**EXHIBIT A: Minutes**

**TO:** **Judge David Newell**

**FROM:** **Holly Taylor**

**RE:** **Minutes of the May 17, 2019 Court of Criminal Appeals Rules Advisory Committee Meeting**

**DATE:** **Prepared May 21, 2019; revised August 2, 2019**

MEMBERS IN ATTENDANCE: Judge David Newell (Chair), Judge Barbara Hervey, Chief Justice Tom Gray, Judge Jefferson Moore, Professor Steve Goode, Emily Johnson-Liu, Chris Prine, John Rolater, Sian Schilhab, Holly Taylor, Deana Williamson, and Ben Wolff
NONMEMBERS PRESENT: Justice Evelyn Keyes, Michael Falkenberg, Randy Schaffer

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**1. Welcome**

Committee Chair Judge David Newell called the meeting to order. Judge Newell directed the members' attention to the reimbursement forms, noting that they must be submitted within thirty days. Ms. Schilhab asked members seated at the end of the table to speak loudly and/or identify themselves to help Ms. Taylor later identify the speakers on the recording. Chief Justice Gray shared an anecdote about a person who would preface each remark by shouting his name into the recorder.

**2. Review of minutes from February 2019 Court of Criminal Appeals (CCA) Rules Advisory Committee meeting (See Exhibit A).**

Ms. Taylor said that she found four typos in her minutes. Chief Justice Gray said that he had found that many typos on pages five and six. He said that he would give his corrections to her later. He identified only one substantive correction: a passage on page twelve in which the minutes suggest that he did not know the meaning of the words "supplemental" and "amended." He suggested an amendment to clarify that he merely did not understand the meaning of the terms as defined in the context of the proposed language. Ms. Taylor agreed that the change would more accurately reflect the conversation. The committee approved the minutes, as amended, by consensus.

**3. Update on CCA order RE Texas Rule of Appellate Procedure (TRAP) 73.7, 73.8 (See Exhibit A.1)**

Judge Newell asked Ms. Taylor to provide an update on the CCA's order amending Texas Rule of Appellate Procedure (TRAP) 73.7 and adding TRAP 73.8. Ms. Taylor said that the Committee discussed these proposed amendments at length at the last meeting. She said that the order

contained in Exhibit A.1 reflects the changes agreed upon by the Committee at the last meeting. However, the CCA decided to make a few small changes before approving the proposed rule amendments:

(1) The CCA asked for language clarifying that these rules apply specifically to writs brought under Code of Criminal Procedure (CCP) Articles 11.07 and 11.071;
(2) The CCA deleted a subsection dealing with the CCA's ruling because the CCA's order will speak for itself; and
(3) The CCA added the word "generally" at one spot in the comment.

Ms. Taylor explained that, unlike the Supreme Court of Texas's (SCOTX's) orders, the CCA's initial rules amendment orders are merely proposals for public comment. In other words, the CCA's order does not set a date by which the proposed change will become permanent. The CCA must sign another order for the proposed amendment to take effect. Judge Newell pointed out that the order will be published in the Texas Bar Journal. He further mentioned that the Court has appointed a new committee member who could not be at this meeting. The new member is Sheri Woodfin, the District Clerk of Tom Green County. She will replace (former) Bexar County District Clerk Donna Kay McKinney who resigned from the Committee.

**4. Proposed amendments concerning bills of exception/offers of proof and the application of the Rules of Evidence in habeas corpus proceedings (See Exhibits B, B.1, B.2, B.3, B.4)**

Judge Newell explained that the Committee had discussed some ideas for rules changes at the last meeting and we decided to bring specific proposals to the next meeting for discussion. He noted that Mr. Varela had submitted one of the proposals, but Mr. Varela was not present at this meeting. Ms. Taylor said that the purpose of the various proposed changes is to address two problems identified by Mr. Randy Schaffer: (1) the question of whether the offer of proof rule contained in Rule of Evidence 103 should apply in an evidentiary hearing in a habeas corpus case; and (2) the larger question of whether the Rules of Evidence as a whole should apply in an evidentiary hearing in a habeas case. Ms. Taylor said that there were four proposals, including the one submitted after the meeting by Mr. Varela. At the meeting, Mr. Varela had suggested a "counter exception" to Rule of Evidence 101(e)(3):

> **(e) Exceptions.** These rules—except for those on privilege—do not apply to:
>
> * * *
>
> **(3)** the following miscellaneous proceedings:
>
> > **(A)** an application for habeas corpus in extradition, rendition, or interstate detainer proceedings**, however, in an evidentiary hearing in a post-conviction habeas proceeding, these rules shall apply**;

Mr. Varela then submitted a proposal via email, which contained an additional proposed change. (See Exhibit B.4). Ms. Taylor said we are focusing on habeas corpus proceedings in felony cases

brought under CCP Article 11.07. For death penalty writs, there is a statutory section in CCP Article 11.071 that provides that the Rules of Evidence apply to a hearing. She said that, apparently, there is some disparity throughout the State as to whether trial courts will apply the offer of proof rule or the rules of evidence in Article 11.07 habeas hearings.

Professor Goode said that, when he read the minutes from the last meeting concerning Rule of Evidence 101, he was "stunned." He said that there is "zero ambiguity" in Rule 101 concerning the application of the rules of evidence. He thought that there might be some ambiguity in Rule of Evidence 103, but there was none in Rule 101. Ms. Taylor remarked that Texas Practice and Procedure states that, "Whether the rules of evidence apply by their own terms is not clear." Professor Goode asked what is "not clear" in Rule 101. Judge Newell said that, even if it does not make sense, practitioners like Mr. Schaffer are encountering the problem. He said that he favored a comment to Rule 103 (see Exhibit B.2) to address the problem. He acknowledged that another approach is to put language in the Rules of Appellate Procedure dealing with postconviction writs. (See Exhibit B.3).

Judge Newell asked Professor Goode if he (Goode) believes that no change to Rule 101 is needed. Professor Goode remarked that the only change he could think of would be to add a provision stating that, "if it is not listed in the exceptions, we really mean it--the rules of evidence apply." He said that Rule 101 clearly states that, if it is not one of the listed exceptions, the rules of evidence apply. Professor Goode said that the "counter exception" proposal makes no sense. He said he understands the issue about Rule 103 and the confusion due to the use of the word "jury." He thinks that that rule could be clarified but he does not think that we could make Rule 101 clearer than it already is.

Ms. Taylor agreed with Professor Goode. She said that she was concerned about adding a counter exception here because it could raise the question of whether there might be other exceptions to exceptions and it could open a "can of worms."

Chief Justice Gray wondered what "rendition" refers to in the context of its use in Rule 101(e)(3)(A): "an application for habeas corpus in extradition, rendition, or interstate detainer proceedings." He said that a regular postconviction writ may not be something that should properly be categorized as an exception in subsection 101(e)(3)(A).

Mr. Schaffer said that he had been making Professor Goode's argument "almost verbatim" to judges for a decade, yet many of them have disagreed with him. He asked whether Professor Goode believed that the rules of evidence should apply in a habeas corpus proceeding where the court does not hold a live hearing. Professor Goode said that there are lots of situations where the rules of evidence do not apply when there is not an evidentiary hearing, including questions of the admissibility of evidence. He said that, on the State Bar Rules of Evidence Committee, lawyers come in all the time with stories about judges who are getting the rules of evidence wrong. He favored the ideas of changing the TRAP rule and/or Rule 103, but he did not think that Rule 101 needed any clarification.

Ms. Taylor observed that "extradition" is a subset of "rendition," which means the "surrender or

handing over of persons or property, particularly from one jurisdiction to another." Ms. Schilhab said that, in a strict technical interpretation, extradition refers only to an international process of surrendering a person. Professor Goode said that this issue is covered extensively in the CCP.

Mr. Wolff discussed the change proposed to TRAP Rule 73 set out in Exhibit B.3: "73.9. Rules of Evidence. -- The Texas Rules of Evidence apply to an evidentiary hearing held on a postconviction application for a writ of habeas corpus filed under Code of Criminal Procedure Article 11.07 or 11.071." Mr. Wolff pointed out that Article 11.071 §9(a) indicates that a hearing could be a paper hearing based on affidavits. Judge Newell asked whether Mr. Wolff thought that the proposed Rule 73.9 should use the term "evidentiary hearing" or just "hearing." He responded that the rule should just say "hearing."

Judge Newell asked for a vote on whether to include the counter exception in Rule 101. No members favored the counter exception proposal.

Judge Newell mentioned Exhibit B.2 (a proposed comment to Rule 103 based on Chief Justice Gray's suggestion at the last meeting):

> **2019 Comment.** When the trial court sustains an objection to a question in a habeas corpus proceeding, the party offering the question is entitled to obtain the answer through a bill of exceptions or make an offer of proof. The trial court retains the authority to control the scope and extent of the bill of exception or offer of proof.

Professor Goode described a change he wished to make to Mr. Varela's proposed change to Rule 103 (Exhibit B.4):

> **(c) Court's Statement About the Ruling; Directing an Offer of Proof.** The court must allow a party to make an offer of proof ~~**outside the jury's presence**~~ as soon as practicable**.** ~~**—and,**~~ **In a jury trial, the court must allow the party to make the offer outside the jury's presence and** before the court reads its charge to the jury. The court may make any statement about the character or form of the evidence, the objection made, and the ruling. At a party's request, the court must direct that an offer of proof be made in question-and-answer form. Or the court may do so on its own.

Judge Newell asked Mr. Schaffer what he thought about Professor Goode's proposed modification. Mr. Schaffer said that he did not have a problem with it.

Judge Moore asked whether the first half of the heading of Rule 103 subsection (c) was needed or should be rearranged to match the order of the concepts in the body of the rule. The title reads: "Court's Statement About the Ruling; Directing an Offer of Proof." Professor Goode explained that this rule historically combined two differing rules from the criminal and civil rules. Judge Newell cautioned that any changes that we make might affect civil cases, as well as criminal, and asked whether any of these changes might have an unforeseen impact on civil cases. Professor Goode said that these changes are "purely non-substantive." He said that Judge Moore's idea of

making the content of Rule 103 match the order of the heading was a good idea.

Judge Hervey said that, if the rules started with the sentence about the court making "any statement about the character or form of the evidence," the reader could be confused. She suggested rearranging the heading to put "Offer of Proof" first. Professor Goode said that the offer of proof comes after the Court's ruling in practice. He thought that the CCA's original rule may have only had the sentence including "any statement about the character or form of the evidence." Judge Moore said that this rule mixes two topics and it could possibly benefit from subsections. Ms. Taylor warned that the more changes our Committee recommends, the more it may cause concern for the SCOTX, since the rule applies to civil cases, too. She recommended changing as little as possible in the rule to achieve the desired clarification.

Judge Newell asked whether there were any members who felt that we should not make any changes to the rule and should just add the proposed comment. Judge Moore responded that he did *not* think that we should rely on the comment, noting the footnote in Exhibit B.2 stating that comments to the Rules of Evidence may not make it into the rule books.

Chief Justice Gray recommended changing the rules to require publishers to include the comments in the rule books. He further stated that he withdrew his suggested comment in Exhibit B.2 under the circumstances. He said that we might have to revisit the proposed comment if the SCOTX does not agree with the proposed change to Rule 103. He said that he has been on the SCOTX's rules committee (the SCOTX Advisory Committee or SCAC) for about fifteen years. He said that it could be two years before a proposed rule change makes it through the SCAC to the SCOTX's desk. He said that he likes Professor Goode's proposed language for Rule 103. He further suggested moving the sentence about the court's ruling in Rule 103 to the end of the rule because, after an offer of proof, the court will be asked to rule again. He said that the language could just require the offer of proof to be made "before the close of evidence" and not mention the "jury's presence."

Judge Newell said that he liked the "vigorous efficiency" of this proposal but he wondered if it was so drastic of a change that "someone might throw a shoe." He asked whether the Committee favored Professor Goode's proposed changes to subsection (c) (indented text above). The Committee approved of this measure by a voice vote.

Judge Newell also asked the Committee to compare two options: (1) moving the middle sentence ("The court may make any statement about the character or form of the evidence, the objection made, and the ruling.") to the front of the subsection; and (2) moving the middle sentence to the end of the subsection and inverting the heading. Professor Goode pointed out that the State Bar Committee tried to keep the Texas Rules of Evidence as close as possible to the Federal Rules of Evidence.[1] Judge Moore recommended starting the subsection heading with "Offers of Proof."

[1] Federal Rule of Evidence 103(c) reads: "Court's Statement About the Ruling; Directing an Offer of Proof. The court may make any statement about the character or form of the evidence, the objection made, and the ruling. The court may direct that an offer of proof be made in question-and-answer form."

Judge Newell said that, the fewer changes we suggest, the more likely that the changes will be interpreted to be non-substantive.

Professor Goode said that he could take this Committee's proposal to the State Bar committee and it might be approved relatively quickly. He acknowledged that the proposal could move more slowly through the SCOTX. He noted that the SCOTX has four or five noncontroversial rules that have been waiting for approval for some time.

Judge Moore asked if it would facilitate the process to give the SCOTX two proposals. Ms. Taylor said that, if the State Bar recommends the change and the CCA recommends it, the SCOTX might take a hard look at it and the process might move more quickly. She said that she did not know whether we should pass on two options. Judge Newell proposed the following option: keep the subsection heading the same, include Professor Goode's changes, move the sentence containing "the character or form of the evidence" to the beginning of the subsection so that the rule content reads in the same order as the heading:

> **(c) Court's Statement About the Ruling; Directing an Offer of Proof.** The court may make any statement about the character or form of the evidence, the objection made, and the ruling. The court must allow a party to make an offer of proof ~~outside the jury's presence~~ as soon as practicable.~~ and,~~ In a jury trial, the court must allow the party to make the offer outside the jury's presence and before the court reads its charge to the jury. ~~The court may make any statement about the character or form of the evidence, the objection made, and the ruling.~~ At a party's request, the court must direct that an offer of proof be made in question-and-answer form. Or the court may do so on its own.

Judge Newell asked for a show of hands regarding the above proposal. The measure carried by a show of hands. Chief Justice Gray asked Mr. Schaffer if he thought that this proposed amendment would fix his problem. Mr. Schaffer said that he thought it would fix the problem because it would be something that he could point to when the issue arises.

Judge Newell then focused on the proposed change to TRAP 73.9 specifying that the rules of evidence apply in a postconviction habeas hearing. (See Exhibit B.3). Judge Newell said that he liked the proposal. No one expressed any opposition.

The committee then discussed whether to use the term "evidentiary hearing" rather than "hearing." Mr. Schaffer said that he has encountered occasional cases where the judge says that his evidence is inadmissible. He expressed concern about applying the rules of evidence to all aspects of habeas corpus proceedings because inmates file 95% of these applications pro se. The inmates cannot comply with such requirements. Further, in a habeas proceeding, there is no reason to quarrel with the offense report or a witness statement. Mr. Schaffer said that he does think that the rules of evidence should apply in the courtroom during a writ hearing.

Ms. Taylor asked whether this has been an issue in CCP Article 11.071 writs. Mr. Wolff said that the rules are much clearer for Article 11.071 (death penalty) cases because there is a specific statute stating that the rules of evidence apply. To clarify the rule's application with regard to the pro se applicant's filings, he recommended striking "evidentiary" before hearing in the proposed language.

Mr. Rolater said that he has used rules of evidence-based challenges in Article 11.071 paper hearings—such as with regard to an expert's affidavit—but it is fairly uncommon. He thinks the proposed rule is a good idea and the idea of removing the word "evidentiary" does not give him any "heartburn." He said that there is some tension in Article 11.071 between the use of affidavits and the provision stating that the rules of evidence apply. He has objected to the use of an affidavit in some instances because he wanted to be able to cross examine the affiant.

Mr. Schaffer said that the statute also provides that the trial judge can rely on his personal knowledge, which falls outside the rules of evidence. Ms. Taylor referred to the relevant portion of Article 11.07 for the committee's reference:

> If the convicting court decides that there are controverted, previously unresolved facts which are material to the legality of the applicant's confinement, it shall enter an order within 20 days of the expiration of the time allowed for the state to reply, designating the issues of fact to be resolved. To resolve those issues the court may order affidavits, depositions, interrogatories, additional forensic testing, and hearings, as well as using personal recollection.

CCP Art. 11.07 § 3(d). She noted that hearings are listed separately in the list under Article 11.07 § 3, which suggests that the hearing is a separate item from affidavits and personal recollection. Mr. Wolff pointed out that Article 11.071 is different from Article 11.07, because Article 11.071 Section 9 is entitled "Hearing" and contains depositions, interrogatories, and personal recollection within that section.

Judge Newell said that he is hearing that it is OK for the rules of evidence to apply to a paper hearing. Mr. Falkenberg said that we want to clarify that the rules of evidence apply in a live hearing. He said that is the matter that is unclear to practitioners. He said that the rules of evidence have never applied to paper hearings. He said it is important to make that distinction. Judge Newell said that the question of whether the rules apply to a live hearing only or to paper hearings as well will need to be answered by the CCA. He said that we need to decide what language the committee will recommend to the Court.

Professor Goode asked if there is some reason why Article 11.07 would be any different from Article 11.071. Ms. Schilhab stated that Article 11.071 has a section expressly providing that the rules of evidence apply in a hearing.[2] He asked if there is some reason why we think that the two statutory writs should be different. She said, "no." She said that it seems clear that the rules would

[2] *See* Art. 11.071 § 10 ("The Texas Rules of Criminal Evidence apply to a hearing held under this article.").

apply to a hearing held under either statute, but the Legislature included it in one statute and not in the other. She said that the benefit of removing the word "evidentiary" is that the rule would then mirror the text in Article 11.071 § 10.

Judge Hervey asked how the rules of evidence could apply to "personal recollection." Chief Justice Gray recalled a case in which the CCA ordered his court to review a trial court's decision, but they did not have the records of those proceedings. Judge Newell said we should go ahead and send the rule to the Court without the word "evidentiary." Ms. Taylor said that we should be careful to avoid unintended consequences. She said that we have many pro se litigants in these cases who file the applications from prison and must attach the necessary documents to their applications. Judge Newell said that he only wants to omit the word "evidentiary" to make the rule consistent with Article 11.071. Mr. Wolff suggested that the Court or the committee could include a comment that this rule does not limit the ability of an applicant to attach supporting documents to their initial pleading. Judge Newell asked if Ms. Taylor "got that."

[[The committee took a break. The committee returned and began to discuss a new agenda item.]]

**5. Proposal to Broaden Requirement for Serving the Office of the State Prosecuting Attorney (SPA), including proposed deletion of TRAP 68.11 and new TRAP 80.1 (See Exhibit C)**

Assistant State Prosecuting Attorney Emily Johnson-Liu explained the background for the proposed rule change. She said that the rules require petition for discretionary review (PDR) filers to serve the Office of the State Prosecuting Attorney (SPA). However, filers of other types of briefs, such as death penalty direct appeals and filed-and-set writs of habeas corpus, do not often serve copies on the SPA and the rules do not require them to do so. The SPA sometimes likes to write amicus statements in capital murder and other types of cases where an issue has arisen that is similar to a pending issue in a PDR case. The SPA would like to be served with all types of briefs filed in the CCA. She has proposed a new rule for the TRAP to require all CCA briefs to be served on the SPA.[3] Her proposal includes amendments to take the current SPA provisions out of the briefing rule (TRAP 38) and the PDR rule (TRAP 68). She discussed an alternative way of implementing the desired change that would involve retaining existing TRAP 68.11[4] and adding new language to the TRAP rules governing death penalty cases and writs. She said that it would be easier to have one rule including all the SPA service requirements. Mr. Wolff asked about habeas writ applications. Ms. Johnson-Liu said that the SPA does not want to be served with all habeas applications, only briefs. The rule would only apply to filed and set writs.

Mr. Wolff suggested that some filers may not understand the meaning of the term "brief" in

[3] Proposed TRAP Rule 80.1: "Service on State Prosecuting Attorney. The State Prosecuting Attorney must be served on every petition for discretionary review or brief filed by any party or amicus curiae in the Court of Criminal Appeals, including replies, responses, amendments, and supplements."

[4] Existing TRAP Rule 68.11: "Service on State Prosecuting Attorney. In addition to the service required by Rule 9.5, service of the petition, the reply, and any amendment or supplementation of a petition or reply must be made on the State Prosecuting Attorney."

proposed TRAP 80.1. He suggested adding the limiting phrase "filed and set" to clarify the application of the rule for writs of habeas corpus. Ms. Schilhab suggested that this content be included in a comment, noting that Ms. Johnson-Liu's memo included content that could become a comment for the new rule.[5]

Judge Newell asked if anyone opposed this proposal. Members did not express any opposition to the proposal.

Ms. Taylor said that she liked this new SPA proposal better than a previous proposal from the SPA that would have amended the amicus rule. Ms. Johnson-Liu explained that it appeared that the previous proposal might be burdensome because of all the pro se litigants who file amicus briefs in civil cases. Ms. Taylor observed that, under the new proposal, the service on the SPA might be relatively simple to implement through the electronic filing system. Ms. Johnson-Liu said that it does not cost the filer anything to serve additional entities using the electronic filing system. Judge Newell observed that this is a discrete rule and, if it does not work correctly, it really only impacts the SPA.

Chief Justice Gray asked whether the CCA receives amicus letters. He observed that his court receives many amicus letters that are not briefs. Ms. Taylor asked whether his court receives the amicus briefs in criminal cases or just civil cases. He said he didn't remember whether they were in civil or criminal cases. He said that they did get some letter briefs in CCP Article 39.14 cases. Ms. Taylor said that she remembered having filed supplemental authority letters in criminal appeals. Judge Newell said that he had written a letter in the past communicating that he did not intend to file a response to a PDR. Ms. Johnson-Liu said that, if the SPA is not served with this sort of letter, that is "okay." She hopes that the SPA will receive service of substantive briefing in the CCA. Judge Newell said that the SPA could come back and talk to the committee later if the new rule is not accomplishing what they had hoped.

Mr. Rolater asked if pro se PDRs would be struck for failure to comply with this new rule. Noting that she could not speak for the Court, Deana Williamson (Clerk of the CCA), responded that the TRAP already requires PDRs to be served on the SPA. *See* TRAP 68.11. She said that the new rule only extends the service requirement to briefs. Further, by the point of filing briefs, a pro se filer would typically have the assistance of an attorney.

Judge Newell said that the committee should move on to the next agenda item.

**6. Proposal from Deana Williamson (CCA Clerk) to amend TRAP 69.4 (Clerk's Duties) to remove requirement to send certified copy of order (See Exhibit D).**

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[5] Ms. Johnson-Liu's memo (Exhibit C) included the following note:

> In using the phrase "brief filed by any party or amicus curiae in the Court of Criminal Appeals," the proposal does not intend to require service on the SPA of applications for a writ of mandamus (or a response) or applications for writs of habeas corpus and accompanying memorand[a] (only briefing in the CCA on filed-and-set writs).

Ms. Taylor said that, since this item was added to the agenda, she, Ms. Schilhab, and Ms. Williamson had found several other outdated provisions in the rules that necessitate simple amendments to modernize the TRAP to reflect current appellate court processes. She said that the committee should "pull back" this agenda item and postpone its consideration so that all of the similar matters could be consolidated. Ms. Schilhab said that some of these matters might be resolved by the Court without going through the committee. Judge Newell moved on to the next agenda item.

**7. Proposal to amend TRAP 47 to address the publication and precedential value of memorandum criminal opinions (See Exhibit E).**

Judge Newell introduced Justice Evelyn Keyes of the First Court of Appeals. He said that she had written a very thorough memo on the issue of unpublished opinions for the committee's consideration. Justice Keyes said that she had been dealing with these issues for many years. In 2003, the SCOTX changed the rules for civil cases for unpublished opinions. She said that this was when things had switched from paper to Westlaw. She said that she thought people had feared that, if we let the unpublished opinions become authoritative, then we would be inundated. And you would not be able to find the opinions, which would not be in the reporters. She said that the landscape has developed very differently. She said that her court thought that they would write short memorandum opinions, but that did not work. She said that they have memorandum opinions that are 35 pages long. She said that the idea was that the memorandum opinions would not make new law. The flaw in that theory was that, under our common law system, each successive opinion incrementally fleshes out how a legal concept will be interpreted under certain facts. She said that the tendency for some judges is to not publish their cases in order to avoid scrutiny. She said that practitioners can get on Westlaw and they are forced to cite the unpublished in order to "flesh out" how the law has been interpreted and "where the lines are being drawn" on an issue by the courts of appeals. She said by not making the unpublished cases have precedential value, we are "literally inviting inconsistency in the law." And this is "so simple to correct." She said that there has not been a problem with the civil opinions since the change was made. She said that, though opinions are "not designated for publication," they do have some precedential value. She said that, under the current system for criminal cases, the only cases that get published are the ones that "are deemed to make some real difference in the law." The problem is that the practitioners do not have all the other cases applying the legal principles for background and to see where the conflicts lie. She said that those authoritative cases just get "older and older" and soon practitioners are forced to rely on cases from 1993.

Justice Keyes apologized for not including in her memo redlined rules suggesting exactly what changes should be made to the cited rules. She asked for permission to supplement her memo with redlined rule amendment text for the committee's consideration. Judge Newell agreed with her request to send redlined text to the committee. Justice Keyes said that, basically, she proposed amending the TRAP to apply the civil rule for unpublished opinions to criminal cases.

Ms. Taylor asked whether Justice Keyes had thought about TRAP 77.3 governing unpublished opinions in the CCA. That rule provides: "Unpublished opinions have no precedential value and must not be cited as authority by counsel or by a court." Justice Keyes responded that she was not

thinking about that rule at all and it "would be a material consideration." She said that she would look at that rule and think about it.

Judge Newell said that, if this change were made, the CCA could not just apply the civil rule to criminal cases. They would need to incorporate some language like in the civil rule providing that the changes will apply to opinions after a certain date. Justice Keyes agreed that this would be appropriate.

Mr. Wolff said that, from a litigant's perspective, in capital postconviction litigation, there are very few published cases. He thought that it would be very helpful from a jurisprudential perspective to have more decisions published. As an example, he said that the last important case involving an ineffective assistance of counsel claim based on Supreme Court's decision in *Wiggins*[6] was *Ex parte Gonzales*[7] in 2006. He said that, more recently, the Court handed down *Ex parte Armstrong*,[8] a lengthy opinion with a lot of guidance on this issue. However, he cannot cite to the *Armstrong* case because it was not published. He must still cite to *Gonzales*, a case decided only a few years after *Wiggins*. Judge Newell recalled encountering a similar problem where prior consideration of a legal issue was only found in unpublished opinions.

Judge Hervey observed that she had been on the Court a long time and she knew that there were reasons that the Court designates opinions as unpublished. Ms. Williamson said that, for example, she understood why the Court would choose not to publish simple opinions on Article 11.07 writs where the Court merely grants an out-of-time appeal.

Judge Moore said that the Court could go back and publish some of its lengthy opinions that were not originally published. Judge Newell said that the CCA could do that, but Justice Keyes is talking about the courts of appeals' publication rule, not the one for the CCA. Judge Newell said that he recalled a situation where judges voted for an opinion because it was unpublished and then the opinion ended up being published. People were upset because, had they known that the opinion would have been published, they would have written something. Justice Keyes said that she was not familiar with the CCA's unpublished opinions. She said that she recalled a case where someone tried to cite a per curiam SCOTX opinion "as actually changing the law." She said that "cannot be done." A per curiam opinion, she said, cannot change the law. She said that intermediate designation (per curiam) is out there as an option.

Justice Keyes felt that the court of appeals should be open about what it wants to say about the law. She said, "If someone wants to dissent, they can dissent." She said that judges often say that a situation is one that will not happen again, "except the fact is that it really will happen again." She said that, especially in criminal cases, it is important to publish the cases because often all we have to rely on for a particular issue is an unpublished opinion. She said that the court will often end up citing the unpublished opinions in their published opinions because that is all they have. Mr.

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[6] *See Wiggins v. Smith*, 539 U.S. 510 (2003).
[7] *See Ex parte Gonzales*, 204 S.W.3d 391 (Tex. Crim. App. 2006).
[8] *See Ex parte Armstrong*, No. WR-78,106-01, 2017 Tex. Crim. App. Unpub. LEXIS 810 (Tex. Crim. App. Nov. 15, 2017) (not designated for publication).

Rolater said that he would like Justice Keyes to come talk to his local court of appeals.

Judge Newell said that courts may come up with different language for published and unpublished opinions. And then a court is eventually forced to adopt the reasoning of unpublished opinions because those are the only cases on point.

The committee discussed the option of memorandum opinions and whether those opinions might result in a change in deference in federal court. Justice Keyes said, "It won't happen." She said that the court was instructed to write shorter memorandum opinions. Within a week, they were fifteen pages, seventeen pages, and then thirty-five pages. Mr. Prine said that the higher courts did not like the short memorandum opinions.[9] He said, "we did not give them enough information."

Mr. Rolater said that the change from not being able to cite unpublished opinions to being able to cite unpublished opinions as nonprecedential was a "profound relief for most practitioners." He said that he thinks Justice Keyes's proposal is "a good change" and he would like to see the CCA change its rule, too. He said that he thinks that the CCA should at least allow litigants to cite to unpublished cases. He said that the Court could impose limitations through the memorandum opinion process. Judge Newell said that he appreciates this conversation, but he was not sure how the Court would proceed.

Ms. Johnson-Liu wondered whether we could have a rule requiring the courts of appeals to publish everything without making a corresponding change to the CCA rule. Chief Justice Gray said that his court's unpublished opinions were not "out there in the ether" because, up until the date that the rules required them to send everything to the publisher, his court thought that "unpublished" really meant "unpublished." He said, if we are going to get into this area, we need to look at TRAP 47.1, which provides, "The court of appeals must hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal." He said that the federal court system works because "they have a concept of 'summary affirmance.'" He said that he does not have a problem with the "summary affirmance" concept when there is a lot of contention. He said, if you want him to write a published opinion that is, "fully precedential" on a lot of issues, he will need "about three more judges" on his court. He said that this is the "practical effect" of trying to push 300 cases through three judges in a year. The more difference of opinion that the judges have, the longer it will take. He understands the need for the common law to have *all* of the law. At the same time, he understands the practical implications and the "significant fiscal note" of what is proposed. He said that there is a competing need to get out an opinion expeditiously so that the litigants have an answer to the question presented. He said that, today, the SCOTX decided one of Mr. Rolater's cases in a manner that could quadruple the amount of time that it will take the courts of appeals to decide a claim. He said that it was a due process issue and it was a per curiam opinion. He said that he does not see the problem with the existing rule because he is "trying to get the work done." He said that he had signed off on opinions "without comment" because they were unpublished opinions. If those opinions were to be published, he would have taken a different path, such as writing a side opinion.

[9] Mr. Prine is the Clerk of the First and Fourteenth Courts of Appeals.

Justice Keyes said that she may not be saying what Chief Justice Gray thinks that she is saying. She said that the reason that federal courts can do summary affirmances is because federal district judges write opinions. She said that we do not do that in Texas. Judge Moore averred that we should not have district judges writing opinions. Justice Keyes said that she was not suggesting that every opinion should be a full opinion with precedential value. She said that her court does have memorandum opinions. The memorandum opinions do not have the same weight as normal opinions. And many of their cases are also per curiam opinions. She said that the per curiam opinions "really are like the per curiam opinions" in federal courts. She said, the memorandum opinions are a "step up" from the per curiam opinions and those must address every issue. She said that we need to have opinions addressing the issues at some level. Since we do not have district court opinions, then we need to do it at the appellate level. She said that, as far as she knows, per curiam opinions do not have any precedential value. Chief Justice Gray said that the SCOTX just issued a per curiam opinion today. Justice Keyes said, "That's the kind that doesn't change the law…. It should not make any new law." Justice Keyes averred, "When they answer every issue and they are the first court to do it, it's hard to say, 'Well, we are answering the issues, but it's not going to have any value for anybody.'" She said, "To me, it's destructive to the law, which is why I hope that you all will give serious consideration to the effect of the categorization."

Judge Moore observed that, "down in the courtroom," they will "toss all these opinions at you." Someone will object, "Judge, that's an unpublished opinion!" Judge Moore said, "I don't really care. I am looking for . . . guidance to move ahead." Judge Newell said that the consideration of the unpublished cases is essentially informing a bet on the future performance of the appellate court.

Mr. Wolff addressed a question that arose earlier concerning whether any change to the state rule would "affect federal deference down the road." He said that it would not. He referred the committee to a United States Supreme Court case decided last year, *Wilson v. Sellers*,[10] in which the Supreme Court said that when there is an "unreasoned" state opinion, the federal court will "look through" that opinion to the last reasoned lower-court opinion.

Judge Newell said that he wanted more feedback and he did not know how to accomplish that. He said he was proud of having a lot of stakeholders at our meetings, but he felt that we needed more input on this issue because of the policy implications and potential impact on the appellate courts. Ms. Taylor said that, if Justice Keyes was going to provide a redlined rule proposal for consideration at our next meeting, that would give us time to publicize the matter, at least to intermediate appellate courts, in case people wanted to attend or submit their thoughts. Judge Newell said that we would need a redlined rule proposal. He said that we want to give this issue a thorough consideration. Deana said that the clerks could communicate this information to the other courts of appeals. Chief Justice Gray said that, as soon as Justice Keyes sent her redlined proposal to Ms. Taylor, Ms. Taylor could forward it to him and he would communicate it to the chiefs of the courts of appeals. He said that there is a criminal seminar coming up in July. Judge Hervey pointed out that Judge Newell is presenting at this conference, the Advanced Criminal Law

[10] *See Wilson v. Sellers*, 138 S. Ct. 1188, 1189 (2018).

Conference. Justice Keyes thanked the committee for its consideration. She said that she was "delighted" that the committee would be thinking about her proposal. The committee thanked her for her proposal and presentation.

Judge Newell then asked the committee to jump forward to consider an item on the agenda concerning three changes that have been made to the Federal Rules of Evidence.

**7. Proposal to amend Rules of Evidence 803 & 902 in light of changes to Federal Rules of Evidence:**

**a. Rule 803(16) (limiting application of ancient documents hearsay exception to documents created before 1998); and**
**b. Rule 902 (creating new subsections re authentication of certain electronic evidence). (See Exhibit I)**

Professor Goode explained the three proposed changes to Rules of Evidence 803 and 902. He said that these changes to the Federal Rules of Evidence came up in the State Bar's Rules of Evidence Committee. The State Bar committee members decided that these issues were more likely to arise in criminal cases than in civil cases. They decided that they would like to have the input of this (CCA) committee. Professor Goode said that the first proposed change amends the ancient documents hearsay exception.[11] The United States Supreme Court promulgated a new rule change limiting the application of the federal "ancient documents" hearsay exception to documents created before January 1, 1998 (replacing the requirement that documents be at least twenty years old). The notes and committee draft indicate that January 1, 1998, was a somewhat arbitrary date, but it roughly corresponds to when the Internet started to "take off." Professor Goode explained that, in the past, the ancient documents exception applied when a document was over twenty years old and "someone thought it was worth saving," and it was preserved in a manner that suggested its authenticity. Now, in the Internet era, "everything is out there—it is all preserved," including a lot of "junk." He said that there was a move to abolish the ancient documents hearsay exception due to these concerns under the theory that the federal rules have the residual hearsay exception (Federal Rules of Evidence 807), which Texas does not have. The thinking was that, without a rule amendment, litigants could use the ancient documents exception to try to get around the hearsay rule for various unreliable Internet content that is over twenty years old.

Professor Goode explained that Exhibit I also contains two new federal rules under the authentication rule (Rule of Evidence 902). These new rules allow certain evidence to be introduced without calling a witness by using an affidavit or certification process. The first new rule deals with information that is generated automatically by an electronic device. For example, if a USB (flash) drive has been plugged into a computer, the computer system automatically records that information. Under the rules now, if a litigant wants to show that the flash drive has been plugged into the computer, the litigant will have to call a witness to testify to this. The exception

[11] TEX. R. EVID. 803(16) provides in relevant part: "The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness: . . . (16) Statements in Ancient Documents. A statement in a document that is at least 20 years old and whose authenticity is established."

would allow the litigant to use an affidavit to authenticate the machine-generated data. The second new rule deals with the use of a mirror-image copy of a computer hard drive or other device. Right now, litigants must bring witnesses to testify to authenticate the mirror-image copy of the device. The exception would allow the use of an affidavit to demonstrate the copy's authenticity.

Ms. Taylor recalled a situation where a witness needed to be flown in from out-of-state for this type of authentication. Professor Goode said that the members of the State Bar committee, who are civil practitioners, said that "this never comes up" in their practice. Other committee members were surprised by that. Professor Goode said that the State Bar committee decided that these issues must come up more in criminal cases.

Judge Moore said that he does not see the ancient documents exception used very much but "more and more" he sees cases involving forensic investigators making a mirror image of a computer so that they do not alter the hard drive. He said that there is often a different guy who makes the mirror image copy than the forensic expert who examined the computer. He said the complaint would be that a party does not wish to lose their right to cross-examine the guy who made the copy because "maybe there is going to be something there." They will pressure the prosecution to bring that witness in, especially if the whole case is about the computer, such as in child pornography cases. He said that this rule would address that situation.

Other committee members suggested that the opposing party could subpoena the witness. Judge Moore said that they would insist that the State must prove its case. Professor Goode said that—just like with the self-authentication of business records rule—the other party could still object and press for the witness to testify even if this rule is passed. He said that the party would have to do something more than just say, "I want to be able to cross-examine." He said that the party would have to be able to dispute the reliability of the affidavit. Judge Newell analogized this to the drug testing certificate issue. He said that, if a party does not complain about it, they just "let it go in." Mr. Rolater said that, in practice, everybody objects on the certificate of analysis[12] and chain-of-custody affidavit[13] and think that they will be "grieved" if they do not object. Judge Moore indicated agreement and said that in most cases, "it's going to get overruled." The objecting party must first show the judge that there is some issue as to the reliability of the affidavit or certificate. He said the litigants respond that they cannot make that showing until they get to question the witness in court. He said that they get into a "hamster wheel" with these issues. He said that the last thing a district court judge wants is something that will come back later. He said that, "if there is a solid rule like we [have] on the drug certifications, that would help us out."

Judge Newell said that cross-examination concerning the scientific reliability of—and hearsay contained in—evidence is a separate issue from the authentication of the evidence. He asked if the suggestion is that we make these changes that have been made to the federal rules. Professor Goode said that the question is whether these changes are worth bringing into our Texas Rules of Evidence. He said that, though no one on the State Bar committee had personally encountered these issues, they believed that these issues were more likely to come up in criminal cases because

[12] *See* TEX. CODE CRIM. PROC. Art. 38.41.
[13] *See* TEX. CODE CRIM. PROC. Art. 38.42.

there is a lot more of this type of evidence. Judge Moore mentioned pornography cases. Professor Goode mentioned text messages. Ms. Taylor mentioned hard drives seized in search warrants. The committee discussed how rules of evidence technology issues more often come up in criminal cases. Judge Newell said that he has had to rely primarily on criminal cases when giving lectures on similar topics. Ms. Taylor said that she had encountered these issues in white collar cases. Judge Newell asked her if she thought that Texas should make these changes. She said that she was not familiar with the specific federal-rule language, but she thought that this was "worth talking about." He said that that means "worth getting a proposed draft."

Judge Newell turned to the ancient documents hearsay exception. Ms. Taylor said that the problem that Professor Goode was talking about was that people would try to get someone's old Myspace[14] page into evidence under the ancient documents exception. Chief Justice Gray asked how a party could prove that the Myspace page was a certain age. He said a twenty-year-old newspaper has a date on it. He said that he has always had a problem with the ancient documents exception. He asked, what makes a document that is nineteen years, 364 days old not credible but, when the document turns twenty, suddenly it's credible? However, he said that, if there is any justification for retaining the ancient documents rule, he does not see the reason to "kill the rule" for all documents, but just for electronic documents because we cannot date them.

Professor Goode said that they considered making a distinction between paper documents and electronic content, but ultimately decided it was not feasible. He said that you can date Internet content using tools like the "Wayback Machine."[15] Judge Moore said that the jury will have to decide how much weight to give the evidence.

Judge Newell asked Mr. Schaffer what he thought about these proposals. Mr. Schaffer said that he had not given a moment's consideration to the ancient documents rule. He said he did not have a problem with the proposal for an affidavit to prove that a USB drive had been plugged into a computer so long as it could be done accurately. With regard to the ancient documents rule, Chief Justice Gray observed that it looked like "they have beaten this thing to death" and we ought to look at it. Judge Newell said, "good."

[[The committee took a break and moved on to discuss another agenda item.]]

**11. Proposal for writ filings to be served on the parties automatically via e-file rather than by**

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[14] See "Myspace," from Wikipedia, the free encyclopedia (last edited on 31 July 2019, at 13:12 (UTC) https://en.wikipedia.org/wiki/Myspace ("Myspace (stylized as myspace) is an American social networking website offering an interactive, user-submitted network of friends, personal profiles, blogs, groups, photos, music, and videos. Myspace was the largest social networking site in the world from 2005 to 2008.").

[15] See "Wayback Machine," from Wikipedia, the free encyclopedia (last edited on 30 May 2019, at 02:17 (UTC)) https://en.wikipedia.org/wiki/Wayback_Machine ("The Wayback Machine is a digital archive of the World Wide Web and other information on the Internet. It was launched in 2001 by the Internet Archive, a nonprofit organization based in San Francisco, California, United States.").

**mail from the District Clerk (See Exhibit H)**

Judge Newell explained that the committee would discuss agenda item number eleven pertaining to serving writ filings via e-file. He said that Ms. Angela Moore was present at the meeting to discuss her proposal. Ms. Moore thanked the committee for inviting her to be here. She suggested that we use the e-file system for writ filings. She said that she has encountered problems when there is a change of personnel, such as a new judge with new staff. The new personnel may know nothing about writs of habeas corpus. She said that a constant problem that she encounters is that she receives no notice of the writ filings, including the trial court's order designating issues (ODI), counsel's affidavit, and the findings of fact. She said that she might receive no information about the writ until she receives the "white card" from the CCA informing her that the writ has been denied. She said that court administration says that they must give it to the district clerk's office and it is up to them to serve the parties. She said that she has depended on court administration to get her an unofficial copy and that does not always happen. She said practitioners e-file writs now and so to receive service of writ filings via the e-file system would be the "way to go."

Ms. Schilhab said that e-filing is mandated for attorneys only and we are still getting counties online. She said that we have encountered counties who were not allowing writs to be e-filed by attorneys. Ms. Moore said that she had encountered that, too. She said that the Judicial Committee on Information Technology (JCIT) is talking about getting ODIs and other orders e-filed. Ms. Schilhab said that any objections to findings should already be electronically filed and served in that manner. She said that, if they are electronically filed, they ought to be going out. And, if that is not happening, it may not require a change to the rules but rather an enforcement of the existing system. Ms. Schilhab said that we are aware of efforts to require judges' orders to be electronically filed. She said that there are coordination and technological fixes that are still coming online, especially in the smaller counties. She also noted that e-filing will not be happening in a majority of writ cases because the applicants are pro se. Ms. Moore indicated agreement. Ms. Schilhab summed-up by saying, "this is in the works, but it is not as simple as we wish it would be."

Ms. Williamson asked Ms. Moore if she receives the CCA's notice that the writ had been received by the CCA. Ms. Moore repeated that sometimes she does not hear anything until she receives the card saying the writ has been denied. She said that the situation would be more uniform if the appellate rules required e-filing.

Judge Newell recalled a relatively recent rule change about forwarding writ filings to the parties. He noted that that change was rooted in similar concerns. Other committee members indicated agreement. Ms. Taylor observed that the rule change that Judge Newell referred to took effect on December 1, 2018. She said that those rule changes also mandated that the clerk sign a cover-page stating that they have complied with TRAP Rule 73.4, which requires the clerk to serve all writ filings on all the parties in the case. She said she thought that there was also a comment stating that "all parties in the case" included the applicant and his attorney. Ms. Schilhab noted that that new rule did not require use of the e-file system to serve the writ filings and speculated that the new rule changes could make officials subject to mandamus. Ms. Moore said that the code provides that the trial court can send the writ record up before the 180-day period expires. She

said that sometimes the practitioner does not know who to serve at the DA's office. She said that it would expedite the process and save the district clerk money by requiring electronic filing in writs.

Judge Newell asked what the trigger mechanism would be and how would we know whether an applicant was pro se or represented by counsel. Ms. Moore said that the writ application would need to say whether the applicant was represented by counsel and attorneys should submit some notation to the court.

Mr. Rolater said that they have been using e-filing for writ filings in Collin County for some time and it seems to be working really well. He said that, when the trial judge signs the findings, those "go up like an order." He said that, when Ms. Moore files a writ application, she should "call ahead and we will tell you who you can serve." He said that he prefers electronic filing to regular mail. Ms. Moore agreed with him.

Judge Newell said that "it sounds like this is in the pipeline." And the goal is for everyone to electronically file writ documents but it's just not working for everyone. Ms. Schilhab discussed the SCOTX's requirement that attorneys enter service contact information. She said some parties will have a centralized service contact and others will not. She observed that it sounds like there is a break down in the procedures, rather than a failure to include a requirement in the procedures. Ms. Taylor said this sounds like this might be an area where the Office of Court Administration (OCA) might be able to help troubleshoot some of the problems they are having in the counties in which Ms. Moore is filing writs.

Ms. Moore said that attorneys are required to provide a contact email address to the State Bar. She said that e-filing ought to be the same. These offices should be required to provide a contact where writs should be sent. Ms. Schilhab noted that the State Bar email contact "replicates to OCA every day." She said if someone changes their email address, OCA will find out about it and will update the e-file system. Ms. Moore said that she was not aware of that and, "that's perfect." She said that she just wanted to make sure the Court was aware of these issues. She said that she has been practicing for thirty-two years and she thought that the rules might be able to manage the problem. She said that now Ms. Schilhab has explained to her that there are other cogs in this machine. She said that smaller counties often are not familiar with writs and do not comply with the rules.

Ms. Schilhab asked Ms. Moore to identify specific language that she would like to change, and we can look at making a rule change, if needed, or take the matter to a JCIT meeting. Judge Hervey said that putting more content in the rule for district clerks' offices may not be that helpful. She said that it might be more helpful to create a simple chart for clerks to track their responsibilities for each type of filing/case. We could give the clerks that chart with the rule changes. It might be a better way to get this message out there to both clerks and lawyers.

Ms. Williamson said that she recalled that the SCOTX was working on a document that would describe things that new clerks need to know. She thought that that would be helpful. Ms. Taylor said that she would ask Ms. Daumerie (the SCOTX's rules attorney) about this. Ms. Williamson said that she does not work directly with the district clerks, but she knows that they express confusion when they hear the word "writ."

Ms. Moore shared that she had not practiced in Boerne in seven years but, for some reason, the Bexar County District Clerk continues to periodically send her something in Boerne. She said that she thought that a writs check list was a great idea. She said she was trying to put one together herself. She asked what JCIT stood for. Ms. Schilhab explained that JCIT was the Judicial Committee on Information Technology and was instrumental in overseeing the implementation of electronic filing. Ms. Moore said that she did not bring a rule change suggestion and Judge Newell was kind enough to bring her in fairly soon. She said that she appreciated the opportunity to propose rule change language. Ms. Taylor explained that the rules governing electronic filing in criminal cases are available on the CCA Rules Advisory Committee's web site. She suggested that Ms. Moore take a look at those and see if there were any that she thought needed to be changed.

**8. Discussion of sensitive data concerns, sensitive data definition, and proposed amendments to TRAP 9.10 (See Exhibits F, F.1, F.2, F.3)**

The committee moved on to a discussion of agenda item number 8 concerning sensitive data issues and proposed amendments to TRAP 9.10. Judge Newell said that Ms. Taylor had done a lot of work on this item. Mr. Prine observed that Ms. Taylor had added a note that court reporters were concerned about being asked to redact records. He said that she should add "appellate court clerks" to that note. Ms. Taylor discussed the color scheme for highlighting and the committee discussed the comment at issue on page 49 of the packets: "Court reporters and clerks have expressed concern that they will be required to redact sensitive data present in records." She said that the term "clerks" was meant to include appellate clerks and that she had surmised that all clerks were concerned about being asked to redact sensitive data from court files/records.

Judge Moore said that, on the federal side after a trial, the court reporter will send notices to the attorneys telling them that they have the duty to mark what needs to be redacted from the transcript before it is published. They put that duty on the attorneys. Ms. Taylor said that OCA has a redaction tool that is "live" for filings made through E-File Texas. To her knowledge, there has not yet been any study done on its effectiveness at redacting all the sensitive data from filed documents. But OCA has stated, based on the beta testing of this redaction tool, that it is pretty effective. This is a tool used by parties who are filing documents. Judge Moore asked whether this is just available for civil cases right now. Other members responded that they thought that it was available for both civil and criminal e-filed documents. Ms. Schilhab noted that clerks could use the tool, too.

Chief Justice Gray asked for Ms. Taylor to explain the color-coded highlighting within Exhibit F. Ms. Taylor said that yellow, underlined items are proposed additions and red, struck-through text represented proposed deletions. Pink highlighting was an automatic function of "Track Changes" indicating that she had made a comment about the highlighted text. Some additions were highlighted pink due to comments, even though they were additions and should have been yellow. These additions could be spotted because they were still underlined. Green highlighted items are those that she thought merited discussion by the committee. She offered to walk through the proposed rule language.

She explained that the committee discussed these issues (e.g., minor names, sensitive data) at the last meeting but did not decide on any specific changes or language. She said that this is the first language that the committee has considered and she was "just looking for guidance." She discussed the changes proposed to TRAP 9.10(a), the definition of sensitive data:

**9.10 Privacy Protection ~~for Documents Filed~~ in Criminal Cases.**

(a) *Definitions*. ~~*Sensitive Data Defined.*~~ For purposes of this rule,

(1) Sensitive data consists of:

(~~1~~A) all but the last four digits of a government-issued personal identification number, such as a driver's license number, passport number, social security number, personal tax identification number or similar government-issued personal identification number;

(~~2~~B) for an open bank account, an open credit card account, or any other open financial account, all but the last four digits of the ~~bank account number, credit card number, and other financial~~ account number;

(~~3~~C) a ~~birth date, a home address,~~ person's month and day of birth;

(D) a complainant's personal telephone number and home address unless the home address was the scene of the offense; ~~and~~

(E) the name of any person who was a minor at the time the offense was committed unless, under Texas Family Code Section 54.02, a juvenile court has waived its exclusive original jurisdiction and transferred the individual to a district court; and

(F) the home address of any person who was a minor at the time the offense was committed unless the home address was the scene of the offense.

Ms. Taylor said that the changes she proposed to Rule 9.10(a)(1)(A) and (B) are based on changes that a subcommittee of the SCAC recommended be made to the definition of sensitive data in

Texas Rule of Civil Procedure 21c (containing the definition of sensitive data for civil cases). The SCOTX has not adopted these changes, but they are being discussed. Rule 9.10(a)(1)(C) ("person's month and day of birth") also mirror the recommendations of the same subcommittee of the SCAC. Ms. Taylor said that she based Rule 9.10(a)(1)(D) ("a complainant's personal telephone number and home address unless the home address was the scene of the offense") on CCP Art. 56.09 ("Victim's Right to Privacy"), which provides: "As far as reasonably practical, the address of the victim may not be a part of the court file except as necessary to identify the place of the crime. The phone number of the victim may not be a part of the court file." She explained that there are other statutes protecting the privacy of the victim/complainant in various types of cases. She modeled this proposed rule amendment on the principles set out in the above statutes.

Ms. Taylor said that she imported the changes recommended for Rule 9.10(a)(1)(E) ("unless, under Texas Family Code Section 54.02, a juvenile court has waived its exclusive original jurisdiction and transferred the individual to a district court") from the Texas Criminal E-Filing Rules, Rule 4.1(4). This sensitive data definition refers to individuals that have been certified to stand trial as adults.

Judge Moore remarked that using the complainant's telephone number in evidence is common in cases where the complainant's text messages are important to the case, such as in human trafficking cases. Mr. Prine commented that these (sensitive data) rules should apply to the parties' filings in the appellate court, but not to the reporter's and the clerk's record. Ms. Taylor agreed that the victim's phone number and the phone calls and text messages between the defendant and the victim are often important evidence. However, this statute (CCP Art. 56.09) states that the victim's phone number "may not be a part of the court file[.]" Judge Newell indicated that there are limits to our discussion where there is a statute on the subject. Ms. Taylor asked if Judge Newell wanted to take time to discuss the sensitive data definition issues now or if she should continue to describe the proposed changes to the rest of Rule 9.10.

Judge Newell asked whether the SCOTX has taken action with regard to the proposed language that subsections (A) – (C) are based on. Ms. Taylor said that her impression was that the SCOTX was considering the language and it was one of the things pending in the SCOTX. She said that she spoke to Ms. Daumerie, who indicated that, if the CCA took action first on changing the sensitive data definition, the SCOTX might take a look at the language that the CCA adopted. He said that, if they were not settled on whether to make these changes, perhaps we did not need to discuss them yet. Ms. Taylor said that she got the sense that what the CCA decided to do with its sensitive data rule might inform the SCOTX's decisions about changes to the civil sensitive data rules. Judge Newell wondered if the proposed language might be designed to bring us in line with JCIT. Ms. Schilhab noted that there is a definition of sensitive data in the e-filing rules. Ms. Taylor said that their goal is for the various definitions of sensitive data in the TRAP, the Rules of Civil Procedure, and other rules to be consistent.

Judge Newell said that we could go through Exhibit F "line by line" or we could move forward to discuss a really pressing thing later in the proposed changes to Rule 9.10. Ms. Taylor said that she could talk about the big picture and hoped that the committee would give her guidance concerning what she should focus on. She said that she thought that the most pressing thing was the problem

that there was nothing in Rule 9.10 that prohibited an appellate court from using the names of minors in opinions. She said that she looked at TRAP 9.8 ("Protection of Minor's Identity in Parental-Rights Termination Cases and Juvenile Court Cases"), which requires the use of aliases to protect children's identities and it applies to appellate opinions. She incorporated various parts of Rule 9.8 into Rule 9.10 including the definition of "alias." She said that Rule 9.8 does not define "minor." Ms. Taylor added a definition of "minor" limiting it to children under the age of eighteen. She picked eighteen to be consistent with distinctions in criminal cases and TEX. CIV. PRAC. & REM. CODE § 16.001 (classifying persons under 18 years of age as being under a legal disability) and TEX. FAM. CODE § 54.02(h) ("On transfer of the person for criminal proceedings, the person shall be dealt with as an adult and in accordance with the Code of Criminal Procedure[.]")

Judge Hervey asked if anyone had thought about the fact that, if you use an alias or pseudonym, it might do "no good" if the child's parent is named? Ms. Taylor said that this issue is contemplated in the civil rule and in the proposed language. She directed the committee members to subsection (g) ("Appellate Court Procedures"). Subsection (g)(1)(A) requires that, in all papers submitted to the appellate court, a minor must be identified by an alias and minor's home addresses must be redacted. Subsection (g)(1)(B) then states, "the appellate court may order that a minor's parent or other family member be identified only by an alias or that their names and home addresses be redacted if necessary to protect a minor's identity[.]" Judge Hervey pointed out that the defendant's name will be in the style of the case. Ms. Taylor agreed that this could be a problem but, "there is only so much that can be done."

Chief Justice Gray described a case involving three kids and two parents. The appellant designated five pseudonyms and then the State used five different pseudonyms that were not the ones used at trial. He said that, the State used a name for the grandmother that was later used by one of the parties to refer to one of the children, though with a different spelling. He remarked, "It's a mess." He said that he did not know if this was the place or the time to talk about it, but he thought that the rule should include a requirement that the pseudonyms used by the parties be consistent.

Judge Newell said that this could very well be the place and time to talk about Chief Justice Gray's concern. Judge Newell described the proposal as "crazy good work" and said that it covers a lot of the issues. He said that he thought that what Ms. Taylor was "trying to say without saying it" is that "we need to take the lead in this and let the Supreme Court catch up if they are going to." Judge Newell said that he was "fine with that" but he thought that the proposed language did not allow for the problem of multiple pseudonyms. He said that the rule ought to contemplate multiple aliases and should say something like, "if a pseudonym has not already been designated. . ." or "if there is not already a pseudonym in use." Ms. Taylor pointed out that there are statutes that allow a victim to choose a pseudonym for use at the trial court level, and that those pseudonyms must be used throughout the case.[16] She said that she recalled that the statute assigned the prosecutor—or

[16] *See, e.g.*, TEX. CODE CRIM. PROC. Art. 57.02(b) ("A victim may choose a pseudonym to be used instead of the victim's name to designate the victim in all public files and records concerning the offense, including police summary reports, press releases, and records of judicial proceedings.").

maybe the trial court—the responsibility of making sure that that chosen pseudonym is used to refer to the individual throughout the case.[17] She said that we could insert language indicating that, if a pseudonym has already been designated for a person, the court must use that pseudonym to refer to that person. She said that, if a victim has chosen their own pseudonym pursuant to a statute, the rule should provide that that pseudonym be used. Judge Newell agreed. He asked if the rule should mandate that there only be one pseudonym for each individual. He asked for Professor Goode's thoughts on this matter, noting his skill at drafting elegant solutions.

Professor Goode noted that a lot of the rule is in the passive voice. Ms. Taylor said that, in this initial draft, she imported as much of the Rule 9.8 language as appeared applicable. She did not yet make any effort to convert passive voice to active voice. She wanted to get the main ideas into the draft for purposes of discussion. She thought that the committee could later "tweak" the language. Professor Goode said that he was "not clear on who was doing what." Judge Newell said that this is one of the problems with the redaction language, i.e., the question of who's going to be doing the redacting.

Mr. Wolff said that he understood and agreed with the policy justifications for these changes, but he saw some practical issues. He said that, in their cases,[18] they plead or attach their client's social histories. These histories contain the names of family members, including children, who are not victims but are related to the client. He said they think about whether or not it makes sense to redact or use initials for these individuals. He said that the inclusion of the phrase "an original or habeas proceeding in an appellate court" in subsection (g) raises the question of whether the rule would require a habeas applicant filing in the trial court to redact sensitive data. He said that we might want to strike the word "appellate" to make it clear that the rule applies to habeas applicants filing in the trial court.

Judge Moore said that some pro se applicants in child sexual assault cases have used the complainant's name throughout their writs. Mr. Wolff noted that the rule would also apply in garden variety cases where minors are involved in those cases.

Chief Justice Gray said that his court puts the pro se and attorney filings that violate the rules into a sealed file. He referred to the following language in the proposed rule comment: "Although appellate courts are authorized to enforce the rule's provisions protecting sensitive data, parties and amici curiae are independently responsible for ensuring that their briefs and other papers submitted to an appellate court fully comply with this rule." He said that "independently" should be "solely" in this sentence. Mr. Prine said that his courts have seen as many violations by attorneys as by pro se litigants.

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[17] *See, e.g.*, TEX. CODE CRIM. PROC. Art. 57.02(f) ("An attorney for the state who receives notice that a victim has elected to be designated by a pseudonym shall ensure that the victim is designated by the pseudonym in all legal proceedings concerning the offense.").

[18] Mr. Wolff is the Director of the Office of Capital and Forensic Writs.

Judge Hervey said that people need to know that, when cases come to the CCA, the judges have the authority to unseal documents. She said that the CCA recently had a case where they needed to access sealed documents and refer to information in them to address the legal issues raised, but there were concerns about some of that information that the Court did not know. She said that parties need to notify the Court if there are confidentiality concerns. Judge Newell said that the question of sealing orders and the power to seal and unseal documents is perhaps a distinct matter. Mr. Prine observed that the proposed rule states this about orders to seal:

> (g)(3) If a district court clerk or appellate court clerk discovers unredacted sensitive data in a record, the clerk shall notify the parties and seek a ruling from the court that received the record. The court may order a party or parties to redact or modify a filed document containing sensitive data. The court may also order that a portion of the reporter's record or a document in the clerk's record be sealed without redaction.

He said that the important question is "sealed from whom?" Who can see the sealed document—the attorneys, the judges? Ms. Schilhab said that the CCA has encountered that problem and now the Court delineates in the sealing order who can see the document, how many people you can share it with, if any, and for what purposes. Judge Newell observed, "The sense that I am getting is that we are voyaging on seas of unknown thought" when it comes to the scope of the sealing rule. He speculated that no one has attempted to codify the extent of sealing. Mr. Prine remarked that the appellate court may face challenges, for example, when a defendant's grandmother comes in and wants a copy of the record in the defendant's case, but the file is sealed.

Ms. Taylor clarified that Rule 9.10 already had a section on sealed materials and the rule currently allows courts to order materials to be sealed. Rule 9.10 also currently provides that a court "may later unseal the document or order the filer to provide a redacted version of the document for the public record." That sentence is in the rule now and she has not suggested changing that language. What she was trying to do was to provide a little more guidance in the rule as to options that the court could take to address sensitive data problems short of ordering the clerk to redact the document. That's why she added express language putting the onus on the filer and language allowing a court to seal parts of a record to address sensitive data in the record. She said that the committee could discuss whether the rule should include language stating that attorneys of record can see sealed documents. The committee discussed entities like The Innocence Project, who are not attorneys of record but may be investigating a case on behalf of a defendant and need access to confidential records.

Ms. Williamson asked to discuss remarks Mr. Prine made earlier. He said that he thought that this rule should apply to documents filed in an appellate court, but not to the reporter's record or clerk's record received from a lower court. She said that, at the CCA, most of the sensitive data issues are spotted in the reporter's record and the clerk's record. She said only rarely do they encounter sensitive data issues in documents filed directly in the CCA. Mr. Prine said that the reporter's records have a lot of sensitive data in them, such as bank account numbers. He said that, if you were to redact all the data, the records would be full of black-out lines. He said that they do not post reporter's records on the Web. He said that attorneys and family members will

periodically come to the office and look at the records. Judge Newell said that the fact that these matters were discussed in a public trial and are available to the public suggests that perhaps it is not appropriate to try to redact information in these records. Mr. Wolff pointed out that clerk's records usually contain subpoenas with unredacted dates of birth. He said that it might be useful to draw a distinction between these records at the trial level and appellant filings "moving forward."

Ms. Taylor said that, in the past, you would not know the information contained in those subpoenas described by Mr. Wolff unless you went to the clerk's office, checked out the file, and looked at those documents. However, in the future, you will be able to sit at home in your pajamas and get that information if criminal cases become part of Re:SearchTX (the statewide electronic access to court records program). People will be able to search for these kinds of documents and information from the comfort of their own homes and thus the sensitive information will be much more broadly available. Ms. Schilhab noted that the documents "are not being reviewed" before they are uploaded into Re:SearchTX. The system uploads the documents as soon as they are accepted by the clerk's office. Mr. Prine said that Ms. Schilhab was speaking of the trial court clerk, not the appellate court clerk. He said that Re:SearchTX does not receive their clerk's records and reporter's records. Ms. Schilhab clarified that the statement applied to documents filed through E-File Texas. Ms. Taylor said that we have to contemplate the possibility that these items may be included in Re:SearchTX. Mr. Wolff said that, in Harris County, the criminal cases are available on the website. Mr. Prine said that they do not put juvenile cases and some family law matters on their website.

Judge Newell said that he understood that there is a problem, but "fixing that problem at the district court level with the records and things is huge." He said that is a "way bigger thing" than we can do here, and it probably has a "fiscal note" attached to it. He said that it seems to him that "the only thing that we can really do" is to figure out what limited measures we can take to help the appellate system. He said that he did not think that we can ask clerks to redact the record. Ms. Williamson pointed out that sometimes statutes require parts of the record to be sealed. For example, the CCA sometimes receives jury questionnaires from district clerks as part of the record, yet these are confidential.[19] Mr. Prine noted that district clerks should also know that PSIs (presentence investigation reports)[20] should not be part of the record. He said that district clerks are "usually fairly good at that but not always."

Chief Justice Gray called attention to subdivision (g)(3), which, as proposed, read:

> (3) If a district court clerk or appellate court clerk discovers unredacted

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[19] *See* TEX. GOV'T CODE § 62.0132(f) ("Except as provided by Subsection (g), information contained in a completed questionnaire is confidential and is not subject to Chapter 552.")

[20] *See* TEX. CODE CRIM. PROC. Art. 42A.256(b) ("A presentence or postsentence report and all information obtained in connection with a presentence investigation or postsentence report are confidential and may be released only as: (1) provided by: (A) Subsection (c); (B) Article 42A.255; (C) Article 42A.257; (D) Article 42A.259; or (E) Section 614.017, Health and Safety Code; or (2) directed by the judge for the effective supervision of the defendant.").

> sensitive data in a record, the clerk shall notify the parties and seek a ruling from the court that received the record. The court may order a party or parties to redact or modify a filed document containing sensitive data. The court may also order that a portion of the reporter's record or a document in the clerk's record be sealed without redaction.

Chief Justice Gray said that Ms. Taylor had referenced district court clerks in this section, but she had not referenced county court-at-law clerks. He called attention to the phrase, "shall notify the parties," saying that compelling the clerk to notify the parties would be a "significant additional burden." He thinks the rule should say "*may* notify the parties" and he would stop that sentence right there and strike the phrase "seek a ruling from the court," which "really doesn't need to be there." Ms. Taylor noted that the sentence that he was referring to was part of existing language in Rule 9.10 that she merely moved to a different location in the rule. [21] Chief Justice Gray said that this language should be fixed.

Mr. Prine said that they interpreted this rule to apply to the parties and they did not think that it mandated that they go through the clerk's record or the reporter's record. Chief Justice Gray said that the language should be "may" and not "shall" and should not mandate that the clerk "seek a ruling from the court" because that should not ever be the clerk's responsibility. He said that he would also remove the phrase "received the record" and would add a sentence: "Upon motion or sua sponte, subject to Rule 9.10(h), the court may order a party or parties to redact or modify a filed document." Ms. Schilhab asked how the court will know to do this order. Chief Justice Gray said that normally a party would file a motion. Mr. Prine said that the DA usually notifies them. Chief Justice Gray said that they can do it on a motion or they can do it sua sponte if they notice it. It just should not be mandatory for the clerk.

Chief Justice Gray asked how a court can order a party to redact or modify a *filed* document. Ms. Taylor said that the criminal e-filing rules allow the clerk to refuse a document that contains sensitive data.[22] Chief Justice Gray said that that presumes a clerk's duty to review the document before they file it, which would create a "huge delay." He said that the appellate court cannot reject a document because of its contents—the court "must accept everything that is tendered." He said that he is very concerned about the rule's statement that the court could order a party to redact or modify a document that has already been filed and suggested using the term "tendered" instead. Ms. Taylor said that she understood that she needed to change the term "filed." Chief Justice Gray said that, after the document has been filed, it will have already been uploaded to Re:SearchTX, so redacting the document at that point will not do any good anyway. He said that, once a party violates the sensitive data rule in filing a document, there is "almost no way that a court can

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[21] *See* TRAP 9.10(d) ("If a district court clerk or appellate court clerk discovers unredacted sensitive data in the record, the clerk shall notify the parties and seek a ruling from the court.").
[22] *See* Statewide Rules Governing Electronic Filing in Criminal Cases, Rule 4.5 ("Non-Conforming Documents. The clerk may not refuse a document that contains sensitive data in violation of these rules or any other statute, rule, or court order. But the clerk may identify the error to be corrected and state a deadline for the party to resubmit a redacted, substitute document.").

substantively and finally and completely fix" the problem. Judge Newell agreed and said that, if the parties fail to redact, the court's remedy would be relatively simple: seal the document. Ms. Taylor said that we can tell filers to redact their documents, but they will make mistakes. And the clerk cannot catch these problems as the documents are being filed. She said that there should be something that a court can do if court staff discover sensitive data in a document after it has been filed. Chief Justice Gray said that the court can take action with regard to the documents within its control. However, Re:SearchTX receives a copy of the document at the point that the e-filing is accepted by the court and the document becomes publicly available. He said that there is "not any way to routinely get it back." He said that they are working on this problem. He referred to a handwritten diagram on his binder, which was drawn by an employee of OCA.

Judge Newell cautioned that we are running out of time. He asked if there was some other pressing matter that Ms. Taylor felt that the committee should address. Ms. Taylor said that there are lots of different issues associated with Exhibit F. She asked if, for next time, we could focus on one issue, such as the minor names in appellate opinions. She suggested that she could "tweak" that content for next time –just focusing on minor names in opinions. Judge Moore said that this topic as a whole is "so huge" that it "might be something for a subcommittee" to work on. Ms. Taylor said that she would love for a subcommittee to work on it. Judge Newell told Ms. Taylor to "just focus on the issue" of minor names in opinions. He said to make sure that there is an ability to craft a pseudonym that will be consistently used and to address the issue of whether a pseudonym has already been designated. Mr. Prine asked whether the CCA could issue an order telling courts of appeals not to use minor names in opinions until the rule can be amended.

Judge Newell said that the committee had run out of time and indicated that it was time to adjourn. Ms. Williamson said that the next meeting is planned for August 30, 2019, in the conference room. Judge Newell thanked everyone and reminded members to turn in their reimbursement forms within thirty days.