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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

MARCH 25, 2022

(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 25th day of March,
2022, between the hours of 9:00 a.m. and 2:07 p.m., at the
St. Mary's School of Law, 1 Camino Santa Maria, San
Antonio, Texas 78228.

INDEX OF VOTES

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

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Remote Proceedings Rules	33620
TRCP Rule 162	33677
TRCP Rule 162	33677

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2 CHAIRMAN BABCOCK: All right. Let's come to
3 order here. We're at the just beautiful, lovely,
4 marvelous St. Mary's law campus, St. Mary's University,
5 but the law school.

6 MS. BARON: No one can hear the room, right?

7 CHAIRMAN BABCOCK: Excuse me? How about
8 this, Alistair, can you hear me now?

9 MR. DAWSON: I can, Chip.

10 CHAIRMAN BABCOCK: All right. Well, just
11 finishing up comments about you, but we'll --

12 MR. DAWSON: It wouldn't take very long,
13 Chip.

14 CHAIRMAN BABCOCK: You can read the record.
15 I was saying that we are -- we are here at the just
16 spectacular St. Mary's University Law School, and the room
17 that -- that the school has provided us is just
18 indescribable. It's -- it's so great. Great improvement
19 over our past meeting spots, no disrespect to those
20 places, but in any event, the dean of the law school, Dean
21 Roberts, is here, and she is going to make a few remarks
22 to us. So Dean.

23 DEAN ROBERTS: Thank you so much. Thank you
24 to the chair, the Chief Justice, and to all of you who are
25 here. We're so grateful that you considered coming to

1 St. Mary's. The work that you do is so important, and to
2 think that we are playing even a tiny role in hosting you
3 is really a privilege for us. It's great for me, as a
4 pandemic dean who started June 1st, 2020, and have seen
5 some of you by Zoom, but I'm only seeing many of you in
6 person for the very first time today, to have you here
7 especially. I bring greetings from our president, who
8 would be here welcoming you himself, but he is welcoming
9 our board of trustees who is here, because tonight is our
10 defining moment campaign celebration. We're concluding a
11 \$150 million campaign, and I have it on good authority a
12 surprise announcement of exceeding that goal will be made
13 tonight, so it's a big day, but he wanted you to know that
14 he welcomes you also.

15 We have amazing students here, absolutely
16 incredible students. We're a minority serving
17 institution, a Hispanic serving institution, with a
18 majority of Hispanic students. I am impressed by these
19 students everyday. In fact, you'll notice if you've read
20 some of our social media, that our mock trial team has
21 just won regionals. That means they beat some of the big
22 boys and girls here in Texas, and outside of Texas, and
23 they'll be going to nationals, and we're really excited
24 about that. Our applications are also up an incredible
25 amount. We're already 500 applications over where we were

1 last year, which is a 25 percent increase, much of it due
2 to the online J.D. that we'll be starting in the fall.
3 You-all may have read about the fact that there are a
4 dozen hybrid programs at law schools across the country,
5 but we are the very first ABA-accredited entirely online
6 curricular J.D. program, and we're fortunate to have
7 that -- the privilege to be the first to have a pilot
8 program for the next five years, with 25 students. We
9 don't in any way expect that J.D. education will be moving
10 online, but we have a lot of experience in this space with
11 our L.O.M. and our graduate law programs, and so we'll be
12 doing significant data assessment and having very
13 carefully curated and taught courses so that we can see
14 throughout the four years of this part-time program how
15 these students do relative to in-person J.D. students.
16 Ultimately we started the program because we want to
17 increase access to the profession, access to legal
18 education.

19 As we've all seen and you are making rules
20 about, having remote options can certainly increase the
21 ability for others to access things they couldn't
22 previously access. So we're excited about that. We'll
23 keep you posted. We're so very fortunate to have an
24 advanced-thinking, forward-looking Texas Supreme Court,
25 because without them saying that these students could take

1 the bar exam, yikes, that would be a problem. Same thing
2 for our Texas Board of Law Examiners, so if anybody wants
3 to learn more about that, I would be delighted to let you
4 know privately. Reach out to me any time, and we really
5 are happy to have you here, and if you'll come back to
6 this beautiful room, I promise you a reception where you
7 can meet some of those amazing students, but thank you
8 very much.

9 CHAIRMAN BABCOCK: Thank you, Dean. Thank
10 you so much.

11 DEAN ROBERTS: Oh, I should say one more
12 thing. We're not afraid of the community, nor are we
13 worried the walking dead is going to come. The fences
14 everywhere are not usually here. So people of San
15 Antonio -- who's from San Antonio? Okay. So you-all have
16 been telling me about Fiesta. Yeah, it's so great, we
17 have Fiesta. Well, I have been here almost two years, no
18 Fiesta. This year there's going to be a Fiesta, and we
19 have the kick-off event at St. Mary's every year
20 apparently when there's not a global pandemic, and it's
21 Oyster Bake, and it is next weekend, and they have 70,000
22 people that come to this campus, and so that's why you see
23 fences everywhere. But thank you again for -- for
24 blessing us with your presence.

25 CHAIRMAN BABCOCK: Thank you, Dean, and

1 thanks once again from us to you for allowing us to use
2 this space. It's going to be great. And so now we'll
3 turn to our agenda. And as usual, we will watch Alistair
4 eating something on a giant screen. That is a visual that
5 I will carry with me forever. In lieu of that, Chief
6 Justice Hecht will give us his comments.

7 HONORABLE NATHAN HECHT: Well, let me just
8 pick up on where the Dean left off and say it really is a
9 remarkable thing. There's 237 law schools in the United
10 States, and this one is the only accredited online
11 program, and it really is visionary, but it wouldn't be
12 accredited except that the school could demonstrate
13 accountability in the instruction and measure it, to be
14 sure that it's actually taking place, and there are a lot
15 of other law schools in the United States who want to do
16 this, so they're all watching very carefully what
17 St. Mary's is doing. And then as an aside, I was just
18 mentioning this to the Dean a minute ago, you probably
19 know that North Texas got finally fully accredited a
20 couple or three weeks ago, and again, that's another
21 testament to the determination of that school and Texas
22 legal education generally to think outside the box and
23 reach students that couldn't go to law school otherwise
24 and train them to -- many of them to be lawyers in the
25 public sector and for public service, so we really

1 congratulate the North Texas school on that, too.

2 And then just a couple of other things. I
3 introduce you to our new paralegal at the Court,
4 Vernis McGill, and she just started a few days ago, and
5 has been working 30 hours a day trying to get ready for
6 this meeting, and we told her that this is really an easy
7 meeting to go to, but she watched the broadcast of the
8 last meeting and she was not so sure. But anyway, we're
9 glad to have her, and she's already hard at work. She's
10 got a B.S. degree in criminal justice from Tarleton State
11 and a master's degree in legal studies from TSU. She's a
12 certified paralegal and also a certified mediator and has
13 worked for several years as a legal assistant in several
14 state agencies, so we're glad to have her.

15 We issued Emergency Order 49 a couple of
16 days ago, last Tuesday afternoon, and it just trims down
17 Emergency Order 47 a little bit, and I think the sense of
18 things right this minute is that Texas courts are pretty
19 much able to handle cases and dockets without needing to
20 suspend procedures and deadlines as they -- as we
21 authorized them to do at the beginning of the pandemic two
22 years ago. And I'm pleased to report that the -- many of
23 the courts in Texas are reducing their backlogs to almost
24 nothing. The juvenile courts are completely caught up.
25 The civil and family courts are just slightly behind, but

1 not remarkably. We do have some challenges in the
2 misdemeanor courts and big challenges in the felony
3 courts, just because of the difficulties that we've had in
4 convening juries the last two years, but some of -- judges
5 in some areas of the state, even in felony cases, are
6 pretty much dug out. Some areas of the state have a ways
7 to go, but everybody is working very hard to try to reduce
8 those as quickly as we can.

9 We also renewed the eviction diversion
10 program order, so I'll just brag about that one more time.
11 This was partly -- mostly Governor Abbott's idea back in
12 the fall, and he approached the Court about procedures to
13 make the program work and gave us \$4 million of federal
14 funding to kind of get started on it, and then a million
15 dollars extra for legal aid to help people in the program
16 navigate the system. It didn't work so well, because we
17 thought it was best to administer it locally, and that was
18 wrong. It's best to administer it from a state agency, so
19 when we changed that the second -- the first program was
20 really kind of a pilot. The real program then started and
21 was one of maybe two, three, best programs in the United
22 States. We gave away all the money. We did it
23 efficiently. We -- New Jersey and Texas were tied for
24 getting it done first, and then a couple of other states
25 were behind us. Some states did not give away hardly

1 anything, did not even use the funding for eviction
2 diversion, but we did, and then I and several others met
3 with the department of -- with the White House and the
4 treasury department to ask about getting the money that --
5 that was unused that the states didn't use, getting a
6 bigger share of that for Texas since we proved that we
7 could use it, and we just found out a week or 10 days ago
8 that that's happened, so we've got an extra \$47.8 million.

9 MS. DAUMERIE: Yes.

10 HONORABLE NATHAN HECHT: Or something like
11 that. So the diversion program was very successful in
12 Texas, and the emergency order just continues to allow
13 that to happen. And several counties got some residual
14 money as well, Harris County, Houston, Bexar County, I
15 think. So that's all been very helpful to our state.

16 We've got comments on the seizure rules that
17 you remember we spent a couple of meetings on and talked
18 about in depth, and they were put out for comment, and now
19 we have the comments back, and we're working through all
20 of those, and we expect to be able to issue the final
21 rules by May the 1st, which is the deadline that the
22 Legislature asked us to -- to try to honor. The -- we
23 changed the board of legal education rules slightly to
24 allow UBE transfers within -- anytime within the five
25 years after the score is received. So that -- that was a

1 little more technical than that before, so that's where
2 that is.

3 And this is not so much the committee's
4 work, but just so you'll know, the Legislature directed
5 that a bail reform system be put in place by April the
6 1st, and the Office of Court Administration has really
7 worked hard to make that happen, because it bet on a very
8 short time frame, and usually these things take a year and
9 a half or so, and this one's going to come in at probably
10 under seven months. It looked kind of bleak a few days
11 ago, but the latest report is that it's going to be almost
12 fully operational by April the 1st, at least all of the
13 pieces will be there. So we're very proud of OCA for
14 getting that done and hope it has a real effect in setting
15 bail across the state. So that's all I have, Chip.

16 CHAIRMAN BABCOCK: But other than that.

17 HONORABLE NATHAN HECHT: Other than that.

18 CHAIRMAN BABCOCK: Great. Justice Bland.

19 HONORABLE JANE BLAND: Other than that, the
20 Court just accepted our seventh certified question from
21 the Fifth Circuit this term.

22 CHAIRMAN BABCOCK: Curious aren't they?

23 HONORABLE JANE BLAND: And but we are --
24 through the Chief's deft encouragement, we're on track,
25 fingers crossed, to clear our docket at the end of the

1 term. That seventh case will argue in May, but other than
2 that, things are good.

3 CHAIRMAN BABCOCK: That's great, but thank
4 you. I'm just going to take a minute to -- to recount a
5 personal story, because it relates a little bit to our
6 first topic of remote proceedings, and that is that I
7 opened my mail a couple of weeks ago and found in it a
8 jury summons; and even though I could have claimed a
9 statutory exemption, I don't believe that people that make
10 their living at the courthouse should try to exempt
11 themselves from participating in the process, so I did not
12 claim my exemption, and I went down to the jury assembly
13 room, which has reopened now in Harris County, and it
14 looks marvelous by the way, Judge Schaffer, and was called
15 out on a case, and it was a -- what I thought was kind of
16 a large panel of 64, and I was number 61, so everybody
17 around here would say, oh, there's no chance you're going
18 to get reached, right? And they marched us through a
19 series of tunnels to the family law center, and they had
20 a -- two courtrooms with the -- with the divider in the
21 middle removed, so it was the size of literally two
22 courtrooms, and we were all located -- each juror was six
23 feet apart.

24 We had individual microphones on each chair,
25 and we also had headsets for each chair if anybody had

1 difficulty hearing. The acoustics were good, so there
2 wasn't any difficulty, but if you put the headsets on, you
3 could really hear, and then it turned out it was a felony
4 criminal case involving a defendant who was accused of
5 sexually abusing a minor. And the judge did a lengthy,
6 I'm going to say two-and-a-half hours, three-hour voir
7 dire of the panel, followed by a break, and then the
8 prosecutor did maybe half an hour, 45 minutes, and the
9 defense lawyer who did the same, and they did their
10 strikes.

11 Well, they went back and obviously I'm sure
12 there were some that were struck for cause, and there were
13 probably some that have hardships that were excused, and
14 they came back out and did their strikes, and I don't know
15 how many people have served as a juror, but there's always
16 this little anticipation that, you know, do I want to get
17 selected on a case like this, or do I not, and I was
18 fairly confident that I wouldn't be eligible, because I
19 was number 61. And they went through the numbers and they
20 got eleven people, and they were still in the, I think, in
21 the low 50's, and then they called juror number 60, the
22 guy sitting right next to me, and if they -- if they
23 hadn't selected him, I think both sides were out of
24 strikes, and if he hadn't gone, it would have been me.

25 So, but it was -- it took a day, but it was

1 a enlightening day for me as somebody who tries jury
2 cases. And it also demonstrated that even in a very
3 emotional and serious case, with a relatively large panel,
4 it can be done safely and expeditiously. So that's my
5 story, and thanks for letting me tell it.

6 HONORABLE ROBERT SCHAFFER: I'm surprised
7 they didn't pick one or two alternates, which would have
8 caused --

9 CHAIRMAN BABCOCK: Which would have
10 caused --

11 HONORABLE ROBERT SCHAFFER: Because I did, I
12 have. I have been picking one or two alternates
13 frequently.

14 CHAIRMAN BABCOCK: I was surprised about
15 that, too, but the judge said right off the bat, we're
16 going to have 12, and that's it, but yeah, I think they
17 would have caught me if there had been alternates.

18 HONORABLE DAVID PEEPLES: I'm surprised. I
19 thought you were going to say that you overheard the
20 lawyers say we want to get those jurors, those fine
21 looking jurors at the end, up front. We want a shuffle.

22 CHAIRMAN BABCOCK: That would have been
23 something. I'll tell you, there's only one person who was
24 really working to get off the jury. Everybody who's tried
25 cases knows how that goes, you know, his hand up all the

1 time. I had a personal experience, you know, where a
2 child, a 10-year-old child who lived across the street
3 from us and was my kid's best friend, was sexually
4 molested by a guy who was arrested, tried, convicted, and
5 sent to prison, serious thing; and, of course, I got all
6 the questions from everybody about, well, could you be
7 fair; and you know, it would have been -- if I had been
8 trying to get off the jury, I could have mealy-mouthed
9 around and said, "Well, I don't know." You know, but I
10 didn't think that would be an honest answer, so I said,
11 no, I could be fair, every case is different; and I think
12 that's how jurors should approach things; and it really,
13 really -- you don't need to put this phrase in.

14 (Off the record)

15 CHAIRMAN BABCOCK: When you see people
16 trying to get off juries just by raising their hand all
17 the time and saying things that, you know, stretch the
18 truth maybe. So anyway, that's my own personal views, not
19 the views of anybody else. But that's my thinking about
20 it, so any other -- any other thoughts about that? Other
21 than Judge Schaffer, I would be dead meat in your Court.

22 HONORABLE ROBERT SCHAFFER: Not a chance.
23 It would have been a fine in my Court.

24 CHAIRMAN BABCOCK: Justice Christopher, are
25 you leading the charge here or is Kennon?

1 HONORABLE TRACY CHRISTOPHER: Well, I think
2 Kennon is, but I have a point of personal privilege also,
3 which is actually germane to our remote proceedings. So I
4 went back and tried a case, a car wreck case in district
5 court, and car wreck cases are the bread and butter of
6 trials in district court and county court. You ask any
7 judge and they'll tell you that 75 percent of their trials
8 are car wreck cases, and it was a three-witness case. The
9 first was a plaintiff with an interpreter. The second was
10 a doctor through a Zoom video, and the final one was the
11 defendant by Zoom live. And the interesting thing about
12 that fact, worked out fine, we didn't have any technical
13 problems, the plaintiff's lawyer had not deposed the
14 defendant yet, so that was kind of interesting, because it
15 kind of tended to be a little bit more like a deposition
16 than a cross-examination, but he made some -- he made some
17 good points, but during voir dire, the defense attorney
18 asked, okay, "Well, my defendant, he's a college kid, he's
19 in Arizona, he's got an exam, so he's going to appear by
20 Zoom. Who will hold that against me?" Not a soul raised
21 their hand. Okay. So 44 jurors, not a soul raised their
22 hand. So I just want everybody to keep that in mind, that
23 people are used to this concept now. Okay. Now, with
24 that, we're going to send it to Kennon, who's going to
25 introduce Judge Chu, I believe.

1 MS. WOOTEN: Yes, thank you very much, Chief
2 Justice Christopher and everyone else. I will say just a
3 couple of things before turning the mic over to Judge Chu.
4 First, thanks for all of the feedback at the last meeting
5 that we had. It was a robust discussion and thought
6 provoking. We, as a subcommittee of the remote
7 proceedings task force working on the rules focused on
8 last time have met remotely and made good progress in
9 looking at the rules and potential revisions to them to
10 address concerns and comments during the last SCAC
11 meeting. One of the changes that we are working on is a
12 carve out for jury trials. So I wanted everybody to be
13 aware that work is in progress in the background. We
14 don't have revised proposals for discussion today. The
15 work is ongoing. I suspect that the discussions that
16 occur today will continue to impact the work and that we
17 will come back to you with revised proposals at the next
18 meeting.

19 With that, I will turn it over to Judge Chu,
20 who was -- is a member of the remote proceedings task
21 force and is also a member of the justice court working
22 group. So he has had his foot in both of those and has
23 been invaluable, I'm sure across the board, but I can
24 speak directly to the work that he's done with the remote
25 proceedings task force and say what he brings to the table

1 with his experience as a judge and as a litigant in the
2 background is excellent. Judge Chu, I'll turn it over to
3 you.

4 HONORABLE NICHOLAS CHU: Thanks, Kennon.
5 Hey, hi, everybody. My name is Nick Chu. I'm the justice
6 of the peace in Travis County for precinct five. So all
7 of y'all are not familiar with that, that's basically
8 downtown Austin, the capitol, what you traditionally think
9 of as central Austin. So my work, along with being a
10 chair of the justice court working group that's been on
11 for about two years now, focusing on JP issues as it
12 relates to the pandemic, a member of the remote
13 proceedings task force, and also a commissioner of the
14 Texas Access to Justice Commission, that's kind of shaped
15 -- I'm kind of like the utility man of these things to
16 kind of bring everything together, bring different levels
17 of -- of basically perspectives.

18 While being a judge, I was -- I presided
19 over the first criminal, fully remote virtual jury trial,
20 and what we have done here is initially when the working
21 group for the justice courts was tasked with creating
22 rules recommendations that they would go to the remote
23 proceedings task force and then eventually to y'all about
24 changes that would remove impediments to conduct remote
25 proceedings in justice courts. So all of y'all are

1 probably familiar with the Rule 500 series of the Rules of
2 Civil Procedure, are specific to justice courts and are
3 exclusive to -- in essence, those are the only rules that
4 by no other rules that the Rules of Civil Procedure apply
5 in justice court, unless expressly told in those rules.
6 And so our task was to look at essentially the 500 series.
7 Being a member of the remote proceedings task force, it
8 made sense instead of creating two separate drafts that
9 then would get combined at the remote proceedings meeting,
10 working with that group and basically combining forces to
11 create one consistent draft.

12 As you've seen, obviously the draft that's
13 in your packet today was the draft that was submitted at
14 the last meeting. As Kennon had said, there's going to be
15 a different draft based on feedback from the previous SCAC
16 meeting, but the goal of this is to try to be as
17 consistent as possible with the larger 21(b) rule and also
18 with the 500 series rules. The advantage to that is, one,
19 ease of understanding, so that when people have practice,
20 lawyers mainly, practice in county court, district court,
21 and they come to JP court, they expect the same rule and
22 the same application of that rule.

23 Also, it's a little bit easier in terms of
24 the expectations of the public. A lot of y'all don't have
25 experience practicing in JP court. JP court cases are

1 appealed de novo to county court, and so there can be a
2 little bit of a shock if you go to JP court, you do these
3 rules, and then all of the sudden the rules change on you
4 when you go up to county court. The remote proceedings
5 task force subcommittee consisted of Kennon as chair,
6 Judge Hoffman, Judge Miskel, Judge Phillips -- former
7 state representative and now current Judge Phillips, and
8 Nelson Mock with Rio Grande Legal Aid. If you look at
9 page 48 of your packet, let me see here again, there we
10 are.

11 If you look at 48 of the packet, as I've
12 said before, this does not -- this does not reflect what
13 the subcommittee is working on in terms of the draft right
14 now. There are a couple of things that are missing from
15 the feedback from the last SCAC meeting. Number one is we
16 anticipate that Rule 21d will mirror something similar to
17 that, or this rule would mirror 21d, but one is, as Kennon
18 said before, there's going to be a carve out in terms of
19 jury trials so that it requires the consent of the parties
20 to engage in a remote proceedings jury trial.

21 Second is you'll notice that the only big
22 substantive difference between this 500 series draft
23 proposal and the previous draft proposal of 21d is just
24 the definition of court proceedings. Under the 500
25 series, basically everything is defined that normally

1 wouldn't be defined, and that's so that pro se or
2 self-represented litigants when looking at the rules have
3 a clear understanding of what is what, and especially with
4 these legal terms of art. And as we've kind of discussed
5 in our working group, we realized that we mentioned court
6 proceedings a lot, but that never gets defined, and so
7 just to be consistent with defining everything in that 500
8 series, that's why there's a definition required in there
9 and then there's a renumbering of that.

10 To kind of frame this discussion, there's a
11 couple of things that I want to bring to light for folks
12 that are unfamiliar with JP practices. Their time and as
13 a baby lawyer, I know that this is -- JP court is usually
14 the place where baby lawyers get their start or a lot of
15 times where volunteer or pro bono work happens, but for
16 those unfamiliar, it's my belief that remote proceedings
17 are here to stay. Now, not in the sense of where we saw
18 in the early days of the pandemic where all 804 justices
19 of the peace in Texas were engaging in remote proceedings
20 almost exclusively for a few months or weeks during the
21 high watermark of the pandemic.

22 I think what will eventually happen is
23 what's happening now, is there's essentially two or
24 three -- or two groups that will break out. Out of the
25 804 JPs, there's going to be a section of JPs who just are

1 not interested in engaging remote proceedings either
2 because of a technology divide or because their wish to
3 only be in person. That's one group. I think a large
4 majority of folks -- and it's not a majority exclusively
5 for urban or highly technology areas, but also rural
6 areas, too, I think will engage in a hybrid model, in
7 terms of they'll probably have some dockets that are in
8 person and some dockets, what I call the short settings,
9 that will probably be virtual. An example of that are
10 pretty much debt claim cases, motions on summary
11 disposition or other hearing types. Bench trials that are
12 pretty open and shut, maybe based on a couple of
13 documents, not necessarily complicated bench trials.

14 And then truth be told, after trying so many
15 virtual jury trials, in my personal experience, I've seen
16 the transcript from SCAC from the last meeting about
17 talking about jury trials and the fear that judges will go
18 to 100 percent remote proceedings or have a bunch of
19 remote jury trials post-pandemic. One, I think that, you
20 know, just knowing the personality types of all trial
21 court judges, not just JPs, but district court and county
22 court judges, those are folks that enjoy talking to
23 people, enjoy that in-person part, and have that
24 experience in the courtroom, so I don't think there's
25 going to be a single judge out there that gets elected or

1 gets appointed and says, "You know what, I want to
2 transfer all of my cases to 100 percent virtual." That
3 just is something that we haven't seen, and I know even in
4 Travis County, which I think we've probably been the most
5 cautious in terms of still being virtual for a while,
6 there's still some in-person proceedings there. I don't
7 know of any court now that does exclusive virtual
8 proceedings at this point.

9 So, again, it's that trying these remote
10 proceedings, jury trials, takes a lot of effort, takes a
11 lot of resources. Practically speaking, if there isn't a
12 need to do that because of a pandemic, they probably won't
13 happen a lot of times, if not ever. The only times where
14 I could see that it happens in justice court in the future
15 post-pandemic will probably be an emergency basis.
16 Situations such as, you know, whether a natural disaster
17 or a fire at the courthouse or something like that that
18 disabled the ability for the Court to meet in person.
19 That gives the JPs an option, especially those -- well,
20 basically the ones that have that infrastructure in place
21 to switch to the virtual option for things that are
22 specific, that can't be delayed.

23 There are a handful of cases that JPs handle
24 that meet strict requirements, similar to CPS cases.
25 Eviction cases, we have to get those tried within 21 days

1 of the filing of the petition, and then there's some more
2 dangerous cases or cases that the committee has interest
3 in resolving quickly, and these are cases -- cases
4 involving evictions due to domestic violence situations,
5 things like that. So those will probably be situations
6 that, yes, we're on a strict time line, and we would like
7 to get this tried. If we can't physically do that, this
8 would be an option that's available as kind of a safety
9 valve.

10 That's kind of where we are in terms of
11 thinking in terms of this, that the virtual option, I just
12 want to hearken facts to is that what we've seen in
13 justice court proceedings specifically is, one, increase
14 in access to justice. Folks are showing up at a higher
15 rate than normal. I think some of that is attributed to
16 the ability of people not having to take off work for a
17 half day or a full day, but rather can sign on, do what
18 they need to, whether it's a 10-minute court setting or a
19 couple of hour court setting, and without much
20 inconvenience to their lives.

21 Second is we've kind of also seen an
22 increase in court efficiency. Now, instead of, you know,
23 we have a set number of cases showing up here, we can have
24 one judge dedicated in one room in a physical space to
25 call a docket. Then there could be another judge, sitting

1 as a visiting judge for that same judge, enter into a
2 virtual space and call another docket. That's essentially
3 a force multiplier in justice court proceedings. In the
4 past, we were limited to one, the number of judges we
5 could get on the bench, and two is the number of physical
6 spaces that we could use. And so that takes out some of
7 that physical space requirement in the equation and helps
8 us resolve cases in a quicker manner, which was kind of
9 the expectation of what justice court is all about. And
10 then the last thing is that I think it increases
11 procedural justice in justice court. The procedural
12 justice in the sense that the litigants feeling that
13 they've been heard, that they've -- that that court case
14 got resolved, and whether they lost or won, it was
15 resolved appropriately.

16 A lot of times, back prepandemic, in cases
17 where the setting only took about less than 30 minutes,
18 well, that person probably spent a good hour, hour and a
19 half, trying to get to my courthouse in downtown Austin,
20 trying to find parking or driving to the other side of the
21 county in a lot of these rural areas to get to their
22 setting. And then once that case is heard, you know, they
23 think to themselves, I came here for a 10-minute deal, and
24 what did I -- I feel like I didn't get heard, but what
25 we've seen from the National Center of State Court studies

1 and other studies that have looked at this is that
2 procedural justice are people who feel like they've been
3 heard that are at least in some of these remote
4 proceedings, and that's -- that's always a positive.

5 Also, we have seen an increase in the access
6 to volunteer legal services or pro bono lawyers engaging
7 in justice court cases. An example that I'll give is in
8 my court, traditionally what's happened is that on
9 eviction cases, Volunteer Legal Services of Central Texas,
10 a group here based in Austin of lawyers who volunteer
11 their time, they go to a clinic, get screened, and then
12 they would show up in court. And, you know, that's pretty
13 tough. That means litigators from big law firms or solo
14 practitioners would have to take the time and schedule out
15 essentially a day or half a day of their time to
16 physically come to downtown Austin to take one or two pro
17 bono cases on that docket.

18 Now, what's happened is we are able to bring
19 the lawyers into a virtual setting, have them screen
20 people that show up to court right there. A lot of times
21 in eviction cases it's not a situation where tenants will
22 show up with a lawyer, because they've been practiced that
23 essentially the first interaction that they have with the
24 court or preparing for court is showing up for -- for an
25 eviction docket. And so when they show up, they get

1 screened. We have a lot more attorneys participating now
2 in these programs, because, frankly, it's a little bit
3 easier. It's couple of hours, you do it by Zoom, you're
4 in your office, you can still -- you need to bill your
5 clients afterwards without having to take that whole day
6 off.

7 So, you know, there's a lot of advantages to
8 remote proceedings. I'm not going to couch it in terms of
9 this is why it's going to happen all the time or anything
10 like that, but it does allow for another option for these
11 justice courts specifically to engage in outside of the
12 box thinking, to get more involved with our legal
13 community, and to actually help our community as well. So
14 with that, I'm happy to answer any questions or discuss
15 further the JP rule proposal.

16 CHAIRMAN BABCOCK: Judge, this is Chip
17 Babcock. I don't know if you can see me. I have a
18 question, then Justice Christopher has one. You said that
19 you thought the JPs fell into three categories, one, those
20 that prefer to continue to do things in person; two, a
21 hybrid, which would be some in-person, some remote; and
22 then the third category, 100 percent virtual. Number one,
23 did I write down your categories correctly?

24 HONORABLE NICHOLAS CHU: You know, I think I
25 articulated that wrong. It's three categories that exist,

1 but I think that third category of 100 percent virtual
2 just will not exist in the real world. It doesn't exist
3 right now in justice courts, but I would categorize those
4 three options or those three possibilities as one way it
5 exists, I don't know, as possibilities, but that third one
6 of 100 percent court that's virtual isn't going to be seen
7 when we actually apply it in the real world.

8 CHAIRMAN BABCOCK: All right. Great. And
9 has there been any survey or discussion on -- with all the
10 JPs about which bucket they fall into, whether it's all
11 in-person, hybrid, or, I guess, very few would be
12 virtually 100 percent virtual?

13 HONORABLE NICHOLAS CHU: Yeah, so I -- I'm
14 the vice-chair of the legislative committee for the JP and
15 constables association. We represent the -- the JPs all
16 throughout the state. Talking to the Justice Court
17 Training Center that's in charge of training all 804 JPs,
18 talking to the association and my colleagues through all
19 of these areas, meaning it seems that, you know,
20 there's -- there's some group of folks that -- that say,
21 hey, you know, I'm just going to go back to in-person 100
22 percent. That's usually dictated by resource availability
23 or whether, one, their court or their community lacks
24 significant infrastructure for broadband access, for
25 example, or they're just not familiar with the technology

1 or the county doesn't give them the appropriate technology
2 to provide fair access to justice to those who cannot --
3 people who don't have computers, for example, that
4 participate remotely, but I think the vast majority -- and
5 you have to realize that JPs just aren't judges in the
6 vast majority of places.

7 We are also -- except for the urban
8 counties, who have medical examiners, we are also the guy
9 who goes to a death inquest, the person who shows up at a
10 traffic accident and that says that this body is dead and
11 here's good cause, the manner and means, and we do that on
12 a regular basis. We also magistrate at the jails, so if
13 you get arrested in a lot of counties, especially the
14 rural ones, every day there is a JP at the jail reading
15 people their rights and setting bonds. And so what I have
16 seen from -- from JPs is they love using a remote
17 proceeding as an option for a situation like magistration
18 or at times when, you know, they may have to go out to a
19 death inquest on the other side of the county and they
20 still want to hold that docket or they still need to hold
21 a hearing, but they are still out. It's going to be a
22 while back to get there, but they can do that hearing in a
23 remote hot spot or another county building, and so it's
24 just another tool for them, and I think that's where the
25 majority of those fall into. That's not just rural or not

1 just urban or suburban. It's pretty diverse in terms of
2 the judges that want that to happen.

3 CHAIRMAN BABCOCK: I think you've answered
4 my question, but I was going to ask and be sure I
5 understood correctly. Of the three buckets, it sounds
6 like you believe the vast majority are in that second
7 category of hybrid, some remote, some in-person
8 proceedings. Would that be fair?

9 HONORABLE NICHOLAS CHU: Yes, sir. And it's
10 also important to note that when we talk about remote
11 proceedings, that may not have -- that may not necessarily
12 be folks that are 100 percent virtual. Maybe similar to
13 this SCAC meeting, for example, where a vast majority of
14 participants are there in person, but maybe one person,
15 like Justice Christopher was saying earlier, was
16 testifying remotely or one person is participating
17 remotely, because, you know, in a lot of these places, for
18 example, I represent downtown Austin, which also includes
19 UT. There are times when somebody gets sued who is a
20 college kid, and they're now living somewhere else, and
21 quite frankly, coming down in person to downtown Austin
22 just to handle a small claims case may not be economically
23 advantageous for them or make sense for them, but for
24 showing up remotely may. So that's kind of where we will
25 probably see both participate in some kind of hybrid model

1 as opposed to just 100 percent virtual or 100 percent in
2 person.

3 CHAIRMAN BABCOCK: Great. Final question.
4 You said that because of your position with the
5 legislative committee for the 804 JPs in the country, this
6 is -- you're not just telling us anecdotal information.
7 Your group has actually in some sense maybe loosely
8 surveyed the JPs across the state to see how they would
9 like to move forward. Is that right or not?

10 HONORABLE NICHOLAS CHU: Yeah. Essentially
11 we've checked on it, and most of that has happened
12 through -- through when we were discussing this at the
13 Legislature, but, you know, this is always a hot button
14 topic at conferences and things like that and through
15 discussion, so that's kind of been -- also, I don't
16 think -- I don't think there has been a necessarily like a
17 survey, like we sent out a Survey Monkey link, and we have
18 like X percent or things like that. These are more, you
19 know, discussions at conferences and hand raisings and
20 things like that at conference -- or our annual conference
21 and things like that.

22 CHAIRMAN BABCOCK: Great. So you sort of
23 have an informed sense of what the JPs want to do going
24 forward?

25 HONORABLE NICHOLAS CHU: Yes, sir.

1 CHAIRMAN BABCOCK: Justice Christopher.

2 HONORABLE TRACY CHRISTOPHER: So, Judge, my
3 question to you is, I understand your desire to have this
4 rule, you know, mirror the civil procedure rule, but you
5 still want to have the option of a remote jury trial in JP
6 court or not? Because I know this group is -- is in
7 strong disagreement for that, and I don't think that that
8 rule would get passed with respect to county or district
9 court cases, but so I want to know your opinion on remote
10 jury trials in JP court.

11 HONORABLE NICHOLAS CHU: You know, I think
12 it's one of those things that it would be a nice tool to
13 have in the perfect world, if Nick Chu got to decide what
14 the rule was, I think that it would be nice to have this
15 just as an option that rarely ever gets used, but in the
16 grand scheme of things, I think it's probably better to
17 have consistency among all courts, district, county, and
18 JP court as to what to expect in terms of launching
19 objections, the standard review to allow for virtual
20 proceedings or to allow for in-person proceedings, and
21 then what tools are available. So in short, I would say
22 if it gets cut out of 21(b), the jury trial provision, it
23 probably for consistency sake will probably be best to cut
24 it out of the JP rules. I think from the work that our
25 subcommittee has been doing, just to kind of preview this,

1 is that is going to be a level of allowing for folks that
2 we would have to have complete agreement with some parties
3 and litigants to proceed with their virtual jury trial,
4 and so my thought was hopefully that that would alleviate
5 those concerns that I read about in the transcript from
6 last meeting, but obviously that may be a philosophical
7 disagreement as opposed to just a wording of the rule
8 disagreement.

9 CHAIRMAN BABCOCK: Great. Thank you.
10 Professor Hoffman, you have a question?

11 HONORABLE NATHAN HECHT: Let me say one
12 thing.

13 CHAIRMAN BABCOCK: Chief Justice Hecht
14 trumps you, Professor Hoffman.

15 HONORABLE NATHAN HECHT: I'll just say two
16 things in addition. The justice courts in 2019 disposed
17 of a little more -- a few more cases than all of the
18 district and county courts combined. So they're a
19 significant part of the docket. They disposed of about
20 3,000 cases per judge per year back in 2019. So that's a
21 lot. And I just say that to say that as we're thinking
22 about these things, there are lots and lots of differences
23 in the kinds of proceedings that go on, so we need to kind
24 of keep in mind that the experience of most of the lawyer
25 members here is not deeply embedded in the justice courts,

1 and so as you're thinking about district and county
2 courts, we need to think about this, too.

3 And then number two, we formed the justice
4 working group in May of 2020, right after the pandemic
5 hit, and Justice Chu has just been a wonderful leader of
6 that group, and we picked him because everybody said he
7 was the best we could get, and they turned out to be
8 right, but the training center that -- for the justice
9 courts is very active. They deeply engage with their
10 members on how to conduct proceedings. So there's a lot
11 of ways to communicate trainingwise with the justice --
12 with the justices of the peace through the training
13 center.

14 CHAIRMAN BABCOCK: Great. Thank you, Chief.
15 Professor Hoffman.

16 PROFESSOR HOFFMAN: Thanks very much, and
17 Chief, your comments dovetail nicely with mine. So -- so
18 the two thoughts that I wanted to pass along, including
19 kind of for a question for Judge Chu to think about and
20 maybe share some of his thoughts are, first, we know that
21 access to the internet drops off fairly significantly as
22 income levels fall. I mean, we just -- this data is
23 totally clear at this point from Pugh, from the federal
24 government, et cetera. And so one question that I have
25 for the judge to think about is do you think it's workable

1 or do you have any sort of reactions to the idea of
2 whether or not there are ways to build in a safeguard -- I
3 saw that the proposed rule has, you know, an option to
4 object, including on the basis of an inability to appear
5 remotely, but realistically, I think it's pretty likely
6 that a bunch of people who don't have access to the
7 internet are not going to be able to -- are not going to
8 be able to lodge their objections. So is there another
9 way that we can, for example, gather data relating to
10 income levels, for instance, and presumptively assume that
11 the lower the income level, the less appropriate it is to
12 require internet presence?

13 So that's one thought, and the second
14 point -- sorry, is a totally different one, but it's
15 related, is what are your thoughts about using the
16 training center to train judges? Because at least in my
17 own experience as someone who's now taught online for two
18 years, there is an enormous difference in terms of the
19 quality of that experience for the people on a remote
20 call, the level of training with Zoom and remote
21 proceedings. So those are my two thoughts and questions.

22 CHAIRMAN BABCOCK: Was there a question in
23 there for the judge?

24 HONORABLE NICHOLAS CHU: Yeah, professor, to
25 go to your last point first, the training center I think

1 will be highly engaged in this. They already have been.
2 I think this is one of those things where, you know,
3 through time people will get much better with Zoom or
4 whatever that virtual conferencing platform is, but
5 definitely what will happen is, as we kind of go towards a
6 more permanent basis of remote type proceedings, I know
7 that there will be trainings for that. I've taught some
8 of those trainings already to some -- on more advanced
9 courses for JP courts within the training center, but that
10 will probably be built in, I'm sure, to some of our
11 requirements.

12 Just so y'all know, when you become a new
13 JP, there is an 80-hour requirement within your first
14 year, so I imagine there may be some discussions about
15 adding that into the curriculum. There's also after that
16 a 20-year -- or a 20-hour requirement for your second
17 year, and then I think it's 10 years after that, but
18 there's a significant amount of training that's required
19 on a continual basis, and I know that that will probably
20 play a large role in -- in that. And not just -- I'm not
21 talking about like, hey, this is how you Zoom, but also
22 how you evaluate access to justice issues, how to probably
23 go away from implicit bias issues as regards to making
24 these decisions. For example, some people may say, oh,
25 well, this person has a cell phone and he obviously sent

1 an e-mail, so he could obviously participate online.
2 Well, you know, training on -- really getting at the heart
3 of the matter of why that person can't access the courts
4 virtually. Language issues, for example.

5 And to your second point, professor, or to
6 your first point about ability to access the internet, you
7 know, I think the courts -- the JP courts specifically see
8 a lot of self-represented litigants, especially at a lower
9 income bracket, just from the fact that we are the
10 original jurisdiction for eviction cases, and so unpaid
11 rent cases play a large part of that. I think if you look
12 at the number of statement of inability to pay affidavits,
13 throughout all court types, I think separate from criminal
14 court, on just civil matters, I think justice courts see a
15 large majority of those, and so we are cognizant of not
16 requiring Zoom for folks that cannot participate by Zoom.
17 I think that obviously part of the training that goes on
18 now is if somebody cannot participate remotely, the courts
19 need to give an option as part -- just simple due process
20 to show up in person. And so part of that is, one,
21 finding a way to have a court decide on whether it's
22 appropriate to do in person or virtual, and then second is
23 what if the court was wrong, how can we evaluate those
24 decisions?

25 That's not in this rule proposal. It's in

1 the draft that's currently pending in the subcommittee for
2 remote proceedings. We discussed that feedback from SCAC
3 from last time, and I think what's going to happen is that
4 at least what we'll see now is there's going to be a
5 mechanism for the court to evaluate whether we should
6 engage in remote or virtual or considerations -- examples
7 of considerations to think of, and then second is if the
8 court got it wrong, how to go about launching an objection
9 and evaluating that. And I think, you know, the objection
10 in JP courts is never like well-articulated at times.
11 It's usually just, hey, I can't do this, and here's the
12 reason why, and the courts -- the JP courts are
13 well-trained on how to handle those kind of
14 self-represented litigants' articulation with their
15 objections.

16 CHAIRMAN BABCOCK: Thank you. Hayes Fuller.

17 MR. FULLER: Judge, first of all, thank you
18 for your work. I think it's good work. I wanted to
19 follow up on a comment that you made about the ability of
20 litigants to participate remotely or virtually, improving
21 participation and providing, I guess, a positive sense of
22 procedural justice. And dovetailing into your last
23 comment, I wonder have y'all given any thought to a
24 situation where -- and this may pertain to other courts
25 where you have a situation where the pandemic has passed,

1 the courts are open. You are providing a virtual
2 proceeding for those who find it easier to participate
3 remotely or virtually, and yet one of the parties simply
4 says, "You know, that's great, I'm all fine with them
5 appearing remotely or virtually if they want to, but I'm
6 able and willing to walk down to the courthouse, and I
7 want to appear at this proceeding in person." I guess
8 that's what you would call a hybrid proceeding. But do
9 you see a situation where, you know, I can almost see
10 where if you said, "No, we're going to do it virtually,
11 you can't come down here and talk to me in person," that
12 could almost lead to a negative perception of procedural
13 justice? In other words, I'm paying for these
14 courthouses, but I'm not allowed to go to them, I have to
15 phone in, and I just -- just food for thought. Have y'all
16 looked at that issue, or what's your feeling? I feel like
17 I'm flipping it a little bit here.

18 HONORABLE NICHOLAS CHU: Yeah. No, no, it's
19 a great question, and, you know, that already happens, and
20 prepandemic it already happened. We have to remember that
21 telephonic conferencing for cases, whether it's 100
22 percent telephonic or hybrid telephonic for one party or
23 one witness, existed, and I saw that, and I think all the
24 judges see that on a not frequent, but semifrequent basis
25 in terms of, you know, there's one person who wants to

1 show up by telephone. There have been times when I've
2 allowed it. There have been times when both parties want
3 to show up by telephone, and there have been times when I
4 don't think it's appropriate and say, "No, you can't show
5 up by person, you have to show up in person," and a lot of
6 times that decision that I made in the past with that
7 telephonic decision was the complexity of the case, how
8 long that case. I think one guy wanted to show up for his
9 jury trial over the telephone in a civil case, and
10 obviously that wasn't going to be efficient for anybody,
11 and so I made the ruling that, no, you need to show up in
12 person if you want your jury trial. And so I think that
13 same instance, it won't necessarily be reinventing the
14 wheel. It will be applying those parameters on what we
15 did with telephonic conference into the video
16 conferencing.

17 The thing about this, though, is you would
18 probably see, out of the 804 JPs, close to 804 different
19 ways to evaluate that request and that decision, and so
20 the beauty of having a rule kind of outlining some
21 possible considerations and possible ways to object and
22 comment or even spelling out the rule itself, ideas behind
23 that objection gives JPs at least the ability to say, hey,
24 you know, this is what we're looking at and kind of
25 standardize at least the criteria. There's always going

1 to be different ways of deciding on the same background
2 within the 804 judges, but at least we'll standardize the
3 criteria that the 804 judges are looking at.

4 MR. FULLER: So if we're providing by rule
5 an option for parties to appear virtually, are we going to
6 say in that rule that if a party chooses to say, "No,
7 that's great, I appreciate the option, but I'm going to
8 show up in person," are we going to be prohibiting other
9 parties from showing up in person if that's what they want
10 to do?

11 HONORABLE NICHOLAS CHU: You know, I'm not
12 sure. I think that would kind of be based on -- I think
13 one of the rules should be that the judge makes that final
14 determination, and I think that that's always best to
15 leave it to the judge to make that determination. I
16 think -- I mean, just from my perspective, post-pandemic
17 if somebody says, "Hey, I want to show up in person, and
18 I'm here," yeah, and if they say, "Hey, I want to show up
19 in person," I think just as a matter of policy people
20 always show up in person.

21 Now, I may be virtual, and the other
22 participant may be virtual, and so it may be a situation
23 where my clerk has set up a virtual setup in the courtroom
24 for this person. So I think that's what's going to
25 happen. I think, you know, for the sophisticated person

1 who is obviously an attorney, who, you know, has that
2 ability, is well-versed in that ability to video
3 conference, I may say, hey, no, you're welcome to show up,
4 you know, but we're doing this virtual anyway, and you're
5 not going to be in the same room as me, so --

6 MR. FULLER: And why would that be? Why
7 would that be? Where would you as the judge be other than
8 in the courtroom?

9 HONORABLE NICHOLAS CHU: Yeah, like I said,
10 for JPs, for example, we're doing a bunch of other duties,
11 so I may be at the jail doing magistrations, and I may not
12 be able to come back to the courthouse in time for my
13 docket, or other JPs who don't have that, they may be out
14 on the road doing a death inquest, and then they're
15 wrapping up that, and there may be another county building
16 that's close to them so they'll set up there because they
17 can't get back from the other side of the county to their
18 docket, and so those are kind of some frequent things I've
19 seen in terms of feedback from JPs. Also, a lot of times
20 they may be working on things at home and that something
21 came up like, for example, for me sometimes, I have a two
22 month old and a four year old. Sometimes my kids get sick
23 and I'm stuck there, but I can still work, it's just it's
24 nice to have that option so you don't have to cancel
25 dockets all together.

1 MR. FULLER: Okay. All right. Appreciate
2 your time. Thank you.

3 CHAIRMAN BABCOCK: Thank you. Any -- any
4 other questions? Yeah, Judge Peeples.

5 HONORABLE DAVID PEEPLES: I've got some
6 anecdotal evidence about JP court, because I filled in for
7 a friend 10 or 12 times during COVID. One thing, a lot of
8 traffic tickets, a lot of eviction cases, and the eviction
9 cases are mentally or emotionally hard, but the Supreme
10 Court's order has always been right there on the bench
11 when I showed up, the most recent one. It is undeniably
12 true, as Judge Chu said, that people who are a long way
13 off from the court, they don't get defaulted as much
14 because they can appear remotely, and that's a good thing,
15 and we need to preserve it.

16 Now, at the JP 3 in San Antonio, the way
17 this docket just the other day, all of the traffic people
18 showed up in person. I don't know, there may have been
19 one or two who wanted to do it remote, and we did it, but
20 they were there in person, and I think that was because
21 they wanted to pay the fine. Whatever the fine was that
22 got reduced, they wanted to pay it in person and get it
23 done. It's easier to do that in person. All of the
24 evictions were done remotely, and the JP 3 allows you to
25 come to the actual courthouse or building and use one of

1 their computers to appear by Zoom, if the judge was gone.
2 I was in the courtroom, but they can do that if they want
3 to if they don't have a computer of their own and so
4 forth. I had a case where one guy, when his case was
5 called, was in his truck. He pulled over somewhere on the
6 side of the road, and in the picture with him was the
7 steering wheel, and he did the hearing from his truck, and
8 that was fine. In person is better.

9 CHAIRMAN BABCOCK: Judge, could you elevate
10 your voice a little bit?

11 HONORABLE DAVID PEEPLES: Yeah, be glad to.
12 In person is better if you've got evidence documents,
13 because, you know, it's just easier to see them, and you
14 can hand them to someone, and it happens in these eviction
15 cases sometimes that they disagree on what's been paid and
16 how it's been credited on the books, and they're talking
17 about something, and they don't have the same documents,
18 and in person that's just easier to handle if you're there
19 in person as opposed to remotely. And, you know, in the
20 old days, you have docket call, and you and your opponent
21 were there, and you talk and work it out in the hall.
22 That's harder to get that done with the Zoom process,
23 because they just are not there to go have a cup of coffee
24 or whatever; and in eviction cases, you know, you would
25 think that the tenant and the manager would know each

1 other because the manager is on site, but that's not
2 always true. In a lot of those cases, the manager is
3 somewhere else, and the tenant has never seen the manager,
4 and they've never had the face-to-face contact, which an
5 in-person hearing they can have. So that's lost, also.
6 That's about all I have to say.

7 CHAIRMAN BABCOCK: Okay. Justice
8 Christopher.

9 HONORABLE TRACY CHRISTOPHER: I think Judge
10 Chu -- I think Judge Chu might need to leave us, so, Judge
11 Chu, are you still there?

12 HONORABLE NICHOLAS CHU: Yeah, I'm still
13 here. I have a few more minutes, if there are any more
14 questions, I can stay for -- I just need to call the
15 docket in probably 10 or 15 minutes is all.

16 HONORABLE TRACY CHRISTOPHER: I just wanted
17 to point that out that he can't stay.

18 CHAIRMAN BABCOCK: All right. So take your
19 shots now. Judge, we had -- we had invited some guests
20 from, I think, Colorado and maybe Georgia and a Supreme
21 Court Justice from Colorado, and our group grilled him
22 pretty good. You've gotten off light so far.

23 HONORABLE NICHOLAS CHU: I know, I was
24 expecting more, especially reading the transcript from
25 last time, you guys.

1 CHAIRMAN BABCOCK: Any other questions of
2 Judge Chu? Yeah.

3 MR. HUGHES: This is more of a practical
4 question that has to do with the increased participation
5 that's been reported. Are these people who didn't file an
6 answer and just somehow should know to show up, or are
7 these people who have filed an answer of some sort, and
8 therefore, the court needs -- already knows how to give
9 them the information? In other words, how are these
10 people who are participating more finding out about the
11 Zoom hearing? Is it because they filed an answer and the
12 court contacts them, or this is somehow in -- given to
13 them in the citations?

14 HONORABLE NICHOLAS CHU: Yeah. So a little
15 bit of both. One is obviously the folks that file
16 answers, we have their contact information, and we send
17 out an e-mail to them with the Zoom link and everything,
18 and so obviously those have even higher participation
19 rates, but in the vast majority of JP cases, number one,
20 in eviction cases, no answer is required. So a lot of
21 times people file those petitions, and my court, for
22 example -- this is the training that's gone out from
23 Justice Court Training Center, is that if you have a
24 virtual link to include that in the paperwork and the
25 notices. So in the citation, for example, there is a

1 prepopulated link and how to participate. Now, that's
2 done on paper format, and then obviously if you find their
3 e-mail address before that link of that e-mail address as
4 well.

5 Also, for default cases, an example is your
6 debt claim case. The person hasn't answered. The
7 plaintiff wishes to have a default hearing to proceed on
8 with the default judgment. The best practice and the
9 practice that I think that the training that the courts
10 are doing or my court's doing as well, is we will send the
11 Zoom link to the plaintiff and then even though it's
12 default judgment, send that to the defendant as well, who
13 has not answered, and sometimes they'll show up because
14 they got the Zoom link. And a lot of times, quite
15 frankly, they show up, because they didn't realize they
16 had to write an answer. They just thought that eventually
17 they'll get a court date and that's what they needed to
18 do, kind of like what you do for traffic tickets, and
19 you're told what your court date is and then you don't
20 have to do anything else. And so, you know, I think that
21 participation isn't just people who are filing answers.
22 It's obviously more than that, because evictions have
23 increased participation, and those don't require answers.

24 MR. HUGHES: All right. Thank you.

25 CHAIRMAN BABCOCK: Great. Yeah, Professor

1 Albright.

2 PROFESSOR ALBRIGHT: I just have one
3 comment. You know, what Judge Peeples said about the guy
4 in his truck and what Professor Hoffman was saying about
5 internet. I think we need to realize that everybody is
6 not on the internet, like a, you know, hard wire in
7 their -- coming to their house. A lot of people have
8 phones, even people who cannot afford regular internet,
9 and a lot of the participation is by phone, and that's one
10 thing that's really wonderful about Zoom is you can
11 participate by Zoom with a smart phone.

12 MR. WARREN: How would that impact sharing
13 documents or evidence?

14 PROFESSOR ALBRIGHT: Well, I think, yeah,
15 that's -- but I think --

16 HONORABLE NICHOLAS CHU: I mean, yeah, the
17 sharing of document part, that's the hardest part. You
18 know, frankly, in JP court cases, there aren't a lot of
19 documents to begin with. Most of the documents are kind
20 of agreed to, whether it's a lease, a contract on a
21 contract dispute, and, you know, one part is that the
22 courts will probably need to develop ways and procedures
23 to accept evidence and to make sure that that's sent out
24 to everybody before the hearing or at the same time of the
25 hearing. That's probably more of a best practices way of

1 dealing with that. Each -- each county and each JP court
2 has different IT requirements in terms of what they can
3 accept by e-mail or how to take evidence electronically,
4 so that may be something that is appropriate to deal with
5 either in the future rule or just after we see this
6 develop and see what the best practices are from the 804
7 JPs that's at these remote hearing post-pandemic.

8 CHAIRMAN BABCOCK: Great, Judge, thank you
9 very much. Go call your 10:15 docket.

10 HONORABLE NICHOLAS CHU: All right. Thank
11 you, guys.

12 MS. WOOTEN: Thank you, Judge.

13 CHAIRMAN BABCOCK: All right, Kennon, it's
14 back to you. And Justice Christopher has got a question.

15 MS. WOOTEN: I feel like there's not much
16 more to add. If people have questions about the proposals
17 relating to district and county courts, I'm happy to
18 answer those questions, but beyond what Judge Chu has
19 said, I don't feel the need to go into substance unless
20 people want to do that. I will point out, though, that
21 the materials include, starting on page 70 of the PDF, the
22 report from the National Center for State Courts, and the
23 report includes data. It's not, you know, over the course
24 of a long, long period of time, but it's nice to read that
25 report because there's a lot of discussion during the last

1 meeting about we only have anecdotal information and, yes,
2 we have more anecdotal information than data, but we do
3 have some data, and so I encourage people that haven't
4 looked at that report to look at it. I think it does a
5 nice job of presenting the state of affairs. It's dated
6 December 2021. I'm sure there will be more reports in the
7 future.

8 CHAIRMAN BABCOCK: Great. Thanks. Yeah,
9 Robert.

10 MR. LEVY: I did want to point out, and
11 Kennon and I have discussed, there are some other studies
12 that are out about the impact of remote proceedings,
13 potential concerns and issues. The Brennan Center For
14 Justice did a study on the impact of video proceedings on
15 fairness and access to justice in court, and it's also
16 done some other work on that subject. I'm trying to see
17 the date, and I'll send Shiva the links, but they do point
18 out, I think, some important issues that should be
19 evaluated as this process continues, and if we do adopt
20 rules, even then, because there are -- there are studies
21 that show that there is an impact in having remote
22 proceedings versus in-person proceedings. There's an
23 impact on issues in criminal cases, for example, on how
24 outcomes are realized. There are issues, for example,
25 even before the pandemic, on remote proceedings in vail

1 setting and that judges were tended to give heavier or
2 more restrictive bond requirements if they -- if the
3 defendants were participating remotely. There are other
4 studies that show that there is a difference in how
5 witnesses are perceived, and some of these are true
6 studies where they were not actual trials, but they did
7 studies where they had the same testimony live versus
8 offered remotely, and the outcomes were different, and I
9 think that's significant, something that should be
10 evaluated.

11 There's also a study that talks about
12 nonverbal communications in a post-pandemic world and
13 evidence-based commentary and cautionary statement for
14 lawyers and judges, and that's talking about just the
15 impact of nonverbal communication, not just credibility,
16 but just the impact of how that is -- how that impacts
17 both the outcome as well as how witnesses are perceived.

18 The Northwestern University Law Review
19 published a study in 2021, Remote Court Principles for
20 Virtual Proceedings During The Covid-19 Pandemic and
21 Beyond, and this also is looking at I think some of the
22 same issues that we're talking about and what are some of
23 the considerations, what are some of the safeguards that
24 might be considered, so the issue that we spoke about or
25 that I was arguing at the last session where we discussed

1 this was that the dynamic of this new world is evolving,
2 and there will continue to be, I think, scholarly work to
3 understand not just who's doing it and how often, which I
4 think is the context of the National Center for State
5 Court survey, but also how is that impacting the
6 administration of justice. And I really do continue to
7 urge this committee and the Court to keep that in mind,
8 because obviously I think that the goal is not to have an
9 adverse impact. Possibly it could even have a better
10 impact, but those decisions should be evaluated within
11 that context of the emerging level of research that is now
12 starting to be seen.

13 CHAIRMAN BABCOCK: Yeah, thank you, Robert.
14 If it wouldn't be too much of a burden, could you send
15 either the links or the cites to Shiva?

16 MR. LEVY: I will do that.

17 CHAIRMAN BABCOCK: And that way we'll have a
18 complete record of all of this. Thank you. Professor
19 Hoffman wants to say something. Oh, no, hang on, Lonny.
20 Professor -- I mean Justice Christopher.

21 HONORABLE TRACY CHRISTOPHER: So I would --
22 one of the things that the National Center for State Court
23 reports said was that we should consider what type of
24 proceedings are best for remote proceedings, and while I
25 understand Judge Chu wanting to have similar rules in JP

1 court as in, you know, county or district, I'm just
2 wondering whether JP court proceedings might be one of
3 those proceedings that we think, yes, you know, let's go
4 forward with that before we, you know, look at everything
5 else, and so, you know, my thought was we could discuss
6 that issue and it might be a way to kind of like at least
7 move forward with their rule. Just an idea.

8 HONORABLE EMILY MISKEL: So in other words,
9 you're saying since JP courts get de novo review, if they
10 want it, by another level of court, what would be the harm
11 in letting them flourish with experimentation?

12 HONORABLE TRACY CHRISTOPHER: Correct.

13 CHAIRMAN BABCOCK: That's exactly what she's
14 saying.

15 HONORABLE TRACY CHRISTOPHER: Correct.
16 Exactly.

17 MS. WOOTEN: We did discuss in the
18 subcommittee level whether there ought to be a different
19 approach for justice courts as opposed to district and
20 county courts, and as you heard from Judge Chu, the
21 initial reaction was let's make it the same, but I do
22 think there is a difference between the justice courts and
23 the district and county, namely, which you've identified,
24 that there will be a de novo trial after the justice court
25 level if people pursue it. That's an if, but it's there.

1 HONORABLE TRACY CHRISTOPHER: And I think
2 the task force, for example, thought about the idea of can
3 we identify proceedings, you know, types of proceedings
4 that would be best for remote or would be acceptable for
5 remote as, you know, a decent alternative. It was
6 extremely difficult to do, so we didn't go that direction,
7 but JP court is a sort of a defined setting that perhaps
8 maybe this group would like to talk about, notwithstanding
9 Judge Chu's thoughts on that.

10 CHAIRMAN BABCOCK: Okay. What was that
11 phrase again, flourish with it?

12 HONORABLE EMILY MISKEL: Experimentation.

13 CHAIRMAN BABCOCK: Yeah, flourish with it.
14 You got that, Dee Dee? All right. Great.

15 Professor Hoffman, we don't want to
16 discriminate against our remote people, so he's had his
17 hand up for some time. Professor Hoffman, you're in.

18 PROFESSOR HOFFMAN: Speaking on behalf of
19 all virtual people everywhere, thank you.

20 CHAIRMAN BABCOCK: You're on.

21 PROFESSOR HOFFMAN: So it's been a good
22 conversation, and it gives me a chance to kind of
23 re-emphasize some of the points that I was leading to with
24 the questions I was asking, which is, I do think it's
25 important that we keep the distinctions of who is

1 attending justice court in mind, and so I'm all for
2 experimentation, but we should experiment with those
3 thoughts in mind. And the issues with internet access, I
4 think are enormously significant, also the diversity in
5 experiences. And I have no doubt that most litigants are
6 probably very fortunate to be in front of Judge Chu, but I
7 also have no doubt that from seeing it firsthand that many
8 justice court proceedings do not go smoothly. Heck, I was
9 in a pretty well-regarded district judge in Midland a
10 couple of summers ago at the start of the pandemic, and
11 the treatment -- now, maybe the start of the pandemic
12 makes that different, but the treatment that we got as
13 virtual participants in that process with lawyers on both
14 sides was outrageous, and so we should not assume that all
15 judges are going to bring the same level of dedication and
16 commitment to fairness and even to understanding what the
17 issues are, that the leaders in this area are going to.
18 So those are my thoughts.

19 CHAIRMAN BABCOCK: Thank you. Professor
20 Albright, and then Harvey.

21 PROFESSOR ALBRIGHT: I think we also need to
22 remember the access to justice benefits from virtual
23 remote hearings. On the way up here or down here, on the
24 radio, there was a story, an Austin story, about using
25 Zoom for eviction proceedings in the justice court, and it

1 was that the woman who was being evicted actually got to
2 participate, because she was standing in a parking lot
3 using her telephone, and she had a VLS lawyer who appeared
4 to help her, and it was the program that Judge Chu was
5 just talking about, where they have these VLS lawyers who
6 can pop in and help, and what they ended up doing is
7 putting off the hearing for two weeks and then the lawyer
8 on her behalf made a deal with the landlord, and so -- and
9 the whole part -- the reason for the story on the radio
10 was that this is a good thing for access to justice and to
11 get the tenant's voice heard in a way where they usually
12 would have just defaulted before and been thrown out. So
13 I think we need to remember -- remember this, and I think
14 justice court sounds like a really good place to begin to
15 keep this process going.

16 CHAIRMAN BABCOCK: Thank you. Harvey.

17 HONORABLE HARVEY BROWN: I would echo all of
18 those comments, and I do think it would be a good place to
19 experiment, but I do think we need to be cautious about
20 the thought that because they have a right of de novo,
21 that automatically means that they will know to exercise
22 that right. I would assume that probably a lot of people
23 who go to JP court never really fully understand their
24 right to appeal and get a new trial, so all I'm saying is
25 we need to be cautious. We really still need good

1 safeguards in the JP court. We can't rely exclusively on
2 the de novo right of appeal.

3 HONORABLE TRACY CHRISTOPHER: I thought we
4 put it in the rules that it has to be in the judgment, but
5 I could be wrong. On the JP rules?

6 CHAIRMAN BABCOCK: No. You know, your
7 memory is ridiculous.

8 HONORABLE TRACY CHRISTOPHER: The right of
9 appeal?

10 CHAIRMAN BABCOCK: I think you're probably
11 right.

12 HONORABLE TRACY CHRISTOPHER: I could be
13 wrong, but I thought it was in there.

14 CHAIRMAN BABCOCK: You remember things none
15 of the rest of us do.

16 HONORABLE HARVEY BROWN: I know, but I still
17 think people may not know how to do it.

18 CHAIRMAN BABCOCK: Anybody else got their
19 hand up remotely? I don't see that anybody does.

20 MS. WOOTEN: I do.

21 CHAIRMAN BABCOCK: Okay. Kennon.

22 MS. WOOTEN: I just wanted to echo what
23 Professor Albright said about access to justice and note
24 for people who are going to look at the report I
25 referenced, that it addresses increased access to justice,

1 stating in part, "Texas judges reported that holding
2 remote hearings had definite benefits for expanding access
3 to justice for many litigants," so that particular
4 component is addressed in the report, and I know we've
5 heard a lot of anecdotal evidence as well.

6 CHAIRMAN BABCOCK: Yeah, thank you. Anybody
7 else? Yeah.

8 HONORABLE DAVID PEEPLES: I want to express
9 the same concern that is Hayes Fuller expressed, which,
10 and I'll voice it this way, I think it would look very bad
11 for the judicial system if judges get so comfortable with
12 judging from home and below the picture, you know, you're
13 wearing sweat pants in the winter and shorts in the summer
14 and all that and you never go to court.

15 CHAIRMAN BABCOCK: Speaking for others, you
16 mean.

17 HONORABLE DAVID PEEPLES: Very seldom go to
18 court, and so the default -- I hope that we can get back
19 to where the default situation is the judge is in the
20 court. And in a lot of different situations, people
21 should be able to appear remotely if they want to, but
22 I -- I agree with Hayes that if a lawyer or a litigant
23 says, "I want to come to the courtroom and do this," the
24 judge ought to have a good reason to not be there, it
25 seems to me, and I don't think we need to encourage or

1 acquiesce in the desire to do it the easy way at home.

2 CHAIRMAN BABCOCK: Thank you. John.

3 MR. KIM: So I've got a question and then a
4 story. My question is, am I missing it? I haven't seen
5 this new language on how we're deciding what a court
6 proceeding is.

7 HONORABLE EMILY MISKEL: No, it's in there.
8 It's in there.

9 HONORABLE TRACY CHRISTOPHER: No, no, no.
10 No, the new language is not, it is still a work in
11 progress.

12 HONORABLE EMILY MISKEL: It's in there.

13 MS. WOOTEN: The definition of court
14 proceeding is specific to the justice court rules, and
15 it's in the existing proposal. It's specifically, "A
16 court proceeding is an appearance before the court, such
17 as a hearing or a trial." That's the definition.

18 MR. KIM: And do you envision that trial to
19 include voir dire?

20 HONORABLE TRACY CHRISTOPHER: No. What we
21 anticipate --

22 MR. KIM: Or carve it out?

23 HONORABLE TRACY CHRISTOPHER: If we're going
24 to try and make it similar to the civil rules, to
25 eliminate jury trial, completely.

1 MS. WOOTEN: Without party consent.

2 HONORABLE TRACY CHRISTOPHER: Without the
3 consent of everyone.

4 MR. KIM: Okay. And so to echo what was
5 just commented, I participated in a Zoom hearing the other
6 day, judge to remain unnamed, in which the judge was
7 clearly on her Zoom, on her phone doing Zoom, it was
8 bouncing and everything. We couldn't figure out where she
9 was until literally she says, "I've got to take a break
10 for a second, I've got to check out at the grocery line."
11 And so I have always felt that appearing in court and the
12 formality and the gravity of what we do is enhanced by
13 that courtroom setting, and so I would echo those comments
14 down there that, to the extent we can, we need to
15 encourage the courtroom setting.

16 The last thing I would say is there's a
17 *Harvard Business Review* article that came out that said,
18 in dealing on the type of meeting that should be held,
19 depending upon the issue, that complexity is a helpful
20 framework in determining what form of a meeting it should
21 be, which includes, like emotional complexity, factual
22 complexity, the level of interdependence that's necessary,
23 the type of interaction that's necessary. And, Chip, with
24 your permission, they printed this matrix. This is a
25 matrix that I would like to pass around.

1 CHAIRMAN BABCOCK: Absolutely.

2 MR. KIM: Which talks about the
3 interdependence between goal complexity and goal
4 accomplishment, and at the very top requiring in-person is
5 conflict mediation, and so I would just set that out.

6 CHAIRMAN BABCOCK: Absolutely. Thank you.
7 Tom.

8 MR. RINEY: I was listening to the comments
9 and something just occurred to me. First of all, let me
10 follow up with what John said. It was reported to me
11 recently about a district judge that conducted a hearing
12 from the judge's car, and it did not impress the lawyers
13 in terms of they were getting the appropriate attention.
14 You mentioned the JP that did -- those are kind of --

15 CHAIRMAN BABCOCK: Tom, just a second. Was
16 the judge driving?

17 MR. RINEY: I was shocked when I heard the
18 story. I didn't probe for details beyond that.

19 CHAIRMAN BABCOCK: You're not supposed to
20 text and drive. I don't know if you're supposed to Zoom
21 and drive.

22 MR. RINEY: I don't know either. But
23 something occurred to me, and that is, I do think that the
24 judiciary needs to be careful, not only from perceptions
25 of respect and dignity, but if we look at what's going on

1 in the business world where people are having trouble
2 getting back, getting employees back, and what a lot of
3 businesses are doing, they're saying, you know, we don't
4 need as much space anymore, and if -- if remote
5 proceedings become very common, I think county
6 commissioners and Legislatures are going to say, do we
7 need all of these courtrooms? If we're just going to have
8 in-person proceedings occasionally, maybe we just need one
9 courtroom. Maybe we can rotate it. Do we need all of
10 these bailiffs, do we need all of these court reporters,
11 and I mean, I think there's just some risk there that I
12 think we should all take into consideration.

13 Also, I heard a speaker a couple of weeks
14 ago, she's actually from Houston, a freelance reporter,
15 writer, that was talking -- she's written a book called
16 *You're Not Listening, What You're Missing and Why It*
17 *Matters*, and she was asked towards the end of the
18 presentation what she thought about Zoom and just laughed
19 and said, "Well, I published an article in the New York
20 Times last year titled 'Zoom is Terrible,'" and she had
21 interviewed some communications specialists. Now, the
22 real focus of her article is why Zoom makes us exhausted,
23 why it makes it hard for us to focus, but she had some
24 interesting things in there about things that we pick up
25 in terms of whether we trust someone or not, that because

1 of lack of bandwidth, Zoom simply can't communicate or
2 actually process such as subtle movements and so forth.

3 With your permission, Chip, I think I'll
4 forward that to the committee.

5 CHAIRMAN BABCOCK: Yeah. Send to it Shiva,
6 and she'll get it out.

7 MR. RINEY: It's not nearly as scholarly as
8 what Robert Levy is proposing. It's interesting.

9 CHAIRMAN BABCOCK: It all counts. Justice
10 Christopher.

11 HONORABLE TRACY CHRISTOPHER: I absolutely
12 agree with Justice Peeples, what Judge Peeples said, that
13 we should encourage judges to be in the courtroom 99
14 percent of the time, and unfortunately, I do think because
15 two years of the pandemic, we have gotten a little lax on
16 that, and I do think it's terrible that you're taking a
17 hearing by phone, unless it was an emergency and that was
18 the only way that they could get, you know, a hold of you.
19 You know, I think if, you know, you should go to the
20 office every day. I'm -- I've been going to the office
21 every day since last January, and, you know, when the
22 courthouse was still sort of closed, but that is -- kind
23 of tends to be a generational thing in terms of being in
24 person. And I just need to point that out, because I
25 believe that the people that are 20 years younger than me

1 do not feel the same compunction to be in person. So --

2 CHAIRMAN BABCOCK: Yeah. The Chief mentions
3 under his breath, you're talking about teenagers?

4 HONORABLE TRACY CHRISTOPHER: Yeah, yeah, I
5 wish. I wish I was.

6 CHAIRMAN BABCOCK: Judge Miskel, and then
7 Robert.

8 HONORABLE EMILY MISKEL: I guess what I was
9 going to say is it doesn't surprise me that people
10 anecdotally have bad experiences with a judge in a Zoom
11 hearing. I'm sure that no experienced trial lawyer has
12 ever had a bad experience with a judge in an in-person
13 hearing where the judge behaved unprofessionally. I guess
14 that's what I would say, is if you have someone behaving
15 unprofessionally, I'm not sure it solves the
16 unprofessional problem to force them to be in a different
17 room. In other words, if we took a judge who handled his
18 hearing unprofessionally and made them be in a different
19 room, we're assuming that would solve the professionalism
20 concerns, and I'm not sure that is a fix for that
21 particular problem.

22 The other thing I would say on the
23 communication issue is what I have seen specifically from
24 self-represented litigants who are a big part of what we
25 do in court, is they do not communicate well in a public

1 speaking environment in a courtroom, so I think people
2 rank fear of public speaking like higher than fear of
3 death, and that's certainly what I see from our
4 self-represented litigants who stand in a formal courtroom
5 and have nothing to say about their very meritorious
6 claim, whereas those same litigants on Zoom speak up a lot
7 more and provide that evidence. I would say that as well
8 to Professor Hoffman who had concern about low income
9 provider -- participants. We have covered that. I think
10 the Pugh numbers that you referenced were that 85 percent
11 of Americans nationwide have a smart phone. I'm not sure
12 that we have evidence that more than 85 percent of people
13 have access to transportation, and so what I'm seeing is
14 more people have a smart phone than have a car. If we
15 disallow those remote appearances, they just don't come at
16 all.

17 So I just wanted to mention that, as well as
18 the disability issues, for people that have mobility
19 concerns as well as some of our hard of hearing attorneys
20 do better on Zoom because they can actually hear what's
21 going on. They can have their own setup adjusted with the
22 things that they like to make sure they can hear. I have
23 a couple of attorneys that I can think of by name that are
24 hard of hearing, and when they come to the courtroom, they
25 say that they are missing things, and they want us to stop

1 and repeat, and those same attorneys have a better
2 experience on Zoom. They don't express as often that they
3 are missing things.

4 CHAIRMAN BABCOCK: What did you say?

5 HONORABLE EMILY MISKEL: Exactly. So those
6 were just some things that I want to -- I think we all
7 share a common value of we love courts, we love trials, we
8 love having an independent judiciary as a place where all
9 Texans can go to have their concerns -- their contested
10 fact issues and their legal issues heard fairly under the
11 Constitution. I mean, I think if we went down the line,
12 every single one of us would give an impassioned speech in
13 favor of all that, and so where we are nibbling around at
14 the edges is, is this the best way to ensure that everyone
15 has a place to come in court, is this the best way to
16 ensure that everyone is and feels heard? So I think that
17 if we're going to talk about proposed changes to the
18 proposed language, we're not disagreeing about our values.
19 We're disagreeing about mechanics and logistics.

20 CHAIRMAN BABCOCK: Robert.

21 MR. LEVY: Well, on that issue of mechanics
22 and logistics, your comment to the reference I think Tom
23 was saying to the participation by people remotely, that
24 we should consider, either in a rule or a best practices,
25 that we -- we should have guidance on how you can

1 participate remotely, if that's how you're going to be
2 part of the proceeding. This is something that Chip's
3 comment sparked an issue with my company, and our rules
4 are you cannot be on a phone if you're driving, and that's
5 a violation of our -- of one of our codes of conduct, and
6 it's for a good reason, that you don't want to be
7 distracted, and it's, God forbid, somebody's testifying
8 might be driving and get in an accident. And so I don't
9 know how we do that, but I don't know if the rule should
10 have a reference to the fact or maybe a note that if a
11 judge does allow remote proceedings, that it should be
12 done in a way to ensure the safety of all the participants
13 or something that -- that keeps in mind that it's just not
14 a presumption, okay, come remotely, but if you're not
15 somewhere safe, you shouldn't be there.

16 CHAIRMAN BABCOCK: Judge Wallace, seconds
17 Judge Peeples' comments, and then Judge Salas-Mendoza has
18 her hand up, and then we'll get to you, Eduardo.

19 HONORABLE MARIA SALAS-MENDOZA: So I'm
20 having trouble hearing. That's a problem with being
21 remote. I missed the first part, my apologies, so I hope
22 I'm not repeating anything that's been said. I agree with
23 everything that's been said. I think everyone has pros
24 and cons, and I can see that. One of the issues I take
25 with remote proceedings is that I think that we're

1 establishing different rules for civil cases and criminal
2 cases, for good reasons, and I understand that, but as
3 we're coming back and we're trying to not lose what we
4 learned, and there were some definite benefits, and we
5 certainly could continue to provide access to the courts
6 during the pandemic, my big opposition is that we are
7 creating different systems, and I don't think we should.
8 I think the access to the courts should be the same,
9 whether you're detained or whether you're a civil
10 litigant, and I see that happening as we don't want to
11 lose remote proceedings, and that's my concern, so I would
12 just want to voice my concern that we don't create
13 different systems for criminal proceedings and civil
14 proceedings.

15 CHAIRMAN BABCOCK: Thank you, Judge.
16 Eduardo.

17 MR. RODRIGUEZ: Well, I'm just concerned
18 about the -- the importance to the general public of
19 appearing in a courtroom and participating in a proceeding
20 in the courtroom and the majesty involved with that with
21 respect to how people that are participating in it for the
22 first time will feel, because when you go into a courtroom
23 as a litigant, it -- you have a much deeper appreciation
24 of our system than if you do something on Zoom. You know,
25 which is, you know, whatever people do on Zoom all the

1 time, but -- but to me, we ought to err on the side of
2 requiring people to attend court proceedings in the
3 courtroom, because of the importance placed on our -- on
4 our court system versus, you know, you're doing a court
5 proceeding on Zoom, which, you know, is like talking to
6 your kids on Zoom. I mean, it's not -- doesn't give the
7 same import, in my opinion, and so I would -- my -- my
8 opinion is we ought to be -- be more concerned about
9 getting people into the courthouse and in courtrooms than
10 we should on Zoom.

11 CHAIRMAN BABCOCK: Thank you, Eduardo.
12 Richard Munzinger, you had your hand up and then you put
13 it down, but now it may be back up again. I don't know.
14 Munzinger.

15 MR. MUNZINGER: Yeah. Am I off? Am I
16 unmuted? Yeah, I'm all right now.

17 CHAIRMAN BABCOCK: We can't see you, though.

18 MR. MUNZINGER: That's intentional. I don't
19 want to scare anybody.

20 HONORABLE TRACY CHRISTOPHER: He's got his
21 pajamas on.

22 MR. MUNZINGER: The comment that was made a
23 few moments ago, pardon me, about the judge who said,
24 "Well, wait a second, I need to pay my check out here in
25 the grocery store," this is a judge. That's a warning to

1 all of us when you are attempting to resolve matters
2 with -- if you're going to try and have a jury trial, for
3 example, justice court or district court, for God sakes,
4 you've got a judge who went to law school, who took an
5 oath to honor the Constitution and the laws of the State
6 of Texas, and he or she is conducting a judicial -- a
7 judicial proceeding, while she or he is in a grocery store
8 checkout line. How can we close our eyes to this risk?
9 We are not involved in doing something efficiently only.
10 The target of our work is justice. We are resolving
11 rights of citizens, and it may be the right to live in an
12 apartment house. It may be a contract case. Only God
13 knows what comes before the courts, but for goodness
14 sakes, let's not lose sight of what we are about, and
15 you've got to be very, very careful.

16 This is a warning, to me, I think in the
17 whole thing. The idea that you could conduct a jury trial
18 and not have confidence that you, the lawyer, know who is
19 in the room with the witness and what he is reading or
20 looking at or being -- receiving signals, is
21 mind-boggling, if you really give a dang about truth.
22 That a judge could purport to make a decision regarding
23 the credibility of a witness without looking the witness
24 in the face blows my mind. How can you do this?

25 You go to buy a car, you form a judgment as

1 to the honesty of the salesman or saleswoman by their
2 demeanor, and here we are in court, and the law books are
3 full of the appellate courts making the statement, "The
4 judge got to see the witness," "the judge made a decision
5 as to who was telling the truth," and so we're going to be
6 bound by these decisions of these judges who work in
7 grocery store checkout lines. Come on. Whatever rules we
8 do adopt have got to recognize, in my opinion, have got to
9 recognize and provide for human weakness, if a judge is
10 willing to resolve and give a dang what the emotion was.
11 If a judge has so little respect for the law that he or
12 she will rule while in a grocery store checkout line,
13 we've got a very serious problem if we blink our eyes to
14 this and don't provide against it in whatever rules we
15 adopt. I'm finished. Thank you.

16 CHAIRMAN BABCOCK: So, Richard, you're in
17 favor of in person?

18 MR. MUNZINGER: I'm not in favor of it. I
19 think motions -- clearly some motions can be resolved by a
20 judge, but whatever the rules are, the judge ought to be
21 in court, for God sakes. I ought to be able to see the
22 judge. I know we've had telephone rulings in the past,
23 and we didn't get to see the judge. At the same time,
24 there wasn't a -- there wasn't a Zoom capacity in most of
25 those herefore. Until the last few years, there wasn't a

1 Zoom capacity to see a judge.

2 My only point is, again, you have got to
3 recognize the human fallibility and the weakness of human
4 beings when you do this. Not everybody is a Tracy
5 Christopher. Not everybody is a David Peeples. We all
6 would give our left arms to work in front of Judge -- and
7 I don't mean to slight any other trial judge on the
8 committee. When I first joined the committee Tracy was a
9 district judge, and I remember arguing with her over
10 certain things that we were going to do about these mass
11 tort litigations, and she said, "Well, I'm going to do
12 so-and-so." I made the comment at the time, "Not
13 everybody is like you, Judge." They're not all honest.
14 They're not all devoted to the law. And we've -- you've
15 got to be careful about this, and you have to be careful
16 about it now.

17 These are people's rights that are being
18 resolved, and in some instances they are very important.
19 And the genius of the American system of jurisprudence is
20 based on western civilization and the Old Testament,
21 everybody is equal in the courtroom. General Motors is no
22 different than Jane Brown. They both have the same
23 rights, and that's the way it ought to be if you're going
24 to have justice. And if you're going to have justice
25 administered by somebody in a grocery store checkout line,

1 you're kidding yourself, and you're doing a terrible
2 disservice to your country and your state and your city
3 and your profession. I'm finished. Thank you.

4 CHAIRMAN BABCOCK: You bet. John Warren,
5 and then John Kim.

6 MR. WARREN: Kind of hard to follow that,
7 but I'll try.

8 CHAIRMAN BABCOCK: He obviously didn't take
9 into account there was a sale on stone crabs that day.
10 Totally understandable. Go ahead, John.

11 MR. WARREN: I think as we address this
12 evolution of remote proceedings and some of the things
13 that I'm hearing, there should be a decorum of a remote
14 proceeding that has to be in place, but as it relates to
15 self-represented litigants who are participating, of
16 course, we have internet issues that we're dealing with
17 and all of the other components of access to the courtroom
18 remotely. And I know, I think, Judge Miskel has mentioned
19 everybody has a smart phone. That's absolutely true, but
20 when you have a smart phone with one bar, that's going to
21 be a disruption to the service, but I think one of the
22 things that we also need to put in place is if someone
23 wants to participate, a self-represented litigant wants to
24 participate in a remote proceeding, there should be a
25 survey. You need to be able to make sure that you're in a

1 stable internet environment to prevent disruption. And
2 I'd go on and on and on. If you look at all of the things
3 that has transpired over the course of remote proceedings
4 and say, well, it would be better if these things didn't
5 happen, the proceedings would have been a more smoothly
6 progressed proceeding if these things weren't in the way.
7 If we put those things in place so that everyone
8 understands that if it's going to be a remote proceeding,
9 it should resemble the in-person proceeding.

10 CHAIRMAN BABCOCK: John Kim.

11 MR. KIM: So given that we're going to get
12 language on the carve out for the trials, I don't have a
13 lot to say today, but it struck me, we charge our jurors
14 and our judges, not to let sympathy, bias, and prejudice
15 enter into your decision or judgment, but it doesn't say
16 anything about empathy, and we require empathy in -- as a
17 truth finder. It demands empathy, and so as we enter this
18 new world, I mean, and it all is still kind of
19 experimental right now. There is never -- I've never read
20 so many neuroscience behavioral studies in the last year
21 than I have, but there is a developing body of science
22 dealing with how people make decisions and what their
23 empathy for it is when they're looking at it through the
24 lens of a Zoom proceeding or a remote proceeding. And the
25 best analogy is that in the military recently, you know,

1 we've started having these drone attacks, and the military
2 has started hiring gamers who are well adept at that, to
3 the drone attacks, and there was a 2015 documentary done
4 that talked to these kids basically who are operating
5 these drones and executing the hits across the world with
6 respect to it, and they -- and it was interesting because
7 they said, "We never knew who we were killing, because we
8 never actually saw a face." You just have silhouettes,
9 and it's easy to have that detachment and lack of empathy
10 and hit the button, and I would hate to think that a fact
11 finder looking through the loom -- the lens of a Zoom
12 without being able to see the entire body of communication
13 and the entire effect of a courtroom and its setting and
14 the gravity associated with that would start to meet out
15 justice and make findings with similar type of lenses.

16 CHAIRMAN BABCOCK: Justice Christopher, last
17 comment before our break.

18 HONORABLE TRACY CHRISTOPHER: Well, I was
19 just going to say that Austin, Travis County, has a
20 extensive list of best practices with respect to
21 participating in Zoom hearings, and it's certainly
22 something that I can pass around to everybody. So, for
23 example, they actually did some remote jury trials, and it
24 required, you know, each juror -- you know, if you don't
25 have the internet, they gave you a hot spot and a

1 computer, and, you know, you have to be in a quiet room
2 with no distractions. You know, you can't be eating,
3 can't be drinking, you know, and so they had a whole list
4 of rules that people had to follow, so, you know, we
5 didn't have this problem of jurors in that case, you know,
6 not taking the process seriously, but -- so, anyway, those
7 rules exist that can be used, and I think it would be
8 extremely hard to do it with a jury trial, and we are
9 exempting that, so John doesn't have to get mad at me
10 anymore.

11 But I totally agree with him that, you know,
12 there is something to be said for in person, although
13 obviously in a trial we have depositions in a civil trial
14 right now, right, that you're just judging it based on
15 maybe a video, maybe a written transcript, and you still
16 have to judge the credibility of a particular witness.
17 But I, for example, feel like our discussion has been
18 better this time because we're in person rather than the
19 last time when we were all Zoom. Because you do take some
20 more verbal cues from people and can understand a little
21 bit more, you know, where people are coming from and try
22 to find the source of our disagreement. And I actually
23 after our last meeting kind of through it out to some of
24 the other trial judges on the committee about, well, what
25 if we had in the Rules of Judicial Administration that the

1 default is for the judge to be in the courtroom, right,
2 unless the judge is sick, you know, and still needs to
3 hold a hearing, or you know, whatever, but that would be
4 the default, and most of the judges on our committee were
5 okay with that. So that's always something that we can
6 include sort of as a backstop, if -- if we decide to move
7 forward.

8 CHAIRMAN BABCOCK: Terrific. Let's -- let's
9 give Dee Dee a break, who has been going for almost two
10 hours. It's not intended, Dee Dee, we just had so much
11 fun. So we'll be back, everybody on Zoom, at 11:15.
12 We're in recess.

13 (Recess from 10:56 a.m. to 11:14 a.m.)

14 CHAIRMAN BABCOCK: We're back on the record,
15 and here's the plan of attack. We're going to spend
16 another 15 minutes, and it's going to be on two things.
17 One, Richard Orsinger has got a comment, so we'll hear
18 that, and then we're going to talk about the topic of
19 whether or not the JP rules should be different or whether
20 they should follow the county court and the district court
21 rules. So that's what we're going to do for the next 15
22 minutes, and then we're going to go to our next agenda
23 item. So, Richard Orsinger.

24 MR. ORSINGER: Chip, thank you very much.
25 The comment I'm going to make is completely different, I

1 think, from our discussion so far. A few years ago, I
2 read a dissertation on a -- a Ph.D. dissertation on the
3 role of architecture in the development of education and
4 in -- as symbols of our government, and it opened my eyes
5 to the fact that, as we all know, historically important
6 government functions occur in impressive buildings, and
7 you can see that all the way from the nation's capitol to
8 our capitol in Texas, which I think is taller than any
9 other capitol building, except for the nation's capitol.
10 But then if you look -- if you drive around rural Texas
11 and you look at the courthouses, you'll see that the
12 courthouse is the tallest building in the county. Until
13 they started building tall buildings, it was the tallest
14 building in Houston and Dallas, and it's impressive, and
15 they're large. They're massive. They're made out of huge
16 stones. They're lined with marble. They have domes at
17 the top. Sometimes they have stained glass and almost
18 reminds you of a cathedral in France.

19 The reason for that is because it causes a
20 feeling of awe or respect, and I even notice that with
21 people, and the Bexar County Courthouse we have today is
22 maybe not as impressive as some, but my clients, who I
23 represent, individuals mostly who have never been to the
24 courthouse before are almost afraid when they walk in,
25 they need reassurance. I'm not going to say they're

1 shaking, some may have, but there is something really
2 impressive about walking into this place where justice
3 occurs, and I'm going to do some more reading and see if I
4 can come up with something more concrete to share with you
5 all, but I think that we lose something when we just
6 decide that we're going to be sitting in ordinary offices
7 or in our homes and conducting justice and dispensing
8 justice. We lose some of the majesty of the law. We lose
9 some of the ability to impress. We lose the feeling that
10 the law is larger than any one person, certainly larger
11 than the individual litigants.

12 I think the jurors that come into a large
13 courthouse feel like their job is more significant and
14 more important, and so if we -- if we step away from the
15 idea that important legal proceedings occur in an
16 important place that is architecturally significant, we're
17 losing something there, and I don't have any studies that
18 I could give you, but I just have a feeling, and I think
19 you all can -- if you have traveled in Europe or Southeast
20 Asia or anyplace like that, you'll see that government
21 buildings are always big and impressive, and the U.S.
22 Supreme Court building is incredibly impressive with the
23 big statues and justice and all this on the top of a hill.
24 So I'm not going to make a big point. I just would like
25 everyone to remember that part of the credibility of the

1 law is -- is the way we treat each other and the formality
2 and the robes, but it's also the structures that we
3 dispense justice in, and so not to make much of that, but
4 I just wanted people to be thinking about that.

5 CHAIRMAN BABCOCK: Great. Thanks, Richard.

6 HONORABLE NATHAN HECHT: One comment.

7 CHAIRMAN BABCOCK: Yeah, Chief.

8 HONORABLE NATHAN HECHT: Just for the
9 record, the Texas capitol is 14 feet taller than the U.S.
10 Capitol.

11 MR. ORSINGER: My goodness, I'm proud to be
12 a Texan.

13 CHAIRMAN BABCOCK: Now, is it true or not
14 that we have a treaty with the United States when we were
15 admitted?

16 HONORABLE NATHAN HECHT: I think so.

17 MR. ORSINGER: It was an annexation. It was
18 act of annexation, but we did -- we can split into four
19 states, you know.

20 CHAIRMAN BABCOCK: There we go.

21 HONORABLE NATHAN HECHT: I don't know about
22 that.

23 CHAIRMAN BABCOCK: That's the urban legend
24 anyway. Yeah, Roger.

25 MR. HUGHES: Well, I'll agree with that, but

1 it's a counterpoint. I found out when I served on the
2 county law library committee and tried to hang on to
3 keeping the law library in the courthouse, the courthouse
4 is Park Place on the board, and people -- some would say
5 all sorts of things happen to make sure that you get a
6 place in the courthouse, and that every time a new court
7 was committed -- was created, et cetera, et cetera, there
8 would be all kinds of back room deals and fights, et
9 cetera, et cetera, about who was going to actually have
10 their courtroom in the courthouse and who was just going
11 to have to go to an annex with a little teeny tiny room to
12 hold their legal proceedings, which gets back to the
13 question is, is that the county commissioners are going to
14 start asking questions about why do we need these grand
15 buildings and deal with all of these fights over who's
16 going to be -- who gets to have an apartment in Park Place
17 and who has to go down to the other end of the board.
18 They're going to ask these questions, but I still favor
19 holding the proceedings in some official place, just for
20 the sake of decorum and formality, but I -- I think it as
21 a practical matter we're going to have to deal with the
22 financial consideration that county commissioners who have
23 to spend money to buy land, et cetera, are going to ask
24 questions.

25 CHAIRMAN BABCOCK: Okay. Thanks. David

1 Jackson has got a hand up. David.

2 MR. JACKSON: Yeah, I didn't want to
3 interrupt the overall discussion about the philosophical
4 differences of Zoom or no Zoom, but the issue that I have
5 -- and I heard you're just about to close out this
6 discussion. On the subcommittee's report on page five,
7 they talk about the official record, and I think it causes
8 more confusion the way they've worded it than it needs to
9 be, because later we're going to talk about the definition
10 of record, and we're going to talk about the definition of
11 court record, and they're a lot broader than what this
12 really means. What this means is the official court
13 reporter's record as defined in Government Code 52, and we
14 need to say that, because saying it like this opens up all
15 of those other definitions for what could be the official
16 record. I could send you a tape recording that I make of
17 this Zoom meeting and attempt to call that an official
18 record, and I don't think that's what we're talking about.
19 We want everyone to know that Dee is making this official
20 record.

21 CHAIRMAN BABCOCK: Thanks, David. Good
22 point. So now turning to the issue of should we have
23 conformity between the JP rules or among the JP rules, the
24 county court rules, and the district court rules, yea or
25 nay? What do people think about that? Judge Miskel.

1 HONORABLE EMILY MISKEL: Well, I think -- I
2 think what was earlier proposed was could we get started
3 with some JP rules, even if we're not ready to do county
4 and district court rules. So I think everybody would like
5 them to be aligned or similar, but I think maybe the
6 question is, can we start with one before we reach
7 consensus on the other?

8 CHAIRMAN BABCOCK: Okay. Any other
9 comments? Anybody got -- yeah, Judge Peeples.

10 HONORABLE DAVID PEEPLES: Dealing with
11 different situations, they're just very, very different,
12 and they probably have different needs, and if I'm right
13 about that, they ought to be able to have different rules.
14 I think to try to have symmetry, it -- there ought to be a
15 good reason for that, and I'm inclined to think that
16 there's not.

17 CHAIRMAN BABCOCK: Yeah.

18 HONORABLE DAVID PEEPLES: So we ought to try
19 to do the best we can for each situation, and if they're
20 different, we live with it.

21 CHAIRMAN BABCOCK: Well, we have a whole set
22 of JP rules that are different. So I think as I heard
23 Judge Chu, he maybe raised the issue of jury trials and
24 whether or not jury trials have to be in person or may be
25 remote either in whole or in part.

1 HONORABLE EMILY MISKEL: I think he was
2 speaking for himself personally, not --

3 CHAIRMAN BABCOCK: No, no. I wasn't
4 suggesting otherwise, but for this committee, what is --

5 HONORABLE TRACY CHRISTOPHER: Well, the way
6 the current rule is written for the JPs it would include a
7 trial. So, you know, I mean, the question is do we want
8 to excise that out or, you know, put in but does not
9 include jury trials or jury trials only with consent, you
10 know, that would be the -- because as written it does
11 include trials, so, you know, that would be a sort of a
12 threshold question that we should try to figure out, I
13 think.

14 CHAIRMAN BABCOCK: Yeah, Robert.

15 MR. LEVY: One of the questions that I had
16 about the removal of the jury trial component is that's
17 not so easy either in that is it that the jurors can't
18 appear remotely, but everyone else can or --

19 HONORABLE EMILY MISKEL: So the -- and we're
20 still tweaking the language, but the current circulating
21 draft, which is not before the committee, because it's not
22 finalized, says the parties, attorneys, or jurors, can't
23 be obligated to appear remotely in a jury trial without
24 the agreement of everybody.

25 MR. LEVY: Parties, attorneys, or jurors,

1 but witnesses could.

2 HONORABLE EMILY MISKEL: Right. Witnesses
3 can currently testify by telephone or deposition.

4 MR. LEVY: I do see deposition a little bit
5 different. The -- on the question about the JP courts
6 specifically, I am interested in that as almost like a
7 trial. I still would encourage us to propose language
8 that suggests the presumption that in-person proceedings
9 would be the norm, absent a determination that in the
10 interest of justice remote participation would be
11 beneficial so that the -- again, there is a presumption of
12 in person versus the current draft of the rule, which was
13 deliberately benign on that.

14 CHAIRMAN BABCOCK: Any other comments?
15 Richard Orsinger.

16 MR. ORSINGER: To follow up on what Robert
17 just suggested, certainly as an interim period, you could
18 have a presumption that you'll be in person and you have
19 to have a justification and get the court's consent if
20 you're a party to participate remotely; and that way
21 people who just -- who don't really need it, but they just
22 don't want to be bothered to go to the courthouse, the
23 judge can rule them out; but if somebody has a limitation
24 or they have to be in a foreign state or another state or
25 something like that, the court could make accommodation

1 for them; and that could be an interim thing rather than a
2 permanent thing that right now we're going to give the
3 trial courts the deciding authority to whether to let some
4 participants be remote, and then if that's working well,
5 we either leave it with the discretion or we go ahead and
6 move it to mandatory.

7 HONORABLE TRACY CHRISTOPHER: And are you
8 talking about for the JP rules or for our new draft of our
9 rules?

10 MR. ORSINGER: Well, I would -- Judge, I'm
11 in favor of running the JP rules by and see how they work
12 before we implement it statewide at all levels, and I'm
13 not opposed to the idea that the JPs should have different
14 rules, but I also think that that's a great way to start,
15 because if it's going to break down, it is going to break
16 down where there's litigants that have no lawyers giving
17 them advice and what have you, and so I think that will be
18 the hardest test for both of those to face, is the JP
19 court, and I would like to do that before we implement
20 statewide.

21 CHAIRMAN BABCOCK: Okay. Any other -- any
22 other comments on this topic? All right. Hearing none,
23 we will move on to our next agenda items, which is Texas
24 Rules of Appellate Procedure 6.5(d). Justice Christopher.

25 HONORABLE TRACY CHRISTOPHER: Could I have

1 some direction for the task force?

2 CHAIRMAN BABCOCK: Certainly, you go down
3 two blocks, take a right.

4 HONORABLE TRACY CHRISTOPHER: Perhaps what I
5 should say is, I'll wait for Justice Hecht to give us
6 direction on which way he would like us to go.

7 MR. ORSINGER: Or do we want to vote on it?

8 CHAIRMAN BABCOCK: You know, I'm a big guy
9 on voting, but I'm not sure what we vote on.

10 MR. ORSINGER: Well, first of all, whether
11 to implement at the justice level before we do statewide.
12 That's one vote. And another is the differentiating jury
13 trials from nonjury trials.

14 CHAIRMAN BABCOCK: Okay.

15 HONORABLE EMILY MISKEL: I thought we had
16 unanimous agreement that jury trials, at our last meeting,
17 were out.

18 MR. ORSINGER: Okay. Then we don't need to
19 vote.

20 CHAIRMAN BABCOCK: That's --

21 HONORABLE DAVID PEEPLES: Was that by
22 agreement?

23 HONORABLE TRACY CHRISTOPHER: Unless by
24 agreement. Although --

25 HONORABLE EMILY MISKEL: Unless by

1 agreement.

2 HONORABLE TRACY CHRISTOPHER: Yeah.

3 Although it was kind of like -- so here's an example, in
4 the case I just tried, right, the defendant was a college
5 student in Arizona and had not been deposed, and so the
6 defense lawyer asked to allow him to appear remotely.

7 CHAIRMAN BABCOCK: Yeah.

8 HONORABLE TRACY CHRISTOPHER: And at first
9 the plaintiff's attorney didn't want to agree, right, but
10 ultimately decided it was better than nothing, because
11 even if he had given a subpoena to the defense lawyer, you
12 know, make your client show up, the judge might have
13 quashed it and said, well, you should have taken his
14 deposition. You know what I mean, I mean, so that would
15 be a situation where maybe you would allow it without
16 consent, a party to appear without consent.

17 CHAIRMAN BABCOCK: Did the jury reach a
18 verdict?

19 HONORABLE TRACY CHRISTOPHER: Yeah.

20 CHAIRMAN BABCOCK: How did they rule?

21 HONORABLE TRACY CHRISTOPHER: They ruled in
22 favor of the plaintiff. It was a pretty modest verdict,
23 but in favor of the plaintiff, but that was expected.

24 CHAIRMAN BABCOCK: I was thinking if I had
25 been on the panel and had been asked that question, would

1 I hold it against the defendant, I think if I was being
2 truthful, I would say yeah.

3 HONORABLE TRACY CHRISTOPHER: Well, I
4 expected more people to say yes, and I had told him ahead
5 of time you may ask the question, but you're not getting
6 cause excuses if they say yes, but you can identify who
7 you think, you know, is really feeling strongly about it,
8 to help you in your peremptory.

9 MR. LEVY: What happened in the case?

10 HONORABLE TRACY CHRISTOPHER: The plaintiff
11 won, but, I mean, it wasn't -- it was a modest verdict.
12 They were happy, so, you know, there will -- they told
13 me -- I said, well, you know, do a judgment; and they're
14 like, oh, no, no, we're just paying it, Judge, you know.
15 Do a nonsuit, which is typical of most car wreck cases.
16 They get paid.

17 CHAIRMAN BABCOCK: Yeah. The problem --
18 the -- I mean, we can't spend too much time on this, but
19 the problem with that question, if somebody raises their
20 hand and says, "Hey, look, you know, I've got things to do
21 today, too."

22 HONORABLE TRACY CHRISTOPHER: Right.

23 CHAIRMAN BABCOCK: And so I'm down here, and
24 yeah, the fact that this kid's in Arizona, not going to --
25 and then, boy, you're going to get some hands.

1 HONORABLE TRACY CHRISTOPHER: You are. I
2 expected to see more hands, and I was kind of surprised
3 when I didn't, which made me think people are getting a
4 little used to the Zoom process, but, you know, I could
5 have had 40 other jurors and everyone could have raised
6 their hand.

7 CHAIRMAN BABCOCK: Yeah.

8 HONORABLE EMILY MISKEL: I think the thing
9 that people have the most emotional reaction to is
10 extending this to jury trials, and I am 1,000 percent
11 satisfied to say we're not going to put jury trials on the
12 table. If five or 10 years from now everyone loves Zoom
13 so much that they want to add jury trials back in, we can
14 always do that in the future. I think we will make more
15 reasonable progress if we focus on other types of cases,
16 and I think there was unanimous agreement that I don't
17 want to revisit at the last meeting to pull juries out of
18 it, and I don't even think Judge Chu disagrees with that.
19 I think what he said is, hey, me personally, I would like
20 to have that as an option, but again, speaking to other
21 judges, no one wants to do them on Zoom.

22 CHAIRMAN BABCOCK: Yeah.

23 HONORABLE EMILY MISKEL: So I think it's a,
24 you know, let's leave that out of it.

25 CHAIRMAN BABCOCK: Yeah, sorry, and in your

1 view, Judge, jury trials are off the table for every
2 court, JP to district, and county in between.

3 HONORABLE EMILY MISKEL: I don't think we're
4 going to make a rule now that is going to go untouched for
5 the next 80 years, so I think the rule we make now should
6 be the best starter rule we can make, and I think we
7 should leave juries out of it.

8 CHAIRMAN BABCOCK: Yeah. So jury trials are
9 off the table for all courts?

10 MR. ORSINGER: Unless agreed upon.

11 CHAIRMAN BABCOCK: Unless agreed upon.

12 HONORABLE TRACY CHRISTOPHER: Unless there's
13 consent.

14 CHAIRMAN BABCOCK: Yeah, unless agreed upon.
15 Okay. Kennon, are you cool with that?

16 HONORABLE TRACY CHRISTOPHER: Yeah, we
17 already have that, she knows that. I guess our -- do we
18 go forward with separate rules for JP court and tweak what
19 we have, or do we reverse and with a presumption of in
20 person unless? You know, because right now, we're --
21 we're letting the judge decide which way it's going to be,
22 and the current plan for the subcommittee is to put in
23 factors to consider, right?

24 CHAIRMAN BABCOCK: For proceedings other
25 than jury trials.

1 HONORABLE TRACY CHRISTOPHER: For
2 proceedings other than jury trials.

3 MR. ORSINGER: And, Judge, is that at all
4 levels or just the JP level?

5 HONORABLE TRACY CHRISTOPHER: Well --

6 CHAIRMAN BABCOCK: That's the question.

7 HONORABLE TRACY CHRISTOPHER: That's the
8 question

9 MR. ORSINGER: Then I would second your
10 motion that we start with the JP

11 HONORABLE TRACY CHRISTOPHER: Okay. And
12 leave it in this format, with factors to consider kind of
13 like with -- and a lot of these things are things that
14 we're already talking about in terms of factors to
15 consider on in person and remote, complexity, you know,
16 all of those things that we've talked about.

17 MR. KIM: Well, I equate you to Harvard.

18 HONORABLE TRACY CHRISTOPHER: Yes. I might
19 not quite use their vocabulary.

20 CHAIRMAN BABCOCK: In terms of the work of
21 this committee, we could certainly organize our workload
22 any way we want, and we can take on JP first, but I don't
23 think -- my sense is the Court's not going to want us to
24 stop there and say, "Here try this out."

25 HONORABLE TRACY CHRISTOPHER: Right.

1 CHAIRMAN BABCOCK: "And then come back to us
2 in a couple of years".

3 HONORABLE TRACY CHRISTOPHER: Like, for
4 example, in JP, we could start out the way it is, giving
5 the judge discretion, right, but maybe in county and
6 district, everyone would feel more comfortable with a
7 presumption in person unless, sort of version.

8 CHAIRMAN BABCOCK: Okay.

9 HONORABLE TRACY CHRISTOPHER: So that would
10 be a distinction, a difference between the two courts, and
11 so we would kind of like to have -- to know which way
12 we're going.

13 CHAIRMAN BABCOCK: Yeah, Robert. And then
14 John.

15 MR. LEVY: Can we -- I suggest we include
16 language that suggests that the -- that the court be in
17 person, the judge, for the reasons that we talked about,
18 absent something significant like they have to attend
19 another proceeding or something of that nature?

20 CHAIRMAN BABCOCK: But Judge Christopher is
21 talking about process, and that's a detail. She's just
22 saying --

23 MR. LEVY: Right.

24 CHAIRMAN BABCOCK: -- should we talk
25 first -- should we focus our energies on JP, get those

1 rules straight, and then move on to county and district?

2 HONORABLE TRACY CHRISTOPHER: Right. And,
3 you know, could we agree to JP rules with the idea that
4 district and county court rules might be different?

5 CHAIRMAN BABCOCK: Yeah.

6 HONORABLE TRACY CHRISTOPHER: Because that
7 would probably help us get agreement.

8 HONORABLE HARVEY BROWN: Yes.

9 CHAIRMAN BABCOCK: Moving along, right.
10 John Kim. Sorry.

11 MR. KIM: Yeah, I was just going to say, I
12 would like to see the presumption language, except, you
13 know, with the exceptions in that, and I'll give you one
14 example where I disagree with Judge Chu. I know he was
15 talking about the JP system, but as Justice Hecht and
16 Bland know, there is a particular just sitting district
17 court judge in Harris County that absolutely will not give
18 a in-person trial, period. And so I think we need some
19 language that says there's a presumption, absent exigent
20 circumstances, of in-person jury trials.

21 HONORABLE EMILY MISKEL: But we're already
22 agreeing that in-person jury trials that that is --

23 HONORABLE TRACY CHRISTOPHER: You mean all
24 proceedings by the judge, or just the jury trials?

25 MR. KIM: Just jury trials.

1 HONORABLE TRACY CHRISTOPHER: Okay. All
2 right.

3 MR. ORSINGER: But if I may, we can also
4 differentiate pretrial hearings from nonjury trials,
5 because there's often not a need to have everyone present
6 for a motion that -- especially if there are no witnesses,
7 so to me there ought to be a differentiation between
8 hearings, trials, without a jury and trials with jury.

9 HONORABLE TRACY CHRISTOPHER: We talked for
10 literally hours about that and how to write it down, and
11 it is a tangled web to try to come up with something.

12 MR. ORSINGER: Really?

13 CHAIRMAN BABCOCK: That's how his mind
14 works, by the way.

15 HONORABLE TRACY CHRISTOPHER: Yeah, I mean,
16 that was the first thing we talked about, was type of
17 proceedings.

18 CHAIRMAN BABCOCK: Yeah, but -- but back to
19 the point, do we want to tackle the JP rules first and dig
20 into them at our next meeting and, you know, get a set of
21 rules and look at them and debate it endlessly, and then
22 come to a resolution and then vote and do all of the
23 things that we do before we move on to the county and
24 district court rules?

25 HONORABLE TRACY CHRISTOPHER: That's a good

1 vote.

2 CHAIRMAN BABCOCK: Huh?

3 HONORABLE TRACY CHRISTOPHER: That's a good
4 thing to vote on.

5 CHAIRMAN BABCOCK: Yeah, you want to vote on
6 that?

7 MR. LEVY: I think we should.

8 CHAIRMAN BABCOCK: All right. How many
9 people think that we should start by focusing -- start our
10 discussions starting with the next meeting, by focusing on
11 the JP rules and try and resolve that before we get to the
12 county court or the district court rules? If you are in
13 favor of that, raise your hand. You're going to have to
14 vote the -- you're going to have to count those votes.

15 Okay. And how many against? You guys all
16 sitting together.

17 Okay. So that passes 21 to 5, the chair not
18 voting. So we'll -- yeah, Robert.

19 MR. LEVY: Just to add a question, are there
20 other types of courts, specialty courts or proceedings
21 that also might be more prone to take advantage of this
22 that could also have a carve out?

23 HONORABLE EMILY MISKEL: High level, yes,
24 but when you get down to trying to write down the details
25 and distinctions, it falls apart, so talking about

1 specific types of litigants or specific types of cases
2 gives the impression that someone is getting less justice
3 than someone else. It just -- so the con -- I think it's
4 interesting to think about a concept where you have a
5 presumption of in person, but wide latitude, for example.
6 Say we had a rule that says there's a presumption that the
7 trial court is in person unless the judge finds good cause
8 to do Zoom. Could I say, look, CPS parents show up so
9 much better on Zoom, I find there's good cause to do my
10 CPS cases on Zoom? Like, I would be happy with that rule
11 if it gave me the flexibility to help the people that I'm
12 always speaking up about wanting these rules to try to
13 help. So I think a quality rule could be drafted either
14 way, so --

15 CHAIRMAN BABCOCK: Yeah, Harvey.

16 HONORABLE HARVEY BROWN: Separate and apart
17 from this, I would like to see the committee come back
18 with a rule to put into the judicial rules, saying that
19 the judge should normally be either in the courtroom or in
20 chambers for hearings or trials.

21 CHAIRMAN BABCOCK: Okay.

22 HONORABLE EMILY MISKEL: I think one of the
23 things you heard Judge Chu mention and that we are also
24 doing in Collin County is that we will run double dockets,
25 so you heard them say felony criminal trials are the ones

1 that are way behind. So you may have a visiting judge
2 doing the felony criminal trial in the physical courtroom
3 with a jury, whereas the other judge -- the sitting
4 district judge can then handle a civil docket on Zoom.
5 And so -- but they couldn't --

6 HONORABLE TRACY CHRISTOPHER: That would
7 definitely be good cause for not being in the courtroom.

8 HONORABLE EMILY MISKEL: Right. As long as
9 that's good cause. Because that's not an emergency,
10 right, that's just efficiency?

11 HONORABLE TRACY CHRISTOPHER: Right. Okay.
12 Right.

13 HONORABLE HARVEY BROWN: And that's why I
14 said chambers, too. One could be in the courtroom and one
15 could be in chambers. There's ways of handling it. We
16 don't want people to be in grocery stores or in cars.

17 HONORABLE EMILY MISKEL: Okay. But if a
18 person is going to make bad decisions and behave badly,
19 that person is going to make bad decisions and behave
20 badly in a physical room.

21 HONORABLE HARVEY BROWN: I don't agree
22 that's 100 percent overlap. I think sometimes being in
23 the courtroom brings a seriousness that will even help the
24 judge who isn't quite as good as others.

25 CHAIRMAN BABCOCK: Tom.

1 MR. RINEY: You make -- Justice Brown made
2 my point for me. Thank you.

3 CHAIRMAN BABCOCK: All right. Great. Any
4 hands up? Okay. Are we good? All right.

5 HONORABLE TRACY CHRISTOPHER: Thank you.

6 CHAIRMAN BABCOCK: Hey, that only took half
7 an hour. All right. We'll go now to Texas Rules of
8 Appellate Procedure 6.5(d), and, Bill, are you going to do
9 it or is Pam?

10 HONORABLE BILL BOYCE: Pam is going to do
11 it.

12 CHAIRMAN BABCOCK: Pam.

13 MS. BARON: Hello, can you hear me?

14 CHAIRMAN BABCOCK: Yes, loud and clear.

15 MS. BARON: That's wonderful. 6.5(d)
16 addresses motions to withdraw as counsel from an appeal,
17 and it dictates the contents of the motion, and the
18 contents that are described there really are mostly geared
19 toward a situation where counsel is withdrawing and the
20 party is left without representation. So it requires that
21 you list the name and address of the party, all of the
22 deadlines and hearings that are scheduled indicate, you
23 know, that the client can appear and object, and then a
24 follow-up duty to supplement if more deadlines occur.

25 There is one exception and that is when new

1 counsel is coming in and substituting, but what there's
2 not an exception for is when a client is represented by
3 multiple attorneys and only one of them who is not lead
4 counsel is withdrawing from the case, like when an
5 associate leaves a firm, or like Justice Young, who was
6 formerly on this committee, gets appointed to the Texas
7 Supreme Court, they're required to file motions to
8 withdraw that includes all of this information when lead
9 counsel is still involved in the case or there's other
10 counsel representing the party, and it's just a cumbersome
11 filing.

12 The Court Rules Committee of the State Bar
13 of Texas has presented an excellent proposal to streamline
14 that procedure when a party continues to be represented by
15 lead counsel that would eliminate a lot of the details
16 that would be included in the contents of the motion.
17 There's no need to list deadlines and court appearance
18 hearings. If lead counsel continues, there's no need to
19 get the name and address of the party, because they
20 continue to be represented by counsel. It does require
21 that the motion be served on the party so that the party
22 is aware that they're represented by fewer lawyers, I
23 suppose, but our subcommittee met on this and agreed
24 unanimously that the proposal presented by the Court Rules
25 Committee of the State Bar should be adopted.

1 CHAIRMAN BABCOCK: Thanks, Pam. Comments
2 about this? Yeah.

3 MR. ORSINGER: Makes sense, makes sense.

4 CHAIRMAN BABCOCK: I knew Richard --

5 MR. ORSINGER: If nobody is going to say
6 anything, I'm just going to say it makes sense. I think
7 we should do it.

8 MS. BARON: Yeah, this should be on the
9 consent agenda.

10 CHAIRMAN BABCOCK: On the summary docket,
11 Pam. Justice Christopher.

12 HONORABLE TRACY CHRISTOPHER: Well, while
13 we're monkeying with this rule, we have had a dispute in
14 my court about when an attorney is in law firm A and he's
15 moving to law firm B and taking the appeal with him, what
16 kind of a motion he files. Because law firm A wants to no
17 longer be associated with the file, but our rule only
18 talks about lead lawyer, okay; and lead lawyer, law firm
19 A, is still lead lawyer in law firm B, but law firm A
20 wants an order saying law firm A is not, you know -- is
21 withdrawn.

22 CHAIRMAN BABCOCK: How does the relocating
23 lawyer get notice?

24 HONORABLE TRACY CHRISTOPHER: Well,
25 essentially it's like a change of address, right?

1 MS. BARON: Yes.

2 HONORABLE TRACY CHRISTOPHER: When you go
3 from law firm A to law firm B, but a change of address is
4 really all you would need, except for the fact that law
5 firm A wants to make sure it is no longer considered part
6 of the appeal.

7 CHAIRMAN BABCOCK: Wouldn't that be a matter
8 between the lawyer and the client and the law firm?

9 HONORABLE TRACY CHRISTOPHER: Well, but yes,
10 but the rule doesn't allow law firm A to, you know, have a
11 paper trail that they're not on the case.

12 CHAIRMAN BABCOCK: Well, I just -- just saw
13 this recently, like day before yesterday, and the
14 relocating lawyer just has a new signature block with a
15 new address and a new e-mail address, and law firm A
16 doesn't appear on the papers anymore.

17 HONORABLE TRACY CHRISTOPHER: Well, I agree
18 with you that they can do it that way, but my -- if we're
19 making a change, what I'm saying is that law firm A often
20 wants something to indicate they're no longer responsible
21 for the case. I mean, because as you know, a lot of cases
22 come to a law firm and your contract is with the law firm.

23 CHAIRMAN BABCOCK: Right.

24 HONORABLE TRACY CHRISTOPHER: Not
25 necessarily with the individual, even though an individual

1 might sign it. It's with the law firm.

2 CHAIRMAN BABCOCK: Right.

3 HONORABLE TRACY CHRISTOPHER: And we don't
4 have anything in our rules that allows -- that
5 quote/unquote allows the law firm to get out.

6 CHAIRMAN BABCOCK: Cynthia.

7 MS. TIMMS: I think it would work like this.
8 I think that the lawyer would change his address and then
9 the law firm would -- and he would be lead counsel, and
10 then under this rule, the law firm or anybody else
11 associated with the law firm would withdraw as non-lead
12 counsel and then it would be gone. They would be gone.
13 Because they don't have to go through all of the steps
14 anymore under this rule.

15 CHAIRMAN BABCOCK: But when -- but I think
16 Justice Christopher's point is when it's the lead
17 attorney --

18 MS. TIMMS: Uh-huh.

19 CHAIRMAN BABCOCK: -- then -- then this fix
20 is not going to help that person, because this is only for
21 non-lead attorneys, right?

22 HONORABLE TRACY CHRISTOPHER: Right, and I
23 think the same problem happens in the trial court, too. I
24 mean, most of us, you know, we'll just sign the order,
25 right, somebody does a substitution that says, I'm -- "I'm

1 moving to law firm B, please excuse law firm A," but I had
2 a stickler at the court of appeals that refused to sign
3 that, so what I'm wondering -- and apparently Judge
4 Schaffer just told me he had the same issue, so there
5 ought to be some way for law firms, rather than just lead
6 counsel, to make sure they're no longer on the -- on the
7 file. While we're thinking about changing, that's all.

8 CHAIRMAN BABCOCK: Yeah, Judge Schaffer.

9 HONORABLE ROBERT SCHAFFER: I kind of look
10 at it the same way you do, it's the lawyer who's on the
11 file, not the law firm, and so I told the guy to just fill
12 out a change of address form, and the law firm doesn't see
13 itself listed in the signature block anymore, and then the
14 termination of the relationship is between the client and
15 the law firm.

16 CHAIRMAN BABCOCK: Yeah, and the law firm
17 would understandably be worried about either malpractice
18 or sanctions, but I know most firms, I would guess all
19 firms, if the departing lawyer -- if there's a departing
20 lawyer, they will require a letter from the client saying,
21 hey, I want to move this file, this file, this file, and
22 this file, to the new law firm with the lawyer who used to
23 be with the original firm, who's going to the new firm;
24 and if there's an act of malpractice that takes place
25 after that, then the original law firm is probably not

1 going to have a problem, and similarly with sanctions, I
2 would think, but anyway. Richard.

3 MR. ORSINGER: I would sympathize with the
4 problem of law firm A and would -- is it not possible for
5 law firm A after the lawyer has departed to file a motion
6 to withdraw and ask the court to remove that law firm as
7 an attorney of record or as a law firm of record?

8 HONORABLE TRACY CHRISTOPHER: Well, that's
9 the problem, the way the rule is written we don't have law
10 firms of record. All we have are lead counsels of record.

11 MR. ORSINGER: So the question is do we just
12 let it go by default that the fact the lawyer moved meant
13 the law firm was off the hook, or do we allow the law firm
14 to have some kind of order saying they're off the hook?

15 HONORABLE TRACY CHRISTOPHER: Right. That's
16 the question.

17 CHAIRMAN BABCOCK: Right.

18 MR. ORSINGER: And you feel like we need to
19 change the rule in order for the law firm to get off the
20 hook?

21 HONORABLE TRACY CHRISTOPHER: I do.

22 CHAIRMAN BABCOCK: Roger.

23 MR. HUGHES: Well, I guess the question is
24 what hook are we trying to get the law firm off of?
25 Because if all we're trying to do is protect the law firm

1 from the client if something goes south after, you know,
2 lawyer Schmedlap goes over to law firm B, I think that's a
3 problem between the client and the law firm; but if, on
4 the other hand, even after lawyer Schmedlap has gone over
5 to law firm B, law firm A has some responsibility to the
6 court so that they can be sanctioned by the court for
7 something that the lawyer -- the departing lawyer does
8 after departing, then I think there's a -- there might be
9 a reason to do it. But if the law firm -- if law firm A
10 is not going to be held responsible by the court for
11 things that the lawyer does after the lawyer departs,
12 I'm -- I'm not sure why we need to get involved in
13 protecting the law firm A from the client. I mean, that's
14 not something I particularly see the rules of procedure to
15 do.

16 CHAIRMAN BABCOCK: Richard Orsinger.

17 MR. ORSINGER: Well, it's my view that when
18 a law firm makes an appearance through a lawyer, that the
19 law firm itself is involved, not just the lawyer.

20 HONORABLE TRACY CHRISTOPHER: Right.

21 MR. ORSINGER: And if you look at Rule 6.5
22 on withdrawal, it says, "An appellate court may on
23 appropriate terms and conditions permit an attorney to
24 withdraw from representing a party in the appellate
25 court." We could say "an attorney or law firm to withdraw

1 from representing the party" and then that allows somebody
2 to file a motion and get an order, and then everyone knows
3 in the world, including some potential future malpractice
4 claim, that you're off the hook, you have no continuing
5 duties. But as long as you're on the court record, in my
6 view -- in the court's eyes you have a continuing
7 obligation of some kind.

8 HONORABLE TRACY CHRISTOPHER: I mean, you
9 know, everyone signs their pleadings lawyer, law firm A.
10 They don't sign their pleadings lawyer, you know, 1001
11 Fannin, Suite 5100, right?

12 CHAIRMAN BABCOCK: Yeah, don't pay attention
13 to this law firm.

14 HONORABLE TRACY CHRISTOPHER: Right. I
15 mean, they say lawyer, Vinson & Elkins, you know, whatever
16 the address is, and, you know, to me, I think we ought to
17 have a way for the law firm to get off.

18 CHAIRMAN BABCOCK: But when lawyer A
19 leaves --

20 MS. BARON: Justice Christopher, would
21 Richard's suggestion take care of your problem?

22 HONORABLE TRACY CHRISTOPHER: Yes.

23 MS. BARON: Then let's do that.

24 HONORABLE EMILY MISKEL: Wait, I have
25 another question. Lately what I've seen lawyers do in the

1 trial court when they move to a firm is they'll just file
2 a substitution, substituting out them in their old firm
3 and substituting in them in their new firm. Do the -- it
4 looks like the appellate rules have an exception for
5 substitution of counsel. Wouldn't that just already
6 address it under the existing rule?

7 HONORABLE TRACY CHRISTOPHER: No, because
8 it's the same lawyer. It's the same lawyer, so there's no
9 substitution; and, you know, the response is, well, it's
10 just a change of address; and to me, you know, Tracy
11 Christopher at Vinson & Elkins is different from Tracy
12 Christopher at Susman Godfrey, you know, when I switched
13 law firms. I just think it's a different signature. It's
14 a different obligation.

15 CHAIRMAN BABCOCK: Well, we've had a
16 proposal that the chair of the subcommittee seems to
17 endorse and Eduardo is going to comment about it.

18 MR. RODRIGUEZ: Well, I don't have any
19 problem with doing that as long as the -- the law firm
20 that is being left behind is not given -- I mean, they can
21 still be sued by the client even though they're no longer
22 involved, if something happened from the start.

23 HONORABLE TRACY CHRISTOPHER: Right. Yeah.

24 MS. BARON: Yes.

25 MR. RODRIGUEZ: Okay.

1 CHAIRMAN BABCOCK: Okay. Yeah, Cynthia.

2 MS. TIMMS: I just want to make one point
3 just to make sure you want to go down this road. Neither
4 the court -- neither the appellate rules nor the civil
5 procedure rules, from what I can tell, ever address law
6 firms.

7 HONORABLE TRACY CHRISTOPHER: Right.

8 MS. TIMMS: Or firms or anything, that it's
9 always addressed to lawyers. And I'm just throwing that
10 out.

11 HONORABLE EMILY MISKEL: I would want input
12 from the clerks as well, because I know that our district
13 clerks, they -- firms don't represent clients, it's only a
14 lawyer, so any lawyer that's appeared is added to the
15 case, and so I would want to hear from clerks before we
16 make this decision on how that affects how they handle
17 things.

18 CHAIRMAN BABCOCK: Yeah, and particularly if
19 we're going to do it on the consent docket, so --

20 MR. WARREN: Notice actually goes to an
21 attorney, not to a firm.

22 MS. BARON: That's what I get for thinking
23 this was a two-minute proposition, but yes.

24 CHAIRMAN BABCOCK: Lisa Hobbs.

25 MS. HOBBS: Yeah, we recently had to say

1 goodbye to one of our partners who is going on to do
2 family law at a different firm instead of just purely
3 appeals with us, and so I was glad that Justice
4 Christopher brought this up because it really was a pain.
5 It wasn't a pain for us to decide internally what cases
6 are staying in-house and what ones were going to the new
7 firm, but we had a problem where sometimes Karlene's name
8 was on a -- like she was the only Kuhn Hobbs lawyer on
9 there, and then sometimes there was Kuhn -- there was
10 Karlene and me, usually, and I was on there, too, and it
11 just got really complicated, and it is totally separate
12 and apart from the client's decision of stay with Kuhn
13 Hobbs or go to new firm. And courts of appeals, like when
14 we would try to get guidance from the clerk's office of
15 like what would you like us to file to ensure that Karlene
16 takes this case in her new firm and Kuhn Hobbs is off of
17 it. And it's just unclear, even with good lawyers trying
18 to figure it out and do right by the rules and do right by
19 our clients and do right by our own protection of, well,
20 we're not on this case anymore, and so I -- I know there's
21 complications, and I appreciate -- I had a hard time
22 hearing Cindy, but I think what she was averring to is
23 that we don't really speak to law firms in the rules
24 currently and that that might be problematic, but I do
25 support Judge Christopher's very practical problem that

1 she's raised and that she's also seeing in her court that
2 I hope is apart -- separate and apart from the Kuhn Hobbs
3 problem, and I would support Richard Orsinger's change as
4 well.

5 CHAIRMAN BABCOCK: Thanks, Lisa. And who
6 else is it? Kennon. Kennon, are you frozen? Kennon, you
7 want to say something?

8 MS. BARON: She's on mute.

9 CHAIRMAN BABCOCK: You're on mute.

10 HONORABLE TRACY CHRISTOPHER: No, she's
11 shaking her head no.

12 MS. BARON: Oh.

13 CHAIRMAN BABCOCK: Okay. Well, then put her
14 hand down. John Warren, do you have anything?

15 MR. WARREN: No. Well, actually --

16 CHAIRMAN BABCOCK: So here's -- here's what
17 we're going to do. We're going to -- the matter that has
18 been assigned to us has been referred to the consent
19 docket, and with unanimous consent, we have found a
20 solution for the Court, and so we're done with that. If
21 the Court wants us to delve further into Rule 6.5 to solve
22 the problem that Justice Christopher raises, then we will
23 do that, and I will let the appellate subcommittee and its
24 excellent chair, Pam Baron, know that.

25 MS. BARON: Can we not proceed on maybe

1 recommending the Orsinger friendly amendment?

2 CHAIRMAN BABCOCK: Well, the Court is
3 sitting here, and so they -- they know about it, and
4 we'll --

5 MS. BARON: Okay.

6 CHAIRMAN BABCOCK: We'll just go from there.

7 MS. BARON: Fine.

8 CHAIRMAN BABCOCK: And so now we're done
9 with that agenda item, and at the risk of talking about
10 something, as they say, on an empty stomach, let's do that
11 anyway, Richard.

12 MR. ORSINGER: Okay. Chip, we are in
13 process, we have no conclusions to forward to anyone.
14 This is a complex issue. 76a was adopted 30 years ago.
15 Most states that I've seen have not even caught up with
16 where we were 30 years ago, but that doesn't mean that
17 what we've got is perfect, and so we looked at the federal
18 solution, because in Justice Hecht's referral letter, he
19 said that some lawyers had complained that it would be
20 better if we just followed the federal rule. Well, to my
21 dismay, there is no federal rule, and every federal
22 district has a different set of local rules, and they're
23 not standardized, and in fact, they're frequently not even
24 similar, and so what -- I was dismayed because I was
25 looking for a solution.

1 I was looking for, you know, a model that we
2 could go after, and it doesn't exist at the federal level,
3 but then I realized slowly that it's actually an
4 opportunity. It's an opportunity for us to see how
5 different federal judges have approached the problem of
6 sealing court records and see if there are good ideas in
7 there that maybe we could adapt to our Texas practice.

8 The problem, of course, is with all of the
9 federal districts, I have a 95-page packet of just federal
10 local rules relating to sealing, which I've been through,
11 and it's very interesting how varied they are. They have
12 a lot of creative solutions, but there's no real model
13 that you could develop out of that without maybe just
14 months of work.

15 So in the midst of all of that analysis,
16 Robert Levy sent me a copy of the Sedona Project or the
17 Sedona Conference proposed model rule to be adopted in all
18 federal district courts, and that's what I sent out to
19 you, and I think that that's maybe a place -- I just
20 wanted to report on this so y'all could be thinking about
21 it as the subcommittee continues to do its work, but they
22 have some novel procedures. They don't take a position on
23 the substantive question of when records should be sealed.
24 They said, "That's not for us. All we're trying to do is
25 get you a procedure that would get the job done

1 efficiently."

2 So we still have the debate about what the
3 presumption should be and what the showing would be and
4 what has to be in the order by way of justification, but
5 the Sedona rule to me is a standout. The thing that
6 stands out to me the most about the Sedona rule is that it
7 protects the right of the party who has confidential
8 information to intervene before it's filed. So a lot of
9 these local rules in federal court and Rule 76a as it
10 exists now in Texas permit a party to selectively decide
11 whether to file their own confidential information or not,
12 but if you produced information in discovery and it's been
13 designated as confidential, the other side can file it
14 without anybody's permission or even advance notice to
15 you, and we have in 76a a provision to get emergency
16 relief. It's not ex parte. You have to give notice, but
17 it is emergency relief, but if your case is being followed
18 closely by the media, if it's a 48-hour period or even
19 24-hour period, the emergency order will probably not
20 protect the information.

21 Now, the Sedona Conference was not so much
22 concerned about that problem. They were concerned about
23 the problem that under a lot of these federal rules a
24 party that wanted to file information that had been
25 designated as confidential was required to file a

1 supporting memorandum as to why the information should be
2 confidential, even if they don't want it confidential,
3 even if they oppose it; and so the conference was
4 concerned that the party who's got the burden under some
5 of these federal rules to justify sealing the file doesn't
6 want it sealed. So what they tried to do was to shift --
7 have a procedure that would shift the burden to the party
8 seeking to seal the record to justify sealing, and they
9 did that by requiring advance notice of the intent to file
10 someone else's confidential information; and then that
11 other person or company, defendant, plaintiff, whatever,
12 has a period of time to file a motion to seal, supported
13 by a memorandum and a description of the information to be
14 sealed.

15 Now, that's good, because it does put the
16 burden of proof on the party who really has the motivation
17 to seek the sealing, but I liked it also because it
18 protects a producing party who is not the filing party.
19 It gives them an opportunity to protect their data, rather
20 than having it slapped on the public record and then
21 they're trying to get the horse back into the barn. So,
22 in my view, at this stage of our analysis, the Sedona
23 Conference proposal is a really good thing for us to
24 consider and discuss or be thinking about and not voting
25 on, because I'm not endorsing it. I'm just saying that

1 it's a lot of work that's been done by a lot of thoughtful
2 people, and that procedural innovation, it's not unique to
3 the Sedona. I've cited in my memo here several of the
4 local federal rules that have a similar procedure of
5 getting notice to the other party so they can get into
6 court and try to justify sealing, but it's something that
7 Rule 76a doesn't have, and it's something that we may
8 consider desirable.

9 So the memo is an analysis of the rule, and
10 I don't know if you've had the chance to read it or not,
11 and then there's also -- they were kind enough to give us
12 a schematic or a flowchart of the process of what goes,
13 but at a very simple level, the party wishing to file
14 confidential information gives notice of the intent to
15 file confidential information and then files that
16 confidential information under seal. So the court has it
17 from the get-go, but it's not made public, and it remains
18 sealed on a temporary basis until the court rules; and if
19 the court seals it, then it remains sealed permanently.
20 Let's talk about the Inmon case separately. Or it would
21 remain sealed until it's overruled; and then within a
22 certain period of days, I think it's seven days, the
23 filing party has to file the unredacted version.

24 So I think the procedure is I file -- I file
25 the documents under temporary seal. I give notice, and

1 they have a form notice, and it's really nothing more than
2 a list, not elaborate, just a simple list of documents
3 that contain confidential information. The other side has
4 until whatever the response deadline is on that motion
5 under the local rules or the federal rules. It's a
6 seven-day response day. You've got to file this within
7 seven days of the motion to seal, and the motion to seal
8 has to have justification associated with it. And they
9 differentiate a memorandum from a declaration, and I'm not
10 clear on what the distinction is between the two, but the
11 point being is that the party with the interest in keeping
12 the information confidential has to file with the court
13 legal justification, and then the rule provides that a
14 proposed order should be submitted, and they don't even
15 have a proposed order in there, but in the commentary
16 there's discussion that the proposed order should try to
17 narrowly target the confidential information so that
18 you're not oversealing. So the idea that you're going to
19 seal everything because there's a paragraph, no, that's
20 not where they're headed. They are wanting to seal the
21 information that's confidential.

22 Now, I need to say that under the federal
23 Rule 5.2, they've already determined there's certain
24 information that would identify individuals that -- that
25 is sensitive information and that would include Social

1 Security numbers, taxpayer ID numbers, things like that.
2 The defect, or I say the deficiency, I should say, in Rule
3 5.2, federal Rule 5.2, is that it permits a party to file
4 previously redacted, without court permission, to file
5 with this confidential information redacted. It doesn't
6 require the court permission to do that, but it only
7 permits it, it doesn't require it. So we still have the
8 opposite party problem. Sure, if I want to file a
9 document that contains my own private information, I'm
10 permitted to redact it under 5.2, but if the other party
11 files a document that has my information, they are not
12 required to redact it. And so we have the same problem we
13 do under 5. -- under 76a, which is that one party can make
14 private information public and then you're back trying to
15 get the horse back into the barn. So I think there's a
16 deficiency on 5.2, and I think our Texas procedures
17 actually provide a mandatory requirement that what we
18 identify as sensitive personal information must be
19 redacted. It's my belief that it's required, and,
20 therefore, there's no moment of exposure where someone
21 else's private information is in the public domain before
22 it gets sealed.

23 So anyway, I think there's some discussion
24 points that can come to us out of that rule, and I think
25 perhaps in another meeting we can do more of a synthesis

1 of what the choices are among the federal districts, and
2 they're quite varied, and I tried to include where there
3 were federal district rules that were either similar to or
4 differed significantly from the Sedona Conference
5 proposal. I mentioned that in here, but it's not
6 comprehensive. I discussed maybe a half dozen local
7 rules, and we've got 100 or more of local rules relating
8 to the subject. So this is just for discussion, and it
9 doesn't have to be discussed today. It's for thinking,
10 because we are eventually going to come back, I guess,
11 when the committee is satisfied that we've seen what the
12 choices are and talked them through.

13 It does seem to me that 76a can be improved.
14 I will say this, that in terms of the substantive issue of
15 sealing, I have not seen a rule that's any tougher than
16 Rule 76a on a party who's wanting to seal; and in most of
17 the debate -- I say debate, most of the written debate on
18 this subject, of which there is a lot, and some of them
19 are law professors and some of them are industry
20 litigation groups, and there is quite a lot of research
21 and briefing and case law citation like in the Sedona
22 Conference, oodles of footnotes.

23 CHAIRMAN BABCOCK: How many is that?

24 MR. ORSINGER: Oodles, o-o-d-l-e-s.

25 CHAIRMAN BABCOCK: I know how to spell it,

1 but --

2 MR. ORSINGER: That's not a professional
3 word. I should say a significant amount, significant
4 number of footnotes. There -- they almost exclusively
5 focus on the public's right to know, and it concerns me a
6 little bit that in some cases we're talking about privacy
7 rights of individuals, and that's why I attached a copy of
8 the article from LCP or the Lawyers for Civil -- let's
9 see.

10 MR. LEVY: LCJ.

11 MR. ORSINGER: LCJ, Lawyers for Civil
12 Justice. I get the impression they're more of defense
13 oriented than plaintiff's oriented. Perhaps that's not
14 fair.

15 MR. LEVY: No, that's true.

16 MR. ORSINGER: It is true, but they may have
17 a reason why they want to curtail public knowledge, people
18 are being sued for wrongdoing or harmful products or
19 whatever, but they have done some work on the right to
20 privacy, and you don't see that in much of the writing out
21 there, and there are some federal courts that have adopted
22 rules that talk about -- a few, that talk about balancing
23 privacy rights against the public right to know. So it's
24 a -- I think a legitimate judicial assessment is to
25 consider the impact on the rights of privacy, and if

1 you're IBM, maybe you don't have much in the way of
2 privacy other than trade secrets, but if you're an
3 individual, maybe you do, and so that's why I included
4 that article in there so that you-all would be exposed to
5 what the arguments are because the right to privacy is a
6 constitutionally protected right at the U.S. level and the
7 state level, and then it's also protected by court law, so
8 those are all factors to consider if we want to reconsider
9 the standards for sealing.

10 And then let me say that Professor Dorsaneo
11 at least six times, I believe, in the life of this
12 committee has brought forward appellate rules, proposed
13 appellate rules. Sometimes they were more discussion
14 stage, sometimes they were specific, but they addressed
15 the transition of sealed records from the trial court to
16 the appellate court, and then the sealing of -- filing of
17 sealed records in the appellate court in original
18 proceedings, and so we haven't spent a lot of time
19 re-analyzing that work to re-present it, but that's a lot
20 of work that was done by very good minds that we need to
21 consider at some point.

22 And the last thing I want to say in this
23 information session, Chip, is that I did a little
24 investigation into the publicity or how the -- it's
25 required that the sealing orders get filed with the Texas

1 Supreme Court, and for a long time they were just
2 accumulated in a file, but I exchanged e-mails with Megan
3 LaVoie, who is the current head of the Office of Court
4 Administration, and she advised me that under the
5 electronic filing system when lawyers file anything in the
6 Texas Supreme Court, they can elect or check off a 76a
7 box, and when they -- if they do that, which they're not
8 required to do apparently at this point, it will
9 automatically go to a service that is called Re, r-e
10 colon, search Texas.com. It's a private site, commercial
11 site run for profit, but they offer county records for all
12 254 counties. I think that's the right number, 254, and
13 it's -- they have a level that's free for anyone if you
14 sign up, and then they have a higher level that's, you
15 know, where you get paid. They're using --

16 CHAIRMAN BABCOCK: Or you pay.

17 MR. ORSINGER: Where you pay them. I'm
18 sorry, where they get paid. Thank you, Chip. So it
19 covers all counties. It gives you free access once you
20 register, but unlike the site that we have in Texas for
21 the family violence orders and citations for public
22 service by citation -- sorry, anyway, that website is very
23 clean, it's like a Google screen, and you can either click
24 on the protective orders or the citation by publication.
25 On this particular website, it's a commercially governed

1 site, so you've got a lot of commercial information, and
2 it's what I would describe as the burgeoning area of legal
3 analytics, which is following the statistics of your
4 judges and your opposing lawyers, and so when I sign onto
5 the page, right now, this is the first page, "Finally
6 attorneys and paralegals can search case information from
7 all 254 Texas counties at once, track cases and get
8 realtime alerts, track existing and potential clients,
9 research and track opposing counsel, search and track
10 expert witnesses, find new businesses with case alerts."

11 So it's a tremendous amount of information.
12 It makes perfect sense, right, to look at the statistics
13 of the judges granting summary judgments and not. I mean,
14 we're talking about the trial court level. You can always
15 look for published appellate opinions for appellate
16 judges, but we have no information really gathered on
17 trial court judges. This is the field of legal analytics,
18 but at any rate, this website to me is attempting to sell
19 that kind of information, but they have the infrastructure
20 to get information from every county, so it makes perfect
21 sense for the State of Texas to just let them handle the
22 administrative load of posting these 76a orders.

23 And maybe that is a budget question, but let
24 me just say, I mean, going straight to site, and I'll send
25 it to Shiva so she can e-mail it around to everybody.

1 There is a lot of commercial information that's
2 distracting if what you're attempting to do is to find
3 76a, and we might just be able to request that they make
4 it a prominent place where you can click a link and you
5 can see the 76a orders, but anyway, it is out there
6 ostensibly if the lawyers click the right button when
7 they're filing and if the people that are users can find
8 it on the website. And the protective order registry I
9 think is cleaner and something to look at. So there is
10 publicity. Obviously it needs to be improved if we're
11 going to rely on the commercial site, but it is out there.
12 I did not know about that, and we probably need to
13 interface with them a little more to be sure that members
14 of the public can readily get to it. And you have to
15 register, which means you're probably going to get a bunch
16 of emails, but, you know, they've got it, and it's up and
17 running, and it isn't going to take six months.

18 So anyway, that's just an update, Chip.
19 Work is ongoing. We take this as a very serious project,
20 and the ferment that's going on in the federal rules
21 actually is good for us because people are coming forward
22 with suggestions, and that can give us ideas that we can
23 use here in Texas.

24 CHAIRMAN BABCOCK: Great. Couple of
25 questions, Richard. You said you've looked at different

1 states. Have you looked at Florida?

2 MR. ORSINGER: No.

3 CHAIRMAN BABCOCK: You should look at
4 Florida before you say we have the most restrictive.

5 MR. ORSINGER: Oh, what is it?

6 CHAIRMAN BABCOCK: Very hard to get a court
7 record sealed in Florida, but a distinguishing factor from
8 our rule with, I'm sure, almost positive, Florida and
9 almost any other state, I would be surprised if there's
10 any other state, is 76a(2)(c), which relates to unfiled
11 discovery on certain -- in certain areas. I don't know if
12 anybody else has that, and I think there's a lot of -- a
13 lot of controversy about that. There was at the time 30
14 years ago.

15 MR. ORSINGER: Yes.

16 CHAIRMAN BABCOCK: I think there continues
17 to be problems with implementing that part of the rule, so
18 you might think about that. And do you have somebody
19 who -- on your subcommittee who is a scrivener who is
20 trying to draft --

21 MR. ORSINGER: Not yet.

22 CHAIRMAN BABCOCK: And would it be
23 appropriate to get somebody to be a scrivener and then
24 have something scribed for next meeting?

25 MR. ORSINGER: Sure. Now, we have some

1 volunteers that are interested in the 76a project that are
2 not on the subcommittee, and they're already making
3 contributions, but right now I haven't called for
4 volunteers and I haven't received any volunteers to write
5 a rule, but writing a rule for next meeting is a little
6 bit of a challenge.

7 CHAIRMAN BABCOCK: Well, you've got two
8 months, and but anyway -- in any event, anybody who wants
9 to jump on -- I mean, our general rule is if somebody
10 wants to volunteer to be on the subcommittee because
11 they're interested, all they've got to do is whistle, and
12 they can ask to be formally assigned or they can just do
13 it.

14 MR. ORSINGER: We're just adding them to the
15 e-mail string --

16 CHAIRMAN BABCOCK: Yeah.

17 MR. ORSINGER: -- and sometimes they're the
18 most active commenters, so we're open to anybody that's
19 interested in this subject matter, because there's a lot
20 to do, but specifically, if we're going to try to come up
21 with a solution to all of these choices and all of these
22 different perspectives with a rule this quickly, yeah,
23 that's going to be a tall order.

24 CHAIRMAN BABCOCK: Well, I mean, we're
25 probably not going to come to a resolution next meeting,

1 but it would be good to have something on paper that we
2 could just look at to see where some of the ideas are
3 because when you talk about in the abstract and we look at
4 the federal rules and we see, you know, they're all over
5 the map, and I'll tell you, if you go to federal court in
6 Florida and try to get something sealed, not easy. In
7 Texas it's a lot easier. I mean, there is a real
8 disparity of treatment among the judges in just those two
9 states, and then there's everything in between. So I
10 would encourage you to maybe get a scrivener and scribe
11 it.

12 MR. ORSINGER: Okay. Well, this is an
13 invitation for anyone who's interested to participate, and
14 it's fair notice to everyone who's involved that we're
15 going to start having a lot more Zoom meetings. They're
16 not going to be in person. They're going to be by Zoom.
17 Chip, I have a vacation that I can't change that's going
18 to occur at the meeting, so if I participate, I'm going to
19 have to participate remotely. And I'll be five hours
20 behind, so we would want to schedule this for the
21 afternoon, so I'm sure I can do it effectively remotely, I
22 mean.

23 CHAIRMAN BABCOCK: Only if you're in a
24 supermarket. Okay. That --

25 MR. ORSINGER: But my subcommittee chair,

1 Judge Ana Estevez might be able to --

2 CHAIRMAN BABCOCK: Judge Estevez would be
3 more than capable.

4 MR. ORSINGER: But I'm not sure she wants to
5 catch all of those arrows in the back.

6 CHAIRMAN BABCOCK: Probably not, and if
7 you're five hour time zones away, then, you know, we're
8 going to have to --

9 HONORABLE ANA ESTEVEZ: I'll do whatever you
10 need, Richard. I'm here for you.

11 MR. ORSINGER: Okay. Thank you. It is so
12 great to have a subcommittee chair like that.

13 CHAIRMAN BABCOCK: Okay. All right. So
14 we're going to take our lunch break. We've gotten through
15 76a, and we're still hungry, and we will be back at 1:15.

16 (Recess from 12:22 a.m. to 1:13 p.m.)

17 CHAIRMAN BABCOCK: All right. Back on the
18 record, everyone. Those of you who were -- did you put
19 them on? Those of you who were Zooming, you missed a very
20 delicious barbecue lunch, so next time maybe you'll show
21 up. I understand we have another consent docket item,
22 which is rules for identifying potential disqualification
23 and recusal issues, and I would like to turn to that if
24 Pam is available. And Bill is out of the room at the
25 moment, but, Pam, could you do that, or do we need to wait

1 for Bill?

2 HONORABLE TRACY CHRISTOPHER: Do we have a
3 page? Do we have a page in this?

4 CHAIRMAN BABCOCK: Huh?

5 HONORABLE TRACY CHRISTOPHER: Page?

6 CHAIRMAN BABCOCK: It's item --

7 HONORABLE TRACY CHRISTOPHER: In this subset
8 of documents.

9 CHAIRMAN BABCOCK: It's item 1. Item 1.

10 PROFESSOR ALBRIGHT: I'm trying to tell Bill
11 what he's being called on for. The disqualification.

12 HONORABLE ROBERT SCHAFFER: It's at the
13 bottom of the -- oh, you don't have a computer.

14 CHAIRMAN BABCOCK: Yeah, I don't have that.
15 I have L and apparently --

16 HONORABLE TOM GRAY: Three pages from the
17 back of your package.

18 CHAIRMAN BABCOCK: Three pages from the back
19 of your package. 237. And I'm not sure if Pam is there.
20 She's not. She was on but not now. Well, here's
21 Orsinger. See if Bill Boyce is outside.

22 MR. ORSINGER: I don't think so. Nobody was
23 out there.

24 CHAIRMAN BABCOCK: Maybe we can't go do this
25 right now. So we'll put this aside for a minute. That's

1 not Bill. We'll put this aside for a minute and talk
2 about Rule 162, which, Richard, is you.

3 MR. ORSINGER: Okay. So this came up last
4 time, and we discussed it, and my subcommittee made a
5 recommendation. You know, we received a suggestion from
6 Judge Schaffer that he was having a problem or at least
7 concerned about cases involving minors that were settling
8 and then they did not come back for approval, judicial
9 approval, by a nonsuit.

10 CHAIRMAN BABCOCK: Right.

11 MR. ORSINGER: And our subcommittee accepted
12 his recommendation and added to the Rule 162 that "Any
13 dismissal pursuant to this rule involving a next of friend
14 shall not be effective unless approved by the Court
15 pursuant to Rule 44," which solves the problem if you want
16 a dismissal, but it doesn't solve the problem if you want
17 a nonsuit, and Elaine Carlson was kind enough to e-mail me
18 a selection out of her treatise. It's MacDonald and
19 Carlson, Volume 5, Section 27.4(a), and it's all about
20 motion for nonsuit, and what she makes clear in here is
21 that the nonsuit is a matter of right, and the judge has a
22 ministerial duty to dismiss the affirmative claims that
23 were nonsuited, but that doesn't tell us -- that doesn't
24 give us finality in the sense that there's no plenary
25 power that expires at the end of 30 days and the case goes

1 to sleep forever, because that's all driven by a judgment.

2 CHAIRMAN BABCOCK: Right.

3 MR. ORSINGER: And so there's a disparity
4 between making a case go away through a nonsuit and making
5 a case go away through a dismissal order, and even though
6 the trial court doesn't have discretion to deny the
7 dismissal order, there's some logic in requiring a
8 dismissal order.

9 And then I also pointed out in my memo that
10 Rule 91a, which has to do with the dismissal of baseless
11 causes of action, if you nonsuit, here if -- if they're
12 attacking your pleading and there's a setting on the
13 motion to dismiss where you are subject to having
14 attorney's fees assessed, if you nonsuit more than three
15 days in advance of the hearing, then I believe the nonsuit
16 is effective immediately and you don't get a ruling on the
17 dismissal. I don't know if you agree with this, Justice
18 Christopher, that you can't get fees then if you nonsuit.

19 I don't know whether y'all agree with that
20 assessment or not, but be it as it may, there is a
21 specific rule for dismissal of baseless causes that's
22 probably more specific than Rule 162, but Rule 162 says
23 that a dismissal doesn't affect counter-relief that's
24 pending, and frequently that's a request for attorney's
25 fees. So I guess 91a probably solves its own problem by

1 the specific prevailing over the general rule in 162, but
2 what doesn't work in 162 is Judge Schaffer's concern, in
3 my view, you know, if you don't -- if you don't have to
4 get a dismissal order and you want to get around the
5 judge, you can do it with a nonsuit without a dismissal
6 order.

7 Now, the counter-argument is insurance
8 companies will never pay unless there's a dismissal
9 because they want a res judicata bar, and maybe that's
10 true, but on the other hand, not all defendants are
11 insurance companies. So I'm not sure that we are
12 satisfied that we really addressed Judge Schaffer's
13 problem.

14 HONORABLE ROBERT SCHAFFER: In some
15 instances, the insurance companies are in on the game.

16 MR. ORSINGER: Really?

17 HONORABLE ROBERT SCHAFFER: And they are
18 going along with this nonsuit because they don't want to
19 have an ad litem appointed and they don't want to -- in
20 one instance I'm having this problem right now with a
21 case, they don't even want to assign a lawsuit that's been
22 filed to in-house staff counsel to answer the lawsuit
23 because the case has settled. So --

24 MR. ORSINGER: Judge, we had attempted to
25 solve the problem you raised, which is the potential abuse

1 that might affect a minor, by saying a dismissal requires
2 approval, but if they can skirt that with a nonsuit that
3 doesn't require approval and they walk away and money
4 changes hands and nobody is looking out for the interest
5 of the kids, we haven't plugged the hole. And then I
6 would say further, we have a conundrum here because
7 finality is always driven by the number of days after the
8 judgment is signed by the judge. In a nonsuit, a
9 so-called entry on the docket or whatever that is, is not
10 a judgment, and so, I guess, statute of limitations would
11 run against refiling the claim that you nonsuit, but is
12 that the way we want to leave it?

13 HONORABLE ROBERT SCHAFFER: Well, I'm just
14 throwing this out here for discussion, and the red part of
15 that where it says "any dismissal," could it say, "Any
16 dismissal or nonsuit pursuant to this rule shall not be
17 effective unless approved by court pursuant to Rule 44"?

18 MR. ORSINGER: That would work if this rule
19 is perceived to change the rule that the court has a
20 ministerial obligation to dismiss because of the
21 announcement of the nonsuit. Now, the --

22 HONORABLE ROBERT SCHAFFER: Therein lies the
23 reason why I'm walking on thin ice.

24 MR. ORSINGER: Yeah. The case law goes back
25 decades, many, many decades, that you have an absolute

1 right to nonsuit, and the court has a nondiscretionary
2 obligation to enter it on the docket, or I forget, it's
3 kind of archaic language, but if this rule change is
4 perceived that nonsuiting -- citing the order of nonsuit
5 is discretionary for the trial court, then you can add
6 nonsuit and fix it, but I'm not sure that it does. We
7 have a lot of case law that we're overturning if we say
8 that this rule change doesn't -- eliminates the
9 nondiscretionary ministerial obligation.

10 HONORABLE ROBERT SCHAFFER: Well, that whole
11 idea is the reason why I know that what we're doing,
12 calling status conferences and having them come in to
13 discuss it, is on thin ice. Fortunately no one has ever
14 challenged me when I did this, and I've been doing it
15 since I've been on the bench, not that great a number of
16 them, but I've been doing it, which is why I've come to
17 make this suggestion to this committee to see if we can
18 find a way to make sure that these kids, the minors
19 whose -- who are receiving money in settlement of claims,
20 that money is treated properly.

21 MR. ORSINGER: Well, one possible
22 suggestion, rather than trying to fix this discontinuity
23 between nonsuit and dismissal in all instances is to
24 describe the cases with minors, that minors are involved,
25 and then if that's the case, take away the mandatory

1 nature of the courts and just say, "Nonsuits in lawsuits
2 that are subject to Rule 44 are not effective until an
3 order of dismissal is signed by the court." And then we
4 can leave a hundred years of case law out there, when a
5 plaintiff with a lawyer nonsuits in the middle of trial
6 before he rests his case in chief, you know, we can still
7 do that. That's a possibility.

8 HONORABLE ROBERT SCHAFFER: That solved the
9 problem, but I know you weren't crazy about it when you
10 talked about it.

11 HONORABLE EMILY MISKEL: That's what I had
12 suggested last time, is instead of putting it in the
13 nonsuit rule, put it in the --

14 HONORABLE ROBERT SCHAFFER: In Rule 44.

15 HONORABLE EMILY MISKEL: Right.

16 HONORABLE ROBERT SCHAFFER: Yeah.

17 MR. ORSINGER: And would you put it in there
18 only as an exception to the dismissal? So like in our
19 comment we would say that even though 162 has been
20 interpreted to give the court a ministerial obligation, 44
21 overturns that for those cases?

22 HONORABLE EMILY MISKEL: I just want to look
23 at 44 before I answer.

24 Right. I would be happy to add with that "A
25 nonsuit is not effective in a case under this rule until

1 it's approved by the court" and put it in Rule 44 rather
2 than the more general nonsuit rule.

3 MR. ORSINGER: And we could maybe just for
4 the people who are not familiar with the rules, we could
5 put a comment under 162 to check 44 to see if it applies,
6 but that seems like a compromise, but I'm skeptical that
7 we can overturn all of the case law by suddenly making
8 nonsuits discretionary with the court. It doesn't get
9 litigated because this is not an appealable point, but as
10 a practical matter, the courts for a long time have spoken
11 in very strong terms about the right to nonsuit. And we
12 could leave that right unaffected and fix Judge Schaffer's
13 problem.

14 CHAIRMAN BABCOCK: Yeah.

15 MR. ORSINGER: In the way that Judge Miskel
16 suggested.

17 MR. HUGHES: Part of the reason -- first, I
18 favor having some provision that the court approve a
19 nonsuit of the minor's claim by the next friend. I
20 realize there may be sometimes skullduggery that's going
21 on, but on the other hand, as the lawyer for the
22 defendant, I feel like, you know, that's a trap for the
23 unwary, and it's best that it be approved officially so
24 that nobody can come back later. But the other thing I
25 was going to say, you know, it's one thing that they're

1 entitled to the nonsuit, but I think it's time to say the
2 judge has got to sign an order, because the first thing
3 is -- I mean, it's fine if you're the defendant who's
4 being nonsuited, but if you're a codefendant, when is
5 your -- when do you ever get a final judgment if you don't
6 have an order of dismissal signed?

7 I mean, I'm defendant B, and I go to trial,
8 I don't like the result, I want to appeal. Well, unless
9 the judge has signed an order nonsuiting defendant A, I've
10 got to wait -- my judgment is not final. I mean, I'm sure
11 the plaintiff would, so to speak, want to get the ball
12 rolling and get an order signed so that he would have a
13 final judgment that's enforceable; but, you know, the
14 thing of it is, it's well known, until we have a final
15 judgment disposing of all -- in writing disposing of all
16 parties, the deadline to file the notice of appeal doesn't
17 start.

18 HONORABLE ROBERT SCHAFFER: And the clerks
19 have a difficult time with that -- with that whole concept
20 as well. They don't want to close a file until there's an
21 order that says the case is dismissed.

22 MR. ORSINGER: We have the same problem
23 where a summary judgment has been granted allowing a
24 defendant out of the case, but others are still there.
25 Everything is interlocutory until something goes final,

1 and we went through all of that I think some years ago and
2 thought the best solution was a severance order. Rather
3 than having individual judgments for each defendant, we
4 would just have one judgment for everybody, and if there's
5 somebody that's not participating, then sever them out and
6 allow the rest of them to go file.

7 CHAIRMAN BABCOCK: Yeah. Richard Munzinger.
8 Can they not hear us?

9 MR. MUNZINGER: I had to unmute myself.
10 Richard, correct me if I'm wrong, current -- pardon me,
11 the current law is that if I, for example, am a plaintiff
12 and I stand up in open court and say, "Your Honor, I
13 nonsuit my case," the dismissal of that case is effective
14 at the moment that I said I nonsuit it.

15 MR. ORSINGER: I think you just mixed apples
16 and oranges, Richard, because you switched from a nonsuit
17 to a dismissal. I would agree that your case is nonsuited
18 the instant you utter that, but it's not dismissed yet.

19 MR. MUNZINGER: Well, but it's no longer on
20 the docket, and I can no longer seek affirmative relief.

21 MR. ORSINGER: Unless you refile.

22 MR. MUNZINGER: Say again?

23 MR. ORSINGER: Unless you refile.

24 MR. MUNZINGER: Yeah. That's my -- that's
25 my understanding of the law. I haven't briefed it in

1 years, but my understanding of the law was, pardon me
2 again, that if I nonsuit my case, it's over with; and the
3 entry of an order may be done to clean up the record, to
4 make the clerk happy, or do whatever; but if you attempt
5 to pursue that claim, I -- my understanding of the
6 substantive law always was that claim no longer exists the
7 moment it's nonsuited. The nonsuit is the right of the
8 plaintiff, and the dismissal, the death of the lawsuit is
9 contemporaneous with the announcement of the nonsuit in
10 open court or the filing of a nonsuit.

11 The same is true if I amend my pleading and
12 drop a claim. I've nonsuited that claim. That's been the
13 law, as I've understood it, for many, many years. I sue
14 for slander and I sue for tortious interference with
15 contract. I file an amended petition. I drop my
16 allegations of slander and no longer seek relief for
17 slander. That is tantamount to a nonsuit. If limitations
18 have run in the one year, I've lost my lawsuit.

19 That's the law, as I understand it. I
20 wouldn't purport to tell you what the law is. I have so
21 much respect for your broad knowledge in it, but that has
22 always been my understanding of the law; and if that is
23 the case, anytime you tinker with this rule, you're going
24 to -- in my opinion, you're going to cause some confusion
25 about the effect of a nonsuit. I think most -- well, I

1 don't know what most lawyers believe, but I certainly have
2 always operated under that understanding, that it is the
3 plaintiff's right to take a nonsuit, and he can't change
4 his mind and wait 30 days and come back and say, "Oh,
5 judge, you never entered an order, I've still got that
6 case pending." No, you don't, you nonsuited it, bud.
7 It's gone.

8 CHAIRMAN BABCOCK: Tom Riney.

9 MR. RINEY: First of all, I support the
10 language in your proposed report. I'm inclined to want to
11 keep it in Rule 162 as opposed to 44, because if we look
12 at the language, 162 is dealing with dismissal or nonsuit.
13 That's where I would tend to look to see how it's to be
14 done, and I think a prohibition there would be effective.

15 Rule 44 seems to be a rule that just says
16 here's how someone can appear in court, so I don't think
17 that's necessarily the best place to go and look at it.
18 It's not a big deal, but I just think it might be clearer.

19 Secondly, on the order, I think Richard's
20 probably right about the effect of a nonsuit, but, you
21 know, I've always been troubled by the fact that this rule
22 says "dismissal or nonsuit." The plaintiff may dismiss
23 the case or take a nonsuit. Well, what's the difference?
24 And I have, in fact, had people who tried to take back
25 nonsuits, and we got back -- we get into the issue about,

1 well, there wasn't an order, and, well, it's effective
2 then. Well, yeah, but if I stood up in open court and
3 said it, the clerk has nothing that says that that case is
4 over; and so I really think it is time that we say there
5 should be an order that -- to follow it up, just to keep
6 it clear.

7 CHAIRMAN BABCOCK: And you wouldn't limit it
8 to where there's a next friend? I mean, you would say
9 there ought to be an order always?

10 MR. RINEY: Yes.

11 CHAIRMAN BABCOCK: Yeah. John.

12 MR. WARREN: I was going to note, I agree
13 where the language should be, but from a clerk's
14 perspective, we have to have -- as our required
15 administrative duty and making sure that we have
16 documented all of the actions of the case, we have to have
17 something to formalize that action where it's verbal and
18 because we also have statistical closures that we have to
19 do with Office of Court Administration.

20 CHAIRMAN BABCOCK: Munzinger, did you raise
21 your hand again? You might be muted.

22 HONORABLE ROBERT SCHAFFER: He is muted.

23 CHAIRMAN BABCOCK: You are muted, and your
24 hand is up.

25 MR. MUNZINGER: Okay. Here I am. If you

1 rewrite this rule, are you implying that the trial court
2 has discretion to ignore the nonsuit? In my practice for
3 most of my life, I always understood if I were in federal
4 court, federal court has the discretion -- a dismissal in
5 federal court is only valid when the judge dismisses it.
6 There's no right to a nonsuit, as I understood it in
7 federal court, ever. That was not the case in Texas. So
8 now, if you fiddle with this rule, are you adopting the
9 federal rule and giving the trial court discretion in
10 every case or just in cases involving minors, and why?
11 And what will be the effects of making this change on the
12 practice of law?

13 I have a problem with amending the rule if
14 you're going to work a change in the way we've practiced
15 forever. I don't -- my personal belief has always been --
16 I briefed it years ago -- that the moment the plaintiff
17 says, "I nonsuit this case," that case is gone. He is no
18 longer permitted to seek any relief on a cause of action
19 nonsuited. And I had it arise in a case of slander with a
20 one-year statute of limitations, and that's when I briefed
21 it, and I have to confess to you it was years ago, but I
22 tried to stay abreast of the law, and I'm unaware of any
23 change in those cases that made that point, that once the
24 plaintiff says, "I nonsuit," it's nonsuited.

25 So now if you're going to give the judge

1 discretion, what have you done with this? There may be
2 perfectly valid strategic reasons for a plaintiff's lawyer
3 to want to take a nonsuit in a case. I don't know what
4 they would be, but then I don't have all of those
5 circumstances in my mind. But I do think this may be --
6 may very well be a change, although it's a procedural
7 subject, it certainly could have an effect on the -- on
8 the substance of the way we deal with nonsuits and whether
9 they are or are not immediate in their effect. I'm
10 finished. Thank you.

11 CHAIRMAN BABCOCK: Thank you. Roger, and
12 then Judge Peeples.

13 MR. HUGHES: Here's why I think we need an
14 order in state court even when it's just a ministerial
15 order, and I agree with Munzinger. I think the nonsuit's
16 effective when it's done. I mean, when the attorney files
17 it or says it in open court, it's effective. The thing of
18 it is, the difference between federal, the federal, they
19 have a rule about stipulating to dismissal; and if you
20 write a stipulation of dismissal and it's -- it has the
21 required prerequisites for a dismissal, either the
22 attorney files it or the parties file it jointly, and the
23 clerk just basically dismisses the case. The judge never
24 signs anything. You just get a letter from the clerk
25 saying, fine, your dismissal, your case is

1 administratively closed because you dismissed it.

2 We don't do that. We're not going to make
3 our clerks try to figure that out, so I think that's why
4 we need a judge, but because there are some deadlines that
5 require finality of the entire case, and those deadlines
6 run from the order being signed, not the pronouncement, I
7 think we're going to -- we need the order just to make the
8 record clean and for the court clerks to know when they
9 can close the case and for parties to know when they
10 appeal.

11 CHAIRMAN BABCOCK: Judge Peeples.

12 HONORABLE DAVID PEEPLES: If we don't
13 require a court to sign an order when the plaintiff, who
14 has sued A and B, files an amended pleading that drops B
15 and continues the suit against A, I mean, excuse me,
16 basically nonsuited or dismissed B, we don't require the
17 judge to affirm that with an order, why would we do that
18 when the plaintiff dismisses or nonsuits the whole case?
19 Why?

20 CHAIRMAN BABCOCK: Richard.

21 MR. ORSINGER: So I think we have a policy
22 question we should address and then a procedural question,
23 and the policy question is when a next friend lawsuit is
24 brought that's settled, do we want the trial judge to
25 approve it before the case is dismissed? I don't do that

1 kind of work, but in the early part of my career I did,
2 and I can tell you that you can sometimes get an attorney
3 ad litem to approve a settlement by agreeing to an
4 extremely high fee award for the attorney. That may not
5 happen often and it may not happen anymore, but it can
6 happen. And so you can't necessarily rely on the attorney
7 ad litem or guardian ad litem to approve -- to perform an
8 independent assessment.

9 I would prefer to have the judge hear the
10 grounds of the settlement and approve it, just as a policy
11 question, because I feel safe that no child will be
12 disadvantaged if the judge -- if the settlement is put on
13 the record and the judge questions everybody about it and
14 then either rejects it or approves it. So if everybody
15 agrees with that policy that the judges should have the
16 final say-so on a settlement involving a minor, we can
17 eliminate most of these arguments against this by applying
18 it only to those cases, not affecting the plaintiff's
19 lawyer that decides to drop one -- one defendant and not
20 another, and we can avoid most of Richard Munzinger's
21 objections, I think, by limiting it just to those
22 situations.

23 So, to me, I don't hear anybody here
24 advocating that district judges and county court at law
25 judges now have the right to reject a nonsuit in any area

1 but the settlement of a lawsuit by a next friend. So, to
2 me, really it boils down to a public policy question. Do
3 we want district judges to approve settlements involving
4 minors? If we do, let's fix the minor problem. Let's
5 take the mandatory nature of the entry of the judgment
6 away in the minor cases but leave it there in the other
7 cases, and then we haven't harmed anybody, and we protect
8 the children.

9 CHAIRMAN BABCOCK: Eduardo. Did you have
10 your hand up, Eduardo?

11 MR. RODRIGUEZ: No, although I agree with
12 what he just said.

13 CHAIRMAN BABCOCK: Judge. Harvey. Or any
14 other judge.

15 HONORABLE HARVEY BROWN: Just so we hear the
16 other perspective, because I do agree with what's been
17 said, but we should at least be aware of the perspective.
18 Sometimes a plaintiff's attorney may join in some minor
19 children just as almost, you know, throwaways and not
20 think about it very carefully, and then it turns out it's
21 not a very big case and they want to settle the case, and
22 they're only going to give the minor \$500 or something,
23 and the insurance company is told by the carrier, well, if
24 we nonsuit it, you have a risk. The case hasn't gone away
25 really. You're giving them \$500, but they can come back

1 anytime when they turn 18 and after limitations and still
2 sue. Are you willing to take that risk? And they say,
3 well, let's see, they've really got no claim, they're
4 never going to make a claim, and an ad litem is going to
5 cost us three or \$4,000, that's the only way we can settle
6 this suit, settle without that extra three or \$4,000, or
7 that's got to come out of something else in the
8 settlement. So I have heard this debate from the other
9 side, just so we're all clear.

10 CHAIRMAN BABCOCK: Judge Wallace.

11 HONORABLE R. H. WALLACE: Thank you. You
12 know, I've never focused on the exact language of this
13 Rule 44 before, but it does say, says, "Next friend or his
14 attorney of record may, with the approval of the court,
15 compromise suits in agreeing to judgments," et cetera. It
16 doesn't say he must do that in order to compromise or
17 settle the case. It appears to me that what it -- the
18 reason to do that is it protects the defendant from
19 getting sued because it binds -- it's forever binding and
20 conclusive on the party that dismisses the suit. So I've
21 always thought if somebody wanted to just pay some money
22 and nonsuit a case, most defendants with certain insurance
23 companies would not want to do that. They would want a
24 court-approved settlement to protect them from subsequent
25 lawsuit.

1 Now, I don't know, there may be case law
2 that says I'm totally wrong about that, but maybe we want
3 to -- if we want to ensure and require that settlements
4 with minors can only be made with approval of the court,
5 maybe it's Rule 44 that we need to add language to, making
6 that mandatory. I don't know if we want to do that. I'm
7 just making that observation.

8 Now, the proposed language in the Rule 162
9 that "any dismissal pursuant to this rule involving next
10 friend shall not be effective unless approved by the
11 court," well, what is the court going to do? You may have
12 a case where the plaintiff's lawyer and the defendant's
13 lawyer are going to settle a case for a thousand dollars,
14 and they've got a 15-year-old plaintiff, and they say,
15 "Well, this is ridiculous, we don't need to go to court,
16 we're just going to file a notice of dismissal." Does
17 that case just remain on the court's docket until maybe it
18 comes up for dismissal for want of prosecution sometime or
19 what? I mean, to say that it's not -- I'm not sure how
20 it's not effective unless approved by the court. If it's
21 not effective, what is it?

22 CHAIRMAN BABCOCK: Thanks, Judge.

23 HONORABLE R. H. WALLACE: That's all.

24 CHAIRMAN BABCOCK: Thank you. Did somebody
25 else -- Richard Munzinger. Munzinger, did you have your

1 hand up again?

2 MR. MUNZINGER: Yes, I do, only to point out
3 that the same logic would apply, it seems to me, to wards
4 of the court, of the probate court, if somebody's got a
5 guardianship and some claim is going to be settled. I
6 just wonder if that would -- the same logic would apply
7 and if the rule would apply in those circumstances.
8 That's all.

9 CHAIRMAN BABCOCK: Thank you. Justice Gray.

10 HONORABLE TOM GRAY: I was going to try to
11 go all day without saying anything, but it's just not
12 going to happen.

13 MR. ORSINGER: Rule 162, he just can't
14 resist.

15 HONORABLE TOM GRAY: I don't know who we're
16 protecting here. If the judge wants to review it and does
17 review it, it seems like to me it forecloses the minor
18 from a subsequent lawsuit. If that doesn't happen, the
19 minor, when they become the age of majority, has a whole
20 lot more targets to sue; and whether that's a good thing
21 or a bad thing, I don't know. Not my bailiwick to solve,
22 but it just seems like we are hamstringing the plaintiff
23 who is already at a legal disability, and whatever that
24 does for the judge or not, I don't understand what the
25 objective is. And I would -- it's always been my

1 experience when we start carving out a suit or a class of
2 suits, that we -- it leads to confusion. The less
3 pigeonhole something needs to fall into, the smoother the
4 process works, and so I would leave it alone.

5 CHAIRMAN BABCOCK: Okay. Judge Schaffer.

6 HONORABLE ROBERT SCHAFFER: Yes. Okay. The
7 reason I brought this up is because over the years I've
8 seen orders of nonsuit, orders of dismissal, on cases
9 involving minors. When I do a status conference, I find
10 out that money has changed hands and the money has gone to
11 the parent, and off they go when the money actually
12 belongs to the child. What caused me to do this one
13 immediately or this year was because my colleague down the
14 hall had a case where there were three minors and each
15 minor was getting \$10,000 or around \$10,000, and there was
16 no minor settlement hearing. There was just a dismissal.
17 And so what -- I guess, if you -- to answer your question,
18 what I'm trying to protect here is the money that belongs
19 to the child, not to the child's parent and to protect the
20 interest of the child to the extent that that money is put
21 into the registry of the court so that when that child
22 turns 18, he or she gets that money and not the child's
23 parent.

24 CHAIRMAN BABCOCK: Yeah, sure, point,
25 counterpoint.

1 HONORABLE TOM GRAY: Where is the reason
2 that the child can't come back and get his money, his or
3 her money because --

4 HONORABLE ROBERT SCHAFFER: Are you talking
5 about the actual money that's part of the suit or later
6 on?

7 HONORABLE TOM GRAY: No, later on. Whole
8 new suit.

9 HONORABLE ROBERT SCHAFFER: I don't disagree
10 with you. There's no finality. If there's not a hearing,
11 a settlement conference, an order signed by the court, I
12 don't disagree with you that there's no finality. The
13 problem is, is that those funds obviously are gone and now
14 the child has to go hire a lawyer and go through this
15 process all over again and has to deal with summary
16 judgments and everything else that go with that.

17 HONORABLE HARVEY BROWN: And there may be no
18 insurance left.

19 HONORABLE ROBERT SCHAFFER: And -- and --
20 exactly.

21 MR. ORSINGER: Or the child may not realize
22 they don't have a cause of action.

23 HONORABLE HARVEY BROWN: Or think mom and
24 dad already settled that. I can't do that.

25 HONORABLE ROBERT SCHAFFER: Or the child was

1 an infant and didn't know about it. And -- and I think
2 it's -- either the property code or the Civil Practice &
3 Remedies Code tells you what you can or cannot do with
4 funds that are obtained on behalf of a minor, and handing
5 it to mom is not one of those things.

6 HONORABLE TOM GRAY: And all I'm saying is
7 if we don't make this change, one, you don't have the
8 obligation to conduct that settlement, because it's not
9 required for these people who brought the suit to do it
10 and you leave the minor with whatever causes of action and
11 remedies they might otherwise have against the greatest
12 number of parties, including their parents. Because I
13 know lots of children, maybe mine included, that would
14 like to, you know, make a suit to bring it when they
15 realize -- when they're 19 years, 364 days old. You know,
16 I just think we're foreclosing something that doesn't need
17 to be foreclosed.

18 CHAIRMAN BABCOCK: I'm going suggest three
19 votes. The first would be let's leave well enough alone,
20 let's not change anything. So people -- that will be the
21 first vote, and people can vote yea or nay on that, and
22 then if we're going to make a change, those who think it
23 ought to be 162, raise your hands, and those who think it
24 ought to be 44, raise your hands. I know it's early,
25 we're not voting yet. Harvey.

1 HONORABLE HARVEY BROWN: I know. I have a
2 point of order or a suggestion.

3 CHAIRMAN BABCOCK: I know you're eager to
4 vote, but --

5 HONORABLE HARVEY BROWN: I don't see how we
6 can have a controversy over the suggestion that's been
7 made, because it's a dismissal, and therefore, it would
8 preclude the minor from bringing a lawsuit in the future,
9 I think.

10 CHAIRMAN BABCOCK: Yeah.

11 HONORABLE HARVEY BROWN: There's at least a
12 certain argument that a dismissal would create a res
13 judicata effect. So I think that that is a different
14 question than the nonsuit question, so I would separate
15 those two.

16 CHAIRMAN BABCOCK: Okay. All right. So
17 everybody that thinks we ought to leave the rules as they
18 are and make no change, with all due deference to Judge
19 Schaffer, raise your hand. Any hands raised there?

20 Okay. And those who think we should make a
21 change, raise your hands.

22 Raise your hands here again. Okay. Closer
23 than I might have expected. Nine for as-is, 17 for a
24 change, so we'll go on to our next vote.

25 Those who think it ought to be made in

1 Rule 162, raise your hand.

2 Okay. Hands down, mechanical hands down.

3 And now those who think it ought to be in Rule 44, raise
4 your hand. Not all at once.

5 Okay. So we have 19 votes for Rule 162 and
6 five votes for Rule 44, the chair not voting, so I think
7 we have a good sense of what our committee thinks and
8 recommends to the Court.

9 MR. ORSINGER: But we don't know what the
10 change is going to be.

11 CHAIRMAN BABCOCK: No, you never know until
12 the Court acts.

13 MR. ORSINGER: Oh, well, that's great, then
14 we can let them decide.

15 CHAIRMAN BABCOCK: Okay. Pam, are you back?
16 I hope. Pam Baron?

17 MS. BARON: Yeah, sorry.

18 CHAIRMAN BABCOCK: That's all right. We're
19 onto your item now, rules for identifying potential
20 disqualification and recusal issues, and I've been told
21 that that's supposed to be on the consent docket, too, but
22 you may disagree with that.

23 MS. BARON: I would never disagree with that
24 statement. I'd like the record to reflect that I am
25 wearing my Purdue sweatshirt.

1 CHAIRMAN BABCOCK: So we're going to make
2 this --

3 MS. BARON: In regards to disclosures of
4 counsel that are involved in the trial court and on
5 appeal, so that the appellate court justices will have the
6 information they need to determine recusal and
7 disqualification issues, the Court didn't indicate that
8 there had been any specific problems, but the way the
9 request came to us, I guess what we're looking at is maybe
10 two areas of concern. One is that the brief or the first
11 document, it could be a brief, it could be a petition for
12 a mandamus, it could be your petition for review in the
13 Supreme Court, where you identify the list of parties and
14 counsel, does not provide a full listing of former counsel
15 that were involved in a trial or appeal but are not
16 appearing on the brief at this point, and those could also
17 be a basis for recusal or disqualification, so the court
18 doesn't have full information.

19 The other concern was that counsel may have
20 changed firms subsequent to their appearance in the trial
21 court or court of appeals, and the justices would need
22 that information, too, to know what other law firms might
23 now be involved as the case goes forward. Jaclyn was very
24 helpful in providing us kind of a suggestion for a rule,
25 and we tinkered with it a little bit, but basically what

1 it does, is it does require a complete listing of all
2 counsel, past and present, in the trial and on appeal, and
3 it imposes a continuing obligation of lead counsel to
4 inform the clerk of the court of any changes that might
5 happen if someone has subsequently changed law firms.

6 There was a question about whether there was
7 a need for an earlier disclosure before the first
8 substantive filing in the case, and we did not think that
9 we wanted to burden the notice of appeal with this
10 information, and the docketing statement, as we view it,
11 is already complicated enough. It's mostly used, as we
12 understand it, for the clerk to enter information into
13 case management and to determine who is required to be
14 served in a case. Former counsel would not be in that
15 list, so actually, what the other tinkle -- tinkering with
16 this that Jaclyn suggested is you only have to get the
17 names and addresses and e-mail addresses for counsel that
18 are continuing to represent.

19 So I think if you look at the bottom of page
20 three of our memo and going over the top of page four,
21 that is the language -- I think I'm looking at the
22 wrong -- I'm looking at an earlier draft of this, but --
23 I'm sorry, I got sick, so Bill Boyce took over for me on
24 this, but I am recovering from a very bad cold. If you
25 look on -- well, you can find the language, but it's Rules

1 53, 55, 38, that all have basically the same language in
2 it, but they identify a different document in which the
3 list of parties and counsel will appear. So that's the
4 language that our subcommittee endorses and open for
5 discussion.

6 CHAIRMAN BABCOCK: All right. Scott.

7 MR. STOLLEY: I'm on this subcommittee, and
8 I think it would be a good change for the rule to clarify
9 how narrow or how granular or how broad the court wants
10 these disclosures to be. I know my personal preference is
11 I always try to be overinclusive in listing counsel,
12 whether, you know, maybe they just appeared at one hearing
13 in the trial court. I still want to put them on the list,
14 but I know a lot of lawyers don't do that and they only
15 list the current counsel, so I think providing some kind
16 of clarity to the bar that is helpful to the Court as well
17 in making their decisions is a good thing.

18 CHAIRMAN BABCOCK: Do you think it's
19 necessary in Rule 10 on motions, motions in the appellate
20 court?

21 MR. STOLLEY: I'm not sure I follow the
22 question.

23 CHAIRMAN BABCOCK: Would the same language
24 -- should it be put into Rule 10?

25 MR. STOLLEY: Oh, about disclosing the names

1 of counsel?

2 CHAIRMAN BABCOCK: Yeah. When you're making
3 a motion.

4 MR. STOLLEY: I don't think so.

5 CHAIRMAN BABCOCK: No, I don't either, but
6 it was raised by the memo, so I thought I would ask.

7 MR. STOLLEY: Yeah. We -- I don't know that
8 the subcommittee even talked about that.

9 MS. BARON: We actually did discuss that,
10 and we did have the benefit of Bill Boyce's experience on
11 the court of appeals, and we really couldn't identify
12 substantive motions that would not be accompanied by
13 something like the petition for writ of mandamus. But,
14 you know, if -- and it would be kind of cumbersome to
15 include it, but we certainly could do that if there's a
16 consensus that we should.

17 CHAIRMAN BABCOCK: I only raised it because
18 it was in the memo. I don't think it's a good idea.
19 Justice Gray.

20 HONORABLE TOM GRAY: Anecdotal discussion,
21 we had a case filed in the Waco court. It was fairly
22 early in my tenure there, about year four or five or
23 something like that, and didn't involve the firm I was
24 with, Fulbright, and so it was progressing along and for
25 some reason in preparing for oral arguments I had gone

1 back to the record, and there was a hearing that was
2 cited, and I read it, and it was -- identified the lawyer
3 by name, and that was the first inkling that I had that
4 Fulbright had been involved in that case. It was no
5 longer involved. That lawyer was no longer involved, but
6 one of the issues related to a hearing in which a lawyer
7 from Fulbright was involved, and so I had to go back to
8 look at the time line, and it had been in litigation for a
9 long time when I was at Fulbright; and so, you know, the
10 day before oral arguments were to be held, it had to be
11 canceled, everything postponed because I had to recuse.

12 And so it definitely is a change that needs
13 to be made. It looks like it would have helped that, but
14 I have no idea how many hearings or rulings or on motions
15 or whatever occurred prior to that event that would have
16 only still been raised with the filing of the brief under
17 these proposals that I may have been on the panel that
18 ruled on those type issues.

19 CHAIRMAN BABCOCK: Yeah. Richard, and then
20 Justice Christopher.

21 MR. ORSINGER: So, Justice Gray, you needed
22 to know when Fulbright was involved in order for you to
23 determine whether you had to recuse, so is it enough to
24 just say this is the former law firm, or is the -- it's
25 not the current law firm, do you have to put the ending

1 date?

2 HONORABLE TOM GRAY: It would have been
3 helpful, but even a flag that said Fulbright had been the
4 counsel at some point in it would have triggered me to go
5 look then.

6 MR. ORSINGER: Where would you look? Where
7 would you look to find that out?

8 HONORABLE TOM GRAY: I actually called the
9 law firm. I called -- or had the clerk call the law firm
10 and found out what the period of time for representation
11 was. And so -- and I'm trying to remember -- there was
12 some other wrinkle in it about the -- the time that the
13 lawyer had actually been at another firm previously. It
14 got fairly involved, but what I'm saying is, that was
15 enough to put me on notice, just seeing her name in the
16 record. What I was trying to respond to additionally was
17 Chip's question about do we need it earlier. I don't know
18 if there had been an emergency motion for stay when the
19 notice of appeal was filed, and I would have had no idea
20 but would have ruled on that motion.

21 I mean, so it kind of depends on the nature
22 of that motion that's filed as to whether or not I needed
23 to be out earlier, but, you know, nothing ever came of it,
24 and I got out before the oral arguments, and so whatever
25 even happened with the case, I don't know. But --

1 CHAIRMAN BABCOCK: Justice Christopher, then
2 Harvey.

3 HONORABLE TRACY CHRISTOPHER: Well, I think
4 this is extremely burdensome in certain type of cases,
5 which are generally probate estate matters, because the
6 cases last forever, and it's not unusual for there to be
7 different lawyers, law firms, throughout the span of a
8 15-year case that has been open for that long. I also
9 think it's very burdensome to say "all counsel who
10 appeared in the court" as opposed to "counsel who were of
11 record in the court." So this would require you to --
12 let's say, two people at Vinson & Elkins were on the
13 pleadings, but a third person at Vinson & Elkins appeared
14 for a hearing, right? You would have to figure that out,
15 because, you know, that will happen occasionally, right,
16 it's not always the attorney of record who comes down and
17 appears at the trial court.

18 So I -- it's a good idea and perhaps, you
19 know, listing firm names would then put us on notice to go
20 look further, would be a way to do it, because like, for
21 example, since my husband's at Crain Caton, and I recuse
22 out of anything that Crain Caton is in, and so sometimes
23 the probate matters that have been going on for forever,
24 their firm will have been in it, you know, 10 years ago,
25 15 years ago, whatever; and sometimes I just write them a

1 letter and say, "Hey, has Crain Caton ever been in this
2 case?" So to me, it's -- it's very burdensome in certain
3 types of cases.

4 CHAIRMAN BABCOCK: Harvey.

5 HONORABLE HARVEY BROWN: It is burdensome,
6 but the cost of getting it wrong could be really big.
7 There was a case out of the First court where Laura Higley
8 wrote the opinion and the side that lost discovered that
9 Baker Botts had been in the case years earlier and didn't
10 know and, therefore, got that opinion set aside, the First
11 had to go back and rework on it, et cetera, so it can be
12 pretty costly if you don't list everybody.

13 HONORABLE TRACY CHRISTOPHER: But wouldn't a
14 firm name be enough?

15 HONORABLE HARVEY BROWN: A firm name, that
16 would be enough, but I do think at least the firm name we
17 should require -- and it should be clear it's not
18 appearing today, it should be whoever appeared.

19 HONORABLE TRACY CHRISTOPHER: Right. But, I
20 mean, if Laura had seen Baker Botts, if I see Crain Caton,
21 then if you had seen Fulbright, then you make an effort to
22 figure out --

23 HONORABLE TOM GRAY: Yeah.

24 HONORABLE TRACY CHRISTOPHER: -- where you
25 go from that point.

1 HONORABLE TOM GRAY: I will say that would
2 be accurate. I mean, if I had seen just Fulbright &
3 Jaworski, but that was the thing under the current rule,
4 you wouldn't have had to identify Fulbright because they
5 weren't involved in the case. And I want to say it was
6 for like three or four years before it got to the
7 appellate court. It wasn't an employment -- it was an
8 employment case, but so -- but anyway.

9 CHAIRMAN BABCOCK: Okay.

10 HONORABLE TRACY CHRISTOPHER: Because I
11 think current counsel might have no idea --

12 CHAIRMAN BABCOCK: Sure.

13 HONORABLE TRACY CHRISTOPHER: -- who all
14 appeared, especially just appeared, before, you know, they
15 took over.

16 CHAIRMAN BABCOCK: Well, they might not know
17 just off the top of their head, but they could find out,
18 though, couldn't they?

19 HONORABLE TRACY CHRISTOPHER: Take a lot of
20 work.

21 MR. ORSINGER: Sure.

22 CHAIRMAN BABCOCK: Take some work.

23 HONORABLE TRACY CHRISTOPHER: And you think
24 about guardian ad litem, attorney ad litem, they would
25 all have to be listed in these -- you know, these estate

1 cases. I mean, there's a lot of people, lot of work.

2 CHAIRMAN BABCOCK: Yeah. So, Judge, you
3 think that the change to these rules should not be made?

4 HONORABLE TRACY CHRISTOPHER: I think it's
5 burdensome.

6 CHAIRMAN BABCOCK: Objection, nonresponsive.

7 HONORABLE TRACY CHRISTOPHER: I do not.

8 HONORABLE ROBERT SCHAFFER: She did that to
9 me about 15 minutes ago.

10 CHAIRMAN BABCOCK: Did she?

11 HONORABLE TRACY CHRISTOPHER: Firm name, but
12 not every lawyer who had ever appeared.

13 CHAIRMAN BABCOCK: Yeah, Pam.

14 MS. BARON: If we would change "appeared" to
15 "of record," would that --

16 HONORABLE TRACY CHRISTOPHER: That would be
17 a lot better.

18 MS. BARON: -- allay your burdensomeness
19 challenge or not?

20 HONORABLE TRACY CHRISTOPHER: Yes, it would
21 be a lot better.

22 CHAIRMAN BABCOCK: Okay.

23 HONORABLE TRACY CHRISTOPHER: You know,
24 because I mean, you can get the court record and figure
25 that out.

1 CHAIRMAN BABCOCK: Yeah. Any other comments
2 or objections to the proposed language by anybody? Any
3 hands up there in Zoom land?

4 All right. Pam, anything else you want to
5 say, having had two --

6 MS. BARON: Boiler up.

7 CHAIRMAN BABCOCK: What's this all about?

8 HONORABLE JANE BLAND: They're in the
9 tournament, Chip.

10 HONORABLE ROBERT SCHAFFER: No, it's a
11 basketball game.

12 CHAIRMAN BABCOCK: I know, you know, I
13 picked them to lose two rounds ago, but -- so I'm aware
14 they're in the tournament.

15 HONORABLE JANE BLAND: So what's the
16 question?

17 CHAIRMAN BABCOCK: I just never associated
18 Pam with Purdue, that's all.

19 MR. ORSINGER: Well, you will not make that
20 mistake anymore.

21 CHAIRMAN BABCOCK: No, apparently not. All
22 right. Anything else on this rule? All right. We're
23 done with this rule. And, Pam, thank you very much, and,
24 Bill, for your efforts in this.

25 When is our next meeting, Shiva?

1 MS. ZAMEN: May 27th.

2 CHAIRMAN BABCOCK: May 27th in Houston at
3 South Texas College of Law. Is Elaine on the -- on the
4 Zoom?

5 PROFESSOR CARLSON: I am.

6 CHAIRMAN BABCOCK: There you are. So tell
7 us all about how you're going to top what we've been given
8 here?

9 MR. KIM: Go Boilers.

10 CHAIRMAN BABCOCK: Elaine, you're going to
11 host us?

12 MS. WOOTEN: You're muted, Professor
13 Carlson.

14 PROFESSOR CARLSON: Thank you, Kennon, what
15 would I do without you?

16 We will be hosting it, and we will have
17 parking available in a block behind the school if you
18 haven't been there before. You're just going to have to
19 push the button on the speaker, and the security guard
20 will let you in. It's complimentary parking, so sometimes
21 that's a problem in downtown Houston, so hopefully that
22 will -- and I don't know, Shiva can tell you what hotel
23 arrangements I think might be available. I don't know.

24 MS. ZAMEN: We're working on that.

25 PROFESSOR CARLSON: But we'll take special

1 requests, including boilermakers.

2 CHAIRMAN BABCOCK: Shiva says we're working
3 on the hotel situation, so we'll do that.

4 I told a couple of people we would be going
5 until 5:00, but I missed that by a smooth three hours,
6 never realizing that we would have two consent docket
7 items. So I underestimated our ability to beat these
8 rules to death. But it's been great. Great seeing
9 everybody in person and great seeing people on the big
10 screen here, too, so --

11 MS. BARON: This has worked really well for
12 those of us who are participating remotely, so that's very
13 much appreciated.

14 CHAIRMAN BABCOCK: You bet.

15 MS. BARON: And the sound quality of people
16 in the room has been really good for the most part, so
17 that's been great.

18 CHAIRMAN BABCOCK: Yeah. And, frankly, we
19 can hear you-all very well, too, so --

20 MS. BARON: Nice.

21 CHAIRMAN BABCOCK: -- at both ends of it,
22 but thanks very much. If there's nothing else, we will
23 stand in recess until the end of May. Thank you.

24 (Adjourned at 2:07 p.m.)

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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 25th day of March, 2022, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are \$ 1,190.00.

Charged to: The State Bar of Texas.

Given under my hand and seal of office on this the 15th day of April, 2022.

/s/D'Lois L. Jones
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