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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

APRIL 16, 2021

(FRIDAY SESSION)

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Taken before *D'Lois L. Jones*, Certified
Shorthand Reporter in and for the State of Texas, reported
by machine shorthand method, on the 16th day of April,
2020, between the hours of 9:00 a.m. and 11:20 a.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:

<u>Vote on</u>	<u>Page</u>
Rule 306	32, 375

Documents referenced in this session

21-01 Memo re Appeals in Parental Termination Cases

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2 CHAIRMAN BABCOCK: Let's start the record,
3 and I welcome everybody to the new and improved Supreme
4 Court Advisory Committee. As you know, or most of you
5 know, I'm the chair of this committee and have been for
6 over 20 years, which is hard to believe, but apparently I
7 haven't messed it up too badly, so I'll be here for at
8 least another three years, which is our term.

9 We've got a lot of new members, and I think
10 it would be -- it would be great if they could just tell
11 us a little bit about themselves. And I've got their
12 bios. Many, if not most of them, I know and can vouch for
13 them, but I don't know everybody. And Shiva, who is off
14 camera here to my right, is our new assistant, succeeding
15 Marti Walker, who retired, although I received a -- uh-oh.
16 Can everybody still hear me?

17 MR. ORSINGER: Yes.

18 UNIDENTIFIED SPEAKER: Yes. I think
19 somebody shared a screen.

20 CHAIRMAN BABCOCK: Yeah, somebody shared a
21 screen. So Marti, Marti retired, although I received a
22 call from a judge who will remain nameless, asking for a
23 reference for Marti, so she may have decided to leave
24 Jackson Walker and go to a different sort of job in
25 post-retirement period. But in any event, let me -- let

1 me call on some people who are new to our committee and
2 ask them if they'll just introduce themselves and tell us
3 a little bit about themselves, and I have them not in
4 alphabetical order, but rather in the order that Shiva
5 gave me, with their bios, which is totally random as best
6 I can tell. So the first on the top of my list here is
7 Connie Pfeiffer from Yetter Coleman. Connie, are you
8 somewhere out there?

9 MS. PFEIFFER: Yes, I am. Looks like I'm
10 the one who shared video.

11 CHAIRMAN BABCOCK: There you are. First, we
12 think you should do a musical introduction, so go back to
13 the piano and play a couple of bars for us. Go ahead,
14 Connie, tell us a little bit about your background, if you
15 don't mind.

16 MS. PFEIFFER: Sure. So I'm an appellate
17 partner with Yetter Coleman here in Houston and brand new
18 to this committee, so I don't know if I'm first up on the
19 line today, but very happy to be a part of this and, you
20 know, interested to work on the committee.

21 CHAIRMAN BABCOCK: Great. Thanks, Connie.
22 The next two people on my list I do know, and they are
23 both rascals of the first order, but the first is Chris
24 Porter. Chris, I saw you somewhere.

25 MR. PORTER: Yes, hi. Chris Porter. I am a

1 trial partner with Quinn Emanuel. I was at Yetter Coleman
2 for almost nine years before that. Unfortunately, I did
3 not get the good fortune to overlap with Connie, but we
4 still remain friends nevertheless. I'm very excited to be
5 a part of this committee, and thank you all for having
6 me -- providing me with the opportunity to join you.

7 CHAIRMAN BABCOCK: Great to have you with
8 us, Chris. Thanks.

9 MR. PORTER: Thank you.

10 CHAIRMAN BABCOCK: The next is John Kim.
11 John, are you around?

12 MR. KIM: I'm here. I'm John Kim. I'm a
13 small firm practitioner in Houston. I do all trial work,
14 a little bit of appellate, but I do both sides, both
15 plaintiff and defendants, and I'm looking forward to
16 participating in the process.

17 CHAIRMAN BABCOCK: Thank you, John. Next,
18 the county clerk, John Warren. John, if you're here.

19 MR. WARREN: Good morning, everyone. Yes,
20 thank you very much, Chip. My name is John Warren. I'm
21 the county clerk for Dallas County. This is my 16th year
22 as serving as county clerk. Prior to that I was with
23 Dallas County courts as a court administrator and
24 assistant administrator for 13 years, and prior to that I
25 worked in the federal court system, so pretty much all of

1 my adult career has been in the courts at some form or
2 another. So I'm looking forward to learning as well as
3 assisting this committee in achieving its goals.

4 CHAIRMAN BABCOCK: Thank you so much, John.
5 Next we have Judge Emily Miskel from Collin County.

6 HONORABLE EMILY MISKEL: Hi, I'm Judge Emily
7 Miskel from Collin County. I'm a District Court Judge,
8 and during the past year or so, I've been especially
9 involved in some of the remote trials and technology
10 issues. I also serve on the computer and technology
11 council for the State Bar, so that's what I've been paying
12 attention to lately.

13 CHAIRMAN BABCOCK: Great. Thank you so
14 much, Judge, and nice to have you with us. Next up is
15 Manuel Berrelez from Vinson & Elkins. Manuel, are you
16 around? Well, I may have to -- I may have to stand in for
17 him then. Manuel is a trial and regulatory enforcement
18 lawyer who represents businesses and individuals in a wide
19 range of litigation and investigation matters, and his
20 resume goes on and on.

21 MS. ZAMEN: He just joined right now.

22 CHAIRMAN BABCOCK: Manuel, did you just
23 join? No? Okay. Next up, Richard Phillips from Thompson
24 Knight. Richard.

25 MR. PHILLIPS: Good morning, everybody.

1 Rich Phillips, as you said, partner at Thompson & Knight.
2 I clerked on the Supreme Court about 20 years ago, so I
3 appreciate the fact that although Chief Hecht knew me then
4 he's still willing to let me be on this committee, and
5 looking forward to the opportunity to work with everybody.

6 CHAIRMAN BABCOCK: Rich, he tried to veto
7 you, but Justice Bland and I said we weren't having any of
8 it, so --

9 MR. PHILLIPS: Well, I very much appreciate
10 that.

11 CHAIRMAN BABCOCK: The last one on our list
12 is Judge Robert Schaffer, a well-known judge to me and to
13 many of us from Houston. Judge.

14 HONORABLE ROBERT SCHAFFER: Thank you. Good
15 morning. I'm Bob Schaffer. I'm Judge of the 152nd
16 District Court, the successor to my friend Harvey Brown,
17 who is also on this esteemed panel. For the last 12 years
18 I've been judge of this court. For the last eight years
19 I've been the local administrative district judge of
20 Harris County. Before that I spent about 20 years as a
21 solo practitioner here in Houston.

22 CHAIRMAN BABCOCK: Thank you, Judge. Next
23 up is Judge Cathleen Stryker. Judge, are you here?

24 HONORABLE CATHLEEN STRYKER: I am here.

25 CHAIRMAN BABCOCK: Great, there you are.

1 HONORABLE CATHLEEN STRYKER: Good morning.
2 My name is Cathy Stryker, and I'm Judge of the 224th
3 District Court. I've been on the bench since 2011,
4 handling family and civil matters, and before that I was a
5 partner in two different firms here in San Antonio, and
6 I'm super excited to be on this committee.

7 CHAIRMAN BABCOCK: Great, thank you, Judge.
8 And the last one I have on my list is a
9 last-but-not-least, is Judge Maria Salas Mendoza from
10 El Paso. Judge, are you here?

11 HONORABLE MARIA SALAS MENDOZA: I am. Good
12 morning, everyone. It's earlier here than it is there, so
13 I know my lighting is off. I may have to add some
14 lighting here. I'm the Judge of the 120th District Court.
15 This is my 15th year on the bench. Former administrative
16 judge of the council here in El Paso. I'm on various
17 committees, and I'm excited to be here, hopeful that I can
18 add some value to the committee.

19 CHAIRMAN BABCOCK: Judge, thank you so much,
20 and you should know that for a number of years, decades
21 really, we have been cursed with having only Richard
22 Munzinger as an El Paso representative on this committee,
23 and it's great that we now have somebody -- somebody else
24 who can represent our western-most city and a different
25 time zone, so, welcome, and thanks for being here.

1 On a -- on a more serious and sad note, the
2 people who are holdovers from past committees will no
3 doubt remember Frank Gilstrap. Frank used to always sit
4 three or four people to my right wherever we met, whether
5 it was at the TAB or at the Bar. He had incredible
6 insight, incredible energy, great humor, and he was just a
7 fabulous colleague to all of us. He passed away a few
8 weeks ago, and there have been tributes from many of the
9 members of the committee that have been circulated among
10 the old committee. You newcomers probably didn't get to
11 see them. If you didn't know Frank and didn't get to
12 practice with him, not only on this committee, but in the
13 practice of law, you missed something. He was a terrific
14 advocate, smart as a whip, one of those rare lawyers who
15 could entertain and convince a jury, but then defend that
16 jury verdict on appeal. He was both a terrific trial
17 lawyer and a terrific appellate lawyer, and there are not
18 too many people that can bridge that gap between trial and
19 appellate. We're going to miss Frank tremendously. I
20 know I will. And I thought in tribute to him, and it's a
21 small one, perhaps we could have a few moments of silence
22 in our virtual meeting here.

23 (Moment of silence)

24 CHAIRMAN BABCOCK: Thank you. I hope -- I
25 hope everybody spent those few seconds with fond memories

1 of Frank, to the extent you knew him.

2 I want to tell, for the benefit of the new
3 members, a little bit about our format and rules, to the
4 extent we have any rules, which we really don't. The
5 format is I try to start these things on time at 9:00
6 o'clock. We will take a morning break of 15 minutes.
7 When that break occurs will depend a little bit on where
8 we are in our discussion. Somewhere around the noon hour
9 we will have a one-hour lunch break, sometimes less in
10 this Zoom era, but when we're meeting in person, an hour.
11 And then when we start up again in the afternoon, we'll
12 take one afternoon break, again, depending on where we are
13 in the discussions. It will be 15 minutes, and then we
14 will conclude at 5:00 o'clock, no matter where we are,
15 because some of us need to get to the Four Seasons to have
16 a drink at the bar. Just kidding about that.

17 We sometimes meet for a half day on
18 Saturday. If our agenda is very, very heavy, which it is
19 not today, but sometimes we need to meet that extra
20 half-day, and we'll try to give you as much notice as we
21 can. We also will endeavor to get you an agenda in
22 advance of this meeting and much further in advance than
23 we did today where we're struggling not only with a new
24 committee, but there's some new assignments, and Shiva and
25 I are just working through how to organize this, so -- so

1 thanks for bearing with us today. Hopefully we'll get
2 better next time.

3 Finally, we really don't have any rules, but
4 the one thing I'd like everybody to keep in mind is that,
5 as our name suggests, we are a Supreme Court Advisory
6 Committee. We give advice to the Supreme Court.
7 Sometimes they take it; many times they do not take it,
8 which is fine. Don't get offended by that. Sometimes
9 they don't act on our advice, and that's okay, too,
10 because we're here to serve the Supreme Court. And before
11 I took over as chair, there were some people thought,
12 wrongly, that they were the Supreme Court and that
13 whatever we did the Court had to just follow in lockstep.
14 The Court proved that theory wrong multiple times, but
15 it's not a good mindset, so I've tried to encourage
16 everybody to recognize that we're just advisers. Just
17 like a lawyer will advise a client, the Supreme Court is
18 our client and we advise them on what we think is the
19 proper way to approach matters.

20 With respect to the matters we consider,
21 before I took over as chair, the advisory committee would
22 consider anything, whether the Court was interested or
23 not. If a lawyer from Spring wrote in and said, "Hey,
24 I've got a problem with Rule 52(a)(1)," the Supreme Court
25 Advisory Committee would study it and come up with a

1 recommendation. That occurred to me was not a good use of
2 our resources. So now, if the Court wants us to study
3 something, we will study it, but otherwise, we won't.

4 Now, a lot of times members of this
5 committee have ideas about ways to improve the rules, and
6 we sometimes as members of this committee have people
7 outside the committee call us or write us and suggest
8 changes to the rules. It is totally appropriate to send
9 that either to me or to the Chief or to Justice Bland and
10 say, "Hey, you know, here's something that might be worthy
11 of study." If the Court feels that it is worthy of study,
12 they'll let us know and then we'll spend our time and
13 resources on studying that issue and reporting to the
14 Court.

15 We are broken down into subcommittees,
16 generally divided by the Rules of Civil and Appellate
17 Procedure, and those subcommittees do a lot of the really
18 hard work in terms of studying and recommending the things
19 that the Court is interested in hearing from us about.
20 The subcommittees will report at the full committee
21 meetings, like this one, and we will have a full committee
22 discussion; and if this group is anything like past
23 groups, we can argue about and talk about anything, even
24 like whether or not E comes after A. There's been some
25 disputes about that, about the vowels, A, I, E, O, and U.

1 I see Ms. Newton is laughing because she knows exactly
2 what I'm talking about. But I will tell you, in
3 concluding this part of the agenda, this is professionally
4 the best thing that I do, and I get the most reward out of
5 the day or day and a half every other month that I get to
6 spend with you-all. I learn a lot. I also learn how much
7 I don't know, which is -- which is humbling, but
8 nevertheless fun.

9 We start out every meeting with a report
10 from the Chief Justice, who is our liaison to this
11 committee, followed by a report from the vice-liaison, the
12 liaison in charge of vice, which is Justice Bland. So to
13 that we will turn right now. Chief, do you have anything
14 for us?

15 HONORABLE NATHAN HECHT: Yeah, Chip, thanks
16 very much, and thanks to all for joining this morning.
17 Let me introduce our rules staff at the Court. Jackie
18 Daumerie, who is on screen, too, is the rules lawyer at
19 the Court, and she works on rules matters full-time.
20 Martha Newton is a former rules attorney at the Court and
21 is now my staff attorney, and she helps us extra with
22 whatever we need, and Pauline Easley is a paralegal who
23 does a lot of work for us as well.

24 The committee has been in existence since
25 1940. It was formed right after the statute passed giving

1 the Supreme Court authority to promulgate Rules of Civil
2 Procedure, and it has continued in existence every year
3 since. It's taken a few different forms over the years,
4 but it's never ceased to function. I've been the liaison
5 to the committee. You may know that we divide up our
6 administrative responsibilities on the Supreme Court into
7 what we call liaisons, and that designated justice is the
8 go-between, if you will, between the group and the Court.
9 I've been the liaison to the advisory committee since I've
10 been on the Court for 32 years.

11 The advisory committee is just absolutely
12 indispensable, and as Chip just said, there's a lot of
13 tire kicking. In fact, we give tire kicking a whole new
14 meaning on the advisory committee, but the good thing
15 about that is whatever path the Court ultimately has
16 chosen to take over the years, it has never found that the
17 advice that it was given by the committee was lacking in
18 any respect. We could always know that we could go back
19 to the transcripts and see that matters were thoroughly
20 discussed, that when there were concerns they were
21 completely considered, and the product that we've got we
22 can depend on, that it has been vetted through and
23 through. So that's what we look for from the committee,
24 and we are so grateful that you're willing to give your
25 time and energy to help us with that.

1 I'll just mention that Professor Dorsaneo
2 was recognized in our order reconstituting as an emeritus
3 member. If you know Bill, long-time civil procedure
4 professor at SMU Law School, he was appointed to the
5 committee in 1982 and has served it for 39 years, and
6 he -- that's not our longest serving committee member.
7 Buddy Low has been on the committee since the Seventies.
8 I don't think Buddy could be with us today, but he's a
9 lawyer in Beaumont. But over the years, we've had a lot
10 of extraordinary talent helping us, and the rules of the
11 game in Texas wouldn't be in as good a shape as they are
12 if it hadn't been for the committee's input.

13 So, now, just a couple of things about
14 the -- what the Court's been doing since the last
15 committee meeting. On the law side, we finished oral
16 arguments for the term and are on track to clear the
17 docket of argued cases by the end of June, so this is a
18 very difficult time for us, and everybody is working
19 really diligently to get everything done. We've been
20 teleworking for the most part throughout the pandemic.
21 The legal staff has been mostly, and most of the judges
22 have been as well. But it hasn't affected the quantity or
23 quality of the work as far as I'm concerned, and I think
24 while we're all looking forward to getting back into more
25 personal settings more often, the teleworking has served

1 us well.

2 We've had several emergency orders, and I
3 just mention a couple of them. We're continuing the
4 eviction diversion program. We've got an order setting
5 out the procedures for asking to be -- to take part in the
6 program. Governor Abbott created it as a pilot back in
7 the fall, and now it's a full-blown project. There have
8 been some administrative difficulties in getting the money
9 out, but there is a lot of money, over a billion dollars
10 in federal funds, and we'll be working to make sure that
11 gets to landlords and tenants in the weeks and months
12 ahead, and the order just provides procedures for doing
13 that in the JP courts.

14 Our general order is now Emergency Order 36.
15 It continues the flexibility that we've given courts from
16 the beginning, by virtue of the Court's statutory
17 authority and to act in disasters, and since the -- since
18 the beginning, we shifted from more central control of the
19 kinds of tools that were available to judges to a more
20 local control, and that's especially important now as we
21 return to jury trials. I know Judge Schaffer in Harris
22 County has been working with the judges down there to try
23 to open courts more regularly to in-person trials, and
24 Judges are doing that all over the State. So for a while
25 we asked judges to clear all of that, all of their plans,

1 with the Office of Court Administration, but we no longer
2 ask them to do that. We ask them, rather, to clear their
3 plans with their local administrative judge and sometimes
4 their regional presiding judge.

5 The regional presiding judges through the
6 pandemic have just been absolutely wonderful. Judge
7 Estevez is in our committee, on this committee, and all of
8 those judges have worked so hard to help our 3,200 judges
9 in Texas weather the storm of the pandemic, so the Court
10 is very appreciative of their efforts and now to all of
11 the LAJ's across the state who are taking on the same
12 role.

13 The new order provides that courts must
14 allow remote participation to every participant other than
15 a juror, and courts don't have to require social
16 distancing and masks, but they can. We're going to leave
17 that to their good sense, as conditions continue to change
18 across the state. We encourage courts in EO-36 to use
19 reasonable efforts to conduct proceedings remotely, and
20 we'll talk more about that a little bit at this meeting
21 but also in the weeks and months ahead, and the court may
22 hold in-person jury proceedings if certain requirements
23 are met. So I won't go through the details of the order,
24 but I just call it to your attention, and the idea of the
25 change is to just take more into account the local

1 circumstances and the ingenuity and the diligence of our
2 local judges in trying to proceed in their own court
3 settings.

4 EO-36 continues to allow remote jury trials,
5 and we've had a bunch. I think we've had about 50. On
6 in-person jury trials, from March of last year through
7 March of this year, we had about 230. We ordinarily have
8 186 a week, so you can see we're pretty far behind, and
9 the Supreme Court has asked the Legislature to provide
10 funding for visiting judges if we need that to try to help
11 work through the backlog that we anticipate will be there.

12 Texas is a leader in the country on remote
13 proceedings, and I know that because I'm president of the
14 Conference of Chief Justices, and so I kind of have a
15 ringside seat to what other states are doing. We've had
16 over a million three remote proceedings in the last year
17 with 4 million participants, and we see this going forward
18 as being something that we need to continue to take
19 advantage of. The Supreme Court has appointed a Remote
20 Proceedings Task Force, chaired by Chief Justice Tracy
21 Christopher of the Fourteenth Court of Appeals and
22 vice-chaired by Judge Emily Miskel, who you just met a few
23 minutes ago; and they have done an amazing job of going
24 through Texas statutes, trying to identify what helps and
25 what impedes remote proceedings. And there's some

1 legislation pending on this, but we anticipate in the
2 months ahead that we will come up with a more
3 comprehensive procedural setting for remote proceedings of
4 all various kinds in urban courts, in our rural courts,
5 what works, what doesn't, and try to preserve what we've
6 learned in the pandemic for whatever the new normal looks
7 like, but also take a hard look at both the efficiencies
8 and the difficulties of remote proceedings; and the
9 committee will be asked to participate in that.

10 On another matter, we gave the first ever
11 Uniform Bar Exam in Texas on February 23 and 24, right in
12 the middle of a winter storm. I don't know what God's got
13 against the bar exam, but it's a very difficult -- been
14 very difficult to conduct the bar exam the last several
15 times, but the Board of Law Examiners managed makeup
16 sessions and tried to accommodate everybody during that
17 difficult period.

18 We've promulgated the changes that the
19 committee recommended in Rule 145. We've got comments
20 back, and there's some legislation pending about the rule,
21 and so we will continue to look at the comments, at the
22 legislation, and expect to have a final Rule 145 by the
23 summer.

24 There will be a Supreme Court hearing,
25 public hearing, for the first time ever, on May 4th on the

1 changes in the disciplinary rules. This is the result of
2 a procedure adopted by the Legislature for changes in
3 disciplinary rules, and once they're voted on by the
4 lawyers, the Court is directed to hold a public hearing on
5 them, and so that will be on May 4th, and of course, it
6 will be by Zoom, but it will also be recorded and placed
7 on our YouTube channel.

8 And we've finalized several sets of rules at
9 the end of the year, changes to the expedited action and
10 discovery rules, which we received a lot of comments on,
11 changes on the rules of substitute service of citation,
12 changes on the panel rehearing rules. So we're working on
13 all of these rules projects that the committee has had for
14 a while.

15 The -- the Governor was not asked to give
16 the State of the State address in the House chamber as he
17 usually is because of the pandemic, and neither was I
18 asked to give the State of the Judiciary address there,
19 but I -- we recorded it, and I tried to go through in that
20 address and touch on the various different efforts,
21 initiatives, challenges, that the Texas judiciary is
22 confronting at this -- at this point in our history.

23 Of course, the Legislature is hard at work
24 and closing in on the end. The veteran members of the
25 committee will remember that since 2003 the Legislature

1 has been very comfortable in directing that this committee
2 and the Court flesh out initiatives that are the subject
3 of statutes to make them effective and workable in the
4 courts and for lawyers. So we worked very hard for years
5 with the Legislature to have that kind of partnership,
6 because the Legislature simply does not have the time or
7 the focus to get into the details of how the Rules of
8 Civil Procedure and other rules governing the functioning
9 of the judiciary should work, and so it really falls to
10 this committee once we have policy issues decided by the
11 Legislature to then figure out the best way to make those
12 effective in our -- to implement them in our procedure.

13 So there are a number of bills, some have
14 gotten quite a bit of attention, like the court of appeals
15 redistricting bill which has now been pulled down and
16 won't be advanced further in this session. But we have
17 lots of other bills there, some involving bail reform.
18 The omnibus court bill will require some rules changes,
19 and there will likely be other bills that will pass that
20 will, again, as has been happening session after session,
21 call on the Court to implement through rules. So some of
22 those are on a tight time frame. Sometimes the
23 Legislature asks that they be in effect by September the
24 1st after the legislative session, so that's pretty quick.
25 Most of the time there's a little more time to get them

1 done. But if we have those, then we'll be looking at
2 those hard in early June as soon as we can and trying to
3 come up with recommendations to effectuate those bills.

4 Jackie Daumerie, whom you've met, our rules
5 attorney, follows all of this legislation as it develops,
6 and if you have questions about it, this is -- these are
7 administrative matters, so you're welcome to call Jackie.
8 It's not -- they're not confidential, like the Court's
9 internal deliberations are, so you're welcome to call
10 Jackie at any time, or Martha or Pauline, and give us a
11 heads-up, ask questions. These are your contacts to the
12 Court for the committee.

13 Looking forward, very much, to working with
14 all of you. Justice Bland has come on as our liaison as
15 well, and of course, you're always welcome to contact her
16 or any member of the Court on rules matters. So that's
17 what I have. Chip, thanks very much.

18 CHAIRMAN BABCOCK: You bet, and we should
19 say that Jackie is more than willing to be contacted any
20 time of the day or night, weekends. It's a 24/7 job,
21 right, Jackie? She's nodding her head "yes."

22 Justice Bland, do you have any comments
23 you'd like to share with us?

24 HONORABLE JANE BLAND: Good morning, Chip.
25 I joined this committee 20 years ago with Chief Justice

1 Tracy Christopher when we were both Harris County trial
2 judges. In my new role as Chief Justice Hecht's deputy, I
3 talk less and smile more, which will probably come as a
4 relief to some of the longer tenured members of the
5 committee, but I am no less engaged in the work and in the
6 discussion that I always find very fruitful.

7 I want to extend the appreciation of the
8 Court to all of you on the committee. The Chief mentioned
9 the extraordinary talent that the membership of this
10 committee has reflected through the decades, and this
11 current committee is no exception to that, and we
12 understand that you have to put aside busy law practices
13 and busy lives to really volunteer your time. You will
14 find, though, that there is no other effort that you could
15 make in volunteering your time toward improving our state
16 court systems and our rules of procedure and evidence. So
17 for that the Court is very grateful, and I will turn it
18 back over to you Chip.

19 CHAIRMAN BABCOCK: Thank you very much.
20 Some of you may know Professor Lonny Hoffman, but you
21 won't see him on this, even though he's here, I believe.
22 Professor Hoffman informs me that he tried to break up a
23 dog fight and, therefore, is in no condition to be seen,
24 and his recommendation to this committee and the Court,
25 don't try to break up a dog fight apparently, so we're

1 always glad to have Professor Hoffman with us.

2 And I skipped over or I maybe inadequately
3 described the background of Manuel Berrelez, who is here,
4 and, Manuel, if you could just give us a brief -- a brief
5 bio of yourself, biography of yourself, that would be
6 great, and then we'll get started with our substance.

7 MR. BERRELEZ: Thank you, Chip, I appreciate
8 that, and apologies to the committee for joining a few
9 minutes late. I was stuck on a call and urgently trying
10 to get off. I'm a partner with Vinson & Elkins in the
11 Dallas office. I have a focus on litigation, with a
12 specialty doing regulatory work, mostly for financial
13 institutions, in addition to a general commercial
14 litigation practice. I'm born and raised in Texas. I'm
15 from a small town in South Texas, Pearsall, about an hour
16 south of San Antonio right on 35, and came back -- went to
17 school out east and got back to Texas about as quick as I
18 could after a clerkship and have been practicing in Dallas
19 since 2006. I started my career at Susman Godfrey, a
20 great firm that I'm still quite close to, and have been at
21 V&E since 2009.

22 I'm really excited to be a part of the
23 committee, had the good fortune of working on a matter
24 with Justice Bland very briefly while she was at V&E and
25 also am very good friends and law school classmates with

1 Justice Blacklock. So really looking forward to being a
2 part of the committee, and thank you, Chip, for coming
3 back to me and allowing me to introduce myself.

4 CHAIRMAN BABCOCK: Oh, yeah, no problem,
5 Manuel. Thank you very much. Our next item of business
6 is discussion of suits affecting the parent-child
7 relationship and out of time appeals in parental rights
8 termination cases. We have already had discussion on this
9 topic in previous meetings, but the chair of this
10 subcommittee is Pam Baron, and the vice-chair is Bill
11 Boyce, and they have been leading us through it, but
12 perhaps one or both could give us an update. Pam.

13 MS. BARON: Let me just introduce Bill real
14 quick. I'm Pam Baron. I've been on the committee only 28
15 years. I'm currently chair of the subcommittee on the
16 appellate rules. I stand in shoes that are way too big to
17 fill, because Bill Dorsaneo was chair of the subcommittee
18 for many, many years. His knowledge of the appellate
19 rules exceeds the combination of all of the appellate
20 lawyers I know put together. So we're sad to see him as
21 emeritus. We also are very, very saddened by the loss of
22 our member, Frank Gilstrap, who was a dynamic member of
23 our subcommittee, always understood both the big picture,
24 the little picture, and knew a lot about the Battle of
25 Thermopylae, so we will miss him.

1 I do want to welcome our two new members,
2 Connie Pfeiffer and Rich Phillips, dream team members, so
3 we're very, very happy to have them. Now I'm going to
4 turn it over to Bill Boyce. He is the vice-chair of the
5 subcommittee, and he stepped up to take over the parental
6 termination rule changes, and it has been a tar baby for
7 our subcommittee and Bill in particular, but hopefully
8 we'll make some progress today. Bill.

9 HONORABLE BILL BOYCE: Thank you, Pam. I'm
10 going to begin with the subcommittee's prayer for relief.
11 And that is I hope what -- where we can get to today is a
12 vote on final or nearly final language for the proposed
13 Rule 306 that's reflected in the April 12th memo that was
14 distributed for today's meeting. This topic has been
15 discussed at multiple meetings over the last year and a
16 half. I'm going to really try to not replot old ground.
17 For those of you who would like a refresher, those of you
18 who are new to the advisory committee, the background of
19 this is discussed in the memo itself. The short version
20 is that we are taking in stages procedures to address the
21 right to appeal and the right to appointed counsel for
22 indigent parents whose rights have been terminated by an
23 action brought by a governmental entity or when
24 conservatorship of a child is sought by a governmental
25 entity.

1 The issue -- there's multiple issues packed
2 into this, and for the last two to three meetings we've
3 been focusing on some threshold issues. One was the form
4 of citation, which I -- we got through relatively quickly
5 and came to pretty quick consensus regarding the language
6 and the need for express notice to the parent of the right
7 to appeal and the right to appointed counsel in the
8 situation of indigency. The next step and the one that
9 we've been talking about at some length is a mechanism for
10 the beginning of the appeal or the beginning of the
11 appellate process. As we've discussed before, the
12 circumstances may or may not be clear about whether a
13 parent whose rights have been terminated wishes to appeal
14 the termination. This may be because the parent has never
15 participated in the case. It may be because a parent
16 intermittently comes in and out of the litigation due to a
17 variety of factors.

18 Prior votes of the full committee focused on
19 an approach that would channel this next stage into the
20 judgment. If we're going to try to set the table for what
21 happens next in terms of claims for inassistance of
22 counsel, if there is an untimely effort to appeal or
23 matters such as that, we need to have a starting point.
24 The sense of the committee as a whole, the entire Supreme
25 Court Advisory Committee, was to follow a recommendation

1 by the subcommittee and channel this discussion towards
2 what do we want the final judgment to say in these cases
3 that will help to clarify whether the appeal is going
4 forward or not, whether appointed counsel will continue to
5 prosecute the appeal or not. And that led us to a series
6 of revisions, proposed revisions, to Texas Rule of Civil
7 Procedure 306.

8 In the memo that was distributed, the most
9 current version of the proposed revisions, the ones that
10 we're going to talk about today, are reflected at pages
11 seven and eight. There also is an additional one-page
12 version of Rule 306, and to avoid confusion, I just want
13 to clarify. The one-page version of the rule that we
14 received shows an earlier iteration of the earlier changes
15 with additional changes that were suggested by Judge
16 Hofmann and Judge Rucker on behalf of the Children's
17 Commission. Their input and interest has been very
18 helpful, very much appreciated, and has helped to guide us
19 towards a resolution or a proposed rule that we can
20 present for consideration, while keeping in mind that we
21 have multiple steps left to take.

22 So, again, to avoid any confusion, we're
23 going to be working off of the proposed rule at pages
24 seven and eight. The proposed rule at pages seven and
25 eight reflects the subcommittee's efforts to incorporate

1 comments from the November 2020 meeting. We talked about
2 this at some length. A number of issues were identified.
3 We've tried to work through them. We've tried to address
4 the concerns that were voiced, identify a couple of areas
5 where we thought there was potential for uncertainty or
6 confusion and eliminate those.

7 And so with that preamble, I would turn to
8 the proposed draft at pages seven and eight of the memo
9 that you've got and start explaining in brief the most
10 recent changes that have been suggested. If you turn to
11 page seven, you'll see some redlining that highlights the
12 discussions we've had leading up to this most current
13 draft. Below that, you'll see the current Rule 306, which
14 already contains an express reference to suits for
15 termination of the parent-child relationship, and so
16 that's why we thought this would be an appropriate place
17 to build out additional factors in the judgment to help
18 guide this process along and deal with the underlying
19 concern about whether an appeal is going to go forward.

20 The policy concern that's been voiced and
21 very ably discussed is that we're dealing with a balancing
22 of interests. The right to parent is protected. It's
23 constitutional, but there's other countervailing
24 considerations, including not having litigation and
25 appellate proceedings drag on while the futures and lives

1 of the children who are affected are in limbo. Those are
2 the continuing balancing of interests, along with the
3 concern about helping the court system handle these cases
4 in a way so that it's clear whether there is concern -- a
5 desire to appeal, avoiding having appeals continue,
6 sometimes been referred to as the phantom appeal, when
7 it's not clear whether there is even a desire to appeal a
8 determination of a parental termination. And so that's
9 the balance that this proposed draft Rule 306 is trying to
10 address.

11 So if you look at subparagraph (1) of the
12 draft, it appears at the bottom of page seven of the memo.
13 You'll see that that picks up the second sentence of the
14 current draft. Turning to page eight, the changes that
15 the subcommittee has recommended primarily focus on this
16 portion of the rule. The goal was to use the judgment,
17 have the trial court sign a judgment that sets the table
18 for what's going to happen next in a little more of an
19 express way. So we started out with earlier iterations.
20 We got Children's Commission input on that, and based on
21 the conversations in November, these are further
22 recommendations.

23 The main points -- the redlining is not
24 super extensive, but it does reflect some very specific
25 points. First, you will see that the prior iteration of

1 the rule set out a laundry list of things that the
2 judgment would have to say. One of these options, again,
3 towards the goal of having clarity about whether there is
4 a desire to appeal, whether the attorney is going to
5 continue the appointment for the appeal, one of the
6 concerns that was expressed during the November meeting is
7 that in part this was implicitly making a decision about
8 whether or not the attorney was going to go forward with
9 the appeal or not. The related question was a concern
10 raised by Chief Justice Christopher and others that
11 inevitably there's going to be judgments that don't
12 strictly conform to these requirements, does that make
13 them interlocutory, what happens then.

14 In an effort to address those concerns, we
15 propose a revision that moves what formerly was subsection
16 (a) and makes that the default and puts it in the body, in
17 the main body of the rule. "The attorney will continue
18 the representation, unless one of the following express
19 statements appears." And then that takes us to the
20 options that are available at that time. The default is
21 "The attorney continues unless the attorney is replaced by
22 another attorney who will continue the proceedings or the
23 attorney is discharged without continuing the appellate
24 representation based upon findings of good cause under
25 certain enumerated circumstances." The circumstances, the

1 four that are spelled out, are not hugely different from
2 what we discussed last time. They're an effort to comply
3 with the case law and statutory requisites for continued
4 representation.

5 The changes that are reflected here in
6 section (2)(b), small Roman numeral (i), was a thought
7 that I think Richard Orsinger had highlighted, the
8 question about the form of service. Rather than describe
9 it colloquially, let's just refer to the rule in an effort
10 to avoid potential confusion. In small Roman numeral (ii)
11 the question was -- the statute is really framed in terms
12 of locating the parent, under the theory, you know, from a
13 jury charge and other context that every "or" is an
14 opportunity for confusion, can we reduce some of the "ors"
15 here. So the thought was, you know, does -- does
16 "identify" add anything that is not already encompassed by
17 "locate." There may be discussion that we have in the
18 course of this meeting that identifies why we want
19 separate reference to identification, but the
20 subcommittee's determination was that in an effort to
21 align with the statute and reduce opportunities for
22 disagreements about what exactly is required, perhaps that
23 language can be omitted. There were other suggestions or
24 questions that were not incorporated in these redlined
25 changes. One of them, for example, under subsection (b)

1 was a suggestion about whether we wanted to say "For
2 purposes of this subpart, good cause means the following"
3 and change that to say "includes the following." The
4 subcommittee looked at that issue and came to a consensus
5 that in the goal of reducing opportunities for uncertainty
6 and future litigation over what good cause is, and to
7 align with the statute, the narrower formulation of
8 "means" would serve that goal. If you look at page 10 of
9 the memo, you will see in redline additional comments and
10 explanations at pages -- at paragraphs (6), (7), and (8)
11 that in shorter version cover what I just covered.

12 So that is the proposal that the
13 subcommittee now brings to the full committee for further
14 discussion, and, Chip, I hope if there is consensus,
15 subject to any other wording changes that may be
16 requested, I would hope that we would be in a position to
17 take a vote on this proposed rule, which would then
18 complete the first part of a multipart assignment, and the
19 subcommittee would move to the subsequent issues that have
20 been identified.

21 CHAIRMAN BABCOCK: Sorry. I was
22 inadvertently muted. Yeah, this committee loves to vote,
23 so we will vote for sure at the end of our discussion, and
24 your presentation was incredibly thorough and terrific,
25 and thanks, thanks very much. You have little buttons

1 somewhere where you can raise your hand, and I've got a
2 little button here where I can tell if a hand is raised,
3 so if anybody wants to -- to say something, go ahead and
4 raise your hand. Electronically, of course. We will
5 definitely have discussion on this, so don't be shy.

6 HONORABLE ROBERT SCHAFFER: All right. I
7 can't find the raised hand on mine, but I have a question.

8 CHAIRMAN BABCOCK: Judge Schaffer. Thank
9 you.

10 HONORABLE ROBERT SCHAFFER: To what extent
11 were practitioners who are involved in this process
12 consulted, more particular, people that appear as
13 attorneys ad litem in these cases?

14 HONORABLE BILL BOYCE: There was input
15 obtained from the attorneys who handle these cases on a
16 regular basis, and in significant part that was the source
17 of a recognition that parents may come in and out of these
18 cases intermittently, which was one of the concerns that
19 we had about trying to craft a rule that did not err on
20 the side of cutting off appellate rights because a parent
21 may have been served and may have initially participated
22 in the case but then dropped out or can't be located after
23 trial and those sorts of things. So that was one source
24 of information, and the second source of practical
25 practitioner information and judicial insight came from

1 the Children's Commission's input into this rule. And,
2 Judge Schaffer, I will take this opportunity to note
3 something that I neglected to include in my introductory
4 comments, which is that the -- at the prior meeting, at
5 the November meeting, Judge Hofmann participated in the
6 discussion. I forwarded these most recent revisions to
7 Judge Hofmann and Judge Rucker and had received input back
8 that from Judge Hofmann that he was comfortable with this
9 current iteration of the rule. I don't know that either
10 of them is on the meeting today, but I did want to note
11 that.

12 HONORABLE ROBERT SCHAFFER: Is there some --
13 was there some discussion about the -- about the fact
14 you're making the -- basically the trial court attorney ad
15 litem the default throughout the process, right?

16 HONORABLE BILL BOYCE: Yes. That is the
17 default position that's in the current draft.

18 HONORABLE ROBERT SCHAFFER: And was that
19 discussed with them? Oftentimes I've heard that, you
20 know, a fresh set of eyes is a really good idea when it
21 comes to appellate -- appealing these rulings when they
22 are appealed. Did the practitioners you talked to express
23 some kind of desire that that should be the default
24 position?

25 HONORABLE BILL BOYCE: To make sure that I'm

1 understanding your question, a default position would be
2 that an attorney is appointed, but it would be a new
3 attorney?

4 HONORABLE ROBERT SCHAFFER: No, the default
5 position that y'all are suggesting here is that the
6 attorney appointed in the trial court is the attorney
7 throughout -- the AAL throughout the trial court
8 proceedings and the appellate proceedings.

9 HONORABLE BILL BOYCE: Yes. Yes.

10 HONORABLE ROBERT SCHAFFER: And my question
11 is, the practitioners you visited with, was that something
12 that they thought was a good idea?

13 HONORABLE BILL BOYCE: I think I don't -- I
14 don't understand there to be any disagreement with the
15 possibility of having appointed -- a new counsel appointed
16 for appeal and the current rule -- the current draft
17 certainly provides that possibility. The default is more
18 aimed at the -- making sure that it's clear whether or not
19 an attorney is going to continue -- an appointed attorney
20 situation is going to continue.

21 I think there may be considerations that we
22 address later in terms of claims for ineffective
23 assistance of counsel and so forth that may have some
24 impact on the questions you're raising, but I don't think
25 that the -- the default reflected in the current draft

1 mandates that the trial court must have the attorney --
2 the existing attorney ad litem at trial continue, but to
3 make sure that the right to appeal is perfected, the right
4 to appointed counsel is perfected. That seemed to be the
5 clearest mechanism for addressing that.

6 HONORABLE ROBERT SCHAFFER: Thank you.

7 CHAIRMAN BABCOCK: Okay. If anybody knows
8 how to find their little electronic hands, go ahead and
9 raise them, but I can't find it, so we'll do it the
10 old-fashioned way. Who wants to -- who wants to speak?

11 MR. JACKSON: Chip, the hand is under the
12 "reactions" button. If you open the reactions button, it
13 will open up and say "raise hand."

14 CHAIRMAN BABCOCK: Under the "reactions"
15 button. Ah, there we go. Oh, cool.

16 HONORABLE ROBERT SCHAFFER: Thank you.

17 CHAIRMAN BABCOCK: Thank you, David. All
18 right, so anybody have a reaction to what Bill Boyce has
19 to say, raise your hand and I should be able to see it,
20 but who knows. Here's one hand that's raised, but I don't
21 know who it is. There it is. Lisa. Okay. We're on the
22 roll now. Go ahead, Lisa.

23 MS. HOBBS: I just wanted to give a comment
24 of support to Bill Boyce's work on this and the
25 subcommittee's work on this. Like I think this is a great

1 draft, and I have some consternation about the "means"
2 versus "include." I probably would have been on team
3 "include" and not team "means," but I can kind of see it
4 both ways. We definitely all agree that certainty in this
5 rule is a driver. I just wondered if for good cause, like
6 if, you know, just trial -- appointed trial counsel is
7 sick or having surgery or, I mean, I can think of some
8 good cause to -- I don't know, but I don't know that it
9 would be an abuse of discretion to consider those things,
10 despite how "good cause" is explicitly defined here. But
11 other than that comment I think you've done a really good
12 job, and I really appreciate your work on it, because I
13 think it's a very important rule.

14 CHAIRMAN BABCOCK: Thanks, Lisa. Bill, any
15 reaction to what Lisa just said?

16 HONORABLE BILL BOYCE: That's a valid point.
17 One option that may work is to -- when we do vote on the
18 rule, to vote alternatively on "includes" or "means." The
19 subcommittee's sense was that if our goal is to provide
20 additional clarity, then a more restrictive definition
21 would serve that better, but like everything else in this
22 arena, we're talking about a balancing of interests, and
23 so it may be the committee as a whole's determination that
24 that balance should be struck in favor of broader
25 language. Or we could also send it, if the committee

1 approves, for consideration as an alternative form, and
2 the Court can look at that and reach its determination
3 about where that balance gets struck.

4 CHAIRMAN BABCOCK: Great, thanks, Bill. Any
5 other comments? Yeah, Rich Phillips.

6 MR. PHILLIPS: Just on what Lisa had said on
7 the concern with good cause, the other thing I think we
8 talked about in our subcommittee is those good causes are
9 really to discharging the attorney and not appointing
10 somebody else. To discharge and say the case is over,
11 there will be no appeal, and so we wanted to keep that to
12 those reasons that kind of track what's in the statute. I
13 think something like what Lisa talked about where the
14 current add litem is sick or some other reason, that I
15 think would be covered by the idea of we're replacing the
16 attorney, we're going to discharge the attorney and
17 appoint somebody new either for the appeal or appoint
18 somebody new. But the good cause in this thing is about
19 discharging the attorney and saying there isn't going to
20 be an appeal, and so we're trying to not have too much
21 flexibility on that issue, just because we want to keep
22 that certain.

23 CHAIRMAN BABCOCK: Great, thank you, Rich.
24 Any other hands? Anybody else want to --

25 HONORABLE LEVI BENTON: Chip.

1 CHAIRMAN BABCOCK: Yeah.

2 HONORABLE LEVI BENTON: I can't find my
3 raise hand button. You know, my -- my interpretation of
4 the concerns raised by Judge Schaffer is that oftentimes
5 people who are appointed ad litem are young lawyers who
6 have no appellate experience. I don't practice in the
7 area. I don't seek out ad litem appointments, but I
8 wonder if either by comment or by language in the rule we
9 should -- we should let the trial court -- or telegraph to
10 the trial court that it shouldn't be reluctant to
11 substitute an ad litem that has appellate experience.
12 Otherwise, you can have young lawyers who do this work,
13 and they're going to have shock and horror to find that
14 they have an obligation to continue with the appellate
15 proceeding. I don't know, maybe -- that's how I construed
16 Judge Schaffer's concerns, so that's my comment, and if
17 David or you could expand your comments about how to find
18 the raise-your-hand button, I'll try to do that next time.

19 CHAIRMAN BABCOCK: There's an icon down on
20 the right, lower right of my screen. I don't know about
21 yours. That says "reactions."

22 HONORABLE LEVI BENTON: I got that. I can
23 clap my hands, I can do a thumbs up.

24 MR. ORSINGER: It's under the participants
25 button. If you click on "participants," it should open a

1 list of participants on the right.

2 HONORABLE LEVI BENTON: Okay, found it.

3 MR. ORSINGER: Invite, mute, or raise hand.

4 HONORABLE LEVI BENTON: Got it. Thank you.

5 MR. ORSINGER: You bet.

6 CHAIRMAN BABCOCK: All right. Well, cool.

7 So now Richard Munzinger. You're going to have to unmute.

8 MR. ORSINGER: You're muted, Richard.

9 Richard, you're muted.

10 MR. MUNZINGER: I'm in favor of using the
11 word "includes" rather than "means." The circumstances
12 that can be present in a trial court are beyond the
13 imagination of the committee as a group. Nobody knows
14 what the circumstances are, and to -- it seems to me that
15 sound judicial management and docket management suggest
16 that you should leave these decisions, to some extent, in
17 the hands of the trial court. There is an interest in
18 finality, and if you limit good cause to just those
19 grounds, I think you tie the hands of trial courts and
20 appellate courts unnecessarily, and I think you should
21 leave it to the discretion of the trial court. Everybody
22 understands, it would seem to me, that it's a serious
23 problem involving parental rights. At the same time, if
24 someone doesn't participate or doesn't show up, a
25 restricted definition, it seems to me, ties the trial

1 court's and appellate court's hands unnecessarily. I'm
2 finished. Thank you.

3 CHAIRMAN BABCOCK: Thanks, Richard. John
4 Warren, and then Judge Schaffer, and then Pam.

5 MR. WARREN: One of my observations when I
6 was a trial court administrator is that the judge I worked
7 for, when they were getting ready to do the ad litem
8 appointments, they always looked at the experience or the
9 area of expertise of the ad litem to make sure that they
10 were being an advocate for the -- for the minor, so I
11 think that's something that -- as it relates to Levi's
12 comment, I think that's something that the trial court has
13 to continue to take into consideration, not just make
14 blanket appointments just because, but because the ad
15 litem is actually going to do a good service on behalf of
16 their clients.

17 CHAIRMAN BABCOCK: Great, thanks, John.
18 Judge Schaffer.

19 HONORABLE ROBERT SCHAFFER: Yeah, I'm going
20 to echo what John just talked about, because I know people
21 who serve as attorneys ad litem in these -- in these CPS
22 cases, and it's not just -- what Levi said is very valid,
23 the young lawyer who doesn't have appellate experience,
24 but it's also the very experienced lawyer who has no
25 appellate experience and doesn't want to go anywhere near

1 the court of appeals, that their practice has been devoted
2 to the trial court and that's where they want to stay, and
3 so they would not feel comfortable in an appellate -- now,
4 in that situation, they would probably move to withdraw
5 and ask the court to go ahead and appoint appellate
6 counsel, and I -- and I think that can be done in this --
7 in this rule, regardless of what the wording is.

8 CHAIRMAN BABCOCK: Thank you, Judge. Pam
9 Baron, and then Justice Christopher.

10 MS. BARON: Yeah, I just want to basically
11 repeat what Rich said, which "means" was picked for a
12 particular reason, and that is we do want to limit the
13 options going forward, and the idea is at this point to
14 have certainty as to whether there will be an appeal, and
15 if there is an appeal, who is in charge of it. Time is
16 very, very short on these appeals. You don't have time
17 for uncertainty, and so we wanted that to be shown in the
18 judgment, for there to be limited outs, and most of these
19 can be taken care of by appointing a different ad litem, a
20 substitute ad litem, if there are issues with a particular
21 attorney who has done the trial work, but that needs to be
22 done promptly, or otherwise, the next thing our committee
23 is going to be considering are out of time appeals or
24 ineffective assistance of counsel, and all of that would
25 feed into more problems there later. So definitely I

1 would stress "means" and not "includes" in the language of
2 the rule.

3 CHAIRMAN BABCOCK: Thanks, Pam. Justice
4 Christopher.

5 HONORABLE TRACY CHRISTOPHER: Yes, I was
6 just going to echo that. I apologize, but the idea behind
7 (b) is that the person will not have a lawyer on appeal
8 because of one of these four reasons. If a lawyer has no
9 appellate experience, he just says to the judge, "Please
10 appoint someone new under (a)," or, you know, any other
11 reason, "Please appoint someone new under (a)." The (b)
12 is when the judgment will say you don't have a lawyer at
13 all. So that is the big difference, and that's why it
14 needs to be limited to these specific circumstances.

15 CHAIRMAN BABCOCK: Great. Any further
16 comments from anyone? Okay. There are no electronic
17 hands raised or otherwise, that I can see anyway, so it's
18 time to vote. And let me frame the vote in a way that is
19 slightly different from the way we usually do it. Vote in
20 favor of these changes to the rule as reflected in the
21 subcommittee draft unless you just think the fundamental
22 approach is wrong and that we ought to go back to the
23 drawing board and do something else. The tweaks to the
24 rule that have been expressed by various members here will
25 be considered by the Court when they look at this

1 transcript. So when you're voting "yes," you can assume
2 that if you have raised a tweak or a slight concern, that
3 that will be considered by the Court. Your "yes" vote
4 doesn't necessarily mean that you've abandoned your
5 position, and we're not going to note who voted "yes" and
6 who voted "no."

7 So everybody that is in favor of the draft
8 that the subcommittee has come up that is behind Tab B and
9 is also laid out in pages seven and eight of the memo,
10 raise your hand. Okay. Keep them up. It just keeps
11 changing on me.

12 MS. WOOTEN: Chip, am I correct that we
13 should raise our hand one way or the other? In other
14 words, virtually or in real life?

15 CHAIRMAN BABCOCK: It would be better if
16 you did it virtually.

17 MS. WOOTEN: Okay. That's what I meant.

18 CHAIRMAN BABCOCK: It would be easier to
19 count that way, although my screen keeps changing every
20 time that I try to count, but I think I'm on top of it
21 now.

22 MR. WARREN: Chip, if you go to
23 "participants," you will see all of the hands raised and
24 that would be easier to count than the continuous shift in
25 the images.

1 CHAIRMAN BABCOCK: You know, thank you so
2 much. You're absolutely right about that, so that's how
3 Shiva and I are going to do it, see if I get the same
4 thing I did with the images. Okay. You can lower those
5 hands. And everybody who is opposed, raise your hand now.

6 MR. ORSINGER: I show -- I show Bill as
7 being opposed, and I'm not sure I believe that. Bill
8 Boyce.

9 HONORABLE BILL BOYCE: I was slow on the
10 lowering of hand draw. I apologize.

11 CHAIRMAN BABCOCK: He lowered his hand.

12 MS. WOOTEN: The ultimate bait and switch.

13 MR. ORSINGER: That would be like the
14 dissenting justice writing the majority opinion.

15 CHAIRMAN BABCOCK: Right. Okay. By a
16 unanimous vote, the proposed rule is passed, and we're
17 done with this and ready to submit it to the Texas Supreme
18 Court. So, Bill, does that satisfy your need to vote,
19 even though briefly you voted against it?

20 HONORABLE BILL BOYCE: Upon further
21 consideration, I think we're done with this aspect.

22 CHAIRMAN BABCOCK: Okay. And the record
23 will reflect it was a unanimous vote in favor. So what is
24 next, Bill or Pam or anyone?

25 MS. BARON: Oh, go, Bill.

1 HONORABLE BILL BOYCE: I think that we've
2 moved to the next stages of this multistage project and
3 will bring back to the committee at an appropriate time
4 the discussion reflected -- or the issues reflected on
5 page two of the memo, talking about what happens with
6 respect to untimely appeals, ineffective assistance of
7 counsel claims, and so forth, and that opens up a new
8 array of considerations.

9 CHAIRMAN BABCOCK: Thank you, Bill. Okay.
10 Moving on to something I think will be brief, an update on
11 the briefing rules, and, Pam, do you want to give us a
12 brief, a brief on the briefing rules?

13 MS. BARON: Sure. We don't really have any
14 action items today, but we -- our subcommittee could use
15 more guidance on this project, so I'm glad we have the
16 chance to kind of update where we are and what we've been
17 generally tasked with and what we've done so far. You
18 might remember, last year the Court referred a lot of very
19 specific items to the appellate rules subcommittee,
20 including things involving the briefing rules. We went
21 through all of those at our late August meeting last year.
22 If you were there, you can remember that we spent probably
23 half a day, maybe more, and Chip said we took more votes
24 than in the history of the committee on these matters.
25 Six of them related to the briefing rules, and that was in

1 the materials, I guess, that was included with the agenda
2 earlier this week, and we had six specific items that we
3 were told to consider.

4 One was to remove the paper copy requirement
5 for documents that were e-filed in the Texas Supreme
6 Court. That passed the committee without dissent. We
7 were asked to consider whether or not to remove the
8 requirement to include the court of appeals judgment and
9 the appendix to the petition for review. That, for some
10 reason, was more controversial than radically changing the
11 supersedeas rules, and it did pass by a close vote of 13
12 to 12, with the chair not voting, Chip.

13 The third thing we considered was whether to
14 add reasons to grant section to the petition for review,
15 and that was very popular. It passed 21 to 2. Then we
16 were asked whether to delete the statement of jurisdiction
17 section in the petition for review and brief on the
18 merits, and we recommended that change, and it passed 15
19 to 8. We were asked whether we wanted to create a
20 standardized form of citation to the record like you have
21 in federal appellate court to permit hyperlinking, and
22 what we learned is that the technology is not yet there in
23 the Texas state courts because we have 254 different
24 counties with different systems, and so we deferred that
25 until technology catches up, and we're reluctant to adopt

1 a uniform system that would have to be changed later if it
2 was not compatible.

3 Then we were asked whether to add a
4 requirement in the Texas Supreme Court briefing to require
5 citations to where the error was preserved in the record,
6 and that did not -- the recommendation was not to do that,
7 and that passed 22 to 1, I know just because of the
8 complexities in the Supreme Court with cross-appeals or
9 whatever of actually pinpointing that in a very short way.
10 It's usually -- and it also would cause way too much
11 attention and fights over preservation when that's really
12 a collateral issue most of the time in most appeals.

13 And, finally, we were asked whether we
14 should remove the certificate of service requirement when
15 documents are e-filed because our e-filing system now
16 generates that automatically, and that was a general
17 favor -- favorable discussion going that way, but there
18 was no vote.

19 So then later in that year I was contacted
20 by the rules attorney saying that the Court wanted our
21 subcommittee to take a more robust look at the briefing
22 rules, and I owe an apology to Jackie because that day was
23 a particularly grumpy day for me during the pandemic, and
24 so she got a little more pushback than she probably
25 deserved, but I did commit on behalf of the subcommittee

1 to do six things, and some of those things have happened
2 and some of those things have not yet, but the first thing
3 I said I would contact the appellate rules subcommittee of
4 the appellate section of the State Bar to see -- to get
5 their input, and that was actually very helpful, because
6 last fall that subcommittee completed a survey of the
7 entire membership of the appellate section of the State
8 Bar on identifying particular problems with the Texas
9 Rules of Appellate Procedure.

10 If you don't know, the appellate section has
11 grown quite a bit, and it is now considered a large
12 section of the State Bar of Texas. It has over 2,100
13 members. They did do a full-press outreach to the
14 members. They had several blast e-mails. They posted it
15 on their Facebook and Twitter feeds. They included it in
16 the quarterly publication, *The Appellate Advocate*, and
17 what was interesting is that they got very little
18 response. So one conclusion that they drew was maybe it's
19 the devil we know is better than the devil we don't, or if
20 it ain't broke, don't fix it, but among the rules, there
21 were -- they touched on a variety of things, but only one
22 addressed briefing, and that was whether there should be a
23 specific rule addressing post-submission briefing with
24 things like word count limits, time for filing, whether or
25 not leave is required, to have a more uniform practice,

1 because that does vary among all 14 courts of appeals and
2 the Texas Supreme Court. Anyway, the appellate section
3 sent its report to the Court last fall, and none of those
4 items have been specifically referred to our committee at
5 this time.

6 The second thing I committed to do was to
7 contact the state -- State Bar Court Rules Committee to
8 get their input. They're a great committee because they
9 operate in a more free-ranging way. They are welcome to
10 go out and find problems, and they also respond to letters
11 that come in to the bar that complain about particular
12 rules or practices. They currently have only one item on
13 their radar that relates to the briefing rules; and as a
14 matter of coincidence, it has to do with post-submission
15 briefing, and they had had a comment of somebody that
16 thinks the Texas courts should follow what are contained
17 in the Federal Rules of Appellate Procedure, which
18 narrowly limit the length, timing, and so on and so forth
19 of post-submission briefing; but they are in very
20 preliminary investigation of that rule, so they have not
21 produced a recommendation one way or the other and have
22 not forwarded anything to the Texas Supreme Court at this
23 time for its consideration.

24 The third thing I had said I would do is I
25 would talk to Evan Young, who has been working with the

1 Court for many years to try and convince them to change
2 the petition for review process to more closely resemble
3 what we see at the U.S. Supreme Court; and if you remember
4 our December 2020 "deep thoughts" meeting, Nina Cortell
5 and Evan Young did a fairly long explanation of that
6 process, and this court -- this group had a really good
7 discussion on that, and so that's gone to the Court, and
8 nothing has been sent back to us to think about.

9 The fourth thing I said I would do is I
10 would ask the Court for more guidance and in particular
11 whether they had particular improvements or thoughts or
12 problems that they wanted us to look at. I did that in
13 e-mail, but did not get further guidance.

14 The fifth thing I said I would do is I would
15 contact the Chiefs of the courts of appeals to get their
16 input on any problems they were seeing. That, I have not
17 done. I'm wondering whether it would be useful -- it
18 would always be useful to talk to them, but after the
19 section, you know, surveyed 2,100 members, many of whom
20 are -- include appellate justices in our state, whether
21 more outreach in that area is needed. And the sixth and
22 last thing I said I would do would be to ask members of
23 this subcommittee to e-mail me any concerns or problems
24 they were having with the briefing rules, and I apologize,
25 I have not done that, but right now I'm asking you to do

1 that if you see problems or corrections that you think
2 need to be made.

3 So what we really need at this point is just
4 further guidance. I mean, the appellate section has
5 basically said there's no great hue and cry for change to
6 the briefing rules. I think we're all kind of used to
7 them. Obviously everything is capable of improvement, so
8 if we had more guidance from the Court and this committee,
9 we're happy to go forward as everyone sees fit.

10 CHAIRMAN BABCOCK: Thanks, Pam. In terms of
11 guidance from the Court I'll start at the top and see if
12 the Chief has any guidance to give you.

13 HONORABLE NATHAN HECHT: Well, not right
14 this second. This is very much a joint effort on the
15 Court, and at various times different people have asked --
16 asked that we -- that we consider different things and
17 have added to the list and then have at the same time
18 said, "Oh, well, we're not really concerned about that."
19 So I think Pam has done a lot of good work on this, a lot
20 of thorough canvassing of stakeholders, but the best I can
21 do is report back where we are and see what my colleagues
22 say.

23 CHAIRMAN BABCOCK: Well, I'll go near the
24 top then, if not right at the top with the Chief. Justice
25 Bland.

1 HONORABLE JANE BLAND: Well, what he said.
2 No, we'll look at the -- we'll look at the State Bar
3 report and track that down and go through that, and then
4 also this issue of whether we should request briefing on
5 the merits only after the petition has been granted, we
6 probably would need the committee's help with that, so
7 probably what we'll do is put together a list and make a
8 formal referral to the committee --

9 HONORABLE NATHAN HECHT: Right.

10 HONORABLE JANE BLAND: -- after consultation
11 with the Court.

12 HONORABLE NATHAN HECHT: Right.

13 CHAIRMAN BABCOCK: That would be great,
14 Justice Bland, and if you -- for the newcomers, the way it
15 ordinarily occurs is that the Chief will send me a letter
16 outlining what the Court wants us to review. I will then
17 refer it to the appropriate subcommittee, and then the
18 subcommittee will do its work and then report back, as Pam
19 just has. So now to the real power behind the thrown,
20 Jackie, is it true that Pam was grumpy when you called her
21 with a totally reasonable request, and do you want her to
22 do anything that she hasn't done?

23 MS. DAUMERIE: I plead the Fifth. No, she
24 was fine. We'll get together a list. I hadn't seen that
25 appellate section report, so I'll try to dig that up.

1 CHAIRMAN BABCOCK: Thanks, Jackie. Martha,
2 you got anything?

3 MS. NEWTON: No, I defer to the Chief and
4 Justice Bland.

5 CHAIRMAN BABCOCK: All right. And, Pauline,
6 the real power behind this whole operation here, anything
7 from you?

8 MS. EASLEY: No, I don't have anything.

9 CHAIRMAN BABCOCK: Okay. Thank you. Well,
10 we will -- we will then defer this, pending further
11 assignment from the Court, so we will not put it back on
12 the agenda for the next meeting, and go from there.

13 The next item is Professor Carlson's, and
14 for those of you new to the committee, you'll see the
15 reference to "deep thoughts," which Pam just mentioned a
16 minute ago. That was a phrase that I coined a number of
17 years ago. We thought that in the December meeting every
18 other year before the Legislature went into session, we
19 might devote our meeting to what I dubbed "deep thoughts."
20 That is, we would consider things that we might recommend
21 to the Court that would improve the justice system,
22 broadly speaking. We've had members of the Legislature
23 address us. We've had members of the Legislature just sit
24 and observe, and we've had ideas come in from all sorts of
25 places. We've had speakers from out of state. So when we

1 refer to "deep thoughts," it's that meeting every other
2 year right in advance of the legislative session.

3 With that said, Professor Carlson, anything
4 to report on your subcommittee's jury rules?

5 PROFESSOR CARLSON: We don't have a formal
6 report, Chip, but this was just recently referred to our
7 subcommittee, and the letter of referral from Justice
8 Hecht asked us to review Rules 216 through 236, because
9 they're outdated and don't reflect current practice, and
10 to draft proposed amendments for the Court's
11 consideration, and Justice Hecht asked that we interface
12 with the Remote Proceedings Task Force in removing any
13 barriers to remote jury proceedings. So I wasn't quite
14 sure what -- how that worked together.

15 I contacted Justice Christopher, who chairs
16 that committee, and she advised that -- I don't want to
17 put words in your mouth, Judge Christopher, so correct me
18 if I'm wrong, that the task force really isn't working on
19 suggestions for jury trials. They're working on
20 identifying impediments to continuing remotely working,
21 the court working remotely with attorneys on hearings, and
22 perhaps trials. So then I chatted with Jackie, our rules
23 committee, and Jackie was kind enough to remind me that
24 Bobby Meadows' subcommittee, which had looked at statutory
25 changes dealing with expedited trials and other matters,

1 had in their memo to the full committee pointed out that
2 one of the changes in that statute requires the county
3 courts to have a 12-member jury for any case where the
4 amount in controversy is over 250,000 and the county court
5 at law has jurisdiction, unless the parties agree to a
6 lesser number or it's waived.

7 And, of course, our current rules don't
8 really reflect that, and Jackie advised me that -- let me
9 look at her e-mail, that she had spoken with Sharena from
10 the clerk's office, who reported that our rules don't
11 reflect current practice, that they're mostly pre-World
12 War II rules and that most clerks don't follow them. They
13 look to the Government Code and their county's jury plan.
14 So I'm delighted that John Warren is on our committee, and
15 he hopefully will give us some input, but I just thought
16 it would be helpful to our committee to get a little more
17 guidance and then to get input from the full committee on
18 any problems that you see with our current rules and then
19 we can perhaps more finely tune our task and report back
20 at the June meeting.

21 CHAIRMAN BABCOCK: Thank you. Justice
22 Christopher.

23 HONORABLE TRACY CHRISTOPHER: Yes, we had
24 not actually been asked to draft any rules yet with
25 respect to remote jury proceedings or even best practices

1 for remote jury proceedings, but if the Supreme Court
2 tasks us with that, we will work on that. What we spent
3 our time doing for these first few months was trying to
4 find where there were statutes that -- or that would
5 prevent things like that, so that's what we spent our time
6 doing. Just in case, as Justice Hecht said, the
7 Legislature is working on some legislation that might help
8 us in this area, but we certainly have people on the task
9 force that can help with best practices on remote jury
10 trials, but we haven't looked at it in terms of revising
11 the current rules.

12 CHAIRMAN BABCOCK: Yeah, it seems to me,
13 Justice Christopher, that there are two parts to this.
14 One is the remote jury trials, which will perhaps be more
15 complex than the other, just looking at the rules and
16 bringing them up to date, recognizing that World War II
17 ended sometime ago and so rules prior to that might be
18 outdated and in need of reform. And I would think that,
19 subject to the Court contradicting me, you would -- you
20 would want to proceed on both tracks, but obviously you'll
21 be limited to some degree on the speed with which the task
22 force is moving. So my proposal, Elaine, would be to --
23 to do it on that basis, and we would bring this back for
24 our next meeting and go from there.

25 We have a couple more comments, though, and

1 let me see who raised their hand first. I can't tell, so
2 we'll go to Justice Christopher again.

3 HONORABLE TRACY CHRISTOPHER: Oh, no, I'm
4 sorry. I forgot to lower my hand.

5 CHAIRMAN BABCOCK: Ah, all right, then John
6 Warren.

7 MR. WARREN: I think Judge Miskel was -- her
8 hand was raised before mine. I'll be a gentleman and let
9 her go first.

10 HONORABLE EMILY MISKEL: I think there are
11 two things here. One is our task force absolutely
12 identified these rules as impediments to remote
13 proceedings, and, you know, universally everyone agrees
14 that they're outdated and don't match current practices,
15 so I think in general we need to work on new rules for
16 normal jury trials anyway, and I would suggest that work
17 can go ahead and get started.

18 As far as the Legislature, I testified day
19 before yesterday in the House committee on remote jury
20 trials. That is an area that's actively being debated,
21 and so I don't know that we should spend any effort
22 thinking about remote jury trials until after the
23 legislative session.

24 CHAIRMAN BABCOCK: That's a fair point,
25 thanks. And I'll have something more to say about that in

1 a minute, but John Warren.

2 MR. WARREN: Thank you. As it relates to
3 virtual proceedings, I'm going to quote Chief Justice
4 Hecht when he says that we will return to normal, but
5 virtual proceedings will be part of the new normal, and
6 while I agree with that that is something we consider
7 later on, but we have to look at the efficiencies that new
8 processes and new technology that's available to us and
9 what that actually means, particularly when it comes to
10 cost for disposition of a case. If you have out-of-town
11 participants that need to -- out-of-town witnesses or that
12 may need to participate in a trial, the opportunity for
13 them to do that virtually adds value to our -- to this
14 process, but we have to look at the foundation. But that
15 is something that we should consider, because it would be
16 actually important to -- to proceeding with a case in a
17 timely manner.

18 CHAIRMAN BABCOCK: Great. Thanks, John.
19 Any other hands?

20 MS. ZAMEN: Cathleen Stryker.

21 CHAIRMAN BABCOCK: Yeah, Judge Stryker.

22 HONORABLE CATHLEEN STRYKER: So in Bexar
23 County we've -- we've been having a lot of remote jury
24 trials, and the one thing I think everyone kind of agrees
25 on, and we did a bar survey on this, is that everybody

1 wants to go back live, but we found locally and what we're
2 going to do as we start our live jury trials in June is
3 continue jury qualification and selection virtually,
4 because our experience in the pretty big number of virtual
5 jury trials we've done is the jurors love it. They don't
6 want to come here and find a parking spot. They don't
7 want our bad wi-fi. They don't want to not have a seat
8 because there's 500 people in one room, and so if nothing
9 else, what I've found as I've qualified some panels is
10 that Rule 224, 225, 226, 226a, none of them -- and the
11 instructions, they're all not applicable. So I've been
12 kind of just rewriting them as I'm talking, because we're
13 qualifying jurors remotely.

14 So I kind of envision that at some point,
15 even if we go back completely live, that the jury
16 qualification procedure might end up remote for a long
17 time, and so to the extent that we're going to look at any
18 rules to address remote, those might be the ones that we
19 start with, only because I do think that's the most
20 logical part that could stay remote possibly forever,
21 because everybody can give their exemptions and their
22 felonies, and their, you know, excuses remotely pretty
23 easily and then we take the panels and have them report
24 live. That's what we're going to do here starting June
25 1st.

1 MS. WOOTEN: Chip, you're muted.

2 MS. DAUMERIE: Hey, Chip, it's Jackie.

3 You're muted.

4 CHAIRMAN BABCOCK: Kent, you're muted. But
5 now you're not.

6 HONORABLE KENT SULLIVAN: I'm not. Are you
7 calling on me?

8 CHAIRMAN BABCOCK: I am.

9 HONORABLE KENT SULLIVAN: Okay. I didn't
10 hear it.

11 CHAIRMAN BABCOCK: Yeah. I was muted.
12 Nobody told me.

13 HONORABLE KENT SULLIVAN: Well, you outmuted
14 me.

15 CHAIRMAN BABCOCK: Yeah, I outmuted you.

16 HONORABLE KENT SULLIVAN: So I just wanted
17 to make a very brief comment, and that is I think it's
18 important that we get some direction and have decisions
19 made as the extent to which we're talking about rules for
20 a new system that would promote real uniformity; that is,
21 uniformity county to county and statewide practice, or
22 whether we continue to facilitate what is largely a, you
23 know, decentralized and even idiosyncratic system that
24 differs in terms of how it operates from the perspective
25 of, you know, jurors and litigants county to county. On

1 the one hand, you look at trying to adopt best practices
2 and pursue a more uniform model. The other hand you
3 continue with more of, you know, what we currently have,
4 just trying to facilitate, you know, certain practices.

5 And then second, if we do promote more
6 uniformity, then there's a question the extent to which
7 there will be more centralization, including the
8 possibility of more centralized support and maybe even
9 availability of resources. My experience is there's a
10 significant difference, county to county, of the
11 infrastructure that is available to support more modern
12 and technologically dependent proceedings and a big
13 difference in terms of just resources in general, and I
14 think that has to be taken in consideration. I don't know
15 to what extent there is a potential role for the Office of
16 Court Administration or of the availability of additional
17 resources that might be available on a centralized basis
18 and not available on a decentralized basis, so just a
19 couple of thoughts.

20 CHAIRMAN BABCOCK: Great, thank you, Kent.
21 Judge Peeples.

22 HONORABLE DAVID PEEPLES: I have a question
23 for those who have been doing this and those who have been
24 studying virtual jury trials. Is there any emerging
25 consensus on whether you can force someone over an

1 objection to try a case -- a jury case virtually as
2 opposed to in-person, and if there's no emerging
3 consensus, what does everybody think about that? I think
4 that's going to be a difficult question for this
5 subcommittee.

6 HONORABLE EMILY MISKEL: So that's actively
7 the question that's being debated in the Legislature on
8 this bill right now, and so that's why I suggested we wait
9 to work on any virtual jury issues until we see if
10 anything happens in the Legislature or not or what it is.

11 CHAIRMAN BABCOCK: Anybody have any views on
12 that issue? I know the Legislature will control, if they
13 pass a bill, but does anybody have any thoughts about
14 Judge Peeples' question?

15 HONORABLE EMILY MISKEL: I would defer to
16 San Antonio, because I know they've done more than we have
17 in Collin County, but my opinion and the opinion of all of
18 the trial judges that I've talked to that have done them,
19 which has been, I think, as we've heard, 50 fully virtual
20 jury trials everywhere from rural West Texas to Austin to
21 San Antonio, Collin County. We've done them, they work,
22 and I think every judge and participant that you talk to
23 that's actually done them has found that they work; and as
24 judges, we all know that our judicial system and legal
25 system can't depend on the agreement of the parties,

1 because they already can't agree. That's why they paid
2 their jury fee and they're having a jury trial.

3 So the concern among the judges that do
4 these is, as you heard John Warren say, it's a large
5 benefit to people coming from out of state for their case
6 or jurors or whoever it may be, but if you let someone
7 object to it, it becomes a litigation tactic, and the
8 person with big pockets can afford to set a bunch of stuff
9 in person that the other party can't afford to travel to,
10 and so I believe the emerging consensus from the judges
11 that actually try virtual jury trials is that if it is
12 based on consent, then none will happen.

13 CHAIRMAN BABCOCK: Great. Thank you.
14 Robert Levy.

15 MR. LEVY: I do want to suggest that we --
16 we travel very lightly and reluctantly in terms of
17 changing rules that would require parties to participate
18 remotely if it's something that in their determination
19 they feel is not in their best interest. The fact that
20 you have a witness who is remote and you don't have the
21 opportunity to be there and really judge their reaction to
22 understand what they're looking at could have a
23 significant impact on -- on that witness' credibility, and
24 if you have a remote witness and then other witnesses who
25 appear in person, that, too, will have an impact; and I

1 think the ability to obtain justice will be significantly
2 impacted; and there might be positives, but there could
3 very well be negatives. And trying to assess the system
4 through a pandemic environment I think is probably not the
5 best test case for whether this is a good and significant
6 change in how our justice system is administered, and so
7 I'm very reluctant and concerned about changes that would
8 be forced on parties.

9 I do understand Judge's comment that if you
10 make it voluntary then it won't work, but the reality is
11 we have rights as parties, including rights to choose to
12 be before a jury; and, you know, those types of rights are
13 ones that should remain with the parties, and it could be
14 that this one as well should remain with the parties.

15 CHAIRMAN BABCOCK: Thanks, Robert. Kennon.

16 MS. WOOTEN: On remote proceedings, I want
17 to touch on something that Judge Stryker referenced, and
18 that is having to kind of edit, if you will, the jury
19 instructions on the fly for remote jury trials because
20 what we have on the books now does not account for remote
21 proceedings. I will say that in Travis County I know of
22 at least one judge, Judge Karen Crump, who has presided
23 over a remote jury trial and also done a lot of work in
24 that space in preparing the court to preside over remote
25 jury trials. She, too, has modified the standard jury

1 instructions to account for the fact that the proceeding
2 is remote and, therefore, some things in the instructions
3 need to be modified. And when I heard Judge Stryker say
4 she's done the same thing, it made me think that when we
5 are ready to think about changes to the jury instructions,
6 it would be worthwhile to find a way to poll the judges
7 around the state who have presided over remote jury trials
8 and have used instructions in doing that that worked, that
9 didn't work, and I bet the input we would get from them
10 would be invaluable, including the input from people on
11 this committee.

12 In regard to whether remote proceedings can
13 be mandated or not, I hope that when we discuss whether we
14 will require remote proceedings in some cases, we won't
15 lose sight of the fact that remote proceedings do increase
16 access to justice for many people. There are people with
17 day jobs that they cannot leave for an extended period of
18 time in order to go to court to attend a hearing. There
19 are people with dependents they can't leave at home, and
20 as a result they have limited access to justice in regard
21 to getting to a hearing and being at the courthouse for
22 however long it takes to be reached and to have their case
23 decided. There are people with disabilities who can't get
24 to certain courthouses and attend hearings, and I really
25 just want us to be thinking about how remote proceedings

1 have increased access to justice and their potential to
2 increase access to justice in the future. Of course we
3 don't want to go too far. Of course there are certain
4 cases where we need to be in person. I'm not suggesting
5 otherwise, but I just don't want to lose sight of an
6 opportunity we have here to really increase access to
7 justice for people.

8 In regard to the task at hand, I think it
9 would be really helpful to know what the Court wants to
10 see from us in regard to suggestions for improvement
11 beyond the remote proceedings concept. By way of example,
12 in this set of rules there are several masculine pronouns
13 referring to parties, referring to attorneys, referring to
14 witnesses, and I think on the whole it would be helpful if
15 our rules were updated to not have simply masculine
16 pronouns. There are things in the jury instructions now
17 that refer to "social networking websites including My
18 Space." I don't know about all of you, but I haven't used
19 My Space ever, and I don't think many people are using it
20 now. And so there are some outdated references to
21 technology that I think we could tend to in this updating
22 process, if that's something the Court wants us to do.

23 So I go back to what Professor Carlson asked
24 for at the beginning, if it would be worthwhile -- Chip,
25 if you think it's worthwhile that we have a broader

1 conversation about areas of improvement that we perceive
2 in this particular set of rules that are needed. Thank
3 you.

4 CHAIRMAN BABCOCK: You bet. Thanks, Kennon.
5 Marcy.

6 MS. GREER: Well, I agree with Kennon's
7 points. I think she said them very well, so I won't
8 restate them. I did want to offer that I am working with
9 a panel of judges from across the country who have been
10 conducting jury trials in their courts. One is a South
11 Carolina federal judge, one is head of the Indianapolis
12 courts, and one is from Nevada, one is from LA, and then
13 Alan Albright, who we all know from the Western District
14 of Texas, who has been conducting jury trials. And so I
15 think it's going to be a really interesting conversation.
16 I have been collecting their practices for how they're
17 conducting the jury trials, and we had a discussion
18 yesterday with a lot of really helpful information, and I
19 think it is worth passing on that information. So I'm
20 happy to forward these materials to whoever would be
21 working on these issues.

22 I do think it's worth, you know, at least
23 talking about it and getting some ideas and game plans and
24 best practices, et cetera, in mind, because this is going
25 to be with us for a long time, and I would also do a shout

1 out that the program where the judges are going to appear
2 is next Friday from 10:00 to 11:30 on the ABA TIPS, and
3 I'm co-chairing -- full disclaimer, I'm co-chairing that
4 program, so I would really love to see everybody sign up
5 and pay for it. It's not very expensive, and it's going
6 to be a terrific program, and that's just one of the four
7 panels that is going to be outstanding. Another one is
8 Chad Baruch's panel on ethics, and if you need an hour and
9 a half of ethics, that's probably the most entertaining
10 way to get it.

11 CHAIRMAN BABCOCK: Great. Thank you, Marcy.
12 Jim Perdue.

13 MR. PERDUE: I was just going to address
14 Judge Peeples' question, although Judge Miskel has already
15 addressed it and acknowledged kind of the issue here,
16 Judge. There are -- there are -- spending a lot of
17 quality time under the pink dome, Judge Miskel keeps
18 getting to testify via Zoom, whereas I apparently have to
19 live in Austin, reluctantly, but there's competing bills.
20 There's a Senate side bill and a House side bill. We were
21 very late into the evening on Wednesday on the House side
22 bill. I think there is a dichotomy developing in the
23 legislation regarding remote proceedings versus remote
24 jury trials. There is certainly not consensus on jury
25 trials, and I just wanted to say that it's apparently an

1 issue that can even bring me and Robert Levy together. So
2 we are not in favor of mandatory remote jury trials and
3 that tells you the scope of the issue.

4 But I think that we'll see a legislative
5 mandate come out by June 1st, which will end up requiring
6 this committee to visit, and Judge Christopher is ahead of
7 the curve on that with her task force, but when it comes
8 to the jury rules, they certainly merit updating, but a
9 rewrite of the jury rules until you get that kind of
10 legislative direction may be a little premature, because
11 you may have two tracks.

12 CHAIRMAN BABCOCK: Great. Thanks, Jim.
13 And, Jim, I notice the very elegant solution that you have
14 for the title on your Zoom box to Kennon's point. Rather
15 than saying "Perdue & Son" or "Perdue & Daughter," you say
16 "Perdue & Kidd," so that's a very neutral way of doing it,
17 which is great. Justice Christopher.

18 HONORABLE TRACY CHRISTOPHER: I'd just like
19 to point out that the Rule of Judicial Administration 7
20 already encourages district and county court judges to use
21 "telephone or mail in lieu of personal appearances by
22 attorneys for motion hearings, pretrial conferences,
23 scheduling, and the setting of trial dates." So I
24 definitely think most lawyers that I've talked to really
25 like the remote proceedings for those sort of actions,

1 that, you know, instead of going to the courthouse and
2 waiting three hours, they can just wait in their office
3 until it's their turn for their hearing.

4 I do think that the jury trial is a much
5 more complicated question. I think it's great that Judge
6 Stryker was talking about the qualification of the big
7 jury panel being done remotely, because that is, you know,
8 a big use of time that could be done remotely. I mean,
9 it's already basically done remotely in federal court.
10 You know, they send you a questionnaire. I just filled
11 one out, frankly, to see whether I qualified to be a juror
12 in federal court. So I do think that even if the trial
13 itself is not remote, there will be certain aspects about
14 jury qualification that could be done remotely.

15 CHAIRMAN BABCOCK: Thanks, Judge. Kim
16 Phillips, you had your hand up, but maybe you put it down.
17 I'm not sure.

18 MS. PHILLIPS: I was just aligning with
19 Robert Levy's comments, and I do have, you know, concern
20 about being mandated to a remote jury trial, and I would
21 just -- you know, however it comes out, I think we have to
22 remember that there could be complexities, too, right.
23 And so we had a situation where we had a remote trial
24 about five months ago, albeit a bench trial, something
25 that would have lasted maybe 10 days live. You know, six

1 weeks into it, I'm like, what is really happening. So I
2 just think there are a lot of complexities that have to be
3 considered, and not every case is going to be suitable for
4 a remote jury trial, and I wouldn't want to find myself in
5 a situation where that was forced -- forced on me.

6 CHAIRMAN BABCOCK: Great. Thanks, Kim.
7 Orsinger, you had your hand up, but now it's down. Do you
8 have anything -- Richard Orsinger, do you have anything?

9 MR. ORSINGER: Thanks, Chip. Most of what I
10 said -- I was going to say has been said. I'll say that
11 the local chapter of the American Board of Trial
12 Advocates, which is a group of lawyers with extensive jury
13 experience, went through a e-mail storm, not a Twitter
14 storm, a proposition to force jury trials, remote jury
15 trials. But we recently did a panel discussion for video
16 that's going to be mailed out in an electronic e-mail to
17 our local chapter, but it's going to the ABOTA chapters
18 all around Texas, and I'll be happy to send it to anyone
19 here.

20 We did a 30-minute interview with the chief
21 jury clerk about the way that she assembled the group from
22 which the individual panels would be voir dired, and she
23 was very positive about the fact that people were much
24 more receptive to participating in the jury process than
25 if they had to come downtown. That comment has already

1 been made today, and we had a panel discussion with Judge
2 Cynthia Chapa of the 288th, who had just conducted --
3 she's conducted two Zoom jury trials, one the previous
4 week, and we had three lawyers on the panel, two of -- one
5 had conducted a bill of review jury trial, which could --
6 has got to be one of the most boring things you could
7 possibly try. The other one had a family law case with a
8 pro se litigant, and the third person had had a nonjury
9 trial in federal district court, where it was partially on
10 Zoom and partially in person. And I'll have to say, I was
11 a moderator of the panel, not -- I've done nonjury
12 hearings by Zoom but no jury trials. They were all very
13 positive about the experience.

14 And so I think there's a lot of opposition
15 because it's so different from anything we've done before,
16 and yet in some ways, it's not so different because some
17 of us have had people testify by telephone or people
18 testify by video deposition, and so I think it's premature
19 for us to debate an issue of whether people should be
20 required. We ought to let the Legislature tell us what
21 their thinking is or what they fail to arrive at, but I
22 personally think that people who participate in the
23 nonjury components are just thrilled with the efficiencies
24 and the conveniences associated with nonjury -- nonperson
25 or remote work proceedings, and I think there's going to

1 be a lot of money saved, and the clients are going to like
2 it. So to me we could talk about what the rules would be
3 for nonjury, because I think they're on the way. I mean,
4 I think that's coming, but as far as jury is concerned,
5 the Legislature may completely kill that or they may
6 mandate it, and so, to me, I think we're getting ahead of
7 ourselves to be debating that.

8 CHAIRMAN BABCOCK: Thank you, Richard. Lisa
9 Hobbs.

10 MS. HOBBS: I just wanted to note that as
11 part of my role in the Remote Proceedings Task Force I
12 either made the wise decision or the poor decision to ask
13 that an e-mail be sent out to every member of the
14 litigation section of the State Bar of Texas seeking
15 comments. My e-mail was worded specific to the actual
16 mission and goal of the task force, but what I received
17 back over probably a two- or three-week period went far
18 broader.

19 So some of the comments that I received
20 about remote proceedings -- and the specific question was
21 any rules or statutes that prevent barriers to remote
22 proceedings, those questions that actually were on -- or
23 those answers or comments that were on target to our
24 mission have made their way to the -- the full task force,
25 but there was a lot of comments that were just kind of

1 broader opinions on the questions we're talking about this
2 morning, the good and bad of remote proceedings, the
3 should it be mandated, should it not, and I am happy to
4 collect those comments and e-mails and send them on to
5 Jackie or Elaine. Some of them aren't really necessarily
6 just what is my position on it. Some of them go a little
7 bit deeper in, but they were still outside the scope of
8 the actual question that the task force was asking, but
9 either way, I think it would be helpful for me to gather
10 those comments and send them along, and I'm happy to do
11 that.

12 CHAIRMAN BABCOCK: Thanks, Lisa. Judge
13 Miskel.

14 HONORABLE EMILY MISKEL: Last word, I just
15 want to speak for self-represented litigants. So lawyers
16 are comfortable in courtrooms, and they want to be there,
17 and as a judge, if I have a case with two lawyers who want
18 to be in the courtroom, I'm happy to accommodate that. I
19 think I heard David Slayton testify on Wednesday that
20 eight out of the nine million cases that are filed are pro
21 ses, and they're in justice and municipal court. So I
22 know that in my court I have done over 250 trials on Zoom
23 since last March, and I would estimate that a third or
24 fewer of my cases have two lawyers, lawyers on both sides.

25 So again, I don't know if there's any

1 representatives for self-represented litigants on this
2 committee, and if there are not, I'll volunteer to be the
3 representative for the self-represented litigants, but I
4 want to make sure that we realize that the cases that all
5 of the very qualified and experienced lawyers represented
6 on this committee work on are not your average case that
7 we see. So please keep in mind our system serves a lot of
8 people who are not usually represented by great high
9 quality lawyers at all times, and so keep that in mind as
10 well as we debate the pros and cons of virtual trials.

11 CHAIRMAN BABCOCK: Thank you very much,
12 Judge. A couple of additional items. One, these
13 subcommittee assignments are fluid in the sense that if
14 anybody has got an interest in serving on a subcommittee
15 that you are not assigned to, by all means, you know, jump
16 in, just let me know so I can keep track of who is on the
17 subcommittee and who is not. So do that. Nina Cortell
18 had a comment that she wanted to make, and I hope she's
19 still on the call, and if she is, now is your time, Nina.

20 MS. CORTELL: Thank you, Chip, but I also
21 noticed some hands have been raised. I don't know if you
22 want to acknowledge those first.

23 CHAIRMAN BABCOCK: Oh, yeah, I didn't -- I
24 see one now. Judge Estevez. Judge, you've got the floor.

25 HONORABLE ANA ESTEVEZ: No, you can go to

1 Nina first. It's fine. I just -- the comment that Judge
2 Miskel just said, I just want to echo that. I've never
3 had so many participants in our cases since we started the
4 remote proceedings, and that's because of all of the
5 family law I do and all of the pro se divorces I do. Both
6 sides will appear. They may appear in their car, they may
7 have a hard hat on, they're in North Carolina, they're in
8 New Mexico, they're all over the states of -- all over.
9 All over. And people that I've had their children for the
10 last 10, 12, 14 years are appearing for the first time
11 because they didn't have to fly to Amarillo, and so it's
12 made a huge difference for those pro se and also just
13 indigent litigants, so we need to remember that.

14 I do think we should have a rule to allow
15 the remote hearings. I don't have an opinion on the jury
16 trials. I've had so much -- I was going to start the
17 remote jury trials, but we're already back open. Our
18 numbers got so good that we're actually been trying two --
19 two or three cases, jury trials a week, between our two
20 courthouses. So we're back in person or we would be fully
21 remote by now, but hopefully, the other numbers will come
22 down throughout the rest of Texas. We were the highest
23 numbers and then we were the highest -- the fastest
24 vaccinated population in the state of Texas, so hopefully
25 we will be the herd immunity for y'all, and a little bit

1 of hope for you, if the variants don't come get us. But I
2 just want to echo that. We need to be looking out for
3 those indigent people. I don't need to be their
4 representative. I just -- I'm everybody's representative,
5 but that's all.

6 CHAIRMAN BABCOCK: Great. Thanks, Judge.
7 John, you have been added to the subcommittee, so thank
8 you for your volunteering for that, and any comment?

9 MR. WARREN: My last comment I have is that
10 we can't just assume that as we come out of this pandemic
11 that it would be business as usual, because if -- and I do
12 believe that this has been a lot of information, this
13 dialogue. I would hope that we would have kind of a
14 roundtable discussion to weigh the pros and cons on the
15 future of virtual proceedings. Understand that we still
16 -- I mean, in Dallas County we've had very few jury trials
17 or bench trials, and so as we come out of the pandemic,
18 we're going to be behind, or should I say there is a need
19 to catch up on the number of trials and other proceedings
20 that we have not gotten to, where we actually have
21 individual, litigants who is actually waiting for a
22 resolution to those cases. So we have to figure out how
23 we are going to do that.

24 I think there should be parameters around an
25 in-person jury trial, if there is a capability of having

1 one and if the jury is willing to participate and the
2 litigants are willing to participate, and I think that
3 should be the benchmark for the decision, not necessarily
4 the attorneys. I can't remember who mentioned the fact
5 that you have an attorney comes down and he's waiting and
6 he's waiting in the courtroom. He's there several hours
7 for a 30-minute hearing. Will he bill his -- will he bill
8 his client for four hours, or will he bill his client for
9 30 minutes? And so those are some of the things that we
10 have to take into consideration. What's actually not best
11 for us members of -- or should I say officers of the court
12 or the attorneys that represent their clients, but more so
13 what's going to benefit the clients and what's in their
14 best interest. So I think there's a lot of dialogue that
15 needs to take place as it relates to the new normal in a
16 virtual environment.

17 CHAIRMAN BABCOCK: Great. Thanks very much,
18 John. By the way, I noted that our agenda inadvertently
19 left off some names of this subcommittee, but we'll get
20 that corrected next time. Professor Carlson.

21 PROFESSOR CARLSON: Yeah, I just wanted to
22 mention in preparing for this meeting today I read the
23 *Litigation Section Advocate*, and it is called "Pandemic
24 Perspectives, Looking Over the Horizon," of which our own
25 member, Lonnie Hoffman, is, of course, the editor of this

1 fine publication. And I was taken back by the trial
2 lawyers who kind of shared Robert Levy's and Jim Perdue's
3 perspective that there's a real issue of judging
4 credibility of witnesses when you're doing it through a
5 Zoom brady box, little square, and again, you have to look
6 at the process, I think, and weigh that against the
7 efficiencies, so I just want to throw that in and commend
8 that publication.

9 PROFESSOR HOFFMAN: Thanks, Elaine.

10 CHAIRMAN BABCOCK: Thanks, Professor
11 Carlson. Judge Salas Mendoza.

12 HONORABLE MARIA SALAS MENDOZA: I just
13 wanted to add to the comments about access to justice and
14 access to the courts. It's my understanding from David
15 Slayton that the panels that are -- are being seated
16 remotely also have greater diversity, and I think that's
17 one of the things that, you know, that we struggle with
18 statewide. And so I think that's good thing and one of
19 those benefits of doing remote proceedings, or at least
20 seating juries remotely. And then, you know, being new to
21 the committee, I'm gathering that we don't want to do all
22 this work, there's a lot of work that goes into any
23 changes for any one rule, but I guess the idea that even
24 if we couldn't force remote proceedings on lawyers that
25 they wouldn't happen, that may be true, but I still think

1 that there should be rules about how those remote
2 proceedings should occur, if they do happen.

3 I do think that there will be some lawyers
4 who see the benefits and will want to have a remote jury
5 trial and that we should have rules that are consistent,
6 and then I also think the idea that somehow we'll come out
7 of this pandemic and there will not be another emergency,
8 that's not true. We could have any other kind of other
9 emergency in which we would have to revert to some of
10 these things that we've learned during this pandemic, and
11 it would be a shame not to take advantage of all that's
12 been learned by those judges who have been doing remote
13 proceedings and codify them in a way that they could be
14 better used should we find ourselves in this situation
15 again. That's what I wanted to add.

16 CHAIRMAN BABCOCK: Great. Well said.
17 Thanks very much, Judge. All right. If there are no
18 other hands that I've missed, and I'm looking intently to
19 see if there are hands, and I don't see any. So, Nina,
20 you get to go next.

21 MS. CORTELL: Thank you, Chip. I just
22 wanted us to take a moment to acknowledge the
23 contributions of Judge Ruben Reyes, who sadly passed away
24 in December, as I understand, from COVID. Those of you,
25 certainly on the judicial administration subcommittee, but

1 the committee generally who have served previously, will
2 remember that Judge Reyes was an ardent advocate for
3 specialty courts and for the roles that our judges play in
4 those courts and how important that is. And specifically
5 you'll remember that the task we had was evaluating the ex
6 parte communication rule in the specialty court context,
7 and in that regard I believe Justice Hecht told us to talk
8 to Judge Reyes, and it was our great pleasure and learning
9 experience to be educated by him and informed by him and
10 guided by his passion, and then the committee as a whole
11 will remember that he spoke I think for the better part of
12 30 minutes or more by telephone with us at one of our
13 in-person meetings before the pandemic, and he was just a
14 wonderfully inspiring judge who served our system in so
15 many ways, and I just want to take a moment to
16 acknowledge.

17 And really the reason I even know is because
18 Chief Justice Hecht mentioned Judge Reyes at the
19 conclusion of his State of the Judiciary, which I also
20 commend to all of you is a wonderful presentation, if you
21 haven't already seen it, but at the end he talked about
22 several of our judges who we lost to COVID, and I was very
23 saddened at the end of the presentation to learn that
24 Judge Reyes was among them, but I certainly want our
25 record to reflect not only his great service to our state

1 and his community, but also to this committee. Thank you.

2 CHAIRMAN BABCOCK: Well said, Nina. Thank
3 you so much, and he was a terrific guy, and we're going to
4 miss him. Tom Riney.

5 MR. RINEY: I just wanted to echo what Nina
6 said, as a lawyer who appeared in front of Judge Reyes
7 many times. I mean, sometimes he ruled against me,
8 sometimes he ruled for me, but never once did I walk away
9 without feeling that I had a very fair consideration and a
10 very thorough consideration that both sides argued. He
11 was a great one, and we are certainly at a great loss with
12 his passing.

13 CHAIRMAN BABCOCK: Thanks, Tom. Well, I've
14 already -- I've already broken one of the rules that I
15 told you about 90 minutes ago, and that is we're not going
16 to take a break this morning and then come back. We have
17 completed our agenda, so when we break now we're going to
18 break for the rest of the day. This is very unusual. I
19 can't remember when we've gotten done before lunch, but --
20 but I'm a firm believer in getting to our business,
21 discussing it thoroughly and not shortchanging anybody,
22 but when we don't have anything more to do and anything
23 more to say, not just hanging around for the sake of
24 hanging around. So unless somebody else has additional
25 business, we'll bring this jury rules matter back on June

1 18th, which is our next meeting, and we'll try to get you
2 an agenda well -- well before that so everybody knows what
3 we're going to be talking about. And, again, welcome to
4 the new members, and welcome back to the old members, and
5 we're going to have three -- three great years together.
6 So with that, we're adjourned. Thank you.

7 MS. BARON: Thank you.

8 (Adjourned)

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

5 * * * * *

6
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8 I, D'LOIS L. JONES, Certified Shorthand
9 Reporter, State of Texas, hereby certify that I reported
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13 I further certify that the costs for my
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16 Given under my hand and seal of office on
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