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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE
JANUARY 28, 2000
(MORNING SESSION)

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Taken before D'Lois L. Jones, a Certified Shorthand Reporter in Travis County for the State of Texas, on the 28th day of January, A.D., 2000, between the hours of 9:00 o'clock a.m. and 12:30 o'clock p.m. at the Texas Association of Broadcasters, 502 East 11th Street, Suite 200, Austin, Texas 78701.

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

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CHAIRMAN BABCOCK: Thank you all for coming, and the most important event of the day, of course, is the social hour at 6:00 honoring our former chairman, Luke Soules. So be sure and -- if you don't know about that or didn't get the invitation, be sure to plan to attend that. Bill Dorsaneo claims he has remarks that he wants to make about Mr. Soules, and we will recognize him for that purpose.

The first agenda item today is to follow up regarding the Texas parental notification rules and forms that we worked on in our last meeting. I want to try to -- when the Court has taken our recommendations and then finally promulgated a rule I want to see, if the Court is willing, for them to come back and tell us why they accepted certain recommendations of ours and rejected others and inform us about any problems that they encountered in terms of the advice that we're giving them so that we can give them more effective advice.

I know I remember being on the committee in past years and seeing something go to the Court and just never hearing anything else about it, and there was a disconnect there, at least for me, that I thought it would be helpful if we tried to establish some

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relationship between what we do and then what the Court does with what we do. Justice Hecht has agreed to tell us what the Court thought about our work product in a second, but one thing -- and I think he's also going to tell about a problem that arose with the rules, and I lay this at our doorstep.

Our job is to make sure that the Court does not face a situation that was not anticipated or not contemplated. There was a minor glitch with the parental notification rules that we should have spotted. It's understandable that we didn't, but our job is to take these proposals seriously and try to look at them and see if there are systematic or systemic problems with the rules, and we slipped up with the parental notification rules in one, I think, minor respect, but nevertheless, it's a slipup that I hope we don't repeat. So with that said, Justice Hecht, do you want to tell us what the Court's view is of what we did?

JUSTICE HECHT: Well, as always we're very grateful to you for your input on the rules, particularly these rules because you had such a short time to look over them, and we had a short time to look at them ourselves, and Justice -- Chief Justice McClure's subcommittee really tried to every time we

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needed them to to help us go over not only your changes, but the changes that the Court was concerned about, too, and that subcommittee was extraordinarily well representative of a whole lot of people outside the legal system that deal with these kinds of proceedings, so we felt like we got some good input on the practical side of how the rules would work.

The changes, I'm just going to tick through the changes, and I welcome any questions. But the changes that we made, we add an explanatory statement at the beginning of the rules that was not there before, and the second -- the first paragraph tells about why we're doing this, because the statutory basis for it, and the second paragraph talks about the Constitutional reservations that have been raised during the rule-making process and identified issues that the Court did not want foreclosed or to appear to be foreclosed by the adoption of the rules, and among those were whether this process is Constitutional at all or not, whether it can be a secret as the Legislature made it, whether time limits can be imposed the way that they are under the rules and whether this is even a justiciable issue for judges to be ruling on.

So we just identified some of those issues in the explanatory restatement. Then we

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rearranged Rule 1. A lot of the -- even though it was changed around quite a bit, a lot of the substantive provisions stayed the same. Regarding Rule 1.1 we took the advice of the committee on the use of the word "inconsistency" with the other existing rules and tried to flesh that out, and I think we incorporated the suggestions the committee made there. On Rule 1.2(a) Bill Edwards had correctly observed that it should be "all other pending matters," and we made that change, as the committee voted to do.

On Rule 1.2(a) we changed "promptly" to "as soon as possible," consistent with the effort throughout these rules to make sure that everybody understood that all the participants, the clerks, the judges, everybody, that time is literally of the essence because most of these proceedings are on two-day time deadlines, and so we tried to make that emphasis.

In Rule 1.2(c) we even defined "instanter," which I didn't think was hard to understand, but you never do know. So we defined "instanter." We divided up the ideas of confidentiality and anonymity and put anonymity in Rule 1.3 and confidentiality in Rule 1.4, and the substantive provisions I think are pretty much what you

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saw before, but we separated out those concepts.
In Rule 1.4 we were troubled with the use of the word "court personnel," the phrase "court personnel" being bound by the secrecy provisions of these rules, and as the district judges here know, or former district judges know, the bailiff and the clerk do not consider themselves to be court personnel and the court reporter only does on a good day. So we wanted to be sure that the sheriff's employees and the district clerk's employees and the county clerk's employees all understood that they were part of this same -- they were bound by these same rules of confidentiality.
The Court -- I mean, the committee voted to adopt version A. There were two versions of confidentiality rules laid out, and basically version A tracked the statutory provisions and version B had its own just kind of a separate standing confidentiality rule and then the third option was not to have anything at all. The committee voted to do A, and the Court followed that suggestion. It was changed up a little bit to make sure that it tracked the statute as closely as we could, although there are a couple of exceptions, minor exceptions. The statute doesn't provide for this clerk's certificate idea if the court doesn't rule,

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that you get a clerk's certificate that says the court didn't rule. So that's an idea that the subcommittee came up with and we left that in.
On Rule 1.4(d) and (e) the Department of Regulatory Services or Protective and Regulatory Services asked that some mention be made of the duty of participants in this process to report evidence of abuse, and that is specifically referred to in the statute, so we took the statutory reference and incorporated it into those rules.
Rule 1.5 allows for electronic filing. Most of the time courts or clerks must get permission from our Court, an order approving their electronic filing mechanism and procedures, but a lot of clerks in Texas don't have that, and we wanted to make this a blanket authorization for these kinds of proceedings that they could use electronic filing if they wanted to because, again, time is of the essence, and we anticipate that a lot of this stuff will get transmitted from office to office by fax. So that's a little -- that's a new idea in Rule 1.5.
We also added a provision in 1.5 to be -- provisions to be sure that confidentiality was protected as much as possible in the electronic transmission of documents. So if your idea -- the idea

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is that if one clerk is transmitting information to another clerk, the clerk should call ahead of time and say, "I'm fixing to send you some stuff. Stand there and get it and don't just let the fax machine that's sitting out in the hallway that everybody in the courthouse uses pick up the materials." But it also contemplates that if a lawyer is going to send things by fax to the clerk's office, the lawyer needs to make that provision ahead of time or else the clerk can't guarantee that it's going to be confidential.
Rule 1.5 permits a record to be made by electronic means rather than by stenographic means to accommodate the rural communities that do not have immediate access to court reporters on a daily basis. There are a lot of counties where that's the case.
We took your advice on what is now Rule 1.6, regards recusal of judges. It's a little bit lengthier than you had before, but I think the substance is about the same. 1.7 was changed. We only translated the forms into Spanish, not the rules themselves, and we also provided in the opening statement of the forms that you can't file the forms in Spanish. We even translated the order, the judge's order into Spanish, but the idea is that the forms will be used with people who understand Spanish better than

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English to give them an idea of what the forms say, not to substitute for the filing in the court. So you still have to file the forms in court in English, but the Spanish translation is to be of help.
Rule 1.8 concerning the duties of ad litems was added at your request, and I think about the same as you requested it. Rule 1.9 we caught at the last minute. Basically the costs that are awarded in these proceedings are a judgment in essence against the state. The state is required by statute to pay them, and at the last subcommittee meeting I asked the representative of the agency out of whose budget these payments have to be made what they were going to do if they got an ad litem bill for $150,000 for two days work, and they said they were going to pay it, so they didn't think they had any choice.
So we gave them a choice here for the state to appeal an award of costs and basically set up a little appellate procedure that gives the state the right to challenge these awards when they're made. Rule 2.1(b) was added, and we talked about this some, but we continued to wrestle with it after the last meeting, and it changed quite a bit, and Rule 2.1(b) sets up a default procedure if the local courts have not agreed upon how to handle these cases, and there

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has been a lot of work in local jurisdictions on handling these, and the ones that I'm aware of are pretty much all different.
I think Harris County agreed to just put them in rotation like regular cases. Jefferson County is going to use all district judges. Tarrant County is going to assign them all to one court, and that judge is going to farm them out to other judges. So there is a lot of different suggestions. This rule says if you don't come up with a local rule, it goes to the district court first if the active judge is in town. If not, it goes to statutory county or probate court if that judge is in town. If not, it goes to the constitutional county court if that judge is in town, and if everybody has fled the realm, then it goes back to the district court for an assignment by the regional presiding judge. And, of course, the regional presiding judge can always assign somebody else to any of these courts to hear the cases if that's necessary.
Rule -- and there's concern, I must say, the principal complaint that I'm aware of following the adoption of the rules is that the constitutional county courts are concerned that while they do not typically do judicial proceedings in many -- probably most counties in Texas, they might have this suddenly come

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in and nobody knows how to handle it and they're not equipped to handle it and they don't have court reporters and ad litems, so they're at a disadvantage. And so they would rather not be in the rotation, but the Legislature put them in the rotation, and I don't think there is anything that can be done about that. If this doesn't -- if there's something about this procedure that doesn't work, we'll look at it again, but it seemed to me that this was the best we could do under the circumstances.
2.1(b) says that -- also says that clerks have to work together when these proceedings are filed. So if the local practice is that these are going to be handled by the county clerk in the county courts and it gets filed with the district clerk, it's the district clerk's responsibility to get it to the county clerk, not to hand it back to the guy and say, "Sorry, you're at the wrong office. Go around to the other side of town." So there's supposed to be -- once it's tendered to a clerk, the system then is supposed to take over and make sure that it gets to who it's supposed to go to.
Rule 2.1(c) was changed. Representative Dunnam pointed out at the last meeting that the statute does not require the minor to personally complete or

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verify the application, and that's correct, so we changed that so it could be done by a surrogate, who, of course, must be able to make the statements that it requires under oath.

Rule 2.1(c), the committee recommended that we take out a statement in the application of the grounds asserted by the minor, but the district judges on the subcommittee wanted the statement in because it would help them in appointing an ad litem so that if the reason were abuse, the judge might pick a different ad litem than he or she would pick if it were some other ground. So it provides the judge a little more information, and when there is such a short time frame, we thought that was a useful thing to have.

The Rule 2.4(e) allows witnesses other than the minor to submit testimony by affidavit rather than by personal appearance. So the idea is if a physician or a friend or somebody else wants to weigh in on the application, the minor may have trouble getting them to the courthouse, particularly if it's a physician, and this facilitates hearing that evidence.

Also, the rule allows a lot of informality in the proceeding, and the judge could call the doctor and take the doctor's testimony even over the telephone if it were not a question of credibility,

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but the minor ordinarily has to be present for -- at the time the decision is made.

Comment 4 to Rule 2 concerning the duties of ad litems was changed I think pretty much as the committee recommended. The -- Rule 3.1 was changed to specify the contents of the notice of appeal. I don't think the committee had time last time to look at that, but I don't think that's a controversial change.

Rule 3.2(b) clarifies the trial court clerk's responsibilities. That's just a clarification requested by the clerks to help them understand their respective roles in all of this. The Comment 3 to Rule 3 deleted -- in Comment 3 to Rule 3 the discussion concerning the standard of appellate review was deleted because the Court felt like that was too substantive for the rules, that the appellate court should just have to work this out and that there was already controversy even in the committee hearings about what the appropriate standard was going to be and how it was going to be applied. So that was deleted, and I think that's not every change that was made, but I think that's the major ones.

CHAIRMAN BABCOCK: Judge, as I understand it, there were some complaints from the constitutional county courts in some rural areas

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pointing out a problem about they were required to appoint ad litems and there were no lawyers in the county.

JUSTICE HECHT: Yes. It's amazing how many reasons you can find not to do something you don't want to do, but they do have a legitimate -- there are counties in Texas -- we think there are eight, but we never did actually go count them up. But we think there are eight counties in Texas that have no lawyers in the county who do not work for the government, which is a real challenge for the Bar, I think, to get some people out there, but --

MR. SOULES: What for?

JUSTICE HECHT: And then there are other counties where there are not very many lawyers in the county, so the constitutional county judge says, "Well, I don't have any way of getting a lawyer here to be involved as an ad litem in this proceeding on this short a notice because there is not even anybody in the county that I could call," but there is a district judge who has more counties in his district, and he can summon a lawyer out of another county to come over to this county and serve as an ad litem.

And that's true, but the Court decided finally that we could not -- that the Legislature's

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intent was pretty clear that they wanted the constitutional county judges in among the people to whom these proceedings could be assigned and could decide them, and we just couldn't -- there was not any way to fix this problem unless if the -- if the constitutional county judge could not work with the district judge to make sure that there were lawyers available if this ever happened in one of those counties and also could not work with the regional presiding judge to make sure that there was a district judge assignable who could be sure that there was an ad litem there, then, I mean, I don't know how else to fix it. There is also concern about court reporters, as I mentioned, but we tried to fix that with the tape recording.

CHAIRMAN BABCOCK: Well, it's obviously a minor problem, but we didn't spot it, and we could have saved the Court some embarrassment if we had spotted that problem, and we probably won't spot all the problems, but we ought to try to do the best we can and hopefully have a standard where we're going to spot all these issues so that the Court doesn't have to respond by saying, "We never thought of that because our advisory committee wasn't smart enough." They didn't say that.

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JUSTICE HECHT: The constitutional county judges asked to have a representative on this group as a result of all of this, and we immediately acceded to that. I am kind of hard-pressed to remember other instances in the past where they would have wanted to be at the table, but they are certainly entitled to be here, and so we will be having an ex officio, right?

MR. PEMBERTON: They are working on figuring out who they are going to send.

JUSTICE HECHT: But they will have an ex officio member on this committee.

CHAIRMAN BABCOCK: Okay. Before I ask if there are any comments about what Justice Hecht said, be sure that your nameplate is in front of you and pointed at our court reporter. She told me to tell everybody that. Have you got one? There is one back at that table. Anybody have any comments either substantively or in terms of the process of how it got from the subcommittee to us and from us to the Court and back again? Anybody have anything to say?

All right. Our next item is to talk about the foreclosure of reverse mortgage rules, and Justice Baker has been quarterbacking that effort with the subcommittee, and I think I'll turn it over to him

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if that's all right with him.

JUSTICE BAKER: Thank you. James Baker. I don't know if you can see that. Before I introduce Mr. Baggett, who I'm sure most of you know anyway, I wanted to give you a little background. After the general election in 1997 when the people of the state passed the constitutional amendment to allow home equity mortgages, the Court was given the task by the Legislature to draft a rule that would cover foreclosures, and included in that responsibility was the opportunity to appoint a task force to do that job, and so the Court appointed Mr. Baggett and about nine or ten other lawyers in every field we could think of that had to do with mortgages to be the task force and draft those rules.

And they did a masterful job because they drafted from scratch the basic rules that you see here that he'll talk about in connection with reverse mortgages within five weeks, and it was through a Christmas holiday situation, and they were approved forthwith and became part of the rules in connection with that new process of home equity mortgages.

Well, then of course, as you may know, as a result of the general election in 1999 Texas now has reverse mortgages, and the Legislature was kind

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enough to give the Court the responsibility to draft the rules for foreclosures of those kind of mortgages, and figured the maxim "don't quit a winner," we went back and asked Mike and the same group to take this task in hand, and they did, and our confidence, was, of course, justified because they did a wonderful job and they finished I think within the first week of January. So, again, in about a five- or six-week period of time they drafted the rules for this particular type of mortgage, and I'll let Mike explain to you how they did it and why it takes this form, but as you know, he's I think still the managing partner or director of Winstead Sechrest & Minick.

MR. BAGGETT: I was yesterday.

JUSTICE BAKER: What?

MR. BAGGETT: I was yesterday. Maybe I am today.

JUSTICE BAKER: And he also was last Saturday night inaugurated as the new president of the Dallas Bar Association, and so we were very pleased to have Mike agree that he would head this group, and everybody except two from the last group agreed to serve on this one, and the two that didn't had a conflict and couldn't make the meeting, and they wisely let somebody else take their place. So it's a great

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deal of pleasure as the liaison that I can introduce Mr. Baggett, and he'll tell you exactly what happened and how.

MR. BAGGETT: Thank you, Judge. I will tell you that the group that we had was very broad-based. We had consumer lawyers. We had title company lawyers, because to a certain extent this deals with title to property, and they were all very concerned that we were not going to upset 150 years of title law. You can imagine that. We had mortgage people from the mortgage industry who had worked on this in the Legislature and had worked on the constitutional amendment. So we had a very broad-based group of people on the committee.

We also had on the committee the regional counsels from Fannie Mae, which is very important in this. Those of you who aren't familiar with it, these mortgages are all originated, put -- not all of them, but primarily, and put in a pool and sold in the secondary market; and if the secondary market doesn't appreciate the posture that we have, they won't buy them. So to a certain extent you had to deal with the real reality of the marketplace. If we're going to have these interests, we've got to be able to do something with them in the marketplace.

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So having all those diverse interests, we started off and we had Judge Wood from Houston on there, who was very good, very helpful, and Judge Baker was terrific. Back in '97 to satisfy the constitutional requirement of a order to proceed with foreclosure, we proceeded to fashion these rules. Now, to give you a little background on foreclosure in Texas, it has for 150 years been nonjudicial. You can have judicial if there is some problem with it, but it is nonjudicial 95 percent of the time so that there is no court involved at all in connection with the foreclosure 99 percent of the time, and you've got different, let's say, bodies of law that effect that.

First, when you have a default you've got a series of common law obligations that have developed over time where you've got to send notices and do that sort of thing, a cure period in order to have a default before you can go forward with anything. Once you have a default then you give notice of foreclosure, and you go through that 21-day process and so forth. All of that is nonjudicial, so what happened in the home equity situation when the constitutional amendment was passed by the voters, they put a lot of consumer protections in there and properly so, because all this deals with single family homesteads, and one

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of those protections was you have to get a court order to proceed with foreclosure.

So what these rules do and all they do is set a procedure in place to obtain that court order to proceed with foreclosure. You still have all the common law obligations and statutory obligations of the cure period before the order ever even comes into play to establish a default. Now, in the middle of the process, so to speak, you have this additional process whereby you obtain an order to proceed with foreclosure, and that's all it is, is an order.

After you get the order you still have to give the 21 days notice and all the same process that you have already had for 150 years, so basically what we added or what the constitutional amendment added was a request from the Supreme Court to develop rules to now have an order in the middle of that process, and that's what we did, and the title companies and the mortgage people and so forth said, "Great, we have no problem with the order, but don't create it in a way that it screws up all these -- or messes up" or does whatever description they wanted to say these titles to the property, because the foreclosure process is very important to titles to property and where we are and so forth.

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So what we did and we had a little discussion, went around the table, "Does everybody agree on that?" Also, do we agree that we want a process that we cannot -- that will not clog the systems up so that if we get into this process and it is uncontested it can be expeditiously proceeded through the court. If it is contested, it just flips over to what I would call regular heads-up litigation, and that's what these rules try to do. If it's not contested, it goes through quick. If anybody wants to contest it, it just flips over and goes into what I would call normal litigation.

We had a discussion about it. Colorado has a process very similar to this. There were some people on the committee said, "We're from Texas. We don't want to follow anybody else. We don't want to do Colorado," dah-dah-dah-dah dah-dah-dah. So it took us a long time to talk about whether Colorado was good, bad, or indifferent and whether we could take a process that worked in Colorado and see if we could work it in Texas; and believe it or not, that probably was the most heated discussions we had is whether we ought to take a Colorado process and Texanize it. So hard to believe, but it's true. That gives you an idea.

We all had the same goal in mind to try

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to get the order but also facilitate the marketplace acceptance of these products. So we did that in '97. These rules have been in place for home equity loans for two years. They have worked extraordinarily well once people understood what the heck they are. So the biggest issue we have had is educating people on this process and what it is. Having the history of two years of working, with really no problems known to us other than the educational process, and most of the educational process is probably with the clerks, and we need to go to their meetings and explain to them what this is and how they deal with it. I think it's more of that than it is anything else, but once you spend time with it we really have almost no problems with it.

So we took the rules that were in place that were unanimous from our committee in '97 and presented the Court, were I think unanimous. Again, when we went back and tried to test the market to see where it was, didn't have problems with it, unanimous again. One of the reasons we had to do reverse mortgages again was because the way they were structured in the Legislature/constitutional amendment back in '97, secondary market would not buy the products.

So the basic product, the requirements

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for setting it up, which we're not dealing with at all, were modified somewhat so that there would be a real market for these products, and when they did that they made these changes. They liked I guess -- the Legislature liked what we did last time and in the constitutional amendment again it requires that there is a process set up by the Supreme Court for getting -- obtaining an order in the foreclosure process in connection with reverse mortgages. So that's what we did.

I don't know how many of you have it in front of you, but Rule 735 and 736, and I think we handed out -- you had them in the package, but we also handed out this morning what shows the only changes we made from 735 and 736 that were in place and working from '97, and they're underlined, and basically all we did was take the old rules, put provisions in there to apply to reverse mortgages where they would be appropriate and went forward, and that really was the only changes we made because we did not find in working with it for two years that there was a problem with it.

Those of you who don't have that, I've got some extras here if you don't have it, so let me know, but that's all the committee did this year, was to make the modification to incorporate into 735 and

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736 the process for reverse mortgages as well as home equity loans. If there's more questions about it, I'm fully willing to go into it however you want to, but basically it is a process. You file an -- well, first you have all of these notices that must be given before this ever starts. Once those notices are given there is a cure period allowing whatever default to be cured.

If that hasn't happened, the cure hasn't happened, there is another notice saying there is a default. Then you get to this process. You can't even file the application until those notices have been given and the default has been established, so you've got roughly a, let's say, 30-day period prior to this application ever coming into place. Then you file this application in district court, and there's a form of notice that must be given also in addition to the application being filed, and that's in these rules.

And then there is a response date which is 38 days from the time of the service, and we've been asked at least 39 times, "How did you come up with 38 days?" The way we came up with 38 days is because there is a Fair Debt Collection Act, a Federal law, that we did not want to walk Texas practitioners into a problem with that. You have 30 days to contest a debt under Fair Debt Collection Act law, Federal law.

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So what we did is when you file the application you can give a notice at the same time that complies with the Fair Debt Collection Act and lets the borrower contest the law in accordance with that act, so we figured there is a certain several days that you've got to get it. There is the answer period that we normally have and then we put some extra days on the end to make sure we gave enough time that there could be contesting under the Fair Debt Collection Act.

That's not in here, but it's to allow lawyers to do that without running into those problems, so that's why there is a 38-day answer period, more than there normally is, and we understand that. But once you have that, this is -- this process, it's like a forcible entry detainer for possession in JP court. There is no discovery, no document production. It's not res judicata. It's not collateral estoppel. It is nothing but obtaining an order that says you can go forward with foreclosure.

So this process anticipates that there will probably be defaults in most of this because that's where it is, and if there is, this order will be given. If at any time a borrower wants to contest any aspect of it, they can file a lawsuit in district court, file a notice of that lawsuit in this

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application process. This application then is automatically dismissed without prejudice. It's automatically dismissed, and you just flip over to what I would call normal litigation.

So that's really all it is, is a streamlined process to expeditiously receive this order. If anybody wants to contest it, we just go at the regular heads-up litigation and then thereafter once the order is obtained you have to give the same notices you were giving beforehand. One of the issues that we always have is what the heck is a reverse mortgage. That's probably not really what these rules are about, but I'll just say something about what a reverse mortgage is. A reverse mortgage is -- this is the market view of the reverse mortgage as opposed to these rules, and you can cut me off --

CHAIRMAN BABCOCK: No, go ahead.

MR. BAGGETT: -- as soon as you want me to because they probably don't want to hear a whole lot about reverse mortgages, but what a reverse mortgage is is a single family homestead, and if you have elderly people that have paid their home off or they have equity in their home but they don't have enough money to live, they'd have to sell their home in order to have some money, this product has been established all

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over the country. You have to be 62 years old to get it. What you do is you go in, and you apply to the mortgage company for a reverse mortgage.

They go in and they evaluate the equity in the home, could be a first lien on it, but it may be paid off, and they will make you a loan based upon the equity in that home, and they will do it actuarially, and once you do that they will have a lien on it. You can elect to take it in a lump sum or pay it off for the remainder of your life. If it's a husband and a wife it can be continued to be paid until the last survivor is around. So it's a vehicle to get liquidity to elderly people in their house if they want it.

You don't make any payments on it. It's interesting to have a mortgage you make no payments on. The events of default, for lack of a better term, are both spouses die. Once they die then it's paid off in the estate process. Another one is they sell it. If it's sold, it has to be paid off, and then there is a couple of other ones that if there's liens against the property that affect the title that aren't -- that can be contested, but they aren't contested, that could be a basis for it.

Another one is if you move out of the property for 12 months and you leave and you're no

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longer occupying it. That's another basis for, quote, default. It is in those latter circumstances where there is a lien against the property that affects the title and may affect the rights in the property or they move for 12 months that you have to give these additional notices so they'll know what's happening.

If they live there and there's no lien against the property, there are no payments, and that's the way a reverse mortgage works. So what we did is took home equity, the process that we had, incorporate home equity into that and proceeded forward. It was very straightforward and really had very little issues with it, even though we had a bunch of consumer lawyers, mortgage companies, title companies, et cetera, et cetera.

CHAIRMAN BABCOCK: Yeah, well, you haven't dealt with this committee yet.

MR. BAGGETT: Okay.

CHAIRMAN BABCOCK: Everybody should have the interlined Rule 735 and 736. We had previously sent you in the package both the 735 and 736 and the statute that is referenced in these provisions. I think Mike's point is a good one to keep in mind. We are not creating a Rule 735 and 736 in the form out of old cloth. We are merely adding the references to

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certain reverse mortgage foreclosures and incorporating those references into the rules. So we're not creating something new here, just broadening the applicability of existing rules.

Mike, the way we have done this, at least the last meeting, the subcommittee chair, which would be you, has the opportunity to accept or reject friendly amendments or changes that are suggested by this committee and then we forward that information on to the Court. I'm not sure that there's going to be a lot of controversy about this, but I may be surprised. So with that in mind, Justice Baker.

JUSTICE BAKER: I just wanted to comment before discussion that I am the liaison of the Court to this task force, and it's been my intention to recommend adopting these rules as-is unless this committee messes them up.

CHAIRMAN BABCOCK: Bill Dorsaneo.

PROFESSOR DORSANEO: Well, to start on that process, you know, there are some matters of form that we don't really need to worry about, but Mike, I'm looking here over here on page seven of the handout draft, and in Item No. 7 where it says "only issues" --

MR. BAGGETT: Right.

PROFESSOR DORSANEO: Then there are two

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subparagraphs or paragraphs. That seems to be the only place that talks about being able to come in afterwards and to seek relief in any court of competent jurisdiction if an application has been granted, you know, let's say by default. Is that right?

MR. BAGGETT: Once an order is signed, that's correct.

PROFESSOR DORSANEO: Don't you think it would be better if the information, particularly in (b) and particularly in the first sentence of (b), would be split out under a separate numbered paragraph, and there is a paragraph 9, abatement and dismissal.

MR. BAGGETT: Right.

PROFESSOR DORSANEO: Which is, you know, not the same thing, but it's in the same, you know, general area of, you know, what happens to this Rule 736 proceeding. If it gets off -- you know, if it gets off the track because it's a contested matter, it gets into heads-up litigation, and it just really seems to me that that paragraph, "only issue," talks about a lot more than that. The "only issue" part of it is in the first sentence in (a). Then, you know, thereafter it goes on to talk about the effect of the determination of that "only issue" and the preclusive effect of it on the parties affected by the determination, right? And

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if that's so, that needs to be put somewhere else because it's buried here, and where I would suggest that it would be put would be in a separate paragraph that could be 10 or whatever number that ends up being. You know, 736.10, perhaps. You understand what I'm saying?

MR. BAGGETT: Yes.

PROFESSOR DORSANEO: That's my suggestion as a matter of organization, and I'd also have further suggestions about how to talk about the order not having any preclusive effect, but I think we could leave that to drafting. I mean, it doesn't need to say "estoppel by judgment" and "collateral estoppel" because that's redundant, and perhaps some other language that simply would say that there's no preclusive effect, you know, be it beyond the effect that the order would have under this rule, okay, would be adequate.

CHAIRMAN BABCOCK: Can I ask Mike a question? Mike, is 7(a), which Bill has been talking about, that is in the existing rule, is it not?

MR. BAGGETT: The existing rule is -- we have not done anything. That's the existing rule as it stands.

PROFESSOR DORSANEO: But I would point

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out to the chair that the existing rule did not get seminared through this committee.

MR. SOULES: That's right.

MR. BAGGETT: That is correct. Yeah. It was presented to the Court, but you're right, it did not go through.

JUSTICE HECHT: And we didn't have time. They were passed. Mortgages were starting to be issued, and we were on a -- it was fast-tracked.

MR. BAGGETT: That's correct. We had, what, five weeks to do it.

CHAIRMAN BABCOCK: Justice Duncan.

HONORABLE SARAH DUNCAN: Following up, I agree with what Bill said, and to me where those things ought to be and what concerns me most about the rule is that they come too late. To me a stand-alone lawsuit, whether it's a usury or fraud or whatever it is, it is in the nature of a response; and these things ought to be, it seems to me, in the response section to alert the practitioner that this is also a viable response; and if you file a stand-alone lawsuit and a notice in a foreclosure suit there will be an automatic abatement and dismissal.

MR. BAGGETT: Well, in response, the first sentence of 4(a) says, "The respondent may file a

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response setting out as many matters, whether of law or fact, as respondent deems necessary or pertinent to contest the application," and we did that for that reason. You can say whatever you want to say in the response, period. We wanted to let them know that. I think your point's well taken, but that's why we tried to say that.

HONORABLE SARAH DUNCAN: And that's why I would put the abatement and dismissal part there, because to be able to put it in a response and it have no effect isn't very comforting to me, but if I know that I can not only put it in a response, which I really wouldn't want to do, I would want to go file my stand-alone lawsuit and just get the foreclosure proceedings.

CHAIRMAN BABCOCK: Justice Baker.

JUSTICE BAKER: Mike pointed out and when you look at these carefully, this process is not contemplated to be a full-blown lawsuit, which he commented on several times; and although I understand your concern, it seems to me that this process by these two rules is to limit it to exactly what's being required; and that is an order. And as soon as you say in the response, "I disagree and I'm going to file a lawsuit," you have to file a separate suit.

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In other words, we don't contemplate by these rules that you're going to have the full-blown lawsuit operating within the framework of this application for an order. It's going to be a separate piece of litigation, as he said before, and so your comments I think are well-taken, but the answer is already there, as he says. You're not going to litigate usury or fraud or whatever in this process.

HONORABLE SARAH DUNCAN: I understand. My only point is that I think you need to alert the practitioners at that sequence in time that, in fact, they have the remedy available in subsection 9, which is to file the stand-alone lawsuit and have the foreclosure proceeding automatically be dismissed.

CHAIRMAN BABCOCK: If I could ask Justice Baker a question. Justice Baker, is it the desire of the Court that this committee study the entire Rule 735 and 736 rules, I should say, in light of the fact that there was not time for this committee to study it before, or are you asking for our advice only on the interlined portion of the two rules that is in this handout that you gave us?

JUSTICE BAKER: Well, my personal viewpoint is because of the circumstances of the first go-around and the fact that the initial rule as

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promulgated by the Court has been in effect for two years without any problems having developed, that I would prefer that the group look at it for purposes of integrating the reverse mortgage part rather than contemplating this discussion as a full-blown redo, if you will, of the substantive rule itself. You know, with all due respect to what your function is and what you-all do, it's only been two years, but it doesn't appear to be broken. I would just leave it like it is unless you think there is a real substantive problem with it.

CHAIRMAN BABCOCK: Yeah. I think it might be helpful to ask the committee if they are aware of any problems. Mike, you're not, and Mike's not -- Luke, do you have something?

MR. SOULES: I think the notice provision in paragraph 2 is unconstitutional.

MR. BAKER: Well, sue us.

MR. SOULES: We worked long and hard, we worked long and hard on Rule 117a, which gives ad valorem tax delinquency collection people some special ways to meet constitutional requirements where they can't find the people and what have you; and this, just to mail to the person whose record or whose name and address is in the records of the lender a letter, I

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don't think that's enough.

MR. BAGGETT: Luke, let me tell you where that came from, and I understand your issue, and we had a lot of discussion about that in the committee, because let me tell you, the people -- the title company people were more concerned about that than you are because if there is some problem with the service it creates a problem with the title.

MR. SOULES: Well, they have got it.

MR. BAGGETT: So we spent a lot of time working on that. Where this came from is that's the exact, exact service requirements that are in 51.002 of the Property Code of the notices you are required to give for foreclosure. That's exact, just right out of the code. The code has been contested on the constitutionality of those notices, and it's been upheld that those notices are constitutional. Now, whether the same language has been upheld in that statute that would be here, maybe, I don't know, for some reason it's typed different or something, I don't know, but basically -- or maybe the arguments weren't made, but the constitutionality of that notice under 51.002 has been upheld.

CHAIRMAN BABCOCK: Yeah, Carl.

MR. HAMILTON: Can you explain what the

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"certain reserve reverse mortgages" are and which ones are excluded?

MR. BAGGETT: Yes. Under the statute or the constitutional amendment, excuse me, there are four bases of, quote, default. I mean, it's not default in your normal sense. One of them is that both spouses die. One of them is that the property is sold. Under those two circumstances the constitutional amendment did not require an order be obtained. The third one is, is that there is some lien against the property that affects the mortgage against the property, and the fourth one is that somebody moves from the property for 12 months and is no longer occupying it. In those last two, one of which as long as the lien is contested you can't go forward, but those last two circumstances are the only two circumstances under which you have to get an order. You do not have to get an order for the first two.

Yes.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: Mike, going back to my point, do you have any problem letting out that preclusive effect and related language from paragraph 7, the "only issue" paragraph, which I think all of you who look at it will recognize talks about a lot more

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than the "only issue," okay, and putting it in a separate paragraph? Even though that's a new matter, I picked out the one thing in this rule that's important that's articulated in an opaque way. I didn't raise every other issue that could be raised. I'm asking for one bite at this to get it into the shape that it needs to be in to be comprehensible, and I'd ask my fellow committee members to take a look at that and to tell me that I'm dead wrong if I'm dead wrong; but if I'm right then I'm asking for Mike to tell me whether he thinks that's a good idea or not.

That's the last thing I'm going to say about it. If all we're going to do is to say that the rule we didn't discuss is good enough for reverse mortgages, I'm ready to vote, because all of these crossreferences now to reverse mortgages, that's all it amounts to, if that's all we're doing.

MR. BAGGETT: Let me respond to you this way, and really it's the way Judge Baker addressed it. I think we could all speculate on whether moving that would make it more meaningful. My view is that with 9 stand alone, if you want to do anything about it, you just file a lawsuit and it's gone, period, is as good a protection as you can ever get. And if you want to know, we had a lot of discussions about that, whether

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or not that's enough protection just to flip it out and do away with all this. It has worked for two years.

I don't think there is a problem with it, so if we are really just looking at the rule and if there is any problems develop addressing those, that might be one, but there have been no problems, has not been misunderstood, and I think if it's already been there for two years. Even though it didn't go through this committee and it's working, we ought to sort of leave it alone.

CHAIRMAN BABCOCK: So to put it another way, you would not accept the friendly amendment from Professor Dorsaneo.

MR. BAGGETT: I think that's my preference would be to not do that.

CHAIRMAN BABCOCK: Let me get back to my question. Yeah.

MR. YELENOSKY: Well, I don't know about Professor Dorsaneo's point, but on the point as to whether it's been working well or not, Judge Duncan's point and Luke Soules' point were as to notice.

MR. BAGGETT: Right.

MR. YELENOSKY: And I don't know how we could know whether it's working or not unless we knew if people had misunderstood the notice or hadn't gotten

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notice and therefore had lost their homes as a result. So I just don't want it to go unsaid that I don't believe we could conclude based on what I've heard that it's been working well from the perspective of someone who didn't get adequate notice.

CHAIRMAN BABCOCK: Yeah. Good point. If you don't have notice you can't --

MR. SOULES: Apparently the title company and the industry is willing to assume it's working well.

MR. BAGGETT: That's right, and they're assuming to give title policies, but they work. We had a big long discussion about that and whether they're going to issue title policies or not issue them based on that notice issue, and trust me, they spent a lot of time talking about that, and since it's the exact notice that we had otherwise they went ahead and did it.

Now, you are correct. I mean, who knows how long it will take for all of this to bubble up. I don't know that, but to the extent things have bubbled up, it's been fine.

CHAIRMAN BABCOCK: Let's see if we can bring closure to whether anybody is aware of any problems. Bob Pemberton, are you aware of any letters

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that you have received on 735 and 736?
MR. PEMBERTON: We haven't received anything, and the only thing I've even heard is some practitioner at a CLE in Houston mentioned that he didn't like the fact that if you wanted to contest one of these you have to file a separate lawsuit. That's just a policy decision that's pretty fundamental. That's all I've heard.
MR. BAGGETT: Let me tell you why we did the separate lawsuit instead of having -- and if you think about it, the way you stop a foreclosure is you go in and get a temporary restraining order, an injunction, and you hear it. We really didn't want them to have to do that. We did not want to go through the situation where they had to get a T.R.O. and a bond and all that sort of thing. We wanted them to have an ability just to file an application, and it's automatically stopped, and the thing is abated, and you're automatically in litigation because you can't proceed with a foreclosure without an order.
So if you don't get the order we've really bent over backwards to go the other way, and some people would say, "Yeah, you've encouraged more litigation." Well, no, we're not trying to do that, but we're allowing them to stop it without a T.R.O.,

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without a bond, without anything other than just filing an application -- a lawsuit.
CHAIRMAN BABCOCK: Elaine.
PROFESSOR CARLSON: Would you consider adding a comment to Rule 735 to the effect that Rule 735 and 736 do not address or purport to change the common law duty of a lender seeking foreclosure, nor do the rules preclude a debtor from proceeding in district court to contest the right to foreclose under Rule 736, subsection 9? That kind of tells a lawyer up front here is your menu of choices and duties that exist independently of the rules.
MR. BAGGETT: That would be -- I mean, if that solves the problem to make sure they know they can do that better, I don't have a big conceptual problem with that.
CHAIRMAN BABCOCK: Okay. We'll talk about that in a second. Anybody else aware of any problems with Rule 735 or 736?
Justice Hecht, while you were out of the room we had a brief discussion about whether or not the Court was interested in our taking on the entire rule rather than just these few changes, and Justice Baker's view was that the rule was working fine and that it was not his thought that we should try to examine the

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entire rules, notwithstanding the fact that because of the timing they hadn't gone through this committee previously, and I was trying to canvass the group to see if there were any problems with those rules that anyone was aware of.
JUSTICE HECHT: Okay.
CHAIRMAN BABCOCK: So we have the comment suggestion. Anybody else aware of problems?
Yeah, Bonnie.
MS. WOLBRUCK: I just wanted to make a comment that in my county, in Williamson County, we have just in the last few months started receiving these applications. Although the procedure has been in place for a couple of years we have just now in the last few months started receiving them.
CHAIRMAN BABCOCK: So if there were problems, they would have just started to arise?
MS. WOLBRUCK: They would have just started.
CHAIRMAN BABCOCK: But you're not aware of any right now?
MS. WOLBRUCK: I don't know of any problems at this time.
CHAIRMAN BABCOCK: Okay. All right.
MR. SOULES: I guess there is one other

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problem here, and that is that the way you set up notice here the response time is really 41 days under the rules because you've got to add three days to certified mail service any time you do it that way. So anybody that's taking a default judgment on the 38th day is automatically taking a judgment prior to the time the response is due.
MR. BAGGETT: Well, I understand your point, and it's a good point, but that's part of why we added the eight days to the 30 days, but I know.
MR. SOULES: That still doesn't take it out of Rule 21a.
MR. BAGGETT: I understand. I'm not disagreeing with you, but that's part of the basis of -- the Fair Debt Collection Act is 30 days. We added this to deal with that, but your particular point I understand.
MR. SOULES: Okay.
PROFESSOR DORSANEO: What number of days would it be if you just picked a number of days and forgot about the Monday next, which in our recodification draft we have eliminated? Okay. What number of days would be the right number of days if you just wanted to give the right number of days?
MR. BAGGETT: You need to give the --

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you need to have the 30 days so that the practitioners won't have the Fair Debt Collection Act problem and then what Luke is talking about.
PROFESSOR DORSANEO: Give me a number. 40, 50?
MR. BAGGETT: 40 is fine. I mean, it's not -- it just has to be over 30 with some leniency on the notice issue.
CHAIRMAN BABCOCK: Any other comments about these rules other than the ones we have talked about? And we have got Elaine's comment about the rules pending. Anything else?
PROFESSOR DORSANEO: Well, I'm going to move to split out the language from the "only issue" paragraph and put it in a separate paragraph 10 that's called "preclusive effect" or words to that effect because paragraph 9 is about abatement, and from my standpoint something that's ongoing is abated, but the ability to come back in and challenge an order later, you know, is a distinct matter.
CHAIRMAN BABCOCK: Okay.
MR. SOULES: May I ask a question? Are we against a deadline here where this rule has got to be enacted?
JUSTICE BAKER: We're past it.

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MR. BAGGETT: We're past it, yeah. We have the same --
JUSTICE BAKER: Time problem.
MR. BAGGETT: -- time problem as we had last time.
CHAIRMAN BABCOCK: Bill has got a motion on the floor. Anybody second that motion?
HONORABLE SARAH DUNCAN: I second it.
CHAIRMAN BABCOCK: Elaine seconds it. Now, as I understand it, the chair of the subcommittee has not accepted it, so what we are going to do now is vote on it, and if it passes then we will inform the Court, and Pemberton will accurately report our vote on that matter. Yeah, Mike.
MR. BAGGETT: Let me say this. If we're going to make some changes to it, that change that you're suggesting doesn't give me great pause. I guess the issue is if we're just going to keep it like it is, would be my preference, but if we're going to make some changes, I don't have a big problem with what you're saying. That doesn't bother me much.
PROFESSOR DORSANEO: My motion, Mr. Chairman, is just simply to move three sentences.
CHAIRMAN BABCOCK: Right. Motion to move three sentences. How many are in favor of the

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motion to move three sentences?
16. A late vote, 17. I get 17. Is that what you got Carrie?
MS. GAGNON: Yeah.
CHAIRMAN BABCOCK: Okay. 17 in favor. Who is opposed? 13 opposed. So that carries. And Mike you accept it or don't?
MR. BAGGETT: I'll accept it, and I will also accept the one on the clarification of 735. Now, I don't know mechanically, Judge Baker and Judge Hecht, our committee has technically expired, I think.
CHAIRMAN BABCOCK: Well, it sounds like that this is not a change in substance. It's just a reorganization.
MR. BAGGETT: Right.
CHAIRMAN BABCOCK: Bill, would you agree?
PROFESSOR DORSANEO: Yes.
CHAIRMAN BABCOCK: So --
JUSTICE HECHT: But Elaine had a comment.
CHAIRMAN BABCOCK: Yeah. And Elaine has got a comment. We'll get Elaine's comment in a minute.
JUSTICE BAKER: I think that it's a matter of drafting, and I guess the regular procedure

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is that whoever has got this in their word processor will move the second sentence of (a), all of (b), and make it number 10 on page eight, and so far as that goes we'll recirculate it to this group. Isn't that the ordinary procedure?
MR. BAGGETT: What I would do if it's not objectionable is I would like to get with you, Elaine, on your suggestion.
PROFESSOR CARLSON: Sure.
MR. BAGGETT: And with Professor Dorsaneo's suggestion and get something to them that's okay with them and then probably set up our committee just to look at it. I think it would be appropriate to do that and report back, if that would be okay. Is that all right?
PROFESSOR CARLSON: Fine.
MR. BAGGETT: Okay.
MR. SOULES: If you're going to do that, I think this rule ought to be looked at for its conformity to the other rules and made to conform. Once we pass it through this committee it's got problems whenever you try to square it with the other Rules of Civil Procedure. If we've got to pass it today, we do in order to meet deadlines or meet deadlines that are past. If we don't have to pass it

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today, I think that the committee ought to try to square this rule up with the other Rules of Civil Procedure so it really fits with the overall practice and doesn't conflict or at least doesn't conflict with the other practice. So it's going over to the next meeting anyway, I think we ought to at least try to do that.
CHAIRMAN BABCOCK: Well, it's whatever the Court wants, but my thought was that we would take Bill's change, and Mike would put that on his word processor, and Elaine would work on her comment right now, and we would talk about that today and forward it on to the Court speedily; but again, Luke, you make a good point. If this committee is charged, or put another way, we're going to be blamed for not having looked at these two rules, then that's another matter. What I hear the Court saying is that they don't need us to, but --
JUSTICE HECHT: Well, what is the timing? I just don't know what the time constraints are.
JUSTICE BAKER: Well, the theory was exactly like the first go-around, that the statutory implementation of the constitutional amendment was effective January 1 of the next year. In other words,

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in '97 it was effective January of '98. This one was effective January 1, 2000. So we were operating on a kind of a strained schedule. We didn't want to appoint anybody until the actual constitutional amendment time said you could do it, so we had about five weeks to do the whole thing, and the theory is that the rule is supposed to be in place on January 1. Well, the reality is, of course, that you can't do a reverse mortgage until January 1.
It's hardly feasible that someone is going to make one and try to foreclose in the first 30 days. So practically we have or did have a time period to finish it, which is what we did in the first go-around, and we felt compelled because of the Legislature's mandate to do it as rapidly as possible and with as few many days expired in January as possible, so here we finished about three weeks ago, I think, wasn't it, Mike?
MR. BAGGETT: Right. Right.
JUSTICE BAKER: And so we delayed to this point merely because this body was not meeting until today.
CHAIRMAN BABCOCK: Justice Baker, could I offer a suggestion?
JUSTICE BAKER: Sure.

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CHAIRMAN BABCOCK: And that is -- and, Luke, see if this works for you. We will forward the work that we've done this morning to the Court, and that is blessing the work of Mike's subcommittee, making the two changes, the one that Bill Dorsaneo has suggested and if Elaine can come up with some comment language that is acceptable to Mike and to the subcommittee -- I mean to this committee -- we'll forward that on to the Court and then at some later time when we have more time we can put Rule 735 and 736 on the agenda for full consideration by this committee.
And I would suggest that we let a little air go underneath this. As Bonnie says, we're just starting now to see these percolate through the system. If there are problems that are going to manifest themselves, it's probably going to be a few months down the road. So I would propose a kind of bifurcated approach to it. Let's give the Court what it needs today because it's under a deadline and defer the full-blown treatment that this committee is capable of giving to a rule to a later time.
MR. SOULES: I move we approve the amendments but not the rule.
CHAIRMAN BABCOCK: Okay.
MR. SOULES: We have never been asked to

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approve the rule. We have just been asked to approve the amendments. If this committee is going to approve the rule we need to study it in an appropriate way.
CHAIRMAN BABCOCK: Okay.
MR. SOULES: So my motion is that we approve the amendments without inferring or in any way expressing --
CHAIRMAN BABCOCK: What do you want to do about Dorsaneo's amendment?
MR. SOULES: With that change.
CHAIRMAN BABCOCK: With that change, and what about Elaine's comment?
MR. SOULES: Whatever. I think it's a good comment.
CHAIRMAN BABCOCK: Is everybody in favor of doing that? Who is in favor of Luke's motion, which I'll second?
I got 28. Anybody opposed? Okay. 28 to nothing. So that's what we're going to do, but, Elaine, you're going to have to come up with some language, talk to Mike about it, and then get back to us today before lunch.
MR. BAGGETT: I'll stay.
CHAIRMAN BABCOCK: Huh?
MR. BAGGETT: I was just telling them

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I'll stay, and we'll work on it.
MR. WILLIAMS: One thing on Professor Dorsaneo's comments about the rule not fitting in accord with the other rules, would it be an imposition on you to give an outline to the committee on how it doesn't fit? You indicated --
MR. ORSINGER: That was Luke's comment.
MR. WILLIAMS: Oh, I'm sorry, Luke.
MR. SOULES: Sure.
MR. WILLIAMS: You said it didn't fit.
MR. SOULES: I will undertake to do that, enlist anyone else's help that will take a look at this in light of Rule 4, Rule 21a, and the citation rules. I know that those need to be looked at for inconcistencies or consistencies with 735 and other rules that are here being proposed. There may be others as well. I'll be happy to do that. I think maybe I'll get Bill, Steve, or somebody else to take a look at it. Anything that you-all see, please drop me a line or give me a voice mail or something so that when we do this we will have it thoroughly prepared for your review.
MR. BAGGETT: Let me comment. Obviously we did not want to interfere with the context of the rules otherwise, and so it wasn't our intent to do

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that, and if there is some issues there we would have no problem with making them consistent. That's fine.
MR. SOULES: I understand that. Thank you, Mike.
MR. WILLIAMS: Thank you.
CHAIRMAN BABCOCK: Anybody else have anything on -- anything else on 735 or 736, the interlined version?
Okay. Let's move on to the next item on our agenda, and thanks very much, Mike, for showing up and helping us with this.
MR. BAGGETT: No problem.
CHAIRMAN BABCOCK: And that is some amendments to the TRAP Rules, and Bill Dorsaneo and Judge Womack -- I was told by Professor Dorsaneo that "justice" was not the right term, should be Judge Womack, unless he was gooning me. Who wants to talk first?
HONORABLE PAUL WOMACK: I guess I will since it's my fault.
CHAIRMAN BABCOCK: Nice to have you here, Judge.
HONORABLE PAUL WOMACK: Thank you. There are -- our reason for taking up your time is I wanted in case any other rule of appellate procedure

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changes were being considered that we coordinate and not be issuing amendments of piecemeal. I know that the Supreme Court will be happy to make any changes we desire that affect any criminal cases just as we're happy to do the reverse.
So there are a couple of these rules that I think really affect only criminal cases and really only affect our Court. The change in Rule 67 is -- I think an inadvertent implication was made that the Court of Criminal Appeals could grant discretionary review of an appellate case only when a petition for discretionary review had not been filed.
In fact, we sometimes like to grant discretionary review when a petition has been filed but it's a really rotten petition and we think there is a more interesting point in the case. So to remove that implication that filing a petition would limit our discretion in that regard, we just want to strike some language out of Rule 67, and this is a -- coming before you with these changes is a good opportunity for us to have your wisdom and thoughts on this.
PROFESSOR DORSANEO: Do them one at a time.
CHAIRMAN BABCOCK: Do them -- I think that's a good idea. Bill Dorsaneo just said that we

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should do them one at a time.
PROFESSOR DORSANEO: Does everybody have -- in the agenda there are -- what are they called, Bob, enclosures?
CHAIRMAN BABCOCK: Right.
PROFESSOR DORSANEO: The enclosure to agenda --
CHAIRMAN BABCOCK: No. 3.
PROFESSOR DORSANEO: 3. Is that right? Yes. Proceeded by Judge Womack's letter and then on Bates stamped page 240, which is the second page following that letter, what the judge is talking about now is at the bottom of the page.
CHAIRMAN BABCOCK: This is Rule 67, 67.1, dealing with, "By the vote of at least four judges the Court of Criminal Appeals may," and then there is some language that is proposed to be deleted.
MR. SOULES: I so move.
PROFESSOR DORSANEO: Second.
CHAIRMAN BABCOCK: Any discussion? All in favor? By acclamation. What's the next one, Judge?
HONORABLE PAUL WOMACK: Next in connection with Rule 42, it's been the rule forever in criminal cases that for an appeal to be dismissed the appellant had to personally ask for the dismissal, that

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it was not enough for the attorney to ask, and maybe reflecting some difficulty in criminal cases that's not -- may not be there in civil cases.
First of all, it's just physically difficult sometimes for attorneys and clients to be together and consult about these things, and I guess also there is a tendency on the part of criminal defendants maybe to turn on their attorneys that's not present in civil cases, but I'll bow to the civil practitioners who have superior knowledge of that.
So the revised rule literally now says that the appellant and his or her attorney have to sign a written withdrawal, which literally would give the attorney veto power over dismissing an appeal even when the client wanted to dismiss it, and don't you know that we had an attorney come up and say we couldn't dismiss the case even though his client had personally asked for it because he, the attorney, wouldn't sign it, and we don't really think that's the purpose of the rule, and so that's why we're trying to eliminate that.
MR. SOULES: So moved.
CHAIRMAN BABCOCK: Second?
HONORABLE SARAH DUNCAN: Hold on a second.
CHAIRMAN BABCOCK: Justice Duncan.

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HONORABLE SARAH DUNCAN: By the same token, we have had cases where the client is incarcerated and thinks there's been an agreement of some sort reached, and he/she thinks, "Oh, I can dismiss my appeal now," and they will file something with our court saying, "Please dismiss my appeal. I've settled with the state," and then you talk to their attorney, and they are seriously misinformed, and my concern is if you don't require something from the attorney we might end up dismissing criminal defendants' appeals when they have asked for a dismissal because of misinformation and not because they would, if correctly informed, want their appeal dismissed, and I'm not sure how you do that. Obviously the attorney can't veto the client's informed decision.
MR. YELENOSKY: Can you agree to stay it?
HONORABLE SARAH DUNCAN: Not after plenary power is over.
HONORABLE PAUL WOMACK: Well, I don't think this change to the rule would necessarily create this problem because it requires the signature, personal signature of the defendant, but it doesn't say that that's sufficient necessarily if the court has some trouble.

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HONORABLE SARAH DUNCAN: As long as you put that on the record I'm fine.

HONORABLE PAUL WOMACK: Fine. Thanks for raising it.

CHAIRMAN BABCOCK: Any other comments about this? Yeah, Bill.

PROFESSOR DORSANEO: The only other thing I would point out is we do have a rule on signing, Rule 9.1, that deals with represented parties. I don't think that anyone could conclude that the provisions of that rule would supersede proposed 42.2(a), but it might be worth some sort of a reference in the comment that, you know, 9.1(a), Appellate Rule 9.1(a), does not apply or notwithstanding the provisions of appellate Rule 9.1(a), something like that. It's a small point, but normally our rule is represented parties -- in a represented party's case a document filed on that party's behalf must be signed by at least one of the party's attorneys.

CHAIRMAN BABCOCK: All right. Any other comments? Okay. Let's vote on the rule first and then we'll take up Bill's comment about the comment, which I think is -- Judge, do you have a reaction to Bill Dorsaneo's point?

HONORABLE PAUL WOMACK: No. That was

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the thought that I had when I was talking to Justice Duncan, and I agree with her entirely.

CHAIRMAN BABCOCK: Okay. All in favor of amending Rule 42.2(a) as indicated raise their hand.

All opposed? Another vote by acclamation.

Now, about the comment. Bill, do you and Judge Womack want to get together on language?

HONORABLE PAUL WOMACK: Yes.

CHAIRMAN BABCOCK: Okay. And when you get some language if you want us to bless it, let us know.

HONORABLE PAUL WOMACK: Okay.

CHAIRMAN BABCOCK: All right. The next one, Judge?

HONORABLE PAUL WOMACK: If I could draw your attention to the next page, Rule 73 would be a new rule, and the more important part of it might be the form that follows the rule. The Court of Criminal Appeals has the jurisdiction of habeas corpus after a final conviction in a felony case. The petitions for these habeas corpus writs are filed in the convicting courts, and after fact-finding procedures if necessary are completed in the convicting courts then everything is forwarded to the Court of Criminal Appeals.

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So now we have a lot more prison space and a lot more prisoners, and the number of these post-conviction petitions that we're getting now is running at the rate of 6 or 7,000 annually, maybe more. We have a staff of attorneys to process these as they come in from the district courts, and the great bulk of them are pro se petitions, and a lot of them are handwritten. I'm sure more than half of them are handwritten, and the biggest trouble with them is just trying to decipher what it is the contention is contained -- what contention is contained in the petition.

The Federal courts by an appendix to Title 28 of the United States Code have promulgated a form that's required when someone petitions in Federal court, and it is our thought that if such a form or similar form were used in the state side that it would make the processing of these forms easier for everyone concerned, and, of course, protecting ourselves I guess is our primary concern, but it should be of help to the district courts and to the prosecutors as well.

So we've tried to come up with a rule which requires the form and then the form itself. Professor Dorsaneo has kindly suggested some change, formal changes in the language of the rule and the

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numbering of the rule to make it more consonant with the language and rule numbering scheme that we have already, so I've taken that into account and will probably come back with some changes on that.

I'm especially interested to have your reactions and advice, Bonnie, especially. We're going to kind of put the onus on the district clerks to not -- basically not accept these petitions if they're not on this form.

MS. WOLBRUCK: I noticed that.

HONORABLE PAUL WOMACK: And naturally we want to try to get the forms to the prison system so the state has petitions and should have them widely available for the prisoners to use, but surely there is going to be some lag time in getting use of these if we adopt this rule.

CHAIRMAN BABCOCK: Yeah, Luke.

MR. SOULES: If we do adopt it, I think the noncompliance first sentence should add the words "together with a copy of the form," so that if we're going to send a defective petition back, at least we know that the petitioner is going to have a copy of the form that would permit that petitioner to correct the defect unless there is some process in the prison system that these forms are going to be distributed,

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which we, of course, have no control over.

So at least if we put that in there, there would be -- that could be a constitutional problem. You're sending it back because he doesn't have it on the right form, but if you send them the form when you send the thing back it probably erases that issue as well. That's my only observation.

CHAIRMAN BABCOCK: Okay. Bonnie, did you have some comments?

MS. WOLBRUECK: I was wondering, Judge Womack, if you say, "The clerk of the court may," is there -- I'm just wondering if the clerk's may not and choose not to do that and follow the rule if that's --

HONORABLE PAUL WOMACK: Well, then they get caught by the next sentence which is --

MS. WOLBRUECK: I noticed the next sentence.

HONORABLE PAUL WOMACK: If you send it to us, we're going to send it back to you anyway. So you save yourself one set of postage.

MS. WOLBRUECK: All right. So if we can send it, you'll send it back to us, and then we'll take care of it. Okay.

CHAIRMAN BABCOCK: Judge, I had a question on the form, Items 10 and 11. You ask the

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prisoner whether they testified at the guilt or innocence phase and whether they testified at the sentencing phase. What is the purpose for that?

HONORABLE PAUL WOMACK: I guess it's because it's helpful to know this in facing a claim that -- there are a lot of claims that attorneys kept their stories secret, that they had a story that they told the attorney, and the attorney did nothing to get that presented at the trial, and so that's I think the reason for that.

CHAIRMAN BABCOCK: Luke.

MR. SOULES: This is intended to be clerk friendly and not Court of Criminal Appeals unfriendly, hopefully. If we could also in the noncompliance or modify that so it would say, "The clerk of the convicting court will without filing an application that is not on this form" so that the clerk has clear direction. If it's not on this form it gets sent back with the form, and that's routine.

MS. WOLBRUECK: I think that that's fine, and I can see that clerks have real difficulty in identifying these post-conviction writs anyway, and maybe this would give us an opportunity to mail it back and say, "If this is a post-conviction writ, it needs to be on this form."

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MR. SOULES: And "We're not filing it at this time."
MS. WOLBRUCK: Yeah.
MR. YELENOSKY: Following up on that point, the only defect we've talked about is it not being on this form, but the rule reads that it could be returned if it's not in compliance with this rule, which I assume means it doesn't have everything under (c) in the contents, and I'm wondering how strictly construed that is. I mean, if one piece of information is missing, do they have to have every court number, et cetera?
MR. SOULES: That shouldn't be the clerk's burden to figure that out.
MR. YELENOSKY: Well, is the Court of Criminal Appeals going to send it back if every single item is not filled in? It's just a question. Is that the intent?
HONORABLE PAUL WOMACK: No, it's not, and I think that's a good point, and probably the best thing to do is change that noncompliance language so it says "not on the form." Thanks for the suggestion.
CHAIRMAN BABCOCK: Any other comments about this rule? Judge Rhea, nice to see you.
HONORABLE BILL RHEA: Sorry to be late.

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CHAIRMAN BABCOCK: Do I understand, Bill, that you and Judge Womack are going to work on the language and bring it back to us?
PROFESSOR DORSANEO: Yes. We have it pretty substantially completed, and I think we could provide it today.
CHAIRMAN BABCOCK: Today? Great.
PROFESSOR DORSANEO: Do you want us to just give it to Mr. Pemberton?
CHAIRMAN BABCOCK: That would be great. If we can circle back around to it today, that would be great.
HONORABLE PAUL WOMACK: All right. Now, the remaining proposed change that we have is in Rule 38.6, time to file briefs. I want to say that the Court of Criminal Appeals is not invested in this rule change at all, but when the 1997 amendments were made there was no provision made to extend the time for filing any brief other than the appellant's brief, and my understanding is that the various courts of appeals have reacted in different ways when appellees or other parties have requested an extension of time to file a brief so that there is now a lack of uniformity and maybe some confusion about whether there is even authority to extend the time for filing an appellant's

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brief other than the brief. So because we have heard so much about this I just wanted to kind of get it on the table. It's really of no concern to us whether this change be made or not.
PROFESSOR DORSANEO: A related question would be, you know, what briefs are we talking about? You could restrict the -- assuming that it would be changed to cover briefs filed by appellants and by appellees, could restrict the language of the sentence to initial briefs, and that would require a little bit of tinkering with the other language in 38.6, which is "time to file briefs."
The Court in its subparagraph to reply briefs indicate that they must be filed within 20 days after the date the appellee's brief was filed. It would be my view that briefs, regardless of whether they're initial briefs or reply briefs, are helpful to the courts, and they ought to be required to at least, you know, take them, and maybe then they'll look at them. So I would say all briefs, not just initial briefs, et cetera. I think most of the appellate judges think that way, too, but apparently not all.
CHAIRMAN BABCOCK: Justice Hecht.
JUSTICE HECHT: The reason this was written this way, as I recall it, was that the practice

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in our court is to require a motion on the petitioner, on the petitioner's brief, but when the respondents ask for more time we usually just say, "Well, if you" -- we send them a letter that says, "If you get your brief in before the Court looks at the petition, fine; and if you don't, you don't."
So we don't keep the respondent from filing a late brief. We just don't have any provision for doing it, and I think there was some assumption along the line that that's the way the court of appeals would do it, too, but they have not -- Paul is right. They have not uniformly construed the rule, and I can't imagine that any appellate court wouldn't want to have the power to extend the time for any brief of an amicus or a third party or reply brief or any kind of brief. We need all the help we can get usually.
MR. SOULES: I move the rule be changed according to the text there at 38.6 on page 240.
CHAIRMAN BABCOCK: Anybody second that?
PROFESSOR DORSANEO: I'd just add the letter "s" to the word "brief."
MR. SOULES: With that change.
CHAIRMAN BABCOCK: Second?
MR. HAMILTON: You better take out "a."
MR. EDWARDS: You better take out "a"

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then.
PROFESSOR DORSANEO: Say not "a briefs" but "briefs." That's my idea.
CHAIRMAN BABCOCK: "Briefs." Yeah. Any discussion? All in favor of changing Rule 38.6(d) raise their hand.
All opposed? Another vote by acclamation.
Judge Womack, you're on a roll here.
HONORABLE PAUL WOMACK: On the subject of appellate judges' salaries now...
MR. SOULES: So moved. Trial judges, too, by the way.
HONORABLE PAUL WOMACK: Thank you for your time.
CHAIRMAN BABCOCK: Thank you, Judge, and you and Bill will double back with us about the language on Rule 73?
HONORABLE PAUL WOMACK: Yes.
CHAIRMAN BABCOCK: Justice Hecht.
JUSTICE HECHT: Could I ask the committee's idea about timing? We don't want to hold up the Court of Criminal Appeals' changes because I think particularly the one, Rule 73, will make a difference in their -- in the way they're conducting

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their business. There are, I think, two other changes or two or three other changes in the TRAP Rules that I'm aware of, or that have been raised that I'm aware of. I don't know if the committee wants to hold these up for those because they probably can't be done until the next meeting or if we should go ahead with these changes.
PROFESSOR DORSANEO: Justice Hecht, I'm really only aware of one. Is it the one -- if you would refresh our recollection, the one about the court reporter?
JUSTICE HECHT: There's that one that Judge McCown has proposed, wants to revisit Rule 13.1 about whether the presumption is the court reporter should be in the room or not be in the room, who has to ask or not ask. Then there's one, TRAP 43, whether we should specify that a court of appeals can remand a case for entry of judgment pursuant to settlement. That's just not listed in the rule, and Brian Garner has asked whether the briefing rules should describe the kinds of issues -- the way the issues should be stated. So those are --
PROFESSOR DORSANEO: Those haven't been presented to the subcommittee. If any of them require, you know, immediate action, I think we could probably

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do it pretty quickly, particularly the one involving the record. What's your pleasure?
JUSTICE HECHT: Well, I'm easy. You know, I just think it of some urgency that we go ahead with Rule 73, but I don't see how we can discuss these other things at this meeting, so maybe we should go ahead with these changes.
MR. SOULES: I think so. I mean, these are -- except for the last one we voted on, these are Court of Criminal Appeals oriented --
JUSTICE HECHT: Right.
MR. SOULES: -- and I think that we should be as accommodating as possible in that regard, and one that affects all cases and is totally uncontroversial.
JUSTICE HECHT: Okay.
PROFESSOR DORSANEO: And those three that you mentioned that would be on the agenda are worth considering, but none of them really make any particular difference from my standpoint to be done today.
JUSTICE HECHT: Right. Right. Okay.
CHAIRMAN BABCOCK: Okay. We'll take a 10 or 15 minute recess.
(Recess taken.)

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CHAIRMAN BABCOCK: All right, Baggett, have you and Elaine got a comment?
MR. BAGGETT: We have.
CHAIRMAN BABCOCK: Okay.
MR. BAGGETT: I think they're good. I have no problems.
CHAIRMAN BABCOCK: All right. The follow-up from this morning is that Elaine Carlson and Mike Baggett have a comment, and Mike Baggett is going to read the comment to us.
MS. MCNAMARA: You need a gavel, Chip.
CHAIRMAN BABCOCK: And you won't be able to hear it if you don't quit talking.
MR. BAGGETT: And Judge Baker has gone over it, too.
CHAIRMAN BABCOCK: All right. Tommy, Bobby, let's go.
Mike, do you want to tell us the comment that you and Elaine have got to Rule 736?
MR. BAGGETT: I will tell you I think we think this is a positive improvement, so I want you to know I take positive improvement as a positive, not a negative. So in any event, if you've got it in front of you, 735, and the concept is, is to let them know when they read Rule 735 that they need to read on at

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the end of 736 to discover golden nuggets in there if they need them, which I understand, and the committee doesn't have any problem with this, and Judge Baker participated in this, so I think we're okay.
Here's what we propose to add as another sentence, two sentences, at the end of 735, and it is as follows. Now, this is your handwriting, so if I goof it up, you be sure and give it back.
PROFESSOR CARLSON: And it's a comment.
MR. BAGGETT: Okay. "Rules 735 and 736 do not address," comma, "nor purport to change," comma, "duties of a lender seeking foreclosure," period. "Nor do these rules preclude a respondent from timely proceeding in district court to contest the right to foreclose under Rule 736," and it's going to be 10 when we make the other change that Professor Dorsaneo wants, "and abate a Rule 736 proceeding." Do you want me to do that again?
CHAIRMAN BABCOCK: Yeah.
MR. BAGGETT: Okay.
CHAIRMAN BABCOCK: Carrie, get this down.
MR. BAGGETT: And she's got it in the form of a comment, and to the extent that that's the mechanical way to do it, that's fine.

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CHAIRMAN BABCOCK: The comment to Rule 735.
MR. BAGGETT: Right.
CHAIRMAN BABCOCK: Okay.
MR. BAGGETT: Okay. "Rules 735 and 736 do not address nor purport to change duties of a lender seeking foreclosure," period. "Nor do these rules preclude a respondent from timely proceeding in district court to contest the right to foreclose under Rule 736" in parentheses (10), "and abate a Rule 736 proceeding," period. Yes?
HONORABLE SARAH DUNCAN: I would only suggest that you not be so restrictive as to say "respondent" because there may be other people interested who have a right standing to file a stand-alone lawsuit who have not been named as a respondent in the 735 and 736 proceeding.
MR. BAGGETT: That is the one thing we changed because we didn't know how to describe that person or entity or whatever it is that we did, and we just made it consistent, we tried to make it, with how we referred to them in the rule otherwise.
CHAIRMAN BABCOCK: Any other comments about the comment?
MR. SOULES: Just the words "under 736"

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is that necessary after the word "foreclosure"?
MR. BAGGETT: That's what that specifically does, is --
MR. SOULES: But it doesn't limit their right to contest foreclosure under anything?
MR. BAGGETT: No.
MR. SOULES: So why do we say "under 736"?
PROFESSOR CARLSON: Well, Luke, you're right, and we could not refer to 9, which is going to become 10. It was just sort of a road map that if you don't want to go the T.R.O. route you can go to the expedited abate under section 9, soon to be 10.
MR. SOULES: I'm between abate and foreclosure there under 736. To contest foreclosure and then skip over the words "under 736," take those out, and then say "or abate" and leave the rest of it.
MR. BAGGETT: That's fine with me.
CHAIRMAN BABCOCK: Is that okay, Elaine?
PROFESSOR CARLSON: Yeah. That's fine.
MR. BAGGETT: That's fine.
CHAIRMAN BABCOCK: Okay. Any other comments about the comment to 735?
PROFESSOR DORSANEO: I didn't draft the complete comment down. I don't know if it's that

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important, you know, but I don't know why it needs to say "or purports to change." Why not say, "Rule 735 and 736 do not change," rather than all these extra words, "address or purport to change." I would have similar comments if I had it all written down about the rest of it, I'm sure.
MR. YELENOSKY: We're sure.
PROFESSOR DORSANEO: So in substance that makes good sense. I would prefer if somebody would type it up.
MR. BAGGETT: I don't mind making it more straightforward and leaving out the part -- if it's all right with you, Elaine, just to leave it "Rule 735 and 736 do not change duties of a lender seeking foreclosure."
PROFESSOR CARLSON: That's fine.
CHAIRMAN BABCOCK: Okay. You got that, Carrie?
Okay. Any other comments to the comment? Okay. Do I hear a motion to approve the comment?
MR. HALL: So moved.
CHAIRMAN BABCOCK: Okay. Second?
MR. YELENOSKY: Second.
CHAIRMAN BABCOCK: All in favor of the

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comment as changed and amended, raise your hand.
All opposed? Again, by acclamation.
Carrie will you be sure and type that up and make sure Mike and Elaine see it and then get it to Bob Pemberton?
MR. BAGGETT: There is one other change that's the movement, and let me address that.
CHAIRMAN BABCOCK: Yeah.
MR. BAGGETT: Okay. Bill Dorsaneo's recommendation, and we accept this, is the former provision under 7 says "only issue." That will remain as it is with the first sentence as it is. The second sentence of the first paragraph as well as the second paragraph will then be moved to a new section 9, which will be labeled "nonpreclusive effect of order."
Let me do that one again while you-all are all looking at it. What was formerly 7(a) will no longer be an (a) because there will just be a sentence under it. The first sentence will be under there. The second sentence of that first paragraph will now be the first sentence of 9 along with the second full paragraph, and the heading of section 9 will be "nonpreclusive effect of order." Bill, that's what we talked about? Okay. And Judge Baker?
Okay. Now, the additional change that's

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required is the old paragraph 9, which is "abatement and dismissal" will now be renumbered 10. So it's the last thing and then 9 obviously.
CHAIRMAN BABCOCK: All right. Any comments on that? Yeah, Bill.
PROFESSOR DORSANEO: One last question, Mike.
MR. BAGGETT: All right.
PROFESSOR DORSANEO: When you read those two together -- and this is really a question about substance -- we're not trying to say that 9 is subject to 10, right? It's not necessary to take action before the signing of the order in order to avoid the preclusive effect, right?
MR. BAGGETT: No, I don't think that is right. If you have an order that's been signed, the requirement to get an order is completed, and you do have to file a new lawsuit before the order is signed and give notice of that lawsuit in the application process.
PROFESSOR DORSANEO: Hmmm.
CHAIRMAN BABCOCK: Is that okay, Bill?
MR. BAGGETT: Now, don't forget what the order is. All it is is a step in the process to proceed with foreclosure, period. Nothing else.

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CHAIRMAN BABCOCK: Any other comments about this change?
MR. BAGGETT: Bill, for your -- if they got the order and they were -- they can still get a T.R.O., they can still do whatever they want to because you've still got to go forward with the 21 days notice and all the stuff you had to do already.
CHAIRMAN BABCOCK: Are we okay?
MR. BAGGETT: Yes.
CHAIRMAN BABCOCK: Anybody move the adoption of this?
HONORABLE MICHAEL SCHNEIDER: So moved.
MR. JACKS: Second.
CHAIRMAN BABCOCK: All in favor of moving the language from paragraph 7 to paragraph 9, "nonpreclusive effect of order" and renumbering "abatement and dismissal" to No. 10, raise your hand.
All opposed? Again, by acclamation, so that will be done.
MR. BAGGETT: Thank you.
CHAIRMAN BABCOCK: Thank you.
MR. BAGGETT: Easy committee. I'm being facetious. For those of you who thought I was serious, I'm not.
CHAIRMAN BABCOCK: Okay. The other

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matter left over from this morning was, Bill, have you had a chance to draft a comment on Rule 42.2?
PROFESSOR DORSANEO: We did drafting on all of those matters, and Judge Womack was going to go word process them right now.
CHAIRMAN BABCOCK: We'll take that up after lunch, and that would be with respect to 42.2 and Rule 73, correct?
PROFESSOR DORSANEO: (Nods head.)
CHAIRMAN BABCOCK: Okay. I don't see Paula Sweeney, who is next on the agenda regarding voir dire. Anybody here been appointed to step into her shoes today?
HONORABLE DAVID PEEPLES: I am the subchairman on that. I didn't realize she was not going to be here, Chip. We had a conference call. Most of the subcommittee was present. Nothing definitive was decided, and it is my opinion that we need to have a good discussion in this group about what to do in the area of voir dire. It's hard to draft something if you don't know what the committee wants, and there is some major things that need to be discussed about voir dire in the opinion of some of us.
CHAIRMAN BABCOCK: Okay. Why don't --
HONORABLE DAVID PEEPLES: Other people

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might want to remember it differently, but I don't think we decided anything that got us very far down the road.
CHAIRMAN BABCOCK: This was brought to the Court's attention by Joe Jamail from Houston, who wanted us to review some suggestions regarding voir dire. Justice Hecht, did you have any information about the thinking on that?
JUSTICE HECHT: Yes. Just a word of background, also attached to the agenda that you got, I think everybody got earlier, it's Item 4, I think, and it's Bates stamped 195 is a letter from Joe Jamail of Houston to Chief Justice Phillips and myself proposing the adoption of new Rule 226b, which is attached which would govern the conduct of voir dire; and then behind that in your materials is Senate Bill 1863, introduced in the last session by Senator Cain of Dallas, that would provide that in level one discovery cases you get at least one hour of voir dire, in level two at least two hours, and level three, at least three hours; and I don't recall whether this passed the Senate or not. I don't think it -- I'm not even sure it got to the House.
But consonant with our intent on taking up Bill's ideas that were introduced in the Legislature

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the last session that pertain to procedure, we put this on the committee's agenda to talk about both the bill, Joe Jamail's letter. Judge Brister has written on this subject and has had proposals in the past, and he has some materials in my pile here today. I guess you-all have them, too, and so that's how it got here.
CHAIRMAN BABCOCK: Okay. There was a letter from Judge Johnson who is in McLennan County, who wrote Bob Pemberton a few days ago, last week actually, and he was very opposed to Senator Cain's bill, saying that the trial courts ought to have discretion in that matter.
Judge Peeples, do you want to outline as best you understand it what the various issues are that you think -- Judge Brister.
HONORABLE SCOTT BRISTER: Did you give everybody copies of my letter and attachment from the Jury Task Force proposals?
MR. PEMBERTON: I think both the Johnson letter and Judge Brister's materials were in the stack that everybody got today.
HONORABLE SCOTT BRISTER: Most people I've talked to have not got it.
CHAIRMAN BABCOCK: Carrie, where is that stack?

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MS. GAGNON: Joe Johnson's letter is in everybody's folder that you picked up with your nametag. Judge Brister's letter and attachment is only in the subcommittee dealing with that.

HONORABLE SCOTT BRISTER: Censorship, huh?

CHAIRMAN BABCOCK: Not intended.

Okay. She's making copies, Judge.

HONORABLE SCOTT BRISTER: To make it clear, this is just the Jury Task Force materials, which a lot of time and effort went into, and it seems to me if we're going to talk about voir dire, that's what a large part of the Jury Task Force was about. We ought to look at those proposals.

CHAIRMAN BABCOCK: Let's see what the issues are first.

HONORABLE DAVID PEEPLES: Joe Jamail's letter had as an attachment this proposed rule on voir dire which would basically require a reasonable amount of time for voir dire to state what you expect to prove and relief sought. It's hard to be opposed to reasonable amounts of time and so forth. I don't think anybody is. I can't speak for our subcommittee, Chip, because we just all talked and didn't reach consensus on anything important.

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Some of us expressed the concern that if you're going to make there be a certain amount of time or a lot of time then we need to start talking about what lawyers are going to do with that time. It's my view just based upon what I've seen and heard from many, many sources that in a lot of courts judges allow lawyers to make detailed fact statements, for example, which causes jurors to start deciding the case, and they get disqualified and challenged for cause.

There is the issue of commitments, what can you get a commitment to do. Follow the law, well, that's fine, but to go beyond that that becomes problematical. Leading questions, should they be permitted. When can you rehabilitate and when can you not rehabilitate a juror or can a juror be rehabilitated.

These are, in my opinion, important questions that happen all the time, and I think we would be doing a service to the legal system if we discussed these issues and tried to come up with some kinds of guidelines and principles. They may have to be general, I don't know, but I think there is a lot of variety all across the state and probably within different counties in different courts about what -- how voir dire is conducted, and maybe that's good, but

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I think there is a lot more at stake in the voir dire process than just who wins a lawsuit.

It's my view that if in the voir dire process you lose a representative jury, a jury that's no -- if what ends up is no longer representative of the community then the results can cause lack of faith in the system, and that's what I think is at stake.

CHAIRMAN BABCOCK: Do we have a problem in this state in that regard? Are we losing representative juries?

HONORABLE DAVID PEEPLES: I think in some courts you do, just what I hear about.

CHAIRMAN BABCOCK: Okay. Bill.

PROFESSOR DORSANEO: In our current rule book there really isn't any coverage of the subject of voir dire examination. Rule 230 says you can't ask certain questions. The sentence that follows the first part of the admonitory instructions that follow Rule 226 simply says the attorney shall now proceed or may now proceed with their examination, but as far as the rule book is concerned, there is not really very much information about voir dire at all, and probably that's because it wasn't necessary in the before time, but that's not now.

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Professor Albright maybe could refresh my recollection if she remembers whether we did very much about this in the recodification draft. I don't know that we did. We added Batson/Edmunson kinds of things, but I don't think we went into this at all, and I think it would be appropriate for a subcommittee to examine at least, you know, the important issue about who conducts voir dire examination, which isn't even -- you know, isn't even talked about in our rules and the kinds of other things that Judge Peeples mentioned.

CHAIRMAN BABCOCK: Yeah. Steve.

MR. SUSMAN: And that's one area of the rules -- of trial practice that seems to be working just fine. Why do we want to mess with it? I mean, why do you want to have rules where it seems to be working great? I mean, one lawyer wants more time, one lawyer wants less time, but I don't see any cry -- certainly there is no need to put a rule in there simply because there is not a rule.

PROFESSOR DORSANEO: Well, what if the judge says, "You're not going to conduct voir dire examination. I'm going to do it."

MR. SUSMAN: I've never had a state court judge tell me -- are there any judges -- are

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there any horror stories? Is that going on?

What is? I've never heard of a state court judge saying that.

CHAIRMAN BABCOCK: Judge Brister.

HONORABLE SCOTT BRISTER: I agree with Mr. Jamail that we need a rule. Without question -- I went around, as some of you know, I'm a big largely anti-voir dire proponent, written a good deal on it, gave speeches to the judicial conferences last year around Texas. For example, I asked at every judicial conference, "Does anybody allow the question, 'Well, the other side has told you what they're going to prove. We've told you what we're going to prove. If you had to vote right now how many of you would vote for my opponent?'" And there are judges in Texas who do allow that right now.

Now, one can make the argument, we could save a lot of time by doing that, just whoever gets the most on their side on the jury wins. But there are -- there is no part of trial practice that varies more across the state than voir dire. The proof of that is, as I've quoted in several of my articles, every authority, every lawyer, plaintiff's attorney, defense attorney, John O'Quinn, Jim Sales, says the most important part of the trial is jury selection.

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I think, No. 1, that ought to give us pause if that's more important than the evidence and the facts and the witnesses, but I think what they may be saying is, is that that is the most variable, that's the most that's up in the air, that's open to doing whatever you can talk the judge into doing, and if that's so, the -- I've got in my article the statistics, 6 percent of the people to whom we send juror summons in Harris County actually make it on the jury.

Now, this goes to the foundation of why we have a jury. I'm a big proponent of juries. I think juries do a lot of things to protect liberty in this country, but No. 1, the main reason for it is because they represent the community. I know more about car wrecks, know about what juries do in car wreck cases than anybody on the jury, but I'm not representative of the community.

The problem is when you get 6 percent of the community, which is the leftovers after we've hashed through them, you do get skewed verdicts because it is not representative anymore. Any statistician will tell you a 6 percent nonrandomly selected sample, which as we all know tends to be the people who have no opinions on anything because that's the people who can

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make it through voir dire, then we do -- you get the risk, same as you would with a six person jury that's a smaller sample of the community, it's more skewed results.

More importantly, in Harris County I really sense a revolt. I think the best way -- if you were against juries, the best way you could get rid of juries in civil cases if you were so inclined would be pass something like this bill requiring three hours of it because there would be such an outrage among the public. I mean, we had the bill that did pass saying that you can't serve on juries more than -- you know, if you've served you don't have to serve again 'til -- the average citizen may be a little upset about McDonald's coffee cup or somebody getting off on a capital case, but the main impact of what we do on their lives is when they come down as jurors, and the main concern is they don't like the time it takes.

The more and more time it takes, the more and more intrusive questions we ask, the longer the questionnaires, the more we're going to get a reaction from them, and so I think it would be good to have a rule. I obviously disagree on the details of that rule. I think the Jury Task Force proposes a more balanced rule, but the idea -- does anybody doubt that

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if we asked the public in an opinion poll, "How many of you think we need -- lawyers need more rights to ask you more questions to get you on a jury" or "How many of you think judges should curtail that," does anybody doubt how that vote is going to come out?

Now, the difficulty thing, of course, of this committee is we're all lawyers, and so we all want more, but I'm concerned that proposals that make it more and longer are going to not end in a repeal of the 7th Amendment, but as we've seen from worker's comp cases, you don't have to repeal the 7th Amendment for jury trials to all go away. There are things that can be done, and jury trials will disappear. We don't have any interesting cases anymore. They are now all in arbitration, and I don't want to see that happen with no fault and personal injury and everything else we do. It's going to disappear if we aren't responsive to what I think most people are feeling.

CHAIRMAN BABCOCK: John had his hand up first, if you still want to talk.

MR. MARTIN: The lack of uniformity is what bothers me a lot. I had a judge last year in a case that involved multiple parties not allow any of the lawyers to conduct individual voir dire after the general voir dire was completed. Well, maybe that's a

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decent rule. The only problem is nobody knew that's what was going to happen when we questioned the jurors individually, and the judge conducted it all himself, and I just think there need to be some hard and fast rules about some basic things like that so that we know what the rules are, because I'm seeing more and more disparity even within my own county, Dallas County, as to how they're treating things like that.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: But I think if you start writing the rules stating what questions you can ask, there is no way. You can't do that. You have to leave that up to the judge to be fair, and if you start saying that lawyers have three hours in certain kind of cases, they're going to take three hours.

HONORABLE MICHAEL SCHNEIDER: Yep.

MR. LOW: I think Steve is right. Right now the judges are treating it the way they think it should be treated, and I can say this, if we deal and strike out the right of lawyers to -- and curtail too much their right to conduct voir dire, we're going to see the Legislature pass something, and you will see it. So we have to be very, very careful what we do here because that's a reality, and the Legislature is not afraid of this committee or Court, and they will do

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their own.

So right now there is something. There is pretty case -- pretty clear law about when a juror is disqualified. The judge has discretion under the law to excuse the juror. Now, I don't know where this 6 percent came from because I bet you a lot of those people just didn't get on the jury are way down below. I mean, were they stricken?

But if you have both sides with opposite views and they get their strikes, I don't see how you argue that you have a representative of the community unless you started out not having it on that panel because you draw panels and don't draw the whole thing. So I think we have to be very careful to start drawing a rule that tells you what you can ask, what you can't ask. Now, it may be if you leave it up to the judge at his discretion -- and I don't disagree there should be something if some judges aren't allowing you questions, there should be maybe some general rule, but I'd keep it as general as I could.

CHAIRMAN BABCOCK: Carl had his hand up first, then Steve. Carl.

MR. CHAPMAN: I'm on that subcommittee, and I agree with Judge Peeples that we didn't reach consensus about a lot of things, but I am of the

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opinion that we reached consensus that Joe Jamail's proposal, to the extent that it refers to a reasonable time to examine the jury panel, is where we ought to be.

There certainly are the issues of commitment. There certainly are the issues of how detailed a statement of facts ought to be made, but I am of the opinion that the trial court ought to make the decision based on the complicated or noncomplicated nature of the case, based on the number of parties whose views have to be presented, and based on the kinds of responses that counsel received from the panel as to how detailed the questions ought to be.

Voir dire, as I have conducted it, is a living kind of thing. My voir dire's go from issue to issue based on the kinds of responses I get from the jury. Now, I think that the courts have said since 1919 that commitment -- committing the jury is not something that we ought to be doing in Texas, but hypothetical questions and hypothetical questions set on the nature of the facts that counsel knows his case or her case is going to be tried upon have never been precluded, but rather, the question is whether or not counsel can ask that question in such a way to elicit the response that we're all interested in, and that is

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whether the jury panel members can be fair and impartial, whether they will follow the law, and whether they will limit their decisions based on the facts that are admitted before the jury by the judge.

Now, beyond saying those things I don't think we ought to make much comment, but I do think that those things ought to be clear, because we have judges -- I've had judges -- who have said in what I thought were relatively complicated cases that each side has ten minutes to voir dire the jury. Well, I can hardly introduce my client in ten minutes and talk about whether or not they have ever been represented by my firm or any member of my firm, and so I just think that the critical issue is that we need a rule that imposes the requirement of reasonable time, and a judge can make a determination about what reasonable time is. We don't need to define that, and we need a rule that says that reasonable inquiry can be made, but there should not be an attempt to commit the jury panel before the evidence is heard, and beyond that I think we should say little, but I think a rule is necessary.

CHAIRMAN BABCOCK: Steve Susman.

MR. SUSMAN: He said basically what -- I don't have anything to add.

CHAIRMAN BABCOCK: Judge Hardberger.

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HONORABLE PHIL HARDBERGER: I think what's before us right now, at least on the two pieces of paper we have in this room, is whether we should have time limits on voir dire. I think to put time limits on voir dire would be a great mistake because it ignores the complexities of the case, which are going to change quite dramatically.

Secondly, it takes away from the discretion of the trial judge, and while it is true that trial judges do vary in how they view voir dire and there is possible for abuses to be on both ends of that, one allowing too much voir dire, too many questions, another one not allowing enough, you still have to favor what the trial judge -- he's there. She's there. That's a decision best made, I think, by the trial judge, not by putting arbitrary limits which totally ignore the practicalities of the exigent situation. It favors order over justice, and I don't think we ever ought to do that.

CHAIRMAN BABCOCK: I personally think we ought to have a rule to standardize the pronunciation of voir dire, and beyond that -- Judge Hardberger what about Judge Brister's point that we ought to by rule expand and talk about things other than just the time limits, that the rule ought to cover other issues?

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HONORABLE PHIL HARDBERGER: Well, I think, you know, there's nothing wrong with an intelligent body of people looking at any problems, and I guess Judge Peeples also hit upon some kind of hot spots in voir dire. I'm not adverse to some sort of further study on that. I do think we have to be careful when we start making hard rules on a fluid situation. That doesn't mean that no rules could ever be made, but I think they should be looked at very carefully, and we should move very slowly because you wind up with a rule that really doesn't reflect our present situation.

CHAIRMAN BABCOCK: Somebody back --

HONORABLE JIM DUNNAM: No disrespect to the committee, but the idea of this committee looking at what can be asked in more detail than we already have case law gives me chills. I think that we have maybe one problem in voir dire, and that is some judges are being unreasonable in time limits. I think we can solve that by the simple proposal of Mr. Jamail.

We have court of appeals that have written on what you can say in voir dire. We have got a lot of case law about what's proper questioning and what's not proper questioning. If we go beyond what the case law says is permitted then the case can be

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reversed. If we have problems with a few judges that are being unreasonable on time then Mr. Jamail's proposal would allow court of appeals to reverse a case if they decide it was unreasonable. But in my community this is simply not a problem, and if I go home and tell the lawyers in McLennan County that we are fixing to study or the Supreme Court -- I don't get a vote here. I'm ex officio or something, but this committee is going to study --

CHAIRMAN BABCOCK: Oh, everybody gets a vote. Yeah, you get a vote.

REPRESENTATIVE DUNNAM: And I don't want to vote either. I don't want to vote. That way I can't be blamed. I think that really gives me chills. I think that what will end up happening is it's going to dummy down the practice of law. Lawyers, I mean, lawyers know what the rules are. We have got a hundred years of case law on what you can say or should not say in voir dire. I trust my judges who are good judges, and we have got good courts of appeals that if my judges go beyond the scope and let me say something that I shouldn't say, they can reverse the case. That's the way our system works, and going into some kind of rule that you can say this and you can't say that, here is a comment that's two pages long about

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what's -- examples of what's appropriate and not, I think that is not the way to go.

CHAIRMAN BABCOCK: Do you agree, Representative Dunnam, that the Legislature is going to do something if the Court doesn't?

REPRESENTATIVE DUNNAM: I think, and I speak based on capitol rumor, but I think that the bill was filed because there was some judge that gave a lawyer five minutes to do voir dire, and so David Cain -- and I'm just saying based on rumor. I don't know that. So David Cain said, "We got to do something. We're going to file a bill and give you a minimum time."

I don't think that's necessary. I think if we say like Mr. Jamail said, "a reasonable time," and then let's let the court of appeals determine in a case by case nature, and let's develop some case law about what a reasonable time is. I think that was a reaction to an isolated case, and the biggest complaint that I get from lawyers in my county and surrounding counties about what the Legislature does and also what this committee does is it passes statewide rules in response to very limited, isolated problems. The biggest complaints on the discovery rules are that we have some lawyers who are clearly abusing the discovery

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practice. In depositions, for example, clearly abusing it. We have no problem in McLennan County, but because some lawyer in Houston was a jerk in depositions --

MR. YELENOSKY: Yeah.

HONORABLE JIM DUNNAM: I can't say anything and I can't say anything when somebody asks my client whether or not he's wearing thong underwear at the deposition. That happened. That happened, and so we -- and the Legislature is just as bad about it. Something isolated, usually on the criminal practice committee, they're doing something in Houston, so we're going to restrict our judges in McLennan County and take away their discretion on something, and I think that is not the right way to do it. If the isolated judges are being -- acting improper then the courts of appeals are there to address that situation, and we should not develop a statewide response.

CHAIRMAN BABCOCK: Okay. Judge Rhea and then Steve Susman and then we'll --

HONORABLE BILL RHEA: I pretty much agree with what's just been said, and I want to go back to 1863 a little bit. I wasn't sure whether it had gotten very far, but the first we heard of it in Dallas anyway in the judiciary was it was on the consent calendar I think in the Senate, and we were freaking

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out when they proposed a time -- minimum time limits. I was ready to be the test case for the constitutionality of the bill at a moment's drop. It was just horrible. I can't imagine anything worse than that bill, and it seems to me that perhaps this is -- either intentionally or unintentionally this proposal may be an anecdote to that happening again in the Legislature, which is certainly always a possibility because where it belongs, the Supreme Court needs to be passing the rules if we're to have rules on this, not the Legislature.

And I agree that the main focus should be the reasonable time limit. I think that's probably exactly what happened. Some courts are abusing the time limits and making them way too short, but taking away the discretion of a judge, we need to put a reasonable standard on it, and this is a reasonable standard. It's something by which the Supreme Court can look at the particular judge's activities and make a decision appropriately on a case by case basis.

The other thing I wanted to mention was the whole -- we talked about this a little bit in our conference call in the subcommittee. The whole issue of I think what a case calls and what I call anyway the concept of creative prejudice in voir dire. Scott went

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over it a little bit, and it happens fairly frequently in my court, I'm sure in most courts.

You have a lawyer who will just throw out a couple of bad facts about his case and then say, "Based on what you've heard so far would anybody lean against my client?" Well, sure. He threw out the bad facts, and I mention that not because it's any big surprise, but that concept is a big surprise to most lawyers who practice in my court anyway. They do not understand that concept, and they think it's outrageous that somebody shouldn't be stricken for that very reason.

So it seemed to me, and Judge Peeples and I talked about, maybe trying to draft some language if that's doable -- and I don't know that it is -- but some language perhaps that will help to clarify that particular point that is so common in my court and I'm sure all of our courts, to do away kind of with this expectation that if you throw out a couple of bad facts and somebody is leaning against you you can get a cause for strike. I mean strike for cause. So and I agree with Carlyle, too, that the subcommittee did in essence agree with some minor changes that the language that Joe Jamail -- and I don't think we have gone back and looked at the prior draft, but in any event that

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Mr. Jamail's language was reasonable and nobody had any big objections to it as it was proposed.

CHAIRMAN BABCOCK: Steve Susman, then Judge Medina, then Judge Patterson.

MR. SUSMAN: Do we currently have a rule that says that the trial judge has discretion to set reasonable time limits for all aspects of the trial? See, that's what we ought to do. I mean, if you want to have a rule, that would be fine. Then they can set some reasonable time limits for closing argument, for cross-examination of witnesses, for voir dire, which is another part of the trial, and "reasonable" gives them the authority to set the limits, and it also protects the lawyers and litigants from them being unreasonable in the limits they set. And I don't see how that kind of rule could be controversial. The trial judges of this state have discretion to set reasonable limits for all aspects of trial, period. I'd favor that kind of rule.

CHAIRMAN BABCOCK: Judge Medina.

HONORABLE SAMUEL MEDINA: It's going to get back to reasonable anyway. You set a minimum standard, I promise you the practicality of it is the lawyer is voir diring; he says, "My goodness, my time is up. Judge, because of this case I know I had this

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amount of time," and the judge is going to say, "Here's the time you have." Okay. If you want to get specific times. He's coming back and he says, "Judge, I know I've gone over the time. It's only reasonable that you do the following." We're at reasonable now. We ought to stay reasonable, and I agree. There is a standard of reasonableness. Hopefully if I'm not being very reasonable I'm going to get kicked out of office, and they will get somebody else that's reasonable. We obviously agree on this.

CHAIRMAN BABCOCK: Judge Patterson, then Bill Dorsaneo, and then Judge Brown.

HONORABLE JAN PATTERSON: Well, I actually took my hand down because I think we're developing a consensus on this, but I do think it's the respectful approach to use a reasonable standard because judges can use their discretion, and lawyers, too. I mean, we've all seen lawyers who have killed their cases because they have gone on, and it really is a self-regulating phenomenon, I think, in most courts. I've also served on juries, and I think jurors want their time to be well-used. They're not resentful towards reasonable time, and so I stand in favor of the reasonableness standard.

CHAIRMAN BABCOCK: Yeah. Bill Dorsaneo.

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PROFESSOR DORSANEO: I will just get back to the point that our rules do not say who conducts voir dire examination really. They don't say that the judge can do any of it. I mean, those are important issues in my mind as to who's -- you know, before we get to whether what they're doing is reasonable, it's who has the right to do it.

Ask the district judges. I mean, do you nowadays participate in voir dire examination? That wouldn't have been true when I started practice. You would have just filled in the blanks. This is a case of blank versus blank. When I started practice the state court judges who became Federal judges did conduct voir dire examination a little bit because they were Federal judges and they kind of thought they were supposed to and then we would correct what they said when we conducted the voir dire examination immediately thereafter.

It's an important issue as to who does it and whether the trial judge can, you know, do some of it and preclude the lawyers from doing that part. Our rules don't talk about that because the attitudes were different before than they are now. I know there are a lot of judges now who haven't tried as many cases as some of the judges perhaps who became judges in the

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before time, or maybe they don't have the same attitude about what's appropriate and what isn't appropriate.

I think it would be good to have a rule. We have a rule that goes into equalization of peremptory challenges in some detail that's based on a Supreme Court opinion that dealt with these important questions. I think the rule doesn't necessarily need to be greatly detailed, but some of these issues are quite important, and it would be good to put them in the rule book.

CHAIRMAN BABCOCK: Judge Brown.

HONORABLE HARVEY BROWN: My view is that we should even kind of do an all or none, and by that I mean I think we should -- if we are going to adopt rules for voir dire, we should adopt rules that touch on many different problems of voir dire, or we should do nothing, because to just highlight one problem, i.e., time, is just one of many problems.

And it kind of goes to the issue of how do we want to develop the law for voir dire. Right now we're developing it through common law. Are there any rules as Mr. Susman asked? No, no codified rules. Is there case law on reasonable time? Yes, there is case law. A court has been reversed for not giving a reasonable amount of time. Yes, they have. Can

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lawyers preserve error? Yes. Do we need new rules to codify existing common law? I don't think we do, but if we do, we should do it across the board I think.

I don't think it was a very serious issue at the Legislature. That was the kind of rumors we had heard, too, is just a reaction to a particular case, but I think Mr. Susman's other point about time limits is good, and that is whether we should look at time limits for not just voir dire, but if we are going to do it for that why not everything. In fact, the ABA's task force that I think you were the chair of recommended that the Court should adopt a time limit rule not only for voir dire but for everything, for evidence, and how to set it up like they do in Federal court.

The Jury Task Force recommended a time limits rule across the board, so I think that would be worth looking at, but I don't think we should just segregate time for voir dire from everything else in the trial. If we are going to do time, we should do it across the board, and if we are going to do voir dire, I think we should look at all of voir dire or leave it alone, as it seems to be for the most part working under the common law.

CHAIRMAN BABCOCK: Let me ask a

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question. I know there's many people in the room that do practice in Federal court. My understanding is that the Federal judges allow very little, if any, individual voir dire, and what impact does that have on the quality of justice that you receive in Federal court, Buddy?

MR. LOW: Judicial conference it's always discussed. Lucius gets up and says, "I don't let any lawyers ask any questions." Barefoot gets up and he tries to -- he shows -- and they argue back and forth, but the most unpopular thing there is when you say, "I'm not going to let these lawyers ask questions." I mean, that's not popular with most of the Federal judges.

It's not popular with the lawyers, and I didn't mean that the Legislature -- if we pass any act. I meant if we pass something that's unpopular with a lot of the lawyers or people then we might see them act. I didn't just mean -- I had no knowledge of the background of this bill, but in Federal court the judges usually will limit.

Jamail and I were picking a jury in Bob Parker's court. He said "15 minutes," and Joe didn't believe him. After 15 minutes he believed him. So we then had to ask the court to ask a few questions,

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but they do limit it, but you don't know, and if you need a little more time because you got -- one case I had 3,200 plaintiffs. I'm the defendant unfortunately, and the judge gave extra time, but they treat that as it comes up.

CHAIRMAN BABCOCK: Judge Patterson and then Luke.

HONORABLE JAN PATTERSON: The trend is in the other direction in Federal court because it used to be that in Federal court we had no lawyer voir dire, and many Federal courts have moved to limited voir dire for lawyers, and that's the trend in Federal court, at least it was. My knowledge stopped a year ago.

CHAIRMAN BABCOCK: What do you think explains that trend, Judge?

HONORABLE JAN PATTERSON: I think, again, it's a respect for the system. I think that the judges recognize that there is a role for voir dire and that the lawyers can best know what that need is in their case and that perhaps a Federal judge may know many things but not the best voir dire in their case, so I think it's a respect for lawyers and judges in the court system. I think it goes to integrity of the system, and Federal judges recognize that.

CHAIRMAN BABCOCK: Do you think our

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system is out of kelter?

HONORABLE JAN PATTERSON: No.

CHAIRMAN BABCOCK: Luke.

MR. SOULES: Well, two things. I think that the reason that there is limited voir dire in the Federal court system; that is, limited as opposed to none, is that those judges that are allowing that realize that there is some degree of advocacy involved in the voir dire process, and they will endure that for about 15 minutes if you want it, and that's about it, and that may be enough.

But there is another piece of this Federal voir dire, and I don't know how it works outside the Western District of Texas, but in our district we don't have absolute standard pretrial orders, but they are pretty standard. We get to submit voir dire questions in our pretrial orders, and the judge considers whether to ask those questions of the jury, and sometimes they don't ask them all, and so we get to give some guidance to the judge about what it is we want to know from this panel before we exercise our strikes.

And some of the judges will tell us before they start the voir dire they are not going to ask this string of questions because the judge doesn't

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perceive the need to ask those kinds of questions, and maybe they're right nine times out of ten, but maybe there's one there that we really need to have asked, and so we tell the judge, "Judge, the reason for this one -- okay about those nine, but the reason for this one is this," and the judge will say, "That's okay. I think they're right on that."

So we basically get in a different format a lot of the same information that we need. That process doesn't work too bad over in San Antonio, but -- and I think that -- I don't know how universal including voir dire questions in the pretrial orders is, but it is pretty much universal down in our country.

CHAIRMAN BABCOCK: Luke, do you think the state system is out of kelter on voir dire?

MR. SOULES: I don't think so as long as the judge sets reasonable limits, but that's going to depend on the case. The biggest case I was ever in in terms of a jury verdict, we started voir dire at about 9:00 o'clock, and we had a jury at 1:00 o'clock, with a lunch break. We struck over the noon hour and both lawyers -- they didn't -- they pretty much followed the rules on what's proper or what I think the rules are on what's proper.

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HONORABLE SAMUEL MEDINA: State or Federal?

MR. SOULES: State. And we got the information that they needed and went on down -- they didn't make opening statements, but they did make statements where they felt that their case might have prejudice either for them or against them, and it was pretty well done, and so I don't -- I haven't had problems with voir dire because the judges in my cases pretty much control things.

Sometimes they don't set a limit, but after it goes on for a while we get to break. You know, you have enough breaks during the day. The opening lawyer goes for an hour and ten minutes and then you take a break, and the judge gets to talk to you. And then it goes and they go back and you go for another little while and you get another break, so it seems to me like it works, but I've got no problem with what Steve is suggesting because I think that's what a huge majority of the judges do right now.

CHAIRMAN BABCOCK: Linda Eads and then Steve.

MS. EADS: In my former incarnation I did tax prosecutions for the Department of Justice all over the United States, and I can say that that

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procedure where you submit questions to judges is almost uniform. The purpose for a Federal judge is -- for voir dire or voir dire, because believe me it's even more complicated when you get out of Texas. There's a million ways of saying it, is to find out what the conflicts are with what the jury knows or believes or has been exposed to and what the case is.

So the judge really spends a lot of time on that and often gives a lawyer some time to develop further conflicts because we do know the case and the judge doesn't, but the whole purpose -- and that leads me to my major point here -- the major purpose of picking a jury in the system, not for us lawyers, who we want to make sure we get 12 or 6 people who are going to vote for us, but the purpose for the system is to make sure that there is no juror that comes to that jury box with a predisposition or a conflict that hasn't been rooted out.

And so, you know, the question of how long we get to do jury selection for us as lawyers is -- I mean, we need to be able to figure out who's going to be on our side, not just who's conflict-free, and I think that the Federal courts for a while went way over to the other side by not letting the -- as Judge Patterson said, didn't allow the lawyers to spend

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any time with the jury because we do know the facts and we can root out conflict on those. Now they are coming back over toward the middle, but the idea that we just get to spend hours with the jury, basically pursuading them, getting them to love us, getting them to come to our side, getting them to conflict out on issues that are irrelevant. That strikes me as an unreasonable purpose, but the real purpose, the systemic purpose is jury selection. So I think it's so complicated an issue that I'd hate for us just to say that there's nothing we can't do to improve it rulewise, and we need to spend some time thinking about it.

CHAIRMAN BABCOCK: Steve.

MR. SUSMAN: You know, I think another thing that you've got to think about in state court that I've seen happen in the last five years is the most complicated -- you know, cases with many involved lawyers are using by agreement jury questionnaires. So before the voir dire process even begins you know so much more about these people than we ever dreamed of knowing before. In fact, there is very little need at that point in time other than to argue your case for spending much time in voir dire.

I've found, in my cases at least, the amount of time in voir dire is going down. It's just

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going down, because after they answer the questionnaire, you know, 20 questions about their life and what they do and what they like, I mean, you really basically right there have enough in most cases to make intelligent decisions in striking jurors, and so, you know, what's a reasonable time depends also on whether you have a questionnaire or not and how extensive the questionnaire.

CHAIRMAN BABCOCK: Yeah. I think jury questionnaires are enormously helpful --

MR. SUSMAN: Yeah.

CHAIRMAN BABCOCK: -- and absolutely cut down the time.

MR. SUSMAN: I've never had a lawyer disagree to do -- I've never had a lawyer in a case I'm in on the other side disagree on submitting a questionnaire to the jury. We disagree on particular questions, and a lot of times, you know, it shortens the questionnaire considerably when you disagree on particular questions. I've never seen a lawyer on the other side disagree on submitting one altogether because the information helps us both.

CHAIRMAN BABCOCK: Carl.

MR. CHAPMAN: I think you're right, Steve, with regard to the larger cases, but I think we

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should not be -- we should not lose sight of the fact that many cases that are tried are smaller cases, and questionnaires are not used or not presented. The other problem with the questionnaire, specifically in Federal court, has been my experience, is that when you submit these questions, you rack your brain to try to figure out how you can present the question, one, to get the judge's attention that it's necessary to present it, and, two, that it has enough substance to it that you get something from it.

And then the problem is that the judge gives the question and you have no follow-up because really what the question has elicited in terms of a response requires a follow-up, and that's a problem, so I'm not a real big fan of questionnaires in the abstract. I think they can be helpful in large cases where you know you're going to have a large panel because you need a large panel because there are issues that will make just 36 or 32 jurors just not work, but I think that we should not lose sight of the fact that many cases that are tried in our state courts, in our district courts, in our courts at law are not the big cases where questionnaires have been used in the past. I don't know if we are moving to that. I hope not, but we shouldn't lose sight of that.

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CHAIRMAN BABCOCK: The Legislature, I think, Bob tells me, passed a statute last session that requires the development of a questionnaire that's being worked on now; is that right, Bob?

MR. PEMBERTON: That's correct.

HONORABLE SCOTT BRISTER: It's really a juror information form.

MR. PEMBERTON: Information form, right.

CHAIRMAN BABCOCK: Probably not the case-specific questionnaire that Steve is talking about.

MR. PEMBERTON: Right.

CHAIRMAN BABCOCK: Judge Brister and then Buddy.

HONORABLE SCOTT BRISTER: Just a couple of quick points. I don't disagree with the case of the unreasonable time limits, that on a complex case to give the attorneys 15 minutes I think is outrageous and on any case to give the attorneys five minutes to me is an insult. That's obviously a judge who has a problem.

But a couple of things. No. 1, I think it's important in this committee, the subcommittee, wherever, that we include the views of the people that this impacts, which is the jurors. Our tendency naturally as attorneys is this is what we do, we want

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more of it. The people who do object to questionnaires are jurors. The one lawyer I've heard object to questionnaires was because she went into a trial, got a 10-page legal spaced questionnaire, and you know what they ask, questions I would never allow you to ask a witness like, "What are the last four primaries you voted in? What's your income? Where do your children go to school? Any of your family members been assaulted," et cetera, et cetera.

And you would never -- why are we allowing more cross-examination of jurors than we would allow with the parties in the case? These are the people who object to it. They -- but they have no one to object for them. Certainly both attorneys, if I was the attorney in the case, the one question I would want presented is, "This is what I say. This is what they say. Who are you going to vote for," because that tells me whether I want them on the jury, and there are a multiplicity of ways, and I think in one form or another the majority of Texas judges allow that question. I think that's a problem.

So I think in the -- because the same question -- the question is put in terms of "Who are you leaning towards?" Now, philosophically and grammatically the question at this point, "Are you

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leaning toward the other side" is indistinguishable from the question, "If you had to vote right now who would you vote for?" Those are the same question. I think it's -- so it's important to get the viewpoint of nonattorneys because these are the people -- they outnumber us in a democracy in the long-term -- that can have dire effects if we don't take their views into account.

No. 2, I don't think the common law is a good way to develop this because now in criminal as well as civil cases you have to prove not only there was error in the voir dire, but that it caused a wrong result. Well, if I don't allow a question, that's easier to prove than if I do allow too many. If I don't allow a question, you say, "This is the question. It's a reasonable question. The judge should have allowed it." If I allowed it, I might have eliminated some people, et cetera. If I allow too many questions or strike too many jurors, it is impossible to show reversible error.

So it's very difficult to -- when I read the cases -- and I've read hundreds of them on jury voir dire -- 99 percent have to do with the judge should not have struck this juror or limited that question. Well, what is the message to a new judge?

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Let them do anything because that's how you get reversed if you put a restriction on it. I think that's out of balance in some courts, and a rule would give some encouragement to bring it back into a balance.

CHAIRMAN BABCOCK: By the way, I need to apologize to Judge Brister. He has submitted a paper or a number of items that I misread his letter and thought it was supposed to go to only the subcommittee. It's supposed to go to the entire committee, and we now have copies there on the back table, right, Carrie? So pick one up because it's on this topic and has materials from the Jury Task Force and also some articles that Judge Brister has written on this subject, and the only excuse I can offer, Judge Brister, is --

HONORABLE SCOTT BRISTER: Oh, don't worry.

CHAIRMAN BABCOCK: -- is that you referred to me as "Chuck," so I therefore referred this to the subcommittee, not the entire committee.

HONORABLE SCOTT BRISTER: Sorry.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: I agree with Judge Brister that we need to consider the public, but if we just

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gave them total consideration, they would say, "I don't want to have anything to do with lawyers," so that would end it. So we as lawyers know more about the system than they do. We have to keep in mind their convenience, their privacy, and things of that nature, and so I think he certainly has some great ideas.

I just don't know how to answer that question as far as one of the reasons you need voir dire time quite often is to find out if a juror is prejudiced. Now, I don't agree that you can take the John O'Quinn approach and quiz them for 30 minutes until you get them to admit it, but if you just ask across the board, "Are you biased or prejudiced in this case" you get nothing, and then with a little development you find out they will admit that they do have a bias against that and couldn't be fair.

And we need to weed those people out, and our system is designed to weed out so that we will have 12 people that will be not influenced, and I've never heard of a judge that let you ask, "Who do you hope for?" You can ask, as I did after John O'Quinn got up for a day of voir dire, I said, "Any of you-all already got your mind made up," and I've lost right now. I mean, you know, you can ask the question whether they are committed. I've got nothing more.

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CHAIRMAN BABCOCK: Okay. Justice Duncan.

HONORABLE SARAH DUNCAN: I don't do voir dire, and I can't remember if we've ever had a voir dire case in our court, but we have convinced me that we are not the committee to handle this problem. I completely agree with Judge Brister that as lawyers we have a vested interest in this process that may not be necessary to the system working properly or advantageous to promoting trial by jury in this state, and I would suggest that a task force including citizen nonlawyer members and lawyers and trial judges might be a better body to look at this particular problem.

CHAIRMAN BABCOCK: I think the Court is ahead of you because this paper that I didn't send out to everybody has the results of a task force, a Jury Task Force that's --

HONORABLE SARAH DUNCAN: I knew there had been one appointed. I didn't hear what happened.

CHAIRMAN BABCOCK: -- just that constituency and membership, so I think we need to give some considerable weight to what they have done.

HONORABLE JAN PATTERSON: And a number of people here served on it.

CHAIRMAN BABCOCK: Tommy, before we do

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that, on this issue of the jury questionnaire, I don't know if others have experienced this, but I have run into maybe half a dozen cases where the lawyers are agreed on a case-specific questionnaire. They have typed it up themselves. They have clipboards for the jurors, they have pens, they have, you know, copying. You know, the court has had to do nothing, and it's been rejected by the trial judge sometimes for no reason, no stated reason, sometimes for stated reasons. That is an issue to me that is worthy of consideration.

HONORABLE SCOTT BRISTER: The problem is we're getting those on the one-day car wreck cases. This attorney who complained about the questionnaire got this ten pages, fills out the ten pages. "Wow, this must be an important case," and then they start the oral voir dire, and it's a one-day car wreck case.

HONORABLE HARVEY BROWN: The voir dire takes as long as the trial.

HONORABLE SCOTT BRISTER: That is out of balance.

CHAIRMAN BABCOCK: Good point. Yeah, Tommy.

MR. JACKS: And it's not going to be fixed by having a rule, because, I mean, the judge who allows the ten-page questionnaire in a car wreck case

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was doing a foolish thing. Unless we're going to have a rule that says you allow a questionnaire in every case -- and I don't think we're going to do that -- you're still going to have judges who are permitted by the rule to do foolish things, and I guess I -- on this business of this rule that Jamail drafted up, I don't have any problem with that rule, but I also don't know that we need that rule.

I mean, essentially it seems designed to do two things. One, to say it's the lawyer not the judge that gets to do the voir dire, and, two, it's the judge -- it puts its thumb on the scale on the side of allowing reasonable time, but it doesn't say what reasonable is, and the judge who thinks that 15, 30 minutes, whatever, is reasonable is still probably going to not allow a whole lot more time than that until there's some appellate decision somewhere that says that ain't enough, and that's something you can get right now without a rule where it ain't enough.

I'm not offended by Steve Susman's idea of, well, let's just have a rule that says a judge can impose reasonable time limits on everything. It does concern me some because that judge who now is allowing 15 minutes for voir dire is going to allow you an hour and a half to put on your case, and I don't know that

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we need to encourage that.

And I certainly am bothered -- I agree with Representative Dunnam that if we're going to start trying to put in what questions you can and can't ask on voir dire, I mean, I think lawyers know that you're not going to disqualify anybody for cause in any court where you have a judge that knows anything by asking a juror which way they're leaning, and I think if the lawyer can't figure out which way they're leaning on the basis of the other stuff they ask, they have got a problem, but I don't know that that's a problem that calls for a rule to fix it.

The idea that there is variability around the state is unavoidable. I mean, I have picked jurors, and I know that many of you have, in rural counties where they get the folks in because it's an inconvenience to bring them in, and they pick several in the same day, and you can't have necessarily as much flexibility there as you do in another county where things are done differently. There is a need for some variability, and I guess I would seriously have a question.

I agree with Sarah that some of these concerns are concerns that we probably aren't the right people to address anyhow, but I think this committee

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should ask itself very seriously do we want to get into this thicket or not. If we're going to, I want to argue that we keep our ambition pretty well under control, but I think we ought to ask ourselves whether we really ought to be writing rules about voir dire at all.

CHAIRMAN BABCOCK: Bobby and then Nina and then Luke.

MR. MEADOWS: I see the issue a little differently than Tommy. I think that I would support this rule of having lawyers involved in voir dire and have the time be reasonable because I don't think judges who are allowing 5 minutes and 15 minutes in inappropriate cases are doing it because they think that's reasonable. I think they're doing it because they think they can do it and no one is going to challenge it. If you have a rule that says you're to allow a voir dire that's reasonable, at least you're in a position to make that in context, so I do think it would be helpful to have the rule.

I hate to see us -- so that's just my thought on that, whether the rule would work. I think that would work across the state and would leave it to the sound discretion of good judges. But whether this committee or some other body works on voir dire, I

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would highly support that because in Judge Ray's example of the situation where he tells lawyers who have tried to commit jurors or the jury panel to a certain position and then are shocked that the judge won't cut them loose, I have had the exact opposite experience where a lawyer on the other side would ask questions and get certain jurors committed to a point of view saying they couldn't be fair and then argue to the court, "Well, they have said the matter. You can't rehabilitate a witness who says they can't be fair" and that juror is gone when they shouldn't be gone because they have really been locked into a point of view in the case which is really not -- I don't think is going to be supported by the evidence, and it shouldn't happen in any event.

So it's an area of the trial where I think there is a lot of room for misbehavior, and it's also an area of the trial that I think the state court judges want to do something about because most lawyers do it poorly and abuse it, and it really does need, I think, some help. There was a question earlier about the Federal court system and how it works and did we like it. I mean, I tried a case recently in San Antonio, and maybe you grow accustomed to this in the Western District, but we did submit questions and

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we did have a chance to talk about, you know, which questions would be asked of the jurors, of the venire, but it was done by a magistrate.

I mean, we had been doing all of our pretrials with the judge and then a magistrate comes in and asks the questions in the most lifeless way you can imagine. There was not a single response from the jury panel and then we had to strike from that. So I think lawyers should be involved. I think it's good for judges to participate.

I tried a case in Fort Worth a few years ago where the judge stood up and asked questions of the jury, you know, got down off the bench and asked questions, all the tough questions, and then the lawyers got to get up and ask the things they were concerned about, so I think to have judges involved makes sense, but to exclude the lawyers is wrong and to not have reasonable time to do it is wrong.

CHAIRMAN BABCOCK: Nina.

MS. CORTELL: This is just for the record. Anne McNamara and I were on an advisory committee to the Northern District of Texas, and we did recommend a local rule to the district, a rule of reason, sort of along the lines that Steve Susman had recommended for all parts of the trial, and although

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some judges were in favor, it was not enacted because the judges wanted to retain individual discretion and didn't want to be put under a reasonable standard.

CHAIRMAN BABCOCK: Luke.

MR. SOULES: I have been looking through these materials that are behind Judge Brister's letter. On page 149 we see the rule that is recommended by the Jury Task Force, which is pretty good. It kind of gets at this reasonableness thing, and I would bet that there was a lot of debate and a lot of thinking and discussion before this text on page 149 got where it is.

HONORABLE SCOTT BRISTER: Correct.

MR. SOULES: And Judge Brister affirms that. It's pretty good. After the admonitory instructions by the judge the judge can make a brief statement, may examine as to qualifications, but that won't preclude the parties from doing their own statements and examination, and each one has a right to a reasonable -- each side has a right to a reasonable examination. Some of it may be conducted outside the hearing. You can do that or maybe elsewhere.

The court may place reasonable time limits. Each party may examine any prospective juror considering matters reasonably related. The court can

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limit the examination if it's unreasonable because it's unduly invasive, leading, or suggestive. Argumentative. "Questions concerning a prospective juror's opinion of applicable law must be prefaced by a proper statement." Not a bad idea. "The party may not inquire as to their probable vote or attempt to commit," and then they have got this rehabilitation thing, which is probably controversial, but it's there and it may --

HONORABLE SCOTT BRISTER: That part was intended just to state the law, the current law.

MR. SOULES: And it may be responsive to some of Robert Meadows' concerns. You know, this is a pretty good piece of work if you look at it, and if we don't do anything more than this, it at least records a format. It gets -- to a certain extent it gives some direction or some guidance, and I think this is a great piece of work and whoever -- all the people who are responsible for it should be thanked. I think we ought to put this in the materials for the next meeting and as a proposed draft for this new rule so that everybody has a chance to absorb it and then talk about the specifics of this document.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: I think that's

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right. I think, as I said before, there is no rule about the conduct of voir dire examination. Rule 230 needs to go into this same, you know, package. That's the rule that says -- that's entitled certain questions shall not be asked. You can't ask a prospective juror whether he or she has been convicted of a felony or misdemeanor theft or is under a legal accusation to that effect. I've always wondered where that rule came from and whether that makes any sense, but it's certainly part of this.

JUSTICE HECHT: It came from Article 2145, unchanged.

PROFESSOR DORSANEO: Well, and I'll bet that came from some other article unchanged. We'll never figure out where it really came from. The related matters, Rule 265, which is the order of trial rule, acts as if the trial begins when opening statements are made, and that needs to be put into this consideration as well.

Rule 266, which is the open and close rule, mirrors some of what Jamail's proposal has in it about who gets to go first and how that works, and that needs to be factored into this as well. I've frankly always wondered whether 266 had anything to do with voir dire examination. And then beyond that just our

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opening statement rule, whatever we do here, you know, has some relationship to the opening statement rule.

I can't conceive of any reason why we wouldn't want to work on this and make some good sense out of it, and I fully agree with Luke that this proposal is a pretty good one, although I'm skeptical about how much judges should get to do here, but maybe I'm thinking about the judges of yesteryear, and I won't name names, but I am thinking about some of them, and I would like for them to just fill in the blank. "This is the case of X versus Y."

CHAIRMAN BABCOCK: Well, it sounds to me like -- and let me see if I can state in a general way what we have been talking about, and it sounds to me like there is consensus, as there was in the subcommittee, that reasonable voir dire should be permitted, and there may not be a complete consensus on anything else, but that this rule that Judge Brister has provided us has got a lot of the elements of what we have been talking about, which people may agree or disagree with, and I think Luke's right that we ought to send this back to the committee that Paula and Judge Peeples are involved in -- although, Judge Brister, are you on that subcommittee or not?

HONORABLE SCOTT BRISTER: No.

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CHAIRMAN BABCOCK: Well, it seems to me that you should be.

HONORABLE SCOTT BRISTER: Probably should.

CHAIRMAN BABCOCK: And you should be because of your work with the Jury Task Force, and I think next meeting -- and I'm going to throw this out in terms of a proposal. Next meeting that subcommittee should report back with a rule, with a proposed rule, that certainly takes into account the Jury Task Force rule as well as the comments of Joe Jamail and the comments that have been made today and then we can debate this issue with language in front of us, and I say that, and the only caveat to that is if the people to my left don't want us to do that.

JUSTICE HECHT: No, I think that would be right.

CHAIRMAN BABCOCK: Okay. David, is that okay with you?

HONORABLE DAVID PEEPLES: Yes, it is. I had two or three things to say or to ask. There were several statements about the case law, and I think that there is a lot of -- you can find a lot of principles in the case law that are pretty clear, and it might be helpful to restate those if we could agree on them. I

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think there are some aspects of the case law that are not clear, and the cases, frankly, are hard to square with each other, and we might be doing a service if we worked on that, and so I just want to suggest that we might in reworking this rule that Judge Brister gave us from the Jury Task Force --

HONORABLE SCOTT BRISTER: Yeah, I don't agree with all of that rule, by the way.

CHAIRMAN BABCOCK: Well, you get a vote.

HONORABLE DAVID PEEPLES: We could state some principles and lay them out in the rule book which everybody has on the bench and in their offices as opposed to having to look up the cases and doing research. I agree also with the statement somebody made that this is a serious matter and we ought not to rush into it.

CHAIRMAN BABCOCK: Okay. Let -- Bill.

MR. EDWARDS: I don't like the assignment to the subcommittee because it presupposes that the subcommittee is going to suggest that a rule similar to what we have been presented is needed or necessary or comes out. I think that when you start codifying what the common law is you end up with unintended consequences of unbelievable proportion. 150 years of jurisprudence has gone into developing the

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common law in this area, and for us to sit around in an afternoon or something and decide that we ought to change that without any more makes very little sense to me, and so I don't like the charge "Come back with a rule that's similar to that." Look at the problem and see if any rule at all needs to be done and come back with a rule if you think one is needed, but as for the substance, I don't think we are, any of us, ready to deal with that.

CHAIRMAN BABCOCK: Yeah. I think that's a great point, and I know Judge Peeples agrees with that, as I do. The threshold issue is do we need a rule. I think one of the disservices this committee can do is by advising the Court that we've got to by rule regulate every little thing that's going on because as you say, Bill, there are unintended consequences. If there is a perceived need for some things in a rule, that ought to be the first question.

So I would amend my charge, and that is to study, No. 1, do we need it at all; No. 2, what should it say, and then bring it back to this group for a discussion on those points. And there is a tendency particularly when a bunch of lawyers get together is to -- you know, this four-step or four-point rule on page 149 all of the sudden becomes a 40-point rule, and

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that just engenders more litigation and more uncertainty, and it does more harm than it does good. So I completely agree with what you're saying.

On the other hand, the fact of the matter is that at least one member of the Legislature has expressed interest in intruding into this area for whatever reason. The Court has asked us for our consideration of it. There has been a Jury Task Force that has spent an enormous amount of time working on it, and it seems to me it is our function to discuss these things and to look at it, so that's what I think we ought to do.

JUSTICE HECHT: And let me just add, the task force was formed when Judge Cornyn was on the Court, and he was the liaison to it, and I think Dean Newton was the reporter for it. I can't remember, and maybe Jack Ratliff was pretty active in it, but anyway, it worked for quite a while and has an extensive report, and Judge Abbott is now the liaison to that group, and I think their work is completed, but I'm sure that Greg would be -- would welcome the input of this group on the committee -- on that task force's work, but we have -- we will communicate with Judge Abbott and tell him that you're looking at it. I think he'll greet that with applause, but then he's never

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been here, so...

CHAIRMAN BABCOCK: He may change his mind.

HONORABLE HARVEY BROWN: Can I ask a procedural question?

CHAIRMAN BABCOCK: Judge Duncan had her hand up first and then you, Judge Brown.

HONORABLE SARAH DUNCAN: I got from Pam a copy of Judge Brister's packet, but is the task force report too long for us to get a copy?

JUSTICE HECHT: No.

CHAIRMAN BABCOCK: No. In fact, we just talked to Bob. Bob thought that we all had it. I don't remember seeing it.

HONORABLE SCOTT BRISTER: It's too long to read.

MR. PEMBERTON: I thought we forwarded it all to the chair, but we will get you copies. It is rather large.

HONORABLE SARAH DUNCAN: I remember when this task force was appointed, but --

HONORABLE DAVID PEEPLES: About a hundred pages.

HONORABLE SCOTT BRISTER: It's more like 200 pages.

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MR. PEMBERTON: It's about a hundred pages plus appendices. Do you-all want the appendices, too? Okay. We'll get it.

HONORABLE SCOTT BRISTER: Well, but the executive summary gives the arguments but the appendices gives the -- you know, the cites to the cases and why, but a big part -- you know, two thirds of the task force was on qualifications, you know, how to draw up the list --

MR. PEMBERTON: Right.

HONORABLE SCOTT BRISTER: -- and juror compensation and stuff --

MR. PEMBERTON: Right.

HONORABLE SCOTT BRISTER: -- that wouldn't relate to this discussion.

MR. PEMBERTON: Right. A lot of those or some of those proposals already have been enacted into legislation. The uniform jury questionnaire. There was a pay bill last session. Some of these wouldn't pertain to what this committee is doing.

CHAIRMAN BABCOCK: Judge Peeples, if you and Paula Sweeney can give us, this committee, something to look at at least a week before we meet again so that we don't have to while we're sitting here at the table try to decide whether the proposals are a

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good or a bad idea, and, Carrie, this will be the No. 1 agenda item on the next meeting.

PROFESSOR DORSANEO: Mr. Chairman?

CHAIRMAN BABCOCK: Yeah, Bill.

PROFESSOR DORSANEO: I would like to suggest something to what the chair says about this, that we do what we did for the last year of our prior existence, and that's to work from the recodification draft to try to integrate, you know, the work product that we're working on into that draft kind of before a second step needs to be conducted, and I just make that suggestion.

CHAIRMAN BABCOCK: We'll talk in just a second about it. Okay. Yeah, Richard.

MR. ORSINGER: The family law bar will be vitally interested in any effort to reform the voir dire process, and I'm a little concerned if this committee is going to move to a final resolution at the next meeting, then I've got to get the subcommittee recommendation out and a committee of the Family Law Council in place and studying and being prepared to report back within ten days, not realistic.

This is such a central part of our practice I'm wondering if I could get a commitment or an assurance from the chair that at the next full

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committee meeting we will not take final votes on the subcommittee proposal so that I have adequate time to get the word out, and if it's possible that we're going to end up with a final product then I've got to have a fire brigade standing by for the second we get the subcommittee proposal, and I don't know if anyone else feels like I do.

HONORABLE DAVID PEEPLES: It is inconceivable that we will have a final product by the next meeting.

MR. ORSINGER: I won't worry about it then.

CHAIRMAN BABCOCK: On the other hand, since you have nothing to do, why don't you get involved with --

MR. ORSINGER: That's why I'm against trying to regulate this, see, because once you start down this road everybody has got to get involved in it. It's just like James Madison said in the Federalist papers, the best reason not to have an official religion is because once you have an official religion you create a fight over which religion it's going to be. If we are going to regulate the scope and content of voir dire, you are going to have -- I have got issues like gender bias, race bias, bias against

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foreigners, sex abuse claims, alcoholism --

CHAIRMAN BABCOCK: It's been said that about you.

MR. ORSINGER: -- mental illness, abortion. We get to voir dire juries on these kinds of issues all the time.

CHAIRMAN BABCOCK: Yeah.

MR. ORSINGER: So when you guys, whoever it is that sits down to regulate the content of voir dire, you're going to get a really big reaction from the family law Bar, and I hope we don't get there, but if we do get there then a lot of us need to get there.

CHAIRMAN BABCOCK: Now, I'm sure that the subcommittee is sitting here and listening that there is a -- if not a consensus there is certainly a strain running through this committee that a lot of overregulation in this area is -- that they are not in favor of, so that may or may not inform what we get back. Okay.

I don't know if anybody is hungry, but Judge Brown, you're not.

HONORABLE HARVEY BROWN: I just want to ask a procedural question about the Jury Task Force. It's made a number of recommendations on things that are related to voir dire such as shuffles, the number

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of strikes, and it's also made a number of recommendations about other things such as, for example, the time limits that the ABA adopted. Is that going to be delegated or has it been delegated to some subcommittee to look at? I just wondered if that work is going to get lost or should it go somewhere next.

CHAIRMAN BABCOCK: Has it been delegated, Carrie?

MR. EDWARDS: I thought you just delegated it.

HONORABLE HARVEY BROWN: Well, I thought you only delegated the voir dire part.

JUSTICE HECHT: The subcommittee needs to look at the whole thing, except I think the task force goes down and says, "Well, this is really legislative and this could be done by a rule."

HONORABLE HARVEY BROWN: Right.

JUSTICE HECHT: And so all of the stuff that could be done by a rule the subcommittee needs to look at.

MR. PEMBERTON: When I send out the task force report there's a brief article that you may have seen in the Bar Journal a few months ago about what task force proposals have been enacted in the legislation and give you an idea of sort of where we

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are and where to go from here.

CHAIRMAN BABCOCK: Okay. Is that okay with everybody the way we're proceeding? Have we got any violent objection to it?

Okay. Well, why don't we eat and be back at 1:30?

(A recess was taken, and the proceedings continued as reflected in the next volume.)

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SUPREME COURT ADVISORY COMMITTEE

I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on January 28, 2000, and the same were thereafter reduced to computer transcription by me.

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