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**MEETING OF THE SUPREME COURT ADVISORY COMMITTEE**

JUNE 21, 2019

(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 21st day of June,  
2019, between the hours of 9:02 a.m. and 2:38 p.m., at the  
State Bar of Texas, 1414 Colorado Street, Austin, Texas  
78701.

**INDEX OF VOTES**

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

<u>Vote on</u>	<u>Page</u>
Rule 91a.7	30,545
Rule 167	30,596

**Documents referenced in this session**

19-11	Joint Judicial Campaign Memo
19-12	MDL Transfers
19-13	Expedited Actions, June 12, 2019 Memo
19-14	HB 3300 and Rule 91a
19-15	Referral Letter with Will Kit attachments
19-16	Report of Rule 167 Subcommittee
19-17	Notice of Appeal, June 11, 2019 Memo
19-18	Pro Se Name Change Instructions, Petitions and Orders
19-19	Adult Name Change Instructions
19-20	Adult Name Change Petition
19-21	Adult Name Change Order
19-22	Child Name Change Instructions
19-23	Child Name Change Petition
19-24	Child Name Change Consent
19-25	Child Name Change Order



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

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

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

22 HONORABLE TRACY CHRISTOPHER: Okay.

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

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

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

1 out of them this time.

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

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

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

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

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

17                   CHIEF JUSTICE HECHT: Yeah.

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

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

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

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

1 approach. I don't think it's in use anywhere else in the  
2 country. Other states have longevity pay like we had for  
3 years, but it's not very much. Ours was 3.1 percent after  
4 16 years, and we didn't have that many judges that were  
5 staying 16 years, so it just was not -- it was not being  
6 used very much at all. So -- yes.

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

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

25 The obstacles we did have are that lots of

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

25 On guardianship compliance, we have 53,000

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

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

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

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

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

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

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

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

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

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

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

13           MS. DAUMERIE: 2021.

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

25           The Court of Criminal Appeals rules

1 committee is considering the evidence rule changes to  
2 align with the federal rules, and these will apply in  
3 civil cases as well. One of them is to limit the Rule  
4 803.16 ancient documents hearsay exception to documents  
5 prepared before 1998 because of the explosion of  
6 electronically stored information. So how -- how do those  
7 rules -- how does the ancient document rule apply to  
8 electronically stored information and the proposed change  
9 that the feds have already adopted, and then there's a  
10 change in Rule 902 to permit the establishment of the  
11 authenticity of -- by certification of machine-generated  
12 information and electronic information, so these are both  
13 changes to accommodate the growing increase of electronic  
14 information, and I understand Professor Goode has approved  
15 the rules -- is approving the rules?

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

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

22 So that's what I have.

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

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

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

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

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

11           You know, the legislative mandate is that  
12 the canons cannot preclude two or more candidates from  
13 conducting joint campaign activity. I think it's common  
14 in both parties to run joint activities. Every voters  
15 forum I've ever been at, almost all of the judges are  
16 standing next to each other, if you're there for a party  
17 event. So the change is a sentence basically added to  
18 both 2B and 5(2) to comply the canons with the Bill 3233.  
19 3233, yeah. And, you know, I think that in the -- from my  
20 perspective of drafting, simplicity is always the best.  
21 It's -- it's pretty simple and elegant in simplicity.  
22 Judge Evans is a simple man, so he can do that easily, and  
23 we -- we came to the end of this I think in all agreement  
24 that this was essentially the best way to fix the canon  
25 while -- while saving the canon. I mean saving the

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

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

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

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

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

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

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

1 under this rule because it's limited only to judicial  
2 candidates. You have to be a candidate. Now, that would  
3 probably be defined by the Election Code as to when you  
4 are a candidate. That would be my -- that would be my  
5 thought with the Judicial Conduct Commission, but it's  
6 limited to the activities, and the legislation was limited  
7 to judicial candidates. So that was the intention of the  
8 committee.

9                   CHAIRMAN BABCOCK: As you noted from the  
10 memo, Justice Hecht provided some historical background  
11 where judges actually wanted this to give them some cover  
12 with the county commissioners, et cetera. Is that still  
13 the -- is that still the feeling that this is helpful to  
14 the judges?

15                   HONORABLE DAVID EVANS: Well, I think the  
16 judges need it. That's the realities of particularly  
17 urban ventures where you don't have any name recognition,  
18 local districts and local appellate -- intermediate  
19 appellate districts, and it's just a -- it's a political  
20 fact that you need to run as a group and you need to be  
21 out there campaigning. I don't think anybody likes it,  
22 but it is -- that's what the realities are. A more  
23 interesting question is, is -- will come in the  
24 enforcement process of the misleading advertisement of  
25 a -- or a -- have you become an endorser. Have you become

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

7 CHAIRMAN BABCOCK: Yeah. Pete.

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

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

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

25 HONORABLE DAVID EVANS: It has not come to

1 that point at this point in the races.

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

10 CHAIRMAN BABCOCK: Yeah. Justice  
11 Christopher.

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

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

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

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

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

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

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

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

23 CHAIRMAN BABCOCK: Buddy.

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

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

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

6 MR. PERDUE: That's exactly the language of  
7 the comment. I don't know, Mr. Munzinger's point in Canon  
8 2B, it says "nothing in this provision." I don't know how  
9 you read the canons collectively, so that's a word choice  
10 issue I would defer on.

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

13 CHAIRMAN BABCOCK: Across the board.

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

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

18 MR. LOW: Yeah, the whole code.

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

21 MR. LOW: Yeah.

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

25 HONORABLE DAVID EVANS: You can just

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

3 CHAIRMAN BABCOCK: Okay.

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

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

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

14 CHAIRMAN BABCOCK: Jim.

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

1 CHAIRMAN BABCOCK: Yeah.

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

10 HONORABLE DAVID EVANS: No, Justice Bland.

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

12 CHAIRMAN BABCOCK: Don't blame him.

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

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

19 MR. HATCHELL: "Nothing herein."

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

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

1 MR. HARDIN: Would somebody put a mark  
2 there?

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

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

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

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

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

6 CHAIRMAN BABCOCK: Well, we all know gray.

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

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

20 MR. MUNZINGER: That would be a violation.

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

24 CHAIRMAN BABCOCK: Okay. Stephen.

25 HONORABLE STEPHEN YELENOSKY: Well, I agree

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

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

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

17 HONORABLE DAVID EVANS: Right.

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

23 HONORABLE DAVID EVANS: Yeah.

24 CHAIRMAN BABCOCK: Kimberly.

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

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

11 CHAIRMAN BABCOCK: Chief Justice Hecht.

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

14 CHAIRMAN BABCOCK: Everything you say  
15 matters.

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

23 CHAIRMAN BABCOCK: Stephen.

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

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

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

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

18 CHAIRMAN BABCOCK: Well, the conduct  
19 commission will decide.

20 HONORABLE STEPHEN YELENOSKY: Well --

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

24 CHAIRMAN BABCOCK: Yeah, Richard. Sorry.

25 HONORABLE STEPHEN YELENOSKY: Well,

1 whatever.

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

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

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

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

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

25           So the rule for your consideration you will

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

16           You will also see the below the recommended  
17 rule addition while you're looking at rules you notice  
18 other things, and that is that we still have rules here  
19 regarding the transfer process before I think it was  
20 September 1, 2003, and whether we still need those rules  
21 on our books is sort of the question. So if you want to  
22 reconsider or if we want to reach that, we've given you  
23 three rules we might look at. Deleting -- obviously if we  
24 were to delete 13.1(c) then our proposed rule would become  
25 13.1(c). If you retained it then we would be 13.1(d).

1 And then, Holly, who is very astute, pointed out that if  
2 we got rid of those rules there was this one provision in  
3 11.7(c), which I've quoted at the bottom in the memorandum  
4 which might still have continuing relevance, so if you  
5 want to get rid of that.

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

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

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

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

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

5 CHAIRMAN BABCOCK: Right.

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

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

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

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

1 future or requiring constant change.

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

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

13 MS. CORTELL: So you would delete it then.

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

16 CHAIRMAN BABCOCK: Holly.

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

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

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

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

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

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

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

1 language. So I --

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

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

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

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

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

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

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

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

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

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

25                  MS. CORTELL: One is just a practical

1 question, which I'm being educated right here from Justice  
2 Christopher that there may be currently pending actions  
3 filed before September 1, 2003. If that is the case then  
4 it would be premature to get rid of the rules. That's  
5 simply -- I'm sorry, we didn't independently research it.  
6 So if there's a sense that there might still be cases out  
7 there then I think that answers it.

8 CHAIRMAN BABCOCK: Okay. So we'll withdraw  
9 that suggestion?

10 MS. CORTELL: We will withdraw that footnote  
11 to our recommendation.

12 MR. PERDUE: There is potential that there  
13 would be on the dust docket on asbestos there could be  
14 something that, you know, that --

15 HONORABLE TRACY CHRISTOPHER: Yeah, I mean,  
16 those dockets still exist, so --

17 CHAIRMAN BABCOCK: Okay. So on this one  
18 we're going to suggest that the Court delete the phrase  
19 "notwithstanding any other law" and then go forward with  
20 the language here, and then the subcommittee withdraws the  
21 suggestion about considering the withdrawal of Rules of  
22 Judicial Administration 13.1(c), 13.11, and possibly  
23 another one, but anyway, we're withdrawing our  
24 recommendation on that. Anything else, Nina?

25 MS. CORTELL: That's it.

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

4                   HONORABLE TRACY CHRISTOPHER: No, he's not.

5                   CHAIRMAN BABCOCK: Are you taking this one  
6 on?

7                   HONORABLE TRACY CHRISTOPHER: I am, yes.

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

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

1           So it's limited only to county courts at  
2 law, and while the amount in controversy is defined as  
3 \$250,000, under the county court provisions that means 250  
4 plus interest, plus attorney's fees, plus statutory  
5 penalties, plus punitive damages. So we're talking about  
6 a potential case of, you know, half a million or more with  
7 a serious punitive damage claim into it.

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

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

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

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

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

12 HONORABLE TRACY CHRISTOPHER: Right.

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

15 HONORABLE TRACY CHRISTOPHER: So that's one  
16 thing, should we -- should we look and make any changes to  
17 169 while we're doing this new change, and then if we're  
18 going to limit it only to county courts, I really think  
19 that we need a task force that has county court judges on  
20 it because, you know, some county court judges are general  
21 jurisdiction county court judges. Some county court  
22 judges do civil and family, some do just civil, and since  
23 we are talking about their entire docket, essentially  
24 creating an expedited action for their entire docket, I  
25 really think we need the input from those courts.

1           Now, it is true that there are other county  
2 courts at law that have jurisdiction above this  
3 250,000-dollar amount. For example, in Dallas they have  
4 the same jurisdiction as district court cases, but we have  
5 such a wide variety of county courts at law, I just think  
6 it would be useful to get some input from the various type  
7 of county court at law judges into the creation of this  
8 rule. You know, it's kind of funny, like the car wreck  
9 docket, some car wrecks can go into county court, some car  
10 wrecks can go into district court, and it really depends  
11 upon the lawyer as to whether he feels more comfortable in  
12 county court or whether he feels more comfortable in  
13 district court as to where, you know, he files those  
14 cases.

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

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

25           HONORABLE TRACY CHRISTOPHER: Okay.

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

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

11                   CHAIRMAN BABCOCK: All right.

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

15                   CHAIRMAN BABCOCK: Professor.

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

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

5 CHAIRMAN BABCOCK: Okay. Richard.

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

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

24 MR. MUNZINGER: A libel case? Yes.

25 CHAIRMAN BABCOCK: Do they have 12 jurors?

1 PROFESSOR ALBRIGHT: Now they do.

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

5 CHAIRMAN BABCOCK: There you go.

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

9 MR. ORSINGER: Ah.

10 CHAIRMAN BABCOCK: Roger.

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

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

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

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

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

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

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

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

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

13 CHAIRMAN BABCOCK: What?

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

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

19 CHAIRMAN BABCOCK: Yeah.

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

23 CHAIRMAN BABCOCK: Yeah.

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

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

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

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

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

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

6 HONORABLE DAVID EVANS: Task force, yes.

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

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

13 CHAIRMAN BABCOCK: Right.

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

1 too, that would be useful on the committee.

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

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

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

10 HONORABLE TRACY CHRISTOPHER: You know --

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

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

15 PROFESSOR ALBRIGHT: Right. Right.

16 HONORABLE TRACY CHRISTOPHER: So --

17 PROFESSOR ALBRIGHT: Wasn't that David  
18 Peeples?

19 HONORABLE TRACY CHRISTOPHER: You know,  
20 that's sort of a different group that started the whole  
21 169 process, so I'm not sure that we have a whole lot of  
22 experience other than I've thought about it.

23 CHAIRMAN BABCOCK: Yeah.

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

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

3                   HONORABLE TRACY CHRISTOPHER:   Okay.

4                   CHAIRMAN BABCOCK:   That's good info.

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

11                  CHAIRMAN BABCOCK:   Yep.  Justice Gray.

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

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

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

9 CHAIRMAN BABCOCK: Who is that, Judge?

10 HONORABLE DAVID EVANS: That's Ray Wheless.

11 CHAIRMAN BABCOCK: Okay.

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

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

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

3 MR. PERDUE: Leach. Was he carrying HB  
4 3336? Do you know? I can't tell if they were companions.

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

8 CHAIRMAN BABCOCK: Note the laughter.

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

13 CHAIRMAN BABCOCK: Right.

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

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

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

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

14           HONORABLE DAVID EVANS: Right.

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

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

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

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

7 HONORABLE DAVID EVANS: The enrolled one.

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

19 CHAIRMAN BABCOCK: Yeah, Jim.

20 MR. PERDUE: But my recollection was that  
21 169 wasn't drafted by this committee or subcommittee of  
22 this committee. There was a task force set up kind of of  
23 constituents outside the committee that then participated  
24 in the drafting of 169 the committee voted on and then  
25 they came to us kind of with this two-pronged option, the

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

3 CHAIRMAN BABCOCK: Uh-huh.

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

9 CHAIRMAN BABCOCK: There's always hope, Jim.

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

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

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

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

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

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

18 CHAIRMAN BABCOCK: Yeah, that's --

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

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

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

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

5 MR. SCHENKKAN: Yep.

6 CHAIRMAN BABCOCK: Judge Evans. Sorry.

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

1 MR. SCHENKKAN: Right.

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

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

8 MR. SCHENKKAN: It does.

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

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

25 CHAIRMAN BABCOCK: Yeah, I think that's a

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

4 MS. PHILLIPS: Okay.

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

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

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

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

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

3 HONORABLE TRACY CHRISTOPHER: No, it was  
4 not.

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

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

9 CHAIRMAN BABCOCK: Okay.

10 HONORABLE PETER KELLY: David Parker, David  
11 Chamberlain.

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

13 MR. JACKSON: Chip, if you look at the title  
14 of our committee on number six, expedited actions, it's  
15 171 through 205.

16 CHAIRMAN BABCOCK: Right.

17 HONORABLE DAVID EVANS: What if we amend the  
18 title?

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

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

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

1 CHAIRMAN BABCOCK: January 1.

2 MR. LOW: So there's time.

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

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

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

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

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

1 CHAIRMAN BABCOCK: Yeah, sure.

2 MR. FULLER: Something along those lines.

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

6 HONORABLE TRACY CHRISTOPHER: Well, the --  
7 then there are some easier parts of this bill. So the  
8 remainder of the changes amend various sections of Chapter  
9 25 on statutory county courts. As we've talked about, you  
10 know, every county has a slightly different way they  
11 handle their county courts, so it's -- the remainder of it  
12 is to allow many county courts to have the higher limit of  
13 cases, upping it from 50,000 to 200 or 250,000, and for  
14 those county courts that already have the higher limits  
15 requiring a 12-man jury for any case where the amount in  
16 controversy is over 250,000, unless the parties agree to a  
17 lesser number or it's waived. Increase the jurisdiction  
18 in JP court, as we discussed, to 20,000.

19 So then on page three of our memo you'll see  
20 in connection with these changes we need to change Rule 47  
21 to have that you have to plead between 100 and 250, in  
22 between 250 and a million, and then we have to change Rule  
23 500.3 to up the jurisdiction of the county courts from 10  
24 to 20,000. So those are pretty, you know, just  
25 noncontroversial changes that need to be done.

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

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

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

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

9 CHAIRMAN BABCOCK: Sorry. Judge Evans.

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

13 HONORABLE TRACY CHRISTOPHER: Right.

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

18 HONORABLE TRACY CHRISTOPHER: But, I mean --

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

21 HONORABLE TRACY CHRISTOPHER: I mean, I  
22 think if I -- if we were in county court and I agreed on a  
23 10-person jury just because that's how big the courtroom  
24 is or whatever --

25 HONORABLE DAVID EVANS: Right.

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

3 HONORABLE DAVID EVANS: That's right, okay.

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

9 HONORABLE DAVID EVANS: I was just saying  
10 that --

11 THE REPORTER: Speak up.

12 HONORABLE TRACY CHRISTOPHER: Right.

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

15 HONORABLE TRACY CHRISTOPHER: Yes.

16 HONORABLE DAVID EVANS: -- questions.

17 HONORABLE TRACY CHRISTOPHER: Yes.

18 HONORABLE DAVID EVANS: They can --

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

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

24 CHAIRMAN BABCOCK: Tom.

25 MR. RINEY: The court reporter looks

1 stressed.

2 HONORABLE DAVID EVANS: I'm sorry.

3 HONORABLE TRACY CHRISTOPHER: Sorry.

4 MR. RINEY: They were talking over one  
5 another.

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

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

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

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

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

16 CHAIRMAN BABCOCK: '21.

17 MR. GILSTRAP: 2021.

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

21 CHAIRMAN BABCOCK: (h-1), right.

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

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

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

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

7 MR. GILSTRAP: 2020.

8 HONORABLE TRACY CHRISTOPHER: So it's not a  
9 '19 change for even these minor ones.

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

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

15 MR. GILSTRAP: Okay.

16 CHAIRMAN BABCOCK: Okay.

17 HONORABLE TRACY CHRISTOPHER: Is my reading.

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

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

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

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

1 going to appoint a rule -- Rules 167 through 170  
2 subcommittee of which we currently have none, so three  
3 rules, including the morass of offers of settlement in  
4 that -- in that three rule grouping. Oh, I know, he's in  
5 the middle of this. Perdue, I'm talking about. So since  
6 the court reporter appears to be stressed let's take our  
7 morning break.

8 (Recess from 10:46 a.m. to 11:08 a.m.)

9 CHAIRMAN BABCOCK: All right. Next up is  
10 none other than Richard Orsinger.

11 MR. ORSINGER: Yes, sir. Item 7 on the  
12 docket, for those of you that are here, and we don't have  
13 a paper handout on this, but I have sent two e-mails in  
14 the last hour. One ten minutes ago. Now, I was listening  
15 the whole time.

16 CHAIRMAN BABCOCK: By the way, are there  
17 people outside or something or did --

18 MR. WATSON: No, just the last discussion  
19 was so simple.

20 CHAIRMAN BABCOCK: Discussion drive everyone  
21 away? David, see if you can round up some people.

22 MR. ORSINGER: You're all encouraged to look  
23 at your e-mail if you can because this is a very limited  
24 issue. Let me read first the referral letter from Chief  
25 Justice Hecht back on May 31. I'm going to quote.

1 "Dismissal. Rule of Procedure 91a provides for the  
2 dismissal of baseless causes of action implementing  
3 Government Code section 22.004(g), Civil Practice &  
4 Remedies Code 30.021 mandates an award of costs and  
5 attorney's fees to the prevailing party. House Bill  
6 3300," which is out of the current Legislature, "amends  
7 section 30.021 to make an award discretionary and applied  
8 to cases commenced on or after September 1 of 2019. The  
9 committee should consider whether other rules should be  
10 changed or comments added to reference or restate the  
11 statute by that date."

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

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

3           The bill then is -- has an effective date of  
4 September 1, and it's prospective only, and so House Bill  
5 3300 made one change of one word, and it moved from "the  
6 court shall award costs and reasonable and necessary  
7 attorney's fees to the prevailing party" and changed that  
8 to "may." So if you go to our Rule 91a.7, tracked the  
9 Civil Practice and Remedies Code, and I will read that.  
10 "Award of costs and attorney's fees required except in an  
11 action by or against a governmental entity or a public  
12 official acting in his or her official capacity or under  
13 color of law the court" previously "must award the  
14 prevailing party on the motion all costs and reasonable  
15 and necessary attorney's fees incurred with respect to the  
16 challenged cause of action in the trial court. The court  
17 must consider evidence regarding costs and fees in  
18 determining the award."

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

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

10 CHAIRMAN BABCOCK: Okay. Comment? Frank.

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

19 CHAIRMAN BABCOCK: Right.

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

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

5 CHAIRMAN BABCOCK: Pete.

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

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

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

17 CHAIRMAN BABCOCK: A decision this morning.

18 MR. SCHENKKAN: Unless you plan to tell him.

19 CHAIRMAN BABCOCK: Yeah, Richard.

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

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

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

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

10 MR. ORSINGER: Agree to what?

11 HONORABLE STEPHEN YELENOSKY: Fees.

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

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

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

7                   CHAIRMAN BABCOCK: Yeah, Lamont.

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

25                   CHAIRMAN BABCOCK: Okay. Judge Evans.

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

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

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

18 CHAIRMAN BABCOCK: Probably by you.

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

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

1 explain why we've deleted it?

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

6 CHAIRMAN BABCOCK: Right.

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

11 CHAIRMAN BABCOCK: Right.

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

21 CHAIRMAN BABCOCK: Today.

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

24 CHAIRMAN BABCOCK: Oh, Schenkkan is  
25 overselling it.

1 MR. SCHENKKAN: Maybe it was yesterday.

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

8 CHAIRMAN BABCOCK: Yeah.

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

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

14 CHAIRMAN BABCOCK: Stephen.

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

25 CHAIRMAN BABCOCK: Okay. Justice Gray.

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

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

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

14 CHAIRMAN BABCOCK: Pretty good point.  
15 Justice Christopher.

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

19 MR. ORSINGER: Right.

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

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

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

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

6 CHAIRMAN BABCOCK: Right. Right.

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

9 CHAIRMAN BABCOCK: Right.

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

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

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

1 it, you have to hear it.

2 MR. GILSTRAP: I think that does it.

3 MR. DAWSON: Yeah, that works.

4 CHAIRMAN BABCOCK: Does that solve that  
5 problem? Stephen.

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

18 CHAIRMAN BABCOCK: Any other comments?  
19 Yeah, Jim.

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

23 CHAIRMAN BABCOCK: Which Schenkkan does,  
24 minute by minute.

25 MR. SCHENKKAN: Not minute by minute

1 apparently.

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

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

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

7           It's dangerous to kind of -- as Judge Evans  
8 put it, to put everything in the rule and not allow for  
9 some flexibility, especially now that you're giving kind  
10 of this -- I mean, the effect of this is going to be  
11 broadening this practice. You're going to -- if you  
12 thought you saw a lot of 91a's before, you're going to get  
13 12(b)(6) world. This is 12(b)(6) world come to Texas.

14           MR. GILSTRAP: Exactly.

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

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

24           MR. PERDUE: I'd delete it.

25           CHAIRMAN BABCOCK: Okay. Justice

1 Christopher.

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

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

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

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

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

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

1 CHAIRMAN BABCOCK: Justice Kelly.

2 HONORABLE PETER KELLY: 91a motions come  
3 early in the litigation, so in theory costs should be de  
4 minimis, but they do have a factor -- there are statutes  
5 and rules governing allocation and collection of costs, in  
6 particular 31.007(b) of the CPRC and TRCP 131. Curiously,  
7 the CPRC says costs may be awarded to the prevailing  
8 party. Rule 131 says they shall be awarded to the  
9 prevailing party, and if we're going to be fixing "mays"  
10 and "shalls," maybe we want to go in and fix 131 as well.  
11 But if we're going to adopt or change the rules with  
12 regard to 91a costs, they should probably be -- make  
13 reference to or at least be consonant with the CPRC and  
14 the rules that are already in place, including 131 and  
15 141, which says the departure -- the trial court doesn't  
16 have to award all costs on good cause shown, but there  
17 already is a structure in place for the awarding of costs,  
18 and this -- instead of inventing a new structure maybe we  
19 should make it parallel, but we should also fix 131 to be  
20 permissive rather than mandatory because it deviates from  
21 the CPRC.

22 CHAIRMAN BABCOCK: Yeah, Jim.

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

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

4 CHAIRMAN BABCOCK: Okay.

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

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

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

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

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

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

25 CHAIRMAN BABCOCK: It's not a gun thing.

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

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

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

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

14 CHAIRMAN BABCOCK: Yes.

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

20 CHAIRMAN BABCOCK: Yeah.

21 MR. SCHENKKAN: But we can't have silence in  
22 91a.7 on evidence if we're going to leave the language in  
23 91a.6 that says you don't hear evidence except as required  
24 by 91a.7.

25 CHAIRMAN BABCOCK: Yeah, the thing I liked

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

2 MR. SCHENKKAN: Right.

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

6 MR. SCHENKKAN: And I agree with that.

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

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

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

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

20 MR. ORSINGER: Right. I agree.

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

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

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

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

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

7 MR. ORSINGER: Yes, I am.

8 CHAIRMAN BABCOCK: Read it with his  
9 amendment.

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

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

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

17 MR. ORSINGER: Right.

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

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

25 HONORABLE PETER KELLY: But how do they get

1 the court reporter fees, deposition fees?

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

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

7 MR. ORSINGER: I don't --

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

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

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

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

20 CHAIRMAN BABCOCK: Yeah.

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

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

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

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

14 CHAIRMAN BABCOCK: Okay. Yeah, Buddy.

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

19 CHAIRMAN BABCOCK: Yeah.

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

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

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

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

16 CHAIRMAN BABCOCK: Yeah.

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

20 CHAIRMAN BABCOCK: Levi.

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

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

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

5 HONORABLE STEPHEN YELENOSKY: Well --

6 CHAIRMAN BABCOCK: Stephen.

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

21 HONORABLE LEVI BENTON: Including agreements  
22 and stipulations.

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

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

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

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

10 MR. MUNZINGER: Fees or attorney's fees?

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

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

17 MR. ORSINGER: Right.

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

21 MR. ORSINGER: It is.

22 CHAIRMAN BABCOCK: Yeah, so say it again.

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

25 CHAIRMAN BABCOCK: Justice Kelly.

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

5 CHAIRMAN BABCOCK: Levi.

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

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

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

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

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

19 CHAIRMAN BABCOCK: Justice Christopher.

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

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

1 MR. PERDUE: Richard's revised last  
2 sentence.

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

5 MR. DAWSON: Levi.

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

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

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

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

14 HONORABLE TRACY CHRISTOPHER: The title of  
15 91a.7 will also need to be changed to delete "required."

16 CHAIRMAN BABCOCK: Whooo.

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

18 CHAIRMAN BABCOCK: No.

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

22 HONORABLE TRACY CHRISTOPHER: Yes.

23 CHAIRMAN BABCOCK: Yeah.

24 MR. ORSINGER: What a catch there.

25 CHAIRMAN BABCOCK: That is a nice catch,

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

3 MR. ORSINGER: That's it.

4 CHAIRMAN BABCOCK: Frank.

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

7 CHAIRMAN BABCOCK: Hang on. Listen,  
8 everybody.

9 MR. ORSINGER: Speak up.

10 MR. GILSTRAP: I think Jim Perdue is right.  
11 12(b)(6) is coming to Texas courts. If you were on the  
12 committee back when we initially drafted 91a, that was not  
13 the intent. Lonny Hoffman I think was pretty eloquent in  
14 saying we don't -- we don't want to have 12(b)(6), and he  
15 cited the famous Ashcroft against Iqbal case in which the  
16 Court defined how you do 12(b)(6), and we talked about,  
17 well, this would only apply in really marginal cases such  
18 as someone alleging that the martians were bugging their  
19 phone or something. I mean, serious. That's the type of  
20 talk we had, and but it hadn't worked out that way.

21 CHAIRMAN BABCOCK: No, events have overtaken  
22 our discussion.

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

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

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

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

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

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

15 CHAIRMAN BABCOCK: That would be nine.

16 MS. CORTELL: E, Tab E.

17 CHAIRMAN BABCOCK: Item 9 on the agenda.

18 MS. CORTELL: Tab E.

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

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

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

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

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

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

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

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

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

14 CHAIRMAN BABCOCK: So you have high hopes  
15 for it.

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

1 Court's Will Forms Task Force as is.

2 CHAIRMAN BABCOCK: Great.

3 MR. PERDUE: So endeth Perdue's report.

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

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

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

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

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

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

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

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

4 CHAIRMAN BABCOCK: Buddy.

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

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

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

20 CHAIRMAN BABCOCK: Yeah. Richard Orsinger.

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

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

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

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

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

25 HONORABLE PETER KELLY: I think it's there

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

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

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

15 CHAIRMAN BABCOCK: Lamont, did you have a  
16 comment?

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

1 says, "This is the right will form if," and it's got these  
2 categories; and it says, "If this is not the right will  
3 form there are other forms that may apply to you," all  
4 suggesting that there are other -- other potential ways to  
5 leave your -- to leave your gifts, leave your estate.

6           So, I mean, I think you could add in each  
7 of -- each one of these boxes that, you know, something to  
8 the effect of there may not -- "None of the forms in this  
9 packet may be suitable for your situation" or words to  
10 that effect, but I think those are really changes of a  
11 margin. It's a really good -- really good job.

12           CHAIRMAN BABCOCK: Yeah. Justice  
13 Christopher.

14           HONORABLE TRACY CHRISTOPHER: There are  
15 assets that pass outside of a will, and with the use of  
16 the transfer upon death deed it's a way to transfer your  
17 real property without going through a will, and I'm not a  
18 hundred percent sure, but I believe that the transfer upon  
19 death deed trumps what's in your will.

20           MR. ORSINGER: Sure. Sure.

21           HONORABLE TRACY CHRISTOPHER: Your life  
22 insurance designation trumps what's in your will. Your  
23 bank accounts that say joint tenancy with right of  
24 survivorship to X trumps what's in your will, and to me  
25 that needs to be addressed somewhere in here.

1 MR. ORSINGER: Sure does. Sure does.

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

6 CHAIRMAN BABCOCK: Stephen.

7 HONORABLE STEPHEN YELENOSKY: Well, I mean,  
8 as essentially the conversation has pointed out, there are  
9 all kinds of different things that could -- could be  
10 addressed here, but we need to address it for the people  
11 who would be using this form who don't have lawyers, and  
12 95 percent of them or whatever are going to use this form  
13 and leave it to children or have no children. Maybe we  
14 need a comment in there, even -- we could have Richard  
15 Munzinger's comment put in there that says you can leave  
16 this to your mistress if you want, Richard Munzinger, but  
17 there could be a comment in there that basically disclaims  
18 that these are the only ways to do it, but I'm really  
19 against changing the form to accommodate all these  
20 different ways, which will rarely be used and, therefore,  
21 will be unnecessarily complex for people who don't have  
22 lawyers.

23 CHAIRMAN BABCOCK: Yeah. Yeah, Marcy.

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

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

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

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

15 MS. McALLISTER: In the instructions.

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

24 MR. PERDUE: Yeah.

25 HONORABLE TRACY CHRISTOPHER: So that's my

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

3 CHAIRMAN BABCOCK: Okay. Buddy.

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

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

12 MR. LOW: I mean --

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

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

20 CHAIRMAN BABCOCK: Yeah.

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

24 CHAIRMAN BABCOCK: Good point. Eduardo.

25 MR. RODRIGUEZ: At the risk of getting

1 yelled at --

2 CHAIRMAN BABCOCK: Nobody is yelling at you.

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

20 CHAIRMAN BABCOCK: Tom.

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

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

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

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

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

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

9 MR. ORSINGER: You're in trouble.

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

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

25 CHAIRMAN BABCOCK: Richard, then Skip.

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

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

23                   MS. McALLISTER: Yeah.

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

1 piece.

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

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

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

25 So that's the plan, to make it in

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

8 CHAIRMAN BABCOCK: Okay.

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

12 MR. ORSINGER: Yes.

13 MR. MUNZINGER: That's what I thought.

14 MS. McALLISTER: Yeah.

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

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

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

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

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

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

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

18           CHAIRMAN BABCOCK: Roger.

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

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

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

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

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

21                   MR. ORSINGER: No, Chip --

22                   CHAIRMAN BABCOCK: Stephen, then Buddy, then  
23 Richard.

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

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

3 CHAIRMAN BABCOCK: Right.

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

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

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

12 MR. ORSINGER: No.

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

16 MS. McALLISTER: Correct. Right.

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

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

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

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

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

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

18 HONORABLE STEPHEN YELENOSKY: Oh.

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

25 HONORABLE STEPHEN YELENOSKY: Yeah. And, I

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

11 CHAIRMAN BABCOCK: Buddy.

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

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

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

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

23 MR. LOW: Okay.

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

1 MR. LOW: All right.

2 CHAIRMAN BABCOCK: Yeah.

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

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

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

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

11 HONORABLE TOM GRAY: Okay.

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

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

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

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

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

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

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

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

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

7 CHAIRMAN BABCOCK: Trish.

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

15 CHAIRMAN BABCOCK: Richard.

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

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

10 CHAIRMAN BABCOCK: Don't we all. Alistair.

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

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

1 looked at it, people who know a lot more about probate law  
2 than respectfully most of the people in this room, and  
3 this is what they have come up with. The subcommittee has  
4 looked at it, and they unanimously recommend it. I think  
5 there have been some useful comments that the Court could  
6 consider in terms of, you know, revisions that they may  
7 contemplate, but I respectfully submit that we ought to  
8 vote on the recommendation of the -- of the subcommittee  
9 to present these to the Court for the Court's  
10 consideration and whatever revisions they think are  
11 probate --

12 MR. JEFFERSON: Second.

13 MR. DAWSON: -- in light of this discussion.

14 CHAIRMAN BABCOCK: Pete.

15 MR. SCHENKKAN: The concern has been that  
16 we're not honoring the statute if we have a form that has  
17 the Spanish in it, but the same statute that requires that  
18 only the English language version be submitted and that  
19 the Spanish language not be submitted, clause (2) of that  
20 very clause says that the Spanish language must be  
21 incorporated into the English language version of the form  
22 in a manner that's understandable to both.

23 MR. MUNZINGER: What page is that, Pete?

24 MR. SCHENKKAN: That is page two of the act,  
25 which is -- I guess the act is the next thing after the

1 committee's --

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

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

8 MR. MUNZINGER: I agree with you.

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

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

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

16 CHAIRMAN BABCOCK: Roger, then Evan.

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

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

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

20                   CHAIRMAN BABCOCK: Evan.

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

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

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

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

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

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

16 CHAIRMAN BABCOCK: Richard, you've got Rule  
17 167.

18 MR. MUNZINGER: You ready?

19 CHAIRMAN BABCOCK: Yeah. Let's go.

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

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

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

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

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

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

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

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

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

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

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

8 MR. MUNZINGER: It was.

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

11 MR. MUNZINGER: Yes.

12 CHAIRMAN BABCOCK: So --

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

1 the question before us.

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

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

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

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

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

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

25                   MR. MUNZINGER: Elaine was on the committee.

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

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

22                   CHIEF JUSTICE HECHT: Just to add to that --

23                   CHAIRMAN BABCOCK: The Chief might embellish  
24 on that.

25                   CHIEF JUSTICE HECHT: The committee I think

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

7 CHAIRMAN BABCOCK: Right.

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

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

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

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

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

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

10 MR. PERDUE: Right.

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

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

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

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

21 CHAIRMAN BABCOCK: Right.

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

1 under which a defendant might bring its part of the case  
2 under this rule, and that is somebody who is third-partied  
3 in after the case has been underway a long time, and I  
4 do -- it does seem to me that that at least, maybe only  
5 hypothetically, poses a different situation, because if  
6 it's the case as first filed against a set of defendants,  
7 it's at least plausible that the -- even the plaintiff may  
8 need some time to think about what to do, but if the case  
9 has been going on a long time and one of the defendants is  
10 third-partying in somebody else, there is a whole lot more  
11 expense that's already been occurred and a whole lot more  
12 that's already known about the case and a whole lot less  
13 justification for saying you get to continue to run the  
14 clock for 60 more days before somebody can make an offer.

15           I mean, that's what I understand to be kind  
16 of the common sense of this second question, and I don't  
17 have enough -- I don't have any relevant experience to  
18 bring to bear on what the answer to the question ought to  
19 be, and I would defer to those who have been involved in  
20 some appreciable fights about potentially responsible  
21 third parties and that sort of thing to shed any light  
22 there might be on whether you still need the rule that if  
23 a newly added defendant in that way wants to invoke the  
24 rule it can do so, but it has to wait 60 more days before  
25 it can make an offer under it and whether that's still a

1 good idea or not.

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

7 CHIEF JUSTICE HECHT: Yeah.

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

12 MR. SCHENKKAN: Right.

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

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

1 statute.

2 CHAIRMAN BABCOCK: Buddy.

3 MR. LOW: Chip, Richard raised a point.

4 Sometimes there might be -- it might be a denial of  
5 coverage or waiting on certain things or you can't get the  
6 parties together in 60 days. Is there any way the parties  
7 can agree to a different date? I mean, you know, it might  
8 be that their idea to get coverage worked out first, or is  
9 that permissible under the rule as written where you could  
10 unite and agree? Well, it can't be done in 60 days, we'll  
11 agree to a certain date.

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

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

19 CHAIRMAN BABCOCK: Yeah.

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

23 MR. LOW: Okay.

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

1 third party situation to be the opposite of that. The  
2 assertion, I gather, is being made that by some counsel  
3 for newly added defendants under third party practice,  
4 that the plaintiff is relying on the 60 days to be able to  
5 run up the fees more, and I'm not -- I am not endorsing  
6 this proposition. I'm not sure I can even parse it in my  
7 head and see how plausible it is, but I understand that's  
8 the -- it's not curable in the way you're talking about,  
9 because the proposition is that there isn't an agreement  
10 between the two sides about that.

11 MR. LOW: Right.

12 MR. SCHENKKAN: And so I guess that's such a  
13 defendant could move as soon as he's been served --

14 CHAIRMAN BABCOCK: Yeah.

15 MR. SCHENKKAN: -- asking the court to  
16 shorten it, but that's the only remedy under the existing  
17 rule.

18 CHAIRMAN BABCOCK: Yeah. Tom.

19 MR. RINEY: If we're trying to protect third  
20 party defendants from being brought in, it's just  
21 difficult to imagine the circumstances where I'm brought  
22 in as a third party defendant and I am so anxious to offer  
23 money to settle the case and subject my client to a risk  
24 of attorney's fees that the client wasn't otherwise  
25 subject to that I couldn't wait 60 days to make my offer.

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

11 MR. LOW: Confusing.

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

14 MR. MUNZINGER: I agree with that.

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

17 MR. MUNZINGER: No.

18 CHAIRMAN BABCOCK: -- Justice Enoch or  
19 Wainwright faced?

20 MR. MUNZINGER: No.

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

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

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

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

14 MR. DAWSON: Leave it the way it is.

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

18 MR. RINEY: Yes.

19 HONORABLE TRACY CHRISTOPHER: Second.

20 MS. CORTELL: Second.

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

24 MR. PERDUE: Nor Justice Gray.

25 CHAIRMAN BABCOCK: Huh?

1 MR. PERDUE: Nor Justice Gray.

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

5 CHIEF JUSTICE HECHT: And he didn't.

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

9 MR. MUNZINGER: No.

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

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

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

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

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

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

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

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

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

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

6 CHAIRMAN BABCOCK: Justice Christopher.

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

1 what they took down.

2 HONORABLE PETER KELLY: In the clerk's  
3 record?

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

6 HONORABLE TOM GRAY: Besides the payroll  
7 records.

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

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

15 HONORABLE TRACY CHRISTOPHER: They could.

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

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

20 CHAIRMAN BABCOCK: David Jackson.

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

1 HONORABLE TRACY CHRISTOPHER: Right.

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

4 CHAIRMAN BABCOCK: Richard.

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

21 CHAIRMAN BABCOCK: Justice Gray.

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

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

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

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

9 CHAIRMAN BABCOCK: Judge Peeples.

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

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

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

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

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

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

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

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

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

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

24                  CHAIRMAN BABCOCK: Eduardo.

25                  MS. RODRIGUEZ: Well, at the risk of being

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

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

12 CHAIRMAN BABCOCK: Justice Kelly.

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

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

1 Rule 21a service? What they probably mean is what Chapter  
2 74 used to say, which is furnish a copy of the extra --

3 CHAIRMAN BABCOCK: Right.

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

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

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

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

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

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

21 HONORABLE TOM GRAY: Pete does.

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

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

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

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

5                   CHAIRMAN BABCOCK: Justice Christopher.

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

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

1 don't know whether that just means the court reporters  
2 have to set up some sort of an account to become a -- you  
3 know, like lawyers do.

4 CHAIRMAN BABCOCK: Judge Peeples.

5 MS. BARON: It's 9.5, sorry.

6 HONORABLE DAVID PEEPLES: The court reporter  
7 is a very interested person in this discussion and a  
8 crucial person, and I just think it's not going to get  
9 done if we don't work through the court reporters. Judges  
10 ought to be doing it, but, I mean, you think about a lot  
11 of things and sometimes you just don't write it down. But  
12 we need to think in terms of telling court reporters part  
13 of your job -- you're going to have to spend -- if  
14 somebody wants to appeal this case, you're going to have  
15 to spend time on this, and you can minimize the time you  
16 spend trying to track down -- if they call you saying,  
17 "Did you report this hearing," you've got to dig through  
18 all of the records. You can minimize the time maybe in  
19 the future if you just get yourself in the system as part  
20 of your job when you show up and report that day.

21 MR. JACKSON: That's right.

22 HONORABLE DAVID PEEPLES: And it may need to  
23 be in the rules, but I'm thinking, David, I think people  
24 ought to be told that because it's so easy to do that.

25 MR. JACKSON: It's the court reporter that's

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

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

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

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

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

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

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

18 CHAIRMAN BABCOCK: Yeah.

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

22 CHAIRMAN BABCOCK: Justice Kelly.

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

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

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

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

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

24           CHAIRMAN BABCOCK: We're good.

25           MS. BARON: Good.

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

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

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

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

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

16 CHAIRMAN BABCOCK: Uh-huh.

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

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

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

21 MR. ORSINGER: Wrampelmeier.

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

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

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

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

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

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

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

8 CHAIRMAN BABCOCK: Stephen. Thank you,  
9 Pete.

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

13 MR. SCHENKKAN: No apology necessary.

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

19 MR. SCHENKKAN: Oh, my.

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

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

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

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

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

25           CHAIRMAN BABCOCK: Anybody else?

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

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

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

13 MR. SCHENKKAN: That's what I meant.

14 CHAIRMAN BABCOCK: With the forms.

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

18 CHAIRMAN BABCOCK: Yeah. Maybe on another  
19 day.

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

24 HONORABLE STEPHEN YELENOSKY: Oh, the change  
25 in gender?

1 MR. SCHENKKAN: Yeah.

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

6 MR. SCHENKKAN: Right.

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

10 MR. SCHENKKAN: Right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 all day for this.

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

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

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

7 CHAIRMAN BABCOCK: Yeah, Evan.

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

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

25 CHAIRMAN BABCOCK: Right. Good comment.

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

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

4 CHAIRMAN BABCOCK: Okay.

5 HONORABLE LEVI BENTON: Can I change my  
6 name?

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

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

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

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

22 CHAIRMAN BABCOCK: What?

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

25 CHAIRMAN BABCOCK: Two days, both days right

1 now.

2 MS. BARON: Okay.

3 CHAIRMAN BABCOCK: All right. Well, thank  
4 you very much, everyone. We will stand in recess. June  
5 21, 2019.

6 (Adjourned)

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**REPORTER'S CERTIFICATION**  
MEETING OF THE  
SUPREME COURT ADVISORY COMMITTEE

\* \* \* \* \*

I, D'LOIS L. JONES, Certified Shorthand  
Reporter, State of Texas, hereby certify that I reported  
the above meeting of the Supreme Court Advisory Committee  
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I further certify that the costs for my  
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Charged to: The State Bar of Texas.

Given under my hand and seal of office on  
this the 7th day of July, 2019.

/s/D'Lois L. Jones  
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