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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

September 30, 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 30th day of September, 2011, between the hours of 9:02 a.m. and 4:59 p.m., at the Texas Association of Broadcasters, 502 East 11th Street, Suite 200, Austin, Texas 78701.

INDEX OF VOTES

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

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Rule 16 (HB 962)	22261

Documents referenced in this session

11-16 Memo from Frank Gilstrap 9-27-11 (HB 962)

11-17 Memo from Frank Gilstrap Appendix 9-27-11 (HB 962)

11-18 Memo from Carl Weeks, Process Server Review Board 9-30-11

11-04 Ancillary Proceedings Task Force draft (January 2011)

11-04c ONLY pages for 9-30-11 meeting from 11-04

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CHAIRMAN BABCOCK: Okay, let's get started, everyone. Welcome. We will start as usual with Justice Hecht's report to us about developments since our last meeting and things of interest.

HONORABLE NATHAN HECHT: You perhaps saw that we amended the Appellate Rules 20.1 and 25.1 along the lines that we talked about in August to be consistent with the changes made by the Legislature, and also amended Rule 28 and Rule 168 of the civil rules, added that, and amended Rule 167 having to do with offers of judgment, so we think we got the rules consistent with the legislation that took effect September 1st. We also appointed a task force for the rules in small claims and justice proceedings, and I can -- you can look on the website for a list of the names, but Justice Casey in Hurst is going to chair that group, and it's a group of, what, eight?

MS. SECCO: Fifteen.

HONORABLE NATHAN HECHT: Fifteen, who are going to work on that project, and then we also appointed a task force for the rules in expedited actions, changes prompted by House Bill 274; and again, you can look on the website to see the names, but former Chief Justice Phillips is going to chair that group for us; and, other task forces, including the one on House Bill 906, the

State Bar task force on cases needing additional resources, are hard at work and will have reports for us probably by next time, so we think everything is moving along. I'd be happy to try to answer any questions.

CHAIRMAN BABCOCK: Any questions on any of that? Okay. Well, if there are no questions, we'll jump into return of service and Frank Gilstrap.

MR. GILSTRAP: Okay, as Hank Jr. might say, are you ready for some rule making? You should have two documents here. They're over there on the desk. One has "memo" at the top. The other has "appendix" at the top. We're going to be talking about those today and flipping back and forth. It also would help to have a shorter memo from Carl Weeks, the chairman of the Process Server Review Board who is with us today and been very helpful in the drafting of this rule. It's also over there. If you'll go to the appendix, the second document, and the pages are all Bates numbered in the lower right-hand corner, and flip to page one, you'll see the reason we're here, and that is House Bill 962. I'm going to wait until everybody has a chance to get that in his hand before we proceed further.

Okay. House Bill 962 was passed by the last Legislature to deal with -- to make some changes in the procedure involving return of process, and the Legislature

enacted section 17.030 of the Civil Practice & Remedies Code, which in turn directs the Supreme Court to make a rule regarding return of service, and this rule has got to have three requirements. First of all, the rule has got to provide, bear with me here -- can no longer -- there's no longer going to be a requirement that the process -- that the return be, quote, "endorsed to or attached to the original process." That's kind of an arcane thing, but apparently it's a problem for process servers always to have to comply with that. Secondly, the process server is going to be able to file the return electronically, and, third, the process server will be able to sign the return without an oath by simply signing it under penalty of perjury as in the Federal practice.

All of these things are there to make the duties of the process server easier; and, you know, unlike as you might think, these bills don't just appear out of the Legislature by magic. There's a history here. There's a reason for it. Carl Weeks, again, who is chairman of the Process Server Review Board, is with us today, and I'd like him to maybe take a couple of minutes and give us the legislative and political background of this bill, Carl.

MR. WEEKS: Thank you. Good morning. My name is Carl Weeks. I chair the Process Server Review

Board for the Court. I'm starting my seventh year doing that, and the impetus behind this legislation was primarily the company that serves the papers for the Attorney General, the child support papers, are having an inordinate number of cases having to get resets because they weren't getting returns back from the process servers all across the country or all across the states timely to get them filed before the hearing was set, so he was the one that -- that company is the one that started this process, if you will. It caused delays having to get the original back from all over, so that group, as you can imagine, serves 9 or 10,000 lawsuits a month, all across the country and in Texas for the Attorney General, and they wanted to expedite that process, so they started the process, went to Representative Hartnett, asked him to file the bill.

Subsequently the trade association -- there's a statewide trade association. Texas Process Servers has an association that has about 1,100 members. They have a full-time lobbyist, and they got involved, and obviously there was a great benefit here to the members of that trade association for these rules to be changed. They also felt it would not only improve their efficiency, make life easier and keep the people out of the courthouse, expedites things, saves work for the clerks,

so forth and so on. So that's the legislative history behind the bill in a nutshell.

MR. GILSTRAP: All right. Thank you. To do the Legislature's bidding here, the Court is going to have to amend Rules 16, 105, and 107, and also it's going to have to amend 536 and 536a, which are the JP rules, and we didn't come across that until real late in the game, and we don't have proposed amendments for those in this memo, but I think once we work through this it will be pretty easy to go back and pick up the JP rules. Bill, you had something to say there?

PROFESSOR DORSANEO: Yeah, I have kind of a threshold issue that concerns me. The statute, which is two pages long, begins talking about "The Supreme Court shall adopt rules requiring a person who serves process to complete a return of service," and when I read the statute first I'm asking myself, well, what process does the statute, you know, talk about, what process is it? Pretty commonly when the term "process" is used in connection with service, you know, by procedure teachers anyway, we're thinking about service of summons or its state law equivalent, service of citation, rather than every type of process that could be issued or ordered by a court, and I -- I have a hard time believing that the word "process" in 17.030, the amendment to that, means anything other

than citation.

MR. GILSTRAP: Let me speak to that, because you bring us to kind of a secondary problem, but it's a problem that you just run into immediately when you start trying to change the language of these rules, and that is it's not clear whether they're talking about citation or other types of process. Let me show you how that -- I think that arose. If you'll look at your appendix and look at page six, and you see there -- you'll see at the top Rules 15, 16, and 17, which come out of part two, section 1, which are general rules, and these rules almost unchanged have been around since the beginning of 1941, and they are, in fact, verbatim from the old civil statutes. They've never been amended, and I suspect seldom read. If you look at them, they deal with all writs and processes. That's what it says, all writs and processes, Rule 15, but as you read further in there it seems to be talking about citation because they talk about it being made returnable on the Monday next after expiration of 20 days, and obviously a writ of attachment, that doesn't apply to.

So you've got these old rules and then you've got the rules starting with Rule 99 which are in a section called "Citation." These rules apparently originally dealt only with citations. They still mostly

do, but it's clear that over the years these rules have been made applicable to other kinds of process, and the place that that's most evident is Rule 103, which is on page seven, which starts out, "Process, including citation and other notices, writs, orders, and other papers, issued by the Court." Obviously that's more than a citation.

There are places -- there are redundancies in the rules. There are places where when they talk about process they're clearly talking about citation only. For example, look at Rules 119 through 124 at the back. Those say "process," but they mean citation. The statute talks about service of process. So one of the things that needs to be done here is that we at least need to go through and tighten up our terminology.

The larger question, and which I think Bill is touching on, is do these rules need to apply to all forms of process. It kind of makes sense to do it that way, but you may not want to do it that way. That's a different question. I'd like to put that off until we get to Rule 103. Let me take you through how we can -- we can start to clean the rules up, and the first thing we can do is repeal -- tell the Court or ask the Court, excuse me, to repeal Rules 15, 16, and 17, and we talk about those on pages three and through five of the memorandum. Almost all the language in these rules is used in the rules in

section 5. You can get rid of these rules and move a little bit of the language from Rule 15 and Rule 17 into the other rules, and it works fine, and you get rid of these kind of dangling old set of rules out here, 15, 16, and 17, that you really don't know, you know, why they're there.

And let me take you through -- first of all, Rule 16 says, "Every officer or person shall endorse on all process and precepts," and precepts, "coming to his hand the day and hour on which he received them, the manner on which he executed them, and the time and the place the process was served." Well, it says "endorse it on the process," but the House Bill 962 says we can't require them to endorse this information on the process anymore. Moreover, all of this information is already included in Rule 107. It's included in the return. So we can easily get rid of Rule 16. Rule -- the language from Rules 15 and 17 can easily be imported into the other rules, starting with Rule 99. Let me go through Rule 99, and you'll see how this process works. "Process" there being used in a broader sense, and then we can maybe stop and talk about how we're doing this.

The citation, again, section 5 is currently called "Citation." "Citation," and yet it obviously refers to other kinds of process, so --

PROFESSOR DORSANEO: Well --

MR. GILSTRAP: -- we're proposing to change this to "Citation or other process." Bill.

PROFESSOR DORSANEO: The only rule that talks about other kinds of process in section 5 of part 2, which is entitled now "Citation," is 103. Now, maybe when we changed 103 we should have made the change somewhere else, but I'm just not convinced at all that -- that the change in 103 should control all of the other rules and what they apply to, and I don't think it's a good idea to use citation procedure for all the other writs either.

MR. GILSTRAP: Okay.

PROFESSOR DORSANEO: It just seems like this is a -- a wrong path to take.

MR. GILSTRAP: And it might be. I think the place where that really, really, the rubber hits the road on that probably is 106 involving methods of service, because, you know, you use a Rule 106 to serve citation. Do you want to use a 106 to serve a summons, for example, on a witness that you can't -- you can't find in person, that type thing? Again, maybe we could talk about that when we get over there, but let me start out here with Rule 99.

CHAIRMAN BABCOCK: Carl wants to make a comment first.

MR. HAMILTON: You also have to keep in mind that we're talking about two different acts. One is an execution and one is a service, and Rule 15 and that area talking about process, talking about things like writs and precepts, the sheriff or constable generally has to execute those because some process servers can't do that. When we're talking about citations we're talking about simple service that anybody can serve, and I think those terms are mixed up throughout here, and when we start trying to equate service and execution I think it's going to cause a lot of confusion.

MR. GILSTRAP: Well, I will certainly grant to you that service and execution are confused in the existing rules, and I've tried to kind of straighten that out here some, but there are places in there where they talk about executing and obviously are talking about serving it. So, again, when we get to those we can talk about it. Richard.

MR. ORSINGER: I wanted to talk about the possible distinction between process and return of service.

MR. GILSTRAP: All right.

MR. ORSINGER: The statute says that the requirement -- pardon me, "The Supreme Court shall adopt rules requiring a person who serves process to complete a

return of service"; and the rules that you have pointed out, the three changes the Legislature requires are to the return, not to the original piece of process; and Rule 16 requires that the date and time and place that the process was served be put on the process itself, which to me means the citation; and I'm used to clients coming in and handing me a citation that has a little pencil or pen from the serving officer that tells me for sure the day that it got signed so I can calculate answer date. Clients are notoriously wrong about when they got served, and that means you might miss an answer date, and so is the Legislature requiring us to discontinue the practice of putting on the original citation the date and time and place of service, or is it just the return and perhaps we should perpetuate that traditional procedure of the original citation having the original handwriting of the serving officer with the date time and place of service?

MR. GILSTRAP: That's an important distinction. The Legislature has said that you no longer have to endorse on the process the day -- the time that it came into his -- the process server's hand and that -- there's no reason to do that, and the Legislature says we don't have to do that anymore. It's very important that the process state -- that the process server write on the face of the process the date and time that he served the

process, because, you're right, here's some guy out there minding his own business, and somebody comes up and hands him a process, and he's just stunned and so he maybe goes and sees a lawyer, and the lawyer says, "When were you served?" He says, "I don't know, maybe last Tuesday," and that's real important, so the requirement, although it's -- I don't think it's actually been in the rule before the -- the other rules before, the requirement that you write the time of -- date and time of service on the face of the process is important, and it's kept, and there's a provision here in these rules that keeps that that we've drafted.

MR. ORSINGER: Frank, does this bill, House Bill 962, relate to the original process at all or just to the return?

MR. GILSTRAP: It relates only to the return.

MR. ORSINGER: So we're not required to change anything about the original process?

MR. GILSTRAP: That's absolutely right. And if you think this is too much, you know, you may want to not do it. We can go in and simply amend, again, Rules 16, 105, 107, 536, and 536a and be done, but at the same time we're going to postpone for another day, to another day, the problem of sorting out all of this conflicting

and confusing language in these rules, and, you know, I guess in my mind there's no time like the present.

MR. ORSINGER: Can I also ask Bill, if you don't mind, you apparently think that there's an important distinction between the citation and other writs, and I'm not -- I mean, I understand that a writ of attachment when you seize a body or seize a personal property is different from a citation, but a lot of these other writs to me kind of just function as notice or, you know, appear in court at a certain time or something. What is the distinction that you're drawing between citation and writs that makes you want to continue to treat them separately?

PROFESSOR DORSANEO: Well, if you're just looking in the -- just about any legal dictionary for the definition of the word "process," you start out by saying that, well, there are various kinds of process. We have citation or summons, which is original process, and that has its own and always has had its own way of operating in whatever system you're in, and we have the process that is issued during the course of the proceedings, and they -- that process is called by a variety of different names. Then we get to the end, we have final process, which is execution, so, you know, "process" is just -- is just another word for "procedure," and when it's used generally I think it requires us to ascertain what does the speaker

mean by process when that term is being used in this context.

I don't know if that addresses your question, but some process is considerably more complicated than citation, and it requires, you know, specific action on the part of a sheriff or constable, all of the attachment, garnishment, sequestration. And I'll stick in my answer to your question, you know, does this statute require all of those rules to be looked at and changed, too, because all of those ancillary proceedings provide for execution, levy, and, you know, service. That's another reason why I want to read this statute to say it means service of citation, return of citation, rather than every kind of process that you could think of that would be involved in litigation.

MR. ORSINGER: And why? Why are you reluctant to extend the modernizing effort of the Legislature to all writs and process?

PROFESSOR DORSANEO: Well, I have to be sure that that's what this means. It doesn't look -- we don't get much information, but the bill analysis didn't lead me to conclude that it meant everything to be changed, just -- just the citation, which is what I --

CHAIRMAN BABCOCK: Professor Albright.

PROFESSOR DORSANEO: -- understand Mr. Weeks

was talking about.

PROFESSOR ALBRIGHT: One example is service of a subpoena. A subpoena would be process.

PROFESSOR DORSANEO: Yes.

PROFESSOR ALBRIGHT: And Rule 176.5 says, "A subpoena may be served at any place within the state of Texas by any sheriff or constable or any person who is not a party," is 18, and it doesn't have all of the return requirements that a citation or attachment or sequestration or something like that would have. So I think we need to be -- I think you're right. I think we need to be really clear as to what exactly we're talking about here. It may be that -- I mean, an attachment and a sequestration, things like that, are more like citation than service of the subpoena is, I guess.

PROFESSOR DORSANEO: My point is I think each of these things is kind of sui generis.

PROFESSOR ALBRIGHT: They're their own animal.

CHAIRMAN BABCOCK: Skip, did you have your hand up, or was it Richard?

MR. MUNZINGER: It was me.

MR. WATSON: It was Richard.

CHAIRMAN BABCOCK: Richard. Sorry.

MR. MUNZINGER: Speaking to Bill's question

as to the legislative intent in section 17.030 and as to whether the Legislature intended to limit the statute to citation only, I think not, and it's because -- this is why I think not. If you look at section (2)(H) at the top of page two, it says that the return of service may include a description of process served, and there is no reason to allow insertion of a description of process served if you're only speaking of one kind of process. Why would you have the redundancy of saying a statute applicable to citation only allows you to state that you served citation. It seems to me it would make no sense, and thus, the Legislature did not intend to limit 17.030 to citation only.

CHAIRMAN BABCOCK: What do we think about that argument?

MR. ORSINGER: Chip?

CHAIRMAN BABCOCK: Yeah, Richard.

MR. ORSINGER: Apart from just the parsing of language of the statute, I think that we also ought to ask ourselves whether the policy that's reflected by the -- what I would call the modernization of the statute is appropriate to apply to these other writs, and it may be that if we are under the gun to get a rule amendment through in the next 60 days to comply with the statute, that we could make changes just for the citation and then

take a more extensive look at the remainder of the process that are in here, because subpoenas are different from writs, which most writs I'm familiar with pursuant to court orders, et cetera, and it does seem to me from Frank's analysis that our Rules of Procedure don't fit anymore. We've changed a few of them, and the definitions are off, and they're inconsistent, but I'm not sure that we need to do all of that on an emergency basis, and I think that policy ought to be part of this consideration because even if the Legislature didn't require it, if this modernizing of electronic filing and this and that and the other, if it's a good thing to do then why shouldn't we go ahead and do it?

CHAIRMAN BABCOCK: Yeah, Frank.

MR. GILSTRAP: Also in response to Bill's comment, even if the statute only covers citation, it certainly doesn't keep the Court from applying it to all other -- all other kinds of process or certain other kinds of process. Let me give you a couple of examples of where there -- why we need to have at least some rules apply to all process. For example, look at Rule 99(a), which is at the bottom of page five of the memo, and -- and also look at Rule 106(a), which is on page nine. That says issuance -- has to do with issuance of citation and service of the citation. There is no rule, for example,

that tells the clerk how to issue a writ or general precept or a notice. You know, the clerks just follow the requirements of 99(a), but 99(a) only applies to citation.

Similarly, over on 106 there is no rule that tells the constable or the process server how to serve a writ or how to serve a notice. Again, they know to go hand it to them, but nowhere does it tell them to do that, so at least it seems to me that some of these rules need to be broadened to cover all process.

Let me just take you through 99. It's real simple, and you can kind of see how this works. 99 would change to "Issuance and form of process," and when you look at 99(a), which is issuance of the process, and 99(d), the copies, those can easily apply to all forms of process. (b) and (c) clearly still apply only to citations, and we would change those to form of citation and notice of citation, and they don't change. In 99(a) it says, "The clerk when requested or ordered by the court shall issue a process. The clerk will deliver the process as direct" -- "as requested by" -- "as directed by the requesting party or by the court, and the requesting party is required to obtain service."

Finally, the very end, "The process shall be styled 'the State of Texas' and shall be dated and signed by the clerk with the seal of the clerk impressed

thereon." That's the language from Rule 15, so we bring it in here, and it works fine. Otherwise, there's no change to the rule other than to make clear that (b) and (c) apply only to citations. So that's kind of the method that we're trying to use to make these rules simpler, and it certainly at least makes some of them apply to all forms of process.

I was thinking about subpoena this morning. That may be different because the subpoena, for example, doesn't have to be served -- doesn't have to be served by an officer or authorized person under the rule.

CHAIRMAN BABCOCK: Yeah, Professor Albright.

PROFESSOR ALBRIGHT: I think Frank is exactly right that there's some rules that apply to everything and some rules that should apply just to process, and I think he's done a valiant, excellent effort in trying to clean these rules up, and it probably make sense to go through and maybe just be -- you know, carefully think about the distinction as we go through.

CHAIRMAN BABCOCK: Okay. Yeah.

MR. DYER: I just had one comment. The writs, writs of attachment, sequestration, garnishment, and distress warrant do have their -- and injunctions do have their own methods of service, return of service, but as far as I can tell we could harmonize all of those same

rules.

MR. GILSTRAP: Yes.

MR. DYER: Because they are, in fact, patterned after service of citation.

MS. WINK: And, in fact, the task force has been -- the ancillary task force has been doing it for those ancillary writs, so that's the good news, is it all dovetails.

MR. GILSTRAP: Yeah, and I was glad to have y'all here. Let me show you where we're trying to cover this. Look at 106(a). That involves a Rule 106 citation, which includes personal service, and 106(a)(1) is delivering in person. 106(a)(2) is mailing it, and then 106(a)(3) is as otherwise authorized by these rules or law, and that's the one that allows you to consider other statutes and other -- that deal with other kinds of process, and over in footnote 7 on Page 11 I've got a few of these statutes and rules which deal with service of other kinds of process or particular kinds of service where there are extra requirements, and I think if push came to shove if you ever came down and found, you know, Rule 418, which doesn't exist anymore, is in conflict that dealt with a certain type of process, is in conflict with this rule, I guess the courts could say, well, the specific controls over the general. But I think

there's -- there is certainly a need to clarify our language and eliminate some redundancies, and, you know, the real question is do we make some of these rules apply to all kinds of process.

MR. DYER: I just had one other question. If -- if the return is not required to be endorsed or attached, what is it that the defendant receives that has the date and time of service?

MR. GILSTRAP: The return has to have the date and time of service. It doesn't have to have the date and time that the constable or process server received the process. That's what the Legislature has gotten rid of, not the requirement that the -- that you put the date and time of service, and there is some specific provision in here that requires that.

Let me go on here and then -- and I believe that's in 106, but let me -- let me go on to Rule 100, and that's a definition of process. The definition of process has been embedded in Rule 103. The -- and in a perfect world it would be out in front of Rule 99, but there's no rule there, and Rule 100 was repealed, so what the proposal here is to put process to include certain particular types of writs and processes. And, again, you know, you could think what other -- what else goes here? You know, what about a deposition notice? What about a

capias? What about a jury summons? I mean, that's a document issued by the court, and I'm not sure -- I think if that -- to put you in jail they have to actually serve you with that. I don't know. I don't think the postcard will allow them to put you in jail. I know in Tarrant County, for example, their approach is, well, summon 2,000, maybe 600 will show up.

But, again, there's kind of certain areas out here on the periphery that these might apply to, and, you know, you guys, there's a lot of collective experience here and y'all might be able to think of some things that don't apply, but the idea is to have a definition of process that these rules do apply to, and that's in 100.

MR. ORSINGER: Frank?

MR. GILSTRAP: Yeah.

MR. ORSINGER: While we're still on Rule 103, as Carl Weeks pointed out in one of his memos, the clerk of the court is authorized to serve citation, but maybe nothing else. We need to be sure about that, but they've got to be listed as a potential server of at least one piece of process.

MR. GILSTRAP: Yeah, and Carl pointed that out in paragraph No. 4, and this takes us to Rule 103. In paragraph four of his memo, and, you know, he points out that the clerks -- the clerks serve a lot of process, and

so in 103 the only change that was proposed was to take the embedded definition out of the first two lines. It's on page seven of the memo, and that goes up in Rule 100, but we also had taken out the second sentence, "Service of process by registered or certified mail and service of citation by publication must, if requested, be made with the clerk of the court in which the case is pending," and as Carl points out, that needs to stay in the rule, so, you know, we need to get rid of that deletion.

But, again, this talks about who can serve, and we've tightened up the language a little. The people that can serve are the sheriff or constable or other person authorized by these rules or by law, any person authorized, we don't need to say "by law." "Any person authorized by written order of the Court who is not less than 18 years of age or any person certified under the order of the Supreme Court," and that I think covers all the people that heretofore have been allowed to serve process under these rules.

CHAIRMAN BABCOCK: Professor Dorsaneo, and then Carl.

PROFESSOR DORSANEO: I want to go back to your definition. I understand the source of the definition. It's kind of in part the language that was added to Rule 103 and then some words that were in either

15, 16, or 17, like the word "precept," and I think more work needs to be done on this if you're going to follow this approach on this definition of the word "process." And notwithstanding that it has a minor pedigree since it's in Rule 103 already, okay, I don't think that that's -- that that necessarily was great work at the time, but we were clearly talking about authorizing persons other than sheriffs or constables to serve, you know, things.

MR. GILSTRAP: All kinds of process, yeah.

PROFESSOR DORSANEO: That was what that was driven by.

MR. GILSTRAP: Right.

PROFESSOR DORSANEO: Who should serve the various kinds of things that are served. But if I was going to define "process" in a Rule 100, I'm not so sure that I would put "notices" in there, okay, and if I -- if I was talking about writs I would probably be a little -- a little more definite when I'm talking about writs because I think the writs that we're talking about would be the attachment, garnishment, sequestration, and other ancillary writs as well as execution. Now, I realize there's a risk in leaving something out if that's not done with care.

I had to look up the word "precept." I

don't --

PROFESSOR ALBRIGHT: I did, too.

PROFESSOR DORSANEO: That's not in my vocabulary.

MR. GILSTRAP: We've all had general precepts. I figured there were other kinds of precepts.

PROFESSOR DORSANEO: Well, I don't think we need to retain all of this learning.

PROFESSOR ALBRIGHT: I did --

PROFESSOR DORSANEO: I would eliminate "precept."

PROFESSOR ALBRIGHT: Yeah, I did a search, and there is only that one place where "precept" is used in the rules.

MR. GILSTRAP: Well, the clerks issue them. I promise you that. I had one issued last week. It's a way to give notice. You've got some document you want served on somebody, you'll say, "Well, what do we issue?"

"Well, we'll issue a general precept." That's the practice, at least in the courts I've been in.

CHAIRMAN BABCOCK: Yeah. Carl had his hand up a long time ago, and then Skip.

MR. HAMILTON: Yeah, I'm still confused about what we leave with the defendant that gets served. The statute says the rules must provide that the return of

service is not required to be endorsed or attached to the original process. Now, the process is the document, the writ or the citation or something else. The return is where the sheriff says, "I got it on such-and-such a day, and I served it on such-and-such a day," and that generally is printed on the bottom of the citations and maybe some of the other writs, too.

MR. GILSTRAP: Right.

MR. HAMILTON: But is this --

MR. GILSTRAP: It's in 106(a)(1). Look on page nine. It says, "Unless the process, or an order of the court otherwise directs, the process shall be served by any person authorized by Rule 103 by" -- and that last "by" in the top paragraph should be deleted -- "by delivering to the person served in person a true copy of the process with the date and time of delivery endorsed thereon." And if you'll look over in Rule -- over on page 10 in Footnote 6, that's a footnote that stayed in the rules for a long time up until the 2009 rules, which I still use, and it states -- sets forth the reason why we have that requirement, which is the defendant can come into court and say, "Well, Judge, they never really told me" -- "They said show up on the Monday next after 20 days, but I couldn't tell from the process when I was served, so that's why I missed the answer date." So

there's got to be something in writing that tells the defendant or other person served when you got it, so you can do the calculation.

CHAIRMAN BABCOCK: Okay. Professor Albright, you had your hand up -- no, Skip, and then Professor Albright.

MR. WATSON: I realize that this may be very basic and that I've missed something, but what's troubled me from the first time I've read this is the remarkable breadth of the definition that was in 103 that we maintain in 100, and not dealing with this as much as Frank and others, I kept reading that just saying what on earth does this cover, and it seems to me to be a universal net. My question is surely we can define this more narrowly and include only what we are intending to include in the term "process"; and my question is, are we -- obviously we're intending to include anything that requires some form of return of service. I think we're also including anything that is, quote, issued. I assume that means signed and handed over by a clerk. But what --

MR. GILSTRAP: And sealed, all of that stuff.

MR. WATSON: The part that's giving me a little heartburn is, is that I can't figure out what the limitation is on papers issued by a court. When I send

somebody over to set a hearing on a motion for summary judgment and get an order setting a hearing on a motion for summary judgment that is signed by the judge and handed back to the runner and I am supposed to send that out, I don't see anything in, quote, "and other papers issued by the court" that is excluding that, and I understand we're saying that because there may be stuff we're not thinking about, but I think we're catching a whole lot of stuff that we're not intending to catch, and so without having all of the answers by a long shot, my suggestion would be that we focus on not identifying each type of piece of paper we're talking about, but identifying the operable characteristics of the papers we're talking about in terms of at least process that requires return of service or process issued by a clerk. Now, there may be others, but I would be more comfortable if we didn't cover all papers issued by the court unless "issued" is defined in some sense that makes it clear to people like me that that doesn't mean signed.

CHAIRMAN BABCOCK: The reasonable Skip standard. Professor Albright.

PROFESSOR ALBRIGHT: Isn't it that -- I mean, I haven't thought through this a lot, but when I teach I always have to -- you know, there's a difference between service, this kind of service and the service

where after someone has appeared and you can just mail things by certified mail. So isn't this kind of service when you're -- you have to give notice to somebody that has a -- you know, it's a constitutional due process notice where you're -- you've got to be able to prove that you gave notice to them, and it's reasonable notice under the due process standard, so it's when you're notifying someone who is not -- notifying somebody of a court proceeding that they're involved in or of some court action when they have not appeared or been present in that action before. Isn't that right?

MR. GILSTRAP: Well, these -- maybe, you know, like talking about Skip's comment, you know, I think -- I see what he's saying, and we all kind of have an intuitive feeling about what processes ought to be covered by this, but it's hard to define it, but I think what the process does is, is it's the document that brings someone within the power of the court.

PROFESSOR ALBRIGHT: Exactly.

MR. GILSTRAP: Once they're there you can do it under Rule 21a.

PROFESSOR ALBRIGHT: Right.

MR. GILSTRAP: Just send them a letter. But, you know, I mean, there's always got to be some formality that brings someone -- like I was reading about

in -- and this is a little farfetched, but ancient Rome, the way they would do it was when you sued somebody you would send somebody out and they would put their hand on their shoulder and say, "I call you to justice," but it's some formality that says now -- I mean, you're a guy selling T-shirts here on the Drag in Austin and you get a document that says, "Show up at the courthouse in New Braunfels on Thursday" and you hardly know where New Braunfels is. Suddenly you're a free person. All of the sudden you are subject to the power of the court and you can be put in jail. That's -- that's the transformation that happens when these documents are served, butI don't know how to -- if someone can do a job of defining it that would be helpful.

PROFESSOR ALBRIGHT: It's what -- what these rules are is the State of Texas trying to comply with the standards of *Mullane vs. Central Hanover Trust* that says you have to have reasonable notice under the circumstances and so --

CHAIRMAN BABCOCK: Carl Weeks.

MR. WEEKS: Here's the practical application of this I've observed for the last 20 years. If you want to take your pleading in there, whatever it is, motion for enforcement, show cause order, whatever, the clerk will take your eight bucks and issue a citation, but the

discretion always falls back on the practitioner. You call the attorney, "Do you want a citation issued or don't you?" I mean, this is the practical way this works in most process servers' offices. So you get this document, the paralegal sends it over, whatever it is. You know, citation is always on first round, they're going to be issued. It's automatic. You don't ask the question.

We get all manner of motions and other documents from lawyers that don't clarify whether or not they just need to be delivered to the person, and the process server executes an affidavit of service or an affidavit of delivery as a standalone document. You attach that to the document that you delivered to the witness and say, "I delivered a true and correct copy of this." You can file that affidavit with the clerk, and they'll take it. You don't pay the eight bucks in that scenario, so you're doing in effect the same thing you would do if the lawyer or, if you will, the practitioner gives you the same set of documents and you call and you say, "You want this issued under citation?" You can deliver that document with a citation or without a citation.

So I -- I'd say, in experience, this is -- in practical application I've observed this 20 years, it's the discretion of the practitioner whether they want to

file it with the clerk, ask for a citation to be issued and serve it under citation, or just deliver it and file the return with an affidavit of service. In effect you get the same thing. You bring the defendant or the respondent or the witness under the jurisdiction of the court by delivering the document to them, but you may have a different argument if you're before the court and the person doesn't show up and you're trying to get a show cause order for them not to appear and get the constable to go out and do a writ of attachment and bring them before the court. So you get a little more authority, I think, when you get the citation issued by the clerk, and you serve them with citation. It's recorded on the docket. You pay the eight bucks and serve that citation, and they're cited to appear where you may not get that if you just delivered the document and then filed the return under affidavit. Does that make sense?

CHAIRMAN BABCOCK: Richard Orsinger.

MR. ORSINGER: Okay. I'm against removing the word "precepts" from here because for me the precept is the category of official notice that you use if it doesn't fit any other category. For example, if you have a pro se litigant and you want to prove that you've served written discovery on them, the only piece of process that really fits of all of these ones that we're all familiar

with is the precept, and some counties observe that, they realize that, that's where the precept practice exists. I've seen other counties where they issue a citation to serve something that doesn't fit something else, so interrogatories might get served with a citation that says they have to answer the Monday following the 20th day after service. We need some piece of process for the clerks to go to when you want to give official notice and have an official return and the presumptions that arise from that.

I also agree with what Skip was saying that "other papers issued by the court," judgments and orders are issued by the court and they're on paper still, and so that's way overbroad, but what all of these things constitute is they constitute official notice of something, notice that they're going to take your bank account, notice they're going to take your home, notice they're going to take your car, notice you've got to be in court, notice that you can't violate a court order without going to jail. They're all official notice, so maybe instead of saying "and other papers issued by the court" we could say "other official notices issued by the clerk," "other official notices," and then whatever it is that it's an official notice of something then that would be a catch-all that would grab probably what we're all thinking

of in terms of process but would not include things like orders and judgments.

MR. GILSTRAP: You could attach the order, if you wanted to give someone notice of the order, you could attach it to a precept.

MR. ORSINGER: I've done that before, too, because to set up a contempt you have to prove that somebody had notice of the court order, so I've -- you can't get an execution on it if it's a court order for them to do something like a child support order or something, so in a situation like that I issue a precept or I ask them to issue a precept and then I have the judgment served with a precept and then I get a return in the file, which creates a presumption that they received a copy of the judgment.

CHAIRMAN BABCOCK: David Jackson.

MR. JACKSON: Would subpoenas kind of slide under all of that, because the notice is issued by the law firm, not the clerk or the court or anyone else? It's a process started at the lawyer's office to send out a notice to the other side that you're going to subpoena the witness and then the subpoena is issued by usually our office and then served by a process server.

MR. ORSINGER: You know, under the current rules even a lawyer can issue a subpoena now, as

frightening as that is, and none of these rules would apply to a lawyer issuing a subpoena for a deposition or a lawyer issuing a subpoena for the production of documents under the rules of discovery, would they? We're not intending that, are we?

MR. GILSTRAP: Maybe we could try it this way. "As used in this section process includes citations," leave out notices, "citations, writs, precepts, and other notices issued by the court or by the clerk."

CHAIRMAN BABCOCK: Pat.

MR. DYER: I've seen courts use precepts and fiats just to set hearings, so are those going to be required to be served because they --

CHAIRMAN BABCOCK: Good point.

MR. DYER: -- would be under the term "process."

CHAIRMAN BABCOCK: Fiats. Yeah.

MR. WEEKS: We see them issued by the clerks still everyday, precepts and fiats, and they're under citations, and they have to be issued by the citation, and they get filed back with the clerk.

MR. GILSTRAP: I think the key is if the lawyer or party who has an issue wants to have it served, he can go through this process, but if he doesn't,

there's -- I don't think there's anything that says that -- that they have to be served. He can just send out a notice if he wants to, but it says that once the citation is issued, it says, over in 99(a), "unless order" -- "otherwise ordered by the court the requesting party shall be responsible for obtaining service of the process." So maybe that's the distinction.

PROFESSOR ALBRIGHT: Yeah.

MR. GILSTRAP: If you don't want it served, the rule doesn't apply, but if you want it served, the rule applies.

PROFESSOR HOFFMAN: Say it again, Frank, explain that distinction.

MR. GILSTRAP: Well, again, over in 99(a), it says in the third sentence, "Unless otherwise ordered by the court the requesting party shall be responsible for obtaining service of the process." And "of the" was stricken out, and it shouldn't be. "Of the process." Well, if -- that's discretionary with the person who issued it. If he doesn't want to have the person required to show in court, show up in court and have the person subject to being put in jail, for example, he just doesn't have it served, but if he wants to have it served he goes through this procedure.

PROFESSOR HOFFMAN: So you're saying that

that sort of goes back to Alex's point that in thinking about when you need this more formal method, the lawyer -- the onus is on the lawyer to think about when does Mullane or any of the other constitutional governing precedents require that more formality, greater formality.

MR. GILSTRAP: I think that's what I'm talking about.

PROFESSOR ALBRIGHT: And that sounds like what you said the practice is.

CHAIRMAN BABCOCK: Pat.

MR. DYER: But the practice has to conform to the rules. I know that it frequently doesn't, but what we're saying here is if in a particular court where they use a precept, it's a notice -- actually, it's an order signed by the court entitled "precept." What I think I'm hearing is if the court sets a summary judgment for hearing by issuing a precept it is up to the party to determine whether he wants to serve that order on the other party, regardless of Rule 21a or in conflict with Rule 21a, and I think we're making the rules less clear and producing another trap for them rather than making them more clear.

CHAIRMAN BABCOCK: Skip.

MR. WATSON: But as worded in the proposal, it's saying the requested -- "requesting party shall be

responsible for obtaining service of the process." I don't see the -- "unless you don't want to" in that.

PROFESSOR ALBRIGHT: Or --

MR. GILSTRAP: Well, he's responsible. He's responsible, but he doesn't have to do it.

PROFESSOR ALBRIGHT: And he can choose 21a service or he can choose this kind of service.

MR. WATSON: Got it.

MR. DYER: But where does that say that here? This says if the notice is issued by the court. I'm talking about there are many courts where you don't just call up the clerk and get a hearing. The court sets the hearing, and they issue an order, frequently called a fiat or precept actually signed by the judge --

PROFESSOR ALBRIGHT: Right.

MR. DYER: -- and that is mailed to both parties, but if we're looking at compliance, let's say it's a notice of summary judgment and the other side doesn't show up. They come back in and they say, "Judge, they didn't serve it on me," and you say, "Well, we served it under Rule 21a." They say, "No, I'm looking under Rule 100, which defines process to include your order, Judge, and then it talks about how it may be served, and he did not comply with that method of service, therefore you cannot hear this summary judgment motion."

PROFESSOR ALBRIGHT: Well, it also says -- it says, if you look at "Method of service," 106 says "can serve process by delivering it by hand delivery, by mailing it return receipt requested or otherwise," and otherwise could be 21a, right? So I remember when I was practicing and I'd get those fiats, if I wanted to make absolutely sure that the other side got a copy, too, so I could say I know they needed -- I can tell the judge they definitely needed to be there, I would mail it certified mail under 21a and get my green card and say, "See, we made sure that they got notice."

MR. DYER: Well, but aren't we putting 106 and 103 potentially in conflict when we're talking about something that comes directly from the court? Because this says "process which includes any notice issued by the court." This is who may serve it.

PROFESSOR ALBRIGHT: Oh, I see what you're saying because we're saying "all process, who may serve it." It doesn't say they can do it as the lawyer.

MR. DYER: Right. Right.

PROFESSOR ALBRIGHT: So maybe 103 is one of those places that needs to say "citation."

MR. GILSTRAP: So if you want the private process to be able to serve certain kinds of writ -- I mean, you want them to be able to serve the writs, and it

says who may serve it.

CHAIRMAN BABCOCK: Okay. Professor Dorsaneo.

PROFESSOR DORSANEO: Well, I thought when you first sent this around that it probably should have -- you know, if you're going to do this job then 21a needs to be part of this, and it can't be left alone or even where it's located despite the fact that 21a is its name and that's what we call it. The Federal rule book is certainly organized a little bit better than ours, and maybe we don't want to even think about it in those terms, but Federal Rule 4 is about summons. 4.1 is about the serving other -- other such things other than a summons and then Federal Rule 5 is our 21a, talking about service of pleadings and motions and other papers, and if we're going to re-engineer all of this, 21a needs to be in the same place, I think. I think it would be useful if it was in the same place as the other alternatives.

MR. GILSTRAP: That just struck me as -- I understood -- you were suggesting that earlier. It just struck me as maybe a bridge too far.

PROFESSOR DORSANEO: From the conversation, we're already there.

MR. GILSTRAP: Yeah, may be. May be.

CHAIRMAN BABCOCK: Yeah, Pat.

MR. DYER: Can we go back to the very beginning that -- with the statute? "It must provide that the return of service is not required to be endorsed." Then we look at Rule 106(a)(1), "By delivering to the person to be served in person a true copy of the process with the date and time of delivery endorsed." Okay. The statute says we can't require that it be endorsed. 106 requires that it be endorsed.

The second part of the statute says, "The following information may be included in the return of service," so I'm trying to figure out if you can't require that it be endorsed and you can't require that a copy be attached, what is it that the defendant gets that says this is when you were served?

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: I think that Rule 106 says that the process is endorsed with the date and time of delivery, not the return.

MR. STORIE: Right.

MR. DYER: But the return, at least in Harris County and most of the counties I've practiced in, is on the very bottom of the process. That's what makes it easy to fill out.

MR. MUNZINGER: I understand, but the rule -- the statute says it doesn't have to -- the return

doesn't have to be, not the process, which speaks to Frank's point earlier on in the discussion about the -- and Richard's, about the importance of letting the person know you've been served with something, and I can -- I as the lawyer can look and see that the process server endorsed it on the process. You have to distinguish between the return and the process.

MR. GILSTRAP: Let me say this. It's not required to be endorsed or attached, but they usually are. If you'll look at in, again, the next document in the appendix on page four, that's the citation of return that's used almost everywhere, and it's a combined document, and you fill out -- you know, the clerk fills out the top, the process server fills out the bottom. That's probably how it's going to continue to be done, but under the statute it doesn't have to be required to be endorsed or attached to the original process. Now, what's the original process? Is that the one handed to the person or is that the one that -- or does that person get a copy, and is the original -- does it go back to the court?

CHAIRMAN BABCOCK: Richard Orsinger.

MR. ORSINGER: I'd like to hear Carl's answer to that question, but I still have a follow-up. Is the original what goes to the defendant, or does the

original go back to the court?

MR. WEEKS: Original always goes back to the court. You get two copies when the clerk issues it. You get a service copy. The original is also attached. You tear off the original. Generally it's stapled. You tear it off. That's the one you execute and file back with the court. The one that's the copy, the service copy, is the one the defendant gets. That's the one you endorse the date of delivery on. Now, the new rule proposes date and time of delivery on the defendant's copy, if you will, the service copy.

MR. GILSTRAP: Well, that solves the problem then. In other words, under the rule, you can just file the return with the court. I think that's the intent, that the process server doesn't have to send a copy of the process back. He can just file a return, and that's all that's required. Again, if he uses the combined form, he may do both, but he doesn't have to file the original process. He only files the return, I think is what the intent was.

CHAIRMAN BABCOCK: Yeah, Richard.

MR. ORSINGER: I wanted to say that in my experience the citations that my clients bring in, they -- either the information about the date and time of service is in the bottom of the officer's return here, just

handwritten in, or they'll sometimes have a stamp that they put on the upper right-hand corner of the citation that has blank lines in it, and they fill it in there. I get both of them, and that does appear to me to be the most frequent way of doing it, and I think, you know, either one is fine. All we want is to be sure that the citation tells the defendant when they were served, and by the way, I think the time is important, too, if there's a temporary restraining order involved, because, whether someone got notice before or after a certain event occurred may depend on whether they go to jail or not.

MR. GILSTRAP: That's in 106(a)(1), right? That's where that requirement is. And it's not changed, except it adds "time" to "date."

CHAIRMAN BABCOCK: Yeah.

MS. SECCO: I just wanted to say something quickly about the endorsement requirement that we were talking about. Originally Rule 107 said the citation shall be endorsed on or attached to the same, and the same is referring to the citation, so I think maybe the Legislature left out the "on" in the first part of 17.030. It says, "The rules must provide that the return of service is not required to be endorsed or attached to the original process issued," and I think it was supposed to be "endorsed on" --

MR. GILSTRAP: I think you're right.

MS. SECCO: -- "or attached to the original process," so it's not saying that it doesn't have to be endorsed generally. It just doesn't have to be endorsed on the original process issued. Carl, do you agree with that?

MR. WEEKS: Totally. That's correct, and I think that was the legislative intent.

MR. ORSINGER: And by the way, does "endorsed" mean a name or does "endorsed" mean any kind of writing at all?

MR. GILSTRAP: Any kind of writing. I think any kind of writing is an endorsement. It's just information that the process server adds, I think.

MR. ORSINGER: So the idea here is, is that we can put the same information in electronically, no human being has ever touched the paper with a pen, so that's what -- that's when you eliminate endorsement that means that can you transmit the information electronically without writing it. Is that what this is all about, eliminating endorsement?

MS. SECCO: I think it's just that it doesn't have to be endorsed on the original citation. I mean, it's still -- it just doesn't have to be connected to the original citation.

MR. WEEKS: Correct. To clarify what I think the intent was, this is about being able to send one piece of paper back to the clerk versus two, because now the clerk won't accept your filing under the current rule if you attach a process server's affidavit, which is the usual practice now. Most process servers that do any volume don't fill out the return on the bottom of the citation. They do their own affidavit or own return -- officer's return of service, so this would allow that document, that one document, to be filed back electronically with the clerk.

The original, if you will, or the court's copy of the citation that was issued stays in the court's file. They have a copy of that. The court maintains it when they issue. They issue three citations, or, if you will, they issue three pieces of paper, whatever it may be, when you file. They issue a copy that's the court copy they keep, which is maybe the citation or whatever it may be, the writ, doesn't really matter. They issue a service copy for the defendant, and they issue a file or original copy, and that's what right now the process servers are having to file back with under the current rule and have a copy attached to that, so it takes two pieces of paper. You can't just file the original citation back or an original affidavit of a process

server.

The intent behind the legislation is to allow the process server to just simply complete a return of service, fill that out, sign it under penalty of perjury, and be able to return it back to the clerk as an electronic document without the need for sending back the second piece of paper, which is the citation. Citation is already on file, and all the information that the court has on this is up here, and all the return would have would be the officer's return portion, would be on the affidavit of the document that's talked about in the legislation to be filed back with the court.

MR. ORSINGER: Well, Carl, if you don't attach the affidavit to the pleading -- pardon me, to the process that was served, how do you know which piece of process was served?

MR. WEEKS: Because the specifications in 17.030 require what's required in the return, which would be the cause number and all the other information for the clerk to know which case that return gets filed with.

MR. ORSINGER: So there's no need to attach it to the process because you're repeating the information in the process in the return itself?

MR. WEEKS: Exactly. It's the same information that's -- in 17.030 the information that's to

be required in the return of service that can be filed electronically is the same information that's cited on the bottom of citations down here. You're just repeating it in another piece of paper that can be filed electronically. This piece of paper has to be filed as a piece of paper before because it had the notary and that information on it. That's what the Legislature -- Legislature provides for is the ability to file that document electronically.

MR. ORSINGER: And if it's not a citation, but it's a writ or a precept or something then you will alter your affidavit accordingly?

MR. WEEKS: Absolutely.

MR. ORSINGER: Okay.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: Chip, maybe I should go on and get 105 and 106 on the table just so that everybody will know what the proposed changes are. 105 is a rule that we've got to change. It presently says -- it presently says, "The person who receives the process shall endorse the date and hour in which he received it." Well, the statute removes that requirement, and then we've added, though, a requirement here that doesn't exist anywhere in the rule. The person who receives it has got to serve it and make a return. Nowhere does it say that

he's got to do that or she's got to do that, so that's the purpose of this. It complies with the Legislature's requirement and adds these requirements that are implicit that it's got to be served.

It says, "executed," but "executed without delay." Well, what does "executed" mean? Well, we're not sure, so it says "serve and/or executed without delay and prepare and file a return," and over in 105(b), this is former Rule 17, and it has to do with -- there's apparently a requirement of the rules that the sheriff or constable can't demand a fee for executing a process in advance. Now, I don't know if that's followed. I don't know what the practice is, because, you know, most lawyers aren't -- you know, the constable or sheriff gets paid at some point, but I'm not sure when, but that's in the rule, so I just moved it here, and if you want to change it you can, but at least it's there, and that comes from Rule 17. Let me go on to 106.

CHAIRMAN BABCOCK: Quickly before anybody raises their hand.

MR. GILSTRAP: Well, I figure --

CHAIRMAN BABCOCK: Oh, you didn't make it.

MR. GILSTRAP: Go ahead. I think we might have some comments on that. That's a good point.

MR. ORSINGER: I am not sure that I am

understanding 105(b), but in my county you pay for service through the constable or sheriff in advance, and there's no way, I don't think, that they're going to do this on the bet that it's going to be taxed at costs and three years later somebody is going to voluntarily pay it. So why are we saying that in (b) they've got to serve it without being paid?

MR. GILSTRAP: Well, because that's what the rule currently says. That's Rule 17.

MR. ORSINGER: Whoa. 35 years of paying in advance, I never knew I didn't have to do that.

MR. GILSTRAP: Carl has a comment on this that I think is kind of perceptive.

MR. HAMILTON: Well, I think that the rule illustrates the difference in serving and executing, because that rule talks about executing, not serving, and generally the court is the one that orders some sort of an execution or a levy, and I don't think the constable could say, "I'm not going to do it until you pay me first" on an execution. Whereas on service, it's usually the lawyers that ask for the service, and they always get paid in advance, so I think we've got to, again, distinguish between service and executions.

MR. GILSTRAP: And conceivably if the court ordered the constable to serve it, he would have to do it.

He couldn't stand there and just say, "Not until I get paid."

MR. HAMILTON: I think that's right, if the court orders him to.

MR. ORSINGER: There's no prospect whatsoever that this rule would ever be accepted by the sheriffs and the constables if we eliminate the requirement to pay them. I mean, I'm speaking for people that I'm not an official representative of, but I truly do believe that this is dead on arrival. I'm not sure that they accept that they have a duty --

MR. GILSTRAP: Well, it was DOA in 1941, because that's how long it's been here, and maybe we just need to get rid of it.

MR. ORSINGER: But it may have been limited, as Carl said, to executing on judgments rather than service of citation. I mean, I just remember all the problems in Houston with Constable Rankin. We could just go on forever.

CHAIRMAN BABCOCK: Not to name names, but -- Professor Dorsaneo.

PROFESSOR DORSANEO: I think we ought to get rid of this. I think that the court system once operated on a credit basis, and it doesn't anymore, and this may be a remnant of that, and I think previously lawyers were

given credit and would pay at the end of some period of time, but that's not the way that any of our rules operate anymore, I don't believe.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: Well, that's partially right because before we had other process servers all we had was the sheriff or the constable, and the clerk always collected the fee for them when you filed something. They added the additional amount for the sheriff or the constable, but now we have other process servers, so sometimes you don't pay that. You have to pay individuals to do it.

CHAIRMAN BABCOCK: Okay, Frank, moving right along.

MR. GILSTRAP: Okay, 106, there is no substantive change except -- and this is a huge substantive change -- it applies now to all process, and I guess, you know, do we want to have a way to serve other kinds of process other than -- well, I don't know. There's nothing in the rules now that says how you serve other kinds of process. We all know that you can go out and hand it to the recipient, but you want to be able to send it by certified mail or you want to have the court to be able to make an order saying how we're going to give this witness notice. It doesn't strike me that that's

really any kind of a problem, but, again, there's nothing in the rule -- and courts can probably do that now. If you had a recalcitrant witness, he could probably make an order saying, "Well, give him notice this way," but again, there's nothing in rules that covers that.

CHAIRMAN BABCOCK: David Jackson.

MR. JACKSON: You know, we debated this issue a few years back, and it dealt more with the credibility of the service of process, especially on subpoenas where you have process servers go out and toss a subpoena in somebody's yard and say they were served and, you know, variations of that. This looks to me like it would open up a whole lot of things that they could start doing and saying they served their process other than just hand it to the guy. You know, we've had debates, where we served a guy by putting a subpoena in his windshield wiper as he sped away and the court ruled that that was service. You remember that, Chip.

CHAIRMAN BABCOCK: I do remember that. Not to name names, but I can name them.

MR. GILSTRAP: One approach --

CHAIRMAN BABCOCK: It was a public official.

MR. GILSTRAP: One approach is then just to say you can only do personal service. I think that's what you're talking about.

MR. JACKSON: Right.

MR. GILSTRAP: If you're going to serve a subpoena or something, you've got to serve -- or notice, you've got to serve it in person, and if you don't serve it in person you can't serve them. That's what we're talking about.

CHAIRMAN BABCOCK: Pat.

MR. DYER: But because writs sometimes can't be served personally and sometimes, for example, a writ of attachment is affixed to an immovable object, and it cannot be picked up. So we would have to make exceptions for some of the ancillary rules.

MR. GILSTRAP: That would be (a)(3).

CHAIRMAN BABCOCK: Orsinger.

MR. ORSINGER: If we don't broaden up Rule 106 to make it broader than citation then we probably ought to have a rule that covers the other kinds of process because I think there is no rule to follow to serve these other things right now. Is that correct?

MR. GILSTRAP: I think that's right. I'm not aware of one.

CHAIRMAN BABCOCK: Yeah, Marisa.

MS. SECCO: Yeah, and there are definitely rules for other kinds of process in the ancillary rules. For example, 700a and 689 are specifically rules about

writs of sequestration and writs of attachment, so I think that -- and I don't know if there are different due process concerns for writs of sequestration and writs of attachment where you wouldn't want a process server to -- A, a private process server can't serve those writs currently under the rules. Only a sheriff or constable can serve those writs, so that's something we should keep in mind with 103, and then with 106, I don't think that we would want to allow, for example, a writ of attachment to be served by mail, and the way that it's written right now gives these three options, and I don't -- again, I don't even know if you could serve a writ of attachment by mail. It just doesn't seem like that's possible, and also foreclosure proceedings have specialized service rules in 735 and 736 which we went through in the last meeting. There are specific rules for service of those expedited foreclosure orders, so there are other rules.

CHAIRMAN BABCOCK: Professor Dorsaneo.

PROFESSOR DORSANEO: Well, just looking at the attachment, the attachment rules, and we're talking about -- I had my hand raised before Marisa spoke, so I'll talk about what I was going to talk about first. There is a Rule 598(a) for a -- and I would suspect there is a similar rule with respect to the other writs talking about the defendant being served with the writ in any manner

prescribed for service of citation or as provided in Rule 21a, and in addition to that, the writ -- the writ is executed by being levied, okay, which involves, you know, physical seizure of a personal property or an office levy on land, so we're actually talking about two different kinds of things, talking about, you know, levy, which we don't want to be done by mail if it could possibly even be thought of as doable by mail, but the service of the writ process is -- and I think in all of these ancillary rules is, right, Pat, covered by a rule like 598a?

MR. DYER: Yes. Yes. So you always have the writ itself, which is executed, and then you serve the defendant with notice afterwards, because if you serve the defendant with notice beforehand the writ's going to be useless.

PROFESSOR DORSANEO: Yeah. And it's interesting to me that -- and I didn't expect to see this. It's interesting to me that it says how you go ahead and serve the writ on the defendant, because I would have -- I would have suspected that it -- in the before time everybody knew that service meant personal service, because that was the way it was done, and it only is later that you can start doing things by -- you know, by mail. That's a relative latecomer into our methods of proceeding, but I do -- Frank, I do think it's probably a

good idea to say that, because when people say "personal service," you use the term "personal service" and a lot of students don't see why mail isn't personal service, you know, because it's addressed to you.

MR. JACKSON: E-mail.

PROFESSOR DORSANEO: Huh?

MR. JACKSON: E-mail.

PROFESSOR DORSANEO: Or e-mail.

MR. GILSTRAP: E-mail, e-mail service.

MR. DYER: I think the problem is that the language of 106(a)(1), (2), and (3) is disjunctive. It would give the plaintiff the opportunity to have the writ served by Rule 21a. Why anyone would want to do that is unusual because you're giving notice to the defendant before you've actually seized the property, but I just think we shouldn't have that kind of confusion here.

MR. GILSTRAP: Well, maybe you could -- maybe you could try this. You could start out by saying, "Except as otherwise required by law or by these rules or by order of the court, the process shall be served." Maybe that's a carve out that we could do to address some of these concerns and then you would probably get rid of (3).

MR. DYER: I think that might work.

MR. ORSINGER: Chip?

CHAIRMAN BABCOCK: Yeah, Richard.

MR. ORSINGER: Frank, what do you think about 106 being a citation rule only and then cross-referencing it for those other kinds of process that we want to treat like a citation and not cross-referencing it for those other kinds of process that we don't want to be treated like a citation.

MR. GILSTRAP: Yeah, except that we don't have a rule that says that a -- you know, this makes a general rule that says that one way to serve it is personal delivery, and I don't know that there's a general rule that applies to all process that says you can do that. Maybe we don't need to.

MR. ORSINGER: Well, maybe we could limit the generic statement that applies to all process to personal delivery.

MR. GILSTRAP: Okay.

MR. ORSINGER: I'm just thinking, though, I mean, all of this special ancillary proceedings appear to have their own service rules, and I'm not sure, I don't have the rules with me, does that apply also to TROs and injunctions? Do they have their own service rules?

MS. SECCO: They do.

MR. ORSINGER: Okay. So almost everything that's peculiar has their own service rule, and to some

extent they might cross-reference citations or they might not. So really all we need to do is define the pieces of process that don't have a special rule, and we either agree to treat them like citations, or we need to write a rule for their unique characteristics.

CHAIRMAN BABCOCK: Professor Dorsaneo.

PROFESSOR DORSANEO: I think if, Frank, your carve out instead of doing a -- instead of doing (a)(3), which I also don't like, makes it clear that most of what we would be talking about would not be governed by Rule 106, that it would primarily cover citation, and I kind of think that's where I started.

MR. ORSINGER: But, Bill, that's -- these are disjunctively joined, so (a)(1) and (2) are available for all process as well as whatever else the law permits, so now all of the sudden you've got mail notice of a writ of attachment. Because these are disjunctively joined it adds (a)(1) and (2) to writs of injunction, writs of execution.

PROFESSOR DORSANEO: Well, you already have that in the 598a or whatever it's going to become. I mean, I guess the rule that I don't like the most is the -- is this method of service rule for process.

MR. GILSTRAP: Right.

PROFESSOR DORSANEO: I don't think that's a

good way to go, and I wish I had something to say about Richard's comment about the description of the process served. I don't really have a response to that, so my backup position would be that the rules about, you know, citation and return of citation not be made all purpose, but that whatever other rules involving returns that need to be changed under the statute, that they be changed.

MR. GILSTRAP: Right. So what I think you're saying or what I'm hearing is we need to limit 106 to citations and it would be method of service of citations.

CHAIRMAN BABCOCK: Justice Hecht.

HONORABLE NATHAN HECHT: The statute is about returns, and we've been talking a lot about service, but just to get your reaction, if the language of the statute was essentially a rule, would there be any problem with -- do you see any problems in that?

PROFESSOR DORSANEO: Where to put it would be the problem.

HONORABLE NATHAN HECHT: Well, I mean, but that and it would just say, "notwithstanding any other rule this is about returns," and you would just have the statutory language. The things that are required would be mandated, the things that are optional would probably be mandated, too, it looks like, and that would just be a new

rule.

MR. GILSTRAP: Why don't we go onto 107? I mean, that's really the guts of the bill.

CHAIRMAN BABCOCK: I mean, what I hear Justice Hecht saying is -- another way of saying it is didn't the Legislature just in subparagraph (a) of 17.030 require rules only on returns?

MR. GILSTRAP: That's right. That's right. Well, and it also required some other amendments to be -- it also had to do with endorsement as well, and you can't have -- you -- there's certain prohibitions of endorsement, but those are easily done in Rule 105, and you're absolutely correct, you know, the bill deals with return, and that's Rule 107.

MR. ORSINGER: Chip, we started the discussion out by saying that the Legislature only requires the change on return, but since we've noticed these bad definitions and over-inclusive terminology in other rules, the question is do we clean them up now or do we clean them up later. That's really the question.

CHAIRMAN BABCOCK: Yeah. And I think that the Court is expecting us to get them something today, and it sounds to me like there's a lot of --

MR. GILSTRAP: I thought it was the next meeting. I thought Justice Hecht's letter said I think

the October meeting for this rule.

MS. SECCO: It did, but if you --

CHAIRMAN BABCOCK: But we've changed that.

MS. SECCO: No. I'll just say that because you had them prepared for this meeting I was concerned about it. Technically we have to have them done by October 15th to comply with the notice requirement in the statute, so they have to be issued by January 1st, which means they have to be in the *Bar Journal* by November 1st, which means we have to get them to the *Bar Journal* by October 15th.

MR. GILSTRAP: Well, then what we do is, you know, we could, you know, break my heart and leave Rules 15 through 17 in place and, you know, do 105, which we've talked about, and that's certainly no -- I don't think anybody has a problem with 105.

MS. WINK: Actually, I do. I think I do. And maybe I'm just not seeing it in the statute, but what you're saying --

CHAIRMAN BABCOCK: Speak up, Dulcie.

MS. WINK: Where you're saying that the person who receives process, that it be stricken that they shall endorse the process on when they received it, I don't see that being required by the statute. I know they can't do that on the return, they don't have to do that on

the return unless we mandate it, but I don't think you want to change that, and just back to the other thing you were mentioning, I would agree with Justice Hecht about using the language from the statute for the rule because the current draft of 107 leaves out the date of service, and that's the most important thing. It does have the date and time it was received by the process server, but it doesn't even say the date of service, and that's definitely important to get back to the court as well as to the recipient.

CHAIRMAN BABCOCK: Well --

MR. GILSTRAP: No, wait, it does over on page 12, rule (c)(1).

MS. WINK: Okay.

CHAIRMAN BABCOCK: Let's take a break here in a second, but the one thing I don't see in these rules, Frank, is -- in these proposed rules is when Munzinger is on Sixth Street late at night and somebody taps him on the shoulder and calls him to justice. There's no way to deal with that.

MR. GILSTRAP: Well, you know, it's kind of profound, "I call you to justice," you know.

CHAIRMAN BABCOCK: It's happened to him several times, but let's take a break.

(Recess from 10:32 a.m. to 10:54 a.m.)

CHAIRMAN BABCOCK: All right, Frank, I think after consulting with the Court that perhaps focusing our attention on Rule 107 is probably a pretty good idea.

MR. GILSTRAP: Right, but you want the shorter and sweeter job.

CHAIRMAN BABCOCK: Well, I think, and which is not to say that --

MR. GILSTRAP: It's time.

CHAIRMAN BABCOCK: -- ultimately we probably ought not to swing back to all of this stuff, but given the tight deadline on the notice, and it was my fault for thinking that we could do this on the October meeting, I just hadn't realized that -- backed out the time deadlines on this.

MR. GILSTRAP: Okay. To do what the statute requires we've got to amend Rule 16, 105, and 107 and 108. I didn't include that in my list, and the two JP rules. I don't know how we get to the two JP rules today, but maybe I can try to come up with something, but we've talked about 16. 16 says, "Every officer or authorized person shall endorse on all process and precepts coming to hand the day and hour on which he received them," you don't have to endorse that on there -- well, as Bill points out, you know, that's strictly not prohibited by the statute. It says that the return doesn't have to be endorsed or

attached to the original process. So if you want to leave that in there you could, although, again, as we talked about, there's no purpose necessarily in endorsing the date and hour on which it's received on the process that's given to the defendant, and all of this information is included in the return. Let's go on to 105. We've talked about 105.

CHAIRMAN BABCOCK: Okay, wait a minute. Let's stick with 16 for a second.

MR. GILSTRAP: All right.

CHAIRMAN BABCOCK: 16 does require the manner in which the officer executed, and it contemplates the process was served, which is still in the statute, which is --

MR. GILSTRAP: But the point is, this all goes into the rule -- into the return, excuse me. All of this information is now included in the return.

CHAIRMAN BABCOCK: All right. So your idea is you're going to delete 16 --

MR. GILSTRAP: Right.

CHAIRMAN BABCOCK: -- and put it in somewhere else.

MR. GILSTRAP: Yeah. All of this information that is -- that's supposed to be endorsed on the process is now included in the return, and most of it

was originally.

MR. ORSINGER: Wait. Hold on a second. The date and time of the service of the process, if it's only in the return it's not in the hands of the defendant to go to the defendant's lawyer, so Rule 16 is where we need to carve out that they'll endorse on the process the date and time of service.

MR. GILSTRAP: And --

MR. ORSINGER: Don't throw that out or else we don't have the notice to the defendant -- reminder to the defendant.

MR. GILSTRAP: And you're talking about the types of process other than citation, which is covered by Rule 106. 106 says that you've got to put the date and time of delivery on -- that it's got to be endorsed with the date and time of delivery.

MR. ORSINGER: I think that takes care of that for the citation but not for the other process.

CHAIRMAN BABCOCK: Pat.

MR. DYER: The date and hour received, usually in citation that's not going to be a problem, but in ancillary writs it will be because the officer is required to execute the writ in order. If he receives multiple writs on the same day he's got to execute the writ that was first received, and I think that this

language was added there to make sure there was a method by which that could be determined.

CHAIRMAN BABCOCK: Well, if we're focusing, Pat, on Rule 16, are you saying that you can't eliminate Rule 16 without having an impact on things other than citations?

MS. WINK: Right.

MR. DYER: Well, so long as we have that -- if we maintain language similar to this in the service and return rules for the ancillary rules, eliminating Rule 16 wouldn't be a problem because it's otherwise covered.

CHAIRMAN BABCOCK: Carl Weeks.

MR. WEEKS: I would urge you to leave 16 as written. It's important for a couple of reasons besides what they've mentioned, and one would be when you get -- notoriously we get papers two days after the statute's ran. You've got to show diligence on these things, you've been diligently attempting to serve. It's good for the person that's got responsibility to get the paper served, when you're running on a statute, then you endorse the date that they actually receive the paper.

MR. GILSTRAP: Well, isn't that shown by the return?

PROFESSOR DORSANEO: No.

MR. GILSTRAP: The date of receipt?

CHAIRMAN BABCOCK: Well, not in the new statute.

MR. GILSTRAP: Well, I mean, in the proposal over On Page 11, (b), that's everything that's supposed to be in the return, and (b)(4) is the date and time the process was received. Now, if it's in the return, are these concerns allayed?

MR. ORSINGER: Well, actually, it's consistent with what I think the statute wanted, because if it's in the return -- pardon me, if it's in the process that's out with the defendant, you'll never see it again, so you want it in the return so that it gets sent back to the courthouse and it's on file.

MR. DYER: But there's a difference also -- the statute says the original process, it's not required to be endorsed or attached to the original process, but the service copy, we do have that in Rule 106, "by delivering a true copy with date and time of delivery." So that has to be given to the defendant so that defendant can refer to that, give it to the attorney to determine the answer date, but there seems to be a distinction obviously between the original and the service return that's a copy, if you would.

MR. GILSTRAP: There's a distinction between the day the constable got it and the day he served it.

MR. ORSINGER: Yeah, but there's also a distinction between the process and the copy that's served, and what Carl wants is some official record that everyone can look at to find out when the process server received it, and that -- it shouldn't be on what's left with the defendant. That ought to be on something that's filed at the courthouse.

MR. GILSTRAP: Which is the return.

MR. ORSINGER: That's what I'm saying.

MR. GILSTRAP: That all goes in the return.

MR. WEEKS: It looks like it's covered adequately in 107. Both are required in 107.

MR. DYER: Well, except it doesn't distinguish or refer to original or copy, so does it apply to both?

MR. GILSTRAP: Well, I mean, if it's on the return it doesn't go on -- I mean, insofar as these rules are concerned, it doesn't have to go on the process. It's in the return.

CHAIRMAN BABCOCK: Okay.

MR. DYER: But all 106 requires is that the copy have the date and time of delivery. It doesn't require anything else.

MR. GILSTRAP: Right. Right. But the date and time of delivery is there for the defendant, the

person being served. That's what he has to have.

CHAIRMAN BABCOCK: Right.

MR. DYER: But it's also there for whoever is serving it if they received a number of lawsuits the same day or writs to determine the order of service preference.

CHAIRMAN BABCOCK: Professor Dorsaneo.

PROFESSOR DORSANEO: Well, isn't it at least a good idea for the person who is going to serve the process to indicate for his or her or its -- I guess his or her own purposes the day and hour on which he or she received it? I mean, even if it is supposed to also be in the return, why -- there's no reason to take it out of 105 other than you don't like it. No reason in the statute, and I can see that that's a good practice, and I don't suppose it makes that much difference, but the Supreme Court decided *In Re: E. A.* not too long ago reversing default judgments because that part of Rule 16 and 105 weren't -- those parts of those rules weren't met, so if you're going to take it out, understand we're taking it out because you don't like it, and I think we would need a -- maybe need a comment or something. Maybe we don't need it, but it would be useful for people to know that a recent Supreme Court case is being changed by rule.

MR. GILSTRAP: Which was based on the rule,

right?

PROFESSOR DORSANEO: Based on the rule.

CHAIRMAN BABCOCK: Yeah, Richard.

MR. ORSINGER: It seems to me that what we've decided to do is separate the return from the process. Previously we used to have the return on the piece of paper that was called "process." Now we're just going to have an affidavit that's filed electronically. Well, what's going to happen with this original process? We've got the copy the district clerk keeps, we've got an original which goes out to the process server, and we have a copy that goes out to the process server. The process server serves the copy on the defendant, so he walks away with his copy, and the process server now has an original and then files a return that's separate from the original. So where does the original go? Into a wastebasket, into the process server's file, or does it get returned to the courthouse, too?

MR. GILSTRAP: It can be separate. It's not required to be.

MR. ORSINGER: Well, what if it is separate? Do we have a rule on what the process server does with the original after he's served it and if the return is filed separately from the process, because I understood Carl to say that they're just filing affidavits now? So the

original, there's no requirement that the original ever be filed at the courthouse anymore. Is that right? And if that's right then why do we have an original? If we have an original then we ought to probably put it back at the courthouse if we're going to write stuff on it. That's all I'm saying.

MR. GILSTRAP: Well, I think the point is not to write stuff on it, except the time and date of the service, which is on the copy that goes to the person being served.

MR. ORSINGER: Right, but if we write the date and time that the process server receives it on the original and we don't say the original gets filed and we don't say it can be thrown away and we don't say it gets served on the defendant then what do you do with it?

CHAIRMAN BABCOCK: Judge Wallace.

HONORABLE R. H. WALLACE: Well, are we sure that -- do they always endorse the copy that the defendant gets with the time and date of service, because I -- I'm not sure that's right.

MR. GILSTRAP: Well, they're --

HONORABLE R. H. WALLACE: What about the guy that you served him with putting it on his windshield wiper? I bet it didn't say the time and date he was served.

MR. GILSTRAP: Well, under 106 --

HONORABLE R. H. WALLACE: I don't know that that's a requirement, but I seem to recall as a practicing attorney getting copies of what my clients received, and it didn't say when they were served. You had to, you know, ask them or find out.

MR. GILSTRAP: Well, in 106(a)(1), that's in the rule.

HONORABLE R. H. WALLACE: That's in the rule?

MR. GILSTRAP: It's in the rule that you're supposed to put the date of delivery on the document served.

HONORABLE R. H. WALLACE: Is that the existing rule?

MR. GILSTRAP: Yeah, 106(a), right.

CHAIRMAN BABCOCK: Carl.

MR. WEEKS: The date is, but not the time. Adding the time is a proposed change on the delivery copy. On the delivery copy now, all that's required under the current rule is the date of delivery, for the purposes we discussed earlier for the defendant to be able to calculate his answer due date. Not the time.

CHAIRMAN BABCOCK: All right. Going back to Rule 16 just real briefly, is it the consensus here that

we should not recommend that this rule be deleted because it may -- that may have unintended consequences with respect to other rules, and it's not required that it be deleted by the statute, House Bill 962?

MR. ORSINGER: Well, Chip, we have to delete the last line and a half because the statute doesn't let us require that the return be endorsed, and this requires that the return be endorsed with the time and place -- no, it doesn't. It requires that the process, so in other words, the return may not require a personal endorsement, but the process does. Well, the Legislature couldn't possibly have wanted that, or could they?

HONORABLE STEPHEN YELENOSKY: They could possibly want anything.

MR. ORSINGER: We've got to eliminate the requirement of endorsing that information on the process, or we haven't saved anybody any effort.

MS. SECCO: I think this goes --

MR. MUNZINGER: But that's a Rule 16 requirement --

CHAIRMAN BABCOCK: Hang on. Hang on for a second.

MS. SECCO: I do kind of think that goes back to -- and Carl, I think, agrees with this, that it's not that the return doesn't have to be endorsed because it

does actually have to be signed under penalty of perjury by the process server. It's just that it doesn't have to be connected to the original process. I think that was the purpose of that first part of the statute. So I don't think that it doesn't have to be endorsed. It's just that it doesn't have to be endorsed on the original process.

CHAIRMAN BABCOCK: Carl, do you agree with that?

MR. WEEKS: I do agree with that. Correct.

CHAIRMAN BABCOCK: All right. Carl, what's your position on current Rule 16? Does the statute require us to delete it? Is it a good idea to delete it even if the statute doesn't require it?

MR. WEEKS: I think we're still going to have to sign the return officially, and I think the date and time will be on the return, so whether it's electronic or done manually, it doesn't matter. So, you know, my personal thinking is leave it alone, we don't have to change it. It speaks to 107. If 107 is fixed properly then this could be -- this would really not affect how you would do the return in 107.

CHAIRMAN BABCOCK: Okay. Gene.

MR. STORIE: Yeah, I would agree with that. I mean, I'm assuming that the Legislature drafted this legislation based on an existing framework and that we

wouldn't want any other changes in that framework unless the legislation really called for it.

CHAIRMAN BABCOCK: Okay. Professor Dorsaneo.

PROFESSOR DORSANEO: Well, on page four of the memo, below Rule 16, Frank's memo says "The requirement to endorse this information on the face of the process conflicts with section 17.030(b)(1)(a), which provides," quote, "that the return of service is not required to be endorsed on or attached to the original process." So Rule 16 is not about the return, so that sentence is wrong, okay, and should be stricken from the memo. Let me do it.

CHAIRMAN BABCOCK: Okay. There we go.

PROFESSOR DORSANEO: And Rule 16, Rule 16 is not vulnerable to statutory cancellation.

MR. GILSTRAP: It's vulnerable to rule-making cancellation.

CHAIRMAN BABCOCK: Okay. That's the point I was asking. Yeah, Richard.

MR. ORSINGER: The tail end of Rule 16, though, does contain a directive that "shall sign the returns officially," and so I don't know what an official signing is, but whatever it used to be it's different now than what it used to be because now --

CHAIRMAN BABCOCK: You have to use multiple pens.

MR. ORSINGER: So sign the returns officially because now they're no longer going to be official in the sense that they're done in front of a notary public. They're now just going to be kind of sworn by process of law or something, so --

CHAIRMAN BABCOCK: I'll get back, Richard, to the question. Do you think that the statute, House Bill 962, requires Rule 16 to be amended?

MR. ORSINGER: I think that maybe it requires the word "officially" to be dropped off and just says "shall sign the returns."

PROFESSOR DORSANEO: Strike "official."

CHAIRMAN BABCOCK: All right. Richard, the other.

MR. MUNZINGER: I disagree. If the person is acting in an official capacity and signs it, he is required to sign it, he is signing it as an official. I believe that's what the word "officially" means. It imparts dignity, the force of law to the signature, reminds the officer that he's signing in that capacity, that it's an official act. It doesn't disagree with 17.030, which only says that it doesn't have to be endorsed on the return; and it does say that he signs it

under penalty of perjury, whatever that means given what we've learned about the Penal Code in these papers; but I don't think you should change that at all. I think that the person serving, he signs it, and he signs it officially, and he dang sure better sign it honestly because he's doing it as an official of the government.

CHAIRMAN BABCOCK: Okay. Since we haven't voted in a while, let's have a vote. How many people think that we should leave Rule 16 as written, raise your hand?

How many think it should be changed? By a vote of 12 to 2 we're going to leave it alone, or at least that's our recommendation to the Court.

Let's go to Rule 107 now.

MR. GILSTRAP: 105 I think probably needs to be dealt with in the same way.

CHAIRMAN BABCOCK: The same way of leave it alone?

MR. GILSTRAP: Yeah. I think if you're saying leave 16 alone you probably leave 105 alone.

CHAIRMAN BABCOCK: Okay. So let's go to 107.

MR. GILSTRAP: 107, all right. In 107 we went through -- we went through the existing rule and did not change the order. As Alexandra points out, maybe we

might want to rearrange the parts, but the first one is the existing rule says, "The return of the officer or authorized person executing the citation shall be endorsed on or attached to the same." Well, that pretty is clearly -- is pretty clearly eliminated by 17.030(b)(1)(a).

CHAIRMAN BABCOCK: Right.

MR. GILSTRAP: So what it says now is "The return may be, but is not required to be endorsed on or attached to the process." Now, there's a larger question. Do we -- does this apply only to process, or does it apply -- does it apply only to citation or does it apply in all sorts of process? Bill raised this at the beginning. Maybe we go through it and see how it works and then we can think about how far it goes. So (a) is pretty simple, and I think the language is required by the statute.

CHAIRMAN BABCOCK: Right, so (b).

MR. GILSTRAP: (b), all right. Now, this --

MR. MUNZINGER: May I raise a question?

CHAIRMAN BABCOCK: Yeah.

MR. MUNZINGER: May I raise a question about 107(a)? 107(a) as currently drawn, as I'm reading it on Page 11, the new 107(a) deletes the requirement of "shall be signed by the officer officially or by the authorized person," which I do not believe is addressed in the

statute. So it's deleting the signature requirement.

MR. GILSTRAP: But there is a new signature requirement. There is a new signature requirement in the rule under penalty of perjury, and that's over in 107(f).

MR. MUNZINGER: Thank you.

MR. GILSTRAP: Okay. (b), this is the information that -- that the Legislature says they would like us to put in the rule, although we don't have to; and 107(b) is the information that has to be in every return, whether it's served or not served; and that's the case number, the name, the court in which it's filed, a description of the process, which is in the statute, the date it was received, the name of the person that received the process, we'll come back to that. I put "any other information required by law," but the -- an important thing is this: It says, "The return together with any document to which it is attached." If you'll look at the form in the appendix on page four, I think that's pretty much a widely used form; and it already contains the case number, the case name, the court, the type of process, that type thing. It's already in the form, so the constable or the process server doesn't have to go back and put that in if he simply signs the return at the bottom. And that's the reason, "The return together with any document to which it's attached" has got it.

In other words, whatever document is filed by the constable or whatever document constitutes the return has got to contain this information somewhere, and then we get to 5, "the name of the person who received the process and his identification number," and Carl would suggest "and his expiration date," all of which makes sense, but I don't know, you know, what identification number and what expiration date is. Obviously if you're a private process server you know what that means, but it's not apparent to me what you mean by "identification number and expiration date." Maybe you could speak to that, Carl.

MR. WEEKS: I'd be happy to. The brunt of private process servers are now on the approved list that our board certifies, if you will, for the Court. There's almost 6,500 private process servers on the list now. When they're approved they get a number that's an identification number, like a SCH number with a series of digits after it. That is their identification number they have to endorse on the return as their authority under 103 to serve those documents. The reason that -- that order to approve them is only good for three years, and they have to renew that.

We've already had instances of folks that have kept serving and not renewed their certification

timely, which in essence would invalidate the service on challenge because they weren't authorized to serve that paper or could, it could invalidate that on a challenge. So our suggestion is if you require the process server to endorse the expiration date adjacent to their number, which would be required, it would be self-proving just like a notary. "My expiration date is," and next to the notary you always see the date their commission expires so they'll know when they endorse the return that they're not expired, and the court can see that if they look at the return.

MR. GILSTRAP: I understand that. That makes sense. I'm just saying I'm a constable serving this and it calls for my -- it doesn't say -- it doesn't limit it to private process servers. It's my identification number and expiration date. Would I put my badge number, or if I'm maybe a person who's been ordered to serve it, do I put my Social Security number? In other words, it's got to be --

MR. DYER: If you add an appositive that says "the name of the person who received the process and," comma, "if the person is a private process server, his or her identification number."

MR. GILSTRAP: Okay. That will work.

CHAIRMAN BABCOCK: Well, the statute, this

proposed subsection (b)(5) says, "The name of the person who received the process." Are you talking about the person who was served or the person who was serving?

MR. GILSTRAP: No, it means the person who is serving.

CHAIRMAN BABCOCK: Who is serving, and that's ambiguous, but the statute says, "The name of the person serving process," so why don't we just say that and then it says, "if the process server is certified as a process server by the Supreme Court, the process server's identification number." That's what you're getting at, and that's quite clear, because that person is going to know I've got an ID number and so I'm going to put it down.

CHAIRMAN BABCOCK: So you're saying, "The name of the person serving the process, and if the person is a private process server, his or her identification number and expiration date."

CHAIRMAN BABCOCK: Yeah, take it right out of the statute.

MR. ORSINGER: Chip?

CHAIRMAN BABCOCK: Yes, Richard.

MR. ORSINGER: The same problem about "person receiving" is in the title of Rule 105, and it appears that the rules are written so that the person who

is serving is sometimes identified as the person who receives the process, because in Rule 105 if you receive the process then you have a duty to serve it, and so it may be that we either stick with the archaic way of approaching it or we need to change that Rule 105, the duty of the person receiving the process to serve.

MR. GILSTRAP: It could be easily changed. You could say, "Duty of person serving process," and you could say, "The person who serves the process shall," you know, "serve and execute it," or just you don't even have to say that.

CHAIRMAN BABCOCK: Okay.

MR. GILSTRAP: "Who serves the process shall endorse thereon the date and hour in which he receives it." That's what you could say.

MR. ORSINGER: I would like to ask if the person receiving the process is always the same person that serves it or maybe are they different?

MR. WEEKS: They are -- excuse me. They are different many times.

MR. ORSINGER: Then we need to perpetuate the distinction, because there's a duty to put the time and date of the receipt, which may be unknown to the person actually serving, so let's distinguish the roles then, and so on Rule 107 are we talking about the one who

received it or the one who is serving it? We're talking here about the one who is serving it even if they didn't receive it, right?

MR. GILSTRAP: 105 we're talking about the person who received it.

MR. ORSINGER: But 107 we're talking about the person who serves it.

MR. GILSTRAP: Right. Okay.

CHAIRMAN BABCOCK: Frank, in (b)(6) you say "any other information required by law." Who knows what that is, but --

MR. GILSTRAP: Well, I'm just saying if this covers something besides citation and it covers one of these more exotic writs, that would -- you could put it in there, and I guess that begs the question what process does this rule cover.

CHAIRMAN BABCOCK: Yeah, Professor Dorsaneo.

PROFESSOR DORSANEO: To be on the safe side I would always follow the language of the statute, I mean, even for such minor things as in (b)(1), you know, "cause number"; and (b)(4), the statute says "the date and time process was received for service." I would add the words "for service." I think the safest path is to use the statutory language. Now, with one possible exception, "the description of the process." I'm not sure what that

means, so maybe something more would be helpful. Maybe we can't do that today.

CHAIRMAN BABCOCK: Okay. Yeah, Carl.

MR. WEEKS: The description can be very lengthy. Many times we're seeing the description of the return now in affidavits to be three or four lines. It could be "original petition accompanied by temporary order copy," comma, "plaintiff's original request for production, request for discovery," whatever it may be, on and on and on, so that would be the description that's required, and what we're seeing now is the -- everybody wants that articulated in the return and filed so it's on file that their answer date is running for discovery, their answer date is running for answer of the lawsuit, and so forth. So that's why the description of the process is very important, and it needs many times -- as we're seeing them now, they grow and they're getting more lengthy and more detailed that the process server is required to articulate specifically everything that was delivered and attached to the original petition at the time of service. Show cause order, motion for enforcement, TRO, discovery, whatever it may be. We're seeing many times somebody is getting four or five things in one service.

PROFESSOR DORSANEO: And you think that's a

good idea, right, for it to be specific rather than just --

MR. WEEKS: Absolutely. It's got to be articulated.

PROFESSOR DORSANEO: Rather than just say "writ of attachment."

MR. WEEKS: Absolutely, it needs to be articulated in the return specifically what the process server served and on what date. It needs to be articulated accurately and individually, each document.

PROFESSOR DORSANEO: How about "a specific description of the process"?

MR. WEEKS: I like that better.

CHAIRMAN BABCOCK: Okay. Yeah, Pat.

MR. DYER: Just to go back to 105, we've agreed to change the language to "the person who receives" -- I mean "person who serves a process"?

MR. GILSTRAP: No, no, no, no. We haven't.

MR. DYER: So it's going to be "person who receives a process." Well, if you look at it, that person is required to serve it. It doesn't make a provision that there could be a difference between the one who receives it and the one who serves it.

MR. GILSTRAP: No, but -- you're right, so we would have to take out the -- at least (1) and (2),

because the person who receives it is not going to be the person who serves it. The person who serves it is going to be the person who prepares the return. I think that's where we're going.

MR. ORSINGER: Uh-huh.

PROFESSOR HOFFMAN: Chip?

CHAIRMAN BABCOCK: Yeah. Professor Hoffman.

PROFESSOR HOFFMAN: One of the things that's confusing to me is -- and we're jumping around a lot, so that may be one reason why, but just to pick up on this discussion earlier about the description of the process, but it seems to me in some ways a larger point, which is it seems like what we would actually want in an ideal world to avoid disputes of fact about what was served is we would want an exact duplicate of what was given to the person by the process server. So, so, for instance, with the description, the process server might incorrectly not list that there were discovery requests, just might make a mistake, or it might be that it was attached to the back of the petition and you didn't see it, and they didn't write it, or it wasn't labeled correctly. One could imagine all kinds of ways in which we might misdescribe it and thus it's hard to prove when it was received.

Another example would be this business about handwriting on the day that, you know, you were served.

You were served at this time and this date, but if that original paper, as Richard was saying, never gets to the -- never gets filed anywhere, we never see that either, and so I may be wondering against the grain here, but is there not a way if we're moving to a system in which things are filed electronically that what we would want to have filed is exactly what the -- you know, an exact copy of what the process server gives to the person being served.

MR. GILSTRAP: The problem with that is the Legislature over in, you know, (b)(1)(a) of the statute says that "The rules must provide that the return is not required to be endorsed or attached to the original process." I guess we could have a requirement saying that they've got to file it anyway, and then they want to be able to electronically file it. What they want is to require the constable or sheriff or process server to -- to be able to fill out the return and send it electronically, however you do that, and that's all he's got to do.

PROFESSOR HOFFMAN: So if I could just respond, so I'm with you, Frank, that that's what it says it's not required to do, but then there's -- I guess what I'm asking is almost a best practices question and also a question of what is practice, because if it -- right now

it's sounding to me like that would be the better practice, so I'm just asking is that the case or not.

CHAIRMAN BABCOCK: Yeah, Dulcie.

MS. WINK: I'm not sure that that would be the better practice. I think there's going to be an inherent question either way, but -- and I know Carl has seen this. There are some of us nerds who have been known to file petitions that have Exhibits A through M, and they're in evidentiary form giving the other side notice inherently that as soon as they answer I'm moving for summary judgment, right, and therefore, I've got that as well as lots of discovery; and if we're going to require our process servers to scan all of that back in and send it back, we're creating work that we haven't considered yet. So that's something to be considered.

CHAIRMAN BABCOCK: Yeah, Carl.

MR. WEEKS: I think absolutely I agree with your comment. I think I understand your concern, but I think it's totally impractical, because many times you may deliver -- I mean, we deliver them, you know, 500 pages or 300 pages or a hundred pages. If you had to scan and e-mail all of that back, whether it would be exhibits or whatever it would be, the clerks would have a fit, you know. I mean, it would just be too burdensome to try to do that. I think, you know, where the safeguard comes in

is when the lawyer gets a return of service back and he's looking for answer dates on discovery or request for production or interrogatories or the original answer date or whatever it may be, if you don't have that articulated in your return you're going to get a call from the lawyer saying, "You didn't put plaintiff's amended petition" or whatever it is, whatever you didn't articulate in your return, so you don't have the date. He can't calculate his date for that. It may be different than an answer date -- obviously it would be different for the answer date on discovery, so I think there's a self-policing mechanism there in place with the practitioner who files that discovery along with his original petition.

CHAIRMAN BABCOCK: Yeah, Dulcie.

MS. WINK: And you can always go back to, again, the clerk's office keeps what you handed to them to be attached. They keep all of that, and they're going to scan that into the system, so, again, when in doubt go back to what was with the original clerk's office file.

CHAIRMAN BABCOCK: Richard Orsinger.

MR. ORSINGER: Frank, if we're going to change Rule 105 so that it just says, "The person who receives the process will endorse the date and hour on which he received it," then over here on 107(b)(4) we don't need the return -- or do we need the return to say

"the date and time when the process was received for service"?

MR. GILSTRAP: Well, if -- I mean, if you were -- you endorse the date and time of -- are you talking about the date and time it was received?

MR. ORSINGER: Yes. Because it doesn't say -- the date and time served is over here under (c).

MR. GILSTRAP: That's just one of the recommended things that's in 17.030.

MR. ORSINGER: Okay. So here's my issue. If we're endorsing the date and time the process is received under Rule 105, what we ought to do is we ought to require that that original citation be returned to the court, so that that endorsement will now be a public record and then we can take it out of the return. It makes no sense to me if it's never served.

MR. GILSTRAP: Well, no, no, no. If it's never served that's when we go into the next two parts of the rule that we haven't gotten to. It's always going to be received.

MR. ORSINGER: I know that, but this is what you're saying is, is that we have to return an unserved return in order to show the date and time that it was received, which is required to be on the citation in the first place. If a return is never served, are we required

to file it with the clerk?

MR. GILSTRAP: Well, let's talk about that. Let's go onto (c) and (d), and you'll see how it's done at least in this proposal. (c) deals with -- first of all, (b) is what's got to be in every return, whether it's served or not served. (c) is what's got to be in the return if it's served. If it's served or executed, "The return together with the document to which it's attached shall also include the following information," and all of this comes outs of the statute, the wording slightly changed. The only thing that I've added is "and time," "the date and time when the process was served or executed." But if you want to take out "and time," everything else is in the statute as a recommended thing to go in the return.

Then in (d) this is what happens when -- when the officer or authorized person has not served the citation. That's the old rule. It says that "The process not served or executed the return, together with any document to which it's attached, shall show the diligence used to serve it, the cause of the failure to serve or execute it, the place where the defendant or person can be" -- excuse me, "the person to be served can be found, if it can be" -- "if it can be ascertained." That's in the current rule. It's just the wording is slightly

different.

CHAIRMAN BABCOCK: Okay. Professor Dorsaneo.

PROFESSOR DORSANEO: Why not combine (b) and (c)?

MR. GILSTRAP: Well, because -- because -- and (b) applies -- (b) has to go in every process whether it's served -- every return whether the process is served or not. You have to identify the case, the court, the process, and the person who tried to serve it. That's got to be -- that's got to be -- regardless of whether it's served or not, that's got to be on the return. And (c) is only applicable when it's served. Obviously this information can't be applicable if the process is not served.

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

MR. HAMILTON: Well, on the 107(b)(5) -- sorry, (3), "description of the process," I think it would be better to say "a description of what was served," because process, again, let's say it's a citation. That's the process, and there's a pleading attached to that, but then they attach discovery to that. Well, clearly discovery is not process, and if they just -- if you just ask for a description of the process, they may just put

"citation" on there.

MR. GILSTRAP: Or "general precept" if it's discovery or something like that.

MR. HAMILTON: Yeah.

CHAIRMAN BABCOCK: Dulcie.

MS. WINK: Sometimes you actually are serving multiple types of process. Pat's famous for this. We've had many discussions. He may be looking for a temporary restraining order or a temporary injunction, so he'll have a writ. He'll also have a writ perhaps for sequestration, so he may have multiple ways of getting his ultimate desired result, and he may be in one set of service being sent -- sending more than one process, so perhaps you want to say "description of process," but you're going to have to identify all the other things attached.

MR. HAMILTON: Well, all I'm suggesting is why put the burden on the server to figure out what process is. Why not just tell him to list all of the documents served?

MR. GILSTRAP: Well, in the rule -- excuse me, in the form it's usually at the top of the page. Look at, again, on page four of the appendix. It just says "citation" at the top of the page. Now, presumably if it's a general precept it will say something else.

MR. HAMILTON: Yeah, so if they just list those items, they would be listing request for production, for example, which really is not process, but they would be listing it anyway.

MR. ORSINGER: I don't think it's feasible for the process server to sift through the documents and identify what legal documents there are. I think everything that is being officially served should have its own piece of process, and if it's an original petition, it's going to be a citation; if it's a temporary order, it's going to be a TRO; if it's a set of interrogatories, it needs to be a precept, although we had a private discussion here that said maybe instead of precept we should call it "official notice"; but I don't think the private process server should be required to leaf through all the documents to figure out how many documents there are and how they're labeled. He should only be required -- he or she should only be required to look at the process that's issued by the clerk and list that. Otherwise it's unworkable.

CHAIRMAN BABCOCK: Yeah.

MR. DYER: I would say the easiest thing to do would be to serve the title of the original document. I mean, if it's plaintiff's amended petition instead of plaintiff's second amended petition, that's a problem, and

service would be invalid if the return refers to amended petition but it was a second amended petition. I think that's what we're really looking at in terms of the description, not that they have to go through and figure out everything else that's in there. Typically that would be in the title, but so long as that -- the title of the document is described, that's really what you need to know because if there ever really were an issue you look at the actual document.

MR. ORSINGER: Shouldn't they pull that information off of the piece of process, because isn't the clerk going to say, "Attached hereto is second amended original"?

MR. DYER: No, that doesn't absolve the officer of what the officer served. You know, if you look at something and the clerk's got it wrong, that doesn't mean you're okay to put it wrong there either. You can correct that.

MR. ORSINGER: So if I filed an original lawsuit and I've got a request for production, request for disclosure, and interrogatories stapled on the back of my petition then I'm going to have a citation, and you're going to expect the private process server to leaf through there and also list interrogatories, request for production, and request for disclosure?

MR. DYER: No, I would not. I would say the process server uses what the title of that document is. Now, if there comes to be an issue about the documents and the pages that were actually served, that's a different issue, but I don't think that that invalidates the service, if they use the title of the document.

MR. ORSINGER: Do you put your discovery as just paragraph 23 of your petition or do you --

MR. DYER: Yes, I --

MR. ORSINGER: -- attach it as a standalone discovery document?

MR. DYER: I just include it in the petition.

MS. WINK: Sometimes -- and just to answer your question, sometimes I do, especially with requests for disclosure, but even if the petition only says plaintiff's original petition as opposed to plaintiff's original petition and request for disclosure, okay, if it's in that petition, they got served with it. I don't think you want a separate piece of process issued by the clerk for each individual thing that you're serving at a time. For instance, if we have the petition, interrogatories, request for production, et cetera, there may be five different things. They're going to charge you for each one of those, and we're going to have extreme

backups in the court.

MR. ORSINGER: The problem is -- the problem with that process if you don't put it in your petition is that the citation is going to tell them they have to appear in the court on the Monday following the 20th day after service, but there's going to be no piece of paper that says that their interrogatory answers are due at the end of 50 days.

MS. WINK: Oh, yes.

MR. DYER: The interrogatories themselves do.

MS. WINK: Our interrogatories themselves specify.

MR. DYER: They're not required to. You're not required to tell somebody what your answer date for discovery is, but most do.

MS. WINK: Absolutely.

MR. DYER: Now, if you were to file an original petition and you got a TRO, you're going to have a separate process for the TRO, but discovery has never been a problem with me, and I don't think we ought to put the onus on the process servers to go through and detail everything that's in there. I just think you take the title of the document that was asked to be served.

MR. GILSTRAP: I think we're ready to move

on, Chip, to (e) on Page 13.

CHAIRMAN BABCOCK: Yeah.

MR. GILSTRAP: 107(e), and this is no substantive change. Currently if the process is served by registered or certified mail under Rule 106, the return says "must also contain the return receipt." Well, this just changes, says -- because they obviously can't contain the return receipt, it's got to be attached. That's the only change.

CHAIRMAN BABCOCK: Any comment on that?

MR. GILSTRAP: Okay. 107(f) is where we start having fun.

CHAIRMAN BABCOCK: We've been having fun all day.

MR. GILSTRAP: I promise you it gets better. Okay. Currently it says, "The return of citation by authorized person shall be verified," and the statute changes that. It says -- and I guess we need to kind of look carefully at it. It says that "A person who's certified as a process server or a person authorized outside the state of Texas to serve process shall sign the return under penalty of perjury," and it's not required to be verified. Now, it really doesn't apply to constables or sheriffs, but that doesn't mean it can't apply to constables or sheriffs in the rule.

Now, the way they -- you know, this is kind of a puzzle here, so you'll have to look at the appendix and look at page 22, and that's the definition of perjury. "A person commits an offense of perjury if he make as false statement under oath or makes an unsworn declaration under Chapter 132 of the CPRC." Chapter 132 of the CPRC until 2011 dealt only with inmates. Inmates could swear under penalty of perjury, and it would be a good verification, but ordinary humans could not. There is a practical reason for this. They didn't want to have to send a notary up to the prisoner's cell or bring the prisoner up to the notary, so they made that rule for inmates.

And if you'll look at -- it's kind of interesting. 37.03 says, "Aggravated perjury is perjury made during or in connection with an official proceeding," and that's a third-degree felony, so I guess that could include signing the citation or signing the return. Anyway, the next page, page 24, the last page of the appendix is -- excuse me, I'm sorry. I'm sorry, back up. Page 22 -- let me back up. Back up to page 21, pardon me, that's the new Chapter 37, 20 and 21. The new Chapter 37 says that -- applies to all citizens and inmates, "Except as provided in (b), an unsworn declaration may be used in lieu of a sworn written verification, certification, oath,

or affidavit required by statute or required by rule or required" -- "or a requirement adopted as required by law." And that doesn't limit itself to returns. Apparently that's everything, and now apparently in Texas we now have the Federal rule.

MR. ORSINGER: It also doesn't limit itself to private process servers and extends to --

HONORABLE STEPHEN YELENOSKY: No.

MR. ORSINGER: -- constables and sheriffs.

MR. GILSTRAP: That's right, and I think that kind of solves the puzzle of the fact that the statute itself only applies to private process servers.

HONORABLE STEPHEN YELENOSKY: Well, it's not just to rules. It's to statutes as well, and as far as the probate judges are concerned it means you no longer have to have a notary to do a self-proving affidavit on a will, which is of concern since you have nobody verifying identity. It's far-reaching.

MR. GILSTRAP: You think about the consequences of this, they're pretty mind-boggling or they can be; however, here it's fairly narrow; and all we've got to do is just say that in (f) "The person who serves or executes or attempts to serve or execute the process shall sign the return. The signature is not required to be verified." That's what the statute requires, and then

it says, "If a return is signed by a person other than sheriff or constable" -- and Carl wanted to put "or court clerk" -- "the return shall contain the following statement." Well, that kind of is in conformity with the statute, but I think on further reflection that everybody ought to be required to have this statute, if they don't verify it, just -- and this language is from Chapter 37, the new Chapter 37; and as Carl points out, it should contain a statement in substantially the following form, not the following statement; but I guess the real question is, do -- do we limit this to private process server or do we just require everybody to sign under -- or give them the option to sign under penalty of perjury? I don't see any reason not to.

MR. HAMILTON: Give them the option?

MR. GILSTRAP: Give them the option. They can -- it doesn't have to be verified, but it can be. They could sign before a notary. They can sign in front of a notary, but they can also sign under penalty of perjury.

HONORABLE STEPHEN YELENOSKY: Well --

CHAIRMAN BABCOCK: Yeah, Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, I mean, the Legislature has said anything that can be required or is required by rule or statute to be done by verification,

oath, whatever, that's done by a notary, not another official who administers an oath, can be done by signing under penalty of perjury. So whether we say it or not it's true.

MR. GILSTRAP: Yeah.

HONORABLE STEPHEN YELENOSKY: I mean, summary judgments now no longer require somebody to swear to the evidence, no -- to give an oath to the evidence. All of that can be done under penalty of perjury.

CHAIRMAN BABCOCK: Okay. Yeah.

MS. SECCO: Just one quick note on that, so currently the rule says, "The return of citation by an authorized person shall be verified," so the verification only applies to an authorized person, and I looked into this previously, and the case law has interpreted "authorized person" to only be a private process server, so they have specifically said that that provision of the current rule does not apply to constables or sheriffs, and which I think explains why the Legislature only applied the now signing under penalty of perjury to private process servers, because the verification only applied to private process servers. So even the new statute, which says that anyone can use an unsworn declaration in lieu of a verification, wouldn't apply to sheriffs or constables under the way -- under the old rule. So we would be

creating a new requirement for sheriffs and constables now under this rule.

MR. GILSTRAP: I think you're right. I think you're right, and I guess then we could just, you know -- we could start out, you know, "The sheriff or constable," and Carl wants to include "or court clerk" because apparently court clerks serve a lot of process. I didn't know that. Just has to sign it, and a signature doesn't have to be verified, and he doesn't have to sign under penalty of perjury. Everybody else has got to sign under penalty of perjury. That would be closer I guess to the current law.

CHAIRMAN BABCOCK: Uh-huh. Okay.

HONORABLE STEPHEN YELENOSKY: I have a question on that -- and it was in your memo I think at one point, Frank, maybe your earlier memo. If they sign under penalty of perjury, the Penal Code says that it's perjury. If you sign under penalty of perjury pursuant to the unsworn declaration in 132.0 whatever, right?

MR. GILSTRAP: Right.

HONORABLE STEPHEN YELENOSKY: So if they sign under penalty of perjury on the return, is it necessarily under 132, or do we need to specify that?

MR. GILSTRAP: Well, no, it's -- let me say this. The statute doesn't require it. They just say

they'll sign under penalty of perjury, but, you know, if they sign it under penalty of perjury and it doesn't fall to the form required by Chapter 132, it's not perjury.

HONORABLE STEPHEN YELENOSKY: Well, that's -- yeah, and obviously there's no case law on this yet, but I would hope in this state that any time you say, "I'm signing under penalty of perjury" it has meaning, but the way they've written the Penal Code in conjunction with 132 there's a question since it's not whenever you sign penalty of perjury. It's whenever you sign an unsworn declaration pursuant to section 132 of the Texas Civil Practice and Remedies Code. So it sort of asks the -- it sort of means to be sure do we have to say you're signing under section 132 of the Civil Practice and penalties -- or do we just wait for the Legislature to fix it and say whenever you sign something in substantially this form that says you're signing under penalty of perjury it really is?

MR. GILSTRAP: I think you've got to use the form or something like it.

HONORABLE STEPHEN YELENOSKY: Or make a reference to "I'm signing under," and I know we don't like to make reference to statutory provisions, but that may be the only way to make sure it's under penalty of perjury.

MR. WEEKS: I think Judge Yelenosky has a

great point that the statute should be referenced that they're signing pursuant to 132 because these aren't going to be misdemeanor perjury cases. These will be felony perjury cases because it's aggravated perjury, and if you're a good defense lawyer, that's the first thing you're going to do is say it's not pursuant to the statute. Well, then why not articulate Chapter 132?

HONORABLE STEPHEN YELENOSKY: Well, and maybe the only thing we can do for now and as maybe the Legislature will see -- I think the probate judges are going to have something to say about -- they weren't -- as I'm told, weren't really aware of this change and are concerned about unintended consequences, so maybe something will come up next session, but --

CHAIRMAN BABCOCK: Yeah, Richard Orsinger.

MR. ORSINGER: I would support just taking that sentence, "I declare under penalty of perjury" and start it out by saying, "Pursuant to Texas Civil Practice & Remedies Code, section 132.001, I declare under penalty."

MR. GILSTRAP: Well, if do you that, though, and it's not substantially the language that's set forth there under -- and indented under part (f), it's not perjury. The statute requires that for it to be perjury it's got to be in substantially this form.

MR. ORSINGER: So you think adding the fact that it's pursuant to the statute that requires it, you think makes it not in compliance?

HONORABLE STEPHEN YELENOSKY: No, no. He's saying -- he's saying that if you say that but yet you fail to follow the form --

MR. GILSTRAP: Right.

HONORABLE STEPHEN YELENOSKY: -- arguably it's not under that provision, and normally that takes care of itself because if you signed it not substantially in compliance with that form, for example, on your summary judgment evidence, the other side would say, "It ain't good evidence," but here it's a little bit of a different question, and are you suggesting that we actually prescribe the verbatim language?

MR. ORSINGER: Yeah.

MR. GILSTRAP: Well, I mean, I think if I sign a document that says, "Pursuant to Chapter 132 of the CPRC I sign this under penalty of perjury," I don't think I'm going to get convicted of perjury, because the CPRC says that it's got to be in substantially -- the jurat -- has to have a jurat --

HONORABLE STEPHEN YELENOSKY: Right.

MR. GILSTRAP: -- substantially in this form.

HONORABLE STEPHEN YELENOSKY: Right. Can we do that consistent with the statute?

CHAIRMAN BABCOCK: Yeah, Richard Munzinger.

MR. MUNZINGER: I have to disagree. I mean, if it said it must be in the following form as distinct from saying substantially this form, what is something that is substantially this form? The content, the intent of the form itself is to make certain that the person signing it understands that a false statement made on this form is perjury, and that is substantially -- can you imagine any court that would read these words with the prefatory statement or a statement elsewhere that this is intended to be done under section so-and-so of the Civil Practice & Remedies Code, saying that is not substantially in this form? I can't imagine --

HONORABLE STEPHEN YELENOSKY: A criminal court judge.

MR. MUNZINGER: -- it has logic and English on its head.

MR. GILSTRAP: I can imagine a criminal court --

HONORABLE STEPHEN YELENOSKY: A criminal court judge, yes.

THE REPORTER: Wait.

MR. GILSTRAP: -- a constable for if he --

if the jurat is not in this form.

MR. MUNZINGER: But it says "substantially this form," which on its face means that it may vary, so long as the substance is not changed.

CHAIRMAN BABCOCK: Yep. Professor Dorsaneo, then Judge Yelenosky.

PROFESSOR DORSANEO: It's a bit of a conundrum here, the "substantially" language, because forgetting about perjury, which may be an experience that I have in some case sometime in the future, but not so far, our rules about service and returns of service don't generally allow for substantial compliance or when they -- when they talk about substantial compliance, it's really the next thing to strict compliance if it isn't absolutely strict compliance. So I'm -- I wouldn't -- I wouldn't like adding the word "substantially" into the rule, huh?

MR. GILSTRAP: Well, if we take this language it will probably get put in the form. If we dictate the language, it will probably be in the form; and if it's in the form this way and you sign it and it ain't true, it's going to be perjury.

CHAIRMAN BABCOCK: Judge Yelenosky.

PROFESSOR DORSANEO: But the more important thing is that the service counts. Isn't it? We're talking about --

MS. BARON: Yes. Yes.

HONORABLE STEPHEN YELENOSKY: Yeah. I mean, there's two different issues, as I was saying. I mean, this is -- the substantially the same form I think is the question when you're trying to see if the service counts or if the summary judgment evidence is sufficiently unsworn but declared, but to make it bulletproof for criminal, I'm not sure we can do that, but I guess I disagree with Richard that a judge wouldn't do that in a criminal context. I mean, substantially sort of raises the issue. Maybe we can't fix it, but if we were to fix it perhaps we would just prescribe they have to use this form.

CHAIRMAN BABCOCK: Richard Orsinger.

MR. ORSINGER: I think we can all agree that if we stick to exactly the statutory language that that's going to be in substantially in compliance.

PROFESSOR DORSANEO: Yeah.

MR. ORSINGER: And what we need to do is not introduce any discretion in our rule.

PROFESSOR DORSANEO: Right.

MR. ORSINGER: This rule is for a limited group of people who are authorized by the Supreme Court or a trial judge to serve process, and they are required to use exactly this wording or they don't have service, and

if we do that then no one can ever say it's not substantially compliant and perjury would apply, so we can't just -- it must say exactly this.

MR. GILSTRAP: All right. So what I'm hearing is, is we keep the proposed language of 10 -- of 107(f) as written on page 13 and add after "constable," "or court clerk." Otherwise it's not changed. I think that's where we're going.

CHAIRMAN BABCOCK: Yeah, Carl.

MR. WEEKS: I certainly agree that if we're going down this track I would recommend to the committee that you use exactly the language as proposed in the statute for the jurat. Then you don't have the issue. I mean, it makes sense. Why not?

CHAIRMAN BABCOCK: Pat.

MR. DYER: The statute also refers to someone outside of Texas who is authorized, which I assume could be a sheriff or constable in another state, and the language here doesn't address that. Then we also have to add an (e) following the "are" in "foregoing"?

MR. GILSTRAP: Say again.

MR. DYER: An (e) following the "are" in "foregoing."

MR. GILSTRAP: Oh, okay.

MR. ORSINGER: Can you explain your first

point, Pat?

MR. DYER: Yeah. The statute says that if the service is done by a person authorized outside of Texas to serve process they can also use this unsworn declaration, but a person outside of Texas could be a sheriff or constable authorized to serve process but in that jurisdiction.

PROFESSOR DORSANEO: Well, they wouldn't be a sheriff or constable then.

MR. DYER: What's that?

PROFESSOR DORSANEO: They wouldn't be a sheriff or constable then.

MR. DYER: Why is that?

PROFESSOR DORSANEO: Because they're not from here.

MR. DYER: Are you saying there are not sheriffs and constables in other states?

PROFESSOR DORSANEO: Not according to our law they're not.

MR. DYER: Okay, but if they're a sheriff in Oklahoma, and they're authorized to serve process in Oklahoma, wouldn't this language be somewhat ambiguous? Are you saying the case law defines sheriff and constable to mean only those authorized to serve process in Texas?

PROFESSOR DORSANEO: That's what I think it

means.

MR. DYER: Isn't that a little unclear if you're a sheriff in Oklahoma?

CHAIRMAN BABCOCK: The lone star is the only star.

MR. DYER: And I don't mean to pick on Oklahoma, although I could, but --

MR. GILSTRAP: What you're saying is if it comes in with a -- it's signed by the sheriff of Oklahoma or, you know, Loris Lebovi or wherever, we want to have more than just a statement that he's the sheriff or she's the sheriff. We want something to -- some statement that takes it beyond that, like a declaration it's under penalty of perjury.

MR. DYER: Right.

CHAIRMAN BABCOCK: Okay. Orsinger, did you have anything?

MR. ORSINGER: I just wanted to put in the record I think we all assume that a sheriff and a constable also includes a deputy sheriff and a deputy constable, and if someone -- if someone is outside of Texas and signs this document subjecting themselves to perjury without an oath, we're assuming that that's prosecutable in Texas. Everybody is assuming that?

HONORABLE STEPHEN YELENOSKY: I don't know

that it is.

MR. ORSINGER: Nobody is assuming that? Well, if we're -- are we going to allow this subject to perjury to -- well, I guess we're required to do it, aren't we?

CHAIRMAN BABCOCK: Yeah.

MR. GILSTRAP: Why don't we put this off to 108, because that's where we actually deal with service out of state, you know.

CHAIRMAN BABCOCK: That's a good idea. Let's go to (g).

MR. GILSTRAP: Okay, (g).

HONORABLE JAN PATTERSON: Chip, can I ask a question before --

CHAIRMAN BABCOCK: Yeah, Justice Patterson.

HONORABLE JAN PATTERSON: Along the same line, Frank, if you add "court clerk" --

MR. GILSTRAP: Yes.

HONORABLE JAN PATTERSON: -- why don't you also think about whether the sheriff and constable as defined would expand to court clerk, because court clerk is a more generic. I'm not sure it's as defined, Bill.

MR. GILSTRAP: That's a more generic name than sheriff or constable.

HONORABLE JAN PATTERSON: It may be, so that

might kind of water down what the definition is, but that's just something I raise if you add that.

CHAIRMAN BABCOCK: Okay.

MS. SECCO: Chip, can I just say --

CHAIRMAN BABCOCK: Yeah.

MS. SECCO: Could we just follow the statutory language which just says specifically who has to do it rather than who doesn't have to sign under penalty of perjury? So the statute says, "A person certified by the Supreme Court or a person authorized outside of Texas shall sign under penalty of perjury" rather than --

CHAIRMAN BABCOCK: That makes a little bit of sense.

MS. SECCO: Rather than excluding.

MR. GILSTRAP: Is there somebody else that could worm through that gap in there?

MS. SECCO: There actually is. There are people who can be process servers by order of court, and I think that we should also include them. I didn't know if -- so I think that that also should be included, but I still think we could write it that way in the affirmative rather than excluding.

CHAIRMAN BABCOCK: Right.

MR. GILSTRAP: Although I don't know how much you gain. If your purpose is to require everybody

but a sheriff or constable or court clerk to sign under penalty of perjury then one way is to say everybody but a sheriff or constable or court clerk sign under penalty of perjury.

MS. SECCO: No, I agree, but it does eliminate the issue of out-of-state sheriffs, constables, or court clerks. I guess it wouldn't be a court clerk, but out-of-state sheriffs and constables.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: In response to Richard's question, and maybe this points out another unintended consequence of this provision on unsworn declarations, I guess it's my assumption that when somebody serves outside the state of Texas traditionally they have gotten that verified in that state, and if they are subject to penalty it's under the laws of the state in which they signed, and I'm not sure that -- except for a party to litigation who happens to live elsewhere, I'm not sure the State of Texas could prosecute somebody in Texas for signing something that in their state would not be subject to perjury.

MR. DYER: Do we need to address that, or is it just a matter of the effectiveness of the service and return?

HONORABLE STEPHEN YELENOSKY: Well, the

question I guess perhaps is did the Legislature intend that somebody be able to use the unsworn declaration when it cannot be -- if that's correct, be subject to perjury because they are outside the state of Texas and they're not a party to the suit. They haven't given unto the -- or given themselves up to the jurisdiction of the State of Texas. They're just out there as somebody serving process in Oklahoma, and in Oklahoma it would have to be sworn before a notary, so can we interpret the statute such that our rule says anybody doing this outside the state of Texas has to have it verified under the laws of that state?

MR. GILSTRAP: Well, again, that's coming up in 108.

CHAIRMAN BABCOCK: What's that?

MR. GILSTRAP: That will come up in 108. That's what you're talking about, out-of-state service.

CHAIRMAN BABCOCK: Gene.

MR. STORIE: Just the same point that you could have people who are not process servers who might be serving process.

CHAIRMAN BABCOCK: Okay.

MR. HAMILTON: Chip?

CHAIRMAN BABCOCK: Yeah, Carl.

MR. HAMILTON: Frank, does this rule mean

that the clerks have got to prepare some kind of return of service document when they serve by certified mail? Because right now they don't do that. They just keep a copy of the green card, and that's all the service they have.

MR. GILSTRAP: If the clerk serves it by certified mail?

MR. HAMILTON: Right.

MR. GILSTRAP: How do you prove return?

MR. DYER: Yeah, you've got to endorse date and time on that -- on the process if you're a court clerk just the same as anybody else.

MR. HAMILTON: So they're going to have to have some kind of form to make a return on, I guess.

MR. GILSTRAP: Why can't they sign the return that we have in the appendix at page four? It says "officer's return." I guess the court clerk is an officer.

MR. ORSINGER: Well, wait a second. There's a difference between mailing it and receiving the green card back. I think that service is effective when it's mailed.

MR. HAMILTON: Mailed, that's right.

MR. ORSINGER: And then someone has the ability to come into court and to refute that presumption,

but they don't get a green card back and then type out a return.

MR. DYER: Yes. Yes, they do.

MR. ORSINGER: They do?

MR. DYER: They have to. That's their return. They have to, and it's not served until that green card is signed by the addressee. So it's not effective upon mail. They've got to have that green card. They've got to put the date and time that they received that request to send it out by certified mail and then they also have to return that green card, and they have to endorse on that the date and time they received it, and if they don't, service is bad.

MR. GILSTRAP: Look at 106(e). It requires the green card to be attached.

MR. ORSINGER: Huh.

MR. GILSTRAP: Are we ready for (g)?

CHAIRMAN BABCOCK: Okay. Let's do (g).

MR. GILSTRAP: Okay. Now, this is more fun. This is the provision that allows the return to be electronically filed, which is required by the statute, and it starts out "The person who signs the return" -- and Carl proposes -- excuse me, "signs the return shall file the return with the court." Carl proposes "shall cause the return to be filed with the court," and certainly

that's not a problem. Then it says, "The return and any document to which it's attached," just like the other provision, "any document to which it's attached may be electronically filed," and then we put -- you know, I was thinking like filing it through e-mail, and so I put in a provision there, "if the court permits electronic filing," because all the courts obviously don't allow that kind of filing. I think very few of them do, but as Carl points out in his memo, he views electronic filing as something broader, such as fax, that type thing.

The whole idea is that the constable can make a copy of the return and send it in quick. That's the whole purpose, whether by e-mail if we all get to that point or by faxing, and Carl might have some more comments on that, and then it says, but if the -- well, I was thinking, well, okay, now, okay, they've got fax copy or the e-mail copy in the clerk's office, but what if there is one of these disputes over service? Don't we need the original? I mean, and originally, I had put in here, "but if electronically filed, the person who signs the return shall keep it for six months." That's just kind of a stab at trying to deal with that.

Carl says he wants the person who signs it to deliver the original return to the party or attorney who requested service, and that makes sense. The party or

attorney who requested service can then, if he wants to, file with the court. Maybe you require him to file it with the court, but the point is they get the return in electronically, and they can take the default judgment if they want to, and if the dispute comes up later, we've got the original return, which is going to be available in some way. That's the idea behind (g).

CHAIRMAN BABCOCK: And, Carl, why are you worried about that?

MR. WEEKS: About what?

MR. GILSTRAP: Carl Weeks.

CHAIRMAN BABCOCK: Oh, that Carl. Sorry.

MR. WEEKS: I'm sorry. What was the question?

CHAIRMAN BABCOCK: Why are you worried about that, the original?

MR. GILSTRAP: You don't want to keep it.

MR. WEEKS: Yeah.

MR. GILSTRAP: Constables don't want to have to keep it for six months.

MR. WEEKS: You know, some people get in this business and don't stay in it, and if there's a challenge, there's an appeal, bill of review, whatever the case, that the court wants to -- the validity of service is the question, they want to see the original return. I

think it would be better for the attorney to store that with his records than the process server.

CHAIRMAN BABCOCK: Okay. Pat, yeah.

MR. DYER: Yeah, I like the language in Carl's option. The only thing is I would change it to four years because a bill of review, the statute of limitations is four years, so you want to maintain the citation for that period.

MR. GILSTRAP: You'd have the person who serves it deliver the original return to the party or attorney who requested it, who can either file it with the court or retain it for four years.

MR. DYER: I would prefer that it be filed.

MR. GILSTRAP: Okay. Do we want to require that in all cases? The problem is you don't want to make filing the original return a prerequisite to a default judgment. If it doesn't get filed you still have a default judgment, although it may come up as an issue if you're trying to set the default judgment aside.

CHAIRMAN BABCOCK: All right. Yeah, Richard.

MR. MUNZINGER: I sure don't like the idea of imposing an obligation on a private party to maintain a record for four years. Most of those private parties are going to be lawyers. Is that a new ground for

malpractice? My secretary misfiles it and I can't find it, whether I've kept it for four years or 40 years. She put it in the Smith file, and it was supposed to be in the Jones file. That happens all the time. It's happened with the district clerks. I think it's a very bad idea to attempt to impose by rule some procedure and obligation on private parties to maintain records for four years that can be used for official purposes.

MR. DYER: You know, the other point related to that but not on the malpractice side but on the other party's side, if they fail to maintain it, does that automatically invalidate service?

MR. MUNZINGER: It opens up a whole unnecessary world of discussion, and there's a reason why you have official records. They're official records.

MR. GILSTRAP: But you would make the electronic return -- excuse me, the electronic copy the official record, which is enough for default judgment, but what if I come in, I'm the defendant, I say, "Well, that's not accurate. I want to see the original return," and there's no requirement to keep it or maintain it? What do you do?

CHAIRMAN BABCOCK: Richard Orsinger.

MR. ORSINGER: Isn't what we're doing is transferring the duty to file the original from the

process server to the plaintiff's lawyer?

MR. GILSTRAP: If it's filed.

MR. ORSINGER: Because the Legislature has told us that they've sort of said we can't make the private process server file the original. Now we're making the private process server give it to the lawyer who is then going to be required to file the original, and I wonder if we're really adding value there.

MR. GILSTRAP: Well, again, if -- I'm just troubled by this situation where, you know, the judge wants to see the original and it ain't available.

MR. ORSINGER: But is the point of not requiring -- that is a point, they don't say it's not required to file the original. They just allow you to electronically file it, which we all know means it's a scan or a fax. Okay. So isn't the Legislature telling us that we're just going to have to get over this original writing stuff and start working with scans and faxes? Isn't that what they're telling us?

MR. GILSTRAP: Yeah, and I guess that's the lesson I have if I'm a defendant who's had a default judgment, I think there's -- that the return maybe isn't a good copy or something like that. Maybe we get over it.

MR. DYER: Well, keep in mind, though, we've been discussing the original versus a copy of the return.

The defendant only gets the copy, and the original is going to differ from the copy. So --

MR. ORSINGER: But the return -- the return, -- the question here is the original return going to get physically transported to the courthouse, or is an image of it going to be electronically transported to the courthouse? Isn't that what this is really all about?

MR. DYER: I think if we say it that way that makes it pretty clear.

MR. ORSINGER: Well, I'm not suggesting that as rule language, but conceptually we're trying to get away from the horse and buggy day of physically delivering the original return to the courthouse and now we're just going to fax it or scan it and e-mail it and be done with it, and so now we're left over with some original somewhere that nobody has said what to do with, and so we're saying, well, let's just either let the private process server keep it or he can throw it away or he can give to the plaintiff's lawyer. He can mail it to the court. I think what we ought to do is -- I mean, understand that we are getting rid of the original. It's no longer important. You no longer have the right to demand it as a condition of anything.

MR. DYER: Should we at least then make it clear in that first sentence that it's the original

return? We refer to that in the subsequent paragraphs, but in the first one it just says the person who signs the return. Shouldn't it be the person who signs the original return and then all the subsequent references make sure that that's what we're talking about?

MR. GILSTRAP: Well, is the copy of the return -- I mean, there's only one original return. There's not more than -- they don't have duplicate returns, do they? You don't give one to the defendant. You've just got a return, and it's signed, and that's the document.

MR. DYER: Frequently in Harris County the copy that is served on the defendant is an identical copy of the original. They're signed at the same time and a copy is made.

MR. GILSTRAP: And it's the form. It's something like the form.

MR. DYER: Yes, and you've got original signatures, but the copy is an exact copy of what was served. But what we're looking at now with the change is all I have to do is give them a copy that just says date and time served. Then I go back to the office and I draft up an original return that contains all of the other information and file that with the court.

MR. GILSTRAP: But you can do that now under

the rules, I think. You don't have to use this form. Everybody just uses it, but you don't have to use it under the current rules, I don't think.

MR. DYER: Well, no, you had to serve a true copy of the return on the defendant, and it had to contain all of the other information required under the return rules.

MR. GILSTRAP: I didn't know there was a requirement to serve a copy of the return.

MR. DYER: Well, I thought it was in there. I'm pretty sure it is. Well, at any rate, now we're definitely going to have a difference always between an original return and the copy, the service copy.

MR. GILSTRAP: Well, I mean, if we use the form, what's going to happen is you're going to have the citation form, and the officer is going to fill out the bottom, and he'll probably attach it to the process. I mean, does he attach it to the process? In other words, I'm sitting here, here's the process, and now I'm going to fill out the return, the bottom of the return, and hand that to you, too. I don't think they do that. I think they just give them the return. It's got the date and time on which you were served on it, and then they fill out the return later, and I don't think the defendant ever gets the return. I don't think -- does the defendant get

this form here? I don't think he does.

MR. WEEKS: He gets a copy of -- excuse me. He gets a copy of it just with the date on it. It's not filled out. It's just a copy of the original that the clerk issued. That's all he gets. He just really has the date.

MR. GILSTRAP: He gets a citation, and down here at the bottom they just write in the date, and the rest of the return is not filled out.

MR. WEEKS: That's correct. That's right.

MR. ORSINGER: Sometimes they stamp it with a red stamp and put it in the upper right-hand corner. I mean, I get as many of those as I do with the bottoms filled out, and I think that's legal. Is that -- Carl, you've seen that?

MR. GILSTRAP: But, Richard, it doesn't have anything but the date and time of service.

MR. ORSINGER: That's right.

MR. GILSTRAP: It doesn't have this other information.

MR. WEEKS: That's all that's required.

MR. ORSINGER: But I think our discussion has got thrown off track here. We're talking about when I'm the process server and I do a return and I signed it under the penalty of perjury, I've got to do something

now.

MR. GILSTRAP: And that's the return, right there.

MR. ORSINGER: Either take it to the courthouse and file it with the clerk or put it on my fax machine and fax it to the clerk or I scan it and I e-mail it to the clerk. Once I've done the faxing or the scanning now there's an official copy with the clerk that meets the statutory requirements, but I've still got the original here, and there is somebody who is -- you know, was born before 1950 or something that says, "I've got to have the one with the ink on it or it's not valid."

CHAIRMAN BABCOCK: Pete Schenkkan, born before 1950.

MR. SCHENKKAN: But I don't know whether I need the original or not.

MR. GILSTRAP: It's not the person who -- it's the copy is a sufficient basis for a default judgment. The court looks at it, says, "Here's the copy, it's been on file for 10 days, exclusive this," or blah, blah, and we've got a default judgment. The problem comes when the person who has the default judgment rendered against him says, "Wait a minute, there's something wrong with this return, and I want to see the original."

MR. ORSINGER: And the answer to that is we

don't keep the originals. We just throw them away.

MR. GILSTRAP: Okay, maybe so, if everybody is comfortable with that. I'm the defendant, and I'm trying to get out of this thing, and I want to see it. Maybe I don't have a right to look at the original.

CHAIRMAN BABCOCK: Carl.

MR. WEEKS: I think that's absolutely correct what they're saying, but in practice what you do anyway is the plaintiff's attorney is going to call his process server and say, "I want you in court on Tuesday to prove up this service." You go in and, you know, "Here's your copy. Did you fill this out? Is this true and correct? Did you serve this person?" So, well, in effect if they want to challenge the validity of the e-filed copy or the electronic copy, the process server is going to be there to testify to prove up to the accuracy of it, of the service.

"Is that the defendant you served?"

"Yes, sir."

"Is this all correct? You filled out all of this date and time" and so forth and so on. You do that under oath in court --

CHAIRMAN BABCOCK: Skip.

MR. WEEKS: -- on a bill of review or whatever the case may be. So I think you can get around

that original, maintaining -- that burden of that original by just accepting the electronic version as the original when it's filed with the court, and if you've got a challenge, bring the process server to testify.

CHAIRMAN BABCOCK: Well, is there a history of fraud with copies, whether they're electronically served or not, that the original would reveal the fraud, like somebody has got a little white out?

MR. GILSTRAP: Yeah, or how about if the copy is unclear, you can't make out the number?

MR. WEEKS: I'm sorry. We don't have that history so far because we haven't been able to file anything electronically. It's all been original. It's ink, ink and paper. This is new ground.

CHAIRMAN BABCOCK: Yeah. Skip.

MR. WATSON: I think, you know, the problem is going to occur from the quality of the copy of not being able to see, you know, is that a 9 or a 7 or, you know, what is it; and I think in practice the prudent plaintiff's lawyer is going to tell the process server, "I want the original," just to state that all, but I don't think it's our job particularly with a stopwatch ticking to worry about what's good practice. Clearly the Legislature has made the decision that we are going electronic, that's going to be good enough. How those of

us who want to be extra prudent deal with that is up to us.

CHAIRMAN BABCOCK: Somebody over there had their hand up. Do they still? No.

MR. GILSTRAP: Okay. What does electronic copy mean? It says "electronic copy." Does that include fax?

CHAIRMAN BABCOCK: I think fax and electronic copy are used to mean different things under the rules, aren't they?

MR. GILSTRAP: The Legislature said "filed electronically," whatever that means, but I think we've got enough leeway in the real world to kind of flesh out what that means.

CHAIRMAN BABCOCK: Okay. Professor Albright.

PROFESSOR ALBRIGHT: Doesn't "filed electronically" mean filed electronically when electronic filing is allowed?

MR. GILSTRAP: Then we're not going to get too many of these because not many places allow electronic filing.

PROFESSOR ALBRIGHT: Well, but if you start, you know, how many of them have -- I mean, do any of them have -- I guess -- do some still have fax filing?

MR. ORSINGER: Yes, some still do.

MS. WINK: They do.

CHAIRMAN BABCOCK: Marisa.

MS. SECCO: I was just going to say in the local rules that we get we still get fax filing rules, and there's a template for fax filing rules, and the title is actually "Electronically Filed by Facsimile," so I think that it should definitely include fax filing. E-mail filing is not really something that's available. The other issue is with the electronic filing. Typically you have to have an account to do electronic filing, so it would only be an attorney who could do the electronic filing, and I don't know how that will work out with having process servers do e-filing, but --

PROFESSOR ALBRIGHT: Well, if there is a fax filing then if you file it you can choose to file it by fax, right? I mean, if I'm a process server, and I have to file -- file a return and it's a county that has fax filing, I can fax it, and I file it, right?

MS. SECCO: Currently --

PROFESSOR ALBRIGHT: No.

MS. SECCO: -- no, because it has to be the original right now, but the return has to be filed in original form. Is that right, Carl?

MR. WEEKS: That's correct.

MS. SECCO: It can't be a copy.

MR. WEEKS: It's not allowed now.

MS. SECCO: Not allowed to be a copy under the current rules.

MR. GILSTRAP: Here's a solution. We could say, "Any document which is attached may be electronically filed," comma, "or filed by fax if the court permits such filing." The problem is that, you know, I guess how's the constable going to know if the court permits such filing. I guess, what does he do?

CHAIRMAN BABCOCK: Calls the clerk, says, "Hey, do we file by fax in this county?" Hopefully he'll only have to do it once and then he'll remember. Richard.

MR. MUNZINGER: I just wanted to make the point that you need to be careful about not confusing but equating electronic filing with faxing, because the rule -- Rule 21a uses the phrase "telephonic document transfer," and unless you change that language in that rule -- and I've always read that rule as meaning exactly what it says, telephonic document transfer, that's a fax, but I don't know that clerks could refuse a fax filing under this statute now because the statute says that the return of service can be filed electronically, raising the obvious question of what that means, clearly, but for us to assume that an electronic filing and telephonic

document transfer are identical I think is a giant step, and we need to be careful about it.

MR. GILSTRAP: And the second thing is, you know, can we make the clerks take -- however we do it can we make the clerks take it? I don't think we can.

CHAIRMAN BABCOCK: Carl.

MR. WEEKS: A couple of points, back to one she raised on e-filing or electronic filing, which is what most of the clerks I think are going to say this means in the current form, is that all three sets of the e-filing rules now, district, county, and JP, specifically prohibit filing returns electronically, so we can't file by e-file returns of service under the current e-filing rules that have been adopted by the limited number of counties. Second to that, out of 6,500 process servers on the list there are probably half a dozen right now that are e-filing participants, so it won't work, and it's six or seven bucks to file any document with e-filing.

It's cost prohibitive, so e-filing won't work for returns of service for a couple of reasons, for those three reasons I think, but I think if we don't enlarge this to say -- and we've -- the folks that were behind this originally, if you will, the stakeholders have already been on the phone talking to clerks in different places going, you know, "We would love to get this stuff

electronically. We don't want you in here. We've got to take the staple apart, we've got to put it -- we've got to scan it, we put it in the deal. You know, yeah, we'll take it by fax, we'll take it by e-mail. However you want to get it to us electronically we would love to have that. It saves us work. It saves work for the staff."

So I think to enlarge the rule is better for that reason additionally, and it will save time for the clerks, and it will save the energy because the fax filing receipt now, many times you turn it into a PDF document, which the clerks can drag right into the file, so enlarging it to say "acceptable by e-mail or fax or any electronic means" will work, I think. I think I called OCA yesterday and got my question answered that there's very few clerks in Texas that don't have e-mail available. She didn't know exactly the number, but I think it's probably less than five percent, so however we can get these things to the clerk's office outside of the realm of e-filing is what the mechanism needs to be, because the e-filing model through texas.gov for these returns are just not going to work, I don't think.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, I mean, a policy may be something else, but doesn't electronic filing mean direct transmission of bytes to the clerk's

office? I mean, a fax is an electronic transmission of a document, but it's not e-filing any more than, you know, you fax it to an attorney, a local attorney, and he or she walks it over to the courthouse. That's not electronic filing just because they got the piece of paper by electronic transmission, so, I mean, electronic filing to me is transferring bits directly to the clerk.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: There's four issues here.

CHAIRMAN BABCOCK: Oh, I thought there was only one.

MR. GILSTRAP: No, do we -- after "electronically filed" do we say, "or filed by telephonic document transfer"? Do we permit fax filing here? That's the first one. Then do we have the provision "if the court permits such filing," or are we going to require all the clerks to sit down and figure out how to use e-mail officially? And then finally, do we say -- do we have a provision in there with regard to the original? I think those are the four issues.

CHAIRMAN BABCOCK: Okay. How do we resolve those, Frank?

MR. GILSTRAP: Well --

CHAIRMAN BABCOCK: Well, it's got to be electronic filing if the court permits it because you

can't -- you can't back door electronic filing.

MR. GILSTRAP: I'm hearing from Carl that they can all take e-mail, it's time we make them do it.

MR. HAMILTON: Are there clerks that have filing by fax?

MS. WINK: Yes.

MR. ORSINGER: Sure. Absolutely.

MR. HAMILTON: In other words, once the clerk receives it, that's considered filed?

MR. ORSINGER: Absolutely.

MS. WINK: I would suggest that you call and make sure they received it despite your transmission that says it went through. I have run into that before, but, yes, a lot of the rural counties allow fax filing. They do suggest that you call and follow-up to make sure they got it.

MR. GILSTRAP: Same with an e-mail. Sometimes they don't go through.

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

HONORABLE R. H. WALLACE: I believe in Tarrant County -- Frank, you may know better than I -- you can fax file, but you have to go through some process with the clerk to get approved for fax filing.

MR. GILSTRAP: Get registered, yeah.

MR. ORSINGER: You have to have a credit card on file is what the main --

HONORABLE R. H. WALLACE: Well, because they want you to pay.

MR. ORSINGER: The main approval process is to prepay.

HONORABLE R. H. WALLACE: And I don't know whether you have to require these process servers to go through that process or you just tell the court you've got to accept fax filing. I don't know.

CHAIRMAN BABCOCK: Kent.

HONORABLE KENT SULLIVAN: Just a quick editorial comment. I found the most interesting comment earlier perhaps to be the notion that as many as five percent of the clerks may not even have e-mail. It is interesting to me just how uneven the infrastructure is from county to county, and I do wonder to what extent that isn't an underpinning of our whole problem as we move forward with 254 counties, each one dramatically different in terms of the way they operate. We really lack seamlessness and uniformity.

CHAIRMAN BABCOCK: Just going back to the specific language of the statute, it says, "The rules must provide that the return of service may be electronically filed." That doesn't sound like there's any exceptions to

that.

MR. GILSTRAP: You talk about unfunded mandate, that's what we've got here. I mean, all the counties are going to have to get set up for electronic filing of these returns.

HONORABLE KENT SULLIVAN: We have a statewide court system that is not a statewide court system. That's the essence of the problem. We have statewide rules that apply to a court system that is not in any real sense statewide in terms of its uniformity.

CHAIRMAN BABCOCK: Yeah, the word "may" might give a little room to wiggle because it may be electronically filed if --

HONORABLE STEPHEN YELENOSKY: If available.

CHAIRMAN BABCOCK: -- the court has an e-mail account, but if the court doesn't have an e-mail account then how are you going to electronically file it?

MR. GILSTRAP: Well, there you go.

MR. ORSINGER: You're going to have a mad Legislature if you try to use that logic.

MR. GILSTRAP: We're going to have some mad clerks, too, I promise you, if we make them take the filing.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: I have to believe that the

Legislature understands that there are some clerks that are signed up for electronic filing and there are other clerks that are not signed up for electronic filing, and when they used the phrase "electronic filing" in this statute they must have contemplated telephonic document transfer. Everybody has got a telephone, even in Texas.

CHAIRMAN BABCOCK: Not in rural counties.

MR. MUNZINGER: I'll bet you the rural counties have got telephones, but they all have telephones, and they all have facsimile numbers, and I think it's incumbent upon the committee to at least recommend to the Supreme Court that when the Legislature used the words "electronically filed" they had within their contemplation telephonic document transfer, and the clerks who don't have e-accounts that mesh with the statewide system can honor this law by receiving faxes.

HONORABLE STEPHEN YELENOSKY: But --

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, if you do that then you're saying that suppose a jurisdiction does have e-filing and they tell the process servers, "No, we're going to just let you do it by fax. You can't use our e-file system" because you've just defined e-file to include e-filing or fax. I mean, it means what it means, and if they can't fulfill it because they don't have

e-filing, I'm with Chip. It means you may do it, assuming the infrastructure is there, but if you start redefining e-filing to be something else then you're going to have that unintended consequence.

MR. MUNZINGER: Where you and I -- we don't part company I don't think. You have a known definition of electronic filing which you have in your discussion, which means the transfer of bits, and I suspect you are correct, but I don't know of a case that says that, and I don't know of a statute that says that, and I suspect anybody that knows anything about computers would agree with you. I don't know what you do with a statute that says you can file something, but there are 16 or 20 or 30 of our 254 counties that are not equipped to allow that. I don't know what the solution is.

HONORABLE STEPHEN YELENOSKY: I think you do what Chip said, which is say that it is implicit within that because the Legislature didn't provide for creation of the infrastructure everywhere that you have the right to use e-filing if it's there as a process server, and that right is to use e-filing if it's there, not to use e-filing or if they want to restrict you to fax, fax.

CHAIRMAN BABCOCK: Richard.

MR. GILSTRAP: Are you -- excuse me, are you fearful that even though we've got e-filing the clerk's

going to say, "No, returns you've got to fax to us"?

HONORABLE STEPHEN YELENOSKY: I'm just -- I'm not fearful that they would do that, but I'm just saying if you ask me to interpret the statute that's how I would interpret it.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: If we don't try to define "electronically filed" it can mean anything, and that could be both good and bad, but someone that doesn't have the official e-filing connection might say, "Look, we are set up for fax and we'll accept faxes, but we're not set up for the other," but Carl Weeks was telling us that some of these clerks are going to be happy to just get personal e-mails to their official account. What's the difference between delivering a PDF file by hand, by mail, or by e-mail? If it gets to the clerk and it gets printed and it gets put in the file, the job is done. So do we want to limit or define "electronically filed" or just leave it open and then the counties that want to have personal e-mails will take them; the ones that have only faxes, take them; the ones that have e-file, take all of them; and the ones that don't have anything, they're just out of compliance? You know, what's the punishment? You can't hold a district clerk in contempt of court, so why don't we just leave the words "e-file" like --

HONORABLE STEPHEN YELENOSKY: Yes, you can.

MR. ORSINGER: You can?

HONORABLE STEPHEN YELENOSKY: Yeah.

MR. ORSINGER: Well, maybe some people would. Maybe you could, but a lot of judges maybe wouldn't, but if we don't define "electronically filed" that may be the best, and let's just let the local practice develop.

CHAIRMAN BABCOCK: We use the phrase "electronic filing" in the Supreme Court's rules on electronic documents in the Supreme Court.

MR. ORSINGER: Is it defined?

CHAIRMAN BABCOCK: We use the word. I don't know if it's defined or not. And don't we have some -- aren't there court of appeals --

MR. ORSINGER: Some of them.

CHAIRMAN BABCOCK: -- on e-filing?

MR. ORSINGER: A few of them have adopted it.

CHAIRMAN BABCOCK: And didn't we just go through a whole big exercise for our practice districts, the counties that are doing the pilot program? Well, we surely defined it there.

MR. ORSINGER: I think we adopted some standards that were like maybe a dozen pages long or

something like that, had a bunch of definitions.

CHAIRMAN BABCOCK: Yeah.

MS. SECCO: We do, "electronically filed" in 9.2 and 9.3 of the appellate rules and in the Supreme Court rules on e-filing and the templates are all referring to texas.gov style e-filing. I don't disagree with Judge Yelenosky that that is what electronic filing is; however, I don't -- currently you can't file a return of service through fax filing, so I don't see why we shouldn't extend it. I'm not saying that that's what this says or the statute says specifically. I do think that we should probably say something like "may be electronically filed if electronic filing is available," rather than "permitted" because, first of all, all of the local rules specifically ban the e-filing of returns of service right now, and because that's what's in the template. So but I think maybe we should also add filing by facsimile if that's available in the court, so just putting the process servers on the same playing field as anyone else who is filing a document in that court. I think that's probably what the Legislature intended.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Yeah, I don't disagree with that. You can add it. I'm just saying don't redefine it incorrectly. Add it.

MS. SECCO: I agree.

MR. ORSINGER: Well, are we going to authorize e-mail if the district clerk is willing to accept e-mails or not?

MS. SECCO: I would -- my instinct on that is no, because we don't do that for any person who is filing any document in any court, so why would we make a special rule for process servers? Why should they have more rights to e-file in a rural court that doesn't have e-filing than just a party to an action in that court? Also, I think there would be a lot of push back from clerks if we tried to allow that. I don't think that that --

MR. GILSTRAP: Surely we're looking to a day when we can file all pleadings by e-mail like the Federal courts do. I mean, that's the ultimate goal. It may be years away, but, I mean, we want to allow that if we do it.

MS. SECCO: Well, the Federal courts don't allow filing by e-mail. They have a separate e-filing system which is --

MR. GILSTRAP: That's right. You're right.

MS. SECCO: -- which is a lot like the texas.gov system, but --

CHAIRMAN BABCOCK: So apologize.

MR. GILSTRAP: You're right. No, you're correct.

MR. DYER: And stop calling her Shirley.

MR. GILSTRAP: I didn't call her Shirley.

CHAIRMAN BABCOCK: Dulcie, did you have something to say?

MS. WINK: I was just going to say I would never recommend e-mail kinds of filing just for the one key concern is you have one person who is working for you in the clerk's office today. They're terminated tomorrow, you have a different person. Perhaps you send that e-mail account over, perhaps you don't, but I don't think we want to depend on the reality that everything will not get in the file.

CHAIRMAN BABCOCK: It would be a nightmare.

MS. WINK: It would be.

CHAIRMAN BABCOCK: Okay. Let's go to -- do we have anything more on (g)?

MR. MUNZINGER: Just a last comment that I think Bill Dorsaneo is correct. If you use the language of the rule and you don't expand it, you don't confuse anything in this area of electronic filing, because those clerks who are not set up to accept electronic filing can say, "We're not set up to accept it," and you don't have to say anything else, and you have honored the

Legislature's command by using their word.

CHAIRMAN BABCOCK: Using their word, but don't you have to say "if available"?

MR. MUNZINGER: I don't know that you have to say that. It's a permissive statement. The court may --

CHAIRMAN BABCOCK: Who is it giving permission to?

MR. MUNZINGER: The Legislature has commanded the Court to say, "We are adopting a rule which permits electronic filing." It doesn't say the clerks have to set a system up to accept electronic filing. It just says electronic filing will satisfy the Legislature.

CHAIRMAN BABCOCK: Well, if the Supreme Court is saying to a process server, "You may electronically file this" then they storm the clerk's office waiving this thing, saying, "Hey, Supreme Court has said we can electronically file this, so don't tell us we can't, you know, that's their problem because they've told us we can."

MR. MUNZINGER: Yes, but if you start defining it then you've got the real problem that we have a Texas state system for electronic filing; and if you start, as someone said, having a separate rule for filing these things, what have you done to the overall system and

what have you done the overall -- I don't want to use the rigidity, but we have a way of electronic filing in Texas just like the Feds have their way, and to set this up and to say something differently other than this language I think you're asking for trouble.

CHAIRMAN BABCOCK: But, Richard, the problem is it's not statewide. You cannot electronically file in every county.

MR. MUNZINGER: I know that. All I'm saying is if you draft a rule that suggests that everybody has to accept electronic filing, whether they're set up under the statewide system today or not, I think we've made a big mistake.

CHAIRMAN BABCOCK: Yeah, I think we're saying the same thing. Professor Albright.

PROFESSOR ALBRIGHT: It sounds to me like the problem is really this rule that says you can't file a copy of the return, right? That prevents electronic --

HONORABLE NATHAN HECHT: Yes.

PROFESSOR ALBRIGHT: I mean, that prevents electronic filing or fax filing of a return, where if you said -- you change that, wherever that is, and then you can file it by fax filing or electronic filing or filing filing, however you want to do it.

CHAIRMAN BABCOCK: Justice Hecht.

HONORABLE NATHAN HECHT: The form rules have always said that, and so when the statute was introduced last spring, you remember I came and asked you if anybody had any reason why returns shouldn't be filed electronically like other things are filed electronically, and nobody did, so they went ahead with the statute, and so --

CHAIRMAN BABCOCK: Is this a waiver kind of thing?

HONORABLE NATHAN HECHT: It's estoppel.

CHAIRMAN BABCOCK: Estoppel, sorry, I was confused.

HONORABLE NATHAN HECHT: And we -- but it's out there in, you know, probably 60 or 70 orders that have to do with fax filing and e-filing that all say this is one thing you can't file, and rather than take all of those back and redo them, this is just an end around that.

CHAIRMAN BABCOCK: David Jackson.

MR. JACKSON: Frank had four issues he wanted to work on, and I'd like to kind of address the fourth one, that we make it simple on the process servers that when they get through with these things and they've e-mailed off or faxed off or whatever they've done with the electronic filing, that they just turn that original document back over to the lawyer that requested it, and if

the lawyer wants to throw it away, he can. If he wants to keep it for four years, he can, but just get out of the hands of the process server.

CHAIRMAN BABCOCK: Yeah. Kent Sullivan.

HONORABLE KENT SULLIVAN: I just had a question about the status of electronic filing in Texas. I had been led to believe earlier that at least technically we had electronic filing in all of the counties, that we had the facade of being able to use TexasOnline and a service provider who would then take it, and often it was either faxed or otherwise handled in such a way that it would get to the county, even a county that did not have legitimate electronic filing. That's not the case?

HONORABLE NATHAN HECHT: No. The clerk has to be willing to accept electronic filing, because they have to have the technology on their end to take the transmission from texas.gov. There are about 30 counties, something like that, that have the e-filing order that permits them to use electronic filing, and they are most of the big counties, so I think there's some assessment that this would cover something like 70 percent of the filings in Texas or more than that. Not everybody uses it, and it's not mandatory. It's also permissive with the party, whether the party uses it or not.

There's long been a thought that we would make it mandatory at some point, and maybe this statute is a good excuse to do that, although it would be the tail wagging the dog, but at some point the Court does envision that this would be mandatory, but in -- with 254 counties and about 425 clerks, that's hard to do, but that's the current status of it.

Then there are about another probably 30 or 40 counties that allow facsimile filing, which predated electronic filing by 15 years, and back in the late Eighties and the early Nineties clerks started taking facsimile filings, and a whole bunch of them still have that authorization. Then there is yet even a third system out there in Harris County, which is a fax filing that the clerk then converts to an electronic filing, which is a way of bypassing texas.gov, and there are policy issues whether the state should allow texas.gov to be bypassed. The reason for it in the first place is so that there would be a state system that apropos to your earlier comments that everybody could expect to use from El Paso to Texarkana as opposed to a different system in various different clerks offices, but that's all still yet to be resolved.

HONORABLE KENT SULLIVAN: One follow-up, if I might, and that's just I know I was present now years

ago at a presentation, and my recollection was that E -- some of the ESPs, the folks that you, you know, pay these fees to to allow you to electronically file had made the pitch that one benefit was that you could file it anywhere and that you could get a file stamp, you know, with the date and time on it, albeit perhaps arriving -- the document arriving much later in the county, you know, depending on what county you were dealing with, but I remember that pretty vividly saying that that was one huge benefit, that you could always file in some remote county and that it was comprehensive. Does anybody else remember that? Because I guess if I understand you correctly, Justice Hecht, that's not the case?

HONORABLE NATHAN HECHT: Well, the system offers that.

HONORABLE KENT SULLIVAN: Okay. That's what --

HONORABLE NATHAN HECHT: But the clerk on the back end has to sign onto it. They have to have a computer sitting there that will take the transmission, and some clerks offices don't, but if they did, yes, the benefit to the service is that you could file anywhere, and filing with your ESP does amount to filing with the clerks. You don't have to worry about what if it doesn't go through and what if their server crashes and what if

lightning hits it in a middle of a hurricane. It all was taken care of.

HONORABLE KENT SULLIVAN: But it sounds like that they really then can't provide you with a file stamp. It all depends on what county you're dealing with.

HONORABLE NATHAN HECHT: They can do it if the county will accept service that way, but otherwise not.

HONORABLE KENT SULLIVAN: Wow.

CHAIRMAN BABCOCK: Okay. Well, that dialogue messed us up big time because Frank had left the room. I thought we could have gotten through this.

MR. GILSTRAP: We can wind it up real quickly with (h) and (i), and let me go onto (i). (i) is the default judgment paragraph. It probably doesn't even belong in this rule, but it's pretty clear we shouldn't mess with it. It's been heavily litigated, and it really doesn't -- you know, that's the way I see it.

CHAIRMAN BABCOCK: Uh-huh.

MR. GILSTRAP: (h) is real simple. We just changed it to put -- process in place of citation, but that kind of brings us back to the larger question that we deferred when we started. Are we going to require this rule -- is this rule going to be applicable to anything other than serving a citation? For example, serving a

temporary injunction, a writ of injunction, that type of thing, or are we going to confine this solely to citation?

CHAIRMAN BABCOCK: Well, the statute says "process."

MR. GILSTRAP: It says "process," and as Richard Orsinger points out, it seems to include -- it says the type of process. That seems to imply more than the citation.

CHAIRMAN BABCOCK: Okay. Well, my hunch is the Court's heard all it needs to hear on that topic, so --

MR. GILSTRAP: Okay. All we've got then -- I'm sure we'll do it after lunch -- is 108, which deals with out of state service and then we're done.

CHAIRMAN BABCOCK: Okay. I thought -- yeah, you said 16, 107, and 108. Okay. So you want to do that after lunch?

MR. GILSTRAP: Sure.

CHAIRMAN BABCOCK: Okay. Let's have lunch.

(Recess from 12:46 p.m. to 1:47 p.m.)

CHAIRMAN BABCOCK: Justice Hecht -- we're going backwards here. We're going back to the very first item agenda, which is Justice Hecht's report, which needs to be amended.

HONORABLE NATHAN HECHT: I forgot to say in

my report at the beginning that Jeff Boyd of our group, formerly General Counsel to the Governor of Texas, is now Chief of Staff of the Governor of Texas.

MR. BOYD: I went and handed him a 20-dollar bill at lunch since he forgot.

CHAIRMAN BABCOCK: So that's great, a great honor, Jeff, as our committee continues to be honored various ways.

Okay. Frank, Rule 108.

MR. GILSTRAP: Yes.

CHAIRMAN BABCOCK: And followed by the JP rules and then we'll be done with this thing.

MR. GILSTRAP: All right. Rule 108 obviously is currently named "Defendant without state," kind of reminds you of man without a country. At least we need to change that to "Service of process in another state." A couple of changes need to be made. First of all, the citation has got to be served by -- in the fourth line, and we're on page 15 of the memo, "any disinterested person competent to make oath of the fact." Well, that gets us back to the question of whether or not they should swear, but if we don't make them swear we obviously don't need to have that language in there, and I just pulled out of Rule 107 -- I pulled "who is not less than 18 years of age." You have to qualify them some way, and I figured

that's at least some limitation.

And then in the next sentence, "The return of service in such cases shall be endorsed on or attached to the original notice." Well, that can't be in the rule now because that's been changed, and then it's got to conform to Rule 107. I said, "prepared and filed in accordance with Rule 107," and then we have the question we all want to talk about, "signed and sworn by the party making such service before an officer authorized by law to take oaths," so anyway, I think that's the issue. Do we allow these people to sign it under penalty of perjury, or do we require them to take an oath? That's what we talked about earlier, and this is the time to decide it.

CHAIRMAN BABCOCK: Okay. Comments? Professor Dorsaneo.

PROFESSOR DORSANEO: Well, probably fortuitous, but it's good that you took out "competent to make oath of the fact" because there are at least some cases that say that the oath that's to be made is that the person is competent, not -- you know, not the fact being what the person did. Okay? So those cases are eliminated from view, but the larger question as to whether they need to -- they need to swear in the traditional manner by affidavit, regardless of whether they're sheriffs or constables where they are, is a more difficult rule, and I

probably would at least consider retaining it.

CHAIRMAN BABCOCK: Okay. Any other comments? Carl.

MR. HAMILTON: Well, the rule is about process, but I think it's clearly talking about citations because the last part talks about appearing and answering, so I don't know whether we want to make it just apply to citations, or if we're going to try to make it apply to all process then it needs some more work done on it.

PROFESSOR DORSANEO: Technically it's not about citation because it couldn't be, because it's service outside of the state. That's why it talks about "looks like citation."

MR. HAMILTON: Looks like citation.

MR. GILSTRAP: It says "such notice." They call it a notice.

PROFESSOR DORSANEO: Yeah. We've always called it "nonresident notice," okay, in academic circles.

MR. GILSTRAP: Carl is correct. Obviously the last sentence applies to notice of citation or notice that you've been sued, not other kinds of notice.

CHAIRMAN BABCOCK: Well, this whole rule is talking about citation, about serving somebody outside the state who has been sued.

MR. GILSTRAP: Yeah. Well, probably that's

the only instance you would use it although it doesn't say -- aside from the last sentence you could -- it says, yeah, "notice of institution of suit," you're right.

CHAIRMAN BABCOCK: Yeah. So, you know, again, this is the question we started out with. We can bite off, you know, a whole big thing to chew, or we can just stick with the statute, and I think the thought is we're going to stick with the statute.

MR. GILSTRAP: So the only question is do they have to swear.

CHAIRMAN BABCOCK: Yeah. How does everybody feel about out-of-state sheriffs being required to swear where the in-state sheriffs don't anymore?

MR. GILSTRAP: I've got one question, and that is this: Are there some states where they're so used to swearing, stating under penalty of perjury, that it's a problem to get them to swear to it?

CHAIRMAN BABCOCK: California.

MR. GILSTRAP: Okay. Yeah. I've sent documents to other states and say they've got to be notarized, and they don't know what I'm talking about almost.

CHAIRMAN BABCOCK: Yeah, they do everything by declaration in California.

HONORABLE STEPHEN YELENOSKY: Can we do it

by reference to that state's requirements? In other words, that we'll swear, confirm, give an unsworn declaration, pursuant to the requirements of the state in which service is accomplished?

CHAIRMAN BABCOCK: Well, the problem I would see with that, Judge, is that --

HONORABLE STEPHEN YELENOSKY: We don't know the law there.

CHAIRMAN BABCOCK: Well, not only that, but it's fine if they have a more onerous standard than we do, but what if they have a less onerous one? In other words, what if somebody can just sign it left-handed when they're right-handed?

HONORABLE STEPHEN YELENOSKY: Well --

CHAIRMAN BABCOCK: Not swear to anything.

HONORABLE STEPHEN YELENOSKY: As we well know, we have a Federal system, something goes in other states that doesn't go here, and we give it full faith and credit, right?

CHAIRMAN BABCOCK: Not procedurally.

HONORABLE STEPHEN YELENOSKY: Well, maybe so.

MR. JACKSON: The other side of the coin, though, is how are they expected across the country to know Texas law? I mean, you just about have to reference

what the procedures are in their area. What we may require them to do may be illegal in their state.

CHAIRMAN BABCOCK: Yeah. Good point. Professor Dorsaneo.

PROFESSOR DORSANEO: Well, but you don't even really need to use that, because it's "notice may be served by any disinterested person" and that just -- that could be, you know, really anybody in this room or any sheriff or constable in Texas or any court clerk in Texas. "In the same manner as provided in Rule 106," which is -- which permits mail, okay, certified mail, return receipt requested. So, you know, whether anybody is interpreting Rule 108 literally or not, I mean, it could be mailed by a process server from here, and it would work just fine. It isn't necessary to get the sheriff of Pottawattame County, Oklahoma, employed in this case.

CHAIRMAN BABCOCK: Okay. Yeah, Richard Orsinger.

MR. ORSINGER: If we don't require an oath in front of a person authorized to give oaths then they're going to be signing our form jurat, and our form jurat says that it's under the penalty of perjury, but then it's going to say the "State of California" or "State of Virginia" or whatever. So it makes me wonder which state's perjury it's going to be under, but then you look

back here at 17.030, this House bill, and they say that if you do it falsely you could be prosecuted for tampering with a government record under Chapter 37 of the Penal Code. So that appears to me to be the Legislature saying that even if you're in another state if you fill it out falsely you're subject to prosecution under that Penal Code provision, which of course is different than perjury.

In other words, our jurat says it's under the penalty of perjury, and our statute says it's tampering with a government record under the Penal Code of Texas. We don't say whose code of -- whose definition of perjury it is. I think it's going to be very difficult to criminally enforce something in another state if it's just a signature on a piece of paper if it says that it's perjury. I mean, it may be difficult to prosecute because they live in another state as well, but I don't even know whose laws of perjury they're doing it under when they sign an affidavit like that.

CHAIRMAN BABCOCK: Gene.

MR. STORIE: It's a different question, but I wonder what happens when you have indirect service such as on a state agency. I think I saw recently that the Department of Transportation could be agent for service of process for a nonresident motorist. Anyone else see that?

CHAIRMAN BABCOCK: Right. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, I guess that leads to my response, Chip, to your comment. It may be a lesser requirement than we have in Texas, but if whatever we're doing in Texas is arguably unenforceable against that individual in that state then I would think we would be more comfortable with saying you sign it under the requirements of your state, because even if they are lesser than the requirements of Texas at least we know that that state has the ability to prosecute them. We have no assurance that Texas could ever prosecute somebody.

CHAIRMAN BABCOCK: Yeah.

MR. DYER: I just had one question. Under existing Rule 108, whoever serves it has to take an oath by an officer authorized by the laws of this state, so how did they do it in the past? If you had someone in Oklahoma serve it, did they come down here to Texas to get a Texas notary, or if the notary went up to Oklahoma and wasn't licensed in Oklahoma, I don't know.

MR. ORSINGER: I think that the Texas, at least Rules of Evidence, say who in other states are authorized to give oaths that we recognize here, and if you're in a foreign country, there's yet another provision that tells you who is authorized to give oaths in the foreign country, so it's not just a Texas notary.

MR. DYER: Okay.

MR. ORSINGER: So our rules conceptually describe the kinds of officials who can give oath in other jurisdictions. You see what I'm saying?

MR. DYER: Yeah.

CHAIRMAN BABCOCK: Yeah, Professor Dorsaneo.

PROFESSOR DORSANEO: That's true, and it's in the Civil Practice & Remedies Code, 22.001 I think.

CHAIRMAN BABCOCK: Okay. Any other comments about this? Does anybody feel strongly one way or the other about how we should do it? Frank, you like the way you drafted it. Carl.

MR. HAMILTON: I think we should leave in the rule just like it is.

CHAIRMAN BABCOCK: So no amendments to the rule at all?

MR. HAMILTON: Well, don't take out that part about -- they ought to have to sign it before some officer authorized by the law -- well, it says "of this state." I think it ought to be of the state where they are.

CHAIRMAN BABCOCK: Okay. Richard.

MR. ORSINGER: I was just -- I would prefer that people take an oath when they're in another state, but isn't there language in here that makes it suggest

that we can't require that if it's done in another state? How are we getting around that?

MR. GILSTRAP: Yeah, I think there is.

MR. ORSINGER: The statute -- I don't know where. I can't find it.

MR. GILSTRAP: It's on page two of the -- of the appendix in paragraph (c), "Person certified by the Supreme Court as a process server or person authorized outside of Texas to serve process shall sign the return of service under penalty of perjury." There you go. "The return of service is not required to be verified."

MR. ORSINGER: So doesn't that take away our discretion to require a signature in front of a notary public?

MR. GILSTRAP: I think so.

MR. ORSINGER: So even if we want to I don't think we can. I mean, we might as well just admit it and go on.

CHAIRMAN BABCOCK: Yeah. Good point. Yeah.

MS. SECCO: I just have a question. Maybe Carl can answer this, but why is it that people who can serve out of state is a much broader category than the people who are allowed to serve in state? Why is it any competent disinterested person rather than -- you know, and is that how it works in practice now? Can anyone

answer that question?

MR. WEEKS: I don't know why -- it's always been that way in the rule to my knowledge. Any disinterested party in another state could serve it that was competent to make oath and execute the return. I don't know why it's always been that way.

PROFESSOR DORSANEO: As I understand it, that never had anything to do with Rule 103. That disinterested person, just, you know, typically originally would have been a sheriff or constable in another state, and since they're not sheriffs or constables here they're picked because they know how to do it, and they're disinterested.

CHAIRMAN BABCOCK: Okay. So is our thinking that the rule with the changes that Frank proposes on Rule 108 is the way to go after all discussion? Anybody dissent from that? I'll get the inertia moving in our favor.

PROFESSOR DORSANEO: I have a suggestion.

CHAIRMAN BABCOCK: Yes.

PROFESSOR DORSANEO: Maybe you want to put an (a) and a (b) in Rule 108 and make the last sentence, you know, (b), rather than just have it be there as a tag in. I think the last sentence could be modified a little bit to be better.

MR. GILSTRAP: Starting out with "The defendant served with such notice."

PROFESSOR DORSANEO: Yeah. And it would make it easier to follow, and I would call the beginning part what I've always called it, "nonresident notice," or, you know, and the --

MR. GILSTRAP: What would you call (b)?

CHAIRMAN BABCOCK: Same.

MR. GILSTRAP: You know, we don't have to name them. We don't have to give them a name.

PROFESSOR DORSANEO: Surely we can come up with something.

CHAIRMAN BABCOCK: Yeah, we haven't named anything else.

MR. GILSTRAP: 99 has names, but they were already there.

CHAIRMAN BABCOCK: Okay. Any other suggestions? Let' move on to the JP rules.

MR. GILSTRAP: All right. Let me just say in passing if you'll look at page 16 and 17 of the memo, 119, 123, and 124 clearly deal with citation, and you ought to change "process" to "citation" there. Okay. Let's go to the JP rules, and they're real, real, real simple.

CHAIRMAN BABCOCK: Famous last words.

MR. GILSTRAP: Well, no, because they're verbatim the rules we've been talking about. Look at Rule 536. It's not in the handout, and you've got to find a rule book. Rule 536(a) is Rule 103, verbatim, except it doesn't have the provision in there that says certified -- "service of process by registered or certified mail and service of citation by publication must, if requested, be made by the clerk." They just took that out. Otherwise the rule is exactly the same. To the extent we're changing Rule 103, and I'm not sure we are, then the same change needs to be made there. That's 536(a), 536(b) and (c) are Rule 106 verbatim, so if we're changing Rule 106, those changes should be mirrored there. And, you know, neither one of those rules is required to be changed by HB 72.

536(a) is a little -- does have some requirements that have to be changed. 536(a), the first paragraph is Rule 105, and if we're going to change Rule 105 then we need to change this. If we're not, we don't. The second paragraph of 536(a) is Rule 107, so if we're going to change Rule 107, the changes need to be reflected here, and we are going to change Rule 107.

CHAIRMAN BABCOCK: We are going to change 107.

MR. GILSTRAP: Yeah. So that's -- excuse

me, the last three paragraphs of 536(a) are Rule 107.

CHAIRMAN BABCOCK: Okay. So you think you could just make parallel changes?

MR. GILSTRAP: I think so. I mean, I can't think of anything -- is there any -- some quality about JP court that would make some of the stuff we've talked about inapplicable?

CHAIRMAN BABCOCK: Well, there's only one expert on our committee that can address that, and he's not here.

PROFESSOR DORSANEO: Frank, were you going to change 534 at all or you think that's fine?

MR. GILSTRAP: You know, that wasn't called to our attention, so 534, well --

PROFESSOR DORSANEO: It's like 99.

MR. GILSTRAP: That's 99, isn't it? Is it the same, Bill?

PROFESSOR DORSANEO: Well, it looks to be substantially the same, but maybe we keep going. Maybe you have to go to at least look at 533.

MR. GILSTRAP: Uh-huh. Uh-huh. Well, 533 is -- looks like the old Rule 15.

PROFESSOR DORSANEO: Uh-huh.

MR. GILSTRAP: Not quite.

PROFESSOR DORSANEO: But it all looks pretty

parallel.

MR. GILSTRAP: Yeah. So 533 is like 15 and 534 looks like it probably is 99.

CHAIRMAN BABCOCK: What about electronic filing in JP court?

MR. GILSTRAP: Don't ask me.

CHAIRMAN BABCOCK: Pam was guffawing.

MS. BARON: Sorry.

HONORABLE NATHAN HECHT: They have rules that are out, electronic filing. Not very many of the JPs use them.

CHAIRMAN BABCOCK: Yeah. Okay. Yeah, because we went through all of that ad nauseam here.

HONORABLE NATHAN HECHT: Yeah.

CHAIRMAN BABCOCK: Okay. Anything else about the JP rules? What about the parallel to 108? Where is that, or do they have it?

MR. GILSTRAP: Do they have something for defendant without state? Doesn't look like they do.

PROFESSOR DORSANEO: The closest thing, 523, I don't remember how all of these rules got changed, but 523 says, "All rules governing district and county courts shall govern the justice courts insofar as they can be applied except where otherwise specifically provided by law or these rules." It may get there that way.

CHAIRMAN BABCOCK: They could import 108 that way. Yeah, good point. Okay. Anything else about the JP rules, Frank?

MR. GILSTRAP: That's all I've got.

CHAIRMAN BABCOCK: All right. Great. Thanks so much. Terrific job. Thanks for helping us. And now Pat and Dulcie are going to take us into the ancillary rules and pick up where we left off the last time we talked about them. Thanks very much, Carl.

MR. WEEKS: You're welcome. Thank you.

PROFESSOR HOFFMAN: Mr. Babcock?

CHAIRMAN BABCOCK: Yes.

PROFESSOR HOFFMAN: One question. What about long arm service through the Secretary of State? Did we not have to touch the rest of Chapter 17 because none of those rules talk about the return of service by the Secretary of State?

MR. GILSTRAP: Say that again. I'm sorry.

PROFESSOR HOFFMAN: So when you serve through the long arm, through 17.044 or whatever it is, 41 --

MR. GILSTRAP: Okay. Yeah.

PROFESSOR HOFFMAN: -- and serve the Secretary of State, I looked at the rules just now. I didn't see anything that talked about formally how the

Secretary of State is required to -- how the return of service goes to the court. I think the way it works is you get the green card back from the Secretary of State and then you, the lawyer, files it with the clerk of the court, but that may not be right.

PROFESSOR DORSANEO: Well --

CHAIRMAN BABCOCK: Professor Dorsaneo.

PROFESSOR DORSANEO: No, it's -- the Supreme Court's decided -- I forget the name of the case. Is it Cullever maybe, but that the only thing you need from the Secretary of State's office --

PROFESSOR HOFFMAN: Is that they mailed it.

PROFESSOR DORSANEO: -- is the Whitney certificate.

PROFESSOR HOFFMAN: Is that they mailed it.

PROFESSOR DORSANEO: Yeah, the Whitney certificate, that they mailed it and something happened to it. You don't need to file the citation and the return.

PROFESSOR HOFFMAN: So just to be clear, the return is the -- that we sent it to the Secretary of State to serve the defendant at their correct address and that the Secretary of State did, in fact, do those two things; but none -- so I guess my question, to be precise, is none of that is in the statute, unless I missed it, and is that the reason that we don't need to tinker with Chapter 17,

because -- the rest of it because the statute, 030, only relates to return of service for which there actually is no actual provision?

PROFESSOR DORSANEO: Well, there is 17.045 that doesn't -- that talks about what the Secretary of State is supposed to do.

PROFESSOR HOFFMAN: Correct, but there is nothing in 045 that says anything about the return of service equivalent.

PROFESSOR DORSANEO: Yeah. I think that's right.

MR. HAMILTON: But the return of service is the service that the process server returns when he serves the Secretary of State.

PROFESSOR HOFFMAN: So --

MR. HAMILTON: And then the Secretary of State does something beyond that.

PROFESSOR HOFFMAN: So a couple of things. One, I don't think you need a process server, and I think more often than not you don't use one. Again, I could be wrong, but I think the way -- maybe, again, somebody else who is still in practice can report if I've got this right, but I think the way it works under 045 is the clerk issues the citation and then you mail it to the Secretary of State directing them --

PROFESSOR DORSANEO: There's a statute that says that. 17.027 I think says that.

PROFESSOR HOFFMAN: -- to serve the defendant on their home or home office, whatever the requirement of the rule is, and again, as we said before, we don't care whether they get it. We only care that the Secretary of State mailed it to the correct address that you told them.

MR. GILSTRAP: And what gets filed back with the clerk of the court?

PROFESSOR HOFFMAN: Right.

MR. GILSTRAP: I mean, current practice, how do you do it?

PROFESSOR DORSANEO: The only thing that you need to get on file for a default judgment is the Whitney certificate, which is the Secretary of State saying what the Secretary of State did after service on the Secretary of State.

PROFESSOR HOFFMAN: They send you a sheet, and it says -- you know, it's an official Secretary of State document. "We delivered process to this player at this address," and my recollection is that's the document that gets filed.

PROFESSOR DORSANEO: Yes.

PROFESSOR HOFFMAN: Probably along with a

lawyer's affidavit that says "I did it."

MR. GILSTRAP: So arguably we would never require the return.

PROFESSOR DORSANEO: Well, based on recent case law we don't require it anymore. There was a split.

PROFESSOR HOFFMAN: Maybe the answer -- the technical answer to my question is we don't need to change anything else because there's nothing in the rule that specifically addresses it, and we could perhaps leave for another day whether we actually want down the road to say something about this process that apparently doesn't actually exist in a rule. Maybe that's the answer.

MR. BOYD: And that process is -- I'm thinking I remember that service is determined to be effectuated when it's actually served on the Secretary of State, no matter when the Secretary mails it out or you receive it. So if service is effective when it comes to the Secretary of State, but for purposes of the return of service, that's dated -- that's something that demonstrates the date when the Secretary later mailed it out, and when they mailed it out is irrelevant for purposes of default judgment because it's the date the Secretary received it that matters for when the Monday next following --

PROFESSOR HOFFMAN: Yes, except this is this

weird animal where the date of service is, as you say, the day you send the Secretary of State, but there's that subsequent fact you need to establish, which is that the Secretary of State did, in fact, do what you -- that you directed them to do.

MR. BOYD: To get default you have to --

MR. DYER: Typically the certificate of service says that notice -- that citation was mailed to the defendant at this address by registered and certified mail, the mail was declined or not accepted, or they received a signed green card.

MS. WINK: Doesn't it also usually say the date the Secretary is served?

MR. DYER: Yes.

MS. WINK: It does. Yeah, I thought so. The Whitney certificate usually says, "It was received in our office on such-and-such date," says the date they mailed it, et cetera.

PROFESSOR HOFFMAN: Again, I don't have anything else to add. There may be nothing to do because the rule doesn't exist yet.

CHAIRMAN BABCOCK: Okay.

PROFESSOR HOFFMAN: Or ever will.

CHAIRMAN BABCOCK: All right. Thanks, Lonny. All right. Dulcie and Pat.

MS. WINK: Back to the world of injunctions, and just FYI, I've already kind of made some notes on the return of service part that will have to be tweaked based on what we did today and what was done with 107. Just trust us to make some more tweaks and get that back to you.

What has happened in your handout in the injunctive rules is to get all of the input from prior meetings, including the last ones on May 13th and 14th. There were a couple of questions that have come up, and I think really -- there are two buttons that I shouldn't have touched. I think the one thing that we really said we wanted to focus on at the last meeting was the very new, I think it's Rule 10. Let me go up to it. The newly proposed redrafted Rule 10 on disobedience. We had not changed the disobedience draft. Judge Peeples gave us a good bit of input, and we got input from the committee, and what you see in injunctive Rule 10 now is completely redrafted. I'll leave it for those of you who are contempt specialists. I think the question came up as to whether or not you actually have to attach the person and bring them before you before you can throw them in jail. I think that's true, yes. So this pretty much puts that into the concept, so if anyone sees something in injunction Rule 10 that needs tweaking, take a look at

that and let us know now so that we can focus on it.

CHAIRMAN BABCOCK: Is this -- Dulcie, is this a handout that you gave us --

MS. WINK: Handed out this morning, yes.

CHAIRMAN BABCOCK: This morning. Okay. Thank you. Has everybody had a chance to look at injunction Rule 10 at page 15 of this morning's handout?

MR. DYER: We need to change the verification.

MS. WINK: Are you talking about Rule 10?

MR. DYER: 10(b).

CHAIRMAN BABCOCK: And why do you think you have to change that, Pat?

MR. DYER: The unsworn declaration, or is that a --

MS. WINK: Huh-uh.

CHAIRMAN BABCOCK: Interestingly enough, the Legislature passed an amendment to the Texas Civil Practice & Remedies Code that because it passed unanimously from both houses was effective when the Governor signed it in June, and it talks about requiring affidavits to support a motion or a response to the motion. It doesn't have the declaration language in it.

MR. DYER: Oh, okay. I thought we were earlier discussing a summary judgment motion where the

evidence was under perjury.

CHAIRMAN BABCOCK: Yeah, I think there's now a standalone statute, but I'm wondering if the Legislature specifies affidavit versus declaration --

MR. DYER: Oh, okay.

CHAIRMAN BABCOCK: -- whether you have to comply with that. That wouldn't be applicable to a rule, but you're right, in the rule it should be either, I would think.

MS. WINK: Yes.

CHAIRMAN BABCOCK: Yeah.

PROFESSOR HOFFMAN: I'm sorry, maybe there's been a bunch of this, and I just don't know that -- and I've missed it. Can you start from some beginning point? I'm reading this rule, and it sounds like the nice regular rule and then all of the sudden there's the part about how we can throw people in jail.

MS. WINK: Yes, okay.

PROFESSOR HOFFMAN: So can you talk a little bit about what existing law is?

MS. WINK: Sure.

PROFESSOR HOFFMAN: Orient us.

MS. WINK: You know, usually we're all excited about going straight to the jail part when it comes to injunctions. One of the reasons that injunctions

are so carefully drafted, so extraordinary, and have a lot of heightened scrutiny and all of the steps that we have to go through to get them is once we have an injunction if someone violates the terms of the injunction they're subject to civil and criminal contempt penalties, so when we get to the situation of saying someone has violated the injunction that's where we turn to the rule about disobedience.

PROFESSOR HOFFMAN: Can I interrupt for a quick question just to make sure I'm clear?

MS. WINK: Yes.

PROFESSOR HOFFMAN: Does that apply to TROs and TIs or just TIs?

MS. WINK: Injunctions of all kinds. Temporary restraining orders are injunctions, as are temporary and permanent injunctions, but, you know, and there are plenty of cases that say that as well. So, again, once we have someone who has violated the injunction, we have never had very good scripting of how you procedurally go through the steps. The rules in the past have said, yes, you can have show cause hearing, you can, you know -- so we've drafted them out here just to make things clearer, so you apply to the court. In the past the way I've done it is file a motion for show cause. Here it's a little easier. You apply to the court, verify

what the facts are and what you're going to prove, and, you know, you get it set for a hearing, and do you have to give notice to the adverse party, you're going to see that in subsection (c). All right. Just like you would any other evidentiary hearing, and you've got to be specific about what you contend that they have done, how they have violated the injunction. If they don't show up then the judge can issue a writ of attachment. If the judge wants to proceed to the level of criminal contempt, they're going to have to issue a writ of attachment. Yes?

HONORABLE STEPHEN YELENOSKY: Are you calling on people or is Chip? This is the first time I've read this. Why doesn't it just stop with "court may punish disobedience," that first sentence ending with "as contempt"? Because everything thereafter I'm not sure comports in every way with existing law. As you've pointed out, to hold somebody in contempt and throw them in jail requires a whole lot of things, and, in fact, I've put together a notebook on that that we -- some of us judges use because we don't see it that often, and so we don't want to reinvent the wheel every time, and it uses a lot of other resources to go to and all before you do that.

You mention show cause, for instance. You talk about notice here. Well, don't you have to serve

them in person with a show cause, and this doesn't say that? That's just one example. I may be wrong about that, but that's one example.

MS. WINK: No, it's a darn good question. I always have because the rules were never clear, so out of an abundance of caution, any time I was having a show cause order on contempt I had it personally served.

HONORABLE STEPHEN YELENOSKY: Well, so I think there are a lot of things I have come to believe need to be done, and I'm not sure I could repeat all of them now. If I had my notebook in front of me I could, but they come from various sources. I'm not sure they're all consistent with this. I did just send somebody to jail Wednesday, so I've done this recently, and it's not something too distant in my mind, and I'm concerned that while this may be -- may be correct and may -- and certainly is a good effort, that it's -- it's too complicated to say that it is.

MS. WINK: Then, and, again, this is our first shot at this, quite frankly, to bring back to you guys. Could we work together on that, Judge Yelenosky, together with your notebook to improve this a bit before we get full committee input on it? Because I just think --

HONORABLE STEPHEN YELENOSKY: Right, and the

other thing I would just point out, one other thing that occurred to me -- and Richard will chime in on this -- in family law cases there are statutory provisions. For example, there is a statutory provision of 10 days notice, which doesn't apply in other contempt proceedings, so everything we do has to fit with those other parts.

MS. WINK: And throughout the rules, especially on injunctions, we've made it clear that if any of the injunctive rules conflict with the Family Code, the Family Code prevails. So that we have covered, and we've mentioned it multiple times throughout, but I would really like your input on this, because you're going to have a lot more experience with it, and if you have the binder to help us with that, that would be --

HONORABLE STEPHEN YELENOSKY: Well, and I would be happy to do that. We may end up back with where I've started in my comments, which is just say it can be punished by contempt, because I'm not sure we can accomplish everything in a rule. I think it is problematic for lawyers and judges who don't do it routinely enough. I think a lot of contempts probably are defective, and we find that sometimes in appellate rulings, and I'm not sure that can be resolved by rule as opposed to CLE for judges, but --

CHAIRMAN BABCOCK: Dulcie, am I right about

this, that as subsection (e) says, there are two kinds of contempt, there's civil contempt and there's criminal contempt?

MS. WINK: Yes.

CHAIRMAN BABCOCK: And civil contempt is you've been told to do something and you're not doing it, so you're going to go to jail until you do it.

MS. WINK: The first step, as I understand it -- there are multiple answers. One, civil contempt can be fines and attorney's fees.

CHAIRMAN BABCOCK: Right.

MS. WINK: Damages, fines, and attorney's fees --

CHAIRMAN BABCOCK: Right.

MS. WINK: -- for the actual damage caused for the contempt, but then the second stage of it -- and I have never had to go through that -- is where the party fails to purge themselves of the contempt and then the judge says, "Great, we'll put you in jail until you do."

CHAIRMAN BABCOCK: Well, for example, the injunction is "Don't transfer assets to the Caymans," and the guy does it anyway, and so the judge says, "Okay, you're going to go to jail until you bring that money back from the Caymans, and then once you do that and I'm satisfied then you're out of jail." But he also could

say, "You've committed" -- "You've violated my order, so I'm going to send you to jail for 30 days." That would be criminal, right?

MS. WINK: I believe so, yes.

HONORABLE STEPHEN YELENOSKY: Chip, that -- I mean, those terms are used. The other terms that are used are coercive contempt and punitive. I don't know if it's important to have exact words, but the concept is you're either being punished for a past action and there ain't anything you can do to get out early because it's punishment --

CHAIRMAN BABCOCK: Right. "Don't beat up your girlfriend."

HONORABLE STEPHEN YELENOSKY: Right.

CHAIRMAN BABCOCK: You go out and beat her up, you can't unbeat her up.

HONORABLE STEPHEN YELENOSKY: Right. Right, but the example of pay X by a certain date, you could impose both punitive date, "You didn't pay it by that date, 30 days, and when you complete the 30 days you'll begin -- or before that, you'll begin your coercive contempt. If you pay it now you're still going to stay there 30 days. If you don't pay it at the end of 30 days, you're still going to be there."

CHAIRMAN BABCOCK: Right. Right. But what

Dulcie was saying to begin with, in civil contempt the judge does have a range of remedies, can say, "Go to jail until you purge yourself," or the judge can say, "I don't like what you did. I'm going to award attorney's fees and I'm going to fine you, you know, a thousand dollars a day until you purge yourself." Jail is not the only option.

MS. WINK: Jail is not the only option.

CHAIRMAN BABCOCK: Yeah. But this last sentence just hanging here on subpart (e), I think it's confusing because it sort of highlights one particular option and doesn't make the distinction between civil and criminal.

MS. WINK: Right, and the sad news is, Chip, is I have a feeling that was part of the language from the original -- the original rule that we're stuck with right now.

CHAIRMAN BABCOCK: That's always confused me.

MS. WINK: As it sits in the rule book right now it's horribly written, and I think it's a minefield for the practitioner as well as for judges, frankly.

MR. DYER: Is the criminal contempt power of the court unlimited? I mean, at some point don't you have to have the court not being the prosecutor but some prosecutor has to be appointed?

MR. ORSINGER: That's direct versus indirect contempt is what you just mentioned.

CHAIRMAN BABCOCK: Yeah, that's right. That's right.

MR. ORSINGER: That's yet another series of distinctions.

HONORABLE STEPHEN YELENOSKY: Well, you also have triggering the length of the contempt proceeding, you have a right to a jury trial at a certain point. I think it's 180 days.

MR. ORSINGER: Criminal contempt is six months and a 500-dollar fine maximum, and you're not entitled to the jury trial, but if you're exposed to more than six months in the same proceeding then you are entitled to a jury trial.

CHAIRMAN BABCOCK: Yeah, Richard, direct contempt is when you said "sit down" to the lawyer and in front of the judge the guy said, "I'm not going to sit down. You sit down."

MR. ORSINGER: Right. That's right, but there's a little subset of rules if it's a lawyer that commits the direct contempt. Most judges that I've heard about recently ignore this, but the judge is not supposed to put the officer of the court in jail. He's supposed to cite him for contempt and allow another judge to decide,

but I have been talking to some lawyers recently that that was a procedural nicety that escaped the judge.

MS. WINK: Which is why it's nice to have a friendly bail bondsman.

MR. DYER: Chip?

CHAIRMAN BABCOCK: Yeah.

MR. DYER: Earlier we were talking about the verification, and are we saying that this verification can stand here and you cannot satisfy with the unsworn declaration or vice versa?

CHAIRMAN BABCOCK: I was just raising the question. I'm not sure.

MR. DYER: Oh, because 132.001 says it can be used for any oath or affidavit required by statute or required by rule. So I think we would have to change that.

CHAIRMAN BABCOCK: Yeah. That's a good point.

HONORABLE STEPHEN YELENOSKY: Well, I don't know that we have to change it because the statute changes it. You can say verification. It's just when you do, the statute says you're also saying unsworn declaration.

MR. DYER: Well, then why did we make changes earlier to other sections like that?

MS. WINK: Before we knew about that, which

we may have to revisit because in the past we've proceeded throughout the drafting of all of the rules that these extraordinary writs all require sworn averments, and our verification was sworn, so with this new statutory procedure we may have to go through and take out the word "verification" and return to affidavits.

HONORABLE STEPHEN YELENOSKY: Well, you don't, because the statute does it, number one, and number two, if the Legislature changes their mind, you don't want to have to go back and put it all back in, because you can leave it in there, and when people read -- it will take years for people to catch onto this. I don't expect to start seeing summary judgments next week that are sworn under penalty of perjury as opposed to notarized, but eventually, if it continues, I don't know what the purpose of the notary is going to be, because you can do everything without a notary. The only thing you can't do is swear an oath that is required to be sworn in front of a particular office other than a notary, so anyway, my point is just that should the Legislature change anything for any particular part like wills or whatever, you don't want to have to go back and put the verification back in. Nothing that says you can't require verification. It just says whenever you say that you also mean 132.001, unsworn declaration.

CHAIRMAN BABCOCK: Richard Orsinger.

MR. ORSINGER: Steve, the role of authentication for notaries will still continue because if you have an authenticated signature then it's presumptively valid, and the burden is on the other side to show it's a forgery, which has nothing to do with a jurat at all, and it's still a valuable function because it gives you a legal presumption from the document self-affirming, self-proving. You see what I'm saying?

HONORABLE STEPHEN YELENOSKY: Yeah.

MR. ORSINGER: So I think that the attestation function -- or maybe I'm -- whatever that function is that validates the identity of the signer is still going to be unaffected by the statute and still be a necessary practice I think.

HONORABLE STEPHEN YELENOSKY: Well, the notaries will I guess have to carve out that niche, because right now the self-proving affidavit for a will is an attestation, so they would have to convert it. To make themselves pertinent and necessary they would have to convert it into an authentication of a signature.

MR. ORSINGER: Well, I don't think a jurat is necessarily -- is a jurat necessarily an attestation? I guess it is.

CHAIRMAN BABCOCK: Yeah, Pat.

MR. DYER: Well, should we at least note it in a comment, note this statute or just play hide the ball?

MS. WINK: Hide the ball. On this one?

HONORABLE STEPHEN YELENOSKY: I mean, otherwise you're going to have to go back and change the rule on summary judgments that says "affidavits." Are we going to go back to change all of those rules?

MR. ORSINGER: What about the discovery rules on answers?

HONORABLE STEPHEN YELENOSKY: Everywhere the word -- by that theory or by that premise, everywhere we use the word "affidavit" we would change it or insert a comment.

MR. STORIE: Verified denial.

HONORABLE STEPHEN YELENOSKY: Exactly.

CHAIRMAN BABCOCK: I noticed that there was no -- in either the old rule or the new rule, there's no burden of proof. It just says "if the evidence establishes."

MS. WINK: Uh-huh. Again, old rule.

HONORABLE STEPHEN YELENOSKY: And that's also important because when it's a criminal -- there's a preponderance of evidence, there can be a beyond a reasonable doubt requirement for criminal content, so --

MS. WINK: I would recommend that we for right now table Rule 10 -- well, no, let's be realistic. I don't mind a first draft, but getting the input is good, but if going back and taking a look at it together with Judge Yelenosky and others is going to help us to have something cleaner, I'm all for it. You know, we're dealing with a rough rule there, but, Chip, if you want to proceed I'm happy to.

CHAIRMAN BABCOCK: No, I was -- Richard.

MR. ORSINGER: I'm trying to figure out what would be a good resource for you outside of this committee.

MS. WINK: The whole law library.

MR. ORSINGER: I think probably family lawyers try more contempts than anybody maybe attorneys in district, in --

CHAIRMAN BABCOCK: Who does?

MR. ORSINGER: Local district attorney's office, and it may be that the -- I'm just thinking here. There's a committee that the family law section does that proposes a form that has a chapter on contingency, and they also write practice notes on how you do a contempt, and I'm thinking that if you'll just send me an e-mail I'll find the right person, and you can take advantage of that, but I can promise you, being an old family lawyer,

that the standards that are in the Family Code today started out as constitutional standards in court of appeals opinions and Supreme Court decisions here in Texas, and so like the 10-day rule, we didn't just make it up. It came out of court of appeals opinions, that due process of law required 10 days, that kind of thing, and so it may be that they can make some suggestions, because the reticence I have about starting down the road to give somebody a road map on how to file a contempt is that once you start you better keep going until you cross the finish line or else you're going to be inviting people to do things that are going to get rich granted, and so my reluctance is that a lot of people will assume that if they just follow this recipe they're in, and they may not be, and I don't do contempts anymore, but I've done them -- I've done a hundred of them. So if you'll send me the e-mail, and I'll try to hook you up with people that are writing the forms and the practice notes for contempt, and maybe they can share something with you that will help.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, yeah, I mean, that's more of the same point where I said finish with that sentence, because, for example, it's clear that a judge has an obligation to make an inquiry upon advising the -- has to advise the person they have the right to

counsel and then make an inquiry into their ability to pay for counsel since it's quasi-criminal, make an inquiry into their ability to pay for counsel. None of that's in this rule, so he's right, and that's my point, which is there's a lot, and there are people who do it. I would also suggest Judge Davis, Paul Davis, has done training and has written on contempt, and the notebook I put together largely plagiarizes his stuff, but it adds forms that I created, but I'm not sure we want to go down that road. There are a lot of lawyers who do it, but very few who do it right. I rarely use the order that a lawyer presents to me if I'm sending somebody to jail because they're rarely right.

CHAIRMAN BABCOCK: I notice that Judge Wilson from Harris County is on your committee --

MS. WINK: He is on there.

CHAIRMAN BABCOCK: -- and he would be a resource on that.

MS. WINK: I'll be glad to draw him in with that.

HONORABLE STEPHEN YELENOSKY: And I can get in touch with Judge Davis, unless you know him.

CHAIRMAN BABCOCK: Judge Davis would be a really good resource as well.

MR. ORSINGER: Can I also say this, Dulcie?

MS. WINK: Yes.

MR. ORSINGER: In family law process we don't issue a writ of attachment for someone who fails to appear. We issue a capias warrant. I think it's called a warrant. I did one about two months ago. We call it a capias, but I think it's -- anyway, it's a civil arrest warrant as opposed to a criminal arrest warrant, and it's handled by the sheriff's offices and the DPS, I believe, differently from a writ of attachment, which is a purely civil process, I think.

MS. WINK: And I'll check into it. It's just our old rule referred to attachment, which is why we put it there.

MR. ORSINGER: It did? Okay. Well, I promise you that the way to do it is a capias, but the district clerk that I had do it didn't know how to do a capias, so I had to write one for her, and then where the capias goes after they issue it is a whole other issue because they all know how to deal with criminal warrants, but they don't know how to deal with civil warrants, and civil warrants in my opinion are completely different from writs of attachment. So, again, maybe the family lawyers that we get involved, if we can get somebody involved, can help elaborate that.

MS. WINK: Okay. Happy to go there. There

are a couple of other things that I would just point out. The rules as a whole, we've had conversations throughout the injunctive rules about what we would propose to be in commentary that we provide only to the Supreme Court of Texas and/or to the law journals, comments that we would propose to be printed but not binding on practitioners, and then comments to the rules that we would suggest from our conversations here that they be binding, much like the comments to the discovery rules are now binding. So what I've tried to do is go through and provide details of that for you to peruse at your leisure. I know this is going to be the most exciting thing to look at, but I wanted to mention that we've put those in there.

Another thing that came up the last time and I'd like to go back to it, when we were looking for the right language to put in the writs, if you'll look at injunctive Rule 5, the contents of writ of injunction, and go down to the first form of the writ. This is the one for temporary restraining order, sub (e), and you'll find in the middle of the command in bold print -- I incorporated all the great wisdom and guidance. It said it needs to be plain language. It needs to be scary language. It needs to -- this was really entertaining reading, though. Plain language, scary language, language that will draw people's attention to the fact that they

need to take action, they need to show up, they need to be prepared. We know it's a burden of proof issue, but to contest it, to defend someone's application, this is the first draft. Thoughts on that, please?

HONORABLE STEPHEN YELENOSKY: On the bold part?

MS. WINK: On the bold part, because that is the main change.

HONORABLE STEPHEN YELENOSKY: Where it says "therefore, you are commanded"?

MS. WINK: Yes.

HONORABLE STEPHEN YELENOSKY: I wouldn't use the word "said" if you're trying to be clear to people. "This order."

MS. WINK: All right.

MR. DYER: This is the writ, though, not the order.

HONORABLE STEPHEN YELENOSKY: Oh, okay.

MS. WINK: This is the writ.

HONORABLE STEPHEN YELENOSKY: You're right. Well, then some other reference.

MR. DYER: We could get rid of "said," I guess.

HONORABLE STEPHEN YELENOSKY: "Said" doesn't tell you which order.

MS. WINK: We can still say "the order."

MR. DYER: You can say "attached order," because it has to be attached.

MS. WINK: Yep. Putting it in.

HONORABLE STEPHEN YELENOSKY: In fact, the second page says that.

CHAIRMAN BABCOCK: Anybody have any comments on this? On this language?

PROFESSOR HOFFMAN: What's the bracketed part? That's an alternative?

MS. WINK: The way the writs are, the forms of the writs, when they're in the form books or the rules themselves, sometimes they'll put brackets around language that doesn't always get used. For instance, the brackets in many cases deal with when the writ is mandatory in nature instead of just a restraining type of injunction. So the bracketed information puts the clerks on notice that there is more they might need to use or choose to use.

MR. ORSINGER: Dulcie?

MS. WINK: Yes.

MR. ORSINGER: It appears to me that we are now using the TRO to give notice and order to appear at the hearing, which is what I would have called a show cause order.

MS. WINK: We always have. It's always been on the TROs, for the most part. They may not have been in family court, because I can't speak to that, but they do. They not only say this is the temporary restraining order, but they must say under even the existing rules the date of the temporary injunction hearing.

MR. ORSINGER: So will we serve this -- I hate to mention the concept, but the process that goes along with this piece of paper is going to be a TRO, or is it going to be a TRO and a notice of show cause?

MS. WINK: It's both. In fact, the last two times that I've done this, in fact, just in the last year, they've both used this language, and the courts tend to -- sometimes they'll say show cause. We were trying not to use the show cause language. Remember, that was part of what you guys asked us to do, but we're required to put in the TRO the date of the temporary injunction hearing. The TRO gives them notice of that.

MR. ORSINGER: Are we eliminating the piece of process that used to be known as a show cause order or notice of show cause hearing?

MS. WINK: Yes. In my experience the TROs have the show cause language in them because they're required to say when the injunction hearing is.

HONORABLE STEPHEN YELENOSKY: Well, is that

right? I mean, a temporary injunction is void if it doesn't -- if --

MS. WINK: If it doesn't have the date of the trial.

HONORABLE STEPHEN YELENOSKY: Of the trial. But a TRO, it only extends for 14 days. Does the Rule 680 say that it has to state the date of the temporary injunction?

MS. WINK: Yes.

HONORABLE STEPHEN YELENOSKY: Because --

MS. WINK: Yes, it does.

HONORABLE STEPHEN YELENOSKY: Okay.

CHAIRMAN BABCOCK: Okay. Skip.

MR. WATSON: I'm just curious, in the language commanding them to obey the terms of the attached order, why does that extend only until the trial on the merit scheduled to begin on such-and-such a date.

MS. WINK: You may be looking at the one on temporary injunctions instead of the one on TRO.

MR. WATSON: Probably am.

MS. WINK: We're looking at injunction Rule 5, sub (e), No. (1).

MR. MUNZINGER: What page?

MR. FRITSCHE: Nine.

MS. WINK: This is on page nine.

MR. WATSON: You're right. I'm on (2), sub (e)(2). I'm sorry.

MS. WINK: No, that's fine.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: Occasionally I'll set a temporary injunction hearing without getting a TRO, and are you going to accommodate that procedure somehow through these rules if we skip the TRO stage and just go --

MS. WINK: If you do that, and I'm trying to remember how I did that. I think I put something in here that said you get a show cause order, but we can make sure that that's in there. I remember making note to it. Let me just make sure at the end of mine that I've covered that.

CHAIRMAN BABCOCK: Richard, do you have to have a show cause order? Can I go to court and say, "Judge, set my application for a temporary injunction," and you just get it set and then you give notice to the other side?

MR. ORSINGER: Yeah. People do that, and I've never been entirely clear on what a show cause order is, because you if you read it literally it says if you don't show up you're going to lose because you have to prove why I shouldn't do all these things to you. So it's

got the burden of proof backwards, and I've never really understood why or how we can turn the burden of proof and put it on the defendant, but the show cause order is traditionally seen as a prerequisite to issuing the capias warrant for the person that doesn't show up for the hearing, because if you just get notice of a hearing and you don't show up, well, you may lose the hearing, but you don't get a warrant out for your arrest. So I think at least in practice over the years there's been this association that if you might go to jail just for not even showing up for the hearing then you should get more than just a fiat served by 21a, if -- you see what I'm saying.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: You can't put them in jail unless they're there in front of you.

MR. ORSINGER: No, I'm talking about the capias when they don't show up.

HONORABLE STEPHEN YELENOSKY: Right.

MR. ORSINGER: When they don't show up for a contempt hearing then you issue a capias for their arrest.

HONORABLE STEPHEN YELENOSKY: Right.

MR. ORSINGER: To be held until they can be brought into court.

HONORABLE STEPHEN YELENOSKY: Yeah. No, we're in agreement on that, and on the show cause, I mean,

in family law we -- sometimes you need to order them to appear and show up to demonstrate what their income is, and orders to appear make sense in those contexts, and hauling somebody in makes sense when you have to have them in front of you to adjudicate the contempt motion. I don't know what the purpose of show cause is, because whatever the burden is you can't shift it. I don't know why we still use that term. In my opinion we should just -- if you need it and typically what we do is call it an order to appear.

MR. ORSINGER: I agree with that, but to me it's important to understand that if you're ordered to appear and you don't appear, there will be a civil arrest warrant issued for you, but if some lawyer just sets a temporary hearing and serves your lawyer through the mail, you can't go to jail just because you don't show up for that hearing.

HONORABLE STEPHEN YELENOSKY: No.

MR. ORSINGER: To me the jail -- the warrant that goes out for your failure to appear has to be a violation of a court order.

CHAIRMAN BABCOCK: Right.

MR. ORSINGER: You see what I'm saying?

MS. WINK: Also, Richard, you had asked, if you'll look at the bottom of injunctive Rule 5, proposed

supportive commentary for injunctive Rule 5, the part that is proposed to be binding. It's the last sector down there.

MR. ORSINGER: Are you on page 11?

MS. WINK: We are. Bottom of page 11 and top of page 12. We made note that sometimes practitioners will elect to apply for a temporary injunction without first applying for a TRO. "If the party sought to be enjoined has already been served with process and has answered the lawsuit, notice of the temporary injunction hearing can be made by service of the notice of hearing under Rule 21a." That's the input we had from the committee last time. Otherwise, notice of the temporary injunction must be served in the same manner as the citation.

MR. ORSINGER: I agree with everything that you wrote there, and the only thing is I don't know if you want to mention this or not, but the whole idea about issuing a capias because you don't show up would not apply if you're under that provision.

MS. WINK: Okay.

CHAIRMAN BABCOCK: Professor Dorsaneo.

PROFESSOR DORSANEO: Well, I always thought the show cause order was just a substitute for a subpoena. That's all it ever -- all it ever was, and that's all that

it should be used for, and I don't know if these elaborations that Richard is talking about, you know, about you've got to have -- you need to -- you know, this tool, you need a capias, you know, rather than a -- rather than some other thing. I think that's all just what -- I don't -- that may make sense, it works fine. People want to do that, fine, but thinking about the show cause being more like a subpoena, you know, works just -- works just as well, if not better, and the subpoena rule says, you know, you can be punished by fine or confinement or both if you violate a subpoena and that's what the -- that's what the show cause order mechanics ought to be.

CHAIRMAN BABCOCK: Bill, despite the language of the show cause order, the effect of it is not to shift the burden of proof, is it?

PROFESSOR DORSANEO: No. No. That's --

CHAIRMAN BABCOCK: I mean, it says show cause why you shouldn't be enjoined.

PROFESSOR DORSANEO: That's in part what I'm trying to say here. It's just a fancy subpoena in this context. It's just an order to appear.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, and I don't know, it may be beyond what we're doing here, but in the interest of plain language I wish we would move away

from language we don't need because it isn't -- you know, you've presented a motion to come in and show why you shouldn't be held by contempt, come in and they have to prove that you should be held in contempt. So somewhere, somehow, we should stop saying that.

CHAIRMAN BABCOCK: Yeah, Skip, and then Judge Wallace. Sorry.

MR. WATSON: Let me just follow up on the little bitty point I was trying to make, and this is just ignorance on my part, but in both the "therefore, you're commanded" part of the TRO and of the temporary injunction part, just reading it without being familiar with this area, I don't get why we would command them to obey up until the time specified for the start of the next hearing, be it the temporary injunction or the trial on the merits. It would seem to me logically, if you're commanding somebody to obey, you know, don't take the Krugerrands across the border, that you would make that until an order is issued at the conclusion of the temporary injunction hearing or the trial on the merits. Why stop when you hear "Oyay, oyay."

MS. WINK: No, you've got a good point, and we addressed that in the permanent injunction part because I can assure you that part, that particular writ language is more specific. Let me go down to it, and then let me

come back to the TRO and your key question. In the one where we're referring to the permanent injunction -- the permanent injunction, we're saying -- I'm sorry, the temporary injunction one says "until further order of the court or rendition of the judgment of the trial on the merits of the ultimate relief requested." So for the temporary injunction one we really said not just when the trial starts, but until you're either ordered otherwise by the court or when rendition of the judgment comes in.

MR. WATSON: Just for what it's worth, on page nine that's not what the order they're getting is saying.

MS. WINK: Right. Right. Wait, wait, wait. Remember, we've got three different writs.

MR. WATSON: I get it.

MS. WINK: We've got one that's the TRO, one that's temporary injunction, and the last one is a permanent injunction. So, now, going back up to the one you're concerned about, which is the TRO, you've got a valid point. There are two things to be concerned about. One, the temporary restraining order ceases to be effective by its own terms either on the day of the hearing, unless it is extended by the court, and if the court has run out of its one extension for a maximum of 14 days then it can only be extended by agreement.

MR. WATSON: But does it run out on the day of the hearing when the hearing starts or when the hearing is over?

MS. WINK: Traditionally the language has just told them to cease and desist, follow this order until the hearing.

HONORABLE STEPHEN YELENOSKY: The language in orders?

MS. WINK: The language --

HONORABLE STEPHEN YELENOSKY: Not the language in the rule. Because that's not what orders I sign say.

MS. WINK: I'm with you. The language in the rules has said that.

HONORABLE STEPHEN YELENOSKY: Says -- where does it --

MS. WINK: The language in the rules. Hang on. Go back to it. Again, we've got to find the right rule.

MS. SECCO: It's 687(e).

MS. WINK: Well, you're looking at the draft, right? That tells us when it's returnable and it tells us how long it lasts. Part of the trick is this is the first time we've gone to the trouble of putting a draft writ in here. The initial draft -- this is on its I

think third iteration. The initial draft was based on literally writs that I had in my files issued by Dallas County, Harris County, and several others, so we're just dealing with tweaking the language to get it right.

HONORABLE STEPHEN YELENOSKY: Well, if there's something in here that says it expires at the beginning of the hearing or on the day of the hearing, I guess I haven't seen that, and point me to it, but the temporary restraining orders I sign say, "This order expires 14 days from the date signed" because that's the outside limit.

MS. WINK: Right.

HONORABLE STEPHEN YELENOSKY: If I hold a temporary -- and it sets a temporary injunction hearing. You're right, it requires that. The temporary injunction hearing could be set three days before that. Let's say we start the temporary injunction hearing and continue it. It doesn't expire in my mind and not by the terms of my order. It only expires 14 days from signature, and there's a time on that signature, or if sooner by issuance of some order of the court.

MR. WATSON: Yeah, I just -- the language on 8 and on 9 regarding if the writ of temporary injunction -- you know, if it's a writ of temporary injunction, just seemed to me to open a window, and I assumed that the

answer was going to be, well, dummy, it's because the person is standing before the judge who is going to hit him with the hammer if he, you know, does something contrary to the order, notwithstanding what the writ says.

HONORABLE STEPHEN YELENOSKY: Well, I agree with you, subject to being corrected, because I'm in conflict with the rule. I wouldn't use the language that's in 9.

MR. WATSON: Yeah.

MS. WINK: What would you propose that it say there, until --

HONORABLE STEPHEN YELENOSKY: "You must appear and prepare" -- I would say until -- if you're going to say that, "until 14 days from the date of signature or prior order of the court."

CHAIRMAN BABCOCK: Judge Wallace.

HONORABLE R. H. WALLACE: I agree with Judge Yelenosky. I don't think you -- I don't normally say that it's going to expire when the hearing starts. It can be "14 days or until further order of the court," and I think that covers it.

My other comment was I still don't like this language telling them where you will appear and show cause why a temporary -- I'm talking now on the writ for the temporary restraining order -- and show cause why a

temporary injunction should not be issued as prayed for. If that's not the burden that they have then let's don't say it. And, secondly, why do they have to appear? When someone is served with citation, it doesn't say you have to appear. It says you may, and if you don't, a default judgment will be entered against you. There's nothing that says someone has to appear for a temporary injunction hearing.

CHAIRMAN BABCOCK: That gets back to Bill's point that a lot of people just use this as a substitute for a subpoena because they want -- they want the defendant present at the hearing.

HONORABLE R. H. WALLACE: They don't do it in the 96th because I strike that out.

CHAIRMAN BABCOCK: Yeah. Well, and if I'm in the 96th and I want the defendant to show up, I'll go subpoena him.

HONORABLE R. H. WALLACE: Yeah.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: I want to make sure I'm looking at the same language everybody is talking about. I have a hard time hearing because you people down at that end think you're talking amongst yourselves, but you're talking to a bunch of us and some of us are old and have bad hearing.

MR. ORSINGER: And cranky, too.

MR. MUNZINGER: I really would appreciate it if you would speak to the group as a whole because it's hard to hear sometimes. I'm looking at the language on page nine, in Rule (e), subpart (1), and I'm going to look at the sentence that begins in capital letters, "Therefore, you are commanded to obey all the terms of said order and that you cease and refrain from performing," et cetera, et cetera, "until hearing," and I understood Skip to be concerned that, in other words, when the hearing begins the order has lost its effect. Is that what your concern is?

MR. WATSON: I'm asking. I think it could be clearer that it's until further order of the court, at the conclusion of the hearing.

MR. MUNZINGER: I agree with that, and the other problem is that it seems to me that a hearing is -- you haven't had a hearing until the hearing has been heard. You don't have a hearing when it begins. The hearing is the hearing. I've listened to the evidence and I'm going to rule.

MR. WATSON: If you can hear it.

MR. MUNZINGER: If you can hear it.

CHAIRMAN BABCOCK: And if you don't speak up, we can't hear you.

MR. MUNZINGER: Well, I can hear myself, that's why I'm so loud, because I can -- it is why I'm so loud, and I apologize to you, but I don't -- you know, this is almost standard language. I don't have any problem with it. The hearing is the hearing, and it's not heard until it's heard. I think the rule is fairly clear.

MS. WINK: And if I may say something here, there's -- there's a little danger to saying "14 days" because sometimes a judge will issue an order that's only seven days long, because the judge -- he or she wants to rush us. That's okay.

HONORABLE STEPHEN YELENOSKY: But that's exactly the next point I was going to make. Why are we saying that at all in the writ? If you obey the order, and the order tells you how long it exists, that's what you look at. We risk a conflict between the writ and the order. We don't need to say anything after "abate the order," period. Everything after "until" can come out.

MS. WINK: Well, I think we should tell them that the order restrains them or requires them to do things.

HONORABLE STEPHEN YELENOSKY: Well, that's fine. That's before the word "until."

MS. WINK: Right. And I think we should tell them because the writ is supposed to tell them the

date of the hearing.

HONORABLE STEPHEN YELENOSKY: Well, it can tell them the date, but --

MS. WINK: Right.

HONORABLE STEPHEN YELENOSKY: But --

MS. WINK: We can fix that.

HONORABLE STEPHEN YELENOSKY: He's right. You don't have to appear.

CHAIRMAN BABCOCK: Bill Dorsaneo.

PROFESSOR DORSANEO: Yeah, the last -- I don't know where it is in the redrafted stuff, but the last sentence in Rule 680 says, "Every restraining order shall include an order setting a certain date for hearing." I mean, that's in there. It doesn't talk about until the hearing, you know, you -- it doesn't -- doesn't draft it that way. Just a separate standalone sentence that requires an order setting a date for hearing, and this language, Dulcie, that you've drafted is not -- "you must appear," this is not show cause language.

MS. WINK: Right.

PROFESSOR DORSANEO: It's a substitute for it.

MS. WINK: Yes.

PROFESSOR DORSANEO: It's what Judge Yelenosky wants in there.

HONORABLE STEPHEN YELENOSKY: No, it's what I would want for an order to appear, but I would not put it here, because you can get an injunction by default, and you can't arrest them for not showing up. I don't order them to appear unless somebody justifies that, so I wouldn't routinely put --

PROFESSOR DORSANEO: You would require them to get a subpoena if they want to have them there.

HONORABLE STEPHEN YELENOSKY: Exactly.

PROFESSOR DORSANEO: Well, it seems like just why not just do it instead of having to go to the subpoena rules?

MS. WINK: If I may say, one reason it says "you must appear" and at the end we have the language that says if you fail here's what can happen --

CHAIRMAN BABCOCK: Speak up.

MS. WINK: -- is our input from all of you last time said, "Make sure they know that they need to show up." So, again --

PROFESSOR DORSANEO: Yeah.

CHAIRMAN BABCOCK: Well, we will be inconsistent from meeting to meeting.

MS. WINK: Okay. I'm okay with that.

CHAIRMAN BABCOCK: And as the wind blows. Pete.

MR. SCHENKKAN: I'm listening to this discussion, and I wasn't at the last meeting, so I'm not guilty of inconsistency on this, just ignorance --

MS. WINK: Yet.

MR. SCHENKKAN: -- but it sounds to me like this paragraph that begins "Therefore, you are commanded" needs to serve two functions, and maybe for clarity it would be nice if we broke them out into two paragraphs or sentences with a space in between so there wasn't -- the first one being simply "Therefore, you are commanded to obey all of the terms of said order," and since we want them to know that the order tells them to do something or stop doing something "and that you cease and refrain from performing all the acts said order restrains you from performing," period, and then a new paragraph that says, also perhaps in bold, "You are hereby notified that there is a hearing on the application for temporary injunction on," date, and then it's a notice provision, but it is not a command that you appear.

HONORABLE STEPHEN YELENOSKY: And the reason I wouldn't do a command and would leave it to subpoena is because we're all thinking about the cases in which everybody is going to subpoena them if it's not in the order. There are tons of family law cases in which they don't show up for the TRO and they don't show up for the

TI, but they obey it. Why should they be subject to contempt for not coming in just to concede? They're pro se. I don't want to command them to appear.

MR. SCHENKKAN: Would those two alone be -- is that kind of what we're trying to achieve here and good enough for that?

MS. WINK: I think I've already made part of your comment, and, Judge Yelenosky, would it be better if it said -- if we just took out the words that are currently in there that say, "You must appear," and it says, "when and where you should be prepared to contest."

HONORABLE STEPHEN YELENOSKY: Well, I don't know if you want to do the drafting now or if this is being sent back. I'm happy to respond, but I don't know if that's what Chip wants me to do, so --

CHAIRMAN BABCOCK: Well, I think, you know, we've dedicated the rest of the day today and tomorrow morning to getting as far as we can on these ancillary rules so that --

HONORABLE STEPHEN YELENOSKY: Do you want me to respond then?

CHAIRMAN BABCOCK: Yeah.

HONORABLE STEPHEN YELENOSKY: I would say, "Therefore, you're commanded" all the way through the bracket, I guess, and then as Pete suggested, a new

paragraph, "A hearing will be held on the temporary injunction and you should be prepared to contest and defend against the application," blah, blah, blah, but not commanding to appear, and then obviously dropping the "if you fail" sentence because they're not commanded to appear.

CHAIRMAN BABCOCK: Okay. Richard.

MR. MUNZINGER: I would take issue with the last part of what Judge Yelenosky said. I would have it say, "When and where," comma, "if you intend to contest the -- the issuance of the injunction," comma, "you must appear," because I believe that's a true statement of law, and it tells the litigant that they need to be there. The last sentence does not say to -- that a person will go to jail for not showing up.

HONORABLE STEPHEN YELENOSKY: You're right.

MR. MUNZINGER: It says if you fail to appear the court can issue an injunction and put you in jail for violating the injunction, which I think is also an accurate statement of law, and I think it should remain there, because Richard points out and Judge Yelenosky knows, they deal in these family law matters with people that have high emotions, sometimes low education, et cetera, that I'm an American and you can't do that to me. Well, that's not really true. You're an American, but we

can do it to you because you didn't come in and contest it.

CHAIRMAN BABCOCK: What kind of nationality are you again?

MR. MUNZINGER: I'm an American, don't make fun of me, Chip.

HONORABLE STEPHEN YELENOSKY: Richard, you're right, but it draws my attention to the fact that the sentence says "if you fail." Shouldn't it say "if you fail to appear and defend"?

MR. MUNZINGER: The main thing is --

HONORABLE STEPHEN YELENOSKY: It's missing a word.

MR. MUNZINGER: Yeah. I think they need to be alerted to it, and it does not say they can go to jail for not appearing.

CHAIRMAN BABCOCK: Yeah. That's a fair point.

MS. WINK: Got it.

CHAIRMAN BABCOCK: Good. What other comments about this? Nina.

MS. CORTELL: I'm reluctant that my first comment of the day be so nominal, but it is.

CHAIRMAN BABCOCK: No, you never make nominal comments.

MS. CORTELL: It's going to be, completely. You haven't heard it yet. Instead of you saying "said order" do we have to say "said"? Can we say "the order"?

MS. WINK: I'm already going back through to say "the attached" and the --

MS. CORTELL: Oh, you already agreed to do that.

MS. WINK: We're [sic]ing ourselves against the "saids."

MS. CORTELL: All right. Sorry, I didn't catch that.

CHAIRMAN BABCOCK: All right. So it was not nominal at all. It was redundant.

MS. CORTELL: Repetitive.

CHAIRMAN BABCOCK: But it was not nominal.

MS. CORTELL: Touche´, touche´.

CHAIRMAN BABCOCK: Gene. Gene.

MR. STORIE: I may have missed it in looking through here, but don't we need to tell them somehow that if they violate the TRO they could also be subject to punishment? Because at the end it's if you violate any such injunctions. It just sounds like the temporary injunction, but what if they say, "Oh, stupid TRO, I don't need to pay attention to that."

MS. WINK: That could be added. If you like

it, Judge Yelenosky, that could be added to the end of the "Therefore, you are commanded to obey" paragraph.

HONORABLE STEPHEN YELENOSKY: Yes. He makes a good point.

MS. WINK: It is a good point.

CHAIRMAN BABCOCK: Okay. Yeah, Carl.

MR. HAMILTON: I just thought it might be easier for the person to understand if we said that you are to stop doing something instead of "cease and refrain."

CHAIRMAN BABCOCK: I always thought it was "cease and desist" anyway.

MR. HAMILTON: Well, it is, "cease and desist," and people don't even know what "desist" means.

MR. ORSINGER: But they know what "cease and desist" -- together they know what "cease and desist" mean.

CHAIRMAN BABCOCK: I think we should have a paren that says, "If you don't know what this means, Google it."

MR. DYER: Doesn't "cease" mean stop, but "refrain" mean don't begin?

MR. HAMILTON: Don't what?

MR. DYER: Don't begin. I may already be violating something, "cease" there does mean stop, but if

I haven't yet begun it but there's a reasonable chance for it, that's why I have to refrain from beginning.

MR. STORIE: That's good use.

MS. WINK: And I can assure you the "cease and refrain" language is in the existing forms in the counties that I went to.

CHAIRMAN BABCOCK: Really?

MS. WINK: Yes.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, I mean, if we're going to go on plain language let's go full bore and just say, "Don't do anything that the order tells you not to do."

MS. WINK: Well, now it's going to get confusing because it's also saying "and make sure you do the things that it tells you to do."

HONORABLE STEPHEN YELENOSKY: Exactly.

MR. SCHENKKAN: Those are two good sentences.

CHAIRMAN BABCOCK: "You read this order, and you obey it in all respects."

MR. SCHENKKAN: Even better, say, "Don't do the things the order tells you not to do and do the things the order tells you to do." That's plain English, which it may be that there's some folks that their education is

so poor in our system that wouldn't get it, but that's as far as we can go, Richard, don't you think?

MR. MUNZINGER: Yeah.

MR. SCHENKKAN: To making clear that it's self-explanatory.

MR. MUNZINGER: Pretty blunt.

MR. SCHENKKAN: Best we can do.

MR. MUNZINGER: Pretty clear, pretty blunt.

CHAIRMAN BABCOCK: What else? Any other comments about this? Okay. Let's move on to something else.

MS. WINK: I'm having a heart attack here. My grammar teacher is screaming in my head here. Hang on.

CHAIRMAN BABCOCK: Well, if you're going to announce that you're having a heart attack, speak up, because they can't hear you.

MR. ORSINGER: Before we leave the topic entirely can I ask a question? If we're going to go to an injunction hearing without a TRO, are you going to provide a directive for someone to appear that's similar to the one you've just described, or are you going to omit that and just let people make it up?

CHAIRMAN BABCOCK: I thought we just decided we're not going to order them to appear.

MR. ORSINGER: If we don't order them to

appear, we're giving them notice that if they don't appear then an injunction could be issued against them and they could be held in contempt if they violate it. The only place we put that language is at the end of the TRO. Many times there will be no TRO. There will just be the hearing and the warning that if you don't show at the hearing then these bad things can happen, and my question is should we put that in the forms, or should we just let people draft whatever they want?

CHAIRMAN BABCOCK: Yeah, Pat.

MR. DYER: I would say in the absence of drafting something else, in Harris County it's the show cause order. That's what they would typically do, so if we want to change a form then maybe we can prepare some language to --

MR. ORSINGER: It would just look like the second paragraph, kind of, wouldn't it?

CHAIRMAN BABCOCK: Right.

MR. DYER: Yes. But we have to get all of the clerks to stop calling it a show cause order.

CHAIRMAN BABCOCK: Okay, next.

MS. WINK: Those are the significant changes. Otherwise, what we have done is provide the input and the things that you voted on, and as best we could tell, if you didn't vote on it but it appeared that

the input was pretty well agreed, that is what is in here at this time.

CHAIRMAN BABCOCK: Okay. So there's nothing else that we need to discuss on injunction rules?

MS. WINK: Right.

CHAIRMAN BABCOCK: Okay.

MS. WINK: And, Chip, I'll get you another draft for the next time.

CHAIRMAN BABCOCK: All right.

MR. ORSINGER: Can I make a comment also?

MS. WINK: Uh-huh.

CHAIRMAN BABCOCK: Sure.

MR. ORSINGER: The truth is that even permanent injunctions can be amended for changed circumstances. Do you agree with that?

MR. HAMILTON: Can be what?

MS. WINK: I know they can in family court.

MR. ORSINGER: Even permanent injunctions can be amended for changed circumstances, so the last sentence of our -- last paragraph of our permanent injunctive order is actually not true. Now, anyone that doesn't hire a lawyer probably doesn't deserve to have a permanent injunction amended, but, you know, permanent injunctions can be amended, and this makes it look like they're good until the end of time. It doesn't bother me.

It doesn't happen very often, but I just wanted to say that it's, in fact, I think, a misstatement to say that you're permanently required to cease and refrain from those things.

CHAIRMAN BABCOCK: Okay. Justice Patterson.

HONORABLE JAN PATTERSON: I don't want to leave the impression that the plain language that was thrown out is helpful or indeed plain, and I'd like to suggest that we consider -- I like the use of the strong verbs of "cease and refrain," and but more than anything I like the word "obey." I think we ought to keep that in there. So if there is a change in that language let me suggest that it's something along the lines that you "cease and refrain or stop" or that you "cease violating any acts prohibited by the order," because I think one of the confusing words may be "performing all of the acts."

I don't think you necessarily cease -- "performing" goes with "refrain," but perhaps not with "cease," but that you not violate the acts that you're prohibited from engaging in, but also that you obey the terms of the said order. I think you can chop that into two phrases and use good, strong verbs and that that might enhance it more than watering it down to something that I think will make it more confusing, frankly.

MS. WINK: Okay.

CHAIRMAN BABCOCK: Okay. What's next?

MR. DYER: Attachment.

CHAIRMAN BABCOCK: Attachment. Let's go attach ourselves to this project.

MR. DYER: First off, let me give you the overall what we did with the four sets of ancillary rules that were similar enough that we tried to make them as much as possible use consistent language, application, respondent, applicant. We did this with attachment, sequestration, garnishment, and distress warrants. They all have so much in common that there was a lot that we could harmonize to make them all follow a very similar format.

So if we start with attachment, on your pages, what is in yellow is substantially from the rules that are cited in green from the existing rules. If it is not highlighted at all that means that we've added that. So I know that's reverse highlighting, but, I decided just to do it because I wanted to be oddly disquieted, but at any rate, we'll start off with (a). You'll see that in all of these to the extent possible we tried to give a heading for each subsection to make it very easy to read. The second thing that we did, and we may have to readdress this at a different time, we had included in each set of rules rules that are repetitive. For example, on

perishable goods. We have a perishable goods section that is virtually identical in each of these four sets of rules. We at first thought, well, why don't we pull that out, make it one rule, and say it applies to all of these.

One of the other things we wanted to do was to give the practitioner one set of rules to address one particular issue, so that if it were attachment the practitioner could go there and find all the rules that the practitioner needed that dealt with attachment rather than have to find several different places in the rules. It does take up more space, more paper. It's something we can address also. One of the other ones is amendment of errors. There is a separate virtually identical section for amendment of errors in each of these, but that's the reason why we did this, is we wanted to make the rules very accessible to a lot of lawyers who frequently don't handle these things. So we wanted to write them as much information as possible in a very easily readable form and with all of the rules in one section.

So if we start off -- and I guess one of the easiest ways to proceed through these is just to go through them and you can see where I've derived the language. So if we look at the very first one, all right, the only change that we've added there is we changed the language that says "or at any time during the process of a

suit." We thought just changing that to "before final judgment" made it clear. By statute a writ of attachment cannot be issued after judgment, and it wouldn't make sense in a sequestration issue either.

Then we go to subpart (b), which talks about an application. Each of these four sets of rules has a similar application format. So -- and with regard to each of them, attachment requires by statute in Chapter 61 that you state the nature of the applicant's underlying claim, and throughout all of these we've changed "plaintiff" to "applicant," whoever is seeking the writ of attachment, writ of sequestration, et cetera, and respondent as the person who is responding to that application. We felt that it made it more clear.

So No. (1) gives a trial court the basic context of the application. No. (2) says "State the statutory grounds for issuance of the writ." We have added in there rather than providing a comment that it comes out of Chapter 61. We used Chapter 61 generally rather than 61.001, et cetera, et cetera, because they may be renumbered, but we wanted to direct the practitioner to the chapter of the CPRC, and you'll note in the green section it says, "With the exception of 61.0021, which provides for attachment, sexual assault, and indecency cases the statutes require an applicant to state both

general and specific statutory grounds."

We've changed in part (3). The current rule says that the writ or the application or the court in its order must state the maximum value of property to be attached. I think that if you look at the CPRC it says it must be the amount of demand. To make it more clear we changed it to "State the dollar amount sought to be satisfied," and the reason why we've added that, to make it clear you can still attach a piece of property, even though it is more valuable than the amount of your claim. We want to make clear that that can happen. If you leave it just as the maximum amount of the demand and your demand is -- let's say it's $20,000 and can you attach a piece of property that's worth $30,000, does that mean you cannot attach that piece of property?

Well, the practice is you can. So we thought this would make this more clear. It's the dollar amount sought to be satisfied. So if I've got a 10,000-dollar judgment, a hundred thousand-dollar judgment, that's the amount I want to be satisfied, and then we leave it up to the officer serving the writ. They've got to make an attempt to value whether they've got sufficient property to meet that demand.

Verification, we've added the word "verified" in there. It's not currently in the rule, but

it's been added to comport with common practice that a verification is the same as an affidavit. If we go now to look at the order --

MR. GILSTRAP: Wait a second.

MR. DYER: Yes.

MR. GILSTRAP: Does it have to be verified now after the --

MR. DYER: No, as Judge Yelenosky was saying, no, you just need to know about 132.001.

MR. GILSTRAP: Okay. All right.

MR. DYER: (d)(1) reflects that a writ of attachment can issue ex parte. That's in the current rule. (d)(2) derives from the current rule. (3), from the current rule. And you can see we've -- if you look at the way that it's been formatted, it's been formatted with a lot of bullet points, if you will, to make it real easy for somebody to find what it is they need to address a particular question. Part (4), from the existing rule. Part (5), this is derived from Rule 592, which requires the order to specify the maximum value of property to be attached. Again, we've attached that to the dollar amount to be satisfied by attachment. Subpart (6) is derived from current rules.

CHAIRMAN BABCOCK: Yes.

MR. MUNZINGER: Back to number (5) a minute.

Amount of property to be attached, is the purpose of the order and was the prior case law to identify the property or to state its value? Because the amount of property, I've got three cars, you're going to do two of them, all three of them. Amount and value differ, and that kind of throws me a little bit.

MR. DYER: We actually chose the phrase "amount of property" rather than "value of property," because the dollar figure that is significant here is not the value of the property, not for purposes of the application. It's how much am I trying to get. That's going to be the amount of my claim. So to translate, amount of my claim to the property it's going to have to be the amount of property. Now, we do later on get into the value of that property, but at this point I'm not required to value the property because I don't know what it is. In attachment I just want a blanket order that allows the sheriff or constable to go out and seize property that will equal my demand or be a little bit more than my demand.

MR. MUNZINGER: So the point of No. (5) is to state the amount required to be satisfied by the writ.

MR. DYER: Yes. And if you want we could rework the title.

MR. MUNZINGER: It's the title that's

throwing me. That's what bothers me, and while I have the floor I want to go back, if I may, with Chip's permission.

CHAIRMAN BABCOCK: Sure.

MR. MUNZINGER: This point number (c), verification, I agree with Judge Yelenosky that the statute, the new statute, cures any problem that is raised by this paragraph, but I wonder if the Supreme Court of Texas wants to adopt a rule in the year 2012 which does not make reference to a statute that takes effect on January the 1st, 2012. It doesn't seem to me to be good form. It seems to me that the Texas Supreme Court will want to notify the -- recognize, rather, the difference between traditional verification, affidavits, et cetera, and taking advantage of a law which is intended to simplify that process and yet retain its integrity, and I don't think it would be a good idea for this committee to suggest to the Court that we ignore the distinction there. There's got to be some way of our -- I think the Court would want to recognize that change in the law.

CHAIRMAN BABCOCK: What do the Federal rules do on that?

MR. MUNZINGER: I don't know the answer to your question.

CHAIRMAN BABCOCK: Anybody know? Because they have a similar thing where they have a statute that

says -- a declaration that says this will satisfy, you know, an affidavit or verified pleading.

MR. GILSTRAP: The question is do their rules talk about affidavits, or do they talk about unsworn declarations?

CHAIRMAN BABCOCK: Well, Rule 56 affidavits.

MR. GILSTRAP: It does? Okay.

CHAIRMAN BABCOCK: I'm pretty sure it does.

MR. MUNZINGER: Well, one -- a simple cure, since section 132.001 of the Civil Practice & Remedies Code, according to what we've been handed, is entitled "Unsworn declaration," "The application must be verified or supported by affidavit or unsworn declaration," somewhere work that language in there as provided by law.

CHAIRMAN BABCOCK: Yeah.

MR. MUNZINGER: "By persons having personal knowledge of relevant facts," et cetera. My only point being I don't think the Supreme Court wants to adopt a rule in 2012 that ignores a very significant legislative change.

CHAIRMAN BABCOCK: Good point. Rule 56(c)(4) of the Federal rules says, "Affidavits or declarations." "An affidavit or a declaration used to support or oppose a motion must be made on personal knowledge," blah, blah, blah.

MR. GILSTRAP: Now, that may be the formula that we used henceforth, something like that.

CHAIRMAN BABCOCK: Uh-huh, yeah. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Two points. Richard, on your first point the content of (5) is dollar amount and maybe that's all you need to do to the title is change it to "Dollar amount of the property to be attached." On Richard's verification point, I guess it gets back to whether -- I mean, the Legislature has spoken certainly, and maybe right here the Supreme Court would be in agreement that an unsworn declaration is just fine, and maybe the Supreme Court would be fine everywhere we say "affidavit" it's just fine to have an unsworn declaration. They don't have a choice right now because the Legislature has said what it said. I'm just concerned if the Legislature changes that at all then we will have by rule what we no longer have by statute, so the point is just if the Supreme Court is going to add in unsworn declaration, my suggestion would be that they do it because they want that regardless of whether or not the statute requires it. I think it is a progressive change and useful. I think there are some areas where it could be problematic and most notably the probate situation.

MR. GILSTRAP: Why do you think the Supreme

Court might change it, for something like probate?

HONORABLE STEPHEN YELENOSKY: You mean the Legislature?

MR. GILSTRAP: Legislature, I'm sorry.

HONORABLE STEPHEN YELENOSKY: Yeah, and I don't understand probate. I'm just repeating what I've heard from probate judges who said they didn't really have input before that went through, and so maybe that's the only instance in which. The second point is just that we'll have an incongruity in the rules that could be resolved if people read the statute carefully, but you're going to have lawyers saying, "Well, here it says 'affidavit or unsworn declaration,' but in 166a it just says 'affidavits,' so clearly the Supreme Court meant us to have an affidavit," and the truth of the matter is, well, the statute says it applies in 166a as well, but it's going to be confusing either way.

CHAIRMAN BABCOCK: Well, and that's the point I made earlier, Judge, that I think it's Chapter 37 to the Civil Practice & Remedies Code where the anti-slap statute where they're talking about supporting or opposing a motion to dismiss. It just says "affidavit." It doesn't say "declaration."

HONORABLE STEPHEN YELENOSKY: And so my concern there is, yes, there is an answer. It can be

incongruent in the rules, but the answer is the same. You can use an unsworn declaration, but lawyers are going to get confused because part of the rules are going to use both and part of them aren't, and they're going to say, "If they meant both they would have said both," and do we want to deal with that problem.

CHAIRMAN BABCOCK: I just filed one, and I did an affidavit because I didn't want to open the door to that argument.

HONORABLE NATHAN HECHT: The Federal rules are inconsistent. Sometimes they say "affidavit or declaration" in Rule 56, but in the injunction or restraining orders rule it just says "affidavit."

HONORABLE STEPHEN YELENOSKY: Well, we can do better than that. We can be consistent.

CHAIRMAN BABCOCK: Justice Patterson, did you have your hand up?

HONORABLE JAN PATTERSON: I did. On No. (5), I thought where Richard was going and what you had said while ago was that you're identifying the property to be attached and the dollar amount to be satisfied, which are kind of two different --

MR. DYER: No, just the dollar amount to be satisfied, because at this point I probably don't even know what property is out there.

HONORABLE JAN PATTERSON: Okay.

MR. MUNZINGER: Chip?

HONORABLE JAN PATTERSON: But it's not the dollar amount of the property to be attached.

MR. DYER: No, it's the dollar amount of my demand, my claim.

HONORABLE JAN PATTERSON: Right. So I think what you want is "the property to be attached" and the order must state the dollar amount. Isn't that -- you don't want the dollar amount of property to be attached. Right?

CHAIRMAN BABCOCK: I think what Pat's saying is this is just the application, and he doesn't even know what property he wants attached because he doesn't know what property is out there. He just wants to -- he wants the applicant to have to say, "Hey, I'm owed 10,000 bucks."

HONORABLE JAN PATTERSON: But the dollar amount is what is to be satisfied by the attachment and not --

CHAIRMAN BABCOCK: Right.

MR. DYER: Correct. So maybe it's my claim for $50,000. That's the amount that I want satisfied by the property that I don't know yet but which hopefully the sheriff or constable will find later on.

CHAIRMAN BABCOCK: Yeah. Richard Munzinger.

MR. MUNZINGER: The use -- I'm back to No. (c) again, "having personal knowledge of relevant facts that are admissible in evidence," and I read that as saying that the facts supported by the verification or the oath must be admissible, and that's the intent of it. At the same time, I'm -- I don't -- is that new language, or is that language from an existing ruling?

MR. DYER: The yellow language is substantially the same as what appears in most current rules, including the --

MR. MUNZINGER: And that's what I thought, and here's what causes me the problem. If I come to court, does the judge or the clerk of the court, "Raise your hand. You're about to testify under penalty of perjury. Go ahead and testify." That isn't what happened. And so this is now talking about admissible into evidence, and I look at the dadgum Civil Practice & Remedies Code, and I'm not sure that the Civil Practice & Remedies Code provision would be applicable to a fact that is offered into evidence.

MR. GILSTRAP: Because it's got to be sworn to before a specific officer, and the 132 says this section does not apply to the oath of office or an oath required to be taken before a specific officer.

MR. MUNZINGER: Well, I'm not -- I looked at it. I hate to be drawing the -- you know, the fly speck on the head of the needle, but the point of the matter is if you're going to offer evidence in an affidavit and the rule says it's admissible into evidence, it ought to be -- I question whether you can just say it's penalties of perjury. You couldn't do it in trial, I don't think, under the current rules and the current law. You would require a person to say -- we all have problems. Some people say they don't want to use God and some people do, but regardless of whether you want use God or not, "I promise to tell the truth, whole truth, and nothing but the truth," comma or period, one of the two, and that's how evidence comes in. I know I'm talking under penalty of perjury. That isn't the way evidence comes in, and is that a change here? Is that substantive?

CHAIRMAN BABCOCK: Orsinger, then Carl.

MR. ORSINGER: I think we discussed this under the injunction rules, and I don't remember how it was resolved, but, you know --

MS. WINK: Painfully.

MR. ORSINGER: -- hearsay is admissible if it's not objected to. Hearsay is admissible if it's not objected to, but it's inadmissible if it is objected to, so when you say that "evidence that would be admissible"

are you saying evidence that would be admissible over proper objection, in which event you cannot put hearsay in an affidavit?

MS. WINK: Let me back up so we don't misstate what happened in the injunctions. We had the conversation, especially when it came to TROs, as opposed to temporary injunctions --

MR. ORSINGER: Right.

MS. WINK: -- because sometimes people will put hearsay in an affidavit and state the information and belief, the grounds for information and belief. The rule as it currently sits to attachment -- the rule as it currently sits in attachment requires that the affidavit set forth facts as they would be admissible in evidence, so you've hit the nail right on the head. Perhaps we have an absolute conflict, yes. In parts of the injunctive rules we've treated it the same way, where the facts have to be stated as they would be admissible in evidence. In other parts, not so.

MR. ORSINGER: Well, I would think that the policies would be very similar --

MS. WINK: Yes.

MR. ORSINGER: -- because this is an ancillary pretrial proceeding that's going to lead shortly to judicial evaluation, and do you get -- do you get an ex

parte attachment order to last until you can get an attachment order after a hearing? No?

MR. FRITSCHE: No.

MR. DYER: Well, you frequently get it ex parte. You don't want to tell them you're coming after property you don't even know what it is, because you won't find it, I guarantee you, if you tell them.

MR. ORSINGER: I mean, is there a policy reason to treat the required proof for an ex parte attachment different from the required proof for an ex parte temporary restraining order? Is there a policy reason to treat them differently? Because to me they seem to occupy the same place in the judicial hierarchy.

MR. DYER: Right. I don't see any reason to -- you're talking about treating them differently with regard to the admissible evidence.

MR. ORSINGER: Yes, exactly.

MR. DYER: No, there isn't. But my recollection is at the last meeting a lot of the judges said, "We frequently have to grant TROs based on hearsay," and that the resolution was there was no way to completely fix that by writing rules, let's let current practice continue the way it is.

HONORABLE STEPHEN YELENOSKY: Richard --

CHAIRMAN BABCOCK: I'm sorry, Carl, you had

your hand up, and then Judge Yelenosky.

MR. HAMILTON: I'm on a different subject, if you want to finish this one.

HONORABLE STEPHEN YELENOSKY: I'm on that subject.

CHAIRMAN BABCOCK: Okay. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Richard, I may be misunderstanding your point, but what it says is "supported by affidavit by persons having" -- "having personal knowledge of relevant facts that are admissible," and to me, I mean, the -- they have to be relevant facts that are admissible, which could be inadmissible for some reason other than the way in which they are proven up, and I think that's what it's referring to, and so I don't see the problem.

MR. MUNZINGER: I'm not sure there's a problem either, Judge. It seems to me that the intent is that --

MR. HAMILTON: Can't hear you, Richard.

MR. MUNZINGER: -- it's much like a --

HONORABLE STEPHEN YELENOSKY: Richard, we have some old people over here, too.

MR. MUNZINGER: Sorry. It's much like --

HONORABLE STEPHEN YELENOSKY: I'm speaking for others, of course.

MR. MUNZINGER: It's much like an affidavit supporting the motion for summary judgment. The affiant must state only those facts that are within his or her personal knowledge, and they should be admissible. They may not necessarily be admissible. It's up to the other party to object to them, and so we may have a problem here in the phraseology of this rule, but the point is or that I'm making is that it seems to me that judicial action is being taken based upon material offered into evidence before the court because the affidavit or whatever it is, the document, is the source of the evidence that allows the seizure of property by the state under an order of the state, and that is -- it's not being done on evidence that is admissible under oath, so help you God.

MR. GILSTRAP: Because a declaration is not admissible. Is that what you're saying?

MR. MUNZINGER: I mean, that --

MR. GILSTRAP: You can't stand up and say, "I declare." You've got to do it --

MR. MUNZINGER: Yeah. I mean, that's a problem. I'm confused by it.

MR. GILSTRAP: But then an affidavit is not admissible either. I mean, swearing before a notary is not the same as swearing before the judge, you know.

HONORABLE STEPHEN YELENOSKY: That's right.

Richard, I mean, the only solution to your problem would be to say you can only do it on oral testimony under oath, and clearly that's not what's intended. It's admissible -- the facts are admissible in court if presented in court in a manner in which they would be admissible in court, but I don't know why we even have to say that, why we can't just say "knowledge of relevant facts."

MR. MUNZINGER: I suspect that cures whatever problem, if there is a problem there, to stop the sentence after "facts." I mean, not to stop the sentence, but to remove the phrase "that are admissible in evidence."

CHAIRMAN BABCOCK: Uh-huh.

MR. DYER: Well, it --

CHAIRMAN BABCOCK: Pat.

MR. DYER: Oh, I'm sorry. I was just going to say, that comes from the current rules, and I think if we delete that aren't we saying, "Hey, it no longer has to be admissible, in admissible form"?

MS. WINK: We can put whatever hearsay we want.

MR. DYER: Which I think we -- at least this was my recollection at the last hearing. We implicitly agreed there are going to be circumstances where someone

is going to apply for a TRO where something drastic may happen, and it is based on hearsay, and you're going to err on the side of granting the TRO because you can sort it out later, but you can't unscramble the egg.

CHAIRMAN BABCOCK: Pete.

MR. SCHENKKAN: I'm way out of my league here on this topic, but I'm wondering if there is a material difference between an application for a TRO and an application for a writ of attachment that's relevant to this issue, and that is what happens later and what the cure is for a problem. The cure for a wrongful TRO is you come back in and you get it dissolved, which you can do very quickly; or you wait until that hearing, which is not supposed to be more than 14 days away, and at that hearing get it stopped; and in the meantime the harm is you've been prevented from doing something you were otherwise free to do.

Okay. That's different from writ of attachment, as I understand it, having never done one, but just from reading the rules I gather what we're talking about here is I need to grab a hold of some property that may be the only thing that could potentially satisfy my judgment that I hope eventually to get before the guy on the other side disappears with it so it's no longer available to be done with, and the remedy for me doing

that wrongfully is I've got to post a bond, and his remedy is he can replevy -- he can come back in and do a replevy and get the property back in the meantime, or he can wait until he defeats me and proves I'm wrong and collect on the bond. Aren't those two pretty different situations in terms of how worried we should be about whether the quote-unquote evidence is right or not? I mean, I don't really understand in a writ of attachment situation why we worry about this at all.

MR. FRITSCHE: And to follow-up, the respondent has a third remedy in that he or she can move for immediate dissolution of the writ on three days' notice, which is -- which you'll find further on --

MR. DYER: Less than three days, I thought.

MR. FRITSCHE: Yeah, it could be less than three. In Rule 8.

MR. SCHENKKAN: So to make a practical question, which is really what I'm trying to get at and maybe it has an easy answer, but I just don't know yet, why do we care much about the, quote, evidence on which a writ of attachment is based if the real remedies are these other remedies, the bonds and the ability to get it undone?

MR. DYER: Well, you certainly could have abuses. You could have someone say, you know, "So-and-so

told me that he owns this car," and you go out and attach that car, and it turns out that car is owned by somebody else.

MR. SCHENKKAN: I thought the writ of attachment was not for "take the car," it was "Go out and get some property to satisfy my claim."

MR. DYER: It is, but if you get some information you're going to want to try to use it. You know, you may not know what type of car it is or anything until, you know, the sheriff goes out there, looks around, or you give him some other information for him to locate it, but do we want -- well, my thought was we wanted to try to put down some parameters to guide this process while recognizing there may be certain situations that are so dire that it's okay to grant the order even though the evidence would not be admissible at trial.

CHAIRMAN BABCOCK: We're going to take an afternoon break here because our court reporter is exhausted, but when we come back why don't we let Pat take us through the rest of the rule without comment. We sort of got halfway through it and then nobody could restrain themselves. So we'll do that and then we can talk about, you know, whatever problems we see in the rule and get that behind us, so let's take a break. Thanks.

(Recess from 3:41 p.m. to 3:57 p.m.)

CHAIRMAN BABCOCK: Pat, I think you had gotten as far as ATT Rule 1(d)(5), when you were so rudely interrupted, so why don't you take us through the rest of the rule without interruption and then we'll go back and talk about the whole rule?

MR. DYER: Okay. (6) is derived from two different rules combined. (7) deals with the applicant bond, and the only change we've made from the existing language of the rule is to change it to "wrongful attachment." The current rule uses "wrongfully suing out the writ of attachment," but the statute says "wrongful attachment," so we made it more consistent with the statute, and it also makes more sense. Wrongful attachment is a cause of action, a claim, that has parameters, but wrongfully suing out the writ itself is a little bit unclear in meaning, at least to me.

Rule (8), we have made a change on the respondent's replevy bond. Now, keep in mind this is still at the stage where the applicant may be proceeding ex parte and the applicant may not know the particular property that he's going after, that he or she is going after. On the other hand, there may be instances where the plaintiff, the applicant, the creditor, does have specific information about assets. The applicant may or may not choose to provide that information to the court.

If the applicant does and the court has the means by which to determine a value then we have provided that the respondent's replevy bond as initially set forth in the initial order will be the lesser of the value of the property or the applicant's claim.

On the other hand, if the applicant does not know the value of the property or there is no evidence of the value of the property, then it's going to be set -- the replevy bond will be set at the amount of the applicant's claim. The existing rules grant the respondent the option of getting a replevy bond in the amount of the value of the property as determined by the sheriff or constable. The sheriffs and constables we spoke to said, "We'd prefer to be out of the valuation business. I know we can't get out altogether, but if we can take this part out of our duties it makes it easier for us." We will see at a later point that the sheriff or constable is going to have to make a determination at some point of value to be attached because they are the ones whose duty it is to go out and attach enough property to satisfy the demand. So we're not able to get rid of it altogether, but we were asked to incorporate that here.

The other thing is keep in mind that the respondent on less than three days' notice may move to dissolve the writ or may move to modify the amount of the

bond. For example, to come in and say, "That property is worth only $2,000, but you set the bond at a hundred thousand dollars, the amount of the applicant's claim. Reduce it to 2,000," and the court hears evidence and can do so.

Subpart (e), we've introduced this into all of these four sets of rules to provide for what happens when multiple writs are issued. You can get a writ of attachment to get property that's in, you know, all 254 counties if you wanted to, but we wanted to provide specifically that you may send them to different counties for service by the sheriffs or constables, and in the event multiple writs are issued the applicant now has a duty to inform the officers to whom those writs are delivered that multiple writs are outstanding. This is to prevent excessive levy.

That's the end on Rule 1. You want to just move right into Rule 2?

CHAIRMAN BABCOCK: No, let's talk about Rule 1 and see if we can -- if there are any other comments beyond what's already been made about Rule 1, and let's start at the top and talk about 1(a). Any comments about 1(a)? Going once. Okay, any comments about 1(b)? Seems straightforward. Carl.

MR. HAMILTON: 1(b)(3), as I understand it,

is what goes in the application, and 1(b)(5) is what goes in the order, but aren't those the same amounts?

CHAIRMAN BABCOCK: You mean --

MR. DYER: Yes.

CHAIRMAN BABCOCK: -- 1(d)(5).

MR. HAMILTON: (d)(5), yeah.

CHAIRMAN BABCOCK: Right. And that would be the same amount.

MR. HAMILTON: Same identical amount, one's in the application, one's in the order.

CHAIRMAN BABCOCK: That's right, isn't it?

MS. WINK: Yes.

MR. FRITSCHE: Unless the court determines a different amount. If for whatever reason -- it's not necessarily going to be the same amount because the court may determine after reviewing the affidavits that a lesser amount may need to be attached.

CHAIRMAN BABCOCK: Okay. Any more comments about 1(b)? All right. How about 1(c)? Yeah, Pete.

MR. SCHENKKAN: My suggestion based on our discussion is to just stop after "having personal knowledge of the relevant facts." I don't see why the rule needs to get into this evidentiary stuff at all.

MR. GILSTRAP: Well, I was looking at what the summary judgment rule does, and the summary judgment

rule requires -- makes the same requirement.

MR. DYER: Well, as do the existing rules for all four sets of these ancillary remedies, but I think we highlight to someone if this language is removed that's been in the rules for quite sometime, and why wouldn't you look at that and say, "Wow, I can now put anything in there. It doesn't even have to be admissible in evidence."

CHAIRMAN BABCOCK: Yeah, the summary judgment practice, Pete, as you know, if somebody has an affidavit supporting or opposing a summary judgment and it has a statement in there that says, you know, "I've got personal knowledge of this, and I know that my aunt told me that Joe's brother said that such-and-such happened," then the opponent is going to file an objection to that evidence and say it's not admissible because it's double hearsay, and I would think you would want to keep the same -- the same procedure and the same right in this rule. That is, that the opponent of the affidavit would have the right to say, "Hey, Judge, you can't rely on double hearsay or even any hearsay, I object to that. "

HONORABLE R. H. WALLACE: But he's not going to be there.

CHAIRMAN BABCOCK: Judge Wallace. What's that?

HONORABLE R. H. WALLACE: This is ex parte, right?

MR. SCHENKKAN: It's ex parte, and the remedies are different.

CHAIRMAN BABCOCK: That's a good point.

MS. WINK: If I may --

MR. SCHENKKAN: That's why I'm trying to understand what the function of getting into this evidentiary issue is in the writ of attachment situation, and I believe I'm about to hear the answer.

MS. WINK: I do have the answer, and I hope I don't wrap myself in the flag because I know we had a lot of that last time. When it comes to -- when it comes to these extraordinary writs they are an elevated standard, and they are an elevated evidentiary standard for a darn good reason. We're giving people remedies, and there may be ways to get around them later, but that's expensive, but we're giving people remedies that are highly unusual and irregular and have always required that heightened evidentiary standard. One reason we do that is some of these remedies are prejudgment. Not only are they prejudgment, they're ex parte, and sometimes the loss of one's property for a day is huge.

Classic, I have some clients that are California wineries. I assure you the loss of their

ability -- their picking processes for a day is key to their winery, so the reason we have these standards is to protect the public. If we start bringing that standard down -- and having worked with this task force and become much more familiar with these rules, hot dog, the possibilities for taking advantage of people unnecessarily is extremely high with these particular writs.

MR. DYER: I just want to add one thing to this because we discussed this -- I don't know if we discussed it at every previous meeting, but one of the things we did say is right now hearsay is admissible in evidence unless it is objected to. Admittedly, we're at an ex parte stage here. One of the suggestions was, okay, well, why don't we put a comment in that says something to that effect, and I think the overall response by the judges was, no, that just tells everybody go ahead and use hearsay. We'd prefer not to do that, but existing Rules of Evidence already deal with that problem.

Now, the judge doesn't have to grant an application. A judge may look at the affidavit, and the judge may decide it is so flimsy, no, I'm not going to grant your application this time. I need more information. Go back and get me some more information, so there are protections, but I think we see this in the injunctions also where you don't have time to get the

person who has the personal knowledge. Maybe they're too far away, but maybe you've just heard somebody is about to take your entire fleet across state lines, and the only form you can get that in is the person that just heard that on the phone from an ex-employee of the company. So is the judge going to say, based on the rule, "I'm not going to do this that because this is not in admissible form."

"Well, Judge, it's not objected to." Well, of course not. The defendant isn't here. I guess the judge does have that option.

MR. SCHENKKAN: That's my point, is that the decision that the judge is making, as I understand it, in this writ of attachment is by its nature -- needs to be ex parte because if you told the other side about it you couldn't get the writ of attachment in time for it to work.

MR. DYER: Right.

MR. SCHENKKAN: So we know the judge is going to be called on to make a decision that could do great harm to either side, depending on which way he makes the decision and which way turns out to be wrong, and I'm saying for a writ of attachment the protection that we're really relying on, I now see that it's two parts. One is the bond. He better -- if it's one that's going to, you

know, mess those wineries up for even a full day, that bond better be pretty big. But that isn't a question of whether this evidence would be admissible or not, and the other is if the statement in the affidavit is using 132, which now says even if it's not sworn it is under pain of perjury, the person who signed it can go to jail for lying, for saying they told me they were about to -- I heard from somebody who heard from somebody else they're going to take it out of state, actually nobody said anything like that, and they get to go to jail, but in neither case does it turn on whether the evidence is admissible.

MR. DYER: Right. That's the method. I mean, the affidavit, I think someone else earlier said the affidavit itself is not admissible in evidence. It's the facts that are contained within the affidavit, so whether it's an affidavit or an unsworn declaration, we're not looking at the format in which the evidence is. We're talking about the evidence that's in it.

MR. SCHENKKAN: No, I'm saying that it could even be that the material that is in the affidavit would not be admissible in evidence, but it is the sort of thing that could justify an emergency order. It's hearsay. It really is hearsay.

MR. DYER: Well, but hearsay is admissible

unless objected to, and this evidence at the ex parte stage is not going to be objected to.

MR. SCHENKKAN: But in the ex parte context, that's a distinction that is theological.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: I agree with Dulcie that current Rule 592 says that you have to have facts are admissible in evidence, and I agree with you if I offer hearsay that's unobjected to, it's admissible, and it is now evidence, not saying the quality that the fact finder wants to give it, but it would be a mistake in my opinion to remove the language admissible in evidence from the rule because the practitioners would interpret that, and justifiably so, as subject to change in the law. I mean, you would have to be a dumbbell lawyer not to realize that if the Supreme Court takes "admissible in evidence" out of the rule that would mean you changed the law. It's been the law since 1941 and --

CHAIRMAN BABCOCK: Justice Hecht.

MR. MUNZINGER: -- now we don't have admissible evidence. I would seize on it in a moment, and anybody would, and Dulcie's point again, and we've addressed it in the past is we are dealing with people's property.

CHAIRMAN BABCOCK: Justice Hecht.

MR. MUNZINGER: The courts are and you've got to be careful.

CHAIRMAN BABCOCK: Hold on, Justice Hecht. You got anything to say?

HONORABLE NATHAN HECHT: But even though it's ex parte, would it be grounds for moving to dissolve the writ if you came in and said, "Your Honor, we want to dissolve this because all of the grounds in the affidavit were hearsay, and we object to it, and they're conclusory, and there's no basis for it.

MS. WINK: Can I answer that? Why would we cause someone to have to hire an attorney to spend the money to go and get rid of something that they didn't meet the evidentiary standard for the first time, the standard we've been living under for 70 years in an extraordinary writ situation? I don't think we want to bring it down. The answer to your question is sure. Is it a ground, absolutely. I just don't want to turn these extraordinary writs into everyday practice. You know, it costs our clients so much more to go to court today than it did 15 years ago, and we hear that a lot of people feel like the keys to the courthouse door are not open to everyone anymore. If we make these expensive extraordinary processes everyday without requiring that heightened evidentiary standard that makes people say, "I've got to

be right, I have to do more to get to that standard to ask the court to do something unusual," I just don't think we ought to turn that over.

MR. DYER: Well, I think, yes, it would be a ground to dissolve it. The question is what else is the judge going to do at that point.

HONORABLE NATHAN HECHT: Right.

MR. DYER: The judge may say, "You know what, you're probably right, but I want to hear a little bit more on this," and now you've got someone who's made an appearance in the case. Maybe you can get an expedited deposition, but, yeah, it is a ground, but in and of itself, is it automatic? That's in the discretion of the court, and the court is going to want to hear, "Okay, you're saying you're losing a million dollars a day with this, okay, are you losing -- losing that much money," and the other side says, "No, no." You know, the judge can decide, all right, we'll have an expedited hearing on your motion to dissolve. We'll hear it tomorrow and then put the onus on them to get it done within that time to present it to the court, and the court may also address the issue of the bond thing.

CHAIRMAN BABCOCK: Pete.

MR. SCHENKKAN: It seems to me that the suggestion that the -- or the solution might be the

hearing on dissolution of the writ of attachment that at least judging by Rule 608, the existing rule on that, it contemplates that this is the point at which the plaintiff has to have admissible evidence, as I read 608. Currently 608, it has two operative provisions. One is it's the plaintiff's burden at that hearing to prove, you know -- to actually prove the writ of attachment, and unless the affidavits on each side are uncontroverted there has to be evidence. Now it really does have to be admissible evidence.

MR. DYER: But keep in mind, again, hearsay evidence, even at that stage, if not objected to is admissible.

MR. SCHENKKAN: I know, but now we have the defendant here. It's no longer ex parte. So to me this just further suggests we don't really need this actually at swearing out the writ stage because if the person has gotten the writ wrongfully it's going to be dissolved at this hearing, and now he's going to have to pay on the bond.

CHAIRMAN BABCOCK: Pete, this hearing does not have to be ex parte. It says it can be and probably mostly is, but doesn't have to be.

MR. SCHENKKAN: Well, as I understand it, as a practical matter, that's what's done.

CHAIRMAN BABCOCK: Mostly is, yes. Skip and then Richard. Skip.

MR. WATSON: I started out agreeing with Pete. The thing that is giving me pause is that my memory is that these are extraordinary writs in part because they involve something very remarkable, and that is state action, action by the state in moving in and seizing private property without there being any judicial findings, opportunity to be heard, opposition, or anything else, for the sake of doing justice, of being able to do justice, and it really does give me pause to think that we have the state seizing property without there being some form of a -- of at least a threshold as high as summary judgment or on other matters that must be met before the sheriff can go out and start seizing property, and that coupled with the fact that it's been in there, I understand the argument that it would -- that there is a very valid argument that it never should have been in there, but the fact that it has been in there and that has been the standard by which we have judged whether an officer of the state can commit state action under due process of law to seize property makes me tip away and say I think it needs to be in there.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: I second everything Skip

said. I wouldn't tip away. I would run as fast as I could, but the other point is Pete's version of this rule would put the burden of proof on the property owner to justify, "Give me my property back, Judge." It seems to me, as Skip says, that stood things on their head. It's my property. You ought not to be able to take it from me if you don't satisfy the Rules of Evidence in the law that we've had for all this time.

CHAIRMAN BABCOCK: Pat.

MR. DYER: I was just going to say it is the same evidentiary standard that's in our motion for summary judgment, so they're protected, and since *Fuentes vs. Chevin* the constitutional safeguard is provided by the post deprivation procedures that we have. So, I mean, it's already met constitutional muster, but to take out the language of admissible evidence might even call that into question.

CHAIRMAN BABCOCK: Anybody know who Chevin was? *Fuentes vs. Chevin*. Yelenosky ought to know that. Yes.

HONORABLE STEPHEN YELENOSKY: I never remember names in cases. *Brown vs. Board of Education*, I think that's the only one I know.

CHAIRMAN BABCOCK: Chevin I think was the Attorney General of Florida. Justice Patterson.

HONORABLE JAN PATTERSON: I do agree that we're not writing on a clean slate here and for that reason in part, but also, whenever we make reference to admissible evidence or credible evidence, it's very often to be contested, but what it says is that the party has to assert and believe that something is admissible in evidence or credible evidence, whatever the test is. It doesn't mean that it's always accepted by the court without test ever, or by the jury, so it's an assertion by the party, and it's our instruction to the party that you must assert evidence of a certain quality, and that I think is what this is, so I agree with Richard and Skip.

CHAIRMAN BABCOCK: Okay. Any other comments about that? Do we have a consensus that we ought not to -- that Pete's dead wrong on this and we should --

MR. SCHENKKAN: Pete's concluded he's wrong. It is a unanimous.

CHAIRMAN BABCOCK: Anybody -- anybody want to second Pete's idea of taking the "as admissible in evidence" out of this rule? Okay. So we'll leave it in. So let's go to 1(d), the order. Any comments? Yeah, Justice Gray.

HONORABLE TOM GRAY: Items (3) through (8) all begin with the words, "The order must," which caused me to focus on items (1) and (2), and the more I focused

the less I thought either of those should be under a heading entitled "Order." It seems to me that item (2), effective pleading, would be better as a new (d), and everything else knocked down one letter level, and then item (1), the more I studied it the more I realized how much was in that single summons. It talks about a hearing, it talks about an order, and it talks about that the hearing can be ex parte, and it just doesn't seem to me -- one, I would break up some of those pieces, and the hearing requirement especially would seem to be separate from the order. Of course, it says it has to be a written order, so I don't know exactly how I'd break it up, but I'd definitely separate the requirement that it -- that it be written from the -- the concept of the hearing, so --

CHAIRMAN BABCOCK: Pat, what do you think about that?

MR. DYER: Well, hearing, for example, with summary judgment motions, doesn't mean you actually have an oral hearing in front of the court. It can be done by submission, so --

HONORABLE TOM GRAY: No question about it, but -- I agree with that.

MR. DYER: So I'm not sure what your point is with regard to hearing. You're not asking what is the hearing.

HONORABLE TOM GRAY: My problem is that you're talking about having a hearing under a title that says "Order." Structurally, the way it is written is -- I'm not arguing that you need to have an evidentiary hearing or what we characterize as a formal record on the hearing or anything like that. It's just that there is a hearing that is required. I don't know why that requirement, that statement, is under a title that says "Order."

MR. DYER: Let me ask this. What if we moved (d)(1) up to (a) and following what's in (a)?

CHAIRMAN BABCOCK: Justice Gray, what do you think about that?

HONORABLE TOM GRAY: I think structurally it fits there much better than where it is.

MR. DYER: I have no problem with that.

CHAIRMAN BABCOCK: Okay.

MR. DYER: And then on (2), I agree we could make that a separate -- move that to a (d) and then make "Orders" subsection (e). And we would do that with the other three sets of rules as well.

CHAIRMAN BABCOCK: Okay. Everybody good with that?

MR. MUNZINGER: Could you say it again what your plan is now?

MR. DYER: Yes. On (d)(1) as it is right now will be taken out of there and moved up to follow the sentence in (a), so now (a) will read, "A writ of attachment may be issued at the initiation of a suit or at any time before final judgment. No writ shall issue except on written order of the court after a hearing, which may be ex parte." Then (d)(2), effective pleading, will be made into a separate subparagraph (d). Then order will become subparagraph (e).

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: In paragraph (3) are we going to provide for the writ to be returnable now or just the return of service?

MR. DYER: That's out of the existing rules, Rule 606 and the Civil Practice & Remedies Code 61.021, and they speak in terms of the return of the writ.

MS. WINK: To which court -- this is more specific as to which court you're going to make a return as opposed to do we need to redo this for purposes of the issues we discussed this morning.

MR. DYER: And the writ is actually a separate piece of paper entitled "Writ of injunction," "Writ of attachment."

MR. HAMILTON: But that's the process, isn't it?

MR. DYER: Well, it is a process, but it's not citation. It's not the same as citation, so you can file your lawsuit and request service of citation on the defendant, but at the same time you've applied for an ex parte writ of attachment, which you get delivered to the sheriff or constable before the defendant's been served with the lawsuit, and the sheriff or constable takes that writ and seizes property. Then that writ and how it was executed, what was ceased, a description of property has to be returned to the court who issued the writ.

MR. HAMILTON: So we're saying that's not covered under 692? 692 is the one we talked about this morning about not returning the process to the court, but only the return of service.

MS. WINK: You're talking about House Bill 692? 962.

MR. HAMILTON: Yes.

MR. DYER: That's the one we were talking about whether you had to return the original or whether an electronically filed one was good enough, right?

MR. HAMILTON: Yes.

MR. DYER: Okay. Well, the writ -- excuse me. The return is still filed. That issue was whether it's good enough if it's the original versus the e-filed one. We haven't addressed whether the return of a writ

can be e-filed. The way we have it proposed it would be the original writ that's returned to the court.

MS. WINK: And there's more distinction later in the attachment rules, in attachment rule No. 4, which relates to delivery, levy, and return of the writ itself. So we will get to the issue of whether or not we need to segregate the return and treat it like we did under the new House Bill 962 or otherwise. I know I'm going to make some tweaks to the injunction rules for that purpose, and based on what you guys do we'll see what we --

MR. DYER: We need to clarify this because I think we spent most of this morning deciding whether or not we could do more than just address citation, and I thought that the conclusion was we're addressing citation only and decided that we're not addressing across the board all processes. Is that not what we decided?

CHAIRMAN BABCOCK: I think -- no, I think what we decided this morning is, my recollection is, that we were trying to be faithful to the statute, which only talked about Rules of Civil Procedure requiring a person who serves process to complete a return of service, but I don't think that we thought that that was limited to citation, that it could crop up elsewhere, but only rules regarding return of service.

MR. DYER: Okay. I think we will have to address that. I think it's later on in the attachment draft where I think we had followed the return of service rules for citation, so we will may need to make changes there.

CHAIRMAN BABCOCK: Yeah, Richard.

MR. MUNZINGER: Subsection (2), effective pleading, "The application shall not be quashed because two or more grounds are stated conjunctively or disjunctively," and you say that's derived from Rule 592; and 592 says, "The writ shall not be quashed because two or more grounds are stated conjunctively or disjunctively," and you say "the application." I suggest that the whole sentence is unnecessary, both in Rule 592 and in this rule. Rule 48 says can you state claims alternatively. They can be self-defeating, et cetera. I mean, they can be inconsistent. I don't know why we would have to have that sentence. I know that something similar to it appeared in 592, but this says "application" as distinct from "writ," and I think it's unnecessary.

MR. DYER: Number one, I think you're right. This language appears in many, many rules, and it may be archaic because there was a time when you could quash something by saying, "This is disjunctive." You know, and I haven't heard an objection like that other than a

compound question, but I don't know, maybe it's because we don't want to let it go and it still surfaces in so many different rules and statutes, but we decided to use "application" rather than "writ," because it's the application that states the grounds for the issuance of the writ. The writ itself isn't going to be disjunctive or conjunctive, so that's why we changed it to "application." We felt the prior rule was wrong in using the term "quash the writ" as opposed to the application.

MR. WATSON: But it's still not necessary.

MR. DYER: Well, but if we take that out, I mean, it's in so many of our different rules. I believe isn't it even still in our pleading rules that it's not subject to attack because it states that it's conjunctive or disjunctive? I mean, state alternative claims. Do we want to get rid of that?

CHAIRMAN BABCOCK: At the very least it seems like it's misplaced in the section on an order.

MR. DYER: Well, no, but we've already agreed to move it up to its own subsection (d).

MR. GILSTRAP: I think Richard's point is it's already in the pleading rules, so why do we need to repeat it. That's what I understood.

MR. MUNZINGER: That is my point, and it's the practice. I mean, I can't imagine appearing before a

judge and saying, "We set it disjunctively, Judge." You can't get that. I would be laughed out of court.

CHAIRMAN BABCOCK: Don't underestimate yourself.

MR. MUNZINGER: I'm laughed out of court a lot.

CHAIRMAN BABCOCK: Okay. Any other comments about the attachment Rule 1(d)?

MR. SCHENKKAN: Yeah, and -- I'm sorry.

CHAIRMAN BABCOCK: Gene had his -- was polite and raised his hand, so we'll recognize him first.

MR. STORIE: On (5), I think I heard you say earlier that's going to make it easier to attach things because the value won't be certain, but I assume that the balance protection for being overaggressive would be that you've got an applicant's bond and respondent can come in and change the terms of the --

MR. DYER: Yes.

CHAIRMAN BABCOCK: Pete.

MR. SCHENKKAN: On (7), the applicant's bond, the second sentence, there are two different versions of wording that's like that sentence in current rules, one in 592 and one in 592(a). The language in 592 makes it very clear that -- or relatively clear that "in the event the applicant fails to prosecute the suit to

effect" is one criteria of the bond, and "to pay all damages and costs of wrongful attachment" is the second one. Are they two different things? Because the wording we've got proposed in (7), if I hadn't read the two rules I would think we were talking about one thing, an event, wrong -- failure to prosecute and resulting damages.

MR. DYER: Your question is are they two separate --

MR. SCHENKKAN: I'm really asking the question. If these are two different things shouldn't we make it clear they are two different things? If, in fact, they are the same thing, okay, it's fine if it looks like they're the same thing. I don't know whether they're different or not.

MR. WATSON: So is the question should the "and" be an "or" I think?

MR. DYER: No, it's "and." It's got to be both. The court has to address both.

CHAIRMAN BABCOCK: Okay. Carl.

MR. HAMILTON: No. (6), "the order must command the sheriff," it should be "sheriff or constable" instead of "and," I think.

CHAIRMAN BABCOCK: You don't have to notify both, do you, Pat?

MR. DYER: No, but I'm trying to figure out

-- I think we struggled with this language, and I'm trying to figure out why. David, I defer to you.

MR. FRITSCHE: I think it was because this is in the order and not the writ. This is saying, "Any officer that receives the writ must levy," and so I think we were trying to be in the conjunctive there to capture every possible officer.

MR. DYER: Aren't there counties that have a sheriff but not a constable?

MR. FRITSCHE: And there's some counties that rely on the constable to serve extraordinary writs. Chambers County.

MR. GILSTRAP: You should just say "Any sheriff or constable." Period.

MR. HAMILTON: The current rules just say "sheriff or constable."

MR. DYER: Well, I think we were trying to make sure that it was a sheriff or constable of a county in which property was located.

CHAIRMAN BABCOCK: Well, if you said, "The order must command any sheriff or constable of any county to levy," wouldn't that get it?

MR. GILSTRAP: Why don't you just say, "any sheriff or constable to levy on the property found in the officer's county"?

CHAIRMAN BABCOCK: There we go. What would be wrong with that?

MR. DYER: I don't know. But something in the back of my mind says we struggled with this language, and I just can't recall.

CHAIRMAN BABCOCK: Okay. What other comments? Yeah, Justice Gray.

HONORABLE TOM GRAY: Did we come to a resolution on a different title for No. (5)?

MR. FRITSCHE: We didn't, and I just think we should say "Dollar amount," period. And to follow that up, since we moved (d)(1) to (a) on the first page it seems like we have to revise that title as well, and I would suggest we just say "Issuance of writ" and delete the first "Pending suit required for," because adding a second sentence makes the title nonsensical.

MR. DYER: Got it.

CHAIRMAN BABCOCK: Okay. Any other comments?

MR. FRITSCHE: And did we decide to lose (d)(2) completely?

CHAIRMAN BABCOCK: Yes. Well, we decided -- we talked about eliminating it, but at a minimum moving it out of this section. And the Court has heard the discussion, so they can make a decision about this.

MR. WATSON: You're sure?

CHAIRMAN BABCOCK: Huh?

MR. WATSON: You're sure, because --

CHAIRMAN BABCOCK: I'm positive. I can hear Justice Hecht listening next to me. All right. Let's go to subsection (e). What comments on subsection (e), if any? Any comments?

MR. GILSTRAP: Why -- why do we need the words "at the same time or in succession?"

MR. DYER: You have some district clerks that will not issue a writ if one writ is already outstanding, so we wanted to make sure that the rules themselves spoke of writs being issued successively. Some counties you can go and say, "I want five writs because I've got property in five counties," and the clerk will give it to you.

MR. GILSTRAP: And they might say, "If you wanted two you should have asked for both at the same time," right?

MR. DYER: Right. Or they might say, "No, I can only issue you one writ, and you've got to return that writ before I can issue a second writ for a second county." So we wanted to make sure and clear to the clerks multiple writs can be issued at once or they could be issued in succession without requiring the return of

the prior writ.

CHAIRMAN BABCOCK: Sounds reasonable. Any other comments? Okay. Pat, why don't you take us through Rule 2 without interruption and then we'll go back and talk about problems that we see in Rule 2.

MR. DYER: Okay. (a), the requirement of the bond, almost all of this is derived from 592, 592a, and CPRC 61.023. The only major difference -- and this is something we'll have to address. The way we have it written in (a)(2) it says "with sufficient surety or sureties," but the statute actually requires for writ of attachment that there be two or more. That's not required for any of the other writs, but that's what the statute calls for. So if we wanted to follow the text of the statute, we would include "two or more" in subpart (a)(2). Other than that the remainder comes out of the existing rules in the statute.

Subpart (b) is new. We've added this to all of the writs just to clarify that in lieu of a bond the applicant has the same right to deposit alternative security, and that follows -- I can't remember the earlier rule, but there's a rule in TRCP that says where you are required to file this you may file in lieu of that cash, et cetera, so we've included that with regard to the bond.

Number or subpart (c)(2), two changes we've

made. The last sentence was changed to make clear that the court has to enter a written order on a motion. So that to make it clear that an oral order was not sufficient. The other thing in the second line of (c) at the very end, you'll see that we change it to "Any party may move to increase or reduce the amount of the bond." There may be, for example, situations where the applicant decides based on events subsequent to the application, wow, this bond is way too high, and the applicant itself moves to reduce the bond; or similarly, we've also added a provision that we'll address later on, what if there is a third party who claims an interest in the property that has been attached. We decided we should allow that party the right also to question the sufficiency of the bond and sureties.

One thing that I forgot to add that we should add, 592b in the rules is a form of the writ. Somehow in moving forward we dropped that form, so I would need to add it, and it may need to be tweaked to make it plain English, but I will add that.

MS. WINK: No "saids."

MR. DYER: What's that?

MS. WINK: No "saids."

MR. DYER: Yes, no "saids." And I think that takes us out of 2.

CHAIRMAN BABCOCK: Okay. Let's talk about 2 and see if we can finish that up before quitting time today. Rule 2(a). Yeah, Pete.

MR. SCHENKKAN: 61.023(b) says, "The plaintiff shall deliver the bond to the officer issuing the writ" and then it says, "The bond shall be filed with the papers of the case." Is that different from (a)(1)?

MR. DYER: No. I believe that we picked that up in a later rule dealing with return.

MR. SCHENKKAN: Okay.

CHAIRMAN BABCOCK: Yeah, Nina.

MS. CORTELL: I agree with the change on surety, but how do we rationalize not being consistent with the statute?

MR. DYER: We don't. We thought we would kind of highlight that to see what the Supreme Court might want to do about that. I don't have a problem just putting that into (a)(2). That is what the statute says.

MS. WINK: And there are multiple places throughout all of these extraordinary writs where that's an issue. That came up in injunctions as well. As I understand it, Elaine and Judge Lawrence visited here, and said, what do you want us to do? The trend is why should we have two or more today, ignoring the recent economic crisis, and the trend was one or more, giving the

flexibility, and for us to note wherever statutory changes would be required to address that.

MR. DYER: I think Professor Carlson said, "Draft it the way you want it," so we did.

MS. CORTELL: All righty then.

CHAIRMAN BABCOCK: There you go. All right. Any more comments on 2(a)?

All right. Let's go to (b). Comments on (b)? We've violated our rule of not trying to cite other rules, but if we don't then we're going to have to say a whole bunch more here than we do.

MR. DYER: You mean the reference to Rule 14c?

CHAIRMAN BABCOCK: Yeah.

MR. DYER: We could say "in compliance with the Texas Rules of Civil Procedure."

MR. GILSTRAP: Chip, I think the prohibition -- the convention is we don't cite to statutes because, you know, when the Legislature changes the statute we've got to change the rule --

CHAIRMAN BABCOCK: Yeah.

MR. GILSTRAP: -- but if we cite to other rules, we change the rules, we can change the other rule.

CHAIRMAN BABCOCK: Gotcha, good point. All right. Comments on 2(c)?

HONORABLE JAN PATTERSON: I have one.

CHAIRMAN BABCOCK: Yeah, Justice Patterson.

HONORABLE JAN PATTERSON: Well, with Nina's comment here, the last sentence I think should read, "After a hearing on the motion, the court must issue a written order."

MR. DYER: I have no problem with that.

CHAIRMAN BABCOCK: Should it be "application"?

HONORABLE JAN PATTERSON: Well, they've called it a "motion."

MR. DYER: No, this is motion practice on the review, so it would be after the hearing on the motion.

CHAIRMAN BABCOCK: Okay. Yeah, okay. Any more comments about 2(c)? Richard.

MR. MUNZINGER: The court's -- third sentence, "The court's determination may be made on the basis of uncontroverted affidavits setting forth facts as would be admissible in evidence; otherwise, the parties must submit evidence." The way I interpret that, if my -- I filed a motion and it's got affidavits in support, my adversary doesn't contest, and the court may rule one way or the other. If my adversary objects to the affidavits for some reason, I must put on evidence.

MR. DYER: Yes.

MR. MUNZINGER: That's the intent of the rule?

MR. DYER: Yes. But I will say now that you brought that up, it's not real clear what that means. "The parties must submit evidence."

"Well, I just did. It's in my affidavit."

"Well, it's controverted." Okay.

MR. MUNZINGER: And that's part of my problem because I have read cases where courts take affidavits, they're permitted to accept the affidavit into evidence, the other side can call whatever witnesses they want and refute it and do whatever; and the way you look at this it seems to me a judge could think, "Well, Munzinger objected to Frank's affidavits, we have to have a full blown hearing. Fly your witnesses in from Paris."

MR. DYER: Well, let me ask this. Would it solve the problem if we said, "The parties must submit other evidence"?

HONORABLE STEPHEN YELENOSKY: No.

MR. DYER: For example, it could be a deposition or -- but I think our point was or what our intent was, is if the affidavits are uncontroverted, there's no necessity for a hearing, the judge could rule. If it is controverted, there needs to be an evidentiary

hearing. I think that was the intent.

MR. MUNZINGER: Was there a similar requirement in earlier rules?

MR. DYER: Yes. It's in all of the existing rules.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: So, so, so the intent was, as Richard said, if it's controverted then you fly the parties in from -- well, hopefully not taking them away from Paris, but that is what you said.

CHAIRMAN BABCOCK: There's no airport in Paris.

HONORABLE STEPHEN YELENOSKY: That's what you would have to do, because you have to have live testimony; is that right?

MR. DYER: Well, it could be by deposition.

HONORABLE STEPHEN YELENOSKY: But absent a deposition --

MR. DYER: I'll go to Paris to take the deposition.

MS. WINK: Let's don't forget other documentary evidence as well.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: I think it's a little unclear on this three days. It's three days for controverting

affidavits to be filed, and if they're filed then who determines if they're really controverted and then do we have to have another setting for a hearing if we have to submit evidence, or how does that work?

MR. DYER: Well, it would be -- the court can grant the hearing. You know, less than three days, means I can grant it today. You've got to be at a hearing today or tomorrow.

MR. HAMILTON: But the hearing, the first hearing that the court grants, as I read the rule, would be for controverting affidavits to be submitted.

MR. DYER: Right.

MR. HAMILTON: And when they're submitted on, say, the third day, we don't know what the court's going to do, accept them or say, "We've got to have an evidentiary hearing" or what. So then we have to have another hearing after that, I guess, if the court decides we need evidence, or do we have to come on that same day prepared to put on evidence?

MR. DYER: I would think you --

MR. HAMILTON: We don't know whether we're going to need it or not because we don't know what the controverting affidavit says or whether it's even filed yet.

MR. DYER: Right. I would think you have to

have a subsequent hearing. The language that gives me trouble is "The parties must submit evidence." This is out of the existing rule, but they've already just submitted evidence. It's just that it's controverted, so --

HONORABLE STEPHEN YELENOSKY: Should it say "The court must hold a hearing"?

MR. DYER: Or "must hold an evidentiary hearing"?

CHAIRMAN BABCOCK: Justice Patterson, did you have something?

HONORABLE JAN PATTERSON: Well, I'm still struggling with that phrase. Could you say "if controverted"? And I think the ambiguous word there is "otherwise." Can you say "if controverted, the parties may submit evidence"?

HONORABLE STEPHEN YELENOSKY: Well, the very next sentence says "after a hearing," so it must mean there's a hearing.

CHAIRMAN BABCOCK: Skip.

MR. WATSON: I'm just wondering if the same type of evidentiary discussion we had before -- I think we all think we know what an uncontroverted affidavit is, but is there room here for the trial judge to exercise some discretion in saying, "Wait a minute, you're calling this

a controverting affidavit, but you have not controverted any material fact here; therefore, the filing of what you're purporting to be a controverting affidavit has not controverted facts; therefore, shouldn't we be focusing on whether the facts, the material facts, have been controverted before we start flying people in from Paris?"

MR. DYER: I agree with you. For example, someone files a motion to dissolve it, and the other files a controverting affidavit saying the sky is blue. It's a controverting affidavit in a general sense because it's filed in opposition to what is filed, but it is not truly a controverting affidavit, but I think under existing practice isn't that what judges do?

MR. WATSON: Well, I'm asking if we're giving them that discretion. I would hope so, if somebody files an affidavit that just simply in a conclusory fashion says, "I have personal knowledge and none of that is true, love and kisses, Joe." You know, is that enough, you know? I would hope not. I would hope the judge has discretion to say, "No, we're talking about controverting" -- "facts here controverted by an affidavit," and I would request that distinction be made.

MR. FRITSCHE: I think you could move the word "uncontroverted" to before the word "facts."

MR. WATSON: Right. I think so. I'm just

wondering if anybody else agrees with that.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: I do agree, and you have to retain "uncontroverted facts set forth in affidavits," so that the use of affidavits is obviously contemplated and encouraged, but Skip's point is -- I'm in agreement a hundred percent with it.

CHAIRMAN BABCOCK: Pete.

MR. SCHENKKAN: Solved it.

CHAIRMAN BABCOCK: Anybody else? Any further comments on Rule 2(c)? Yeah. Pat.

MR. DYER: I think we should clarify the party -- and what it means, "The parties must submit evidence." We're talking about a motion practice, which can be done by affidavit, so that the last sentence that says, "After the hearing on motion," doesn't necessarily mean it's following an evidentiary hearing. It can also be done by ruling just based on the affidavits, so it seems to me maybe it would be better to strike "The parties must submit evidence" and have "the court must conduct an evidentiary hearing."

HONORABLE STEPHEN YELENOSKY: Yeah.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Yeah. I mean, move "uncontroverted" to in front of "facts" and then say,

"If the facts are controverted the court shall hold a hearing, and after a hearing the court must issue an order."

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: I think it needs to be in two parts because otherwise people aren't going to know what to do. The first part ought to be like a summary judgment, you file your motion and if they file controverting affidavits which creates a fact issue you stop and then you have to have a trial. Here we ought to have a time period for the controverting affidavits and then if they're uncontroverted the judge can rule if they're controverted, and the judge determines they're controverted then he needs to set another date for the evidentiary hearing because the way it's worded we would have to have all of our witnesses there within three days ready to go in case he ruled that we needed to have an evidentiary hearing, and we may not need that.

CHAIRMAN BABCOCK: Okay. Any more comments on 2(c) of the attachment rules?

MR. DYER: So can I reread back what I think we've agreed on?

CHAIRMAN BABCOCK: Okay.

MR. DYER: We're moving "uncontroverted" from before "affidavits", to before "facts." And then

deleting "otherwise the parties must submit evidence" and substituting instead, "If the facts are controverted the court must conduct an evidentiary hearing," and then the last sentence would be "After a hearing on the motion the Court must issue a written order."

CHAIRMAN BABCOCK: Is that good? Justice Patterson.

HONORABLE JAN PATTERSON: If you delete the word "evidentiary," which I think is assumed by hearing, then that leaves the court open to either having a hearing or not having an in court hearing, so it can receive evidence and not have an actual court proceeding, I think.

MR. DYER: Well, but doesn't that ambiguate it? The court's already conducted a hearing to the extent it's reviewed controverting affidavits on submission, for example. I file a motion to dissolve with an affidavit, set it for submission, three days, the other side files a controverting affidavit, doesn't the judge, quote, "have a hearing"?

HONORABLE JAN PATTERSON: Well, that's true.

MR. DYER: So I wanted somehow to distinguish that hearing from what needs to follow.

HONORABLE JAN PATTERSON: Okay.

MR. DYER: And I don't know if "evidentiary hearing" is the way to do it because it also was somewhat

of an evidentiary hearing before because he had to determine that the evidence was controverted.

HONORABLE JAN PATTERSON: I think that's probably a good point.

MR. DYER: "The court must conduct another"?

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: Is there any requirement in what you contemplate writing that first affidavits may be used to establish a fact, which if uncontroverted -- this is what I understand we're hoping to do. Affidavits may be used to establish facts, which if uncontroverted may support the order. If the facts are to be controverted or are controverted, they must be controverted by either testimony or an affidavit meeting the same standard, a fact coming into evidence. The court is required to resolve disputes on controverting facts with a hearing. That's what we're trying to accomplish.

MR. DYER: Yes.

CHAIRMAN BABCOCK: Okay. We good? We good on this, on Rule 2? Okay. Tomorrow it really would be good if we could get through the rest of these attachment rules. I don't think we'll get beyond that, and let me just say that I know we're, you know, working really hard through the end of the year, thanks in no small part to the Legislature, and I really appreciate everybody coming,

and I hope that people can come tomorrow. We're down to less than half our committee today, and the quality of our work really suffers when we don't have a lot of people here, so if you can possibly make it tomorrow morning, 9:00 to 12:00, please do so.

And for those of you -- hopefully this doesn't apply to anybody. If anybody can't come tomorrow, here's what Justice Hecht and I talked about on upcoming events. We think in October we're going to have to do the parental rights termination cases, because there's a deadline in October for our comments on that. There's a task force that's been appointed to work on that. Justice Patterson is available, she says, to discuss the constitutional challenges to statutes in October, and Bill Dorsaneo is not here anymore, but I think he told Angie he could do security details, and then we'll continue and hopefully finish the ancillary rules. That's a very ambitious October schedule, but I hope we can get that done.

And then in November we'll have hopefully cases requiring additional resources, which is a big issue, small claims, and begin our discussion in November on the dismissal, the so-called loser pays rule, which is really not as much a loser pay rule as it's been touted to be, but nevertheless that one, and then finish that

discussion or continue it in December and in December talk about expedited -- begin to talk about expedited actions.

And as everybody knows, our term, this committee's term ends in December, and so I'd like to at least have our imprint on all of these things that we've been asked to comment on. I would be surprised if most of the people in this room, who are among the most diligent on this committee, wouldn't be re-appointed, but that's not my call, and there will be a new committee come January. So, anyway, that's it until tomorrow morning, and we'll see hopefully everybody at 9:00. Nina.

MS. CORTELL: Do we have a few more copies of -- what I brought apparently is an old copy, and we're out of these.

CHAIRMAN BABCOCK: You want more copies?

MS. CORTELL: In the morning.

MR. WATSON: There weren't enough in copies in the --

CHAIRMAN BABCOCK: Okay. One more thing before you leave, and this has to do with money. That got everybody sitting back down. Angie wants to tell you about new procedures for getting your expenses reimbursed, don't you, Angie?

MS. SENNEFF: Well, I didn't have a chance to get with the coordinator at the State Bar, but y'all

know that the Court is no longer paying -- reimbursing for your expenses. It's going to have to go back to the State Bar like it did several years ago.

MR. GILSTRAP: Does it go back to the old rate?

MS. SENNEFF: I have no idea. But I'll get the forms posted on the website on Monday.

MR. MUNZINGER: Is that now or in the future?

MS. SENNEFF: That's for this meeting.

MR. MUNZINGER: For this meeting.

MS. SENNEFF: Yeah. And from now on.

(Adjourned at 4:59 p.m.)

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MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

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I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 30th day of September, 2011, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are $ 1,959.00 .

Charged to: The State Bar of Texas.

Given under my hand and seal of office on this the 17th day of October, 2011.

D'Lois L. Jones

D'LOIS L. JONES, CSR
Certification No. 4546
Certificate Expires 12/31/2012
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