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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

DECEMBER 7, 2018

(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 7th day of December,
2018, between the hours of 9:00 a.m. and 3:13 p.m., at the
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Documents referenced in this session

- 18-19 State Court Revisions of Civil Rules
- 18-20 Updating Civil Rules of Procedure
- 18-21 Legislative Preview

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1 of this meeting from our representative from the
2 Houston -- or representative from the Texas Court of
3 Criminal Appeals. For those of you who are from out of
4 state, Dick and some others, in Texas we have two high
5 courts, one for criminal matters and one for civil
6 matters; and our representative is Judge Newell; and he's
7 going to give a report now on what the Texas Court of
8 Criminal Appeals has been up to. Judge Newell.

9 HONORABLE DAVID NEWELL: Thank you. Okay.
10 So I think report is overselling it. I'm going to let you
11 know a couple of things that we've been working on. You
12 know, we've been working very hard on local rules. I
13 don't know, maybe you've seen some stuff in the news, if
14 there were some local rules we had a chance to approve
15 beforehand it might have solved some problems, but we did
16 not, so we're taking that very seriously, and we're
17 looking at those things, but one of the things that Holly
18 and -- well, she was here. So Holly and I -- there you
19 are -- our rules attorney, have been working very, very
20 diligently on a number of different rules changes for the
21 Rules of Appellate Procedure in criminal cases, and I
22 would be remiss if I just did not praise the high heavens
23 how much work and how hard Holly has worked. We don't
24 have a reporter, you know, in our rules committee
25 meetings, and so she records everything and does these

1 very thorough minutes that Chief Justice Gray can attest
2 are phenomenal with only maybe one or two typos in like 20
3 pages of minutes, and so she's done an incredible job in
4 drafting and providing insight into the way to draft
5 certain rules, and we couldn't have done it without her,
6 and so obviously I wanted to give props to Holly and all
7 of her hard work.

8 One of the things that we finally fixed was
9 a rule, TRAP Rule 4.6. Right now it's 4.6. It could be
10 4.7 at some point if someone wants to renumber some later.
11 But basically one of the things we had noticed was that in
12 criminal cases when a defendant wants to appeal, his
13 sentence is pronounced in his presence, so there's never
14 really a situation unless his attorney fails to tell him
15 he has a right to appeal that -- there's never really a
16 situation where the defendant doesn't know his timeline
17 has started, and so it's not -- it's not often. You know,
18 it does happen. It's not often that you would say that he
19 didn't get notice of what his sentence was, but there's a
20 unique proceeding that has just come up in recent days or
21 recent years, not days, recent years, DNA testing; and
22 these DNA testing don't necessarily require the defendant
23 to be present; and so there were situations where these
24 defendants were not getting notice that their order had
25 been signed and they were missing their deadline; and so

1 we worked very hard to finally come up with Rule 4.6 which
2 mirrors the civil rule for not getting notice of a
3 particular judgment so it allows these defendants a chance
4 to get an extension of time so that they can file their
5 appeal and not have it be untimely. Because there are
6 times when the defendant would basically appeal, he would
7 be told that he had -- there was no jurisdiction because
8 it was untimely and then he would have to do the whole
9 thing over again.

10 And so we have -- so we have Rule 4.6 is
11 finally passed, is finally -- and we had it once, and we
12 had to take it back because some very astute member of the
13 appellate bar decided to send a letter to everyone and
14 their mom about the problems with it on the last day of
15 public comments, and so I'm not bitter.

16 HONORABLE TOM GRAY: Tell me how you really
17 feel about that letter, David.

18 HONORABLE DAVID NEWELL: I would like to say
19 that that person is now -- because I am shrewd I have now
20 brought him into the rules committee so that doesn't
21 happen again. The other thing that -- the other thing,
22 similar sort of an offshoot of Rule 4.6 was Rule 25.2 and
23 appendix D, another larger change, too, dealing with DNA
24 appeals. One of the requirements of criminal cases is
25 that the trial judge has a certificate of a right to

1 appeal that they have to let the defendant know what his
2 rights are and whether he has a right to appeal. They
3 have to sign that off and it goes to the courts of
4 appeals, but because the defendant is not always there in
5 DNA when the order signed, we have removed the requirement
6 that that certification be filled out for a DNA appeal.
7 So the certification of right to appeal form itself has
8 changed in appendix D; and Rule 25.2, the rule dealing
9 with that certification has an exception so trial judges
10 do not have to certify the defendant's right to appeal in
11 a DNA case.

12 Additionally, another thing we did was
13 Rule -- from here on out it's all habeas, so I'm just
14 letting you know. It's all habeas. So I know how
15 exciting habeas corpus is, and hopefully I will run
16 through this as quickly as I can.

17 CHAIRMAN BABCOCK: Compared to the other
18 stuff we do? It's huge.

19 HONORABLE DAVID NEWELL: Exactly. Yes,
20 exactly. I often joke that there's no way to make habeas
21 corpus sexy, even Ryan Gosling couldn't do it. You are so
22 cognizant. All right. So TRAP rule, we did change TRAP
23 Rules 73.1 and 73.4; and basically this was a change that
24 some of the practitioners, criminal practitioners who were
25 dealing with habeas law, had noted, was that there were

1 times where findings and conclusions filed by the trial
2 court were not getting to the defendant or his attorney,
3 and so we -- and we changed the rule to include a
4 requirement that now the district clerk has to -- has to
5 forward on anything that's filed as it's filed. Okay. So
6 and that made it a little clearer, so it puts a little bit
7 more of a duty on district clerks to make sure that --
8 make sure that all of the people involved know when they
9 can make an objection to say findings of fact or
10 conclusions of law that have been proposed by the state
11 before the trial judge makes them or after the trial judge
12 makes them before it goes to, say, us. So appendix F is,
13 of course, just a standard form that we've included that
14 dealing with district clerks that now has to go to us for
15 our 11.07 writs as well. So that was one thing we did
16 there.

17 Another big significant change, though, with
18 regard to habeas is changes to Rules 31.1 and 31.2.
19 Criminal cases are generally under the rules given
20 precedence, and one of the things that has been going on
21 for a long time is writs of habeas corpus are accelerated
22 and are treated as accelerated appeals. This makes a lot
23 of sense when you're talking about a habeas corpus where
24 the guy is looking for bail, like if I'm being held, I'm
25 not getting bail, I will file a pretrial writ of habeas

1 corpus or some other pretrial habeas corpus. That
2 deserves to be accelerated because the guy hasn't been
3 charged, we want to expedite this thing as quickly as
4 possible; but there are also post-conviction habeas corpus
5 proceedings; and so what we created is two timelines
6 whereby the pretrial habeas are still accelerated, but the
7 post-conviction, 11.07(2) writs that are going to be
8 appealed like a regular appeal are treated like a regular
9 appeal. So that's one of the things that we did, and we
10 went back and forth on that one.

11 And then lastly, the -- the, pièce de
12 résistance, we changed our form for 11.07 writs, which I
13 know will have no effect on any of you, but we have made
14 it -- we have made it much more user-friendly we hope. We
15 went through this form line by line, even the blank lines.
16 There were a lot of blank lines. We saw in the bar
17 journal, there's this board and had all of these -- we had
18 to put them in, but generally worked very hard to make
19 sure that this -- our target audience, of course, was the
20 pro se inmate who wants to file a writ of habeas corpus.
21 There were some things more confusing about our original
22 form. We passed this form out a while ago, and now we've
23 made some changes we think will make it easier for these
24 litigants to have better access to get their application
25 of writs of habeas corpus filed.

1 That's it. And I will end on -- I always
2 think it's a good idea to end on sort of a note of like
3 "ah," so I'm going to do that. I'm going to end just like
4 that.

5 CHAIRMAN BABCOCK: A virtuoso performance.

6 HONORABLE DAVID NEWELL: Absolutely. Thank
7 you. Thank you very much.

8 CHAIRMAN BABCOCK: Thank you, Judge, and I
9 think we should bring his act back for every meeting, so
10 we are -- we are honored to have Judge Xavier Rodriguez
11 from the United States District Court for the Western
12 District of Texas with us, and Judge Rodriguez, as
13 everybody knows here with a few exceptions, used to serve
14 on the Texas Supreme Court. And, Judge, I know you have
15 some remarks, and we would love to hear them.

16 HONORABLE XAVIER RODRIGUEZ: Thank you, and
17 thanks for the opportunity to say a few things about the
18 proposed discovery rules that you-all continue to look at.
19 You know, just by way of a quick little background, I've
20 been teaching e-discovery now for about six, seven years
21 at St. Mary's, and I'm a nationwide lecturer on the topic.
22 I just came back from Georgetown, and I'm also the
23 co-chair of the Federal Judicial Center's programs where
24 we teach judges on this subject, and so I get a bit of a
25 nationwide perspective on what's going on with discovery,

1 and as I had the opportunity to look at the last draft,
2 which to my understanding is about four or five -- if not
3 older than that, four or five months old, I became a
4 little concerned about the sanctions rule, and so I just
5 wanted to briefly mention to you what's going on
6 nationwide and what you might want to contemplate as you
7 continue to tweak that issue.

8 And so on the sanctions rule, for those of
9 you who may be familiar with the federal rule, there's two
10 parts. There's negligence spoliation of evidence,
11 something called (e)(1), and there's curative measures;
12 and I think all of that's appropriate; and I think it's
13 been working fine. I think it's been a good check on
14 judges who were a little bit overtenacious on faulting
15 parties who didn't correctly keep discovery that they
16 should have, and so I think (e)(1) is fine, and I believe
17 what your rule contemplates, it pretty much follows that.

18 It's (e)(2) that I'm a bit more concerned
19 about, and (e)(2) deals with the intentional spoliation of
20 evidence; and with regard to the intent, here's a couple
21 of things that are going on. Number one, the courts are
22 very confused about what standard to apply on what
23 constitutes an intent to deprive someone of evidence, and
24 so the case law is somewhat all over the board, but
25 generally from my -- and I speak just alone here. I'm not

1 speaking on behalf of any groups. These are my personal
2 thoughts. I'm thinking there's a little bit of a concern
3 here with cases that come up and say, okay, we understand
4 the managerial agent was deposed, we understand the
5 managerial agent testified in his deposition that he
6 destroyed e-mails with the intent that they don't come out
7 in this lawsuit, but that still rises not to the level of
8 intent to deprive, and there are no sanctions. To me that
9 just doesn't match, and so if we're going to have a fair
10 and balanced system we can't have case law developing over
11 some ambiguous rules allowing for that.

12 The second part I want to bring up about the
13 intentional spoliation is judges recognizing that this
14 intent to deprive has been a little bit onerous in its
15 application have been defaulting to judges' inherent
16 authority. That's very problematic. If we draft a rule
17 that allows for judges to circumvent the rule by
18 application of inherent authority, then absent an abuse of
19 discretion standard, you're not going to get the judge
20 overturned; and so by the drafting of an onerous rule you
21 may be creating unintended consequences that may be
22 regretted and were not initially contemplated, and so many
23 courts -- there's three things that are going on in the
24 case law in the federal courts nationwide. One, is
25 there's a whole bunch of judges not citing to the rule,

1 not stating that they're applying inherent authority and
2 just issuing sanctions. That's trend number one.

3 Trend number two is they just apply inherent
4 authority, do not cite to the rule and issue sanctions;
5 and then trend number three is they cite to the rule,
6 botch the rule, and issue sanctions. So I would get --
7 you know, the members of the drafting committee here, just
8 share those thoughts with you all about where this may be
9 headed. I was very pleased to see in the draft that you
10 have a meet and confer now as part of the rules. I think
11 that early on having a meaningful discussion between the
12 lawyers to discuss the parameters of discovery will bear
13 fruit. I know the court hesitations -- I'm going back
14 now, 10 or 15, 20 years, about having such a meet and
15 confer conference, thinking that it would just impose
16 unnecessary expense and time. No, I think meet and
17 confers now do pay for themselves and in dividends, so I
18 would suggest you do have that and perhaps have specific
19 guidance of topics that should be discussed at the meet
20 and confer, and so I would make that suggestion to
21 you-all.

22 And then lastly, I've been somewhat critical
23 in law reviews that I've written now on the court.
24 Justice Hecht and I banter back and forth about this.
25 He's, as a matter of fact, at the program that I need to

1 return to, and I'm speaking there in about an hour, but
2 the Court's opinions I think start from the wrong premise.
3 The Court's opinions have been starting from the premise
4 that electronically stored evidence and digital evidence
5 is difficult, it's expensive; hence, we should not allow
6 it; and that seems to be the premise. I believe the
7 correct premise is now that is where evidence is stored,
8 that there is no more paper now; and so we start from the
9 premise that discovery is found there; and now then we
10 move to in the rule process, then what is relevant, what
11 is proportional to the discovery process with this
12 relevant evidence; and so the premise I think starts off
13 wrong from the cases; and I think that needs to be
14 corrected by the rules.

15 Last point, and I'll stop, and you've been
16 generous in letting me talk. I wouldn't make a
17 distinction between electronically stored evidence and
18 other evidence. The federal rule does. I think now ESI
19 is just discovery. E-discovery is just discovery now, and
20 so having this artificial distinction is not helpful. As
21 a matter of fact, it's unhelpful from the sanctions
22 analysis, because now you don't look to the rule for loss
23 of physical objects, and so now you go to the court common
24 law to apply any applicable sanctions, and that's probably
25 not a good starting point from judges and certainly from

1 some of the litigants, and so I would urge you all not to
2 make that distinction. I welcome any opportunity you
3 might have to pose questions for me, if I can be of any
4 assistance to your drafting committee as you go forward, I
5 will make myself available, but I did want to share just
6 those overall comments for you to think about.

7 CHAIRMAN BABCOCK: Justice Christopher.

8 HONORABLE TRACY CHRISTOPHER: So in
9 connection with your work have you come up with a
10 different draft from what you think (e)(2) should look
11 like?

12 HONORABLE XAVIER RODRIGUEZ: No, but I can.

13 CHAIRMAN BABCOCK: Justice Brown.

14 HONORABLE HARVEY BROWN: Your point on the
15 inherent authority and the courts relying on that, is your
16 point that because courts are doing that it shows the rule
17 is not working and we need to change the rule; or are you
18 saying, even further than that, that you think the rule
19 should say something to try to limit the court's inherent
20 authority, which seems to me might be problematic? I
21 don't know how a rule can limit inherent authority.

22 HONORABLE XAVIER RODRIGUEZ: So the rule is
23 meant to limit inherent authority. It says in the
24 advisory committee notes that that is the intent, and so
25 inherent authority should be a gap filler to the rule. In

1 limited circumstances where the rule does not fit,
2 there's -- you go to inherent authority to fill in those
3 gaps. That's not what courts are doing. The courts are
4 looking at (e)(2), finding it to be unfair, ignoring it,
5 and going to inherent authority; and I think a complete
6 disregard by my colleagues is wrong, one; but, two, you
7 know, then what's also wrong is drafting a rule which
8 forces judges to come up with a concept of fairness to
9 overlook the rule. Yes, sir. Congratulations, Peter.

10 MR. KELLY: Thank you, Judge.

11 HONORABLE XAVIER RODRIGUEZ: Peter and I
12 were classmates at Harvard together.

13 MR. KELLY: Long time ago.

14 HONORABLE XAVIER RODRIGUEZ: Long time ago.

15 MR. KELLY: More hair and a different color.

16 HONORABLE XAVIER RODRIGUEZ: Peter and I
17 were the only two wearing uniforms in ROTC in a Harvard
18 guiding class.

19 MR. KELLY: Yes. The judge was very kind to
20 help --

21 CHAIRMAN BABCOCK: Surprised that you
22 survived that.

23 MR. KELLY: -- me get my uniform in order.
24 I was not very good at getting everything lined up, and I
25 counted on his advice to avoid demerits. It worked for a

1 while. But I read some press reports about some circuit
2 court judges, federal circuit court judges, talking about
3 limiting discovery and getting rid of discovery in federal
4 cases worth less than \$500,000. Is there any
5 institutional momentum for that, or is that just a wish
6 list?

7 HONORABLE XAVIER RODRIGUEZ: No. And so
8 what is taking place -- and there is a couple of pilot
9 project going on nationwide, in Arizona primarily, is
10 looking at mandatory disclosures; and so, you know, I
11 think that deserves some look at. You know, if you have
12 some mandatory disclosures, you get the parties early on
13 in the case showing hands and showing cards, and for less
14 than .8 percent of our cases are going to trial. So if
15 we're doing this to effectuate a settlement early on then
16 that has a lot of merit.

17 Now, the only thing I see about mandatory
18 initial disclosures is that -- well, there's going to need
19 to be teeth if you fail to timely disclose the mandatory
20 disclosures, but I'm not aware of any of the appellate
21 judges making the argument for no discovery. That's the
22 first I've heard of that.

23 MS. GREER: Well, you can use the inherent
24 authority.

25 HONORABLE XAVIER RODRIGUEZ: To overrule the

1 circuit judges?

2 MS. GREER: Exactly.

3 CHAIRMAN BABCOCK: Your comments are really
4 timely because at our first meeting in 2019 we're going to
5 take up the subcommittee's proposed changes to our
6 discovery rules; and if anybody else has questions, fire
7 away, but I've got one. You know, the Eastern District in
8 Texas, many of the judges, if not maybe all of them, say
9 you can't have request for admission, that the litigants
10 have to produce relevant documents. Is there -- any of
11 your groups talked about that, about how you deal with
12 request for -- request for production?

13 HONORABLE XAVIER RODRIGUEZ: So in my
14 federal court circles, no. The State Bar litigation, I'm
15 going to be incoming chair in about two years, and Hayes
16 is leading up this effort. We're engaged in a long-term
17 study about what's going to be happening to litigation,
18 where we're at, what may be the implications for the
19 section, what training do we perhaps need to offer
20 lawyers, but -- and so us speaking theoretically I'm
21 hesitant to do so now with a court reporter here, but I'm
22 urging this work group and there's four Baylor law
23 professors associated with this effort, so we've got a lot
24 of fire power behind --

25 CHAIRMAN BABCOCK: Careful we've got one

1 here I'm going to introduce in a minute.

2 HONORABLE XAVIER RODRIGUEZ: Yeah. And so
3 Jim's part of the effort here, and so, you know, I'm
4 urging the group to be heretical and think outside the
5 box, I mean, and things as heretical as why do we really
6 require an answer that has specific admissions on line by
7 line and paragraph by paragraph, what does that get us,
8 whoever looks at the answer, what kind of expense was
9 associated with the answer. The same thing with request
10 for admissions, and so I think that, you know, if we're
11 going to bring down the cost of discovery, and the
12 whole -- it's just not discovery, it's the whole process.
13 We need to start thinking about things like that.

14 CHAIRMAN BABCOCK: Yeah, I may have said
15 request for admissions. I meant request for production,
16 and that's what the Eastern District says you can't have
17 it. That's fairly radical in my view, but I do think that
18 request for production are unlimited in both our systems,
19 and in some cases if somebody is trying to abuse you,
20 you'll get the 16th request for production and it will be
21 up to request number 362, and I wonder if there's any
22 thought about trying to limit that.

23 HONORABLE XAVIER RODRIGUEZ: So in the
24 federal rules there are limitations on the numbers of
25 requests and interrogatory answers.

1 CHAIRMAN BABCOCK: Right.

2 HONORABLE XAVIER RODRIGUEZ: And so whether
3 that's something we should adopt here in Texas, that's
4 probably good. I've never had anybody come to me in 15
5 years saying, "I need more."

6 CHAIRMAN BABCOCK: Yeah, right. Right.
7 Good. Other questions for Judge Rodriguez? Anybody?
8 Okay. Well, Judge, thank you so much.

9 HONORABLE XAVIER RODRIGUEZ: Thank you for
10 the opportunity. Appreciate it.

11 (Applause)

12 CHAIRMAN BABCOCK: I should introduce
13 Professor Jim Wren from Baylor, who is sitting next to
14 Hayes. It's -- I can tell you that Hayes probably
15 especially appreciates that because no one usually sits
16 next to him, in his zone of his own there.

17 PROFESSOR WREN: I just appreciate a seat.

18 CHAIRMAN BABCOCK: Thank you for being with
19 us. Okay. We'll get to the agenda after noting that
20 Justice Boyd has joined us and his comments have been
21 pushed down on the agenda a few items, so we'll hear from
22 him later, but we are really honored to have Dick Holme,
23 who is over here on my left, to come and address us and
24 share some of the things he's been doing. Dick is from
25 Colorado. You remember the last time we had a speaker

1 from outside -- from Colorado attend and address us, the
2 former chief justice of the Colorado Supreme Court, and we
3 were in our usual fashion very critical of her proposals
4 in a way that I don't think the genteel members of the
5 Colorado bar might have been used to. So when we -- when
6 it comes time to comment on what Dick is telling us, let's
7 be gentle. On our scale of one to ten of viciousness
8 let's keep it at a five.

9 Dick -- Dick went to the University of
10 Colorado. He was on the law review. He has been a
11 longtime partner in Davis, Graham & Stubbs, a very
12 prominent firm in Denver. He was a deputy district
13 attorney for a period of time. He was elected to
14 fellowship in the American College of Trial Lawyers in
15 1983, and he has been on the American College's task force
16 on discovery and has until just recently been the chair of
17 the American College's standing committee on rules
18 changes, and he has written -- was the lead author in a
19 book called "Working Smarter, Not Harder: How Excellent
20 Judges Manage Cases," which is "a manual for state and
21 federal trial judges nationwide on techniques for
22 increasing pretrial efficiency to obtain just, speedy, and
23 inexpensive handling of cases." He -- his resume
24 concludes by mentioning the most important part of his
25 life, which is his wife, Barb, and their sons and

1 grandsons. So thank you for joining us, Mr. Home, and let
2 us know what the American College is up to.

3 MR. HOLME: Thank you, Mr. Babcock, and may
4 it please the Court.

5 CHAIRMAN BABCOCK: We never do that, by the
6 way.

7 MR. HOLME: I was taught --

8 HONORABLE DAVID NEWELL: Yeah, we're
9 supposed to be unhappy.

10 MR. HOLME: I was taught to do that more
11 than 50 years ago by my father, who said you never talk to
12 a group without asking to please the Court. I am not here
13 as a spokesman with a calling from the American College of
14 Trial Lawyers to sell anything in particular. I am not
15 purporting to be up to speed with what Texas has done up
16 to this point in time with respect to efforts to increase
17 efficiency, speed, costs in civil litigation, but I would
18 like to fill you in on some of the major efforts that have
19 been made by the American College and by judicial bodies,
20 and -- other judicial bodies and organizations, because to
21 some extent and to the extent that these issues have not
22 been dealt with by Texas at this point, it's conceivable
23 that some of the work that's been done will expedite what
24 you're going to be doing, and there's lots of resources
25 out there that can be useful.

1 I may be singing to the choir, but let me
2 give just a brief background of what's been going on with
3 respect to efforts to increase the efficiency of civil
4 trial work, particularly over the last 12 or 13 years. It
5 started when the American College and the Institute for
6 the Advancement of the American Legal System, which is the
7 group that former chief justice -- or former Justice
8 Kourlis headed up and who has spoken to you, apparently
9 walking out with bruises, but in any event -- and let me
10 in her defense say that she has been an unbelievable force
11 in terms of getting action moving with respect to the
12 necessity to re-examine how we try civil -- how we prepare
13 primarily civil cases in ways that can be done that are
14 faster and less expensive; but in any event starting in
15 2006, IAALS, the institute, and the college decided that
16 they had been hearing a lot from people about how
17 inefficient the judicial system was and how bad it was,
18 citing among other things to the fact that so many more
19 cases now are being handled by arbitration or mandatory
20 mediation and that it was reflective of the fact that
21 litigation was simply too expensive, assisted by the
22 realization of the people who started working on this that
23 they themselves, lawyers who were working on this,
24 couldn't afford to have themselves in litigation, that
25 it's just simply too expensive even for people who

1 generally are at the upper edges of the income streams.

2 So they decided to run a survey of the
3 fellows of the American College. There are about 3,300
4 fellows in the American College; and keep in mind that
5 about half of them are criminal lawyers and, therefore,
6 not particularly concerned about what's going on in the
7 civil realm. But they sent out this survey to ask people
8 what their reactions were and what their understandings
9 were, what their experience were, and got a response of 42
10 percent of the college responded to it, a staggering
11 support or response level with respect to any kind of a
12 survey; and often in the results that were -- that came
13 in, there would be 85 to 90 percent agreement with respect
14 to discussions about, number one, the judicial system is
15 broken or at least in serious threat of being broken with
16 respect to civil litigation; that, in fact, the civil
17 litigation is cumbersome, inefficient, expensive, slow.
18 All of those were supported by very large percentages of
19 the respondents.

20 The results were so concerning that the
21 American Bar Association then did a -- replicated that
22 survey of the litigation section members of the American
23 bar, I think hoping to find that maybe the college was
24 just overreacting, but instead they found that the results
25 from the American Bar survey were virtually the same as

1 the ones from the college. That seemed to light a fire
2 under a lot of people with respect to the fact that
3 something really needed to be done to figure out ways to
4 make the system work better. At that point the American
5 College formed a task force on discovery and civil
6 justice. This was comprised of about 30 highly
7 experienced and reputable civil trial lawyers,
8 representing both plaintiffs and defendants, along with
9 federal trial judges and state trial judges on that
10 commission. In 2009 -- the survey had been done in 2007.
11 In 2009 the college produced a final report.

12 The task force had spent ungodly numbers of
13 hours working on this and had been thinking very hard
14 about how do we make the system work better. They
15 proposed 29 principles that ought to be considered by
16 states in revising their rules or their procedures. They
17 broke it into groups, so I'm not going to give you 29, but
18 let me give you the top six groupings of what they
19 proposed. They proposed, number one, a recognition that
20 one size does not fit all, that the federal rules are good
21 with respect to major cases where there's lots of
22 different and highly expensive stuff going on, but it
23 doesn't work for a 50,000-dollar case. You just can't
24 have the kinds of discovery availability in a
25 50,000-dollar case unless you want to have the cases cost

1 \$100,000 to win 50.

2 Second, with respect to initial pleadings,
3 those should provide notice of both factual and legal
4 assertions. This is consistent with Iqbal and Twombly
5 from the United States Supreme Court. In fact, a lot of
6 the states have adopted those requirements just simply as
7 part of their legal decisions on cases. I know that
8 Colorado has done that, for example, and I know a number
9 of other states have, so that was -- is maybe well on its
10 way toward being adopted.

11 With respect to discovery, they said there
12 should be proportionality with respect to discovery
13 directly relevant to the size and complexity of the case,
14 and furthermore, initial discovery -- initial disclosures,
15 rather, should be early and complete. With respect to
16 experts, they recommend that there should be -- the
17 experts should provide full written disclosure of their
18 facts and opinions and then be limited to testifying in
19 court to those things that have been disclosed in writing.
20 With respect to dispositive motions, there should be --
21 these should be promptly decided, that it can speed up the
22 process a lot if those kinds of motions are dealt with
23 quickly, and finally, that where possible it's a huge
24 advantage to have a single judge handling all aspects of a
25 case as distinct from getting a different judge every time

1 you've got a motion to be heard and ending up with
2 inconsistent and judges acting on information where they
3 don't have the full picture.

4 This report inspired the calling of a
5 national conference held at Duke University in 2010 where
6 some 200 leading judges, academics, and trial lawyers came
7 together and discussed it for several days, ending up
8 largely supporting the positions that have been taken in
9 the final report, and it -- that also ended up leading to
10 a large number of state pilot projects, frequently trying
11 to deal with separate parts of these recommendations to
12 see whether they actually work. Nice idea, but does it
13 work, and so a lot of those were done as a result of this.
14 New Hampshire, Utah, Arizona, Colorado, among others,
15 already have adopted significant changes, most of them in
16 compliance with and following the recommendations of the
17 final report. The United States Supreme Court rules
18 committee adopted in 2015 a civil rules amendment largely
19 to Rule 16 relating to pretrial case management and Rule
20 26 relating to discovery, and then following on this the
21 college went back and re-examined its final report and
22 came up with a second final report, which they
23 thoughtfully reduced the number of proposed principles to
24 24.

25 The -- in 2016 the -- excuse me, the Council

1 of Chief Justices organization of all chief justices in
2 the country produced its report, suggesting many of the
3 same kinds of changes in what it called its call to
4 action, and following up on that, IAALS and the National
5 Center for State Courts have had meetings with 40 of the
6 chief justice committees around the country to discuss how
7 they can implement these suggestions that have been made.
8 Then as relevant to my purpose here or the reason I'm
9 here, two years ago the American College Judiciary
10 Committee was charged with contacting as many state courts
11 as possible to encourage rule revisions and upgrades and
12 to offer assistance, any kind that we can with respect to
13 being of help. The -- when the judiciary committee took
14 this on, one of its early tasks was to try and create a
15 website that would have significant documents relating to
16 the development of new, more efficient rules and
17 amendments to rules by the states, and so we did put
18 together a database that's not too big, but we thought
19 provided at least the basics.

20 And then among the documents that you-all
21 were sent yesterday, maybe earlier than yesterday, is the
22 American Judiciary Committee Resources for State Court
23 Revisions of Civil Rules, as of October 1, 2018. The
24 first entry on that is a remarkably long ERL for -- to get
25 into the database, and once you get into it then you've

1 got access to the full printouts of all of these various
2 things that have been included. So in the database there
3 we broke it into several sections. There is a leading
4 suggestions for improvements is section one, and that
5 includes the call to action, and it includes full text of
6 both of the final reports of the American College so that
7 you can examine the details of what they provide. With
8 respect to preparation for reform and fact-gathering,
9 there's some several different articles and pieces about
10 what kind of information can be gathered to -- by each
11 state to determine what may be important to their lawyers
12 or to their cases or relevant to the way their history is
13 being set up in terms of handling civil -- civil
14 litigation. I think there is at this point in time
15 sufficient information available both through this website
16 and through the -- through IAALS and its website that
17 actually a fair amount of that kind of investigation can
18 be checked and seen having been done by several different
19 states, several different ways, and may not require
20 reinventing the wheel on all of these.

21 The third section is legal and factual
22 research, and one of the documents in there is a review of
23 five years from 2008 to 2013 of pilot projects and efforts
24 to improve the system that can be useful. And then the
25 fourth of the sections in there contains a new California

1 report that was issued earlier this year, a report on the
2 Utah rule for amendments, and a significant amount of --
3 for better or for worse, my thinking on the Colorado
4 changes that have been made and the reasons for those
5 changes.

6 There are two documents, particularly in
7 section four, that I would like to call your attention to.
8 One is the document entitled "Working Smarter, Not
9 Harder." This document was -- came as a result of
10 personal interviews, telephone interviews, but with the
11 judges, with 28 judges across the country, federal and
12 state. Trial judges these are, federal and state, from
13 literally New Hampshire to California, trying to get big
14 states, small states, different kinds of states, different
15 geographic areas, and we had asked for the American
16 College members in each of those states to tell us who the
17 judges were who they thought really knew how to handle
18 cases, really knew how to handle the management of cases,
19 and could do a good job and provide useful information
20 using those selections.

21 I then had two to three-hour telephone
22 conversations with each one of them to try and gather what
23 learning they had to provide on this, and I commend this.
24 I think it's a very useful document for considering
25 choices. Two things that came out of that that I was

1 struck by is that, first of all, with respect to early
2 case management, every single judge we talked to engaged
3 in early case management, meaning that at the very outset
4 of the case either immediately upon the filing of a
5 complaint in some cases, but certainly at the point where
6 the case was at issue, the judge would call in the
7 lawyers, lead counsel, not some of the associates who
8 don't have any authority to do anything without losing
9 their job. They call in the parties, spend a half an hour
10 with them discussing how the case could be moved faster,
11 what kinds of things are really important, traffic case,
12 personal injuries, is it damages that are the problem, is
13 it causation that's the big problem with respect to
14 getting this case resolved. If it's causation, okay,
15 let's start our discovery there, and they set out, and
16 "How many people are we going to need to talk to?"

17 "No, no, we don't need to talk to 12. Are
18 there one or two or three people who are really
19 significant in understanding causation?"

20 "Yeah, okay, then do those people first.
21 Come back, we can talk about it later if you need more."

22 All of these judges that we talked to did
23 that kind of thing, and they all found it very helpful in
24 terms of moving cases along quickly. The other part of it
25 was that -- and I'm going to go back just a step with

1 respect to a personal experience. I ran into this issue
2 about 20 years ago when I walked into a -- into a court
3 hearing. We had had a preliminary injunction hearing, and
4 the case was then going to be going through the regular
5 processes, and the judge called us into his chambers, and
6 he said, "I've got some personal rules you're going to
7 have to pay attention to. Number one, you may not file a
8 motion for discovery." And we all gulped and thought what
9 the heck, and he said, "Until you've called me and we've
10 talked about it first, and then if I need to have
11 something written I'll ask about it." So the result of
12 that was, not surprisingly, no one ever called the judge.
13 The lawyers were able to figure everything out because
14 none of them wanted to admit that they had this stupid
15 objection that they were going to have to be dealing with,
16 and so it never happened.

17 Well, all of these judges, again, that we
18 had interviewed did the same thing. We had started to do
19 the same thing in Colorado within the last five or six
20 years because a couple of our Denver judges had started
21 doing it and loved it and then when we had a pilot project
22 that was a civil action pilot project to test a number of
23 these things, we required that the judges and the parties
24 have oral communication with respect to motions before you
25 could file written motions, the judges in the five

1 districts that were handling the pilot project all loved
2 it. Sometime, if you care, meet me after we're done here
3 this morning and I'll tell you about my personal
4 experience when I did this as a -- as a special master.

5 But in any event, it to me is perhaps the
6 single most important change that can be made to move
7 along a case and to cut the costs. Somebody has got a
8 discovery dispute, they -- first the requirement is the
9 lead lawyers have to discuss it, and then they call the
10 court. In 15 or 20 -- well, the court will set a hearing
11 usually at lunchtime or beginning of the day or end of the
12 day. In 15 or 20 minutes all of the judges agree you can
13 solve almost every problem that comes up. It avoids
14 having three sets of briefs that take two months to get
15 done, to then sit on a pile on your desk that has all of
16 the other ones that you still haven't gotten around to
17 dealing with because it takes hours and hours and hours to
18 go through deciding those things in that situation;
19 whereas, most of these things literally can be solved in
20 15 to 20 minutes, and it gets done immediately. There's
21 no delay. There's no lawyers having to relearn the case
22 and that kind of stuff, but in any event, there is a
23 document in section four that I wrote with four trial
24 judges as my co-authors describing how this thing works.

25 So the fundamental position here is we

1 would -- we, the college, would be delighted to provide
2 any resources, any help, any advice, any suggestions or
3 not, as you-all want; and if you want help, I hope we'll
4 be able to be of genuine help. So thank you very much.

5 CHAIRMAN BABCOCK: Yeah, thank you, Dick.
6 Would you subject yourself to some questions?

7 MR. HOLME: Sure.

8 CHAIRMAN BABCOCK: We've got two fellows of
9 the college sitting here. Bobby Meadows, who is actually
10 chair of our discovery subcommittee that's going to
11 hopefully wind up its work at our next meeting, and Judge
12 Wallace, who is a district judge in Tarrant County.
13 Judge, age before beauty. I'm not saying who's older and
14 more beautiful, but would you like to ask any questions
15 about this?

16 HONORABLE R. H. WALLACE: Well, I was just
17 thinking about the meeting early on to -- you know, to
18 help move cases along in the state courts, and in most --
19 I don't do that, and I'm not sure -- I don't think it
20 would be called for in the majority of the cases that we
21 have. I mean, I look at every docket sheet when a case is
22 filed, and if it's somebody versus Tarrant appraisal
23 district, okay, I know what that is. That's going to be
24 no discovery, and it will never go to trial. There's
25 others that are the fender benders and things of that

1 nature. Every now and then you see the one that's going
2 to be substantial, but most of our time -- at least most
3 of my time is spent reading and deciding on motions and
4 things of that nature. It's not meeting with attorneys
5 the way you talk about, and I'm not -- I guess I would be
6 willing to give it a shot, but sometimes I like to at
7 least try to give some credit to the attorneys that they
8 know better -- that the good attorneys know better how to
9 try their case than I do. Okay.

10 So it's an interesting -- it's an
11 interesting thought, interesting theory. I don't know, I
12 would be interested to know how some of the practicing
13 lawyers feel about that. It would be a -- it would
14 certainly -- well, I don't know how big a -- how much time
15 it would take. I don't know if we have that time. We
16 don't have law clerks to do research or writing and things
17 of that nature, at least we don't in Texas, so -- I don't
18 really have a question. Those are my great thoughts.

19 CHAIRMAN BABCOCK: Deep thoughts.

20 MR. HOLME: Let me respond to that, if I
21 may. This -- your concerns are ones that we hear every
22 time this issue comes up. "I've got 800 cases on my
23 docket. How can I possibly spend an extra half hour on
24 each one of them to deal with this?" Well, part of the
25 answer is that -- and the experience of the judges that we

1 spoke with in the working harder -- Working Smarter
2 document as well as some others that I'll mention in just
3 a moment, the experience was for half an hour spent at the
4 beginning of the case to make sure that the parties are --
5 that lawyers are on track with respect to what the court
6 is going to expect with respect to limitations on
7 discovery and proportional discovery and stuff that really
8 counts, for half an hour spent then they literally would
9 discover that they have saved, 10, 20, 50, a hundred hours
10 down the road not having to deal with some of the issues
11 that they could deal with by focusing the discovery.

12 I had the occasion -- I was a member of
13 three people who had been asked by the Colorado Supreme
14 Court to -- after we had adopted our rules in the middle
15 of -- in July of 1915, two years later they asked us to go
16 talk to the judges and ask them how they reacted to these
17 changes.

18 CHAIRMAN BABCOCK: Dick, you meant 2015, I
19 hope.

20 MR. HOLME: Pardon?

21 CHAIRMAN BABCOCK: Did you mean 2015, not
22 1915?

23 MR. HOLME: It goes to show how time flies.
24 It was passed in 2015, and we were now in 2017 going
25 around. They had asked us to go and interview and talk to

1 as many judges as we thought was useful. We ended up
2 talking to all of the civil trial judges in 10 of
3 Colorado's 22 judicial districts. The 10 that were the --
4 10 of the 11, all but one of them was the -- were the
5 largest districts in the state. In every single case the
6 judges were delighted at what had happened with respect to
7 early case management. They -- in one case we had one
8 judge who had actually been doing it and was one of the --
9 one of our templates, had been doing this for several
10 years before down in Colorado Springs, and his records
11 that he had kept established that his overall docket in
12 the civil cases had dropped by a third by virtue of the
13 fact that he could clean these things out quickly.

14 We had, you know, examples being given to
15 us, one judge said we got a call from Colorado Springs
16 lawyers who -- this is in Fort Collins, which is about 120
17 miles apart -- lawyers called and said, "Judge, we don't
18 want to come up there in person, and we don't need to,
19 because we've got it all worked out"; and the judge said,
20 "No, I want you to be here in person." The next day he
21 heard that the case settled. The judges say, you know,
22 it's remarkable how many times lawyers will file cases or
23 their associates will file cases, somebody in their office
24 will file cases, and the lawyers don't know what it's
25 about. When you ask them to come in, they learn what it's

1 about, and that frequently helps in terms of getting it
2 done.

3 So the experience has been that it works,
4 but, you know, clearly there's some cases that are going
5 to not work. Ultimately one of the other things that
6 people noted was they get very exasperated at motions
7 being filed that take cheap shots at the opposing counsel,
8 that say things that are not civil, that are not rational,
9 that shouldn't be said, when one of the things that the
10 judges all said that they would do is emphasize at the
11 initial conference, "We're not going to do that, so don't
12 express it that way"; and when you have to call them
13 before you file the motion, nobody says that kind of stuff
14 in front of the judge, so it has apparently had a
15 significant impact in terms of assisting the civility
16 issues that tend to roll around the subject. So --

17 CHAIRMAN BABCOCK: Let me ask a question
18 about that. Judge Peeples or Judge Evans or Judge
19 Wallace, the trial judges on our committee, what about the
20 idea of before you can file a -- before you can file a
21 discovery motion you've got to have a telephone call with
22 the judge? Is that feasible? Judge Wallace.

23 HONORABLE R. H. WALLACE: No. I don't want
24 to be getting telephone calls all the time about discovery
25 disputes. That's my personal view.

1 CHAIRMAN BABCOCK: Well, they would say, I
2 presume, they wouldn't just call you up and say, "Hey,
3 we're all on the line. We want to talk to you." They
4 would send a letter or something saying, "Hey, we've got
5 this discovery dispute. We understand under the rules
6 we've got to have a call with you, so we're asking for a
7 call." Would that work or not?

8 HONORABLE R. H. WALLACE: And then what, to
9 do what? To basically argue their motion that hadn't been
10 filed?

11 CHAIRMAN BABCOCK: Yeah.

12 MR. HOLME: Yes. So that they don't have to
13 write it, so that you don't have to read it, and usually
14 they're shorter when you ask them to argue.

15 HONORABLE R. H. WALLACE: As a practical
16 matter here's what I think normally happens in most cases.
17 Somebody -- they can't agree on discovery, so, okay, I'm
18 going to file a motion, and then a lot of those get
19 resolved rather than, you know, once the lawyers are
20 focused on that issue, rather than with something else,
21 they look at it, they get together, they talk, and they
22 work it out; but the filing of the motion is the thing
23 that starts the ball rolling. Now, if they want to call
24 and get some guidance, you know, advisory opinions of
25 "Here's what I think," I don't know how that would work.

1 I don't know.

2 CHAIRMAN BABCOCK: Justice Christopher, who
3 used to be a trial judge, by the way, in her prior life.

4 HONORABLE TRACY CHRISTOPHER: I like the
5 idea of the phone call, but I wanted to ask you in
6 connection with Colorado's appellate practice, when a
7 judge makes a discovery ruling in Colorado is there any
8 sort of extraordinary appeal of that ruling? We have
9 something called mandamus in Texas. In the federal court
10 those are pretty well denied all the time, but in state
11 court we do review discovery rulings on an interlocutory
12 basis. So I wondered how that works.

13 MR. HOLME: In Colorado there is a method
14 under our appellate Rule 21 to bring up a ruling from the
15 trial court on a discovery or other pretrial matters for
16 the Supreme Court to review. The Supreme Court has to
17 approve review of those and rarely does.

18 HONORABLE TRACY CHRISTOPHER: Right, and
19 that's --

20 MR. HOLME: Most of the time that is found
21 to be useful in the criminal cases where granting a motion
22 to suppress is the end of the case as a practical matter,
23 even though it's not over.

24 HONORABLE TRACY CHRISTOPHER: Well, unless
25 our Supreme Court changes its review of discovery rulings

1 and kind of goes back 30, maybe -- 30 years when they
2 didn't review discovery rulings. It used to be like that.
3 You know, they just didn't. They were denied, they were
4 denied, they were denied, but then mandamus of discovery
5 rulings became more and more acceptable at the Supreme
6 Court and, therefore, also at the court of appeals
7 because, you know, we're following the Supreme Court
8 opinions that says, you know, discovery needs to be
9 tailored here or there. So I'm just wondering, given the
10 way our system works, how would someone preserve that
11 point to take up after they've called you on the phone,
12 called the trial judge on the phone, and the trial judge
13 says, "Yes, you not only get discovery about this tire,
14 but you also get discovery about this tire, because you've
15 convinced me that they're substantially similar."

16 MR. HOLME: Well, the way it would work in
17 Colorado with the vast majority of the judges who do it,
18 is, first of all, the parties are required to have a
19 genuine meet and confer with lawyers who can make
20 decisions, but then they will end up -- the parties will
21 end up calling the judge and saying judge -- or to the
22 clerk and say, "We want to get a meeting with the judge to
23 talk about discovery." She or he will set the matter for
24 a hearing within a week or two at most, usually in person,
25 and then will have a conference whether it's in person or

1 by phone that's on the record, and so people can go ahead
2 and make their positions known.

3 CHAIRMAN BABCOCK: In writing or just
4 orally, Dick? In writing or orally?

5 MR. HOLME: No, they -- well --

6 CHAIRMAN BABCOCK: Because that's Justice
7 Christopher's problem, there's no written thing to go up
8 on.

9 MR. HOLME: No, what will be done is -- and,
10 you know, I should say that -- I'm getting confused
11 myself. One of the options that the court always has
12 after they've heard the oral ruling is to say, "You know,
13 I think this one is too complicated. We really need to
14 have a written record on this, so please file motions and
15 we'll get it done officially." I mean, in great detail --

16 HONORABLE DAVID PEEPLES: Could you speak up
17 just a little bit?

18 MR. HOLME: Pardon?

19 HONORABLE DAVID PEEPLES: A little louder.

20 MR. HOLME: Sorry. The judges will have the
21 oral hearing; and if they find it too complex they will go
22 ahead and say, "Let's go ahead and file motions, but I
23 want it limited to this issue that you've identified, not
24 those issues which you've already dealt with"; and even
25 that shortens up the process. So that can be done, but in

1 any event, the telephone call or the in-person hearing and
2 most of them like in-person hearings even for a half an
3 hour session or 15 or 20-minute session, they'll do that
4 with a court reporter so that it could be appealed, but
5 the lot of these things are things that just aren't all
6 that big a deal, you know. "Well, I want to take my
7 depositions first."

8 "No, I want to take my depositions
9 first." And you're going to have briefs on that? You
10 know, there's a lot of the stuff that comes up that just
11 is not all that crucial that anybody would be appealing
12 it, and the judges can get that ruled, out of the way.
13 Frequently, in my experience, what the lawyers most often
14 need with respect to discovery is we've got this thing
15 going and we need to know do we take the right hand curve
16 or do we take the left hand curve; and, frankly, either
17 one is okay, as long as we know which one we're doing so
18 we know what the rules of the game are. You say, "Take
19 the left." Fine, that's the end of it, and a lot of the
20 discovery motions that I've been involved in over the
21 years end up being that sort of thing where I don't care
22 whether you're ruling for me or against me, just rule so
23 we know what we can do.

24 CHAIRMAN BABCOCK: Judge Peeples, you've --
25 I'll get you in a second, Marcy. Judge Peeples, you're in

1 a jurisdiction, Bexar County, that has a central docket,
2 and so calling up the judge is not as easy because you
3 don't know who -- don't know which judge to call. Is
4 there any way this phone the judge procedure -- which I
5 think a lot of federal judges in one way or another are
6 utilizing across the country. Is there any way that could
7 work in Bexar County or Travis County?

8 HONORABLE DAVID PEEPLES: You might have,
9 you know, every month or so a different judge have that
10 particular responsibility for everybody, maybe. I just --
11 Judge Wallace mentioned, you know, the tax collection
12 case. I think there's some cases where you wouldn't need
13 this, if you had a blanket rule for everything. The first
14 one of your points was one size doesn't fit all. I think
15 in some cases this would be helpful, and with some lawyers
16 it would be very helpful. I'm just kind of thinking that
17 if you had this policy of no motions until you've talked
18 with me, you might end up with the same number of
19 contested hearings that we have right now, but you would
20 have fewer motions written up and filed, and that would be
21 a gain right there, but --

22 MR. HOLME: One of the things that I should
23 say is that -- and this was our Colorado experience, was
24 that we did not want to make that kind of a -- you have to
25 call the judge first, a flat rule. It's not a flat rule.

1 It is -- we did provide in the rule revisions the
2 authority for the judges to do that with the encouragement
3 that they do it; but, for example, I had a case, a fairly
4 large case, with a judge who had spent his entire life in
5 criminal court. He had been a prosecutor for all of his
6 life and then was appointed to the bench and came in, and
7 I just happened to be handling this significant case that
8 was on the Court that he moved into. It was his first
9 experience with a civil case. If he had asked to have us
10 do this, he would have been -- it would have been useless,
11 so we have not required any judge to do it, but have
12 allowed them to do it and encouraged them to do it.

13 HONORABLE DAVID PEEPLES: Chip, it occurs to
14 me that this discussion presumes a certain level of the
15 floor competence and ability and so forth of the
16 judiciary.

17 CHAIRMAN BABCOCK: I think so. Yeah.
18 Marcy.

19 MS. GREER: I was going to say the Northern
20 District of New York, the federal court, has a practice
21 like this; and I've had two major, huge cases with a lot
22 of contentious parties; and it was incredibly effective in
23 handling the discovery disputes, because they would have a
24 standing order to the magistrate to have this prehearing
25 conference; and the magistrate could often, without giving

1 a ruling of any kind, give an indication of where it was
2 going; and if it was too complex to decide based on that
3 call or a ruling needed to be made, then they would set it
4 for hearing and issue a briefing schedule and then we
5 would have a hearing on it; and it was incredibly
6 effective because a lot of it, like you say, can be
7 addressed if the judge just gives a leaning towards, you
8 know, y'all need to figure it out with this. If it needs
9 a ruling, both of the magistrate judges I dealt with in
10 those cases I thought did a really good job of kind of
11 calling those balls and strikes.

12 CHAIRMAN BABCOCK: Judge Evans, and then
13 Pete.

14 HONORABLE DAVID EVANS: Well, I think Judge
15 Peeples hit on one issue, just it depends on the lawyer.
16 I don't think there's any judge that's sitting in a civil
17 district only court, as opposed to a general jurisdiction
18 court. There's a different practice mode that goes on in
19 a general jurisdiction court where you try criminal,
20 family, and civil; and you have different time restraints
21 on you as a trial judge than you do in a civil only court
22 like you find in the urban counties in Texas that wouldn't
23 want to discuss with the lawyers the discovery process,
24 the disposition of dispositive motions, decision trees
25 that would expedite the matter; and I think most of us do

1 upon the first contested hearing that comes in attempt to
2 have some sort of bench conference or short conference to
3 see if they can move the case forward by reasoning with
4 the lawyers. And as soon as you find out that one lawyer
5 is unreasonable and obstreperous, you can just pack your
6 bag and head for chambers because ruling is the only thing
7 that will take care of it.

8 On the other hand, I just moved a large case
9 through and only had one discovery hearing. They tried it
10 for three weeks. It took two years to prepare. It's a
11 products case. We had -- happened to have a discovery
12 hearing, had a lot of conference about it, what issues
13 we're going to do, scheduling order came in, and that's
14 the way it works, and that's a level three case. You have
15 local judges that have a pretty good idea of who the
16 reasonable, quality players are in big money; and I'm not
17 talking about the cases that take a long time because
18 you've got a lot of finger pointing going on and
19 vindictive language and comments. Those are just
20 impossible cases to reason with anybody on. You've got to
21 have three participants who are willing to discuss the
22 matter and drop some of the advocacy and get down to the
23 work, and we don't train for that.

24 Now, in Tarrant County, I count my -- I go
25 -- like R. H. does, I go through my cases as they're

1 filed, and I look at them. Right now only 25 percent of
2 my cases are being filed by Tarrant County lawyers.

3 CHAIRMAN BABCOCK: Is that right?

4 HONORABLE DAVID EVANS: And 25 percent are
5 out of Harris, Bexar, or San Antonio. So the idea of it's
6 easier probably to get a lawyer up from Austin than it is
7 to get them from Collin County, but given the gridlock
8 that exists, so then it's the in-person problem, and
9 telephone conferences are extremely difficult for
10 discovery disputes and reasoning out any kind of a
11 conference. You've got to have eye contact on people in
12 order to make that kind of system work, and so I think a
13 lot of us just wait until it gets in front of us on
14 something and say, "Can we talk for a few minutes? Can we
15 go off the record for a few minutes?" And I think if the
16 lawyers are willing to do it, they do it; and I agree it's
17 productive; but it's not necessary in 80 percent of the
18 cases I have.

19 CHAIRMAN BABCOCK: Thanks. Pete, in a
20 second, but Senator Whitmire has joined us; and, Senator,
21 we have a seat for you at the head table, but Orsinger
22 wants you to sit on his lap. I don't know why, but you
23 can do either, sit in Orsinger's lap or come to the head
24 table, your choice. And we're finishing up this section,
25 and we'll be with you --

1 SENATOR WHITMIRE: No, take your time. I'm
2 in good shape.

3 CHAIRMAN BABCOCK: We're delighted to have
4 you. Pete Schenkkkan.

5 MR. SCHENKKAN: One process comment and then
6 a bigger picture concept.

7 CHAIRMAN BABCOCK: Speak up, Pete.

8 MR. SCHENKKAN: One process comment and then
9 a bigger picture comment. The process comment was central
10 docket systems, which we have in Travis as well as Bexar,
11 need not be a stopper for this process if there is a
12 vigorous and reasonably successful system for special
13 assignment of cases that warrant it; and Travis County has
14 a local rule for that process that describes the kind of
15 cases for which you can request a judge to be specially
16 assigned to handle that case from beginning to end. I
17 don't do enough of it at this point to know whether it's
18 still working well, but it certainly was as of a couple of
19 years ago, and I don't know whether that is true in Bexar
20 County or not, but if we thought we needed to go in this
21 direction and we still wanted to be able to have central
22 dockets, we can solve that with this -- with the measure
23 for special assignment.

24 Stepping back to the bigger picture, I hope
25 that we will give serious consideration to providing the

1 Texas Supreme Court with some recommendations that trial
2 judges and trial lawyers think might work to do exactly
3 this, to make it a -- a standard part of a major case that
4 such a meeting takes place at the very beginning and with
5 the lead lawyers because what we are really doing here is
6 reframing the particular case and the whole system to
7 return part of the focus to what we have in common, which
8 is if we don't learn how to do this stuff efficiently we
9 are out of business. And so if we can get it accepted by
10 the lead lawyers and the judges that we're going to have
11 such a conference at the very beginning in which the goal
12 is going to be to say, okay, now, what is this really
13 about, and what is it we don't know yet that we're going
14 to need to know to try it effectively, and what are your
15 thoughts on how we're going to manage this so we can get
16 it done faster and cheaper while still fair and accurate.
17 If you -- if we get it reframed, we have made a big step
18 in the right direction of being able to do it. So I'm in
19 favor of the concept, although, the devil, of course, is
20 in the details.

21 CHAIRMAN BABCOCK: Okay. But you're talking
22 now about bringing the lawyers in and at the outset. What
23 about this idea of you've got to call the judge before
24 you're going to file a discovery motion?

25 MR. SCHENKKAN: Same notion, is if we start

1 with this notion, we're going to have to adjust the
2 parameters of it to fit with people's experiences of the
3 judges we have and the lawyers we have and the kind of
4 cases we have, and we may have to feel our way into that,
5 but we -- if we start at the beginning in the major case
6 with this and then we start to some targeted extent where
7 you think it's most likely to work with those kinds of
8 calls, it will change the culture.

9 CHAIRMAN BABCOCK: Yeah. Okay. Thanks.
10 Bobby. I'm sorry. Professor Albright.

11 PROFESSOR ALBRIGHT: I just wanted to --

12 CHAIRMAN BABCOCK: Then Bobby.

13 PROFESSOR ALBRIGHT: I just wanted to agree
14 with Judge Christopher about the mandamus issue. I think
15 there are some judges who would try to keep you from
16 having a record for a mandamus in an important discovery
17 decision, and since we do have the practice of taking big
18 discovery issues up on mandamus I think it can be dealt
19 with, but we have to figure out how to do that.

20 CHAIRMAN BABCOCK: Okay. Bobby, who is a
21 fellow in the college and head of the discovery
22 subcommittee. Any thoughts, observations, questions?

23 MR. MEADOWS: No, not to belabor it. My
24 experience with having a judge who is actively involved in
25 the case has always been good. I mean, I have that

1 experience right now in several other jurisdictions, and
2 so the idea of that certainly is appealing to me. I agree
3 with whomever said it that the -- you know, the active
4 involvement of a competent or good trial judge can't do
5 anything but help move the case along.

6 As for the other comments about the American
7 College examination of how to make litigation less costly,
8 more efficient, I mean, that's something we've been doing
9 in Texas for sometime. If you think about a number of the
10 things that were mentioned, we undertook, you know, one
11 size doesn't fit all, reducing and putting limitations on
12 discovery, two decades ago; and so while we're looking at
13 how we can make the discovery rules better right now, much
14 of what you're talking about in terms of kind of managing
15 litigation and managing discovery in a way that makes it
16 less costly is something we've been focused on -- I can't
17 say that we can claim complete success, but I think in
18 Texas we've been working on those ideas for a long time.

19 CHAIRMAN BABCOCK: Richard.

20 MR. MUNZINGER: Well, right now in a
21 discovery dispute in Texas in most courts and in the rules
22 themselves you have to certify to the trial judge that you
23 have had a conference regarding the issue to be brought to
24 the court before you take it to the court and that you've
25 made a good faith effort to resolve it by agreement.

1 That's in our rules. So, now, if I have to call a judge
2 to have an informal telephone conversation with the judge,
3 not on the record, but to get the judge's feelings,
4 whatever the judge's feeling is on that issue is going to
5 color my response to every discovery issue in the case
6 from that time forward, and it's going to have an impact
7 on my client. Why do I want to have an informal
8 conversation with a judge in a telephone conference? We
9 can't resolve a dispute, when I've got a rule which says
10 I've got to try and resolve the dispute before I take it
11 to you.

12 If there's a record kept of the
13 conversation, that's one thing, if there is no record kept
14 of the conversation, I now have a client whose rights have
15 been affected, possibly adversely, by an informal
16 conversation of a judge who takes the call without any
17 knowledge of what the dispute is about. My experience in
18 52 years of law practice is with Texas state trial judges
19 in damn near every jurisdiction in the state, they're all
20 busy. They have no clerks. They have no briefing
21 attorneys. They've got divorce cases. They've got
22 property cases. They've got will cases. They've got all
23 kinds of cases; and they hear some two guys arguing over
24 whether or not they can get so-and-so's letter. "Give him
25 what he wants" or "do this or that"; and they make a

1 ruling immediately, spontaneously, without thought; and
2 now my client's case has been affected by the
3 conversation; and every time I go to that judge with a
4 discovery dispute he remembers that I'm the guy that
5 didn't give the letter or what have you. I think it's a
6 -- with all due respect to Colorado and all due respect to
7 the problems that we have, and we have them in our
8 profession and in our courts, there's no question but that
9 it's too expensive.

10 Most of us who are trial lawyers in this
11 room at least, we all understand that you only go to the
12 trial judge in a discovery dispute if you absolutely have
13 to. If you take minor disputes to a judge you're a
14 dumbbell. If you take the serious ones to the judge it's
15 because you have to, and we all know that. Sometimes it's
16 imposed upon us by the personality of the other lawyer or
17 by the other lawyer's client. I've got a case right now,
18 I don't think this fellow's client would agree that the
19 sun is in the sky. If I asked him to agree that the sun
20 is in the sky he wouldn't do that. Well, that's his
21 personality, and the lawyer takes his instructions from
22 the client or withdraws.

23 I'm not in favor of anything that brings an
24 issue to the judge informally. I like a record. It's my
25 client's rights, and I've -- all the time I say this, but

1 it really is true if you think about it. Whether you are
2 General Motors or the Bowie Bakery, a very popular bakery
3 in El Paso, a Mexican bakery, makes the best confections,
4 bakery products in town south of El Paso.

5 CHAIRMAN BABCOCK: Is this product placement
6 here in --

7 MR. MUNZINGER: A good client. They're not
8 really a client, but the point is the Bowie Bakery is
9 entitled to the same dadgum rights as General Motors, and
10 so is Joe Smith and Pedro Gomez; and anything that gets
11 between the client's rights, remember, these are people
12 who these are their businesses, these are their lives.
13 What was it they pledged, that our lives, property, and
14 sacred honor? That's what we deal with as lawyers if
15 you're in the civil courts. We're not dealing with
16 freedom or death, what have you, but we are dealing with
17 lives and fortunes and sacred honor. Those are very
18 serious things to citizens. I'm opposed to anything that
19 puts me in front of a Texas trial judge -- I'm calling a
20 trial judge in Laredo and I'm in El Paso, and the Laredo
21 lawyer is there, and the call goes, and the judge takes
22 the conversation. Who's going to win that conversation?

23 CHAIRMAN BABCOCK: Well, you, because you
24 always do.

25 MR. MUNZINGER: No, but I've made my point.

1 I am very, very concerned about anything that will allow
2 the discovery to be guided in a direction by a judge on an
3 informal basis without a record that leaves it up to
4 almost happenstance of what is said or not said in the
5 conversation and, more especially, the response of the
6 judge who hasn't given the dadgum problem any thought
7 before it's given to him.

8 MR. MEADOWS: I'd say the lasting point that
9 I took from that, Richard, is that you don't think any of
10 your fellow members are dumbbells.

11 MR. MUNZINGER: I couldn't hear that.

12 CHAIRMAN BABCOCK: You're exempting members
13 of this committee from the dumbbell category we're hoping.
14 Justice-elect Kelly and then Eduardo and then Roger.

15 MR. KELLY: There is a federal judge in -- I
16 could use his name because it doesn't matter anymore.
17 Judge Hughes in Houston will prejudge the case, 26(f)
18 conference. In theory there's a court reporter. Things
19 that are said in the session disappear, don't show up in
20 the transcript. There is no -- frequently, prejudices the
21 case before the 26(f) conference, and then there's no
22 meaningful appellate review of what happens; and the idea
23 that that could be codified into the rules, a lack of
24 meaningful review, essentially prejudge cases, I find very
25 troubling in that a lot depends on the efficacy and the

1 temperament of the judge hearing the case; and to not be
2 able to correct that or have any other avenue for fixing
3 it I think is a recipe for disaster in the long run, so it
4 will empower judges who have prejudged the cases to rule
5 before anything can happen on them; and it will close the
6 courthouse doors.

7 CHAIRMAN BABCOCK: Eduardo.

8 MR. RODRIGUEZ: Well, I was going to ask
9 Richard two things. One is if you're from El Paso and
10 you've got a case in Laredo, are you -- is it better for
11 your client to pay for you to go and take two days to get
12 to Laredo from El Paso for a hearing, or is it -- what
13 outweighs the other, the expense to your client or the
14 possibility that you're going to get a bad ruling because
15 your opponent is sitting in front of the judge while
16 you're doing the conference?

17 MR. MUNZINGER: Most of my cases are such
18 that I can hire a local lawyer in Laredo to assist me, but
19 not all of the Bowie Bakery cases are that way. Not every
20 case allows a lawyer in El Paso to hire a local counsel
21 and doesn't have a client in -- Dallas, Houston, Lubbock,
22 I don't care where you are. Some people don't have the
23 money to hire a local lawyer to help them, so, yeah, I
24 either have to go to Austin or Lubbock or what have you.
25 The thing that concerns me is the trial judges are busy.

1 These men and women are doing their best to stay abreast
2 of how many different kinds of cases, and the phone rings
3 -- or even if you say, "Judge, we would like to have a
4 conversation with you, and can we do this next Wednesday
5 at 10:00 o'clock?"

6 "Yeah, I'm out of court."

7 "Well, let us send you some papers to tell
8 you what the problems are." Have you saved any money? I
9 don't know that you have. Is he going to read all of
10 those papers before he gets there? Is he going to
11 understand what it's all about? I don't know. My concern
12 is that -- I've told y'all this story once before. I'm
13 going to stay it again. It will only take a second. I
14 once had a case involving a French oil company. I dealt
15 with the general counsel's office. The basic issue before
16 the court was whether or not the federal district court in
17 Houston had jurisdiction over the case. The French oil
18 company's counsel said to me, "You Americans, you waste so
19 much money on the court's competence," meaning
20 jurisdiction; and he said -- and then he laughed. He
21 said, "But you get to the truth." His point being we do
22 it on affidavits, you're taking depositions, but he said,
23 "You get to the truth."

24 That's what we deal with. That's the
25 foundation of justice. Truth. And, yes, it's expensive,

1 and, yes, it's time consuming. Is the goal efficiency, or
2 is the goal truth? And any time that you have to weigh --
3 in my opinion, if you have to weigh efficiency and truth
4 in court, truth wins. We need to be very, very careful
5 when we adjust discovery rules that we are not doing these
6 things to our respective clients and to the search for
7 truth. Truth is truth, and let it come out.

8 I've heard all of these things about we're
9 going to make mandatory disclosures. The mandatory
10 disclosures in my personal opinion are a farce. The
11 United States of America has attorneys who are supposed to
12 disclose under the Brady rule documents that affect the
13 freedom of a citizen, and they routinely don't do it. The
14 lady from Colorado was here two or three years ago and I
15 made the comment to her --

16 CHAIRMAN BABCOCK: You mean the chief
17 justice?

18 MR. MUNZINGER: I said, "Ma'am, in all due
19 respect to disclosure rules, ask Ted Stevens that." He
20 was the Senator from Alaska who lost his election because
21 the federal attorneys suborned evidence in his case, and
22 what happened to them? 90-day suspensions from their pay,
23 and a citizen was convicted of a crime, later converted,
24 and he lost a Senate seat; and the fate of the republic
25 was affected one way or the other, whether you like it or

1 you don't like it, but that's what we deal with. We're
2 dealing with truth, and we need to be dang careful of it,
3 and if it's expensive, I don't know what the solution to
4 that is. I don't know. Inflation affects lawyers, too.
5 You know, my hourly rate was \$25 an hour when I started
6 practicing law 52 years ago, and I was dang glad to get
7 \$25 an hour. That was a lot of money. I don't know what
8 the solution is, but I do know we need to be careful when
9 we're dealing with the truth. I won't repeat myself. I
10 apologize.

11 CHAIRMAN BABCOCK: Well, and I think all of
12 us would join, and we're glad you're getting 50 an hour
13 now. So Roger, and then last comment from Lisa before we
14 get to Senator Whitmire and fulfill our commitment to have
15 him start speaking at 10:30 or so. Roger.

16 MR. HUGHES: Well, maybe I'm steering things
17 in a different direction, but one of the things that was
18 discussed was the judge getting on top of the case early
19 as saving time for those busy judges. Well, and what I
20 was going to ask, in Colorado do you have a practice of a
21 mandatory initial conference set by the court whether the
22 lawyers ask for it or not? Because we do in federal court
23 in Texas. We have the mechanics that the state court --
24 state judges could implement it if they do.

25 In my experience in my venues, it's the rare

1 judge who says, "You will be in front of me within 60 days
2 after you filed the lawsuit." In federal court, this
3 accomplishes a lot of the virtues that we've talked about.
4 The judge focusing, the getting on top of the case early,
5 focusing the lawyers' attention on, "Well, you really need
6 discovery about that? It seems to me this is the issue."
7 But what happens is, is that we've implemented all of
8 these rules about discovery levels and getting the case on
9 track, but in courts, which are, at least like I say,
10 mostly in my venue, they're all meaningless because
11 nobody -- nobody comes in front of the court until one of
12 the lawyers wants a conference for some reason. So it
13 doesn't make any difference what discovery level. I mean,
14 a lot of the rules we have about, you know, level one or
15 even the fast-tracking it by pleading under a hundred
16 thousand, they all get tossed because effectively until
17 somebody asks to go in front of the judge to set the trial
18 schedule, to set the discovery base, it doesn't get done;
19 and then by the time somebody asks for a hearing, oh,
20 well, we ought to set this for trial. Well, sometimes the
21 level one discovery deadlines have all gone by, and that's
22 not the court's fault, because no one says we should have
23 a rule that the parties will have a mandatory initial
24 conference within so many days after filing. The courts
25 can, but they don't, so I'm wondering whether Colorado or

1 some of these other states have implemented this so that
2 the court forces the parties to come in early?

3 CHAIRMAN BABCOCK: Well, we'll do that
4 off-line, but let's get Lisa's last comment.

5 MR. HOLME: The answer to that is yes.

6 MR. HUGHES: Okay.

7 CHAIRMAN BABCOCK: Lisa.

8 MS. HOBBS: I agree with a lot of what's
9 been said here. One size doesn't fit all. I think
10 there's a lot of cases on our general jurisdiction dockets
11 that trial lawyers experience that don't need this kind of
12 early intervention the way some of our more complex cases
13 need it. I happen to practice in the more complex world,
14 and so I'm -- I think what has been proposed is really
15 good for my type of cases that I work on.

16 A lot of what has been commenting on today
17 is about the judges and, you know, the need for making
18 sure we have records for appellate review; and I agree
19 with a lot of those comments; but I think that part of the
20 reason for implementing this rule is actually about the
21 lawyers and that lawyers are oftentimes completely
22 unreasonable until they get in front of a judge and they
23 have to actually articulate this to somebody who they're
24 going to try a case in front of; and I think a lot of this
25 discussion has lost sight of our problem and focused more

1 on like judiciary problems; and I'm not saying there's not
2 problems on both sides; but I do think -- I've talked to a
3 lot of trial lawyers as an appellate lawyer where they
4 just are so up in arms about something and I'm like,
5 "Yeah, I say turn those documents over. This ain't the --
6 this is not the sword to fall on. It is not going to get
7 you anywhere." And so you can get an appellate lawyer to
8 tell you that, you can get a judge to tell you that, but
9 someone might need to tell you, "This ain't the sword,
10 move on, stop spending all kinds of money."

11 And it really -- these discovery fights are
12 huge. Even in the trial court level before we go up on
13 mandamus, the costs of the discovery disputes are
14 astronomical in these cases, and then you get me to come
15 in, and I just blow the budget completely up, as does Alex
16 and Marcy or any of us who fight these discovery battles
17 in the courts of appeals; and I just think -- and I
18 respect some of the points about things happening off the
19 record, but I'm used to that in a trial. Like the jury
20 charge, one of the most sacred things that we do as
21 lawyers and certainly as appellate lawyers, half of that
22 is off of the record, if not 90 percent of that is off the
23 record, and then we come in and we have our formal charge
24 conference, and we preserve our error.

25 And so it seems to me that you could craft

1 some sort of rule that, again, as I understand the
2 Colorado proposal is to authorize judges to do it,
3 although I think judges have the authority to do it now.
4 I don't think we actually need a rule, but I think
5 sometimes putting something in a rule reminds judges that
6 they have the authority to do it, but that authorizes it
7 but doesn't mandate it and then that also gives you an
8 ability to craft a rule that addresses some of the
9 concerns around this table, which is what happens when
10 something goes wrong in that off the conversation
11 telephone call and what can you demand as a lawyer to
12 then, you know what, I need an appellate lawyer and we're
13 going to -- "We need to file motions, and we need to get
14 this on the record because this is a bigger deal than you
15 realize, Judge, and we think it is actually outcome
16 determinative" or whatever, and then you can address some
17 of the concerns that have legitimately been stated around
18 this conversation. So that's my view.

19 CHAIRMAN BABCOCK: Thanks, Lisa. Well,
20 listen, I want to thank Dick Holme for coming at his own
21 expense to talk with us, and I hope you'll tell Chief
22 Justice Kourlis that we accorded you a happy welcome and
23 experience here as opposed to maybe what she got last time
24 around, but --

25 MR. HOLME: I don't know that that will make

1 her feel a lot better.

2 CHAIRMAN BABCOCK: It won't. It won't. But
3 anyway, a round of applause for Mr. Holme.

4 (Applause)

5 CHAIRMAN BABCOCK: And thank you very much,
6 Dick, and thanks to the college for all it does, too. Our
7 next speaker, we are really honored to have Senator John
8 Whitmire, who represents the 15th Senatorial District in
9 Houston. Senator Whitmire has been in the Senate for 35
10 years.

11 MR. MUNZINGER: Wow.

12 CHAIRMAN BABCOCK: If you can believe it.
13 It seems like yesterday. He is known appropriately as the
14 dean of the Texas Senate. He's the chair of the Criminal
15 Justice Committee. He's truly committed to ensuring
16 everyone is treated fairly in our judicial system. He's
17 also a member of the Senate Business and Commerce
18 Committee, a University of Houston graduate and the Bates
19 College of Law, and like Dick, he recognizes his family,
20 and he's got two great daughters and two grandsons, but
21 his greatest claim to fame, not on his resume, is that his
22 Astros seats are right in front of mine. Senator Whitmire
23 is going to talk to us about bail reform, a huge issue for
24 our justice system. Senator.

25 SENATOR WHITMIRE: Thank you, Chip. First

1 of all, I'd like to comment on your legal fees and the
2 level. I don't think it's just inflation. From listening
3 to you, it's your passion and experience and knowledge, so
4 I don't think it's an inflation factor.

5 Thank you for inviting me, and, Chief
6 Justice, it's always great to be in your company. I will
7 talk briefly about bail bond reform. It's not a
8 complicated issue, but a serious one. I think we have a
9 real opportunity because of a lot of the hard work of a
10 lot of people and because it's been recognized across the
11 nation as a serious detriment to the liberty of many
12 people, primarily those without money, and then we can
13 talk, time allowed, any other criminal justice issues
14 you'd like to talk about. I've got a couple I'd like to
15 bring up because I do recognize the fire power in this
16 room.

17 First of all, it's real simple. The people
18 that are low risk and broke stay in jail. The high risk
19 with money get out, and that is a very broken system. I
20 know for a fact this morning in Harris County jail people
21 that haven't even been to court yet, presumed innocent,
22 may be there because they got pulled over for driving with
23 a suspended license because they can't pay their driver
24 responsibility fees, which is another horrible program
25 that I want to recruit your help in repealing. They're in

1 court this morning because they don't have a thousand
2 dollars. I saw a recent poll that 80 percent of Americans
3 do not have a thousand dollars for an emergency, so it
4 forces them, one, to go get a payday lender loan or car
5 title loan or lose their job, family; and I know I'm
6 talking to the people that know what I'm talking about; or
7 in even a worse instance, they plead to something that
8 they'll stand there and tell their appointed attorney,
9 baby lawyers often, which I did as a baby lawyer, in the
10 hold over cell, "But I was defending myself, I didn't
11 strike him first."

12 "Well, your reset is 30 days from now."

13 "Well, I'll lose my job. Well, what did you
14 say I could get, three days credit for two?" No one
15 explains to them the terms of probation, which is another
16 burden. I don't understand why we make people pee in a
17 cup when they were shoplifters and have no relationship to
18 an addiction; but last session with the hard work of the
19 Chief Justice, David Slayton, my staff, a lot of help, we
20 got a reform package out of the Senate, risk assessment.
21 It just says, "Judge, you know, don't send down to the
22 magistrate in the basement of the Harris County jail with
23 a list of offenses and what the bail will be." That's
24 wrong. That's outlived its -- if it was ever useful.
25 Praise the Lord, the Chief Presiding Judge Rosenthal in

1 Harris County is taking some strong action. In fact,
2 Jerry Smith on the Fifth Circuit in a footnote said if the
3 Legislature would have passed this legislation last
4 session we wouldn't be having this hearing. So right is
5 on our side, but the politics is the struggle.

6 The bail bondsmen and women are a very
7 strong force. They're involved in every community. They
8 worked the House very strong, and it never even got a
9 hearing, never got out of the House. So we're back, and
10 we have momentum on our side. Crazy as the world is, the
11 politics, the hard right, my tea party colleagues coming
12 all the way out from Washington and the Trump
13 administration want to do some criminal justice reform. I
14 think they think it's God's calling and they can recruit
15 anybody they want to to help. Y'all didn't think that was
16 clever, huh? It's the religious right has become some of
17 my strongest supporters because they believe Jesus gives a
18 second chance if you want to bring him into the formula.
19 But truly, the libertarians over in the Senate I can name
20 -- a couple of them got defeated Huffines in Dallas and
21 Konni Burton in Fort Worth. We didn't agree on much, but
22 they really believe in reform to the criminal justice
23 system.

24 Dan Patrick and I worked together on a
25 prison ministry program and other second chance programs,

1 but I can't begin to tell you -- and this is where I think
2 you could play a mighty role, is support those of us that
3 are going to take on the bail bond industry. There's only
4 six counties that have risk assessment as a tool, the
5 larger one being Harris County, of course. It's still
6 tied up in federal court, but they are doing a version of
7 risk assessment. It still allows cash bonds after a
8 review of the case.

9 Unfortunately there's 200 plus counties out
10 that are still doing things like -- let me put a face on
11 it right quick. Sandra Bland, her tragedy in Hempstead
12 four years ago. On Saturday afternoon at 2:30 after being
13 held overnight -- and if they would have looked at the
14 interview process, she had a record of mental health
15 issues, but on Saturday afternoon before a JP in
16 Hempstead, they gave her a 5,000-dollar bond. She
17 couldn't come up with the \$500. She had a job at Prairie
18 View, a residence in Prairie View. She was a good risk.
19 She should have never been in jail on Sunday morning when
20 she took her life.

21 Fast forward, individual named Rodriguez in
22 Fairfield was being held for assaulting a state trooper.
23 He gets out on a 15,000-dollar bond, had to come up with
24 1,500. Within hours of being released on that cash bond
25 he killed officer trooper -- Trooper Allen. Tragedy.

1 Governor Abbott during his campaign endorsed bail bond
2 reform. He wanted to name it after Trooper Allen. We've
3 incorporated that into our proposal, and I really think,
4 colleagues, that we're doing the right thing. I think
5 we're going to succeed. It will be a profound change in
6 the criminal justice system.

7 Harris County is overloaded. They continue
8 to blame it on Harvey. You know, you can't go the rest of
9 our lives blaming the lack of justice on Harvey. You make
10 adjustments. You find other places to hold court. Let me
11 tell you how bad it is in Harris County, if I can digress,
12 or it all fits together. This morning we have 400
13 detainees out of Harris County on the
14 Mississippi-Louisiana border. I started getting calls
15 last month from families. They couldn't find their
16 relatives. Because of overcrowding and poor
17 administration of justice, the backlog in the courts, they
18 had at that time 700 people who have not been to court
19 yet, have not been convicted of anything, Chip, shipped in
20 the middle of the night to not even Lake Charles. It
21 would be a help if it was on this side of Louisiana.

22 We have no jurisdiction. Our Jail Standards
23 Commission cannot follow them, and they are at a private
24 prison. I would suggest follow the money, in a parish on
25 the Mississippi-Louisiana border. I'm after that problem,

1 and I'm going to be next week saying if you can't run the
2 Harris County jail, maybe the state needs to step in and
3 take some supervision. That's a horrible problem.

4 Another one I would mention is the
5 certification of youth as adults. Always been
6 controversial. It gets a lot of press, and I would assume
7 -- and I do this everyday all day -- that those were
8 really bad kids. Now, Giddings holds a lot of bad
9 juveniles, murderers, child offenders or sex offenders,
10 even capital murderers, very young people; but two weeks
11 ago I was in the Ellis unit in Huntsville, and I wanted to
12 see the 26 certified youth that are being held as adults.
13 Folks, they're for nonviolent offenses. I've got one over
14 there for fraud. I've got one for taking a gun where
15 alcohol is being sold. I have discovered, Judge, that
16 some communities just want to get them out of the
17 community. They certify them as adults, and they're over
18 there separated but certainly the experience of an adult
19 prison is so detrimental. There's 26 there, most of whom
20 -- there's four we found in state jails, no treatment.
21 The maximum time they can be there are two years. We've
22 got to fix that.

23 And I mentioned the Driver Responsibility
24 Act. 1.7 million Texans since this program started in '03
25 have lost their license because they can't pay. I am

1 shocked that it hadn't been declared unconstitutional, and
2 we did have a federal lawsuit filed this week by an equal
3 justice organization out of DC working with Texans. 1.7
4 million have already paid their fines, gone to jail in
5 some instances, but then to pay for trauma care, which is
6 important, and the Legislature will not pay for it the way
7 it should be paid for out of general revenue like other
8 programs, they put it on the least capable of paying.
9 They not only lose their license, but they lose their
10 insurance. They can't be insured, so it's a huge public
11 safety issue, but also a terrible unjust program that we
12 need to address.

13 I will wrap up and answer any questions.
14 Mental health still permeates the entire criminal justice
15 system. Harris County has got a little diversion program.
16 The problem is you stabilize the individuals and then
17 release them out the door. If you believe this one,
18 Harris County, because they get credit for the next day,
19 still releases their confinees at midnight. Do you
20 believe that? I guess I need to pass a law that you've
21 got to at least let them out while the sun is up, but they
22 let people out the back door at midnight in weather like
23 this. They go get on a metro train or bus and then
24 they're arrested for trespassing or vagrants, and they go
25 back in there, and their mental health was stabilized in

1 this very small program. So we've done a lot of good
2 things. Working with the Chief Justice and others, we've,
3 you know, decriminalized that school behavior that was
4 such a huge problem. You don't get a ticket now if you're
5 truant and your family is going through divorce and you're
6 living out of the back seat of your mama's car because
7 she's being abused. Those individuals are not ticketed
8 anymore. So we've done some good things. We've closed
9 six prisons in the last six years actually because
10 treatment does work, early intervention, certainly for low
11 level offenders.

12 So thank you for allowing me to be here.
13 We've done a lot of great things, but we've got a lot of
14 work ahead of us. I think the stars are lined up. I
15 think the public's always been ahead of the Legislature in
16 terms of second chance treatment, and I could go on and
17 tell you the rest of the day some of our problems. We've
18 got 300 prostitutes locked up in Gatesville this morning.
19 I was busy in another part of the building about 10 years
20 ago when Highland Park got John Carona to make
21 prostitution a felony. So you get three felonies in
22 Harris County, you get five years in prison, where you
23 don't need to be. You need to be in the community in a
24 life skills course, helping you get away from whoever is
25 placing you, your pimp. I regularly go to briefings.

1 Human trafficking is correctly a very high priority of the
2 Legislature, and I've been on a couple of panels, and I
3 always start it out because the room is full of law
4 enforcement, everybody from the Texas Alcoholic Beverage
5 Commission that talks about prostitution in clubs down to
6 DPS that talks about the traffic on highways. They start
7 saying, "We've got these victims. We're going to bring
8 before you today victims"; and I always stop and say, wait
9 a minute, we're going to spend all day identifying these
10 victims correctly, but then the criminal justice and the
11 Legislature still calls them felons. So it's one of my
12 real high priorities to treat victims correctly that are
13 forced into prostitution, because this morning we have
14 approximately 300 in Gatesville serving anywhere from
15 three to five years. It's horrible for the State of Texas
16 to operate that way. Bail bond factors into their ability
17 to have someone hear their case.

18 So bail bond is a high priority. I'm
19 guardedly optimistic, but nothing happens by accident in
20 the Legislature. You have to be ready, work. The Chief
21 Justice and I, I think, are such good examples of
22 bipartisanship. I really thank him. I've worked -- I was
23 in the House 10 years before that 35 in the Senate. I've
24 seen a lot of great Chief Justices. John Hill certainly
25 comes to my mind, a mentor of mine, but no one has been a

1 better working partner on doing the right thing and using
2 his office to get people's attention than the Chief
3 Justice. His State of the Judiciary -- I will have a
4 little public confession. I used to not even go because I
5 was busy, but I make it a point to listen to Chief Justice
6 Hecht's because it's got some real substance to it.

7 I'll be glad to answer any questions, but
8 it's going to be a real challenging session, a lot of
9 moving parts, but I had a teacher one time that told me
10 the reason she enjoyed teaching is because every class is
11 different, different personalities, different framework.
12 The sessions are very similar. Each one of them is going
13 to have new personalities. It will be very interesting to
14 me if some of my colleagues who had very close elections,
15 starting with Dan Patrick, and see if it's going to have
16 the impact that I have seen it have on others in previous
17 years. Most politicians in a very close race will go look
18 in the mirror and say, "I must be doing something" -- or
19 we'll be positive, "I think I can do something better."

20 Thanks for having me. You know, the bail
21 bonds is very fixable. It's a national effort, and
22 sometimes you've got to have the federal courts come along
23 and tell the state what to do, and this has been one of
24 those instances. But I'm going to use that with my
25 colleagues. Wouldn't we rather run our business from

1 Austin, us designing our model, instead of having a
2 federal judge mandate?

3 CHAIRMAN BABCOCK: Yeah. Senator, thank you
4 so much.

5 SENATOR WHITMIRE: Thank y'all.

6 CHAIRMAN BABCOCK: Kennon, just a second,
7 but the Chief -- yeah, that deserves it.

8 (Applause)

9 CHAIRMAN BABCOCK: We'll defer to the Chief
10 first.

11 MS. WOOTEN: Absolutely.

12 CHAIRMAN BABCOCK: You sure that's okay?

13 MS. WOOTEN: Absolutely.

14 CHIEF JUSTICE HECHT: Well, Senator Whitmire
15 and I are kind of the odd couple in the Legislature,
16 and --

17 CHAIRMAN BABCOCK: You've got hair.

18 CHIEF JUSTICE HECHT: Yeah. I remember
19 going over there years ago with Joe Jamail trying to sell
20 the rules -- some of the rules changes that we had talked
21 about here in the committee, and Joe couldn't help
22 himself. He was explaining. He felt like it was his job
23 to talk, and so he was explaining the intricacies of the
24 class action rule to the lieutenant governor, and the
25 lieutenant governor was an engineer, and he was sitting

1 there, he didn't have a clue what Joe was talking about,
2 and he just said at the end, "Look, anything you and Hecht
3 are for, I'm for," so this -- these issues really -- you
4 may have seen in the paper this morning, Senator Cruz
5 wants to make an addition to some federal legislation and
6 help sponsor it. So a lot of these criminal justice
7 reform ideas are extremely bipartisan, all the way from
8 the ACLU to the Koch Brothers; and they just have a lot of
9 support; and you think to yourself, you know, with this
10 kind of support how come we can't get this passed; and
11 there are all sorts of reasons, none of them very good;
12 but I think Senator Whitmire was right. We've already
13 talked to the Governor's offices this fall; and he is very
14 supportive of all of this; and so I think we'll see some
15 great changes, I really hope, in the -- in this
16 legislative session. So it helps, as the Senator said, it
17 helps the people whose -- who are in trouble and not
18 get -- not just be devastated by mistakes that are bad
19 mistakes, but they shouldn't be the end of the world; and
20 it's bad for the taxpayer, it's bad for the courts, it's
21 bad for just the government in general, it's bad for
22 society, and so trying to make improvements is really
23 important to us, but we're continuing to work on them.

24 CHAIRMAN BABCOCK: Thanks, Chief.

25 (Applause)

1 CHAIRMAN BABCOCK: Kennon.

2 MS. WOOTEN: A question about certification
3 of youth as adults.

4 CHAIRMAN BABCOCK: Speak up.

5 MS. WOOTEN: What is the current criteria
6 for certifying a youth as an adult, and how are you
7 proposing that it be changed?

8 SENATOR WHITMIRE: Well, obviously they've
9 got to commit what the Court and the DA thinks is an adult
10 crime. Yeah, and I yield to anybody. I'm more of a
11 practitioner than certainly a detail. But what we're
12 finding out is we find out throughout the criminal justice
13 system it just depends on whose court you land in and
14 certainly who the prosecutor is. It's unconscionable a
15 couple of youth I ran into in the adult jail for
16 nonviolent offenses when you can go to Giddings and you've
17 got 250 youth locked up, and most of them have committed
18 very violent offenses. I mean like murder. And then you
19 go to the adult and you've got someone that's committed
20 fraud, a state jail offense; and two of the young
21 gentlemen, young men, were from Beaumont; and so we're
22 researching right now to find out -- Judge Gist retired, a
23 dear friend of mine. I'm going to go into that
24 jurisdiction and see what the hell is going on. We've got
25 a problem. It was two African-Americans. These were

1 16-year-olds I was talking to, by the way. They look like
2 -- in the yard it's just sophomores in high school, and
3 they're sitting over there in a classroom run by TDCJ and
4 I started -- you know, I learn by doing, and I think it's
5 just the sheer discretion, and you can go to Giddings and
6 see people confined in TYC that other communities keep
7 them in the community and work with them. I think they
8 just pissed somebody off. You know, they're tired, they
9 got a first and second chance and didn't take it, and then
10 everybody just said, "We're tired of messing with you."
11 It's a resource allocation, and it's also, you know, race
12 and other circumstances. So I would yield to somebody
13 that can say how you -- what you have to prove to get them
14 certified.

15 CHAIRMAN BABCOCK: Professor Hoffman.

16 PROFESSOR HOFFMAN: Sorry, I wasn't going to
17 talk about that issue, but since I have the floor.

18 CHAIRMAN BABCOCK: You talk about whatever
19 you want.

20 PROFESSOR HOFFMAN: Yeah, I was going to
21 just mention another issue that you hadn't talked about
22 that you and I know each other on, of course, is the
23 foster care issues; and Senator Whitmire has been
24 indefatigable in fighting for changes and indeed out of the
25 last legislative session gets as much credit as anybody

1 for all of the many, many good changes and additional
2 money that came in; and the reason I wanted to flag this
3 issue, not just to also say thanks on that, is I think
4 it's actually a great example of, again, using the bail
5 case and the point you just made a minute ago. You know,
6 sometimes private litigation and institutional reform go
7 hand in hand, and so foster care is exactly that same way.

8 I've been involved in the foster care case
9 that's been in Judge Jack's court for more than five
10 years. The case is even older than I've been involved in
11 it, and it's very clear that none of the positive changes
12 that have happened so far would have happened but for the
13 litigation. The litigation wasn't the only factor, but it
14 played a role, and it's for me a very nice -- it's been a
15 very poignant illustration for me of how essential private
16 litigation is and can be, and we -- and although a lot of
17 what you talk about is sort of beyond our purview
18 expressly, there are other parts of it where there are
19 these intersections, these key points of intersection,
20 and, you know, where private litigation can move the
21 government, the Legislature, the executive branch to make
22 positive changes. You know, we want to always be careful
23 about limiting private litigation because then it limits
24 reform on the other side, and I think the foster care case
25 is a great example of that.

1 SENATOR WHITMIRE: Excellent example, and we
2 wouldn't be where we are with foster care but for a
3 judge's orders; and, of course, the state's appealing it;
4 but back to your point, most of the high profile cases
5 that you would read about would be very violent youth,
6 multiple murders, that get certified, because someone has
7 determined it was an adult crime that they committed,
8 although I would suggest that we're transitioning out of
9 that -- you know, we're learning. We're a lot wiser than
10 when that was instituted, but I assumed for certain they
11 had to be violent offenders. So if I don't do anything
12 else this session, I would certainly put some categories.
13 You've got to be at least a 3G offender. You've got to
14 have harmed someone physically and probably used a weapon
15 to even be considered for certification. I mean, the
16 nonsense that you would -- a state jail felony, I mean, we
17 created that for low level nonviolent offenders, and then
18 somebody has got two 16-year-olds in the state jail, and
19 unfortunately because of lack of resources they've cut out
20 most of the rehab in those state jails. So we've got two
21 teenage kids going into an adult setting, coming out
22 without counseling and supervision. State jails you come
23 out without a parole officer, so it's just a waste of that
24 person's life, and the state of Texas can -- will do
25 better if I have some direction.

1 CHAIRMAN BABCOCK: Great. Holly, who has
2 been taking the longest running selfie I've ever seen.

3 SENATOR WHITMIRE: I hope I didn't do the --
4 did I say pissed off?

5 MS. WOOTEN: You didn't need to.

6 MS. TAYLOR: I was just looking at Family
7 Code, section 54.02.

8 CHAIRMAN BABCOCK: It looked like a selfie
9 to me, Holly.

10 MS. TAYLOR: Yeah. So "The juvenile court
11 may waive its exclusive original jurisdiction and transfer
12 a child to the appropriate district court or criminal
13 district court for criminal proceedings if the child is
14 alleged to have violated a penal law of the grade of
15 felony and the child was" -- and then there's three
16 different levels, basically, "if the child is 14 years old
17 or older at the time he is alleged to have committed the
18 offense, if the offense is a capital felony, an aggravated
19 controlled substance felony, or a felony of the
20 first-degree and no adjudication hearing has been held.

21 "Or if the child is 15 years old or older at
22 the time the child is alleged to have committed the
23 offense, if the offense is a felony of the second or third
24 degree or a state jail felony and no adjudication hearing
25 has been held, and after a full investigation and a

1 hearing the juvenile court determines that there is
2 probable cause to believe that the child before the court
3 committed the offense alleged and that because of the
4 seriousness of the offense alleged or the background of
5 the child, the welfare of the community requires criminal
6 proceedings."

7 SENATOR WHITMIRE: Uh-huh, welfare of the
8 community. I promise you, that's a huge consideration, a
9 DA, a juvenile judge, probably a district judge in a lot
10 of our communities just says, "You know, I'm just tired of
11 seeing you down here, and the juvenile courts didn't work
12 for you, so try an adult," and they get over there and we
13 give up on them, and they come out worse obviously. So --

14 CHAIRMAN BABCOCK: Judge Newell.

15 HONORABLE DAVID NEWELL: I was going to add
16 something to that, too. I think you're right, discretion
17 does play a large part in how this happens, and so but I
18 did want to sort of balance out, too, with pointing out
19 that there is a -- there is a requirement that a
20 particular study be done to understand the child's welfare
21 and his family and his upbringing, and they have to
22 consider that before that. For a long time there wasn't
23 any real way to review those things, because our Court
24 basically had no way of doing it because the judges
25 weren't required to sort of specifically say what they

1 were relying on, but in 2014 we came out with an opinion
2 that now provides more meaningful review in that regard,
3 so there is progress being made. I'm just only saying
4 that there's progress.

5 SENATOR WHITMIRE: Sure.

6 HONORABLE DAVID NEWELL: Not that we're
7 there yet or anything like that, but I just wanted to add
8 that that is something that has moved the ball forward in
9 that area, not to suggest the suggestions you just
10 described in Giddings are acceptable, just to let you
11 know.

12 SENATOR WHITMIRE: Sure, sure.

13 CHAIRMAN BABCOCK: Yeah, Professor Albright.

14 PROFESSOR ALBRIGHT: Senator, I really
15 appreciate your being here and all you're doing. I've
16 been reading recently about mothers in prison.

17 SENATOR WHITMIRE: Uh-huh.

18 PROFESSOR ALBRIGHT: And I know there's been
19 a lot of talk about that and research on that and how then
20 their children end up in the foster care system --

21 SENATOR WHITMIRE: Sure.

22 PROFESSOR ALBRIGHT: -- and the criminal
23 justice system. Has that been -- are we there to talk
24 about that in Texas yet?

25 SENATOR WHITMIRE: Sure. I mentioned women

1 in prison because we over-incarcerate general population,
2 but women in particular. If you go up to Gatesville this
3 morning there's about 12,000 women incarcerated, most for
4 substance abuse, certainly nonviolent crimes, oftentimes
5 because of the abuse of a partner. You know, often they
6 don't have a choice whether to engage in that crime spree;
7 and, you know, what's sad is because I get involved and
8 learn, I could tell you a third of them could be released
9 today, men and women, and we wouldn't notice it. It would
10 not compromise public safety, but court-appointed
11 attorneys. If I could, when I started in '93 I had never
12 been on criminal justice. I was not a criminal lawyer,
13 but the chairman got defeated. It was a total mess,
14 revolving door in '93. We had 60,000 inmates with 30,000
15 backed up in county jails. So I had a lot to learn, and I
16 surround myself with people a lot smarter than me, Tony
17 Favela, I could name others.

18 So one of the first stops I went to
19 Gatesville. A warden invited me up there, and so I had
20 four ladies that they had in the gym. I just sat down,
21 "What are you here for? Where are you from," to get to
22 know. The fourth lady, I asked her where she was from, De
23 Kalb. It's 200 people near Texarkana somewhere, and she
24 was crying the whole time I was trying to talk to her; and
25 I was so young, it was a long time ago. But she was

1 crying, and I knew very little about criminal justice or
2 even the prison experience. Prisons didn't become an
3 issue. I went there in '73 to the Legislature. We didn't
4 talk about prisons during the Seventies. It was a rural,
5 self-supporting, about 10,000 people. Actually Bill
6 Clements in '81 vetoed 10,000 prison beds. It was only in
7 the early Nineties, late Eighties, when crack cocaine was
8 introduced to our streets that the criminal justice system
9 just blew and the nation wasn't ready for it and neither
10 were we.

11 But back to the lady that I met, which will
12 show you how we over-incarcerate women in particular.
13 After about 10 minutes, she was not making eye contact. I
14 asked her, "Ma'am, can I ask you why you're crying? I'm
15 here to help you. I'm trying to learn." She said, "They
16 took my baby away from me." I had no idea pregnant women
17 went to prison, and I sure as hell didn't know what
18 becomes of the baby. I said, "What do you mean?" She
19 said, "Two weeks ago they took me to Galveston," where we
20 delivered the babies. Now in Texas City we've got a
21 prenatal treatment. About six weeks before delivery we
22 take the women to Texas City, but at that time they waited
23 for them to go into labor, take off down the road. So
24 she's telling me this, and I said, "Why are you here?"
25 She said, "My fifth DWI." So we've got a pregnant mother

1 delivering a baby, and let me tell you how horrible it is
2 and one of the accomplishments, still got way too many --
3 we've got over 280 babies delivered every year.

4 Some judges do their good judgment, send
5 women to prison when they're before -- for health care
6 reasons, to get the women off the crack and off the
7 streets. But the lady told me about her experience. So
8 on Friday she gets to Galveston and has the baby. On
9 Saturday morning at that time you either put the baby up
10 for adoption Saturday morning because no family, or the
11 family gets the baby and leaves. No breastfeeding, no
12 nurturing, no nothing. That haunted me, haunted me, until
13 about eight years ago we came up with the BAMBI program.
14 Now if you're within two years of release, mostly state
15 jail offenders, and you're pregnant, we have an apartment
16 in northwest Houston, northeast Houston; and this morning
17 there would probably be about 19 mothers there that are
18 allowed to keep their babies. It's -- and so you go visit
19 them, and it's what charges my batteries. You know, I
20 need wins in this business, and that's a win, and they
21 will be holding their baby, and they will tell you, "I
22 didn't get to raise my other kids, but I'm going to raise
23 this one," and it obviously goes a long ways towards
24 turning the mother's life around.

25 So thank you for the question about women.

1 You know, we talk about human trafficking correctly, but I
2 promise you there are victims of human trafficking
3 incarcerated this morning in Gatesville. We passed a bill
4 in '93 that's never been used. I passed it when Ann
5 Richards was governor, you can have a special review by
6 the Court of Criminal Appeals. If someone petitions and
7 says, "I'm up here in prison only because I was protecting
8 myself."

9 Let me -- one more story. Susan Cranford
10 was the warden that took me to meet these ladies in '93.
11 She said, "Do you mind if I run by my house for a moment,"
12 and I said, "No, you're in charge." So we ran in. She
13 had an inmate housekeeper. We got back in the car, and I
14 said, "What did she do? She said, "Oh, she murdered her
15 partner." I said, I thought -- murderers, come to find
16 out, are some of your best inmates. They killed whoever
17 is messing with them, and they go back to being peaceful.
18 So I said, "What's the deal?" I was so young and green,
19 and I still learn everyday. She said, "Oh, she's over" --
20 I forget, some small community, and her boyfriend, she
21 became pregnant. The boyfriend starts beating her,
22 abusing her. She has a miscarriage. Unfortunately, she
23 can't leave or did not leave. She gets pregnant again.
24 She shot him. Court-appointed attorney. She is serving a
25 life sentence. That lady should have a special review to

1 let someone look at the circumstances of her conviction.

2 It's never been used because of lack of
3 political courage by the people that can pull -- take
4 action. In fact, maybe I ought to revisit that. I've got
5 a full plate, but the bottom line is there are a lot of
6 women in particular. It's a unique prison population.
7 Oftentimes they are there because of the circumstances of
8 society. Human trafficking, drug abuse, not to mention
9 mental health.

10 In fact, that probably should be the first
11 thing I talk about. The prisons, men and women, are full
12 of mental health cases. Harris County jail is full, and
13 it's just -- you know, I made a commitment to a mental
14 health group few years ago. I'll never give another talk.
15 I don't care if I'm talking about parks and wildlife, I'm
16 going to incorporate mental health. They don't have an
17 active lobby. We have associations. Sometimes they
18 overlap and compete with one another, but the criminal
19 justice system is driven by lack of mental health in our
20 state and then, of course, drugs. The good news is drug
21 treatment and alcohol addiction works -- it's crazy as
22 hell. When I took over in '93 I found out there was very
23 little classification of inmates. We would put DWI
24 offenders -- and in Harris County you get your third DWI
25 you'll do five years. You serve time with a rapist in a

1 two-man cell. I thought that makes no damn sense because
2 a DWI offender if he's not drinking is not a danger to
3 anyone. So I asked Rissie Owens one time back in the
4 early 2000's, I said, "Rissie, most people get good time,
5 but I notice DWI offenders, they get five years and they
6 do all five years. Why is that?" She said, "We know we
7 can keep them off the streets," because they're not
8 getting any treatment at TDCJ. We still turn out
9 thousands of people every year that have served time for a
10 DWI that get zero counseling, something as basic as
11 Alcoholics Anonymous.

12 So when we did our reforms in '07 -- another
13 thing that's working well that we need several more -- we
14 created a 500-bed facility where nothing but DWI offenders
15 go there. They don't go out into the field. They go to
16 class and get counseling, and the recidivism rate is
17 really a good one. The problem is we need about three or
18 four more of those.

19 So thank y'all for letting me share some
20 frustrations, some challenges, but also a couple of
21 accomplishments, and it's what keeps me going.

22 CHAIRMAN BABCOCK: Senator, thank you so
23 much.

24 (Applause)

25 CHAIRMAN BABCOCK: We'll be on break for 10

1 minutes. Thanks.

2 (Recess from 11:16 a.m. to 11:38 a.m.)

3 CHAIRMAN BABCOCK: We are back on the
4 record, and I'm just delighted that Jerry Bullard could
5 come and speak with us. Jerry is known to many of you,
6 but he performs a terrific service of trying to follow
7 prefiled bills for the session and focusing on those that
8 affect the justice system. Jerry is a graduate of the
9 University of Texas and Baylor, cum laude. He's with
10 Adams, Lynch & Loftin. He's board certified in civil
11 appellate law, and he's got a resume that goes from here
12 to the other end of the table, and I won't take the time
13 to list all of his many accomplishments, but, Jerry, thank
14 you so much for being with us, and let us know what you're
15 thinking.

16 MR. BULLARD: Well, thank you for the
17 invitation. It's an honor to speak before this group, and
18 many of you here, as Chip said, get greetings from me on a
19 regular basis during the legislative session, and
20 sometimes it's probably the first thing you see in your
21 inbox Monday mornings or if you're monitoring e-mails late
22 at night you'll see it there first. If anybody wants to
23 join that greeting system, feel free to let me know, and
24 I'll be happy to add you to that list.

25 Well, November 12th the bills started

1 getting filed; and as of November 30th there were 638
2 bills that have been filed, but only a handful really
3 relate to civil justice issues; and some of the more
4 notable bills are in the paper that has been provided to
5 you; but for purposes of our discussion today, especially
6 since I think I might be standing between this group and
7 lunch, I will only touch on a handful of these bills; and
8 in that paper, by the way, the electronic version, there's
9 hyperlinks to the bills, the text of the bills, the
10 Senator or the rep who is sponsoring the bill and some
11 other things, so I hope to make everything real easy for
12 y'all to access the information that I'm talking about.

13 The first bill I wanted to visit with you
14 about, just to let everyone know that has been filed, is
15 really what I think is the third attempt at amending
16 Chapter 38 of the Civil Practice and Remedies Code dealing
17 with the award of attorneys fees. Representative Cane has
18 filed that bill this session. The past two sessions the
19 bill has failed to get out of the House in 2015 and got
20 out of the House in 2017 but did not get anywhere in the
21 Senate. And what HB370, which is the bill, would do would
22 be to amend Chapter 38 to permit the recovery of
23 reasonable attorney's fees from an individual or
24 corporation or other organization. As many of you
25 probably know, there are several court decisions beginning

1 around 2014 where the courts of appeals and there have
2 been some federal district courts have interpreted the
3 statute the same way, that says you cannot recover
4 attorney's fees from limited partnerships, LLC's, or some
5 other type of business organization other than a
6 corporation or an individual. So there's motivation, I
7 understand, to get this bill through. There's various
8 reasons why it failed the past two times, depending on who
9 you talk to, but it's one I suspect that a lot of folks in
10 this room who have to deal with the issue on a regular
11 basis would like to see addressed. So I will be keeping
12 track of that bill, and it's one I think that a lot of us
13 would like to see actually get across the finish line this
14 time, but we will find out for sure.

15 Next item I wanted to mention was a bill
16 dealing with court costs, Senate Bill 39, which is filed
17 by Senator Zaffirini, and the Chief could probably do this
18 a little bit more justice than I could, but essentially
19 what that bill is going -- it's an omnibus bill, as I
20 understand, that's really a placeholder; but the intent is
21 going to be to simplify the civil filing fees and criminal
22 court costs structure to ensure the filing fees and costs
23 are going to support the judiciary, if that's what the
24 intent of those fees are for, and then also to make sure
25 that the intended purpose of the fees are actually being

1 used for the intended purpose. As I understand it,
2 there's about 143 different types of fees in the district
3 criminal court system that cover 17 different categories.
4 In the civil system I think it's about 211, 212, and about
5 18 different categories, and it varies county to county.
6 So it gets a little confusing. I don't know a lot of the
7 details. OCA has an excellent report on it that was
8 generated in 2014 that goes into detail about what those
9 fees and costs do that are on the books now and what
10 they're intended to do. So that's one that will be of
11 interest to many of us whose clients have to pay these
12 fees as we go through the process.

13 There are -- there are two bills to deal
14 with amendments to the revenge porn statute, which is what
15 it's been called for, which is basically the dissemination
16 of graphic material. The Tyler court of appeals had
17 determined that section 21.16 of the Texas Penal Code was
18 not constitutionally overbroad, and so we have two bills
19 to deal with that particular statute. There's a civil
20 component to it, a civil liability component as well,
21 that's addressed in one of these bills; but essentially
22 what the Tyler court of appeals has found was that that
23 section of the code did not permit the trier of fact to
24 determine whether a particular graphic material was
25 obscene; and it theoretically could apply to someone who

1 just disseminates some sort of graphic material to another
2 party without even having any sort of intent whatsoever,
3 knowledge of what was actually going on. Just a little
4 bit of background on that. I mean, as the title of the --
5 the nickname of the bill has suggested, essentially
6 someone is trying to get revenge on somebody by
7 compromising pictures being disseminated to someone else
8 about that particular individual, and there's been a
9 remedy associated with it both on the civil side and the
10 criminal side.

11 Let's see. There's several local ordinance
12 related bills I threw into the mix here just because I
13 think they're somewhat interesting when you deal with
14 these local control issues and unfunded mandates. Senate
15 Joint Resolution 10 proposes a constitutional amendment to
16 restrict the power of the Legislature to mandate
17 requirements on a county or municipality. That resolution
18 was jointly filed by Senator Buckingham and Senator Perry,
19 and so there's been a lot of complaints about unfunded
20 mandates coming from the Legislature for various things,
21 and that's the intent of that resolution is to deal with
22 that, but there are a couple of other ones that I found
23 somewhat interesting, somewhat humorous, that I just
24 tossed in here for fun because you have to find some fun
25 things in this task that I undertake just to keep my

1 sanity, but Senate Bill 86 is a bill that deals with the
2 regulation of raising or keeping six or fewer chickens in
3 a political subdivision. Apparently that's a problem in
4 some places. I'm sure it's a real problem for some, but
5 that was actually a bill that's been proposed a couple of
6 times that hadn't made it across the finish line. So I
7 can tell everybody we might actually get to find out why
8 the chicken crosses the road if this bill gets across.
9 It's trying to get to another jurisdiction.

10 And then Representative Krause has proposed
11 HB234 dealing with the local regulation of sale of
12 lemonade or beverages by children. So we've all read the
13 news stories, I believe, about some ordinances passed that
14 deals with kids who want to sell lemonade and being some
15 ordinance against it, so that's what that bill is intended
16 to deal with.

17 Bills that are in the pipeline, I believe,
18 or have reason to believe that they will be filed on page
19 -- let's see, those bills start on page four of my
20 materials. The affidavits concerning the cost and
21 necessity of services and amendments to chapter or --
22 chapter 18 of the Civil Practice and Remedies Code, last
23 session, Representative Scofield had filed a bill, HB2301,
24 to modify that statute dealing with the proving up of
25 expenses, whether it be medical expenses or services that

1 are being charged to a particular claimant, whether it be
2 for repairs, for what have you; and that bill did not get
3 out of the House committee that it was charged -- that was
4 charged to review it. There is some anticipation that it
5 would happen again if it gets filed because both sides on
6 both sides of the docket, the plaintiffs bar and the
7 defense bar, were working to get that resolved; but
8 essentially what would happen under that bill is it takes
9 a look at that framework and the time frame about filing
10 affidavits to prove up expenses and the time to file
11 counter-affidavits, put those expenses in issue, and deals
12 with those who can support those affidavits, who can
13 prepare the affidavits, who can prepare the
14 counter-affidavits; and especially with respect to this
15 issue that came up in the recent Supreme Court decision
16 *Gunn vs. McCoy* where the Court had found that affidavits
17 executed by subrogation agents for health insurance
18 carriers would also be sufficient to demonstrate that a
19 plaintiff's medical expenses are proper. So there's some
20 issues as to who should be able to sign those affidavits
21 and who can contest it, and that bill would address some
22 of those issues, and any bill that comes forward this
23 session I think would have to take into account *Gunn vs.*
24 *McCoy*. So that's one that I believe is coming down the
25 line.

1 It also wouldn't surprise us to see another
2 bill dealing with the recovery of medical expense --
3 medical and health care expenses, this issue about paid
4 but not incurred. It's constantly being litigated, so it
5 would -- I would expect to see some legislation to deal
6 with that issue again. Representative Scofield had filed
7 that bill, too. Of course, he was defeated in this last
8 round of elections, so someone else will be carrying the
9 water on that particular legislation if it is filed.

10 The question I'm commonly asked about if
11 we're going to see a bill on is the chancery court bill.
12 The past two sessions, as many of you know, there was a
13 proposal to create a chancery court system at the trial
14 court and the appellate level. In 2015 it got out of
15 committee but did not advance any further in the House,
16 and last session the bill was filed but was not even set
17 for a hearing. The sponsor of that bill, Representative
18 Villalba, was defeated in the primary in March. I visited
19 with him briefly about who would be taking up the mantle
20 on this one. He said he was not sure, but I suspect there
21 will be some type of legislation to deal with it, and I
22 know the Judicial Council has made some recommendations
23 dealing with a pilot court program, if I recall correctly,
24 dealing with the business court, so that could get dealt
25 with in that fashion as well.

1 I would also expect to hear some -- to see
2 some legislation filed dealing with the Texas Citizens
3 Participation Act. That's a heavily litigated topic.
4 It's at every level of our civil justice system, depending
5 on who you talk to, it's a good piece of legislation; and
6 those, of course, on the other side would say there are
7 lots of problems with it. Not sure how much traction a
8 bill like that would have at this point, but there are
9 those I have talked to who will be getting their
10 legislators to file something to deal with that issue, so
11 we will have to see what comes down the pike on that as
12 well.

13 There are several Judicial Council
14 resolutions that were passed dealing with the civil
15 justice system, and those are on page six of my materials.
16 If I counted right, there's about 16 or 17 different
17 recommendations that are encapsulated in the resolutions,
18 some of which deal with issues like the method in which we
19 select our judges and compensation issues for our
20 judiciary, which are serious concerns that need to be
21 dealt with, and so we have resolutions to deal with that.
22 There are some changes recommended in the structure and
23 jurisdiction of the courts to increase efficiency, such as
24 raising the jurisdictional floor in the district courts
25 from 200 to 10,000. Some modifications to the

1 jurisdictional floor for county courts. There's a
2 recommendation for simplifying the court of appeals
3 structure because of the transfer of cases that we have
4 to -- that cases have to move through our appellate
5 system, so lots of potential bills coming down the
6 pipeline dealing with civil justice.

7 Some of the interim charges that were
8 studied by our legislators touch on civil justice as well,
9 and those are kind of described in the paper as well, so I
10 won't go through each and every one of those because I
11 know that y'all can read those. Some of them are
12 redundant and compared to what the Judicial Council has
13 recommended, so I'll leave those to your reading later on.

14 That's essentially all that I have in terms
15 of an overview of what's in the pipeline now and what I
16 think might be in the pipeline. Like I said, if you want
17 to enjoy more reading material during the session I'm
18 happy to provide that to you, and I'm help -- want to be
19 as helpful as I can to anybody who wants any information
20 or anything I can provide.

21 CHAIRMAN BABCOCK: Well, it's a great
22 service, and your writing is terrific, really great.
23 Thanks for that overview. Does anybody have any questions
24 or thoughts? We've discussed the chancery court here
25 before, and so that's something to talk about, but Frank.

1 MR. GILSTRAP: Jerry, you and I have talked
2 about this before. You know, periodically in these
3 meetings we bemoan the fact that every Legislature adds to
4 the list of interlocutory appeals. I don't know how
5 many -- how many we have now, but it's hard to say that,
6 you know, "I've got my bill, and I want an interlocutory
7 appeal because your bill got one two sessions ago." Is
8 there any consciousness on the part of anyone that maybe
9 we should stop doing this in some way?

10 MR. BULLARD: I've not found anyone that
11 I've visited with at the legislative level -- first of
12 all, you have to explain to the legislator exactly what
13 the issue is where it's like, well, that sounds like it
14 could potentially be something we want to deal with, but
15 then another bill comes along that adds another
16 interlocutory appeal. So there is not a stream of
17 consciousness, I think, about the potential problem. If
18 you think it's a problem. There are those who do not
19 think it's a bad idea to have interlocutory appeals to
20 help resolve cases potentially earlier if they can get
21 certain issues resolved. So short answer to your question
22 is no.

23 CHAIRMAN BABCOCK: Yeah. Anybody else?
24 Yeah, Justice Gray.

25 HONORABLE TOM GRAY: I would just say as a

1 longtime recipient of Jerry's e-mails through the session,
2 it's really amazing what he covers in those e-mails, and
3 I'm not always interested in -- well, I'm never interested
4 in everything in the e-mail; but there's always a few
5 bills that he's tracking that is of particular interest to
6 various components of the bar; and I would really
7 encourage, Jerry, if your contact information isn't
8 readily available there, you give it to either Dee Dee so
9 it could be incorporated in the record or make it where
10 it's easier for them to get on your list. So --

11 MR. BULLARD: My e-mail addresses are at the
12 bottom, the last paragraph of the materials that y'all
13 have, so they click and send, or let me know. I have
14 your -- I have the list. I could just add everybody to it
15 if you want to be a part of it.

16 CHAIRMAN BABCOCK: That would be great. Any
17 other -- any other comments? Pete, cold?

18 MR. SCHENKKAN: Yes.

19 CHAIRMAN BABCOCK: Pete Schenkkan is all
20 wrapped up here, the record should reflect. We can get
21 the heat adjusted if you'd like. Anything else from
22 anybody? This chancery court thing I think is probably
23 going to show up again, you think, Chief?

24 CHIEF JUSTICE HECHT: I expect there will be
25 a bill, but I don't know what will happen to it.

1 CHAIRMAN BABCOCK: Yeah. Okay. Well,
2 great. Well, listen, we're going to -- I know we just had
3 a break, but we're going to break for lunch, but before we
4 do Justice Keyes is here, Evelyn Keyes from the First
5 District Court of Appeals in Houston, and I know you
6 thought you might make some remarks. Can you wait until
7 after lunch and do it then, or --

8 HONORABLE EVELYN KEYES: Oh, thank you.
9 Well, I didn't come to make remarks. I came to hear -- as
10 an interloper to hear just what is going on in the -- in
11 the areas of legislation that might take place to deal
12 with the matters of some of the -- some of the things with
13 the courts particularly. I knew that we were going to be
14 hearing about mental health courts, and I know that
15 Justice Hecht is going to bring us up to date on where --
16 on where there may be legislation for all of these
17 specialty courts, which are of great interest to me,
18 because I don't want to lose a lot of the expertise that
19 we have just lost by our partisan elections; and this is
20 to me an absolutely not a partisan matter at all; but it's
21 very much a matter of retaining or bringing in or assuring
22 that we have talent in some of these specialty areas, like
23 mental health; and I know a lot is going on there, and
24 like child protection, the drug courts; and actually, I'm
25 a proponent of the chancery courts as well, for complex --

1 for complex business litigation, so I just wanted to know
2 what -- I look at the people here and I see just
3 incredible talent in here.

4 CHAIRMAN BABCOCK: We think so, too.

5 HONORABLE EVELYN KEYES: It's so great.
6 What?

7 CHAIRMAN BABCOCK: I said we think so, too.

8 HONORABLE EVELYN KEYES: Oh, yeah, of
9 course, and so it is just wonderful to have an opportunity
10 as a member of the public to come in and hear where we are
11 on this; and I, too, am a recipient of Jerry Bullard's
12 legislative things that he sends out; and it's very
13 interesting to follow legislation; and I knew that
14 anything that's going to be done has to be done fairly
15 soon. So I just wanted to see what you-all had in mind,
16 and thank you very much for letting me sit in on this.

17 CHAIRMAN BABCOCK: Oh, the members of the
18 public are welcome.

19 HONORABLE EVELYN KEYES: That's me.

20 CHAIRMAN BABCOCK: And this is always -- our
21 proceedings are always on the record. It's posted on our
22 website and all.

23 HONORABLE EVELYN KEYES: Well, I did get the
24 communication, and it had this wonderful agenda, and so I
25 thought, wow, I have to go. Thank you.

1 CHAIRMAN BABCOCK: That's all Marti's doing.
2 She's the wow person involved here. Right after lunch
3 David Slayton of the Office of Court Administration is
4 going to speak to us, and he's got a very tight window,
5 and he's going to speak by telephone, and he's -- so we're
6 going to have to be in our seats probably at five of 1:00,
7 and then he'll get on the phone at 1:00 o'clock, and he
8 only has 30 minutes. I think he -- I think he's in Vegas,
9 isn't he?

10 CHIEF JUSTICE HECHT: That is where they
11 are.

12 CHAIRMAN BABCOCK: I think they're getting
13 drunk in Vegas.

14 CHIEF JUSTICE HECHT: Wherever he is he's
15 not getting drunk.

16 CHAIRMAN BABCOCK: But in any event, David
17 will speak to us at 1:00, so if we could be back in our
18 seats at five of 1:00, knowing how this group doesn't
19 exactly get there right on time, that would be great. And
20 then after we hear from Oscar Rodriguez, who is the
21 executive director of the Texas Association of
22 Broadcasters, which is our host for many -- not all, but
23 most of our meetings and shares this terrific space, so I
24 thought it would be appropriate to hear what he had to say
25 and also to thank him formally for letting us use this

1 space month after month, year after year. So unless
2 there's something else, we'll be in adjournment or recess,
3 and, Jerry, thank you very much. We ought to give Jerry a
4 round of applause.

5 (Applause)

6 CHAIRMAN BABCOCK: We're in recess.

7 (Recess from 12:01 p.m. to 12:57 p.m.)

8 CHAIRMAN BABCOCK: Hopefully, David Slayton
9 will be on the line.

10 TAB EMPLOYEE: He is. David, are you there?

11 MR. SLAYTON: I am here.

12 CHAIRMAN BABCOCK: All right. We're working
13 on our crack technology here, David.

14 MR. SLAYTON: You cut out a little bit. Are
15 you there?

16 CHAIRMAN BABCOCK: Yeah. We're here. Is
17 there any way to turn that up?

18 TAB EMPLOYEE: I am going to try to turn it
19 up.

20 CHAIRMAN BABCOCK: Hang on, David, we're
21 going to try to turn up the mike.

22 MR. SLAYTON: Okay, great.

23 CHAIRMAN BABCOCK: But while we're waiting
24 for that, I can tell you about David Slayton because he
25 already knows this. He is the administrative director of

1 the Office of Court Administration and has done that since
2 May of 2012.

3 Hey, David, can you hear this?

4 MR. SLAYTON: I can hear you just fine.

5 CHAIRMAN BABCOCK: All right. That's
6 better. We still could do it a little bit higher. I was
7 just telling the group what your position is, David, and
8 he is also executive director of the Texas Judicial
9 Council. He's got a very impressive resume, including
10 serving as court service supervisor for the United States
11 District Court for the Northern District of Texas in
12 Dallas. He's on the board of directors of the Conference
13 of State Court Administrators. He's the co-chair of the
14 National Court Joint Technology Committee and is a past
15 president of the National Association for Court Management
16 and a great guy, and you're in Vegas; is that right?

17 MR. SLAYTON: You weren't supposed to share
18 that piece.

19 CHAIRMAN BABCOCK: Well, the Chief has --

20 MR. SLAYTON: I'm at the mid-year meeting.

21 CHAIRMAN BABCOCK: -- rushed to your defense
22 and said you're sober.

23 MR. SLAYTON: Yeah, that's right.

24 CHAIRMAN BABCOCK: So we're ready to hear
25 your sobering remarks.

1 MR. SLAYTON: Great. Well, thanks,
2 everyone. I'm actually at the mid-year meeting of the
3 Conference of State Court Administrators. The COSCA, you
4 just mentioned a second ago, so I apologize I can't be
5 there with you-all in person; and thanks, Chip, for
6 inviting me to talk a little bit about some of the things
7 that are going on at the Office of Court Administration.
8 I'm also going to include for you some of the things that
9 the Texas Judicial Council is doing, some of which I think
10 you've already heard about today, but I would like to
11 highlight maybe a few of those, and I will start with --
12 with one of the things I think that's probably one of the
13 -- could be potentially one of the biggest shifts in the
14 future of the court system, and that is with regard to
15 data collection.

16 I know many times those of you working on
17 projects at SCAC, actually reach out to us and ask us for
18 data; and as you know, OCA, since its foundation has been
19 responsible for housing data that's collected from all of
20 the courts monthly. Unfortunately, one of the issues with
21 that data collection is that it's very summary level data,
22 and we have difficulty in being able to provide for anyone
23 who asks really more case level data that's more specific
24 to say what you're looking for. So I remember back
25 whenever there was a group working on, say, last year on

1 child welfare issues, trying to look at specific data; and
2 it becomes really difficult for us to provide that; and so
3 one of the things that we've been working on at OCA and
4 the Judicial Council has been working on is really a
5 transition to what we're calling case level data where we
6 could collect from the courts more detailed data and where
7 we could be able to answer more questions; but, of course,
8 when you're looking at a decentralized court system like
9 ours doing that it is a significant undertaking.

10 So we're working both at the state level,
11 but also actually I was at a meeting last week at the
12 national level where we're trying to set this up where it
13 can be done through technology and to actually reduce the
14 burden on courts and even what their current reporting
15 level, reporting burden is. So it's probably still a few
16 years away, but I know that the national level they're
17 intending to release the criminal data standards for
18 reporting in the first quarter of next year, which would
19 actually give us a significant start working on
20 transitioning to that and then ultimately probably over
21 the next year or so having all of the case tied -- so I
22 think in relation to your work, you know, I think the
23 message there is, you know, we may begin to see more data
24 that could help answer some questions that I know
25 oftentimes comes up in relation to your work.

1 Another thing that we're working on, as you
2 all recall in the aftermath of Hurricane Harvey, the
3 Supreme Court and the Court of Criminal Appeals were able
4 to exercise some of their authority under the statute to,
5 you know, take action, emergency actions, to weigh certain
6 procedural issues, but in that response from both the
7 Supreme Court and the Court of Criminal Appeals found some
8 things that could work better. For instance, under the
9 current law, even individual JP courts that are looking
10 for, say, you know, they need to relocate to a different
11 place within the county because, say, they're not --
12 there's nowhere for them to meet in their current
13 jurisdiction, like for instance in Harris County a JP
14 wanted to move across the street because his building was
15 damaged, but there was a place across the street
16 available, but it was in a different JP precinct, and so
17 they had to come to the Supreme Court to get that ability
18 to move; and so, you know, the thought there is could we
19 do that more on a local level, for instance, with say the
20 regional presiding judges. And in addition to that,
21 providing the Supreme Court the authority to have -- to
22 issue these emergency orders that have a longer tenure.
23 Right now the law limits their orders to 30 days, and they
24 have to renew them every 30 days in the midst of a
25 disaster, and so the work we're working with the

1 Legislature on is to extend the Court's ability where they
2 could issue those for 90 days originally and then with
3 extensions thereafter. They could even be granted by the
4 Chief Justice without the full court.

5 So those are some work that's being done.
6 Obviously we just want to be clear that in those emergency
7 type matters those are only allowable when there's a
8 disaster declaration by the governor, so they are limited,
9 but we're trying to make sure that's a little bit easier
10 when those disasters occur.

11 We're also working on continuing on our work
12 in something that I think that's really important as we
13 look to the future of Texas is the guardianship area. As
14 many of you know, this is a very -- very much a
15 fast-growing case type within our court system. As there
16 is an aging population we're seeing more and more people,
17 and we expect that to continue as the population of those
18 over 65 in Texas is expected to double by 2030 from its
19 current. So, you know, obviously one of the challenges to
20 that is that in many of our courts across the state they
21 just don't have the resources to monitor to make sure
22 people who are managing other people's monies -- money and
23 lives are doing that in an appropriate way, and so we've
24 been working for several years to try to improve both from
25 a statutory basis on providing some guidance to the courts

1 and the law as well as in providing real staff resources
2 to monitor these cases.

3 We've now reviewed over 28,000 cases. There
4 are about 50,000 of them active in the state and looking
5 at, you know, basically the annual accounting filing, the
6 annual reports, the inventories, all of the different
7 things that are required by law to be filed. In many of
8 those cases the guardians are not complying with filing
9 those reports regularly. In fact, I think the number is
10 about 43 percent of the cases are out of compliance, and
11 when we do find that they are filing the required reports
12 they're oftentimes using funds for things that are not
13 allowed under the law or the court order. So, for
14 instance, you know, ATM withdrawals that are unexpected or
15 paying for vehicles or credit card balances or other types
16 of things that are not justified expenses. So, you know,
17 we need to do -- we need to do a better job in the courts
18 of monitoring the cases; but, as I said earlier, one of
19 the biggest challenges there I think to the courts is that
20 in most places just don't have resources. You can imagine
21 in many parts of Texas these cases are being handled by
22 the constitutional county judges, who are not provided
23 additional resources to assist them in that. So that's a
24 big part of our work as well.

25 I think you were informed this morning by

1 Senator Whitmire about bail reform. Obviously it's a big
2 issue from a policy perspective and the need to make
3 reforms there is significant. I'm sure I may repeat what
4 he said this morning, but it's probably worth repetition
5 that the number of Texans in jail right now waiting --
6 awaiting trial, innocent until proven guilty, has
7 increased from 25 percent of Texas' jail -- I'm sorry, 33
8 percent of Texas' jail population 25 years ago to now over
9 75 percent of Texas' jail population. Of course, the cost
10 of that to taxpayers is we spend about a billion dollars a
11 year statewide holding people pretrial. Obviously some of
12 those people, that's probably where they need to be to
13 protect public safety, but we believe by the data that we
14 have that a lot of those people are simply there because
15 they just can't afford whatever amount has been set, even
16 if it's a minuscule amount, that would allow them to get
17 out of jail.

18 As you know, the federal courts have been
19 very active in this area and have consistently held that
20 Texas' system as it's been implemented is
21 unconstitutional, so we're working to try to make some
22 improvement there; and OCA in particular has, even without
23 law changes, begun to try to work with counties to make
24 improvements. We held a pretrial summit a couple of
25 months ago where we invited about 20 counties from across

1 the state to bring teams of stakeholders from those
2 counties to begin to think about ways to reform the
3 system, and we are also developing technology that will
4 allow them to have an automated risk assessment that would
5 provide judges additional information as they're making
6 bail decisions. So a lot of work going on in that area
7 and a lot of work left to be done. Make no doubt about
8 it, if the law does change in this area, certainly we're
9 hopeful that the Legislature will take the work that the
10 Judicial Council has done in this area and make reforms
11 there. It was a significant undertaking for counties to
12 transition from what we've been doing for decades to more
13 of a risk-informed type system, so everyone that works
14 there as well.

15 Another area that we're working on is in the
16 area of juvenile justice. Some of you may be aware this
17 has been an area where the Judicial Council has been
18 active for several sessions, starting back with looking at
19 school ticketing where juveniles were being ticketed at
20 school in high numbers and all the way up through truancy
21 in the last couple of sessions.

22 One thing that's not commonly known by most
23 is that Texas is one of only a few states in the country
24 where children under 17 who are charged with fine-only
25 offenses are actually handled in the criminal system. So,

1 as you know, if you're a child under 17 and you commit
2 aggravated robbery or murder or possession of marijuana or
3 one of these other types of Class A/B misdemeanors or
4 felonies your case is handled by the juvenile courts as a
5 civil matter; but if you're charged with a minor
6 misdemeanor offense, a fine-only offense, your case is
7 handled in the criminal courts, as a criminal case in the
8 justice and municipal courts. So we're working to -- in
9 the last couple of sessions ago we moved truancy, the
10 offense of which was failure to attend school as a
11 criminal offense, that was moved to a civil offense, more
12 similar to the way it would be handled if it was handled
13 by the juvenile courts; but we left the jurisdiction with
14 our justice and municipal courts who have the capacity and
15 were, quite frankly, doing a pretty good job with them as
16 far as handling the cases.

17 We have seen a 90 percent drop in the number
18 of truancy cases because in addition to moving it from
19 criminal to civil we also basically put some additional
20 responsibility upon schools to try to implement prevention
21 and intervention measures before sending a case to court,
22 and we've seen a pretty significant decline in the number
23 of cases filed without a corresponding -- there's not been
24 a decrease in school attendance. In fact, school
25 attendance has actually increased under this as well, so

1 that's been exciting. So we're continuing work there.
2 We're looking at trying to take the remainder of Class C
3 offenses, fine-only offenses, against kids to more of a
4 civil type proceeding in this next legislative session.

5 In addition, one of the big challenges that
6 judges have raised and we're doing some work on with the
7 Judicial Council is dealing with kids who are involved in
8 both the CPS system and the juvenile justice system. As
9 you can imagine, there are a significant number of kids
10 who cross over from one system to the next, but due to our
11 decentralized and fragmented system, court system, many
12 times those kids are in multiple courts handled by
13 different judges and different lawyers in the courtroom,
14 and so really we've had a few counties in the state where
15 they have begun to try to address this by creating what
16 are most commonly referred to as crossover dockets where a
17 single judge is handling the case in the child welfare
18 system as well as the juvenile justice system and trying
19 to really tailor the services to meet the needs of the
20 kids to correct whatever issues may be there, but in many
21 courts that's not the case, and we see issues where kids
22 are getting referred to different types of services.
23 Sometimes those services may not be in alignment with each
24 other. So the goal here with this work is to try to give
25 courts the authority they need and to encourage those

1 courts to be handling both, if you have a kid who's dually
2 involved in both systems to be able to handle those cases
3 in conjunction with each other. So that's continuing work
4 we're doing.

5 The other -- a couple of other kind of
6 really important ones, obviously we're continuing our work
7 with trying to address the mental health needs of people
8 in our system. As you are fully aware, mental health is
9 not just an issue that comes up in criminal cases. It
10 happens over the justice system from literally traffic
11 court all the way through -- throughout the system, and
12 so -- we did a lot of work last legislative session on the
13 criminal side and trying to make sure we're identifying
14 these individuals early on to make sure that they are
15 getting either diverted from the system where appropriate
16 or getting the help they need. But now we've turned our
17 attention to trying to provide judges additional resources
18 to use the civil commitment system where appropriate,
19 obviously with due process concerns on our mind, but also
20 making sure that there aren't improper barriers such as
21 being able to take care of individuals' mental health
22 needs through the civil commitment process.

23 You know, one of the things that was raised
24 in our work in this area with the Judicial Council was
25 that many times when an individual has a mental health

1 concern and they -- you know, they have a family member
2 that calls and says, "What should we do with our son that
3 has a mental health issue and how do we get them help they
4 need?" Oftentimes the response is "Well, get them
5 arrested and then they'll maybe get the help they need
6 that way," and obviously that's not always the best answer
7 or never the best answer, and so we're hoping to be able
8 to provide some additional tools to judges to deal with
9 individuals who have mental health issues.

10 And the last one -- I'll talk about one more
11 thing we're working on and then I want to give you an
12 update on one other issue. One of the probably the most
13 significant things that the Judicial Council did in the
14 last year and a half was Chief Justice Hecht charged the
15 council with really looking at the civil justice system.
16 You may be aware that the system is a lot different than I
17 think what most of us think it is. I'll give you just a
18 couple of quick facts here. In Texas in 1992 there was
19 one tort case to every one contract case, so a one-to-one
20 ratio between tort and contracts. In 2016 there was one
21 tort case to every seven contract cases in the court
22 system. At this point more than 80 percent of the
23 caseload in the court system on the civil side either
24 involves a contract -- a contract case or a small claims
25 case. So there are lots of debt cases in our court

1 system, landlord-tenant cases, other types of contract
2 case. So more and more the courts are being used as more
3 of a debt collection type service, and certainly that's a
4 lot of the work that's going through our courts. What we
5 know in those cases is that many times the defendants in
6 those cases are unrepresented. There are also many times
7 not answering at all, and so lots of default judgments are
8 being used to resolve those cases.

9 When we visited with county court at law
10 judges who are hearing a lot of these cases, the county
11 court at law judges said that under the rules, of course,
12 they -- the plaintiffs will meet the requirements and they
13 will be entitled to a default judgment, but the county
14 court at law judges report that whenever they are signing
15 those default judgment they are doing so knowing -- many
16 times knowing that there's no way that the case could be
17 proven if a defendant would have answered because of debt
18 reselling and all kinds of other issues. And so the
19 council made a number of recommendations for civil justice
20 reform, most of which are actually rule-based
21 recommendations, trying to encourage defendants who are
22 sued to, you know, answer, to actually try to get engaged
23 in their case, to encouraging the implementation of online
24 dispute resolution, which is the asynchronous online
25 ability for plaintiffs and defendants to attempt to

1 resolve cases, to trying to reduce the number of citations
2 by publication or other types of maybe less effective
3 service. So there's a whole set of recommendations around
4 that that are attempts to try to really improve the civil
5 justice system, and I expect that you-all may be hearing
6 more about that in the future.

7 So those are -- those are really sort of the
8 legislative priorities in the work that the council has
9 done in the last year and some of the work the OCA has
10 done. I wanted to give you one update on some work that
11 we did previously, just to show how impactful the work
12 that the Judicial Council in particular can have. As you
13 know, the council, Chief Justice Hecht, and Presiding
14 Judge Keller, were both really instrumental last
15 legislative session in getting some reforms through the
16 Legislature on fines and fees, collection of fines and
17 fees in criminal cases. There was a -- not only -- not
18 only fraught, but there's also data to show that many
19 people were being jailed for inability to pay courts costs
20 and fines, and the system -- even though the laws
21 themselves were set up in such a way that it was
22 problematic for defendants who didn't have an ability to
23 pay. So there was a whole set of reforms that were put
24 into place, and at the time those were going through many
25 people were arguing saying this is going to have, you

1 know, really negative consequences for the finances of
2 counties and cities and even the state and maybe not have
3 the outcomes that everyone were hoping for. We now have a
4 year's worth of data underneath those reforms, and even
5 though we believe there's still probably some
6 implementation that still needs to be done on that law at
7 the local level, what we've seen is that every indicator
8 of the reform has been very positive.

9 So, for instance, the number of people being
10 jailed for failure to pay has declined significantly. The
11 number of warrants being issued for failure to appear,
12 failure to pay, has declined also significantly; and the
13 number of people whose court costs and fines have been
14 waived by judges have increased as well as the number of
15 people who have been able to satisfy their court costs and
16 fines and other judgments through community service have
17 also increased; and so you may say, well, that must mean
18 that revenue must be down. Interestingly enough, revenue
19 is actually up six percent from year -- the year before
20 the implementation until the year after. So we've seen
21 really positive -- all around the board positive outcomes
22 from those efforts, and we're hopeful that those will
23 continue and that we can view that type of data to help us
24 with some of these other areas in which we're working.

25 So I talked here about a lot of things we're

1 doing, and I'm happy to spend the rest of the time I have
2 with you answering any questions you might have or any
3 comments that you-all might have.

4 CHAIRMAN BABCOCK: Great, David. Thank you
5 very much. David has got a hard stop at 11:30 his time,
6 1:30 our time. So we have probably about eight and a
7 half, nine minutes left, and Richard Orsinger will ask the
8 first question.

9 MR. ORSINGER: So, David, you said it's a
10 one-to-seven ratio tort to contract. Do you have a sense
11 of the percent of the docket that's family law as opposed
12 to other civil?

13 MR. SLAYTON: Yeah, I actually do. So I
14 was, of course, breaking down for you just the civil
15 numbers. The family portion of the docket is about half
16 of the docket now. If you -- I don't have the numbers
17 right in front of me, but I gave a report to Chief Justice
18 Hecht and the regional presiding judges last Friday on
19 this, and my recollection it was about -- if you take
20 civil, criminal, and family and lump them all together,
21 it's about -- about 50 percent of the docket now is family
22 law. So obviously that's significant. I think one of the
23 areas where the Judicial Council may do some work in the
24 next interim is in the area of family law. Again, there's
25 a lot of -- a lot of other states doing a lot of work in

1 this area with regard to how do we reduce the
2 adversarialness of this system.

3 As you might expect on the family law side,
4 something actually kind of surprising to me is the number
5 of divorces being filed in our state has not increased,
6 the raw number has not increased in 25 years. It's been
7 almost completely level over 25 years, despite our
8 dramatic increase in the population, but where the growth
9 in the caseload has occurred is in both suits establishing
10 or suits affecting the parent-child relationship, so
11 nondivorce type cases and then also in the area of
12 post-judgment actions. That's probably where the most
13 significant growth is, is post-judgment, so, you know, if
14 there's ways we can try to help address some of those
15 things I think it would be beneficial not only to families
16 but also to the court system.

17 MR. ORSINGER: If I can ask a follow-up
18 question, David, do you have a sense of the difference
19 between the percent of the docket versus the percent of
20 the cases that go to trial?

21 MR. SLAYTON: Yeah, I mean, I think we
22 could -- I don't have it in front of me to have all of
23 that data, so, you know --

24 MR. ORSINGER: See, I can't tell whether the
25 family law cases are falling out and they only represent

1 one out of five cases that go to trial or whether it's the
2 very opposite and the civil cases are settling out and 90
3 percent of the family law cases are going to trial,
4 because part of what we do is pretrial procedure and part
5 of what we do is trial procedure.

6 MR. SLAYTON: Well, yeah, I mean, we can
7 pull all of that data for you. We have it. I think my
8 recollection from the -- one thing worth noting, I think
9 this is really important, is that in every case type
10 across the board, less than one percent of the cases are
11 going to trial, and some types of the case types it's less
12 than half a percent are actually going to trial. So, you
13 know, the trial of virtually any case in our system is
14 becoming more and more obsolete, which I know is troubling
15 for me and troubling for many of you, and so that
16 continues to be a problem. I do think that -- my sense is
17 that there are more family law cases that go to at
18 least -- go to a bench trial at least than there are, say,
19 civil cases. I do think that the vast majority of civil
20 cases are being resolved without trial and at probably a
21 higher rate than the number of family law cases. Like I
22 said, I think more courts are hearing family law cases
23 than they are hearing -- than if we looked at the
24 proportion of that versus civil cases.

25 MR. ORSINGER: Thank you.

1 MR. SLAYTON: I can get you that exact data,
2 though.

3 CHAIRMAN BABCOCK: Thank you. Five more
4 minutes. Anybody else have questions of David? Seeing
5 none, we should give David Slayton a round of applause for
6 making time for us.

7 (Applause)

8 CHAIRMAN BABCOCK: David, thank you very
9 much and enjoy the rest of your time in Nevada.

10 MR. SLAYTON: All right, sounds good. Thank
11 you so much. If you have any other questions, please feel
12 free to reach out to me. I'd be happy to visit with you
13 or answer anything we can help you with.

14 CHAIRMAN BABCOCK: Thanks very much. Dee
15 Dee, you want to --

16 MR. SLAYTON: Bye-bye.

17 CHAIRMAN BABCOCK: -- disconnect there?
18 Great. All right. Justice Hecht.

19 CHIEF JUSTICE HECHT: Just to follow up on
20 what he said, hardly any cases go to trial, particularly
21 in the civil system. It's -- and that's true of the
22 federal courts, our state, and every other state; and
23 right now, it's running around a half of one percent.
24 About 1.2 percent or maybe a little more go to trial in
25 criminal -- on the criminal side, but not even that many

1 in federal court because of sentencing guidelines. You
2 know, you get a -- if you plead out, that's taken into
3 consideration under the sentencing guidelines. So there
4 are very few cases going to trial, and another interesting
5 thing in the statistics that OCA has gathered is that
6 there's been a decline in criminal cases as a whole the
7 last several years, and that's true again across the
8 country, and the only reason anyone has been able to come
9 up with is that law enforcement resources have been
10 shifted to things like the border and away from traffic
11 enforcement and those kinds of things. So I think for the
12 first time in a while -- I don't know if it was this year
13 or the last year or two, the court of appeals docket
14 became more civil than criminal, and it's for years and
15 years it's been more criminal than civil. Back some years
16 ago it was about 55/45 criminal, and now it's less than
17 half criminal, I think.

18 CHAIRMAN BABCOCK: Wow. Yeah, Judge
19 Peeples.

20 HONORABLE DAVID PEEPLES: Just a follow-up
21 on what the Chief Justice said and David Slayton alluded
22 to it, the difference between jury cases and nonjury; and
23 the figure, one percent or a half a percent, in family law
24 seems low to me, if you're talking about nonjury trials;
25 and let me just elaborate on that. First of all, there's

1 temporary orders where, you know, they're either not ready
2 or can't -- statutorily they've got to wait to get
3 divorced, but you've got to decide who uses the house or
4 the cars and so forth and pays support; and that's a
5 temporary decision; and my experience in San Antonio,
6 anecdotal I'll grant you, is that a lot of that is tried.
7 And, now, it may be -- understand, it is a small
8 percentage of the whole caseload, but 14 district judges
9 are doing a lot of that. I'm not saying all day long.
10 I'm not saying, you know, five days a week all the way
11 till 5:00 o'clock, but a lot of it's happening.

12 So there's temporary orders and then there
13 are -- you've got to decide what's a trial. Okay. There
14 can be a lot of issues in a family law case, but very
15 commonly they'll agree -- they'll come in, and they'll
16 say, "We've agreed on custody. We've agreed on
17 visitation. We've got an issue about who is going to make
18 the payments on the car, and whether visitation is going
19 to take place, you know, exchange on Sunday night or
20 Monday morning." So they've limited the potential issues.
21 It could have been several days worth, but they've settled
22 it down to a little bit, and so if that takes me 15
23 minutes, is that a trial?

24 CHIEF JUSTICE HECHT: Probably. I mean, one
25 of the problems we have is it's up to the clerk --

1 HONORABLE DAVID PEEPLES: Yeah.

2 CHIEF JUSTICE HECHT: -- to characterize,
3 because they turn in the data, but my understanding is
4 that they're not counting something like that as a trial.

5 HONORABLE DAVID PEEPLES: But so I don't
6 know what use is going to be made of these statistics, but
7 there's a lot of what I just described here, and a bunch
8 of 15-minute hearings, 30-minute, they add up, and there's
9 a little bit of time in between. Maybe they get there,
10 and "Can we talk just a minute" and so forth. So there's
11 all kinds of time spent, but I just think if we're
12 thinking that in 99 percent of the cases they never even
13 go to court, except maybe on discovery --

14 CHIEF JUSTICE HECHT: Oh, no.

15 HONORABLE DAVID PEEPLES: -- I think that
16 would be a misleading picture. Richard, what do you
17 think? You've seen what I'm talking about.

18 MR. ORSINGER: You know, sitting at the
19 docket I see lots and lots of temporary hearings, and I
20 see lots and lots of one-day and two-day family law
21 trials. I don't do that much anymore myself, but I see
22 the presiding courtroom calls about a hundred cases every
23 week morning for a trial. They have an 8:30 docket that's
24 maybe about 50 cases and then a 9:00 o'clock docket that's
25 anywhere from a hundred to 150 that they call. Some are

1 reset, some go out to negotiate, and then they start
2 assigning them out, two hours, three hours, half a day,
3 one day, two days, and that's what I see mostly the docket
4 is. I don't see hardly any civil litigation at the Bexar
5 County courthouse.

6 CHAIRMAN BABCOCK: Yeah, but this isn't
7 Bexar County.

8 MR. ORSINGER: This isn't Bexar County.

9 CHAIRMAN BABCOCK: Central docket.

10 MR. ORSINGER: It's difficult to get a
11 comparison if you go to Houston or Dallas or Fort Worth
12 because you've got specialty courts. So the story I hear
13 is that the civil district courts in Harris County are
14 empty and the hallways are empty, and that's been my
15 experience. When I get on a hallway in a civil district
16 court in Houston it's empty. Until the flood, and now
17 everybody is all in the civil courthouse sharing the same
18 courtrooms. So the family law dockets are crowded, and
19 they can't handle their cases, and they are setting cases
20 off for trial a year and a half, and I'm hearing that on
21 the civil side they're not trying any jury trials at all.
22 But in San Antonio they're all thrown together, so it's a
23 chance for us to kind of see how the dockets work when
24 they're all thrown in one pot.

25 HONORABLE DAVID PEEPLES: But I'm simply

1 saying and then I'll stop, there is a lot of the small
2 cases that are trials on the merits. They may be
3 temporary orders, they may be final, but they may be very,
4 very small, and the shortest -- it could be five minutes,
5 but more likely it's 15, 20, 30, or an hour, but there
6 might be several of those in a day. But it's a trial, and
7 it adds up, and so I -- you know, obviously that's easier
8 to do than a jury trial or a two- or three-day family law
9 case nonjury, because there's a lot of it, and it seems to
10 me the numbers ought to capture that in some way if we're
11 going to make some use of those numbers.

12 CHAIRMAN BABCOCK: Great. Thank you.
13 Anybody else on that topic? All right. We skipped over
14 the report from Chief Justice Hecht in order to
15 accommodate David's schedule today, but we're ready for
16 that, if you are.

17 CHIEF JUSTICE HECHT: I'm ready. First of
18 all, and very importantly, this is Shanna Dawson's last
19 meeting. Shanna has elected to be closer to her family
20 instead of her court family, which shows very poor
21 judgment I think.

22 CHAIRMAN BABCOCK: Let's take a vote.

23 CHIEF JUSTICE HECHT: But we -- Shanna has
24 been a great resource for us at the Court, and we're very
25 sorry to lose her, but she's moving out to California in a

1 week or two. So -- and you already know that Justice
2 Johnson has announced his retirement at the end of the
3 month, and he's -- he and Carla are going to establish
4 their principal residence in Lubbock and spend more time
5 there and with family, and they've got kids in New York
6 City and around, so we're very sorry to have him go. But
7 he said it was either leave or get divorced or commit
8 murder, so he picked the least of those.

9 Just a couple of things that were done, I
10 appreciate David going through the list of the Judicial
11 Council initiatives. So they're on the Court's website at
12 txcourts.gov, and the Judicial Council's recommendations
13 are in the form of resolutions that recite the work that
14 led up to the recommendation and then a recommendation for
15 usually legislation, a couple of cases, and so you can get
16 those on the Court's website, and the legislation that's
17 called for is being drafted. Usually in the past we have
18 not drafted the legislation until the first part of the
19 session, but as the legislators will tell you, the earlier
20 the better and then we just heard this morning about
21 legislation that's being filed, so the council is lining
22 up sponsors for a lot of the things that he talked about,
23 and we hope to be pressing them -- pressing that
24 legislation forward during the session.

25 As he said, one thing that we are

1 particularly proud of and is getting national attention is
2 that our changes in the fines and fees procedures in
3 basically traffic courts, Class C misdemeanor courts, has
4 resulted in not only fewer incarcerations, fewer -- less
5 jail time, more waivers of fines, but also more
6 collections; and the explanation is that -- the basic
7 explanation is that when the judge suggests something
8 other than the full fine or jail, defendants will -- are
9 more apt to pay something rather than nothing. So if you
10 tell them it's \$400 plus -- there's \$200 fine and \$200
11 court costs, and they say, "Well, I don't have \$400" and
12 they said, "Well, you're going to jail." And then the
13 judge says, "Well, then you got \$300," and they end up the
14 judge ends up getting more fine and fee money in more
15 cases so that revenues are actually up, even though fewer
16 people are going to jail. So we think that's a good
17 model, and the National Center for State Courts is
18 studying it to see if it could be replicated other places.

19 The -- this doesn't affect anybody here, but
20 we have provided a slight break for senior status
21 designation under the TBLS standards. So if anybody here
22 were 70 years or older and had been certified for 20
23 consecutive years, you would get a little break in your
24 certification.

25 CHAIRMAN BABCOCK: Where did Munzinger go?

1 CHIEF JUSTICE HECHT: The Court announced in
2 an order several weeks ago that we will move to a Uniform
3 Bar Exam. You may know that states around the country
4 have been changing to a Uniform Bar Exam, and the biggest
5 element of it is that the score is transportable so that
6 you can take the bar in a state that has it, go to another
7 state that has it, and your score will transfer there so
8 that you can go to law school in a place that you don't
9 intend to practice in and then move to that state without
10 having to retake the bar. So it's very popular with
11 students, needless to say, and very popular with the law
12 schools, and they talked about it for -- our law schools
13 did for a year and a half, and we had a task force that
14 reported back to us, and that was their recommendation, so
15 it will be -- we're trying to get it ready. There will be
16 a Texas component to the UBE, and so that has to be
17 prepared, but we hope to give it for the first time in
18 February of 2021. We've put that out for comment several
19 weeks ago, and I don't think we've gotten any comments on
20 it.

21 The Court of Criminal Appeals and Supreme
22 Court's Joint Permanent Commission on Mental Health that
23 has been working for the last -- since January or
24 February, Justice Boyce is one of the leaders on that
25 joint commission. Justice Brown on our court, Judge

1 Hervey on the Court of Criminal Appeals. They had a
2 summit in October and in Houston, a room full of people.
3 I don't know, Bill, maybe 400 or so? From every aspect of
4 the justice system, judges, prosecutors, law enforcement,
5 the criminal side, the civil side, caseworkers, doctors,
6 all kinds of people who came together to talk about how we
7 can better handle the needs of people in the -- in the
8 civil and criminal justice systems that have serious
9 mental health issues.

10 We have -- are trying to have a program
11 worked up to present to the Legislature this session. We
12 have -- I've spoken to the leadership of the Legislature,
13 and they are very positive about what we're doing, I think
14 because they're glad we're doing it and not them and
15 because there are just lots and lots of issues, but we
16 hope to have something concrete there before the session
17 and have it result in some good legislation during the
18 session. Part of it is to develop specialty courts like
19 we have for veterans and drug courts that have been very
20 useful, so we would try to adapt that paradigm to mental
21 health issues and see what we can do about improving the
22 way that we handle those.

23 So David mentioned Child Protective Services
24 cases with trying to -- there's a lot of interest in the
25 Legislature in setting up separate courts for those cases

1 to make sure that the child's intersection with the
2 justice system is complete -- is treated completely and
3 not just because they were getting abused or they got
4 picked up for delinquency or whatever, but to look at the
5 whole problem, and we already have some of those courts
6 operating, and so we hope to expand that in the session,
7 expand the funding and the regional presiding judges are
8 very fond of those courts. They think they do a great
9 job, and they bring a lot of expertise to those cases that
10 you wouldn't have if you just filed them in whatever court
11 and jurisdiction. So we are hopeful about all of that,
12 but so far legislators have been very supportive,
13 including in discussing providing additional funding for
14 the efforts.

15 The bar is concerned about lawyer
16 well-being, so you may have read in the press recently
17 that -- half is what the story I read, half of physicians
18 say they're stressed out, and so I don't know about you,
19 but the two places where I don't want to see somebody
20 stressed out are the doctor's waiting room and an
21 airplane. I want people to be rested and ready to go, and
22 so it's becoming increasingly true in the bar, and the law
23 schools are already developing some counseling and
24 educational opportunities for law students to address
25 these issues, and the State Bar's Lawyer Well-being Task

1 Force is working on some of them as well. They're coming
2 up with their report, which will be out shortly and will
3 probably recommend that the bar do some things, that the
4 Court do some things.

5 One thing they want the Court to do, which
6 will probably come over here, is to make lawyer
7 communications with the State Bar's wellness operation not
8 only confidential but privileged because one of the
9 concerns is that lawyers don't want to reveal their
10 stresses because they're afraid it will hurt them in their
11 careers, and so we'll have to think about that at some
12 point, but they've got a lot of other ideas that they'll
13 be presenting as well.

14 And then we'll be working on trying to get
15 real funding to improve court security. We have a
16 security officer, you probably know, in the Office of
17 Court Administration; and he has been very effective
18 around the state in bringing -- in getting law enforcement
19 to help us with threats against courthouses and the
20 judiciary. So we've had situations where judges have been
21 threatened either face-to-face but more frequently in
22 writing or with phone calls; and the threats could be
23 identified, but we just didn't have any way to pursue
24 them; and Hector Gomez has gotten the Department of Public
25 Service, sheriff's offices, even the U.S. Marshal Service

1 from time to time to provide resources to help ensure the
2 protection of the judges and courthouses when those kinds
3 of threats have been identified; but it's just the very
4 teensy tip of the iceberg, and so we will be trying to get
5 better help for that.

6 Just as an aside, I think Judge Kocurek is
7 going to be the feature of a CBS news program next spring,
8 which we hope will -- we think it will be very
9 sympathetic, and we hope it will galvanize some support
10 for the issue in the -- among policy makers. So I think
11 that's most of the administrative stuff that we are
12 working on, except technology, which Justice Boyd is in
13 charge of.

14 HONORABLE JEFF BOYD: I'll just briefly
15 report on the e-filing side of things. We have been fully
16 implemented with e-file Texas in civil cases now for a
17 while and with the excellent support of the Court of
18 Criminal Appeals have been implementing that throughout
19 the state as well for criminal filings, which raises
20 little unique challenges when you deal with filing
21 informations and other types of criminal documents, but
22 making good progress on that. Probably the biggest issue
23 on e-filing on the filing side of it has mostly to do with
24 users who get frustrated because they come across
25 different local requirements and rules on how to file

1 various documents or attachments to documents or proposed
2 orders for documents.

3 We put together a subcommittee of clerks to
4 focus on that, and it's sort of part of the nature of the
5 beast when you have locally elected officials responsible
6 for the documents and the procedures, but they've worked
7 very hard and very productively to come up with some
8 really good suggestions. We had a JCIT meeting last week
9 where we went over those and I think were some very good
10 suggestions that were figuring out how to best implement
11 to create some more uniformity in the filing system
12 throughout the state so that any individual lawyer's
13 experience will be much more predictable and uniform
14 throughout the state.

15 On the access side of things, the
16 re:SearchTX program is up and running and now fully
17 implemented with access not only for judges, which was the
18 first roll out, so those of you who are judges you do have
19 through re:SearchTX online access to all of the filings
20 throughout the state, and then rolled out with lawyers
21 when they are a lawyer on the case, and then last month
22 rolled out for lawyers also on cases that they are not a
23 lawyer on the case on. So lawyers, members of the bar,
24 have access throughout the state, and then members of the
25 public who are registered users can go online and register

1 and create an account and have access as well as some
2 members of the media or whoever might be interested.
3 That's all now rolled out, has been a very smooth roll
4 out, and I wish I had the numbers in my memory. I don't.
5 But the report we got last week shows how the number of
6 users who are now accessing has really skyrocketed in just
7 the last couple of months as people have become more aware
8 of it and begun using it, so we're seeing that working
9 well.

10 The challenges, other than the uniformity
11 issues on e-filing, in fact, just this week there have
12 been a couple of times where the system went down. We're
13 aware of that. I am always made aware of that very
14 quickly. I think David Slayton, who is no longer on the
15 phone, is the only one who knows about it quicker than I
16 do. One of them, they -- these things happen. They were
17 running a test of a system, and the test broke the system,
18 so they didn't plan the test correctly, and they
19 acknowledge that, and they responded, and so those little
20 things happen, and it's very frustrating I know, but in
21 the big picture we're very pleased with how rarely that's
22 happened and how quickly they have responded.

23 On the e-access side, the re:SearchTX side,
24 the biggest issue probably has to do with just the
25 complications with protecting against the filing and

1 ultimate public disclosure of information that should be
2 redacted and must be redacted. Tyler Texas, that is our
3 primary contractor in all of this, has created a system
4 that will automatically redact after you file your -- so
5 lawyers have the obligation to make sure they have
6 properly redacted birth dates and minors' names and Social
7 Security and bank account numbers and those kinds of
8 things, but this program that Tyler has prepared and
9 provided at no cost to all of the electronic filing
10 service providers, which are the ones that the lawyers
11 independently will retain as their own vendors, so they
12 now can use that redaction software. We're seeing
13 promising results on how that's working and are continuing
14 to work on that to try and implement that more effectively
15 as well.

16 In both the e-filing and some of the things
17 we're dealing with to improve the system and the
18 experience among the clerks as well as the e-access and
19 the redaction and some other issues, they've come up with
20 some good recommendations that will likely result in
21 some -- or have already resulted in some recommended rule
22 changes that will likely be recommend -- or requests that
23 we'll bring to this committee and ask this committee to
24 weigh in on making some rule changes on those that Jackie
25 is aware of, and so we'll look forward to getting your

1 input on how to now start changing the rules to make the
2 system work better.

3 CHAIRMAN BABCOCK: Great. Thank you. Any
4 questions of Chief Justice Hecht or Justice Boyd? Okay.
5 Great. Well, thank you very much. Always informative.

6 Our next and last speaker is -- represents
7 the host of our meetings; and, Oscar, I know I try to
8 thank you every time we're here, but on behalf of the
9 whole committee and the Court, thank you. This space is
10 terrific, and it's far superior to other places where we
11 have held our meetings, the lighting and the acoustics;
12 and, frankly, your staff is just tremendously welcoming,
13 so, thank you, thank you for that.

14 Oscar Rodriguez is the president of the
15 Texas Association of Broadcasters. That's a statewide
16 organization for the state's 1,200 plus free over-the-air
17 local radio and television stations. Oscar was assistant
18 press secretary for Mark White back in the day when he was
19 Governor. He was the legislative liaison for the Texas
20 Education Agency going back to 1990 -- early Nineties. He
21 grew up in McAllen and has lived here since 1991, so he's
22 Texan through and through, and he has led this
23 organization since Ann Arnold, long-time executive
24 director, passed away several years ago, and has done an
25 absolutely outstanding, tremendous job for the radio and

1 TV stations around the country. There are legal issues
2 that TV stations and radio stations face day-in day-out,
3 and they often interact with the justice system in a
4 number of different ways, and I had asked Oscar if he
5 would to share with us some of those -- some of those
6 issues and just generally to give us his thoughts. So,
7 Oscar, the floor is yours.

8 MR. OSCAR RODRIGUEZ: Thank you, thank you.
9 Welcome, everyone. It is always our pleasure to host you.
10 It really is. Someone once said, "It's not really your
11 pleasure," and I barked back at him because that's how he
12 barked at me, one of your colleagues. I said, "It is,
13 too, our pleasure." It really is. It's always an honor
14 for us to have you folks with us, and certainly the good
15 work that we've been able to accomplish for the industry
16 has come at the hand of our great partners at Jackson
17 Walker and several, several attorneys who I'm sure you
18 have met or worked with at some point or another in your
19 careers.

20 I very much appreciate the opportunity to
21 talk about this. I'll note that in the brief biography he
22 presented he never said anything about a law school, and
23 it's true I'm not a lawyer, so just go ahead and just, you
24 know, rip me up. I don't know what you are talking about,
25 but I can tell you what my folks are talking about. I

1 think our greatest concern legislatively, because that's
2 really where we are, at this point with respect to our
3 operations is the viability, question mark, of the Texas
4 Public Information Act. We have as an organization been
5 successful over the past many, many years, again, thanks
6 in part to a good bit of work that Jackson Walker
7 attorneys did, we secured an interlocutory appeal of the
8 statute. The free flow of information law, the Citizens
9 Participation Act, the Defamation Litigation Act, a body
10 of law that's extremely beneficial to journalists and our
11 ability to serve the needs and interests of our viewers
12 and our listeners; but unfortunately, over the past few
13 years, several years now actually, we have seen so many
14 court rulings that have, you know, chipped away at the
15 Public Information Act to one degree or another, that we
16 now find it increasingly difficult to -- to do the kind of
17 investigative reporting that is necessary to ensure
18 accountability of our public officials, to do the kind of
19 investigative reporting that a lot of our viewers and
20 listeners are asking for.

21 So we are not alone. The Public Information
22 Act is not a body of law that's written for broadcasters
23 or journalists. It's written for the public, and we are
24 feeling the pain of these rulings, just as many members of
25 the public are, and so we endeavored last legislative

1 session to pass some legislation that would address a
2 number of our concerns, and we succeeded in doing so in
3 the Senate, but we were stymied in the House. So we have
4 spent much of the interim reaching -- casting a broader
5 net for -- to try to clearly understand, gauge the
6 concerns and interests of other parties, especially in the
7 business community on this front to see what we can do
8 to -- to address our concerns, and so we're hopeful that
9 this coming session we'll not just get it through the
10 Senate but actually get it through the House as well and
11 to the Governor's desk and he will sign it. That is our
12 primary concern. Okay.

13 CHAIRMAN BABCOCK: Okay. Great, thank you,
14 Oscar. Any questions of Oscar, either individually or in
15 his role with the TAB? We got --

16 PROFESSOR CARLSON: So what's going on?

17 CHAIRMAN BABCOCK: Professor Carlson.

18 MR. OSCAR RODRIGUEZ: Well, increasingly --
19 I'll say, I was surprised actually even this morning in
20 the *Texas Tribune* I saw what I think is now the third
21 eulogy for the Public Information Act. Attorney Jill
22 Larson serves on the board of the Freedom of Information
23 Foundation of Texas where it lists the various court cases
24 in the past few years that have -- the rulings that have,
25 you know, blown holes through the PIA. Our primary

1 concern is the degree to which we -- the -- I guess it's
2 the Boeing -- the Boeing ruling and the Greater Houston
3 Partnership ruling taken together have greatly diminished
4 the ability of members of the public to get their hands on
5 final contracts between government entities and private or
6 nonprofit companies that involve doing business of the
7 people of Texas.

8 If we cannot see the contracts we do not
9 know how much money is being spent, and we don't know that
10 the money was well spent. We don't know that it was spent
11 on the intended purpose. We cannot hold them accountable,
12 and the degree -- I mean, which you -- our position,
13 anyway, is if you don't know how the money is being spent,
14 you've lost your government, you've lost control of your
15 government; and at this point I think we are -- we are
16 unique in the country now where we are essentially at the
17 point now where if I'm a governmental entity and Marti's a
18 member of the public and Chip is a private contractor with
19 me, if Marti wants to see the contract that I signed with
20 Chip, I get to ask Chip whether he wants me to release it,
21 and he gets to tell me "no." That's not open government,
22 shorthand, certainly, but that's basically where we are.

23 PROFESSOR CARLSON: That's helpful.

24 CHAIRMAN BABCOCK: And in your hypothetical,
25 by the way, for the record, Marti can see whatever she

1 wants as far as I'm concerned. Yeah, Richard Orsinger.

2 MR. ORSINGER: Now, the rulings that you are
3 concerned about, are they administrative rulings or
4 judicial decisions by appellate courts?

5 MR. OSCAR RODRIGUEZ: State Supreme Court
6 rulings.

7 MR. ORSINGER: Okay. Well, there's not much
8 we can do.

9 MR. OSCAR RODRIGUEZ: I don't think it was
10 the intent. I don't think that --

11 HONORABLE JEFF BOYD: Hypothetically, did
12 anyone dissent from all of those decisions? No, never
13 mind.

14 CHAIRMAN BABCOCK: And, if so, who would
15 that be?

16 HONORABLE JEFF BOYD: Just wondering.

17 CHAIRMAN BABCOCK: Who would that be?

18 MR. OSCAR RODRIGUEZ: Who indeed, who
19 indeed.

20 CHAIRMAN BABCOCK: Anybody else have
21 anything for Oscar? Well --

22 CHIEF JUSTICE HECHT: Roger did.

23 CHAIRMAN BABCOCK: Oh, Roger, I'm sorry, I
24 missed you.

25 MR. HUGHES: You sort of commented on it in

1 passing, was about the changing character of journalism.
2 Is there any concern to -- as to who should be treated as
3 a journalist anymore? I mean, almost anyone who can set
4 up a web page or make a podcast could call themselves a
5 journalist or a member of the media, but then again, then
6 they would enjoy all of the privileges against defamation
7 enjoyed by the press, et cetera. Is there a concern that
8 by -- if this is expanded it may in effect boomerang and
9 diminish the kind of protections or -- well, now we're
10 going to call it professional journalists and broadcasters
11 enjoy.

12 MR. OSCAR RODRIGUEZ: Well, I think that's
13 the proverbial sticky wicket that we always have when it
14 comes to issues like this, and I think that -- I guess it
15 was in the Free Flow of Information Act, Chip, where we
16 attempted to discern to a great degree what qualifies or
17 who qualifies as a journalist, and I think that -- I think
18 that that will -- that the discussion will continue
19 forever ultimately, but I think ultimately the -- what is
20 most important is trying to discern when an operation has
21 some formal editorial process and systems of checks and so
22 on. That's a -- just kind of a beginning of an answer to
23 your question.

24 MR. HUGHES: Okay.

25 CHAIRMAN BABCOCK: Yeah, Justice Gray.

1 HONORABLE TOM GRAY: I'm not familiar with
2 the cases that you referenced involving the information
3 act, and so I don't know if they were existing contracts
4 or not, but would you comment on where we are with regard
5 to what I will call the incentives like the Amazon
6 incentives? Are they accessible to the media?

7 MR. OSCAR RODRIGUEZ: Not at all. That is
8 -- and I will tell you on both cases -- so the Boeing case
9 had to do with I believe it was a contract involving a
10 lease between Boeing and the City of San Antonio. The
11 Greater Houston Partnership case had to do with the
12 expenditure of tax dollars that the City of Houston had
13 contributed to the Greater Houston Partnership to engage
14 in economic development activities. The requests were, of
15 course, to see the contract between Boeing and San
16 Antonio. The request again was also to see how the city
17 tax dollars that were given to the economic development
18 group were spent, and in both cases the parties claimed
19 that, no, that that was information that if it were
20 released would leave them at a competitive disadvantage.
21 There is a trade secrets provision in the Public
22 Information Act, and we thought that was sufficient, but
23 clearly that's not how it played out. And I am sorry I
24 forgot the question.

25 HONORABLE TOM GRAY: It was about the

1 incentives.

2 MR. OSCAR RODRIGUEZ: Oh, so when it comes
3 to economic development incentives, no, it's completely
4 silent. We know, for example, that the City of Dallas and
5 the City of Austin, or at least their economic development
6 partners, made substantial offers to Amazon for their HQ2
7 project. We have no idea what they promised, none
8 whatsoever. And we're talking we suspect billions of
9 dollars, tax dollars, that could have been spent that --
10 and I know a lot of Dallas taxpayers didn't want to spend
11 and Austin taxpayers didn't want spent, so, yeah, it's --
12 that's basically what we mean when we say nonprofit
13 companies.

14 CHAIRMAN BABCOCK: Any other questions?
15 Okay. Richard.

16 MR. ORSINGER: Yeah, I don't want to get
17 down into the weeds too far, but --

18 CHAIRMAN BABCOCK: Yeah, that would be
19 uncharacteristic of you.

20 MR. ORSINGER: Are government officials
21 authorized to release the information if they wish, or
22 does it require the consent of the private contractor for
23 the government officials to release?

24 MR. OSCAR RODRIGUEZ: The way things are
25 playing out in the Boeing ruling is that basically a

1 governmental entity is asking the contractor whether they
2 will consent to --

3 MR. ORSINGER: No, my question is are they
4 required to do that or they just choose to do that?

5 MR. OSCAR RODRIGUEZ: I can't answer that
6 question. I think they're required.

7 MR. ORSINGER: Because our solution may be
8 to elect government officials that will release the
9 information to the voters.

10 MR. OSCAR RODRIGUEZ: Well, certainly I have
11 wondered -- and, again, not being an attorney, but I've
12 wondered whether a potential solution might not be for
13 citizens of individual communities to prevail upon their
14 local government officials to simply state that, you know,
15 the terms of this contract is it will be made public, so
16 if you do not want it to be made public, don't apply for
17 the business. I don't know if that would fly honestly.

18 CHAIRMAN BABCOCK: Yeah. All right. Yeah,
19 Frank.

20 MR. GILSTRAP: This -- what you're talking
21 about is an important public issue, but your current
22 problem I guess is political, and I'm a little puzzled
23 because the media in general in Texas has done pretty well
24 politically. We've had the provision allowing
25 interlocutory appeals in defamation cases, the Citizens

1 Participation Act, which is a far-reaching and reaching a
2 lot farther than people expected. What's the problem
3 here? Who's resisting it?

4 MR. OSCAR RODRIGUEZ: You're correct. It is
5 a political problem because we have enjoyed great support.
6 When we talk individually to lawmakers, by and large
7 they're astonished. They're aghast. We got stymied last
8 session in the House. This is -- to the best of our
9 ability to discern the tea leaves of the legislative
10 process, it seemed clear to us that one of the great
11 concerns, parochial concerns, that the speaker had was the
12 potential loss of the Sweet 16 tourney from San Antonio if
13 the bathroom bill is passed, and he needed the business
14 lobby, big business lobby, to help to kill that bill; and
15 open government was one of the things that got traded for
16 it. That is our perception, and we --

17 MR. GILSTRAP: Wow.

18 MR. OSCAR RODRIGUEZ: And we have a number
19 of reasons to characterize it in that way.

20 MR. GILSTRAP: Very interesting. Thank you.

21 MR. OSCAR RODRIGUEZ: So we understood that
22 was a different political circumstance, and we get
23 politics, and I know Joe, and if Joe had simply told me
24 "Oscar, it ain't going to happen this session," we would
25 have said, "Okay, we understand" and we move forward,

1 right. But that wasn't the case, and so we fought to the
2 bitter end, and so it was bitter. So we understand that
3 won't be an issue this time. We also know the lieutenants
4 that were especially in this case for this committee for
5 this bill was not re-elected. It was not an insignificant
6 issue in his campaign. So we think it's clear, and we
7 know, we know, that open government and having -- ensuring
8 that the public has access to these final government
9 contracts is extremely important to the people of Texas.
10 So we'll make the argument once again, and we think the
11 landscape hasn't changed much in the Senate, so we
12 anticipate we'll pass it again. We passed it twice in the
13 last session. So we anticipate we'll succeed there, but
14 we can't take it for granted, so we'll work, and then
15 we've got to make our case in the House.

16 But to be fair, clearly there were some
17 concerns with the legislation that we had drafted, but we
18 had drafted it so early in the process that there was
19 ample opportunity if there had been the will to do it, to
20 address those concerns and amend the legislation
21 accordingly, but it was -- it was predetermined that that
22 body of legislation was not going to pass the House.
23 So --

24 CHAIRMAN BABCOCK: Anything else? All
25 right. Well --

1 MR. ORSINGER: I'm sorry that our guest from
2 out of state had to hear all of this.

3 MR. OSCAR RODRIGUEZ: It's embarrassing.
4 It's embarrassing, and I take it almost personally, even
5 though I wasn't around when it happened, but for many
6 years the Texas Public Information Act was the model of
7 public information law for the rest of the country, and
8 now it's an embarrassment. We actually have -- we know of
9 incidents where in other states the governmental entities
10 and private companies have tried to somehow funnel their
11 contracts through Texas so they can somehow take advantage
12 of the Boeing ruling.

13 MR. ORSINGER: The solution at the federal
14 level is to just leak it to the press, so why don't you
15 try that?

16 MR. OSCAR RODRIGUEZ: Who, us?

17 CHAIRMAN BABCOCK: Now, now. Justice Gray.

18 HONORABLE TOM GRAY: I did have one question
19 to follow-up on the introduction. How old were you when
20 you were working for Mark White?

21 MR. OSCAR RODRIGUEZ: Well, I was still in
22 college, and I was actually a junior, so I guess I was
23 about 20 years old.

24 HONORABLE TOM GRAY: Okay.

25 CHAIRMAN BABCOCK: He's aged gracefully, as

1 you can tell.

2 HONORABLE TOM GRAY: Yeah. Very good
3 career, very good career.

4 MR. OSCAR RODRIGUEZ: Thank you. Thank you.

5 CHAIRMAN BABCOCK: Oscar, once again, thank
6 you so much for making this wonderful space available to
7 us, and round of applause.

8 (Applause)

9 CHAIRMAN BABCOCK: Thank you so much, Oscar.
10 All right. We've got -- I know people are worried about
11 getting back to Houston because of the weather, and there
12 are other concerns. Do we want to talk about what deep
13 thoughts we all have, or do we want to call it a day?
14 Judge Peoples, what do you think?

15 HONORABLE DAVID PEEPLES: I'm enjoying this.
16 I'd like to stay a while.

17 CHAIRMAN BABCOCK: Okay. Anybody else have
18 any thoughts one way or the other? Well, let's -- let's
19 go forward, and I'll take the privilege of the Chair by
20 talking about something that I've alluded to over many
21 meetings, and that is discovery obviously; and in my
22 practice, which is not only in this state but in other
23 states and split between state and federal, the discovery
24 practice that -- or problem that I see the most is with
25 respect to documents. Some of it's ESI, but it's more

1 than that, and that -- the rule in both the federal and
2 our state system and all of the other state systems I know
3 about -- Dick may correct me about Colorado -- but there
4 are unlimited requests for documents that one can make so
5 that when somebody on the other side is interested in
6 making your life miserable, you will get a first request,
7 a second request, a third request, et cetera, et cetera,
8 et cetera, down the line; and unless at the beginning of
9 the case you have been able to convince your client that
10 the client should take a snapshot of the entirety of a
11 very broad range of people and search terms, and that
12 doesn't usually happen, the client will push back and will
13 try to narrow what you capture at the beginning of the
14 case. And then as each request comes in, you have to go
15 back to the well again and again and again, and it's
16 enormously expensive; and what is produced from the
17 subsequent request for admission -- request for production
18 -- I called it admission -- request for production to me
19 is generally speaking not proportional to the benefit that
20 you get out of it.

21 So one thing that I advocate is that we
22 limit, as we have with interrogatories and depositions,
23 the number of request for production that a party can
24 serve on the other party in the case. Just talking about
25 party discovery now. Not talking about third party

1 requests for production, but party discovery and maybe an
2 initial request early in the case and then another request
3 maybe later in the case, and limiting the number of items
4 that -- number of categories that can be requested. I
5 mentioned earlier today, this morning, some judges in the
6 Eastern District of Texas say you can't request documents
7 at all; and that strikes me as, in some cases anyway,
8 going too far, just abolishing the request for production
9 and telling the parties' lawyers that they have to produce
10 anything that's relevant.

11 And you remember in the federal side we had
12 a big debate about whether or not there should be a
13 disclosure requirement for relevant documents, relevant to
14 anything and anybody, or merely disclosure requirement of
15 anything you wanted to use at trial; and the federal side
16 I think opted for the latter, that you have to disclose
17 what you might use at trial or what might be pertinent at
18 trial for your side of the case; and you don't have to
19 make the judgment a difficult judgment about, well, I have
20 this document. It might not be relevant, but, boy, I know
21 the other side would love to see this document; and you're
22 absolved of that sort of Hobson's choice. So that's the
23 outline of my deep thought, which you can tell is very
24 shallow, but nevertheless, that's what I think. Anybody
25 want to comment about that at all? Yeah, Justice Gray.

1 HONORABLE TOM GRAY: Is there a trade-off in
2 doing that with the specificity requirement versus the
3 number of requests? And I ask that in the context of when
4 I was in practice a fair amount of my litigation that I
5 was involved in was with financial institutions, and we
6 could -- and it was primarily in defense of public
7 accounting firms involved in that, and so we could
8 endeavor to make a very broad request, very general in
9 nature that would require the financial institution to get
10 a really large basket of documents if they fully
11 responded. After some experience of seeing that process
12 play out, the disagreements about whether or not a
13 document was included in the basket or should have been
14 included in the basket initially, I tended to wait until
15 we knew more about the case, until we had deposed some
16 people and found out what do you call certain documents,
17 and it allowed us to do much more targeted requests for
18 production, a specific their name category of documents.

19 It would seem to me that if you limit the
20 number of requests that can be requested, you are
21 validating the first type of request, a broader request
22 where there's a greater risk of conflict of trying to
23 exclude something because it's not specific enough or,
24 "Oh, that's what you wanted, you wanted that document."
25 And so there's a trade-off there, it seems like to me.

1 CHAIRMAN BABCOCK: You may be exactly right.
2 The experience I have is that the initial request -- and I
3 just got one for 109 categories, and they're all broad.
4 They're all like, you know, incredibly overbroad, in our
5 view anyway; and so I don't know if limiting the
6 categories would fix that, because it happens a lot; but
7 for sure you would probably get -- if you limited the
8 number your requests would probably be broader than they
9 might be otherwise, but that was why I was thinking that
10 maybe we allow later on after you've done some depositions
11 and learned about more about the case, maybe a second
12 request and maybe even a third request where you hone in
13 on what you're looking for; and even that would be
14 preferable to what you get in a lot of big cases now.

15 I had one, it was probably two years ago,
16 but I think we were on our 16th request for production the
17 other side sent us; and, of course, the temptation is to
18 retaliate, you know, so they've sent us 16 requests, well,
19 we'll send them 17 requests. That's the temptation, and
20 it just -- it's very expensive, and that's the only area
21 in the discovery rules where we have unlimited.

22 HONORABLE TOM GRAY: I take it that requests
23 4 through 15 were not like for one document. They were
24 still very broad requests in their nature.

25 CHAIRMAN BABCOCK: Pretty much, yeah.

1 Justice-elect Kelly.

2 MR. KELLY: Were the requests proportional?

3 CHAIRMAN BABCOCK: What?

4 MR. KELLY: You said you had all of these
5 requests, and 16 through round -- third round of 16
6 additional requests. Were those proportional to the case?
7 And if not, didn't the trial judge have the opportunity to
8 manage the case and refuse to allow them? What tools did
9 the trial judge need that he does not already have to
10 limit the discovery if it was, you know, incredibly
11 overbroad on the third round? I think that's the key
12 question. What can we -- what are the trial judges
13 missing that -- it's already proportional. They can
14 already hear motions to limit discovery. What further
15 rule changes do we need?

16 CHAIRMAN BABCOCK: The case I reference was
17 in state court, and we were down in court at least once a
18 week. The judge heard these elaborate discussions about
19 the request for production and why they were, you know,
20 narrowly focused and proportional -- well, it was in state
21 court, so, you know, why they met they standard, and this
22 judge by and large solved the problem by taking it under
23 submission.

24 MR. KELLY: But, see, if we have a rule that
25 says a specific number, we're going to have to allow

1 people to move for leave to expand the number.

2 CHAIRMAN BABCOCK: Of course.

3 MR. KELLY: So it's just putting the shoe on
4 the other foot and creating a mirror image of the problem,
5 and unless you have a hard cap, which I think will deny
6 justice if you're going to absolutely limit discovery, I
7 just don't know what other tools we can give the judge.
8 Either they have the authority to limit the number or the
9 authority to expand the number. Either way it requires a
10 judicial resolution on the number and a tailored response
11 to the case before it at that time.

12 CHAIRMAN BABCOCK: Yeah. Yeah. You may be
13 absolutely right. I'm just thinking of our experience in
14 depositions and in interrogatories, and at least in my
15 practice it's rare that anybody on either side asks for
16 more depositions than they're permitted in the case or
17 asks for more interrogatories than they are permitted in
18 the case. Sometimes they do, and they usually come up
19 with good cause, some reason why they need more, and a lot
20 of times you -- that will be consented to. There will be
21 a consented motion, but if there's not, the judge
22 certainly has the tools to decide that, but there's
23 nothing -- there's nothing in the production of documents
24 rule that sets up that kind of system where there's a --
25 there's a number and but if the party needs more than that

1 they go to the other side, and if that doesn't work then
2 they go to the judge. I don't know. It just sort of
3 makes sense to me, but anyway. Roger.

4 MR. HUGHES: Well, I take it to heart that
5 maybe we already have the tools in place that we need, but
6 I -- I'll give you two reasons why maybe a limit might be
7 useful, even if it means that they can go and ask for
8 more. The first one is I can't tell you the number of
9 times that I send out contention interrogatories, tell me
10 why you have -- your factual basis for all of these
11 various theories against me, and the first one gets
12 answered, and the next four is "I'll tell you later, but
13 give me 30 classes of documents," and so that is number
14 one. I think it will focus people in their discovery at
15 the initial what they think they can prove as opposed to
16 going on fishing expeditions.

17 The second one is you still have to object
18 to that hundred. You can argue they're not proportional,
19 but what happens when the judge goes, "I don't know, and
20 what's your other objections?" Well, then you had to go
21 through and make all of those objections, so that's
22 time-consuming to the client.

23 CHAIRMAN BABCOCK: Right.

24 MR. HUGHES: And then the third is you don't
25 know what the judge is going to do, so you've got to have

1 all of these documents, if you're going to claim
2 privilege, say, you've got to explain to the judge why
3 they're privileged. That means you've got to have your
4 affidavits all at the ready, all because maybe there's a
5 proportionality objection at the outset, but you don't
6 know so that's why you have to have all of your objections
7 lined up. And the next thing if you're going to claim
8 relevancy or proportionality, somebody's got to explain
9 that to the judge, and sometimes that requires an -- a
10 couple of affidavits and proof or et cetera, et cetera.

11 So I can see some benefit to limiting it at
12 the outset. It would spare some unnecessary expense and
13 focus people, the requesting party, on the theories they
14 think they can -- they can -- that they're actually
15 serious about, as opposed to, well, it would be negligence
16 to sue an insurance company just for a breach of contract
17 and not throw in an insurance code violation. I'd get
18 sued for malpractice, so I've got to throw it in. I don't
19 know why I'm alleging it, but I am.

20 CHAIRMAN BABCOCK: Speaking hypothetically.
21 Richard Orsinger.

22 MR. ORSINGER: So part of the difficulty in
23 this committee is writing a set of rules that governs the
24 wide range of litigation that we have, and I regret that I
25 didn't ask David Slayton statistically what percent of the

1 family law docket of the civil docket is family law. I
2 think the answer he gave me was 50 percent of the total
3 docket, civil and criminal combined. My estimate based on
4 my experience in Bexar County and other counties, it's
5 about 80 percent of the civil docket. I wish I had a
6 better number. And so a lot of the litigation -- most of
7 the civil litigation that's going on is family law
8 litigation, and so when we make decisions here based on
9 cases involving big corporations suing big corporations or
10 successful plaintiff's lawyers suing 50 defendants or
11 something like that, we've got to remember that the rules
12 that we're enacting are going to impact maybe 80 percent
13 of the docket in which just two individuals are suing each
14 other, and there might be some kids on the side to see how
15 it all turns out.

16 So my comments are going to be from the
17 perspective of this discussion applied to family law, and
18 perhaps the best or perhaps the only solution is to say,
19 well, we ought to have a different set of rules for family
20 law, and maybe we should because maybe we can't reconcile
21 these, but at least let me share my perspective on these
22 issues from a family lawyer's perspective.

23 So the way I see it, we have some lawyers
24 who intentionally use the discovery process to inflict
25 pain or expense on the other side to try to gain an

1 advantage in the litigation, and that's a pernicious
2 practice that we should stamp out because lawyers are
3 misusing the legal process in doing that. Then I see
4 another category of lawyers that's either overly cautious
5 or overly careless, and they're just asking about
6 everything that might conceivably be relevant just on the
7 chance that they might see something that would be
8 important, and they're not intentionally misusing the
9 system, but because they're not being disciplined and
10 because they're not thinking their case through they're
11 asking for too much and putting too great a burden on the
12 other side.

13 But then there's another category of
14 defendants out there, and I run across these in my
15 practice, if you don't in yours; and those are people who
16 have done something wrong, either fraudulent or they've
17 breached a fiduciary duty or they've done something
18 illegal and they don't want you to find out about it; and
19 so they've structured the evidence in such a way that
20 you're not likely going to find it unless you do some
21 serious discovery; and in the family law arena, what I
22 find is that in some instances one of the spouses had
23 decided several years before the divorce that they're
24 going to get a divorce. They have access to business
25 lawyers, CPAs, chief financial officers, and they start

1 laying the groundwork for the divorce two or three years
2 before the divorce is filed and then the divorce is filed
3 and the other spouse comes in completely unprepared and
4 completely surprised and with no resources other than
5 what's under the control of the other spouse, and you're
6 supposed to see that justice is done.

7 So this is somebody that's taken two or
8 three years with all of this professional assistance to
9 structure the situation so that they can have an advantage
10 in the divorce, and the other spouse is coming in starting
11 at zero on the day of divorce, perhaps not even with
12 access to money except through a court order and asking
13 you to protect their rights. So when you limit discovery
14 by some arbitrary measure you are assisting the people who
15 are dishonest and who are -- had the wrongful intent.
16 You're allowing them to protect their wrongdoing, because
17 the only way they're going to be discovered is -- the only
18 way their wrongdoing is going to be uncovered is through
19 the discovery process.

20 So I'm very reluctant to impose arbitrary
21 restrictions on the lawyers who are abusing the system to
22 harass the enemy. I think we ought to let judges sanction
23 them, and the lawyers who are overrequesting because they
24 are sloppy or incautious, and we ought to use the judge's
25 discretion to limit them, and we ought to leave

1 fundamental discovery alone for the victims who are trying
2 to right a wrong and the only solution they have is the
3 discovery process and a trial.

4 Having said that background, a couple of the
5 things that you need to keep in mind in a divorce case is
6 that unlike commercial litigation or tort litigation or
7 contract litigation, frequently the documents that we're
8 asking for in a divorce case are owned by both parties,
9 but one party is in control of them, so that means that
10 we're setting up a set of rules here that says you can't
11 see your own tax returns, you can't see your own bank
12 statements, you can't see your own credit card statements,
13 even though they belong to you because you're in a divorce
14 with your spouse and they're in your spouse's control and
15 we've limited you to 25 documents or 20 categories of
16 documents or whatever our rule is. Well, now, is that
17 right? If the party who is requesting records owns the
18 records, why should there be any limit on their ability to
19 see their own records?

20 So then the next thing I wanted to say was
21 that is the scope of relevant evidence. In a tort case,
22 except for like a continuing tort like asbestos or
23 something like that, a tort is generally a single event.
24 There's going to be a time and place where something
25 happened, and there's going to be witnesses, and you can

1 write their names down, and you can take their depositions
2 and go out and measure things up, and that's it. That's
3 your case. You've just done your discovery. On a
4 contract case, as we heard, usually they're not litigating
5 liability. They're litigating damages, and from what we
6 heard they're really just usually often a default; but at
7 any rate, the same point, is that in a contract lawsuit
8 you have two people that came together and signed a
9 contract and then there was a breach and now the fight is
10 what are the damages over the breach. Okay. So in a
11 marriage things that happened 5 or 10 or 15 years ago can
12 affect the outcome of the case, particularly if you're
13 fighting over separate and community property. You have
14 to prove that 20 years ago the \$200,000 that you inherited
15 from your aunt is over here in this CD over here and
16 didn't just get lost.

17 On child custody issues, it's quite relevant
18 what happened five years ago and even 10 years ago when
19 you're fighting over the custody of a kid, and there are
20 an unlimited number of witnesses because you've got
21 neighbors, friends, babysitters. I mean, the list goes
22 on. So the time frame of the relevant evidence in a
23 typical family law case could be a 5 or 10 or 15 or
24 20-year time frame as opposed to a tort case where an
25 accident occurred in a matter of seconds in one day or a

1 contract case where a breach occurred and now we're
2 calculating damages. So you just need to understand if
3 you're going to impose strict limitations based on
4 litigation that involves one event in time with a limited
5 number of witnesses, it's not going to work well when 10
6 or 15 years of a family's life is at stake.

7 Another thing about the suggestions, and
8 I've discussed this privately with Dick about the Colorado
9 suggestions, which he said don't apply to family law, is
10 that it's based on continuity. You have the continuity of
11 the judges required and continuity of the lawyers is
12 required if you're going to have an interview process or
13 informal conferences with the judge. In a docket like we
14 have in San Antonio or Austin you don't have uniformity of
15 judges. Even in the rural counties you're not guaranteed
16 uniformity of judges because we have overlapping counties
17 where there are multiple districts, and some judges are
18 there on some weeks and gone on other weeks, and it's been
19 my experience that they'll swap off cases for purposes of
20 hearing. So you can't just assume continuity of the
21 judges, but in the family law area especially you can't
22 assume continuity of the lawyers because things that
23 happen in a family law case can be very emotional, and
24 sometimes people are doing things for emotional effect,
25 and so if a lawyer tells the client something they don't

1 want to hear and the client is upset then the lawyer gets
2 fired and replaced by a new lawyer. So in family law you
3 can't count on the continuity when you're having this
4 sequence of meetings with the judge.

5 The last thing I wanted to say was let's
6 talk about the goal. The typical goal in typical civil
7 litigation is to get the case over fairly quickly and
8 inexpensively, but that's not the goal in a family law
9 case. In a family law case the goal is to see that
10 justice is done when two people that have lived together
11 and shared their wealth for X number of years have to
12 divide it all up based on complicated rules that were
13 invented 150 years ago and basically are unchanged, and
14 then you've got kids over here that you're trying to see
15 if you can arrive at a solution and trying to test
16 different options while the case is pending and trying to
17 make the best decision on a permanent basis. And so I
18 would say in a family law case we're not driven by
19 reducing costs and we're not driven by speed. We're
20 trying to -- we're trying to help these people break up
21 their lives and break up their families and put together a
22 post-divorce life, and sometimes that can be done quickly,
23 and sometimes it has to be done slowly, and sometimes it
24 can be inexpensive, and sometimes it's expensive as hell.

25 So those perspectives show the difficulty of

1 trying to write one rule to address huge civil litigation,
2 small civil litigation versus family law litigation, and
3 the policies are different, and I don't want to belabor
4 this committee with my concerns about being a family
5 lawyer and what I see. It may be the best thing to do is
6 to have a primary discussion about big civil lawsuits and
7 a separate discussion about family law, but I can't sit
8 here and hear these proposals going by without seeing that
9 the effect that it's going to have in family law
10 litigation is quite different from what we're all
11 discussing. So, anyway, I'm glad I had this opportunity.
12 Thank you very much.

13 CHAIRMAN BABCOCK: Could you repeat that?

14 MR. SCHENKKAN: Yes, family law is
15 different.

16 CHAIRMAN BABCOCK: That's the point I took
17 away from it. Professor Hoffman.

18 PROFESSOR HOFFMAN: Hard to follow that. I
19 do have some thoughts, some -- I don't know if -- I'm also
20 going to be scared of calling them deep thoughts, but I
21 have some thoughts that are sort of in the same universe,
22 so I thought maybe that's okay.

23 CHAIRMAN BABCOCK: They're thoughts.

24 PROFESSOR HOFFMAN: They're thoughts, I'll
25 go with that. I think we have a potentially really neat

1 and unique opportunity in front of us that we've never had
2 before due to a confluence of technological changes as
3 well as some terrific reforms. So Justice Boyce has been
4 talking about and has been at the forefront of, you know,
5 e-discovery changes and research access and data that
6 we've never had before, and so I have a suggestion for us
7 to think about that also I think is relevant because --
8 well, let me throw out the suggestion, and I'll explain
9 what it is.

10 CHAIRMAN BABCOCK: Sure.

11 PROFESSOR HOFFMAN: Which is many years ago
12 we used to require that discovery be filed in civil cases.

13 CHAIRMAN BABCOCK: Right.

14 PROFESSOR HOFFMAN: At least the discovery
15 requests themselves be filed. We don't do that anymore
16 and haven't done that for a long time, but there's an
17 interesting potential opportunity that we may have here in
18 Texas, again unique to sort of the timing that we have and
19 the opportunities we have today that we've never really
20 had before. David Slayton again talked about how
21 frustrating it has been that data has not been available.
22 That if we do require people to file discovery requests
23 and I'd probably expand that to events a little more
24 broadly and talk about that, that we could mine the data
25 to learn all sorts of things that we think we know now but

1 don't know. So I'll say a little bit more and then I'll
2 -- because I don't want to compete with Richard in the
3 length, if only.

4 MR. ORSINGER: I apologize.

5 PROFESSOR HOFFMAN: I'll keep this short.

6 MR. GILSTRAP: Tell us, tell us.

7 PROFESSOR HOFFMAN: So one of the,
8 obviously, the big questions, a tune you have heard me
9 repeat many times over. Chip, in fact, referenced it
10 again today when he was talking about Betty Kourlis' last
11 visit here is that there is a perception of discovery
12 abuse and costs run rampant through the system that is, as
13 you've heard me say time and again, utterly unsupported by
14 any of the empirical evidence going back now decades. For
15 the studies that Mr. Holmes talked about, there is another
16 study that happened at that exact same time period by the
17 Federal Judicial Center that is sort of generally regarded
18 by most, not all, as a gold standard of these studies; and
19 it found none of the findings that the ACTL study found or
20 the Lawyers of Civil Justice study found, all in that same
21 type period.

22 Now, there are problems with a lot of these
23 studies, and they start with that they are mostly surveys
24 of lawyers and in some cases surveys of companies. What
25 you could get by doing data is you don't have to ask

1 people their perceptions of how frequently discovery goes
2 on or their perceptions of this. You could actually just
3 look at the data and see in family law cases how many
4 discovery requests are there and in civil cases under
5 \$100,000 how many depositions are there and how many times
6 when there's an e-discovery request and if there is an
7 e-discovery request, how many times is there a fight about
8 it because they didn't preserve or whatever. Now, there's
9 a professor at Connecticut, Alexandra Lahav, who actually
10 has already recommended this in a paper she did for a
11 symposium at Vanderbilt, so I can take absolutely no
12 credit for the germ of the idea, but what struck me as
13 interesting -- and I'll stop at this -- is that precisely
14 because of the efforts of Justice Boyd and the technology
15 that we've talked about and David Slayton mentioned it, we
16 may have an opportunity to mine data that we have never
17 had before and we might actually be able to, therefore,
18 make rule decisions based on good data that again in the
19 past has been a little illusive.

20 CHAIRMAN BABCOCK: And what -- you would
21 propose filing things that are not currently filed, and
22 what would you propose filing?

23 PROFESSOR HOFFMAN: So I think we would want
24 to talk about that some more, but my suggestion would be
25 that we think about for starters, every time there's a

1 discovery request it ought to go in. So if you want to
2 take a deposition, you ought to file it with the court.
3 Notice that, by the way, this is an incredibly small cost.
4 I mean, everything is electronic filing nowadays, so the
5 filing of the notice of deposition, for instance, or the
6 interrogatory request or the 16th request for
7 production --

8 CHAIRMAN BABCOCK: Right.

9 PROFESSOR HOFFMAN: -- is just simply the
10 act of putting it together and filing it. Now, we would
11 probably also, I would think, want to capture other
12 discovery events that happened thereafter. So, for
13 example, we might want to capture if there's a -- you
14 know, some sort of a -- we're already going to capture
15 motions for protective order, motions to compel. Those
16 are already on file, but there are probably going to be
17 other discovery events that might not be captured in that
18 right now. I don't think if you have a discovery request
19 that the responses ought to be filed.

20 CHAIRMAN BABCOCK: Yeah.

21 PROFESSOR HOFFMAN: I mean, I think there's
22 no need for the documents to be attached, for instance;
23 and of course, there are confidentiality issues we could
24 work through, but we work through those now; and I don't
25 know why this would be any different. So anyway, that's

1 the concept, but already I went on longer than I intended
2 to.

3 CHAIRMAN BABCOCK: No, no, no, that's okay.
4 Eduardo.

5 MR. RODRIGUEZ: In my experience throughout
6 my 50 years of practice is we've gone through different
7 progressions of discovery and trying to limit them and so
8 forth. I've found that that -- that the best thing for
9 litigants was to have a judge that was involved, that
10 became involved in the case, and it didn't really matter
11 whether it was 45 years ago or 20 years ago or today. It
12 matters that the judge gets involved and is willing to
13 sit -- to listen to -- to both litigants about whatever
14 complaints they have, and so -- and so, yeah, we've gone
15 through periods where we've had fairly unlimited access to
16 documents and to discovery; but if you had a judge that
17 was willing to listen, you know, there was ways that that
18 was stopped and was not given; and we've had -- been on
19 the side where, you know, we don't want them to find out
20 too much about what we have got; but we've got a judge who
21 is willing to sit there and listen and participate.

22 And so my problem is, is not so much trying
23 to come up with a perfect number of questions that you can
24 ask and so forth. My problem is, is how do we get the
25 judges to be participants; and, I mean, if we had the

1 judges that sit around this table as I've been here
2 throughout the years and seen them, that would be awesome,
3 but we don't; and that's what a lot of times has caused so
4 much concern and -- I'm losing the word I need, but so
5 much difficulty with our clients in discovery. And I just
6 throw out the fact that -- that, you know, I come from an
7 area that's a difficult litigation area; but, you know, we
8 had -- we've had judges that were willing to sit there;
9 and, you know, Darrell Hester was one of the great ones
10 down there; and he was because he was willing to sit there
11 and engage in the process and wouldn't let either side
12 take advantage of the rules.

13 And so my -- my idea would be that if we
14 could teach judges in judges school to be participants and
15 be willing to be participants in the process and if we did
16 we would have -- we would have less -- less issues than I
17 think than we have.

18 CHAIRMAN BABCOCK: You think we could do
19 that by rule, Eduardo?

20 MR. RODRIGUEZ: I don't know if we could do
21 that by rule. I mean, we can't do it by rule, obviously,
22 because I think the rules are in order there. I mean, for
23 instance, you know, one of the big judges that was -- I
24 mean, I was a defense lawyer, that was mostly for the
25 other side, told me was, you know, "Don't let any judge

1 tell you to draft the judgment. The judgment is his
2 judgment." But how many -- how many -- you tell me how
3 many judges draft their judgments? I mean, and it's, you
4 know, if I am on the winning side I'm going to draft it,
5 you know, to try and protect my side.

6 CHAIRMAN BABCOCK: Findings of fact and
7 conclusions of law.

8 MR. RODRIGUEZ: Huh?

9 CHAIRMAN BABCOCK: You want findings of fact
10 and conclusions of law, you have the winning party draft
11 it.

12 MS. RODRIGUEZ: That's right. But it's
13 their duty, but they don't ever do it.

14 CHAIRMAN BABCOCK: Yeah. Yeah. Professor
15 Carlson, then Richard.

16 PROFESSOR CARLSON: Chip, it seems to me
17 your proposal is a lot like our level one exists. In
18 level one there is a limit of 15 requests for production,
19 but you can request disclosure of all documents in the
20 possession, custody, or control that the party may use to
21 support their claim or defense, and that is not a request
22 for production according to request for disclosure.

23 CHAIRMAN BABCOCK: That's a good point. I
24 hadn't even thought of that.

25 PROFESSOR CARLSON: So that would be a -- I

1 mean, that's why it's wide open.

2 CHAIRMAN BABCOCK: It's a model for how you
3 could do it if you wanted to do it.

4 PROFESSOR CARLSON: Either that or in level
5 three you could draft a discovery control plan that gives
6 you sufficient information on your contention
7 interrogatories and legal theories that would restrict or
8 the scope of, you know, the litigation so that you could
9 define more narrowly the categories.

10 CHAIRMAN BABCOCK: Yeah. Great point.
11 Richard. Time limit this time.

12 MR. ORSINGER: Yeah.

13 CHAIRMAN BABCOCK: Just kidding.

14 MR. ORSINGER: I haven't been harboring this
15 all year. This is a recent --

16 CHAIRMAN BABCOCK: No, we love hearing
17 everything you have to say.

18 MR. ORSINGER: So I wonder if we shouldn't
19 revisit the Texas Lawyers Creed. It was I think a very
20 beneficial effort on the part of the Supreme Court at the
21 time it came up. There was a debate. I wasn't central to
22 the activity, but I was purpose to the activity, and there
23 was a debate about whether it should be supportable by
24 sanction or not and I think --

25 CHAIRMAN BABCOCK: They exempted the family

1 bar, you know.

2 MR. ORSINGER: This is just a general
3 comment about all practice. I think that the decision was
4 made not to make it enforceable so that it wouldn't
5 encourage satellite litigation on sanctions, and I agree,
6 I think there are too many sanctions. I think the
7 standards are too vague. I very much identified with the
8 discussion earlier today that we don't want to fall back
9 on the court's inherent power to do things. If we have
10 legislation in place or if we have rules in place by the
11 Supreme Court, then I think they ought to supplant
12 inherent power, because that's the effort, is to make it
13 concrete and replicable so we get similar justice in
14 different courts and what have you. Okay.

15 So I don't want a bunch of satellite
16 litigation on violations of the Texas Lawyers Creed, but a
17 lot of the abuses that I think we see in the discovery
18 arena are addressed in the lawyers creed, but they're just
19 ignored, and if you agree with me then maybe you'll feel
20 the same way that perhaps what we ought to do is look and
21 see if there's any part of that or maybe all of that we
22 ought to elevate to a more enforceable standard. Either
23 enforceable from an ethical standpoint from the grievance
24 complaints or from the standpoint of a foundation for the
25 award of attorney's fees for discovery abuse or something,

1 but a lot of good work was done, a lot of good principles
2 were established, but they're not enforceable that I can
3 tell, and that's just a thought, perhaps we should
4 consider that.

5 CHAIRMAN BABCOCK: All right. Great,
6 thanks. I think Pete had his hand up next.

7 MR. SCHENKKAN: I think that the question of
8 electronic discovery of document production requests in
9 the electronic age context needs to be approached with a
10 couple of things in the foreground that are special to
11 that kind of discovery. There's kind of an intrinsic
12 limit on the number of potential witnesses, and there's
13 very much an intrinsic limit on the ability to abuse it by
14 hiding the nature of the potential -- the identity of the
15 potential witnesses or by inflating the number of
16 witnesses that you -- on the other side that you're going
17 to notice up and take the deposition of, and it's going to
18 be easy enough to show how peripheral some of them are and
19 how sensible it is to start a particular order.

20 The same is true for interrogatories, both
21 the interrogatories and the answers. All you really need
22 to be is trained as a lawyer, meaning the judge, to have a
23 pretty good idea by reading through it, this is
24 ridiculous, this is too far afield, that's not a
25 responsive answer. It's not true with electronic

1 discovery. It is intrinsically a fishing expedition to
2 some degree, because all you know about what you don't
3 know is I don't know what I don't know. And so that
4 doesn't answer the question of what do you do about the
5 problem we're facing, Chip, but it means to me that we
6 can't approach it with the sense that we've been down this
7 road before in these other discovery contexts and we sort
8 of know how to solve it. We don't.

9 The second thing is, unlike these other
10 areas of discovery, it is a technological issue and like
11 all of our technological issues it's changing so fast --

12 CHAIRMAN BABCOCK: Yeah.

13 MR. SCHENKKAN: -- that the odds that
14 anything we say about it now will be the right answer
15 three years from now, they may not be zero, but they round
16 to zero, and so we ought to try to approach this question
17 with some -- maybe this is just a way of endorsing what
18 several people have said earlier, maybe we can get some
19 more data, but the third thing is I at least as someone
20 who all I really know -- need to know about information
21 technology is what is the extension of the person who is
22 my information services person because I don't know
23 anything myself. I'm just going to go get the help. If
24 we really want to tackle this project, I surely hope we
25 can find some people who are in the business of big data

1 to come in and talk to us about this.

2 CHAIRMAN BABCOCK: Uh-huh.

3 MR. SCHENKKAN: I would feel more
4 comfortable if I had a better sense of what can be done in
5 the way of essentially pattern recognition when you're
6 faced with a problem I don't even know what pattern I'm
7 looking for, and I'm confident that the people who do this
8 for a multibillion or tens of billion-dollar living may
9 know about it, but I don't think it's come to us.

10 CHAIRMAN BABCOCK: Great point. Somebody
11 over here. Yeah, Dick. Then Roger.

12 MR. HOLME: There are a number of things
13 that have been said here that I would love to respond to,
14 but I don't have the time. When we went through our
15 process in Colorado of revising our rules we were looking
16 and thinking hard about what the federal rules are doing,
17 about what some of the pilot projects had shown and other
18 things, and there were several conclusions we reached
19 early in the game that I think it's easy to lose track of
20 but we shouldn't. Number one, nothing we do is going to
21 be perfect. Whatever we do is going to have exceptions.
22 There has to be capability of allowing for exceptions, but
23 we can't write rules that cover everything. We can't
24 write rules -- and indeed part of the problem with the
25 older federal rules was they didn't limit discovery, and

1 it got to the point where it was so bad that it finally
2 required somebody to take some action, and the action that
3 was taken was to look at a undefined but reasonably
4 understood provision of talking about proportionality.
5 Let the judge in the particular case decide, look, this is
6 a 2 billion-dollar case. What the hell are you
7 complaining about having to spend \$100,000 on -- or a
8 million dollars on electronic discovery, but should we say
9 that the solution to that is to require every case to be
10 exposed to that kind of discovery? No, we should make it
11 proportional, and so that's one of the places where we
12 wanted to go in order to allow the flexibility to deal
13 with different cases in different ways.

14 The understanding that the huge bulk of
15 civil litigation that goes on in this country is under
16 \$100,000, you just can't go through electronic discovery
17 regimes for \$100,000. You've got to be in a position
18 where you can identify more closely what's needed and then
19 stop. It's not perfect. Are there going to be cases that
20 are -- that come out badly because it's not perfect? You
21 bet. That happens everyday under the existing system
22 where people can't afford to go to court or people can't
23 afford to press their valid claims, where they can't
24 afford to press their valid defenses. So that became a
25 central limiting factor in what we ended up doing and I

1 think needs to be something that everybody keeps in mind.

2 By the way, just one brief comment. Our
3 provisions -- and I think it would be true of the feds as
4 well, but our provisions do not cover domestic relations
5 cases. These are different. We do have separate rules
6 that deal with the discovery or with the handling of
7 domestic relations cases, and I'll stop with that.

8 CHAIRMAN BABCOCK: Thank you. Roger.

9 MR. HUGHES: Well, I want to echo the
10 comment that was just made that if we're going to draft
11 rules for, you know, a rules for all seasons, we have to
12 think that most cases don't require unlimited fire power
13 in the nature of discovery, and maybe by rule we can
14 tailor it for that so that you can go to the judge to say
15 if you need more.

16 The other thing I wanted to say was one of
17 the comments earlier about civility and maybe we need to
18 put teeth in the lawyers code. At this point maybe I'm
19 going to sound like Peter Kelly and say we have -- judges
20 have about all the sanction power they need right now
21 between their inherent power and what the Rules of
22 Procedure give them and all of the other penalties. The
23 question in my -- what the problem is in my mind is ethos.

24 CHAIRMAN BABCOCK: Is what?

25 MR. HUGHES: It's an ethos. When I started

1 to practice back in the Eighties if you talked that way
2 about opposing counsel you would get an immediate dressing
3 down in open court in front of every -- all of the counsel
4 and all of the lawyers, and they just basically you don't
5 talk that way, you don't talk that way about judges, you
6 don't talk that way about other attorneys, don't do it
7 again, and you knew there would be consequences for your
8 case if you did. And then this ethos came in that, well,
9 we don't want to punish the client, we don't want the
10 client to suffer for what the lawyer did, and so it was
11 let it slide.

12 And so all sorts of things were said
13 because, number one, I hate to say it, there are some
14 clients, they love to see it. They like it when you
15 get -- throw barbs at the other side or, you know, say bad
16 things about the trial judge. They want to read that in
17 briefs. They want to hear it; and one can understand then
18 why when lawyers advertise on TV they talk about warfare,
19 who's the meanest, who's the roughest, who's the one that
20 will go in to fight. Well, if you have attracted these
21 clients by promising to be a fighter, they want to see
22 blows, they want to see blood drawn. Then they know
23 they're getting what they paid for.

24 So, once again, I think it's not so much
25 that we need sanction power to bring back civility. I

1 think there needs to be, as they say, consequences; and
2 the more people are perceived to -- the more it's
3 perceived to be tolerated, the more we're going to see of
4 it. And that's my two cents worth.

5 CHAIRMAN BABCOCK: Okay. Thank you, Roger.
6 Yeah, Frank.

7 MR. GILSTRAP: I would like to move off of
8 discovery issues.

9 CHAIRMAN BABCOCK: Yeah, let's get to
10 another deep thought.

11 MR. GILSTRAP: This involves a fairly
12 noncontroversial area. It's fairly stable at worst, which
13 is summary judgment. We haven't amended the summary
14 judgment rules since we added no evidence back right about
15 the time I came on the committee. The procedure works,
16 everybody understands it, so why tinker with it? Well,
17 one of the problems is this, and it has to do with as it
18 relates to in some way to ESI. First of all, you know,
19 it's a fairly short time limit. You can't get your motion
20 heard in 21 days, and what you're seeing is very large
21 summary judgment motions with a whole lot of evidence and
22 people responding by throwing the kitchen sink into their
23 response. I don't need to excerpt the depositions. I've
24 got eight depositions, here they all are. They're
25 electronic, put them in the file. The result is the trial

1 judges are confronted with very large records.

2 In response to Richard's comment about the
3 halls and the courtrooms in the civil division being
4 empty, it may be that the judges are in the back reading
5 summary judgment motions. This has been addressed by some
6 of the federal districts, and it's just a modest proposal,
7 and we might want to think about it, and Judge Evans I
8 think floated this earlier this year, and that is the
9 possibility of placing some type of limit on the size of
10 the summary judgment motion and the evidence so that they
11 don't put the kitchen sink in there and so that people do
12 take more time. You would have to couple that with maybe
13 some rules that maybe kind of formalized the process.
14 Everybody files a reply, but the reply is not in the rule.
15 You might need some more time, and of course, you would
16 have a provision in there allowing leave to exceed these
17 limits --

18 CHAIRMAN BABCOCK: Yeah.

19 MR. GILSTRAP: -- just like you do in the
20 appellate courts, and we don't -- we have kind of a dearth
21 of trial judges on the committee now, and, you know, if
22 maybe some people who have been on the trial bench could
23 speak up, but it seems to me like a modest proposal that
24 we might want to at least consider sometime out there in
25 the future.

1 CHAIRMAN BABCOCK: There's a judge, Frank,
2 in the Southern District of New York who has got a
3 personal rule that says on summary judgment you can only
4 have three exhibits. You can ask her for more, but three
5 is the -- was that a cough or guffaw?

6 HONORABLE TRACY CHRISTOPHER: A little bit
7 of both.

8 CHAIRMAN BABCOCK: And there's a --

9 MR. GILSTRAP: Well, how about 30 exhibits?
10 You know, I mean, but and a lot of judges from what I've
11 seen there are judges who are dealing with this with
12 standing orders about summary judgment motions. But, you
13 know, I have seen some of these motions. I have seen
14 motions prepared by big firms with gangs of lawyers, and
15 they are a real, real pain to respond to and cost a lot of
16 money, and, you know, maybe this is an abuse we want to
17 deal with.

18 CHAIRMAN BABCOCK: Yeah. All right. Good
19 point. Yeah, Professor Carlson.

20 PROFESSOR CARLSON: Kennon asked me to raise
21 in relation to summary judgment the idea of for pro se
22 litigants advising them when their response is due. She
23 said most pro se litigants get served with a motion for
24 summary judgment. No one knows what that is. Everybody
25 thinks you get your day in court, and they don't file the

1 response and then they end up losing. So I said I would
2 pass that along.

3 CHAIRMAN BABCOCK: How would they be
4 notified?

5 PROFESSOR CARLSON: You would have to do
6 something like a special -- not a citation, but something
7 like that.

8 MR. GILSTRAP: Put it in the motion.

9 PROFESSOR CARLSON: Or you could put it in
10 the motion.

11 CHAIRMAN BABCOCK: Boldface and capitals.

12 MR. GILSTRAP: "You have 21 days to
13 respond."

14 PROFESSOR CARLSON: Can I direct a question
15 to Richard Holme? I think you said something this morning
16 that part of the Colorado reform dealt with time frames by
17 which dispositive motions had to be determined by the court,
18 trial court? Did I understand that?

19 MR. HOLME: Yes.

20 PROFESSOR CARLSON: And do you do it just by
21 general all dispositive motions, or you do it by motion?
22 Like summary judgment is this many days and other --

23 MR. HOLME: No, we do it -- well, in the
24 summary judgment case we have a last date that you can
25 file a summary judgment motion in order to -- without

1 leave of court in order to get people thinking about it in
2 enough time that the judge has some time to think about
3 it.

4 MR. ORSINGER: No time limit on the judge to
5 rule, though?

6 PROFESSOR CARLSON: Yeah, that's what I was
7 kind of --

8 MR. HOLME: No. I haven't ever had the
9 balls to do that.

10 PROFESSOR CARLSON: Under submission.

11 MR. HOLME: And while we're on the -- if I
12 may, while we're on summary judgment --

13 CHAIRMAN BABCOCK: Yeah, sure.

14 MR. HOLME: You would be interested to know
15 that IAALS and the American College are right at this
16 moment about a year into thinking about how we can try and
17 do something to expedite summary judgments and to make
18 them cheaper.

19 MR. GILSTRAP: Like what? I mean, that's a
20 fairly broad category.

21 MR. HOLME: Well, one of the key things is
22 to have people go to explain their summary judgment
23 thinking to the court before they file the motion, not as
24 an -- not as an exclusion. You know, if the judge were to
25 say, "That sounds kind of weak" it wouldn't prevent you

1 from filing it, but if the judge says, "That sounds kind
2 of weak" it might dissuade you from doing it. That seems
3 to be the primary thing that has been thought about and is
4 certainly drawn from the experience that a lot of people
5 have had using that requirement to do an oral explanation
6 of what's going on.

7 MR. GILSTRAP: This relates to your earlier
8 proposal about the telephone conference with the judge.

9 MR. HOLME: Yeah.

10 MR. GILSTRAP: Kind of get a reading from
11 where the judge is coming from before you do it.

12 MR. HOLME: Yeah, although I don't think
13 anybody is suggesting that the desirable way to do it is
14 with a telephone. I think they're saying go in and have a
15 hearing with the judge, doesn't have to be a long one,
16 but, you know, there's an awful lot of summary judgment
17 motions that never should have been filed in the first
18 place.

19 CHAIRMAN BABCOCK: Okay. Any more comments
20 about summary judgments? Any more deep thoughts? Shallow
21 thoughts? Any thoughts, jokes? All right. Judge
22 Peeples, last chance.

23 HONORABLE DAVID PEEPLES: You know, back on
24 the documents, can we go back to the documents?

25 CHAIRMAN BABCOCK: Okay.

1 HONORABLE DAVID PEEPLES: Number one, a
2 fateful turn was taken back in the late Eighties when this
3 committee and the Supreme Court, different court, changed
4 from a motion to produce to a request for production.
5 Back in the Eighties, until they changed it in '88 or
6 whenever it was, the movant had to make some kind of
7 showing to get documents. Now, the responding party has
8 to whittle down a request, and maybe it's time to take
9 another look at that.

10 There was mention made -- this was the
11 second point -- of tools for the judge, and somewhere in
12 the 190's of our discovery rules is a rule that says that
13 the judge -- I don't know if it's "shall" or "may" do
14 three things. I don't think it takes a request. Number
15 one, if you can get the discovery elsewhere, the judge can
16 say "no." If the cost exceeds the benefit, the judge can
17 say "no"; and if it's going to be cumulative, burdensome,
18 and so forth, the judge can say "no." Now, that takes a
19 judge who will say "no," but maybe we ought to think
20 about, you know, instead of just a request for production
21 and the burden is on you to whittle it down or else you've
22 got to produce it, say, and maybe in level three cases,
23 the movant at least has to deal with cost exceed benefit,
24 cumulative I guess wouldn't apply on the initial requests,
25 and can you get it elsewhere. We've got -- if it's a

1 product liability case somewhere else -- unless you're the
2 first case somewhere else in the country a whole lot of
3 discovery has been done.

4 CHAIRMAN BABCOCK: Right.

5 HONORABLE DAVID PEEPLES: And maybe that
6 ought to at least be addressed before the court says,
7 "Let's add more." I don't know how you rule, but at least
8 talk about it.

9 CHAIRMAN BABCOCK: Justice-elect Kelly, and,
10 Peter, you were out of the room when Judge Peeples just
11 noted historically that it used to be -- we used to have a
12 motion to produce and now we have a request to produce,
13 and that changed sometime in the Eighties.

14 HONORABLE DAVID PEEPLES: Late Eighties, I
15 think.

16 CHAIRMAN BABCOCK: Late Eighties, and he
17 thinks that we should consider going back to a motion to
18 produce that puts the burden on the requesting party to
19 justify it.

20 HONORABLE DAVID PEEPLES: We should talk
21 about it.

22 CHAIRMAN BABCOCK: Yeah, anyway, I thought
23 you might be interested.

24 MR. KELLY: One reason I started doing
25 appeals was I hated discovery so much and putting an extra

1 layer of having to get -- because sometimes you can't get
2 a ruling on a -- I mean, perhaps it's different in San
3 Antonio where you have the central docket, you can always
4 get a judge. That's one of the big values of it, but in
5 Harris County, if you have to get -- you know, you have to
6 wait two months to get before a trial judge on your
7 motion, and then they have 90 days to produce and 30 days
8 to produce, and all of the sudden you are nine months into
9 when you thought you needed the document before you
10 actually get it, and so I think that would slow things
11 down a great deal.

12 I just raised my hand to comment especially
13 in products case where the discovery can be shared, in any
14 case remotely touching on trade secrets, whether we're
15 going first party cases against insurance companies, any
16 products case, there is very stiff opposition to sharing
17 of discovery, and I've had three mandamuses go up. I
18 don't think I've had one actually ruled on because the
19 case ended up settling or agreements were reached, but
20 sharing of discovery is not -- you can't take it for
21 granted. It's very strictly resisted by the defendants.

22 HONORABLE DAVID PEEPLES: There's a case
23 called *Garcia vs. Peeples* that told the trial judge --

24 MR. ORSINGER: So 40 years later you're
25 going to overturn that, David. Now they won't let us put

1 your name on it anymore.

2 HONORABLE DAVID PEEPLES: Just a topic,
3 Richard.

4 MR. ORSINGER: You can't blame Justice
5 Hecht. He wasn't on the Court then.

6 PROFESSOR ALBRIGHT: Judge, I remember when
7 I first met you I thought, oh, my God, that's the Peeples
8 procedure man.

9 CHAIRMAN BABCOCK: That's true. That's
10 exactly true.

11 MR. ORSINGER: The fateful turn we took was
12 when we changed the rule about putting the district
13 judge's name as the respondent in the mandamus.

14 CHAIRMAN BABCOCK: Right, yeah.

15 MR. ORSINGER: Because then there was no
16 longer any accountability.

17 CHAIRMAN BABCOCK: Whoa.

18 MR. ORSINGER: Well --

19 PROFESSOR CARLSON: Incoming.

20 CHAIRMAN BABCOCK: All right. That was not
21 a deep thought there, I'm fairly certain. Well, I don't
22 know about you-all, but, number one, thanks for staying
23 around. Number two, I say this over and over. This is
24 the best thing I do professionally is be amongst all of
25 you every other month, and it's just terrific. And we do

1 have a date for the next meeting, which is February 15th,
2 and, Marti, why don't you get a notice out to the rest of
3 the committee -- well, everybody here but the rest of the
4 committee next week? I know you've sent something, but a
5 lot of people thought we were kidding. They thought that
6 was a placeholder or something, and then we'll work on a
7 schedule for the whole year. A lot of moving parts in
8 terms of -- in terms of putting that together; and if
9 there's nothing else, everybody have a happy holiday and
10 enjoy life with your family and your friends, and we will
11 see you in 2019.

12 (Adjourned)

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REPORTER'S CERTIFICATION
MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

* * * * *

I, D'LOIS L. JONES, Certified Shorthand
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Given under my hand and seal of office on
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3215 F.M. 1339
Kingsbury, Texas 78638
(512) 751-2618

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