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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

AUGUST 28, 2020

(via Zoom videoconference)

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Taken before *D'Lois L. Jones*, Certified Shorthand Reporter in and for the State of Texas, reported by machine shorthand method, on the 28th day of August, 2020, between the hours of 9:00 a.m. and 4:07 p.m., via Zoom videoconference and YouTube livestream in accordance with the Supreme Court of Texas' Emergency Orders 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:

Documents referenced in this session

20-37 August 7, 2020 S. Henricks Letter to Justice Busby

20-38 August 24, 2020 Memo - Procedures to Compel a Ruling

20-39 Rule IX, Compensation

20-40 August 13, 2020 Memo - Rule 306a(3)

20-41 August 13, 2020 Memo - TRAP 24.1(b)(2)

20-42 August 13, 2020 Memo - TRAP 34.5(a)

20-43 August 20, 2020 Memo - Briefing Rule

20-44 August 13, 2020 Memo - TRAP 56.2 Vacating Opinions

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CHAIRMAN BABCOCK: Okay. Well, I've got 9:00 o'clock, so let's get started. I'm sure other people will join us, and Pauline will let them in, and thanks for coming remotely again. Sadly, someday soon we'll be able to get back together, altogether in person. I was thinking about the -- the thing that impacts us maybe the most is lunch, because at lunch, you know, we all go and we get our food and then we all chitchat with each other and everything, and in this format, not as easy to do, which is a loss for us, but we'll get through this. So welcome to everybody, and we'll start as usual with comments from the Chief Justice.

HONORABLE NATHAN HECHT: Well, good morning, everyone. I hope everyone is staying safe and well through this time. Only two members of my court have contracted the virus, and both have recovered fully, and the Court is not meeting in person, and all of the staff are working from home, outside the court, and have been since March. We're getting ready to start 18 new law clerks in a couple of weeks, and it will be interesting to see how we transition to that. It was not so hard in March where all of the legal staff was familiar with each other and with the Court and with our processes, and now that won't be the case with a whole bunch of new people,

so we'll see how that works, but we're expecting to have to work from home at least through the early part of the fall and maybe into -- later into the year.

Justice Green is retiring, effective Monday, and we will miss him very much. He's been the senior justice for the last seven years and has done a wonderful job for the Court, both then and before, and he has really been a great contributor to the legal work of the Court as well as to its administration. So we'll miss Paul a lot, and it's all sadder because we don't -- we don't have a way to celebrate, so he came by the other day at the Court to drop off his key and his -- pick up some last things, and there was nobody there, so it's kind of -- we've just got to find a way in the future to celebrate all of these things that we've missed because of the pandemic.

Sadder news still is that my good friend and former colleague, Gene Cook, passed away on Sunday, Sunday last, Sunday afternoon. He had been ill and in declining health for a long time, and he -- we're sorry that his passing. His notable contributions, one of them, to the Court, was he was the principal author of the Texas Lawyers Creed and got both courts to pass it 30 years ago, and he was always very proud of that. He's survived by his wife, Sondra, and his children, Gene and Laurie, and Gene tells me that they probably will not have a service,

memorial service, for him.

We've -- the Court has put out seven emergency orders since we last met two months ago, and I'll just run through them right quick. One extends the bar dues deadline from August 31st until October 31st. A second one, the Court extended the suspension of the statute of limitations so that deadlines that fell between March 13 and September 1 were extended to September 15th, and it's unlikely that the Court will extend those suspensions further. We extended the pleading requirement in residential eviction cases. Many times an eviction cannot go forward because it's barred by federal law, but sometimes the tenants don't know that. Usually the landlords do, and so we have imposed a pleading requirement on the landlords to state to the justices of the peace that they know no reason why the -- the proceeding should be barred by the CARES Act or other federal requirements, and that's extended until September the 30th.

You probably have all heard that we canceled the July bar exam. We did a thorough investigation. The Board of Law Examiners just concluded it was too dangerous to do so. We are going ahead with the September bar exam, but we're doing it in a unique way. The -- the Board of Law Examiners has arranged for hotel rooms in four Hilton

hotels, Lubbock, Austin, Dallas, and Houston, a hotel room for each taker of the bar; and it works out pretty well because the hotels are all desperate for occupancy, and proctors can walk the halls where the exams are being taken and kind of observe the takers, so we're hopeful that that will work pretty well.

The October bar is to be online. That was added in the July order. It -- I think it's going to be okay. Three -- there are three national companies that provide these kinds of tests online, and two of them have decided they cannot give something like the bar exam for various different reasons, but the third one is still going. There are about 30,000 takers signed up for the October bar across the country, so there's a lot of expectation that it will happen and will go off without a hitch, but we're all kind of working very hard to make sure that that happens.

And then we extended the -- what we call -- I call the omnibus emergency order, our first emergency order covering a lot of different areas and generally allowing courts to suspend deadlines and procedures. We extended that until September 30th. Jury trials are prohibited between -- before October 1st, unless you have approval from OCA, and OCA has developed a kind of a template instruction manual on how to -- how to conduct a

jury trial, who -- what staff you need, how you have to arrange it, where the jury is going to assemble, all the various different logistical aspects of trying a jury case for judges who want to do so. Since March, we have had 13 jury trials in Texas. Two were in June, and I think -- not sure there was one in July, and then the rest of them have been since. There are a number scheduled for trial in Houston. It will be the first time there's been trials in Houston. I think there was one this week, and then there were a number that are scheduled in Houston, and we will see.

About -- a large number, I think something like half of the trials that have been approved to be conducted ended up canceling for various reasons. There have been a couple of problems with jury trials. A couple weeks ago one was started in Brazos County, and the jail forgot to tell the judge that the defendant had tested positive previously. So I don't think anybody else out there involved in that has contracted the disease, but they're under quarantine, and so even when we are -- even when we know what has to be done, it's very hard to make all the pieces work right in this situation.

We tried the first virtual, fully virtual, jury trial in Justice of the Peace Nick Chu's court here in Austin in a misdemeanor case, a traffic case; and it

worked fine and raises the question whether the 1,500 cases or so that are tried each year in the municipal and justice courts can't all be tried virtually at less expense and trouble for the parties and the court, especially since you're entitled to trial de novo in the county court in all or most all of those cases. So we're still experimenting.

Last fiscal year we tried 8,800 cases to verdict, and we -- other than the 13 that I mentioned, we have not tried any cases since the middle of March. David Slayton estimates that we're about 1,900 criminal cases behind. So as we -- when we start to reopen, whenever that is, we're going to have a lot of cleanup work to do, and we face doing it at a time when the budgets are likely to be tight as well. So that's the status of the emergency orders.

On rules, we gave final approval to rules requiring citation by a publication, and then that was back in June. Then last week in response to the same legislation, Senate Bill 891, we approved service of citation by social media for comment, and so that comment period will last until December the 1st, and then the rule is expected to take effect December the 31st. That's one. Then we completed work on another legislative directive, rules governing the newly enlarged expedited actions

category. The threshold was expanded by the Legislature from 100,000 to 250,000; and so we changed the discovery rules, excuse me, in Rule 169 a little to increase deposition hours from 6 to 10 in the current rule to 20; and we changed the rules to require mandatory disclosures, not just in those cases but in all cases, per discussions that the committee has had. The comment period on those rules changes also extends to December 1st, and they are scheduled to take effect January 1st.

And then this week we issued a joint order with the Court of Criminal Appeals, amending TRAP Rule 49.3 on motions for rehearing, and we studied all of the work of the committee very carefully. There were a number of proposals that were discussed by the committee. In the end we chose to say that there -- three justices should sit on all motions for panel rehearing, except when the two -- when there are two remaining and they agree. If there are zero or one left on the panel, the Chief Justice assigns additional judges. If there's two of the original justices left on the panel and they can't agree, then the Chief Justice will assign additional judges, and then if there are two and they can agree, no other justices would have to be assigned. So that's the change that we have proposed in the rehearing rule, and then we've had to delay implementation of the protective order registry.

The committee discussed that at considerable length in November and February. As you will recall, there are a number of logistical and legal issues to navigate in setting up the protective order registry so that it works and then also so that it does not impinge on important privacy rights. That was to be completed -- it was to be set up by June the 1st and operational by September the 1st. The pandemic and the ransomeware attack on the appellate courts have distracted OCA and required reallocation of resources to the point that they have not been able to meet those deadlines.

The Judicial Council has extended the establishment deadline from June 1st to September the 1st, as the statute clearly provides and then our Court is extending the operational deadline. That's when courts will actually start regularly putting protective orders into the registry, until October 15th, so there has been a little delay in that, but it's moving along, and I think we'll be able to meet those deadlines. That's what I have for an update, Chip.

CHAIRMAN BABCOCK: All right. Thank you, Your Honor. We will move on to the first item on our amended agenda, and that is amendments to the rules concerning admission to the bar of Texas. I know that Susan Henricks wanted to be with us. I don't know if she

is or not.

MS. CORTELL: She is, Chip.

CHAIRMAN BABCOCK: Okay, great. Well, Nina -- welcome, Susan. Thank you for joining us, and as everybody knows, she is the executive director of the Board of Law Examiners. And Nina is going to -- Nina Cortell is going to lead our discussion on this again.

MS. CORTELL: Thank you, Chip, appreciate it. So you-all have the letter that Susan has written on behalf of the Board of Law Examiners. She's very aptly put out what the issue is and then what the proposed changes to the rules are, but basically the issue is whether to change a conviction from a conclusive finding against character and fitness of the applicant to a rebuttable presumption. So that's the basic idea. I would like Susan to give us the background and reasoning for that, and when we have our discussion I suggest we bracket it into two questions. One, conceptually, is the committee of the view that we should recommend a change from conclusive finding to rebuttable, and then secondly we can talk about the actual wording that Susan has proposed. And let me say that we're very grateful, Susan, for you to participate. Susan is on vacation, and so --

CHAIRMAN BABCOCK: Aren't we all, Nina?

MS. CORTELL: So and I said, Susan, if you

can be on for the first hour, that would be terrific. So it's time limited, but in terms of Susan's participation we want to let her return to her family, but anyway, welcome, Susan, and thank you so much for taking time to participate with us. So let me turn it over to you to provide the background to this proposal.

MS. HENRICKS: Thank you, Nina, and I really do appreciate the committee allowing me to be first on the agenda. That's very generous of you, and I appreciate it very much. The background on this is this rule has been in place for a very long time. I think it's -- the corollary of it I think is Rule 11 of the disciplinary rules that you may be familiar with that provides that if a licensed attorney is convicted of a felony, they may not reapply for admission to the bar until five years after completion of their sentence, whether it's probation or actual incarceration. So this rule is very similar, but it applies to people who are not lawyers at the time that their offense occurred. They're, you know, young people usually, in their twenties, who have some -- get into some kind of difficulty and they have felonies, and the way the rule is written now they can't even apply. They can't file a declaration as a law student, and they can't apply for admission to the bar.

So many times we currently do consider

waivers. For many years the board took the position that this rule was immutable and that they could not waive it. There's a very general provision in Rule 20 of the rules governing admission to the bar that says that for good cause shown the board can waive any of the provisions in the rules, but the board for many years took the position that this was a rule that did not appear to be subject to waiver, and that is part of the language in Rule 20, if it appears the rule is not subject to waiver. So they took that position on this Rule 4(d)(2), and then at some point that was challenged, and the board was advised by the Court that they didn't think that this was something that couldn't be waived, so now we do sometimes entertain requests to waive this provision, but in the judgment of the staff and the board, this is really not fair.

I think you could even make some kind of a due process argument, because it's not apparent from the rule itself that you can obtain a waiver. It looks like a hard and fast prohibition that would prevent anyone with a felony of this vintage from even applying. So I think that many people may read the rule and be deterred and may not seek a waiver because they don't realize that that's possible. You know, if they call us and talk to us about it, we'll tell them, but they may not do that, and they may not realize it.

So many people on the board and applicants and actually I think a few members of the Court have thought that this rule was a little too -- too strict and didn't give the board a real opportunity to exercise discretion, depending on the circumstances of the offense and the person and all of the different factors that you would consider, so this rule would just allow them to go ahead and apply. We would require them to appear before a panel of the board, and we would evaluate the circumstances before we would ever license anyone with a felony. So that's the background on it. Maybe that's too much information.

CHAIRMAN BABCOCK: Not for this committee. Thank you for being so brief. Nina.

MS. CORTELL: Thank you, Susan. That's really helpful information, and these were all points that our subcommittee did discuss, although we didn't have all the benefit of Susan's insights, and so that's why we wanted just to bring it to the general committee. We had a range of positions on the subcommittee, so I will let our various members speak for themselves. I would say on balance, I think we leaned toward making the change, but we certainly were not uniform in that view. So why don't I open it up to for discussion either to the subcommittee or to others generally, and again, let's talk conceptually

about the change, whether we are going to recommend to the Texas Supreme Court from a change to conclusive finding to to rebuttable.

CHAIRMAN BABCOCK: You've got little buttons to raise your hands somewhere on your screen, and that would be the best way to do it if you can, but if not, then just charge on in.

MS. CORTELL: I'm hoping at a minimum that our subcommittee will speak up, because I know there are a lot of views.

CHAIRMAN BABCOCK: Well, Robert Levy has got his hand up, and Lonny, Professor Hoffman, does as well, so we'll start with Robert, who's got it up just a shade ahead of Lonny. Robert.

MS. CORTELL: Robert, we can't hear you.

MR. LEVY: Can you hear me?

CHAIRMAN BABCOCK: We can now.

MS. CORTELL: Yes.

MR. LEVY: All right. Is there a concern that changing this to a rebuttable presumption will actually create a much more significant workload from the board in terms of evaluating the specific facts? Is this --

MS. HENRICKS: No, I don't think so. There's not that many people, you know, that overcome a

felony to graduate from law school and apply for admission. There's not that many.

MR. LEVY: Okay.

MS. HENRICKS: But thanks for thinking of us.

CHAIRMAN BABCOCK: Professor Hoffman, did you have your hand up?

PROFESSOR HOFFMAN: Yeah. Not much to add, just quickly, it seems to me what Susan is saying is all the proposed change does is make the existing rules clear that waiver is indeed an option. That certainly seems like a better system than the one we have, and so I'm in favor of this change.

CHAIRMAN BABCOCK: Great. Anybody else? Kennon.

MS. WOOTEN: I will echo Lonny's sentiments. I am also in favor of the change, and what Susan said about the text of the rule not making it clear that somebody has this right is something that really stuck with me. It strikes me that some people may not even try because they don't know they can, and that's problematic, from my perspective, for a couple of reasons. One, it deters people from trying, and two, it's not consistent with the options that are truly available to them.

CHAIRMAN BABCOCK: Okay. Anybody else have

any comments? Justice Gray.

HONORABLE TOM GRAY: I'm also a member of the committee, and so I'll weigh in on the -- you notice Nina is grinning, so, you know, I'm coming in on the other -- other side of this, which is what she was baiting me for. Philosophically it is -- if the problem is people aren't aware of the waiver route then let's just make it clear that a waiver is available if sought. That's a drastically different rule rewrite than changing the presumption. Having observed human behavior for a number of decades now, I see that people sometime need a safe harbor, and I'm speaking primarily to the people that will be deciding these waivers. I know no members of the board, and so I'm not suggesting any of them are in the category that -- okay, I'll just say it. The people need a spine, and they need some reason to decline a request when somebody's in front of them, and they need something to hide behind, and if we are going to evaluate a felony in this regard, I don't see the need to change the presumption, make the waiver available.

If you want to take the view, as current political philosophy seems to be shifting, and I for different reasons in the past have seen this demerit of this, but I don't see it here, but if you're going to take the view that they have served their time, they've paid

their debt to society, then why evaluate it at all? Because this -- remember, this is for five years after the conviction has been served and they've done their time, and so if you're going to have this presumption for five years versus the one way or the other how it's going to be evaluated by the board, I don't -- I just don't see the need for the change. They're not, you know, pounding down the door. It's not a burden on the -- on the committee, so if you feel compelled to make it more well-known that there is a waiver available, then make it clear that a waiver can be applied for, but otherwise leave it alone.

CHAIRMAN BABCOCK: Thank you, Judge. Anybody else want to comment on this conceptual issue?

MS. CORTELL: I would say one other suggestion that came up at the subcommittee discussions is if a bright line is desired still in terms of a conclusive finding, that you maybe tinker with it by limiting the years. That was brought up by Justice Gray's comment that it's now -- there's a five-year period. You know, maybe make it a two-year period. Just want to throw that out there. I thought that was an interesting thought.

CHAIRMAN BABCOCK: Okay. Anybody have any thoughts on that?

HONORABLE KENT SULLIVAN: I'll add two cents if I could.

CHAIRMAN BABCOCK: Commissioner.

HONORABLE KENT SULLIVAN: I do think it might be helpful -- I generally agree with the proposal, but I do think it might be helpful to add something of a framework for what the calculus should be for approval, with maybe the obvious considerations being remoteness of the felony and seriousness of the felony. Right now I've -- I do think it's something of an open-ended calculus, and that could be somewhat problematic.

MS. HENRICKS: If I could -- if I could speak to that --

CHAIRMAN BABCOCK: Yeah, certainly, Susan.

MS. HENRICKS: The board does have very detailed guidelines for decision-making in character and fitness matters that the board adopts separate from the rules provided by the Court, and they do include all of those factors for evaluation of anyone with any kind of a criminal history. The amount of time that's passed since the offense, the conduct of the applicant since the offense, the seriousness of the offense, and there's a long range of list of factors, and I don't have that document with me right now, but we do have a calculus, as you say, for the board to use in making these determinations.

CHAIRMAN BABCOCK: Thank you. Roger.

MR. HUGHES: Well, I'm all in favor of if the board was granting waivers then people ought to know about it. People at least ought to know what the practice is. I'm going to echo the suggestion that there be some basic minimums for waiver, just to avoid the argument that they're being -- that waiver is being granted capriciously, and I'm talking about a time limit after the conviction or the person has done their time. I don't know that we can have a rule getting any more concrete guidelines than that, setting up more than that, but I think at least some sort of minimum period might at least avoid the argument that it's being applied capriciously. Thank you.

CHAIRMAN BABCOCK: Thanks, Roger. Stephen Yelenosky.

HONORABLE STEPHEN YELENOSKY: Yeah, I'm just wondering. I don't -- obviously I don't -- I haven't judged as a criminal judge, and I haven't practiced law as a criminal defense attorney, but it occurs to me that if you lump everything into the category of felony, then you can talk about it that way, but there are felonies and there are felonies, and I don't know whether it matters for purposes of this rule, but I think we ought to think about it, and maybe it's -- some of it may be counterintuitive. I would be more concerned about

somebody convicted of a felony of embezzlement than I would about somebody who was convicted at age 19 of some involvement in some kind of violence, frankly. The former is more of a risk to a client probably, and so what we call felonies is a grab bag, and we should keep that in mind when we're talking about what ought to be done here.

CHAIRMAN BABCOCK: Okay. Good point. Anybody else on this -- on this topic?

MR. HATCHELL: This is Mike Hatchell. I was part of the subcommittee as well, and I'm pretty much in Tom Gray's camp. Felonies are a pretty serious thing, and I think this topic should be treated with that degree of seriousness. I've served on a regional committee that approved people for the bar. I've served on the committee that approved people for -- to take the specialization exam, and my problem with waivers is that they are invariably unevenly applied, and so if waivers are to be counted, I'm fine that we make it clearer, but -- and I'm also fine with shortening the period of an irrebuttable presumption to three years or say he may apply for a waiver after two and a half years or whatever, but I'm just thinking just turning it loose to sort of the whims of the day and the appealing nature of any individual applicant probably isn't the best course to get consistent results.

CHAIRMAN BABCOCK: Thanks, Mike. Kennon.

MS. WOOTEN: I just wanted to echo the comments that Judge Yelenosky made about there being a variation in terms of felonies, and I also feel that this is the type of rule that maybe we ought not apply the standard analysis to. More specifically, I mean that we often think about how big of an impact an existing problem has when assessing whether we ought to change the text of the rule. I'm of the mindset that there probably are some people out there who did some things when they were young; and if they are precluded from entering the profession for five years because of that, that could have a very detrimental impact on a life; and to me, if that has a really detrimental impact on one life, that's worthy of consideration. And I'll stop there.

CHAIRMAN BABCOCK: Okay. Judge Estevez.

HONORABLE ANA ESTEVEZ: I'm going to echo the last two speakers. Just because of the --

(Dog barking)

HONORABLE ANA ESTEVEZ: I've got a dog, should I wait a second? I'm sorry.

CHAIRMAN BABCOCK: They're going to second you.

HONORABLE ANA ESTEVEZ: I'll just -- I'm sorry, that's quite embarrassing, because he doesn't even

bark. So there must be a dog walking by because he doesn't bark at people, but I am going to echo them just because of the differences in the type of felonies. I don't think people are aware that right now if a teenager or a college kid, age 19 or 20, drives off to Denver, buys a whole bunch of edibles, gets caught in Texas where they stop lots of cars going by, they are probably in the second-degree felony range for having three -- you know, a bag of gummy bears and two cookies or a brownie, and so we need to be able to differentiate on what type of felonies we're talking about, especially in that age group when they're more capable of doing stupid things and then that five years hits right into your law school time.

So -- so, you know, I think the rules are good, but I think that there's always room for flexibility for trying to determine are these things that really are going to affect your law career or whether or not you're going to be of a great -- the moral standard that we want, and a lot of these things aren't crimes of moral turpitude, and yet they are felonies, so we need to just have some flexibility in that, however everyone determines that is. And I apologize again for the dog. I'm going to go do something to him right now.

CHAIRMAN BABCOCK: Uh-oh, do it off camera, okay.

HONORABLE ANA ESTEVEZ: He's like eight pounds. I'm doing nothing to the dog.

CHAIRMAN BABCOCK: Okay. Any other -- any other comments on this? Nina, is there any other subcategory that we need to talk about on this rule?

MS. CORTELL: No. I think -- what I suggest is a vote on conceptually what people think, and then regardless, let's look at the wording as well.

CHAIRMAN BABCOCK: Okay. Stephen has got a comment before we do, before we vote.

HONORABLE STEPHEN YELENOSKY: Well, the elephant in the room is, of course, race, in my mind. I just looked up real quickly, and I can't verify these numbers because I am not real sure of the source, so I'll say that upfront about the reliability of the source, but for every one white person convicted of a felony, you have four African-Americans. Another study says it's three percent of the population of whites are convicted of felonies and 15 percent of African-Americans, and you could say, well -- and I hope you don't say -- that's just a reflection of more crimes percentagewise being committed by African-Americans, but even if you accept that there's a huge overlap between race and income, and it's not surprising that there would be more felonies among a low income population. So we're creating a presumption right

upfront that I think reflects a bias in the population, and whether that results in one presumption or another, I don't think we can just gloss over that.

CHAIRMAN BABCOCK: Thanks very much. Any other comments, either relating to what Stephen said or anything else before we take a vote? Yeah. Justice Gray.

HONORABLE TOM GRAY: I guess I would like to ask the chairman of the board that gave us the letter if we just did away with the felony requirement -- or felony prohibition entirely and just let the board evaluate it in the context of their character to practice law metrics, what -- what does that do for the way the rule is structured and the board would address this? Because I can kind of see where this train is going, and I'm not willing to sacrifice for it, but what if we just took that out entirely? It's just another factor that gets weighed.

MS. HENRICKS: Well, if you want me to respond to that, what I would say is I think that in some ways that is the effect of this rule. It would mean that -- because we can't control when they apply. They're supposed to file a declaration and tell us about this, but many times they don't, and so they wiled away through law school and maybe even pass the exam before they appear before the panel, and that is the point in time when they would, you know, be making this determination. Many

people want to get it decided early because they don't want to go through law school and borrow all the money and do all the work and then find out that they can't be admitted, but, you know, it varies. Sometimes they wait. Or they come from out of state and they don't even know about this when they go to law school, so I think, honestly, Judge, that will be the ultimate effect of this rule change, is that it will be simply another factor, another important factor, that the board will have to consider, and they do take a felony history very seriously.

CHAIRMAN BABCOCK: Thank you. Any other comments before Nina frames a vote for us to take? I don't see any other hands up, so, Nina, you want to try to take a shot at what we would be voting on?

MS. CORTELL: Yes. The question for the committee is whether we are in agreement that the rule should be amended to convert what is now a conclusive finding to a rebuttable presumption.

CHAIRMAN BABCOCK: Okay. Everybody in favor of amending the rule to make it a rebuttable presumption, raise your hand. Pauline, you're going to help me count here.

MS. BARON: Are we raising our actual hands, or are we raising our virtual hands?

CHAIRMAN BABCOCK: Yeah, do it electronically. That will be easier.

MS. WOOTEN: I've got it both ways, just to be clear.

HONORABLE STEPHEN YELENOSKY: Does that mean my vote counts twice?

MS. WOOTEN: Mine, too.

CHAIRMAN BABCOCK: Yeah, probably.

MS. CORTELL: I hate to admit this, but I don't know how to do it.

HONORABLE STEPHEN YELENOSKY: It's in the bottom -- if you open "participants," and it lists everybody.

MS. CORTELL: Yeah.

HONORABLE STEPHEN YELENOSKY: In the bottom it says "raise hand."

MS. CORTELL: Oh, I see. Okay.

CHAIRMAN BABCOCK: Yeah, that would hopefully be a more accurate way of doing it, but if everybody is done electronically voting --

MS. CORTELL: I have got to admit I'm not seeing it for me.

CHAIRMAN BABCOCK: People are still voting.

MS. CORTELL: Oh, here.

PROFESSOR CARLSON: Nina, put --

MS. CORTELL: I finally found it. Sorry. Sorry.

CHAIRMAN BABCOCK: All right.

HONORABLE STEPHEN YELENOSKY: Is it worth pointing out that nobody else sees the hands raised? I was confused about that before, but isn't that right, that people -- whether they're voting up or down essentially it's a secret vote, which is fine, I just thought people might want to know that they don't see anything on their screen.

CHAIRMAN BABCOCK: Right.

MS. HENRICKS: There's little blue hands.

MR. RODRIGUEZ: You'll know how people vote if you go to that list where you raised your hand.

CHAIRMAN BABCOCK: Right.

MR. SCHENKKAN: Yeah, mine lists the participants and shows which way they voted.

MS. CORTELL: Right. Right.

HONORABLE STEPHEN YELENOSKY: Okay. Thanks.

CHAIRMAN BABCOCK: All right. Hang on. All right. Pauline, what do you have as your tally?

MS. EASLEY: I have 17.

CHAIRMAN BABCOCK: Yeah, that's what I have. 17 in favor. Everybody against, raise your hand.

MS. WOOTEN: And everybody raised their hand

to be in favor has to be lower.

CHAIRMAN BABCOCK: Right. Lower.

MR. HUGHES: Give it a few minutes, because it takes a while for the lowering of the hands to register.

CHAIRMAN BABCOCK: We had 17 in favor. And, Pauline, what do you have on opposed?

MS. EASLEY: I have five.

CHAIRMAN BABCOCK: That's what I have. The Chair not voting. So the vote is 17 to 5. The nays can lower their hands now, and, Nina, what else would you like our committee to discuss?

MS. CORTELL: Okay. The revisions themselves are reflected in two different provisions of Rule 4, which are attached to Susan's letter. So first I would turn the committee's attention to 4(d), and the revisions are in -- well, they're in all of 4(d). The main ones are in (1), (2), and (3), the subsections, but so if there are any comments on this proposed --

HONORABLE HARVEY BROWN: Can you tell us which tab on the documents this is? I've been looking for it.

MS. CORTELL: It's tab A.

CHAIRMAN BABCOCK: Yeah, first tab, tab A.

MS. CORTELL: So Susan sent a letter dated

January 7, 2020, and attached to it is a redline. It's page two of tab A. It essentially accomplishes what we've been talking about, but if there are any thoughts, which often this committee has, on the actual wording, I invite those comments now. So we'll start first with 4(d).

CHAIRMAN BABCOCK: Well, I've got a question, Nina. You change -- or somebody changes in the body of (d), "character and fitness" to "or fitness." What was the purpose of that?

MS. HENRICKS: Well, the reason for that is that character pertains to their -- whether they're honest, trustworthy, reliable, and fitness is more to do with their mental well-being, so those are not the same. A person could have a character issue and not have a fitness issue and vice versa, so it's just to distinguish between those two.

CHAIRMAN BABCOCK: Anybody got any comments about that language? Justice Gray.

HONORABLE TOM GRAY: I don't have a comment about the "or." Mine relates to something else.

CHAIRMAN BABCOCK: Judge Yelenosky, do you have anything about the "or"?

HONORABLE STEPHEN YELENOSKY: It sounds like the "and" before did treat them as the same thing, but to the extent it treated them as different things, it's a

negative sentence, "lacking in." So arguably, it had to be lacking in both before, and now with the "or" you would be lacking in one or the other. I'm just talking about the meaning. I'm not saying what's preferable.

CHAIRMAN BABCOCK: Okay. Any other comments on that?

MR. GILSTRAP: Yes, I've got one, Chip.

CHAIRMAN BABCOCK: Yeah, Frank.

MR. GILSTRAP: Well, as I understand, you're retaining both good character and fitness. They both have to be satisfied. The places where you put -- and that's where you say "and." The places where you put "or," as I understand, means that you're requiring separate consideration of each one. Am I correct that you still have to show a present good moral character, which is like you're honest, and fitness, which is maybe, you know, you can read, something like that. Those are different things, but you have to -- you still have to satisfy both of them. Am I correct?

MS. HENRICKS: Well, you do. And that's provided in other portions of the rule. You know, fitness, as we use it in these rules, really pertains -- usually it's substance abuse history is the most common fitness issue that we -- that we find that we address in evaluating applicants.

MR. GILSTRAP: Oh, really. That's not a good moral character issue.

MS. HENRICKS: No, we don't think of it as a moral character. It may. It may also -- their conduct may also suggest poor character as related to that, but often it's just a simple matter of -- of not being well enough to practice as a lawyer, and what we mean by are they able to practice law, can they read, can they pass the bar exam. That's a competence requirement.

MR. GILSTRAP: But they've still got to really -- they've got to satisfy all three.

MS. HENRICKS: Yes, they do.

MR. GILSTRAP: Okay. One more question. You've changed it from "been convicted" to "been finally convicted," and I'm not sure what that means. Does that mean when your felony conviction is affirmed by the Court of Criminal Appeals? What is finality? And it looks to me like if you haven't been finally convicted, you don't have to satisfy any of this.

MS. HENRICKS: Well, you're correct in your understanding of the change, but as a practical matter, if someone has a pending criminal offense that has yet to be adjudicated, even a misdemeanor, the board has the authority under I believe it's Rule 15 to defer a determination on their application until that criminal

matter has been finally determined, because we're not in a position to really adjudicate the criminal charges. We can't conduct a trial on that. It would be -- you know, it wouldn't be an appropriate thing for us to do, and so we don't generally have hearings for people or approve them if they have a pending criminal matter, whether it's a felony or misdemeanor.

HONORABLE STEPHEN YELENOSKY: Can you show us that rule?

MS. HENRICKS: Yeah. Let me look here. I don't know if I can show it to you.

MR. GILSTRAP: Oh, go ahead.

MS. HENRICKS: I could -- I think I could find it and read it to you. Okay. It's Rule 15(b) of the Supreme Court's Rules Governing Admission to the Bar; and it says, "If there are pending proceedings involving the applicant or declarant" -- the declarant is a law student -- "the resolution of which could affect the determination of his or her character and fitness, the board may exercise its discretion to defer the hearing until such time as the pending proceeding is resolved."

MR. GILSTRAP: My comment is, of course, that's discretionary, and if the board chose to exercise its discretion and consider it, 15(d) under the present, if you say finally, 15(d) will simply not apply because it

only applies to final convictions.

MS. HENRICKS: Well, I can tell you that they wouldn't do that, but I see your point that the way the rule is written it's conceivable.

MR. GILSTRAP: All right. That's all I have.

CHAIRMAN BABCOCK: Thanks. Susan, and on this issue of finality, what if -- what if there's a pending habeas petition?

MS. HENRICKS: We don't generally consider a pending habeas to be -- to affect the finality of the decision, but that -- you know, I guess that could be discretionary. The panel might decide that it -- that it does impact the finality.

CHAIRMAN BABCOCK: What if the -- what if the trial judge had recommended to the Court of Criminal Appeals that the habeas be granted?

MS. HENRICKS: Yeah, I think that would be an instance where they might -- might decide that it's not final.

CHAIRMAN BABCOCK: Okay.

MS. HENRICKS: I think the reason we took -- we added that language is that we are -- I believe we're deleting (d)(3).

CHAIRMAN BABCOCK: Okay. Professor Hoffman.

PROFESSOR HOFFMAN: Thanks, Chip. So, again, I like the intent here, but I don't know that the execution really succeeds. So sort of specific to this section, (d), what you asked about, I mean, it seems to me that we're going to end up with a rule that says an individual guilty of a felony is presumed not to have good moral character and fitness and that it's likely to have the same effect that we're in right now, which is that a great many of the very small number of people to whom this applies are going to be deterred from even applying. There's no cross-reference here in any way to be special exception for good cause, and so I actually find myself agreeing with my good friend Tom Gray. Even though we might disagree sort of conceptually, I sort of like the idea of doing away entirely with a separate provision for treating people who have had felonies.

If the -- if, Susan, the practical effect of this rule is, is that the board is going to take into consideration sort of a holistic assessment, just as they would any other applicant, well, then why have a separate rule about it then, which especially if written this way is likely to do the very thing you don't want it to do, which is misinform and deter people from applying for the exception.

MS. HENRICKS: It could have that effect. I

think the thinking was that we wanted to signal to applicants that a felony conviction is still a very serious matter and that the board would expect there to be significant evidence of rehabilitation and a significant period of good conduct to overcome the presumption of lack of good character indicated by a felony conviction. I think that was the thought, just to give them notice that this is a serious element, because obviously the Court when they adopted Rule 4 originally took that view.

PROFESSOR HOFFMAN: So, Chip, if I could have one quick follow-up on that?

CHAIRMAN BABCOCK: Yeah, of course.

PROFESSOR HOFFMAN: So -- so that makes sense to me if that's the case and if that's the sort of prevailing sentiment both on the Court and on the BLE, but then I think we ought to say that in the rule, and there ought to be a -- some sort of a reference to "for good cause shown" or something. Again, the problem with this revised version is no one is going to remember a few years from today -- certainly no one who is unrepresented is going to have any idea that the rule once said "conclusively" and now says "presumed," and thus, there's a small window of opportunity here. So I just -- I feel like you have a -- this is a very good intent that will end up practically making no difference if we make the

change that is being suggested.

MS. HENRICKS: Also, I would point you to 4(f), which does have some -- explains that -- that they have the burden to show that these -- that they -- that they should be licensed, despite the felony conviction. So it gives them some guidance about what -- as you're mentioning good cause, effectively what good cause might -- might consist of.

CHAIRMAN BABCOCK: Robert Levy.

MR. LEVY: I wanted to go to the language reference on taking out the "and" between "moral character" and "fitness" and changing it to the "or." I'm concerned that this is a much broader issue and that the rule that you reference, Rule 15, I believe, also uses the "moral character and fitness," and I think it's a mistake to change it just here rather than doing a wholesale change throughout the rules to show that those are two different standards.

MS. HENRICKS: Okay.

CHAIRMAN BABCOCK: Stephen. You're muted, Stephen. You're muted.

HONORABLE STEPHEN YELENOSKY: Yeah, got it. I was looking at the rule that's in the -- in the printed materials for somebody who has previously been determined not to be fit or of good moral character, and the way it

phrases it there, I think it's subparagraph (f), is that a person or -- "seeking a redetermination of present moral character and fitness," which is -- which means, obviously that they were previously determined not to be morally -- of good moral character and fitness. Then has to prove, by a preponderance of the evidence -- and then there's (1), (2), (3). Is that different from the presumption that we're talking about with the felony? Because why would they be different, and particularly I imagine there's a provision for prior disciplinary actions, and so why would those things be different? As I said, felony is a grab bag, and at least with these things we know whatever they did is directly related to the practice of law. So shouldn't that be considered? Are we being consistent?

CHAIRMAN BABCOCK: Thanks. Justice Gray.

Nina, do it mechanically. That will put you in the queue.

MS. CORTELL: Okay.

HONORABLE TOM GRAY: On the "or" question in (d), to follow up on Robert Levy's concern, in (d)(2) it is not changed, and so that seems to create an issue there. The addition of the word "finally" in the fourth line of (d) may have been intentionally omitted originally or not. There is an inherent problem when you start

talking about felony convictions, because of the community supervision. There are two different types of community supervision. There is probation, and there is deferred adjudication. Deferred adjudication is referred to at the end of (d), and all I'm saying here in this context is I think very careful attention needs to be paid to just dropping in the word "finally" when you've used throughout the rule "period of probation," and everywhere I saw that, I thought you really intended to use the catch-all of community supervision, but then -- because it catches both, and yet you still have that "deferred adjudication" language up in (d).

And so there is -- there's a lot of potential unintended consequences when you start trying to define what is a final conviction. There's a whole body of law on that, because you can use a final conviction to enhance an offense to another level of felony, so be aware of that.

One other thing that's really kind of a gnat, but in (d)(2), the three words "under this rule" in the first line probably need to come out, because I'm not aware that there can be a felony under this rule. I understand what it meant in its original context, but I doubt that that's necessary to maintain.

CHAIRMAN BABCOCK: Roger.

MS. HENRICKS: Yeah, that's in the original rule.

CHAIRMAN BABCOCK: Roger, you're muted.

MR. HUGHES: I unmuted myself. Well, I'm going to speak in favor of having some sort of presumption about a felony conviction, and I think what tips it for me is the public perception. To simply jettison anything about felony convictions being a bar or a presumption and just say, well, it's going to be a -- a general weighing of fitness and character and competency, I think the public is going to say what are you doing? A felony ought to be a big red flag. Now, you and I know there are felonies and felonies and felonies, but the public perception is felonies are very serious crimes. That's why we give them to district judges instead of somebody else, so on and so forth.

So I think as a matter of restoring some sort of public confidence in who gets to be consider -- at least to be considered to be a lawyer, we need to have some sort of presumption, if not a bar, and I favor the presumption, because if that's what the -- they're doing, people ought to know about it. I think the most important thing is to set some very objective, minimum requirements to get a waiver, at least to make it look like people are being -- that waivers are not being handed out willy-nilly

or on a capricious basis. So that's my opinion.

CHAIRMAN BABCOCK: Thanks, Roger. Frank.

MR. GILSTRAP: I want to go back to "finally." It does narrow the rule. It creates a loophole, and I don't think it's a good enough answer to say, well, we're creating a loophole, but we'll never use it. That's not what we ought to do in a rule-making provision. As I understood, that was put in because we were getting rid of (3). I don't see anything wrong with (3). If you're -- if it's reversed or you get a pardon, the rule doesn't apply. The way we have it now is the rule doesn't apply if you haven't been finally convicted. I see -- I don't see any reason to make those changes. Take "finally" out, that way the rule applies to everything.

CHAIRMAN BABCOCK: Okay, Frank. Harvey Brown.

HONORABLE HARVEY BROWN: I want to agree with Frank on that about the "finally" requirement. I think since it's a presumption only, that we don't need to say that. They can talk about in their application that it's on appeal and why they think they're going to prevail, so that seems to me that it would be something that they could consider, but we don't need to put in the rule itself. As to the rule itself, I think subparagraph

(2) on the presumption could be slightly more clear for the nonlawyer who may be reading this than a presumption. I would probably say something like "creates a rebuttable presumption that the individual does not present" and then leave the rest as is, until you get to the end, and then at the end I would specifically reference subsection (f), since I found that helpful when we did that just now. I think the reader would find that helpful, so I would probably put it at the end, "subject to subsection (f)."

CHAIRMAN BABCOCK: Great, thank you. Nina, finally getting to you.

MS. CORTELL: Well, Justice Brown just said what I would have said, which is that I do think we can connect it up and say something about -- and I like the changed wording also, but I want to make sure Susan is comfortable, but make sure that (d)(2) references that it can be rebutted, you know, based upon considerations in Rule (d)4 or something like that.

CHAIRMAN BABCOCK: Great.

MS. CORTELL: So right at the outset you say there is a presumption, but there is a way to rebut it.

CHAIRMAN BABCOCK: Great. Thanks. Stephen.

HONORABLE STEPHEN YELENOSKY: Yeah, I think Roger makes a good point about public perception. Perhaps we -- we should be more specific about what the board is

considering when it's considering felonies, that there should be a reference to felonies, but there's no reference, I don't think, in there, Susan, to the nature of the crime. Is that right?

MS. HENRICKS: Not in the rule.

HONORABLE STEPHEN YELENOSKY: Right.

MS. HENRICKS: We have some -- we have some guidelines.

HONORABLE STEPHEN YELENOSKY: Right, but from public perception -- well, they probably don't see any of this, but if they don't see any of this, then Roger's point is kind of moot. But if they do see this, we should reveal -- if we're going to say something about possible rehabilitation from a felony, explain what that might be, which might be the nature of the crime or rather than crime, nature of the felony, because that is something that you clearly take into account, and which is something earlier on I said was important because there are felonies and there are felonies, as Roger has acknowledged, and then I want to throw a wrench into this by asking is it a conviction if you get a presidential pardon?

MS. HENRICKS: I don't think it would be.

CHAIRMAN BABCOCK: Okay. Any more hands? I don't see any, and, Nina, I don't know if a vote is in

order at this point on subparagraph (d), but if you think so, we'll -- we'll vote.

MS. CORTELL: Based on my notes, I would like to go ahead and ask Susan whether, kind of going in order here, "finally" is a term that you're wedded to, or is there some flexibility to take that one out? It seems to have created some issues.

MS. HENRICKS: Yeah, no, we're not. I mean, I think that, you know, the committee's vote on the overall intent of the revision is what's key here. That's consistent with our objective; and, you know, the details for how we best implement that, we're very flexible on that. And we spent a lot of time thinking about this and going back and forth about it, and I think it's, you know, it's subject to difference of opinion about how best to implement it.

CHAIRMAN BABCOCK: Susan, you have no idea of how many hours this committee has spent on the issue of finality.

MS. HENRICKS: I can imagine.

MS. CORTELL: Well, Chip, I think to your point, I have a sense of where the committee stands, and I've made some notes based upon the good suggestions here, and what I'm going to suggest to Susan and the Court is something along these lines, and we can tinker with it,

but to change (d)(2), perhaps delete "finally" and in (d)(2) say, "A felony conviction creates a rebuttable presumption that the individual does not have present good moral character and fitness, but that presumption may be rebutted based on considerations under Rule 4(f)," or something like that.

CHAIRMAN BABCOCK: Yeah.

MS. CORTELL: If that's okay with you then I don't think we need a vote, but I'll defer to you on that.

CHAIRMAN BABCOCK: Well, if you're deferring to me, that sounds fine, and if you're deferring to Susan, we'll see what she has to say.

MS. CORTELL: That's a good point, and then we also say, we haven't talked about 4(f), but let's wait on that and finish on 4(d) first.

CHAIRMAN BABCOCK: Right. Yeah. I was going to get to 4(f), and, Frank, we'll get to you in a second, but, Susan, are you comfortable with us proceeding in that way?

MS. HENRICKS: I am. I think the board would be fine with that approach.

CHAIRMAN BABCOCK: Okay. Frank.

MR. GILSTRAP: Well, I would just say that if we're going to take out "finally," I think you ought to put back in (d)(3). I mean, I don't see any possible

reason not to have a provision in there and saying if you're -- if a felony conviction is reversed or if you get an executive pardon, this doesn't apply.

CHAIRMAN BABCOCK: Yeah.

MS. HENRICKS: We'd still need to revise (d)(3) because of the "shall be permitted" language, but, you know, that could be done.

CHAIRMAN BABCOCK: Good point there, Frank. Thank you. Any other comments? Okay. Nobody -- no hands up, so we need to look at 4(f), I think, right, Nina?

MS. CORTELL: Correct. And then that will conclude it, and, Susan, we'll let you get back on your vacation.

MS. HENRICKS: I appreciate your time.

MS. CORTELL: So I think the changes to 4(f) are really reflective of the change, right, from conclusive to rebuttable basically?

MS. HENRICKS: That's the intention, yes.

CHAIRMAN BABCOCK: Okay. Any comments about 4(f)? Going once. Okay. I don't see any hands raised about that, so we will -- we will proceed on that basis, and I think that's it, isn't it, Nina?

MS. CORTELL: That's it, and again, with great gratitude to Susan for helping us today and all of your guidance in this area. We appreciate it.

CHAIRMAN BABCOCK: Wait a minute. One second. Justice Gray had his hand up. I don't know how I missed that.

HONORABLE TOM GRAY: Well, it took me a while to find it again. The --

CHAIRMAN BABCOCK: So when I said "going once" you were desperately trying to find the button.

HONORABLE TOM GRAY: I had my mouse in my hand, and I'm going all over the screen, looking for how to raise my hand, but what I'm -- again, Robert's point about the "and/or" appears in (f); and the concept of community supervision, deferred adjudication, versus probation runs throughout the rule; and I don't know if Nina is intending to hand it off and not do any further come back with a draft with all of the changes in it or not, but I don't care as long as the Court is aware of the "and/or" issue throughout the rule and the question of probation, which is a subset of community supervision versus deferred adjudication.

So I make those comments so that they can evaluate that in the context of making any revisions to the rule and specifically point out that on (d)(2) you've got sort of a -- the conflict -- an individual guilty of a felony, it does not take into account in that phrase whether or not they have been -- whether or not they're on

deferred adjudication, which is a type of community supervision.

MS. CORTELL: Well, I think we would take that language out under the revision.

CHAIRMAN BABCOCK: Yeah. Well, if -- unless Jackie or Martha or the Chief want to put this back on the agenda for next meeting, I would say we are done with this for now; and, Nina, you can coordinate with Jackie and Martha about any tweaking that needs to be done as a result of this conversation; and Susan, of course, is always invited to participate in that. And Susan, would we -- I would be shocked if you don't want to stay for the rest of our meeting until 5:00 today and hear some of the discussion that we have about these rules, but if you have to leave, go ahead.

MS. HENRICKS: Well, I feel that I must. But I trust that you will have a very robust coverage of the agenda items. I'm not worried about that.

CHAIRMAN BABCOCK: Yeah, I think we probably will. But thank you so much for joining us.

MS. WOOTEN: Thank you, Susan.

MS. HENRICKS: Okay. Thanks for having me.

CHAIRMAN BABCOCK: Great. Pam, first of many appearances on our docket today, suits affecting the parent-child relationship and out of time appeals in

parental rights termination cases. Judge Rucker of the Family Law Council had hoped to be here, but I think we got an e-mail from him yesterday saying that he was unable to -- I'm right about that, Marti? You're muted.

MS. WALKER: That is correct, Chip. He is not able to attend today.

CHAIRMAN BABCOCK: Okay, great. So Pam.

MS. BARON: Well, actually Bill Boyce is handling this for our subcommittee, so I turn it over to Bill.

CHAIRMAN BABCOCK: So Bill.

HONORABLE BILL BOYCE: Thank you, Chip. So I'm glad you highlighted the letter that the children's -- that Judge Rucker sent as jurists and residents on behalf of the Children's Commission because we're going to lead off our discussion with that, and I want to highlight that letter to make sure that everybody is aware that that letter has been sent, because I think it highlights some policy choices that underlie the rule provisions that we've been discussing and tweaking and so on and so forth. So for purposes of today's discussion, I think the -- the two things to have handy in front of you are the August 24th memorandum addressing appeals in parental termination cases.

Subsection A of the discussion hasn't

changed. Subsection B of the discussion, showing authority to appeal, has changed in the following respect. If you go to page seven and eight of the August 24th memorandum, you will see a draft Rule 306 that incorporates changes in an effort to address comments and suggestions that were raised at our prior meeting, our June meeting, regarding the mechanism for this proposed rule. I think Judge Rucker's letter is an invitation to take a step back and look at a larger policy choice that we're really talking about here in the form of rule provisions.

So this is recounted in the memorandum. I'll go over it at a high level here, but you will recall that the HB7 task force had initially recommended a motion to show authority or a requirement to show authority to appeal procedure for counsel in these cases that would roughly parallel Texas Rule of Civil Procedure 12, but would be specific to these cases, and the proposal from the task force was Texas Rule of Appellate Procedure 28.4(c), certification by appointed counsel and motion to show authority, and the concept there was that there would need to be an affirmative showing that the desire to appeal was present on behalf of the parent whose rights were terminated, and I think there's two main considerations with that.

One is the very legitimate consideration that the continuation of litigation, the continuation of appeals of termination of parental rights, creates uncertainty and disruption in the lives of the children involved for as long as that litigation is ongoing, and that's -- that's a very appropriate and legitimate concern, consideration. Going back to our discussions, really into 2019 around this topic, I think that the subcommittee's discussion and then later the full SCAC discussion really focused on the -- one of the practicalties, one of the realities of these types of matters, which is the potential difficulty of discerning the parent's -- the terminated parent's intent, in significant part because the terminated parent may or may -- may or may not be reachable, may or may not be involved in the case, may come in and out of a case intermittently, and so a -- a certification of authority to appeal in some ways presumes that you can locate and communicate with the parent at issue. And if you can't, then what happens.

That was the discussion we had over multiple meetings, and that kind of morphed into the current rule proposal that appears at page seven and eight of the memo, and that is based more on essentially narrowing the circumstances under which an appeal is not going to go

forward, and maybe the way to -- the easiest way for me to think about this is as follows. We are having a discussion around this question, which comes up in a lot of different contexts. Which way does the silence cut, okay. If -- if it is not clear or if there is not an ability to get a clear determination of intent to appeal, what is the next step? Do you have a rule that essentially says that the appeal is not going to go forward in the absence of a clear ability to convey an intent to appeal? And I think in general terms that would be a -- what I hope is a fair characterization of Judge Rucker's concerns and comments and proposal and the initial proposed rule. So does the silence cut in favor of saying that in the absence of an ability to get a clear statement of intent to appeal the appeal is not going to go forward?

And that's certainly a legitimate approach to this. It reflects the notion of needing to have a procedure so that litigation over termination of parental rights doesn't continue indefinitely. It dovetails with the time limits that the Court has created for determining these types of appeals. It dovetails with the fact that these appeals are accelerated. In fact, they're very accelerated, so absolutely a legitimate policy choice and determination. Or are we going to have a determination

that the silence cuts in favor of having the appeal arising from a constitutionally protected right to go forward, except in very narrow circumstances.

The draft rule that appears in the memo reflects this approach, that unless somebody -- an alleged father has been completely not part of the litigation, the default is going to be that the appeal goes forward in recognition of the important and constitutionally protected nature of the rights at issue. And so I'm -- I'm very cognizant that Judge Rucker is not part of the meeting today. I understand that Richard Orsinger is -- was involved in these discussions leading to the letter. I don't understand him to be part of the meeting today, so I'm -- I'm very -- I want to be very cautious about not failing to characterize correctly the concerns that have been raised.

I'm giving you my understanding of where things are right now, and I think where things are in this discussion is that Judge Rucker's letter is potentially an invitation to talk about where the balance should be struck here between important policy considerations and important interests. Is it -- is it going to be struck more on the side of not having the appeals go forward, which may serve some interest of the children involved, by not having prolonged litigation. It may serve court

interests and court personnel interests in not creating what has been referred to before as the phantom appeals where the appeal goes forward, records are created, in the absence of clarity that somebody actually wants to appeal. That's a -- that's a legitimate policy choice, if that's where this committee wants to focus its votes. Ultimately the policy choices are going to be for the Court to make, based on recommendations and input and its experience.

Do we want to have the silence cut in that direction, or do we want to have the silence cut in favor of the appeal going forward unless there are narrow circumstances and good cause, however we want to define that? This rule takes a swing at it, but we can certainly have that discussion. However, we want to define good cause for not having an attorney, an appointed attorney, stay on to continue with the appeal. And so I really sort of see that in light of this letter there's -- there's, you know, a couple of ways we can approach this. We can have -- you know, we can take a step back and have this discussion about the policy choice that's reflected in the current draft Rule 306 that's been put out there for you. We may want to make sure that the -- the input is heard in person from Judge Rucker, from Richard, or whoever else wants to participate in that discussion.

I will confess to being a little bit

uncomfortable with significant concerns having been raised, but nobody here to articulate them in person to you, and so maybe we wait to make sure that they can be articulated in person. Maybe we've crossed this bridge already and the time is most spent productively looking at the draft, the revised draft of Rule 306, and seeing if it works for the purposes that it's supposed to work for. So, you know, the subcommittee will -- will accommodate whatever direction the full committee wants to go in. My understanding and belief is that the current August 24th draft reflects the direction that the full committee has -- has pointed towards over the last, you know, three or four meetings when this has come up, but nothing says we can't take a step back and re-evaluate that if that's the will of the committee as a whole. And so with that introduction, I guess I would ask for discussion or direction about whether we want to take a step back and look at this larger policy choice, or do we want to drill down and talk about the pros and cons and the wording of a particular proposed rule?

CHAIRMAN BABCOCK: Bill, let me ask you a couple of questions. Number one, I don't recall, is this something that we're under a time constraint on? Is this something that has got to get done right away?

HONORABLE BILL BOYCE: I will certainly

defer to the Chief Justice, but I'm not aware of a specific deadline that is for statutory requirement that we have to meet.

CHAIRMAN BABCOCK: Yeah. And the second question is Judge Rucker until yesterday was going to be here. I don't know what -- what conflict Richard Orsinger had, but is there any appetite to take -- to take this agenda item over to our next meeting and try to encourage one or both of them to be here?

HONORABLE BILL BOYCE: We'll certainly be comfortable with that as the subcommittee. I think it's really the question to the full committee about how it wants to proceed with that.

CHAIRMAN BABCOCK: I just got this letter a day or so ago and really haven't fully digested it. I doubt anybody else on the full committee has either. So, Frank, what's your thought about all of this? You've got to take yourself off mute, Frank.

MR. GILSTRAP: Sorry. Small thought and a larger thought. Small thought, Richard Orsinger is in mediation. I communicated with him yesterday, and he regrets that he can't be here. In the larger thought, one of the things that we've struggled with on this subcommittee is the fact that none of us work in this area.

CHAIRMAN BABCOCK: Yeah.

MR. GILSTRAP: We're all generalists, and so as a result, our fallback position for virtually every person on this court when you're confronted with this kind of question is due process, and so we're trying to give this -- this parent who is about to lose his child every break in the world, but -- but when people who work in this area come in, we see that there's really a countervailing issue, and it's a huge issue, and that is, one, the fact is that the -- the termination is probably going to be upheld. We're talking about, you know, the people we're trying to -- whose rights we're trying to -- to protect are showing that they're unfit because they won't communicate with their lawyer over this huge question.

And so, you know, my -- and finally, of course, you think about the adoptive parents. As I understand, the child is in the possession of the adoptive parent while this is going on. Am I correct? Maybe no one knows, but it's a huge thing. I mean, I can recall a tragic case years ago in Tarrant County where these people had -- had adopted the child, they had had the child for a couple of years, and the decree came down that they had to give it up, and it was just -- it was just heart-ripping.

So, you know, all I can say is I agree with

Bill. I think -- I think we need help on this. We need people who work in this area. They need to come in and tell us what they're concerned about. I appreciate the letter. I wish we had gotten it earlier, but it's really helpful that we got it in time, so I think -- I agree, I think we need to defer and get some help.

CHAIRMAN BABCOCK: Yeah, thanks, Frank. One of the things that occurred to me -- and Pete and Lisa, we'll get to you in a second. One of the things that occurred to me was is there any data on how many of these phantom appeals morph into a real honest-to-God appeal, and that will be an interesting thing to know. Pete.

MR. SCHENKKAN: I fully agree that we shouldn't go forward to a recommendation to the Court without Richard. That's one of the two things that you need to know, you know, how does this play out with actual people, the clients, and the people on all sides, and I just don't have a clue, and I wouldn't want it to take a -- make a recommendation without that. But the other key part of this is the impact as seen through the eyes of the judges, and we do have those here, and I'm wondering if it would be useful to at least have that part of the discussion here. If it is, the part I would be most interested in is can any of you give us some examples of situations in which the putative father, let us say, shows

up late and says, "Yeah, I do want to," and where we might be cutting something off that you think legitimately should have been considered, recognizing that that doesn't get you to the answer, because you've got to weigh it against all of these other things. But -- but, you know, that's the other part of what I don't know about that I'd like to have in mind. We can either do that now or wait until we have a chance with Richard.

CHAIRMAN BABCOCK: Okay. Thanks, Pete. Lisa.

MS. HOBBS: I certainly don't think we're under any time gun that we can't defer this to the next advisory committee meeting. It's certainly important enough to. I have the utmost respect for Judge Rucker and where his heart is in this. We fall on different sides of it. I was on the HB7 committee, along with Richard and Judge Rucker; and my partner, Karlene, is on the CPS wheel, so we probably do within our firm about, I don't know, I would guess 8 to 10 of these cases a year. So I'm certainly not as involved with them as Karlene is, but I definitely review every brief that's filed before it goes out. Justice Boyce has been awesome about reaching -- even though I'm not on the subcommittee and nor is Karlene, but Justice Boyce has reached out to both of us for some amount of, like, practical consideration.

And the problem is, to your point, Chip, about whether we have statistics or not, no, we don't. We have anecdotal evidence, which is kind of what House Bill 7 was founded on, and then we know that it's not just the parents' constitutional rights. Like parents -- there are parent constitutional rights here, too, but there are children's constitutional rights, too. Children also have a constitutional right to a relationship with their biological parent. So the constitutional dimensions of this problem are twofold and might prompt someone to read Judge Rucker's e-mail and think, huh, I get it, you're a judge and a litigator, and, you know, rules work both ways for litigants, but we've always put children's rights above others and recognize that they're not really represented in the truest form, and so we make accommodations in our procedures to make sure that their own constitutional rights are protected.

On the other hand, I was around when we started the Children's Commission. I was around when we got courts of appeals to have to decide these cases so quickly and we implemented our own procedures. I 100 percent agree, and I think Bill -- Justice Boyce said it one hundred -- like his tee up of this issue could not have been more fair. There are countervailing policy choices on this. I just stand in a different relationship

with Judge Rucker, and statistically an -- my anecdotal statistics are more of these cases come up where there is a participant at trial, but then they're hard to either get in touch with later or timely get in touch with later, which is its own problem. Like I can eventually figure out how to get to a mom or dad in prison, but maybe not within -- it's not even 20 days, because the appointment -- an appellate appointment comes in sometimes even after the 20-day deadline, but certainly it gets really whittled down to where it's a matter of days, and there's no -- you get an order. You get no contact information about this parent. You have no idea even that there -- may be even in prison. You don't know what their mental issues are, and you're moving fast and as quickly as possible, but the safest thing that you can do is file a notice of appeal.

But going back to the subcommittee's proposal, what I like about it that's different than what Judge Rucker's proposal is -- and I might be getting too much into it, but it goes down into the philosophy of it, is it puts the onus on the judge when someone is in his or her courtroom to say, "You have a right to appeal. You have a right to an attorney." If I need to know -- I may be taking this under advisement or we just got the verdict or whatever the -- what happened at trial, but in that

moment when you have someone present, you get an indication from them right then whether they think they're going to appeal it or not.

That's probably anecdotally somewhere between -- if I'm conservative, 70 percent of those cases, up to, if I'm more idealistic, 90 percent of those cases. And again, this is just anecdotal Lisa, not actual statistics, but it will take care of a big part of the problem where you have that moment to ask the -- for the judge to ask the parent whose rights might be about to be terminated at that moment, "What do you think you're going to want to do?"

Then once you get -- but I think what Judge Rucker would rather do is put the onus on an appellate lawyer within 20 days to try to figure out how to get in touch with their client, which sometimes might be easy and sometimes might be almost impossible within that time frame to certify in some way that this appeal is intended to be taken by the client, and to me, that's just -- it -- it is not the reality of my experience of our firm handling these cases over the last two years since Karlene has gotten on the CPS wheels. It's just -- it's just impossible. And if that determines whether or not this person has a right to appeal that affects the parent's constitutional rights as well as the child's

constitutional rights, I am not in favor of it. Although, I love Judge Rucker, and I agree that maybe we should pause and have a conversation where you can hear both sides of it, because everybody in this world has the best interest of these children at heart, and we lean one way or another, but everybody wants the best way to figure out how do you protect parents and kids and everything and have the best for them under our Rules of Civil Procedure and Appellate Procedure that don't necessarily lend themselves to that.

So that's a long-winded Lisa passionate way of saying that I would gladly defer to have this conversation when Judge Rucker could be here, too.

CHAIRMAN BABCOCK: Other than that you don't have anything to say?

MS. HOBBS: What?

CHAIRMAN BABCOCK: Other than that you don't have anything to say?

MS. HOBBS: Exactly.

CHAIRMAN BABCOCK: Good. Professor Carlson at one point had her electronic hand up, but it got lowered. Do you have anything, Professor Carlson?

PROFESSOR CARLSON: No. I was going to echo what Lisa said, that we did speak with Karlene, and she did present a number of instances in which it was very

difficult to reach the parent in a timely fashion.

CHAIRMAN BABCOCK: Okay. Scott.

MR. STOLLEY: Thanks, Chip. I want to give a great hat tip to Bill for chairing this subcommittee. I'm on the subcommittee as well, and we have talked about this at length, and like Lisa Hobbs, I fall on the side of affording the greatest possible process for this very significant legal issue, but I also agree that it makes sense to have some people who are in -- in the trenches on this issue everyday, so I'm in favor of putting it off until next time.

CHAIRMAN BABCOCK: Okay. Well, I think the Chair is going to make an executive decision and defer this until our next meeting. Marti, if I'm correct, that would be November 6th; is that right? If you're going to talk, you need to take yourself off mute.

MS. WALKER: Yes, that's correct, November 6th.

CHAIRMAN BABCOCK: Okay. And so I'm going to suggest that the Chief enter an order commanding Judge Rucker and Richard Orsinger to be at the November 6th meeting, and that will prevent any mediations, court hearings, or anything else from interfering with our -- with our work. And so with that, in order to give Dee Dee a little break here and to give ourselves a break, let's

take a 10-minute recess and then come back. Thanks, everybody.

(Recess from 10:42 a.m. to 10:54 a.m.)

CHAIRMAN BABCOCK: Okay. Let's get back to business here if we can. Give everybody a chance to put on their screens. Hello, Pam. All right. Procedures to compel a ruling, and, Nina, once again you are -- you are leading the class. So go for it.

MS. CORTELL: Well, thank you. Actually, it's Justice Boyce gets to do a twofer here. So he graciously agreed to lead the charge on this topic.

CHAIRMAN BABCOCK: Well, that's -- that will be great. The floor is yours.

HONORABLE BILL BOYCE: Thank you, Chip. So to recount the long and winding road that we've been on on this topic, this -- this began with a referral based on a letter from Chief Justice Gray identifying issues that -- that he had encountered and I suspect many appellate judges have encountered in terms of mandamuses, filed primarily by persons who are incarcerated trying to get a ruling on a particular motion or suit. The case that Chief Justice Gray was focusing on was a DNA testing request, but the issue cut more broadly, which is the circumstance that happens frequently is mandamus is filed, but particularly given the circumstances of the

incarcerated person, they can't really show that there's been presentment of this motion or request to the trial court and refusal to rule, and it turns out to be a not very productive exercise.

Maybe the mandamus gets dismissed, maybe a response is requested, and then that prompts the ruling, but it's a cumbersome way to proceed. And so the discussion started out from there about whether there would be some kind of a procedure that would be appropriate to either create a presumption of -- by ruling that would allow a mandamus to proceed or a presumption of awareness of the motion, and that also sort of morphed into a larger discussion involving civil cases generally and not -- not limited to just criminal cases involving incarcerated persons -- not just civil cases involving incarcerated persons, but civil cases generally where from time to time difficulties are encountered in getting a ruling and difficulties are encountered in showing that the request had been presented to the trial judge for purposes of obtaining a mandamus to compel a ruling.

Over the course of the discussions, the scope of the proposed rule was narrowed by discussion and vote of the full committee not to encompass criminal matters, not to encompass all civil matters, but to encompass civil actions by incarcerated persons. And so

that winding road brings us to page five of the memo that was circulated for today's meeting, which basically adapts the prior notice process that was discussed as a proposed rule, but limits it to a particular context. When we got to looking at what was already on the books, it seemed that this really may dovetail with Chapter 14 governing inmate litigation.

Chapter 14 of the Civil Practice and Remedies Code, which already contains definitions of claim, contains definitions of an inmate. The scope of the chapter involves cases in which the inmate has filed an affidavit or unsworn declaration of inability to pay costs. It's a fairly narrow area, but obviously one that's significant enough to require legislation to address it, and so the thought was maybe this -- this rule could be made to dovetail with what's already on the books. And so it's basically the same rule proposal that we initially discussed at the last meeting, but with more narrow application.

One thing I want to flag for the committee is section 14.014 of the Civil Practice and Remedies Code, the part of this chapter dealing with these types of suits by inmates, which says that "This chapter may not be modified or repealed by a rule adopted by the Supreme Court." I'm not sure we're modifying the Chapter 14, but

I want to flag that as something that we should give consideration to in deciding if this is the approach we want to use. I would convey to the -- what I think is the sense of at least part of the subcommittee, is that with these narrow guardrails on it, this is a pretty limited rule as it currently is presented to you, dealing with very limited circumstances. There's a lot of absences of ruling that aren't going to get addressed by this. We had a lengthy discussion at the last meeting about whether this was more appropriately addressed by a rule or whether, you know, administrative type actions would be better to address it, and the vote ultimately came down on a rule approach and a rule approach with this narrow focus. There may be other points that other members of the subcommittee want to highlight, but -- but that's kind of where we got to the current proposal that is on page five of your memo.

CHAIRMAN BABCOCK: Great. Thanks, Bill. Comments, questions? Raise your electronic hand. Unless you think it's perfect, which given its proponent, it undoubtedly is.

HONORABLE TOM GRAY: I don't know if that proponent was attributed to me or to Bill, but I -- and if it was to me, I make a motion that this proposal be indefinitely tabled, because the narrow scope of the

proposal as done will achieve none of the benefits for which I had sought a solution.

CHAIRMAN BABCOCK: Well, we'll take a vote on whether or not you're the perfect one or Boyce is. We'll do that later, though. Other comments? Judge Estevez.

HONORABLE ANA ESTEVEZ: Well, I was -- I was hoping for a rule, if it was going to be an inmate rule, that after a certain period of time it would just be denied, not that somebody can mandamus me or do this extra motion to compel. I don't think that the inmates should have an extra way of forcing me to compel a ruling that all of the other litigants wouldn't be able to have. So I would just say that after 60 days that the motion is deemed denied, and then -- again, I think most of the time the judges aren't even aware of the motions that have been filed in a lot of these cases; and then the other ones are they're -- the requests they usually have are not -- I won't say all of them. That's not true. There's plenty of -- there's plenty of them that would be you need a hearing for, you know, it might be discovery because sometimes the other party may not feel compelled to answer discovery if an inmate is sending it to them. So I have had motions to compel, you know, hearings for motion to compel with inmates in which they were the prevailing

party, so I won't say that they should necessarily have it -- or that they necessarily file frivolous motions, but I think that it should just be deemed denied, and I guess they can file another motion at some other point if they feel like it should be considered or a motion for reconsideration. But I don't -- I don't like this, as a trial judge who has prisons in its jurisdiction and regularly deals with these issues.

CHAIRMAN BABCOCK: Thank you, Judge. Frank.

MR. GILSTRAP: Justice Gray, you brought this forward as a proposal for inmate litigation only, as I recall. Am I wrong?

HONORABLE TOM GRAY: Yes. That would be inaccurate.

MR. GILSTRAP: Well, I thought that your concern involved inmate litigation.

HONORABLE TOM GRAY: It was primarily because of inmate litigation, because the inmate, unlike other civil litigants, does not have the ability to go to the clerk's office, get the clerk or the judge involved directly, or, you know, you know, I rhetorically suggested, you know, what is the inmate supposed to do, break out of prison and go to the judge's house, show up at his door with a copy of the motion and say, "I need a ruling" because that's what we essentially require, is

evidence that the motion has been brought to the attention of the judge, and when it is actually my turn to speak and not responding to you, I'll talk about that, but so it was primarily about inmates and their inability to get the evidence necessary to then support a mandamus to merely compel a ruling. That was the background on it.

MR. GILSTRAP: Let me just ask one more question. Are you satisfied that if we limit it to inmate litigation, you make that decision that the current rule as proposed does that job?

HONORABLE TOM GRAY: Well, no, because the first thing that got cut out, as Bill said, was all the criminal, and that was probably 60 percent or more of the rulings that don't get made, is in criminal cases. But as to the civil side of it, it might address most of them.

MR. GILSTRAP: Well, speaking for myself, I -- you know, I like the idea of special -- a special rule for inmates because the reason you just talked about. They don't have the way to come -- maybe get the court to rule that an ordinary civil litigant does have. I would be very troubled by extending this broadly to all litigation. I'm -- I guess there is a problem with judges not ruling, and I can certainly see that problem arising with regard to -- to a final judgment where a judge just sits on a judgment that he should be signing. I'm really

concerned, though, about doing it for other types of procedures, most notably summary judgment. I've seen over the years judges do a very good job of carrying a summary judgment to trial and -- and using that to resolve, that threat to resolve the case, and if we -- if we apply this type of rule to all civil litigation, I think we're taking a lot of power away from the trial judge. That's all I have.

CHAIRMAN BABCOCK: Justice Gray, it's now your turn to not only respond, but speak substantively.

HONORABLE TOM GRAY: Thank you. In response to Frank's last comments, nothing would, I don't think, change that dynamic. Remember that you're only doing -- and we've already crossed that bridge, so I'm not going to revisit that. We've already voted against applying it to all civil litigation, all criminal as well, so I won't replow that ground. The deemed denial issue was discussed fairly extensively at the subcommittee level. There are -- that Justice Estevez raised. The problem with that is you can really adversely affect the appellate timetable of something if the person is incarcerated and the -- he doesn't know when the time period necessarily starts, doesn't know if there's going to be a ruling, and then you get this deemed denial, and they're on lockdown, and they can't do anything with it for, you know, 30 or 60 days.

And remember that this only would trigger in those cases when the inmate on a specific motion wanted a ruling to pre-stage a need to do something, and so it's really a -- would be fairly limited, I would think, because the inmates that we see here on mandamus, while enough to be a problem, it's not like there's, you know, hundreds of them, but they almost always have a specific problem that they need addressed, and they need a ruling before they can proceed to a direct appeal.

In answer to Judge Estevez's observations, which I think is 100 percent accurate, that most trial judges in this situation are completely unaware of the motion that -- on which the inmate wants ruled, I would add in the middle of the proposal -- and it literally is right in the middle where it shifts from the -- what the notice is to the consequences, so right where the word "if" is, that when one of these notices is filed, that it is the clerk's duty to provide a copy of the request for ruling and the motion to which it relates to the trial court within seven days of the filing of the request. That way the trial judge has a copy of the motion placed on his or her desk.

Whether that's electronic or paper, it doesn't matter, but at that point the inmate has advanced the ball, which is what the mandamus cases almost

uniformly now strike down as being inadequate to draw the trial court's attention to it, and so the mandamus is summarily denied, frequently without explanation so that the inmate doesn't even know why his mandamus was denied. But like I said, this has been pared down so narrow to such a small number of cases, I don't know that it's -- because the next question we're going to have is where to put this rule, and that's going to create a whole other series of conversations and needs and pushback, and it's just probably not worth the effort, and I will never ask for another ruling, Nathan, another rules amendment, so you broke me of that.

CHAIRMAN BABCOCK: Well, we would love to hear what your comment was, Chief, but you were muted, and maybe perhaps that's a good thing. Who knows.

HONORABLE NATHAN HECHT: I said be careful what you ask for.

CHAIRMAN BABCOCK: Stephen Yelenosky.

HONORABLE STEPHEN YELENOSKY: Yeah, if this is going to be a rule that just applies to inmates, I think we need to do exactly the opposite of an automatic denial, because that just encourages judges to never even consider inmate motions, makes it easy. They're often ignored now. That's the problem, and I think that, you know, philosophically we talk about everybody -- everybody

has a right to be heard; but of course, the circumstances are such, as many have pointed out, that you can't be heard from jail, or at least you can't as easily be in a position to be heard. And so I think that if we're going to do an exception, it should not be an automatic denial.

What we do is we flag those. I mean in Travis County, what they do now, they flag those and they set them for phone hearing, every single inmate claim that comes in. Now, it's possible you do that and you still don't get a ruling, and so you need some backstop for that, but at the very least the inmate gets heard on the phone, and it may be that their problem is one that they don't understand needs to be addressed elsewhere, and so they get that kind of advice. So I would want something that makes it -- makes it possible for inmates to at least assure that a judge has put eyes on whatever it is that they've filed and ideally given them opportunity to literally be heard on it.

As for Frank's concern on the motion for summary judgment, I think that that could be taken care of by an exception, either for MSJ's, if we're going to apply it to all other civil cases, or just an exception for an order from the judge deferring things until trial, assuming it's summary judgment or anything else. So that's it.

CHAIRMAN BABCOCK: Thank you. Frank.

MR. GILSTRAP: Well, insofar as Justice Gray's concern about it being overly narrow, as I understand, what we have now is a rule that applies to civil litigation by inmates. That's what we have. And it could be broader, but I -- and that can certainly be tweaked, as Judge Yelenosky has pointed out. There are various ways to do it, but I think we ought to go forward and adopt it. And we've got -- it's kind of a laboratory really. We did this for inmates with regard to unsworn declarations. They couldn't get a notary public, so we let them file unsworn declarations. Nobody else could do it. It worked. Now it applies to everybody. I think we need to do the same thing here. Let's put this in place for civil litigation for inmates and see what happens. We can visit it later. Let's tweak it and fix it, but let's go forward.

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: I just wanted to note my agreement with Judge Yelenosky. I think he's spot on.

CHAIRMAN BABCOCK: Thanks, Richard. Any other comments? All right. If there are no further comments, then I think we have thoroughly discussed this rule, and I think everybody has got a sense of where the various positions are, so we're going to deem this

submitted, and go on to -- go on to our next topic, which is compensation for supervised practice. And, Nina, tell me where I should send this particular train to. You or to Kennon or --

MS. CORTELL: I get this one.

CHAIRMAN BABCOCK: You get this one. All right.

MS. CORTELL: So lucky me. I have a twofer today.

CHAIRMAN BABCOCK: You tricked me.

MS. CORTELL: All right. So it's agenda Item 7, and the document you should be looking at is D, tab D or item D on compensation for supervised practice, and this relates to some rules that the Court recently re-upped for I think in light of COVID and all of the implications of that, and the specific issue is in what way do we allow compensation for a qualified unlicensed law school graduate or, let's see, a supervised attorney, I believe also, under the rules; and the current rule does not allow direct billing by these practitioners, rather it must go through the supervising attorney, so the question was should we look back at that and loosen the reins and allow for billing by that attorney, or not yet licensed attorney, but practitioner, as long as the bills are countersigned by the supervising attorney.

So if you look at the document we've provided you, the current Rule 9 on compensation is provided there, and we're talking about qualified law students or qualified unlicensed law school graduates, and it says you can get paid, but not for direct billing. You can't do it directly. So it has to be through the supervising attorney. The subcommittee met on whether to loosen the reins here and allow for direct billing in the circumstances outlined by the Court. The subcommittee does not recommend that change. I provided in this document some of our concerns. This isn't all of them, but we didn't want to disincentivize close supervision by the supervising attorney. We didn't think the focus should be so much on billing but on the services provided, and we were unaware of a problem that needed to be fixed, although I think the reason behind the idea to loosen the reins here would be to expand the pool of supervising attorneys, perhaps make it easier for solos and not -- you know, persons not in a law firm situation. I think that was the motivating idea. Jackie or others maybe can help us on that.

But anyway, it's a pretty straightforward request, really, whether we want to allow direct billing by this category of practitioners as long as the bills are countersigned by the supervising attorney. So that's the

question. If there's an interest in looking at that, we have provided some suggested language at the bottom of the page. The new language is in italics.

CHAIRMAN BABCOCK: Great. Thanks, Nina. Anybody have any thoughts about whether we should just recommend the status quo and not try to amend the rule, and you know, once we discuss that, we'll go talk a little bit about the language that's proposed, but any comments about status quo, versus nonstatus quo? Nina, you've cowed people into submission.

MS. CORTELL: I doubt it. I doubt it.

CHAIRMAN BABCOCK: Yeah, Lisa Hobbs, never -- and Judge Wallace, who was falling into the lake the last time I saw him, may be coming back.

HONORABLE R. H. WALLACE: I would vote for the status quo.

CHAIRMAN BABCOCK: Judge Wallace is a status quo guy. Lisa, what about you?

MS. HOBBS: I don't have much to add besides what, you know, I think Nina tried to articulate, but I don't see a problem, and I see a lot of problems that could arise out of changing the status quo, so I am passionately against changing the rule, but for no more reasons than what the subcommittee has already presented to the group.

CHAIRMAN BABCOCK: All right. Judge Estevez.

HONORABLE ANA ESTEVEZ: More of a question. So right now, can I just ask you, Chip, like in your firm, if you had a clerk there, how do you bill your -- I didn't really understand how it's allowed now. Is it just when you review their memo, if you find it's accurate, you can bill your time for looking at it; or do they get to bill, you know, as a legal assistant or something like that? I didn't understand how -- what's allowed now. Like in these large law firms, because I'm going to guess the large law firms would love to bill them out at $300 an hour because they're already getting paid more than most of the lawyers are in these really large law firms, so I don't know how I feel about it, because I don't really understand what's allowed right now. I've never been in that circumstance where I was aware of how they were billing my time, if they were billing my time before I was a lawyer.

CHAIRMAN BABCOCK: Yeah, I can't speak for all large law firms, but, for example, in the summer you have law students who are typically first or second-year law students will spend the summer with you, and they'll work, and billing and getting paid are two different things, but I've never thought that there was a

prohibition on including in a bill that I review and send out to a client, having on it the work of a summer law clerk or a paralegal or any other -- you know, a IT person who is doing a document production. There are nonlawyers who find their way onto -- onto bills. Now, a lot of -- a lot of clients will say, "Well, if it's a law clerk, I'm not paying for that," so but that's a different question. The bills frequently have nonlicensed lawyers on the bills, in my experience, but Nina may -- she's in a big firm. She may have some other thoughts on that.

MS. CORTELL: The same is true for us.

HONORABLE ANA ESTEVEZ: Okay. So then what's the issue? Is this -- I guess I don't understand what needs to be changed. Or what's not allowed.

MS. CORTELL: Well, Jackie might want to speak to this, but I guess the feeling was that for these -- let's say you have a solo who wanted to be able to bill directly and not have to go through a law firm mechanism. This might loosen up that requirement. It might make it easier for persons not in large law firms. I think that's the basic idea, and to make perhaps, I think -- I don't know how it would work, but expand the pool of supervising attorneys. But I'm not sure why it would have that effect, but that -- Jackie provided us with some commentary by various persons, and that's what

we ascertained from the commentary.

MS. DAUMERIE: Yeah, I think the rule effectively requires the graduate to work at the same firm as the supervising attorney, so Nina couldn't supervise someone outside of Haynes & Boone on a mentoring goodwill basis, and so the question is whether we want to allow for that. Because right now the rule doesn't really sufficiently -- or, well, the question is whether the rule sufficiently helps graduates who don't have firm jobs.

CHAIRMAN BABCOCK: So a law student -- somebody graduates from law school, they've either taken the bar or they're about to take the bar, but there's a period of time where they're not licensed, and so they come to Nina, who has got a big heart, and they say, "Hey, I'm going to hang out my shingle," so to speak, "and I want to start -- I want to get going, you know, I've got some neighbors that have got legal problems, and so I want to get going doing it, and but I want to bill them, but now I can't, so, Nina, will you, you know, take a look at what I'm doing and look at the bill and send it out?" Is that the concept? Is that the idea?

MS. DAUMERIE: Well, I think the idea would be that the graduate who's hanging up their shingle could send out their own bill, just as long as Nina signed off on it, yeah.

CHAIRMAN BABCOCK: Right. If this proposal is accepted.

MS. DAUMERIE: Right.

CHAIRMAN BABCOCK: But otherwise they couldn't, right?

MS. DAUMERIE: Correct. Yes.

CHAIRMAN BABCOCK: Okay. All right. Lisa.

MS. HOBBS: So as a small firm -- so I have the big firm experience; and I think my big firm experience is similar to what Chip and Nina have expressed, is that there are unlicensed attorneys' time who gets billed to clients, who decide they may or may not pay for it, depending on that; but as partners in those firms we reviewed the work product; and we, of course, would never pass off a fee to our client where we didn't think they were getting some substantive value of it, whether they were a licensed attorney or not. So that does happen all the time in a big firm environment, is my experience -- well, that was my experience. I can't say it happens all the time. That was my experience.

But as a small firm, I've never hired an intern, which I think is kind of what this is, whether a summer associate or an intern, but I do use contract lawyers, and I don't understand why the fact that I would be the one to figure out what my arrangement was between

me and this law student or unlicensed lawyer, and then I would take care of billing for them. So I can choose to make the -- I mean, they may come to me and be an unpaid intern, or they may come to me and be a paid intern, but ultimately the obligation to discern whether they added value to a case in a way that makes it a reasonable fee that the client should pay for, that they offered value to that client, I want that to be a decision of a licensed attorney with a fiduciary relationship with their client, and so I don't understand -- like I don't understand why this would broaden things.

I mean, I kind of get the superficial context of like, well, I could bill them myself, but I think the harm that you could do to the system where I had like -- I don't know, like a paralegal billing my clients by themselves without me overseeing it? Like, no, that's not how this works. Like it's my -- ultimately my obligation as the one with the fiduciary relationship with the client to make sure that everything that I bill them is reasonable and necessary to the provision of legal services to them, and I don't -- I don't think it's a good policy for the State of Texas to let someone else have that screening process and be able to bill somebody. It just seems like it could just open up a whole can of worms that is just really problem -- and whatever -- whatever

problem is identified here is small enough that I'm just not so concerned about it, that I think I would be -- if I were the justices of the Supreme Court that I would be willing to open up the can of worms that it could open up.

CHAIRMAN BABCOCK: Judge Estevez.

HONORABLE ANA ESTEVEZ: I disagree with Lisa. I think that after hearing why you're doing it, it sounds like what you're trying to do is separate or take off the responsibility from that supervising attorney, and if that supervising attorney has a fiduciary duty, and -- they should be supervising and also know what these bills are. I know you said they have to sign off on the bill still, so they would review the bill?

MS. CORTELL: Right.

HONORABLE ANA ESTEVEZ: Then why not just let them send the bill? You know, I mean, they're doing the same amount of work and then whatever gets recovered. It doesn't seem -- it seems like you're having the same amount of work anyway. You still had to review the work. I think it creates more problems than it solves, if it's solving any problems. So --

CHAIRMAN BABCOCK: Yeah, the -- go ahead, Nina.

MS. CORTELL: I think the idea is to allow this rule to take place to protect practitioners. That's

what I'm calling this other category, unlicensed practitioners, where they can do it outside of a law firm context. So the idea would be that there's no direct client relationship probably between the supervising attorney and the client. So you're in essence allowing more independent practice by this unlicensed person, which has its own bag of problems, but if you wanted to expand that pool and allow this to occur outside of any law firm context, not -- not just a big law firm, but a small law firm, and allow them to be independent practitioners, so it's only a countersigned bill. I think that's the idea here, to loosen those rings, open the pool.

CHAIRMAN BABCOCK: Richard Munzinger. You've got to go off mute. Yeah, take your mute off.

MR. MUNZINGER: Sorry. I think a rule that does not require some kind of a relationship between the certifying attorney and the client weakens the rule against the unauthorized practice of law and creates some ethical problems possibly, and certainly some -- if there's a dispute about it who is this -- the lawyer who has certified that something is reasonable and fair and necessary to the client, but he has no relationship with the client. How could he make such a certification? It doesn't make sense. The rule, if you're going to have nonlawyers bill people for services that they provided

that are legal services, they are not licensed to practice law. They shouldn't be doing it. If they do it, they do it under the auspices of an attorney who has a fiduciary relationship with the person who is being benefited by the services. That makes sense. Anything that is beyond that does not make sense. Thank you.

CHAIRMAN BABCOCK: Okay, Frank.

MR. GILSTRAP: Well, as long as we're talking about other contexts I'll give you -- I'll give you one. I've come across recently two cases that were terribly botched, and the business model was they had one lawyer and nine paralegals or legal assistants. They did all the work. The clients were ordinary consumers. They didn't know how to deal with lawyers, and they signed lengthy fee agreements when they came in the door, and that's going on now, and to the extent -- I can see these people hiring a part-time law student, say, "Hey, now we've got a part-time law student for you to talk to," but essentially the work is not being done by the lawyer, and to the extent -- or even reviewed by the lawyer in some instances, and to the extent that we could discourage that, I would be for any rule to do that.

CHAIRMAN BABCOCK: Thanks. Alistair.

MR. DAWSON: Yeah, so I guess I'm mostly going to agree with what Richard Munzinger said. You

know, at our firm we allow law students to come in, and we've done it this year because of the delay in taking the bar exam, where they come in and -- and we bill for their time, but -- but because we have obligations to our client, number one, we adjust the billing rate to recognize the fact that they're not licensed; and number two, we review the bills to make sure that the amount of time that they're spending is appropriate for the work that's being done, and we make whatever adjustments need to be made; and the concern that I have is here you've got the unlicensed attorney is billing his or her client, so the supervising attorney has no obligations to that client, has no role in the setting of the billing rate, has no ability to make adjustments to the bills to make sure that they're appropriate and reasonable for the services that are being charged.

And so I think it's fraught with danger for -- for abuse, frankly, and so I'm not in favor of the proposed change. I'm sympathetic to the situation involving unlicensed attorneys, but since they're not -- if they're not going to be affiliated with a firm and the protections that come from that, then I don't favor the rule.

CHAIRMAN BABCOCK: Thanks. Judge Peeples. You've got to take your mic off mute, Judge.

HONORABLE DAVID PEEPLES: I think this shows the wisdom of our usual policy, which is if it ain't broke, don't fix it. There's no proposal out there saying, "Here's a problem, please fix it." The Court asked us to look at it, and we've done that. I've been listening carefully, and maybe 12 or 15 people have spoken, and nobody has really said there's a problem, let's fix it, and I think this random unfocused discussion just shows the wisdom of talking about it and moving on.

CHAIRMAN BABCOCK: Thanks, Judge. Chief Justice Hecht, it looked like maybe your hand shot up, not electronically, but actually. Nope? Okay. Anybody else have any comments about this? Jackie, you could get the last word if you want to be a proponent of this ill-conceived thought.

MS. DAUMERIE: I'm not a proponent. I just -- these were some concerns raised by the deans and a few members of the bar when we were looking at the supervised practice rules, so --

CHAIRMAN BABCOCK: Yeah, I sort of -- sort of agree with Judge Estevez, that if it's somebody working for you as an intern or as a summer clerk, I mean, you're going to send the bill out. They don't need to send the bill out; and if they're not working for you, you have all of the problems that Richard Munzinger just raised of not

having an attorney-client relationship with the client of the unlicensed attorney, so I guess maybe I'm in Judge Peeples' camp where this is a -- a solution in search of a problem. So, Nina, unless you want to overrule me or anybody else, the Chief or -- to discuss further, then I think we'll submit -- we'll submit this and move on to our next item.

MS. CORTELL: That's great, and it's in accord with what the subcommittee concluded as well.

CHAIRMAN BABCOCK: Okay. So we've got that going for us. All right. Good, that one is done. So now Texas Rule of Civil Procedure 306a(3), and, Frank, I see you as the chair of this one.

MR. GILSTRAP: All right. I'm ready to go if you are.

CHAIRMAN BABCOCK: I'm ready. Let's do it. We're on a roll.

MR. GILSTRAP: Right. This is Item 8 on the agenda. The first item in there is a six-page memo, but it's double-spaced, and you'll need to look at it, particularly pages two and three. I want to begin by telling a story. The other day in preparation for this presentation I actually electronically filed my own pleading. I know many of you do that, but I've never done it, and it was an amazing experience. I had -- it was

hard to get Internet Explorer working because it's a cranky program, but once I did, it was a few clicks and I had the pleading filed and I had notice given to the other side all in one fell swoop. There was no pen, there was no paper, there was no envelope, there was no postage, there was no three-day rule. There was no nothing. Obviously, it's a huge system and really a great system. I know that the people who worked on it back in 2013 probably see all of the problems and warts, but from the outside it's a great thing, and obviously it's the way of the future.

It offers -- like a lot of the internet, it offers enormous savings in time and energy, and I thought the last discussion about how we bill our time was kind of interesting, and, you know, we could have that discussion about electronic filing, but here we're talking about concerns raised by people who don't get paid for their time, and these are the clerks, who are public servants and are concerned with the public fisk and the time of their employees. And the focus is on the fact that most of our rules or almost all of our rules were adopted before the time of electronic filing in 2013, and they have some provisions in there that are totally inconsistent with electronic filing or electronic notice.

Particularly, there are four rule provisions

that require the clerk to send notice of the judgment -- of a judgment to the parties by first-class mail or their equivalent. These are ones that you're probably largely familiar with, are Rule 239a involving default judgments; Rule 165a involving dismiss for want of prosecution, DWOP. One that you may not be too familiar with, 119a involving divorce decrees, and finally, Rule 306a, which is the subject of our discussion today. But I'm simply saying this because if we decide to go to electronic notice with regard to 306a, there is almost no reason not to do it with regard to the other rules, and that will probably occur.

Now, 306a is a nifty rule. It's 306a(3) says that the clerk has to send out notice of the judgment by first-class mail. If you look on page two of your memo, the second indented paragraph, which has a (3) in front of it, that's 306a(3). Take out the words "electronically." We'll talk about that later, and just imagine it without those words. That's the rule as written. It's mandatory. The clerk has to send out notice of the judgment by first-class mail. The way the rule works is if you can show -- if you're the defendant and you can show that within 20 days you did not get that notice and you didn't have actual notice, then you get to postpone the running of your post-judgment timetable.

If you've ever used it, it's a neat rule, and it works, but again, the problem is sending first-class mail. The obvious question is should we send notice electronically, and this came from the Joint Committee on Information Technology, and they noted correctly that clerks are already doing this, and they have authority to do this. They have authority under the next rule on page three, which is Rule 21(f)(10), which says, "The clerk may send notices, orders, or other communications about the case to a party electronically."

There is also at the very top of that page two, Rule 80 point -- excuse me, section 80.002 of the Government Code, which says that "A court, justice, judge, or magistrate or clerk may send any notice or document using mail or electronic mail. This section applies to all civil and criminal statutes requiring delivery of notice of a document." Well, the clerks up here, you know, arguably are within their rights doing it now. Why not bring the rule into accord with these provisions and with the current practice of the clerk, and it's -- insofar as electronic filing, there is no reason not to do it. We can just do it as shown on page two. Again, the second indented paragraph, just add the words "or electronically" and it works.

But there is a problem. There are some people who don't file electronically. Here is the current regime. If you file, if you're an attorney, you have to file using the electronic filing master maintained by OCA, which means that you file electronically, and you have to provide an e-mail address. A nonlawyer can do that, and he is supposed to provide -- he or she is supposed to provide an e-mail address, but they don't have to. Remember, the clerk has to take -- if you file a pleading that's an answer to a lawsuit, the clerk has to take it. The clerk can't set it aside and say, "Oh, wait, you left off an address. You left off an e-mail address." They have to take the pleading, and there are some people who don't use the internet. There are some people who have e-mail addresses, but don't file electronically. What do we do with all of these people? And that's really the problem that we face here.

Our initial -- we dealt with it at the subcommittee level. Our initial response was to say, okay, we'll just put a provision in, carving out people who don't file electronically. Look on page two of the memo. There's two versions there. One carves out people who have not previously filed a document electronically; another, which is slightly different, carves out people who have not provided an e-mail address. We can quibble

over those, but there is a larger question. Should we do -- have a carve-out at all? And we had some pushback on our subcommittee, and it seemed to me that they had a good argument, and of course, they're going to get to talk in a second, but let me see if I can summarize it.

The problem is that -- and Sharena Gilliland, who is the clerk representative on the -- on the SCAC and who was very helpful on this, pointed out, look, fellows, if you carve out people who don't file electronically, you're destroying the efficiency of the -- of the reform. And the problem is this: How do you know if someone in a file has not filed electronically? How do you know that there's not a pro se answer that was sent to the clerk by paper, scanned, and put in the file? You don't know. You can't go to the OCA or the electronic filing master because they don't keep track of people who don't file electronically.

Moreover, the clerks use two or three versions of case management software. It's not mandated. Ms. Gilliland says, you know, "Our version that we use in Parker County," which is a pretty up-to-date county. I've been there before. "We can't do it. There's no way we can go through that file and immediately tell whether or not there is a pro se party who hasn't filed electronically." I doubt if you're going to be able to do

that without redesigning or reprogramming the electronic -- the case management system that the clerks use. Well, then why not just go ahead and check each one? Well, you've got to open the file, you've got to look through it, and you've got to say, "A-ha, there is a pro se answer. And I'm going to go ahead for those people -- I'm going to type up a notice of judgment and send it out by snail mail." That's the problem.

Moreover, there was some question as to really -- and this is kind of a cost-benefit analysis. It's kind of a junior version of the enormous questions that we dealt with on -- on termination cases earlier. How many people are we talking about, and are we -- is it -- is the -- and under a cost-benefit analysis, is it really worthwhile to jam the whole system so that these people get paper -- get notice of the default judgment? You know, initially, I, like most of you, my default position is due process; and I said, wait a minute, we can't do that. But wait a minute, we're talking about an enormous savings to the taxpayer, and let me give you some statistics.

Last year there were 42,000 judgments signed in Texas. First-class mail postage is 55 cents as -- and if we assume that we send them one first-class mail for each one of these -- these cases, that's about only

$23,000, but it is taxpayers' money; and, you know, clerks are funny about taxpayers' money. They like to save it. There's also, I think, larger savings involved with time and energy.

So, you know, this is the way of the future. Are we going to let a few people stand in the way, who don't file electronically, of progress? Well, how many people are we talking about? Well, let me give you -- I couldn't find any answers on that. It would really be helpful to know how many pro se litigants there are in Texas who don't file electronically, but I -- you know, I can't imagine that there would be a way to figure that out in the whole 254 counties that we have. I did find some nifty statistics from something called the National Telecommunications Information Administration. I don't know whether that's a government agency or not, and they said that in -- these statistics are all 2019. 79 percent of Americans over age three -- I don't know how they came up with that number -- over age three use the internet.

Now, there's some variations. As you might expect, certain ethnicities or minorities have less, 47 percent less. Also, as you might expect, there is an income disparity. People whose family income is below 25,000, only 62 percent have access to internet, excuse me, 65 percent; and where it's over a hundred thousand, 80

percent; and finally, people 65 percent or over, about 68 percent. Well, okay. Those are statistics. How does that translate into how many people file pro se answers without filing electronically? There is no way to tell, but I suspect -- but this is just a guess, that it's much longer -- much lower, excuse me.

So the question then -- and I think the question that we decided on the subcommittee to present to the full committee, because it's an important question, is do we have a carve-out at all? Once we make that decision and if you say we have a carve-out, we can draw one up real easy. It's no problem, and it won't be any problem to extend it to these other rules, although that may fall to other subcommittees. There would be problems -- certain problems with each rule. For example, DWOP notices under Rule 165a are sent out in bulk. Well, we're not talking about searching one case. We're maybe searching 30 cases to make sure that there are no pro se answers where the people haven't filed electronically. And finally, with regard to default judgments, the people don't even know they've been sued. Are we going to leave them out? Are we going to not send electronic notice? Or not send paper notice to them?

There is one further thing. The fact is that people who don't get notice do have remedies. First

of all, the first rule is Rule -- Rule 306a. You get extra time if you can show that you didn't get notice in time. You don't have a restricted appeal because -- because you can't show error on the face of the record, but your fallback position is a bill of review, and there are cases that do say that if people don't get notice of their judgment, that's -- they can get a bill of review.

So that's pretty much the controversy in a nutshell. I think, Chip, you know, I'll turn it back to you, but I think I'd like to hear or maybe you'd like to hear from members of the subcommittee on this point. Let me add one thing more. Even if the subcommittee had not disagreed, I still think we would bring this issue to the full committee because it's that significant. Thanks.

CHAIRMAN BABCOCK: Great summary, although I think that must be a bigger nut than we typically think of as being a small nutshell, but --

MR. GILSTRAP: Okay.

CHAIRMAN BABCOCK: All right. Great summary of the problem. Who has comments? We'll wait a second while people get their electronic hand. Roger.

MR. HUGHES: Well, I favor some sort of change on this, because I live in an area where the courts are being a little schizophrenic. I have one county that will remain nameless, and they will e-mail you the notice,

and they will e-mail you the final judgment, because they can. I have another county where they will absolutely positively refuse to electronically send you the final order of dismissal or judgment. Instead you get a letter and telling you that if you want a copy, send us a dollar a page plus the cost of mailing, even though you can go online and download a copy from the clerk's office. I don't understand that. I think it ought -- ought to be available -- the clerk ought to have the option to send it to you electronically, just to end the madness, and lower the expense.

I will say this, I think there is a problem with pro se litigants, because you -- they may have an e-mail address, but there's nothing in the record that will tell you what it is. They may have called the court coordinator and given them an e-mail address, and things will be sent to them, but nothing in the record will show that that's a good e-mail address. I even had one case where the lawyer withdrew, and the court started sending notices to the now pro se plaintiff by e-mail, and after summary judgment, six months later, up popped -- well, we used to call them writ of error. Now I call them accelerated appeals or whatever, and there was nothing in the clerk's record to show that the e-mail address to which all of this stuff had been sent to the pro se

plaintiff was a good e-mail address.

So the case -- the summary judgment had to be reversed. Without the litigant ever certifying that they hadn't gotten it, the question on the accelerated appeal was can you prove it in the record? So I would also suggest consideration of some official record being made or allowed to be made that a pro se -- either someone who filed pro se or became pro se during the course, what their e-mail address is, so we don't have the problem that they're getting stuff but we can't prove it, because even if there's something showing the court sent it to that e-mail address, there's no proof linking that e-mail address with the litigant. That's my two cents' worth.

CHAIRMAN BABCOCK: Thank you, Roger. This was a small point, but if the clerk doesn't have an e-mail address for the litigant, how are they going to -- how are they going to serve the judgment? I mean, they would have to default to first-class mail, wouldn't they, I would think? Frank.

MR. GILSTRAP: Well, unless we said they didn't have to. They, of course, would have an automatic access to Rule 306 -- to Rule 306a because you have to show that you either didn't get -- have actual notice or didn't get the notice from the clerk, and they didn't get notice from the clerk. Yes, that's a real problem, and we

don't know how many people we're talking about. I mean, you could think about maybe it's some isolated person out in the sticks like the unibomber, and maybe so, but -- and it is true, in fact, that there are a lot of people that you wouldn't expect to have e-mail addresses that have e-mail addresses. For example, homeless people go in to the public library all the time and check their e-mails. So, again, we just don't have any handle on that.

The -- one further thing. You know, in terms of what Roger said, you know, and Sharena Gilliland pointed out this in her -- in her memo, and it's in the materials, and it would be helpful for y'all to read that. She said, look, why send notice, why not just send the judgment itself? You're sending it electronically. Yes, it's 150 pages, but it's electronic. The requirement of notice was given back when you had to send it by mail. You don't have to now. So you could certainly make the system operate more efficiently then.

But if we don't do anything, if we leave it there, I predict the clerks are going to continue to send it out electronically. That's just what's happening. It's too big a savings, and there is support in the rule and the statutes for them to do it. That's all I have.

CHAIRMAN BABCOCK: Thank you. Professor Carlson.

PROFESSOR CARLSON: Yeah, I just wanted to mention that 306a(4) only gives protection for 90 days if the litigant didn't or their attorney didn't have notice or knowledge of the judgment, but they do receive it within 90 days. After that, if you received notice after the 91st day, the Texas Supreme Court has said the rule does not help a litigant, doesn't extend the time for post-judgment motions or the time to appeal, but you still have, as Frank pointed out, the equitable bill of review avenue.

And I wanted to echo what Frank said. I think it would -- if we're going to move in a direction of giving electronic notice of the signing of a judgment or appealable order, it ought to include the actual judgment or appealable order because it is not, I don't think, overly burdensome for the clerks to send that along with it. That's all I have.

CHAIRMAN BABCOCK: Thanks, Elaine. Judge Wallace. Judge Wallace.

HONORABLE R. H. WALLACE: There's a category of cases, your default judgments, where you're almost certainly not going to have an e-mail address and all you're going to have is a physical address. So I think, at least as to default judgments, if you don't send out a first-class mail to that address, then you may as well

just say that in default judgment cases they're not entitled to notice, because that's the only way you've got to give them notice. But that -- that could be a carve-out, I would think, when obviously you would have to send it by first-class mail.

CHAIRMAN BABCOCK: Yeah, thanks, Judge. Stephen.

HONORABLE STEPHEN YELENOSKY: Yeah, let me ask a question first. I was confused, Frank. You said that there's no way for the clerk to tell if a pro se litigant had filed electronically. Is that right?

MR. GILSTRAP: No. There is a way to tell -- well, I don't know. I presume that there is a way to tell if a pro se litigant has filed electronically, but it doesn't make any difference. If you send out notice electronically to everybody who has filed electronically, you're going to pick up the pro se litigants who have filed electronically. The problem --

HONORABLE STEPHEN YELENOSKY: Right, but you're not going to follow up with an e-mail because you just assume everybody got -- or they're not entitled to, if they --

MR. GILSTRAP: There is a halfway point there. There are a number of people who provide their e-mail. In fact, the rules say that you have to -- the

statute says you have to provide your e-mail address, although people don't do it. And but there's a problem there, and I think this is -- and that's this. Just because I have filed -- if I have filed a paper pleading and included my e-mail address, I'm not watching my e-mail. I mean, we are all lawyers. We know to look. When we see "no reply" on our e-mail, we know to look at that. People who are not filing electronically, who have been filing by paper, even though they provided an e-mail address, will not know to look for that.

HONORABLE STEPHEN YELENOSKY: Well, but that's a -- that problem is easier to understand why it would be incumbent on them to check e-mail if they have it. Now, putting aside that there are people who don't check e-mail, those who have e-mail, in my experience, check it several times a day, and some people just start to ignore their first-class mail because it's all junk, but the part I'm getting to is if -- if the clerk sends out notice through the electronic system, are they going to know if they also have an e-mail address to send it to?

MR. GILSTRAP: I don't know that.

HONORABLE STEPHEN YELENOSKY: Okay. Because --

MR. GILSTRAP: Certainly they can research the file to determine if that person has provided an

e-mail address.

HONORABLE STEPHEN YELENOSKY: Right.

MR. GILSTRAP: And also, just as a sideline on what Judge Wallace is talking about, if we do a default judgment, you have to file a certificate of last known address. You can include an e-mail address in there. But one more thing, and that's this: You and I may move at different circumstances, but I know a whole lot of people who don't check their e-mail.

HONORABLE STEPHEN YELENOSKY: More power to them, but it seems to me that we've got to give -- I think, you know, it's fine to give electronic notice, but if it turns out the person has not filed electronically, then that's a problem, and so we either need to be -- if you can't determine, but you have their e-mail address, you can send it to the e-mail. I think it's their problem to check it or not. They gave you the e-mail address.

The converse is why are you asking for their e-mail address if you're not going to use it, when you give notice of a judgment? So I don't know -- I mean, is there a savings from just saying we're going to send all these notices electronically and if we don't know we'll send it by e-mail or we'll send it electronically and by e-mail? How does the clerk deal with that as a practical matter?

MR. GILSTRAP: Well, the clerk, under -- under the -- all of the proposals will have a choice. Right now the clerk has to send it by first-class mail, but the clerk will have the option to send by e-mail. As it turns out, as Sharena Gilliland's memo points out, there are clerks in some small counties that prefer regular mail.

HONORABLE STEPHEN YELENOSKY: Oh, I think they should have all of those options. I guess I was getting at I thought you were saying that some people are going to fall through the cracks and that's the price we pay for efficiency; and if you mean by fall through the cracks that they will -- they'll still get an e-mail, whether they look at it or not, then I'm fine with that. They've provided the e-mail address and ought to know they should be checking it if, in fact, they're involved in a suit, but I wouldn't want somebody who neither files electronically nor gives you an e-mail address to not get mail, and so I think everybody needs to get notice. In all of those options certainly electronic should be available.

I was going to point out, but it's already been pointed out, but 306a is only -- is only 90 days, and after that you're out of luck on that. I don't think these backstops -- if we're talking about pro se

litigants, talking about the backstops doesn't really help. Hopefully if they get notice of the judgment they'll do something with it or not. They're not going to be aware of 306a.

Final point is just that when I looked at all of this material earlier, it seems to me that -- and this would be a bigger project, but perhaps not, or a broader project, but perhaps not a bigger one. The whole thing on notice of judgment is confusing because of the way it's structured, and I think it could -- you could easily move things around, but there's a lot of places where it doesn't signal clearly that it's talking about notices from the clerk at all. 21 says "electronic filing" and then way down under (f) is "electronic filing." Way under (10) it talks about notice from the court and orders, doesn't say judgments there, but even regardless it's talking about electronic filing. Then you get into 306a, and 306a says "Periods to run from signing of judgment." But way down in there somewhere is the notice requirement, so under (3), so to me this should be reorganized and relabeled. That's a bigger issue.

MR. GILSTRAP: Yeah. Let me say this. I disagree with you on one point. I think if we're going to give paper notice to people who haven't filed -- provided -- who merely filed a paper response and haven't

provided their e-mail, I think we ought to also give paper notice to people who have filed, but -- but and provided an e-mail address, but haven't filed electronically. You know, like I say, I look -- I know to look for my e-mail and to look at "no reply." That means I've probably been served. People don't know that. They don't know that from -- it's somebody in Kazakhstan trying to get to know them better. I mean, it's just there's no way that people are going to -- a lot of people are going to check their e-mail with the thoroughness that this requires.

Let me give you one further bit of information you need to have, and that's this. Apparently the clerk -- the Court, or at least OCA, looked at this question back in 2013 when Rule 21(f) was promulgated, and if you'll look over on page five of the memo, you see the original version of the provision involving clerk notice, and it's applied only to parties who file documents electronically. That was the original version, which I think was adopted in June or July of 2013, but when the final deal went down in December of 2013, they took that out, and they simply put the current provision, which we talked about earlier, which says the clerk may send notices, orders, or other communications about the case to a party electronically. I don't know, it would be helpful to know, what lay behind that decision. Was it a

technological problem, or did the Court decide we don't need to send notices -- we're going to send all notices electronically. We don't have that information, but it would be helpful.

HONORABLE STEPHEN YELENOSKY: Well, Frank, if somebody had -- if the clerk has the person's e-mail address, then they've gotten it somehow from that person, correct?

MR. GILSTRAP: Yes. Or maybe. Maybe they've gotten it from the opponent.

HONORABLE STEPHEN YELENOSKY: Okay. Well, that's an issue certainly, but if they get it from the individual it certainly could -- when they're served, because they're going to have to be served initially if they're the defendant, we could easily put in there a notice that "Please provide your e-mail address, and you'll receive all further communication through the e-mail address."

MR. GILSTRAP: That would help.

HONORABLE STEPHEN YELENOSKY: Yeah. I mean, that's what everybody else does now in the private world. You know, you essentially consent to notice electronically. Everything is moving that way, and so I don't know the answer to your problem. If they got the e-mail address from the plaintiff, maybe there's some

other way to fix that, but it doesn't seem to me that once the person knows, either by giving their e-mail address to the court or knows that the other side has given an e-mail address and confirms that it's correct, that we should worry at all whether they're checking their e-mail, because once they know that and with some other advice or notice about it, they should check for this particular e-mail, and like some entities do when they send you e-mail, they say to make sure you include us in your contacts so it doesn't go to spam. I mean, all of that is moving towards there, so if you do -- if you set it up right I'm not really concerned about sending something to a person's e-mail address.

MR. GILSTRAP: And what you're saying I think is suggesting that we amend the form of citation.

HONORABLE STEPHEN YELENOSKY: Maybe so.

CHAIRMAN BABCOCK: Sharena has been patiently waiting for about an hour.

MS. GILLILAND: Thank you. I really like the language proposal just to add "or electronically." I think I would interpret that as a clerk, if I have an electronic means to get somebody notice I can use that. If I don't, then I should be sending them first-class mail of that. That's how I would read it if you just said "first-class mail or electronically."

I think the broader "or electronically" is better than specifying the electronic case filing system or e-mail. As Frank mentioned, each county decides what kind of case management system that they want. Some are more sophisticated than others, and it would allow county by county if you want to use the e-filing system, you could. If your case management system could gather up all of those e-mails and massively send them out, it would allow you to do that and just give some flexibility in terms of what could come with case management systems in utilizing electronic addresses.

And Frank mentioned this, too. I would love to see instead of just notice if the clerk actually gave you an electronic copy of the order or judgment, that that satisfies notice. It doesn't need to be a separate notice. Just to CYA, we prepare a separate notice that says "final judgment" or "order" and then if you want a copy we can get you a copy, but we're -- in our office we're already e-filing every single signed order and judgment to the parties and going through the e-file system. So if we already just give them a copy of that signed order, I think that should satisfy that notice requirement.

With respect to default judgments, those may be somewhat more unique and somewhat different because we

haven't had any contact from that defendant, and so maybe that should remain just by paper, but at least maybe think about any electronic options if that's appropriate. But I do like, from the clerk's perspective, if you just leave it more broadly "electronically," that allows county by county to utilize whatever electronic means they have to fulfill that requirement.

CHAIRMAN BABCOCK: Great, thank you. Lisa.

MS. HOBBS: I might be the contrarian view here, and I appreciate the clerk's office perspective, of course, but we're only talking about final or appealable judgments, and put aside that even sometimes I don't know what is an appealable judgment or not, and I'm board certified in appellate law, but we all -- I think -- and we also sometimes don't know when something is a final judgment, so I was about to say we don't. But if something is marked "final judgment," the magnitude of that moment deserves something different, and I think that we should cautiously -- apart from all the practical problems that have been raised here today, I think we should be mindful of the significance of the moment of a final or appealable order, but mostly a final judgment, because I think the law is developing that sometimes appealable orders, like even though they are appealable at that moment you won't lose your rights if you don't appeal

it at that moment. But for sure final judgments, whenever possible it should be, you know, hey, this is not going to an old Gmail account. This is actually going to your residence, much like the start of the lawsuit is not just going to a Gmail account. We're doing something different with all of the other orders that you've gotten to say, hey, this order, this judgment, this is actually affects your rights in a big way.

So I -- I mean, I get it. You know, and to counteract Frank's story about him getting on e-filing, you know, in this -- when the appellate courts lost their means really in a lot of ways to communicate with us effectively over the early part of this pandemic, the Supreme Court started -- when you use -- when you get a notice from the Supreme Court, which is where I practice most often, you actually get a notice that comes from a different e-mail address. It's not from like a -- it doesn't look like my service copies that the other side is filing to me. It comes in, I don't know, some other way that I'm like, oh, whoa, Supreme Court is communicating with me, what are they saying, I've got to go, but in this period of pandemic when they didn't have full access to the TAMES system, they basically had the clerk serve me like orders and notices just like as if it were the other party serving me something. And not that I don't take

every service completely seriously, but in that scheme and in that chaos of, you know, March, April, May, the Supreme Court had ordered full briefing on a case where I was the petitioner, and I missed it. Like I just didn't get it. That's not the way I'm used to getting notices, and that's no fault of their own, but that's just the point of even seasoned lawyers and even seasoned -- you know, sometimes you need additional notice when you're like this is actually really important.

So I wouldn't change it. Even as somebody who e-files all the time and gets my notices from courts mostly electronically, I still think that final judgment should be mailed to me personally as a lawyer who participates in the e-filing system on behalf of my clients, I want to get the first-class notice of an actual final judgment.

I also -- just for the record, I do not think these clerks have authority to be doing anything differently. I think the specific controls over the general, and the fact that they think that they can be mailing final judgments out without doing it by first-class mail is completely wrong, and they don't have the authority to do it. There's some -- I get some ambiguity in that, but I think 306a(3) is pretty specific. So if any clerk wants my legal advice on that, you do not

have the authority to be doing it otherwise until we change the rule. So that's it.

CHAIRMAN BABCOCK: Great. Stephen. You've got to take yourself off mute, Stephen.

HONORABLE STEPHEN YELENOSKY: Yeah, I know. I was just trying to find the button. I guess we're in a transition phase regarding first-class mail, and we're also in a -- pro se litigants I think are in a different situation than a lawyer sitting in the office. You look at all your mail or someone looks at all of your mail. You send something to a pro se litigant, it's less likely. At least they're not going to be as rigorous in checking their mail. Maybe they don't check the e-mail, but that doesn't mean they look at every piece of paper that's coming through first class, and so like I said, maybe it's -- maybe it's a transitional thing, but I wouldn't assume that people still pay more attention to their paper mail than they do to their e-mail; and we know, as a matter of policy, the post office seems to be less and less equipped to deliver mail; and that's perhaps going to change. But in any event, I think it's transitional and so maybe -- maybe, Lisa, it's too early now, I don't know, but it seems to me to be changing.

CHAIRMAN BABCOCK: All right. Thanks, Stephen. Frank, it looks to me like we have four options

in front of us. One, the Hobbesian choice of no change. Two, just adding the two words "or electronically", the Gilliland proposal; or they've previously filed a document electronically; and the fourth choice, a party hasn't provided an e-mail address.

MR. GILSTRAP: I think --

CHAIRMAN BABCOCK: Is that how you see it, Frank?

MR. GILSTRAP: Yes, that's how I see it.

CHAIRMAN BABCOCK: Okay. Well --

MR. GILSTRAP: I think --

CHAIRMAN BABCOCK: Huh?

MR. GILSTRAP: I think we would probably maybe go in a different order. I think we first need to say are we going to allow the clerks to give electronic notice, and then the next question is do we -- do we -- do we carve out -- if we allow them to give electronic notice, do we carve out people who either haven't filed electronically or haven't provided their e-mail address. And with regard to that last one, should we -- should we change the citation Rule in 99. That might be something we talk about. Finally, the last issue -- and I think this is -- I think everybody agrees on this. If we allow electronic notice, we should allow the clerk to send the judgment instead of the notice. That would be the -- kind

of the super savings there.

CHAIRMAN BABCOCK: Okay. Well, it seems to me that the threshold issue is whether the committee votes to make a change at all.

MR. GILSTRAP: Yeah, do we accept the JCIT recommendation or do we reject it.

CHAIRMAN BABCOCK: Well, that's a loaded way of saying it, but --

MR. GILSTRAP: Okay.

CHAIRMAN BABCOCK: Lisa says, "I don't want to make a change," so that position is going to get one vote unless she changes her mind. But why don't we take a vote on that threshold issue first? Okay? So everybody that thinks that we should not make a change, raise your hand electronically, please.

Well, it did get one vote, two votes, three. Keep coming. Four, five. Anybody else?

MS. HOBBS: Chairman Babcock, I would like to point out that these are some of the most esteemed members of our committee, myself excluded.

CHAIRMAN BABCOCK: Well, Schenkkan has got his hand up. Are you including him?

HONORABLE STEPHEN YELENOSKY: Lisa is right about that, but before I vote I think I need my notice by mail.

CHAIRMAN BABCOCK: We're holding steady at five esteemed members. Everybody is esteemed. Pauline, do you have anybody -- any more than five?

MS. EASLEY: I have five, but I wanted to point out that Nina had her hand raised before you started the vote, so I'm not sure if she had a comment or if it's an actual vote.

CHAIRMAN BABCOCK: Good point. Nina, comment or vote?

MS. CORTELL: I'm just, for all of the reasons that have been said -- and I don't mean to overly complicate -- I would actually provide for service both ways. I think this is so important, and for reasons said, there's mail issues as well as e-mail issues. This is an important deadline for people to be apprised of, so I would provide for both types of service, provided that the electronic information is available. But I would not -- I would not let go of the mail option, the mail requirement.

MR. GILSTRAP: For anyone, right?

MS. CORTELL: Correct. Correct.

CHAIRMAN BABCOCK: So you're taking down your electronic hand on what we're voting for, which is no change in the rule. Okay.

MS. HOBBS: And if I could maybe -- maybe clarify what the Hobbesian position is, that's kind of my

position, too, so maybe I didn't -- I thought no change, but I'm not opposed to also sending me electronic notice. I just want the mail notice, too, so maybe I've derailed this in an un --

CHAIRMAN BABCOCK: No, I don't think you did, because if you want to mandate mail notice, then you're going to say no change. Right?

MS. CORTELL: Well, no, but what we're saying is both, and that wasn't an option before, and that's why I voted for no change, is because I do think there should be by mail. I don't disagree with that. I would just add electronic if available, but I wouldn't take away mail. Sorry.

HONORABLE DAVID PEEPLES: I agree with that, too.

CHAIRMAN BABCOCK: All right. And --

MR. SCHENKKAN: And so do I. So do I. That's why I voted the way I did.

CHAIRMAN BABCOCK: Okay. All right.

MS. HOBBS: So I think the way to interpret that vote from I think now all five of us who voted that way, not that it matters because there's just five, but I think what we're saying is we're not opposed to electronic service, but we just don't want to take away the mail service, and it sounds like that was the consensus of

everybody who raised their hand for, quote-unquote, no change.

CHAIRMAN BABCOCK: Okay. We got it. Take your electronic hands down. So now there is a proposal to just add the words "or electronically" and not have a carve-out, as Frank calls it. This would be the language that would be on page two of the memo. How many people are in favor of that? Raise your electronic hand.

HONORABLE STEPHEN YELENOSKY: Can you give us a minute to find page two?

CHAIRMAN BABCOCK: Yeah, sure. Take your time.

HONORABLE ANA ESTEVEZ: I just want to clarify. This one would be if they electronically filed, then they get it by electronically -- they get electronic notice, and if they were a pro se or they have that address on a certificate of service, then it would -- they would get their service or their notice by e-mail.

CHAIRMAN BABCOCK: No. No, no, no, no, no.

HONORABLE ANA ESTEVEZ: Okay. I don't have the page in front of me, sorry.

CHAIRMAN BABCOCK: No, that's okay. The language on page two gives the clerk the option to either send it by first-class mail or electronically. It is silent about whether they have the address, whether

anybody has filed electronically. It's just -- it's just two words that are being added.

HONORABLE ANA ESTEVEZ: Okay. I think that would give the same effect, because obviously if they don't have an e-mail, they can't send it to them, so they will have a way -- if they had a way to give them notice, they would have to do one or the other, correct?

CHAIRMAN BABCOCK: I don't know. Okay. Pauline, how many do you have there?

MS. EASLEY: 15 now.

CHAIRMAN BABCOCK: Okay. I just saw another one.

MS. EASLEY: That's 16.

CHAIRMAN BABCOCK: Yeah. Anybody else? 17. Anybody else? Okay. Pauline, I've got 17 votes.

MS. EASLEY: Yes, 17.

CHAIRMAN BABCOCK: Okay. So that -- that has 17 votes in favor. How many people think we should have a carve-out, one or the other of the two carve-outs?

Okay. Everybody done?

MR. HUGHES: Chip, can you clarify what's the vote you're asking for right now?

CHAIRMAN BABCOCK: Whether there should be a carve-out. There's two options, but right now we're just going to say whether you think we should have one or the

other of the options, and then we'll vote on who thinks what is the best option.

PROFESSOR CARLSON: Chip, are you talking about the language on page three?

CHAIRMAN BABCOCK: I am. Yes. That's what Frank refers to as the carve out.

MR. GILSTRAP: That's correct.

CHAIRMAN BABCOCK: Okay. Everybody voted? I've got nine, Pauline. How about you?

MS. EASLEY: I show nine.

CHAIRMAN BABCOCK: Okay. Now, of the two carve outs, regardless of how you voted previously, do you like carve out number one, which is the first carve out on page three that talks about if a party had not previously filed a document electronically? Everybody in favor of that carve out as opposed to the other one, raise your hand.

Everybody done? Nope, there's another one. Pauline, I got four.

MS. EASLEY: Four.

CHAIRMAN BABCOCK: Okay.

MS. HOBBS: I think I'm another one, too, Chip, if we're allowing people to vote of the -- if you hate where we're going with this, but you still want a say in it, then I would be on that one, too.

CHAIRMAN BABCOCK: Okay. So that's five. And so the second carve-out, how many people are in favor of that?

Everybody voted? Pauline, I've got nine.

MS. EASLEY: I'm showing 10. Hold on.

CHAIRMAN BABCOCK: Yeah, one just added, yeah, since I said that. Ten.

MS. EASLEY: Looks like 11 now.

CHAIRMAN BABCOCK: Okay. Count that again. Oh, yep, there we go. Evan came in. Got it. So 11 for that, for the second, the second carve-out.

So recapping, nine people -- nine members of our committee think there should be no change, 17 like just leaving it adding two words, "or electronically." But if we're going to have a carve-out, the second proposal, the proposed carve-out, which says "but if a party has not provided an e-mail address then notice must be given by first-class mail", that is preferred over the other carve-out by a vote of 11 to 5. So how about that for some voting, huh?

MR. GILSTRAP: Very good, Chip.

MR. HUGHES: I have a friendly suggestion for further study. It's Roger.

CHAIRMAN BABCOCK: Who wants to suggest something?

MR. HUGHES: Roger, Roger Hughes.

CHAIRMAN BABCOCK: Okay, Roger, you may be -- hang on. There you are.

MR. HUGHES: Yeah. Okay. My suggestion is if people are worried about notice that we consider that the clerks have to mail it out with blue backs.

CHAIRMAN BABCOCK: And then we'll take our exam?

MR. HUGHES: Yeah.

CHAIRMAN BABCOCK: Wow. Frank -- we'll take that under advisement, Roger. Sorry.

MR. HUGHES: Yeah, okay.

CHAIRMAN BABCOCK: Frank, you want to exceed the scope of the inquiry and change Rule 99?

MR. GILSTRAP: I think so. I think if we're going to go with the second carve-out, then I think -- or even the first -- you know, let me say this. I think you probably ought to change Rule 99 in any event, to let people know that they can file electronically, because there will be people who do it and people who don't read the rule book. And if you decide, you know, you can put further language in there, but I think it's a good idea -- and I know it's kind of radical to mess with Rule 99, but I think this warrants it. For everybody. You can file electronically, and if so, then this is how you do it.

CHAIRMAN BABCOCK: Okay. Professor Carlson.

PROFESSOR CARLSON: Yeah, I would also suggest, Frank, you take a look at Rule 57, which deals with signing of pleadings and imposes right now an obligation of counsel and a party not represented to provide an e-mail address.

MR. GILSTRAP: Yes. Yes. We do cite that in the memo in our footnote.

PROFESSOR CARLSON: Okay.

MR. GILSTRAP: And you're -- that could certainly be in Rule 99 that you -- you know, what you've got to provide in the answer. You've got to provide an address. If you've got an e-mail, you've got to provide it. And also you can also file electronically.

CHAIRMAN BABCOCK: Great. Harvey.

HONORABLE HARVEY BROWN: Did we vote on Lisa's suggestion that notice should be sent by both mail and e-mail when it's available?

CHAIRMAN BABCOCK: We didn't vote on that because I didn't perceive Lisa as advocating that, but maybe she was.

HONORABLE HARVEY BROWN: I thought she was, and I thought Nina seconded it.

MS. CORTELL: That's correct.

CHAIRMAN BABCOCK: Yeah, I'm in a voting

kind of mood. How many people -- how many people are in favor of requiring the clerk to send both first-class mail and electronically? Raise your hand, electronic hand. .

MS. GILLILAND: Can I comment on that?

CHAIRMAN BABCOCK: I figured you would. I was waiting for you to dive in on that.

MS. GILLILAND: Okay. That's just not practical. It's just not. When you're dealing with volume, even right now there's no case management system that keeps track, when you open up your case, who filed electronically and who filed in paper. Maybe you can dig through the e-file manager and be able to tell, so any efficiency with electronically is completely lost if you have to research and figure out who filed which way. Requiring both is a little over the top, I think.

CHAIRMAN BABCOCK: Hey, don't worry, you're winning. Only seven people are --

MS. GILLILAND: It's a bit -- it's a bit much, and any efficiencies are completely lost at that point, particularly when you get to your DWOP docket, if you want to go in that direction, because of the volume. That's just -- it's just overkill.

CHAIRMAN BABCOCK: Yeah, don't worry, there's only seven people have their hands raised on that one.

MS. GILLILAND: Okay. I wouldn't be doing my fellow clerks justice if I didn't say please don't go that way.

CHAIRMAN BABCOCK: I was shocked that you didn't, you know, start pounding the screen when that came up, so we're good. And we're at a stopping point, I think, for our lunch break, and so why don't we come back at 1:30. Does that work for everybody? That will give you about 50 minutes for lunch. Okay. We'll do -- we'll be in recess until 1:30. Thanks, everybody.

(Recess from 12:36 p.m. to 1:30 p.m.)

CHAIRMAN BABCOCK: Okay. Let's get going, everybody, if everyone is ready. I assume everybody can hear me. Okay, good, good. Next up is Texas Rule of Appellate Procedure 24.1(b)(2), and Pam, the ever-present Pam Baron, and the ever-present Bill Boyce. Who is going to lead us in this?

MS. BARON: This is my black bean here.

CHAIRMAN BABCOCK: All right.

MS. BARON: This is handout F in your materials, 24.1(b)(2), which involves the content and approval of supersedeas bonds. Right now, to be effective a supersedeas bond must first be approved by the trial court clerk, and the Court referred us this matter because they have heard from some practitioners that they were

running into issues getting approval of the trial court clerk in order to stop execution of a judgment and also input from some clerks who said they felt a little uncomfortable with their role in approving bonds. So to cut to the chase, our subcommittee explored a lot of options, which I'm going to lay out for you, but so that you can get completely freaked out upfront, our unanimous recommendation is to amend the rule to provide that supersedeas bonds are effective upon filing and no longer require approval of the clerk and that if a party has some problem with the bond, they can take it up with the trial court judge.

So to give you some background -- and I want to say we have three great resources I hope on this meeting. We have Sharena Gilliland, who just participated in our last discussion, District Clerk of Parker County, and also Nancy Rister, who is District Clerk of Williamson County, and I want to apologize to her, because I did not recognize her as a member of this committee on -- in my memo, but she is certainly one of many esteemed members; and we also have Professor Elaine Carlson, who is pretty uniformly considered to be the state's expert on supersedeas bonds.

So to give you a little background, I did follow up with Jackie to see -- get a little more sense of

what the comments were that the Court had been receiving. She put me in touch with Reagan Simpson. He used to be a partner at Fulbright & Jaworski. I think many of you know him, and he's now I think head of the appellate practice group at Yetter Coleman; and I've attached his letter, which he was nice enough to send in, that outlines some problems that he's encountered mostly in rural counties where the clerk's office is not either familiar with or not equipped to deal with supersedeas judgments in large cases where it's very important to the defendant to get that approved in order to stop execution. He's had problems with -- I'm not sure it made it into his letter, but he had one case where they started taking the trucks, and he's had one where he had to threaten the clerk with mandamus or where the clerk said, "I'm not going to approve it. It has to go to the judge."

Reagan's suggestion was that we move to a federal practice, which is that all supersedeas bonds in federal court are approved by the district judge. There were a lot of reasons -- well, I'll get into why we didn't think that was a great idea in a minute. And then Jackie also reached out to our district clerk members, both of whom said why can't we just accept it and then if people have problems, take it up to the judge. There's not much we do in terms of examining and approving the bond. We

can do, you know, a little Google search to see if the surety's okay; and then I also did get, with Justice Christopher's kind assistance, a copy of the policies -- they're actually very detailed -- from the Harris County District Clerk, which is -- you know, they have their own section in the clerk's office for post-judgment matters. They're very well-equipped to handle this. They have an extensive checklist. Kind of the two major things they do is they do check the federal register to make sure that the surety is approved and that the amount of the bond is consistent with what they are approved to provide as surety, and they also check that the bond amount complies with the provisions of the statute.

There are some other relevant rules, and you should know that if a party files a cash bond, the clerk has no role in approving it. So we're treating supersedeas bonds different from cash bonds, and also, if a party files a net worth affidavit and it says, "My net worth is $5. Clerk, here's $5," the clerk really has no role in that either, and a party who wants to challenge the amount of the bond or the net worth again has to file a motion and take it to the trial court judge.

So just in further background, the approval by the clerk has been Texas law since the late 1800s. That kind of came as a surprise to me when I looked back

at this. It was statutory, and it's discretion that is not unlimited, and at least one court in describing it has said it is -- it's discretion of a judicial character that is exercised by the clerk in deciding whether or not to approve a bond, and that's a little bit unusual to have a clerk who's exercising what is something very similar to judicial discretion. They can be mandamused if they don't approve a bond that at least on its face is facially compliant, and they can also be mandamused for approving a bond that wasn't facially compliant with the rules, so basically what we came down to is kind of a list of maybe six or seven options. And in terms of what Reagan's comment was, which was to always go to the trial court clerk to approve the bond, our committee really thought, you know, this is working in most cases right now, even with the clerk approving it, we shouldn't let the exception kind of make everybody have to go through this extra step that will burden trial court judges, and they don't need more on their plate, and it could slow down getting the bond approved.

So we weren't enamored with that option, but how many alternatives are -- oh, and the last alternative would be write into the rule something very similar to what the procedures are that the Harris County District Clerk's office is currently doing so that there's a very

clear checklist of what is required for approval, so it makes it uniform across the state, because right now, some clerks, like Harris County, have these detailed guidelines. I checked with Bexar County through Judge Peeples, and they do not have written guidelines. They just refer to the rule and the statute. I assume that some of the smaller counties also do not have written guidelines. I did not check in Dallas. I would guess they are pretty on top of this.

But kind of the options that we were looking at is, you know, leave the rule the way it is, which we just did on something else, because it's working in most cases and that Reagan's cases are kind of the outliers. The second would be the Reagan Simpson idea, which is to require the trial court judge to approve the bond in all cases. A variation on that could be to give the litigant who is filing a supersedeas bond to at its option instead bypass the clerk and ask the judge to approve the bond. So that would be a variation on that. Fourth one is just to make the bond effective upon its filing, which filing, at least in my mind, is not just hitting the button to send, but the clerk also has to accept it, but not approve it, which is different, and then let the judgment creditor if they're unhappy with the amount of the bond or the sureties on the bond that they can, as they currently can

do now, take it up before the trial court judge.

We did have some concern with people filing junk bonds. Okay. Not like junk bonds on the financial markets, but bonds that are not compliant, the sureties are crummy; it's, you know, Uncle Joe or whatever. Just in order to stop execution, be able to move assets, and do whatever. That's a risk we already have now, to some extent, with the net worth affidavit. I suppose with cash bonds. There is a provision in Rule 24 that does permit the judgment creditor to seek injunctive relief from the trial court in certain limited circumstances to prevent the judgment debtor from transferring assets to avoid execution other than in the ordinary course of business, so there is some remedy there. We debated whether there needed to be new sanctions to kind of guard against the idea of people filing junk bonds in order to avoid execution, and we were reluctant to add yet another sanctions rule when we certainly have plenty and to invite ancillary or secondary litigation over sanctions in yet another context in our rules.

So that is kind of -- oh, and the last option was to write all of the very specific things that need to be checked in order to approve the bond and continue to have the clerk actual -- actually engage in approving the bond. We had a great discussion, and -- no,

we realized that this is a fairly major change in our practice. We did feel like it wasn't totally crazy, because we do want -- we felt uncomfortable, as some trial court clerks do, with them exercising what is essentially judicial discretion. We wanted to see a uniform practice throughout the state if we could accomplish that. File and challenge is already in place in our bonding rules in terms of cash bonds and net worth affidavits. And, you know, there is this injunctive relief, although that's fairly limited, and there are our general sanctions rules available for junk bonds.

So the rule we propose is on page six. It's probably also on page two, where we have changed subsection (2) to now read instead of "to be effective the bond must be approved by the trial court clerk" to provide that a bond is effective upon filing. "On motion of any party, the trial court will review the bond." That's what we've got.

CHAIRMAN BABCOCK: Thank you, Pam. Comments from people? Thoughts? If you have any, raise your electronic hand. Nina. Yeah.

MS. CORTELL: I'm sorry, did you say my name?

CHAIRMAN BABCOCK: Yeah, we can hear you now.

MS. CORTELL: Sorry, sorry. Just I fully agree. I've filed a lot of bonds and come into some of the situations that Reagan describes, and so I think it's an excellent change, and I would be in favor.

CHAIRMAN BABCOCK: Thank you. Roger.

MR. HUGHES: I have nothing to add.

CHAIRMAN BABCOCK: Take yourself off mute, Roger.

MR. HUGHES: I thought I had. No, when they originally revamped all of the supersedeas rules about what you count, what you don't count, what you bond, what you don't bond, there was a lot of confusion; and bonds would be held up for two, three days while clerks would be calling me, calling the county attorney, et cetera, et cetera. Things have calmed down, but still it may take a day or two, and in the meantime, if you've got a good bond, it means you're biting your nails wondering whether they're going to be out seizing property, et cetera. So I think it's a healthy change, and if people think the bond is bad or it's not in the correct amount, that's what judges are for. So I think it's -- I think --

CHAIRMAN BABCOCK: Thank you, Roger. Lisa.

MS. HOBBS: I agree. I think the subcommittee that -- and thank you, Pam, for letting me participate, even though I wasn't as good of a participant

as I should have been, but I was watching it all, and I agree. You know, good appellate lawyers are going to confer with the other side if there's anything -- area of the law or any portion of the bond that -- because we don't want to have to go get a bond a second time from -- so we're having these conversations from the moment the judgment is signed until the -- and we may work it out or we may legitimately have disputes, but ultimately it needs to be filed. It needs to stop the execution of the judgment, and the onus should be on the other party to go get an order. The clerk should accept whatever is filed and then see what happens.

CHAIRMAN BABCOCK: Okay. Thanks, Lisa. Any other comments or thoughts? Yeah, Richard Munzinger.

MR. MUNZINGER: The draft of the rule says the court will review the bond. I think it ought to be mandatory, "must review the bond promptly" or something to that effect, because supersedeas can have some very serious consequences; and a knowingly false supersedeas bond or inadequate bond or one that cannot be cured can still cause havoc; and there ought to be some encouragement to the trial court to point out that, A, you must address the sufficiency of the bond if it's questioned, and, B, you've got to do so quickly. That's all.

CHAIRMAN BABCOCK: Thank you, Richard. Good point. Who else? Anybody else? Yeah, Robert.

MR. LEVY: I'll also speak in support of the proposal, and also I think Sharena had her hand up.

CHAIRMAN BABCOCK: She has been recognized once. I don't know if she has it up again. I don't see it.

MS. GILLILAND: I'll be quick and echo what has been said. I think taking the clerk out of the approval process is a good decision. Most of the time clerks aren't in a position to really know if it's a good bond or if it's junk, and I think if the parties have an issue after it's been filed, it's something that should be presented to the trial court judge to consider.

CHAIRMAN BABCOCK: Great. Thanks, Sharena. Anybody else? Yeah, Professor Carlson. You have to take mute off, Elaine.

PROFESSOR CARLSON: I am so sorry. I'm on the subcommittee, and I supported this change. There's a real uneven ability, I have found, in different clerk's office on being able to assess things like the sufficiency of the bond or even the law on what's compensatory damages. So I think there's -- I mean, you're weighing the rights of a judgment creditor against the judgment debtor, but a judgment creditor can seek a turnover order

and even the appointment of a receiver, you know, immediately after judgment; and it's vitally important to the defendant who is appealing that they be able to stop that; and I think the court already has the ability to enter sanctions if someone misuses the process. Thanks.

CHAIRMAN BABCOCK: Thanks. I don't think you had joined us yet, but at the very beginning Pam said that you were the most knowledgeable person about this issue of anybody in the state.

PROFESSOR CARLSON: It's very sad, isn't it?

CHAIRMAN BABCOCK: You mean we have minimum knowledge about this in the state? Justice Kelly. Peter, you're going to have to take your mute off.

HONORABLE PETER KELLY: There you are. An additional protection for judgment creditors in this situation is the Uniform Fraudulent Transfer of Assets Act, which gives a remedy in the trial court against the judgment debtor if they try to fraudulently hide assets, and so because there are several layers of protections for junk judgment creditors in this situation, I would support this change.

CHAIRMAN BABCOCK: Thank you, Judge. Anybody else have any comments? Pam, it seems to me, for the first time perhaps in the history of this committee since I've been on it, we have a quick consensus about the

work of a subcommittee. How do you feel about that?

MS. BARON: Stunned.

CHAIRMAN BABCOCK: Do you think we need further discussion?

MS. BARON: No.

CHAIRMAN BABCOCK: All right. Thank you. We have -- we will submit this to the Court for its review, and we will move on, and the next -- the next topic for us is Texas Rule of Appellate Procedure 34.5(a), and let's see if you and Bill can top your last performance, Pam.

MS. BARON: Well, I thought that was the hard one today, so I can only be disappointed.

CHAIRMAN BABCOCK: Good luck with that.

MS. BARON: I can only be disappointed from here on out. This is Item G. This is Rule 34.5(a), and that governs what is automatically included in the clerk's record on appeal without designation by a party. And we had -- the Court had communication from Ben Taylor, who asked that the Court consider whether the supersedeas bond, which was our subject of the afternoon, should automatically be included in the clerk's record and be added to that list, and the reasoning behind this is the appellant normally would not need to put the supersedeas bond when it designates other items to be put in the

record.

On the other hand, the appellate court in a number of circumstances needs the bond in order to draft a judgment, so if the judgment of the trial court is affirmed and there's a supersedeas bond in place, the judgment must render judgment against the sureties as well as the appellee, the party. So a clerk can't or the court itself can't formulate the judgment without knowledge of who the sureties are so that they can render judgment against them, and the Supreme Court has a parallel provision when it's affirming a judgment either via the court of appeals' judgment or the trial court judgment directly. And it can slow the process down. The appellee sometimes doesn't need to designate the record at all, so it adds additional expense to them. I did call upon Blake Hawthorne, who is clerk of the Supreme Court of Texas, and Michael Cruz, who is clerk of the Fourth Court of Appeals in San Antonio. They both supported the idea, thinking that it would be helpful in just streamlining it. It is very similar to other items that are automatically included in the clerk's record, like the bill of cost. Again, that's in there because the appellate court needs that in order to formulate the judgment and to assess costs against the parties as it sees fit under the rules.

So what we would propose is on page three of

your memo, is adding new section (13), that adds as automatically included in the clerk's record on appeal in civil cases any supersedeas bond and then renumbering the catch-all one, whatever else the parties have designated, as (14). A couple of people said, well, shouldn't we include any security document, like if there's a cash bond or whatever. The appellate courts don't need that to formulate the judgment, because they only have to render judgment against the sureties. So if they are reversing a judgment, they actually don't release the judgment against the sureties explicitly in the judgment. They reverse the judgment, and under the terms of the bond, because it's conditional, the sureties are released. That's it.

CHAIRMAN BABCOCK: Okay. Thank you, Pam. Comments from anyone? Raise your mechanical hand. I see no hands raised. Now there's one. Professor Carlson. You've got to take it off mute.

PROFESSOR CARLSON: I know. It took me a minute to find the button. The only thing I would add is that there's no real concrete deadline to file appellate security, so ordinarily you want to do it obviously as soon as the judgment is signed, but it -- you can run into a situation where the supersedeas is filed after the record is filed, and I don't know if we want to require a party to notify the appellate court of that or not.

MS. BARON: Uh-huh. Well, I think in that situation we should just say -- we could say, "Any supersedeas bond on file at the time the record is prepared." We can't put the onus on the clerk to have to do it twice.

PROFESSOR CARLSON: No, no, no. I didn't know if you wanted to have a party notify --

MS. BARON: Yeah.

PROFESSOR CARLSON: -- the appellate court. I don't know if it's that vitally important or not.

MS. BARON: I think this will sweep up most cases.

PROFESSOR CARLSON: Yeah.

MS. BARON: And I guess the question is in those few where somebody decides to file a supersedeas bond after the record has been designated, they can just -- I would just let them fix that later.

PROFESSOR CARLSON: Yeah. Okay.

MS. BARON: Unless somebody else feels strongly that we have to be super precise.

CHAIRMAN BABCOCK: Lisa.

MS. HOBBS: No, I agree with Pam's position. This captures most of the bonds that are going to be filed, and the ones that aren't are in no worse condition than where we are today, and so let's let it fly.

CHAIRMAN BABCOCK: Makes sense. Anybody else? Okay. Pam, you may have set a Supreme Court Advisory Committee record for -- okay. All right.

MS. BARON: If I had a football, I would be spiking it.

CHAIRMAN BABCOCK: Getting two items through, both unanimously and in record time. So having finished with that, we'll go to the next item, which again is yours, the briefing rules, and I don't know if you're going to do it or Bill or somebody else.

MS. BARON: I have all the black beans for the afternoon.

CHAIRMAN BABCOCK: All right, good. We're on a roll, and let's not slow it down.

MS. BARON: I only wish. Okay. This was a referral from the Court to examine certain of the briefing rules to see if they can be improved. This was a task with seven discrete subparts, so fasten your seatbelt, right, and they cover kind of a broad range of things. I would say the first four -- four of them are more mechanical and three of them are more substantive in terms of what's actually the content of the brief. We have decided to take them in order of what we thought was easier to hardest, because isn't that the way you want to do everything.

So the first question is whether to remove the paper requirement, the paper copy requirement, because right now the rule says if you electronically file a document in the Supreme Court and the Court of Criminal Appeals, within X days you have to provide paper copies to the court, and the number of paper copies you have to provide to the court is determined by court order. And the Texas Supreme Court stopped requiring paper copies a long time ago, and the rule doesn't reflect that, and it confuses people who are not familiar with inside baseball, and so Blake Hawthorne, the court of the clerk, gets a number of calls of people or people trying to send him paper copies. So the Supreme Court pretty clearly wants it removed, and Blake agreed to contact the Court of Criminal Appeals clerk and start a dialogue with them to see what their druthers were; and at first they came back saying, "We don't know, we need to think about it," but my latest information is they probably want to keep getting paper copies. So what we would need to do is just change the rule on paper copies to say you don't have to do it in the Supreme Court, but you still have to do it in the Court of Criminal Appeals.

So that was the -- I had originally set out two different options, one if both courts wanted to stop getting paper copies and one if just the Texas Supreme

Court wanted to stop getting paper copies, and so option one is on page two to three of your memo, and what it says is we remove references to the Supreme Court in terms of where the paper copies go, and we add a sentence at the end saying, "A party need not file a paper copy of an electronically filed document in the Supreme Court." That's our proposal.

CHAIRMAN BABCOCK: Okay. Comments?

MS. BARON: This seems like what's to comment, but --

CHAIRMAN BABCOCK: Well, but we want to have due process here on this committee, so --

MS. BARON: The Court doesn't want it, we're going to say they don't have to take them.

CHAIRMAN BABCOCK: The power is going to your head, Pam, I can see that. You want to ram these things through so you can --

MS. BARON: I'm ready. I'm ready now.

CHAIRMAN BABCOCK: All right.

MS. HOBBS: Hey, Pam, I think I probably was copied on communication, but you're saying that you did confirm with the Court of Criminal Appeals that they do still use the paper copies, because I've only filed once with them, and it was kind of a pain in my latter years of my practice that I wasn't used to that, but they are still

-- they are still useful to the Court of Criminal Appeals?

MS. BARON: I think some of them are still -- yes, want the paper copies.

MS. HOBBS: Okay.

CHAIRMAN BABCOCK: Okay. So no dissent, Pam. Your roll continues, although as you promised, it's going to get harder.

MS. BARON: Yes. Okay. The second point is (b) on the bottom of page three of our memo, and it's whether to remove the requirement that makes mandatory inclusion of the court of appeals' judgment in the appendix to the petition for review, and that is in 53.2(k)(1)(C). And if you have seen what courts of appeals issue, they issue an opinion, but there's a separate piece of paper that's the judgment, and a lot of even good practitioners like me, when it says "include the" -- the item says "court of appeals' opinion and judgment," a lot of times the only thing that will be included in the appendix is just the court of appeals opinion and not the separate piece of paper that's the judgment. And because it's mandatory, the clerk's office has to hold on to the petition and ask you to refile or provide the judgment before they can accept it as filed. So it slows things down. It doesn't affect the actual date of the filing of your petition, so your petition

isn't going to be late or anything.

I talked to Blake Hawthorne again about this, and what he indicated is all of these judgments are online. The staff attorneys say they're easy to get. They don't really need them. And it would just -- from a pragmatic point of view it would make everyone's lives easier if they didn't have to hold up these petitions to wait for people to refile with the judgment included in the mandatory appendix. Of course, you can always include anything you want in the appendix. There's optional -- a provision that says "optional," you can include whatever you want.

There was some just sadness on our committee about this idea of foregoing including the judgment, because you don't appeal opinions, you appeal judgments. The Court doesn't reverse opinions, it reverses or acts on judgments, and the judgment is really what our appellate life is all about, but pragmatism prevailed, and we did unanimously agree that the requirement should no longer be mandatory, especially in the world -- hopefully at some point we'll be moving to you don't have to include any of this because it will all be electronically forwarded to the court.

So what we would suggest is three quarters of the way or almost at the bottom of page four is to

change 53.2(k), (C) to -- capital (C), to no longer say "the opinion and judgment of the court of appeals," but to say "the opinion of the court of appeals" as a mandatory item to be included in the appendix to the petition for review only.

CHAIRMAN BABCOCK: Okay. They're lined up to get you now, Pam. Lisa.

MS. HOBBS: I'm not going to get her. I get where she's going. I actually have had a petition for review dinged when I did not include the judgment inadvertently, so I will just say that as a board certified lawyer, appellate lawyer, but I -- what I like about requiring the judgment is it does keep us focused on the Court's role, and much like I want -- there's some purity to wanting final judgments that mean something being snail mailed to people because they realize it's this -- this is the important thing, and much the same way I think that judgment of the court of appeals needs to be forefront in our minds, and I'm embarrassed when I forget to include it, in those rare times I forget to include it, I'm mostly embarrassed and I get it to them within like 15 minutes. But I think there might be other people who are petitioning to the Supreme Court who really haven't thought about it or even looked at the judgment of the court of appeals, and we have seen significant cases that

depend on the wording of the judgment instead of the wording of the opinion and what to do when there's conflicts about them. And so just as an appellate purist, I would not support the subcommittee's -- even though if the Court wants to do that, I am on board with how the subcommittee has solved the problem, but I just want to --

CHAIRMAN BABCOCK: Stop sucking up to the Court. That's it, come on.

MS. HOBBS: I just want to go on record, like, we need everybody to keep focused on the judgment. That's what we're reviewing.

CHAIRMAN BABCOCK: Yeah, Kennon.

MS. WOOTEN: It's a related comment. If it's the judgment that's being reviewed, why not remove the opinion and keep the judgment. It just strikes me that the opinion is almost always more voluminous, taking up digital space. It's not what's being appealed. It is equally accessible online, so I'm struggling to understand why we took out the judgment and kept the opinion.

CHAIRMAN BABCOCK: Nina is going to tell us the answer to that.

MS. CORTELL: Well, I do think you need both. I mean, obviously how the court of appeals reached its conclusion is very important to the Texas Supreme Court in determining whether review is appropriate, so I

think the opinion comes in; but I also think the judgment should come in; and like everyone else would say, I've done it, too, gotten it thrown out, had to refile; but it's important to stay focused on the judgment, and if people aren't, then they're not -- sometimes actually there's problems in the judgment. It's not in accord with the opinion, it awards relief in a different way. So I think it's important to keep practitioners aware of a very key document, and then, of course, all the things you've already heard, which is just it is the judgment you are appealing.

But I think beyond that, I don't think it's just an issue of appellate purity. I think it's an important document that everybody needs to be aware of as part of the process, and if we don't, then we are losing sort of a tickler, if you will, for all practitioners, not just appellate, you know, specialists, but all practitioners need to be reminded this is a key document. You need to know about it. This is what the Texas Supreme Court is going to be looking at, as well as the opinion, so it warrants being attached. So I would keep it in.

CHAIRMAN BABCOCK: Okay. Roger.

MR. HUGHES: Well, yeah, I just want to echo that. Initially when I read this, yeah, I thought, well, why do we need the judgment anymore, but several years ago

I read an article about the importance of the drafting of the judgment, especially as it pertains to the scope of remand, et cetera, et cetera, et cetera, and how sometimes there can be a conflict between the opinion and the judgment over what's going back if they're not synced properly. So I would add the point that it not only helps the appellate practitioner remember, it helps the person who wrote the judgment in the first place to think that this is -- this is not an after thought, and it encourages both the author and the reader to think a lot about what the judgment says. Leaving it out would be a subtle communication that this is not an important document either to write or to read. So that's my two cents.

CHAIRMAN BABCOCK: Okay. Thanks, Roger. Any other comments? Pam.

MS. BARON: Well, I like to make clerks' offices happy because they're the people you deal with everyday, so I would be inclined, because it has been a pain for them to have to review and bounce all of these, to let them do it, but if the will of the committee is to leave it in just to remind people of the importance of the judgment, that the justices could certainly tell the clerks "From this day forward, we will not bounce petitions just because the judgment is not there."

CHAIRMAN BABCOCK: Evan Young.

MR. YOUNG: The -- I share a lot of the concerns, and, Pam -- I guess I was sufficiently vociferous about it that Pam credited me in the memo with that. I would just comment that at the U.S. Supreme Court, which is at least as assiduous about all of the technicalities and formalities and all the rest of it, a cert petition's appendix must -- must include the judgment sought to be reviewed if the date of its entry is different from the date of the opinion or order required in a -- in a different subparagraph, the opinion is accompanying the judgment. So it's just interesting, of course, that court also -- it's reviewing judgments, not opinions. That's the mantra, and the justices of that court are very fond of quoting it, but that court doesn't require judgments, unless it's of a different date. That's for a different reason, to compute whether or not it's jurisdictionally out of time given the relevant statute.

So given Pam's referral to us of how the clerk's office says, "We don't need this, it's a real burden on us," you know, I would agree, I kind of like keeping it in just for all of those salutary reasons that are articulated; but, you know, these are to benefit the court, not really to benefit, you know, the appellate lawyer, who should know to look at the judgment; and, you

know, with that, it strikes me as a possible way of either doing what Pam mentioned, which is to say, "Well, we just won't bounce it if it fails to comply with this rule, but we'll leave it in the rule in order to be able to signal the importance of the actual operative document or take it out just on the grounds that if it's -- that the appendix is there to benefit the Court, and the Court already has it and doesn't need it, then, you know, that would be the message hopefully that will be conveyed, not the message that the judgment actually isn't significant.

CHAIRMAN BABCOCK: Thanks, Evan. Yeah, Pam, on the issue of blame, why don't we just tell Blake that it's all Jackie's fault, or whoever the rules attorney is at the time?

MS. BARON: She wouldn't be happy with that.

CHAIRMAN BABCOCK: Probably not. Okay. Any other comments? We're about to take a vote. Everybody who wants to take it out, which is the subcommittee proposal, raise your electronic hands.

Everybody voted who wants to vote? I count 13.

MS. EASLEY: I got 14.

CHAIRMAN BABCOCK: All right. Let me look again. Yep, okay, 14. All of those who want to leave it in, raise your electronic hand.

MS. BARON: People have to lower their hands.

CHAIRMAN BABCOCK: Yeah, lower your previous vote hand and don't vote twice, and --

HONORABLE STEPHEN YELENOSKY: Pauline, can't you lower the hands for everybody after a vote?

MS. EASLEY: Yes, but they already started voting, so I can't determine who didn't lower their hands.

CHAIRMAN BABCOCK: We're going to trust them. So there's -- how many did you get on this vote, Pauline? Yeah, you're muted, so you would have to --

MS. EASLEY: 12.

CHAIRMAN BABCOCK: Yeah, that's what I got. So 13 take it out, 12 leave it in. So much for consensus, Pam. Your streak is over.

MS. BARON: If you had told me that we would have done that on this item compared to completely changing approval of supersedeas bonds, I'm still stunned, so all right.

CHAIRMAN BABCOCK: Well, a stunning result, but nevertheless, go on to the next item, and we'll be the judge as to whether it's difficult or not.

MS. BARON: Okay. This is the hardest conceptually for most people because it involves how the electronic filing system works, and Frank gave us a good

preview of that and also how case management works, but the question is whether to maintain a certificate of service requirement for e-filed documents in appellate courts. If you have not looked at a recent document filed in the Texas Supreme Court, it's worth doing that, because in the e-filing system the individual court can turn on a switch that says "produce an automatic certificate of service," and that then appends to the back of the document, and it shows exactly who was served through the e-filing system. And it doesn't matter what your certificate of service says, and many of them are wrong, or at least that's been my experience as somebody who doesn't get service or who hits the button to serve and then includes 50 people I didn't list on my certificate of service. The only way to know accurately who was served through the e-filing system is through the e-filing system report that's generated and then attached to the back of the document.

And on page five of your memo it shows all of the courts that have turned on this automatic certificate of service. It includes both the highest courts of the State and all but three of our courts of appeals, and those are the only courts we're talking about right now. The Second, Tenth, and Twelfth Courts of Appeals -- hi, Justice Gray, Chief Justice Gray -- have

not yet opted to turn it on, but my understanding is that Blake Hawthorne and the OCA, Office of Court Administration, is doing their best to persuade all of the courts in the State to move in this direction. And I have exchanged some e-mails with Blake Hawthorne, Clerk of the Texas Supreme Court. I've set out his comments. He thinks this works great. It's really the best way to know.

The two issues I saw with this are, one, you know, obviously we're going to have to maintain the certificate of service requirement for parties that do not file through the e-filing system. So you do get pro se or indigent parties or whatever, who are still filing paper copies with the court and not filing and serving through the e-filing system. The second is there are documents that are required to be filed in the appellate rules that actually are not filed in the appellate court. So your supersedeas bond is filed with the trial court clerk, your notice of appeal, a few other documents are just not filed in the appellate courts.

So what we have done -- and the subcommittee eventually saw their way to this. We had some struggles along the way, but we unanimously recommend what you see on the top of page six, and what we've done is documents that are served electronically, you can't serve a document

electronically unless you've filed it electronically, so it's also going to have been filed electronically. It says, "A proof of service and a certificate of service are not required for a document filed electronically" and then we add "in an appellate court," so we're not covering documents that are filed in trial courts that may or may not have turned on the automatic certificate of service and are also served electronically. And then we have documents not served electronically, and there we have done a little bit of renumbering, a little bit of tinkering, to add subsections that basically take the paper certificate of service that used to file and limit it only to documents that are not served electronically.

CHAIRMAN BABCOCK: Okay. Justice Gray had his hand up before you got your third word out, Pam.

MS. BARON: I imagine so.

CHAIRMAN BABCOCK: And he doesn't want us to hear him because he's muted. Nope, you're still muted.

HONORABLE TOM GRAY: I was trying to use the spacebar as Robert recommended, and for some reason that feature wasn't working at the moment. Well, see, first of all, I was trying to work with the Fourth Court of Appeals to make it where we were the Dr. Pepper courts, the 10, 2, and 4 that were not doing this. When Blake approached me on this, I told him that we would do it as soon as we got

a rule on it. So I'm in favor of the rule, because I don't want to do it, but right now the rule does not provide for a certificate of service, and so I try to play by the rules. So I'm in favor of it for that reason, do it, and I'll let it go at that.

CHAIRMAN BABCOCK: Thanks, Judge. Anybody else?

MS. HOBBS: Hey, I'm in favor of the rule, but I do want to correct something that Pam said that I think was innocuous and not -- but you actually can file and/or serve separately through the system without doing both. So I can serve discovery on somebody where I don't file something, and I can file something where -- if I'm a shit, which I'm not, but I could not actually serve something I filed, but the two screens are separate, and you actually can do those separately on the system, but what the -- it's irrelevant to this conversation, because what the screenshot will capture is who was served, which is what we're talking about, regardless of link -- it will capture everybody who is served.

MS. BARON: Right. I did not understand that, and I appreciate the correction.

CHAIRMAN BABCOCK: She's board certified, you know.

MS. BARON: Aren't we all?

CHAIRMAN BABCOCK: No. We're not all board certified. All right. Any other comments? Yeah, Kennon.

MS. WOOTEN: Two points, and they're kind of side notes. I'll be quick. First point is I continue to think that we need amendments to the Texas Rules of Civil Procedure to state more precisely the manner of service comparable to what we have in the appellate realm.

The second point is that something about the certificate of service and how it's structured has always bothered me a bit, because you put it in your document before you file it, and you state you have served a document before you have served it, and I struggle with that because it's a representation that is on its face inaccurate. It hasn't happened yet. So I raise that just because I have myself at times put into certificates of service, "The document will be served" in expla -- because that feels more accurate to me, and I may be splitting hairs, but this is something that's always troubled me a little bit because the attorneys are making representations that aren't, in fact, true when they're being made.

MS. BARON: Plus, they don't serve them themselves, so they don't really know.

CHAIRMAN BABCOCK: Right. But in the old days, Kennon, your assistant, your legal assistant, would

frequently send out the service copies at or before the time that the runner went down to the courthouse to file it.

MS. WOOTEN: And I think it made sense to structure the certificate of service as stated when that happened, because the service, you know, maybe had occurred beforehand, but now you make that representation all the time before you've actually served, and then you encounter sometimes difficulties with effectuating service as intended. You've already made a representation in a filed document with the court, and it just raises some kind of unnecessary dilemmas I think in the mind of the attorney trying to be as honest as possible.

CHAIRMAN BABCOCK: Got it. Thank you. Robert.

MR. LEVY: I agree with Kennon. The statement or the practice of certifying service is anachronistic when we have electronic filing, and not only is the timing off, but you're trusting that the electronic system is doing what it's supposed to do, and you don't really know. You don't know if opposing counsel gets it. The system is designed to accomplish that, but the whole purpose of certifying service of process I don't think really should be in there.

MS. BARON: You do know that they got it,

because you can go into the e-filing system after you serve a document, and it shows who opened the document and who received it.

MR. LEVY: You can do that later, but you don't know it while you're doing it, plus it's not your -- kind of your action. It's the system.

MS. BARON: You do know while you're doing it, because you put a check mark next to everybody in the list of counsel who you are serving, so you have -- and those are the people who are going to get served. It's extremely accurate. I think I've had cases where I think people affirmatively unchecked my name, which I don't quite understand the reason for that. When I represent an amicus they don't have to serve me, and so they decide they're just not going to, but that's a whole different issue, but, no, you know who you're serving through the -- I file my own documents, so I know how these work.

MR. LEVY: Well, don't you -- don't you also get notification of filing even if you're not checked for service in those cases, if you're a listed counsel?

MS. BARON: No.

CHAIRMAN BABCOCK: Lisa.

MS. HOBBS: I think -- I mean, I think Kennon and Robert have raised a good point, but I think they're actually in favor of the rule change, right?

Because we're now not just like certifying that the lawyers are doing what they're supposed to do, but we're actually getting a third party confirmation that they did, in fact, do that thing. So, I mean, I think this is great. I mean, I'm probably going to be one of those old school like dinosaurs who still keep my certificate of service, and that's just tacked onto the end as it is with my Supreme Court filings right now, but maybe, you know, 10 years from now, some associate is going to be like, why are you so old school, and I'll change it, but right now I believe the most accurate formation of who was actually served is from that third party server that says these parties were actually served, and I don't think there's better evidence of who was actually served than that -- than that certificate that the clerk's office gets.

CHAIRMAN BABCOCK: Okay. Any more comments this?

MS. WOOTEN: I should have stated I agree with the rule instead of stating things that weren't really on point to the proposal. I do agree with the proposal.

CHAIRMAN BABCOCK: Yeah. Yeah, that occurred to me, Kennon, but we're moving on.

Okay. Hyperlinking. This is easy.

MS. BARON: If you've ever had to make your

own hyperlinks, it's not easy, but the question is whether or not we should move to a uniform system of citation -- am I frozen?

CHAIRMAN BABCOCK: No.

MS. BARON: Okay. Uniform system of citation to the appellate record in the appellate courts, so that they can automatically hyperlink to the appellate record, and if you're not familiar with the appellate courts now currently have a system in Texas where they do automatically hyperlink to the cases that are cited. If they are online, they can, you know, click on the case, and it will I think pull it up in Westlaw or whatever. The Fifth Circuit has a program that automatically hyperlinks to the record. They have a uniform system. It's ROA and then the page number. In the Fifth Circuit the appellate record is one document. It's consecutively numbered, so it's pretty easy to figure out out how to connect that cite to that record in that case.

I've had a number of conversations with Blake Hawthorne, Clerk of the Supreme Court, on why the Fifth Circuit system currently cannot work in Texas, and I think you heard earlier from Sharena that all of the clerks and counties and district courts have different case management systems. Some are Mercedes and some are Hondas. And our records are produced a little bit

differently. They're produced by individual clerks from 256 counties across the state, so they're not -- they're semiuniform. They're not super uniform. We have a separate reporter's record that's not consecutively numbered with the clerk's record, and as Blake explained it to me, he dumbed it down for me. He said think of it as like car parts. In the Fifth Circuit all of the car parts are standardized, so if you need a muffler, everybody uses the same muffler. In Texas we have basically every kind of car you can name, and so we can't develop a program at this point that plugs that muffler into an automatic hyperlinking system.

Obviously this is something that they are striving -- or desired to get to at some point in the future, but right now it's not technically feasible in Texas. The question is whether we want to develop a uniform system of citation just to get used to it right now. I'm not sure that the appellate courts are too burdened by not having a uniform system. Most people use one of two or three different formulations. You might -- for the reporter's record you might put 1-RR and then the page number and in the clerk's record you put 2-CR and the page number, and then of course we have first supplemental and second supplemental and third supplemental clerk's records, but that's another story, and you develop just

some kind of thing that works, and I don't know that appellate courts and staff are having that much trouble interpreting the citations to the record at this point.

What I would say and, you know, we could do it. We might have to change it later if the technology becomes available with a uniform ability to hyperlink to the record. We probably would have to completely change what that citation to the record would be, so that would really not accomplish the ability to hyperlink in any way, and I guess in terms of we do have a lot of appellate practitioners on this call. We are very protective of our word count limit, and we would be vigorously opposed to anything that would add any extra spaces in the citation form, so that 1-CR-3 suddenly becomes three words instead of one word on a word count. But our committee unanimously agreed to propose no change at this time and to encourage OCA and the Joint Committee on Information Technology, whatever it is, to pursue exploring how we can have a uniform record so that we can get to this at some point in the future.

CHAIRMAN BABCOCK: Okay. Are there any proponents to change now? I know the subcommittee unanimously rejected that, but how about -- how about somebody like Justice Gray who wants to change now?

HONORABLE TOM GRAY: You will maybe find

this surprising, but I do like technology. I would really like to see this happen sooner rather than later, and I think that the way to do it is from the top, meaning that if the Supreme Court will impose the rules that make it the most efficient and economical way to do it, the courts of appeals will follow, then the trial courts will follow, and we will be there much, much sooner than waiting for JCIT to try to implement it from the ground up. This is one of those things where I strongly recommend to the Supreme Court to lead where the rest of us can follow. If they don't do it first, there will be a -- I think Pam said there's three or four different methods generally used in citations now. She must work with just three or four different appellants or appellees because they're all done different ways, and in the criminal arena where there's a lot more -- there's a lot fewer appellate specialists, we see a much wider range of kind of ways to cite things. I -- I just think if the Supreme Court takes the bull by the horns, cram down effect, we will get there sooner.

CHAIRMAN BABCOCK: Thanks, Justice Gray. Lisa.

MS. HOBBS: Yeah, I want to reiterate two points. One, Pam has already spoken on behalf of all of us who are appellate practitioners. There should be no

spaces in any of those record citations because that takes away our word count. We do not want to -- it needs to be just all one, how awkward you make it, capital letters, I don't care, but no spaces because I want one word for every record citation. But to Justice Gray's point, which is actually really important, you know, those of us who practice mostly in the Supreme Court, we have the benefit of at that point a mostly stagnate record, but I can't tell you -- I mean, I commiserate with Justice Gray about when I am in the court of appeals, I'll be writing my brief, and I'll realize either something I requested wasn't included in it or something I didn't even know existed was not included, but either way you get these supplemental records, and no clerk's -- of the 254 clerks offices, some will call it first supplemental record, some will call it supplemental record. Some will -- the names get a little bit lost, so I -- I think that's going to be the challenge, and because the Supreme Court has so many more stagnate records, it's very rare that I supplement at the Supreme Court level.

I think y'all may be able to look at your database and kind of assess the scope of those names in a way that would be hard among the 14 court of appeals.

CHAIRMAN BABCOCK: Okay. So the -- thanks. Thanks, Lisa. The recommendation is to wait for the

technology. Justice Gray says, come on, Court, be a leader, don't be a follower, but is there anybody else that wants to speak up in favor of we need to -- we need to get a rule -- we need to spend some time to get a rule before the Court to speed up the technology? Okay. Anybody feel strongly about it?

Jackie, I think we'll leave it to you and Martha and the Court to tell us whether you want us to work on a specific rule, because right now we're just saying, you know, wait for the technology.

MS. DAUMERIE: I'll get some feedback and get back to you.

CHAIRMAN BABCOCK: That would be perfect. Thank you very much. Let's move on to whether to remove or limit the statement of jurisdiction.

MS. BARON: Okay. This is Item E on page seven. Right now statement of jurisdiction is mandatory in both the petition for review and a petitioner's brief on the merits, and it's supposed to state without argument the basis of the Court's jurisdiction. The Court's jurisdiction used to be a little more complicated than it is now. There used to be a lot of subsections like dissent, conflict, cases involving state revenues or the Railroad Commission, and these were all amended in 2017, and basically it's a one-stop shop. It's is the issue

presented important to the jurisprudence of the state, and the interlocutory appeal statute was similarly amended so that it now falls under that same jurisdictional umbrella. So there's really not much on a normal petition to dispute about jurisdiction other than whether the issue is important. People like me, though, view this because the statement of jurisdiction is not included in the word count, we beef it up. It's like the free space in bingo. You go for it right there.

I can understand that the Court probably skips that most of the time now, because jurisdiction is really do they think it's important and are there enough votes to grant, and so we kind of came down with you don't need it, and so take it out in both. And also take out in the response to petition and respondent's brief on the merits, the reference to the statement of jurisdiction, and that recommendation is on page eight, just above F.

CHAIRMAN BABCOCK: Thank you. Comments about this? Eliminating the statement of jurisdiction. Nina.

MS. CORTELL: It's really more in the way of a question. I understand, and I'm -- I'm kind of neutral on this, but do you think that for those who don't regularly practice in the Texas Supreme Court, whether there isn't a purpose to be served here by making sure

that that person or that lawyer understands the way to frame the petition is to fall within this jurisdictional standard so that it's really not for this group that's here today, but for those who are less frequent visitors to the Court, whether it is important to remind them of the standard that they need to address, because if they miss it then their entire petition could be wrong headed.

CHAIRMAN BABCOCK: Thanks. Mike Hatchell. Take yourself off mute. And if you don't --

MR. HATCHELL: Sorry about that. No, I think it's useful to state the basis of jurisdiction. I'm not sure that -- even though we've had an amendment to our jurisdiction to eliminate subcategories, I'm not sure that all categories are the same, such as original proceedings may have a different statutory and constitutional basis, and there also is two or three unwritten grounds of jurisdiction. One would be *Eichelberger vs. Eichelberger*, which is of a constitutional dimension, and then there's the hidden appeal from courts of appeals that I won't go into, but since it's so short and there are varying reasons or varying bases for jurisdiction, I don't see any reason to take it out. I think it's very useful to have.

CHAIRMAN BABCOCK: Thanks. Roger. Take your -- there you go.

MR. HUGHES: I was going to say that I --

maybe Mike can address this, whether there were any oddball statutes of providing jurisdiction, aside from that in the Government Code such as direct appeals from the trial court, like some federal jurisdictions are not -- so that if there were, shall we say, something in addition to the general basis it might be worth a section so that the party could alert the Court to an additional basis. That's all.

CHAIRMAN BABCOCK: Thank you. Lisa next.

MS. HOBBS: Yeah, so I think what Hatchell and Roger are getting at is what would be the basis for the Supreme Court to on their own right, if -- if there is an unusual basis for jurisdiction, which would not be the traditional petition for review or even the petition for writ of mandamus, what would be their grounds if they doubted jurisdiction. Would the party be thrown out, or would the Court have some means to do it? And I think, you know, the short answer is that historically the Supreme Court has questioned its jurisdiction, particularly on direct appeals. Any time you bypass the Supreme Court and you allege some basis for it, they request a briefing purely on the jurisdictional issue and -- and Pam is raising her hand, and so I am going to defer to my esteemed colleague that she may know more than that, but that's kind of my concern, is I generally think

that section is useless in 99 percent of filings, but in the one percent that it is useful, then I do worry a little bit about it, along with Mike and Roger.

CHAIRMAN BABCOCK: Pam.

MS. BARON: Well, I think the one percent fall under different rules. So if you are filing for mandamus, that's a different rule. It does require a statement of jurisdiction. If you are bringing a direct appeal, that's a different rule. You file with the Court, you know, a document asking them to accept jurisdiction over the direct appeal, and the parties brief the basis for jurisdiction in all of those cases before the Court requests or accepts the case and requests briefing. So we're not talking about the one percent of cases. We're talking about the 99 percent of plain vanilla petition for review cases that are not under some extraordinary chutes and ladders way to the Court.

MS. HOBBS: So you're excluding -- you're excluding -- you're just doing the petition for review rule and not the petition for writ of mandamus, so if I have a mandamus against executive officer, I would still need to explain why the Court could mandamus an executive officer?

MS. BARON: Yes.

MS. HOBBS: Okay.

MS. BARON: Just in the petition.

CHAIRMAN BABCOCK: Okay. Scott.

MR. STOLLEY: Thanks, Chip. I'm on that subcommittee, and I agree with the recommendation to drop the statement of jurisdiction. I will say, though, as an alternative if the Court decides it still wants to have that section in, I think we all agree that we find that that section gets misused more often than not. It's turned into another argument section, so the alternative I would suggest is at least putting a very small word limit on that section if it's kept. Maybe 50 words, something like that. Not apply that toward the 4,500 word limit, but I think we've got to rein in these crazy long statements of jurisdiction that have just become another argument section.

CHAIRMAN BABCOCK: Yeah, Pam.

MS. BARON: I love it. I love the statement of jurisdiction section.

CHAIRMAN BABCOCK: Yeah, okay. So the subcommittee says take it out. How many in favor of take it out? Put up your electronic hands and be counted.

Everybody done? Pauline, how many do you get?

MS. EASLEY: 14. Well, 15 now. Someone else just voted.

CHAIRMAN BABCOCK: Okay. 15, take it out. How many for leave it in? Well, everybody lower your hand. Everybody lowers your hand, and now leave it in?

MS. BARON: Mine's still up.

CHAIRMAN BABCOCK: Well, take it down.

MS. BARON: Okay. I did.

CHAIRMAN BABCOCK: Everybody done voting? I got eight. Pauline, how many do you have?

MS. EASLEY: Eight.

CHAIRMAN BABCOCK: Okay. 15 to 8, take it out. All right. On to the next item, whether to add a reasons-to-grant section in the petition and brief. Are these words going to count, Pam, or not?

MS. BARON: Yes.

CHAIRMAN BABCOCK: Uh-oh.

MS. BARON: Reluctantly. To begin with, I guess I want to say our subcommittee believed that the petition and briefs are fundamentally different purposes, and I know that Evan Young on our subcommittee has been working with the Court to examine the petition for review brief on the merits two-stage process to see whether adjustments to that to parallel more the U.S. Supreme Court are in order, but the concept in the U.S. Supreme Court is that the petition is to convince the Court to grant review, and the purpose of the merits brief is to

actually brief the merits, and under our current system, you sort of have to make your pitch in both, but for purposes of examining changes going forward, we as a subcommittee thought it's best to recognize at least in theory that they do serve different functions, and so we did think that the idea of including reasons to grant in the petition for review was a great idea. We did not think it was such a great idea at the merits briefing stage where you're supposed to be briefing the merits and not trying to sell the product anymore.

So the rationale was a lot of good practitioners are already doing this. Many either do it in the introduction section or in the statement of jurisdiction section or in the summary of argument. They are addressing, "Court, here are the reasons the issues here are important to the jurisprudence of the State" and why they should -- why the petition should be granted, and a number of us already do, you know, "Summary V. Argument," colon, "Review is warranted." Or, you know, "Introduction: This case presents issues important to the jurisprudence of the state." And so adding this section is a way to try and up everybody's practice so that everyone is doing that, and we kind of discussed where and how it should go, whether it should be up front, and also, of course, vigorous discussion of how it would affect our

ever-protected word count limit. And what we did decide was right now in the petition, if you include something that's like introduction that explains why the Court should grant review, the summary of the argument is not super useful as a separate matter.

In fact, you know, summary of argument is required in the petition, and sometimes if you're not actually arguing about reasons to grant, there's not much to say in there, other than two sentences about everything you already are going to say in the next four pages. So it can be very, very redundant, so in terms of trading off on word count, we are willing to leave the 4,500 word count on the petition by substituting reasons to -- introduction and reasons-to-grant section and deleting the summary of the argument on the theory that that's kind of a wash in terms of words, and our recommendation would be to put the introduction and reasons-to-grant section before this -- right after the issues statement, but before the statement of facts so that it would front-end load the petition and the Court could see right up front why you think this case merits their attention and a grant.

So our recommendation, unanimous again, is on -- it got a little complicated. Let's see, is on page 10, so you can see in (c) -- excuse me, I had to talk way

more than I've talked in the last six months. I'll tell you that. We have taken out section (e), which was statement of jurisdiction, in accordance with our last discussion and renumbered issues -- relettered issues presented. We've added new section (f), introduction and statement of reasons to grant, and it says, "The petition must contain an introduction stating the reasons the Court should grant review." Then we have modified (h) and say that, you know, if you want a summary argument, you can have it. It's optional. And then instead of calling the argument "the argument," we are calling it "reasons to grant," again to help whoever is writing the petition to focus on what the purpose of the document is. And I think that covers it, and we did -- we did need to change the response to petition rule, which is right above (g) on page 11 where we give the respondent the ability to include a statement of the reasons the Court shouldn't grant review, which is what the whole purpose of the response to petition should be and not always is. And then we also determined or agreed that no parallel changes should be made to the briefing on the merits rule.

CHAIRMAN BABCOCK: Pam, just the -- the summary of your recommendations are at the top of page nine, right?

MS. BARON: Probably. Yes.

CHAIRMAN BABCOCK: Okay. And then the actual language is on 10 and 11.

MS. BARON: Yes.

CHAIRMAN BABCOCK: Great. All right. Comments? Nina.

MS. CORTELL: I agree with everything that has been recommended. I would suggest one slight modification, and that is the header on subsection (i). I would stay with "Argument." I think it's a little confusing, because -- as suggested, because you have statement of reasons to grant in (f) and then we've got reasons to grant again down in (i). I think argument is really what we're talking about here, and often -- at least how I've always done it, I have to say, and I've always done a reasons-to-grant section, so I've done that, but the argument, it can be a little bit different, and I think you make the point you want to make in the body where it says the argument should state the reasons why the Court should exercise jurisdiction so there's not confusion there. So I would stay with the original header.

MS. BARON: I'm fine with that. It would be subject to -- I think this came from Evan Young in terms of changing that word, and, Evan, are you okay with that?

MR. YOUNG: Well, it's not so much whether

I'm okay with it, whether the Court thinks it's useful. To me, honestly, the petition -- this is a distinction between the brief and the petition. What we would maybe characterize as argument might really just be a subset of the reasons to grant, if you accept the premise that the petition is -- is there, the documents to cause the Court to say, all right, we have a limited docket, why this case should be included, a plenary review on that plenary docket among the many, many cases that we get. One basis is, you know, the judgment below is wrong, or the opinion below is wrong even, I suppose we could say based on our prior discussion.

The others would be things like there's massive confusion or the case is really important, as it relates to the jurisdictional. It's just really important to the state. It involves a lot of governmental entities across the state. It will affect a lot of money, across -- whatever those thing are, those are reasons to take it that are not primarily about the merits, but one of them also just is this is an error in the law and you should fix it before it metastasizes beyond what already has happened, and to me all of those are -- we say those -- I think, Nina, maybe you had mentioned at least once today, what are we doing that signals to people what this -- this is for, and I think that deleting the word

"argument" helps people at the petition stage understand that everything I'm saying, yes, it's an argument, and we can be clearer, whether in the text or in guidance, but it's an argument that's focused not primarily, just on the lower court got it wrong. I would include that.

And I don't think it's important that it matches up with what the U.S. Supreme Court does, just because the U.S. Supreme Court does it; but they have been fairly successful in their certiorari process, not having an argument section at all but calling it "reasons," the "reasons" section, as this would do; and I think it really does make all practitioners, whether they are routinely in the U.S. Supreme Court or not, stop and recognize the distinction between an ordinary argument you make to an appellate court about why you're right versus something that's a little bit more nuanced and more useful to a court with discretionary reviews. I personally would prefer to keep it this way, but it wouldn't be the end of the world. It would still be a great advance, I think, to make these other changes.

CHAIRMAN BABCOCK: Lisa.

MS. HOBBS: Okay. So I kind of think I'm opposed to even the fundamental changes to the subcommittee recommendation, without making Pam mad at me that I didn't say that before because she was kind enough

to include me on a lot of correspondence with the subcommittee.

MS. BARON: Yeah, the statute of limitations has passed, Lisa.

MS. HOBBS: Okay. And here's the reason why. This is all an art form, and the petition is especially an art form. Okay. Like where we add value as appellate lawyers is at its height at the petition stage, I think, but we carry it on through the briefing. Obviously we're all really concerned about the development of the law, but I'm telling you, even though I appreciate as I read what's supposed to be in my petition for review, I have never done a summary of an argument. I have always said reasons why the petition should be granted if I'm petitioner or reasons to decline review if I'm the respondent, and never once has my brief been stricken for doing so, which is all to say, sure, it's good to -- like, we -- those of us who practice in the Supreme Court all the time, we know that that's our job.

We're either trying to convince the Court to take the case or try to convince the Court to let it go, but what you put on those headings is so not important and has never been stricken, at least in my experience, even when I didn't completely comply with it, because really what they're looking for is they want the art and not

the -- and some people have it; and, Pam, you have it, and Nina has it, and Evan has it, and you guys all have it, whether you're on the petitioner's side or the respondent's side, but changing those headings, it's sort of -- you're just -- I feel like it's missing the point, in my opinion; and it's not helpful and I'm not sure that -- and I hear the argument that it might make people -- other people who are not us in our little appellate world think about it more, but they probably also won't do as good of a -- like it won't really change the summary of the argument or the -- like it will still be a summary of the argument. Like they -- if you don't get the art, you don't get the art; and I don't know, I just feel like I'm -- honestly, I'm not opposed to any of this. It's what I do anyway, but I also don't think it's necessary, whether you call it a summary of the argument or reasons to grant review. It's never been dinged either way, and so I don't know. That's just my kind of opinion. Sorry.

CHAIRMAN BABCOCK: Sounds like you feel strongly both ways. Hatchell.

MR. HATCHELL: I'm for the change. I think most summaries of arguments these days at the petition stage are crammed into whatever few words you have left and are largely meaningless. I mean, they've just become

abstract statements, and I think the change would perhaps channel the nonspecialist into thinking more creatively about the underlying policies they use and adverse consequences involved in the case. My only change would be, which is what I do in petitions now, is I make it much earlier on. I would make it virtually the first thing you read when you turn the cover of the brief, and I mean, I -- most people know I absolutely detest what Bryan Garner has caused, these visually repulsive statements, single-spaced statements of the case, which I don't think anybody reads. So I think you ought to engage the Court very early on on what this case is about from a fundamental level by moving the reasons to grant forward.

CHAIRMAN BABCOCK: Okay. Thanks, Mike. So we have a -- we have recommendations from the subcommittee.

MS. HOBBS: Can I just say something in response to that?

CHAIRMAN BABCOCK: Go ahead, Lisa.

MS. HOBBS: I'm sorry. But never in my life have I thought that the contents of the petition for review had to be in that order. So there are times that I go heavy on the front end, because, again, it's an art, where I want to set the stage before you read the statement of facts. There's other times that the

statement of facts lead to my legal argument, and so I want -- but there's nothing in 53.2 that says this is the order, and I've never read it as such. But I -- I mean, I respect my appellate colleagues if they tell me I'm wrong on that, but I have never -- I've never read that rule to say there is an order, so are we really talking about requiring an order to those?

MS. BARON: No. No.

CHAIRMAN BABCOCK: That's not the way I read it either. Justice Gray.

HONORABLE TOM GRAY: "The petition for review must, under appropriate headings and in the order here indicated, contain the following items."

MS. BARON: Well, that's always been viewed as just a guideline, not a code.

CHAIRMAN BABCOCK: Well, we're all doing it wrong. We've got a recommendation, and we've had a nice discussion. How many people are in favor of the subcommittee's recommendation? Electronically raise your hand.

Pauline, I've got 18.

MS. EASLEY: I have 19.

CHAIRMAN BABCOCK: Okay. Maybe I missed one at the end there.

MS. EASLEY: Looks like 21.

CHAIRMAN BABCOCK: Yeah, 21. All right. Those opposed to the recommendation? Everybody put their hands down.

MS. BARON: Well, my --

CHAIRMAN BABCOCK: Or, Pauline, you could put everybody's hands down. Okay. Now everybody opposed to the subcommittee. Anybody else want to vote?

So by a vote of 21 in favor, 2 against, that will give the Court some sense of our subcommittee, or our committee's recommendation on that. Okay. We're on to G, the home stretch here, Pam.

MS. BARON: Well, we have a whole other agenda item, but, yes.

CHAIRMAN BABCOCK: Yeah, I know that, but on this agenda item.

MS. BARON: Okay. This is whether to add a requirement to include a citation to where the argument has been preserved, and we viewed this as a question limited to Supreme Court petition and brief, and it's not that simple to say exactly where in the record the issue was preserved because it depends on a lot of things. It depends on whose burden it was at trial, whether it's JNOV, whether you were appellant or appellee in the court of appeals, whether the error arose at the trial court or in the court of appeals; and sometimes you have no

obligation to have preserved error; and it takes a lot of time and space to explain all of those factors; and again, we are zealously guarding our word count.

It didn't seem all that useful in most cases, because in most cases by the time you get to the Supreme Court, you're not really often fighting about whether the issue has been preserved. Usually it will have been addressed by the court of appeals, so you know it's been preserved at that point. And the Supreme Court, even in those cases where parties do challenge and dispute whether an issue has been preserved, takes a very liberal approach to preservation and generally does find that it has. So it would be using a lot of time, effort, energy, and words to provide information that in most cases is not necessary. And in those cases right now where preservation is an issue, the respondent is always free, and, in fact, maybe under the obligation, as is probably the petitioner's counsel, to show that it has not been.

So we generally thought this was not a great idea. We would leave it as it is. If the Court, for some reason, thinks it's that important to require this in all cases when it's only going to be at issue in a very small number, we would recommend that it have to be done on the issues page so that it doesn't count in the word count.

CHAIRMAN BABCOCK: Pam, you must have

thought that this was going to be the most difficult issue of all of these.

MS. BARON: No. This just kind of fell into the substantive changes, so that's where it ended. No, I thought the supersedeas one was going to be the worst.

CHAIRMAN BABCOCK: Okay. Lisa.

MS. HOBBS: Well, I want the record to reflect that I completely agreed with the supersedeas thing. Hey, Jackie, I just have a question. Was this proposed -- because as I understand it, and maybe around the time I was at the Court or around the time I left the Court, the law clerks have to do this section in their memo, and so the idea would be to create a section in the brief where it kind of centers the law clerks so that they don't have to go through the record, you know, so difficultly, that both parties have kind of addressed kind of whether this was preserved and where this was preserved in a way that helps them do their study memo. Is that kind of the thought behind this recommendation or --

MS. DAUMERIE: I honestly can't remember off the top of my head exactly where the recommendation came from. Martha, do you?

MS. NEWTON: Yes. This, I think, came many years ago from the Court Rules Committee, the State Bar committee, and it was kind of championed by a staff

attorney at an intermediate court of appeals. In my -- and this was back when I was the rules attorney; and the impression that I got from that -- from being present at the meetings where that was discussed was that they have such a high volume of appeals that they, you know, have to go through; and I guess, in some cases there are people making -- you know, trying to make arguments for the first time on appeal that weren't preserved and that it adds to, you know, her time or it becomes burdensome on the court of appeals staff to have to go through and kind of weed through the record to try and find, you know, to see if the argument was preserved. I agree with the comments that this, I don't think, is really an issue in our court, just because of the nature of -- of, you know, the practice.

MS. BARON: And also -- I'm sorry. It also encourages, once you start down this road, more fights about preservation, once you start having to put it in there.

CHAIRMAN BABCOCK: Yeah, if there's a serious preservation issue, your opponent is going to point it out. The respondent is going to point it out, so Roger.

MR. HUGHES: Yeah, well, I'd like to sort of argue the other side, because I remember when we used to

do points of error, and the rules of procedure required that the point of error contain a reference where the error was preserved in the record, and I think that was useful because it focused people on what was the error, not what's your legal argument is, I mean, for a preservation point.

And so my suggestion would be is that, number one, we -- that would be useful in the court of appeals and then merely to put it in the issue statement as to where the error occurred or something about where it's preserved. That way it doesn't work against the word count, and if it becomes an issue, the court of appeals will deal with it. It will be in the opinion, and it doesn't need to be handled in your petition for review. I think maybe dropping -- not having it in the petition for review is a good idea because everybody worries now about the word count, but I think it would be a very useful, you know, return to the past for briefing in the court of appeals.

CHAIRMAN BABCOCK: Thanks, Roger. Mike Hatchell.

MR. HATCHELL: Roger is correct that this is kind of deja vu all over again. We used to have this requirement, and I would have to say that at the end of a briefing process it would sometimes take you as many as

four hours, maybe longer, to document all of that for an issue which may not even come up on appeal. So it's enormously expensive to the practitioner to have to document all of this. The rules already provide that you give record references, appropriate record references, to actual statements and arguments that you make. So it's already there, but Pam is absolutely correct that this is just not easy to decide. So -- so if you -- if you omit something, then now are courts going to start throwing you out of court because you forgot to put something in? Just in my experience the fights over preservation are very few and very easily determined. So I don't see any reason to go back in history and start this extremely expensive and perhaps largely useless process all over again.

CHAIRMAN BABCOCK: Thanks, Mike. Frank.

MR. GILSTRAP: The direction from the Court just said citations, and I thought that was ambiguous. I mean, there's citations to the record, and there's legal citation. Everybody here who practices in the Supreme Court says, oh, this means record citations. Well, it needs to -- if the Court puts something like that in here, it needs to say "citations to the record" because there are people who maybe don't practice as often in the court would look at that and say, oh, I've got to have legal citation to support preservation.

CHAIRMAN BABCOCK: Thank you. Kennon.

MS. WOOTEN: My spacebar trick also did not work, for the record.

CHAIRMAN BABCOCK: Who suggested that?

MS. WOOTEN: It's a good suggestion. It works sometimes, not all the time. But I digress. I will say from the State Bar Court Rules Committee recollection I have, there was some strong opinion from the staff attorney at the court of appeals about needing this information because there was a thought that it would reduce the burden that's on them, so I would throw that out there just because I think when we're considering burden on practitioner, we ought to be equally sensitive to the burden on the court personnel. I'm not speaking necessarily in favor of it, but it was something that struck me as worthy of attention when I was on the Court Rules Committee.

I'll note further a slight recollection -- and Martha may have a better one than I do here, but my slight recollection is that the discussion at the Court Rules Committee level included an assessment of what the rule used to say and an effort to ascertain why the rule was changed, and we were not able to identify a real good explanation for why the rule was modified in the past. And I defer to Martha if she has a better memory than I do

on that front.

MS. NEWTON: I do not remember that.

CHAIRMAN BABCOCK: All right. Thank you. Evan.

MR. YOUNG: Pam had mentioned that when we were thinking about this we were focused on this at a Supreme Court rather than court of appeals level, and now Martha and Kennon have clarified where that came from, but it actually makes me like it even less as an idea, just the idea that the other side isn't troubled by any of these arguments, that they aren't saying it hasn't been adequately preserved, but some staff attorney is just wanting to be Inspector Javert and go around and find ways to pour you out when the adversarial process is just -- I want to double my vote against adding this requirement now.

CHAIRMAN BABCOCK: Okay. You can vote twice, Evan. That's a deal. Roger, and --

MS. BARON: "Look down, look down."

MR. HUGHES: Well, look, if I may give a slightly more nuanced approach to the last comment. I have been in cases and I have seen cases in the courts of appeals where you're -- you make an assertion about an issue. The other side joins issue, argues it, never talks about error preservation, and then you get an opinion for

the first time and say, "Well, we don't think you preserved error, bye." Too bad, so sad. I think it's important in the court of appeals because there are clerks who, if they can't find it, they'll tell their judge it's not preserved and what a nice way to get rid of a difficult issue, and you don't get any answer, and then you file a motion for rehearing explaining where in the -- where you think you preserved it, and all you do is get a postcard saying so sad.

And you never get -- you never get to join issue, because when the first time around they couldn't find it because you didn't tell them in your point of error where it is. So I think at least in the court of appeals it is an important hedge against getting a surprise, and it also means that if -- if the judge or a law clerk thinks you didn't preserve it, well, there it is in your brief explaining where, and they'll have to deal with it. So that's my opinion.

CHAIRMAN BABCOCK: Okay. Thanks, Roger. Justice Gray.

HONORABLE TOM GRAY: The rules by which we live is that we must address preservation first. We frequently don't because there's no argument, but we have to look at that with regard to the issues we address. Please remember that 60 percent of my docket is criminal

cases. Preservation is a bigger problem in criminal cases than in civil cases, because there are two types of error -- not even getting to charge error, but it's a case called Marin, cagetory one, category two, that don't require error preservation. Then whether or not it -- in the charge error if it was or wasn't preserved, it affects the harm analysis, how you approach the harm analysis, so in the court of appeals, if that's what we were actually talking about here, it would be very important because we're talking about petition and not briefing in the court of appeals. Frankly, that's after I have to deal with it, so I don't care.

CHAIRMAN BABCOCK: Richard Munzinger. No, you've got to unmute yourself, Richard.

MR. MUNZINGER: Sorry. I agree with Mike Hatchell's comment. This costs time and money to clients. We're talking about the petition for review and not briefing in the court of appeals. If there's an issue, the other side will raise it. You pointed that out, Chip, and I agree with that. If they raise it, then you go back and you say, no, it's in this or there or whatever it is. It becomes an issue if raised. If not, let the Supreme Court get on with it and deal with the jurisprudence of the state.

CHAIRMAN BABCOCK: Thanks, Richard. Lisa.

MS. HOBBS: I was about to text Pam. Like was this proposal just for the Supreme Court, or was it for the court of appeals? I thought it was just for the Supreme Court, but that may have been my own ignorance.

MS. BARON: Well, that's how I read it, and I guess if the Court wants to refer it back to us to look at court of appeals, we can do that. I don't know that I would change my opinion, but our subcommittee could discuss it.

MS. HOBBS: I'm not sure I would either. The rationale for the Supreme Court is that in the briefing attorney's memo they have to do a preservation section, so if they have that section in their memo, hell, I'm happy to like write that for them, and you just cut and paste what I say happened. And so it's worth my client's time for me to do it at that stage, but to Justice Gray's standpoint, preservation of error isn't -- that's not fundamental error; and so if the other side doesn't raise it, I don't know why courts of appeals are going out of their way to raise it, because if I didn't -- let's say my trial counsel did not raise an issue and the other side -- we go through full briefing at the court of appeals and they don't raise lack of preservation, I don't know, I kind of think that's waived.

Like, but I know smart people can disagree

with me, and you can disagree with me in a way that a different court of appeals might disagree with me, but we aren't talking about fundamental -- it's not like subject matter jurisdiction where you actually have an obligation to consider your jurisdiction, so I don't know. I feel like we're going down -- if anything, the conversation that we're going down is making me way, way, way less inclined to include this, even though I do think it would be helpful at the Texas Supreme Court level where I know within -- internally within their briefing memos that the law clerks do, they have to include this section.

CHAIRMAN BABCOCK: All right. The subcommittee recommends no change. How many people are in favor of no change? Raise your electronic hand.

Evan has got two votes. Sorry, good point.

MS. BARON: Does he have two hands?

CHAIRMAN BABCOCK: He has two hands, yeah. Okay, Pauline, I've got 22.

MS. EASLEY: So do I.

CHAIRMAN BABCOCK: All right. Everybody lower your hand. Okay. Anybody that wants a change, raise your hand.

Okay. Almost, Pam. You almost got unanimous. 22 to 1, so no change. The subcommittee recommendation is followed in terms of our recommendation

to the Court. So now we've got one more agenda item, but I think we'll give Dee Dee and everybody a break, and so why don't we come back at 10 minutes to 4:00. I mean, I'm sorry, 20 minutes to 4:00, so take about a 15-minute break.

MS. BARON: Okay.

CHAIRMAN BABCOCK: All right. Great. Thanks, everybody.

(Recess from 3:26 p.m. to 3:40 p.m.)

CHAIRMAN BABCOCK: Well, we're on the home stretch now, and this is an item that got added late because we had somebody else drop out. But this is vacating opinions, and surprise, surprise, the person leading this is Pam Baron, who is not back on screen yet, so we'll have to wait for Pam, but it's Tab I, the August 13th, 2020, memo, regarding TRAP Rule 56.2. So as soon as Pam comes back --

MS. BARON: Sorry.

CHAIRMAN BABCOCK: -- we will get after it. Hey, Pam.

MS. BARON: Sorry.

CHAIRMAN BABCOCK: I gave you a huge build-up.

MS. BARON: What did you say?

CHAIRMAN BABCOCK: I said surprise,

surprise, leading our final item of the day is none other than Pam Baron.

MS. BARON: On the Guiness Book of World Records, I'll just go down as 10 items in a row.

CHAIRMAN BABCOCK: It's awesome. You are so awesome. It's incredible.

MS. BARON: Thank you. All right. Last item. Vacating court of appeals' opinions in moot cases. We have a little bit of an aberration in the appellate rules, and if you turn to page two of your memo and you compare Rule 56.2, moot cases, with 56.3, settled cases, and you read the last two sentences of settled cases that are in bold, it says, "The Supreme Court's order does not vacate the court of appeals' opinion unless the order specifically provides otherwise. An agreement or motion cannot be conditioned on vacating the court of appeals' opinion." There's no parallel provision for moot cases, and what it provides for in moot cases is simply that the Supreme Court dismisses the case.

There's a history of opinions from the Court that says merely vacating the judgment as you would do in a settled case or a moot case does not vacate the court of appeals' opinion. If you look at Rule 60.6, though, it does give the Court the authority to make whatever other orders deemed necessary in disposing of a case. The Court

had a case this term, *Morath vs. Lewis*. There the plaintiff sued the Commissioner of the Texas Education Agency for violating the statute relating to the STAARs exam in a particular year. The trial court denied the plea to the jurisdiction. The court of appeals affirmed, finding that the plaintiffs had sufficiently pleaded an ultra vires claim.

The commissioner took it up to the Texas Supreme Court. The Texas Supreme Court requested briefs on the merits. That shows interest in the case by at least three justices on the Court, and after that happened, the plaintiff filed a nonsuit and motion to dismiss as moot, and the commissioner opposed both, but alternatively asked that if you do grant the motion to dismiss and vacate as moot, please also vacate the court of appeals' opinion. And so the Court had to deal with this discrepancy between the rules that address moot cases and those that address settled cases, because in settled cases it specifically recognizes that the court in its order can, in fact, vacate the court of appeals' opinion.

And the Supreme Court kind of reviewed history and reviewed this disparity in the rules, and really, it concluded that they've been reluctant in the past to vacate court of appeals' opinions, but that doesn't mean they don't have the authority to do it, and

the lack of a specific provision in the moot cases rule didn't change that analysis. The Court did look at Rule 60.6 as giving the authority to vacate a court of appeals' opinion in certain circumstances, and then the rest of the opinion -- this was issued per curiam this year in 2020 -- discusses kind of what the criteria would be for doing that, and the Court found that this case in particular met it because in this situation the party that was winning in the court of appeals effectively took away the ability of the losing party to ever challenge it by filing the nonsuit. And the court of appeals' opinion, even though the Supreme Court had expressed some interest by requesting briefs on the merits, was basically unreviewable at that point; and it would be precedent for future cases across the State that involve similar facts; and so the Court determined that, yes, they would vacate the court of appeals' opinion in that circumstance.

A vacated court -- there's a difference when a -- just the judgment is vacated. The court of appeals' opinion remains persuasive authority. Is that right? It's like a writ dismissed case. A vacated court of appeals' opinion can still be cited. It's still on the books, but it's -- it's a vacated opinion. You can just argue it as persuasive in that circumstance.

Anyway, the committee looked at all of this,

and recommends that Rule 56.2, moot cases, be amended to parallel the same provisions that are currently included in 56.3, settled cases. So if you look on page four of the memo, the underlined, highlighted language is exactly what is currently provided in settled cases, and settled cases are really just a subset of moot cases, so it's odd that we even have this disparity. That's it.

CHAIRMAN BABCOCK: Ta-da. All right. Lisa has already got her hand up. Lisa.

MS. HOBBS: Okay. I just want to take a little bit of liberty to my esteemed colleague and mentor, who I adore with all of my heart, saying that settled cases are just a -- a subset of moot cases. They actually aren't. At the time that the court of appeals -- I don't know, now maybe I'm challenging myself a little bit, but at the time that the court of appeals decided the case, it was neither settled nor moot, so it wasn't an advisory committee -- an advisory opinion. The problem when you know a case has gone moot, whether it's at that moment at the Supreme Court or moot at some other time that you think it went moot, then you're going into an advisory committee -- an advisory opinion that is -- the Texas Constitution says you can't do.

So I take a little bit of issue with that comment, and I am sort of not -- I have not -- I have not

found my ground of where I fall on this. I think I'm -- I think I wish that the Court would be reticent to ever vacate an opinion as opposed to the judgment, but I don't know that I'm opposed to a rule that gives them the discretion to do it under certain circumstances. So --

CHAIRMAN BABCOCK: Okay. Frank.

MR. GILSTRAP: This strikes me as a complete no brainer. I mean, we're just codifying the rule in Morath, and the two provisions should be parallel. However, as we've drawn it, they're not, because 56.3 begins with the words "in any event," and 56.2 leaves out those words. Gosh, the words are -- the provisions are different. Those words must mean something. Of course, they don't. So 56.3, we need to strike the words "in any event." That's it.

CHAIRMAN BABCOCK: Thank you. Roger.

You're talking to yourself, Roger.

MR. HUGHES: Yeah, okay, and not getting a very good audience. I understand the value in codifying a rule, but two things, what are we accomplishing here? If all we're doing is what the opinion says, then why codify the rule, and the second thing of it is, to -- I guess I sort of have to ask whether an attempt at codifying the rule is also an attempt to freeze it. I mean, if the Court is giving itself a considerable latitude and

discretion, the rule may advance; whereas trying to codify it may freeze it; and then the Court at some other time will go, well, yeah, but our equitable discretion goes even further. And I really -- I don't see this as a substitute. I mean, the subset.

When you have a settlement, you know, the parties are effectively agreeing, some out of condition, their arrangement on vacatur. But when you have either events have superseded a party or you have a party that goes, hey, I got a great opinion from the court of appeals, so let's -- let's pull the rug out and live to fight another day, because we've got precedent on our side. I mean, there may be other situations, but I don't see them as the same, so I guess my -- I'm -- myself, what I'm asking is, what are we gaining by codifying the rule, and what possible damage are we doing by then in a sense freezing the Court's discretion on the issue?

That's my two cents. I'm -- I'm really not sure we get anything by doing this, and I'm a little worried that we may be putting a roadblock in the way of progress. So I'll leave it there.

CHAIRMAN BABCOCK: Okay. Thanks, Roger. Lisa. No, Lisa, you've got to unmute yourself.

MS. HOBBS: Okay. As I understand the rule, is that parties can settle at any time, but the law as --

at the Supreme Court, once they get to the Supreme Court level, the law has developed in a way that the court of appeals has stated it at a time when there was not a moot controversy. And so we value the development of the law, and we're not -- we think -- we're not going to vacate opinions because the development of the law is as important as anything else, and we see this when we talk about why we love arbitration or not, right.

One of the disadvantages to arbitration is there is not the development of the law. These are private things that we don't know how they come out, and we don't know how the law is developed, but with different fact scenarios and different blah, blah, blah, and so the development of the law is actually really important, and that's why we don't let parties dictate whether we're going to vacate the opinion. Like they can dictate whether we're going to vacate the judgment, because those two are different, as we started today, and so we'll let them vacate -- we'll let them ask to vacate the judgment, but we won't let them eradicate the development of the law.

What I don't like about moot cases -- and again, I'm probably repeating myself, but if it goes moot, we're talking about subject matter jurisdiction. So now we are running up against a Texas Constitution that says

no court can give an advisory opinion. Now, when that happens, I know it can be complicated and da-da-da, but it is different, because the reason why there are two different rules is because one goes to the subject matter jurisdiction of the court and one goes through jurisprudential or whatever concerns that we might have about the development of the law, and so there actually is a really logical reason why there are two different rules.

CHAIRMAN BABCOCK: Okay. Thanks, Lisa. Any other comments? Yes, Richard Munzinger.

MR. MUNZINGER: If I understand the situation, the Supreme Court asked the committee to look at this issue. The Supreme Court is not doing anything regarding its own jurisdiction in this rule discussion. It's looking backwards to the court of appeals as to whether it should or should not vacate the court of appeals' opinion. When the case was heard before the court of appeals, presumptively it was not moot. The court of appeals had jurisdiction. There were two or more parties who were fighting over a part of law, and the court of appeals entered an opinion, and presumptively a judgment, resolving the issue. That's law, and it's law for that court of appeals until set aside by the Supreme Court. So now the Supreme Court says, well, wait a second, this case was up here on a petition. I don't know

nor does anybody know what the votes were within the Supreme Court, but the Supreme Court is in a unique position to know whether it is or isn't in the best interest of the state to allow the court of appeals' opinion to remain in force, because there's now law on the books.

As to Roger's question, if the case has been ruled by the Supreme Court to say they have the authority, why would you put it in the rule, so I don't have to brief it. I don't have to go and say, Supreme Court, do you have the authority to set this aside? Don't do this, et cetera, et cetera. I like the rule the way it's written. I think it's necessary, and I don't think it addresses any question at all of mootness at the Supreme Court level. Thank you.

CHAIRMAN BABCOCK: Thanks, Richard, and you've got to change your handle. It just looks like "rum" to me. So we're going to start calling you "rummy." Nina, and then Pam.

MS. CORTELL: I think Lisa made some very good points, that the settlement rule is really directed to something very different than the mootness rule, and mootness goes to jurisdiction and what can and can't happen and might depend on the particulars of the case. It's just a very different animal; whereas, settlement,

you're letting people know that you can go out there and settle a case and ask us to dismiss, but you can't anchor it to vacating an opinion. So I think that's an important point. I could see maybe accepting the first suggested additional sentence, but not the second.

CHAIRMAN BABCOCK: Thanks, Nina. Pam.

MS. BARON: Well, in Morath the case became moot because of the affirmative action of a party in dismissing its case, so the party had the absolute control whether or not that case was going to be mooted at the time it was pending in the Supreme Court and when things looked like they were going a little bit south, and in that situation, the Court should be able to decide whether the fact that the party has made the opinion unreviewable should be taken into account and whether it should diminish the persuasive or, you know, writ denied type case precedent value. I mean, that case will have precedent in the Third Court of Appeals district for all trial courts, all courts of appeals. It will be considered as a court of appeals' opinion across the state, only because the plaintiffs filed a nonsuit at the Texas Supreme Court level.

MS. CORTELL: I understand, but this is broader than Morath. This is all moot cases, so I totally get the issue in Morath, and I think it was correctly

decided, but that is not -- that is not the situation in a lot of mootness situations. That something becomes moot has nothing to do with a nonsuit.

CHAIRMAN BABCOCK: Lisa.

MS. BARON: Well --

CHAIRMAN BABCOCK: Or Pam. Point, counterpoint.

MS. BARON: Whatever, okay.

MS. HOBBS: No, I'll let Pam -- this is an important conversation between three people I very much respect, so I'll let Pam go next.

MS. BARON: Now, when you say you respect me that means you're about to disagree with me completely.

MS. HOBBS: No, I don't.

MS. BARON: I'm happy to take the second sentence out, if my subcommittee agrees to that, and I do think the Supreme Court, you know, stated in Morath what its criteria are for when it's going to do this in moot cases. It clearly has the authority to do it. We should let people know they have that.

MS. HOBBS: And just my counterpoint to that would be like when it became moot, and I think it dovetails perfectly with Nina's comment that things become moot for a lot of reasons at a lot of times, and no one disagrees that it was not moot when the opinion issued.

So that court had jurisdiction at that moment, and we're just talking about Supreme Court jurisdiction, and to me that makes a difference. And, look, we could probably, you know, go head-to-head in a case and totally disagree with that, but just on my initial thing it's like if the opinion -- the court of appeals' opinion was issued -- I don't know. I just -- I feel like mootness and parties in control are very different, because one triggers the Texas constitutional provision that our appellate courts cannot give advisory opinions, and so to me that is probably why the rule was originally written the way it was.

MS. BARON: I don't think that's why the rule is written this way. I think what happened is we went back and revisited 56.3 after the Court issued its series of per curiam opinions saying, "We don't generally vacate court of appeals' opinions." I would have to go back and look, but I'm pretty sure this is a change of somewhat recent vintage and nobody thought to look at 56.2.

CHAIRMAN BABCOCK: Lisa, I'm -- are you arguing for the retention of this second sentence, or is your argument that we should delete it?

MS. BARON: I think she wants to delete all of -- she doesn't want to change the rule.

CHAIRMAN BABCOCK: Okay. Where did she go?

She left us. Okay. Because to me you shouldn't -- you shouldn't allow private parties to dictate whether a decided case, when the lower court has jurisdiction, vanishes from the face of the earth. That just doesn't seem to me to be right. I'm not an appellate specialist like the rest of you guys, but that just doesn't seem jurisprudentially to be the right thing to do. But that may just be me. Any other comments?

All right. Pam, do you want us to vote on the committee's proposal, or do you want to amend it in any way, or how do you want to frame this issue for a vote?

MS. BARON: I would vote on it as we propose it.

CHAIRMAN BABCOCK: Okay. Everybody that's in favor of the subcommittee's proposal to Rule 56.2, signify by raising your hand electronically.

Everybody finished voting?

MS. HOBBS: Hey, Chip, I'm sorry. I was trying to hit unmute, and apparently I did leave. Can you tell me what we're voting on and then I will cast my vote? And I apologize that I disappeared.

CHAIRMAN BABCOCK: Yeah. I asked you a question, and you were gone.

MS. HOBBS: I'm sorry. I was just trying to

unmute, and it was like "leave." Okay, great.

CHAIRMAN BABCOCK: We are voting on the subcommittee's proposal. Everybody in favor is raising their hand.

MS. HOBBS: Okay. Thank you.

CHAIRMAN BABCOCK: Pauline, I have got 14, but I may be off.

MS. EASLEY: I show 12.

CHAIRMAN BABCOCK: All right. One of us is off then. Let me try it again. One, two, three, four five, six, seven, eight, nine, ten, eleven, twelve -- now I got 11. I'm going to go with your vote, and you got 12?

MS. EASLEY: Uh-huh.

CHAIRMAN BABCOCK: Okay. Everybody that is against the proposal raise -- everybody drop your hands, and then everybody against the subcommittee proposal raise your hand.

Everybody finished voting, or anybody else want to vote? Yeah, I got seven on this. Is that what you have, Pauline?

MS. EASLEY: Yes.

CHAIRMAN BABCOCK: All right. So the vote is 12 in favor of the subcommittee's proposal, with 7 against.

Pam, I'm going to say that this may be the

most successful afternoon in the history of this committee.

MS. BARON: All right.

CHAIRMAN BABCOCK: Actually, a very successful day. We've disposed of all the agenda items, with the exception of Item 5 which we deferred, and I'm -- Marti, remind me to send an e-mail to Judge Rucker and to Richard Orsinger encouraging them to be at the November 6th meeting, and I will tell them that if I get any back talk that the Chief is going to enter an order, so they better -- they better do it as I say. Does that work for everybody? Chief Justice Hecht, does that work for you?

HONORABLE NATHAN HECHT: It does. That's great. Great day, very productive.

CHAIRMAN BABCOCK: Yeah. Terrific day, everybody. Thanks so much, and we had really good attendance today. So thanks, thanks again. And, Pam, thank you and the appellate subcommittee for all of the hard work you-all did. So we'll be in adjournment until November 6th, and we'll be letting you guys know whether it will be Zooming again or whether we'll meet in person or some accommodation thereof.

MS. BARON: Skip -- I mean, I'm sorry, Chip.

CHAIRMAN BABCOCK: Yeah.

MS. BARON: We'll still have the option to

participate remotely, even if you meet in person?

CHAIRMAN BABCOCK: I think so, frankly. Yeah, I think so.

MS. BARON: I'm pretty sure I'm not traveling through the end of the year, so --

CHAIRMAN BABCOCK: Yeah, okay. Yeah. You know, odds are there's going to be a total Zoom meeting, but, you know, hope springs eternal. Maybe there will be a vaccine by November 6th.

MS. BARON: Oh, yeah, right.

CHAIRMAN BABCOCK: Yeah, probably not.

MS. BARON: Okay.

CHAIRMAN BABCOCK: All right. So, yeah, anybody that doesn't want to be in person but wants to participate, we will certainly accommodate that. So all right. Thanks, everybody. That's great. Thanks so much again. Talk to y'all later. Bye-bye.

(Adjourned at 4:07 p.m.)

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MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

* *

I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 28th day of August, 2020, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are $ 1,661.25 .

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Given under my hand and seal of office on this the 20th day of September, 2020.

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