, you get in your car -- or you take it upstairs, if the court of appeals is in the same courthouse, as it is in many counties, or it's down the street or something, but it's to be delivered immediately. Because as long as the clerks know that the time is again tracking and it's happening, that there's only two days again, I think that that's just going to have to be understood.

CHAIRMAN BABCOCK: Nina.

MS. CORTELL: I have a question. It covers this and it sort of covers a lot of other things, and that is the cost aspect of everything. I mean, couriers, fax, court reporters, getting the record up, the ad litem, everybody, I mean, how -- are costs at all covered here? I mean, the court reporter is just going to do this not getting paid?

HON. ANN CRAWFORD McCLURE: They will be paid through the Department of Health.

HON. SARAH B. DUNCAN: 33.007.

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HON. ANN CRAWFORD McCLURE: There was a fiscal note attached to the legislation.
CHAIRMAN BABCOCK: Yeah. But that's not our concern.
MS. CORTELL: It's only our concern -- I mean, I'm not worried about the funding so much as, obviously, a lot of court reporters, just as a practical matter, don't like to give you their record, et cetera, until they're paid. I mean, is this an exception to that? I mean, that's built into the Appellate Rules.
HON. ANN CRAWFORD McCLURE: What was presented to the LBD was that, at the trial court level, total court costs incurred by TDH for minors would be $259,200 for the fiscal year. As for the appellate process, they envision 207,360 per year. Total estimated fiscal impact, 466,650.
MS. CORTELL: So this will be, then, an exception to the normal Appellate Rules where you have to arrange for payment and all that? That's automatically provided for?
HON. ANN CRAWFORD McCLURE: Well, the minor cannot be charged anything. She

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cannot be charged filing fees, court costs. There can be no requirement of any payment for her for the reporter's record or any of it. It is all done by court order process through a request to TDH.
CHAIRMAN BABCOCK: Justice Duncan.
HON. SARAH B. DUNCAN: I thought what Nina was referring to, the Appellate Rules that would have been incorporated by reference, do not even require the court reporter to start working on the record until the requesting party has paid or made arrangements to pay.
JUSTICE HECHT: But the statute requires that the court reporter be paid in state money every time.
MR. HALL: But who is going to train the court reporters, if that's what they have to be doing?
HON. BILL RHEA: The arrangement has been made by the statute.
CHAIRMAN BABCOCK: Judge Schneider.
HON. MICHAEL H. SCHNEIDER: Well, I think that's a good point. What's the practical effect when a reporter just doesn't

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get the record to you? I mean, you're sitting there in appeals court and it just doesn't get there. It happens all the time.
MR. ORSINGER: It gets deemed granted.
HON. MICHAEL H. SCHNEIDER: Well, I know that. But I'm just saying at some point in time it seems to me that the appellate court needs to protect its jurisdiction after so many hours of not having a transcript. I don't want to superimpose that on this committee, but I think it is an issue.
HON. ANN CRAWFORD McCLURE: We have some real concerns about it. Representations to us by representatives of the court reporters association was that it would not be difficult having those transcripts prepared and filed instanter.
CHAIRMAN BABCOCK: And maybe in a lot of cases it won't, but there will be some that it will, I bet.
HON. ANN CRAWFORD McCLURE: I'm sure that's true.
CHAIRMAN BABCOCK: Nina.
MS. CORTELL: I guess, again, the

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issue of the Appellate Rules and how they contemplate arrangements being made for payment of the appellate record. I don't know whether we need a footnote or a comment that this operates outside of this mechanism.
HON. ANN CRAWFORD McCLURE: I'm not uncomfortable with that in a comment.
CHAIRMAN BABCOCK: Don't we already have that? That's what we talked about this morning, and there's going to be language added to that effect. Buddy.
MR. LOW: Chip, could I ask a question? Why does the court of appeals time start when the notice is filed in the trial court rather than when received? The statute requires that?
JUSTICE HECHT: Yes.
MR. LOW: Oh, well, that makes sense.
CHAIRMAN BABCOCK: If there's nothing else on the record on appeal, let's quickly move to rulings.
MR. EDWARDS: While you're on rulings, could I get you to look at 2.4(e)(2), because I think it could create a problem.

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CHAIRMAN BABCOCK: 2.4(e)(2), Conduct of hearing, denial. "If the minor fails to establish any of these grounds by a preponderance of the evidence, the court must deny the application."

MR. EDWARDS: Okay. You could interpret that to mean that the minor has to establish all three. And it should say, I think, if the minor fails to establish at least one of these grounds, because the (A), (B) and (C) are alternatives.

CHAIRMAN BABCOCK: Justice McClure, do you accept that?

HON. ANN CRAWFORD McCLURE: Yes.

CHAIRMAN BABCOCK: Has anybody got a problem with that?

HON. DAVID PEEPLES: Did you say if you fail to establish one?

CHAIRMAN BABCOCK: At least one. If you fail to prove one.

MR. EDWARDS: This could be interpreted, the way it was, that it requires you to establish all three.

CHAIRMAN BABCOCK: Good point. Okay. What else about rulings, Judge

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McClure?

HON. ANN CRAWFORD McCLURE: Well, the debate obviously is over the opinions, whether ruling is tantamount to an opinion. We took the position that, in order to facilitate review realistically, the Supreme Court needed the benefit of the intermediate court's analysis, and we have tailored rules to that effect, whether you agree or disagree.

CHAIRMAN BABCOCK: All right. That's the issue.

REPRESENTATIVE DUNNAM: I would just point out that that gives you up to a 24-day time period from the initial application. It could be longer if you have holidays on Mondays or Fridays or whenever. But ten working days is two weeks, and then if you've got two four-day weekends, that's a long time.

HON. ANN CRAWFORD McCLURE: The ruling will come within the statutory time frame.

REPRESENTATIVE DUNNAM: But the Supreme Court does not have to act for 10 days, at least 10 days, so you've got a 24-day potential window, maybe up, no more

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than 30, but I appreciate you all's -- I heard the same thing from the appellate judges at home. That's an awful lot to ask. And I don't have much consolation -- I mean, I don't know what to say about that. 24 days is a long time.

HON. ANN CRAWFORD McCLURE: Well, the debate that we had internally was, do we want to facilitate the development of some sort of a body of law that will be transmitting confidentially to the Supreme Court, and in their wisdom, they can incorporate into guidelines, comments, however they want to implement it, if that's the overriding concern behind the legislation?

And we heard some indications that there was an interest in that. Then we tried to come up with a way that we could fulfill that while still ruling within the window that was created by the statute. That was about the best our committee could do.

REPRESENTATIVE DUNNAM: Well, the statute doesn't really speak to time limits on the Supreme Court, does it?

HON. ANN CRAWFORD McCLURE: No, not

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to the Supreme Court, it doesn't.

REPRESENTATIVE DUNNAM: The Supreme Court has as much time as they want.

HON. ANN CRAWFORD McCLURE: Yes.

REPRESENTATIVE DUNNAM: So it probably should encompass them.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: Well, I guess somebody will look this over carefully, but I'm noticing the word "petition" kind of appearing here occasionally. On Page 11, it appears in the clean draft, (e)(3) and (f)(1). Unless that is something different from the application, it probably ought to say application.

JUSTICE HECHT: But you like that, don't you? The more petitions, the merrier. You want it to go to fewer applications.

MR. ORSINGER: Well, if you say petition, it's scary, because we have petition provisions in other parts of the Rules of Civil Procedure. I would rather use the word application so that no one confuses it with an original petition.

HON. ANN CRAWFORD McCLURE: I'm not

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opposed to that at all.
MR. PEMBERTON: It was our intent to use "application." I'll run a word search and get it fixed.
CHAIRMAN BABCOCK: Okay. That's good. Sarah Duncan.
HON. SARAH B. DUNCAN: Does everyone else agree that ruling includes opinion?
MR. ORSINGER: No.
HON. SARAH B. DUNCAN: To me a ruling is a judgment or order. It is not at all an opinion. And I don't see that the statute requires anything more or less than a ruling.
MR. PEMBERTON: And I guess the subcommittee takes somewhat inconsistent positions. On one hand they say for purposes of confidentiality the appellate level ruling encompasses opinion. And yet for purposes of what the court of appeals has to do, we're saying ruling and opinion.
CHAIRMAN BABCOCK: That was Richard's point this morning.
MR. PEMBERTON: Well, it stuck. It was good.

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CHAIRMAN BABCOCK: Alex.
PROFESSOR ALBRIGHT: I'd like to know why we need an opinion. I mean, this says an opinion is required. The statute only refers to a ruling, so it seems like all this does is kind of slow down the process of getting to the Supreme Court.
HON. ANN CRAWFORD McCLURE: The original draft that was presented was simply a ruling, that we would rule up or down on affirming or denying. In meeting with the representatives of Senator Shapiro and Representative Delisi's office, there was a great deal of interest in developing in Texas the case law that we have coming out of other jurisdictions on these issues. The only way we could think of to accomplish that is through an opinion process.
Additionally, if we're going to be ruling on issues of constitutionality or statutory interpretation and it goes forward to the Supreme Court, then perhaps there was some interest in having the benefit of the analysis behind those decisions available to the Supreme Court for consideration.

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PROFESSOR ALBRIGHT: Well, couldn't a court of appeals write an opinion if they wanted to, but without requiring it?
HON. ANN CRAWFORD McCLURE: That was the second draft. In the third draft, the consensus was, if we give them a choice, they aren't going to do it. And if the legislative intent was to develop that, have the Supreme Court have the benefit of it, then we needed to make it a requirement. That's what the subcommittee's consensus was.
CHAIRMAN BABCOCK: Bill Dorsaneo.
PROFESSOR DORSANEO: These opinions will be dealing, I suppose, in a number of cases, with factual insufficiency complaints, so they won't be easy to write necessarily under the Poole standard. I really wonder whether it's worth the trouble to go to that much work.
PROFESSOR ALBRIGHT: I would move to either -- I would go for either deleting or making it an option.
CHAIRMAN BABCOCK: Do you accept that, Judge McClure?
HON. ANN CRAWFORD McCLURE: No. I

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understand the motivation, and keep debating it, but I cannot accept that.
MR. EDWARDS: How about having the Supreme Court act on the basis of the order, but still requiring opinions so you get your body of law?
CHAIRMAN BABCOCK: I think under these rules, the Court has that option, doesn't it?
MR. EDWARDS: I think it does, yeah.
CHAIRMAN BABCOCK: Steve.
MR. YELENOSKY: Well, I just wanted to make the point about the legislative intent that there be a body of law. That sounds to me to be an indication that the Legislature did not intend the confidentiality that we were talking about earlier. How can it be that they intended a body of law yet all of this was to be secret?
HON. ANN CRAWFORD McCLURE: I asked them that.
MR. YELENOSKY: That seems to me to relate very directly to our conversation earlier today and to argue strongly that maybe the judges' names could be confidential, but I

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don't see how, consistent with that legislative intent, anything else could be, except the anonymity of the girl.

REPRESENTATIVE DUNNAM: I would urge that we try to find the legislative intent of that nature on the record somewhere, I agree, because I don't think you will find it on it.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: If you don't have an opinion, then the Supreme Court is going to operate as a de novo review. In other words, they will not be sitting in review of a court of appeals error. They will be looking at the underlying record and they will be making their own decision. That's not the way the Constitution has set our judicial system up. And an important part of the opinion process is for the court of appeals to state what law it's applying and how it's applying it to the facts. And if you don't have that and you just have the record, then the Supreme Court is basically serving as a court of appeals.

HON. MICHAEL H. SCHNEIDER: We have that in mandamuses now. We do not mandamus, we don't write -- well, I guess we can write

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one down but it's not --

MR. ORSINGER: But if you deny a mandamus, the Supreme Court looks at mandamuses the same way they --

HON. MICHAEL H. SCHNEIDER: They look at a record. We don't have to write an opinion.

MR. ORSINGER: But it's not an appeal either, it's an original proceeding.

HON. MICHAEL H. SCHNEIDER: But this isn't an appeal either, if you really want to know the truth.

CHAIRMAN BABCOCK: Judge Patterson.

HON. JAN P. PATTERSON: I don't think the courts of appeals are going to avoid writing if it's called for, and I would like to propose that we say "may issue a memorandum opinion," and that way it kind of gives the full spectrum of opportunity, but not the requirement.

CHAIRMAN BABCOCK: Yeah. We're headed for a vote on that in a minute.

HON. SARAH B. DUNCAN: I guess Richard and I have a differing view on yet another topic, and that is what de novo review

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is. I don't think whether the court of appeals writes an opinion or not or discloses its reasoning has anything to do with whether the Supreme Court exercises de novo review powers. The Supreme Court can, with or without a court of appeals opinion, defer to findings of fact made by the trial court and review the questions of law de novo.

CHAIRMAN BABCOCK: John Martin, do you have an opinion about this?

MR. MARTIN: Not a strong one. I do not think the court of appeals ought to be required to write an opinion. I don't see any point in having that discussion.

CHAIRMAN BABCOCK: Well, Justice McClure has not accepted this friendly amendment, so we're going to vote. And the first thing we'll vote on is whether or not we should recommend to the Supreme Court that the court of appeals' opinion should be in its discretion. In other words, they can write one if they want to and they don't have to write one if they don't want to. So everybody who is in favor of that raise their hand. Discretionary. The opinion is discretionary

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with the court of appeals.

All right. And against. That passes 23 to five, so our report will indicate to the Court that by a vote of 23 to five, this committee believes that the court of appeals should have the discretion to write an opinion or not.

Okay. Anything else on the rulings?

MR. ORSINGER: Then we need to change the timetable in the Supreme Court if we're not going to have an opinion now, because right now it's triggered by --

CHAIRMAN BABCOCK: That's right. And that's why, this rule that's going up to them, this is just something that we're going to tell the Court that, although the subcommittee wouldn't agree to it, we think by that margin that discretionary --

HON. ANN CRAWFORD McCLURE: -- that we were arbitrary and unreasonable.

CHAIRMAN BABCOCK: Capricious is the word that I would use. Alex.

PROFESSOR ALBRIGHT: I'd just like to make one more comment that these opinions, if they're going to be on factual sufficiency,

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it would be virtually impossible to have an opinion that gives any guidance to anybody without giving a whole lot of facts that are specifically prohibited from being disseminated to the public.

MR. ORSINGER: But we voted this morning that no one is going to read the opinions but the nine justices on the Supreme Court anyway, so what difference does it make?

CHAIRMAN BABCOCK: That's right. That was the other point. Nobody much is going to read them. Mike.

MR. HATCHELL: As I understand Rule 3.3(a), if an appeal is successful, when the court of appeals reverses, it has no power to remand. So in the situations we have discussed today, if a judge is constitutionally disqualified, his order is void, you appeal that and you win, or it's not filed in the proper court. All basic remand issues, including against the weight and the preponderance of the evidence, are basically halted. Where is the authority in the statute to do that?

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HON. ANN CRAWFORD McCLURE: There isn't any. There isn't any. But it does not give us the option of reversing and remanding. It gives us the option to reverse and grant.

HON. SARAH B. DUNCAN: It says to rule.

HON. ANN CRAWFORD McCLURE: I think there's language to the extent of reverse and grant the application.

CHAIRMAN BABCOCK: 33.004(b).

HON. SARAH B. DUNCAN: It just says rule.

MR. ORSINGER: Just as an aside, if they decide that this is not a case or controversy, they're going to reverse and dismiss anyway regardless.

CHAIRMAN BABCOCK: So Mike, restate your point again.

MR. HATCHELL: It was really more a point of clarification. I've read the statute three times. I can't find this language that limits the power of an appellate court to remand. I just can't find it. And it's fine if that's the way they want to do it, and if

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everybody agrees that's what they should do. But it seems to me like there are inherent errors that you can complain about. We talked about two today. One, the judge is constitutionally disqualified; two, you filed it in the wrong court --

MR. EDWARDS: You can't file it in the wrong court.

MR. HATCHELL: Yes, you can. So that's an issue.

MR. EDWARDS: Well, it says any court.

MR. HATCHELL: Well, but that's an issue.

HON. SARAH B. DUNCAN: But over there, they're saying that "any court" doesn't mean any court.

MR. EDWARDS: Well, the other final thing is that if it isn't ruled on within two days after the thing has been filed, 48 hours after it's been filed, you know, it's granted. So if you remand it, it's going to take you more than two days. It's already moot.

HON. ANN CRAWFORD McCLURE: What

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they're saying is that is a ruling.

HON. SARAH B. DUNCAN: To reverse and remand would be ruling, and it would avoid the default ruling of grant.

MR. EDWARDS: Now, if it's remanded, it hasn't been decided in the trial court within the time specified.

HON. SARAH B. DUNCAN: But all the statute says is if the court of appeal fails to rule on the appeal.

MR. EDWARDS: I understand that. But the other one says if the trial court doesn't rule within the time -- well, not if it's remanded, he didn't. Well, but there's no provision for an extension of time in the trial court by virtue of a remand.

CHAIRMAN BABCOCK: The point is that you start the clock ticking again perhaps if you remand.

MR. EDWARDS: It doesn't say that.

CHAIRMAN BABCOCK: It doesn't say that, but that's arguably the effect of it, so that's something you've got to think about. It may be, as you say, that the effect of reversing and remanding has no effect because

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48 hours have passed and now it's just granted, but that's not necessarily so.

HON. ANN CRAWFORD McCLURE: We got into this in talking about the standard of review. And one of the reasons we didn't want to get into the standard of review was that very issue in terms are we going to advocate facile sufficiency review, which the remedy for is review.

CHAIRMAN BABCOCK: Okay. Mike, did you have a fix for this, or was this just --

MR. HATCHELL: No. I'm just raising the question. We need to be very certain that we are limiting the power of the courts of appeals which they would otherwise have. And as far as I can determine, it's not authorized by the statute.

CHAIRMAN BABCOCK: Well, that's always a problem.

HON. SARAH B. DUNCAN: If there is constitutional disqualification, the order, at least according to Texas case law, would be void ab initio. So how can you not vacate that order and remand the case for further consideration?

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CHAIRMAN BABCOCK: Bill's point is, if it's a void order, then they haven't gotten it done within 48 hours, so it's granted if it's a void order.

MR. EDWARDS: If it's a void order, they haven't ruled.

HON. SARAH B. DUNCAN: But if it's filed in the wrong court, it's only voidable.

MR. EDWARDS: But how can you get it in the wrong court?

CHAIRMAN BABCOCK: He's just fixing one problem at a time.

HON. SARAH B. DUNCAN: They're going to transfer it to some other court.

HON. ANN CRAWFORD McCLURE: We talked about transfer.

CHAIRMAN BABCOCK: Okay. Well, we're not talking about transfer now. We're not going to get into transfer right now.

HON. SARAH B. DUNCAN: An exchange of benches.

CHAIRMAN BABCOCK: Do you want to entertain a fix for this, or do you want to merely note it for the Court and dump it in their lap, which I have always thought was a

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great idea.

HON. DAVID PEEPLES: Let's leave one or two imperfections.

CHAIRMAN BABCOCK: Sarah.

HON. SARAH B. DUNCAN: This is one that I would actually vote in favor of the suggestion to the Court that it not decide, because it's a fairly serious, not just a little technical problem if you're going to limit the court's ability to either reverse and render or affirm.

CHAIRMAN BABCOCK: Did you want to vote on something, Sarah? Do you want our committee to vote on it?

HON. SARAH B. DUNCAN: Yes.

CHAIRMAN BABCOCK: Okay. Tell us what you want to vote on.

HON. SARAH B. DUNCAN: The deletion of the second sentence in 3.3(a).

CHAIRMAN BABCOCK: Okay. This is only advisory, because Justice McClure does not accept this amendment.

HON. SARAH B. DUNCAN: I understand.

CHAIRMAN BABCOCK: Okay. So

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everybody who votes to delete the second sentence in Rule 3.3(a) raise their hand. Okay. Hang on, keep them up. Some hands started popping up there all of a sudden.

All against. 13. It loses 13 to 12.

Do you want me to count again?

PROFESSOR DORSANEO: Yes.

CHAIRMAN BABCOCK: Okay. Let's do it again.

HON. SARAH B. DUNCAN: First can we hear the reasoning for leaving it in?

MR. EDWARDS: Prompt disposition.

PROFESSOR ALBRIGHT: And this is a different proceeding. I don't think this has the impact that you think it does on regular appellate procedure.

CHAIRMAN BABCOCK: Okay. All in favor raise their hand. This is in favor of taking it out. Everybody who wants to take it out raise your hand. You guys lost a vote.

Okay. All in favor of leaving it in.

By a 14-11 vote, the vote is to leave it in. 14 to 11 the sentence stays in, is the recommendation of this committee.

Okay. Anything else?

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HON. ANN CRAWFORD McCLURE: No, nothing more. You've pooped me out.
CHAIRMAN BABCOCK: Yeah, Scott.
HON. SCOTT A. BRISTER: We never did -- we discussed it a lot, but we never did vote, and we need to, on whether the hearing has to be closed to the public and in chambers. I, for one, don't want to hold -- I don't want a rule that says you can't hold it in chambers, and I don't want a rule that says you have to hold it in chambers. It appears to me this says I have to do it in chambers. I'm concerned for all kinds of reasons about that. That's 2.4(b) and (c). 2.4(b) and (c).
CHAIRMAN BABCOCK: And that gets back to the argument that we had earlier under (k), that the court proceedings should be conducted in a manner.
HON. SCOTT A. BRISTER: Yeah. We kind of discussed that, and I don't know that we need to vote again. My recommendation is that you just say what the statute says. The court must make proceedings -- court proceedings shall be conducted in a manner that protects the anonymity of the minor, and

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let case law work out whether it has to be in chambers, whether it has to be in secret.
You know, the DA can't be there under this. Should that be an exception? There's nothing in the statute that says the DA can't be there, but this rule will say you can't.
CHAIRMAN BABCOCK: It strikes me as incredible that you could have your court of appeals opinion and the identity of the judges confidential, and yet you could have a proceeding in open court. They would know who the judge was, for one thing.
HON. SCOTT A. BRISTER: In fact, it doesn't say the judge is confidential.
MR. ORSINGER: Maybe we could conduct it in such a way you can't identify the judge.
CHAIRMAN BABCOCK: Richard Orsinger has a smart-a remark about this, but we're not going to get into that right now on the record.
Okay. Do you accept Judge Brister's recommendation?
HON. ANN CRAWFORD McCLURE: No.
CHAIRMAN BABCOCK: No. Do you want

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to bring it to a vote, Scott?
HON. SCOTT A. BRISTER: Sure.
CHAIRMAN BABCOCK: Okay. The proposition which we're going to vote on is that the provisions of section -- what number is that?
HON. SCOTT A. BRISTER: 2.4(b) and (c) be replaced by the second sentence from the statute, 33.003(k), the second sentence of that subparagraph.
CHAIRMAN BABCOCK: All in favor of that raise your hands.
Everybody against. That fails by a vote of 14 to eight. Yeah, Steve.
MR. YELENOSKY: I think I've got just a typo, but then I also have a point, if we're allowed to bring up extraneous little things.
CHAIRMAN BABCOCK: Bring the typos up to Bob later.
MR. YELENOSKY: Okay. Well, the other point that I alluded to earlier was that in the rules, and I'm looking at Page 14 of the annotated, the contents of the application adds two things, one thing which is fine, it's

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informational. The other thing is (3)(F). It refers to a statement of the grounds or grounds for which the minor is seeking the order.
I don't see that requirement in the statute, and when you put it in the application, in the form, it's either meaningless because they're just checking it off, or it may be something that has to be explained to the applicant. And in every instance where an applicant is seeking this, presumably they think it's in their best interest. So I don't see the point of making that pleading, what I see as a pleading requirement in the application that I meet one of these grounds. So I was wondering why the subcommittee put that in there?
HON. ANN CRAWFORD McCLURE: There was some consideration given to, by identifying the grounds in the application, it would give the trial court the benefit of some wisdom in what type of individual to appoint as an ad litem.
MR. YELENOSKY: But the form doesn't have you specify which of the grounds. It

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just has a checkpoint for one of the following grounds, so it doesn't provide any information, except that you have one of the following grounds, which is statutorially -- well, presumably they proved up. But it doesn't have a check for which of those three grounds.

HON. ANN CRAWFORD McCLURE: I thought it did.

MR. YELENOSKY: Not in the one I'm looking at, which is Form 2A. It just has a checkmark, "I am requesting this order for one or more of the following reasons," one, two, three. And that seems to me to be a meaningless hoop to jump through. If you want them to check off the others, I guess you could. But my concern is also presumably at this point most of them will not be represented by an attorney, and I don't know what information you would get that would necessarily be that meaningful. And again, it's not required by the statute, so I would suggest eliminating that.

MR. PEMBERTON: The subcommittee went back and forth on that. In the original

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version of this Form 2A there was a checkmark or check blank beside each of the three enumerated grounds. I think there was a concern with arguments or problems with technically waiving some ground if the minor didn't check the right one and having to amend, and so just to simplify things, we moved back toward just one check off --

MR. YELENOSKY: Well, I understand why you went from a check for each one to something else, but what I don't understand is why you didn't go to just eliminating it.

CHAIRMAN BABCOCK: All right. So the proposal is to eliminate (F). And Judge, what do you think about that?

HON. ANN CRAWFORD McCLURE: The forms, I didn't have a great hand in the forms. The forms were done predominantly by the trial judges in our community, and I'm not going to deviate from their recommendations.

CHAIRMAN BABCOCK: Sarah.

HON. SARAH B. DUNCAN: Chip, as a procedural matter, I guess I'm confused. Do ex officio members vote or not vote?

JUSTICE HECHT: They vote.

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CHAIRMAN BABCOCK: They do vote.

PROFESSOR DORSANEO: There is no 2.4(e)(2)(A), by the way.

MR. YELENOSKY: That was my typo. It refers to (e)(1) instead of (2)(A). But I guess if that's not to be accepted, and I don't see it as that big of a point, but it's just a meaningless hoop to jump through, a check spot. And the footnotes say that technical violations will not be overlooked, so presumably an application where they haven't checked this is defective, and I just find that to be putting form over substance. They wouldn't be there putting an application in if they didn't think one of these three things existed.

CHAIRMAN BABCOCK: Should we vote on it, Steve?

MR. YELENOSKY: I would suggest we do.

CHAIRMAN BABCOCK: Okay. Let's vote on this, and the vote is to delete subparagraph (F) from 2.1(b)(3). So 2.1(b)(3)(F), the vote is to delete it. All in favor of deleting that provision raise your

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hand. All against.

Mike, do you have your hand up or not?

By a vote of 19 to eight, the Advisory Committee is in favor of deleting it. By a vote of 19 to nine, the Advisory --

REPRESENTATIVE DUNNAM: No, I'm not voting. I've got a comment.

CHAIRMAN BABCOCK: Hang on, let me just finish reporting the vote. By a vote of 19 to eight, the Advisory Committee advises the Court that this provision should be deleted. Okay.

REPRESENTATIVE DUNNAM: Along that line, this is an application, and there's no requirement that I see in the statute that requires that the minor personally make the application as opposed to the attorney filing it for them, like you would do with an application for writ of garnishment or application for injunction. Those are all applications too. The statute does not say that the minor -- and you all can see it. I've read it a couple of times. I don't see where it says that the minor has to personally sign the application. It also specifically

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does not say that the oath has to be made by the minor. It simply has to be made like in any other case by a person with personal knowledge and able to swear under oath.

The application form you have requires that the minor sign it. It requires that the minor be the one that makes the statements under oath. The reason I think this might be -- and I did not draft this and I wouldn't claim it, but under 33.003(c), one of the things that you have to have in the application that is noticeably missing is the minor's name. And obviously, I'm not speaking for the Legislature on this, but this rule, as you all are proposing it, requires the minor's name to be stated, requires the minor to sign the application, requires the minor to do it under oath, and I don't see that in the statute.

HON. ANN CRAWFORD McCLURE: What we did in drafting these was to look to the other jurisdictions additionally that have implemented them. The doctors had some concern about there being a verification page which did contain the name, and that's where

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that is going to be listed. Under oath was something that we talked about to some extent.

It was, as I recall, Sam who developed it in the subcommittee, the editorial committee, and drafted it. So if you want to address that?

HON. SAMUEL A. MEDINA: Well, it was basically more out of concern of trying to marry people up, and if you're going to try to -- you know, the same individual here as there, and that's what came out of it.

REPRESENTATIVE DUNNAM: I understand. Well, there was some talk about you stamp the verification or something with the same number and this and that, but I was just -- my personal reading of this was that I could file this on behalf -- absent the rule that's being proposed, I could file this on behalf of a client, I could have a friend of theirs verify it under oath, and I could proceed under this statute. That's the way I read the statute, just like I could for any other writ of garnishment or anything else.

HON. SAMUEL A. MEDINA: I don't

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disagree with you.

REPRESENTATIVE DUNNAM: I think that's a substantive change from the statute.

CHAIRMAN BABCOCK: Well, the only thing I would say is that if you look at 3(C), it says, "A statement that the minor wishes to have an abortion." It's very subjective. I suppose an attorney could sign under oath saying, "She told me that she wanted it."

REPRESENTATIVE DUNNAM: Well, a friend could do it. Anybody with personal knowledge. We do that all the time. Every time we have somebody sign an affidavit, they're saying what other people want, generally, or what other people did. That's a fair point. Linda.

MS. EADS: I think if you're going to require the minor to verify under oath, you're not taking into account a lot of different kinds of minors you're going to be dealing with. Some of them will be incompetent mentally. I think the statute is a better way of having this, which is the application is verified, rather than requiring the minor be the one who verifies it.

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CHAIRMAN BABCOCK: Do you accept accept that, Judge?

HON. ANN CRAWFORD McCLURE: No.

REPRESENTATIVE DUNNAM: The other thing I'd like to point out, if you all decide to make this change, then I would sure urge that something be put on the application in pretty big letters informing the minor, "Your name will not be released to anybody" somewhere.

CHAIRMAN BABCOCK: Let's do it one at a time. Let's have a vote on whether or not -- the suggestion that the minor should not be required to file the application under oath but just somebody with personal knowledge.

REPRESENTATIVE DUNNAM: I think there are two issues. One, does the applicant have to file that application? The application is signed, not by a lawyer, not by -- so if somebody comes in to see me, I'm not signing the application. Fine. And then the second point is the oath. Does the oath have to be made by the minor? I think there are two things that are being added to the

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statute that aren't there.
CHAIRMAN BABCOCK: Okay. I understand the oath part. But what's the first part again?
REPRESENTATIVE DUNNAM: The first part, the application, the formal application, is to be signed by the minor under the rule. Under the rule the minor signs the application.
CHAIRMAN BABCOCK: Right. Under oath.
REPRESENTATIVE DUNNAM: Right. So I think there's two issues. One, does the minor have to be given the oath; and number two, does the minor have to sign the application.
CHAIRMAN BABCOCK: Let's split it into two, though, so we're clear about what we're voting on. The first proposal is that we should delete the requirement from the rules and the form that the minor must sign the application. Everybody in favor of that raise their hand.
HON. BILL RHEA: Chip, can I make a comment first? I think we're missing perhaps 33.003(a), which to me is very specific. It

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says a pregnant minor may file an application. In the Rules of Civil Procedure, for the most part it's very clear that it's the attorney who can file on behalf in this or that type of action, but that's real explicit.
REPRESENTATIVE DUNNAM: If we look at the garnishment statute, the Civil Procedure rule on garnishment, it says the plaintiff may file an application for writ of garnishment. But in every garnishment, I'm signing it. It's not my client's signature. I think it's a drafting problem in the statute.
MR. MEADOWS: Before I vote on this, there have been a number of votes today, and in many instances I've been guided by what the subcommittee decided because they had more opportunity to think about it and hear from other people. The points that I found to be most significant were when we voted on things that really seemed like departures, when the rule departed from the statute. And so I've been interested in what the subcommittee had to say about it. In this instance, what I've

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heard is that it's been done this way because other jurisdictions did it that have similar statutes. I can't --
HON. ANN CRAWFORD McCLURE: Well, there's another issue, too, that I thought I made clear and perhaps I didn't. The application has to be under oath by statute. The question is, who is going to do the oath? Is it going to be the lawyer on behalf of the minor, or must it be the minor?
We took the position at the subcommittee level that in all likelihood these are going to be filed before the attorney is appointed. The number of instances in which she has sought independent counsel before she files it is going to be in our view less frequent. In order to come up with forms, which we were required, the two forms we were required to come up with, one of them is the application; that if we had an application, that it ought to be providing for her verification.
The doctors expressed some concern about having the verification by something other than the minor.
CHAIRMAN BABCOCK: Could the father

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file the application?
MS. EADS: What are you going to do about the retarded 14-year-old who has been raped by the father? I mean, this rule requires that that retarded 14-year-old sign the application. That makes no sense to me. Why is it mandatory that that's the person who signs it, when the statute just says the application has to be verified? I mean, that puts an enormous burden on the system, and I don't see any reason for it.
PROFESSOR DORSANEO: It's the same as the civil procedure rule saying that a next friend can institute the proceeding on behalf of a minor. It isn't going to apply to this.
HON. ANN CRAWFORD McCLURE: Depending on how you construe the next friend, depending on the nature of their ability to act on behalf of the minor, it may implicate.
PROFESSOR DORSANEO: Well, our next-friend law generally doesn't impose any particular requirements on somebody to be the next friend. It may not be a good idea for somebody who might want to be in this business to be acting as a next friend. Then again,

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you know, that's kind of prejudging circumstances that aren't present.

REPRESENTATIVE DUNNAM: One thing that was discussed, in this situation, I'm informed that many of these girls don't come from traditional families. They live with grandparents and things like that. I envision most of these applications being things where another family member is the one that assists the minor in filing this application. I know there will be other times where various organizations will assist them. But with regard to the other bypasses that were discussed, I can see a grandmother who has basically raised the child go in, either to a lawyer or on their own. Not many young women are going to be able to do this by themselves without assistance from somebody.

CHAIRMAN BABCOCK: Judge Lawrence.

HON. TOM LAWRENCE: It seems like we're trying to expand the statute unnecessarily. If the judge is going to have the applicant perform for the hearing, I don't see that having the applicant swear to the affidavit gives it any more weight or

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credibility.

HON. SAMUEL A. MEDINA: Mr. Chairman, may I say something?

CHAIRMAN BABCOCK: Yes.

HON. SAMUEL A. MEDINA: For what it's worth to the rest of committee, basically some judges from Harris County, myself and others, and a judge from Austin, basically that was taken from Section A, I believe. And it was not a matter of, oh, it's got to be this way. There was not a whole lot of discussion. I don't know if that makes any difference. It was more like, okay, we have to look at it. A pregnant minor. Okay. We're we go. But there was not debate over this. So take that for whatever it's worth to you. You make decisions.

CHAIRMAN BABCOCK: Judge Brown.

HON. HARVEY G. BROWN, JR.: I do think we're adding to the statute a little bit by saying the application has to be sworn to and signed completely by the minor. But I don't think we're adding to it when we say that subpart (3) needs to be sworn to by the minor. Only the minor can say if the minor

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wishes this. An attorney doesn't have personal knowledge of what the minor wants. If the attorney is told what the minor wants, that is still, it seems to me, hearsay, not personal knowledge. It can only be the person who says they want it.

MS. SWEENEY: But we speak for our clients on a fairly regular basis on things like that when we say what they say they want.

CHAIRMAN BABCOCK: I can envision a situation where the teenage father goes in there and files the application and swears to it because the girl has told him that's what she wants, and then they go before the judge and there's some potential for abuse there, particularly if there's a snafu and there's no actual hearing but it's deemed granted by operation of law, so that the young woman is never before the judge, so he never really gets to ask the woman himself. That strikes me as potential for abuse. So that's my comment, Judge.

JUSTICE HECHT: Or the incestuous father, like Linda raised. What if the father, who has abused the child, he makes the

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application?

CHAIRMAN BABCOCK: Of course, that would be somewhat incongruous since it's parental notification.

JUSTICE HECHT: Well, the stepfather or the boyfriend or uncle.

MR. LOW: Any part of the affidavit that's signed by somebody mentally incompetent, I don't know that they want that. How can somebody incompetent sign an affidavit, no matter what it is? That's the first thing.

MR. YELENOSKY: But that's always an issue, and there are all kinds of requirements that people sign an affidavit to something that they have to take into account that potentially someone is incompetent, and then a guardian is appointed or some other accommodation is made as somebody requires it.

HON. JAN PATTERSON: What is meaningful to me is the face-to-face, the hearing, the judge and the girl. The application gets them there. And so I think we ought to facilitate getting them to the judge as soon as possible so that the judge

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can make an informed decision.
CHAIRMAN BABCOCK: Judge Rhea.
HON. BILL RHEA: I agree with Chip, and that's that it never happens. That's the danger. This could be so easy for some family member, either the abuser or just somebody who doesn't want the trouble, to push something on a girl who may not want it. We have to leave that option open to the minor as well.
MS. EADS: Well, there's abuse on both sides. And the statute says "application," it doesn't say "applicant verifies," so I mean, we can argue abuse on both sides of this question obviously.
CHAIRMAN BABCOCK: Yeah. This is a very interesting issue at 5:15. Bill Dorsaneo.
PROFESSOR DORSANEO: Frankly, the statute doesn't say -- I don't find it in the statute anywhere, although I think it's a good idea, that the minor would appear at this hearing, but I don't see that the statute says anything about that. I mean, we're embroidering on the statute quite a bit.
CHAIRMAN BABCOCK: Well, let's stick

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to this issue. Judge Dorsaneo raises a great point. Okay. Is it still the sense of the subcommittee that they don't wish to entertain this amendment?
HON. ANN CRAWFORD McCLURE: Yes.
CHAIRMAN BABCOCK: Okay. So we're going to vote first on whether or not the application must be signed by the minor. And so the issue will be if you are in favor of deleting the requirement in the rule, in the form, that the minor must sign the application, raise your hand.
All right. All those who are in favor of the rule in the form as drafted, which requires the minor to sign the form, raise your hand.
By 16 to 12, the sense of this committee is that the application should not -- it should not be a requirement that the minor sign.
All right. Now, the next issue is, all those who believe that the rule and the form should be changed to delete that the minor swear to the application under oath raise their hand.

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All right. And all those who believe to the contrary, that the rule and form as drafted should include or require the minor to sign it under oath, raise their hand.
By a vote of 13 to 14, the sense of this committee is that it should be dropped, that the minor should not be required to sign it under oath. Did you got that, Bob?
MR. PEMBERTON: Got it.
MR. ORSINGER: The very last rule in here, about when the Supreme Court exercises its rule making authority, I think is negated by our decision to make all of the opinions in private, because it says the Supreme Court should promulgate rules in cases where there's no appeal from the court of appeals to the Supreme Court, but that the court of appeals interpreted this Family Code provision as otherwise. But in light of the fact that it's never going to be published or revealed to anybody, the Supreme Court will never know about that category of cases, and shouldn't we delete that now?
MR. PEMBERTON: There's a provision in Rule 3 for forwarding a court of appeals

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opinion to the Supreme Court, even -- well, assuming that at the time we provided there would be an opinion in every court of appeals case. It would always be forwarded, whether the case went up or not, to the Supreme Court, so they would take it into account in issuing their guidelines.
CHAIRMAN BABCOCK: I think that's the answer to that. Paula.
MS. SWEENEY: In those two votes, did we solve the problem of the mentally incompetent minor? If the Court would follow that suggestion, then somebody else could speak for the mentally incompetent?
CHAIRMAN BABCOCK: If the Court followed that suggestion, that's right.
Okay. I think the sense of Justice Hecht and myself and Justice McClure is that we have answered the major substantive issues with respect to these rules, thus obviating the need for a meeting tomorrow morning, which I know will disappoint many of you. However, if anyone spots something in these rules that needs to be fixed, either a substantive issue, or the thing I worry about is that there's

some word dropped out or there's a typo or there's some inconsistency, please tell either myself or Justice McClure or Bob Pemberton just as soon as you can.

And I think for my sake, this level of discussion has been on a very high plain, and I thank everybody for it, and I hope my first meeting hasn't been a disaster as I feared it might.

MS. SWEENEY: You did really good.

JUSTICE HECHT: Let me tell you that we appreciate, Judge Baker and I, appreciate your looking at this on such short notice. And the Court is going to expedite its own consideration of this, and then almost immediately, as soon as we can finish, ask for public comment, since we have such a short time. And that request will probably go out about the same time that you get the product of all of these comments and reworks that we heard today. So we're not going to be able to come back to you with a revised version ahead of the time that we ask for public comment. That doesn't mean that we don't want your comments during that period. It's just that

we have such a short time to get these finished that that's the way we'll have to do it.

CHAIRMAN BABCOCK: And I think we probably, as long as we're clapping, ought to clap for Judge McClure and her subcommittee.

Thanks. We're adjourned.

(Meeting adjourned at 5:45 p.m.)

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