Study L-637 December 4, 2006

First Supplement to Memorandum 2006-45

Revision of No Contest Clause Statute (Discussion of Issues)

The Commission received the attached letters from Shirley Kovar, the liaison on this study for the Executive Committee of the Trusts and Estates Section of the State Bar. (Note that the committee now refers to itself as "TEXCOM.")

TEXCOM discussed this study at its November 11, 2006 meeting and conducted straw polls on the merits of various reform possibilities. The results of that meeting are discussed in the first letter, at Exhibit p. 1.

Ms. Kovar has also provided a letter explaining why TEXCOM sees fee shifting as the best way to deter unreasonable contest litigation. See Exhibit p. 8. The main points of the letter are discussed briefly below.

MERITS OF FEE SHIFTING

Avoid Need to Construe Instrument Language

Much of the uncertainty that can arise in enforcing a no contest clause results from the need to interpret the meaning of the clause. What conduct is it meant to deter? Is it meant to apply to an instrument other than the instrument that contains the clause? These questions must be resolved on a case-by-case basis, by construing language that may be poorly drafted or that may not account for present circumstances.

TEXCOM's proposal would circumvent that problem. Instead of relying on individually drafted no contest clauses, the statute would apply a fixed statutory rule penalizing any person who brings a direct contest of any testamentary instrument without reasonable cause. It would still be necessary to determine whether a particular action is a "direct contest" but it would not be necessary to consider whether the action falls within the intended scope of a uniquely drafted no contest clause.

The need to construe instrument language would be eliminated. Certainty would be enhanced.

Universal Application

The proposed fee shifting rule would apply to any direct contest, regardless of whether an instrument includes a no contest clause. There are three advantages to that approach:

(1) There would be no need to consider whether a no contest clause in one instrument governs another related instrument. All testamentary instruments would be subject to the rule.

(2) The availability of the deterrent would not depend on how sophisticated or well-advised the transferor happens to be. Unreasonable contest litigation would be penalized in all cases, without regard for whether the transferor realized the benefit of including a no contest clause in an instrument. TEXCOM believes that the typical transferor would welcome that result.

(3) The rule would apply to non-heirs. With a no contest clause, the transferor must make a sizeable gift to a potential contestant, or the threat of forfeiture is toothless. Fee shifting does not require a gift in order to deter. The transferor would therefore never be required to give a gift to a person that the transferor would rather disinherit.

PRE-TRIAL PROBABLE CAUSE DETERMINATION

TEXCOM believes that a pre-trial determination of probable cause should not be decided purely on the pleadings and affidavits. Especially in cases of fraud and undue influence, which are likely to require extrinsic evidence to establish, discovery should be permitted. However, that would turn the proceeding into a mini-trial on the merits, which would be duplicative and costly.

DISCUSSION

TEXCOM makes several strong arguments in favor of its fee shifting proposal.

However, the staff is somewhat bothered by the prospect that the decision of whether to penalize a contest, and the amount of the penalty to be imposed, would be taken entirely out of the transferor's hands. The primary rationale for enforcement of a no contest clause is to effectuate the wishes of the transferor. The TEXCOM proposal would replace case-by-case consideration of a transferor's expressed intentions with a fixed rule that is believed to provide the result that most people would want, if they thought about it.

There are many examples of this sort of approach in estate planning law. For example, the rules governing intestate succession are intended to effectuate the most likely intentions of a person who dies intestate.

There is an important difference. Intestacy is a *default rule*, which can be overridden by a person who actually intends a different result. The TEXCOM proposal would not provide a way to opt out. A transferor could not choose a different result.

The Commission should consider whether the considerable benefits of a one-size-fits-all rule would justify imposing such a rule on a transferor who intends a different result.

Respectfully submitted,

Brian Hebert
Executive Secretary

MEMORANDUM

TO: California Law Revision Commission (CLRC)
FROM: Shirley L. Kovar, Liaison of Trusts and Estates Section of State Bar of California (TEXCOM) to CLRC Study on No Contest Clause
RE: Summary of TEXCOM Straw Votes on CLRC No Contest Clause Study
DATE: November 28, 2006

I. Introduction

The TEXCOM met on November 11 , 2006, in its regular session and discussed and took straw votes regarding the enforceability of the no contest clause. In summary, the results of the November 11, 2006, meeting of TEXCOM, was to urge the CLRC to support the TEXCOM proposal for the following reasons:

- The TEXCOM proposal would **solve the "21320 problem**."
- The TEXCOM proposal would **deter direct contests that are not based on reasonable cause**.
- The TEXCOM proposal would **deter elder abuse** (fraud in execution of estate planning documents) and **facilitate court review of errant fiduciaries**.

II. In general, the **"21320 problem"** refers to the following concerns:

A. The **failure of section 21320 to provide certainty** that the filing of a pleading would or would not be a "contest," including the failure of subsequent statutes designed to increase that certainty:

1. Section 21305(b) has failed to provide certainty. **A court may find a pleading to be a "contest"even if the caption on the pleading cites an action listed in 21305(b)**. For example, the court would make its own determination of whether an action is one for "construction", which is protected, or a challenge to the testator's intent, which is a contest.

2. Section 21305(a) has failed to provide certainty. Section 21305(a) is **a broad statute** that contains dozens of opportunities that require a court to determine whether 21305(a) applies. *See, e.g., Estate of Zwirn v. Schweizer*, 134 Cal. App. 4th 1153 (2005),

3. The court in a proceeding under Section 21320 **cannot rule at all** whether a pleading is "frivolous" or in a case that requires a decision on the underlying merits of the proposed petition. *Estate of Ferber*, 66 Cal. App. 4th 244 (1998); Prob. Code section 21320(c).

B. The chill placed on a beneficiary's access to the court to respond to **elder abuse (in**

this context, fraud in the execution of estate planning documents) and **breaches of fiduciary duty by executors and trustees**.

1. Elder abuse

   Fraud in the execution of wills, trusts, beneficiary designations and other estate planning documents.

2. Breaches of fiduciary duty

   Since 21305(b) does not protect a pleading ultimately found to be "frivolous," and the court cannot rule on that issue in a 21320 proceeding, **valid actions against errant fiduciaries are deterred** due to the lack of certainty that any particular action for breach of fiduciary duty is protected by public policy. *See, Estate of Ferber*, supra.

C. The **delay, procedural nightmares**, and **cost** caused by 21320 proceedings and litigation.

1. The minimum **delay** in the most simple proceeding is 120 days (60 days to get on the court calendar; and 60 days for the appeal period to run); and that number is increased to two years or more when an order is appealed.

2. A 21320 order is "petition specific", which means a 21320 order protects only the exact wording of the proposed petition, and there is no protection for objections to a 21320 petition. Both of these problems require the filing of **multiple 21320 petitions** in the same case or filing the underlying petition without the protection of a 21320 order.

3. Our clients incur significant costs in a 21320 proceeding, and **any cost for a proceeding is unacceptable when it is as efficient and ineffective as a 21320 proceeding** has become to solve the problem of lack of certainty of the meaning of a "contest."

4. These problems are of particular concern since the 21320 problem **could be resolved by use of a single proceeding** on the merits of the underlying petition.

D. The **inefficiency** and **burden on the judiciary** caused by 21320 proceedings. (See the October 26, 2006, letter from the California Judicial Association.)

III. TEXCOM believes **any solution to the "21320 problem" must include repeal of Section 21320**, which, in turn, will require solving the underlying problem that Section 21320 was enacted to resolve, but has not.

A. Introduction.

The following are the results of the straw votes taken at the November 11, 2006, meeting of TEXCOM. The current composition of TEXCOM is about one-third litigators or attorneys who handle primarily contested matters and two-thirds practitioners who concentrate in estate planning and trust and probate administration. TEXCOM is comprised of highly-regarded trusts and estates practitioners with geographical diversity and are elected as members in part for their demonstrated dedication to improvement of California law in a manner that best serves the public good. The straw votes below do not follow from the area of practice of the TEXCOM member. The straw votes do follow from extensive first-hand experience with "the 21320 problem" and reasoned analysis of how to go about solving that problem. Unfortunately, simple repeal of section 21320 and related statutes, although an essential part of a solution, would not, alone, solve the underlying problem: the inability to define a "contest" with any certainty. The case law and exerience of trusts and estates practitioners attest to the uncertainty of the answer to the fundamental question: What is a contest?

The discussion and straw votes focused on three possible alternative approaches to the TEXCOM proposal to solving the 21320 problem: 1) retaining the enforceability of the no contest clause (NCC) against direct contests, but not against indirect contests; 2) enacting a probable cause exception; and 3) tightening strict construction of the NCC.

B. **Straw votes regarding enforcing direct contests**

The first set of straw votes dealt with enforcing the no contest clause against direct contests, but not against indirect contests. Six votes were taken to explore the position of TEXCOM relating to this approach. Each vote was taken to determine if there is an acceptable alternative to the TEXCOM proposal.

Each of the following votes combined **enforcing the NCC against only direct contests, and not against indirect contests**, with one or more other ways to attempt to ameliorate the 21320 problem. Question to TEXCOM: Would you support any of the following rather than the TEXCOM proposal?

1. Enforce NCC for direct contests; plus effective date reform.

   Vote: Yes 4 No 20

2. Enforce NCC for direct contests; plus attorney-fee shifting.

   Vote: Yes 2 No 22

3. Enforce NCC for direct contests; plus probable cause

Vote: Yes 8 No17

4. Enforce NCC for direct contests; plus strict construction

Vote: Yes 2 No 23

5. Enforce NCC for direct contests; plus all of the following: effective date reform; attorney-fee shifting; probable cause exception; and tighten strict construction.

Vote: Yes 3 No 22

6. **None of the above**

Vote: Yes 21 No 1

C. **Rationale of straw votes on enforcing the NCC against "direct contests."**

1. Enforcing the NCC against direct contests would create litigation over "What is a direct contest?"

a. There is **not a bright line** between direct and indirect contests.

b. A **direct contest is uncertain** when a NCC clause is in one document and the "contest" is against a different document.

2. An attempt to tighten strict construction would be futile.

a. Probate Code **section 21304 already requires** "strict construction", and case law has diluted the concept beyond recognition. *See, e.g., Burch v. George* 7 Cal. 4th 246 (1994)*; Genger v. Delsol*, 56 Cal. App. 4th 1410 (1997); and *Estate of Zwirn, supra*.

b. Section 21304 simply requires "strict construction," which can mean **whatever a particular court wants it to mean** in order to resolve the particular case before the court.

c. An attempt to catalogue in a statute the application of strict construction" to each specific circumstance is akin to "**pushing back the ocean**." Section 21305(a) took this approach, and litigation has already begun over the application of the statute. *See, e.g., Zwirn v. Schweizer, supra*.

3. The concept of "**probable cause**" **is a completely different issue** than "What is a contest?"

   The "21320 problem" arises from the uncertainty of "What is a contest?" Whether a contestant has "probable cause to bring a contest" first requires the answer to "Is it a contest?" The second question then becomes whether the contestant had "probable cause" to bring the "contest."

D. TEXCOM voted unanimously against a preliminary hearing to determine if there is "probable cause." The following vote was taken on the concept of a **preliminary hearing to determine probable cause**. The vote assumed the following: a) NCC is enforceable against both direct and indirect contests; b) no repeal of section 21 320; c) preliminary hearing whether contestant has probable cause to file the contest, as follows:

   1. The court would first determine in a preliminary hearing whether contestant has probable cause to file the contest.

      a. If the court determines "no probable cause," then contestant must pay all attorneys' fees for that phase of the trial.

      b. But contestant may withdraw contest without triggering forteiture.

      c. If contestant proceeds despite court ruling there is no probable cause, the NCC will apply unless it is nullified by a successful contest.

   2. If the court determines in preliminary hearing there IS probable cause, then NCC will not apply.

      Vote: Yes none No 25

E. **Rationale regarding preliminary hearing straw vote**

   1. **Probable cause** to file a contest **is a different issue** than "What is a contest?" Probable cause must necessarily be brought AFTER a determination of whether the action is, in the first instance, a "contest." Probable cause is not a substitute for a 21320 proceeding, which determines the threshhold issue of whether the proposed action is a "contest." Either there would have to be a 21320 proceeding prior to the preliminary hearing on probable cause OR the preliminary hearing on probable cause would necessarily include the same issue as in a 21320 proceeding, namely, is the proposed action a "contest."

   2. Even if it appears "clear" the action would be a contest, a preliminary hearing

would simply add **another layer of litigation**, which would not take the place of settlement negotiations or a trial on the merits of the contest.

F. The following vote was taken to determine support for a tighter standard for strict construction of the no contest clause as a cure for the 21320 problem. The vote assumed retention of the no contest clause in some form and application of Probate Code section 21304, which requires strict construction.

1. The **NCC must be in the same document subject to the contest**, and the document must be executed on a single date. For example, the NCC is in the original trust and contains a NCC. An amendment to the trust does not include a NCC. A contest to the amendment would not violate the NCC in the original trust.

   Vote: Yes 2 No 16 Abstain 5

2. **Forfeiture** for triggering the NCC must be limited to the **fund subject to the document** containing the no contest clause.

   Vote: Yes 1 No 11 Abstain 9

3. **No extrinsic evidence** to determine if NCC applies.

   Vote: Yes None No 22 Abstain 1

4. Should there be a **higher standard of proof** to invalidate an instrument?

   Vote: Yes 1 No 22

G. **Rationale** regarding straw votes on **strict construction**

1. TEXCOM in general believes it is **unfair and/or unworkable** to find a contest only when the NCC is in the same document subject to the contest. The rule of thumb in estate planning is the execution of multiple documents (e.g., will, revocable trust, irrevocable insurance trust, insurance policy designation, retirement plan designation, IRA designation, buy-sell agreement, education trusts, deeds, POD documents,etc.), and a "same document" rule may not carry out the intent of the testator.

2. TEXCOM in general believes it is **unfair and/or unworkable** to limit forfeiture to the fund subject to the document containing the NCC. Same reason as G.1 above.

3. TEXCOM in general believes it is **unfair and unworkable** to disallow

extrinsic evidence to determine if a NCC applies. The trend is toward admission of extrinsic evidence in order to carry out the intent of the testator.

4. There should **not be a higher standard of proof** to invalidate an instrument. It is already extremely difficult to establish the invalidity of an instrument, and this high bar already works against establishing elder abuse (fraud in the execution of documents). There is rarely direct proof of elder abuse, which must be shown by circumstantial evidence.

IV. **Conclusion. The TEXCOM urges the CLRC to support the TEXCOM proposal to substitute attorney fee-shifting for enforceability of the no contest clause against a direct contest and to repeal the enforceability of the no contest clause against indirect contests.**

A. The TEXCOM proposal **solves the 21320 problem**.

B. The TEXCOM proposal would **deter direct contests that are not based on reasonable cause**.

C. The TEXCOM proposal would **deter elder abuse** (fraud in execution of estate planning documents) and **facilitate court review of errant fiduciaries**.

MEMORANDUM

To: Brian Hebert
From: Shirley L. Kovar, Liaison to CLRC from Trusts and Estates Executive Committee (TEXCOM) re No Contest Clause Study
Re: Response to your November 21 , 2006, Memorandum re No Contest Clause Study
Date: December 1 , 2006

I. DIFFERENCE BETWEEN FORFEITURE AND FEE-SHIFTING

A. Introduction.

1. Thanks again for your written comments of November 21 , 2006. This was very helpful in trying to **identify the remaining difference between your recommendation and the TEXCOM proposal**. Although, as I indicated previously, your recommendation and the TEXCOM proposal both provide that a no contest clause should not be enforceable against an indirect contest, perhaps I did not identify precisely enough where the difference lies with respect to a direct contest.

2. You mentioned in your November 21 , 2006, memo that "[t]he only major difference" [between the proposals is between "forfeiture as a deterrent" and lee-shifting"as a derrent. This difference is greater than may initially meet the eye. I understood your recommendation for a "probable cause"exception to refer to lack of probable cause to bring a direct contest that would result in forfeiture of a bequest pursuant to a no contest clause. **Forfeiture of a bequest necessarily requires inclusion of a no contest clause**.

3. The "reasonable cause" in the **TEXCOM proposal** refers to **lack of reasonable cause to bring a direct contest defined by statute**. If an instrument included a no contest clause, the no contest clause would be unenforceable against either an indirect or direcr contest. A court would look to the statute to determine whether there was a "direct contest." If the court decided a pleading was a "direct contest", then the court would determine whether there was reasonable cause to bring that contest. If the court found no reasonable cause, then fee-shifting would apply in accordance with the statute.

B. Forfeiture as a deterrent requires the use of a no contest clause, and fee-shifting does not.

There is **one fundamental difference** between finding lack of probable cause to bring a direct contest that results in a forfeiture under a no contest clause and finding lack of reasonable cause to bring a direct contest that results in fee-shifting. **"Forleiture" of a bequest by means of a no contest clause requires the use of a no contest clause, and fee-shifting does not**. The requirement to use a no contest clause to trigger the forfeiture based on a direct contest gives rise to four key problems, which are described below.

EX 8

1. Noone knows when a pleading will trigger any particular no contest clause

a. The first problem is that trustors, aftorneys, and courts alike find it **extremely difficult to figure out what a no contest clause means** when applied to a specific set of circumstances after the death of a trustor. Attorneys either use a generic no contest clause or fashion a lengthy no contest clause that attempts to cover all possible circumstances (what I have called the "kitchen sink" approach.) (See the attached article on drafting no contest clauses.)

b. The uncertainty of "what is a contest" produced Probate Code section 21320 to allow beneficiaries to seek a court order that a proposed pleading would not be a contest under the no contest clause. As previously indicated, the TEXCOM strongly believes that section 21320 must be repealed in order to solve the "21320 problem." In turn, **repeal of 21320 requires solving the underlying problem, namely, the lack of certainty in determining whether any particular pleading, in any particular set of circumstances, triggers any particular no contest clause**. So, that is the first and fundamental reason that we need a system that does not rely on the enforceability of a no contest clause as a deterrent. We just don't know what pleading will trigger any specific no contest clause.

Fee-shifting would eliminate violation of the no contest clause as the trigger for the penalty of filing a direct contest. **The penalty (fee-shifting) would depend solely on whether the court determined a contestant had filed a direct contest within the meaning of the statute without reasonable cause**.

2. Multiple documents require a court to determine whether a no contest clause in one document (such as a trust agreement) is violated by a contest of another (outside) document.

A second key problem in using a no contest clause as a deterrent rather than fee-shifting is that modern estate plans include multiple documents. For example, an estate plan may consist of a revocable trust (or sometimes more than one revocable trust if a husband and wife have separate property), a pour-over will, an irrevocable insurance trust, irrevocable trusts for minor children, a QPRT, a GRAT, beneficiary designations under an IRA or other retirement plan, a beneficiary designation of an insurance policy, a POD account, assets held in joint tenancy or, in the future, potentially "beneficiary deeds." Multiple documents in an estate plan require the court to resolve what document, when challenged, results in a violation of the no contest clause contained in a different document. For example, in *Burch v. George*, 7 Cal. 4th 246 (1 994), one issue was whether the contest of a beneficiary designation was a contest of the trust agreement. In *Genger v. Delsol*, 56 Cal. App. 4th 1410 (1997), the question was whether a contest of a buy-sell agreement violated the no contest clause in the trust agreement. Other cases involve the effect of a challenge to an amendment to a trust, when the trust agreement, but not the amendment, contains a no contest clause. See, e.g., *Estate of Rossi*, 138 Cal. App. 4th 1325 (2006)(appeal pending in Cal. Supreme Court); *Scharlin v. Brown*, 9 Cal App. 4th 1 62 (1 992). **When the multiple document problem is combined with an infinite variety of ways to draft a no contest clause, the uncertainty whether the no contest clause has been violated, is profound**.

Multiple documents do not cause the same problem when fee-shifting is used

as the deterrent to a direct contest brought without reasonable cause. In fee-shifting, the court is not required to go outside of the contested document to determine whether to shift the fees. For example, in Burch v. George, supra, if the issue had been whether the beneficiary's challenge to the beneficiary designation was brought without reasonable cause, the court could shift the fees for that action to the party challenging the beneficiary designation. However, in the actual case, the Court had to determine whether a challenge to the beneficiary designation constituted a violation of the no contest clause in the trust agreement.

One of the **significant sources of 21320 litigation arises out of multiple documents**. As explained above, multiple documents would not cause the same problem where the court can simply order fee-shifting if the court determines whether a direct contest was brought without reasonable cause and not whether a challenge to one document results in a violation of the no contest clause under a different document.

> [Note: an attempt was made to solve this problem with Probate Code section 21305(a). However, it is already clear that 21305(a) raises just as many issues as it attempts to resolve. Moreover, **one court has completely ignored 21305(a)** and framed the issue differently, based on the court's own view of what should violate the no contest clause, not what do the statute and the no contest clause actually say. In *Zwirn v. Schweizer*, 134 Cal. App. 4th 1153 (2005),the court reasoned that the no contest clause had been triggered by the pleading in question, even though the express terms of the statute had not been met.]

3. A third distinction between fee-shifting and probable cause that raises concern is : Why should the penalty for filing a direct contest without reasonable cause depend on whether or not the instrument being contested contains a no contest clause?

It doesn't seem fair that a penalty for filing a "direct contest" without reasonable cause should apply only when the trustor or attorney thinks to include a no contest clause in the instrument. The inclusion of a no contest clause may have more to do with the drafting attorney's standard forms or habits of practice, rather than whether the trustor did or did not want to use forfeiture of a bequest as a penalty for a direct contest. Viewed in another way, it would seem likely that **any trustor would want to deter a beneficiary from filing a direct contest without reasonable cause**. As the Supreme Court of California opined in *Ike v. Doolittle*, 61 Cal. App. 4th 51 (1998), "*[i]t is the intention of the trustor, not the trustor's lawyer, which is the focus of the court's inquiry*."

4. A trustor may be unable to include a no contest clause in an "outside" document (referring typically to a document other than or "outside" the trust agreement which contains the no contest clause.)

A point related to both paragraphs 2 (multiple documents) and 3 (no difference in fee-shifting between inclusion or no inclusion of **a no contest clause) involves** the **staggering complexity** of the relationship among (a) the multiple documents of an estate plan, (b) the complexity and uncertainty of a no contest clause, (c) the frequency of a trustor's changing beneficiaries of outside instruments (meaning instruments other than the basic revocable trust agreement) or adding new outside documents after the trust agreement is signed, and (d) the difficulty or inability to include a no contest clause in a beneficiary designation, deed, or other outside instrument, and (e) the discrepancy between the standard generic no contest clause and current technical statutory requirements for coverage of an "outside" instrument by a no contest clause in a trust agreement or other instrument.

For example a generic no contest clause is not specific, so that a contest of a beneficiary designation may not be penalized by loss of a bequest under the trust agreement, which is the only document containing a no contest clause. See Probate Code section 21305(a). **Fee-shifting would level the playing field by treating all "direct contests" alike, thereby better carrying out the probable intent of trustors**.

Another example is that a "kitchen sink" no contest clause may refer specifically to all beneficiary designations, amendments to the trust agreement, and other outside documents that the trustor might sign either in connection with the estate plan or in future years. Assume in this example that a beneficiary designation in the future is obtained by the undue influence of a neighbor when the trustor lacks capacity. In this case **the no contest clause works against the trustor's intent** by deterring a contest of the beneficiary designation, because the beneficiaries do not want to take any risk of losing their bequests under the trust agreement, and do not file a contest, even though their lawyer believes the potential contestant has reasonable cause to contest.

One of the straw votes taken at the November 1 1 , 2006, meeting of TEXCOM was whether, in order to address the multiple document problem, TEXCOM would support a statute that would require the no contest clause to be contained in the same document that is subject to the contest. TEXCOM voted "no" because it is too difficult or **impossible to put a no contest clause in every document** in a multiple-document estate plan.

C. The TEXCOM proposal depends solely on the definition in a statute as to what is a "direct contest," whereas your recommendation would rely on both the statutory definition of a direct contest AND the application of the statutory definition of "direct contest" to the actions prohibited in a no contest clause. **TEXCOM believes sole reliance on a statutory definition, rather than a no contest clause, will assist the trustor, drafting attorneys, and the courts in identifying a "direct contest**."

1. Under our current law, courts tend to give much greater weight to what the court believes the trustor's "probable intent" must have been in light of reason, fairness, and the particular circumstances, rather than the exact wording used in any particular no contest clause. **Elimination of the no contest clause and reliance on a statute would, in reality, simply codify what the courts are already doing**.

2. My personal opinion (no straw vote on this has been done by TEXCOM) is that our **current statute** defining a "direct contest" does not draw a bright line, but it's **a great deal better than a generic no contest clause or kitchen sink drafting**. My personal recommendation would be to delete "revocation", "misrepresentation" fraud" and “mistake” from the current definition of a "direct contest." Elder abuse (fraud in the execution of estate planning documents) virtually always involves lack of capacity and undue influence, which I do think draws a bright line between a direct contest and some other kind of petition.

3. So, in response to your comment that the lack of a bright line concerning "what is a direct contest?" is just as big a problem for the TEXCOM proposal (fee-shifting) as for your recommendation (a probable cause exception to violation of a no contest clause), the answer is that "yes", the lack of a bright line is still a problem in fee-shifting, and my personal opinion is that we should do some work on the statutory definition of "direct contest". But, as explained above, the lack of a bright line to govern fee shifting is not nearly as big a problem as trying to figure out when a no contest clause has been violated by a "direct contest." **The uncertainty involved with a no contest clause as opposed to fee-shifting is magnified by the infinite variety of no contest clauses and the problems raised by multiple documents, which is unique to the no contest clause as the deterrent**.

4. One additional thought is that if we use a **statutory definition**, we are better able to control the definition of "direct contest" and are **more likely to bring some consistency to what is a "direct contest**."

5. Unlike a 21320 proceeding, which precedes a direct contest, and is always present (if the attorney is alert), limiting the penalty to fee-shifting based on lack of reasonable cause at the end of the trial will significantly **reduce the court time on this issue**.

II. PROBABLE CAUSE IS A DIFFERENT ISSUE THAN WHETHER A PLEADING IS A DIRECT CONTEST.

A. A preliminary hearing on probable cause would just result in the same type of double (if not triple) litigation that we have now. Now we have 21320 proceedings, then a hearing on the merits on the underlying petition. Probable cause is not the problem; the problem is the lack of certainty of the meaning of a no contest clause and the double litigation that produces. With a preliminary hearing on probable cause, we would always have a preliminary hearing, followed by a hearing on the merits of the direct contest. I don't see how there could be a preliminary hearing on probable cause without first a hearing on whether there is a direct contest. **A preliminary hearing on probable cause would mean three trials: one on whether the pleading is a direct contest; then a preliminary hearing on probable cause; then finally the trial on the merits of the direct contest**.

B. **Fairness to the parties would require extrinsic evidence** in a preliminary hearing , and that means discovery, cost and delay.

C. Most cases settle; and fee-shifting would encourage settlement because the contestant with a weak case is more likely to settle quickly than risk payment of attorneys' fees for the opposing party. **Most cases will not go to trial, and the issue of "is it a direct contest" will never reach the court, whereas there would always be a probable cause preliminary hearing**.

III. WORK TOGETHER ON DEFINITION OF "DIRECT CONTEST"

A. Is it possible for CLRC to **approve the TEXCOM proposal in principle** at the meeting on December 8? Or what would you suggest?

B. Then would it be feasible for the two of us to **work together on a statutory definition of "direct contest?**" I would then take that definition back to TEXCOM for a straw vote.

C. Assuming approval by TEXCOM of the proposed definition, you would then be in a position to make a **final recommendation to the CLRC**.