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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

JUNE 18, 2021

(FRIDAY SESSION)

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Taken before Lorrie A. Schnoor, Certified Shorthand Reporter in and for the State of Texas, Registered Diplomate Reporter and Certified Realtime Reporter, reported by machine shorthand method, on the 18th day of June 2021, between the hours of 9:00 a.m. and 2:00 p.m., via Zoom videoconference and YouTube livestream in accordance with the Supreme Court of Texas' Emergency Orders regarding the COVID-19 State of Disaster.

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2   CHAIRMAN BABCOCK: Well, welcome to our

3 hopefully final meeting by Zoom, and I say "hopefully"

4 because we will meet in person on October 8th of 2021;

5 but as everybody knows, we have a challenging agenda

6 necessitated by a number of more than usual, as I

7 recall, statutes by the legislature which require either

8 rule amendments or at least being addressed in some

9 fashion by the rules.

10   And I want to thank everybody on the

11 committee for jumping on our latest referrals from the

12 Court and just doing a terrific job, and I know we're

13 going to see the results of that in a minute.

14   I also want to note two things. One, it

15 probably doesn't need being noted, but this is an

16 important day in our nation's history, and especially in

17 Texas history. Long recognized in this state is

18 Juneteenth but now recognized nationally, as is only

19 appropriate.

20   Second thing, it has been the tradition

21 when a new committee has been appointed to, on our first

22 meeting -- on the Friday night of our first meeting, to

23 have a reception for the committee and to have a team

24 picture taken. And we're going to do that, although

25 we're a little late this time, but on the Friday night

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1 following our October 8th, 2021 meeting, there will be

2 such a reception. And Shiva will get the details of

3 that out, but just hopefully plan to be -- stay in

4 Austin to do that, and we'll have a record -- photo

5 record of this committee, and we'll get a chance to talk

6 to each other casually and in a social setting.

7   So with that, I'll turn it over to the

8 Chief for a report from Chief Justice Hecht.

9   HONORABLE NATHAN HECHT: Well, thanks,

10 Chip. We have several things to mention to you today.

11   First of all, as you know, our colleague

12 for the last 11 years, Justice Eva Guzman, has resigned

13 this week and has announced her candidacy for the office

14 of attorney general of Texas. And so we wish her well.

15 Justice Guzman was started on the trial bench back in

16 about '98, I think, or '99. She had been on the bench

17 22 years and has contributed immensely to the work of

18 the judiciary. She contributed enormously to the

19 Children's Commission, the Mental Health Commission, to

20 the Access to Justice Commission, and she is a

21 nationally-known advocate for improving the operations

22 of the justice system in all those areas. So we wish

23 Eva well, and we look forward to continuing to see her.

24   We have also had another resignation this

25 week. David Slayton has resigned as administrative

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1 director of the Office of Court Administration to take

2 the position as vice president of the National Center

3 For State Courts in charge of court consulting services,

4 both nationally and internationally. This is really

5 David's dream job, and I was hoping and praying that it

6 would come along in a couple years, but here it is. And

7 so we wish him well. He will be starting that position

8 in -- on September 1st and leaving us at the end of

9 August.

10   We began a search for a new OCA director.

11 This is going to be very difficult because the job that

12 David has made the position into involves policy and

13 innovation, both setting policy and trying to imagine

14 what policy should be. It involves an enormous amount

15 of IT work because the appellate courts are all

16 operating almost online all the time, and trial courts

17 are coming along in that regard as well. And it

18 involves work with the legislature. And there's just

19 nobody who knows the Texas judiciary inside and out,

20 both from positions to people and the staffing who knows

21 the legislature, and the people over there who regularly

22 help the judiciary with legislation that we request or

23 need. And then, of course, with the IT. I think the IT

24 department is pretty strong. We still need a manager

25 there. So we're looking for somebody to fill David's

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1 position here starting in September.
2   The Court is beginning to gather in person
3 again. We had our last two conferences this past
4 Tuesday and the week before or maybe -- yeah, the week
5 before -- in person. And meeting in the conference
6 room, just to put it in perspective, it was Justice
7 Huddle's first time to meet with the Court in person,
8 even only she's been there for months. And Justice
9 Bland had not joined us in person very many times, so it
10 was very good to get back together again, and we're
11 looking forward to working in person in the fall both in
12 oral arguments and in conference. We're trying to
13 decide, like law firms are, what our in-person policies
14 should be for all personnel going forward, and that's
15 kind of a work in progress.
16   And we're -- it's been a very productive
17 term, and we're on track to clear the docket of argued
18 cases by the end of June. Our goal is to beat the
19 Supreme Court.
20   The Court has issued 38 Emergency Orders.
21 Two are still in effect, the one covering eviction
22 diversion, which just sets out a procedure for the
23 program in the justice courts, and the general omnibus
24 order, which expires August 1st.
25   And I think going forward, the -- our hope

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1 is that the order will be fully as -- give trial judges
2 full flexibility in continuing to handle backlogs, any
3 changes in risk from COVID, and any other aspects of
4 their procedure, which they have been learning to handle
5 in -- with the challenges of the pandemic.
6   So we'll continue -- some people have
7 asked if the State -- if the governor's disaster order
8 expires and the Supreme Court's power expires --
9 emergency power also expires will we continue remote
10 proceedings, and the answer is yes. And we will try to
11 give by order -- we don't expect the disaster to -- the
12 governor's order to expire. We expect him to continue
13 it. I think actually Hurricane Harvey disaster order is
14 still in effect. So we don't expect a change, but we're
15 preparing for one and trying to move a lot of what we've
16 learned over into rules of procedure. We'll be
17 continuing to do that.
18   For example, there's a paragraph in the
19 omnibus order that allows for remote proceedings and bar
20 disciplinary matters. And we're preparing to move that
21 over into the rules of disciplinary procedure so that it
22 would not need the support of any Emergency Order going
23 forward, so we'll be looking at those.
24   This, in my view, is not something that
25 can be done top-down. I think we need to draw on the

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1 very good work of our trial judges, Judge Miskel, Judge
2 Ferguson, Judge Schaffer in Houston, all of his judges,
3 lots of judges who have been trying to navigate the
4 shoals of the pandemic and learn from their experiences
5 and try to put those into practice going forward, so
6 that's kind of our strategy in that regard.
7   We're trying to expand jury trials. The
8 trial judges are trying as hard as they can. We've had
9 about 60 virtual jury trials since the pandemic started
10 in traffic cases, child protection cases, a few
11 insurance cases, a few small claims, and they work
12 reasonably well in those kinds of settings. We have not
13 had much success with using them in bigger cases, but we
14 are trying to do all we can to conduct jury trials in
15 person. Just to give you a perspective, from March 2020
16 through March 2021, 13 months, we tried 239 cases to
17 verdict. In 2019, we tried 186 a week. So we're way
18 behind.
19   And our -- one of our strategies for
20 getting through the backlog is to utilize visiting
21 judges. And you may have seen some press about the
22 legislature giving us only a portion of the funding that
23 we asked for for visiting judges, but that is not going
24 to hamper the program. We expect to get federal funding
25 through the governor's office, and the legislature knew

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1 that, and so we're -- this is not a repudiation of the
2 plan, but it's just a working together to try to get it
3 done, but we are way behind. And it's not for want of
4 trying. And so we will have to utilize some innovative
5 procedures to try to get back on track.
6   It's the same way throughout the United
7 States. I see, from my national perspective, that
8 everybody is struggling with this. Nobody has a better
9 plan than Texas. And we're all trying to learn
10 together, but that's kind of the way that we are looking
11 for it to develop.
12   Remote proceedings do work well outside
13 jury trials, and we've had a lot of them, over one and a
14 half million, through the pandemic involving almost
15 5 million participants. And so we'll continue to try to
16 refine those procedures and encourage them among our
17 judges.
18   Chief Justice Christopher has chaired a
19 Remote Proceedings Task Force identifying statutes that
20 may impact proceedings. Judge Miskel vice-chaired that
21 task force. We're going through that report. It's very
22 voluminous. And we're going through the report, and we
23 expect that over the summer, we'll make a lot of
24 progress in trying to come up with more comprehensive
25 rules to help with those proceedings.

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1　　　　We're working on final changes in Civil
2 Rule 145. We've gotten a lot of comments on the
3 proposed rule that was put out for comment, a number of
4 them from court reporters. And we're looking through
5 those carefully, and we thank David Jackson for helping
6 us with that, but we expect to have those changes
7 approved before very long.
8　　　　We have also been working on Appellate
9 Rule 49 involving motions for rehearing, and are also
10 working with the Court of Criminal Appeals, because it
11 affects them too, and we hope to have the comments in by
12 the end of August and new rules in effect by October the
13 1st.
14　　　　You-all know that the changes in the
15 disciplinary rules that were approved in a referendum of
16 the Bar had been also approved by the Supreme Court and
17 are taking effect as well. Of course, they have to do
18 with advertising and -- predominantly, but also some
19 other issues. I think there are eight rules changes.
20 And I'm sure you've heard much about them.
21　　　　We did make a change, per the
22 recommendation of this committee, to change the Code of
23 Judicial Conduct to clarify that specialty court judges
24 are not engaging in improper ex parte communications in
25 the way they handle matters in their courts, which, of

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1 course, place those judges in a different role than most
2 judges. And I think that clarification will give them a
3 lot of comfort knowing that -- in going about their
4 jobs.
5　　　　As Chip mentioned, the session has left us
6 with some work to do. And some of it we'll be tackling
7 today, and some of it we'll be continuing to look at.
8 There have been changes in the rules concerning court
9 reporters, guardians, military spouse licensing, and
10 several other things, and so we'll be trying to address
11 all of those new issues soon.
12　　　　One very good thing from the legislative
13 session is that the Legislative Branch, as well as the
14 Executive, continue to recognize the important work of
15 Legal Aid and legal services, pro bono work, and access
16 to justice and were very generous in continuing the
17 funding of all of those projects in this past session.
18　　　　The Supreme Court -- the basic funding for
19 the Access to Justice Foundation, which comes from
20 appropriations, is in the Supreme Court's budget. And
21 when we were asked to cut 5 percent going into the
22 session, we declined to cut any of the BCLS funding
23 because we just think in the times that we're in, we
24 have to emphasize how important this is to both the bar
25 and to Legal Aid providers, to their clients, and to

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1 justice in Texas. So we're very grateful for the
2 legislature's recognition of that.
3　　　　The Texas legislature is one of the most
4 generous legislatures in the country when it comes to
5 funding Access to Justice. The only two I know that are
6 comparable are -- other two are New York and California.
7 So we can be very proud of that good relationship we
8 have with the legislature.
9　　　　And finally, we're talking about setting
10 up a rules Listserv. So it's been called to our
11 attention that sometimes it's hard to get notice of
12 meetings or proposed rules of things that have to do
13 with our rules operations, so we're going to try to set
14 that up over the summer and get you-all signed up so
15 that we can pop in your inbox with updates from time to
16 time. And, of course, we'll email everybody when that's
17 ready to go.
18　　　　I think that's all, Chip. We are grateful
19 to our staff, as always, to Jackie and Pauline and
20 Martha and all of our staff at the Court, for their help
21 with our rules.
22　　　　CHAIRMAN BABCOCK: Great. Thank you very
23 much, Chief.
24　　　　And Justice Bland reminded me just a
25 moment ago that I have already messed up this morning.

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1 Our next meeting is not in October. Our next meeting is
2 September 3rd, live and in person, in Austin, and that's
3 when the reception is going to be that night, that
4 Friday night. So I apologize for that, but for those
5 people who have joined after we started, you won't be
6 confused, and now hopefully the confusion will be
7 corrected for the rest of the committee; but our next
8 meeting, Friday, September 3rd, in Austin, in person,
9 reception to follow, with a team picture taken that
10 night at the reception.
11　　　　So with that, Justice Bland --
12　　　　MS. HOBBS: Chip?
13　　　　CHAIRMAN BABCOCK: Yeah.
14　　　　MS. HOBBS: I'm sorry. Isn't that the
15 night of the Historical Society dinner?
16　　　　CHAIRMAN BABCOCK: It probably is, but
17 we're going to work -- we're going to work that out.
18　　　　MS. HOBBS: Okay.
19　　　　CHAIRMAN BABCOCK: We'll work that out,
20 Lisa. Thanks.
21　　　　MS. HOBBS: Okay, uh-huh.
22　　　　CHAIRMAN BABCOCK: Justice Bland.
23　　　　HONORABLE JANE BLAND: Good morning. I
24 don't have anything to add to Chief Justice Hecht's
25 remarks. And I know we have an ambitious agenda. It's

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1 good to see everybody, and let's get to work.
2   CHAIRMAN BABCOCK: Great. Well, I'm sure
3 everybody would want to know -- and if not everyone, I
4 want to know -- who are the baseball players over your
5 virtual right shoulder?
6   HONORABLE JANE BLAND: They're all my son,
7 Daniel, various -- you know, the year -- every year he
8 played baseball, I got one of those cutouts, so it's the
9 same baseball player.
10   CHAIRMAN BABCOCK: Okay. And so he looks
11 like he's --
12   HONORABLE JANE BLAND: He's now 26, so not
13 playing so much baseball anymore.
14   CHAIRMAN BABCOCK: I thought he would have
15 been in at least AA, maybe AAA, by now, but...
16   HONORABLE JANE BLAND: No, just a proud
17 mom.
18   CHAIRMAN BABCOCK: All right. So I think,
19 speaking of baseball, the most valuable player on our
20 committee is going to be Bill Boyce, who has not only
21 chaired a committee that has had a bunch of projects
22 given to them as a result of the legislative session,
23 but he is currently in trial and trying to juggle that
24 with his work on this committee. And so it's -- and
25 they got a day off from trial today, so it's great that

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1 Bill could be with us and help us. And on the agenda, I
2 have the three items that his committee, Judicial
3 Administration, have been assigned. And, Bill, if
4 you're here, maybe you could give us a roadmap of how
5 you plan to attack all this.
6   HONORABLE BILL BOYCE: Thanks very much,
7 Chip. I appreciate it.
8   We've got three urgent topics. And so my
9 proposal is to take them one at a time, but they're all
10 specific applications of the same general issue, which
11 is that different statutes have established different
12 limitations for time requirements on certain types of
13 cases. And so the general question is: Should either
14 the Texas Rules of Civil Procedure or the Judicial
15 Administration rules be amended to reflect these new
16 statutorily created limitations on particular types of
17 cases. So that's the big picture.
18   We've got three of them, in particular,
19 and so I think it would probably be easier and less
20 confusing if I introduce each of the three, we talk
21 about that one, and then move on to the next one as
22 opposed to mixing them all up.
23   CHAIRMAN BABCOCK: Okay.
24   HONORABLE BILL BOYCE: The first is an
25 amendment that House Bill 2950 accomplished to

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1 Government Code, Section 74.1625 to prohibit an MDL
2 panel from transferring a Texas Medicaid Fraud
3 Prevention Act action brought by the AG's Consumer
4 Protection Division.
5   The question on the table is: Should Rule
6 of Judicial Administration 13.1 be amended to reflect
7 this statute change? The subcommittee met and -- I'm
8 grabbing my notes here while we're talking. The
9 subcommittee met and discussed each of these.
10   With respect to Rule 13.1 -- and I'm
11 flipping to it right now -- Rule 13 of the Rule of
12 Judicial Administration sets out different procedures
13 related to multidistrict litigation, Rule 13.1 discusses
14 applicability to certain types of civil actions. The
15 current references to applicability are mostly time
16 related in terms of when the statute became effective,
17 but the bottom line is that as currently drafted, Rule
18 13.1 really doesn't try to capture every statutory or
19 other limitation on what can be sent and how it can be
20 sent to MDL proceedings. And so the subcommittee's
21 thought was that there's really not a reason to carve
22 out this particular new limitation and include it as
23 well.
24   There was also the thought that this is a
25 highly specialized area. If the specialized attorneys

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1 from the AG's office, Consumer Protection Division, are
2 involved in it, they're going to be well aware of the
3 statute and can apprize the Court of that. And so the
4 bottom line for this particular subpart was to recommend
5 leaving Rule 13.1 alone for this particular purpose.
6   And I should pause at this moment to say
7 that as we go through each of these subparts, if there
8 are additional comments that any of the subcommittee
9 members have, I certainly would ask them to chime in.
10 Because of the nature of the legislative schedule, this
11 meeting was done in an expedited fashion. The write-up
12 you have is not the usual fulsome report that you would
13 have with all the appendices. So if there's something I
14 leave out or a point that anybody on the subcommittee
15 wants to amplify, I would certainly ask them to do that;
16 but that's an overview of the first of these items.
17   CHAIRMAN BABCOCK: Great. Thanks, Bill.
18   Does anybody on the subcommittee have any
19 additions to Bill's excellent summary of this portion of
20 the referral?
21   HONORABLE DAVID PEEPLES: This is Judge
22 Peeples, and I have just a brief suggestion about all
23 three of these. All three of them deal with statutes
24 that have an impact on rules of procedure or
25 administrative rules. And the real question for me is:

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1 Would it be helpful to either mention in the rules or
2 comments that there are statutes that modify them? And
3 so, you know, "Would it be helpful," to me, is the
4 question. And when I ask that question, I get different
5 answers on all three of these, so I think we need to
6 talk about them individually, but for me, that's the
7 focus.
8   CHAIRMAN BABCOCK: Okay. Anything
9 specifically, Judge, on this particular MDL with respect
10 to -- you know, Bill points out that this is a very
11 specialized area where the practitioners are likely to
12 know about it, but what are your thoughts on that?
13   HONORABLE DAVID PEEPLES: Yes, two or
14 three things. It involves Medicaid fraud cases brought
15 by the attorney general, and they can bring those in all
16 across the state. And the MDL panel will know -- they
17 probably already know about this -- know that they could
18 not grant such a motion.
19   The assistant AGs who will be prosecuting
20 these cases will know about it, too. And if they are in
21 litigation with people and those people start
22 threatening, "Hey, we're going to file an MDL motion,"
23 the assistant AGs will tell them very quickly, "You
24 can't do that." It's a nonstarter, and it just won't
25 happen. And so it's just not needed. It's just utterly

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1 not needed, and so I think that we ought to just
2 recommend that to the Court.
3   CHAIRMAN BABCOCK: Great. Thank you,
4 Judge.
5   Anybody else from the subcommittee with
6 comments about this MDL rule that Bill went through.
7   HONORABLE DAVID EVANS: Chip, David Evans.
8   CHAIRMAN BABCOCK: Yes, sir.
9   HONORABLE DAVID EVANS: I chair the panel,
10 MDL panel, and there are other acts in legislation that
11 restrict the authority of the panel. Windstorm
12 Association venue is fixed in the Windstorm Association
13 cases. And I agree with Judge Peeples, it's not
14 necessary for the panel. The matter will be brought to
15 their attention in the responsive briefing, and it'll
16 take care of it at that point. So would be my thought.
17   CHAIRMAN BABCOCK: Thank you, Judge.
18 Anybody else from the subcommittee, then we'll go to our
19 full committee. But anybody else from the subcommittee
20 have any comments about this aspect of it?
21   MS. WOOTEN: This is Kennon, and I will
22 echo agreement with Judge Peeples and also point out
23 that if we were to identify one area in which statutes
24 amend processes, it would suggest that statutes are not
25 amending processes in other areas. So it could, on the

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1 grand scheme of things, be more confusing than helpful
2 to practitioners.
3   CHAIRMAN BABCOCK: Great. Thanks, Kennon.
4   Anybody else from the subcommittee?
5   (No response)
6   CHAIRMAN BABCOCK: All right. How about
7 the full committee? Anybody else have any comments on
8 the MDL aspect of it?
9   (No response)
10   CHAIRMAN BABCOCK: All right. I don't
11 hear anybody or see any hands, any mechanical hands,
12 popping up. So Bill, let's go to the next subpart of
13 this.
14   HONORABLE BILL BOYCE: So the subcommittee
15 discussion on the next subpart, number two, and the
16 third one, number three, was a bit more involved. We
17 reached consensus on this first one that we just
18 discussed pretty quickly, but there's probably more room
19 for discussion on both number two and number three.
20 And, again, I'm going to try to keep them separate, but
21 I also want to flag that Judge Peeples and I had visited
22 last night, and I think he may have some additional
23 thoughts that he will want to share after I sort of
24 introduce this topic.
25   Number two involves cases with a family

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1 violence protective order under Section 85.006 in the
2 Family Code.
3   House Bill 39 shortened the time,
4 potentially, within which a default judgment can be
5 obtained that is different from what's referenced in
6 Texas Rules of Civil Procedure 107(h). So the question
7 on the table was: Should the text or a comment be
8 added -- should the text be amended or comment be added
9 to Rule 107(h) to reflect that for this very specific
10 kind of case, the default rules are going to be
11 different?
12   The thinking or at least the discussion of
13 the subcommittee -- I'm not going to presume to say what
14 people were thinking, but the discussion in the
15 subcommittee was that at a minimum, the Rule 15 through
16 165a subcommittee should be consulted on this since this
17 also overlaps potentially with their jurisdiction. And
18 we certainly would invite anybody from that subcommittee
19 who has thoughts to chime in at the appropriate time.
20   I think the consensus was that this is --
21 even though this is a specialized area of type of case,
22 it probably does behoove the courts and the litigants to
23 alert, either through rule amendment or through a
24 comment, that the rules for this very specific kind of
25 case are different with respect to the availability of a

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1 default judgment. Again, the courts that are dealing
2 with this are likely to be specialized courts.
3   We had a thought that the attorneys who
4 may be in one of these situations may or may not be as
5 specialized, and we thought for that reason that this is
6 a significant departure from what is otherwise a pretty
7 bright-line rule in Texas Rules of Civil Procedure 107.
8 Folks should receive a head's-up about it, so the
9 question is: How do you do that?
10   When we had the discussion within the
11 subcommittee, I think the initial consensus was to look
12 at a rule amendment to talk about that, but it wasn't
13 100 percent clear. There was some recognition that a
14 comment may be an appropriate way to do that, but one
15 way or the other, there should be some kind of head's-up
16 of notice of this, particularly in light of the
17 potentially urgent circumstances in which this type of
18 request for a family violence protective order might
19 come up. So that's kind of the overview, but Judge
20 Peeples may have additional thoughts that he wants to
21 share.
22   HONORABLE DAVID PEEPLES: Yes, I do.
23   All across the state, in the big cities
24 and also out in the country, most of these cases are
25 bought by dedicated prosecutors, I mean, prosecutors who

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1 this is what they do, and they're heard most of the time
2 by judges who this is one of the main things they do.
3 And so the people out there are going to know this by
4 and large, but I don't think that's true everywhere.
5 And I do think it would be very -- there's an easy fix
6 that would be helpful to people who might not know about
7 this.
8   And so I agree with the subcommittee's
9 recommendation that maybe the text and/or a comment
10 would be -- should mention this. And I've got a
11 ten-word sentence that could be inserted in Rule 107(h)
12 that would cover it. Quote, This section does not apply
13 to family law protective orders, period. And then I
14 think that could be footnoted and there could be -- a
15 comment could be drafted that would just basically quote
16 the statute, and depending upon how it's formatted, it
17 might take up four or five lines.
18   The statute is very clear and refers
19 explicitly to Rule 107. And so I think there's an easy
20 fix that would be helpful for some people, although the
21 specialists in this area I think would know about it.
22   CHAIRMAN BABCOCK: Thanks, Judge. And
23 anybody else on the subcommittee have any thoughts about
24 this? Emily, there's a hand. Somebody who's
25 technologically savvy. Yeah, Emily.

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1   HONORABLE EMILY MISKEL: And I'm sorry,
2 I'm in a hotel room, so I'm trying to like look this up
3 on my phone while we're having the discussion. But I
4 think a lot of family violence protective orders are
5 filed by pro se litigants, and they're filed in general
6 jurisdiction courts. So I do think it helps to have a
7 comment. I don't know that it needs a rule change. And
8 I'm sorry, I'm not on the subcommittee, so I apologize
9 if I'm overstepping.
10   But one thing I wanted to look up that I
11 couldn't access quickly enough is, there are also
12 stalking protective orders under Chapter 7A of the Code
13 of Criminal Procedure. And a lot of times, they're
14 mixed together and we treat them similarly or we try
15 them together. We use the same forms for both. And I
16 just don't know if the change on the Family Code also
17 affects the other types of protective orders under the
18 Code of Criminal Procedure. So I don't know the answer,
19 but I just wanted to mention that.
20   CHAIRMAN BABCOCK: Thank you very much,
21 Judge. And you're certainly not overstepping your
22 boundary.
23   But here's another technologically savvy
24 person. Kennon, what do you have to say?
25   MS. WOOTEN: Thank you, Chip. I just want

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1 to echo, again, Judge Peeples' good suggestion. I think
2 that's a clean way of addressing this particular matter
3 in the rule.
4   And in regard to the fact that there are
5 pro se litigants out there confronting these situations,
6 I will say, for what it's worth, that this might be a
7 good thing to address on TexasLawHelp as well, the
8 website that has recently been addressed via amendments
9 to the citation rule. It's a great resource for pro se
10 litigants, self-represented litigants, and frankly
11 people like me who do pro bono work in the family law
12 realm and don't really know the ins and out of how it
13 works. So I would also say that collaboration and
14 working with the Texas Legal Services Center to get
15 something up on TexasLawHelp.org in regard to this
16 matter would be a good thing to do.
17   CHAIRMAN BABCOCK: Great. Anybody else?
18 Yes, Judge. Judge Salas?
19   HONORABLE MARIA SALAS MENDOZA: So I
20 understand what Judge Peeples is saying, but sort of the
21 other part of the conversation on the subcommittee is
22 that if you -- the question was whether the Rule 6
23 should be amended. And if you look at that particular
24 rule, it's talking about suggestions for disposition of
25 cases. And it has -- in the first part, you know, it

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1 refers to criminal cases and it refers back to the
2 statute, then talks about civil cases. I don't have it
3 in front of me, so I apologize to y'all not having the
4 particular cite. But at least A, B, and C refer to
5 these, as we discussed them in the subcommittee,
6 aspirational rules for disposition of cases. And then
7 you get to D, and I think there's an E also, that do set
8 out some deadlines.
9   And so I was of the opinion there were
10 some of us on the committee that thought this isn't the
11 place for anything having to do with a deadline. It
12 should be referred to the actual Family Code, and that's
13 where people would go.
14   And to the extent that people are thinking
15 that a pro se litigant might need the additional help, I
16 don't think they're going to the Rules of Judicial
17 Administration. I think that still would be more
18 helpful in the actual Family Code.
19   So I think Rule 6 is an interesting rule
20 because it mixes a couple of things, but I guess I
21 wasn't in the group that thought adding to the mix-up or
22 the hodgepodge would be helpful. So I just think this
23 is not the place to add it.
24   CHAIRMAN BABCOCK: Great. Thank you,
25 Judge.

32443

1   Is Richard Orsinger with us? He's the
2 chair of the Rule 15 through -- what is it -- 137
3 subcommittee, or Judges Estevez or anybody else on that
4 subcommittee, any comments that you-all might have about
5 this? Either raise your electronic hand or just pop in.
6   (No response)
7   CHAIRMAN BABCOCK: Well, the only thing I
8 can --
9   HONORABLE ANA ESTEVEZ: I like what Judge
10 Peeples said. And I will just say from my experience
11 with pro se litigants, they're not going to be looking
12 at the code of -- you know, the injunction code.
13 They're going to be looking in the Family Code. They're
14 going to go to a family violence coordinator, and
15 they're going to get the need they -- the help they
16 need. I would be more concerned with our attorneys that
17 are doing pro bono work, so that sentence would help.
18   CHAIRMAN BABCOCK: Great. Thanks, Judge.
19   Anybody else on the committee whether or
20 not they're on the subcommittee?
21   HONORABLE DAVID PEEPLES: Chip --
22   CHAIRMAN BABCOCK: Yes, sir.
23   HONORABLE DAVID PEEPLES: -- the issue
24 that Judge Salas Mendoza brought up, I want to save that
25 for the next issue we have, which is the 90-day deadline

32444

1 to rule after you've had a trial. But this one right
2 here deals with the default judgment issue and must --
3 notice and so forth, citation, be on file for ten days,
4 and the legislature said not in a protective order case.
5   And the more I think about -- I hadn't
6 thought about the pro se issue. It is true that
7 sometimes pro se people bring these. I think it adds a
8 little bit if 107(h) would have that sentence, and then
9 a comment would quote the statute and they would see it.
10 It certainly doesn't hurt. Probably helps a little.
11   CHAIRMAN BABCOCK: Yeah. That makes some
12 sense to me, but anybody else have any comments?
13   HONORABLE TRACY CHRISTOPHER: Oh, I have
14 my hand raised, Chip. I don't know if you can't see me,
15 but --
16   CHAIRMAN BABCOCK: Oh, no, I can see it
17 now, yes. Sorry.
18   HONORABLE TRACY CHRISTOPHER: Okay.
19   CHAIRMAN BABCOCK: Justice Christopher.
20   HONORABLE TRACY CHRISTOPHER: So, you
21 know, I've been on the Pattern Jury Charge Committee for
22 a long time. And we put a lot of stuff in the comments,
23 and I have found that people don't read the comments.
24 So I actually think it would be better to, you know,
25 add, you know, in a family violence protective order

32445

1 case to the text of the rule rather than putting it in a
2 comment just because people don't read the comments.
3   I do see this note that Tom Gray has put
4 up that says, "If we amend 107, the statute negates
5 anything in 107." Yes, yes, it would, but, you know, I
6 think everyone would find it clearer if you actually put
7 it in the text.
8   CHAIRMAN BABCOCK: Great. Thanks, Judge.
9   Richard Munzinger.
10   MR. MUNZINGER: I agree with putting it in
11 the text of the rule. The ten-word sentence that Judge
12 Peeples suggests is fine, but I do think that
13 practitioners need to be alerted in the text of the rule
14 to a place that they can go to learn that there is a
15 shortened time frame because those rights are being
16 affected, and most people think you have 20 days, et
17 cetera, et cetera. So I think that the practitioners
18 should be warned in the text of the rule itself. Thank
19 you.
20   CHAIRMAN BABCOCK: Thanks, Richard.
21   Okay. I'm scanning for mechanical hands,
22 and I don't think I've missed any, but I may have.
23 Anybody else have any comments about this?
24   (No response)
25   CHAIRMAN BABCOCK: Okay. Well, Bill, back

32446

1 to you.

2 　　　　HONORABLE BILL BOYCE: So the third item
3 is the one that I think Judge Salas Mendoza and Judge
4 Peeples have flagged for us, and this was also a topic
5 of considerable discussion within the subcommittee and
6 not a clear consensus on what to do about it. And I
7 think Judge Salas Mendoza really crystallized the source
8 of potential confusion.

9 　　　　So the issue on the table is, House Bill
10 567 has added a new Family Code section that sets a
11 90-day deadline for rendering a final order in a child
12 protection case after the date on which trial commences.
13 So the question was: Should Rule of Judicial
14 Administration 6 be amended or flagged with a comment to
15 reflect this new time limit?

16 　　　　And the thing about Rule 6 is at its core,
17 as Chief Justice Gray pointed out in our subcommittee
18 discussion, Rule 6.1 setting out different timetables is
19 not mandatory. It is aspirational. It is permissive.
20 District and county -- district and statutory county
21 court judges should, so far as reasonably possible,
22 ensure that all cases are brought to trial or final
23 disposition in conformity with the following time
24 standards, and then you've got different time standards
25 for different types of cases.

32447

1 　　　　Same thing with 6.2. You've got this "so
2 far as reasonably possible" language, which is more
3 aspirational, obviously entitled to attention in an
4 effort to comply with it, but not really framed in
5 mandatory terms.

6 　　　　In contrast, the statutory amendment is
7 framed in mandatory terms. You decide this matter
8 within X number of days, absent a showing of good cause,
9 which good cause is statutorily defined. So it's
10 mandatory rather than permissive.

11 　　　　So the overall concern was, if we start
12 mixing up mandatory and permissive in Rule 6.1, is that
13 a source of potential confusion, because as we read the
14 statute, the statute is not telling judges to do this
15 insofar as is reasonably practical or possible. It's
16 telling judges to do this. So that's an overarching
17 consideration.

18 　　　　A related consideration is that, you know,
19 there still may be some source of potential confusion.
20 Even under -- even if we leave Rule 6.1 alone, it
21 references some statutory provisions. The subcommittee
22 did not have a particular grasp on whether there are
23 other mandatory timeframes for dispositions either in
24 the Family Code or in other context. The suspicion is
25 there probably are, but we didn't run that to ground.

32448

1 　　　　And so there's still a potential source of
2 confusion because, for example, 6.1 references
3 timeframes for family law cases. That's kind of a broad
4 term, and you capture within that there may well be
5 types of family law cases, quote, unquote, that have
6 specific time frames within them.

7 　　　　So there was not a consensus on whether to
8 amend Rule 6.1 to have some kind of a notion that says
9 these standards don't apply in this specific kind of
10 case under this provision of the Family Code.

11 　　　　I think the options that were settled on
12 to bring to the full committee is, number one, possibly
13 just leave Rule 6 unchanged with the concern that
14 highlighting this one particular mandatory statutory
15 timeframe may, by omission, mislead people into thinking
16 that this is the only one and there are others out
17 there.

18 　　　　Another option that was discussed is kind
19 of a general preamble perhaps to the entirety of Rule 6
20 that says nothing in these guidelines, or however you
21 want to characterize them, nothing in the time standards
22 set out in Rule 6, displays any mandatory deadlines that
23 any statute anywhere may establish. Not perhaps, you
24 know, the most precisely informative preamble, but at
25 least it gives folks an idea that they should

32449

1 consider -- they should investigate whether there's
2 something specific to the very particular kind of case
3 that they're working on.

4 　　　　So the two options for further discussion
5 that the subcommittee came up with are reflected at the
6 end of the short memo in Subsection B. There may well
7 be other options that folks want to flag.

8 　　　　And, again, Judge Peeples and I talked
9 about this some last night, and he may have some
10 additional thoughts in addition to any other
11 subcommittee members who may want to chime in at this
12 point.

13 　　　　CHAIRMAN BABCOCK: Great. Thank you,
14 Bill.

15 　　　　Judge Peeples.

16 　　　　HONORABLE DAVID PEEPLES: Yeah, two or
17 three things. I think it bears stressing, this deals
18 with judges who have tried the case. They've had a
19 trial. I mean, they have tried the case and it's over,
20 and they've got 90 days from the start of the case to
21 sign a judgment that's final. And so this is going to
22 be on their radar. They will know about it.

23 　　　　And the lawyers, you know, again, many --
24 maybe most of these cases are brought by people that
25 this is what they do. They'll be reminding the Judge,

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1 and there's so many easy ways to do it. "Your Honor, we
2 just would like to get it on your calendar because the
3 legislature, you know, was mad about this. They said
4 mandamus lies -- urged people to bring mandamus if you
5 don't get this done in 90 days." And the legislature
6 does care about this because they said in the statute,
7 once you've started the trial, that 90-day period is not
8 tolled if you recess the trial. And they did that
9 because judges were doing that, some of them.
10   And so I just think this is going to be --
11 the Judges are going to be aware of this and the people
12 involved in the case will remind them. And that, plus
13 the fact it's just a bad fit in Administrative Rule 6,
14 which is preparatory and aspirational, and it could be
15 done. We tried the drafting it. It's just hard because
16 it's such a bad fit. So -- and my view is because it's
17 not helpful to put it in Administrative Rule 6, we
18 shouldn't try. The Court shouldn't try, but it can be
19 done if the Court wants to do it.
20   CHAIRMAN BABCOCK: Thank you, Judge.
21   Yes, Judge Miskel, you've got your
22 electronic hand up. Thank you.
23   HONORABLE EMILY MISKEL: I was just
24 realizing that, you know, child welfare cases have a ton
25 of very specific and strict deadlines that have never

32451

1 been mentioned in Rule 6. So I'm on board with either
2 leaving it the same, because everyone that does child
3 welfare cases knows that that's its own specific set of
4 deadlines, or to just modify 6.1 where it says "family
5 law cases" to just say "family law cases except child
6 welfare cases."
7   CHAIRMAN BABCOCK: Thanks, Judge.
8   Justice Gray has a comment. I don't know
9 if everybody's seeing it. "They start the case to avoid
10 the mandatory dismissal and tell them to come back for
11 some more of the trial on a date in the future, so the
12 trial is not over."
13   Judge Peeples, did you address that issue?
14 It seems like maybe you did, but --
15   HONORABLE DAVID PEEPLES: The statute
16 itself addresses it and says -- if you -- once you've
17 started the trial, the 90 days is not tolled by
18 recessing the trial. I mean, they explicitly said that
19 in the statute.
20   CHAIRMAN BABCOCK: Got it.
21   All right. Judge Salas Mendoza.
22   HONORABLE MARIA SALAS MENDOZA: So Judge
23 Miskel, I don't do family law, so I would defer to you,
24 but my recollection is that there are a ton of deadlines
25 in all the cases. And so if it's just child welfare,

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1 then I agree that's helpful, but that was the
2 conversation we had, too, that we wouldn't want to
3 suggest in any way that those are the only deadlines.
4 And so, you know, that's why I thought it's just not a
5 good place to put it in.
6   CHAIRMAN BABCOCK: Thank you, Judge.
7   Any other -- any other comments? Yes,
8 Kennon.
9   HONORABLE BILL BOYCE: You're muted.
10   MS. WOOTEN: Can you hear me now?
11   CHAIRMAN BABCOCK: Yes. Yes, thank you.
12   MS. WOOTEN: Sorry about that. I was
13 hoping nobody would ever tell me I'm muted again on Zoom
14 but hopes get dashed all the time.
15   CHAIRMAN BABCOCK: It happens.
16   MS. WOOTEN: It does.
17   With Rule 6 of the Rules of Judicial
18 Administration -- this is beyond the scope of the
19 immediate task; however, I'm wondering whether it might
20 be worthwhile to say something general in that rule
21 along the lines of "unless provided otherwise by
22 statute," comma, and then go into the text of the rule,
23 because it strikes me based on the feedback received
24 today that there are instances in which the statutes
25 require disposition by a certain date. And then we have

32453

1 this rule that's aspirational as opposed to mandatory
2 that could be somewhat confusing if an individual were
3 to go to it and think that it is universally applicable.
4   So, again, I know this is a suggestion
5 beyond the immediate scope of the issue at hand, but I
6 throw it out there for consideration in light of the
7 fact that we have a rule that may be a little misleading
8 to people who don't have a grasp on the broader context.
9   CHAIRMAN BABCOCK: Thanks, Kennon.
10   Any other -- any other comments? Justice
11 Gray has amended his -- or supplemented his comment to
12 everybody indicating, "So we will be arguing in the
13 mandamus proceeding if it was tolled but amending RJA
14 does not need to be done, and it would be tolled versus
15 recessed to determine if the trial is over."
16   Anybody -- Bill, do you have any thoughts
17 about Justice Gray's comment?
18   HONORABLE BILL BOYCE: My main thought is
19 I don't think tweaking or changing Rule 6 is the place
20 to address these issues. Some of them may get litigated
21 and so on and so forth.
22   You know, speaking for myself, not
23 purporting to speak on behalf of the entire
24 subcommittee, I think some kind of a flag to
25 litigants -- either we try to identify the entire

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1 universe of statutory exceptions or we have some
2 catch-all language in Rule 6.
3   And trying to capture the entire universe
4 of every specific timeline that's statutorily mandated
5 somewhere would be fraught with opportunities for
6 omission. And because of that, you know, I think
7 alerting folks that nothing in the rule overrides a
8 specific statutory mandate for a time frame is probably
9 the best we can do for purposes of Rule 6.
10   CHAIRMAN BABCOCK: Great. Rich Phillips?
11   MR. PHILLIPS: Yeah. Again, I think just
12 looking at Rule 6.1 and 6.2, like Kennon said, why not
13 just put a thing in the beginning that says, "Except as
14 otherwise required by statute," comma, right at the
15 beginning of 6.1, and put the same thing at the
16 beginning of 6.2. Problem solved.
17   CHAIRMAN BABCOCK: There you go.
18   Anybody else?
19   (No response)
20   CHAIRMAN BABCOCK: Okay. I don't see
21 anymore hands. Bill, any closing remarks before we move
22 on to our next topic?
23   HONORABLE BILL BOYCE: I think we should
24 move on to the next urgent topic.
25   CHAIRMAN BABCOCK: Okay. Thank you.

32455

1   HONORABLE BILL BOYCE: Thanks.
2   CHAIRMAN BABCOCK: So we'll do that. And
3 terrific job by you and your subcommittee on such short
4 notice. Really, really fine work. Thank you.
5   HONORABLE DAVID PEEPLES: Chip, I have one
6 parting comment, which is that Bill Boyce ought to chair
7 more subcommittees.
8   CHAIRMAN BABCOCK: I think we ought to
9 make him chair of all the subcommittees.
10   HONORABLE DAVID PEEPLES: He's good. Very
11 good.
12   HONORABLE BILL BOYCE: Thanks, I think.
13   CHAIRMAN BABCOCK: And Roger Hughes, I
14 don't know if he's shared a screen with the rest of you,
15 but he must be proud of some mandamus ruling because he
16 keeps putting it up on the screen, but if you won it,
17 Roger, congratulations.
18   Okay. We're going to move on to -- and
19 where I went to college, we used to play URI in
20 football, but -- University of Rhode Island, but I'm not
21 sure what U-r-i, Uri-related appeals, particularly
22 refers to, but Pam's going to tell us. I hope you're
23 here, Pam Baron.
24   MS. BARON: Here I am. This is going to
25 be a very similar discussion to the one we just had

32456

1 because the primary question is whether new legislation
2 should be referenced either in the text or comment of a
3 rule governing direct appeals.
4   Chip, the winter storm that you just went
5 through had a name, and its name was Uri.
6   CHAIRMAN BABCOCK: Oh, that's right.
7 Yeah, well, I was in Florida, so I didn't get to benefit
8 from that storm.
9   MS. BARON: Okay. Well, there you go. If
10 you had been there, you might remember and be on a
11 first-name basis with it; but there were extraordinary
12 costs, as you might expect, in the power industry at all
13 levels. And if all of those costs are immediately
14 incorporated into rates, it will have a really
15 devastating impact on ratepayers throughout the state.
16   And so the legislature has come up with a
17 way of securitizing extraordinary costs related to the
18 winter storm, which basically, you know -- this is not
19 my area, but I think it basically means that they can
20 issue bonds and recover their costs over a period of
21 time instead of passing them directly to ratepayers.
22   And so there are three different statutes.
23 They all look somewhat similar. They're a little bit
24 different, because gas utilities are regulated by the
25 Railroad Commission and other market participants either

32457

1 fall under ERCOT or the PUC, but basically authorizes
2 gas utilities, ERCOT, market participants, and electric
3 co-ops to use securitization as a method of recovering
4 extraordinary costs from the winter storm.
5   They all provide that they move on a
6 pretty expedited basis from the issuance of whatever
7 agency's order authorizing the securitization to the
8 District Court, and District Court is required to
9 consider it expeditiously. And then it skips the Court
10 of Appeals and it goes directly to the Texas Supreme
11 Court and can go only to the Texas Supreme Court from
12 there.
13   Review is limited to the record before the
14 agency, and the issues are very limited to whether or
15 not the securitization order was authorized by the
16 constitution and the laws of the state and was within
17 the jurisdiction or power of the agency that issued it,
18 so it's a pretty limited appeal.
19   There is a rule governing direct appeals
20 to the Texas Supreme Court. It's Rule 57.
21   There are other direct appeals. The most
22 common one is, in the course, jurisdictional statute,
23 and it involves issuance of injunctions based or denial
24 of an injunction based on the constitutionality or
25 unconstitutionality of a state statute. So that's --

32458

1 like the school finance cases are a good example of
2 direct appeals to the Texas Supreme Court from a
3 District Court. They go -- they proceed just like any
4 other kind of appeal.
5   There are also other statutes that are
6 particular to utilities and securitization. There are
7 two in the utilities code where the PUC issuance of
8 securitization orders proceeds by direct appeal to the
9 Texas Supreme Court, and it's heard at least two of
10 these on direct appeal some years ago.
11   There is another one or two here and
12 there, like House Bill 4, tort reform, had a provision
13 in there saying that if you're challenging the damages
14 cap provision, that has to go up by direct appeal. So
15 we see these periodically. I would say there are not a
16 lot of them.
17   I think going back to Judge Peeples'
18 question, our overriding concern is would changing the
19 rule or statute be helpful to reflect this very rare and
20 unique type of statute where you're going to have very
21 sophisticated participants in the proceedings before the
22 agency. It has not traditionally been our approach in
23 the appellate rules to cite to particular statutes
24 either in the rule or comment.
25   As you know, I guess we have now six or

32459

1 seven different kinds of direct appeals. If we were to
2 do this, for example, in the interlocutory appeal
3 statute, you can -- rule, you can imagine, it would be
4 pages of comments at this point because there are so
5 many different kinds of interlocutory appeals.
6   So generally we would think it's not
7 helpful -- the first phrase of Rule 57 does require that
8 there be an authorizing statute to bring a direct appeal
9 to the Texas Supreme Court. I did a quick look, and
10 over the last ten and a half years, there have been 26
11 direct appeals brought to the Texas Supreme Court. It
12 has noted jurisdiction in only two. That's because I
13 think many of these come from pro se people who don't
14 know that they have to have a particular statute, even
15 though the rule tells them they have to.
16   So that's kind of where we are. And the
17 committee by -- all agreed -- I can't say the word
18 unanimous for some reason -- we all agreed that we would
19 not recommend change to the rule or comment.
20   CHAIRMAN BABCOCK: Thanks, Pam.
21   Anybody on either the subcommittee or the
22 full committee have any thoughts or comments about this?
23   (No response)
24   CHAIRMAN BABCOCK: Boy, you bulldozed
25 them, Pam.

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1   MS. BARON: Well, I try.
2   CHAIRMAN BABCOCK: All right. Well, if
3 there are no -- if there are no other comments on Storm
4 Uri, we will flip back to our next agenda item, which is
5 protection of sensitive data. And I got a report I
6 think today from somebody on this, but is Jim Perdue
7 here?
8   MR. LEVY: Jim is not here, but I think
9 I'm going to be covering this topic.
10   CHAIRMAN BABCOCK: Yeah. Great, Robert.
11 Thank you.
12   MR. LEVY: Okay. And I will apologize.
13 The memo that was sent out did not have the full vetting
14 of our subcommittee, so it's a work in progress, and I
15 encourage the input of the full committee. This topic
16 relates to passage of two bills, House Bill 1540 and
17 House Bill 2669.
18   The issue of most focus is House Bill
19 1540, which is a bill that was passed and was sponsored
20 by representative Senfronia Thompson, and it addresses a
21 variety of issues pertaining to child trafficking. And
22 there were a number of different features in the bill,
23 but the one that I think requires this committee's focus
24 is a provision in the bill that amends Chapter 98 of the
25 Texas Civil Practice and Remedies Code that deals with

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1 the ability of a victim of child trafficking or
2 trafficking to bring a cause of action against
3 individuals or entities that participated in the events.
4 And that chapter has been in place for over ten years.
5   The provision of House Bill 1540 adds
6 language that allows a claimant under this chapter to
7 bring those claims under a pseudonym and otherwise avoid
8 the disclosure of any information that might be
9 identifying to that claimant.
10   And the bill also includes provisions that
11 make clear that the only people that can be aware of the
12 identity of the individual is the Court, the parties,
13 the attorneys representing a party to the action, and
14 anyone that the Court specifically authorizes. When a
15 Court authorizes that further disclosure, the Court is
16 obligated to inform those additional individuals of the
17 responsibility to keep the information confidential and
18 the power to enforce that through contempt.
19   The other element of this is that the
20 right to bring the -- or to bring the action under a
21 pseudonym and in confidence is voluntary. So the
22 claimant could bring the claims in her or his name, or
23 they, of course, can bring it under a pseudonym.
24   The issue for the committee, I think, is
25 advising the Court on potential rulemaking, and similar

32462

1 to the prior discussions, the question is: Do we need
2 to propose specific rulemaking, or do the procedures
3 that are currently in place enable courts to apply their
4 administrative practices to address this issue?
5   Another element of the law that is
6 important is that a Court has an obligation to inform a
7 claimant of her or his right to proceed confidentially,
8 and that ostensibly would suggest that after the lawsuit
9 is originally filed, that notification would go to a
10 claimant, and then the claimant would effectively --
11 should be enabled to withdraw the original petition and
12 replead using a pseudonym.
13   It creates a number of very challenging
14 questions in terms of the way cases are tried both in
15 pretrial as well as trial practices. And it starts with
16 issues about pro se proceedings and how a party would be
17 named and how discovery would proceed, issues about
18 disclosures in discovery. And one of the significant
19 questions or issues is that this obligation not only, of
20 course, falls on the party bringing the claim, but it
21 also would fall on other parties to the action and not
22 taking any steps that would violate the statute by
23 disclosing the identity of the claimant. And that would
24 involve issues about depositions, production of
25 documents, how to deal with medical records, if there

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1 are medical records involved, the selection of experts,
2 and what information the expert would be told, and all
3 of those issues should be considered.
4   The other interesting question is, in
5 terms of the way the statute is written, it actually
6 raises a question of: Is the reference to the attorneys
7 representing the parties mean that the rest of an
8 attorney's staff are not permitted to know the identity
9 of the claimant? And that would include, of course, the
10 parties representing defendants in the action.
11   The other questions involve transcripts.
12 Rule 76a potentially is involved. There are a few Texas
13 Rules of Appellate Procedure that would come in play.
14 And then also, and not listed in the memo, is the Rule
15 of Judicial Administration, Rule 12.5(i) that covers
16 confidentiality.
17   The other point that is worth noting in
18 terms of the statute is, the statute specifically
19 prohibits rulemaking that is contrary to the language of
20 the statute. And I'm not sure if that is precedented or
21 not, but it is notable and something that I think this
22 committee should keep in mind.
23   So I think that the question for the
24 committee is: Would a specifically drafted rule that
25 covers Chapter 98 proceedings be appropriate, or should

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1 specific rules that cover the names of the parties or
2 other references that might involve disclosure of a
3 claimant be specifically amended, or is rulemaking
4 generally not needed because of the ability of the
5 courts to manage this issue just under current
6 practices?
7   In the memo, I included a proposal to
8 create a new rule, and the rule would provide for the
9 reference to the right of a party to bring the claim
10 under a pseudonym that also issues about not having to
11 disclose their address, email information or using a
12 pseudonym for an email or any other identifying
13 information. It would also note that any information
14 that is filed in the case, whether in motions or other
15 proceedings, including potentially a trial, those would
16 be filed under seal.
17   A party that needs to present an affidavit
18 or verification can use a pseudonym, and the court clerk
19 also would be instructed not to disclose any information
20 about the individual in bills of cost or anything else,
21 because obviously if a claimant brings a claim under
22 that chapter and a bill of cost is adjudicated against
23 that claimant, you know, normally that would list the
24 name of the party, and so that would need to be
25 addressed.

32465

1   There's an additional issue of -- well,
2 let me just go through the rest of the proposed rule.
3   It would also obligate that the parties --
4 no party to the action may disclose identifying
5 information in any form. So, for example, if a
6 defendant is listing all of the individuals with
7 knowledge of relevant facts, they should not include the
8 name of a claimant. And no other individual should be
9 advised of the identity of the claimant absent express
10 written approval of the Court. And, of course, the
11 Court must include admonishment that the disclosure of
12 the identity of the claimant is punishable by contempt.
13   Some other questions that are also
14 triggered by this relate to how trials themselves could
15 be conducted if you have a claimant who has chosen to
16 maintain confidentiality. If a claimant is sitting
17 there at trial, do steps need to be taken to protect
18 that individual's identity through a screen or other
19 types of ways to keep their identity from being
20 disclosed, how that issue applies to our open courts,
21 and, you know, the right of the press to attend and
22 participate, the way the transcripts, of course, would
23 be dealt with.
24   What I did in the memo -- and I don't need
25 to go through it in detail -- is talk about all the

32466

1 rules that I could find where the identity of a party or
2 witness is called for and therefore could be impacted as
3 a result of the passage of this statute.
4   I will note specifically one area that is
5 not necessarily for rulemaking but something that -- a
6 suggestion to the Court is that in there under Rule 18c,
7 Court is authorized to permit the broadcasting of
8 proceedings. And I think consideration might be
9 appropriate to include in the rules for broadcasting
10 that steps might need to be taken to protect the
11 identity of Chapter 98 claimants, if that claimant makes
12 that election.
13   There are other specific references to
14 rules that provide for protection of privacy, which is
15 in Rule 21c. That rule could be amended to include
16 reference to Chapter 98 cases, and the memo includes a
17 proposal to add that language.
18   And the rest of the memo talks about the
19 additional rules that might be involved. I'll leave
20 that for your review, but I will stop there and see
21 if -- thoughts or suggestions about how to address this
22 issue.
23   CHAIRMAN BABCOCK: Great. Thanks, Robert.
24 Very thorough memo for sure.
25   Yes, Stephen Yelenosky with a mechanical

32467

1 hand. I see that --
2   HONORABLE STEPHEN YELENOSKY: There's a
3 real one, too.
4   CHAIRMAN BABCOCK: I see a second one.
5 You got three hands.
6   HONORABLE STEPHEN YELENOSKY: This is --
7 goes a little beyond this, but I think it's directly
8 related. I think 90 percent of my comments on this
9 committee have involved Rule 76a. So somebody who
10 survives me, please make sure that my epitaph says,
11 "Rule 76a. See below."
12   I put in a chat about this. And some time
13 ago, I brought this up regarding 76a. And the reason I
14 brought this up about name changes is that it's not just
15 in sex trafficking. It's also true in name changes, and
16 perhaps other contexts, that a person wants an order
17 precisely because they want to protect their identity.
18 Most often you have a domestic violence situation.
19 Somebody has gone into hiding, let's say, or at least
20 moved, and they don't want another person to find them,
21 with good reason.
22   And under 76a, you cannot seal, quote, any
23 order. The exception for Family Code does not include
24 orders. That includes other things. 76a does not apply
25 to the Family Code except for the first part of 76a. So

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1 name changes under the Family Code, which are under the
2 Family Code, don't allow you to steal an order which
3 changes a person's name from this to that. So arguably,
4 I don't know how difficult it would be, but somebody
5 knowing the name of the person they're trying to find
6 would then know, if they can figure out how to get the
7 order, what that person's new name is.
8   And I'll admit to violating that part of
9 76a for some time as a judge because I decided the harm
10 to a person trying to avoid a harmful person was more
11 important than keeping their name open in an order. I
12 would like to be able to do that consistent with the law
13 rather than in violation of it.
14   And so I would propose, if we're going to
15 do anything with respect to sex trafficking, that
16 preserves the identity of a person, as it should, that
17 at the same time, we add a sentence after no court order
18 that does not exclude those kind of orders from 76a but
19 says that instead -- essentially instead of under these
20 statutes or an order under Chapter 45 entered to protect
21 a person from harm shall not include the identifying
22 intervention -- or information but also adds "and
23 instead shall make reference to a sealed document
24 containing that information," because that
25 information -- for example, law enforcement needs to be

32469

1 able to get name change information and I imagine sex
2 trafficking information. So an order that simply leaves
3 that stuff out, without some reference elsewhere to the
4 identifying information, is an unenforceable order, as
5 far as I can tell.
6   So that is my suggestion. And if that's
7 of interest either now or by email or whatever, I can
8 propose some language.
9   MR. LEVY: I think that it's a very
10 important point, something that I didn't emphasize
11 earlier, is that the language of 76a, as you know, it
12 includes the language that says "no court order or
13 opinion issued in the adjudication of a case may be
14 sealed." The problem with that is that an order
15 reflecting the confidentiality of a claimant or, as you
16 point out, a name change, would be such an order and
17 therefore the -- if an order lists the name of the
18 original claimant, that would obviously be public. So a
19 court would have to be very careful how it would
20 describe that information.
21   One other point that I failed to mention
22 earlier that I wanted to suggest as well, that one of
23 the issues that the statute could be addressed is in the
24 area of electronic filing. And obviously we have a
25 number of different services that are available for

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1 parties, including pro se parties, to bring their
2 claims. And the -- I think it should be included in the
3 forms that claimants or petitioners would use to file
4 their proceedings, that if they have a Chapter 98 case,
5 that they have the right to bring the case under a
6 pseudonym and use nonidentifying information, because
7 obviously the format of what used to be the case
8 information sheet would include their full name and
9 address both as a pro se or as a -- you know, the
10 attorney preparing it. And so that is one place to
11 advise parties of their rights and would avoid the
12 challenge of trying to strike that data from the
13 electronic records if they originally filed it with
14 their full name and then they decide to later proceed
15 confidentially.
16   CHAIRMAN BABCOCK: Great. Thanks, Robert.
17   There is a chat from Judge Miskel that
18 says that there's a similar -- similar to the current
19 procedure under federal law to obtain disclosure of drug
20 and alcohol treatment records requires filing under a
21 pseudonym, closing the courtroom, et cetera, and cites
22 to a Law Review article at
23 law.cornell.edu/cfr/text/42/2.62. And Judge Yelenosky
24 has talked about Rule 76a on the record and also in a
25 chat.

32471

1   The reason why I'm reading that into the
2 record is because although we're technically not subject
3 to the Open Meetings Act, although we are subject to
4 Open Records Act, we ought to try to create a complete
5 record for the public for anybody who's watching and for
6 the court reporter who is taking this down, which the
7 Court will review in trying to decide whether to adopt
8 our recommendations or to reject them or modify them.
9   And so the Court will have a full record,
10 unless you're like Justice Gray who is having trouble
11 phoning in, and with respect to that, I'll read his
12 comments into the record; but other than that, you know,
13 these comments are all terrific and should be made, but
14 if we could make them on the record, that would be
15 great. And I'm trying to keep up with the chats as
16 well, but I think I've got everything into the record
17 that people have said.
18   So with that, Justice Christopher and then
19 Roger Hughes and then Judge Miskel.
20   HONORABLE TRACY CHRISTOPHER: Yes, I would
21 suggest that rather than trying to amend certain rules
22 that we consider putting a section into Part 7 of our
23 rules, rules relating to special proceedings, and just
24 make an omnibus rule there.
25   And I think a lot of the things that

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1 Robert brought up, some of them are more best practices
2 versus rule changes. So I think that also needs to be
3 considered, too. Do we really want to micromanage
4 everything that the trial court does in connection with
5 these type of cases?
6   It seems to me that, you know, we identify
7 the specific thing is the original pleading, right, that
8 starts the whole process. And the district clerks are
9 going to need to know that someone is filing a lawsuit
10 pursuant to this statute and that the rules -- you know,
11 that they're allowed to use this pseudonym and no
12 identifying information, because otherwise, they might
13 reject the pleading.
14   So I think when we're looking at the
15 rules, we've got to figure out which ones absolutely
16 have to be rules versus which ones are just best
17 practices for the trial court. And I would suggest
18 rather than trying to tinker with every rule of civil
19 procedure, that it be in a separate rule.
20   CHAIRMAN BABCOCK: Great. Thanks, Judge.
21   Roger?
22   MR. HUGHES: Yeah. I want to echo the
23 earlier remarks of Yelenosky about Rule 76a. And I
24 think we need to consider a way to somehow seal this off
25 so that there are no, so to speak, chinks in the armor

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1 that would allow a person to invoke Rule 76a to get at
2 what would otherwise be unavailable information.
3   And part of the reason I say this -- and
4 maybe it's just because I'm at an age where I've gotten
5 a little cynical -- the defendants in these cases are
6 not going to be nice people. And I can imagine the
7 possibility they would be more than willing to, so to
8 speak, blackmail or threaten the possibility or findings
9 raising some 76a issue to unseal or make public this
10 stuff. And I want to be able to take that off the table
11 as a bargaining chip, so to speak.
12   Now, how to do that? I leave it up to
13 somebody else. I'm just saying I think we need to be
14 very cautious and be very thorough to make sure that
15 Rule 76a is not going to undo what this statute has
16 done. Thank you.
17   CHAIRMAN BABCOCK: Thanks, Roger.
18   Judge Miskel.
19   HONORABLE EMILY MISKEL: I was going to
20 agree with what Chief Justice Christopher said, which is
21 have rules for special proceedings because there are
22 several places that require pseudonyms and
23 confidentiality and all of that, and so it might be
24 helpful to just have one general rule that guides courts
25 in that. Because, for example, on the drug and alcohol

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1 treatment records, the link I included was a link to the
2 text of the federal law that requires filing under a
3 pseudonym, keeping it all confidential. And I do those
4 about like once every 18 months, and it's just long
5 enough for me to totally forget how to do it in between.
6 So I agree with that.
7   I also think the interplay between 76a and
8 21c, I am a passionate hater of TRCP 21c, but one of the
9 problems with it is it causes a huge burden on the trial
10 court. So, for example, that's the one that says you
11 can't use a child's name in any pleadings. And so what
12 will happen is, the parties will go throughout the whole
13 case filing a bunch of stuff with the child's name in
14 it, and then at the end of the day, they're like, "Oh,
15 wait. That all has to be redacted," and then turn to
16 trial court like it's now my job to somehow go and
17 redact all the pleadings that you filed that you now
18 don't want that information in.
19   So just a plea on behalf of trial courts
20 is I believe -- I'm quickly reading the statute, but I
21 believe it says the claimant may keep their name
22 confidential, but I think we need to have something that
23 says if they themselves file a bunch of things with
24 their own name in it, the burden is on them to provide
25 substitute redacted copies or something like that just

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1 to -- so that it's not the trial court's job to go clean
2 up and seal and fix all the pleadings that get filed
3 incorrectly.
4   CHAIRMAN BABCOCK: Great. Thanks.
5   John Warren I think was next, and then
6 Kennon and then Stephen.
7   MR. WARREN: Okay. My question was as it
8 relates to seal versus a pseudonym. What impact would a
9 pseudonym have on a prosecutor's ability to enhance
10 charges on a defendant? So like if you have a defendant
11 that may have been charged with one incidence, and you
12 see that he has a pattern -- a history pattern of
13 multiple or bad behavior, how would the use of a
14 pseudonym hinder the prosecutor from enhancing his
15 charges on a defendant?
16   MR. LEVY: I don't think that would have
17 an issue in terms of these proceedings. These are civil
18 cases. So any criminal record involving a defendant and
19 their victims would be in the criminal records, which is
20 separate.
21   MR. WARREN: Okay.
22   CHAIRMAN BABCOCK: Kennon.
23   MS. WOOTEN: Make a comment now just to
24 put on the record something I'm remembering about Texas
25 Rules of Civil Procedure 21c that may be helpful when

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1 deciding how to proceed with the matters at hand.
2   My recollection, which Chief Justice Hecht
3 may correct to a degree or in full, is that there was
4 extensive discussion about rule -- what ultimately
5 became Rule 21c. A lot of differences of opinion about
6 what should be in the record, what should be kept out of
7 the record. There were discussions with legislators
8 about the impact of excluding certain information from
9 court records.
10   For example, if you exclude certain
11 information from the court records, do you make it
12 difficult for people to try to enforce judgments. In
13 relation to what Judge Yelenosky said, if you exclude
14 certain information from the record, do you impact law
15 enforcement efforts negatively to a degree?
16   All of these discussions were happening.
17 There were a lot of strong opinions. I recall, when I
18 was the rules attorney many years ago, going back to
19 look at discussions of this esteemed committee and
20 seeing a lot of debate about what to do, how to proceed,
21 et cetera.
22   For a period of time there was discussion
23 about having something called a sensitive data sheet or
24 something along those lines. And that sensitive data
25 sheet would include the information perceived to be

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1 sensitive or defined as sensitive from the actual
2 filing, but the sensitive data sheet would be maintained
3 by the Court separately from the filing such that to the
4 extent there was a need to actual use this sensitive
5 data that was a legitimate need, you would have the
6 information stored in the court system.
7   My recollection is that there was concern
8 about the burden a sensitive data sheet process would
9 impose on clerks, on courts, et cetera. I'm hearing now
10 that there is a burden imposed on courts, clerks, et
11 cetera, because of noncompliance with 21c.
12   I do note for the record that there was
13 supposed to be a rule that tended to that potential
14 burden, and that was put out in Rule 21c(e), as in
15 elephant, the intent of that rule being to put the
16 burden on the parties to comply with the rules opposed
17 to putting the burden on the courts to deal with
18 noncompliance with the rule in terms of actually
19 handling materials that did not comply with the rule.
20   So this isn't really a comment to offer a
21 particular suggestion in regard to rule revisions but
22 more a comment to put on the record that there is a
23 robust discussion of this committee from years ago about
24 how to handle sensitive data and how to deal with the
25 fact that any time we take things out of court filings,

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1 we, of course, encounter need to consider openness of

2 courts. There are many competing considerations at

3 play, obviously.

4   The final thing I'll say, just for what

5 it's worth, is that I agree with Judge Yelenosky's

6 comments regarding Rule 76a. I think it goes a bit too

7 far, if you will, in that it requires a very cumbersome

8 process and sometimes precludes sealing from court

9 records -- or sealing court records when those court

10 records do contain information that could be used to

11 harm individuals. And at the end of the day, I would

12 hope that we put the safety of people who come before

13 the courts before strict adherence to these rules, but

14 in an ideal world, we would modify the rule to be more

15 protective of individuals to the extent needed.

16   MR. LEVY: Just one follow-up on that.

17 Kennon's comment does emphasize the point that there

18 should be, or I would think there would need to be, a

19 way for the Court to become aware of the true identity

20 of a claimant for a variety of reasons, particularly if

21 there was later a dispute that the -- an individual

22 trying to enforce a judgment or otherwise, was that

23 claimant and/or if the claimant did not prevail and

24 brought another case under a different pseudonym that

25 res judicata would apply, and so a process would need to

32479

1 be addressed on how to keep track of who that -- who the

2 true identity was without being inconsistent with the

3 statute.

4   HONORABLE NATHAN HECHT: Chip, let me just

5 add, if I might.

6   CHAIRMAN BABCOCK: Yes, sir.

7   HONORABLE NATHAN HECHT: There was

8 considerable discussion. Kennon's exactly right. And

9 just to color in a little bit the background, it was

10 precipitated by the federal statute requiring the

11 federal courts to adopt the rules they did, which is

12 5.2. And so we decided to look at our rules at the same

13 time, but we got about -- we had several meetings

14 internally about it. And we got about halfway through

15 what we thought the issues were, and it was so unsettled

16 and so difficult, we finally decided we're just going to

17 have to let the situation mature more before we could do

18 anything.

19   But there are some -- there are a lot of

20 interests that you would never think of that have views

21 about this. For example, the title insurers are in

22 favor of more disclosure and pleadings so that they can

23 track down issues that might have to do with title. I

24 never would have imagined that, but the legislature has

25 since, I think, enacted legislation at their behest

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1 providing more information in pleadings.

2   We even got a letter at some point, I

3 think, from the Boy Scouts saying they wanted to go

4 through -- I think maybe churches wanted to be able to

5 go through records and look for people that might be

6 dangerous for them to employ. So it's just a whole raft

7 of issues, and this is just the latest piece of

8 legislation.

9   CHAIRMAN BABCOCK: Great. Thanks, Judge.

10   I think it's -- the order is Stephen

11 Yelenosky, then Sharena, and then Richard Munzinger.

12 And I thought Judge Miskel had her hand up, but maybe

13 she took it down. Anyway, Stephen.

14   HONORABLE STEPHEN YELENOSKY: Okay.

15   CHAIRMAN BABCOCK: There she is.

16   HONORABLE STEPHEN YELENOSKY: Couple of

17 things. One, I agree with pretty much everything that's

18 been said. I'd just point out a few things.

19   One, with regard to the cumbersome process

20 of 76a, the process does not apply to anything under the

21 Family Code. It's only the sentence on the order that

22 applies in the Family Code. So to the extent you have a

23 name change, which is in the Family Code, the only issue

24 is sealing the identity in an order.

25   Now, sex trafficking, I don't know if it

32481

1 falls under the Family Code, but those things that don't

2 already fall under the Family Code that are akin to sex

3 trafficking and name change to protect someone should

4 only be -- should only be affected by the order language

5 of 76a and not the process. So that's one point.

6   Secondly, the mechanics obviously are

7 complicated and need to be worked out. I would

8 disagree, though, with the prior statement about putting

9 the burden of removing sensitive information on the

10 parties because you're going to have pro se litigants,

11 you're going to have -- typically a woman, sometimes a

12 man -- come in and want to do a name change who doesn't

13 know anything about protecting identity. I don't want

14 that person to be stuck with dealing with this when we

15 already have the clerk deal -- at least Travis County

16 deals with this sensitive data. And most often in

17 family cases, you know, they're required to eliminate

18 sensitive data, but they're not really particularly

19 concerned about it, the parties; but in a name change

20 case to protect somebody, it is important.

21   And I guess the last point is that I

22 generally agree with the point by Justice Christopher

23 that best practices is a better way to deal with a lot

24 of things, but I don't think you can deal with this

25 issue under best practices because 76a is a prohibition.

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1 And I don't think a comment or a best practice
2 instruction can affect the 76a prohibition.
3   And even if there's another rule that were
4 written that made an exception under 76a, it would have
5 to refer to 76a and say, "except in the case of 76a."
6   Finally, if you're going to make
7 exceptions, I really, really, really believe they need
8 to be in one place so that there is a clear instruction
9 of the openness of records as it is under 76a, and you
10 don't get to go and look elsewhere or have to look
11 elsewhere for an exception. If there is an exception,
12 it follows that sentence. That's what I have to say.
13   CHAIRMAN BABCOCK: Thanks, Stephen.
14   Sharena.
15   MS. GILLILAND: With respect to talking
16 about sealing versus pseudonyms, just from a practical
17 matter, pseudonyms are going to keep the case unsealed,
18 a little bit more transparency in what's happening and
19 what's being filed with the Court. It also allows you
20 to continue to use E-filing.
21   If a clerk flags the case as sealed,
22 nothing can be E-filed, and the actual pleadings
23 themselves shouldn't be E-filed. So just from a
24 practical matter to still be able to utilize E-filing,
25 pseudonyms might be an easier approach.

32483

1   With respect to the in-depth discussion
2 about who should be redacting, the clerks are very
3 adamant about not wanting to take on that challenge
4 because what happens when you miss something? What
5 happens if we redact something that you really wanted in
6 there? And kind of sets up a fight between clerks and
7 parties what should be redacted, when should it not, is
8 there an exception; well, we know we could have
9 redacted, but we really wanted it in here, and you kind
10 of end up in a circle and a lot of finger pointing if
11 you put that on the clerks. And that's all.
12   MR. LEVY: Wait. One -- Chip, if I could
13 comment on that.
14   CHAIRMAN BABCOCK: Yeah.
15   MR. LEVY: And that was something that
16 Justice Gray pointed out about the desire to proceed
17 with pseudonyms versus sealing. And I do agree that
18 it's -- in terms of the use of the pseudonym, that's the
19 way that the statute contemplates, but the question is
20 how to address other aspects of the trial practice like
21 discovery where you're providing documents -- medical
22 records, I would think, would be a very likely situation
23 or other just documents that would include identifying
24 information. And do the rules need to address ways to
25 modify, redact those documents, as -- before they're

32484

1 used, and then what happens if a witness at trial refers
2 to the correct name of the claimant versus a pseudonym,
3 which I would think would be likely, those types of
4 situations where it's -- the pseudonym alone is not
5 going to protect identity.
6   CHAIRMAN BABCOCK: Okay. Thanks, Robert.
7   Richard Munzinger.
8   MR. MUNZINGER: I'm going to show my
9 ignorance and inexperience in this area, but it does
10 occur to me that there is a problem regarding res
11 judicata and claims preclusion. I don't know if the
12 statutes or rules or codes address that problem, but
13 suppose, for example, that somebody accuses me of doing
14 something that's a violation of the law that's in this
15 area and I win the case, and the judgment has now been
16 entered under a false name.
17   There are certain occasions, as I recall,
18 where if you're attempting to set aside a judgment, you
19 can't go beyond the judgment. You can't go outside the
20 judgment. And so whose name is used in the judgment,
21 and how does the person who has been exonerated in a
22 trial protect himself or herself from false claims by
23 one of these claimants or claims that have been
24 precluded even if they were successful?
25   There is a problem here, unless -- again,

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1 I may be showing my ignorance -- I'll keep quiet -- but
2 I do think that res judicata and claims preclusion are
3 issues. Perhaps they're addressed by the statute or
4 others, and I'll be quiet and listen.
5   MR. LEVY: Statute does not address that
6 issue, and I think that is a legitimate point. The way
7 the statute seems to be drafted is the claimant's
8 identity remains confidential whether they prevail in
9 the civil action or not.
10   CHAIRMAN BABCOCK: Once again, Munzinger
11 has shown his wisdom and the opposite of ignorance,
12 which he so frequently self-deprecatingly states.
13   Judge Miskel had your hand up, but maybe
14 you lowered it.
15   So we'll go to John Warren.
16   (Reporter dropped from Zoom. The
17   following proceedings were transcribed
18   from audio.)
19   MR. WARREN: I would just like to comment
20 that while we talk about whether it's a pseudonym or --
21 and how those documents are received electronically, it
22 would require an amendment to the E-filing rules, but
23 also as it relates to -- and Sharena, I share your
24 concern about pro se litigants.
25   One of the things that my office does, we

32486

1 have a personal information redaction form that we will
2 have people fill out, and you have to identify the
3 specific page and that the information contains -- that
4 the information is contained on so that we are able to
5 capture all of the information. And it is -- it is on
6 the -- while you may be a pro se litigant, you're still
7 required to know it and exercise the laws related to the
8 litigation that you're pursuing. So I just wanted to
9 make that comment.
10   CHAIRMAN BABCOCK: Great, thank you.
11   Stephen.
12   HONORABLE STEPHEN YELENOSKY: Couple of
13 things. I do agree, obviously, pro se litigants are
14 required to follow the law. We have, as judges -- I
15 still sit as a visiting judge, so I guess I can say us
16 judges -- are allowed to make certain accommodations to
17 pro se litigants, and that's a dicey area, but I would
18 not want to impose a strict requirement of understanding
19 a rule about -- that's necessary to protect potentially
20 your life. That seems to me to put the priorities
21 wrong.
22   The other thing, though, is there's been a
23 discussion of pseudonym versus sealing. And my
24 suggestion is, you use both. And you can use a
25 pseudonym. You can use a blank space in the order.

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1 Ultimately, there is a document that's sealed that, if
2 unsealed by law enforcement or by the Judge for any
3 purpose -- for res judicata, whatever -- that a Court
4 can unseal it, and it can unseal it to allow it to
5 particular people or to, you know, it's been 20 years
6 and now unseal it to the public.
7   So there's not a problem as long as
8 whatever is public refers to an unsealed document that
9 can be readily obtained and, by a judge's order,
10 unsealed for particular people and places. So that's
11 the sealing part.
12   The pseudonym part is not a big deal. You
13 can have the order with a pseudonym. You can have the
14 order with a blacked-out name. You can have the order
15 with a blank. You can have an order that says, "See
16 sealed order." It doesn't matter.
17   So I think pseudonym versus sealing is a
18 false choice. You have to have both. You have to have
19 protected information in the order and sensitive
20 information in a sealed document, and one refers to the
21 other.
22   MR. LEVY: May I ask a follow-up question,
23 then, on that? Would it be appropriate to include in a
24 rule a reference that the use of a pseudonym be noted in
25 the pleading itself so that it's -- and this would

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1 hopefully go to Richard's point, that a claimant's name
2 that is a pseudonym is a pseudonym, not just a made-up
3 name, and therefore the record would reflect that that's
4 not the true name and that the name of the claimant
5 would be kept in a sealed document.
6   And I think it is kind of ironic that I'm
7 looking at -- Justice Gray is using John Doe in this --
8 in our chat. So, you know, that could be an example of
9 a pseudonym.
10   HONORABLE STEPHEN YELENOSKY: Yeah, he was
11 just trying to be sneaky, I think. Right, Justice Gray?
12   I don't know if that question was directed
13 generally, but if you're concerned about people being
14 confused by a pseudonym, then the option among those I
15 referenced from the order would instead be a blank or,
16 you know, a blacked-out part or merely the reference to
17 the name of this individual is in this sealed document.
18 You don't have to use a pseudonym. I mean, if not --
19   MR. LEVY: I think the statute -- yeah,
20 the statute does allow the use of a pseudonym, so I
21 think that that would need to be the approach, but --
22 and there would be, I think, numerous situations where
23 you have to have a name or identity to reference either
24 "Claimant" or "John Doe," "Jane Doe," something like
25 that, so that the opposing party would have somebody to

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1 talk about and, you know -- and similarly, you know, the
2 other identifying information that would include
3 addresses or email address, things like that.
4   HONORABLE STEPHEN YELENOSKY: Yeah. You
5 know, for years with 76a when we're not talking about an
6 order but a pleading, which obviously isn't affected by
7 the no court order language, but it's affected by
8 everything else if it's not in the Family Code. And
9 rather than always sealing the entire document, my
10 practice was to say, "Well, what part of this document
11 is problematic?" Like somebody wants to seal the whole
12 motion for summary judgment because within that motion
13 for summary judgment, there's a dollar figure that's
14 a -- you know, I don't know -- it's a proprietary
15 matter.
16   So in those instances -- and this could be
17 done -- it's the same thing with an order, if permitted
18 with an order, is the instruction to attorneys that I
19 give is, "Take the order with all the information in it,
20 bring that to me, and I'll seal that. File publicly the
21 same document that's -- you know, the same pleading in
22 the case now with everything taken out that's
23 sensitive." So you have identical documents, one
24 redacted, one sealed.
25   Now if the statute says it has to be a

32490

1 pseudonym or you want a pseudonym, that's fine as
2 opposed to just blanking it out.
3   But the idea, I think, applies, which is
4 there's a public document, there's a sealed document,
5 and the difference between the two is that we have to
6 unseal one document for many reasons.
7   CHAIRMAN BABCOCK: Thank you. Thanks for
8 that.
9   Kennon points out a few minutes ago that
10 linking the federal rule referenced by Chief Justice
11 Hecht, so just for the completeness of the record, the
12 cite is law.cornell.edu/rule/frcp/rule5.2. So we'll
13 have that in the record.
14   And now Sharena, I think you're next and
15 then Scott Stolley.
16   MS. GILLILAND: Just real quick to Judge
17 Yelenosky's point of a hybrid pseudonym sealing-type
18 situation. We kind of already have that in the lawsuits
19 where people want to undo their structured settlements.
20 They essentially file their petition, any follow-up
21 pleadings with initials, or it could be pseudonyms. At
22 the time of the final judgment, we typically get two
23 versions, and so there's one with the name redacted, and
24 then there's one that is sealed that includes all of the
25 information that's not public until it meets statutory

32491

1 timelines. But that is a possibility to essentially
2 have two versions, one that's public and one that is
3 sealed.
4   CHAIRMAN BABCOCK: Great. Thank you.
5   Scott.
6   MR. STOLLEY: Thanks, Chip. I want to
7 compliment the subcommittee for doing such a thorough
8 memo on such short notice. And that list of rules that
9 could be potentially affected is a pretty awesome list.
10   I agree with the subcommittee's sentiment
11 that we really can't modify all those rules. It seems
12 to make more sense to do one catch-all rule.
13   And then the one comment I have on the
14 catch-all rule as it's drafted now, and I realize this
15 is an initial cut at doing that, but it needs to be
16 drafted with gender neutral language. Thanks.
17   CHAIRMAN BABCOCK: Great. I had a
18 comment, Scott, about the -- excuse me.
19   I had a comment, Robert, about the --
20 about the proposed new rule. And I'll join Scott in
21 saying this is a remarkable memo and the time you put it
22 together.
23   I wondered if you-all considered -- I
24 think it's Section 132.001 of the Civil Practice and
25 Remedies Code, which talks about declarations. There is

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1 a requirement in there for certain identifying
2 information that would be in conflict with this statute
3 that we're trying to address in the new rule.
4   I believe that the reason for the
5 identifying information in declarations is to guarantee
6 or to assure some credibility or some ability to check
7 to see whether the declarant who is doing it not in
8 front of a Notary but just saying "Under penalty of
9 perjury, I say all these things are true," how that fits
10 if the plaintiff, who is operating under a pseudonym,
11 wants to submit a declaration.
12   I know you talked about affidavits
13 elsewhere, but I wonder about declarations. So that's
14 one question I have. And maybe you've thought of it,
15 and like Richard Munzinger, I'm just a dumbass and
16 didn't realize it.
17   MR. LEVY: I think that's a very good
18 point. The focus was on affidavits or other items under
19 oath that would be filed in the court case itself, but I
20 do agree that Section 132 is also implicated
21 particularly to the extent that a Chapter 98 proceeding
22 would involve a declaration. And it does trigger that
23 question if you make an affidavit or declaration under
24 oath, but you don't use your full name or your true
25 name, is that is the penalty of perjury applicable that,

32493

1 you know, could a claimant get out of a perjury claim
2 because they said, "Well, I didn't use my name;
3 therefore, it shouldn't apply," and would a rule need to
4 potentially even address that, that declarations or
5 affidavits, verifications using that pseudonym, are
6 punishable as if they use their real name.
7   (Portion transcribed from recording
8   concluded.)
9   CHAIRMAN BABCOCK: Yeah. And unlike, you
10 know, all the rules that you've laid out here, obviously
11 a statute, if it conflicts with a rule, is going to
12 trump the rule; but with Section 132, you're dealing
13 with two competing statutes, I think, so that raises
14 some issues.
15   Before I get to Judge Miskel, there is
16 some language in this proposed rule where you say
17 pleadings, motions, discovery responses, or other
18 submissions, and that seemed broad to me. And I wonder,
19 for example, if there is some dispute that requires an
20 in-camera submission where only the Judge and the
21 parties and the attorneys representing the parties would
22 be -- would have access to that in-camera submission.
23 Would that be -- would that be excluded or would it be
24 included in your other submissions language? So --
25   MR. LEVY: Yeah, that's a good point. We

32494

1 should add that, because that's a way to address the
2 confidentiality issue, submitting it in-camera, which
3 is, you know -- how that overlays with the sealing
4 element, but that would be a way to protect the
5 identity.
6   CHAIRMAN BABCOCK: Okay, great.
7   Judge Miskel.
8   HONORABLE EMILY MISKEL: I just wanted to
9 add on the unsworn declaration issue, this comes up
10 already right now. I think in connection with family
11 violence protective orders, a lot of times the applicant
12 does not want to provide their birthday. I can't
13 remember what all information is required by 132. It
14 might be like name, birthdate, address -- I can't
15 remember, but we already have people that don't want to
16 provide that information and request to be excused from
17 it. And what our answer has been so far is, "If you
18 don't want to provide that information, then you'll need
19 to do a Notary instead of an unsworn declaration because
20 the ability to do unsworn declaration requires providing
21 that information." But then that may not answer the
22 question for this particular case because I'm not
23 sure -- can a Notary notarize something with a
24 pseudonym? So I just don't know the answer to that.
25   But as far as currently people who don't

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1 want to provide that unsworn declaration information, we
2 just say, "Do a Notary instead if you don't want to
3 provide that."
4   MR. LEVY: And it does require the
5 birthdate under the unsworn declaration. And it raises
6 that question of if you have to provide a notarization,
7 you're then obligated to show the Notary your
8 identification, so is that inconsistent with the statute
9 if there is a requirement either for verification or
10 otherwise to -- for a claimant to take an oath, and do
11 we need to address that as well.
12   CHAIRMAN BABCOCK: Thanks. Kennon.
13   MS. WOOTEN: Just point out a couple
14 things for the record. In regard to the requirements
15 pertaining to unsworn declarations under penalty of
16 perjury as set forth in Chapter 132 of the Civil
17 Practice and Remedies Code, there are some opinions out
18 there I believe at the intermediate appellate court
19 level that essentially come down and say, the most
20 essential part of the jurat from the statute is to say
21 that you're swearing under penalty of perjury to the
22 veracity of the statements in the particular
23 declaration. However, I believe there is also a
24 statement from the Texas Supreme Court in an opinion
25 suggesting that strict compliance with 132 is required.

32496

1   So in matters with my clients, I have come
2 down on strict compliance being required, in light of
3 that statement from the Texas Supreme Court opinion, and
4 it does lead to clients not wanting to use that
5 statutory mechanism, which does simplify procedures in
6 many ways because of the sensitive data requirement.
7   But to close the loop on it, I'll also
8 point out that the sensitive data that gives people a
9 lot of concern is the birthdate and home address, and
10 both of those things are in the definition of sensitive
11 data in Texas Rules of Civil Procedure 21c. So to the
12 extent that I have filed those declarations in the court
13 record, I have followed 21c and not actually included in
14 the court record that sensitive data.
15   CHAIRMAN BABCOCK: Great. Thanks, Kennon.
16   Justice Gray, acting under the pseudonym
17 John Doe, for the record says, "The cool thing about
18 having a rule authorizing using only the pseudonym and
19 no other identifying information is that when the
20 petition is filed, it already has the pseudonym and
21 avoids many problems. The res judicata matrix does not
22 change. The defendant has to prove the parties are the
23 same. I cannot imagine that is going to be a serious
24 issue." And then there's what could be a smiley face or
25 a frown. I'm not sure. "We had a case working its way

32497

1 through the Tenth Court of Appeals now that uses only a
2 pseudonym, and I have no doubt that if a subsequent suit
3 was filed, the defendant would know exactly who it is
4 based on the alleged facts." So there you have Justice
5 Gray's thoughts.
6   Are there any other comments about the
7 proposed rule that Robert has in his memo found at
8 Page 2 of the memo.
9   (No response)
10   CHAIRMAN BABCOCK: Okay. You've had your
11 chance. So we'll, I think, Robert --
12   MR. LEVY: Let me just raise one --
13   CHAIRMAN BABCOCK: Sure.
14   MR. LEVY: -- on the referral, it also
15 includes reference to House Bill 2669, and I reference
16 that in the memo.
17   In my review of that, it's a -- just
18 trying to make two different statutes aligned on the
19 question of the disclosure of criminal records relating
20 to misdemeanors. There was -- two statutes in the Code
21 of Criminal Procedure had some inconsistency.
22   I did not see any rulemaking issue that
23 would be triggered by that statute, so I just wanted to
24 mention that as well in case anyone has a different
25 point of view.

32498

1   CHAIRMAN BABCOCK: Great. Well, Lamont
2 has raised his hands, so maybe he does.
3   Lamont.
4   MR. JEFFERSON: No, not on that point. I
5 was going to just raise a real quick reaction to Chief
6 Justice -- well --
7   CHAIRMAN BABCOCK: Gray, Hecht, or
8 Christopher. Those are the chief --
9   MR. JEFFERSON: Chief Justice -- give me a
10 chief --
11   (Laughter)
12   CHAIRMAN BABCOCK: A, B or C.
13   MR. JEFFERSON: Yeah, no -- sorry. I'm
14 having a little moment here, so let me check through
15 the -- Chief Justice Christopher's comments -- thank
16 you -- from early on about whether a rule is necessary
17 at all here or where it should be if there's going to be
18 a rule.
19   So the statute says -- or the statute from
20 Senfronia Thompson, the recently passed statute,
21 provides that these -- under this circumstance, you
22 could have anonymity or use a pseudonym or whatever.
23   Should we have a rule that just addresses
24 the situation of Chapter 98? And I would say no. And
25 if we're going to have -- and the reason why I'd say no

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1 is because this -- it's such a specialized area. It's
2 not, I don't think, a special proceeding, and I don't
3 think that I would change a rule in the special
4 proceedings rule because if this is just a -- it's
5 another tort, but there's a whole list of torts, and
6 they're mostly in the Civil Practice and Remedies Code
7 for medical malpractice, for wrongful death, for, you
8 know, all kinds of different torts that have these very
9 particularized rules that just apply to that tort, to
10 that particular thing.
11   And that's what this is. This is a rule
12 that applies -- a special rule that apply to a very
13 narrow, rarely used cause of action. And so to change
14 the Rules of Civil Procedure to address this one narrow
15 issue I think is unwise, and I think we've just not done
16 that, generally speaking. There are a lot of
17 particularized procedure rules that are contained in
18 statutes for these rarely used torts, and so I would
19 advocate that we not pass a rule particular to that one.
20   CHAIRMAN BABCOCK: Great. Thanks, Lamont.
21   MR. LEVY: Can I ask Lamont just a quick
22 question on that?
23   CHAIRMAN BABCOCK: Sure.
24   MR. LEVY: Two areas that might be
25 inconsistent are -- what we talked about was 76a and

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1 also the question of whether we should include in 21c
2 reference to the right of the party to include their
3 identity as confidential information. Is that
4 inconsistent with your comment?
5   MR. JEFFERSON: I mean, I do -- you know,
6 I think 21c also has its issues. I don't know -- I'm
7 not sure that I quite understand the question, Robert,
8 but the entire point that I'm making is that there are a
9 lot of rules that by statute govern specific causes of
10 action that are not in the Rules of Civil Procedure
11 because they're so specialized -- they're so specialized
12 causes of action.
13   MR. LEVY: Yes. The question is on 76a,
14 whether that should be addressed because there is the
15 potential inconsistency of the way 76a applies that
16 could be inconsistent with the new statute that would
17 require the disclosure of the claimant's name if it's
18 included in an order, and then the issue of whether we
19 should include it in 21c just to help cover situations
20 where litigants might think that the rules are
21 inconsistent that -- with the statute and not knowing
22 how to proceed with that.
23   And I will also point out that Rule of
24 Judicial Administration 12.5(i) does list specific
25 examples, or at least a couple of examples, of

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1 situations where confidential information needs to be
2 maintained, the confidentiality of information. And it
3 might make sense to include Chapter 98 proceedings just
4 to have that reference point.
5   CHAIRMAN BABCOCK: Great. Thanks, Robert.
6   Are there any more comments that anyone
7 wishes to make about this proposed rule and the
8 subcommittee's excellent work addressing this statute?
9   (No response)
10   CHAIRMAN BABCOCK: Well, if not, then
11 thank you very much, Robert, and your colleagues.
12   Here's the schedule that I think we'll try
13 to follow for the rest of the day. We have -- the next
14 item, sexual assault survivor privilege. Let's take our
15 morning break right now for 15 minutes, and we'll come
16 back at 11:30 and we'll deal with that topic, and then
17 we'll break for lunch because Bobby Meadows, who is the
18 chair of the subcommittee addressing the next two
19 topics, is not available until after lunch.
20   So we'll take a 15-minute break now and
21 then we'll come back and we'll do sexual assault
22 survivor privilege until we conclude, and then we'll
23 take our lunch break, and then we'll come back after
24 that and do the final two items on the agenda, if that
25 works for everybody. So we'll be in recess for 15

32502

1 minutes. Back at 11:30.
2   (Recess: 11:15 a.m. to 11:30 a.m.)
3   CHAIRMAN BABCOCK: And now we are
4 recording and back on the record. Hopefully our court
5 reporter is somewhere taking all this down, and we're
6 streaming live on YouTube. And we have the great Buddy
7 Low, who is the chair of our evidence subcommittee, and
8 we'll take up the next item on our agenda, sexual
9 assault survivor privilege.
10   Buddy.
11   MR. LOW: I may not hold myself out as an
12 expert in sexual assault, but I've been asked to report
13 on it.
14   This assignment was from the Chief Justice
15 which asked us to consult with the State Bar of Texas
16 Administration of Rules of Evidence Committee and
17 consider whether we should write a rule following the
18 new amendment or should we have a comment or just what
19 we should do.
20   We have always in our evidence committee
21 have submitted things to the State Bar AREC and then
22 they would give a report, we would review that report
23 and try to get together. Well, unfortunately here,
24 their membership is changing. The chairman of that
25 committee goes off Monday, but I have had a telephone

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1 conference call with the incoming chairman and with him,
2 and I have been in communication with our committee.
3   And for background -- most of you might
4 already know this -- Senate Bill 295 amended Chapter 420
5 of the Government Code to provide a privilege for
6 victims of sexual assault for particular people
7 associating and helping victims. There was already a
8 privilege for victims of domestic violence. And so
9 apparently, the legislature wanted to make them equal.
10   All right. Well, the first thing I did
11 was call Professor Goode, who is a long stay on the
12 AREC, and I sent him the material, and he responded back
13 that we should do nothing because there are about 15 or
14 20 privileges that he knows of that are not in 500
15 section.
16   I sent all that to my committee. And I
17 agreed with Professor Goode. Unfortunately, nobody on
18 my committee agreed with me. Some wanted to draft a
19 rule like 295. Most wanted a comment. And I responded
20 back and I said, "If we have a comment, then what do we
21 do with the comment? Where do we put it? At 501?"
22   We also state that there are many
23 privileges -- legislative privileges that are in
24 existence and not here. And then if we put that in a
25 comment, then we overshadow the domestic violence --

32504

1 violence privilege. I mean, what to do? And we've not
2 gotten beyond that other than a majority of my committee
3 does favor the comment. And with that, Roger can give
4 you some of the help.
5   Now I do point out that a -- that the only
6 reference in that amendment -- they do refer to the
7 Rules of Evidence, and they say -- let me find the term
8 here. Hold on just a minute. They say,
9 "Notwithstanding Subsection A and B, the Texas Rules of
10 Evidence govern the disclosure of," and they talk about
11 communication with regard to expert witnesses. And as
12 you know, expert witnesses under 703 can rely on
13 privileged material.
14   And so the question was -- we want to do
15 what the legislature wanted us to do. Do they want us
16 to do anything? Do they want us to draw a rule or what?
17 But I do point out that they do mention that. And in
18 other times, they have asked us to draft a rule, a
19 procedural rule, according to a legislative directive.
20   All right. Roger, do you have something
21 to add?
22   MR. HUGHES: Yeah. Let me explain a
23 little bit about what this privilege is. And he is
24 right, but he's right that most of the committee favored
25 a comment; but there was one minority view that we do

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1 nothing, and then there was a -- another minority view
2 that we try to write a rule.
3   Now, what it is, you have Government Code
4 Chapter 420, which creates a -- or authorizes the
5 creation of nonprofit corporations to provide sex
6 assault advocates to victims of sexual assault and then
7 later in the chapter creates a privilege. And what
8 Senate Bill 259 did was, it expanded the privilege and
9 codified some waivers.
10   Now to bring it to a point, nothing in
11 Senate Bill 295 asks the Supreme Court to write any
12 rules at all, rules of procedure or Rules of Evidence.
13 That's nowhere in it. What it does is it expanded the
14 privilege to cover not just communications between the
15 advocate and the victim but also to cover the written
16 records of the advocate. And then in the next -- it
17 amended the section on the exceptions to the privilege,
18 one is for exculpatory records that the Court has. Now,
19 I'll come back to that in a moment.
20   The second of it is in the exception
21 section, it says that the Texas Rules of Evidence will
22 control disclosure of underlying facts if the expert
23 gets on the stand.
24   We all know if you have a testifying
25 expert, the expert doesn't have to disclose their

32506

1 underlying facts that they're relying on, but if this
2 expert has reviewed confidential records or
3 communications, the Court has some leeway under Rule of
4 Evidence 706 first to allow the opposing counsel to
5 explore that on voir dire and second to perhaps have the
6 jury hear it.
7   The next one is that it created a new
8 motion in criminal cases, and it set out exactly what
9 has to be in the motion, how it has to be verified, and
10 what the Judge has to do to allow access to exculpatory
11 information in the records.
12   And what my opinion was after looking at
13 all this, is that, number one, trying to write a rule to
14 encapsulate this or paraphrase it would be impossible.
15 It's a very -- the whole several sections about the
16 privilege, the exceptions, waiver, are several sections.
17 They're very detailed. I just don't think we can write
18 a rule to encapsulate them all other than to quote the
19 rule itself.
20   The second is, it seemed to me that this
21 was a legislative compromise because the bill went
22 through several versions, and it seemed to me that there
23 was, shall we say, something going on in the back room
24 between the advocates and the criminal defense bar. And
25 any attempt to paraphrase this rule, trim it,

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1 encapsulate it, whatever, is going to look like we're
2 trying to upset the legislative apple cart.
3   And furthermore, we've got a situation
4 where people who are involved in this probably know this
5 statute already. The advocates are going to know it.
6 The criminal defense people are going to know it.
7   Now to give some credence to the minority
8 view that we do nothing, not even a comment, Professor
9 Goode did give a very lengthy list of statutory
10 privileges, and he said that is not complete. And if we
11 have a comment saved, for example, to Rule of Evidence
12 501, which is the general rule of privilege, everybody's
13 going to say -- going to have a "What about me, too?" I
14 have a -- there is this privilege and there is that
15 privilege. And if you mention one, then they're all
16 going to say "equal dignity, mention me all," and it
17 could get lengthy.
18   On the other hand, the issues of family
19 violence and sexual assault are very extensive. And I
20 don't practice criminal law, but I suspect they occupy a
21 considerable portion of the Court's docket. I'll defer
22 to trial judges about whether that's a valid viewpoint.
23 And so maybe mentioning it might be of some help. I
24 don't know.
25   Anyway those are my comments. Thank you.

32508

1   MR. LOW: Chip, you can understand why I
2 said I feel comfortable when I have his backup. He's --
3 now, the committee -- Roger, one of the things that they
4 are considering is whether they can do this through Rule
5 510, mental health. I don't know how they can. What do
6 you think about that?
7   MR. HUGHES: Well, I don't think it's a
8 neat pigeonhole to fit the -- or to try to incorporate
9 it into Rule 510. Sexual assault advocacy in some
10 senses is broader than physical and mental health,
11 whereas Rule 510 is limited to communications with
12 professionals who deal with mental health issues.
13   Sexual assault advocates may deal with a
14 broad range of issues, and there may be information that
15 they acquire about the victim that might not be
16 pertinent to treating them for an illness or counseling
17 them about mental health issue. I'm just not sure it's
18 a very neat pigeonhole to try to say this is more like
19 mental health.
20   My personal opinion is that sex assault
21 advocates are more like social workers that deal with
22 the whole person and all of their problems that arise
23 from a particular situation and not just their
24 physical -- treating them for their physical or mental
25 condition.

32509

1   MR. LOW: All right. Chip, you've heard
2 our report. Now, the chairman of the AREC has told me
3 that they will begin immediately working on that and try
4 to get something out, you know, as quickly as they can;
5 but under our procedure, unless we're asked to do
6 differently, we always get an opinion from them and then
7 try to get a joint opinion. That's gone on for a long
8 time, and it's worked well.
9   And in the meanwhile, I've asked my
10 committee to draw their own conclusions and be able to
11 go forward. So we're staying abreast, and now we're
12 waiting on the AREC. And if Chief Justice Hecht would
13 like for us to start drawing a comment or doing
14 something, I'd be glad to do so, but traditionally,
15 we've waited to hear from the AREC.
16   CHAIRMAN BABCOCK: Well, I'll defer to the
17 Chief on that question, but I think the Court was
18 interested in getting this committee's views. And
19 unfortunately it had to be expedited because the rule
20 goes -- the section goes into effect September 1, and
21 the Court needs, of course, time to decide what to do,
22 if they're going to do anything.
23   So we'll get to Lonny in a second, but
24 Chief, do you have any response to Buddy's thoughts or
25 comments?

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1   HONORABLE NATHAN HECHT: Yeah. Well, I
2 think it would be a good idea, because of the timing, to
3 go ahead and get the committee's views on the subject
4 and then begin AREC in the next few weeks after the bar
5 year changes and they get settled.
6   MR. LOW: Your Honor, I have already sent
7 my suggestion of where we should put it and my
8 suggestion of basically what the comment is or should
9 be, and I've heard nothing about that. My suggestion
10 was, again, nobody has -- in my committee has responded
11 to this. My suggestion was, we show -- we put a
12 footnote for this an example of legislative privileges
13 or this -- although there are many other legislative
14 privileges, we don't list them all. That was -- I
15 didn't draft the comment, but that was my suggestion and
16 I've heard nothing.
17   I will ask the committee, since the
18 majority of the committee want a comment, I will ask
19 them to start to work on what the comment would be and
20 what it would say.
21   CHAIRMAN BABCOCK: Okay. Professor
22 Hoffman.
23   PROFESSOR HOFFMAN: Thanks, Chip.
24   So I guess -- I serve on the subcommittee
25 here.

32511

1   MR. LOW: Right.
2   PROFESSOR HOFFMAN: We had an awful lot of
3 email discussion about this, and I guess I -- it may
4 be -- you know, I guess one could read the email
5 discussions differently, but I mean, I guess I -- the
6 place I disagree with Buddy's characterization is, I
7 think we largely are unanimous in that I don't think
8 there's anyone who's supporting a rule change right now,
9 and so --
10   (Simultaneous discussion)
11   MR. LOW: -- one member was, and he's
12 backed off.
13   PROFESSOR HOFFMAN: So I just wanted to
14 clarify for the whole committee, there was no one on the
15 subcommittee who is supporting a rule change. At one
16 point Levi was, but he isn't now.
17   MR. LOW: Right.
18   PROFESSOR HOFFMAN: And so we're really
19 left with just the question of whether we should do
20 nothing or whether we should add some reference in the
21 form of sort of a comment or something somewhere.
22   And, I mean, I thought Roger did a pretty
23 good job of summarizing some of the issues and, you
24 know, as Buddy says he raised one suggestion of one
25 possible alternative. And if the Court wants us to go

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1 in that direction, we certainly can.
2   I mean, I guess I'll just add, you know, I
3 looked at all of the legislative history that I could
4 find on this. And although there isn't a lot, as usual,
5 that sheds a lot of light, at least in the House's --
6 the House Judiciary & Civil Jurisprudence Committee's
7 report that came out, the first paragraph emphasizes
8 that the state law currently doesn't provide survivors
9 of sexual assault with the same confidentiality
10 protections when they're seeking a crisis center's
11 assistance as current state law does as to survivors of
12 domestic violence, so -- and let me just repeat. That's
13 what the House Committee's report asserts.
14   And so apparently, the effort -- the
15 legislative effort here was to make -- the goal of the
16 new statute was to make Texas law consistent for victims
17 of domestic violence and of sexual violence. And so
18 that -- again, that may or may not be a correct
19 characterization, but that's what I took away from the
20 legislative history, which I think could be helpful in
21 informing our thinking about what we should do here.
22   The only other thing I'll add that I
23 don't -- well, I'll stop there. That's enough. Thanks.
24   MR. LOW: But one of the things, didn't
25 you say that you got the impression they wanted to treat

32513

1 those equally. And if we comment on one and not comment
2 on the other, would we be treating them equally?
3   PROFESSOR HOFFMAN: So that's a good
4 point, but, again, there's no reason that we can't do
5 both. In other words, we might say, for instance, that
6 victims of domestic violence and of sexual violence have
7 protections under statutory law that are not codified
8 here in any part of the rules; go look them up.
9   MR. LOW: I agree with that.
10   So, Chip, what -- as I understand what
11 we're to do is start working on a comment because that
12 would be approved by most of my committee, to add a
13 comment, and now the details of the comment would be
14 left up to us. And I will try to keep the State Bar
15 committee informed of how we're going and what we're
16 doing.
17   CHAIRMAN BABCOCK: Yeah. Well, I think we
18 ought to finish our discussion today, to the extent
19 anybody has any further comments. And then if your
20 subcommittee is going to do additional work after today
21 and propose a comment that y'all agree on, then I would
22 think that that needs to be done pretty quickly because
23 the effective date of this statute is September 1. The
24 Court right now is very occupied with trying to get all
25 their opinions out by the end of June, as has been their

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1 custom for the past several years. So, you know, I
2 would think that they would need something from us, if
3 we're going to provide it in writing, by the -- you
4 know, in a couple of weeks, so...
5   MR. LOW: I understand. What had held me
6 up was the traditional way -- now, this is due
7 September 1, as I read the bill. Isn't that right?
8   CHAIRMAN BABCOCK: That's when it becomes
9 effective.
10   MR. LOW: That's when it's effective. I
11 understand. We can't wait till then. All right. I
12 will have the committee start working on a comment and
13 we'll go from there.
14   CHAIRMAN BABCOCK: That would be great,
15 Buddy. And then give it -- you know, obviously send it
16 to me and to Shiva. We'll distribute it to the full
17 committee. And we're not going to have another meeting
18 before September 1, so we'll provide any comments the
19 full committee has, but that's the timeline.
20   And we'll continue our discussion today,
21 if there are any more comments. Does anybody else have
22 anything to say other than what Professor Hoffman and
23 Roger have added?
24   HONORABLE HARVEY BROWN: This is Harvey.
25 I have a comment. One, on the September 1st deadline,

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1 because the legislature is not requiring a rule, it does
2 mean that we could decide to have a comment, have that
3 after the fact, since right now at least we're getting
4 indications that the committee from the State Bar thinks
5 there should be no rule at all, which means if we don't
6 do anything, we'll be doing exactly what the State Bar
7 committee is inclined to do and that we could do it
8 after the fact.
9   Secondly, I think one of the bigger
10 problems with this is where to put a comment. And I
11 haven't found a place that I really feel like it goes
12 very well. And to that extent, it occurred to me, after
13 our email exchanges, that we could have a new rule, Rule
14 514, that would be entitled "Statute Privileges" that
15 would basically just say, "These rules are not
16 exclusive. There are also statutory privileges," and
17 just keep it that short to remind people to check to see
18 if there is one. That puts it in a place that's easy to
19 find and alerts practitioners to the issue.
20   We were a little sensitive, or at least I
21 was sensitive, to the fact that maybe we want to
22 highlight new privileges because practitioners may not
23 know them. On the other hand, any time we -- if we were
24 to start listing them, not only do we have the problem
25 of a long list and maybe inadvertently missing some --

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1 even Professor Goode said he didn't have an exhaustive
2 list -- but of changes that occur in those privileges,
3 so that would be a problem in listing them. So I think
4 we were pretty set on we should have no list. The
5 comment would be fairly general, if we have one.
6   I throw those out just for committee
7 reaction, if they have any ideas on -- if we have a
8 comment were to go -- or would it be simpler to have a
9 rule that says there's other privileges. And I'm seeing
10 Rich Phillips' comment here, and I just have to
11 double-check, frankly, 501. I have it somewhere on my
12 computer right in front of me, but I don't see it right
13 now.
14   CHAIRMAN BABCOCK: So the record's
15 complete, Rich Phillips' message, it says, "Doesn't TRE
16 501 already do what the proposed comment would do?" So
17 that's his question, and --
18   MR. PHILLIPS: I'll just read it: Unless
19 the constitution, a statute, or these or other rules
20 prescribed under statutory authority provide otherwise,
21 no person has a privilege to.
22   Doesn't that already flag people that
23 there could be a privilege in a statute somewhere? What
24 would a comment do that that sentence in 501 doesn't
25 already do?

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1   MR. LOW: And that's a good point.
2 Professor Goode pointed out that one of our most
3 important privileges is the 5th Amendment. We don't
4 mention that, but the rule does mention what you said,
5 statute or constitution.
6   CHAIRMAN BABCOCK: Judge Estevez.
7   HONORABLE ANA ESTEVEZ: So this is my
8 ignorant question time, since other people got to say
9 that.
10   When I -- looking at the statute that they
11 passed, it's a privilege for sexual assault survivors.
12 And my question is: Is a sexual assault survivor
13 someone who is claiming they've been sexually assaulted
14 or someone who has been adjudicated as a sexual assault
15 survivor? Because I've had so many cases in which the
16 counseling records have come in to determine whether or
17 not a sexual assault ever even occurred. And if a
18 sexual assault survivor does not include an alleged
19 sexual assault survivor, then the most important thing
20 we need to do is to let people know that it doesn't
21 include that.
22   So I would suggest that we need to find
23 out if the -- what this privilege really is would be --
24 that would be more helpful than determining where we put
25 it, because it's going to change our litigation,

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1 especially when we're talking about children.

2   So we have so many counselors that come in

3 to talk about the advising and the counseling when we

4 have children as victims. And right now, we've just

5 privileged a huge amount of information before we

6 determine what a survivor is. And maybe there's

7 litigation already there that determines that. I just

8 don't -- I don't know. That's why I'm ignorant, but we

9 do need to do something with this if a sexual assault

10 survivor does not include an alleged sexual --

11   PROFESSOR HOFFMAN: It does, Judge. The

12 statute defines survivor, individual victim of assault,

13 regardless of whether a report or conviction is made in

14 the incident. So -- and then the second point I'd make

15 is, I think the issue you're raising is really more of a

16 statutory construction question rather than one for us.

17   HONORABLE ANA ESTEVEZ: I would agree, but

18 I would also -- I mean, it's going to be so important.

19   MR. LOW: I mean, you're going to have

20 people -- volunteers helping somebody that has been

21 sexually assaulted, maybe the person hadn't been

22 convicted or they have. I don't see how you can draw a

23 distinction. And this legislation did and it didn't.

24   HONORABLE ANA ESTEVEZ: Well, I think you

25 draw a distinction if we're talking about a case in

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1   MR. LOW: I mean, we can't change the

2 legislation. Under this legislation, what would you

3 suggest we do? Should we draw a distinction, or what

4 should we do? Should we try to define sexual survivor?

5 The legislature didn't do it.

6   HONORABLE ANA ESTEVEZ: But they did.

7 They just didn't make it very clear.

8   MR. LOW: Okay. What should we do as a

9 committee within our limits?

10   HONORABLE ANA ESTEVEZ: I think we should

11 be consistent. If we're not going to put a lot of

12 comments on every specific place we change or we add

13 privileges, then we should probably not do that; but I

14 think this is such an important change for family law

15 cases and potentially criminal law cases because of

16 impeachment issues that everybody needs to know this,

17 but I guess I'm --

18   MR. LOW: I know, but how are you going to

19 do it without changing the legislation? I mean, we're

20 limited. We can only -- we can't change. So I'm

21 limited to what our committee can legally do. If

22 somebody has a suggestion, I'm open to suggestions

23 because I have no answer to that.

24   CHAIRMAN BABCOCK: Well, let's hear from

25 Justice Christopher, but then we need to get back to

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1 which you're trying to determine whether or not there's

2 a survivor. I understand that there's not a conviction,

3 but let's say that you're in a civil case, and whether

4 or not that person was ever sexually assaulted, I mean,

5 it'll be privileged, because when you're getting -- I

6 mean right now, they usually don't disclose it anyway or

7 it's ex parte, and they give it to us to review

8 in-camera; but I just don't -- I don't know where this

9 is -- it's been the most helpful probably for juries to

10 determine -- what the facts are or what they believe

11 them to be have been these records. And I don't -- I

12 don't know if you just -- and I understand it's

13 legislative. That's why I said it was -- you know, that

14 was my ignorant part. I understand that that's the

15 statute that they passed.

16   And when I was reading the rule in the

17 Government Code, I didn't necessarily see that that --

18 that the words, regardless of whether they've been

19 convicted, would make a difference in a lot of

20 scenarios. So it could -- you could still use it to

21 determine whether or not it's a sexual assault survivor.

22 And I just think that if we know that in some other area

23 of law that it's already been established, then we

24 should point that out in some sort of notation when

25 we're doing this other part. It would be helpful.

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1 Judge Estevez's point and specifically with respect to

2 the definition of survivor and the statute that Lonny

3 points out, because I think, as the Judge says, it's --

4 at least my reading, it's not all that clear, although

5 I'll be the first to admit, I don't practice in this

6 area. So Justice Christopher.

7   HONORABLE TRACY CHRISTOPHER: Yes. I was

8 looking at the comment to Rule 510, and apparently the

9 mental health information privilege was enacted in Texas

10 in 1979. And it appears that we then wrote a rule of

11 evidence to cover it.

12   And so my question, because I haven't

13 really studied the rule that well versus our privilege

14 rules, is: Is there a difference between what is in

15 that rule and what the normal procedure would be in

16 terms of a privilege? And I agree with Judges Estevez.

17 This could be a huge number of cases, especially on the

18 criminal side.

19   And I don't agree with someone's comment

20 that a criminal defense lawyer, for example, might know

21 what kind of motion he has to file to get this

22 information, so -- I don't think that they would. So

23 putting it in the Rules of Evidence I think would be

24 useful for them. And obviously we have rules in our

25 Rules of Evidence that specifically apply to criminal

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1 cases versus civil cases. So I think we need to look at
2 it a little bit more and consider those problems.
3   CHAIRMAN BABCOCK: Thank you, Judge.
4 Getting back to the point that Lonny made about the
5 definition of survivor -- and, Lonny, make sure I'm
6 reading the right section here -- survivor means an
7 individual who is a victim of a sexual assault or other
8 sex offense. That's how it starts. Right?
9   PROFESSOR HOFFMAN: Yes. So, I mean, this
10 is 420.003 Definitions, and it's the eighth item down,
11 so survivor. Yeah.
12   CHAIRMAN BABCOCK: And then it says in
13 making that -- in meeting that definition, you can
14 disregard two things: One, whether a report or a
15 conviction -- whether a report was made or a conviction
16 is made -- I think they mean conviction of a perpetrator
17 occurs. But to Judge Estevez's point, in the
18 definition, survivor means an individual who is a victim
19 of a sexual assault or other sex offense.
20   Is it sufficient for somebody to come in
21 and say, "Hey, I was a victim of a sexual assault, and
22 now I have this privilege," or does there have to be
23 some determination by a fact finder when that person
24 meets the definition of survivor and therefore gets the
25 privilege. Is that what you were raising, Judge

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1 Estevez?
2   HONORABLE ANA ESTEVEZ: Yes, exactly,
3 because sometimes that's what's being litigated.
4   CHAIRMAN BABCOCK: Yeah.
5   HONORABLE ANA ESTEVEZ: They need those to
6 determine it whether or not they -- there was a sexual
7 assault because the fact finder is going to determine
8 that.
9   CHAIRMAN BABCOCK: Right.
10   PROFESSOR HOFFMAN: Okay. I guess my
11 reaction to this is really -- I guess it's the same as
12 what I had before -- maybe I just need to elaborate a
13 bit -- is -- and I think Buddy already said it pretty
14 well, which is whether we think this was a good or a bad
15 statutory change, whether we think it was ambiguous or
16 not -- by the way, I could make an argument that it's
17 totally not ambiguous, that the legislature is being
18 clear that it's not only the people who are safe or
19 victims and can prove it, but just simply people who say
20 they're victims. But, again, whether I'm right about
21 that or not, this is what we've got to deal with. And
22 so it's not clear at all to me how we're going to
23 resolve any of this with some sort of line drawing in a
24 rule.
25   And then the other thing I'll just add,

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1 and this was the place I hesitated before, but it made
2 me take a look at this, is under federal law, under the
3 Victims Against Women's Act, from my early research that
4 I did for part of this, it looks like federal law under
5 VAWA already provides confidential protection privilege
6 for both victims of domestic violence and of sexual
7 assault.
8   And there are several Texas attorney
9 general opinions that recognize VAWA's confidentiality
10 protections are enforceable under state law. Now,
11 again, I haven't dug into what that means and how
12 they're enforceable and whatnot, but I mean there's sort
13 of additional layers here, again, none of which I think
14 a rule would address -- we wouldn't address it in any
15 other rule.
16   And then the only thing I guess I'll just
17 add is back to Tracy's point. You know, Tracy, I hear
18 you, but I also -- it may be of some value to some
19 practitioners to have it in the rule; but, again, as
20 Professor Goode has said, there's all sorts of
21 evidentiary privileges that aren't recognized explicitly
22 in the rules. And so why we would add this one and not
23 another is not as obvious to me. And many of those are
24 also statutory, not all, but many of them are.
25   HONORABLE ANA ESTEVEZ: Can I just respond

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1 to Professor Hoffman? So I'm sorry I'm not as
2 articulate as all the people that talk for a living, but
3 what I wanted to say was that my question -- I started
4 off with a question, and the question was: If they have
5 defined what a survivor is under any of these other
6 statutes, then I think the most important thing we can
7 do for a practitioner is to let them know that that's
8 been defined and that this privilege wouldn't apply if
9 it's an alleged victim and you're actually litigating
10 that issue.
11   So it is -- if it's there, since the
12 legislature didn't put it specifically in this statute,
13 if they had done it in the family violence statute and
14 there's already case law and we can point that out, that
15 would be more important than letting them know that this
16 privilege exists. It's to let them know that this
17 privilege does not apply to that specific type of
18 scenario. So that's why it was important, not because I
19 was trying to change what the legislature did or I
20 disagreed with them but because if there's been an
21 interpretation already on that survivor issue, it would
22 be imperative for the Judges to know when they go
23 through these cases that if we looked at a rule of
24 evidence and it says they have a privilege, we don't
25 just say, "No, you're not getting that in." We need to

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1 know that there's that exception.

2   CHAIRMAN BABCOCK: Okay. Fair enough. I
3 don't know who had their hands up first, but I think the
4 order was Richard Munzinger, Robert Levy, and Justice
5 Christopher, so we'll go in that order.

6   Richard.

7   MR. MUNZINGER: Judge Estevez raises a
8 very, very, very important issue in my opinion. Does
9 the Texas Supreme Court interpret statutes by making a
10 comment to a rule of civil procedure when the statute
11 itself needs to be interpreted? Because the legislature
12 wrote it the way it wrote it.

13   I don't see how the Court can write a
14 comment even on this rule without addressing the problem
15 of definition. And if it is doing that, then it is
16 resolving an issue that I believe should be resolved in
17 litigation.

18   I think Justice Estevez hit a home run
19 here. You've got a real problem if you come in here and
20 say, "He sexually assaulted me," you haven't -- he
21 hasn't been convicted. The other two provisions in the
22 rule that have been read don't apply, but they don't
23 apply to the situation that we're talking about. So how
24 can the Supreme Court write a rule or a comment without
25 interpreting the statute or at least admitting that the

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1 statute is ambiguous? And I don't know that that's the
2 Supreme Court's job, to tell the legislature that they
3 blew it.

4   CHAIRMAN BABCOCK: Okay. Robert.

5   MR. LEVY: Well, I look at this issue, the
6 specific one that we're discussing, in a similar lens
7 that I looked at the issues on the Chapter 98 questions
8 about claimant's confidentiality.

9   I think -- at least my view is that the
10 Court should draw this more broadly in terms of what I
11 believe is the intent of this statute and the others on
12 a similar vein, is that we want to encourage victims,
13 alleged victims, to bring claims, to be able to testify,
14 to have confidence in their protection and the
15 application of the privilege and that we would not want
16 to place any preconditions or suggestion that they have
17 to prove that they are a victim before they're able to
18 benefit from the statute, similar to the fact that they
19 can bring a claim whether -- notwithstanding whether
20 there's been an adjudication that there was trafficking,
21 for example, so that we should suggest a broader
22 application and not a threshold.

23   And the way that Professor Hoffman read
24 the statute, it seemed that there is no requirement that
25 you prove that you are a victim or there's any

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1 adjudication. In fact, it would seem to me that there
2 wouldn't necessarily be an adjudication for the
3 privilege to apply. So I think that a trial court would
4 have to assume that the person was a victim and apply
5 the privilege accordingly.

6   CHAIRMAN BABCOCK: Justice Christopher.

7   HONORABLE TRACY CHRISTOPHER: Well,
8 looking at 420.074, talks about disclosure of privileged
9 communications in criminal proceedings. So to me, that
10 would seem to imply that we were talking about a victim
11 where there has not yet been an adjudication, that they
12 are a victim of sexual assault, because, you know, at
13 that point, there's just a contention that they're a
14 victim of sexual assault. You know, I would assume
15 that.

16   And, you know, I mean, this is a very
17 different procedure that puts the burden on the lawyer
18 for the criminal defendant to file this motion. And I
19 just think that this needs to be flagged for criminal
20 practitioners, at the very least. So that's why I think
21 it should be in a rule.

22   And in terms of, you know, Buddy saying,
23 "Well, where should we put it," well, we're kind of --
24 it's difficult because of the numbering. We haven't,
25 you know, left us any room to add a new number, but

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1 frankly, I'd make it a new number.

2   CHAIRMAN BABCOCK: Harvey?

3   HONORABLE HARVEY BROWN: The issue is to
4 whether it would cover somebody who is an alleged victim
5 as opposed to an actual victim.

6   I think that it's possible the legislature
7 wrote this very carefully, and it is delegating that
8 issue to the trial court. Now let me tell you what I
9 mean by that.

10   Rule 104(a) of the Rules of Evidence says
11 trial judges, you make the preliminary determination as
12 to whether the privilege applies or as to whether
13 something meets a rule. So, for example, when somebody
14 claims attorney-client privilege, and the other side
15 objects and says "No, no, you were getting business
16 advice, not legal advice," well, that's a fact
17 determination. And the Judge makes a preliminary ruling
18 on that, and based on that preliminary ruling, the
19 privilege applies or it does not apply. Whether
20 something is an excited utterance, the Judge makes a
21 preliminary ruling.

22   So lots of these rules have these
23 preliminary rulings by a Court, and so it might be that
24 the legislature was saying, "We're not going to say that
25 everybody who alleges that they're a victim gets this."

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1 It might be they're saying, "We want some type of
2 safeguard, but we also want the Judge to look at it
3 first."
4   So I'm not sure that it's as vague as we
5 think it is. It might take education for people to
6 understand how that procedure works under Rule 104(a),
7 but the rule does provide a procedure within it.
8   CHAIRMAN BABCOCK: Justice Gray asks: Why
9 would the determination of whether the person was a
10 victim be any different than the application of an
11 attorney-client, religious advisory, patient-doctor?
12 The decision of the application definition is decided.
13 Judge Brown is now making my point. If the Judge says,
14 "No yes privilege," then potential mandamus.
15   And what I took to be a smiley face is, in
16 fact, explained to me to be -- by Justice Gray just
17 something that he has to hit in order to get his message
18 sent to us. So now the record is complete on that.
19   And I think Richard Munzinger and then
20 Judge Peeples.
21   MR. MUNZINGER: I respectfully dissent
22 from Harvey's comments. The point at issue is whether
23 the person using the language of the statute, quote, is
24 a victim, closed quote, not whether advice has a
25 particular nature as business or legal, but whether

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1 the -- this is a suit where Jane has sued Bill claiming
2 Bill sexually assaulted her. That's the nub of the
3 case. And so the trial court, if Judge Brown is
4 correct, makes his preliminary decision in his own mind
5 that the plaintiff wins the case to apply the privilege.
6 How can that be? How can a judge make such a decision
7 without having heard all of the relevant evidence?
8   I'm a defendant. I've got a right for the
9 Judge. Judge can't make a ruling on the merits of my
10 case without having heard all the relevant evidence, and
11 shouldn't be able to if due process means anything. And
12 if, judge, justice means anything, when the legislature
13 says a person is a victim, victim has a meaning. We
14 deal with words and the Supreme Court all the time,
15 "When we interpret a statute, we figure the legislature
16 knows what they're saying, and so we're going to apply
17 the English language as it's written and as they wrote
18 it."
19   And all we're doing here is attempting to
20 dodge that to create a privilege to an alleged victim as
21 opposed to a victim. And so you've ruled on the status
22 of the person claiming the privilege to apply the
23 privilege when that's the nub of the lawsuit. That's
24 Judge Estevez's problem in my -- that's the way I read
25 it, at least, and I don't see how you can possibly write

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1 a rule that let's -- the Supreme Court can write a rule
2 that avoids that discussion.
3   We are bound by what the legislature --
4 the Court is bound by what the legislature wrote. The
5 legislature did not state, "Create a rule or create a
6 comment."
7   My personal recommendation to the Court
8 is, let it work its way out in the court and don't say
9 anything.
10   I'm finished. Thank you.
11   CHAIRMAN BABCOCK: You bet.
12   Judge Peeples.
13   HONORABLE DAVID PEEPLES: Two or three
14 things. Courts, and trial courts especially, interpret
15 vague statutes all the time. All the time. And I think
16 that's what has to happen here. I doubt the Court --
17 the Supreme Court would want to interpret this statute
18 by rule.
19   I would point out secondly that the only
20 time this comes up is when the person who says "I'm the
21 victim" went to an advocate. We will at least know that
22 they -- I mean, that's what it's all about, but there
23 are discussions with the advocate.
24   And then the third thing I would say is,
25 as a trial judge, I don't need a list of privileges

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1 because the only time I have to rule on it is when
2 somebody makes an objection at trial or before trial.
3   So from my point of view, I don't need a
4 list, but I would find a list of these privileges very
5 helpful, and I wouldn't know the first place to go other
6 than Professor Goode's treatise on it or his handbook on
7 it. But I think to mention, as Harvey Brown said, or
8 maybe 501 is good enough, but just to have a tentative
9 list -- maybe it's incomplete, maybe something will be
10 left out, but if that happens, you just add it later.
11 But I think for practitioners, just a summary of what's
12 out there would be helpful. And we got to muddle our
13 way through on the rulings, but sometimes you take a
14 baby step.
15   CHAIRMAN BABCOCK: Judge Estevez.
16   HONORABLE ANA ESTEVEZ: I just want to
17 make the point that the place I see this the most has
18 been a parent charging the other parent -- they're
19 charging the other parent of having sexually abused one
20 of their children, one of their -- you know. And it's
21 been their greatest defense has been those counselors
22 that have come in.
23   And so, you know, when I -- if it's
24 privileged, it's privileged. And if they're an alleged
25 victim, the child -- you know, the child's not running

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1 around thinking about, "How am I going to make my case
2 better," or "Who's going to be looking at my files
3 later," like an adult.
4   And so I think that this is such an
5 important issue that -- and I appreciate everybody that
6 supported that -- that they don't -- it's going to make
7 a huge difference. And if we already know the answer to
8 that, I just want to say we need to let them know.
9   And I'm going to agree with Chief Justice
10 Christopher. The reality is that our defense attorneys
11 will not know what to do. Most of them won't unless
12 they happen to go to the CLE that specifically told them
13 what to do. I mean, they're not going to get that
14 information. They're going to miss it. We're going to
15 have -- even our appellate lawyers may not know about
16 it. So we're not going to have a way to make them learn
17 what to do in these type of cases. So we probably do
18 need a rule for them any time we're dealing with the
19 criminal defense part just because that's just our
20 reality.
21   CHAIRMAN BABCOCK: Thank you, Judge.
22   Levi.
23   HONORABLE LEVI BENTON: Judge Estevez's
24 example there of parent versus parent, you know, I don't
25 practice in family or criminal, but, you know, any

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1 privilege can be waived. And it seems to me in the
2 example she cites, it wouldn't be one parent or the
3 other who would have the right to assert the privilege.
4 I don't know if an ad litem is appointed in such cases,
5 then it's the ad litem's decision.
6   But I've gone in the context of a week
7 from being a proponent of a rule to a proponent of a
8 comment, to now I'm persuaded by Richard Munzinger and
9 in part by Harvey Brown that we should do nothing at
10 least for a period of time, because if we do nothing, we
11 are still giving the sexual assault victims the same
12 treatment that domestic violence victims are afforded.
13 And that gives us some time to let the cases percolate
14 and to get some opinions from the intermediate courts,
15 at a minimum. And it also gives the Buddy Low
16 subcommittee, which I'm a member of, the opportunity to
17 debate with the State Bar committee. And whether it's
18 September 3rd we come back with something or someday
19 later, we just -- the Court need not rush because we'd
20 be complying with a statute by taking our time to think
21 and debate. That's all I've got. Thanks.
22   CHAIRMAN BABCOCK: Thanks, Levi.
23   On the timing of our work, I went back and
24 reread the reference letter. And on the topics that
25 we're talking about today, the Court said we should

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1 conclude our work at this meeting. I doubt that the
2 Court would have much trouble with us taking an extra
3 week or so to suggest a comment, if that's what the
4 subcommittee and the full committee thinks is right, but
5 running it out until our next meeting I don't think was
6 contemplated by the Court. But if the Court wants us to
7 keep studying this, that's fine, but the reference
8 letter said we were to conclude our work today. So I
9 offer that as a point of information.
10   HONORABLE LEVI BENTON: Well, maybe our
11 subcommittee chair could make a motion for leave to
12 extend.
13   MR. LOW: I would so do, but I've heard
14 enough from my committee members to think right now, a
15 majority are going to say do nothing. Now are we
16 supposed to draw a comment anyway if we vote to do
17 nothing?
18   CHAIRMAN BABCOCK: Well, we face -- this
19 is not the first time we've faced that, Buddy. And
20 sometimes the Court says, "Got it," you know, "We
21 understand your recommendation but go ahead and draft
22 something anyway," and we'll hear from Justice
23 Christopher and then maybe ask the Chief if he has any
24 direction to give us both on should we draft a comment,
25 and number two, do we have any additional time, and if

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1 so, how much to do so.
2   So Justice Christopher.
3   HONORABLE TRACY CHRISTOPHER: Well,
4 unfortunately there will be waiver in the appellate
5 world. And so we will not see any criminal decision --
6 any decisions on the criminal side very soon because if
7 the criminal defendant's attorney doesn't follow this
8 rule to try and get the information, then there will be
9 waiver. So that's why I consider that particularly
10 important on the criminal side.
11   CHAIRMAN BABCOCK: Thanks, Judge.
12   Kent Sullivan.
13   HONORABLE KENT SULLIVAN: I just wanted to
14 weigh in very briefly on what I perceived to be the
15 Tracy Christopher and David Peeples side here.
16   Certainty is good. Plain language is
17 good. User friendliness is good. I think the idea of
18 doing absolutely nothing and just sort of letting some
19 cases bring forward issues -- you know, it's one thing
20 when you're dealing with a case in which there's
21 uncertainty as to the outcome. That's every case. It's
22 another thing when there is uncertainty about core
23 issues of process, and the litigants become cannonfodder
24 in that sort of uncertainty.
25   I think we need to look at this from the

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1 user's point of view, and we need to at least provide
2 some reasonable amount of guidance here and weigh in.
3 That's it.
4   CHAIRMAN BABCOCK: Thanks, Kent.
5   Well, on the motion by the chair of the
6 subcommittee, who's also vice chair of this committee,
7 for an extension of time to draft and propose a comment,
8 I will kick that to the Chief to see whether he would
9 find that -- he and the Court would find that helpful or
10 whether we are to, as the letter said, conclude our work
11 today.
12   HONORABLE NATHAN HECHT: Well, I think it
13 would be most helpful for me and, at this point -- and
14 Jane -- and at this point, I think you've pretty well
15 aired your ideas, just to have an understanding of what
16 the considerations are.
17   And before I think we ask you to do more
18 work on it, I think we probably should talk about it
19 with the Court and kind of get their view on it and --
20 because I don't think we could comfortably speak on the
21 Court's behalf given all the various considerations that
22 we've heard without laying it out to them first.
23   CHAIRMAN BABCOCK: I agree. That is good
24 guidance, so we'll -- we will, at least for the moment,
25 conclude our work on this matter.

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1   And I'll ask Bobby Meadows, who I saw that
2 joined us -- but before I ask him anything, Harvey has
3 his hand up. So Harvey, do you have a comment?
4   HONORABLE HARVEY BROWN: I just had a
5 question for the Chief, and that is: Would it be
6 helpful to the Court to kind of do a preliminary survey
7 or vote, if you will, to see how many people fall in
8 each of three categories? We have the "do nothing," the
9 "write a comment," and then we have the "write a rule,"
10 three different ideas out there? Would it help the
11 Court to get a sense of the committee as to people's
12 preliminary reactions?
13   HONORABLE NATHAN HECHT: Sure.
14   CHAIRMAN BABCOCK: Okay. Everybody who's
15 in favor of do nothing, raise your electronic hand.
16 Anybody else? Okay. Has everybody voted? All right.
17   Everybody who's in favor of -- you can
18 lower your hands.
19   Everybody who is in favor of a comment,
20 raise your hand. Has everybody voted that wants to?
21   Okay. Lower your hands.
22   Everybody in favor of a rule, raise your
23 hands. Has everybody voted that wants to? Okay. You
24 can lower your hand.
25   Let the record reflect that the do nothing

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1 party received 17 votes, the comment crowd received 11,
2 and the rules group garnered four votes. So -- and the
3 chair didn't vote. So that's where that came out.
4   And anything else on this topic?
5   HONORABLE ANA ESTEVEZ: I just want to
6 say: This is the highest litigated area in the whole
7 state of Texas. If you're going to have a lawsuit,
8 whether it's criminal or family law, it's going all the
9 way to the jury trial if it's a sexual assault case.
10 That's all. It's very important.
11   CHAIRMAN BABCOCK: Thank you, Judge.
12   MR. LOW: Chip, I have one question about
13 my instructions, were wait to hear from the Chief, is
14 that correct, before we do --
15   CHAIRMAN BABCOCK: That's correct.
16   HONORABLE NATHAN HECHT: Yeah.
17   MR. LOW: Okay. Now with regard to the
18 supreme -- the State Bar committee, I have them go ahead
19 and work or not?
20   CHAIRMAN BABCOCK: Well, my own view would
21 be that that's up to them; but if they're doing it for
22 our benefit, they're using their resources in a way
23 that's not helpful to us because our work is finished
24 for the moment. So if they want to do it for their own
25 benefit and get their own -- get that input to the

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1 Court, then that's fine.
2   MR. LOW: Okay. I understand. All right.
3 I'm sorry that we -- all the other things went so
4 smoothly, and I happened to (indiscernible) this one,
5 but I had help. Thank you.
6   CHAIRMAN BABCOCK: Okay. And Robert
7 wants -- has a question about the protection of
8 sensitive data. I think whether there's -- whether
9 there should be more work done, and I think I'm going to
10 predict that we're done for now, Robert, unless the
11 Chief thinks we need more work; but I think for now,
12 we're done on that.
13   HONORABLE NATHAN HECHT: I agree.
14   CHAIRMAN BABCOCK: Am I right about that,
15 Chief?
16   HONORABLE NATHAN HECHT: Yes.
17   CHAIRMAN BABCOCK: Okay.
18   MR. LOW: Thank you.
19   CHAIRMAN BABCOCK: All right. And so now
20 back to Bobby Meadows, who I saw enter the frame here a
21 little bit ago. And Bobby, your items are coming up
22 next, the last two items on our agenda. Do you have
23 scheduling problems, or would it be okay if we took a
24 half hour lunch right now?
25   MR. MEADOWS: Perfect. No, we're ready to

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1 go, and a break's fine.

2   CHAIRMAN BABCOCK: Okay. You look like

3 you're in a construction site.

4   MR. MEADOWS: Well, I am actually. I'm in

5 Montana, and we're wrapping up a little project here.

6   CHAIRMAN BABCOCK: All right. Good for

7 you.

8   Well, it's 12:35, so why don't we

9 reconvene at 1:05, unless that's not enough time for

10 everybody to get lunch. Is that sufficient time for

11 everybody? If anybody thinks it's not enough time,

12 raise your hand. No hands have been raised, so we will

13 reconvene at 1:05. That would be 30 minutes from now.

14 Thanks everybody.

15   UNIDENTIFIED SPEAKER: Recording stopped.

16   (Recess: 12:35 p.m. to 1:05 p.m.)

17   CHAIRMAN BABCOCK: It looks like we are

18 now recording, so welcome back after our lunch break.

19 And somebody is trying to call me, but we'll get back to

20 our meeting.

21   And I have, I think, taken care of some

22 confusion I created this morning --

23   UNIDENTIFIED SPEAKER: Recording in

24 progress.

25   CHAIRMAN BABCOCK: -- unintentionally, but

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1 our next meeting is September 3rd, so that's for sure;

2 but the SCAC reception and picture taking is October 8th

3 because if we did it on September 3rd, as Lisa Hobbs

4 pointed out, we would be conflicting with the Texas

5 Supreme Court Historical Society cocktail party and

6 dinner, which many, if not most of us, will be

7 attending. So my apologies.

8   Next meeting September 3rd, followed by

9 the Texas Supreme Court Historical Society event. And

10 the meeting after that will be October 8th, followed by

11 an SCAC reception and picture-taking ceremony. So

12 hopefully we got that squared away, and we will now turn

13 it over to --

14   MR. RODRIGUEZ: Chip --

15   CHAIRMAN BABCOCK: Yes.

16   MR. RODRIGUEZ: -- this is Eduardo

17 Rodriguez. Is the meeting --

18   CHAIRMAN BABCOCK: Hello, Eduardo.

19   MR. RODRIGUEZ: Is the meeting on the 3rd

20 going to be on the 4th also? It's the 3rd and the 4th

21 or just the 3rd?

22   CHAIRMAN BABCOCK: I think just the 3rd,

23 Eduardo.

24   MR. RODRIGUEZ: Okay.

25   CHAIRMAN BABCOCK: So why don't we turn

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1 over to Bobby Meadows on oaths in depositions, the next

2 agenda item today.

3   MR. MEADOWS: Okay. Thank you, Chip.

4   So the task we were assigned was to take a

5 look at House Bill 3774 that includes language allowing

6 court reporters to administer the oath to witnesses even

7 if not in the same location as the witness, so that is

8 the court reporter taking the deposition can administer

9 the oath to someone who's in remote location. And the

10 question put to our subcommittee and to this larger

11 committee is: In light of that statutory language, does

12 Rule 199.1(b) that addresses or deals with remote --

13 oral depositions in remote places, or remote

14 depositions, does it need to be changed or include a

15 comment in light of this statutory development?

16   And our committee met and concluded that

17 Rule 199.1(b) does need to be changed. And Justice

18 Christopher, as she often does, went right to the heart

19 of things, prepared a proposal that, you know, is pretty

20 quick work. It eliminates -- her proposal removes the

21 last sentence of the current Rule 199.1(b) which allows

22 an oral deposition of a remote witness if the witness is

23 present with a person authorized to administer the oath

24 in that jurisdiction. So that part of Rule 191 -- I

25 mean, 199 would no longer apply.

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1   And so that -- our committee proposal is

2 to strike that -- unanimous proposal was to strike that

3 sentence but add a comment that notes that Section 154

4 of the Government Code governs the administration of

5 oaths by a court reporter for a remote deposition.

6   So a pretty straightforward approach to

7 it, pretty much, I think, dictated by the language in

8 House Bill 3774.

9   CHAIRMAN BABCOCK: Thanks, Bobby. Anybody

10 have any comments on this?

11   (No response)

12   CHAIRMAN BABCOCK: Bobby, this may be a

13 first in our history.

14   MR. MEADOWS: It's not -- can't attribute

15 it to me.

16   CHAIRMAN BABCOCK: Justice Christopher has

17 saved us at the bell here.

18   (Laughter)

19   HONORABLE TRACY CHRISTOPHER: Sorry.

20   MR. MEADOWS: Of course.

21   HONORABLE TRACY CHRISTOPHER: This is the

22 fix to the legislation. I think the Court also put in

23 their letter: Is there anything else that we want to do

24 with respect to this rule? That would implicate the

25 broader question of Zoom depositions or WebEx or

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1 whatever going forward.
2   And so I just wanted to say that we, in
3 the committee, decided that we didn't need to address
4 it. The rule already allows for it. And the question
5 would be whether we should put something in there about
6 grounds for objecting to a remote deposition versus the
7 in-person depositions, and we decided not to at this
8 time; but if the Court wants us to look at that, we can
9 look at that.
10   CHAIRMAN BABCOCK: Great. Yeah, I think
11 my own sense is that this was sort of a "Let's get done
12 what we can do today," and if there are other issues
13 that require more study, we'll do that in a more
14 leisurely pace, but Robert.
15   MR. LEVY: I just had a question. How
16 would this rule apply to situations where you have a
17 deposition, a deponent in another state or even another
18 country? Does it suggest that a Texas court has the
19 power to compel that witness to participate, or does it
20 only, I guess, assume that it's by the cooperation of
21 the witness and the parties that the remote deposition
22 take place?
23   MR. MEADOWS: It's my appreciation that
24 it's the latter.
25   MR. LEVY: Got it.

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1   MR. MEADOWS: And then the authorizing
2 statute goes into pretty significant detail into how the
3 identity of the witness can be established.
4   HONORABLE TRACY CHRISTOPHER: I don't
5 think it changes anything with respect to that in terms
6 of the authorization without agreement to produce
7 somebody and how you would subpoena for the remote
8 deposition or anything like that.
9   CHAIRMAN BABCOCK: Yeah, that would sure
10 be my take, but all right. Any other comments about
11 this? You're still about to set the record, Bobby, even
12 with the help from two of your colleagues.
13   MR. MEADOWS: By the co-chair, you might
14 note.
15   CHAIRMAN BABCOCK: By the co-chair, that's
16 right.
17   All right. If there is no further
18 discussion about this topic, then we can move on to the
19 next one, ethical guidelines for mediators. And, again,
20 Bobby is here to talk to us about it.
21   MR. MEADOWS: Okay. Well, if you think
22 that was easy wait till you hear this.
23   So the question here is around a request
24 to have the Court amend the guidelines to ethical -- the
25 ethical guidelines for mediation. It's a request that

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1 surfaces from I guess a period of confusion about the
2 scope and extent of what a mediator can do in terms of
3 reducing a settlement, the terms of a settlement, from
4 mediation into a written document.
5   And I don't really need to go into the
6 history, but apparently for some period of time, for
7 eight years or so, there has been a good bit of
8 confusion that surfaced out of a ethics opinion -- 584
9 to be precise -- about what a mediator could do in terms
10 of moving from a mediation to the implementation of it.
11   And so the question is: Can mediators in
12 a case where the parties are not represented by lawyers
13 prepare a divorce decree and other necessary documents
14 to effectuate the agreed divorce?
15   And so from that question, we now have a
16 new Ethics Opinion 675 that was issued in 2016 that
17 largely embraces or articulates what it is that the
18 Supreme Court is being asked to accept in terms of an
19 amendment to the ethical guidelines, and that is that a
20 Texas lawyer acting as a mediator can prepare a written
21 agreement that memorializes the terms of the parties'
22 agreement and even suggests additional terms for
23 inclusion in the draft agreement. So that's it.
24   So is it okay for a mediator to reduce the
25 terms of settlement from a mediation into a written

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1 document? And that's the question.
2   And, again, our subcommittee met on this
3 and it was unanimous that this request should be
4 accepted.
5   CHAIRMAN BABCOCK: Okay. I think just one
6 small clarification, Bobby. Was the Opinion 675, was
7 that 2016 or 2018? I thought it was 2018.
8   MR. MEADOWS: I have written March 2016
9 from the letter that I read, but I could have the date
10 wrong. I didn't do original research on this.
11   CHAIRMAN BABCOCK: Yeah, that probably
12 doesn't matter. In fact, it doesn't matter. But we can
13 get the precise date if we need to.
14   Any comment or discussion about the
15 subcommittee's recommendation?
16   MR. LEVY: Let me raise my hand, if I
17 could.
18   CHAIRMAN BABCOCK: Yeah, Robert.
19   MR. LEVY: So one of the -- I guess the
20 issues -- and I did not look over the opinion but having
21 the mediator involved in crafting a settlement agreement
22 potentially makes that mediator a witness in a
23 subsequent dispute about the settlement or the terms of
24 that agreement.
25   And we've tried, I think, historically to

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1 be very clear to protect mediators from ever becoming a
2 witness to keep their role separate. And if we somewhat
3 encourage them to draft the settlement agreements, then
4 are we subjecting them to exposure as witnesses and then
5 the conflict with the language that -- of the provision
6 that says that they are not witnesses?
7   MR. MEADOWS: Well, nothing about our
8 assignment included that question or implication. It
9 was just simply a pretty straightforward examination of
10 whether or not a mediator who presided over, you know, a
11 dispute and that was resolved in compromise could reduce
12 the terms of that to writing.
13   (Simultaneous discussion)
14   MR. LEVY: My thinking is, though, that by
15 enabling that, we're actually putting the mediator in a
16 more likely position of having to be a witness. And is
17 that -- do we want that to be the outcome or try to
18 avoid it by not adopting the proposed rule?
19   CHAIRMAN BABCOCK: I'll say that
20 typically, your agreement with the mediator is that
21 you -- no party will call him as a witness any time,
22 anyhow, anywhere. And if anybody tries to, he won't
23 show up and -- or she won't show up.
24   And the mediator's agreements that I've
25 seen, they'll have a kind of a form and it'll have a

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1 bunch of stuff in it that, you know, is just kind of
2 form information, and then the parties will either
3 dictate or write in themselves the terms of the
4 agreement.
5   I've not had experience with mediators who
6 say, "Okay, I sort of get the gist of what you guys are
7 trying to do. I'll go back in my office and I'll draft
8 an agreement." I don't see that happening, and I'm not
9 sure that's widespread, if it does; but I'm
10 offering 2 cents here, and we've got people who probably
11 know more than I do.
12   So, Roger, you start off, and then we'll
13 go to Judge Miskel and then Lisa.
14   MR. HUGHES: Well, my first point is, is
15 my experience with mediators providing a form agreement
16 is pretty much the same as yours. I've come to expect
17 them to have a fill-in-the-blank form ready because they
18 don't want to be bothered to have to craft a new interim
19 agreement from the beginning. And it's important at
20 least in nonfamily law cases to have something that's
21 enforceable in case someone tries to back out. And
22 unfortunately, I've had that happen once or twice.
23   As far as dragging the mediator into it,
24 pretty much unless they're going to claim fraud or undue
25 influence, I don't know what -- why they would be able

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1 to call the mediator. And if they're going to claim
2 undue influence/coercion/fraud by the mediator, I don't
3 know what could protect the mediator from having to go
4 to court to say, "I never said those things. I didn't
5 twist his arm behind his back," et cetera.
6   My only observation is, pretty much every
7 form mediation memo that I've signed usually has a
8 paragraph to make work for the mediator in case you-all
9 fall to arguing later on that "You can't go to court
10 unless you re-mediate with me," or "If anyone tries to
11 back out, you have to mediate with me before you can go
12 to the court," that kind of thing. But generally
13 speaking, I'm not offended by that.
14   So overall, I don't think this is going to
15 do anything to change what's already going on out there.
16 And I haven't heard people squawking about -- of course,
17 we only use attorney mediators in my firm, but I haven't
18 heard anyone squawking about the interim agreements.
19 You just have to be very careful because frequently, you
20 will remember something that you wanted to put in the
21 agreement that you didn't, and then afterwards, they
22 won't sign a more extensive release than is described in
23 your mediation memo.
24   That's all I have to say.
25   CHAIRMAN BABCOCK: Okay, great.

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1   Judge Miskel.
2   MR. HUGHES: Quite favored by the way.
3   CHAIRMAN BABCOCK: Great. Thank you.
4   Judge Miskel.
5   HONORABLE EMILY MISKEL: So the question
6 is specifically about pro se parties and attorney
7 mediators. Is that correct?
8   MR. MEADOWS: Right.
9   HONORABLE EMILY MISKEL: Okay. So I think
10 that, for example, Kennon earlier mentioned
11 TexasLawHelp.org, and that has very specific Supreme
12 Court approved forms for final judgments in many types
13 of cases. And I have often wondered why mediators
14 couldn't mediate a pro se case and check the boxes in
15 the form final judgment and then send the pro se parties
16 to court with their Supreme Court approved form, boxes
17 checked, as their final agreement in the mediation. It
18 would be very efficient.
19   And so I think the recommendation that I'm
20 hearing would not force any mediator to prepare a final
21 judgment. So if a mediator does not want the risk of
22 being called as a witness, they don't have to do any of
23 this; but if a mediator wanted to do a low-cost
24 mediation for some pro se parties in a family law case
25 and check the boxes on the Supreme Court approved forms,

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1 I think that would be wonderful.

2   MR. MEADOWS: I don't think the mediator
3 can prepare the actual divorce decree or any of the
4 Court documents. As I appreciate it, that was kind of
5 the point of uncertainty and controversy was around
6 these earlier ethics opinions about, you know, a lawyer
7 cannot, you know, obviously act as a mediator and then
8 act for one of the parties in terms of as a lawyer, so
9 it's just --

10   HONORABLE EMILY MISKEL: But I'm saying
11 the final form of the MSA could have all the same check
12 boxes. That way you would know that you've ruled on --
13 or that the parties have resolved all the issues by
14 agreement or what's been reserved. In other words, the
15 question was about the mediator preparing the form of
16 the settlement agreement.

17   MR. MEADOWS: Right, the agreement.

18   CHAIRMAN BABCOCK: Lisa.

19   MS. HOBBS: Yeah, I'm going to piggyback a
20 little bit off what Judge Miskel is talking about
21 because I think we got off on sort of more sophisticated
22 mediation that most of us deal with more regularly than
23 what I think the ethics opinion is about.

24   And, Bobby, you can correct me, but
25 generally speaking, what was the background of that

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1 ethics opinion? It was a family law and it was pro se?

2   MR. MEADOWS: Right, and that was -- yes.
3 I mean, I don't know if that was the background for it.
4 I mean, that was -- the way the question was framed was
5 around that circumstance where you had, you know, two
6 parties not represented by a lawyer involved with a
7 mediation, you know, what was the scope of what the
8 mediator could do at the conclusion of the agreement.

9   MS. HOBBS: Yeah. And so, I mean, I
10 agree -- well, first of all, on my end, any case agree
11 with what -- that a mediator could draft settlement
12 agreements.

13   It's kind of interesting. I feel like
14 you're raising two separate issues, like it's one thing
15 to memorialize with some legal language what the parties
16 at the mediation agreed to, but then we all kind of know
17 that sometimes in a mediated agreement, then you add
18 "and the party will indemnify them" or -- I don't know.
19 There this sort of, like, stock language that you might
20 add to, like, the specific terms of this controversy.

21   I am in favor of letting mediators do
22 that, I think, but I'm sympathetic to the ethics opinion
23 because you can see, if you're a mediator and you're
24 adding these provisions that might never come up, and
25 probably in the vast majority of mediated agreements

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1 don't come up, but once you start advising them about
2 what it means on some stock language, then you start --
3 I don't know. Like it does get into a gray line, so I
4 don't know. I'm sorry, I'm just maybe being sympathetic
5 for the ethics opinion, even though my vote would be to
6 let mediators do this. I'm probably completely
7 unhelpful in my comments.

8   MR. MEADOWS: Well, I would say --

9   (Simultaneous discussion)

10   CHAIRMAN BABCOCK: Go ahead.

11   MR. MEADOWS: -- I was just going to say
12 just one thing that might be useful, and perhaps I
13 should have said it from the very beginning. I mean,
14 the important thing about this whole request, I believe,
15 is that the -- it's to recognize the difference between
16 simply, you know, memorializing the parties' agreement
17 and then moving forward with some sort of legal
18 effectuation of that with a divorce decree, which ethics
19 opinion does not permit.

20   But in terms of the questions around, you
21 know, protecting mediators and, you know, from being
22 witnesses and all of that, I should have said early on
23 that this request, this proposal, has the support of
24 every statewide organization in Texas representing
25 mediators, including the Council of Alternative Disputes

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1 Resolution of the State Bar.

2   So I would just -- you know, I don't know
3 that for a fact. It was just in the referral materials.
4 But if true, I would think that the mediators themselves
5 would know how to look out for themselves, and if they
6 were concerned about being called as witnesses or
7 something else, they would not be supporting this.

8   CHAIRMAN BABCOCK: Yeah, speaking of a
9 gray line, Justice Gray says, "If we have nonlawyer
10 mediators reducing, quote, agreement, quote to a
11 document, MSA, Rule 11, or regular mediation, I am sure
12 that the" -- (phone ringing) that may have been me.
13 Sorry about that.

14   Let me start again. Justice Gray says,
15 "If we have a nonlawyer mediator reducing the, quote,
16 agreement, quote, to a document, MSA, Rule 11, or
17 regular mediation, I am sure that the unauthorized
18 practice of law section of the SBA has a view on this.
19 If the lawyer mediator can do this because they are not
20 practicing law for either party, could a nonlawyer do
21 this?"

22   So, Bobby, there you go. You got an
23 answer to Justice Gray?

24   MR. MEADOWS: I really don't. I think
25 that -- and perhaps others on the committee would want
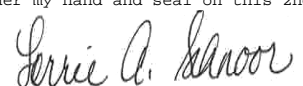
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1 to venture an answer. I understood our task to be
2 examining this request built entirely around what a
3 lawyer mediator could do.
4   CHAIRMAN BABCOCK: Yeah, I think that's --
5 I think that's right, but it's an interesting question
6 nevertheless.
7   Justice Christopher.
8   HONORABLE TRACY CHRISTOPHER: I guess I
9 have to disagree with Bobby. I think that the requested
10 change would include nonlawyer mediators.
11   And, you know, the mediation group
12 rejected the idea that it would be the unauthorized
13 practice of law. I mean, if they wanted to make it just
14 for lawyer mediators, they could have put that in the
15 comment, but it's not -- it doesn't distinguish between
16 lawyer and nonlawyer mediators.
17   And Harvey couldn't make it this
18 afternoon, and he said, you know, if the Court wanted
19 to, of course, they could limit it to lawyer mediators;
20 but I actually am in favor of the nonlawyer mediators
21 being allowed to do this because in the vast majority of
22 family law cases -- well, not the vast majority -- in a
23 large number of family law cases, we have nonlawyer
24 mediators, because they are a lot less money. And it's
25 very simple for them to help the parties fill out a

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1 settlement agreement.
2   And, I mean, it's kind of funny because
3 that ethics opinion says, "Well, you're not really
4 acting like a lawyer when you're helping fill out the
5 settlement agreement." And so if you're not acting like
6 a lawyer when you help them fill out the settlement
7 agreement, then it seems like a nonlawyer could do it,
8 too.
9   So, I mean, it is a concern, it is an
10 issue, but I actually did not see the proposed comment
11 as limiting it to lawyer mediators.
12   MR. MEADOWS: Well, that's a good point,
13 then. I mean, it may be that I was -- the ethics
14 opinion that prompted all this was Opinion 675 that was
15 turned on the question of "Can a Texas lawyer, acting as
16 a mediator, prepare a written agreement that
17 memorializes the terms of the parties' agreement and
18 suggest additional terms for inclusion in the draft
19 agreement?"
20   So perhaps I read our assignment too
21 narrowly because I read it as focusing on what a lawyer
22 could do in terms of memorializing the agreement but not
23 taking the next step of preparing the divorce decree.
24   So it certainly would be impermissible, in
25 my view, for a nonlawyer mediator to act beyond

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1 memorializing the agreement; but what we know from this
2 ethics opinion is that it's impermissible for a lawyer
3 to do anything -- a lawyer mediator to do anything
4 beyond memorializing the agreement.
5   So if I've read it too narrowly, I think
6 you've made a good -- you know, you've raised a good
7 point, Tracy, and maybe it's something that ought to be
8 discussed. But that was how I was undertaking, you
9 know, the response to that question was based on how I
10 understood the question out of that Ethics Opinion 675.
11   CHAIRMAN BABCOCK: Okay. Judge Miskel had
12 a hand doing something, but it may have been raised or
13 it may have been a thumbs up. I'm not sure. But rather
14 than try to interpret the hand, the mechanical hand,
15 we'll just let her speak.
16   HONORABLE EMILY MISKEL: I was giving a
17 thumbs up initially because I totally agree with Chief
18 Justice Christopher. If it doesn't involve giving legal
19 advice to a party, then it shouldn't matter if it's a
20 lawyer mediator or a nonlawyer mediator.
21   And then I was also going to say there was
22 the question about suggesting additional terms. And so
23 specifically thinking about family law, that might be,
24 "Okay, you've decided your weekday possession. Would
25 you like to make agreements about the holidays?" or "You

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1 haven't mentioned who's covering the child on health
2 insurance," and so those would be things that would be
3 additional terms that they might need to agree on but
4 that wouldn't be like legal advice or tax advice or
5 something along the lines that we wouldn't want
6 mediators advising parties on.
7   So I approve -- I agree with what Robert
8 Meadows is saying. I agree that lawyer and nonlawyer
9 mediators should be allowed to fill out a settlement
10 agreement as well as make sure any additional terms, you
11 know, like summer visitation or whatever it is, get
12 covered in the agreement.
13   CHAIRMAN BABCOCK: Great. Thank you,
14 Judge.
15   Richard Munzinger.
16   MR. MUNZINGER: When you start suggesting
17 additional terms, it's not always as simple as a divorce
18 case saying, "Oh, don't forget custody on vacation
19 days." These cases aren't all divorce cases whether
20 they're pro se or not.
21   And when I begin to suggest additional
22 terms to somebody, am I not practicing law if I'm a
23 lawyer? What happens if one of the parties decides that
24 the agreement as written by the lawyer, which they
25 signed, was interpreted by the lawyer to them and finds

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1 out later that it had other features to it? Do they
2 have a malpractice case? Can they file a lawsuit?
3 What's the mediator's position in that situation?
4   There's some problems about saying that a
5 mediator may suggest terms to parties. They do to me.
6 We've all been in mediations where somebody has
7 forgotten something or something else, and the mediator,
8 if he's a good one, will say -- might ask a question,
9 but when they're pro se parties, I think you've got a
10 problem when you start saying that the mediator may
11 suggest additional terms to the parties. "Well, he told
12 me I should do this. I didn't know that this had this
13 result to me, and now I'm going to file a lawsuit and
14 say I want out of the agreement. If I don't get out of
15 the agreement then, by God, I'm going to sue that dadgum
16 mediator. He gave me bad advice."
17   I mean, I don't know what -- how you
18 handle this. I mean, they're different issues. It's
19 certainly not what the committee was asked to concern,
20 but including the language that you may suggest,
21 additional terms to the parties I think has some
22 ramifications that are not just necessarily scrivener
23 recommendations. They may have substantive effects that
24 affect the right of parties who are not represented by
25 counsel; and you got a guy representing both sides, and

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1 that is problematic. Thank you.
2   CHAIRMAN BABCOCK: Thanks, Richard.
3   Robert.
4   MR. LEVY: Following on Richard's comment,
5 I do think there's a material difference in having the
6 rule that would apply to lawyers as mediators versus
7 nonlawyers, because as Richard points out, that there is
8 a substantive context to a mediator suggesting weekend
9 visitation. So let's say that they include that, but
10 they don't include holiday visitation, something they
11 should have talked about, or they don't include issues
12 about a QDRO and retirement. And the party assumes that
13 the mediator's guidance about what to include, including
14 additional terms, will cover all the important issues
15 that should be covered, and let's say they don't. And
16 there is legal context and advice to a mediator
17 suggesting terms to include or not to include or
18 suggest, "No, you don't need to address that in the
19 order," and it turns out, they should have addressed it,
20 and the mediator had no qualification to give that
21 advice.
22   And so, you know, there is the terms that
23 you suggest, and then there are the terms that you
24 indicate don't need to be included, and then there are
25 the terms that the mediator neglects to address; and all

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1 of those have consequences.
2   CHAIRMAN BABCOCK: Thanks, Robert.
3   Lisa, Judge -- Justice Christopher, and
4 then Judge Miskel.
5   MS. HOBBS: Pass.
6   CHAIRMAN BABCOCK: No, I'm sorry. I
7 missed Judge Estevez before Judge Miskel.
8   MS. HOBBS: I'll pass and let the Judges
9 talk. They probably have more experience.
10   CHAIRMAN BABCOCK: Justice Christopher.
11   HONORABLE TRACY CHRISTOPHER: Well, I
12 mean, I think you have to understand that in any pro se
13 mediation, the mediator is going to be telling the
14 parties what they have to agree to if they want to get a
15 divorce. Right?
16   And this goes back to our very long
17 discussion that we had about whether the clerks can help
18 people out and, you know, how much the Judge could do to
19 help people out. It's all part of that same philosophy.
20 You know, the parties show up in front of the Judge, and
21 they've got this agreement, and the Judge says, "Well,
22 you've forgotten about this. You know, go back and get
23 the agreement on that." Some judges think they
24 shouldn't do that. Some judges think they should and
25 that's the best way to handle things to, you know, get

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1 the pro se parties. So it's -- we had a long, long
2 discussion about this before, and this is just along
3 those same lines.
4   CHAIRMAN BABCOCK: Thank you.
5   Judge Estevez.
6   HONORABLE ANA ESTEVEZ: So I just want to
7 confess that when Judge Miskel was suggesting that they
8 pass out this final decree of divorce and everybody
9 checks the box while the mediator was there, I was
10 saying, "Yes, yes, yes." And then -- and then the
11 ethics came up, and then I started thinking about the
12 ethics issue again. And we already approved that form.
13 And I bet you they probably -- and I'm talking about
14 PRPC or whatever these mediators are, because they go to
15 the $50-a-side mediators so that they can get a
16 mediation done. I mean, they don't have money or they
17 would have gotten the lawyer, so they don't have a
18 lawyer mediator. They don't have a lawyer for
19 themselves, and they don't have a lawyer for their
20 mediator.
21   And the -- we did the ethics issue. We
22 talked about the ethics issue when we adopted those
23 forms. We kept going on and on about, "We're practicing
24 law and we're doing all this and telling them that this
25 is what they're supposed to do." And so I think we're

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1 past that. I think that this applies to a lawyer and a
2 nonlawyer.
3   I think it's a good thing, and I also -- I
4 want that whenever -- if the TexasLawHelp.org hasn't
5 heard us before that they actually take our final decree
6 of divorce and call it a mediation checklist because I
7 think that would be very helpful to all of the parties
8 and especially the Judges.
9   I mean, we spend -- I send them away after
10 I don't give them legal advice so that they come back
11 and do it right. And so if we can just give them that
12 nonlegal advice right up front, they can get them done
13 faster. We get them divorced, but all of you that think
14 that they magically come here knowing what to do or how
15 to do it right and that we don't have to cross that --
16 the Judges don't have to cross that line in order to get
17 it done, you know, we live in a different world. It
18 doesn't work.
19   So I just -- I want to echo what Chief
20 Justice Christopher said and Judge Miskel said. I think
21 it should apply to both. Even if that's what the ethics
22 opinion was talking about, it probably doesn't read so
23 narrowly that it's only talking about attorneys. It's
24 either legal advice or it's not legal advice; it either
25 crosses that line or it doesn't cross that line. If it

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1 does it for an attorney, it does -- if it doesn't for an
2 attorney, then it doesn't for a nonlawyer.
3   CHAIRMAN BABCOCK: Thanks. Lisa, I'm glad
4 you didn't get in the middle of this judicial admiration
5 society. The record will reflect that even though the
6 court reporter couldn't hear it, the mechanical hands of
7 Judge Miskel were clapping while Judge Estevez was
8 talking. So --
9   (Simultaneous discussion)
10   HONORABLE TRACY CHRISTOPHER: And Judge
11 Christopher was nodding.
12   CHAIRMAN BABCOCK: -- your turn.
13   HONORABLE EMILY MISKEL: Did you say it
14 was my turn? I was just going to say that, for example,
15 we trust clerks to know when to give information and
16 when to say "I can't give you legal advice." And I
17 think some types of additional terms are not legal
18 advice, and I think some types of additional terms are
19 legal advice. And I think we should trust mediators to
20 know in the moment like "I can't give you tax advice. I
21 can't suggest legal advice, but you haven't talked about
22 where the kid's going to go to school," and I feel
23 comfortable leaving that judgment call in the hands of
24 the mediator.
25   CHAIRMAN BABCOCK: Great. Thank you.

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1 Thank you, Judge.
2   Any other comments about what we're about
3 to recommend? Bobby, anything --
4   MS. HOBBS: I think I was smart to defer
5 to the Judges, but I would say, if I could sum up, their
6 experience is we can't let idealistic or perfection get
7 in the way of good enough. And sometimes in --
8 sometimes we just need good enough to like get people
9 through the process.
10   And I don't mean to put words into our
11 judges' mouths, but that's kind of what I'm hearing.
12 And that's a little bit why I backed off. I kind of
13 wanted to play some intellectual advocate or some, you
14 know, sitting in my ivory tower advocate. And really
15 sometimes you just need to get people through the
16 process and get a divorce, you know? It may not be
17 perfect.
18   CHAIRMAN BABCOCK: Well, now we need some
19 real world advice from John Kim.
20   MR. KIM: Thanks.
21   So does 675, as I read it in the letter
22 brief that was given, it doesn't seem to limit this to
23 divorce cases. Am I incorrect in that?
24   MR. MEADOWS: I don't think so. John, I
25 was just about to say, maybe -- I don't want to

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1 implicate your thinking on this, but this entire issue
2 arose through these ethics opinions that were dealing
3 with lawyer circumstances, and therefore I probably
4 approached this too narrowly. And Judge Christopher, as
5 is often the case, is correct, because what we're being
6 asked to do is to amend Guideline 4. Guideline 4
7 currently states, "agreements in writing" -- this is
8 ethical guidelines for mediators -- 14 currently states
9 a mediator should encourage the parties to reduce all
10 settlement agreements to writing.
11   The proposed amendment, which has been --
12 which I think we were asking this group to accept as the
13 subcommittee's proposal, and I still do, says -- it
14 would now have a comment, and the comment would read "A
15 mediator may prepare a written settlement agreement that
16 memorializes the terms agreed by the parties and may
17 suggest additional terms in a draft that are consistent
18 with the terms agreed by the parties."
19   So as I now understand this -- the way the
20 issue is being presented, it does not apply singularly
21 to lawyers who are mediators. It would, as Tracy
22 observed, I would guess, be broader than that. But
23 then, as you point out, John, the entire discussion
24 below that in terms of what prompted this request for an
25 amendment turned on these lawyer circumstances: Divorce

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1 situations, nonrepresented parties, and so forth.
2   So I just want to add that I think Tracy
3 is right in that the issue for the committee is whether
4 or not we should accept this amendment or propose this
5 amendment -- recommend to the Supreme Court that they
6 accept this amendment knowing that it's not -- I mean,
7 it applies to any mediator.
8   CHAIRMAN BABCOCK: Thanks.
9   John, does that answer your question, or
10 do you still have questions?
11   MR. KIM: Well, my concern is if it -- if
12 it is to be interpreted to apply to cases outside of
13 just divorce cases, which I don't have a problem with
14 this rule in that aspect; but once you get outside to
15 complex type of business litigation, I sure as hell
16 don't want any mediator proposing terms to the other
17 side. I mean, it is a business transaction that's going
18 on, and there is strategic decisions that are being
19 made, which I don't want a mediator who doesn't have a
20 full grasp of the entire case or the complexities
21 therein from a business aspect of it making any
22 suggestions.
23   HONORABLE ANA ESTEVEZ: Can I respond to
24 that?
25   CHAIRMAN BABCOCK: Sure.

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1   HONORABLE ANA ESTEVEZ: The ethics -- the
2 ethics opinion is specifically for people with no
3 lawyers.
4   MR. KIM: Fair enough.
5   HONORABLE ANA ESTEVEZ: So if you're a
6 lawyer, I don't think they're allowed to give another
7 suggestion, at least not to your party. Maybe they
8 can -- I -- but it is specific to unrepresented parties,
9 which is why we're going on and on about family law,
10 because that's probably 90 percent of the cases or
11 99 percent of these cases are going to be used in the
12 family law context.
13   CHAIRMAN BABCOCK: And, John, to your
14 point, I just had a mediation in California. And the
15 California mediator did exactly what you're talking
16 about, and I was very critical of his doing that and
17 told him so and said, you know, "It's not your place in
18 this very complex, you know, international implication
19 business transaction to go, you know, butting your head
20 into it," and he apologized and -- you know, but frankly
21 if I use him again, I'll take that into consideration.
22   So I think you can probably handle those
23 kind of things on a, hey, if a mediator steps out of
24 line that way, you can deal with it, but I think you're
25 exactly right in your comments. No question about that.

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1   So Judge Peeples, I think, is next and
2 then Judge Stryker.
3   HONORABLE DAVID PEEPLES: I want to
4 emphasize that these pro se family law cases are very
5 different from regular civil cases. In a regular civil
6 case, if a cause of action or element of damages, for
7 instance, is left out, issue preclusion will bar that
8 from being brought up later. That's not true in family
9 law.
10   If the details of something like
11 visitation, possession, and so forth, if those are left
12 out, and if the mediator can't even mention those, that
13 will come back to court. That will come back and the
14 courts will have to deal with it, so there's a lot at
15 stake here in the family law pro se cases.
16   CHAIRMAN BABCOCK: Thank you, Judge.
17   Judge Stryker.
18   HONORABLE CATHLEEN STRYKER: Along those
19 same lines, the biggest concern I have is the depth of
20 suggesting additional terms in a family law case. So if
21 you tell the parties, "You have to figure out whether
22 you're going to sole managing conservators or joint
23 managing conservators," of course the next question is
24 going to be, "What does that mean?"
25   And the bulk of the cases that I see where

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1 the pro se litigants are coming back because they're
2 unhappy with their settlement is they did not know what
3 that meant, and it was something suggested either
4 through the attorney general's office, who was helping
5 them resolve their -- the amount of child support and
6 then they throw in possession and access in the back of
7 those orders, or they went, you know, and had a
8 nonattorney mediator and, you know, depending on that
9 person's leaning toward whether mom should always be
10 primary or dad should, you know, just be possessory
11 conservators, they end up with something they totally
12 didn't understand.
13   So I'm a little concerned with saying
14 mediators can suggest additional terms without having
15 some kind of parameter in there because I see all the
16 time people unhappy with the agreements they came to
17 because they didn't understand and were just filling in
18 the blank like they thought they were supposed to.
19   CHAIRMAN BABCOCK: Thank you, Judge.
20   Judge Miskel.
21   HONORABLE EMILY MISKEL: So first of all,
22 what I would say is, in order to mediate family law
23 cases, you have to complete a 40-hour training in
24 mediation, and you have to additionally complete an
25 additional 24 hours of training in mediating family law

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1 cases, so these are mediators who have gotten twice as
2 much education on the topic.
3   But what I also will say is, we may not be
4 thinking about online dispute resolution. So online
5 dispute resolution is currently happening in Texas.
6 Counties are currently paying Tyler Technology for their
7 asynchronous mediation product, which is the plaintiff
8 and the defendant exchange offers through a software
9 platform with the assistance of a mediator and reach a
10 settled -- settlement agreement. And I have been
11 trained in the platform that Tyler Technology is selling
12 in Texas because they wanted me to test the family law
13 one, and it literally walks the parties through the form
14 in a checklist manner.
15   And so if we are currently, as counties,
16 paying for software that does this on the county dime, I
17 don't think that we should say that professionals who
18 have had two training classes can't exercise their
19 judgment in this area.
20   CHAIRMAN BABCOCK: Thank you, Judge.
21   Bobby, do you want to restate your -- the
22 subcommittee's recommendation, and then we'll give
23 everybody one more chance to say if they disagree with
24 it?
25   MR. MEADOWS: No, I think our -- I mean,

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1 Tracy and others for sure should speak up, but I think
2 our recommendation remains the same, and that is if the
3 Court should accept the requested amendment to Rule 14
4 and let mediators reduce, memorialize, the terms of the
5 agreement. And it does -- the comment does go on to say
6 "and suggest additional terms," but it says "that are
7 consistent with terms agreed by the parties." So --
8   CHAIRMAN BABCOCK: And you -- I'm sorry,
9 Bobby. And you accept Justice Christopher's friendly
10 amendment that the term "mediators" applies to both
11 lawyer and nonlawyer mediators?
12   MR. MEADOWS: The reason -- as I say, I
13 haven't done any original research on this, but of
14 course I do. And the language of the rule that's being
15 amended says "a mediator should." And so if you qualify
16 as a mediator under this rule, I would think whether
17 you're a lawyer or not, this ethical guideline would
18 apply to you.
19   CHAIRMAN BABCOCK: Okay. We're going to
20 vote in a second on that. Anybody -- any further
21 discussion? Because the vote is going to be are you in
22 favor of the proposal of the subcommittee as Bobby just
23 identified it with a friendly amendment from Justice
24 Christopher.
25   Richard Munzinger.

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1   MR. MUNZINGER: The way it's written, it
2 says, "The mediator may suggest additional terms," which
3 I interpret as meaning substantive material as distinct
4 from "the mediator may suggest areas requiring further
5 agreement" or areas -- I like what I just said,
6 "requiring further agreement." If you're doing divorce
7 cases, you can say, "Well, what'd you do about
8 vacations?" If it's not a divorce case, the guy may
9 think of something else, but it's one thing to suggest
10 the terms as distinct from the issues and let the
11 parties find their own way to it.
12   I think I've said what I want to say.
13   MR. MEADOWS: But Richard, I was just
14 going to add, it says -- and, look, I don't really --
15 I'm pretty agnostic about this. It says "suggest
16 additional terms in a draft that are consistent with the
17 terms agreed by the parties." So I would take the draft
18 comment to mean that the parties themselves had to agree
19 to what's being suggested.
20   MR. MUNZINGER: Well, dealing with a pro
21 se person, the lawyer suggests the substance of a term.
22 Is he intimidated intellectually? I don't mean he's
23 frightened, but is he -- he yields to the expertise of
24 somebody, and there's a lot of emotion, you're in a
25 hurry, and you want to get out of there and this and

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1 that. I mean, my only concern is that the mediator is
2 suggesting terms to parties, and I see that as
3 problematic; but I don't deal in these things every day
4 like some of the Judges do, and they know what they're
5 doing.
6   CHAIRMAN BABCOCK: Great. Thank you,
7 Richard.
8   All right. Everybody in favor of the
9 subcommittee's proposal as amended by Justice
10 Christopher, or at least the interpretation as amended
11 by Justice Christopher, raise your hand.
12   Everybody -- you can lower your hands now.
13   Everybody opposed?
14   All right.
15   MR. LEVY: Richard can't do this without
16 voting.
17   CHAIRMAN BABCOCK: What's that?
18   MR. LEVY: Richard, you're not voting?
19   CHAIRMAN BABCOCK: Well --
20   MR. MUNZINGER: I don't have strong
21 feelings either way. I'm not --
22   MR. LEVY: I'm sorry, I shouldn't push
23 that on you.
24   MR. MUNZINGER: Oh, no, no, no. You're --
25 I'm glad you noticed I didn't vote, but I just -- I

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1 don't have strong feelings either way, and so I'm going

2 to abstain, unless Chip tells me I have to vote.

3   CHAIRMAN BABCOCK: No, you don't. You

4 don't have to vote.

5   And, Pauline, check me on this, but it

6 looked like there were 24 in favor and three against.

7 Pauline, is that what you had?

8   MS. EASLEY: Correct.

9   CHAIRMAN BABCOCK: Great. So that will

10 carry by a vote of 24-3, the chair not voting. And that

11 concludes our agenda; but before we go, one more time,

12 Lisa, you may not have heard me -- my statement right

13 after the lunch break because I think you came in later,

14 but you've saved me once again.

15   The next meeting will be September 3rd,

16 and after that will be the Texas Supreme Court

17 Historical Society cocktail party and dinner, which many

18 of us will go to; but it will be the October meeting

19 where the SCAC will have its reception and photo

20 session. So I was all confused at the beginning. I

21 apologize for that, but now we're on the right track, I

22 think until I mess it up again, and that will happen any

23 minute now. So --

24   MS. HOBBS: I'm glad for the correction.

25 As an officer of the historical society, I will say to

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1 everyone on this call: We are about to sell out because

2 we are at limited capacity due to Four Seasons' policy.

3 So it's not -- it's going to be much less lawyers in

4 that room than normal, and I think we are about six

5 tickets away, which means one table way, from selling

6 out. So I'm sorry to put in a plug for the historical

7 society, but if you do not have your table or your

8 tickets, you need to get with Mary Sue immediately

9 because we're about to sell out.

10   CHAIRMAN BABCOCK: Thanks, Lisa. That's a

11 good reminder for a worthy cause for sure.

12   And if there's no -- if there's no other

13 business, I'll repeat what Justice Bland has said, which

14 is great to see everyone. Thank you. And I add my

15 thanks, too. This was extraordinary work under a really

16 tight time deadline. And, you know, this committee

17 continues, after all these years as chair, to amaze me

18 in how great you are and how hard you work and how

19 insightful everybody is, so thank you.

20   MR. MEADOWS: Oh, did Justice Bland say

21 that it was -- did Jane say it was her preference to see

22 everyone this way?

23   CHAIRMAN BABCOCK: Let's see what she

24 says. "Glad to see everyone. Thank you. Have a good

25 summer, and we look forward to seeing you in September."

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1 No, I think she wants to see us --

2   MR. MEADOWS: There you go.

3   CHAIRMAN BABCOCK: -- in person, as we do

4 her, so...

5   HONORABLE JANE BLAND: In person.

6   CHAIRMAN BABCOCK: In person, right. So

7 that's great work everyone and done in record time, and

8 we will now go off the record and be in recess. Thank

9 you. Thank you, Pauline.

10   UNIDENTIFIED SPEAKER: Recording stopped.

11   (Adjourned)

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1 *

2   REPORTER'S CERTIFICATION

          MEETING OF THE

3   SUPREME COURT ADVISORY COMMITTEE

4 *

5

6

7   I, Lorrie A. Schnoor, Certified Shorthand

8 Reporter in and for the State of Texas, Registered

9 Diplomate Reporter and Certified Realtime Reporter, do

10 hereby certify that I reported the above meeting of the

11 Supreme Court Advisory Committee on the 18th day of

12 June, 2021, and the same was thereafter reduced to

13 computer transcription by me.

14   I FURTHER CERTIFY THAT the costs for my

15 services in the matter are $.

16   Charged to: The State Bar of Texas.

17   Given under my hand and seal on this 2nd day of

18 July, 2021.

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ability	32486:16	32442:23	32561:17	32500:14
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