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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

NOVEMBER 1, 2024

(FRIDAY SESSION)

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Taken before Amy Russell, Certfied Shorthand Reporter in and for the State of Texas, reported by machine shorthand method, on the 1st day of November, 2024, between the hours of 9:00 a.m. and 3:55 p.m., at 502 East 11th Street, Suite 200, Austin, Texas 78701.

INDEX OF DISCUSSION OF AGENDA ITEMS

CHAIRMAN BABCOCK: Welcome, everybody. We are now going on the record, straight up at 9:00, as is our custom. And we will start with a report about what the Court has been up to and what has been done with some of our work projects.

So Justice Bland.

HONORABLE JANE BLAND: Yes, good morning, everyone. I'm standing in for Chief Justice Hecht, who is at a meeting -- a national meeting about judicial security, which is a topic that is of interest to state judges across the country, but also to federal judges. So there is work being done at a national level about -- on that topic.

In terms of an update from the Court, it's pretty brief this morning. We had oral argument this week at the University of Houston on Tuesday, and it was a great event for the students who were very engaged. We had two cases argue with advocates, who did a great job, and the cases were very interesting. And to a full house, and the students seemed to really enjoy it.

I wanted to thank the University of Houston Law School and Dean Baynes, who just rolled out the red carpet. Literally, red. There is a lot of red at the University of Houston. And just did such a terrific job making it a memorable event for their students and alums

and were just great hosts to the Court.

We've been monitoring the rollout of the business courts and in the 15th Court of Appeals and trying to assist with that as we can, but mostly through the Office of Court Administration.

So there is a total of 38 cases currently in the business court. Most of those, 18 of them, are in Houston. Dallas has ten, Austin four and Fort Worth at three.

So they're starting to build a docket. And those judges are busy educating the Bar about their courts, about practice in their courts and working hard to get up and running with staff and procedures.

The business court judges elected Houston's Grant Dorfman to be their administrative judge. So Judge Dorfman is going to help shepherd that group as they move forward with their work.

With the 15th Court of Appeals, some of you may have seen, they had oral argument this week. So they are out of the gates, running. And they have about a total of 120 cases pending already.

A hundred of those were transferred over the summer -- were identified over the summer and then transferred immediately upon the effective date of the courts. And the other Courts of Appeals were an

essential part of identifying the cases that ought to be transferred.

And that happened fairly seamlessly. There has been some amount of activity in terms of identifying whether the cases should have been transferred or not. And the transferring court and the 15th Court play a role in that. And then if there is a disagreement or a party, once reviewed with our Court, they can request that we do something different than the courts of appeals have done.

So far, ten cases have been transferred back to their original courts because the ultimate decision was that they belonged back in their original courts. But they are starting to get original cases filed in their Court according to their exclusive jurisdiction.

So -- and we have deadlines for bookmarking, bookmarking rules and other kind of cleanup rules for briefing, a little bit -- a change to the appendices and a little bit of clarifying rules to the -- clarifying changes to the rules of civil procedure to make sure that it's clear that pretrial disclosure only requires a party to disclose a list of documents at trial, not the documents themselves.

And then the other is to make it clear that process servers are certified by the Judicial Branch

Certification Commission, not the Supreme Court. So those set of rules I just discussed, we are looking to finalize those on December 1st.

We approved the disciplinary rules to go into effect in August. And those were the rules that the Bar membership approved in April. A couple of differences between the rules voted on and the rules approved.

First, the terminology section was approved to be a rule, but the Court left it as a terminology section. The reason for that is it would be easier to amend definitions and terms short of holding a referendum on a rule change. But the Court adopted all of the proposed amendments to terminology that were approved by the Bar.

And then in addition, the Court did not adopt changes to Rules 805 and 806 that have to do with jurisdiction. In particular, the rules would have allowed the State Bar to discipline Texas lawyers working in other states whose conduct violated other states' disciplinary rules, but did not violate Texas disciplinary rules. Often, the contours of jurisdiction are judge-made and court-made. And so we left those amendments out of the rule.

And then, finally, the Board of Disciplinary Appeals adopted -- we approved changes to their internal

operating procedures, upon their request, and they align with House Bill 5010 and our related changes to the disciplinary rules that House Bill 5010 required, and in particular, it allows a respondent attorney to file an appeal with BODA as to a grievances classification.

And before, only the complaining party, the complainant who had a complaint against the attorney, could do it. But now an attorney can challenge the grievance classification. And that was a legislative dictate.

That's about it in terms of a rules update. And thank you to Kennon and Quentin, who the chair has tapped to come up with our agenda for December, where we talk about deep thoughts, and I'm sure our chair will elaborate about that. And we'll have some guests from the other branches here for that meeting.

CHAIRMAN BABCOCK: Great. And I was going to call on Quentin and Kennon just to give us any update, if they have any, about where we are on our deep thoughts for the next meeting in December.

You guys have anything you want to say?

KENNON WOOTEN: I'll give an overview and then hand it over to Quentin to supplement as needed.

We are planning to focus on AI and technological advancements. So it's appropriate that

we'll start talking about AI today and can build on that in the meeting in December.

We will have two panel discussions, as opposed to the multiple panel discussions we've had in the past, when we had a full-day meeting. We have extended invitations to the Governor's office and also to Representative Leach and Senator Hughes to attend. So we hope to have all of the branches represented.

Additionally, we are going to pass on having a keynote speaker, in light of the fact that we only have a few hours, two panel discussions and guests that we don't want to rush in their presentations to this group.

Quentin, is there anything else you want to add?

QUENTIN SMITH: I think that's about it.

CHAIRMAN BABCOCK: Great. And Justice Bland reminded me that maybe some new members to our committee don't know what "deep thoughts" means. And if you don't know what a deep thought is, you shouldn't be on the committee.

But maybe, six or maybe eight years ago, I thought that it might be good, in advance of the legislative session, to interact with the members of the legislature and for ourselves to think and try to generate ideas that might help the civil justice system.

And over time, this session, which was always in December every other year, became known as "deep thoughts."

So if anybody didn't know what "deep thoughts" was, that's what it is. And Kennon and Quentin are going to do a great job running it this year.

Last time, we had a number of interesting speakers, and a number of interesting ideas came out of it. So far as I know, no legislation has ever been enacted based on our deep thoughts meeting, but we can always keep trying.

So with that said, we are going to go to third-party litigation funding. And there are two terrific memos, one by John Kim, and one yesterday, a spirited response to John's memo by Robert Levy. And they are both really, really well done.

This is not going to be the last meeting on this issue. But the Chief wanted us to have a fulsome discussion about it today, and that is why it got moved to the first item, so that we could have plenty of time to talk about it.

So having said that, Harvey, the floor is yours.

HONORABLE HARVEY BROWN: All right. Well, I'm sure that everyone stayed up late at night and read all

of our materials that we sent to you. This is my notebook, and it does not have even everything that we distributed. It has probably about 80 percent of it.

So there are lots and lots of materials on this issue. It is an issue that has been subject to a lot of public debate. So if you don't mind, for those that did not get a chance to read it, I will give a quick little overview, and I'll tell you what our committee did, and then I will let other members of the committee speak on it, as well.

So third-party litigation funding is -- a primary issue is whether investment groups that are behind lawsuits, whether there has to be disclosure by the lawyers that such investment groups are in the case, and, if so, what the disclosure must be.

So a lot of litigation today moves forward because funding has been provided by investor groups to cover all the costs of expenses.

Beginning in 2013, a number of groups decided that they thought that there should be mandatory disclosure of litigation funds and went to the Texas State Legislature in 2013.

And then in 2014, the US Chamber started a number of efforts to convince various groups that there should be disclosure of litigation funding. They have

gone for the last ten years, since 2014 every year, to the Federal Civil Rules Advisory Committee.

In addition to going to the Texas -- to the Federal Civil Rules Committee, like I said, they've gone to legislatures in Texas. They've gone to legislatures all across the country. They have gone to a number of different conferences.

One of these groups, the Federal Advisory Committee, put together a subcommittee that studied it back in 2014 or so timeframe. They went across the country. Took testimony on the issue. There's been hearings in Congress about it. Congress has declined to do it. Federal Rules Committee so far has declined to do it. And that kind of gives a broad background.

In the last year, there has been continuing efforts to try to get this adopted. And if you'll see in my memo, on October 10th, Federal Rules Advisory Committee appointed yet another subcommittee to study this thing. So they're looking at it once again.

And then just in the last couple of weeks, the Arizona Supreme Court received a report from a task force on it. And it took yet a different approach, which I will talk about in just a minute.

So you can see this is a hot topic. Right? A lot of people are very interested in it. A lot of

people want it. A lot of people are resisting it. And frankly, it's the first time since I've been on this committee that I've had people directly lobby me.

As the chair of the subcommittee who was asked to do this, I got outside groups writing to me. Would you look at this? Would you consider this? And you have three memos from those various groups in your materials to peruse.

Our committee had a good-spirited discussion about it. John wrote a memo on Monday, after our discussion, outlining the reasons that he was opposed to it. Yesterday, Robert got the last word in, so to speak, and submitted one last night, responding to John's memo. So you have that material as well to look at.

Our committee is pretty small. There's only four of us that attended the meeting about this. We voted 3 to 1 against it.

Although it's not technically relevant, let me just say this, just by way of the background, because I don't want this to look totally like a plaintiff versus defense type of dispute.

When this was referred to our committee by the Chief, one of the first things I did was contact the powers that be at my firm and say: "Do we have a

position on this before I get too involved in this?" And I was told, "No, our firm, as a plaintiff's firm, does not do this." So whatever I thought was the appropriate public policy, that's what I should advocate for.

I know John has told me that his firm also does not use third-party litigation funding. So when you hear discussion, you will hear, at least, me as a -- for the last five years, a plaintiff's lawyer, taking a position that I oppose it. But, you know, in my heart of hearts, I believe that's just my view of the merits, and we'll talk a little bit about the merits.

But what I would like to do now is that background, so you have the sense of this. This is a ten-year public policy debate with people all across the country speaking.

Oh, I should say this by way of background too. The federal courts have, as I said, not adopted a rule so far. Instead, what has happened is federal courts across the county have dealt with this issue on a case-by-case basis.

A large number of them have said no. A few have said yes, we're going to have disclosure, but it's going to be limited, and it's going to be ex parte, because I don't want to generate, what I call satellite

litigation, more fighting, but I just want to see what's going on here.

And then some federal courts have a little more full disclosure, including recently in the 3M litigation, there has been disclosure. So we're seeing the federal courts approach it in a variety of ways right now.

I think it's fair -- and, Robert, you can tell me if you disagree with this -- to say that at this point probably the majority are saying no. But there is a little bit more starting to say yes to some type of disclosure, with the issue being whether it should be in camera or not in camera.

All right. Since, Robert, you got in the last word yesterday, I'll let you go first and let John get the last word this time.

ROBERT LEVY: Thanks so much and thank you for letting me participate on the subcommittee.

HONORABLE HARVEY BROWN: Oh, yeah. I should say out of fairness, I called Robert and just said, Robert, I know this is an issue you're involved in. You've been involved in this process for many years. And to make sure that we are balanced, and we see both sides of the issue, I asked him to be on our committee, and he's been invaluable. Most of this notebook,

frankly, is Robert sent me a lot of literature.

So thank you, Robert, for all of your hard work.

ROBERT LEVY: And I endeavored in that information to provide a full spread of data that has been developed on the topic from law professors who have written law review articles, and they are now coming out probably monthly. It used to be one or two a year, but now they are much more frequent. As well as information from the fending (phonetic) industry.

The International League of Finance Association is kind of the advocacy organization of the fending (phonetic) industry. And materials that the US Chamber, Lawyers for Civil Justice, TCJL, who is here today, are provided as well to give a broader perspective.

I will point out that there have been a number of courts that have adopted disclosure requirements. The US District Court in Delaware, the Northern District -- I'm sorry, the New Jersey Federal Courts have a disclosure requirement, the Northern District of California, and a number of states have adopted TPLF disclosure rules.

The issue that my memo talks about and highlights is that third-party litigation funding is

very new. What is not new is the ability for litigants and attorneys to seek financial support for their matters.

Obviously, this is an issue that, as you pursue lawsuits, that we sometimes need financial support from external sources. And so litigants will very often get loans or get some type of financial aid to enable them to continue their action.

And while it is not unusual in some cases where it's possible to secure that interest through the right to receive the proceeds or the first proceeds to repay the loan, what is very different is the sale, basically, of an interest in the outcome, where instead of loaning a million dollars, you are giving a million dollars and in return you get 10 percent, 20, 30 percent of the plaintiff's recovery.

And, obviously, it could be first money or it could be last money. I don't really know exactly how that works out in each individual case. That's one of the challenges, is not knowing, not having any transparency.

But that dynamic and the impact that it is already having on the administration of justice is really significant. And one of the law professors who is the most prolific, Maya Steinitz, and she's testified

before Congress a number of times and has written quite a few law review articles on the topic, has pointed out that TPLF is having a major impact on our justice system.

I personally have concerns about it because it changes what is a forum that our founding fathers and mothers developed to provide an opportunity for people to resolve disputes fairly, equitably, in a neutral forum is now an investment vehicle.

It's an opportunity to try to make money, not based upon doing justice or resolving disputes. It's just taking a bet on the outcome of a matter. And that is a significant issue, and I think it's a significant concern.

The risks related to funding are also significant. And one of them becomes the ability of funders to influence the outcome of the case by either de facto control or de jure control, based upon the agreements.

And again, there is not transparency to understand what those agreements say, but my understanding in listening to funders is that these agreements enable the funders to basically review and make decisions about continuing to provide funds through the course of the case.

So they would not say, here is a million dollars. They would say, here is two hundred thousand, and then I'm going to continue to give you money based upon how the case progresses and what they determine.

And, again, that might be obligatory in terms of me being objective markers. Or I suspect it's probably more discretionary if the funders are satisfied with the way the case progresses.

Another issue that is happening -- and this is something that's identified in the second law review article that I pointed out from Professor Parikh; it's called the Alchemist's Inversion -- is that funders are also funding portfolios of cases. Large MDL's. Large class actions or mass tort actions. Where they will fund not only the opportunities to try to find plaintiffs, but they will also fund the actual actions.

There, I think that there is an even greater concern about the impact that the funders would have on how the case has progressed because they are the pipeline for the cases. They are the entity that is providing the ability of the lawyers to continue to prosecute those matters.

And even if they do not have explicit control by virtue of their agreements, the lawyers will absolutely know that the funders are the key player in

the process. Because if they pull the funding, or if they express concern about the direction, including whether matters are settling or not settling, that's going to have a significant impact.

And the argument that the Chamber makes and Lawyers for Civil Justice and TCJL, is that this is not an issue where there is a request to stop the practice or to limit the practice. And in Europe, by the way, they actually have put limits on funding, and in particular, the percentage of recovery that funders can receive.

But this is an issue of disclosure. Because of the significant challenges and impact that the funding has, it just becomes more important that disclosure takes place.

And some of the issues that I pointed out in the memo in terms of why: It does make a difference what the resources of the parties are, in terms of their ability to pursue litigation and respond to litigation.

Every time you have a lawsuit, plaintiff is going to want to inquire about the defendant's net worth. They are going to want to inquire about their financial status generally. Are they in a position to be able to fund a judgment or a settlement or other factors that will significantly inform the plaintiff and

their counsel about the ability to settle the case? Or the leverage in the case? How much pressure can we put?

These are all factors. They don't relate to liability, in effect, at all, unless it's punitive damages. But lawyers are not going to just try to learn that information just to make a punitive damages argument. In a contract case, you're going to be looking at the same issues because you want to know what defendant's ability to withstand judgment, as well as how much they are going to be able to push back on the case and work through discovery.

It's also the issue of understanding the adequacy of the representation itself. Understanding how the lawyers are prosecuting the action, and is there potentially undue influence by the funders, based upon what their agreements provide.

And these are factors that the parties need to understand. Lawyers need to understand, particularly if there are multiple plaintiffs in the case.

There is a typo on the second bullet. What I was saying is you want to know who the decision makers are. You want to be able to walk into a mediation and understand who is helping to make the decision.

We obviously have a common practice in mediation where you want insurance there. You want the

people who are going to have the ability to decide whether they are going to participate in settlement to be at the table.

In this dynamic, if you try to work out a settlement, and you have a funder who, again, doesn't have explicit veto rights, but they certainly have a huge stake in the outcome, and they are going to be very interested and, undoubtedly, extensively involved in any discussion of settlement. They need to be there, and it needs to be understood what their role is and what their interests are.

There's also issues about credibility of witnesses in terms of the case and how this issue comes up and particular witnesses, particularly if they are in a relationship with the funders or a potential interest in the outcome of the case.

Similarly would be a situation if a witness had another interest in the case just by virtue of the fact that family members gave money and would recover that money if the case proceeded. You would want to know that because that might impact the credibility of that witness.

It's also a significant issue regarding judicial recusal. When I realize that there's been quite a bit of, you know, disparaging comments about

this issue or just critiques about this issue in saying, you know, judges are not going to invest in funders. So it's not going to be an issue.

Well, the reality is that the funding industry is exploding, and the involvement of all sorts of different types of companies -- hedge funds, investment banking funds, financial services firms, law firms -- are also getting into the funding process.

So the sense that judges are going to not invest in funders is overly simplistic, and I don't think it's going to address the long-term progression of this booming industry. And because of that, we need to know who the funders are so that the judges can make an appropriate determination about whether they need to recuse.

The other issue also relates to how the case is characterized. And this is an issue I think, in a sense, goes to some of the heart of what the funders are concerned about.

And I was at a conference earlier this week at NYU where two very articulate and excellent funders were there. And they were pointing out that they're not opposed to disclosure of funding. That's a bit of a shift in position from where they have been in the past.

So they are willing to agree to disclosure of

the existence of funding, but they don't want to disclose the agreements, and they don't want to disclose the details of their funding.

And their concern is that it might prejudice them and their customers, in terms of the litigation. Well, obviously, this is an issue, and I understand that concern.

But fundamentally, if a funder is funding a case for an individual plaintiff with millions of dollars, and the funder is there and that money is there, but yet the plaintiff and plaintiff's attorney is standing up and saying, this big, bad, horrible corporation, with all its money and resources, is able to bring in all of these experts, and it's just me and my lawyer, well, that might not really be the case.

And I think that there's an inequity and an unfairness if the funder is there, and the lawyer -- and the plaintiff has substantial resources to prosecute their case, and yet, they are saying something to the contrary.

I will also point out that in terms of the access to justice question -- and I noted this in the memo, and I agree with John that access to justice is really critically important. And we have seen too many trim lines that fewer cases are being filed, and far

fewer cases are going to juries or judges for trial on the merits.

And that, I think, is an issue that is wrapped up with the cost of litigation and the cost of the pretrial processes. And, you know, large companies are in a position where they can decide to invest in prosecuting the case, whereas smaller companies, smaller plaintiffs, defendants, sometimes have to make a very difficult and, I think, unfortunate decision to settle a case or not to bring a case because the costs are so high that it does not warrant filing the lawsuit, even if they are absolutely correct on their claims or defenses.

And that is a big problem and that relates to the, I think, systemic challenges that we have in the way that our discovery process works. But funding doesn't fix that problem, and it isn't specifically needed to address that problem.

Funding will be a continued opportunity for parties to gain funds to bring the lawsuits. Disclosure does not change that. Disclosure does not limit that. It in no way would prevent the funding industry from progressing and investing in these cases.

Again, personally, I have concerns about that as a general issue, but that is not the subject that

we're talking about.

And the issue about privilege is often raised, and the idea that the relationship between funders and plaintiff's lawyers and the plaintiffs is work product. And to that I would suggest that there is no reason why any kind of relationship, particularly with an outside party, is completely cloaked with the conundrum of privilege, particularly work product.

The same issue would be that an insuring agreement is not considered privilege, even if it includes language related to litigation strategy and litigation conduct. And a funding agreement similarly is not just de facto always going to be privileged.

And we shouldn't just make that presumption in any event. I think that there is a strong argument that significant elements of the relationship between the funder and the decision to invest in a case potentially is not privileged. It's a business decision. They are making an underwriting decision regarding whether they think they should invest in the case.

And much of that analysis does include legal advice, legal judgment, presumably. Again, I haven't seen it. But the actual agreement itself is not necessarily protected by privilege. And even if there are elements of it that are, it does not mean that the

entire agreement should be protected without the ability to review it.

One of the issues that we discussed as a subcommittee is the idea of submitting the agreements in camera to the judge. And I understand the concern with respect to that as it pertains to the potential that there is privilege.

The problem that I suggest with that approach is imagining, again, that I don't have personal knowledge, that these agreements are very long and detailed. They are written by investment bankers who are even better than lawyers at drafting agreements. And they are going to have tens or hundreds of pages of provisions in them. And we're going to be asking a judge to do something with it.

And I'm not sure that the judge is going to even be in the position to make a determination about working through a very detailed, complex agreement to decide what information about it is relevant to the parties and the Court. Or not relevant, but important that they should be aware of.

And I think a better approach is that provisions of the agreement that are believed to be privileged can be redacted. And the parties can have discussions about that. The party producing the

agreement will make an argument about what is privileged and why.

And there can be a discussion before the judge, and at that point, then, there can be an in camera review of those portions, but within the context of making a decision about privilege. But just providing it to the judge, here it is, again, it's not clear what the judge is going to be asked to do with respect to that.

As I pointed out, a lot of courts and rule-making authorities are looking at this issue, have been very active in it. Harvey is correct that this is an issue that has been discussed at length before the Federal Civil Rules Advisory Committee. The Federal Appellate Advisory Committee has also spent a bit of time on it as well.

The issue there is the first discussion in the subcommittee that considered it about seven or eight years ago was really looking at it through the contest of the MDL messaging or MDL rule making. And so they were in a more narrow band with respect to third-party funding.

And the recent decision to appoint a subcommittee on this topic is, I think, welcome. But it doesn't suggest that it's -- you know, just, we're

just -- they're just circling around the same issue they've considered before. The appointment of the subcommittee is, in fact, the first time that there has been a specific referral of just that issue and potential rule making.

And, obviously, I'm hopeful that the Federal Civil Rules Advisory Committee will progress the issue and consider and propose rule making on it. But I will point out, as many of you know, that that process is extraordinarily time consuming.

And because there's not even a potential rule on the table, it would be no earlier than December of 2029 before a rule would go into effect, and most likely, it would be one or two years after that because of the number of -- every cycle requires basically another year or year and a half to progress a potential rule.

So I think, in summary, this is an issue that is not trying to stop the practice. It's an issue of simple disclosure to allow all of the parties to have a perspective on what's going on in the case.

We do make the suggestion that there is a similarity to the requirement that insurance policies be produced. Insurance is absolutely not relevant to the merits of the underlying case. Obviously, would never

go to a jury on a merits issue because of the prejudicial impact.

But yet, our rules clearly provide -- our disclosure rules provide that insuring agreements are subject to disclosure. Not just the fact of insurance, not just the amount of insurance, but the actual agreements are subject to disclosure. And that's because it makes a difference to the parties, to the plaintiffs.

And the fact that an insurance company might have a coverage obligation relates to the relationship between the defendant and the insurer. Plaintiff does not have the right to bring the insurer into the case in almost any circumstance, and they don't have a contractural relationship with the insurer. They have a significant interest in it, and they want to know, because that tells them quite a bit.

Similarly, they would want to know about the provisions of an insurance policy that requires the insurance company to provide a defense. And that is even more similar to the issue about funding. Because the plaintiff does not have any access to those funds about defending the case. They don't get to recover unspent legal fees that the insurer was obligated to provide.

However, they want to know because they want to know the capacity of the defendant to at least rely on insurance funding to continue in their defense of the action.

Similarly, the desire of defendant's to know about funding provides the exact same understanding. What is the capacity of the plaintiff to continue to prosecute this case? And how is that going to impact the potential for a settlement?

And so I think these are very important factors. And in the fairness of the process, disclosure is appropriate, and we should move forward with that.

CHAIRMAN BABCOCK: Thank you, Robert. I'm sure we wanted to hear from John, but something that Robert just said sparked a distant memory, back to 1998. Was anybody on this committee besides me at that time? Harvey and Skip and Professor Carlson.

Well, check me on my memory here. We redid the discovery rules at that time, and we added the obligation to disclose indemnity and insurance agreements. I recall many of the same discussions about whether we should do that or not. And there was some substantial opposition to it.

And I wonder if to thoroughly study, this we ought to go back and see if my memory is right about

this and see what kind of thoughts were present then.

I was on the committee, and I think the Chief was, but we had just come on the committee at that time, within a year or so of that.

Harvey, do you have a different memory than I do of that day?

HARVEY BROWN: I don't remember at all.

PROFESSOR ELAINE CARLSON: Elaine, any thoughts about that?

PROFESSOR ELAINE CARLSON: No.

CHAIRMAN BABCOCK: Well, it might be worth looking at it because -- I know John is going to say it's not even an imperfect analogy because whether you pay a judgment is different than whether you fund litigation.

But, all insurance policies, I think, that come into play and should be disclosed do account for the payment of the defense costs. And they are all different. And so that is a more perfect analogy than just, we are not going to indemnify -- or indemnify obligations stop here or there. So it might be something worthwhile to look at.

And having mediated a few cases, that's stuff that the mediator really wants to know. I have a case right now where the indemnity application is virtually

nil because it's a wasting policy. But the defense obligations are, you know, vast. I mean, it never stops.

You get to the US Supreme Court first and last, and then the obligation to defend, which is not true of all policies. And that really is coming into play in settlement of the case.

So I am rambling too long. And, John, it's up to you. But that's why I couldn't stay with you in the bar and drink last night because I had all of this stuff that you gave us that I had to look at.

JOHN KIM: Well, I stayed in the bar and drank.

CHAIRMAN BABCOCK: I know you did. We're going to consider your comments accordingly.

JOHN KIM: I think this is a clear issue. I think it is a public policy issue; it's not a rule-making issue at this point in time. And I think it's important to understand who the messengers are. Because if you read Robert's reply, he kept saying the litigation funders and me.

So let me make this clear: I am not employed nor do I lobby the third-party litigation funding. I was assigned this by Harvey, who I will punish at a later time.

CHAIRMAN BABCOCK: There will be a group flogging later on.

JOHN KIM: But let's also be clear. As you've heard Mr. Levy say, this is initiated by the Chamber of Commerce, the top one hundred companies, which includes Exxon, his employer. This is a mandate, a policy mandate that they are trying to spread across the country.

And, Chip, I'm with you. Except I go three years further back than 1998. And I remember sitting here in the legislature in 1995, when everyone will remember Catskill Four tort reform. And we got our brains bashed in if you were a plaintiff lawyer. And probably deservedly so.

Joint and several was out of control. Doctors couldn't get insurance. Rates were increased and doctors were having to leave state. It was affecting our health care. There were no caps, and it was a mess.

But there was a plethora of real world examples, real world decisions. And what is absolutely absent from this debate or policy proposal are facts. True facts. More important, there is not anything that supports the need for change in Texas. Because tort reform took a lot of it.

I took a note that judges weren't smart enough

to review a document in camera. Judges weren't smart enough to analyze what those agreements really said. Well, then why are we here? Right? We're not here to promote more dumb judge rules. Right? We're here to promote justice, and we're here to promote the access to justice.

So let me start by saying this is how the Chamber and the top one hundred companies in the world have characterized those who use third-party financing. And this is right out of their memo. They are not interested in social justice. Not interested in providing relief to those who have been injured.

His law review professor calls people that use it apex predators, that the mass tort dispute involves non-meritorious claims, and there's Alchemist's Inversion.

So let me say, because, as someone who does today 70 percent defense work, 30 percent plaintiff work, but I promise you I'm associated as being a plaintiff lawyer, I think those victims, those Boy Scouts, they beg to differ. I think the little gymnasts would beg to differ.

I think our Armed Forces that got exposed to polluted water for decades at Camp Lejeune, they would beg to differ. I think our military that was given

defective ear guards in the 3M litigation, I think those veterans would beg to differ. Those claims are meritorious.

But think about the flip side of it. Who are those claims against? The 3Ms of the world. The Exxons of the world. The big pharmacy companies of the world. And if you have an individual claim, if Justice Bland has an individual claim, she can't afford the cost of litigation now.

And as a result of that, the rules have provided a way for these claims to have an access to the courtroom and an access to the judge. They are the MDLs of the world. Texas has those. They are the class actions across the country. Texas probably killed them. You know, these are all things.

And when you talk about the ability to control merits or non-merits, you have to presume that the judge is going to act in the best interest of justice, that the attorneys are going to act in the best interest of their claimants and that the committees formed are going to act in the best interest of them.

Because if you start with the presumption that we don't care about social justice, we don't care about the merits, we're apex predators, then we flipped the system all over on its side.

But there's a reason they want to start the debate with this. Because the current rules, the current rules of discipline, the concurrent cannons of ethics that apply to the judiciary, allow for this. Allow for such analysis and disclosure, if necessary.

There have been over a hundred decisions across the country. Sixty-seven percent, or two to one, of those opinions say no disclosure. Some of the opinions are really, really important. Because courts, as Mr. Levy talked about, wanted to talk about the adequacy of representation.

And courts look at funding agreements for that? You bet they do. Because when you're class counsel, one of the fundamental rules of Rule 26 is adequacy of counsel and whether you have the monetary needs to do so.

So let's be clear. What is -- according to business, big business, what is litigation financing, right? Who does it capture? Does it capture me if I'm doing contingency work and I take 40 percent of my client's recovery? And I have to automatically disclose my contingency agreement in a case where there are no attorney's fees implicated. Where Texas law would not support it.

Does it include a parent, if Jane's parents

funded her case, individually? And of course they want their money back. And of course the only way they're going to get their money back is if there's a successful outcome in the case.

Does it inclusive those agreements that don't include plaintiffs? It's just a loan to the lawyers. And then when you get to the lawyers, does it include those lawyers who get a portfolio loan? Not a portfolio loan as described, but so of many of these agreements are a portfolio basis. They give a lump sum to plaintiff lawyers, and it crosses over multiple sets of litigation, multiple cases. Basically, first in/first out on the return on investment.

What about that? How do you allocate that to any specific type of the litigation? Does it include those finance agreements that are directly to the plaintiff? It is undefined. It is vague. And the whole thing is speculative at this point in time.

Now, you hear this claim right and left that, oh, this is just like insurance. You know. Well, it's not. We know why the disclosure of insurance exists. Because the insurance company is going to pay the judgment.

In Texas, we have this little thing called a Stowers Doctrine. We, under the rules, have to keep our

Stowers demands within the scope of insurance. As you get to larger companies, you have complex insurance towers that you need to know the levels of insurance in order to handle the Stowers demand. Because they are paying the judgment, if any, in the end.

Now turn over to any type of third-party finance. They don't pay anything. They are not paying for a loss, except they don't get a return maybe. But they are not funding any money into the justice system. It's not justiciable what they're doing, unless it's a private dispute between them and those people they funded.

But here is the danger. You have insurance companies who control the outcome of the litigation because they're funding. They choose what lawyers to hire. They choose what rates. They have these meetings and status reports. You have to write these extensive white papers if you're representing them.

On the flip side, thirty-party lending. And as you heard in the original presentation, I guess, I surmise, I haven't seen one. Well, I have. I have seen a lot of them.

Every single one of them that I have seen has clear language that says, we don't have any control over the litigation. We don't have a say-so in how you

handle it from a liability standpoint. We don't have a say-so in how you present the case. We don't have a say-so in how you try the case. We don't have a say-so in the settlement process. We don't have a say-so until you get funded, and then we get our money.

Fundamental difference. And the presumption, without evidence, that somehow litigation funders are in mediations and mediation funders are in the courthouse directing the litigation. Okay. I mean, it doesn't happen.

But here is what does happen. We take this allegation that Robert mentioned about, oh, they control it. You know, because we have this one case that they were funding in tranches, which clearly means they control the litigation, and if they didn't like what was happening, they just wouldn't budge.

There are tranche obligations. One, especially in a generalized portfolio. But in specific cases, the tranches are meant to ensure that the lawyer just doesn't sit on the case and not move it. So it's guided by moving the case forward. It is not guided by, oh, you lost a summary judgment hearing; I'm going to cut this much and not the other.

So let me tell the big danger of equating this with insurance. Because when I get an insurance policy,

I get just that. The policy. I don't get the reservation of rights letter. I don't get the legal analysis behind such reservation. I don't get their risk analysis on the claim itself. I don't get their levels of authority they've given. I don't get anything that would indicate to me what their litigation strategy is. Fair game, right?

But if you start disclosing third-party litigation, you are going to get the terms of the agreement, the amount of the agreement. You are going to get a look inside the due diligence that has been done by third-party funders.

Because to the extent anyone believes that these companies doing third-party funding are dumb, they are not. They are not investing in non-meritorious cases. They have a ruthless due diligence process, in which they hire some of you, some of the best appellate lawyers across the state, to review those cases and help them make an investment decision in those cases.

You would find out things such as the terms or the length of the agreement. And why is that dangerous? Because when you are dealing with the biggest companies in the world, they will merely wait you out. They can drag out litigation. They'll drag it out until you've run out of the funding. They will drag it out until

there is a change necessary.

They will drag it out until you have to acquire more funding and give up a greater percentage of the recovery, either to the plaintiff or to the lawyer and their fees, because there's all sorts of different agreements.

That's far different and a far greater disclosure and a far more improper disclosure under work product than you would get under insurance.

So just a couple of other random thoughts because I haven't really thought about this very much. But I think this notion that there are social ills as a result of the litigation funding, there may be some merit to that from the proponent's position. It has allowed unbridled access to conglomerate cases.

I would suggest that we all understand that 20 years ago, I could go down to the bank, Bank of America, get a line of credit to fund my office or fund some litigation. Commercial banks won't do that anymore. You don't have the common ability to get capital that people need to compete with the Exxons of the world.

And I think the rules already exist to control any type of disclosure issue. There are cases in which disclosure have been granted across the country.

Nothing in Texas, mind you. I'm not sure why we're discussing it here. But across the country, in which there has been an abuse, or there has been an internal dispute in lawsuit between the lawyers and the funders that have come up, in which the courts have required disclosure. Not just redacted disclosure. Full disclosure.

There have been instances where they have required -- of the 37 opinions that I saw across the country which required some form of disclosure, more than half of them required redacted disclosure under certain circumstances.

There was the federal court in Florida that required disclosure in the 3M litigation to ensure that there was an adequacy of representation as they reached a monumental type of settlement. The rules already exist for this.

Last thing. It would effect witnesses. And the credibility of witnesses. If they had -- if an expert has an interest in the outcome of litigation, you have to disclose it. It you don't ask that question when you take that expert's deposition, I would suggest you ought to get a better set of lawyers representing you. It doesn't.

But -- I just hate to be called a cynic, but I

am. Because I have seen it in countless instances in pharmaceutical mass torts. Thee who has the money, the industry under attack, buys the science.

So look at the sources. I'm begging you to look at the sources and the affiliations of these. Independent law group offices.

The last thing I'll say is I think access to justice is important, and I think a 14-year-old gymnast who has gone to southern California to train for her lifelong dream of being an Olympian, earning a medal, standing on that stage, hearing the national anthem, making that sacrifice, her family making that sacrifice -- they can't afford, on an individualized basis, this type of litigation. And that is why you have a need for third-party finance.

Now, I'll throw it on the flip side. I agree that if there is proof of some overwhelming control by these finance companies in the handling of the litigation, the liability aspects, those areas which traditionally belong to lawyers and are traditionally protected by work product, yeah, you got to disclose it.

But are we going to trust our lawyers like we did on current disclosures? Right. So a lawyer's words under the new world would be worthless. Produce it. Right? We're changing the landscape on a public policy

issue that has not been fully studied or investigated at the Federal Rules Committee level, Congress or even our state legislature.

And so my suggestion would be, let's wait and let's study this. Let's see what's really happening in Texas, number one, that may force us to do some Texas rule making. Let's see what happens nationwide. And let's see if there's really, in reality, a laundry list of evils that is nothing more than speculation and surmise at this point in time.

CHAIRMAN BABCOCK: So you're against disclosure. (laughter)

JOHN KIM: Yes. Truthfully, I was just assigned the position.

CHAIRMAN BABCOCK: So you're an advocate for hire, is what I'm hearing.

JOHN KIM: Yes.

CHAIRMAN BABCOCK: Let me ask you a couple of questions. One, do you think disclosure, no matter how broad or how limited, would chill the industry? In other words, there would be fewer or less access to third-party funding, third-party financing.

JOHN KIM: It depends on the disclosure. I mean, I think you're already seeing a fundamental shift in the industry now -- I don't think Robert mentions it

in his memo -- where traditionally it was venture funds that were formed that were investing with lawyers and plaintiffs or litigation.

That is evolving into a different kind of industry now, where it's private equity, more public type of hedge funds and things of that nature.

So the dynamics -- now we get into finance stuff. But the dynamics between those type of structural setups are a little bit different. But I would argue that once you go from a single-purpose entity vehicle specifically for third-party litigation finance to a hedge fund or an equity fund, which is more generalized in nature, then the dangerous control over litigation slowly begins to disappear because they have --

The way those things operate, it is -- all they care about is the return. They don't get involved in it. The only time they get involved in it is if they are actively trying to take over the company.

CHAIRMAN BABCOCK: Do you think the evolution of the industry cuts against the chilling effect that there is disclosure or exacerbates it? In other words, the way the industry has moved, does that mean they are less likely to care if there is disclosure or more likely to care?

JOHN KIM: I don't think it alters the equation. I mean, I think honestly, whoever is investing, whether it be in the lawyer, in the litigation, or in a plaintiff, they're doing it for money. They want a return on investment. So I don't think it alters the equation one way or the other.

CHAIRMAN BABCOCK: Is there any way we can -- I can't think of any, but maybe you can. Is there any way we could develop data on the issue of whether or not disclosure would have a negative impact on the availability of third-party financing?

JOHN KIM: I'm not smart enough for that. But it's why I'm saying that with Congress looking at it, with the Federal Advisory Committee looking at it, we ought to let them do the work and see if they -- and see what analysis comes out.

Because, you know, in 2014, when the Advisory Committee first started looking at this, over 50 percent of the judges had never heard of third-party finance. They didn't understand the issue. And now it's just -- it's become the new child for the Chamber, so.

CHAIRMAN BABCOCK: A couple more. And I'm sorry to dominate this. But as the chair, I get to do that. It's so much fun.

JOHN KIM: Well, you know I drank last night.

(laughter)

CHAIRMAN BABCOCK: Do you think disclosure, whether it is broad or limited, would have any usefulness to a mediator who is trying to settle the case?

JOHN KIM: No.

CHAIRMAN BABCOCK: Why not?

JOHN KIM: It doesn't matter. Because you are presupposing that the attorney representing the real party at interest is not adhering to his ethical and moral duties as an advocate. I can promise you, especially when you're on contingency, when you go into a mediation, you're trying to get the last penny you can get.

CHAIRMAN BABCOCK: Two other things. Two final things. One, I assume you were exempting everybody in this room when you referenced dumb judges.

JOHN KIM: Well, I didn't say the judges were dumb. I'm saying that the proposed rule implies that judges are dumb.

CHAIRMAN BABCOCK: I only ask that question because Judge Wallace sat up in his chair, and I thought he was going to come over the table, frankly.

The last thing, and then I'll shut up, is you may, in fact -- I have no reason to doubt it -- do

70 percent defense work and 30 percent plaintiff work, but the reason you're identified as a plaintiff's lawyer is two things. One, you wear pink coats and, two, you have a plane. So I rest my case.

JOHN KIM: Got rid of the plane. Those Fortune 50 companies have planes you can use. And I like pink.

CHAIRMAN BABCOCK: You are very stylish. And if Rusty was here, he would be jealous.

JOHN KIM: But don't tell him.

CHAIRMAN BABCOCK: He just emailed me saying he's so sorry he missed. I'll tell him what he missed.

Harvey, sorry. I didn't mean to capture this thing.

HONORABLE HARVEY BROWN: No. Great. I'm sure there will be lots more questions. I want to recommend something for people's reading, since you said we're going to be doing this in more than one session.

If they kind of want to see the strongest point of view for disclosure, they should read the article entitled "Grim Realties" by the Chamber. It relies heavily on a dispute between a third-party litigation funder and other parties where there has been allegations of controlling the settlement process.

So that's kind of their big argument is there

is control going on. There has been a whole lot of testimony from third-party litigation funders that they don't control. There has been a lot of articles about that. But there are, at least in two lawsuits, allegations that they were going to so, so the "Grim Realities" will kind of get you to see that point of view.

I thought the Kent Hance memo gave a good history. So if you want a history of how this has gone on and all the different groups that have considered it, such as, I mean, there's been an MDL subcommittee that didn't adopt a rule like this. So if you want a good overview of that.

Now, it was written with a view that was against disclosure. So bear that in mind. But it does at least give you a pretty good history.

Process wise, I called the Chief to ask how he wanted us to proceed on this public policy issue. I said, well, if we vote against this as a committee, are we finished telling you the answer to the question?

And he gave the answer that I expected, which was, no, even if you are against it from a public policy standpoint, we would like to see a rule for us to at least look at and think about.

So we have drafted two rules. One -- they're

essentially identical, except for one provision. And that is one of them has in camera disclosure only and the other has disclosure to all parties. So that's in your memo. We can get to that in just a minute.

To answer one of your questions, at least somewhat answer it, you asked is there anything that could be done to find out whether this would have a chilling effect? I don't know of anything.

But I will say that I thought what Arizona just proposed in it's 12-member task force was interesting. They are not having a mandatory disclosure rule. They voted against that. Instead, they are having on their civil cover sheet a one-sentence -- one question with a yes-or-no answer: Is there third-party litigation funding in this matter, period -- or question mark.

And the reason for that is they want the data on how often this is occurring. So gathering data for several years might give some ideas to whether, for example, Arizona is getting more or less funding compared to other states that don't have disclosure rules. So that is one idea possibly, to answer your questions.

After hearing the two of them, I thought I would chime in. After reading all of this, I had two

primary problems with it. First, it seems like, to me, that this was the start of a bigger fight. You get the disclosure, and then you want to find out -- you know, you start comparing notes among various defendants about what else are they funding, how are they doing the funding?

And you hear all of these arguments and articles and statements about, oh, we need to know X, we need to know Y, we need to know this. And it seemed like to me it was the start of the process.

In other words, it's not just that they want to know the agreement. Then they want to know, well, who knows about the agreement, how that's influencing them, and what's going on behind the scenes.

So I thought, this is just going to lead to a whole lot of discovery fights for judges, and it's going to lead to a whole lot of accusations against lawyers if they haven't fairly disclosed it, et cetera, et cetera. So I was very worried about this is just kind of the start of a big, big controversy that would happen.

The second thing is I was disturbed about this just from a kind of procedure and policy point of view. I don't remember us, as a committee, ever having something that was proposed to the legislature, lost, proposed to the legislature, and repeatedly has been

presented to the legislature, and when they can't succeed there, they ask this committee to make a recommendation.

And not only are we asked to do that, then we receive lobbies about their positions. And it seems to me that should not be our role as an advisory committee, to open an avenue for somebody who can't win in the legislature, to find a new avenue to try to impact public policy goals that they think are important.

I think that's dangerous for us as a committee. It doesn't mean that we have never initiated something on our own. But usually we are responding to the legislature who says, there's this problem, or we would like you to draft a rule on this. We are not going and adopting something that the legislature has already rejected. That seems to me somewhat problematic.

CHAIRMAN BABCOCK: Yeah, you talk about the committee. My view is that the committee does what the Court asks us to do. And, you know, they'll note that comment and whatever others. But it is really the Court's issue about whether or not this is something they should do in the face of legislative rejection of similar proposals.

Yeah, Robert?

ROBERT LEVY: I did want to add one clarification from personal perspective that my comments, as all of ours, I perceive, are in my personal capacity. I'm not here speaking on behalf of any company that I happen to work for. I do think that this is an issue that companies like mine care about. But it's also an issue that small companies, other litigants, people that find themselves in court, do have to deal with. And so --

But I am informed by my experience and perspective, and that is how I arrived at my advocacy on this issue.

The one point, though -- or a couple points that I wanted to emphasize, is that the lawyers clearly have ethical duties that participate in litigation. The parties to litigation have duties under Rule 13. And in the Texas Civil Practice and Remedies Code, they have duty to candor, disclosure that they are subject to, and they face sanctions if they violate those duties.

But the funders, other parties that are ancillary, do not. And so while the lawyers would have duties, the impact that the funders might or might not have in the action, could be very significant in terms of how the case progresses.

As John pointed out -- and by the way, John, I

was not folding you within the funding rubric. I was simply, you know, pointing out that some of your comments are similar to comments that people in the funding industry have raised as well.

But the issues in a litigation proceeding where a funder might have undue influence can be significant, and, you know, that's why we have discovery. That's why, you know, if I said, we've got insurance and it's X amount, you probably wouldn't accept that. If I said, we have -- insurer has the duty to defend, which is, again, not money that the plaintiff would ever recover, you're probably going to want to see the policy to look at it yourself.

And of course, you should. That's how the process works. And that's why we need to look at and understand other factors that might impact how the case is progressing.

I do want to also point out the reference to Arizona. I think it's important to understand the full context of how that report actually was generated. It's just interesting because that report came under a process of the Arizona Supreme Court's examination of alternative legal structures or -- which I'm not suggesting that we open that can of worms, but Arizona is looking at the potential of having non-lawyer-owned

law firms, basically, and whether that is a good or a bad thing. And that's the context in which that analysis of third-party funding came up.

And I think, also, the suggestion about private equity becoming -- you know, moving into more multipurpose hedge funds or investment companies, becoming like portfolio lenders, and it would lessen the concerns about control, that -- there is no reason to know if that is true or not true.

But certainly, hedge funds, retirement funds, any type of large funds that have amounts of capital that they are looking to invest, they underwrite and they look very carefully at their investments, and they also follow up with them.

You know, these funds that are investing in corporations, they are very active in questioning how the corporation operates and the decisions a corporation takes and the votes that the corporation offers to shareholders, and they also propose votes to shareholders.

So funders are very sophisticated. They are very smart. You are absolutely right. They have many lawyers who have a history in the legal profession. And they are smart people, and they know what they're doing. And they also know that they want to maximize their

return however they can.

They do it in a way, again, that is not subject to our ethical rules or obligations. And the funders, unlike the plaintiffs and unlike plaintiffs' attorneys, are simply looking at return on investment. They don't look at the 14-year-old gymnast who was abused. They are looking at potential that they are going to make money out of that set of circumstances and defendants.

And if they're not, even though that 14-year-old might have the most important case that many of us would ever see as a lawyer, somebody who screams for justice, funders are going to say, not interested because you're not going to make us enough money.

That's it. And that's not a bad thing. It's just economics. That's what they're looking at. And if they're a public corporation, like Berker Capital, they have a duty to their shareholders to do exactly that: Find the maximum way to make money out of their investment.

And that is going to be their motivation. But that is important information that the parties want to know about and need to know about.

And you asked Chip a question about the mediator wanting to know about the fact of funding. And

I think absolutely. The mediator is going to hone in immediately on that fact. Just like I suspect -- I haven't been on this side of the fence -- that a mediator is going to want to know how much money and what the contingency fee interest is in the case.

Because the mediator cares about how much money the plaintiff will walk away with. After all the expenses, after all the overrides, they want to know. So that if the case settles, and the plaintiff is going to walk away with $10,000 on a $250,000 settlement, it's not going to settle because the plaintiff needs money. That's what they're there for.

So the mediator is going to want to understand what all the layers are. How much money will be paid in expenses? How much money is going to be paid to the funders? And to the lawyers? Because otherwise --

HONORABLE ANA ESTEVEZ: I just have a question for you, whenever. I just wanted you to know.

ROBERT LEVY: And that is critical information to assist the mediator in determining if a case can be settled.

And I recognize the reference to language in proposed disclosure rules. There's a suggestion that it's vague. It could be over-inclusive. That's obviously an issue that we're well-equipped to discuss.

Frankly, it's one of the reasons why I think this issue should be before this committee and not a legislative committee, because we have the experience and the perspective to discuss it, and we're not subject to the political whims of a floor debate.

And love the legislature. Worked there. But I have also seen what comes out of a floor discussion, amendments that are written on a scrap of paper. It's not always the most carefully considered and well-thought-out process. But I think this committee and, of course, the Supreme Court, is really the right place to develop rules that relate to how litigation is managed. And so.

CHAIRMAN BABCOCK: Judge, you're third in line. It's Kent and then Skip and then Judge Estevez and then Judge Wallace.

So Kent, you are up.

HONORABLE KENT SULLIVAN: Okay. I'll try to be quick.

CHAIRMAN BABCOCK: You had an early hand. Your hand was up early.

HONORABLE KENT SULLIVAN: I'm trying to play by NBA rules. Take a shot and hit the rim within 20 seconds.

I like to think in terms of best practices.

And so I tried to do a little bit of internet research, and it did look like here in the States that we're still flailing a little bit and haven't gelled with respect to an issue like this.

So I looked more broadly, and I found that there is a proposed European Union directive out on third-party litigation funding, which I thought was interesting. Again, this is not a proposal I'm making. It's just that it is interesting that they appear to have looked at it, and at least this proposal that I saw gelled a number of issues.

And the thing that I took away that was most interesting, perhaps, was the issues were far broader than disclosure. I will just really quickly identify them. There are only six. But I thought it created a different context for evaluating this whole issue.

One, the proposal would require that the arrangement be in the best interest of the claimant. Two, requires financial oversight, in the sense that the funder has to show that it has adequate resources to meet the financial obligations of the arrangement.

Three, the prohibition -- excuse me, it has a prohibition against abandoning the litigant. No surprise there, probably. Four, provides for safeguards against conflicts of interest on the part of the funder.

Five, provides limits on recovery, ensuring that at least 60 percent has to go to the claimant. And six, interestingly, was a disclosure issue. It was only one of six. And this one, that I found --

And again, what I saw, which appeared only to be a few months old -- it could be out of date -- but it seemed to suggest that the court had to be informed and to know the substance of the funding arrangement involved in the case before it.

So I thought that was interesting and provided a broader perspective on the issue of the various elements of perhaps what should be considered when discussing how to deal effectively with this.

And this is also not to suggest that these are all the issues that this committee or even the Court necessarily can resolve. But they did seem to make sense to me as issues worthy of consideration.

Last quick point is there tends to be, I think, a tendency to view this in very asymmetrical terms. And I will just relay briefly personal experience that I had being involved in a conversation with lawyers from a Fortune 500 company, a publicly-traded company, who was very interested and, in fact, had a history of using litigation funding, much to my surprise, because there was no indication that there

was some financial need for them to use litigation funding, but they did.

And in essence, they indicated to me that it was a way to control their earnings and their balance sheet. And they gave me some specific examples that I'm not going to go into, but I was very surprised.

So, again, just an interesting data point to add to this, that it is perhaps not as -- the circumstances that we tend to think of are perhaps not representative of the entire playing field and the direction this could be going. Just a thought.

CHAIRMAN BABCOCK: Thanks, Kent.

CHARLES "SKIP" WATSON: I don't have a dog in this hunt, but I really think that I see an issue the Court needs to be aware of because this is going to come up. It may need to be dealt with in the disclosure.

John's comment that all the investor was interested in is his return on the money, but that he doesn't have a say in anything, there's just no say whatsoever going through, no control, reminded me of a case that I had in the oil and gas context before the Supreme Court, where it's analogous.

When a landowner sells the land and the minerals, they typically keep a non-participating royalty interest. Non-participating in every sense, not

just the bonus paid for the lease. But they don't have any say-so in anything. It's truly non-participating.

And they are in it after taking, presumably, a slightly less sales price in return for the investment to come at the end, if there ever is a lease and there ever is royalty income. So it's analogous.

But in the KCM Financial versus Bradshaw, was a case in which that non-participating royalty owner, who has no say in the negotiations, nothing to do with the lease, sued because the landowner executor, who signs the lease and has absolute authority to make the terms, made a decision to take a higher, much higher, bonus up front for making the lease in cash -- in other words, money in the pocket now -- and a 16th or so less long-term royalty interest.

Well, most of that royalty is going to go to the executive, the person who makes the lease, who owns the minerals. But the non-participating royalty owner suddenly said, now, wait a minute. You didn't get the full lease payment that other people were getting on this lease. That cuts into me. You know, you take a 16th less, I get a 16th less in my non-participating, you know, investment here.

And the Court held that even though there's nothing in writing, and they had no right to

participate, that to effect the purpose of that initial withholding of the non-participating royalty, interest there was an informal quasi fiduciary duty to get the best royalty interest you could get.

Well, what that means is that in a subsequent case that I had before the Court, which thank goodness that issue didn't come up, the landowner had insisted, in making the lease that, I've only got an 80-acre tract here. I live on it. I have a baby, a child with asthma. I don't want any trucks or any drilling activity within two hundred feet of my home or two hundred feet from my water well. And there's not to be any bright lights or nighttime drilling. I want my children to sleep.

Well, the unfortunate thing with doing that was the spacing requirements were 40 acres per well. By putting in that two hundred foot around my house, no activity, and two hundred feet around my water well, no activity, it was limited to one well on the tract. Had there been a non-participating royalty owner, their income from their royalty would have been cut in half because there was only one well on the land instead of two.

What I'm trying to say is the Court will get, sooner or later, a very clever request that I know I

don't have any say in this, but I am in it for the investment. And to affect the outcome and to generate what was intended by that investment, I should have a, you know, informal fiduciary right to get the best settlement possible out of this case.

And you didn't get the best settlement possible. You settled it because your plaintiff didn't want to get on the witness stand, you know, like the 14-year-old girl or whatever, and face rigorous cross-examination. And you should have taken more money.

I just would caution the Court to be aware of how easily it is to create a duty to take into account the investor, to affect the point of that investment contract. I'm not saying that it's right or wrong, but I'm saying it's a rat's nest once you get into it.

And really creates -- I think the plaintiff lawyer who took the investment would rue the day when that happened when there's a target on him to take into account maximizing the investor's return on income or face a potential lawsuit himself.

I may be dead wrong about this. I hope I'm dead wrong about this. I don't think I am.

JOHN KIM: Skip, does it change your opinion if typically those third-party finance agreements are

non-recourse?

CHARLES "SKIP" WATSON: Yes. That really would help, John. You bet.

JOHN KIM: That is the true facts.

CHARLES "SKIP" WATSON: Thank you. Never mind.

CHAIRMAN BABCOCK: Judge Estevez.

HONORABLE ANA ESTEVEZ: First of all, this is just an incredibly fascinating topic that I've never really considered. And I just want to say that I would love to invest in John Kim's and Rusty's plaintiff work. So if they ever left the judges also invest in other people's, I think I can make some good money.

And I'm not trying to be funny. I really was sitting there thinking, I never even realized people were doing this.

So, Robert, you brought in your memo and you brought it up here, and it really struck a chord with me on the recusal of a judge because once this does become -- we're going to know who the good attorneys are. We're not going to do the ones in our courts, but if we really think this is a good investment, we're not going to want to be precluded from it.

I'm being honest. I don't know that this isn't -- I want justice for the gymnast, and I know

there will be money that comes from justice for the gymnast as well.

But the issue that -- and I don't have an opinion on this. This is all a brand new topic for me. But I, too, in my past life before I got on the bench, worked both on the plaintiff's side and defendant's side, depending on who my client was.

And as a plaintiff -- and I can easily put myself in those shoes -- I would feel like my duty would be to disclose these to my client and have my client decide whether or not they want to -- you know, realizing that I need to do this. In order for your case to be successful, we need this money.

Because outside of third-party litigation, all of your work is always kind of conducted through how much money you have. If you don't have enough money to finish a litigation, then you're going to have to settle, or you're going to have to get really creative, or you're going to have to take a loan out, or something is going to have to happen.

So the question is: Why does the defense need to know? The defense does not need to know. The plaintiff needs to know, but it's an advantage to the plaintiff to have the defense think someone is giving them money. Because if the defense thinks that I'm

getting third-party litigation, then they are going to think I'm going to go and make you spend another million dollars because I have another million dollars, and I can make more money that way.

And I think that it is -- yes, I think the mediator needs to know, if you think the mediator needs to know as a plaintiff. Because the plaintiff gets to decide -- or both parties gets to decide what they want to tell the mediator, so that the mediator knows what the parameters are.

But there's no need to disclose it to the other side unless you think it's an advantage. I mean, this is something that people who do need justice, whether or not -- I mean, it doesn't matter that the investor wants money. Of course, the investor wants money, and they don't care about justice. Why is that important?

Because the attorney wants -- the individual is going to get the justice when they are done. They are going to get some sort of damages or sometimes injunctions, or they are going to make a social change for everyone. They are going to get that. And the reason the other people are doing it is for the money. That's not bad; that's just reality.

So I don't think we say that we are going to

disclose this to the defendants because then they do know how much money they have, and they will change the litigation.

And I see from a plaintiff's perspective why they wouldn't want to have to tell. I think they would like to tell if they had a really good third-party litigation because then that would help them settle or help them get through, and I think they wouldn't want you to know if they are on a different case, and they received no funding. They would want you to think they're getting the funding, so that you would settle sooner and save more money.

So I just wanted to make those points.

CHAIRMAN BABCOCK: Thank you, Judge.

Judge Wallace and then Richard Orsinger.

JUDGE WALLACE:

HONORABLE R.H. WALLACE, JR: I haven't read all of this material, so this might be a dumb question. But I'm trying to figure out, if there is a disclosure requirement, what is the purpose of it? Let's say we want to adopt the rule that says you got to give the agreement -- third-party funding agreement to the judge in camera. To do what? I mean, what is the judge to decide? If it's legal and doesn't violate any ethical rule; what is the judge going to do with it?

CHAIRMAN BABCOCK: Is that rhetorical?

HONORABLE R.H. WALLACE, JR: No. I'm serious. If I go back and try a case next week, and somebody gives me one of these, what am I supposed to rule? What's the issue?

CHAIRMAN BABCOCK: Well, Judge Estevez says you get a piece of the action.

HONORABLE ANA ESTEVEZ: If you invested.

CHAIRMAN BABCOCK: Yeah, a good question, rhetorical or not. But Richard Orsinger had a comment.

RICHARD ORSINGER: I wanted to ask two questions, really. I don't understand the economics. And if it can be generalized: Is the structure of the benefit of the payment to the investor, is it treated like a loan with interest, or is it like a partnership with a guaranteed rate of return, or is it a percent of the recovery, eventual recovery?

So Robert is nodding his head that it's a percent of the eventual recovery, which means that the investor has a stake in the outcome. Now, then, what happens if the --

CHAIRMAN BABCOCK: Hold on for a minute. John is shaking his head no.

RICHARD ORSINGER: Okay. Let me carry on with this because I don't want to lose my train of thought.

If the plaintiff's lawyer and the plaintiff are presented with a cash award up front or an annuity payment over a lifetime or over a period of 20 years, the choice could radically affect how quickly the investors get their money back. So I'm curious as to whether that is a dynamic.

And then my second question is, is this only commercial arrangements that apply? Because in family law matters, we frequently find that some members of the family may be paying fees, or a company may be paying fees to -- that impact the divorce case, and I just want to know if this is going to have an impact on family law or not.

CHAIRMAN BABCOCK: Whatever we do, we are going to exempt this from family law. I don't even know what the Court is going to do with it, but I'm sure it will be exempted from family law.

RICHARD ORSINGER: That is reassuring.

CHAIRMAN BABCOCK: Okay. It's Kennon, Pete, and then Justice Kelly.

KENNON WOOTEN: My question pertains to the interplay between what we're discussing with disclosures and the type of disciplinary rules of professional conduct.

And, John, I think you said that the existing

disciplinary rules cover this for the lawyers, and the canon covers it for the judges.

So in looking at the disciplinary rules for the lawyers, I see that Rule 1.08(e)(2) expressly states that a lawyer shall not accept compensation for representing a client from one other than the client unless there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship.

So my question is to John, whether you think that's the rule that comes into play and gives sufficient protection.

And, also, to Robert, why that's not enough in light of what you said with the funders not having an ethics check on them.

JOHN KIM: So I think it does cover it. Because there is a positive presumption that the lawyer's going to adhere to their responsibilities and do their duties, with respect to the client relationship.

And I think that addresses -- it really addresses the mediation examples that we've been talking about, in that every one in that room -- and funders typically are not in that room. But everyone in that room is there, on the plaintiff's side, to maximize the

recovery to the plaintiff.

And so whether a funding percentage is in play or not, depends on part on the type of agreement. So if it is a funding agreement that I have taken out just against my portion of the fee, then it doesn't affect the plaintiff's recovery.

I think a mediator should know, and I think in every good mediation a good plaintiff lawyer, when you get to the point of considering whether to accept an offer, lays out for their client, here is the distribution sheet. Here is how the waterfall breaks down, and here is what is going to go into your pocket in the end.

And then, Richard, to your topic about the annuities.

RICHARD ORSINGER: Yeah.

JOHN KIM: So two things about that. Number one, a percent of return isn't the absolute norm in these agreements. It's contractual. They are different.

Number two, those with the percentage amount of return often come with a cap with respect to the recovery. And that's regardless of whether is a loan to a plaintiff or whether it is a loan to the attorney against his fee or whether it is a portfolio loan to the

attorney for his docket, basically funding his law firm.

But to your question on the annuity, two things happen that I know from personal experience with a friend of mine who did the exact same thing.

Lenders want their predicate return quickly, and on the annuity portion, it's not really practical for them to ride it out for 20 years because they want to close that investment vehicle. But there's a whole wide world market of being able to monetize those annuities.

It's similar to what I think most of the judges all the time down in the courthouse, when people have settled with a structured settlement, you know, three years later, I want to go back hard. They come down and try and monetize for present value their annuities. So that's how I address that.

RICHARD ORSINGER: Is there a danger, John, ever that an award for future medical or future personal care might not make it to the plaintiff because of the duty to pay back the investment? Does that question make sense to you?

JOHN KIM: Yeah, it does. And I think if you look at it in an absolute, there is a risk of anything happening. I think that risk is minimized with respect to medicals and things like that.

Because, typically, as a plaintiff lawyer, you know, if it's an insurance company that is funding it, I worry if whether ten years from now they can continue to fund it.

So we make a fund and put it in medical trusts with the plaintiff as the beneficiary as part of the settlement immediately. And so keeps -- with an appointed trustee, it keeps everyone's paws out of it.

CHAIRMAN BABCOCK: Mr. Levy.

ROBERT LEVY: Yeah, I wanted to respond to Kennon's question. It's a good question. First of all, potentially it's a little bit beyond the scope of the disclosure rule issue. But there is, of course, a tension between a lawyer who represents a client and a funder who wants to fund the client in return for a percentage interest in the outcome of the case.

And I do think, Richard, that is the common approach. That the funders are not funding at a 8, 9, 10 percent interest rate. There are some -- a bank does that. Other funders will do that. But the issue we're talking about is not that.

It's the funders who are purchasing the right to a percentage return in the outcome of the case. They are -- excuse me, they are stereotypically, as I understand, non-recourse. That's the whole dynamic,

that the plaintiff does not put themselves at risk other than they have to share in the proceeds.

And also on that point, in reference to Kent, this is absolutely an issue that hits the commercial side as well. Companies are approached quite frequently by their law firm, saying, we have got a great case for you. We've got a funder who is going to fund it, and you don't have to pay anything. So -- and if you recover, you'll recover hundreds of thousands, millions of dollars. It's a great opportunity. So you've got zero risk.

That's obviously not entirely true, but, you know, in terms of funding the cost of the litigation, it's all supposedly going to be borne by the funder. And companies might decide that that's in their best interest to go that route. And many have. But again, it does impact how the case progresses.

And back to Kennon's point. There is a tension and potentially conflict there in terms of the lawyer and the plaintiff making a decision regarding whether to fund the case and the question of what the plaintiff should get in terms of the advice, independent advice in making that determination. A company is in a very different place to make that decision versus an individual plaintiff.

And yet, while we do have disclosure rules and duties that lawyers have, courts have an independent duty to make an analysis and determination, particularly in situations where there's an ad litem involved, where there's a class involved, where you have multi-party cases where some are settling and some are not.

And the lawyers that represent those parties sometimes even have internal factors to balance that are in conflict with each other. And while the Texas rule addresses the issue to a certain extent, I don't think that that rule is sufficient to be able to determine that issue without some ability to have disclosure.

And in some cases it needs to be the Court, and in some cases the only party that has an incentive to address that issue, a reason to want to know, is the defendant.

CHAIRMAN BABCOCK: Harvey and Pete Schenkkan have been waiting.

PETE SCHENKKAN: I'm thinking, though, that both Harvey and John, who are deeply involved in this, want to reply to Robert there, and I think that might be more of an education than my starting up a new train.

CHAIRMAN BABCOCK: Does Justice Kelly also yield?

HONORABLE PETER KELLY: I have a very brief

point. Kennon made it far more precisely than I could.

This entire drive to regulation and disclosure, it's premised on the idea that the plaintiff's lawyer is going to violate the fiduciary duties to the client.

And in many billing arrangements, with hourly billing arrangements, you have the tension between what the attorney wants to do, which is make some money, and his representation of the client. That's blessed by the Bar. We have insurance defense and the tendering of defense to insurance companies. That tension is blessed by the Bar.

This drive to regulate and disclose is premised, I think, on a bias against plaintiffs lawyers, anybody working for a contingency fee.

That is my only point.

CHAIRMAN BABCOCK: Okay. Thank you, Judge.

Harvey. Now to you.

HONORABLE HARVEY BROWN: For Kennon, I was going to point out that if you do have a chance before our next to look at any of these materials, there's a --

KENNON WOOTEN: I will.

HONORABLE HARVEY BROWN: There's a letter dated September 27th, 2017, from Professor Wendel, who is an ethics professor at Cornell, going through the

issue that you just asked about, ethics. Makes some of the points that Justice Kelly just made. Yeah, there's a tension, but lawyers already have that.

I do think that examples you gave are good. I mean, the insurance context, I don't get to ask how many, you know, cases you have for this insurance carrier or how that might influence you. All of that is kind of secret.

In mediation, I have never forced a party to tell me -- forced, I'm using that word loosely. But I have never pressured somebody to tell me this information. What happens is the information is disclosed if the attorney thinks it will help him.

So, for example, whether a policy is a wasting policy, that isn't something that walks in the door and the plaintiff's, you know, demand to know about that. What happens is the defendants say, hey, you better settle now because the policy is wasted.

So the defendants disclose when it's to their benefit. And I think that a lot of the disclosures that do go on right now in mediation are by the party that elects to disclose because they think it helps them, not a party that is being compelled to disclose.

CHAIRMAN BABCOCK: Yeah. And that applies to reservation of rights. Defense lawyer says, yeah.

There may be no insurance.

HONORABLE HARVEY BROWN: Exactly. And I know plaintiff's lawyers would love to get behind the scenes on all that stuff, but that door has always been closed.

CHAIRMAN BABCOCK: Yeah.

Pete, do you have anything to say that you remember?

PETE SCHENKKAN: Yeah. This is sort of moving a little bit further in a different direction. But John, do you need --

JOHN KIM: I'll defer.

PETE SCHENKKAN: Okay. It seems to me, the courts -- you told us the courts made it clear that even if a lot of us think this is a really bad idea to do a little, we need to present a draft ruling.

CHAIRMAN BABCOCK: Yeah.

PETE SCHENKKAN: So I would like to talk about what might be the scope of our work, while honoring the belief that I'm joining a number of people who have spoken. That a lot of what we're talking about is covered in one of two ways.

First, the plaintiffs' lawyer has a fiduciary duty of -- Kelly already left.

Fiduciary duty of utmost loyalty to his client. And that duty includes handling the

negotiations of aggregate settlements of individual clients with different fact interests.

And there is a very prominent Texas Supreme Court case, Burrow v. Arce, coming down pretty hard on a whole bunch of prominent plaintiff's lawyers for having -- and I hope I don't misstate this. I think it was at least alleged, I don't know whether it has been found, that they had abused that duty pretty badly to a bunch of individual plaintiffs.

So the notion that there is no remedy under the existing state of the law for a plaintiff's lawyer who abuses the use of third-party financing, either in the signing up of the original terms or in their affect on the case, is just wrong.

And if the use is on a large scale, it has economic value that enables the abused clients to do what they did in Burrow v. Arce to retain another lawyer to sue their former lawyers. That's what happened.

So it's not just the disciplinary rule. It is the full force and effect of a duty of utmost loyalty of the words that press to the outer limits of what the law is capable of enforcing, but indicate just how strongly we feel about this.

Then, there are things within the context of -- it may seem as a policy matter that particular

terms ought to have to be in third-party finance agreements, or ought to be prohibited from being in them.

And they may not be so clear that the plaintiff's lawyers failure to recognize that and insist on a particular term being put in or object to a particular one being put in as a breech of his duty of utmost loyalty. It just may be too unclear to where the likelihood of the Court can say that the plaintiff's lawyer, by failing to insist that the agreement be non-recourse, breached that duty.

That may be, it seems to me, the kind of policy question that Congress, and if to the extent we're not preempted by what the feds do about it, the Texas legislature ought to look into it.

I personally love the idea that it ought to be a requirement that these are non-recourse. But in saying that, all I know so far about it is the two or three sentences that were exchanged about that. There may be all kinds of good reasons why there's a subset of cases, you know, where it shouldn't be the case, or, you know, limits are the extent to which it ought to be the case or Whatever. That's what legislatures are for.

So having said those two things, I'm interested in getting started. And it's only a start.

We have an elephant-sized problem here, as reflected in the notebook. And how do you eat an elephant? One bite at a time.

I didn't either drink or read these materials last night. I promised my wife that we would go see Tilda Swinton and Julianne Moore in a new movie. I highly recommend it once it goes into general release in the vicinity. Swinton will win an Academy Award for this.

So I don't know anything about the specific situations in which a fight in front of a judge about disclosure of something about a third-party's plaintiff's agreement. This is a follow-up to the follow-up.

I'm not quite sure what the problems are we would be trying to fix, since you can always make a motion explaining why you need a certain kind of discovery and try to pass the test of relevance and deal with attorney/client and work product defenses or any others. I gather from skimming a few pages in one of the documents that that's where these fights are mostly occurring. And in a whole lot of the 106 cases or whatever study discussed, the outcome was you get some discovery and not others. Some results are redacted.

This seems like what we ought to be focusing

on, what are the context in which we need to look at the uses for -- potential uses which discovery would be appropriate.

And for that, I think, Harvey, you said that there was an article, "Grim Reality," by the Chamber, that, I gather from your description, talked about two particular lawsuits, and highlighted uses on that.

HARVEY BROWN: Allegations have been made. Lawsuits have been filed.

PETE SCHENKKAN: Could we perhaps hear a little bit about those two? Because I don't know what kind of abuses those allegedly were and how they might play into, do we need any change in the rules at all, and if so, what changes?

JOHN KIM: Welcome to the committee.

PETE SCHENKKAN: I get to ask these questions. I don't bring very much in answering them.

CHAIRMAN BABCOCK: I don't know if anybody noticed, but our court reporter Dee Dee is not here today. She had a conflict. And she talked her unsuspecting friend, Amy Russell, into subbing.

We have now been going two hours and ten minutes, and I think Amy is entitled to a little bitty break. So let's give her that.

And when we come back, let's do two things

with this. One, let's vote on whether or not we think there ought to be a disclosure rule or not. And then, two, let's discuss what the subcommittee has suggested in terms of what should be in a rule if there is one.

And if that doesn't cut off discussion, the type of things that are floating in the air and have been left on the table. But Amy needs a break and so do I. So we will be in recess for 15 minutes.

(15 minute break)

CHAIRMAN BABCOCK: I was told that maybe we have not discussed this rule enough. So we have a couple of options. We've got a big agenda. We have to bring this back anyway. So we can move on now, or we can talk about it some more. Because apparently some people still have things to say.

Harvey is -- left. Where is Harvey.

ROBERT LEVY: It might make sense to shift to let people --

CHAIRMAN BABCOCK: There he is.

Harvey, it was suggested to me on the break that we probably should take some more time to discuss this. But we do have other items on the agenda, and people have ordered their day in reliance on roughly when we're going to get to things.

So do you think we would benefit by having

more substantive discussion about this now? Judge Schaffer is voting with his head. Or -- because we are going to bring it back anyway. Or what is your thought? And then Robert and John can weigh in.

HONORABLE HARVEY BROWN: My thought would be that a delay would probably be better on the substance of the policy discussion. Admittedly, there's a ton of materials, but if people just read John's and Robert's memo and the Chamber's, that would only be four things, and I think our discussion might be a little better informed next time. So I would suggest that.

I would also suggest that while we draft the rule, you know, we weren't quite sure how to do it. In all candor, this is pretty much my draft, and Robert made one tweak with an alternative number two. So some people might have some ideas, because we didn't have a lot of ideas on this. But we did our best.

CHAIRMAN BABCOCK: Yeah. Well, I thought the discussion so far has been great. I don't think it has been uninformed or ill-informed at all.

John, do you have any thoughts about that, among other things?

JOHN KIM: I think we discussed most of the major issues. So I think waiting is a good thing. And it would give me a chance to look at the rules because,

as everyone knows, turns out I don't do rules.

CHAIRMAN BABCOCK: Nice to have you on the committee.

HONORABLE HARVEY BROWN: I think that there was some issues with these copies of the proposed rules or draft rules. So everybody has not actually been able to read the draft of the rules. So that would be another reason to put this off. Actual language of the rule itself.

ROBERT LEVY: Okay. I think that makes sense.

CHAIRMAN BABCOCK: Makes sense. All right.

All right. Pete Schenkkan, you're always dissenting.

PETE SCHENKKAN: I do think it would be helpful. If everybody knew it's a one-page draft rule, what the basic idea of the draft rule is, you could be thinking about that between now and next time we start reading, perhaps a smaller part of the package.

CHAIRMAN BABCOCK: Yeah, Harvey.

HONORABLE HARVEY BROWN: One other point is, if there is a rule, should it be universal? By that, I mean, all litigation? All litigation except family law?

CHAIRMAN BABCOCK: That's just a given.

HONORABLE HARVEY BROWN: I figured it was.

Right now the draft says it's only in cases

that are in the business courts. Make sure we are only looking at very sophisticated, large litigation. But some people may not like that idea. Another idea is do it only in MDL litigation. So people should give a little bit of thought as to if we have a disclosure rule, which courts should have it.

CHAIRMAN BABCOCK: Kent.

HONORABLE KENT SULLIVAN: Speaking for myself, I feel extraordinarily uninformed to take a vote now. Candidly, I will not vote on this, and I don't know how many people --

CHAIRMAN BABCOCK: No. I just said we're not going to vote now.

HONORABLE KENT SULLIVAN: Oh, I'm sorry. I thought that's what you had said.

ROBERT LEVY: Chip, I will also volunteer. Be careful what you -- if you ask. But I have shared with our subcommittee links to substantial amounts of information, and I tried to be inclusive of all positions. It includes submissions to the advisory committees, sections of agenda books where it's debated, legislative proposals, Congressional testimony.

So if you are interested, let me know, and I'll be happy to forward that, or ask Harvey, and he can forward it to you.

CHAIRMAN BABCOCK: Yeah, great.

HONORABLE HARVEY BROWN: That's all included in the package that was sent out.

HONORABLE ROBERT SCHAFFER: Excuse me, where is the rule?

HONORABLE HARVEY BROWN: The rule is on my memo, the second page.

CHAIRMAN BABCOCK: Okay. So we're going to leave this for now and bring it back for further discussion and possible vote in January. So that's the plan.

Now, by coincidence, the next item is also Harvey and John Kim and others.

So Harvey, go ahead.

HONORABLE HARVEY BROWN: This is an assignment from the Evidence Committee of whether we should have an evidence rule addressing AI issues. The Federal Evidence Committee chaired by Professor Daniel Capra is working -- I was going to say diligently, although some might disagree quite with that label, is working hard on this issue, and it has had a number of meetings about it.

And we had thought about deferring completely on this issue until they decided, and then we thought maybe it would be better for us to talk with members of

that committee or people that are involved with that committee to see what the status was and how long of a delay there might be if we wait on the Federal Rules Committee to come up with their answer.

So we had a meeting this week with two people who are advising that committee, Judge Paul Grimm and Professor Maura Grossman, both who are very interested in, and advocating for, at least two, and maybe three, evidence rules addressing AI.

They think there is a decent shot that at next week's meeting a proposal will come out for rules addressing AI evidence. They -- it would be an overstatement to say they are optimistic, but it would probably be a little bit of an understatement to say that they are totally pessimistic. They think there is a chance.

If that comes out, it will take several years probably before it would actually be enacted by the time it goes through all of the layers of process. And they walked us through the layers of process. And Robert has -- I don't know if Robert has actually been on that committee, but he certainly worked a lot with that committee. So he can give you more details, if you want, on why that process takes many years.

But we are looking at least two to three years

before they will have a rule in place, even if they do something in the next couple weeks with the first draft.

So at the end of the day, we decided that we should see what comes out of this meeting next week. And as part of that, we have given to you this great memo written by Daniel Capra, who is really one of the leading experts on evidence in the country.

He goes through all the proposals that have been made. The status of those. One reason this may not happen next week is that he is not as much of an advocate for having an AI rule on evidence. He has a little more trust that the existing rules can handle the situation adequately.

So there is some disagreement on the committee as to the best approach. Of course, that is helpful for us to know as well. But that might slow down the process.

So bottom line is we're recommending that we table this until January. We see what happens at the meeting. I think it's November 8th, if I remember correctly. And then report back. But we don't just kind of follow our norm, which would be to wait until the feds deal with it, because it's going to take too long.

As part of our process to determine whether

this was something that needs our immediate attention, we asked the members of our committee and a couple other judges to talk with their colleagues about whether this is coming up very much in trial courts right now.

And so far the answer is, from an evidence standpoint, no. From the standpoint of pleadings and briefings, yes, that is coming up. But that is different than what our committee is addressing.

CHAIRMAN BABCOCK: Okay. Robert, do you want to add some stuff?

HONORABLE HARVEY BROWN: We adopted Robert on our committee again. So he has been doing yeoman-like duties.

CHAIRMAN BABCOCK: Something is going on here. I'm not sure what it is. This adoption thing of Robert.

ROBERT LEVY: The issue of technology and the intersection of the law is a fascinating topic. So that is why I asked to be involved in this.

If you look at the memo that Chip is referencing, it's on Page 807 of your PDF. It's under Tab F. And Professor Capra is the reporter to the Evidence Advisory Committee, a different committee than the one we were talking about earlier. And it really does lay out, and in very helpful detail, some of the issues.

And we had a very interesting discussion with Judge Grimm and Professor Grossman. And actually, I think the Chief is at a conference that Judge Grimm hosts as the director of an institute at Duke University.

Just to frame the issues, there are really kind of two points that the committee is looking at with respect to AI. One of them has to do with the risk of deep fakes. And we talked about this in our August meeting. It's the question about --

And this one, by the way, Richard, should apply in family court, unlike the other rules.

It comes up in the context, as Judge Grimm noted to us, about a spouse brings a tape recording of the other spouse threatening or saying something that is wrongful. And that other spouse says, I never said that. But it's their voice. It sounds exactly like them.

So what does the judge do with that? What is the procedural posture of determining, does that recording come into evidence or not? And that's the arena of the deep fake. What does a court do? What do the litigants do to either present that as evidence or dispute it?

And the suggestion that we're struggling with,

or at least working through, is, are the current rules of evidence sufficient to provide guidance on that, to help determine how to review that issue, or do we need additional rules, comments to help understand the issue?

The second element is a more kind of procedural one. It's just simply working through the process of companies or others that use artificial intelligence tools, like generative AI tools, to -- as part of their business. As part of their internal processes.

And reports are generated in part using artificial intelligence, and you get an output where the tool tells you this is what the documents say. This is a summary of the meeting. All of those types of features. Is that a business record? And are business record rules are -- business record exceptions are kind of structured in the context of it being a declaration, being -- and then the question of proving it as an exception to the hearsay rule.

But fundamentally, is it really a declaration? The computer does not speak. It does provide information. But -- and what is different between a typical business record and a record of a, you know, electronic system is that artificial intelligence takes it to the next level, where the tool is actually

generating unique information based upon the information that its -- its model, its language, its library of information.

So the second part of the suggestion is that -- in particular, Judge Grimm and Maura Grossman had proposed is an additional provision, and Federal side Rule 901, that would detail the determination process of whether it is should be admitted, whether it's both reliable and accurate, and what the process might be for an opposing party to challenge that admissibility.

So these are the issues. Same issues I believe that the Federal Evidence Advisory Committee will discuss next week.

CHAIRMAN BABCOCK: November 8th?

ROBERT LEVY: November 8th.

CHAIRMAN BABCOCK: Okay. Yes, John.

JOHN KIM: Just to underscore the importance of waiting on this, to emphasize it, there really isn't a record to go on yet. There have only been two cases in the country with any type of ruling on the admissibility of artificial intelligence generated or enhanced evidence.

The first was a few months ago in Washington state, a criminal case. A triple homicide which

involved the admissibility or the question of the admissibility of AI-enhanced video evidence.

And, ultimately, the judge applying -- they applied the Frye standard in Washington. But engaging in kind of Daubert-like balancing test. He said, hey, this hasn't been peer reviewed. It's not accepted. So it's not relied on.

More recent, and the only other case, took place in New York, in Surrogate's Court in New York, in the matter of Weber, just a couple of weeks ago. And in this, we didn't have a Daubert-style balancing act. But the judge actually used Microsoft Copilot himself to try to replicate the expert's so-called AI-generated conclusions.

He asked the Microsoft Copilot the same question three different times and got three different answers, and decided this is not reliable.

So while they took two different approaches in the only two case that have occurred so far, you know, I think it underscores what Harvey said. It is important to probably let this play out a little longer.

CHAIRMAN BABCOCK: Just out of curiosity, how do you approach if you got -- an example that was used a minute ago, that you have a supposed audio recording, and it's the voice of the woman, sounds exactly like

her, but it's not. Or she says it's not. How does a judge decide that?

JOHN KIM: Well, the approach that Judge Grimm and Professor Grossman have been advocating is kind of a, let's hold -- the judge is the gatekeeper. Let's hold a Daubert-like proceeding to determine the reliability and potential validity of this evidence.

Some of the concerns are, well, this is going to lead to a little bit of an arms race. You know, my expert can beat up your expert. We have -- the technology is getting better for both producing deep fakes, but also for detecting deep fake evidence.

So they're going to -- assuming the affected party says, no, I never made those statements on those audio recordings. Okay. Well, trot out your expert to talk about how this is unreliable. Well, the other side is going to have its expert talk about why it is reliable. But it's the judge, ultimately, who needs to make that determination.

CHAIRMAN BABCOCK: Yeah, Harvey.

HONORABLE HARVEY BROWN: That is exactly right. Under Rule 104(a), which lets the judge conduct an evidentiary hearing before admitting evidence. And the test would be under Rule 901, which says is there sufficient evidence to support the finding that it is

what it purports to be.

So the judge would conduct a hearing to see whether that voice was, in fact, the party's voice or not, and then make a preliminary ruling. And a cautious judge would probably tell the jury something along the lines of, while I'm admitting it, you have the ultimate say as to whether you think it is an accurate recording. I'm just leaving it for you to make that determination.

CHAIRMAN BABCOCK: And one suspect in who created the deep fake if it is a deep fake is the party opponent. So do they get to testify in this little mini proceeding outside the presence?

HONORABLE HARVEY BROWN: I think everybody can testify, experts, parties, et cetera.

CHAIRMAN BABCOCK: Mr. Levy.

ROBERT LEVY: It should be, the other side of that is that this information -- a judge could alternatively decide to send it to the jury and let the jury decide what it thinks.

ROGER HUGHES: And the concern there that Judge Grimm pointed out is that once a jury hears the recording or sees the video, it's very hard to not remember that.

And we have such a visual and oral way of assessing information. So that's a risk point that

they're focusing on.

CHAIRMAN BABCOCK: If Rusty were here, he would say the skunk in the jury box.

Yeah, Roger and then Richard.

ROGER HUGHES: Well, I really encourage people to read the Choker article, because it's a true cover the waterfront.

But there's actually two things that get teased by Grimm and Grossman. The first one is a general rule once a person admits that whatever they are offering was created or processed by artificial intelligence, then they have to establish the process was reliable and valid. And those are two concepts that they were kind enough to explain to us yesterday.

And reliability means given the same data, you will get consistently the same result. But as they pointed out in one of the examples, even a stopped clock is reliable twice a day.

So they said there has to be some concept of validity. And that the results you're given, given the data, are accurate and not merely consistent.

The other problem, and they treat this separately, and they would write a new rule, is the deep fake problem. That is, that's not my voice. That audio recording is a fake. That's not me in the video.

That's a fake.

And I think that's a serious problem these days because, as they pointed out, one of the articles they had was a lot of the January 6th protesters who are being prosecuted argue, that wasn't me on the video. Those are deep fakes.

As you can imagine, there's a lot of people today who go, yeah, yeah, I can see that.

What they would do is create a burden shifting that the proponent who offers something that's being challenged that way has to offer some evidence, some, that it is what it is. It is accurate. And then the opponent has to offer evidence that, no, it's a deep fake.

And then if they do, it doesn't come in unless the proponent can establish evidence that, more likely than not, it is what it is. It basically puts it in the judge's hands. It creates a kind of burden-shifting thing in which, once the opponent establishes some evidence that it's a fake, if you want to call it -- use that term, then the proponent has to go further and satisfy the judge that, I can show you evidence that shows that more likely than not, under the burden of proof, it is what it is. Which then allows the judge to put it in front of the jury.

But then the jury still has the option to say, no, it's not what it is. But then I think the problem is, the people who are worried about these studies, that once the jury sees it, they'll never forget it.

CHAIRMAN BABCOCK: I think Richard had his hand up first, Judge.

RICHARD ORSINGER: So my comment is not restricted to this particularly difficult form of evidence. But I just wanted to make a point that the authentication requirement does not require the judge to believe because a preponderance of the evidence, that the evidence is what it claims to be.

And if you read 901 -- Texas Rule of Evidence 901(a), which Harvey referred to, it says: To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

So in my view, the role of the trial court is to say, do you have enough evidence supporting the authenticity of this evidence that I should let the jury hear it? And it's for the jury to decide whether it's believable or not.

Whether the letter was signed by the individual, whether the will was really in the

handwriting of the deceased, those are fact questions that the jury should decide.

So any discussion here about a trial judge thinking it's more likely than not, that the video or audio is genuine or fake, I think that we're missing -- we are getting off base here. Because the role of the judge is merely to find, is there enough evidence that would support the jury believing it?

And if the professor that was mentioned that says, well, once the jury hears it, they can't get it out of their mind, well, that's the whole point of a trial. Once the jury hears anything, they may not get it out of their mind.

They go back to the jury room. They have this big fight, and then they decide that video is legit or it's not legit. That is what the jury is supposed to do.

And the idea that this new technology somehow means that the trial judge should usurp the ultimate role of the jury in deciding whether evidence is believable or not, I think is something we should be very aware of, that this discussion is headed in that direction.

CHAIRMAN BABCOCK: Okay. Justice Miskel.

HONORABLE EMILY MISKEL: Okay. So I have two

separate points, one about deep fakes and one about sort of legitimate uses of AI-generated stuff.

On the deep fakes, so you were talking about burden shifting with evidence. So most of these people are not going to have lawyers, or there's going to be no money for experts.

So they are going to come in and say, the texts are fake, that wasn't me, I wasn't there. We'll call that the Shaggy defense. But it's common and people are doing it now. Any time anyone thinks there's bad evidence, they're going to argue it's fake. On the other side, people do make fakes.

But if there's no lawyers and no experts, we do have to remember that the testimony of a party is evidence. Right? And it's just going to come down to the credibility or the believability or the other evidence that's, you know, presented in the case.

We could circle around in reevaluating -- for example, I know John Browning is very familiar with this, but if it's between the Texas approach to electronic evidence versus the Maryland approach, where Texas -- okay, and then sidenote, I'm getting sidetracked again.

Texas approach is found in a decision -- an opinion by the Court of Criminal Appeals. So I'm not

sure how much by rule that we are overruling, you know, the Tienda decision. But that's a question for somebody with more rules experience than I have.

But under the Maryland approach, if you are the one offering the social media evidence or electronic evidence, you have a burden to have extra indicia of reliability compared to sort of traditional evidence. And we can debate whether that's a good thing or a bad thing, but there is a lot of scholarship on that topic.

I want to leave aside the deep fake. The reason I wanted to talk about that was just to flag. We're talking about expert versus expert, but most people can't even afford one lawyer, much less an expert on top of it.

So realistically, where the rubber hits the road on that is just going to be somebody with text messages against somebody with pictures on their phone. Right?

The second point I wanted to make was about the process for looking at electronically-processed information. So something was fed in to some kind of AI process, and a result was spit out. What do you need to admit that result?

One way to do it is to have an expert testify, for example, like, this is our current law on altering

photographs digitally. You have to have a witness who can testify that the digital-enhancement process leads to a reliable result. That's one way to handle it.

But I was listening to a replay of a CLE from this summer, where they were going over AI tools that people can use right now in litigation, and one of the really cool tools that I heard about was this service where you can send them 12,000 pages of bank records.

They will feed it into the AI overnight, and in the morning it will spit out an Excel file that is sortable, filterable, has the payees organized together. If --

You know, the actual name of the business is not always what shows on the credit card report because sometimes people try to conceal what that money was for. The example they used was Rick's Cabaret doesn't show up on a credit card as Rick's Cabaret. It shows up as payment processing 123. But this AI looks up what that entity actually is and flags these high-risk transactions for you.

So would you need an expert to say that that AI service that organizes and processes voluminous bank accounts, that the AI itself leads to a reliable result, or would it be enough for you to say, okay -- or the witness that's authenticating the underlying bank

records, I reviewed the bank records, I reviewed the AI-generated spreadsheet. The transactions match. I think that also is an appropriate way to authenticate the result of computer-processed data.

So those are the two points I wanted to make. One about deep fake, and realistically, this is litigated not with experts and money. And then the second point is there are a ton of legitimate, uses and how do we use our existing rules of evidence to authenticate the result of AI-processed data?

CHAIRMAN BABCOCK: Great points. Any other thoughts? Professor Carlson.

PROFESSOR CARLSON: To respond to you, Richard, that was my initial reaction, that it really is something that should go to the jury. But then I started thinking, because of Judge Grimm, we used to not have Daubert hearings. It used to be for the jury to decide.

But I think the point that they were making is deep fakes are becoming so good and can do such damage if they are introduced, that maybe this is a time when we need to have a trial judge be a gatekeeper and allow parties to try and put on their best proof that one is valid and one isn't.

They might have other circumstantial proof.

It couldn't be me at the Capitol on January 6th because I was in the hospital in Methodist in Houston.

But my initial reaction was exactly yours, but now I -- when I listen to them and the extent of how good this technology is becoming and how threatening it is to underpinning our faith in our legal system, it just seems to me that we have to take a really hard look at the gatekeeper function.

CHAIRMAN BABCOCK: Robert.

ROBERT LEVY: That was my point.

CHAIRMAN BABCOCK: Okay. Yeah, Roger.

ROGER HUGHES: One of the things that came up in the phone call yesterday, and was pointed out in some of the papers was, we're not just writing a rule for civil cases. We're writing a rule for criminal cases.

And it was pointed out in the call that the Department of Justice had a lot of pushback on having any rule about AI authentication because of the amount of audio and visual stuff that the government often offers in government criminal cases, and that they would create an additional burden for the government to offer photographs, audio, visuals, et cetera.

And I thought, what about all of these cases where, I mean, the local DA wants to offer the video cam that the officer wears. Well, the defendant says, that

is a fake video. They manipulated that, et cetera, et cetera.

And a sympathetic judge, based merely on the defendant's claim, goes, well, it's possible, and the government hasn't come up with anything to show that they didn't do it. So I'm not letting it in.

The same thing goes for, you know, the camera of the person robbing the convenience store. I mean, even if it isn't altered. The person goes, that's not me, the police altered the video afterwards. And based nothing more on the defendant's word, the video gets chopped.

So what I'm saying is that altering the rule is going to affect more than the civil cases that we all try. That there may be some questions asked by the Court of Criminal Appeals and DAs and the Office of the Attorney General about how this is going to affect them. Thank you.

CHAIRMAN BABCOCK: Judge Estevez.

HONORABLE ANA ESTEVEZ: And I was going to remark as to Elaine's comment. I agree with how -- with her initial thought, is where I still am. So I think that it always comes down to not the admissibility, but the weight of the evidence, and you should leave it -- especially if you're in a jury trial, you're going to

have to leave it to the jury.

If not, you're not only commenting on the weight of the evidence, you're excluding evidence that could possibly be extremely important. And they have asked them to be the fact finder, not us.

So I can see that there would be a rule somewhere in between where if that issue came up before trial, and we had a pretrial hearing because we did discovery, and they already -- you know, one of the sides already knows that this video is coming up, and it is absolutely fake, and so we have that type of hearing. So it's almost an exclusionary suppression type of hearing.

But if we're in trial, and they ask the original question, and they said, is this you on the video and you say, no, you know, and then we have a hearing outside the presence of the jury and then we let everybody come back, and they say why it's not them, then it allowed the jury to make that determination.

It's just we're taking that away from the jury and giving it to the judge, but it's not an expert issue. The expert issue is that background that you can look at something, and you bring in an expert to determine whether or not it was a deep fake.

Which you can always do that on any type of

evidence. I mean, we have cases all the time where they say, no, I didn't sign this. Well, isn't that your signature? I mean, that happens a lot. A lot more than you guys would think. No, I didn't sign this. Well, this is your signature. Well, I didn't sign it. Well, where did it come from? And we all assume that she really did sign it because she is saying, yeah, it looks just like my signature, but it's not mine.

So the fact finder determines it based on credibility, like everything else.

So I don't know what kind of rule you really need, or if you even need a rule, because I think that it really does fall into pretrial type of matters or an expert matter, if you are anticipating that, which you should. I mean, assuming that we are not two pro se people that just showed up and made up all these text messages somehow. Which apparently is easy to do, as well.

In that case, you are usually -- the judge is usually the fact finder anyway. So we would be determining the believability of the witnesses in that matter.

I just think that you shouldn't be taking this away from the jury at the end of the day.

CHAIRMAN BABCOCK: Roger, did you still have

your hand up from before?

ROGER HUGHES: No. Maybe just to point out that if we raise the bar on generally admitting digital information audio visually, there just may be pushback from the criminal side of the docket.

CHAIRMAN BABCOCK: Elaine wanted to respond to something --

PROFESSOR CARLSON: I wasn't meaning to suggest that this was a matter for experts. My thought process was, how did we get to Daubert? And how did we get that away from the jury? And it was because of, supposedly, of the situation where there was junk science being produced and introduced to the jurors, and was doing a lot of the damage. So my inclination is, yes, this should go to the jury, until I really started to think about it; this might be a place in our history because of a technology where we need to do something Daubert-esque make sure that we vent what we think is questionable evidence.

CHAIRMAN BABCOCK: What you're saying is junk science is a form of artificial intelligence.

PROFESSOR CARLSON: I suppose it is. And I did want to note that Judge Grimm did, in talking about the time table, that it would take many more years before this worked its way through the Federal Advisory

Committee, and complimented the streamline procedures we have in this committee.

RICHARD ORSINGER: He obviously never sat through a meeting.

CHAIRMAN BABCOCK: Richard, then the judge, and Roger again, and then Rich, I think.

RICHARD ORSINGER: To follow-up on Elaine's comment, I just wanted to say that if we do make an exception for certain kinds of evidence where the judge actually is weighing the preponderance, rather than just whether the evidence is sufficient to support a finding, we're going to have great difficulty in defining exactly what kind of electronic evidence fits in that category. And it does seem to me that we faced the issue of fraud in evidence forever, and particularly in forgeries. I myself have tried two forged will contest cases. And if you read the Rules of Evidence, the fact finder is actually qualified to make their own decision about whether a signature is fraudulent or not. You don't have to have expert testimony. So I think that in making a policy decision to create a new category of evidence that is ill-defined and changing every 24 hours, we also need to look at how the legal system has handled fraudulent evidence in the past, and maybe draw some wisdom from that.

CHAIRMAN BABCOCK: Roger. No, I'm sorry. Wait. Justice Miskel.

HONORABLE EMILY MISKEL: I'm also staying on this point of should we import the Daubert procedure onto electronic evidence, and in thinking about why would a judge be better able to detect junk science than a jury, then we would say, well the judge deals with experts a lot, so the judge would have better, more relevant experience in determining whether an expert is a junk science expert or not. We would have a reason to believe that that judge would be better at it than the average person, but I think that's not true with fake evidence. There's no reason to believe a judge would be better at discerning whether a video is a deep fake or not as compared to a juror, any other person in that room. I don't think by virtue of sitting on a bench, you obtain the ability to better spot a fake video. So I would say that it's probably distinguishable in my mind to put that in the hands more of the judge, so that was my point.

CHAIRMAN BABCOCK: And now Roger and then Rich and then Tom.

ROGER HUGHES: Well, again, all I can do is comment on how the proposals deal with the Daubert problem. The first thing that Grimm and Grossman

propose is a general amendment; it's kind of electronic evidence, digital, audio, et cetera, there must be some evidence offered of validity and reliability. They would propose then a comment, this is the sort of thing we do, a comment that's determined under Rule 702. The letter, which is long, it's 52 pages. He would actually propose an amendment; a new rule in the 700 series that it would basically be governed by the rules for expert evidence, but then he would exempt evidence produced by "commercially available programs." Now how you would distinguish between the kind of software, "used frequently and commercially available," I think was the phrase. Now how you would make that, I think the worry is that the kind of program that was described earlier, for sorting through all of these checks and then basically giving you a lot of information that may not be on the checks, et cetera, that may require an expert under that. But then, you know, the breathalyzer test, used by DPS et cetera, that may not require you to show the machine as reliable and valid to get it in; although some people might question that. It's a difficult issue to try to -- about how you are going to link or link at all the question of reliability and validity to Daubert challenge, which is why everybody is advocating that all of the objections based on AI generation being a deep

fake or just general challenges be raised and resolved pretrial.

CHAIRMAN BABCOCK: Thanks, Roger. Rich?

RICHARD PHILLIPS: It just occurred to me that Daubert is really less a rules issue than it was the court's kind of making the law. I mean, they did have to interpret 702. Because we are talking about this needs to be a Daubert-styled thing, that may be beyond the scope of writing rules to address it, and may need to be more of a question for the court to look at on a substantive matter, and how do we make this determination, rather than us trying to write a rule about it.

CHAIRMAN BABCOCK: Okay. Tom.

THOMAS C. RINEY: I haven't read all of these materials, but I'm looking at page 781, which I think is Professor Grimm's proposal for deep fakes and how to deal with it, and it clearly puts some burden on the person challenging the admissibility of the computer-generated electronic evidence to basically come forward with some evidence. I think it's very important that we have that balance. That is, it can't just be, well, that's not me in the video. That picture's a fake. Because, I mean, my experience has been recently, we always had some dishonesty from people testifying, I

understand that. People are more likely today to absolutely just deny something. It's kind of shocking at times. So there needs to be that type of balance. That burden to challenge, at least have some evidence to support it before we start getting into, you know, the proponent has to come forward with some type of expert.

CHAIRMAN BABCOCK: Yeah. Did I miss anybody over here? Harvey?

HONORABLE HARVEY BROWN: I was going to ask if the Court could appoint someone to our committee that is either a liaison for the Court of Criminal Appeals or somebody from that Court, since we've been told this will have ramifications with criminal cases.

CHAIRMAN BABCOCK: Why don't we get Rusty to join your committee?

HONORABLE HARVEY BROWN: That would be a good idea.

CHAIRMAN BABCOCK: The DA's office and criminal defense.

Would you make a note that Rusty's been given a job?

All right. Let's move on to the next topic, because Richard Orsinger is over in the corner just itching to make one of his 35 minute speeches, and we can't wait.

RICHARD ORSINGER: Are we going to break at 12:30 for lunch or when --

CHAIRMAN BABCOCK: No, no. We're going to break when you finish talking. We'll break when appropriate.

RICHARD ORSINGER: Okay. So the first thing I'd like to do is situate you all in the agenda. This presentation on recording and broadcasting trial court proceedings in civil matters starts at tab H of the PDF agenda. Page 863 was a task force recommendation that was discussed in previous meetings. Rule 880, is the Travis County Rules for recording and broadcasting that were approved as local rules by the Texas Supreme Court; that's the closest we have to a model, but it's not statewide. That's at page 880 of the PDF attachment. And then we have the August subcommittee memo is page 890, and then the memo for today is at page 900 of the PDF attachment. If you don't have access to that, I emailed it out to the entire committee about 45 minutes ago, so if you can't access the PDF, you can look at your email attachment.

The two probably most important things to consider today are two proposed rules. And PDF page 906 is the proposed rule that gives the trial court discretion on when and how to record and broadcast.

Page 910 is the proposed rule that requires consent, which is similar to what exists. You have to have the consent of the parties, and to record or broadcast a witness you have to have consent of that witness. These are two alternative rules, sort of opposite extremes. And our purpose here at this meeting is to bring forward alternatives. And the last thing I want to mention is tab M-1, page 921, is an opinion that my valuable vice chair forwarded to me, which is Donald Trump's criminal prosecution in Washington D.C. the media wanted access to be able to record and broadcast, and the United States Government filed a brief in opposition to that. It's a criminal case and it's federal, but the writing in here gives you a really excellent background on what the federal courts have done about broadcasting and recording, and so I would commend that to your reading.

PETE SCHENKKAN: I'm not sure how many people have gone through the box, but if you wanted to work with hard copies, this is how many we have left. I'd like to walk around and hand those out. This is the brief.

RICHARD ORSINGER: Yes, please. Put your hands up if you would like to look at a copy. There's very important stuff in it. I'll comment on a little of it. While Pete is walking around, I'll go ahead to

remind you, and we've visited this twice already, there was a referral letter in July of this year in which Chief Justice Hecht expressed reports of concerns about things that were being done with recordings and broadcasting of trial court proceedings. There are a lot of different things, some of them are maybe questionable decisions by judges. Others are what is the proper role of individuals making recordings? Are they still prohibited from making recordings, or are they not? The task force report I mentioned in 2021, addressed many issues, this was one of which, and they came up with some criteria for a trial judge to consider if it was a discretionary call. The current Rule, 18C, you will recall is that, a trial court may permit broadcasting, televising, recording or photographing the proceedings in the courtroom only if, and you have A, B or C. A is in accordance with guidelines promulgated the Supreme Court for civil cases, which the Court has not done but could do. B is when broadcasting, televising, recording or photographing will not unduly distract participants or impair the dignity of the proceedings, and the parties have consented, and consent to being depicted or recorded is obtained from each witness whose testimony will be broadcast, televised or photographed. So that's a perpetuation of the current

rule. And subdivision C, the broadcasting, televising, recording and photographing of investiture, so if it's not evidentiary in the nature of a trial, than it's okay to do. That rule was adopted in 1990, I believe with no change, so it is due to be modernized.

Now moving on to .4 in the subcommittee memo, there's an issue, or there's an issue of state level control of at least the technology here. Because on September 4th, slightly before last month, in September, Chief Justice Hecht wrote a letter to Megan Lavoy, who's the administrative director of Office of Court Administration, asking her to investigate the possibility of state sponsored and state controlled broadcast arrangements for all courts. I guess, kind of like e-Filing that we have now. The idea that the courts could provide the technology. It would be standardized. It would be subject to control. The ownership presumably of the video would belong to the state and couldn't be disseminated without state permission. Chief Justice Hecht asked for a report back on November 18th, so we should be hearing from the OCA about the plausibility of a uniform statewide control of the technology of recording and broadcasting. So what we're left with is some high level questions, and I thought at the end of the last meeting that really our

primary job was to write a couple of rules that we could discuss, but in discussing and in writing the rules, these high-level issues kept surfacing again. So I'm afraid we're going to need to touch on them during this meeting, but just briefly. And there are probably more than this, but there is a list that we could use. The question, does the new technology require electronic access to court proceedings? In other words; traditionally, it was physical access, walk in the courtroom and see everything that was happening. Now the question is, with the new technology, is there a right to digitally view court proceedings remotely? The next one, is recording or broadcasting always permitted, sometimes permitted, or never permitted? That's a really huge policy question, and on our subcommittee, we have people take all of those positions. Number 3 is consent of participants required, or is it discretionary with the trial court? Number 4, is recording or broadcasting permitted only upon request, or can a judge make a decision that all proceedings are going to be recorded or broadcast? One suggestion was made, categories of cases, like every case where the State of Texas will be recorded and broadcast, because after all, Texas is a party. So we do have that option.

Then the question, who can object to recording

or broadcasting? Obviously, the parties. Probably witnesses. What about venire people that are subject to questioning in the courtroom for voir dire? The question arises, does the trial court or do private persons do the recording and broadcasting? We know the media, traditionally, was able to bring in cameras, and lights and microphones, but now that we have cell phones that can record things, what if recording is permitted to the public? Does that mean they can do it on their cell phone, and does that mean that they can text it or email it to anybody that they want to? Are there different rules that are needed for recording versus broadcasting? Recording probably means for later broadcasting, but there are concepts to broadcasting that may be slightly different from recording, and we have to consider whether we should discuss any differences. Should recording or broadcasting some types of cases be permitted and others not? For example, I can think easily, the Family Code makes adoption proceedings confidential, so I think we can rule that out. What about parental termination cases? Some judges may want them to be published, some may not want them to be recorded and broadcast because of the nature and because there are minors involved. So we could have some categories that are allowed and some

that are not in a rule or standards that the Supreme Court promulgates.

And the last point is, should the recording or broadcasting be cut off at certain types of evidence? So let's say for example you're in the trial and now you're having a psychiatrist who's about to testify to what would otherwise be confidential mental health privileged information, but because of the litigation exception for the privilege, it can come out in this trial for the judge and the jury to hear, but that doesn't mean that everyone else in the world should here that privileged information, because they don't need it for what they're doing, observing. It's only the litigants, the judge and the fact finder that need access to that privileged information. So we could have a rule that says the court should cut off the recording or the broadcast if there's information that's privileged as against the world, even if it's useable inside the litigation. So we have a lot of these choices in a rule that we draft, and these are kind of high level statements.

Moving on to the memo, there's an issue with the public's right to access. As the brief, you will see says, there's never been a case of any note in the United States that has said that there's a right to

electronic access. The courts have always ruled that there's a right to physical access. And so the question we have now with the new technology and the ease with which you can do it, and the fact that you don't have to have cameras in the courtroom, you can just have a camera behind the judge, or a camera facing the bench, and it won't intrude on anybody. They don't really even realize it's there. So the question, I guess, is what is the public's right to access? And that comes up, well, what if a hearing is, what if a proceeding is entirely by Zoom, judge and the lawyers and the witnesses are on Zoom? What is public access then? is it the right to participate in the Zoom, or do you have to have a television screen in the courtroom? And if the judge is in the courtroom, and you can see the judge up at the bench participating, but if the judge is in chambers or somewhere else, there's a T.V. in the open courtroom that you can walk in and sit down and watch, and that's your public access to a Zoom proceeding. The concern is, is that if an outsider is allowed to participate in a Zoom proceeding, they could be recording it with their cell phone or otherwise, and then it could be rebroadcast, and we've lost control over it.

Privacy considerations, there's a lot of focus

on the public's right to know. It's very important in an open society that parties who are litigants know that the public will find out how they're being treated in the courtroom. People who elect their judges are entitled to see how their judges are performing their job. So there's lots of reasons why in an open society like ours we would want the courtrooms to be open, but there are privacy considerations now that become more weighty perhaps than they used to be, because in the old days, probably just the people that were in the town would go to the trial, and then they would talk to each other about it. But now if we're broadcasting trials out on the internet or through YouTube or broadcasting them to the world, they will never be erased; they will exist somewhere. And so that raises the question of well, you know, before we had, there was functional privacy; really only a few people that were involved in the proceeding or in the locale would be given access to private information. Now it could be the entire world. It could be foreign countries. Hackers. And so I think we have to reassess the weight of privacy against the right to know. If the right to know is for voters or people in your county or whatever, does that include people that are in China and Africa who are trying to put together fraudulent schemes? And then another

question we have is, who owns the recording that's made in the court proceeding? If OCA is the only one allowed to have a recording, then the State of Texas should own it. Someone told me that the State of Texas can copyright it. We would not necessarily want someone recording trial proceedings in Texas and then turning around and making a profit off of replaying those with advertising associated and things like that. So it would be beneficial perhaps to have the State own it, but if the State doesn't own it, who owns it? Does the media own it? Does the individual who has a cell phone on it? Those are questions we need to ask. And then can courts have standing rules if we allowed judicial discretion? Can they have standing rules in which all cases in a category fit, or are they required to do that on a case by case basis? And I guess another thing to consider, and this hasn't gotten much traction at the subcommittee level, but you could make an intellectual connection between Rule 76A and public access to file court documents and public access to trials, and as a result of that, this memo lists the factors and the presumptions and the procedures associated with 76A. They are not that practical for an ongoing hearing or trial, but they're put here in case they give you a thought of maybe a restriction or procedure or

presumption of what the burden of proof is to make something public or non-public. We have the two proposed rules. We have different perspectives on our particular subcommittee. And so even though our goal initially was to come up with alternatives where we could eventually vote after a debate, I think that some members of our committee felt like some of these really fundamental issues were not resolved and need to be discussed in the context of specific rules. And so I rest.

CHAIRMAN BABCOCK: Okay. Well, you rested in record time.

RICHARD ORSINGER: I did. I think everybody will be happy with that.

CHAIRMAN BABCOCK: We're going to be on a lunch break for an hour. We'll be back here at 1:40.

(Lunch break)

CHAIRMAN BABCOCK: We're back on the record. We have several people with a 5 o'clock flight, so we will try to get through as much as we can and end a little early to accommodate them.

Richard is back in his seat ready to roll. How do you propose we answer these millions of questions that you've raised?

RICHARD ORSINGER: I would like for the vice

chair and Justice Miskel and then Peter Schenkkan to state their perspectives, which were important differences between them and open to everyone, anyone on the committee who wants to say anything, and that should provoke a good discussion.

Let me start by referring to this brief that was previously discussed, filed in the U.S. versus Trump case. This is the United States' answer to a request by the media to record or broadcast, and I wanted to highlight the part relating to new technology. The brief says, advances in technology do not diminish the government's significant interest ensuring a fair trial. Cameras may be smaller, lighter and quieter, doesn't change the Constitutional significance.

Then they cite a case, despite changes in technology, there is no right to webcast a trial. And the brief says to the contrary, advances in technology raise additional concerns. While today's technology may be less physically intrusive in the courtroom, with fewer cables and lights, modern technology poses an even greater threat to the fair administration of justice. And they cite a case finding that advances in technology have created new threats.

Carrying on with the brief: Video not only airs on television, but streams and remains on the

internet, effectively forever. When a witness's image is captured on video, it's not just a fleeting image, but it exists indefinitely, paired with the ever-increasing acrimony and public discourse, witnesses and others who appear on video may be subjected to threats and harassment. Were there an appeal and retrial, witnesses who were subjected to scrutiny and harassment on social media may be unwilling to testify again. Even the knowledge that their images will circulate on social media, may temper a witness's initial testimony. In addition, knowing that the trial will be broadcast in the first instance may make jurors unwilling to serve, and knowing that a trial is being broadcast could lead to participants grandstanding for the cameras. So we are dealing with new technology. We're dealing with an old principle of open courts, and we have diverse views. So what I would like to do, first of all is acknowledge my vice chair, Ana Estevez, who spearheaded the drafting of these rules, and was essential, and my public recognition pleas for what a great job you did, and I appreciate that. But that's not to say that we didn't also, Justice Miskel was very important in the contributions at the beginning, and Peter Schenkkan became interested in a lot of the implications. And Giana Ortiz commented, and others.

So what I would like to do is have the members of the subcommittee express their views so you can see kind of the context in which these rules emerged. So Ana, I will go ahead and ask you, what is your perspective on the issues we have and the choice we have between the two rules?

HONORABLE ANA ESTEVEZ: Okay. And you should have the two rules in your packets. We'll start at page 906, because the other rule is basically the same rule that we have right now.

Okay. So I do not believe that a trial court judge should be broadcasting the proceedings unless everyone that is being broadcast has actually consented. So if you come into my court and you are, let's say that I like to broadcast everything, and that's my normal policy, then I would have notice on the OCA website. Notice at the door that says, as a matter of course, all proceedings are broadcast on the OCA website. If you have an objection to this, you can make your objection when you are called, either as a witness or as a party. So then you come in, and when the judge would swear you in, if you're a witness, you can object. And if the witness objects, then nothing is broadcast. If the witness doesn't object, then everything continues to be broadcast. If either of the parties object, nothing is

ever broadcast. This is the most important thing you're going to need to grasp, we're talking about two different types of broadcasting. Prior to Covid, there was only one. No courts were broadcasting. When a court broadcasts, that means we are using the county's technology; it is going through our court and into our YouTube channel, wherever it was, during Covid. We did that because there was an issue on whether or not courts were open at that time. If nobody could come to court, or if we were prohibiting and locking doors because of the pandemic. The current state right now, is that every judge, even if they are doing a Zoom proceeding, is supposed to be sitting on their bench at the time of the Zoom proceeding. So anyone can walk in at any time on any hearing and it is an open court, the way it was in the past, because if the judge is sitting in the courtroom, that is considered an open court under Zoom. So I want to just make sure that we all know what we're talking about first. There are some statutory exceptions. Those statutory exceptions include the Office of the Attorney General on child support cases are allowed to do their cases sitting anywhere by statute and by Zoom. They are supposed to be in the courtroom, too, but there are some other things that the legislature has decided would only work for them because

of the financial burden that this has been on the office of the Attorney General's office for child support. So we are excluding that. And then I also want to talk about, so we don't spend a lot of time about, well, what if something happens at a later time? We have another pandemic. We have a hurricane. We have a tornado. Something bad happens. There's emergency orders that can once again can come in and that can all change again. We have procedures that can fix those problems, whether it's county commissioners at a local level, or whether it's the Governor or the Texas Supreme Court. There's ways to deal with those issues. So this is a rule for the every day, not emergency situation. And so now we have this issue that we never had before that has never been contemplated, and that is that every state, every state court at this point has the ability to broadcast if they want. And some courts, from my understanding, continue to broadcast even though there's no need, and the courts are open. My position is that a trial court judge should not be in the business of broadcasting at all, unless there's an emergency. And I'm not saying not using Zoom. So we would continue with Zoom hearings. If somebody else needs to be there for some reason, they can get a Zoom invitation, and they can still see the proceeding. So I'm not closing

anything; I'm keeping it the same as if somebody can walk in. They would have the same privilege. They hear the same testimony. Whoever the witness is can see who's in the courtroom. You know, they would know who's hearing what's going on, who's recording what's going on. The second part of the rule has to do with the media. Well, past law, again, always required consent from the parties and the witnesses. And we have one that will allow the court to have discretion with a whole bunch of factors to consider on whether or not, or when the media would be able to record and broadcast. And that was another issue that we didn't bring up, who's the media? Now we have all heard, there's YouTubers, influencers, they could come in. But we provided a set of guidelines or rules of which they would have to follow in order to be able to record and broadcast for the public.

RICHARD ORSINGER: So I'm suggesting if Justice Miskel could present her perspective, because to some extent on the other end of the spectrum. Not necessarily extreme end, but I think it would be useful to hear the comparison, if that's all right?

CHAIRMAN BABCOCK: Yeah, absolutely.

HONORABLE EMILY MISKEL: Okay. So I'm not going to get into the rules yet, but I'm just going to

say that the two differences are present under tab K and tab L, and the main difference is tab L is the one that you just heard about that would require the consent of everybody, or no recording and no broadcasting could occur. Tab K is the different view where the trial court, at the end of the day, would be the judge and gatekeeper of whether it would be appropriate to record or to disseminate a particular case.

So just big picture, in general, I am not a fan of rules that require the consent of everyone, because we're in the litigation business, and the parties would not be standing in front of a judge if they were capable of agreeing on stuff. So in general, I think our system should always provide for a decision. And specifically here, I think the judge should have the final word and be the final gatekeeper of whether court proceedings are recorded or disseminated. So in one proposal of the rules, which is the tab K proposal, I still differentiate between recordings or disseminating, asterisk, we had a debate over whether broadcasting means a live broadcast or putting it on a website to be viewed later, and so Pete's suggestion was that we not use the word broadcast because it really is inapplicable to technology and video, so your rule talks about recording and disseminating. So there's two different

parts of the rule. One is, again, if the judge is the one initiating the recording or the disseminating. For example, this case involves the county. I think it's important to the public. I'm going to be live-streaming this case that involves the county or the State of Texas, or for whatever reason this case is important and it needs to be broadcast. And a witness could object, or a party could object. The rule says, interested person. Again, we had also a separate discussion on how much interest do you -- how much connection do you need to the case to be able to make an objection. But under my version, there would always be notice that something would be recorded or disseminated and then there would always be a procedure to object, But the difference with my rule is at the end of the day, the judge could say, I hear your objection. I overrule it. We are going to broadcast anyway.

And I believe under the alternative version of the rule, if anyone objects, there will be no broadcasting; the judge can't supercede that.

So under my version, if the trial court is the one initiating the recording or dissemination, there's a specific notice and objection procedure. The second moving part of tab K is if a third party is requesting that a specific proceeding be recorded or disseminated,

then there's a procedure, again, for the third party to provide notice. The judge to rule on any objections, and then whatever the judge says goes. And then there is also a third part of the rule, which is where we said these types of cases are prohibited to be broadcast no matter what, the parties can't agree otherwise. The judge can't overrule it for these particular things. And we can debate about what belongs in that prohibited category, but one thing we talked about was voir dire examination. Probably should never be recorded and broadcast, so that was in our never. Like, child witness testimony probably should never be recorded or broadcast, so that was in our prohibited list.

So the main difference between the first one you heard about and the second was, in the category of can a trial court initiate? I believe Judge Estevez says never. And then can a third party initiate? And she says, only if there's no objection.

Is that fair?

HONORABLE ANA ESTEVEZ: Yeah, but I was okay with evaluating everything, but that is okay.

HONORABLE EMILY MISKEL: And under mine, it's always up to the judge, so if someone objects, the judge has to hear it and rule on it, but can go forward anyway. And then I think what you're going to hear

next, and I'm not going to commit you, but what I think I heard in our subcommittee meeting was kind of the inverse of Judge Estevez where he was saying, I don't think third parties should be able to come in and demand; I think if the court is doing it, there should be protections so that will turn it over to you.

PETE SCHENKKAN: The first thing about the brief of the United States is helpful for context on this was a criminal trial under the federal criminal procedure flatly prohibits broadcasting. So the United States sort of said, why are we having to brief this? And proceeded to do so. And in the course of doing so, they described the fact that it's not just that the actual rule, but it had been the policy, the judicial conference policy of the United States since 1972. That it does not allow either civil or criminal court proceedings in district courts to be broadcast, televised, recorded, or televised for the purpose of dissemination. So well, what about the First Amendment? Doesn't that entitle people to do this? No. Our first Texas contact with this, 1965, before the judicial conference policy, followed after the policy by Nixon versus Warner concerning the tapes, and multiple cases ever since. They say, no, this is not a First Amendment issue at all. That the First Amendment is all anyone is

allowed to do is come into the hearing of the courtroom. And they can listen and they can take notes, and we can still do that. They are within their First Amendment right to come in see what happens. And then the bad policy thing that Richard read some of are performance in court by someone who may not know that they are a performer or may know they are a performer. It may be different. If it is being televised and broadcast, it is very likely to be different. And that includes, of course, not only the witnesses, but the lawyers, who may be making a reputation for themselves in this case whether their client wins or loses. So there are reasons why we might not want to do this if we are making a positive choice. So then the Texas Rule, since I gather about 1990, had this consent requirement, and as far as I am anecdotally told, everyone can think of one case where anybody ever litigated, the requirement of the consent, and I assume that must mean that what didn't actually happen very often that reports, courts, broadcast in Texas, and at least it didn't attract any attention. Until, of course, the pandemic, which changed the situation. The only way you could have access to a Zoom conference if the judge was for you to use the Zoom feature. And anybody who was going to attend by Zoom could be sitting there attending and

having coffee and cutting a little piece out of a portion of it and putting it on the internet immediately and perhaps altering it in the process. Perhaps mischaracterizing it in text before you get to the video, and then it's out there forever instantaneous worldwide. The consequences for which, essentially, at the moment no one can be held liable, because Section 230, 47USC230, Communication Decency Act said you can't hold a platform liable or any user of the platform for reusing some other user's content. So the one suit is your slander suit for the first poster. And as a practical matter, unless you have some extremely publicly-minded lawyers who are willing to take on the case of the parents of the children at Sandy Hook. Those who repeatedly said were actors, and their children did not die. Unless you have something like that, there is no remedy as a practical matter. So we really ought to think carefully, do we want to get in this at all? If we do get in this business, we know from the very hard work that the real sub committee did, because I arrived late, we have in the court, in the part of the option, the tab K option, where the court can -- first we face the question, if we are going to do this at all, who's going to do it? Is it going to be the court and the county? Or is it going to be someone

who says, I want to come in the courtroom and, you know, give my cell phone or something more elaborate, record this and disseminate? That's a big choice. For that second one, let's maybe for some circumstances let somebody in to do the recording, you are making a decision whether to allow this to have a list of 18 factors.

The trial judge, in addition to all of the other things she is supposed to be doing in insuring that we have a fair trial in a civil matter, is now in the job of being the producer and director of a dramedy which has two competing screenwriters, the lawyers on each side, and two different casts. Neither of whom can be fired, because they are the witnesses and the parties. And so you are asking the trial judge in realtime to monitor which parts of this are we going to allow, which can be televised in realtime. Does that seem like a good idea to add to the tasks of the trial judge?

There is a possibility of substantially mitigating both kinds of risks: The management risks and the internet abuse. Now, I'm told that there is a state or two which has something like that, and I assume that is part of what our OCA is looking into. Who out there has already tried to do this? How's it going?

What does it cost? Assuming it is going to cost a fair amount of money to make sure that every courthouse in the State of Texas has adequate equipment to do this and somebody who knows how to use it, which may take more than one person to do this, as well as some OCA people who are going to be in charge of, for example, I'm assuming, negotiating the forms that all of the participants must sign to certify that they don't own the filming of their testimony, the State does, and any contracts that the State may choose to enter into with whoever is going to use the recordings. We can control the recording and the disseminating to some degree. I'm quite sure that if we come back and we hear from Chief Justice Hecht and the court administrator here is something somebody in some other state has done, here are the three or five or whatever it is, main questions and main issues and would the committee please draft some rules, I think we might be able to make a contribution. Until then, I think the conclusion in the brief of the United States is, this is a bad idea. There isn't a reason to turn it to go start doing it without being really sure that we can put the control of doing it and managing the risks of it hurting a lot of people in a way that we have the right people with the right training and experience and enough time and energy

free from other obligations, to do a good job of it, and we are not in that place today.

HONORABLE EMILY MISKEL: I do want to clarify, no part of our rules, we are never forcing a trial judge to broadcast. So if a trial judge doesn't want to manage the dramedy or doesn't have the equipment, or doesn't like it or feel it's right, a trial judge is never -- there is no option that would force a trial judge to broadcast.

HONORABLE ANA ESTEVEZ: I want to respond, if for some reason we decide to, say that if the media comes in that the trial court's going to do the broadcasting, then that does put a burden on the trial court, and I will say right now that my equipment's a 50/50 chance any time, so what happens when, you know, what happens when the equipment's down, and you have a hearing that they're expecting to be broadcast, and it's your equipment? Are you postponing the hearing? Are you going forward and -- I mean, what happens then? So I just think you should take out the trial court. It will cost money for the county to try to keep it up all the time. For those that don't want to have it, they don't have it. They can get new equipment at another time if there's another emergency. I'm going to keep doing that; every time I get a chance to talk to say the

judge shouldn't be doing that.

HONORABLE ROBERT SCHAFFER: I'm just wondering what's the impetus for us considering this rule? I certainly have never considered doing it, and if I'd been asked, I can't remember the last time someone asked.

CHAIRMAN BABCOCK: Well, I think the two proposals highlight a little bit the split between who's interested in this. Historically, going back some years, there was an effort, I was part of it, to draft local rules that could be blessed by the Supreme Court to allow broadcasting in trial courts in Texas, both civil and criminal. And a number of counties, Travis has been pointed out, but also Dallas and Harris and Bexar, had rules that governed when the judge could permit, not the court itself, but an outside media, typically media organization, and the reason that the media was interested in that was because from time to time, there are cases that are of great public interest to the community. I will give you an example: From your courthouse, Sylvester Turner sued channel 13 and Wayne Dolcefino, one of it's reporters --

HONORABLE ROBERT SCHAFFER: Did you have something to do with it?

CHAIRMAN BABCOCK: I was there, and I was

younger and missed a revenue opportunity for myself. I should have had some swoosh on my collar or something. But that was a case, I think most people would agree, there was a high degree of public interest in it. And it went on for eight weeks, and the jury was out eight days, and there was a cable channel at the time that covered it gavel to gavel. So that's one example, but there have been others. And so to answer your question, sometimes it's the media is representing the people who are interested in certain cases.

Now the other part of it is, does the court need to get into the business of recording and broadcasting? That's a separate question, and there probably is less demand for, you know, I don't want to pick on family law, but a minor prove-up or a discovery fight or an injunction in a trade secret case. There might be less interest in that, so the question is whether as a state, as a policy matter, we're going to say we reach more citizens by using this technology where you have available, and when the citizens see how our civil justice system works, because that's what we're talking about here, not criminal. When they see how it works, they will have more confidence in it than not. And if we are proud of our civil justice system, than we would expect that would be the result. If we're

not proud of it, and we think, uh-oh, if the public is exposed to what we do day in and day out, then that's the worst thing that could happen because they will lose all respect for our justice system; so it's a two prong thing depending on who's wanting to do it. And I just wanted to offer a friendly amendment to Mr. Schenkkan on the First Amendment. The First Amendment right to attend a criminal trial is well-established by the United States Supreme Court from the early '80s, and the Supreme Court has extended that on at least three occasions to cover pretrial proceedings, voir dire proceedings, and juveniles -- sorry family law -- juvenile proceedings even when the minor victim of a rape is called to testify. So there is a First Amendment right. The federal courts, as a matter of policy, don't allow cameras, as we all know, but there's nothing in those cases that say, and by the way, the First Amendment stops here. You know, it is expanded in the matters that the court has chosen to accept and write on. Nixon versus Warner is a documents case, and whether the public has a right to documents filed with the court is more like our 76A, except they recognize the common law right of access to judicial records; that's different from the First Amendment right to attend and for the public to see what's going on in its

courts.

PETE SCHENKKAN: I wanted to make sure we get it clear, for that extension, you're saying extension to these other stages in the proceeding, you're not talking about extension from being able to attend to extending it to a First Amendment right to bring your camera in and broadcast it live.

CHAIRMAN BABCOCK: No, the camera case from the U.S. Supreme Court is the Sheppard versus Maxwell case where it was a bizarre scene in the courtroom with cables. They had still photographers going up to witnesses while they were testifying with the big flashbulbs and, you know, getting them. So, I mean, circus-like atmosphere was what the court thought was a violation of due process, and I think everyone in this room would agree. But the cases I'm talking about, those four cases are the First Amendment right to attend a trial.

PETE SCHENKKAN: But not to broadcast. That's all I meant to say. There is no First Amendment right to broadcast a courtroom proceeding.

CHAIRMAN BABCOCK: Right. It doesn't say it can; it doesn't say it can't. Those four decisions do not address whether you can or cannot. As a matter of policy, the judicial conference has said no cameras, and

that's been that way for a long time.

PETE SCHENKKAN: No one has won a case saying I have a First Amendment right to broadcast.

CHAIRMAN BABCOCK: As far as I know. I mean, maybe there's a case somewhere in federal court, but I doubt it.

Yeah, Richard?

RICHARD ORSINGER: You know, Chip, the thing that argues in favor of us considering this is that the one rule we have dates all the way back to 1990, and it's never been revised. And as a result of the recent experience with remote access to court proceedings, we are just faced with a different environment. And I don't know that I can identify a particular interest group that is pushing hard for us to adopt a rule, but we should look at it as we have new capabilities that we never had before. The old definition of public access was physically walking into the courtroom and seeing what was going on. That's good for 1990. That's good for 1880. But is it good for 2025? I don't know. So do we want -- yes, our citizens will be able to see our court proceedings better, but so will bad actors all over the world if we allow this to be broadcast on the internet. And I'm particularly concerned about litigation that is really -- it's a public interest.

I'll have to admit that I watched as much as I could, the lawsuit between Johnny Depp and Amber Heard, and it was fascinating, just fascinating, but it was none of my business, right? It really wasn't. And I feel sorry for them because regardless of who won and who lost, they both lost because they detracted from each other, and they were public figures, not political figures. But at any rate, my point is, yeah, I mean it's kind of interesting to watch two famous celebrities slashing each other's throats right there in front of everybody. It's like the Romans and the Gladiators, I guess, but, you know, is that really what we want our court system to evolve into? And not only that, but it's not just our citizens that will gain access to that like it used to be. It was only people that were local that would come down to the courtroom, but now we're putting it out on the internet, coupled with AI, you can make people's mouth move while they're saying something they didn't say. That goes out on the internet, gets 20,000 replications; there's no way to ever bring it back if you ever do that. So, yeah, I think as this U.S. Attorney brief points out, it's going to be less disruptive in terms of physical noise. No flash bulbs. No cables across the floor. But if we make a mistake about disseminating private information, or information

that is embarrassing, or information that's threatening, it might lead to someone being attacked or killed. You know, do we really want that kind of information going out at all? Or at the discretion of the trial judge over objections of people who are participants who might be harmed? Those are the questions that we're asking, and I don't think we are asking them because we have to ask them. It's been since 1990, the world is different, and are we going to change what we do at all? And how? But to me, that's why we're here.

CHAIRMAN BABCOCK: And in fairness, you've cited this brief a number of times, and there is another section, for the sake of the complete record, the applicants says media organization. And this brief says, on page 17, that the applicants posit that state courts have demonstrated that broadcasting does not degrade the integrity of the criminal justice process. That some academics and judges support it. That it was permitted during the recent pandemic allegedly without ill effect. That modern technology, in their view, makes the process non-disruptive, and that broadcasting would enhance public confidence in proceedings among other arguments. But these are all policy arguments best left to legislatures and rule makers, and that's us. The rule makers anyway.

RICHARD ORSINGER: Right. The advisors.

CHAIRMAN BABCOCK: And the depositing of the applicants here have support in the record because we know there have been many televised proceedings since 1990, and the world hasn't fallen apart, and we've had the internet. And I mean, you can still see wayne Dolcefino screaming at Ron Franklin on the internet today, and nobody's suffered ill-effects, other than me that lost the case, but other than that, so...

Yeah, Pete and then Judge Chu. Just because I saw him first, Judge.

HONORABLE NICHOLAS CHU: That's fine.

PETE SCHENKKAN: One of the other things that's changed from the Nixon tapes era and from our current rule, is we had a distinct concept of who was a journalist and what a journalist was at the time, and that distinction was partly a result of facts that were just economic response of people in the businesses, but it was partly a matter of the legal framework. Broadcasting was done by television networks who was licensed to broadcast, is a federal FCC license, which could be revoked or not renewed for a variety of reasons under the Publications Act. There's not a lot left of that regime, even for the traditional institutions, is my impression. But there is nothing like that to prevent

Alex Jones from saying, I'm a journalist and I get to come in, and I get to broadcast as I see fit. Nothing. And once he does that, there is no sanction for that unless a direct target of his slander is injured. That's it. And I respectfully submit that that is a remedy that is worth nothing whatsoever to the vast majority of the people who might be injured by his broadcasting, so it's the responsibility of the people who decide to let in the broadcast. Who is going to broadcast? What parts of things are going to be broadcast, and how are we going to manage it? I think we should take our time in, and I agree certainly the Court has the power to make rules on this, and I just think if we wait to see if the Chief would like for us to look further into it; that's one direction. And if that's really not a viable option, then we are going to have to look in a different direction to see, but not today.

CHAIRMAN BABCOCK: Judge Chu?

HONORABLE NICHOLAS CHU: First, I want to point out the irony of discussing this in the broadcaster's building.

CHAIRMAN BABCOCK: They're not listening.

HONORABLE NICHOLAS CHU: I have had a lot of experience with this, along with Judge Miskel. She and

I both had to do the first set of Zoom trials during the pandemic. And when I did that, I had to deal with a lot of grappling on, how do we do YouTube? How do we do the broadcasting? How does the media get involved in this? How do we protect against recording or unauthorized recording? What do I do with the recording after I get done with it? Do I delete it? Am I allowed to delete it? Things like that. And kind of through that analysis, number one is, should courts in general allow for media access or broadcasting access? Whether number one, the federal standard applies or no, we should let people in, right? And so I think everybody just in the states area agrees, yeah, there should be some level of allowing this to happen, right? Unless, I mean, if we do the federal way, job's done; this is an easy decision for us. But now if we do decide on, okay, well there's some level of public benefit of allowing people to see recordings, number one, who should be that gatekeeper? And I agree with Judge Miskel here on, I think it should ultimately be the trial court's decision, whether we're going to allow it or not, or specific reasons why to allow this at this point of the trial, but not at this point in trial. Maybe there's a minor involved. Maybe there's a victim of domestic violence involved, something like that. Also, I think that from a big

philosophical point of view, we have 400 and odd district judges, plus all of the county court judges, the JPs and everything like that, and all of those are individually elected by their electorate to provide for some level of accountability. And I think that that person that the citizens have elected is in the best position to figure out what's the level of access that I should give the people that elected me, or the people that want to know if I'm doing a good job or not. Some will agree and say, hey, you know, you should see this. Others may say, no, you need to come down to the courthouse. But that's the call that that individual elected official should be making. And whether society agrees with them or not, that's what the ballot box is for, to pay that consequence.

Now, I do think if we allow for some level of requiring consent, there is just some level of litigation or litigators or parties that will never agree, and we will never see that. I can only assume, you know, government parties, major corporations, people who would want the PR aspect of this to come into effect, they would always say no. State of Texas will probably also always say no to that, right? Why have that public exposure? So at that point, if we allow for this idea of, hey, we need more transparency in the

court process, but we allowed it for this consent requirement, we actually only allow for transparency on the people who want to be transparent, but not for the people who maybe would benefit for more transparency.

Lastly, I think from just like the standpoint of how rule making works, especially with how all this works, I think the rule should be looked at as, you know, there's the traditional media component, the OJ trial, the Johnny Depp trial, that kind of stuff. How do we handle that kind of rule making? And how does the judge handle that analysis? How they handle where the cameras should be. What you can record. What you can't record. Bench trials, things like that. And then there should be a separate analysis of separate kind of rule making for, what if it's a court case operation? And then kind of divide it up that way. And I think a lot of that isn't necessarily put it into rules; it's just kind of creating a framework of you should have this analysis. And then I think we should lean in heavily on the college for predicate judges, the Texas Support Justice Center, the Office of Court of Administration to train those judges on how to deal with that, because not every situation is going to be unique, and there may be some different situations. I'll give, for example, the emergency docket in Travis County District Court three

weeks ago now, had to deal with a subpoena issue on a very contentious state execution case. There was a significant interest in that, not just here, but nationwide. And the judge in that court made a decision to livestream that because it was on a Friday afternoon. Staffing for security is a little bit harder to deal with at that time, so if you had a bunch of people flood the courtroom at that point in time, on top of handling all the other emergency cases on that docket, it would just be highly ineffective and kind of a circus in terms of administering those cases. Well, that's not something you can write into the rules. It's just something that through her training and through her experience, she was able to navigate those options and figure out a solution for that. And so I think you just have to trust the judges, train them up. And that's kind of why I think the lesser way of doing these rules and to rely on judge's discretion is the best way. It's a long silloquey.

CHAIRMAN BABCOCK: That's okay. You're still under Orsinger's average. Justice Kelly.

HONORABLE PETER KELLY: I was curious about the relationship between a recording made under, however it's made under this rule, and the official record. If both proposed rules say any recording proceeding

pursuant to these rules shall not be considered as part of the official court record, but can be used to correct the official court record. For instance, if the court reporter records, "cross talk," and one attorney says, no actually, I said, "hearsay," can the recording be used to correct it? And not necessarily replace it, but to make sure it is fully accurate. And is that considered, part of the official record? Can it be considered on a motion of a party? Or is it completely banned? What is the effect of having another recording, not the official court reporter?

HONORABLE EMILY MISKEL: The intention of the committee was that we completely banned. We don't want courts in the business of litigating differences between the reporter's record and janky video that somebody made, so the intention was for that to count as nothing ever.

HONORABLE PETER KELLY: Then you might want to strengthen that. Say, shall not be used to assail or correct or otherwise modify the court record. Because this rule leaves it open for something like that to occur. Or someone to make an AI deep fake and say, actually I did say hearsay.

HONORABLE JOHN BROWNING: Has anyone considered the cyber-security concerns? Because, you

know, court systems nationwide have been exploited in recent years. Potter County, Amarillo was down for weeks. And it would seem to me that having, you know, this as adding another layer of potential vulnerability for courts and court systems. But I don't know if that was looked at or considered.

HONORABLE EMILY MISKEL: So we didn't specifically look at it. I think there are two ways that cyber-security concern enters into our discussion. One is the referral for OCA to look at a State-provided receptacle for the videos. The State would then be responsible for the cyber-security on the state system. So that might affect the feasibility of OCA's recommendation. As far as cyber-security of, like, protecting the stream or whatever, it is interesting that there are already cameras in most courtrooms, because the sheriff has cameras on us. And I don't know if you remember the one where the judge got caught texting because the sheriff's camera was right over her shoulder. So we already do have cameras in the courtroom that are recording, just hopefully the sheriff is the only one looking at them and recording them and sending those recordings to other people, which also didn't happen. But yeah, those are vulnerable to being hacked as well, I suppose.

CHAIRMAN BABCOCK: Judge Wallace?

HONORABLE R.H. WALLACE, JR: If the judge can always -- even if both parties consent, if the judge says, no, is there some level of discretion that can be abused if he does that? And the reason I'm asking that is because there are people that will do it for nefarious purposes. My only experience with someone asking to record proceedings, was they wanted to record a proceeding and then filed a motion to recuse the judge. They wanted their own camera in there. Clearly, what they wanted to do was get a record of them telling all the terrible things that this judge did, so they could go out and put it on the internet. Nobody said that, but my suspicious mind thought that that's probably what they were going to do. Luckily, in my case, one of the parties said no, so that made it easy. But what if both sides said yes, and I said, no, you're not going to record it? And to Judge Miskel's point, he pointed out at the court, and said, Judge, there's cameras right up there recording these proceedings.

HONORABLE EMILY MISKEL: I just was going to clarify, it was the intent of the committee that a judge is never forced to broadcast, so we can wordsmith that. There is no circumstance where parties can force a judge to broadcast.

CHAIRMAN BABCOCK: This distinction has come up in my mind, anyway, a couple of times. One thing you are talking about is when the judge has control of the camera.

HONORABLE EMILY MISKEL: We meant both.

CHAIRMAN BABCOCK: The other is when Channel 11 comes in and broadcasts. Once they're broadcasting, you can't tell them, you can't show this part or that part, right?

HONORABLE EMILY MISKEL: I think you can, right? Because you can prohibit them from broadcasting trade secrets. Right? You can close the courtroom for certain portions.

CHAIRMAN BABCOCK: Well, you can, but if they're in and see it, there are certain canaries in this mine --

HONORABLE EMILY MISKEL: Right. So that's in our list of 18 things that the Court should consider, is whether confidential information is going to be coming up. If we know that up front, that might not be a good one for broadcast.

CHAIRMAN BABCOCK: Yeah, fine. But once they see it, you can't tell them, oh, you can't broadcast that. They may get in trouble later, but you can't stop them. Yeah, Richard?

RICHARD ORSINGER: It seems to me that we are kind of fusing recording and broadcasting in the same discussion when they really are slightly different things. Once something is recorded by an individual or a media company or something like that, I don't think we're going to be able to control broadcasting. The only way to stop broadcasting is to stop the recording or to stop the live feed, so that only people that are there can see it. In Chief Justice Hecht's referral letter on July 17th, 2024, he mentions specifically reports of extraneous judicial commentary and extra judicial remarks made in connection with the proceeding. And I think he's talking about where you have a YouTube feed, and people are posting things live and commenting on what's going on in the trial. And I think I even heard that a judge got kind of fighting back and forth with someone who was commenting on the way that she was running the court. Then he also said that the prolonged availability of proceedings in cases involving sensitive data and permitting a posting of public comments and reaction to official court proceedings and judicial responses. I think that's talking about the judge defending himself from the posted attacks that go along with the feed. This is turning into a drama.

CHAIRMAN BABCOCK: I can tell your head's

exploding.

HONORABLE EMILY MISKEL: But I think our recommendation from the last meeting is most of those are addressed by existing canons of judicial conduct. One of the canons of judicial conduct is the, something about the dignity of the proceeding.

CHAIRMAN BABCOCK: Kent has been waiting patiently to get a comment in.

HONORABLE KENT SULLIVAN: I just want to note one thing in passing. We've been talking about a couple of access issues, and the focus is almost exclusively on these broadcasting issues, and I just think it's worth us noting that it leaves out a significant element of access, which is access to really seamless access and transparency relative to the parties' filings, you know, the Court's orders and opinions. And I say this in the context of, if you are a member of the general public, you generally can't get access to those things. You have to pay fees, and there are various hurdles to that. Federal Courts, I think, provide a great example of this as a very significant element of access to the courts and the operation of the legal system, in that, do you care that much about watching what's going on in the federal courts? I think the answer is, probably no in the sense that there isn't much going on in the

courtroom often. Where a lot of the activity takes place in the Federal Courts is by way of filings and motion practice and how those are being handled and disposed of. And if you are interested, you want access to those documents and to be able to read them. But, at least as far as I know, I think you have to have a PACER subscription to have access to those.

CHAIRMAN BABCOCK: If you live in Wichita and the case is pending in New Hampshire, it's probably not a viable option, but you can go down to the clerk's office and ask to see a file, right?

HONORABLE KENT SULLIVAN: Same issue with respect to broadcasting, right? you can always walk down to the courtroom and watch what is happening. But we are focused very much on the broader access question, and I'm simply saying, if you're looking at the total volume of information that somebody might be interested in, there is probably far more in the filings than there is going to be on TV, and yet we've got a significant barrier to that, and we don't spend much time talking about that, and particularly in an electronic society as we are now. we really haven't done anything to provide accessibility. It's still, I think, a major problem. And it's at least worth noting if what we're talking about is an access issue. This is an access problem.

CHAIRMAN BABCOCK: Richard has spoken in the past about practical obscurity. And that's a phrase that runs around in these circles.

Judge Chu, did you have your hand up?

HONORABLE NICHOLAS CHU: Just about the earlier discussions about YouTube comments and things like that, I think all that is solved, not from rule making, but through judicial training. So I think a lot of these things that we're pointing out, this is solved by that.

QUENTIN SMITH: As someone who is planning to attend a hearing this coming Wednesday, I would like to leave it up to the trial judge. I don't want some prohibition on broadcasting. And there are lots of MDLs that involve hundreds of lawyers from across the state, and trying to get them all in the courtroom all the time, even if they are not going to be talking, but they want to know what's going on for their client, they should be able to watch. So I don't think a prohibition on broadcasting unless everybody agrees is reasonable.

CHAIRMAN BABCOCK: Yeah, good point.

HONORABLE EMILY MISKEL: Following along to that and something Judge Chu said, when we require consent, what we're effectively doing is prohibiting the judge from doing that. I can see a candidate for

judicial office campaigning on the platform, I believe sunshine is the best disinfectant. I think transparency promotes trust and confidence in our system, and if I'm elected, I'll broadcast. Should we tell her that she's prohibited from initiating that reform in our system? Maybe. Maybe your answer is yes, and we should not even allow that. But like Judge Chu, again, I think it comes down to the individual judge and if that judge believes they can do it.

HONORABLE ANA ESTEVEZ: I'm going to ask everyone a very personal question, and you can either answer it or not. Let's say you either served your spouse, or your spouse served you tomorrow. How many of you would like your divorce to be broadcast?

HONORABLE HARVEY BROWN: Is there any money in it?

HONORABLE ANA ESTEVEZ: Even if you have nothing to hide, do you really want someone to flip the channels and find you being broadcast in court?

QUENTIN SMITH: So I understand that, but there could be people, I know people that go and just log in and look at files. And they can go start a YouTube video talking about your divorce and everything you said. And put pictures up of you as you walk in and out of the courtroom. Read all the filings. Read all

your financials, and we can't stop that. I mean, I wouldn't want that to happen, but I think that's an extreme version, rather than someone fighting over some discovery that doesn't really matter.

CHAIRMAN BABCOCK: I think you got to answer that on two levels. That question is very reminiscent to me of the debate with Michael Dukakis who was running for president as a democrat, the Governor from Massachusetts, and the question was, suppose your wife had been raped; would you want the rapist to receive the death penalty? And Dukakis fumbled the answer, because he was against the death penalty, but he didn't want his wife to be raped, right? So he went blah blah blah. And the answer is, well, my immediate reaction is I'd want to go kill the son of bitch, but, as president, as somebody who is a rule maker, I have got to rise above that, and I can't do that. I'm against the death penalty, and even in a case of great personal harm and sacrifice, no, I wouldn't be in favor of that person being put to death, even though I would want to kill him myself because of what he did to my wife. And that's sort of where I would answer your question. No, of course, I don't want my divorce on television. But that's not the issue. As a rule maker, I think I have to transcend that. Yes, Judge.

HONORABLE SALAS MENDOZA: I think it would be helpful to have a rule. My inclination is to agree that the judge should really have discretion. But I'm a little confused by the conversation, because the courts are different, and our equipment is different. I think we are mixing up when we are on Zoom and broadcasting on YouTube, and then having a courtroom broadcasting. We've had some courts that are super fancy. Just so you know, in my courtroom, sheriff doesn't have a camera and I don't have a camera. If I'm broadcasting from the courtroom, it's my laptop that I use; that's it. But there are other places where they set up their courtrooms, and you can watch everything. They have various angles. And for the most part, that's been good. It's been helpful to see those proceedings. So I think a rule would be helpful if courtrooms are set up to do that, and I agree there's lots of reasons why a court might want to, and having those rules is helpful. I want to weigh in on the security issue. Judge Chu mentions the situation in Travis. Last week we had the Walmart shooting in El Paso, and we are suggesting, for safety reasons, that that be done remotely. Every time there's a proceeding in the courtroom, you know, there's just a lot of problems. We have had witnesses that are survivors who have brought weapons, so there is a

security issue that can be addressed with broadcasting. And it still provides access to very important litigation, but we now have a way to keep people safe. And I think for those reasons, we want to have a rule that addresses how that is providing access. That that is open to the court, so that everyone can see, but also providing security for the judge, but I'm a little confused because we do have differences in the courtrooms, so I think a rule should address Zoom and YouTube and broadcasting and then actually in the courtroom broadcasting. And that is more like having the media come in. Every time we've allowed cameras, we have a conversation with them. You're not showing jurors. You're not showing these witnesses. No one has ever disrespected the rules of the judge. I think it would be helpful to have a rule.

CHAIRMAN BABCOCK: Chris, did you have your hand up?

CHRIS PORTER: I would like to answer the question about the divorce. Having thought about it for a second, I think that if you knew that your divorce proceeding would be broadcast to the State, it may make people act a little bit better.

CHAIRMAN BABCOCK: There is that argument of, people knowing they are being recorded act a little

better. My experience, having tried a few cases that have been televised, is that people forget about the cameras after awhile, and then they go back to behaving badly.

JOHN WARREN: I don't want to answer your question. I'm going to address this the way I manage my office. My office is one of the most impressive, but at the same time my office has not been progressive because of what society requires, and so I operate on a hybrid platform. For those constituents in Dallas County that really want to embrace technology, it is there. For those individuals who don't have the ability to appreciate or use technology, the solution is there. And for those individuals who may be senior citizens who want to maintain their own independence outside of the advancement of technology, the ability is there. When it comes to broadcasting court proceedings, one thing we have to take into consideration. Several things. At the end of the day, we don't want court proceedings to become material for Saturday Night Live or Jimmy Kimmel or anyone else. Proceedings should be open to the public. But in the instance of broadcasting, it should be in the interest of the public. Murders. George Floyd. All of those things where there is an interest of the public and the outcome; does the judicial system

really work? That should be the only time it applies. There should be standards. Not everyone's divorce needs to be broadcast. You are right, as he said. The case records are there. Research Texas. It doesn't matter where you go. Those records are there. Go there to view it. But as it relates to what's broadcast, it has to be solely for public interest.

QUENTIN SMITH: I want broadcasting for my case, right? I mean, there's literally 500 lawyers in these cases. There's not a courtroom big enough.

JOHN WARREN: To your point, this also creates an opportunity to have high school students actually look at real trials, because I may want to be a lawyer, but have no idea what that means. And so now you can use it for those types of tools.

CHAIRMAN BABCOCK: Professor Carlson.

PROFESSOR CARLSON: We could start building Hollywood sets for real judges in Harris County. Seriously, is there some way that this could be limited to a bonafide licensed broadcaster? Or is this to anyone who claims, I want to broadcast.

HONORABLE EMILY MISKEL: So not the first part about the trial court doing the broadcasting, but we're talking about third parties requesting a broadcast. We didn't come up with any way that you could limit it.

HONORABLE PETER KELLY: I think the answer to your question, if the State is going to allow -- insert their own choice of licensed broadcasters, I'm not sure if they are licensed anymore, then I think they are going to have a First Amendment challenge to keep Alex Jones or what's -- I can't remember the name of the two or three Kentucky based journalists who turned out to be with the Russian government.

CHAIRMAN BABCOCK: This comes up not infrequently, and what the judge typically says, and everybody says fine. The judge says, look, I'll let you in, but I'm not going to have 15 cameras. Y'all have a pool camera, and whoever wants the video will agree that you take the feed from the pool camera. So it doesn't matter who the quote-unquote, journalist is. There's one camera, and the person running that camera is going to allow a feed to everybody who is interested. That's how that's typically solved.

And I'm sorry John walked out, because I wanted to disagree with one thing he said. You know, I I've been on the cover of Sports Illustrated, but I want to be on Saturday Night Live. So anyone who didn't, I can't imagine why they wouldn't want to be on it. Oh, yeah, Browning doesn't want to be on it.

HONORABLE JOHN BROWNING: I don't want to be

on Saturday Night Live. I respect Judge Salas Mendoza's statement that there should be a rule, but isn't there already a rule? I mean, a judge has inherent authority to manage his or her own docket.

HONORABLE EMILY MISKEL: The current rule does, in fact, require consent from everybody. Just nobody realized that.

CHAIRMAN BABCOCK: Richard.

RICHARD ORSINGER: One factor that occurs in my practice that hasn't been discussed here, and that is when one litigant is using the ability to have the legal process disseminate that the other party wants to keep confidential as leverage in settlement. I've been involved in cases where there's pressure on one party to settle at a higher and higher or almost any cost because they know if the case goes to trial, that this other evidence is going to come out that's going to be embarrassing or is going to damage a political career or business career. And that's a misuse of this public function. If we're allowing publicity for the public to be aware of what's going on, but we understand that people are motivated to avoid public humiliation, I should say, we've got a situation where we've created a tool for leverage in settlement that has nothing to do with the merits of the case. It has to do with

somebody's sense of privacy is valuable to them independently from the merits of the case. And that does go on. I can tell you it goes on, because I've had to grapple with that several times. So we create an incentive for someone to misuse the publicity aspect of litigation to get extra money, and that's not necessarily a reason not to do it, but it's something to keep in mind.

CHAIRMAN BABCOCK: Quentin.

QUENTIN SMITH: I'm just going to say, I don't know if you've heard of Colby Busby; I think he does that right now. There's no cameras or anything in the courtroom. He's dealing with Diddy's accomplices right now, but I just don't think that is related to broadcasting. That fear. I think that's just a reality of public litigation.

HONORABLE ANA ESTEVEZ: I want to ask Quentin something. If the OCA made a platform for large litigation, and there was a special link that things would be broadcast, would that satisfy your need for broadcasting?

QUENTIN SMITH: That would make me feel better. Most of my cases don't involve the sensitivity that you all are talking about, so I really wouldn't care if most of my cases were broadcast. But yes, that

would make me feel better about it.

HONORABLE ANA ESTEVEZ: You know, you put in a password or have a special way to get into it.

CHAIRMAN BABCOCK: Okay. We will come back to this in January.

RICHARD ORSINGER: I don't think that it would be too fruitful for us at the committee level to go through the room with all of these components, like there's 18 factors. I would suggest that we invite everyone to send an email to the subcommittee about any edits they have, or any questions or additions or subtractions and let us process that over time, rather than trying to do it realtime in a meeting. Is that okay?

CHAIRMAN BABCOCK: Fine with me.

CHRIS PORTER: One quick question. On the cases that you've had that had been televised, if you had something come up of something that was pursuant to a confidentiality order or something of that nature, did the judge just then turn off the camera for that portion? Or has that arisen in your practice?

CHAIRMAN BABCOCK: I never had one televised where there was trade secrets that might come up all the time or something like that. My recollection is that there were a few confidential things that came up in the

Turner case, but the judge just had us up to the bench, so all the camera would see is a bunch of people around the bench, and there would be no audio. And she made sure that there wasn't any audio available.

RICHARD ORSINGER: And I could say in the family law arena during the Zoom era when we had Covid, everything was being sent out over the waves, and some of the district judges had YouTube channels, but you could go to them if you were in a sensitive part involving a child or the interest of a child or something, and ask the judge to turn off the switch until that part was done, and they would until that part was done. And so I can envision if you had a psychiatrist who was going to testify to something that would be covered by the mental health privilege, the judge could just cut off the feed for that testimony and turn it back on.

CHAIRMAN BABCOCK: That reminds me, I had a case three weeks ago where it was a remote proceeding, but it was available to everybody by video, but there was a whole segment that was confidential, so she cleared the courtroom and cut the camera off.

CHRIS PORTER: I think if we have those kind of procedures in place, then I don't see any issue with it.

CHAIRMAN BABCOCK: Yeah.

HONORABLE EMILY MISKEL: Specifically, I think what Richard was saying is we would welcome specific wording, wordsmithing, responses to tab K and tab L just sent by email.

CHAIRMAN BABCOCK: Okay.

All right. Lamont, you're here. Are you going to talk about transfer on death deeds and forms?

LAMONT JEFFERSON: Yes, and unlike the last committee, we would very much not like any comments whatsoever.

(Laughter)

lamont: You have the forms that have been distributed to everybody. So I don't know if everyone, this is new to me, probably new to everybody else on the committee, but actually the 84th Texas legislature, 2015. So the legislature met in 2015 and decided after a lot of deliberation that there ought to be a bill to require the promulgation of forms for transfer on death deeds after deliberation. So the way this works is, if you die and you have a transfer on death deed filed in the county records, the title transfers to the beneficiary who you designate on the form. No probate court required. And the idea is it saves costs, it saves obviously attorney time and money, and it's

primarily for small estates, although it can work with any estate. And so the legislature, the reason why I'm saying we don't need comments is because shortly after the legislature passed the bill that said we're going to have these forms, the Texas Supreme Court appointed an illustrious group of lawyers and judges to work on drafting the forms and instructions to go along with them. And they started their work in 2016, and they have in front of you the results of their work, which is a really nice simple, elegant set of forms. That would at least accomplish what the legislature mandated almost ten years ago. We've read the forms. The forms make sense. The instructions make sense. I mean, you can nitpick here or there on the forms, but it would accomplish what the legislature did.

There are four forms in the packet. There is a transfer on death deed from one individual to a number of beneficiaries. There's a transfer on death deed if two or more persons own a piece of property, and then that will transfer to the designated beneficiaries. And then there is an affidavit of death. And there's a cancellation form that you could file if you want to cancel your transfer on death deed that you just filed with the county records. All of the forms are accompanied by instructions. The committee has read the

forms. And then we talked to Judge Polly Jackson Spencer who's a probate court judge in San Antonio, chaired the task force that put together the forms. I've known Judge Spencer all of my career. She was a probate court judge for many years in Bexar County. She's sharp as a tack, and she got on the phone with us. She was still very much engaged in this project, and she would like to see it through. She got on the phone with the committee, along with Trish McCallister, who spoke on behalf of the Access to Justice Commission and Community; although, she's no longer with the Access to Justice Commission. And they've both been involved since the beginning of this process. And so other committee members feel free to chime in here, but our recommendation is, obviously we'll listen to anybody's comments, but our recommendation is to vote up on the forms as they appear in your packet, and get these forms out into the public, so they can start being used as they were intended to by the legislature.

CHAIRMAN BABCOCK: Okay. Elaine.

PROFESSOR CARLSON: Are these different than the forms that are out there now? There are official forms out there.

LAMONT JEFFERSON: I wasn't involved in this, but I understand there is a whole set of probate forms

that committee worked on.

HONORABLE NICHOLAS CHU: Yeah, so there have been some forms that have been approved already by the Supreme Court as it relates to wills or small estate affidavits, but there's nothing approved by the Supreme Court for transfer on death deeds.

PROFESSOR CARLSON: I can tell you there are transfer on death deeds on the official site of the State, that I used two years ago.

HONORABLE NICHOLAS CHU: Those are probably self-generated by -- these are just forms that people could create their own, just like any attorney can create their own forms, and they can be on any site.

PROFESSOR CARLSON: This is an official government site.

HONORABLE NICHOLAS CHU: Because this sounds exactly like what they are.

LAMONT JEFFERSON: The bill that was passed in 2015 had forms attached to it. That may be. I don't know what you were looking at, but that would be -- when the legislature considered it, they were already considering forms, and that was part of --

CHAIRMAN BABCOCK: Are you worried about title?

PROFESSOR CARLSON: Yeah, I could die any day.

This is killing me.

JOHN WARREN: My only question is, because these will be recorded in my office. The transfer on death deed, the new version or the new one's you all have recommended, those are only for the individuals who currently own the property to transfer to another individual, correct?

PROFESSOR CARLSON: Yes.

JOHN WARREN: I just wanted to make sure.

LAMONT JEFFERSON: Yeah, yes. The idea of a deed is a fast title from the current owner or owners to the beneficiaries.

warren: One of the issues that we deal with is property fraud spikes around the death of a property owner, so as long as -- there's the affidavit of heirship that people drop in unbeknownst to the other 35 heirs, and says, so, I'm the sole owner of this property. So I just want to make sure that that was the case.

LAMONT JEFFERSON: That's correct.

CHAIRMAN BABCOCK: Any other comments?

All right. Hearing none, we will consider this submitted to the Court, and await the Court's action. Lamont, thank you. Excellent work and the only thing we've completed today. But that's okay. And now

we'll start a very short ten minute afternoon break, and Amy can rest her aching fingers, and we will be back at five after three.

(Break)

CHAIRMAN BABCOCK: All right. Bill.

HONORABLE BILL BOYCE: Yes, sir.

CHAIRMAN BABCOCK: We have error preservation citations.

HONORABLE BILL BOYCE: All right. Shouldn't this be a 9:00 topic as opposed to a 3:00 topic?

CHAIRMAN BABCOCK: Yeah, no kidding. Well, let's just see what we can do.

HONORABLE BILL BOYCE: All right. We'll power through.

So if you go to Tab R., also Page 986 of your PDF, you'll see the memo addressing error preservation citations.

This is resuming the discussion from the August meeting. I won't recap it at great length, other than to note that there were -- there was a proposal for a fairly well-developed longer set of rules pertaining to a requirement to include in briefing citations for error preservation, both to aid with the process of deciding appeals, but I think also a significant part to alert folks that you actually have to have a preserved

complaint to bring up on appeal, which doesn't always reflect in the brief.

The memo in front of you reflects a revised proposal. Actually, a couple of options of revised proposals for language to add to Texas Rule of Appellate Procedures 38, in the different subparts.

And the general operating assumption that our subcommittee has, both on this and some other topics that we'll talk about this afternoon, is that the most effective rule amendments are the ones that involve the least possible words to get done what you're trying to get done.

The longer the amendments are, the more elaborate they are, the more ambiguities or complications amplify.

So what these options are that are reflected on Page 2 are subcommittees' efforts to boil down what we understand the committee as a whole wants to accomplish in a few words.

And so -- and I need to give credit. This is David Keltner's draftsmanship and handiwork in large part. He took the labor on this. So I want to thank him for that effort, even though he is not able to be here today.

For example, if you go to option one,

TRAP 38.1(i) shall be amended as follows. The existing language tracks what we already have: Brief must contain clear and concise argument for the contentions made with appropriate citations to the authority and to the record.

And then this is the new proposed language: For each appellate contention, the brief must also contain citations to the record where the contention was raised and ruled upon by the trial court, or an explanation of why a complaint and ruling were not necessary to preserve the alleged error.

And then the option goes on to give parallel language for the appellee's brief reason and cross points. So that's the first option and that is shorter.

Option two is shorter yet. Option two TRAP 38.1(i) will read as follows: For each appellate contention, the brief must also contain information required by Rule 33.1. And then 33.1 references preservation.

So what these options attempt to do is to use more emphatic language. That was one of the takeaways from the last meeting, using "must" language. It provides the committee with options about how to do this, short or even shorter, with invitation for discussion about whether this accomplishes the goal.

And before I relinquish the floor, I want to flag one further topic for your consideration, which is on the subcommittee, we had some discussion and some concern about whether "contentions" is really the right word or not used for this type of rule.

It's in these drafts because that's what the existing rule refers to. But there is some concern that this is a little bit of an awkward fit because you raise issues presented on appeal, and then you draft legal and factual contentions in support of those issues presented.

So it's not -- for the sake of consistency we went with "contentions," but it may not be the best language. There may be better terms that this committee can suggest.

And I'll make one other general observation. There is still some anxiety -- or I should say concern, on the part of the subcommittee about including error preservation briefing requirements in the rules, out of concerns that that sets up potential for additional determinations of briefing waiver in the course of handling many appeals across many courts.

So it's a balance of considerations. The Court of Appeals are entitled to know from the parties that things that were being complained about were

actually raised and can be appropriately addressed by the Court of Appeals, but we're also mindful of the fact that the general tenor of rule-making, appellate and rules of civil procedure, is to avoid creating procedural waiver traps.

So there's kind of a low-grade lingering concern about whether putting these expressed provisions in there potentially creates that sort of a situation.

But assuming that we are going to have some kind of rule expressly requiring preservation citations, these are the options that the subcommittee is presenting.

CHAIRMAN BABCOCK: Bill, can I ask you a question? Is the sentence in option two which refers to 33.1, is that saying the same thing as option one? In other words, the language that you've added to option one would be found, in essence, in 33.1. There would be an overlay between the two.

HONORABLE BILL BOYCE: Yes. So option two is the shorter version that sort of incorporates by reference 33.1, insofar as it says that preservation is a prerequisite for presenting a complaint for appellate rule.

CHAIRMAN BABCOCK: Yeah, but there's a whole bunch of words in 33.1 that aren't there in option one?

HONORABLE BILL BOYCE: Correct.

CHAIRMAN BABCOCK: But the intent was that they're fungible, they're equal.

HONORABLE BILL BOYCE: I think the intent of option one is to flag the need to address this issue. But perhaps not with the complete detail that 33.1 does.

CHAIRMAN BABCOCK: So if I just go ahead and comply with option one, if I say, okay, here's what I got to say, but it doesn't hit all the marks that 33.1 says, then I could be in danger of waiver.

HONORABLE BILL BOYCE: I guess the question would be -- the presumption would be that both of these rules are going to be complied with. How -- this is really -- the purpose of this is to just remind people to put it in the briefing.

So I guess if the question is, can option one be expanded to be more closely tracking 33.1, yeah, I guess it could be.

CHAIRMAN BABCOCK: Well, the only reason I ask those questions is because I liked option two because it took me to 33.1. It said, okay, here's how you do this. Whereas option one, you know, I might -- because I'm not the smartest lawyer in the room, I might think, oh, that's all I got to do.

HONORABLE BILL BOYCE: That makes sense.

CHAIRMAN BABCOCK: Judge Miskel.

HONORABLE EMILY MISKEL: I think the people who were interested in this change at the last meeting --

CHAIRMAN BABCOCK: Are gone.

HONORABLE EMILY MISKEL: Well, I was one of them. But I think the point is it's really -- so the committee report at the last meeting was, why is this needed? Everyone knows that you have to show how your error was preserved.

Well, of course, sophisticated repeat players know that you have to do that. But a lot of what appellate courts see is not sophisticated repeat players. It's self-represented litigants, attorneys who have only done it once, et cetera.

And so I prefer option one because it actually says, you have to say how it was preserved. 33.1 still says preservation how shown, right? But option two, if you are an unsophisticated, not repeat player, you're going to breeze right on by an incorporation by reference.

So I don't think option two solves the problem that we were requesting a solution to, which is telling someone who doesn't do this every day, by the way, for each point you have to show us where you brought it to

the attention of the trial court. Which option one does say that.

CHAIRMAN BABCOCK: Yeah. Well, forget everything I said then.

Richard.

RICHARD ORSINGER: I'm wondering about the use of the term "argument," that -- it's option one, category "argument." In some of my briefs, Bill, I will use -- where I have a pinpoint error, rather than a generic one, I'll go ahead and put the record citation in the issue presented in brackets.

I wouldn't want to have to waste a whole sentence to say the same thing that I can say in a few words by just putting a bracket at the end of the issue presented.

Could we allow it to be done in any way? Does it have to be done in the argument? Do you see the point I'm making? In other words, if I have a series of issues presented that are precise rulings of the Court, I typically will give the record reference in a bracket immediately under the issue presented. This says it has to be in the argument. Do you see the distinction I'm making?

Because I think it would be efficient to be able to put it in the issue presented, rather than have

the issue presented hanging out there in space, and then you have to read down to the argument where you get a paragraph or two or three paragraphs about preservation.

HONORABLE BILL BOYCE: So that is a fair point. I think that the inclusion of the argument -- the inclusion of this proposed language in the "argument" subsection was a reaction to the prior proposal, which was to have a separate standalone section on where I preserved this that would not count against the word limits.

And so -- and the subcommittee's logic on that was it would make -- there was a view that it wasn't really necessary to have a standalone section and to exempt it from the word limits, because that also provides opportunities for gamesmanship and things like that and smuggling a lot of merits briefing into a preservation argument, that sort of thing. So that's the logic of putting this under 38.1(i).

Your point is, well, maybe I don't want to put it in the argument.

Put it under the issue presented. Is that not acceptable?

HONORABLE EMILY MISKEL: The text doesn't prohibit that.

RICHARD ORSINGER: I'm required to repeat it

in the argument.

HONORABLE EMILY MISKEL: No. It just says the brief.

HONORABLE BILL BOYCE: The brief. It doesn't say the argument section.

RICHARD ORSINGER: The section is the section on argument.

HONORABLE EMILY MISKEL: But it doesn't require the argument be a separate section.

CHAIRMAN BABCOCK: Do you want her to get this down?

HONORABLE EMILY MISKEL: Sorry.

CHAIRMAN BABCOCK: Rich.

RICHARD PHILLIPS: That's what I was going to say. It's the argument section, but it just says the brief must also contain citations to the record. It doesn't say it has to be in the argument section.

RICHARD ORSINGER: Well, why don't we put it under the issue presented section, which is where it really belongs in my estimation, not in the argument.

HONORABLE BILL BOYCE: Well, that's not going to work if you're going to have three paragraphs to explain how it was actually raised in X, Y and Z discussion, or three paragraphs that said, actually, this is a complaint about subject matter jurisdiction,

so I can raise it the first time on appeal.

I appreciate your desire to have it where you want to put it, but I think the concern is not creating another standalone section called preservation. So maybe one -- like Rich was suggesting, maybe one answer to that is if the operative sentence doesn't say it has to be in the argument, maybe your response is, well, but when you put it in the rule under heading "argument," it suggests that it needs to be there.

Another possible way to do it is to have the bold-face sentence just as its own standalone subsection.

CHAIRMAN BABCOCK: Roger, then Peter, then Rich.

ROGER HUGHES: Two things. First, this whole thing about where to put it, it's really an argument over does it count against my words or not? That is what it is. And I can remember back when we had to put in what we call the point of error, where it was raised and ruled on. That was in the rule. And it was simple. You just put a citation in the record.

And I think we -- basically, it's easy enough to simply say to prevent it from getting into -- counting it against your words in the argument, simply say, a record citation where the complaint was raised

and ruled on in the record or a statement that you don't need; it's unnecessary. And then leave it to the argument in the brief to explain that.

I mean, if you're going to put in the point of error, I don't have to -- I don't have to raise this in the trial court, I can raise it for the first time in appeal, and then you don't explain it in the brief, I think you're going to have a waiver problem. But I don't think at the -- at this stage it needs more than to say that in the issues statement.

The second is that I don't like the word "contention." I would say "complaint," and this is my reason. "Contention" is a narrower phrase than "issue." Contentions support issues, but they're not the entire issue.

But error preservation under Rule 33.1 is a prerequisite to presenting of a complaint. You have to show where the complaint was made. And, of course, there's requirements of what the motion or complaint had to say, and that the trial court ruled on it. It doesn't talk about where the contention was made.

And what I fear is that if we use the word "contention," at this point, as you do in option one, we're going to get into, well, you did object to what the trial -- you did ask the trial court to do action X.

But you didn't give that particular reason for it, and therefore, you haven't preserved the reason.

And I have actually seen cases where people will get really nitpicky and say, well, you didn't cite that case, or you didn't cite that statute. So you can't talk about that case or that statute. Because that wasn't raised in the trial court. You didn't preserve that.

I don't think we need to get anything. I think once we say cite where you made the complaint on the record and the judge ruled on it. Or, you know, state as part of your issue why that was unnecessary.

And then in the brief they're going to have to argue about why it was unnecessary. Or if the appellee wants to say, that didn't happen, you didn't make that complaint, or the judge never ruled on it, well, then, yeah, you're going to have to brief that in your reply brief.

But to force you, it then leads to what is kind of unforced there, and that you were speaking of earlier that leads to waiver. Well, you didn't argue strongly enough in your brief where this was raised and all of that, and so on and so forth.

And then we get wrapped around axles about whether you sufficiently, in your argument, stated error

preservation.

I think once you've stated where in the record to find it, or that it was unnecessary, and you can raise it for the first time in review, you have done what is necessary to alert the Court and the other party that there is an issue here.

HONORABLE BILL BOYCE: May I ask a follow-up question?

CHAIRMAN BABCOCK: Sure.

HONORABLE BILL BOYCE: So to make sure I'm understanding what you're advocating, are you advocating for preservation to be a separate standalone section?

ROGER HUGHES: I think it should be -- instead of having the sentence that's in option one or two under "argument" in 38.1, it should be under -- what is it -- 31 -- 38.1(f) under the "issue statement," so that it doesn't count against your words.

CHAIRMAN BABCOCK: Richard.

RICHARD ORSINGER: So, Bill, I'm wondering if maybe a better approach is to break this out as a subdivision G, or whatever the next subdivision is, and don't try to say where it is. Just say that each brief must refer.

The same concept here. And I don't like the idea, frankly, of citations to the record. I could be

wrong, but I think citations are to legal authority and references are to the record. And I don't know if anyone shares that view, but I always am careful in my briefing to call them record references rather than citations. I don't know if you agree with that or not.

CHAIRMAN BABCOCK: Rich and then Justice Kelly and then Roger.

RICHARD PHILLIPS: I think keeping it in the argument section when we go back to why are we doing this. For people who are not experienced appellate lawyers, this is the most logical place to put this. Because when they are getting to the argument section of the brief, they have to say this is how I preserved this error.

And it does say anywhere in the brief, I don't think -- obviously, I am not an appellate judge but I would be very surprised if an appellate court were to find someone waived error by putting it in their issue statement instead of putting it in the argument section.

But if we tried to lay this out in an issue statement part of the rule, I think we may not be as helpful to people who are not as experienced. I think it makes the most sense to put it here to tell them why you've got to -- where you're discussing your argument, you've got to tell the Court where you've preserved it.

And then as far as concerns that somebody is going to argue about whether you've adequately explained your preservation, it doesn't say. It's not -- the first part of the rule says clear and concise argument with appropriate citations. This one doesn't say anything about clear and concise argument. It says citations to the record, or record -- references to the record. I've always called them record citations.

But all you have to do to comply with this rule is cite the record where you preserved the error. So there's not going to be an issue of somebody complaining you didn't explain your preservation well enough.

So, to me, I think when we think about what are we trying to accomplish with this rule, putting it in the argument section and phrasing it like this is probably the best way to accomplish what we're trying to accomplish.

CHAIRMAN BABCOCK: Justice Kelly.

HONORABLE PETER KELLY: His reminds me of advice Justice Christom gave me when I first got on the bench, which was in criminal cases always read the State's brief first. Because you read the appellate brief, you get excited, oh, my God, there's an error. It's almost never been preserved.

So having this rule would certainly save a lot of time for the Courts of Appeals in reviewing these cases, but the point of the rules is not to save the Court's time. And I have trouble just with the basic principle of it and sort of the philosophical question, can waiver be waived?

Waiver is an argument for the appellee to make. It's not something the Court should do. Rule 33.1 says as a prerequisite for appellate review, but it doesn't say it's jurisdictional.

So if the party making the complaint has not properly preserved it in the trial court, I think it's incumbent on the appellee -- setting aside cross points. Incumbent on the appellee to make that argument.

Otherwise, the system is putting a thumb on the scales and I think waiver, just like any other argument, can be waived. And if the appellee doesn't make it, then tough on them. The Court of Appeals can consider it. Unless it actually is jurisdictional, and there's no indication in the rules or otherwise that preservation is jurisdictional.

CHAIRMAN BABCOCK: Roger.

ROGER HUGHES: Getting back to my point, I just wanted to clarify one thing. I think the requirement to state where in the record you can find

the complaint, et cetera, needs to be in the statement of issue so it doesn't count against words.

Second, and this is a clarification I wanted to make. I think you need to do it for each issue. That's the way we used to do it for a point of error.

And one thing I just thought of as I listened to Justice Kelly. One reason I think it would be helpful, all the way around, to actually return to this sort of thing, rather than just say, let's see what the appellee brings out, whether they want to just waive the error, so to speak, I think in framing your issue it's very helpful to think about, well, what was your complaint in the trial court? What did you tell the Judge you wanted the Judge to do? What did you ask to be done, and what did the Judge actually rule?

I mean, the point of error thing, the one virtue of it was you had to point to a specific ruling by the judge, say it was error and why. And by getting away issue statements, we just kind of drifted away from this. It's almost sort of like a philosophical discussion about something that happened in the trial court.

And by at least bringing it back to say, well, where was your complaint in this court of this issue, where was that, where was that raised, you need to say

that. It makes the advocate go back and focus when framing their issue to at least link it to what happened in the trial court.

CHAIRMAN BABCOCK: Bill.

HONORABLE BILL BOYCE: So two thoughts. Number one, if we take this language in option one and take it out of the argument subsection I and make it its own thing, its own subsection, then based on the structure of 38.1, we are saying this is a separate standalone issue. Because the preamble to 38.1 says the appellant's brief must, under appropriate headings and in order here and contain the following.

And the committee as a whole may want to do that. But to answer the question that I think I raised myself a little while ago, I don't think we can have this language just be free floating in 38.1. It's either under one of the existing subsections, or it becomes its own subsection. That's one observation.

The other observation I made is in response to Roger's comments, which is -- this is my take on it. But there were varying views on the subcommittee about where and how to express a preservation requirement. There was zero enthusiasm to go back to point of error.

So rule amendments now that sort of halfway walk us back to a point of error practice, I think would

cause some concern because, if I can broadly summarize it, it was to get away from the ritualistic, very formulaic statement of things and tell the courts what the actual issue was. That would be great.

And preservation is certainly part of it. And somewhere between excessive generality and granulated particularity is nirvana. So I don't know where that is.

But I will express on behalf of the subcommittee that nobody wants to go back to points of error, at least on the subcommittee. Maybe the committee as a whole, but not the subcommittee.

CHAIRMAN BABCOCK: All right. Any other comments?

Bill, do you want to propose a vote on the two options, or do you want to drop back and punt or what do you want to do?

HONORABLE BILL BOYCE: Can I ask for a couple of votes?

CHAIRMAN BABCOCK: Certainly.

HONORABLE BILL BOYCE: First vote. Language in option one versus language in option two. And then a subsequent vote on, okay, if we go with one, where does that go?

CHAIRMAN BABCOCK: Okay. All those who are in

favor of the language in option one, raise your hand.

All right. Option two, raise your hand.

All right. Option one wins by the rousing margin of 12 to 3, the chair not voting and the subcommittee chair not voting.

HONORABLE BILL BOYCE: Okay. So can I frame the second issue for vote?

CHAIRMAN BABCOCK: Yes. This is exciting.

HONORABLE BILL BOYCE: I feel like there's a sense of momentum building.

So using the language of option one, do we want to use the word "complaint" in place of "contention" and "statement" in place of "explanation"? Which is essentially what I think Roger was suggesting.

CHAIRMAN BABCOCK: Is that two votes or one?

HONORABLE BILL BOYCE: Up to you.

CHAIRMAN BABCOCK: So it's going to be two votes.

So everybody that wants "complaint," raise your hand.

All right. Everybody that wants "contention," raise their hand.

So "complaint" wins 14 to 3 with the chair not voting.

All right. And then the other two words

were --

HONORABLE BILL BOYCE: The second word substitution choice would be instead of saying an "explanation" of why a complaint and ruling were not necessary, say a "statement" of why a complaint --

CHAIRMAN BABCOCK: All right. Everybody that's in favor of "explanation," raise your hand.

And everybody that's in favor of "statement," raise your hand.

"Statement" wins 9 to 5, chair not voting.

Yes, Justice Kelly.

HONORABLE PETER KELLY: I missed the last meeting, so I didn't vote. How do we register our opposition to any rule change at all?

CHAIRMAN BABCOCK: There was discussion about that for sure. Whether we had a vote, I don't know.

HONORABLE BILL BOYCE: I don't think there was an actual hands-up vote. I'm happy to have that vote.

CHAIRMAN BABCOCK: Let's have that vote. So everybody that thinks that we should make a rule change to 38.1(i) along the lines that we just voted on, raise your hand.

And all those who think we should not have the rule.

The ayes have it for rule, 10 to 7, chair not

voting.

HONORABLE BILL BOYCE: All right. One -- I'm sorry.

CHAIRMAN BABCOCK: Justice Bland, did you have --

HONORABLE JANE BLAND: I just counted 8.

CHAIRMAN BABCOCK: You counted 8? Do you want to do it?

CHAIRMAN BABCOCK: Ultimately, it really only matters what the Court would like. I think we should now have hand-marked ballots. It's easier to count them, and we'll know by our January meeting.

Rich.

RICHARD PHILLIPS: So just in fairness to taking a vote here, what we did in the last meeting, a lot of the people who were very strongly in favor of this rule are not at this meeting and were at the last meeting.

So that vote might have come out differently. We're missing the two Justices.

CHAIRMAN BABCOCK: The rule -- I mean, we came out in favor of the rules 10-7 or 10-8.

RICHARD PHILLIPS: It's even further that, I think, if we consider the people who were here last time who are not here.

CHAIRMAN BABCOCK: Okay. There you go.

RICHARD PHILLIPS: And I'm on the losing side of that.

CHAIRMAN BABCOCK: There you go.

All right. So now we got that out of the way, don't we?

HONORABLE BILL BOYCE: May I ask for one more vote?

CHAIRMAN BABCOCK: You're a voting machine. Yeah, let's let do it.

HONORABLE BILL BOYCE: So the vote I would request is, does the committee as a whole want to leave the new language that we just approved under subsection 38.1(i) "argument" or does it want it somewhere else?

CHAIRMAN BABCOCK: All right. How many people want it under "argument"?

How many people want it somewhere else?

7 to 6 vote "argument," chair not voting. So figure that one out.

All right. Any more votes?

HONORABLE BILL BOYCE: That's all I can think of.

CHAIRMAN BABCOCK: Okay. Good. We are moving right along. Courts of appeals opinions I think is next.

And, Bill, you got that one, too.

HONORABLE BILL BOYCE: Yes. This was not -- this was on the agenda the last time. I'm not sure it got reached. And it's not really a rule amendment inquiry or referral. Justice Bland can correct me if I'm misinterpreting it. I think it's a request for the committee's vote on whether or not the Supreme Court should continue its current practice of directing that opinions be published in "Southwest Reporters" when PFR is granted.

And the memo gives you some discussion of that. And I think at one time the distinction between opinions in the "Southwest Reporters" versus opinions not in the "Southwest Reporters" carried some potentially significant weight. I think the subcommittee sense is that that's kind of gone away over the last two decades or so since publication versus non-publication was a topic of consideration.

My sense is that, both in terms of the analysis that they contain and how they are used in briefing, because parties and courts are not making a humongous distinction between opinions that appear only as an online reporter's site versus those that appear in the "Southwest Reporters."

But the discontinuation still exists in rules,

and if I understand the referral, the referral is not a request for the committee to consider whether or not this distinction should continue to exist. It's a more narrow referral, which is if the review is granted, should it be directed to be published?

And our subcommittee's thought was as long as this distinction is going to be continued to be carried forward in the rules, then yes, it makes sense to have the opinions be directed to be published in the "Southwest Reporter" when review is granted for whatever additional reachability and ability to find them for the public at large, if that allows.

CHAIRMAN BABCOCK: Well, there's a second reason, too. They're easier to cite that way. You don't have to have the Westlaw and -- there's a difference between Lexis and Westlaw. I mean, the citation is, to me, an issue.

So discussion on whether or not our view is that, yeah, tell Westlaw to get off their duff and publish these things.

Yes, Richard.

RICHARD ORSINGER: When this originally came up years ago, we had a "do not publish" category. And then when that was rescinded for --

CHAIRMAN BABCOCK: Good reasons.

RICHARD ORSINGER: Yes, good reasons, with a lot of impassioned arguments, we -- I didn't vote in favor of this memorandum opinion designation. But for people that were advocating in the meeting where the vote occurred, were of the view that there needed to be some way to distinguish between cases that are important and cases that are not important, so that when your associate was researching they didn't bring you a bunch of minor cases.

What I noticed is over the years that the Courts of Appeals frequently make significant decisions and put them in memorandum opinions, which is misleading -- non-intentionally misleading. Although people sometimes suspect that sometimes a memorandum stamp is put on a thing, and so it's less likely to attract the attention of the Supreme Court. I don't know if that has ever happened.

But I don't know that there's any value anymore between the memorandum and official, because they're all government acts. They're both precedential.

And I'm totally in favor of making West publish anything where the petition for review has been granted because the Court of Appeals opinion is sometimes a very important foundation to understanding the Supreme Court opinion.

CHAIRMAN BABCOCK: So if you're in favor of that -- which I believe you just said you were, right?

RICHARD ORSINGER: Yes.

CHAIRMAN BABCOCK: Raise your hand.

RICHARD ORSINGER: I would rather eliminate the distinction of memorandum --

CHAIRMAN BABCOCK: I know, but that's not before us. That's not before us.

So if you're in favor of getting West to publish, raise your hand.

Everybody else that agrees with him, raise your hand.

HONORABLE ROBERT SCHAFFER: I'm sorry, can you repeat that? What are we voting on?

CHAIRMAN BABCOCK: Whether West is going to be required to automatically publish. Anybody against that?

All right. Unanimous. That was easy.

RICHARD ORSINGER: The record will reflect my comment that we should eliminate memorandum opinions?

CHAIRMAN BABCOCK: Yes.

RICHARD ORSINGER: One question.

CHAIRMAN BABCOCK: It will be reflected and ignored.

HONORABLE ROBERT SCHAFFER: Does that apply to

cases that have been -- where the Supreme Court grants pursuant to settlement?

RICHARD ORSINGER: No. It shouldn't.

CHAIRMAN BABCOCK: It shouldn't.

RICHARD ORSINGER: Correct me if I'm wrong, Justice Bland, but I think that if the Supreme Court dismisses on agreement, doesn't that eliminate the judgment? And then, what' is the status of the opinion? Is it automatically initiated or is it -- The opinion stays if there's a settlement on appeal? The judgment.

HONORABLE JANE BLAND: It depends on what the settlement requester's request, and what the Court determines in connection with the Court of Appeals opinion.

RICHARD ORSINGER: The purpose of this rule is the cases that are significant enough get decided by the Texas Supreme Court, you should have a Court of Appeals to help understand it.

If the Supreme Court isn't going to rule, then why are we cluttering the "Southwest Reporters" with opinions that didn't ever get Supreme Court review?

CHAIRMAN BABCOCK: Yeah, that's the point that was just made.

HONORABLE BILL BOYCE: And I think that also raises -- what's the case -- the Inwood case and the

notion that parties can't bury their bad results through a subsequent settlement on appeal.

I think the default -- and maybe that's what Pete was referring to. The default is an appellate court will vacate an underlying appeal -- an underlying judgment, but they won't generally vacate the opinion itself because they don't want to promote a situation where people get a bad result, gamble, don't like the result, and then they settle to make it go away.

CHAIRMAN BABCOCK: But sometimes --

PETE SCHENKKAN: A lot of work in that sentence. You can make a showing that can persuade the majority of the Supreme Court to wipe the opinion off, too. And if that happens, the opinion certainly doesn't get in there. I guess in either case, if the issue is granted, that doesn't turn the memorandum.

CHAIRMAN BABCOCK: Okay. Pete, you got -- I mean, Bill, you got 18.1, right?

HONORABLE BILL BOYCE: Yes.

CHAIRMAN BABCOCK: Do you want to tell us about it.

BILL: Okay. So this is a discussion about being more explanatory about when the mandate issues. And it has its genesis from a proposal from the State Bar rules committee. The committee report, which is

attached to the materials, identifies certain additional circumstances that are probably not expressly covered in existing Texas Rule of Appellate Procedure 18.1.

And so the subcommittee's draft proposal in the memo is to add those particulars as three additional subsections at the end of TRA 18.1 without substantially rewriting TRAP 18.1.

And we can talk about whether those additions are necessary and whether the language used accomplishes what was trying to be accomplished.

The committee that -- the State Bar rules committee proposal additionally suggested a further revision to TRAP 18.1 that I think if you were starting, you know, fresh with a clean piece paper in front of you, is probably a little more elegant than the existing wording.

Basically what the additional proposal does is to divide the discussion of when mandates issue according to whether or not you have filed something. So if you don't file anything, then it happens at X period of time. If you do file something, then it happens at Y period of time.

The subcommittee considered this and, again, going back to sort of the baseline principle that the most effective rule amendments are those that generally

add the fewest number of words to accomplish what you're trying to accomplish.

Our thought is that there really wasn't a crying need to reconfigure 18.1. Even though the way it's been suggested is logical. But subject to the experiences of the judges and lawyers in this room, I don't think there was a great sense on the subcommittee that existing 18.1 is causing a lot of confusion. At most, there are maybe some very specific circumstances that are not expressly covered in it.

And so that -- the bottom line proposal, which is reflected in the bottom of Page 2, top of Page 3 of the memo, is here are three rifle-shot circumstances to be more explicit about when the mandate issues that aren't already expressly covered in there.

And if you flip to it, you'll see -- you get the motion for rehearing is denied without opinion. I think the logic behind that is that that precludes further filings and would be beneficial to be express about.

The next one was ten days after the petition for review has been set aside, if it is initially granted and then set aside. Again, I'm not sure how frequent that's going to be, but still a possibility.

And then the last one was, what happens if the

motion for extension that you asked for is denied? I haven't had experience with motions for extensions in that respect, you know, that would affect the issuance of the mandate getting denied. Maybe that's a problem that folks have identified. It's not one I'm personally familiar with.

But in any event, those are the new particular circumstances that are proposed to be added to the end of the existing 18.1(a).

CHAIRMAN BABCOCK: Has there been any discussion with anybody at the Court of Criminal Appeals about this?

HONORABLE BILL BOYCE: No.

CHAIRMAN BABCOCK: Do you think we need to?

HONORABLE BILL BOYCE: That is a good suggestion. And I say, no. I should be more specific. Not by me or anybody on the subcommittee.

The State Bar proposal may have involved some discussion with the Court of Criminal Appeals. I don't know that that is reflected in the State Bar memo, which is attached.

CHAIRMAN BABCOCK: Well, we'll figure that out later, what involvement we need to have with the Court of Criminal Appeals. But in the meantime, Richard has a comment.

RICHARD ORSINGER: On subdivision 5, it says it requires that the motion for extension be on file when the deadline arises, but I believe a motion for extension can be filed for up to 15 days after the deadline arises, and there's no reason to require that the motion be on file on the day the deadline arises, when it's permitted to be 15 days later.

So just take the motion for extension of time. Scratch "that is on file with the deadline arises," and then we don't have that problem. Do you see what I'm saying?

HONORABLE BILL BOYCE: Yes. I just want to double check to see if we take that language out, does that duplicate what's already in the rule? I will just have to look at that.

CHAIRMAN BABCOCK: Okay. Any other comments about this proposal?

All right. Hearing none, subject to any conference with the Court of Criminal Appeals, we'll consider this one submitted.

And Bill, how did you draw all these assignments today?

HONORABLE BILL BOYCE: I said, please give me every topic from 3:30 on. That would be prime time.

CHAIRMAN BABCOCK: We're going to slide one in

that's not yours.

So Bill can catch his breath, Elaine, do you want to talk about this 226(a) amendment?

PROFESSOR CARLSON: Yeah. It's not on the agenda but it is in your material because it was originally submitted to the full committee in the August 8th report of the subcommittee addressing artificial intelligence.

And that subcommittee was looking, of course, at changes to the rules of evidence, but they also noted that they thought there should be changes made to Rule 226(a) and to another rule. And I will read from that report very quickly.

Although not referenced in the Supreme Court's referral, the subcommittee suggests the advisory committee consider and refer to the Rules 216, 299(a) subcommittee whether to amend 226(a), instructions to the jury panel and jury to direct the potential jurors and impaneled jurors should not access AI tools to investigate information or other resources regarding the case before them.

It also recommends updating the language to reflect changes in technology. That's on Page 3 of that August 8th report.

And then on Page 21 of that same report, that

subcommittee did a first-run draft of Rule 226(a) changes, and then it got kicked to the 226(a) subcommittee.

And so we looked at the language that was suggested, and, indeed, Rule 226(a) did instruct the jury not to discuss the case or look at certain social media platforms. But some of them are no longer current. Some of them were misnamed, and there is no reference in any of 226(a) to artificial intelligence.

So we decided to give it to Kennon because she's our brain trust on young -- young people know technology.

HONORABLE ROBERT SCHAFFER: She's probably the youngest one on the subcommittee, too.

CHAIRMAN BABCOCK: Kennon, are you the young person; is that what I'm hearing?

KENNON WOOTEN: You sound surprised. Is that what I'm hearing?

CHAIRMAN BABCOCK: You take no interpretation from my remarks.

ELAINE: Carl son.) Young, intelligent and a former rules committee, and so she did a bang-up job.

And so the way the word, as you see on Tab E, today, Page 801, a recommendation that we -- in 226(a), Paragraph 3 of the venire instructions, instruct them

not -- the jurors not to -- potential jurors not to consider -- discuss the case with anyone, your spouse or friend, in person or by any other means, including but not limited to, phone, text messages, email, blog or social networking, electronic platforms -- that's just very broad for new ones to come in -- websites, including Facebook, X (Twitter) or Instagram.

And then it says in the last sentence there: We do not want you to be influenced by something other than the evidence admitted in open court.

So it just modernizes the language of which platforms. It makes a global statement about platforms to keep us from having to keep changing the rules.

CHAIRMAN BABCOCK: Roger.

ROGER HUGHES: Well, on the way over here this morning, I got to listen to a report on what the Russians think are the most influential websites to spread disinformation on. And it wasn't Facebook. It was X and Truth Social.

CHAIRMAN BABCOCK: This is from the advisory committee website.

ROGER HUGHES: So no one will feel left out or feel that we're only referring to websites used by people over 50, we might want to give some consideration to things such as Truth Social, Instagram, Telegram, et

cetera, et cetera, et cetera.

Because I can tell you when I talk to my daughters, I can almost tell how old they are by which social media sites they talk about reading things on. And for them, somehow, Facebook and X are like -- you know, that's like talking about parchment rolls versus digital media.

So I would give some thought to maybe a more inclusive, expansive statement about what social media, and the ones that they are likely to consult. And I realize that may change from week or month to month. But I just think referring to Facebook, X or Instagram -- well, Instagram might be in there. Oh, my gosh.

HONORABLE ROBERT SCHAFFER: And she took MySpace out.

ROGER HUGHES: We might want to put in some others, just so they don't think that it has to be like Facebook or X or Instagram.

CHAIRMAN BABCOCK: Justice Miskel.

HONORABLE EMILY MISKEL: I don't think we should solve the MySpace problem by substituting a new product that won't be around in ten years. So I think we should take out any references to corporate products entirely. And if a judge wants to add something, they

can.

But I would say take out Facebook, Twitter and Instagram entirely. If we're not going to go that far, I would just say take out Twitter because, by user, that is actually a very small website and, for example, TikTok has three times the amount of users as Twitter. Twitter has about as many users as Pinterest. So if we're going to list the most populated, then I wouldn't pick that one.

CHAIRMAN BABCOCK: Richard.

RICHARD ORSINGER: If we're trying to reach the youth, we should put TikTok in here. But the problem is it's like Whack-a-Mole; it's going to change, and there's going to be a new one and another new one after that.

And so I agree with the comment that we ought not to try to identify with specific programs or platforms because they'll change too frequently.

CHAIRMAN BABCOCK: Because Kennon's not getting any younger.

KENNON WOOTEN: Well, we spent all morning on a rule that hadn't been changed since 1990. I don't think we should freeze in place Twitter.

CHAIRMAN BABCOCK: 1990 doesn't sound that long ago to me.

RICHARD PHILLIPS: I was going to say the exact same thing Justice Miskel did. So I'll waive.

CHAIRMAN BABCOCK: Okay. Judge Chu.

HONORABLE NICHOLAS CHU: Backing off this whole -- along with deleting out the name brands, I was thinking with platforms, websites or apps or applications, whatever, folks play things nowadays that an app is different than a website. At least people think that that are young.

CHAIRMAN BABCOCK: Judge Wallace and then Justice Kelly.

HONORABLE R.H. WALLACE, JR: I would think whatever list we come up with in five years is going to be -- something is going to be changed or different. Could we say "or any other electronic means"? I don't know, maybe that's not all-inclusive enough, or maybe they don't understand it. But rather than try to list all the apps, social media websites and any other electronic means.

And while we're talking about Rule 226(a), we also instruct them by not using their telephone and all that. And we say do not record or photograph any part of these court proceedings because it is prohibited by law. What law prohibits recording those proceedings? 18(a) doesn't prohibit them.

I always read that and hurry past it because I'm afraid somebody is going to raise their hand and ask me.

CHAIRMAN BABCOCK: My law.

HONORABLE R.H. WALLACE, JR: What law prohibits --

CHAIRMAN BABCOCK: Inherent power.

PETE SCHENKKAN: I mean, really seriously, wouldn't you say, don't record. I don't care. Every time I read it, I have to snicker to myself.

CHAIRMAN BABCOCK: Good point, though.

Justice Kelly and then Kennon.

HONORABLE PETER KELLY: The way licensing agreements usually read for movies or television shows is means or technologies known or unknown. That prevents the argument that they couldn't be referring to a technology that didn't exist when they drafted this document. By specifically referring to unknown technologies, then it goes to the future.

CHAIRMAN BABCOCK: Forward looking, that is a good point.

Yeah, Kennon.

KENNON WOOTEN: Two thoughts. One, as a general matter, I agree that there's some danger in listing any particular example because of how quickly

technology advances.

Second thought, however, is that this is written for jurors, and if you don't give examples, they may not pick up on what you're talking about.

Related to that second thought, I think it would be worthwhile to look back at the scat transcript for when this original language was discussed and added. My recollection is that Professor Wayne Schiesse was consulted at some point to make it more plain language.

My recollection as well is that there was a concerted effort to help people understand what you're referring to. And while some other language may be clearer to lawyers, I question whether a juror would know what you mean if you were to use language like that.

I think it's more useful to give the jurors examples. I suspect that part of the reason this language is in brackets is because the judge is not required to read it that way. It's an option. I suspect the judge has discretion to use other examples if he or she wants to.

So I appreciate the concern and actually share it, but I think that the examples were probably there to help the jurors understand more readily what you're referring to, rather than assuming they know what you

mean.

CHAIRMAN BABCOCK: Okay.

KENNON WOOTEN: Just by way of an example, we may want to take out the word "communicate." We actually had to have a mistrial because a juror, unbeknownst to me, the parties or the judge, was an influencer and posted on Instagram about, "I'm on jury duty," and lots of comments that came with that.

And he didn't realize until just before we started opening that maybe that violated the judge's instructions because he posted what he was doing that day. And there were a lot of comments on what the verdict should be. And they didn't even know their case yet.

CHAIRMAN BABCOCK: Yeah, Rich.

RICHARD PHILLIPS: Since it is in brackets, could we not, since they're listing out specific sites, put something in there to the judge to suggest, put examples here. So that the trial judge can put the examples in, and it can then be organic and evolve as necessary without us having to do anything.

KENNON WOOTEN: I like that suggestion.

HONORABLE SALAS MENDOZA: Also giving us a lot of credit. I appreciate it, but I read that and I still say MySpace and then I look up, and I say and Snapchat

and WhatsApp and Marco Polo and whatever occurs to me that morning, because then they get it.

So I agree with that point that it's helpful to give examples, and that point, which is that if we don't tell them the stuff, they think, oh, that wasn't included. And posting isn't communicating. So when I do it, I'll say, do not talk, communicate, post.

CHAIRMAN BABCOCK: Kent.

HONORABLE KENT SULLIVAN: I just wanted to agree with Kennon's points and a couple of other people who largely echoed and just expand on it briefly. And that is, now, many years ago, we actually did some research that came out of this group that was hands-on.

I think it was -- it involved some help from UT. It also involved help from some trial science people. I think that Ms. Hamilton participated in the research, and we gained, I thought, some valuable information about what jurors hear and what they actually understand, process and use effectively.

We, as lawyers, I think do tend to think that if we wordsmith the right enumerated list, that that's what achieved the desired result. Answer, in my view, no. Because that's our bubble. But jurors react differently.

One example is 226(a) is typically, I think

almost exclusively, just read to jurors. That's not very effective either, particularly for that much language. In other words, there's no visual attached to it. There's nothing else.

In 2024, that's going to be a much more effective approach to have sort of a -- if you will, a more multimedia approach, as opposed to having somebody simply read to them and expect that they are really going to effectively process the language, understand it, and then abide by it.

So I think that's something we ought to consider. It seems to me the ultimate concept is one of we don't want you to make any decisions relative to this case from any source that is outside the courtroom. I mean, that is really what this is all about. We don't want it in any way, shape or form.

And that's what we want to communicate to them. It's not just providing them with a list. Maybe we need to do that. But I would want to know, and I think research might be appropriate, you know, sort of practical research, which can be done. And I think maybe we ought to give more consideration to that.

Because all of the questioning and what they hear, and what they are going to act on, and what's the best way to communicate with them where they are. That

is it.

CHAIRMAN BABCOCK: Judge Schaffer.

HONORABLE ROBERT SCHAFFER: You know, we're talking about spoonfeeding these people and treating them like they're 12 years old. Your influencer should have listened to your instruction and figured out, don't do that, idiot. Okay? There is nothing confusing about the instruction that was given to that person, but he or she just didn't hear it right.

I'm in favor of a general statement, don't do this stuff. And I've been changing the platforms that I used over the years, and sometimes I joke about MySpace, and everybody laughs because nobody knows what MySpace is all about now.

But if I say Facebook, Twitter and MySpace, somebody will post it on Snapchat and they'll say, well, you didn't say, don't put it on Snapchat. And so that's my concern, that we can name three or four applications, platforms, whatever you want to call them, but there will be one more that comes in tomorrow, which they don't think that counts.

And so I don't know what to tell you to do, but I like having examples in there, and I can change them if I want, because they are only suggestions, but I just want to reemphasize that that person was an idiot.

HONORABLE SALAS MENDOZA: Can I just add that I think it's right if we do read them? And I know that some judges just read whatever that is. But after I go back, I look up, I say to them, I told you now in five different instructions and lots words that the only thing you may properly consider in this case, you will hear in the courtroom.

And if you consider anything else, it's unfair to the parties. You won't have the ability to object.

So there is a lot of that and they still do it.

PETE SCHENKKAN: And you also state, and if you do that, you could cause us all to have to do this all over again.

HONORABLE SALAS MENDOZA: Yes.

HONORABLE EMILY MISKEL: That is in the instructions.

HONORABLE SALAS MENDOZA: And I also tell them it's wasting time and resources. So you can instruct all you want and go over it, but I like them. I like the examples.

CHAIRMAN BABCOCK: Okay. Any other -- Justice Miskel.

HONORABLE EMILY MISKEL: I guess I was just going to follow on to what Judge Schaffer was saying

because we do have, like, a lot of problems that you think are just, wow, how did somebody think that was okay to do?

Like, I had to discipline a venire person for texting on her Apple Watch during voir dire. And I was like, I told you to turn off your phone and not communicate with anyone, and she's like, I can't turn off my Apple Watch. And I was like, okay, here we go.

I kind of agree. I don't know where the line is between making it very user friendly and using regular person language and not lawyer jargon. I agree with all of that. I wonder if the whole thing could be replaced by, like, don't communicate with anyone, don't be on your phone, don't -- you know what I mean?

I guess I don't -- like maybe wordsmithing the one that we have is not solving the problem. And maybe -- I don't know the solution. I tend to just be like, don't communicate at all in any way, and leave it at that. Or are we going to keep, and don't use your Apple Watch and don't be an influencer and don't -- you know.

HONORABLE ROBERT SCHAFFER: Don't be an idiot.

HONORABLE EMILY MISKEL: Yeah, I guess we can't make enough rules to make people who are not motivated to listen to them act right.

CHAIRMAN BABCOCK: But don't you think it's. appropriate to have some reference to the Internet?

HONORABLE EMILY MISKEL: Yes. But I also wonder -- I agree with Judge Chu. People don't think an app and a website are the same thing. So they think the Facebook app they use on their phone, they don't associate that with being an internet website. So I agree that we may need to revamp the whole language that we use.

Which then leads to my next point of the more specific we are, the more we create gaps for people to squirt through. So I don't know what the solution is.

KENNON WOOTEN: It's late.

CHAIRMAN BABCOCK: Okay. Got it. Okay.

Any other comments?

Okay. Judge Schaffer, is that you raising your hand or just clicking your pen?

HONORABLE ROBERT SCHAFFER: Just clicking my pen.

HONORABLE EMILY MISKEL: He was texting on his Apple Watch.

CHAIRMAN BABCOCK: So this issue will be submitted to the Court with a nice healthy discussion for them to consider.

And now, Bill, you've caught your breath. But

Kennon's got a question first.

KENNON WOOTEN: I just wondered whether y'all want to look at the other red lining that occurs to AI or just stop there?

PROFESSOR CARLSON: Yeah, there's one more about artificial intelligence.

CHAIRMAN BABCOCK: Let's do that. So Bill maybe doesn't even have to breathe at all again.

PROFESSOR CARLSON: So in Paragraph 6 of 226(a), don't investigate the case on your own. For example, don't look up anything on the internet. The words were added "or by using artificial intelligence tools." That's the addition, to learn anything about the case. That's it.

CHAIRMAN BABCOCK: Okay. Any comments on that?

KENNON WOOTEN: It's wordsmith, the red line. I guess it should say instead, look anything up on the Internet or use artificial intelligence tools to try to learn. That tweak.

CHAIRMAN BABCOCK: Okay. Anything else on this one? Richard?

RICHARD ORSINGER: Yeah, I think this is beneficial because sometimes I look things up on the internet by talking to Siri on my cell phone. And I'm

not sure -- I know that that's the internet, but does everybody or does somebody with an Apple Watch think that they're just talking to Siri?

So I think we should put that in there. I don't know if they'll understand that Siri is artificial intelligence, but I don't think we ought to mention her specifically. Siri is a problem.

CHAIRMAN BABCOCK: Judge Wallace is going to say --

HONORABLE R.H. WALLACE, JR: I was going to say, that might be giving them a good idea. Hey, I can go home and ask the stuff that I don't understand that I'm hearing, I will go ask Siri.

CHAIRMAN BABCOCK: Siri's not the only game in town, right?

Okay. Anything else on this one?

Giana

GIANA ORTIZ: I might just whittle it down to say, do not look anything up on your phone or your watch to learn more about the case, or your computer. That's another approach.

HONORABLE BILL BOYCE: Or your tablet.

GIANA ORTIZ: That would avoid the issue of Internet, app, AI, and there are probably other ways that young people might look things up that we're not

anticipating.

CHAIRMAN BABCOCK: All right. I'll spend the next half hour listening to Bill talk about the rules of the Texas Judicial Conduct Commission, but not if you guys don't want to.

All in favor of adjourning at this point, raise your hand.

All right. By the authority invested in me, we are adjourned, until deep thoughts in December.

(Meeting adjourned)

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REPORTER'S CERTIFICATION
MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

* *

I, Amy Russell, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 1st day of November, 2024 and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are $ 1,895 .

Charged to: The State of Texas.

Given under my hand and seal of office on this the 18th day of December, 2024.

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