

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

\* \* \* \* \*

**MEETING OF THE SUPREME COURT ADVISORY COMMITTEE**

JUNE 19, 2020

(via Zoom videoconference)

\* \* \* \* \*

Taken before *D'Lois L. Jones*, Certified  
Shorthand Reporter in and for the State of Texas, reported  
by machine shorthand method, on the 19th day of June,  
2020, between the hours of 9:00 a.m. and 3:15 p.m., via  
Zoom videoconference and YouTube livestream in accordance  
with the Supreme Court of Texas' First Emergency Order  
regarding the COVID-19 State of Disaster.

**INDEX OF VOTES**

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

<u>Vote on</u>	<u>Page</u>
Remote depositions	31,710
Procedures to compel a ruling	31,822
Procedures to compel a ruling	31,824
Procedures to compel a ruling	31,828
Procedures to compel a ruling	31,829

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

**Documents referenced in this session**

- 20-26 New Rules for Civil Actions, Level 1A-REVISED
- 20-27 2/28/20 Memo - New Rules for Civil Actions
- 20-28 6/19/20 Memo - Remote Depositions
- 20-29 6/15/20 Memo - Parental Termination Appeals
- 20-30 6/3/20 Parental Continuance Rule Proposal
- 20-31 State Bar Texas CRC Proposal, Parental Leave Continuance
- 20-32 Florida rule re Continuance and FL Supreme Court Opinion
- 20-33 Harris County Vacation Letter Local Rule Civil Courts
- 20-12 Rule 26 North Carolina Secure Leave, Parental Leave
- 20-15 Family Medical Leave Act 2019 Section 2612, leave requirement
- 20-34 6/15/20 Memo - Compelling a Ruling
- 20-35 6/15/20 Report on Civil Rules in Municipal Courts
- 20-36 Exhibit A to June 15, 2020 Report

1                                   \*-\*-\*-\*

2                   CHAIRMAN BABCOCK: Well, if everybody is  
3 okay with it, why don't we get started, and people can get  
4 admitted into the meeting as we go along, right?

5                   MS. EASLEY: Yes, so give me one second and  
6 let me start the YouTube livestream.

7                   CHAIRMAN BABCOCK: Okay, great. You like my  
8 clock in the background?

9                   MS. EASLEY: We are live.

10                  CHAIRMAN BABCOCK: On the stroke of 10:00  
11 according to my clock. Well, welcome, everybody. This is  
12 our first official Zoom meeting. I regret that we can't  
13 be altogether in person, but for now this will have to do.  
14 And, by the way, this meeting is being recorded. So,  
15 without further adieu, Chief Justice Hecht, if you would  
16 like to make your remarks followed by Justice --

17                  HONORABLE NATHAN HECHT: Thanks, Chip. Of  
18 course, it's Juneteenth. President Abraham Lincoln's  
19 Emancipation Proclamation really changed nothing in Texas  
20 for more than two years until Major General Gordon Granger  
21 landed at Galveston with news that the Civil War had ended  
22 and the slaves were free. It was 155 years ago today, and  
23 still we find ourselves engaged in critical conversations  
24 about equality and justice under the law. For judges and  
25 lawyers whose life work is trying to assure that equal

1 justice under law is a reality for all, nothing is more  
2 disturbing than to hear that we have not always understood  
3 the concerns of all those we serve or responded as  
4 effectively as we must.

5           We must redouble our efforts to make the  
6 justice system the model it should be. For over 80 years  
7 this committee has had a singular role in those efforts.  
8 So it is fitting, I think, that we convene on this  
9 anniversary to try to make the justice system more  
10 effective, more efficient, more accessible, and fairer for  
11 all. I hope we'll be guided by that spirit today.

12           This is another historic first for the  
13 committee, meeting remotely as we do today, but in the  
14 last 16 weeks since we met on February 28th, a lot has  
15 happened. The first COVID case in Texas was March 4. A  
16 hundred thousand cases ago, 2,100 deaths ago, but also  
17 64,000 recoveries ago. So we're deep into this historic  
18 pandemic, learning as we go. The disaster declaration for  
19 the state was on March 13th, and later that day the  
20 Supreme Court of Texas and the Court of Criminal Appeals  
21 issued their first emergency order for the courts in  
22 trying to navigate these difficult times. Now we've  
23 issued 17, and I'll just go briefly over kind of what  
24 we've done and how we've tried to order things in the  
25 justice system in Texas.

1           The first thing was to give courts broad  
2 discretion to modify procedures and deadlines so that the  
3 justice system could continue to function but safely. So  
4 that meant closing for most courts or severely curtailing  
5 procedures in both civil and criminal cases. Excuse me.  
6 Other changes that we made were not discretionary, but  
7 were to impose fixed procedures, like, for example, the  
8 extension of the statute of -- statutes of limitation to  
9 August the 15th. But through it all we've directed that  
10 courts must conduct proceedings remotely whenever  
11 possible, and Zoom has become the platform of choice.

12           There are 3,220 judges in Texas. The Office  
13 of Court Administration bought about 3,000 licenses, Zoom  
14 licenses for the judges to use. Well over half are using  
15 Zoom as a platform to conduct their business. We logged  
16 in -- we have logged in so far 340,000 hours of Zoom  
17 hearings with 525,000 participants. Zoom has taken over  
18 the operation of the courts. The Supreme Court of Texas  
19 has had arguments on Zoom and conferences on Zoom, and  
20 we're functioning well. Courts across the state are doing  
21 the same thing. This, of course, is a profound change for  
22 us, a change in the system, a change in the profession,  
23 and we're beginning to wonder now what lies ahead. I  
24 think we'll talk about remote depositions going forward,  
25 and this is a permanent change. Will there be as many

1 court hearings, will more be done remotely, will the  
2 practice of law change, what's ahead for us, and these are  
3 questions that we're asking all over the country, but the  
4 answers are still not clear.

5           Through it all, one thing that's been very  
6 important and what we're doing today with this meeting is  
7 to ensure transparency and public access to all of these  
8 hearings so that the courts do not by becoming remote  
9 become invisible, because we want people to see that --  
10 how the courts are performing, what they're doing in cases  
11 just as they would -- just as they did before.

12           We're gradually reopening, but to reopen a  
13 court in Texas it must have a plan, and the plans can be  
14 regional. They can be for a county or a jurisdiction.  
15 We've -- OCA has gotten more than 600 so far, so we're  
16 almost fully opened as far as being able to conduct some  
17 proceedings in person, but they're still very limited. So  
18 here's kind of the basic structure that we have gone to.  
19 The Supreme Court has issued emergency orders that are  
20 mostly general. A few of them were more specific, but  
21 mostly they're general sort of principles to guide the  
22 operation rather than the details. Courts have wanted to  
23 know more details, and so the Office of Court  
24 Administration has provided usually weekly published  
25 guidance, they call it, that courts can use to try to

1 answer questions that they have about how courts in the  
2 State are operating and should operate.

3           Then we've also relied heavily on the  
4 regional presiding judges to supervise all of this, so  
5 Judges Evans and Estevez have kind of picked up new duties  
6 through all of this and are helping, along with the other  
7 nine regional presiding judges, to sort of shepherd things  
8 along, guide things along.

9           And then for specialized areas we're relying  
10 more on instruction, specific instruction. For a while  
11 the Court imposed a statewide moratorium on evictions and  
12 debt collection, but things are changing differently in  
13 different parts of the state, and we decided it was time  
14 to leave that -- leave the conduct of evictions and debt  
15 collection and other kinds of cases like that to the  
16 courts that handle them. So we have formed a justice of  
17 the peace task force, which has about 16, 17 people on it,  
18 some judges, also stakeholders in those cases like Legal  
19 Aid, the Texas Apartment Association, creditors bar,  
20 creditors attorneys, landlord attorneys, to try to come up  
21 with best practices and guidance for those judges. So we  
22 go from the very general in the emergency orders down to  
23 more specific instruction in hopes that we can help  
24 everybody move along either as quickly as they want and  
25 safely, or at a -- at a more cautious pace, but to try to



1 get everybody back where we were before this hit.

2           The hardest nut to crack is jury trials, so  
3 there can be none before August the 1st without  
4 permission, and I imagine that the date will get pushed  
5 back to September and maybe even later than that as time  
6 passes, but we don't know yet. The first virtual jury  
7 trial in the country, we think, was in Collin County a few  
8 weeks ago. Judge Emily Miskel up there put it all  
9 together. It was a summary trial for settlement purposes,  
10 and it went -- it went well, and the participants got to  
11 reflect on what the virtual presentation to a jury was  
12 like, but the whole trial was virtual.

13           Since then Federal District Judges Barbara  
14 Lynn and Amos Mazzant have tried cases, I think one each.  
15 I think Barbara tried a criminal case and Amos tried a  
16 civil case. Our first state court in-person jury trial  
17 started yesterday in a criminal case in Bowie County, and  
18 I haven't gotten a report on that yet this morning, but it  
19 was moving along yesterday. We have four more lined up in  
20 Scurry County, Cameron County, Fort Bend County, and  
21 Henderson County. These are judges who have volunteered  
22 who want to go to the trouble of trying to make sure that  
23 jurors can socially distance, that they screen as they  
24 come in the building, that court staff will be screened,  
25 and that everybody can stay safe.

1           Then we've got another partially remote,  
2 partially in-person trial scheduled in Comal County in a  
3 couple of weeks, and then several others as jury trials  
4 that are pending approval. So we're moving in that  
5 direction, but all over the country the courts are trying  
6 to figure out how do you try jury cases, and we're still  
7 finding our way. Of course, it would be easy if we had a  
8 quick and accurate test for COVID, but we don't. And  
9 it's -- doesn't look likely that we will much before there  
10 may be other curative medicines or vaccines or other ways  
11 of attacking the disease. So we'll -- we'll be slow going  
12 on jury trials. We try -- Texas tries about 4,500  
13 criminal jury trials a year and about 1,200 civil jury  
14 trials. There's -- we don't know exactly how many there  
15 are in the country. Probably 70 or 80,000 a year in the  
16 country, and so as the weeks pass, we're getting further  
17 and further behind on those, but we're trying to catch up.  
18 That's it on the pandemic.

19           On the bar exam you've probably heard that  
20 at the recommendation of the Board of Law Examiners and  
21 the law school deans, the Supreme Court decided to keep  
22 the in-person bar exam in July and added a second exam in  
23 September but shortened the exam to two days from two and  
24 a half days to lower the risk of exposure and the expense  
25 of giving the exam. And states -- other states are all

1 over the map. Some are delaying the exam, some are giving  
2 it online, some are waiving the exam altogether, and those  
3 states have just taken different approaches, which is  
4 probably good because we'll see how those turn out.

5           We've -- the Court's also updated its  
6 decades-old supervised practice rules to serve as a  
7 stopgap measure that allows recent graduates to practice  
8 under supervision until they can take the exam.

9           You may have heard that the appellate courts  
10 suffered a severe ransomware attack on May 8th, and thanks  
11 to the years of careful preparation by OCA and by the  
12 state DIR, the state agency in charge of technology, very  
13 little information was lost. Almost all of it was backed  
14 up. It has been quite a bit of work and a significant  
15 expense to get back -- put everything back together and  
16 have it functioning fully again. We're closing in on it,  
17 although we still have a ways to go. People have been  
18 working 24/7 trying to -- trying to get this done, and  
19 Microsoft, we've hired Microsoft to help us and others  
20 where we needed more expertise in trying to resume.

21           I will say that the courts of appeals have  
22 just done remarkably well under very difficult  
23 circumstances, and this is really -- the court management  
24 system that we use, we call it TAMES, is kind of the  
25 backbone of our functioning, and so it has really

1 hamstrung the courts of appeals, but they have worked  
2 through it. They're working through it, and they -- my  
3 hat's off to them. They've just done remarkably well  
4 under these difficult circumstances. I know the bar has  
5 had to kind of get used to that a little bit, but we hope  
6 the lawyers will remain patient, because this -- the  
7 attack came from outside the country, and we don't talk  
8 very much about it because it's been criminally  
9 investigated, and the advice of homeland security and  
10 others is just don't talk very much about it, so we  
11 haven't, but it -- it has severely hampered our  
12 operations.

13                   On the rules front, we have delayed the  
14 effective date of the rules requiring citation by  
15 publication on the OCA-run website because they turned to  
16 trying to get our case management system up and running  
17 again, so that will come up July 1st instead of June 1st.  
18 We've given final approval to the changes to Rule 277,  
19 effective May the 1st, requiring specific jury questions  
20 in parental termination cases. We adopted the changes in  
21 Rules of Civil Procedure 47 and then 500 and 509, the  
22 jurisdictional limits in statutory county courts and  
23 justice courts, and they will be effective September the  
24 1st. The Supreme Court and the Court of Criminal Appeals  
25 adopted the Rule of Evidence 103 amendments to clarify

1 that offer of proof provisions apply in bench trials, and  
2 they became effective June the 1st.

3           We revised protective order forms that have  
4 been worked on for sometime, and we just amended the  
5 Judicial Branch Certification Commission rules, largely in  
6 response to legislation; and the big changes, perhaps the  
7 biggest changes, were creating a court reporter  
8 apprenticeship and a provisional certification for court  
9 reporters. So those changes have just been approved.

10           So while we have struggled to try to keep  
11 the courts in Texas functioning, we've also been able to  
12 do some work with the rules, and the Supreme Court is in a  
13 good place. We've had five oral arguments by Zoom, and  
14 they -- all but one was flawless, and the one had some  
15 technical glitches in it, but it didn't keep the argument  
16 from happening, and so it went fairly well, and almost all  
17 of the high courts in the United States have by now had  
18 remote oral arguments. The Court's -- our Court has also  
19 had seven conferences by Zoom, and that's very easy for  
20 us. The only particular challenge we've had is what to do  
21 with the staff, because the more you meet outside a room  
22 or outside the strictures of the room, the more you risk  
23 confidentiality being compromised, so we're still working  
24 with that, but the conferences themselves went well, and I  
25 think after this morning we have five argued cases that

1 have not been decided, and final orders are scheduled for  
2 a week from today.

3                   So despite the pandemic, a ransomware  
4 attack, and a rookie judge all year long, we seem to have  
5 done pretty well, and that's my report, Chip.

6                   CHAIRMAN BABCOCK: Thank you. Other than  
7 that, what have you been doing?

8                   HONORABLE NATHAN HECHT: Doing Zoom calls  
9 all the time.

10                  CHAIRMAN BABCOCK: Yeah. Thank you very  
11 much, Chief. Justice Bland, do you have any comments you  
12 would like to share with us?

13                  HONORABLE JANE BLAND: Well, I'm the rookie  
14 judge, and the -- there have been a couple of members of  
15 the Court that have said this unconventional year, is it a  
16 coincidence that it happened when you joined, and that I  
17 don't know, but I hope that our years are more  
18 conventional in the future.

19                  The Court would like to express its  
20 gratitude to everyone who serves on this committee, and  
21 many of you have taken on additional voluntary roles as  
22 parts of task forces that are looking at all of the things  
23 that might need to be amended either temporarily or for a  
24 longer term in connection with COVID, and without your  
25 guidance and wisdom I'm confident that we would not have

1 been able to react quickly to the needs of both the bench  
2 and the bar in addressing this crisis.

3 I also would like to express the Court's  
4 gratitude to Jackie and Pauline, who are representative of  
5 the staff of the Court who have really had to work an  
6 extraordinary number of hours to not only keep up with  
7 their own work, and in particular in the area of rules and  
8 emergency orders, Jackie has, you know, had to do double  
9 duty keeping up with her regular work, and she and Pauline  
10 have been instrumental in facilitating the Court's  
11 processes to these amendments to the rules and being our  
12 liaison between the stakeholders that are providing us  
13 with information and enlightening us on the problems, and  
14 we just couldn't do it without them and all of our staff  
15 who have been working so hard. So with that, Chip, I'll  
16 turn it back over to you for our meeting because I know we  
17 have a lot to cover.

18 CHAIRMAN BABCOCK: Okay. Great, thank you,  
19 Justice Bland. I appreciate it, and I should add a word  
20 of thanks to Marti Walker, who makes our meetings run very  
21 smoothly and spends an enormous amount of time trying to  
22 organize everything that we're doing, so thank you, Marti.  
23 And finally, you know, just following up what the Chief  
24 has said, we are living in extraordinary times. We have  
25 lost people to the pandemic and to other events that are

1 well-publicized, and I'd like to take just a few seconds  
2 of silence to remember those people in our lives who we've  
3 lost and who we miss. So just a couple of seconds.

4 (Moment of silence)

5 CHAIRMAN BABCOCK: Okay. Thank you. Our  
6 first agenda item is expedited actions. Bobby Meadows and  
7 Justice Christopher, I believe, are leading up that  
8 effort, so whoever wants to take the helm, go for it.

9 MR. MEADOWS: Thank you, Chip. This is  
10 Bobby. Let me just kick it off because Tracy will be  
11 doing most of the talking. The discovery subcommittee has  
12 convened on our first two agenda items, expedited actions,  
13 specifically revision of level 1-A, and Rule 199 and just  
14 for remote depositions. As I indicated, Justice  
15 Christopher prepared the memo from our subcommittee on  
16 both topics, and she will lead the discussion on both.

17 HONORABLE TRACY CHRISTOPHER: Thank you. So  
18 if y'all will remember back in February we discussed how  
19 we were going to implement the legislative law about  
20 creating new rules for the 250,000-dollar or less cases.  
21 We discussed three options at the meeting, and although  
22 the majority of the people voted for level three -- or the  
23 third option, which was to put the cases in level two and  
24 change the deposition limits for all level two cases, the  
25 subcommittee ultimately went back and decided that that



1 was not a workable way to do it. We also felt that we  
2 would not be true to the Legislature asking us for  
3 specific rules -- asking the Supreme Court for specific  
4 rules about these cases and that if we made only minor  
5 changes to level two it would not look like we were  
6 actually doing our job.

7           So the subcommittee then went back to the  
8 level 1-A option for these cases, which we have drafted.  
9 We -- we talked a lot about what Lisa had said in  
10 Connection with the enactment of this new rule, that  
11 people said the expedited action rules were working, and  
12 from the judges' point of view, the part of Rule 169 in  
13 terms of the actual trials never really seemed to come up.  
14 So what we ultimately concluded that what was working out  
15 of the expedited actions, the rule, was the limited  
16 discovery that we put in level one. And so what we have  
17 done is we've created a level 1-A with limited discovery  
18 for these cases involving \$250,000 or less, but not  
19 changing or trying to put them actually into Rule 169.  
20 Because, as we discussed, especially in the county courts,  
21 if all of their cases are \$250,000 or less, there's no  
22 real way to give priority to those cases, which is  
23 contemplated in the expedited action rule.

24           So that is where we have ended up, and  
25 you-all should have all gotten a copy of our proposed

1 level 1-A. It is almost identical to level one, with some  
2 exceptions, which we have highlighted, so we have added a  
3 provision about "without leave of court." We've changed  
4 the hours to 20, same thing for interrogatories, request  
5 for production, request for admissions. We also added a  
6 sentence with respect to reopening discovery. So we  
7 think that -- and we talked a lot about whether we thought  
8 the number of hours and the limitations on discovery would  
9 be enough. We think that it is enough for the vast  
10 majority of the cases, and for the few cases where it's  
11 not enough, the parties can either amend their pleading or  
12 they can go to court and ask for more discovery. So  
13 that's basically what we've done in connection with this  
14 new rule.

15 CHAIRMAN BABCOCK: Okay. Thank you, Justice  
16 Christopher. I think if you hit your participant button  
17 you can raise your hand if you wish to make a comment and  
18 then I will see it on my screen hopefully, so if anybody  
19 wants to comment on this, raise your hand on your little  
20 thingamabob there. Or you can just start talking.

21 Frank Gilstrap, I see your hand up.

22 MR. GILSTRAP: In the real world, you know,  
23 is there -- what would be the result if we simply  
24 collapsed all of the level one discovery into 1-A? I mean  
25 I just wonder what the proportional amount of cases in

1 each one is.

2 CHAIRMAN BABCOCK : Justice Christopher.

3 HONORABLE TRACY CHRISTOPHER: I don't know  
4 the answer to that. I do know that, you know, we've been  
5 tasked by the Legislature to have rules for both levels,  
6 so that's why we went with the separate level for the  
7 \$250,000.

8 MR. GILSTRAP: So we couldn't do it even if  
9 we wanted to?

10 HONORABLE TRACY CHRISTOPHER: Maybe. I  
11 think it would be clearer to the Legislature, especially  
12 since level one then ties into Rule 169, which is a  
13 shorter trial and getting to the, you know, top of the  
14 docket, so I think we need to keep them separate.

15 MR. GILSTRAP: All right. Thank you.

16 CHAIRMAN BABCOCK: Lisa Hobbs.

17 MS. HOBBS: So when I was reading it this  
18 morning I was not as thrilled about excluding these from  
19 169, but as you're talking, Judge Christopher, I think I'm  
20 coming around to maybe your view. You know, when we  
21 started this expedited actions thing, it was a trade-off,  
22 like you're not going to have as much discovery maybe, but  
23 we promise you we'll get you to trial -- or we'll do our  
24 best to get you to trial as quickly as possible. But I do  
25 hear what you're saying, if everything on the court of --

1 the county court's docket is expedited then nothing is  
2 expedited, so I think -- and that kind of goes to Frank's  
3 comment, too. I kind of think this might be the best  
4 middle ground, like maybe not ideal in the initial  
5 compromise of expedited actions but practically speaking  
6 might be the only way to do it. So I'm supporting right  
7 now what the subcommittee did, and thank you, Judge  
8 Christopher, for taking my comments to heart.

9 CHAIRMAN BABCOCK: Justice Gray, and then  
10 Roger Hughes.

11 HONORABLE TOM GRAY: Tracy, excuse me, I was  
12 looking at the placement of the "without leave of court."  
13 Is it the intent of the subcommittee to allow the trial  
14 court discretion only with regard to the discovery period,  
15 or should it be in regard to all of the subparts of  
16 limitations?

17 HONORABLE TRACY CHRISTOPHER: I think you're  
18 right. I think that "without leave of court" needs to  
19 move up.

20 HONORABLE TOM GRAY: Specifically, what I  
21 thought worked was right after the word "following  
22 additional limitations unless expressly modified by leave  
23 of court" and then you just allow modification on all six  
24 of the subparts then.

25 HONORABLE TRACY CHRISTOPHER: Yeah. I think

1 you're right. I think that -- the idea was that you could  
2 go into court and say the 20 hours is not enough or the 20  
3 interrogatories is not enough. So I think you're right,  
4 that needs to move up to at the top under (b). Rather  
5 than (b) (1).

6 CHAIRMAN BABCOCK: Roger.

7 HONORABLE TRACY CHRISTOPHER: You're muted,  
8 Roger.

9 MR. HUGHES: Okay. I just wanted to say I'm  
10 persuaded by the subcommittee's reasoning. I think the  
11 only real value to making the change is to get limited --  
12 a limitation on discovery in these cases. The other  
13 benefit of an expedited action is to get cases to trial  
14 faster, and frankly, I don't know how it's going  
15 elsewhere, but getting cases to trial with -- in the  
16 expedited trial period just doesn't seem to be happening.  
17 And so the real benefit of these discovery levels is not  
18 the rapid progress to trial, but instead is the limitation  
19 on the costs and amount of discovery involved. So I think  
20 it's good.

21 CHAIRMAN BABCOCK: Okay. Does anybody else  
22 have a comment? I don't see any hands up. Any parting  
23 words, Justice Christopher or Bobby?

24 HONORABLE TRACY CHRISTOPHER: I don't think  
25 so. It looks like -- we had put in that Rule 47 also

1 needed to be changed, but it sounds like the Court has  
2 already done that.

3 CHAIRMAN BABCOCK: Yeah. All right. So  
4 that will conclude our discussion about expedited actions.  
5 That recommendation will go to the Court for its  
6 consideration, and we'll move on to --

7 MR. PERDUE: Hey, Chip.

8 CHAIRMAN BABCOCK : Yeah.

9 MR. PERDUE: Can I ask a question on one of  
10 these notes in the memo?

11 CHAIRMAN BABCOCK: Certainly.

12 MR. PERDUE: I know in the discovery rewrite  
13 that Bobby and Justice Christopher were working on there  
14 was this idea of automatic disclosures versus request for  
15 disclosure practice as we have now, but I don't think I  
16 see that in the rule. Is that something that's tabled on  
17 the discovery rules or -- because I see it in the memo,  
18 but I'm a little confused.

19 HONORABLE TRACY CHRISTOPHER: Yeah. Well,  
20 we wrote the rule assuming that there would not be a  
21 change to the automatic disclosures, and we are still  
22 advocating as part of our wholesale changes to the  
23 discovery rules the idea of automatic disclosures. You  
24 know, I have no idea whether the Supreme Court wants to  
25 take that -- you know, those changes at this point in

1 time. We know that they are under a time constraint to  
2 get rules out with respect to these cases, so we have  
3 written it with the idea that the bigger changes have not  
4 happened, but we are still hopeful that the bigger changes  
5 will happen.

6 MR. PERDUE: And is it -- is it -- so I know  
7 this is not a -- your subcommittee is not a judicial body,  
8 but the clear language of the statute was "filed in county  
9 courts at law." Is it despite that clear language there  
10 is a finding of alternative legislative intent, or  
11 that's -- we're going to blow that off?

12 HONORABLE TRACY CHRISTOPHER: Well, I think  
13 we discussed that last time or two times ago, and I think  
14 the majority of the SCAC did vote to make them applicable  
15 to all cases, just under the Supreme Court's general  
16 rule-making ability; and the reason that we did that was  
17 that there's overlapping county court, district court  
18 cases in various counties; and the idea of, you know,  
19 having one set of rules for 250,000-dollar cases in county  
20 court versus another set of rules for 250,000-dollar cases  
21 in district court did not make sense to us, so that's the  
22 way we wrote it the way we did, and I think we've -- we  
23 did vote on that a couple of times, I think.

24 MR. PERDUE: Well, I get it, but I'm not  
25 sure I disagree with the logic of it. I'm just curious

1 about whether -- I mean, so it's clear we're talking about  
2 the general rule-making authority rather than complying  
3 with the legislative mandate in a clear language of a  
4 statute.

5 HONORABLE TRACY CHRISTOPHER: Well, I think  
6 it does both. I mean, we have clearly written rules for  
7 county courts where they have the amount in controversy of  
8 \$250,000 or less, and then under the Court's rule-making  
9 authority they have applied that rule to district court.  
10 So, I mean, I think we've -- we have done both things.

11 CHAIRMAN BABCOCK: Jim, the question would  
12 be whether the legislation prohibited making these changes  
13 in district courts. I don't have it in front of me, but  
14 my recollection from our discussion was we did not believe  
15 that the Legislature said, "Make this change for county  
16 courts and only county courts," but if it did say that or  
17 if that intent was manifest from the language of the  
18 statute, then -- then I think we better be careful, but I  
19 didn't remember that.

20 MR. PERDUE: I don't disagree with that  
21 either, Chip, but having read more than a few court  
22 opinions interpreting legislative intent depending on the  
23 clear language of the statute versus kind of an implicit  
24 takeaway, that's not always the rule.

25 CHAIRMAN BABCOCK: Fair enough. Any other



1 comments about this before we move on? Okay. Marti, if  
2 you will note that this has completed our work on this  
3 topic, so we will move on, again, to the same  
4 subcommittee, Bobby and Justice Christopher, talking about  
5 remote depositions.

6 MR. MEADOWS: Thank you, Chip. As I said,  
7 Justice Christopher will lead this discussion. I have to  
8 say, though, it does seem that this new Zoom platform has  
9 added a level of efficiency to our committee that I  
10 haven't seen in the last 20 years.

11 CHAIRMAN BABCOCK: Fair enough.

12 HONORABLE LEVI BENTON: We're having trouble  
13 hearing what Bobby said.

14 HONORABLE TRACY CHRISTOPHER: Bobby said the  
15 Zoom platform has made us more efficient.

16 HONORABLE LEVI BENTON: Thank you.

17 CHAIRMAN BABCOCK: Less verbose. Justice  
18 Christopher.

19 MR. MEADOWS: Justice Christopher.

20 HONORABLE TRACY CHRISTOPHER: Okay. So the  
21 Court asked us to look at Rule 199 in connection with  
22 remote depositions and whether we should change the rule  
23 once the COVID-19 situation is over, and our subcommittee  
24 does not recommend changing the rule. So we have talked  
25 to people that have taken depositions remotely. They seem

1 to be working, but most people consider it a stopgap  
2 measure to sort of keep the wheels of justice going, and  
3 so I think in particular we were asked to look at whether  
4 someone could mandate basically that the deposition take  
5 place by Zoom and that no one could object to that  
6 procedure, and we -- we did not feel once the COVID-19  
7 crisis is over that that should be mandated.

8           So right now Rule 199 allows for remote  
9 depositions, and so basically if you want to take a remote  
10 deposition, you notice it as a remote deposition. In  
11 practice, we understand some people will say, "Okay, but  
12 I'm flying to wherever my witness is, and I'm going to be  
13 with my witness when they're being deposed," and so then  
14 sometimes that makes the lawyer who noticed the deposition  
15 say, "Well, if you're going to do that then I'll fly out  
16 there, too." So -- which kind of ended the whole idea of  
17 the remote deposition. But when people want to do the  
18 remote deposition, we have the rule of procedure already  
19 in place that allows it, and at this point in time we do  
20 not recommend changing that.

21           The only thing that we recommend changing is  
22 in connection with the administration of the oath to the  
23 witness, and right now -- well, under the rule it was kind  
24 of a hybrid thing, and I think a lot of judges used that  
25 when they were letting people testify remotely in a

1 hearing or trial. You would have a person who could  
2 administer the oath actually with the witness and swear  
3 them in, and then they would be, you know, officially  
4 sworn in for testifying, and at least I know when I was a  
5 trial judge I swore them in, too, just to make sure,  
6 right. So there would be someone actually with the  
7 witness that would swear them in and then the judge would  
8 swear them in, and off we would go.

9           However, since the COVID crisis, people have  
10 been swearing in witnesses over the computer, and we think  
11 that's a good change, and that change can be made to Rule  
12 199. I mean, Judge Busby, Justice Busby swore in all the  
13 new lawyers from home. I mean, people are swearing in --  
14 administering the oath to people remotely over the  
15 computer. You know, we could do a little micromanaging,  
16 you know, the witness has to show their ID so you know who  
17 they actually are and that they're the person who's being  
18 sworn in, but with the ability to actually see someone as  
19 opposed to just over the telephone, we think the whole  
20 idea of requiring the person to be present with the  
21 witness could be changed. But the actual rule, the way  
22 we've allowed it, we think it's flexible enough for people  
23 to continue to do remote depositions in the future if they  
24 want to, but we don't think it should be a mandatory type  
25 rule.

1                   CHAIRMAN BABCOCK:   Okay.   Thank you.  
2 Professor Hoffman.

3                   PROFESSOR HOFFMAN:   Thanks very much.   So I  
4 agree with this.   I think the suggestion of the  
5 subcommittee makes sense.   I have one small additional  
6 suggestion.   So 199.1(c) allows for nonstenographic  
7 recordings to take place, and I, in fact, have taken a few  
8 of these nonstenographic remote depositions in the last  
9 few weeks, but -- and they work reasonably well.   One of  
10 the problems with the rule is it doesn't -- it's not super  
11 clear about who is authorized to administer the oath.  
12 There is a Texas -- I've done some research.   There's a  
13 Texas Attorney General opinion that seems to make it clear  
14 that lawyers can do it.   Kennon and Bob Wise have a good  
15 article that cites to that as well, and part of the  
16 Government Code also seems to make it clear, but my  
17 suggestion I'm leading to is I wonder if we might -- if  
18 we're going to make changes on the administration of the  
19 oath, we might specifically talk about who is authorized  
20 to administer an oath when you have a nonstenographic  
21 deposition.

22                   HONORABLE TRACY CHRISTOPHER:   I didn't  
23 realize that lawyers were authorized to administer the  
24 oath.

25                   CHAIRMAN BABCOCK:   Kennon Wooten.

1 MS. WOOTEN: I also suggest not including a  
2 provision to mandate remote depositions. I've over the  
3 course of the last two and a half months had approximately  
4 a dozen remote depositions, all via Zoom, and I think they  
5 are a wonderful alternative to no depositions occurring.  
6 I think that in part because if you stopped everything one  
7 of the consequences that you confront is damages  
8 potentially getting higher and higher and higher as  
9 discovery is halted, right. So the remote deposition  
10 option has been very good, but it does have some  
11 limitations. One of them is, of course, technology that  
12 can be spotty at times.

13 Another potential limitation that I've  
14 experienced that I can't really quantify, but I can  
15 qualify is that people tend to get more exhausted with  
16 Zoom after being connected to the computer about seven,  
17 eight hours, than they would feel if they were in person,  
18 and I think that affects how witnesses respond. I think  
19 it affects how attorneys interact with one another. So  
20 remote depositions are good, but I would strongly advise  
21 against making them mandatory, because I don't think  
22 they're the same as in-person depositions.

23 In regard to a comment, however, I think it  
24 would be helpful if there were some comment to kind of  
25 specify that this rule does apply, it allows these remote

1 depositions. I think sometimes what's apparent to us as  
2 the Supreme Court Advisory Committee, as a group of people  
3 who have been looking at these rules for a long time,  
4 isn't necessarily apparent to the average person picking  
5 up the rule book. So if the rule is going to be modified  
6 in part to address remote depositions, I think it would be  
7 helpful to specify in a comment that these remote  
8 depositions are permissible so that there's no question to  
9 people reading the rules.

10 CHAIRMAN BABCOCK: Thank you. Robert Levy.

11 MR. LEVY: I also agree with the  
12 subcommittee's recommendation, but I thought it would be  
13 helpful to point out a couple of issues that if there was  
14 either a comment or rule-making that items that could be  
15 addressed. One of them has to do with exhibits to the  
16 deposition. In talking to colleagues who have handled a  
17 number of these remote depositions, they've noted that  
18 when a party is taking a deposition they'll try to show a  
19 witness an exhibit on the screen, obviously in the Zoom  
20 format, and that can be very difficult for the witness to  
21 review a multipage document on the screen, particularly  
22 when they don't control the document; and one of the  
23 processes that has been followed, which seems to work  
24 well, is to send the witness a sealed envelope with the  
25 exhibits; and that is opened prior to the deposition

1 starting or when it starts, so that the party taking the  
2 deposition still has a chance to, you know, use their  
3 exhibits without a lot of prepping and but yet the witness  
4 will still have a physical copy of the materials.

5           Another question I think will probably come  
6 up that relates I think to what Professor Hoffman was  
7 noting is at trial the use of the Zoom video itself, how  
8 will that actually function as terms of playing the Zoom  
9 video before the jury, and obviously it's a little bit  
10 different to edit that versus a regular video deposition.

11           And the final issue that comes up from time  
12 to time is whether the -- it should be clear that all the  
13 lawyers, including the party that's defending the  
14 deposition, should be on screen so that it's -- it's clear  
15 that there's no one coaching the deponent immediately off  
16 screen, particularly if the lawyer is sitting in the room  
17 with the deponent. So those are --

18           HONORABLE TRACY CHRISTOPHER: So we -- I  
19 mean, we did talk about a lot of those things in committee  
20 and thought it's really hard to write a rule to manage  
21 everything, and that for -- as this procedure continues,  
22 more and more lawyers are suggesting ideas, like the  
23 sealed envelope idea, and we kind of felt like we should  
24 let it play out a little more and really see if there are  
25 problems. Like, you know, if -- if they end up going to

1 court and you see a problem with it, you know, then we'll  
2 have sort of an idea of what might happen. With respect  
3 to the actual Zoom deposition, my understanding is that  
4 it's not just the Zoom platform that's recording, that you  
5 actually have somebody else who is recording it. Like I  
6 just gave -- and I could be wrong, but I just gave a  
7 speech for the Texas bar CLE, and it was over Zoom, but  
8 they were recording it. You know, not -- it wasn't just  
9 the Zoom record. It was a separate record that they were  
10 doing that they then would be able to edit easily, which  
11 was good, because I made a few mistakes, and so them being  
12 able to edit those out before the final presentation, so I  
13 think we felt like getting into those details was  
14 premature, and so we didn't.

15 CHAIRMAN BABCOCK: Thank you. Thank you,  
16 Judge. Robert, just when you send the sealed envelope  
17 with the exhibits in it, in your experience do you send  
18 them to the court reporter or to the opposing counsel?

19 MR. LEVY: You would send them to all the  
20 participants, and if the witness is in a separate location  
21 I guess you would send that to the opposing counsel who  
22 would provide a copy to the witness, but you would send  
23 multiple copies so that everyone is working off the same  
24 set of materials.

25 CHAIRMAN BABCOCK: And how do you protect



1 that the sealed envelope is not unsealed before the  
2 deposition?

3 MR. LEVY: At least from the witness' point  
4 of view you can actually watch the witness open the  
5 envelope on the screen, and I guess you could do that also  
6 with the opposing counsel as well. Hopefully, though,  
7 there is some level of trust in the process. But it's not  
8 foolproof, clearly.

9 CHAIRMAN BABCOCK: Yeah.

10 HONORABLE TRACY CHRISTOPHER: One thing that  
11 we did discuss, which would be a simple fix that could  
12 help, is if we put the court reporter with the witness  
13 after COVID is over. Okay. Because right now the way the  
14 rule is written -- which is the second part of our report.  
15 Right now the way the rule is written, the court reporter  
16 is with the person who noticed the deposition. Okay. And  
17 if we put the court reporter with the witness then the  
18 court reporter could be given the exhibits ahead of time.  
19 The court reporter could make sure that there's no other  
20 person in the room, you know, giving hints to the witness  
21 about how to testify. So that would be a potential change  
22 that might be useful.

23 MR. LEVY: I think you would want to avoid  
24 limiting the flexibility of the platform, though, in cases  
25 where the witness might be remote, and there are other --

1 there are other issues that I don't think can be avoided.  
2 Like if -- if I'm looking at the comments and my lawyer is  
3 sending me a comment about a question, how to answer it,  
4 that's not going to show up in the -- in the video, nor  
5 will it be apparent to the court reporter even sitting  
6 next to me taking my testimony. So there are challenges.  
7 Obviously you could ask a witness that question, so to try  
8 to get that information, but I do agree, though,  
9 ultimately that I don't think the rule itself should be  
10 changed, but those are issues that should be developed  
11 either through practice or potentially commentary.

12 CHAIRMAN BABCOCK: Great. Roger, then  
13 Frank, then Kennon. Roger.

14 MR. HUGHES: Yeah, I wanted to echo the  
15 comment or the suggestion that we let this play out a  
16 little bit before we start changing the rules, and here is  
17 why I think it's important. I think this is going to be  
18 the wave of the future. Once corporate clients, insurance  
19 companies, et cetera, realize that lawyers have this  
20 technology in place and the court reporters have this  
21 technology in place, they're going to insist that it be  
22 done that way. They don't like paying lawyers to travel  
23 to the court reporter or travel to distant locations to  
24 take depositions, and it's just going to be -- I think a  
25 lot of pressure is going to be put at least on a certain

1 segment of the legal community to do every deposition  
2 possible by Zoom, and I think any change in the rule is  
3 going to have to reflect the likely problems that are  
4 going to come up, and I'm going to comment on a few of  
5 them.

6           One, about exhibits. Sometimes you don't  
7 use all the exhibits you bring to a deposition. Sometimes  
8 all of the sudden something pops up and you have something  
9 you haven't thought of before, but you do have it with  
10 you, and now you can show it to the witness right there.

11           The next thing is who's going to take charge  
12 of the exhibits? Because sometimes witnesses are asked to  
13 draw on things, mark things, et cetera, et cetera, so who  
14 is going to take charge of those? Who gets custody of the  
15 exhibits that the witness actually used, saw, draw on,  
16 et cetera.

17           The next thing is objections in multiparty  
18 cases. Right now if you have all the lawyers in the room  
19 I don't think it's horribly difficult for the court  
20 reporter to realize objections are being lodged, that they  
21 have to be written down before the witness answers. That  
22 gets a lot more difficult if you have five lawyers online  
23 and four of them are all going "objection" at the same  
24 time. It drives the poor court reporter crazy. So there  
25 may have to be something done to work out getting the

1 objections down, and whether we continue to require they  
2 be lodged at the time or later, may have to be an issue to  
3 be revisited, and finally, if we're going to allow the  
4 Zoom recording to be the video of the deposition, then  
5 we're going to have to work out who certifies that,  
6 whether we're going to have -- I mean, once again, clients  
7 are not going to want to pay a videographer just to sit  
8 there and watch the deposition and then download the video  
9 from Zoom. They may find that a bit excessive. So we may  
10 have to rethink about who is going to certify the video  
11 and how they're going to certify it. Those are my -- so  
12 that's why I think we may want to watch this play out a  
13 bit before we start really changing the rules. Thank you.

14 MR. GILSTRAP: Hello.

15 CHAIRMAN BABCOCK: Thanks, Roger. Frank,  
16 you're next.

17 MR. GILSTRAP: Yes. Currently, as I  
18 understand, remote depositions have to be done by  
19 agreement, and you know, everybody is trying to be nice,  
20 but over time lawyers will be lawyers, and we'll see them  
21 use the rules for the advantage of their clients. As I  
22 understand -- read the rule, I have an absolute right to  
23 attend the deposition. Is there -- because that's what  
24 Rule 199.5(a)(2) says, "A party may attend an oral  
25 deposition even if the deposition is taken by telephone or

1 other remote electronic means." Is there any way that a  
2 judge can -- under the present rule can mandate -- and you  
3 can see that, for example, it can be used as an  
4 intimidation factor. If you have a witness who is  
5 concerned about his health and some lawyer or party comes  
6 in and says, "I want to sit across the table from you and  
7 cough." You can see that happening. Is there any  
8 provision where the court can mandate a remote deposition  
9 presently?

10 HONORABLE TRACY CHRISTOPHER: Well, I  
11 believe that there is an emergency order, and Justice  
12 Hecht can double check me on this. There's an emergency  
13 order that says you cannot object to the fact that the  
14 deposition has been noticed remotely during this place in  
15 time. I don't know if there is a specific rule addressing  
16 what you talked about, Frank. Although, my husband has  
17 done quite a few of these remote depositions; and he did  
18 have opposing counsel who initially said, well, I'm going  
19 to do exactly what you said. I'm going to go, you know,  
20 and be with my witness. And basically all of the other  
21 lawyers said, "Okay, well, we'll go into the court to get  
22 an order saying you can't because it would be dangerous to  
23 the witness," and he backed down. So I don't know whether  
24 anyone else has had that problem.

25 MR. GILSTRAP: One more thing I -- you know,

1 you mentioned the possibility of the problem of coaching  
2 the witness, and I had all sorts of, you know, scenarios  
3 set up where people would stand behind the camera and hold  
4 up cue cards, but Robert Levy is smarter than me, and he  
5 says, look, you can just send it to them on their phone,  
6 and the only way you can deal with that I guess is to ask  
7 the witness not to have the phone with him or not to look  
8 at his phone. Is that -- is that generally what's done?

9 MR. LEVY: But you can actually use the Zoom  
10 chat feature and tell them what to say, so and they're  
11 looking at it.

12 HONORABLE TRACY CHRISTOPHER: Though,  
13 apparently I've heard that backfires, because even though  
14 you send a private chat message to your witness, at the  
15 end of the Zoom all of those chats are available to  
16 whoever was the host. So --

17 MR. LEVY: No, they are private. They are  
18 private.

19 HONORABLE TRACY CHRISTOPHER: Okay.

20 MS. WOOTEN: No, they're available after the  
21 fact, is what Justice Christopher is saying. So during  
22 the deposition they're private, but if somebody wants to  
23 capture the chat they can capture the private components  
24 of the chat, at least under the current technology.

25 MR. GILSTRAP: But that might be too late.

1 The witness has already answered the question.

2 MS. WOOTEN: But it evidences coaching that  
3 shouldn't have occurred along the way.

4 MR. GILSTRAP: Well, so you could object to  
5 it at trial then. Okay.

6 CHAIRMAN BABCOCK: Kennon.

7 MS. WOOTEN: One thing I'll share, for what  
8 it's worth, is that when we first started having remote  
9 depositions in the case I referenced earlier, several of  
10 us were a little unclear as to what we would need from a  
11 technological perspective in order to make these  
12 depositions as smooth as possible via Zoom. In the past I  
13 know the Judicial Commission on Information Technology has  
14 prepared technology standards to kind of go with the  
15 e-filing rules, and the standards, of course, can be  
16 modified more readily than rules and can be more quickly  
17 updated to account for changes in technology. It may be  
18 overkill in this context. It may, however, be very  
19 helpful, because in our case we spent a fair amount of  
20 time figuring out what we really needed versus what would  
21 be ideal to have; and lawyers, although we are learning  
22 how to exist in this remote world, a lot of us don't have  
23 technological savvy necessary to tease apart what we  
24 really need versus what would be ideal. So I offer that  
25 up for consideration to the Court to consider whether

1 technological standards could be set forth via JCIT that  
2 might help the process be more efficient for a lot of  
3 lawyers and parties alike.

4 CHAIRMAN BABCOCK: All right. Any other --  
5 any other comments from anyone else? We are indeed  
6 efficient.

7 HONORABLE LEVI BENTON: Chip, hey, so,  
8 Tracy, under the example you used of the depositions that  
9 your husband has taken where there was a lawyer wanting to  
10 attend where the witness was, I don't see why the court  
11 couldn't order proper social distancing within the room,  
12 couldn't order the -- you know, I don't know that there's  
13 specific language, but a judge can always order anyone who  
14 insists on attending to wear a mask and to maintain a  
15 distance from the witness. You agree with that, right?  
16 You're nodding.

17 HONORABLE TRACY CHRISTOPHER: No, I do agree  
18 with that. I think at the time when people were doing  
19 this there was like shelter-in-place orders as opposed to  
20 the opening that we have had, so I would imagine there  
21 will be more people that are going to want to say, "I want  
22 to be with my witness." And, you know, masks, social  
23 distancing, yes, I mean, I could see how the court might  
24 say, "Well, that seems reasonable to me, and as long as  
25 you do X, Y, Z, it's okay." But, you know, that's just



1 COVID-related, and our task was should we change these  
2 after, after the COVID crisis.

3 HONORABLE STEPHEN YELENOSKY: Chip?

4 CHAIRMAN BABCOCK: Yes.

5 HONORABLE STEPHEN YELENOSKY: A couple of  
6 things. One, my experience with Zoom as a mediator is  
7 that the host can disable the chat function between  
8 participants. Is that relevant to the discussion on  
9 inappropriate chat?

10 MR. LEVY: That is true. You can. You can  
11 disable the chat so there is no chat function. Now,  
12 obviously there are other ways to chat. You could have a  
13 different chat tool.

14 HONORABLE STEPHEN YELENOSKY: Sure, but the  
15 comment was that you could do it through Zoom, and that --

16 MR. LEVY: Right.

17 HONORABLE STEPHEN YELENOSKY: -- could be  
18 prevented.

19 MR. LEVY: You can.

20 HONORABLE STEPHEN YELENOSKY: Second thing,  
21 Chip, as to what the court could require for depositions,  
22 I'm on a local committee for juries, and, of course, COVID  
23 is a big issue there. I'm not sure that Tracy was  
24 suggesting this, but to the extent there's a suggestion  
25 that the court could order somebody to sit for deposition,

1 even at social distance and with a mask, I think is  
2 dubious. I mean, the court could order it, but is that  
3 what you're suggesting as a possibility, Tracy?

4 HONORABLE TRACY CHRISTOPHER: No. I was  
5 suggesting that assuming that the witness was okay with  
6 it.

7 HONORABLE STEPHEN YELENOSKY: Yeah. Okay.  
8 That was just going to be my point.

9 HONORABLE TRACY CHRISTOPHER: Right. Right.  
10 Assuming it was, you know, you want to depose the  
11 defendant, and I'm the defense attorney, and, you know,  
12 the two of us have agreed it's okay to be in the room,  
13 socially distanced or wearing a mask or whatever, you  
14 know, that the court could allow that. I mean, it's  
15 allowed under our rules right now. It was the forced idea  
16 that with my husband's deposition that the -- you know,  
17 they felt that the lawyer was trying to do that just to  
18 bust up the deposition.

19 HONORABLE STEPHEN YELENOSKY: Yeah, I think  
20 my comment then is general, and this has come up in the  
21 question of jury trials locally, and my comment to them as  
22 a judge was that when you talk about juries and to the  
23 extent it's applicable here, I don't think I as a judge  
24 would ever compel anybody to even appear anywhere  
25 physically inside, despite social distancing and a mask,

1 and so to the extent in this context we're suggesting  
2 anything like that, I think it's problematic.

3 HONORABLE TRACY CHRISTOPHER: No. I was not  
4 suggesting that it would be over anyone's objection.

5 HONORABLE STEPHEN YELENOSKY: Okay. Thanks.

6 HONORABLE TRACY CHRISTOPHER: Yeah.

7 CHAIRMAN BABCOCK: Kennon. Yeah. Justice  
8 Gray had his hand up, but I thought he put it down.

9 MR. MUNZINGER: Chip, this is Richard  
10 Munzinger.

11 CHAIRMAN BABCOCK: Sir?

12 MR. MUNZINGER: I would like to go back to  
13 Roger's comments which in general addressed the integrity  
14 of the proceeding and the integrity of the exhibits. The  
15 rules should specifically state how exhibits should be  
16 managed, which is the record copy of the exhibit, mandate  
17 that there be no communications with the witness during  
18 the proceeding, direct or indirect, et cetera, et cetera.

19 If these remote depositions are going to be  
20 used in court, which they obviously are, why are they not  
21 subject to stringent rules that verify their authenticity  
22 and their, quote, purity, close quote. For God sakes,  
23 this is evidence. It's affecting people's rights. There  
24 is no time to say, well, let us have a rule that we work  
25 out over time, and we'll work the kinks out. Until the

1 kinks are out, people may have been victimized by coaching  
2 lawyers, by chats, or something else.

3           A fight could come up in a courtroom, "Well,  
4 wait a minute, that -- that exhibit isn't the exhibit that  
5 you questioned the witness about." And an argument comes  
6 up, well, which is the record copy of the exhibit? You  
7 don't have that with an in-person deposition, because the  
8 court reporter's copy of the exhibit is the record copy of  
9 the exhibit, and people are present to make certain that  
10 the exhibits are kept properly, that they are, in fact,  
11 the same exhibit that the witness is looking at,  
12 et cetera, et cetera. You don't have any of these  
13 controls in a Zoom deposition, but the Zoom deposition  
14 goes into court and affects people's rights.

15           I -- I understand that you don't like to  
16 make complicated rules and you don't want to do all of  
17 these things. Nevertheless, look at what we are doing and  
18 the process that we are doing. The end result of these  
19 proceedings affects people's legal rights in any kind of a  
20 case, in every kind of a case that the civil courts have  
21 jurisdiction over. There's no room, in my opinion, for  
22 any kind of informality or taking a chance on any of this.  
23 We've all -- we all know that not every lawyer is honest  
24 and not every witness is honest, and we all know that  
25 people attempt to game the system. Not all lawyers are

1 honest and what have you.

2           The rule should specify a number of things,  
3 such as no communication with the witness, no one present  
4 with the witness, et cetera. If it turns out -- I mean,  
5 we say that the lawyer has a right to attend the  
6 deposition, what does that mean? Can he go be with the  
7 witness? You know, the rule of thumb ought to be six feet  
8 and a mask. That's good enough to have a court hearing,  
9 it's good enough for everything else, but the long and  
10 short of my point is that I agree with Roger, except that  
11 I think that the rule should specify these things to avoid  
12 problems, because I could see a problem right now. I've  
13 got a 50-page exhibit, and it's a multimillion-dollar  
14 lawsuit or what have you, and someone says, "That's not  
15 the exhibit I testified to. The exhibit I testified to  
16 said A, B, C," and who's going to resolve that issue now  
17 in the trial? How does the trial judge resolve that issue  
18 correctly, meaning truthfully? What is the truth? How  
19 does he know? He doesn't know. And so he says, "Well, I  
20 overrule the objection, get on with it." We've all been  
21 there.

22           The rule should specify these things. This  
23 is a new effort here. This is a new experience. I don't  
24 think that we should take a chance that allowing this  
25 thing to work its way out and to mature itself is what the

1 Supreme Court of Texas is all about. It's about truth,  
2 justice, and it needs to specify in the rule how you  
3 secure that. I'm finished speaking. Thank you. I'm  
4 sorry I don't know how to raise my hand with this dang  
5 machine.

6 CHAIRMAN BABCOCK: You go up to the right --  
7 or somewhere there's a thing that says "participants," and  
8 you hit that, and then your name will be there somewhere,  
9 and when you want to raise your hand you just hit it, and  
10 your hand will come up.

11 MR. MUNZINGER: I'll try and do that next  
12 time. Thank you.

13 CHAIRMAN BABCOCK: But you can butt in any  
14 time, Richard. And, Kennon, who has patiently had her  
15 hand up following the rules, is next.

16 MS. WOOTEN: I just want to make one comment  
17 in regard to the statement about requiring masks, you  
18 know, parameters for an in-person depositions that are  
19 sufficiently protective of the participants. Anecdotally  
20 what I've heard is that people will go into remote  
21 depositions with ideas about how they will play out and  
22 that within a matter of an hour or two people's masks are  
23 coming off, they're getting close to each other. I'm not  
24 saying that people couldn't be safer or better in how they  
25 act in person during this time in depositions and

1 otherwise, but the reality is I think it becomes quite  
2 difficult sometimes when you're in person to keep the six  
3 feet between you. You've got the witness who can't wear a  
4 mask when being deposed, so there's a limitation right  
5 there in terms of what can be done effectively to protect  
6 health and safety in person during these times.

7 I share that information only because I  
8 think so far what I'm hearing is it can be done, but when  
9 it's done it's not going to be as safe for the people  
10 involved, and it's probably not going to entail masks on  
11 everyone, primarily the witness you have not wearing a  
12 mask at all, because that's just not practical.

13 CHAIRMAN BABCOCK: Okay. Levi Benton. Levi  
14 Benton.

15 HONORABLE LEVI BENTON: I construed Richard  
16 Munzinger's comments as a motion to remand this to the  
17 subcommittee, and I second the motion.

18 CHAIRMAN BABCOCK: Okay. I guess -- go  
19 ahead, Tracy.

20 HONORABLE TRACY CHRISTOPHER: Well, remote  
21 depositions have been in the rule for a long time. Now, I  
22 think David was telling us in our subcommittee that, you  
23 know, the court reporters were excited about it, got all  
24 geared up for it, and then they never happened. But they  
25 are happening now, and I actually think that Kennon's idea

1 of perhaps a best practices for remote depositions would  
2 be the best way to go rather than to try to micromanage it  
3 in the rule, just because technology does change. We  
4 would need, you know, a bunch of people that have done it  
5 and have come up with ideas to, you know, sit in a room,  
6 and get those things together.

7           And then the question is if we should spend  
8 that time to do that when anecdotally we haven't seen  
9 problems yet. Now, you know, maybe they're out there.  
10 Maybe there's massive coaching of witnesses. Maybe  
11 there's, you know, lost exhibits that, you know, we  
12 haven't seen yet, but anecdotally it seems that, you know  
13 people are working it out. But so that's my two cents'  
14 worth on remanding it to the committee, especially if the  
15 rule is only for COVID time, which we hope will -- will  
16 end in, you know, a year, assuming we get vaccines.

17           CHAIRMAN BABCOCK: Yeah. Lisa has got  
18 something to say about this, and Kennon does, too.

19           MS. HOBBS: Okay. It might be kind of the  
20 same thing. I think Kennon's comment, just for the  
21 Court's benefit, she was talking about the technology,  
22 like what speed does the computer that your witness is  
23 going to be on need to be, and like I think she was  
24 thinking about like technology. I think that -- I can't  
25 believe I'm saying this, but I do believe that it would be



1 hard for the Court to write best practices of like if  
2 you're going to allow a lawyer to be next to a client what  
3 is the -- you know, what are best practices for that. I  
4 would be scared for the Court, as their former general  
5 counsel, one, because, one day WHO tells me masks are not  
6 helpful, and the next day, the very next day, WHO is  
7 saying, oh, yeah, they're totally helpful. That just kind  
8 of seems like a recipe for disaster. So I don't want to  
9 misinterpret what -- I think I'm -- and Kennon can correct  
10 me if I'm wrong. I think she was just talking about like  
11 the technology of it and not necessarily the Court  
12 weighing in on if you do these things you'll keep  
13 witnesses safe.

14                   On the other hand, I do think I concur  
15 completely with Yelenosky that we should be doing  
16 things -- I mean, we've got to take into account when  
17 trial courts listen to orders -- you know, decide on  
18 motions, like you do need to make sure you're keeping  
19 participants, especially third party participants that  
20 aren't the plaintiff or the defendant, safe during  
21 depositions, but I don't know that we can do that on a  
22 statewide basis, especially when we have, you know, some  
23 counties that are hard hit by the corona and then a lot of  
24 counties that may not have even seen their first corona  
25 case.

1           It just seems that -- I agree with Tracy,  
2 like I don't know that this is the role of the  
3 subcommittee. First of all, none of us are doctors or  
4 epidemiologists or anything like that. I don't advise it  
5 for the Court. I hear all of the concerns, but I think  
6 they would have to be taken on a case-by-case basis,  
7 including the witness' own statement about what their  
8 vulnerabilities are, because it might, you know, matter  
9 more for a 65-year-old nonparty witness than it would  
10 matter to a, you know, 24-year-old super healthy person,  
11 none of which we know. I mean, we're all just learning  
12 about this. I just -- I don't know. That's a little bit  
13 of a soap box, and I'm sorry if I went too far.

14           CHAIRMAN BABCOCK: That's okay. Not to  
15 mention when you're 105 like Munzinger. Kennon.

16           MS. WOOTEN: I will note that what I was  
17 thinking about was technology because that was something  
18 that presented the biggest hurdle for us in the beginning  
19 in terms of internet speed, whether we needed external  
20 speakers, what kind of cameras were required, would it  
21 suffice if it were just in the computer versus needing  
22 something external. In my case we had a lawyer on the  
23 other side tell us all this stuff we needed, and when we  
24 probed about why we would need certain things the response  
25 was "I just copied it and pasted from the Zoom website."

1 So there wasn't a lot of understanding exactly of what was  
2 being demanded because it was picked up and repeated. So  
3 ultimately we realized we didn't need everything on the  
4 list, but had to work with our IT people, go back and  
5 negotiate with them, et cetera, et cetera, and I think  
6 probably when it was all said and done about 10, 15 hours,  
7 went into the process that could have been avoided if  
8 there were some technological standards that we could just  
9 look at and follow.

10 I do want to follow-up on the prior  
11 conversation we were having about the portion of the chat  
12 that's visible after the fact. I received a very helpful  
13 article that indicates that maybe now the private chats  
14 aren't available after the fact, but I point this out as a  
15 perfect example of how quickly the technology can change,  
16 so if you were to try to document what should be done in  
17 the rule proper, I think you would just be stale within a  
18 relatively short period of time if you provided any  
19 meaningful degree of detail.

20 CHAIRMAN BABCOCK: Okay. Thank you.  
21 Alistair, and then Stephen.

22 MR. DAWSON: So it seems to me that, as this  
23 committee does from time to time, we have gotten fairly  
24 far afield of the committee's recommendation. The  
25 recommendation is a recognition in part that remote

1 depositions are going to continue in the future, even  
2 after COVID. I think that they will become used much more  
3 often than they had been in the past, and so as I read the  
4 recommendation, it's merely to amend the administration of  
5 the oath to permit it to be done via video or via computer  
6 as opposed to in person. I think that's a no brainer. We  
7 ought to allow that.

8                   All of these issues that are being raised,  
9 you know, maybe -- maybe they happen in isolated  
10 situations. You know, maybe there are problems with  
11 exhibits or maybe there are problems with, you know,  
12 lawyers coaching witnesses, but those are, I think,  
13 isolated. I haven't experienced them, and I don't think  
14 we could write rules to address all of those. I don't  
15 think we can write rules to have best practices nor should  
16 we. I think all we should do is vote on the  
17 recommendation to change the rule as it relates to the  
18 administration of the oath so that people can use remote  
19 depositions in the future. So I move that we vote on  
20 that.

21                   CHAIRMAN BABCOCK: Thank you. Stephen.

22                   HONORABLE STEPHEN YELENOSKY: Yeah. One  
23 thing I want to follow up on the chat issue. Kennon, were  
24 you saying that the current rule is that -- or the current  
25 technology is that you can or cannot or have the choice of

1 recording chats?

2 MS. WOOTEN: I am digesting right now an  
3 article, and I'll go ahead and say that Robert provided  
4 it, and I'm not sure ultimately whether you can or cannot  
5 see the private chats after the fact.

6 HONORABLE STEPHEN YELENOSKY: Yeah, I mean,  
7 since -- since private chats could be improper, like  
8 during a deposition, they might also be quite proper  
9 between attorney and client that are not a violation of  
10 any rule. I know that in mediation the private chats are  
11 attorney-client privileged conversations in -- between the  
12 attorney and the client who are in different locations,  
13 and neither the host nor anyone else should be able to see  
14 those at the time or after the fact.

15 MR. LEVY: I posted the article in the chat.

16 MS. WOOTEN: And I will note that if  
17 somebody wants to test this --

18 MR. LEVY: Right.

19 MS. WOOTEN: -- they could capture our  
20 meeting chat and see whether Robert and I, our private  
21 conversation, is visible when it's captured.

22 MR. LEVY: But, yeah, one answer would be,  
23 as Kennon notes, you just turn off the chat so that that's  
24 not even an option, and in Zoom, but you certainly would  
25 have the ability to chat through another means, even on

1 the computer. So, you know, again, I think that -- that  
2 there is so much and such a dynamic environment that I  
3 don't -- I agree with -- again, with Tracy's comment that  
4 the rules itself really can't address that, but maybe an  
5 issue for the State Bar to develop best practices and  
6 helpful guides to how to do it to cover these types of  
7 issues, and then as we get more experience then perhaps in  
8 a, you know, few years we can work through additional rule  
9 making.

10 CHAIRMAN BABCOCK: David Jackson.

11 MR. JACKSON: Yeah, I would just like to  
12 kind of take you back to 1989 when videoconferencing first  
13 started. We went through this at that time. We set up 28  
14 different locations throughout the United States. We all  
15 used the same equipment. We all operated at an optimum  
16 bandwidth of 512, which is a half of a T1 so that we  
17 didn't have lag time and their lips weren't moving outside  
18 the audio, so we've done a lot of these things and had a  
19 lot of these issues come up, and some of the gamesmanship  
20 that happened back then, looks like could happen now, and  
21 I'm just telling you that that lasted -- we finally shut  
22 down our unit in like 1995 because of lack of use.  
23 Lawyers used it some. We took some depositions in  
24 England. We took them basically all over the world, but  
25 the issues of gamesmanship probably was the leading cause

1 of people not being comfortable taking videoconference  
2 depositions.

3                   CHAIRMAN BABCOCK: Thank you, David. There  
4 are no more hands up. So, Roger, to the extent you made a  
5 motion, which Levi seconded, I wonder if I could reframe  
6 it slightly and have a vote on whether or not we should  
7 follow the subcommittee's recommendation and leave the  
8 rule as is, and the "no" vote would be, of course, that we  
9 should propose a different rule, and that would require a  
10 remand. So everybody that follows the subcommittee's  
11 recommendation and thinks that the rule should be left as  
12 is for the time being, raise your hand. Remotely.

13                   All right. I've got 11 votes. Let me count  
14 it again. 13 votes now. Everybody done voting? 14, 15,  
15 16 votes now. Anybody else?

16                   Okay. Everybody against the proposal, raise  
17 your hand.

18                   MS. DAUMERIE: Hey, Chip, this is Jackie.  
19 Remember we need to lower hands first.

20                   CHAIRMAN BABCOCK: Right.

21                   PROFESSOR ALBRIGHT: Can you restate the  
22 proposal, please, so we're sure what we're voting on?

23                   CHAIRMAN BABCOCK: Sure. The proposal was  
24 to follow the subcommittee's recommendation and leave the  
25 rule as is for the time being. How do you want to vote on

1 that, Alex?

2 PROFESSOR ALBRIGHT: I'm voting for the  
3 subcommittee's proposal.

4 CHAIRMAN BABCOCK: Okay.

5 PROFESSOR ALBRIGHT: I'm sorry.

6 MS. HOBBS: But to be clear, there was a  
7 change to -- are we ignoring the oath right now?

8 CHAIRMAN BABCOCK: No. No. No, we're not  
9 ignoring that, Lisa.

10 MS. HOBBS: Okay.

11 CHAIRMAN BABCOCK: With the oath. The  
12 subcommittee's proposal. So anybody that is against the  
13 subcommittee's proposal, raise your hand.

14 HONORABLE ANA ESTEVEZ: Chip, I didn't -- I  
15 didn't vote, so I would like to vote with the first. This  
16 is Ana.

17 CHAIRMAN BABCOCK: Yeah. I'll count you  
18 with the first group.

19 HONORABLE ANA ESTEVEZ: Thank you.

20 CHAIRMAN BABCOCK: Anybody else?

21 PROFESSOR HOFFMAN: Yeah, same thing here,  
22 Chip, with Lonnie, vote in favor of the subcommittee  
23 proposal. Sorry about that.

24 CHAIRMAN BABCOCK: Anybody else?

25 MS. PHILLIPS: Same is -- Same is -- it's



1 Kim Phillips, Chip. I'm voting for it, too.

2 CHAIRMAN BABCOCK: Okay. Perfect.

3 MR. STOLLEY: Chip, this is Scott Stolley.  
4 I vote in favor as well.

5 CHAIRMAN BABCOCK: Okay. The vote is 22 in  
6 favor and three against, the Chair not voting. So we will  
7 submit that to the Court, and, Marti, note that we're done  
8 with this particular rule, and let's take a 10-minute  
9 recess and come back at 15 minutes before the hour.

10 (Recess from 10:32 a.m. to 10:42 a.m.)

11 CHAIRMAN BABCOCK: Justice Hecht, Chief?

12 HONORABLE NATHAN HECHT: I'm here.

13 CHAIRMAN BABCOCK: All right. Well, let's  
14 go to item three, suits affecting the parent-child  
15 relationship and out of time appeals in parental rights  
16 termination cases. Pam Baron and Bill Boyce I believe  
17 have got the helm on this one.

18 MS. BARON: Yeah, thanks, Chip, and Bill  
19 Boyce was recently named vice-chair of our subcommittee,  
20 and he is taking the lead on this for our subcommittee.

21 CHAIRMAN BABCOCK: Great, thank you. Go  
22 ahead, Bill.

23 HONORABLE BILL BOYCE: Thank you. So this  
24 proposal that we've outlined in the memo today revisits  
25 the topic that we have discussed at the last -- at least

1 the last two meetings. The overall inquiry is addressing  
2 circumstances that may lead to claims of ineffective  
3 assistance of counsel based on missed appellate deadlines  
4 in parental termination cases in circumstances when there  
5 is an entitlement to representation in connection with  
6 efforts by a governmental agency to terminate parental  
7 rights. If you want to see the roadmap -- I'm not going  
8 to go through the whole background that's set out in the  
9 memo, because we've done that a couple of times already,  
10 but if you want to follow the roadmap, the roadmap is  
11 issues for discussion on page two of the memo, and we're  
12 at stage 1(a), which is dealing with the threshold issue.

13           The threshold issue is showing or addressing  
14 either authority of an attorney to pursue an appeal or, a  
15 flip side of that, intent of a parent to pursue an appeal.  
16 As a threshold inquiry about whether there is a -- a  
17 desire to move forward with an appeal that there is an  
18 entitlement to.

19           What's new in this draft that you have in  
20 front of you are proposed revisions for discussion to  
21 rule -- Texas Rule of Civil Procedure 306. I want to give  
22 a hat tip to Roger Hughes because this proposal in large  
23 part stems from discussions that -- that he initiated  
24 after our last meeting, but before we get to the  
25 particulars of a proposed rule, I want to put down a

1 couple of qualifications.

2           Number one, I don't know that there is  
3 really consensus among the subcommittee members at this  
4 point that this is the ideal way to go. The subcommittee  
5 members may well weigh in with additional thoughts, but --  
6 but I think, as in many situations, rather than have an  
7 abstract discussion, it's a lot easier to have a draft  
8 rule to talk about to flesh out the issues, and so that's  
9 the purpose of this draft right now. You'll recall from  
10 our prior meetings that there was substantial discussion  
11 around the issue of the difficulty of -- in some  
12 circumstances, of determining whether there is a desire on  
13 the part of a parent whose rights have been terminated at  
14 the initiation of a government agency, that there  
15 sometimes can be difficulty in determining whether there's  
16 a -- there's a desire to appeal that, for reasons that we  
17 discussed. The terminated parent may have never  
18 participated in the litigation, or the terminated parent  
19 may have come in and out of the litigation at different  
20 stages. A parent may be difficult to establish  
21 communication with because of a variety of factors, such  
22 as homelessness or domestic abuse or substance dependency  
23 or some combination, and so there's not necessarily going  
24 to be a clear answer in all cases about whether there is a  
25 desire to pursue an appeal.

1           That circumstance led to our prior  
2 discussion about the issues around attorneys who are not  
3 sure if their clients want to appeal pursuing a protective  
4 appeal or a phantom appeal that then leads to other  
5 consequences. The wheels of the appellate process are  
6 engaged perhaps when it's not clear whether or not they  
7 really need to be because there's an intent to appeal, and  
8 that has consequences for courts and court reporters and  
9 such.

10           So our prior meetings discussed potential  
11 mechanisms for trying to -- to create a determination  
12 about whether or not there was an intent to appeal, and I  
13 think -- I'm not sure that there was -- there was a  
14 universal consensus about the best way to go. I think  
15 there were some concerns about creating additional  
16 mechanisms or additional procedures, and we can flesh that  
17 out here shortly. But if you go to page seven of the memo  
18 that was distributed for today's meeting, what you'll see  
19 is -- and carrying onto page eight, a showing of the  
20 current text of rule -- Texas Rule of Civil Procedure 306  
21 and a draft discussion version of Rule 306. Prior  
22 discussions at the full committee meeting and the  
23 subcommittee meeting had identified Rule 306 as a  
24 potential area to place additional rules, if that's the  
25 ultimate decision that we want to do that, because it

1 already talks about requirements for a judgment in a suit  
2 for termination of the parent-child relationship. Rule  
3 306 is not the only place in the rules that talks about  
4 that, and as Chief Justice Hecht mentioned, there's now  
5 additional guidance under Rule 277 for the types of jury  
6 findings that are needed to be made.

7           We can have a discussion about where an  
8 appropriate rule should live if -- if we want to continue  
9 down the path that this draft suggests. One of the topics  
10 that was discussed at the subcommittee was perhaps as part  
11 of a large -- this larger issue we should look at putting  
12 all of the parental termination related rules together in  
13 one place, you know, similar to the way that they are  
14 assembled in part seven of the Rules of Civil Procedure  
15 for other types of specialized court activities. We'll  
16 put that out there. We can come back to that later.

17           Here's the point: Based on the discussion  
18 at the prior meetings and some concerns about the  
19 difficulties of determining whether or not there really is  
20 an intent and how to make that finding and when it should  
21 be made and so on and so forth, this draft rule that's  
22 contained at pages seven and eight of the memo attempts to  
23 realign the discussion around the existing statutory  
24 standards in the Texas Family Code for the duration of the  
25 attorney's representation and when that attorney ad litem

1 is going to cease representation of the parent or the  
2 putative parent. And so the idea here is to have a  
3 mechanism that aligns with existing statutory standards,  
4 but also provides room to make the determinations that  
5 we've discussed previously about whether there is good  
6 cause to continue with the representation and thus the  
7 appeal.

8                   So if you look at page seven under the draft  
9 Rule 306, that first paragraph continues the second  
10 sentence of the existing rule. The subcommittee's thought  
11 was that the first sentence of existing Rule 306 probably  
12 could be moved to Rule 301 because it's generic to all  
13 types of cases and not necessarily specific to parental  
14 termination. But the draft rule picks up the second  
15 sentence of existing Rule 306, and then the paragraphs  
16 (2) (a), (b), and (c) cover circumstances under which the  
17 attorney, the appointed attorney, would continue or not  
18 continue with the representation; and within that,  
19 specifically under (2) (a), that contemplates a finding of  
20 good cause. That may be the place where further  
21 discussion can be made about whether or not there really  
22 is an intent to appeal, any difficulties in maintaining  
23 contact with the client, that sort of a thing.

24                   2(b) points out or focuses on an area that I  
25 think that there was a significant amount of agreement

1 with. I won't say universal or consensus, but I think a  
2 significant amount of agreement with in the prior  
3 discussions, and that was that, sort of dividing the world  
4 into two, there are cases in which the putative father  
5 never appears in the case after citation, never  
6 participates, never evidences any circumstance or any  
7 evidence to indicate a wish to participate or contest  
8 termination, and I think there was probably some greater  
9 comfort level about having a default rule that said in  
10 that particular circumstance it may be appropriate to say  
11 we're going to reach a conclusion that there's not a  
12 desire to pursue an appeal here and avoid a phantom appeal  
13 or a protective appeal in that circumstance.

14           So that's what 2(b) is trying to get to, as  
15 distinguished from the other circumstance that was  
16 described where a parent involved in a parental  
17 termination proceeding may enter intermittently  
18 participate in the case, may disappear for a while and  
19 re-emerge, may participate in trial but then be  
20 unreachable after trial, those sort of situations where  
21 there was a greater concern about having some sort of a  
22 default rule that would cut off rights. And so I think  
23 that's a sufficient preamble at this stage to open up the  
24 floor for further comments, and I guess I would suggest  
25 that to the extent that any of the subcommittee members

1 want to elaborate on this introduction or point out  
2 anything that I've omitted, this would be the time to do  
3 it.

4 CHAIRMAN BABCOCK: Thanks, Bill. I think  
5 Pam's got her hand up, and then Alex.

6 MS. BARON: Yeah, let me just say, we are  
7 suggesting changes to Rule 306. We realize those are not  
8 in the appellate rules. We're not trying to engage in a  
9 takeover here. We did coordinate with Frank Gilstrap's  
10 committee, subcommittee, and they participated in our  
11 discussion on these changes. That's it.

12 CHAIRMAN BABCOCK: Thank you. Alex.

13 PROFESSOR ALBRIGHT: I don't want to get  
14 into gender politics here, but I -- it occurred to me as I  
15 was reading this, would it be -- I understand why we say  
16 "alleged father," but might it be better to say "alleged  
17 parent"? I don't know that I'm qualified to know whether  
18 that's appropriate or not, but I just raise it for Jackie  
19 or someone who might want to check and see with all. You  
20 know, gender is very fluid these days, so I don't know if  
21 fatherhood is fluid, but I just want to flag that.

22 CHAIRMAN BABCOCK: Thanks, Professor  
23 Albright. Justice Christopher, and then Frank.

24 HONORABLE TRACY CHRISTOPHER: So I was a  
25 little unclear what we're doing with respect to replacing



1 by another attorney. Usually what happens now, you have a  
2 trial attorney in the parental termination cases, and then  
3 they -- the court appoints someone else for the appeal.  
4 It's not the same lawyer generally that goes up for  
5 appeal. So was that intended to be there in section (a)?

6 HONORABLE BILL BOYCE: Are you talking about  
7 2(a)?

8 HONORABLE TRACY CHRISTOPHER: 2(a), uh-huh.

9 HONORABLE BILL BOYCE: Yes. Yes. So the --  
10 I think the short answer is yes, to just make it as broad  
11 as possible to -- to provide -- to cover whatever might  
12 happen at the conclusion of the trial, either a  
13 termination of the -- of the trial attorney ad litem's  
14 participation in not going forward with the appeal or  
15 termination of the attorney ad litem's participation at  
16 trial in going forward with the appeal with another  
17 attorney. Not -- trying to not limit it either way, but  
18 to provide a place in the rule where if a discussion is  
19 going to be had, you know, does this terminated parent  
20 really want to appeal, that would be a place that would  
21 authorize it. Does that make sense?

22 HONORABLE TRACY CHRISTOPHER: I would be  
23 confused if I was a trial judge reading this.

24 HONORABLE BILL BOYCE: Okay.

25 HONORABLE TRACY CHRISTOPHER: As to what it

1 specifically addresses. I mean, if the idea is to capture  
2 only those cases where they don't want to appeal, I think  
3 the rule needs to be clearer, because, you know, I mean  
4 otherwise we have this regular practice of -- at least in  
5 Harris County, we always get a different lawyer, appointed  
6 lawyer for the appeal versus the trial. I mean, that's  
7 just a matter of course, you know, for a number of  
8 reasons. The primary -- primary one is that you want the  
9 appellate lawyer to have an opportunity to say that the  
10 trial lawyer was ineffective, so, you know, when you do  
11 the appointed process, you usually pick a different person  
12 for the appeal. So to me I would be confused about what  
13 we were doing here.

14 HONORABLE BILL BOYCE: Okay.

15 CHAIRMAN BABCOCK: Okay. Frank, then Roger,  
16 then Lisa.

17 MR. GILSTRAP: First of all, with regard to  
18 Pam's comment, it was pretty easy to bring our  
19 subcommittee on board since we have considerable overlap  
20 with the appellate rules subcommittee, although the people  
21 that came on later were very helpful. With regard to the  
22 draft, I do have a comment on 2(b). The idea is, is -- as  
23 I understood it, was that, if, say, the father hasn't  
24 appeared at all or maybe he's only appeared once briefly,  
25 then that's kind of a de minimis appearance, and so we're

1 going to say under those circumstances we can go ahead and  
2 conclude that there's good cause. But when I read the  
3 draft, it says "in any manner," and a clever lawyer could  
4 read that just the opposite. Well, you know, there were  
5 10 appearances and you only made nine, so you failed to  
6 appear in some manner. That's got to be clearer.

7 CHAIRMAN BABCOCK: Roger.

8 MR. HUGHES: Yeah, two things. First, to  
9 address the thing about gender politics, I had a hand in  
10 suggesting this draft, and I chose that language to track  
11 the statutes when an ad litem must be appointed, and those  
12 are in two circumstances, one in which the government  
13 agency is attempting to terminate some parent's parental  
14 rights, or it's a paternity suit and they're trying to  
15 serve an alleged father. That's why the "alleged father"  
16 is in there.

17 The second thing was -- and this is a purely  
18 personal thing. I think trying to figure out what a  
19 parent who has very little contact with the attorney ad  
20 litem or maybe none at all, trying to figure out what they  
21 want done in a given circumstance, personally, and this is  
22 my opinion, it's a legal fiction, and in that if you  
23 appoint an appellate attorney, the only way they're going  
24 to feel safe is to march forward. So to me I think to try  
25 to follow the statute, the question needs to be not does

1 the attorney have authority to appeal. I think the  
2 question is, is whether there is good cause, yes or no,  
3 and that's a factual question, just to terminate the  
4 appointment of an attorney altogether, and that ends  
5 having to try to figure out a hypothetical issue as to  
6 whether the attorney, who may never have seen or met with  
7 the parent or has only met one or two times and not  
8 recently, whether that attorney has authority to appeal.  
9 That's my two bits. Thank you.

10 CHAIRMAN BABCOCK: Lisa. Lisa, we can't  
11 hear you if you're talking.

12 MS. HOBBS: Sorry about that. I promised  
13 myself I would not do that today. I'm unmuted now, but to  
14 Judge -- Justice Christopher's comment, when I first read  
15 2(a) I thought it was a little bit cumbersome, too, and  
16 maybe not clear, and maybe that's reason for us to all  
17 look at the language a little bit closer, but keep in mind  
18 that it says, "The judgment may state that an attorney ad  
19 litem appointed for a parent or alleged father is relieved  
20 or replaced by another attorney." So I think that the  
21 "relieved or replaced" takes care of Harris County that  
22 always appoints a different appellate lawyer versus some  
23 of these small counties where they don't, that the trial  
24 court -- they don't have an appellate wheel. They just  
25 have like a trial court CPS wheel and not an appellate

1 wheel. So I think just -- and I'll look forward to  
2 further discussion with you about it, Judge Christopher,  
3 but I just wanted to point that language out.

4           The -- the -- and then Roger made the point  
5 about alleged father versus putative father. I always  
6 thought it was a putative father. Am I just making that  
7 up? Does the statute really talk about an alleged father?

8           MR. HUGHES: I don't have the statute in  
9 front of me, so I can't remember the exact statutory  
10 language, but I was attempting to attract -- pardon me, to  
11 track the statutes in their language so that nothing would  
12 be missed or go astray.

13           MS. HOBBS: Uh-huh.

14           MR. HUGHES: So if you go back to the  
15 statutes and they only use one term, then that's what we  
16 use.

17           MS. HOBBS: As to your broader point, Roger,  
18 I think that Justice Boyd does a good job of laying out at  
19 the bottom of page six, top of page seven, where the --  
20 what the real problem is meant to address, which is  
21 somebody disappears from a case for an amount of time.  
22 They might be imprisoned. They might be just going  
23 through, you know, mental illness issues, and so I'm  
24 mostly speaking from experience of my partner being an  
25 appointed appellate attorney where we don't -- like we are

1 way past any -- I mean, hopefully before we file our brief  
2 we will have talked to -- finally gotten in touch with the  
3 parent whose rights have been terminated, but there's all  
4 kinds of reasons it comes up. Incarceration, you know,  
5 other issues going on. Just they move for a job, and  
6 trying to get in touch with family members of like where  
7 they went for their job, like it's just harder than you  
8 can imagine, and it's never as timely as you think it can  
9 be before we can even get on the phone call. Like a phone  
10 call with the client. And I thought Justice Boyce did a  
11 really good job of outlining that for the committee, so  
12 the problem that we're trying to solve here.

13 CHAIRMAN BABCOCK: Okay, thanks, Lisa. Pam.

14 MS. BARON: Yeah, I think in response to  
15 Justice Christopher's comment, I see why she said that,  
16 and I'm wondering if this might fix it if we changed (a)  
17 to say, "or replaced by another attorney for purposes of  
18 appeal" and then add language in (b) and (c) that says --  
19 that makes clear that the attorney ad litem is discharged  
20 and no one will be appointed from there on for appeal. So  
21 we have, you know, part (a) that says you're relieved or  
22 replaced with an appellate attorney, and (b) and (c) have  
23 two situations where you're discharged without anyone else  
24 being appointed to continue the appeal. Would that work,  
25 Justice Christopher?

1                   CHAIRMAN BABCOCK: Justice Christopher.

2                   HONORABLE TRACY CHRISTOPHER: Well, okay, so  
3 do we really have to have the judge put in good cause if  
4 they've decided to hire a different appellate attorney?  
5 You know, as is just sort of the normal practice in Harris  
6 County, the trial attorney is out, the appellate attorney  
7 is in. I mean, do we have to have a finding of good cause  
8 all the time in the judgment to that effect? That's what  
9 I'm confused about. I mean --

10                   MS. HOBBS: No, I think -- I think the first  
11 one says that -- the intent, and Justice Boyce can correct  
12 me if I'm wrong. The first one says that it's sort of the  
13 timing, like we want in the judgment whether we're going  
14 to relieve the -- the trial court and/or appoint a new  
15 one. The rest of them are meant to be the standard for  
16 when you're relieving them, but you might -- a trial  
17 court -- I don't know. Some trial courts who do CPS cases  
18 tell me, and I can talk to Karlene about it, but I  
19 think -- I think (b) kind of only kicks in if you're going  
20 to -- like if you've gotten some reason to believe that  
21 the -- under Rule 12 or whatever standard we adopt, that  
22 the client doesn't want to pursue an appeal. Right? And  
23 then at that matter -- it's the standard -- I don't know.  
24 It might be complicated because we're trying to do too  
25 much in one rule.

1 CHAIRMAN BABCOCK: All right.

2 MS. HOBBS: In other words, we're -- we're  
3 trying to -- we're trying to determine like both the  
4 duration of an appointment and -- and whether they have  
5 authority to pursue on. We're also trying to put the  
6 standard in there. So we're trying to do the timing of  
7 when -- who and when makes these decisions, and we're  
8 trying to do the standard for them, and we're doing it in  
9 the same rule, and that might be where the confusion is,  
10 Justice Boyce.

11 HONORABLE BILL BOYCE: Uh-huh.

12 CHAIRMAN BABCOCK: Pam.

13 MS. BARON: Yeah, I don't think we need good  
14 cause in (a). Because good cause is in (b) and (c).

15 MS. HOBBS: Yeah, Justice Boyce, you tell  
16 me, was (a) meant to be that you -- maybe I'm wrong about  
17 what you intended (a) to be. Is that the timing of it?  
18 It needs to happen -- maybe I'm just confused, too.  
19 Sorry.

20 HONORABLE BILL BOYCE: No. So the intent  
21 was to have kind of an overall provision that could be  
22 adapted to multiple circumstances. Maybe the attorney ad  
23 litem is relieved and not replaced, maybe the attorney ad  
24 litem is relieved and replaced. I think at least the way  
25 I was thinking about it is 2(a) is kind of a catch-all to



1 cover multiple circumstances; (b) and (c) are more  
2 specific to address the specifics that we talked about;  
3 for example, the alleged father who was served but never  
4 has appeared at all. And, Lisa, just to follow-up in your  
5 earlier question, I double-checked the statute, and it  
6 does refer to "alleged father."

7 MS. HOBBS: Okay. Very good.

8 HONORABLE BILL BOYCE: For whatever that's  
9 worth. Now, that being said, maybe 2(a) is too much of a  
10 catch-all, and that's what's causing confusion, and  
11 there's going to be uncertainty about exactly what it  
12 authorizes or what it requires in the trial court, so if  
13 it's too much of a catch-all, then that could be  
14 granulated out some more.

15 CHAIRMAN BABCOCK: Roger.

16 MR. HUGHES: There -- the reason -- the  
17 reason the word "good cause" keeps appearing throughout  
18 the draft is that is a statutory and a case law  
19 requirement. The Supreme Court has basically said if the  
20 ad litem is going to be relieved, there needs to be a  
21 finding of good cause, and I think in one of the cases --  
22 and it's cited in the note -- they said good cause is not  
23 going to be "I think the appeal is meritless." That's not  
24 good cause for relieving the attorney. That's good cause  
25 for a brief stating the attorney's opinion, but not for

1 relieving the attorney. So the reason why it was phrased  
2 that way was to give the judge a discretionary basis which  
3 would be fact-intensive or fact-specific to the case that  
4 -- for good cause, and that -- that was all it was  
5 intended to do.

6 MS. HOBBS: To that point and in further  
7 criticism of (a) that we may need to rework it, I don't  
8 think that replacing an ad litem requires good cause. So  
9 the way the rule is worded is that to relieve them -- and  
10 I agree with Roger that that is the statutory standard,  
11 but appointing an appellate attorney in this case doesn't  
12 require good cause. In fact, it's the default that you  
13 would appoint them, absent some acknowledgement by someone  
14 that the client doesn't want to appeal.

15 CHAIRMAN BABCOCK: Okay. Justice Gray.

16 HONORABLE TOM GRAY: The issue -- there's a  
17 lot of moving parts here, and I agree with whoever it was  
18 that said maybe we're trying to address too much in one --  
19 one place in the rules, but specifically with regard to  
20 replacing an attorney, there's a well-developed body of  
21 law in criminal cases that you cannot replace appointed  
22 counsel over the objection of a client, particularly prior  
23 to judgment. So the "for good cause" language in 2(a) may  
24 avoid a due process violation appointing appellate -- and  
25 appointing an appellate specialist may, in fact, be the

1 good cause you need, but there is a due process argument  
2 that once an attorney is appointed and the client is  
3 satisfied, you can't replace them just because, you know,  
4 you want somebody that's more cooperative or something to  
5 get in a judgment, is the problem.

6 CHAIRMAN BABCOCK: Thank you, Justice Gray.  
7 Harvey Brown.

8 HONORABLE HARVEY BROWN: It seems to me the  
9 "relieved" is the thing that is requiring the good cause,  
10 and the "replaced by another attorney" may be that we need  
11 consent. So I would break those down into two separate  
12 things. I mean, I would have a little (i) for "relieved"  
13 after "stating a finding of good cause" or two little (i),  
14 "replaced by another attorney with consent of the parent  
15 or alleged father."

16 MS. HOBBS: I think that's a great idea,  
17 breaking them out. The problem is that we're addressing a  
18 point where we don't necessarily know whether we're  
19 going -- like we don't know -- we're assuming under this  
20 rule that we don't know where the parent is, so I don't  
21 know what you mean by consent. Maybe you mean unless  
22 objected to. It can't be consent, though, because that  
23 assumes like an affirmative action by a client that we may  
24 not be able to get in touch with at this moment.

25 HONORABLE HARVEY BROWN: I think that's a

1 good point, so maybe what you suggested, something of a  
2 consent or some other language to take up the person who  
3 we can't reach.

4 MS. HOBBS: Yeah.

5 CHAIRMAN BABCOCK: Justice Christopher.

6 HONORABLE TRACY CHRISTOPHER: I was  
7 making -- I'm sorry, I was making an effort to sort of  
8 rewrite it, and to me, I mean, if we're going to put this  
9 in here, I would say, "The judgment must address a parent  
10 or alleged parent's appeal by one of the following: (a),  
11 acknowledging the appointed ad litem will continue the  
12 appeal, or (b), replacing the trial attorney with another  
13 attorney for the appeal, or (c), where the parent or  
14 alleged parent has failed to appear," then you go into the  
15 good cause that you have in (b) and (c), that, you know,  
16 there will be no appeal because the parent or alleged  
17 parent has failed to appear. I mean, let's make it clear  
18 what we're doing. There won't be an appeal at that point.

19 CHAIRMAN BABCOCK: Roger. Roger, you need  
20 to unmute.

21 MR. HUGHES: I just wanted to make two  
22 points. First, when I made my suggestions, I thought that  
23 the judgment ought to be the place where if an attorney is  
24 going to be relieved or an attorney will be replaced,  
25 that's where it be, that that issue be resolved in the

1 judgment so that everybody will know when and where that  
2 order is going to be, and that it not be some collateral  
3 order, which God only knows when it gets made.

4           The second thing is I was -- when I read  
5 Justice Boyce's memo, I was really attracted to the idea  
6 of dealing with the phantom appeal by saying that there be  
7 a rule of -- or an appellate procedure that incorporates  
8 Rule 12 and simply refers the matter back to the trial  
9 court to determine the attorney's -- the ad litem attorney  
10 or the appointed counsel's authority to pursue the appeal.  
11 I think that's a good way to do it. And that's my two  
12 cents' worth.

13           CHAIRMAN BABCOCK: All right. Bill, back to  
14 you.

15           HONORABLE BILL BOYCE: Okay. Well, I've got  
16 the committee's guidance and can work with the  
17 subcommittee to reconfigure this proposal to try to make  
18 it more clear. I guess I would ask for the full  
19 committee's thoughts about whether Rule 306 is the place  
20 to do this or do it somewhere else or gather rules  
21 together. I have to say that I am persuaded by Roger's  
22 point that if we're going to try to have a clear place  
23 where everybody knows what to look to to figure out what's  
24 going on and whether or not an attorney is going to  
25 continue and/or there's going to be an appeal, steering

1 the findings and the discussion to the judgment seems like  
2 a good place to do that, but there may be different  
3 thoughts about how to approach it.

4 CHAIRMAN BABCOCK: Okay. Lisa, and then  
5 Frank.

6 MS. HOBBS: Okay, I just -- first of all,  
7 Justice Boyce, I'm sorry that I didn't read this before  
8 this committee. I probably could have given you some  
9 advice before today, and I know you circulated it, and I  
10 apologize that I didn't get some comments to you before  
11 that. I really like Justice Christopher's idea of like  
12 breaking this down a little bit more simpler, and I think  
13 we do need to go back to the drafting table. I think one  
14 thing that struck me about her word choice, though, which  
15 I know she was just on the fly and not committed to, when  
16 she says, "There will be no appeal if (b) or (c)," I don't  
17 think -- I don't think you can say it that -- Shelby, stop  
18 it. Sorry. Sorry. That's my dog. Dog number one.

19 I don't think you can say it that bluntly  
20 just because you still have discretion. A trial court,  
21 even if a father failed to appear in any manner, he  
22 might -- I don't know, I can't think of the scenario, but  
23 I certainly would like for him to have some discretion  
24 based on the record and what he learned about the father  
25 or whoever, whatever parent. So I still want a little bit

1 of discretion in there. I think we move into statutory  
2 drafting as legislators instead of just trying to  
3 interpret the Family Code if we go too far there, so  
4 that's just kind of a rule -- just a thought as we move  
5 forward on redrafting.

6 I kind of like the idea of the -- Roger's  
7 suggestion about a Rule 12 but in the appellate court,  
8 because things move so fast at the end of these trials, we  
9 may actually have more facts as the appeal is perfected  
10 where someone could figure out how to show authority on  
11 appeal. The problem, of course, with that is that  
12 appellate courts, these can be fact-intensive and  
13 appellate courts aren't exactly the best place to resolve  
14 factual disputes. They could obviously, obviously, abate  
15 it, but I think the reason why we've gone to the point of  
16 this needs to be made at the judgment stage and maybe  
17 before the client ever leaves the courtroom after the  
18 verdict is because of the problems either getting the  
19 client after that moment or just who can really serve that  
20 fact-finding purpose.

21 CHAIRMAN BABCOCK: All right. Frank  
22 Gilstrap.

23 MR. GILSTRAP: Chip, I think Bill had called  
24 for comments about placement, but apparently there's still  
25 some people that we need to -- would like to talk about

1 the provisions of the rule, which is much more important  
2 at this juncture than placement, so my comments don't have  
3 anything to do with the -- the wording of the rule, and  
4 maybe you want to defer that.

5 CHAIRMAN BABCOCK: No, I think go ahead now.

6 MR. GILSTRAP: Okay. Okay. Well, you know,  
7 we don't talk about placement much, and, you know, as you  
8 know, when we have a problem with the rules, we just try  
9 to fix the rule because we know that if we start tampering  
10 with other provisions it can have unintended consequences.  
11 It's kind of like fixing a leak on a ship. You just fix  
12 the leak because you don't want to rock the boat, but  
13 after a while you fix leak after leak and the ship tends  
14 to become unseaworthy, and I think we've kind of reached  
15 that point here with the Rules 300.

16 Originally, you know, as everybody has  
17 pointed out, the first sentence of Rule 306, which simply  
18 calls for the names of the parties against whom the  
19 judgment is rendered to be in the judgment, is not a big  
20 deal, and it could easily be moved to Rule 301. But  
21 originally Rule 306 was a big deal because it also  
22 required that you recite the findings of the jury and upon  
23 which the judgment of the court is based, and that was a  
24 big deal, but the Court got rid of that in 1971 so we just  
25 had the first line of Rule 306, which was kind of a throw



1 away.

2           But then in 2012 the Court came back in and  
3 put this second sentence that we're struggling with about  
4 the recitations in a suit for termination. I don't know  
5 why the Court put it there, but that's where it is, and  
6 now we're talking about making Rule 306 kind of a  
7 standalone rule dealing with this termination issue.  
8 That's not a bad idea, but it doesn't need to be in 306.  
9 It needs to be further back in the rules, and if you'll  
10 look at the rules, bear with me here, Rule -- in the 300s,  
11 Rule 300 through about, gosh, 307 or 308, are generalized  
12 rules that apply to every kind of case. Then when you get  
13 after that, you have very specialized rules that apply to  
14 different cases, foreclosures, suits against executors,  
15 appeal from justice court. The first one of those rules  
16 is a rule that's entitled, "In suits affecting the  
17 parent-child relationship." That's 308(a) and when you --  
18 you say, well, that's a great place to put this rule,  
19 except when you read that rule it has nothing to do with  
20 what we're talking about. It has to do with enforcing  
21 child support obligations, and, you know, possession of  
22 child, and I don't know if that rule is still being used.  
23 I don't know anything about the area. It would be helpful  
24 to know what the current status of that rule is, but I  
25 think we need to -- we need to take the rule that we're

1 drafting and put it in in 308(b).

2           It will be fine there, and it will stand  
3 alone. It will be next door to another suit -- another  
4 rule involving parent-child relationship, and I think  
5 Scott Stolley on our subcommittee said, well, this may be  
6 the time to go ahead and kick it over into the last part  
7 of the rules, which where we have specialized rules, like  
8 with trespass to try title, that type of thing. I don't  
9 think the time has come yet, but certainly I think the  
10 rules involving judgment that touch on the parent-child  
11 relationship need to be together, and we don't need to put  
12 this rule back at the beginning of the rules where it's  
13 misplaced. That's all I have.

14           CHAIRMAN BABCOCK: Thanks, Frank. Justice  
15 Gray.

16           HONORABLE TOM GRAY: This is a comment,  
17 first, back where Lisa was talking about the need to have  
18 the ability to do the appeal even if you didn't  
19 participate in the trial. We've had the situation in Waco  
20 where the father never -- and actually the mother as well,  
21 so it's gender neutral here -- never showed up at any  
22 point during the trial, and the reality of it all didn't  
23 hit until the actual judgment. And so the -- and there  
24 may or may not have been problems about participation in  
25 the trial, but it was -- they may not even have known

1 about it until they wound up getting a copy of the  
2 judgment, and, you know, that's when it became real,  
3 that's when it became important to them. Sometimes it's  
4 where the child wound up that is the part that triggers  
5 the parents' reaction to the judgment, and so I agree with  
6 Lisa that there needs to be some way to preserve that  
7 ability to appeal, even if there was no participation  
8 during the course of the trial.

9           And then second, I question whether or not  
10 we should be doing anything without Richard. You know,  
11 should we even get close to the Family Code without  
12 Richard's presence. So with that I'll sign off.

13           CHAIRMAN BABCOCK: All right. Scott  
14 Stolley.

15           MR. STOLLEY: Yeah, Chip, I want to echo  
16 Frank -- a little bit of Frank's comments. In our  
17 subcommittee meeting I mentioned that we -- we meaning the  
18 Court eventually -- might want to consider putting all of  
19 the rules related to the parent-child relationship in a  
20 different, separate subpart toward the end of the Rules of  
21 Civil Procedure, and toward the end there we have separate  
22 subparts for various things like garnishments,  
23 attachments, injunctions, foreclosures, trespass to try  
24 title, and it seems like it would be a good idea to  
25 capture all of the rules relating to the parent-child

1 relationship lawsuits in one place rather than having them  
2 scattered throughout the Rules of Civil Procedure.

3 I mean, we're talking about one of the very  
4 fundamental constitutional rights here, the parent-child  
5 relationship, and we have other types of lawsuits that  
6 have their own subparts in the rules that are not nearly  
7 as important as the parent-child relationship, so I would  
8 urge that eventually the Court create that separate  
9 subpart in the rules so that they're all -- they're all in  
10 one place and not so hard to find. Thanks.

11 CHAIRMAN BABCOCK: All right. Thank you.  
12 No other hands are up, so I'll pitch it back to Bill.

13 HONORABLE BILL BOYCE: Okay. I think that  
14 gives us the guidance we need to retool and come back.

15 CHAIRMAN BABCOCK: All right. Great. So we  
16 will -- we will, in Levi Benton's words, remand this one  
17 to the subcommittee and bring it back at our next meeting.  
18 Unless everybody is violently opposed, I'd like to work  
19 until -- for another hour until about 1:30. Would that be  
20 another hour? Yeah. Before we take our lunch break. The  
21 reason for that is not because I'm trying to starve  
22 everybody, but because Judge Mazzant while we've been in  
23 this meeting has set me for a TRO hearing this afternoon  
24 at 2:00. So that way I'll be able to hopefully get ready  
25 for the TRO, have the TRO, and be back with everybody by

1 2:30. So if there's no violent objections to that, we'll  
2 move on to the next rule, which is the parental leave  
3 continuance rule, and Professor Carlson and -- is the  
4 chair. Tom Riney is the vice-chair, and, Elaine, are you  
5 there?

6 MS. WOOTEN: I will chime in and say that  
7 she has asked me to take the lead today.

8 CHAIRMAN BABCOCK: Okay. Great. And I  
9 couldn't see who was speaking.

10 MS. WOOTEN: Kennon.

11 CHAIRMAN BABCOCK: Okay, great. Fire away.

12 MS. WOOTEN: All right. So we have provided  
13 a memo for the committee's consideration, and in this memo  
14 we have now presented a recommendation of the subcommittee  
15 for full committee consideration. To refresh everyone's  
16 memory, during the last meeting in which parental leave  
17 continuances were discussed, the subcommittee had for the  
18 committee just a draft, discussion draft. This is an  
19 actual recommendation based on input received from the  
20 full committee both during the last meeting, which was on  
21 February 28th, 2020, and during the prior meeting on  
22 November 1, 2019. I'll just walk through some of the key  
23 points in the memo and then defer to other members of the  
24 subcommittee to make any further points that they think  
25 should be made before we have full discussion.

1           So as noted in the memo, first paragraph,  
2 like I said earlier, we've had two meetings to discuss  
3 parental leave continuance and related issues, and I  
4 noticed in reading the transcript from the February 28th,  
5 2020, meeting that perhaps there was an error in the vote  
6 characterization that got carried over to this memo, so  
7 we'll have to go back and check, but from what I can tell  
8 from our last transcript, the full committee voted 20 to 1  
9 in favor of proposing a rule addressing parental leave  
10 continuance on November 1, 2019; and over the course of  
11 time what we've seen is a little bit of development in  
12 that when the State Bar Court Rules Committee was first  
13 looking at parental leave continuance, we had only the  
14 Florida rule and a local rule to kind of guide us.

15           Since then, of course, we've had North  
16 Carolina come on board with a continuance rule for further  
17 guidance and also some -- some good language that's been  
18 carried over in part to the proposal before you today.  
19 Both the Florida and North Carolina rules are provided as  
20 attachments if you want to look at them. In addition, for  
21 your review if you want to look at it, is the State Bar  
22 Court Rules Committee's proposed changes to Rule 253, the  
23 continuance rule. In addition, if you want to look at it  
24 again to refresh your memory, we've provided the Harris  
25 County local Rule 11 that entitles the lead counsel to

1 file a vacation letter that precludes the case from being  
2 set for trial and relieves counsel from engaging in  
3 pretrial proceedings during that time frame.

4           Over the course of our discussion, we  
5 received input from the Court, both during Supreme Court  
6 Advisory Committee meeting and also separately, to  
7 consider broadening the proposed continuance rule to  
8 extend not just to parental leave continuances but also to  
9 situations set forth in the FMLA that, of course, extend  
10 beyond just the birth or adoption of the child. So that  
11 all of you can look at what's provided in the FMLA, we  
12 have also provided a copy of that as an attachment.

13           So the proposal for consideration today  
14 begins on page two of the memo that's been provided to  
15 you. So we'll turn to that, and you can see at the top of  
16 page two you have the existing language of Rule 253 to  
17 kind of ground you, and then the subcommittee  
18 recommendation follows. So I'll cover some high points  
19 here and again leave it to the other subcommittee members  
20 to fill in any gaps they think need to be filled before we  
21 have a broad discussion, but I think a high point to make  
22 before we dive in is that there is this desire to kind of  
23 balance our personal needs and including parental needs  
24 and the need to care for our loved ones with the need for  
25 efficient administration of justice. And so the challenge

1 is striking the right balance in the proposal, and that's  
2 what the subcommittee has tried to do.

3           So if you look at the rule that's proposed,  
4 subpart (a) is the part dealing with parental leave  
5 continuance specifically. As noted in footnote 1, we  
6 could refer to this as "secured leave period" following  
7 North Carolina, but as of now it's referred to as  
8 "parental leave continuance" because that is the subject  
9 matter at hand, specifically the birth of a child or the  
10 placement for adoption of a child. I know there was a lot  
11 of discussion during the last meeting about the scope for  
12 this rule, what it should cover. As of now the  
13 recommendation is to include both trial settings and  
14 determination of summary judgment motions.

15           Just to kind of give you-all some additional  
16 background there, in North Carolina there is application  
17 to proceedings and depositions, and I believe our  
18 legislative continuance rule here in Texas applies simply  
19 to trials. In this proposal you'll see that 12 weeks is  
20 the presumptive maximum length for the parental leave  
21 continuance that may be taken within the 24 weeks of the  
22 birth or placement of a child for adoption. Unpacking  
23 that just a little bit, I believe that's what North  
24 Carolina does as well, and more specifically has the  
25 12-week presumptive maximum leave that it's within this 24



1 weeks after birth or placement of a child for adoption.  
2 I'll insert just a personal note here that I think that  
3 24-week period is good, in part because what it allows is  
4 for parental leave to be taken by a father, for example,  
5 perhaps not right after the birth of a child, but after  
6 the mother goes through a parental leave period.

7           You'll see in the proposal there, paragraph  
8 (a), still that upon a showing of good cause the trial  
9 court may allow a longer time for the parental leave  
10 period. So that's just discretion accounting for  
11 variations that occur in our lives when we become parents  
12 that we shouldn't try to imagine all of those  
13 possibilities here as a committee or put them into the  
14 rule.

15           There is then finally the last part of  
16 subpart (a) there, an exclusion clause, saying that the  
17 rule does not apply to cases arising under Chapter 54, 83,  
18 or 85 or 262 of the Family Code. You'll see in footnotes  
19 explanations of what those chapters cover, and it also  
20 says that this wouldn't apply in involuntarily civil  
21 commitment or guardianship proceedings. In footnote 6  
22 you'll see that there's a recommendation as of now from  
23 the subcommittee to recommend presumptively mandatory  
24 parental leave application to expedited trials, but if we  
25 do that, we're going to need to amend Rule 169(d)(2) to

1 reflect the application of the proposed rule.

2           Subpart (a)(1) addresses timing for filing.  
3 I know there's been a lot of discussion about when the  
4 filing should occur, so you'll see here that it's at least  
5 90 days before the date of commencement of parental leave  
6 period as to an existing trial settings and then for  
7 others within seven days of a trial setting made less than  
8 90 days before commencement of the secured leave period.

9           Again, there's a sentence in here accounting  
10 for the fact that there's no way to predict the needs,  
11 timing, et cetera, for when we become parents and how that  
12 all unfolds, so last sentence of subpart (a)(1) reads,  
13 "Because of potential medical complications and the  
14 uncertainty of a child's birth or adoption date, the trial  
15 court must make reasonable exception to this requirement."  
16 So some discretion, but also a mandate to make some  
17 reasonable exception.

18           Turning the page to three, you'll see that  
19 there is a requirement to support your motion for parental  
20 leave continuance and have an affidavit or an unsworn  
21 declaration confirming several things. I won't read all  
22 of those things, but you can see them all set forth there.  
23 One bracketed area for discussion is in 2(B), where you  
24 have to show the continuance is not sought merely for  
25 delay. Bracketed language is in there, "but to care for

1 the child." That language, I believe, comes from the  
2 North Carolina rule. As you know, the default showing for  
3 these continuance motions is that you're moving so that  
4 justice may be done. So that's something to be discussed  
5 by the full committee whether we should change the  
6 bracketed language or run with it.

7           Then in (3), subpart (a)(3), you see that  
8 the trial court must grant the continuance absent  
9 extraordinary circumstances stated in the trial court's  
10 order. The trial court shall enter a written order  
11 resetting the date of trial or determination of the  
12 summary judgment and adjust its pending pretrial deadlines  
13 in the scheduling order, if any, to correspond with the  
14 new trial date. And then finally, it states, "Absent  
15 extraordinary circumstances the trial court shall not set  
16 the case for trial, including summary judgment, during the  
17 designated leave period."

18           Subpart (b) is intended to address other  
19 situations beyond this parental leave situation. I think  
20 most importantly for the committee's knowledge and  
21 discussion is to know that right now the subcommittee's  
22 proposal is that the FMLA parameters would be addressed in  
23 a comment that would correspond with the text of the Rule  
24 (b). So if you turn finally to the last page of the memo,  
25 four, you'll see some standards for considering a motion

1 for continuance under subsection (b). What the trial  
2 court should consider is in that first sentence, and then  
3 in the next sentence you see the FMLA standards there. So  
4 "Although discretionary, trial courts should give serious  
5 consideration to granting a requested continuance when the  
6 attorney seeking the continuance," and then you have a  
7 list of three items which are coming straight from the  
8 FMLA. And then finally in this comment, "When granting a  
9 continuance under subsection (b), trial court should  
10 consider using orders to minimize the harm caused by  
11 delay. If a prompt reset is difficult to fit in the trial  
12 court's schedule, the trial court should consider seeking  
13 the assistance of an assigned judge."

14 I'll say my recollection, high level, of why  
15 the subcommittee decided to address FMLA in the comments  
16 is primarily that in the circumstances set forth --  
17 specifically (1), (2), (3) in the comment there are coming  
18 from the FMLA -- it's a little different, if you will,  
19 from the parental leave context. Most notably for a  
20 parent, a new parent, we all have this three-month period  
21 where we know there is extreme dependency of the infant,  
22 and I think, as I mentioned before, it makes sense for us  
23 to consider that that period where there is dependency  
24 needs that are more extreme than in other parts of a  
25 human's life, it's really more than three months. People

1 say it's more about six months, which is why in my case,  
2 for example, my husband and I had a six-month parental  
3 leave period starting with me and then going to him for  
4 three months.

5           In these situations addressed by the FMLA,  
6 however, it can be a very long period of time potentially  
7 that comes into play. For example, I know in my own life,  
8 I've had a father-in-law who was in the hospice-type  
9 situation for many, many months. Some people have had  
10 family members who were in hospice for years, and so these  
11 health conditions that may come up or the need to care for  
12 a family member, it's harder to peg down how much time you  
13 need. The standards become much fuzzier. This  
14 conversation about whether you should make it mandatory or  
15 discretionary for the judge gets a lot more difficult and  
16 thorny, if you will. So ultimately, bottom line, the  
17 subcommittee felt like giving the trial court discretion  
18 made more sense and just providing this guidance in a  
19 comment as opposed to trying to address everything in the  
20 rule text proper.

21           With that I'll stop talking and turn it over  
22 to the subcommittee to address things that I most likely  
23 inadvertently omitted.

24           CHAIRMAN BABCOCK: All right. Who wants to  
25 speak from the subcommittee? Okay, we're done. Just

1 kidding. Just kidding. Well, if no subcommittee members  
2 want to talk, any comments about this proposal?

3 HONORABLE DAVID PEEPLES: Chip, I'll say  
4 something.

5 CHAIRMAN BABCOCK: Yes.

6 HONORABLE DAVID PEEPLES: This area seems to  
7 me very, very difficult because I think there are weighty  
8 concerns on both sides. The concerns in favor of a  
9 mother, especially, but also a father who, you know, had  
10 had their career trajectory at stake and all of that, and  
11 to be at the mercy of a trial court, that's a serious  
12 thing on one side, but the potential damage to the  
13 administration of the judicial system is also at stake,  
14 and so I think this is a very, very hard problem. I don't  
15 think that we can finish -- I just would be very surprised  
16 if we come up with something today that is, you know,  
17 tight and good, and but it's just hard, and I think that  
18 the wisdom on this committee is the subcommittee would  
19 really love to have good discussion before we go back to  
20 the drawing board.

21 CHAIRMAN BABCOCK: Yeah. Well said, Judge.  
22 Thank you. Frank.

23 MR. GILSTRAP: Thank you, Chip. First of  
24 all, I oppose this, and prior meetings I've opposed this  
25 rule, but you know, that battle is over, and I think we've

1 got to try to draft a good rule, and looking at the  
2 problems, I don't envy the subcommittee's position,  
3 because there are some difficult issues here, but  
4 nevertheless, I'd like to look at Rule 253 as proposed and  
5 point out some issues. I think that's what we want.

6           First of all, as I understand, we're going  
7 to put the triggering event is going to be a trial setting  
8 or a summary judgment. I understand, summary judgment is  
9 a big deal now. More cases decided by summary judgment  
10 than by trial, but the language here, it says that -- in  
11 the first line it says, "Continuance of a trial, including  
12 the determination of a summary judgment." Well, that's  
13 different from the hearing. I mean, judges sometimes take  
14 summary judgment and sit on them until before trial, and  
15 then you go in and say, "Well, Judge, I want a continuance  
16 because you haven't determined the summary judgment.  
17 You're determining it right now, so I get a  
18 continuance." That needs to be clarified.

19           And at the end of that line it says, "in  
20 connection with the birth." Well, that's pretty vague.  
21 I'm not sure what "connection with a birth" means, but I  
22 would prefer "because of," something definite. And then  
23 in the next -- then we say "the birth or placement for  
24 adoption," and I'm not sure what the purpose of the rules  
25 "placement for." It would make sense just to say "the

1 birth or adoption of a child." You could read that to  
2 say, "Well, yeah, Judge, I'm placing a child for adoption  
3 in another court, and it's not my child, but I'm the  
4 attorney doing it." Again, I don't see why we need the  
5 word "placement for."

6           And then we get into the real problem of, as  
7 somebody pointed out, gender politics. It's without  
8 placement, it would say "birth or adoption of a child by  
9 an attorney movant, regardless of the movant's gender."  
10 Well, that makes sense where there's an adoption, but it  
11 doesn't make sense literally speaking where there is a  
12 birth because at last -- the last time I read, fathers  
13 don't give birth. I know that's difficult to draw, but  
14 it -- right now it doesn't make sense.

15           Next issue, as I understand, we're talking  
16 about a minimum period which you have an absolute right  
17 for, and then the judge can extend it, but you -- as I  
18 understood, you were going to get 12 weeks during the  
19 first 24 weeks. Well, it doesn't say that. It says 12  
20 weeks is the presumptive maximum length. I'm not sure  
21 what that means. "Okay. Counsel, the presumption has  
22 been rebutted. You're getting one week." If we're going  
23 to give a guaranteed period of time, it needs to be  
24 specifically, and I don't think "presumptive maximum  
25 length" does it.



1                   Then moving down into (1). It says that --  
2 you know, in (1) we start talking about parental leave  
3 period, as existing -- as to the existing trial setting  
4 and within seven days of the notice of trial setting, but  
5 we're not -- we don't mention summary judgment there.  
6 Then in the fourth line we talk about "secured leave  
7 period." Obviously a mistake, because we haven't used  
8 that term to begin with. Finally, the last line of that  
9 sentence, "The trial court must make a reasonable  
10 exception." Well, what -- what is a reasonable exception  
11 that you must make?

12                   Let's see. Again, on page three, we have in  
13 (2) (A), we don't have any mention of the summary judgment,  
14 and in (2) (C) we do. And again, in (3) we get back to  
15 this language, "determination of the summary judgment"  
16 whatever that means, and finally we say "designated leave  
17 period." I'm not sure what that means. That's all I  
18 have.

19                   CHAIRMAN BABCOCK: All right. Thanks.  
20 Justice Christopher.

21                   HONORABLE TRACY CHRISTOPHER: I think I have  
22 said this before. I'm opposed to the 90-day time frame,  
23 and I think Frank was right in terms of the way that  
24 paragraph is written, in terms of what exactly does that  
25 mean in terms of reasonable exception. And then my other

1 comment was in No. (3), "The trial court must grant the  
2 continuance absent extraordinary circumstances stated in  
3 the trial court's order." I assume that means they must  
4 grant the continuance if the movant has fully complied  
5 with No. (2). I envision that there will be a debate over  
6 "substantial responsibility for the preparation or  
7 presentation of the case." And so the question -- you  
8 know, if someone is opposing it. If someone files their  
9 motion, the other side is opposing it and says, you know,  
10 "I've never seen this lawyer on the case. How on earth do  
11 they have substantial responsibility for the preparation  
12 or presentation of the case?" And I assume that the  
13 extraordinary circumstances wouldn't apply there. I mean,  
14 if they don't meet the requirements of the rule, they  
15 don't get the continuance, right? That's my thoughts.

16 CHAIRMAN BABCOCK: Okay. Judge Estevez.

17 HONORABLE ANA ESTEVEZ: Yeah, I -- I was  
18 listening to Frank's comments regarding placement or  
19 adoption of a child, and I think it would be very helpful  
20 to have a definition of what placement for adoption of a  
21 child is. There's -- my brother adopted a child from  
22 Taiwan, so they went to Taiwan, they picked up a baby, and  
23 they definitely need this leave. I was a foster parent,  
24 you know, and so I have stepparent adoptions where the  
25 child's lived with them for five years, and they -- they

1 are -- maybe they're not placed for adoption, but they get  
2 adopted after living there five years or going -- the  
3 child is going to school for the next few years, you know,  
4 and the next day. So are we talking about any type of  
5 adoption where the mother didn't adopt the child, but the  
6 father adopted the child? Are we talking about only when  
7 the placement is a baby where it will have higher needs,  
8 because if you place a child for adoption and the child is  
9 10 and we're in a school year and we don't have COVID,  
10 then that means that child is going to school, or any  
11 other pandemic.

12           So I don't know if our intent is really to  
13 have it that broad, and maybe it is, because we want  
14 everybody to have that right to have that time with the  
15 child, but if the kid is the age for school, then that  
16 child's not going to be home with that parent, so it's --  
17 it could be used, you know, without having to show any  
18 type of good cause. They just get a vacation for a few  
19 weeks, and there's nothing you can do about it, and I'm  
20 not suggesting people would do that. I just think that it  
21 would be helpful to just have a definition. I think  
22 everybody knows what a birth is, but I don't know that  
23 placement for adoption is the same in every circumstance.

24           CHAIRMAN BABCOCK: Great, thank you. Any  
25 other comments?

1 HONORABLE DAVID PEEPLES: Chip?

2 CHAIRMAN BABCOCK: Yeah, Judge Peeples.

3 HONORABLE DAVID PEEPLES: The Harris County  
4 vacation rule is something that came to us at the last  
5 minute, at least I didn't see it until just a few days  
6 ago, and I'd like to ask the Houston lawyers how that  
7 works and if it gets abused, is it hard for judges to  
8 administer. It's elegant almost in its simplicity and its  
9 clarity, but I can see a lot of -- I mean, there could be  
10 games played there. What's the experience with that?

11 CHAIRMAN BABCOCK: All right.

12 HONORABLE DAVID PEEPLES: I know the time  
13 period, the maximum is four weeks. That's a big  
14 difference, but there are some similarities, and I'd like  
15 to know how it works.

16 MR. LEVY: It's -- you have a deadline to  
17 submit it, but it's a process. You just pick your four  
18 weeks that -- that you don't want to be called to trial,  
19 and you don't have to have a reason for it, and, you know,  
20 you obviously don't have to go on vacation during those  
21 weeks, but you're able to block trial settings during that  
22 time. And what ends up happening, at least in my  
23 experience, is very few trials go to -- very few cases go  
24 to trial in the summer because of the vacation letters.

25 CHAIRMAN BABCOCK: Justice Christopher.

1 HONORABLE TRACY CHRISTOPHER: Yes,  
2 especially if it's a -- if it's a multiparty case, I think  
3 sometimes the lawyers get together and block out the whole  
4 summer by putting down dates, you know, to block it off,  
5 as a way to give themselves a continuance without actually  
6 asking for the continuance, but from my perspective as a  
7 trial judge, we always had plenty of cases that wanted to  
8 go to trial, and if people wanted to block it out, fine.  
9 The number of trials tends to go down in the summertime,  
10 just because people are on vacation. They, you know, want  
11 to do this or that. But there is definitely gamesmanship  
12 involved in it, but it didn't really seem to stop the  
13 wheels of justice by allowing it.

14 MR. HARDIN: Chip, this is Rusty on audio.  
15 I'm sorry I can't see -- I can't raise my hand, but my  
16 experience has been, to answer the question, it works  
17 pretty well really. We have a deadline to get those  
18 submissions in. I just had a recent situation to amend  
19 mine by a week or two and was able to do it, but it wasn't  
20 in connection with any trials or connection with a trip.  
21 Actually, I think most trial lawyers in Houston like the  
22 system, and I quite frankly have never heard any -- it's  
23 so engrained we never hear anybody complaining about it.  
24 Let me put it that way. And it's not something that you  
25 could do like the legislative continuance, which was

1 always so abused where you could do it at the last minute.  
2 It's something that you've got to apply for, looking  
3 ahead, and four quarters, you can do it throughout the  
4 year, but you're limited to the 30 days a year. I -- I  
5 think if you polled most lawyers in Houston they would  
6 think it works fine.

7 CHAIRMAN BABCOCK: Thanks, Rusty, and  
8 everybody should be aware that Rusty was recently voted by  
9 somebody as a legal legend in Texas.

10 MR. HARDIN: Yeah, well, that is -- anyway.  
11 I would ignore -- I would ignore Chip on these matters and  
12 get back to the rules, please.

13 CHAIRMAN BABCOCK: Absolutely true. Levi.

14 HONORABLE LEVI BENTON: Yeah, so, David,  
15 one, I'm kind of shocked to hear that Bexar County doesn't  
16 have such a rule, and I would add to the things that have  
17 been said. You know, Chip -- Chip Babcock, for example,  
18 could have 10 cases pending. Unless he has a case against  
19 Jim Perdue that he knows he's going to lose, he could  
20 serve his vacation letter in the case against Jim, but not  
21 assert his vacation letter in another case pending the  
22 same week. It's his right. It's an absolute right to  
23 assert, and I've never known of a Harris County trial  
24 court judge to disregard a vacation letter.

25 CHAIRMAN BABCOCK: Robert.

1 MR. LEVY: I wanted to respond to Judge  
2 Estevez's comments about needing more definitions. I  
3 think that there's so many different possibilities that  
4 are in the -- in the area that it probably would be  
5 counterproductive to try to define all the potential  
6 situations with adoption or even birth. You could have a  
7 surrogacy, a same sex couple that is working through  
8 surrogacy, or other situations, so that it would be very  
9 difficult to line out all of the possible situations, and  
10 rather I think the court just needs to evaluate the motion  
11 under its own terms to decide whether it fits the rule and  
12 is appropriate.

13 CHAIRMAN BABCOCK: Thank you. Frank. You  
14 have to unmute, Frank.

15 MS. WOOTEN: Frank is just saying how much  
16 he loves the rule.

17 MR. GILSTRAP: I know. Are we ready to talk  
18 about part (b)? Have we merged over into part (b) of the  
19 rule yet?

20 CHAIRMAN BABCOCK: Well, maybe we've slopped  
21 over a little bit, but just go ahead and say what you want  
22 to say, and then Harvey and Jim Perdue will weigh in.

23 MR. GILSTRAP: Well, the comments that I've  
24 heard all seem to relate to the old adage that Harris  
25 County is uninhabitable in summer, but aside from that,

1 (b) we talk about discretion for good cause. I'm not sure  
2 what that means. And then we have an enormous comment, I  
3 understand, and I don't know where it came from, but you  
4 know, the idea has been for years not to make the rules in  
5 the comments, and here we have this, you know, one of the  
6 longest comments I think in the rules about this, and  
7 the -- and moreover, these comments only apply to part  
8 (b). Well, in part (a) I thought that the judge had  
9 discretion to grant more than 12 weeks. Why wouldn't some  
10 of these things apply to part (a)?

11 The problem is, is that, you know, we --  
12 there really isn't any need for (b). The existing rule  
13 has always handled -- we've always handled it under the  
14 existing rule just fine, but to kind of save face we have  
15 to put (b) in there to show that this is not some kind of  
16 deal just for lawyers. I really question whether (b) and  
17 the comment is a wise -- wise choice.

18 CHAIRMAN BABCOCK: Thank you, Frank.  
19 Harvey.

20 HONORABLE HARVEY BROWN: Well, I think the  
21 comment is generally very good and a good idea for the  
22 outlier judges who don't take these things into  
23 consideration that will help somebody get a continuance  
24 with that. But I wanted to talk a little bit about  
25 subpart (2)(E), the language in the brackets, quote, "but



1 to care for the child." I think not only should it be in  
2 there, but I think we should have an additional  
3 requirement. I could just see this being abused  
4 potentially by people who are working regular -- doing  
5 their regular job and are going to continue to work their  
6 regular job, but just want to get off for the trial  
7 setting. So I would not only require them to say that  
8 they're doing this to care for the child, but that they  
9 are not -- and I don't know exactly how to word it, but  
10 basically are not working their regular job and work  
11 hours, that they're actually taking leave from their  
12 normal job duties.

13 MR. PERDUE: What section was that, Harvey?

14 MS. WOOTEN: You're on mute. I think,  
15 though, you're referring to (a) (2) (E), correct?

16 HONORABLE HARVEY BROWN: Yes, (2) (E). It's  
17 on page three. It's indented, cap (E).

18 CHAIRMAN BABCOCK: Okay. Jim Perdue.

19 MR. PERDUE: Well, so I'll dovetail a bit  
20 with what Harvey was saying and go back. So, Judge  
21 Peeples, part of the elegance of the vacation letter rule  
22 for Harris County, which has been abused and does  
23 eviscerate trial dockets in July and August, and, Frank,  
24 it is unlivable here in July and August, but we do have  
25 air-conditioning and tunnels, and we make do. But the --

1 the -- the self-constraining aspect to my personal  
2 experience with the vacation rule is that you're talking  
3 about four weeks, so whether it be invoked, you know,  
4 outside the summer or all in the summer, there is a  
5 self-limitation on a four-week continuance that has taken  
6 away trial settings no doubt and has frustrated the heck  
7 out of me because I have seen multidefendant cases where  
8 it's used, but you do eventually get the train back on the  
9 tracks, and it can't take things over.

10           This rule is talking about a lot longer  
11 period of time, and I understand in concept the -- the  
12 idea and the pleasantness of tracking along with family  
13 medical leave, but when you start talking about blocking  
14 three months, that is -- that is a different event  
15 altogether on a litigation time line, and I'm trying to  
16 catch up on the language that ended up being the amended  
17 or final language in Florida and understanding how they --  
18 they came back on this a little bit. But the -- the odd  
19 thing that seems to me the subcommittee is balancing is  
20 this idea of advanced notice that you're going to take it  
21 versus the events that qualify for taking it, which  
22 sometimes don't give you 90 days advanced notice, but the  
23 parties need some advanced notice, and then language that  
24 this is -- as to Judge Brown's point, this thing has got  
25 to get to balance somehow the idea that somebody truly is

1 unable to perform in the capacity of either lead or, you  
2 know, substantial role counsel, because of this  
3 responsibility, which is honored in the law, but at the  
4 same time, you know, you have the ethical responsibility  
5 that if you've undertaken to represent a client in a piece  
6 of litigation, you have to -- you have to be able to do  
7 that. And it strikes me that if you had a conflict that  
8 was taking you away from your ability to represent your  
9 client for, you know, three, four, five, six months, I  
10 don't know how in the law you build in the idea that then  
11 the lawyer has not crossed over into an area that  
12 that's -- that that kind of cessation of activity is not  
13 representation of that client.

14           So I'm trying to balance not from adverse --  
15 not necessarily from an adverse counsel perspective on the  
16 rule, but if you -- if you take Judge Brown's point, which  
17 I think is important, which you truly have a conflict that  
18 prevents you from serving in the role, then how is it that  
19 you stay maintained as lead counsel for that client for  
20 six months when the case is just allowed to sit there.  
21 That's a real tension that I'm not sure I am seeing how  
22 it's balanced through in the language of this, and I don't  
23 know how they solved it in North Carolina and Florida  
24 because I'm not as well-versed in the materials that you  
25 sent. My apologies for that.

1                   CHAIRMAN BABCOCK: Justice Christopher.

2                   HONORABLE TRACY CHRISTOPHER: Yes, I mean, I  
3 disagree with Harvey that we should include "but to care  
4 for the child" because I do think that they're -- even if  
5 you're going to the office and working, it's very  
6 different from being in trial, which, as you know, is, you  
7 know, a 15-hour day, not an eight-hour day; and, you know,  
8 having my husband home when I was on maternity leave at  
9 5:00 o'clock was a lot better than having him home at  
10 10:00 o'clock; and you know, I think the men ought to be  
11 able to take that leave.

12                   With respect to Jim's concerns, the rule  
13 does require that the client has consented to the  
14 continuance, and I do understand that under the FMLA, you  
15 know, and we've seen this at the appellate court, someone  
16 will write in and say, you know, "I've got cancer, I can't  
17 get my brief done," and, you know, you give them -- you  
18 give them three months; and then they want, you know,  
19 another six months, they want another nine months, you  
20 know; and at some point you have to say to them, you know,  
21 "Are you actually representing your, you know, client at  
22 this point?" Does your client really understand that, you  
23 know, your appeal or your trial has been abated and unable  
24 to move forward?

25                   So to me the client's consent is important

1 with respect to a longer than 12 weeks. Those are my  
2 thoughts.

3 CHAIRMAN BABCOCK: Thank you, Justice  
4 Christopher. Justice Gray.

5 HONORABLE TOM GRAY: I won't repeat what  
6 I've said before about why the rule focused on the family  
7 continuance is such a small part of what we need to be  
8 addressing. I think if we need the rule at all, it's a  
9 judge training problem that really can't be solved by a  
10 rule. I would strongly suggest that we bolster the range  
11 of considerations that are discussed in (b) and have only  
12 a -- the (b) part of the rule and required judicial  
13 education on the issue like we do for ethics and family  
14 violence. I mean, there are so many factors that you as a  
15 trial judge need to consider when you're granting a  
16 continuance on the eve of trial that affect so many  
17 people's lives besides just the lawyers. The witnesses,  
18 the other litigants that are going to be forced to trial  
19 if you don't go to -- I mean, there's just a lot of moving  
20 parts in a situation like this that it's almost impossible  
21 to write a rule that is going to capture when a trial  
22 court abuses his discretion in granting or denying a rule  
23 -- or granting or denying a continuance, and these are  
24 going to come to us in mandamus proceedings because a  
25 trial court did or did not grant them. And so what I'm

1 asking is that you just make it clear enough that I can  
2 either know I'm going to grant it or know I'm going to  
3 deny the mandamus and have a leg to stand on because  
4 they're coming to us if they're granted or denied, and  
5 we're going to need some help.

6 CHAIRMAN BABCOCK: Okay. Thank you, Judge.  
7 Any more comments about this subcommittee report or the  
8 proposed rule? Anybody else have any comments? Lisa  
9 Hobbs.

10 MS. HOBBS: Okay. You know, as we're  
11 listening to everybody's comments, I think we're both -- I  
12 think some people want -- and to Justice Gray's comment,  
13 like be very clear, and I think what -- when you try to  
14 write into a rule like trial court discretion, right, like  
15 we want to maintain some kind of discretion, but we're  
16 giving these parameters, it's just trial court discretion  
17 -- and maybe Justice Hecht will agree with me. It's like  
18 I know when it's abused, like I don't know -- like it's  
19 just it's hard to say, and I just feel like some of the  
20 comments, just to sum up, are both that we're doing too  
21 much and we're not doing enough, and the reason why we're  
22 having these views is because it's hard to put into a rule  
23 what is the parameters of discretion when it comes to the  
24 uncertainty of medical conditions and leave and how babies  
25 are born and how mothers are responding to it and how

1 adoptions come about and all these things, and I just  
2 wonder if -- and I agree with the spirit of allowing a  
3 continuance for parental leave, but I wonder if there's a  
4 more streamlined way to go about it, possibly even just a  
5 comment to the continuance rule. And I'll leave it at  
6 that.

7                   CHAIRMAN BABCOCK: Thank you, Lisa.  
8 Commissioner Sullivan.

9                   HONORABLE KENT SULLIVAN: Yes, sir. First,  
10 I just wanted to thank Kennon for the job she did in  
11 laying this proposed rule out. I thought she did a great  
12 job. In reference, a comment or two made earlier, Judge  
13 Peebles made the really important one, and that is issues  
14 like these are hard. They really are. It's the  
15 intersection between these kinds of important  
16 considerations and the -- you know, the procedural issues  
17 that we all have to balance; and in that sense, Frank's  
18 much earlier comment weighs on me a little bit here. He  
19 was talking about, you know, you're trying to fix holes in  
20 a boat, and you realize that at some point you need to  
21 look at the entire boat and fixing it more holistically,  
22 and I do think it's something that we're going to have to  
23 take a look at.

24                   I do think that while I suspect virtually  
25 everybody is in agreement that we should accommodate a

1 parental leave such as we are discussing today, there is a  
2 tendency, I think particularly for a group like ours, to  
3 underestimate the damage that is caused by procedural  
4 uncertainty, delay, and excess cost that our system can  
5 produce. Those are burdens that disproportionately fall  
6 on clients and less so on lawyers and judges. So I think  
7 at some point we really do need to step out and take a  
8 more holistic look.

9           I think it's always difficult when we look  
10 at these in a granular fashion. As I say, I think almost  
11 everybody is in favor conceptually of parental leave and  
12 the accommodations that ought to be made for somebody, but  
13 you can also create a list of other situations where you  
14 would probably produce a similar vote. I've seen in the  
15 courtroom the issue come up in terms of the death of a  
16 parent. I remember one case vividly in terms of someone  
17 asking for an accommodation and actually not getting much  
18 of any accommodation. What about, God forbid, the death  
19 of a child? That would be extraordinary, and the list can  
20 go on. I guess the point is, is that there are a lot of  
21 really difficult circumstances, and you do wonder to what  
22 extent you want to create inflexible rules around those.

23           And I finish with one other point, back to  
24 Chief Justice Hecht's earliest comments, and that is he  
25 recited I think the numbers for criminal and civil trials



1 in the state last year. 4,500 and 1,200 I think is what  
2 he referenced, and when you consider the size of the state  
3 and the number of cases filed, I think what we need to  
4 acknowledge is that number is extraordinarily low, and we  
5 need to acknowledge there are reasons for that and for  
6 what increasingly I think is a problem in confidence  
7 attached to the system in terms of delay, cost, certainty,  
8 and at some point we're going to have to address it. If  
9 we do this -- you know, if we deal with these sorts of  
10 procedural issues in isolation and in the abstract, we do  
11 run a risk of simply exacerbating some of the issues, but  
12 again, I say that I'm in favor of accommodations for  
13 parental leave. I suspect virtually everybody on the  
14 committee is.

15 CHAIRMAN BABCOCK: Thank you, Commissioner.  
16 Chief Justice Hecht, and then Roger.

17 HONORABLE NATHAN HECHT: Just to fill in on  
18 the number of jury trials, the civil jury trials are and  
19 have been for years a little over 4/10 of one percent of  
20 the cases filed, and on the criminal side it's about -- it  
21 runs a little less than 2 percent, about 1.5 or 6.  
22 Sometimes it goes up and down a little bit.

23 CHAIRMAN BABCOCK: Roger.

24 MR. HUGHES: Well, I'll echo what I said at  
25 the last meeting. This is an idea whose time has come.

1 We're going to have to figure out how to integrate this  
2 into it, and if -- and if there's a direction to go, my  
3 personal favorite is that we have a minimum amount of time  
4 off if the application is -- meets the standards, and I  
5 think it's -- part of the reason it's hard is that there's  
6 just a lot of circumstances that go on around pregnancy or  
7 adoption that until now, until the last decade or so, we  
8 didn't have to deal with. Well, now we do, and it may  
9 require acquiring information, but I think we're going to  
10 have to make that accommodation. So that's my two cents'  
11 worth. Thank you.

12                   CHAIRMAN BABCOCK: Thank you, Roger. And  
13 you-all probably thought I was out of my mind when I said  
14 we were going to have to work until 1:30. I was off on my  
15 time zones. Sorry. I'm on the Eastern time zone. So we  
16 can take a -- we can take a break for lunch. The parental  
17 leave continuance rule, unless the Chief or Justice Bland  
18 think that -- or Jackie, would think we would benefit from  
19 more discussion about it, we'll submit that to the Court,  
20 so speak now or forever hold your peace on that. And I  
21 don't think, since we're all I think within reasonable  
22 distance of food, that we maybe need an hour, and since we  
23 can't congregate with each other and chitchat. Maybe we  
24 could come back at 1:00 o'clock. Would that be  
25 satisfactory to everybody? If anybody is against that,

1 raise your hand electronically. I see no hands raised, so  
2 we'll be adjourned until 1:00 p.m., and everybody will  
3 have to dial back into the meeting at that point. Thanks,  
4 everybody.

5 HONORABLE JANE BLAND: Thank you, Chip.

6 HONORABLE STEPHEN YELENOSKY: Chip, you can  
7 leave everybody on. It's probably better.

8 CHAIRMAN BABCOCK: That's fine, too. I'm  
9 going to dial back in, though.

10 (Recess from 12:23 p.m. to 1:00 p.m.)

11 CHAIRMAN BABCOCK: All right. This meeting  
12 is being recorded. The next item, No. 8 on the agenda,  
13 procedures to compel a ruling, and I understand Bill Boyce  
14 will lead us through the thicket of this issue.

15 HONORABLE BILL BOYCE: Yes. Thank you,  
16 Chip.

17 CHAIRMAN BABCOCK: Sure.

18 HONORABLE BILL BOYCE: So we are revisiting  
19 a topic that we had discussed. I don't think we reached  
20 it at the last meeting, but we discussed it at the meeting  
21 before, and I'll go through the genesis of this briefly,  
22 because what the memo for today's meeting does is present  
23 two options to address the issue, and there's not really  
24 consensus on the subcommittee about which one to follow  
25 on, or maybe there is and I'm not grasping it, but

1 we'll -- I will go through that here shortly.

2                   So by way of background, this initially came  
3 as a referral from this -- this initially came as a  
4 referral from -- I'm sorry, I'm having a telephone issue  
5 here. From Justice Gray that started out as a question  
6 about efforts by pro se prisoner litigants to get rulings  
7 that would enable mandamus. We talked about it. It was  
8 sort of expanded to cover a recognition that there are  
9 civil issues as well where it's difficult to obtain a  
10 ruling and what are the procedures for doing that. We  
11 received subsequent guidance from the high courts that we  
12 should really focus on the civil aspect of circumstances  
13 to try to obtain a ruling. If you filed something but you  
14 can't necessarily establish that it has been seen or  
15 received by the trial court, just not ruled on, you could  
16 be stuck in limbo for a period of time trying to get a  
17 ruling on something. So we talked about basically two  
18 different approaches to addressing this issue.

19                   One is creating a presumed notice or a  
20 presumed denial mechanism under the Rules of Civil  
21 Procedure that would basically allow a notice or a request  
22 to be filed, and after a set period of time it would be  
23 presumed that the trial court received and was aware of it  
24 for purposes of seeking mandamus relief solely for  
25 purposes of obtaining a ruling. That's alternative No. 2

1 that's contained on page four.

2           The other approach, which is one that was  
3 developed in the most recent subcommittee discussions was  
4 more of an administrative reporting approach, focusing on  
5 a proposed addition to Texas Rule of Judicial  
6 Administration 6 that would get at the same issue in a  
7 different way by basically requiring judges to keep up  
8 with reporting requirements that would apprise them of  
9 things that had not been ruled on. And I'm -- I'm happy  
10 to launch into discussions of these approaches further,  
11 but at this juncture it may be appropriate to ask Judge  
12 Peeples or Kennon, who were particular proponents of an  
13 administrative reporting approach, to describe more fully  
14 their thought process and why they think that's a good way  
15 to go for this issue.

16           CHAIRMAN BABCOCK: Thanks, Bill. Judge  
17 Peeples has already volunteered to share with us his  
18 views, and of course, if Kennon has views we would love to  
19 hear those, too. But we'll recognize Judge Peeples first.

20           HONORABLE DAVID PEEPLES: There are existing  
21 rules in Administrative Rule 6 enacted by the Supreme  
22 Court back when Tom Phillips was Chief Justice, which is  
23 called "Time standards for disposition of cases," but it's  
24 all about people supervising others. There's no -- there  
25 are no real teeth in it, and the proposed subsection (e) I

1 think would add some kind of enforcement mechanism, sort  
2 of. The problem is -- it's not widespread. I don't think  
3 this is a widespread problem, but it is very serious when  
4 it happens because it's a failure of judicial duty, and it  
5 applies only to judges who have matters that are submitted  
6 and waiting for a decision more than 90 days. Not one  
7 judge in the state has to -- under this proposal would  
8 have to report anything if he or she is current and  
9 doesn't have anything awaiting decision for 90 days or  
10 more. It doesn't apply to things that are simply filed  
11 but haven't been heard yet. It applies only to matters  
12 that have been submitted. The judge is not waiting for  
13 anything. Everybody is waiting for the judge to make a  
14 decision, which is what we're supposed to do when we hold  
15 this office.

16           And so (e) would add a reporting requirement  
17 for the judges, and one question would be to whom that has  
18 to be sent, and we had three choices. You could use all  
19 three of them, the Office of Court Administration or the  
20 local administrative judge or the regional presiding judge  
21 or some combination of those, maybe all three. There's no  
22 express sanction for someone who doesn't do this, but it  
23 is -- there is language in the proposed subsection (e)  
24 which points out this would be a duty of the office, and  
25 I myself think that would enable the Judicial Conduct

1 Commission to get involved if somebody does this, and it's  
2 bad enough. So and another thing that's sort of unspoken  
3 but in the background is the feeling I -- and I feel this  
4 way and an awful lot of people feel that lawyers shouldn't  
5 have to poke the bear or stir up the hornet's nest by  
6 reminding a judge, "Your Honor, you've had this for three  
7 months" or four or five.

8           I know of a case in -- well, in a  
9 medium-sized county where the jury came in with a verdict  
10 two years ago, and there's some question about what kind  
11 of judgment should be rendered on that verdict or whether  
12 a new trial ought to be granted, and the judge has not  
13 done one thing for two years. I had a recusal motion a  
14 good many years ago in which I learned during the motion  
15 that the judge in the very case had a pending motion to  
16 transfer venue in a family law case that he had had for 22  
17 months. 22 months. And it's mandamusable after six, but  
18 he hadn't decided it for 22 months, and I was surprised in  
19 the previous discussion we had in the full committee, both  
20 informally and on the record, of how many people had their  
21 own anecdotal experiences with judges who have got the  
22 briefs, got the arguments, and simply cannot make a  
23 decision for a good long time, and I was just surprised  
24 and flabbergasted actually that so many people have  
25 experiences where judges have just not ruled.

1           So proposed (e), and that's alternative one,  
2 aims to get at that, and then alternative two really  
3 speaks more to Tom Gray's issue, which was the mandamus  
4 petitions they get from prisoners who have filed something  
5 and the judge hasn't even dignified it by looking at it  
6 apparently, much less ruling on it. And so these two  
7 proposals sort of come at it from different ways, and  
8 that's what is before the committee.

9           CHAIRMAN BABCOCK: Kennon, anything you want  
10 to add?

11           MS. WOOTEN: I don't think there is anything  
12 that I could say that would be better than what Judge  
13 Peebles has said, so I will stay silent.

14           CHAIRMAN BABCOCK: Okay. Comments?  
15 Commissioner Sullivan.

16           HONORABLE KENT SULLIVAN: Just a quick  
17 question. I'm curious about the administration of a  
18 reporting rule and, in particular, the extent to which we  
19 would have confidence that every county could uniformly  
20 run a report that would yield information as to what  
21 judges have matters that have been pending for 90 days  
22 with no ruling. Could we get statewide compliance with  
23 that, you know, county by county and that sort of  
24 reporting, where it's coming essentially from the clerk's  
25 office that would -- it would avoid the need for



1 self-reporting, which, you know, has some obvious issues  
2 associated with it? Just curious if anybody could answer  
3 that question.

4 CHAIRMAN BABCOCK: Judge Estevez.

5 HONORABLE ANA ESTEVEZ: Well, I don't -- I  
6 don't believe you need reporting after 90 days. I think  
7 there's -- there's several reasons sometimes why things  
8 don't get ruled on, and sometimes the parties are still  
9 going on, and you had your initial hearing, and there's  
10 just too many complicated reasons why things don't get  
11 ruled on after 90 days. My understanding of why we  
12 started this had to do with Justice Gray and the issues  
13 with our inmates, and I will tell you that I review those  
14 motions. Sometimes I get orders without even a motion  
15 pending. Nobody responds to the other side. Nobody ever  
16 sets it for hearing, and I know under this this isn't even  
17 triggered, but the next thing they do file a mandamus, and  
18 so I either was unaware of it or something may have  
19 happened along the way. There definitely wasn't ever a  
20 hearing.

21 So I think one of your proposals had to do  
22 with a denial as a matter of law after a certain period of  
23 time. I don't have a problem with that, because I think  
24 all the parties would be very interested in pushing a -- a  
25 ruling that way, explaining to the judge that in 80 -- in

1 two more days it's going to be a denial, in case the judge  
2 just for whatever reason was waiting on one final thing.  
3 But I don't believe the reporting is going to be helpful.  
4 I think it's going to require more from the OCA, and, you  
5 know, there's -- I mean, are you really going to have  
6 something set up for grievances and things like that for a  
7 judge when they may have legitimate reasons why they  
8 haven't ruled or just been unaware of it, and then do you  
9 really have to spend all that extra time to respond to a  
10 90-day or 91-day ruling or a hundred-day ruling. I think  
11 it's just too much.

12                   So that's my -- I like the idea of in any  
13 type of inmate case if you need to expand it, but if you  
14 limit it to inmate cases, I think that is the problem.  
15 Sometimes we get those motions, and we don't even  
16 understand them.

17                   CHAIRMAN BABCOCK: Robert Levy.

18                   HONORABLE ANA ESTEVEZ: I have the delight  
19 of serving in a prison county, so I get many. There's a  
20 big chunk of litigation that I get regarding the inmate  
21 cases. So --

22                   MR. LEVY: I have a few comments. One is I  
23 don't see these two proposed rules as alternatives. I  
24 think they can both work together. I believe that in the  
25 federal courts they have this type of reporting where they

1 will report on judges who have motions that are pending.  
2 I think it's six months. And, you know, judges are  
3 somewhat accountable for that, and I think that it would  
4 be an appropriate measure of the administration of  
5 justice, not only how many cases are pending, but how many  
6 have issues that have been presented. In some situations,  
7 I think like historically in Harris County, you could file  
8 a motion and a response is filed and unless it's set for  
9 submission or set for hearing, it will just sit there. So  
10 it might be a little bit unclear as to when that clock  
11 should start running.

12           But another question is the issue that was  
13 raised about in some cases it might be better to simply  
14 have the motion overruled by operation of law, similar to  
15 I think a motion for new trial, that if you don't rule on  
16 it by a specific point in time then it's denied. I  
17 realize that won't work for some types of motions, but in  
18 that case you get that resolution, and that then gives you  
19 the ability to submit a mandamus, so that if you submit a  
20 notice that a ruling is needed and there's no disposition  
21 by a set period of time then it's just denied and then you  
22 can move forward with mandamus relief if appropriate, or  
23 it might just allow you to proceed with a straightforward  
24 appeal. So I do think that this rule, the approach makes  
25 sense.

1                   CHAIRMAN BABCOCK: Thank you. Roger.

2                   MR. HUGHES: I guess as much as I don't like  
3 poking the bear, and I like -- and I maybe think it's a  
4 good idea that you have an administrative 90-day report,  
5 but I have seen in the federal court the slowpoke yearly  
6 report about how many judges have motions pending over so  
7 many months, but here's the thing, the -- they have a very  
8 efficient clerk system and a -- usually a procedure in  
9 place that your motion is deemed submitted after a period  
10 of time, and I am sure the judge is made aware that it's  
11 pending, the federal judge, I mean.

12                   The other thing is every time anything is  
13 filed, if it's a motion, it gets a number and the date to  
14 respond to it is calculated by the clerk for you as a  
15 matter of fact, and you can see it on the docket sheet,  
16 and I think in order to make a system where the  
17 administrative rule sort of creates this 90-day slowpoke  
18 report, it is going to put a big burden on the -- on  
19 district clerks and county clerks to figure out is this a  
20 motion that's been filed or not. Has it been set? When  
21 did it get under submission? That's a lot to ask from  
22 some clerks, especially given the high volume of civil  
23 litigation in -- in some districts. So I guess I tend to  
24 lean towards some sort of notice, even if it means poking  
25 the bear. That's my -- that's my opinion.

1 CHAIRMAN BABCOCK: All righty. Lisa Hobbs.

2 MS. HOBBS: So I want to answer Commissioner  
3 Sullivan's direct question based on my knowledge of  
4 reporting ability, whatever -- it's been more than a  
5 decade since I left the Court, even though I look so  
6 young, like how could it be that long, but they are on a  
7 county by county basis. Judges don't typically do the  
8 report themselves, as I understand it. It's county  
9 reports. I'm not sure whether it's the clerk that does it  
10 or somebody else, but I don't think at this point, absent  
11 particular courts, like maybe MDLs are done differently.  
12 I don't know, but just in general I don't think it's a  
13 judge making the report. I think it's a county report  
14 that I presume comes from the county clerk and/or the  
15 district clerk.

16 So you've raised a valid point about just  
17 how it interplays into the current reporting system. That  
18 said, I do think there is value in reporting, even if  
19 there's noncompliant reporting and a reporting  
20 requirement, and we've addressed on the slowpoke report in  
21 the federal court, and I do think you start to -- once  
22 that deadline starts coming up you do see federal courts  
23 sort of like, oh, we've got to get this case off this so  
24 it's not in the slowpoke report. Clerk, what's pending,  
25 you know. You just do some assessments internally of your

1 docket when you know something is going to be -- about to  
2 come up, but as -- as has already been said, they also  
3 have a lot more support than some of our county and  
4 district judges, so internally they probably know when  
5 those cases are due easier than our state court judges do.

6           But just from experience, I remember when  
7 the Legislature required the Chief Justice of the Texas  
8 Supreme Court to report on who was missing internal  
9 deadlines, which I think they still do. I don't know. I  
10 haven't looked at that rider in the budget. We don't do  
11 that anymore? Okay. Justice Hecht is saying no. But  
12 when they first came out with it, it was highly effective  
13 because no one wanted to be reported that they were  
14 missing internal deadlines, so I just saw from a firsthand  
15 experience that sometimes reporting deadlines, even if  
16 there's no remedy for curing it, just we're dealing with  
17 elected officials who don't want people to think that  
18 they're not doing their job and they're not doing their  
19 job as efficiently as they can. So there's value in  
20 reporting.

21           I'm a little bit nervous about ruling -- any  
22 rule that would say something is granted or denied as a  
23 matter of law after a certain time frame. We have that  
24 certainly with a motion for new trial, the Texas Supreme  
25 Court has that on a motion for rehearing after 180 days.

1 I still believe that's the rule, but it's just it doesn't  
2 serve justice, and it has -- it can have unintended  
3 consequences. And a motion for new trial stage, they  
4 become formulaic, like you could have super valid grounds  
5 for seeking a motion for rehearing -- I mean a motion for  
6 new trial, and you can't get it set. It's just it just  
7 becomes this preservation document that has like kind of  
8 no meaning, and I just worry about extending that idea to  
9 other motions that might be more important.

10           And I've gone up on mandamus for a failure  
11 to rule. Like a -- you can do it, even if they -- I mean,  
12 that is a valid ground if at some point it becomes really  
13 unreasonable, I think you can take it up and get at least  
14 temporary relief to make a ruling when it's, you know,  
15 something important enough that actually, you know, is  
16 affecting the way the litigation is going. So those are  
17 just -- sorry, that's a little snapshot. I was just  
18 taking notes as everyone was talking. So I'll shut up  
19 now.

20           CHAIRMAN BABCOCK: All right. Bill Boyce.

21           HONORABLE BILL BOYCE: Yeah, I wanted to  
22 respond to Robert's point about the having an automatic  
23 overruling as X number of days to underscore the same  
24 point that Lisa made, which is I think that there was  
25 heartburn on the subcommittee about rights being lost by

1 folks who didn't know for various reasons that something  
2 had happened or what they needed to do or that something  
3 would get overruled automatically. And so the second  
4 proposal on the last page of the memo that you see was  
5 drafted more narrowly to just create a presumption of  
6 notice rather than an overruling of something on the  
7 merits.

8 CHAIRMAN BABCOCK: Okay. Richard.

9 MR. ORSINGER: Thank you, Chip. I think  
10 there is some important value to having a public record of  
11 judges who don't rule reasonably quickly, especially at  
12 the chronic condition and especially with the elected  
13 judiciary, but even if we do go to an appointed judiciary.  
14 So I greatly favor a report that is available to the  
15 public and also to opponents who are looking for grounds  
16 to unseat an incumbent. So I think that the public  
17 reporting is good. I agree with the idea that it's very  
18 difficult with a clerk with thousands of filings to know  
19 when a ruling has been under submission for more than a  
20 certain period of time, so I'm attracted to the solution  
21 we use on findings of fact and conclusions of law. Under  
22 Rule 296 after a bench trial, you can request written  
23 findings and conclusions and then they're due within a  
24 certain period of time and then you file a reminder and  
25 then the deadline is extended.



1           We could invent a process called a  
2 certificate, a reminder of need to rule on a case, or  
3 something like that, and say if a matter has been under  
4 submission for 90 days a party can file a reminder, and  
5 we'll make up the title so that it's pretty clear what it  
6 means, and then all the clerks have to look for is the  
7 reminders. They don't have to look for motions and figure  
8 out when it was heard and how long it's been since it was  
9 heard. The clerks can just look for these reminders, and  
10 I wouldn't suggest that failure to file a reminder should  
11 be a waiver of any right. I'm just saying that the  
12 lawyers are the ones who are watching the clock. They can  
13 file the reminder. The clerk can look for the reminder,  
14 and the reminder will be the trigger for the reporting.

15           With regard to the issue of automatic  
16 granting or denial of a motion, I agree that I hate for  
17 people's substantive rights to be either -- either  
18 affirmed or rejected by operation of law without the  
19 intervention of a judge, after you've had a hearing and  
20 paid lawyers and done briefing. It seems to me like  
21 you're entitled to a ruling on the merits. As an  
22 alternative, we could have a provision that if a reminder  
23 is filed and the court fails to rule, and let's give a  
24 fixed deadline like 15 days or something like that, that  
25 it will be grounds for a mandamus. And that way no one's

1 rights are prejudiced by a ruling or denial or grant or  
2 anything else, but we're sending a signal to the judges  
3 that if you get this reminder, you've got so many days to  
4 rule or else they're going to get a mandamus against you,  
5 and then the courts of appeals need to put some muscle  
6 into it by granting mandamus. So I think my suggestions  
7 are kind of practical approaches, is let the clerks look  
8 for the reminders and let's let the appellate courts --  
9 let the trial courts be on notice that if they wait too  
10 long they're going to get mandamused. Thank you.

11 CHAIRMAN BABCOCK: Thanks, Richard.  
12 Commissioner Sullivan.

13 HONORABLE KENT SULLIVAN: I think Richard's  
14 idea is intriguing, certainly worth some thought. I just  
15 want to circle back to the fact that I assume that the  
16 federal court report is the analog that we're using here,  
17 and I think the important consideration that I was, you  
18 know, trying to point to earlier is the fact that the  
19 federal courts clearly had the administrative  
20 infrastructure to support that uniform reporting system,  
21 and I'm curious and maybe, if I could, I'll direct this  
22 question to Judge Peeples, is I was wondering whether this  
23 proposal, which reads to some extent like a self-reporting  
24 system, if I'm reading it correctly, talks about the judge  
25 sends, you know, an explanation for anything that hadn't

1 been ruled on in 90 days. Is that the essence of the  
2 proposal, what would in effect be self-reporting, or was  
3 it the contemplation that there be independent reporting  
4 from the clerk's office of anything that's been pending  
5 for 90 days?

6           And then the separate question, I'm just  
7 curious because you've got the experience to give us, I  
8 think, you know, a good estimate of the system. Do you  
9 think that we have the infrastructure that would allow for  
10 uniform county by county reporting of these sorts of  
11 matters, if we -- we went that direction.

12           HONORABLE DAVID PEEPLES: Thanks for the  
13 question, Kent. I'm kind of baffled at all this talk  
14 about clerks having a duty on this. It seems to me when a  
15 judge has tried a case or has a summary judgment motion  
16 under advisement, either after an oral hearing or not, the  
17 judge ought to remember that, and if -- if a judge has so  
18 many of these that he or she can't remember them, then  
19 that means it's a real big problem that needs to be  
20 addressed. I say in all my years I never had a single  
21 thing anywhere near 90 days waiting for a decision, and I  
22 think the vast majority of judges don't. So I just don't  
23 think clerks would need to be involved in this at all,  
24 because it's something that the judge ought to know in the  
25 back of his or her mind, "I need to do this, and gosh, I

1 need to find time to do it," and if there's -- if I can't  
2 do it, I ought to have a reason, shouldn't I? I mean, I  
3 ought to be able to say, "I've been tied up in capital  
4 murder jury selection for three months" or whatever the  
5 reason is, if there is reason.

6 HONORABLE STEPHEN YELENOSKY: Chip?

7 HONORABLE DAVID PEEPLES: So I just think  
8 the burden on clerks or how clerks are going to do this, I  
9 don't see it that way, and that certainly is not the  
10 intent.

11 CHAIRMAN BABCOCK: Somebody was trying to --

12 HONORABLE STEPHEN YELENOSKY: Yes, it's  
13 Stephen.

14 CHAIRMAN BABCOCK: I didn't hear, who was  
15 that?

16 HONORABLE STEPHEN YELENOSKY: It's Stephen  
17 Yelenosky.

18 CHAIRMAN BABCOCK: Yeah, go ahead. There's  
19 a bunch of people in line, but go ahead, Stephen.

20 HONORABLE STEPHEN YELENOSKY: Well, I didn't  
21 see any other hands up, so I figured I would jump in. If  
22 somebody was ahead of me, go ahead.

23 CHAIRMAN BABCOCK: All right. Well, Justice  
24 Christopher, somebody no less prestigious than Justice  
25 Christopher was ahead of you.

1 HONORABLE TRACY CHRISTOPHER: Go ahead,  
2 Stephen. I'll go after you.

3 HONORABLE STEPHEN YELENOSKY: Sorry, I  
4 didn't see a hand there, so I thought Chip maybe just  
5 didn't see it. Just some observations. One, no, the  
6 clerks don't have the infrastructure. Two, if they did  
7 have the infrastructure, you're creating a situation in  
8 which an elected clerk is in the position of chastising an  
9 elected judge essentially. Perhaps in an election year.  
10 I don't think that's a good idea. It's a bad idea for the  
11 judge not to do things in a timely manner, but it really  
12 puts the clerk in an odd situation in continued  
13 relationships with the bad judge who won't rule.

14 If it's not automatic, then is it going to  
15 be used. Right now, lawyers could file mandamus, but this  
16 is the first time I've heard of lawyers actually doing  
17 that. Maybe it's one time you're in court, but lawyers  
18 who are in the same court a number of times are not going  
19 to poke the bear. So that's the second point. I don't  
20 see how it works if it's not automatic. And if it's  
21 denied by operation of law, I am concerned about it makes  
22 it too easy for the judge to punt, and again, since we're  
23 talking about judges who don't rule in a timely manner,  
24 Judge Peeples says -- said they should do this, they  
25 should do that, and they should, but some don't. That's

1 why there's a problem. And those same judges, if there's  
2 an automatic or operation of law, denied by operation of  
3 law, may find it easy to just punt. No, I didn't deny it,  
4 it was denied by operation of law.

5           And finally, none of this so far is going to  
6 address the problem with prisoners. In my experience it's  
7 very hard for prisoners to even get attention when they  
8 file things, much less get something before the court that  
9 a lawyer, even a pro se litigant who's not in jail could.  
10 So whatever of all the things being considered right now,  
11 I haven't heard anything that requires a judge who's  
12 inclined to dismiss without consideration prisoner  
13 complaints or prisoner suits, any way of addressing that.  
14 And finally, nobody has talked about the presiding --  
15 local presiding judge perhaps having a role in this.

16           CHAIRMAN BABCOCK: Thanks, Stephen. Now  
17 Justice Christopher.

18           HONORABLE TRACY CHRISTOPHER: Well, when I  
19 was a trial court judge in Harris County, I would on  
20 average have 30 motions set for submission on Monday  
21 morning per week, and then I would have probably another  
22 20 set for oral hearing on Monday. So, Judge Peeples,  
23 it's easy to lose track of the fact that you haven't ruled  
24 on something, and sometimes the summary judgments are this  
25 big, you know, this big, and now that everything is

1 electronic, once again, it's easy to lose track of  
2 something. So I definitely don't think that a judge would  
3 be good at keeping track of what things were over 90 days.

4 I -- we have had a situation in Harris  
5 County, and we've issued maybe five mandamus opinions  
6 against the same judge for failure to rule, but it's a  
7 pretty few and far between problem, and issuing the  
8 mandamus opinion is -- is not really working well either,  
9 because it hasn't made that judge change the judge's  
10 actions. Because the judge will rule, then he'll get  
11 behind, will rule, get behind, will rule. To me the key  
12 is the regional presiding judge who could get in there and  
13 talk to the judge and take cases away from the judge,  
14 because that ultimately is what needs to be done. Right?  
15 Not automatically denying something. Get the case  
16 transferred to somebody who is going to pay attention to  
17 it and rule on it.

18 I mean, you know, automatically denying a  
19 summary judgment, that doesn't help people. If it's a  
20 judge who hasn't ruled on entry of judgment in two years,  
21 can't do an automatic denial of that. Automatically  
22 denying a request for discovery, you know, that's not  
23 good. What you need is administratively -- and I think it  
24 has to be the regional presiding judge, and the reason why  
25 I think that is that person is generally not up for

1 election. Now, I think we have like Ana is, but a lot  
2 of -- a lot of our regional presiding judges are retired  
3 now, right, and no longer up for election, so they are in  
4 a position to actually go to the trial judge and say,  
5 "You're not getting your work done, I'm taking cases away  
6 from you." The local administrative judge is also up for  
7 election, and it's difficult.

8 I mean, this one particular judge, we  
9 notified everybody. We notified the local -- the court of  
10 appeals did. We notified the local administrative judge.  
11 We notified the presiding judge. We notified Harris  
12 County's internal lawyers, right. They have certain  
13 lawyers that help the judges on things, to try and get the  
14 judge to move forward. To me when you have that kind of a  
15 situation where it's a systemic problem, the only way to  
16 take care of it is through moving the cases from the  
17 judge. And if it's just a, "Oh, I forgot" and you file  
18 the mandamus, people rule. Because we see that. You  
19 know, we'll file the mandamus, we'll say, okay, let's have  
20 a response, and the next thing we know the judge rules.  
21 So apparently Harris County is a big enough county that  
22 people are doing it. Maybe unlike Austin, unlike a  
23 smaller county.

24 HONORABLE DAVID PEEPLES: Can I ask a quick  
25 question? Tracy, how would the regional presiding judge



1 know that judge A has a bunch of unsubmitted matters if  
2 there's no duty to report?

3 HONORABLE TRACY CHRISTOPHER: Well, the  
4 regional presiding judge knows because someone has filed a  
5 mandamus, and we send the mandamus to the regional  
6 presiding judge. I think that we've got to rely on the  
7 lawyers to want to move their case. I mean, Judge Estevez  
8 is exactly right. You get -- at least in Harris County,  
9 and I'm sure it's true in many other counties. I don't  
10 see a motion unless it's properly set. Right? So it  
11 either has to be properly set for submission, or it has to  
12 be properly set for hearing. You know, I do not see every  
13 piece of paper that -- you know, that got filed in a case.  
14 I mean, we have 1,500 civil cases. On the -- on the  
15 criminal side, you know, excuse me, on the federal side,  
16 they'll have a hundred civil cases. Maybe 150. I mean,  
17 the volume that we have, you can't really look at what the  
18 federal courts do versus what we do. And in county  
19 courts, it's even higher in terms of the volume of the  
20 cases that you have on your docket.

21 To me you've got to wait for the lawyers to  
22 really want a ruling. I don't -- I don't mind this second  
23 proposal, this request for a ruling, but so what happens  
24 when the pro se who never set it right to begin with sends  
25 in this notice of ruling, right? Or what happens with

1 motions that are filed after I've clearly lost  
2 jurisdiction, right, that just gets put in a file, right,  
3 and never seen by the judge. And then the next thing you  
4 know is you get a, you know, notice of ruling that is some  
5 sort of prima facie evidence that I should be mandamus.  
6 I mean, there's just all sorts of problems with both of  
7 these things.

8 CHAIRMAN BABCOCK: Bill Boyce.

9 HONORABLE BILL BOYCE: So I'm -- I hear  
10 differing views, and I think moving forward would be aided  
11 by a vote on do we do one or the other approach or both?

12 CHAIRMAN BABCOCK: Okay.

13 MR. MUNZINGER: Chip?

14 CHAIRMAN BABCOCK: Yeah. Yes.

15 MR. MUNZINGER: This is Munzinger. Let me  
16 share a thought I have here. In state court, I don't know  
17 how a district or county clerk ever knows that a motion  
18 which has been submitted to a judge has been pending for  
19 any period of time after it has been submitted, because  
20 there is no, to my knowledge, procedure where one or the  
21 other party or even a court files a document, does  
22 anything of record, to indicate that a motion has been  
23 submitted and is now awaiting decision. We don't have  
24 that. Federal courts have all kinds of things, but we  
25 don't have that in state court. How can you have a

1 reporting by a clerk who doesn't know that a motion has  
2 been submitted? I don't see how that happens.

3           You might want to suggest a procedure where  
4 any party to a motion may file a notice of submission or  
5 something along those lines that the motion has been  
6 submitted, and if there's no objection to it, within 90  
7 days or whatever time period you want, any party may seek  
8 mandamus relief, and that's a ground for mandamus. That  
9 doesn't mean anybody is going to. I've been victimized  
10 this way three times in my life. All three times the  
11 client told me let it pend, because nobody wants to poke  
12 the bear, as you say. But in any event, I don't know how  
13 the clerks would file a report, because they don't know  
14 when a motion has been submitted. They know it's been  
15 filed, but they don't know if it's been briefed. They  
16 don't know any of that stuff, so I don't see how you could  
17 have a clerk have any kind of automatic duty to report  
18 without something else being filed by one of the parties,  
19 and I join the chorus of those who oppose any automatic  
20 ruling that could prejudice a client because of a failure  
21 of a judge. I'm finished. Thank you.

22           CHAIRMAN BABCOCK: Thank you. Robert Levy,  
23 and then after Robert I'm going to drop off and hand this  
24 off to the Chief, who will continue moderating this  
25 discussion while I go visit with Judge Mazzant, and I will

1 be back as soon as I can, but, Robert, you're next, and  
2 then Frank.

3 MR. LEVY: Thank you. I wanted to go back  
4 to the question about the alternative two, and it seems to  
5 create additional, in effect, mandamus jurisdiction for  
6 the courts of appeal, and it would seem that this will  
7 potentially flood courts of appeal with mandamus petitions  
8 that will require at least a lot of process, and in the  
9 pro se cases I think that will just be grist for the mill  
10 for them, and in the situation with a case where you've  
11 got a motion that hasn't been ruled on, you're then forced  
12 to go to the expense of filing a mandamus, asking the  
13 court of appeals to make a decision to force the trial  
14 judge to rule. So the merits of the issue aren't going to  
15 be addressed. You're going to end up delaying the process  
16 for weeks or months, and obviously most of the time the  
17 courts of appeal will withhold the mandamus to suggest to  
18 the trial court you need to rule, but then, of course, you  
19 have to deal with the merits of the issue.

20 I think that Richard Orsinger's idea of like  
21 a process to -- to notify but then that itself is  
22 actionable and will either accomplish what I had  
23 suggested, an automatic determination. But in addressing  
24 Judge Boyce's comments, I'm not suggesting that a party  
25 would automatically lose their rights due to the operation

1 of this rule. My thought is that it would require a party  
2 to actually file that motion or that notice of a ruling  
3 needed to trigger the process and then let the case go  
4 forward so that it doesn't get stalled out or  
5 significantly delayed by a mandamus.

6 HONORABLE NATHAN HECHT: Frank Gilstrap.

7 MR. GILSTRAP: We started out with what  
8 seemed to be a simple problem, namely the prison cases,  
9 and we've expanded it into a much more complicated problem  
10 involving the whole judicial process, and it is a -- it is  
11 a meritorious problem, and I appreciate all of the  
12 thoughts about this, but maybe we need to eat the elephant  
13 one bite at a time. Prisoner cases are a specific kind of  
14 case. They're even recognized in law, and there's a  
15 reason there's a problem there because they're  
16 incarcerated. They can't go to the courthouse and see  
17 what's going on with their case. So why don't we start  
18 out and eat the elephant one bite at a time. Why don't we  
19 pass an automatic denial rule and limit it to prisoner  
20 cases. If we're going to go on and expand it to other  
21 type rulings, I think, again, we need to eat the elephant  
22 one bite at a time. It's one thing where a judge has had  
23 a jury case tried and hasn't ruled on it, but it's a  
24 completely different case where an experienced judge is  
25 carrying a motion for summary judgment to trial, and I've

1 seen that used quite well to advance litigation.

2           Finally, if we're going to talk about a  
3 requirement to rule, we already have requirements to rule.  
4 Rule 91a, the Citizen's Participation Act, there are other  
5 provisions -- other provisions as well where the courts  
6 have ruled saying that you have to rule. We've got to  
7 overlay this with some type of rule that applies to all  
8 cases that -- where we require a ruling in every kind of  
9 case. I just think that's a bridge too far. Let's start  
10 with a simple case. Thanks.

11           HONORABLE NATHAN HECHT: Alistair Dawson.

12           MR. DAWSON: So in my experience this is a  
13 fairly isolated issue where you have judges that either  
14 don't want to or refuse to rule. I don't remember a  
15 specific case where I've ever had a problem with it, and I  
16 fear that we are either creating unnecessary work for a  
17 lot of judges who are doing their best to rule and/or  
18 creating more mandamus, which I don't think our courts of  
19 appeals need any more mandamus filings. You know, most of  
20 the time -- like I'll give you a recent example. So we  
21 had a discovery hearing or a discovery motion that we were  
22 required to file under submission because of COVID,  
23 because the courthouse wasn't open, and we did. And as  
24 Justice Christopher pointed out, it kind of slipped  
25 through the cracks, and we needed a ruling before some

1 depositions. So I just told the court clerk, "I need a  
2 status conference to raise an issue with the judge having  
3 to do with an upcoming deposition," and we got an oral  
4 hearing, and we had our ruling, and he issued our ruling,  
5 and case moved on.

6 I am actually persuaded that we -- rather  
7 than having all of this alternative one or alternative  
8 two, why not create a mechanism whereby a litigant who  
9 hasn't gotten a ruling and feels like he or she, you know,  
10 is entitled to a ruling and their case is being  
11 jeopardized can file a motion with the regional presiding  
12 judge to have the case transferred to another judge, sort  
13 of follow along with Justice Christopher's suggestion of  
14 let the regional presiding judge address the issue. Maybe  
15 he or she talks to the judge, see if they can figure out a  
16 resolution, and as Justice Christopher points out, we do  
17 have one judge in Houston that's known for not ruling, and  
18 if regional presiding judge thinks that that's going to be  
19 a pervasive problem then he or she can transfer the case  
20 to another court. It also has the advantage of hopefully  
21 reducing the number of mandamus filings. So that's my  
22 suggestion.

23 CHAIRMAN BABCOCK: Jim Perdue.

24 MR. PERDUE: Thank you, Chief. So this is  
25 an issue that's got some odd constituencies because I'm

1 going to -- I think I'm hearing a little bit of a chorus  
2 that I wanted to come in on. Mandamus as the remedy for  
3 this is a dangerous slide. I know my friends who are  
4 appellate specialists love mandamus. I think mandamus is  
5 available if you can't get a ruling, especially like a  
6 judgment, and so I'm -- when I read this rule again, I was  
7 trying to figure out how it would invoke the right to  
8 mandamus any more than already exists, because I don't  
9 read the language in the proposed rule as necessarily  
10 giving you a per se right to mandamus. And I agree  
11 wholeheartedly with Alistair that the idea of taking up  
12 the failure to rule on a motion to compel or a motion for  
13 protection is a -- is an even greater slide into mandamus  
14 practice than where we are.

15           I've had -- the only thing I wanted to add  
16 then is I don't -- I don't know about regional  
17 administrative judges' ability to rectify what I agree  
18 with Alistair is a pretty small problem, but that solution  
19 does seem to find some compromise to what Judge Peeples  
20 has done with this reporting question, which I agree with  
21 the Commissioner has an IT element to it that I'm not sure  
22 that capacity exists within our budget, but it -- you can  
23 see how it federalizes a little bit this reporting  
24 practice, but maybe if you had the empowerment to transfer  
25 or take away the case, you get a remedy that would bypass



1 and find some middle ground between these two proposals.

2           The last thing is I think this has been a  
3 majority voice so it doesn't need mine, denial by  
4 operation of law is incongruent with what your -- what the  
5 real issue is here. If you're looking for a final  
6 judgment on a verdict that's a hundred days -- that's a  
7 hundred days old, you can't deny that by operation of law.  
8 You've got to get a judgment. If you've got competing  
9 motions to compel versus motions for protection, you can't  
10 deny both. It's not a binary situation with those  
11 examples, so while that denial by operation of law exists  
12 in very specific questions, I don't see how you could take  
13 that and put that into this situation. So just from my  
14 little old perspective agreeing with what was said, and  
15 throw it in the hopper.

16           HONORABLE NATHAN HECHT: Levi Benton.

17           HONORABLE LEVI BENTON: Let me respond to a  
18 number of things. First, I think it was Richard Munzinger  
19 who made the observation that the clerks might not know  
20 that something had been pending. I think every time a  
21 court sits on the bench to consider arguments there's  
22 going to be a clerk in the courtroom, so the clerks are  
23 able to note in the file realtime what -- and, in fact,  
24 does note, you know, did the judge take it under  
25 consideration, did the judge say matter is submitted, take

1 it under advisement. So there is always a calendar entry  
2 that the clerks can make, and, of course, the clerks have  
3 some control over the submission docket, and so I don't --  
4 I don't -- I don't want to exclude the clerks from the  
5 process, if we're going to have a process, because they  
6 are, in fact, in control of -- of the calendar.

7 I want to add my voice to those who observed  
8 this is not -- I don't think this is a huge problem. I  
9 had never heard of it being a problem until recent issues  
10 out of Tracy's court that they had to address. But no one  
11 has really talked about what's -- what's the remedy by way  
12 of mandamus other than to take the case from the judge.  
13 You know, Tracy's court can order a judge to rule, but  
14 what if the judge still doesn't rule? Then what? So I  
15 would like to offer instead of taking the case from the  
16 judge, you know, whether it's the regional judge or the  
17 court of appeals should order that the offending judge  
18 should get no more new cases assigned to such judge until  
19 the issue is cured.

20 And then I really like Gilstrap's idea of  
21 one bite at a time. Maybe we really just address the  
22 prison cases first and see how that works out and see if  
23 there's a real problem with other cases outside of the  
24 prison cases or prisoner cases. That's all I've got,  
25 Chief. Thank you.

1                   HONORABLE NATHAN HECHT: Bill, back to you,  
2 and then Presiding Judge Estevez and Presiding Judge  
3 Evans.

4                   HONORABLE BILL BOYCE: So I heard some  
5 sentiment for take on the prisoner cases first, which was  
6 actually the genesis of Chief Justice Gray's letter that  
7 led to the referral in the first place. The guidance that  
8 we got from the Court, from the two high courts, was to --  
9 to focus on the civil side rather than the criminal side,  
10 and so if -- if there's sentiment from the committee as a  
11 whole to take another look at the prisoner cases, I guess  
12 we can present that to the Courts and the Courts can  
13 decide if we should move forward with that, but I just  
14 want to highlight that because this started out with  
15 respect to the prisoner cases. It expanded into the civil  
16 cases, and then it focused on the civil cases, and there's  
17 some desire to go back to the criminal cases, the prisoner  
18 cases. So we just need to probably -- the subcommittee  
19 would need guidance if that's the direction we're going to  
20 go.

21                   And I also wanted to address the point I  
22 think Jim Perdue had made in terms of encouraging more  
23 mandamus. Really, the -- I think the concern -- and Chief  
24 Justice Gray may have thoughts that he wants to articulate  
25 if I don't get this captured properly, but the point was

1 that the mandamuses were being filed anyway, but they were  
2 being summarily denied because of an absence of proof that  
3 the trial court had actually received and/or considered  
4 and/or not acted on a request for relief. And so to avoid  
5 that unproductive exercise, that was the genesis for a  
6 rule proposal in the first place that said if we come up  
7 with a procedure, you can at least have it established  
8 that something has been brought to the trial court's  
9 attention and not ruled on for purposes of just the narrow  
10 effort to get a ruling on something, separate from the  
11 merits. So we're kind of circling back on some topics  
12 that began at the beginning of the process, and so the --  
13 I think the subcommittee would benefit from some guidance  
14 about go in a particular direction, because there's a lot  
15 of good ideas. There's pros and cons for all of these  
16 approaches, and I think some guidance from the committee  
17 as a whole would help to frame something for the next  
18 round, the next presentation.

19 HONORABLE NATHAN HECHT: Presiding Judge  
20 Estevez.

21 HONORABLE ANA ESTEVEZ: First of all, I'm  
22 going to go ahead and clarify some jargon that we are  
23 using, because I didn't realize that it may be unclear.  
24 An inmate case is only civil cases. So it's a civil case  
25 that a inmate that's in prison has filed against the

1 prison or some other entity, but they want to be heard  
2 while they're still a prisoner, so we -- they filed this  
3 lawsuit while they're an inmate in prison, not in jail.  
4 They're serving a sentence. They're going to be --  
5 they're usually there for, in my experience, 20 to 40-year  
6 sentences, so I don't have like a practical way to get  
7 everything done in person. So they're only civil cases  
8 when -- that's what Justice Gray was bringing up, were  
9 these inmate cases.

10 I would like to hear from Justice Gray and  
11 any other court of appeals justice because I will say that  
12 I have -- I don't know how many mandamuses I've had filed  
13 against me over the last 14 years, but I will say for a  
14 lack of a ruling, they have only come from inmates, and in  
15 every one of those cases I never had notice that a  
16 mandamus had been filed or even that this motion may have  
17 been pending, and so usually what would happen was the  
18 first time I heard about it, I got this "Please respond,"  
19 and then I said, "Respond to what?" And I look at the  
20 file, and I either then ruled at that point, and I would  
21 say I probably denied the motion a hundred percent of the  
22 time because it wasn't anything that was something I could  
23 do or something that may have needed a hearing or wherever  
24 it was, but I would suggest that the problem is not large  
25 enough that you need to address it in any other area

1 except in the inmate -- the inmate cases, just because  
2 this is -- it's a -- it's a common thing for them to do.  
3           They will file something. We never get  
4 notice. You don't get notice of anything in my  
5 jurisdiction unless there's a proposed order, and then you  
6 don't -- they rarely ever try to set it for hearing. They  
7 don't request a hearing. Different things happen. I  
8 don't even -- I can't even discuss all of the ways that  
9 they don't do it correctly or don't do it in a way that  
10 would trigger any type of response, and sometimes it may  
11 be just unilateral nobody needs to respond, but I wasn't  
12 even aware of the filing. And -- and I do believe that  
13 the best way to deal with the inmate cases is go ahead and  
14 have that 90-day denial and then they can appeal it or,  
15 you know, as it goes on we can address it at another time.  
16 We can reconsider it, not even knowing about it, or  
17 whatever when the case continues to go. But we need a  
18 solution for that, and I'm going to agree with Justice  
19 Gray. This is a huge problem, because I would have rather  
20 have ruled on that motion than had to go off and then file  
21 a response, because I still had to file my response. My  
22 response was, "I've just ruled on it. I wasn't aware of  
23 it," or whatever it may have been, but, you know, all of  
24 the sudden, the same thing as the trigger of the notice  
25 would have done.

1           I have never had a mandamus from a party in  
2 a regular civil case that wasn't an inmate suit, and, you  
3 know, what happens if I forget or for some reason it  
4 slipped through the cracks? They call my court  
5 coordinator. My court coordinator sends me an e-mail,  
6 "Have you ruled on this? They're calling on this," and I  
7 look at it and I determine why I haven't ruled on it, or  
8 if I didn't have a reason to not -- I might ask for  
9 additional briefing. I may at that point rule on it one  
10 way or the other, but I always act on it once somebody has  
11 brought it to my attention, but I don't -- I don't think  
12 that that is -- I think that's a common thing that  
13 happens, and that's how most people address it, except for  
14 Ms. Hobbs, which is fine.

15           I mean, if I got it -- if she had done that,  
16 she probably did that several times and nothing happened,  
17 but I would suggest that 90 percent of the judges with  
18 that kind of, "Hey, have you ruled on this, hey, are you  
19 going to rule on this," they eventually end up ruling on  
20 it or asking for additional information if something is  
21 holding them up.

22           Judge Benton had said something about  
23 there's a clerk in the courtroom. Well, there's not a  
24 clerk in my courtroom or any of the judges I know. So you  
25 are the first -- and maybe it's just in Houston, but I had

1 no idea there were clerks in the courtrooms in other  
2 states -- or other, I'm sorry, counties.

3           And then, you know, if we went forward with  
4 the notice, how do I find out about the notice? I mean,  
5 so I don't know about anything that's filed. I know when  
6 I go to my hearing or I have something that's been set for  
7 submission and I get that from my court coordinator, but  
8 all of the other filings, I have no idea what's been filed  
9 everyday, and so if I get that notice, when are they  
10 sending me that? So all of the sudden if I was Justice  
11 Christopher, because I have it set up different and I was  
12 a trial judge in her time, and she did 50 -- let's say she  
13 did 50 hearings that day, because it sounded like she had  
14 30 and then she had 20, so she had 50 of them. So does  
15 that mean a week later she gets a notice, and she gets 50  
16 notices, and they're all on her computer, and now she's  
17 overwhelmed because she's just heard 50 more? And then  
18 she goes to the next one.

19           I mean, is there -- I don't -- I think  
20 that's overwhelming. I think it just -- it sounds like a  
21 nightmare, and I don't think that the judges are doing as  
22 poorly as that. I think that there are cases that are a  
23 little more difficult that judges do sit on, and they're  
24 looking for some divine revelation that may never come,  
25 but, you know, if you prod them with those e-mails I think



1 most of the time you'll get a ruling and you'll get a  
2 timely one.

3 HONORABLE NATHAN HECHT: Presiding Judge  
4 Evans.

5 HONORABLE DAVID EVANS: Thank you, Chief.  
6 It sounds like another pandemic from a regional judge's  
7 point of view. There's a number of duties that might be  
8 assigned as a result of this problem, but a couple of  
9 comments. Justice Christopher makes a point about  
10 regional judge adjusting caseload of a judge who is not  
11 getting their work done. I think we need to look  
12 carefully at the Government Code. I think that's still  
13 with the LAJ, but there's another way to approach it if --  
14 I think her point is well-taken about the regional judge  
15 having some distance and being used to ruling on matters  
16 where colleagues might be offended. I would say that  
17 transferring whole loads to other industrious colleagues  
18 is going to meet with a lot of backlash, because they'll  
19 tell you you're rewarding the lazy and punishing the  
20 industrious, so I'd like you to look at that.

21 But what I think Justice Christopher has  
22 really said is it's a de facto ground of recusal, and if  
23 you want to make it a de facto ground -- if you want to  
24 make it an in fact ground of recusal in a case for failure  
25 to rule, then you should build in a notice that you

1 haven't ruled, probably a second notice that you haven't  
2 ruled, and then if it's filed, the presiding judge  
3 recuses. And I will tell you that as a trial judge and as  
4 someone who works with trial judges everyday over  
5 recusals, no one likes an adverse ruling on a recusal.  
6 It's in the file, it's public, and the grounds which were  
7 alleged are known. So if you want to look for something  
8 that has -- or Richard Orsinger that has a political  
9 impact, that does. Now, that would -- David Peeples is  
10 looking at me strongly because he drafted all of our rules  
11 of recusal, and I'm not certain I feel that comfortable  
12 with it, David, but that's what Justice Christopher is  
13 suggesting.

14           I don't think you're ever going to get  
15 self-reporting by trial judges on 90-day rulings or timely  
16 rulings. There are, quite frankly, just no uniform case  
17 management system in this state, much less a uniform case  
18 management docket. We had -- they're all local solutions,  
19 and the reporting by a judge themselves would be highly  
20 suspect as to accuracy. So I just raise that out there.  
21 Prisoners are the problem, more so than the litigants. It  
22 has been my experience that two motions will be ignored  
23 mostly, and that is the summary judgment motion that  
24 Justice Christopher and I are familiar with. There are  
25 days I would pray for page limits and font limits in trial

1 courts. Just give me a 50-page limit and a reason that I  
2 can hear a motion to expand a summary judgment past 50  
3 pages and 2,000 exhibits, I would be a happy camper. But  
4 that's just a problem.

5           And then the prison font. There is nothing  
6 more challenging than reading prison font, and it has to  
7 be read step after step, and so I think that Frank  
8 Gilstrap's suggestion about addressing prisoners might  
9 have some -- I think it was Frank -- might have some  
10 merit, because they are the ones that don't understand how  
11 to get to the coordinators. They don't have the telephone  
12 access or the e-mail access to get to the coordinators for  
13 the settings, and as a consequence their motions can  
14 languish. So but obviously -- and I will say that I don't  
15 have a clerk present in the 48th District Court when I'm  
16 setting motions, and every ounce -- every bit of reporting  
17 that you've discussed has a financial impact on a county.  
18 This is more personnel on a county payroll. So that would  
19 be -- and another report through OCA, so I just point that  
20 out. Thank you.

21           HONORABLE NATHAN HECHT: All right. We've  
22 got Tom Riney, Nancy Rister, Justice Christopher, and  
23 Steve Yelenosky in the queue, and then we'll go back to  
24 Bill and have him lay out what he wants us to give him  
25 direction on, vote on. Tom Riney.

1 MR. RINEY: Thank you, Judge. Well, first  
2 of all, with respect to the clerks, I've never seen a  
3 clerk in the courtroom in the Panhandle or West Texas  
4 except during voir dire, and many times our judges will  
5 have three or four counties, and so you might have a  
6 hearing in a Hemphill County case in Wheeler County, and  
7 so, of course, the Hemphill County clerk may not even have  
8 any possible way of knowing that there's hearings being  
9 held, and I think we need to break this down into things  
10 that have been submitted.

11 The rule talks about being submitted, but  
12 some of the comments have been about a hearing never  
13 having been requested. Well, in terms of the hearing that  
14 never had been requested, very easy to separate that  
15 between the pro se cases and the cases where there's a  
16 lawyer, because lawyers often file motions and don't  
17 request a hearing or they request a hearing and they pull  
18 it down because things get worked out. So I don't think  
19 getting a hearing is really a problem with lawyers, but if  
20 you start running deadlines after the time a motion is  
21 filed, you know, it's a separate situation, so perhaps we  
22 could have some type of -- I know uniform case management  
23 is not practical because of the differences among our  
24 counties, but at least some kind of best practices where  
25 maybe when there is a filing by a pro se that a clerk does

1 have some type of trigger to warn the judge a certain time  
2 after the motion has been filed. But I think we need to  
3 be careful about treating motions when lawyers are  
4 involved versus these pro se motions, because clearly we  
5 don't need -- I don't think we need to change the whole  
6 system just because of these pro se cases.

7 HONORABLE NATHAN HECHT: Nancy Rister.

8 MS. RISTER: Yes, sir. I just wanted to do  
9 some FYI's. Our clerks don't go into the courtroom  
10 either, but our -- we do all of the OCA reports. No judge  
11 does a report at all. And I'm not about -- kind of like  
12 what Stephen said. I'm not about to tell a judge when or  
13 what to do. I'm just not going to do it. That's very  
14 inappropriate. I know my place. Now, as a medium-sized  
15 county we do have the software, if a motion is filed  
16 electronically, we could set a reminder timer. On a pro  
17 se and it's going to be paper, we can still set it as we  
18 scan it in our system and put it in as an event, there is  
19 a timer set up in there that we can offer, and, you know,  
20 we can run reports and let the judge know, but our judge  
21 has three staff, so the coordinator usually has a lot more  
22 time than we do.

23 In smaller counties, some of them don't even  
24 use software. Some of them are still on paper, and they  
25 do everything is in paper. They print off the electronic

1 filings, and that would probably be extremely burdensome  
2 for them, even though their volume probably is a whole lot  
3 less than ours. And as far as these being the inmate  
4 cases, that's district court. So misdemeanors, I just --  
5 we don't deal with that at all. I don't -- I don't see  
6 it. And we've never set the judges' schedules. They have  
7 court coordinators that do that, at least in our size  
8 county, and I would assume in Harris County, too, they  
9 have coordinators who set the cases. In smaller counties,  
10 I don't know there. I would think that if you've got a  
11 district judge who's got several counties that he would  
12 keep up with his own schedule and not depend on all the  
13 different clerks in every county. That's -- I just kind  
14 of wanted to FYI.

15 HONORABLE NATHAN HECHT: Thanks, Nancy. For  
16 -- if you don't recall, Nancy is the county clerk in  
17 Williamson County. Justice Christopher.

18 HONORABLE TRACY CHRISTOPHER: I didn't mean  
19 to suggest that it would be an automatic recusal. I  
20 actually meant to suggest that the regional judge could  
21 counsel the judge who is not getting their work done, and,  
22 you know, if there's a reason why the judge isn't getting  
23 their work done, think about moving the cases. And David  
24 is probably right, it would probably have to be the local  
25 judge to actually move the cases. They would have to work

1 together to move the cases, but, no, I did not want it to  
2 be an automatic one.

3 I think what happens with the -- at least  
4 when we're looking at mandamuses, we tend to have the  
5 problems with the criminal -- criminal prisoners rather  
6 than the civil prisoners in Harris County because Harris  
7 County's local rule calls for a submission docket, right,  
8 but not all district judges have submission dockets,  
9 right? So if you want a ruling on something you either  
10 set it for oral hearing or you set it for written  
11 submission, and that's pretty clear on our websites, and  
12 so a person who is in prison can put their motion on the  
13 submission docket and not actually have to come in to  
14 court and, you know, have a hearing. So we don't tend to  
15 have that many civil pro se prisoner problems. We have it  
16 on the criminal side because the criminal courts don't  
17 have a submission docket.

18 So the -- there's nothing for the criminal  
19 prisoner who is trying to get a ruling on something to do  
20 to request a hearing other than, you know, file a bunch of  
21 letters with the clerk saying, you know, "Please ask the  
22 judge to rule." And, of course, then they never have  
23 proof that they asked the judge to rule, and you know,  
24 it's -- it's difficult. So to me -- and I don't know,  
25 Judge Estevez, whether you-all have a submission docket,

1 but that is a very simple way to allow someone who cannot  
2 actually come to court and present their motion to, you  
3 know, have the motion submitted, and you know, we require  
4 10 days notice. You've got to give notice to the other  
5 side, but once that's done, it gets on the court's  
6 calendar.

7 HONORABLE ANA ESTEVEZ: Well, they just  
8 appear by phone, so we have them appear all the time. So  
9 we have -- I set up prisoner hearings all the time. So if  
10 they ask for a hearing, they get one in person, and they  
11 appear by phone. That's not our problem. Our problem  
12 isn't that they can't get a hearing. It's that they don't  
13 ever really request one or it's never given to my court  
14 coordinator I guess. I don't know. I don't know what the  
15 problem is, but there's a problem.

16 HONORABLE NATHAN HECHT: Steve Yelenosky.

17 HONORABLE STEPHEN YELENOSKY: Sorry, I had  
18 to unmute. Tom Riney was talking about best practices,  
19 and I think that's important here. A lot of times you  
20 can't fix things by rule, and with respect to prisoners, I  
21 think there are best practices, and I like -- I like what  
22 we do in Travis County, and briefly what that is, is  
23 prisoner communications come in the mail. They don't file  
24 electronically. What -- I don't know how it happens, but  
25 the clerk's office knows to direct those to the court



1 coordinator, and the court coordinator's practice is then  
2 to communicate with the judge about a hearing, some judge,  
3 and he has relationships with people in every prison, and  
4 he calls that person at the prison and says, you know, "I  
5 need to set up a call with the prisoner for a court  
6 hearing," and then that happens. I -- you can't require  
7 that of a judge, but it would be nice if judges were  
8 educated about doing that.

9           Having -- without that and just having an  
10 automatic denial, even if that's what would happen 99  
11 percent of the time, to me it's a bad appearance that  
12 we're sort of shuttling aside prisoner complaints. I  
13 think it does matter how we deal with them, not just how  
14 we rule on them, and I think best practices would include  
15 something to try to get judges to give them some attention  
16 rather than just letting them go away by operation of law.

17           Second thing is whatever we do with regional  
18 administrative judges taking cases away from judges,  
19 respectfully, Judge Evans, I wouldn't call it recusal, and  
20 I'm not sure that you were suggesting that, but that would  
21 cross a bright line for me in terms of what we mean by  
22 recusal, because it would be requesting a recusal on the  
23 basis of something the judge has done or hasn't done in  
24 the case, and that to me blurs that quite a bit.

25           I also don't know as a practical matter what

1 it would mean if a judge hasn't ruled on some motion after  
2 the case has been in court quite a while. If the case is  
3 removed then does the new judge start over? That --  
4 that's just a question in my mind, but whatever it's  
5 decided to be done about it, I wouldn't use the term  
6 "recusal." That's it.

7 HONORABLE NATHAN HECHT: All right. I said  
8 we would go to Bill, but we've got two more with their  
9 hands up. Judge Estevez.

10 HONORABLE ANA ESTEVEZ: I didn't want to  
11 leave the impression that our inmate cases don't get  
12 hearings and that I just deny them the relief they're  
13 requesting, because that's not what's happening, as I was  
14 trying to state to Justice Christopher. If they -- when  
15 they file their motions, if they request a hearing or if  
16 they request a hearing at any time and it's -- and we know  
17 about it, we do set it for hearing. We have relationships  
18 with our jail, and we've never had a problem not setting a  
19 hearing with any -- I didn't mean jail. With our prison,  
20 and I've never had a problem not setting it for a hearing.  
21 So I don't -- that is -- our problem isn't once I've had a  
22 hearing that the rulings don't occur. The problems are  
23 we've had motions that have been filed, and no one has  
24 requested a hearing, and I'm at no -- I'm unaware that  
25 anyone has requested a hearing, and then all of the sudden

1 we've had those motions filed, and I don't know -- I can't  
2 remember any because I don't have them fresh on my mind to  
3 give you specific examples, but we do hear our inmate  
4 motions all the time, motions for discovery, motions  
5 for -- motions for mediation. I've ordered mediation in  
6 the prisons before. Different things that may come up.  
7 So --

8                   HONORABLE STEPHEN YELENOSKY: No, I heard  
9 you say that, and I didn't mean to suggest -- I know you  
10 said you heard motions. I didn't mean to suggest that you  
11 don't. I do think, though, we have to be more proactive  
12 with prisoners because they can't pick up the phone. A  
13 lawyer can pick up the phone any time. A pro se litigant  
14 can, too, even though they may not know where to go, but  
15 once a piece of mail hits us from a prisoner, I mean, we  
16 talk about sort of some modification of our rules for pro  
17 se litigants. Well, take a pro se litigant, put that  
18 person in jail, and then what do you do. If you get  
19 correspondence from a prisoner, it doesn't ask for a  
20 setting, I think we need to be proactive about that,  
21 because they can't call in, for one thing. For two, they  
22 don't know how things work, and so if you get any  
23 communication from a prisoner, I think the court  
24 coordinator ought to communicate with the judge about that  
25 and decide whether it ought to be treated as a request for

1 a hearing.

2 HONORABLE ANA ESTEVEZ: Well, then I think  
3 you need to review that and determine whether that should  
4 be a rule for everyone, because that's not what we do.  
5 When somebody files a motion with us on any other case, we  
6 don't call them and say, you know, "Set for a hearing."  
7 If I get a proposed order and it's in my queue and I look  
8 at it and I recognize it needs a hearing, then I put "set  
9 for hearing," but if it's not coming with an order, which  
10 is the only way I really know, an order has hit my queue  
11 that there's been a motion filed. We don't go looking for  
12 those. So unless --

13 HONORABLE STEPHEN YELENOSKY: Well, I'm not  
14 suggesting a rule. I'm along the lines of best practices.  
15 I don't -- I don't know that, you know, if all of the  
16 places have considered this, but a best practice I'm just  
17 saying would be to be a little more proactive, because  
18 think about everything lawyers can do, then put that  
19 lawyer in a jail and take their phone away.

20 HONORABLE NATHAN HECHT: Levi Benton. Then  
21 we'll go to Bill. You're muted, Levi. Can't hear you.

22 HONORABLE LEVI BENTON: Sorry about that.  
23 Again, addressing the issue that Stephen raised, recusing  
24 a judge in a case because of something he or she did or  
25 did not do, which is why I find more appealing saying to

1 the judge, "You may not be assigned any more cases until  
2 you address this." In the small counties, let's say it's  
3 a one -- a one judge county, the commissioners or the  
4 Supreme Court would have to assign another judge  
5 temporarily to hear the cases -- the new cases because the  
6 judge that's behind can't take the new cases, and so  
7 taxpayers grumble, "Hey, Judge, do your job so we don't  
8 have to pay for the second judge." In a multijudge county  
9 then you have the peer pressure of, "Hey, it's not fair  
10 I'm getting more cases because you're not doing your job,"  
11 and so I just want to lay that out there one more time to  
12 Bill and the subcommittee because I really thought others  
13 would bite on that brilliant idea of mine, but no one did.

14           And then finally, this -- the beauty of this  
15 committee is that you always find out about the diversity  
16 of the state. In the 10 years that I served on the  
17 district bench I did not -- I think there was hardly not a  
18 day I went into the courtroom to hear arguments where  
19 there wasn't an assistant district clerk in the courtroom.  
20 So interesting that others don't have that practice.

21           HONORABLE NATHAN HECHT: All right. Bill,  
22 what can we do to give you and the subcommittee guidance?

23           HONORABLE BILL BOYCE: So I think I've --  
24 let me make sure I'm unmuted. Yes, I am unmuted. I think  
25 I've got a decision tree here that I'll ask for votes, I

1 guess. Let me sketch it out, if I may.

2 HONORABLE NATHAN HECHT: Sure.

3 HONORABLE BILL BOYCE: And then we can  
4 refine it as needed.

5 HONORABLE NATHAN HECHT: Okay.

6 HONORABLE BILL BOYCE: The -- the genesis of  
7 this topic, I think, was prisoners seeking rulings in all  
8 cases, both civil prisoner cases and criminal prisoner  
9 cases. So I could see a first decision vote being do we  
10 want to -- whatever our approach is, do we want to limit  
11 it to prisoner cases involving civil matters, or do we  
12 want to try to bite off civil cases generally? That would  
13 be step one.

14 Step two, a vote or guidance on whether we  
15 have a reporting only approach, a notice of ruling needed  
16 approach, or accommodation of the both of them together.  
17 And then step three would be guidance about whether we  
18 want to involve the regional presiding judges in some way  
19 to be determined, because there's obviously a lot of very  
20 thoughtful and important considerations that go into that.  
21 So I sort of see that as step one, step two, and step  
22 three.

23 HONORABLE NATHAN HECHT: All right. So on  
24 step one, the question is should we limit whatever we do  
25 to prisoner -- civil cases involving prisoners? Prisoner

1 cases that are civil, not on the criminal side. So, yes,  
2 we would limit it to that; no, we would look at the other  
3 issues that we've talked about this afternoon. So if you  
4 think yes, I think you hold up your hand, I believe is the  
5 way it happens and then we can count them.

6 HONORABLE STEPHEN YELENOSKY: Judge, there  
7 is a way to raise your hand electronically for the  
8 participants down in the bottom right of the participant  
9 list so you'll actually be able to see that.

10 MS. HOBBS: And, Chief, this is Lisa Hobbs.  
11 Can I just get a clarification on the vote?

12 HONORABLE NATHAN HECHT: Yes.

13 MS. HOBBS: Which is, are you saying if we  
14 want to include prisoner cases, are we limiting them to  
15 civil only and not trying to go into the foray of the  
16 criminal side, or are you saying the subcommittee's task  
17 should be limited only to civil inmate cases and not  
18 whatever the problem is on getting rulings in general?

19 HONORABLE NATHAN HECHT: I think the latter,  
20 right, Bill?

21 HONORABLE BILL BOYCE: That is correct. So  
22 I'm -- by asking for this vote I'm excluding all criminal  
23 stuff completely, and so -- all criminal matters  
24 completely, and so the vote would be whatever rule or  
25 approach we use, are we addressing only civil cases

1 involving prisoners, or are we addressing civil cases  
2 generally. That's what I'm trying to drill down to.

3 MS. HOBBS: Great. Thank you for the  
4 clarification.

5 HONORABLE NATHAN HECHT: So vote if you  
6 haven't, please. Let's see, four, six, eight. I count  
7 two, four, six, eight, ten, twelve. 14 looks like, to  
8 limit. And now, if you'll turn your -- if you'll pull  
9 your hands down. And people who think we should look at  
10 the issue more broadly in other kinds of civil cases, now  
11 raise your hands.

12 MS. BARON: Can I change my vote, because I  
13 didn't quite understand it the first time? I'm sorry.

14 HONORABLE NATHAN HECHT: Okay.

15 MS. BARON: So take me off the first one and  
16 put me on the second one.

17 HONORABLE NATHAN HECHT: All right. So  
18 that's 11. 13 to 11 is what I show.

19 And then the second issue Bill wants some  
20 direction on is whether the mechanism, the correction  
21 mechanism, should be reporting only or separately giving  
22 notice the ruling is needed or both. So I guess a way to  
23 vote on that is just everybody who thinks it should be  
24 reporting only or both, vote that way, and everybody who  
25 thinks it should be notice of a ruling needed or both. Is



1 that right? I'm not sure that's right. No, that's not  
2 right. Pam is shaking her head.

3 All right. Let's just vote on the three of  
4 them. Reporting only, notice a ruling is needed, and then  
5 we'll vote on both. So first is reporting only. Hold up  
6 your hands, please. Has everybody voted? That has one.

7 Then notice of a ruling needed.

8 MS. EASLEY: Chief, I'm sorry to interrupt,  
9 but it looks like Richard had his hand raised, so I  
10 couldn't tell if it was for the first vote or for the  
11 second vote.

12 HONORABLE NATHAN HECHT: Richard? Second  
13 one, I think.

14 MR. ORSINGER: It's going to be for the  
15 third vote, not for the first vote. It's for both. I  
16 like both. So don't count me as report only.

17 HONORABLE NATHAN HECHT: Okay. That's 13.  
18 No, let's see. Yeah, 13. And then both, so take your  
19 hands down and vote for both. Two, four, six, so that  
20 looks like seven. So there's 1 for reporting only, 13 for  
21 filing a notice of ruling needed, 7 for both. Bill,  
22 that's --

23 HONORABLE BILL BOYCE: Okay.

24 HONORABLE NATHAN HECHT: And then the third  
25 thing Bill wants guidance on is whether we should ask the

1 regional presiding judges -- there are eleven of them  
2 around the state -- whether they should be involved in  
3 this by counseling the judge, assigning cases, getting  
4 somebody else to reassign the case, or should the regional  
5 presiding judges be helping to monitor this, and we have  
6 two on the committee, and I think two no votes, but if you  
7 think yes, we'll see in a minute. If you think yes --

8 HONORABLE DAVID PEEPLES: Can I ask a  
9 question? They already have the obligation to monitor  
10 this. It's in the comment "regional presiding judges  
11 shall determine the existence of cases tried and awaiting  
12 entry of judgment." Been there for 20 years. So  
13 what's the -- how is this different?

14 HONORABLE NATHAN HECHT: Bill.

15 HONORABLE BILL BOYCE: I guess what we're  
16 contemplating is the discussion that's occurred about  
17 whether there should be some additional affirmative steps  
18 that the presiding judge should take. Counseling,  
19 shifting cases, other to be discussed if we go down this  
20 path.

21 MS. HOBBS: Which, if I could just say, I --  
22 and Judge Peeples, you obviously know your job better than  
23 I know your job, but I certainly have a hand in it. I  
24 think you can -- I think you can transfer -- I think you  
25 can certainly go to your judges already and say, "Hey,

1 we've noticed some mandamus proceedings being filed.  
2 What's going on? What can we do to support you?" I think  
3 you can either -- even transfer cases with or without the  
4 local administrative judge's thing. I think the regional  
5 PJ's may be able to transfer at least individual cases.  
6 I'm not sure you could say don't assign any more cases to  
7 them, but you could -- if there's some complicated cases  
8 that we're just not getting rulings on I think you could  
9 intervene, but maybe we have sort of assumed some of that  
10 in our discussion. And, Justice Hecht, I'm sorry if I'm  
11 opening the floor for a discussion after the call for the  
12 vote, but I mean, what do you think your -- what do you  
13 think a regional PJ -- some of this isn't just giving you  
14 authority, in other words. What I think is it's giving  
15 you sort of extra permission to do what you already have  
16 authority to do.

17 HONORABLE DAVID PEEPLES: I don't think a  
18 regional PJ has the authority to take a case away from a  
19 judge who doesn't want to give up that case. Now, recusal  
20 is different, but we're not talking about recusal here.

21 MS. HOBBS: No, but what about transfers? I  
22 mean, y'all take -- I mean, presumably when you get a  
23 request to transfer a case you do it without necessarily  
24 the consent of the trial judge.

25 HONORABLE ANA ESTEVEZ: No. Those are --

1 those are after we've had hearings, on a recusal.

2 MS. HOBBS: No, no, no. Justice Peeples,  
3 I'm talking about outside of the recusal. So I'm thinking  
4 about like -- I'm kind of thinking about maybe Rule 11,  
5 and so maybe I'm getting confused, and then ultimately  
6 Rule 13.

7 HONORABLE DAVID PEEPLES: MDL is totally  
8 different, Lisa, but I just don't think there's anything  
9 in the statutes that lets a regional PJ take a case or  
10 more away from a judge who doesn't want to give up that  
11 case.

12 MS. HOBBS: Okay. So you couldn't think for  
13 the efficient administration of your region that you could  
14 pop in to some case in Bexar County and say, "No, I think  
15 it actually should be in" -- I forget your region, but it  
16 could be in the Boerne or wherever, whatever county that  
17 is.

18 HONORABLE DAVID PEEPLES: I --

19 MS. HOBBS: Outside of Rule 11 or Rule 13.

20 HONORABLE DAVID PEEPLES: I'm not aware of  
21 it.

22 MS. HOBBS: Okay. I misunderstood. I  
23 thought y'all could transfer cases more easily, but maybe  
24 I'm just misremembering the statute.

25 HONORABLE DAVID PEEPLES: David Evans, are

1 you aware of anything like that?

2 HONORABLE ANA ESTEVEZ: He's on a personal  
3 emergency, so he's not on right now.

4 MS. HOBBS: Judge Peeples, one more  
5 question. What about within Bexar County, if you saw a  
6 problem, so you're not -- now you're not dealing with  
7 statutory or constitutional restrictions on where a case  
8 can be filed or heard, but you wouldn't intervene and move  
9 a case from a judge, even within the jurisdictional  
10 parameters of the original filing of the case?

11 HONORABLE DAVID PEEPLES: I think that is a  
12 correct statement.

13 MS. HOBBS: Okay. So then I think as we  
14 answer this question I think one of the things -- it would  
15 be easier to move it to somebody within the same county,  
16 but I think we should all remember they can't -- it would  
17 only be by statute or constitutional change that they can  
18 move it outside of the county for sure.

19 HONORABLE NATHAN HECHT: All right. So I  
20 show eight for extending the involvement of the regional  
21 presiding judges. If you would put your hands down.

22 MS. HOBBS: Hey, Chief, will you add -- will  
23 you make that nine, because I was talking instead of  
24 voting?

25 HONORABLE NATHAN HECHT: Yes. Yeah.

1 MS. HOBBS: Thank you.

2 HONORABLE STEPHEN YELENOSKY: Ten, please.  
3 I was listening.

4 MS. WOOTEN: I'm sorry, I didn't know -- I  
5 didn't realize we were calling the vote when the  
6 discussion was open, and this is Kennon, and so I'm on  
7 board, too.

8 HONORABLE KENT SULLIVAN: Make it 12.

9 MS. HOBBS: Chief, should we just redo that  
10 vote, because I think -- everybody put their hands and  
11 redo it one more time so we have an accurate vote?

12 HONORABLE NATHAN HECHT: All right. Let's  
13 vote again for involving the regional presiding judges,  
14 yes. Hands up, please.

15 HONORABLE ANA ESTEVEZ: Well, I think we  
16 could always be involved, but this is for involving them  
17 to a greater extent, right?

18 HONORABLE NATHAN HECHT: Right.

19 HONORABLE BILL BOYCE: Yes.

20 HONORABLE NATHAN HECHT: I show 15.

21 CHAIRMAN BABCOCK: 16.

22 HONORABLE NATHAN HECHT: 16.

23 CHAIRMAN BABCOCK : Oh.

24 HONORABLE NATHAN HECHT: No, I show 14 now.

25 MS. HOBBS: Chief, I took my hand down after

1 the vote, after you said the count, sorry.

2 MS. WOOTEN: I did the same thing. This is  
3 Kennon, but I put it back up.

4 HONORABLE NATHAN HECHT: Maybe we had 18.  
5 17, okay. And then for not? Hands for doing it down,  
6 hands for not doing it up.

7 HONORABLE ANA ESTEVEZ: And Judge Evans did  
8 give me his proxy to vote, so he's voting in this vote.

9 HONORABLE STEPHEN YELENOSKY: Justice Hecht,  
10 I think the host can just clear out the hands, just to  
11 make sure in case somebody has forgotten to lower their  
12 hands.

13 HONORABLE NATHAN HECHT: Okay. Pauline may  
14 be doing that.

15 HONORABLE ANA ESTEVEZ: Oh, well, she just  
16 cleared me out. Let me --

17 HONORABLE NATHAN HECHT: So the nots are  
18 four, so that's a good clear vote. Oh, five.

19 HONORABLE BILL BOYCE: And so for my  
20 clarification, Chief, when we go back to the first vote,  
21 which I think you said was 13 to 11.

22 HONORABLE NATHAN HECHT: Yes.

23 HONORABLE BILL BOYCE: That means 13 in  
24 favor of dealing -- of confining whatever rule proposal we  
25 come up with to prisoner cases only involving civil

1 matters; is that correct?

2 HONORABLE NATHAN HECHT: Yes.

3 HONORABLE BILL BOYCE: Okay. All right.

4 HONORABLE NATHAN HECHT: That's the way I  
5 understood it, yes. Okay. Anything else that you need  
6 guidance on, Bill, on this?

7 HONORABLE BILL BOYCE: No. I think that  
8 gives us the ammunition to take another swing at it.

9 HONORABLE NATHAN HECHT: Okay. Well, then  
10 that takes us to the last item on the agenda, which we  
11 should be able to finish without too much trouble, so  
12 maybe we should go ahead and take a little break, and I've  
13 got a quarter to 3:00. We have a visitor. Judge --  
14 Municipal Judge Ryan Henry is with us, so let's come back  
15 in 10 minutes at five minutes to 3:00, and finish up.

16 CHAIRMAN BABCOCK: And, Chief, I'm back, if  
17 you want to relinquish the reigns, but you sound like  
18 you're having fun.

19 HONORABLE NATHAN HECHT: No, no, no, I  
20 wouldn't call it that.

21 CHAIRMAN BABCOCK: I mean, I've never heard  
22 so many votes, it was awesome.

23 HONORABLE NATHAN HECHT: We'll take a  
24 10-minute break.

25 (Recess from 2:43 p.m. to 2:54 p.m.)



1                   CHAIRMAN BABCOCK: I think it's of all the  
2 46 or so, 48 people, now down to 42, Judge Henry has truly  
3 Zoomed in here, if you are looking at his background.  
4 It's from somewhere in outerspace. He is --

5                   HONORABLE RYAN HENRY: Yes.

6                   CHAIRMAN BABCOCK: And Marti wants to know  
7 about procedures for compelling a ruling, that's going  
8 back to the subcommittee, and the parental leave  
9 continuance rule is done and going to the Court, unless  
10 somebody tells me differently.

11                   So civil rules in municipal courts, Levi  
12 Benton is the chair. Judge Estevez is the vice-chair, and  
13 whoever wants to lead off and talk. And, Judge Henry,  
14 thank you for joining us, and thank you for your memo. It  
15 was very thoughtful. Thank you.

16                   HONORABLE RYAN HENRY: Oh, you're welcome.  
17 And I must say, this is a fascinating process to watch. I  
18 should have popped in and saw you guys when you weren't  
19 doing it through Zoom, but it was very interesting.

20                   CHAIRMAN BABCOCK: Yeah, well, when we do it  
21 in person there's often food fights, because there's food  
22 there, and we sometimes toss it at each other, but this is  
23 much more civilized. So, Levi, take it away.

24                   HONORABLE LEVI BENTON: All right. Thank  
25 you, Chip. So as Chip said, Judge Henry, who serves as a

1 municipal court judge in San Antonio, I believe it is.

2 HONORABLE RYAN HENRY: Actually, it's  
3 Westlake Hills up in the Austin area.

4 HONORABLE LEVI BENTON: Oh, thanks for  
5 correcting me. Excuse me. Wrote the Chief maybe about a  
6 year ago, actually, and asked the Chief to take a look at  
7 this topic, and the topic is considering whether the Rules  
8 of Civil Procedure need to be made to apply to municipal  
9 courts, and so the Chief in his letter of about a year ago  
10 asked us to consider Judge Ryan's proposal. The four  
11 proposals made by Judge Ryan are laid out in the report.  
12 I won't read them, but, one, apply -- change Rule 2 to say  
13 expressly that the rules apply to municipal courts, and  
14 then the third proposal was to come up with some  
15 specialized rules like the rules in the 500 series that  
16 apply to JP courts.

17 The subcommittee heard from a couple of  
18 other judges besides Judge Henry, and even in the small  
19 number of judges we visited with, there wasn't unanimity.  
20 There was a judge from Dallas who had some strong  
21 objection to having the civil rules apply to municipal  
22 courts. In the final analysis, the subcommittee thought  
23 the course we should take is to suggest to the Court that  
24 we set up a committee of municipal court judges. Most of  
25 this committee remembers that when we went down this path

1 with the JP courts, as I recall, the project went nowhere  
2 until we got JP justices or judges involved. I think  
3 there was a special committee of about 10 justices of the  
4 peace who made some proposals, and since I know of no one  
5 on our committee who practices in the municipal courts or  
6 knows anything about municipal court rules, I think it  
7 would be challenged to come up with it, and there are over  
8 a thousand municipal courts across the state. Or about a  
9 thousand.

10                   We thought really we should use the same  
11 model used with the justices of the peace, and that is,  
12 let's -- you know, maybe we reach out. The subcommittee  
13 didn't expressly address this, but maybe the right thing  
14 to do is either the Court or the subcommittee reach out to  
15 the municipal court's association and ask that  
16 organization to set up a committee to consider Judge  
17 Ryan's proposals. And really, that's where we left it.  
18 So I will yield to Judge Ryan or to Ana or Stephen  
19 Yelenosky, who was also on the subcommittee, to see if  
20 they would like to add anything.

21                   HONORABLE RYAN HENRY: Judge Benton, may I  
22 go first, real quick?

23                   HONORABLE LEVI BENTON: Absolutely.

24                   HONORABLE ANA ESTEVEZ: I'm not going to say  
25 anything, so you just take all of my time, too.

1                   CHAIRMAN BABCOCK: Yeah, go ahead, and I've  
2 I've been calling you Judge Henry, but maybe it's Judge  
3 Ryan. You have two last names, so --

4                   HONORABLE RYAN HENRY: Actually, Henry is  
5 the last name, Ryan is the first name, so Judge Henry is  
6 correct, sir. First, I did want to thank the subcommittee  
7 for all of their work and for listening to me and for  
8 taking a very hard look at this particular issue, but the  
9 more you look at it and kind of the diversified nature of  
10 all the different courts and the way the Legislature has  
11 given certain courts different powers and things like  
12 that, it's a little bit bigger elephant to eat, as I heard  
13 a reference earlier on, and so dividing things up might be  
14 more appropriate.

15                   I had reached out -- and I just recently  
16 heard, so this is something the subcommittee, I had not  
17 informed them of yet. Just recently heard back from the  
18 Texas Municipal Court Education Center. It is the  
19 training center for municipal judges and prosecutors and  
20 clerks throughout the state, and they basically offered me  
21 their certain resources that is their newsletter and their  
22 website ability to conduct surveys and actually just blast  
23 out information to all of the municipal judges, and they  
24 have to go through the TMCEC to get their judicial credit  
25 and their continuing education credit, and so they have a

1 kind of a list of all of them and solicit comments and  
2 things like that they can compile and actually bring back  
3 to the committee.

4           So as Judge Benton had mentioned, reaching  
5 out to the ones that deal with them all the time, I did  
6 get an affirmative commitment from the executive director  
7 I want to say it was Sunday night that they would be  
8 willing to do that, if that's what the subcommittee felt  
9 was appropriate. It would just be kind of what to ask  
10 them all about. My concern and the reason I brought this  
11 up was just there are -- municipal courts, especially  
12 municipal courts of record, have been given more and more  
13 civil jurisdiction to try and handle I guess an overflow  
14 and to make things more cost-effective for all the parties  
15 involved and to act and respond quicker. As Judge Benton  
16 had mentioned, that the judge in Dallas, that's Judge  
17 Acuna, and he's actually on the board for the TMCEC, or  
18 TMCA, I'm sorry. That's the association that overlooks  
19 them.

20           He didn't necessarily have a problem with  
21 the rules. He just wants special rules, because he  
22 recognizes all of the different nuances that kind of come  
23 up in the different counties, and I have received comments  
24 from different judges that basically said either "Thank  
25 you very much. We need this because there's no guidance

1 on certain issues," or "Don't do it because you're going  
2 to screw things up for us," because those courts have some  
3 specialized things that they have to deal with. Municipal  
4 courts are so diverse, I mean, if you just compare, say,  
5 Lubbock, and it's a municipal court of record, and they  
6 have, you know, quite a few civil matters that go on, with  
7 El Paso, who has a tremendous amount of civil matters that  
8 go on, but the statute expressly gives them a municipal  
9 court of appeals, and so the rules that apply with them  
10 are completely different than the rest of the state.

11           And I joke with -- I teased the former city  
12 attorney, but she actually is the new president-elect for  
13 the State Bar, Sylvia Firth, that, you know, I was born in  
14 El Paso, but El Paso is a different country and a  
15 different world, but they still have to follow the rules  
16 that are submitted. So I believe that the subcommittee's  
17 intent was just get more input and get them involved  
18 earlier, the judges that live and breathe in this world,  
19 as to what kind of rules they think should apply. I do  
20 know there is a certain population, myself included, that  
21 wants some guidance and because we want to do it right,  
22 but there does need to be some flexibility, but that's why  
23 we need to kind of get the comments from all the rest of  
24 the judges. So I am available for questions, but  
25 otherwise I'll shut up now.

1 CHAIRMAN BABCOCK: Okay. Thank you very  
2 much, Judge. Any -- anything else, Levi, or do you want  
3 to open up the questions, or tell us where you want to go.

4 HONORABLE LEVI BENTON: Well, I really I  
5 guess need direction. You know, I think where I  
6 personally part company with -- or differ with what Ryan  
7 just said is that I don't know that we need necessarily  
8 comments from more judges, municipal court judges. I  
9 think we need an express or formal request from the --  
10 from the Court either to the TMCA or the other  
11 organization that he referred to asking them to draft --  
12 draft rules and/or to expressly say as a body, "Aw,  
13 thanks, but no thanks."

14 CHAIRMAN BABCOCK: What did the referral  
15 letter from the Court say? Do you know, Levi, or Marti,  
16 do you know?

17 HONORABLE LEVI BENTON: Yeah, yes. It says  
18 to set up a process for considering the proposals  
19 submitted by Judge Ryan. Excuse me, by Judge Henry.

20 CHAIRMAN BABCOCK: He'll answer to either.

21 HONORABLE LEVI BENTON: Pardon?

22 CHAIRMAN BABCOCK: I said he'll answer to  
23 either, I'm sure.

24 HONORABLE RYAN HENRY: Yes, sir.

25 HONORABLE LEVI BENTON: And he'll even

1 answer if you don't say "Judge." He's just put me in  
2 coach.

3 CHAIRMAN BABCOCK: Yeah, right, right. So  
4 to set up a process to respond to that and then report to  
5 the Court, is that what --

6 HONORABLE LEVI BENTON: Set up a process for  
7 considering the proposal, so, Chip, circling back to where  
8 I started, you're mature enough to remember when we went  
9 down this road with the justices of the peace. Right?

10 CHAIRMAN BABCOCK: Yeah. Oh, I tried 20  
11 jury trials in JP court.

12 HONORABLE LEVI BENTON: But didn't we have a  
13 -- just a special committee of justices of the peace? And  
14 I don't remember and I don't know whether -- I'm sure they  
15 have an analogous state association, whether that  
16 association was involved. In other words, this wasn't a  
17 top down approach, because it could never work as a top  
18 down approach. We've got to have the municipal court  
19 judges and municipal court administrators buy in that  
20 there is a need for the rules, because we already have --  
21 well, first, like in Houston, I could get no interest  
22 amongst the judges to respond to the inquiry. We had a  
23 Dallas judge to respond whose -- who says, you know, "I'm  
24 not sure we need to do this because we don't have -- we're  
25 not set up to apply rules of discovery like other courts."



1 So to answer your question, Chip, we need direction.

2 CHAIRMAN BABCOCK: Okay. Lisa has got some  
3 historical information for us. But you'll have to unmute,  
4 Lisa.

5 MS. HOBBS: Hi, I moved my phone. My  
6 recollection is when we rewrote the JP rules I obviously  
7 wasn't around for the first time we did the JP rules, but  
8 when we rewrote them, which has been in the last few  
9 years, we did have a JP study group that we worked with  
10 before it came to the advisory committee. In other words,  
11 this committee is fantastic within our experience and even  
12 fantastic in kind of punching some holes in things that  
13 other people have written, but most of us haven't  
14 practiced in municipal court, so I would second Judge  
15 Benton's recommendation that this really needs to come  
16 from the municipal judges and then us assess what they're  
17 doing, and that doesn't mean no support. Maybe it means  
18 supported by the subcommittee. But I do think -- I do  
19 think there needs to be a special group of municipal  
20 judges from varying size counties to kind of assess it,  
21 for instance, and then propose something to us for review.

22 CHAIRMAN BABCOCK: Okay. Thank you. David  
23 Jackson. You'll have to unmute, David.

24 MR. JACKSON: I just would ask that Lisa go  
25 back to her computer. We could hear her perfectly this

1 morning. I got about half of what you said.

2 CHAIRMAN BABCOCK: Yeah, Lisa, you were  
3 breaking up a little bit, but -- but half of Lisa is, you  
4 know, 120 percent of most of us. So --

5 MS. HOBBS: I'm sorry. My computer's audio  
6 stopped working, so then I had to switch to my phone,  
7 which is why you're seeing me outdoors more often because  
8 I can -- so I apologize. I'm mostly supporting what Levi  
9 is saying, is that we need -- we need -- it needs to be  
10 ground up and not top down.

11 CHAIRMAN BABCOCK: Yeah. Well, I think that  
12 makes sense, and I know Professor Carlson and I served on  
13 a subcommittee a number of years ago, and we had a -- it  
14 may have been Judge Lawrence or it may have been somebody  
15 else, but, you know, it was kind of a subcommittee of one  
16 person because he's the only one that knew what was going  
17 on down there. So, Levi, unless there are more questions,  
18 we'll -- we'll take this under advisement, as they say,  
19 and I'll confer with the Court, and we'll see if more work  
20 needs to be done or a committee -- a sort of a bottom up  
21 committee needs to be formed, and if that's all right with  
22 you, unless somebody else -- Judge Henry, if you've got  
23 anything else or anybody else -- and Judge Henry has got  
24 his hand up, so you're recognized.

25 HONORABLE RYAN HENRY: Well, I believe Judge

1 Benton was trying to say something first.

2 HONORABLE LEVI BENTON: Yeah. Thank you,  
3 Ryan. So, Chip, and Chief, I think to say it differently,  
4 if -- if there's agreement that someone should reach out  
5 to one of these state associations that municipal courts  
6 and judges belong to, should that request or should the  
7 communication come from me, from Chip, or from the Court?  
8 And that's all I have to say.

9 CHAIRMAN BABCOCK: Well, I know who I would  
10 rank last and who I would rank first. I would be last and  
11 the Court I think would be first.

12 HONORABLE LEVI BENTON: That's what I  
13 think --

14 CHAIRMAN BABCOCK : Okay. All right. Well,  
15 we'll -- we'll go back then, and then, Judge Henry, did  
16 you have a comment?

17 HONORABLE RYAN HENRY: Yes, sir. The two  
18 groups, if you're going to reach out, and from what I'm  
19 hearing, it's essentially has the judges collect -- write  
20 the rules that they think want to control them and then  
21 bring it back to you, but when the Court asks for it. The  
22 two groups to make such a request -- and I think we can  
23 get some coordination because I know the individuals that  
24 kind of head both groups. One is the TMCEC, and the other  
25 is the State Bar section -- State Bar has a section for

1 municipal court, and both would be, at least in my  
2 opinion, appropriate to reach out for and to ask for some  
3 guidance with regard to, you know, proposing rules.

4 CHAIRMAN BABCOCK: Great. I'm writing that  
5 down. Thank you, Judge. Any other comments about this?

6 HONORABLE LEVI BENTON: None from me.

7 CHAIRMAN BABCOCK: All right. No hands are  
8 up. So that means that in record time we have  
9 gotten through a nine item agenda, so Zoom may be the way  
10 to go in the future, and Judge Henry, you can go back to  
11 Mars or wherever that planet is behind you, and everybody  
12 else can go back home, which is where probably a lot of  
13 you are. So thank you so much. I thought this meeting  
14 went very smoothly, and it was -- and it was productive,  
15 and it's a testament to all of you guys, and so thank you.  
16 And I'm very sorry I had to -- I had to duck out for a  
17 little bit this afternoon, but duty calls. So we will  
18 stand adjourned until our next meeting, which, Marti, is  
19 when? You'll have to unmute, Marti.

20 MS. WALKER: I did. Our next meeting, let  
21 me look at my calendar, is August 28th. Yes.

22 CHAIRMAN BABCOCK: Okay. We will -- we will  
23 be back together August 28th somehow, some way. Thanks,  
24 everybody. Really appreciate it.

25 (Adjourned)

1 \* \* \* \* \*

2 **REPORTER'S CERTIFICATION**  
3 MEETING OF THE  
4 SUPREME COURT ADVISORY COMMITTEE

5 \* \* \* \* \*

6  
7  
8 I, D'LOIS L. JONES, Certified Shorthand  
9 Reporter, State of Texas, hereby certify that I reported  
10 the above meeting of the Supreme Court Advisory Committee  
11 on the 19th day of June, 2020, and the same was thereafter  
12 reduced to computer transcription by me.

13 I further certify that the costs for my  
14 services in the matter are \$ 1,475.00.

15 Charged to: The State Bar of Texas.

16 Given under my hand and seal of office on  
17 this the 17th day of July, 2020.

18  
19 /s/D'Lois L. Jones  
20 **D'Lois L. Jones, Texas CSR #4546**  
21 Certificate Expires 04/30/21  
22 P.O. Box 72  
23 Staples, Texas 78670  
24 (512)751-2618

25 #DJ-558