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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

August 26, 2011

(FRIDAY SESSION)

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Taken before *D'Lois L. Jones*, Certified Shorthand Reporter in and for the State of Texas, reported by machine shorthand method, on the 26th day of August, 2011, between the hours of 9:00 a.m. and 3:16 p.m., at the Texas Association of Broadcasters, 502 East 11th Street, Suite 200, Austin, Texas 78701.

INDEX OF VOTES

(No votes were taken during this session)

Documents referenced in this session

11-09 House Bill 274

11-10 Memo from Bill Dorsaneo re: Amendments to TCPRC 51.014

11-11 Proposed changes to TRCP 167

11-12 House Bill 1228

11-13 Proposed revisions to TRCP 735 & 736 (clean version)

11-14 2011 Task Force Draft to TRCP 735 & 736 (redline. version)

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CHAIRMAN BABCOCK: Welcome, welcome everybody. I've been asked by the building to say that if you're in a reserved spot, you may get towed, probably will get towed, so hopefully everybody knows you're not supposed to be in a reserved spot.

HONORABLE JAN PATTERSON: But you'll have good representation.

CHAIRMAN BABCOCK: Huh?

HONORABLE JAN PATTERSON: You'll have good representation.

CHAIRMAN BABCOCK: That's right. We'll all file suit in the morning. As you know, we -- as a result of the Legislature delegating a number of rules-making proposals to the Court and therefore to us, we have a very -- a very busy end of the year and are going to be meeting every month rather than every other month in order to get through this agenda. We have a full agenda today, which we'll get to in a minute, but some of you have probably seen Justice Hecht's July 13th referral letter to me, and there's some very tight deadlines on some of the rules, like today or tomorrow, but others have equally tight deadlines. I think March 1 is -- no, October is the next deadline and then we have a December deadline, a March deadline, and a May deadline.

Our term, by the way, is up this year. Our three-year term as a committee is up this year, so I'd like to try to get through all of these things by the end of the year, and in that regard, there are task force -- task forces that have been formed or are forming with respect to a number of these rules, but some of them are deliberately being kept within our group and not being sent out to a task force. The first of those and one that I think will probably generate a lot of discussion, already has, is the dismissal rule, House Bill 274, Government Code section 22.004(g), and Civil Practice & Remedies Code 30.021. The subcommittee which Justice Hecht and I would like to refer this to is the one chaired by Judge Peeples and cochaired by Richard Munzinger, also consisting of Jeff Boyd, Elaine Carlson, Nina Cortell, Rusty Hardin, Gene Storie. Lonny Hoffman has asked to be involved in that, and, Judge Peeples, I'm sure you wouldn't mind having Lonny, and Bill Dorsaneo, Professor Dorsaneo, has also been asked to be involved in that. In addition, there is a group of lawyers from Texas ABOTA, the TTLA, the TADC, and various other interested people who have studied this and have some input that they want to give us, so that -- so that's what our committee will be doing with that, Judge Peeples, if that's acceptable to you. Hearing no denial then --

HONORABLE DAVID PEEPLES: Okay.

CHAIRMAN BABCOCK: -- the next is the expedited actions, the cases involving matters in controversy, that does not exceed $100,000. A task force is being formulated with respect to that, and the Court has asked former Chief Justice Phillips to lead that task force, and he has accepted that appointment, and that's going to be a pretty important thing, and it will come to us in due time after they've studied it. Interlocutory appeals are going to be discussed today, led by Professor Dorsaneo. Offer of settlement will be discussed today, led by Professor Carlson. The parental rights termination cases we'll talk a little bit about tomorrow morning. There's a task force that is dealing with that.

The ever present return of service is being referred to Richard Orsinger's subcommittee, and, Frank, you're the cochair of that, so in Richard's absence please make sure that that's studied. The expedited foreclosure is a task force, and that will be discussed today. The constitutional challenges to statutes, Justice Patterson, that's going to be referred to your subcommittee, consisting of Justice Bland, Justice Pemberton, Pete Schenkkan, and Judge Yelenosky. Security details, we didn't quite know where to put, Bill, but it seems to have some appellate aspects to it --

PROFESSOR DORSANEO: Oh, wonderful.

CHAIRMAN BABCOCK: -- so that's getting referred to your subcommittee. Small claims, there is a task force, and cases requiring additional resources, it's a task force, but it's a little unusual in that the statute mandates that the State Bar appoint the task force, so in consultation with the Court and with our committee that task force will be appointed by the State Bar. So as you can see, a lot to do, and thank you all for agreeing to help us do it, and with that we'll move to Justice Hecht's part of the calendar.

HONORABLE NATHAN HECHT: First, we have a new rules attorney, Marisa Secco, who is here, and please welcome her today. Marisa is a graduate of the University of Texas at Austin, honors graduate in government and economics, and then an honors graduate of University of Texas Law School, where she was on the *Texas Law Review*, Order of the Coif, and Chancellor, and she was an associate at Vinson & Elkins for a few years when we snatched her up. So also she clerked for Judge Benavides on the Fifth Circuit.

CHAIRMAN BABCOCK: But other than that she hadn't done very much.

HONORABLE NATHAN HECHT: No, other than that. So she's already been hard at work this summer, and we appreciate her help.

Since we met in May the Legislature went home and left us some work, which Chip has gone over and was set out in my July 13 letter, and I'll just add to what Chip said a couple of things. One is that the small claims task force really involves all the justices of the peace in the state; and there was some concern about the statute in the course of its enactment; but it will be a fairly large task force; and their job will be to prepare rules for small claims so that that court, so to speak, as a separate court, separate from the justice of the peace, will no longer exist; and we hope in the process that they'll take a hard look at the justice of the peace practice across the state and see what else needs to be done with it. So that will be a fairly sizable task force, and they will report back, I'm sure, with recommendations that will take us a while to get through. But then the others Chip has gone over.

We're also pleased that the Legislature -- I'll just take a moment and say -- funded Access to Justice for the next biennium, a little over $17,000,000, and this is a very important effort that the Court made to make sure that happened. As you can -- as you know, interest rates are zero and they're going to stay at zero, according to the White House, until maybe 2014 or 15. So that means IOLTA won't have any money in it and we'll have to get it

from somewhere else, and I'm pleased to tell you that the Legislature recognizes the importance of that work, the way that the funding is leveraged to help pro bono efforts by the bar and stood to the call this year in a very difficult year where people were getting cut pretty severely, including our Court, but we're very pleased to have that response by the Legislature and, frankly, will be looking forward again next time.

And also we have put out finalized amendments to Rules of Appellate Procedure 9.2 and 9.3 regarding e-filing, and e-filing is about to be mandatory or is mandatory at the Supreme Court. Several courts of appeals are moving very close to that or are already there, and I think by next year probably the Texas appellate courts will all have e-filing, and we are now working harder than ever trying to get the trial courts on the -- in the same place, which is a really very difficult effort, but I want you to know about that, and we're kind of trying to make sure this works well, so if you or, more importantly, your paralegals and assistants encounter problems with electronic filing, please call our clerk, Blake Hawthorne, who kind of heads this up for us, or others and let them know so that we can fix these things.

We tweaked the recusal rule slightly, and it's now final, and you may have noticed that the American

Bar Association at the annual meeting, summer meeting in Toronto, passed a resolution encouraging the states to have recusal rules that take the judge who is the subject of the motion out of the process and ensure that the different kinds of considerations that were involved in the Supreme Court cases are taken into account in deciding the motion. Well, of course, our rule already does that, and I wrote Judge Peeples a week or two ago and said, "Isn't Texas way ahead of the curve on this," and we are. So -- and he pointed out that the recusal process was invoked in the Jeffs case, and I think after the trial started.

HONORABLE DAVID PEEPLES: On the first day -- the day it went into effect Judge Walther applied it to a motion filed in mid-trial in the Warren Jeffs case.

HONORABLE NATHAN HECHT: And it didn't delay the trial, so it worked like it should, so you should take -- you should take pride in that. And then finally, some of these rules will -- some of these statutory directives will require a -- the Court to act without a public comment period, and that's happened in the past, and so what we will do is put the rule out, make it effective as required by statute, and then ask for the public comment to follow, and of course we'll make any changes that we need to make in the light of that comment period. That's all that we can do and still meet the statutory directive

of a deadline.

However, as this happens, there will be -- there may be a few instances where it's going to be difficult to get notice to everybody that there's been a change in the rule. For example, if we -- if the Court approves the changes recommended by the parental rights termination task force as a result of this meeting, those changes will be made next week to take effect immediately, and so the only way they'll be possible to get notice to judges and lawyers is electronically, and of course we'll try to e-mail the judges, and we'll put it up on our -- on the Court's website, but a few times in the next year and a half or two years we may need to do that again. So we will try to make sure that all of these changes are available to the bar and courts electronically. So if you run into that problem, that would be the first place to check, I think, is the Court's website or with Marisa to see where you can find changes that we've had to adopt on an expedited basis. And I think that's all I've got.

CHAIRMAN BABCOCK: Okay, great. Item 3 on your agenda deals with a proposed -- a proposal that there be a local rule or a statewide rule requiring e-mail or voice mail accounts for attorneys. This was raised by Judge Stubblefield, who is the presiding judge of the Third Administrative Judicial District. Judge Peeples, do you

know whether this is something that the administrative judges have talked about or --

HONORABLE DAVID PEEPLES: We have not talked about it.

CHAIRMAN BABCOCK: Okay. Well, it is -- I know only what -- what has been told, which is summarized in this paragraph, which is that an attorney practicing in a court should be required to have an active e-mail address and/or voice mail account, so the question is what do we think about it? We don't need to spend a lot of time talking about it, but the Court, the Supreme Court, would like the benefit of people's thoughts about that topic. So if nobody has any thoughts I'll call on you. I know if Orsinger was here he would be all over this. This is the type of thing that Orsinger likes to talk about, but any ideas about this? Does this infringe on the rights of lawyers? Yeah, Justice Gray.

HONORABLE TOM GRAY: Well, we've talked about it somewhat in the context of service through e-mail, and, you know, I will say that there are a lot of times that from the Waco court that we would like to communicate in a more rapid pace than surface mail, and it's only going to work if it's a requirement and is an authorized method of communication by the Rules, and we have just recently started receiving service of -- or certificates of service

that indicate that the briefs have been e-mailed, which is not an approved method of service, and you know, while it may be just a little idea from Judge Stubblefield, it has a lot of ramifications across the rules, and -- but, frankly, I do think it's time that we recognize what's happening in the technology area and maybe not require but certainly authorize communication via e-mail, although I personally don't find it offensive to be required to have an e-mail account.

CHAIRMAN BABCOCK: Okay. Any other thoughts about it? Yeah, Judge Evans.

HONORABLE DAVID EVANS: I would like to see e-mails being used. It would certainly cut costs, for part of our cost is paper by fax or by mail, and all of our trial judge departments have to get funding from counties, and so e-mail could help us with that. I would, though, like the Court to at least give some clarification as to whether or not communications of that nature need to be then produced in paper and put in the file. If I send out a fax scheduling order, which is what we use now is fax because we save money on postage, I have a hard copy of the fax and of the order, and it will go into my file. Any type of order or communication, but I don't see the same record keeping available, and there seems to be some split of opinion between trial judges as to whether or not

correspondence of that nature is required to be put in the district clerk's file or not, and so I would hope that if you require it and authorize it that you clarify what has to happen and then that may be -- that may end up being a cost issue because then we'll have to print it and have the labor time involved, so, yes, but make sure we think out all the ramifications of it.

CHAIRMAN BABCOCK: Okay. What sort of -- what sort of communications are contemplated by e-mail between the court and the attorneys?

HONORABLE DAVID EVANS: I'll tell you what I've done, if you're asking that question of me. If we're going into a Friday afternoon and we think we're going to be arguing a charge the next Monday or something like that, I'll authorize the lawyers to communicate with me, or we've got scheduling problems during a winter storm or anything of that nature, I will authorize those communications to come to me by e-mail, and I'll respond to them by e-mail, but then I'll have that whole group of messages printed off and placed in the clerk's file. My feeling is, is that those are court actions and communications and I'm required to put them in the clerk's file, but I will tell you that on my hallway there are judges who disagree with me about that, so I'm just not clear.

I know a couple of judges out in Central

Texas who communicate exclusively by e-mail, and they have active arguments on the merits through the e-mail chain, and I know of no -- and I've heard that there's no appellate record on that.

CHAIRMAN BABCOCK: Justice Christopher, then Judge Yelenosky.

HONORABLE TRACY CHRISTOPHER: Well, two points. Already the First and Fourteenth Court require e-mail addresses for anyone who e-files, and it also includes in our -- by local rule, which the Supreme Court approved, and it also includes a note that the clerk can send e-mail notices out, which does save the clerk a lot of money and is very useful to us, so we would be in favor of mandatory. Even if somebody doesn't e-file it would be nice to be able to send notices to them via e-mail. E-mail is free. Anybody can get a free e-mail account, so I don't see a burden on a lawyer to set up an e-mail account.

On the trial court issue, I do consider that to be an issue also. I had a case where people were sending drafts of a jury charge via e-mail, and just like a charge that somebody hands you in the courtroom, if they don't ask you to file it and it's just a draft charge, I don't file it. You know, I might tear it apart, write on it, and, you know, end up using part of it and then, you know, it goes in the trash unless somebody specifically

asks me to file it, but somebody sent me one by e-mail, and now I've heard from the judge that has taken over the case that that has somehow become an issue, so I do agree that it should be --

HONORABLE DAVID EVANS: Just clarification.

HONORABLE TRACY CHRISTOPHER: -- clarified one way or the other.

CHAIRMAN BABCOCK: Okay. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Yeah, I would just emphasize what I said last time. I'm very concerned about communications with the court by e-mail. It's already a problem, I think, because typically those things, unless the judge is conscientious about writing them out, don't go into the file; and even if the lawyers could later recreate it should they need it for an appellate record or something, there's the separate issue of public access, not open courts, essentially the equivalent of our open records; and I think I mentioned last time there was a pretty celebrated important trial in Travis County involving an important public official; and the criminal court judge was communicating with the attorneys by e-mail; and the press got upset about that; and he stopped doing that. So I'm very concerned.

Maybe there's a technological fix for it where communicate -- e-mail with the court would include an

e-mail address that goes to the clerk's office, and so you wouldn't necessarily need paper but then there would be a record of it automatically in the clerk's office, but there's nothing to prevent attorneys with the judge's approval from conducting business by e-mail, which would normally be in the court's file, and there being no public record of it.

CHAIRMAN BABCOCK: Frank, did you have a comment? And then Justice Bland.

MR. GILSTRAP: Yes. Obviously this is part of a much larger question. I mean, you know, you know, requiring someone to provide an e-mail address begs the question of why it's going to be used and what it's going to be used for, and I'm not sure we should back into that. Just with regard to the comments, I -- you know, we're talking about giving notice by e-mail. Well, what happens when you don't get it?

I mean, we've got a fairly well-developed set of rules that have been beaten out over the years about mail, you know, snail mail, what -- you know, whose responsibility, when service occurs, what happens if you don't get it; but, you know, e-mail is somewhat different because it strikes me that, you know, sometimes my e-mail doesn't go through; and I don't think we should just jump in and say, "Oh, great, let's give everybody" -- permit

service by e-mail without considering that a little bit further; and maybe that's what we're doing defacto when we require every attorney to put an e-mail address on his pleadings.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: I agree with Frank, and I'm wondering if we could refer this to a subcommittee because there are so many notice provisions throughout the Rules of Civil Procedure and Appellate Procedure that involve notice and forms of notice, and it seems like the time has come that we need to include e-mail in those rules, and it seems like it would be beyond the scope of anything we could get done today to decide how each of them should look, what they should look like, but a month ago we had this issue about trial court orders and communicating those by e-mail, and then I know that there's like the withdrawal rules require both regular and certified mail to your client if you're notifying them of your intent to withdraw or getting permission to withdraw, so would that be acceptable by e-mail? And currently under the rule it's not, so under -- it seems like under a a whole umbrella of rules we've got notice issues, and we've just ignored e-mail because we believed that it's time had not come, but clearly it has, so I think we should refer it to a committee to first take a survey of all the rules that are

implicated, where e-mail could be implicated and then come up with some suggestions.

CHAIRMAN BABCOCK: Okay. Alex.

PROFESSOR ALBRIGHT: I completely agree, and I also -- this is a little off topic, but it reminded me, I'm getting lots of phone calls now from people who are reading discovery rules and asking if documents includes electronically stored information, so I think the -- we wrote those rules when we really weren't even using e-mail very much, if at all. I remember faxing a lot of stuff, so it may be that it's time to take another look at all of the rules, discovery rules, in view of just the way we live now is different than it was.

CHAIRMAN BABCOCK: Yeah, Sarah.

HONORABLE SARAH DUNCAN: And relative to a subcommittee on -- the data miners is who I'm thinking about. I've got one e-mail account that I can basically not use anymore because on any given morning I have 400 junk e-mails in that account, so if you e-mail me in that account I look at it once a week, but I'm not going to look at it any more than that, it's too time consuming, and I am very reluctant to give anyone the e-mail address I really use now for fear that the same thing is going to happen to that, and this task force -- I think the task force that Jane suggested is a great idea. I hope they will consider

that once we require e-mail addresses on filed documents, that e-mail address will become a public record and accessible to all the data miners for whatever purpose they want to commit it to.

CHAIRMAN BABCOCK: Good point. Anybody else? Yeah.

MS. SECCO: I just wanted to provide a little bit of context on the -- on Judge Stubblefield's request. I think the issue there was that one of the trial courts in his region had an attorney who he couldn't reach. You know, the judge could not reach the attorney by e-mail because he didn't have an e-mail address, his voice mail account was always full, and so there was just a communications issue, and so, you know, I didn't see any local rules that mandated an e-mail address. I did see e-service or e-filing rules that said if you are going to e-file you have to have an e-mail address, but nothing that just generally required an e-mail address. So I think this is a -- was a more narrow issue that Judge Stubblefield was asking about. I like this discussion, but it was something about having a standing order or a local rule that required some method of communication where the attorney would have to be available to the court just so the court could reach that attorney for important communications, and on a less than -- you know, on a shorter time frame than would be

available by using snail mail, and so I think that was -- just generally that's the gist of what Judge Stubblefield was requesting, and so I don't know if there are additional comments on just that more narrow issue of requiring someone to have something so that the court can reach them in a timely manner.

CHAIRMAN BABCOCK: Anybody have trouble reaching people? Yes, Justice Bland.

HONORABLE JANE BLAND: That happens all the time.

CHAIRMAN BABCOCK: Really?

HONORABLE JANE BLAND: And this particular offender, probably if he had an e-mail address, you would try to send the e-mail and it would bounce back. I mean, there are people that don't want to be found by a court, lawyers that do not want to be found by a court.

CHAIRMAN BABCOCK: That seems counter-intuitive to me.

HONORABLE JANE BLAND: Not that unusual.

HONORABLE JUDGE EVANS: Every dismissal docket has a number of people who just didn't get the notice.

HONORABLE NATHAN HECHT: Yeah.

CHAIRMAN BABCOCK: Justice Hecht.

HONORABLE NATHAN HECHT: But is there any

problem with -- does the committee have any problem with approval of a local rule that said, "Lawyers practicing in this court have to have e-mail addresses"?

CHAIRMAN BABCOCK: Sarah.

HONORABLE DAVID EVANS: Wouldn't the rule have to come to you for approval from the Court?

HONORABLE NATHAN HECHT: Yeah.

HONORABLE DAVID EVANS: Well, I think it has to see -- it would depend on what form the notice -- for what purpose it would be used. If it turns into an e-mail that requests an e-mail exchange as a method of communication with the judge and then turns into request for relief, and that's what you now see, "We argue this," and then, "Judge, we reurge our motion." That's a document that seems to me to be called for public filing; and so I still think it has to have some sort of -- the court would have to have some sort of idea of how far you're going to allow e-mails to be used; and I think it's an excellent point made about those e-mails then becoming public record; and on my side of it, if the e-mail is coming from my court, I want to think about whether it comes from my coordinator or if it comes from me and what type of e-mails I get back as a public official. Do I suddenly become the recipient of a series of jokes or off color stuff that have my IT people then crawling up and down the wall, so I think

we have to have a whole idea of where we're going to go with this method of communication so that we -- on both sides of it, but I think it would depend on the rules.

CHAIRMAN BABCOCK: Sarah, and then Kent, and then Judge Yelenosky.

HONORABLE SARAH DUNCAN: Well, and one other consideration that brings up, when you keep a public calendar on your public computer it's accessible to the public basically and then there is a personal calendar on a personal computer that is not accessible, but once you start mingling the two, they're both accessible, and I think the same would be true of address books, and I don't know how many of y'all received the e-mail when my e-mail account was hacked into that said I was stranded in England with no money and please wire funds --

CHAIRMAN BABCOCK: Sounds like you.

HONORABLE SARAH DUNCAN: Yeah, right.

HONORABLE STEPHEN YELENOSKY: Well, you said you'd pay me back.

HONORABLE SARAH DUNCAN: I actually had people try to send money, which was horrifying, but --

HONORABLE KENT SULLIVAN: All of us would like to see you on the break.

HONORABLE SARAH DUNCAN: But that's part of the concern of making e-mail addresses mandatory, is when a

judge inadvertently mingles a personal address book with a public address book and they become discoverable to the public.

CHAIRMAN BABCOCK: Kent.

MR. SUSMAN: With 254 counties in the state I confess I'm increasingly concerned about the proliferation of local rules where there are differences in practice one county to the next, and I really think it is worth some consideration as to whether we want to continue to encourage more and more local rules as opposed to a seamless and more or less uniform practice throughout the state.

With respect to this specific issue, it does occur to me that this is the type of thing which really should lend itself to uniformity. I mean, our filing requirements are essentially uniform, or we make an attempt at uniformity, and this is presumably headed towards official communications. I mean, that's what we're talking about here, and it does seem to me that the notion of approaching it from the point of view of local rules as though they should be different or that they could be different county by county is a -- is a bad idea.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: The public records issue aside, which I've already spoken to, the flip

side of the attorney who doesn't want to be contacted by the court is the court who doesn't want to be contacted by the attorneys in an informal way, and until e-mail is used in court with the kind of formality that we expect motions practice to be, I'm not willing to use it with the attorneys because it tends to be -- lend itself to a stream of consciousness. You're always at the beck and call, and there's no way to turn it off, and so I don't want to open that door; and whatever we approve, I guess I'm speaking to judges out there, think twice before you open that door. I have found when I didn't open the door and attorneys opened it by getting my e-mail, sending the form order suddenly comes to a reply from the other side saying, "But, Judge, we don't approve this type of form order, and, oh, by the way, would you reconsider the ruling?" That wouldn't happen on paper. It wouldn't happen in that way on paper, and I wouldn't be expected to respond to that, so just a cautionary note.

CHAIRMAN BABCOCK: Did somebody have their hand up over to the left? Okay. Sarah.

HONORABLE SARAH DUNCAN: I just have a question. What happens when an elected public official uses it selectively? I mean, I can easily imagine giving anybody in this room my e-mail address, but I can think of some pro se litigants I would not want to open that door

to. One in particular comes to mind.

CHAIRMAN BABCOCK: We haven't talked about voice mail. The question from Judge Stubblefield was should we require an active voice mail account. Yes, Bill.

PROFESSOR DORSANEO: No.

CHAIRMAN BABCOCK: That would be my reaction.

HONORABLE DAVID EVANS: No, would be my reaction to it. You have less record and then more problems and from -- when I said I wanted e-mail, I would want it for electronic notification and being able to deliver orders and items in that fashion from a cost-effective standpoint. That just saves us effort and time. I think all the issues about replies, they're not desired from the court's -- from my viewpoint, unless I want to open up the dialogue with the lawyers on a separate matter on an emergency basis.

CHAIRMAN BABCOCK: Gotcha. Okay, good. Yeah, Judge Peeples.

HONORABLE TOM GRAY: Chip, I mean, really what Judge Stubblefield is looking for to me seems something different than the specifics of either e-mail or voice mail. He wants a method by which he can immediately communicate with the lawyer; and a rule that requires providing to a judge, particularly a trial court judge or an administrative judge, that ability may not need to

specify what form of communication is done, because, I mean, it is a very short step from a voice mail on a cell phone to a text message and then that's a whole other form of communication, so maybe the better rule to settle Judge Stubblefield's problem is a rule that requires an attorney to provide a method of communication on an expedited basis, whatever works in the situation.

CHAIRMAN BABCOCK: Yeah. Judge Peeples.

HONORABLE DAVID PEEPLES: We've had -- our discussion has been basically about the practicalities and the pros and cons and so forth, but I would ask don't -- would a trial judge not already have the authority in a given case when he or she is having trouble contacting somebody, say, "I'm going to require you to give me a reasonable way that I can contact you, and unless you've got a better suggestion I'm requiring you by day after tomorrow to have an e-mail account." Would that be mandamusable? We probably already have inherent power to do that.

HONORABLE STEPHEN YELENOSKY: I suppose he hadn't yet had a problem with this attorney and needed to get in touch with him or her right then, and so that solution wouldn't -- wouldn't solve that problem, whereas a local rule would have required them to have provided it up front. I guess that's what's at issue.

CHAIRMAN BABCOCK: Yeah, Sarah.

HONORABLE SARAH DUNCAN: This reminds me an awful lot of discussions we had on the old appellate rules committee with Judge Guittard, and he was very fond of saying, "We cannot mandate that lawyers be ethical and responsible and accountable by rule." That's something that if they're not doing, the grievance committee needs to take care of that; and that's sort of what it sounds like to me here, is if a lawyer is truly unreachable to a judge before whom the lawyer has a case, that lawyer is not performing; and the judge has other remedies available other than a statewide rule mandating that every lawyer, who is being ethical and accountable, perform up to par.

CHAIRMAN BABCOCK: Yeah. Yeah, Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, two things. I don't worry so much about, like Judge Yelenosky does, about open records, because a judge can have a phone conference with a bunch of lawyers right now, and there is no record of that, and that doesn't take place in the courtroom, and no one considers that to somehow violate any rule. So an e-mail -- to me an e-mail communication is the same thing and would not necessarily require that it become part of the court record.

With respect to Judge Peeples' comment, you

know, could a trial judge make somebody do that? Well, yes, but if you then said, "Show up for trial Monday at 1:00," via e-mail and that lawyer didn't show up Monday at 1:00 and you DWOP the case, well, then from the appellate point of view there's no rule that allowed you to communicate that notice to show up at that particular point in time. So I think that would cause some perhaps appellate problems on -- I mean, it's absolutely true, especially if you have a docket -- say, you set cases on a two-week docket, you set 20, 30, 40 cases on a two-week docket, and you just call them, you know, in whatever order, sometimes you don't get hold of people, and you know that you're not going to get hold of people. So I kind of agree with Sarah that even, you know, you know, requiring them to have the e-mail account, it's going to bounce, just like the voice mail is going to be full.

CHAIRMAN BABCOCK: Okay. Thanks. That's helpful. Let's go on to interlocutory appeals. Professor Dorsaneo.

PROFESSOR DORSANEO: All right. The place to start, as the agenda indicates, is House Bill 274, so everybody should have that revision, that section in front of them; and assuming that you do, you can see that there were a number of amendments made to the pertinent sections, (d) and (e), and now we have as a result of the amendment

(d), (e), (d)(1), and (f); and just working through them quickly I can identify the changes. The first change is to say "trial court" in (d), "on a party's motion or on its own initiative" -- the words are different there, but they essentially have the same meaning. "A trial court in a civil action." The statute originally stated "district court," and it was amended to say, "District, county court at law, or county court." Now it says "a trial court," and I'm not sure whether the Legislature actually means that rather than a district court, county court at law, or county court. If it does then perhaps more drafting is required to deal with appeals from the justice court to the next level up, but I'm ignoring that for the moment, because I don't believe that justice courts were meant to be included in this drill.

CHAIRMAN BABCOCK: How many votes did you get in the last election? Just kidding.

PROFESSOR DORSANEO: Well, you know, we're supposed to get what they intend, and I don't think that they intended justice court appeals to county level courts, but maybe they did. All right. So then we permitted appeal from an order that is not otherwise appealable and the situational requirements under (d) as it has existed from the outset have been modified. If you look at (d)(1), the words "The parties agree that" have been removed; and

if you look at former (d)(3), you can see that it has been removed. So the parties' agreement to this interlocutory appeal is no longer a statutory requirement, so it is considerably more like what it was modeled on, 28 United States Code, section 1292(b). The parties' agreement aspect has been, you know, removed, and that's a significant change.

(d)(1) does what many of these statutes do under the influence of the family bar, people like Richard Orsinger, leaves the Family Code -- leaves the Family Code out of this game. (e) is amended, but not in a way that affects, I don't think, anything that we're -- we would be concerned with. I almost can't read that. I have to look at the statute. Is it still here, Elaine?

PROFESSOR CARLSON: Yeah.

PROFESSOR DORSANEO: You turned me off.

CHAIRMAN BABCOCK: By all means, turn him back on.

PROFESSOR DORSANEO: (e), what it said -- so an appeal under subsection (d) before its amendment, what it said and I guess what it still says for a little while, "An appeal under subsection (d) does not stay proceedings in a trial court unless the parties agree and the trial court, the court of appeals, or a judge of the court of appeals orders a stay." So "does not stay proceedings

unless the parties agree to a stay, or the trial or appellate court orders a stay." So it can be based on the parties' agreement or alternatively the trial or appellate court orders a stay of a pending -- the proceedings pending appeal. I don't think that requires any -- any adjustment of any of our rules, but if I'm wrong, then someone presumably will correct me.

What the important thing is, is (f). Now, (f) was in the statute for -- which I think was first passed in 2001. (f) was in the statute until 2005. We had been working on a rule to implement what (f) required, which is an acceptance or approval of the interlocutory appeal by a court of appeals. We worked on that in 2004 and 2005, and at about the point where we were ready to make a final vote on a companion procedural rule we noticed that the former (f) was repealed. So all of that work, about a year's worth, probably six or seven drafts, became irrelevant.

CHAIRMAN BABCOCK: For the time being.

PROFESSOR DORSANEO: Right. But now (f) or a slightly different version of (f) is back, and like the predecessor (f), as my report says, the -- the Rules of Appellate Procedure need amendment to provide a mechanism for requesting the court of appeals to accept the interlocutory appeal of the order that the trial judge

believes should be appealed under (d), so what I did -- and let's work through (f). What does (f) -- what does (f) now say? "An appellate court may accept an appeal if the appealing party, not later than the 15th day after" -- "the 15th day after the date the trial court signs the order to be appealed," so it's the order to be appealed that triggers the timetable for requesting acceptance of the appeal, and acceptance of the appeal under the statute is "by filing in the court of appeals having appellate jurisdiction over the action an application for interlocutory appeal explaining why the appeal is warranted."

Well, our appellate rules will need to say what that application for an interlocutory appeal should look like. Okay. And that's -- that's what we were doing before and what we're going to be talking about in a minute. Now, it's called an application, but that's -- that's in the manner of uniform acts legislation anyway. "Application" is a word that we could use, for example, in our appellate rules, but "application" is a neutral word, okay. I mean, we proceed by pleadings, which we call petitions, and answers and by motions in the trial court, and we proceed in a similar manner in the appellate courts. The word "application" doesn't mean anything. It just means you ask. There's no independent distinct meaning to

the word "application," and we could call what we're going to file in the appellate court an application or we could call it something else.

Okay, the Federal rules, Federal rules call what's filed in their rule book under these circumstances a petition, okay. Which is -- which is what I had called it, but maybe it shouldn't be called a petition. Maybe it should be called something else because maybe calling it a petition requires fees or imposes some other kind of a requirement.

All right. Now, if the court of appeals accepts the appeal then it's regarded as an accelerated appeal and is governed by the procedures for pursuing an accelerated appeal. Well, except the second sentence, the last sentence rather, says, "The date the court of appeals enters the order accepting the appeal starts the time applicable to filing the notice of appeal." So it's kind of governed by the rules for pursuing an accelerated appeal because the next sentence says that the time starts when the court of appeals enters the order accepting the appeal, and that's not the time for giving notice of accelerated appeal. Okay. That's a different starting point. All right.

So I went back after Lonny called me and said that this was something that I needed to do now, okay, and

looked at what we did before, and particularly I looked at a memorandum written by me to the -- to Justice Hecht and to the members of the committee and Marisa's predecessor, Jody Hughes, and identified Rule 28, which we worked on. 28.1 in our rule book now is accelerated appeals. 28.2 is agreed interlocutory appeals in civil cases. 28.2 was crafted to work with the 2005 version of 51.014, in effect, (d) with no (f); and it needs to be reworked. Okay. It need to be reworked because it contradicts the statute and really it's been superseded by the statutes. The question is how much -- in 28.2, how much in what we had done before should we do now.

So that takes me to attachment A, I believe, which is a revised version of Rule 28. I didn't make any changes in 28.1, although I'm sure if I read 28.1 carefully from top to bottom I would have changes to recommend, although probably not because of the amendment to the statute. Okay. It's just -- but that's just me, okay. So let's go to 28.2, and this is pretty close to what we had done in 2005 based on the minutes of the May 7 and August 26, 2005, meetings, but I made changes in it when I thought those changes were required by the new provisions from House Bill 274. It's just -- to go through it, I mean, (a)(1) is essentially what we did in 2004 and 2005 with this exception: This petition under the statute or this

application under the statute must be filed, as the statute says, not later than the 15th day after the date the trial court signs the order to be appealed. Okay. What we had done previously was probably based on the predecessor statute or on our own -- on our own thinking, "Petition must be filed not later than the 20th day after the date a trial court signs a written order granting permission to appeal." The Legislature picked the order to be appealed as the trigger for this application rather than the trial court's order granting permission to appeal.

CHAIRMAN BABCOCK: What if the trial court hasn't granted permission by the 15th day?

PROFESSOR DORSANEO: Well, then their time hasn't started. The permission has to be -- oh, by the 15th day?

MR. GILSTRAP: Under the old statute?

CHAIRMAN BABCOCK: Under the new statute.

PROFESSOR DORSANEO: That's a good question. That's very good question.

MR. GILSTRAP: The new statute doesn't -- does the new statute require permission?

CHAIRMAN BABCOCK: Yeah.

PROFESSOR DORSANEO: Yes. The trial court must -- the trial court must conclude in effect, must give permission, because the trial court must make an order that

the order to be appealed involves a controlling question of law, blah, blah, blah, and "an immediate appeal from the order may materially advance the ultimate termination of the litigation." So I guess the Legislature didn't ask themselves the question you just asked me. I don't know what happens.

CHAIRMAN BABCOCK: Okay.

PROFESSOR DORSANEO: So what I would recommend to people is that they go ahead and file this petition at the time they are dealing with the trial judge in order to try to get the trial judge's order.

MR. GILSTRAP: That's a terrible situation, though.

PROFESSOR DORSANEO: Well, I didn't cause it.

MR. GILSTRAP: I know, but there's got to be a better answer than that. I mean, you know --

MR. MUNZINGER: The only thing you could do would be to file a motion with the trial court to reconsider the original -- the fact scenario is the trial court grants an order denying a plea to limitations or something, which would be an order that would otherwise qualify under this statute if certified by the trial court. 15 days pass, the trial court has not certified the question; therefore, the 15-day period is gone and you can't appeal under this statute as written and under the

rule as written. The lawyer is going to have to file a motion to reconsider and maybe ask the judge that the order denying the reconsideration becomes the order to be appealed from. That's the only solution, but they did not think ahead on that issue.

MR. PERDUE: Wait. Where does it suggest that you can appeal the trial court's decision on whether it's a controlling issue or not?

PROFESSOR DORSANEO: Well, that would be what you would be doing in asking -- because it's whether the appeal is warranted.

MR. PERDUE: Right. Because the initiation of the 15 days is the trial court's order itself.

MR. MUNZINGER: That's right.

CHAIRMAN BABCOCK: Right. But if it's a condition precedent to asking the appellate court, in other words, if the trial court has to first say, "Yeah, go ahead and ask the appellate court, I agree with you, this is a controlling issue of law," and you've got to ask the appellate court within 15 days, but that condition precedent hasn't happened yet --

MR. PERDUE: Right.

CHAIRMAN BABCOCK: -- then what happens? Where are you? I mean, are you just --

MR. PERDUE: You don't have anything to ask

permission for.

CHAIRMAN BABCOCK: Right.

MR. MUNZINGER: Well, but you could file a motion to reconsider that original order and then he denies that and you consider your -- and certifies that denial as being within the 15-day period. That would be the only way you could get to the appellate court.

CHAIRMAN BABCOCK: Well, the other thing you could do is file something with the appellate court and say, "We have a application pending for permission, but the statute requires us to talk to you within 15 days, so here we are doing it."

MR. PERDUE: 15 days of the order by the court.

CHAIRMAN BABCOCK: By the order that you're appealing from. You're not appealing from the permission order. You're appealing from the underlying order that has a controlling issue of law that is worthy of interlocutory review. I think. Sarah.

HONORABLE SARAH DUNCAN: What I would do is file a conditional -- what are we calling this -- petition to the court of appeals.

CHAIRMAN BABCOCK: Right.

HONORABLE SARAH DUNCAN: And a mandamus.

PROFESSOR DORSANEO: The question is should

we talk about this in some rule.

HONORABLE SARAH DUNCAN: You've got to file a mandamus. You've got to get a ruling from the trial court on your motion under (f).

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: All of the answers that have been posed so far are terrible -- are terrible situations. I mean, they're just ridiculous.

CHAIRMAN BABCOCK: And it's all Bill's fault.

MR. GILSTRAP: Well, it may be the Legislature's fault. Surely this is someplace where the Court's rule-making power might be able to come into play, and we could just say that, in fact, the 15 days starts running from the date the permission order is denied. Or granted.

HONORABLE TRACY CHRISTOPHER: Granted.

MR. PERDUE: Granted.

CHAIRMAN BABCOCK: Yeah, it's granted. Right. Professor Dorsaneo.

PROFESSOR DORSANEO: Well, instead of just being that rude, or reasonable, whatever law you want to pick, we could do some more engineering but we would probably be doing it in the trial court rules where there's nothing mentioned about any of this in specific terms at all yet.

CHAIRMAN BABCOCK: Jim, you still have your face scrunched up. There's something that's bothering you.

MR. PERDUE: I -- knowing a little bit about the genesis of this, the concept as I understood it was that you had a trial court asked to essentially agree, or -- and it may.

CHAIRMAN BABCOCK: Right.

MR. PERDUE: And then you have to ask the court of appeals --

CHAIRMAN BABCOCK: Right.

MR. PERDUE: -- if it takes what the trial court has said, it may be done.

CHAIRMAN BABCOCK: Right.

MR. PERDUE: And I think I'm hearing the question being the right to appeal the trial court's denial that it is a controlling question of law because that's the scenario where you get in the 15-day trap --

HONORABLE NATHAN HECHT: No.

MR. PERDUE: -- but maybe I'm misunderstanding, because Sarah is whispering "mandamus" in my ear, and that always starts to scare me, so --

HONORABLE NATHAN HECHT: No. Partial summary judgment, somebody thinks they should appeal. They ask the trial judge, the trial judge says, "yes," but it's 30 days later.

MR. PERDUE: And so the concern -- well, okay, so you're right. The way to do it is 15 days from the order certifying the order.

HONORABLE NATHAN HECHT: Right.

MR. PERDUE: As opposed to the underlying order.

CHAIRMAN BABCOCK: Right, but that's not what the statute says.

HONORABLE SARAH DUNCAN: With all due respect, that's not what the statute says, but we can fix it if we say, "Within 15 days of the date of" -- you've got to file your petition with the appellate court.

CHAIRMAN BABCOCK: Right.

HONORABLE SARAH DUNCAN: Within 15 days, if within 15 days the trial court has ruled.

MR. PERDUE: Granted.

HONORABLE SARAH DUNCAN: Granted the motion.

CHAIRMAN BABCOCK: Granted.

HONORABLE SARAH DUNCAN: And if not, within 15 days after the date the trial court rules, or grants.

CHAIRMAN BABCOCK: Okay. Justice Christopher.

HONORABLE SARAH DUNCAN: So it is effectively extending the appellate timetable because the trial court hasn't ruled.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: That just strikes me as unnecessarily complicated. That provision is not in the rule -- in the statute. I think we just fix it. We just fix it in the appellate rule, and we say from "15 days from the date the trial court signs the permission of appeal of the order."

CHAIRMAN BABCOCK: So you have a conflict between the rule and the statute?

HONORABLE TRACY CHRISTOPHER: That was what was intended by the Legislature. We know that. They couldn't have anticipated this terrible trap of they signed an order and they've got to get the permission done within 15 days and then somehow you've got to file a premature filing at the court of appeals. I mean, what a waste to have all these premature filings at the court of appeals if the trial judge is going to say "no" on this permission to appeal.

CHAIRMAN BABCOCK: Judge Evans, and then is it Richard or Jan?

HONORABLE DAVID EVANS: Well, it may be reconcilable. If I sign an order of partial summary judgment on limitations and 30 days later one of the parties sits down and thinks, "You know, I ought to take this up," the order I originally signed is not appealable.

It does not become appealable until I give permission or until I grant the motion, and, in effect, the second order saying it can be appealed on interlocutory basis amends the original order. I'm not sure that you're going to have as much problem as you think you're going to have with that lag, because the court has got to give notice that I'm going to amend this order and now make it -- this prior order and now make it appealable, otherwise there would be no basis to take it up to any court. I'm just not -- it could be better written. It's poorly written.

CHAIRMAN BABCOCK: So what you would say is that your order granting -- in Justice Hecht's scenario granting partial summary judgment.

HONORABLE DAVID EVANS: Is a nonappealable order.

CHAIRMAN BABCOCK: It's not appealable for sure, but then you get this application in because it's -- it's argued that it involves a controlling question of law, substantial difference of opinion, so you reenter your order but you add a paragraph and say that the court -- the court believes that this has a controlling issue of law.

HONORABLE DAVID EVANS: It could be happening in several ways, depending on the form given to you by the lawyers and how you direct it. You've heard the motion for interlocutory appeal, you decide to grant it, and you

hereby grant it, and you attach a copy of the order that is now appealable, and as of that date it is appealable. Or, the parties say, "Judge, so that we don't have any problem on any TRAPs, we want you to sign an amended partial -- order granting partial summary judgment and incorporate the following language making it an interlocutory appeal." It is -- no doubt somebody will try to catch somebody on a trap, but it does seem to me that the first order is not appealable, never has been and won't be.

CHAIRMAN BABCOCK: Right.

HONORABLE DAVID EVANS: Until somebody gives permission to do so, and the third way it happens is you enter a separate order that says, "I grant the right to appeal as to my prior order," and I think the court, the appellate courts, will interpret that to be a modification of my prior order.

CHAIRMAN BABCOCK: Okay. Munzinger had his hand up first, and then Professor Dorsaneo.

MR. MUNZINGER: To simply ignore the language of the Legislature I don't think would be prudent. The Court consistently invokes rules interpreting statutes and says consistently, "We are bound by what the Legislature has written," except where it doesn't make sense, et cetera, and it would be unseemly and possibly harmful to that line of authority for the Court to simply finesse the

issue without recognizing it. It is a drafting problem of the Legislature's, and perhaps the Court can cure the problem by adding a paragraph that would say something along the lines of, "In an instance where the trial court certifies such an order but does so more than 15 days after the entry of the original order, the certification date shall be the order from which the timetables run," et cetera. That is a specific recognition that the Legislature chose inartful language from the standpoint of an appeal. It's respectful, and it doesn't risk harm to the line of authorities that you apply statutes as they are written.

CHAIRMAN BABCOCK: Jan, did you have your hand up?

HONORABLE JAN PATTERSON: Well, I did. I agree with Justice Christopher's approach, but I think the language is inartful and may not be in conflict with what we need to do, and the way they -- it may not have contemplated the problem here, and what it does say is that the -- it describes the order as the date the trial court signs the order to be appealed, not the order that may be appealed or might be appealed, so it looks as though it's one-stop shopping at that stage, and I don't think it just contemplates the problem that we envision, and I think we ought to not do anything inconsistent with the language but

just provide the solution as a rule making.

CHAIRMAN BABCOCK: Professor Dorsaneo.

PROFESSOR DORSANEO: One thing Richard didn't mention is that we do -- the Court does have the authority under the Rules Enabling Act to make Rules of Procedure that don't infringe, enlarge, or modify substantive rights. Frequently it's difficult to decide whether it's a procedural issue or a substantive issue, but this looks very procedural; and the question is whether the Court thinks that they would want to list this newly enacted statute as partially repealed to the extent that the language differs from the appellate rule. I mean, the easiest thing would be to just change it, except that would cause -- that would confuse some lawyers. Okay. We only have four -- we don't have many hours to teach procedure, so we don't always -- don't always teach much of it.

HONORABLE JAN PATTERSON: Is that our new standard? Is that our new standard, the rule may not confuse lawyers?

PROFESSOR DORSANEO: Well, it's helpful if they're not confused, you know, but -- or, so my question is, you want to do that or you want me to wire around it? I understand how to wire around it in one way or another, and I could draft it to do that, and that seems to be the question.

CHAIRMAN BABCOCK: Yeah. Frank, and then Sarah, then Justice Brown, and then Elaine.

MR. GILSTRAP: One way to wire around it, and maybe the simplest, is the Court does have power by rule to extend an appellate deadline, and I think there's a 15-day extension provision in the rules.

PROFESSOR DORSANEO: In this rule.

MR. GILSTRAP: Yeah. Maybe we just say that in the event that the certification order is signed after the order being appealed, the order being appealed from, which would be in almost every case, the appellate -- the appellate deadline is just extended to 15 days after the certification order, and, you know, I think the Court has the power to do that, and that would fix the problem.

CHAIRMAN BABCOCK: Yeah, Sarah.

HONORABLE SARAH DUNCAN: I guess, Frank, I need to ask a question. What is it that you think is inconsistent between the language of the statute and what Judge Evans was saying, because as I understand what Judge Evans is saying, is we don't mess with the statute. We don't wire around it. We simply overlay what we all know to be modification law of orders on the statute. The original order is not appealable, period, unless and until the trial judge certifies it, at which point the original order is in effect and under the law modified.

HONORABLE DAVID EVANS: Because "the order to be appealed" is in the language of statute.

MR. GILSTRAP: It's a blatant fix.

PROFESSOR DORSANEO: It is wiring around it.

HONORABLE SARAH DUNCAN: We use it everyday.

MR. GILSTRAP: I mean, that's -- no one reading this would think that the certification order is somehow a modification of the order being appealed from. We're just doing that as a fiction because we've got a problem with the legislative language. Maybe that's the answer. I like the extension approach better.

CHAIRMAN BABCOCK: Justice Brown.

HONORABLE HARVEY BROWN: I agree that this is a trap and we need to fix it, but I want to point out it's possible -- I'm not saying it's true, but it's possible the Legislature did this on purpose, because they may have thought we don't want somebody to get a summary judgment denied, six months later go down to the judge and ask for the right to appeal. We put in a short time frame. It is very short. You better get your ducks in a row if you're going to do this because otherwise we may be building in more delay.

CHAIRMAN BABCOCK: Yeah. That's a point that I had thought about. Elaine.

PROFESSOR CARLSON: That was exactly my

point, too. I think there has to be a time -- well, doesn't have to be. I think ideally we want to have a time certain by which the order should be signed because subsequent litigation can depend upon the prior order and you get further and further into the bushes and then there's a reverse field by a trial court's discretionary order to appeal eight months later or a year later.

CHAIRMAN BABCOCK: Hayes.

MR. FULLER: I'm not an appellate lawyer, so I may not be seeing some of the nuances that are being pointed out, but it seems to me we ought not monkey with the statute. If the court is going to permit the appeal they need to do so within 15 days. If they don't do so within 15 days then you can presume that permission is denied and move on. I think that may very well be what the Legislature could have intended.

CHAIRMAN BABCOCK: Justice Gray, and then Justice Christopher.

HONORABLE TOM GRAY: Playing off that, if a -- because I think that the Legislature may very well had the purpose that they've been attributed here of putting the short fuse on it to get this issue, discrete issue, behind the litigants and move on down the road. At the same time, if the trial court recognizes the need to have that issue decided dispositively by an appellate court, I

don't think there's anybody in this room that wouldn't recognize the trial court's ability to encourage the litigants to file a motion to reconsider that prior ruling; and like Judge Evans has indicated, we'll go back and revisit it and enter an order because people are not going to go to these kinds of hearings where these dispositive legal issues are going to be decided without recognizing that that is going to be a point of law on which the case will turn; and so I don't think anybody is going to be surprised by one of these orders out of the blue that they would want to take an interlocutory appeal.

If the trial judge wants that issue decided, they're going to revisit it at a later date, refresh the order in some fashion, so that they can permit the interlocutory appeal. I just -- I have real reservations about going in either directly or indirectly trying to fix what the Legislature may very well have been their purpose of having a very short fuse on these things to decide it, get on with it, get it resolved, or let it go.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Everybody is going to file an application with the trial judge on every single summary judgment or other dispositive interlocutory motion, because now it doesn't have to be agreed, and, you know, it's -- and so, what, you file the motion for summary

judgment. You don't even know if you're going to win it or lose it yet, and you've got to file your permission to appeal it at the same time? I don't think the Legislature was thinking you've got to have it all done at the same time. Okay. And if it was a summary judgment that I denied and six months later somebody wants to appeal it, I mean, as the trial judge I'm going to say "no." You know, if you thought this was so important why did you wait six months, and that's the end of it.

CHAIRMAN BABCOCK: Yeah, Richard Munzinger, then Sarah.

MR. MUNZINGER: I don't think the Legislature intended that it's 15 days or you die, because they have a provision which says you can stay proceedings or not stay proceedings of the trial court. In other words, it's entirely within the discretion of the trial court to allow the case to proceed forward while this interlocutory appeal is pending, or the trial court can stay it. There may be innumerable reasons why a lawyer or client doesn't at some point in time seek to appeal from an order, whether it's -- he or she doesn't understand that it was potentially dispositive or the client didn't want to do something, later changes its mind, or whatever.

The ultimate goal behind the law is to allow termination of cases that ought to be terminated before

they go to trial. We've all been in cases that last years. We've all been in cases where you call a trial judge or their schedulesing clerk and say, "I need to file a motion" and it's an -- "Well, you can't, we're in trial. We're trying a capital murder case. We can't do this." You've got -- "We can see you the 5th of August," and it's the middle of June or it's July. These are serious problems about having something done in a short period of time, and I think that the Court ought to do something along the lines that Frank talked about or something along the lines I talked about that allows someone to come back at a later date and have such an order certified by the trial court and remain appealable. Otherwise, the purpose of the statute is frustrated because it's 15 days or go to hell. Doesn't work that way. That's not good law.

CHAIRMAN BABCOCK: Sarah has been patient and so has Pete, so Sarah, then Pete.

HONORABLE SARAH DUNCAN: And for me to be patient is a minor miracle.

CHAIRMAN BABCOCK: Let the record so reflect.

HONORABLE SARAH DUNCAN: And this is for the record, and I understand there is disagreement about this. I was not in on the legislative decision to amend the statute. I was in on the initial drafting of the rule to implement the permissive appeal statute. The primary

problem with that statute -- and it was repeated at every seminar by virtually everyone that experienced trying to get agreement from the other side to pursue interlocutory appeal is that it required agreement of the parties.

All I see the purpose of this statute to be is to amend that mess of a statute that we had before, which required agreement of the parties and the trial court and which virtually never happened. There's nothing in this statute that says, the last clause in TRAP 28.2(a), "Unless the court of appeals extends the time for filing pursuant to Rule 26.3" There's nothing in the statute that says the Supreme Court didn't have authority to extend the time to file. There's nothing in the statute that says that the 15 days isn't modified by a subsequent order certifying this for interlocutory appeal, as Judge Evans suggested. There's just nothing in the statute that says any of that, and y'all may know more than I know about how the statute was drafted. It sounds like Jim does, but if you do, put it on the record, because it's not in the words of the statute.

CHAIRMAN BABCOCK: Pete.

MR. SCHENKKAN: I want to say I'm in favor of the notion that you ought to have to move in your motion for summary judgment or in your opposition to the motion for summary judgment in the alternative for permission to

take an interlocutory appeal if you don't prevail on your side of the motion for summary judgment. I don't think that will happen most times, because most times you're going to know that whichever side of that issue you're on your chances of getting an appellate court to accept your interlocutory appeal are zero. That they -- the appellate courts aren't going to like this. They never have in the past. They aren't going to like them in the future. The Federal appellate courts don't like them either, so the result of it is you don't move for this usually. At least you don't move for it, except on the, well, maybe I'll get lucky this time occasion. You don't move for it seriously expecting to win unless you have an issue that is one where you're clearly right or where it's clearly a close law issue that doesn't really require any more fact development and there is, therefore, a chance that the appellate court will say, "Yeah, let's go ahead and take that up now." You know, we don't need a 50-page brief with a 20-page statement of facts in this case. This is a nice little issue that's in play.

So I don't see the problem with making people tee this up in a way that can permit them to have a ruling from the trial judge on the substance issue, and on the "I will or will not permit you to do this." If you have something -- people talk about, well, what happens six

months later. Well, six months later the main thing that could happen is some other appellate court could have -- or your own, it could be the appellate court in this hierarchy -- could have changed the law or at least opened up a question that you hadn't been aware before. You try your motion again. You say to your trial judge, "Hey, Judge, the law has changed, and we need to take this up one more time."

So I do not see this as a insurmountable practical problem for trial counsel or trial judges, and I think the safeguard on abuse of this is one we can count on, the appellate courts, the intermediate appellate courts, are not going to be in a hurry to say, well, gosh, somebody procedurally did this in the right time frame. You know, in all 10,000 motions for summary judgment in Harris County district courts this year, the movants included a certifying interlocutory appeal, but it isn't going to work. It isn't going to produce a whole bunch of interlocutory appeals.

CHAIRMAN BABCOCK: Professor Dorsaneo.

PROFESSOR DORSANEO: Well, we've had this statute or a version of it since 2001, and it's never worked. People have not figured out how to use it. There aren't many cases. It's just always been bad. Listening to everybody, and if I had asked myself the question that

Chip asked me, I probably would have written this sentence after the first sentence in (a)(2): "If the trial court does not permit appeal from the order by written order within 15 days after the date of the order to be appealed, the petition may be filed within 15" -- pick days, maybe 15 -- "15 days after the date a trial court signs a written order granting permission to appeal." And that seems to me to capture what a lot of people were saying, some people saying that that's self-evident, that that's how it works, or that's how you can justify it, and that to me wires around the problem.

CHAIRMAN BABCOCK: Yeah, Tom.

PROFESSOR DORSANEO: If that's what you want to do.

CHAIRMAN BABCOCK: Tom.

MR. RINEY: I was just trying to look at from a practical aspect. I agree that there will probably be very few appeals will be decided because of this statute, and I would think that most often it would be the situation that we've all experienced where you're arguing a motion in front of the trial judge, and the trial judge says, "You know, I wish the Supreme Court had written on this" or "I wish the court of appeals for this particular district had an opinion on this."

I mean, I think it's going to be limited to

those type of situations, and in those situations it's seldom that we just get an order in the mail such that the 15 days would start running. There would either be a hearing or there would be an order from the judge or letter from the judge suggesting someone draft an order, and so I think there might be some way to, you know, work that in to a final order. The issue could be raised at that point, the trial judge could consider it. Again, just as a practical matter I think that's probably the way it's going to work, is that most trial courts would give the parties the opportunity to argue whether or not that should be included in an order or subsequent order.

CHAIRMAN BABCOCK: Yeah, the only problem with that is in some counties you find out by postcard what's happened, and in some places it's hard to get back in before the judge --

MR. RINEY: I agree.

CHAIRMAN BABCOCK: -- to talk to them within a short period of time like 15 days.

HONORABLE TOM GRAY: You could send him an e-mail.

CHAIRMAN BABCOCK: Yeah, if he's got an active e-mail account. So, okay, Sarah. I'm sorry.

HONORABLE SARAH DUNCAN: But both of the times, and I can only think of two, because my career has

been very short, that I have needed an interlocutory appeal and not been able to get one, either because there wasn't then a statute at all or because there was a statute and it required agreement of all the parties, one was a limitations issue and what statute of limitations applied in a breach of fiduciary duty case to a particular claim, and the other was which version of the Tort Reform Act applied. In both cases it would have disposed of either the bulk of the claims or the bulk of the lawsuit favorably or unfavorably, depending on what side you were on, and in both cases the cases were somewhat notorious, and I can't imagine a court of appeals or a trial court not wanting to get them off the docket and out of the papers, so I think this could happen. I don't think it's meant for the usual case, but, Bill, as I understand it, isn't what you said -- doesn't that put in language what Judge Evans said and I agreed is the law.

PROFESSOR DORSANEO: Yes. I put it in the rule so it wouldn't be a secret to the rest of the people.

HONORABLE SARAH DUNCAN: Right. And I think that's the way to go, and I don't think it's wiring around. I think it's explaining to people who don't know that modified -- or that orders can be modified by subsequent orders.

CHAIRMAN BABCOCK: Judge Evans.

HONORABLE DAVID EVANS: I would hope that we would draft a rule that would allow some time for people to reflect on a ruling and decide whether they want to take an interlocutory appeal or not rather than force them into an option upon the court's pronouncement of the ruling. Often parties come into the trial judge, want a ruling on summary judgment, and then want to pursue some immediate talk about settlement, and if we force them into immediately into appeal we just cause the parties more costs. Now, there's a delay factor, and maybe people shouldn't come back six months later and say, "Now I want to appeal this," but the trial judge has the discretion to decide if he wants to proceed onto trial at that point.

The final issue is -- and I'm not sure that I agree that it's a real problem, but I think that if I were practicing and I filed an interlocutory appeal and had to file one and request one and say this is a substantial question, I'd worry that if I abandoned that appeal am I later on going to hear that somehow I waived it or something. Now, whether that would ever go anywhere or not, I don't know, but it's just I don't think we should just trigger people into the appellate court right off the bat through our rule, but if the statute requires it and that's what the majority says then obviously that's where we go.

CHAIRMAN BABCOCK: Well, it seems to me that we ought to be careful about trying to change the literal language of the statute. I mean, that should be a last resort, it seems to me, and if you look at this as a whole -- and, Jim, you were sort of there or around this. It looks to me like they were trying -- the Legislature was trying to make this a little easier because, as Sarah says, you know, the agreement thing, I mean, what winning party on summary judgment would ever agree, "Oh, by the way, you can take it away from me right away." That's just never going to happen, so the Legislature is trying to liberalize that a little bit, but it could have been that the quid pro quo was, but if we're going to liberalize this you've got to do it right away. You can't hang around, because in Judge Evans' first hypothetical it was 30 days after the order or after they reflected upon it or after they've done mediation, then they can come in and ask for permission to appeal, and that doesn't seem to be within the literal language of what this statute says.

HONORABLE DAVID EVANS: Well, if you read the first part of it, I sort of read that to say that I or anybody else on their own initiative may move for a written order to permit an appeal from an order that is not otherwise appealable, and so I read (d) to indicate that a party could come to me and say, "We have an existing order

that you signed and we're moving for you to now make that appealable."

PROFESSOR DORSANEO: Yes.

HONORABLE DAVID EVANS: That's how I read the opening line there.

CHAIRMAN BABCOCK: Yeah. Sarah.

HONORABLE SARAH DUNCAN: Yeah, and that's what I was saying earlier. I don't see anything in the statute to support what you've suggested, Chip. I just don't.

CHAIRMAN BABCOCK: Well, well, let me be clear about what I'm relying on.

HONORABLE SARAH DUNCAN: Help me.

CHAIRMAN BABCOCK: (f), "An appellate court may accept an appeal permitted by subsection" -- "if the appealing party not later than the 15th day after the date the trial court signs the order to be appealed files in the court of appeals having an appellate jurisdiction the request."

HONORABLE SARAH DUNCAN: That's right, but that's what Judge Evans has been saying all along, is if there is an order granting a motion for an interlocutory appeal, ipso facto that amends the previous order --

CHAIRMAN BABCOCK: Okay.

HONORABLE SARAH DUNCAN: -- and makes it

appealable, and there's nothing in here to indicate the Legislature wanted to except this interlocutory appeal provision unlike anything else in the statutes from just general procedural law.

CHAIRMAN BABCOCK: No, I like what Judge Evans is saying, and he said it sometime ago, that the new order, the one that says summary judgment is denied, has additional language in it that says, "And, by the way, I think this involves a controlling issue of law and there's a substantial disagreement" and so, "so ordered."

HONORABLE SARAH DUNCAN: And just as a for instance, let's say that the question is which statute of limitations applies or which version of the Tort Reform Act applies and I file a motion for summary judgment and say X and my opponent says Y and my opponent wins, but then three months before trial -- and the trial is going to last three to six months let's say -- the Supreme Court comes out and says, nope, it was X. Not Y, X. Well, lord, surely I can then go to the trial judge and say, "Judge Peeples, with all due respect, sir, the Supreme Court has disagreed with you" --

CHAIRMAN BABCOCK: Well, yeah, you ask him to change his ruling.

HONORABLE SARAH DUNCAN: -- "and please may I now take this up and get my summary judgment that I

should've gotten anyway." Actually, I think Judge Peeples will say, "You know, I read that opinion, and you're right, I'm reversing myself."

CHAIRMAN BABCOCK: Yeah. I mean, that's what you ask for first.

HONORABLE SARAH DUNCAN: But I should be able to go in and ask for it to be certified at that point.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: Well, when I look at this (d), right at the beginning, look at it, page two, "On a party's motion" -- following what Judge Evans was saying -- "a trial court in a civil action may by a written order," one written order, "permit an appeal from an order." Right? That's two orders. That's the way it's written. It doesn't say "may by amended order permit an appeal from an earlier order." It's just not that way. Now, we can say that. That's the kind of thing that lawyers say all the time that it doesn't really quite mean what it seems to mean. It means something else that would be better, but the easier -- it's not a situation where you can't -- and I guess the Supreme Court has to decide, does it have to be 15th day after the date the trial court signs the original order to be appealed, and if the -- if you haven't gotten -- if you haven't gotten permission to appeal from the trial court in 15 days, game over? Could

mean that, or should we at this committee level put my sentence in brackets and send it to the Court to say --

CHAIRMAN BABCOCK: Yeah.

PROFESSOR DORSANEO: "If the trial court does not permit an appeal from the order by" -- which would be clear what the order is because it would be the second sentence, "by written order within 15 days then the petition may be filed within 15 days after the date a trial court signs a written order granting permission to appeal." The second one. So if you want to add that in there, Supreme Court, that's --

CHAIRMAN BABCOCK: Up to you.

PROFESSOR DORSANEO: It would make it work better arguably, and it's not saying we have rule-making power under the Rules Enabling Act to change what you thought was the appropriate procedural thing to do, and we're doing it.

CHAIRMAN BABCOCK: Professor Hoffman.

PROFESSOR HOFFMAN: Yes, I'm not sure there's room on the head of this pin for one more voice, but I'll jump in. So I think that the last point that Bill made is one I agree with, and maybe that's the fix, because otherwise by pointing out, Bill, as you do that there are two different orders you actually make, I think, Chip's argument.

CHAIRMAN BABCOCK: That's what I thought.

PROFESSOR HOFFMAN: So you've got an order permitting an appeal from another order that is the order to be appealed. That's the one that involves the controlling question, and when you jump over to (f) it says "15 days from the order to be appealed." You've got that hanging around phrase at the end there that's the problem. So I think the last point Bill made is probably the answer, and it doesn't feel like one has gone to battle with the Legislature just to clean that up, but that seems -- that seems to be the problem, that you have got two different orders.

CHAIRMAN BABCOCK: Judge Peeples.

HONORABLE DAVID PEEPLES: This statute requires a trial judge who is willing to be appealed on this point. That is beyond dispute. It seems to me that if a trial judge is willing -- you know, becomes convinced six months later I ought to grant an appeal, he or she would be willing to amend the, you know, summary judgment ruling, the dismissal, or whatever it was to include language allowing an appeal, wouldn't he? I mean, if you grant the premise I am willing to be appealed, wouldn't I sign a new -- it's interlocutory by definition. I've got the power to change it. Wouldn't I do that?

PROFESSOR HOFFMAN: Except that I think the

question is, is whether the opponent can argue to the appellate court that a reason for not taking the appeal, which it also has to approve, is that it was late in time because it wasn't 15 days after the relevant order. And so this -- again, this question that's rather nice and technical really turns on whether in writing a rule we can write language that makes it clear without offending the statutory purpose.

CHAIRMAN BABCOCK: This is what we live for, you know.

HONORABLE DAVID PEEPLES: Tell me again the argument. If the judge says, "You know what, I agree, this ought to be appealed. Let's amend my six-month old order to include language allowing appeal that complies with (d)," what is the argument that throws that out in the appellate court? I mean, they may exercise their discretion not to take it.

PROFESSOR DORSANEO: Right.

HONORABLE DAVID PEEPLES: But what other argument is there?

CHAIRMAN BABCOCK: Justice Gaultney, and then Levi.

HONORABLE DAVID GAULTNEY: We sometimes see interlocutory orders get entered a second time. I mean, it happens. Trial judges -- trial judges, you know, if asked

to enter an order or an amended order to protect the appellate time, you know, on a case that they are in agreement should be appealed will probably reenter that order, and so why -- why would the statute treat an amended order which says I have denied this summary judgment or whatever, and I -- this involves a controlling issue, why would the statute and the courts treat that order different than it would an order that was entered 16 days earlier, and the certification -- it strikes me that if we don't put it in the appellate rules that this is in a sense a modification of the earlier order or an order that makes it appealable or whatever language that we can put into it to make it clear, you run a couple of risks. One, you run the risk of treating those 16-day apart orders differently for some reason, but, secondly, you run the risk of having appellate courts across the state construing the statute differently. One appellate court saying we're going to treat it like Sarah and David view it, the two orders together as being the order to be appealed, and another court saying, wait a minute, that order was entered, you know, 16 days earlier, certification here, you're -- we're going to treat that as a jurisdictional problem, we don't have jurisdiction to consider it. And so it strikes me that we need to be very clear in the appellate rule exactly which order we're appealing. I think I prefer to treat it

as a -- as an order becoming final and appealable once the trial court decides that it's an issue that ought to be appealed. I mean, that to me is the key decision that this order is now an appealable order, you ordered to be appealed.

CHAIRMAN BABCOCK: Okay. Levi.

HONORABLE LEVI BENTON: Well, David may have just taken some of the -- some of the fire out of my argument, and I thought Jim Perdue might have said this, but, you know, what about the other side? If the trial court can wait three or six months and then amend the order then a litigant might say, "Well, wait a minute, if I had known you were going to do this I would not have retained another expert, we might not have done all of this other discovery," and you know, this -- this ain't fair, this ain't right rule. I mean, if the objective is to minimize costs, it ought to be an objective that applies to both sides, not just one side, and so that's the problem with permitting a trial court to amend the order.

I mean, just -- it just seems to me there has to be a point at which the opportunity to take it up is over, and you can't play games by amending the order because there are -- there are real economic consequences to the other side also.

CHAIRMAN BABCOCK: Yeah, Bill.

PROFESSOR DORSANEO: Well, if enough people think that then another sentence is needed to say that you have to do this within some period of time in the case or after the order to be appealed was made. I mean, we have a lot of new judges in some counties and --

CHAIRMAN BABCOCK: You got any in mind?

PROFESSOR DORSANEO: -- they might be inclined to want to after seven days of trial get help from somebody on a difficult legal question.

HONORABLE DAVID EVANS: After seven minutes.

PROFESSOR DORSANEO: Well, I saw this happen after seven days of trial, and there was a mistrial granted. All of this anecdotal stuff is entertaining as it is, but a mistrial was granted and then a partial summary judgment subsequently granted where the judge changed his mind back again to his original -- to his original ruling, so we're back where we were on the sixth day of trial, but, of course, those days need to be done over. Inexperienced judges might do this really late in the game in order to, you know, avoid embarrassment, reversal, get better advice, where an experienced judge would just say, okay, and we just keep going.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: Well, and as I said earlier, I think it's presumptuous of us to pretend that we

can know all the circumstances that might cause a party to come in six months or six years after the initial order and request certification for an interlocutory appeal. There's just too many unknowables.

CHAIRMAN BABCOCK: Well, when I first read this, trying to think about how it would work practically, I was thinking, just reading this myself, perhaps misreading it, that if I -- if partial summary judgment was denied, but it was eligible for interlocutory appeal under this new statute, in my own mind I was thinking, boy, I'm going to really have to hustle up and get a motion on file and get it heard and get a ruling and then have something ready to go in the court of appeals so that I can be there in the court of appeals, all of that within 15 days. That's the way I read it. That's the way I thought I was going to have to do it. Now, that may be what the Legislature intended, it may not have been what they intended, but that's what I was thinking, so that's one way to do it, and that's the way that Bill has drafted this draft rule. That's the way it's drafted right now.

PROFESSOR DORSANEO: Right.

CHAIRMAN BABCOCK: The other way to do it is to say, as some people have suggested, that we draft the rule so that the Supreme Court tells everybody, "Look, it's really not that quick a deal, you can come in 30 days

later, 60 days later. Obviously you're going to run into the problem Judge Christopher alludes to, which is, well, wait a minute, if it's so damn important why did you wait so long, but nevertheless you could do that and still comply with the statute. That's a big difference. That's a big difference, and we ought to think about whether the statute -- you know, how the statute is teaching us on this and how we ought to address it, but let's do that after our morning break.

(Recess from 10:42 a.m. to 11:07 a.m.)

CHAIRMAN BABCOCK: Bill, it looks like -- it looks to me like the problem we've been talking about is raised in your attachment A, proposed Rule 28.2(a)(2), which is going to need some -- some different language if we're going to follow the Dorsaneo/Evans approach, and since our deadline is today to get this to the Court I wonder if rather than try to draft with 30 or so people, maybe you and Judge Evans could try to draft something over lunch and come back to us with it and then we'll talk about the rest of the rule.

PROFESSOR DORSANEO: That's fine with me.

CHAIRMAN BABCOCK: Okay with you?

HONORABLE DAVID EVANS: Agreed.

CHAIRMAN BABCOCK: Okay.

HONORABLE DAVID EVANS: I will agree to

everything that Bill writes.

CHAIRMAN BABCOCK: So we'll handle the problem that way, and let's look at the rest of the draft rule, and, Bill, are there -- we've already vetted this once, albeit sometime ago and with a different statute, slightly different statute, but, Bill, is there anything that you want to bring up that you think we ought to discuss or --

PROFESSOR DORSANEO: Well, yes. The contents of the petition, our draft rule from years ago contained the same or very similar language to what's in my draft proposal, except it also had a couple of additional provisions talking about including a statement in the petition that all parties agreed to the order, court's order granting permission to appeal. That's also -- that's also in 28.2. Now, maybe -- for those of you that brought a rule book you can look at 28.2, which is what we -- what the Court ended up passing and we ended up recommending that the Court pass after the 2005 amendments, and, you know, it was itself based on -- in part on our draft proposed 28.2, so the -- I guess I ask the committee as a whole to look at the things that I put back into this proposed 28.2, and I didn't absolutely cross-check it against 28.2, but I think it includes the same or very similar things, with one exception.

Justice Christopher pointed out to me something that we didn't -- we didn't think about in 2005, and that's how the petition would be handled in the First and Fourteenth Courts of Appeals districts, so I added an additional thing in my handwritten notes that would go in as either (f) or perhaps earlier in the list, that would need to be in the petition, and I wrote it like this, modeling it on similar language in the notice of appeal rule: "State the court to which the appeal is directed unless the appeal" -- and maybe that language should be different. Could be "State the court that is requested to accept the appeal" but, you know, "to which the appeal is directed" appeals to me, "unless the appeal is to either the First or Fourteenth Court of Appeals," in which case the petition must state that the appeal is to either of those courts, so I make it make this petition for appeal say the same thing that a notice of appeal --

HONORABLE TOM GRAY: Well, then you're going to have to accommodate for the other overlapping counties in the northeast Texas where the parties have a choice.

PROFESSOR DORSANEO: Well, we haven't done that so far. Do you think we should do that generally?

HONORABLE TOM GRAY: I guess it's only the First and Fourteenth that are affected because they have the lottery or allocation.

PROFESSOR DORSANEO: Right. They have the local rules.

MR. GILSTRAP: You can always -- in those counties you can always pick what court you're in.

HONORABLE TOM GRAY: Right.

CHAIRMAN BABCOCK: Right.

PROFESSOR DORSANEO: So that's the only thing there.

CHAIRMAN BABCOCK: Okay.

PROFESSOR DORSANEO: The other thing has to do with the timing for the notice of appeal, and I, frankly, made a mistake in (e)(1) when I put down 15 days. "In order to perfect an appeal a party to the trial court proceeding must within 15 days." I think we just change that to 20 so it's the same as accelerated appeals generally, but I didn't just cross-reference 28.1 with respect to perfection of this accelerated appeal, notwithstanding the fact that the Legislature says that the accelerated appeal rules apply, because they don't always apply. The time for perfecting the appeal is 15. Now, my recommendation, 20 days, after the court of appeals signs the order accepting the appeal. Okay. That's the timing in the statute based on the last sentence of (f).

So where I would need people to read carefully and to check on me would be in the contents of

the petition, which I -- which we talked about a lot, you know, in 2005. That doesn't mean that it's -- that it's -- doesn't require additional work. And then I've added as now as (f) "state the court of appeals to which the appeal is directed" based on Justice Christopher's good suggestion to me by e-mail.

CHAIRMAN BABCOCK: Okay. Lisa has got a younger memory than either you or I, so what do you remember about that, Lisa?

MS. HOBBS: I didn't remember about that. I just have some comments about the technicalities.

PROFESSOR DORSANEO: Okay.

MS. HOBBS: In your draft 28.2(b)(2), "The petition must be served on all parties." I think that's already in Rule 9.5(a), which says you have to serve all -- all documents filed in the courts of appeal have to be served on parties, so I think that's redundant. In subsection (3) you note that the response time stems from service, and in the appellate rules almost everything else does -- starts ticking from filing, not service, so it seems like we don't want this rule to be different from everything else in the TRAPs.

PROFESSOR DORSANEO: So would it work just the same if I just substituted the word "filed"?

MS. HOBBS: Yes. So I would strike

subsection (2), change (3) to (2), substitute the word "filed" for "served" in (2). In subsection (3) I would just -- I would actually -- my recommendation would be to just title that "Length of petition" because all papers -- Rule 9 already applies to all documents filed in the courts of appeal, so that's redundant; and our rules already talk about how many copies the courts want; and it's based on whether they e-file versus paper file; and so it seems like you might not want to add another layer, so I would strike that last sentence, too, and then just -- I would instead of "except by the appellate court's permission" I would just add on the last line saying, "The court may on motion, permit a longer petition," only because that's the language we use in 5.6 or 53.7. That's just a consistency point.

PROFESSOR DORSANEO: Lisa, tell me that exact language again.

MS. HOBBS: "The court may," comma, "on motion," comma, "permit a longer petition." And subsection (d) you require somebody, it's unclear who because it's passive, to serve a copy of the court's order granting permission, and I would strike that sentence. 12.6 already places a duty on the court of appeals clerk to serve a copy of all court notices and orders on parties, so I would -- I would want that duty to be on the court clerk and not on the parties themselves, and service sort of implies parties

and not court, but --

PROFESSOR DORSANEO: So the whole sentence you say should go.

MS. HOBBS: Yeah, I think it's already covered by 12.6.

PROFESSOR DORSANEO: And this is -- and I would say, you know, I'm making all of these changes. These are all changes that you're suggesting with respect to the committee's work, not necessarily my work.

MS. HOBBS: Okay.

PROFESSOR DORSANEO: All right. These are all things that were discussed, you know, over four days, in May.

CHAIRMAN BABCOCK: Wait, are we in Washington? We're passing the buck?

MS. HOBBS: And these are just my comments.

CHAIRMAN BABCOCK: Was Lisa on the committee, by the way?

PROFESSOR DORSANEO: She was here.

CHAIRMAN BABCOCK: How come she didn't figure it out the first time? Frank.

MS. HOBBS: And then finally on (e) --

CHAIRMAN BABCOCK: Oh, I'm sorry.

MS. HOBBS: -- a bigger question is the way this is drafted now, what constitutes perfecting an appeal

is three things, filing with the trial court, filing with the court of appeals, and paying your fees; and until all three of those things are done your appeal isn't perfected; and I think that's different than what we do, which is as long as you file it in the trial court your appeal is perfected; and you have to do all these other things, but that doesn't relate to perfection, and I would prefer that to remain the rule today, is one thing requires perfection and the other things you've got to do, but that we have a date certain of when something is perfected based on the one thing being done.

HONORABLE SARAH DUNCAN: That's why the previous rule was written as it was. I was just looking to check, and it just says you perfect just the way you do under 25.1. Much easier.

CHAIRMAN BABCOCK: Okay.

HONORABLE SARAH DUNCAN: And more sure.

MS. HOBBS: That's all I have.

PROFESSOR DORSANEO: Certainly I agree with that, with the docketing statement is certainly not something we want to include in the perfection.

MS. HOBBS: Right. Or the fees. I think fees is important because people -- your secretary forgets to send the check or whatever.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: This may have been partly addressed by the suggestion that we put a provision at the end of (c) saying, "The court may by motion permit a longer petition." The way it is now we only have 10 pages, and I don't think that's enough. The Federal rule, Federal Rule 5, gives you 20 pages. Now, think about this. It takes one page to say what's in the petition, and we're limiting people to 10 pages. You've got to explain the case to the court, you've got to say why it involves a controlling question of law, why there's a substantial ground for difference of opinion, and why an immediate appeal may materially advance the ultimate termination of the litigation, and you've only got 10 pages.

This is kind of like a petition for review. It's a -- as I understand it, it's a discretionary act by the court of appeals to take the case. On a petition for review you get 15 pages plus a statement of the case and the opinion of the court of appeals and an appendix and then the court can then request further briefing. Well, the court can't request further briefing here. It has to read that and decide whether to take it and then you go forward with the appeal, and the court's got to hear it.

CHAIRMAN BABCOCK: So what's your proposal?

MR. GILSTRAP: Well, I think we -- I think we need a longer -- I think we need 20 pages. I mean, I can't

imagine -- I mean, we all love brevity, but think about trying to explain all that to the court and all the court of appeals is going to see are your 10 pages, whatever the response is, and the order, which may be two lines.

CHAIRMAN BABCOCK: Yeah, Justice Bland.

HONORABLE JANE BLAND: I agree with all of Lisa Hobbs' comments, but I would say that if we change the time running on the response to the filing, which I think we should, then we should extend the time for the response out from 7 days to maybe 10 days to allow for the difference between filing and service; and, secondly, Frank, if we can barter this, the petitions for review are 15 pages, so I know we have 10, which I think is plenty. You're suggesting 20. How about we compromise at 15?

MR. GILSTRAP: Anything would be better than 10.

CHAIRMAN BABCOCK: Yes, Justice Brown.

HONORABLE HARVEY BROWN: I personally think it would be helpful to have a copy of the motions in play attached, but I'm a little fearful because some summary judgments are so long, so I would say the motion without any attached exhibits or -- without any attached exhibits.

CHAIRMAN BABCOCK: Okay.

HONORABLE HARVEY BROWN: Or any response would be helpful.

CHAIRMAN BABCOCK: Who else?

HONORABLE TOM GRAY: I was just going to speak on behalf of 10 pages and why it would be appropriate in this situation over 15 or 20, and that's because unlike a petition that may have multiple issues that you're trying to get the Supreme Court's attention on, presumably this is a single issue and should be more -- if you can't focus it in 10 pages, you've got a bigger problem than a page limit, would be my argument for sticking with a very brief 10 pages.

CHAIRMAN BABCOCK: Judge Evans.

HONORABLE DAVID EVANS: Should we consider requiring that the trial court's order to identify the question of law and to make a finding that it would advance it? That would at least give the appellate court the idea of what the trial judge thinks he's asking about.

HONORABLE TOM GRAY: Isn't that what item (c) is under (b)(1)?

HONORABLE DAVID EVANS: If it is then I'm going to step out, Tom, and go somewhere else. Let me see.

HONORABLE TOM GRAY: And the reason I noticed that, I thought that's what that was, I thought (d) and (c) were kind of out of order in the sequence.

HONORABLE DAVID EVANS: But I thought that was just the party's order. I didn't see that the trial

court was required to sign an order. Is it in (c) there?

HONORABLE TOM GRAY: Oh, it -- that's back to the statute.

HONORABLE DAVID EVANS: Well, if the court has to find that there is, but it doesn't say that the order has to contain it.

HONORABLE TOM GRAY: Oh, you're saying that the order permitting the appeal --

HONORABLE DAVID EVANS: The order permitting appeal --

HONORABLE TOM GRAY: -- would have to have a finding --

HONORABLE DAVID EVANS: Well, the way I've written it out would have to -- "The order to be appealed must identify the controlling question of law to which there is a substantial ground for difference of opinion and contain a finding that an immediate appeal from the order may materially advance the ultimate termination of litigation." So the trial judge would identify the question of law that he or she wants the guidance on.

HONORABLE TOM GRAY: Someone is whispering in my ear, and it's not Hayes, that the problem with that may be that that belongs in the Rules of Civil Procedure as opposed to the Rules of Appellate Procedure, but that's not to say we --

HONORABLE DAVID EVANS: I don't have a disagreement that it -- place, but this just lets the advocate identify the issue as opposed to the trial judge who is looking for -- who says, "This is a question I need answered in order to proceed."

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, if we're going to add something that actually provides some detail to the court of appeals I'm for that, but not a rogue recitation. I mean, isn't it assumed you found that it would further the law if you approved it? I'm against rogue recitations.

HONORABLE DAVID EVANS: No, I said "identify." You have to identify --

HONORABLE STEPHEN YELENOSKY: Yeah, the first part --

HONORABLE DAVID EVANS: The judge has to identify.

HONORABLE STEPHEN YELENOSKY: But any findings that are assumed by what's required in order to send it up I wouldn't put in the order.

CHAIRMAN BABCOCK: Sarah, then Lonny, Professor Hoffman.

HONORABLE SARAH DUNCAN: I would like the trial judge to at least have the opportunity to state what

he or she believes to be the controlling question in as neutral a language as is possible, I would go further and say not only that they have to make a finding that it would materially advance the litigation --

HONORABLE STEPHEN YELENOSKY: And how.

HONORABLE SARAH DUNCAN: -- but also how.

CHAIRMAN BABCOCK: Okay. Lonny.

PROFESSOR HOFFMAN: Is there a space for amicus briefs in interlocutory appeals?

HONORABLE SARAH DUNCAN: Sure.

PROFESSOR HOFFMAN: And does the rule -- is there a rule that already governs this?

PROFESSOR DORSANEO: Well, there's --

MS. HOBBS: Yes, there's a rule that governs that.

PROFESSOR DORSANEO: An amicus rule.

PROFESSOR HOFFMAN: So would it apply to -- so we don't need to say anything in this rule about it. It already applies.

PROFESSOR DORSANEO: No.

MS. HOBBS: It's Rule 11.

HONORABLE TOM GRAY: It wouldn't apply to the petition, but once the petition was granted and the appeal was perfected then any amicus brief could be received.

HONORABLE SARAH DUNCAN: Why do you say it

wouldn't apply to the petition?

HONORABLE TOM GRAY: Well, it wouldn't necessarily not apply, but just timingwise I'm just thinking --

HONORABLE SARAH DUNCAN: I don't see anything in the amicus rule that prevents me from filing an amicus brief in support of a petition for interlocutory appeal. Do you?

HONORABLE TOM GRAY: No, I don't think it would be prohibited or not. I'm just saying that as a practical matter we're going to already have denied it by then.

HONORABLE SARAH DUNCAN: I believe that.

CHAIRMAN BABCOCK: Okay.

HONORABLE SARAH DUNCAN: Laughter. Laughter.

CHAIRMAN BABCOCK: This is all great stuff. Richard.

MR. MUNZINGER: Why do we have a prohibition against filing motions for rehearing?

PROFESSOR DORSANEO: We don't want them.

MR. MUNZINGER: Why? Why?

CHAIRMAN BABCOCK: That's --

PROFESSOR DORSANEO: That's what we voted on last time. That's why.

MR. MUNZINGER: I understand that's what the

committee did, but, I mean, do appellate courts make mistakes and change their minds? Of course they do. Are appellate judges perfect? Of course they're not. If my client is hurt why can't I ask you to change your mind? I think that's a -- I don't think that's a good rule at all. Justice is for the citizens, not the courts.

MR. GILSTRAP: Along those lines, Chip, I notice the Legislature is now -- allows these appeals to go to the Supreme Court.

CHAIRMAN BABCOCK: Right.

MR. GILSTRAP: Which wasn't the case before, I don't think, so maybe that fits in with the -- maybe we need to allow motion for rehearing.

CHAIRMAN BABCOCK: With the rehearing. Good point. Yeah, Carl.

MR. HAMILTON: If the court on its own initiative certifies some question, who is the appealing party?

HONORABLE TOM GRAY: Whoever files the notice of appeal.

PROFESSOR DORSANEO: Yeah, that's probably right.

CHAIRMAN BABCOCK: Yeah.

MR. HAMILTON: Either one?

HONORABLE TOM GRAY: Because all the trial

court has done is given permission, and the court has granted the petition. Then somebody is going to file a notice of appeal.

CHAIRMAN BABCOCK: Yeah, that's a good point.

MR. MUNZINGER: Different subject, Rule 28.1(a) currently has a parenthetic phrase that says "Types of accelerated appeals. Appeals from interlocutory orders," paren, "when allowed as of right by statute," close paren, and I think that the words, "when allowed as of right" are superfluous and probably confusing under the new circumstances and should be deleted.

THE COURT: You're talking about the present rule or the proposed attachment A?

MR. MUNZINGER: The present rule has this "when allowed as of right," and I don't think this would be an appeal allowed as of right. It's in the discretion of at least two courts.

PROFESSOR DORSANEO: Well, but this isn't in 28.1, but it kind of is by reference to the legislative statement that it kind of is, so I think that should come out.

MR. MUNZINGER: If you took it out it would just say "when allowed by statute," and that would cover this circumstance.

PROFESSOR DORSANEO: Well, you don't even

need to say that. Okay. You just take out the whole parenthetical. The reason why it was in there is the distinction was drawn between -- in the drafting process between appeals as of right and appeals --

CHAIRMAN BABCOCK: Permissive.

PROFESSOR DORSANEO: -- that are permitted.

CHAIRMAN BABCOCK: Yeah.

PROFESSOR DORSANEO: But 28.2 morphed into something else because the statute changed, and now it's changed kind of back.

CHAIRMAN BABCOCK: Right. Okay. Any other comments about 28.2?

HONORABLE STEPHEN YELENOSKY: Are we leaving in no motion for rehearing then or is that off the table?

CHAIRMAN BABCOCK: I'm sorry, Judge, what?

HONORABLE STEPHEN YELENOSKY: The no motion for rehearing, are we leaving that in?

CHAIRMAN BABCOCK: Well, the issue is on the table. You know, I don't know if we need to vote. What's your thought about it?

HONORABLE STEPHEN YELENOSKY: Well, I just think enough is enough. I mean, you've created an interlocutory appeal and, sure, judges can make mistakes, but if you have a motion for rehearing that same argument would argue, well, then you should be able to ask a third

time and a fourth time. So enough is enough. Trial judges make mistakes, but we don't always entertain motions for rehearings, and this is a special thing that they can bring up again later.

CHAIRMAN BABCOCK: Okay. Justice Christopher.

HONORABLE TRACY CHRISTOPHER: In (b) we don't put in the names and addresses of pro ses. I can't imagine that there would be too many, but there might be, and I wouldn't put "telefax number" in. It's not in our normal brief requirements and people just -- nobody faxes anymore.

PROFESSOR DORSANEO: Tracy, what should we just take out -- make that telephone numbers or --

HONORABLE TRACY CHRISTOPHER: Well, you know, just in our normal briefs we don't -- we just say names and addresses.

CHAIRMAN BABCOCK: Yeah. And nobody calls it telefax anymore either.

HONORABLE TRACY CHRISTOPHER: And no one calls it telefax.

CHAIRMAN BABCOCK: This is a 2005 draft.

HONORABLE TRACY CHRISTOPHER: This is where the e-mail address is going to go.

CHAIRMAN BABCOCK: This is where we've come from in six years.

PROFESSOR DORSANEO: Look at the rule. It says "telefax numbers" in 28.2 now, so I think that's probably Jody's work.

CHAIRMAN BABCOCK: There we go. Sarah.

HONORABLE SARAH DUNCAN: Why does (d) presume -- (d) as in dog, presume that there will not be argument, oral argument?

MR. GILSTRAP: Well, that's on the petition, not on the case, right?

PROFESSOR DORSANEO: Yeah, right.

CHAIRMAN BABCOCK: Right. That's the way I read it.

HONORABLE SARAH DUNCAN: Okay.

HONORABLE TOM GRAY: I think it's because of the same reason that we decided that we didn't want a motion for rehearing. This whole thing is a collateral proceeding, and you're talking about speed and trying to get to an answer, and oral arguments generally take more time for an ultimate disposition.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: I mean, I know we're in a time bind on this, we need to get this out, but I still would recommend having something in the Rules of Civil Procedure with respect to what the order should look like because I think that really helps the trial judge. It

helps the practitioners who look there first.

PROFESSOR DORSANEO: Yeah. I agree with that, especially now that it's not agreed anymore. That pretty much took care of it, you know. We even had a question as to whether the parties agreed to it, is that the -- you know, at one time is that the end of it --

CHAIRMAN BABCOCK: Yeah.

PROFESSOR DORSANEO: -- or must the courts go along with it, or does it still have to be a controlling -- blah-blah.

MR. PERDUE: And I would -- it also solves the order of which you are appealing question. If you -- I had written at the break if you had a Rule of Civil Procedure that the order from the trial court has to address what it is that they are, quote-unquote, "certifying for appeal," then you solve this 15-day issue in the statute and that the order mandated by Rule of Civil Procedure by the trial judge is capturing that which you are appealing from. He's granting it, or she's granting it, but you're then capturing the issue in that order.

CHAIRMAN BABCOCK: Yeah, but the problem is there's got to be some trigger for the trial judge to think "I need to address this." It wouldn't address it as a matter of course.

MR. PERDUE: It wouldn't, but it would be --

it would -- the rule would essentially do exactly as Judge Evans was talking about, is you would have a rule essentially directing the trial judge that they are now -- they're finding that this is a question that should be appealed from and, therefore, you now have an appealable order as contemplated by the statute so that you don't have this conflict that everybody was worried about on the 15 days, so it -- and it also clarifies the issue, quite frankly, because if you have a partial motion for summary judgment that's got four issues and you've got a denial and then you get a one-sentence order that says, "I agree there's a controlling issue of law that can be appealed from," which one is it? And I don't think that's fair to anybody or the court of appeals.

CHAIRMAN BABCOCK: Do you think that ought to be put in 166a?

MR. PERDUE: Well, it's not only a summary judgment issue, though.

CHAIRMAN BABCOCK: Yeah, that's true.

MR. PERDUE: I mean, you can have a controlling issue that may not necessarily be a 166a issue. So I don't know where it goes.

CHAIRMAN BABCOCK: Oh, thanks.

PROFESSOR DORSANEO: You let Lisa be on our lunch committee, and I'll look at that, too.

CHAIRMAN BABCOCK: Lisa is hereby banished to your lunch committee. Judge Evans.

HONORABLE DAVID EVANS: I don't profess to know what can be put in the appellate rules, but I know that sometimes I have to go look at them to find out what I have to do as a trial judge, and I handled *In Re: Mikey's House*, which was an interlocutory appeal on a decision of whether or not you could have a jury trial or not, but had a written waiver of jury trial, and that was simply on a motion that was brought to me as to whether we're going nonjury or jury, so it's not a summary judgment. I don't know where you would place it in the Rules of Civil Procedure, but if it wouldn't do great harm to the TRAP rules I'm not sure that you couldn't say that the rule -- "an order is not appealable unless it identifies."

CHAIRMAN BABCOCK: Yeah.

MR. PERDUE: We've got that with new trial, don't we?

CHAIRMAN BABCOCK: Well, lest you take on too much lunchtime work, concentrate on (a)(2) first.

HONORABLE DAVID EVANS: Sure.

CHAIRMAN BABCOCK: Get that done. If there's time to work on a civil procedure rule then great. What other -- what other comments to this proposed rule? These are all great comments, by the way. Anything else? Okay.

Well, then we will move on and await -- await the lunch bunch's drafting, and, Elaine, let's go to offer of settlement.

PROFESSOR CARLSON: All right. You'll recall that following the passage of House Bill 4 in 2003 the Legislature enacted Chapter 42 of the Civil Practice & Remedies Code and allowed defendants to elect whether they wanted to put in play a potential fee shifting when an offer to settle was made and was, quote-unquote, "unreasonably rejected." That chapter made it optional that a defendant may choose to make a settlement offer under fee shifting if they put it in play by a timely declaration or not. That has not changed. If a defendant elects to put fee shifting in play and files a declaration to that effect, an offer then would follow, and it could be made by either party, and if the offer is unreasonably rejected, which is defined in the statute and the corresponding Rule 167, then the offerer could recover litigation costs that ran from the date of rejection of the offer to the day of judgment. That's the grand scheme, and, of course, the devil is in the details.

You'll recall that under the statute and Rule 167 if a plaintiff gets -- if a plaintiff unreasonably rejects a settlement offer made under Chapter 42 the plaintiff is subject to paying litigation costs that are

defined in the statute and the rule, but there's a cap. A plaintiff can never be required or a counterplaintiff can never be required to pay out-of-pocket litigation costs, even though they might have unreasonably rejected an offer. None of that has changed. But what has changed is what litigation expenses get shifted when an offer is made under Chapter 42, and the ceiling has changed.

One of the changes that were made in House Bill -- what are we on here, 242 -- 274, I'm sorry, is that ligation expenses that can be shifted include not only costs from the date of rejection, reasonable attorney's fees, and reasonable expenses of two testifying experts, the statutory change made in this last session now would include in that sum of fees to be shifted reasonable deposition costs. So one of the changes that you can see that I made under Rule 167.4 -- and this is the handout that at the bottom lefthand column -- top says "Rule 167," the bottom says "Draft 8-12-2011." If you turn to page three you'll see then under 167.4, subsection (c), litigation costs now includes reasonable deposition costs, and of course that's from the date of rejection to the day of judgment, and that's just mandated by the statutory change.

In that same section, 167.4, subsection (c), I changed the wording in the first sentence to say,

"Litigation costs are the expenditures actually spent as opposed to its current provision, which is actually made." I did that because when I looked back at Chapter 42 that's the language that the court -- that, sorry, that the Legislature used, and I know there's been some case law dealing with spent and incurred, and so in the interest of consistency I recommended that that change be included.

It used to be that a party who unreasonably rejected an offer when fee shifting was in play under the statute could not be required to pay more in litigation costs than 50 percent of their economic damages, a hundred percent of noneconomic, and a hundred percent of punitives. The other key -- there's several other subissues. The other key change made by the Legislature to Chapter 42 is now that sum has been enlarged to the entire amount, a hundred percent of economic damages, a hundred percent of noneconomic damages, a hundred percent of punitive damages.

So while a plaintiff cannot be required to reach in their pocket and pay litigation costs they can lose everything that they were awarded in damages, and so when you look at on page four of subsection (d) of 167.4, (d), you'll see that the language that's included there is, I believe, precisely what the statute reads. I didn't try and change the language at all. I did include "to any party." So now 167.4(d), page four, says, "The limit on

litigation costs. The litigation costs that may be awarded to any party," because that's how the statute now reads. This applies to plaintiff and defendant. There's a cap on both sides, depending on who unreasonably objected if fee shifting is in play. "Must not exceed" -- and this is tracking statutory language -- "the total amount that the claimant recovers or would recover before adding an award of litigation costs under this rule in favor of the claimant or subtracting as an offset an award of litigation costs under this rule in favor of the defendant." So that's precisely the language that the Legislature chose in House Bill 274, so I believe that's now consistent.

An additional change that was made in 274 is in the original Chapter 42, and our rule there is a provision for some types of cases to which fee shifting does not apply. It goes from class actions all the way down to actions brought in the justice of the peace court. That's how the original statute read. When we voted on our proposal of Rule 167 -- and you'll go back to page one now, if you will, of Rule 167, the handout. You'll see under 167.1(f) we've always included an action filed in the justice of the peace court or small claims court. The last legislative change to House Bill 274 added small claims court. We already have it in there, and with the irony being they're going away anyway. So we're just kind of

dotting our I's and crossing our T's here.

Okay. Looking over to page five of Rule 167, proposed draft 167, the Legislature also in its modifications this year included this statement in the statute: "The parties are not required to file a settlement offer with the court." You'll see on page five, our current Rule 167.6 provides without the additional proposed language currently, "Evidence relating to an offer made under this rule is not admissible except for purposes of enforcing a settlement agreement or obtaining litigation costs. The provision of this rule may not be made known to the jury by any means." So I would suggest that our current Rule 167.6 covers the situation. I'm not sure what the Legislature was thinking when they said, "Parties are not required to file a settlement offer." I suspect they were thinking, well, we don't want to require the parties to file something with the court and advise the trial court that there's this potential settlement out there unless the court needs to know it. I don't know if that's their thinking or not. So I don't know if I got this right. I may not have.

On 167.6 I modified our current rule with this proposal, that "Evidence relating to an offer made under this rule is not admissible and should not be filed with the court except for purposes of enforcing the

agreement or obtaining litigation costs." I don't know how you would otherwise enforce the agreement or obtain litigation costs without filing with the court at that point. So I'm hoping that's consistent with the legislative thought. I'm not sure. Finally, when you look at 167.7 of the proposed draft on page five I attempted to incorporate some changes the Legislature made in House Bill 274 to the language of Chapter 42. The former version of Chapter 42 said, "An offer to settle or compromise that is not made under this chapter does not entitle any party to recover litigation expenses." The Legislature changed that to say, "An offer to settle or compromise that doesn't comply with Section 42.003." So instead of "this chapter," "42.003," which is their provision for what needs to be included in an appropriate offer to settle made under the chapter.

All right. And, of course, it makes you go on and say the original version and the prevailing version, before and after the statutory change, empowers the Texas Supreme Court to enact rules to implement the statute and gives the Court the authority, and I quote, "to designate other matters considered necessary to the implementation of the chapter." So with that wiggle room I did not put in "in compliance with 42.003" in 167.7 only because we generally are not referring to outside statutes because

they change. Hope springs eternal. Our rule is -- and I believe this in my heart to be true -- complies with 42.003. Everything in 42.003 I believe is in our rule, so I put "a settlement offer not made in compliance with this rule" as opposed to "42.003." If the Court is not comfortable with that or the committee, then that can be an easy substitution. I just know that we generally do not cross-reference statutes in our rules, but that's not written in stone.

And then I thought this was a fine point, but when I looked back at the language in the proposed Chapter 42, they use the language "as to any party." So the Legislature in my view is saying if a offer to settle is not made that is compliant with the requirements of the statute and the rule then no fee shifting shall occur as to any party, and so I included that language "as to any party" in Rule 167.7.

Our rule does not track precisely the language that the Legislature used because it would have required a little bit of brief finessing of the entire rule, but I believe 167.7 comports with the statutory changes in that regard, not made in compliance with the rule, there's no fee shifting, made as to an offer in which the statute doesn't apply, or to a consistent class actions, et cetera, and that is true as to any party. So

if there's an attempt to make a fee shifting offer and it's defective, it doesn't comply with the statute or the rule, and the -- ends out it's rejected and you go to trial and the judgment is significantly less favorable by the margins that remain the same, pre-House Bill 242 to the current -- I'm sorry, 274. I keep saying 242. Then there is no fee shifting that occurs as to any party. That's the language that the Legislature used, and I guess they mean as to any party. So those are my suggestions, and I don't know how you want to take this, Chip, one at a time or just general comments.

CHAIRMAN BABCOCK: Confirm by acclamation would be my preference.

PROFESSOR CARLSON: Or confirm by acclamation.

CHAIRMAN BABCOCK: What comments do we have about any --

MR. SCHENKKAN: I wanted to ask about the bottom of page three of the draft 167.4, awarding litigation costs. In (c) "The litigation costs are expenditures actually spent and the obligations actually incurred." I know we went over all of this when we did the rule originally, but I'm puzzled as to the difference between that wording and the wording in the statute at 42.004(c), which I gather has not changed from before,

which says, "The litigation costs that may be recovered by the offering party under this section are limited to those litigation costs incurred by the offering party after the date." So the statute says "incurred." The rule says "expenditures actually spent and obligations actually incurred." Is there a difference between those two concepts, and if so, what is it, and is it desirable or permissible under the statute?

PROFESSOR CARLSON: Actually House Bill 274 amends 42.001 --

PROFESSOR DORSANEO: (5).

PROFESSOR CARLSON: Uh-huh. To say "a litigation cost means money actually spent and obligations actually" --

MR. SCHENKKAN: It's in the statute where?

PROFESSOR CARLSON: It's in the statute. Page four of the statute under section 4.01, subsection (5).

MR. SCHENKKAN: Okay. All right. Sorry.

PROFESSOR CARLSON: That's why I made the change. I thought, well, maybe "made" means something different than "spent." I don't know, but I know that "spent" and "actually incurred" is in other statutes as well.

PROFESSOR DORSANEO: But it doesn't say -- it

doesn't say -- where am I? "Expenditures actually spent." It says, "money" --

HONORABLE JAN PATTERSON: "Money actually spent."

PROFESSOR DORSANEO: -- "actually spent."

MR. SCHENKKAN: What do we do with that in 42 --

PROFESSOR DORSANEO: I guess cost means money actually spent and obligations actually incurred.

MR. SCHENKKAN: And that was already in 42.001(5), and I'm just saying so was what I just read out of 42.004(c), was also already in there. Either one of them has been changed. I'm not quite sure. I still have my question, but it no longer really goes to the rule, but it goes to the two different provisions of the statute that don't use the same wording.

PROFESSOR CARLSON: Right.

MR. SCHENKKAN: The definition of "litigation costs" includes money actually spent and obligations actually incurred, but the statutory provision for what litigation costs may be recovered is limited to those incurred. So I'm confused.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: I actually like the language that was in there before unless we change

"expenditures" to "money," like the statute. If we want to sedulously follow the statute say, "Litigations costs are money actually spent and obligations actually incurred" or just leave it as "expenditures actually made."

CHAIRMAN BABCOCK: Elaine, what do you think?

PROFESSOR CARLSON: I don't know that there's really a difference. We're just being overly cautious tracking.

PROFESSOR DORSANEO: Some of the language.

PROFESSOR CARLSON: But we can change "money" from "expenditures." That's what Bill's saying. If you're going to track, "money actually spent" or leave it "expenditures actually may."

CHAIRMAN BABCOCK: "Costs are money actually spent and obligations actually incurred."

PROFESSOR CARLSON: Uh-huh.

CHAIRMAN BABCOCK: That's what Bill's suggestion is.

PROFESSOR DORSANEO: You need these so you can see?

CHAIRMAN BABCOCK: Boy, there's a fair amount of academic --

PROFESSOR DORSANEO: There's a lot of old people over here.

CHAIRMAN BABCOCK: -- stuff going on here.

Anybody else? Yeah, Carl.

MR. HAMILTON: Well, 167.6 before the change you added we were talking about the evidence to enforce a settlement obligation. Do you mean that -- I think what you want -- it's not the evidence that's to be filed. It's the offer itself.

PROFESSOR CARLSON: You're absolutely right.

MR. HAMILTON: Huh? Isn't that right?

PROFESSOR CARLSON: You're absolutely right. That's a good catch. So it would read "and the settlement offer should not be filed with the court."

MR. HAMILTON: Yeah. And then in 167.7, is there a difference in an offer made in compliance with the rule or not made under the rule? We need both of those?

PROFESSOR CARLSON: Yeah. You can continue to make a settlement offer that's not under this rule. It's what we had knew to be settlement offers before 2003. Right, let's say you're a defendant and you choose to make an offer and you don't want to put fee shifting in play. You can just make an offer. You don't say this is made under Rule 167. There's not going to be any fee shifting, and that's all this is saying, and again, let me look to the language.

MR. HAMILTON: Yeah, but if I make an offer that's not in compliance with the rule, it's also not under

the rule, right?

PROFESSOR CARLSON: Well, you could make an offer that could be made under the rule but it's defective, or you could choose not to make an offer under the rule at all.

MR. GILSTRAP: Well, to comply with the rule, the rule has got -- the offer has got to state that it's made under Rule 167. On -- on 167.2(b).

CHAIRMAN BABCOCK: Any other comments? Yeah, Rusty.

MR. HARDIN: Elaine, I think my assumption is that the reason this was being done this way is to keep the judges out of really trying to get into settlement conversations, and so wouldn't we want something here that says that at the -- that it couldn't be filed until the time of judgment, until a judgment has been entered or something, so that whether it's judgment entered, judgment rendered or so, so that the court is not made aware of what the settlement offer is prior to trial, because I think the inclination then would be all of the sudden the two sides are going to be -- a judge who wants to get a settlement is going to start potentially getting into the figures business.

PROFESSOR CARLSON: I think that is the intent. How would you word the rule?

MR. HARDIN: "Should not be filed with the court until after judgment." I mean, because certainly after there's a judgment rendered the court has every right to know what the offers were because they've got to do that in order to talk about shifting the costs, but I think the rule ought to have something here to make sure that everybody knows these are not to be filed with the court until there's been the litigations completed.

HONORABLE NATHAN HECHT: Should it be in 167.2?

MR. JEFFERSON: That was going to be my suggestion.

PROFESSOR CARLSON: I struggled with that, to be honest, where to put it.

MR. HARDIN: But as it is here I don't think it tells people when they can.

PROFESSOR CARLSON: Okay.

MR. HARDIN: I'm just talking about a time frame somewhere in there.

CHAIRMAN BABCOCK: So how would you say it?

PROFESSOR CARLSON: Well, you could do it in one of two ways. I mean, if you want to do it in Rule 167.2 as part of the settlement offer rule, you probably want to put it maybe as a new (f). I'm just trying to figure out logically where it would go, you put -- or you

think (g)?

PROFESSOR DORSANEO: (Nods head)

PROFESSOR CARLSON: My colleague says (g).

MR. HARDIN: If we look at 167.2(a), again, it almost sounds like everybody knows what it is that's got to be done 45 days before the case is set.

HONORABLE SARAH DUNCAN: What about in .5, procedures?

MR. HARDIN: We're really talking about the settlement offer has got to be made to the other side, not filed, and so if we could just through this language reach the -- that it's always consistent.

PROFESSOR CARLSON: Are you suggesting that the declaration doesn't need to be filed with the court?

MR. HARDIN: I don't care if a declaration has been made. I do care if the terms of the declaration is made. I just think that if the trial judge knows he's 45 days before trial, he doesn't really want to try this case, and now he's got before him what the defendant is willing to settle it for, and what's going to happen with plaintiffs? They're just going to be hammered and hammered and hammered to get it settled.

PROFESSOR CARLSON: Maybe at 167.6 might read "Evidence relating to an offer made under this rule is not admissible except for purposes of enforcing a settlement

agreement or obtaining litigation costs. A settlement agreement should not be filed with the court" --

MR. HARDIN: Not settlement agreement. The --

PROFESSOR DORSANEO: Offer.

PROFESSOR CARLSON: Settlement offer, I'm sorry, I said agreement. "Settlement offer should not be filed with the court," and you might put there, "until after judgment is rendered except for purposes of enforcing." Would that do it?

MR. HARDIN: Sure. Although I think it would, except I don't know what -- how is it going to be used to do a settlement agreement? That's unclear in my mind. If it's a settlement agreement then the offer -- I don't understand how it fits in. I'm sure I'm missing something. I would just say except for -- why is there anything in addition to obtaining litigation costs? How would a settlement offer be used to enforce a settlement agreement?

MR. PERDUE: Somebody tries to back out and you've got a Rule 11 deal. Seller's remorse, buyer's remorse.

MR. HARDIN: But I think, Elaine, the way you were saying would work, though.

PROFESSOR CARLSON: So that would be changing

Rule 167.6, the first sentence would read -- second sentence, I'm sorry, "Evidence relating to an offer made under this rule is not admissible, and the settlement offer should not be filed with the court until after judgment is rendered" -- but then it says "except," though. That doesn't work, does it?

MR. HARDIN: Well, actually if you used --

PROFESSOR CARLSON: "Only for the purpose"?

MR. HARDIN: Yeah. Well, actually if you just say that, if you just said, "should not be filed with the court," do you really need to add any of that other? If it's not going to be filed with the court until after judgment is rendered then it really wouldn't matter, would it?

PROFESSOR DORSANEO: Well, saying "after judgment" is not good because, you know, let's say in 167.5 it's clear that the litigation costs awarded to a defendant are a set-off in the judgment.

MR. HARDIN: You're right. Yeah, you're right.

PROFESSOR DORSANEO: So it's in the judgment.

MR. HARDIN: Yeah, you're right. You just say "until after verdict is rendered." This is only going to apply when you actually end up with a trial, isn't it?

PROFESSOR DORSANEO: Well, no. It could be a

summary judgment.

MR. MEADOWS: Why doesn't it work as it's written, because you're not going to be in a position to enforce the agreement until you've got an outcome?

PROFESSOR DORSANEO: Yeah.

(Off the record discussion)

CHAIRMAN BABCOCK: Let the record reflect we're talking amongst ourselves.

HONORABLE NATHAN HECHT: Sidebar.

HONORABLE TOM GRAY: You can't -- like Bobby said, you can't do it until you have an outcome, and in a jury trial that's going to be at least tentatively you're going to get to the verdict, but then in a trial before the bench then you may or may not know what or when that's going to come, and you can't wait for the judgment obviously because this has got to be part of the judgment, and somebody is going to want a jury trial on what these fees -- whether or not they're reasonable or not.

CHAIRMAN BABCOCK: Is it -- since the plaintiff's damages, if any, cap the award, would it be "after damages, if any, are awarded"?

HONORABLE SARAH DUNCAN: Juries don't award damages.

PROFESSOR CARLSON: It's not limited to jury, though, is it?

CHAIRMAN BABCOCK: No? Yeah, Bill.

PROFESSOR DORSANEO: I agree with Bobby. I think it was fine the way it was. You know, I'd take out "and should not be filed with the court." Unless it says "and should not be filed with the court" what do they do if you do it? Give you a 15-yard penalty or scold you? You can file things with the court without them being admitted in evidence.

CHAIRMAN BABCOCK: Yeah, but doesn't the statute say that you --

PROFESSOR DORSANEO: No.

HONORABLE DAVID PEEPLES: No, it just says "the parties are not required."

PROFESSOR CARLSON: "To file a settlement offer with the court." So do we want the -- do we want to just track that language?

MS. SECCO: When I read the statute I noted that the rule doesn't require the parties to file with the court, so it didn't really actually require a rule change. We could put it in there to mimic the statute, but the statute never required that the parties file the settlement offer with the court, so I don't think the change is necessary.

PROFESSOR CARLSON: Okay.

CHAIRMAN BABCOCK: Yeah, so just wipe that

out.

PROFESSOR CARLSON: That's fine with me. Yeah, I struggled with that because --

CHAIRMAN BABCOCK: Okay. So just wipe that out and not worry about it.

PROFESSOR DORSANEO: Some fights aren't worth fighting.

HONORABLE NATHAN HECHT: Since the rule will never be used anyway.

MR. HARDIN: Which part did we strike out now?

CHAIRMAN BABCOCK: 167.6, the language that --

MR. HARDIN: Just the underlying portion.

CHAIRMAN BABCOCK: -- had been suggested, "and should not be filed with the court," that's been stricken.

PROFESSOR DORSANEO: I have a question, point of information.

CHAIRMAN BABCOCK: Yes.

PROFESSOR DORSANEO: Does anybody think that this will ever be used by anybody?

CHAIRMAN BABCOCK: That would be a good question for the room. Has anybody ever used this rule?

PROFESSOR DORSANEO: I don't know anybody who

has used this rule.

CHAIRMAN BABCOCK: Judge Christopher.

HONORABLE TRACY CHRISTOPHER: I saw it once.

CHAIRMAN BABCOCK: Huh?

HONORABLE TRACY CHRISTOPHER: I saw it once.

CHAIRMAN BABCOCK: You have a broad litigation experience. Was it when you were on the trial bench?

HONORABLE TRACY CHRISTOPHER: Yes.

HONORABLE STEPHEN YELENOSKY: Did it result in award?

HONORABLE TRACY CHRISTOPHER: Yes.

CHAIRMAN BABCOCK: What happened? Anything?

HONORABLE TRACY CHRISTOPHER: Well, they got money, the defense got money.

CHAIRMAN BABCOCK: Okay. Well, there we go. Anything more about this rule? Motion for lunch?

PROFESSOR DORSANEO: Second.

CHAIRMAN BABCOCK: All right. So carried. We'll be back at 1:00.

(Recess from 12:04 p.m. to 12:58 p.m.)

CHAIRMAN BABCOCK: Before we get to item six, which is expedited foreclosure, Eduardo Rodriguez would like to say something about one of our members.

MR. RODRIGUEZ: I just wanted to --

CHAIRMAN BABCOCK: Not defamatory, right?

MR. RODRIGUEZ: No.

CHAIRMAN BABCOCK: Okay.

MR. RODRIGUEZ: I just wanted everybody to know that when Judge Hecht spoke to us earlier about what the Legislature did with respect to legal services funding and so forth, what he failed to tell you is how much time he spent in Washington earlier this year making sure that at the national level the Congress didn't emasculate the National Legal Services Corporation, which also funds all of our -- partially funds all of our state legal services things, corporations, and he spent three days walking the halls of Congress talking to as many congressmen as he could in three days asking them to support the funding. They were trying to cut back the funding from 419 million to less than 3 -- about 320 million, and we were fortunate that it only got -- they only cut it to about 403 million, but a lot of that help was given to us by Judge Hecht, talking to the Senators, both Senator Hutchinson and Cornyn, but also talking to the individual congressmen, many of whom, as you all know, are not fans of Legal Services Corporation, but he went in there and sat there and explained to them why it was important, and so I thought it was important for you-all to know that he did a really great job for us.

(Applause)

CHAIRMAN BABCOCK: Do you have a rebuttal?

HONORABLE NATHAN HECHT: I can't top that. Thank you.

MR. BAGGETT: Give him a raise.

CHAIRMAN BABCOCK: All right. It says next to the agenda that I'm responsible for this topic, expedited foreclosure, and I'm very glad that Tommy Bastian and Mike Baggett are here because I would have no way of leading us through this discussion, but they are head of the task force that was appointed by the Court and have talked to us before about this several years ago, and now the Legislature has brought it back to us, so have at it, guys.

MR. BAGGETT: I'm going to start and then I will tell you I'm more glad that Tommy Bastian is here than anybody in the room because he's the one that really knows the stuff, and I sort of just hit big picture, and I'm taking the Fifth before I ever start, so be nice to me.

Okay. Let me give you a little history so you'll know what it is. Some of you kind of know what it is to a certain extent, but Texas basically has nonjudicial foreclosure as opposed to the other 22 states that are fighting about foreclosures in great volumes that you hear about in the media and so forth; but what happened when we

got home equity for the first time, since we were the last state that didn't have it, it was a constitutional amendment that passed; and then the home equity legislation, they required the Court to come up with an order dealing with a procedure to go forward on home equity loans if you had a default. So in 1997 we wrote Rule 735 and 736 dealing with home equity only; and what it is, it's an expedited procedure, got -- we'll go into the details of it, but basically you file it and what you do at the end of it is you get an order, and that order allows you then to go do the foreclosure that you would do otherwise.

So remember what we're doing. We're starting and creating a process that results in an order to proceed with foreclosure in the normal fashion that you'd do it, have been for a hundred years; and one of the things we're very concerned about always when we look at these rules is we don't mess up title, land titles and all of that stuff, by having foreclosures that are defective for whatever reason. That creates a lot of real estate type issues. So we got the rule, the Court passed it. It went into play in '97.

So then they came down with reverse mortgages and said, "Would you add those to the rule?" This was '99. So we added reverse mortgages to it, so in that process you've got to file under 735 and 736 this expedited request

for an order. You don't have a hearing. All the different stuff in there is very unusual, but you get an order, so we did that in '99. Then we came home -- came along and the ad valorem taxes, there were issues about how they got foreclosed and the inferior lienholders or the superior lienholders didn't get notice of it, and they primed it and got issues with title and a lot of real estate issues, so they said, "Add that to it," so we added it to it, and I will say with more gusto than we needed to, and we created a very long, long order for an expedited procedure that we sent to the Supreme Court, and they said, "Well, wait for," I think, "the disciplinary rules," and they also probably put in the drawer and said, "We don't want to do this. These people messed it all up." So anyway, it sat there waiting for the disciplinary rules so nothing has ever happened on it.

So in the meantime in the last Legislature they liked it so much, I guess, they said, "We want to now apply it again," and so what we've got to do now is apply it to -- what are we applying to this time? Property owners associations because there's issues in the property owner associations, who gets notice and who doesn't and making sure everybody knows what's going on that may have any interest in the property, lienholders and all that sort of thing, and so we got a request again, "Would you add

property owner association to your rule," and in the legislation it directs that we do it like we had already done 735 and 736. It's in the legislation directing that to be done, so what we've done now is we've taken the rule, it's going to apply to all four of those different circumstances. We had a big volume of stuff. We've cut it back down. We don't have voluminous forms that take up your rules inordinately, is what I remember last time. It's going to be half the pages are our stupid orders I think is one of the words somebody said. I said, "Okay, fine."

So we've gone back down, and we slimmed it back down to apply to all four of those and come up with a rule that does it, and that's our recommendation today, and the man who really knows how to do it is not me. I take all the credit, that's fine; but he's the guy that really knows the rules and the issues; and I just gave him the questions, Judge, I'm sorry, about 30 minutes ago; and he's over here looking at them; and I apologize for that. So, Tommy, you're up for what -- the real part of the law. Has anybody got questions? Big picture, make sure you remember big picture what we're doing. All this ends up in is an order that's not appealable. It's not res judicata. It just lets you go forward with the foreclosure. That's all it is. And apparently the Legislature and the -- likes it,

so they keep directing that we do it some more. Okay, Tommy.

MR. BASTIAN: Let's see, in 2009 we came before this group twice and went through the rules. The proposed rules were 6,430 words, the forms were 7,017 words. The original rules was just 1,875 words, and now this new version that you have in front of you is 2,168 words, so we went from one extreme to the other. In 2009 the document that was prepared that went on forever and ever and ever was designed because at this point in time if you'll go back in history foreclosures were in the headlines everywhere. Courts were being inundated with foreclosures, and we'd have all of these headlines, and so the rules that we've prepared tried to do two things. Number one was educate, and the way the rules were set up and the forms were set up, so if you followed those rules it was almost like cookbook fashion that you would do it right, and this rule that you have now that's now the 2,000 words, basically -- and part of it is because we've gone through two years now worth of foreclosure, and a lot of people kind of understand those things that were in the headlines, and what you have now is just the broad framework of, okay, Mr. or Ms. Lawyer who is preparing one of these applications, you now have to read the law. We aren't going to tell you every little detail what you have

to do to do it right. You're just going to have to read the rule and do it right.

There's one other kind of hidden agenda in these rules, and it's self-enforcing, self-enforcing in the sense that when you do a foreclosure, when the lender does a foreclosure, or the petitioner in this particular case does a foreclosure, you're going to have to attach all the documents that have to be sent according to the applicable law or the lien you're dealing with. So what that means is that when somebody -- if they don't show up or if they have a foreclosure and they have a problem with it, they go to their attorney. The attorney just has to flip through the application, and they can tell immediately if everything that was supposed to be done under the law was done right, and then they can turn around and file their lawsuit and stop the Rule 736 proceeding.

Now, that's another thing that these rules were premised on, and that is for this rule wasn't going to change any foreclosure law that we have had in Texas for 150 years. You still have to do a foreclosure just like you always did under 51.002 and then the loan agreement and then the lien that you were dealing with. This order just kind of jumps in after somebody had had an opportunity to cure. If they fail to cure then they have to file this application, and if the judge grants the order then they

can continue with the foreclosure, which means they can post it for the foreclosure sale and then actually go -- go foreclose the property.

So on the second page of your handout you can see that this rule isn't designed to change anything except to add this special expedited rule procedure in the middle of everything so can you go get the order that the Texas Constitution requires for home equity, reverse mortgage, and HELOC liens and in the statute for property owners associations and property tax liens.

The new changes on page three, this kind of gives you a thumbnail version of the changes. All the changes you see here were in the 2009 version that this committee vetted and also a subcommittee vetted, so there is really nothing new in this particular rule that you have before you that wasn't in that particular rule, except you don't have all of the minute details that were in the original rule.

Probably the -- one thing is new, and I should point that out. In the original rule the person who brought the application, we called it the applicant, and we did that intentionally back in 1998 because the idea was these -- these things were going to get filed, somebody is going to see this thing and wouldn't know what to do with it; and if they saw the word "applicant" because they've

never seen a petition filed with applicant that maybe somebody would go ask and say, "What is this?" And when they ask the question then maybe somebody could walk them through, well, this is that new Rule 735/736 procedure, because now when you file a petition in district court, as I understand it, there is a cover page that you have to fill out, and the cover page is you have to describe whether it's a defendant or -- it's a plaintiff or petitioner, defendant or respondent, so we just changed it back to respondent so it would be consistent. Again, this Rule 735 and 736 has been in existence since 1999. So it's been around a while. People kind of recognize these things.

We left the property description as part of the style of the case as another signal to everybody that this is different, and it's also there so that a title company when they're going through making copies of everything when they see the address there hopefully they'll figure out, well, wait a minute, this is one of those home equity, reverse mortgage, property owner, or property owner or property tax loan liens and we've got to go get in another box because it's going to affect land title, so it's designed that particular way.

The next page, let's see, what does it say that would be of interest? A lot of people -- this was

interesting. One of our task force members was a court coordinator, and she was -- I think she was like the treasurer of the court administrators association, and she said many of the members thought -- said that their judges thought when they signed the order under 736 that was the foreclosure. They didn't understand that you had to go through the whole foreclosure process up to accelerating the maturity of the debt, and that's only because when the rule was originally written we didn't have property tax and we didn't have property owners in the rule, but once you accelerated you went through this process. After you got the order then you continued with the foreclosure process. She said judges didn't understand that, so that's why we wanted to make sure that everybody understands that this process just kind of fits in the middle of a regular foreclosure process.

For a lot of people this sets it up. You initiate the regular foreclosure process, which means that you send out the demand letters by certified mail, because property owners, associations, you don't have a -- you don't have to mature the debt. We just said you can't file one of these applications until you give the respondent the opportunity to cure. Once they have the cure then they can go file the application. Once the application is filed, the clerk and this is -- we went round and round with the

clerks, and a couple of us appeared before the clerks in a couple of their trade association meetings and walked through, okay, because of the sewer service problem we're going to ask the clerks to be the ones who mail the citation. Under the original rule it was the attorney or the petitioner themselves, applicant, whoever it was, sent out and then they did a cert of service to the court that I actually served somebody, and there are a lot of judges didn't think that was happening.

Now what happens is the clerk prepares a citation just like they always do, and now all they have to do is put the citation in an envelope and mail it regular mail, and they get ten bucks for that. They get the eight bucks that they're entitled to under the statute, and part of that is based on an experiment that Judge Priddy, who used to be on our panel, did. He had -- I believe it was 30 cases in his court. It was -- he just had this suspicion. Nobody had filed a response, so he directed his clerk to send out a notice to these 30 people for a hearing date, and 16 people showed up, so it was his opinion that if they got the notice from the court or from the clerk that more than likely somebody is actually going to have notice of this proceeding. Really what happens, I think it's two things, is these people have gotten all of these letters from these lawyers, they're ignoring it, and so it

just goes in the trash can. They just blow it off, but when it comes from the clerk maybe they'll open it up and see it and then you just go forward with the process.

We also added that you serve the property or the occupant of the property, and we basically used the same rules that you use in an eviction proceeding, so what happens when this application is filed, the clerk prepares the citation for all the respondents, all of the respondents get a regular mail notice of a citation, and that includes the occupant of the property, and then if it is the property then you have to get personal service. Somebody who is authorized under Rule 103 has to go to the property and either serve it on someone that's older than 16 years of age. If they can't serve it then they put it on the door. If they can't get it on the door because it's in a gated community or something like that then they send it to the person express mail or U.S. Postal Service and they put this special "Do not return to sender" because the post office and Fed Ex and a couple of the other services if you say on that express mail package "Do not return to sender" they'll leave it there on the doorstep instead of bringing it back to their office and leaving a little slip, "Hey, call me." The whole idea is trying to get notice to these people.

Once the order is -- again, this rule tries

to make it real clear if somebody files a response there is going to be a hearing, but if they don't file a response then the judge just goes on and signs the order. The petitioner has the obligation -- again, because of the court management systems, the clerks want to make sure that they have a piece of paper in their hand that they can put in their system to track it, so the petitioner is obligated after the response date to send in a motion and order to the clerk if it's going to be a default situation. It also assumes if somebody sends in a -- you know, a letter or they file a response even after the response date that the judge then immediately you're going to have -- you're going to have to set that thing down for a hearing.

Now, these rules are kind of designed on management by exception, and it tries to take care of 90 percent of the situations so you don't have to think about it and then we'll deal with the other 10 percent and just have to put on our thinking hats and figure out how we're going to do that. The rule of 2009 tried to get it up to about 98 percent, and, of course, it was just -- it was just laborious. So that's kind of the background of the rule.

The last thing is, again, not changing law like it's always been in Texas, if somebody has a complaint about the foreclosure process they simply come in and they

file their lawsuit in a court of competent jurisdiction. As soon as they file that lawsuit then this proceeding or if there is an order it's automatically stayed once they provide proof that they did file a lawsuit. Then either the order -- if there is an order that's already been entered is vacated, if it's still in the proceeding stage it's dismissed, and that's kind of the -- that's the skeleton of this particular rule.

It takes out a lot of the details. It leaves more room for -- I mean, it just forces attorneys and folks who are preparing these applications to read the rule. You've got to know what your particular kind of lien requires to do a foreclosure. I say it's designed to be self-enforcing because let's say you're dealing with a property tax loan. There's some very special notices that a property tax loan lender has to do as a condition precedent to do this foreclosure. They're going to be attached to the petition so that if the borrower thinks that something doesn't smell right they can take it to their attorney or they can read the rules themselves and determine whether all of those things that had to be done before they could file the application actually were done.

That prevents an attorney either, number one, having to file a lawsuit and then go through the discovery stage, which takes forever, or maybe do a Rule 202

deposition in contemplation of litigation. The attorney or somebody who is knowledgeable can look at that pleading and say, yeah, they either did it or they didn't. If they didn't then it's a wrongful foreclosure. You stopped at that process before it all gets entangled. I'm through.

MR. BAGGETT: Okay. Let me tell you we had a -- so you'll know, we had a task force that was very broad trying to cover every possible special interest known to man. We had a bunch of -- two people in the pro bono arena who do a lot of this to protect people that have got those kind of issues. They were very much involved in it and made a lot of suggestions. We followed a lot of those. We had title company people. We had anybody that's connected with this industry was on the committee that wrote these rules, and we spent a lot of time on it, so it's a balanced rule. The rule is kind of interesting. No discovery, not res judicata. It's just an order.

It's a very interesting little rule, but it works and once you get the order then you go through what you would normally do otherwise on foreclosure, so it just gives these people more knowledge, more information, more ability to do something if they want to. If they see that they've been -- this is served on them, and they think there's a problem with it or give it to their lawyer, if their lawyer files a regular lawsuit this is automatically

abated and dismissed. So that's really -- it's pretty ingenius process in my humble opinion, and I think it works, and the Legislature, I know they're not always the wisest in the world, but they apparently want us to write these rules for everything, I guess, I don't know. We've got four different areas now, and really basically what we're doing is adding -- and we were directed to do this by January 1, right, in the legislation, that we have this rule in place applicable to the fourth -- the property owners stuff, but this rule covers all four of those, home equity, reverse mortgage, ad valorem taxes, and property owners.

CHAIRMAN BABCOCK: Mike, I notice in the draft 23 there are footnotes, and there are -- some of the footnotes say things like "I would argue this provision should stay in." Who is the protagonist on this?

MR. BASTIAN: I'm guilty.

CHAIRMAN BABCOCK: Yeah.

MR. BASTIAN: This is -- the mark-up copy is kind of the base for the clean draft that you have. That was our -- that's the 23rd draft, by the way, of this rule, and that was -- when we sent it out to committee it had all of these comments so that we could kind of highlight for everybody on the task force that here may be a potential problems. This one doesn't have the highlighted -- I mean,

there was some policy issues that kind of needed to be discussed and the highlights went out, but, again, we tried to make sure that everybody focused on anything that seemed to be a problem depending -- it didn't make any difference, you know, whatever your stripe was, we tried to consider it and get it before the committee and everybody at least go through it and discuss it. I think everybody except one person is -- was unanimous about this particular rule and --

MR. BAGGETT: Bottom line question is the committee went back through all of these, and we agreed on all of them, except for Mary on a one -- couple of things, except for one minority vote.

CHAIRMAN BABCOCK: Okay. And that was my question. The footnotes preceded the final document.

MR. BASTIAN: Right.

MR. BAGGETT: That's exactly right.

MR. BASTIAN: And this was the source of discussion for a conference call we had, what, Tuesday? Yeah, Tuesday. So that as a result of that conference call you have this clean draft that --

MR. BAGGETT: We all agreed on.

MR. BASTIAN: You've got the clean draft.

MR. BAGGETT: And so when Judge Hecht called us and said we've got to get all this done by January 1, we

started scrambling, and we had a meeting down here with all hands on board in August. Then this came out again, and everybody talked about it, and then we had another conference call. So we've been through it and we have one -- I just said minority dissent. Okay, fine, we'll put it in there, but we're going to move on, so that's what we did.

CHAIRMAN BABCOCK: Okay. And I saw that on the clean version the dissent was noted in footnote 1.

MR. BASTIAN: That technically is the only dissenting item, and that's on the property tax loan -- and Mike calls them ad valorem. It's really a property tax loan. I don't know if you're -- a lot of people are probably familiar. This is really kind of unique. Somebody with the permission of the borrower can go to the taxing authorities and then get permission to pay somebody's lien. They pay off the lien. They have to get this sworn statement, and that's provided. It's a form that the Finance Commission has to come up with, and then they have to get the taxing authorities to sign a certifying statement, and that basically says John Doe, Mary Jane, who is the tax lien lender, they actually paid those taxes. That's a condition precedent, has to be filed in the land title records, and then this investor goes and negotiates a brand new note and a brand new deed of trust

with that borrower for the amount that was paid to the taxing authority.

It's -- the Finance Commission has really passed a lot of regulations and have gotten rid of a lot of the abuses and the overcharges, but a lot of times what you would see is somebody paid the taxing authority $5,000, but this note that this borrower signed, this brand new note that was secured by a deed of trust against the homestead now may be $7,500, 8,000, $9,000, and that particular instrument then could go be foreclosed nonjudicially, whereas if it was a taxing authorities were trying to enforce this lien, they would have to go do a judicial foreclosure. So you can see where the rub was in the Tax Code. These liens could -- you could charge up to 18 percent statutorily. A lot of the tax lenders are really irked because it is such a lucrative business, and there's so much competition, instead of being able to charge 18 percent, the competition means you can only pay 12 or 13 percent. So, anyway, and there's probably a need for these, but, I mean, the Finance Commission is really been -- I mean, has been tasked with overseeing and trying to get rid of many of the abuses.

MR. BAGGETT: Plus another issue is they had priority over other liens that were there, and they could come in and foreclose for these new lesser amounts and wipe

out the priority liens that would otherwise be there, and now they've got to give notice, they've got to tell the lenders who have a first lien that this prime, that all of this is going on.

CHAIRMAN BABCOCK: Okay.

MR. BAGGETT: So it helps everybody let them know what's going on.

CHAIRMAN BABCOCK: The provision where there was disagreement was Rule 736.1(b)(6), and the dissenting task force member argued that sworn statement shouldn't be in there?

MR. BASTIAN: Yes.

CHAIRMAN BABCOCK: And what was her reasoning on that?

MR. BASTIAN: I'm not sure I know. I don't know if we really can figure it out, to be real honest. I have in front of me on August 5, 2011, now, this is the Office of Consumer Credit Commission sent out an advisory bulletin, and it says, "This bulletin explains which parties must receive a copy of the homeowner's sworn document for property tax loans," and Mary is arguing that that shouldn't be one of the documents that is attached to the application. We're simply saying that document needs to be attached to the application because it shows all the things that had to be done to make sure that that lien was

created properly, and for some reason -- I think she was -- you help me. I mean, we went round and round and --

CHAIRMAN BABCOCK: Was this a big deal? Was there blood on the --

MR. BAGGETT: No, no. She's the only one that said it, and all it is is attaching what the code requires.

CHAIRMAN BABCOCK: Okay.

MR. BAGGETT: It's more effort to do that. You've got to go get it. You've got to put it in there. It costs money to do that, but we think it ought to be in there.

CHAIRMAN BABCOCK: And other than that one thing the task force was unanimous about everything?

MR. BAGGETT: Yes.

MR. BASTIAN: I must confess, again Mary Doggett said I left something out of the draft that they agreed on, and I think it was the words "conditions precedent," and I'm not sure exactly where it went, but you had to I think put in the body of the -- I don't have -- these e-mails just came in just a little while ago.

CHAIRMAN BABCOCK: So are we looking for the "condition precedent," or is it lost forever?

MR. BASTIAN: I don't think it's -- I think it's just redundant, but she wants it in there, so --

MR. BAGGETT: It was a question after our meeting that she didn't raise in the meeting that we don't think it makes any difference.

CHAIRMAN BABCOCK: Okay. All right. Anybody -- anybody have -- Justice Hecht.

HONORABLE NATHAN HECHT: And I'll point out that in 13 years these two rules have never been cited.

CHAIRMAN BABCOCK: Now, is that a good or a bad thing?

HONORABLE NATHAN HECHT: Well, Mike says they're working.

MR. BAGGETT: They're not appealable. That's why.

MR. BASTIAN: They're not appealable.

CHAIRMAN BABCOCK: Have they been complained about?

MR. BAGGETT: If they are, the Legislature doesn't know it because they want to write it on more and more and more.

CHAIRMAN BABCOCK: Yeah, right. Right. Good.

MR. BASTIAN: Well, there's one other point I think I left out, and that's one of the cardinal principles of this rule. This rule was really designed because we -- just in regular practical practice most of the foreclosures

people just default and they just walk away from their property. Originally when it started out it was like you have to do a judicial foreclosure on every one of these; and we thought, well, wait a minute, if most of the people don't care then we need to have a rule that just make sure we go through, give somebody the due process, if they want to complain they can go on and file their lawsuit, but if they don't give a hoot you get the order and you can continue down the road and get the foreclosure and get it off everybody's books, and so this rule is really designed for that situation where nobody cares or they don't file a response. When they don't file a response then you get this order and then you continue with the foreclosure process. Again, what that means is they're going to get notice of the foreclosure sale. They have to have at least 21 days notice. I mean, all of those things that are required under the law and if there are special requirements, if in your lien documents or your security agreement then you still have to go through those. Yes, sir.

HONORABLE STEPHEN YELENOSKY: Tommy and I know one another, and we've worked on this, and I know you didn't mean this, but I do want to correct, these people do care, they just have no defense because they haven't made their mortgage.

MR. BASTIAN: That's right. That literally is right. That's right.

CHAIRMAN BABCOCK: Professor Dorsaneo.

PROFESSOR DORSANEO: I was going to make a similar comment. There's a -- there are responses filed occasionally, right?

MR. BAGGETT: Yes. Yes.

PROFESSOR DORSANEO: And this -- these rules are cited in before the -- and what tribunal handles this? It doesn't say in the rules. Does it say in the statute? Is this district courts?

HONORABLE STEPHEN YELENOSKY: Yes.

MR. BASTIAN: Yeah, it's district court, though, the 2009 version tried to deal with a dead debtor situation, because a lot of times you'll have the dead debtor situation, and it might be in a probate court, so and a lot of times -- like in El Paso, I think that's an example, and there are certain counties where a county court at law has the same jurisdiction as the district court, and most of these were getting filed in county court, even though the rule says it has to be filed in district court, so that's why we changed that provision so that you file the application where the property is located or if there is another court -- and that's contemplating the situation there may be a probate pending, you'd file it

in the probate proceeding.

PROFESSOR DORSANEO: Well, but I guess I'm asking what are we supposed to do with this? Are we supposed to -- it doesn't look like it was written by somebody who is in the business of writing rules. I mean, without meaning any criticism whatsoever, I mean, there would be a lot --

MR. BAGGETT: That's fine. We don't care.

PROFESSOR DORSANEO: If somebody from this committee went through this, there would be many changes, many little changes.

CHAIRMAN BABCOCK: Well, we did go through it.

PROFESSOR DORSANEO: We did?

CHAIRMAN BABCOCK: Yeah.

MR. BAGGETT: Yeah.

PROFESSOR DORSANEO: There weren't many changes. I stand corrected.

CHAIRMAN BABCOCK: At some length.

MR. BAGGETT: Yes, a lot of length.

PROFESSOR DORSANEO: Huh. Well, I'm just going to be quiet then.

CHAIRMAN BABCOCK: You missed the meeting.

MR. BASTIAN: Yeah, it went through two -- we've been through this committee twice with the 2009

version and then a subcommittee went through the version. Now --

MR. BAGGETT: And it's been working since '97, so --

MR. BASTIAN: And you're right, I don't know how to write a rule.

CHAIRMAN BABCOCK: Any other comments about this? Yes, Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I just had a couple of questions, really as to why some things were different from the old version. So my first question was why under 736.1(b)(3) you have deleted the legal provisions that used to be in the old version. Because it used to be that it said in the old version what part of the Constitution we would look at or what part of the Property Code we would look at, and those are gone now, and I just wondered why you deleted them.

MR. BASTIAN: Just for simplicity sake, and again, this is basically set up, "Here's the rule. Now, you go -- you go do it."

HONORABLE TRACY CHRISTOPHER: Well, but my comment on that would be that the vast majority of these are uncontested, and so the trial judge is reviewing it to make sure it meets the legal requirements, and if it doesn't state in there what the legal requirements are,

then, you know, the trial judge may or may not know what the legal requirements are, and I know they're supposed to state it. I see that in (a), but, you know, basically how do I know that what they've told me is correct?

MR. BASTIAN: Well, and my response is probably two-pronged, and I hope this isn't kind of deflecting what you're saying. The 2009 version went through great detail on every piece of paper that you, Mr. Petitioner or Mrs. Petitioner, had to file. We just tried to wipe that out and say, "Okay, it's your job to do it right," and how do we protect that? Well, there's two ways, I think.

Number one is that somebody ought to have the opportunity -- I think we learned from the first version -- to talk to all the judges at the judicial conference that you just walk through this, and at that particular time it would seem to me that we could give the judges a handout that says, "Okay, if this is a property tax loan, here's the things that are supposed to be attached to that application, and here's an example of what it really looks like." Because as we understood, what many judges do, they give it to their court coordinator, say, "Go through this checklist. If it meets the checklist then you can bring it back to me and we'll consider it." So thinking along those lines, if we had the opportunity to explain and have that

kind of handout so the judge basically has in their hands just exactly what you're talking about, but it's not the rule, but you would have that.

HONORABLE TRACY CHRISTOPHER: Well, I think it would be great to have that kind of handout for the judge, but I think it ought to be, you know, officially referenced either in the rule or that we know exactly where it is, because, you know, there are a ton of trial judges, some of them go to judicial conferences, some of them don't.

MR. BASTIAN: Well, I understand. I mean, we can do that. I think one of the initial iterations did have it in there, but what we were trying to do is reduce this down from 6,000 words down to, I mean, just the bare bones, so you didn't tell somebody specifically and hold their hand. I mean, it's simple to do that, because there are some unique things. It's unique when it comes to a property tax loan. It's unique when it comes to a property owners association.

HONORABLE TRACY CHRISTOPHER: Right.

MR. BASTIAN: There are some particular things. That also created a dilemma for us because if we put in the statute, we already know that probably on the property tax loans there's probably going to be a lot of changes. So when you say Rule 32.06(c)(3), the next

Legislature may come in and change, (c)(3) is now completely different or is gone, and now we have this rule we've got to go through the same process.

HONORABLE TRACY CHRISTOPHER: Well, I like the --

MR. BASTIAN: We were fighting that process all the way through where we would quote a rule and do we need to quote that rule or do we just say it generally, and we went round and around trying to do that balance between the two, being -- I mean, describe every little tiny detail or just be real general, and we leaned more on the general side.

HONORABLE TRACY CHRISTOPHER: Well, I don't have a quarrel with not having it in the rule, and your .13 says we're going to have forms, that the Supreme Court may publish forms. I think that's good. I think those need to be ready to go, because you know --

CHAIRMAN BABCOCK: You get that, Justice Hecht?

HONORABLE TRACY CHRISTOPHER: Because otherwise these applications are going to be filed and they are no longer going to have this form that they have to follow, and we get a lot of -- trial judges get a lot every week in major metropolitan areas. I don't know how many they get in the smaller areas, but they get a lot every

week in like Harris County, probably Austin, probably Dallas, and --

HONORABLE DAVID EVANS: Don't you point that finger at me and say "Dallas." Dang, Tracy.

HONORABLE TRACY CHRISTOPHER: Sorry, sorry, sorry, sorry, and I just think --

MR. BASTIAN: Well, there may be an easy answer to that because --

HONORABLE TRACY CHRISTOPHER: -- they need to be available.

MR. BASTIAN: Those forms have already been vetted by this group, you know, twice, and the subcommittee twice. I mean, they're still sitting there. We would have to go back and tweak them a little bit. We would have to come up with a form for the property owners association, but basically those are pretty much standard except for that unique provision for each one of the kind of liens that you're dealing with. I think we could do that.

HONORABLE TRACY CHRISTOPHER: And my same thing -- and my same comment would apply to subsection (g) there, that before the application was filed any other action required under applicable law has -- was performed. Again, since most of these are defaults, I need to know -- trial judge needs to know, sorry, which wall, what has to be performed, you know, checklist.

MR. BAGGETT: The biggest criticism we had is we had too much volume and too many forms and too much references the last time, so we reacted to that by cutting it back.

HONORABLE SARAH DUNCAN: You just can't win.

MR. BASTIAN: But we can cure exactly what you're talking about.

CHAIRMAN BABCOCK: This is a no win, Mike.

MR. BASTIAN: Instead of saying the word "action" that really should have been the word "notice," because then you're going to -- because this rule contemplates that situation where you're -- where you're doing a foreclosure not because it's a monetary default. Like in a reverse mortgage. Somebody abandons the property for 12 months you have to describe what it is that you have to do to cure the default, and this revision was for that, so what -- we should have said the word, I think, "notice," because then that -- the attorney who is representing the respondent could see, okay, you describe that I had to cure the abandonment of the property for 12 months on the reverse mortgage. That's what that provision is there for.

MR. BAGGETT: Here's the problem. We've got four different types of property we've got to deal with, so we're going to have to write a form that deals with all of those different ones, and it changes regularly.

HONORABLE DAVID EVANS: Well, let me --

HONORABLE TRACY CHRISTOPHER: Well, I understand that it's a difficult thing to do, but, you know, as I said, it would be useful for the trial judges to know what they have to cross-reference, and the best way to do that is with a form, and it doesn't have to be in the rule. It can be on the website that gets changed regularly in accordance with the Legislature.

MR. BASTIAN: We can do the form.

CHAIRMAN BABCOCK: Judge Evans.

HONORABLE DAVID EVANS: If you've want the order signed you do the form. If a trial judge has a stack of applications for foreclosure, tax or first lien or whatever, sitting on his desk, and he's got a checklist that he and the eight or ten other judges in the county, which we have come up with, and he has had his staff review it, and it doesn't fit the checklist, it's going to sit on that corner forever. I can take any default judgment on unliquidated damage claim. I can check service on it. I can see the petition whether it's liquidated or not, sign the default and be gone, but when you're talking about people's homes, especially when probably somebody has gone out and bought a tax lien from someone who may or may not speak English, I think trial judges take some time to read them over and make sure they comply, and if I've got to sit

there with a form and it doesn't match up, it's just going to sit over there, unfortunately, as time -- until I find time to go through it, and that may be difficult, Mike, but that's the real world.

MR. BAGGETT: We don't mind doing a form if you want to put it somewhere.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: One of the concerns that you said that your committee had or that members of your committee had was that there was a question about whether the respondent was receiving notice of this proceeding. In the current rule you're required to serve by regular mail and certified mail, and it doesn't say to a particular address. It just says "to the party that may be liable for the debt." Under this rule you cut it to regular mail, and it looks to me like the only service that's required is to the address of the property, but often -- that's not right? Okay. Where am I going wrong?

MR. BASTIAN: In the first part of the rule it describes who the respondents are, and it goes to all the respondents --

HONORABLE JANE BLAND: And the property.

MR. BASTIAN: -- at the last known address. Last known address is defined over in the Property Code. The petitioner has to supply that. In fact, we had a

provision that we cut out at the last minute, again, for brevity sake, where the petitioner's attorney had to provide a list to the clerk and say, "Here's the person who has to get service and here is their address," and part of that came about because the clerk said, "You've got to make our job real easy if we're going to agree to this."

HONORABLE JANE BLAND: Okay. So --

MR. BASTIAN: But we took that out so --

HONORABLE JANE BLAND: So look with me on 736.3, and it says "to occupant of" -- and it looks to me like "state property's mailing address." Isn't that the address of the property? That's not the debtor's last known address.

MR. BASTIAN: No. It's -- there is a citation that goes to each one of the individual real persons respondents.

HONORABLE JANE BLAND: Okay.

MR. BASTIAN: And then there is a citation that is mailed to -- and it's going to be addressed to "occupant of 1303 15th Street," and that's going to be mailed.

HONORABLE JANE BLAND: Okay. And "at the address provided," is there somewhere where we define that as the last known address?

MR. BASTIAN: Well, last known address is

defined in the Property Code.

HONORABLE JANE BLAND: But here when we're talking about serving them.

MR. BASTIAN: Not here.

HONORABLE JANE BLAND: I mean, instead of saying "at the address provided," because to me I read that in connection with the clause in front of it as the property address.

HONORABLE STEPHEN YELENOSKY: Well, that's not true for everybody who is getting it.

HONORABLE JANE BLAND: Well, that's what you're explaining to me, but you can say that I can send it to every respondent at the address provided. What I'm saying is you have "the address provided," but where is -- where is it that the address provided must be the last known address? And then, secondly, why have y'all taken out certified mail?

MR. BASTIAN: Because there's --

HONORABLE JANE BLAND: I mean, how are we getting any further assurance that these people are getting notice of this proceeding, I guess is the bottom line question?

MR. BASTIAN: And it's, again, one of those -- there's a couple of Supreme Court -- U.S. Supreme Court decisions that somebody is more likely to get a notice of

something if it's sent regular mail than certified mail, because what happens -- and you see it all the time -- it just stays in the post office, and nobody ever sees it. I mean, that's why we did it that way. It could be done certified mail, but we did it intentionally trying to make this rule work in the real world as opposed to, you know, how we always think it needs to be done. This is -- tries to be a practical rule that gets to the heart of it to make sure somebody gets notice of it.

HONORABLE JANE BLAND: But my concern is that it's got different service rules than any of the other service rules, and one of the differences is that service is complete when you mail it. There's no requirement that we determine whether or not these people received a notice, and since a lot of these things are going to be done by default, we've got to be sure that they get notice, and so it doesn't seem to me like -- it says "to each respondent," but there's no "at last known address." There's -- what about this is going to tell people they need to -- they don't need to do sewer service, they need to do real service?

HONORABLE STEPHEN YELENOSKY: 736.1 is -- 31 is the service on the address.

HONORABLE JANE BLAND: Right.

HONORABLE STEPHEN YELENOSKY: And that isn't

by mail. That's left there or handed to somebody 16 or older.

MR. BAGGETT: On the front door.

CHAIRMAN BABCOCK: Yeah, Bill.

MR. BASTIAN: Back up in the original rule, I mean, we say that you have to identify the respondent, and it has the different categories. You have to describe them by name and their last known address, which is in the Property Code. Now, there's another part of this. In the Property Code notice to somebody is when it's put in the mail. It's not whether they receive it. It's not whether you have proof that they received it. It's just putting in the mail, and so we're basically following again the same principles that are there for regular old foreclosures.

HONORABLE JANE BLAND: Okay. But you keep saying "last known address," but I can't find last known address in this draft of rules.

MR. BASTIAN: It's not in the --

CHAIRMAN BABCOCK: Oh, it is in your application.

HONORABLE JANE BLAND: Put "service at the respondent's last known address," because I think the default is going to be these people are going to all get served at the property, and if the property is abandoned, whether it's left on the doorstep or mailed to it, if it's

abandoned nobody is getting notice.

HONORABLE NATHAN HECHT: 736.1(b)(1) --

PROFESSOR DORSANEO: Says "last known address."

HONORABLE NATHAN HECHT: -- says "last known address."

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: Yeah, it does --

HONORABLE JANE BLAND: Thank you.

PROFESSOR DORSANEO: If the application does as it should, say that you have to identify by name and last known address each party. We don't know the definition of "last known address" from the Property Code, but probably -- probably we could tell what that is, but it does look as if 736.3 in the parenthetical when it says "state property's mailing address," that that's just wrong.

HONORABLE NATHAN HECHT: No.

PROFESSOR DORSANEO: It should be "party's mailing address."

CHAIRMAN BABCOCK: It's in addition to the respondent.

HONORABLE NATHAN HECHT: No, it's supposed to be addressed to that person, "Occupant of such and so" at the address --

PROFESSOR DORSANEO: Oh, "and to occupant."

MR. BASTIAN: Yeah, it's two things. I mean, but it's easy enough right there -- I mean, I think we can solve what you're talking about. We just add the word "to each respondent their last known address" --

HONORABLE JANE BLAND: Yes.

MR. BASTIAN: -- and to -- I mean, if that covers it.

HONORABLE JANE BLAND: Yes.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: I just had a couple of other sort of technical problems on the service. For a return of service for just regular mail we don't know what that's going to look like, and we'll need to know that it happened, and so that's by the clerk. I mean, it says, "Service of citation of mail is complete when it's deposited," but without a return of service we don't know when that happened. We have to have some sort of a return of service from the clerk.

MR. BASTIAN: The return of service is when they put it in the mail.

HONORABLE TRACY CHRISTOPHER: But we have to have a piece of paper that says, "I, the clerk, put it in the mail on this date." That's a return of service.

MR. BASTIAN: Well, we designed it, that's the way it's set up to be. I mean, now, we may not have

said that very well, but when the clerk puts it in, I mean, that citation that's going to go out, the one that's going to go in the court's file, is they're signing down here, "I served it when I put it in the post office today on January 14th at 3:30 p.m."

HONORABLE TRACY CHRISTOPHER: Okay.

MR. BASTIAN: And that's what's going to end up in the clerk's file, and the clerk does that, and it's basically at the same time they put that into the mail.

HONORABLE TRACY CHRISTOPHER: Again, it's just a different form than what the clerks currently have they're going to have to develop or you're going to have to develop.

MR. BAGGETT: But you've got to understand this, too. Clerks didn't like that. We did a lot of work to make sure the clerk is sending it out so we know it's sent out and not some sewer problem.

HONORABLE TRACY CHRISTOPHER: And then on .31, a process server I assume serves under .31. The rule doesn't say that, but it can be, you know, constable or a process server.

MR. BASTIAN: We say "authorized person under Rule 103." I mean, that's the --

HONORABLE TRACY CHRISTOPHER: Okay. And then normally to fix to the door you have to get a court order

to do that, and this rule doesn't say how many times you have to go try and find a real person before you fix it to the door and then if you can't fix it to the door because of a gate then you mail it, and normally that all gets accomplished by a motion under the regular service rules. You try to go serve somebody who is 16. You can't, then you file a motion saying, "I want to attach it to the door. Well, I can't attach it to the door because there's a gate, so I want to put it in the mail," and there's a court order that says you can do that, and then the return of service will say, "I followed the court order that said I could attach it to the gate or put it in the mail." So, I mean, you reference 107 in terms of the return of service, but 107 usually includes a court-ordered alternative service, and you seem to have sort of jumbled it all together in (a) and (b).

MR. BASTIAN: Well, we tried to take the eviction -- how you do it in an eviction when these -- I mean, in an eviction and this is our -- Fred Fuchs is our expert on that. He wrote probably the treatises. You just attach it to the door, and we went even further, says -- because a lot of times you can't attach it to the door because it's in a gated community, and that's why we went to the next step.

HONORABLE TRACY CHRISTOPHER: I'm not arguing

with that fact. I'm just arguing with the way it's worded and whether a motion is required.

MR. BASTIAN: No motion is required.

HONORABLE TRACY CHRISTOPHER: All right, so --

MR. BASTIAN: Your job is to --

THE REPORTER: Okay, wait. I can't take both of you.

HONORABLE TRACY CHRISTOPHER: Do they have to try a couple of times to find someone over 16, or they show up once, nobody is there, I'm going to stick it to the door? Or I show up once, nobody is there, and I can't get to the door, so I stick it on the gate?

HONORABLE STEPHEN YELENOSKY: It doesn't --

HONORABLE TRACY CHRISTOPHER: That's all I want to know.

MR. BASTIAN: We didn't contemplate that you had to serve -- try one time, ten times, three times. I mean, it would be simple enough you have to try three times before you go the express mail. I mean, it's --

HONORABLE TRACY CHRISTOPHER: Well, I just -- it's unclear to me how it works. Either way you-all want to go is fine. You can't reference 107, which says the process server, you know, attaches a copy of the alternative service order when there isn't an alternative

service order.

MR. BASTIAN: Well, we need to get rid of the reference to Rule 107 -- the idea is that there is going to be a citation mailed to that occupant. It's going to say on the letter, "occupant of 33012 15th Street." Then the process server is going to have to physically go out to that property, and he's going to try to serve it on somebody who is 16. If there is nobody there -- and we could say three times, whatever it is, and if nobody is there, he puts it on the door just like you do in an eviction and then but if he can't put it on the door because it's a gated community or something like that then you go through the express mail. We can --

HONORABLE TRACY CHRISTOPHER: I'm not arguing with that process, which is how it's normally done, but it just requires a court order usually; and if we're going to eliminate the requirement of a court order, we need to clearly specify that.

MR. BASTIAN: Can do it.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Tommy, the prior rule, did it require anything before you affixed it to the door, or was it just the mail?

MR. BASTIAN: No, you had to serve -- you had the attempt to serve somebody over 16.

HONORABLE STEPHEN YELENOSKY: And then you had to get an order?

MR. BASTIAN: No. You never had to get an order. You attempted to serve. If you couldn't get it served then you put it on the door.

HONORABLE STEPHEN YELENOSKY: Right. I didn't think this was a change in the law, and I think the intent of both of them is not to require any prerequisite before you do this.

MR. BASTIAN: That's exactly right.

HONORABLE STEPHEN YELENOSKY: Which is what it means, as I understand it.

MR. BASTIAN: That's right.

MR. BAGGETT: What we did is we took the pro bono -- Fred Fuchs, who is as testy about that as anybody known to man, said, "You write it," and we did what he asked us to do.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: I didn't have any.

CHAIRMAN BABCOCK: I know that. I was just trying to see if you were on the ball. Elaine.

PROFESSOR CARLSON: Can I ask you some questions? This is an area of which I have no familiarity. These rules are to get an order from the court that you can proceed with foreclosure --

MR. BAGGETT: Right.

PROFESSOR CARLSON: -- nonjudicially.

MR. BAGGETT: Correct.

PROFESSOR CARLSON: Could you just kind of describe in a few sentences what happens in a nonjudicial foreclosure as far as notice and protection and all of that stuff?

MR. BAGGETT: Okay. First of all, you've got to establish a default that allows you to go forward -- you've got to do that before you do this predicate. Here you get an order basically in accordance with this. Once you get the order you go through your normal foreclosure, which is a new demand on them to cure whatever it is or whatever -- pay it, satisfy it, whatever. If they don't do that then you give them a notice, 21-day notice, that's filed at the courthouse, and they get personal service, all the debtors of record according to the records of the holder all get service and then on the first Tuesday of every month you go out, and you go between 10:00 and 4:00, and you go out on the steps, and you sell the property, and on any major county you'll see on -- between 10:00 and 4:00 on first Tuesday you'll see a whole crowd of people out there, and they're saying -- they read the notice, they announce it for -- open it up for bids. They take a bid. Most of the time it's a credit bid by the lender who has

the debt and then they excess it off to convey it to whoever is the high bidder.

PROFESSOR CARLSON: And if there is any problem with that notice and that part of the proceeding --

MR. BAGGETT: Yeah, it's called wrongful foreclosure. Yeah.

PROFESSOR CARLSON: That's the lawsuit they would file?

MR. BAGGETT: Oh, yeah. If there's any issue with the normal process that we've written about in this book for 20 years they can come in and argue that all they want to, and this order that we're doing here is just a predicate to all of that, so we haven't changed any of that. That's still there. It's been the law for 20 years, and it's a -- I think reasonable -- yeah, that's right, 20 years. I mean, it's been there 150 years. There have been very few changes in this law in many years. So all of that law still applies. You've just got another one in front of it to get this order. Then you go forward with what you've been doing for 150 years or whatever it is.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: I know Fred Fuchs well, and he was my mentor at Legal Aid, and, yes, he is sort of Saint Fred on low income housing law.

CHAIRMAN BABCOCK: But are you testier than

he is?

HONORABLE STEPHEN YELENOSKY: Oh, yeah.

MR. BAGGETT: He was good about it. He was really good about it.

HONORABLE STEPHEN YELENOSKY: Yeah. But all I was going to say is I would imagine from Fred's perspective, the people that he represents and I used to represent, the people you're concerned about are -- as with renters, they're concerned about losing their leasehold, and the best way to get them notice is handing it to them or putting it on their door because they live there. Low income people who own the house live in the house, and if they no longer live in the house then they probably have less interest in the issue, not that they have less interest, but they essentially abandoned their claim to it to some extent because they're not living there anymore. So putting notice on the house from that perspective and I imagine from Fred's perspective is as good as any notice you could give them.

MR. BAGGETT: You imagine correctly.

HONORABLE STEPHEN YELENOSKY: The only place where it perhaps falls down is when somebody owns the property, has a renter, notice goes there, doesn't get to the actual owner because they rent it out. Those aren't typically people I would imagine Legal Aid is thinking

about. Those are property owners who own rental property or own the property and don't live there. If that's the concern then that's probably a different concern than what generally has been the concern about foreclosure, and that's people losing the homes they live in.

MR. BAGGETT: Remember that from the context that we just talked about. All of this on the door and so forth is just a predicate to doing what you've got to do next, which is all the debtors of record according to the records of the holder, all the things you do normally anyway. So there's a whole set of process for the order. There's a whole other one for the foreclosure itself.

HONORABLE STEPHEN YELENOSKY: Well, and all that's just procedure, too, and as we know, I mean, trial judges in the last few years, the notice issue has been, I think anyway, less of an issue than figuring out essentially a chain of title. I mean, it can all look like on paper everything is there, but they haven't really established that the person seeking foreclosure is in a position to do that because they're not the owner or holder of the note. You have this whole issue of MERS --

MR. BAGGETT: Right.

HONORABLE STEPHEN YELENOSKY: -- and all of that stuff is not going to be answered by a rule.

MR. BASTIAN: Well, we tried to handle that,

because this rule says that, petitioner, you've got to show your authority, you've got to have an affidavit, and I think we're going to go to the word "declaration" -- is that -- Marisa?

MS. SECCO: Yeah, we might.

MR. BASTIAN: But in essence this affidavit is designed to be like a motion for summary judgment where you have to walk through all of those things that we're talking about, all the pieces that you have to do to have a good foreclosure are going to have to be described in that affidavit and then you're going to attach to that affidavit all of these documents that show you actually sit -- not only do you have a copy of what you sent to folks, but the proof that you sent to it. Now, I think that was one of your questions, Judge Christopher, about how do you have proof? Everything -- now, the clerk is going to send it out regular mail, but all of these notices that we're talking about under the foreclosure law, that's by certified mail, and you can go to the U.S. Postal Service now, if you have the number, you can get this affidavit off the website. I mean, anybody can pull it up to show -- and it will show when it was deposited with the post office, so you'll either have the green card to show that you sent it or you'll have that from the post office.

HONORABLE NATHAN HECHT: Lamont Jefferson.

MR. JEFFERSON: Can I just ask you some leading questions?

MR. BAGGETT: Sure. We need to be led if we do. Go ahead.

MR. JEFFERSON: Yeah. Tell me if I'm getting this right. So Texas hasn't always had home equity loans, right?

MR. BAGGETT: Correct.

MR. JEFFERSON: So home equity loans came into play --

MR. BASTIAN: We're the last state that had home equity loans.

MR. BAGGETT: And we had to do it in a full deal to change the Constitution.

MR. JEFFERSON: Before there was such a thing as a home equity loan, lenders would without any judicial intervention at all go in and foreclose on property, post it at the courthouse steps, and it would be sold.

MR. BAGGETT: Correct.

MR. BASTIAN: If they had the power of sale in their loan documents, and that's kind of a battle that went on in our committee that you don't really see, and it comes up in the property owners declarations because they wanted to say that this rule let them go nonjudicially foreclose when their declaration basically said the only

way you can foreclose is a judicial foreclosure.

MR. JEFFERSON: Okay. I'm talking big picture.

MR. BASTIAN: Okay, big picture.

MR. JEFFERSON: Big picture, and in a commercial context now lenders do the same thing. If the borrower doesn't pay the obligation --

MR. BAGGETT: Right.

MR. JEFFERSON: -- the commercial lender goes in, self-help foreclosure.

MR. BAGGETT: Correct.

MR. JEFFERSON: Forecloses on malls or stores or --

MR. BAGGETT: Whatever.

MR. JEFFERSON: -- whatever, commercial property branches.

MR. BAGGETT: Right.

MR. JEFFERSON: And there's no judicial intervention.

MR. BAGGETT: Correct.

MR. JEFFERSON: When the Legislature passed the Home Equity Lending Act, whatever it's called, that allowed mortgagors to now get a lien on second lien mortgages, get a lien on real property for the equity in places where people were living.

MR. BAGGETT: Right.

MR. JEFFERSON: Which then allowed for a foreclosure on those obligations.

MR. BAGGETT: Right.

MR. JEFFERSON: The Legislature then looked at that and said, "We want some more protection, we don't want this all to be just self-help, we want some more level of scrutiny," and that's when --

MR. BAGGETT: That's when this rule --

MR. JEFFERSON: -- the statute was passed on the home equity part of it.

MR. BAGGETT: Right.

MR. JEFFERSON: That then involved into the tax lien part, because there are these tax lenders who would come in and say, "I see you're distressed, you owe a bunch of property taxes. Let me lend you the property taxes, and I'm going to step in the shoes of the property tax lender, and if you then default on your obligation to me then I can foreclose" --

MR. BASTIAN: Right.

MR. JEFFERSON: -- and if there was not this statute in place it would again be a self-help foreclosure. There would be no judicial intervention. So now there are all these different ways to foreclose, doesn't affect any commercial property, but the Legislature has said with

respect to residential property the Legislature is not comfortable with pure self-help foreclosure.

PROFESSOR DORSANEO: Some residential property. Only home equity.

MR. JEFFERSON: Well, yes.

MR. BASTIAN: You can have property tax loan liens on commercial property. Big ones.

MR. JEFFERSON: No, on obligations on some residential property. There are some obligations -- if it's first lien mortgage then you can still have a self-help foreclosure, correct?

MR. BAGGETT: Correct.

MR. JEFFERSON: So what these rules are designed to do are to set out what's supposed to happen if someone defaults on either a tax lien loan or on a home equity mortgage loan, and those are the things that the Legislature has said, "We want another look by somebody who says, 'Looks like the paperwork is in order to me. You can proceed with the foreclosure.'" Is that where we are?

MR. BAGGETT: That's correct. That's right. And the home equity, what you have to do to establish in a forcible home equity is highly complex in all the things you've got to go through to make it work, because it's very regulated on what goes in there to make it an enforceable home equity loan.

MR. JEFFERSON: Okay. All to say that -- I mean, I think that these rules have come up before, but we've not -- I don't think we've been line by line. I don't remember going line by line through them and talking about what ought to -- you know, what makes sense and what doesn't, the kind of questions that Bill and Judge Christopher are asking now. I mean, but the idea has been an expedited procedure that allows the -- what would otherwise be a self-help foreclosure to be reviewed by another set of eyes before that happens.

MR. BAGGETT: Correct.

HONORABLE NATHAN HECHT: Judge Christopher.

HONORABLE TRACY CHRISTOPHER: Well, except on the homeowners association loans, those were never self-help. Those were all full judicial -- full judicial foreclosure.

MR. BAGGETT: Still have to be.

HONORABLE TRACY CHRISTOPHER: And now they don't have to be. Now, they can --

MR. BASTIAN: No. No.

HONORABLE TRACY CHRISTOPHER: -- do this.

MR. BAGGETT: No.

MR. BASTIAN: And that's -- that's kind of a dilemma that they brought up because the way the Legislature drafted that rule, they're going to have to go

through the Rule 736 process to get this order and then they're going to have to turn around and go file a judicial foreclosure because they don't have the power of sale.

MR. BAGGETT: No, that's right.

HONORABLE TRACY CHRISTOPHER: Okay. Yeah, because I was confused on that.

MR. BASTIAN: Otherwise we were going to have to -- I mean, we started to draft around that, and then, well, wait a minute, we're really changing law because they have to do a judicial foreclosure unless their homeowners or property owner declaration says you can do it nonjudicially, and most of them don't have that power of sale.

HONORABLE TRACY CHRISTOPHER: So then like --

MR. BAGGETT: And the industry tried to get us to do that and we said "no."

MR. BASTIAN: Oh, did they.

HONORABLE TRACY CHRISTOPHER: Well, like point five here, "Conspicuously state that if petitioner obtains a court order he will proceed with a foreclosure of the property," and according to that with the law. That means filing another whole lawsuit?

MR. BASTIAN: That's exactly right.

MR. BAGGETT: Yes. Yes.

PROFESSOR DORSANEO: So then your first rule

when it says you can do this foreclosure, (a), by judicial foreclosure or, (b), you don't really mean (a) all the time?

MR. BASTIAN: No. The way we interpret the way 209 -- I think .0092 is because the way the Legislature drafted that, you have to go through this process before you can go do your judicial foreclosure. I mean, it's crazy, but then that would make us basically say, okay, if you have one of those, you don't have to go -- if you have a property owners association, you don't have the power of sale. You can just go do a judicial foreclosure because that's the order that allows you to go -- sell the property, instead of having the extra step.

MR. BAGGETT: We had it -- the industry guy had it drafted so that we created in here a power of sale that they didn't have otherwise, and we said, "No, we're not doing that."

PROFESSOR DORSANEO: That is a dilemma, isn't it?

MR. BASTIAN: For judicial economy it makes all the sense in the world on a property owners association, if you don't have the power of sale, and most of them don't, that you either go through this Rule 736 process or you do what you're going to have to do anyway, and that's go do a judicial foreclosure so you don't have

to do it twice, but that's one of the things that we bounced up against. Well, we're making new law if we say that because that's not the way Rule 209.0029 was written.

PROFESSOR DORSANEO: Well, you know, I hate to -- it sounds to me like this either is -- people say this works, and I guess it works because the district judges do what they need to do, at least in some counties, to make sure that it's -- that it's done the way it should be done or else it doesn't matter. I mean, that's what I'm hearing.

MR. BAGGETT: It's just an extra step of protection.

PROFESSOR DORSANEO: If it matters or if it doesn't work all the time then I think it should be looked at more carefully, notwithstanding the fact that there's a deadline and that it's tomorrow.

HONORABLE NATHAN HECHT: No, we don't --

HONORABLE DAVID EVANS: Tommy --

CHAIRMAN BABCOCK: This doesn't happen till January 1.

HONORABLE NATHAN HECHT: Yeah, January 1.

PROFESSOR DORSANEO: Oh, I mean the deadline in Justice Hecht's letter was --

HONORABLE NATHAN HECHT: Yes, but we got a report back from them that it didn't need to be done by

September. We couldn't tell for sure, so we asked them to tell us.

MR. BAGGETT: Statute says January 1.

MR. BASTIAN: But it still has to be out for comment for 60 days, so --

MR. BAGGETT: You've got a process you've got to go through to --

HONORABLE NATHAN HECHT: Right. But we're trying to get it done now so it can get to the Court and get approved in time.

MS. SECCO: Before November 1st.

HONORABLE NATHAN HECHT: Yeah. Basically by Columbus Day.

HONORABLE DAVID EVANS: Did the clerks object -- and I understand about people more likely to pick up regular mail than certified mail, but the dual service that exists right now with certified mail and regular mail, was that a cost issue for the people foreclosing, or what was the issue?

MR. BASTIAN: Well, we were trying to figure out a way how to get somebody served and not have personal -- I mean, the intent was how do we make sure that somebody actually gets this and then who can do that so somebody is going to get it, and that seemed to be the clerk, and that's basically Judge Priddy's experiment kind

of showed us this was the way to do it, and then he was just talking to the clerks, and I will tell you at first they said, "Well, wait a minute, if we have to put this in the envelope, that's a service fee, and we ought to get the same thing that you pay the sheriff or constable." So I went round and round and round and round, and said, wait a minute, if you've got ten bucks -- because literally all you're going to have to do is you're going to have to fill out the address on an envelope, put the citation in, and send it off.

HONORABLE DAVID EVANS: And do the return now.

MR. BASTIAN: And you do the return basically the same time when you put the citation in the envelope. Well, I mean, it's contemplating that's the way -- we said the way you, Mr. -- Mr. or Mrs. Clerk, do your normal mailing, and that would be the -- the sense was you put it over in this box, and somebody comes around at 4:30 everyday, picks it up, and takes it to the post office. That's the normal procedure of the clerk, and so that's what would go into that return of service at 4:30 when John Doe came and picked it up out of the box and took it to the post office. That's what we contemplated.

HONORABLE DAVID EVANS: You know, we try certificate of services issues at times, first class mail

and lawyer signs a certificate, and the other side says they didn't get the notice, and you know, they don't go very far, but we see that a lot, but in this situation we're not even going to know anything more than the district clerk was supposed to have dropped a piece of first class mail in a box outside the -- outside the courthouse.

MR. BASTIAN: That is correct.

HONORABLE DAVID EVANS: I will say that in cases I've tried and have heard as a -- and now heard as a judge I've always been impressed with those situations where people sent an item by first class and by certified because then you just look at the fact that the certified mail was never picked up, and you knew that it was out there and that it had gone out there and it had come back.

MR. BASTIAN: Well, then I have an idea.

HONORABLE DAVID EVANS: It is a matter of giving notice to the people who are out there and being able to say that they had an opportunity, whether they took care of it or not.

MR. BASTIAN: Then here's a -- I mean, I'm pulling this out of the air. Then we can go back to the old original rule and the attorney has to send out the application certified mail, and the clerk does it, too. Because under the old rule the attorneys sent it out, did a

cert of service, sent it certified mail. I mean, that's how it was served. So we could keep that same procedure. The attorney or the petitioner would do that, but you have the fail-safe which way you want to go and the clerk sending it out, too.

HONORABLE DAVID EVANS: Well, I don't know if the committee is bothered by the regular mail or not, but it is an item in the court that you know that the agency tried to deliver it and it wasn't accepted, and I do agree that Judge Priddy's -- I'm not contesting the fact that when you send something by regular mail people are more likely to pick it up. I'm just pointing out to you that it has its own deficiency, too, because you have no assurance that it went anywhere.

MR. BASTIAN: I think the beauty of this task force is everybody tried to be a statesman, and nobody had trying to protect their own little turf --

HONORABLE DAVID EVANS: I didn't think anybody was trying --

MR. BASTIAN: -- and this might be a situation where we could just add that procedure, the attorney sends it and the clerk sends it both.

HONORABLE DAVID EVANS: I don't know that other people on the committee feel as I do or not about a different service than first class mail.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Along those lines, under the old rule it looked like if the respondent -- if you knew respondent was represented by counsel you served counsel, and that got taken out, and I'm just curious about why that was taken out.

MR. BASTIAN: I don't even know if we even considered that. Part of that is back on the other side is because of the Fair Debt Collection Practices Act. I mean, that's another law that's involved in all of this that would almost force that to be done automatically anyway, but, I mean, that's another thing that's easy enough to add it in.

CHAIRMAN BABCOCK: Any other comments? Justice Hecht, anything else you guys need?

HONORABLE NATHAN HECHT: (Shakes head)

CHAIRMAN BABCOCK: Well, guys, thank you very much for this, a little less painful than last two times.

MR. BAGGETT: It was. Tell the Legislature to quit telling us to do all of this stuff.

CHAIRMAN BABCOCK: Yeah, but you're getting practice at it. I want to apologize for not scheduling better because we have another agenda item, it's very important, and the parental rights termination people are going to be here tomorrow at 9:00, so we'll have to deal

with them then. If you-all have just a few minutes, we might talk a little bit about the expedited actions, the hundred thousand or less lawsuits that a task force is going to deal with, but Justice Phillips, Chief Justice Phillips is going to lead, but there has been talk about in these cases going to a -- going to a regime somewhat akin to criminal cases where there's no discovery other than what you might use at trial, and I'm not sure about exculpatory information in a hundred thousand-dollar or less lawsuit like you would have in a criminal case, but it would be a fairly dramatic radical change from the wide open discovery days, which we all know is a burden our courts and our practice with enormous expense, so what's the sense of the room about abolishing discovery in these hundred thousand or less cases? Kent, you can go first since you're nodding "yes."

HONORABLE KENT SULLIVAN: I just think it's a good idea. As a practical matter that's what is preventing --

CHAIRMAN BABCOCK: Could you speak up a little bit, Kent? She can't hear you.

HONORABLE KENT SULLIVAN: I think it's a good idea because I think that the cost of discovery is preventing the filing of claims that ought to be filed and the efficient disposition of claims under a hundred

thousand dollars, I do think there is one issue that I am uncertain about, and that is in order to access some sort of expedited process like this where discovery would be very limited or perhaps even eliminated, does that -- does that mean -- the fact that we're talking about a less than hundred thousand-dollar claim, does that mean that regardless of what happens a court cannot render a judgment in excess of a hundred thousand dollars?

CHAIRMAN BABCOCK: It's going to be an issue.

HONORABLE KENT SULLIVAN: I'm sorry?

CHAIRMAN BABCOCK: I'm saying I think that will be an issue.

HONORABLE KENT SULLIVAN: Well, because I think there are clearly going to be concerns there.

CHAIRMAN BABCOCK: Yeah. And, David, we will pay the court reporters, so don't --

MR. JACKSON: Since I'm sitting next to Kent I'll take the other side of that issue.

MR. MEADOWS: Well, how could it exceed a hundred thousand --

CHAIRMAN BABCOCK: Wait, wait. Bobby, hang on. Let David --

MR. MEADOWS: Oh, I'm sorry, David.

MR. JACKSON: I was at a deposition yesterday that's obviously less than a hundred thousand-dollar case.

Somebody evicted someone from their lease property. The case was over because of the deposition that was taken. They discovered that the guy didn't own the property that he claimed was in the leased property to begin with, so the discovery ended the case. As soon as I get them their deposition they're going to file their summary judgment motion, and the case is over.

CHAIRMAN BABCOCK: Kent.

HONORABLE KENT SULLIVAN: My thought is, is that discovery should be -- it's not necessary to perhaps eliminate discovery, but it ought to be entirely different. I mean, I think that Jim Perdue and I have batted this around a little bit because of our concern over claims that aren't getting filed anymore and trying to create efficiencies for smaller claims, so -- and to me this is an access to justice issue, so you could go to a process where people have to produce statements for people when they -- parties or people that they have control over. There are ways to facilitate the exchange of information at much lower cost so that hopefully you'd still get -- you might not always be able to deal with the issues that we were just talking about, but, I mean, you wouldn't have to be completely blind, and you would have information available to you that you could impeach people with and the like, but you might actually see the regeneration of an entire new

group of trial lawyers as opposed to -- I mean, increasingly a lot of the folks that used to be trial lawyers are now discovery lawyers.

CHAIRMAN BABCOCK: Yeah, Bobby, and then Judge Wallace.

MR. MEADOWS: Well, just a couple of things, and I personally think this is the best part about this new act, this provision that calls for an examination of how to make it possible to have litigants reenter our state courthouses and resolve their disputes there. This has been -- you know, the vanishing jury trial is something that we're all aware of, think about, care about. Kent just spoke to it. I think if we get this right it's an opportunity for us to reintroduce the resolution of disputes to the state courthouses where -- where I think it largely doesn't occur anymore. I think it has the benefit of you know bring young lawyers in a way they don't get opportunities at large firms any more, so I think this is a real opportunity for us in the state. I'm delighted to hear that Justice Phillips is going to be involved in it. I do think it implicates the work and thinking of our discovery subcommittee. I'm not sure how that will be brought into the effort, but I think we should be mindful that that's a place where a lot of this work has definitely gone on, but I really hope that we bear down on this and do

something really creative and helpful and then I hope we -- if it's as good as it can be, I hope the bar, you know, promotes it and we get the word out and we, you know, attract people to it and we bring disputes back to the state courthouse.

CHAIRMAN BABCOCK: Judge Wallace.

HONORABLE R. H. WALLACE: Well, I've been in discussions before about this, talking about the vanishing jury trial, and I've always advocated that we ought to cut down on the discovery process in civil cases. I was -- ten years as a Federal prosecutor and some criminal defense work it always seemed like an anomaly to me that when life or liberty was at stake you didn't do any discovery, but when you're fighting over money you had these endless discovery battles. I mean, you're right. Lawyers forget how to go into a -- they think they've got to depose every person that might possibly step into that courtroom, so -- but here's a problem: The subpoena power. If you can't take a deposition and you can't subpoena a witness who is outside the court's subpoena power, that's something that's -- that's something I would think you have to address. Federal prosecutor doesn't have that problem. He can subpoena anybody anywhere in the United States, state, and I guess subpoena them all over the state, so if you're going to cut out discovery you're going to have to somehow

figure out how do you get testimony from those witnesses that you don't have subpoena power over.

CHAIRMAN BABCOCK: Great point. Alex.

PROFESSOR ALBRIGHT: I just want to remind everybody that we have done a lot for these kinds of cases or at least tried to in the discovery rules. We have the part one, tier one, level one discovery, and so we talked about this a lot then. We -- you know, everybody was afraid of it, and we limited it to $50,000 and less cases. I really haven't heard that much about how many cases are using level one.

HONORABLE R. H. WALLACE: None.

PROFESSOR ALBRIGHT: Everybody probably opts out of it, but so I think it was an experiment, but at least our rules now have a place that where we can strengthen that and put that in there, and I think we ought to be mindful that it's not like we have completely ignored this through the years.

CHAIRMAN BABCOCK: Yeah, I agree. Frank, you had your hand up, and, Jim, did you have your hand up?

MR. GILSTRAP: Chip, you were talking about limited discovery or no discovery. Is that what you were saying?

CHAIRMAN BABCOCK: I said limited or no.

MR. GILSTRAP: Well, there's a big

difference, and if we go to no discovery on any kind of case I guess that brings back trial by ambush, which was, you know, a terrible thing at one point. You've got to have --

PROFESSOR DORSANEO: Sounds bad.

MR. HARDIN: Was it really that bad?

MR. GILSTRAP: But, you know, you've got to find some -- and we also have, you know, very loose pleading rules, so you go into the court and you really don't know what the case is about. Are we going to go back to detailed pleadings? Because that was what we had before we had discovery. You know, I mean, I guess it's possible, but that would just be an enormous to step. Insofar as limited discovery, my impression is, you know, 190.2 for level one just isn't used. I mean, I don't know anybody that's ever used it.

CHAIRMAN BABCOCK: That's true.

PROFESSOR DORSANEO: Nobody wants to be a level one lawyer, as Paul Gold used to say.

CHAIRMAN BABCOCK: Judge Wallace.

HONORABLE R. H. WALLACE: Well, the solution may be if you can give the judge the power to say, "This is a level one case. You're not going to do -- we're not going to have level three discovery order. This is a level one case, and that's what you're going to do."

CHAIRMAN BABCOCK: If it's a hundred thousand or less it's a level one case per se. Yeah. Pete.

MR. SCHENKKAN: One of the ideas I understand only from reading the letter to Justice Hecht that was by the ABOTA and other people, some intitial thought, one of the ideas is that the rules for these cases either be or at least the subset of them be voluntary, and it's voluntary on both sides is the concept, and that goes a long -- you know, for any cases to which that applies that goes a long way toward dealing with the concerns that, well, you know, if I had even one deposition I could prove this case goes away, and so, you know, you might take -- you might cut into a piece of the problem by having rules that both sides have to agree apply to the case for them to apply, but if both sides agree there is no discovery in that case. Then each side gets to decide can I afford to do this without any depositions, can I afford to give up my advantage of being able to run up the costs and burden the people on the other side, am I going to be able to subpoena whoever I, you know, need to have at the trial? To the extent you approach it on both sides voluntary agreement is required basis then you cut into the problem, and you've enabled some cases potentially to be tried in our courts instead of resolved some other way because nobody can afford to try them.

Then you've still got cases where for one or more of the reasons I just described one side is not going to be willing to agree --

CHAIRMAN BABCOCK: Right.

MR. SCHENKKAN: -- to do them voluntarily, and now you have to tackle for those cases what am I going to do about the fact that discovery makes hundred thousand-dollar cases unaffordable, and now you're going to have to look at some options for either giving it to the trial court to decide or setting up categories of these certain kinds of cases where you can go with no discovery or one deposition or whatever.

CHAIRMAN BABCOCK: Eduardo.

MR. RODRIGUEZ: Yeah, I don't know of any lawyer that gets a case that says it's a level one discovery that doesn't turn around and object to it and say, you know, we've got to change it because you just don't want to go through the process of trying to figure out how many days you have to have everybody named and so forth that it's easier when you all have to agree or it's in a scheduling order, so I think whatever rules we make would have to -- would have to take that into account. I think that we could -- I think that you could do these kind of cases and limit the type of discovery that -- that the parties can do, but I also agree that there needs to be

some change in the pleading -- in the pleadings so that the defendant knows actually what he's being -- what the allegations are, because the way pleadings are, at least in some of the courts that I practice in, you have to do a lot of discovery to try and find out what it is that you actually did wrong.

CHAIRMAN BABCOCK: Well, the Federal courts, you know, are -- you know, the Twombly and the Iqbal case are requiring more detailed pleading. They overruled *Conley vs. Gibson,* so, I mean, there's that trend in the Federal courts. Justice Bland, and then somebody was -- Justice Brown.

HONORABLE JANE BLAND: I tried a case in May where the lawyers agreed to do no discovery whatsoever, just show up on the day of trial, and it worked fine, but there were a couple of things they agreed about. One was there was going to be no motion for summary judgment filed because a no evidence motion for summary judgment requires you to produce evidence. They exchanged all their trial exhibits. They did all the things I think that you're contemplating. The only thing that was getting used at trial got exchanged a week ahead, just a week ahead, but it was all voluntary, and if we're going to make it required you're going to have to look at these other gatekeeping kinds of rules that we have because those are hurdles that

people can't get over without evidence.

CHAIRMAN BABCOCK: Yeah. Justice Christopher, then Justice Brown.

HONORABLE TRACY CHRISTOPHER: Well, I think a huge, huge expense is summary judgment practice; and, you know, I say eliminate summary judgments for these smaller cases; and, you know, if you've got a two-hour bench trial on a legal point, come down and do your two-hour bench trial on it versus crafting affidavits that have problems, and then you have objections to the affidavits and then you've got --

PROFESSOR ALBRIGHT: Really?

HONORABLE TRACY CHRISTOPHER: It would be faster to have the bench trial.

CHAIRMAN BABCOCK: Justice Brown.

HONORABLE HARVEY BROWN: I was just going to say sometimes discovery is cheaper, though, than going to the courthouse. For example, the plaintiff who needs a doctor's deposition, a lot cheaper to depose the doctor than to bring the doctor live down to the courthouse; and sometimes, you know, finding out that one piece of information that disposes of a case is the fastest and cheapest way to dispose of a case, so I think eliminating discovery is a bad idea, but I think limiting it is a good idea.

CHAIRMAN BABCOCK: Okay. Tom, then Gene.

MR. RINEY: Well, I just agree very strongly with what Judge Wallace and Bobby said. I mean, this is a real opportunity for us to I think preserve the jury trial system and to train some young lawyers, and I think it's going away very fast. That being said, I also agree this needs to be a voluntary process. If it's not voluntary, good lawyers can get out of it. I mean, you know, we've got problems right now you're not even supposed to put what you're suing for in the pleading, but if we make that a requirement good lawyers can get around it, and you're probably going to take some out of the system that might otherwise be in there. The key is going to be once people learn about this procedure and learn to trust the procedure.

We have now created a generation of lawyers that are scared to go to the courthouse if they haven't discovered every e-mail that the other side has ever sent on almost any subject because they're afraid there might be a smoking gun out there that they've missed. If we can limit that risk and say that it's in a hundred thousand-dollar exposure, that's the worst that you can lose and we get them to agree to this process and basically teach them how to be trial lawyers and do a little bit of investigation other than by deposing everyone that they can

find. I think trial by ambush is much maligned.

MR. HARDIN: Amen.

MR. RINEY: If you go back to, you know, back when I was a young lawyer and we had workers comp cases tried in front of a jury, I mean, no one wanted to pay a lot of money in discovery. You can send a young lawyer over there because your exposure was capped, and you didn't have all of these depositions, you didn't have all of these document requests; and while I'm not suggesting we return to the day of workers comp, there is -- there was some value in the way that we did that, and maybe we do eliminate summary judgments. I mean, I think that should be on the table.

I'm not sure it should be no discovery, but I think it should be limited discovery, and what I hope we can create then is that lawyers can agree in a certain case we're going to go under this expedited trial process, but then after you get into it the lawyers could reach an agreement, you know what, if we're going to limit these cases to one deposition per side, in this case you and I can agree we're going to take two. I think there is some real benefit to that.

CHAIRMAN BABCOCK: Gene.

MR. STORIE: My first thought was to make a lot more work for the trial judges because it seemed to me

since you're looking at problems and efficiencies as well as the discovery issue you want really a robust pretrial conference and to try and have that as early as possible, just get the parties in there and see if they can agree to some extent what they're really fighting about and what they'll need to prove it, because if people aren't going to put their cards on the table it's going to be hard to make this work.

CHAIRMAN BABCOCK: Yeah, Judge Evans.

HONORABLE DAVID EVANS: Not a vote one way or another, but just an observation, where the work is standardized such as in the soft tissue car wreck cases, the discovery level is generally within line in the amount in controversy. Those lawyers, captive insurance counsel on one side, plaintiffs who only do soft tissue car wrecks on the other side, it's a medical record affidavits, maybe do a deposition on written questions, and maybe have a small deposition and tee it up, and they don't want you to have a pretrial because they don't want the additional cost. They don't want to have the jury pulled on the Friday before. They want to come down, tee it up, and they'll try it in a day and do it, and I have those on my docket every week behind all the other cases.

Without saying that there's any empirical data to support it, but saying it's an observation from me

after eight years smaller commercial cases where the lawyers are being paid on the hour and the results are not -- and not that the hourly fee is necessarily the vice, but where the law is not established, the jury result is not known, are the ones that seem to be overdiscovered and overtried, over summary judgment, and just let me say that I second the motion to do away with summary judgment practice. We are -- it's only become good to educate the trial judge. Given the standard that exists in the state practice Judge Christopher is exactly right. We try all of these in two hours in a bench trial and come up with a factual sufficiency ruling that will stand on appeal or try them with a jury and do it.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: Well, I was just going to say what Tom said. When I started practicing law we didn't have any written discovery, none at all. I guess it was on the books, but nobody knew about it. All we did --

PROFESSOR DORSANEO: Must be around since the Republic.

MR. HAMILTON: -- was maybe take a deposition of the other side, but the fun in trying the lawsuit was trial by ambush to do the best you could with what you had in the courthouse, and it worked fine, and then we start all of this discovery, and I think the written discovery is

what drives up a lot of the cost.

CHAIRMAN BABCOCK: Yeah, Lonny.

PROFESSOR HOFFMAN: So I guess I would just add one comment that I may find myself saying again. I always get the hairs on the back of my neck stand up that when I hear us -- when I hear people generally assume we know what's happening in the world when we may not, and indeed the world may, in fact, quite differently than that if we look better at data; and so, for instance, I want to echo what Judge Evans said or at least part of what you were saying. It may turn out -- and certainly the best empirical work that I've read so far seems to show this, that discovery turns out to not be an issue at all, not -- not that it's, you know, different, but that it's just like you were describing for the vast majority of cases and that there is a problem with discovery, but that it appears to be limited, at least based on the Federal Judicial Center's best recent research, for a small sliver of the world that it turns out that people who are policymakers often end up being the litigators in these complex cases involving, as it turns out, lawyers who often get paid by the hour a lot.

So I'm not against being creative by any means. I think it is a great opportunity we have here, but before we assume that discovery costs are, you know, the worst thing or the sole cause for the vanishing trial and

indeed we are inundated with some litigation crisis that is driven primarily by discovery run amok, we ought to remember that it's important to find out what's actually going on. Unfortunately at the state level the data is not as good as it is at the national level.

HONORABLE SARAH DUNCAN: Chip?

CHAIRMAN BABCOCK: Well, yeah, and I agree that you shouldn't make policy on anecdotal information, and you try to get as much information as you can, but this group here represents a broad range of experience, so our collective experience counts for something, I think. I know it does with the Court. And for my own part, there was an article I think this week in the *New York Times*, maybe last week, about the situation in California, and they are in absolute crisis, and it's in part due to fact they don't have any money and they're getting cut, and we're getting cut, but our Legislature and our administration I think has been -- correct me if I'm wrong, Justice Hecht -- but very supportive of the judicial branch --

HONORABLE NATHAN HECHT: So far, yeah.

CHAIRMAN BABCOCK: -- of our government without question. So we don't face that crisis, but I also know that in California, where I have been spending a lot of time lately, every day the trial judges have docket call

at 8:30, and the amount of discovery disputes that come through that court are staggering, and they choke the court's ability to do anything, and they choke the ability of the cases to move, and I for one don't want to see us go in that direction because what's going to happen in California is that people who aren't able to get the public court system to resolve their disputes in a timely way are going to go to other dispute resolution mechanisms, and I think, frankly, that's bad. I think we need a public court system to resolve our disputes.

I think they're better resolved in public than in a private arbitration or some other dispute form of resolution; and if I have a bias, I suppose I'm showing it here; but I think this is an enormously important issue; and echoing what others have said, it is a tremendous opportunity for us and for the Court to do something forward looking, far reaching; and I don't want to use the radical word in this company, but something that is way different than is being done elsewhere where it is not working, for sure. Kent.

HONORABLE KENT SULLIVAN: With respect to Professor Hoffman's observations, one thing I was curious about is, you know, I presume that there's no empirical research one way or the other dealing with the cases that don't get filed. And to me that's a real concern. I see

Jim nodding his head, and that is something we've talked about. The concern that I have is that if you go primarily to a contingent fee lawyer, but it could be an hourly rate lawyer as well, although it's almost always going to be a contingent fee lawyer taking a smaller case probably for a plaintiff, and they have to factor in can I afford to take this case, does it make economic sense; and the thing that they've got to factor into that is the cost of discovery; and so the smaller claims I think are increasingly being left unrepresented and never getting filed because of the problem associated with discovery.

Just a couple of other quick notes. People have made the distinction here about the issue of you can't have no discovery because you may need to take depositions either of the doctor -- I think Justice Brown pointed out or someone else pointed out the person who is outside of the subpoena power. In my view those are trial depositions. I mean, that's not classic discovery, gee, we just want to find out what he's going to say. We've got to do that in order to try the case, and I would segregate that out. To me that's not the classic discovery issue that we're talking about, and I think we need to make that distinction.

The other thing I've heard is the issue of trial by ambush, people aren't going to lay their cards on

the table. To me that's the one procedural reform that needs to be considered consistent with a no discovery sort of format, and that is you have to have a procedure where you do have to lay your cards on the table. Just off the top of my head my thought is if you filed a piece of paper, maybe it's two pages, but it lays out, you know, your claims or defenses, your damages, your witnesses, and you attach the exhibits you intend to offer. Boy, that's it. I mean, and then you could -- I think you could really facilitate a no discovery sort of approach. I guess what I'm saying is I hate for us to be reflexive and knee jerk and say, gee, you can't do it because this isn't what we've been doing for the last 25 years. I'd at least like for people to give it some real consideration, because then you could access the courthouse at a much lower cost, trial lawyers could learn to be trial lawyers again. It might be interesting.

CHAIRMAN BABCOCK: Jim, you got any thoughts about this?

MR. PERDUE: I echo everything that was said at the other end.

CHAIRMAN BABCOCK: Well, there's lots of stuff said at the other end.

MR. PERDUE: Down there. I mean, yeah, Judge Sullivan and I started this conversation over a year ago

and the -- but Judge Brown reminds of something that's important, which is if you've got an element of the case it may be cheaper to do a trial deposition or something that takes it out of the case, and I never could get my brain around how to write a rule along what Justice Sullivan and I were thinking of, which was request for disclosures that have meaning, essentially mandatory exchange of information that has meaning, and then you go to the courthouse, and what is the path to achieve that, which seems to I think be what was underlying the concept and what we really were discussing, which is allow people to take a 75,000-dollar case economically that makes sense for both sides.

CHAIRMAN BABCOCK: Right.

MR. PERDUE: A plaintiff and defendant, that you can litigate and have mandated in the rule and understanding what the case is about basically what's going to be the theory and the defense and then go to the courthouse and tee it up, and there will be some surprise, and lawyers will have to relearn how to listen to answers and ask questions from it and do that, but at the same time, you know, we've got soft tissue car wreck cases now where judges are requiring a physician to establish causation that you cannot -- that a layperson cannot infer the medical records establish they were caused by the wreck, and per se that's a new interpretation. We've got a

whole lot of minilitigation going over medical bills and the whole procedure of being able to prove up medical bills versus what is and isn't is -- continues to be a challenge. So it is a -- for I think the vast majority of small cases lend itself to those types of questions. There's just extra procedures in the rules that I don't know how you answer those, even at the same time I can see a pathway to limiting discovery and having essentially disclosures that count and say, "I'll see you at the courthouse in, you know, less than six months."

CHAIRMAN BABCOCK: Are cases that are under a hundred thousand not being filed?

MR. PERDUE: I don't think there is any question about that. There is a whole universe of people calling themselves prelitigation lawyers, which I have no idea what that means, but, I mean, you've got claims adjusters on the plaintiffs side, which is bizarre to me, but they have to settle those cases because they cannot be filed. You cannot litigate that case.

CHAIRMAN BABCOCK: Yeah. David, you've had your hand up for a while, then Bill.

MR. JACKSON: You know, we've worked to the point now where freelance court reporters, 90 percent of what we take now is car wreck cases, and it's where -- it's just a routine. You go in, you take one side's deposition.

There's another court reporter there waiting to take the other side's deposition. It's a lawsuit that's filed. It's a case that's worth maybe four or five thousand dollars. All they want to do is take plaintiff's deposition, take the other driver's deposition, turn it over to the insurance company, and let them see how much they're going to pay, and it never gets to the courthouse, and if you take away that and you make all of those people go through this process all the way to the courthouse you're not going to save anybody any money.

CHAIRMAN BABCOCK: David, and then Bill, and then Bobby. Sorry.

HONORABLE DAVID PEEPLES: I think there's something happening out there that nobody in this room knows what's causing it. You know, as I recall, the theory behind level one discovery was if a plaintiff wants to keep a case low budget you just plead it under a hundred thousand dollars and then it takes an agreement or a court order to make it an expensive case, but there are not that many of those yet. Until the Legislature changed it recently most of the county courts at law in civil cases had a hundred thousand dollars maximum jurisdiction so you could file a smaller case in county courts. I know they get plenty of cases in San Antonio, so I think that, you know, there are plenty of those cases being filed. I have

no doubt that some cases are not, but I do not have an explanation as to why more people don't take advantage of the lower level opportunities; that is, level one discovery and/or county court at law, until they changed it recently.

Now, something I hear occasionally from lawyers is "I've got to do the discovery because I don't want a malpractice case against me."

CHAIRMAN BABCOCK: Yeah.

HONORABLE DAVID PEEPLES: And I don't read that much about them, but I'm not aware that there's a rash of malpractice cases because you didn't do enough discovery or you agreed to level one or you filed it in county court instead of district court, and I'm not sure, and I know the Supreme Court cannot say in a rule, you know, that as a matter of law it's not malpractice to file a cheap case, but I just hear occasionally from lawyers that that's one reason they do a lot of discovery.

CHAIRMAN BABCOCK: Professor Dorsaneo, and then Bobby.

PROFESSOR DORSANEO: I was just going to say that the focus on the personal injury cases where there is insurance, I mean, those cases are a lot better off than the smaller commercial cases where you can't -- you can't find a contingent fee lawyer who is willing to take a hundred thousand-dollar residential construction liability

act case, even though you could recover attorney's fees. I mean, you can't -- it's just not -- doesn't make sense for them, even if they're only going to take, you know, one deposition for one hour. Those cases are -- a lot of those cases just aren't filed because it's just not worth it. That's just not --

CHAIRMAN BABCOCK: Yeah.

PROFESSOR DORSANEO: -- the kind of case that lawyers want to do.

CHAIRMAN BABCOCK: Bobby.

MR. MEADOWS: I was just going to make the additional point that, I mean, I think that's the opportunity and the challenge in this assignment, because, I mean, the point that we've been talking about a little bit that Harvey raised about is it more efficient to take the deposition of a physician rather than bring him to the courthouse, I mean, obviously it is, and that's what this -- you know, we're compelled to examine, is to find a way to promote efficient and cost effective resolution. So when you look at the whole anatomy of a dispute and each element of it, you know, how can you make it work more efficiently? Is it a matter of taking a deposition before trial or would you do some other -- handle it in some other way, but that's what I think is interesting about this is that we're to look at each aspect of it and find the way

that is the most efficient and the most cost effective and design a system.

CHAIRMAN BABCOCK: Yeah. Rusty.

MR. HARDIN: Yeah, just from the point of view, our practice now for the last seven or eight years has been about 90 percent civil, and it's probably about half between plaintiff and defendant. In spite of occasionally some cases being in the paper many of them are very small cases, and I think the one thing we're missing here is that these arguments that I think are very valid also apply to the defense. I regularly have people who have small disputes that somebody is accusing them of that they feel like when you get through counseling them they're going to end up paying some money that they shouldn't do because fighting is going to be too expensive on their side.

So this issue applies to both plaintiffs and defendants, and I think that it's not just a few cases where lawyers are afraid to do things for fear they'd be accused of malpractice. I think as long as the law looks like there's no distinction between the level of discovery in terms of what people are doing for little cases as big cases, lawyers are going to continue to do all of that because everybody is afraid now for all the reasons that we just said of leaving a stone unturned and then being

criticized later.

If the presumption for the rule or the court or however it's done is that there will be little or no discovery in these smaller cases, except -- and every time I come to one of these things I'm always singing the song of judicial discretion, and I've said before, the older I get the more I switch my view, which was as a young lawyer we couldn't trust judges to make a lot of discretionary decisions so we wanted to hem them in, and I've gone 180 degrees a different way, and I think it can be structured to where in those situations where a deposition -- everybody, we're not going to have discovery but judge can always allow it. It is just there would be a presumption against it in these cases and then the court can take an individual case where the need does require it and explain to it, the court can make an exception, but if the whole system knows there is a bias against discovery in these cases to be only done when the unique facts of that circumstance or case call for it then I think we've made a lot of progress.

CHAIRMAN BABCOCK: That's a good point. Judge Evans, and then Justice Gray.

HONORABLE DAVID EVANS: One, I don't know if I've -- if it came across, but one of the things that impressed me about the way the soft tissue litigation is

handled between captive counsel and those lawyers that advertise for it, is that the insurance companies don't use captive counsel to drive up costs. You don't see that kind of complaint about discovery. So one of the conclusions I drew from that is there's a sophisticated client on the defense side who is controlling costs, as Rusty pointed out, in a fashion, but when you get to the other cases where we're having the trouble getting the trial, there's not a sophisticated consumer. I don't think it's malpractice, Judge Peeples. I think it's grievances that drives that concern on the smaller cases, and I think that that is the problem, is trying to get the lawyers to the comfort level that they think they can try with less, and -- or a set of rules where the trial judge could say, "No, I'm not allowing but two oral depositions and certain matters to go forward," but then again, a hundred thousand isn't what it was when we started practicing.

We're really -- we're not talking about -- when you look at these cases that aren't, quote, being filed or tried, residential liability cases, those are built-in appellate cases. There's more cost out there for the consumer and the defendant than you can imagine.

CHAIRMAN BABCOCK: Yeah. Will you yield to Rusty, Justice Gray, for a second?

HONORABLE TOM GRAY: Absolutely.

MR. HARDIN: Just for a follow-up, just to add, the one thing that I think sometimes I disagree with when we talk about trial by ambush, when we talk about no discovery, we're not talking about people not knowing anything. We're talking about going back to the old days where you went out and talked to witnesses. What a better way to train a lawyer than to get them to learn to not only listen in court when they're asking questions but to go out and know how to interview and talk to people and get that information. We're not talking about them going into court not knowing anything about the case. We're talking about them going in and discovering it at a lot cheaper cost to their client and in many ways a much more informative way.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: We've been talking about the implementation of section 201 of House Bill 274, but I don't know that we can address it without also simultaneously doing 101 of House Bill 274, and that's the rule regarding how we're going to dispose of the frivolous lawsuits from the beginning, which has to be determined within 45 days of the motion being filed. So I think those two are part and parcel of a problem, and then just anecdotally from the appellate side, probably the area that at least in a sense is now tried without much discovery is in the criminal arena, and that is tried on a fairly

specific pleading in the form of the indictment, and -- although some would argue that that is very general in some situations, and it can be, but at least there's some ways to improve knowledge of what is going to be at issue. There's very limited discovery, as y'all know, in criminal cases, and having read quite a few of the records in criminal cases, they are not the pictures of trial lawyer training that y'all are wanting to foster, and so I counsel --

CHAIRMAN BABCOCK: On behalf of the criminal bar I take offense to that.

HONORABLE TOM GRAY: I counsel that you think about carefully whether or not this is going to be a training exercise that you want to engage in and is going to yield the results. I mean, we -- before I became on the committee y'all did the discovery rules, and I actually thought -- I was with Fulbright at the time. I thought that was going to be the largest change in the practice of law in my career, and it really turned out to be almost a nonissue with the different levels of discovery, at least from what I've seen on the appellate level. So my comments, and like I say, I think the more fundamental part of what I had to say is that without knowing really how we're going to identify and dispose of the frivolous lawsuit, that's going to be -- it's going to be a challenge

to do the small lawsuits.

CHAIRMAN BABCOCK: Yeah. About our discovery rules, it's compared to what, and I'll tell you, our discovery rules compared to rules in other parts of the country, even the Federal system, are miles ahead in my opinion, miles ahead. Pete, you've had your hand up, and then Lamont.

MR. SCHENKKAN: I want to follow back to Lonny's point. I'm not -- you know, I don't do this kind of work, so I don't have an anecdotal base of my own to go on --

CHAIRMAN BABCOCK: Oh, come on.

MR. SCHENKKAN: -- but I'm not sure I'm getting a picture of what are the cases that are not being filed that are, in fact, less than a hundred thousand-dollar cases that are not being filed that we can then use that fact information, a picture of what that case is like or that category of cases is like and make sensible decisions. Is this a discovery problem? Is it a discovery problem of a type that you could solve by saying you get to do a trial deposition of a doctor in turn for nobody, you know, being able to call the doctor? I don't understand which -- I'm not disagreeing that these cases exist. I'm saying I don't understand what the description is of the cases that we're talking about, and I think we need that as

a starting point if the work is going to be effective in coming up with rule-based approaches to making and trying them.

CHAIRMAN BABCOCK: Well, we've described a couple of categories, the construction, small construction defect cases, the small commercial cases, a breach of contract under a hundred thousand dollars.

MR. SCHENKKAN: I heard two people say that anecdotally, and it's unclear to me is there a consensus on that, because on the auto cases I heard some people say, no, this is working fine and others says it's not, and I don't know which is --

CHAIRMAN BABCOCK: Yeah. Lamont, then Judge Wallace, and then Richard.

MR. JEFFERSON: Three points, but let me respond to that first. I think if it's a construction case against -- and you're going to be a plaintiff against a large company and there's not a lot of money involved, you're not going to file it because it's going to cost you more money and time than it is to resolve it. There are many other examples that are similar to that where you're a plaintiff chasing a relatively small amount of money against deep pockets, and those cases aren't going to be filed.

But the three points are, one, the source of

all of this consternation, I think, I think the reason why litigation costs are completely out of control is the hourly billing concept that lawyers operate under universally, and it's tragic. It puts you at odds with your client. You have complete control over the amount of work that gets done on a file, and it just puts -- it completely disincentivizes your -- the motivation to resolve a case early and efficiently, and it's been under attack supposedly, but it's still by far -- that is, hourly billing has been under attack, but it's still the gold standard as far as how lawyers are pricing their services, and it just is not -- if someone came to a lawyer, said, "I've got a 75,000-dollar dispute. I'll pay you $25,000 to resolve it," and if the lawyer said, "Okay, you know, I'll take your $25,000" and have some knowledge that that's -- that it's not going to just take over their life in terms of time, that case would get filed, and it would get resolved for that amount of money because the lawyer would have a price, and he would manage the case efficiently and get it resolved.

So hourly billing, No. 1. No. 2, if we're going to put some sort of delineation on it, I'm not sure that a dollar delineation is the correct one. Back to the point about we want to make sure we're diagnosing the problem correctly, I mean, I would want to see the cases

that get filed, what kind of cases are they that get filed, that where they're just out of control as far as litigation costs because it's not always cases involving a dollar amount. It's cases that, from my experience, where both sides get entrenched in the principle, whatever the principle is, and it's not necessarily a magnitude deal.

Third point is if we're going to do anything about it, it ain't going to work -- and we've seen that with the level one discovery -- unless it's mandatory on at least one party. One party isn't going to like it. The party that thinks they're at the advantage, the deep pocket, who thinks, okay, I can drive up the other side's cost, they're not going to like it if you say you cannot do things that will drive up the other side's costs beyond what the proportionality of the problem. So I think it's -- if we're going to be creative, if we're going to be innovative, and I absolutely encourage it and I think all the comments that everybody has made would -- you know, at least in some kind of experimental phase would be welcomed by a large percentage of the bar, and I think a large percentage of the population who just can't afford a lawyer, but it's going to have to be compulsory on at least one party.

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: Number one, in terms of the

lack of information available to us, the people in this room generally don't handle cases worth a hundred thousand dollars or less, so we don't know what's there, but I would tend to believe that at least in El Paso and I suspect elsewhere there are a lot of lawyers who would love to take a case worth $75,000 and think they were going to get paid $25,000. That's not a bad deal for a lot of lawyers. We've talked about discovery.

I recall Rule 26 of the Federal courts being amended years ago where the party had to produce the names of persons with relevant knowledge and documents that party was going to rely on. Well, that was small solace to the adversary because you're going to rely on those documents. Where is the rest of the truth? What else is out there? And that's what prompts in large part discovery in lots of cases. It is fear of a malpractice case, but it's also what's the truth here, so if you're going to have a rule where you make disclosures, make people disclose every document believed relevant to the case regardless of whether it's helpful or not helpful.

Now then, that puts a burden on the lawyer to be honest and ethical and moral. They may not all be that way, but it might prevent the lawsuit from being filed. It might lead to a prompt settlement of the case. Most of us know that -- I mean, if I say to you, "Here's my witnesses

and here are my exhibits," fine. What aren't you showing me? That's what prompts discovery. So I don't -- if you're going to have a rule where you expedite these hundred thousand-dollar cases, make people produce all the evidence. There is no trial by ambush. It's just as easy to make them produce it. It probably clears up the dockets a lot quicker.

I also have a question in my mind about making it voluntary. I listen to people say, well, it ought to be voluntary to opt into this hundred thousand-dollar program. Why would I opt into a hundred thousand-dollar program if I'm a plaintiff with a marginal case and I've got the right to force you to spend 50,000 or $60,000 by not opting into the hundred thousand-dollar program? Why would I do that? I'm giving up part of my leverage.

It's a real problem obviously to identify the category of cases that are amenable to the category prescribed by the Legislature. Is a declaratory judgment action -- can you always quantify the issue in a declaratory judgment action? I don't know. Sometimes you can. Maybe sometimes you can't. Maybe there is some issue that's religious or whatever it might be that is the subject of a declaratory judgment action where there is no damages of a hundred thousand. Does that fall into that

category? You've got to be careful when you write a rule, and we've been commanded to write a rule by the Legislature. You've got to be careful of that issue, but I sure as heck -- back to this question of making it voluntary, I can tell you right now that if I'm a lawyer and a guy says to me that I've got a chip that I can play that you're going to give me money if I threaten to do something to you, I'm going to threaten; and if you take that chip away, I can't play it; and so I wouldn't make it voluntary at all; and the other thing I would do would be to say, "Boys and girls, if you know something is relevant to this case, give it up."

CHAIRMAN BABCOCK: Richard, let me ask you a question about that. The Federal rules I think were criticized for forcing a lawyer to decide what was relevant and what wasn't relevant. You've filed motions in limine, I'm sure, where you say, "Okay, the other side knows about this because I produced it, but it for sure isn't relevant, and, therefore, it should be kept out of evidence." What about the hundred thousand-dollar or less case where the lawyer has got to review, you know, hundreds or thousands of e-mails in order to pluck through and see what's relevant? Isn't that going to drive up the cost of the defense if you make him do that?

MR. MUNZINGER: Yeah, but the other side of

the coin is if you take away your adversary's right to look at those files and e-mails and the truth is in there -- everybody hears the story about was it the Microsoft fellow who had the nasty little e-mail, and it resulted in a huge judgment. Was it Microsoft? I don't remember who the company was, and I don't mean to taint any company.

MR. JEFFERSON: It would have been Arthur Anderson, I think.

MR. MUNZINGER: May have been Arthur Anderson. Whoever it was, we all know they were out there searching for that smoking gun e-mail, and we all know that, yes, there are thousands of e-mails, but I don't know the solution to it. Trials are supposed to be pursuits of truth.

And I shared with y'all the story I had years ago about the guy from France. I was representing a French company, and we were fighting tooth and toenail over whether the Southern District of Texas had jurisdiction over a case that originated in Africa, and the general counsel of this French company said to me, "Oh, you Americans, you waste so much time on determining the courts of competence," he said, meaning jurisdiction, and he said, "You have all of this discovery," and then he says, "But you do get to the truth." They do it all on affidavits. They don't get to the truth. The affidavits are

self-serving, so they --

CHAIRMAN BABCOCK: They don't have perp walks either.

MR. MUNZINGER: In a hundred thousand dollar case is truth less important? I don't know, they're your philosophical questions, but they're problems to people who are writing rules resolving issues for citizens.

CHAIRMAN BABCOCK: Sarah, and then Justice Christopher.

HONORABLE SARAH DUNCAN: I would like to join Professor Hoffman and Pete Schenkkan on define the problem before you try to design a solution. I remember raising this any number of times with the discovery rules previous amendment process, and I don't know how we can't design a solution until we define a problem. I do think there is a class of cases -- I'm not saying we could define the class to encapsulate the universe of cases that either aren't getting filed or are getting decided outside the judicial system, but I think we can define some portion of that class and try to figure out a means of resolving them much more expeditiously than we do.

I think Chief Justice Gray makes a very good point with the criminal system. It was also -- I was thinking along the same lines, that when you have a detailed indictment and you have a prosecutor with an open

file policy so that everything is disclosed by the party pursuing the lawsuit up front, the need for discovery by the defendant is not as great. I agree with virtually everything Lamont said. When you talk about the amount maybe not being the reason for pursuing the lawsuit, and I'm sitting here across from Hatchell, we pursued a lawsuit for my father, I think it was a 5,000-dollar lawsuit, and Rothenburg, Hatchell, and I probably spent half a million in attorney's fees because of the principle. I don't want people to not take their principle cases to the judicial system. I want principles to be respected and available for judicial consideration.

I think part of the problem, I would add to what Lamont said, is the adversary system, and at least theoretically that's not what we have in the criminal system. We have the pursuit of justice, being the prosecutors in their creed. In the *New York Times* today the article was about in San Francisco all of the lawsuits that aren't getting filed because of just standing in an hour -- in line for seven hours to file a lawsuit over your custody agreement, and the woman was like "This is the second day in a row I've done this." She was in a lawn chair, and I think that is part of the problem. Related to that, I think the Legislature's decision to finance the courts of appeals by tacking on filing fees has caused the

filing fees to get ridiculously high. We're funding ethics training, we're funding courts of appeals, all sorts of things.

Some of the cases that occur to me that are not getting filed are the -- like when I was first starting at Fulbright, there was a very active Aetna docket that Mr. Sales was determined to keep because that's where lawyers learned how to try lawsuits, and he was afraid that day was going to come to an end. I think it has in large measure come to an end. I had a lot of the GM docket, and GM just paid everything. I mean, they were very rational about it. "We are not going to spend $20,000 in attorney's fees to Fulbright when we could settle with a plaintiff for 15." Well, in my view, there ought to be a route for those cases to get into the judicial system and to get resolved quickly and cheaply and correctly, and I do think it's possible. I think we've got to define the set of cases that we're trying to design a solution for first.

CHAIRMAN BABCOCK: Well, we've got to start with what the Legislature said, which is a hundred thousand dollars. Judge Christopher has had her hand up for a minute, and then Pam, and then Justice Brown.

HONORABLE TRACY CHRISTOPHER: Well, I think a lot of the problem with respect to the smaller cases is the cost of expert testimony, and I don't know how we address

that, but so many cases now require expert testimony through causation, that to hire someone to be able to prove that the, you know, 20,000-dollar asphalt job that cracked was because of poor workmanship by the company instead of a natural soil shifting, okay, which was their defense, and you have to spend $20,000 taking core samples and getting some, you know, Ph.D. expert. Those are the kind of cases that can't be prosecuted.

CHAIRMAN BABCOCK: Pam, then Justice Brown.

MS. BARON: This is a little bit on a different topic, but when you said a hundred thousand dollars, we've had some experience with determining the jurisdictional limits of county courts at law at a hundred thousand dollars, and there are a whole subset of issues related to that that the task force is going to have to deal with, because amount in controversy is not a static concept. It changes as interest accrues or if a plaintiff's injuries get worse or if the damages get worse, if the pleadings are amended to assert new causes of action. So they're going to have to decide when do you determine amount in controversy, what happens if there are amendments to the pleading, and third, is it a limit on the amount of the judgment that can be entered, which is not true with respect to county courts at law right now.

CHAIRMAN BABCOCK: Right. Absolutely true.

Justice Brown.

HONORABLE HARVEY BROWN: One, I want to agree with Justice Christopher about the cost of experts. I think that's a big problem, and Daubert, but, secondly, when we're thinking about creative solutions, I don't know we need to treat every case under a hundred thousand dollars the same, and by that I mean we might even have a second category of even smaller numbers. For example, it might be 25 or 50, because one case I really don't think get filed is the five or ten thousand-dollar case right now. I think the seventy-five thousand-dollar case or the hundred thousand-dollar case there is a market of some lawyers who will take those for a lot of them that aren't real complicated, but the five, ten, fifteen thousand-dollar cases, I don't think you can find a lawyer who will take those at all unless it's a friend or a relative, and so those --

CHAIRMAN BABCOCK: Unless you're Sarah's dad.

HONORABLE HARVEY BROWN: Exactly. So those might -- I'm just suggesting we at least think about whether we want to treat every case under a hundred thousand the same or maybe have some subcategories.

HONORABLE SARAH DUNCAN: In that vein of what Tracy and Harvey are saying, this has happened in criminal law with treating criminal scientific evidence the same

under Robinson-Daubert. It's happened in DWI cases if you've been reading the newspaper here. Police are filing -- they're stopping an unbelievable number of people and getting them charged with DWI, and most of them are getting dismissed because they're not meeting the threshold requirements under Kelly. They have to bring the actual DWI examiner in. They have to bring the person who calibrated the breath test machine, and it -- it has resulted in a lot of people's DWI charges being dismissed in Travis County.

CHAIRMAN BABCOCK: Yeah, Carl.

MR. HAMILTON: I hate to say this, but I think the only way to hold costs down is to have a rule that loser pays.

HONORABLE LEVI BENTON: We can't hear what Carl said.

CHAIRMAN BABCOCK: He wants a loser pays.

MR. HAMILTON: Loser pays, loser has to pay.

CHAIRMAN BABCOCK: Not just on a motion to dismiss but on everything.

MR. HAMILTON: Hold down both the costs and the lawsuits.

CHAIRMAN BABCOCK: Okay, well, lots to think about, and thanks, and sorry I didn't schedule this better so that we could have made this a one-day, not a two-day,

meeting, but we're going to meet every month for the rest of the year, and we're going to schedule them all for two days, and if we can get away with one we'll do it. Thanks. We're off the record.

(Adjourned at 3:16 p.m.)

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MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

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