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6 **MEETING OF THE SUPREME COURT ADVISORY COMMITTEE**
7 JUNE 21, 2019
8 (FRIDAY SESSION)
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19 Taken before *D'Lois L. Jones*, Certified
20 Shorthand Reporter in and for the State of Texas, reported
21 by machine shorthand method, on the 21st day of June,
22 2019, between the hours of 9:02 a.m. and 2:38 p.m., at the
23 State Bar of Texas, 1414 Colorado Street, Austin, Texas
24 78701.
25

INDEX OF VOTES

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

Vote on	*Page*
Rule 91a.7	30,545
Rule 167	30,596

Documents referenced in this session

19-11 Joint Judicial Campaign Memo

19-12 MDL Transfers

19-13 Expedited Actions, June 12, 2019 Memo

19-14 HB 3300 and Rule 91a

19-15 Referral Letter with Will Kit attachments

19-16 Report of Rule 167 Subcommittee

19-17 Notice of Appeal, June 11, 2019 Memo

19-18 Pro Se Name Change Instructions, Petitions and Orders

19-19 Adult Name Change Instructions

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19-21 Adult Name Change Order

19-22 Child Name Change Instructions

19-23 Child Name Change Petition

19-24 Child Name Change Consent

19-25 Child Name Change Order

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CHAIRMAN BABCOCK: Welcome, this morning. Jim, Judge. A few announcements of my own before -- before we get to Justice Hecht. I don't know what it is about this year, but we have had the hardest time with scheduling. You know, they tell us this room is available and then they call Marti and say, whoops, it's not available, and then we have to change the dates and then there are no hotel rooms available, so I don't know what it is, but maybe the water or something. Anyway, we're going to have to have some changes. Marti will send e-mails out on this, but we're going to have to change the September 6th meeting, 6th and 7th meeting, to September 13th and 14th, so slip a week, and that was I think a scheduling from maybe one of our important members of the committee who can't -- can't miss, not me. But we don't know where it's going to be yet because the bar told us that this room was available and then they told us, no, it's not, and TAB where we have often met is not available, so Marti and the bar are working on an alternative site, and so we'll get that out to you.

MR. GILSTRAP: Chip, could you cover the date again, the date change?

CHAIRMAN BABCOCK: Yeah. The date change is from September 6, 7, to September 13, 14, and so that's

the September meeting. The November meeting, November 1 and 2, is being moved to Houston because, why, there's some car race or something here? A Formula One race here, and apparently the combination of no hotel rooms and noise has chased us all the way to Houston, and Marti is working again with everybody on securing space for that and hotels and all of that stuff, so she'll -- she'll be e-mailing you soon on that. You know, it would be easy to -- to go to law firms for our space, but I've sort of tried to steer away from that for appearance of impropriety's sake. I mean, Jackson Walker has got a big conference room here and in Houston, so does Baker Botts, V&E. I mean, there are a whole bunch of places that would gladly host us, but I thought it's better to try to go to neutral sites. Yeah, Stephen.

HONORABLE STEPHEN YELENOSKY: The local bar may have enough room.

CHAIRMAN BABCOCK: Yeah, we've been looking into that, too. And we're looking into Houston, Justice Christopher, to the 1910 courthouse. I think Marti has contacted somebody there.

HONORABLE TRACY CHRISTOPHER: Okay.

CHAIRMAN BABCOCK: So, I mean, yeah, there are plenty of public places we can go. So, anyway, that's the -- that's the reasoning behind that.

Secondly, I got an e-mail from Justice Busby who asked me to announce that he has very reluctantly resigned from this committee. I was pretty sure that I had said so at the last meeting, and my brain here has confirmed that I did, but he says that people from our committee have been going up to him and saying, "How come you're missing our meetings?" So if you didn't hear the announcement last time, you're hearing it this time. Justice Busby -- and it's very sincerely and reluctantly -- has resigned because he's just got a lot on his plate for obvious reasons. So that's it for me and my announcements, and I apologize for the inconvenience of all of these dates changing, but it's -- I assure you it's not Marti's fault. She's working on this all the time trying to make it smooth for everybody, so with that I will turn it over to Chief Justice Hecht for his report.

CHIEF JUSTICE HECHT: Just a quick follow-up on that. September 6th is the evening of -- Friday evening is the Hemphill dinner that the Supreme Court Historical Society has every year, and Justice Gorsuch is going to be the keynote speaker this year, so it should be an interesting -- make an interesting contribution to the evening. And then as of two minutes ago we have five cases, argued cases left to be decided, and I think the U.S. Supreme Court has 16, so we're going to beat the tar

out of them this time.

You've seen from the letter that the Legislature gave us quite a few assignments this time, and so just a word of history. Our relationship with the Legislature in this regard has been back and forth over the years, and it was -- it was at a low point in the late Nineties and in the early aughts. Several of us proposed to the leadership that they would be better off if they would decide broad policy and then either direct or leave to the Supreme Court the working out of that policy in procedural rules because they just don't have the time or the resources to do this kind of work, which is necessary to make their policies work, so they really tried to do that in earnest in 2003. Lieutenant Governor Ratliff was a big fan of it, and I think we got 11 assignments that year, and then since then we have gotten a few here and there; but it has been a very beneficial arrangement and now is a trusting one that they are confident that the Court will be faithful to the legislation. And when we've had doubts about that in very difficult areas, very complicated areas like foreclosure of equity loans on homes, we circled back to the sponsors of the bills to make sure that they were comfortable with what we were doing, and I think it's worked very well.

So we've got a lot to do this time, and our

history is that we will make the deadline even if we can't publish for comment ahead of time and just say in the -- in the order that we will take comments and make changes accordingly, but we're trying to meet the statutory deadline. The Court's always been of the view that that trumps the general rule-making statute. So that's what we'll do.

Just a word about the session. The Judicial Council bills passed, judicial pay. Senator Huffman came up with a longevity approach, and Judge Evans and others worked very hard on trying to get that to happen. We ended up successful. The guardianship compliance expansion proposed by the Office of Court Administration passed, and so by --

CHAIRMAN BABCOCK: On the longevity thing, you want to explain to them?

CHIEF JUSTICE HECHT: Yeah.

CHAIRMAN BABCOCK: Because I think it's unique, and you had a hand in the thinking about that, too.

CHIEF JUSTICE HECHT: Well, the judicial pay increases over the years have always been across the board, and I won't get too much into it, but 38 years ago when I started we got raises pretty much every session, and I think the first 18 years I was on the bench we got

eleven -- well, it couldn't have been that. Anyway, almost every session we got a raise. Then the last 20 years we've gotten -- this is the third one. So that's a recent development, and it's across the country. It's not just Texas; and even in the federal court, federal courts there have been lurches on compensation. And so this time we've got 440 new judges, including JPs and constitutional county judges, so that's a lot, and I anticipated there might be some reluctance in the Legislature to increase salaries for brand new judges, but they were willing -- and this was their idea -- to increase compensation, but on sort of a forward going basis.

So if you've been a judge -- there is a base salary of a district judge is $140,000; and if you've been a judge for four years, it will be 110 percent of that. If it's eight years, it's 120 percent of that, and then if it's 12 years you get an extra five percent in longevity pay. So it got the costs down where it was reasonable, and the new judges were I think generally on board with that. They expressed support for it, because it's hard -- it's very difficult to get a raise, so they seemed to be supportive, and so it -- it passed the House very strongly. Then it kind of languished a little while in the Senate but eventually passed, and leadership was for it, and the Governor ended up signing it. So it's a new

approach. I don't think it's in use anywhere else in the country. Other states have longevity pay like we had for years, but it's not very much. Ours was 3.1 percent after 16 years, and we didn't have that many judges that were staying 16 years, so it just was not -- it was not being used very much at all. So -- yes.

HONORABLE TOM GRAY: You might address the delinking problem and why it made it work.

CHIEF JUSTICE HECHT: Right. And so somebody had a very bad idea years ago to link judicial retirement -- I mean, legislative retirement to judicial compensation, and you know, and I'm sympathetic with this, and the legislators deserve some sort of compensation for working as hard as they do and getting paid $600 a month when they are serving in the Legislature. So but it's very difficult to make that happen, and at the -- the politics of the moment are that the Legislature is not going to vote to increase their retirement in any way, shape, or form, and they're not going to vote to delink legislative retirements from judicial pay. So we faced a real quandary there, and Senator Huffman -- this was all her idea -- by doing it the way she's done it, base pay is not raised, so legislative retirement is not affected, and so the -- we didn't have that obstacle.

The obstacles we did have are that lots of

other salaries are tied to judicial pay, so it's not just a legislative retirement. The district attorneys are tied to the pay. The county judges are paid differently. The state does not pay all of their salary, and the counties can increase their -- can pay them whatever they want to, so that some of the county judges can make more than appellate judges and more than anybody else in the state. So to bring them -- they wanted to be included in this in the new legislation; and to bring them in we had to work through how that was going to work with county supplements, but we got that done; and the prosecutors had a very exciting session and very interesting, as the Chinese would say, session; and they kind of went up and down with legislators, so keeping them in the bill, which they wanted eventually to be in was difficult as well. But anyway, we got it done, and a lot of people worked very hard on it, and many judges called and e-mailed their legislators like we asked them to, and it was very effective. I'd go over there and the legislator would catch me in the hallway and say, "Are you responsible for all of this judicial attention I'm getting these days"; and I said, "No, these are just concerned citizens trying to make sure the right thing gets done," and so that was good.

On guardianship compliance, we have 53,000

guardianship cases pending in Texas involving estates north of a billion dollars altogether, and no way -- the trial judges have no way of checking up on those cases, monitoring them to be sure that state law is being followed by the guardians; and the Office of Court Administration has been working on that and has made great progress in the last four years; and now they've been given a mandate to expand that program so that in the next two years they expect to get through every case that's pending and then to develop procedures for circling back and monitoring them again as time passes. So that was a real -- we felt really good about that. That's just a good government issue. It's -- it doesn't make money for the state, so we're proud that the Legislature did that.

We had a bill to consolidate the scores of court costs, mostly in criminal cases, but a few in civil cases, some of which the Court of Criminal Appeals has held are unconstitutional because they've held that you can't impose costs in a criminal case and then spend it on highways and buildings. So we've tried to clean all of that up. That passed. The Governor signed that.

We expanded the flexibility that the judiciary has in responding to disasters. So we had a problem in Harvey that we had judges who could not physically sit in their jurisdiction, and it was unclear

from the Constitution and statutes whether we could -- how much we could move them around. So when the storm hit Rockport it just leveled the courthouse and the judge there could go up to San Jacinto and sit, and they were happy to have her, but we didn't know if we could authorize that or not, but we did. And then we had a worse problem in Harris County where particularly with justices of the peace -- the district judges worked through it pretty quickly, but the justices of the peace had the same problem. They just couldn't physically sit in their precinct, and different judges at different levels can authorize those -- those moves, and we thought it made sense for the regional presiding judges to have that authority because that's kind of what they do anyway, so we had a bill that gives them more flexibility.

On funding, we did great. So the general revenue for access to justice, that was first included in the budget in 2009 and has been included in every budget since, except last time. It's back in the budget as well as the money that is given to Access to Justice from the Pope Act. The Pope Act provides that the state's settlements of basically consumer cases across the country go to Access to Justice. So this past biennium the Wells Fargo settlement, that gave us $50 million. The biennium before the Volkswagen settlement gave us $50 million.

Last session it was a very tight fiscal session, and the Legislature made us use the Pope money in lieu of the general appropriation. This time they gave us both and also increased funding for Legal Aid for veterans from 3 million to 6 million at the Governor's insistence, and we -- the first time we got that money was the last session. So that was a real help to us, and they restored a cut in funds for Legal Aid to survivors of sexual assault. That's a program that the access to justice group calls LASSA, L-A-S-S-A, and the veterans and LASSA have each resolved close to about 9,000 cases in the last biennium, so these are very active areas of Legal Aid, and we are glad to have the help.

The Legislature also funded a central staff attorney position for the courts of appeals. So the courts of appeals are trying to work to ease any burden of transferring cases to equalize filings, so this is a constant problem, and this time we've got a new -- they've got a new staff attorney to try out, central staff attorney, and in addition the restriction on the use of visiting judge money to pay only the visiting judges was removed so that the courts of appeals can pay staff as well as visiting judges. Because one of the problems that the courts of appeals have is when they get visiting judges to help, they don't get any additional staff. So

that just doesn't entirely relieve the burden on the courts. So we'll see how this -- we'll see if this does work.

Then you know the Legislature modified its directive regarding Rule 91a, and we have that to talk about. It increased the jurisdiction for expedited actions from a hundred thousand dollars it imposed here a couple of years ago, several years ago. It changed -- directed changes to be made in the rules regarding notice of appeal, citations, substitute service. We've got all of that before us; changed the power of the MDL panel a little bit restricting some of the cases that they can hear; changed the Canons of Judicial Conduct regarding judicial campaign activities. We've got that on our agenda. Changed some mental health procedures and directed rules changes in the CPS and juvenile case rules, required protective order registry forms, transfer on death deeds forms, even directed the Supreme Court to make criminal forms. That -- that was not on my radar, so the first time I saw that was on the list of bills before the Governor, and the Governor vetoed that so he -- but not because he didn't trust us to write criminal rules. I'm sure he has full confidence in that, but he just said OCA can do that anyway and they should do whatever they need to do.

So the Senate Bill 37 is a -- is legislation that's going around the country, and it prohibits the revocation, suspension, or nonrenewal of a professional license because of a student loan default. So lots of states are passing this, and we were directed to make changes in our rules, so we've already done that and changed the rules for suspension of attorneys in default on guaranteed student loans and the JBCC rule with regards to court reporters.

Then on the UBE, the Supreme Court approved a format for the Texas law component of the UBE, which is going to be given the first time in February of --

MS. DAUMERIE: 2021.

CHIEF JUSTICE HECHT: 2021. So we're working on that in conjunction with the bar, and the format will be a video course with embedded test questions throughout, and it's a model that has been used in Alabama and Arizona, and the competing -- the competing model was just a straight -- a straight up test, an additional half day of testing on Texas law. So we'll see how this works, and the Board of Law Examiners and the State Bar are working hard to get a model up and then there will be lots of time to comment on it, and we can see how it's going to work.

The Court of Criminal Appeals rules

committee is considering the evidence rule changes to align with the federal rules, and these will apply in civil cases as well. One of them is to limit the Rule 803.16 ancient documents hearsay exception to documents prepared before 1998 because of the explosion of electronically stored information. So how -- how do those rules -- how does the ancient document rule apply to electronically stored information and the proposed change that the feds have already adopted, and then there's a change in Rule 902 to permit the establishment of the authenticity of -- by certification of machine-generated information and electronic information, so these are both changes to accommodate the growing increase of electronic information, and I understand Professor Goode has approved the rules -- is approving the rules?

MS. DAUMERIE: The State Bar's evidence committee is taking a look at them.

CHIEF JUSTICE HECHT: Yeah. And Professor Goode is involved as always in that and then when the State Bar committee acts then they'll come over here for a look.

So that's what I have.

CHAIRMAN BABCOCK: Is that all? Great. Thank you, Justice Hecht. And we will now go to our first item on our lengthy agenda. Joint judicial campaign

activity with -- which is Jim Perdue's subcommittee that he chairs, and I don't know if you've had a chance to read the memo that Jim and his committee prepared, but it's one of the few areas of the law I know something about, and this is a really, really well done memo. So take us through it, Jim. Thank you.

MR. PERDUE: Well, I can take no credit for this. This was all Justice Bland's work. She's got briefing attorneys from the new court of Vinson & Elkins working on this, and they did some background work. It's Tab A in your materials. It's a six-page memo with a change to the canons of judicial conduct 2B and 5(2). Judge Evans was helpful in the drafting as well of the solution. You know, the historical note regarding kind of the promulgation of these bills since 2003 that direct the Court to do X, Y, or Z, this is another one where a certain constituency regarding a certain -- apparently certain complaint related to certain campaign activities led to a bill that passed both houses and signed.

It's pretty simple. It just -- it just added into the Election Code a specific provision that said the Code of Judicial Conduct can't say X, right, and so it can't prohibit a certain thing. That does impact the endorsement canons of which Chip is much more familiar than I. The background is laid out as to how the bill

came about. The history of those canons specific to Texas you'll find at the bottom of two, continuing on in three. This obviously implicates both White and in Texas *In Re: Hecht*, but I think the solution and the recommendation of the committee, which the chair not voting, only because of his lack of presence, not because of -- but Judge Evans made an observation, and so you'll see the language regarding the proposed changes that on page seven -- pardon me, page six of the PDF, page six of the memo, last page, under Tab A.

You know, the legislative mandate is that the canons cannot preclude two or more candidates from conducting joint campaign activity. I think it's common in both parties to run joint activities. Every voters forum I've ever been at, almost all of the judges are standing next to each other, if you're there for a party event. So the change is a sentence basically added to both 2B and 5(2) to comply the canons with the Bill 3233. 3233, yeah. And, you know, I think that in the -- from my perspective of drafting, simplicity is always the best. It's -- it's pretty simple and elegant in simplicity. Judge Evans is a simple man, so he can do that easily, and we -- we came to the end of this I think in all agreement that this was essentially the best way to fix the canon while -- while saving the canon. I mean saving the

principle of the endorsement concept in the canon as it is allowed constitutionally, but comply with the statute that was passed by the Legislature.

So Justice Bland should take the credit for the memo and the report. Judge Evans was involved in the final drafting, and I submit it to the committee as a unanimous --

HONORABLE DAVID EVANS: Do I get two hours response on this?

MR. PERDUE: I laid that out in less than five minutes.

CHAIRMAN BABCOCK: Would Judge Evans, the simple man, like a rebuttal?

HONORABLE DAVID EVANS: I want to point out to you that -- and it was in Justice Pemberton's comments. We don't know what joint activity means. I know the sponsor. I spoke with her Tuesday evening, and it's just a whole realm of activities that are going on in mostly the urban counties from right at the polling place where there's a slate being handed out, the list of group of judicial candidates to go vote for being handed to voters outside, to combined advertising and hiring of political consultants.

I think it's interesting to note that an incumbent judge who is not on the ballot cannot endorse

1 under this rule because it's limited only to judicial
2 candidates. You have to be a candidate. Now, that would
3 probably be defined by the Election Code as to when you
4 are a candidate. That would be my -- that would be my
5 thought with the Judicial Conduct Commission, but it's
6 limited to the activities, and the legislation was limited
7 to judicial candidates. So that was the intention of the
8 committee.
9 CHAIRMAN BABCOCK: As you noted from the
10 memo, Justice Hecht provided some historical background
11 where judges actually wanted this to give them some cover
12 with the county commissioners, et cetera. Is that still
13 the -- is that still the feeling that this is helpful to
14 the judges?
15 HONORABLE DAVID EVANS: Well, I think the
16 judges need it. That's the realities of particularly
17 urban ventures where you don't have any name recognition,
18 local districts and local appellate -- intermediate
19 appellate districts, and it's just a -- it's a political
20 fact that you need to run as a group and you need to be
21 out there campaigning. I don't think anybody likes it,
22 but it is -- that's what the realities are. A more
23 interesting question is, is -- will come in the
24 enforcement process of the misleading advertisement of
25 a -- or a -- have you become an endorser. Have you become

responsible for the content of advertising in a joint material if it lists credentials or anything like that. I don't think it will ever go that far in enforcement, but that's just not addressed by the bill, and it's not out there. I think the comments meet what we were tasked with doing, and that's it. No further action is needed.

CHAIRMAN BABCOCK: Yeah. Pete.

MR. SCHENKKAN: One of the questions that's left open, but I think it has to be given the wording of the statute, is whether joint is really limited to joint between judges, two or more. What if it's joint two or more judges and a nonjudicial campaign activity?

HONORABLE DAVID EVANS: We drafted it as to be two or more judicial candidates, and I think that the author is aware of it. Now, that doesn't do us a whole lot of good with the rest of the Legislature, but Representative Klick is aware that it's limited to two or more judicial candidates.

MR. SCHENKKAN: But what if the two or more judicial candidates conduct a joint activity of themselves with a nonjudicial candidate. I'm saying I understand it is probably not what is intended, but it is not inconsistent with the wording either of the statute or the rule.

HONORABLE DAVID EVANS: It has not come to

that point at this point in the races.

MR. SCHENKKAN: This is to your point, Chip, about the origin of the need to have a ban on endorsement to keep the county commissioners from leveraging you into -- leveraging a judicial candidate into being on the slate with a county commissioner candidate, but I'm saying I don't -- hopefully the county commissioners will not come to realize they have a new opening to try this, but I think perhaps they do.

CHAIRMAN BABCOCK: Yeah. Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, in addition to the sanction for the two judges that conducted the joint campaign, the commission also sanctioned a county judge for campaigning with I believe it was the district attorney in the county, and they did the same sort of things. They had separate fundraising but shared expenses, and the Judicial Conduct Commission disciplined a worse discipline than these two judges that had campaigned together. So, I mean, that's definitely an issue, and I do think most judges would prefer not to have to work or be allowed to work with other nonjudicial candidates. I mean, you certainly don't want to get into the position of having to take a position in a primary, for example, between two candidates in a primary. I mean,

that, you know, you're much -- it's much better to say, "Oh, so sorry, I can't endorse either one."

CHAIRMAN BABCOCK: Yeah. Sixteen judges endorse my candidacy in the primary.

HONORABLE DAVID EVANS: Pete, I will -- I think the language was in -- but I can go back and check, but just to say that in the statute is "a joint campaign activity conducted by two or more judicial candidates," and it didn't put additional language with other candidates.

MR. SCHENKKAN: I agree. I'm just saying --

HONORABLE DAVID EVANS: I think that's where we are with it, and I think that was -- I don't know how much of a chilling effect this has, quite frankly, on prosecution at all. I have no idea what that would do with the commission.

CHAIRMAN BABCOCK: Okay. Any other comments? Yeah, Richard.

MR. MUNZINGER: Is it more accurate to change the word "provision" to "canon"? "Nothing in this canon precludes" as opposed to "nothing in this provision precludes"?

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Yeah. I had -- I sent you long before our -- this meeting I sent you a provision exactly

like that Richard says, suggesting "Nothing in the Code of Judicial Conduct prohibits a judicial candidate from having a joint campaign activity," and so forth.

CHAIRMAN BABCOCK: How do people feel? Should we change it?

MR. PERDUE: That's exactly the language of the comment. I don't know, Mr. Munzinger's point in Canon 2B, it says "nothing in this provision." I don't know how you read the canons collectively, so that's a word choice issue I would defer on.

MR. LOW: Well, the Legislature intended it to apply --

CHAIRMAN BABCOCK: Across the board.

MR. LOW: -- to everything, didn't it? You can't prevent it.

MR. PERDUE: No. It said -- the bill says "Code of Judicial Conduct."

MR. LOW: Yeah, the whole code.

CHAIRMAN BABCOCK: And the Code of Judicial Conduct is made up of multiple canons is your point.

MR. LOW: Yeah.

CHAIRMAN BABCOCK: So how do we feel about "nothing in this provision" or "nothing in this canon" or "nothing in these canons"?

HONORABLE DAVID EVANS: You can just

track -- you can track the legislation, "Nothing in the Code of Judicial Conduct."

CHAIRMAN BABCOCK: Okay.

HONORABLE DAVID EVANS: That's what the legislation says, "may prohibit or penalize." It's -- even if you had a violation, you couldn't penalize for it. That's an interesting point.

CHAIRMAN BABCOCK: Yeah. So, Judge, would you say on 2B here, "Nothing in the Code of Judicial Conduct" instead of "this provision"?

HONORABLE DAVID EVANS: If you wanted to be literal and just track the statute I think that's what I would do. I don't have a problem with that.

CHAIRMAN BABCOCK: Jim.

MR. PERDUE: I would defer to those who have an interest in this particular issue. That's a drafting issue. I mean, so, I mean, look, the global question was are we getting rid of the endorsement provisions in the canon, and I think that the collective -- at least our committee and I think also the jurists' input, that is not something that is recommended nor was the intent of the bill or the author of the bill. So when you go and you look at the canons, the canons that impact this particular thing regarding campaign activities is 2B and 5(2), so we added the sentences we did --

CHAIRMAN BABCOCK: Yeah.

MR. PERDUE: -- to those particular canons. Buddy's point is the bill says "Code of Judicial Conduct" as a global proposition. Mr. Munzinger points out that the word that we used to amend Canon 2B says "provision" versus "nothing in this canon." That sounds to me like an agreeable amendment to the author, but I'm not the author. Judge Bland -- Justice Bland and Judge Evans are the author.

HONORABLE DAVID EVANS: No, Justice Bland.

MR. PERDUE: Yeah. Trust me, I know.

CHAIRMAN BABCOCK: Don't blame him.

MR. PERDUE: And then we just -- and then we drop the comment to kind of capture the global point that Buddy is making, and so that was the solution in concept.

CHAIRMAN BABCOCK: Yeah. It all makes sense. How do we want to roll with it? Hatchell, you're a wordsmith.

MR. HATCHELL: "Nothing herein."

CHAIRMAN BABCOCK: See, I'm such a straight man. He was just sitting here thinking that. That's a -- that's not a bad idea. What do we think about that? Richard Munzinger, how does that sound?

MR. MUNZINGER: I'm going along with whatever the committee votes.

MR. HARDIN: Would somebody put a mark there?

CHAIRMAN BABCOCK: "Nothing herein precludes two or more" -- and the comment will take care of that. Okay. Any other comments about this? Are we good? Justice Gray.

HONORABLE TOM GRAY: I did not understand this when I read it to be focused on the endorsements like it has been discussed here today, and is that because I distinguish or don't consider that a -- an endorsement is a joint campaign activity? Are we talking about semantics in definitions of the two? Because I don't think they authorized me as a candidate to endorse someone else. They -- we can have a joint fundraiser, and maybe the inference could be drawn that you share each other's views or endorse each other, but that seems to me to be different than what we're doing here. And I'm okay with that, because I -- you know, but I just didn't want it to go by without at least a comment that this may not give a judicial candidate the authorization to endorse another judicial candidate.

CHAIRMAN BABCOCK: No, I hear what you're saying. I mean, I think it is a little bit of a matter of semantics, because if you and -- if Justice Gray and Justice Chartreuse, for example, both have a joint

campaign event, there's an implied endorsement of one of the other, isn't it? A colorful event obviously.

HONORABLE TOM GRAY: I don't know chartreuse all that well. I never was sure if it was green or some other color.

CHAIRMAN BABCOCK: Well, we all know gray.

HONORABLE TOM GRAY: And justice is neither black nor white, it is gray. But I just couldn't let it go by that this is not a blanket authorization for a judicial candidate to endorse another judicial candidate. I mean, I don't even see it as approaching the line, but that's --

CHAIRMAN BABCOCK: Well, what if you have a joint -- you and the other judge have a joint campaign activity and within that activity you get up and you say, "By the way, you know, I want you to vote for me, but Judge Chartreuse is just terrific. She shares my values, and you ought to vote for her, too." That's a joint campaign activity.

MR. MUNZINGER: That would be a violation.

HONORABLE TOM GRAY: I agree with what Richard just said under his breath. That would be a violation.

CHAIRMAN BABCOCK: Okay. Stephen.

HONORABLE STEPHEN YELENOSKY: Well, I agree

with Justice Gray. I think they're distinct, and it would allow us to say, "I can't endorse you because this doesn't authorize an endorsement" and then I could choose to do a joint activity or not. And I could imagine joint activities for economies of scale or something like that. I can imagine all kinds of things that are not an endorsement, but if people want to infer an endorsement, I still have the ability to say I'm not going to affirmatively endorse someone, and I like that cover.

CHAIRMAN BABCOCK: It's a matter of cover. Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I think it goes back to what does it mean to conduct a joint judicial, you know, campaign. I mean, the two judges that were disciplined urged constituents to vote for each of them. So, I mean, they were clearly endorsing them.

HONORABLE DAVID EVANS: Right.

HONORABLE TRACY CHRISTOPHER: And if this legislation was intended to remedy that, then it -- you know, it appears that that's -- that is part of a joint campaign, is that you are endorsing the person you're campaigning with.

HONORABLE DAVID EVANS: Yeah.

CHAIRMAN BABCOCK: Kimberly.

MS. PHILLIPS: I just -- I think if you look

at it from a voter's perspective, if you see a joint campaign activity, you don't have to stand up in the room and say, "I endorse Justice Christopher." The voter, not a lawyer, not a judge, not looking at all of this nomenclature and these distinctions are going to assume that the two judges or three, or however many there are, are endorsing one another, so if that's -- if that's okay with the Legislature and the committee, then you vote one way. I think if that's not then there's a different consideration.

CHAIRMAN BABCOCK: Chief Justice Hecht.

CHIEF JUSTICE HECHT: Not that it matters very much, but --

CHAIRMAN BABCOCK: Everything you say matters.

CHIEF JUSTICE HECHT: But all I heard that this bill got almost no attention, and all I heard about it was that they were -- it was a desire to do what the U.S. Constitution requires, that there was not a discussion about is this a good idea for judges to do this or not. The question that was being advanced was we're just following the U.S. Constitution.

CHAIRMAN BABCOCK: Stephen.

HONORABLE STEPHEN YELENOSKY: Well, I understand what Justice Christopher is saying, but under

statutory construction we take those words and we interpret them, and whether or not I -- whether people think the legislative history from what they've heard shows particular intent, is that admissible legislative history? I don't know, but the statute says a joint campaign activity, which could be interpreted exactly as Justice Gray wants it interpreted and as I want it interpreted, but that's up to the Supreme Court. It's not for us to decide what that language means other than to use the same language.

CHAIRMAN BABCOCK: And if the conduct commission went after Judge Chartreuse for endorsing Gray at the joint campaign activity, I would suggest to them that they don't have the authority to prosecute that judge because of the statute.

HONORABLE STEPHEN YELENOSKY: Well, good for you, but the Supreme Court will decide.

CHAIRMAN BABCOCK: Well, the conduct commission will decide.

HONORABLE STEPHEN YELENOSKY: Well --

HONORABLE TRACY CHRISTOPHER: Conduct commission decides and then a panel of three. Never the Supreme Court.

CHAIRMAN BABCOCK: Yeah, Richard. Sorry.

HONORABLE STEPHEN YELENOSKY: Well,

whatever.

MR. MUNZINGER: Had the Legislature intended to overrule the canon it would have said so. It didn't. All it did was prescribe the activity contained in the sentence of the statute that it wrote, and I think Jim is correct, that the solution that his committee has come up with is, in fact, truly elegant because of its terseness. All it does is repeat what the Legislature said. It has now obeyed the Legislature and left it up to the Supreme Court to interpret the rule. It's -- it is so simple and so accurate a solution that it ought to be adopted. My only -- the only thing I raised was do you want to say "canon" instead of "provision," but other than that I think the solution is perfect.

CHAIRMAN BABCOCK: Good thing Orsinger is not here. Oh, he is here. He snuck in. He would have something to say to that, Richard. Okay. Are we okay with this language if we substitute "nothing herein"? Anybody got any other comments or problems with it? Okay. Well, we'll mark this one closed. And I think Nina has gotten here, although Dee Dee is in my sight line there. And, Nina, you've got the MDL applicability issue, so if you want to take that away.

MS. CORTELL: We do. It's under Tab B of your agenda, and we've included what you should have as a

memorandum of our subcommittee and then attached to that is the assignment, the Senate bill at issue, House research organization analysis, Texas Rule of Administration 13, and then the Government Code provisions on MDL. It's pretty straightforward. The bill that we are being asked to consider is one that prohibits certain transfers into the MDL system. The idea behind it was to not impede actions by the attorney general under both the Deceptive Trade Practices Act and the fraud in the Medicaid area of that statute as well, and so those are prohibited transfers under the MDL statute, and the question was should we either revise the related administration -- Rule of Judicial Administration or provide a comment or do nothing.

So you'll -- the main document to look at is the June 21 memorandum from the subcommittee, and you will see that our -- we considered and thought about do you really need to do anything since the primary stakeholders, primarily the attorney general, is going to know of this law. We thought on balance it was better for transparency and to avoid unnecessary cost both at the judicial level and at the attorney level to go ahead and be clear in the rule that we had now these two areas of prohibited transfers.

So the rule for your consideration you will

see in the memorandum at the bottom is 13.1(d). It will be a new rule. It will be called "Prohibited transfers." The language we're hoping we can get past this committee is exactly what the statute says. We did not vary from it. There was some discussion in e-mails -- and I don't know if whoever sent me the e-mail wants to speak to that about whether we should say "notwithstanding any other law" because that is a rather unusual phrase within the parlance of the rules, but we decided just safest to go ahead and stay with the actual statutory language. So what you see here is exactly what's in the statute. We did not vary from it. It makes clear that you cannot transfer these two categories of actions; and, again, this is to free up the attorney general in these types of actions.

You will also see the below the recommended rule addition while you're looking at rules you notice other things, and that is that we still have rules here regarding the transfer process before I think it was September 1, 2003, and whether we still need those rules on our books is sort of the question. So if you want to reconsider or if we want to reach that, we've given you three rules we might look at. Deleting -- obviously if we were to delete 13.1(c) then our proposed rule would become 13.1(c). If you retained it then we would be 13.1(d).

And then, Holly, who is very astute, pointed out that if we got rid of those rules there was this one provision in 11.7(c), which I've quoted at the bottom in the memorandum which might still have continuing relevance, so if you want to get rid of that.

So I think what we ought to do is first look at 13.1(d) and then secondarily look at whether the committee has any interest in looking at deleting other rules that might no longer have relevance. With that let me open it up to the subcommittee if you-all want to add anything.

CHAIRMAN BABCOCK: Anybody from the subcommittee want to speak in opposition to Nina? I didn't think so. Hey, by the way, these things the Legislature handed us, you know, came up very, very quickly; and you guys have done a terrific job, these subcommittees, of putting out really quality analysis of this on a short fuse, so thanks for that.

Well, if nobody on the subcommittee wants to comment, any other comments about focusing on 13.1(d) now? Yeah, Evan.

MR. YOUNG: I was not the person who wrote anything about "notwithstanding any other law" because I'm not on the subcommittee, but that could become inaccurate as soon as some other law is passed because one

Legislature cannot bind its successors. I noticed that "notwithstanding any other law" language is used in various other statutes that are part of Tab B back in 2003 and elsewhere.

CHAIRMAN BABCOCK: Right.

MR. YOUNG: I was afraid that incorporating that into a rule could signal something that would definitely require --

PROFESSOR ALBRIGHT: Excuse me. Evan, could you speak up a little bit?

HONORABLE TRACY CHRISTOPHER: Yeah, it's very hard to hear you at all.

MR. YOUNG: Sorry. I am not sure that the "notwithstanding any other law" language that you referenced -- and I disclaimed being the person that you mentioned had written to you because I'm not on your subcommittee. I'm afraid that it runs the risk of becoming inaccurate as soon as some other law may be passed that has broader applicability because this Legislature cannot bind future Legislatures any more than the prior Legislatures that used that same "notwithstanding any other law" language could bind this one, and so if we freeze that in here without some recognition "notwithstanding any other law" from 2019 or before, then it strikes me just inviting confusion in the

future or requiring constant change.

MS. CORTELL: So you might add "currently in place" or something like that?

MR. YOUNG: Yeah, or just, you know, deleting it for now and then we can -- you know, if some future law were to specifically and more specifically govern this then that would take precedence anyway; but if we actually say "notwithstanding any other law" that seems to suggest to people, oh, well, they've thought about it, this law that seems to say the exact opposite should be disregarded because of the text of this rule. So that's just a thought.

MS. CORTELL: So you would delete it then.

MR. YOUNG: That's better I think than to keep it.

CHAIRMAN BABCOCK: Holly.

MS. TAYLOR: I was the -- I'm the guilty party who flagged that language, which was in the statute, but I thought it might be problematic for the very reasons that you've talked about; and I also did just a quick search of the various Rules of Civil Procedure, Rules of Appellate Procedure, and Rules of Evidence; and I was not able to find that phrase in any of those bodies of rules, so I thought there's probably a reason you see it in statutes all the time but not in rules.

CHAIRMAN BABCOCK: There we go. Makes sense. So, Nina, what do you think? Should we take it out?

MS. CORTELL: I'm fine with taking it out. Again, we just wanted to give the committee the benefit of the statutory language.

CHAIRMAN BABCOCK: Yeah. Okay. Anybody opposed to taking it out? Okay. Let's suggest to the Court that they take that phrase out. What other comments?

HONORABLE TOM GRAY: Did you see that I opposed just so that there was one on record of I would leave it in?

CHAIRMAN BABCOCK: Why does that surprise me that you would oppose the entire will of the committee? No, Justice Gray, why would you leave it in?

HONORABLE TOM GRAY: I don't think it's misleading or subject to being misconstrued. It is what the Legislature said, and it is more expansive than simply the statutes. When you use the "any other law" you capture the Constitution, you capture the rules. I just -- if it -- if that becomes an issue in the future, the Court or levels of court that deal with it can deal with it appropriately based on existing rules and canons, and we've been faithful to the Legislature's explicit

language. So I --

CHAIRMAN BABCOCK: Okay. Does that change anybody's mind?

MR. SCHENKKAN: I think it actually highlights the importance of taking the language out, because the context in which we've been conducting the discussion up to this point has assumed that the only sources of other law are the Legislature, but when we're talking about the administration of the judicial system there is an argument that can be made in certain circumstances that it is part of the inherent power of the judicial branch to do, and that would be another law that would -- basis of law that would remain available to be urged as the basis for the Court's having intended to prohibit these particular transfers no matter what the Legislature thinks.

Now, obviously that's not what is intended. I can't imagine any such argument being seriously advanced or taken seriously, but it is an illustration of the proposition of why we don't want to be in that business of saying "notwithstanding any other law" unless we have to.

CHAIRMAN BABCOCK: Got it. Judge, you okay with if we take that phrase out over your dissent?

HONORABLE TOM GRAY: Y'all are going to do it anyway, so I'm accustomed to that.

CHAIRMAN BABCOCK: No, no, no. You've won a bunch of battles in this committee. Anybody have any other comments?

HONORABLE TOM GRAY: I mean, you do understand I'm opposed to everything we do here because we're just an agency of the Legislature, and so -- but I try to help get it as good as we can.

CHAIRMAN BABCOCK: Anybody -- anybody have any other comments about this?

MR. PERDUE: Well, Evan's point and Judge Gray are both well-taken, and two people I may not always agree with, but the problem with "notwithstanding any other law" is you do have Legislatures making ad hoc judicial policy. This is a bill very specifically to deal pretty directly with the opioid action of the AG, which got sucked into the MDL of which I have been sucked in as well, and it's -- you know, so then you have a bill that specifically addresses that specific situation, and you could have a Legislature in six years do the exact opposite, but that is the -- that is what's happening.

CHAIRMAN BABCOCK: Yeah. Okay. Good point. Thanks, Jim. Anything else about this? All right. What about the second issue, Nina, about going further and withdrawing certain rules?

MS. CORTELL: One is just a practical

1 question, which I'm being educated right here from Justice
2 Christopher that there may be currently pending actions
3 filed before September 1, 2003. If that is the case then
4 it would be premature to get rid of the rules. That's
5 simply -- I'm sorry, we didn't independently research it.
6 So if there's a sense that there might still be cases out
7 there then I think that answers it.
8 CHAIRMAN BABCOCK: Okay. So we'll withdraw
9 that suggestion?
10 MS. CORTELL: We will withdraw that footnote
11 to our recommendation.
12 MR. PERDUE: There is potential that there
13 would be on the dust docket on asbestos there could be
14 something that, you know, that --
15 HONORABLE TRACY CHRISTOPHER: Yeah, I mean,
16 those dockets still exist, so --
17 CHAIRMAN BABCOCK: Okay. So on this one
18 we're going to suggest that the Court delete the phrase
19 "notwithstanding any other law" and then go forward with
20 the language here, and then the subcommittee withdraws the
21 suggestion about considering the withdrawal of Rules of
22 Judicial Administration 13.1(c), 13.11, and possibly
23 another one, but anyway, we're withdrawing our
24 recommendation on that. Anything else, Nina?
25 MS. CORTELL: That's it.

CHAIRMAN BABCOCK: All right. Nicely done. Moving right along. Expedited actions, and Bobby is not here, I don't think, is he?

HONORABLE TRACY CHRISTOPHER: No, he's not.

CHAIRMAN BABCOCK: Are you taking this one on?

HONORABLE TRACY CHRISTOPHER: I am, yes.

CHAIRMAN BABCOCK: Oh, great. Thanks, Justice Christopher. Take it away.

HONORABLE TRACY CHRISTOPHER: So I think that's Tab C in your paperwork. So Senate Bill 2342 amended the Government Code to up county court at law jurisdiction to 250,000, and it also upped JP jurisdiction to 20,000. In addition, they added a new section to the Government Code, (h-1), and made some changes to section (h). If you-all remember this particular section, section (h) of the Government Code asked us to create an expedited action procedure for cases up to $100,000, inclusive of interest, fees, punitive damages, anything like that. So we created Rule 169 to satisfy the legislation under (h). The (h-1) that has been now added says that "The Supreme Court shall adopt rules to promote the prompt, efficient, and cost-effective resolution of civil actions filed in county courts at law in which the amount in controversy does not exceed $250,000."

So it's limited only to county courts at law, and while the amount in controversy is defined as $250,000, under the county court provisions that means 250 plus interest, plus attorney's fees, plus statutory penalties, plus punitive damages. So we're talking about a potential case of, you know, half a million or more with a serious punitive damage claim into it.

So the first -- first thing that we identify -- oh, and the new rules the Supreme Court has to adopt has until 1-1-21 to adopt the new rule. So that does give us some time to work on it. So we -- in connection with this new rule we've identified the following issues. First of all, find out why the final version was limited to county courts. All right. And notwithstanding the limitation to county courts, should the Court consider a rule that would apply in all cases, in all courts for cases up to that 250,000 plus dollar amount. So that would probably be the first thing that we would want to discuss here, whether we stick straight solely with what the Legislature has said, which is we write this rule for county courts at law, or do we say under Supreme Court rule-making authority we're going to expand it not only to county courts at law, but to the district courts for cases involving that amount in controversy.

So that's -- that's sort of the first issue we identify, and I'll go through our issues and then we'll come back. So then we thought, well, can we just amend current Rule 169 and up the limit to $250,000. Well, at first glance most of our committee did not recommend doing it -- not all, but most -- because we thought discovery would be too limited for a case involving that amount of money. Because if you'll remember in Rule 169 it's level one discovery. The trial time limits might be too restrictive, currently eight hours per side, and the amount in controversy is not defined in the same way in Rule 169 versus the new (h-1). So Rule 169, 100,000 includes interest, fees, any punitive damage claim, but (h-1) is 250 plus all of that. So, I mean, we're talking about a potential big monetary difference in terms of Rule 169. And most importantly, if all cases in a court fall into the limit, which would be most county court cases, there would be no way to move to the top of the docket, because all cases would be at the -- you know, would be entitled to the same expedited action. So we really have to, in our opinion, come up with a new proposal to deal with this.

The next point that we thought about is because we do have time to work on this matter should we first of all see if Rule 169 is working, and I have

already started anecdotally getting information from Harris County district courts, and the answer to that is no one ever requests a 169. I mean, in the years that it's been in place it's just not being asked for.

HONORABLE DAVID EVANS: We went back after the bill was -- when the bill was in process, we went back three years in my court. Every case has a motion for continuance in it that is agreed to. We've had one case on a second continuance, where it was opposed and said it was ruled on. We keep them stacked. We've kept them marked. Now, that's anecdotal, but --

HONORABLE TRACY CHRISTOPHER: Right.

HONORABLE DAVID EVANS: That's what every judge in the county says right now.

HONORABLE TRACY CHRISTOPHER: So that's one thing, should we -- should we look and make any changes to 169 while we're doing this new change, and then if we're going to limit it only to county courts, I really think that we need a task force that has county court judges on it because, you know, some county court judges are general jurisdiction county court judges. Some county court judges do civil and family, some do just civil, and since we are talking about their entire docket, essentially creating an expedited action for their entire docket, I really think we need the input from those courts.

Now, it is true that there are other county courts at law that have jurisdiction above this 250,000-dollar amount. For example, in Dallas they have the same jurisdiction as district court cases, but we have such a wide variety of county courts at law, I just think it would be useful to get some input from the various type of county court at law judges into the creation of this rule. You know, it's kind of funny, like the car wreck docket, some car wrecks can go into county court, some car wrecks can go into district court, and it really depends upon the lawyer as to whether he feels more comfortable in county court or whether he feels more comfortable in district court as to where, you know, he files those cases.

The county court at law also gets a lot of credit card debt and foreclosure matters, and of course, they get all of those appeals from JP court. So, I mean, they do have a very distinct docket, which is why I think we need that input. So that's it in terms of (h-1). There are some other changes in the second half of our memo. You want me to go through that or do you want to talk about (h-1) to begin with?

CHAIRMAN BABCOCK: I think we probably should talk about (h-1) first.

HONORABLE TRACY CHRISTOPHER: Okay.

CHAIRMAN BABCOCK: Just because people are seething to weigh in.

HONORABLE TRACY CHRISTOPHER: So I don't know why the final version was limited to county courts instead of, you know, all actions involving $250,000; but notwithstanding whatever reason that was, I think the first thing we should discuss is whether we're going to write a rule that's only for county courts or are we going to write a rule that is for all cases involving that amount in controversy.

CHAIRMAN BABCOCK: All right.

HONORABLE TRACY CHRISTOPHER: And we don't really have a strong feeling on it one way or another, the committee.

CHAIRMAN BABCOCK: Professor.

PROFESSOR ALBRIGHT: One thing I -- looking at this, I think it's at least arguable since it's (h) and (h-1) that they -- that the amount in controversy is a defined term in (h) that then goes to (h-1). So I think that's something we could talk about, too, as to whether the amount in controversy is amount in controversy as defined in the jurisdictional statutes or the amount in controversy is defined as it is in (h), which is inclusive of attorney's fees and interest and all of that. So that would limit the cases that are included here where if you

used the amount in controversy as defined in the jurisdictional statutes, like Justice Christopher said, that expands the coverage to huge numbers of cases with huge amounts in controversy.

CHAIRMAN BABCOCK: Okay. Richard.

MR. MUNZINGER: El Paso has the same situation that Dallas has. We have seven or eight county courts at law, all of whose jurisdiction is identical to the district courts, and all filing is done with the district clerk, and the cases are assigned at random. So you don't choose to file in a county court at law in El Paso. You just file and then the clerk selects the court in which your case goes. From time to time your case will be sent to a district court because a trespass to try title action, for example, must be filed in district court, and the clerks later go along and see that there is a mandatory statute directing that it go to a district court, and they will so transfer it, but it is a problem that our county courts at law have the same jurisdiction, and so it's going to complicate things in El Paso when you do that.

CHAIRMAN BABCOCK: Can a county court at law in El Paso try a libel case?

MR. MUNZINGER: A libel case? Yes.

CHAIRMAN BABCOCK: Do they have 12 jurors?

PROFESSOR ALBRIGHT: Now they do.

MR. ORSINGER: There's a new change in the law that requires 12 jurors in all county court cases, I think.

CHAIRMAN BABCOCK: There you go.

HONORABLE TRACY CHRISTOPHER: Well, that's the second part. It has to be over the 250,000 mark to get the 12-man jury.

MR. ORSINGER: Ah.

CHAIRMAN BABCOCK: Roger.

MR. HUGHES: Well, just to summarize, I favor this study in all cases. I think that would be very useful to find out how well the category one is working under -- to get expedited trial under Rule 169. I think that's very important, but the other thing is that I note -- and maybe I -- because I skimmed through the new statute very quickly. It looked to me like the new statute when they raised the jurisdiction of county courts at law not only made them concurrent, it allowed district and county judges to freely swap benches and transfer cases involving concurrent jurisdiction.

So now, even in those counties like Munzinger described, it doesn't make any difference where you start out. If you fall in the 250,000-dollar bracket you might be in district court or you might get

transferred to county court or vice versa, and the -- this brings me to my third point. Most of the reasons that county court at laws were given expanded jurisdiction over the original -- over the main statute was the belief -- at least this is what was argued continuously. You're going to get to trial faster in county court. They aren't clogged up like the district courts; and now if you say, well, look, it doesn't make any difference where you file, you might -- we're going to have the -- you might end up in district court or not, et cetera, et cetera, it may start -- people just start filing in district court to begin with. I mean, what's the difference?

So, I mean, I still favor a separate rule to deal with this issue, although there is part of me -- and I suggested it over breakfast this morning is we ought to tell the Legislature is Rule 169 is working just fine, and that's all the study we need, and if we want to protect the county courts at law, 169 is doing its job.

CHAIRMAN BABCOCK: Okay. Who else? Anybody else have any comments on this? Justice Gray.

HONORABLE TOM GRAY: I just wanted to note that in this new and trusting environment that we have with the Legislature in the last decade that they gave us (h-1) and in the first paragraph they said the Supreme Court is going to adopt these rules, but then they by --

and I will note this was by a floor amendment, as I recall. The last sentence, "The Supreme Court may not adopt rules under this subsection that conflict with other statutory laws." So I guess we can go ahead and violate the Constitution or our own rules, just not statutory laws. So but they didn't trust us to not recommend something to the Supreme Court that might otherwise violate a statute.

CHAIRMAN BABCOCK: I thought we could repeal state law if we wanted to.

MR. ORSINGER: That worked one time and then --

CHAIRMAN BABCOCK: What?

MR. YOUNG: I would say on the similar expressio unius principle not only does it mean that we can --

HONORABLE TOM GRAY: You are going to have to speak English.

CHAIRMAN BABCOCK: Yeah.

MR. YOUNG: I'm sorry. Every other statute that requires rules it doesn't say that they can't conflict with other statutory law. Presumably, have fun.

CHAIRMAN BABCOCK: Yeah.

MR. YOUNG: Which means you never say anything that is not intended to be meaningful.

HONORABLE TOM GRAY: You know, you could say that that might be an unintended prohibition against the repealer in that statute that says we can repeal other statutes.

CHAIRMAN BABCOCK: I just want Evan to quit talking dirty. That's all. Whatever he said, it sounded dirty. Judge Evans.

HONORABLE DAVID EVANS: I agree with Justice -- the committee and Justice Christopher that county court at law judges should be involved, especially the problem of general jurisdiction county court at law judges. We can provide some examples of the priorities that they have to face because of criminal settings. They're set out in general jurisdiction. If the committee as a whole agrees with the suggestion that the new rule should be applied to district courts as well, then the task force should include general jurisdiction district court judges. That's where the real problem with special civil rules come in. It doesn't come in in urban counties like mine where you're civil only judge. You don't worry about felony cases, but when you move out of just 30 miles up to Denton, there's no specialized court. So you've got to wade through trying divorces first, trying felonies first, so that would be -- I would echo that. I think the threshold question may be at some point are we going to

make it applicable to district courts as well. And if we don't, how do we split it?

CHAIRMAN BABCOCK: Assuming the Supreme Court thinks it's a good idea to add some county judges to this group to study this --

HONORABLE DAVID EVANS: Task force, yes.

CHAIRMAN BABCOCK: Task force. What -- how many and what should be their characteristics? Should it be an urban, somebody outside?

HONORABLE TRACY CHRISTOPHER: Yeah, I mean, I think you need -- you need somebody that has concurrent jurisdiction like El Paso and Dallas.

CHAIRMAN BABCOCK: Right.

HONORABLE TRACY CHRISTOPHER: You need somebody that doesn't, like Harris County. You need the general jurisdiction judges in the county courts, and some of them have family law jurisdiction and some of them don't. So you need to make sure that you've got somebody that's representative of each type since, you know, family law is supposed to get precedence in general over civil cases. So I just think we need more of that, and perhaps in terms of lawyers we need some lawyers that are in the foreclosure docket, because a lot of those cases, you know, move from JP up to county court, and I could probably think of some other specialized type of lawyers,

too, that would be useful on the committee.

CHAIRMAN BABCOCK: Wouldn't it -- Judge, wouldn't it make sense to take your subcommittee, which has already started on this project, and just add people with those characteristics?

HONORABLE TRACY CHRISTOPHER: You know, that's up to the Supreme Court.

CHAIRMAN BABCOCK: Well, of course, but what would you think?

HONORABLE TRACY CHRISTOPHER: You know --

CHAIRMAN BABCOCK: What, are you talking to your lawyer now?

HONORABLE TRACY CHRISTOPHER: Well, our subcommittee didn't even do Rule 169 to begin with.

PROFESSOR ALBRIGHT: Right. Right.

HONORABLE TRACY CHRISTOPHER: So --

PROFESSOR ALBRIGHT: Wasn't that David Peeples?

HONORABLE TRACY CHRISTOPHER: You know, that's sort of a different group that started the whole 169 process, so I'm not sure that we have a whole lot of experience other than I've thought about it.

CHAIRMAN BABCOCK: Yeah.

HONORABLE TRACY CHRISTOPHER: But, I mean, we'll be glad to do it if that's the assignment.

CHAIRMAN BABCOCK: Okay. Well, we'll figure it out, but thanks.

HONORABLE TRACY CHRISTOPHER: Okay.

CHAIRMAN BABCOCK: That's good info.

HONORABLE TRACY CHRISTOPHER: But I do think the threshold question to the extent we can get a vote on it is is the rule going to be only for county courts, or is it going to be for county and district courts, and what are we going to do with people that -- like in Dallas and El Paso that freely pass those cases back and forth?

CHAIRMAN BABCOCK: Yep. Justice Gray.

HONORABLE TOM GRAY: In considering who to put on the subcommittee from the judiciary, I do think at least one county where they have a general jurisdiction in each that have actually had some problems in transferring cases back and forth and has been litigated would be helpful, and Navarro County comes to mind. They have a general jurisdiction district court, just one, and then a highly legislative jurisdictional parameters for the county court at law, and we've had some cases on whether or not they could or couldn't transfer and how that may fit within this whole formula. It sounds like, though, Denton County may have a general of each as well.

HONORABLE DAVID EVANS: Well, I think if you're going to mention counties, the co-sponsor of this

bill was Representative Leach from Collin County, an attorney, and I believe that these provisions were one of his legislative priorities, and they have several county courts at law there and several district courts, and I would imagine that we should go through the regional presiding judge there and see what he thinks. He is a sitting district judge in Collin County. He may be able to help us with at least one representative.

CHAIRMAN BABCOCK: Who is that, Judge?

HONORABLE DAVID EVANS: That's Ray Wheless.

CHAIRMAN BABCOCK: Okay.

HONORABLE DAVID EVANS: And if you read the analysis of the bill, I pulled it up, it doesn't even recognize that this rule was going to be addressed only to county courts at law. It seems to say that the analysis of the bill on file with the Legislature wanted expedited actions across the board. I don't think -- I'm not saying that for voting purposes. There's been some bewilderment expressed as to why this happened, and most of the discussion in the Legislature was -- had to do with the jurisdiction above 250 and the 12-person jury, and there wasn't a whole lot of focus on the limitation here as we went through hearings.

MR. PERDUE: Do you know if Wheless was carrying --

HONORABLE DAVID EVANS: Ray is not a legislator. Leach was.

MR. PERDUE: Leach. Was he carrying HB 3336? Do you know? I can't tell if they were companions.

HONORABLE DAVID EVANS: They were, and he was also our pay bill sponsor, and I'd have voted for anything he had.

CHAIRMAN BABCOCK: Note the laughter.

MR. PERDUE: I -- so the complexity of this is interesting because this is one of these classic, there's a House bill that was 250, was going to do expedited actions up to 250.

CHAIRMAN BABCOCK: Right.

MR. PERDUE: We're now looking at the Senate bill that actually got passed, and Justice Gray mentioned a floor amendment, but I think the analysis that you're reading, this (h-1) thing came oddly compromised late in the process somehow and brackets it down to county court. As I'm reading -- I'm going back and reading the discovery rule changes that y'all have been working on, which is going to level one to the 167 rule, and so now you're messing up all of the discovery rule drafting that's been done to kind of coalesce expedited actions to level one. So there's moving parts in the classic judicial -- legislative compromise that screws up a lot more than it

needs to. That's editorial, by the way.

You know, so they've -- so we've got expedited actions as level one now. They don't change 169 in concept. I was tracking this bill on the House side, which was going to take it to 250, but it was -- but in concept the idea was that you would get 12 in county court so that if you were trying a larger case you could get more than six if you --

HONORABLE TRACY CHRISTOPHER: Well, but actually passed was you get 12 if you're above the 250. So in those few counties where the county courts at law have jurisdiction above the 250 mark, you get the 12-man jury.

HONORABLE DAVID EVANS: Right.

HONORABLE TRACY CHRISTOPHER: And also in some counties that do family in county court a lot of them already had a provision for a 12-man jury on the family cases.

HONORABLE DAVID EVANS: And they increased JP jurisdiction to 20,000, which is going to increase county court at law appeals now, which are more difficult than original actions for the county courts at law. So it's compounded.

PROFESSOR ALBRIGHT: But this was a last minute change, because the way we kind of figured it out

is I just -- I had Googled the bill and bill number and this was the last version that I saw was the one that applied to all cases and then Justice Christopher says, well, you must be looking at the last version -- I mean not the last version, so where I was looking at engrossed or enrolled or something.

HONORABLE DAVID EVANS: The enrolled one.

HONORABLE TRACY CHRISTOPHER: Right. Right. One version, a prior version, just amended subsection (h) to put 250 in there. But then that got dropped out and (h-1) was added; and I disagree with Alex on the amount in controversy question, because this is all part of the Government Code that defines the amount in controversy to mean plus interest, attorney's fees, and penalty and punitive damages; and so, I mean, it would seem weird to me to, okay, to carve out in a county court the 250 inclusive when -- it would just be hard, if they are already at a 250 plus.

CHAIRMAN BABCOCK: Yeah, Jim.

MR. PERDUE: But my recollection was that 169 wasn't drafted by this committee or subcommittee of this committee. There was a task force set up kind of of constituents outside the committee that then participated in the drafting of 169 the committee voted on and then they came to us kind of with this two-pronged option, the

primary issue of which was the ability to plead it and set it --

CHAIRMAN BABCOCK: Uh-huh.

MR. PERDUE: -- versus opt-in or object or have it as an option, and that was an extensive discussion. I'm the last constituency to talk about, hopefully, cases under a hundred thousand dollars, although it happens to me.

CHAIRMAN BABCOCK: There's always hope, Jim.

MR. PERDUE: With too much regularity. But, you know, I think that even as I read the bill in the concept of county court you could in concept have a case up to 250, but create something where you don't necessarily invoke it. But it's -- it's a complicated issue because a foreclosure case might be fine or not fine. I know nothing about that world. I can think of a car wreck case where I've been saying at CLE's for 10 years now opt in and use it because in concept it will lower your cost on the plaintiff side. It's still not getting done, but I can think of cases where it probably is 250 where you know there's going to be two or three experts in the case. It's a -- it's an interesting issue, especially one in county court where at -- you know, in Harris County we have a pretty robust district court setting and four civil county courts of various

trustworthiness -- don't put that on the record.

CHAIRMAN BABCOCK: No, we want you to name names.

MR. PERDUE: It's just a different system.

CHAIRMAN BABCOCK: So back to the question, should we just confine it to county courts, or should we -- should we try to write something that's for all courts? Any other thoughts about that? Pete.

MR. SCHENKKAN: I think you've got to assemble this task force first and get them to comment on that because I think there's so many different scenarios I've heard out there that I can easily imagine a person who's been active in that particular -- in one of the particular scenarios that's been mentioned having very different view of the right answer to that question from one who is operating under a different scenario. Maybe not, but I'd like to wait and hear from them first --

CHAIRMAN BABCOCK: Yeah, that's --

MR. SCHENKKAN: -- before I take a vote.

CHAIRMAN BABCOCK: That's a good point, but I think Justice Christopher might say, you know, we want to give it to the Court right now, a sense of our feeling about it, but Justice Christopher, and then Judge Evans.

HONORABLE TRACY CHRISTOPHER: Well, now that I know that there are counties where they are freely

transferring county court to district court cases, which I was not aware of, I mean, I don't really see how we could only limit it to county courts. I mean, that would just throw a huge wrench into those counties.

MR. SCHENKKAN: Yep.

CHAIRMAN BABCOCK: Judge Evans. Sorry.

HONORABLE DAVID EVANS: Well, we've actually equalized dockets in Tarrant County by having orders from the county courts at law to the district courts of cases, and we consolidate -- you can consolidate a case filed in two different -- one in county court, one in district. The case will end up in district court under the Government Code on a consolidation. I think the rule is going to be the same for both courts in the end of the day. I don't know how you would write one for two different courts, and it would be up to the Supreme Court whether to adopt it, but it would be very difficult as a practitioner to say, I've got a case under -- between a hundred and 250, where am I -- this doesn't make a whole lot of sense. So I think the Legislature just missed it, should have just done it all the way through. I think what Pete said about having the task force make the recommendation, but I would have district judges of general jurisdiction on the task force so if it gets adopted --

MR. SCHENKKAN: Right.

HONORABLE DAVID EVANS: -- for district courts that has that or working committee or whatever you have.

CHAIRMAN BABCOCK: Yeah. Pete's comment, while very good, presumes that there's going to be a task force.

MR. SCHENKKAN: It does.

CHAIRMAN BABCOCK: And there's no question that I think whatever group of people consider this needs additional resources, whether that's an independent task force or people being added to a committee, subcommittee of this group. A good question, and we'll answer it shortly. Anybody else got any thinking about -- yeah. Kimberly.

MS. PHILLIPS: Given that we have time, I do wonder if you have enough information on the pros and cons of either decision, so whether it's a task force or an expansion of our committee, I do wonder if it's a bit more prudent to get some more perspective from, you know, county court judges, district court judges, you know, just to make sure before we say it's -- it should be for all, you know, all courts or it should just be for county courts.

CHAIRMAN BABCOCK: Yeah, I think that's a

good point, Kimberly. I think right now we're just kind of talking about it. I don't think we're going to take any sort of binding vote --

MS. PHILLIPS: Okay.

CHAIRMAN BABCOCK: -- that would preclude going in a completely different direction once we find some other resources. Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I mean, I do believe that some of the rule amendments that our subcommittee did work on have the effect of lowering discovery costs, just because of the way we've defined the relevance of discovery. We've limited the number of document requests. We've limited -- so I don't think the rules should be independent of all of the rule -- you know, the rule changes that we've already proposed actually, because I think a lot of what we had proposed would meet the legislative goal of lowering discovery costs balanced against the complexity and discovery needs. So I guess I'm putting myself back into the committee.

CHAIRMAN BABCOCK: Yeah, you definitely are, but what -- does anybody remember which subcommittee of our -- of our committee worked on the expedited actions? Because we don't have a subcommittee on 169.

MR. FULLER: It was a task force. And then came to the group as a whole.

HONORABLE LEVI BENTON: It was Bobby Meadows' committee as I recall.

HONORABLE TRACY CHRISTOPHER: No, it was not.

MR. JEFFERSON: Justice Phillips chaired the task force on Rule 169.

MR. PERDUE: Yeah, it came to us from outside.

CHAIRMAN BABCOCK: Okay.

HONORABLE PETER KELLY: David Parker, David Chamberlain.

CHAIRMAN BABCOCK: Yes, that's right. Yeah.

MR. JACKSON: Chip, if you look at the title of our committee on number six, expedited actions, it's 171 through 205.

CHAIRMAN BABCOCK: Right.

HONORABLE DAVID EVANS: What if we amend the title?

CHAIRMAN BABCOCK: Yeah, we don't have a 169 subcommittee, so I'm sure that Marti and I just picked the one closest to 169. Okay.

MR. LOW: Chip, is there a deadline for this? Justice Hecht.

HONORABLE TRACY CHRISTOPHER: The new rules are 1-1-21. '21.

CHAIRMAN BABCOCK: January 1.

MR. LOW: So there's time.

MR. FULLER: Which interestingly enough is the first day of the next session, so I'm thinking this came up at the last minute. Nobody noted -- question number one, where did this come from? I mean, I get the sense that we may be making rules for some really poorly thought out legislation, and I hesitate to be a heretic, but along with Justice Gray's point is there any reason why the Supreme Court just can't say "no" or we haven't been able to do this because we don't understand your legislation, and maybe we can fix that with this new session that's just starting on the day of our deadline?

CHAIRMAN BABCOCK: I suppose the Court could do whatever it wanted, but I would doubt that they would openly tell the Legislature that --

MR. FULLER: It seems we just need to fix it.

CHAIRMAN BABCOCK: -- they're not doing the right thing, but who knows. Yeah, Eduardo.

MR. RODRIGUEZ: Well, maybe the recommendation would be to fix it to that -- for that legislative session. In other words, fix it up and present it to them so they -- so they could pass it as new legislation.

CHAIRMAN BABCOCK: Yeah, sure.

MR. FULLER: Something along those lines.

CHAIRMAN BABCOCK: Yeah, something like that. Yeah, for sure, but -- anyway, Tracy, what else should we talk about?

HONORABLE TRACY CHRISTOPHER: Well, the -- then there are some easier parts of this bill. So the remainder of the changes amend various sections of Chapter 25 on statutory county courts. As we've talked about, you know, every county has a slightly different way they handle their county courts, so it's -- the remainder of it is to allow many county courts to have the higher limit of cases, upping it from 50,000 to 200 or 250,000, and for those county courts that already have the higher limits requiring a 12-man jury for any case where the amount in controversy is over 250,000, unless the parties agree to a lesser number or it's waived. Increase the jurisdiction in JP court, as we discussed, to 20,000.

So then on page three of our memo you'll see in connection with these changes we need to change Rule 47 to have that you have to plead between 100 and 250, in between 250 and a million, and then we have to change Rule 500.3 to up the jurisdiction of the county courts from 10 to 20,000. So those are pretty, you know, just noncontroversial changes that need to be done.

Then we looked at possible changes to a number of rules, which are also not in our subcommittee, but we were given this whole -- this whole area, and basically all of these rule numbers that I've listed reflect 12-member juries in district court and six-member juries in county court, and the rules are basically unchanged from 1941 except for some changes to Rule 233. We actually do not recommend making changes to those rules because we think that county courts that have a 12-member jury requirement will know to follow the 12-member jury rules, and it would just be a lot of work for no good reason to change those rules.

If we did change those rules, we should look at them and update them, and then a possible change to Rule 226a. 226a references both 6 and 12 without mentioning the court level; and, you know, that's -- that's the jury verdict that says if it's a 12-man jury it's 10-2; if it's a six-man jury, it's five-one. Well, what's interesting is under the changes the parties can actually agree to a lesser number than 12. All right. So it's possible they could agree to 10 or 9 or 8 or, you know, whatever, but we do not recommend changing 226a to take that into account. We think the odds are small that someone would agree to a jury with less than 12 but more than six, and if they do they should just agree on what

the verdict split should be rather than having our committee try to say, okay, it's 10-2. It's nine-two. It's eight-one. It's -- you know, in terms of what the potential split would be. So a couple of minor rule changes and then recommending not changing a bunch of other rules.

HONORABLE DAVID EVANS: Well, wouldn't you --

CHAIRMAN BABCOCK: Sorry. Judge Evans.

HONORABLE DAVID EVANS: There is a rule that you can get a verdict with nine, the absentee juror, the excused juror.

HONORABLE TRACY CHRISTOPHER: Right.

HONORABLE DAVID EVANS: You can get a verdict with nine. Wouldn't you just -- if you were going to change it, you would just write that the parties could agree to a verdict, a unanimous verdict of less than 10.

HONORABLE TRACY CHRISTOPHER: But, I mean --

HONORABLE DAVID EVANS: I guess that's what you're saying. It would just be whatever it was.

HONORABLE TRACY CHRISTOPHER: I mean, I think if I -- if we were in county court and I agreed on a 10-person jury just because that's how big the courtroom is or whatever --

HONORABLE DAVID EVANS: Right.

HONORABLE TRACY CHRISTOPHER: -- that, you know, it might be nine-one --

HONORABLE DAVID EVANS: That's right, okay.

HONORABLE TRACY CHRISTOPHER: -- instead of unanimous at 10, or -- because, I mean, for a six-member jury it's five-one, so there's not a real reason to require the unanimity if you've chosen -- in my opinion if you've chosen to go with a different number to start with.

HONORABLE DAVID EVANS: I was just saying that --

THE REPORTER: Speak up.

HONORABLE TRACY CHRISTOPHER: Right.

HONORABLE DAVID EVANS: Number of people that had to answer "yes" on all of the --

HONORABLE TRACY CHRISTOPHER: Yes.

HONORABLE DAVID EVANS: -- questions.

HONORABLE TRACY CHRISTOPHER: Yes.

HONORABLE DAVID EVANS: They can --

HONORABLE TRACY CHRISTOPHER: That's what I think. The parties should just figure it out.

HONORABLE DAVID EVANS: They can enter into an agreement as to how many had to answer the same question the same way.

CHAIRMAN BABCOCK: Tom.

MR. RINEY: The court reporter looks

stressed.

HONORABLE DAVID EVANS: I'm sorry.

HONORABLE TRACY CHRISTOPHER: Sorry.

MR. RINEY: They were talking over one another.

HONORABLE DAVID EVANS: Only take down what Justice Christopher said.

HONORABLE TRACY CHRISTOPHER: No, I'm bowing to Justice Evans. He got me a pay raise.

HONORABLE DAVID EVANS: Well, that's a nice compliment.

CHAIRMAN BABCOCK: All right. Any other comments? Yeah, Frank.

MR. GILSTRAP: And these rules won't take effect until September 1st of 2020?

CHAIRMAN BABCOCK: '21.

MR. GILSTRAP: 2021.

HONORABLE TRACY CHRISTOPHER: Well, no. No, no, no. The JP jurisdiction takes effect earlier. It's only the (h-1) --

CHAIRMAN BABCOCK: (h-1), right.

HONORABLE TRACY CHRISTOPHER: -- that is supposed to be 1-1-21. The JP jurisdiction I believe is '20. It's not '19. I think it's '20, but let me double check. That also changed at the last minute. Because I

know in Justice Hecht's referral letter he said it started in '19, but --

MR. GILSTRAP: Judge Christopher, I've got -- it says --

HONORABLE TRACY CHRISTOPHER: 2020 is what I have for the other changes.

MR. GILSTRAP: 2020.

HONORABLE TRACY CHRISTOPHER: So it's not a '19 change for even these minor ones.

MR. GILSTRAP: September 1st, 2020. That's when they start. And that's all of these rules, right?

HONORABLE TRACY CHRISTOPHER: The upping the jurisdiction of county courts starts in 2020, upping the jurisdiction of JPs starts in 2020.

MR. GILSTRAP: Okay.

CHAIRMAN BABCOCK: Okay.

HONORABLE TRACY CHRISTOPHER: Is my reading.

CHAIRMAN BABCOCK: Any other comments on this, on this portion?

Okay. Justice Christopher, is there other -- are there other issues?

HONORABLE TRACY CHRISTOPHER: No, that's it in terms of what we need to do. The main part is (h), (h-1).

CHAIRMAN BABCOCK: Yeah. And we're -- we're

1 going to appoint a rule -- Rules 167 through 170
2 subcommittee of which we currently have none, so three
3 rules, including the morass of offers of settlement in
4 that -- in that three rule grouping. Oh, I know, he's in
5 the middle of this. Perdue, I'm talking about. So since
6 the court reporter appears to be stressed let's take our
7 morning break.
8 (Recess from 10:46 a.m. to 11:08 a.m.)
9 CHAIRMAN BABCOCK: All right. Next up is
10 none other than Richard Orsinger.
11 MR. ORSINGER: Yes, sir. Item 7 on the
12 docket, for those of you that are here, and we don't have
13 a paper handout on this, but I have sent two e-mails in
14 the last hour. One ten minutes ago. Now, I was listening
15 the whole time.
16 CHAIRMAN BABCOCK: By the way, are there
17 people outside or something or did --
18 MR. WATSON: No, just the last discussion
19 was so simple.
20 CHAIRMAN BABCOCK: Discussion drive everyone
21 away? David, see if you can round up some people.
22 MR. ORSINGER: You're all encouraged to look
23 at your e-mail if you can because this is a very limited
24 issue. Let me read first the referral letter from Chief
25 Justice Hecht back on May 31. I'm going to quote.

"Dismissal. Rule of Procedure 91a provides for the dismissal of baseless causes of action implementing Government Code section 22.004(g), Civil Practice & Remedies Code 30.021 mandates an award of costs and attorney's fees to the prevailing party. House Bill 3300," which is out of the current Legislature, "amends section 30.021 to make an award discretionary and applied to cases commenced on or after September 1 of 2019. The committee should consider whether other rules should be changed or comments added to reference or restate the statute by that date."

So the e-mail has a copy of the act, 3300, as well as the proposed rule change. So let me move on to the Civil Practice and Remedies Code section 30.021. I won't -- I'll just read the relevant section here. In a civil -- "in a civil proceeding on a trial court's granting or denial in whole or in part of a motion to dismiss filed under the rules adopted by the Supreme Court under section 22.004(g), Government Code, the court" -- and it used to say, "the court shall award costs and reasonable and necessary fees." The Legislature changed that this session. "The court may award costs and reasonable and necessary attorney's fees to the prevailing party. This section does not apply to actions by or against the state, other governmental entities, or public

officials acting in their official capacity or under color of law."

The bill then is -- has an effective date of September 1, and it's prospective only, and so House Bill 3300 made one change of one word, and it moved from "the court shall award costs and reasonable and necessary attorney's fees to the prevailing party" and changed that to "may." So if you go to our Rule 91a.7, tracked the Civil Practice and Remedies Code, and I will read that. "Award of costs and attorney's fees required except in an action by or against a governmental entity or a public official acting in his or her official capacity or under color of law the court" previously "must award the prevailing party on the motion all costs and reasonable and necessary attorney's fees incurred with respect to the challenged cause of action in the trial court. The court must consider evidence regarding costs and fees in determining the award."

The proposed rule change is to change "the court must award the prevailing party" to "the court may award the prevailing party." It's what the Legislature directed. It's simple. We're doing exactly what they said. However, there is some context perhaps that some of us would like to discuss, so the subcommittee proposal is to do exactly what the Legislature told us to do, which is

in the statute they changed "shall" to "may." We're proposing we change "must" to "may," and the safe thing to do is to do only that so that the bill's co-sponsors -- I think I recall there were about four or five of them -- get the message that we're doing what we said; but if we have to make other changes, of course, I guess we can make recommendations; but at least my feeling is we ought to do what we're told and no more. So that's the long and short of it.

CHAIRMAN BABCOCK: Okay. Comment? Frank.

MR. GILSTRAP: I agree with Richard, but I do want to point out one thing, and in making this change I recall Richard Munzinger's comment that it's elegant because of its terseness. This is pretty terse. It's done exactly what the Legislature changed, says it changed "must" to "may." However, the last sentence of Rule 91a.7 says the court -- and remember, in 91a.7 as presently drawn the court has to award attorney's fees.

CHAIRMAN BABCOCK: Right.

MR. GILSTRAP: It must award attorney's fees, and the last sentence says, "The court must consider evidence regarding costs and fees in determining the award." I question whether that is still needed since now it's a discretionary award. I could easily see the judge deciding the case on a written motion, deciding that he's

not going to award attorney's fees, and he doesn't -- he shouldn't have to hear evidence, and so we might want to consider changing "The court may consider evidence regarding costs and fees in determining the award."

CHAIRMAN BABCOCK: Pete.

MR. SCHENKKAN: I think we would want to say, "If the court is going to award fees," if it's exercising the court's discretion to award fees, "the court must consider this evidence." We just had a brand new Supreme Court decision handed down this morning that says exactly that, I think, that there was a sanctions award.

CHAIRMAN BABCOCK: What a brown-noser, and the Chief isn't even here.

MR. SCHENKKAN: It can't be brown-nosing if he's not here, Chip.

CHAIRMAN BABCOCK: A decision this morning.

MR. SCHENKKAN: Unless you plan to tell him.

CHAIRMAN BABCOCK: Yeah, Richard.

MR. ORSINGER: I sympathize with what Frank is saying. I think it's -- that the purpose of this sentence is to be sure that the award is based on testimony and not just a judge's reaction that I'm going to award 5,000 in fees or whatever; and so perhaps we could rewrite this to say, "Any award of costs and fees

must be based on evidence"; and that's not requiring them to hear it if they don't want to, but if they're going to give fees, they better base it on -- on testimony. So that would be perhaps a more elegant, less terse way to get this done.

CHAIRMAN BABCOCK: Yeah, that's good. Stephen.

HONORABLE STEPHEN YELENOSKY: Does that exclude a judge from having the parties agree?

MR. ORSINGER: Agree to what?

HONORABLE STEPHEN YELENOSKY: Fees.

MR. ORSINGER: Well, it might. I guess you could --

HONORABLE STEPHEN YELENOSKY: Because there are a lot of times when somebody comes in on a 91a and they -- that part that requires fees, right now, leads them to say, "Hey, Judge, if you rule in our favor, we're not asking for a lot in fees." Because you've got some pro se litigant there who's, you know, got some delusional idea, and it seems kind of in -- sort of ridiculous to award fees when maybe they're not collectible, but I've had people say, "Judge, you know, if you rule in our favor we're only asking for a hundred dollars in fees"; and the other person may say, "Yeah, that's okay." And so would this preclude it?

MR. ORSINGER: You know, it seems to me that the parties have the freedom to agree around a rule or a statute, and so it's kind of an unstated exception that if this rule required evidence for an award but the parties stipulated or agreed, then the stipulation or agreement would override the rule, but I don't know.

CHAIRMAN BABCOCK: Yeah, Lamont.

MR. JEFFERSON: I'm with Pete. I don't -- I think I would just delete that last sentence. I think it's confusing if -- if the decision is purely discretionary then why have that kind of guidance, and also I skimmed the case from this morning that seems to say that fees always have to be reasonable and necessary, which it implies based on evidence. If we have this sentence, I understand where if fees are mandated, if it's mandatory to be awarded, you might have that kind of guidance in a rule; but if it's not, if it's discretionary, then this looks out of place to me; and I can't -- I mean, you've got to think about all of the other situations where fees can be allowed where this specific guidance, you've got to use evidence to award fees, is not specifically there. So by making it discretionary I think it makes that last sentence unnecessary.

CHAIRMAN BABCOCK: Okay. Judge Evans.

HONORABLE DAVID EVANS: In a dec action the fees are discretionary, and there's nothing that says you must take evidence in a dec action on fees, but you always take evidence because you allow the parties to make a record. You're compelled to make a finding of fact as to the amount of reasonable and necessary fees if you find adversely, and you can in your discretion decide not to award them. I think the sentence has always been surplusage. The duty has always been there to hear evidence under any circumstance. Now, maybe many of us need that instruction, but even with a "may" you're going to have to let people make a bill and present their fees.

CHAIRMAN BABCOCK: If we take this sentence out, do we imply that you don't have to have evidence anymore?

MR. ORSINGER: That argument will be made, so I would suggest --

CHAIRMAN BABCOCK: Probably by you.

MR. ORSINGER: If we delete this sentence we should put in a comment that we're not deleting because evidence is unnecessary. We're deleting it because it goes without saying.

CHAIRMAN BABCOCK: And in the interest of brevity, would it be better to have language like you suggested as opposed to having to delete this and then

explain why we've deleted it?

MR. ORSINGER: I prefer -- you know, in the world of sanctions, and this is not a sanction, but it's like a sanction because it's really not a full-blown trial and --

CHAIRMAN BABCOCK: Right.

MR. ORSINGER: -- there is I think a lack of clarity to the degree to which a court can impose sanctions without hearing, you know, the traditional fee evidence.

CHAIRMAN BABCOCK: Right.

MR. ORSINGER: So I think this was an important safeguard so that judges just didn't say, "I find that this is an abusive filing. You've made a ridiculous claim that you can't support, and I'm going to award 2,500 in fees." I mean, when you get down there on these discovery hearings and sanction hearings judges sometimes do that. I think this was a precautionary measure to be sure that it had to be based on facts. The Supreme Court case that came out this week, though --

CHAIRMAN BABCOCK: Today.

MR. ORSINGER: No, it came out yesterday I think. I read it.

CHAIRMAN BABCOCK: Oh, Schenkkan is overselling it.

MR. SCHENKKAN: Maybe it was yesterday.

MR. ORSINGER: Well, I read a case when I left my office on Wednesday. I think it came out on Wednesday, but at any rate, whenever it came out, it's pretty clear now that you've got to have evidence to back it up, but that's clear if you read the Supreme Court cases.

CHAIRMAN BABCOCK: Yeah.

MR. ORSINGER: But if you don't read the Supreme Court cases and you just read the Rules of Procedure, that's not clear.

MR. PERDUE: Well, aren't the judges supposed to read the Supreme Court cases?

CHAIRMAN BABCOCK: Stephen.

HONORABLE STEPHEN YELENOSKY: Well, I mean, sometimes sanctions, people say sanction like in discovery dispute and they mean attorney's fees; and if it only means attorney's fees then, of course, it either needs to be evidence or agreement now you're saying we can get around that; but sometimes sanctions are sanctions; and there's a rule about proportionality, but they don't necessarily have to be fees; and so that would be based on, I guess, some evidence, but not reasonable and necessary fees.

CHAIRMAN BABCOCK: Okay. Justice Gray.

HONORABLE TOM GRAY: First to respond to justice -- or Mr. Perdue's comment about us reading the opinions, I had a trial judge in McLennan County that said "You can reverse me, but you can't make me read it," so -- and he said it more than once. But --

MR. PERDUE: That's my kind of judge.

HONORABLE TOM GRAY: You know, this sentence that y'all are talking about, there's a -- I would say a high probability that it was in the rule as drafted because it was in the statute that was passed at the time and that the rule was passed in response to, and so before I took it out completely I would go back and see why it was put in there in the first place.

CHAIRMAN BABCOCK: Pretty good point. Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, if I remember the reason why it was put in there to begin with is that 91a is not evidence-based to begin with.

MR. ORSINGER: Right.

HONORABLE TRACY CHRISTOPHER: And we specifically put that in there to make everyone understand that you had to have evidence on the fees. So I think we added that.

CHAIRMAN BABCOCK: I kind of lean toward having Richard's substituted language for that sentence as

opposed to deleting it and having a comment, but that's just me. Frank.

MR. GILSTRAP: Yeah, I mean, the point is that you don't have to have evidence if you're denying sanctions. Am I right?

CHAIRMAN BABCOCK: Right. Right.

MR. GILSTRAP: Okay. Well, you don't have to have evidence if you're denying attorney's fees here.

CHAIRMAN BABCOCK: Right.

MR. GILSTRAP: And the way this is going to happen if you keep it in here, the defendant is going to come in and file a motion to dismiss. The judge will say, you know, "I'm going to grant that. Get out of here," but now, wait, I have to hear evidence? And, you know, I mean, I'm not going to award attorney's fees. I'm just not going to award it. Why do I have to hear evidence? And often judges will make their mind up based on the merits of the motion.

CHAIRMAN BABCOCK: Sure. Richard, but doesn't your language cure that?

MR. ORSINGER: Yeah. So, Frank, what I'm doing to get around that problem that you just put your finger on is to say, "Any award of costs or fees must be based on evidence." So then if you're not going to award it you don't have to hear it, but if you're going to award

it, you have to hear it.

MR. GILSTRAP: I think that does it.

MR. DAWSON: Yeah, that works.

CHAIRMAN BABCOCK: Does that solve that problem? Stephen.

HONORABLE STEPHEN YELENOSKY: Well, one of my concerns is that if you say anything like that there, it's almost as if, oh, that's an exception to everything else. It's sort of like putting in "and the judge shall apply" -- or "apply due process." Or "the judge shall be impartial." You know, I mean, there are some things that attorneys wanted me to sign which were a given, and if I signed that once then all of the attorneys would want it, too, when neither one needs to have it. But in this case, to me it kind of sends a signal that can have unintended consequences if you're really concerned about people not knowing what the law is.

CHAIRMAN BABCOCK: Any other comments? Yeah, Jim.

MR. PERDUE: I mean, I think the law on attorney's fees has gotten kind of more clear in the last month. If you read the cases, but --

CHAIRMAN BABCOCK: Which Schenkkan does, minute by minute.

MR. SCHENKKAN: Not minute by minute

apparently.

MR. PERDUE: You know, so here you have -- to Justice Gray's original point earlier today, here you have the Legislature changing the language of a rule that it passed barely 10 years ago and in more judicial management and taking a rule that had been negotiated and designed to be a very serious thing and such that the -- this -- this is the generation of the fee shifting award. This is how it evolved, and the idea to take "must" to "may" is what the Legislature has done, I think you have to abide by that, but the -- but the only thing -- the only point I have to make is that we see in these on either side what Judge Yelenosky's point was, is that in either defending one of these or in bringing one of these you've got attorney's fees related to the case, then you've got attorney's fees specific in concept to this motion, and then you've got the question of attorney's fees specific to the cause of action in the motion that was granted versus the cause of action that was potentially denied.

And if you start macromanaging or not allowing for the flexibility to address that, which is the real world on the ground of how these potentially go down, you're at real risk, I think, of not addressing kind of the discretion of what the Supreme Court has said you have

to have to merit the attorney's fees versus some mandate; and, yeah, there are some situations where either before or after the hearing somebody says, "I'll only" -- "I'll only ask for five." And you say, "Okay." Or you beat it back and you say, "I won't ask for anything." Because, you know, we defeated it.

It's dangerous to kind of -- as Judge Evans put it, to put everything in the rule and not allow for some flexibility, especially now that you're giving kind of this -- I mean, the effect of this is going to be broadening this practice. You're going to -- if you thought you saw a lot of 91a's before, you're going to get 12(b)(6) world. This is 12(b)(6) world come to Texas.

MR. GILSTRAP: Exactly.

MR. PERDUE: And so the effect of this in the end game is going to have a real broad effect on Texas practice. If you start then micromanaging the attorney's fees side of it in every single case, you really put, I think -- not to speak for the judges but -- not to speak for the parties, you take away the flexibility of the reality of what's going on here.

CHAIRMAN BABCOCK: Jim, based on what you're saying, what would you do with this last sentence?

MR. PERDUE: I'd delete it.

CHAIRMAN BABCOCK: Okay. Justice

Christopher.

HONORABLE TRACY CHRISTOPHER: Well, when you look at 91a.6 it says, "Hearing, no evidence considered." And then it says except as required by 91a.7 you don't consider evidence, and then you go down to 91a.7, and you must consider evidence on attorney's fees. Your complaints are -- or your concerns apply to the current version as well as a new version.

MR. PERDUE: I didn't like the current version.

HONORABLE TRACY CHRISTOPHER: Well, I mean, I think that we should keep the part that there has to be evidence for attorney's fees, if you decide to award them, and people can still agree and work around it just like they currently do.

MR. PERDUE: Well, so the response to that will be, you know, "My client's read the rule and he says or she says I can't do that. I can't work around it, Jim. Sorry, we're going to have to have a hearing, and I'm going to ask for the full freight." Not being rude, just my client says I have to do that.

HONORABLE TRACY CHRISTOPHER: But that's what it says now.

MR. PERDUE: That's what the rule says, but that doesn't say that's what a party has to do.

CHAIRMAN BABCOCK: Justice Kelly.

HONORABLE PETER KELLY: 91a motions come early in the litigation, so in theory costs should be de minimis, but they do have a factor -- there are statutes and rules governing allocation and collection of costs, in particular 31.007(b) of the CPRC and TRCP 131. Curiously, the CPRC says costs may be awarded to the prevailing party. Rule 131 says they shall be awarded to the prevailing party, and if we're going to be fixing "mays" and "shalls," maybe we want to go in and fix 131 as well. But if we're going to adopt or change the rules with regard to 91a costs, they should probably be -- make reference to or at least be consonant with the CPRC and the rules that are already in place, including 131 and 141, which says the departure -- the trial court doesn't have to award all costs on good cause shown, but there already is a structure in place for the awarding of costs, and this -- instead of inventing a new structure maybe we should make it parallel, but we should also fix 131 to be permissive rather than mandatory because it deviates from the CPRC.

CHAIRMAN BABCOCK: Yeah, Jim.

MR. PERDUE: So I know Peter reads the law, but I'm pretty sure there's a Supreme Court case dealing with an El Paso situation where the judge in his or her

discretion did not award the cost bill against a pro se litigant and the Supreme Court said, nope, you can't do that, you've got to.

CHAIRMAN BABCOCK: Okay.

HONORABLE PETER KELLY: Yes. I had a parallel case.

MR. ORSINGER: What I'm thinking, we have a deadline of September 1 to change one word in this rule. We have all the time we need to change all of the rest of the rules and all of the other, so one possible way out of this situation is to make the change that we're required to make by September 1, and then let's investigate the correlation with Rule 131, 141, and the Civil Practice and Remedies Code when we have more opportunity to investigate it and have discussions of solutions.

CHAIRMAN BABCOCK: Well, we have a consensus, don't we, about changing "must" to "may," because that's what the statute says.

MR. ORSINGER: Yeah, I think it's a vote with a gun pointed to our head.

CHAIRMAN BABCOCK: Right. It's a collaborative process.

MR. ORSINGER: There we go. Yeah. I forgot, it's collaborative.

CHAIRMAN BABCOCK: It's not a gun thing.

MR. ORSINGER: That's right. We stand still, and they point the gun.

CHAIRMAN BABCOCK: So but while we're at it, I'm kind of in a voting mood, so if we took your language and substituted that for the last sentence, I'd like to see what the committee thinks about that. So read your language, and everybody that is in favor of it I'm going to ask to raise their hand in a second, but read it.

MR. ORSINGER: Well, that would require me to rethink it here. Let me pull the rule up.

MR. SCHENKKAN: Chip, while he's looking for the language before you actually take the vote on it, now that my attention has been called to 91a.6 --

CHAIRMAN BABCOCK: Yes.

MR. SCHENKKAN: -- which I hadn't noticed before, because 91a.6 says except as required by 91a.7 the judge may not -- the court may not consider evidence, I think we now have to have either the existing last sentence of 91a.7 or Richard's amended version of it.

CHAIRMAN BABCOCK: Yeah.

MR. SCHENKKAN: But we can't have silence in 91a.7 on evidence if we're going to leave the language in 91a.6 that says you don't hear evidence except as required by 91a.7.

CHAIRMAN BABCOCK: Yeah, the thing I liked

about Richard's was that he takes into account --

MR. SCHENKKAN: Right.

CHAIRMAN BABCOCK: -- all of those things, including the fact that we're now making it discretionary as opposed to mandatory.

MR. SCHENKKAN: And I agree with that.

MR. ORSINGER: Okay. So what the proposal is, that "Any award of evidence or costs must be based upon" --

CHAIRMAN BABCOCK: No, wait. Go back to that. Any award of what?

MR. ORSINGER: I'm sorry. I jumbled it. "Any award of costs or fees must be based upon evidence."

HONORABLE DAVID EVANS: How about just "fees," because that's the only -- cost is determined by another part of the rule. If you're going to get a dismissal anyway and really the rule only speaks to awarding reasonable fees, and I just looked at this. We don't need evidence on costs. That's a cost bill.

MR. ORSINGER: Right. I agree.

CHAIRMAN BABCOCK: But the current rule says "costs."

HONORABLE DAVID EVANS: It shouldn't say "costs."

MR. ORSINGER: Well, but the question is --

I mean, courts routinely award costs without even knowing what they are because you go to the district clerk to figure out what they are after you get your judgment.

CHAIRMAN BABCOCK: I'm just saying, but you're going to adopt -- you're going to accept Judge Evans' amendment.

MR. ORSINGER: Yes, I am.

CHAIRMAN BABCOCK: Read it with his amendment.

MR. ORSINGER: "Any award of fees must be based upon evidence." Or "evidence presented." Okay. "Based on evidence."

CHAIRMAN BABCOCK: Let's make sure about what this sentence is going to say.

HONORABLE PETER KELLY: Court reporter fees are taxable court costs.

MR. ORSINGER: Right.

HONORABLE PETER KELLY: And they're not in the custody of the clerk of the court, so you have to introduce evidence of your stenographic fees.

MR. ORSINGER: Well, you do? I mean, when you go -- when you get a judgment that awards costs, don't you go to the district clerk and then that's where they assemble the cost information?

HONORABLE PETER KELLY: But how do they get

the court reporter fees, deposition fees?

MR. ORSINGER: I haven't done this in a while, but I used to have to get a certificate from the court.

CHAIRMAN BABCOCK: You haven't won a case in a while?

MR. ORSINGER: I don't --

CHAIRMAN BABCOCK: He's a little rusty on that.

MR. ORSINGER: I endorse what Judge Evans said, that "Any award of attorney's fees must be based upon evidence," period.

CHAIRMAN BABCOCK: Okay. That's what we're voting on. Roger, you want to say something before we vote?

MR. HUGHES: Well, just about the costs. Generally speaking if you're talking about deposition fees, the court reporters file a certificate of costs as they go along, so those will be in the record.

CHAIRMAN BABCOCK: Yeah.

MR. HUGHES: And the last time I researched this, which was a month ago, the court just says, "I tax court costs." It's up to the clerk of the court then to calculate them, and if you don't like what the clerk of the court does, you then go back to the judge and ask to

have them taxed. So unless you have something that's not filed in the court with the clerk of the court such as mediation fees, and I don't think that's going to be involved, the only thing you're going to be hearing evidence on will be attorney's fees and what we call attorney's fees and expenses over -- attorney overhead and attorney hourly costs, et cetera.

CHAIRMAN BABCOCK: So you like the way he's amended it?

MR. HUGHES: I still favor the one word change. I think the courts are not going to get wrapped around an axle that I'm not going to hear any evidence of it.

CHAIRMAN BABCOCK: Okay. Yeah, Buddy.

MR. LOW: In the anti-SLAPP attorney's fees it doesn't say, you know, it has to be on evidence. I mean, well, how does that read? Reasonable attorney's fees.

CHAIRMAN BABCOCK: Yeah.

MR. LOW: You know, and you've got to prove what your fees are, and most any award of anything has to be based on some evidence, and this is of record. You know, it's the court reporter's record or court's record or something, so I -- I mean, I don't know why that sentence, based on evidence, because I've never known an

award that didn't have to be based on evidence or a record.

CHAIRMAN BABCOCK: Yeah. I think that's right. Yeah, Lamont.

MR. JEFFERSON: Just real quick, I agree that, what was it, 91a.6 would have to be changed and so if we're going to vote about, you know, whether to include the sentence or not, I think the revised sentence is fine unless we're going to rewrite everything, and so we have the -- so there is a -- that's the downside to me of having superfluous and potentially harmful instructions specific to a rule that suggests that it's -- there's something unique about this situation that's not in other situations where attorney's fees are awarded and whatever unintended consequences that might result in, who knows.

CHAIRMAN BABCOCK: Yeah.

MR. JEFFERSON: But if we're not going to change the whole rule, then, yeah, I'd vote to just change --

CHAIRMAN BABCOCK: Levi.

MR. JEFFERSON: -- "must" to "may" and make that change.

HONORABLE LEVI BENTON: To address Jim Perdue's comment and Steve's comment or Jim's client who says, "I read the rule, you've got to do the full thing,"

evidence includes the agreement or stipulation of the parties about what is reasonable and necessary. That's competent sufficient evidence. We agree? That's evidence.

HONORABLE STEPHEN YELENOSKY: Well --

CHAIRMAN BABCOCK: Stephen.

HONORABLE STEPHEN YELENOSKY: Well, I mean, I wasn't aware of what Justice Christopher just pointed out about you shall not take evidence, but there is a difference between when it says you shall not take evidence, there's a difference between saying anything more than "except for attorney's fees the court shall not take evidence," which then means the normal rules apply with respect to attorney's fees, because even -- you know, any other way you're trying to say that all of the different possibilities for attorney's fees consistent with common law and other statutes are there, and all you're saying is you shall not consider evidence, which is an exception to what we usually do, but except for attorney's fees and then that pulls in everything else.

HONORABLE LEVI BENTON: Including agreements and stipulations.

HONORABLE STEPHEN YELENOSKY: Yeah. Yeah. It pulls into everything else, which we -- which has been said that we shouldn't try to detail because it's a matter

of common law and statute, and to try to repeat all of that in particular -- and I don't -- you know, if we're just going to change the one word, I agree with that, but my feeling on it is the exception is not to take evidence except for attorney's fees.

CHAIRMAN BABCOCK: Okay. Richard, read one more time, and then we're for sure going to vote.

MR. ORSINGER: Okay. "An award of fees must be based on evidence."

MR. MUNZINGER: Fees or attorney's fees?

MR. ORSINGER: Attorney's fees. Well, the rule says "fees," but we can add "attorney." It says -- the last sentence says "fees," but we can certainly say "attorney's fees" because that's even clearer.

MR. MUNZINGER: I was just asking it because you phrased it two ways.

MR. ORSINGER: Right.

MR. MUNZINGER: In the discussion I want to make sure the one we're voting on is the one that you -- you are stating.

MR. ORSINGER: It is.

CHAIRMAN BABCOCK: Yeah, so say it again.

MR. ORSINGER: "An award of attorney's fees must be based on evidence."

CHAIRMAN BABCOCK: Justice Kelly.

HONORABLE PETER KELLY: Except that a stipulation or an agreement is not evidence, is actually a waiver of proof, and the way that's drafted it would not allow award of attorney's fees based on a stipulation.

CHAIRMAN BABCOCK: Levi.

HONORABLE LEVI BENTON: I know that Jim Perdue said Peter Kelly reads the law, and he didn't say Levi Benton reads the law.

CHAIRMAN BABCOCK: Yeah, I didn't hear him say that.

HONORABLE LEVI BENTON: I didn't hear him say that, but I've never heard that a stipulation or an agreement is not evidence. It is evidence, and if the First Court wrote what he just said, I would come back to service just to overrule that.

MR. DAWSON: Let's hope that doesn't happen.

HONORABLE DAVID EVANS: At a higher rate of pay, may I add.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: All of these concerns are already in the current version of the rule that no one is having trouble with, so this is an easy fix. Vote for it.

CHAIRMAN BABCOCK: All right. Everybody in favor, everybody in favor raise your hand.

MR. PERDUE: Richard's revised last sentence.

HONORABLE DAVID EVANS: I'm voting with Justice Christopher. I don't care.

MR. DAWSON: Levi.

HONORABLE LEVI BENTON: Well, there's still a problem with it, and we cut off discussion.

CHAIRMAN BABCOCK: All right. Everybody against? So by 26 to 1 Richard has finally won one.

MR. ORSINGER: That was supposed to be a three-minute deal, and Frank decided to bring this up.

CHAIRMAN BABCOCK: Yeah, that was Frank's problem. Justice Christopher.

HONORABLE TRACY CHRISTOPHER: The title of 91a.7 will also need to be changed to delete "required."

CHAIRMAN BABCOCK: Whooo.

MR. ORSINGER: Do we have to vote on that?

CHAIRMAN BABCOCK: No.

MR. ORSINGER: Okay. Let's just drop the word "required" and just say "Award of costs and attorney's fees," period?

HONORABLE TRACY CHRISTOPHER: Yes.

CHAIRMAN BABCOCK: Yeah.

MR. ORSINGER: What a catch there.

CHAIRMAN BABCOCK: That is a nice catch,

reading these titles. Okay. We got anything else to talk about on this, Richard?

MR. ORSINGER: That's it.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: I just want to say -- point out one thing. I think Jim Perdue is right.

CHAIRMAN BABCOCK: Hang on. Listen, everybody.

MR. ORSINGER: Speak up.

MR. GILSTRAP: I think Jim Perdue is right. 12(b)(6) is coming to Texas courts. If you were on the committee back when we initially drafted 91a, that was not the intent. Lonny Hoffman I think was pretty eloquent in saying we don't -- we don't want to have 12(b)(6), and he cited the famous Ashcroft against Iqbal case in which the Court defined how you do 12(b)(6), and we talked about, well, this would only apply in really marginal cases such as someone alleging that the martians were bugging their phone or something. I mean, serious. That's the type of talk we had, and but it hadn't worked out that way.

CHAIRMAN BABCOCK: No, events have overtaken our discussion.

MR. GILSTRAP: And with the removal of the attorney -- the idea was, well, people wouldn't file them because they might get hit -- defendant might get hit with

attorney's fees. Well, that's no longer the problem, and it's no longer mandatory, so I just want to mark that, you know, we didn't intend this, but I guess someone did.

CHAIRMAN BABCOCK: Well, you've got to listen to the Legislature for sure. Okay. Anything else on this rule? I'm going to mark it as done. Pam is -- Pam Baron, who has got the next item, has asked that it be moved to 2:00 o'clock, so we will do that. So, Jim, you got anything to say about will kit forms?

MR. PERDUE: Oh, you jumped us. Sure.

CHAIRMAN BABCOCK: Yeah, without notice, I might add.

MR. PERDUE: So which tab am I on this one? I'm so sorry.

CHAIRMAN BABCOCK: That would be nine.

MS. CORTELL: E, Tab E.

CHAIRMAN BABCOCK: Item 9 on the agenda.

MS. CORTELL: Tab E.

MR. PERDUE: All right. So Tab E, which is the referral letter itself, and you can skip the first two pages, and then you get the actual report to the Texas Supreme Court from the Supreme Court's Texas Probate Forms Task Force. This is actually not a product of our most recent 2019 Legislature. This is a product of a legislative mandate set in 2015, and I would say that the

interval amount of time hopefully would speak for itself to this committee and the level of work that was done by the task force.

The task force report -- well, let's start with the history. So Senate Bill 512 was passed during the '15 session, and the Court then enters an order establishing the probate forms task force in response to that legislation, January 21, 2016. By way of editorial comment that might tell this committee that the Court thought that people who were more versed in probate law should be doing this rather than this committee, and those people are this task force. Judge Spencer chaired the task force. You can see the members of the task force, including Trish McAllister, who is here, I think. The -- but you have both jurists and practitioners specializing in probate, of which I would tell you that the subcommittee on judicial mandates didn't really readily identify any probate specialists. I read the probate forms task force report, circulated it to the subcommittee, and every member of the subcommittee read the report and then looked through the forms as offered.

I think the report, frankly, speaks for itself, and it shows an amount of effort and revision and effort and revision that represents three and a half years of work product that led to them starting at page 13 of

your PDF or of the print, the actual will forms. The challenge in the will forms was to create a form practice for something that we all know is dangerously not necessarily will form practice. Setting aside the policy conversations about forms, this is a judicial mandate. There was a mandate that the Court would have a task force develop forms and that mandate then given to the members of this particular task force took it and the solution then comes with a four-pronged concept.

They considered others, but you get down to essentially a four form will proposal, married with no children will, married with children will, an unmarried with no children will, and an unmarried with children will. The forms then necessarily distinguish themselves because of the probate issues obviously with children and with marriage. Those two bifurcations create your four prongs, and there are disclaimers galore.

The language I think that any layperson who were to pick this up in a Legal Aid clinic or whatever is being directed as best as the task force can that the advice of a lawyer is strongly recommended, but again, you've got a policy mandate from the Legislature. You've got a work done by people in the practice to the best -- I would say best practices, to the best of my knowledge, because I don't know, but it seems to represent best

practices, and a revision process that represented a consistent effort to try to simplify the language to serve the policy goal that the general public could utilize the form.

I circulated it to the committee. Judge Evans was the only one to respond who said -- and I'll let him speak for himself -- the report of the task force represents good work. I asked the committee if anybody identified anything in particular in the forms. Nobody did. I don't pretend to be able to. If we -- this committee certainly has the ability to tweak and revise anything so simple as a one word change to a statute, so I recognize --

CHAIRMAN BABCOCK: So you have high hopes for it.

MR. PERDUE: So I recognize that, you know, the invitation here in concept is -- but I don't even have a written report to give you because the task force report, the six pages, I think represents work product of the people who specialize in it, who understood what they were doing, and spent three and a half years doing exactly that. That is the will of the legislative mandate subcommittee unanimously as well, and our report is that we unanimously recommend that the Court -- or this committee accept the work of the state -- Texas Supreme

Court's Will Forms Task Force as is.

CHAIRMAN BABCOCK: Great.

MR. PERDUE: So endeth Perdue's report.

CHAIRMAN BABCOCK: All right. Thank you, Jim. Discussion? Richard.

MR. MUNZINGER: If I understand the law, I am free to do with my estate largely what I want to do with my estate. When I went to law school the rule was in Texas you couldn't leave a trust fund to take care of your cats. That has apparently changed I'm told, and now I can set up a trust to take care of my cats. Anywhere in here does the court say to the proposed testator or testatrix you may do what you want with your property. I look at the forms, and they assume that I want to leave things to my children. Rusty has experience with a client who wanted to leave things to his mistress. That's lawful.

MR. HARDIN: Actually, he didn't want to leave her anything.

HONORABLE TOM GRAY: But just saying if he did, just saying.

MR. MUNZINGER: But my point is -- my point is justifiably the committee assumes that those who will use these forms are going to leave things to their children, their grandchildren, et cetera, et cetera. At the same time they remain citizens. At the same time this

is the Supreme Court of the State of Texas, which is promulgating forms. Does it not have an obligation to say to the citizens, "You may do what you want with your property"? These forms are designed for those who wish to leave things to their children, grandchildren, wife, et cetera, but you may do whatever in the dickens you want with your property. That seems to be the state law. And I think that somewhere or another the Supreme Court should say that.

These -- this is not -- the philosophy behind this is laudable. We're trying to save money for people who don't have money to go to lawyers and have lawyers draft their wills. The other side of the coin is there are a lot of people who don't want to spend money on lawyers who have money to spend money on lawyers who will voluntarily choose these forms. Are they any less entitled if it is the Supreme Court giving the advice to the advice that a lawyer would give them? I would say to a testator who came to me, "You may do what you want with your property." I have that duty to him as a lawyer. I think that's my duty, and so the testator says, "Well, you know, by God, I didn't know that. I thought I had to leave everything to my children." No, you can do -- "Well, you mean to tell me I can leave it to my mistress?" You sure can. I have a duty to give that advice to my

client. Does the Supreme Court have less of a duty? I think somewhere in here that needs to be addressed. I'm finished.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: I mean, I don't think you can really -- I agree with him on everything, but one thing, I don't think you can do anything. You couldn't say, "I leave all of my property to whoever will kill Bill Jones." I mean, you can't do that. I know people that would have loved to have left their property for that.

MR. SCHENKKAN: Well, you can do it. It's just not effective.

MR. LOW: I might be one of them that was on the receiving end of that, but there are certain things that are against public policy or something like that. Basically what Richard says is within the law, if it doesn't violate some law, you can leave property to anybody you want to really, but it's not that you can just do what you want to with it.

CHAIRMAN BABCOCK: Yeah. Richard Orsinger.

MR. ORSINGER: So, Richard, on page three of four in the instructions they have the definition of the term "beneficiary." What it means, "Anyone you choose to receive property or other items in your will." So there's at least a suggestion there that a possible beneficiary is

just whoever you want it to be. One of the things I noticed in here, though, is that there's no suggestion or even -- unless I missed it somewhere, to leave something to a charity, and that it seems to me is an option that a lot of people might like to have built into their form. I may have missed it. I didn't see it, but --

MR. MUNZINGER: My only point is, is that it ought to be that broad. There should be something in here that would take that into consideration. I agree with you. It should be to an organization, not necessarily left to a person. I can leave my money to the Republican Party, Democratic Party. It doesn't have to be a charity. It can be any organization essentially that I want.

MR. ORSINGER: But generally speaking, these -- although this is long and it's going to be complicated I suppose if you ever litigate something that's so many pages long, but I think they do a great job of simplifying the concepts so that someone can make a decision without the assistance of a lawyer. I'm fearful that there will be foul-ups, but I do think they did a good job to my eye.

CHAIRMAN BABCOCK: Nobody is suggesting otherwise. Richard is just suggesting a tweak, an added sentence or so. Justice Kelly.

HONORABLE PETER KELLY: I think it's there

already. If you go to page four of ten of the forms, section two, "Giving my property." Choice one is giving everything to my children. Choice two is "I give everything I own except for any specific gifts in equal shares to the following persons listed below." And perhaps that can be tweaked to say, "Persons can include charities, Democratic Party," or whatever else, whatever definition you want to put in there.

CHAIRMAN BABCOCK: Let's stop it at Democratic Party, huh?

HONORABLE PETER KELLY: Or the Republican Party if you want to. Trump International Hotels if you want to. Because it's not -- but I think those two choices can be tweaked to clarify that.

CHAIRMAN BABCOCK: Lamont, did you have a comment?

MR. JEFFERSON: Yeah, I think just following up on that, I think it is in here. It could be highlighted if the committee thinks it should be -- that is, the idea that you could do whatever you want with your property, but each of these forms has a very clear suggestion about when that particular form is appropriate and then refers the reader to other forms if that one doesn't work, and when you go through just that -- for instance, I'm looking at page 17 of 52 of the PDF, which

1 says, "This is the right will form if," and it's got these
2 categories; and it says, "If this is not the right will
3 form there are other forms that may apply to you," all
4 suggesting that there are other -- other potential ways to
5 leave your -- to leave your gifts, leave your estate.
6 So, I mean, I think you could add in each
7 of -- each one of these boxes that, you know, something to
8 the effect of there may not -- "None of the forms in this
9 packet may be suitable for your situation" or words to
10 that effect, but I think those are really changes of a
11 margin. It's a really good -- really good job.
12 CHAIRMAN BABCOCK: Yeah. Justice
13 Christopher.
14 HONORABLE TRACY CHRISTOPHER: There are
15 assets that pass outside of a will, and with the use of
16 the transfer upon death deed it's a way to transfer your
17 real property without going through a will, and I'm not a
18 hundred percent sure, but I believe that the transfer upon
19 death deed trumps what's in your will.
20 MR. ORSINGER: Sure. Sure.
21 HONORABLE TRACY CHRISTOPHER: Your life
22 insurance designation trumps what's in your will. Your
23 bank accounts that say joint tenancy with right of
24 survivorship to X trumps what's in your will, and to me
25 that needs to be addressed somewhere in here.

MR. ORSINGER: Sure does. Sure does.

HONORABLE TRACY CHRISTOPHER: Because otherwise people will think if they did a transfer on death deed, well, now I've done a will and I'm giving it to somebody different.

CHAIRMAN BABCOCK: Stephen.

HONORABLE STEPHEN YELENOSKY: Well, I mean, as essentially the conversation has pointed out, there are all kinds of different things that could -- could be addressed here, but we need to address it for the people who would be using this form who don't have lawyers, and 95 percent of them or whatever are going to use this form and leave it to children or have no children. Maybe we need a comment in there, even -- we could have Richard Munzinger's comment put in there that says you can leave this to your mistress if you want, Richard Munzinger, but there could be a comment in there that basically disclaims that these are the only ways to do it, but I'm really against changing the form to accommodate all these different ways, which will rarely be used and, therefore, will be unnecessarily complex for people who don't have lawyers.

CHAIRMAN BABCOCK: Yeah. Yeah, Marcy.

MS. GREER: As I'm understanding you, you're not saying change the form but just have an instruction so

that people know that the will doesn't trump. Because if you go get a bank account it typically has the joint tenant with right of survivorship, and that's the biggest problem I think is out there. Not everybody signs the deeds, but we might as well list those because people think that if the bank account is opened, it's now going to go under the will, and it's not.

HONORABLE TRACY CHRISTOPHER: I'm sorry. It is in there. I missed it. I do think it needs to be a little bolder because I think truthfully the vast majority of people can avoid the need to probate a will through those transfers, so --

MR. PERDUE: So the transfer on death language is in here?

MS. McALLISTER: In the instructions.

HONORABLE TRACY CHRISTOPHER: It's in the instruction, and I just missed it, under "Important information," and I mean, really I think if you went to a Legal Aid clinic, the Legal Aid clinic person would say, "Okay, you've got a house, let's do the transfer on death deed. You've got a checking account and the savings account, and we're going to put so-and-so's name on it," and you're done.

MR. PERDUE: Yeah.

HONORABLE TRACY CHRISTOPHER: So that's my

only suggestion, that that needs to be a little bit more emphasized.

CHAIRMAN BABCOCK: Okay. Buddy.

MR. LOW: Chip, talking about organizations, it says, "Beneficiary, anyone you choose." That should be amended to say "or organization." It says one. What about a holographic will? Is that still recognized in Texas, if somebody just says I want to write my own and let anybody --

HONORABLE TOM GRAY: It better be because that's all I've got.

MR. LOW: I mean --

CHAIRMAN BABCOCK: Of course, you don't have to worry about it.

MR. LOW: It doesn't tell them they can write it out and what you have to do to do that. They should address. I know the wills lawyers don't like forms and they don't like holographic wills, but maybe we should have some reference to that anyway for people.

CHAIRMAN BABCOCK: Yeah.

MR. LOW: If they don't want to fill out a form, just say, "I leave everything to whomever." Richard.

CHAIRMAN BABCOCK: Good point. Eduardo.

MR. RODRIGUEZ: At the risk of getting

yelled at --

CHAIRMAN BABCOCK: Nobody is yelling at you.

MR. RODRIGUEZ: There's words in these documents that say you can choose to leave property to anyone. I don't think we need to do anything more than that. I mean, we originally started this project out to help those -- to help the poor that didn't have funds to hire an attorney. I mean, we're talking about giving people instruction in this -- in this thing that for people that want to leave their property to their dogs or animals or whatever, I just think we're going far away from -- from what we originally intended to do in this process, and in doing that we are -- we are effectively affecting the livelihood of attorneys in the state, and I am all in favor of helping the less fortunate and those that need help, and I've been doing that for the last 15 or so years, but I think at some point we can't be out there trying to draft stuff that helps people that can afford to hire an attorney.

CHAIRMAN BABCOCK: Tom.

MR. RINEY: I'm not going to yell at Eduardo. I agree with him, and I think we've really got to get back to what we're doing, which is a legislative mandate to develop some forms in limited circumstances. From my extremely limited knowledge of estate planning,

all of these comments about what it would be nice for people to know are absolutely correct. In fact, I've learned a few things, but we -- these are forms to fit specific limited situations. What we're talking about is you know what these people really need is a lawyer to explain all of their different options, and we can't do that in forms.

So I think these forms are well-drafted in my judgment. They do not -- I mean, I've got serious reservations about us providing forms to laypeople, and once we start putting instructions in there, the instructions in there are fairly good, they're fairly simple, and the more we add, the more complicated they become, and I think less is more in this situation.

CHAIRMAN BABCOCK: Uh-huh. Yeah, Justice Gray.

HONORABLE TOM GRAY: This is where I started my practice. I've probated form -- a form will. I've probated holographic wills. I've contested a form will. So -- and the form will that I saw and that we contested was one page, front and back, had the instructions on it. It was designed to work in many states, didn't work perfect in Texas obviously because we had litigation over it, but I want to echo what Tom just said about it needs to be simple, and I'll be very candid.

I got stuck on this project when I read the title of the first document that I got to, which was the form, because I looked at it and I said, you know, I got married to a woman with some children and she died, and so then I got remarried, and we had some children, and I got divorced. And so then I got remarried, so am I -- am I widowed? Am I divorced? You know, where am I in this stage?

MR. ORSINGER: You're in trouble.

MR. WATSON: You need a lawyer is what you need.

HONORABLE TOM GRAY: And I've got no money, but I do have one gun that I go hunting with on a regular basis, and I want to leave it to somebody. You know, it was my grandaddy's gun. So I'm just telling you, while I admire and I understand the work that has gone into this, I'm probably on the other end of the spectrum from what you've heard, and Richard's right. Everybody, the comments are right, but this is too darn complicated to have these four different forms. It needs to -- to accomplish what Eduardo wants to accomplish, the situation where it effectively deals with 99 percent of the issues that people using these forms will want to address, this is too complicated.

CHAIRMAN BABCOCK: Richard, then Skip.

MR. ORSINGER: So I hope they didn't disband the task force, because the legislation requires that the form be translated into Spanish, but the Spanish version of it can't be filed in court. So we're going to have Spanish forms, but those Spanish forms are going to have to be filled out on the English forms by somebody that can't read English. Okay. So it seems to me the only way to make that work is to combine the two forms together so that you have the English instructions followed by the Spanish translation and then you fill in the blanks, except the statute says the English language version in the form must be submitted to the probate court. So what do you do if your will is both Spanish and English and then you're going to get into an interpretation fight, and we don't know which language? Do you ignore the Spanish, which is the only one they were thinking? So at any rate I hope they didn't disband the task force, but there is going to be some real complexity in translating these forms into Spanish so that they can be filled out in English by someone that doesn't read or write English.

CHAIRMAN BABCOCK: Skip, and then, hey, Trish -- is Trish down there?

MS. McALLISTER: Yeah.

CHAIRMAN BABCOCK: Yes, there you are. You might respond to Richard in a second after Skip says his

piece.

MR. WATSON: Well, mine isn't much. I mean, I agree with Tom Riney. You know, this is a marvelous effort. It's limited purpose. It's been done. We need to adopt it. That said, I agree with Tracy that I don't think she and I are the only ones who missed "Your new will does not change the current beneficiary of." I just think that should be bold. That's all.

CHAIRMAN BABCOCK: Okay. Trish, did you have any response to Richard's --

MS. McALLISTER: I do have a response to Richard, which is that we had a long conversation actually with the Chief before we even started the family forms years and years and years ago about English/Spanish because obviously that's a big thing; and, you know, the plan is always to have the English/Spanish so in the same form so there's not one form and then the next. And the plan is, is to have someone who is licensed and, you know, an interpreter -- there's only 560 of them in the state -- to translate it and have it be a certified translation, just like we do in court when we have a document that's not in English language. We have to get that translated into English by a certified -- or by a licensed interpreter.

So that's the plan, to make it in

English/Spanish form, and that actually was the understanding. I mean, you know, the legislation, I was there during the whole -- during that process, and that was when Justice Guzman and I testified, and the understanding was that that was what would happen, although maybe the legislation itself doesn't reflect that.

CHAIRMAN BABCOCK: Okay.

MR. MUNZINGER: Could I ask a question? Does the law -- does the law require that the form be translated into Spanish?

MR. ORSINGER: Yes.

MR. MUNZINGER: That's what I thought.

MS. McALLISTER: Yeah.

MR. MUNZINGER: Yeah, it does. And this raises a problem about translation, because bear in mind, this is an official publication of an -- the Supreme Court of the State of Texas, and so there should not be any argument over the translation of the document. It can't be left open to private parties to interpret it. It's got to be interpreted under the auspices of the Supreme Court. It's the government of the State of Texas saying to a segment of its citizenry this is what you can do to make sure your little boy gets your property. Now, we're not going to have a fight over what it says in Spanish. It's

the Supreme Court that is saying it in Spanish because it was told to do so by the Legislature.

So there's got to be a formal interpretation, and those of us who practice on the border know that you can have translators get into some pretty serious fights in interpreting what appears to be a very simple document, and one verb can have -- in Spanish can have six -- just like in English, can have six or seven meanings, and in what sense was that verb used? It's a problem. So you've got to have -- it seems to me at least that if the government is going to say to a citizen you may rely on a form that we, the government, have prepared by the highest judicial agency contemplated by the Constitution of the State of Texas and it did so in Spanish, you can trust the Spanish. And this is what the Spanish says in English right below it or on the form attached. There's no fight over the translation. You can't have a fight over the translation if you're to accomplish your purpose here.

CHAIRMAN BABCOCK: I think that's why Trish said they're going to get a certified translator to do it. Kimberly.

MS. PHILLIPS: No, I don't have anything.

CHAIRMAN BABCOCK: Oh, I'm sorry. Pete, you had your hand up. Then Roger.

MR. SCHENKKAN: I just want to come back one more time to the "Your new will does not change the current beneficiary of your bank." I think the problem is not just that it's not bold enough. It's that it's not -- it's sort of a passive description of your problem. It doesn't explain it clearly enough that much of what you care about may go to the people that you said when you filled out your insurance policy, and if you want to change that, you need to change your insurance policy beneficiary designation. I mean, there's a little more to it, I think, in terms of getting people to understand what they need to do to do what they want to do in those contexts, and I missed it entirely. I was one of the ones in the subcommittee who got this thing and flipped all the way through it and didn't see that at all. So I think the odds that somebody who is trying to do this without a lawyer would understand that are zero at the moment.

CHAIRMAN BABCOCK: Roger.

MR. HUGHES: Is it that the English language one is going to control at court?

MR. MUNZINGER: That's what the statute seems to say.

MR. HUGHES: Well, aside from that problem, it's very all nice and well to say that we'll just have them get certified translators. Maybe where you live they

are plentiful and on every street corner, but not along the border. If you go out to some of the more rural counties or Starr County or some of the ones further up the river, trying to find a certified translator, it suddenly puts you in the realm of you might as well go to an attorney.

And then the second one is I realize that's what the Legislature said, but a lot of these people that need the Spanish language, they may be -- they may not read Spanish all that well, but they can sure -- they sure understand it real well, more -- better than they understand English, so when it's read to them in Spanish, they know what it meant and then you tell them that's what the English says. Maybe yes and maybe no. So I -- the alternative, you know, certified translators, if that's built into the statute, fine, but there's got -- if we're going to say the English language controls, there's got to be some method of giving them a reliable translation that they can work on that doesn't involve the expense of a certified translator.

MR. ORSINGER: No, Chip --

CHAIRMAN BABCOCK: Stephen, then Buddy, then Richard.

MR. ORSINGER: If I can respond to that, I think that -- I think that the proposition was that the

OCA or the state of Texas would employ the certified translator to make the official translation.

CHAIRMAN BABCOCK: Right.

MR. ORSINGER: Not that each individual testator would have a translator.

CHAIRMAN BABCOCK: Right. That's how I understood it. Stephen.

HONORABLE STEPHEN YELENOSKY: And I don't know anything about probate, but is the idea that the translation would occur at the point where it's admitted into probate?

MR. ORSINGER: No.

MS. NEWTON: I think we're going to have them translated before they're promulgated and made available to the public, right, Trish?

MS. McALLISTER: Correct. Right.

MS. NEWTON: So the forms will be bilingual when they're approved and made available to the public.

HONORABLE STEPHEN YELENOSKY: Okay. And so the translation would come at what point? If somebody -- is there a blank where you can write? I mean, can you write out certain things that aren't just checkboxes?

MS. McALLISTER: The way they physically look is you will -- you will have this exact same form and then there will be a line of Spanish underneath the

English, so when they are filling it out it will only be done one time, the translation will only be done one time to all of the forms, and then when the person is reading them they will see the Spanish right underneath the English, and they will fill out the blank in English I guess. They'll have to get somebody to help them if they don't write English.

HONORABLE STEPHEN YELENOSKY: So I'm still not understanding. So when does the certified translator come in?

MS. McALLISTER: It's just like Martha said. Basically what will happen is we will send them to a licensed -- really is the correct term -- licensed interpreter who has been certified by the state to be proficient in Spanish in the legal realm with the legal terminology, slang, all of that other stuff, and they will translate the documents, all these documents.

HONORABLE STEPHEN YELENOSKY: Oh.

MS. McALLISTER: And then the Court will approve those documents, just like when you -- when you translate a document and submit it to court now, you have a Spanish document or any other document, you have to have a licensed translator do that and certify it that it's in the right --

HONORABLE STEPHEN YELENOSKY: Yeah. And, I

mean, you don't get around the translation problem. You know, you're going to have it in court perhaps with a judge, most often a judge who doesn't speak Spanish. There's going to be a translation at some point. That's a problem all the time. I've sat in court and heard a certified court reporter translate something in Spanish, and my Spanish ain't great, but it was enough to know that that was an abbreviation of what the person really said. So, you know, it's a problem that exists, and I don't think this makes it any worse.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Chip, since the committee spent a lot of time on this, wouldn't it be appropriate for us to submit to them the questions we have and see if they've considered them or whether they want to change rather than us trying to rewrite their rules?

CHAIRMAN BABCOCK: Yeah, I don't think the idea is that we're going to rewrite their rules. I think this discussion is going to be considered by the Court.

MR. LOW: Oh, okay. All right. Okay.

CHAIRMAN BABCOCK: And they may want to rewrite the rules or not based on this discussion.

MR. LOW: Okay.

CHAIRMAN BABCOCK: I think that's where we're headed with this.

MR. LOW: All right.

CHAIRMAN BABCOCK: Yeah.

HONORABLE TOM GRAY: Can I ask Richard a question? Richard Orsinger.

CHAIRMAN BABCOCK: Yeah, of course. Give Munzinger some time to rebut it.

HONORABLE TOM GRAY: Richard, my recollection of the bill was that only the English document could be admitted into probate.

MR. ORSINGER: That's not what this says.

HONORABLE TOM GRAY: Okay.

MR. ORSINGER: It says that -- it says the Spanish translated form is to be used solely for purposes of assisting in understanding the form and may not be submitted to the probate court.

HONORABLE TOM GRAY: Okay. I thought that was --

MR. ORSINGER: But the English language of the form must be submitted to the probate court, but there are actually going to be Spanish and English on the same form, so you can't admit the English without also admitting the Spanish.

HONORABLE TOM GRAY: And, therefore, you're going to have a problem because the judge may reject the document that has both, and the reason for that being the

way it is, I think, is to avoid the exact problem that Stephen Yelenosky, Judge Yelenosky, pointed out, is if you have the English followed by Spanish and the testator signs the document there will be a fight in probate over what the Spanish version of that means, and that comes back to Richard's point of we've got to have some place that we say this is what the testator signed. Did he sign the English or the Spanish, and I think that language is designed to prevent that very debate, and it is the English terms that are used in the document that have to control. The only way to control that was to keep the Spanish out of the document that is the will, and so I would submit that what has been tendered is what will have to be the form, and you cannot overlay a Spanish translation on the will document.

MR. ORSINGER: And let me complicate it further, that the listing isn't going to say "my house" and "my car." It's going to say "mi casa" and "mi coche." So you're going to have -- the words are going to be in Spanish by the testator in a form that under your proposal is required to be entirely English.

CHAIRMAN BABCOCK: Holly. And then Trish, and then Richard.

MS. TAYLOR: The statute appears to contemplate the option that the Spanish language

translation be incorporated into the English language form in that it says, "The Spanish language translation of the form must: (1), gives the option of two forms, or (2), be incorporated into the English language version of the form in a manner that is understandable to both the probate court and members of the general public."

CHAIRMAN BABCOCK: Trish.

MS. McALLISTER: I just want to clarify that there will be an English only form for people who speak English. The English/Spanish forms are specifically intended for Spanish speakers or Vietnamese speakers or whatever else. The intent was to try to do all of the languages, but of course, that's quite expensive, so anyway.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: If Richard Orsinger read from the statute, it seems to me that the statute itself precludes a form in both languages and requires that the English be submitted to the probate court, not the Spanish. How can the Supreme Court adopt a form that flies in the face of the statute? I don't understand it. And this is part of the problem. If you're -- are you litigating the translation, or are you litigating the English language document? And the Senate -- I mean, the bill rather, seems to say you will not present the Spanish

version to the probate court, if that's what Richard read. The English will be presented to the probate court. How then can you submit a form that has both languages? It has to be a separately translated form, and it cannot be used in the probate, and there's a good reason for that. The law of -- the language of law and commerce in America is English, and the Supreme Court is promulgating a form. You've got a real problem if you're just going to ignore what the law says.

CHAIRMAN BABCOCK: Don't we all. Alistair.

MR. DAWSON: So I think we're hung up on this translation issue unnecessarily. I mean, what we have is we have a group of experts in this area have spent an inordinate amount of time and effort drafting these forms. We need these forms. People of the state of Texas need these forms. They are being presented to the subcommittee and to this committee in English. They will be presented to the Court presumably hopefully in English, and then as Trish says, then they will get certified translators to make sure that they do the translation in accordance with the legislation.

So I respectfully submit that we're spending a lot of time on a nonissue and that what we ought to do in my judgment is we ought to adopt the recommendation of the subcommittee. We've got experts in this area who have

1 looked at it, people who know a lot more about probate law
2 than respectfully most of the people in this room, and
3 this is what they have come up with. The subcommittee has
4 looked at it, and they unanimously recommend it. I think
5 there have been some useful comments that the Court could
6 consider in terms of, you know, revisions that they may
7 contemplate, but I respectfully submit that we ought to
8 vote on the recommendation of the -- of the subcommittee
9 to present these to the Court for the Court's
10 consideration and whatever revisions they think are
11 probate --
12 MR. JEFFERSON: Second.
13 MR. DAWSON: -- in light of this discussion.
14 CHAIRMAN BABCOCK: Pete.
15 MR. SCHENKKAN: The concern has been that
16 we're not honoring the statute if we have a form that has
17 the Spanish in it, but the same statute that requires that
18 only the English language version be submitted and that
19 the Spanish language not be submitted, clause (2) of that
20 very clause says that the Spanish language must be
21 incorporated into the English language version of the form
22 in a manner that's understandable to both.
23 MR. MUNZINGER: What page is that, Pete?
24 MR. SCHENKKAN: That is page two of the act,
25 which is -- I guess the act is the next thing after the

committee's --

CHAIRMAN BABCOCK: Yeah, Holly said that a minute ago, by the way.

MR. SCHENKKAN: -- report and before you get to the forms. So I think what we have here is one of these deals where the Legislature's language was less than ideal but is certainly sufficient to justify --

MR. MUNZINGER: I agree with you.

MR. SCHENKKAN: -- submitting a form to the court that has both the English and Spanish in it.

MR. MUNZINGER: It is. I agree with you.

MR. SCHENKKAN: And it's just the statute is declaring that only the English part counts as submitted to the court, whatever that means, and so I don't think we have a problem here. I think we're good.

CHAIRMAN BABCOCK: Roger, then Evan.

MR. HUGHES: Well, after listening and having the statute clarified in my mind, I think that the problem is almost insoluble, and I lean towards the Spanish and English translations being in the same document. Why I say it's insoluble is if you have the English and Spanish together in one form, where I live you have numerous Spanish speakers throughout the courtroom. You're going to have a judge who probably speaks Spanish, and you're probably -- if it ever gets litigated you're

going to have several jurors that speak Spanish. I've been in court before where I've actually had jurors actually raise their hand and ask the judge if they had to accept the translation from the court interpreter, who is a certified interpreter; and when the judge tells them they have to, I could see half the jurors going, "I'm not doing it, I don't believe it."

On the other hand, if you have them in separate forms, well, that's a fruitful source of information for a will contest. Well, he only thought he was signing what's in Spanish on that form, and he didn't know what was on the English form, et cetera, et cetera. I think the answer is, is most of these wills that are technical documents to begin with, even if they've simplified the language, it's still being -- it's still being used in a technical way to achieve certain things; and if we have a certified translator saying this language is going to do in Spanish what the English words do, God, I don't know how much better we can do.

CHAIRMAN BABCOCK: Evan.

MR. YOUNG: I agree with what Alistair said. I think all of the complications that a group of lawyers that can come up with -- and it's a pretty big list -- is dwarfed by the benefits that having something like this go to people who otherwise just may not have access to a will

of any sort, and for that reason, you know, the possibility of some litigation occasionally for people that need to use these forms seems rather small. It will happen, but the alternative is lots of people without wills, period.

The related point I would make is that the statute seems to give ample authority to the Supreme Court to consider ways to make this -- these forms readily available to the general public, and in addition to hard copy forms, all the problems they have, I wonder if it could be considered that one way they could be readily available would be through an online program in English and Spanish, where people can answer questions, and then if you say, "I don't have any kids" you're not going to see any more questions about kids. If you answer that you've never been married, you're not going to have to see all of the stuff about people that are married. And then it will spit out a simple short form that will get only the things relevant for you, maybe in both languages even, and it will say in both languages the English one is the official one to solve the problem, but that strikes me as potentially a massive step towards dramatically enhancing the access of ordinary Texans to have something that really gnaws at the minds of people that don't have wills, even don't have any assets, it gnaws at them, and they're

afraid to go to a lawyer. They don't have the money to go to a lawyer. They're afraid of these complex forms. We've come up with about 20 things more to put warnings to people about different assets that they might not even know what they are, but we're going to spend a lot of words to tell them about warnings about this sort of thing. Maybe just simplify it even further in that sort of way, and I hope the Court if it has the resources could consider that authorization by the Legislature in a way to even further enhance access.

CHAIRMAN BABCOCK: Yep. Great point. Great point to end on because I'm hungry, and so let's eat for an hour and then come back, and we'll get into Mr. Munzinger's Rule 167 subcommittee.

(Recess from 12:29 p.m. to 1:32 p.m.)

CHAIRMAN BABCOCK: Richard, you've got Rule 167.

MR. MUNZINGER: You ready?

CHAIRMAN BABCOCK: Yeah. Let's go.

MR. MUNZINGER: Rule 167 is the offer of settlement rule. Brief history of it would be the defendant is the only party who can trigger the applicability of the rule by filing a declaration that the case is subject to the rule. Once he does that then an offer of settlement being made, but the offer of

settlement may not be made for a period of 60 days and after the appearance of the offerer or offeree, whichever is the longer. A question was raised by former Justices Enoch and Wainwright. Apparently they had a client who felt the client was prejudiced by this 60-day period because, as you may recall, if the -- an offer is made and rejected, there is a, quote, my word, penalty, close quote, for not having accepted an offer if it falls within the constraints of the rules. 20 percent if you're a defendant, 20 percent below the judgment; if you're the plaintiff, 20 percent above the judgment. If your offer was within those then you have to pay litigation costs.

The litigation costs are those costs that are incurred after the offer was made and include reasonable attorney's fees, the fees for two expert witnesses, the fees for some depositions and court costs, so those fees and expenses could be quite extensive, and the question raised was, well, do you really need 60 days because during that 60-day period there's a lot of expense that can be incurred and risked, and that may impact the usage of the rule.

This committee addressed the rule at least twice in 2003. The subject was discussed at some length. The principal concerns of the committee at the time of the original discussion about these time limits was that a

party needs to have some time to investigate the claim to determine whether the party does or doesn't want to, A, declare that the rule would be applicable or, B, accept an offer or make an offer, and not -- the rule is limited to claims involving monetary claims only; and, of course, not all cases are simple automobile accident cases, rear-end collisions, and what have you. There are other monetary claims that are complicated and extensive and serious, and so the committee's concern the first time around that we discussed this was that you have to have some time to give a responsible lawyer an opportunity to gather sufficient information, whether by discovery or otherwise, to make a considered judgment as to what they will do under the rule, and so now the question is, is 60 days too long. That's what the Court has asked us to determine.

The members of the committee had essentially, as I recall our discussions, no experience under the rule. The justices who raised the question raised it for a late joined party. For example, a third party defendant, not joined in the original pleadings, does such a party require 60 days. That is something that you want to consider in answering the overall question, but none of the members -- I never have had the rule invoked on me nor have I ever invoked the rule. I don't know what other parties' experience is and what other

members on the committee their experience with the rule has been, but as I say, none of the members of the committee when we discussed it had had any experience personally with the rule.

So the question is, is the 60-day period too long and should it be shortened. That's what the Court has asked our opinion on, and the committee believes that the 60-day period is reasonable at least for the originally joined defendant, but has no specific recommendation to make for later joined defendants, and when you read the rule, the rule is in the materials. It's attached to our little e-mail report. The rule defines defendant as a person against whom a monetary claim is made, so that plaintiff sues defendant. Defendant files a counterclaim for money damages. The plaintiff then is a defendant as to that counterclaim and could opt to make the rule applicable, et cetera. So "defendant" as used in this rule means a person against whom a monetary claim is made and not necessarily the person who was the first person to sue.

A last point, the rule only applies to the defendant who files the declaration invoking the rule. So if you have multi defendants in the rule and only one files the declaration, it only applies to that defendant. If all defendants were to file the declaration, obviously

it would apply to all. I hope I've explained the rule and its history adequately. The question is from the Court do we want to extend the 60-day time period?

CHAIRMAN BABCOCK: Yeah. The only thing I would supplement is that as I recall -- well, you would know this. We spent a lot of time working on this rule, and it was a legislative mandate, I think.

MR. MUNZINGER: It was.

CHAIRMAN BABCOCK: I think the Legislature asked -- told us to pass an offer of settlement rule.

MR. MUNZINGER: Yes.

CHAIRMAN BABCOCK: So --

MR. MUNZINGER: And I don't know if people even use the rule. I don't know if people who -- the original discussions began as if it were applicable only -- I'm going back to the history in our transcripts. If it was just applicable to the automobile accident cases and what have you, the simpler case, and as the discussion went on, it became obvious to everybody that it applied to all kinds of litigation, and the risks to a person receiving such an offer are substantial. The fees of two expert witnesses, the fees of an attorney, and so it could be quite substantial, and those fees begin to run at the time the offer is rejected and run until the time of judgment. Well, that can be very substantial, so that's

the question before us.

I'm going to voice my personal opinion, if I may, Chip, and then be quiet. This is my personal opinion, not the committee's, because the committee had no recommendation. My personal belief is that 60 days is reasonable. No rule that we'll ever adopt or recommend to be adopted will be perfect, and it can't meet every circumstance or every criticism, but 60 days is not a lot of time in today's world. Think about it for just a moment. You have to -- if you're a defendant, for example, defendant as defined in the rule. You've got to confer if you're a corporation with management. Management has to confer. There may be technical facts that need to be known by the defendant. There may -- because this is not just, as I say, an automobile accident case.

Then there -- you might have multiple counsel before you can take a deposition. We've all been through the task of setting a deposition with three or four lawyers. "I can't do that, Richard, I'm in trial in Alabama. I can't do that, Richard," I'm in so-and-so. And so you have all of these delays to discovery and yet you are counsel to a party and you're going to have to make an informed judgment and recommendation to your client about whether the client does or doesn't either

make an offer or accept an offer, knowing that if you're wrong in that your client may incur penalties that could be substantial. And so my personal belief is that 60 days is reasonable. This committee never voted on a time limit originally that I could find in the two transcripts that I looked at, and I believe 60 days is reasonable, and I'm finished with my presentation.

CHAIRMAN BABCOCK: Maybe, maybe not. My recollection is that Elaine Carlson had a lot to do with this rule, and after -- after the Supreme Court passed it she did a CLE presentation or maybe she did it to us, but I think it was CLE. Am I right about that?

CHIEF JUSTICE HECHT: Yeah, I think she did a paper on it.

CHAIRMAN BABCOCK: She did a paper on it, too, and she mapped out, you know, what the risks were to everybody by utilizing this rule; and my recollection is a little hazy; but I think the defendant can trigger this rule and only the defendant, right? But once the defendant opens that door then the plaintiff can counter punch, and she had this elaborate chart where it showed that it -- in very rare cases would it make sense for a defendant to open the door to this -- to this offer of settlement rule.

MR. MUNZINGER: Elaine was on the committee.

We had that discussion in our -- we had two telephone meetings. We had that discussion. She didn't mention that article, but we all understood that it is most probably a very rarely used rule, and that's why I mentioned that nobody on the committee had any personal experience with the rule, and I think it makes a difference to the length of our discussion and the length of our effort if the rule is not used. I don't think it's because of the 60-day time period. You couldn't cut it down by more than 15 days or 20 days or so and give a lawyer a reasonable period of time to make an informed judgment, but she was on our committee, and we did discuss that, Chip.

CHAIRMAN BABCOCK: Yeah. Well, I also recall that in the -- in the Supreme Court Advisory Committee there was a lot of negotiation, debate going on about it, and there were some members, primarily on the plaintiff's side, who were -- didn't like the rule, very upset with it, and so a lot of stuff got put in there that made it so it wasn't as attractive as it might have otherwise been. That's just my recollection.

CHIEF JUSTICE HECHT: Just to add to that --

CHAIRMAN BABCOCK: The Chief might embellish on that.

CHIEF JUSTICE HECHT: The committee I think

wrote or was getting ready to write or was at least willing to write a rule that could be invoked by both sides, because Governor Ratliff has an engineering background, and he thought this made a lot of sense, and we said, well, the federal rule, the feds have a rule and it's never been used.

CHAIRMAN BABCOCK: Right.

CHIEF JUSTICE HECHT: And he said, well, what do they know, and so we said, well, we'll -- the committee will do that, we'll write a rule that both sides can invoke and then we received word back, why don't you hold your horses and we'll see? And then the Legislature passed a statute that basically outlined in some detail the rule that they wanted, which was only to -- could only be invoked by the defendant. So that's -- then we wrote the rule to match the statute.

HONORABLE PETER KELLY: That was the first thing that Governor Ratliff said in the hearing, was that this is going to be a two-way rule. It was initially drafted as part of House Bill 4. It was a one-way, defense only, and first thing he said in the hearing was this was going to be two-way, and it's never been used.

CHAIRMAN BABCOCK: Yeah. Okay. Well, there's --

MR. PERDUE: It has been used. It was used

anecdotally, so and in that odd moment of history, but it was invoked in a car wreck case in Travis County, and the defendant lost like on a 20,000-dollar car wreck case and then got doubled up, and that story made the front page of the *Texas Lawyer*, and to my knowledge it's never been used again.

CHAIRMAN BABCOCK: Well, and that's exactly what Elaine anticipated that defendant might open themselves up to if they triggered the rule.

MR. PERDUE: Right.

CHAIRMAN BABCOCK: And I guess I'd forgotten that, but I guess somebody --

MR. PERDUE: No, it wasn't my case. I wish it was, but that wasn't my case.

CHAIRMAN BABCOCK: So I guess now we're onto whether we extend the time limit on a rule that nobody other than perhaps former justices of the Court uses.

MR. SCHENKKAN: Well, if I may, I think there are two questions here. One is whether to talk about changing the time period at all.

CHAIRMAN BABCOCK: Right.

MR. SCHENKKAN: But the other -- and I don't see it reflected in the correspondence that Martha was part of, but my understanding is that at least part of the concern was for a discrete subset of those circumstances

1 under which a defendant might bring its part of the case
2 under this rule, and that is somebody who is third-partied
3 in after the case has been underway a long time, and I
4 do -- it does seem to me that that at least, maybe only
5 hypothetically, poses a different situation, because if
6 it's the case as first filed against a set of defendants,
7 it's at least plausible that the -- even the plaintiff may
8 need some time to think about what to do, but if the case
9 has been going on a long time and one of the defendants is
10 third-partying in somebody else, there is a whole lot more
11 expense that's already been occurred and a whole lot more
12 that's already known about the case and a whole lot less
13 justification for saying you get to continue to run the
14 clock for 60 more days before somebody can make an offer.
15 I mean, that's what I understand to be kind
16 of the common sense of this second question, and I don't
17 have enough -- I don't have any relevant experience to
18 bring to bear on what the answer to the question ought to
19 be, and I would defer to those who have been involved in
20 some appreciable fights about potentially responsible
21 third parties and that sort of thing to shed any light
22 there might be on whether you still need the rule that if
23 a newly added defendant in that way wants to invoke the
24 rule it can do so, but it has to wait 60 more days before
25 it can make an offer under it and whether that's still a

good idea or not.

MR. PERDUE: So I don't recall the exact language of this particular provision in HB 4, but they -- this rule breaks substantially Rule 68, and my recollection, Chief, is they engineered it pretty specifically.

CHIEF JUSTICE HECHT: Yeah.

MR. PERDUE: The 60 days may not be in the bill, but they engineered this pretty specifically, and, of course, they were re-engineering third party practice in House Bill 4 as well.

MR. SCHENKKAN: Right.

MR. PERDUE: So but the language that you may be addressing, you may have to go back to the source statute on it because they really did engineer this pretty -- with some particularity.

CHIEF JUSTICE HECHT: Oh, the -- there were a bunch of directives in House Bill 4, and, for example, the one on class actions was the Supreme Court should write rules to make sure class actions are litigated fairly or something. It was like one sentence, but this rule is several detailed sections of the Civil Practice & Remedies Code, and we even had some debate about whether we could vary any of the language when it was unclear, and we ended up doing that, but it was a very detailed

statute.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Chip, Richard raised a point. Sometimes there might be -- it might be a denial of coverage or waiting on certain things or you can't get the parties together in 60 days. Is there any way the parties can agree to a different date? I mean, you know, it might be that their idea to get coverage worked out first, or is that permissible under the rule as written where you could unite and agree? Well, it can't be done in 60 days, we'll agree to a certain date.

MR. MUNZINGER: You know, I don't think the rule addresses agreed extensions. I need to look at it again. I know the trial court may change the time periods on motion and good cause shown, but I don't think the rule mentions extensions by agreement.

MR. LOW: I mean, an estate might be in probate or something, and we don't know.

CHAIRMAN BABCOCK: Yeah.

MR. SCHENKKAN: Well, since it does allow the court to exercise a discretionary decision to change the rules --

MR. LOW: Okay.

MR. SCHENKKAN: -- that would answer your concern in an agreed situation, but I had understood this

1 third party situation to be the opposite of that. The
2 assertion, I gather, is being made that by some counsel
3 for newly added defendants under third party practice,
4 that the plaintiff is relying on the 60 days to be able to
5 run up the fees more, and I'm not -- I am not endorsing
6 this proposition. I'm not sure I can even parse it in my
7 head and see how plausible it is, but I understand that's
8 the -- it's not curable in the way you're talking about,
9 because the proposition is that there isn't an agreement
10 between the two sides about that.
11 MR. LOW: Right.
12 MR. SCHENKKAN: And so I guess that's such a
13 defendant could move as soon as he's been served --
14 CHAIRMAN BABCOCK: Yeah.
15 MR. SCHENKKAN: -- asking the court to
16 shorten it, but that's the only remedy under the existing
17 rule.
18 CHAIRMAN BABCOCK: Yeah. Tom.
19 MR. RINEY: If we're trying to protect third
20 party defendants from being brought in, it's just
21 difficult to imagine the circumstances where I'm brought
22 in as a third party defendant and I am so anxious to offer
23 money to settle the case and subject my client to a risk
24 of attorney's fees that the client wasn't otherwise
25 subject to that I couldn't wait 60 days to make my offer.

If I want to settle the case -- I mean, if I really had all of the information I needed to make that decision within 7 days or 30 days or not having had time to send out any discovery at all, I can just offer to settle the case. It wouldn't trigger this, but I could still settle the case and get out of it, so I'm not real sure that I understand the problem that we're trying to solve and if -- I'm sure there could be some circumstances where that could be an issue, but does it really merit a rule change to a rule that nobody has ever --

MR. LOW: Confusing.

MR. RINEY: -- in this room has ever used? I don't think so.

MR. MUNZINGER: I agree with that.

CHAIRMAN BABCOCK: Do we have any more detail on what the situation was that --

MR. MUNZINGER: No.

CHAIRMAN BABCOCK: -- Justice Enoch or Wainwright faced?

MR. MUNZINGER: No.

HONORABLE DAVID PEEPLES: Chip, I think -- I'm remembering back a long time ago, and I think it was in cases that may have been in the MDL court where there are a lot of cases, insurance cases, and it was pretty easy for the insurance carrier to know what the damages

were and didn't need a lot of discovery or at least they thought that, but that the people for the plaintiff were running up the fees as Pete was talking about. I think that was the type of situation that was happening in a lot of cases that were similar.

MR. MUNZINGER: Well, I agree with what Tom just said. It's interesting to me that there's not a lawyer in the room who has raised his hand, judge or practitioner, that has any personal experience with the rule at all.

CHAIRMAN BABCOCK: Well, because we all listened to Elaine. Anybody -- anybody got any more wisdom on this?

MR. DAWSON: Leave it the way it is.

CHAIRMAN BABCOCK: Well, there's been a motion made to leave it the way it is. Any second on that?

MR. RINEY: Yes.

HONORABLE TRACY CHRISTOPHER: Second.

MS. CORTELL: Second.

CHAIRMAN BABCOCK: Who is in favor of leaving it like it is? Anybody opposed? Unanimous, the Chair not voting.

MR. PERDUE: Nor Justice Gray.

CHAIRMAN BABCOCK: Huh?

MR. PERDUE: Nor Justice Gray.

HONORABLE TOM GRAY: I couldn't help but notice that Chief Justice Hecht looked over here to see if I had raised my hand.

CHIEF JUSTICE HECHT: And he didn't.

CHAIRMAN BABCOCK: Well, a milestone has been reached for sure. All right. Richard, is there anything else to discuss about this?

MR. MUNZINGER: No.

CHAIRMAN BABCOCK: Okay. Pam, it's five minutes to 2:00. Are you ready?

MS. BARON: I'm here early, so yes. What was referred to the appellate rules subcommittee was new Senate Bill 891, section 7.02, which requires the notice of appeal in addition to the numerous people already listed also be served on each court reporter responsible for preparing the reporter's record, and the referral letter said that our subcommittee and this committee has already considered it, and we are very happy to hear that, but then when we thought about it we sort of have and we sort of haven't.

We've been over this ground, but in a slightly different context last July in response to the report, report from the task force on House Bill 7 we addressed this issue in parental termination and child

protection cases and proposed changes to Rule 28.4, which deals with just that subspecies of cases. The Senate bill is not so limited. It requires this notice in all appeals, so we discussed all of these issues before. I don't really think there's much for this committee to discuss, but instead of proposing changes to 28.4 our subcommittee recommends that we change TRAP 25.1(e), just to add the sentence, "The notice of appeal must also be served on" -- and we're quoting directly from the statute -- "each court reporter responsible." There's a typo in there. "Each court reporter responsible for preparing the reporter's record," so not rocket science.

Then we propose a couple of changes to (f) that reflect our conversation from last July, which is just to specify which clerk in the heading so the trial court clerk knows to read this section, and it was generally thought that providing the notice of appeal to the trial judge would also help get notice promptly to the court reporter.

I guess the footnotes kind of cover sort of issues we would flag for the Supreme Court to consider. The first is that one of our subcommittee members thought that each -- there should be the words "if any," after "each court reporter" because in some appeals you will not have a reporter's record or even need one. My concern was

that 7.02(b) of the Senate bill says, "The Supreme Court may not amend or adopt rules in conflict with this section," and we were concerned that adding the words "if any" might be viewed as some kind of amendment. So that's for the Court to figure out.

The second footnote, you know, now, 25.1(f) that requires the trial court clerk to forward the notice of appeal to each court reporter is redundant. I think the court reporter may get notice three different ways now under this formulation of the rule, but on balance, we said, you know, it's already in there. It must not be happening as efficiently as it should be, and we'll leave it in there in case somebody does fail to actually serve the notice of appeal on the reporter as they are required. So that's how we came down on that.

The third footnote relates to the comment. The comment is a carryover from what we discussed last July. There was a concern that adding different notice of appeal requirements, courts of appeals might think that those could be jurisdictional or a basis to dismiss an appeal. We wanted to make clear that it was just administrative notice, and, again, I guess that's for the Supreme Court to consider whether this would be in conflict with section 7.02 of the Senate bill or whether it's useful to include it. Nothing in the Senate bill in

any way suggests that the additional notice of appeal requirement is jurisdictional. So I don't know that we need a vote, but I guess if people would like to make comments on the record for the Court to consider, this is a pretty straightforward fix that follows the statute.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I was trying to find out if there's a rule somewhere that requires substitute reporters to get their name somewhere in the official record, name, address, phone number, in the official record, because from our point of view at the court of appeals, you know, the official court reporter is the one who is supposed to -- if they didn't take the transcript down, they are the one that has to find where these substitutes are, get in contact with them, and get the record going. It's a big problem if we do not have an official record somewhere as to, you know, who the substitute court reporter is, and sometimes it's not even a substitute. Sometimes it's another official who comes in and takes down the record, you know, because your official is out because you didn't think you were going to have a trial, and so you bring somebody else in. So I know the statute says on each court reporter responsible, but I think we also need a rule that requires that court reporters put somewhere in the record who they were and

what they took down.

HONORABLE PETER KELLY: In the clerk's record?

HONORABLE TRACY CHRISTOPHER: I don't know. Somewhere.

HONORABLE TOM GRAY: Besides the payroll records.

HONORABLE TRACY CHRISTOPHER: Right. I mean, you know, it's a big problem. I don't know how a litigant would know who to serve other than the official court reporter.

MS. BARON: Is there a way to have the court reporter enter an appearance at the hearing or state their name on the record?

HONORABLE TRACY CHRISTOPHER: They could.

MS. BARON: Oh, but then they would have the record, so --

MR. ORSINGER: It's got to be the clerk's record.

CHAIRMAN BABCOCK: David Jackson.

MR. JACKSON: You have to remember that's an untranscribed record, and it's just the court reporter's steno notes, and it's in every one of them now. The court reporter's information is all there, but you're ordering this record. That hasn't been transcribed yet.

HONORABLE TRACY CHRISTOPHER: Right.

MR. JACKSON: So it's there. It's just trying to figure out who is responsible for providing it.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: We had this same discussion the last time the rule came up. How do I as a lawyer serve someone and prove that I made the service? They're not listed electronically that I know of that the court reporter has something I can send to them electronically, and this was the subject that we discussed. We're talking about child -- changes of -- the parental custody of children and what have you. If I have a duty to notify somebody, first question I have is how do I do it? And there's no answer to that question. And there needs to be an answer to the question, whether it's serve the trial court who shall serve the court reporters or some other way. I don't even know that the statute that was enacted would allow that, but it is a problem that we are required to give service, but we don't know how to give service, because there is no address to give service to.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: It really comes up a lot more than in the termination cases. We have the trouble because we frequently wind up being the one that's notified of an omitted transcript that's not included in

the record. It can come up in criminal context, but it's -- when you're dealing with associate judges, Title IV-D judges, and I forget what they're called, but they're regional family judges. Somebody help me, if you know what I'm talking about. It's the ones that you see a lot in family cases where there's four or five counties that they ride a circuit on that hear different type of family and termination cases; and without, as Judge Christopher says, something in the clerk's record and as Richard points to, that they can easily access and find who they need to provide these notices to, we're in the same place that they are on the court of appeals of trying to build the record from which to make the decision, and it -- we -- it's most pressing in the termination cases because of the extraordinary short time frame that we have before we get put on the naughty list in those cases, and there needs to be a way to fix it.

I would add that, as I did before when we talked about the rule, I would love for there also to be the requirement that the court of appeals gets a copy of the notice of appeal when it's filed with the trial court clerk because even though it says that -- in the next section (f) that the trial court clerk must immediately send a copy, immediately is a word that has varying meaning depending on what else you have to do; and it has

been many weeks, if not months at times, before we know that the notice of appeal has been filed; and we don't know to try to shepherd it or move it along or, you know, and then all of the sudden one day we get an entire record that has a notice of appeal in it. So the notice of appeal we can tell was timely filed, but, you know, we're already three, four, five weeks into the appellate process. So --

CHAIRMAN BABCOCK: Judge Peeples.

HONORABLE DAVID PEEPLES: There's not a problem where the judge is in his or her courtroom and the official reporter who is there everyday reports the hearing. Now, that's not the situation. Visiting judges don't have their own reporters, and so that's a lot of the problem, and then people do fill in for people that get sick. So I look at this and from the viewpoint of the person who wants to complain about a ruling and usually through appeal, where would they go? And I think that they would go to the court's file, which is more the electronic these days.

So how are we going to get the court reporter's name for that particular one-hour hearing or whatever it is in the court's file? For a long, long time, I have tried to in my notes write down who the reporter is. Of course, if they've got their little stamp

and it has their phone number, their official name, and their address and so forth. E-mail maybe. But maybe I lose my notes, and sometimes I try to recite it in orders, but a lot of times the orders are prepared by the winning lawyer, and lawyers I think are not told to put the name of the reporter for that hearing in the order.

So I think it's -- I mean, one thing I think needs to happen is we need to get word to court reporters, David, that this is something they ought to do, and I don't know how they get their name and a phone number and address into the electronic record, but, you know, there ought to be some way to do it. Judges ought to be doing this. I don't know, lawyers ought to be keeping those records, too, but --

CHAIRMAN BABCOCK: Yeah. Well, I'm going to jump the line here. David, what do you have to say?

MR. JACKSON: Another problem we have to deal with is you can hand out all of the information that you want to to the lawyers that are in a trial, and I do that. I give them my business card or whatever so they all know who I am, but the appellate lawyer is the guy that is trying to find this stuff. You know, the lawyer may have already thrown all of that stuff away, and he's turned it over to the appellate lawyer, and they don't know where to go.

CHAIRMAN BABCOCK: Richard, then Eduardo. Then Justice Kelly.

MR. ORSINGER: It seems to me that a simple solution is to just adopt a rule that the reporter should file a certificate with the clerk every time they report a record and give the date, the court, and the reporter's name and contact information and require it be filed with the clerk, and then it will always be in the clerk's record for the appellate lawyer, and they can pretty easily go through and notify everyone. That's very simple, and I think part of our Rules of Procedure are set aside for instructions for the reporters. Can we not put a rule in there? David, isn't there a section in the rules?

MR. JACKSON: Sure. There's a uniform format manual you can put it in as well.

MR. ORSINGER: Well, I would envision that it not just be triggered upon a request for a record, but that it be a duty at the time the record is made that a certificate be filed, unless it's the official reporter. I would say that's useless to have them filing 15 or 20 of these a day, but if it's not your official job then why don't you file a certificate with the clerk?

CHAIRMAN BABCOCK: Eduardo.

MS. RODRIGUEZ: Well, at the risk of being

yelled at, why can't the judge just write it on the docket sheet who the court reporter is and put his or her address and phone number there and then people can find it in the docket sheet?

MR. MUNZINGER: How do I prove I gave that person notice? I mean, if the court reporter just simply does what Richard said, types in an e-mail address saying, "I reported this thing," that person, I can send an e-mail service notice immediately. It's done. There's proof that I did it. I don't have to go to the judge's chambers to read what he put on his docket.

CHAIRMAN BABCOCK: Justice Kelly.

MR. MUNZINGER: I may not live in that city.

HONORABLE PETER KELLY: What does serve mean? And anything referring to serving the court reporter -- the court reporter is not a party, so it's an open question as to whether Rule 21a would apply to it, which allows for electronic service or mailing or certified mail, because 21a refers to delivering a copy to the party to be served, so you would have to expand 21a to include court reporters and court functionaries, because you file with the clerk. That's how you generally get things to the clerk, and you serve parties. So any rule that's -- the statute says that we're trying to interpret here says "serve," but what do they mean? Serve process,

Rule 21a service? What they probably mean is what Chapter 74 used to say, which is furnish a copy of the extra --

CHAIRMAN BABCOCK: Right.

HONORABLE PETER KELLY: So any rule that's adopted has to account for Rule 21a or use the Rule 21a methods of service but apply it to a nonparty court reporter.

MS. BARON: It would be Rule 4 of the TRAPs under this, because this is a TRAP.

HONORABLE PETER KELLY: What do we do about the Rules of Civil Procedure, though, which --

MS. BARON: I know, but the notice of appeal service is in the Rules of Appellate Procedure, so the service requirements for appellate documents would apply, which is usually electronic service, not any form of citation or anything like that.

HONORABLE PETER KELLY: So that would rule out service of process, but does Rule 4 refer to service upon a party or to -- I don't have Rule 4 in front of me.

MS. BARON: I don't either, unfortunately.

HONORABLE TOM GRAY: Pete does.

MR. SCHENKKAN: I just need to put my glasses on and get to it.

MS. BARON: Then you're going to tell me it's actually Rule 5 and not Rule 4, but I think it's 4.

CHAIRMAN BABCOCK: I take it this motion with the hand is research.

HONORABLE PETER KELLY: That's what I'm doing. I'm trying to flip through on the iPad.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I don't know how we could get into the electronic, you know, service system the court reporters' names, but it seems like that's something that OCA could find out for us, and that perhaps then we need to write a rule that accounts for that in some way, shape, or form. But I think it needs to be in the civil procedure rules and not just in the appellate rules, because then the trial judges who tend to only read the trial rules will be more aware of the requirement to sort of make sure their reporters are getting that work done.

I mean, we tried in Harris County, because we were having trouble, if there was a substitute, the substitute was supposed to fill out paperwork and put it in the clerk's file. But that was just, you know, an internal, and I would always when I had a substitute I'm like "Did you fill out your form? Did you fill out your form," but I never made sure it actually got into the, you know, the clerk's file. But we want to be able to do electronic service in some way, shape, or form, and I

1 don't know whether that just means the court reporters
2 have to set up some sort of an account to become a -- you
3 know, like lawyers do.
4 CHAIRMAN BABCOCK: Judge Peeples.
5 MS. BARON: It's 9.5, sorry.
6 HONORABLE DAVID PEEPLES: The court reporter
7 is a very interested person in this discussion and a
8 crucial person, and I just think it's not going to get
9 done if we don't work through the court reporters. Judges
10 ought to be doing it, but, I mean, you think about a lot
11 of things and sometimes you just don't write it down. But
12 we need to think in terms of telling court reporters part
13 of your job -- you're going to have to spend -- if
14 somebody wants to appeal this case, you're going to have
15 to spend time on this, and you can minimize the time you
16 spend trying to track down -- if they call you saying,
17 "Did you report this hearing," you've got to dig through
18 all of the records. You can minimize the time maybe in
19 the future if you just get yourself in the system as part
20 of your job when you show up and report that day.
21 MR. JACKSON: That's right.
22 HONORABLE DAVID PEEPLES: And it may need to
23 be in the rules, but I'm thinking, David, I think people
24 ought to be told that because it's so easy to do that.
25 MR. JACKSON: It's the court reporter that's

fighting for these extra days that they're losing by not getting notice, so we need to come up with a way to get that information to them and whoever is filing that appeal, so we get that notice as soon as we can get it.

CHAIRMAN BABCOCK: Maybe we can make your appearances. The judge could say, "The court reporter here and ready to go? State your name for record."

MR. ORSINGER: It doesn't do any good because that's in the record of the court reporter you can't identify.

CHAIRMAN BABCOCK: Oh, yeah, that's right.

MR. ORSINGER: So you have to find them first. It needs to be a certificate.

CHAIRMAN BABCOCK: Well, once you get the record you know who it is.

MR. ORSINGER: You need to file the certificate with the clerk.

CHAIRMAN BABCOCK: Yeah.

MR. ORSINGER: Because you can always find the clerk. We know where they are. They work in the same place everyday.

CHAIRMAN BABCOCK: Justice Kelly.

HONORABLE PETER KELLY: 9.5. TRAP 9.5 tracks manner of service as in 21a, but in 9.5(a) does talk about service on all parties, service on a party

represented by counsel, so it would have to be expanded to include the court reporter. Or at least the court reporter would have to be referenced.

HONORABLE TOM GRAY: Someone mentioned it on the -- and I thought it may have been Richard, but attorneys when they show up in a case, they file a notice of appearance. I mean, why is that same concept not appropriate for the court reporter that -- you know, that takes a hearing in any case and that has to be filed with the clerk. If you really want to get mean about it, you require that before they get paid, and they file it with their pay request, and it's going to get done. But it is an ongoing problem that takes up a lot of our time, is finding the court reporter that actually took the hearing, and it may be even more problematic if we have this county court at law and district judges rotating in and out and who knows what. Who knows which court reporter is going to wind up taking that hearing on a particular day.

CHAIRMAN BABCOCK: Right. Pam, do you think we've given the Court enough direction on this or --

MS. BARON: I would think so, but if Justice Hecht, Chief Justice Hecht, wants additional discussion, I'm certainly happy to provide it.

CHAIRMAN BABCOCK: We're good.

MS. BARON: Good.

CHAIRMAN BABCOCK: Thank you very much. So we're moving on to the last item of the day, which is Mr. Schenkkan's subcommittee on name change forms.

MR. SCHENKKAN: So, this is a pro se issue, pro se form issue again. It's fairly common, surprising to me. Trish and Kristin furnished some information according to Travis County, which actually tracks the numbers of these things. There were 757 name change petitions in 2017, and all 757 were pro se, and in 2018 there were 702, and 702 of them were pro se. David Peeples checked somewhat more informally in Bexar County, and the number looks more like on the order of --

HONORABLE DAVID PEEPLES: They have a docket every Wednesday afternoon with about 30 people. That's the day you come in to get it done in San Antonio. All pro se.

MR. SCHENKKAN: And then we've got downloads from the Harris County law library, which provide forms, and that gives you some idea of the volume there, a little bit more complicated, but it looks to be in the thousands of adult and child name change petitions, and I expect we can have some more informed discussion of that if people need to hear about it, and then the statewide source at the moment is the Texas Law Help, or at least one of them, and they have, again, thousands of downloads of these

forms. So we're talking about something which is important to a lot of people who are trying to do something that matters to them, and what the committee was asked to do was to report our views on the name change issue as presented by a set of draft rules that the Access to Civil Justice Commission and staff had worked up, and actually they worked them up several years ago, and they kind of went sideways into limbo after the big controversy over the family law forms for a while, like maybe people felt it was time to let the dust settle, but then were revived for this -- to consider the rules that Trish and Kristin, both of whom are here. That's Trish, everybody knows. I don't know everybody knows Kristin Levin, who is the civil justice attorney at the ACJ staff who is actually working on this project.

CHAIRMAN BABCOCK: Uh-huh.

MR. SCHENKKAN: So they have been through an extensive process there, and then they came to us as of January, and we were playing catch up to start with and trying to find out what this was all about and learned about the process that had gone into the drafts as they were then. We did -- the subcommittee members did review those drafts electronically and suggested some changes and asked some questions, and Kristin made a number of the changes and gave us some explanations of why we shouldn't

make the others, and so we were just kind of working away gradually on it and intending to get to the family law bar to ask their views on the matter when we got the notice on April 29 that we were up on May 3rd.

I did immediately get in touch with Chris Nickelson of the family law bar, and Gary Nickelson you may notice out in the hallway is on the hall of fame for the family law bar here, and Chris -- I mean, less than 24 hours he turned around a response with some I guess 10 or 12 comments. One of whom -- one of which was a flat error in what we had. Definitely a good catch and a couple of other substantial ones and then a couple that were more in the wordsmithing category, but he did respond immediately, but he did say the time was too short for him to reach out farther to more people in the family law bar, so I asked Chip if we could pass on that last session, and, of course, Chip said yes, and so we have since done that, and Chris -- with the additional help of Chris -- and I hope I'm not butchering the pronunciation of his name, Wrampelmeier.

MR. ORSINGER: Wrampelmeier.

MR. SCHENKKAN: And some others furnished some additional comments which they -- Chris Nickelson took a break from a two-month trial to get on a conference call with Trish and Kristin and me and went over those

and, again, made some further changes in these rules and got some explanations for some other things as to why they were the way they were, and what you see before you in this set is the result of that process.

So I say all of that mainly just to say that there's a pretty good chance that the substance here is both right and workable, not guaranteed, and it may well be that one or more people on this full committee from your experience would be able to spot something that hadn't been attended to, and that would be helpful. Every time anybody so far has read this draft who hadn't read it before, something else is caught, so I'm not suggesting it's perfect, but I'm suggesting it's probably not terrible, and it's probably not controversial, not highly controversial.

So in terms of going through it and talking about looking at specific parts of this, let me just describe the scope of it. We have a set of instructions, instructions, a petition and an order, and we have one for adults, and we have one for agreed changes of a child's name. There is no set and there's no proposal to have a set for contested child, and that presents additional problems. The -- the set for the child also has a consent form in there because the statute requires the consent of the child.

Some of the concerns that you should keep in mind in thinking about comments on these drafts are obviously one is the standard one in any pro se forms. We -- we don't want the perfect to be the enemy of the good. We are trying to make something that is comprehensible enough to where a person who is proceeding pro se can actually do it. Offsetting that is we've got to get to a point at which a judge is willing to sign the order and is going to do so, reasonably satisfied that the underlying requirements of the statutes and the policies that they are intended to serve are being met, and those include not escaping your debts, not getting out from under the consequences of a criminal conviction, and not causing a problem that is contrary either in the case of the child, that's particularly important to the best interest of the child by the proposed name change or contrary to the public interest more generally, which is inherently completely open-ended.

Oh, and there is one other thing to say about the scope. These instructions are -- for the adults are not for use in divorces. That's handled separately, and the process for getting a change back to a prior used name is part of this process. So with that the question as to the scope, I'm -- I think our subcommittee as far as we know now we are fine with them as they are. Although

we did catch a typo right before the meeting. Actually I think Kristin -- it may be in the set that was distributed. It may have already been corrected, but we think we're okay with them as they are, but we're looking forward to finding out what else we learn from some of the people around these tables who have actually been involved in this.

CHAIRMAN BABCOCK: Stephen. Thank you, Pete.

HONORABLE STEPHEN YELENOSKY: Two areas, and I did talk to Trish about this at the beginning of the day, and, Pete, I'm sorry I didn't talk to you about it.

MR. SCHENKKAN: No apology necessary.

HONORABLE STEPHEN YELENOSKY: The thing that jumped out at me, and I've done name changes a lot of times. I never really paid attention if it was on our forms. I don't know. To the question about gender or sex.

MR. SCHENKKAN: Oh, my.

HONORABLE STEPHEN YELENOSKY: And the first thing about it is the forms are not consistent. At one point the forms say "gender at birth" or they say "gender on birth certificate," but more importantly the statute doesn't say any of that. The statute says "sex." And that's an important difference for a couple of reasons. I

can't say why the Legislature did that, but I can see why it makes a difference because when you ask a person to say what their sex is, they can answer that however they're comfortable answering it; and there is no policy reason I can see with respect to identifying a person to ask what their gender was at birth or what's on their birth certificate; and I'm sure Richard Munzinger will back me up in saying, well, that's a privacy issue unless it can help identify a person, and there are a lot of scenarios I can imagine where it doesn't help you identify a person. And, in fact, it is unhelpful because if you have a person who decides their appearances can be another gender and therefore puts down that gender, if you want to know on appearance, like the police stop somebody or something, that's the gender that should be shown, and I don't know all of the purposes here.

The other thing is that there is always a question when somebody wants to change his or her name to her or his name for gender change reasons as to whether or not they can get a change on their driver's license, and for the reason that I just said, it only benefits identification for an officer to be able to look on there and see somebody that says male who looks male, because they've chosen to look that way. So that's an issue that's not addressed here that has been addressed in the

Travis County courts, and at least from what I've heard, people who want to change gender who go to Texas driver's license are told to go to the Travis County courts because they'll order us to change it, and whether we have the authority or not they don't seem to be upset about it and maybe because it's helpful to them.

The other thing is -- the other area of concern is -- and I think I've said this elsewhere in different contexts, protection of people from family violence. We get name changes sometimes from a woman or a man, typically a woman, who says, "I want to change my name so that my abuser cannot find me." Now then, I am asked to create a public document that allows her abuser to find her because the order cannot be sealed under 76a. So we have a problem with the purpose there in 76a, and I'm usually obviously a great defender of 76a, but here I see a direct conflict between protecting somebody from family violence and the provision that an order can never be sealed, and I don't know the answer to that. I can tell you my answer in the past has been when I was convinced it was to prevent an abuser was to seal the order in violation of 76a, but have it remain open to law enforcement or any official, but not somebody who just wants to look it up. So those are the issues.

CHAIRMAN BABCOCK: Anybody else?

MR. SCHENKKAN: Does the scope of our discussion here -- I suppose it's implicit that if we've got a problem with 76a maybe we need to change -- or the Court needs to change 76a to carve this out as a -- as an exception.

HONORABLE STEPHEN YELENOSKY: Or put "Notwithstanding 76a, an order" -- "an order changing a name for the protection of an individual can be sealed from the public, but accessible to" --

CHAIRMAN BABCOCK: Yeah, I mean, I don't -- I don't know that that's necessarily the charge that we got.

MR. SCHENKKAN: That's what I meant.

CHAIRMAN BABCOCK: With the forms.

MR. SCHENKKAN: That's why I was asking the question that way, but it's clearly a problem that needs to be solved.

CHAIRMAN BABCOCK: Yeah. Maybe on another day.

MR. SCHENKKAN: Yeah. But the -- but the sex/gender one does -- seems harder, and I guess I would like to hear more about how Travis County does it. How does --

HONORABLE STEPHEN YELENOSKY: Oh, the change in gender?

MR. SCHENKKAN: Yeah.

HONORABLE STEPHEN YELENOSKY: Well, in here I think your instructions are that you can get a name change on a birth certificate. This is obviously a big issue in public policy now.

MR. SCHENKKAN: Right.

HONORABLE STEPHEN YELENOSKY: But nobody can deny that there are people who are going to at the very least change their identification with gender.

MR. SCHENKKAN: Right.

HONORABLE STEPHEN YELENOSKY: And the law can't do anything about that. Whether or not you can make documents change or not, that's going to happen. So given that that's going to happen, what do we do about that, and you're asked just about name change here, and I don't think there is anything in state law that addresses change of gender on anything, and so maybe it's beyond your scope, but it's an issue, and I don't think it's just an issue for the person asking for it to the extent gender on a driver's license is meant to help with, "Is this you?" Right? "Your name is Pat or Ryan, and this says you're male, but couldn't be you because you're dressed as a female."

So the person's interest aside, there should be some consistency between the appearance that somebody

has shown and what their driver's license says, because that's the useful information, and whether somebody's DNA is male, female, or both in some instances, whether they've had surgery or not, or whether they just choose to identify a particular way, none of that is useful for purposes of identification. The only thing that would really be useful is the fingerprint, and you've got that.

MR. SCHENKKAN: And maybe -- I'm interested in hearing some views from people other than the two of us about this, but the statutory authority framework here is all we've got is the petition requiring one of the items required to be included is the petitioner's sex, using that noun, and then two different sets of wording that I submit gets to roughly the same results, one in the adult petition name change section of the law and the other in the child. In the case of the child, the court may order the name of a child changed if the change is in the best interest of the child and in certain cases the change is in the interest of the public. So expressly discretionary with a reference to both the interest of the child and the interest of the public.

Then as to the adults, the court shall order a change of name under this subchapter, except for certain people with felony convictions, if the change is in the interest or to the benefit of the petitioner and in the

interest of the public. So we really only -- if all we have to go on here or all the court -- which in terms of legal realism, what are we trying to get the district court to be in a position to do here, is to decide if it wants to find that this is in the best interest of the petitioner or the child and whether it's in the best interest of the public. That's all we have right now.

HONORABLE STEPHEN YELENOSKY: Right. Right. And it is within the scope, though, to make the language of the form and the proposed order consistent with the statute, and all the statute says as far as I can tell is sex for an adult, and it says nothing about gender or sex for a child.

MR. SCHENKKAN: That's more bluntly put. That's what I was trying to say, is my point is I think the Court is free to decide if it wants to go farther than that and say something about this in the way of either trying to limit the discretion of the district judges or to guide it or encourage it. I don't know what that would be. I don't know what the Court would want to do, but it looks like that's where we are in terms of authority to do it.

CHAIRMAN BABCOCK: Hatchell has got something to say. I can always tell. I just haven't decided the evidence.

MR. HATCHELL: Well, not on this topic, but --

CHAIRMAN BABCOCK: Well, we'll let you talk.

MR. HATCHELL: Well, I don't want to divert from this very good conversation here, but I find it a little bit offensive that we stigmatize the user of this form under inability to pay costs and say, "If you are poor or on government benefits, because you are poor or you cannot pay court costs." Why not just say, "If by reason of your financial circumstances you cannot pay court costs"? I mean, poor is not any kind of standard that I'm aware of.

CHAIRMAN BABCOCK: That's a poor choice of words I would say.

MR. HATCHELL: Yeah. I would also take out the phrase "pauper's oath" because that also seems stigmatizing to me.

CHAIRMAN BABCOCK: See, I knew you wanted to say something.

HONORABLE STEPHEN YELENOSKY: As somebody who represented poor for many years, I don't think that's offensive, and it's understandable as opposed to "financial circumstances," but that's just my opinion.

CHAIRMAN BABCOCK: Okay. What else? Pete is eager to hear comments from people. He's been waiting

all day for this.

MR. SCHENKKAN: More than all day. A month.

CHAIRMAN BABCOCK: That's true. Yeah, months. Anything else?

MR. SCHENKKAN: I don't want to stand between any member of this group and your drink, but --

CHAIRMAN BABCOCK: Yeah, Evan.

MR. YOUNG: On the instructions for the adults, at the second chunk where it says "use as adult name change form," it says "if" and it's got a bunch of boxes. It seems like I need to check all of these off, and some of them are mandatory, and some others are alternatives. Like "You have no felony convictions," check; "You have a felony conviction and you attach proof of that." Well, those are alternatives.

And I think the way they deal with the next one, you are not a sex offender, or you are one and you have to do -- blah, blah. Maybe that could be done alternatively, or we can do "Use this name change form if you meet all of these requirements," check, check, check, check. You meet any of these requirements, something like that, just because I think that some people will get confused if it looks like it's literally like they're little boxes and you put a checkmark

CHAIRMAN BABCOCK: Right. Good comment.

Anybody else? Levi, are you not itching to say something?

HONORABLE LEVI BENTON: I'm already on the record today. Thank you.

CHAIRMAN BABCOCK: Okay.

HONORABLE LEVI BENTON: Can I change my name?

CHAIRMAN BABCOCK: Pete, you ready to call the question?

MR. SCHENKKAN: Up to the two of you, but I think we are ready, are we not?

CHAIRMAN BABCOCK: All right. Are we ready? We are ready. So pretty nice work today. I wasn't sure we were going to get through 11 items, but we did. So we'll -- for anybody who came in late, there's been a change of the meeting date in September. It's slipped back a week to the 13th and 14th of September. It's going to be at a site to be determined, and Marti will let you know, and the November meeting will be in Houston, not in -- not in Austin for various reasons.

MS. BARON: Is the September meeting one day or two days?

CHAIRMAN BABCOCK: What?

MS. BARON: Two days now? Because it was going to be one.

CHAIRMAN BABCOCK: Two days, both days right

now.

MS. BARON: Okay.

CHAIRMAN BABCOCK: All right. Well, thank you very much, everyone. We will stand in recess. June 21, 2019.

(Adjourned)

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REPORTER'S CERTIFICATION
MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

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I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 21st day of June, 2019, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are $ 1,301.75 .

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