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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

MAY 27, 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 27th day of May, 2022, between the hours of 9:00 a.m. and 2:33 p.m., at the South Texas College of Law, 1303 San Jacinto Street, Houston, Texas.

INDEX OF VOTES

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

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CHAIRMAN BABCOCK: Let's go on the record. Welcome, everybody. And glad to see -- glad to see you here. I've had one request, which I make on behalf of the committee and myself, speak up. I've got a microphone, but not everybody does, so be sure to speak up so everybody can hear. And without further adieu, we are so delighted to be at the South Texas College of Law. And we have the Dean here, and Dean Barry would like to make a few opening and hopefully welcoming remarks.

DEAN BARRY: A little bit of both, yes. Good day, everybody. For those who are on Zoom, I am the little dot in the far corner. Hello.

My name is Mike Barry. I am the Dean and President of South Texas College of Law, Houston. On behalf of Elaine Carlson of your group, I am honored to welcome you here to South Texas.

CHAIRMAN BABCOCK: Where is Elaine?

DEAN BARRY: Elaine is on Zoom, and I am not allowed to disclose her actual location, so -- she regretted not being able to be here in person.

I have been asked to give about 45 minutes worth of remarks, so -- I'm just seeing who is paying attention. That's good.

Just very quickly, as you walked in the door

today, you might have looked up on the right-hand side, and the mission statement of the school is in very big letters on the right-hand side of the school. We were founded 99 years ago, our centennial will be next year, and we have four hallmarks of the mission of the school here. We are a school of excellence, we're a school of opportunity, we're a school of service, and we're a school of diversity. And I'll just hit two of those points very quickly.

The first is the diversity point. As you know, Houston is the most diverse city in the country. And I have made the commitment that we will be the most successfully and intentionally diverse law school in the country, because that's the community we serve, and it's the right thing to do for our profession. And we were very honored last year when one of our alumnus gave us a very sizable gift to create a diversity center here at South Texas so that we could be the leader in the state when it comes to increasing the diversity of the legal profession.

The second is on service. Our clinical program last year gave $3.6 million worth of pro bono service between the attorneys and the students to our community. And one hallmark of that, particularly this year, was with respect to ensuring that people maintained

housing during the pandemic. We are having a celebration today because our faculty and students have helped 1,000 families stay in their homes this year alone.

Last year, the White House celebrated the efforts of law schools to help people during the pandemic maintain housing. They identified that there were about 10,000 people across the country who had been helped. At that point, South Texas had helped 1200 of the 10,000 across. That's the commitment that this school makes to the community.

We recognize the importance of training people who are not only prepared, but who care about the world that they will serve and the communities they serve. And that's one of the reasons we're honored to have you here today, because you help make the rule of law possible by ensuring that we have the right processes and procedures. If there's anything we can do to help, please reach out. Thank you for being here. Come anytime. We're happy to host you.

Back to you.

CHAIRMAN BABCOCK: All right. Dean Barry, thank you very much.

(Applause)

CHAIRMAN BABCOCK: Thank you for your students' and your faculty's pro bono commitments. That's

really terrific. Good for you. Thank you.

Thank you. So I have been the Chair for almost 22 years, I think, of this committee. I was on the committee for some lengthy period of time before that. Chief Justice Hecht may have missed one meeting in all of that time, but it would be only a overriding reason for him not to be here, but he's not. But I think he's on Zoom, and, if he's not, Justice Bland is here and ready to fill in with the Chief's opening remarks.

But, Chief, if you're anywhere out there and want to say something, speak now. Otherwise, Justice Bland is going to do it.

HONORABLE NATHAN HECHT: I yield to Justice Bland.

CHAIRMAN BABCOCK: Well, here she comes.

HONORABLE JANE BLAND: I don't hear that that often. But it's nice, it sounds nice.

Good morning, everyone. As you -- as you just heard, the chief has left us to our own devices, and he had said that he was going to read the transcript. So I was going to tell you to be sure not to -- you know, not to go wild. But I think he got a little bit nervous about it, so here he is on Zoom with us. So -- okay.

So Court's been busy working toward clearing our docket this June. It's a commitment that the Court

made eight or so years ago and has successfully maintained through the years, and we hope not to be the year that we fall down on the job with that. So we're working hard to get the remaining cases decided.

We -- this week the chief extended the general emergency order, 51, until August 1st, 2022. As you probably know being on this committee, when the pandemic first started, these orders gave lots and lots of flexibility to judges to manage their dockets and prevent the spread of COVID. And then we moved more toward the regional presiding judges and OCA urging caution and giving direction and guidance to courts. And then as conditions got better, we moved once back toward local control.

There are really just two main provisions left of the omnibus emergency order. The first maintains the authority for remote proceedings until we get a rule written. So that falls on this committee to -- to get our work done there. And then the EO also clarifies that local judges can continue to have the authority to implement health controls as necessary to protect all court participants and those who are visiting the courthouse.

Also, the Court renewed its emergency order concerning evictions. And just taking a page off of what

Dean Barry just spoke about in terms of the great help that South Texas students have given to people to maintain housing during the pandemic, a big part of that has been through the eviction diversion program. And because the program has been the most successful in the country, the Treasury Department just recently allocated additional -- an additional $47 million in emergency rental assistance funds to the program, some through statewide allocation, and then also Houston, San Antonio, and certain other localities are going to get about 42 million. So the total package is $89 million.

And what happens in the eviction diversion program is that an applicant who is on the brink potentially of being evicted gets notice about rental assistance in the court papers, and then the justices of the peace are instructed to inquire whether tenants who qualify are interested in going -- going through the program with help from legal aid lawyers when they're available. And what then happens is through a negotiation, the eviction case is moved off the docket, the landlord waives any fees, and rental assistance is provided to secure continued housing for the person.

So it's been a -- it's been a good program. I know the chief had spoken nationally with the Justice Department showing -- showing how -- how we implemented it

and modeling it for other court -- other state courts across the country.

Oh, the big topic now as we move kind of out of the acute phase of the pandemic is backlog. And I know you know that we have a backlog across the state, and we are not unique in that, most states have one. But there have -- the courts of appeals are pretty much caught up, and some courts of appeals used the opportunity of the pandemic to decrease an existing backlog that they had. So they've done a great job.

The trial courts are more of a mixed bag, and as you might expect, the 20 most -- the 20 counties with the greatest amount of backlog kind of -- kind of mirror the 20 most populous counties, although some regions are doing better than others. And so -- and it affects civil cases. I mean, the backlog is primarily on the criminal side and, in particular, as you might expect, criminal felony trials. But especially in places where judges have general jurisdiction, you know, working through a felony backlog means that civil cases can't get reached and -- because those will take priority. And so it's really important to all of us that we figure out a plan for getting us back up to speed completely across the state.

And to that end, Chief Justice Hecht and the

Office of Court Administration have asked for backlog solution plans from the 20 counties that have the largest backlogs, and they were due last week. OCA is reviewing them now. Harris County is, you know, 21 percent of the population, so it has the largest backlog, but they got their plan in I think about two weeks ago. They were ahead of the game there, and I know they're already taking steps to try to implement it.

And we've also reached out to the National Center for State Courts, which has been providing training on backlog management and has even some contracts with localities to help. And we have additional visiting judge money, federal ARPA money it's called, to disburse in response to the needs identified in the backlog plan. So hopefully we're going to try -- through lots of good management and farming out judicial assistance where it's needed, we're going to try to catch up.

You also are probably aware, because it came through this committee briefly last meeting, that the Court accepted this committee's recommendation and proposed changes to the appellate rules that clarify that appellate counsel must identify in their briefing, not only obviously themselves and trial counsel at the time of final judgment, but any appellate counsel that's appeared in the case and any trial counsel that's appeared in the

case.

And it's really important because that's the way the courts of appeals and the Supreme Court identify potential conflicts. And it's better to identify the conflict on the front end then sort of as you're going through the record and you see that someone has appeared with some firm, and you had no idea. They may have been there for a one-day hearing, but it could potentially present disqualification or recusal issues, so we're asking practitioners to follow the rules starting right now. It's going to go into effect on August 1st. It's available for public comment right now.

And we also finally -- and those who have worked on rules or have been rules attorneys, and there are a few of you on this committee, will be glad to hear that we gave preliminary approval to the local rules process. It's -- and this is something that this committee has discussed off and on over the years, and -- and I think we've struck a good balance between sort of making sure information about local rules is available to any who practice in the court. So a local rule will not be effective unless it is posted on an OCA website that's going to warehouse and contain all local rules. But there won't be this process where people have to go through lots of layers to get their local rules approved by the Court

in advance of passage.

And as you might know, people were implementing local rules anyway, whether they were approved or not, and they were calling local rules something other than local rules, like standing orders or something like that, just to evade the process because they weren't getting, you know, timely enough feedback from the courts to -- to adopt these rules. So now we've changed the rules to reflect that local rules cannot conflict with other state or federal law or the Court's statewide rules. But so long as they don't, and there's -- and they're properly posted, they can become effective.

Now you say, well, I'm a lawyer, and I am seeing this terrible local rule, and it's onerous, and it's ridiculous, and it violates the rules, and what do I do? We have implemented a back-end process. So a lawyer or anyone can notify the regional presiding judge of a problem with a local rule in writing and then our court. And we are going to try to handle it that way with the idea that most local rules are helpful. It's a great way for courts to experiment with piloting programs that maybe are things that the whole judiciary will be interested in at some point. And so long as there's no complaint about the rule, we're not going to stand in the way of it, and

that there's transparency and people know about it.

And finally, we had an in-person new lawyer swearing in ceremony, which is the first one we've had since November 2019, so that was great. And we next Tuesday are going to have the State Bar budget hearing. And that's about all of our report for now.

CHAIRMAN BABCOCK: Great. Thank you, Justice Bland.

I've got one announcement to make before we start, two announcements. One, we're going to have to revise the order of our topics today because of some commitments that various people have. So we're going to do the evidence rules first and then go to remote proceedings. And, Professor Hoffman, while -- while I'm making a second announcement, I wondered if maybe you could get near a microphone. Either Levi has got one or Richard has got one there next to him, and there's a seat there. So that would be good.

And the announcement I wanted to make, for those of you who don't know, I attended a function last night where three of our members were honored. The person sitting to my right, Justice Bland, was honored as the appellate lawyer of the year. And she introduced Justice Christopher, Chief Justice Christopher, who was also awarded the appellate lawyer of the year.

HONORABLE PETER KELLY: Appellate judge.

CHAIRMAN BABCOCK: Appellate judge of the year, sorry. And I didn't understand how that could happen where you would have two, essentially the same person, getting the award in the same year, but it was explained that it was because we had to skip a year because of COVID. So that's why Justice Christopher and Justice Bland were both honored.

And the main event, the trial judge of the year was our very own Judge Schaffer, sitting down at the end of the table. And he -- he was honored at this dinner last night as well, and it was terrific. And we know we're the best in the state, but here it was, once again, being recognized publicly.

And I'll say one final thing, and that is that Jane introduced Judge Christopher. And if I ever have to be introduced for anything --

MR. HARDIN: I agree with that.

CHAIRMAN BABCOCK: -- I want her to introduce me. It was the best introduction I have ever heard, and I learned things about Justice Christopher that I did not know, and they may not have been true, but it was terrific.

HONORABLE JANE BLAND: All true, a hundred percent.

CHAIRMAN BABCOCK: What you said, so -- so congrats to them.

So now, Lonny, that you're miked up, Professor Hoffman will take us through one of these two evidence rules, and please identify which one.

PROFESSOR HOFFMAN: Will do.

Okay. So we're talking about Texas Rule of Evidence 503 and specifically (b)(1)(c), so 503(b)(1)(c). This rule has come before the committee before in 2015, and it came the same way that it has come to us now, which is that the administration, the State Bar's Rules of Evidence committee or AREC, A-R-E-C, has made an recommendation for amending it. This committee voted 25 to 7 in favor of the changes that AREC proposed back in 2015. I don't have the back story for why sort of nothing happened after that, but the rule has remained unchanged. AREC has reproposed almost the same changes, and I'll highlight again the difference. The memo that I did tried to concisely summarize it, and I'll just briefly talk about it.

And so we again, as a subcommittee of the Supreme Court Advisory Committee, we also again support AREC's recommendation, though only in part, and I will flag the difference.

So there are two changes. The first change

is identical to the change that AREC was recommending in 2015, which is to add, "or anticipated" to the rules. So just to kind of translate that right now, the rule only protects conversations among different folks when there is pending litigation, and the proposal would be to add when those conversations also cover anticipated actions.

That's the same change that AREC recommended in 2015, it's the same change that our whole committee voted 25 and 7 in favor of, and it's the same change that the -- that our subcommittee, again, is recommending that we support.

The other change that AREC is recommending this time around, however, is also to add the word "related," so it -- you can look in my memo on the first page, and you can see it there highlighted in red and underlined. They would add also the word "related" before "pending or anticipated actions."

That is not a change that they recommended in 2015, it is not a change that we support now, and the memo talks about why, and there's essentially two points. One of them is the word we think is not clear, and then the second one, which I think is doing more significant objection work, is that "related" adds an additional requirement, thereby limiting the scope of this allied interest privilege. That is to say, you now have to

demonstrate not only that there's a common interest in the conversation, but that the proceedings pending or anticipated are related to one another. And it was hard for our committee to see what advantage, if any, there was to adding that second requirement. It adds confusion, and, among other things, it probably limits the scope of the allied interest exception -- I'm sorry -- the allied interest privilege, which is a strange thing to do given that AREC was trying to expand it.

So we think that this may have simply been an oversight or maybe not fully -- as fully thought through on AREC's part. In any event, we don't support it, and I would think as -- or perhaps a better way to say this is more relevant than our opinion, Steve Goode shares our views on that. So I'll leave it at that.

So that's mostly what I have to say. I do have maybe one other comment that might -- may or may not be productive. Certainly we can still talk about it if any folks want to.

I will say for those of you who didn't reread the 2015 transcript, no reason for you to have done that, but those of you who didn't, there was a fairly long discussion that we had about whether we should even have the word "action" at all in the rules. So a suggestion that -- I don't want to -- I'm not sure if it was a

suggestion that Richard Munzinger made, but it was a comment that he raised, was can't we just leave it at if parties and lawyers have a common interest that the allied interest provision would apply. And all sorts of people, including my dear friend Jim Perdue to my left, explained one of the difficulties with that, which is if we do not limit it to action in some way, you're allowing conversations with lawyers of other businesses, other companies, just so long as there's some common interest. It could be a common business interest, it could be, you know, common interest in baseball, I guess, could be an interest in anything, and then we cloak those privileges. No state in the country that we are aware of has ever expanded the allied interest privilege so broadly.

I'll add that Frank Gilstrap, of classic memory, also made the comment that if we were to attach common interest from any kind of action requirement, he made the observation that -- oh, again, sort of agreeing with Jim, it would essentially have no limit at all as to what it would cover and, again, far broader than any other jurisdiction in the country.

So anyway, I'm happy to -- you know, people can talk about it, whatever, but I thought I would flag that kind of in advance. That is not on the table. We talked briefly about it in our committee, but we're

unanimous in sharing the view that the allied interest should be linked to a pending or anticipated action. AREC has never considered that, Steve Goode has never considered that a thing we should do. So I personally hope this is a -- not a topic of conversation, but just in case it is, I thought I would try to get the first words in.

With that said, that's largely what I have, Chip. I see Buddy, so I don't know whether Buddy wants to weigh in or not, our fearless leader, on Zoom.

MR. LOW: One thing that I'll point out, the Supreme Court in '22 in *Emerson vs. Wallace* held that the words "related to" were slippery words. I consider these related as like the same thing, that "arising from" and "related" are both slippery words. I don't recommend -- I follow Harvey's recommendation.

That's all.

CHAIRMAN BABCOCK: Okay, great. And just for the sake of the record, Professor Hoffman, when you're talking about AREC, you're talking about the State Bar's Rules of Evidence committee?

PROFESSOR HOFFMAN: That's exactly right.

CHAIRMAN BABCOCK: Yeah. What's the A, is it attorney?

PROFESSOR HOFFMAN: I think it's the

Administration of Rules of Evidence Committee.

CHAIRMAN BABCOCK: Okay. Administration of Rules of Evidence --

PROFESSOR HOFFMAN: It could be the super awesome Rules of Evidence committee.

CHAIRMAN BABCOCK: Could be that. Could be that. Okay.

Robert, you've got your virtual hand raised.

MR. LEVY: Thank you. I'm sorry I couldn't be there with you.

I did want to ask Professor Hoffman if the language order was changed to say "pending," comma, "related, or anticipated action," wouldn't that make it clearer as to what was intended? Because as it looks now without a comma and having "related" first, I think that it might potentially be misinterpreted in terms of what the intent was.

And the other issue about related, if the word "related" is a concern, a word like "similar" could be substituted. I do think, though, that it is helpful to have the reference to related or something -- the same, the same type of word. Because if you have different proceedings with the same subject matter, the same issues, and we often have situations where you have mass tort cases, multiple cases that arise out of the same exact

issue, like super defense or something like that, just as an example, and so you have a defense who's been working together and they all might not be in the same case, so having that controlling interest clearly apply I think does serve the ends of justice and would be appropriate.

So those are my two questions or suggestions regarding the rule.

PROFESSOR HOFFMAN: I guess, Robert, you're right, that if we were to rewrite the proposal so it says "pending," comma, "related," comma, "or anticipated," it would avoid the overlap issue. But, I guess, from my part, I would say I'm not clear what related means then or how courts would define what related means separate from common interest.

So, again, we have to -- the rule itself requires that the communication has to concern a matter of common interest. So if it already concerns a matter of common interest, what work is "related" doing, and what is this universe that an action could be somehow related and also --

MR. LEVY: I think that the issue there is you might have a defendant in case A, a separate defendant in case B, and they want to coordinate together because the issues are exactly the same, they just don't happen to be parties in the same action. And so then the argument

would be that the joint interest privilege would not apply because they are not in the same case.

PROFESSOR HOFFMAN: Right, but -- sorry. But, Robert, so --

MR. LEVY: And the word "related to" would resolve that.

PROFESSOR HOFFMAN: So I may not -- I just may not be understanding then what you're saying. But no matter what, there has to be a common interest. Again, the rule says the communication concerns a matter of common interest. So the idea behind pending -- adding "anticipated" is that this is covering everything. It's covering either a pending case or an anticipated case.

What's the third category of a related action if it isn't already either pending or anticipated?

MR. LEVY: So the issue there is you might have the joint interest parties, could be plaintiff, could be defendant, they're not -- they're not joint in the same case, they are joint in the same issue. But just because of the nature of the way the cases are brought, they might be defendants in separate -- completely separate cases, but yet the interests are the same, and that's where the argument is the joint defense or common interest privilege should apply.

But if they're in separate cases, then I

think that argument, that defense, could be challenged because of the way the rule is described. It says a case, and if the other defendant is in a separate case, the argument would be it's not applicable. But it should be because the issues are the same and the interests are the same. They just don't happen to be parties in one case together.

PROFESSOR HOFFMAN: And, again, my only follow-up, then I guess I'll turn it over to others, is I'm just not following what you're saying, Robert.

The -- if we have two cases, and they're both pending, and there's a matter of common interest, then the allied interest privilege applies, period. They don't -- it doesn't need another word.

MR. LEVY: If the word says "case" or "action," I could see an argument that that applies to one case, not two, and, therefore, the interest shouldn't apply.

Now, if we -- we said "actions," that might solve the problem because it -- just to make clear that they don't have to be parties to the same proceeding for the interest to apply.

PROFESSOR HOFFMAN: Okay. So just maybe for everyone's benefit -- I think maybe -- tell me if I'm saying this right, Robert.

You might be more comfortable if the proposal was "in pending or anticipated actions."

MR. LEVY: Right.

PROFESSOR HOFFMAN: Then, if that were the case, you wouldn't need the word "related," you just -- plural is enough.

MR. LEVY: I think that's right.

CHAIRMAN BABCOCK: Okay. All right. Kennon.

MS. WOOTEN: This is more of a question, and it pertains --

CHAIRMAN BABCOCK: Speak up, Kennon.

MS. WOOTEN: This is a question, and it pertains to the word "anticipated" in the proposed rule.

In the definition of work product in the Texas Rules of Civil Procedure, there is, of course, a reference to anticipated litigation with a lot of case law that's been developed to construe when litigation is or is not anticipated. So one of the questions I have when reading this proposal is whether the intent is to sort of encompass that analysis that exists for work product assessment or whether that just hasn't been discussed yet.

PROFESSOR HOFFMAN: So a very good question.

We did talk about it, and I think -- there are others on the subcommittee that can weigh in. I think

it is correct to say that the sense of our group is that we did imagine courts would look to the work product doctrine to -- you know, 192.5 to think about what advice to tease out what anticipated means. In our report, we do say that we -- the Court may want to consider adding a note, an advisory note to 503, saying that we expect existing work product law should guide courts. We are not recommending that in our text we recommended. We are just simply making the observation that may be something the Court wants to consider. So I do think Kennon is flagging a nice point.

CHAIRMAN BABCOCK: Okay. Kennon, flag something else.

MS. WOOTEN: Now I'll make a comment, and that is that I think this is a needed change to our rules. I have encountered so many situations in which people don't understand that the rule in Texas is different from the rule in many other jurisdictions. And by the time I get involved with the case, often as local counsel, there have been lots of conversations that they think are protected, which are not, in fact, protected.

Oftentimes I see kind of allied litigant, not even reference to that common interest, agreements being crafted that will have no ability to protect conversations in light of the existing rule on the books

and the way it's been construed by the Supreme Court of Texas. So this is an area where I've seen it happen time and time again, where very good, experienced lawyers fall into -- I will call it a trap of thinking their communications are protected when they're not, in fact, protected.

So I am a huge proponent of changing the rule as modified by the subcommittee of the Supreme Court Advisory Committee.

CHAIRMAN BABCOCK: Okay. Any other comments in the room? Yeah. Justice Kelly.

HONORABLE PETER KELLY: Sort of the Scylla to Kennon's Charybdis is the -- if we liberalize it too much, and if we were -- I think we're conscious of taking the expansion of the rule too far, you start -- and I remember the discovery days, Mr. Perdue might remember it as well, when insurance companies, just by having the lawyer conduct the investigation would claim something was privileged. So by rinsing it through a lawyer, all of the sudden it's a privileged communication, even though the lawyer was just doing a routine factual investigation.

And so I think one of the fears of pushing it too far and liberalizing it too far, which is why this rule is sort of crafted very narrowly, is you could have things -- two companies talking about a combination

restraint to trade. Somebody says, "Well, that's going to get us sued." Well, now you're anticipating litigation. Is it now privileged under this rule?

And I think that the rule is crafted finely enough that that's not, and I think it should be made clear that this is not -- the rule is not an expansion or in any way a dilution of the ability of plaintiffs and parties to get access to other communications that might otherwise be illegal.

CHAIRMAN BABCOCK: Any comments offline? Shiva, you got anybody with their hand raised? No hands raised offline. Jim.

MR. PERDUE: Lonny, is the language of --

CHAIRMAN BABCOCK: Jim, speak up or speak into that mic.

MR. PERDUE: Well, I may actually -- there is no comparable rule in the federal rules, right?

PROFESSOR HOFFMAN: I think the answer is no. No, there's common law.

MR. PERDUE: Right. They don't have privilege rules in the federal rules. Okay.

CHAIRMAN BABCOCK: Any other comments?

HONORABLE HARVEY BROWN: If I could just say one thing.

I am also in favor of having a comment that

defines anticipated so we don't have to have fights for the next decade over what that means. So I think that would be very helpful and could be very short.

MR. PERDUE: Because comments always prevent fights.

HONORABLE HARVEY BROWN: Narrow the fights at least. Hopefully.

CHAIRMAN BABCOCK: Sometimes they don't prevent fights. Well, Harvey, do you have a comment in mind?

HONORABLE HARVEY BROWN: No. I mean, it's a pretty straightforward rule.

CHAIRMAN BABCOCK: You want Jackie to do a comment? You want to assign her to do a comment?

HONORABLE HARVEY BROWN: That would be fine.

CHAIRMAN BABCOCK: All right. So if there's nothing else, I think maybe we take a vote on not accepting the "related" language, in other words, not adding that term, but adding "or anticipated" and making action, "actions," plural.

Lonny, is that where we are?

PROFESSOR HOFFMAN: Well, yeah. So the turning action into plural is Robert's suggestion. The committee hasn't --

CHAIRMAN BABCOCK: Oh, I thought you nodded

your head and said, yeah, that we could do that.

PROFESSOR HOFFMAN: I mean, I understand Robert's point. But, I mean, again, that wasn't part of our discussion.

Let me just add, I mean, it's totally clear from the prior cases that multiple pending actions are encompassed by this rule. I don't disagree that Robert is raising a nice point that making it plural makes it a little clearer, but it's not anything AREC talked about, it's not anything we considered, and there hasn't been a confusion in the case law at this point. So --

CHAIRMAN BABCOCK: Okay. Are you a plural guy or a singular guy?

PROFESSOR HOFFMAN: I'm going to stay singular now.

CHAIRMAN BABCOCK: You're a singular guy. Okay. So let's vote on plural versus singular.

Since the subcommittee recommended singular, that is just having the word "action" as opposed to "actions" plural, everybody in favor of "action" singular, raise your hand.

What's the count on the --

MS. ZAMEN: Six.

CHAIRMAN BABCOCK: Six in favor. Okay.

And everybody against raise your hand.

MR. STOLLEY: You mean for plural?

CHAIRMAN BABCOCK: No, no, no, no, no. We're talking about action plural, "actions." Everybody in favor of that, raise your hand.

So singular wins by 21 to 9.

And interestingly enough, Lonny, the outlying virtual counties split six, six, so you carried the day in person, but not virtually, which was a tie.

Okay. With that clarified, how about the rule as proposed by the subcommittee, which would not include "related," but would include "or anticipated action," singular. Everybody in favor of that, raise your hand.

And everybody opposed?

All right. So 21 to 1 that passes, so thank you. John.

MR. WARREN: I have a question. So how does this rule apply in a class -- in class action litigation? Take the Delta plane that crashed in Dallas sometime ago. You have lots of litigation. So how would this apply to that?

PROFESSOR HOFFMAN: The rule doesn't distinguish between direct and class action.

MR. WARREN: But should it?

PROFESSOR HOFFMAN: I don't think so. But

again, the way the rule is drafted, it's any action, however conceived of that aspect. It could be a representative action, it could be a direct action.

MR. WARREN: Even though you may have 20 different plaintiffs or 40 different plaintiffs?

PROFESSOR HOFFMAN: Or 40 different defendants.

CHAIRMAN BABCOCK: Okay. Great. Thanks, Professor Hoffman.

So now we will go to the next evidence rule, 803(16), which I believe Harvey is going to lead us through, right?

HONORABLE HARVEY BROWN: Yes.

803(16) is the ancient documents hearsay exception. It is rarely used, but when it is used, it can be of great importance. It's been used in a lot of litigation over old insurance policies, deeds, et cetera.

It has undergone a change in the federal rules back in 2017, a fairly dramatic change. Let me give you a little history because I think that history will help you with the reasons for the rule.

So one of the foremost evidence commentators in the country, a man named Daniel Capra, wrote a law review article saying that he thought that the ancient documents exception was now going to create havoc in

courts because of the advent of the internet. Because of the internet, we now have blogs, we have all kinds of postings on Facebook, et cetera, that began around 1998 and, therefore, would fall under the ancient records exception. In other words, these documents would now be ancient -- would be ancient documents and, therefore, arguably admissible in court.

And he gave examples of, for example, events involving elections, involving political candidates, et cetera, that all of these things now somebody could offer as an ancient document, and the ancient document exception on its face says nothing about personal knowledge being required. So they thought this was going to allow a whole bunch of documents to possibly be admitted, and so they suggested initially the complete elimination of the rule. They said we're in an electronic age, we don't really need this anymore. And to the extent that we do need it, it can be taken up by two different rules. If you have an ancient document in a lot of litigation, it's going to be a business record ancient document, so that will do the work we need. And if it doesn't come under the ancient -- under the business record exception, it will come under the residual hearsay rule, 807.

So there was a long debate about whether to eliminate it completely, and the committee -- the federal

evidence committee first did suggest that, and then there was a strong backlash against that with over 200 comments received saying, no, that goes way too far, we really do need this rule in some litigation where people have very, very old records, and people have died, and it's the only way to prove things up, is through these documents.

So they went back and looked at it again, and instead what they decided was what you see on the first page of the memo in Tab E, the rule in the federal rule, which AREC has recommended to us. And it says statements in ancient documents -- "A statement in a document that was prepared prior to January 1, 1998, and whose authenticity is established."

Why 1998? Why does it have to be prepared before 1998? Well, 1998 was when Google started, and so they thought that was the right cutoff date. They admitted it's a little arbitrary, but they thought that things older than that, there's still a good chance that there may be handwritten notes, et cetera. But things after 1998, they thought most of that is going to be electronic anyway, and they did not want this problem of blogs and et cetera coming into evidence in courts.

So that's the rule that they've suggested. We agree with that rule, we unanimously agreed with that rule, and would suggest that we adopt it.

If you'll turn to page 10 of that memo, you'll see we have three other recommendations, or maybe I should say we have two and one other to discuss.

One of the motivating factors when you read the debate and when you read the comments for this rule is we can narrow the ancient documents exception because of the two hearsay exceptions that I just talked about, the business records exception and the residual hearsay exception. But Texas doesn't have the residual hearsay exception, so what do we do about that? And this committee back in 2015, after AREC came to us and recommended 807, and Professor Goode recommended it, this committee voted in favor of recommending it, and the Court has not adopted it. We don't know why, but we know the Court hasn't.

So our committee has thought that if we're going to adopt the ancient documents new rule, we should adopt the residual hearsay rule, which is part of the foundation for it. So we're recommending that.

Normally our committee does not make the recommendation without it first going through AREC. So I called Professor Goode to talk to him about it, and he said he did not really know why it wasn't adopted. He's still strongly in favor of it. He says the federal courts have not had any problems with it in the last five years,

and, in fact, the rule's actually been simplified a little bit a couple of years ago so that it's now a two-prong test rather than four-prong test. But courts continue to say it is an exception to be used sparingly, is the word the courts have used.

So we recommend that -- kind of in a tandem that the Court adopt both 803(16) and 807. But because the Court did not adopt 807 in the past, we considered could we allow the rule to come into play with the ancient documents exception as now written and craft 807 into the ancient documents exception itself. In other words, if they don't want 807 for all documents, but they just want it for ancient documents because of this rationale.

And so we lifted the language from the -- Federal Rule 807, and this is on page 10 again, the third recommendation. And it says, if the Court does not adopt 807, put in 807's language verbatim into the rule. So that's what we've done, we've put it verbatim into the rule. So that is subpart (b).

So (a) is what is AREC, and federal rule (b) is the part that we've added. Nobody else has done it, so it would make us unique, but we're also -- I don't know if we're totally unique, but we're certainly the minority in not having a residual hearsay rule.

So those are the three recommendations we've

made. The first two were unanimous. The third one was not unanimous. It was a four to two vote, and some people felt like that rule -- that tweak or addition made it overly complicated. It certainly makes it a lot longer, and some -- well, Lonny was one of the opponents, so I'll just let Lonny speak for himself as to why he thought that that was an unnecessary addition to the rule.

CHAIRMAN BABCOCK: Yeah.

PROFESSOR HOFFMAN: You want me to do it now?

CHAIRMAN BABCOCK: Yeah, Professor Hoffman, now. Are you one of the dissenters on that four-two vote?

PROFESSOR HOFFMAN: Yeah, I just -- you can look at the language, but, I mean, it's a -- it's a bear to add all of that italicized language. This is an awful lot of additional language to add for a problem that we're not likely to ever really see in a meaningful way.

I mean, again, business records -- this is just an exception to the hearsay rule. There are other exceptions to the hearsay rule that work just fine most of the time, the business records exception being the largest of those.

And then finally, I agree with Harvey that -- that we probably should have an 807 that applies for everything, and so it is a strange thing to add a

residual exception just for ancient records, one of the most rarely seen and rarely needed provisions, and then just abandon it for everything else.

So instead, I'd rather keep pressure on the Court to do what I think our whole committee does think it ought to do, which is adopt a residual hearsay exception like 807. So anyway, that's about it.

CHAIRMAN BABCOCK: Yeah. Makes a lot of sense, Professor Hoffman. And, Buddy, if you have a comment. But mine is if you're defining people or anything prior to 1998 as ancient, then I guess everybody on this committee is.

Richard, did you have a comment?

Richard? No? Okay.

Judge Miskel has a comment? Judge?

HONORABLE EMILY MISKEL: I was just putting my hand up because I did have something to add when we get to the discussion part about this. Is that -- are we at the discussion part yet?

CHAIRMAN BABCOCK: We're wherever you want to be, but I would say, yes, we're into the discussion part.

HONORABLE EMILY MISKEL: Okay. This is an issue that's very important to me because I have researched and written and published a lot about

electronic evidence under both Texas law and federal law. And Texas substantive law on electronic evidence, ESI, is not 100 percent overlapped the same with federal law, so it's -- right now, our Texas substantive law on this issue is that we do not have separate Rules of Evidence for ESI, and we do not treat ESI as presumptively more unreliable than traditional documents. That approach is literally referred to as the Texas approach. So if you read articles about this area, they refer to that as the Texas approach because that is named after our system.

So my concern is the report doesn't identify any problems with the current 803(16). In fact, the author says, like, nobody has identified any widespread problems. So the reason this change is coming to our committee is just to have conformity with the Federal Rules of Evidence, but federal substantive law on ESI is not the same as Texas substantive law on ESI.

So my concern is that by expressly codifying this one rule that treats ESI differently from other Texas -- or traditional documents, that that's going to have unintended consequences and ripple effects because you're putting in writing here's one way we treat ESI different from additional documents, but the rest of our Texas law is we do not treat ESI different from traditional documents.

And so I want to make everyone aware that this could be a change to our substantive law, it's not just a mere cleanup of language to match federal because -- because this is actually just a difference between Texas and federal law.

So I just wanted to bring that up, that I have concerns about putting in writing that we treat ESI as some kind of presumptively more unreliable than traditional documents. Because if you read our Texas case law from the Texas Court of Criminal Appeals, from the Texas Supreme Court, that's not what our substantive law is right now.

CHAIRMAN BABCOCK: Judge, before you put your hand down -- well, put your hand down. Do you have any insight or thoughts about why 807 was -- was not accepted or, alternatively, why a Rule 807 would depart from -- either depart or be the same as federal law?

That's for you, Judge Miskel, but you'll have to take yourself off --

HONORABLE EMILY MISKEL: I didn't realize that question was for me. So can you repeat it, please?

CHAIRMAN BABCOCK: Yeah. Two parts, a compound question, objectionable, of course.

But the first part is any insight as to why we didn't accept -- why the Supreme Court did not accept

807 when it was proposed by this committee? And, number two, whether doing so now would run afoul of the same sort of criticism that you're making about the ancient document exception?

HONORABLE EMILY MISKEL: So I don't know about 807, but I don't share the same concern about 807, because it doesn't codify an express difference in reliability between ESI and traditional documents.

CHAIRMAN BABCOCK: Fair enough, but -- Harvey.

HONORABLE HARVEY BROWN: Just to be clear, the amendment that is proposed by AREC and that we're suggesting, and it's in the federal rule, does not on its face talk anything about ESI. It doesn't create a new definition, it doesn't substantively change anything about ESI on its face.

What I was talking about ESI is the rationale, the reasoning for the rule. So I -- I may be missing something, but I don't think it's going to have the substantive change of --

HONORABLE EMILY MISKEL: But the whole reason that you're making this change is because people are uncomfortable that e-mails from 2001 might be offered into evidence under this ancient document hearsay exception.

HONORABLE HARVEY BROWN: Well, sort of. It's really not e-mails, it's they're very concerned about blogs, postings, et cetera, and they think those should not come in. The authors who wrote this and studied it did admit this has not come up in any reported case that they can find yet, but they thought it was a huge potential problem. They, you know, had the statistics on how many articles have been posted on the internet, millions and millions, more since 1998 than have ever been written in history combined, and so they thought they should not wait for this problem to present itself and harm people in litigation when it was a potentially big problem.

HONORABLE EMILY MISKEL: And that's a substantive change to Texas law because right now Texas law does not treat blog posts and social media posts as inherently or presumptively more unreliable than faxes or books or whatever it might be. So if we're all discussing this, because we are uncomfortable with treating a blog post from 2001 as an ancient document, we are all agreeing that we want to treat ESI as more inherently unreliable than a paper document from that era. And I'm just pointing out that that is a substantive change to current Texas law.

CHAIRMAN BABCOCK: Yeah, it sounds like you

wouldn't have to scratch very deeply beneath the surface to know that when the federal rules committee talks about Google that they may be talking about ESI.

HONORABLE HARVEY BROWN: Oh, absolutely. It's in their comments.

CHAIRMAN BABCOCK: Yes. And '98 is sort of the demarcation for ESI, so -- okay. Any other comments?

HONORABLE HARVEY BROWN: I just wanted to point out that the business record exception can't do all the work for ancient documents because the business records exception requires proof of six factors, one of which is personal knowledge, and the ancient documents exception expressly does not include a personal knowledge requirement. In fact, a number of courts have said that's not required.

In the federal rule, the fact that it's -- it was written over 20 years ago, presumably at a time that there's no litigation incentives, is itself considered enough evidence of reliability that you do not have to independently prove personal knowledge and any of the requirements of 803(6). So 803(6) will not fix the problem completely if you don't have an 807 and you adopt the federal rule that's now in the federal rules.

CHAIRMAN BABCOCK: Yeah, okay. Any other comments in the room here? Yes, Robert.

MR. LEVY: Chip, this is Robert.

I think this is not a wise move. One of the issues is that, with the record, the first thing you have to do is prove it up under Rule 901. 901(8) specifically talks about the same issue, the evidence about ancient document statute, you have to demonstrate that it's in a condition that creates no suspicion about its authenticity. It's in a place where, if authentic, it would likely to be found and is at least 20 years old. So not only would we have to potentially change that rule as well, but that rule I think solves the problem that the committee was referencing from the federal court perspective, that if there is a question about authenticity, you can challenge it, based upon Rule 901 in terms of its -- you know, just that it's proven up, and then, you know, getting to the question of hearsay, it -- you know, the question there is if a blog says what a blog says, it -- you know, it's a statement. And whether it was stated verbally or stated in a written fashion, I think that's going to be to the weight of the evidence.

And we're making a very risky move by picking an arbitrary date because we're going to end up excluding records that can't be proven up in any other fashion. It might be a contract that's not clearly a business record, and you don't have somebody to prove it

up, or other records that -- that's the reason why we have the ancient records doctrine exception to hearsay. And I think setting a date now, that 40 years from now we're going to have evidence that can't be admitted because it can't be proven up by any other means.

CHAIRMAN BABCOCK: Thanks, Robert.

Okay, Scott, and then Justice Kelly, and then Tom Gray. There he is, back with his beard.

MR. STOLLEY: I'm going to move here closer to the microphone.

I'd like to hear what the trial lawyers think, but as an appellate lawyer, I have a concern about this wholesale adoption of 807. It seems to me it has the potential to swallow everything with respect to hearsay. And the standard of review is abuse of discretion. And I can tell you, as an appellate lawyer, it's very hard to reverse a trial judge's evidentiary decision under the abuse of discretion standard. So you've got to think about what are we opening up if we have this residual Rule 807 in these rules.

CHAIRMAN BABCOCK: Thanks, Scott.

Justice Kelly.

HONORABLE PETER KELLY: My comment was just in Mr. Levy's comment about, yes, it's an arbitrary date, 1998. We tried to work in Eliza Bean plus 21 years, but

that didn't quite -- nothing like the rule against perpetuities go.

But the technology is changing so quickly. I mean, it used to be in 1998, a company would have a server, and someone would testify this came off of our server. But now you go to a company, and they have -- they store everything on the cloud, and there's a third party and fourth party and fifth party technological storage issues.

So to address the earlier comment, yes, it is inherently more unreliable because we're not talking about something physical. It used to be ancient documents were stuck in somebody's vault or in a file room at a law firm, but now it's like we have no idea where it actually was. And actually tracing it and proving it up, you know, the fourth custody in the cloud is going to be very difficult sometimes, so we do have to acknowledge that. So I think it's wise to change the rule to put us slightly -- to get rid of the presumption that an ancient document is authentic.

CHAIRMAN BABCOCK: Okay. Justice Gray, and then Lamont.

HONORABLE TOM GRAY: I apologize, I could not hear most of that last comment, but I wanted to add on to Judge Miskel's concern and comments that -- about the

difference in state and federal.

Specifically, my recollection -- and it's been a long time since I've shown up in a federal court, but that a federal trial judge can comment upon the weight of the evidence when he gives the charge, he or she gives the charge. And so the federal evidentiary system has a protection against questionable evidence that the state of Texas simply does not have.

As an -- just for clarification, I would like to ask Lonny if my understanding is correct that, as modified, if I printed Doogie Howser's diary at the time that the series was popular, it would be admissible, that print. But if I went to it today and printed it, it would not be admissible, and if that's correct.

And just -- you know, the other thing that I wanted to say was that to the extent that Professor Capra thinks there was or is a problem in the federal system, maybe that's where it needs to stay. Because we are more likely to use this rule, I believe, anecdotally in Texas with regard to land title disputes and other things that are unique to Texas property law that we need this rule the way it is and doesn't need to be tinkered with.

CHAIRMAN BABCOCK: Lamont.

MR. JEFFERSON: Yeah, I -- I'm not smart enough to figure out all of the ramifications of the --

I'm not sure about all of the applications of the ancient documents rule exception to the hearsay rule, but this change makes sense to me, that the current rule says 20 years old, we're in a different era. We can't just ignore that we're in an electronic era now, and so the change from 20 years to the 1998 date, which in some respects is a bit arbitrary, but it has logic behind it, advances the ball.

And then all this is is an exception to the hearsay rule. It has nothing about admissibility. So that -- I think if we just define it as something that makes sense in today's age, we've accomplished -- we've done better.

On the Rule 807 situation, I would vote against that. I don't think -- I just don't think it's necessary. I think judges have enough discretion now and enough judgment to decide whether evidence ought to get in based on the other hearsay rules. So that seems like an all-encompassing kind of change. I agree with Scott on that.

CHAIRMAN BABCOCK: Great.

Harvey.

HONORABLE HARVEY BROWN: Two things. One on the 807.

Judges who feel constrained to follow the

plain language of the rules sometimes will say things like, "Tell me the rule number, show me where." I had a case where I told the lawyer, when I was a trial judge, if 807 was here, it would come in, but there is no 807. You've got to help me find a way to get it in under the rules. I don't think it works, and I didn't admit it. So I do think there's a reason to have 807.

I will point out that when I first read this stuff I thought that Professor Capra didn't place enough weight on Rule 403 for the problem that he was addressing. I would think that Facebook posts, blogs, et cetera, et cetera, could easily be kept out under Rule 403, and that it was therefore unnecessary to narrow the ancient documents exception. And that was the way I kind of leaned, and then I thought that the arguments were strong enough, though, that putting it into a rule where it gave a little more predictability were good and, of course, having uniformity with the federal rules is something we generally strive for. But I think it's a close call.

CHAIRMAN BABCOCK: Okay. Thank you.

Professor Carlson, you just popped up on our screen. And it looks like you're here, but you must be hiding in your office. And, of course, you forgot to take yourself off mute.

PROFESSOR CARLSON: All right. For people

who are watching remotely, if you unmute your -- actually if you disable your microphone, you'll have clearer reception, because we're having a little bit of an echo, Chip.

CHAIRMAN BABCOCK: Yeah. What do you think about 807?

PROFESSOR CARLSON: I think it's great. I'm for it.

CHAIRMAN BABCOCK: There we go. Straight from the library of South Texas College, School of Law.

Any other comments? Any -- anybody virtual, any virtual comments? Anybody got their hand up, Shiva?

Okay. Let's -- let's vote, and let's vote on the first recommendation, which was unanimous by the subcommittee -- oh, yeah. Professor Carlson, you've got your hand up now?

PROFESSOR CARLSON: Sorry, Chip. It went up inadvertently.

CHAIRMAN BABCOCK: Ah, an inadvertent hand.

Everybody in favor of the subcommittee's recommendation that 803(16) be amended in conformity with the federal rules.

PROFESSOR HOFFMAN: Sorry. Just to be sure I'm clear, you're saying who's voting in favor of the January 1, 1998, date? We're not talking about the

additional italicized language yet?

CHAIRMAN BABCOCK: We're not talking -- yes, that's correct, we're not talking about the additional language, just the '98 date. Everybody in favor of that, raise your hand.

All right. Everybody opposed?

All right. Well, the virtual -- the virtual counties have defeated the rural by 17 to 13. 13 in favor, 17 against. So there.

Let's go to the --

HONORABLE HARVEY BROWN: Chip?

CHAIRMAN BABCOCK: Yes.

HONORABLE HARVEY BROWN: On 807, we recommend that to kind of address the 803(16), so I would suggest we pass on that for today. Because typically we do let AREC come in with its formal proposal on that, and they are studying it themselves. So I think it would be appropriate for our committee to withdraw that portion of its recommendation.

CHAIRMAN BABCOCK: Okay. So you're afraid 807 is going to go down in flames here.

HONORABLE HARVEY BROWN: No, I'm happy to vote on it. The Court didn't like it before, so I'm guessing it won't like it now.

CHAIRMAN BABCOCK: No, that's fine. We can

defer 807 until AREC has given us their thoughts on it. That's fine.

And I assume that since the 1998 date amendment to the rule failed --

HONORABLE HARVEY BROWN: That it's unnecessary to look at the other part.

CHAIRMAN BABCOCK: Unnecessary to look at the other one, right.

HONORABLE HARVEY BROWN: Right.

CHAIRMAN BABCOCK: Anybody disagree with that? Okay.

HONORABLE HARVEY BROWN: And by the way, we had a comment that is in the federal rule that I suggested, our committee never got to it, but if we don't adopt the rule, we don't need a comment obviously. But it's in the memo in case the Court wants it.

CHAIRMAN BABCOCK: Okay. Great. Jackie appreciates it very much.

All right. So we're done with that one.

Pam Baron has got her hand up. Pam? But if you're talking, we can't hear you, so you must be on mute.

MS. BARON: Yeah, sorry. I couldn't find the button.

So you're ready for us?

CHAIRMAN BABCOCK: Well, depends on who us

is. If you're talking about the TRAP rule --

MS. BARON: Yes. Yes. We're ready.

CHAIRMAN BABCOCK: -- we're not ready for you unless you want to go out of order.

MS. BARON: No, I'm good. I'm good. We're moving to Tab G of your materials. The most recent referral letter from the Court asked our subcommittee to review and make recommendations on a proposal from the State Bar Court Rules Committee that addresses TRAP Rule 39.7. TRAP 39 addresses oral argument in the court of appeals. 39.7 in particular relates to request and waiver of oral argument.

And the current rule provides that if you fail to put the words on the cover of your brief "oral argument requested," you waived oral argument, even if the court later decides on its own motion or on the basis of a request from another party, that it will hear oral argument in the case. The court rules committee has proposed changing that so that failure to request does not waive the right to participate in oral argument, and all parties filing a brief can participate if the Court determines that it wants to hear oral argument in the case. And our subcommittee unanimously thinks that's a good idea, and we liked actually the language that the court rules committee had proposed.

As you'll see in the court rules subcommittee, the court rules committee, they have looked at all of the various internal operating procedures of the courts of appeals, and they diverged pretty substantially. Five of them -- five courts of appeals provide that even if you don't request oral argument on the cover of the brief, and the court sets the case for argument, if you file a brief, you are entitled to participate. Six are silent in their internal operating procedures on what happens in that situation, and three specifically require a motion. And the motion -- you know, most motions are -- the courts require a 10-day advance filing, and the court rules committee memo cites instances in which the court has denied the opportunity to participate in oral argument by parties who filed a motion because they did not put those particular words on the cover of their brief.

We think our subcommittee agrees that the rules should be consistent and that parties who file a brief do have a right to be heard, even if they don't put the magic words on the cover of the brief.

CHAIRMAN BABCOCK: Great. Thank you.

MS. BARON: So I open it up for discussion.

CHAIRMAN BABCOCK: Any discussion? Anybody in the room want to talk about that? Anybody online? Somebody has got their hand up. Who is it, Shiva?

Justice Gray.

HONORABLE TOM GRAY: Did you call on me, Chip?

CHAIRMAN BABCOCK: I did. I did, Judge.

HONORABLE TOM GRAY: With great respect and admiration for Richard Munzinger, I would like to attempt to channel him at this moment. My God, this is not some game we are playing here. These are real people with real disagreements about the law to be applied to the facts. And to refuse to allow one side to argue because they submitted their brief and didn't think at the time it would be helpful to the court to have oral argument, and now the court wants argument from one side and to refuse the other side oral argument is ridiculous.

It's 15 or 20 minutes, for Christ's sake. Let both sides have their say and help the Court make the right decision. This change needs to be made.

(Applause)

CHAIRMAN BABCOCK: Justice Gray, you just missed one line. If Munzinger was here, he would add "because this is America."

All right. Well, I think I know how this vote is going to go. Any further comment?

Richard.

MR. MUNZINGER: Well, I'm honored that I was

cited. If you said "for Christ's sake," I would not have said that, but I agree with everything you said.

CHAIRMAN BABCOCK: All right. Thank you. Anybody else?

All right. Everybody in favor of this change to the rule, raise your hand.

How about offline?

All right. Anybody opposed? Raise your hand.

HONORABLE MARIA SALAS-MENDOZA: Can we note me in favor? I was already --

CHAIRMAN BABCOCK: You're opposed?

HONORABLE MARIA SALAS-MENDOZA: Actually, in favor.

CHAIRMAN BABCOCK: Thank you. Anybody else?

All right. It's unanimous, 31 to nothing. Nicely done. Nicely done, Pam.

MS. BARON: Woohoo.

CHAIRMAN BABCOCK: Wow. Looks like she has scored a touchdown. She's in the end zone dancing.

We'll take our morning break for 15 minutes. Thank you.

(Recess from 10:17 to 10:41 a.m.)

CHAIRMAN BABCOCK: All right. Let's get back to work, and we're now going to talk about remote

proceedings, even though nobody is here to talk about it.

MS. WOOTEN: I think that's the perfect time.

CHAIRMAN BABCOCK: Perfect timing, so we're going to ram this right through.

I know Justice Christopher could not be with us today, and Kennon was unaware if she had delegated her part of this to anybody else. And if anybody else has been the delegees, raise your hand. We didn't think so. And the second piece, Lisa Hobbs had, and she is not here, we don't see. And if she delegated it to anybody, raise your hand. And she didn't.

So, Kennon, that leaves it to you. So what do you have to say about this that you haven't already said?

MS. WOOTEN: Oh, there are a few additional things to say about it. And --

MR. DAWSON: You can say whatever you want because none of your committee members are here.

MS. WOOTEN: That's true. I'll speak for the committee in its entirety today.

So what we have that's new for consideration today is, in the materials, there's a memo from me dated May 23rd, 2022, and it's about revisions that we discussed at this committee and some additional changes that are

being made in an effort to perhaps better balance all of the competing considerations relating to the subject matter at hand. And let me go ahead and lay the foundation a little bit more for the subject matter at hand.

So we have, as a committee, on two prior occasions discussed potential rule revisions for remote participation in court proceedings, specifically in regard to Texas Rules of Civil Procedure 21(d), 500.2(g) and 500.10, as well as a potential revision to Rule 21 of the Texas Rules of Civil Procedure. And this is the subset of the Remote Proceedings Task Force work that specifically pertains, like I said, to how we participate or appear in court proceedings.

So in Supreme Court Advisory Committee meetings on February 4 and March 25, we had I think a robust discussion about the concerns that people have about remote participation in court proceedings, as well as the perceived benefits for some cases of remote participation in court proceedings. And after the meetings, there was distribution of material from members of this committee. And I believe the Court and committee has also received materials relating to the various things we've been discussing pertaining to remote proceedings.

So in the last meeting that we had, and in

the prior meeting, there was no vote taken on one of the biggest questions I think that's on the table, and that is whether you're going to carve out remote jury trials, speaking generally, from the typical rule of giving the court discretion whether to allow or require remote participation in court proceedings.

And the takeaway that I had from the meetings and the transcripts that I looked at is there was unanimous consent that there should be a carve-out for remote participation in jury trials, and so there was no vote taken either in the first meeting or the second meeting on that particular point.

But in the last meeting, more specifically the meeting on March 25th, 2022, there was a vote taken, 21 to 5, to focus first on the justice court rules before we make decisions about the rules governing district and county courts.

So after the two meetings and that particular vote, at the task force level, there was an effort to revise the justice court rules to reflect feedback received from this committee and others relating to remote proceedings. But also at the task force level, as I indicated earlier, there was discussion about whether there might be a better way to balance all of the competing considerations at hand relating to remote

participation in court proceedings. And what we have on the table for consideration today is that effort to strike a better balance.

So in the initial version of the proposed rules, the basic structure was that the court, or the trial judge to be more precise, had the discretion whether to allow or require in-person or remote participation in court proceedings. Under the initial proposal, the mechanism for the party to say I want a different way was to file an objection. And, generally speaking, the court then could grant that objection if good cause was shown for the appearance to be something other than what the court had directed.

In the version that's on the table today for consideration, that's changed such that now the court still has discretion whether to allow or require a particular type of participation, but then a party can make a request to appear in a different manner, and that request would be granted unless the court has good cause not to grant it. So the way it's structured now gives the party more of a say, I think, and puts that good cause consideration in a different point in the process.

So that's something that I think is worth discussion by this committee, if it's a better way, if that addresses some of these concerns that some people

have had about whether there's maybe too much discretion given to the trial courts in directing how people would participate in court proceedings.

The other thing that is set forth in the memo and I think we should discuss today is whether we still as a committee feel across the board, or at least have a strong majority, that there should be a carve-out for remote jury trials. I think I know the answer to that question, but because the structure of the rule has changed, what we've done in the memo and in the proposals is put in italics the carve-out for remote jury trials so that we can take a nice, clean vote on this issue.

Again, I think I know how it's going to turn out, but I just thought it would be good to get a vote on it with this new structure, more specifically the new structure again being that request granted unless there's good cause not to grant it.

So what I will say beyond what's already been said for the record, for anyone who's looking at this transcript in the future, we, of course, have transcribed meetings from the prior discussions on February 4, 2022, and March 25, 2022. And I know that materials have been distributed by committee members and, again, received by committee members, and I would hope those would also be made available to people so that they can see the context

of the discussions.

This is a difficult area. I think people have very strong opinions. It's hard to strike the right balance. One of the things I'll say before passing the mic is I've tried and I think members of the subcommittee have tried to think beyond our own practices and client base to think about what's best for the state as a whole. We live in such a diverse state, and I think we're all mindful of that fact, but sometimes it's easy to lose sight of it because we look through a lens that's based on our personal experiences and our own client relationships. So in that regard, I'll just say one more time that one of the thoughts behind what's been proposed before and what's being proposed now is the reality that some people won't have access to justice if they don't have the ability to appear remotely.

And with that, I'll turn it back to you, Chip.

CHAIRMAN BABCOCK: Okay. Great. Thanks, Kennon.

I think -- I think something you just said struck me, and it's really true, that we have to do what's best for the state as a whole. And I think we always strive to do that, but it's good to be reminded every so often, particularly on a subject that is as important as

this one.

And I think we usually as Texans are never devoid of self-confidence and our influence, but through Chief Justice Hecht's work with the -- with the Chief Justices Association and some of the work our Court has done and this committee has done, people do look to this state as a -- as at least one way to intelligently approach problems. And so I think, as I'm thinking about this problem, I'm, of course, thinking first about Texas, but I'm also thinking about beyond our borders.

And I know that the Chief Justice of Michigan has some very strong views about this, and I know our Chief does, too, and our Court does, and I do. And I am worried about a society that is increasingly remote. Starting in 1998 with -- as we've talked about before, with communicating by e-mail and by text and by slap and by chats, but not dealing with each other face-to-face, and now because of the pandemic, keeping at least six feet of distance from each other, you know, people lamented the loss of the central docket.

Remember when we went -- we had the ceremony down there when we moved from the old courthouse to the new one, and they had the 25 cases with the central docket? The central docket, probably no longer workable here, although it is in some other counties, but it did

bring the bar closer together, and it did eliminate some of the acrimony that you see in the bar today that did not exist when you had to deal with the lawyers on a weekly or maybe twice or three times a month basis, at least in central docket. So I think we have to think very carefully about further creating remoteness among ourselves.

And we're a very important part of the fabric of our society, and I think that this issue is so important, and we have a -- a huge influence on this issue. And I don't know if people are thinking about it in the way that I just expressed it. I hope they are, I know some people are, and I guess I just want us to think about it broader than, hey, I don't want to have to go down to the Valley for a five-minute hearing. Of course, nobody wants to have to go -- you know, travel to El Paso or to Amarillo from Houston for a five-minute hearing. And that is -- okay, we want to go to Amarillo all the time, Tom. Sorry. Riney is -- for those of you not here, Riney is offended.

MR. RINEY: I'll pick you up at the airport.

CHAIRMAN BABCOCK: And I mentioned El Paso, and now Munzinger is going to be on my case, so I am really, really in trouble now. But you get the point.

At one end of the spectrum, we have the

routine five-minute status conference where we're going to get a case management order put together, and somebody shouldn't have to travel for a day or a day and a half to go down there for that five-minute hearing. We get that. And at the other end of the spectrum is the jury trial, which there are not many of them compared to what there was 20 years ago, or certainly in 1998. And figuring out what to do in between those two, two ends of the spectrum is something that's very important, and I think we need to -- we need to be careful about it.

Alistair.

MR. DAWSON: So I think the change of moving the good cause over to the judge is a good change, and I support that. And I will say I am a big supporter of access to justice. I serve on the commission along with Kennon, and I recognize that having remote proceedings improves access to justice, no question.

Having said that, I think that there are so many problems with allowing a trial court to mandate a jury -- a remote jury trial that I'm against that unless the parties both agree. There's just an inordinate amount of trouble and problems that can occur in a remote jury trial. It's so hard to control the jurors. There's just all kinds of problems.

And there are judges in our state who have

announced that they will no longer have in-person jury trials, one of them resides here in Harris County, and so they're going to mandate remote jury trials, regardless of the parties' objections. And that's -- that's just wrong, in my opinion. And I get it that our folks that need access to justice, that that has an effect on it, but I think it's relatively small because they'll still have the ability to appear remotely for hearings for eviction cases, for most debt collection issues. It's only if they're actually going to trial by jury would they be impacted by the carve-out rule, and I think that's a relatively small number of cases. And I think the harm there is more than outweighed by the harm in allowing remote jury trials.

So I'm in favor of the carve-out notwithstanding my great support for access to justice.

CHAIRMAN BABCOCK: Judge Miskel, and then Kennon, and then John.

MR. LEVY: We can't hear you.

CHAIRMAN BABCOCK: Better unmute there, Judge.

HONORABLE EMILY MISKEL: Okay. Sorry.

First I wanted to thank Kennon and Chief Justice Christopher because I was supposed to be helping with this, and I have been completely absent for the past

two weeks due to travel and being sick. So thank you, Kennon, for taking over.

I would like to throw my hat in for -- I support excluding jury trials from any change to the remote appearance rule. I think no one wants remote jury trials. When we bring up the concept of remote jury trials, everyone freaks out. And I think if we push on that, we risk losing -- you know, letting the perfect be the enemy of the good, and we risk losing all of the access to justice benefits for the indigent, for the disabled and all of those people, because -- I don't know -- Shiva, I asked am I able to share screen? I guess I will give it a shot.

Okay. I'm going to put up on the screen -- can everybody who's in person see what's on the screen?

CHAIRMAN BABCOCK: Yeah, we can see it, Judge.

HONORABLE EMILY MISKEL: Okay. So this is some data from 2019. This is prepandemic. This is the number of trials, bench trials and jury trials in noncriminal cases in district court. So this is not every level of court, this is just district court.

But you can see that there were about just over 1,000 civil jury verdicts in the 2019 fiscal year. In comparison, we had almost 92,000 family law bench

trials. So I don't think it's any impediment to take these 1,000 -- well, and if you add the family law in, 1100 jury trials off the table to give us some flexibility to the almost a hundred thousand other bench trials that is the day-to-day work of the courts.

So I'll stop sharing that.

And then I'll just follow on by saying I'm also our liaison to the Judicial Council, and the Judicial Council met last Friday. What we discussed in our civil justice committee for the Judicial Council, we got updates from Legal Aid, we got updates from all of these access to justice groups, and it was the consensus of the civil justice committee of the Judicial Council that the Judicial Council -- I'm just reading from my recommendations so I don't make any mistakes. The Judicial Council should work with other stakeholders to recommend that courts continue to be able to make remote appearances available where appropriate to increase access to justice and the efficiency of our courts.

So I think if we just take jury trials off the table, we have much more buy-in about the flexibility of letting those who our traditional system has excluded benefit from technology to be included.

CHAIRMAN BABCOCK: Anything else or is that it?

HONORABLE EMILY MISKEL: That was it. Next.

CHAIRMAN BABCOCK: All right. Kennon, and then John.

MS. WOOTEN: Just a couple points.

One, in regard to the carve-out for remote jury trials -- which, by the way, is Tab B, and we have attachment A for the justice court rules and attachment B for rules governing district or county courts.

But the carve-out specifically now states that a court may not require lawyers, parties, or jurors to appear remotely for a jury trial, absent consent of all parties involved in the jury trial. And I wanted to speak to this briefly to call out that it would still allow, for example, for certain witnesses potentially to come in and appear remotely, but it would obviously on its face not allow for parties, lawyers, or jurors to appear remotely without that uniform consent.

And I'll share a recent example in support of this particular phrasing. It was an in-person jury trial set for three weeks. In that particular case, I was representing, among others, multiple police officers, and the potential trial list was about 70 deep. And so if you were not going to allow some of these individuals to testify remotely, they wouldn't know when they would need to be there in person, it would take them out of the

field. And so having the ability for those witnesses to come in remotely, even if you're in person, that can be a very good thing for some trials.

But I just wanted to point out the language to all of you so you'll know exactly how it's contemplated now and understand that it would still allow for some remote appearances by witnesses even in in-person jury trials.

CHAIRMAN BABCOCK: Right. Yeah, I don't think it addresses that, but that's a separate issue.

MS. WOOTEN: Uh-huh.

CHAIRMAN BABCOCK: Because having a witness, and regardless of who the witness is -- I don't know what kind of case you had, but a police officer, having the jury being able to see them in person is different than having them -- seeing them on a television screen.

So --

MS. WOOTEN: Yeah, certainly.

CHAIRMAN BABCOCK: -- that's a different issue.

MS. WOOTEN: Certainly.

CHAIRMAN BABCOCK: But, John, you had a comment.

MR. WARREN: Yeah, thank you. I'm just going to basically echo what Kennon --

CHAIRMAN BABCOCK: Speak up a little bit, please.

MR. WARREN: I'm going to echo what Kennon and Judge Miskel said. From a clerk perspective and then from my previous life as a court administrator, we get to hear all of the anxieties from litigants. And given that in Dallas -- and not just Dallas County, but a lot of other counties, particularly in divorce cases, those are all self-represented or pro se litigants. And to put them under the pressure of trying to do -- represent themselves in a matter where they are emotional and then trying to do a virtual process, that's just going to mess them up, if you will. And if the outcome is not what they like, it would appear to them that the judicial system is not on their side because they may feel that they didn't -- they weren't able to express their views or to present their case accordingly.

And so for that, I would say, as it relates to jury trials, those should be taken off the table, not considered as it relates to remote proceedings at all. But also, think about worst case scenario. For anything that would be considered a virtual process, we still have those who are disenfranchised because of the lack of internet access, so we have to take that into consideration because they, too, will be considered that

they were not given an opportunity to fairly represent themselves.

CHAIRMAN BABCOCK: Yeah. Thank you, John.

David Jackson.

MR. JACKSON: Yes, Chip, thanks.

From a court reporter's perspective, jury trial would be really a problem to make a verbatim record of. For example, this meeting alone, you take the 27 people who are virtual, we've all heard something different than what that court reporter is sitting there writing. Because of our technology, I may have a better computer than someone else on this call using an iPhone. They've got a lot of feedback. So if you're putting your jury virtually, they're not all hearing the same thing, and I just don't think you can make it work and keep an accurate record.

CHAIRMAN BABCOCK: Thank you, David.

Judge Estevez.

HONORABLE ANA ESTEVEZ: I just want to echo what Judge Miskel said. And I don't -- I think we take it off the table. If there are some JP courts that want to do it, I think that they need to not only have the agreement of the parties and all parties involved, but also the agreement of the judges. So I don't want parties to agree to have a virtual jury trial because I don't want

to have a virtual jury trial. So --

CHAIRMAN BABCOCK: Thank you.

HONORABLE ANA ESTEVEZ: I think the judge -- I don't think it should just be up to the parties. I think everyone involved needs to all be on the same page if you're going to have any type of virtual jury trial.

CHAIRMAN BABCOCK: Thank you, Judge. Good point.

And Richard Munzinger had his hand up, and then Robert. Richard Munzinger.

MR. MUNZINGER: My view is that we should not distinguish between jury trials and nonjury trials unless -- I'm speaking now only for a nonjury trial, unless the parties consent. I don't believe that any litigant whose rights are being determined by a court of law should be forced to participate in a Zoom proceeding over that party's objection. What is the difference between a jury trial and a nonjury trial? Many, of course.

But facts are determined. The judge is the fact finder. Facts depend upon credibility most often, in my experience. How do you judge credibility from a screen? You don't see body language. The camera may be -- right now I'm looking at Chip. I can't see anything about his face. He's probably 35, 40 feet from the lens

of the camera. I can't see anything about his face. Because of the background that I'm looking at, I can't really see anything about his legs.

CHAIRMAN BABCOCK: We'll stipulate it's very handsome.

MR. MUNZINGER: I can't tell if he's fidgeting, if he's crossing or uncrossing his legs. I don't know what he's doing. And all of these little signals, we all -- if you try jury cases, you know the juries pick some of these things up. They may be right, they may be wrong, but that's how they form their judgments.

The second case I ever tried in my life was given to me by a partner who instructed me to try it nonjury. It was a breach of contract case, a minor case. He instructed me to try it nonjury. I obeyed. I was an associate. When I went there, the judge, who was one of the greatest judges I ever worked in front of in my life, George Rodriguez, Sr. -- fairest, smart, loved the law, dang good trial judge. But he sat there -- it was a contract case -- and he wrote down on a legal pad offer, acceptance, consideration, breach, damages. And once those were done, that's all he cared about. And I don't mean that critically, he viewed it from a lawyer's perspective. The witnesses were below him facing the

courtroom, not facing him. He didn't judge their credibility. He listened to the case and judged it based upon the law.

I don't think that I -- in 56 years of law practice, I probably -- I can't really think of any serious case that I ever tried nonjury because of that experience. My client told the truth. The other client didn't, the other guy didn't. And had you watched him, you would have seen him, stick his finger in his shirt collar, turn his face around, frown, stutter. The judge was oblivious to all of this because he couldn't see the man's face because of the way the witness box was set up. That's compounded by Zoom trials.

And I don't want to take a lot of time. I just don't think that any litigant should be deprived of his or her or its right to have a trial in front of the judge in person where the judge is the fact finder, because that judge is the fact finder, and he's got to make credibility judgments or she has got to make credibility judgments in the resolution of a disputed case.

And these are -- I know y'all laugh at me sometimes, but the truth of the matter is we are dealing with people's rights. When they wrote the Declaration of Independence, they said, "We dedicate our lives, fortunes,

and sacred honor." And that's what you do in the courtroom. That's what you deal with, lives, fortunes, reputations. This is serious stuff. It's not -- the problem that I have with the feds, they're all into efficiency. They're all into efficiency. Well, efficiency is a virtue certainly, but truth and justice, that's the purpose of the courtroom.

I'm finished. Thank you.

CHAIRMAN BABCOCK: Thanks, Richard. Richard Phillips, and then Robert Levy, and Judge Miskel, and then Lonny.

MR. PHILLIPS: I'm in favor of the carve-out as well. I just have one question about the language of the carve-out. It ends with "consent of all parties involved in the jury trial," and that language seems a little squishy. I don't know if we want to just say "parties to the case," or "the parties," since we're talking about parties. But I -- we don't want it to be read to suggest like is a juror a party -- they're not a party, but considering the thing earlier about requiring to appear, I would suggest we consider whether that language ought to be tightened up just a little bit.

CHAIRMAN BABCOCK: Yeah, I had that same thought. Because if you say "lawyers, parties, or jurors," and then you repeat the phrase "parties" later,

but is that meant to encompass the three? So maybe "litigants" or "parties to the lawsuit" or --

MS. WOOTEN: I think "parties to the lawsuit or the case" would be clearer. That is the intent.

CHAIRMAN BABCOCK: Yeah. Okay, Robert.

MR. LEVY: I didn't want to first comment on that, but I do agree with Richard's comments. And I'll suggest that Richard's reference to the Constitution is -- carries extra weight because I think he was there when it was signed.

But the question about the jury versus nonjury trial, I do agree that the ultimate issue of the case being adjudicated should be tried in the court, should be tried in person. And there could be a provision for remote trial, remote participation, but that should be with the agreement, at least, of all the parties. And that would particularly include the ability of a witness to testify remotely.

You know, we have our rules about deposition testimony and the admissibility, but the question of having a witness there, being able to have the judge address and assess the credibility is important. I know Judge Miskel and other judges would suggest that having a witness on Zoom is actually better, but I still think that it -- it should be the witness being there in person, and

not only because of the judge, but the other people who might be attending the trial. The trials are open. The public has the right to access. They should be able to walk into the courtroom and see all of the proceedings.

The issue about the changes that Kennon discussed regarding the rules -- the rules, I think that just excluding jury trials or generally trials still does not solve the problem because the right to have a witness or a party there to assess their testimony applies not just in the trial context, but, as I've noted before, in the context of a disputed fact issue that might be presented to the judge, like a TRO hearing or a preliminary injunction hearing where a witness might be testifying. That witness -- the presumption should be that the witness is there in person.

You can have a provision to enable them to appear remotely with the agreement of the parties, or at least showing that the benefit of that remote participation outweighs the presumption that they should be in person.

So, in short, my suggestion is that the rules should clarify that the presumption is a trial proceedings or pretrial proceedings will be in person, at least if there is going to be testimony taken, absent a showing that a remote participation is appropriate or on

the agreement of the parties to the case.

And one other question, David Jackson's comment is well-taken. Does the -- what is the record in the case? Is the Zoom video the record? Can you argue to that on appeal? Can you -- does the court hear that? Maybe they should, maybe they shouldn't.

Judge Miskel is saying no, and -- but the problem is I might argue that, you know, the transcript is wrong, or I might try to argue that, you know, some other element of the reporting is appropriate to take up to the -- it just raises some questions, and it leads to we probably should clarify if we are going to adopt a rule like this. I'll leave it at that.

CHAIRMAN BABCOCK: Thank you, Robert.

Judge Miskel, and then Professor Hoffman, then Judge Stryker, and then Connie.

HONORABLE EMILY MISKEL: And just briefly, to give the cite on the answer to your last question, the Rules of Appellate Procedure define the record to be the clerk's record and the reporter's record, and so there is no way to compel the court of appeals to consider the Zoom, which Texas could consider. Arizona sends audio and video of trials to the court of appeals. Texas has not done it that way, but that's a much longer side discussion.

I was just going to talk about witnesses and allowing witnesses. So currently witnesses can already appear remotely without the agreement of the parties. For example, witnesses can testify telephonically over the objection of one party. So adding video to the telephonic testimony would not be worse than the current system that we have now.

The other thing that I just want to point out about requiring the consent of all parties is that if the purpose of this is to use remote appearances where appropriate to expand access to justice, the problem that you would have is that a game playing litigant or attorney -- say the other side has a disability or indigent, does not have a car, whatever it is. If I don't want them there, and I want a default judgment against them, it would be very easy for me to say, gosh, sorry, I don't agree to them appearing remotely. Make them come in person, which I know they can't do because they're in another state or they're incarcerated or whatever it might be.

So anytime we require unanimous consent, that's not really how our system functions. Judges don't require unanimous consent for anything else that we do because we understand we're a dispute resolution system.

I had one other point, but now I've

forgotten, so I'm going to let the next person go.

CHAIRMAN BABCOCK: Okay. I do want to ask a question about the witnesses. At least in my experience, it's very rare to have a witness testify at a jury trial remotely, prepandemic for sure. But -- but you're right that that can happen, and it has happened from time to time.

What's the standard when one side says, "I want to call, you know, Joe Smith, who's going to testify by video from New York," and the other side says, "No, we object"? How does the -- what standard does the judge apply in that circumstance?

HONORABLE EMILY MISKEL: Yeah, so there's no rule on it, so I guess the standard would be abuse of discretion.

MS. WOOTEN: And I think now --

CHAIRMAN BABCOCK: That would be the appellate standard, but what is the -- what standard does the trial judge apply?

MS. WOOTEN: I think now the trial judges are relying on the emergency order, or at least I've seen that happen. So the look to the language that was referenced in the -- the directory remarks about what's happening at the court and saying, you know, under this order this is what can be done.

And I'll add on, at the risk of stating the obvious, that a lot of video testimony is already happening in jury trials through deposition video presentation.

CHAIRMAN BABCOCK: Yeah, that's for sure.

Professor Hoffman.

PROFESSOR HOFFMAN: Let me go back to something Judge Estevez raised. I think, I think I heard her say even if the parties unanimously consent to appear remotely in a court proceeding, the judge could veto that. I don't know if I heard her right in saying that.

I guess my question to Kennon is --

HONORABLE ANA ESTEVEZ: I was talking about a jury trial.

PROFESSOR HOFFMAN: Ah, okay.

HONORABLE ANA ESTEVEZ: I think the judge should be able to veto that. I don't want to do a remote jury trial, and I don't have the equipment to do a remote jury trial, so I never want to agree to a remote jury trial. I wouldn't be able to do it, and I wouldn't spend all of my resources trying to figure out a way to do it.

MS. WOOTEN: Well, and I'll say to that point, as structured in the version presented under Tab B, I think the judge could veto it because it now states that if -- even if you have consent, I think the judge can come

in and say you may want to appear this way, but I'm not going to -- I'm not going to allow it, in part because we don't have the technology to provide meaningful participation.

HONORABLE ANA ESTEVEZ: So when I was going to do one, when it appeared the pandemic was never going to end and that was the only way I could get a civil jury trial to go, OCA was kind enough to offer their resources. So we had to make an appointment with them to get clean iPads and all of this other equipment that we do not have. So it's not that simple for just a judge to do a remote jury trial when they haven't had the training or everything else it would take, the equipment to do one. It's not the same as, you know, don't let them use their phones. You have all of these instructions. It's quite complicated.

CHAIRMAN BABCOCK: Thank you.

Judge Stryker, and then Connie, then John Kim, and then John Warren.

HONORABLE CATHLEEN STRYKER: I was just wondering if there was any discussion when these rules were being drafted about nonjury civil contempt proceedings that can lead to jail time and -- and/or termination proceedings, nonjury termination of rights, parental rights.

HONORABLE EMILY MISKEL: So there has been a remote jury trial regarding jury termination of parental rights that was affirmed, but there's no -- so you're asking because of the quasi-criminal nature of a contempt proceeding and because of the heightened evidentiary burden of clear and convincing evidence, I'm not so -- so your first -- so your second question about nonjury termination of parental rights, I -- in a civil case, regardless of the burden of proof, their standard is due process, not the Sixth Amendment confrontation clause. So I don't think an increased evidentiary burden of proof would take away from the fact that we're still talking about due process, not a Sixth Amendment right to confront witnesses. So I don't think parental rights termination would be treated any differently for the purpose of having a witness testify by telephone or having a witness testify by Zoom in any other type of civil proceeding.

Now, for contempt proceedings, I have held contempt proceedings during the pandemic. I've put people in jail for contempt based on a Zoom proceeding, but no one objected. So I have never had it come up -- if someone objected, I probably wouldn't do it on Zoom. I would do it in person.

Again, I would be happy to not do contempts by Zoom. We can easily do those in person, and they are a

relatively small number of the business of our docket. So because that may be treated -- because defendants are entitled to the protections of a criminal trial, it probably does make sense to do all of your contempt proceedings in person. But as far as just because you've got a heightened evidentiary burden of clear and convincing, I don't think that converts it into, like, a Sixth Amendment type of right.

Does that answer your question?

HONORABLE CATHLEEN STRYKER: Yes. I mean, I agree with you on the second point.

I guess I would say I have a concern with terminating someone's parental rights if they are objecting to their -- the person who is trying to terminate them appearing virtually, and the court overruling that and having to have it virtual.

HONORABLE EMILY MISKEL: But realistically that's a lot of what we have now, because oftentimes the father is in federal prison, and we cannot get inmates from federal prison to appear personally in court. And so those fathers have either been defaulted, or they've appeared by telephone or whatever we can get the federal prison to allow. So we already have a system where we allow non-in-person appearances for termination of parental rights trials.

HONORABLE CATHLEEN STRYKER: Sure. I just have great concern about it for folks that want to appear, and want -- you know, want to be live. And if they end up overruled on that, you know, the moms are getting terminated. I just have concern with having nonjury termination over the objection of the person who's being sought to be terminated. I also have a concern about anybody getting thrown in jail over Zoom.

HONORABLE EMILY MISKEL: And, Kennon, can you maybe answer this question, but I think Judge Stryker's concern may be alleviated by the new language where you're saying if somebody -- basically the new language is that people get to appear how they want to. So if you -- absent some good cause, right? So if you want to appear in person, that you should be able to appear in person, absent some kind of good cause.

Am I stating that correctly?

MS. WOOTEN: You are.

HONORABLE CATHLEEN STRYKER: But they may want -- the person that's trying to terminate them, you know, if mom's trying to terminate dad, they may want to see that person live and objecting to having anybody appear remotely. And then, of course, the civil contempt proceeding is more of a quasi criminal problem that I think should be excepted, but that's just me.

MS. WOOTEN: And, Judge Stryker --

HONORABLE CATHLEEN STRYKER: Otherwise I agree with everything that you've been staying.

MS. WOOTEN: Judge Stryker, I'm sorry to interrupt you. That was inadvertent.

But I think the way the word -- the rule is worded now, a party gets to file this request for a participant to appear in a manner other than directed by the court. So it's not just I get to file a request about me or my client. It's a party in the case can file a request for any participant involved in the proceeding.

CHAIRMAN BABCOCK: So we're probably skipping ahead a little bit. But this subpart (b), Kennon, is the way it would work is that the judge says, "Okay, in two weeks, we're going to have a Zoom proceeding on termination of parental rights," and then the father, who is being terminated, says, "No, I don't want to do it by Zoom, I want to do it in person." He files that within a reasonable time, and the court has to rule on that and tell the parties. But it doesn't have to have a hearing, the judge doesn't have to have a hearing and can grant the request unless there's good cause not to grant it.

Is that the way it would work?

MS. WOOTEN: Yes, that's the way it would work. And I'll just add, the final sentence in the

proposed rule would require the judge to then go on and document the good cause for not doing what the party has requested. And the reason that language is there is to have a record if there is an appellate proceeding that stems from the judge's decision.

CHAIRMAN BABCOCK: Okay. So in Judge Stryker's hypothetical, the parent files the request, and the opposing parent says, "No, it's going to take too long." He's in prison, can't get him here. And the judge says, "Yeah, the request is denied," and the reason is he's in prison and we can't get him here.

MS. WOOTEN: And then the question would be, is that good cause?

CHAIRMAN BABCOCK: But in the meantime, the parent would be terminated.

MS. WOOTEN: And it could be undone on appeal if it's determined --

CHAIRMAN BABCOCK: Right. Sure.

MS. WOOTEN: -- that the judge's decision wasn't supported by good cause.

CHAIRMAN BABCOCK: Yeah. All right. Connie, sorry, took a long time to get to you.

Judge Stryker, are you done? Did you have anything else?

HONORABLE CATHLEEN STRYKER: I do not have

anything else. Thank you.

CHAIRMAN BABCOCK: Thank you. Connie.

MS. PFEIFFER: That's okay. I think they set up my question. So I had keyed in on a little bit of the last part of 500.10(b), and that's where it says the court must grant the request unless it finds there is good cause not to grant, and this last sentence says, "Such good cause must be documented in the ruling denying the request," which caught my eye because it reminds me of the Texas Supreme Court mandamus jurisprudence that says orders granting new trials have to include good cause and the reasons for granting the new trial, and that those orders are reviewable on mandamus.

And so I'm curious -- I mean, this, to me, looks like potentially this could be an order reviewable by mandamus, and I'm curious if that's the thinking of the language or if there is thinking and intent here.

CHAIRMAN BABCOCK: Kennon?

MS. WOOTEN: The thinking was that there would be a right to mandamus relief. So to further address your question for, I think, what could happen other than what I stated as a possibility is that it stops the proceeding, and there is mandamus review, and then the appellate court decides how a party is going to appear. Trial then ensues after the appellate court's decision.

CHAIRMAN BABCOCK: Great, thanks.

Connie, did you have anything else?

MS. PFEIFFER: No. That answers it.

CHAIRMAN BABCOCK: John Kim.

MR. KIM: Thank you.

CHAIRMAN BABCOCK: Where's the fire?

MR. KIM: May be that NRA thing.

MR. PERDUE: It's 45.

CHAIRMAN BABCOCK: Let's hope not.

MR. HARDIN: Actually, they are telling people in our building, which is 5 Houston, that they might have trouble getting through the streets after noon. They're concerned over there about the counter-demonstrations. So there are going to be demonstrations against the NRA, and then the supporters of the NRA have volunteered to show up if it comes to protect the people at NRA. So that's what everybody is all concerned about. It may turn out to be nothing, but --

CHAIRMAN BABCOCK: And you're wearing a bright aqua-colored --

MR. HARDIN: So I'm a good target.

CHAIRMAN BABCOCK: All right. John Kim.

MR. KIM: Okay. So, first of all, thank you to the committee and subcommittee, because I think we're making a lot of progress. To that end, the first thing I

would like to note -- and I sent a copy of it to Shiva to then formally put --

HONORABLE EMILY MISKEL: So the last two speakers we haven't been able to hear. I don't know if you guys can find a microphone.

MR. KIM: Yep.

CHAIRMAN BABCOCK: Yeah. The soft-spoken Rusty Hardin and John Kim are having trouble being heard.

MR. HARDIN: But mine wasn't of substance.

MR. KIM: Okay. Better?

So I'd like to formally put into the record, there was a letter that was sent to all the justices and to you, Chip, that was jointly signed by TEX-ABOTA, by TTLA, by TADC, by the Texas Civil Justice League, and the litigation section for the State Bar, the state representative of the American College, all in consensus saying that this is a rule that bears great thought and we should tread carefully because it is so fraught with not only constitutional and due process issues, but also the right to better access to the courts.

And so I appreciate everything that we have done thus far with respect to the rule, but I will candidly say that I think the language of saying just jury trials is too restrictive. I think it should encompass bench trials. I think it should encompass injunctive

hearings. I think it should encompass anything that is evidence-based.

And I say that while giving tremendous respect to all of the judges and their need to be able to handle the administrative duties of their courts. And I -- I concede Zoom is here for a while. I mean, it's here for the future, but I just don't think it's here for a jury trial, and I just don't think it's here for an evidentiary hearing. And I just think -- you know, we've talked about all of the nasty terribles with respect to not being able to judge a person's credibility and everything; but I think the biggest problem is this new ground of science coming out that talks about how in a remote proceeding, the participants over time, because of the screen and everything, lose their sense of empathy. And I think every fact finder and every fact presenter can never lose that portion and that empathetic part of us that hopefully governs how we resolve our disputes, which is ultimately what we want to happen in a reasonable and credible manner. And so I think jury trials in and of itself is restrictive.

The other thing is -- and I appreciate the good cause flip, but I think we should make more clear that the presumption of this rule is to be in person. And I don't know how to delicately say this because all of the

judges participating in this are experienced and are not the problem, but we have brand-new judges -- and I'm just going to pick on Harris County. We've got brand-new judges in Harris County. If you put in the comments three or four things that say this is good cause, they're never going to expand off of that because they're not capable of expanding off of that. They're just going to say, nope, it doesn't fit into one of these three or four categories that the rulemakers have put in the comments or notes, and so there is no good cause, or there is.

And so I think we have to be careful with that language to make sure it is, you know, clearly not limiting in nature. That's all I've got.

CHAIRMAN BABCOCK: Great. Thank you, John. John Warren.

MR. WARREN: I'm just going to repeat kind of what John Kim said, but I had a more granular level.

CHAIRMAN BABCOCK: Put it into the microphone so --

MR. WARREN: Pardon me. At a more granular level. Doing remote jury trials -- and while you can send remote devices out to those jurors and you can send wifis or mifis out to those jurors, but if there's no infrastructure there, that still will not allow them to participate in a jury. And if that's the case, what

happens to having a really diverse jury panel? And what also happens to Batson if that ends up being the case?

CHAIRMAN BABCOCK: Great. Great point, John. Thank you.

Any other hands up remotely? I don't see any, but -- there's one, and it's Justice Gray. Justice Gray.

HONORABLE TOM GRAY: This is just an anecdotal story that you need to consider with regard to the rules. It was a -- there's at least one dad in Oregon that really is glad that he was allowed to participate in the termination of his parental rights remotely. Because if he had shown up in Texas, he would have been arrested for assaulting the mother, a previous woman, and he had -- one of the biggest problems of his compliance with the department's plan for reunification was that he had just gotten out of jail for assaulting a third woman. And so the last thing he wanted to do was participate in an in-person trial in the state of Texas, because he would have been arrested and gone back to jail for violation of his parole and several other things.

So that -- that kind of issue needs to be factored into whatever it is we do. Thank you.

CHAIRMAN BABCOCK: Yeah. Thank you, Judge. I'll get you in a second, Rusty.

And I think Judge Stryker's concern that she articulated, when applied to those facts, Judge, might be that the parent who was being terminated could, I would think, waive his right to be present in person for whatever reason, but -- for the reasons that you expressed where he might be called upon to violate a condition of parole or a judicial order, whatever it may be. So that would, I would think, be an exception that perhaps Judge Stryker would find acceptable.

But, anyway, Rusty.

MR. HARDIN: I -- I think we confused something. I want to follow-up just real quickly, just for the record, with John Kim, to echo that and give an example.

I started a criminal trial -- and we're not -- I'm not really talking about criminal versus civil here. It's just a courtroom proceeding is the relevant part of what I'm observing. And we started before the pandemic, and then the pandemic hit about a month into trial. I had -- we had -- we don't have the right, of course, of depositions in Texas in criminal cases, but we had had interviews and meetings with witnesses and knew what they were like in person. When it broke, the same 13 jurors stayed available, available, available. We broke in the middle of March. We resumed on September 20th out

at NRG.

The State -- we were defending, and the State wanted a witness they thought would help them, and I made a decision that every trial -- every trial lawyer would do when they're given the deal. I only gave in because I was allowed to choose or not or oppose it. If either side opposed it, she wasn't going to allow it. I allowed it because I knew that that witness they wanted to call would be very difficult to successfully cross-examine remotely, and since it was a witness that had information that was helpful to me, even though the State wanted to get certain other things outs of them, I was willing to have a remote witness, so we had a remote witness in a jury trial. The fact that it was criminal versus civil is irrelevant.

He was nowhere near the witness for the State that he would have been in person. And -- and I think sometimes when we talk about this, we fail -- we all say judging the credibility of the witnesses, and we usually talk about it in terms of the judge being able to determine the credibility, but the experience that I've had since remote proceedings started has made me very, personally, strongly adversarial to remote proceedings against the will of the lawyers that involve any type of adversarial issues. Most of my practice involves -- and

trials are usually involving, on our side of the table, cross-examination. An adversarial cross-examination is inherently 10 times, in my opinion, more difficult and lacking in success than it is in person, and so the trial judge gets to watch, the jury gets to watch, the participants -- we talk about terminating parental rights, the thought that -- that my child could take -- be taken away from me because I'm in jail and I don't have to be -- you know, they didn't have to make me be there is just mind blowing, because the lawyer for that person or whoever is representing that person has a much better chance of challenging the allegations in person than they do.

So whether it's civil -- our practice, y'all heard me say many times, is probably 85 percent civil trial work, so I'm not really talking about it from the perspective of historical criminal defense trial lawyers. I'm talking about it from somebody who wants to challenge what that person is saying, and I can do it nowhere near as successfully remotely as I can in person. And it's not just me. I respectfully suggest that's all trial lawyers. So as we -- I really do agree also with John.

I really appreciate what's been happening with this committee about it. Now, this is, what, maybe it's been talked about either our third or fourth session.

It's hugely important, but I -- I want to reemphasize my agreement with John, that it's just something to tread very lightly on, but very, very carefully with, because it has huge, huge implications for the person that civilly or criminally is defending against an allegation, and their best defense is putting what the other person says to the test in person and having people really look at them and do. I saw that witness in the trial that he was nowhere near what he was like in person. So thank you.

CHAIRMAN BABCOCK: You bet. Yeah, Judge.

HONORABLE MARIA SALAS-MENDOZA: So I've been handling the mic over here, doing really well. I just want to comment on a few things. One is that I think Kennon's introduction bears reminding, which is I think the committee took into account all of these things. We've had several meetings where these opinions and experiences have been expressed, and -- and I think the recommendation tries to reach a fair resolution with regard to these issues that doesn't throw the baby out with the bath water. I mean, we've learned that being able to keep the courts open with remote proceedings has been obviously excellent since we didn't shut down, we were able to continue to handle our dockets, and -- and there were some very good things.

There was a comment made about judges being

about the numbers, and that's how we decide what -- what we do. Some of the information that was shared with the committee was about that, in fact, remote proceedings take longer, right? They -- they take longer for lots of different reasons, so it's not necessarily more efficient. These proceedings take longer. They're harder on the participants. I will tell you that I personally am exhausted from Zoom. I don't think it's normal to be on your computer all day. I think that interaction with the Brady Bunch boxes is not normal. That was also in the materials. I thought they were talking to me. They didn't talk to me about that. I don't think that's normal. But I don't think that we should not support what the committee has come up with because there are some advantages.

Judge Miskel has already mentioned that the trial judge has always had the ability to permit witnesses in various ways. We've always had that authority, but we didn't do it that often, you know. That's -- that's great, because the judges are -- are prioritizing in-person proceedings. That tells you the judges know that it's important, but in unusual circumstances and in, you know, extreme or unique cases, you might want to let that person from prison participate by phone because it's better than no participation.

What the committee is suggesting is even better, because you could have someone who might participate remotely in proceedings where they currently have no option. And the example that Mr. Hardin just gave, sometimes you'd rather go with plan B. It's not what you prefer, but if the option is not having the witness, this -- this gives us the ability to have witnesses and parties to make that decision, so -- so I just wanted to emphasize that I think that the carve-out is good, just because I think that that takes a whole lot of other -- we're not talking about having jury trials remotely. Those judges who have done it have already expressed the benefits of it, and we all have different experiences, but I -- but I think it would be a mistake if we didn't take advantage of all of the experience and all of the information that's been shared to provide this option.

And I just want to state again that I also agree with Judge Estevez that it's important to allow the judge to veto remote proceedings because of -- of all the things she said, but -- and I want to reiterate, as -- as John said, the OCA will make available the equipment, but that's not all it takes, and so if a judge is not prepared to do a remote proceeding, the judge also should be able to veto that, even if the parties consent.

CHAIRMAN BABCOCK: Thank you. Thank you, Judge. Justice Kelly, and then Kent Sullivan.

HONORABLE PETER KELLY: As a general philosophical point, we have to bear in mind that the appellate process is premised on -- and we have to give great deference to the fact finder because they're the one who have the ability to assess the credibility of the witnesses, and anything that interferes with that ability to assess the credibility of the witnesses, for instance, having to watch it in a Brady Bunch box or have it purely remotely, sometimes it's raised in my mind, has the credibility really been assessed if it's been a remote hearing that has now been transcribed and come up to me. There's been some opportunity lost for give and take through cross-examination or follow-up questions, or if there's a breakdown, you know, sometimes -- I was reading one transcript where a witness is testifying by remotely and then the feed went off. Well, that ruins -- as any trial lawyer would tell you, that ruins the rhythms of the cross-examination. It can throw things off, give the witness time to recuperate. But I've had the question come up, well, do I give that less deference in terms of how the trial court or the finder of fact has assessed the credibility of the witness?

So if there's to be any change, we should do

whatever we can to permit the finder of fact to have the greatest ability possible to assess the credibility.

CHAIRMAN BABCOCK: Thank you, Judge. Kent Sullivan, and then Tom Riney.

HONORABLE KENT SULLIVAN: I really just wanted to briefly punctuate the comments made by John Kim and just, you know, add my thoughts about the need to be very, very careful and not rush to -- to judgment with respect to a rule in this area. I think almost any rule is going to be dependent upon the thoughtful and experienced exercise of judicial discretion; and as I think John was very candid about and I think it's something that we increasingly need to acknowledge, is that our Texas trial judiciary now represents a very broad range of experience and capabilities. The people who populate the trial courts have very different experiences that they bring to the bench.

In a number of cases, we're seeing folks that have very, very limited experience, as some, of course, as he pointed out, many brand new judges; and in addition to the difficulty of acclimating themselves to the bench, many bring very limited experience as -- as trial lawyers. So sort of a double deficit that a number are having to grapple with, I think, which means, of course, lawyers and litigants are also having to deal

with -- with that reality in some of the courtrooms. So I think increasingly we're looking at a situation which rules like this need to offer very, very clear guidance to the trial courts in terms of how they would handle issues like this.

And I'll -- I'll also throw out the point that I always try and make, and that is I think that we ought to try and avoid the tendency that we all have to be parochial about this and we ought to consider best practices. By that, I mean to look to the experience of other states in light of the -- in light of the pandemic, you may well be able to even look to the experience of other countries in terms of how they have handled remote judicial proceedings, and I think that we've got to try and adopt the very best practices available based on the broadest experience that we can draw upon in terms of what works and what doesn't. Thanks.

CHAIRMAN BABCOCK: Thank you, Kent. Tom Riney. Come on down.

MR. RINEY: Is it coincidental that this corner down here is the only part of the room that's nowhere near a microphone?

CHAIRMAN BABCOCK: Well, you guys self-selected where you're sitting, so don't blame me.

MR. RINEY: All right. Good point. I

really want to emphasize what John Kim and Rusty Hardin just said. I'll try not to repeat it, but they're very, very good points. One thing particularly is that John said -- and, Kennon, thank you very much for your work. You're dealing with a very, very difficult issue, and while I disagree with some of your recommendations, I appreciate your efforts. One of the reasons that it is difficult is because we're talking about making fundamental changes in our justice system.

John mentioned the -- briefly, the letter that was sent from six different organizations of trial lawyers in the state. Organizations who have fundamental differences on -- on many, many issues, and they say that they -- they oppose -- that they do not oppose remote proceedings for uncontested, routine matters, but that they do oppose it for adversarial proceedings such as witness testimony, evidentiary hearings, dispositive motions, or bench trials. I agree. My -- my shorthand is if it's an evidentiary proceeding, it should not be remote unless the parties agree.

Now, I think these organizations probably would also agree that if there's certain, you know, justice of the peace court matters, certain family law matters, those may be perhaps a little bit different situations; and I know I don't purport to having the

expertise regarding that, but think just for a moment about one statement from this letter that says, "We are of one mind that in-person proceedings must be preserved if the parties desire them." It's difficult to get six trial lawyers to be of one mind on any issue, but to get six different organizations of trial lawyers to -- to make that statement shows, I think, how profound this issue is and how we must be -- be very careful.

They, of course, advocate that -- I would think they would say that there must be, like John Kim suggests, the default would be that there's always an in-person proceeding. Don't put the burden of proof on someone who seeks to have a traditional in court proceeding to show good cause. I won't go over the letter, but they talk about, please, carefully define good cause if you have a good cause exception, because there can be problems there.

Now, Chip, are we at this point just addressing proposed subparagraph (a), or are we accepting comments on some of the other subparts?

CHAIRMAN BABCOCK: Well, we're headed to a vote on subparagraph (a), but if you want -- wish to comment on (b), that is -- that's great.

MR. RINEY: Well, I actually had (b), (c), and the comments I was going to comment on, but I can wait

until we get to those sections.

CHAIRMAN BABCOCK: Your pleasure.

MR. RINEY: All right. I'll defer.

CHAIRMAN BABCOCK: Okay. Great. Judge Miskel.

HONORABLE EMILY MISKEL: Just to return to the point of judging a witness' credibility on Zoom, I don't think that's anything anyone is going to change anyone's mind on. I think the people that believe you can't do it aren't going to have their minds changed. And I think the people that have seen you can do it are not going to have their minds changed, but what I'll add is there is some data coming out. So Professor Valerie Hans from Cornell has already conducted a study where she got funding to do a same -- do the same -- put on the same trial to an in-person jury and a remote jury, and she's already conducted her trial, and she's writing up the paper, so we will have data on these things eventually.

I will say I've done, you know, upwards of 300 trials on Zoom, and I think it's perfectly fine to judge a witness' credibility on Zoom, but I understand that won't convince anyone who disagrees with me.

I do point out that it is kind of ironic, I was at a program last week for implicit bias, and they were just hectoring us about how you should not judge a

witness' credibility based on their appearance, based on their body language, based on all of these things that are subject to bias and prejudice and are improper, and you should listen to the content and all this. And so it's funny to me to go from a session on implicit bias where they're saying you should not judge a witness' credibility on shifty body language or whatever it might be, to come to a meeting where we're talking about we can't do it on Zoom because we must judge a witness' credibility based on shifty body language and appearance.

So I will just note we are sort of in a -- in a transition period in our legal system about what is appropriate to judge witnesses' credibility on, because I got an opposite message at the implicit bias presentation.

One last thing, I would just please beg everyone to consider the graphic that I showed at the beginning of this discussion, which, if I can share again, I'm going to put back up on the screen. Let's not throw the baby out with the bath water. What I've heard everyone say is, we disagree that Zoom should be used for these 8,000 trials, but we have no experience with these 92,000 trials, and so I would say I have lots of experience with these 92,000 trials, and I would say that there are many, many times in family law that it improves justice for parties to either be forced to appear remotely

or forced to appear in person without the consent of all parties. And I could come up with just a variety of examples in the trials that are the day-to-day work of what we hear, that it would be 100 percent a good thing and yet you won't get consensus unanimity on it because it's a high conflict case or whatever the case may be.

For example, family violence protective orders. Those are free for litigants to file, so many times they will have all kinds of disputes, who -- who gets the washer and dryer when they broke up and moved out. It costs money to file a case about who gets the washer or dryer. It does not cost money to file a protective order, so a pro se applicant will come in and file a protective order that on its face does not meet the elements to be able to grant a protective order, but we still have to set a trial of that lawsuit. Generally when we have protective order trials, they are pro se on both sides. They take approximately 15 to 20 minutes total for the final trial. They come in and we say, oh, you don't have the statutorily required relationship or you don't meet the standard for other reasons, and the case is dismissed or denied or whatever it might be.

We have some applicants who file these cases repeatedly, and so what I have done is to say -- instead of making the respondent constantly have to take off work

to come down and defend this frivolous game, we're just going to do those on Zoom. Having that tool is great, and it enhances justice, and I can think of a million examples for family law, so I would just please request even if everyone agrees that in your civil jury trials you don't ever want fact finding to be done on Zoom, you've expressly stated that you don't have experience with the 92,000 other trials out of 100,000 trials that Texas courts are hearing in district court. So I'll stop there and let Judge Estevez add or disagree.

HONORABLE ANA ESTEVEZ: She just knows I'm going to agree. That's why she called on me.

CHAIRMAN BABCOCK: Well, but go ahead.

HONORABLE ANA ESTEVEZ: I'm going to -- I'm just going to echo what Judge Miskel is -- is trying to communicate. The amount of bench hearings, whether they're final, temporary, whether it's in family law or I'm doing a discovery dispute in civil. I mean, we keep talking about the credibility of the witness, the credibility of the witness, but most of the time, it's just we're really weighing how much does that evidence affect what we're going to do. So we don't have a lot of people getting on here saying, no, that's not true, she wasn't tardy that day at school. She doesn't have 45 tardies. They're giving us whatever the excuse might be,

and we're weighing the evidence that may be agreed, it's contested, but they're trying to decide do we think this is worse or are you a better parent, and -- and they're not really saying that they've never engaged in these behaviors.

Likewise, let's say we have a Daubert hearing and we're listening to all of this stuff about an expert. No one's -- the expert is not going to say, "No, I really didn't" -- "you didn't really publish this." I mean, the question is when we have all of the information on most of these contested hearings, who's -- who's going to prevail? Not whether or not a lot of that information is true. I think when we have those true fact issues, was the light green or was the light red, those are the issues that they normally do go to a jury trial. I've actually never had a bench hearing on what color the light was or no one has presented any of those car wreck types of cases for me as far as a bench -- bench hearing.

So when she's talking about these 90,000, 95,000 bench hearings, what we're usually looking at is applying these facts to the law and determining who's the best parent under the circumstances, what's in the best interest of the child. It's not really -- there's just not that many people that are lying unless you're talking, you know, in the criminal cases, sure. I mean, they've

already taken that off -- that's off the table, so we can't do those unless they're agreed, which by the way, I mean, my last Zoom hearing was Monday. I've got family law cases that they've asked me to do by Zoom that start on Tuesday. I don't know if one of them is out of town or, you know, I've had lots of them that one side moves and the other one stays. And so it's just such an important tool, and if one person wants to appear in person, they can always appear in person at this point, and so we shouldn't be taking away somebody's choice of how they need to appear for them to be able to access justice.

So I -- I just want you guys to think about that. I mean, I've -- I've felt like the credibility issues or judging my witnesses has been -- it's been a total different dynamic. I mean, when you get somebody didn't know what they were wearing at work before you get to see them, you know, and I'm not saying I'm judging them on that, I just see that. I see what's in the background. They -- they act a little more like themselves, whatever that might be. And I think most of y'all work with very sophisticated clients. We're working with the -- with the ones that don't have the resources to miss work. They might be in the car. They may not have a car, so they may be using someone else's phone on a lunch break or taking a

quick break so that they can be heard, and we just -- we really have to be thinking of them. You will always be able to object. You will always have, you know, when you go in there, you'll have -- your client will have your voice to object, make a record, but we need to think about everyone.

CHAIRMAN BABCOCK: Thank -- thank you, Judge. Something that Judge Miskel said sparked a memory, and I know Tom Riney probably will remember this as well, and Judge Schaffer saw an example of this last night -- where I had a case in Amarillo and a witness for the other side flew down from Chicago to testify. And he was quite adamant and animated in his testimony that something had happened a couple of years earlier in front of him that he had seen, and it was -- it was a particular way. He had a clear memory of it, and this had happened, and he had forgotten that the -- the day after the incident that he was describing, he had given a television interview and said the exact opposite of what he had testified to.

Now, the guy was either English or Irish, very fair-skinned, you know, the pink skin, and he was bald, and so when I caught him in this lie, the blood rushed to his head, and I was very proud of myself for thinking on my feet and saying, "How do you make your face go red like that?" And that happened last night with

somebody who made a gaffe in introducing me to Judge Schaffer, and my point is that that witness' credibility was damaged greatly, I thought, and we later learned the jury thought as well, by his blood rushing through his -- his head and his head exploding in red, and that might have been lost on video. Maybe not, but probably would have been, and I think that his credibility would have been affected, whether that's a jury trial where the jury is the fact finder or the judge, where the judge is a fact finder and -- and seen that, or at least when I pointed out that this guy had been caught in a lie and his face was going red, it might have impacted things.

And Judge Miskel said, and it's true, that a lot of times we -- we have video depositions at a trial, but, think about it, it's always because -- almost always because we can't compel that witness to come to trial and we've taken their depositions in a remote place, and we have to play it because we can't make them come to the courthouse, or -- and I saw a case -- one case tried where the witnesses typically could have been compelled, but had done so badly in their depositions that they played the depositions back-to-back-to-back, but that's a choice of the litigants, and that's different from what we are talking about where we're going to take that choice away from the litigants.

Kennon, I know you want to speak, but Justice Kelly has waited patiently while Judge Estevez jumped the line on him, and I did, too. So sorry, Judge.

HONORABLE PETER KELLY: So it's 20 minutes or half an hour ago when I raised my hand, but it seemed there were two or three comments in a row dumping on new judges. I think there's an old judge problem, too. Sometimes judges have too much experience or won't read the comments when they're applying rules, so I just want to be clear that we're not changing rules or considering things because there are new judges on the bench in 2022. It can be a problem either way.

CHAIRMAN BABCOCK: Great -- great point, well-taken. Kennon.

MS. WOOTEN: Just a couple of things I thought would be good to say. Actually, three. First, there is a hard-working subcommittee, it's not just me, so I appreciate all of the kind words, but I want to kind of say thank you to all of the people who have done work on the proposed rules in an effort to strike the right balance.

In regard to the letter that's been referenced several times from ABOTA and others, I will say I read that this morning for the first time, so those statements aren't reflected in what we're considering

today, and I think in the past a lot of the focus has been on jury trials, but I think it's going to be interesting, if the Chair agrees to have a vote, on whether the carve-out should apply to contested matters as opposed to just jury trials, because it seems as though several people would believe that the carve-out should be broader than it is now.

The third and final --

CHAIRMAN BABCOCK: Let's take baby steps first.

MS. WOOTEN: Yes, of course, but I just -- I just wanted to acknowledge that this is developing quickly, and the input is being received along the way, but the draft sometimes get done before all of the feedback comes in. The final thing in regard to the good cause definition, welcome suggestions on how to make that clearer. I will say that there's already a phrase in the comment that I am guessing -- and I could be guessing wrong -- but I'm guessing that some people who honor grammar at the Texas Supreme Court might think is unnecessary, because it states now that "When evaluating a request, the court should consider factors, including, but not limited to, the following." So "but not limited to" is obviously unnecessary because the term "including" is designed to convey it's a nonexhaustive list, but the

reason that unnecessary phrase is there is to drive the point home for the people who are going to be reading this comment, if it someday becomes something that goes on the books, that this is not an exhaustive list and the analysis does not begin and end with the enumerated factors laid out.

CHAIRMAN BABCOCK: Yeah, great point. Judge Wallace, did you have your hand up?

HONORABLE R. H. WALLACE: Yes, I did.

CHAIRMAN BABCOCK: I thought so. Get -- get the microphone.

HONORABLE R. H. WALLACE: Of course, one thing we're wrestling with is we're trying to formulate a rule that there's one size fits all, and what I'm hearing, access to justice in the family courts, that's probably a much bigger issue than it is in just plain old civil cases. There are very few pro se litigants in civil cases. If they can't find a lawyer to represent them in a civil case, it may be because the lawsuit is frivolous or brought for just harassment purposes.

But in any event, I don't know, you know, if there should be a carve-out talking about the one rule in family courts and others in other courts. Probably not, but that's kind of -- as a practical matter, that's the difference.

Also, I think there's a huge divide, and we're talking not necessarily about contested, but evidentiary versus nonevidentiary. I mean, a summary judgment can be contested, but I have no qualms about hearing one of those by Zoom anytime, but I also think that trial judges should have a whole lot of discretion in deciding. I'm -- I'm carving out jury trials completely, but just for everyday hearing, the trial judges should have a lot of discretion, because there may be reasons they want to hear a particular issue in person and see the lawyers there that -- that don't appear in the black and white record.

And -- and I have a -- I guess my last comment is in the form of a question. As far as good cause, let's say, Chip mentioned awhile ago the problem of having to go to Amarillo or Brownsville or whatever. Is -- is the cost -- would the cost and expense and time of counsel be good cause for having a hearing remotely as opposed to in person if -- if Tom says, "It's going to take me X number of hours and cost me so much money that my client's going to have to pay me to get to Brownsville for this hearing," is that good cause? And if so, I don't know if you want to go down that path. That's all I have.

CHAIRMAN BABCOCK: Yeah, thank you, Judge. Yeah, Jim Perdue. Take the mic.

MR. PERDUE: Judge Brown did have his hand up, but it was given to me, so --

CHAIRMAN BABCOCK: Well, I spotted you first.

MR. PERDUE: I appreciate it. I'll be quick, just because I don't want to repeat stuff, but there's been some suggestion regarding data. There is a report from the National Center of State Courts. As everybody in this room may know, David Slayton was with OCA and then he moved up there. They take a focus group project of judges in Texas and that leads to a national report on the Texas experience with remote proceedings. It is -- it suffers from some selection bias, in my opinion, because of the judges who were participants in it, because it's voluntary, and they're trying to get a cross-section of urban to rural, but even in this report, which, frankly, from my perspective was designed to kind of be a proponent of remote proceedings.

It picks up on a couple of things. One, the promise of remote proceedings taking less time for the courts and litigants is not true. They actually take about 1.5 -- it's about 50 percent more in time, according to this survey. In the report for the takeaways for, you know, why would we abandon what was practice in February of 2020 for a world that hopefully will get past this

pandemic, the -- the judges report that it is -- it is not the type of case -- the way it's written is judges -- Texas judges agreed that the type of case is less relevant than the type of hearing. Generally speaking, remote hearings function most effectively with short hearings that are limited in scope, such as setting hearing dates, trial dates, permanency hearing, discovery hearings, motion hearings of various types, summary judgments, interestingly self-represented divorce dockets, and nonevidentiary cases.

It comes to the same conclusion as the ABOTA letter, that uniformly the judges don't believe the jury trials work, and then that leads me to the language of the rule, because the -- the language of the rule, two issues for the subcommittee's -- and perhaps this committee's consideration. The carve-out in -- in a limited sense to just jury trials is also in the construct that the court is the one determining the form of the proceeding, so that the notice is essentially by the court of the -- of the nature of the proceeding.

So one of the legislative compromises that did not get passed this past session was in the bill that came out of the Senate author, but it did actually say "jury trials and contested evidentiary hearings." That became the language that was agreed to by both sides. And

to your point, Judge Wallace, that terminology was "contested evidentiary hearings" could not be remote without the agreement of all of the parties.

And obviously I think there's general consensus, even amongst those in the family bar and others that the concept of jury trials, and this focus group data seems to support it, so I would -- I would suggest that maybe there's a consideration of what the language we look at in -- in a carve-out that would carve out contested evidentiary hearings. Is that too broad, is that too narrow? I think it strikes a balance, because I think you're going to have -- I think you want a rule with a hard out, because of this scenario.

The way this reads now, a court sets the means of the hearing, so you've got a bench trial, and under the current system the way the rule is in flipping the, quote-unquote, good cause showing, one of the parties to that bench trial now must object and the court must grant it unless it finds there is good cause, but realize the comment says that the party wishing to do it differently must state the reason why.

MS. WOOTEN: Or should.

MR. PERDUE: Or should.

MS. WOOTEN: It's permissive, yes.

MR. PERDUE: And then you have this

limitation on examples of good cause, which are always dangerous because now there's examples, and to John Kim's excellent point where if you're not one of the examples, I agree, not including two should get you there, but Rusty Hardin objects to a -- a virtual bench trial. Rusty Hardin objected to a virtual jury trial, and I think had to take it up on mandamus, but the judge -- and he does it because he wants to cross-examine the adverse party in person, and the judge finds good cause in that that person has to travel from New York, has some immunodeficiency history. They're doing business in this state, and whether a plaintiff or defendant or a party and subject to the jurisdiction of that court, under this rule as written now, because of the way the defaults work with the court setting the process, the party having the burden to make the objection, and the objection must be granted, but with the out and without a hard carve-out, you can see an easy pathway for a serious matter involving contested evidentiary decisions to be forced into a remote proceeding context.

I'm struggling with the language for you on -- on the alternate means out. My joke for the appellate friends and appellate bar is everything looks like mandamus, and I hate that, but you know, just today in here for those of us in this room versus those of us

who are on Zoom, humbly it's not a matter of the credibility of witnesses. The transcript of this today is not going to really reflect this deliberation. The people who have testified via Zoom on this TV screen, I don't know if you've caught all of it. I'm proud of you for doing everything you do. The people that are in here listening to each other having differences, we've had technology failures even with all of these resources. This is just a difficult, difficult thing, and there is a path forward, I believe, moving forward next year, but there is some data regarding judges, takebacks, time involved; and while the interest of access to justice is certainly important, I don't believe the system was failing to provide access to justice for whatever number of people in February of 2020, so --

CHAIRMAN BABCOCK: Thank you. I'm not sure who had their hand up first, either Judge Miskel or Harvey, but who wants to go first? Judge Miskel.

HONORABLE EMILY MISKEL: I think that that statement ties into the point I was going to make, which is -- I mean, first of all, I'm glad to be here because I've been sick in bed all week, and you wouldn't have heard my voice today unless I had been allowed to participate by Zoom, and I think the discussion would not have had all of the perspectives that I've been able to

say, but thank you for allowing me to appear remotely and present them.

CHAIRMAN BABCOCK: But we wouldn't have wanted you here if you were sick anyway, so --

HONORABLE EMILY MISKEL: Our discussion, by its very nature, is biased. We all have cool war stories about things that happened with those witnesses who were in court or the opposing party who was in court, because they showed up; and what is harder to imagine is the thought experiment of all of the things that would have happened had we ever heard from all of the people who didn't show up. And so in February of 2020, I had a failure of imagination, because the people who didn't show up weren't real to me, because they were the type of people who never showed up; and so I never heard from them and I never had to worry about them, and I'm not some sort of technology zealot. I don't like technology for technology's sake. The reason I'm so passionate is because during the pandemic when I was forced to do things on Zoom, I started seeing all of the faces of all of the people who never showed up before and were never the subject of those devastating cross-examinations because we never heard from them, and so I became passionate because those people are now real to me.

One thing I would say is I -- I spoke about

protective order trials, and so one of the things I want to just add, the reason I brought that up, a final trial can be a short matter that's very limited in scope. So I do -- I don't know how many of those protective order trials I do in a week, five to ten. And on average, they're almost exclusively self-represented litigants, and they take literally about 15 minutes beginning to end, but they require those people to take off work, come to the courthouse, wait around, all of that. Just for perspective, our numbers that we're doing in trial courts, I average 30 final trials a month. That means I'm doing one and a half final trials a day, and that's because some of our trials in family law cases are these 15-minute pro se -- it's a lawsuit, it gets a final trial, but it's quick, it's limited in scope.

Oftentimes it's technically contested on paper, but that's because the self-represented litigants aren't sophisticated enough to even know that they're not actually contested, they actually agree, right. Final divorce, both pro se litigants show up and I say, "Well, who's the kid going to live with primarily during the school week." "Oh, mom, of course," and we go through each of the things in the pro se divorce form and they've agreed on everything, but that was a contested hearing because they didn't know beforehand that they agreed on

everything. Those are things that would help them to sit on Zoom. And so that's the reason I push back against requirements of unanimity, requirements that all contested evidentiary things must be done in person, because those are the things that are the barriers to access to justice for the people that I have now seen their faces that were totally excluded before February of 2020.

CHAIRMAN BABCOCK: Thanks, Judge. All great points, but you're not trying to take away my war story, are you?

HONORABLE EMILY MISKEL: War stories are great. Now we can have war stories with all of the people we never even got to, you know, devastate before.

CHAIRMAN BABCOCK: There you go. But did you make any of them -- their faces go red, I think not. Okay. Harvey.

HONORABLE HARVEY BROWN: Well, I wanted to speak out in favor of -- of many points about --

CHAIRMAN BABCOCK: And go into the mic.

HONORABLE HARVEY BROWN: -- injunctions and evidentiary hearings. I think we should have a -- a carve-out for that. I've been persuaded by Judge Miskel that we should create an exception for family law and protective orders, at least initially.

CHAIRMAN BABCOCK: We've never done that.

We've never done that.

HONORABLE HARVEY BROWN: And I just wanted to point out that we have two attachments, A and B, and last time we had a justice of the peace speak very strongly that those courts should maybe be treated differently, and -- and in those courts maybe it should be limited to just jury trials, and I just didn't want us to lose that discussion. I'm not sure I'm persuaded or not, but I do think district courts are a little different because of the access to justice issues in -- in JP courts.

CHAIRMAN BABCOCK: Well, and de novo appeal, too.

HONORABLE HARVEY BROWN: Right.

CHAIRMAN BABCOCK: So, okay, anybody else want to talk about subparagraph (a)? I think that we probably, Kennon, could have a vote on -- on subparagraph (a) of this exception language if we added the language either substituting "litigants" for "parties," or "parties to the lawsuit" and then adding -- and the court, pursuant to Judge Estevez's comment. So the -- the court would have to agree, too, right? Is that acceptable to the chair of the subcommittee?

HONORABLE EMILY MISKEL: I think the allowing of the court is already built in because it says

the court may allow or require, so I don't think the language could ever be used to compel a court to allow a jury trial.

MS. WOOTEN: It just says that the court cannot.

CHAIRMAN BABCOCK: Yeah, it says the court may not.

MS. WOOTEN: I think changing the last phrase "involved in the jury trial" to --

CHAIRMAN BABCOCK: Yeah, and I didn't --

MS. WOOTON: -- quote, "to the lawsuit" or something like that, so it would be all parties to the lawsuit.

CHAIRMAN BABCOCK: Yeah.

MS. WOOTEN: I think that's better.

CHAIRMAN BABCOCK: Yeah, and delete "involved in the" -- "in the jury trial."

MS. WOOTEN: Correct.

CHAIRMAN BABCOCK: If it were up -- if it were up to me, I would put a belt and suspenders on it, just Judge Miskel is right, it grants discretion in the first sentence, but I would say "all litigants or all parties to the litigation and the court."

MR. PERDUE: So how -- how would that work then if the court ordered it in person, a litigant objects

to it being in person and wants it remotely, that must be granted, but the court doesn't agree under (a)?

HONORABLE MARIA SALAS-MENDOZA: That's not what's required.

CHAIRMAN BABCOCK: The court can require the lawyers, litigants, or jurors to appear remotely for jury trial, absent the consent of all litigants or all parties to the litigation. So you don't want to add in the court --

MR. PERDUE: Well, I'm -- I'm just curious, because the -- the construct in (b), right, is a way other than ordered by the court, not --

MS. WOOTEN: And the construct in -- in (b), is really about things other than jury trials, because what the exception -- that carve-out is there just to say, look, that's off the table.

MR. PERDUE: Right. Right.

MS. WOOTEN: So the conversation is over under this proposal if you don't have consent of all of the parties to the lawsuit.

CHAIRMAN BABCOCK: Right.

MS. WOOTEN: I don't know that adding the phrase "and the court" works with all of the other parts --

CHAIRMAN BABCOCK: Yeah, no, I see what your

point is, yeah.

MS. WOOTEN: -- of this rule.

CHAIRMAN BABCOCK: Yeah, Judge Estevez, what do you think about that, if you're not doing a hearing right now?

HONORABLE ANA ESTEVEZ: I couldn't hear the final part. I liked what you were saying before, but what did she just say that she suggested? Can you repeat that?

CHAIRMAN BABCOCK: Yeah. Kennon was saying that with this language in the italicized under proposed 500.10(a), "except that a court may not require lawyers" -- I'm just going to say "litigants" -- "lawyers, litigants or jurors to appear remotely for a jury trial, absent the consent of all litigants." Or "all parties to the lawsuit," one or the other, and she's -- she's suggesting not inserting, "and the court" on the theory that that's already provided for in the introductory sentence. If I -- if I understand you correctly, Kennon; is that right?

MS. WOOTEN: That's correct.

CHAIRMAN BABCOCK: Okay.

MS. WOOTON: I don't think that phrase works --

CHAIRMAN BABCOCK: Yeah.

MS. WOOTON: -- considering that.

CHAIRMAN BABCOCK: So that's --

HONORABLE ANA ESTEVEZ: As long as it's clear that no one can agree above what the court would -- that -- I just want to make sure the court gets their veto power, because I don't think all the courts would allow that even if they agreed. I think the majority of the courts in Texas do not want to have remote jury trials, but find that it is very beneficial to allow someone to appear remotely, and it doesn't necessarily have to be a remote proceeding, but you could have one person in-person and the other person appear remotely. I think that is beyond the majority. I would say 98 percent of the judges would probably agree with that.

CHAIRMAN BABCOCK: Yeah.

HONORABLE ANA ESTEVEZ: So --

CHAIRMAN BABCOCK: Well, I'm with you, and I'm going to read the language and then we're going to vote.

HONORABLE ANA ESTEVEZ: But I think -- I think it will be okay.

CHAIRMAN BABCOCK: I'm going to read the italicized language as we have worked on it here, and everybody who is in favor of it is going to raise their hand. "Except that a court may not require lawyers, parties to the lawsuit, or jurors to appear remotely for a

jury trial, absent the consent of all parties to the lawsuit," period. Everybody in favor of that, raise your hand.

MR. PERDUE: What's the vote, the language you just read?

MS. WOOTEN: Yes.

HONORABLE HARVEY BROWN: And, Chip, that was for the justice of the peace courts?

CHAIRMAN BABCOCK: This is for this Rule 500.10. Okay. Everybody opposed, raise your hand. So that passes by a margin of 22 to 5.

HONORABLE ANA ESTEVEZ: I just -- I want to ask, and everyone agrees that that was enough to give the court veto power, correct?

CHAIRMAN BABCOCK: Yes.

HONORABLE ANA ESTEVEZ: Okay.

CHAIRMAN BABCOCK: That -- that's clear from our discussion and we think from the language, but the Supreme Court will have the last word on that.

MS. WOOTEN: Yes. And on many other things.

CHAIRMAN BABCOCK: On everything, but what -- what the Supreme Court will not have the last word on right now is our lunch break, which is now.

MR. KIM: Can I ask a question?

CHAIRMAN BABCOCK: Yeah. Off the record.

(Recess from 12:28 p.m. to 1:01 p.m.)

CHAIRMAN BABCOCK: While we're waiting for others to join us from outside, Kennon, do we want to go to (b), or John Kim wanted us to discuss whether or not there would be other matters exempted from anything other than juries, jury trials. So this concept of, you know, any contested evidentiary hearings, and I don't know if John is still around.

MS. WOOTEN: He had to leave.

CHAIRMAN BABCOCK: Did he leave? Okay. Well, let's -- why don't we defer that issue until later, because I think justice court, as somebody just said when we broke, is different or could be different on that issue.

MS. WOOTEN: I agree.

CHAIRMAN BABCOCK: So we'll just note in the record that -- Shiva, note that John dissented from our -- our last vote, but without the understanding, and we're going to go back and see whether or not it should be broader or not than just jury trials, so let's go to subparagraph (b) and talk about that.

MS. WOOTEN: Sounds good. So, again, for the record, the big difference here when compared with the initial proposal is as follows: The initial proposal would have allowed the trial court to direct whether a

party or participant, more precisely, appears in person or remote. Then the initial proposal then would have allowed the party to object to what the court has done and would have allowed the trial court to grant the objection with good cause. So what we're looking at today for consideration is in attachment B to the materials. Specifically, though, it's attachment A to the memo from me, dated May 23rd, 2022, subpart (b) of proposed new rule 500.10, and it would allow the party to file the request to participate in a manner other than what's been directed by the court and would provide for a granting of that request, absent good cause; and I think, Chip, you did a really nice job of fleshing it out and laying it out earlier in the record, so I won't repeat what you said; but, of course, there's more to this subpart (b) that I just stated.

CHAIRMAN BABCOCK: Okay. Harvey.

HONORABLE HARVEY BROWN: I have a question. It says the parties may file a request. May a lawyer file a request?

MS. WOOTEN: I think when the lawyer is acting on the party's behalf, yes.

HONORABLE HARVEY BROWN: Right, but if the lawyer wants to appear remotely but the party is going to appear in the courtroom, is that something that this rule

contemplates or not?

MS. WOOTEN: Not in its current form. It would be driven by a party request, and again, if -- the lawyer could certainly make requests on behalf of the party for any participant to be there in a manner different than what the court has directed.

HONORABLE HARVEY BROWN: Do you see any disadvantage to allowing a lawyer to ask?

MS. WOOTEN: I'm thinking about potential disadvantages, and the only one that's automatically coming to mind is the possibility of lawyers maybe trying to game the system a little bit, and the way it's drafted now, it's driven by the actual parties to the lawsuit in terms of how their proceeding would go through, but that's the only thing that's come to mind right away. You may have a counter to that and the lawyer should be able to --

CHAIRMAN BABCOCK: Well, if the lawyer wants to do what Harvey suggests, wouldn't the lawyer say, you know, "I'm Harvey Brown, counsel for" --

MS. WOOTEN: Yes.

CHAIRMAN BABCOCK: -- you know, "the plaintiff"?

MS. WOOTEN: Yes.

CHAIRMAN BABCOCK: And -- and "moving on behalf of the plaintiff, I want you to let me appear

remotely"?

MS. WOOTEN: Yes. I think that could happen, and thinking aloud a little bit more on this particular point to some kind of situation where a lawyer wants something that the party doesn't want, well, at the end of the day, the lawyer is there to represent the party and carry out what the party wants, and so I don't know that we need to identify lawyers specifically.

CHAIRMAN BABCOCK: I suppose Harvey could say, "I'm representing the plaintiff, and I want to appear remotely, but my client is going to be there in person," and the client files a letter or something with the court and says, "No, no, no, I want my lawyer with me. I don't want to be there by myself."

HONORABLE HARVEY BROWN: Right, but the client might also consent. I mean, I -- I think of when we were somewhat past COVID, but some people were still very concerned and some lawyers who were a little older really were concerned about it, and they might have wanted to appear remotely, have their client in the courtroom; or if you had more than one lawyer on your team, for example, maybe your appellate lawyer wants to participate, but they're in a different city and they want to participate remotely, they may want to be able to have the ability to ask for that.

CHAIRMAN BABCOCK: Yeah.

HONORABLE HARVEY BROWN: I guess I don't see a downside in allowing the lawyer to ask because I don't see how a lawyer would game the system, because what would be the advantage of appearing remotely? I don't see an advantage.

CHAIRMAN BABCOCK: No, I totally agree with you, but I -- is the language where we say "a party," I mean --

HONORABLE HARVEY BROWN: I guess I think -- when I think of a party, I think of the party itself, not the lawyer acting on behalf of the party, so I would say party or a lawyer.

CHAIRMAN BABCOCK: Okay.

HONORABLE MARIA SALAS-MENDOZA: Can I --

CHAIRMAN BABCOCK: Yeah, Judge.

HONORABLE MARIA SALAS-MENDOZA: More -- more in the way of a war story, but we are seeing that some of the access to justice issues are coming from lawyers, and we do see a number of lawyers who, because of age or their health conditions, have asked to appear remotely, even as courts are returning, but I know we are specifically addressing disability issues; and one of the articles that was shared was about how the screens and the freezing and all of those things really sort of can -- can set us all

off. So I do think there are circumstances where it's not necessarily a -- for a strategic litigation position, but just the request of the lawyer that has nothing to do with the party's position or anything like that, and we are seeing that. We are seeing some lawyers, for various reasons, asking to participate remotely themselves.

CHAIRMAN BABCOCK: But are you seeing situations where the lawyer says let me appear remotely, but their client is going to be in court?

HONORABLE MARIA SALAS-MENDOZA: I have seen it, because I've had pleas that were taken and the defendant knows they've got to be present at a physical location and -- and so I have seen lawyers request to appear remotely for pleas when -- sometimes it's a conflict, but I have seen the request for health reasons.

CHAIRMAN BABCOCK: Yeah. Okay.

HONORABLE MARIA SALAS-MENDOZA: So that's a hybrid situation, but it's for a health reason, and we have seen that.

CHAIRMAN BABCOCK: Yeah. Judge Miskel.

HONORABLE EMILY MISKEL: I was just going to say since these are the justice court rules, I don't know the answer to this, but do other places in the justice court rules refer to parties and attorneys, or because it's the justice court rules do they just refer to

parties, because I would just say whatever makes it consistent with the rest of the justice court rules.

CHAIRMAN BABCOCK: Lamont, is that your hand up, or you're just twirling your glasses?

MR. JEFFERSON: No, but I had a -- I had a -- just a quick comment that to me lawyer is the party, and I -- whether it's in county court or the district court or justice court, if it's good for -- if it's good for the lawyer, it's going to be good for their party -- for their client, and if that's not the case, then you've got bigger problems, so but I don't think -- I don't think we need to separate out and say, you know, it's the lawyer's request as opposed to the party's request.

CHAIRMAN BABCOCK: Okay. Robert, and over the lunch hour I received feedback that -- that your mic is not as strong as some of the others, so maybe if you could speak up a little bit, that would be great.

MR. LEVY: Sure. Sorry about that. The -- I just had a couple of comments. One is similar to what was said earlier. I think that the rules should include a presumption that the proceeding will be in person rather than just leaving it as neutral. But the other point is should this rule also permit a third party to also appear remotely if we're allowing parties and their attorneys? Because there might be a situation where somebody wants to

challenge a subpoena or other issue of request for production and they want to appear remotely on behalf of their client who is not a party in the case.

CHAIRMAN BABCOCK: Okay. Thank you. On the issue of whether or not the word "party" is used in the JP rules, Rule 500.2 asks -- specifically defines "party" as "a person or entity involved in the case that is either sitting" -- "is either suing or being sued, including all plaintiffs, defendants, and third parties that have been joined in the case." The lawyer is not defined. Attorney is not defined. And I don't see on a quick look that there is a distinction made between the party and the lawyer, but I'm just -- in fact, just looking at some of the rules, I don't think there is a distinction. Okay. If anybody spots one, let me know.

HONORABLE HARVEY BROWN: Rule 500.8 in one sentence talks about a party versus an attorney of record.

CHAIRMAN BABCOCK: 500.8. I didn't read far enough.

HONORABLE HARVEY BROWN: Part (d). Third sentence, "If the witness is a party and is represented by an attorney of record." I'm not asking for a vote. I'm just asking for it to be thought about.

CHAIRMAN BABCOCK: Okay.

HONORABLE HARVEY BROWN: Because I can

see -- I do know some lawyers who did not want to appear personally at some proceedings --

CHAIRMAN BABCOCK: Right.

HONORABLE HARVEY BROWN: -- when COVID was going on or even after we're somewhat over it.

CHAIRMAN BABCOCK: Great, all right. Any other comments? Robert, do you still have your hand up? Okay. Any other comments about the proposed 500.10(b) as in boy?

MR. JEFFERSON: Just --

CHAIRMAN BABCOCK: Yeah, Lamont.

MR. JEFFERSON: Just real quickly, so and the -- the relationship between (a) and (b), so if a -- if a court says you have to appear one way or the other, then can a party then basically make the judge explain by -- in the -- in the second part, saying I want to appear in a way that the court has not ordered or ordered the other way? So I'm just trying to understand the dynamic between the two. So the court says, "I'm requiring a participant to appear by" -- "in person," and then you go to (b). Then the party can file the request that says, "I disagree, I want to appear remotely," and then the judge has to justify why the judge wants that person to appear in person. That's the way -- that's the dynamic.

CHAIRMAN BABCOCK: That's -- that's the way

I read it. Kennon, is that the way you read it?

MS. WOOTEN: That's the way I read it as well.

CHAIRMAN BABCOCK: Yeah, okay. You got a problem with that?

MR. JEFFERSON: Well, no, not necessarily, it just seems like it puts a lot of -- it creates a -- a strange kind of tension between the judge and the -- and the party.

CHAIRMAN BABCOCK: Well, it -- Kennon in a moment of weakness earlier today admitted that this language was constructed that way for -- for mandamus.

MR. JEFFERSON: Oh, okay, well --

MS. WOOTEN: I do think you should be kinder to me. I don't know what's going on already. I jest. We're laughing, for the record.

No, but again, Lamont, to the -- to the question you've raised, the idea of the request mechanism was to try to balance the competing considerations that we've heard both at this committee and -- and other places. The other mechanism that we had initially would have had an objection to what the court has directed and would have required the party objecting to set for good cause to have something other than what the court has directed, so yes, this is a little different from the

norm, but it's an effort to strike a balance on all of the competing considerations.

CHAIRMAN BABCOCK: Yeah, Judge Evans.

HONORABLE DAVID EVANS: Well, I've been trying to understand the interplay between this set of rules -- I've been trying to understand the interplay between this set of rules and the rules on subpoenaing a witness to trial, and the fact that the judge says you can't appear remotely doesn't mean that you have to appear at trial. You haven't been served -- you have been served with a subpoena. Is that -- we're not overturning that, are we?

MS. WOOTEN: No.

HONORABLE DAVID EVANS: Okay. And, Chip, just for the record, you've got bad video, I can -- anybody can see me turn red on video stream anywhere.

CHAIRMAN BABCOCK: Well, I didn't -- I didn't try that out on video.

HONORABLE DAVID EVANS: And you just turned red, you did well.

CHAIRMAN BABCOCK: Totally, but you -- you're in person, so you can see that.

HONORABLE DAVID EVANS: You can see me -- you can see me through smoke.

CHAIRMAN BABCOCK: All right. Anything more

on -- on (b)?

HONORABLE HARVEY BROWN: So I think I understand this, but let me just make sure. The judge says, "I'm having remote hearings on all of my discovery fights." One party objects and says, "I think it's much more effective in person. I want to be there in person." The judge says, "Well, I guess that's good cause, so I'm going to have to do it by -- let you appear in person and then everyone else, of course, is going to appear in person if one person is there in person." So we're kind of letting the parties trump the judge's practices for what might be routine hearings. Some judges may not like that.

CHAIRMAN BABCOCK: Okay. I don't think that's fair to say. John.

MR. WARREN: Yeah, we -- we shouldn't overlook the fact that even though you can have a remote proceeding, you still have to have your courtroom available, as the Texas Supreme Court defined as -- as it relates to during the proceedings during COVID, because you -- otherwise, you have a closed proceeding, so you have to -- so whether -- if someone wants to appear in person, they can still go to the courtroom and show up if everyone else is -- is participating remotely, because the courts still have to make that proceeding available to the

public.

HONORABLE DAVID EVANS: If --

CHAIRMAN BABCOCK: Yeah, Judge Evans.

HONORABLE DAVID EVANS: If we're under the 51st rule, the judge doesn't have to be in the courtroom.

MR. WARREN: But that's -- that's what I'm saying, that the -- the courtroom can be vacant, but the public still have to have access to observe a proceeding, otherwise it's a closed proceeding.

HONORABLE DAVID EVANS: Well, that's -- that's the briefing from OCA, but that's not in the order. The -- the only order right now says notice. I just wanted -- that was the guidance during the pandemic, but that had -- I may -- maybe I misread the 51st order, but I'm not sure that that's incorporated in there, but -- and I don't know that it has anything to do with these set of rules, but I think that's one of the problems we've fixed so far is we've had judges outside the courtroom, and that's another issue, but not here. But I digressed a little bit.

MR. WARREN: From -- from what I understand, and it may have been one of the first rules, is that the judge can have a virtual proceeding, this is on the onset of the pandemic.

HONORABLE DAVID EVANS: Yes.

MR. WARREN: The judge can have a remote proceeding; however, the courtroom had to be made available for those individuals, the public, that did not have access to the internet or to observe otherwise.

HONORABLE DAVID EVANS: I may have understood it a little bit differently, and it had to do with YouTube access versus in person to the courtroom, because it wouldn't necessarily have -- you wouldn't necessarily have the remote proceeding being played in the courtroom. And so we may be talking about two different things here.

MS. WOOTEN: I don't want to get ahead of where we are, but subpart (d) of the proposal addresses open courts issues, and so I realize we're not there yet, but to be discussed in the future how that's handled.

CHAIRMAN BABCOCK: Right. Judge Miskel.

HONORABLE EMILY MISKEL: I put my hand down because we're going to discuss that later, but the courtroom is not required to be physically open. For example, many of the uses of remote proceedings are when we, like, had an electrical fire in our courthouse or ice closed the building, we were still able to go forward remotely.

CHAIRMAN BABCOCK: All right. Anything more on (b)? All right. Then let's go to (c), the notice.

Any comments you want to make about (c), Kennon?

MS. WOOTEN: The only quick comment I'll make is that the language here is the same as it was before. I didn't anticipate needing to change it because there wasn't a discussion focused on it previously.

CHAIRMAN BABCOCK: Any other comments on (c)? Anybody got their hand up? Okay. Go on to (d), which is what we were anticipating.

MS. WOOTEN: We have arrived.

CHAIRMAN BABCOCK: We have arrived at (d).

MS. WOOTEN: Yes. Okay. So this language that's in subpart (d) of proposal 500.10 is actually derived from legislative language that was discussed during the last regular session of the Texas Legislature, so it's copied in large part from what was being contemplated at the legislative level. I can get into deeper weeds on that if desired, but I did want you-all to know that's the -- the basis for the provision.

CHAIRMAN BABCOCK: Any comments on (d)?

HONORABLE HARVEY BROWN: I have a question.

CHAIRMAN BABCOCK: Yeah, go ahead, Harvey.

HONORABLE HARVEY BROWN: So last time we heard some stories of judges who were conducting hearings in their cars and the -- the like.

CHAIRMAN BABCOCK: The grocery checkout

line. That's the one that resonated with everybody.

HONORABLE HARVEY BROWN: Right. Is that being addressed in any of the rules?

MS. WOOTEN: It's not currently addressed in the text of the rules, and one question that was discussed during a break by some of us is whether it makes sense to put the requirement here or in standards governing the judges specifically, like the cannons, and I don't know the answer to that. I haven't given it extensive thought, but the -- the answer to your direct question is that it's not --

HONORABLE DAVID EVANS: Chip?

MS. WOOTEN: -- explicitly addressed in the current version of the proposed rules.

HONORABLE DAVID EVANS: Well, what does (c) do when it says location of proceeding? What does (c) do below that, location of proceeding? Is that where the judge is located?

MS. WOOTEN: Yes. So I think it's going to be where the judge is located. If it's in person, right, it's going to lay that out, and if -- if the judge is going to conduct proceeding remotely, I don't know that it would directly tell you where judge is located in its current form, right, because judge could conduct that proceeding remotely from the bench in his or her chambers

or remotely from home, I think the way it's crafted now, but maybe you're getting at this potentially being a good spot to clarify?

HONORABLE DAVID EVANS: It is this issue of being in the grocery line or in the car, where is the court -- where is the proceeding, and it's the same issue if you go to the courtroom and see the proceeding. And then you get into security issue for the judge, and you have a visiting judge, say, and they're doing a remote hearing, don't want to travel 400 miles in order to do something, it -- and that won't happen in JP court, but location of the proceeding doesn't have the same meaning with remote proceedings as it did with a traditional courtroom. And I think that's part of what the public wants to know, is where is the judge.

MS. WOOTEN: Uh-huh.

CHAIRMAN BABCOCK: Judge Miskel.

HONORABLE DAVID EVANS: And --

CHAIRMAN BABCOCK: Sorry.

HONORABLE DAVID EVANS: And either you're in the courtroom or remote from the courtroom.

CHAIRMAN BABCOCK: Judge Miskel.

HONORABLE EMILY MISKEL: I think since this provision is speaking about open courts and public access, it probably means where the public can observe the

proceeding.

MS. WOOTEN: So we have that -- and perhaps, Judge Miskel, I'm missing a finer point, but we have that language specifically in subpart (d).

HONORABLE EMILY MISKEL: That's what I thought we were talking about, was (d).

MS. WOOTEN: I think you were referencing (c) as well, weren't you?

HONORABLE DAVID EVANS: Yeah, well, (c) says you've got to give notice of the location of the proceeding, which is not a virtual proceeding -- location as I would read it in traditional language. That's a physical location.

MS. WOOTEN: Uh-huh. And I think that that language is about the physical location, and especially when you look at it in context, including location of the proceeding, or instructions for joining remotely.

HONORABLE DAVID EVANS: That's right.

MS. WOOTEN: But I think there is a little lack of clarity, for lack of a better phrase, in regard to where the judge is sitting still, with the phrasing that we have in the proposed rule.

CHAIRMAN BABCOCK: Okay. Jim Perdue.

MR. PERDUE: Kennon, do you know, when we -- this project got underway, right, six months into the

pandemic and we were reviewing just everything, and I remember reviewing a bunch of Government Code provisions, I don't remember drilling down to the JP courts.

MS. WOOTEN: I don't either.

MR. PERDUE: As far as the establishment of JP courts and whether that language is similar to what you see with district courts. Do you know?

MS. WOOTEN: I do not know, but I can certainly research that between now and the next meeting.

MR. PERDUE: It -- just for the committee to understand, and I think everybody, the court needs to understand, and it may not be as much of a political risk as I perceived it; but, you know, courts are a body of government that are supposed to be accountable to their locale; and the Government Code, at least with district courts, establishes where you have to conduct your proceedings, right? It sets -- it sets your building. That's the reason why we have those buildings. So in concept, you're talking about by rule-making authority coming over the top of the Government Code.

HONORABLE EMILY MISKEL: For district courts it's actually in the Texas Constitution.

MR. PERDUE: Then that -- that may or not be an existential risk to the Court. It may be or may not be an issue in the next legislative session. In driving the

history of this, the reason why there was -- there was a discussion of a legislative fix is because the question was, do you have to have an amendment into the Government Code to provide for this as far as the, quote-unquote, location, because there is -- seemingly there's an easy way to read the Government Code if, you know, you're having hearings -- and again, this concept is all in the concept of at some point in time the state of emergency is lifted, and therefore, we don't have the means to kind of trump the Government Code. But you're kind of explicit here and in a couple of places in the provisions acknowledging that the proposed rule is coming over the top of what is a legislative -- I won't say mandate, but it's -- it's in -- it's in the code of the State of Texas.

CHAIRMAN BABCOCK: Yeah, Judge Evans.

HONORABLE DAVID EVANS: Well, for an elected official in office, I think it's one thing for us to discuss access for attorneys and parties and witnesses remotely, but for a judge to conduct his business, her business, from her home or outside of her courtroom is detrimental, in my opinion. That's just my opinion on -- on the record. I've got a stack of complaints right now where people can't get to talk to a court coordinator, because the judge is still at home conducting court and the coordinator is not there. Now, remote proceedings for

parties, witnesses, litigants, that's one thing, but I don't -- I would urge the Court not to get into remote proceedings for a judge to be remote from outside the courtroom, except in exigent circumstances that could be spelled out and defined, and that's just -- yeah, my statement in the record. My bus leaves in an hour, so I'm through talking.

CHAIRMAN BABCOCK: Judge Miskel, when you were talking about the constitution regulating the place where the proceedings will take place, it looks to me like it's Article 5, section 7(d), "A district court shall conduct its proceedings at the county seat of the county in which the case is pending, except as otherwise provided by law." Do you know what the exception is, if any?

HONORABLE EMILY MISKEL: So we're talking about rule, and it doesn't say "except as otherwise provided by rule," so my belief is that when the emergency orders go away, district courts must conduct the proceeding from the county seat, even if it's remote. But for justice courts, though, the rule that we're talking about, it looks like Government Code, Chapter 27, section 0515, sets the place where justice courts have to hold court, and that's up to the commissioners.

CHAIRMAN BABCOCK: But theoretically, it would be -- have to be the county commissioners, and that

would mean the county, right?

HONORABLE EMILY MISKEL: Right. So what it says is -- oh, I'm sorry, 27.051, it says, "Each justice shall hold the regular term of court at the justice's office at times prescribed by the commissioner's court. The commissioner's court shall set a time and place for holding justice court."

MS. WOOTEN: It says at -- at the office?

HONORABLE EMILY MISKEL: And it says if there's more than 75,000 inhabitants, the commissioner's court shall furnish a place. If it's less than 30,000, it can be another facility. So there's -- it's basically up to the county commissioners for justice court.

CHAIRMAN BABCOCK: But if they -- if the county commissioners establish a place, then presumably the Government Code would require the court proceedings to be at that place. Right?

HONORABLE EMILY MISKEL: And I think the open question, though, is in the past it's been impossible for the judge to be at a different place than where the public would watch, and so I think what we're putting our finger on right now is -- is where the judge is -- is the proceeding where the judge is, or is the proceeding where the public can watch?

CHAIRMAN BABCOCK: Except if the judge

doesn't have authority after the emergency order expires to hold court anywhere other than the place that the county commissioners establish, then that problem doesn't exist, right, because the place is always going to be where the public can watch.

HONORABLE EMILY MISKEL: Right. So in normal circumstances, this probably means judges are in the courthouse when they're doing remote proceedings. I still have a question mark because some of the times we've found remote proceedings useful is when the courthouse has been shut down, so -- and not necessarily for statewide emergency, but like I said, we had an electrical fire, we had ice.

CHAIRMAN BABCOCK: I heard we had a flood in Harris County, hard to remember that, but -- yeah, I mean, floods and natural disasters, things like that. But -- but in those circumstances, there would be some sort of emergency order, right?

HONORABLE DAVID EVANS: Anytime --

CHAIRMAN BABCOCK: Yeah, Judge Evans.

HONORABLE DAVID EVANS: Anytime -- anytime we've had --

HONORABLE EMILY MISKEL: No.

HONORABLE DAVID EVANS: Anytime we've had a flood down here, the courts issue an order with regard to

courthouses, on hurricanes.

CHAIRMAN BABCOCK: Yeah.

HONORABLE DAVID EVANS: Anytime -- and I don't know about just the local --

HONORABLE EMILY MISKEL: I'm sorry. I can't hear you. Can you speak into your microphone?

HONORABLE DAVID EVANS: I can. Every time we've had, so far, a judge being allowed not to be in their location, dictated by the Constitution or the Government Code, it has been because there's an emergency order of the Supreme Court that's gone into effect. I didn't want to see us write a local rule of civil procedure that would indicate to a judge that they should be -- an elected judge, and I'm being very careful about this, the judge who's in the office, being outside of their -- having court outside of their office, except in exigent circumstances that would be defined. Because I think that's where the place is. It's not the same as a lawyer being in Amarillo and a lawyer being in Houston and needing access to a courtroom and appearing remotely and good cause. There is no good cause reason for the judge to be at home, unless the courthouse is closed due to some sort of other issues.

CHAIRMAN BABCOCK: Yeah. There -- there are rules that --

HONORABLE DAVID EVANS: That govern that.

CHAIRMAN BABCOCK: -- permit a -- for example, the Texas Court of Criminal Appeals, a judge at home can stay the execution in a capital case --

HONORABLE DAVID EVANS: Right.

CHAIRMAN BABCOCK: -- of the defendant.

HONORABLE DAVID EVANS: But that's spelled out.

CHAIRMAN BABCOCK: But that's spelled out, right. Okay. Kennon, you got this -- you got this solved?

MS. WOOTEN: Well, my current thinking is to consider adding a statement to the proposed rule that explicitly addresses where the judge sits for a proceeding, and I do feel we should nonetheless have language like what is proposed in subpart (d) for situations in which judge is not in that particular location, but I think we can add a sentence in here. I can do a little bit more research, kind of tracking how things work for the JPs, and propose some language on that front.

HONORABLE EMILY MISKEL: Well, I think one other thing we've talked about is, for example, right now when courts are trying to clear up COVID backlogs and they're running double dockets, you might have a visiting

judge using a public courtroom and you might have the sitting district judge, for example, in chambers doing a remote proceeding. Well, if the parties are going to participate or the public is going to watch that remote proceeding, they won't be able to watch it in a public courtroom because a second proceeding is going on there with a visiting judge, and so it might still be -- you could still be complying with the Constitution and the Government Code, but the way to access the proceeding is remotely.

MS. WOOTEN: I think that that's a great point, and it's something that Judge Chu was describing, I believe, in the last meeting that we had. So I don't -- I don't think based on the language I've -- I've seen and heard today that it's a strict requirement for the judge to sit in a particular courtroom, necessarily, right, and so I think I just need to dig a little deeper and come up with some proposed language at the next meeting for where the judge sits for the proceeding.

CHAIRMAN BABCOCK: Okay. Richard Munzinger, and then Judge Estevez, and then Jim or Harvey, one of you for sure.

MR. PERDUE: Harvey.

CHAIRMAN BABCOCK: Okay. So Richard Munzinger.

MR. MUNZINGER: My comments are probably not as applicable to justice court proceedings as to district and the county court at law is, but the intent, if not the language of the rule, is that the proceedings in the courtroom should be open to the public and that the public may observe the proceedings, which raises the question, if the judge is looking at a screen and the lawyers are in their offices or the witness is in Chicago or wherever, how does the public get to observe and have notice of the judge conducting whatever the judge is conducting by screen? It's one thing to say I get to go and watch the judge sit in the courtroom. Well, that doesn't mean anything to me. So maybe it's a proceeding involving a politician and everybody wants to keep it real quiet, and we don't want the media and so we publish this thing or we have this remote proceeding, but no one is given notice of it, and even if they're given notice of it, is there access to it?

Now, if the rules say that the public should have access to the proceedings, they ought to have access to the proceedings. And it isn't up to the courts for efficiency sake to deprive the public of the right guaranteed them by Texas law. I have a case where a district -- a federal district court in the Eastern District of Michigan held a hearing on a related matter

not in my case, and because of the way the federal court does its work there, it gave notice of the proceeding that it would be conducted remotely so that the judge was in -- either in the courtroom or in her chambers, I'm not sure which it was. From the appearance, it appeared to me that she was actually in the courtroom, but there was also notice given on the docket as to how interested citizens could observe the proceedings and participate by Zoom, which several of us did, and we all listened to what was said by the respective parties, with rapt attention. Several of us ordered the transcript because of its importance of some of the things that were said there.

All of these matters that I've just mentioned are within the contemplation of the requirement that the courts be open to the public. And so it seems to me that -- and I understand the problem of divorce cases and having motions that drive you crazy and all of this, I understand that. I understand the case load, but at the same time, if the law says that it's supposed to be open to the public, then it ought to be open to the public, and open to the public in the context -- in the context of a Zoom meeting means full access to the Zoom proceedings, so you can hear, observe, record, if you wish, everything that is said. That's what the law requires. So it seems to me that some -- something has to be said here about

notice and about the proceedings.

Was it the last meeting that somebody gave the report -- gave the report that the judge was listening to a telephone motion and said, "Excuse me, fellows, I've got -- it's my turn at the cashier." She was in line or he was in line at a grocery store listening to the case. "Excuse me, fellows, it's my turn at the cash register, I'll be right back with you." Justice in Texas, remotely. That's ludicrous, it's embarrassing. It's disgraceful. And the court needs to make, in my opinion, the court needs to make arrangements that contemplate if we're going to have a rule that says proceedings are open to the public that contemplates allowing the public to observe what goes on, and if that applies to justice courts, so be it. If they are going to change it in the rule, then comply with it. That's it.

HONORABLE EMILY MISKEL: Did you disagree with the way section (d) says things have to be noticed to the public?

MR. MUNZINGER: I I confess to you, I have not read section (d) because I -- I live in California now. I live in San Francisco, and sometimes I have a hell of a time -- heck of a time getting my computer to read the things that are sent to me because of the volume. I apologize to you. I don't have a question with it,

because I haven't read it carefully. I apologize.

CHAIRMAN BABCOCK: Okay. Judge --

HONORABLE ANA ESTEVEZ: Call on me.

CHAIRMAN BABCOCK: Judge Estevez.

HONORABLE ANA ESTEVEZ: Well, I -- I started off with wanting to say something and now I have so many things to address, the first one being I am so glad you get to participate with us from California, Richard, because you wouldn't be able to do so, I don't believe, without spending an extraordinary amount of money and extraordinary amount of time traveling to Houston, which for me, my issue this time was definitely time since I wouldn't have even gotten home until tomorrow because of the flight schedules, technically 12:05.

CHAIRMAN BABCOCK: Hey, don't underestimate Munzinger. He's got his own private plane.

HONORABLE ANA ESTEVEZ: Well, if he has his own private plane, I guess he can do whatever he wants to. I'd like to -- I mean, obviously we have abuses from judges that have been brought up. I think that, you know, there's a lot of ways they can deal with that, and I think the issue here is whether or not judges should be required to always be in the courtroom, and I'm just going to -- I know it's been said over -- and I don't know who was here and what meetings other people have attended, but, you

know, when I had COVID, I never missed a day of work. I was quarantined in my home, no one necessarily knew I had COVID, because they couldn't tell that I couldn't taste or smell anything, but I -- I worked every day, and I got a lot of work done.

When we had an ice storm, I got to just keep going. There wasn't -- no one left their homes. When there was that -- they had the ice storm -- mine wasn't as bad. We weren't on your -- on the grid, but I had other people that could participate that were in the Dallas area and -- and other areas where they hadn't had power for two days, and they got on enough to -- to deal with whatever cases they had; and of course, we -- we had ice problems, too. So the reality is it shouldn't really make a difference where the judge is. I think the preference, because people feel like they want to see a car in the parking lot, would be for them to be at the courthouse, but when there's a circumstance in which they can't be, I mean, I had a child, so in the past, before there was COVID, I would actually take a sick child to work with me and put them in my -- my chambers and would continue to work, because the other option would be for me to cancel that whole day of cases.

Now, I don't think that's acceptable any -- anymore, because everyone believes that everything is

contagious and I think they fear anyone that's coughing, sneezing or sniffling, so there's just so many circumstances in which the flexibility should be allowed.

As far as access to the public, I mean, I totally disagree with Richard. I got off one of my hearings once, and I had 123 random people that I don't know watching my hearing that day. I seldom get off of a Zoom hearing where some strangers have not been watching. I don't know who they are, but it does show how many people are watching live and how many times that video has been shown, and so there's a -- a much higher participation from the public than there ever was. I don't know if somebody just sent out some e-mail and said, "Please pray for my hearing, here's the YouTube connection" or whatever it may be, but the reality is, people are watching and people have access. And the other reality is I've had to get my bailiff to take people out of a courtroom before when they were publicly watching and decided they had an outburst that they couldn't hold in, and so we were in a safer type of environment when -- when we do these cases and give the access remotely or I guess through the YouTube channel.

I don't -- I don't think that's -- I think they see everything we see, and I think it's a good way of giving the open courts provision the amount of, I don't

know, deference that it deserves, but I -- I don't see an open court issue. I think they're participating more than they ever have. I don't usually have people in my courtroom unless they're going to testify or they're family, and those are usually criminal cases. Family ones, they just -- they get on the Zoom, too, and I usually have to tell them they're out because of the Rule, and whether or not they're cheating, I don't know. Because I guess they could be watching the YouTube channel, but we always tell them not to.

I think it doesn't matter where the judge is. I think that's my whole -- my whole point, and I think that if there's a way we have to do that, whether it's through the Legislature or whether you do it through the rule, I think you should leave that flexibility. So if you're talking about a rule and you should not restrict the judge to any location, allow the Legislature to decide that or leave it to a point where the parties can somehow agree. And I will say that as far as the county seat, so we're trying to catch up on our jail docket, so I physically have gone to the jail to conduct pleas, so we take the district attorney, we take our court reporter, we take our bailiff. We take everyone -- all of the people there, and we have the lawyers show up and meet with their clients, and we get rid of 40 cases in four or five hours,

and that's very effective, and that, again, is the county seat issue. We have the commissioners state that that's okay, but we're not really sure that you can do that, so we get a waiver from them as well.

CHAIRMAN BABCOCK: Okay. Thanks, Judge. Harvey, did you have a comment?

HONORABLE HARVEY BROWN: I'll pass.

CHAIRMAN BABCOCK: You'll pass. Okay. Well, we'll -- we'll continue the discussion about this matter and the rest of the remote proceedings pieces at our next meeting, and we have one final agenda item, and that is Pam Baron, I hope is ready to talk about the Anders brief and parental termination cases. Pam, are you ready to talk about that?

MS. BARON: I am. Are you?

CHAIRMAN BABCOCK: I am totally ready. I am so ready. I've been waiting for this moment all day.

MS. BARON: Okay. Well, this is your materials at Tab H. This is the next step in our series of developing rules for parental termination cases, in terms of appointed counsel, effective assistance of counsel. This is the next step that the Texas Supreme Court had referred to us, and that is to look at the proposal from the rule -- the House Bill 7 Task Force that relates to an Anders briefs. And if you're familiar with

Anders briefs, they have their origin in criminal cases where appellate counsel is required to bring forward an appeal that determines that it is frivolous and files a brief with the court that explains that conclusion and -- and how it was reached, but then the client has an opportunity to come in and contest that. And the task force -- and has migrated into the parental termination context in Texas, in particular we are seeing Anders briefs, and that the task force thought that should be codified and brought into rules so that it is more structured and uniform. And generally, our subcommittee -- Bill Boyce, I should add has been heading this up. He's been doing a great job. He is attending his daughter's graduation ceremony today. She actually graduated two years ago, but the ceremony was deferred because of COVID. So anyway, Mazel Tov to Bill and his family.

The subcommittee agreed with a concept that there should be a rule that gives people a little more information on Anders briefs and how they work. We started as our basis the rule that was written by the task force on House Bill 7. We made a number of changes. Let me just generally outline their proposal. It's that appointed counsel in a family law or child protection case should not withdraw, if he or she concludes that the

appeal is frivolous, but should proceed and file with the court a certification that they've reached that conclusion and then a brief that explains basically that they're familiar with the record, they've looked at particular issues that we could or would be raised, and how he or she reached that conclusion. Then the parent at that point has an opportunity to come in, file a response, saying there are nonfrivolous issues in this case, here they are. Then the court of appeals can look at that and determine whether they think that additional counsel should be appointed to address the nonfrivolous issues.

So that's kind of the general scheme of it. There are -- I think it would help our subcommittee if we could focus maybe not so much on wordsmithing the rule, but to look at seven particular questions that the subcommittee kind of flagged as we went through the rule, and the first is, you know, do we want a rule on Anders briefing in parental termination cases? So that's question one.

Question two is to what type of cases should it apply to, and the way the task force wrote this, it's a pretty broad term of parental termination and child custody cases. To date, our committee has been working with a more limited subset of that, and that's suits that are initiated by a government entity to terminate parental

rights or -- let me get the language -- "in which termination of the parental-child relationship or appointment of a conservatorship for the child is requested," so that's -- that's what we've been looking at because that's been kind of the scope of where there is a right to appointed counsel. So that's question two, should it be more broad term or should it be more specific?

Question three is the way it is -- task force drafted it, it relates only to appointed counsel. There are situations in which counsel that is actually not appointed has filed Anders briefs. Clearly even if we limited it to appointed counsel, hired counsel could certainly follow this rule even if it were more limited.

The fourth question is the way the task force drafted it, it kind of gave a little bit of definition to the term "frivolous," and we have not done that in other parts of the rule, and the subcommittee did not remove the additional language, but I just point out that in TRAPs 39.1 deals with oral argument. It says the court doesn't have to grant oral argument if it determines the appeal is frivolous, but it doesn't define frivolous. Rules 45 and 62 allow the courts of appeals and the Texas Supreme Court to impose sanctions for frivolous appeals. Again, no definition. Texas Civil Practice and Remedies

Code, Chapter 10, talks about frivolous pleadings, and it also does not define it. It's probably fleshed out in case law and in -- in these other contexts that we've seen, and so we thought we didn't want to define it here if it's not defined elsewhere.

Fifth -- fifth question, in the rule it requires the attorney who is filing the Anders brief to say that they've gone through the parental termination briefing checklist adopted by the Texas Supreme Court and reviewed all of the particular issues that could be raised and found no basis for raising them in the case, and we're not going to get into the details of what that checklist would contain today. I think it is in the materials provided by the task force, but the question is, do we want that checklist? Is it a good idea? And, I'm sorry, there's so many questions here.

Question six, if the court of appeals determines that a parent has raised some -- some possible nonfrivolous grounds for appeal and wants to abate the appeal to allow additional counsel to be appointed, do we toll the 180-day time period for deciding the appeal under the Rule of Judicial Administration 6.2, and I think we determined to do that in an earlier context when the court of appeals was sending the case back for determining ineffective assistance of counsel, so we've kind of

crossed that bridge at least in -- in one regard.

And then finally, the task force has recommended templates for the court of appeals' opinions in sort of routine parental termination cases that kind of go through the various steps from the checklist, and we're not going to get into the details of those templates today, but the question is, is that a good idea, is that something we would like to -- to suggest the Texas Supreme Court adopt templates for these cases in particular? So those are the seven questions and then we also have the rule.

CHAIRMAN BABCOCK: All right, thanks, Pam. Do you want to dive into the rule, or do you want to get these questions discussed?

MS. BARON: Well, I think it would be helpful to go through these questions because I think they'll kind of dictate what the rule language is, but I guess it would be helpful to start with whether people think it's a good idea to codify an Anders practice in the Rules of Appellate Procedure.

CHAIRMAN BABCOCK: With respect to the parental termination.

MS. BARON: Yes.

CHAIRMAN BABCOCK: Right. Anybody got any thoughts on that? The Anders brief situation is a -- is a

real dilemma for -- for an attorney and -- and fraught with peril, I would think. Some of the appellate lawyers here would know better than I, but -- but it's a -- it's a tough decision to make as an appellate lawyer. I would think personally that it would be better to have some guidance and better to have a rule than to not, but -- but that's not my practice area, so I defer to people who -- who do practice in that area, like you, Pam and Scott, and anybody else who has a thought about it. Richard, you, too. Should we have a rule or not? Justice Gray.

HONORABLE TOM GRAY: Greetings. If I can have 15 seconds before I talk about this specific, I want to make sure that Richard Munzinger knows that my earlier tribute to him was because of the utmost of respect, and I think the rest of the committee shares that, and I was only trying to make sure that the committee knew the passion with which I was approaching that particular issue, as Richard approaches passionately his search for truth and justice, and I am indebted to him for that dedication. I mean, he just exudes that dedication to the law that I can only aspire to.

CHAIRMAN BABCOCK: Well, let me stop you on that -- on that point, Judge, because I don't think there is any ambiguity about that in this room of the people who are here, because we all love and admire Richard

Munzinger, so I wouldn't worry about it from us. If anybody remotely didn't catch the obvious affection that you have for our colleague, Mr. Munzinger, then -- then we appreciate the remarks, but hopefully Richard didn't think you were mocking him but rather honoring him.

HONORABLE TOM GRAY: Yeah, thank you. That's exactly the -- the emotion with which it was offered. I hope to bring some of that same passion to this discussion. I have done and participated in literally hundreds of the termination appeals, many of which have been Anders cases. I will say first and -- and to go through the seven questions and the -- the connection to seven is interesting. I would say -- well, I won't be glib. I was going to just click through the seven, but as to whether or not we need to codify this, and I think this is important for the committee, the -- the large body to fully understand, is that the whole purpose of the Anders is because of counsel's obligation not to present frivolous issues to a tribunal. The result of that genesis is that the appointed counsel has to do something and they can't just present something frivolous, and so what drove the Anders decision was the need -- they file a motion to withdraw and then they file a brief in support of that motion, to which the Supreme Court has said that you have to give the client the opportunity to

file a response, and in which the CCA, the Court of Criminal Appeals, has said in the criminal law context you get to file -- the State will then get to file a response if the client files a response, but otherwise the State does not get to file a response. That is not addressed in the rules that have been proposed.

So there is a vast body of law already developed with regard to Anders and Anders briefs and the procedure. In fact, the Waco court just this month in a case called *Cummings vs. State* revisited our entire procedure, and what drove that review was the fact that we were having an increasing number of cases in which counsel identified an issue, but it was not an issue that would alter the judgment or the sentence of the defendant. Therefore, they were not going to get relief in the form of a new trial or a modification of their sentence, but there was going to be some other tweak in the judgment. Most often this has to do with court costs. I raise that case only because what we are dealing with is a huge body of law that has changed over time.

The Anders case, in fact, the United -- which was a United States Supreme Court case, the Supreme Court has revisited Anders on a number of occasions. The one that I would like to bring the subcommittee's attention to most forcefully is a case called *Smith vs.*

Robbins at 528 U.S. 259. That case describes a different procedure than the Anders case to use when you have appointed counsel that thinks that the appeal is frivolous. What the subcommittee and the task force have proposed is almost that procedure. The fundamental difference between that procedure and the Anders procedure is what happens if the court identifies an issue of merit. The existing procedure -- and Pam referenced this when she was talking about abating the case and appointing new counsel. Under the Wende procedure that is described in this *Smith vs. Robbins* case, you don't have to abate it. You send it back to the same lawyer to brief the issue identified by the court. It is a much more streamlined procedure. It is much more cost effective for the county, and it has been determined to meet constitutional requirements, and so I strongly encourage the committee to look at that as an alternative if they are going to write a rule at all.

The appellate courts have adopted the Anders procedure. It is what we use. I don't know of any substantive problem that we have encountered other than the one created by *In Re: P.M.* about what to do with counsel once we have determined that the appeal is, in fact, frivolous. In the -- in the context of criminal cases, we grant the motion to withdraw and that ends

counsel's responsibility to us, although the counsel still is going to have responsibility to the client and, Pam has -- they've discussed that in the duties to the client as far as communicating to the judgment and where do they go from here. I'm not going to revisit *In Re: P.M.* I didn't get the last word on that. But I can't really tell if Jane is smiling at this point, but they got the last word on that, and, you know, they did what they did. I just -- I do disagree with it. I think it would have been perfectly logical to construe it the same way that we do in criminal cases, that a petition for review is not an appeal, but I -- shall we say I got outvoted on that, but it wasn't the one that I got to participate in.

The only other comment -- well, let's see, the third question, so going in order, Pam, first question, no, I don't think we need a rule for Anders cases in termination, which I would suggest if we do, we need to go the Wende route, not Anders. Second question, it needs to be the more narrow focus only when you're dealing with appointed counsel. Number three, the only reason that you can file an Anders brief is because you cannot withdraw. If you are hired counsel, you can always withdraw. You do not -- I say you can always withdraw, subject to the court recognizing your inability to communicate with your client, which usually means I'm not

getting paid, but if you have a frivolous case and you're a hired attorney, you do not have the duty to file a frivolous appeal, and you -- so we don't need it for anything other than appointed counsel. Do you need to define frivolous? No, it's all over the case books. It's in other things that we do. We don't want to start trying to put a -- a written definition at this point.

Do we want to use the checklist? I would strongly encourage you not to do that. It will add exponentially to the cost of doing these proceedings. Most of the time you can read the record and you know immediately whether or not it is a frivolous appeal.

Abate for new counsel, I've -- I've already touched on the front end aspect of that, but should we toll the 180 days? If you do the abatement process, I -- maybe, but I just don't think so, because the whole point of the 180 days is to keep the fire lit under everybody to get these cases disposed of. If it falls outside the 180 days, it's -- it's an -- it's an exception that has to be looked at and explained. That's fine, let us explain it. We can say we had to abate this one and we didn't meet our 180 days because it wasn't frivolous and it had been briefed as frivolous, and finally, with regard to the templates, those are not templates designed for Anders cases.

Those templates that were proposed by the task force, as I read them, are for merit cases on factual sufficiencies. I have tried to use those at our court in our termination cases and have found them to be difficult or inefficient to implement. I appreciate the time that you have offered me and that I have taken and that you've given me, and with that, I will rest and give it back to the committee. Thank you.

CHAIRMAN BABCOCK: Thank you, Your Honor. Munzinger has had his hand up, almost to the moment you started to speak so he obviously demands a retort.

MR. MUNZINGER: I just want to tell Justice Gray, I knew you were being complimentary. I was honored by it. Thank you. That's all.

CHAIRMAN BABCOCK: We knew that. Anybody else? Judge Estevez.

HONORABLE ANA ESTEVEZ: Well, I want to jump on the bandwagon of the admiration for Richard Munzinger before I comment as well because he is always an inspiration, and I feel just as strongly about most of the things he feels strongly about. Every now and then we disagree, which is -- there's not that many times, but I do favor a rule, so I'm going to -- I'm going to vote yes for codification of Anders. I have a lot of experience in those through the criminal side, and I just -- I think

it's very -- I think it will be very helpful for practitioners and for everyone to -- to know how to do them and all of the expectations that go around that. I'd say they're a narrow focus as well. I think it's for appointed counsel, and I don't think I've ever -- I know I've never received an Anders brief from anyone except someone we've appointed and that being because anyone else would just refuse to file it and would -- would request a withdrawal. So when you're appointed, you have a different type of responsibility. And I think that's all I want to speak to as to right now, but I do really -- I strongly -- I strongly believe that a rule would be helpful.

CHAIRMAN BABCOCK: Thank you. Anybody else on any of the seven questions that Pam posed to us at the beginning?

MS. BARON: Worse -- it's worse than passover, there are only, you know, four questions then, so --

CHAIRMAN BABCOCK: All right. Well, you want to dive into the rule, Pam, or you want to talk about the *Smith vs. Robbins* case, which some suggest overruled Anders?

MS. BARON: Well, you know, this is -- Bill Boyce may know those cases, I don't. I'll just say that

up front so I won't be speaking out of complete ignorance. I will say I really appreciate Justice Gray's comments. I thought that they were very helpful, very insightful, and I would agree with him on almost all of them, except that I -- I still would put a rule in place. But if we want to -- do we want to take votes on these seven items and then go through the rule, or do we want to go through the rule?

CHAIRMAN BABCOCK: Well, your pleasure, but I would take votes on the seven items.

MS. BARON: You would, I'm sorry?

CHAIRMAN BABCOCK: I would -- I would suggest we take a vote on each of the seven items.

MS. BARON: I would like that.

CHAIRMAN BABCOCK: Good, all right. Number one, should we codify with a rule? Everybody in favor of that, raise your hand.

MR. HARDIN: There is a shrug. I'm not sure how you record a shrug.

MR. PERDUE: Rusty has got my vote.

CHAIRMAN BABCOCK: All right. All opposed? All right. Pam, that's unanimous, 17 to 0, the Chair not voting. What was question two again?

MS. BARON: What happened to Justice Gray? I thought he did not want a rule?

HONORABLE TOM GRAY: I have my hand up. You obviously can't see me, or you've chosen to ignore me.

CHAIRMAN BABCOCK: Shiva ignored you. I didn't ignore you. So the vote is 17 to 1.

MS. BARON: Okay. Thank you.

HONORABLE Babcock: All right.

MS. BARON: Okay. Then question two was whether it should be narrowly focused to suits and issues by a governmental entity or it should be the more broader parental termination and child custody cases? Can we say raise your hand if you think it should be narrow?

CHAIRMAN BABCOCK: Everybody that thinks it should be narrow, limited to governmental entity cases, raise your hand.

Everybody who thinks it should be broader?

MR. HARDIN: I'm not sure I understand it.

CHAIRMAN BABCOCK: Well, nine for narrow, five for broad, and one who doesn't understand it. So Rusty -- Rusty, what --

MR. HARDIN: If we make it broader, what's the ultimate result? That's what I'm trying to figure out.

CHAIRMAN BABCOCK: That it would apply to a broader a number of cases -- broader number of cases rather than just cases brought by a governmental entity.

MR. HARDIN: Gotcha.

CHAIRMAN BABCOCK: So, Pam, it's a -- it's a narrow vote with a number of people not voting, but it's nine.

HONORABLE ANA ESTEVEZ: Can I -- can I ask a question real quick, because there's a question in my mind whether -- when you get court-appointed lawyers in the first place in these type of cases, so it's clear that anytime there's a termination where the government is coming forward to take away your child, you are entitled to court-appointed counsel, but when you're a private person and let's say you're a foster parent and you have the child, you -- you've been there -- no one else is -- and the CPS has left, so you need some sort of agreement or somehow you're just the mom trying to terminate dad in a private case, there's no -- there's no clear appointment of counsel for that, so if you go broader, you are giving everyone this -- this tool to use that shouldn't apply. Because if you're -- unless we're court-appointing appellate lawyers on every termination case, which we don't appoint when there's a private suit, why would we be giving it to them on appeal? So I'm mom, dad's been on drugs forever, now he's in prison. CPS was never involved. I go file a termination. The statute doesn't say that they get a court-appointed lawyer.

MS. BARON: That's correct.

HONORABLE ANA ESTEVEZ: So why would they -- why would it apply and any type of Anders apply to a private situation?

CHAIRMAN BABCOCK: So you were -- you were one of the nine that voted not to have it apply broadly.

HONORABLE ANA ESTEVEZ: Well, I'm wondering -- I mean, what you're saying when you apply it broadly is you are now giving them a lawyer, because, I mean, you're -- I mean, who's paying for that? You're going to make your county pay for that? How --

MS. BARON: I don't think that's how I would read the task force proposal. You know, I would -- I'm definitely on the side of this should be narrow because that's what the statute provides, that's what the Texas Supreme Court case on right to appointed counsel encompasses to date. It's only the scope of the statute. I think they weren't saying you get appointed counsel. They're saying if you have paid counsel, they can still file this kind of brief rather than withdraw. They're saying even paid counsel should not withdraw, despite I think I agree with what Justice Gray just said, they should not withdraw, but they should file a brief saying the appeal is frivolous and here's why.

CHAIRMAN BABCOCK: Judge Miskel. Judge, are

you talking?

HONORABLE EMILY MISKEL: Sorry, my microphone was unplugged. I voted for broad, but it was -- it was incorrect. I want to change my vote because I agree with Judge Estevez that -- so logically, if I understand this, the Texas Family Code gives a parent the right to counsel and court-appointed counsel if the government is seeking to terminate their parental rights, and because the Family Code has given them that right, they are entitled to effective counsel, which was why we were having this discussion, but since private parents do not have the right to court-appointed counsel in a private termination, they don't have that same right to private effective counsel, I guess, but then I'm -- I'm not educated on the point that Pamela just brought up, which was even private counsel should not withdraw until X, so I kind of missed that if that's important.

MS. BARON: Well, no, I think that was the way the task force had written this, but private counsel can always withdraw. They don't have an obligation to move forward with a frivolous appeal. Appointed counsel has to continue. They don't have the option to withdraw, unless they can find somebody to come in and take their place, so I think what we were saying, we were not saying then with the task force broad writing on this because we

do think it should be limited to the statutory Texas Supreme Court parameters, for now, unless the Texas Supreme Court expands that.

CHAIRMAN BABCOCK: Let's go to question three. You want to restate it, Pam?

MS. BARON: Well, I think we've -- we've sort of already answered question three. The question is whether it limited it to appointed counsel versus appointed and private counsel. Bill Boyce's draft had scratched out "appointed." I don't think I agree with that, and I don't remember discussing it, but I could have blanked out during our subcommittee meeting, I don't know. But I think that the discussion we've just had would suggest it should be limited to appointed counsel.

CHAIRMAN BABCOCK: Got it. Question four.

MS. BARON: I don't remember what question four is.

CHAIRMAN BABCOCK: It's going to be hard to vote on it.

MS. BARON: Oh, do we want to define "frivolous" when it's not defined anywhere else? And I think we've kind of answered that, unless somebody thinks we need to define it here when we haven't defined it in Rules 39, 42, or 65, or Chapter 10.

CHAIRMAN BABCOCK: Yeah. There is so much

case law on what is frivolous and what isn't.

MS. BARON: Okay. So I don't -- I don't think we need a vote on that.

CHAIRMAN BABCOCK: Question five.

MS. BARON: Question five is -- oh, do we want a checklist -- Justice Gray was firmly anti-checklist. I'm probably not all that keen on checklist, but I'm more agnostic about it.

CHAIRMAN BABCOCK: Anybody want to speak up in favor of checklists? I don't see any appetite for checklists, Pam. What's question six?

MS. BARON: Question six is whether -- and I think we can -- maybe we should talk about Justice Gray's point, which I think is a good point, which is instead of abating the appeal and sending it back to get new counsel, that they direct existing counsel to brief what appears to be a nonfrivolous issue, and I -- I think he's right on the money that that would definitely streamline the case instead of bringing somebody new in who doesn't know anything about the case. So I guess to see if -- if people generally agree with that approach, and then the second question -- the part B of question six would be do we stay the 180-day provision because of the extra time that would be given to counsel to brief the potentially nonfrivolous issue?

CHAIRMAN BABCOCK: Okay. How many people are in favor of requiring existing counsel to brief what the court deems to be nonfrivolous grounds? Everybody who believes that, raise your hand.

Everybody against? Oh, wait. Wait a minute. Hang on. Ten.

Everybody against? All right.

HONORABLE ANA ESTEVEZ: Can I -- can I just one more time, I'm sorry I'm interrupting, but the problem is I thought the issue about doing it the way Pam was suggesting was that the issue that came up was ineffectiveness of counsel, and it was -- the problem was that the lawyer they were talking about -- or the Haga case would be in effect. I thought that that was one of the issues we had brought up before. So I am -- I am totally with Justice Gray regarding having -- on the Anders brief where they bring up an issue and they say it's frivolous or the court of appeals tells them to brief another issue, it has nothing to do with that particular lawyer, but I think when we do have an ineffectiveness of counsel issue that we need to get that one out and start a new one and have a new lawyer. I thought that was an issue that we've brought up before, and that's why we didn't discuss this. Am I --

MS. BARON: Yeah. We do have -- we did pass

a concept or maybe even a rule that allowed the court of appeals to abate and require either a hearing on ineffective assistance of counsel or appointment of new counsel.

HONORABLE ANA ESTEVEZ: Okay. And that's not the same thing we're doing here?

MS. BARON: This is really they have appellate counsel who may or may not be existing trial counsel, who comes in and tells the court there are no grounds, and I think your point is if the client comes in, files their response, and says, "Well, they didn't raise ineffective assistance of counsel and they should have," that, yeah, in that situation you probably would not have the same lawyer briefing that issue. But I think we can write the rule in a way that the court of appeals has the option of going either way, right? Because right now it says, go appoint new counsel. We could say the court of appeals can direct existing counsel to brief the issue or, you know, abate and -- and have new counsel appointed, and let them make that decision on which they think is most expedient for this particular case.

HONORABLE ANA ESTEVEZ: I'd like to vote for that option.

MS. BARON: Okay. Well -- well, let's say that's the option we're going to vote on. All right.

CHAIRMAN BABCOCK: Is that --

MS. BARON: So the court of appeals gets to choose whether to send it to existing counsel or appoint new counsel.

CHAIRMAN BABCOCK: Okay. Just for the record, the vote we just took was 17 to 1 in favor of requiring existing counsel to brief issues the court of appeals deemed to be nonfrivolous, but now there's been a -- a suggested amendment such that what we're voting on is whether it's a good idea to allow the court of appeals to determine whether to require existing counsel to brief what the court thinks are nonfrivolous grounds or to send it back for the appointment of additional counsel, from different counsel. Is that right?

MS. BARON: Yes. Yes.

CHAIRMAN BABCOCK: Okay. Everybody in favor of that, raise your hands.

All right. Anybody opposed?

MS. BARON: What -- wait. I've got to put my hand down.

CHAIRMAN BABCOCK: That passed 19 to 1.

MS. BARON: 19 to what?

CHAIRMAN BABCOCK: 19 to 1.

MS. BARON: Okay. Thank you.

CHAIRMAN Babcock: All right. Now question

seven.

MS. BARON: Well, we have 6(c) now.

CHAIRMAN BABCOCK: Well, is it 6(b) muted by the vote we --

MS. BARON: This is -- is whether to write into the rule an abatement under -- of the 180-day time for making the decision under Rule of Judicial Administration 6.2.

CHAIRMAN BABCOCK: Okay. So we just voted on 6(a). So now we're going to vote on 6(b). 6(b) is to require an abatement.

MS. BARON: Well, it's -- it's not really an abatement. It's whether you get an extended deadline under Rule of Judicial Administration 6.2. Justice Gray says he doesn't think it's necessary.

CHAIRMAN BABCOCK: Okay. And what do you think?

MS. BARON: I'm kind of leaning towards what he says because he has much more experience with this than I do.

CHAIRMAN BABCOCK: All right. How many people think it's necessary? Raise your hand.

HONORABLE MARIA SALAS-MENDOZA: To have an extension?

CHAIRMAN BABCOCK: How many people think it

is not necessary? All right. The not necessaries have it by a vote of 14 to 1, so now can we get to question seven?

MS. BARON: You're just in a hurry to get to the end here, yes.

CHAIRMAN BABCOCK: Well, we have -- the record should reflect that we have lost a quorum of our committee.

MS. BARON: How dare they.

CHAIRMAN BABCOCK: So I'd like to get through this before we lose the entire committee on this one.

MS. BARON: I can guess what the answer is going to be on this one, too, which is, you know, should we have court of appeals opinion templates. Justice Gray kabashed those as well. That was kind of the general sense I had from Justice Boyce as well. Our subcommittee determined that we would not spend lots of time going through those until we got the sense of this committee whether we should devote the time and resources to doing that. So I guess the question is, is there any appetite for opinion templates or not?

CHAIRMAN BABCOCK: I can frame the question --

MS. BARON: And Justice Gray's observations are correct. These are not the Anders type cases.

These -- this is a -- a separate -- actually, part of our assignment was to look at these, and I should have made that clear at the beginning, I apologize. But it would help our subcommittee to know, you know, how we should spend our time and resources.

CHAIRMAN BABCOCK: Okay. Well, I'm going to rephrase the question slightly, with your permission, and everybody who agrees with Justice Gray, raise your hand.

Everybody -- everybody who disagrees with Justice Gray. On this question only.

HONORABLE ANA ESTEVEZ: Justice Gray is disagreeing with himself on this question. I just want to point that out.

CHAIRMAN BABCOCK: So the vote is 21 agreeing with Justice Gray and two disagreeing with Justice Gray, including Justice Gray.

HONORABLE TOM GRAY: I did that in jest. I pulled my hand down.

CHAIRMAN BABCOCK: All right. Let the record reflect that this -- this meeting has descended to -- to the absolute depths, and we have now lost not only a quorum, but rational discourse. So, Pam, I think we'll get to the rule itself in our next meeting and --

MS. BARON: Well, that's what I would suggest at this point, too, because I think we have all of

the concepts we need to frame a more -- hopefully a nearly complete rule. What I would ask is if any of the people who -- the three people who are still at the meeting, have any particular comments on the particular wording, if they would e-mail them to either Bill Boyce or me, or both of us or our subcommittee.

CHAIRMAN BABCOCK: All right.

MS. BARON: And that would help us when we come back next time.

CHAIRMAN BABCOCK: Pam, thanks very much.

HONORABLE PETER KELLY: I would also like to loop in one of my staff attorneys, the ones who actually do the laboring more on the Anders stuff, to make sure that in the worst way we get the work actually done here, so --

MS. BARON: Yeah, I know that Bill has looked at some of the things on our Fourteenth Court of Appeals website to get guidance, usually more in the criminal context on Anders. This is a -- you know, this is different, and thought that what we had done so far was consistent, but that would be very useful and helpful and appreciated by the subcommittee.

HONORABLE PETER KELLY: Okay. I'm still here, Chip, just --

MR. HARDIN: I think it's really impressive

that he went back to his office, made sure he had one final thing to say, so we knew he did not abandon us. I'm impressed.

CHAIRMAN BABCOCK: And he got a background that looks like it's in New Orleans.

HONORABLE PETER KELLY: That's actually Sam Houston right here in Hardy Park.

CHAIRMAN BABCOCK: All right, there we go. Well, thank you, everybody, for sticking through this. Dee Dee, thank you, and we'll be adjourned until our next meeting, which is?

MS. ZAMEN: August 19th at Fort Worth.

CHAIRMAN BABCOCK: August 19th at Fort Worth. So we'll See everybody there.

(Adjourned)

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REPORTER'S CERTIFICATION
MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

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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 27th day of May, 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 $ 1,356.25 .

Charged to: The State Bar of Texas.

Given under my hand and seal of office on this the 27th day of June, 2022.

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