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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

FEBRUARY 17, 2023

(FRIDAY SESSION)

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Taken before *Melinda M. Walker*, Certified Shorthand Reporter in and for the State of Texas, reported by machine shorthand method, on the 17th day of February 2023, between the hours of 9:00 a.m. and 3:46 p.m., at the Texas Association of Broadcasters, 502 E. 11th Street, Suite 200, Austin, Texas 78701.

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: All right. Everybody, let's get going. Welcome, and we will start as usual with remarks from the Chief Justice.

HONORABLE NATHAN HECHT: Good morning. Thank you, Chip.

We issued our electronic participation rules, Civil Procedure 21d, and also over in the JP section, 500.10, and some other minor changes in the JP rules effective February 1st. They're much like what the committee worked on and debated long and hard. They provide the courts may allow or require a court participant to appear electronically but district and county courts can't require electronic appearance of a participant in a jury trial unless the parties agree or where the oral testimony is being taken, unless there's an agreement or good cause, and the rule sets out what constitutes -- several things that constitute good cause.

Then we also issued an emergency order that was captioned "Final Emergency Order," and when we started the emergency orders on March 13th, 2020, Justice Boyd -- one of my colleagues, Justice Boyd -- suggested that we number them -- number them in the

caption "Emergency Order," and I thought that was kind of silly. But after we issued 59 of them, it was probably a good idea, and this is the -- would have been the 60th, but we said "Final" because we anticipate that the electronic participation rule will cover what was left of the emergency orders for the most part.

We're still kind of grappling with the need for some judges, especially associate judges, visiting judges, to meet away from the courthouse, and this is especially a problem in the rural areas of the state, but we're working through all of that, and we -- there'll likely be legislation in this session to cover some of those issues.

So we -- we need the emergency order for the time being, just for the criminal cases, and we're still working to see what those are going to be like going forward.

There are two other emergency orders that are out: one on eviction diversion and one on Operation Lone Star, which is the border intercept operation down in Kinney County and along the border. And they need an order so that judges can participate in those proceedings remotely.

So there's still a little bit left over, but we think we're back out of the emergency order

business for the most part.

We also issued the changes that you discussed in TRAP 39.7 effective February 1st that have to do with oral argument at the court of appeals. If you file a brief and you didn't request argument but somebody else did and the court grants it, everybody can participate without having specifically requested it. As I say, we talked about that.

We're trying to finalize the forms on rules and cyber bullying in response to legislative directives. Those were -- those forms were published December 1st and we're working on the final versions. The local rules website that you, again, discussed went live January 1st, and the courts are now required to post local rules on OCA's website. If you haven't seen it, you should go take a peek. It's very easy to use, and we're -- it comes at a very good time because, without the emergency orders, there are a lot of courts that are going to specify more than they had -- than they would have in the past how hearings are going to be conducted and whether remotely or not and schedules for doing that. It affects family cases a lot but other cases as well. So those will be posted on the website.

And then we gave preliminary approval of TRAP 34.5a which requires the clerk to include the

supersedeas bond in the clerk's record without being asked to do so, and comments on that are due April 2nd.

And we're missing one of our members today, who is being sworn in on the Dallas Court of Appeals, Judge Emily Miskel. Sorry to miss her, but she's having an exciting day of her own up in the Dallas area.

And that's our report.

CHAIRMAN BABCOCK: I wrote Judge Miskel and admonished her for her priorities, not being here but instead being sworn in to the court of appeals.

Justice Bland, you're up.

JUSTICE JANE BLAND: Nothing from me today.

CHAIRMAN BABCOCK: Nothing from you today.

Well, we have an honored guest from Potter County who will be introduced by Judge Estevez.

HONORABLE ANA ESTEVEZ: This is Alexis. This is my daughter. She's nine years old. I think she wants to be a doctor, but you guys are going to convince her to be a lawyer today.

UNIDENTIFIED SPEAKER: Or a judge.

CHAIRMAN BABCOCK: Alexis, we're really happy to have you here. Are you happy to be here?

ALEXIS: (Nods head.)

CHAIRMAN BABCOCK: Just wait.

HONORABLE ANA ESTEVEZ: She actually had a

choice, and she said she wanted to be here. I tried to explain what we did, and she said, "Mom, I'd really like to go."

CHAIRMAN BABCOCK: Perfect. Well, you guys dressed alike in matching outfits. It couldn't be better.

So, with that, we'll turn to our first agenda item, and Harvey Brown will take us through Rule 7 in lightning speed because this has got to be noncontroversial, right?

HONORABLE HARVEY BROWN: Well, hopefully so for the most part. Unfortunately, I'm the only one here from our committee, but I think the first parts will be relatively easy.

So back in November of 2020 we were, as a committee, asked to consider whether an independent executor may appear pro se, and this committee generated a memo written by Bob Pemberton and the rest of the committee that recommended the pro se be able to appear pro se and went through all the law, provided briefing from the case that was before the Texas Supreme Court, including the amicus briefs in that case, provided a number of cases in a pretty detailed memo, and the committee voted 18-3 that pro ses -- that independent executors could appear pro se.

So we were given the narrow task of writing the rule or putting in the comment. So you'll see in attachment A to the memos from our committee our proposal. It's red-lined so the first change is just to make it gender-neutral, and then the second sentence that we've added is to make it clear the reason we're doing this is that a person who is acting in a representative capacity, such as we often see an individual tries to appear for a corporation -- that's a no-no -- but when they're appearing not in a representative capacity, it is okay. So that's the change we made to the rule.

Then addressed the specific issue before us, we wrote, An independent executor can appear pro se, and just to provide additional clarity, we said, The guardians who are representing somebody and acting on somebody's behalf they may not appear pro se. Those are the two largest categories of issues that are still out there that seem to generate some -- some questions.

So we took both those on, and those two things thoroughly comply with all that we were asked to do. I think we should discuss them first, hopefully for a short time, but we'll see.

And then there was an additional suggestion for something we should consider which we've brought and

which we'll talk about next.

CHAIRMAN BABCOCK: Okay. Comments about the rules -- let's start with the rule and then talk about the comment. What about the change in the rule? Any comments about that? Any thoughts about it? Yeah, Chief Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I'm philosophically opposed to having our court write a rule when the law has been settled, and by rule, settling the law. So there are a lot of judges out there that think this is wrong, and you know, it seems to me it should have gone through the regular process to get a ruling from the Supreme Court that this rule is correct, although I think it is, but I'm opposed to the process.

CHAIRMAN BABCOCK: You're not among the allotted judges that think it's wrong?

HONORABLE TRACY CHRISTOPHER: No, but the vast majority of probate judges do think this is wrong.

HONORABLE HARVEY BROWN: Although I will say that the probate judges in their brief before the Texas Supreme Court said we don't think, Texas Supreme Court, you should handle it here. We think this should be decided either by the Legislature or by the rulemaking process of this committee. So they didn't like being punted, if you will, to this committee.

CHAIRMAN BABCOCK: Fair enough.

Justice Gray.

HONORABLE TOM GRAY: Probably not surprising that I would have an opinion on this.

CHAIRMAN BABCOCK: And as you talk, you're dissenting from Justice Christopher or from the rule?

HONORABLE TOM GRAY: I never dissent from Justice Christopher.

CHAIRMAN BABCOCK: Okay.

HONORABLE TRACY CHRISTOPHER: Usually concur.

UNIDENTIFIED SPEAKER: In a separate opinion.

HONORABLE TOM GRAY: Without a separate opinion.

I feel compelled to give just a little bit of my background and why I feel so strongly about this, and that is, that my first three years of practice was spent doing a lot of estate litigation, and in that capacity, it was me representing most often independent executors. But I approached the entire probate practice from the perspective that I was taught by Tom Featherston, a retired attorney, that, as I said in my dissenting opinion that's in the papers, in Texas we have an incredibly flexible probate system. We avoid

immense costs of having everything run by a judge in a pseudo-administrative/judicial capacity administration of an estate. That's all done by an independent executor, and it is -- it's the envy, really, of the nation in how we deal with estates.

Tremendous resources are spent in other states to avoid the probate process. One of the things they do is what Harvey is going to want to talk about in a little bit is trust. They create an inner bag [Phonetic] of trust, and they do all this stuff of asset transfers, and it's just an immensely complex system to avoid what we have. What we have done in Texas is so efficient that they're trying to get that -- to that point by some other method in other states.

The way that Tom Featherston described it -- and I guess it's now inculcated in my DNA -- is an independent executor can do anything that the decedent could do if that person were alive, and it literally -- the independent executor, in their capacity as such, can do what the decedent would have done. And that -- that wasn't even part of what some of the cases were that -- that apparently the probate judges may have problems with, and that's in actually getting the probate process done, whether or not -- because, at that point, the person is not even an independent executor. They've

been named as the independent executor in a will but cannot -- can that person go in and file the paperwork to probate the will? Because if they can't --

(Phone ringing.)

HONORABLE TOM GRAY: I'm sorry, I thought I had -- there it is. Different button.

If they can't represent the decedent in that capacity, they can't even file the application for probate, and so -- because that is a classic pleading that needs to be done by a lawyer if they can't do this pro se.

Well, all over Texas -- and I will speak to Navarro County where I was practicing at the time -- it is very routine for an individual to go in, surviving spouse, without a lawyer, you know, designated independent executor, do the paperwork, follow the forms, file it, get it done, and never involve a lawyer. Is it a wise practice? Probably not. Lot of things can go wrong.

I probated my grandparents' estates in Harris County in front of one of the probate judges there -- I don't remember which one -- and I saw a number of pro ses successfully navigate the process. I also saw one that got to the point where they offered the will for probate, and the judge said, Denied, and

she was somewhat dumbfounded, and she said what -- What did I do wrong? And the judge said, I can't tell you, you know, not my job. You might want to talk to one of these lawyers out here.

And I say all that just because it can be done or it should be able to be done, and I am a strong proponent of the ability to do that. I do not think this rule will effectively and efficiently, as proposed, do that, and I would simply suggest that a sentence that says, An independent executor is acting on behalf of the -- or is in effect the decedent and can do anything the decedent would have done.

I would basically make the rule the Tom Featherston statement and leave it at that because this nuance that the literature and the rule tries to draw that the individual is somehow representing themselves, we're going to get to the point of, well, wait a minute, he's not representing himself at this point. He's representing one of the heirs that is going to receive that piece of property. Maybe he's trying to clear up an oil and gas lease that's on one of the pieces of estate property.

It just -- it -- I think this is going to be confusing. I think it's going to lead to more litigation, and it just needs to be, The independent

executor can do anything that the decedent could have done, including representing himself.

CHAIRMAN BABCOCK: Has that Featherston -- Featherston view found expression in the case law?

HONORABLE TOM GRAY: There is at least two opinions from an intermediate court of appeals -- I think it's out of Waco -- that has that expression.

Beyond that, I don't know, but it is -- if you go into the -- into the case work and into the individual cases and you -- and you look at this -- and I will add kind of before the advent in the wide use of probate judges because, you know, if we, the intermediate appellate judges, got together and were allowed to write some rules for our courts, we would probably ban pro ses around the state.

It's just -- it's not effective or efficient. It can be very time consuming, but that's not the standard that we need to be going for here. And I think everybody knows here, you know, I would rather have a lawyer in front of me at the appellate level do the brief and, hopefully, quality briefing. We've had some very good briefs filed in pro se, but I will tell you, for example, in the case in which I wrote the dissent that's in the works -- the appellate work here, the Steele case, it was a very bad facts made bad law

case. I mean, this was a litigant that had -- we had lots of problems with over a long period of time. It was the Steele v. McDonald order and related to a dissenting opinion.

And I think there was a certain element of we've got to change our tactic, you know, or we will never be done with this case, and that was one of the ways to do it. And it, unfortunately, was effective and -- but I think the independent executor or the person that's designated as such should be allowed to represent in probate court or any other court and do anything that the executor -- or that the deceased could have done if they were still live.

CHAIRMAN BABCOCK: Okay. Roger.

MR. HUGHES: I just have a question. The first rule talks about an individual who's acting in a representative capacity, but I know sometimes in probate matters there will be a corporate independent executor. I assume then an independent executor, who is a corporation such as a bank or trust department, would not be able to appear pro se.

HONORABLE HARVEY BROWN: That's what the intent was, and that's one of the reasons that we didn't just say an independent executor may appear pro se. We could do that. That would be simple, but there is the

issue of a corporate independent executor.

MR. HUGHES: Yeah. That's what I thought you'd found. Okay. Thank you.

HONORABLE HARVEY BROWN: Just one other point, to give the probate judges a little more credit, while there was some debate about the law, I thought the strongest argument was not a legal argument. It was a practical argument. I think the committee who wrote the report before correctly concluded that the law strongly leans towards this is appropriate, but they did have a pragmatic concern of what we just heard about the hearing where the judge wouldn't admit the will and couldn't tell anybody why because the judge is precluded from giving legal advice.

And so I would suggest, if we adopt this rule in whatever format, that we ask the probate section to draft some instructions to pro se independent executors. It seems like, to me, there's probably, you know, half dozens or dozens common problems that come up, and a number of probate judges or practitioners have come up with written instructions, just like we have for divorces now and working out the wills. And while it wouldn't be a form, it seems like we could take care of most of those problems to me.

CHAIRMAN BABCOCK: Any other comments?

HONORABLE TOM GRAY: I would like to add to that, in the Probate Code, there's very detailed already what's required to be proven to admit a will in probate, and it's -- there's hundreds of forms already out there. Pretty simple. But looking ahead in the day, we could always require the probate judge to explain why they're denying the admission to probate.

CHAIRMAN BABCOCK: Well, on that point, Justice Gray, I've always been puzzled by that. I can't tell you -- I mean, sure you don't give legal advice, but you should be given the reasons for denial, if asked, right?

HONORABLE TOM GRAY: You -- not to foreshadow what we're going to get to later today, but I think it's called like discretionary review, sort of the same thing, you just deny and move on.

CHAIRMAN BABCOCK: Okay.

Justice Christopher.

HONORABLE TRACY CHRISTOPHER: I have one other question or comment about the comment where it says, "Guardians prosecuting or defending suits on behalf of their wards act in a representative capacity and may not appear pro se." Is that intended to cover a parent as next friend of a child? Because often parents as next friend of children will appear pro se generally

in the settlement of a lawsuit, and a friendly suit is filed where the person is pro se on behalf -- that are representing themselves and their children. So I'm worried that that "guardian" word, parent, child, would be a problem.

HONORABLE HARVEY BROWN: The short answer to the question is, no, it's not intended to cover that. If you have a suggestion for drafting, you think that would make that clearer, we'd be open to that.

CHAIRMAN BABCOCK: Okay. Any other comments? Judge Schaffer, you're looking bemused. Maybe that's your usual --

HONORABLE ROBERT SCHAFFER: That's my 9:24 a.m. look.

I -- Justice Christopher raised it. A lot of the issues that we are faced with a lot in the trial court especially with regard to the parent filing a friendly lawsuit -- and there's -- there's case law that's interpreted to say they cannot do it and yet judges who routinely allow it in the settlement of cases.

This comment seems to speak to that because -- I mean, a parent as next friend is not the, quote, guardian, close quote, but acting as the child's guardian in this particular situation. So I think you

might be creating some confusion at the trial court level with this comment the way it's -- the way it's written.

CHAIRMAN BABCOCK: Okay.

HONORABLE ROBERT SCHAFFER: In fact, I promise you that you will be creating some confusion at the trial court level the way this is written.

CHAIRMAN BABCOCK: Of course, the proposed change to Rule 7 or the proposed, I guess, change and addition to Rule 7, do you have problems with that language?

HONORABLE ROBERT SCHAFFER: Not with the specific language because the comment comes in and is there to supposedly clear it up. I'm wondering myself why we would treat an independent executor differently because, notwithstanding Justice Gray's comment, it seems to me that the independent executor is acting in representative capacity for the benefit of those that are -- that stand to inherit from that particular estate.

CHAIRMAN BABCOCK: Okay.

Yeah, Lamont.

MR. JEFFERSON: I was just going to say the same thing. I mean, I've read the memo and I understand the case law. An independent executive is not

representing themselves in any real sense of the word. I mean, they've got duties to everybody else. They're not to -- supposed to not be representing themselves, and so this -- the language in here that they're -- if you're acting in a representative -- not acting in a representative capacity, if that excludes independent executives, I think we're excluding too much from them. I mean, they -- so from an attorney-client perspective, maybe they're not representing, you know, themselves in that situation, but they are representing the interests of others.

So I agree that I think it's confusing to say that an independent executor is only representing themselves. That's exactly what they're not doing.

CHAIRMAN BABCOCK: Are there any -- yeah, Richard?

MR. ORSINGER: I guess I have more of a question. Looked at from a policy perspective, is the purpose behind the rule that a representative of another cannot appear as a lawyer, appear as an advocate, is that to keep people who are not licensed from practicing law from representing people? If that's what we're doing is to keep non-lawyers from acting like lawyers and you put that prism over this situation, it seems to me that an independent executor is not really the kind

of wrongful behavior that the rule is designed to stop.

The rule is designed to stop a nonlawyer from appearing as an advocate for some friend or client, and I don't -- I mean, if that's the justification behind the rule, I don't see that it really applies well to independent executors.

I have a problem, too, with the guardian. You know, you're forcing these guardians to get a lawyer. Clearly, they're representative -- they're in a representative capacity, but it's not the -- the mom that we're attempting to prohibit, which is a nonlawyer acting like they're a lawyer for someone else as an advocate. So I don't know. To me, the situation is not clear.

CHAIRMAN BABCOCK: Pete.

MR. SCHENKKAN: I have no comment on the merits of the situation --

THE REPORTER: I'm sorry, can you speak up, please.

MR. SCHENKKAN: I'm sorry. I have no comment on the merits of what ought to count as the unauthorized practice of law in this context, only comment on how it ought to be decided. And it seems to me that it needs to be decided by a rule of the Texas Supreme Court, and that is because the main practical

issue that is at -- that means that some decision needs to be made is, unless it is made, it is undisputed that there are thousands of small estates in which legal fees have to be paid that are more than the value of the estate. It is a substantial barrier to access to the judicial system, but the Texas Supreme Court which, if any one single institution ought to be deemed to be in charge of what is deemed unauthorized practicing of law, I think it would be a good candidate for that role. They should call the shot, and as a practical matter, waiting for one of these $10,000 cases in which somebody's got to spend $15,000 either to give up and follow the probate court rules that you've got to go get a lawyer or spend the $15,000 to take the case up and then spend another $15,000 if you lose, it's not going to happen.

So the court needs to call the question. The rulemaking is the way to do it. And I agree very much, Justice Christopher, with the instinct that in many situations there is a tension between having the Supreme Court do so by rule or by case. I think what limits the damage on that tension here is this one is about the unauthorized practice of law. Many of the things that the court is called on to decide either by case or rule are not, and I think that makes this

different.

This court has the special responsibility when deciding where at the edges are we talking about the unauthorized practice of law, if you take into account practical realties alike, the impact of thousands of people, you know, who have been named as independent executor of a small estate and need to get the thing done.

HONORABLE HARVEY BROWN: We didn't spend a lot of time, really, any time talking about the merits since we already voted on that two years ago, but I will point out that the Texas Access to Justice brief states that 11 percent of the estates in Texas are $10,000 or less and that the average fee in these cases for independent executors was that or more. So that was one of the policy reasons they came out the way they did.

CHAIRMAN BABCOCK: Your prefatory comment about we've already voted on this --

HONORABLE HARVEY BROWN: I understand.

CHAIRMAN BABCOCK: Have we voted on this language?

HONORABLE HARVEY BROWN: No. You just voted on the fact that the rule should be changed to make it clear that independent executors may appear pro se. That's all we were asked to do. The guardian

sentence, we added on our own. We could cut that out or we could edit that in a number of ways. I think maybe court-appointed guardian might fix Judge Christopher's issue. If not, I'm sure we can come up with some other language between the two of us sitting here at the break.

CHAIRMAN BABCOCK: Yeah, Richard.

MR. ORSINGER: I wanted to -- I have an afterthought about the guardians. I really don't think it's necessary to address the primary threat which is to allow independent executors to be independent. I would -- I would recommend that we not include the guardian statement and consider that further, and also, as a practical matter, guardians have to have court approval for whatever action they take, and those actions are likely going to be taken in the guardianship court because it has jurisdiction of all guardianship-related matters.

So here we have a court-appointed guardian who's making annual reports to the guardianship judge, appearing in the guardianship court, asking for the guardian -- for the court to approve certain actions. I don't know that I see the public policy behind forcing that guardian to hire a lawyer to go in front of the guardianship judge and ask the guardian questions so

that they can come in the form of testimony so that the judge can rule.

I just -- I would much prefer if we took that sentence out and just dealt with the independent executors.

CHAIRMAN BABCOCK: Okay. Justice Gray.

HONORABLE TOM GRAY: Just for purposes of putting it on the record, a draft that I would wholly support is something on the order of an independent executor, who's a rightful person, is the party for purposes of this rule when appearing in that capacity in a suit.

And that would cover the application. It would cover the -- the need to -- if there's a small claims court, an eviction proceeding of a tenant on the decedent property, you know, wherever it might take you, that would cover it, and it would address Lamont's concern about corporate independent executors, which is a valid issue there.

CHAIRMAN BABCOCK: Robert.

MR. LEVY: I agree with Justice Gray, and I do think that the language in the rule should be clearer because we, as lawyers, can parse through and understand what is and isn't applicable, but the average pro se person who might be looking at the rules wouldn't

understand it, and they wouldn't know to go to the comments. And so we should be very clear about what this means in the circumstances of that we're contemplating.

CHAIRMAN BABCOCK: Harvey.

HONORABLE HARVEY BROWN: Again, I'm not speaking for the committee since I'm the only one here but I don't have --

CHAIRMAN BABCOCK: You've got a wide open road.

HONORABLE HARVEY BROWN: I don't have a problem taking out the guardian sentence. I thought Richard's example was definitely something worth thinking about.

On the first sentence, I think we could simplify it. Obviously, the way we've written it explains the rationale; that is, that they don't represent themselves. But we could just say in the rule, we could just say, An independent executor in an estate may appear pro se. That's about as simple as you can make it.

I think if we go to the comment it was just one special thing, and the problem here is that if pro ses try to represent themselves, the problem that we've seen is when they try to do so, some of the courts don't

like that, and this is really more instruction to the judges that they have to allow them to do so.

CHAIRMAN BABCOCK: Okay. Any other comments?

So do you want to make those amendments in the form of a motion?

HONORABLE HARVEY BROWN: Sure.

So cut the line where it says represent himself or herself and not others. So only reads, An independent executor of an estate may appear pro se, period. Drop the second sentence of the comment, and leave everything else in the rule and the first comment the same.

CHAIRMAN BABCOCK: Okay. How many people are in favor of that amendment to the language? Raise your hand if you're in favor.

HONORABLE MARIA SALAS MENDOZA: I have a quick question since Harvey is the only natural person to address.

HONORABLE HARVEY BROWN: Well, the rule says an individual. So that's already addressed in the rule that we marked.

HONORABLE TOM GRAY: I did not understand what -- you were going to put that entire sentence in a comment and drop the existing comment?

HONORABLE HARVEY BROWN: No. I was suggesting that I thought it should stay in the comment, the sentence that says --

CHAIRMAN BABCOCK: Let's not vote on whether it's in the comment or not.

HONORABLE TOM GRAY: I'm not understanding what we're voting on, what it is, or where it is.

CHAIRMAN BABCOCK: Harvey was suggesting an amendment to the comment.

HONORABLE HARVEY BROWN: Make it just one short declarative sentence without an explanation.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: I think the sense of the room is it would be better to be in the rule.

CHAIRMAN BABCOCK: Okay.

HONORABLE TRACY CHRISTOPHER: So I think before we vote on changing the comment we should vote on whether the language in the rule should stay as it is or should the rule just say, An individual who is an independent executor may appear pro se?

CHAIRMAN BABCOCK: Okay. We can do that.

Harvey, is that --

HONORABLE TRACY CHRISTOPHER: I think somebody said that the language in the rule itself is

confusing, and I agree.

CHAIRMAN BABCOCK: Yeah. I agree, too.

That okay, Harvey, if we do that?

HONORABLE HARVEY BROWN: If the two of you agree, why I would try to --

CHAIRMAN BABCOCK: That's a fair point. Okay.

HONORABLE HARVEY BROWN: This is the second thing we amended.

CHAIRMAN BABCOCK: So everybody's in favor of putting the language, as amended by Harvey, into the rule itself raise your hand.

HONORABLE ANA ESTEVEZ: We're dropping the other?

CHAIRMAN BABCOCK: Yeah.

MR. ORSINGER: It looks unanimous.

CHAIRMAN BABCOCK: Okay. Everybody opposed. Well, there are 23 votes in favor, nobody opposed, so that was a good solution.

MR. JEFFERSON: Are we deleting the language that was in the rule --

HONORABLE HARVEY BROWN: We're deleting the language that says with "an individual."

MR. JEFFERSON: Got it.

CHAIRMAN BABCOCK: So let's read into the

record what the rule is going to say -- the proposed rule is now going to say.

HONORABLE HARVEY BROWN: Any party to a suit may appear and prosecute or defend his or her rights therein, either in person or by an attorney of the court. An independent executor of an estate may appear pro se.

CHAIRMAN BABCOCK: Everybody good with that? Jim.

MR. PERDUE: I was just -- I was in awe of the way you owned the room.

CHAIRMAN BABCOCK: Okay. Any other comments on that? Harvey.

HONORABLE HARVEY BROWN: I said that our next suggested comment, which I think now is dead on arrival --

CHAIRMAN BABCOCK: Let's talk about it anyway.

HONORABLE HARVEY BROWN: So Connie Pfeifer has a colleague at her firm who teaches on community property and suggested that we should say not only may an independent executor appear pro se but a trustee should be able to do so, too. Cited a case called Huie v. DeShazo. This was not in the purview of the assignment from the Texas Supreme Court, so we did not

really take a position.

You'll see I wrote this -- an alternative comment suggested by Andrew Ingram, this professor. He suggested it should cover trustees. We did read the case that he cited. It was also cited by Pemberton in his original memo. We thought the rationale legally was valid, but like I said, it was beyond the purview of our committee. None of us really has great expertise or any expertise in this area, and it doesn't seem to be as much of a problem. It isn't something that we've within the legal community have seen raised before. I think most trustees, not necessarily all trustees, tend to be people who do have either corporations that are the trustee or have lawyers represent them because it's a little more complicated. They're not simplistic like $10,000 or less.

So rationale-wise, as a pragmatic matter, seems like we don't need it. Rational-wise, under the law, seems like the same principal would apply, but like I said, we're not recommending it. We're just throwing it out there in case the court wanted to consider it.

CHAIRMAN BABCOCK: Okay. Anybody have any comments on that? Judge Peeples.

HONORABLE DAVID PEEPLES: Not on that.

CHAIRMAN BABCOCK: Anybody have any

comments on anything? Judge Peeples.

HONORABLE DAVID PEEPLES: I think the original language goes back to 1941. Are we comfortable with either in person or by an attorney of the court? By attorney or something? As long as we're tweaking language, let's --

HONORABLE HARVEY BROWN: I will agree that is strange language and just hadn't focused on it before.

CHAIRMAN BABCOCK: It could mean that you're appearing in the court proceeding. So by that language, attorney of the court. That seems redundant. You're either an attorney or you're not.

MR. SCHENKKAN: Surely, they mean an attorney admitted to practice before this court which, as a general proposition, in a state court would be any licensed lawyer. I suppose there are some exceptions but not many.

CHAIRMAN BABCOCK: Okay. So that's something for the court to consider.

MR. SCHENKHAN: Yeah.

CHAIRMAN BABCOCK: Back to the thing the court did not ask us to look at but we're going to look at anyway, does anybody have any comments about that? Jeff? Yeah, Lamont.

MR. JEFFERSON: I guess my only comment, I voted against the independent executor acting pro se in the first place. For all of the -- I think -- and the only exception to that, I understand, is small -- much smaller estate things.

So for the trustee situation that -- there's less of a justification to allow trustees to proceed pro se, and this is -- this is complicated stuff. We've had so many cases involving the privately created trusts that, you know, there is no court supervision whatsoever, and you're trying to go back after the fact and recreate both what the testator wanted and, you know, how circumstances may have changed.

So, I mean, I don't -- I wouldn't dive into expanding the idea of allowing pro se representation in this area to allow it. It's just so complex, and especially if you take away the financial impediments, which I recognize maybe are more prominent in the independent executor situation but not, you know, with a trust where you've got to specifically create the trust and got to be assets there that make it worthwhile. So I -- I wouldn't -- I wouldn't go down this path.

CHAIRMAN BABCOCK: Yeah.

Justice Christopher, you had your hand up.

HONORABLE TRACY CHRISTOPHER: Well, a trust is not considered a legal entity, so I'm not -- in the probate situation. So I think we need to study this a lot more, along with the guardian issue.

CHAIRMAN BABCOCK: Okay. Richard.

MR. ORSINGER: So the common estate planning technique that I see now is to name the beneficiary of the trust the trustee of their own trust with an independent as sort of the standard for distribution so they don't run afoul of estate tax law. So here we are saying that a trustee, who is trustee for himself or herself as beneficiary, is in a representative capacity and has to have a lawyer. That doesn't make any sense to me at all.

I really -- you know, underlying the common law is the idea that courts don't make decisions until they have a real controversy before them where both sides are advocating the outcome and the court can decide what to do. Here we are giving advisory opinions through comments to the rule in an area where we probably don't even really know where all the issues are, much less do we agree on what the answers to the issues are.

So, to me, this is like an advisory opinion. We shouldn't comment about trustees being

independent or not. It may be the rule ought to be, if you're a trustee for yourself, you can be pro se, but if you're a trustee for others, you can't, or something. But we're just kind of just throwing this all in together while we're making a change. We're trying to clarify the law in other areas, and I'm not sure we even agree on what the issues are, much less how to clarify them.

So I would recommend that we not mention trustees or guardians, and let's just stick with independent executors.

CHAIRMAN BABCOCK: Okay. Any other comments?

Does anybody want to advocate in favor of this alternative comment? Or is it DOA as some of you predicted?

Hearing no advocates, then we'll -- we'll go on to anything else that you want to talk about, Harvey.

HONORABLE HARVEY BROWN: Not right now, thank you, but I'll save my time for something else later.

CHAIRMAN BABCOCK: You're going to do stuff later. All right.

So we're going to go to permissive appeals,

and right in your neighborhood to your left is another former member of the court, Bill Boyce, and you're going to lead us on that or not?

HONORABLE BILL BOYCE: No. I am going to cheerfully allow Rich Phillips.

CHAIRMAN BABCOCK: Well, let's continue down the continuum to Rich Phillips.

(Simultaneous speaking.)

CHAIRMAN BABCOCK: Good follow-up, I might had.

MR. PHILLIPS: Well, it's probably only time in my life anyone has ever described me that way and ever will. Good point.

So I drew the short straw.

CHAIRMAN BABCOCK: To the commentary, Tim McCumber dies, and all of the sudden you're doing a good job.

MR. PHILLIPS: So I drew the short straw on this one, I think, and I'll get to stand up and get shot at a little bit on this one, little bit of background just for the people that are not totally aware of what this statute is and its history because I think that will play a little bit into what we do.

In 2001, the Legislature adopted a version of rule -- of section 51.014(d) to allow the parties to

agree to an interlocutory appeal of an order that otherwise would not be appealable. It set requirements for -- similar requirements to what the rule is now, the statute is now, but it required the parties agree. And for ten years, that was there, and unsurprisingly, it didn't get used very much. The parties rarely agreed, particularly because you had to agree that the thing you just won, that there was substantial ground for a difference of opinion. So that really didn't go anywhere.

So, in 2011, the Legislature amended the statute and removed the requirement that the parties agree to the appeal, and instead, made it the trial court can certify if this issue involves -- meets this test and then send it up, and if the court makes that certification, then the parties can go apply to the court of appeals for permission to appeal. And the statute said the court of appeals may allow an appeal in that circumstance.

The statute is very similar to a federal statute. We saw something similar in 1292(b). It has basically two requirements before you can send an issue up. First is if the order of appeal involves a controlling question of law as to which there is a substantial ground for difference of opinion, and the

second is an immediate appeal from the order may materially advance termination of the litigation.

In response to those amendments in 2011, the court adopted Civil Procedure Rule 168 and Appellate Rule 28.3 to set out the procedures for this. Then people started trying to take these things up, and I looked a little bit at some statistics --

THE REPORTER: I'm sorry, can you say that again, please.

MR. PHILLIPS: Sorry. I've done some looking at statistics. Did a couple of presentations at the UT CLE -- appellate CLE on this procedure.

In 2016, I found -- and it's hard to really be exact about these statistics because of the way that the courts of appeal track these petitions, but we figured it was about 40 percent were getting granted statewide, and that varied a lot from court to court.

The court -- Supreme Court in 2019 issued a case called Sabre Travel, where they very much encouraged the courts of appeals to take these if the statutory standards are met. The key phrase is in the memo. Basically, the court said just because the courts of appeals can decline to accept permissive interlocutory appeals doesn't mean they should.

I updated my paper last summer, looked at

just since Sabre Travel, and actually the grant rate went down. From 2019 to 2022, we found that they were being granted about 26 percent of the time.

Right before I gave that presentation, the court issued an opinion in Industrial Specialists which didn't produce actually a majority opinion. There's a plurality of concurrence and a dissent, and as is suggested, there's a lot of sort of division as to how this scheme should be applied. The result of the parties is that what usually happens when these get denied is you get a three-sentence denial that looks a lot like a mandamus denial. It said in Industrial Specialists, the first sentence identified the parties. The second sentence said they asked for permission to appeal. The third sentence said we don't find the statutory requirements are met; therefore, we deny. And that was it.

Both parties went to the Supreme Court and argued that the court of appeals was wrong to find that the statutory standard wasn't met and had abused its discretion in not taking up that permissive appeal. The controlling rationale of the court, identified in the -- in a footnote, is that the court did not abuse its discretion. And then the question is, why?

The plurality has some standards about is

it sufficient if it states that the statutory standards are not met. Pointed out that the court could perhaps impose stricter requirements by rule, but it wasn't going to do it in the opinion.

The concurrence is a little broader, and that basically said the discretion to take or deny one of these is absolute, and that's the end of the analysis. And the dissent would have required more explanation but would have held that the discretion is not absolute, would require the courts to explain when there are announced statutory requirements, and then -- and this gets a little bit tricky -- once the requirements are met, then the statute says the court may accept. So there's discretion there even if the statutory requirements are met.

The dissent would -- said the court should explain their reasons for not exercising their discretion in order to start developing some standards about how to exercise that discretion.

One of the things that the dissent also pointed out is there's not been a lot of development in the case law about what these statutory standards mean, and there's a fair amount of confusion attached to the materials -- the updated version in my paper about this, where I walk through some of the cases about what do

these standards mean.

Some of them are easy: Is it a question of law? That's pretty easy. Is it a controlling question of law? There's some dispute among the courts as to what that means.

And substantial ground for difference of opinion is one that really nobody knows what it means. There's one court that says, if it's an issue of first impression, then clearly there's substantial ground for difference of opinion. There's another court that says, if it's an issue of first impression, we don't know if there's a ground for difference of opinion, so it's not met. So there's really not been a lot of development about what these mean.

And may materially advance the determination. That's a little squishier standard that have been made, but there's not been a lot of comment on that either. So the dissent pointed out that probably another thing needed for parties and lower courts is to know what these statutory standards mean.

So, with all of that, then the court asked us to look at whether the rules should be amended to require something more and, if so, where should that rule go and what's the scope. So that is kind of four main things that we looked at as a committee: the

whether question; where it goes; what the scope is if we do it; and then a fourth thing, which was not directly in the referral but relates to that first version of the statute -- so back when it was an appeal by agreement -- the court adopted Rule 28.2 to govern the procedures for appeal by agreement. And when the statute was amended in 2011, the court adopted 28.3 but kept 28.2 in place for cases to which it still applied. It's now been 12 years since that, and it's very unlikely that there's any cases floating around that the agreed version of this might apply.

So we also recommend the court consider repealing 28.2. I think there's some possibility it's causing confusion. We had looked at some of the courts of appeals' decisions on this, and they do talk about why they're not granting this procedural problem frequently and sometimes if the people are trying to do it by agreement rather than by order of the trial court, because this rule is still there. So one of our recommendations, the court should consider repealing 28.2.

So back then to the rule for the existing version of the statute. First question is whether, and we actually had significant discussion about that in the subcommittee about whether the court should amend the

rule to do that. There's some concern about trying to dictate to the courts of appeals about how they write opinions, obviously concern about the workload of the courts of appeals. And we detailed some of these considerations in the memo.

We don't want to necessarily micromanage, make the trial courts of appeals to write full opinions, particularly when it's on a short application for permission to appeal, and of course, the statute grants discretion whether to grant permission to appeal. The subcommittee did not want to propose an amendment that would interfere with that discretion.

And there was also some concern about whether a very detailed opinion might be treated by some of the lower courts as law of the case when maybe it shouldn't be. A lot of discussion of the facts, just to allow the background, someone could argue court of appeals could have found those facts if they were in dispute or even sometimes a comment that something -- the law on something is well settled so that there's not substantial ground for difference of opinion, could that be interpreted as law of the case?

On the other hand, as noted in -- talked about a little bit -- and the dissent in Industrial Specialists talks about it -- is there lack of authority

about what these statutory requirements mean? And there's a fair amount of confusion, I think, among the lower courts and the bar as to how you show that the standard is met. There are some cases that suggest some standards. You can look at some of the federal cases under 1292(b), but we really don't have a good body of case law, and as long as nobody is explaining why the standard is not met, we're not going to get that.

Another consideration I think is explain to our clients. If it looks like the standards are met and we have this question of law and it's really important and there's a dispute about it and we get an opinion from the court of appeals that says standard not met, how do you explain that to your client? You can't even tell them why it's not met because the court didn't tell me.

And as the unanimous court in Sabre Travel pointed out, permissive appeals can really be an important tool in aiding "early, efficient resolution of determinative legal issues" in proper cases. So, on balance, we decided that we should propose a rule. We recommend the committee propose a rule. We tried to draft it narrowly to address some of these other concerns, to not impinge on the courts of appeals' discretion or to increase their burden to write a full

opinion on a short briefing, but we do recommend that there be a rule adopted.

The next question then is where does it go. The courts of appeal have said consider 28.3 or Rule 47 which is the rule that talks about the kind of opinions the courts need to write when deciding a case. We decided that 28.3, which is the rule on permissive appeals, makes the most sense. Most, for a couple of reasons. First, because that's where people are going to be looking to know what the procedure for a permissive appeal is, and they wouldn't necessarily go to Rule 47. Also, any amendment to Rule 47 would -- could get into other kinds of opinion drafting. And, finally, in Industrial Specialists, some of the judges pointed out that they weren't even sure Rule 47 would apply to an order on a petition for permission to appeal. So we didn't want to exacerbate any confusion there.

We recommend it go into Rule 28.3 which would then make it Rule 28.3(l) which is, like, the worst letter to put in there because it looks like a one, but that's the letter we're on. So it's 28.3(l).

And then, finally, the scope of the rule, what we wanted to say. So that is on the first page of our memo is the rule that we propose. If the petition

is denied, the court must specifically -- and here, we did have a bit of dispute, and so we're going to leave it to the committee -- identify or explain -- one of those two words -- in its order the reasons, if any, the petition does not satisfy the statutory or procedural requirements for permissive appeal.

We thought that that would ask for more than what is currently being done in a lot of courts of appeals where they state the standards aren't met, or sometimes they just say we considered the petition and we deny it. And even the majority or the plurality in Industrial Specialists wasn't sure that would be enough to satisfy what the court needs to do.

So we think it's narrowly drawn. We did consider a statement that would require the court to explain if it decides to exercise its discretion not to permit an appeal. Even if the statutory standards are met, should the court have to explain why? And we decided not to do that. There's really nothing in the statute that suggests a standard for that discretion, and we decided that was maybe going a little bit too far in getting into the discretion of the courts of appeals and requiring more -- sort of micromanaging the court's work. So we did consider that and reject it, and obviously, if the sense of the committee is we ought to

consider it, we'd be happy to do that.

So that's it. And then the question then, is it enough to say specifically identify the reasons or do we want to say explain the reasons if we decide to go to it? So that is our proposal, and I'm happy to answer any questions.

CHAIRMAN BABCOCK: Okay. Thank you very much.

Richard.

MR. ORSINGER: You know, Rich, would you mind putting in the record a little bit what procedural requirements -- why are you including procedural? Is it a failure to give proper notice on time or --

MR. PHILLIPS: Sort of -- the procedural requirements under Rule 168 and in Rule 28.3, they include things like getting -- there's a whole procedure for getting the trial court's permission. And that's -- in the statute, it says the trial court can grant permission, but the rules talk about how you do that. So the way it's supposed to be done, as it's written in the rules, is that after the court issues its order that you want to appeal, you go back and ask the court to amend that order to include in that order permission to appeal. And then the trial court is also supposed to identify the question, state why there's a substantial

ground for difference of opinion and why an appeal may be clearly advanced for determination. So those are procedural requirements that have to be in that order that are not in the statute. So those are things from Rule 168 and Rule 28.3.

MR. ORSINGER: And so your concern that an appeal might be rejected is because it wasn't procedurally put together, even though the criteria for the statute might be met?

MR. PHILLIPS: That happens frequently.

MR. ORSINGER: Really?

MR. PHILLIPS: Yeah.

And a lot of them -- we looked at some of the cases that actually explain the denial. There were lots of them that say, well, you didn't get the trial court's permission or it's not in the order that you're trying to appeal, or a lot of times what happens is the trial judges like to identify the issue and then not decide and just ask the court of appeals to decide.

So those are more procedural issues. They're not specifically in the statute, and so we wanted to be sure that, if it's going to be denied for failure to meet procedural or statutory, that those get explained so the parties know what's going on.

MR. ORSINGER: Well, I'm just curious. Is

it too late to fix the procedural defect once you find out about it?

MR. PHILLIPS: Probably not. There's at least one case that has suggested the parties could fix it, and in a minute, we're going to be talking about the mandamus petition. They need to give somebody the opportunity to correct that procedural defect, and maybe the court should get that opportunity. I think it's probably beyond the scope of our referral, but those do come up, and it's something we're trying to kind of educate the bar on when I give these speeches. The main thing I talk about is read the rule and do it exactly right because that's the easiest way to not get that.

MR. ORSINGER: It must be hugely important it's curable that the court of appeals tell them it's a procedural problem so they can then clear it and we get to the merits.

MR. PHILLIPS: Right.

MR. ORSINGER: Thank you.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I spent all day yesterday at the Legislature begging them for more money for the court of appeal. We need more money because we need more lawyers, and the more work we have, the more lawyers we need. This, of course, will

increase our workload. I understand that.

I'm going to put that aside and focus solely on -- it is a real issue. It is a real issue because if y'all want to increase the length of time it takes us to get anything done, then make us do more work, but the mandamus, with this, that's what you're doing. That's okay. Just understand that it's going to take us longer to get things done.

To the merits, I -- unfortunately, I didn't get a chance to read this until after my time at the Legislature yesterday. So, yesterday afternoon, I found two cases through the use of Google Scholar on my iPad that came from my court.

CHAIRMAN BABCOCK: They were written by you.

HONORABLE TRACY CHRISTOPHER: Well, no. One was per curiam made, but the other one I was just aware of out of our court. Those were sent to you late yesterday afternoon, and I would ask that you open up your email and look at both of those cases, because both of those cases we give explanations for why we're denying the permissive appeal. One of them and -- so I would ask whether with this draft, what we have done, is sufficient. Okay.

So, first of all, the first case is Ayala,

okay, and panel consisting of Christopher, Busby, and Jewell before Justice Busby went up to the Supreme Court and decided we really needed to explain our reasoning. I digress. Okay. So what he did in this particular ruling -- I think you should look at it -- we set out some facts. We said, okay, this is what the judges ruled, and then we say we have permission -- our jurisdiction is established if we consider that a substantial ground for difference of opinion exists. Okay.

Then we say substantial grounds mean when it's novel or difficult, when controlling circuit law is doubtful, when controlling circuit law is in disagreement.

Then we conclude. "We conclude no substantial ground for difference of opinion exists on the controlling issues of law stated in the Amended Order."

Is that enough? Does anybody understand what we said about that? I read it to mean we think the trial judge was right, so we're not going to grant a permissive appeal. Is that law of the case? Is that sufficient as to what's been drafted? It's an excruciatingly difficult thing to do what you're asking us to do.

The second case that I've given to you for your reading enjoyment is Gulf Coast v. Lloyd, and in that case, we granted the permission to appeal. We had full briefing on the merits. I'm not exactly sure how long it took us to get this opinion out, but at the end of the day, we concluded: too many fact issues here precludes us from determining the controlling questions of law. We withdraw permission to appeal and dismiss.

Okay. Now, that would clearly be sufficient, I think, under this rule for what we did, but my point is, if it's only after we granted permission, had full briefing, dug into everything were we able to determine really, there's some fact issues here that are preventing us from answering the question. If the facts are X, the law is Y. If the facts are Y, the law is Z. So, I mean, is that the kind of opinion you want us to come out with? We thought no. So we withdrew our permission to appeal, said go away.

My third example, very recent -- and I'm not talking about the merits of the case. This case is still pending in front of me -- we get a denial of a motion for summary judgment. Everything seems to agree permissive appeal. Everybody says, yeah, procedurally, it looks good. We look at the motion for summary judgment order denying it, and the trial judge has

sustained the plaintiff's objections to some of the defendant's evidence. Okay.

So I'm looking. Well, what am I going to do with that in terms of a permissive appeal? So we actually wrote the parties a letter and said do we have to rule on these evidentiary issues before we can answer your controlling question of law? And they kind of hemmed and hawed and said, no. You know, even if the trial judge was right excluding these particular pieces of evidence, we said this, so please take our appeal. So we have.

But maybe at the end of the day we'll really disagree with them on this point. And, again, you know, the whole process of deciding to take the appeal took several months, and now we're going to go a full brief on the merits, and they're just going to get in line with all the other cases when you -- despite the fact that you're an interlocutory appeal. Right? Interlocutory appeals go no faster than trials on the merits. They just don't.

We have so many filings at the court of appeals it's not possible to prioritize anything with 180 days cases. I mean, we're supposed to prioritize criminal cases. We're supposed to prioritize interlocutory appeals, but at the same time, we have to

get all our appeals done within two years. So there is the rub of what we do on a daily basis.

So I'm not sure what this rule means. I would like you to look at Ayala in particular and tell me whether what we said in that is sufficient, and if so, I'm okay with it because I can write opinions like Ayala, but I don't know for sure what this rule means.

CHAIRMAN BABCOCK: Okay. Well, the committee will go into conference, and we'll do --

HONORABLE TRACY CHRISTOPHER: I just want to know.

CHAIRMAN BABCOCK: -- get an opinion at some point on it, but Justice Kelly.

HONORABLE PETER KELLY: Setting aside the --

THE REPORTER: I'm sorry, can you please speak up.

CHAIRMAN BABCOCK: Speak up.

HONORABLE PETER KELLY: Setting aside the workload issues and funding, we need more staff attorneys, and my attorney would kill me for saying this.

But also speaking as a relatively recent practitioner, a number of years ago, I had a case in Justice Christopher's court where I got a denial of

permissive appeal, and it just said denied. How do I explain that to the client? Maybe there won't be mandamus, I don't know, but as a practical matter, you've gone through the trouble of explaining to the trial judge -- and this was an issue -- it wasn't a summary judgment being issued, didn't have to deal with the ultimate liability in the case, or whether the third party medical funder was going to be able to assert a claim. And that drastically affected the amount of settlement. I can't remember the exact numbers right now. I think it was a $300,000 claim, a hundred thousand dollar lien. Whether that was enforceable affected the amount of settlement. So, again, it affected the ultimate resolution of the case.

So to persuade the trial court judge if this is important, if we answer this question, the whole case will go away, and it will go up to the court of appeals. The court of appeals says, nah, it's not important or we don't know why they denied it. So as a practitioner, it's extremely important to have that knowledge, especially if you persuaded the trial court who, in theory, knows a lot more about the case than the court of appeals does as they're watching all the dynamics going on, trial court's persuaded that it will resolve the case, and now you have to persuade the court

of appeals to do that.

And that's why it's helpful to get some explanation from the court of appeals as to why it's being denied. Are you agreeing it's not going to resolve the case? Do they disagree with the trial judge? Or perhaps there's some procedural defect.

And it's very similar to mandamus, where, you know, we have the authority maybe in the court of appeals just to deny without opinion. Well, as practitioners you get that. That means that you forgot to attach a verification or think they're out of adequate remedy or I'm wrong on the substance.

I mean, it's difficult to explain to the client practitioner to figure out what the next step in the strategy is. So the idea is perhaps in permissive appeals, and perhaps even mandamuses as well, some guidance would help resolve the litigation.

Now, problem is that, as Justice Christopher pointed out, what is enough guidance? There's no -- I can't think of a way to draft a rule to say you have to write, you know, 500 words on it or, you know, one good reason what is the metric for determining what is an adequate explanation. So sometimes someone drafts a guideline or a comment saying the court of appeals should attempt to or should try to just to

encourage the courts of appeals to do that. Again, that's setting aside the workload issues.

CHAIRMAN BABCOCK: Lisa.

MS. HOBBS: Okay. I'm going to say at the outset that my position on this rule might be different than my position on the mandamus rule, and so I don't think they're inconsistent. I've reconciled it in my mind over the last 24 hours, but on this one, let me go with the easy thing as an appellate lawyer.

I agree this should be in Rule 47 and not 28.3 or -- I'm sorry, I agree that this should be in 28.3 and not 47, and I agree that it's time for the court to just revoke 28.2. I don't think that it's come up. So that is the easy item.

CHAIRMAN BABCOCK: So you say.

MS. HOBBS: So we say. And I really appreciate that the subcommittee, and I think it's really thoughtful your verb choice on your proposal of identify versus explain, and I would -- even before I heard Justice Christopher's thoughtful comments on A -- the A word.

HONORABLE TRACY CHRISTOPHER: Ayala?

MS. HOBBS: Ayala. Okay. I really think that identification is what we need, and it kind of runs into the mandamus rule. So sometimes somebody can

identify why they're denying a permissive appeal in a way that is, in fact, curable, and -- and I agree with what has been said about it. I don't want to delay a decision. I think our courts of appeals are overloaded. I don't think we should require some courts of appeal analysis on every permissive appeal, which is kind of where you're going if you use the word "explain," and probably what Justice Christopher is really worried about is I don't want to do a full analysis on every case.

But I think if you identify why the permissive appeal -- and you might even say identify the specific statutory elements. So you might have even gone further than you needed to in that opinion, if you could just say, we don't think there is whatever statutory requirement, period. And that might be a way to answer your question on whether you think this opinion is enough, which I do think it is.

The problem is -- and I think Richard -- Rich sort of, like, got into this is, first of all, most trial lawyers don't even know the statute exists. Sometimes they're calling me after there's been an order drafted that allows a permissive appeal. Sometimes they're calling me, like, what am I supposed to do, how could they possibly do this.

But what I know is that, in my experience, trial judges are very likely to sign an order that says, on this date, this motion was presented to me; I hereby grant or deny it. It's, like, very simple. They're going to sign their name to that. Thank you for being -- you know, drafting that.

But with these orders, you need to be way more specific, and in fact, the case law is not clear how much specificity on any of these statutory elements you need to have in the opinion. Rich pointed out one, which is -- I do know you need a ruling. You can't just say, interesting question, I don't know, take it up. The judge needs to rule on it. But the specificity on a lot of the other elements isn't really settled law.

So you're drafting an opinion for the trial court to sign, hoping you're not going to get dinged by the court of appeals for something that could be curable. Right? And then you present it to the judge and say, hey, Judge, you want this to go up, we want this to go up, sign this order, and then the judge says, well, maybe I'll take this order. And, I'm like, yeah, but you didn't need to explain, may not have appellate jurisdiction. Right?

And so, when you're having these orders that require specific things, you're not necessarily in

control of what the judge actually signs. And he or she may have reasons for doing it, but you also have reasons for presenting it.

And so that's why I think that if you just required an identification, then, you know, is this something curable or they just -- the court of appeals just disagrees with us if it's controlling or what did they answer, for whatever reason.

But the fact is, you don't control that order completely, and it might be curable if the court would just identify why -- identify, not explain -- identify the specific statutory elements that were not met as the grounds for denying it.

I don't know. I mean, I appreciate the law of the case issue, but if the statutory -- the standard is or isn't met, I don't know why it shouldn't be the law of the case, at least until there's, you know, further appeal on it. If the court of appeals believes that, you know, that this is so certain and so whatever, then I want the trial judge to go with that as law of the case. That doesn't really bother me.

It's not saying I won't disagree and I might not take it up on further appeal or try to convince the court of appeals otherwise, but the reality is sometimes it really is a material issue on which

people can't disagree, even if the court of appeals is, quote, unquote, wrong, like, because a subsequent court tells you later or you just reconsider. I'm kind of, like, well, just give us the guidance order so that gets us to a resolution so we can go back up on appeal.

I'm less worried about the law of the case and what that means, and I'm not sure it's going to create law of the case if you stick to the identify instead of the explain verb. Those are my thoughts.

CHAIRMAN BABCOCK: Okay. So you're more or less in favor of the rule?

MS. HOBBS: Yeah, yeah. Identify verb --

CHAIRMAN BABCOCK: Professor Carlson.

PROFESSOR CARLSON: Correct me if I'm wrong on this, Rich, but I recall the subcommittee conversation pertaining to the law of the case. That was one of my reasons we went from opinion to an order.

MS. HOBBS: And I would support that, but the reality is that, if you give me a document, whether an order or opinion, and I have been -- I have a trial court and they change my trial court order in a way that I'm, like, I think that gets me by, but I'm not sure, and then the court of appeals tells me I'm just denying this, I'm, like, gosh, I already was frustrated with the trial court that they didn't sign the order that I

wanted them to sign because my concerns were correct, and I can just get him or her to change, like, that one little thing and make it compliant with the statute, or is it because you guys just think this is not going to -- I mean, there could be bigger issues.

And so it's just so frustrating when you're trying to talk to your client about an order that is especially -- and I'm not saying -- it happens in other times, too, but I've specifically been twice where I proposed the order that I thought would for sure give the court of appeals jurisdiction, and then the trial court changes it, and now, I'm, like, God, is it because they didn't dot their I's and cross their T's or it's curable or it's just because they really don't believe the standard is met, and I won't ever know.

PROFESSOR CARLSON: We were talking about the appellate order as opposed to an appellate opinion, no?

MS. HOBBS: So I agree with you. If you make it that you have to identify in an order as opposed to explain in an opinion, I think those are. We're talking what you're getting out. So I agree, I would support identify in an order, and I think if we take out the word "opinion," that might -- might cure some of Justice Christopher's concern, too.

CHAIRMAN BABCOCK: Rich.

MR. PHILLIPS: I think we did say "order" in the draft rule, not opinion, so that's covered. And I think Lisa's captured, not having sat in on our meetings, exactly why we were going back and forth between identify and explain.

I want to respond to a couple of Justice Christopher's comments.

So Gulf Coast, I want to start with that one. It's slightly standard older of the two. It's an outlier in what courts have done in responding to these, and partly it's because they got to it after a full briefing.

It's really -- if you start trying to draft a petition for permission to appeal and you want something you can look at and say this is what it means to have a controlling question of law or a substantial ground for difference of opinion, Gulf Coast is it. That's really the only opinion that's out there that attempts to wrestle with some of those standards, and even then, it's not -- it's a nice outline, but it's not enough. We need more development for the bench and the bar as to what these standards mean.

In Ayala, I think Ayala would satisfy this rule. That's just my opinion. I'm not speaking for the

subcommittee. But I think the part of it that I appreciate in Ayala is that it doesn't just say we find that there's no substantial ground for difference of opinion. It's got a paragraph afterwards that says -- and it doesn't explain -- doesn't cite cases to explain, here's cases that say this question is resolved. All right.

And I think that gives the parties the answer to the question, and it does what the rule says, which is identify. It doesn't have to explain exactly why, but it identifies it in a way that at least I can go back to my client and say this is why the court of appeals said we couldn't do this or a trial judge can look at that and say that order didn't get there. Now for my analogizing, it's going to help me develop standards as to how this could be applied. So I do think that Ayala gets there on identify.

I probably come down on the identify side of the line just between identify and explain, but we wanted to put that out there for everybody. I think it's important we understand, though, that Ayala and Gulf Coast are outliers. The vast, vast, vast majority of these denials are the three sentence. Ex parte to that they simply can appeal. 51.014(d) says you can appeal if and recites some standards. We don't find

these standards are met, denied. That's it. And that makes it hard to go back to the client, and it makes it hard when you're in Lisa's position and a judge will want to tweak your order. You don't have a case that says, well, that's not going to get us there.

I did want to be clear, too, on what's -- so Rule 168 identifies what the trial court has to do. The order must identify the controlling question and must state why an immediate appeal might be cured in advance, but it doesn't have to say why it's -- it doesn't have to identify why that question is a controlling question of law as to which there might be a substantial ground for difference of opinion. It just has to say this is the question, and then it has to explain why it might be curable in advance. So that's what's in Rule 168.

I do think -- and I'm a little bit -- I think I agree with Pam, and she'll appreciate reading this in the transcript later -- that we want to be careful in trying to pack too much stuff into comments. But it might be an ideal way, if we go with identify, we can put a comment in that says identify means give enough of an answer that parties can understand -- we have to massage the language, but kind of explain what we want sort of along the lines of what Ayala does.

I did also neglect to mention that there is -- and this is in the materials. There is a House Bill that's been proposed that deals -- attempts to deal with this. We looked at the language, and it's on page -- I'll just scroll down to the PDF. It's page 1561 of the PDF. We don't think this really gets there. It's House Bill 15 -- it's the House Bill 1561. It's on page 206 of the materials. Yes. And it just says can --

MS. HOBBS: It's 157 on mine.

MR. PHILLIPS: What?

MS. HOBBS: It's 157 on mine, but there were two PDFs that went --

MR. PHILLIPS: Okay. So, anyway, it's in there. But basically, you have two parts. It says, If a court of appeals does not accept an appeal under Subsection (f), the court shall state in its decision the specific reasons for finding the appeal is not warranted worked.

Our view is that some of these three sentence denials that arguably meet that test.

And then the second one states, The Supreme Court can review a decision by a court of appeals not to accept.

We also think after Sabre Travel and Industrial Specialists the court has kind of said they

do have jurisdiction. So we wanted to make sure the committee was aware that that is out there, and it might recommend adopting a rule so that we don't have to do whatever the Legislature requires instead, but I'll leave that out there.

Let's see if there are any other comments. I think that responds so far to the comments that are out there.

CHAIRMAN BABCOCK: Richard, and then Bill.

MR. ORSINGER: So I'm a little concerned about trying to force too much of the merits to be stated as a dismissal order. I would think all the merits should be stated if the appeal is granted and there's an opinion written, absolutely, it needs to be fully explained.

But if you're denying it, and the judge has ruled in a certain way, then you're saying, well, there's no substantial ground for difference of opinion about what the judge ruled, and yet we don't have the kind of a robust briefing we would expect in a normal appeal, and we don't have any of the facts really, unless they're stipulated in the trial court's order.

And so I -- I'm really concerned about anything that would elevate a denial to any kind of preclusive effect for the rest of the trial or for the

subsequent appeal.

CHAIRMAN BABCOCK: Bill.

HONORABLE BILL BOYCE: So I would endorse the order and the identify language, and I think respond in part to Richard's concerns.

You know, my take on reading the briefing from Industrial Specialists is that part of the concern was that the interlocutory appeal permissive appeal procedure was being applied in inconsistent ways across multiple courts of appeals, and in some courts of appeals you could not obtain permission if your life depended on it. So it was a big no for everyone with a form order that tells you nothing about it.

And so I think to go behind the identify language and the order language in this whole rule is to have a little bit more to work with so that, for example, if you want to take a swing at going to the Texas Supreme Court and saying, even though the court of appeals denied this, this really is an important issue, I'll say, you have a little bit more to work with than just a no order.

And you know, certainly sensitive to the workload issues and to the fact that everything is interlocutory and accelerated. Nothing is accelerated. But I think -- I would hope that doing this in the form

of an order with identifying reasons will ameliorate that to some degree so it's not looking for a formal opinion that exacerbates the problems that Chief Justice Christopher identified.

One other observation which is, you know, I have heartburn about the effect of an order in this context on what happens later in the case, but basically, that's a calculus that you've got to make every time you're going to pursue an interlocutory appeal or a mandamus. You can get incidental comments in the course of those procedures that have a subsequent effect, for better or for worse, on the merits of your case, and that's just part of the calculus. Just as you've got an interlocutory appeal doesn't mean you should take it.

But if you make the calculus and you're going to do it, I think that having it framed as an order with identification for some explanation but short of a full-on opinion is probably an acceptable middle ground to balance all of these considerations and not put yourself in some sort of --

(Phone ringing.)

CHAIRMAN BABCOCK: Speak of the devil, Justice Gray, did you have your hand up? You're next.

HONORABLE TOM GRAY: Was Bill finished?

HONORABLE BILL BOYCE: Yes. Bill was finished.

CHAIRMAN BABCOCK: I've got this alarm.

HONORABLE TOM GRAY: Bear with me for a moment.

But after the Supreme Court, needless to say, where its encouraged us to write more, maybe the grant rate went down because the more frivolous ones stopped. And so it not only would encourage us to write more but encourage more to be filed and, ergo, the rate goes down.

I would say that we may be one of those courts where the three-sentences opinion is too long. It's one sentence, and it is the permission requested on such-and-such is denied. And it's left at that, and there's a reason for that, and I'll get to that in a minute.

We all want more information about our case, the law, to guide our client through this maze, and this is an opportunity to get an advisory ruling that is permitted in this unusual circumstance. And it is very dangerous, in my opinion, because of the law of the case being decided on undeveloped facts where the case is either not fully discovered yet or it's -- the parties just haven't seen how it's going to play out or

they have, and they have a premonition of where it's going, you know, whatever the reason.

But we see this all the time, and we don't get the explanation or identification of the issue that the rule is seeking to impose. I think about how much easier it would be to rule on a motion for summary judgment that has been granted if I knew why the trial court had granted it.

So, you know, I think it would really be nice to know -- and I'm going to recognize the reverse here -- why a motion for new trial was granted when it is now required to be explained and can be reviewed. And I'm sure there's a lot of litigants that would like to know why a petition for review was denied summarily when it's denied, and it would provide them information maybe not on that case but on others.

So my point is, we all would like to have more information at some point in time about what may affect our case.

I can't let the workload go because I sat through the same hearings that Tracy did yesterday, and based on the statistics that Rich presented of 129 of these petitions over the period of time that he was looking at, that is one judge's workload for a year what we're looking at. So it's not an inconsequential burden

on us to do this.

I even share Richard's concern that or kind of reference that maybe we need to go back to the rule and do a better job of filling in what is required in the trial court before you get to the order that then gets to the request for the permission to do this interlocutory appeal, this permissive appeal, and maybe that's the better place to do the cleanup than here.

I would also say that if we have a summary denial and the parties feel that strongly about it that they want to seek review by petition to the Supreme Court and the Supreme Court needs more information about why we didn't grant it, you may want to think about, literally, a remand procedure from the Supreme Court that says, okay, on this one, give us a full write-up, and that way it limits the number in which we have to do that.

You've got an undeveloped record, this whole question -- oh, the statutory requirements. What if at the appellate court we can't even agree, which occasionally happens, as to whether or not this is ripe for a permissive appeal? Then we're going to start writing majority and concurring opinions -- and I'll get to the opinion versus order in a minute -- but on -- on why this issue is or isn't, and then suddenly we've

created more of a problem for the litigants because we've given them a snapshot of what might be down the road on their case on an interlocutory appeal that may or may not be dispositive of the case.

I notice in the rule that they use the jury charge favorite phrase of "if any." I thought that was great because, as long as that is in there, I might still be able to do a one-sentence denial. Somebody might infer from that that there are no reasons; we just deny it.

So I am very concerned about the law of the case because what happens if, based on the facts as then developed, we go one direction, and then when the case is over, because it didn't resolve because of this issue, what if, if, turns out those weren't the facts that the jury found; and therefore, maybe the rule becomes different?

We get to this question of the order versus opinion. It's really outside the scope of what we're about today on this, but right about the time I joined the court 25 years ago, the chiefs, for statistical reasons, they have to dispose of proceedings by opinions. It's the only way you count at the court of appeals. You may have a judgment or you should have a judgment in addition to the opinion, but it is the

opinion that controls the statistics, and the problem with that is you may label it an order in a rule, but it's going to get disposed of by an opinion.

And I'm sure there was something else I was going to say, but I will close there.

CHAIRMAN BABCOCK: All right. Thanks.

HONORABLE TOM GRAY: In case it wasn't clear, I don't think you need the rule. I don't think this is the place or the way to do it.

CHAIRMAN BABCOCK: Lisa had her hand up a minute ago, but she's since left the room. It will be up -- Tom Riney.

MR. RINEY: I just have a concern about Representative Smithee's bill pending on the same subject. I mean, this is -- an interlocutory appeal is a statutory creature, and if one legislator is interested in amending that statute, I just think it can cause issues if we try to pass a rule on the same topic, regardless of whether our rule is better than what they might do.

CHAIRMAN BABCOCK: Well, I say in response to that that we're not going to pass anything. We're just going to tell the court about what we think, and it's up to the court to -- to pass it or not. And by the time the court gets to it, the Legislature may or

may not have spoken. So I'm not too worried about that myself, but -- so, Lisa, do you still want to say something?

MS. HOBBS: Yeah. Somebody -- there should be -- Chief Justice Gray said that -- I just want to kind of have a dialogue with him.

CHAIRMAN BABCOCK: Take it outside.

MS. HOBBS: No, but I think it's for the benefit of our discussion.

With regard to the word "order" in the proposed draft, as I understood, you basically are saying there's opinions and there's judgments. There's not really orders because of your reporting requirements?

HONORABLE TOM GRAY: Not final disposition orders.

MS. HOBBS: Well, and I guess to pushback just a little bit, mostly out of curiosity, and not because I necessarily disagree with the comments, because that's my experience with most cases at the court of appeals, but even on preliminary motions -- so like you have an order of abatement, or an order, so we know there are some preliminary orders.

HONORABLE TOM GRAY: The -- even now when we do a -- like for bankruptcy, an abatement --

permanent abatement for bankruptcy, it will be classed as an opinion, and there will be a separate order that does it, and remember that the denial of one of these requests is a final disposition and --

MS. HOBBS: So that takes it off your docket; that's what you're saying?

HONORABLE TOM GRAY: Yes, it's gone.

MS. HOBBS: Similar to a motion to dismiss, that's going to be an opinion and -- an opinion and a judgment, not an order. So you think anything that removes it from your docket, it's not an order necessarily. Okay. I understand now. I was trying to clarify.

And then -- so my experience is -- on both sides of this is that the trial courts are not quite as reluctant as the courts of appeals to take this -- take these up, but there's a lot of investing at the trial court level. So I think you reiterated Rich's -- I take Rich's 129 permissive appeals in the last reporting cycle --

MR. PHILLIPS: That was 2016 to 2019. So over three years.

MS. HOBBS: Okay. So it's not a judge -- it's not a court of appeals' judge's docket in a single year. That was a three-year --

MR. PHILLIPS: That's statewide, 2019 to 2022, three years statewide, Lisa, three years.

MS. HOBBS: So it's not a one year -- because you -- when you said that, I was, like, oh, I don't think of things in the aggregate, right, because my actual experience is -- and one of the reasons why I really am advocating for this -- and I'm going to take a different position on the mandamus -- is this is screened very heavily with the trial courts. Trial courts generally don't like their papers graded, and to get permission to have their paper graded, I have found when I'm trying to get it is a labor in lore, and when I'm trying to convince them to resist it, it's not at all hard to get the trial court to resist it.

And so I don't -- I feel like this is a small part of your docket, but I also don't want to discount -- like, I agree with everything every justice -- court of appeals justice has said today. The more you allow permissive appeals and other interlocutory review, the harder y'all's job is and especially in the courts of appeals where they have criminal jurisdiction, too.

So I really respect it, but I find these -- I'm probably doing one or two a year max, and Rich is probably maybe doing a little more because he writes all

the papers about it. So they call Rich before they call me, but if Rich has a conflict, sometimes he calls me. No, I'm just kidding.

But I just find it -- the trial courts don't really like this. I feel like the trial courts are sincerely thinking that -- that's a tough issue, and I don't know -- and I have years of litigation on this, and if I'm wrong, I need a court of appeal to tell me how that I'm wrong, because otherwise we're wasting everybody's time. And I just feel that trial courts are not granting these willy-nilly. And that's a gatekeeper role that is so important, and it's a burden and a hurdle in and of itself to get a trial court to say, yeah, you're right, this will stop three or four years of litigation if you'll just go to the court of appeals, ask the court of appeals to tell me if I'm right or wrong.

CHAIRMAN BABCOCK: Okay. After our morning break, Justice Christopher will be first up and then Judge Evans, but Melinda's new, and we're just beating her into the ground in an hour and 45 minutes of continuous comments. So I can see her sweating over here. So we're going to take our morning break and be back at 11:05. Thank you.

(Recess from 10:46 a.m. to 11:05 a.m.

CHAIRMAN BABCOCK: All right. Let's get back at it.

When we broke, we were on the verge of getting to listen to Justice Christopher, but she is out of the room.

HONORABLE TRACY CHRISTOPHER: No, no, I'm here. I'm here.

CHAIRMAN BABCOCK: There she is. So the wisdom is delayed for just a minute, but now we're on point and would love to hear.

HONORABLE TRACY CHRISTOPHER: I'm not really sure that there is a difference between an order and an opinion with respect to law of the case. That's number one. If someone thinks there is, I'd be interested in seeing that.

And then number two, as a practical matter, if you want to be able to look at my orders, I have to call it an opinion for Westlaw to put it in the books, okay, because if I just call it an order, even if I put "Publish," "Publish," "Publish" at the top of it, they may or may not decide to publish it.

And we have found that to be the case in connection with the motions to review the supersedeas bond. And there is substantive information that we put in our orders on the motion about the supersedeas bond

that we, even as a court, lose track of because it's in Westlaw. I'm, like, I know we did one of these. You know, we have to dig around and dig around and dig around until you find it. So I'm not a hundred percent we should say "ordered" if the idea is that we want something that's going to give guidance, not only in this case but in other cases.

CHAIRMAN BABCOCK: Okay. Judge Evans, you had your hand up before the break.

HONORABLE DAVID EVANS: Well, I'm an early proponent of a trial judge of sending cases up, and I sent them up on permissive appeal and then gradually changed my mind because the workload at the court of appeals --

(Phone ringing.)

HONORABLE DAVID EVANS: Oh, I'm sorry.

CHAIRMAN BABCOCK: That's okay. It happened to mine, too.

HONORABLE DAVID EVANS: It's to remind me not to speak.

CHAIRMAN BABCOCK: Your time is up.

HONORABLE DAVID EVANS: Then because of the workload that's before the court of appeals, it doesn't expedite the case, and then I started using it only in cases where it might -- where a jury trial might be a

two-week trial or have extended time and that a particular decision on the law would impact the charge and how the case was tried. These were usually discrete questions, not totally dispositive of the case, or you'd send the case up on an order granting summary judgment.

And then I can appreciate and do appreciate why the appellants -- the appellants want a decision that sets out the factors, and they need that if they're going to pursue further review. But I was never confused as a trial judge when one was denied because I wasn't reversed, you know, and I figured if it was bad enough to get a comment that the Second Court of Appeals would send me notes of don't do that, you know.

So, as a trial judge, an outright denial isn't possible. I just proceed. That's all I have.

CHAIRMAN BABCOCK: Okay. There are some other hands up, and that would be Pete Schenkkan. Pete.

MR. SCHENKKAN: I wanted to try and make sure I understood what the wording on this rule is intended to do, and if it is, I think it may be that that clarification of what we're trying to do will help us get the words right and not solve these problems in terms of the workload but help ameliorate them.

It seems to me that there are three categories of reasons for denying a permissive appeal.

Category one is the person asking for it did not dot their Is, cross their Ts, hop on their left foot three times, and say, Mother, may I, please, three times. They screwed up procedurally. They need to know about that. Some of the time it's curable. If it's curable, they need to decide am I going to make an effort to cure it. And other times, it's not curable, and they need to know that so they can go on down the road and live their life with the consequences of having made an uncurable remedy.

The second thing is the statutory requirements, a controlling question of law, as to which goes to material grounds for a difference of opinion. I think they're entitled to know you thought and you persuaded the trial judge that X was a controlling question of law estimation, a material ground, and we don't think so. That's why we're not going to take this. That's useful information and shouldn't be that hard to write.

The final one, though, is all you have to do to get your ticket punched on this to get up there in front of the court of appeals is that the trial court agrees with you that it may materially advance the litigation to answer this controlling question of state law as to which there are material grounds for a

difference of opinion, but the court of appeals may say, yeah, it might, but it's not very likely to. It is a lot more likely that this is going to waste a year of our time and another year or two in the Texas Supreme Court, and so we don't think this is a good idea to do this now. And that's why they still may not going to do it. And I think just saying this may not -- we don't think it's going to advance it enough to do it this way ought to be good enough.

CHAIRMAN BABCOCK: Justice Kelly.

HONORABLE PETER KELLY: I just wanted to clarify this concern about application of the law of the case that the Supreme Court has repeatedly stated the law of the case doctrine only applies in cases brought up to the court of last resort which would be the Supreme Court. So, technically speaking, a court of appeal opinion denying this doctrine of appeal or granting it does not become law of the case. It may have some other preclusive or prejudicial effect on the determination of the rest of the litigation, but it's not technically law of the case.

CHAIRMAN BABCOCK: What if it goes to the Supreme Court on a, you know, discretionary writ or a petition and the petition's denied or the writ's denied?

HONORABLE PETER KELLY: That has not been

answered yet.

CHAIRMAN BABCOCK: Rich.

MR. PHILLIPS: Just on Pete's comment, because I think it is important we think about it that way. I like the buckets. I think I might think about them slightly differently.

The materially advance determination standard is part of the statutory standard. So I think there's also another bucket beyond that which is -- and the court wrestled with this a little bit in Industrial Specialists. We talked about it in the subcommittee. We decided not to say anything about it in here.

The statute says, if those standards are met, including materially granted, then the court may grant permission to appeal. So, if you meet the standards, the court can still deny you in its discretion, and we discussed whether or not we should ask the court to explain why they're not exercising their discretion to grant permission, even if the statutory standards are met. We decided not to include that requirement.

So I think there's -- if it's three buckets, I would think about them as all the procedural requirements: get permission, make sure that the trial court actually decides it, all that stuff.

Then the statutory requirements: is this a question of law, is it controlling, is it -- is there a substantial difference of opinion, might it materially advance.

And then the third bucket: Is the court of appeals going to exercise its discretion to permit this appeal that satisfies the statutory standard.

MR. SCHENKKAN: Could I follow up?

CHAIRMAN BABCOCK: Yeah. Sure.

MR. SCHENKKAN: I agree with you that the "may" is, itself, a statutory requirement, and I guess what I'm suggesting is that I'm having -- I'm imagining that if you -- if one were able to -- if you go and actually test your eyeballs over some briefing all 169 cases over a three-year period, that an awful lot of the ones in which the court of appeals did not take the permissive appeal, even though they did not identify a procedural failure or a failure on step one and two, and they did not say there is no controlling question of law here -- they did not say there is a controlling question, but there is no ground of -- material ground upon -- I'm guessing that the vast majority, if not all, of the ones that they still didn't take after not identifying the failure to meet an earlier criterion, was simply they didn't think it was likely enough to

materially advance the case to do it that way.

And that's why I think that first external requirement is the discretionary one, as opposed to the first two are it's either true or false, and we all know as lawyers that's an oversimplification. Some things are closer to truth than others. But the "may" really is much more intrinsically discretionary.

MR. PHILLIPS: I agree, but there's two "mays," and you and I are talking about two different "mays." The "may" materially advance for sure is may, and it may be, although we don't know, but a lot of times that it's being denied is they don't think it will materially advance. There's a different "may."

So the other "may" is if those two things --

THE REPORTER: I'm sorry, can you slow that down, please.

MR. PHILLIPS: Sorry. The controlling question of -- the court found a controlling question of law, if there is one of those, and if it may materially advance, then the court of appeals may grant permission. So it's a completely separate "may." They -- even if they think it may materially advance and they think it's a controlling question of law, the court of appeals under the statute and the way the Supreme Court's read

it in Industrial Specialists, they can still say -- they're talking about discretion not to take this thing, and we did not want to put in there something that requires them to explain that "may."

And I think it may be useful -- I keep saying "may." It may be useful, but they need to, if they think it won't materially advance, to at least say we don't think it will and, again, identify so they don't have to say why they don't think it will, but -- and I think that even will give parties additional information.

One other thing I want to comment on -- I know Lisa wants to jump in, but I want to say this while I'm thinking about it. Chief Justice Christopher talked about opinion, order, and what Westlaw picks up, and Chief Justice Gray and I were talking in the break. These statistics are very, very, very rough and limited, and they're limited by the fact that I can't find them. Right?

If Westlaw hasn't picked it up -- and so we did Westlaw searches. We called clerks. Some of the clerks code this in the system as petition for permission to appeal, but I couldn't find them, but only, like, one of them does that. So finding it was hard even for the clerks.

I was talking to Chief Justice Gray. I said we called the clerks and asked how many of these they've had and if they could tell us which one. And he said even they probably can't find it. So he knows I found one in Waco in three years. He's pretty sure it's two or three. The reason I didn't find it is because it was a one-sentence order that Westlaw didn't pick up and it didn't cite a statute or rule. Just said you've asked for permission to appeal; we deny. I'm never going to find that.

So I hadn't even thought about the idea of an order or opinion extension for whether Westlaw picks it up, but if we're trying to give guidance, we may need to think about how parties are going to find these things when they're issued.

I still think the rule ought to be in 28.3, not 47, even if it is technically an opinion so that Westlaw will pick it up, but I wanted -- I appreciate that insight, and also, I want to make sure as we talk about these statistics that we all understand the limitation of trying to figure out what's going on because it's just a little opaque statistic.

CHAIRMAN BABCOCK: Okay. Lisa, did you have your hand up?

MS. HOBBS: Rich covered most of where we

were confused to those two "mays" in there.

But I do want the record to reflect that the idea may advance the litigation really has to do with the outcome of that appeal. Right? So, if I win, I'm getting a judgment, you know, and the case is over. If I lose, we're still going to trial, right? So that first "may" is not, like, I disagree -- I don't even need to speak for the court of appeals, but the way I read that first "may," this has a chance that we're never going to jury trial. This gets resolved right now by the trial court, and the court of appeal says, no.

It's the second "may" where I totally agree with everything Rich said, which is I think it's -- I think the court of appeals can just say it meets the standard and I'm still not going to agree with that, for whatever reason. It's the second "may" that gives them discretion.

I don't want this record to imply that -- the may materially advance the litigation, it seems like that standard should be the same as the trial court and the court of appeals meaning, depending on how this comes out, it may materially advance this thing. It could make it go away or it could make it go forward, and we're going to be in the same place we are, which is going to a jury trial, whatever. I just, I don't know.

I get very sensitive about these standards, and I just don't want the record to be confused that there are two "mays." Rich is right. And I mean -- and you're right as the court of appeals has a lot of discretion here, but it's in the second "may" that gets the discretion.

CHAIRMAN BABCOCK: Jim, then Harvey.

MR. PERDUE: The language of -- at least the substantive side of the rule is straight out of the federal cite. I mean, it's identical. So what Lisa is just clarifying is the proposed rule change essentially is a ticket to mandamus. That's what you're writing in there. It's under the discretion of the trial court -- I mean, discretion of the appellate court to deny it, is now subject to mandamus because they haven't satisfied this new standard.

MS. HOBBS: Well, the Supreme Court has already said they will review it. So, with that, mandamus is actually going to be review of the denial to permit the appeal.

MR. PERDUE: With now vague language about you have to clarify what your rationale was.

MS. HOBBS: Yeah, because it might be curable or it might not be.

MR. PERDUE: Or it may be in their discretion as Judge Gray said -- Justice Gray said.

It's in their discretion and they made up their mind.

MR. PHILLIPS: And that may be something for the Supreme Court to take up. There's a discussion about the question about discretion is discretion and it's absolute. And that's -- the concurrence said that's it and we're done.

The same words were -- we're not sure that that is the kind of discretion, but that's something that maybe needs to be fleshed out but can't be right now. The courts of appeals are not explaining -- or at least identifying the reasons for denial.

CHAIRMAN BABCOCK: Harvey.

HONORABLE HARVEY BROWN: It seems like to me most of our discussion has been about the policy and whether this is a good idea, and I think at least the Supreme Court has spoken on the statutory issue, as well as the statute meaning, and what it says is the statute means that the three-sentence order is sufficient. I mean, that's one of the points that was brought forward in Industrial Specialists. The majority opinion said they have unfettered discretion to deny it.

MS. HOBBS: Plurality.

HONORABLE HARVEY BROWN: Excuse me, yeah, plurality, and then the concurring opinion, five total said there was absolute discretion. So, if there's

unfettered, absolute discretion and a three-sentence order was sufficient there, it seems like, to me, we're -- at least it would propose a rule certainly be intentioned with that opinion, and we don't normally do that, I don't think.

I'm also concerned that even about an opinion as the Ayala opinion. Even if it doesn't technically have law in the case repercussions, it is a practical matter. Let's say it goes back down with her order, which cites two cases, said, you know, there was no material difference of opinion, there's no substantial ground for difference of opinion. She cites two. I haven't read any of it, but my guess is that the other side either, A, said those aren't mine, they're distinguishable for the following reasons; or said, yeah, but there's these three other cases. This is very short. It doesn't address those arguments.

It goes back down. The trial judge says, well, great, you know, this basically says I was right. New judge comes into office. New judge comes in office and looks at this and says, well, I'm not changing anything; the court of appeals blessed that. So, well it may, technically, not be law of the case. It's going to have the practical effect of law of the case without full briefing, and to me, that's dangerous.

I'm also concerned this will encourage more of these, yes, there's no explanation. There's reasons for why there's no explanations. Justice Gray said they wanted it in summary judgment rulings and lots of other rulings, where we have to advise clients as to why we think the court did what it did without knowing. But I think this will encourage it and create some -- some problems, and there's at least tension with the statutory language. And I know that Justice Gray said perhaps a rule change would make this easier, but perhaps, to me, does not say, yes, it would. And so I just have some concerns about it.

CHAIRMAN BABCOCK: Rich, and then Pete.

MR. PHILLIPS: Yeah. I want to be sure we're clear about what the holding from Industrial Specialists is, the one that got the vote --

CHAIRMAN BABCOCK: The plurality opinion?

MR. PHILLIPS: Well -- so in prove up 16, which is in the plurality, this is holding -- we hold that 51.014(f) permits the Texas courts of appeal to accept permissive interlocutory appeal when the two requirements of section 51.014(d) are met, but it grants the courts discretion to reject the appeal even when requirements are met. That's the thing that got five votes.

The other stuff about absolute discretion, that only got a couple of votes. So I think the rule as we're trying to posit it -- and we did try to take that into account -- I don't think is intentioned with the holding in Industrial Spec. I think the holding is about the fact that the discretion exists and what the court of appeals say about the exercising of their discretion.

The other thing I just want to comment on the law of the case to highlight the issue. I think there's always a risk. If you're going to take something up in an interlocutory appeal, you may get a comment in there that maybe comes back down, and you get a new judge, and you're not going to be able to convince the new judge to do something different. That's something the parties have to take into account in their calculus. I'm not sure that's a reason not to ask the courts of appeals to help the parties understand what's going on with these statutory standards.

And I think where we came down, at least for me and I think the subcommittee would agree, the reason we ultimately decided this narrow rule was probably a good idea is we just need some guidance. The trial courts and the parties need some understanding as to what these standards mean and how they're being

applied so that we can advise our clients whether it makes sense to seek this or, if it gets denied, we can at least understand what's going on.

And anyway, I'll leave it at that.

CHAIRMAN BABCOCK: Pete, then Harvey.

MR. SCHENKKAN: So it seems reasonably clear from Justice Boyd's plurality opinion, which combined concurrence produces the five votes that says --

CHAIRMAN BABCOCK: You've got to speak up, Pete.

MR. SCHENKKAN: Justice Busby's -- Justice Boyd's plurality opinion was key to the five votes for saying there's discretion just to say no at the end, but Boyd says specifically, perhaps we can do this by rule. And I don't think there's any question but what the court -- the Supreme Court of Texas in its job as managing the discretion, the standards for discretion of the intermediate courts of appeal which determine which cases reach the Texas Supreme Court and under what circumstances can exercise its rulemaking discretion to say we need to shift this balance. So they can do it, and they're here asking us for some input on whether to do it and how.

Now, yes, there are two different "mays."

One "may" is the trial court says this may advance the litigation, and the court of appeals can say no, it might -- there's no way this can advance the litigation. That's a possible answer.

I'm suggesting it's possible to say, yeah, it may, but it's not likely enough, and that's why we're not going to do it.

And what I'm trying to understand is, are there any other grounds on which a court of appeals could say no on its may, on which it could say, yeah, you're right, this could materially advance the litigation. It's actually quite likely to do so, and yet nevertheless we say no. I'm kind of thinking that's likely to be error.

MR. PHILLIPS: The statute specifically says they can say no, even if --

MR. SCHENKKAN: But I'm saying if their "no" is because it may but it is not likely enough, that's what I think they mean by their "may."

So I'm trying to understand, is there any other subset of cases in which it is generally possible. It's just very damn unlikely.

CHAIRMAN BABCOCK: So you're saying this second "may" isn't additive of anything? So, if they said no, but your two requirements are met, but I've got

another two things --

MR. SCHENKKAN: I'm saying it's focusing our attention as input to the Chief and the Chief's colleagues, for whatever it's worth, from the rest of us that the question is, do you really want to tell the courts of appeals to say anything other -- after having said you got all the procedure right and, yes, there's a controlling question of law, and, yes, there's a material ground of difference, all that's true, and we still don't want to take it, is there any scenario under which there -- that is anything other than a difference of professional judgment by the three members of the intermediate appellate panel with the trial judge on how likely this is to, in the long run, advance the efficiency of the process?

CHAIRMAN BABCOCK: Can you ask that question a different way? Could you say under what circumstances would there be abuse of the -- of discretion with the second "may?"

MR. SCHENKKAN: Yeah, that -- that's my question and I don't understand --

CHAIRMAN BABCOCK: Well, what's the answer --

MR. SCHENKKAN: -- that seems to be all there is.

CHAIRMAN BABCOCK: Okay. Now, Harvey.

HONORABLE HARVEY BROWN: Well, I mean the three-person plurality opinion says it's unfettered discretion. The concurring opinion of two justices says absolute. That sounds like there is no way to undo that.

But it seems to me that if you can't get three justices -- any one of them -- to write on this, that means it was not interesting to them. They don't think there is either, A, they don't think there's an error or, B, they think the error is pretty small and not likely to be very important, and none of them want to write on it. Then we are going to put judicial resources forward for basically just one purpose, and that is to educate the lawyers who can educate the clients because you're not advancing the case at all because all the judges have agreed this isn't important.

It just seems like to me that's a high cost to advise clients. I agree that it's helpful. I mean, I'd like it in a summary judgment context like I said. I'd like it in an expert context. I'd like it from the Supreme Court. But we don't do that because of extra workload, and it seems like, to me, that benefit does not offset the burden on the courts when no one's interested in it.

I mean, I remember the first time this came to me when we were debating it, and there was a little bit of debate between us that, in the end, all three of us agree, but to then take that and have to write it would have taken a fair amount of resources.

CHAIRMAN BABCOCK: Okay. Lisa and then Richard.

MS. HOBBS: I don't mean to bring up any motion for new trial controversy, but there was -- y'all remember the way that came about. It was, you trial courts need to state the reasons they're going to grant a motion for new trial, and the court said, yes, you need to state the reason, and we went into the specificity of that. And then the next question is, Are we going to review the ground stated? And there are a lot of people who are like, well, didn't you already answer the question, do you want to state your reasons, and so, of course, we're going to review them.

And I actually took the position, no, there are reasons you would require a judge to state the basis of your reasoning because it's individual accountability, right? So, if an appellate court needs to say this is why we're not going to take this, even though they have very broad discretion on whether to do it, it's making you get into your head and not just

because, well, I'm too busy.

There is value in stating the basis for your ruling. I might advocate it in a summary judgment. I'm glad we're not there yet, but I do think that if you could tell the parties you did not -- just identify the specific statutory element that was not met, it really gets judges -- appellate court judges to focus on why do I think this permissive appeal that a trial court allowed to go up and at least one party agrees, then why -- why am I doing -- just identify the specific element.

Going to the three buckets -- and I know there's some disagreement about the three buckets. I don't know that I would say, if you get to that second "may," you need to say, I just don't like these parties or my docket's too busy, I've got too many damn cases, which might be that the concurrence is a valid reason to deny it. But there is a reason to require courts to identify for the parties, but not just for the parties, but for personal accountability.

The statute says you -- you know, this is the standard for a permissive appeal. If you are not going to take it, then at least go through a pro forma order or opinion or whatever to say why you don't think it meets the standard.

CHAIRMAN BABCOCK: Okay. Richard and then Roger.

MR. ORSINGER: Well, I continue to have a concern that putting too much weight on the denial order might have effect -- unintended effect. It clearly would be helpful if the Supreme Court had said that the courts of appeals need to do more than just deny it. They need to do something to explain the reason or identify the reason. But the denial is not the same as the granting of an appeal and writing an opinion that then the Supreme Court then reviews.

So I would feel better if we had a comment that said that an order denying, no matter what it says, no matter how specific it is, is not -- is not law of the case. I would feel better about that because I don't think it should be law of the case, and I don't think it should be considered truly really on the merits for anything other than the purpose of the trial court disposing of the rest of that case.

CHAIRMAN BABCOCK: Roger, then Justice Christopher.

MR. HUGHES: Two points. First, the comparisons of the motion for new trial, it is imperfect, and it was done to protect jury verdicts. And remember, when we -- the way that law developed,

it's like if the judge is going to deny the motion for new trial, they don't have to say anything other than deny. It's when they want to upset the jury system and grant the motion, then they've got to explain themselves and have a valid reason.

And so, if we were going to apply the analogy, if we're going to upset the apple cart and grant the motion, yeah, they maybe ought to explain themselves. But if they're going to deny it, the analogy says they don't have to explain themselves.

But I think it comes down to this: the discretion to grant or deny has been given by the Legislature. That's the ones that decided that they have discretion. And if the Legislature, when they enacted the statute the way they wrote it, intended the court of appeals to have unfettered or, as we say in the Valley, bulletproof discretion, then this whole exercise is just about how many angels could dance on the head of a pin.

If the bottom line is, when we get past the procedural and statutory requirements being all satisfied, I can still say no and there's nothing you can do about it, then -- we have a place for that in the Valley. I don't live there anymore, but we did. It's called snake bit. You're not going to win. You're just

snake bit, and that's the thing.

If we're going to say that they can say, yeah, you satisfied all the requirements, all the Ts are crossed, all the Is are dotted, but we don't have to take it, and there's not a thing that -- and we can't be reversed for doing it, then why are we putting the court of appeal through this drill?

And I'm sorry, the decision as to whether the discretion is bulletproof or not, it's not going to be decided by a rule. It's going to be decided by the statutory construction.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: I have a couple of questions.

First of all, did you figure out how many permissive appeals were filed in the Supreme Court after Sabre Travel and how many they accepted?

MR. PHILLIPS: Didn't look at that.

HONORABLE TRACY CHRISTOPHER: Okay. Well, see, if the Supreme Court said in Sabre Travel, it doesn't matter that the court of appeals didn't rule on it, you just asked us to rule. So won't the Supreme Court have to explain why they're not taking it if we change this rule? Something for the Supreme Court to think about because, you know, I mean, why not?

CHAIRMAN BABCOCK: It's on --

HONORABLE TRACY CHRISTOPHER: That's all I'm saying.

MR. HARDIN: There's seven not represented.

CHAIRMAN BABCOCK: That's right. Justice Gray.

HONORABLE TOM GRAY: The way you can get me on board to agree to this would be if we added this workload, along with sovereign immunity and business court appeals, to the workload of the statewide intermediate appellate court.

CHAIRMAN BABCOCK: Okay. Here we go.

Robert.

MR. LEVY: I was just thinking about the issue that Lisa mentioned the different categories that might be the basis for denial. Could it be as simple as just having a form that the court of appeals fills in when they're denying the motion, just it doesn't meet this, we find it's not -- similar to what your court did, just very simple check box that says this is the basis for the denial?

Speaking as a lawyer and as a client, when your appellate lawyer comes and says we think this is a situation for a permissive appeal, you invest the money. It's not a small amount of money, and then you get a

denial back. You're kind of left wanting, and the cost of that, because you felt that it was worthwhile, but then you're just faced with not knowing.

And so would it be a compromise to do this in a way that simply is checking the box, but at least it gives some information to appellate clients?

CHAIRMAN BABCOCK: Richard, the family law bar is going to be opposed to the form, right?

MR. ORSINGER: You may be past that.

CHAIRMAN BABCOCK: We're rather past that? Well, I think our food is beckoning us, so we need to vote on this.

So we have the language in front of us as mentioned by the subcommittee, and we're going to vote. Those in favor of adding subsection L to Rule 28.3 when petition denied -- if the petition is denied, the court must specifically identify in its order the reasons, if any, that petition did not satisfy the statutory or procedural requirements for a permissive appeal, everybody in favor raise your hand.

MS. HOBBS: You're leaving out identify?

CHAIRMAN BABCOCK: Yeah. Is there somebody behind you, Lisa?

UNIDENTIFIED SPEAKER: Yeah, there is.

MS. HOBBS: Yes, not my vote.

CHAIRMAN BABCOCK: Everybody opposed raise your hand.

Well, the vote is close, but it is the -- vote in favor has 14 and the vote against has 12. So the court will consider that we are almost evenly split but not so split that I would have to vote. The Chair has not.

Judge Wallace.

JUDGE WALLACE: I agree with Justice Gray's comment. I think we need to take out "if any" because you're saying there's got to be a reason in the phrase "if any."

CHAIRMAN BABCOCK: Now, it is to be noted that the Chief is not leaving in anger.

MS. HOBBS: He heard me say that I threw a flag at him.

CHAIRMAN BABCOCK: There is wedding news afoot. The Chief is going to preside over a marriage -- over the lunch hour, and speaking of marriage, Richard Orsinger on Valentine's Day, very romantic, got married to his fiance for I think two or three decades, Joan Jenkins, and so we believe he is in for a round of applause.

(Applause.)

CHAIRMAN BABCOCK: Yeah, Rich.

MR. PHILLIPS: Can we just -- I think I know this, but 28.2, our recommendation the court ought to consider repealing 28.2.

CHAIRMAN BABCOCK: Everybody in favor of repealing 28.2 raise your hand.

MR. PHILLIPS: That is the one that agreed interlocutory appeals, only for cases filed before September 1st, 2011, which there probably shouldn't be any problem.

CHAIRMAN BABCOCK: Anybody opposed to 28.2?

PROFESSOR CARLSON: Are we done?

CHAIRMAN BABCOCK: Do you want to vote against 28.2? So there were 14 votes to repeal 28.2, and there were no votes in favor of retaining it. So that's that.

Lisa.

MS. HOBBS: I just wanted to add --

CHAIRMAN BABCOCK: But you're winning, Lisa.

MS. HOBBS: -- I had a conversation but on the backup conversation, if the court was so inclined, they could say, specifically identify the statutory grounds in the first part of the section, and that would not require a court of appeal to talk about that third bucket that we may have disagreement with what that

third bucket is, but it wouldn't tie it to the statutory language, and I'd just like that for the benefit of the staff who go back and look at the transcript of a way to know that even --

CHAIRMAN BABCOCK: Richard, is this --

MR. ORSINGER: I want to respond to Justice Wallace's comment about "if any" which troubled me, too. But if you take it out, it kind of creates an inference, the only grounds to deny is a failure to meet the statutory requirement. It's possible to meet all the statutory requirements that the court would still not do it, and that's why I think "if any" should stay in.

CHAIRMAN BABCOCK: Okay. So anymore comments, if any?

So let's go to Rule 52, and Rich, I see your handiwork in this, too.

MR. PHILLIPS: Well, I'm on the subcommittee, but I'm not going to take -- I think Pam took the lead on it.

HONORABLE BILL BOYCE: I'll present.

CHAIRMAN BABCOCK: Bill, okay. Where's Pam?

(Simultaneous speaking.)

CHAIRMAN BABCOCK: You went over to the other side.

HONORABLE BILL BOYCE: I'm working for a living.

CHAIRMAN BABCOCK: Okay. Bill.

HONORABLE BILL BOYCE: All right. So we actually touched on this a little bit in our prior discussion. There are two thoughts behind this rule proposal. Number one is to sync up the handling of mandamus petitions with the rules that govern other appellate procedures, such as an appeal on the merits and so forth, and that is to state affirmatively that a denial of petition for writ of mandamus that is based on a curable technical issue, provide the verification, you didn't put the right stuff in the appendix, things of that nature, there should be notice and an opportunity to cure that. So that's part one.

Part two is to be a little more precise about the disposition of the petition through mandamus. The current rules speak in terms of grants and denial. The proposed rule amendment would expressly authorize dismissal, which may be the appropriate disposition, for example, if somebody tries to mandamus a person or an entity who is not among the list of mandamusable people in the statute for that particular court.

So that's the short version. I think Chief Justice Christopher has already expressed a view about

at least the first part of the proposal.

CHAIRMAN BABCOCK: She accused you of going over to the dark side.

All right, Lisa. You're perky today.

MS. HOBBS: Well, you're talking about appellate rules, what I do for a living, and Chief Justice Christopher will be pleased I'm not on the dark side on this.

I agree that mandamuses should be denied without the court of appeals telling us specifically why, and as I was wrestling with why I have such a strong opinion on the court should grant or state the reasons for denying a permissive appeal and equally strong views that they should not have to explain or even give notice and opportunity to cure on the defect on the mandamus petition, my first thought is, like, get consistent. If you're going to advocate for one, advocate for the other. Right?

But I've come around to this. My gut has reasons for taking two different reasons, and one of them is the nature of a mandamus proceeding. This is a rare writ. It is an equitable remedy. So this is not an appeal. It's actually an original proceeding whose basis is inequity and is fair for the court of appeals to say dot your Is or cross your Ts or go away because

it's equitable. Right?

So that was a shallow reason why I could take different positions on this, but really, when it really came down to it, it was, when you have a permissive appeal, you have fought hard as a trial court to get that order granting a permissive appeal. There is a gatekeeper at the trial court to say, sure, you can go up. That's going to, like, delay the trial court proceeding. Yes, it's going to cost people money to go up, but I believe there's -- there is a judicial, nonparty gatekeeper in allowing that to go up.

And mandamus, anybody can go up for any reason and quickly and cause the same delay that a permissive appeal will cause, but with no gatekeeper. And if they want that extraordinary relief, they need to dot their Is and cross their Ts, and I don't think that the court of appeals should have to tell them when they haven't because of the equitable nature and because there isn't anybody being a gatekeeper.

It can really -- you can get a trial halted in a moment just for a mandamus proceeding that doesn't actually comply with the mandamus threshold. It's very frustrating. So, in addition to all the things that have been said about workload and we shouldn't have to do this, I hundred percent agree with that. Makes me

inconsistent with that position, but I agree with all that.

But I just wanted that as to explain why I was in favor of the permissive appeal rule that we just voted on, but I am against giving further work to the court of appeals on mandamus.

CHAIRMAN BABCOCK: Okay. Well, we'll go to Levi and then Bill and then Robert and then Rich.

HONORABLE LEVI BENTON: In all the years I've been licensed to practice law, over the years --

THE REPORTER: I'm sorry, can you speak up, please?

HONORABLE LEVI BENTON: Yes, ma'am. No one's ever said that.

CHAIRMAN BABCOCK: There's always a first time.

HONORABLE LEVI BENTON: There is nothing intensive jurisprudence that offends me more than an intermediate court denying a petition for mandamus and not explaining why and then having the high court take it and say we really wish the intermediate court had done its job. There's nothing more offensive.

And I know I might be having gone to the dark side, but it is -- to the taxpayers of this state, it's like -- I'm sorry, I'm on the record --

(Simultaneous speaking.)

THE REPORTER: You're all talking at once. I can only take one person down.

HONORABLE LEVI BENTON: With all due respect to my dear friend Lisa, there is a gatekeeper on these issues. There is a trial court who has said no, Mr. Hardin, you cannot have that discovery because I didn't really like Mr. Perdue's lawyer. So we've got to fix this mess.

I could go on but I yield back.

CHAIRMAN BABCOCK: Okay. Chief Justice Christopher had her hand up and I missed it, and then Bill and then down the line.

HONORABLE TRACY CHRISTOPHER: So I'm not going to talk about workload, but I'm going to talk about the way this rule is written. And the reason why I'm going to talk about it is there are a few judges on our court that routinely impose this rule in all mandamuses, and if the two of them are on a panel together, then we have to do this rule. If they're split up, then no, and one of them often dissents. So it's quite an ongoing little brouhaha in my particular court.

It has not gained traction in any other court of appeals, and actually, I was looking for this

particular justice's name involved in this, but I didn't see it. So he's probably gotten somebody else to do his dirty work on it.

Okay. Here's my problem with the way it's written. So sometimes you'll get a mandamus and you'll look at it and you'll say adequate remedy by appeal, but it's also defective, right? And if I'm on a panel with these two particular judges, they make the lawyer fix the mandamus before they say denied, which to me is a total waste of time and effort and money. And his thought process is, well, I can't examine the merits of the case until the procedural problems are fixed because maybe that will change my mind when they fix the procedural problem.

So the way this is written does not help me with my dispute with my colleagues. I could say I'm denying this mandamus because adequate remedy by appeal, all right, without mentioning the defect. So the question is, if there are defects, do I always have to do this, or -- because the way it's written, to me, it's confusing.

You know, if we have to do it, we have to do it. We are now doing a checklist on our website for mandamuses -- it's probably up there now -- on what needs to be in a mandamus because of this ongoing

dispute with the court -- within the court on the formal requirements for mandamus which are lengthy and often fail.

My thoughts.

CHAIRMAN BABCOCK: Bill.

HONORABLE BILL BOYCE: So I want to address Chief Justice Christopher's comments in a moment.

I just want to observe what I think is maybe the discussion conflating two different things because I do not perceive this rule to be addressing whether or not courts of appeals have to explain why they are denying a petition for writ of mandamus. I see this as a separate procedural rule, safeguard, whatever you want to call it, providing for notice when there is a procedural defect that will otherwise prevent the mandamus from getting reached perhaps.

So I don't think we're talking about should the courts of appeals explain why they're denying mandamuses. And perhaps the rule can be written more clearly to reflect that.

To Chief Justice Christopher's point, my initial reaction is that if the petition does not -- if the petition brings up an issue for which there is an adequate remedy by appeal, then it is not being denied for formal defects or irregularities, but there's

probably some wordsmithing that can be done to try to --

HONORABLE TRACY CHRISTOPHER: You got me.

HONORABLE BILL BOYCE: I'm here to help -- to try to address the circumstance where it's both substantively not going to get granted and procedurally defective, and you know, that may be an outlying discussion we have.

But I do want to just make a point that I really see this as -- as I put before, syncing up the way that procedural defects are handled in a mandamus proceeding with the way they're handled in other appellate proceedings. And, yeah, mandamuses are different and they're supposed to be special and extraordinary, but you know, the policy of the courts as expressed in rule and expressed in court opinions is, you know, we don't throw out your appeal because there is a tiny glitch in the notice of appeal if we can figure out that you intended to appeal, and that same policy and logic, it seems to me, would be applicable to all forms of appellate mechanisms that are being invoked.

And if we want to be stricter about when you can get mandamus, then we can be stricter about it in terms of the standards that are applied about whether or not it's going to be granted.

But the overall policy of allowing things to be decided more on the merits and less on procedural defaults seems to me to be pretty equally applicable.

CHAIRMAN BABCOCK: Robert.

MR. LEVY: I agree with Justice Boyce's comments, and in response to Lisa, I do think that our courts are providing a customer service, and we need to make sure we take care of our customers. In the rush of time to -- and mandamuses are typically under very stressful situations and submitting a mandamus, and it turns out that the notary public jurat is expired and I don't notice that, but the court of appeals does and says it's not a valid notarization on the verification; therefore, it's denied -- it just seems like that's a gotcha. And there's no reason why we can't address that rather than, you know, just denying the relief that otherwise might have been very well stated, and you would never know. And I think that Justice Boyce is saying we need to get away from those gotchas and try to focus on providing the service.

CHAIRMAN BABCOCK: Okay. Rich, I think you're next.

MR. PHILLIPS: Yeah. Bill covered what I was going to say. This is supposed to be limited to the technical, curable defects, not suggesting the court has

to explain why you're not getting mandamus relief. But if you're going to kick it for something that could be fixed, then let's get with the rest of the rules and give them a chance to fix it before you kick it.

CHAIRMAN BABCOCK: Harvey.

HONORABLE HARVEY BROWN: One problem is that many times that those are technical defects, it's not one gotcha. It's there's three, four, five defects, and then overall the briefing is just poor and makes the appellate justices' job much more difficult. Poor briefing just makes the job harder to figure out what to do and what the cases say and how you want to write an opinion.

So I often saw that blend. There was multiple defects. There was other problems as well. It seems to me that if we had a petition back in the old days and we thought it was good on the merits but it had a technical mistake on the notary, I just feel confident that one of us would have said, you know, this has merit, they got a mistake here, we should advise them. But to say the court has to in every situation when there may be multiple ones just seems like, to me, kind of ties the court's hand more than it needs to.

The court will recognize when it's a really gotcha situation and tell the court -- tell the parties

just that, and let them fix it if there's merit to the case.

CHAIRMAN BABCOCK: Roger.

MR. HUGHES: Well, I'm sympathetic to allowing people to cure technical defects and that that doesn't become the reason for dismissal. What I'm concerned about is the absolute screaming emergency cases where I need to know, where the court's got to decide today, and the usual practice that I've seen almost everywhere is if you come in with a motion for emergency relief with a petition, either you get an order granting the emergency relief at the end of the day or you'll just get a summary order it's being dismissed.

I'm wondering how we build in a protection that the parties -- that the party doesn't end up with a gotcha but on a technicality that they can't get time to fix; that is, maybe the court would like to give them time to fix, but they need to move on to the Supreme Court or have it resolved right away.

So I'm wondering, is that somehow built into the rule or do we just have to hope that the court will entertain the petition and not deny it? What I'm thinking is that perhaps add some sentence that the court would be allowed to put in the order that any

defects are being overlooked or forgiven in the interest of being expeditious to deal with the emergency relief issue.

I leave that where I said it.

CHAIRMAN BABCOCK: Judge Peeples.

HONORABLE DAVID PEEPLES: Speaking for the appellate judges, it would seem to me that if you see a petition for mandamus and you look at it and think I'd like to consider this or it seems to have merit but they didn't touch all the bases, how often -- attorneys do this and how often does it happen, that you'll say deny because of not sworn or -- or whatever it is. In other words, basically, we have precedent and we'd like them to re-file, kind of like Harvey Brown was stating a minute ago. You think you kind of like it and you want to tell them there's a defect, but you're not imposing rules on the appellate courts in every case.

I get that.

CHAIRMAN BABCOCK: All right. Justice Christopher, then Justice Kelly.

HONORABLE TRACY CHRISTOPHER: I think that that is a judgment call that courts will handle differently. So if -- and really, the question at heart is are all the requirements in the rules about mandamus somehow jurisdictional or not, right? Which there's no

case law on that.

So if you have -- you've got a mandamus. You have failed to give me the reporter's record or a statement that there was no reporter's record, right -- that's one of the gotchas that gets people all the time -- but I think your case has merit, I will say, Request a response from the other side, and, oh, by the way you need to tell us whether or not there was a reporter's record.

Some people who think it's jurisdictional will not grant the relief, will not ask for corrections. They'll just deny it.

So, as far as I know, there's no case law on it. Mandamus is a discretionary writ. It has a denial. There's never law of the case. If we start writing on it, it does become law of the case, but a denial is not, and you can absolutely re-file if you screwed up. If we tell you what you screwed up on and you can re-file it, it's just another filing fee.

CHAIRMAN BABCOCK: Justice Kelly.

HONORABLE PETER KELLY: I try to -- try to get my colleagues to do it as well is seems a lot of times depends on the posture of mandamus coming up. One issue would be -- Rogers talked about you have a screaming emergency. It's going up no matter what we

do. We know it's going to go up to the Supreme Court. That might lead to let's just deny that opinion, get it out the door in ten minutes, and let someone else get that.

But there's kind of a more leisurely approach to it. You can order the petition be withdrawn to correct for the lack of, say, reporter's record or request a response, as Justice Christopher was saying, and by the way, petition is defective because it didn't include a particular statement or jurat has expired or something like that.

I think it's incumbent on us as justices to try to reach the merits of the issues and give parties a chance to get the merits of the issues in front of us. So I try to -- and encourage my other panel members doing this -- I'll sign-off on this as long as you tell them why you're doing it and try to limit it sometimes just to even a clause in a sentence to say use the adequate remedy or whatever it was.

CHAIRMAN BABCOCK: Thank you. Thanks, Judge.

What other comments? Any other comments? Yeah, Roger.

MR. HUGHES: Let me clarify. All I'm saying is if we adopt this rule and you get in a

screaming mandamus with emergency relief, section C -- pardon me -- E effectively requires the court to go, so we're not going to rule on your petition until you cure defect A, and we'll give you until Monday to do that. Well, Monday's too late or maybe -- I'm just thinking maybe there will be only some waiver provision where the court can say we're going to deny the petition without referencing any formal defects and just, you know, we're not -- the usual pro forma, you know, failed to establish -- lack of adequate remedy of law and abuse of discretion -- to deal with that rather than saying, well, we can't deny it until we give them a chance to amend.

I think it would be better if they -- saying formal defects, we don't care about them. Even if you cure them, you're not getting anything. They should just be able to rule that and not, so to speak, tie up the workload of the court of appeals trying to fix a mandamus that's never going to fit. That's all.

CHAIRMAN BABCOCK: Yeah, Lisa.

MS. HOBBS: I have a comment on subsection D instead of E, which is what most of the comments have been on so far.

CHAIRMAN BABCOCK: Okay.

MS. HOBBS: The first is just a comment

on -- I mean, the experience I had, I went up to Fort Worth. I tend to be at the Fort Worth appellate bar, and one of the judges from the Fort Worth court and -- yeah, my topic was mandamus, and I was do you have any idea why the Houston court say it's missing things instead of denying things, like, I can't make heads or tails of it. He was, like, oh, that's weird, I have no idea because I'd been granted access. So you remember that, you know, one or the other, right? So it was an entry -- and I was talking with the staff attorney, too, and he was, like, I can't make heads or tails of why this was dismissed or denied. So that was just an interesting conversation.

This goes into my question about D, which is the court may dismiss the petition based on lack of jurisdiction. I understand why that's a dismissal. For want of prosecution, I understand why that's a dismissal. But what does order as required by statute mean that would not be -- you mandamused the wrong person --

HONORABLE BILL BOYCE: And the example would be a vexatious litigant.

MS. HOBBS: Can they review -- can they get mandamus reviewed if they want to re-file a lawsuit in the first place? I think that I can get that by

mandamus, so -- so there's a part of a vexatious litigant -- they were never -- if they're a vexatious litigant, presumably they weren't ever allowed to file anything in the trial court. I don't know what the statute says about vexatious litigants. Either they don't have review of that or the -- I can't think of the statute that gives them mandamus review of that, but maybe I'm wrong.

CHAIRMAN BABCOCK: Judge Evans.

HONORABLE DAVID EVANS: As a response, every judge has responsibility for allowing the filing. A judge exercises its -- and so it's -- it is up to local administrative judge subject to mandamus.

MS. HOBBS: And if -- when it would be dismissed as required by the statute? Wouldn't the court of appeals --

HONORABLE DAVID EVANS: Not my opinion.

MS. HOBBS: I'm just trying to understand the language. I can't think of a situation.

CHAIRMAN BABCOCK: Levi.

HONORABLE LEVI BENTON: Just to help Lisa understand, the declaration of mandamus -- that if from if appealing, okay. But then I come back the next day and I -- against Sullivan, well, I'm not -- I'm not permitted to fight that suit, and that's where -- so it

shouldn't be a mandamus on the AJ's order saying I can't file that suit.

HONORABLE DAVID EVANS: Well, I think the LAJ has to have -- has to be standards to follow on whether or not to allow the --

HONORABLE LEVI BENTON: Yesterday, you declared me that --

HONORABLE DAVID EVANS: It's -- vexatious litigant orders are always based on a particular suit, the case of a different party. That may not fall under the prior order.

MS. HOBBS: But either way, I don't understand where there's a statute that would require dismissal of that mandamus procedure, assuming that there's a finding there.

HONORABLE PETER KELLY: There is one vexatious litigant in the Houston area and files all these suits pro se, filing orders as a vexatious litigant, remember it's simply saying he can't file unless an attorney has signed off on it. Hire an attorney to sign off on the petition and then you file the pro se mandamus and it has not been signed off on. So, under the terms of the statute and order, he's now violated the order. He started off fine, because he paid the lawyer to sign-off on the petition, but now

they're coming to our court pro se, he's violated it and gets dismissed under the terms.

MS. HOBBS: Why is it dismissed under the terms of the order instead of just denied? Because it's --

HONORABLE PETER KELLY: I don't recall exactly.

MS. HOBBS: Okay. It's the dismissal versus deny that is -- it just struck me as I don't know what you mean, and I've been doing this a long time. I'm definitely open to areas that I don't know, especially these are --

HONORABLE PETER KELLY: Chief Justice Christopher's court is more interesting than mine. Sometimes there is some debate about re-file versus dismissal, and I think we sort of looked at it as ultimately a distinction without a difference for the ultimate resolution of the dispute. With regard to one particular issue of vexatious litigant, I think that's what we're talking about.

CHAIRMAN BABCOCK: Rich.

MR. PHILLIPS: I think it's not appealing the vexatious litigant determination. It's just talking about somebody who has been declared one is not allowed to file something without an order, or whatever the

terms of that order are. So they file that mandamus petition, and that's in violation of being a vexatious litigant. You don't get to the merits. You don't deny it. You just -- it's dismissed because they violated the statute on filing.

CHAIRMAN BABCOCK: Roger, and then Justice Gray.

MR. HUGHES: One thing I want to speak in favor of section D. I think it is helpful if there is a problem with jurisdiction, et cetera, that the court should -- the rule states may dismiss for that. I've had cases where people call me about why did my mandamus petition get dismissed. Well, what does the order say? Well, one court was actually nice enough to tell somebody lack of jurisdiction. Oh, you should have filed in the Fourth Court instead of the 13th Court. And of course, that's very helpful to have that information. I don't think that there's a real jurisdictional issue. Being able to just say that could be very helpful to the litigant and the counsel.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: Well, first, I apologize for Pam -- to Pam because I had promised her that I was not going to speak on the subject. So, if she reads this in the record, she will know that I

apologized in advance.

CHAIRMAN BABCOCK: Will she forgive you?

HONORABLE TOM GRAY: She may not forgive me but, you know, it's --

MR. WOOTEN: I'm pretty sure she wouldn't hold you to that. Now, Judge Christopher --

HONORABLE TRACY CHRISTOPHER: Not reasonably reliant.

HONORABLE TOM GRAY: But what I rise to speak about is vexatious and pre-filing orders are different. So a pre-filing order can be rendered because of it being vexatious, but they are not mutually exclusive. So that's kind of a gnat in this general conversation.

But the specific that I had mentioned to Pam about why this extension needed to be there is because we see litigants that have pre-filing order requirements slip by the clerk and get something filed, and then the statute requires that the clerk dismiss it -- dismisses it when it is brought to their attention. That is the specific example that caused that phrase to be included, and as I said to Pam, I am sure there are others. I just can't think of them right off the cuff as we speak.

Since I've already violated my promise --

CHAIRMAN BABCOCK: Keep going.

HONORABLE TOM GRAY: Thank you. I wanted to address Roger's comment about this problem of the need for emergency. We routinely, and I do mean routinely, use Rule 2 to lift all or suspend -- in the language of the rule -- to suspend the procedural requirements of the mandamus filing so that we can get to the merits thereof and summarily deny it or, on the occasion where we think there may be something there that needs to be addressed, we will use it to lift the procedural requirement and request a response. And we put that Rule 2 language usually in a footnote right on the front of the opinion or front of the order, so...

CHAIRMAN BABCOCK: Cutting edge stuff.

HONORABLE TOM GRAY: Hey, look.

CHAIRMAN BABCOCK: All right. Are there anymore comments on the proposed rule? I smell lunch and so I know everybody's itching to vote.

So everybody that's in favor of adding subsection D and E to Rule 52.8 raise your hand. All right. Everybody opposed raise your hand.

All right. By a vote of 16 to 9, the people in favor prevail over the people opposed, and that means we can have lunch.

We'll be back at 1:25 p.m.

(Recess from 12:21 p.m. to 1:25 p.m.)

CHAIRMAN BABCOCK: All right, guys. Let's get going.

Just before lunch, the Chief got a letter that is very sad news for all of us, and I'll let him inform us what happened.

HONORABLE NATHAN HECHT: So I said earlier we're missing Justice Miskel now today, but I had noticed we were missing another. And it's my sad duty to tell you that our good friend and colleague for many years Richard Munzinger passed from this life on Sunday. I should have noticed his absence right way because how could you not miss Richard, and he would have loved to debate this morning and had several things to say and would have said them as fervently as he could, as he always did. He was a great lawyer. He was faithful in attending many of the meetings. He did tell me a couple of times that it was hard to get here from El Paso. It really added an extra day on to his meeting time, but he was always here, always prepared, always insightful, and well respected in El Paso at the time. So we will miss Richard.

CHAIRMAN BABCOCK: That is for sure. He was certainly one of my favorite people on this committee, and he used to sit right over there next to

where Elaine is.

HONORABLE ROBERT SCHAFFER: I was just told I'm sitting in his chair.

CHAIRMAN BABCOCK: That's it, may be his chair, but he had way of expressing himself, and it was with such passion and -- and he evoked our Constitution, both state and federal, in such eloquent ways and I think made us all think about lots of things but -- and I'll miss him, and so let's have a moment of silence.

(Moment of silence.)

CHAIRMAN BABCOCK: Okay. Thanks. So now we will get back to important, but more mundane, things in light of that news, Rule 226a. Tom Riney is going to lead us through that.

MR. RINEY: Thank you, Chip. We were asked to address an issue regarding an instruction on implicit bias in Rule 226a, and I'd like to give you a little background of where we've been up until this point, and then tell you we're going to punt. We would like to ask a little guidance on what you think our future direction should be.

The court Rules Committee, that is, the State Bar Court Rules Committee, sometimes referred to in here as the CRC, sent a proposal for an implicit bias instruction to this committee, and we debated that at

our meeting on September 3rd of 2021.

Now, our subcommittee had reviewed it in advance, and we recommended adoption of the language as proposed by the court Rules Committee at that time. There was a lot of discussion -- I want to hit some highlights of that in just a moment -- but we did not take a vote as a committee. However, the court Rules Committee apparently looked at the transcript of our discussion on the subject and sent a revised proposal back, presumably to address some of the issues that were raised.

However, that did not get to our subcommittee until last week. We did go ahead and schedule a call yesterday morning, and after about a 45-minute discussion of some of the specifics of the proposed changes that they had sent to us, we decided as a subcommittee that we were going to say that we weren't ready to make any recommendations going forward and thought that the issue merited some more study.

Let me go back to some of the issues that were raised in September of 2021. Several people raised the question about whether or not the instruction was actually helpful, did it really do much good, that there was certainly a worthy purpose behind it, but they questioned whether it really did much good.

There was also a question about when the instruction should be given. In the 2021 version, the instruction or a version of it were to be given twice, and that is, once the jury was in the box or -- I think it's actually part two if you look at the rule -- and also in the court's Charge. The revised proposal -- and by the way, you do not have the 2021 language, I don't think, in the materials that were presented to you, and the reason that I mention that is that I think at least some of us on the committee actually kind of liked the previous language better than the current language, at least in some respects, which I'll address here in just a moment.

But -- and before I go any further on that, the majority of the subcommittee yesterday decided that there should not be an instruction prior to voir dire of the jury, and the idea was that that may infringe, to some degree, upon the lawyer's ability to make a determination about bias or prejudice and that that was simply not an appropriate time to do so.

Now, let me get to some of the other parts of the instruction. In your proposal -- and candidly, had we had a little bit more time -- and again, I'm not blaming anybody -- but had we had a little bit more time, I probably would have put together a document that

showed the current rule, the 2021 language, and the 2023 language just for comparison purposes, but if you'll turn to -- and the pages are not marked -- but if you'll turn to instruction in part two of the proposed amended rule there is a paragraph 5 in red-line, and I just want to point out a couple of issues that came up during our discussion yesterday.

It says, Our system of justice depends on judges like me and people like you making careful, fair, and unbiased decisions. And then you'll see a couple of sentences down it talks about, we categorize people, and sometimes these categorizations involve negative or positive biases or prejudices, which may be conscious or unconscious. Such preferences or biases, whether or not they are conscious or unconscious, should be discussed now.

So, first of all, you're talking about biases and prejudices in one sentence, and the next sentence you talk about preferences or biases. So that's one of the reasons we kind of like the previous language. This was actually the voir dire instruction. It said should be discussed now and weren't sure that was particularly helpful language, not sure what it meant.

So let's go over on to a couple of pages to

the -- you'll see a paragraph eight in red-line. These would have been the instructions when the jury was in the box. First of all, you see the switch from biases or prejudices in one sentence to preference in the next. Then you'll see a paragraph that says techniques that you can use as jurors.

Now, I want to break that down because we didn't really like this paragraph that says our system of justice as well as we liked the previous version. We thought this had the problems that I mentioned, plus it was just a little bit too wordy. However, there's the general consensus on the subcommittee that this paragraph about techniques that you can use to check whether there are unconscious biases, we thought that was pretty good. Although there was some discussion about eliminating the final sentence of which dealt about parties, witnesses, or attorneys that had different personal characteristics, we weren't quite sure exactly what that meant.

By the way, I will mention that Buddy Lowe mentioned in our discussion in 2021 that we had to be careful about criticizing all prejudices and biases because he said, what about if someone has a prejudice against witnesses that had shifty eyes or witnesses that looked down at their shoes when they're answering a

question, that's a prejudice, but it may not be something that's inappropriate. So, again, those are just some of the comments that we thought about.

Finally, the instruction in the jury charge had some of the same language, and it's -- that's actually over -- yeah, it's in paragraph 2, and it follows the traditional instruction of do not let bias, prejudice, or sympathy play any part in your decision. Again, some of the language we liked, some we didn't, and when we got to that, that's about the point we said, you know, this is pretty complicated. We still had questions about whether this language is really going to serve a purpose or if it is effective in serving the purpose that we hope.

Since we finished that call yesterday morning, I've got a half a dozen emails from members of the subcommittee, including during the meeting today, talking about different resources that we could probably look at -- John Kim also had some helpful suggestions -- to learn a little bit more about implicit bias. And one of the questions is, if you're not conscious that you have a bias, how can we instruct you how to deal with something you don't recognize. That's what these attempt to do.

So, with all of that, Chip, we would like

to at least go back and be able to compare the different versions of the language, and then -- I mean, you tell us how far you want us to go. I mean, we have no sociologist on the subcommittee, and so we recognize our limitations. But there is -- if you would like for us to do so, we can look at some of these other issues.

CHAIRMAN BABCOCK: That's good. I think I better open it up for comments, but I've got to tell one quick story. One of the best answers I've heard in a deposition, the lawyer on the other side had been trying to get the witness to say that they had said something in his conversation. The witness said, I don't remember that. I don't think I said that and about the fifth or sixth time, and finally, the lawyer said, well, are you in denial about saying this, and the witness said, well, if I was in denial, how would I know?

Same problem. Clever answer, I thought. So we will take comments about this whole thing.

Judge Peeples.

HONORABLE DAVID PEEPLES: As a member of the subcommittee, I'd like to just give some overview and background, sort of a bird's-eye view of this.

And the first thing is, these are four different things that judges tell jurors during a jury

trial. Roman I is what we tell the panel or the venire when they come in the first time. And the second thing is what you tell the 12 when they've been chosen and have been sworn in and they sit in the jury box. And Roman III is what we tell them in the Charge of the court. Number IV is what we tell them when we say good-bye, thank you for your service. So, if you think of it in those four categories, it helps sort things out.

Now, as we sit here today, the only reference to bias, prejudice, or sympathy is in the third group, the Charge -- the instructions in the Charge. And the first numbered instruction says, Do not let bias, prejudice, or sympathy play any part in your decision. It used to say in your deliberations. But that's what is said now.

And the proposal from the sub bar committee is to have more -- to say more about that and to say it in three different places: to say it in the first part to the jury panel, the venire; to say it again to the jury that's been chosen, the 12; and then say it a third time in the Charge of the court. And then what they propose is not the same identical language every time. It's sort of different.

And so what we need some guidance on as a

subcommittee is where to go on this, and I've divided it into two things: placement and content. Now, the placement question is, do we keep it in where it is now, the bias, prejudice, and sympathy instruction, which is in the Charge to the jury and elaborate on it? Do we keep it there alone or do we also say something in Roman I and Roman II, which is the venire, you know, the 30, 40, 50 people, whatever the number is, 60, and then again to the 12 and then again in the Charge? Do we say it in all three of those times or maybe two of them or only one?

And then the second question, aside from placement, is the content, and some of these things are very, very different. They talk about -- they go all the way to gender identity and sometimes these proposals, things like that, and sometimes it doesn't. And so the wording and the content is something we need guidance on, too.

So it seems to me placement and content, defined that way, that makes sense to me, Tom.

MR. RINEY: I agree.

HONORABLE DAVID PEEPLES: Okay. That's just a bird's-eye view.

CHAIRMAN BABCOCK: Bird's-eye view. You've been a judge for a long, long time. Do you think that

jurors sometimes ignore those -- that instruction: do not let bias, prejudice, or sympathy play any part or all of the time or mostly or --

HONORABLE DAVID PEEPLES: I'm sure some who do some of the time. I think it makes a difference to have that language in the Charge, and it's going to be in the Charge, and so I heard -- and I know the lawyers and judges have, too -- lawyers when they're voir diring the jury and when they're talking to the 12 will frequently and sometimes -- almost all the time will say, now, the judge is going to instruct you, do not let bias, prejudice, or sympathy play any part in your deliberations. So we'll talk about it during the case, and I think that does some good with jurors. Totally good with everybody, obviously not.

CHAIRMAN BABCOCK: All right. So do you think that, if you said it more often from the bench, that would be a good thing or a bad thing?

HONORABLE DAVID PEEPLES: Chip, I come down on the side of saying it where we say it right now in the Charge and trusting the lawyers to mention it as they see fit for the case during voir dire, when they make opening statements to the 12, and then when they sum up after the evidence is finished. To me, I come down on saying it and saying it well and not too much

detail in the same place where we say it right now and then letting the lawyers decide how to try the case.

CHAIRMAN BABCOCK: How do you feel about unconscious bias? Do you think that if it's good to alert jurors that there may be biases they have that they don't recognize but they should?

HONORABLE DAVID PEEPLES: I don't know the answer to that, but I can tell you that the Texas Senate and Judiciary puts on a conference for new judges in December of every year. And I've been there four or five or six times, and I've heard the same one-hour lecture four, five, six times by a professor from Connecticut on implicit bias. And they're trying to tell judges what it means, and I'm still working on it.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: So, Chip, I've been thinking a lot about that, this whole topic, and even more dangerous than that I've been doing some research on it, and I think I might have found your professor from Connecticut, James Colquitt [Phonetic] who was --

HONORABLE DAVID PEEPLES: No, Wetsinkski [Phonetic] or something like that.

MR. ORSINGER: Oh. Well -- and I've also been talking to some of the juror selection experts, those who do focus groups in jury selection, and so I

want to start by borrowing from the medical profession the beginning of the Hippocratic Oath: First, do no harm. Okay?

Now, that's their first principle, and it should be our first principle when we're deciding we're going to change things up, and I'll quote from an article here that was from the National Center for State Courts, 2014, written by a Jennifer Elek and Paula Hannaford-Agor, and I will quote them: "To prevent distribution and implementation of jury instructions that may do more harm than good, any instruction of this kind must be carefully evaluated."

Now, one of the things to consider about instructing the jury is what the social scientists called the backfire effect, which is that you may actually make a situation worse with some people, even if you make it better with others.

Another thing to consider is the social desirability effect, meaning that once someone in authority lays down a standard by which the people are expected to respond, they're going to want to respond in a way that makes it look like they're cooperative, that they're socially resound and they're fitting in.

So, if you lead too early and too strongly about not being biased, first of all, you may have a

backfire effect by some people that I'm inclined to my views, but secondly, more prevalent, is that you may actually motivate people to be afraid to say that they have a bias.

And so my question is, is it the fix for implicit bias, which is a bias that jurors or venirepeople are not even aware they have, is the fix for that to say search within yourself to find your biases and don't let them affect what you're doing? Or is the better approach is to structure the voir dire process in such a way that the lawyers and the judges can actually detect the implicit biases in venireperson responses.

The juror selection people that I've talked to are very much against any instruction that would cause any jurors to be less revealing in their voir dire. So that, if before the voir dire, you tell them we all have biases but you're not supposed to allow the biases to be expressed here in this case, you're never going to have anybody or -- you'll have fewer people who will raise their hands and say, yeah, I'm biased because of this and that and the other.

So we have to worry about, in my opinion, especially with the social desirability effect of dampening the willingness of jurors to admit they have a

bias.

Now, the structured voir dire could make a big difference. According to the research, many states, as well as the federal courts, don't have much lawyer participation in the voir dire. Texas doesn't have that problem because our judges allow the lawyers to participate in the voir dire, but from reading the literature, it appears as if the lawyers and the judges are all interactive in encouraging jurors to express their feelings without telling them in advance certain feelings are bad, then you're more likely to find out who has an implicit bias, and the judge can have a better foundation for challenge for cause. And in the literature, by the way, they don't like leading questions because you're suggesting to the venireperson what the correct answer is, and they'll likely go along with you.

So when the judges -- and in my experience a lot of them in voir dire -- some of them will be up there in front of the bench on a challenge for cause saying they have a bias or a prejudice, and the judge will say, If I instruct you on the law, you'll agree to be governed by my instruction of the law, won't you, and you'll decide based on the evidence. Well, now all of the sudden, the judge who's the central authority is

telling them the right answer is for you to say, yes, even though I have this bias, I will -- I will follow your instruction on the law and I will make a decision based on the evidence. Now, is that true or are they just buckling under pressure from the judge?

So we need to be very sensitive that the judges are not grinding the biases in the ground before the lawyers find out. And my view is, the best cure to implicit bias, which admittedly these people don't even know they have, is not to tell them don't have what you don't know you have. That's ineffective. What is effective is to say be open about the way you feel about things.

Now, a lot of the research that I saw -- and all of this data is pre-COVID -- was based on racial bias, and that was perhaps one of the most pernicious problems with the justice system for many back then, but it's also very -- too valued. It's very black and white, not to make a joke of it, and so it's easier to test. It's easier to see what the choices are that you're presenting.

But in civil litigation, it's not so much race related, and in one of the papers I have here, which I won't put in the record but I can share with you later, they found out that the predominantly White

panels they were testing were more sympathetic to an African American defense than they were a White person's defense. They were more sympathetic to the Black defendant, which is contrary to what you would think, but that's what that study showed. But the point is, is that racial bias is not really a big deal in my world on the civil side.

What we have and what the literature shows is that there's bias against tobacco companies. There's bias against asbestos manufacturers. There's even bias against HMOs. There's bias against corporate management. There's bias against corporations. Generally, there's bias against complaints of soft tissue injuries in the neck. There are a lot of biases that don't relate to what this rule talks about: race, color, natural origination, ancestry, religion, creed, age, disability, sex, gender. Those are all personal qualities that don't apply to a corporation or to the government or to a group of people that might be of mixed whatever.

So I think that I'm questioning the validity of the whole idea that, by telling these people that they have biases that they don't realize, then they should not allow them to influence their thinking when they don't even really know what their biases are. And

people may say, oh, well, I don't have a bias based on race, color, national origin, or ancestry. That's not the bias we're really struggling with in civil litigation in my estimation.

So a better cure I think, as I said dangerously having thought about it, is that, number one, we need to be sure we have good lawyer participation and that we give the lawyers the opportunity to detect the implicit bias by the unconscious answers that the venirepeople are giving you about what they truly think, and let the lawyers decide if that's going to be pursued to a challenge for cause or whether that's going to be the basis for a peremptory strike.

So anything we can do to encourage open answers will help the lawyers be the ones that decide where the implicit bias is and what to do with it rather than just telling people, Don't have an implicit bias.

The next question is: Well, what about juror privacy? Now, you know, there is a privacy question of, well, I've been brought here against my will and now you want to find out if anybody in my family has been a victim of a violent crime. Well, that's private information. That's not for you to know. There's reasons why we do want to know. The privacy

consideration is more than just a sense of invasion is people are less likely to be revealing about their own deep feelings in a group.

And so there's some writers that advocate juror questionnaires as a way to determine whether venirepeople have implicit biases, and of course, we don't ask them, please list your implicit biases. We don't do that. You ask them kind of general questions and then you get their answers and you can infer that they have an implicit bias.

And so some of the questions were, well, should we send a questionnaire out before you even bring them down to the jury room and exclude the ones electronically that, you know, express a bias that wouldn't be fair for the kind of case we've got.

Then you've got when they show up and they fill out a questionnaire, like in Bexar County, for example, just have a little small information card that tells you what religion you claim, your marital status, whether you've been a plaintiff or a defendant, whether you've been on a jury before. That's a questionnaire of sorts. It's not much, but it is -- but then there are more elaborate questionnaires.

But that's not very practical in my community because we have random assignment of the judge

for the trial on the Friday before the trial, and Austin does, too. Travis County does, too. So we're not going to be able to get questionnaires, you know, by the judge -- I mean, the judges are not -- I've never tried to get a questionnaire from a Bexar County judge, but they're trying to get the jury impanelled and get the case tried in a week, and the idea to then show up and try to convince them about questionnaires, you're in trouble. But if the lawyers can get together or, again, if there was even some kind of jury charge that came out with questionnaires that were well targeted against the kind of implicit biases that we face in civil litigation, that might be a useful tool.

And then another thing from the literature is to ask prior open-ended questions, not leading questions, because you don't want to lead the venireperson into what the right answer is. You want to find out what they really think.

So, having said all that, the social desirability effect, to me, is the biggest risk of instructing the jury about implicit bias before the voir dire, and of course, you want them to be truthful in the voir dire, but you also want them to be open in the voir dire. So, if you're going to have an instruction on implicit bias, which I question whether there's any

science at all that says it helps, it shouldn't be before voir dire.

The instruction before voir dire ought to be along the lines of the jurors -- I mean, the lawyers are going to ask you questions -- they're personal -- about your feelings about things, but understand we need to do this in order to pick a jury for a fair trial, and urge them to be open about the way they feel so when the lawyers ask their questions, if they ask about the defendant, that's ask one set of questions, and if they are an HMO, that's another set of questions. If they represent a godless corporation, that's another set of questions. Or a plaintiff that has a neck injury, that's another set of questions.

We need to let the lawyers decide what the set of questions is, what the implicit biases are that they're after. And so I think I understand that this is a worthy goal to try to ensure that people are made aware of their implicit biases. Some people are in therapy for decades in order to work through that kind of thing, and I don't think we're going to cure it with one or two or three instructions that say don't be implicitly biased.

While I don't see much harm from doing this later in the process, I can see a lot of harm in doing

it so early in the process that the lawyers and the judges can't effectively detect implicit bias.

Well, I told you it was a danger but I just got real interested, and so I read the literature.

CHAIRMAN BABCOCK: Read a lot. I'm just worried about your therapy, but Tom.

MR. RINEY: Richard, to your list of groups of may suffer from prejudice, I think you can safely add nursing homes and lawyers. So certainly that is a point.

But I really wanted to mention something that Hayes Fuller mentioned at dinner last night. When we were talking about this, he pointed out that since the last time we discussed this we had Dr. Phil here, and he said based on what Dr. Phil said, some people could perceive these instructions as basically an offensive-type accusation against them and they would dig their heels in even deeper. That's why I have some trepidation about our committee being able to successfully determine what's appropriate, but we're happy to try.

MR. ORSINGER: I could say Justice Grayson did back in 2006, when he was here, Justice Grayson did a survey at the request of the State Bar about the effectiveness of our pattern jury charges, and I have a

copy of it right here. And he had even some stuff about bias and prejudice in that, how meaningful that was. I don't know if he was paid for this. He may have been, I assume, but it was a State Bar of Texas commission to field test these jury charges.

Maybe what we ought to do if and when we decide we want to make an instruction on implicit bias, maybe we ought to contact Jason or someone like him, and say that these are our choices, would you field test and see whether this is hurting or helping or not making any difference.

CHAIRMAN BABCOCK: Good idea. Justice Christopher, and then we'll go around.

HONORABLE TRACY CHRISTOPHER: Well, I actually think we should talk about bias or prejudice in number I, before voir dire, and we actually do talk about it because we say, being thorough and trying to choose fair jurors who do not have any bias and prejudice in this particular case, and that's the spot of number IV and number I.

That's the spot where a lot of judges will give examples, all right. So they will say, you know, this is a nursing home case, you know, and you might have jurors that had a bad experience in a nursing home and maybe that makes you biased against nursing homes.

And you talk about it in connection with the case. So I do actually think it's good to have it there. I'm not sure I like the particular wording that is in the proposed rule. But I do understand what Richard is saying about being careful how you say it. Right?

I think, though, what we're trying to get at with implicit bias is not a bias against nursing homes. It's a bias against race, sex, gender. Right? So it's socially acceptable for a juror to say, you know, I don't really like nursing homes, okay, and people can explore that issue in voir dire. It's not socially acceptable for someone to say I don't like Black people. All right? So that is where you are going to have the unconscious bias/bias problem. Right?

When I was a trial judge and the plaintiff was African American, you know, the words I would always say, okay, anybody got a prejudice against my client because he's African American. Well, of course, no one was going to answer yes to that question because it's not socially acceptable to say that, even if you feel it. Even if it's conscious or unconscious, you're not going to say that.

The best question I ever heard in that kind of a case was: Has anyone here been accused by anyone else of being biased against Black people? And then

you'll find all sorts of interesting situations where, you know, somebody else who works with them has said, oh, you're just prejudice, or maybe somebody's actually filed a complaint against somebody. And they'll get to say about how I'm not prejudiced but you know this person over here thought I was. And that gives you useful information to make your strike on that particular person.

So I think we have to -- and also as a judge, you would rehabilitate someone who said I don't like corporations. Right? You would try to rehabilitate that person. But you would not try to rehabilitate someone who said, I don't like Black people. You know, I mean, like -- you know, people have said, I don't believe anything that he said. Right? So you don't try to rehabilitate that person, but you might with respect to corporations.

So I think we have to really figure out what -- what we're talking about here, and my understanding of these instructions is race, religion, sex, sexual orientation, that people feel like they can't say.

CHAIRMAN BABCOCK: Yes, Judge.

HONORABLE MARIA SALAS MENDOZA: So I support the idea that we need more work. We need to get

some experts maybe and get some more information, but I think the information should be in all the places. Like Justice Christopher said, we say up front that the lawyers are trying to find jurors who are going to be fair and unbiased. We say that up front, and that's where I use the time to give an example.

I've been talking about implicit bias for a while now. I spoke last year at the State Bar with Judge Sandill and Judge Evans, both from Houston, on implicit bias in jury selection and -- and gave various examples, and Judge Sandill talked about how he won't -- he shouldn't be saying you guys because that would cut out 50 percent of the audience. I disagree. I've talked to people in El Paso about that, but it's one example of how we can get jurors to think about things that they're not thinking about.

Implicit bias is a very difficult concept. I agree with you that it's hard to do this in the right way, and I think that the reason that it's hard is because the assumption is, it is just about race, gender, and all the things that are hard. When I talk about implicit bias, I tell them we're generally not talking about illegals for discrimination, but if that's an issue in this case, the lawyers will talk to you about it because I think the important job for the judge

is to open the door so that the lawyers can talk about it in a meaningful way. But race discrimination, when you have a Black defendant, is as important in that case as bias against a nursing home in a case that involves a nursing home.

I mean, the issues are equally important, but I think that the implicit bias opens the door for jurors to consider their bias, and I tell jurors when I'm done, so everyone has bias, a leading question, and they all agree because I say I have bias, they all have bias, and then it lets them talk to the lawyers when they're asking them the questions about how they might be having a unique approach.

What I see more in my community, because it's not very diverse, is bias about socioeconomic status, about education. There's all kinds of things that lawyers want to learn about. I think it's very important that we talk about implicit bias, and I think the more we talk about it, the more it's understood. They'll come back and say, oh, I didn't realize I have implicit bias. I'm going to say it now, but it's not a cure. We don't cure implicit bias.

The only thing that when the judge says it and when we do it often and when the language is better -- I don't like the language -- but it does give

people an opportunity to recognize it and to talk about all the other things which we are not -- I think we'd be wrong to think that implicit bias is just about those areas that are about illegal discrimination. It's not just that. It's all the ways and all of the experiences that jurors bring to their service, and I tell them it's an important experience. We're not asking you to leave that outside the door. We just want to know about it, you know, to tell the lawyers about it.

I know we also tell them if they stay quiet they're going to get one of the good seats in the jury box. I know we -- and that language could be better, but I'm having it -- in favor of having it in all the areas but working on the language.

CHAIRMAN BABCOCK: Great. Thanks, judge. Al.

MR. YORK: I'm Alan York. I'm not a voting member, but I'm the CRC liaison today. I agree with everything that you just said, and that was part of the CRC's discussion, which we've had in-depth discussions on this.

Richard, to your point, there was a considered decision for us not in the instructions to the venire to call up prejudices or biases as being bad but instead to mention them and encourage discussion of

them at that time. All right? So, while the language might need to be refined, that really was our studied goal there was to open the door to the conversation so that those then could at least be discussed at that point.

With regards to law -- and you'll notice as we go through, we went short, long, short. We did three places. We agreed, again, it was worthy of comment in all these three places and not as an attempt to cure implicit bias because it's not, but because more -- the more implicit bias becomes conscious, the easier it is for jurors to deal with it.

The listing in this -- in the longer version, which is the instructions to the seated panel, does go into very specific comments about specific types of implicit bias including gender, sexual orientation, gender identity, and things like that.

We believe that it was important to say those things, and any further discussion that is had of this -- again, I think it's a great thing to have these discussions and to try to come up with better language, but I would encourage everyone who is talking about this to think about it not only from a traditional standpoint but also from the viewpoint of people who often have felt left out of the justice system, who have been

shortchanged by the justice system, who are many of the categories that are named in that specific longer instruction.

It's important when we have people come into our justice system that they see themselves represented, that they hear their concerns being voiced, and that's one of the purposes of having that named in that longer instruction.

And so, as this subcommittee continues the discussion, I would encourage you to use as a resource -- I know there are others -- Judge Tonya Parker who had a significant involvement in crafting this language. She's passionate about this project, and the CRC, like I say, I just want to make sure you understand many of the conversations that are happening today have already happened at the CRC level and are reflected in the language we requested.

CHAIRMAN BABCOCK: Judge Wallace, I'm sorry.

HONORABLE R.H. WALLACE: Yeah, I agree, implicit bias doesn't allow lawyers and corporations, -- people normally don't like lawyers and corporations. The thing that's so difficult here is, how do you get somebody to open up about something that they don't know they have. I understand that one thing. I don't know

the answer to that. I look forward to that.

I don't think you can get into that in voir dire -- just, you may not have a big instruction on -- in your voir dire instructions, but what's going to keep one of the lawyers from getting up and saying, I anticipate the judge is going to instruct you, if you're selected as a juror in this case, that you can't consider religion, creed, age, disability, sex, gender, including gender identification, all those things you cannot consider that in your deliberations. Is there anyone who cannot follow those instructions?

That's when you maybe -- and you get some hands then, but it will come up in voir dire, and that's where it should come up. I mean, if they -- if they get on the jury and then they hear that and go, whoa, then you've got a problem.

CHAIRMAN BABCOCK: Professor Carlson and then Kent.

PROFESSOR CARLSON: Kent, are you going to be speaking?

MR. SULLIVAN: After you apparently.

PROFESSOR CARLSON: Okay. Probably what I was going to say is, but you may be saying....

Richard, I went to the National Center For State Courts yesterday to kind of see what's new on the

subject and rushed an hour and a half presentation on jury instructions and implicit bias with a three-person panel, a judge, a professor, and a sociologist, and what struck me was the lack of data or testing on what is effective, and there's a shared fear that was expressed earlier that people will dig in who disagree with the instruction, affirmation, bias. So saying don't be biased is probably ineffective.

But then the question becomes what is effective to call out an unfair bias against litigants, and I was just kind of surprised how little there really is in the studies. And I can see where juror questionnaires would be much more revealing, not asking are you biased, but I think they might reveal a bias, than the voir dire instructions or the jury instructions.

I notice that I rushed a couple -- made a couple of other things. Some states use videos with orientation -- I didn't watch those yet -- instead of including it in their jury instruction. That's like a prerequisite when you're called on to do jury duty. Some judges are already giving instructions on bias in Texas in Harris County and more extended than our 226a. So you might be able to get a feel from those judges if they feel that that's an effective way of doing things.

My concern in this assignment, as well as my concern as a faculty member, because we just went -- I was telling our group yesterday, I was in a five-hour orientation on new ABA standards for law professors where we are required to teach cultural competency, and we brought in an expert. And, you know, we take that seriously. We're supposed to be following the ADA guidelines. They're the ones who accredit us. So everyone was there dutifully.

And I asked the speaker to kind of explain what is -- what is it we're supposed to be doing, and I never really did get a clear answer, and this is very -- it's hard to get your arms around. It's easy to say bias and don't do that. It's hard to really call out what that is and when it should be decided on.

And I would say I think there is -- almost positive -- 7th Circuit case where a juror was struck based on sexual preference, and it was hard to violate that and the other side of the case. It was a case I think that dealt with HIV medication, and so the jurors were asked if they were familiar with it, I think. And I just throw that out to try to confuse things.

Probably the most cited person that I heard yesterday -- and I don't know if this is true or not -- is Mark Bennett out of Iowa, who Judge Bennett gives

instructions and also questionnaires to prospective jurors in his courtroom.

So we need help if they're going to be effective. I mean, we can roll it out with what we've been given, but I think our committee doesn't feel totally confident that it would be effective, and we're just trying to figure out how to get there.

CHAIRMAN BABCOCK: Kent.

MR. SULLIVAN: I would ask Richard, if I could, what was the date of the research done by Jason Bloom?

MR. ORSINGER: 2006, and it was just the standard TJCs that included the bias and prejudice.

MR. SULLIVAN: I was involved in it, and Judge Christopher was involved in it, too, I remember, and I believe the Chair was involved.

CHAIRMAN BABCOCK: Well, the Chair's wife was involved.

MR. SULLIVAN: There you go.

CHAIRMAN BABCOCK: Close enough.

MR. SULLIVAN: And let me say that -- so I thought it was very useful research and produced some -- I mean, produced useful and counterintuitive, unexpected information, and it is unfortunate that we don't do it more systematically and routine in terms of trying to be

more scientific and data-driven and objective about how we should manage the -- our system of jury trials.

So I will say, I agree with many of the points that Richard made, several by our speakers, Judge Peeples, Professor Carlson. There are a number of nuanced points that have to be considered.

I just want to add one which is I do think we tend to be somewhat piecemeal how we approach issues, and I think we run some risk of doing that again here today. I think the overall management of juries and the jury trial process generally should be viewed in a more holistic and more integrated approach with respect to issues like the communication with and instruction of juries. We ought to look at the work product that is in question and, more generally, try and test, not simply rely on opinions or war stories, but test to determine whether those communications are useful for the end user -- jurors -- and whether they're effective in terms of trying to produce outcomes that are within a range of the sort of outcomes that we want.

I also think it would be useful for us to think about the jurors more as important users of the system. People have mentioned privacy rights of jurors, and I do think that's an interesting topic to take up and is one that is sorely neglected in terms of what are

the appropriate boundaries of a process like voir dire.

Also, I don't think it's unreasonable to take up the question of time management and time commitment of jurors because it is currently largely unboundary [Phonetic], and jurors -- I think we all ought to acknowledge -- are effectively hostages in the trial process, people that have other things to do, often very important things to do, and they're not considered very often.

So I think we ought to consider this issue of user friendliness, this issue of being more objective, using things like best practice analysis to determine what the best alternative is, and you know, I have -- I would say that -- I like Richard's starting point which was actually something I had written down, and that was this point of the Hippocratic Oath that goes to first do no harm.

And so I think that ought to be a starting point, and I think the likelihood of harm is increased significantly. I think we move forward in important areas like this one and do so only on the basis of opinions or war stories and all that.

I'd love to see more time and thoughtfulness devoted to this. I'd also like to think that we could consider partnering with people, perhaps

even on a national basis, people -- and there may be sources of support and resources to do more meaningful testing.

I was very disappointed that we didn't follow-up the 2006, I guess it was, testing because I thought it produced useful results. If I recall it correctly, I believe we actually changed 226a. There were modest language changes resulting from some of that research. We could have done a lot more. We can do a lot more now.

CHAIRMAN BABCOCK: Thanks, Kent. There was one other hand. Roger and then Judge Estevez.

MR. HUGHES: Two things that I want to echo. I do think word testing these instructions might be of extreme value, but I think if there's a jumping off point for where the instructions need to go, the first line talks about the justice system depends on judges like me and jurors like you making careful, unbiased, and fair decisions.

There was a federal judge in the Valley, who will remain nameless, but that judge started voir dire by telling jurors how important it personally was to the judge to be fair and to make even-handed decisions and how hard that was and now you're a public official just like me and so it's real important that

you be able to do what I try to do.

And I think it's important that that jumping off point is important for two reasons. First, from what I got from our last talk about what jurors think today when they come to the courtroom, it's not just the confirmation of bias. It's an outright hostility to the judicial system, and they don't see a judge as a human being that's trying to do the right thing. It's not going to be easy for them to want to do it either. And so that's why I think that instruction gets off on the right foot.

The second thing is this, why we're asking these questions: You're about to be a temporary public official and you're going to be a team with that judge to make a decision about this company or that person's livelihood, whatever. And that tells them why we're asking all these questions, and that's why fairness is important.

Getting on to the next point, I guess the word "privacy" comes to mind. The instruction about all the kinds of people that determine for fairness about race, gender, sexual orientation, all that. That might be a bridge too far for a couple of reasons. If your case doesn't involve any of those issues, you know, do you really want to get people all stirred up about them

before they even sit down to decide your case?

The second thing is, do you want them trying -- if you don't have witnesses who are lesbian or homosexual or transgender or whatever, do you really want the jury trying to figure out if they are just because they said they won't be biased against them or not. That's never going to be in evidence. Then you're almost forcing them to rely on stereotypes to determine who is the person they shouldn't be biased against.

And the privacy of the parties and witnesses, if that's not going to be an issue, why are we trying to launch the jury off in that direction?

So what I'm thinking is this may need to be at least tailored to the needs and wants of the case as opposed to just a general statement. I leave that out there for further discussion. Thank you.

CHAIRMAN BABCOCK: Hayes.

MR. FULLER: Just several thoughts. I really was wanting to see what Rusty had to say about this.

But first of all, less is more in my opinion in this area. I think any instructions we're drafting and using, we need to be careful that it is an instruction and not an accusation or not perceived as such.

Specifically looking at this lengthy instruction after the panel is seated, couple of thoughts. I think that strays into the area of putting people on their heels and basically saying, you know, don't want to admit you're implicitly biassed, let's talk about that. But more importantly, if you're going to deal with the issue of implicit bias, which I think can produce and often does produce an unfair result, I feel the jury will say that's too late. You can't do anything about it. You're not going to cure someone of that bias after that time, but implicit bias, you need to deal with that up front.

And, you know, Richard's right in the sense that I think the questionnaire is the best way to kind of give you the background to tell you whether that's a problem because people with implicit bias, they're really trying to get the information that really reveals why they should be stricken, either for cause or just outright struck. You're not going to rehabilitate that initially. And the questionnaire is good, but more often than not, a lot of judges don't want to take the time of a questionnaire. At least, that has been my experience. That's a discretionary thing, and if they don't want to do it, we're just kind of stuck, and it would be even worse in federal court, where the judge

gives you ten minutes and says can you be fair and impartial, good, okay, we're done, you know.

We need those opportunities to visit with the panel members to uncover that implicit bias. I mean, we in trial are not going to basically have someone self-diagnose themselves as being implicitly biassed and be able to do anything about it to the extent that any of us would have confidence in a fair and impartial verdict.

I believe when we're talking about corporations or things like that, yeah, you can rehabilitate that in those situations, whether we say it one time or three times. All you're really doing is providing anchors for skillful advocates and the court to come back to in regards the particulars of their case, you know, have you thought about this, have you thought about that, remember what the judge said in the instructions, I know you may not like this, but however you want to deal with that.

And I just think those are some things we need to be thinking about going forward. Kent, you had a great thought in terms of doing this as a holistic major project that may be beyond the scope of our committee. I'm not sure we'd ever finish it.

But you know, if we're going to focus

strictly on these -- these instructions, I think less is more. I think let's stick with what we've got before we do anything else. Let's carefully study it and what the actual effect of that is.

And another thing we ought to look at and encourage is a way for the judges to, more often than not, use a questionnaire if it's appropriate and the parties may not ask that or may not care, but if they do care, what's the harm?

CHAIRMAN BABCOCK: Judge Estevez.

HONORABLE ANA ESTEVEZ: I know this is going to surprise all of you, but my jurors are completely different from your jurors. We are all -- you know, what will offend my jurors is different than what will offend your jurors, and I will tell you that in the Panhandle, I'm not sure -- there may be some implicit bias, but you know, most of them know what their biases are. And I do believe that the best way to handle this is probably for a judge to make a broad statement on bias and that the lawyers, when they know that there's an issue, they need to take care of it during voir dire, and we can have something in the Charge.

And I think that the language that you indicated here is too strong for us, I mean, for the

Panhandle. It's judge-y and it's pushback, and they will push back. I mean, if they had these type of instructions, I have the jurors that would say why they have what would be considered implicit bias in Austin but it would be downright acceptable biases in the Panhandle. And they'll express them and they'll express them proudly.

So I think that when we're doing the study we need to make it a geographical study to see how different areas react to these type of instructions. I don't think you're going to get the same thing. I think what Dr. Phil said about it having a pushback is going to be true, and in terms of legal, I think it's a problem anywhere else except in the Charge for a specific instruction from the judge.

I think that, you know, the best place for those types of cases are for the lawyers to deal with it, and they need to make them feel open to talk about it because I think at least our jurors, they're really willing to talk about things unless you come down and tell them that what they feel is wrong. And then they'll either shut down or they'll push back, but you won't get the truth, and you won't get your jurors.

So I just wanted to share that my preference would be or I would say for the ones that I

have experience with, a section 3 instruction would be the most effective with a broad opening from the judge to allow them to then follow up in the voir dire however they feel their case fits into whatever category someone may have bias.

CHAIRMAN BABCOCK: Judge Salas Mendoza.

HONORABLE MARIA SALAS MENDOZA: So I want you all to come to El Paso and get a peek at our questionnaire. Every single panel, you get a questionnaire from every juror, and I will tell you it's not your implicit bias but your actual bias that you're using when you go through this questionnaire and, great, now find jurors who are against you because they're just facts. Right? It doesn't mean I'm against the person, and when a guy based on religion or whatever, that person, against or for you, you made a decision based on your bias. And so, if these things are not fixed -- implicit or actual bias, it's not about fixing it. It's about addressing it and feeling like you did everything you can to address it and have it in the instructions and the judge do it. It opens the door for a more open conversation.

But I like what Joseph said. We judges, we might recommend a more simple instruction. We talk to judges and maybe judges view about -- we know what works

in our community. There's some things that I can say to my panels that y'all can't say in Harris County. I mean, it's just a fact, and so that may be something that is really worth considering.

And then the last thing -- I've said it before but I don't want it to be lost -- this idea that you have to have results. I don't know what that looks like. What we're looking for is a process that appears fair, that is open to everyone, and when we do this, we're saying we want everyone to feel like this is our courtroom. It's not about what verdict you get or what you hope you get. It's the process and how we treat people in our courtrooms. That's what this is about. It's not about getting can we get a correct verdict or get more opinions for this. I don't know what measure we think we're looking for, but when you talk about this idea, it's about the procedural fairness of our processes that we are -- that we're seeking.

CHAIRMAN BABCOCK: Yeah, and Judge Estevez, don't forget, it's not only the impact on the jurors but it's the impact on the parties, too. I've told you this story before, but you know, I represented a very famous Black woman in your county.

MR. ORSINGER: Over food?

(Simultaneous speaking.)

CHAIRMAN BABCOCK: And when the panel came in, it was full of people, all White, and she leaned over and said, Is that a jury of my peers? And I said, I don't think there's a billionaire around. That's a war story.

And Rusty Hardin, I heard, has tried five jury cases in his illustrious career. So maybe you have some war stories about rooting out implicit bias or, I note, leave yourself out of it because I think you have strong views about it --

MR. HARDIN: I do have strong views about it, but I think, in my view, given this area, is in order to elicit information, is not to lecture and change people's views. That is not what the trial is supposed to be about. The trial is supposed to be making sure, in my view, that each of those two parties get a fair hearing and get a fair trial, and as you all know, I'm not trying to lecture but I really want -- as I listen to this, let me go back for a second.

The subcommittee had different views about language, but that led to a pretty unanimous view that we didn't feel like we were qualified to pick these words right now and that we needed more research, not on the issue of whether or not bias should be addressed, but whatever, in order to not do harm, we do agree on or

certainly the court hopefully does it and follows the recommendation, that it is language that hasn't done more harm than good.

And we didn't feel like -- everybody had different views on it but pretty much expressed what you heard, four or five members of the subcommittee so far, and that was it's that worthwhile looking at the language, it's worthwhile doing some research and trying to figure out, but just like elections, what are some of the consequences.

And the fear was is that we weren't qualified even if we had a month. It had more to do with all the relating background to be able to figure out what those words are. In my view, those words should be designed and be two times in a trial, not four times. Whatever words are going to be decided, it's worth doing and decided to do it, it should be at the jury selection stage and at the jury charge stage. I don't see the reason to be talking about it when they're impanelled and put into a box or something.

But the words can be hugely helpful to the trial lawyer because it gives the imprimatur of the court on a subject that then the trial lawyer has to express, and whenever I -- a number of years, more than I like to remember, of jury selection, 30 years I've

been trying to say, lawyers, quit asking negative questions that we have acknowledged here. You want to find out information. You only do that by asking their views. So these words are the imprimatur of the court, enable us to say what do you think, what's your reaction, not, well, you promised me not to be biased. We all know what the answer is going to be. But it gives us a way to sort of elicit and talk to them and surface their views. It takes a judge who's tolerant enough to give us more than 20 minutes, but if you've got 45 minutes or an hour to pick a jury in a major civil case, because many of y'all know I and my firm do malpractice and a bunch of others. We don't do just criminal. We also do civil, do probates, and others. They're all the same, 40-something people out there to hear these cases, and we want to know what they think.

And so this wording is to say the judge believes and is telling you he's going to -- you cannot let bias, prejudice in, but tell me what your views are. I'm not going to change your views because one of the things that I think we've got to remember here is this is not designed to change societal views. That's not what a trial is. It'd be unsuccessful if it was.

It is to make sure that people have -- feel an obligation to tell us if they have those kind of

views. As a trial lawyer, I could -- but I do care. I care in a societal way, but as far as the trial is concerned, I just want to know what they think, and I want them to know I want to know what they think because y'all have to talk to me. You know, you took an oath to tell me the truth. So I don't want to put you over here in the jury box and have you violate your oath and be acting on something that bothers you that is inherent bias or prejudice. Just tell us what it is and we'll do what we're supposed to do.

And so I want to urge that we look at this in terms of more research. We all agree it's a good thing to fill out more than just the one sentence, not bias or prejudice. The advantage of it, knowing that the Supreme Court has asked us to do anything on this, it lets the trial lawyers have a better shot at truly getting people's opinions if the wording is right. We know you got to tell us what you think, and that is -- our job is to find it out, and so if it -- some wording should be different, jury selection would be pitched to one thing, and then the jury charge, the language that you've now said, I told you at the beginning now, and now you've heard it, and when you make these decisions, these are things you can't do, these are things you can act on, so if you slip through as we hoped you didn't --

but, anyway, I just want to make clear there are two different worlds here. One is trying to change the public's attitude, and the other is finding out where they are right now in this trial. Changing the public's attitude is in another forum. Tell us what you think in this forum so both sides can do the same thing.

CHAIRMAN BABCOCK: Thank you, sir. Skip.

MR. WATSON: Well, what Rusty was saying has sort of crystallized my thinking. It seems to me that we're talking about kind of two separate things, and that, to me, says that there are probably two different goals.

At the first of finding out what people think what their biases are, that is what we all do. We all can understand that. We want to be able to get an accurate reading of what people think, and if that means what their bias, prejudices, or preferences are, yes, we want to know that.

To me, it shifts and I'm not sure what we're trying to accomplish. After we get to the point that they're seated, at that point, they exist to determine really the credibility of the evidence as it's coming in on disputed facts. They are deciding which do we want to believe.

And the next step at the Charge, they're

weighing that credible evidence. They're weighing the evidence they found credible to say which way am I going to step on answering this disputed fact.

Now, I really get at the voir dire stage a ferreting out, but I'm left wondering -- and I'm not saying what the answer is because I don't know -- but I'm wondering why we are putting this -- the implicit bias language in there unless what we're trying to say in the second two aspects, we not only don't want you to be biased in hearing this testimony, but we want you to examine why you came to believe or disbelieve every witness. And if that doesn't come down to a true indicator of their veracity -- rather, it's just a kind of subliminal reaction of I don't like insurance salesmen or whatever it is, you know -- or the worst that Tom Gray and I were talking about is, you know, is there a possibility of just assuming that because somebody is, you know, an 80-year-old White professor that gives evidence on what happened at an intersection might have more weight than a 16-year-old girl. You know, that -- you know, that could be there.

But do we want to ferret that out and get them to say I'm examining why I choose to believe this witness? That, to me, is the reason I'm hearing for getting into implicit bias is to get the person to

recognize, well, I've thought about it now and I do know why I'm leaning, and maybe that's not a good reason.

It's the same thing that holds true when you get to weighing the evidence that you found credible, of why are you giving more weight to some testimony, but I'm not sure that asking the jury to examine why you're making credibility determinations and why they're weighing -- giving more or less weight to what they've judged credible evidence, I'm just not sure if that really would be effective. And I'm not sure that it's going to really help anything, and I'm not sure that it's going to actually move the needle toward a fairer shake, a fairer trial.

I'm willing to hear, but I think that's what we're trying to say we're doing is examine why you choose to believe this person over that one and make sure it's not some inherent matter that shouldn't be there. And it may be you're going to say that but if we do say it, I think we should say it very directly rather than just talking in general, feel-good terms.

CHAIRMAN BABCOCK: Rusty.

MR. HARDIN: Yeah, and I don't have quite the answer to what you're saying by any means, but I think there's a second element of that. If the first part of the jury instructions -- not the jury

instructions -- if the judge is telling the jury that in the jury selection, we don't approve of bias, prejudice, say all those different things, then we get to the jury charge stage, and the court, with all of the sanctity that's the -- to consider the judge said, this is another time to remind you, our system -- this is part of what the judge is talking about -- disapproves strongly of you using a bias or prejudice to reach your conclusion. So you have to look within yourself -- whatever the language is obviously. I won't get into the way it's drafted -- but you've got to look within yourself as you reach this, but I want to tell you, the sanctity of this system that you participate in depends on you not letting bias or prejudice affect how you view things, and you've got to be willing to look carefully as to whether you're going to -- are you letting anyone of that compact that you have really thought to think about, are you letting that affect how you look at the evidence, and that's what you --

MR. WATSON: I like that.

MR. HARDIN: You know, my experience with most jurors is they feel noble about the process when it's over, and that's what we want them all to feel. We want them all to feel better having made that contribution to society, and so, if the end return on

this system that we hold sanctity, it reminds you that you cannot make these decisions as to credibility of witnesses of feelings because of some out-of-trial violation or prejudice or attitude you have, I think maybe --

MR. WATSON: That goes right at -- that gets at what I'm trying to say is that's the legitimate purpose of doing it, but it needs to be sharper --

MR. HARDIN: That's why we didn't feel qualified to do it --

(Simultaneous speaking.)

CHAIRMAN BABCOCK: I feel like I'm on a talk show or something.

I've been following Perdue's Facebook page, and he claims he's tried many more cases than you. So, Jim, what's your take on all this?

MR. PERDUE: Just not a fair transition.

Rusty's tried hundreds and hundreds of cases, and criminal case is a fascinating journey into bias. Right? But everything that I've heard about decision science tells me that if you think that you're going to tell them in the jury charge don't let bias affect your deliberations, you're fooling yourself. That's just not the way decision-making works.

CHAIRMAN BABCOCK: So how do we handle it?

MR. PERDUE: Well, I mean, the lawyers -- the lawyers have a role in the advocacy process. I mean, what Rusty just did was talking about the way they're to judge the evidence and their role as jurors that have a higher responsibility to the process. But I mean, the idea you put it in the Charge, don't let something that you don't know you have and haven't had a conscious recognition that you have it affect your conscious conversations about the deliberations of the evidence is comical. It's just not the way the brain works.

Most people don't know why they make a decision. Most people then rationalize with the frontal cortex the facts to explain the decision they've reached. So what you're talking about here is -- I mean, there's -- I think there's a conflation because I really don't know where this term "implicit bias" is supposed to capture because if it's a synonym for "unconscious feelings" about things, if that's what it's intended to be is a synonym for "unconscious feelings" or thoughts about things, the trial lawyer's responsibility is to find it during jury selection to test it out through life experiences what you think may affect that which they cannot verbalize in their ability to be a good juror for your case. That's the whole --

that's the whole job of jury selection, right, Rusty?

MR. HARDIN: Right.

MR. PERDUE: And if you fail to do that and you've got 12 people in the box who are dog lovers and Michael Vick is on trial for killing dogs, you're going to have a good shot. Just -- that's just true. So -- and you're not going to fix that with an instruction in the jury charge saying don't allow things that you don't know that you feel affect the way you feel about this case.

HONORABLE ANA ESTEVEZ: And I guess unconscious assumptions is how I look at it. It's unconscious assumptions, so you're assuming something that will happen.

MR. PERDUE: Well, I think the conversation about implicit bias I've heard mostly has been in kind of conversations to get a little more honest conversation going about people's reaction about race, about gender, about some of those really hot topic issues that are hard to test, and that's fair.

But you know, if you had a case where -- I mean, Rusty, you tell me. If you had a case where you were really worried about race playing a role in it, the trial lawyer has a responsibility to be really brutally honest and test that during jury selection because an

instruction is not going to fix that problem.

MR. HARDIN: I agree, but I think the trial ought to be -- what she's treating it as a social discussion and societal activities ought to be what you're talking about because from what she's talking about, the lawyer can turn around and use the reason I like it at the end of the trial is not to convert them. It's to put the imprimatur on the court of what the lawyers were talking about in jury selection, what the judge has got in the Charge; that is, you can't let those views affect it. It gives me a bigger wedge if I've got the judge's language to talk about what the bias is -- you may end up in argument. In other words, it gives the trial lawyer a tool to elaborate on whatever happened in the trial that some bias or prejudice might affect if you got it, and you're reminded you can't do that.

MR. PERDUE: I completely agree, but I mean, we have an instruction that says do not let bias, prejudice, or sympathy play a role in your deliberations, and Tom Riney, if he's got a brain damaged baby case that he's defending is going to grab that instruction early in closing argument and say the court has instructed you, the law of the State prohibits you, it is almost impossible for you not to feel

sympathy for this child, but you cannot allow that to play a role in your deliberations.

So that's the imprimatur you're talking about. It's this additional stuff about don't let the things that you don't know affect you not affect you is just -- it's kind of gobbledygook with that. That's a legal term.

CHAIRMAN BABCOCK: Judge Wallace, most of you know -- I mean, you know Judge Wallace, but you maybe didn't know that he, as an American trial lawyer before he went on the bench, tried four cases more than Rusty and Jim combined. So you're speaking from an authority here.

HONORABLE R.H. WALLACE: And I tried a lot of legal malpractice case work, and I know biases against lawyers. I think between Jim and Rusty, they pretty well hashed out what I was thinking, and that is a lot of what -- Rusty wasn't giving a jury instruction. He was giving a closing argument, and that's where, you know, Rusty is.

If a plaintiff or not plaintiff -- any party say their client is a homosexual and they know that evidence is going to come out, for whatever reason, in trial, they may or may not want to voir dire on that, and you know, let them form the question to try to draw

out the information that they want, not by telling somebody you can't take that into consideration, but finding out whether there's -- what their thoughts are. So I think whatever we do probably less is going to be better.

MR. PERDUE: I do have a solution, chairman.

CHAIRMAN BABCOCK: I know that. I was trying to tease that out of you.

MR. PERDUE: I think the family bar section needs to develop a form questionnaire.

CHAIRMAN BABCOCK: We have a lot of time to get a form out of the family bar. Why don't we do that.

(Simultaneous speaking.)

CHAIRMAN BABCOCK: There's a famous Florida governor a long time ago who said that, you know, I'm trying to overcome my biases. You're apparently satisfied with yours. And the guys who's biased, I mean, is probably not going to change, and if we can find that out during voir dire, then we're going to boot him if we can. But the person that's trying to overcome bias, that's where the implicit bias comes in. So they know it's wrong, but they just go on thinking they'll overcome it. And so, if they see a witness who is -- has a particular -- maybe it's an insurance salesman,

maybe it's a Black person, maybe it's a woman -- they will be active in imputability that there are other witnesses, and that's what you're kind of doing.

HONORABLE R.H. WALLACE: Can I say something right quick. I think an example of the jurors that try the case and one of the parties was a Vietnamese guy, and at the end of the voir dire, one of the panel members raised his hand up, asked to come up to the bench, and basically he said, Judge, I served in Vietnam back in sixty-something, and I thought I had overcome my prejudices but I realize here that I haven't.

HONORABLE ANA ESTEVEZ: I've had that happen, too.

HONORABLE R.H. WALLACE: If you ask them ahead of time are you biased or prejudiced against people who are Vietnamese, he may have said no, but anyway, I'll understand --

CHAIRMAN BABCOCK: See, war stories do have their places. We have Judge Salas Mendoza.

HONORABLE MARIA SALAS MENDOZA: I'm going to say that's the last question, right, if there was something I hadn't asked you, would you -- that that brings that out, but I do want to address something we haven't addressed: juror privacy. And I don't know if

it goes along with this effort here, but I do tell jurors that I don't want to try to embarrass them and if they want to approach the bench. I also tell them that there's a very good chance that there's someone else on the panel who's going to have that experience or be able to talk about their own experience. It's not -- it's something I add in. So we might think about an instruction regarding privacy and how that's not our goal to embarrass people.

CHAIRMAN BABCOCK: Yeah. Kent raised that question, and you know, I think it's a serious one I don't think that's talked about much, but Hayes, you had your hand up a minute ago.

MR. FULLER: I was just following everybody else. Again, implicit bias is also challenging. That's the whole purpose of the voir dire. We're trying to uncover what those implicit biases are, and you know, a lot of times we can fish it out and get some clues as to where to go from a questionnaire, something like that, but I see implicit biases frequently because both sides are trying to figure out what they are, and the implicit bias is only bad if it adversely affects one side or the other. I mean, I'm striking yours and you're striking mine, right? Sometimes we don't know and we'll strike each others.

I love jurors that go through where everybody thought they were okay, but at the end of the day, I guess there are some implicit biases and why it's so important we find them in relation to the case is some of them may not make any difference on the case. You know, in which case, we both let them through, but I think, you know, if anything we do in the area of implicit bias, it needs to be a tool for the advocates to use in uncovering that implicit bias so intelligent decisions can be made prior to the selection of a jury, and that's probably a good place to stop.

CHAIRMAN BABCOCK: Okay. Family bar raised their hand to second the solution here?

MR. ORSINGER: We've been dealing with Family Code so you can't consider gender as a factor in making decisions in parent-child. We can tell them that all the time until the cows come home, but everybody on the jury panel -- if the evidence was that the mother and father were equally good parents, who would you give custody to. The mother? Eight out of ten raise their hand. So just live with it.

So my perspective on it, or I guess my experience in this conversation is we ought to consider this to be a partnership, not are we going to cure it all through an instruction, but can we use the

instruction to help the lawyers figure out what the implicit biases are, and then address them with challenges for cause or peremptory challenges.

And I think that this instruction is an effort to try to solve the whole problem in the instruction, and maybe what we ought to be doing is focusing on what we do to help these people out so that -- I mean, sure, more during the voir dire, so that the court can make a more intelligent decision on a challenge for cause or a peremptory strike. The lawyers can exercise their peremptory strikes.

And in conjunction with that, you know, the idea that someone will be more honest about the way they feel if it's private, you can maybe exploit that with a questionnaire with an understanding that this will not be shown to either one of the lawyers and the court in the case, maybe they'll be more forthcoming. If it's a sensitive area, you take them up to the bench and question them alone in front of the judge.

To me, there's a combination of things we could do to make our voir dire process better at detecting bias, but I think it has to be the courts and the lawyers who actually carry it out and act on it.

CHAIRMAN BABCOCK: Good point. Hey, Bobby, just give me one second. Bobby, we haven't talked to

you and you're a trial lawyer.

MR. MEADOWS: Used to be.

The court: Yeah. You have more experience in California than in Texas in recent years.

MR. MEADOWS: Well, I agree with a lot of what's already been said, and I think we all agree that an instruction of this type is not going to make the jurors better people.

And so it's a tool. It's a tool for the trial lawyers to explore a particular concern in a particular case, whether it's about the race or gender or age of a witness or expert, whether it's a concern about the lawyer themselves.

And so the idea is that some instruction -- I agree we haven't settled on it -- but some instruction of this type would be helpful in the sense that it would create a dimension beyond what we already have to talk about a way to discover and to have particular jurors or potential jurors confront, and that's what the lawyers want to do on both sides.

CHAIRMAN BABCOCK: Kennon, you tried a case or two, I remember you said.

MR. WOOTEN: Well, one thing is that the questionnaire, while a good idea, is not practical in a case. You just don't have the benefit of getting a

specific questionnaire in many of the cases you try. So I agree that people are probably more likely to share in that space where they're just writing something down or clicking a button than in front of a lot of other people. I just don't think in this big and diverse world and the courts doing that it's going to be a solution across the board.

In regard to what we say, we all acknowledge in this room that we've had the instructions for many, many years, the statement about not being biased or prejudiced. And I believe that there are many people who think they are not biased or prejudiced but, in fact, have biases and prejudices, not because they're bad people, but it's because that's a common thing for human beings.

So I think it would be helpful to explain, without doing harm, a little bit more what you mean when you're saying that because I have a feeling that's going right over the head of a lot of people who don't have the self-awareness to recognize I might have some biases and prejudices and how assessing the evidence, the people, et cetera, and while it is our goal to assess credibility, I think the goal is to do so without bias and prejudice, to the extent possible. And the idea that people aren't going to be better versions of

themselves when they're jurors I think might not be giving every juror enough credit.

I think probably all of us in this room have been on boards, spaces, and places where we have to set aside some viewpoints, maybe make decisions that are in the best interest of the whole for our business, for example, even if personally it's not easy. So I think we can be better versions of ourselves and rise above our normal state of being in the ways that affect liberty, life, property, et cetera.

Maybe I'm giving people too much credit, but I don't want to assume they can't be better versions of themselves when they're in that space with such an important responsibility.

I hope we don't get too hung up on the text that's in front of us because what I'm learning in just a little bit of time is that different text has been used for years in Texas in various places. So, in terms of the data, I'd like to see what text has been used for years, for example, in Dallas, in Harris County, and talk to the judges who have used that text for years to get their viewpoints on whether it's been helpful. I bet some of them have talked with jurors after the fact to see whether it has been helpful.

I think the text that has been presented to

us, from what I can tell, is perhaps borrowing from some of the other places but might be a hybrid as opposed to something that's been used in any particular court in any particular county. So I would like to get more information based on the actual text that's been used before we have a conversation about the content that's on the page before us and the proposal but perhaps has never been tested.

CHAIRMAN BABCOCK: Okay. Very good. Yeah, Judge Evans.

HONORABLE DAVID EVANS: Well, you know, I have worked on a case that there's express bias in most voir dires, and I think most of the people today discussed expressed bias.

My best example of implicit bias is a person has a stated value and yet acts on information contrary to the stated value. One of the most often seen, most constructive to me is that you have a stated egalitarian view that women can do the same job as men. Yet, as an employer, you rely on the advice of male co-workers or give greater credibility than you do women. That's a really hard problem, and that's true implicit bias right there, or if you have a stated value that -- with regard to race and yet you value the opinion of a White male lawyer over a Black female

lawyer.

We don't really address implicit bias in voir dire as trial judges, and we don't have enough good examples that are psychologically vetted for their unintended consequences to do that at this time.

But the good cases I've tried that have not only worked on express bias but they've given consideration to the character and the models of the witnesses coming forward and addressed it, not the car wrecks, but have addressed it as they go forward with who they've got in the box, and they put more emphasis on one witness or another.

If you got -- I watched one case where I knew one of the experts that was put in was designed to go for the eight females that were in the box, that they would give that witness more credibility than the other witness that was available. Now, he just had that ability and there was a lot of money involved, but the court does have to take a strong position on express bias and implicit bias without interfering with the trial process and producing unintended consequences.

CHAIRMAN BABCOCK: Okay. Thanks.

HONORABLE DAVID EVANS: Most trial lawyers in here or trial judges, I've tried cases with same-sex couples. I've seen it addressed. I've had cases with a

number of people who couldn't speak English, and I've seen good results from a jury that I was confident that race and alien status did not influence it. And in fact, in one I think that the value system of the immigrant so overwhelmed a northwest Tarrant County jury that they probably awarded more money than they would have awarded otherwise.

You know, I've seen it work a lot of ways once they get into that, but I'm not sure I agree with this language here. But I do agree with Rusty and others that the court has to take a position on bias and not just group it in one word. Don't let bias, prejudice, sympathy get a highlight. That would be my thought on that.

CHAIRMAN BABCOCK: Thanks. Tom and Professor Carlson, I'm going to give a courtesy, see if we can get you some additional resources, but if we don't -- but I think we will -- but if we don't, you'll have to slog through it as best you can and then bring this back to the next meeting and it'll be an agenda item, and you'll either sink or swim then. And we'll see where we are, but for the moment we're going to take our afternoon break and be back at 3:20.

(Recess from 3:03 p.m. to 3:19 p.m.)

CHAIRMAN BABCOCK: We're now on the record

on suits affecting parent-child relationship and out-of-time appeals in parental rights termination cases, and we have been working through this at a good pace, and Bill Boyce is going to take us for the next hour or so. Ready, Eduardo?

MR. RODRIGUEZ: Yes, sir.

CHAIRMAN BABCOCK: Okay.

HONORABLE BILL BOYCE: Hopefully, less than an hour.

This is an old discussion we had in October relating to votes that we took on the form of a draft rule that we discussed at that meeting, and so if you look at the memo, you will see that there was a draft Texas Rule 28.4 that was circulated for discussion in October relating to the handling of appeals that are deemed frivolous in this particular context, the context being a suit for termination of the parent-child relationship or suit affecting the parent-child relationship filed by a government entity for managing conservatorship.

And so we worked through issues last time, and there were a couple of votes on tweaks to the proposed rule that the subcommittee is now bringing back to the full committee for your consideration.

So, if you look on page 2 of the

February 13th memo, you will see two subsections. One is called Pro Se Response to Certification of Appeal Deemed Frivolous, and then there is a new subsection under that, Abatement for Additional Briefing.

You may recall that the original draft of this proposed rule had the sentence that now appears at the bottom of the page. That was actually as continuation of the prior section called Pro Se Response. The sentiment of the committee as a whole was to break that out as a separate sub part, which is what this does. It gives it a new subheading, Abatement for Additional Briefing, and this reflects the discussion we had about whether abatement for additional briefing at the court of appeals or the appellate court sees an issue that appointed counsel has not -- appointed counsel has come in and said there is no issue to brief here. If the court of Appeals nonetheless sees one, it can send it back.

There was some discussion last time around on the notion of whether it should go back, whether an appellate court would have discretion to either send it back to the same lawyer and say we looked at this issue or appoint a new lawyer to do that. This draft reflects the vote that was taken to have that be an option for the court and not to automatically mandate appointment

of a new lawyer.

And so it says an appellate court may abate the appeal for either existing counsel or newly appointed counsel to provide additional briefing to evaluate a nonfrivolous ground for appeal that has not been adequately addressed by counsel.

The other refinement to the rule that we talked about in October appears on page 3 of the memo, and it is an addition of a comment that is based on the In re P.M. case that references the reviewing court's independent obligation to evaluate the record and make its own determination about whether there are nonfrivolous or potentially nonfrivolous grounds for appeal.

There was some discussion about putting that in the rule or a comment. The vote came down in favor of putting it in a comment. So that's what this does, and we've had some discussion over the course of multiple meetings about whether or not it's really accurate to call this an Anders procedure or is it a different procedure that's related to but somewhat distinct from Anders, but this comment refers to the Anders case because that's what In re P.M. said and did.

And so, to sync it up with the case law that we're relying on, that's what the comment says. So

those are the two what I hope are relatively small refinements to the rule that was previously presented to the committee as a whole.

CHAIRMAN BABCOCK: Okay. Thanks, Bill. Yeah, Richard.

MR. ORSINGER: Okay, Bill, so a couple of specific suggestions. And we got the list of the things that the appellate lawyer has to put in the brief, and under subdivision three, it says one is the certification, two is the brief, and three is the notice of the claim. "Notify the client in writing of the right to access the appellate record and provide the client with a form motion for pro se access to the appellate record."

It seems to me we should also require to inform the client of the right to file an appellate brief or a pro se response to his -- the court's Anders brief because it's not just looking at the record. We need to also be sure that they understand that they can represent themselves at that point.

The next one I wanted to say is under the pro se, in the next rule, it's an appropriate response to a certification of frivolous, and it entitles the client or the individual to file a pro se response. And I'm wondering if a pro se response is a brief or is it,

like, just a handwritten statement of facts that's unsworn? I mean, we need to be more technical about what they file other than to say pro se response because I'm afraid that's not much direction, and I don't know if we want a brief or whether we just want 15 pages of handwritten, unsworn testimony. I mean, the word "response" should be evaluated as to whether that's a word we really want.

The next paragraph is Abatement for Additional Briefing. The appellate court can abate to have existing counsel or newly appointed counsel evaluate a nonfrivolous ground, but it also occurs to me that they may have violated the standards up above on the contemporaneously filing of a brief, and it seemed just as likely to me that the court of Appeals may want to abate to direct the appellate lawyer to file a brief in conformity with the rule in case they didn't do an adequate job on the statement of facts or whatever.

So my thought would be to say an appellate court may abate the appeal for either existing counsel or newly appointed counsel to provide additional briefing, and add in, if the requirements of Rule 28.4 above are not met -- and we don't have a number so it may be 28.4(1) or not, but it's not just to evaluate the grounds or the nonfrivolous ground. It's to comply with

the requirements of the brief and the rule itself. It's my understanding, from talking to the court of Appeals judges frequently, if the quality of the brief initially filed by the lawyer is not up to snuff -- and they've spoke of instances in which they remanded to that lawyer to draft a brief in compliance.

The next comment is on the next paragraph, and it talks about what the court of Appeals is empowered to do. And it says a court of appeals should affirm the final orders subject to the requirements that the attorneys still must, one, A, B, C; and two -- well, that's -- that's a limitation on the court of appeals' power, and it ought to be a duty on the appellate level.

It seems to me we ought to take that laundry list of things that the lawyer must do, and instead of saying that courts affirm it subject to the lawyer doing these things, we ought to have a separate section that says the lawyer must, within five days after the opinion is issued, send a copy to the client, et cetera, et cetera.

So, to me, a clear duty on the appellate lawyer, rather than a limitation on the court of appeals' ability to affirm.

And then the other laundry list I think we should have, file a motion for rehearing under Rule 49

because if, in fact, this person is going to go on to the Supreme Court, an obvious first step is to file a motion for rehearing in the court of appeals, and we're not telling them that's no longer required but it's an option. And as long as we're telling these pro ses what their options are after the court of appeals has ruled against them, I think we ought to include a motion for rehearing in there.

That's it. I'd like the record to reflect --

CHAIRMAN BABCOCK: Yeah, I like the comment.

MR. ORSINGER: Yes, I liked the comment.

CHAIRMAN BABCOCK: Do you have a comment on the comment?

MR. ORSINGER: I do have a comment on the comment.

We talked a lot and tried to work through that and make Anders work in this context and the decisions that we had and whatnot, and I think it's good to make it clear that we think this meets the constitutional requirements of Anders. And I also think it's good to tell the appellate court to conduct an independent evaluation.

My interaction with the court of appeals

justices is they already believe that and do that, and we're complaining about how biblical it is for their staff attorneys to plow through the record without an appellate brief to tell them look at this page and look at this line, but I certainly think it's good to put it in here so everyone can see that there is going to be an independent evaluation. Whether the appellate brief is good or not, the court is going to take upon itself to be sure that we don't have an improper permanent termination of a parent-child relationship. So I like the comment.

CHAIRMAN BABCOCK: Okay. Any other thoughts about it.

MR. JACKSON: I just have a question, Chip.

CHAIRMAN BABCOCK: Yes, David.

MR. JACKSON: Are these appeals filed under the expedited appeals, like the original cases of these child cases that we've been talking about in the past? In the other words, does the court reporter have 15 days or 10 days?

CHAIRMAN BABCOCK: Well, it says accelerated appeal.

MR. JACKSON: Accelerated.

MR. ORSINGER: We had a lot of work on here at this committee level because the Legislature had

instructed us to make recommendations to speed the appellate process along, and the public policy behind that, just to remind you, is that the child status is in limbo. They can terminate it, but there's a process of due law and sufficiency of the evidence, and if that goes on for six months or nine months, then the process can't move forward. So I think the Legislature said speed it up, speed it up, and we did. We made a lot of changes in the appellate rules here.

MR. JACKSON: Right. But in the frivolous appeal-type things which -- yeah.

MR. ORSINGER: I can't remember what we did in the last meeting, but the task -- 7 Task Force, we wanted to create a separate timetable with it's own motion for a new trial deadline because it's impossible to raise ineffective assistance of counsel when the lawyer that you're asking to file that argument is the lawyer who was incompetent.

And so the question -- and some incompetency is not on the face of the record. Some of it's embedded in the inability to call witnesses. And so the thought was the only way for us to think this in was to create a new timetable for motions for new trial on ineffective assistance of counsel, and give the new lawyer time to come in, acquaint themselves with the

case. I can't remember what we ever did with that. I'm not sure we resolved that issue or really took a vote on it. I don't know.

CHAIRMAN BABCOCK: Okay. Any other comments? Yeah, Justice Gray.

HONORABLE TOM GRAY: There is a potential discrepancy between use of the words "response" versus a "brief." The pro se litigant, at that point, the actual party, does get to file a response.

In the criminal context, we have expressly and forcefully said this is not a brief. No file a briefing requirements. This is a response to inform the court of what issues you think we should look more closely at while we are doing our independent review.

So I think the use of the term "response" in the unlabeled section under four is correct.

But that -- your comment made me think more about the heading for the next one, Abatement For Additional Briefing. "Abatement," again, a term of art that actually when we, or at least for our court -- may not be a way for the First and 14th or the other courts of appeal -- abatement is a formal process of putting a trial court back in jurisdiction to do something. That is not what is happening at that point.

I could do without the word "abatement,"

and it's actually more in the nature of a study or schedule suspended, just an order requiring additional briefings. It's not really a true abatement, but I'm not terribly offended by it, not nearly as much as I am other portions of the rule which I won't go back into because I've already lost --

MR. ORSINGER: Can I ask you a question. What is the impact of the timetable that's running against the court of appeals?

HONORABLE TOM GRAY: None.

MR. ORSINGER: Doesn't matter whether you call it abatement or stay?

HONORABLE TOM GRAY: No.

MR. ORSINGER: Can you stop the clock or is it running, no matter what?

HONORABLE TOM GRAY: Right now, as it exists -- and I'd have to go back and see if there was some -- I know it was discussed in the context of this, whether or not we could stop the clock for any reason, but I haven't -- didn't get a chance to look at this to see if it now does that. But right now, the way everything has worked is of the day that the notice of appeal is filed in the trial court -- one of our problems has been we may not even know that for 30 days -- our 180 days is running. And it never -- it

doesn't stop for any of this, not for delays in the record, not for anything.

MR. ORSINGER: Even for a remand for a new brief, which starts the whole new briefing cycle?

HONORABLE TOM GRAY: Correct.

MR. ORSINGER: But that's something the House Bill Task Force thought about, how does the court of appeals reconcile having a second briefing cycle with a new lawyer and still be under that six-month clock.

HONORABLE TOM GRAY: We've made it. We've done it. We've been able to do it, but it is -- you've got to have somebody assigned to process these appeals from the date you first get the notice of appeal, and they ride herd on them or you don't make the 180 days.

Do you agree with that, Tracy?

HONORABLE TRACY CHRISTOPHER: Yes, and sometimes we bust those 180 days because of that.

HONORABLE BILL BOYCE: And just by way of background, there's a series of votes that are reflected on the first page of this memo that, the short version, we count some of this ground that's been plowed at prior meetings. The notion of tolling it for an abatement was voted down.

MR. ORSINGER: Oh, okay.

HONORABLE TOM GRAY: And in closing on my

part, my comments, the suggestion that Richard made on the last part of the rule to split the discussion between the court duties versus the lawyer duties when they give their -- when they get to the order that affirms the trial, I think that's a good division. I think that we add one more section to the rule, but if the lawyer duties that kick in at the point that we affirm the order of termination was set out in its own rule or own portion of the rule with a subheading would be an improvement. I wouldn't vote against it because of that, but I do like the idea that Richard suggested to break it out separately.

CHAIRMAN BABCOCK: Bill, how do you feel about the word "abate" versus "stay" or some other word?

HONORABLE BILL BOYCE: I guess I have a broader conception of abatement, does not necessarily be limited to sending the matter back from the appellate court to the trial court because I think of it, for example, in the bankruptcy context. The appeal is just stopped or paused while bankruptcy -- the stay is in place. So I guess I don't have a super strong feeling about using the term "abatement" versus "stay." Stay may be more plain -- plain English.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, you do

abate if you're going to send it back for newly appointed counsel. So I think it is all right to leave it at abatement.

I like what Richard said. Sometimes the -- like the most common problem we see within Anders is they won't address the grounds D and E, and so D and E might be a frivolous issue ultimately, but they still have to specifically address it. So -- so I wouldn't call -- like, if they didn't put D and E in their first brief, I wouldn't remand to say it's a nonfrivolous ground. I'd just say you have to address D and E and give us your opinion separately if it's D and E are frivolous.

HONORABLE BILL BOYCE: So should it say potentially nonfrivolous then?

HONORABLE TRACY CHRISTOPHER: Yeah. That'd be all right.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: While the attorney has drawn the conclusion that the appeal is frivolous, the grounds are D, E, and O, we are going to do an independent review to see if we agree, and we are going to include in our review a D or E evaluation, why would we have to have counsel's briefing on D and E as an independent frivolous issue?

In other words, we don't -- I'll tell you this. We don't require that now. If they say it's frivolous, we assume that they have complied with -- is it P.M. They have complied with P.M., and when we do -- then we do our independent review and we comply with P.M. by reviewing internally D or E and agree that those would be frivolous grounds to argue that they were meritorious.

And so we don't -- we still affirm and we will mention which one we looked at, but we're not going to require counsel to independently brief two grounds that they've determined are frivolous.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: So we do.

HONORABLE TOM GRAY: I know.

HONORABLE TRACY CHRISTOPHER: So our Anders checklist, which is on our website, requires sufficiency of the evidence with respect to D and E specifically. We require them to specifically mention that. So...

MR. ORSINGER: For the context, I believe -- correct me if I'm wrong -- the reason that D and E is so important is that that has to do with abuse and neglect of this child, but it can also be the grounds for abuse and neglect, the termination of a different child. So it could have res judicata effect,

and that's why you've got to get it right in this case because they don't get another chance, I guess, with the next child. That's why the importance of D and E for you?

HONORABLE TRACY CHRISTOPHER: Yes. So we specifically put it in our Anders guideline. So, if they didn't address it, we'd send it back and say do that.

CHAIRMAN BABCOCK: So are we ready to vote on these two proposed changes or do we need more discussion or do we need more amendments?

HONORABLE BILL BOYCE: I think we're ready to vote, and I think we're done with this rule, and it's incorporated and submitted to the court. I think that's where we are.

CHAIRMAN BABCOCK: Yeah. All right. Let's vote on the Abatement for Additional Briefing language. First, everybody in favor raise you're your hand.

HONORABLE BILL BOYCE: Keeping the abatement language?

CHAIRMAN BABCOCK: Anybody opposed? Twenty-one to nothing in favor.

And then the comment. Everybody in favor of the comment as drafted, raise your hand. All right. Twenty-two to nothing. We picked up a vote. Chair not

voting. And so that will take care of that.

MR. ORSINGER: Hold on, Chip. There's another important one. It's the last one there about whether to break out: The court of appeals should affirm the final orders, subject to the requirements that the attorney do so himself.

CHAIRMAN BABCOCK: Tell me what page you're reading from.

MR. ORSINGER: The last page, very last paragraph of the rule. A suggestion was made and other people suggested as well that we turn that into a separate paragraph setting out the duty of the appellate lawyer after the opinion comes down affirming, and that's really important because right now this doesn't --

CHAIRMAN BABCOCK: The pages are numbered.

HONORABLE TOM GRAY: Right above the comment.

CHAIRMAN BABCOCK: Page 3, that's supposed to be -- Bill, what's your position on that?

HONORABLE BILL BOYCE: I'm fine with that. I think that will be potential clarity.

CHAIRMAN BABCOCK: I'm sorry, say again?

HONORABLE BILL BOYCE: I'm fine with it.

CHAIRMAN BABCOCK: You're fine? Anyone

opposed? I didn't hear anybody opposed. You made it.

MR. ORSINGER: Okay.

CHAIRMAN BABCOCK: You're going to have your fingerprints on the recommendation.

All right. Do we have any other business before us today, other than to compliment Alexis for being a terrific member, ex officio? That is one focused child.

Your thanks for everything, and we will next meet April 21st, right back here. April 21, back here, and thank you all for your hard work today, and thanks, everyone. We're in recess.

(Proceedings concluded.)

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REPORTER'S CERTIFICATION

MEETING OF THE

SUPREME COURT ADVISORY COMMITTEE

* *

I, MELINDA M. WALKER, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 17th day of February 2023, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are $1,917.00.

Charged to: The State Bar of Texas.

Given under my hand and seal of office on this the 22nd day of March 2023.

/s/Melinda M. Walker
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