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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

December 10, 2021

(FRIDAY SESSION)

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Taken before *D'Lois L. Jones*, Certified
Shorthand Reporter in and for the State of Texas, reported
by machine shorthand method, on the 10th day of December,
2021, between the hours of 8:59 a.m. and 11:44 a.m., at
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1 hear from Chief Justice Hecht.

2 HONORABLE NATHAN HECHT: Thanks, Chip.

3 You know, we have our ninth justice, Evan Young, who was
4 appointed by the Governor last month and sworn in, and so
5 I just remind you that the surest way to our Court is by
6 membership on this committee, so we have gotten a lot of
7 good committee members to the Supreme Court.

8 CHAIRMAN BABCOCK: I know.

9 HONORABLE NATHAN HECHT: Justice Huddle's
10 swearing in finally is this afternoon, so I hope y'all
11 will come, and in our parlance, we're swearing out Justice
12 Green and Justice Guzman, and we've been waiting for this.
13 It got postponed because of the pandemic and then session
14 after session after session of the Legislature, so we
15 couldn't get use of the chamber, but it will be this
16 afternoon, so please come.

17 We don't talk much about this here, but one
18 of the main supports of the Texas judiciary is the Office
19 of Court Administration. And they support courts with
20 legislative help, drafting bills. They're reporters for
21 the Judicial Council, which works on policy issues, and
22 they help trial courts with staffing, funding issues, all
23 kinds of things. They've got an IT department that helps
24 the courts with that, so they're a big operation, started
25 back in the Eighties, but now it's really a very sizable

1 operation; and David Slayton, who has been our leader over
2 there for about 10 years, got tapped to be vice-president
3 of court management for the National Center of State
4 Courts. And so our loss is the country's gain, and we
5 have asked Megan LaVoie, who was pretty much his deputy,
6 to take over, and she has agreed. And Mena Ramon, who has
7 been the general counsel over there for 24 years, had been
8 the interim administrative director, so the office has
9 been in good hands since David's departure, and Megan, I'm
10 confident, will do a great job.

11 You'll notice up here on the front, we've
12 lost our paralegal, Pauline Easley. She's gone to North
13 Carolina for court management.

14 On the emergency order front, we've issued
15 45 orders so far. The Emergency Order 44 continues the
16 guidance and support for eviction relief diversion
17 programs. I'm very proud that Texas had the very best
18 eviction diversion program in the country, and a lot of
19 other states tried to model ours, and we spent all the
20 money, which only about three or four states have done
21 that so far.

22 CHAIRMAN BABCOCK: Could you speak up a
23 little bit? Apparently the people behind us can't hear.

24 HONORABLE NATHAN HECHT: Three or four
25 states have tried to emulate our program, but have barely

1 done it, so we're very proud of the eviction diversion
2 program. Even though we're out of the money, there are
3 some of the local governments still have a little bit,
4 Dallas does, maybe San Antonio. I'm not sure about
5 Houston. But that order will remain in effect until the
6 last applications get processed.

7 Then Emergency Order 45 extends the general
8 provisions that we started out with in the beginning, with
9 modifications that we've made along the way. But we
10 signal in the order that courts should be moving toward
11 in-person jury trials as much as possible to reduce the
12 backlog. We're doing pretty well on the backlog in all
13 areas of the Texas justice system. We've got some places
14 that are backed up a little bit, except felony jury trials
15 and to some extent smaller criminal jury trials, but we're
16 making some progress. But the -- there's a lot of
17 pressure, as you've probably noticed, in the bar to resume
18 jury trials as quickly as you can. I know we're doing all
19 we can, and I'm really proud of the trial courts for
20 having done as much as they could, but we're moving in
21 that direction, and the emergency order says that.

22 We gave preliminary approval to changes in
23 TRAP 57, direct appeals to the Supreme Court, in August;
24 and we are finalizing that rule, which is to take effect
25 January the 1st. We have approved changes in the Code of

1 Judicial Conduct to let constitutional county judges act
2 as arbitrators and mediators. We made some changes in the
3 State Bar rules in response to the McDonald litigation,
4 the major change being it prohibits State Bar
5 representatives from speaking on behalf of the full bar.
6 We also changed the rules, at the request of the board, to
7 make all members of the State Bar members of TYLA,
8 irrespective of age, so that's good for you, if they've
9 been licensed 12 years or less, so that's not good for
10 you, at the beginning of each fiscal year, so that
11 clarifies the TYLA membership.

12 We reduced the number of trials necessary
13 for certification in civil trial law, just because we're
14 trying fewer cases, and kept the same experience
15 requirements for staff attorneys. We talked about raising
16 those.

17 And, excuse me, our Remote Proceedings Task
18 Force, chaired by Chief Justice Christopher, Judge Miskel
19 is on it, Marcy Greer, Lisa Hobbs, Jim Perdue, Kennon
20 Wooten. I think that's everybody here. They've made a
21 full report, as you might expect. It's very thorough and
22 thoughtful, and it's coming to the committee to look at,
23 and excuse me, this is an issue that every state in the
24 country is looking at, trying to figure out best practices
25 as a result of the new normal, and so we're trying to do

1 the same, and I think based on what I see at the National
2 Center we're ahead of the curve on that, but everybody is
3 working on it, so we will be, too.

4 And then finally, we put out the seizure
5 exemption rules and forms Wednesday for comment to try to
6 meet the May the 1st, I think it is, deadline that the
7 Legislature asked us to meet. So those will be out there,
8 and we talked about those the last two meetings, and so we
9 were kind of on an expedited basis on them. There's quite
10 a bit to chew on, and there are new provisions at the
11 beginning over what the rules should be, but we hope that
12 we've taken your comments and counsel and come up with
13 rules that we'll get a lot of support for. So anyway,
14 those are out for comments through the first part of March
15 and then will be hopefully ordered by May the 1st as the
16 Legislature has asked. And that's it.

17 CHAIRMAN BABCOCK: All right. Thank you.
18 Justice Bland.

19 HONORABLE JANE BLAND: I have nothing to
20 add.

21 CHAIRMAN BABCOCK: All right then.

22 HONORABLE JANE BLAND: Good morning.

23 CHAIRMAN BABCOCK: We'll go to the next --
24 we'll go to the 10th justice, Richard Orsinger, who has
25 got a full agenda today, but he promises me that 162 will

1 last 15 minutes. And I said so I'll double that, and so
2 we'll get there, but go ahead, Richard.

3 MR. ORSINGER: Thank you very much, Chip.
4 The proposal for amendment for Rule 162 originated with an
5 e-mail from Justice Schaffer or Judge Schaffer in Harris
6 County.

7 MR. LEVY: Justice.

8 HONORABLE ROBERT SCHAFFER: No, you got it
9 right the second time.

10 CHAIRMAN BABCOCK: "His Highness" is what we
11 call him in Harris County.

12 MR. ORSINGER: So he was concerned about a
13 potential conflict between Rule 162 and Rule 44. Let me
14 explain. Rule 162 is the rule on dismissal or nonsuit,
15 and I think for continuity in the record I would like to
16 read the rule. It's fairly short, so as a foundation for
17 the discussion so that anyone reading the transcript will
18 have the context. Rule 162, dismissal or nonsuit, starts,
19 "At any time before the plaintiff has introduced all of
20 his evidence, other than rebuttal evidence, the plaintiff
21 may dismiss a case or take a nonsuit, which shall be
22 entered in the minutes. Notice of the dismissal or
23 nonsuit shall be served in accordance with Rule 21a on any
24 party who has answered or who has been served with process
25 without necessity of court order."

1 New paragraph: "Any dismissal pursuant to
2 this rule shall not prejudice the right of an adverse
3 party to be heard on a pending claim for affirmative
4 relief or excuse the payment of all costs taxed by the
5 clerk. A dismissal under this rule shall have no effect
6 on any motion for sanctions, attorney's fees, or other
7 costs pending at the time of dismissal as determined by
8 the court. Any dismissal pursuant to this rule, which
9 terminates the case, shall authorize the clerk to tax the
10 court costs against the dismissing party unless otherwise
11 ordered by the court." That is the end of the rule.

12 Judge Schaffer's concern is that Rule 44
13 requires that a lawsuit brought by a next friend and
14 settled requires that the settlement be approved by the
15 district judge or by the court in which the case is
16 pending, and apparently he's either seen or heard of
17 instances where it appears that the settlement was reached
18 through a next friend, which may, in fact, present the
19 possibility that there's a conflict of interest between
20 the interest of the child or a person who is
21 representative next friend as well as the person that --
22 the next friend him or herself. And so ordinarily the
23 safeguard is the district judge has to approve the
24 settlement, but his concern, Judge Schaffer's concern, is
25 that instead of getting approval there are instances in

1 which people will dismiss the lawsuit through a nonsuit
2 and then there is no final judicial review, because the
3 case law indicates that after a nonsuit the judge has a
4 ministerial duty to dismiss the case, and the portion of
5 the rule relating to counterclaims or pending motions or
6 motions for sanction don't appear to apply.

7 So Judge Schaffer would like and has
8 proposed language to add to the rule, which was included
9 in the memo, and his proposal was to add in the middle of
10 the following sentence, "Any dismissal pursuant to this
11 rule involving a next of friend shall not be effective
12 unless approved by the court pursuant to Rule 44." That's
13 a simple solution, and what he's attempting to do is to be
14 sure that if there's a suit with the next friend and
15 there's an effort to bring a nonsuit, that it involves a
16 settlement, it has to be presented to and approved by the
17 court.

18 So we were on a short fuse. We had some
19 email difficulties with the subcommittee, so we didn't
20 have a full subcommittee vote on this, but at the time the
21 meeting approached and so the subcommittee is presenting a
22 memo with this proposed change from the judge, and those
23 of us who were able to confer with each other in the
24 limited amount of time that we have, given the
25 intervention of Thanksgiving, vacation, et cetera, I

1 thought that this was a simple solution, but other persons
2 involved in the subcommittee thought this change was
3 unnecessary. So I think that that's a point we ought to
4 discuss, is there a problem and is this a good fix for
5 the problem.

6 While we are looking at this rule, there are
7 some -- there's a lot of confusion or uncertainty about
8 how this rule operates, and these are outlined in the
9 subcommittee memo, points one through seven. One is, is a
10 dismissal something a judge does and a nonsuit is what a
11 party does, or can a party both nonsuit and dismiss? And
12 if the party dismisses in open court, that the clerk is
13 required to enter it in the minutes, but don't know
14 that -- that really doesn't constitute an order, so
15 theoretically plenary power continues after the dismissal
16 is noticed in the record. So a question is, is a nonsuit
17 something a party does and a dismissal something the judge
18 does, and if that's true then we need to rewrite that part
19 of the rule.

20 The second point is what is the effect of a
21 nonsuit if there is never a dismissal order. Presumably
22 the plaintiff's claims are gone, but if the court has
23 plenary power, does the court have the power to grant a
24 new trial or reinstate the case even years later?

25 Third point is how do you enter an oral

1 dismissal on the minutes in this day and time? In the old
2 days it was a handwritten note from the clerk that would
3 go into the permanent paper records in the court. Now
4 it's all electronic, so I think it's just perhaps we
5 should discuss whether there's any modernizing of the rule
6 that's necessary, and the second sentence of the rule says
7 that it will be -- let's see. "Notice of dismissal of a
8 nonsuit shall be served in accordance with 21a on any
9 party who has answered or has been served with process,
10 without necessity of a court order." What does "without
11 necessity of a court order" refer to there? Does it refer
12 to giving notice? Does it refer to entering it in the
13 minutes? It seems to me that it's a little bit out of
14 place, and I'm confused as to what it means, and I'd be
15 curious to hear what people on the committee said. And in
16 the absence of an order what happens?

17 So the fifth point is the entire second
18 paragraph says that dismissals are subject to
19 counterclaims and motions for attorney's fees and whatnot,
20 but it doesn't say that nonsuits are. So if the plaintiff
21 just takes a nonsuit and doesn't take a dismissal, then
22 what is the status in the case? I presume these other
23 motions are still pending. That seems confusing to me. I
24 would be curious to hear what anyone says. In the case of
25 *University of Texas vs. Estate of Blackmon*, the Supreme

1 Court of Texas ruled that a court can defer signing an
2 order of dismissal for a reasonable time to adjudicate any
3 pending motions for costs, attorney's fees, sanctions,
4 et cetera; and so the question becomes since that's been
5 developed in the case law that the court has a reasonable
6 time before dismissal, should we add that to the rule?
7 Because it's not apparent from the face of the rule, and
8 also, I might add that the case law indicates that you can
9 actually file one of these motions after the nonsuit and
10 it still has to be heard before the dismissal.

11 The seventh point is should we add a comment
12 to clarify any of these issues rather than a rule change.
13 So the memo has case law, important case law. It has a
14 very important provision out of McDonald and Carlson,
15 Elaine Carlson, our own, which talks about dismissal
16 procedure, and I'll quote from that treatise, Texas Civil
17 Practice by McDonald and Carlson. "A plaintiff dismisses
18 a case by filing a motion for nonsuit with the clerk of
19 the court. If the motion is timely, as discussed below,
20 nothing else is required. The nonsuit is effective the
21 moment it is filed, and it must be entered in the minutes.
22 No order ever needs to be entered," and the treatise cites
23 *Strawder v. Thomas*, Corpus Christi 1992 846 S.W.2d 51. So
24 it seems to me that there's a lot of clarity and that
25 perhaps while we're looking at this rule we should discuss

1 other parts to the part that Judge Schaffer suggested,
2 Chip.

3 CHAIRMAN BABCOCK: See what you started now.

4 HONORABLE ROBERT SCHAFFER: I am amazed at
5 what all came out of this memo, because I don't have a
6 problem with looking at 162, because I agree with a lot of
7 what he said, but I was just trying to address a one small
8 specific point when I started this.

9 CHAIRMAN BABCOCK: Yeah, the law of
10 unintended consequences. I had a thought that, you know,
11 in federal court in derivative actions you can't nonsuit
12 without court approval, and I know we have a class action
13 rule that says a certified class can't be dismissed
14 without court approval, but what about an uncertified
15 class or a derivative action in state court? Would that
16 implicate this rule as well?

17 MR. ORSINGER: I think it would.

18 CHAIRMAN BABCOCK: Do you think so?

19 MR. ORSINGER: It seems to me.

20 CHAIRMAN BABCOCK: And by including this,
21 are we excluding these other things that might -- might be
22 applicable?

23 MR. ORSINGER: I think it's entirely
24 possible, and I'm very curious to hear the discussion.
25 This seems like a very inoffensive, unimportant rule, and

1 I've only experienced a few nonsuits in my lifetime, so I
2 always file a counterclaim now to offset that. That's the
3 general practice in my area of law now; but the rule, the
4 idea of nonsuit, entry in the minutes, and dismissals,
5 sounds to me like an earlier era of the practice of law,
6 Chip; and I think that things are more complex now, there
7 are more exceptions, and what we need to do is -- is there
8 a clear distinction between nonsuit and dismissal? Is
9 there even a difference between the two, and if there is,
10 how do we define it, and what is the proper role of the
11 lawyer, what is the proper role of the judge, and what
12 exceptions are we going to make.

13 If we make one exception for next friend
14 lawsuits, what do we do about the two that you mentioned,
15 which are clear exceptions? Do we just hope people read
16 the right cases? Do we put it in the comment, or do we
17 say something in the rule "except otherwise as provided by
18 law" or something? But the rule is a little bit archaic,
19 and it made more sense in a local practice where everyone
20 would meet for the docket on Monday morning, like happened
21 in the rural counties when I started practicing. I'm not
22 sure that it works so well in present time.

23 CHAIRMAN BABCOCK: Yeah. Professor Hoffman,
24 you had resist --

25 PROFESSOR HOFFMAN: No, no, I'm going to

1 listen first. It's a new approach I'm adopting.

2 CHAIRMAN BABCOCK: Shocking.

3 MR. ORSINGER: Look first and shoot second.

4 CHAIRMAN BABCOCK: Yeah. John.

5 MR. WARREN: From the clerk's perspective,
6 I'm not quite sure if a simple nonsuit actually satisfies
7 the case, because we also have to report those filing
8 dispositions to the Office of Court Administration. So a
9 nonsuit in itself may not be what it's -- I think we need
10 to go further than that, even if it's just the judges now
11 have a -- a sort of dismissal docket where nonsuits
12 automatically go, and they execute an order. I thought
13 the role of the judge was to preside over the case and
14 make sure that the law was applied, and so we want to make
15 sure that there's a clear definition. You have a lot of
16 young lawyers who may think that they are doing the right
17 thing, and they may not be doing the right thing, and I
18 think the judge should have oversight, like cases are
19 getting more complex, and there should be some oversight
20 as it relates to -- particularly in a case where it deals
21 with a minor. I heard mentioned next friend. So I think
22 the judge should have the final, even if it's just a
23 review of the case, and that the clerks will have a clear
24 definition of what's the final disposition of the case.

25 CHAIRMAN BABCOCK: Yeah. Robert.

1 MR. LEVY: So when I was a practitioner,
2 this became a challenge in terms of a nonsuit should, as
3 Professor Carlson says, immediately dismiss and end the
4 action. No action by the judge is needed or even
5 appropriate. It's over, if the nonsuit is filed by the
6 party -- the claimant. If there's a counterclaim, it
7 raises the question Richard pointed out, that the second
8 paragraph refers to dismissal not applying. I think, as
9 practically applied, the rule does not differentiate
10 between nonsuit and dismissal. It operates the same way,
11 but it is confusing. So typically you file a notice of
12 nonsuit and dismissal to cover both those bases.

13 On the question that Judge Schaffer raises
14 or the issue, I do think it's a problem, and his solution
15 seems to fix it, although you correctly point out that
16 under Rule 42 the Court has to approve a settlement or
17 dismissal.

18 CHAIRMAN BABCOCK: Or dismissal, right.

19 MR. LEVY: And so perhaps the rule needs to
20 include reference to Rule 42 as well. I think that part
21 of the challenge, it would seem to me, is that you would
22 need to give the clerk guidance to know when not to
23 dismiss a case that's brought under 44 or 42, to give them
24 notice to keep the case active on the docket.

25 CHAIRMAN BABCOCK: Okay.

1 MR. WARREN: And if I can add to that, if
2 you have multiple parties and traditionally a nonsuit
3 represents the end of the case, then if you have it and
4 the nonsuit is only for one party and then so with that I
5 think there should be more guidance as to how that
6 actually works.

7 CHAIRMAN BABCOCK: Yeah, good point.
8 Justice Christopher.

9 HONORABLE TRACY CHRISTOPHER: Some parties
10 file a motion for nonsuit instead of a notice for nonsuit,
11 which also causes problem, so I agree that the rule could
12 be modernized to sort of take into that -- into account.

13 CHAIRMAN BABCOCK: Y'all remember the -- the
14 cattlemen cases -- Tom will -- in Amarillo against Oprah
15 Winfrey? There were two cases. One was originally filed
16 in federal court, and the other one was originally filed
17 in state court, and they sued the local TV station that
18 carried her programs, and then they nonsuited the local TV
19 station. And then we, the -- Oprah's lawyers removed that
20 to federal court and got it consolidated with the pending
21 federal action, but then they -- they rejoined the
22 nondiverse defendant, and after that the trial judge
23 entered the order of nonsuit.

24 That was the point of appeal in the Fifth
25 Circuit, and the Fifth Circuit threw its hands up and

1 said -- and relied on a doctrine that, hey, if you've gone
2 to all this trouble to try the case, then we're not going
3 to worry about the other stuff. Literally.

4 Yeah, Judge.

5 HONORABLE EMILY MISKEL: Just to add No. 8
6 to the list that's in the materials, one issue we've had
7 is when a self-represented litigant comes in for a family
8 violence protective order. They get ex parte protective
9 order, and that order is served on law enforcement
10 agencies, who will arrest the respondent on sight if they
11 are caught in a place they are not supposed to be. What
12 frequently happens is the petitioner will come in and file
13 the suit asking for the protective order, get the ex parte
14 protective order, and then nonsuit the case. The
15 nonsuit -- the clerk is not directed to send a nonsuit to
16 all of those law enforcement agencies, so the nonsuit,
17 according to the *Blackmon* case, extinguishes the case from
18 the moment it's filed; but law enforcement still has the
19 registry of family violence protective orders, which are
20 valid for 20 days; and so they don't know that that order,
21 which on its face says it's valid for 20 days, has been
22 extinguished, and it causes problems. So we've directed
23 our clerk to send the nonsuits out to the law enforcement
24 agency as well, but we recently went through all of this
25 discussion on our county basis as well because it was

1 raised in that area.

2 MR. WARREN: If I may --

3 THE REPORTER: I can't -- don't --

4 CHAIRMAN BABCOCK: John, you're going to
5 have to speak up. Speak to her.

6 THE REPORTER: Yeah, speak to me.

7 MR. WARREN: As it relates to that, was that
8 a motion for nonsuit or a notice of nonsuit? I think
9 those are two different things. If it's a motion I think
10 you're asking the court to consider something, and if it's
11 a notice, it's just, hey, we're done with it.

12 HONORABLE EMILY MISKEL: I think I saw
13 something that said the nonsuit was supposed to be read
14 broadly and not, first, very technically. So I think
15 whether it's called a motion for nonsuit or a notice of
16 nonsuit, under our Texas notice pleading standard we just
17 consider that a nonsuit, and you're absolutely right.
18 It's a ministerial duty.

19 CHAIRMAN BABCOCK: Judge Schaffer.

20 HONORABLE ROBERT SCHAFFER: Not to get back
21 to the more mundane portion of this -- of this, I
22 appreciate taking a look at 162, because I know that
23 clerks in Harris County are often confused as to whether
24 or not they should put this in the closed file or keep it
25 open or what they should do with it, but the issue arises

1 when I'm going through my nonsuit orders involving minors,
2 and I have to request a status conference to find out if
3 any money has been paid, and there was a specific
4 incidence with one of my colleagues where three minors
5 were receiving \$10,000 each, and that money was going to
6 be paid to the parent, not into the registry of the court
7 or any other manner that's allowed under the statute, and
8 we didn't think that was the right way to go. We didn't
9 think it was legal either, which is why I posed this
10 question, so that we could make sure that nobody comes up
11 and challenges me or the other judges, "Look, this nonsuit
12 is effective as soon as I filed it, you don't have the
13 authority here," and that's the issue I'm trying to
14 address here. No one has done that since we've called
15 these for these status conferences, but that's a problem,
16 potential problem.

17 CHAIRMAN BABCOCK: Judge Miskel.

18 HONORABLE EMILY MISKEL: Can I ask a
19 clarification question? So does Rule 44 say they're not
20 supposed to compromise the claim without court approval,
21 and then they are breaking Rule 44 and nonsuiting it, and
22 you just are saying we need a check and balance so we
23 catch people who are violating Rule 44?

24 HONORABLE ROBERT SCHAFFER: I wouldn't say
25 it quite like that, but yes.

1 HONORABLE EMILY MISKEL: Okay.

2 HONORABLE ROBERT SCHAFFER: I mean, yes,
3 Rule 44 says if you have a case involving next friend,
4 settlements have to be approved by the courts.

5 HONORABLE EMILY MISKEL: And you're saying
6 people are like doing settlements in violation of Rule 44
7 and then nonsuiting them, and you want a second chance to
8 catch them?

9 HONORABLE ROBERT SCHAFFER: I'm not holding
10 my hand over my mouth when I'm saying this. I'm saying
11 directly that they're doing it. I compelled a couple of
12 lawyers to come out of pocket, money that they had handed
13 over to a parent and couldn't find, and put the money in
14 the registry of the court for that child, so, yes, that's
15 exactly what they're doing.

16 HONORABLE EMILY MISKEL: Because my concern
17 is the clerks can't do things by discretion, right. They
18 can't look at it and say, "Oh, this must be a Rule 44
19 case. That means this type of nonsuit has to be checked
20 on," right? They have to purely have more of a strict you
21 do this, I do this relationship to it, so my concern about
22 putting this exception in 162 is, first of all, if people
23 are already breaking one rule, making more rules is
24 probably not an effective solution; but secondly, I think
25 it introduces some discretion into the rule that causes

1 problems for clerks.

2 CHAIRMAN BABCOCK: Who is that? Judge
3 Benton.

4 HONORABLE LEVI BENTON: First of all, this
5 is not a new problem, and I'm glad you are bringing light
6 to it, but what I can't remember is whether the court
7 acting sua sponte has the authority to appoint an ad
8 litem.

9 HONORABLE ROBERT SCHAFFER: I can tell you
10 that it's being done.

11 HONORABLE LEVI BENTON: Yeah. You know, and
12 when I would observe this, I would call defense lawyer
13 Orsinger in and say, "Mr. Orsinger, I know you've got the
14 settlement agreement and you require the plaintiffs to
15 indemnify you, if years later these minors come back in
16 and say, 'Hey, wait a minute, there was no court approval
17 of this.'" And that will cause defense lawyer Orsinger to
18 say, "Hmm, maybe I better ask the court to appoint an ad
19 litem and let's do this on the up and up."

20 HONORABLE ROBERT SCHAFFER: That would be
21 because defense lawyer Orsinger I think has a greater
22 concern for closure --

23 HONORABLE LEVI BENTON: Yeah.

24 HONORABLE ROBERT SCHAFFER: -- than some
25 people who are handling smaller cases.

1 HONORABLE LEVI BENTON: Yeah.

2 HONORABLE ROBERT SCHAFFER: Which might not
3 get -- which might not have a defense lawyer like defense
4 lawyer Orsinger representing the defendant.

5 HONORABLE LEVI BENTON: Yeah. But even -- I
6 guess even without this language, the Court could sua
7 sponte say, "I'm going to appoint an ad litem and we're
8 going to have a hearing on it."

9 CHAIRMAN BABCOCK: Kent Sullivan.

10 HONORABLE KENT SULLIVAN: I consider myself
11 a best practices guy, which is a fancy way of saying I
12 like to copy off of everybody else's paper, and I do
13 wonder to what extent the committee or others generally
14 have looked at whether, what is it, Rule 41 of the federal
15 rules would provide a solution or whether another state --
16 because we've got 49 other states out there, and I'll be
17 willing to bet that one or more of them have crossed this
18 bridge before. Have we looked at whether or not they have
19 an adequate solution to this?

20 MR. ORSINGER: The subcommittee has not, but
21 we can, if we have more time.

22 CHAIRMAN BABCOCK: Yeah.

23 HONORABLE KENT SULLIVAN: My point is simply
24 that it has always struck me as inefficient at best and
25 we're not as well-resourced as we could be at worst if we

1 don't look at what everybody else has already done on the
2 same subject.

3 CHAIRMAN BABCOCK: Pete Schenkkan, and then
4 Judge Yelenosky.

5 MR. SCHENKKAN: I've got a two-part
6 question. One is is it possible to relatively
7 expeditiously come up with a fix for the evasion of Rule
8 44, which seems to be the matter of some urgency and some
9 clarity, and we have some challenges in it. As people
10 have mentioned, you put one exception somewhere, and it
11 may suggest there are to be others, and that's not true.
12 It's not that it's a perfect way of dealing with it, but
13 it's relatively straightforward, and it's urgent.

14 It seems to me that the bigger picture that
15 Richard has raised and various people have reinforced here
16 this morning of should we have something that the party
17 can do on his own that the court doesn't have to do and
18 what are its implications and should we have things that,
19 you know, we have to do by motion to get a court order.
20 And I believe the answer to that "or" question is, yes,
21 we've got both, and I think the topic of which ones of
22 these ought to be something -- need to be something that
23 the plaintiff's lawyer can do by filing a notice and which
24 ones require -- ought to require a motion and the court
25 consideration is a big area and is going to take us a

1 while, and the committee is going to need a lot of time to
2 do it. Subcommittee. I'm kind of hoping is there a way
3 we can subdivide this task and try to get the first one
4 done and give us some time to really dig into the subject?

5 CHAIRMAN BABCOCK: Yeah, got it. Judge
6 Yelenosky, then Judge Miskel, and then Hayes.

7 HONORABLE STEPHEN YELENOSKY: I apologize
8 for being late, so I first need to ask Richard.

9 THE REPORTER: Louder, please.

10 HONORABLE STEPHEN YELENOSKY: Oh, I'm sorry.
11 You and I exchanged an e-mail about why we have a nonsuit.

12 MR. ORSINGER: Oh, yeah. It hasn't been
13 covered, so go ahead and cover it.

14 HONORABLE STEPHEN YELENOSKY: Okay. Why do
15 we have a nonsuit? When I started as a judge, I didn't
16 sign nonsuits, and I told the lawyers, "You don't need me
17 to sign them," and they said, "Yeah, but we need a date of
18 dismissal." So in my experience, they're going to need a
19 date of dismissal anyway, so why do we bother having a
20 nonsuit for anything? Why doesn't everything require a
21 judge's signature?

22 CHAIRMAN BABCOCK: Judge Miskel.

23 HONORABLE EMILY MISKEL: Okay. I raised my
24 hand initially for something else, but I would briefly
25 respond to that, which is our Texas state court system has

1 different needs than the federal system. More cases are
2 filed in district courts in Texas than are filed in the
3 entire U.S. federal district court system. So we need a
4 way to process the vast quantity of cases that each judge
5 deals with. I don't think federal court experience
6 matches our task. So I do think we need a way for people
7 to nonsuit their cases without court action. A lot of the
8 nonsuits are done by self-represented litigants. They are
9 never going to come back and give you an order on it, so I
10 just think the practical needs of our system require this
11 to exist and to be different from federal, because we just
12 have different needs.

13 What was the -- oh, I know, what I
14 originally raised my hand on was rather than modifying
15 162, the nonsuit rule, to address Rule 44 cases, would it
16 make more sense to add another item to Rule 44 that just
17 says, "A party may not nonsuit a case before seeking court
18 approval"?

19 CHAIRMAN BABCOCK: Okay. I see nods around
20 the room.

21 HONORABLE ROBERT SCHAFFER: Either would
22 work. Either would work.

23 MR. DAWSON: Then you don't have the issue
24 of --

25 THE REPORTER: I can't hear you.

1 CHAIRMAN BABCOCK: Alistair, you're going to
2 have to speak up.

3 THE REPORTER: I cannot hear you.

4 MR. DAWSON: Then you wouldn't have the
5 problem that you articulated about the certified class and
6 having to address that rule. We just put it in Rule 44
7 and solve your problem.

8 CHAIRMAN BABCOCK: Shiva, do we have anybody
9 on the Zoom that wants their hand raised or has their hand
10 raised?

11 MS. ZAMEN: We're having some really bad --
12 we're restarting over here now. I've been telling people
13 by --

14 CHAIRMAN BABCOCK: So the answer is we don't
15 know.

16 MS. ZAMEN: So not yet.

17 CHAIRMAN BABCOCK: Sorry up there.

18 MR. ORSINGER: They're back moving again.
19 They may be able to speak now.

20 CHAIRMAN BABCOCK: Okay. Do you see anybody
21 with their hand up that is unmuted?

22 MR. ORSINGER: Raise your hand if you want
23 to talk, anybody. No takers.

24 CHAIRMAN BABCOCK: Sorry about that. Yeah,
25 Hayes.

1 MR. FULLER: From a best practices
2 perspective, there are consequences to doing it right and
3 consequences for doing it wrong, this whole issue of
4 nonsuit and dismissal. Some of those consequences are
5 catastrophic, some of those are not. Those that are
6 catastrophic generally result in appeal, as we explained
7 in the issues that Richard has raised in terms of the
8 problems with this interaction between these two rules.
9 That seems to me to be an inefficient way of cleaning up
10 the problems necessarily, so if we can -- if we can touch
11 the rule and clean it up a bit, we might be able to
12 eliminate some of those issues. And so I think that's --
13 that's worth taking a look at.

14 But by the same token, I think one thing we
15 need to be aware of in the small personal injury case is
16 the situation that, Judge Schaffer, you're talking about.
17 A lot of carriers now, if they've got really small
18 settlements, don't want to incur the cost of an ad litem,
19 nor do they want to incur the cost of getting court
20 approval. Now, you know, the defense counsel in that
21 instance has an interest to either go ahead and do it, but
22 usually what they do is work through it by having the
23 plaintiff's attorney insist upon it and then having the
24 cost taxed for that, but it's something that does need to
25 be looked it at, but I think it's going to be more of a

1 recurring problem as people try to focus on trying to save
2 costs for approval in some of these smaller settlements.

3 As a general rule, you know, it's not best
4 practices. The defense lawyer doesn't have finality for
5 his clients, you know, and I think the carriers don't care
6 if it's 20 years from now and that minor becomes an adult,
7 everybody is gone, you know, and that's kind of what
8 they're betting on. But it's not best practices, and like
9 I said, it can have some -- I mean, sometimes it's done
10 intentionally, if you're -- you know, if you're
11 representing a corporate party that doesn't have insurance
12 and 20 years from now there's not going to be anybody
13 there and they don't have -- they've got a small amount of
14 money to pay out anyway. It may not matter. Again, not
15 best practices, but the consequences aren't catastrophic,
16 but, yeah, I think we need to take a look at it.

17 CHAIRMAN BABCOCK: Okay. Any more ability
18 for the Zoomers to say anything? Kennon.

19 MS. WOOTEN: I would just say if there's
20 going to be an analysis of nonsuits generally that we
21 should also look at Rule 726, and also Rule 91a, which
22 addresses nonsuits, so there's as a comprehensive review.

23 CHAIRMAN BABCOCK: Yeah, I think 91a is on
24 sanctions, isn't it, or attorney's fees?

25 MS. WOOTEN: Dismissal.

1 CHAIRMAN BABCOCK: Yeah. Yeah. And the
2 case law is fairly well developed that you can't avoid
3 sanctions or 91a by nonsuit. I think.

4 MS. WOOTEN: Also 91a is addressing what
5 happens if a respondent files a nonsuit within a
6 particular period of time.

7 CHAIRMAN BABCOCK: Right. Yeah.

8 MS. WOOTEN: And so this discussion about is
9 it a notice, is it a motion, what's the impact, I think
10 comes up in that instance; and I do think there's a lot of
11 case law, robust case law, on nonsuits; and that's
12 something that I think parties will go to before these
13 rules.

14 CHAIRMAN BABCOCK: Yeah.

15 MS. WOOTEN: And for what it's worth, in my
16 practice, I sometimes couple the nonsuit with the
17 dismissal to avoid any gap, because I don't want to run
18 into an issue when there's a lack of clarity, particularly
19 when I'm crafting a settlement, but it does seem less than
20 clear exactly how to go forward and the impact of the
21 nonsuit alone in the text of the rule.

22 CHAIRMAN BABCOCK: Okay. Well, it's quite
23 clear to me that Justice Shaffer has acquired a nickname
24 today of Pandora.

25 MS. WOOTEN: Is it his nickname, or is it

1 somebody else's?

2 CHAIRMAN BABCOCK: So, Richard, I think
3 since we've now gone 45 minutes on your 15-minute topic
4 that we'll -- we'll ask you to reconvene the subcommittee.
5 And I know you did this on very short notice.

6 MR. ORSINGER: Right.

7 CHAIRMAN BABCOCK: And we'll have a more
8 comprehensive look at this rule, including the real
9 problem that Judge Schaffer raised.

10 MR. ORSINGER: When I get a transcript of
11 today, all of the people that volunteered comments will be
12 able to help us with the task, too.

13 CHAIRMAN BABCOCK: Yeah, there you go.
14 That's true. And the Chief missed one announcement. Kent
15 Sullivan is trying out for the broadcast crew of Monday
16 Night Football. I don't know if anybody --

17 MR. ORSINGER: He's going to provide color?

18 CHAIRMAN BABCOCK: Well, he's got the yellow
19 jacket. He doesn't have the decal yet, so -- he's got the
20 voice for it, too, you know.

21 All right. Let's go to 76a.

22 MR. ORSINGER: Okay. So this one --

23 CHAIRMAN BABCOCK: That will be 5 or 10
24 minutes, right?

25 MR. ORSINGER: I would say this is probably

1 a six or eight-hour debate.

2 CHAIRMAN BABCOCK: Yeah, let's just get
3 started.

4 MR. ORSINGER: How do you eat an elephant in
5 pieces? Okay. So the referral letter that Justice Hecht
6 sent on October 25th, 2021, was rather -- rather short,
7 but once you dig into it, you realize there's more depth
8 here. Let me quote from Justice Hecht's letter. The
9 portion relating to Rule 76a says, "Texas Rule of Civil
10 Procedure 76a," period. "Since its adoption in 1990, the
11 Court has received a number of complaints about the Texas
12 Rule of Civil Procedure 76a. Courts and practitioners
13 alike complain that the Rule 76a procedures are
14 time-consuming and expensive, discourage or prevent
15 compliance, and are significantly different from the
16 federal court practice. The committee should draft any
17 rule amendments that it deems advisable and in making its
18 recommendations should take into account the June 2021
19 report of the legislative mandates committee," period.
20 That's the end of it.

21 So it seems simple, but it does say "rule
22 amendments that it deems advisable," so the subcommittee
23 was moving very quickly. We never had a complete
24 subcommittee meeting or an official vote on anything. We
25 had some outside volunteers who offered to assist, and

1 there was some committee members that didn't get e-mails
2 of the one Zoom session we had, and so what we've done for
3 this meeting today is to prepare three items for
4 consideration and discussion. One is the subcommittee
5 report that I wrote, which wasn't vetted with any other
6 subcommittee members, so you cannot blame them if there's
7 something in error that you dislike or disagree with. The
8 second is a memo from Judge Steve Yelenosky, who is not a
9 member of the committee, who graciously volunteered to
10 assist us, and he also wrote a revised Rule 76a for us to
11 look at, to discuss and look at. The memo has not been
12 reviewed or revised or approved by the subcommittee, and
13 the rule, while it was conceptually discussed by some of
14 the committee members in one Zoom meeting we were able to
15 have, has not been voted on and is neither recommended or
16 rejected.

17 I can say that some of the observations that
18 were made, Judge Yelenosky graciously included amendments
19 to his proposed rule. Others were excluded because Judge
20 Yelenosky disagreed with them, I believe, and he'll have
21 the opportunity --

22 HONORABLE STEPHEN YELENOSKY: It's my memo.
23 It's my memo to you.

24 MR. ORSINGER: Okay. So we are at the
25 preliminary stage. We are not ready to debate final

1 changes, in my opinion, and Judge Yelenosky made for me
2 the very, I guess, disturbing suggestion that we look and
3 see what happened in the past with regard to Rule 76a, and
4 I thought, well, gosh, the rule is 31 years old, hasn't
5 been changed in 31 years. How often have we looked at it?
6 And rules attorney Jackie sent me a listing from her
7 available resources and then I found another one from an
8 earlier rules attorney, and since 2000 there have been
9 probably 10 or 12 sessions involving -- where 76a was on
10 the agenda, and so I started looking at those minutes, and
11 I started looking at those court reporter transcripts, and
12 I found out that either these proposals that came from
13 various subcommittees were either briefly touched on or
14 not even mentioned at all. And so basically there's been
15 no committee-wide reassessment of where we are after 31
16 years of 76a practice.

17 So I thought maybe we could get context by
18 going back to the original 1990 session in which Rule 76a
19 was adopted. The first meeting governing it was on a
20 Friday and carried over to Saturday, and at the end they
21 reconvened the following Saturday and then the rule was
22 done. So in an eight-day period, Rule 76a came from the
23 imagination of a group of people to a proposed rule in the
24 Supreme Court, and then it was forwarded to the Supreme
25 Court. There were -- at the time the chair of the Supreme

1 Court Advisory Committee was Luther Soules, Luke Soules,
2 from San Antonio. The Legislature adopted a statute for
3 the Government Code directing the Supreme Court to adopt
4 rules governing the sealing of court records. That became
5 effective on September 1 of 1989.

6 Luke Soules appointed an ad hoc committee,
7 not one of the standing committees, but an ad hoc
8 committee, co-chaired by Lefty Morris in Fort Worth and
9 Charles Herring in Austin, and the two of them conducted
10 some public meetings and then they had competing drafts
11 from what a rule might look like, and they prepared a
12 co-chair proposal of a rule that was a compromise between
13 two competing drafts, one that was pro-publicity or public
14 access and one that was not anti-public access, but more
15 concerned about putting limits on public access. So that
16 compromise draft was brought to the advisory committee
17 meeting. But then Tom Leatherbury, a lawyer from Dallas
18 whose law firm was representing the *Dallas Morning News*, I
19 believe, came up with his own draft of Rule 76a; and in
20 the very first reading on this rule it was decided that
21 Leatherbury's draft would be the point of discussion to
22 vote to include or exclude, and the co-chairs of the
23 committee draft was put to the side.

24 Now, there were a lot of overlaps, but
25 remember, one was a compromise draft, and the other one

1 was a draft by the law firm representing the *Dallas*
2 *Morning News*. So if you read the debate that went on
3 between some of the greatest legal minds in Texas at the
4 time, it's a surprisingly --

5 CHAIRMAN BABCOCK: You're excluding
6 Leatherbury, I hope.

7 MR. ORSINGER: Yes. But Chip Babcock was
8 there, and Justice Hecht was there.

9 CHAIRMAN BABCOCK: Well, you can include us.
10 That's fine.

11 MR. ORSINGER: Absolutely. No, I'm
12 really -- given the quickness with which all of this
13 happened, it's remarkable -- Judge Peeples was there, too.
14 I see him on the Zoom. You can see these names are
15 written in history. The transcript, I've -- I decided
16 that if we're going to do a 31-year review of Rule 76a, we
17 ought to look at the wisdom of what was done originally,
18 and so I included the agenda items that were attached when
19 the rule was promulgated by the committee or recommended
20 by the committee. There was a quite lengthy record that
21 was attached to the agenda, and I've brought that forward
22 so that we can have that context or that knowledge.

23 I will say this, that at the -- all I knew
24 about this at the time was rumors that I heard because I
25 wasn't on the committee, but I was a good friend of one --

1 of both of the family members -- family lawyers who were
2 on the committee, but reading the actual transcript itself
3 is really remarkable the degree of sophistication, and at
4 the time the perception was that the plaintiffs' lawyers
5 versus the defense lawyers, and you'll even see some of
6 that in some of the transcript, but in reading the actual
7 dialogue or multilogue that went on, there were many
8 lawyers who I remember as being plaintiffs' lawyers who
9 were making suggestions that would support the idea of
10 preserving privacy of individuals. So it was a mixed bag,
11 even though there were only two defense lawyers on the
12 committee and quite a number of plaintiffs lawyers, it
13 seems to me that policy was in the form of the debate, no
14 matter which perspective of the docket you were on -- now,
15 Chip, you may remember it differently, but anyway, let me
16 get my piece said.

17 So the rule came out. Chairman Soules moved
18 that train fast. I'm telling you, if you read it, it's
19 shocking about how quickly votes were reached compared to
20 my experience of the last 20 years where we have plenty of
21 opportunity to say everything we want and then more and
22 then more and then we take some votes, and the votes are
23 real clear, and everybody has a chance to understand
24 exactly what they're voting on. Well, this is a different
25 experience if you read this transcript. So anyway, that

1 rule came out in eight days, and it was forwarded to the
2 Court with a memo from Chuck Herring, and it was a long
3 discussion with a lot of supporting material, and he
4 talked about how controversial it was and constitutional
5 issues and rights of privacy and all of this other stuff,
6 and then he concluded his memo to the Supreme Court by
7 saying "Good luck."

8 Okay. So then the rule goes to the Supreme
9 Court, and I think in April is when they promulgated this
10 rule, along with many, many other rule changes. And this
11 is all in my memo, because I just almost couldn't believe
12 it when I was reading it. The Supreme Court adopted Rule
13 76a as referred from the committee with two dissents,
14 Justice Gonzalez and Justice Hecht; and that dissent,
15 which is one-page long, is an eye-opener. And there were
16 many issues that were -- that were looked at in the very
17 abbreviated fashion at the committee level.

18 Now, let me put in context that there were
19 some public meetings that predated the committee level, so
20 this rule didn't go from imagination to reality in just
21 eight days. There was actually more groundwork was laid,
22 but the real process of this incredibly influential event
23 being eight days is pretty amazing. And so as word leaked
24 out, letters were sent from around the country, not just
25 around Texas, but around the country, expressing alarm at

1 the effect that this might have, particularly on trade
2 secrets; and that was really, I think, foremost in the
3 minds, was the preservation of trade secrets amongst the
4 debate and the compromising that went on; but anyway,
5 these -- this correspondence is captured in the original
6 agenda from that meeting, even though the correspondence
7 and law review articles and briefs and alternatives may
8 have been submitted before or may have been submitted
9 after the committee meeting. So they're all there, and
10 there is an incredible amount of wise observations, pro
11 and con, and there's a lot of predictions about what good
12 things would happen or bad things would happen from the
13 draft that came out of the rules committee.

14 And so I think that if there's tolerance for
15 it, now, 31 years later is a good time for us to reassess
16 what everyone thought at the time that they adopted this
17 rule or recommended this rule and the Supreme Court
18 adopted this rule, and we can not only have the wisdom of
19 the current committee, but we have available to us the
20 wisdom of the original committee, and it's my view as the
21 subcommittee chair that we should take this opportunity to
22 reconsider some of these substantive or fundamental
23 assumptions underlying Rule 76a and not just make
24 adjustments to the procedures so that the hearings and
25 notices are more widespread and the hearings operate more

1 smoothly.

2 Now, that's not my decision, but let me say
3 that we live in a different world now. In the old days,
4 meaning in 1990, if you wanted to find out what your
5 judges were doing, you could go down to the courthouse and
6 sit in the audience, and you could watch, and you're a
7 voter, and these are your judges, and this is your
8 courthouse, and these are your neighbors who are
9 litigating in court. Well, now we live in a world where,
10 at least at the present time, Texas court proceedings are
11 going on YouTube; and they can be seen by anyone in the
12 world, including foreign governments; and people now with
13 Twitter and all of the social media, if certain
14 information becomes public that might have previously been
15 either private or inaccessible to anyone except someone
16 who walks into the courtroom, now these kinds of details
17 can be picked up by anybody who's watching, and in the
18 flash of a passage of a few seconds it can be spread
19 across the country and spread across the world. And so we
20 live in a world where the dissemination of information
21 from a lawsuit is -- is remarkably quick and remarkably
22 broad, and once it's out there on the internet people can
23 create responses that can damage reputations, can damage
24 companies.

25 Now then, the main concern and tension at

1 the time seemed to be the impact of this disclosure on
2 trade secrets, and secondarily, if we had dangerous
3 products or products that were allegedly dangerous in
4 commerce, there was a desire to stop the process of a
5 manufacturer or a distributor, suddenly a damage case with
6 a settlement agreement that had a confidentiality clause
7 that kept the dangerous feature of the product or service
8 secret so that the public wouldn't find out about it, and
9 there was a concern that manufacturers or others might use
10 the process of sealing or confidentiality to keep damaging
11 information secret, which would then hurt the public.
12 That also went over, well, some of these secrets were
13 trade secrets. So you get in this big fight about whether
14 a trade secret is a bona fide secret or whether it's just
15 an effort to keep a damaging feature of a product out of
16 the public eye, and so that was why so much of the
17 comments -- so many of the comments were from the
18 intellectual property bar who were attempting to defend
19 their trade secrets that sometimes were the life of the
20 company.

21 The Texas Legislature adopted the Uniform
22 Trade Secret Act, which has provisions in it that require
23 that trials be conducted in such a way or court
24 proceedings largely -- larger than trials be conducted in
25 such a way to protect trade secrets. So that whole debate

1 about 76a has really been modified by statute, and the
2 rule needs to be changed to recognize what the Legislature
3 has done with the adoption of the Uniform Trade Secrets
4 Act.

5 What has been left out of the equation that
6 for me is a bigger concern now is privacy of individual
7 litigants. I'm not even sure whether a corporation has a
8 right to privacy. Some common law -- or some law
9 professor here can tell me, but I can tell you that
10 individuals have privacy rights, and I know that the U.S.
11 Supreme Court and the Texas Supreme Court has developed a
12 doctrine of its own of privacy that all individuals are
13 constitutionally entitled to keep private as against
14 government involvement or government interference. So
15 that's what I would call the constitutional zone of
16 privacy, and the existence of that zone of privacy for
17 individual litigants is not recognized in Rule 76a or its
18 standard.

19 The second area of concern for me that goes
20 beyond pure mechanics of notice and hearings is the tort
21 concept of private facts, private embarrassing facts. The
22 Texas Supreme Court has recognized a cause of action for
23 damages and exemplary damages for invasion of privacy by
24 exposing to the public private embarrassing facts, so
25 there is a tort remedy if someone takes private

1 information about you or your family and puts it out in
2 the public domain, and you can sue, and you can get
3 damages, and you can get exemplary damages. If someone
4 does this by filing a pleading or a response to a motion
5 for summary judgment in a lawsuit under Rule 76a, by
6 definition it's a court record, and all of these standards
7 on presumption of openness and an elevated burden of proof
8 in order to seal that information automatically applies,
9 because 76a applies across the board, regardless of the
10 nature of the lawsuit or the nature of the right involved.

11 So beyond the constitutional right to
12 privacy we have a public privacy reflected in our tort
13 system that information should not be made public, private
14 embarrassing information; and if it is, then you can be
15 sued and you could have exemplary damages. But if that's
16 done by filing an attachment to a pleading, like a lawsuit
17 I had recently, where 750 pages of exhibits were attached
18 to an original petition and got filed in the public
19 record, all of the sudden we have what may have been
20 transgression of tort that may now be privileged because
21 it was done in the context of litigation, and now it's a
22 public record, and now someone has to move to seal it; and
23 Rule 76a, there's a presumption that everything, including
24 tax returns, because they were filed, the public has a
25 right to know; and we have an elevated burden of proof on

1 the party trying to seal it to try to re-impose privacy.

2 The third area of concern for me is
3 prelawsuit confidentiality agreements, like you would find
4 between an employer and an employee. In many instances an
5 employer and employee or maybe a company that's
6 considering taking over another company will sign a
7 confidentiality agreement; and in reliance on the
8 confidentiality agreement, a party that has information
9 that's private will share it with the other party, in
10 reliance on the contractual promise that it will remain
11 confidential. Now that confidential information is held
12 by two people, but those two people are bound by a
13 contract that says this information will remain
14 confidential.

15 Now, let's assume that the employee files a
16 lawsuit against the employer or let's assume that the
17 company that's going to -- that was attempting to acquire
18 files a lawsuit over the acquisition. They already have
19 the confidential information in their possession. It's
20 not like the typical personal injury case, products
21 liability case, where if a request is made to produce
22 information in discovery you can file a motion for a
23 protective order, you can ask a district judge, "Wait,
24 this is not relevant, this is overbroad, this is
25 confidential, this is privileged, it shouldn't be made

1 discoverable"; and the trial judge will look at it and
2 decide, "Yes, this is irrelevant and I'm going to make it
3 narrower," or "Yes, this is confidential, I'm not going to
4 allow it to be disclosed" or "Yes, this is privileged
5 information. You're not allowed to receive in discovery."

6 Well, that protected mechanism of the
7 district judge evaluating the discovery request and
8 limiting discovery to what should be discovered, that
9 doesn't exist where the both parties already have the
10 confidential information; and what happens is because the
11 plaintiff, for example, in this instance, has the
12 information that's confidential already, they can
13 unilaterally override the contractual confidentiality
14 right by attaching confidential information to what they
15 file in court. And under Rule 76a, the mere fact that
16 this litigant has attached what is contractually
17 confidential to a pleading makes it a court record, and
18 there's a presumption of openness to the public, and
19 there's an elevated burden of proof to impose the sealing
20 order on that.

21 Now, in my view, that contract is a property
22 right. It's protected by the constitutional -- the
23 contract laws in the United States Constitution as well as
24 the contract clause in the Texas Constitution, and we have
25 U.S. Supreme Court cases and Texas Supreme Court cases

1 that both say there's a constitutional dimension to your
2 right, your contract rights. So my third category of
3 pre-existing confidentiality agreements creating a
4 contract right, in my view, requires that those types of
5 situations be handled differently.

6 So with these three categories -- and I have
7 many other points that are mentioned here in the memo --
8 it seems to me that we should look not just at the
9 mechanics of how we give notice and the mechanics of who
10 participates and how, but also what is the substantive
11 standard for privacy. Do we recognize only trade secrets
12 as an exception to Rule 76a, or are constitutional zone of
13 privacy an exception? Is the tort protected privacy an
14 exception? Is the contractually agreed right an
15 exception? If it's not an exception to the rule
16 altogether then perhaps we should have a different
17 standard.

18 So those are, I think, some fundamental
19 philosophical questions that it is appropriate for us to
20 revisit, considering the wisdom of the original debate
21 together with what we might add to that. There are other
22 aspects that are raised in the memo. I don't want to
23 dominate this conversation too much, Chip, and so what I
24 would suggest to the Court and to the committee chair, is
25 that today we're making discussion proposals that haven't

1 been vetted fully and haven't been voted on by the
2 subcommittee, but they are good foundations for
3 discussions or debate, and I'm hoping and asking that we
4 be given the opportunity to dig into this deeper and maybe
5 set this off not one meeting, but two committee meetings
6 to allow us to revisit the original debates, to integrate
7 what we hear today, and to come back after 31 years with
8 an assessment of whether, not only do we need to improve
9 or modernize the way we give notice.

10 But we need -- poor Professor Dorsaneo, six
11 times he's tried to get an appellate rule to govern this,
12 and it's never made -- we got -- I've got it in the
13 record, lots of subcommittee work done on how you would
14 have sealing orders in appellate proceedings, and it's
15 never made it to even a discussion to my knowledge in the
16 Supreme Court Advisory Committee. I think we definitely
17 need to consider appellate Rule 9, not today. So with
18 that foundation, Chip, my suggestion is to either open the
19 floor for discussion on these more philosophical matters
20 or move on to Stephen Yelenosky's specific rule proposal,
21 either one.

22 CHAIRMAN BABCOCK: Well, you can't see it
23 because they're behind you, but either Stephen Yelenosky
24 has had to go to the bathroom urgently during your talk,
25 which I might add has touched on every hot button issue in

1 the country for sure, if not the world, although I think
2 you left out the Russian buildup on the Ukrainian border.

3 HONORABLE ROBERT SCHAFFER: No, it's in
4 there. He just decided not to talk about it.

5 CHAIRMAN BABCOCK: Yeah, he glossed over
6 that, didn't he? Five seconds into your talk Lisa Hobbs
7 had her hand up, so she'll go first, and then, Yelenosky,
8 you've got 20 minutes to --

9 HONORABLE STEPHEN YELENOSKY: Thank you.

10 MS. HOBBS: Well, I was still living under
11 my parents' roof in 1990, so anything I know about the
12 historical debates of 76a is from being a former rules
13 attorney at the Supreme Court, but I did just want to
14 correct the record in that I think that the Texas Judicial
15 Council worked on this rule before it went to the advisory
16 committee, because I recall some memos and things from
17 Denise Davis at the time. So I just wanted to -- that's
18 why my hand went up quick, is that obviously objected
19 opening by Richard Orsinger started off maybe factually
20 incorrect about how quickly this rule was passed, and I
21 obviously have a different view than Richard on the rule,
22 but I know I will not say it better than Judge Yelenosky,
23 so I will yield the floor to my friend.

24 HONORABLE STEPHEN YELENOSKY: Okay. First
25 of all, Richard and I worked very well on this, some of

1 the specifics and -- a lot of specifics. We disagree
2 about some things, but I'll say up front, the way I've
3 drafted the rule tries to address trade secrets in a way
4 it's never been addressed before. Well, since 1990. It
5 also tries to address the fact that we have public
6 hearings that no one attends and, therefore, makes them
7 subject to requests.

8 Having said that, and this is a legal point,
9 not a point of ad hominem. Richard, I think that all that
10 happened prior to the Supreme Court's adoption of Rule 76a
11 is worthy of consideration. It's very helpful, great
12 minds, but to suggest that it lacks some legitimacy
13 because of the amount of time it took to pass it and who
14 said what to me is objectionable. We could say that about
15 any rule, and so how many people voted, who looked at it,
16 maybe it went through quickly because everybody agreed it
17 was a great idea. We look at legislative history when
18 we're trying to find intent. There's no doubt about the
19 intent, and at least from what I've heard it was an attack
20 on the legitimacy of the vote that was taken, and I think
21 all of that could be ended by saying the Supreme Court
22 adopted it. We don't need to deal with the vote prior to
23 that.

24 As was said, and Richard said initially, his
25 memo was not -- I'm not on the subcommittee, so I can say

1 whatever I want without worrying about the rest of the
2 subcommittee. But Richard was very helpful or very
3 willing to let me participate, but as Richard said at the
4 beginning, what he just went through is his opinion, as
5 far as I understand it, wasn't even read by the
6 subcommittee. Is that right, Richard?

7 MR. ORSINGER: That's right.

8 HONORABLE STEPHEN YELENOSKY: Because I
9 didn't receive it until a couple of days ago, so I didn't
10 have a chance to respond to Richard had he let me. Again,
11 I'm not on the subcommittee. So I think there are a lot
12 of good points in there, but the other bookend I think he
13 got to was -- and one of Richard's great concerns that I
14 share and I don't know the solution to it, but the last
15 thing Richard said, one of the last things he said, was it
16 doesn't have to do with 76a. It has to do with the
17 immunity to defiance, and the problem is that a bad actor
18 -- let's call them a bad actor -- can file whatever he or
19 she wants with impunity. So no matter what 76a says, if
20 somebody can file something confidential and there's no
21 consequence for that, 76a never gets to operate. So that
22 part is not a criticism of the rule. It's a criticism of
23 the immunity granted to whatever anybody wants to file in
24 the court, and that's a philosophical or legal question, a
25 mechanical question if there is one, but I wanted to take

1 that on in front because that's a big concern of Richard.
2 It's a concern of mine. I don't know how prevalent that
3 is.

4 You know, when you get to the constitutional
5 issues, I'm not going to argue about, you know, whether
6 this is -- it's constitutionally protected or not, but the
7 rule itself considers all -- I think it's specific and
8 substantial -- what's the language? I should know by now.
9 Specific and substantial interest includes constitutional
10 rights. Now, we can say it explicitly, but 76a largely,
11 except for the presumption, is a mechanism for a judge to
12 figure out what he or she is looking at, what's at issue,
13 and as I draft the rule, is it a trade secret or not.
14 Constitutional right of privacy, I agree it's there, but
15 the parties can't just decide that. It's a 76a. It's an
16 open records -- I mean it's a 76a issue and on sealing,
17 and so a judge has to have a first look at that.
18 Otherwise the parties can agree to whatever they want to
19 agree to because it serves their purposes. So the judge's
20 look at it doesn't exclude the consideration of
21 constitutional interest, et cetera, but there has to be
22 some preliminary consideration of it.

23 If you want to put in there constitutional
24 rights specifically, that's fine, but I'd note that it
25 still requires some review, and maybe it's not public at

1 that point, but I don't know any constitutional right
2 that's absolute. First Amendment is not absolute, so I
3 imagine the right to privacy is not either. And so there
4 needs to be some recognition that there needs to be a
5 process for a judge to decide what's at issue, and so 76a
6 is largely a mechanism, but the two -- I mean, the big
7 exception for trade secrets is, as Richard said, Trade
8 Secrets Act flips the presumption, and it's not a
9 presumption of openness to the public. It's a presumption
10 that it should be kept confidential. And maybe you create
11 that presumption if the judge decides what your
12 constitutional right is, but that is -- that is I guess a
13 philosophical question, but also a mechanical question
14 about how you deal with that.

15 So I don't disagree that there are
16 philosophical issues here, but I do disagree that 76a was
17 ill-conceived, certainly not illegitimate. The Supreme
18 Court adopted it, and all of that information going way
19 back is very useful, but as Richard said at the end,
20 what's more important is what's happened since so we can
21 look at the 76a and how it's operated and how it hasn't
22 operated well; and as I said very first paragraph of my
23 memo, I agree, it hasn't operated well and why it hasn't;
24 and there's some approaches to that that we could follow.

25 So overall, I think the conclusions that

1 Richard reaches -- and they are conclusions -- are
2 premature for the very reason that he said, which is we
3 should have a discussion of philosophical issues, and we
4 need to discuss very importantly a non-76a issue, which is
5 bad actors filing stuff with immunity that never goes
6 through 76a.

7 CHAIRMAN BABCOCK: Great. Thank you.

8 HONORABLE STEPHEN YELENOSKY: Was that 20
9 minutes?

10 CHAIRMAN BABCOCK: No. I'm giving you back
11 five minutes, so you can do a rebuttal.

12 HONORABLE STEPHEN YELENOSKY: Oh, great.

13 CHAIRMAN BABCOCK: Pete Schenkkan.

14 MR. SCHENKKAN: To those members of the full
15 committee, like myself who has limited exposure to --

16 THE REPORTER: Look this --

17 CHAIRMAN BABCOCK: Pete, you've got to talk
18 to her.

19 MR. SCHENKKAN: -- to the 76a issues before,
20 to those members of the committee who have only had
21 limited contact with these issues before, I was an active
22 participant in the limited subcommittee discussions we've
23 just had, so I'm a little bit ahead of you on the
24 learning curve, and I want to assure you that if you think
25 after listening to Richard and Stephen that this is

1 complicated, it's worse than you think. It's a lot worse
2 than you think. And what I'd like to try to suggest from
3 my own experience of the last few days is some guides to
4 listening and speaking in this discussion, to highlight
5 some of the points that we need to sort of gradually get
6 in focus before we can make intelligent decisions about
7 what to recommend to the Court.

8 It's clear from what you've just heard that
9 we have two very different kinds of sets of practical
10 problems presented by the same rule. Trade secrets and
11 personal sensitive information. I'm exaggerating, but
12 those are two big subsets, and they present different
13 issues, including the issues that are most sensitive in
14 the trade secret area where you've got two private parties
15 who have previously agreed to keep something confidential
16 between them as part of a deal where consideration was
17 paid, but the public interest, there's a public interest
18 or may be a public interest in having that information
19 publicly available, or at least some of it. So you've got
20 two different kinds of substantive contexts that are
21 problems.

22 These may raise different substantive law
23 standards. You've heard now mentioned the constitutional
24 protection of freedom of contract and constitutional
25 protection of privacy, and then there is constitutional

1 law that is reflected in the Court's order about the right
2 of the court -- of the people to public access to the
3 courts.

4 So we've got three different sets of
5 constitutional provisions out there. We've got a bunch of
6 different statutory provisions that either directly
7 address one part or another of the problem, like the Trade
8 Secrets Act, or do so in kind of a backhanded fashion by
9 saying that, you know, your HIPAA information is protected
10 in some way and you can get in trouble if you disclose it
11 without taking the proper steps, but don't really say what
12 that means for this purpose. So you've got different
13 statutory law that may apply, and of course, you may have
14 different common law that applies.

15 So we've got, in looking at what legal
16 criteria we are already bound by in the rest of the
17 system, we've got a wide world we're going to have to look
18 at and make careful we don't step over or kick over
19 unintentionally. These may well involve -- these problems
20 may well involve different procedures being warranted, and
21 for that I would just remind you of the one example that
22 came up in here, which is it's one thing to talk about
23 protecting this stuff when we're in the trial court. It's
24 another thing to talk about protecting this stuff when
25 we're on appeal and we're dealing with what is in the

1 trial court record, and it's now going to be, to one
2 degree or another, made more easily accessible in the
3 world through this in the appellate briefs.

4 The -- Richard has highlighted a very good
5 point about the change in the world we live in today from
6 1990, but I want to emphasize one implication of that that
7 makes our job even harder, which is it's the internet, the
8 reduction to virtually zero of the cost of transmitting
9 information, that changes the tactical balance of what's
10 worth using as a tactic either with the demand to make
11 information public or with a motion to seal it. The
12 consequences are different. The harm that can be done is
13 different and so is the public advantage perhaps. So
14 we're going to change the ground rules here that matter to
15 the people who are looking, as well as to the litigants
16 and their counsel.

17 And then I'm going to give you one more
18 aspect as to how this is worse than you thought and then
19 I'm going to stop, I promise. The real issue is we -- the
20 rule as drafted and the words that we're looking at so far
21 are focused on court records and documents and then
22 there's some reference to court orders. All of those are
23 important practical parts of the situation, but they're
24 different. Documents could be obtained in discovery.
25 What is the significance of that step in the process?

1 Documents could be filed with the court attached to a
2 motion. The motion might be a dispositive motion, or it
3 might not be, or they could be offered in evidence at the
4 trial, may be cleared in advance with the motion in limine
5 pretrial order discussion, maybe not. Or they could be
6 ones that are part of the court record and arer on appeal.

7 So we've got a whole wide array of
8 subcategories even under the word "documents." We've got
9 a wide array of different court orders where we can think
10 about this, and then finally, this isn't really about
11 court records and documents. They're just a subset. It's
12 about information, and that information could also have
13 come out in the course of the trial itself where we're
14 having to deal with things like, you know, limiting the
15 public's access to a portion of the trial while the minor
16 is testifying. We've got issues of what are we going to
17 do with the hearings themselves.

18 It's worse than you thought, but it's
19 actually also hugely interesting and fun. I just think
20 we're going to have to work really hard to try to find
21 out -- to carve at the joints to figure out what the
22 decision points are in this thing and set them up in this
23 fashion. So I'm hoping that helps the rest of you. I've
24 spent hours over the last 10 days dazzled by all of this.

25 CHAIRMAN BABCOCK: This committee is all

1 about having fun, so let's do it. Robert and then --

2 MR. LEVY: One of the things that prompted
3 this discussion related to our prior discussion in June on
4 amendments to Chapter 98 of the Texas Civil Practice &
5 Remedies Code dealing with claims under -- human
6 trafficking claims, and the challenge there or the issue
7 there is the right of parties to bring their claims under
8 a pseudonym, but the challenge is that if you filed the
9 claim under your own name, the law now requires that you
10 be notified of your right to change the status to a
11 pseudonym, and then quickly we discussed the problem with
12 76a(1), which requires that all court orders have to be
13 public, so how can a court effect that relief without a
14 public order that might disclose information. So that
15 identified one of the issues that we needed to address.

16 One of the other points that I wanted to
17 contextualize is that in many cases information that is
18 sought in litigation and can become part of the public
19 record comes from third parties who are not -- who are not
20 in the courtroom, who don't have a stake in the action,
21 but they obviously have concerns and rights regarding
22 information that they share and provide; and while a court
23 might sign a protective order to protect their interest,
24 their property interest, that in the case of a -- of an
25 exhibit being used at trial, they're not always going to

1 be able to argue their rights, or even if they can, 76a
2 can bypass their rights or their issues. And so that I
3 think also needs to be considered.

4 Additionally, the fact that a defendant,
5 which is brought into court in effect involuntarily is
6 still required to produce information, confidential
7 information, that then can -- that confidentially or the
8 value of that information can be lost if it is used at
9 trial, and there are property rights involved, and
10 obviously it's some questions of constitutional rights of
11 the loss of the -- the value of their intellectual
12 property if it is, in fact, forced to be disclosed and
13 available to others. And I would also point out that the
14 federal civil rules advisory committee is also looking at
15 how to -- whether to and how to adopt a rule on sealing,
16 because there is currently no standard rule in federal
17 practice and each court looks at the issue differently,
18 and so it is somewhat ad hoc, and it's an interesting
19 question that -- that they are looking at, obviously as we
20 are looking to revise our rule.

21 CHAIRMAN BABCOCK: Thanks. Judge Timms.

22 MS. TIMMS: I thought I would provide a
23 little bit of historical perspective to the rule, because
24 I was personal friends with the reporter at the *Dallas*
25 *Morning News* that got this project started, and I will

1 tell you that a substantial reason for pursuing the
2 Rule 76a and the legislation was a series of case -- or
3 reports that a reporter made. Fundamentally what was
4 happening in Dallas and around the state was people being
5 sued for atrocious acts. Priests sexually abusing
6 children, doctors sexually abusing patients. A lawsuit
7 would be filed. The person would very quickly enter into
8 a confidentiality agreement with the plaintiff, a
9 settlement, seal the court records, we're done. The
10 person is then allowed to go forward, continue their
11 abuse, and that happened repeatedly. These people were
12 repeat offenders, and they were using the sealing records
13 to protect themselves as they went about doing their
14 abuses. So as we think about how to preserve legitimate
15 privacy rights, we need to think about how to carve out
16 the people whose privacy interests are the privacy
17 interests in abusing patients, and so there you have it.

18 CHAIRMAN BABCOCK: Justice Christopher, and
19 then Levi Benton.

20 HONORABLE TRACY CHRISTOPHER: Well, I was
21 looking at what the Supreme Court asked us to look at.

22 CHAIRMAN BABCOCK: Now, don't do that. This
23 is all about having fun.

24 HONORABLE TRACY CHRISTOPHER: Okay. And is
25 76a time-consuming and expensive? Yes. Does it

1 discourage or prevent compliance? Yes, because people
2 enter into agreed protective orders that judges often
3 sign, and records get sealed without following Rule 76a.
4 All of those things are true. And significantly different
5 from the federal court practice, true. But the question
6 is do we want to be more like the federal court practice,
7 or do we want to be more like agreed protective orders
8 that make discovery a lot less expensive for all parties,
9 that doesn't require judges to have myriad of hearings, as
10 Judge Yelenosky's proposal requires, to try to figure out
11 what is or is not a trade secret when that is the crux of
12 the case most of the time. So, I mean, we have to figure
13 out where we want to go.

14 CHAIRMAN BABCOCK: Yeah. It sounds to me
15 like you've answered the questions the Court was asking,
16 so we're done.

17 HONORABLE TRACY CHRISTOPHER: But I'm, you
18 know --

19 CHAIRMAN BABCOCK: Levi.

20 HONORABLE LEVI BENTON: Two things. First,
21 for the record, the young lady who just spoke, I didn't
22 get her name.

23 MR. ORSINGER: Cindy Timms.

24 MS. TIMMS: Cindy Timms.

25 HONORABLE LEVI BENTON: Did you say "Judge

1 Timms"?

2 CHAIRMAN BABCOCK: I did, but I misspoke.

3 HONORABLE LEVI BENTON: So that was
4 misspoke.

5 CHAIRMAN BABCOCK: I called you a judge a
6 minute ago, too.

7 HONORABLE LEVI BENTON: It's Mr. Benton.
8 Okay.

9 CHAIRMAN BABCOCK: Sir.

10 HONORABLE LEVI BENTON: The second thing is,
11 respectfully, I don't get it. We've had this rule 30
12 years. There's hardly a 76a case on the books. It's not
13 like Tracy Christopher or any other justice around the
14 state is throwing their hands up saying, "Hey, we've got
15 all of these darn mandamuses or appeals on 76a. Help us
16 out." So why are we talking about this? I rest my case.

17 CHAIRMAN BABCOCK: All right. Stephen,
18 Judge Yelenosky, his middle name. Then Alistair.

19 HONORABLE STEPHEN YELENOSKY: Well, we're
20 talking about it because of all of the letters that you
21 reference. The problem doesn't show up in the court of
22 appeals because these are people saying -- judges saying
23 in the trial court and attorneys saying in the trial
24 court, "I had to do this. I had to do that. I had to
25 hold a hearing that nobody appeared at, which I

1 recognize." And so that's why we're addressing it.

2 As far as all of these hearings, Justice
3 Christopher, I'm not saying that the mechanism I wrote is
4 what we should end up with, and it's a point of
5 discussion, but as far as hearings go, if your case is
6 about trade secrets, you go to the judge and you say,
7 "Judge, this is case about trade secrets," and the judge
8 listens to both sides and says, "Yeah, this is about trade
9 secrets." Somebody has to decide whether it's about trade
10 secrets, and so that's the judge. Otherwise, it's the
11 parties, and the parties can label anything a trade
12 secret. So somebody has to decide that, whether you do it
13 through a hearing or whatever. But what it does eliminate
14 is the hearing that we've had, because the rule requires
15 it when nobody wants the hearing, and so it puts it in a
16 request mechanism for that.

17 CHAIRMAN BABCOCK: Yeah. Alistair, and then
18 Levi. Alistair first.

19 MR. DAWSON: So Justice Christopher is
20 right. As a practical matter we try and do everything we
21 can to avoid compliance with 76a. So we put it in
22 protective orders that -- or confidentiality orders. We
23 say we can temporarily seal it under the rules. We can
24 file it in camera with the court, and nine times out of
25 ten that works, and the judge signs it, and we go on about

1 our business, and we don't have to worry about 76a.
2 However, there are trial judges that they read a
3 protective order or confidentiality order and say, "No,
4 you have to comply with 76a," and so there are instances
5 where we're not able to achieve our objective. It is
6 cumbersome. It is time-consuming. It is expensive, and
7 it achieves no real purpose. It doesn't do anything.

8 I would scrap it. I would let the parties
9 file things under seal, just like you do in federal court.
10 I would have the party who wants to file it under seal,
11 they have the burden of proving it. Let the trial judge
12 decide if it should remain sealed or not sealed. And it's
13 not just about trade secrets. All kinds of confidential
14 information that may not rise to the level of trade
15 secrets that you want to protect. People's salary and
16 things of that nature you wouldn't want out there in the
17 public, so let people file it under seal.

18 In our confidentiality orders that we all
19 have, it always allows the party receiving the documents
20 to challenge the designation of confidentiality. And so
21 if I file stuff that's -- and I mark it as confidential
22 and my friend Jim Perdue is on the other side and he
23 doesn't believe it's confidential, he can challenge it.
24 We have a hearing about that, and if I don't think it's
25 confidential and I lose, then it's free. I mean, it's

1 open for the public. You can use it, file it with the
2 court, or do whatever. It no longer has a confidential
3 designation.

4 So and the other thing I'll point out is
5 that it is subject to deposition, and a member of this
6 committee, not present toay, we had a case opposite each
7 other years ago, and I was representing a computer
8 company. He filed my entire document production with the
9 court, and I had to apply under 76a and go down and have a
10 hearing to prove up an entire document production. The
11 hearing lasted five days, I think, evidentiary hearing.

12 CHAIRMAN BABCOCK: But not as long as what
13 Richard just spoke about.

14 MR. DAWSON: Right. And so they were trying
15 to get leverage in the case, and you know, I'm sure
16 there's instances where people file stuff and as exhibits
17 to make them court records and then you have to file a
18 76a, so I think it achieves -- you know, and the other
19 thing is if part of the rule was to prohibit people from,
20 you know, getting documents back at the end of the case,
21 if that was part of the objective, people do that all the
22 time. Every settlement agreement that I've ever signed or
23 drafted has a provision that says you agree to destroy all
24 of the documents I gave you and send me a certification
25 that you destroyed them or you return them to me. So

1 that's still going on today. So I don't think it achieves
2 anything, and it's subject to gamesmanship, and it's very
3 cost prohibitive in all respects, and for most of the time
4 we're figuring out ways to get around it.

5 CHAIRMAN BABCOCK: Judge Miskel, and then
6 Judge Yelenosky, and then Shiva.

7 HONORABLE EMILY MISKEL: I just wanted to
8 add just a quick thing because -- to respond to the bad
9 actor point of anyone can file anything. Rule 59,
10 TRCP 59, says what's allowed to be attached to a pleading,
11 and so you can imagine in family law all kinds of -- you
12 know, file all types of stuff for litigation advantage or
13 whatever it might be. We had a recent case where one of
14 the parties filed nude photos of the children attached to
15 a pleading. Now, you don't have to seal it. My
16 interpretation of Rule 59 is if someone attaches an
17 exhibit that's not allowed under Rule 59 to be attached,
18 you can strike it, and I have signed orders that strike
19 the pleading and order the clerk to not make it available
20 as if it had never been filed, and so I would propose that
21 maybe clarifying 59 to say that if someone violates 59 and
22 is a bad actor and files something that's not allowed to
23 be filed, the court has the power to strike that pleading
24 and effectively make it not sealed, but as if it had never
25 been filed. That would address that issue.

1 And then I'm not going to speak at length,
2 but I would just raise my hand on the side that I don't
3 believe that people should be able to make information
4 confidential or private just because they agree to it or
5 just because it's embarrassing. I think that we need to
6 monitor what our government is doing to people, and so I
7 just am horrified by the concept that any time something
8 is embarrassing your government gets to operate in secret.
9 So I won't speak at length, but I'll take the opposite
10 side of the spectrum from the private attorneys.

11 CHAIRMAN BABCOCK: Your point about the rule
12 permitting a judge to strike pleadings, I think that's as
13 far as it goes, so there's no further consequences to the
14 lawyer or the party that has attached the document or the
15 picture or whatever to the pleading that is subject of the
16 motion to strike.

17 HONORABLE EMILY MISKEL: So Rule 59 doesn't
18 explicitly provide a strike process. It just says no
19 other instrument or writing shall be made an exhibit to
20 the pleading, and so I'm inferring that I can strike it.

21 CHAIRMAN BABCOCK: I think there's another
22 rule on striking somewhere.

23 HONORABLE EMILY MISKEL: But you can always
24 do sanctions. I mean, that's in another rule and allows
25 for litigation sanctions.

1 CHAIRMAN BABCOCK: Okay. Steve. And then
2 somebody in the Zoom room.

3 HONORABLE STEPHEN YELENOSKY: Well, the
4 comment was made that it doesn't do anything. I'm sorry,
5 I apologize, what is your name?

6 MS. TIMMS: Cindy.

7 HONORABLE STEPHEN YELENOSKY: Judge Cindy --

8 MS. TIMMS: Judge Timms. Justice, Justice
9 Timms.

10 HONORABLE STEPHEN YELENOSKY: Justice.

11 CHAIRMAN BABCOCK: We're honored to have a
12 U.S. Supreme Court justice with us.

13 HONORABLE STEPHEN YELENOSKY: Pointed out an
14 instance in which it would work, and that is where there
15 is a sexual assault, for example, and somebody wants to
16 seal it. I think there's some confusion between discovery
17 and sealing. Anything that involves discovery but is not
18 filed with the court is not subject to 76a, unless it
19 falls under the provision, whatever it is, below that
20 says --

21 CHAIRMAN BABCOCK: 76a(2)(c).

22 HONORABLE STEPHEN YELENOSKY: What's that?

23 CHAIRMAN BABCOCK: 76a(2)(c).

24 HONORABLE STEPHEN YELENOSKY: You got it.
25 Unless it falls under that, and that's a rare situation.

1 So, sure, you could file a confidentiality agreement that
2 says we're not going to reveal this to anyone and we're
3 going to give it back when it's done, unless you file it
4 and you want to file it under seal. That's different.
5 But it doesn't do anything, from what I've heard, because
6 people aren't complying with it. It would do something if
7 people complied with it. Now, most of the time maybe
8 people think it's a waste of time, which is why I do think
9 the rule can be revised to make it more focused, let's
10 say.

11 But to suggest that it doesn't work, I know,
12 because lawyers come in with a confidentiality agreement,
13 which is not just that we will keep it secret, but, oh, by
14 the way, if we file it, it will be filed under seal.
15 Well, the clerk sees that the judge has signed it, they
16 seal it. I always take that out of the confidentiality
17 agreement because it's not complying with 76a. Now, other
18 judges don't. That's a problem. There's maybe an
19 educational issue there or maybe they need to be reminded
20 that 76a exists, and maybe the amendment will change it so
21 it's more appealing and usable by people, but, having said
22 that, I'll sit down.

23 CHAIRMAN BABCOCK: Okay. Shiva, do we have
24 somebody in the Zoom room who wants to say something?

25 MS. ZAMEN: Marcy Greer.

1 CHAIRMAN BABCOCK: Marcy.

2 MS. GREER: Hello, how is everybody?

3 CHAIRMAN BABCOCK: We're good.

4 MS. GREER: I hope I'm not repeating what
5 other people have said. Some of it we had trouble
6 hearing, but -- and I don't want to be redundant, but I
7 just want to say from the standpoint of practitioners, it
8 is a real problem, and the reason it's not in mandamus
9 opinions is because we try to wire around it as much as
10 possible. It creates a lot of logistical problems in
11 these complex cases, and I do think moving towards
12 something like the federal law could be helpful. I'm not
13 in favor of pleadings and orders being filed under seal.
14 There's a political authority in the federal courts right
15 now, and I think that's a bad idea, but there are times
16 when confidential information needs to not be subject to
17 being put on the internet and going everywhere, and I
18 think the parties usually are able to work it out.

19 And if somebody overdesignates and then, you
20 know, you want to file something in court, you would reach
21 out to the other side and say, "Hey, does this really need
22 to be sealed," and in those cases we're able to work it
23 out. But I will tell you that the courts of appeals are
24 now requiring -- they're no longer permitting documents to
25 be submitted in camera, almost two to one I think they are

1 requiring a 76a procedure for a document to be submitted
2 to the court in camera, even if it was submitted to the
3 trial court in camera, if both parties sought it, and I
4 think there's a different procedure if only one party
5 sought it and is submitting it in camera for the judge's
6 review, but if confidential information is given to the
7 trial judge in camera, you still have to go back and do a
8 sealing procedure in the court of appeals. So I'm in
9 favor of raising it and talking about it and seeing if we
10 can come up with a better way.

11 CHAIRMAN BABCOCK: Thank you, Marcy. Does
12 anybody else have their hand up, Shiva?

13 MS. ZAMEN: Not right now.

14 CHAIRMAN BABCOCK: Not right now, okay. But
15 I see somebody behind you that has his hand up.

16 HONORABLE LEVI BENTON: Yeah, you skipped
17 me. I was supposed to be after Mr. Dawson. I would like
18 to politely just ask the Chief or inquire of the Chief,
19 since this was his memo to you, or maybe Jaclyn, do we
20 have information or have a number of 76a cases? Because I
21 am not getting all of this from some of my colleagues on
22 this committee about all of this trouble. It is trouble,
23 but Mr. Dawson's paid \$1,200 an hour to fix the trouble,
24 and I mean, this --

25 MR. DAWSON: Assumes facts not in evidence.

1 MR. ORSINGER: I move to seal. I move to
2 seal.

3 CHAIRMAN BABCOCK: We don't need that in the
4 public record, that's for sure.

5 MR. ORSINGER: It's your call. You're the
6 chair. Are we going to seal that number?

7 CHAIRMAN BABCOCK: No, I think -- I think
8 it's underestimated, if anything, so --

9 HONORABLE LEVI BENTON: I object, I'm being
10 interrupted. It's a 30-year-old rule. Where are the
11 cases?

12 CHAIRMAN BABCOCK: Well, I was going to
13 bring that up, but there is a recent decision of the Texas
14 Supreme Court that addresses the interplay between TUTSA,
15 the Texas Uniform Trade Secret Act, and 76a, and it
16 answers many of the questions -- not all, but many of the
17 questions that have been posed today about trade secrets.
18 So, Richard, you probably want to take that decision into
19 account. And a couple of questions of historical maybe
20 significance, maybe not, but as I recall, the Leatherbury
21 draft, which you talked about, did not include 76a(2)(c);
22 that is, the applicability of 76a to unfiled discovery.
23 Is that right?

24 MR. ORSINGER: I haven't completed my review
25 of the transcript, but I saw that that was kicked -- the

1 can was kicked down the road several times, and I don't
2 know where that ultimately came in. It may have come in
3 on day two. It didn't come in on day three.

4 CHAIRMAN BABCOCK: Yeah, it came in I think
5 pretty late, and I don't know that the *Leatherbury/Dallas*
6 *Morning News* draft had that in it, and frankly, in my
7 experience that's where a lot of the mischief has been
8 created with the unfiled discovery, because there's no
9 certainty about whether or not you're in a case that is of
10 the type that that provision of the rule addresses, so
11 you've got to take into account, you know, whether your
12 unfiled discovery is going to have to comply with 76a, and
13 that leads to the problem that Alistair identified and
14 Justice Christopher has talked about, and I agree, I think
15 there's a lot of cumbersomeness to that.

16 You also excluded from your otherwise very
17 thorough recitation of the history that the family bar
18 very adroitly exempted themselves from 76a, so a lot of
19 the -- a lot of the concerns that you have in your
20 practice and your two colleagues who were on the committee
21 at the time don't come up in family cases because 76a
22 doesn't apply to family cases.

23 MR. ORSINGER: But some judges will use the
24 76a standards because there are no other standards for
25 family law.

1 CHAIRMAN BABCOCK: Yeah. I'm just saying,
2 it says it. Shiva, I'll call on you in a minute, but
3 Judge Miskel has her hand up first.

4 HONORABLE EMILY MISKEL: I was going to say
5 if we revise 76a, my first request was going to be that we
6 eliminate the exception for family law cases.

7 CHAIRMAN BABCOCK: Okay. That will get the
8 the fight started, for sure. One other thing, Richard,
9 I'm not sure it's clear. You know, in privacy, there's a
10 posture of four prongs of privacy, and Texas has quite
11 clearly rejected false light, which is the first prong.
12 It quite clearly has accepted intrusion, which is the
13 second type. It, I think, has arguably accepted
14 misappropriation of name or likeness, the so-called right
15 of publicity, which seems an odd right of privacy, but in
16 any event, but I'm not sure that the Court has adopted the
17 privacy prong on misappropriation -- not misappropriation,
18 but publication of private and embarrassing facts.

19 MR. ORSINGER: I'll dig into that. You
20 think not?

21 CHAIRMAN BABCOCK: I don't think so, but I
22 could be wrong.

23 MR. ORSINGER: Then I stand corrected if I'm
24 wrong.

25 CHAIRMAN BABCOCK: Well, you may be right.

1 I'm just saying I don't think it's -- and I consulted with
2 some people at this table about that.

3 MR. ORSINGER: Aha, well --

4 CHAIRMAN BABCOCK: Nobody could remember.
5 Nobody could remember. So I think that's what I had in
6 response or in reaction to your historical recite,
7 although it is -- it is certainly true that the problems
8 that were -- or at least one of the impetus for the rule,
9 which -- which Cindy, Judge Timms, talked about is still
10 with us. I mean, you know, we have state Legislature
11 saying you cannot put a confidentiality provision into a
12 settlement agreement on certain types of cases, mostly
13 dealing with sexual abuse. So that -- that's a
14 thirty-one, -two, -three year-old problem that is still
15 with us that has to be dealt with.

16 And the last comment I would make is that
17 it's true, as Alistair says, that, you know, in many, many
18 instances it's up to the litigants to get together and
19 agree or not on what's private and what's not, but the
20 public does have an interest in some things, for example,
21 the orders and opinions of the court. I mean, I cannot
22 conceive of many instances where the public is not
23 entitled to know what their judges are doing. The very
24 first meeting I chaired over 20 years ago dealt with the
25 legislation on judicial bypass, and some of you were here

1 for that, where a minor goes to a judge to get permission
2 to have an abortion. Well, that statute says that the
3 opinion of the court is sealed and it's not a matter of
4 public record.

5 Now, the Supreme Court took several of those
6 cases right after the statute was passed and did not seal
7 their opinions, but the trial judges and the courts of
8 appeals did, and that has always struck me as not a good
9 thing. You can see why they did it, because, you know,
10 some judge allows a minor to get an abortion, and the next
11 election, you know, you can see -- you can imagine what
12 happens, but is that a justification for sealing the
13 judge's order? I personally don't think so, but the
14 statute was passed, and it's the law, and nobody has
15 challenged it, so there you go. Yeah, Kennon.

16 MS. WOOTEN: I'll just echo the comments
17 that this is an issue in private practice, and the amount
18 we're paid doesn't negate the importance of the issue
19 because that is, of course, incurred by the clients, and
20 many times in cases there have been many hours spent
21 working through this procedure, going to the court, going
22 to different judges at central docket in Travis County, by
23 way of example, who handle this rule drastically different
24 ways from judge to judge. So I do believe that we have an
25 issue that should be addressed. I think that clients are

1 incurring unnecessary costs because of the way this rule
2 is crafted now, and I hope that we can do some of what
3 Judge Yelenosky suggested, including this online community
4 that would simplify things somewhat and make it less
5 burdensome and less costly to our clients as a result.

6 These problems occur as well in pro bono
7 matters, so I love doing pro bono work. My firm supports
8 that, but when you start incurring a lot of costs and
9 you're not getting paid anything, that's also an issue.
10 So I believe there are issues to be addressed. This isn't
11 make-believe. I think we need to do something about this
12 rule and modernize it and make it better.

13 MR. LEVY: Chip, and Rusty's iPad --

14 CHAIRMAN BABCOCK: We're in the back of the
15 room and then we're going to go to the Zoom room.

16 MR. PHILLIPS: So and I'll just stand up
17 just to be sure I can project. The other comment I've got
18 is that if judges weren't seeing it, if what we're hearing
19 in the room is we're trying to wire around the rule, then
20 we're also missing the point of the rule. If we're
21 filing -- people are filing motions for protective order
22 that just have a sealing in it and hoping the judge will
23 sign it because this rule is so complicated and so
24 difficult to do that we're just hoping we can get around
25 it with this order because the judge won't pay attention,

1 well, then we also have a problem. We may not be seeing
2 it in court as a problem, but it's a problem because what
3 we're trying to do with the rule isn't happening. We're
4 not going through the process to make sure that what's
5 getting sealed is what should be sealed, rather than just
6 the parties getting together and hoping the judge will
7 sign it without paying attention.

8 So the fact that some judges may not be
9 seeing it as often maybe is an indication again that the
10 rule isn't working because some parties aren't using it.
11 They're trying to wire around it, sometimes legitimately,
12 sometimes illegitimately.

13 CHAIRMAN BABCOCK: Great, thank you. Oh,
14 Shiva had your hand up.

15 MS. ZAMEN: Yeah, it's for Rusty.

16 CHAIRMAN BABCOCK: Rusty Hardin. Muted, one
17 of the few times.

18 MR. HARDIN: Thank you. At the end of the
19 day is the purpose of this discussion right now is to
20 decide whether to devote more time to it on another
21 occasion? If that's the case, I would be all in favor of
22 it, because I'm very schizophrenic about this whole issue
23 back and forth as far as public disclosure. I disagree
24 with Judge Benton that it's not worth messing with because
25 this thing is hugely, hugely significant I think,

1 particularly as Richard has talked about, when you talk
2 about the impact of social media. So those of us who
3 periodically represent people who have some public
4 exposure, the public knows who they are, and so sometimes
5 the courtroom is the only way we can respond to -- if we
6 want to try to avoid violating the cannon of ethics, as to
7 what we say pretrial. The courtroom and our pleadings and
8 other things are the only refuge we have, and so getting
9 out a public disclosure becomes critically important that
10 we can use the judicial process to answer things that just
11 go out instantaneously, within eight hours. It's
12 impossible to be able to get out in front of a major
13 story, and the court proceedings are about the only way
14 you can ever do it. So I opt there for as much public
15 exposure and resistance of sealing as possible.

16 But on the other hand, if the same kind of
17 irresponsible conduct by private litigants in terms of
18 saying the most outrageous things and being protected by
19 the judicial privilege, we've got to have a way for a
20 judge to be able to do something about that. I think this
21 merits -- this whole subject merits a much, much broader
22 discussion for the committee, even though it might end up
23 one day moving us back into additional Saturday meetings,
24 and so I hope we're going to talk about this more in the
25 future and in a much more extended basis, and I also want

1 to go -- I really, really enjoyed Richard's memo. Not
2 only because of a trip down memory lane as far as the
3 different lawyers and the history of the committee and
4 these issues of the state, but I'm just dumbfounded about
5 a private litigant who takes the time to have produced
6 this product, so regardless of which side of the issue
7 you're on, I think Richard deserves incredible kudos. I
8 love this.

9 (Applause)

10 CHAIRMAN BABCOCK: We're applauding for you,
11 Rusty, not Richard. He's got a big enough head as it is.
12 Stephen.

13 HONORABLE STEPHEN YELENOSKY: I just want to
14 make an observation, which is this rule is not just about
15 everybody in this room, and let's talk about this. This
16 is a public hearing. Who's here from the public who's not
17 an attorney? No one. So I think the judges, given the
18 76a process, have an obligation to stand in and make
19 people prove that they qualify to seal something under
20 whatever mechanism that we set up, because there's nobody
21 to do it among the parties. Parties will agree to all
22 kinds of things when one party is going to pay the other
23 party and one of the conditions is, well, we're going to
24 seal this, and so that's why you need the judge to stand
25 in for it. And remember that we're talking about how

1 burdensome it is on attorneys, and I agree it is, and it
2 can be fixed, but to throw it out is to say that the
3 public has no interest in this, and the public's interest
4 in a court system is because it resolves disputes in a way
5 that is civil, so to speak, but there are limits to that.
6 I mean, the public pays for all of this. It's not just
7 attorneys who, you know, and their clients who are getting
8 paid for it. It's a public forum, and it's a public forum
9 until you prove that part of it shouldn't be.

10 CHAIRMAN BABCOCK: Great. Alistair, would
11 you mind if we took a break right now?

12 MR. DAWSON: I will not be insulted by that.

13 CHAIRMAN BABCOCK: Okay. Dee Dee's been
14 going for two hours, and so we'll take a 10-minute break
15 and be back here at 11:10, 11:10, and then we'll go to
16 Levi's subcommittee, and we'll put this over as you
17 requested, Richard, for two meetings.

18 MR. ORSINGER: Okay.

19 CHAIRMAN BABCOCK: So not the next meeting
20 but the meeting after that.

21 MR. ORSINGER: Okay.

22 CHAIRMAN BABCOCK: Okay, great. Thanks,
23 everybody. Great discussion.

24 (Recess from 10:58 a.m. to 11:15 a.m.)

25 CHAIRMAN BABCOCK: All right. We're back on

1 the record. Sorry this took longer than 10 minutes, and I
2 apologize for that, but we are at the place in our agenda
3 about Rule 506.1(b), and Levi Benton is the chair of this
4 subcommittee and is going to take us through it.

5 HONORABLE LEVI BENTON: All right. So
6 like the Orsinger committee, we didn't really meet. We
7 communicated via e-mail, but unlike the Orsinger
8 committee, we have attempted to answer just the question
9 asked.

10 HONORABLE STEPHEN YELENOSKY: That's not
11 fair because the charge said whatever else you think needs
12 to be done.

13 CHAIRMAN BABCOCK: It was a catch-all.

14 HONORABLE STEPHEN YELENOSKY: Yes.

15 HONORABLE LEVI BENTON: So we were asked to
16 consider whether the bond amount in the JP courts, which
17 is double the amount of the judgment, is too high. And
18 there may be members of this committee who, like -- like
19 me, didn't really give any thought to what the
20 jurisdiction of a JP court was or is. It's now \$20,000,
21 so a JP could issue a judgment of \$20,000, and read
22 literally, an appellant would have to post the bond of
23 \$40,000 in those circumstances, plus costs. And so our --
24 our answer to the question, is that too high, is "yes." I
25 don't know how my colleagues on the -- I can tell you how

1 I got there, but I can't tell you how others on the
2 subcommittee got there. The subcommittee is Stephen
3 Yelenosky, Professor Carlson, and Judge Es --

4 MR. ORSINGER: Estevez.

5 HONORABLE LEVI BENTON: Estevez, excuse me.
6 I get there because it's a lot of money, \$40,000. It's
7 just too much money for something out of the justice
8 court. The Court asked or the committee asked us -- or
9 the Court asked us to consider other changes, and the
10 majority of the committee concluded that the JP courts
11 ought to just use TRAP 24.2, try not to have a separate
12 rule for the JP courts. I'll pause there. I know Judge
13 Yelenosky probably has --

14 HONORABLE STEPHEN YELENOSKY: You must have
15 eyes in the back of your head.

16 CHAIRMAN BABCOCK: Yeah, he's had his hand
17 up since you began.

18 HONORABLE STEPHEN YELENOSKY: All over
19 again. I don't -- were you done?

20 HONORABLE LEVI BENTON: Yes, sir.

21 HONORABLE STEPHEN YELENOSKY: Okay. Well, I
22 didn't dissent because I don't really know the answer to
23 this, but -- and part of it, really, I guess, would be the
24 Legislature. What is the purpose of JP court? We start
25 from there and then I say, well, are we trying to get

1 things to end in JP court? Is that where we want it to
2 stop? It seems like, because it's cheaper and people can
3 use that without a lawyer, so why -- why should we make it
4 something where it's easier to appeal, if the purposes are
5 to get things done in JP court and the jurisdiction is so
6 high that people find it necessary to go to county court,
7 then it seems to me that the jurisdiction is too high,
8 which we can't do anything about.

9 But it seems the opposite of what we ought
10 to be doing if we're trying to get things -- I mean, to
11 lower it is the opposite of what we should be doing to
12 have a finality in the JP court because then it is easier
13 to appeal, and I don't know why we want things to happen
14 in the JP court and then de novo done in county court, and
15 so if that's the result of a high jurisdiction, you know,
16 I think the bond, I'll state, is high to discourage that.
17 Maybe the Legislature needs to lower the jurisdictional
18 amount, but I don't think the goal is to increase the
19 ability to get another hearing in county court.

20 CHAIRMAN BABCOCK: Thank you. Anybody else
21 have comments? Yeah, John.

22 MR. WARREN: From a -- you mentioned de novo
23 at the county courts, and that brings me in, so what
24 happens with, like, say, the eviction cases that we will
25 be getting at some point when that relief is over, so we

1 have to take that into consideration and the economic
2 position of those individuals who actually go to for
3 relief in the JP courts.

4 CHAIRMAN BABCOCK: Yeah. Who's got the --
5 Kent? No.

6 HONORABLE LEVI BENTON: Who's got what?

7 CHAIRMAN BABCOCK: Who's got the contrary?
8 You said one member of your subcommittee.

9 HONORABLE LEVI BENTON: Yeah, it was Judge
10 Yelenosky.

11 CHAIRMAN BABCOCK: Okay.

12 HONORABLE LEVI BENTON: And so his viewpoint
13 is let's have finality, let's not necessarily have two
14 bites at the apple, but the other side of it is was there
15 ever really a bite at the apple, and let me explain what I
16 mean by that. I don't -- I have to be very careful with
17 what I'm about to say, we're on a public record. I didn't
18 know this until I got into this project, but as we sit
19 here today only nine percent of JPs across the state have
20 any amount of legal training. So one has to ask have they
21 really had in most cases a bite at the apple, and so I
22 favor lowering the bond requirement so that there is some
23 substantive chance to have a bite at the apple and to pay
24 a fee to John Warren.

25 CHAIRMAN BABCOCK: Judge Yelenosky, you had

1 your hand up.

2 HONORABLE STEPHEN YELENOSKY: Well, my
3 response to that is, well, get rid of JP courts then.
4 What are they for? What is small claims court?

5 HONORABLE LEVI BENTON: Okay. I could go
6 there, too, but that wasn't the question asked.

7 MR. ORSINGER: That goes beyond the scope of
8 the assignment.

9 HONORABLE STEPHEN YELENOSKY: Well, what's
10 the purpose of small claims if it's not to be there to be
11 used by people who can't go to county court, either for
12 eviction, at least initially, or you know, they've got
13 some claim like, you know, some warranty wasn't complied
14 with, something like that. What is the purpose of small
15 claims court if you don't think it's a bite at the apple;
16 and if you think, well, it's okay for some things to be a
17 bite, but only that bite at the apple, because that's all
18 people are going to get, then lower the jurisdictional
19 amount.

20 CHAIRMAN BABCOCK: Yeah. John.

21 MR. WARREN: I was just going to say in
22 addition -- well, my recommendation is that you set the
23 bound amount at a percentage of the value of the case, and
24 so if you have a -- if it's \$1,500 in controversy, you
25 make the bond amount maybe 40 or 50 percent of the value

1 of the case.

2 CHAIRMAN BABCOCK: Okay. Professor Hoffman.

3 PROFESSOR HOFFMAN: Stephen, can you talk
4 real quick --

5 CHAIRMAN BABCOCK: You've got to speak up.

6 PROFESSOR HOFFMAN: Sorry. Why not use --
7 why not use the 24.2 TRAP provision? In other words, even
8 if everything you say is right, why treat -- why require
9 double the amount of the award from a JP case?

10 HONORABLE STEPHEN YELENOSKY: Well, because
11 you're going de novo in the county court is the main
12 reason. You're not appealing -- you just had the trial.
13 It's not of record, as Levi says, and but you're getting a
14 do over. Why should it be as easy to get a do over as to
15 do an appeal, which is going to be limited to various
16 points of error, but my question back to you is, well,
17 what is small claims court for? And how do you achieve
18 that goal.

19 CHAIRMAN BABCOCK: John.

20 MR. WARREN: I would like to add that in
21 some instances, just like in Dallas County, county courts
22 at law have the same jurisdiction as the district courts,
23 but that's not always the case in other counties, so --
24 around the state, so it's going to be kind of offset, but
25 I think it may be that we have to look at the -- just like

1 you have requirements for someone to be a judge. Perhaps
2 we should look at some level of requirements for JP, if
3 they're going to serve in that capacity.

4 CHAIRMAN BABCOCK: Yeah. Thank you. Shiva.

5 MS. ZAMEN: Professor Carlson has her hand
6 raised.

7 CHAIRMAN BABCOCK: Professor Carlson.

8 PROFESSOR CARLSON: Yeah, I just want to
9 remind the committee that JP courts are not courts of
10 record. They have their own set of procedural rules.
11 They are meant to be inexpensive, fairly quick proceedings
12 that don't cost a substantial amount of money, and most
13 times people represent themselves pro se, and I don't know
14 the number, but I suspect there aren't that many de novo
15 appeals.

16 HONORABLE STEPHEN YELENOSKY: Good.

17 MR. WARREN: That would depend on the
18 county.

19 CHAIRMAN BABCOCK: Yeah.

20 MR. WARREN: Urban counties it's high.

21 CHAIRMAN BABCOCK: Yeah, I don't know if you
22 heard that, Elaine, but John Warren said that in urban
23 counties there are a high number of appeals. Justice
24 Christopher.

25 HONORABLE TRACY CHRISTOPHER: Well, it does

1 seem to me to be a little unfair to require a plaintiff to
2 only pay a 500-dollar bond to get a trial de novo versus
3 the defendant has to do twice the judgment. So I would
4 suggest we should lower the defendant's and increase the
5 plaintiff's, if we want --

6 CHAIRMAN BABCOCK: Parody.

7 HONORABLE TRACY CHRISTOPHER: -- to have a
8 sort of a level playing field between the two sides.

9 CHAIRMAN BABCOCK: So you would -- you
10 wouldn't go for the TRAP Rule 24.2. You would just write
11 in there each have 500 or 750.

12 HONORABLE TRACY CHRISTOPHER: Right, too
13 complicated. 24.2 is too complicated.

14 CHAIRMAN BABCOCK: Yeah. It struck me that
15 in JP court if you start getting into what somebody's net
16 worth is and having to decide all of that, that you sort
17 of are contrary to the idea of JP court. But so you would
18 just have a set number for --

19 HONORABLE TRACY CHRISTOPHER: I would kind
20 of have it the same on both sides. I mean, because it
21 doesn't seem right to me that the plaintiff gets a de novo
22 trial for \$500 bond and the defendant has to pay twice the
23 judgment for a de novo trial. I mean --

24 CHAIRMAN BABCOCK: Yeah.

25 HONORABLE TRACY CHRISTOPHER: It doesn't

1 seem right.

2 CHAIRMAN BABCOCK: Yeah, the plaintiff's
3 side of it I guess would be, well, I've won and I'm going
4 to win on appeal, and this guy's going to, you know,
5 disappear, and there's not going to be any bond that will
6 satisfy, you know, the judgment that I'm ultimately going
7 to get.

8 HONORABLE TRACY CHRISTOPHER: And the
9 defendant's side is this is a frivolous lawsuit that
10 should never have been brought, and now I have to try it
11 again.

12 CHAIRMAN BABCOCK: Yeah. Yeah, Robert.

13 MR. LEVY: I -- I think that if we went with
14 your approach, Judge Christopher, we're going to basically
15 destroy the -- the use and value of the JP small claims
16 court because the defendant will never pay a judgment.
17 They'll just pay the \$500 and just try to wait out the
18 plaintiff, and the whole idea is to have an inexpensive
19 disposition. I'm not saying that the issue about the
20 plaintiff paying \$500 is -- is right in that context, but
21 I don't think we want to void a defendant paying a bond.
22 I do think one difference would be that the \$500 is gone,
23 the plaintiff pays that, they don't get it back unless
24 they get costs; whereas the defendant's bond does -- would
25 apply against a future judgment in the county court case.

1 CHAIRMAN BABCOCK: Okay. Any other comments
2 about this proposal? Yeah, Kent.

3 HONORABLE KENT SULLIVAN: I'll give my two
4 cents.

5 CHAIRMAN BABCOCK: You've got to speak up
6 because Dee Dee can't hear you.

7 HONORABLE KENT SULLIVAN: For what it's
8 worth, I agree with Tracy. I think that this is not a
9 court of record. It's not presided over by an officer
10 that has judicial training. If a plaintiff is serious, to
11 the point that was just made, you file the case in county
12 court. As a practical matter, I have heard people
13 describe JP court as legal mud wrestling. I, of course,
14 would never say such a thing, but I think that for cases
15 of any seriousness, it is at best an advisory type of
16 process, and a serious case will end up in county or
17 district court anyway. I think it is -- I think there is
18 a manifest unfairness to it, just as Justice Christopher
19 pointed out.

20 CHAIRMAN BABCOCK: Okay. Shiva, anybody
21 else got their hand up behind me?

22 MS. ZAMEN: Not currently.

23 CHAIRMAN BABCOCK: Okay. Well, if there are
24 no further comments, Levi, thank you for your work on
25 this. The Court will consider these comments and decide

1 what to do, if anything. So we'll move now to the --
2 these two evidence rules. Is Buddy -- is Buddy around?
3 Is he --

4 PROFESSOR HOFFMAN: He's not.

5 CHAIRMAN BABCOCK: Has anybody decided to --

6 PROFESSOR HOFFMAN: He's asked me to --

7 CHAIRMAN BABCOCK: There we go. Professor
8 Hoffman.

9 HONORABLE EMILY MISKEL: I'm sorry, can I
10 just add one thing to the prior discussion?

11 CHAIRMAN BABCOCK: Sure.

12 HONORABLE EMILY MISKEL: OCA does publish a
13 report of cases appealed from justice court.

14 CHAIRMAN BABCOCK: Uh-huh.

15 HONORABLE EMILY MISKEL: It took me a minute
16 to get to it. While it doesn't seem an excessively high
17 number, I just wanted to speak and add that data is
18 available in an easy-to-access way.

19 CHAIRMAN BABCOCK: Okay, great. Thank you.
20 Professor Hoffman, back to you.

21 PROFESSOR HOFFMAN: All right. So I am
22 filling in for Buddy Low, which are enormous shoes to
23 fill. I will do the best I can. So we are going to start
24 -- there are two different recommendations. Both of these
25 come from AREC, the Administration of Rules of Evidence

1 Subcommittee of the State Bar. The first deals with Texas
2 Rule of Evidence 404(b), so in the tabs that -- I'm going
3 to be kind of reciting out of -- the shortest summary is
4 Tab H, which is this November 11, 2021, memo.

5 So until 2020 the federal rule and the state
6 rule on 404(b) were identical, and then the federal rule
7 was amended, and the amendment adds additional notice
8 requirements on the prosecution in a criminal case. AREC
9 supports amending the state rule to track those federal
10 changes. Our subcommittee met, we discussed it, and we
11 were unanimous in agreeing with AREC that the rule should
12 be changed to mirror the federal rule changes. I will
13 flag just at the outset -- and we say this in the memo --
14 that since these rule changes are talking about criminal
15 cases, it raises questions about the extent to which the
16 Supreme Court may want to seek input either from the Court
17 of Criminal Appeals or from lawyers and lower court judges
18 who routinely handle criminal matters. We thought those
19 were beyond our pay grade, so we just leave those to one
20 side but flatten those.

21 All right. So why make the rule change?
22 Primarily, as AREC's memo makes clear, and if you want to
23 see AREC's memo, it is at the tab just above it, so that
24 is tab -- Tab G. You'll see under there that they detail
25 some of the federal changes from 2020. Primarily, the

1 prosecution has to identify evidence that it intends to
2 offer pursuant to the rule, and it has to do that in a
3 written notice form to the defendant in a timely manner.
4 And they also have to articulate what's referred to as a
5 nonpropensity purpose for which the evidence is offered.
6 And so I guess I could say more and walk through the rule.
7 If you want to see the rule changes you can see them.
8 This is in the PDF page 875 of 889, and you can see the
9 redlined version that would reflect the new Rule 404. So
10 that's probably a pretty reasonably succinct summary that
11 may get us started.

12 CHAIRMAN BABCOCK: Great. Thank you, Lonny.
13 Rusty I bet will have an idea about this.

14 PROFESSOR HOFFMAN: So maybe I ought to just
15 invite -- I don't know if there's anybody else on the
16 subcommittee that wants to say anything before we open it
17 up to the whole committee.

18 CHAIRMAN BABCOCK: Anybody on the
19 subcommittee have comments?

20 PROFESSOR HOFFMAN: Okay.

21 CHAIRMAN BABCOCK: All right. Rusty, you
22 still on?

23 MR. ORSINGER: Yes, he is.

24 CHAIRMAN BABCOCK: Are you still unmuted?

25 MR. HARDIN: There you go. It doesn't work

1 -- if I mute on my iPad, it doesn't seem to take care of
2 it with y'all, so, yeah, I -- look, I think this is
3 excellent, and I don't really have any observations or
4 corrections about it.

5 CHAIRMAN BABCOCK: Okay. Anybody else have
6 any thoughts about this? Do you see anybody on the
7 screen?

8 MS. ZAMEN: No.

9 CHAIRMAN BABCOCK: All right. Well then,
10 we're moving right along, aren't we?

11 PROFESSOR HOFFMAN: We are, yeah. All
12 right. So then that takes us to the other and last
13 evidentiary rule we considered. Again, it was a suggested
14 change from AREC, and this relates to Rule 601(b), which
15 we all probably know more affectionately as the dead man's
16 rule. So if you want -- there are sort of three things
17 you can look at. The one I'm going to start with is,
18 again, the memo, so this is, again, Tab H, but I'll just
19 mention there are two other things. There's an excerpt
20 from Steven Goode's outstanding treatise on evidence that
21 relates specifically to a little of the history of the
22 dead man's rule, the statute, and then the rule. And then
23 there is also AREC's memo on this, which again is at
24 Tab G. So for those of you following along, I'm going to
25 start at Tab H again.

1 So under 601(b), again, we again summarize
2 the issue, but essentially what we're dealing with is we
3 have a rule that has been in existence for as long as it
4 has been critiqued. Or it has been critiqued as long as
5 it has been in existence, and although the Supreme Court
6 made a number of changes to the rule that helped
7 significantly, as Professor Goode notes, this sort of
8 fundamental sort of issue about whether to retain a rule
9 prohibiting someone from testifying about something that
10 someone said when that someone is deceased, remains a
11 potential problem, and so the -- I think AREC's
12 suggestions, which a majority of our subcommittee agreed
13 with, are that, number one, the rule has been problematic,
14 because it is written confusingly, because it can be
15 applied in many ways that the work around is easy. All
16 you need is to come up with some corroboration. Any
17 evidence to corroborate what the deceased said is enough
18 to get around the dead man's rule, and so it creates the
19 problems.

20 And then, finally, we have the issue of or
21 the critique of it being unnecessary because even if the
22 rule is abolished other existing admissibility rules
23 apply, most especially hearsay and the statute of frauds.
24 Only a minority of states still maintain the rule, and so
25 AREC recommends repealing the rule entirely. Most of the

1 subcommittee on this group that looked at it fully
2 supported AREC's proposal to repeal the rule. Two of the
3 subcommittee members suggested amending the rule, though,
4 and then their suggested amendment appears below. So you
5 can see the rule in its existing form at page 883, and at
6 page 884, you'll see their proposed amendments to it from
7 the two members of our subcommittee. I will let perhaps
8 them or others talk about that rather than me trying to
9 summarize their thoughts on that. What else can I say?
10 Well, that's probably maybe enough, Chip, to get us
11 started.

12 CHAIRMAN BABCOCK: Yeah.

13 PROFESSOR HOFFMAN: So to summarize, the
14 majority of our committee favors AREC's recommendation to
15 repeal in its entirety 601(b). A minority of our group
16 would rather leave some version of the rule in, and I
17 guess maybe I'll sort of generally summarize to say that
18 their version of the amended rule would acknowledge that a
19 person is indeed competent to testify about oral
20 statements made by a testator, including someone who is
21 deceased, but the jury may need to be instructed that
22 they're the sole judges of the evidence and the weight to
23 be given and that they don't have to accept that testimony
24 as given, I guess is the way to say that.

25 CHAIRMAN BABCOCK: All right. Why don't we

1 do the same protocol, members of your subcommittee,
2 especially the two that --

3 PROFESSOR HOFFMAN: Yeah.

4 CHAIRMAN BABCOCK: -- have proposed this
5 language. Are they present?

6 HONORABLE LEVI BENTON: Only I am.

7 PROFESSOR HOFFMAN: One is.

8 HONORABLE LEVI BENTON: The other is Roger,
9 and he's not here, and I -- the instruction that -- in
10 fact, I don't know that Roger really felt strongly about
11 this, and you know, I don't -- I don't argue as
12 strenuously about this as I will 76a. It speaks for
13 itself.

14 CHAIRMAN BABCOCK: Well, then let's talk
15 about 76a again.

16 HONORABLE LEVI BENTON: Yeah. I don't have
17 anything to add to what's in the report, Chip.

18 CHAIRMAN BABCOCK: Okay. Any other thoughts
19 about -- Richard Orsinger.

20 MR. ORSINGER: I'd like to ask Professor
21 Hoffman, if he knows, has the dead man's statute been
22 revoked kind of around the United States of America, or
23 does it seem to be prevalent?

24 PROFESSOR HOFFMAN: So I will give you
25 and -- so I'm getting this -- I didn't do any independent

1 research of this, but I'm getting this from AREC's memo,
2 so this is at Tab G. So the answer to Richard Orsinger's
3 question, I'm getting it from the same place, if you want
4 to look at it you can see, but it looks like a majority of
5 the states, the vast majority, have gotten rid of any
6 version of either the dead man's statute or the dead man's
7 rule. There is -- there is one state, I think it was
8 Colorado, that when they revisited it not long ago
9 actually revised it and kept it on its books, but that was
10 sort of the outlier from it. Yes, we are not alone in
11 keeping it, but we appear to be in the minority in that
12 regard. That's how I took it in their summary.

13 CHAIRMAN BABCOCK: Other comments?
14 Questions?

15 MR. RINEY: Chip?

16 CHAIRMAN BABCOCK: Yes, Tom.

17 MR. RINEY: I recently did a little research
18 on the dead man's statute for the first time in decades.
19 I was defending a will contest, and you know, typical
20 grounds, mental competency --

21 CHAIRMAN BABCOCK: Right.

22 MR. RINEY: -- and undue influence, and the
23 law is very unclear right now. I thought I could get past
24 hearsay for obvious reasons, but then there's some cases
25 out there to suggest that maybe the dead man's statute is

1 a problem. So there's a lack of clarity and seems to be
2 some unfairness in certain situations, so I think it's
3 really a good idea to just abolish the rule.

4 CHAIRMAN BABCOCK: Just abolish the rule?

5 MR. RINEY: Yes.

6 CHAIRMAN BABCOCK: Okay.

7 PROFESSOR HOFFMAN: And I guess I can add
8 just a little more to Richard's -- in response to
9 Richard's comment. The ALI back in 1942 eliminated the
10 rule in its model code of evidence. I'll add the federal
11 rules, of course, don't incorporate any version of the
12 dead man's rule, and, again, as I say, AREC's memo kind of
13 summarizes the states that have kept it. The states that
14 are in the minority that have retained it are Missouri,
15 New York, Pennsylvania, and South Carolina.

16 CHAIRMAN BABCOCK: Say that again, I'm
17 sorry.

18 PROFESSOR HOFFMAN: Sorry. So AREC's memo
19 lists four states as retaining some version of the rule in
20 addition to Texas, as New York, Missouri, Pennsylvania,
21 and South Carolina.

22 CHAIRMAN BABCOCK: Okay. Except for us, all
23 east of the Mississippi. Maybe not Missouri.

24 MR. ORSINGER: Missouri.

25 CHAIRMAN BABCOCK: Is Missouri west of the

1 Mississippi?

2 MR. ORSINGER: Yeah.

3 CHAIRMAN BABCOCK: Okay. Then we're two and
4 two. Two and three. Okay. Any other comments about this
5 rule? Okay. Well, thank you. Thank you, Lonny, for
6 pinch hitting for Buddy, and we are at the end of our
7 agenda. See, they said it couldn't be done, and not only
8 that, we did it early. So I hope everybody has a good
9 rest of the day, and I'll see some of you at the
10 investiture of Justice Huddle and then hopefully at our
11 next meeting, which will be when and where?

12 MS. ZAMEN: It's going to be at the TAB.

13 CHAIRMAN BABCOCK: It's going to be at the
14 TAB.

15 MS. ZAMEN: Yes. And I believe it's
16 February --

17 HONORABLE LEVI BENTON: Tab A or Tab B.

18 CHAIRMAN BABCOCK: The Texas Association of
19 Broadcasters.

20 MS. ZAMEN: February 4th.

21 CHAIRMAN BABCOCK: February 4th. And we'll
22 try to get our agenda out in a timely fashion, and thank
23 you all for being here, both on Zoom and in person. So we
24 will be adjourned. Thank you. Sir?

25 HONORABLE LEVI BENTON: Before we adjourn, I

1 was reminded before we started today that this meeting
2 customarily had been our big ideas meeting.

3 CHAIRMAN BABCOCK: No. It's only -- it's
4 every other year.

5 HONORABLE LEVI BENTON: I'm sorry?

6 CHAIRMAN BABCOCK: Our deep thoughts meeting
7 is every other year right before the Legislature.

8 HONORABLE LEVI BENTON: Okay. I stand
9 corrected.

10 HONORABLE STEPHEN YELENOSKY: Hold those
11 deep thoughts.

12 HONORABLE ANA ESTEVEZ: We have another year
13 before we have to think.

14 CHAIRMAN BABCOCK: Yeah.

15 MR. ORSINGER: We had a lot of deep
16 thoughts.

17 (Adjourned)

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REPORTER'S CERTIFICATION
MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

* * * * *

I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 10th day of December, 2021, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are \$ 813.75.

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