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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

OCTOBER 22, 1999

(MORNING 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 8:35 o'clock a.m. and 1:00 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:

(Session convened at 8:35 a.m.)

CHAIRMAN BABCOCK: I want to welcome everybody to the first session of the new Supreme Court Advisory Committee. My name is Chip Babcock, and I was telling people that Justice Hecht and Justice Phillips got me totally inebriated and then at the end of the conversation said would I do this, and I accepted under those circumstances. But I'm deeply honored to have been asked to chair this, following a great leader in Luke Soules, who couldn't be here. And as a result of that, the roast of Luke, which was scheduled for immediately after today's session, is going to be postponed but not canceled. So we will have a session to roast Luke Soules at a later meeting but not today.

The person here with the laptop is Carrie Gagnon, who is my secretary in Houston, and she is going to help me with this project. And if anybody has questions about anything about the committee, about our dates, about getting documents, call her. Her number is 713/752-4210.

MS. SWEENEY: Give it again, please.

CHAIRMAN BABCOCK: Did everybody get that? 713/752-4210. At the back table there should be some expense reimbursement forms, and there also are some folders with your names on it that have subcommittee assignments. Those subcommittee assignments have been made by myself and Justice Hecht, but they're not certainly set in stone. And if anybody feels they have any particular expertise to add to a particular subcommittee, let me know. We would be delighted to add you although possibly not subtract you from your subcommittee assignments.

We are hoping to get through the Parental Notification Rules today, thus obviating the necessity for a session tomorrow, but we're not going to shortcut our discussion of the rules either. Our work has to be finished at this session. And as a result of that, our procedure today is going to be different than it typically is. For those of you who have served on this committee before, you know that we typically beat these rules to death and will talk about them for a minimum of a year. That has always been my understanding. But on

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

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

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

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

HON. ANN CRAWFORD McCLURE: As was I.

CHAIRMAN BABCOCK: As you were.

HON. ANN CRAWFORD McCLURE: I was.

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

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

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

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

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

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

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

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

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

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

HON. F. SCOTT McCOWN: Chip, has

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everybody really read them? Or would it be faster to take a few minutes and just let people read through them?

CHAIRMAN BABCOCK: I don't know if everybody has read them or not, Judge.

HON. F. SCOTT McCOWN: Well, maybe we don't want to ask that question, but maybe we might want to ask if people want to take a few minutes to review them and refresh their recollection.

CHAIRMAN BABCOCK: That would be fine. We'll take four or five minutes here for people to just do what I'm sure they've already done. Unfortunately, the process imposed upon us by the Legislature has been so quick that the final typed-up clean version was only prepared late Wednesday night and we got it yesterday, so that's why you got it yesterday.

And I might say that one of the reasons we have to finish our work today is that the Court is going to have to digest what we give them and then I think send it out for public comment and get this all done by January 2.

JUSTICE HECHT: December 15th.

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CHAIRMAN BABCOCK: December 15th. So we're on an extraordinarily tight schedule. So by the clock everybody has five minutes to refresh their recollection.

(Five-minute pause.)

CHAIRMAN BABCOCK: Okay. Your five minutes is up. We were just commenting about how much legal talent is in this room, and for all this legal talent to be quiet for five minutes is remarkable.

I should have mentioned that Justice Baker, who is with us and talking to Mike Hatchell over there, was the liaison to the subcommittee and is going to be with us today. We're delighted that Justice Baker has joined us.

Let's go to Rule 1.1, Application. Any comments? No comments from our committee, so we will move to 1.2, Expedited Proceedings --

HON. SCOTT A. BRISTER: Well, could I suggest that we just have -- there are a lot of words on here. Maybe if we could have Justice McClure just give us a one-minute synopsis of why they did what they did on Rule 1.1.

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CHAIRMAN BABCOCK: And Justice McClure can also tag Bob Pemberton, too, if she wants to. But sure, that's a great idea.

HON. SCOTT A. BRISTER: I didn't mean to put her on the spot.

HON. ANN CRAWFORD McCLURE: Understood. Well, first of all, we were mandated by the legislation to ensure two things with regard to implementation of these rules: Confidentiality being foremost; secondarily, it has to be conducted in an expeditious manner. The time frame imposed by the legislation itself can only be described as a rocket docket, so we had to do something in order to ensure that when these cases are filed, they get brought to the immediate attention of the judge, whichever judge may be assigned to consider them.

We also discussed whether we wanted to include these rules, fold them over into another body of rules, or allow them to be freestanding on their own. And we decided that, because it's necessary to have them implemented so quickly, we needed to have them as freestanding rules. That having been said,

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there are some circumstances in which some of the ideas that we came up with might be in conflict with the Rules of Civil Procedure and the Rules of Appellate Procedure. We wanted to ensure that, to the extent these rules were in conflict with those rules, these rules would apply. But we also did not want to leave the impression -- understanding that a number of these cases at least originally are going to be filed by minors that may not have attorneys appointed at that particular time, that they would have to understand the nature of the proceedings as well.

And as one example, the statute gives no timetable for the filing of a notice of appeal in the event the trial court denies the application. We had an extensive debate about whether we wanted to impose an arbitrary deadline. Did we want it filed within 24 hours? 48 hours? The consensus of the subcommittee was, if the application is denied, perhaps the minor would take that opportunity to reflect on her decision and consider other options. We did not want to impose an arbitrary deadline upon her.

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

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

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

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

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

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

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

CHAIRMAN BABCOCK: Yeah.

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

CHAIRMAN BABCOCK: Well, I know

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

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

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

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

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

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

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

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

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

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

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

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

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

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proceeding.

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

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

MR. PEMBERTON: The latter.

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

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

MR. PEMBERTON: Other states have

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

CHAIRMAN BABCOCK: Bill Dorsaneo. Professor Dorsaneo.

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

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

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

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

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

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

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

CHAIRMAN BABCOCK: Bill Edwards.

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

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

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

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

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

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

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

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

I think Justice Hecht had a comment.

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

MR. LATTING: I guess my question

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

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

MR. LATTING: Okay.

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

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

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

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

CHAIRMAN BABCOCK: Judge Brown.

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

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

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

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

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

CHAIRMAN BABCOCK: Okay.

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

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

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

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

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

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

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

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

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

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

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

Now, realistically, if a judge were to

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

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

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

MR. EDWARDS: Yes, you can.

CHAIRMAN BABCOCK: Okay. Good.

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

CHAIRMAN BABCOCK: That solves that problem. Justice Duncan.

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

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

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

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

CHAIRMAN BABCOCK: Justice Duncan.

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

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

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from a footnote to a comment.

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

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

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

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

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

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

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

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the court, but also situations where the application of another rule of the court would be inconsistent with the general framework and policy of the Parental Notification Rules.

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

MR. EDWARDS: Just make that a comment.

CHAIRMAN BABCOCK: Make it a comment or put it in the rule?

MR. EDWARDS: Or put it in the rule. Either one.

CHAIRMAN BABCOCK: I think Professor Dorsaneo suggests putting it in the rule.

Justice Duncan, what do you opine on that, put it in the rule or have it as a comment?

HON. SARAH B. DUNCAN: I would rather it in be in the rule. It's easier to say "that's the rule" if it's in the rule.

CHAIRMAN BABCOCK: Justice McClure?

HON. ANN CRAWFORD McCLURE: That's fine.

CHAIRMAN BABCOCK: So the language from Footnote 4, which would say, "also apply,

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but to the extent they are inconsistent with these rules, these rules control" -- now, how does that work, Justice Duncan?

MR. EDWARDS: I just took the footnote, is what I was reading.

MR. TIPPS: Starting with the words "The phrase 'are inconsistent' is used to denote."

HON. SARAH B. DUNCAN: Or it could say "'inconsistent' denotes."

CHAIRMAN BABCOCK: Okay.

MR. PEMBERTON: Or you could stick the phrase in with hyphens after "inconsistent."

CHAIRMAN BABCOCK: Okay. So after "but to the extent they are inconsistent -"

MR. PEMBERTON: "- either directly conflicting or inconsistent with the general framework or policy of Chapter 33 or these rules --". You could do it that way.

CHAIRMAN BABCOCK: What's everybody's preference on that?

HON. ANN CRAWFORD McCLURE: I think that makes it clear as far as the definition.

CHAIRMAN BABCOCK: Is everybody in

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agreement with that? Okay. We'll make that change to 1.1.

Bobby, you keep track of how that's going to read.

MR. PEMBERTON: I have it.

CHAIRMAN BABCOCK: Are there any more comments on 1.1? Yes.

HON. BILL RHEA: Do you want to talk about recusals now or later, since that came up?

CHAIRMAN BABCOCK: I think recusals are handled elsewhere, aren't they, in this rule? The silence is elsewhere.

MR. PEMBERTON: That's pretty much where it comes up.

CHAIRMAN BABCOCK: It is? Okay. Well, Judge Rhea, Bob Pemberton says now is the time to talk about recusals.

HON. BILL RHEA: Well, it seems to me that there's a great danger in being silent on the issue of recusals. There are any number of reasons that one could recuse. My best friend's daughter may be the applicant. My political opponent's daughter may be the applicant. There are any number of situations

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where that could arise that are completely divorced from the issue of whether I'm pro-life or pro-choice.

My concern is that if a situation were to come in where I would feel compelled to recuse myself, the temptation may be, depending upon the circumstances, to just go ahead and let that go by the wayside, go into the ordinary rules, I refer to Judge McDowell, and those two days will pass real quick and I won't have to deal with the issue. And that may be something I want accomplished or just want to avoid publicity on. All sorts of scenarios arise out of that.

It seems to me that it would be a much better situation to tailor recusal rules to this particular circumstance and this particular situation; for instance, requiring a judge who did recuse to immediately notify a local administrative district judge for reassignment or, I guess depending upon the county and the size of the county, some other circumstance for an immediate referral and putting an obligation on the judge to immediately refer it to somebody else and not

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just to let inaction be the word of the day. Because that inaction itself can be used by the judge, and again, there would be a big temptation to use it that way under particular circumstances.

HON. ANN CRAWFORD McCLURE: Well, I certainly understand that thought. In fact, Judge Medina, who was on our subcommittee, expressed almost identical concerns about the daughter of a friend or perhaps his godchild or whoever it might be, having the application filed in his court. I agree with you that the preference would be to try to incorporate something to that extent.

It was the consensus of the subcommittee that, because we were supposed to implement to in large extent the legislative intent, and it was real clear what the legislative intent was, we did not do that. I am not opposed if this group wants to craft some sort of specific rule to address that issue. I think it's a significant issue.

CHAIRMAN BABCOCK: Justice Duncan.

HON. SARAH B. DUNCAN: When you say the legislative intent was clear, is it

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clearly that that was the view of all voting on the statutes, or the view of one or more senators?

HON. ANN CRAWFORD McCLURE: Do you want to respond to what the discussion was at the time?

MS. CUNNINGHAM: Well, I wasn't a part of the discussion, but I did --

THE REPORTER: Ma'am, identify yourself, please.

MS. CUNNINGHAM: Oh, I'm sorry. My name is Stacy Cunningham. I work for Senator Florence Shapiro, who was the author of SB30. I was attending the subcommittee meeting, and the issue came up, so I took the question back to Senator Shapiro. And her response was that the conversations that she was involved with that recusal -- having free rein to recuse could potentially cause problems. And if you're in a small district, you know, if one or more judges recuse themselves, it could end up having where the child could not get a hearing within the time frame. And she reported that back to the subcommittee.

And I don't know if you have any opinions

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on it also.

HON. ANN CRAWFORD McCLURE: There are situations, too, where one judge has jurisdiction over several counties, and he may be the only judge within a certain number of miles' radius. That's just one of the inherent problems with the statute in and of itself.

REPRESENTATIVE DUNNAM: I have a question.

CHAIRMAN BABCOCK: Representative Dunnam.

REPRESENTATIVE DUNNAM: I may have been asleep, but I don't recall anything about recusal ever being mentioned on the House floor when we voted on this issue. And we had a lengthy debate, and I don't -- I was going to ask, other than the senator's letter, is there anything else in the committee transcript or discussion that talks about legislative intent? Because I'm not going to say it didn't happen, but I sure don't recall it.

HON. ANN CRAWFORD McCLURE: Bob, you have all of those tapes.

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MR. PEMBERTON: What we've looked at so far, and it's kind of an ongoing process, there are a lot of tapes, is the entirety of the 12-hour hearing on this in the House State Affairs; and we've been in contact with both Senator Shapiro's office and Representative Delisi's office, who, of course, was the House sponsor, just antidotally, if any of these issues came up in the discussion.

REPRESENTATIVE DUNNAM: But if it didn't come up on the floor of the House or Senate and was not read in as some type of legislative intent, I don't know that just a discussion and one member's opinion expressed in a committee hearing establishes the intent for all 181 members.

HON. F. SCOTT McCOWN: I've got a solution. It seems to me that we could add a sentence that says, "In the event a judge recuses, the application shall be referred immediately by local rules or the local administrative judge to another judge." And then -- I can't remember where it is, Judge McClure, but perhaps you can point it out to me. It seems to me that, as I recall, the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

HON. ANN CRAWFORD McCLURE: I agree with that.

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

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

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

CHAIRMAN BABCOCK: Justice Duncan.

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

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

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

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

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

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

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

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

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

CHAIRMAN BABCOCK: Judge Medina.

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

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

Houston, Harris County, "Here is how you will do it."

HON. F. SCOTT McCOWN: May I make a complete proposal now?

CHAIRMAN BABCOCK: As opposed to an incomplete proposal?

HON. F. SCOTT McCOWN: I propose that we add a paragraph that says, "In the event a judge recuses, the application shall be referred immediately pursuant to the local rules or by order of the local administrative judge to another judge." That preserves the locality working out how they want to handle it.

Second sentence: "In the event a judge is asked to recuse and refuses, the minor can make an application to another judge pursuant to the local rules or assigned by order of the local administrative judge, who shall review the question of recusal, and if the second judge determines that the first judge should have recused, shall rehear the application."

Right now, in the recusal rules, if I'm asked to recuse and time is of the essence, I don't have to recuse. I mean, if I determine

that I shouldn't recuse, I don't have to recuse. I can go ahead and decide the matter. So this would be consistent with what the rule of procedure is now. If I'm asked to recuse and I refuse to recuse, I decide the application. If I grant it, there's no further proceedings. If I deny it, the minor then, pursuant to the local rule or by order of the local administrative judge, can go to a second judge who would review the propriety of my decision. If the second judge decides that I should have recused, then the second judge rehears the application. If the second judge decides that I shouldn't have recused, the application stands, the order of the first judge stands, and the minor can take an appeal.

CHAIRMAN BABCOCK: How long is all this going to take?

HON. F. SCOTT McCOWN: It shouldn't take more than 48 hours.

CHAIRMAN BABCOCK: How long does your proposal allow?

HON. F. SCOTT McCOWN: It says immediately. I mean, I'm assuming that we're

only going to have one hearing on these, that they're going to be at the courthouse, and that they're going to go immediately from the denial to wherever the local rule refers them or wherever the administrative judge sends them.

I admit that there may be some counties that lack the judge power to implement this, but we can't fix that problem. There's no rule you can write. But what I would say to you is that these applications aren't going to come up in those counties very often. And at least this rule would give everybody guidance on what their local rule or their local administrative council of judges need to decide how we're going to handle this, recognizes that there may be instances of recusal, and gives a general outline for how you resolve it.

CHAIRMAN BABCOCK: Buddy Low, then Judge Brister, then Judge Medina.

MR. LOW: One of the things I understand that Judge Underwood is going to -- like in Beaumont, we've got three retired judges. He's going to refer all that on a

rotating basis. Now, if I'm not mistaken, there's something that gives you one shot at where you assign a judge aside from your regular judge. So was that discussed in reference to -- I'm raising the question rather than an answer. I have a lot of questions and not too many answers. Was that discussed in reference to why, with the time element involved, that we don't address recusal? Or was that discussed at all, that they might assign not the regular judge but just some visiting judge?

HON. ANN CRAWFORD McCLURE: We did discuss it to the extent that a number of local administrative regions have already decided that's how they're going to handle it. Houston wants to do it that way. I've heard some discussion from other judges as well. Fort Worth is talking about it. So if we're going to allow that type of strike, then I think if we're going to involve a rule that addresses the recusal issue, you're going to have to incorporate the rule that addresses that issue.

MR. LOW: But wouldn't they

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automatically -- if we don't address it, it's not inconsistent, then they would be granted that strike, would they not, unless we take it away?

HON. ANN CRAWFORD McCLURE: That's my interpretation. I don't know whether everybody would --

MR. LOW: And so therefore, by not addressing it, I mean, we either say, okay, there is none, or we've written it into it. And that's one of the things that we might want to avoid.

CHAIRMAN BABCOCK: Judge Brister.

HON. SCOTT A. BRISTER: Without getting into the visiting judge issue, I'm assuming recusal only arises because the applicant has a lawyer. You would not assume -- the judge might do it, but the judge would just do that because they were going to recuse personally. But the applicant is not going to know what the word "recusal" means. So they have got a lawyer. It seems to me what all lawyers would do in that situation is you nonsuit when the judge declines to recuse, and you file it again. There's no argument

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that that's res judicata. You haven't gotten to the merits. So I'm not sure we need to -- I'm tending to think we may not need to address it. The lawyer who doesn't like this particular judge will know what to do, which is, you nonsuit when recusal is declined and you file it in front of another judge.

Now, that works fine with the "I happen to know this person," unless -- in most big urban counties, all of the judges are not going to know this person and you're eventually going to get to somebody who is not. In a small county, if everybody knows the applicant, that's just going to be a problem and you may have to drive to another county. But again, it's only going to arise, I would think, when you've got an applicant's attorney there who can figure out how to do that.

CHAIRMAN BABCOCK: Judge Medina.

HON. SAMUEL A. MEDINA: I tend to agree. That's what I wanted to address. You start addressing recusal and you start making a rule and then you get another rule, and perhaps if we're going to do that, then you

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have to add, just so we don't confuse them, let's limit that to 48 hours, although they know it's 48 hours, so let's add that to it, and you have to link it somehow.

I mean, honestly, I think the practical effect of what's going to happen is each one of these -- in Lubbock, for example, we've been talking about having visiting judges take care of a lot of this. We've talked about the issue of, well, that helps us with the recusal issue somewhat. But what if one of the visiting judges decides, "Well, I can't take it"? Well, the administrative judge says, "I want you to take this case." And he says, "No, I can't take it." Well, he's going to find a judge that will come in and take it.

Then what's the basis for someone saying, "Well, I don't want this judge"? Well, they're not going to know that he traditionally denies or traditionally doesn't deny those, because it's not published. So how are they going to know? I don't know. They better not, because they've violated confidentiality, then, according to this law.

HON. F. SCOTT McCOWN: Well, the

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providers will tell them.

CHAIRMAN BABCOCK: Justice McClure, I sense that Judge McCown has a specific, concrete proposal that our full committee can vote on or not.

HON. F. SCOTT McCOWN: Well, there is some wisdom to what Judge Brister says about nonsuit.

CHAIRMAN BABCOCK: Do you want to withdraw your proposal?

HON. F. SCOTT McCOWN: Well, I just don't know, though, if the -- I think he's right technically, but I'm not sure that it works practically.

MR. EDWARDS: The first thing the court is supposed to do after it gets one of these applications -- actually it's the second thing. After he appoints an ad litem, it says the second thing he does is appoint an attorney for the minor. So the minor is going to have an attorney in every case. So you're not dealing with somebody that isn't going to know. So from a pragmatic standpoint, it also gives the minor the right to postpone the hearing as long as she wants to forever. And

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

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

CHAIRMAN BABCOCK: Bill Dorsaneo and then Judge Rhea.

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

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

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

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

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

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

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

MR. EDWARDS: May or must?

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

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

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

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

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

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

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

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says 1.2.
HON. F. SCOTT McCOWN: Yeah, 1.2. That would be probably the better place for it.
CHAIRMAN BABCOCK: Okay. Do we have Judge McCown's language? Bob, do you have that?
MR. PEMBERTON: I was sort of relying on the reporter.
CHAIRMAN BABCOCK: Okay. The court reporter has got it, so we'll vote. Is everybody in favor of that? Is anybody against it? Okay. That will be --
HON. SAMUEL A. MEDINA: Can you restate that one more time?
HON. F. SCOTT McCOWN: If a judge is struck or recuses, the application shall be referred immediately pursuant to the local rules or by order of the local administrative judge to another judge.
CHAIRMAN BABCOCK: That will be added to 1.2.
MS. CORTELL: Can I ask one question? Does that contemplate a motion for either being granted? I mean, that sounds

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

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

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

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

MR. EDWARDS: Or another county.

HON. SCOTT A. BRISTER: Or another county.

CHAIRMAN BABCOCK: Buddy Low.

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

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

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

HON. ANN CRAWFORD McCLURE: There is

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

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

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

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

CHAIRMAN BABCOCK: Steve.

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

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

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

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

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

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

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

CHAIRMAN BABCOCK: Would you Harris County guys get together.

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

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

MS. SWEENEY: But you're talking about requiring that they perjure themselves by saying, "I haven't previously asked."

HON. SCOTT A. BRISTER: I don't see that. That's not on that particular form anywhere.

MS. SWEENEY: Well, I saw it. Where is that? I've lost it now.

HON. ANN CRAWFORD McCLURE: Well, that's what Bob was just talking to me about. That was deleted off of the last draft without the blessing of the subcommittee. It was inadvertent.

MR. PEMBERTON: A misunderstanding of the will of the subcommittee. There should be a blank on the application asking the minor to say if she's filed somewhere else previously.

CHAIRMAN BABCOCK: Judge Schneider.

HON. MICHAEL A. SCHNEIDER: Isn't there a practical issue here, though, if you dismiss in one case where an attorney has been appointed and you go to another court? There's nothing that says that that attorney is appointed forever. So really a person is

going to be without counsel when they go to another court.

CHAIRMAN BABCOCK: Possibly. Bill Dorsaneo.

PROFESSOR DORSANEO: Well, Judge Brister is assuming that you're going to have an absolute right to nonsuit in this context, and I'm not completely sure that's right. There are some cases that provide judicial discretion to disallow a nonsuit, and I would worry about that in this context.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: I have a question about if we don't provide for a ruling on the recusal within a 48-hour period. Does the default clause that the failure to react within 48 hours is deemed granting, does that still apply? And as a practical matter, if there's a recusal that hasn't been resolved in 48 hours, do we default the grant? Or do you have to have a hearing and no ruling before the default clause goes into effect?

HON. ANN CRAWFORD McCLURE: There's no requirement that there be a hearing conducted, because the default provisions also

contemplate the fact that you can't get a judge to hear it, particularly in West Texas, which I'm pretty familiar with. So there's no requirement that there be a hearing. I think the avenue of relief is the minor has the opportunity to request, and the forms include a request, that the hearing not be commenced until within 48 hours after a date that she either specifies or her attorney specifies.

HON. F. SCOTT McCOWN: I've got a motion now.

HON. ANN CRAWFORD McCLURE: Did you withdraw your last one?

CHAIRMAN BABCOCK: Yes.

HON. F. SCOTT McCOWN: Well, I'm keeping the first sentence, but I'm melding Brister and Brown here.

If a judge is asked to recuse and refuses, the judge shall promptly decide the application, unless it is voluntarily dismissed (hint, hint). If the application is denied, a minor can make a second application to another judge assigned pursuant to the local rules, or by order of the local administrative judge, who shall review the

question of recusal and, if the second judge determines the first judge should have recused, shall rehear the application. Third sentence: This rule controls instead of Texas Rule of Civil Procedure 18a.

And I would move that we add that either as a separate paragraph or to the "Expedited" paragraph.

CHAIRMAN BABCOCK: Judge Peeples.

HON. DAVID PEEPLES: I want to suggest something different. I don't have language, and what I want to suggest is, I think there are some principles that we can agree on, and then either have the committee draft some language, in other words, agree on principles and have them draft, or move on to something else and have some people here draft some language.

The principles I think we can agree on are, number one, you ought to have the right to self-recuse. Number two, if the motion to recuse is granted, no problem. If it's denied, I think the burden ought to be on the judge who denies it, that the 48 hours ought to keep ticking, and the judge who denies a

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

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

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

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

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

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

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

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presiding judge and get it done.

MR. LATTING: As opposed to the lawyer?

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

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

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and submit that to them separately.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

for whom?

MR. ORSINGER: A guardian ad litem who is an attorney under the Family Code is specifically given the right to examine witnesses.

CHAIRMAN BABCOCK: Can he make objections to evidence?

MR. ORSINGER: I think so. If you can -- I mean, who knows. But if you can participate in examinations, could you not also object to questions that are impermissible?

CHAIRMAN BABCOCK: Nina.

MS. CORTELL: Could we back up? I have kind of a global question. I have tried to envision what the hearing looks like from an evidentiary standpoint. What is it that the subcommittee thought that would look like?

HON. ANN CRAWFORD McCLURE: It's an in chambers discussion generally with the judge in a position to ask questions of the minor. We have devised sort of a checklist of ideas that the guardian ad litem or the attorney ad litem should produce in terms of

background information. It is to be as informal and nonintimidating as possible, and that was the conception. Everyone else is to be excluded except those that are necessary to participate. So it was not envisioned that it would be in the courtroom with miscellaneous bystanders participating.

MS. CORTELL: And medical testimony is something that is envisioned as well as the report of the guardian ad litem?

HON. ANN CRAWFORD McCLURE: Well, certainly it would be possible. We envisioned and had a discussion about the guardian having the opportunity to gather psychological records or medical records. Certainly the emotional health of the minor would be an issue. Perhaps substance abuse problems, emotional problems, would be something that the trial judge would want to look at. Given the time frames, we were uncertain as to whether we would have live testimony, whether it would be done through medical records, or through testimony of the child herself. But to the extent that we can gather all of that information and produce it in chambers within

48 hours, that was our concept.

CHAIRMAN BABCOCK: Judge Brown, is your problem solved by the amendment we've already made to 1.1, talking about how the rules are going to be construed so as to comply with the general framework or policy of the Parental Notification Rules? Would that give you in your mind discretion to admit an affidavit? I mean, hearsay is sometimes admissible.

HON. HARVEY G. BROWN, JR.: At least it will give an argument, I guess.

CHAIRMAN BABCOCK: Mr. Tipps.

MR. TIPPS: What about the possibility of incorporating language like that which you find in arbitration rules with regard to the Rules of Evidence? I don't have any in mind, but those standard rules talk about arbitrators using some discretion to consider evidence. That might provide the judge with the kind of discretion that he needs. For example, if you're talking about medical records, well, under the evidence rules, you have to get a deposition on written questions and prove up medical records, and

that's obviously not practicable.

CHAIRMAN BABCOCK: Yeah.

HON. ANN CRAWFORD McCLURE: Our thinking was that it would provide a basis for the guardian ad litem to make a recommendation to the court based on those medical records, which wouldn't necessarily meet the evidence rules in order to have that before the judge.

CHAIRMAN BABCOCK: You could add a sentence that said something like "Affidavit testimony of witnesses other than the applicant is admissible in the court's discretion." That would solve your problem. Bill Dorsaneo.

PROFESSOR DORSANEO: Well, I'm back at the same point. What Rules of Civil Procedure or Rules of Evidence do we need to have applicable? We should approach it that way. I think there will be an enormous number of issues that could be raised concerning inconsistency and incompatibility. And I'm becoming persuaded that it would just be better for this to just kind of operate on its own basis and not be kind of in between.

CHAIRMAN BABCOCK: Has anybody else

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got any other comments? Yes, Richard Orsinger.

MR. ORSINGER: If you don't allow medical evidence by affidavit, you can expect no doctors are going to be able to participate in this, because these are going to be hurriedly scheduled, awaiting the appointment of an ad litem, which may occur in 30 minutes or may occur in half a day, and doctors are going to be doing rounds in the morning and everything else. I think if you don't have affidavits from doctors, you're not going to have medical testimony at all. And if you're serious about evaluating the medical risks to the mother, I think you ought to encourage medical input. So I would be in favor of allowing affidavits from doctors.

CHAIRMAN BABCOCK: That was Judge Brown's point which kicked off this discussion. All right. Justice McClure, what do you feel about it?

HON. ANN CRAWFORD McCLURE: I think the overriding concern from the standpoint of the subcommittee was to not allow affidavit testimony from the minor. There was some

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discussion about should we permit telephone hearings, should we provide for it to be just on submission on the basis of the affidavits, and we felt that it was extremely important for the judge to have the benefit of the minor.

As regards the medical testimony, it's my position that it would not damage the proceedings to have it done by affidavits.

CHAIRMAN BABCOCK: Okay. So my language would solve the problems that you talked about: "Affidavit testimony of witnesses other than the applicant is admissible in the court's discretion." That would give the judges discretion or not.

MR. ORSINGER: Can I make a suggestion that we also allow for third party witnesses, or maybe just limit it to medical people, to be put under oath over the telephone to testify? Because as a practical matter, that's more likely than an affidavit. Call the doctor on the phone, put him under oath. Everybody can direct examine the doctor. The judge can ask questions.

CHAIRMAN BABCOCK: Is that

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permissible under the rules now?

MR. ORSINGER: I don't know.

CHAIRMAN BABCOCK: Can you do that right now in a court hearing?

HON. SCOTT A. BRISTER: Yeah. The rule says it doesn't matter where the notary is. You don't have to be with the notary.

MR. ORSINGER: That's for a deposition rule. This is trial testimony. Can you do that in trial?

CHAIRMAN BABCOCK: I've had it done; I don't know whether you can do it or not.

HON. ANN CRAWFORD McCLURE: Unless there's an objection to it.

MR. TIPPS: Following up on Professor Dorsaneo's question, the only part of these other rules that I've heard mentioned as being needed is the 30-day notice of appeal rule, which quite frankly I can't imagine that that's going to come into play very often, because people are not going to wait 30 days. So I wonder if the committee really believes that we need to incorporate the other court rules by reference at all, rather than just letting this be a stand-alone set of rules.

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CHAIRMAN BABCOCK: Justice Duncan.

HON. SARAH B. DUNCAN: That gets back to my unintended consequences. There are a lot of rules in the Rules of Civil Procedure and Appellate Procedure, and unless and until someone goes through them and makes sure that they're not going to have adverse unintended consequences, it's a little scary to just wholesale do this.

CHAIRMAN BABCOCK: Yeah, but if we are silent on that question, then the rules are going to apply in any event. So we would have to be prepared to make an affirmative statement that they don't apply.

HON. SARAH B. DUNCAN: Well, we could make the statement simply that we can look to the Rules of Civil and Appellate Procedure for guidance.

MR. BABCOCK: Well, I think that's what we've done by putting Footnote 4 in there. We can tinker with that language. But I think it would be dangerous to be silent. And I think it would be more dangerous to say they don't apply.

HON. SARAH B. DUNCAN: It seems to

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

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

CHAIRMAN BABCOCK: Bill Rhea.

HON. BILL RHEA: I think I have to agree with that, because the judge can always say, "All right. Here is the affidavit. It's admissible, but it's not enough for me. I

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MS. SWEENEY: What's our other choice?

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

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

How many people want "judge's discretion" in. Affidavit testimony of witnesses other than the applicant is admissible in the court's discretion, how many people are in favor of that? Eight people.

How many against? The language would be only affidavit testimony of witnesses other than the applicant is admissible, period, taking out the judge's discretion.

MS. SWEENEY: So we're voting if we want the language you just said?

MR. ORSINGER: It's either mandatory, it's discretionary, or it's prohibited. Those are the three choices.

PROFESSOR DORSANEO: But we're just voting between the two right now.

CHAIRMAN BABCOCK: Right, just for the two right now.

So a majority of the committee, by a vote of 17 to eight, is in favor of having the language be "Affidavit testimony of witnesses other than the applicant is admissible," period. So that's what we're going to vote on now.

Should we include that in Rule 1.1 as a

parenthetical after "Rules of Evidence," so that we would say, "Rules of Evidence (except affidavit testimony of witnesses other than the applicant is admissible)"? How many in favor of that? 21 in favor. How many against? Nobody against.

Do you accept that, Justice McClure?

HON. ANN CRAWFORD McCLURE: Sure do.

MR. TIPPS: As a point of order, isn't there some better place to put that? Isn't there a section over here about the hearing and when you can hear the -- that the applicant has to be present?

CHAIRMAN BABCOCK: Yeah, there may be. If we come upon it, we'll insert it there.

HON. ANN CRAWFORD McCLURE: There is a structural rule on conducting it.

CHAIRMAN BABCOCK: For now we'll put it here. So those two changes are approved as to 1.1, the parenthetical after "Rules of Evidence" and then the language from Footnote 4. Are there any other changes that people want to make to 1.1? Go ahead, Judge

Medina.

HON. SAMUEL A. MEDINA: What happens when -- it says it is admissible -- when you get some judge saying, "I understand it is admissible, unless" -- you know, what do we gain?

CHAIRMAN BABCOCK: Well, judges will be judges.

MR. ORSINGER: You can't make them follow the law.

HON. SAMUEL A. MEDINA: But they're going to think they are.

CHAIRMAN BABCOCK: Bill Dorsaneo.

PROFESSOR DORSANEO: Well, perversely, and I think you've already probably decided to put that language somewhere else, but the more you make adjustments to eliminate Rules of Evidence from play, you suggest that the other rules are applicable.

CHAIRMAN BABCOCK: Right. And that's what we're going to talk about right now.

PROFESSOR DORSANEO: And I think it's a slippery slope here; that we would be

better off not incorporating all other things by cross-reference and then eliminating some things we can think of here today.

CHAIRMAN BABCOCK: Right. I haven't forgotten Justice Duncan's point, and I think that we need to hear from Justice McClure on this one.

Justice McClure, would you accept a variation of what the language is that you have so that either you're silent on whether the other rules apply, or Justice Duncan's suggestion that we have language saying that the spirit of the rules can be looked to but -- what was your phrase, Justice Duncan?

HON. SARAH DUNCAN: Guidance.

CHAIRMAN BABCOCK: Guidance. The other rules could be looked to for guidance.

HON. ANN CRAWFORD McCLURE: I am more comfortable with that language than I am with just a complete elimination or a statement that they're not applicable.

Understand that in some instances these records are going to be referred for other proceedings. To the extent there has been sexual assault of a child, there has been any

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

MS. SWEENEY: I had a question about that. How does that happen if everything is confidential?

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

CHAIRMAN BABCOCK: Steve.

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

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be admissible and that's an example.

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

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

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

CHAIRMAN BABCOCK: Yeah. You ought to vote it.

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

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

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

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

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

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

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

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

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

(10-minute recess.)

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

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

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

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HON. ANN CRAWFORD McCLURE: I'd like a refill on my coffee, just a second, since I didn't get a break.

CHAIRMAN BABCOCK: All right. While we're waiting, does anybody have any comments on 1.2? Justice Hecht.

JUSTICE HECHT: The Court has some tentative concerns about the constitutionality of the time limits in the statute; and specifically, whether a statute can prescribe the time in which to rule and can also prescribe the consequences by failing to rule within that time. For example, in the statute, if the court of appeals does not act within a certain amount of time, the trial court is automatically reversed, and that's a fairly unusual provision.

And one thing I wish you would keep in mind, as you discuss this provision and others, is whether the rule could be silent on the subject of time limits and just let the statute govern. And then, if there ever is a challenge to the statute, then the Court would not be in the position of looking as if it had already prejudged the issue by writing a rule

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that incorporates the statutory limits. We had this concern also on confidentiality, and I'll mention that when we get to it. But we don't necessarily propose that as a solution. But if a challenge to the statute was made on that grounds, we wouldn't want to look as if we had already decided it by writing the rule. And there's no clear answer to it that we know of that says, yes, this is okay, or no, it's flat not okay. There are arguments that go both ways.

CHAIRMAN BABCOCK: Justice McClure.

HON. ANN CRAWFORD McCLURE: Well, I just want to respond that those issues came up in the subcommittee. Our mandate under the order appointing the subcommittee was to implement the rules, implement the statute through the rules. And although we had some discussions about, first of all, is this even a justiciable controversy and the constitutional ramifications of that. And exactly as Justice Hecht just suggested, separation of powers and the Legislature mandating the outcome of a particular proceeding as a result of noncompliance with

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the time deadlines, we as a committee did not feel it was our assignment to address those constitutional issues.

We did try to tackle the confidentiality stance, but certainly to the extent that you have suggestions on whether we should implement that or not, we would be happy to hear them.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: I was just going to comment that I think that the Legislature has run afoul of the Court of Criminal Appeals on this very issue on when a judgment goes final on bond revocations. I've looked at this a long time, but I believe they've declared several statutes in a row unconstitutional on separation of powers grounds. And the Court needs to jealously protect its prerogative under the Constitution. And if the Court -- if an argument can be made that the Court has compromised its position by enacting rules that endorse or affirm what the Legislature did that might be unconstitutional, I would favor trying to draft around it.

MR. EDWARDS: Could you handle that

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in a comment, say, Comment No. 1, if you said in there, whether abortion in general is legal as governed by the law, nothing in the adoption of these rules is meant to comment on the constitutionality of the act, or something like that?

MR. PEMBERTON: Some states do it that way.

HON. F. SCOTT McCOWN: It seems to me that if we go down that road it really becomes unraveling. And I think the suggestion of a comment, a general comment that by adopting these rules the Court is not prejudging or passing on any constitutional question might be the better way to handle it. Because if you start leaving out some and not others, then it looks as if like the ones you haven't left out you're deciding.

For example, where is the case or controversy? Why is this a thing that courts can constitutionally do at all? But if you get over the hurdle that, yes, courts can do things like this, well, then the time limit -- if it's administrative, then the time limit becomes kind of irrelevant. If we're doing

something that's administrative, the Legislature can tell us how quick to do it, if it's not judicial. So I think they're so entwined that if you pick one to be silent about and not the other, it suggests you prejudged the other.

HON. SCOTT A. BRISTER: What does 1.2 add if it wasn't there? An actual notice requirement?

MR. EDWARDS: Prompt actual notice is one thing.

CHAIRMAN BABCOCK: That would be something it would add.

MR. ORSINGER: What if you said "required by law" rather than required by Rules 2, 3 and 4, and then be vague about what law it is?

CHAIRMAN BABCOCK: Justice McClure, what's your reaction to that?

HON. ANN CRAWFORD McCLURE: Well, my personal preference is to leave the rule the way it is and address it by comment. If you want to expand the comment to the extent that by drafting the rules and implementing the statute, the Court expresses no comment on

constitutionality of any of the provisions, I think that would accomplish the purpose with the least amount of difficulty.

CHAIRMAN BABCOCK: Is Rule 2.4(a) and Rule 2.4(f) basically just a repetition of the statute, the timing issue?

HON. ANN CRAWFORD McCLURE: Yes.

MR. PEMBERTON: Yes. It's right from the statute.

CHAIRMAN BABCOCK: Because Justice Hecht's comment, it seems to me, you've got to read in conjunction with the reference to 2.4(a) in the rule we're now discussing, 1.2, and Rule 2.4(f). If we're going to go silent on the timing issue, then probably Rule 2.4(a) and (f) are going to go away.

HON. ANN CRAWFORD McCLURE: Oh, they would have to. They'd have to.

CHAIRMAN BABCOCK: Justice Duncan.

HON. SARAH B. DUNCAN: And that's one of the problems we've had in the Rules of Civil and Appellate Procedure.

CHAIRMAN BABCOCK: Could you speak up? The court reporter can't hear you.

HON. SARAH B. DUNCAN: I'm talking

about the difficulty for lawyers going between and among statutes and rules. And to the extent we can incorporate, either by comment or by rule language, the statutory constraints, we've done a better job of actually getting people to go look at the statutes and comply with them.

CHAIRMAN BABCOCK: Bill Dorsaneo.

PROFESSOR DORSANEO: Well, there's kind of a tension both ways here, because when we repeat what the statute says and the statute gets changed, as it invariably does, that creates difficulties. I really think that happens more often than most of us recognize. There are a lot of incompatibilities right now.

HON. SARAH B. DUNCAN: It seems like last time we resolved that by putting into the comment, "Look to other law," and we listed examples.

PROFESSOR DORSANEO: Our normal procedure is to identify the statutory provision in a comment and not to reiterate it in the text of the procedural rules, at least in recent years.

CHAIRMAN BABCOCK: I think this timing issue is an overarching issue of concern to the Court. So even though we're talking about 1.2, I think we should try to fully explore whether or not we should take the timing elements out of the rules, so that it would not only be applicable to the trial court but the court of appeals as well. So I would entertain additional discussion on that. Paula Sweeney.

MS. SWEENEY: If the vision is to have a pamphlet to give to the minor that sort of explains it all and you take all the timelines out, then how does she find that out?

CHAIRMAN BABCOCK: Put the statute in the pamphlet.

MR. ORSINGER: Or put it in the comment. You could put it in the comment, what the statute says the time deadline is, and the woman won't know the difference between the statute and the comment. She won't understand the statute anyway. She'll be reading the comment.

MR. EDWARDS: Refer to the statute

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in 1.2.

JUSTICE HECHT: Well, the pamphlet is going to be written in more user friendly language to the minor. It won't have either, I don't imagine, the rule or the statute in it.

MR. ORSINGER: The lawyers might need to see the rule and the statute.

CHAIRMAN BABCOCK: Yeah. Judge McCown.

HON. F. SCOTT McCOWN: I guess I'm just repeating myself, since you all didn't agree with me the first time, but this is a stand-alone procedure. It's going to be very difficult for courts and clerks and doctors and providers and minors to implement. And Judge McClure's committee has done a great job of developing rules that you can start on Page 1 and read to the end and understand the whole thing, whether you're a layperson or a lawyer.

And anytime you say, "We want to take something out because we're not prejudging it," you're in fact offering an invitation and suggesting an inclination. And if you decide

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to say, "We're not prejudging some things," then you're saying, "We are prejudging other things," and inviting attacks.

It seems to me that a simple comment at the beginning that just says we're promulgating these rules pursuant to the statute, we're not passing or prejudging the constitutionality of anything in the statute or anything in the rules, and we'll work all that out case by case as it comes, that covers the Court and the jurisprudential process without messing up the practicalities for those of us who have got to implement these things.

CHAIRMAN BABCOCK: Is there anything you need to say to that? No comment here.

JUSTICE HECHT: We're interested in exactly those reactions.

CHAIRMAN BABCOCK: Does anybody else have a comment about taking several sections, 2.4(a), 2.4(f), 3.3(b) and (c), to the extent it deals with timing, out of the rule, and 4.3(d), I guess, 4.3(d) as well?

MS. CORTELL: I agree with those comments that this has to be a clear guide.

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And I think if you start taking these things out, it's not going to be a self-standing, clear guide. And if our problem is not taking a position of constitutionality, I think that can also be covered by a comment in this situation, or we may want put it in the preamble or something. I mean, you can hedge that bet that way. But to obfuscate this just to accomplish that other goal doesn't work for me very well.

CHAIRMAN BABCOCK: Buddy Low.

MR. LOW: I think any rule we have now, like notice, it doesn't prevent somebody from coming in and saying it violates the process or something like that. I don't interpret any of the rules as having been decided a constitutional issue by the Court. But that's the way I interpret it.

JUSTICE HECHT: Well, as far as I know, the U.S. Supreme Court has never held a rule that it promulgated unconstitutional.

HON. F. SCOTT McCOWN: That's untrue, by the way.

JUSTICE HECHT: Is that right?

HON. F. SCOTT McCOWN: Yeah, they

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have. They have declared a Rule of Civil Procedure unconstitutional. If you can help me out, Professor, I'll get you the cite. But no, they have. They have declared one of their own rules unconstitutional.

JUSTICE HECHT: Well, I was under the impression they hadn't. And we have not ever declared a rule unconstitutional, except that one little phrase in the Ethics Rules about contact with jurors after the trial, whatever case that was. I forgot the name of the case.

MR. TIPPS: But is there not a certain distinction here in that most of the rules are not promulgated as expressly to implement a particular statute? They're more general. I think you'd have a little more cover here given the fact that you have been directed by the Legislature to implement a particular statute.

HON. SCOTT A. BRISTER: But taken out of context of this, let's say the Legislature passes a tort reform measure that caps damages and that somehow we need to implement that by rule and we pass a rule. It

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

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

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

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

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

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that you've said you don't want to make.

CHAIRMAN BABCOCK: Well, I think not, because the case or controversy issue has been decided initially by the Legislature, just as the timing issue has been done. I don't think anything in these rules speaks -- in fact, there was briefing by the subcommittee that dealt with the case or controversy issue. There's nothing in these rules that says, hey, this is a case or controversy. There is something in these rules right now that says we've got to decide this within 48 hours.

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

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

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

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versus the statute?

PROFESSOR DORSANEO: No, I meant in other places.

HON. BILL RHEA: Oh, okay.

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

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

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

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

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

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

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

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

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

MR. YELENOSKY: But that's prejudging it.

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

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

MR. EDWARDS: Well, maybe they should.

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

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

MR. WATSON: I'm a little confused

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

JUSTICE HECHT: They can't.

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

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

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

MR. WATSON: And I'm not just

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addressing Justice Hecht.

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

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

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

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sure that we can help do that dance, you know, of whether it has to be addressed in the stage of we are not going to knowingly adopt an unconstitutional rule or this is not unconstitutional.

CHAIRMAN BABCOCK: I think, Skip, that one answer is that we surely are not in a position, I don't think, to advise the Court about whether or not this is or is not constitutional, although I think there is a sharply raised issue of constitutionality on portions of the confidentiality provision. But we certainly can advise the Court or give the Court our view on, number one, the more mundane issue of should we be in the business of passing rules that merely repeat what's already in the statute. So that's one issue that we can express an opinion on to the Court.

And we can also discuss and debate an opinion as to the issues of convenience to the users or friendliness to the users; and Judge McCown's point of why not put them in there to have a complete package, and to have a comment, which I think Judge McCown was in

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favor of, saying we're not deciding anything about constitutionality, but you can't have a uniform, whole body of rules unless we have the time limits in there. And those are all things I think we can and should advise the Court on.

MR. WATSON: Thanks, Chip.

CHAIRMAN BABCOCK: Representative Dunnam.

REPRESENTATIVE DUNNAM: I would just point out that there are really two things that the Legislature asked the Court to do. One is to adopt forms -- this is in Section 6 and Section 2 of the statute -- to adopt forms, which is easy to understand. And two, which I also think is easy, to ask the Court to adopt rules to do two things: One, ensure confidentiality, and two, to ensure sufficient precedence and ensure promptness of disposition. So I think that goes specifically to what the Legislature asked be done. And to leave out the things to ensure timeliness and promptness, I don't know, that seems to be contrary to what was requested.

CHAIRMAN BABCOCK: You said

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something after "ensure confidentiality," Representative Dunnam?

REPRESENTATIVE DUNNAM: Yeah. It says, "to ensure" -- look at Section 2, the last page of the statute. The Supreme Court shall issue rules...to ensure confidentiality and to ensure sufficient precedence over pending matters to ensure promptness of disposition.

Now, I didn't write that, but it sounds to me like we need to have the time limits in there.

HON. ANN CRAWFORD McCLURE: And if I could follow up with that, what our subcommittee was tasked with doing was just that, address the expediency issue of getting these pushed through; second of all, the confidentiality issue. That's why our subcommittee only addressed those particular issues in the rules. And that's what our version of implementation of the rules meant. And that's why you find the time frame specified and the confidentiality issue specified in the rules with the draft.

CHAIRMAN BABCOCK: Representative,

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the language is two-fold: One, confidentiality; and then "sufficient precedence over all pending matters to ensure promptness of disposition."

Is your reading of that language more than they've got to put these matters up to the top of the queue? In other words, don't tell me, "I'm in a two-week jury trial and I can't do it." You've got to reset your jury trial and do this. Or does it mean something more than that in your view?

REPRESENTATIVE DUNNAM: Well, I can tell you that we talked about priority quite a bit in all the debate and giving priority and those types of things. And the 48-hour limits was talked about repeatedly.

CHAIRMAN BABCOCK: Right. And that's in the statute, and that's clear. Bill Dorsaneo.

PROFESSOR DORSANEO: It strikes me that it would be very easy to write a simple rule that talks about giving precedence. And one wonders why the Legislature didn't amend the statutes to talk about priority and precedence of one type of case over another

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

CHAIRMAN BABCOCK: Judge Brister.

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

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

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

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

CHAIRMAN BABCOCK: Any other comments about this?

PROFESSOR DORSANEO: I haven't studied this line by line or word by word, but it seems to me the most important thing to

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

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

CHAIRMAN BABCOCK: Steve.

MR. YELENOSKY: Well, this is jumping ahead, but on that point, I've

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

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

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

CHAIRMAN BABCOCK: Okay. Let's not --

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

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

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

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they come within these limits. And a lot of time we set deadlines, we set dates and so forth, within legislative limits. And that would appear to me to be what they're asking us to do, rather than saying, "Well, we just refer back to you."

CHAIRMAN BABCOCK: Richard Orsinger.

MR. ORSINGER: I think what Bill is saying is that right now it's helpful to have everything in the rules, but as soon as the Legislature changes anything, then it's not helpful to have it in the rules if they're inconsistent with the Legislature. If we put it in the rules now where everything is parallel, then I think we need to make a commitment to be flexible. And as the Legislature changes the procedures or the time elements, then we need to pretty quickly react to these rules. If we do that, then we're not going to be creating too much confusion. But I think we do have it parallel here, and we have to be flexible and keep up with the Legislature.

CHAIRMAN BABCOCK: Representative

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Dunnam has pointed out something that I did not appreciate in Section 2 of the Act, which is the enabling language. It says that the Court shall issue promptly such rules as may be necessary in order that the process established by the section may be conducted in a manner that will, one, ensure confidentiality; and two, sufficient precedence over all pending matters to ensure promptness of disposition.

To me, that second requirement is not for these rules to regurgitate or refine the legislative structure of the 48 hours, et cetera; but rather, for the Court to mandate that the lower courts will grant these proceedings precedence over other proceedings. Does anybody read this differently?

HON. F. SCOTT McCOWN: Yes. I can think right off the bat of half a dozen, and there's probably many more, statutes that tell me this is the most important thing, do it first. And you call a docket, and you've got half a dozen to a dozen things all waving their preferential statutes. The Legislature

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developed a timeline they wanted this done in, and I just want to come back and emphasize something.

I was at the Judicial Conference two or three weeks ago. This is the worry of every trial judge in the state. This is going to be a nightmare logisitically in every courthouse. This subcommittee, which I was not on, has done a great job of putting together consistent uniform rules that solve almost all of the problems that we're going to have. I mean, it's in one place, it's easy to read, it puts it together for the people that are going to use it. I don't think we should hold it to the standards of other Rules of Procedure. It is a stand-alone proceeding. It's a particular stand-alone problem, and we ought to leave it the way it is.

CHAIRMAN BABCOCK: Paula.

MS. SWEENEY: I would like to move that we vote on this and go on, or we're going to have a whole lot longer than a day and a half meeting. I'd like to move that we adopt the rule as written by the subcommittee, including the time limits envisioned by the

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subcommittee, if it is in order.

CHAIRMAN BABCOCK: It is in order. And if nobody else has any comments, I think that in trying to keep with the procedure that we talked about before, and we will vote one way or the other, but Justice McClure, what do you feel about the issue of incorporating the time lines in the rule?

HON. ANN CRAWFORD McCLURE: I think it's important that they stay there. I think the subcommittee felt it was important that they stay there. But I don't want to sit here and tell you that we don't care what your thought processes are, because we do. All I was asked to do was to bring our recommendations to you for your consideration. And in most instances, we're willing to talk with you on redrafting language that is of concern. But as far as this particular format structure is concerned, it's going to be my position that we keep this portion of the rules intact.

CHAIRMAN BABCOCK: Judge Brister.

HON. SCOTT A. BRISTER: Let me ask Justice McClure for her opinion on and comment

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about, you know, that this is pursuant to legislative mandate without respect to constitutional questions and the normal rule making processes of the Court.

HON. ANN CRAWFORD McCLURE: Well, I'm certainly not opposed to it. I think that is something that the Supreme Court needs to answer for itself, whether it wants to draw attention to that issue or not draw attention to the issue. And my understanding in my discussions with Justice Hecht is they do have some considerable concerns about it that they may want to have briefed and presented to the Court and adopt that. Our subcommittee would have no difficulty with a comment to that effect.

CHAIRMAN BABCOCK: Okay. So in keeping with our kind of procedure here, in light of Justice McClure's comments, we're going to keep these in the rules. But I think to advise the Court, we ought to vote on Paula's motion. And would you accept Judge Brister's friendly amendment that we keep the time limits in with a comment that this is not a prejudging on constitutionality of any

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issue?

HON. BILL RHEA: That's really a separate issue.

MS. SWEENEY: I think it is. I think we might have to paste that to the front of the whole book of the Rules of Civil Procedure.

MR. ORSINGER: And some people might vote for that with the comment and against it without. So I'm not sure that it's a separate issue. For me it may not be.

MS. SWEENEY: Well, I decline to accept your friendly amendment.

CHAIRMAN BABCOCK: She doesn't accept that, so we'll do it without.

HON. SCOTT A. BRISTER: Or should I move to amend the motion so we get a vote on that issue? Whichever way you want to do it.

CHAIRMAN BABCOCK: That would be fine. You want to move to amend. Does anybody second that?

MR. ORSINGER: I'll second it.

CHAIRMAN BABCOCK: Okay. And the amendment is not accepted by Paula. So is the right way to do it to go ahead and vote to see

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if the amendment -- okay. How many people are in favor of the amendment?

MR. EDWARDS: Could I ask what we're amending?

CHAIRMAN BABCOCK: Yeah. Paula Sweeney is moving that we give an expression to the Court that, whether or not, how many people on this committee are in favor of retaining the time limits that are contained in the rules. And Richard Orsinger or Judge Brister says, "I want to amend that to say that, yes, we've retained the time limits, but there's a comment which says we're not prejudging the constitutionality of any issue." Have I got that right?

HON. SCOTT A. BRISTER: Right.

CHAIRMAN BABCOCK: Okay. So what we're voting on now is whether or not we're going to accept the amendment to Paula Sweeney's motion. So all in favor of the amendment, raise your hand.

MS. CORTELL: I have a question, Chip, sorry. Does the preamble modify the entire set of rules, or just the time limits?

CHAIRMAN BABCOCK: That was my

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understanding of what Judge Brister intended.

HON. SCOTT A. BRISTER: Yeah. You could put it in the order, I suppose. The Court signs an order adopting the attached rules normally, I believe. I suppose you could put it in the order, or you could put it in the comment itself to Rule No. 1.1 probably.

CHAIRMAN BABCOCK: All right. Does that answer that, Nina?

All right. So everybody in favor of the amendment raise their hand, please. 19.

All against. Nine. Nine against. So the amendment will carry.

So what we're going to vote on now is Paula Sweeney's motion that the time limits be retained in the rule, but with a comment as outlined by Judge Brister.

HON. F. SCOTT McCOWN: A comment not about the time limits, but about --

CHAIRMAN BABCOCK: Constitutionality globally.

HON. F. SCOTT McCOWN: Right.

MR. HAMILTON: A general question.

CHAIRMAN BABCOCK: Yes.

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

CHAIRMAN BABCOCK: Yes, sir.

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

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

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

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

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

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

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

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

MR. MEADOWS: Okay. But obviously

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

HON. ANN CRAWFORD McCLURE: Sure.

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

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

MS. SWEENEY: Yes.

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

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

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

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

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

MR. PEMBERTON: Yes.

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

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

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

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

HON. ANN CRAWFORD McCLURE: That's fine.

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

MR. PEMBERTON: Got it.

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

HON. ANN CRAWFORD McCLURE: I don't.

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

MR. JEFFERSON: That comment on

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

HON. ANN CRAWFORD McCLURE: Thank you.

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

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

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

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

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

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

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

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

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

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

MR. TIPPS: That would be okay.

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

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

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

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

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

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

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

CHAIRMAN BABCOCK: Good question. Why?

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

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

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

HON. ANN CRAWFORD McCLURE: That's true.

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

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

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attorney.
MR. ORSINGER: There is never going to be a recipient's attorney. The only attorney is for the applicant.
CHAIRMAN BABCOCK: Quit while you're ahead, Richard.
HON. ANN CRAWFORD McCLURE: He goes into attack mode and he can't back off.
PROFESSOR ALBRIGHT: Excuse me, I hate to beat a technicality, but isn't the recipient always just the recipient? You have a designated recipient, whether or not it's the applicant, the attorney or somebody else.
MR. YELENOSKY: Why don't you just say "to give prompt actual notice"? I mean, the rules say who it goes to.
HON. ANN CRAWFORD McCLURE: All right. What if we say "in a manner designed to give prompt actual notice" and delete everything else in between?
CHAIRMAN BABCOCK: Another good point. We're making progress. Anything else on 1.2? Okay. 1.2 then is approved with those two changes, inserting the word "all" in front of "other pending matters" on Line 2,

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and deleting the language in the last line, "the recipient or their attorney."
Moving on to 1.3, there is a dispute on subparagraph (b), which we'll get to in a minute, but let's focus on 1.3(a) to start with. Any comments on 1.3(a), Anonymity? Richard Orsinger.
MR. ORSINGER: On subdivision (a)(3)(B), I would make a special plea for us practicing lawyers that we not use the word "attorney" when we're talking about the attorney ad litem, and that we use "the attorney ad litem" every time we're talking about the court appointed attorney. I can foresee that someone is going to be appointed an attorney ad litem for a girl who has a lot of problems besides just this one. And I want to be sure that when we're designating the person that's appointed as the attorney ad litem that the scope of their representation is limited to this particular proceeding. And I would prefer that we use the word "attorney ad litem" rather than "the attorney appointed for the applicant."
So my suggestion would be to say, "When

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an attorney ad litem is appointed under Rule 2.3(b)." And then everywhere else in here that we talk about the minor's attorney, I've added minor's attorney, meaning personal hired attorney who has many duties, or attorney ad litem, whose duties are limited to representing her in the lawsuit.
HON. ANN CRAWFORD McCLURE: I understand your comment. The statute doesn't refer to an attorney ad litem. The statute refers to "The court shall appoint an attorney."
MR. HAMILTON: There's a guardian ad litem.
HON. ANN CRAWFORD McCLURE: And you and I well know the debate and the difficulty between those implications. But that's why the forms track the statute, because the statute does not refer to an attorney ad litem.
MR. ORSINGER: But would you agree, if the court appoints an attorney to represent someone in a lawsuit, that they are an attorney ad litem? Or do you think that they are something other than an attorney ad litem?

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HON. ANN CRAWFORD McCLURE: I may have to write on that.
MR. ORSINGER: Okay. I can't ask that. Well, my proposal is a practical one. It is an attorney ad litem, but I -- these situations are fuzzy situations, but when you're appointed to be a minor's attorney, I would like it to be clear that your duty is limited to this particular proceeding and nothing broader.
HON. ANN CRAWFORD McCLURE: Well, Paula Sweeney raised that issue with me during the break as well to make it clear, particularly if we're going to be giving implications that a nonsuit is an appropriate remedy to the recusal problem, that the responsibilities of the attorney terminate when that application is withdrawn. And if it is filed yet in another court, there will need to be the appointment of another attorney.
MR. ORSINGER: Well, as long as you're going to go that far, you probably ought to be sure, because traditionally the appointment of an ad litem cuts off before the appeal obligation, doesn't it? You're

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

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

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

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

MR. LOW: Chip.

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CHAIRMAN BABCOCK: Yes, Buddy Low.

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

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

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

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which are repeated in this Title 2 chapter.

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

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

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

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

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

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

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

HON. ANN CRAWFORD McCLURE: No, not

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in my interpretation. You and I talked about changing the form, and I agree with you, instead of requiring a disclosure as to whether the application has been filed, whether the application has been denied previously, which would resolve that difficulty.

HON. F. SCOTT McCOWN: Wait, I'm sorry. I didn't mean to interrupt.

HON. ANN CRAWFORD McCLURE: That's all right.

HON. F. SCOTT McCOWN: But it seems to me that when the Supreme Court -- or when the Legislature asks the Supreme Court to write rules, that there is some ability to fill in the interstices. And I think that we need at least a comment, if not a rule, because this would be easy to clarify.

Under the family law, this appointed attorney I don't think can have any scope for the minor beyond this proceeding, because the parents or guardian ad litem presumably has the legal authority to control their legal affairs except for this proceeding. And so what I think we need to just say is the

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attorney is appointed for this case. If the case concludes, the attorney's duties conclude, knowing that if she files another application, she gets another attorney wherever she files it. And we need to say, "And the attorney is responsible for the entire process all the way through the appeal," because traditionally your obligation terminates at the trial court, and just clarify it. Just step out and clarify it. Easy to do.

HON. ANN CRAWFORD McCLURE: And that raises the distinction between the attorney ad litem and the role as attorney. Because if there is an appellate process for the denial, it is anticipated that that is going to be brought by an attorney, but there is no provision in the statute to appoint another appellate attorney.

HON. F. SCOTT McCOWN: Just keep the same attorney.

HON. ANN CRAWFORD McCLURE: Well, that's why I'm hesitant to further define it by saying it's an ad litem.

HON. F. SCOTT McCOWN: Don't call it

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an ad litem. I'm saying --

HON. ANN CRAWFORD McCLURE: I agree with you. It's Richard I disagree with.

HON. F. SCOTT McCOWN: But I think I've solved Richard's problem. I mean, he's worried. Like all lawyers, they have this paranoid fear of being sued. I've never seen one of them get sued yet by a child.

HON. ANN CRAWFORD McCLURE: I have.

HON. F. SCOTT McCOWN: But you're the attorney for just this proceeding. The parent controls their legal affairs for all other proceedings.

HON. HARVEY G. BROWN, JR.: Could we clarify that not only by the language in the rule but by the form? Do we have a form?

MR. ORSINGER: We have no form for appointment. We should for both the guardian and the ad litem. It seems to me we could really help a lot of people if we do a form.

MR. PEMBERTON: I think there's a proposed form along those lines in the Alternative Forms. There's an alternative version of the form that's the last attachment that you have. Those were suggested by some

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of the Harris County judges, Judge Elizabeth Ray and Judge Sharolyn Wood, and they do have a form in there, I think, if I'm not mistaken.

HON. F. SCOTT McCOWN: But we should say somewhere, either as a rule or a comment on the order, that you're the attorney for this case. When the case is over, your obligations end, but you're obligated to also pursue the appeal.

CHAIRMAN BABCOCK: Justice Duncan.

HON. SARAH B. DUNCAN: There again, attorneys don't end with the conclusion of the proceeding. We have continuing duties. For instance, you do need to reveal that you have made a misrepresentation to the client as a continuing duty. To say that the obligation to represent, or the duties that go along with that representation, expire with the proceeding may be inaccurate.

HON. F. SCOTT McCOWN: Well, you may have duties, but you couldn't take any legal action on behalf of a minor.

HON. SCOTT A. BRISTER: No. I think on publication, can't you -- the attorney ad litem sometimes has the duty to appeal service

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by publication.
CHAIRMAN BABCOCK: Richard, do you wish to pursue your ad litem issue?
MR. ORSINGER: I would be willing to live with what Scott is saying. But I wish it would be written in the rule, and not the comment, that the scope of the responsibility has to do with the court proceeding all the way through the Texas Supreme Court, and I'm happy; that if you're appointed in the trial court, you're appointed -- or if you don't want to do it that way, I'm happy with that.
But I just don't like the loose use of the word "attorney." Because if a person is appointed to be an attorney for a minor child, you are guaranteed she will have more problems in her life than just this one when she comes into your office.
CHAIRMAN BABCOCK: Justice McClure has been unwilling to accept that as an amendment, so we need to vote on something. Do you wish to vote that as a specific language change to 1.3(a)(3)(B)?
MR. ORSINGER: Yes. But it will occur elsewhere. But I just would like to

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make it clear that when we're talking about an appointed attorney, that we identify them, and I don't care if we call them appointed lawyer or attorney ad litem or some other lingo, but something to indicate that their responsibility is somehow different from someone who has accepted voluntary appointment and probably has greater duties to advise the client on a broader scope of things.
CHAIRMAN BABCOCK: For the purpose of the vote, why don't we go with your initial language, that is to say, when the attorney ad litem is appointed, et cetera.
HON. F. SCOTT McCOWN: But rather than do that, can't we just add in these general provisions a new one point -- whatever the last number is, and I guess it would be 1.7 -- and just say that the attorney that is appointed is to represent the minor in this proceeding only, and that their obligation is to carry any appeal through the Texas Supreme Court?
MR. ORSINGER: I'd prefer that.
HON. F. SCOTT McCOWN: Just do that, and skip these debates about what "ad litem"

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means.
CHAIRMAN BABCOCK: Steve, could we hold on until I see what Justice McClure's thought about that is.
What do you think about that?
HON. ANN CRAWFORD McCLURE: I'm uncomfortable in doing that, because I think it begins to define the scope. And there are all sorts of scenarios that can arise under this statute that we can't even imagine yet, and I'm uncomfortable defining or in any way trying to limit the reference, because I think when we begin to do that, then we start to define it ourselves.
CHAIRMAN BABCOCK: We're going to vote on that in a second, Judge McCown, but Steve first.
MR. YELENOSKY: Well, turning for a minute from the attorney's paranoia about being sued to the girl's interests, and this may be taken care of, but assuming that the adolescent girl gets an appointed attorney and the advice of that attorney is, "You need to go file this somewhere else," because they're in a county where they're never going to get

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it approved. And the prudent advice is to go file it in some other county, which you're entitled to do. So is the assumption that that appointed counsel's responsibility ends at the point that he advises the client of that, she accepts the advice, and he dismisses it voluntarily? Or does he have any continuing obligation to get her to somebody in a different county and get the process started again?
CHAIRMAN BABCOCK: So you are supportive of Justice McClure's concern?
MR. YELENOSKY: Well, yes.
CHAIRMAN BABCOCK: Justice Duncan.
HON. SARAH B. DUNCAN: Just to point out, we're having a problem in San Antonio right now with the San Antonio plan where you pay to get out of criminal appointments. I think it's limited to criminal appointments, and I'm not quite sure if it's going to complicate events or not, but one of the concerns that's been brought up recently is the continuing duty on appeal. And people are filing motions to withdraw so that they can get out of the proceeding, and they simply

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

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

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

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

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

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

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

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

CHAIRMAN BABCOCK: Justice Duncan.

HON. SARAH B. DUNCAN: For the South Texas College of Law, Richard and I and several other people debated this kind of question. It's not clear under the current Disciplinary Rules what a "matter" consists

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

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

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

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

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thing.

CHAIRMAN BABCOCK: One last-ditch --

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

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

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

CHAIRMAN BABCOCK: Buddy Low.

MR. LOW: If it's not limited to this bypass, what if she has a bad result with the doctor? Do you represent her against the doctor then? I mean, where does it stop, if it's not limited to the bypass?

CHAIRMAN BABCOCK: Judge Rhea.

HON. BILL RHEA: Well, it seems to me that you've got that problem already in any number of circumstances. We have attorneys ad litem we appoint for purposes of service by publication. That attorney at litem has ill-defined duties. It's unclear as to whether they're even going to get paid. It seems to me it's a risk that goes with the territory.

MS. SWEENEY: But here is an opportunity to not have that problem.

HON. BILL RHEA: This issue with the dismissal and the refiling, it seems to me that's largely mooted by the fact that the new judge is compelled to appoint an attorney.

MR. YELENOSKY: But time could be of the essence. And if you're dealing with a young person who may not be that intelligent, she's managed to get to a lawyer in this

county, and he says, "Go somewhere else," and if he knows that time is of the essence, either medically or otherwise, legally perhaps, given the state of law, I don't know that he doesn't have an obligation to expedite her getting into another court.

HON. BILL RHEA: If she's gone to that lawyer, then that's a private attorney, not one appointed by the court, and that attorney has got the usual --

MR. YELENOSKY: No, I'm talking about an appointed counsel. She gets into court, she files her application, an attorney is appointed. That attorney's advice, and good advice, is to file elsewhere. But time is of the essence, either medically or legally, given the state of constitutional law on abortion. I would hate to say that just ipso facto, by virtue of this rule, his obligation or her obligation to expedite the filing of an application in another court is not his or her responsibility.

CHAIRMAN BABCOCK: Richard Orsinger.

MR. ORSINGER: I think the proposal

is a little narrower than what you stated, Chip. I think the way I interpret what Scott is saying is that we're just saying that the responsibilities of the lawyer are limited to this proceeding. We're not attempting to say what those responsibilities are in this proceeding, but we're just saying that the appointment is for purposes of this proceeding and not any broader than that. And we're not saying when it cuts off or even how broad it is.

But you read the language later on in here, and you're going to find out a lawyer appointed -- an attorney appointed for the minor, and that language is so broad I can tell you right now there's going to be a lot of lawyers like Paula that are going to be suing all of us because we were appointed -- Paula wouldn't do it -- but because we were the attorney appointed for the minor --

MS. SWEENEY: Martin is going to branch out and do it.

MR. ORSINGER: -- and we are now the attorney for the minor.

CHAIRMAN BABCOCK: All right. You'd

define it as "responsibility of the attorney is limited to this proceeding including appeals"?

MR. ORSINGER: I think that you ought to have one appointment all the way through the Texas Supreme Court but not to the U.S. Supreme Court. That's my feeling.

CHAIRMAN BABCOCK: Judge McCown, do you accept what Richard just said?

HON. F. SCOTT McCOWN: I would add, "Unless a motion to substitute counsel is granted," so if they want to get off or claim that they're incompetent for appeal that they would have a way to do it, but that it's their obligation. They're responsible unless relieved.

MR. YELENOSKY: And does that encompass my concern? Or do you not see it as a concern?

MR. ORSINGER: When that dismissal occurs in the trial court, that appointment is over, because the court proceeding is gone, there's no jurisdiction, there's no client, there's no lawyer. And if she's going to go to another county, she gets in the car and

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

CHAIRMAN BABCOCK: O. C. Hamilton.

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

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

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

CHAIRMAN BABCOCK: Right. What they just said.

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

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

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

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

HON. F. SCOTT McCOWN: Yes.

HON. ANN CRAWFORD McCLURE: Fine.

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

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

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

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

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

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

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

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

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

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

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

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

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

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lawyers.

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

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

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

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

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

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directions. The attorney who was appointed knows about it. The minor knows that their attorney is so and so and they can call them. And (B) just refers to that entire sequence of steps that effectuates the attorney's representation of the kid.

MR. ORSINGER: Yeah. But the problem you've got is that it says basically that this is a duty on the clerk to communicate to the minor's attorney, whether that duty occurs when an attorney appears on behalf or when an attorney is appointed and the minor is given notice. How on Earth does the clerk ever know when the minor is given notice and therefore can start mailing only to the lawyer?

MR. PEMBERTON: Well, I guess in practice this refers to when the attorney gets involved and starts showing up in court with the kid.

MR. ORSINGER: Well, my suggestion then would be -- well, maybe there's only one court hearing. But the clerk is never going to know when the second half of your sentence has occurred; and therefore, it's going to

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create a problem. What you really want is notices to go to the lawyer at any point. I'm worried, because who is going to inform the clerk that the minor has been notified of the appointment?

PROFESSOR ALBRIGHT: Richard, the provision that's referred to has the clerk giving the notice, so it's just the clerk who has given this notice.

MR. ORSINGER: No. The clerk is required to give notice to the minor's attorney in two instances: Number one, when the attorney, a private attorney, has appeared on behalf of the minor; or number two, when an attorney has been appointed for the minor and the attorney has communicated with the minor. So the clerk's duty to advise the minor continues until they become aware that the lawyer and the minor have talked.

MR. YELENOSKY: No. It's referring to 2.3(d)(1), which is the clerk's notice to the minor.

HON. F. SCOTT McCOWN: That should read, "When the attorney" -- what it means is when the attorney is appointed and the clerk

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has given the notice to the minor of the attorney's appointment.

MR. YELENOSKY: Right.

MR. ORSINGER: Okay. I see. If it reads that way, then I understand it. It doesn't mean that to me, though, the way it's written.

HON. F. SCOTT McCOWN: You have to go back and incorporate Rule 2.3(d)(1).

CHAIRMAN BABCOCK: Which this rule references.

MR. ORSINGER: Okay. Well, I'll let go of that if everybody else understands it.

PROFESSOR ALBRIGHT: Well, I think you're correct that it should say something instead of "the minor is given notice." That seems to indicate the actual notice being handed to the minor. The way the rule refers to it, the clerk has given notice. Make the subject the clerk instead of the minor.

MR. YELENOSKY: Using the active voice instead of the passive voice. The clerk has given notice to the minor.

CHAIRMAN BABCOCK: Anything else on 1.3?

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MR. PEMBERTON: What about the use of "Jane Doe" as opposed to the initials?

CHAIRMAN BABCOCK: Say it again, Bob.

MR. PEMBERTON: The rules require the use of the pseudonym "Jane Doe." That's a little bit different than the statute. The statute literally gives the minor the right to use either initials or a pseudonym. Well, A, we are inconsistent with the statute. Is that a problem? B, should we be using "Jane Doe" uniformly? I think the thinking was that applications are filed by the minor and sometimes they'll use initials. Particularly in a small-town setting, that might be a dead giveaway of who it is. And so for their protection maybe we can just mandate a uniform pseudonym. How does the committee feel about that?

MR. ORSINGER: I like it.

CHAIRMAN BABCOCK: Orsinger likes it, for the record. Bill Rhea.

HON. BILL RHEA: I don't like that. Molestation cases get filed often times with the initials. People choose to use that in a

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

CHAIRMAN BABCOCK: Paula.

MS. SWEENEY: Doesn't the statute intend forum shopping to happen?

CHAIRMAN BABCOCK: It seems to.

HON. BILL RHEA: Nonsuits and reapply.

MR. YELENOSKY: Yeah, as long as it's not adjudicated.

CHAIRMAN BABCOCK: And Bob, I think the enabling section gets around your problem, because it instructs us to pass rules that will ensure confidentiality. And for the very reason that Judge Rhea may be able to identify

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

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

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

HON. BILL RHEA: Doesn't the statute allow for initials or any other form on the application?

HON. SAMUEL A. MEDINA: Yes, it does. Again, the reason we went with Jane Doe was we emphasized confidentiality.

HON. BILL RHEA: So we're supposed

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to enhance what the Legislature has already done?

HON. F. SCOTT McCOWN: That's what they asked us to do. They said, "We'd like you to write rules to ensure confidentiality."

HON. SAMUEL A. MEDINA: And promptness. Those were the two key issues that we were looking at.

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

HON. ANN CRAWFORD McCLURE: We had two district clerks on our committee, both of whom are here today.

Cindy, I remember there being some other concerns expressed by you as far as using the Jane Doe as opposed to the initials. Am I right or wrong about that?

This is Cindy Groomer, District Clerk of Potter County, Amarillo.

MS. GROOMER: In our discussions in the subcommittee, we were concerned about

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

CHAIRMAN BABCOCK: Richard.

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

HON. F. SCOTT McCOWN: That's a horrible idea.

CHAIRMAN BABCOCK: And it was said tongue in cheek. All right. Richard, are you making -- the Jane Roe thing aside, are you making -- or I guess, Bob, this is how -- you

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

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CHAIRMAN BABCOCK: Okay. Moving on, anything else on 1.3?
MS. SWEENEY: Well, does that indicate the sense of the committe to you? I mean, do you have a sense of this committee now sufficiently to go forward?
HON. ANN CRAWFORD McCLURE: My subcommittee, yes.
CHAIRMAN BABCOCK: No, no, no, judge. Do we have a sense of this committee?
MR. PEMBERTON: We do.
MS. SWEENEY: What is it?
CHAIRMAN BABCOCK: Okay. Richard.
MR. ORSINGER: On the very last paragraph of (b), there's a reference to guardian. This is (4), (b)(4), "Court personnel must not disclose" --
CHAIRMAN BABCOCK: No, we're not on (b) yet.
MR. ORSINGER: Oh, you're not on (b)? I'm sorry.
CHAIRMAN BABCOCK: Confidentiality you're talking about?
MR. ORSINGER: Forget it. I withdraw it.

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

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

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what the minority view was?
HON. SAMUEL A. MEDINA: Well, in a nutshell, the minority felt like we could accomplish what the statute basically wanted with limited public disclosure. And quite frankly, the only other reason that we could come up with for the public not knowing what a judge does is mostly political, you know, and that's the very reason it's a difficult issue. This is a difficult situation, and that's the very reason that we ought to let it be known. I think you can argue the same thing and come up with two different conclusions.
CHAIRMAN BABCOCK: Judge McClure, do you want to add something?
HON. ANN CRAWFORD McCLURE: The proposition that I presented to the subcommittee was this: I gave them the choice of three votes that they could make. One was to submit the proposal with pros and cons, both ways, without making a recommendation to this committee or to the Supreme Court. One was to adopt Version A with the minority report of B. And the third choice was adopt B

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with the minority report of A. So our subcommittee explicitly chose not to remain silent on the issue. They wanted their voices heard on the subject. The vote was 12 to 4 in favor of Version A, which is absolute strict confidentiality.
Certainly the statute speaks in terms of express confidentiality. Our investigation, to the extent possible in the time constraints of legislative intent, was they envisioned the identity of the trial judge to be confidential.
What got convoluted in the discussions was this: My understanding was the Legislature wanted there to be some body of law to develop, obviously through appellate decisions, as to the parameters that ought to be considered. What are the factors judges should be looking at in deciding maturity? What are the factors judges should be looking at in deciding whether parental notification is or is not in the child's best interest? The only way we can do that through published appellate decisions is to publish. And certainly to publish an opinion completely

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violates the confidentiality.
So my thinking is it's either all got to be confidential, including the identity of the trial judge, the county in which the proceeding was filed, and the basis for the trial court's ruling, the basis for the court of appeals' ruling. If we are to implement it as mandated, then the entire process has to be confidential. That destroys the purpose of trying to identify those factors to give guidance to the bench and bar as to how we go about deciding these issues.
I can tell you Paul Watler drafted the minority report. He is an attorney in Dallas with Jenkins & Gilchrist and president of the Freedom of Information Foundation, I think is the name of the group. What he wanted was to be able to track a score card for trial judges as to how many of these applications are you granting, how many of these are you denying. We did inquire of the Office of Court Administration as far as tracking the number of these cases that are processed in the counties. They are required to submit information to OCA on various types of

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lawsuits. It will not be difficult to create a separate category for these so that we can track how many of these the system is absorbing every year. They wanted to be able to break that down into trial judges and rulings. And it was the consensus of the subcommittee that they did not want to do that.
CHAIRMAN BABCOCK: Justice Hecht, did you want to add anything about the point of the third option of just not talking about this in these rules?
JUSTICE HECHT: Well, it's the same as I alluded to earlier. The Court is aware that there are constitutional arguments that can be made that some of this information, particularly the identity of the judge and the substance and basis of rulings, should not be confidential and cannot be. And I don't know of another proceeding, frankly, where this much information is completely secret.
We don't propose to decide this issue without an adversarial proceeding, and we don't propose to ignore what the statute says, because the Legislature can read the

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

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

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

CHAIRMAN BABCOCK: Understood.

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

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

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

CHAIRMAN BABCOCK: Judge Medina.

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

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

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

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

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

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

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

CHAIRMAN BABCOCK: Nina Cortell.

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

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

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

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

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

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

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

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

CHAIRMAN BABCOCK: Steve Yelenosky.

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

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

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

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

CHAIRMAN BABCOCK: Judge McCown.

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

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

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

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

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

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

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

CHAIRMAN BABCOCK: Yes.

HON. SAMUEL A. MEDINA: And I

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

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

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

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

HON. SAMUEL A. MEDINA: Well, okay.

CHAIRMAN BABCOCK: Elaine Carlson.

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

CHAIRMAN BABCOCK: Joe Latting.

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

CHAIRMAN BABCOCK: Buddy Low.

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

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

CHAIRMAN BABCOCK: Richard Orsinger.

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

The issue of abortion is probably the

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

REPRESENTATIVE DUNNAM: Good.

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

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

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

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

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

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

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

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

As an individual judge, if you develop a

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

CHAIRMAN BABCOCK: Justice McClure.

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

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

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

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

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

CHAIRMAN BABCOCK: Bill Dorsaneo.

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

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

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

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

CHAIRMAN BABCOCK: Judge Brown.

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

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

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

CHAIRMAN BABCOCK: Sure.

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

MR. PEMBERTON: That is correct.

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

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

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

CHAIRMAN BABCOCK: Steve.

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

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

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

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

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

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

CHAIRMAN BABCOCK: Justice Duncan.

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

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

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

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

CHAIRMAN BABCOCK: Bonnie.

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

HON. PHIL HARDBERGER: I believe

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

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

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

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the appellate courts to do? Are they just to issue a ruling as an order either affirming or reversing? Are we to write written opinions? Or do we make that a decision at each intermediate court level?

HON. PHIL HARDBERGER: My own opinion on that is that, if it comes to us, that we would make a crack at it, obviously to be reviewed by the Supreme Court on whether we said what they would have said or not.

HON. ANN CRAWFORD McCLURE: So in your view, the rules should not address opinions at all?

HON. PHIL HARDBERGER: That is correct.

HON. ANN CRAWFORD McCLURE: Okay.

HON. SARAH B. DUNCAN: Under the current TRAPs, we must identify the members of the panel.

MS. SWEENEY: I'm sorry, you must what?

HON. SARAH B. DUNCAN: Identify the members of the panel.

HON. JAN P. PATTERSON: I'm generally a big believer in openness in

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courts, and I think that whenever you tamper with openness in courts that it skews the system and it is harmful to the system. On the other hand, what we have here turns openness on its head, because the only thing we have open is the judge's name.

Traditionally, whether you have criminal trials or whatever trials, it is the process and the procedure that the public is entitled to see so that they know and have the comfort that a procedure is a fair one. Here the Legislature has made a decision that the procedure is not going to be available to the public. That is their choice. It is not a desirable one. It will be challenged. But I would urge that we go with that procedure as one of the undesirable options.

But I don't think that it's completely a matter of openness. I also don't think it's a matter of judicial safety. I would like to underscore what Judge McCown said, and I think that we always have to look at the purpose of this Act; and that we always have to keep the minors who are the subject of this Act uppermost in our minds, because every girl

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ought to be able to walk into a courthouse and not worry whether that judge thinks, "Do I have too many this month or this year, or has so and so done as many as I have?"

In fact, if we want to have openness, it ought to be the criteria and the adjudication that are public, that the findings are public in some fashion. But that's the part that the Legislature has sought to keep from the public. And that traditionally is what has maintained our system from being a Starr Chamber, so that is an important part of the process. And to have the only public part just the judge's name, to me that sabotages any openness argument.

CHAIRMAN BABCOCK: Bill Dorsaneo.

PROFESSOR DORSANEO: When Section 2 of the bill speaks about rule making and it talks about the Supreme Court shall make rules to ensure confidentiality, I'm kind of wondering, well, what in the world could that be about? It seems to me it's likely about what's covered in (b)(1) of both versions, which is not very detailed at all. It just says, "Court personnel must ensure that the

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minor's contact with the clerk and court is confidential and expeditious." I think there's considerably more work that could be done on how that's to be accomplished, and I think that's probably what a fair reading of the legislation would indicate that we're supposed to be talking about, not about whether it's only going to be semi-confidential or not.

Is it sensible just to say that, just "be confidential"? In my experience, that means that everyone who knows something about it can tell one other person. Maybe some sort of procedures for files and behavior of court personnel would be appropriate, rather than just tracking the statute and then going on to this judge identification issue, which seems out of bounds to me.

HON. ANN CRAWFORD McCLURE: I must tell you that I did have a phone call while I was in the judicial conference from the administrative judge of Tarrant County, who told me they have a peculiar problem up there with a lot of supposedly confidential information being leaked out of the clerk's

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office.
PROFESSOR DORSANEO: What Bonnie talked about, too, is that we know there are ways that this information could be ascertained that she knows about that we should guard against. Presumably that's what the job involves at least in part.
CHAIRMAN BABCOCK: Judge Brister.
HON. SCOTT A. BRISTER: That's the question I had. The court administration gathers data, I know our clerk does, on the number of temporary injunctions filed, the number granted, the number denied, summary judgments the same thing. I don't see that in the statute. The statute -- and secondly, the statute makes the court reporter's notes of the hearings, the statute makes court orders, the application -- the statute doesn't say the hearing is secret, does it?
HON. ANN CRAWFORD McCLURE: It restricts who can be there.
HON. SCOTT A. BRISTER: Where is that?
HON. ANN CRAWFORD McCLURE: Does it not? It does not.

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MR. ORSINGER: Look at (k).
HON. SCOTT A. BRISTER: Really it doesn't say that a judge is confidential, that my name is confidential.
HON. ANN CRAWFORD McCLURE: Well, subsection (k) says, "The court proceedings shall be conducted in a manner that protects the anonymity of the minor. The application and all court documents pertaining to the proceedings are confidential and privileged and are not subject to disclosure."
HON. SCOTT A. BRISTER: My point is this: I would be very concerned about the problem of drafting a rule that might be unconstitutional; but I'm more concerned about drafting a rule that adds something not required by the statute that would be unconstitutional.
CHAIRMAN BABCOCK: The argument that was advanced at the subcommittee, as I understand it and correct me if I'm wrong, was that this subparagraph (k) did not preclude the Version B, but rather that the intent of the Legislature was not to protect the confidentiality of the judges and the judicial

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process, but rather it was the intent of the Legislature to protect the anonymity of the minor, so that one has to read in subparagraph (k) the two sentences together; that "The court proceedings shall be conducted in a manner that protects the anonymity of the minor," and then the second section, "The application and all other court documents pertaining to the proceedings are confidential and privileged and are not subject to disclosure," et cetera, et cetera, et cetera; reading those together to the extent necessary to protect the confidentiality and anonymity of the minor.
That was the statutory construction argument that was advanced in the subcommittee by some people, principally Paul Watler.
HON. ANN CRAWFORD McCLURE: The other issue is, we were asked to look to the laws in other states and the rules that have been implemented in other states that have a similar statute. And a number of the other states provide for proceedings conducted in chambers, limiting the individuals who may be present; restricting, if we have it in the

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courtroom, who is in the courtroom. And so we have grafted some of that at the request of the Supreme Court in their order appointing the subcommittee.
MR. ORSINGER: Ann, how do they handle the appellate problem of secrecy at the appellate level?
HON. ANN CRAWFORD McCLURE: Well, in Ohio, they ruled it was open. That's the basis of the Version B.
MR. ORSINGER: Has any state implemented a secret appellate procedure?
HON. ANN CRAWFORD McCLURE: Bob is going to answer that.
MR. PEMBERTON: We don't know. A number of states do have published appellate opinions, but I don't know whether all of them do. I've not found any indication that any state has expressly or in any published form addressed the issue of whether their appellate procedures shall be open. Perhaps internally they have. And we easily, or maybe not so easily, could just contact states individually and see what they've done.
CHAIRMAN BABCOCK: Paula Sweeney.

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MS. SWEENEY: Well, so much of this is public policy and is something that, as Justice Hecht put it, I can't imagine decisions being made without a full exploration of the issues and full discussion and briefing and debate with all of the tools that we have available to us in this system. To me, that supports that we really must go with Option 3, which is to be silent on this and not -- I don't think we can take a vote here and be as deliberative and as fully elaborated as we must be on such an issue that -- you know, yes, it should be, or no, it shouldn't be, you know, what should be public, exactly where the lines are and how it should be done. I don't think the statute tells us exactly what that is. I do not think we can write that or even make a recommendation to the committee in, you know, what did you say, we have a half hour for this discussion and then we're going to take lunch. And so I strongly advocate Option 3.

CHAIRMAN BABCOCK: Judge McCown.

HON. F. SCOTT McCOWN: Let me point out an additional reason. I'll agree with

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most of what Paula said. I think we either go with Option A or we go silent.

I don't think we can go with Option B constitutionally, and let me explain why. The Legislature passed a statute. Part of that statute included confidentiality and was voted for on the basis that it included confidentiality. If the Supreme Court says confidentiality cannot constitutionally be provided, I don't think they get to substitute another statute that has no constitutionality. I think they have to strike the whole thing down, or at least there would be a very good constitutional question about it. And so if we went with B, we would be falling into the same trap as those who advocate not going with A.

CHAIRMAN BABCOCK: I think that there is a nonfrivolous legitimate argument that the Legislature was concerned about anonymity and confidentiality for the minor and not for the judges or the judicial process. However, I think that the language in subsection (k) which says, "The application and all other court documents pertaining to

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the proceedings," is not ambiguous. And it would be a strained reading of the statute to suggest that the Legislature clearly only intended to protect the anonymity of the minor. So I think that we do not have -- we should not, in the face of that language -- even though Senator Shapiro doesn't recall that as being a matter discussed -- we should not, in the face of that language, adopt Version B of this statute.

Having said that, I want the record to be clear about my views on this. I think that that provision of the statute is repugnant in a democracy such as ours. The most controversial issues and the decisions made by our elected officials on those controversial issues are the ones that are most subject to being open, the most compelling reasons for them to be open, for the very reason that they are controversial.

I think that there are serious questions about the constitutionality of Proposal A. I think this is different than what we talked about before where we are merely tracking the language of the statute in terms of timing. I

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think this is fundamental to our democracy, and I feel very strongly that we should pursue Option No. 3 and be silent on this matter. That's my own personal view.

And we'll take three more comments, and then we're going to vote, first on Option 3, and if that doesn't pass, then we will vote on Option A and Option B. Mr. Hall.

MR. HALL: Mr. Chairman, I would just agree with your comments. I think that when I read the statute, what came to my mind was protection of the confidentiality of the minor, not of the judge or necessarily the outcome of the case.

And it is my understanding in adoption proceedings, for instance, the judge's name isn't a secret matter. The protection of the adopted child and the parents whose rights are terminated through that process are what have been protected. And I think what we're trying to do is draw a line in an area where it's an incredibly emotional issue, and I think that's where you get into trouble with drawing lines.

Think back. If this had been tried -- if

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

CHAIRMAN BABCOCK: Alex.

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

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

CHAIRMAN BABCOCK: Judge Patterson.

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

CHAIRMAN BABCOCK: Paula.

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

CHAIRMAN BABCOCK: No, we're not.

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

CHAIRMAN BABCOCK: There's no question.

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

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

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

CHAIRMAN BABCOCK: Uh-huh.

MR. TIPPS: It's too close to lunch

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for that.

CHAIRMAN BABCOCK: Right.

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

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

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

CHAIRMAN BABCOCK: You mean you put in the rule.

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

all, of this B is exact words. There are a couple of things I've noted, like the reporter's record, that's new. But if you just put -- most of it is the exact words.

If you drop those and just leave it the exact words, then you avoid that constitutional crisis of we didn't do what the Legislature says. You leave the things open like -- okay. So this hearing comes up. Somebody wants to be at the hearing. One trial judge excludes them. One does not. Then you do the things we do, which is, people bring lawsuits and injunctions against the judge who did not or the judge who did, and you sort that out. What does "ruling" mean? What does "confidential minor" mean? And you have time to brief and work these things out.

So my proposal is that we -- so for instance, I would be against B, because it does add something. I'm not saying I don't think -- I think probably you would have a good argument that you've got a right to the name of the judge and how the judge ruled, though you don't have a right to the order. Are there ways you can do that so you can

avoid the constitutional problems? Maybe so, if you have to, if the Constitution requires that.

So I would be in favor of Version A, dropping anything that is not a direct quote from the statute, and again, with something either in the comment or more probably in the Supreme Court order adopting the rules saying this is pursuant to rule making direction of the Legislature without prejudice to saying whether it's constitutional.

CHAIRMAN BABCOCK: Justice McClure, as the chair, has prevailed upon me for one last comment before we vote, and eat, I might add.

HON. ANN CRAWFORD McCLURE: Real briefly, if what you're contemplating is letting this work its way up through the appellate courts and we have full briefing and the opportunity to have argument, remember that that maximum or little bit better than 48-hour time window operates in the appellate court, too. The appellate court must rule by 5:00 o'clock on the second business day after the notice of appeal is filed. So unless the

minor asks for the continuance that she's allowed to ask for, there won't in all likelihood be briefing or arguments.

CHAIRMAN BABCOCK: Judge Brister.

HON. SCOTT A. BRISTER: But I'm thinking Chip's clients -- this is going to come up not in one of these proceedings, but when Chip's clients sue me, and then there's going to be plenty of time.

HON. ANN CRAWFORD McCLURE: That's right.

CHAIRMAN BABCOCK: Or when Watler's client is suing you.

Okay. We're going to vote first on Option 3, and Option 3 is to be silent on this issue. All in favor of Option 3 raise your hand.

MR. LATTING: Can we eat first?

CHAIRMAN BABCOCK: No, we can't eat first. Ten.

All against Option 3.

Option 3 fails by a 22 to 10 vote.

All for Option B.

PROFESSOR ALBRIGHT: Why are we voting in reverse?

CHAIRMAN BABCOCK: Because it would be easier if Option 3 had passed. Then we don't have to get to Brister's point. Anybody in favor of Option B?

MR. ORSINGER: Is that Version B, you mean?

CHAIRMAN BABCOCK: Version B, sorry. Everybody in favor of Option B. Six is what I've got.

Against Option B.

HON. ANN CRAWFORD McCLURE: Overwhelming opposition.

CHAIRMAN BABCOCK: Option B fails 25 to six.

Option A without the Brister gloss, as written. Option A as written.

Okay. Option A against. Against Option A as written.

HON. SAMUEL A. MEDINA: How many times can you vote?

CHAIRMAN BABCOCK: You can vote on each item.

Option A passes 25 to eight.

Judge Brister, do you wish to suggest amendments to Option A, or do you want to

leave it where it is?

HON. SCOTT A. BRISTER: Well, I suppose, yeah. The only things I've noted would be the court reporter's notes and whatever "documents relating to appeal" means.

MR. YELENOSKY: What about the word "opinion"?

MR. ORSINGER: Oh, I want to add the word "opinion" to that, because --

CHAIRMAN BABCOCK: Okay. Then we're going to talk about that --

MR. ORSINGER: We're going to have a ruling here, and opinions are what we do to regulate the trial courts --

CHAIRMAN BABCOCK: Okay. We know what we're dealing with now. We know the language we're dealing with. So we'll talk about amendments to that language after lunch. We'll take a half an hour for lunch.

(Lunch recess from 1:00 p.m. to 1:45 p.m.)