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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

JUNE 28, 2024

(FRIDAY SESSION)

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Taken before *D'Lois L. Jones*, Certified Shorthand Reporter in and for the State of Texas, reported by machine shorthand method, on the 28th day of June, 2024, between the hours of 9:00 a.m. and 12:42 p.m., at the State Bar of Texas, 1414 Colorado Street, Suite 101, Austin, Texas 78701.

INDEX OF VOTES

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

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CHAIRMAN BABCOCK: All right, welcome, everybody. Good morning to a nice, hot day in Austin, and we'll start, as always, with comments from Chief Justice Hecht.

HONORABLE NATHAN HECHT: Well, good morning. A few things that the Court has been doing the last -- since we met. I think the business court rules and the Fifteenth Court of Appeals rules are posted on orders this morning, so we thank the committee for their work on that, especially Marcy Greer and her group. Lots of work went into it. It's pretty much what the committee sent us. The one thing we are having a difficulty with is court reporters, just finding them. This is a problem all over the country, as you may know, but we're trying to set up a process where there will be a pool and judges can get court reporters when they need them, and then we had to look at recording -- making a recording of the record or whatever we can do to keep it going, but those rules are out.

The Office of Court Administration is working to find locations for all of the judges, chambers and hearing rooms, courtrooms, and they're pretty far along on that. In Fort Worth, the business courts are going to sit at the A&M law school, which is good; and in

Houston, it's in the court of appeals building; and we're working out places in Dallas, Austin, and San Antonio, so we're making progress on -- on all of that.

The appendix in lieu of a clerk's record, which was directed by legislation the last session, has been approved, changes in TRAP 34.5(a). Those went out in April. The requirement that orders be e-delivered, ideally, on re:SearchTX one of these days, but we're trying to get case management systems in all of the trial courts across the state to be able to hook up to re:SearchTX and to be able to do that. That doesn't -- I don't think that's too far out. OCA is already working on standardizing case management software and hardware throughout the state, which is a huge undertaking.

I'll just tell you that COVID hit, you remember, March 13 in 2020, and that was on a Friday; and Monday morning, the chief judge in New York called me and said, "What are you going to do," and I said, "Well, it's not going to really affect us that much in the outset because we have e-filing." New York doesn't have e-filing. In New York City they have it, but lots of the rural areas in New York don't. So we're making pretty good strides to get that done.

We swore in new lawyers in May, and then approved the State Bar's budget. We're still looking at

the disciplinary rules that the membership voted on in referendum in April, and we will have -- we have, I think, 90 days to make a decision on those, so you'll have something out on those by the end of August. If you're interested, again, in those rules or the comments that have been sent in on them, you can find those on the Court's website.

We did approve a rule that shortens the time for the State Bar of Texas presidential candidates to run. They were interested in shortening that time so it doesn't eat so much out of the schedule of the candidates, so that was approved.

We approved minor amendments in civil Rules 103 and 107, omitting the requirement that process servers put their birth date on the return. There was some complaints by process servers that this was a privacy issue, and we saw no reason for it, other than to make sure that they're not minors, so we made those fixes.

The rules on paraprofessionals, as recommended by the Access to Justice Commission and worked on by us and others, should roll out here in the next few weeks, and that program should be up and running December the 1st, so we hope that those people who are trained and licensed to do semilegal work as paralegals will make a difference in the -- in legal aid offices and elsewhere as

well.

The Court has tentatively approved giving the NextGen bar exam July, 2028. Maybe you've heard of the NextGen bar --

MR. LEVY: I think we're old gen.

CHIEF JUSTICE HECHT: Yeah, some of us surely are. It's been in development some years. It's had some controversy attending it. Part of it was wanting to put family law on, and the decision was ultimately made to do it. Then the question about putting probate law on, and the decision was made not to do it. So that's still going back and forth a little bit, but the UBE will be discontinued in a couple of years, so we don't -- our choices are to go with NextGen or do what Florida is trying to do, which is to write your own, and some other states are trying to do that as well. There will be a Texas law component to the bar exam, but it's supposed to roll out -- the first victims are July of '28. So we'll be hearing comments on that and keeping everybody apprised of that.

The Board of Law Examiners is going to develop the Texas law component, and they've done that before, and it's a very good product, so we're confident that that -- that will be good. I should tell you, in that regard, that the Conference of Chief Justices in the

United States has formed a group called CLEAR. I think it's Committee for Legal Education and Admission Reform, I think is the acronym; but, anyway, it has nine Chief Justices on it from across the country and a whole bunch of other people; and they are going to be looking at the entry into the profession from beginning to end, so preparing high school students and college students better for a possible legal career, how to get admitted to the law school, what the training should look like, should it vary depending on what kind of practice you're going to have, and then what licensure looks like, should it always be a bar exam or should there be alternatives; and they're working with the ABA Council, which is a -- the group that accredits the law schools in the United States. I think there's 198 currently, but a couple of more are coming online. So there may be some changes in the entry into the profession before too long.

And, let's see, it's a little after 9:00, so I hope the Court's orders are up, and if they are, we will have cleared our docket one more time of argued cases.

(Applause)

CHIEF JUSTICE HECHT: And we beat the tar out of SCOTUS this time.

CHAIRMAN BABCOCK: A friendly competition.

CHIEF JUSTICE HECHT: That's my report.

CHAIRMAN BABCOCK: All right. Justice Bland.

HONORABLE JANE BLAND: Well, I thought Jack Nicholson just walked into the room, but it's our own Professor Dorsaneo. Welcome.

(Applause)

HONORABLE JANE BLAND: I have nothing to add, other than I guess SCOTUS announced that they're going to issue opinions on Monday, so they slipped just a little bit over the line.

CHAIRMAN BABCOCK: How many do they have left?

HONORABLE NATHAN HECHT: Seven.

CHAIRMAN BABCOCK: But who's counting? All right.

CHIEF JUSTICE HECHT: We had seven, and we got ours out.

HONORABLE JANE BLAND: There but for the grace of God. Okay.

CHAIRMAN BABCOCK: Very good. Thanks, everyone.

Well, our first order of business, it looks like, looking at the agenda, it's the Chief Justice Tracy Christopher show for the part of this morning, but we'll start with the Remote Proceedings Task Force

recommendation regarding subpoenas, and, Chief Justice Christopher, it's all yours.

HONORABLE TRACY CHRISTOPHER: Yes, well, I understand that this is the most controversial of my three, so maybe we should flip it, but I'll go forward with this one. So we reviewed -- well, I'll go back to when we had the Remote Proceeding Task Force when we were dealing with COVID issues, and we looked at questions about subpoenas, because at that point in time everyone was pretty much doing everything by Zoom depositions, and for the most part, it was all by agreement, people were working it out. There was some questions about, you know, serving people who won't open their door for personal service because of COVID, and we decided not to tackle that, that that was a too difficult process to consider.

We even talked about perhaps doing certified mail, decided that that was a bad idea, did not recommend that. We looked at how to describe document production in Zoom depositions. We also decided that that was also too difficult to handle by rule and that it seemed like during the pandemic that people were handling it appropriately. So, really, the only suggestion that we ended up coming up with was a specific notation that you can subpoena someone to show up by Zoom as opposed to -- or other -- or by telephone or as opposed to showing up at a particular

place.

So our first suggestion, which is 176.2, just basically means that the change is to specifically state the subpoena can require someone to show up by telephone or by Zoom as opposed to a particular place. So I don't think this part is controversial in terms of a suggestion.

The more controversial suggestion was in 176.3(b), and the concept behind this is that if I have a case in Houston, I can subpoena someone in Dallas to show up, which is more than 150 miles from Houston. I can subpoena someone to show up by Zoom or telephone and subpoena them there in Dallas for a proceeding in Houston, notwithstanding the 150-mile designation, because the witness is not actually traveling 150 miles. So that -- that was the point and the attempt that we have made here with respect to subsection (b).

That is already happening in the federal courts. The federal courts, for example, have nationwide service of subpoenas by remote proceedings, and this is just statewide, would not include any -- no Texas court could subpoena somebody in New Jersey or Oklahoma. You would still have to go through the usual process to get that done, and we have specifically put in 176.2(a) that court permission is required to make them show up at a

hearing or trial, which dovetails with the Civil Practice & Remedies Code provision and with Rule 21 point -- Rule 21d. And, you know, if we want to cross-reference that, we can do that to make it more explicit, but we're not trying to go around the CPRC provision or Rule 21d in terms of having someone appear at a hearing or trial through this process.

So that's -- those are the changes that we've made and suggest.

CHAIRMAN BABCOCK: Okay. Probably not controversial at all, so we won't have any comments. Robert, apparently, is always --

HONORABLE TRACY CHRISTOPHER: I knew Robert was ready.

THE COURT: There's always one, isn't there?

HONORABLE TRACY CHRISTOPHER: He told me he didn't like it a long time ago.

MR. LEVY: So I think there are a number of potential challenges with this change. First issue is it doesn't really match Rule 21d, the recent Supreme Court rule that made very clear the expectation that parties will be in court to testify. That's the standard and not --

HONORABLE TRACY CHRISTOPHER: I -- I agree with you. We did say court permission. If you want to

specifically reference 21d, perfectly fine to do that.

MR. LEVY: I do think that that needs to be part of the analysis, but there are also some other issues with the rule change, and I will suggest that the federal rules have not changed. They do not have nationwide service for remote testimony in that nature. They -- there is a suggestion that you include it in your proposal to change the federal rules, but the -- the current rules are actually more restrictive than the Texas Rule 21d in terms of allowing remote testimony, and in most cases, it's not -- it's not allowed, absent some very specific requirements that a court has to find.

But some problems with this rule, one of the problems is you have a witness who's traveling through the State of Texas, attending a football game. You serve them with a deposition notice, or trial notice, trial subpoena notice. They might live in New York. They might live in another country. Are they now required to appear at trial remotely because they were subpoenaed while they were in the State of Texas?

Another issue, you have party witnesses. Generally speaking, we don't require trial subpoenas for party witnesses, but you can't subpoena a party witness to testify in the trial in Amarillo if they live in Houston. You can ask opposing counsel to produce them, but they're

not obligated to do that, but now you send a party notice, saying, "I want all of your witnesses to appear by Zoom, remotely." That's a huge problem, because the challenges of presenting a witness who might be all over the state and presenting them as a party, you can't just get on the phone and talk to them for five minutes and have them appear. Presenting parties are going to want to have a lawyer there, have somebody talking to them, make sure the witness is comfortable.

It's a big issue to testify in a trial, and now, all of the sudden, if you want party witnesses to be there, you just send a list of 30, 40 witnesses that you want to appear, and all of them might have been deposed, but, now, all of the sudden, you want them to appear. And the challenges also with this is that it raises the prospect that -- that the burden of producing a witness will be somehow undermined because the idea is that it's easy for a witness to appear remotely, so the challenges and burdens of having excessive testimony or people that it would be very inconvenient for all of the sudden become a nonissue, and the -- the idea will be it's no problem for remote witnesses to be there, because they are easily accessible by remote means.

The -- and I do think that the language of the rule is also problematic, the way that it's set out.

The -- at the very least, it really should provide that the expectation is that parties -- that the witnesses should in most -- in all cases, but would appear in person, and I also think that the presumption should be that parties should agree, and if they don't agree, then you take it to the court, but it -- this creates significant issues, and I also think, in terms of depositions, it's going to create the same kind of issues.

And the history and the reason why we have the 150-mile rule, I should ask Richard how long that's been in place, because I'm sure he knows the history, but there's reasons for it. You want parties and the lawyers and the participants to be there, and for a company like mine, we do get concerned that all of the sudden you'll be having depositions all over the State of Texas, day after day after day, maybe multiple ones a day, and to take the deposition, it's a piece of cake, but to present the witnesses, it's a huge burden and challenge, and this kind of change is going to just open -- potentially open the floodgates to that type of dynamic.

CHAIRMAN BABCOCK: Yeah, Justice Christopher.

HONORABLE TRACY CHRISTOPHER: The problem of subpoenaing someone as they, you know, are in Texas for a football game exists whether it's to show up somewhere or

not, so that is nothing different than here. I agree with you that there are more difficulties from your perspective in Zoom presentation of witnesses, but we already have a deposition rule that allows that, right? And you're allowed to be there in person if you want to. Rule 21d, and as I said, I'm perfectly happy to make it clear that Rule 21d applies to this, if it's not clear, you know, says that a party is not required to appear remotely, absent good cause or the agreement of the parties. So you wouldn't have that problem with respect to party witnesses.

You know, as you know, there's a new Supreme Court opinion that basically says I can send a deposition notice and require you to produce a corporate representative within 150 miles of the courthouse. You probably didn't like that case, but --

MR. LEVY: No, that's --

HONORABLE TRACY CHRISTOPHER: But it's out there, though, right, so I understand your fears. I think with Rule 21d, the fears are much smaller and because of the guiderails we have in there.

MR. LEVY: One quick response.

CHAIRMAN BABCOCK: Go ahead, Robert.

MR. LEVY: So I appreciate that notation, and I was not concerned about the decision requiring party

witnesses to appear, as long as they're within the subpoena range.

CHAIRMAN BABCOCK: Everybody having trouble hearing Robert?

MR. LEVY: Sorry. But the one challenge, and, you know, it might be a question for the trial judges. Yes, you're correct that somebody coming to a football game could be subpoenaed, if they're in the same district where the trial is going to be. If they're in Austin and the case is in El Paso, it won't work, so it's not the same. But even if it was in the same area, when you go to a court and say, "Judge, this trial subpoena needs to be quashed, my witness lives in Missouri," or wherever, "and it's burdensome to have him come in to testify," the judge is going to be very attentive to that. She's going to to ask was their deposition taken, why do you need this person to come in, are you going to pay the costs, all of those issues.

Now you go in and say, "Judge, they just get on the phone, it's no problem," and that's a real problem, because it creates the same kind of burden, but trying to explain that in the context of a remote deposition is very, very different, and there is a -- I think there's a fundamental unfairness about that.

CHAIRMAN BABCOCK: Justice Miskel.

HONORABLE EMILY MISKEL: I was going to ask Robert, to me this gets very confusing because we're mashing together a discussion about hearing and trial subpoenas and deposition subpoenas, which I think have different considerations.

MR. LEVY: That's true.

HONORABLE EMILY MISKEL: So, for example, just the general rule about subpoenas is Rule 176, but oral depositions are Rule 199. Which portion of your objections -- for example, if we didn't modify Rule 176, but instead added a section in Rule 199 pertaining solely to, like, remote depositions, which part of your concerns would remain? How would that change kind of what you expressed?

MR. LEVY: On that one, my concern would be that, without some language in either the rule or the comment, that issues of burden might be minimized as it relates to doing remote depositions, and those issues are very, very important. So, you know, one issue is -- and I know we have established precedent on apex depositions, but if the argument is, you know, you send a deposition notice or you get the CEO of a company and say it's only a -- "I just want him for an hour, Judge, and he can just pop on Zoom in his office. It's no burden to him." It is a burden, and it might not be an apex person, but every

time somebody's deposition is taken, it's a huge imposition. It's costly. It's difficult to prepare, and you just have to go through that process, and so while we want to make the process as efficient as possible and reduce the cost, the idea of just allowing depositions anywhere in the state, I think, opens it up too much without some consideration that remote depositions can be just as burdensome as depositions in person.

HONORABLE EMILY MISKEL: So you're saying the it's easy to hop on Zoom hides the fact that every deposition still requires you to prepare and all of the other costs that might become invisible to judges if we don't have that geographic restriction.

MR. LEVY: That's right. Right.

CHAIRMAN BABCOCK: Jim Perdue had his hand up.

MR. PERDUE: I was going to agree with Judge Miskel on the -- Justice Miskel, pardon me, on the proposition of depositions versus trials, the rule, but -- and I don't mean to single out my friend Robert, but we just enacted five courts with 250 -- 254-county jurisdiction and a court of appeals with 254-county jurisdiction. So, yes, the business court for Tarrant is going to be in Fort Worth, but the reality is, is that we've got a system now which is acknowledging kind of a

statewide jurisdiction, at least for one set of courts, so you're looking at something that is progress for certain people when it comes to business litigation, but we're not allowed to analyze progress in regular district courts, except those are the rules of procedure that are supposed to apply to these business courts.

You know, the progress that's been made in the last four years regarding the ability to take remote depositions, the reduction of cost and time that that has achieved in the discovery process for both sides I think is a lot more than anecdotal at this point, and you're -- in this day and age, the 150-mile rule, when it comes to a remote deposition, seems like an anachronism that is being held onto somewhat hypocritically when you're in favor of 254-county courts, at least in five administrative districts.

CHAIRMAN BABCOCK: Jim, can I ask you a question?

MR. PERDUE: I may not be able to answer it, Chip.

CHAIRMAN BABCOCK: Well, I'm counting on that. It's really an answer in the form of a question. It appears to me that under this rule for trial that it would be within the judge's discretion whether to allow it or not, but if they allow, in a jury trial, a telephone

testimony, is that going to impact how you try your case to a jury, and is it going to change the dynamic of a jury trial where jurors judge the credibility of a witness by looking at them?

MR. PERDUE: So it's a great question that's been looked at. You said -- you said telephone, and that sounds a lot different than Zoom.

CHAIRMAN BABCOCK: No, no, it is different than Zoom.

MR. PERDUE: Yeah, but I thought in the memo on the federal rules it made a good point that would I prefer -- would I prefer a remote witness via Zoom in live cross for the purposes of a jury's comprehension over cutting a discovery deposition? Absolutely.

CHAIRMAN BABCOCK: Yeah. No issue on that. It's just the difference between Zoom and telephone.

MR. PERDUE: Yeah.

CHAIRMAN BABCOCK: And is there an issue there, in your mind? As somebody who tries cases to a jury.

MR. PERDUE: Well, I mean, I think the visual input of seeing the witness versus just hearing their voice is important. So I would agree with you.

CHAIRMAN BABCOCK: Yeah. Chief Justice Christopher, then Justice Miskel.

HONORABLE TRACY CHRISTOPHER: So under our rule, it's not going to happen in a jury trial, absent agreement of the parties, right? So it's just not. Under 21d(b)(2)(b). Okay.

HONORABLE EMILY MISKEL: That doesn't cover witnesses.

HONORABLE TRACY CHRISTOPHER: Oh, true, it doesn't cover witnesses, right. All right. Correct. Sorry. But -- and the reason why I did put the federal suggestion in there, I do realize it's not the law. Federal court has always been different. Federal court has always wanted witnesses to appear in person. They don't like depositions in federal court.

MR. LEVY: They're hearsay.

HONORABLE TRACY CHRISTOPHER: We have had, you know, depositions in court for a very long time, you know, and absolutely, Jim is right, wouldn't you much rather have a Zoom live witness than a cut up deposition in any jury trial? Yes. Okay, but it's not what the Legislature wanted, right, and they enacted CPRC, and we have followed that in 21d, and we are going to continue to follow that in 176, subpoena.

CHAIRMAN BABCOCK: Okay. Justice Miskel.

HONORABLE EMILY MISKEL: I was just going to say, I agree, no one likes telephone. I don't know why it

has to include telephone. My proposal would be to cut telephone.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Okay. Telephone was the first way we ever had hearings like that, right, so witnesses --

MR. LEVY: Not telegraph?

HONORABLE TRACY CHRISTOPHER: -- couldn't show up, with permission, you get somebody on the phone, and then we had doctors testify by phone in trials. Yes, Zoom is much better than telephone, but I think telephone is still necessary. It's especially necessary for people in foreign countries that have agreed to come in and testify for things. The Zoom connection, especially in remote areas, is just not there, where telephone might be.

CHAIRMAN BABCOCK: Okay. Kent, and then back to Robert.

HONORABLE KENT SULLIVAN: Great point about would you prefer a Zoom witness as opposed to, you know, a deposition or portions of a deposition, but, you know, I think my candid answer would be it depends, and it seems to me that there are two overarching issues that we're discussing. One comes under the broader category of, I would call it, logistics, distances and various issues of -- you know, associaed with trying to make it happen. But

the second would be what are the safeguards associated with the more specific circumstances of how the testimony is worth them giving.

And I apologize if I'm retracing any ground here, but, you know, I actually tried to do a little sort of best practices research yesterday after we got the agenda and was just looking at it, and with a little help from AI, interestingly, I, you know, pulled together some things and came up with like 10 different categories that various jurisdictions are concerned about with respect to safeguards, and I do think that's something that maybe should be of greater interest to us, and, you know, I can read them off, but I don't want to bore everybody. But, you know, I just -- I think there are a lot of different details that go into trying to ensure that remote testimony is going to be, you know, subject to the sort of reliability guarantees that someone would be concerned about in a trial.

CHAIRMAN BABCOCK: Okay. Robert, and then Judge.

MR. LEVY: I will agree with Justice Christopher that the federal process is different, and I'm sorry to interject it, but in federal cases, deposition testimony is considered hearsay unless certain exceptions are met, so that is a very meaningful difference. It is

interesting, though, that even after the CARES Act and process that the federal advisory committees went into looking at the post-pandemic dynamic, they did not change the rules to facilitate more remote testimony. They recommended no rule changes would be needed.

This proposal is being looked at, but it's not at all clear, and I do kind of follow that, that it's going to actually happen, and, Jim, I'll point out that in the business court context, actually, it is remarkably narrow to the different districts where the business courts reside, so that you don't have statewide jurisdiction. Like for a jury trial, it has to be in the county where the trial would have been held, and you -- if you have a business case with venue in Montgomery County, you cannot necessarily just bring it in Harris County or Harris County business court. So the Legislature, in its wisdom, decided to keep it pretty narrow, and -- and so it might not allow the full uptake on -- on that new court, but it does recognize the importance of witnesses and people in -- in their locales.

I will also point out, you know, for whatever it's worth, that the Legislature is very, very interested in the issue of remote participation, as reflected by some of the legislation that they considered. I do think that they were very appreciative of the Supreme

Court's work in the changes to Rule 21d, but it is an important issue, and for those others, if I could take one moment to point out, as I'm watching the U.S. Supreme Court, that other court, that they did overturn the Chevron deference standard this morning.

CHAIRMAN BABCOCK: Judge Mendoza Salas. Did you have your hand up, Judge?

HONORABLE MARIA SALAS MENDOZA: I didn't, but I would like to after -- you were next, go ahead.

CHAIRMAN BABCOCK: Well, no, no, you can pull rank on him any time you want. Go ahead.

HONORABLE MARIA SALAS MENDOZA: I just had a couple of things on the deposition rule. I don't really see how there is an increased burden. The lawyers still have to prepare. I don't know who that is hidden from. If anything, it reduces the burden on the witness or the party, and why wouldn't you want that?

I think the issue is really with testimony during trial, and I agree that I just -- you'd rather have live or virtual testimony than depositions. I will say that I've seen deposition splicing done really well, and you have a lot of services where they run the -- the actual like closed captions under the witness, and it's -- it can be done well. Does a jury still kind of tune out? I think, yes. So you'd rather have it virtual than by

deposition, and so I think this would be good.

I also don't -- I mean, why are we forgetting that that's what we've been doing for the last few years? I mean, the only reason we're here is because I think we've learned that this works and can be useful. I will say, though, that I had several trials in '21 where, by agreement, the parties had witnesses give virtual testimony, and it is not great. There are so many factors, and in El Paso, we had -- we were able to pivot and had virtual proceedings from the very beginning, but I remember one case where we had someone testifying from Pepperdine, who was an expert, and they agreed to it, and his connection was bad, and so it really -- while you preferred it, it does have the problems that we're all aware of. So I think it's better, but you need to be prepared for the backup, which is a depo, and then that's why I would leave the telephone.

HONORABLE TRACY CHRISTOPHER: Right.

HONORABLE MARIA SALAS MENDOZA: Because if you have testimony that has already begun and you lose one way of taking it, you need to have the alternative.

So I think the rule is good. I wanted to hear the safeguards, because I'm like, am I missing some safeguards? I think there's enough there in the rules, and, frankly, I was persuaded that we currently have that

gamesmanship where people will move certain witnesses or parties outside of the scope, so I think this does away with that or tries to deal with that, so I think there's a -- the proposals are good.

CHAIRMAN BABCOCK: Good. Thank you, Judge. Now, Roger, or has she stolen your thunder?

MR. HUGHES: I'm sorry, what?

CHAIRMAN BABCOCK: Has she stolen your thunder?

MR. HUGHES: No, not at all. Good points, all. I was intrigued by the comment that you would leave document production to be worked out, but that led me to another question, which was enforcement and protection.

Witness is summoned to a location in Amarillo to testify by Zoom from that location for a case in Houston. The third party witness goes, "This is onerous. I have privileges. I shouldn't even be called to testify." Or the document production is outrageous. Where do they file their motion for protection? Because if they have to go to Houston to fight it and fight it there, they're not -- we're not achieving much protection and vice versa.

I think I know the answer to this one. If Smith says, "Come and get me, copper. I'm doing a runner," and they want to go after the person for contempt

for not showing up, I think the answer is they have to go to Amarillo to file the enforcement proceeding.

HONORABLE TRACY CHRISTOPHER: Right.

MR. HUGHES: But vice versa, what's the story for Smith when they want to avoid looking like they're being uncooperative? They want to fight it out in court, what court do they fight it out in?

HONORABLE TRACY CHRISTOPHER: So 176.6 already says that they get to go to Amarillo, because it says you can move for a protective order either in the court in which the action is pending or in a court in the county where the subpoena was served. Okay. So if I'm the witness in Amarillo, I'm served in Amarillo for the Zoom deposition. So they -- out of, you know, a Houston case, so they can either go to Amarillo or Houston, under our current rule.

MR. HUGHES: I assume that's where the onerousness of the production would be filed.

HONORABLE TRACY CHRISTOPHER: Right. Right. The real -- there's not any change with respect to document production, right. The only thing that we didn't feel like we should address was what happened during COVID, right, where people exchanged documents ahead of time so that you could question a witness with a document via Zoom, right, either with a split screen or by having

sent them, you know, their whole set of documents to begin with.

So because how to handle documents in a Zoom deposition is trickier, we thought that would be best left to the parties to work out the ramifications of it, and I have seen it where it -- it doesn't always work in trial if you don't have everything lined up ahead of time. Like, if you just call somebody up on Zoom when you're in trial and you don't have all of the documents already with that witness or you don't have it -- you're using the Court's machinery instead of your own machinery, in terms of putting up a split screen so that the witness can see the document, there are problems. I totally agree that there can be problems with respect to using documents in Zoom, so, but it's the sort of thing that we felt like had to be worked out as opposed to trying to put it in a rule. So we thought about it, we looked at it, and we decided it was just too difficult to write in this.

CHAIRMAN BABCOCK: Yeah, and, Tom, I'm going to get to you, but the judge just triggered something, so as the -- as the Chair, I'm going to take the liberty of saying it. In a case now, you have a video deposition, and if you're good, you edit it down to 10 or 15 minutes, because -- and it's edited well, so that the points that you want to make come across, and it's on a big screen,

and the jury can get it. If you do that same witness by Zoom, live, are you going to lose -- are you going to lose time? Are you going to lose focus?

For example, if it's a live witness, the direct might be more rambling and more free-flowing, and the cross may very well be more free-flowing. In other words, by doing it this way, are you going to lose any efficiencies? And by this question I don't mean to suggest an answer. I'm just wondering. So you get to answer that one.

HONORABLE TRACY CHRISTOPHER: Oh, I get to answer that one. From a judge's perspective?

CHAIRMAN BABCOCK: Sure.

HONORABLE TRACY CHRISTOPHER: I prefer to see the witness answering questions in realtime as opposed to the Memorex, here's my 15 minutes of key information, but I can certainly see from a practitioner's standpoint that they might want the 15 minutes Memorex and not have the live witness. I can -- but I think from my perspective and I think from a juror's perspective, that's what they would prefer.

CHAIRMAN BABCOCK: Yeah. Tom.

MR. RINEY: I agree with Justice Christopher. The hearings should be in Amarillo, and thank you. But I have a question about the language of

176.2(a). It says you can command someone to attend and give testimony at a deposition or hearing or trial, which attendance may be in person, by telephone, or by other remote means at a deposition. Can the language be used to -- well, first of all, I assume the intent is not to give the witness the choice of whether to appear by in person, telephone, or other remote means, correct?

HONORABLE TRACY CHRISTOPHER: Well, that's a good question, and I know that that issue came up sometimes during COVID, like people would send out a Zoom depo notice and one side would say, no, I want to be in person, right, on it. So it -- you know, it seems to me if a witness says, no, I want to be in person, that that would be, you know, allowed, but --

MR. RINEY: Well, it's the flip side is the problem. You want someone to be there in person, and I think the language of the rule, arguably, could be used to say, no, the witness gets the option. And I don't think that should be the case.

HONORABLE TRACY CHRISTOPHER: No, no.

MR. RINEY: I think the person issuing the subpoena has the right to determine how it's going to be. Maybe that witness has a right under some other rule to ask for protection, but I think the language should be clarified.

HONORABLE TRACY CHRISTOPHER: No, I agree with you. If I'm subpoenaing somebody within the 150 miles in person, they need to be in person, right? We were trying more to address the idea of people that were outside of the 100 and, you know, 50 miles, but, you know, I -- I think, again, that kind of has to be worked out, and if -- if you think it's unclear that in person means in person, then, you know, we can do some wordsmithing on it, but short -- you know, do I want to travel 147 miles to a -- to attend a hearing? Wouldn't I rather say, "Hey, can't you do it by Zoom?" You know, I'm a minor witness. You know, it's only going to take an hour and, you know, I've got to take a whole day to drive three hours from Austin to Houston for this deposition, which yesterday I noticed was 147 miles from my courthouse to the hotel where I was staying at last night, so I thought it was past that 150, but according to Google it was not.

MR. RINEY: Well, here's my concern. I've got a case with Perdue. I subpoena a witness for deposition in my office, within 150 miles. Jim thinks that's fine, but the witness goes and gets a lawyer and says, "Hey, look, I really don't want to give a deposition in this case. Can't we do it by Zoom?" As someone who presents witnesses for deposition, I would much rather present them by Zoom than live because they're never going

to be as effective, and so I don't think the witness ought to have the right to determine how the witness is going to respond to the subpoena.

HONORABLE TRACY CHRISTOPHER: Okay. I was anticipating -- and, like I said, if it's not clear -- that the subpoena would say show up in person at this location for a deposition, or show up at this location for a Zoom deposition.

MR. RINEY: I just recommend some clarification.

HONORABLE TRACY CHRISTOPHER: Yeah.

CHAIRMAN BABCOCK: Okay. Any other -- yeah, Richard.

MR. ORSINGER: I wanted to focus on the 150-mile restriction, which makes sense in terms of physical presence, but if you're subpoenaing someone for a telephone deposition, why should they have to drive up to 150 miles to call into a number when they can call in from their home? Zoom is close to that, because presumably by Zoom everyone will be connected electronically, and why should a witness be required to drive 150 miles to get on a computer to connect to a bunch of other people who are on a computer? It doesn't make sense to me to require someone to go up to 150 miles if they're going to testify by telephone or deposition. So -- by Zoom, I meant.

So it seems to me that we should revisit that 150-mile limit, which makes sense when your physical body is going somewhere, but it doesn't make much sense if everybody is connected remotely. Why does the witness have to drive at all? Why can't they just do it from their home or their office?

And I guess one other thing that I'd like to say is do we need to alter the language in 192 about seeking protective orders to, I guess, say something about the right of a witness to make -- seek court relief about whether they're going to appear physically or whether they're not or whether they have to travel. I'm just wondering, because I'm looking at those rules here, and there are -- they're very much oriented towards physical presence and not so much emphasis on the witness having a right to come into court, and I'm not sure it's clear from the rules, maybe from the case law, that you have to have your protective order -- or you can file it in the county of residence. I'm not sure if that's still true, but at any rate, I just wanted to say that. Thank you.

CHAIRMAN BABCOCK: Okay. Yeah, Justice Gray.

HONORABLE TOM GRAY: Well, Chip, it's been a long time, 25 years or more, since I've had to worry about getting witnesses organized and ready to present in a

trial.

CHAIRMAN BABCOCK: You never lose that knack, Judge.

HONORABLE TOM GRAY: Yeah, I think I have. I wouldn't want to worry about it now. The scheduling and coordination, you know, and in effect, the ones I did were small compared to what Tom and Jim and others in here are trying these days, but so I don't fully understand how all of this will fit together with that, but there are -- when I was doing it, there were witnesses that we knew when we were taking their deposition and we scheduled their deposition and we took video deposition, knowing they were not going to be in the courtroom.

CHAIRMAN BABCOCK: Right.

HONORABLE TOM GRAY: Nature of the testimony, whatever it is, they were not going to be there, and I'm not talking about even out-of-state witnesses. I'm talking about going to Brownwood, Texas, to depose a retired Office of the Comptroller of the Currency that had done a bank examination, you know, over in Marshall. It was one of those things that you just had to do, and you did it. And to address Robert's question, when you do it that way, you have the lawyer for both sides being able to work with the witness on scheduling and doing all of that, and most of that that we did was

without a subpoena. It was all done by agreement, and we were working principally with the witness and the witness' schedule to get that done.

I look at this rule now more as a witness than I do as a litigant or as a trial lawyer or as even a trial court. We don't see these kind of issues much at the court of appeals level, so I don't have a lot of working knowledge with that end of the problem, but looking at this as a witness, and one of the things that Richard just mentioned, I mean, why can I be served with a subpoena while I'm sitting here in Austin, Texas, to attend a trial in San Antonio when I live in Waco, and maybe the notice that they give me is to attend a trial in Houston, but they subpoena me for attendance at a video in San Antonio? It just -- it doesn't make any sense.

The whole distance thing, if you're going to do this electronically, makes no sense. But, I mean, and I don't know if it's time to talk about the $10 subpoena fee or not, because, you know, that was a -- that was a rule that was done when gas was -- I know y'all are -- some of y'all are going to find this easy to believe, others will find it hard to believe, but I remember pumping gas at 17 cents a gallon in my car. I mean, it's not that long ago, but the -- you know, a bus ride, train ride, 25 cents, 4-dollar hotel, you know, 2-dollar meals.

That would cover your $10 a day. Well, $300 won't hardly cover it now.

So what I'm saying is there are a lot of old pieces in these rules and procedure that need to be updated, one of which I noticed was in the 176.3, where it just says, "Produce documents or other things in a county." We have counties in Texas that are almost 150 miles across, probably do have some in West Texas that are that far across. In other places in the new draft of the rule, they use the terminology "at a location," which seems to be much better there than a general reference to "in a county," and I have no idea why the place a person is served should be a valid criteria for the application of this rule.

The feds' draft, or proposed, maybe it's their existing, says within a hundred miles of where the person resides, works, or regularly conducts business. I hate to say it, but in that instance, it looks like the feds make a lot more sense than the state rule.

CHAIRMAN BABCOCK: Well, hush your mouth. Chief Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, unfortunately, we have a statute that talks about $10 and 150 miles, so, you know, that has to be changed before we can get rid of those requirements, and case law says if

you don't give them that $10, the subpoena is no good, which was another reason why we did not attempt to change that in this rule, because it's still going to -- it's still going to require someone, disinterested, to go to a person's house and give them that subpoena with $10, even if all you want them to do is to show up on a Zoom call. You know, we are mandated by statute and did not feel that we could change that.

CHAIRMAN BABCOCK: Kent, will you yield to --

HONORABLE TOM GRAY: Yeah, because I wasn't through.

HONORABLE KENT SULLIVAN: He still has the floor.

CHAIRMAN BABCOCK: He was beating up on the feds, and he was just getting going.

HONORABLE TOM GRAY: I just, you know, tried to catch my breath there, and you let Tracy jump in on me.

HONORABLE TRACY CHRISTOPHER: Sorry.

HONORABLE TOM GRAY: But since you mentioned the statute for the $10, would that be a prohibition of us, by rule, making it 300 or 200 or something that has some semblance to what a witness may actually be out if they are required to travel and stay overnight at a location? But that's kind of a rhetorical question. I'll

put it out there.

I will say that this month the CCA allowed a witness in a case to appear remotely, much like what was described here. It was -- the thing that sort of surprised me about that is there wasn't any prior planning. It was just kind of on the fly, and at least this would give some type of structure for how that was to have occurred and noticed, and it seems to me that this rule, while conceived to apply in 254 counties, it needs greater flexibility in, I would guess, the trial judge's application. Because I'm thinking of the -- like my district, 13th Court of Appeals -- or 13th Court, District Court, Navarro County, population, I don't know, a couple hundred thousand people -- you know, about 50,000 people in Navarro County, and the requirements for conducting a trial in that county are very different than the 414th that is in McLennan County, which is a quarter of a million people there, and I can't imagine what it would be like to try to coordinate in one of the Harris County district courts and the trials that occur there and the number of witnesses involved, and there needs to be some latitude for the trial judge's involvement and protection of the witnesses. I mean, it's just flat out easier to get in and out of the courtroom in McLennan County than it is in Harris County. I mean, that's just -- we have free

parking.

CHAIRMAN BABCOCK: Whoa.

HONORABLE TOM GRAY: So, anyway, with that I yield.

CHAIRMAN BABCOCK: Are you done, Your Honor?

HONORABLE TOM GRAY: There was some more editing things that I wanted to raise, but I don't think we're to the editing stage yet.

CHAIRMAN BABCOCK: Okay. Kent.

HONORABLE KENT SULLIVAN: Well, I just wanted to return briefly to my theme of safeguards, and just by way of example, I'll point to one of the earlier categories that was brought up, and that was document handling in remote testimony. And I think the comment was there's probably a need to work it out, and I understand that. It's an acknowledgement, I think, of how uneven things are in Texas. There are 254 counties, very different circumstances that you may be dealing with from one venue to another.

That said -- and I will note that with respect to, you know, my little best practices research, technology was one category of issues out of the 10. Document handling was also another issue out of the 10. Other jurisdictions have identified them specifically, but I do think that, regardless of the difficulties, we're

going to have to look at some baseline minimum standards that ensure reliability for testimony, particularly in trials. Otherwise, you really face a wild west sort of circumstance, and I think that's, to put it mildly, highly undesirable.

If we talk about leaving this just to the discretion of an individual trial judge, that sounds good, but I think we need to examine it more specifically. Just for example, number one, what are the different levels of technological sophistication that you think individual judges have around the state? My guess is that it varies really significantly.

Number two, to my knowledge, there is no training that is routinely and uniformly offered to trial judges about how to handle these kinds of issues that intersect significantly with technology issues, so leaving this to the individual discretion of trial judges under our current circumstances strikes me as a really unsound idea. It will reduce very erratic results and, despite the best of intentions, may produce circumstances that are highly unreliable in terms of the witness testimony that could be given. I'll leave it there for now.

CHAIRMAN BABCOCK: Chief Justice Christopher, and then, Chris, did you have your arm up?

MR. PORTER: No.

CHAIRMAN BABCOCK: Don't do that.

MR. PORTER: Sorry.

CHAIRMAN BABCOCK: Chief Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, how does a document production occur now when we're talking about a third party witness? Presumably, when we're talking about party witnesses, documents have already been exchanged, right. Everyone has a universe of documents that they can get to their witness ahead of time, if they want their witness to be able to review it.

As we talked about on a Zoom deposition, you know, do you have the split screen so that the witness can see whatever it is, but in a normal situation now, when you're talking about a third party witness, you subpoena that witness to show up at a location with documents. All right. And then the court reporter takes custody of the documents, and they are attached to the deposition. I mean, that is old-fashioned, how you do a deposition with, you know, a subpoena attached for documents. And everybody gets a copy of it and then they have it.

As a practical matter, it almost never happens that way. One side or the other, whoever wants the deposition, talks to the witness ahead of time, gets a copy of the documents ahead of time, sends them out to

both sides. I mean, I would imagine it's a pretty rare deposition where somebody shows up with a witness and doesn't know what the witness is going to produce, but the reason why we didn't deal with it at the time at the Remote Proceeding Task Force level was because of COVID, right, and we, you know -- it's a pretty simple procedure when the court reporter shows up with the videographer, and the person shows up, and they produce the documents, right. And if everybody else is remote, then the court reporter needs to have a really good scanner to get it to everybody, right, but we didn't really think we should micromanage how that would happen. But I do understand Kent's position on it, but we just didn't think a rule was possible to cover all of the variables.

With respect to, you know, should a witness have to travel 150 miles or 140 miles, 192.6 does talk about the discovery not being undertaken at the time or place specified. So I don't think that needs to be changed if there's going to be some sort of a contest with respect to that.

CHAIRMAN BABCOCK: Okay. Any other comments? Yeah, Justice Miskel.

HONORABLE EMILY MISKEL: Also, in thinking about dealing with documents, I think we've already had this fight in connection with requests for production.

Like when I started as a new lawyer, you would send a request for production, and the other side would be, "They're in a box in my office; you send a copy service, you can come look at them," and then there was some case law saying, no, you can't do that, you have to produce it and the court can make you produce it electronically. So it's already within the court's power within the existing rules of, I think it was 196.1(b), that you specify a reasonable time and place for production, and our case law already interprets reasonable time and place to take away parties' abilities to play games with making the documents artificially hard to get to and allows courts to make you send electronic copies of them. So I think very similarly to those fights that we've already had and either won or lost, depending on your perspective, I would anticipate the court would have the same power to say, no, you've got to send it electronically, you can't say it's in a box in my attic, come look at it.

CHAIRMAN BABCOCK: Okay. Yes.

HONORABLE MARIA SALAS MENDOZA: I just wanted to say that I agree with Justice Gray that -- I still think the proposals are good, but I think they are good because they do provide the kind of latitude that trial judges need, and I do think it suggests the fact that you have some judges who have really made use of all

of the -- the features of remote proceedings and probably say, "We can do this, this is easy." The parties want to do it, we can handle it, and you have judges that, as I understood, there are still some courthouses that didn't have good connectivity ever, and so those courts and those cases will say, "We just can't do this." So even if the parties agree, we have to figure something out, so I think that's why you need the rule to provide the latitude for those circumstances.

CHAIRMAN BABCOCK: Okay. Kent.

HONORABLE KENT SULLIVAN: Yeah, I don't know whether Justice Miskel's comments were intended as responsive to some of mine, but I thought I would at least clarify one point, and that is in what I've seen in terms -- and what I was speaking to, vis-a-vis what some other jurisdictions are concerned about, is not a document production issue. It is a contemporaneous use of documents by a witness while testifying. The extent to which you know exactly what the witness is looking at, the extent to which the jury and the judge and everyone can contemporaneously view exactly what the witness is looking at, there are no questions about that. Those are issues that I think at least other jurisdictions have suggested are worthy of thoughtful consideration.

CHAIRMAN BABCOCK: Okay. Robert.

MR. LEVY: Just one small comment. I recognize the challenge with dealing with the production of documents and the complexities, but I think that if we don't address that issue either in the rule or in the comment, it's just going to create more problems, because people will assume they can require the production of documents the same way. So I think we need to either address how to solve the problem or note that we're not addressing that in a way that provides clarity.

CHAIRMAN BABCOCK: Justice Miskel.

HONORABLE EMILY MISKEL: I was going to ask -- this is not a rhetorical question. It's a genuine question. Could we just say do it the same as production of documents for discovery? Like just follow, like, Rule 196 applies to this, too?

MR. LEVY: But we -- yes, I'm just trying to think in terms of if you're saying, like under the current draft of the rule, that you could serve a production request --

HONORABLE EMILY MISKEL: And let me back up and change my question, because I think I renew my request that we treat hearing and trial subpoenas differently from discovery subpoenas. I think it would clear up a lot of these problems. So for purposes of a discovery subpoena, like a deposition subpoena, you could say the production

of those deposition documents has all of the same proportionality and tailoring and reasonable time and place, all of the existing rules we have for discovery. Obviously, you might need a different rule for a live hearing or trial, so excepting that, if we're talking about deposition subpoenas, I think we have existing rules.

CHAIRMAN BABCOCK: Chief Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, there is sort of a difference between what's in 176.2 and the rest of our discovery rules. Okay. 176.2 is a very broad -- broadly written rule, right. If you look at the current subpoena rule, it says show up and produce and permit inspection and copying of designated documents, right? So show up with your documents, right? I mean, that is the current rule that we've been living with for -- since at least '98, and I'm sure before that also. It was a very similar rule. So I'm not really sure what the concern is, because we've had this same rule. We've had people subpoenaed to show up and produce documents for a long time, and there really hasn't been a lot of concerns.

CHAIRMAN BABCOCK: Somebody either was brushing their hair or had their hand up over here. No?

MR. LEVY: It wasn't Tom then.

CHAIRMAN BABCOCK: Marcy.

MS. GREER: I was just demonstrating.

CHAIRMAN BABCOCK: Jim Perdue. And it's very hard to see you.

MR. PERDUE: It is, and I apologize.

CHAIRMAN BABCOCK: That's all right.

MR. PERDUE: And I tend to brush my hair, but I actually raised my hand.

CHAIRMAN BABCOCK: About every two minutes.

MR. PERDUE: I wanted to go back, and I wanted to second -- the more I read this, Justice Christopher, Tom Riney's point. With kind of the fix of the way (a) has been rewritten, I fear that you're going to open to a potential rash of motions to quash on trial subpoenas, the way it's written. Because every trial subpoena reads to be discretionary, the way it's written, and I don't think that's the intent. I think it's to try to bracket trial subpoena, appearing at physical trial versus subpoenaing for a deposition, but I think this is the point Tom was making, and I think I agree with it, as I often do, that it seems to provide latitude to both witness, and potentially represented party, to quash any trial subpoena, to ask for the court's permission for any witness, even in range, you know, for whatever reason, to appear at trial. And I don't think that's the intent. I

think it's trying to bracket it from the subpoena rule for depositions.

And I -- Justice Christopher is dead right that the vagaries of the way that we deal with production of documents is as variable as the trust relationship you have with the attorney on the other side. I can get an expert's file produced to me for a Zoom deposition two days before the deposition, or I can have a flash drive dumped into a drop box two minutes before the deposition begins, which creates a problem for a discovery deposition because when you do it that way, you've probably added a couple of hours to the deposition unnecessarily, rather than just being up front and giving me the documents so I can get them organized and be able to question on them more efficiently. And I don't know the fix on that, other than micromanaging it by rule versus leaving it to the parties to work such things out, Robert, because I -- there's -- that is one of those things which is equally unfair to both sides.

MR. LEVY: I agree.

MR. PERDUE: Yeah.

MR. LEVY: Absolutely, and it is incumbent on parties to try to work that out. The last thing I want is to have to produce a witness a second time because I didn't produce documents.

MR. PERDUE: Right, right.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I guess I'm repeating myself, but a lot of the problems that people are talking about now are already in this rule. They're in 176.3, limitations range, and it talks about if you're subpoenaed where the person resides or is served, so if I'm here for a football game and I get served, I'm served, right.

And with respect to the deposition, appear and produce documents at any location permitted under Rule 199.2. So we're already referencing in this current rule that's been out there working, sort of, I guess, we're already doing the things that everybody is concerned about. But I can see splitting it out to say deposition in person versus deposition by telephone or remote means, just to make everybody happier.

CHAIRMAN BABCOCK: Yeah. Justice Gray, you mentioned edits. Are you interested in editing anything? Because we're going to vote here in a minute.

HONORABLE TRACY CHRISTOPHER: Oh, I was about to say, why don't we just take those for the Supreme Court to look at?

CHAIRMAN BABCOCK: Why don't we just what?

HONORABLE TRACY CHRISTOPHER: Take Tom's

edits and pass it on.

MR. ORSINGER: We don't know what they are.

HONORABLE TRACY CHRISTOPHER: I'm ready to pass it on.

CHAIRMAN BABCOCK: Well, Tom is frequently -- Justice Gray has frequently provided healthy, insightful edits, and he mentioned that he wanted to edit it, so here is his opportunity.

HONORABLE TRACY CHRISTOPHER: But I've already agreed I should do some edits, too, so perhaps it's premature to vote.

CHAIRMAN BABCOCK: Well, we don't have to vote.

HONORABLE TRACY CHRISTOPHER: I'm not asking for it.

CHAIRMAN BABCOCK: Yeah. Well, what do you -- do you think we need more discussion or we shouldn't vote or what?

HONORABLE TRACY CHRISTOPHER: I think we should pass it for now. We'll come up with new language. I'll take Tom's edits.

CHAIRMAN BABCOCK: Okay. I see what you're saying.

HONORABLE TRACY CHRISTOPHER: I'll split out in person and remote. I'll add 21d into it.

CHAIRMAN BABCOCK: Okay. I'm with you. You want to try to do that today or wait for the next meeting?

HONORABLE TRACY CHRISTOPHER: I would wait for the next meeting, because unless the Court really wants to push forward on it, everything seems to be okay without this rule.

CHAIRMAN BABCOCK: Yeah, I'm with you. Sorry.

HONORABLE TRACY CHRISTOPHER: Let me just put it that way.

CHAIRMAN BABCOCK: I misunderstood what you were saying.

HONORABLE TRACY CHRISTOPHER: No.

CHAIRMAN BABCOCK: So that's fine. We'll pass it to the next meeting, and that way Justice Gray can edit at his leisure.

HONORABLE TRACY CHRISTOPHER: And send it to me, and Jim can, too.

CHAIRMAN BABCOCK: All right. Next meeting.

MR. PERDUE: I'm not the grammatician that you are.

CHAIRMAN BABCOCK: All right. Uniform Interstate Depositions and Discovery Act. Once again, Chief Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Okay. We

were asked to look at this because of the last legislative session where the -- and if I didn't give it to you this time, I probably gave it to you last time, where basically the Legislature said Supreme Court should look at and see if we should adopt the Uniform Interstate Deposition and Discovery Act; and if so, if the Court adopts it, then CPRC 20.002 would be repealed.

So our subcommittee looked at it, and, frankly, no one had much experience with the uniform act on our subcommittee. We looked at the uniform act. We thought that it looked good. It doesn't -- it's not a whole lot different from what we currently have, but it could be cleaner to say, yes, we have adopted the Uniform Interstate Deposition and Discovery Act. So we tentatively said, yes, it seems like the Legislature wants us to do this. It looks like a pretty clean procedure, and so the recommendation of the subcommittee was to do so, but you have to remember that this is only dealing with deposition notices coming to our state, right. It's not dealing with deposition notices going elsewhere. Like, by adoption of this act, we can not compel California to do anything different other than what they're already doing, right. So it's only a one-way act, how we handle deposition notices from other states versus how we get depositions in other states. So it's -- it's

kind of different.

So what we did is I've given you a draft of the Uniform Interstate Deposition and Discovery Act, and we have created draft new Rule 201.2, adopting the uniform act. It's kind of the -- the act uses the term "foreign jurisdiction," when it really just means a state other than this state. So it's a little bit confusing, but that's the way it's defined in the act, and we thought about totally rewriting the act and calling it the act, but decided that we should keep the terminology of the uniform act. So our current rules, we don't -- foreign deposition really means outside the country, but now the uniform act says foreign deposition -- foreign jurisdiction is a state other than this state, so we're going to have to remember that.

So, basically, the draft, which is at Tab G, does everything that basically adopts everything that's in the uniform act. The only change that we proposed is in, let's see, (b)(3), where we talked about a subpoena of any party who has appeared and is not represented by counsel. That's the only addition we made from the text of the actual act. (C) and (d) under the uniform act say refer to your own state rules, so (c) and (d) were added to -- are in there to refer to your own state rules, so we referenced 176 and basically all of our rules in (d).

And then the second paragraph, you know, specifically referencing back to 176. Then we added a comment, which says, by adoption of this rule, the Supreme Court adopts the Uniform Interstate Deposition and Discovery Act. We're kind of in this weird -- you know, because usually it's a legislative rule adopting these acts, so but we wanted to make it clear what we were doing so that it would correspond with the legislation that said if the Supreme Court adopts it, then CPRC goes away. So that's why we have put this in the comment, and we added also the second sentence of the comment, which is in the uniform act itself, and -- but we thought it belonged more in a comment than in the rule itself.

So, basically, we adopted it. We added things that pertain to Texas, as the uniform act requires, and added the comment. So but then we had to figure out what to do about depositions in foreign countries, so we kept, basically, what we currently had and made a few changes to it, because the CPRC that is going to be repealed dealt with both foreign countries and other states. So once that gets repealed, we have to have a rule about foreign countries again. So that is what 201.3 is, and so --

CHAIRMAN BABCOCK: Great.

HONORABLE TRACY CHRISTOPHER: -- that's what

we did.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: The Interstate Agreement on Detainers Act applies to all of the states that sign on, does not apply to any state that does not. Is this like that? In other words, if a state has not adopted this and they send somebody in Texas a subpoena for a deposition, does this apply, or does the regular rule regarding what would have been another state apply?

HONORABLE TRACY CHRISTOPHER: No, there is no reciprocity requirement on this uniform act.

HONORABLE TOM GRAY: Okay. Second question, I'm a bit confused about the applicability, because the first sentence of 201.2 says, "In a court of record of any other" -- "if a court of record of any other state or foreign jurisdiction," and then the definition of foreign jurisdiction in 201.2 says, "Foreign jurisdiction means a state other than this state." So it looks like, under 201.2, foreign jurisdiction is something other than an "other state."

HONORABLE TRACY CHRISTOPHER: Well, (a)(1) defines foreign jurisdiction as "a state other than this state."

HONORABLE TOM GRAY: Right. Which seems to be counterintuitive to the first sentence in 201.2.

HONORABLE TRACY CHRISTOPHER: No. No, we're eliminating current 201.2 and replacing it with this 201.2 and then adding 201.3. So 201 -- the current 201.2 is gone.

HONORABLE TOM GRAY: Okay.

MR. ORSINGER: Chip, can I comment on that for just a second?

CHAIRMAN BABCOCK: You may. Will you yield, Justice Gray?

HONORABLE TOM GRAY: Oh, I had started drinking coffee again. I was done.

CHAIRMAN BABCOCK: Okay.

MR. ORSINGER: So, Justice Christopher, in 201.2 it says, "If a court of record of any other state or foreign jurisdiction," which suggests that there's a distinction between "other state" and "foreign jurisdiction."

HONORABLE TRACY CHRISTOPHER: Right. I didn't make it clear. Current 201.2 is gone.

MR. ORSINGER: And this is current 201, so that --

HONORABLE TRACY CHRISTOPHER: Right.

MR. ORSINGER: -- duplication or --

HONORABLE TRACY CHRISTOPHER: Right.

MR. ORSINGER: Very good, thank you.

HONORABLE TRACY CHRISTOPHER: I am sorry I didn't make this clear in my memo. Current 201.2 would be gone, replaced by new 201.2, which is the act, and new 201.3, dealing with real foreign countries.

CHAIRMAN BABCOCK: Judge Chu.

HONORABLE NICHOLAS CHU: Justice Christopher, I had a little hard time following this. On page 46, on 20.002, the second paragraph and third and fourth of that, is that meant to be just a comment on the draft, or is it an actual comment? Is it essentially, in other words --

HONORABLE TRACY CHRISTOPHER: This memo wasn't written as well as I should have. I apologize. Section 20.002 is the current CPRC rule.

HONORABLE NICHOLAS CHU: Yeah.

HONORABLE TRACY CHRISTOPHER: And we created 201.1 and 201.2 based upon the current CPRC provision.

HONORABLE NICHOLAS CHU: Okay, I gotcha now. Okay. And then my next question then is should there be a formal comment somewhere in the rule, just reflecting the fact that the Civil Practice and Remedies Code section is repealed based on some kind of statutory authorization or something like that?

HONORABLE TRACY CHRISTOPHER: Might be a good idea.

HONORABLE NICHOLAS CHU: Just because I know some litigator will look at that and say, well, this actually trumps because this is a statute versus rule and not realize --

HONORABLE TRACY CHRISTOPHER: Right. I think the last time this was on the agenda I included the new language from the Legislature, and I apologize that I didn't repeat it this time. But, yeah, so we could add that to the comment, that by adoption of this, according to this, this is repealed.

HONORABLE NICHOLAS CHU: Yeah.

CHAIRMAN BABCOCK: Right. Yeah, Roger.

MR. HUGHES: I had a couple of questions. First, on the new subsection (b)(1), they have to submit the request to the clerk of a court. I think it would be advisable to specify what court, district, county court at law, because, I mean, under this rule, they could ask a municipal court clerk to issue it, and I don't think that's what we want, and I can see certain difficult litigants saying any -- that any court other than district court has no jurisdiction to do that, but rather than get into it, I suggest we -- I suggest picking a court to submit it to, so we don't get that one.

Next, that -- the one that's "A request for an issuance of a subpoena does not constitute an

appearance in the courts of this state." I think essentially what they're saying is if you submit the request, you are not -- it's a kind of a self-enforcing special appearance. But the problem is, is that it says only the request for an issuance. Well, what if there is a discovery fight over it? Because later on, you adopt a lot of the discovery and subpoena rules that would allow someone to contest the subpoena or seek protection, and I can see someone arguing as that, well, the request is protected, but, you know, there was this subsequent proceeding, the motion for protection, the motion to quash, and that's not protected, so you did appear in Texas. Or God forbid a mandamus should arise out of it, is the mandamus, et cetera.

So I would suggest adding a phrase to the effect that it's not just the request, but any proceeding related to or arising out of the request. And I just trust that this is enough to say that it -- a person is not making an appearance and subjecting themselves to Texas jurisdiction, and we don't need to kind of expand it to drag in all of the verbiage that goes along with conducting a -- contesting a personal jurisdiction in Texas.

And then, finally, under subsection (d), the draft is good. The draft brings in all of the rules of

this general discovery, which would include our limitations on the scope of discovery and then the Rules of Evidence, but choice of law, you know, what happens if they're coming to Texas to get around a discovery prohibition in their own state?

I would suggest considering some -- tossing in something about other applicable law, because I don't think we want to write a choice of law provision for this. That, I think, would be getting too far into the weeds, but just simply saying that there's some other applicable law, for example, a statute in the original court's jurisdiction that would prohibit -- that would allow a privilege that Texas doesn't recognize yet or prohibit production of a certain class of documents that Texas would otherwise do. Just, perhaps, something in the effect that, that or any other applicable law concerning discovery, and I think that would solve the choice of law problem.

HONORABLE TRACY CHRISTOPHER: Or "other applicable Texas law." Because I believe the idea behind the uniform act and your concerns are that even though we're making it easier to -- let's say it's a New York lawsuit, sends the subpoena to Texas for a witness to show up and produce documents. The witness in Texas is protected by Texas rules, not New York rules, so if I put

in -- if you made that change, I'm a little worried whether it would expand to New York law, because I agree with you, there are very different -- I mean, there might be a reason why we want to quash something in Texas that would be permissible in New York, and -- but that's why the act is written the way it's written, I think.

CHAIRMAN BABCOCK: Justice Miskel.

HONORABLE EMILY MISKEL: The comment to the uniform law specifically says those laws include -- on the enforcement and application of the court provision, "Those laws include the discovery state's procedural evidentiary and conflict of laws rules. The discovery state has a significant interest in protecting its residents who become nonparty witnesses," et cetera, "any discovery motions must be decided under the laws of the discovery state. This protects the deponent," et cetera. So the purpose of the uniform law is to say that the out of New York discovery production in Texas will be governed entirely under Texas rules.

MR. HUGHES: Well, but they also said it would include Texas' choice of law, and there are times when people get into fights over whether, under Texas law, Texas would choose to recognize the privilege of some other state as applicable as opposed to its own, so that's why I get back to -- I mean, I don't want to get into

writing a special conflict of law. I think that would be too onerous and unnecessary. I'm just saying perhaps saying "any other applicable Texas law, including Texas choice of law."

I leave it to wordsmithing. I'm just saying I'm concerned that the person -- the witness may say, "I may be testifying in Texas, but it's going to be read in New York," et cetera, and we've already seen witnesses -- I mean, we get -- I won't get into it. I'm just saying I think it's a problem, and I wouldn't want someone to say the rule has shortchanged the argument that you can't use -- invoke Texas' choice of law to invoke some other privilege that might be applicable.

CHAIRMAN BABCOCK: Justice Kelly.

HONORABLE PETER KELLY: I think the statute, the uniform statute as it's currently drafted and you're looking at it, is at least intellectually consistent and tracks the language with the domestication of foreign judgments. That law follows, in this case, the discovery state, and the domestication of foreign judgment is the same laws that are in the state that rendered the judgment, so I think that's -- it's parallel to that and consistent with that.

HONORABLE TRACY CHRISTOPHER: I mean, we can add another "applicable to Texas law" to that. With

respect to your comment about the clerk of the court, I did think should we specify a court, and should we specify a district court or a county court, or the uniform act just says this? It probably is because, you know, other states don't have the myriad levels of courts that we do, but I think that that would be perfectly permissible to say it needs to be in district court or county court.

The second sentence that you were asking about there comes from the uniform act, is directly out of the uniform act. We didn't make any changes other than the underlying part in (b)(3), and it probably makes sense to add that, too.

MR. HUGHES: Okay. And the reason I say that is I don't practice a lot in other states, but we have a pretty rigorous procedure for contesting personal jurisdiction, and it's very mother-may-I, you've got to do it this way and no other; whereas, a lot of states follow the federal rules, which are not quite so strict; and a party might -- coming to Texas, might not realize the difficulty in trying to raise personal jurisdiction. That's why I'm saying we might want to make it into the rule. That's all.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: On the issue of privilege, it concerns me when we have interstate jurisdiction, or

particularly international jurisdiction, as to which law -- which state's or country's law of privilege would apply, and the list that Justice Miskel read did not mention privileges. It mentioned procedures. There were about three or four categories, and I think privilege was not on the list.

HONORABLE EMILY MISKEL: It did say evidentiary.

MR. ORSINGER: So you think that includes privileges? Well, it seems to me that that would be particularly a bad idea to specify that Texas law must control on privileges, particularly where the litigation is going on and involves mostly people in other states and Texas is kind of collateral.

You know, under the interstate second we're talking about governmental interest analysis and the state with the most significant relationship to the issue and the parties, and I can imagine that a lawsuit that's primarily between New York people might have some important information to get from a witness in Texas, and yet New York law -- New York privilege law should be the one to apply. So in my view, we should -- if we say "other Texas laws" or whatever the catch-all phrase is, if that forces the hand of the Texas judge to apply Texas privileges, that probably is not as good as letting the

judge make a conflict of law determinations as to which state's privilege should be honored.

HONORABLE TRACY CHRISTOPHER: I mean, we did discuss it in the committee, and our recommendation is to keep Texas privilege.

MR. ORSINGER: And so what is the rationale for that?

HONORABLE TRACY CHRISTOPHER: Because you're not a party. This is a nonparty witness, right, that -- I mean, maybe if you were a party witness, it would be different, but this is a nonparty witness that is just supposed to give testimony in New York, and it seems to me that because I live in Texas I'm entitled to the privilege law of Texas. So, I mean, we did discuss it and specifically put in the Rules of Evidence where our privileges are.

CHAIRMAN BABCOCK: Justice Miskel.

HONORABLE EMILY MISKEL: I was going to say, I would make it even stronger and say Texas law always applies, regardless of Texas choice of law, because also, as a judge, I don't want to be -- you know, these people are imposing on our jurisdiction enough, and then having us try to figure out New York law, I don't want to do that. So if they're going to come to our state and do discovery here, then they can live by our rules, and I

don't think -- I don't want to burden our judges with having to try to figure out the law of every jurisdiction that they come from.

CHAIRMAN BABCOCK: Robert.

MR. LEVY: I agree with that, because the privilege issues can vary. In Europe, they're even more variant and problematic, so I don't -- I think for the purposes of taking discovery, Texas law should apply. If the parties have an argument on privilege applicability, then they should take it up with the host court, the -- where the case is pending.

CHAIRMAN BABCOCK: Fair enough. Any other comments? David, you want to share those?

HONORABLE DAVID KELTNER: I'm going to eat this note and swallow it. The -- I have --

HONORABLE TRACY CHRISTOPHER: I plead the Fifth.

HONORABLE DAVID KELTNER: Two thoughts. I understand the issues, but isn't it really this simple? Couldn't you say "permitted by the" -- "the discovery permitted by the foreign state and not prohibited by Texas"? Then you get the scope of the foreign state, and Texas, the Texas resident is protected by Texas law.

I also think, though, we ought to exclude from foreign jurisdiction the state of Oklahoma, so we

don't have to deal with them.

MR. LEVY: Or Louisiana.

CHAIRMAN BABCOCK: Let the record reflect that that was said in jest and deference to our Sooner friends, or as one of my partners calls them, the land thiefs.

So any other comments? All right. It's an appropriate time for our morning break, and we will be back at 11:00 o'clock. Thank you.

(Recess from 10:42 a.m. to 11:06 a.m.)

CHAIRMAN BABCOCK: All right. We have completed the Uniform Interstate Deposition and Discovery Act, and it is submitted, Shiva, so we're good on that. And we will now go to the court interpreter issue, and guess who's leading that discussion.

HONORABLE TRACY CHRISTOPHER: Quite a day.

CHAIRMAN BABCOCK: All right. Take it away, Chief Justice Christopher.

HONORABLE TRACY CHRISTOPHER: So Government Code 57.002(g) was amended to clarify that a person who has filed a statement of inability to afford payment of court costs need not pay interpreter's costs, and we were asked whether Rule of Procedure 183 should be changed or a comment added to reference or restate the statute. So we reviewed 145 and 183 and the Government

Code amendments.

The Government Code is a comprehensive rule about interpreters and CART providers. By contrast, Rule 183 is very bare bones and seems to conflict with the statute, so we actually recommend a complete revision to Rule 183 to follow the Government Code, and in addition, Rule 145 should be amended to list an interpreter under the definition of costs. So the -- you can see what current law, 183, looks like, and in our opinion, it contradicted the Government Code, so it needed to be rewritten.

So we have totally revised 183 to follow the Government Code provision, with one possible change, and so (a), (b), (c), and (d) are all straight from the Government Code. The (d)(2) is poorly written, we thought, and didn't really explain what the Legislature was trying to get at, and we -- oh, I'm sorry, I forgot, we added (c). We need to talk about that. So I'm going to back up, and I'm going to go to (c).

So you have to have a certified court interpreter under the Government Code. We put in Rule 183, provision number (c), which is, with the agreement of the parties, a court may use a nonlicensed interpreter, and the reason we wanted to add that is that there are a lot of small, nondispositive hearings where we believe a

nonlicensed interpreter would save the counties a lot of money and time. So right now if, you know, someone shows up for a hearing, they don't speak English, they're indigent under the rule, they're entitled to a certified interpreter to help them understand the court proceedings.

If -- if it's just a very minor little thing, the former practice had always been if -- if, for example, it was a Spanish-speaking person, if your bailiff or your court coordinator or your court clerk spoke Spanish, they would interpret for the witness and tell them what they needed to do from this point forward. Technically, under the rule, that's not allowed, but we wanted to allow that to be, you know, put back into the rule, so that's why we added (c), and we made it with the agreement of the parties.

We talked about, well, should we define exactly what proceedings can go forward, you know, with this nonlicensed interpreter, but we thought as long as the parties agreed to it, we would be okay, but I understand that that could be a point where people might disagree with us. Another instance where you might not need a certified interpreter could be like a minor settlement hearing, right, where everyone is all agreed on what the settlement should be, the parent comes in and does a kind of a pro forma, yes, this is what I accept on

behalf of my child. The ad litem is there and says it's fine.

It didn't strike us as the type of proceeding where we would need to hire a certified court interpreter and that, with the agreement of the parties, you know, even somebody connected to the case could be the interpreter, because, you know, in the olden days we would have the legal assistant who spoke Spanish, or maybe even the lawyer who spoke Spanish, who would, you know, interpret back and forth.

It's not technically allowed under the Government Code provision, so, you know, we would be stepping outside the Government Code by adding a subsection (c) here, but because it -- we included with the agreement of parties, we thought that we could do it, but, full disclosure, that's not what the Government Code says. All right. Government Code says certified interpreter unless there's certain exceptions, right? So that's -- that's one addition, change that probably needs to be discussed.

And then the (d)(2), the way it is written, is the way the Government Code provision is written. We thought it was kind of unclear, so we rewrote it. That's what the alternative version is, just to make it a little clearer what was really meant by that. And then this is

probably not necessary, but we made a suggested change to costs, which is 145(a), to include fees for a court-appointed -- fees for an interpreter, yeah, sorry, fees for an interpreter. And sorry that wasn't highlighted. I think it was in yellow, and that didn't come through on the copy, but we added that language, "fees for an interpreter."

So those -- those are the -- 145(a) is not controversial at all. The question to be discussed is whether we want to add (c), with the agreement of parties, and then whether we should stick with the actual language in the Government Code, which is (d)(2), or rewrite it in the alternate version, which is, in our mind, clearer.

CHAIRMAN BABCOCK: Okay. Justice Miskel.

HONORABLE EMILY MISKEL: I am concerned about the "by agreement" language. We don't have that many licensed interpreters available, and so requiring the agreement goes beyond the Government Code. The Government Code says you can use a nonlicensed interpreter if the court makes a finding that there's no licensed interpreter within 75 miles, and there are languages that we got all the time. We had a lot of Amharic speakers, which is Ethiopia. We had Burmese speakers. We had particular dialects of Bengali that we would need, and there aren't licensed interpreters; and so I think 183(c) goes pretty

far because it says there has to be an agreement, so that means we can't do it for a default judgment because there won't be an agreement; and also, if someone wants to cause trouble and just not agree, they can prevent the opposing party from testifying or from the case going forward; and so I think it's fine to say by agreement or the court makes the finding that no licensed attorneys are available, but I just -- there are a bunch of languages that we just do not have access to licensed interpreters.

HONORABLE TRACY CHRISTOPHER: That's what we meant, and that's a good change.

HONORABLE EMILY MISKEL: Okay. Okay.

CHAIRMAN BABCOCK: Okay. Any other comments? Yeah, Judge Chu.

HONORABLE NICHOLAS CHU: I'm just a little bit concerned about the "by agreement," just because in the statute it -- it sets out for a population of under, I think, 50,000 that if you aren't a certified court interpreter, you have to be an expert, according to the Rules of Evidence, over 18, and not a party to the case, and so it creates a standard of who can be a nonlicensed interpreter, whereas, in the rule, if we have just by agreement, there's a potential for either a conflict of interest or, I think, worst case, the guy who speaks more Chinese than everybody else, so, therefore, he's the

interpreter, but maybe he's not really interpreting everything correctly.

And so I think that if we do have a by agreement standard, one, I'm in favor of just tracking the Government Code itself and kind of leaving this by agreement language out, but if we do do the by agreement standard, I think it does have to have some kind of criteria of who is eligible so it's not just, oh, the parties agreed to this guy, so the court has to just accept this guy, when maybe it's not sufficient, or there may be a conflict of interest that -- that the parties are okay with, but the court may not be.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: Well, first of all, anecdotal comment, best interpreter I ever used at an arraignment was another inmate. He was great. Incredible guy. But under (c), why did we exclude hearing impaired? Why would you not let someone use someone that was not certified CART to do the interpretation for a hearing impaired person?

HONORABLE TRACY CHRISTOPHER: I think we just didn't think about it.

HONORABLE TOM GRAY: It would seem to me that it would be a good idea.

HONORABLE TRACY CHRISTOPHER: Yeah.

HONORABLE TOM GRAY: For the same reasons. Apparently Justice Miskel has an answer.

HONORABLE EMILY MISKEL: No, I have a question, because, you're right, because I was thinking, well, it would be hard for just an average person to perform CART services, because they would have to have like court reporter-esque skills, but I was like, well, a nonlicensed person might do sign language interpretation; and then looking at this, it doesn't provide for sign language interpretation. So I would be totally in favor of having a nonlicensed sign language interpreter in some of these scenarios. I don't know that a nonlicensed CART would be technically feasible or possible, but also, interesting that sign language interpretation is not provided for by the rule.

HONORABLE TRACY CHRISTOPHER: Yeah, I mean, it's not in there.

CHAIRMAN BABCOCK: Lamont.

MR. JEFFERSON: Well, just on that point, so deaf and hard of hearing, (3) talks about interpreter services being provided free of charge. Someone has got to pay for them, right, so how is that going to be --

HONORABLE TRACY CHRISTOPHER: The county pays for them.

HONORABLE EMILY MISKEL: Yeah.

HONORABLE TRACY CHRISTOPHER: The county does.

MR. JEFFERSON: The county pays for them just like -- okay.

HONORABLE TRACY CHRISTOPHER: So, well, in the bigger counties, they have interpreters on call, and they submit their time to the county, and the county pays them. In the smaller counties, the interpreter would, you know, submit their time to the county.

MR. JEFFERSON: Well, I know in Travis County they have a service where they provide -- the interpreters are all paid. Because there's a deaf school here, there are a lot of interpreters around, which makes it easy to get an interpreter, because they know they're going to get paid, and the Bar association has a program that gets them paid. But if you're in San Antonio, you're going to have a lot harder time finding an interpreter, unless you, you know, pay them up front, and I don't -- it's a -- and I don't know if that should go in the rule or how you address it, but that's a concern, is just securing the services of an interpreter.

HONORABLE TRACY CHRISTOPHER: It used to be that whoever wanted it had to pay, but now the Government Code makes clear that, you know, it will be a county expense ultimately, if there's not -- you know, if

somebody is indigent.

CHAIRMAN BABCOCK: Justice Miskel, then Judge Chu, and then Robert.

HONORABLE EMILY MISKEL: So how it works behind the scenes is this really comes up in connection -- the problem is solved, first, in connection with magistration of people who are arrested, because those people have to be magistrated within 24 hours, and so counties have to have all of these resources available. You have to have someone, if you arrest a deaf person, that person has to be magistrated within 24 hours. So counties have solved these problems.

Just like some counties have public defenders, some counties have interpreters on staff. Other counties handle it like payment of court-appointed attorneys on a wheel. So in Collin County, we had local rules for interpreting, and they submitted time sheets, and we paid that -- the court approves them, just like we do court-appointed attorneys for indigent people, so just FYI.

MR. JEFFERSON: Just one last question, are those costs charged as costs? Are the fees charged as costs of court for interpreter services?

HONORABLE EMILY MISKEL: So the county only pays if the party is indigent. So the budget line item in

the county budget is indigent defense.

HONORABLE TRACY CHRISTOPHER: But if the party is not indigent, it is a court cost, and generally, whoever needs the interpreter pays them to show up.

MR. JEFFERSON: So if you're deaf, and you have -- you go to court, you have to secure your own interpreter or --

HONORABLE EMILY MISKEL: I don't know about deaf, because that's ADA, so that's different than foreign language. So ADA we might have to accommodate you. I don't know the answer off the top of my head, but for foreign languages it's BYO interpreter, if you are not indigent.

MR. JEFFERSON: Yeah, I have a lot of familiarity with the deaf community, which is why I'm asking about the deafness in particular. So if you're deaf and you're in court in Bexar County, does this say that the county will pay for an interpreter for you?

HONORABLE EMILY MISKEL: I don't want to commit, but my recollection is for deaf, blind, physical disabilities, things like that, the county has to provide and not charge you for it, but I don't know for sure.

CHAIRMAN BABCOCK: Judge Chu, you've been waiting patiently.

HONORABLE NICHOLAS CHU: Yeah, no, just to

add a little bit to that, I think most -- I can't remember if it's all urban counties or all counties are required to have a language access plan. Part of that language access plan also includes ADA accommodations; and for the most part, at least, I think in Travis County for sure, the county has contracted interpreter services for ASL; and so I think what happens is -- I'm just -- if there's a requirement to pay up front, a lot of counties will have issues with their auditors and issuing a payment for services not rendered yet; whereas, in these situations, pretty much if it's an indigent person, the county always pays, and it's not a question of the interpreter won't take the job because it doesn't pay. Maybe they won't take the job just because of the county rate, but it's not necessarily a "We can't find an interpreter because of payment." It's usually a "We can't find an interpreter because they don't speak this specific language in that area."

Now, with the advent of Zoom and the language line from OCA, it's become a lot easier to get interpreters for unique languages and for ASL for, like, magistration or other things, so it's a little bit easier in those rural communities, but not as -- not totally solved, if that gives some highlights into it.

MR. JEFFERSON: Last comment, so (3) says,

"Interpreter services shall be provided free of charge."

HONORABLE TRACY CHRISTOPHER: Right.

MR. JEFFERSON: And everybody just knows that means the county is going to pay for it?

HONORABLE NICHOLAS CHU: Yeah.

CHAIRMAN BABCOCK: Yeah, Justice Kelly.

HONORABLE PETER KELLY: Because in 2024 we have to ask, on subsection (c), where it's "Court may use a nonlicensed interpreter," is that necessarily a human interpreter, or does that include apps or AI? Are we going to account for increased technology in that?

MR. DAWSON: We never thought about that.

HONORABLE TRACY CHRISTOPHER: Correct. We did not think about that.

HONORABLE PETER KELLY: So a licensed interpreter is -- I mean, it's obviously human, but a nonlicensed interpreter, you could say a computer is doing it as interpreter.

CHAIRMAN BABCOCK: Robert. Robert, then Justice Miskel.

MR. LEVY: So, question, is -- are there situations where a witness could be testifying, a nonparty witness testifying in another language, where their rights might be impaired if they get faulty translation? And so the -- the reason why I'm mentioning that is you might

have parties that agree, but do we want to also permit a -- the witness to question the interpreter or have the right to challenge a nonlicensed interpreter? Because they -- you know, their testimony potentially could be subject to perjury, their rights could be impacted in other ways, and so I think we maybe should at least allow them to raise the point.

HONORABLE TRACY CHRISTOPHER: I didn't think about that, but, I mean, we could add "with the agreement of the parties and witness."

CHAIRMAN BABCOCK: Justice Miskel.

HONORABLE EMILY MISKEL: I was just going to answer the question that the Government Code -- is it -- yeah, the Government Code defines a nonlicensed interpreter as "a person who must be qualified by the Court as an expert under the Texas Rules of Evidence," so I don't think it could be an AI under this Government Code.

MR. LEVY: Not yet.

HONORABLE PETER KELLY: Not yet.

CHAIRMAN BABCOCK: Justice Browning, did you have your hand up?

HONORABLE JOHN BROWNING: Yes, I was just going to add, first, I think we would defer to whatever the definition of interpreter is, and I'm glad that it is

defined as a human, because I was going to add, in looking at issues regarding AI translation, from the simple more everyday ones that we're now familiar with like Google translate, we've seen a number of problems in courts, particularly immigration courts, where there have been mistranslations that have led to an impairment of rights or an impact on rights of the people whose testimony was being translated, where they translated a singular reference as plural; and that can have an impact as far as, you know, number of witnesses, various other issues. And this has come up in the immigration context. It's come up in the criminal context, and so right now the state of the law nationally is in a very cautious and, right now, very little reliance on any sort of AI or technology-assisted translation.

CHAIRMAN BABCOCK: Yeah, Judge Mendoza.

HONORABLE MARIA SALAS MENDOZA: So I was just going to say that the -- I think the correct term is "licensed court interpreter." I think you-all included it in your (c), but in (a) and (b) you're using "certified court interpreter," and I don't think that's the correct term.

And then I was just going to say that I think that because of the criminal indigent defense constitutional requirements, you have interpreters, but

this is the civil, right, this is for civil, so you might have counties that have access to court interpreters because they are required to do it for criminal proceedings, and this would cover the costs if you file your affidavit of inability to pay, but if not, then it's a cost.

CHAIRMAN BABCOCK: Okay. Roger.

MR. HUGHES: I think we already have baked into -- I don't know whether you call it trial procedure or the common law, that parties can contest contemporaneously, I think, the translation. I think they have to do it on the spot and raise it on the record.

The second thing is, and which is what makes this difficult, is that, technically, interpretation is not translation, and most interpreters do not literally word-for-word translate. They are trying to gain a sense as well as a translation of what the person is saying, and if you've ever watched a foreign film in a language you speak, you can realize the difference between what the subtitles attribute to the speaker and what the person is actually saying. Now, sometimes you have to struggle to find the phrase in English that matches what the person is saying, because it, as they say, doesn't translate exactly

CHAIRMAN BABCOCK: Yeah.

MR. HUGHES: So while we struggle with this,

let's give some, say, a plan that joins to interpreters, because that's a necessary part of their function.

CHAIRMAN BABCOCK: Justice Kelly.

HONORABLE PETER KELLY: One more comment on the suggested revision to Rule 145(a), at the bottom. You say "Fees for an interpreter." 183 breaks out interpreter and CART provider, so I wonder if you want to include CART provider in 145(a) as well.

HONORABLE TOM GRAY: There are some other changes to 145 that should be made, but it's to changes that are language that's been there, so I'm not going to raise those, but there's some other problems in that rule.

CHAIRMAN BABCOCK: Okay. Chief Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, just kind of as an FYI, in the pattern jury charge committee, we have been discussing a proposed rule to be given to jurors in cases with an interpreter, and there's been very lively discussion on what we should tell the jury about an interpretation, especially when the juror knows the language, right? And we're still working through that.

We -- I urged that the PJC take it here, too, to get, you know, official Supreme Court blessing so we didn't get it wrong. I'm not sure whether that's going to happen or not, but it might show up in our book before

that, but in connection with that, I did research how you object to an interpretation.

All right. So we have -- we have a rule of procedure with respect to documents, right. You get your certified translation; you give it to the other side. If they can get their own interpreter, they can contest it. You have a hearing. The two -- the judge, you know, makes a decision as to, you know, which version is correct, and then that is the official version of the document that is given to the jury.

There is nothing in our rules about how to challenge an interpretation, you know, from an interpreter, and basically, you have to object at the time. The case law says that, but --

CHAIRMAN BABCOCK: I'm sorry, you have to what?

HONORABLE TRACY CHRISTOPHER: You have to object at the time.

CHAIRMAN BABCOCK: Yeah.

HONORABLE TRACY CHRISTOPHER: But after that, what you do is far from clear, right, and I don't know if that's something that the Court wants to, you know, consider down the road. I mean, we've seen it different ways. Like I usually would say, well, you can handle that on cross-examination if you think the word

choice was wrong by the interpreter, but some courts have allowed the other side to actually question the interpreter, right, because the interpreter takes an oath at the time that they are going to truthfully interpret, right? And so they're kind of a witness, in a way, and I can actually see that as being useful.

We all know that some words have different meanings, and usually you can tell by context in English, you know, what meaning that word took on; but sometimes an interpreter might miss the meaning of a word that's, you know, tricky, has several meanings to it; and so then, I mean, I can see it both ways; and we've discussed this quite a bit in our pattern jury charge. Should you at the point in time say, "Well, Mr. Interpreter, doesn't this word have two different meanings?" And, you know, doesn't it -- can't it mean this and that and, you know, which one did the witness mean? So it's a really interesting area of the law, if we want to get into it.

HONORABLE MARIA SALAS MENDOZA: I just want to interrupt to say the reason it's super messy is because we have jurisdictions where the jurors understand the language and the lawyers understand the language, and so it just gets really messy, and I think what we settled on at the PJC is that we were not going to say "meaning," because "meaning" was too nuanced, and I think we ended up

just saying "the translation," or I don't remember, but either way, it's a difficult thing.

I was just going to say very quickly, so that it's clear, because I agree that the letter (c) should not say "with the agreement of the parties," because I think that's beyond what we want to see happening at a trial court, but even though Justice Christopher referenced the rule that we have about translations, I don't think the law actually requires it. So if you have a statement that is in Spanish, and it happens frequently, they have -- you have stops that are, I would say, in Spanglish, not English or Spanish, and involuntary statements in Spanish; and the parties get to court, the most recent statement on that issue is Castrejon, the First Court of Appeals decision; and it says it's not required. The parties do not have to actually do that translation and go through that process of which is better.

The other case that's cited is Peralta. It's a case out of my court, and we did have a translation, and there were objections, and then in that case it was whether you are required to have contemporaneous interpretation in court, and the answer was, no, because they did follow the rules.

But so I think that letter (c) goes way

further than Texas law requires. A court can have -- I don't think the court has to find an expert. The court can just determine this person is good enough, and it could be the detective, like in Castrejon, who took the statement.

HONORABLE TRACY CHRISTOPHER: I'm not sure under the rule you can anymore. I mean --

HONORABLE MARIA SALAS MENDOZA: Under this one?

HONORABLE TRACY CHRISTOPHER: Under the Government Code. When someone -- and this rule says when a witness comes in or a party comes in and says, "I need an interpreter," I don't think that you can appoint a noncertified interpreter for that person under the Government Code, without this exception.

What you're talking about is different, where you have a videotape of -- let's say it's a traffic stop, and it's recorded on the camera, and then -- and there are court of appeals opinions that say the cop can interpret that, you know, because he was speaking in Spanish to the defendant and, you know, understood what was going on and that he has the ability, by his training and experience, to do that interpretation. So we have --

HONORABLE MARIA SALAS MENDOZA: That's different, right.

HONORABLE TRACY CHRISTOPHER: Yeah, a little different levels of where we are, but this is when a party comes in and says, "I want an interpreter," or a witness comes in and says, "I want an interpreter." Government Code says it has to be a certified one.

HONORABLE MARIA SALAS MENDOZA: Licensed.

HONORABLE TRACY CHRISTOPHER: Unless certain requirements are met.

HONORABLE EMILY MISKEL: And I think that would be the only times that we would really be taking advantage of nonlicensed, because if it's Spanish, we have Spanish interpreters. That's mostly easy. It's when we have a weird language that we're doing this, and it says "expert under the Rules of Evidence," which would qualify by knowledge, training, or experience, or whoever that they're bringing in. I don't, I guess --

HONORABLE TRACY CHRISTOPHER: Well, the reason why we suggested it, and, you know, if the committee says no, the committee says no, but the reason why we suggested it is that I have heard that sometimes it takes a long time to get the interpreter to the courtroom; and, you know, if it's a minor thing that can be handled by using your clerk or your court coordinator or your bailiff, who speaks Spanish, just to be able to move things along and not sit there and wait for the certified

person. I know that this committee doesn't like to give judges a lot of discretion, but that's really what it was designed for.

CHAIRMAN BABCOCK: Justice Kelly, I think you had your hand up about a half hour ago.

HONORABLE TRACY CHRISTOPHER: Sorry.

HONORABLE PETER KELLY: Just to make two follow-ups on Judge Christopher's point about the need for objections and how do you remedy this during depositions. I had a deposition 20 years ago, if I can get this right, I think in Northern Mexico, "cinche" meant upper back and in Guatemala and Southern Mexico it meant the lower back; and that was crucial to determining whether there was a prior injury; and so I just happened to notice that the witness pointed to his upper back and not the lower back. I had a defense lawyer who was willing to work with me, and I was able to object and work through, get on the record whether it was upper or lower back, but there was no rule for it.

So it's a larger project for this committee or somebody else, trying to figure out how to work through whether the deponent can object or the opposing party can object or what can be done to fix that in a live deposition or live courtroom testimony.

CHAIRMAN BABCOCK: Okay. Yeah,

Justice Miskel.

HONORABLE EMILY MISKEL: And I was going to ask, the way you were describing it was kind of like how we have two rules of optional completeness. One you get to interrupt right then, and one you have to wait until your turn, right.

HONORABLE TRACY CHRISTOPHER: Right, right.

HONORABLE EMILY MISKEL: So you're treating the objection to the interpretation like optional completeness.

HONORABLE TRACY CHRISTOPHER: Right. Right.

CHAIRMAN BABCOCK: Okay.

HONORABLE TRACY CHRISTOPHER: So if we want to vote, I guess the first question is whether we want to have an agreement of parties exception for a noncertified interpreter, not nonlicensed, a noncertified interpreter, agreement of the parties and the witness.

CHAIRMAN BABCOCK: Okay. So everybody that's in favor of -- yeah, Judge.

HONORABLE EMILY MISKEL: I'm sorry, I had a quick question.

CHAIRMAN BABCOCK: Yes.

HONORABLE EMILY MISKEL: The Government Code seems to be pretty thorough. Is there a reason we need to have a separate rule?

HONORABLE TRACY CHRISTOPHER: Well, the current 183 was bad. All right. So it is possible to just delete 183, but I think we have generally tried to put things in the Rules of Procedure rather than trying to refer people to the Government Code. So that's why we did what we did.

CHAIRMAN BABCOCK: Well, and our charge from the Court was to do this, right?

HONORABLE TRACY CHRISTOPHER: Yes. Well, to see if 183 needed to be revised, yes.

CHAIRMAN BABCOCK: Yeah.

HONORABLE TRACY CHRISTOPHER: It either needs to be repealed or revised.

CHAIRMAN BABCOCK: Yeah. Okay. So state the proposition we're voting on again.

HONORABLE TRACY CHRISTOPHER: Okay. The --

MR. BULLARD: (C).

HONORABLE TRACY CHRISTOPHER: (C), whether we should have an exception to the Government Code for an agreement by the parties and the witness to use a noncertified interpreter.

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

HONORABLE MARIA SALAS MENDOZA: Can I ask if the alternative is a (c) that does not --

CHAIRMAN BABCOCK: No, not while we're voting.

HONORABLE MARIA SALAS MENDOZA: All right.

CHAIRMAN BABCOCK: Because I lost count now.

HONORABLE MARIA SALAS MENDOZA: I'm sorry to interrupt again.

CHAIRMAN BABCOCK: All right. Anybody opposed?

HONORABLE MARIA SALAS MENDOZA: Can I just say I'm opposed, but I want (c)? I just don't think it should be with agreement of the parties.

HONORABLE TOM GRAY: My vote as well. That's exactly why I'm voting no, is I don't think there needs to be an agreement of the parties.

CHAIRMAN BABCOCK: Okay. So the vote is 27 in favor, four against, with eloquent and strong dissents from two of the --

HONORABLE TOM GRAY: Don't put it that way. Don't hang that dissenting stuff on me.

HONORABLE NICHOLAS CHU: I'm with them. I just don't think we need the agreement of the parties.

CHAIRMAN BABCOCK: Got it.

HONORABLE TRACY CHRISTOPHER: Well, the statutory exceptions still apply, so --

CHAIRMAN BABCOCK: Of course.

HONORABLE TRACY CHRISTOPHER: If you met the statutory exception, that would be fine. The idea behind the agreement of parties is when you don't meet the statutory exception.

CHAIRMAN BABCOCK: Right.

HONORABLE TOM GRAY: Which doesn't that raise the first question that we should have voted on, which was Justice Miskel's, of do we need to have a rule versus rely on the statute and just repeal 183? Is that how you would phrase it?

HONORABLE EMILY MISKEL: Exactly.

CHAIRMAN BABCOCK: Okay. I'm all for voting. You know I'm a big voter guy, so let's vote on that. You want to phrase the vote, Justice Miskel?

HONORABLE EMILY MISKEL: Oh, I adopt the wording. Do we repeal 183 and just rely on the Government Code?

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

Everybody against, raise your hand.

All right. That fails by a vote of 6 in favor and 18 against, the Chair not voting on this or the prior one.

So any more votes that anybody wants to take? All right. Are we ready to send this to the Court?

HONORABLE TRACY CHRISTOPHER: No. The second question is whether --

CHAIRMAN BABCOCK: Oh, the alternative language?

HONORABLE TRACY CHRISTOPHER: The alternative language.

CHAIRMAN BABCOCK: Yeah.

HONORABLE TRACY CHRISTOPHER: Yeah.

CHAIRMAN BABCOCK: Sorry. Thank you. I meant to raise that. Any discussion about which of the alternatives to (d)(2) should be adopted?

HONORABLE TRACY CHRISTOPHER: So (d)(2) is the statutory language. We just thought it was wordy and a little hard to comprehend, so we made an alternative version.

CHAIRMAN BABCOCK: The intent was to stick with the statute obviously, but --

HONORABLE TRACY CHRISTOPHER: Right.

CHAIRMAN BABCOCK: But to write it in a way that was more user-friendly.

HONORABLE TRACY CHRISTOPHER: Yes.

CHAIRMAN BABCOCK: All right. Any comments about that, statute versus user-friendly? Sounds like it tilts the argument a little bit.

No comments about that? Do we want to vote

on that?

HONORABLE TRACY CHRISTOPHER: Up to you or the Court can decide.

CHAIRMAN BABCOCK: No, it's not up to me.

HONORABLE TRACY CHRISTOPHER: Or the Court can decide, you know.

CHAIRMAN BABCOCK: All right. Everybody that thinks we should stay with the legislative language, which is the language in (d)(2) right before the alternate version, raise your hand.

HONORABLE NICHOLAS CHU: Man, I feel like I'm in the minority on all of these votes.

CHAIRMAN BABCOCK: Everybody that wants to go user-friendly?

MR. DAWSON: Imagine that.

CHAIRMAN BABCOCK: All right. User-friendly wins 23 to 2, the Chair not voting.

HONORABLE MARIA SALAS MENDOZA: Can I note my abstention, because I just think if we're going to have this with the agreement of parties, that I voted just to keep the Government Code, and that's why I voted consistently.

CHAIRMAN BABCOCK: I'm sorry, Judge, could you --

HONORABLE MARIA SALAS MENDOZA: I didn't

participate because I think we should have just kept the Government Code provision, and only because I hate that with the agreement of the parties. I'm so vehemently opposed to it.

CHAIRMAN BABCOCK: Got it, thank you.

Okay. Anything else that we need to touch upon, Justice Christopher?

HONORABLE TRACY CHRISTOPHER: No.

CHAIRMAN BABCOCK: Okay. And that one's ready to be submitted. So that will go to the Court, and, Richard Orsinger, you are up now, and as best I can tell, Chief Justice Christopher has no fingerprints on this.

HONORABLE TRACY CHRISTOPHER: I can read the Court's opinions now. Sorry.

MR. ORSINGER: So, Chip, is this something we're going to do between now and 12:00, or do you want to -- because it will be brief. This is our fourth time to consider this.

CHAIRMAN BABCOCK: Right, I know.

MR. ORSINGER: So we'll do an accelerated.

CHAIRMAN BABCOCK: Well, we'll do it as accelerated or not as you care to.

MR. ORSINGER: Okay. So I did a short --

CHAIRMAN BABCOCK: You're not an accelerated kind of guy, Richard.

MR. ORSINGER: No, I'm going to try to restrain my inclination. So there's a memo back here that summarizes the situation, if you've read it. If you haven't, I'm going to just touch on it.

We have discussed what to do with the unclaimed funds in class actions now for several meetings, and, finally, on April 5th, 2024, we had a vote, and the vote basically boiled down to whether the trial court should allocate the unclaimed class action funds or whether the Supreme Court should do it, either by rule or in some other way, to determine in advance for all cases whether there's one or more preapproved, or even mandatory, recipients for these unclaimed funds.

So in the -- Judge Schaffer promoted the idea or sponsored the vote to have the trial judge do it, based on consultation with the parties, and as a corollary of that, he said the worst thing possible would be to escheat to the State. Pete Schenkkan, in the final analysis, argued the view that the Supreme Court ought to adopt a rule, and he related the Civil Practice and Remedies Code, section 26.001, requires the Court to adopt rules for fair and efficient resolution of class actions. He said or predicted that if all lawyers knew in advance where the unclaimed funds were going to go, it could actually speed up or simplify settlement of class actions

and remove the appearance of favoritism or any kind of improper influence with regard to the decision on how the funds were going to be allocated.

Pete also said the cy pres doctrine was not mandatory, even in equity. It was a discretionary concept, and it only applied to a particular area of probate law and didn't really apply generally across the spectrum, especially to include something like class actions, and he concluded his comments by saying, "My respectful suggestion is the concept here is as close as possible to helping people who can't, in fact, afford to pay lawyers to litigate cases that are otherwise meritorious," and by that, it was in the context of his recommendation that the Texas foundation -- the Texas foundation for access to the legal system should be the sole designated recipient to receive these unclaimed funds.

In the vote, Judge Schaffer's model of the trial court with the consent or advice of the parties got 13 votes in favor of it. Schenkkan's for the Supreme Court to lay down a rule specifically for the access to justice got 12 votes, so that's 13 to 12, and then there were three that didn't vote. They didn't articulate why, but they voted against both. So that's a pretty good vote, 28 out of the committee members.

So it does seem to me at this point that we have to make a fundamental and final decision about whether we want to allow individual trial judges to decide where those unclaimed funds go or whether the Supreme Court should do something that's universal; and in the context of something that's universal, I have recently had a coalescence of my thoughts on this issue, which have shifted back and forth, but the disposition of unclaimed funds is not inherently a litigation issue. It's more of an administrative issue. If you consider how due -- if you're going to have people apply for -- for distribution of funds, are you going to have a hearing, or is it going to be sworn? Is it going to be just statements? Are you going to request budgets, with a promise to spend the money in the way that it's allocated? These are administrative matters. They're not inherently litigation matters.

So if you leave it in the trial courts, you're almost pushed into a choice of letting the parties agree, with the consent of the judge, because if you try to open it up broader than that and allow applications, whether it's the Texas Bar Foundation or whether it's the access to the legal system foundation or some other foundation, it doesn't fit the litigation model. So it does seem to me if you stick with the trial courts, you're

stuck with the litigants and the judge deciding where the money is going to go.

If you say, okay, this is really not a litigation question. This is really an administrative issue, and we just have to figure out how we're going to dispense these funds, the Supreme Court has several alternatives. They can pick a single provider, which some states have done by legislation or rule; or they can pick a list of preapproved providers, saying that the parties and the judge are free to pick off of this list; or they can split the baby by saying 50 percent of it must go to the Access to Justice Foundation and 50 percent of it is for the parties and the judge to work out.

There is another alternative that occurred to me while I was drafting this memo. Sorry I didn't raise it at an earlier meeting, and that is that we could actually create a foundation for the sole purpose of administering the disposition of these funds, and the Supreme Court, you know, whoever creates it, sets up the rules. I was actually the person who created the Texas Family Law Foundation. That's easy. You just file as an organizer, you apply for nonprofit status. The more difficult part is getting the IRS to agree that you're a 501(c)(3), which should be easy. You can have one organizer, or you can have a group of nine. They can be

done by volunteers. It can be done by private designation by the Supreme Court of Texas. If the decision were to go to a foundation that's just dedicated to dispensing these funds, we could have an interim solution where we have the Bar Foundation and the Access to Justice Foundation or one or the other on an interim basis and later on to be replaced by the foundation for this purpose.

What occurs to me is that if we pick the access to the legal system, we are only facing one dimension of issues that face Texans. If we go to the Texas Bar Foundation, they're also law/litigation oriented, but with a broader, I would say, focus; and my perception is that the Bar Foundation moves forward by applications by foundations or nonprofits that will submit a budget and indicate how the money will be spent, and then there's some follow-up to be sure that the money is spent as promised.

I've had some -- some years as a member of a foundation board, and what I've found, in experience, is that the obvious charities that you would think to give money to in your community, what surprised me in that -- in that part of my activities is when the application grant process is open, there are many activities that come to your attention you would not otherwise know, and some of them, in my experience, have been amazing, what a small

group of people who are dedicated to a particular cause are able to do that's being neglected or overlooked or unattended by larger operations. So the advantage to having a grant process is that -- that people will bring to your attention needs that you may not predetermine, and so that's, I think, something that the Supreme Court should consider, is whether they want to have a grant process of some kind and whether it should be restricted just to legal services for those who don't have access to the system or whether it should be broader law-oriented or whether it should be even broader to include other needs in our society besides just legal needs.

So the Supreme Court, basically, if they can -- they have these wide range of things, but the disadvantage to leaving it at the trial court level is that on the cases that do get objected to and make its way to the appellate court so we can read them, there are very questionable decisions made about who received the money, and sometimes the suggestion has been made that the lawyers will agree on going to their own alma mater law school or whatever, and then in order to get trial court approval, they'll find a foundation that the trial judge is affiliated with or a supporter of. So, you know, if the Supreme Court makes the decision once and for all, we don't have to worry about those particular situations

where the money might be going places we wouldn't prefer.

So if we do let the Supreme Court decide, they're just going to say this is an ironclad rule, it goes one place, it goes two places, or they're going to allow some kind of grant process. You can -- both of those -- the legal access and the Texas Bar Foundation are basically foundations that administer funds based on, at least, on the Texas Bar Foundation on a grant process, and so the Supreme Court can kind of elect what group it wants to be deciding how to allocate this, and that group, the board of trustees or the subcommittee on grant funding, will be selected on a basis that's broader, I suppose, than if we just mandate one source.

So, to me, we're kind of down to the issue here, Chip, of whether we're -- we're divided. The committee is very closely divided on whether it should be in the trial court or whether it should be in the Supreme Court. If it is in the Supreme Court, the Supreme Court has alternatives. They can go 50/50 and let the trial judges and the trial lawyers get half and designate foundations, or they could even have a list of approved recipients that could change. It doesn't have to be in a rule. It could be in an administrative order, and we can add to it -- or the Court can add to it or subtract to it, but I feel like we're at those choices.

CHAIRMAN BABCOCK: Yeah, I have devised a series of complicated, but insightful, votes that we will take, and I'll tell you the ground rules in a minute, but I noticed that there's no option for the funds to be administered by the Supreme Court Advisory Committee, and I don't --

MR. ORSINGER: The administrative costs would be too high.

CHAIRMAN BABCOCK: That's the problem with that. I didn't recognize that.

MR. ORSINGER: Yeah, I think so, with all of the hotel and everything.

CHAIRMAN BABCOCK: The other thing is to send it all to the NIL fund of your alma mater, but --

MR. ORSINGER: And, by the the way, Chip, I have sample rules back here, but I don't think there's any point in us trying to deal with this. This is going to be drafted by the Supreme Court ultimately.

CHAIRMAN BABCOCK: Yeah, I would guess that, unless the Court remands it to us for our consideration. Let's have a little discussion, to the extent we need to, but we have talked about it three times.

MR. ORSINGER: I think, yes, although it may go back more than that, but three times.

CHAIRMAN BABCOCK: At least three times.

Okay. Justice Miskel.

HONORABLE EMILY MISKEL: And please cut me off if this committee has already discussed this. I don't recall, but if the Supreme Court, in other words, the government, is going to be keeping a list of where this money that's not voluntarily taken from parties and given to other parties, my concern is if -- if we're proposing that an option be a list of charities, my concern would be that we not ask the Court to make content-based decisions on which charities are in and which charities are out. I think it would be safer to stick to the functions of the judicial branch, like legal aid, regulating the profession, things like that, because I think to the extent you get expansive, people are going to want to be on the list, and then you're saying, no, your theater organization can't be on the list, yes, your wetland preservation can. You know what I mean? I think that's a problem.

CHAIRMAN BABCOCK: Okay. Any other comments? Judge Chu.

HONORABLE NICHOLAS CHU: And so along the same lines of that is, Richard, could -- I'm just kind of confused with what authorizes the Supreme Court to -- statutorily allow it to create an organizion that says, hey, it's going to be 50/50, and this is the organization

that you have to pick.

MR. ORSINGER: Well, Pete Schenkken suggested the Government Code, section 26.001, requires the Court to adopt rules to provide for the fair and efficient resolution of class actions. That's pretty broad, but to your point, many states in the country have done this through legislation and not rule-making, and so we don't have a legislative action. We have these funds piling up. Something needs to be done with them, because right now, it's just the wild west. You know, each trial court handles it differently, so it's possible, if a rule were adopted, the Legislature might get interested and pass a law; but absent legislative enactment, then either there's no regulation or at least Supreme Court regulation.

HONORABLE NICHOLAS CHU: And just as a follow-up to that, then if I was a party and I didn't like how the Supreme Court divided up the residual funds, and I appealed that, what would then happen? Like, would it just put the Supreme Court in a position where they have to recuse themselves and --

MR. ORSINGER: That's an interesting thought, but the Supreme Court doesn't recuse itself historically when it's litigating issues of its own rules, because who else is there to decide the case except --

HONORABLE NICHOLAS CHU: Right.

MR. ORSINGER: So I don't think that the fact that it's a rule would disqualify the Court from ruling on -- in the litigation context, as to whether the -- whether the -- it violates operation of powers or something of that nature.

HONORABLE NICHOLAS CHU: And maybe I'm just misinterpreting the fourth option where the Supreme Court decides 50/50. Is it essentially just deciding, hey, it goes to these entities, and then somebody else decides these entities, or is the Court actually deciding on which specific entity?

MR. ORSINGER: So in most of the instances around the country, whether it's legislation or rules, it's going to the access to the legal system is a mandatory grant, say, for 50 percent, and the other 50 percent is for the parties and the judge to figure out. So it could be anybody in the world.

HONORABLE NICHOLAS CHU: Okay.

MR. ORSINGER: So, to me, really the question is the litigation model is not a good fit for allocating funds, because really you need information about who the recipient is going to be and that kind of thing, unless you have someone preapproved. Like we know what the Access to Justice Foundation does. They're all

controlled. They've got all kind of bylaws. Same with the Texas Bar Foundation, and there may be others beyond that that we can trust to administer properly.

MR. JEFFERSON: Can I ask a procedural question?

CHAIRMAN BABCOCK: Certainly.

MR. JEFFERSON: The last meeting, so we had the Schenkkan model and the --

MR. ORSINGER: Schaffer.

MR. JEFFERSON: Schaffer model.

CHAIRMAN BABCOCK: Yeah, your last name had to end in S.

MR. JEFFERSON: Did we just have one vote, or was there --

MR. ORSINGER: We just had one vote, I think --

CHAIRMAN BABCOCK: We did.

MR. ORSINGER: -- after much discussion.

CHAIRMAN BABCOCK: But not today. Today we're going to have multiple votes.

MR. JEFFERSON: Okay. Okay. Well, maybe that answers my question. I thought at the last meeting we voted in favor of the Schenkkan model.

MR. ORSINGER: I think Pete got the --

CHAIRMAN BABCOCK: There was one vote.

MR. ORSINGER: Schaffer got 13 and Pete got 12, and three voted against both. It's kind of like the election.

MR. JEFFERSON: I'm reading the transcript wrong.

MR. ORSINGER: Well, then I'm reading the transcript wrong. When I read the -- if you've got the transcript up, and I don't, why don't you just read it and let's see?

CHAIRMAN BABCOCK: No, we don't care, because that's -- we're voting anew. It's a revote.

MR. JEFFERSON: Fair enough.

HONORABLE TOM GRAY: They didn't like the last vote, so we're going to do it over.

CHAIRMAN BABCOCK: The last vote was too close, but this vote is going to reveal the real intent. Giana, do you want to say something?

MS. ORTIZ: No.

CHAIRMAN BABCOCK: You had your hand kind of halfway up. Yeah, Rich.

MR. PHILLIPS: Can I just ask a quick question? The rule, as proposed, just looking at the first one, I think all of the rules say this, "The trial court shall provide." When is this supposed to happen? Is it supposed to happen in the judgment, the order

approving the settlement? Does it happen later in the process when there's money to be distributed? It just says, "The court shall provide." Do we need to say when exactly in the process the court should provide that?

MR. ORSINGER: People in the committee here that have more active experience in class actions than I do might have a different opinion, but my view of it is that it occurs in the order approving the settlement and that you specify and then you have an open period where claims can be filed, and when the deadline is reached, then the funds are distributable. Whether they're distributable before or after that, may be some preliminarily, but one of the questions I had is where does the appellate review occur here? Do we have interlocutory appellate review of this order, or does it have to be folded into the final judgment?

And that raises the question of if it's going to be subject to appellate review, don't we need findings and conclusions so that the appellate court has some basis on which to review the trial judge's decision? And it's never going to get appealed unless somebody in the class disagrees, and that's what's happened in the federal circuits all around. Somebody -- in fact, there's some foundations that offer the legal service. If you feel like this allocation is being abused, we'll represent

you, and you'll see them recurrently at the courts and even in the U.S. Supreme Court, which has reviewed -- they have considered it, but refused to write on it now several times.

CHAIRMAN BABCOCK: Richard, my thought is that the Court needs to get the sense of this committee on one -- one proposal, and if the Court wants further rules to implement that proposal or some other proposal, then we'll tackle that, and hopefully, they'll send it back to us for further consideration, because no meeting would be complete without dealing with this issue.

MR. ORSINGER: Chip, I think if we have to bring it down to the ultimate test, it's kind of the question of whether it should be the trial court that makes the decision or the Supreme Court.

CHAIRMAN BABCOCK: No. We've got four --

HONORABLE PETER KELLY: Or the court of appeals saying something.

CHAIRMAN BABCOCK: Everybody listen to this. It's complicated. You've got four options. You've got two trial court, two Supreme Court. Trial court with complete discretion, trial court with discretion but parameters, the Supreme Court with a hundred percent discretion, or the Supreme Court with a hundred percent selection what they do with the funds, and then Supreme

Court, 50 percent what they do with the funds.

MR. ORSINGER: I bet we're going to get split votes that are --

CHAIRMAN BABCOCK: No, no, we're going to come out with a clear winner, because every proposal is going to have -- everybody is going to have four votes per proposal. And follow me.

MR. ORSINGER: This is complex.

CHAIRMAN BABCOCK: If you vote -- if you give a proposal your number one, so you say, "I like this the best," that's going to be a weighted vote, one times four. If it's your second choice, it's going to be times three, and if it's your third choice, it's going to be times two, and if it's your last choice, it's going to just count for one.

MR. ORSINGER: So who's going to do this math?

CHAIRMAN BABCOCK: Shiva. No, we're going to vote. Then we're going to take a lunch break, and everybody will have to stay until they come back after lunch to hear how it came out.

MR. JEFFERSON: What does 50 percent mean? What does the Supreme Court, 50 percent, mean?

CHAIRMAN BABCOCK: You want to explain that?

MR. ORSINGER: Yeah, the Supreme Court will

dictate that half of it goes to X and the other half is decided by the trial judge and the lawyers.

MR. PHILLIPS: And when you say the Supreme Court, you mean that by rule, the rule will say 50 percent goes to --

MR. ORSINGER: You know, the rule could say the legislations are clearly designated who the recipient is. I don't know that our Supreme Court are that tied. They could have a list of preferred recipients that would be more flexible and could change.

MR. PHILLIPS: But to be clear, we're not saying every one of these goes to the Supreme Court to decide in every case where the money is going.

MR. ORSINGER: The fundamental choice here is, is the Supreme Court going to announce a rule that controls who receives this money or half of this money.

MR. PHILLIPS: So decision by Supreme Court is decision by rule, not something else.

MR. ORSINGER: Yes, although, like I said, I think it might be better to have a list of approved recipients more flexible than the rule change process, but the bottom line is the rule will say the Supreme Court is going to have a list, and if you're on that list, you're preapproved, and if you're not on that list, you're not preapproved.

CHAIRMAN BABCOCK: And, by the way, we're not going to do this by electronic voting. It's going to be by hand, by raising hands. Justice Gray.

HONORABLE TOM GRAY: Of these four bad options, if I am in support of a grant process like you described, although the who can apply may need to be circumscribed by rule, as Judge Miskel suggested, which one of these options, bad options, would I vote for?

MR. ORSINGER: You know, that's not in Chip's list, but you could have a grant process in the trial court.

HONORABLE TOM GRAY: I'm only going to have four options.

MR. ORSINGER: I know.

HONORABLE TOM GRAY: Which one is the closest to the grant option?

MR. ORSINGER: Let me explain. You could have a grant option in the trial court, if the Supreme Court so said, and the question is do you have a public hearing? Do you have public notice like Rule 76a? Do you have applications? Do you have a trial judge figure out which one of these charitable organizations should receive this money? Are they going to be required to submit a budget? Are they going to be required to stick to the budget? Or the Supreme Court could do the same thing. We

know, of course, the justices are not going to do that, which is why I think they need to delegate the administrative function to some kind of administrative operation, including one that's newly created for this purpose, which can be done. So I don't feel like --

HONORABLE TOM GRAY: You don't feel like that option is in any of Chip's options?

MR. ORSINGER: I think it is in the Supreme Court options, that the Supreme Court could opt to administer 50 percent of it or a hundred percent of it and then designate the foundation to handle the administration, whether it's the Bar Foundation or legal access to the --

CHAIRMAN BABCOCK: Okay. Anybody want to try this?

HONORABLE NICHOLAS CHU: Chip, can you repeat the options again?

CHAIRMAN BABCOCK: We're going to start with trial court discretion, and if that's your favorite, we're going to see whose that's the favorite. And then we're going to see on that one who prefers that as their number two option, and then three and then four.

HONORABLE TOM GRAY: So you're going to take 16 votes?

CHAIRMAN BABCOCK: I'm going to take 16

votes.

HONORABLE TOM GRAY: Okay

MR. DAWSON: Before lunch.

CHAIRMAN BABCOCK: You're going to -- before lunch. You're going to do the math, Justice Gray.

HONORABLE TOM GRAY: Oh, then good, I already know how it's going to come out then.

CHAIRMAN BABCOCK: No, not that kind of math. All right. All right. Trial court certification. Yes, Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Do we have to agree with the parameters on trial court discretion?

CHAIRMAN BABCOCK: Do we have to do that?

HONORABLE TRACY CHRISTOPHER: To vote for that as our preferred number, do we have to agree to all of the parameters that are written?

CHAIRMAN BABCOCK: No.

HONORABLE TRACY CHRISTOPHER: Okay.

CHAIRMAN BABCOCK: We'll come up with other parameters.

HONORABLE TRACY CHRISTOPHER: Okay.

CHAIRMAN BABCOCK: All right. Everybody ready? All right. The first proposal, trial court complete discretion, everybody who that's their favorite option, raise your hand.

All right. Everybody who it's their next favorite option, raise your hand.

Everybody who it's your third favorite option, raise your hand.

Okay. And, finally, everybody who thinks that's the worst option, the last option.

MR. ORSINGER: If you don't vote at all, it's better than if you vote for four, right, because then it doesn't score at all.

CHAIRMAN BABCOCK: Quiet.

HONORABLE TRACY CHRISTOPHER: It's true.

MR. ORSINGER: I withdraw my vote then.

CHAIRMAN BABCOCK: Okay. Trial court -- you can manipulate the vote. That's your right as a citizen.

MR. ORSINGER: I withdraw my vote, so it's not going to have any weighted voice.

CHAIRMAN BABCOCK: Trial court discretion with parameters. Everybody who that's your preferred option, raise your hand.

Second option?

Third?

And, finally, you don't like this one at all, it's your last option? That one's going down in flames.

All right, Supreme Court, a hundred percent

control. Everybody that's your favorite option, raise your hand.

Next favorite option?

Third favorite option?

And last option.

Okay. Finally, Supreme Court, 50 percent control. Everybody that's favorite option?

Next favorite option?

Third favorite option?

And last option.

All right. We'll break for lunch, come back, and I'll give you the results.

(Recess from 12:15 p.m. to 12:38 p.m.)

CHAIRMAN BABCOCK: All right, thanks, everybody. Come on, Justice Gray. Everybody take their seats.

Before I reveal the votes, I should have acknowledged somebody who's been a frequent contributor to our committee and is now a member and has ascended to the Fifteenth Court of Appeals, Justice Bullard.

MR. BULLARD: Business court.

CHAIRMAN BABCOCK: Business court. I knew it was some court. Anyway, he's on a court now, but he didn't used to be.

But everybody ready? Everybody here? Okay.

Here are the results. Finishing last, everybody's least favorite option was the trial court with complete discretion. It has a score of 24, only because we counted 14 last place votes. So there's truly not the option that anybody prefers.

Finishing next was Supreme Court with 50 percent discretion. Finishing second was the trial court with parameters, and that tells you that the Supreme Court with a hundred percent discretion was the winner, with 64 points, followed by the trial court with parameters at 55. The Supreme Court 50 percent at 56, and the trial court, complete discretion, had 24, with 14 last place votes, swelling the total of the trial court with complete discretion.

So now there should be applause.

MR. ORSINGER: That's perfect clarity, Chip, perfect clarity.

HONORABLE TOM GRAY: Well, I was just hoping Jane would make sure and tell the other eight that I voted for that option that won.

HONORABLE JANE BLAND: They might not thank you for it.

HONORABLE TOM GRAY: Good point. Never mind.

CHAIRMAN BABCOCK: I was going to say, even

though the Chair didn't vote, I would have voted for that, but now I'm not going to say anything. But only because we have so much confidence in the Court.

So that takes care of that, and if the Court wishes us to implement any rules on that or any of the other three proposals, you'll let us know, and that will be good, and probably because Justice Christopher had the majority of our docket today, we are done.

(Applause)

CHAIRMAN BABCOCK: And thanks for coming, and particularly pleased to see Mike Hatchell and Professor Dorsaneo.

MR. ORSINGER: Hear, hear.

CHAIRMAN BABCOCK: Hear, hear, and we'll be in recess. Thank you.

(Adjourned at 12:42 p.m.)

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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 28th day of June, 2024, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are $ 1,034.00 .

Charged to: The State Bar of Texas.

Given under my hand and seal of office on this the 20th day of July, 2024.

/s/D'Lois L. Jones
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