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**MEETING OF THE SUPREME COURT ADVISORY COMMITTEE**

AUGUST 28, 2020

(via Zoom videoconference)

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        Taken before *D'Lois L. Jones*, Certified  
Shorthand Reporter in and for the State of Texas, reported  
by machine shorthand method, on the 28th day of August,  
2020, between the hours of 9:00 a.m. and 4:07 p.m., via  
Zoom videoconference and YouTube livestream in accordance  
with the Supreme Court of Texas' Emergency Orders  
regarding the COVID-19 State of Disaster.

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**Documents referenced in this session**

20-37 August 7, 2020 S. Henricks Letter to Justice Busby
20-38 August 24, 2020 Memo - Procedures to Compel a Ruling
20-39 Rule IX, Compensation
20-40 August 13, 2020 Memo - Rule 306a(3)
20-41 August 13, 2020 Memo - TRAP 24.1(b)(2)
20-42 August 13, 2020 Memo - TRAP 34.5(a)
20-43 August 20, 2020 Memo - Briefing Rule
20-44 August 13, 2020 Memo - TRAP 56.2 Vacating Opinions

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1  
2 CHAIRMAN BABCOCK: Okay. Well, I've got  
3 9:00 o'clock, so let's get started. I'm sure other people  
4 will join us, and Pauline will let them in, and thanks for  
5 coming remotely again. Sadly, someday soon we'll be able  
6 to get back together, altogether in person. I was  
7 thinking about the -- the thing that impacts us maybe the  
8 most is lunch, because at lunch, you know, we all go and  
9 we get our food and then we all chitchat with each other  
10 and everything, and in this format, not as easy to do,  
11 which is a loss for us, but we'll get through this. So  
12 welcome to everybody, and we'll start as usual with  
13 comments from the Chief Justice.

14 HONORABLE NATHAN HECHT: Well, good morning,  
15 everyone. I hope everyone is staying safe and well  
16 through this time. Only two members of my court have  
17 contracted the virus, and both have recovered fully, and  
18 the Court is not meeting in person, and all of the staff  
19 are working from home, outside the court, and have been  
20 since March. We're getting ready to start 18 new law  
21 clerks in a couple of weeks, and it will be interesting to  
22 see how we transition to that. It was not so hard in  
23 March where all of the legal staff was familiar with each  
24 other and with the Court and with our processes, and now  
25 that won't be the case with a whole bunch of new people,

1 so we'll see how that works, but we're expecting to have  
2 to work from home at least through the early part of the  
3 fall and maybe into -- later into the year.

4           Justice Green is retiring, effective Monday,  
5 and we will miss him very much. He's been the senior  
6 justice for the last seven years and has done a wonderful  
7 job for the Court, both then and before, and he has really  
8 been a great contributor to the legal work of the Court as  
9 well as to its administration. So we'll miss Paul a lot,  
10 and it's all sadder because we don't -- we don't have a  
11 way to celebrate, so he came by the other day at the Court  
12 to drop off his key and his -- pick up some last things,  
13 and there was nobody there, so it's kind of -- we've just  
14 got to find a way in the future to celebrate all of these  
15 things that we've missed because of the pandemic.

16           Sadder news still is that my good friend and  
17 former colleague, Gene Cook, passed away on Sunday, Sunday  
18 last, Sunday afternoon. He had been ill and in declining  
19 health for a long time, and he -- we're sorry that his  
20 passing. His notable contributions, one of them, to the  
21 Court, was he was the principal author of the Texas  
22 Lawyers Creed and got both courts to pass it 30 years ago,  
23 and he was always very proud of that. He's survived by  
24 his wife, Sondra, and his children, Gene and Laurie, and  
25 Gene tells me that they probably will not have a service,

1 memorial service, for him.

2           We've -- the Court has put out seven  
3 emergency orders since we last met two months ago, and  
4 I'll just run through them right quick. One extends the  
5 bar dues deadline from August 31st until October 31st. A  
6 second one, the Court extended the suspension of the  
7 statute of limitations so that deadlines that fell between  
8 March 13 and September 1 were extended to September 15th,  
9 and it's unlikely that the Court will extend those  
10 suspensions further. We extended the pleading requirement  
11 in residential eviction cases. Many times an eviction  
12 cannot go forward because it's barred by federal law, but  
13 sometimes the tenants don't know that. Usually the  
14 landlords do, and so we have imposed a pleading  
15 requirement on the landlords to state to the justices of  
16 the peace that they know no reason why the -- the  
17 proceeding should be barred by the CARES Act or other  
18 federal requirements, and that's extended until September  
19 the 30th.

20           You probably have all heard that we canceled  
21 the July bar exam. We did a thorough investigation. The  
22 Board of Law Examiners just concluded it was too dangerous  
23 to do so. We are going ahead with the September bar exam,  
24 but we're doing it in a unique way. The -- the Board of  
25 Law Examiners has arranged for hotel rooms in four Hilton

1 hotels, Lubbock, Austin, Dallas, and Houston, a hotel room  
2 for each taker of the bar; and it works out pretty well  
3 because the hotels are all desperate for occupancy, and  
4 proctors can walk the halls where the exams are being  
5 taken and kind of observe the takers, so we're hopeful  
6 that that will work pretty well.

7           The October bar is to be online. That was  
8 added in the July order. It -- I think it's going to be  
9 okay. Three -- there are three national companies that  
10 provide these kinds of tests online, and two of them have  
11 decided they cannot give something like the bar exam for  
12 various different reasons, but the third one is still  
13 going. There are about 30,000 takers signed up for the  
14 October bar across the country, so there's a lot of  
15 expectation that it will happen and will go off without a  
16 hitch, but we're all kind of working very hard to make  
17 sure that that happens.

18           And then we extended the -- what we call --  
19 I call the omnibus emergency order, our first emergency  
20 order covering a lot of different areas and generally  
21 allowing courts to suspend deadlines and procedures. We  
22 extended that until September 30th. Jury trials are  
23 prohibited between -- before October 1st, unless you have  
24 approval from OCA, and OCA has developed a kind of a  
25 template instruction manual on how to -- how to conduct a

1 jury trial, who -- what staff you need, how you have to  
2 arrange it, where the jury is going to assemble, all the  
3 various different logistical aspects of trying a jury case  
4 for judges who want to do so. Since March, we have had 13  
5 jury trials in Texas. Two were in June, and I think --  
6 not sure there was one in July, and then the rest of them  
7 have been since. There are a number scheduled for trial  
8 in Houston. It will be the first time there's been trials  
9 in Houston. I think there was one this week, and then  
10 there were a number that are scheduled in Houston, and we  
11 will see.

12           About -- a large number, I think something  
13 like half of the trials that have been approved to be  
14 conducted ended up canceling for various reasons. There  
15 have been a couple of problems with jury trials. A couple  
16 weeks ago one was started in Brazos County, and the jail  
17 forgot to tell the judge that the defendant had tested  
18 positive previously. So I don't think anybody else out  
19 there involved in that has contracted the disease, but  
20 they're under quarantine, and so even when we are -- even  
21 when we know what has to be done, it's very hard to make  
22 all the pieces work right in this situation.

23           We tried the first virtual, fully virtual,  
24 jury trial in Justice of the Peace Nick Chu's court here  
25 in Austin in a misdemeanor case, a traffic case; and it

1 worked fine and raises the question whether the 1,500  
2 cases or so that are tried each year in the municipal and  
3 justice courts can't all be tried virtually at less  
4 expense and trouble for the parties and the court,  
5 especially since you're entitled to trial de novo in the  
6 county court in all or most all of those cases. So we're  
7 still experimenting.

8           Last fiscal year we tried 8,800 cases to  
9 verdict, and we -- other than the 13 that I mentioned, we  
10 have not tried any cases since the middle of March. David  
11 Slayton estimates that we're about 1,900 criminal cases  
12 behind. So as we -- when we start to reopen, whenever  
13 that is, we're going to have a lot of cleanup work to do,  
14 and we face doing it at a time when the budgets are likely  
15 to be tight as well. So that's the status of the  
16 emergency orders.

17           On rules, we gave final approval to rules  
18 requiring citation by a publication, and then that was  
19 back in June. Then last week in response to the same  
20 legislation, Senate Bill 891, we approved service of  
21 citation by social media for comment, and so that comment  
22 period will last until December the 1st, and then the rule  
23 is expected to take effect December the 31st. That's one.  
24 Then we completed work on another legislative directive,  
25 rules governing the newly enlarged expedited actions



1 category. The threshold was expanded by the Legislature  
2 from 100,000 to 250,000; and so we changed the discovery  
3 rules, excuse me, in Rule 169 a little to increase  
4 deposition hours from 6 to 10 in the current rule to 20;  
5 and we changed the rules to require mandatory disclosures,  
6 not just in those cases but in all cases, per discussions  
7 that the committee has had. The comment period on those  
8 rules changes also extends to December 1st, and they are  
9 scheduled to take effect January 1st.

10           And then this week we issued a joint order  
11 with the Court of Criminal Appeals, amending TRAP Rule  
12 49.3 on motions for rehearing, and we studied all of the  
13 work of the committee very carefully. There were a number  
14 of proposals that were discussed by the committee. In the  
15 end we chose to say that there -- three justices should  
16 sit on all motions for panel rehearing, except when the  
17 two -- when there are two remaining and they agree. If  
18 there are zero or one left on the panel, the Chief Justice  
19 assigns additional judges. If there's two of the original  
20 justices left on the panel and they can't agree, then the  
21 Chief Justice will assign additional judges, and then if  
22 there are two and they can agree, no other justices would  
23 have to be assigned. So that's the change that we have  
24 proposed in the rehearing rule, and then we've had to  
25 delay implementation of the protective order registry.

1           The committee discussed that at considerable  
2 length in November and February. As you will recall,  
3 there are a number of logistical and legal issues to  
4 navigate in setting up the protective order registry so  
5 that it works and then also so that it does not impinge on  
6 important privacy rights. That was to be completed -- it  
7 was to be set up by June the 1st and operational by  
8 September the 1st. The pandemic and the ransomware  
9 attack on the appellate courts have distracted OCA and  
10 required reallocation of resources to the point that they  
11 have not been able to meet those deadlines.

12           The Judicial Council has extended the  
13 establishment deadline from June 1st to September the 1st,  
14 as the statute clearly provides and then our Court is  
15 extending the operational deadline. That's when courts  
16 will actually start regularly putting protective orders  
17 into the registry, until October 15th, so there has been a  
18 little delay in that, but it's moving along, and I think  
19 we'll be able to meet those deadlines. That's what I have  
20 for an update, Chip.

21           CHAIRMAN BABCOCK: All right. Thank you,  
22 Your Honor. We will move on to the first item on our  
23 amended agenda, and that is amendments to the rules  
24 concerning admission to the bar of Texas. I know that  
25 Susan Henricks wanted to be with us. I don't know if she

1 is or not.

2 MS. CORTELL: She is, Chip.

3 CHAIRMAN BABCOCK: Okay, great. Well, Nina  
4 -- welcome, Susan. Thank you for joining us, and as  
5 everybody knows, she is the executive director of the  
6 Board of Law Examiners. And Nina is going to -- Nina  
7 Cortell is going to lead our discussion on this again.

8 MS. CORTELL: Thank you, Chip, appreciate  
9 it. So you-all have the letter that Susan has written on  
10 behalf of the Board of Law Examiners. She's very aptly  
11 put out what the issue is and then what the proposed  
12 changes to the rules are, but basically the issue is  
13 whether to change a conviction from a conclusive finding  
14 against character and fitness of the applicant to a  
15 rebuttable presumption. So that's the basic idea. I  
16 would like Susan to give us the background and reasoning  
17 for that, and when we have our discussion I suggest we  
18 bracket it into two questions. One, conceptually, is the  
19 committee of the view that we should recommend a change  
20 from conclusive finding to rebuttable, and then secondly  
21 we can talk about the actual wording that Susan has  
22 proposed. And let me say that we're very grateful, Susan,  
23 for you to participate. Susan is on vacation, and so --

24 CHAIRMAN BABCOCK: Aren't we all, Nina?

25 MS. CORTELL: So and I said, Susan, if you

1 can be on for the first hour, that would be terrific. So  
2 it's time limited, but in terms of Susan's participation  
3 we want to let her return to her family, but anyway,  
4 welcome, Susan, and thank you so much for taking time to  
5 participate with us. So let me turn it over to you to  
6 provide the background to this proposal.

7 MS. HENRICKS: Thank you, Nina, and I really  
8 do appreciate the committee allowing me to be first on the  
9 agenda. That's very generous of you, and I appreciate it  
10 very much. The background on this is this rule has been  
11 in place for a very long time. I think it's -- the  
12 corollary of it I think is Rule 11 of the disciplinary  
13 rules that you may be familiar with that provides that if  
14 a licensed attorney is convicted of a felony, they may not  
15 reapply for admission to the bar until five years after  
16 completion of their sentence, whether it's probation or  
17 actual incarceration. So this rule is very similar, but  
18 it applies to people who are not lawyers at the time that  
19 their offense occurred. They're, you know, young people  
20 usually, in their twenties, who have some -- get into some  
21 kind of difficulty and they have felonies, and the way the  
22 rule is written now they can't even apply. They can't  
23 file a declaration as a law student, and they can't apply  
24 for admission to the bar.

25 So many times we currently do consider

1 waivers. For many years the board took the position that  
2 this rule was immutable and that they could not waive it.  
3 There's a very general provision in Rule 20 of the rules  
4 governing admission to the bar that says that for good  
5 cause shown the board can waive any of the provisions in  
6 the rules, but the board for many years took the position  
7 that this was a rule that did not appear to be subject to  
8 waiver, and that is part of the language in Rule 20, if it  
9 appears the rule is not subject to waiver. So they took  
10 that position on this Rule 4(d)(2), and then at some point  
11 that was challenged, and the board was advised by the  
12 Court that they didn't think that this was something that  
13 couldn't be waived, so now we do sometimes entertain  
14 requests to waive this provision, but in the judgment of  
15 the staff and the board, this is really not fair.

16 I think you could even make some kind of a  
17 due process argument, because it's not apparent from the  
18 rule itself that you can obtain a waiver. It looks like a  
19 hard and fast prohibition that would prevent anyone with a  
20 felony of this vintage from even applying. So I think  
21 that many people may read the rule and be deterred and may  
22 not seek a waiver because they don't realize that that's  
23 possible. You know, if they call us and talk to us about  
24 it, we'll tell them, but they may not do that, and they  
25 may not realize it.

1           So many people on the board and applicants  
2 and actually I think a few members of the Court have  
3 thought that this rule was a little too -- too strict and  
4 didn't give the board a real opportunity to exercise  
5 discretion, depending on the circumstances of the offense  
6 and the person and all of the different factors that you  
7 would consider, so this rule would just allow them to go  
8 ahead and apply. We would require them to appear before a  
9 panel of the board, and we would evaluate the  
10 circumstances before we would ever license anyone with a  
11 felony. So that's the background on it. Maybe that's too  
12 much information.

13           CHAIRMAN BABCOCK: Not for this committee.  
14 Thank you for being so brief. Nina.

15           MS. CORTELL: Thank you, Susan. That's  
16 really helpful information, and these were all points that  
17 our subcommittee did discuss, although we didn't have all  
18 the benefit of Susan's insights, and so that's why we  
19 wanted just to bring it to the general committee. We had  
20 a range of positions on the subcommittee, so I will let  
21 our various members speak for themselves. I would say on  
22 balance, I think we leaned toward making the change, but  
23 we certainly were not uniform in that view. So why don't  
24 I open it up to for discussion either to the subcommittee  
25 or to others generally, and again, let's talk conceptually

1 about the change, whether we are going to recommend to the  
2 Texas Supreme Court from a change to conclusive finding to  
3 to rebuttable.

4 CHAIRMAN BABCOCK: You've got little buttons  
5 to raise your hands somewhere on your screen, and that  
6 would be the best way to do it if you can, but if not,  
7 then just charge on in.

8 MS. CORTELL: I'm hoping at a minimum that  
9 our subcommittee will speak up, because I know there are a  
10 lot of views.

11 CHAIRMAN BABCOCK: Well, Robert Levy has got  
12 his hand up, and Lonny, Professor Hoffman, does as well,  
13 so we'll start with Robert, who's got it up just a shade  
14 ahead of Lonny. Robert.

15 MS. CORTELL: Robert, we can't hear you.

16 MR. LEVY: Can you hear me?

17 CHAIRMAN BABCOCK: We can now.

18 MS. CORTELL: Yes.

19 MR. LEVY: All right. Is there a concern  
20 that changing this to a rebuttable presumption will  
21 actually create a much more significant workload from the  
22 board in terms of evaluating the specific facts? Is  
23 this --

24 MS. HENRICKS: No, I don't think so.  
25 There's not that many people, you know, that overcome a

1 felony to graduate from law school and apply for  
2 admission. There's not that many.

3 MR. LEVY: Okay.

4 MS. HENRICKS: But thanks for thinking of  
5 us.

6 CHAIRMAN BABCOCK: Professor Hoffman, did  
7 you have your hand up?

8 PROFESSOR HOFFMAN: Yeah. Not much to add,  
9 just quickly, it seems to me what Susan is saying is all  
10 the proposed change does is make the existing rules clear  
11 that waiver is indeed an option. That certainly seems  
12 like a better system than the one we have, and so I'm in  
13 favor of this change.

14 CHAIRMAN BABCOCK: Great. Anybody else?  
15 Kennon.

16 MS. WOOTEN: I will echo Lonny's sentiments.  
17 I am also in favor of the change, and what Susan said  
18 about the text of the rule not making it clear that  
19 somebody has this right is something that really stuck  
20 with me. It strikes me that some people may not even try  
21 because they don't know they can, and that's problematic,  
22 from my perspective, for a couple of reasons. One, it  
23 deters people from trying, and two, it's not consistent  
24 with the options that are truly available to them.

25 CHAIRMAN BABCOCK: Okay. Anybody else have



1 any comments? Justice Gray.

2 HONORABLE TOM GRAY: I'm also a member of  
3 the committee, and so I'll weigh in on the -- you notice  
4 Nina is grinning, so, you know, I'm coming in on the  
5 other -- other side of this, which is what she was baiting  
6 me for. Philosophically it is -- if the problem is people  
7 aren't aware of the waiver route then let's just make it  
8 clear that a waiver is available if sought. That's a  
9 drastically different rule rewrite than changing the  
10 presumption. Having observed human behavior for a number  
11 of decades now, I see that people sometime need a safe  
12 harbor, and I'm speaking primarily to the people that will  
13 be deciding these waivers. I know no members of the  
14 board, and so I'm not suggesting any of them are in the  
15 category that -- okay, I'll just say it. The people need  
16 a spine, and they need some reason to decline a request  
17 when somebody's in front of them, and they need something  
18 to hide behind, and if we are going to evaluate a felony  
19 in this regard, I don't see the need to change the  
20 presumption, make the waiver available.

21 If you want to take the view, as current  
22 political philosophy seems to be shifting, and I for  
23 different reasons in the past have seen this demerit of  
24 this, but I don't see it here, but if you're going to take  
25 the view that they have served their time, they've paid

1 their debt to society, then why evaluate it at all?  
2 Because this -- remember, this is for five years after the  
3 conviction has been served and they've done their time,  
4 and so if you're going to have this presumption for five  
5 years versus the one way or the other how it's going to be  
6 evaluated by the board, I don't -- I just don't see the  
7 need for the change. They're not, you know, pounding down  
8 the door. It's not a burden on the -- on the committee,  
9 so if you feel compelled to make it more well-known that  
10 there is a waiver available, then make it clear that a  
11 waiver can be applied for, but otherwise leave it alone.

12 CHAIRMAN BABCOCK: Thank you, Judge.

13 Anybody else want to comment on this conceptual issue?

14 MS. CORTELL: I would say one other  
15 suggestion that came up at the subcommittee discussions is  
16 if a bright line is desired still in terms of a conclusive  
17 finding, that you maybe tinker with it by limiting the  
18 years. That was brought up by Justice Gray's comment that  
19 it's now -- there's a five-year period. You know, maybe  
20 make it a two-year period. Just want to throw that out  
21 there. I thought that was an interesting thought.

22 CHAIRMAN BABCOCK: Okay. Anybody have any  
23 thoughts on that?

24 HONORABLE KENT SULLIVAN: I'll add two cents  
25 if I could.

1 CHAIRMAN BABCOCK: Commissioner.

2 HONORABLE KENT SULLIVAN: I do think it  
3 might be helpful -- I generally agree with the proposal,  
4 but I do think it might be helpful to add something of a  
5 framework for what the calculus should be for approval,  
6 with maybe the obvious considerations being remoteness of  
7 the felony and seriousness of the felony. Right now  
8 I've -- I do think it's something of an open-ended  
9 calculus, and that could be somewhat problematic.

10 MS. HENRICKS: If I could -- if I could  
11 speak to that --

12 CHAIRMAN BABCOCK: Yeah, certainly, Susan.

13 MS. HENRICKS: The board does have very  
14 detailed guidelines for decision-making in character and  
15 fitness matters that the board adopts separate from the  
16 rules provided by the Court, and they do include all of  
17 those factors for evaluation of anyone with any kind of a  
18 criminal history. The amount of time that's passed since  
19 the offense, the conduct of the applicant since the  
20 offense, the seriousness of the offense, and there's a  
21 long range of list of factors, and I don't have that  
22 document with me right now, but we do have a calculus, as  
23 you say, for the board to use in making these  
24 determinations.

25 CHAIRMAN BABCOCK: Thank you. Roger.

1 MR. HUGHES: Well, I'm all in favor of if  
2 the board was granting waivers then people ought to know  
3 about it. People at least ought to know what the practice  
4 is. I'm going to echo the suggestion that there be some  
5 basic minimums for waiver, just to avoid the argument that  
6 they're being -- that waiver is being granted  
7 capriciously, and I'm talking about a time limit after the  
8 conviction or the person has done their time. I don't  
9 know that we can have a rule getting any more concrete  
10 guidelines than that, setting up more than that, but I  
11 think at least some sort of minimum period might at least  
12 avoid the argument that it's being applied capriciously.  
13 Thank you.

14 CHAIRMAN BABCOCK: Thanks, Roger. Stephen  
15 Yelenosky.

16 HONORABLE STEPHEN YELENOSKY: Yeah, I'm just  
17 wondering. I don't -- obviously I don't -- I haven't  
18 judged as a criminal judge, and I haven't practiced law as  
19 a criminal defense attorney, but it occurs to me that if  
20 you lump everything into the category of felony, then you  
21 can talk about it that way, but there are felonies and  
22 there are felonies, and I don't know whether it matters  
23 for purposes of this rule, but I think we ought to think  
24 about it, and maybe it's -- some of it may be  
25 counterintuitive. I would be more concerned about

1 somebody convicted of a felony of embezzlement than I  
2 would about somebody who was convicted at age 19 of some  
3 involvement in some kind of violence, frankly. The former  
4 is more of a risk to a client probably, and so what we  
5 call felonies is a grab bag, and we should keep that in  
6 mind when we're talking about what ought to be done here.

7 CHAIRMAN BABCOCK: Okay. Good point.  
8 Anybody else on this -- on this topic?

9 MR. HATCHELL: This is Mike Hatchell. I was  
10 part of the subcommittee as well, and I'm pretty much in  
11 Tom Gray's camp. Felonies are a pretty serious thing, and  
12 I think this topic should be treated with that degree of  
13 seriousness. I've served on a regional committee that  
14 approved people for the bar. I've served on the committee  
15 that approved people for -- to take the specialization  
16 exam, and my problem with waivers is that they are  
17 invariably unevenly applied, and so if waivers are to be  
18 counted, I'm fine that we make it clearer, but -- and I'm  
19 also fine with shortening the period of an irrebuttable  
20 presumption to three years or say he may apply for a  
21 waiver after two and a half years or whatever, but I'm  
22 just thinking just turning it loose to sort of the whims  
23 of the day and the appealing nature of any individual  
24 applicant probably isn't the best course to get consistent  
25 results.

1 CHAIRMAN BABCOCK: Thanks, Mike. Kennon.

2 MS. WOOTEN: I just wanted to echo the  
3 comments that Judge Yelenosky made about there being a  
4 variation in terms of felonies, and I also feel that this  
5 is the type of rule that maybe we ought not apply the  
6 standard analysis to. More specifically, I mean that we  
7 often think about how big of an impact an existing problem  
8 has when assessing whether we ought to change the text of  
9 the rule. I'm of the mindset that there probably are some  
10 people out there who did some things when they were young;  
11 and if they are precluded from entering the profession for  
12 five years because of that, that could have a very  
13 detrimental impact on a life; and to me, if that has a  
14 really detrimental impact on one life, that's worthy of  
15 consideration. And I'll stop there.

16 CHAIRMAN BABCOCK: Okay. Judge Estevez.

17 HONORABLE ANA ESTEVEZ: I'm going to echo  
18 the last two speakers. Just because of the --

19 (Dog barking)

20 HONORABLE ANA ESTEVEZ: I've got a dog,  
21 should I wait a second? I'm sorry.

22 CHAIRMAN BABCOCK: They're going to second  
23 you.

24 HONORABLE ANA ESTEVEZ: I'll just -- I'm  
25 sorry, that's quite embarrassing, because he doesn't even

1 bark. So there must be a dog walking by because he  
2 doesn't bark at people, but I am going to echo them just  
3 because of the differences in the type of felonies. I  
4 don't think people are aware that right now if a teenager  
5 or a college kid, age 19 or 20, drives off to Denver, buys  
6 a whole bunch of edibles, gets caught in Texas where they  
7 stop lots of cars going by, they are probably in the  
8 second-degree felony range for having three -- you know, a  
9 bag of gummy bears and two cookies or a brownie, and so we  
10 need to be able to differentiate on what type of felonies  
11 we're talking about, especially in that age group when  
12 they're more capable of doing stupid things and then that  
13 five years hits right into your law school time.

14           So -- so, you know, I think the rules are  
15 good, but I think that there's always room for flexibility  
16 for trying to determine are these things that really are  
17 going to affect your law career or whether or not you're  
18 going to be of a great -- the moral standard that we want,  
19 and a lot of these things aren't crimes of moral  
20 turpitude, and yet they are felonies, so we need to just  
21 have some flexibility in that, however everyone determines  
22 that is. And I apologize again for the dog. I'm going to  
23 go do something to him right now.

24           CHAIRMAN BABCOCK: Uh-oh, do it off camera,  
25 okay.

1 HONORABLE ANA ESTEVEZ: He's like eight  
2 pounds. I'm doing nothing to the dog.

3 CHAIRMAN BABCOCK: Okay. Any other -- any  
4 other comments on this? Nina, is there any other  
5 subcategory that we need to talk about on this rule?

6 MS. CORTELL: No. I think -- what I suggest  
7 is a vote on conceptually what people think, and then  
8 regardless, let's look at the wording as well.

9 CHAIRMAN BABCOCK: Okay. Stephen has got a  
10 comment before we do, before we vote.

11 HONORABLE STEPHEN YELENOSKY: Well, the  
12 elephant in the room is, of course, race, in my mind. I  
13 just looked up real quickly, and I can't verify these  
14 numbers because I am not real sure of the source, so I'll  
15 say that upfront about the reliability of the source, but  
16 for every one white person convicted of a felony, you have  
17 four African-Americans. Another study says it's three  
18 percent of the population of whites are convicted of  
19 felonies and 15 percent of African-Americans, and you  
20 could say, well -- and I hope you don't say -- that's just  
21 a reflection of more crimes percentagewise being committed  
22 by African-Americans, but even if you accept that there's  
23 a huge overlap between race and income, and it's not  
24 surprising that there would be more felonies among a low  
25 income population. So we're creating a presumption right



1 upfront that I think reflects a bias in the population,  
2 and whether that results in one presumption or another, I  
3 don't think we can just gloss over that.

4           CHAIRMAN BABCOCK: Thanks very much. Any  
5 other comments, either relating to what Stephen said or  
6 anything else before we take a vote? Yeah. Justice Gray.

7           HONORABLE TOM GRAY: I guess I would like to  
8 ask the chairman of the board that gave us the letter if  
9 we just did away with the felony requirement -- or felony  
10 prohibition entirely and just let the board evaluate it in  
11 the context of their character to practice law metrics,  
12 what -- what does that do for the way the rule is  
13 structured and the board would address this? Because I  
14 can kind of see where this train is going, and I'm not  
15 willing to sacrifice for it, but what if we just took that  
16 out entirely? It's just another factor that gets weighed.

17           MS. HENRICKS: Well, if you want me to  
18 respond to that, what I would say is I think that in some  
19 ways that is the effect of this rule. It would mean  
20 that -- because we can't control when they apply. They're  
21 supposed to file a declaration and tell us about this, but  
22 many times they don't, and so they wiled away through law  
23 school and maybe even pass the exam before they appear  
24 before the panel, and that is the point in time when they  
25 would, you know, be making this determination. Many

1 people want to get it decided early because they don't  
2 want to go through law school and borrow all the money and  
3 do all the work and then find out that they can't be  
4 admitted, but, you know, it varies. Sometimes they wait.  
5 Or they come from out of state and they don't even know  
6 about this when they go to law school, so I think,  
7 honestly, Judge, that will be the ultimate effect of this  
8 rule change, is that it will be simply another factor,  
9 another important factor, that the board will have to  
10 consider, and they do take a felony history very  
11 seriously.

12 CHAIRMAN BABCOCK: Thank you. Any other  
13 comments before Nina frames a vote for us to take? I  
14 don't see any other hands up, so, Nina, you want to try to  
15 take a shot at what we would be voting on?

16 MS. CORTELL: Yes. The question for the  
17 committee is whether we are in agreement that the rule  
18 should be amended to convert what is now a conclusive  
19 finding to a rebuttable presumption.

20 CHAIRMAN BABCOCK: Okay. Everybody in favor  
21 of amending the rule to make it a rebuttable presumption,  
22 raise your hand. Pauline, you're going to help me count  
23 here.

24 MS. BARON: Are we raising our actual hands,  
25 or are we raising our virtual hands?

1 CHAIRMAN BABCOCK: Yeah, do it  
2 electronically. That will be easier.

3 MS. WOOTEN: I've got it both ways, just to  
4 be clear.

5 HONORABLE STEPHEN YELENOSKY: Does that mean  
6 my vote counts twice?

7 MS. WOOTEN: Mine, too.

8 CHAIRMAN BABCOCK: Yeah, probably.

9 MS. CORTELL: I hate to admit this, but I  
10 don't know how to do it.

11 HONORABLE STEPHEN YELENOSKY: It's in  
12 the bottom -- if you open "participants," and it lists  
13 everybody.

14 MS. CORTELL: Yeah.

15 HONORABLE STEPHEN YELENOSKY: In the bottom  
16 it says "raise hand."

17 MS. CORTELL: Oh, I see. Okay.

18 CHAIRMAN BABCOCK: Yeah, that would  
19 hopefully be a more accurate way of doing it, but if  
20 everybody is done electronically voting --

21 MS. CORTELL: I have got to admit I'm not  
22 seeing it for me.

23 CHAIRMAN BABCOCK: People are still voting.

24 MS. CORTELL: Oh, here.

25 PROFESSOR CARLSON: Nina, put --

1 MS. CORTELL: I finally found it. Sorry.  
2 Sorry.

3 CHAIRMAN BABCOCK: All right.

4 HONORABLE STEPHEN YELENOSKY: Is it worth  
5 pointing out that nobody else sees the hands raised? I  
6 was confused about that before, but isn't that right, that  
7 people -- whether they're voting up or down essentially  
8 it's a secret vote, which is fine, I just thought people  
9 might want to know that they don't see anything on their  
10 screen.

11 CHAIRMAN BABCOCK: Right.

12 MS. HENRICKS: There's little blue hands.

13 MR. RODRIGUEZ: You'll know how people vote  
14 if you go to that list where you raised your hand.

15 CHAIRMAN BABCOCK: Right.

16 MR. SCHENKKAN: Yeah, mine lists the  
17 participants and shows which way they voted.

18 MS. CORTELL: Right. Right.

19 HONORABLE STEPHEN YELENOSKY: Okay. Thanks.

20 CHAIRMAN BABCOCK: All right. Hang on. All  
21 right. Pauline, what do you have as your tally?

22 MS. EASLEY: I have 17.

23 CHAIRMAN BABCOCK: Yeah, that's what I have.  
24 17 in favor. Everybody against, raise your hand.

25 MS. WOOTEN: And everybody raised their hand

1 to be in favor has to be lower.

2 CHAIRMAN BABCOCK: Right. Lower.

3 MR. HUGHES: Give it a few minutes, because  
4 it takes a while for the lowering of the hands to  
5 register.

6 CHAIRMAN BABCOCK: We had 17 in favor. And,  
7 Pauline, what do you have on opposed?

8 MS. EASLEY: I have five.

9 CHAIRMAN BABCOCK: That's what I have. The  
10 Chair not voting. So the vote is 17 to 5. The nays can  
11 lower their hands now, and, Nina, what else would you like  
12 our committee to discuss?

13 MS. CORTELL: Okay. The revisions  
14 themselves are reflected in two different provisions of  
15 Rule 4, which are attached to Susan's letter. So first I  
16 would turn the committee's attention to 4(d), and the  
17 revisions are in -- well, they're in all of 4(d). The  
18 main ones are in (1), (2), and (3), the subsections, but  
19 so if there are any comments on this proposed --

20 HONORABLE HARVEY BROWN: Can you tell us  
21 which tab on the documents this is? I've been looking for  
22 it.

23 MS. CORTELL: It's tab A.

24 CHAIRMAN BABCOCK: Yeah, first tab, tab A.

25 MS. CORTELL: So Susan sent a letter dated

1 January 7, 2020, and attached to it is a redline. It's  
2 page two of tab A. It essentially accomplishes what we've  
3 been talking about, but if there are any thoughts, which  
4 often this committee has, on the actual wording, I invite  
5 those comments now. So we'll start first with 4(d).

6 CHAIRMAN BABCOCK: Well, I've got a  
7 question, Nina. You change -- or somebody changes in the  
8 body of (d), "character and fitness" to "or fitness."  
9 What was the purpose of that?

10 MS. HENRICKS: Well, the reason for that is  
11 that character pertains to their -- whether they're  
12 honest, trustworthy, reliable, and fitness is more to do  
13 with their mental well-being, so those are not the same.  
14 A person could have a character issue and not have a  
15 fitness issue and vice versa, so it's just to distinguish  
16 between those two.

17 CHAIRMAN BABCOCK: Anybody got any comments  
18 about that language? Justice Gray.

19 HONORABLE TOM GRAY: I don't have a comment  
20 about the "or." Mine relates to something else.

21 CHAIRMAN BABCOCK: Judge Yelenosky, do you  
22 have anything about the "or"?

23 HONORABLE STEPHEN YELENOSKY: It sounds like  
24 the "and" before did treat them as the same thing, but to  
25 the extent it treated them as different things, it's a

1 negative sentence, "lacking in." So arguably, it had to  
2 be lacking in both before, and now with the "or" you would  
3 be lacking in one or the other. I'm just talking about  
4 the meaning. I'm not saying what's preferable.

5 CHAIRMAN BABCOCK: Okay. Any other comments  
6 on that?

7 MR. GILSTRAP: Yes, I've got one, Chip.

8 CHAIRMAN BABCOCK: Yeah, Frank.

9 MR. GILSTRAP: Well, as I understand, you're  
10 retaining both good character and fitness. They both have  
11 to be satisfied. The places where you put -- and that's  
12 where you say "and." The places where you put "or," as I  
13 understand, means that you're requiring separate  
14 consideration of each one. Am I correct that you still  
15 have to show a present good moral character, which is like  
16 you're honest, and fitness, which is maybe, you know, you  
17 can read, something like that. Those are different  
18 things, but you have to -- you still have to satisfy both  
19 of them. Am I correct?

20 MS. HENRICKS: Well, you do. And that's  
21 provided in other portions of the rule. You know,  
22 fitness, as we use it in these rules, really pertains --  
23 usually it's substance abuse history is the most common  
24 fitness issue that we -- that we find that we address in  
25 evaluating applicants.

1 MR. GILSTRAP: Oh, really. That's not a  
2 good moral character issue.

3 MS. HENRICKS: No, we don't think of it as a  
4 moral character. It may. It may also -- their conduct  
5 may also suggest poor character as related to that, but  
6 often it's just a simple matter of -- of not being well  
7 enough to practice as a lawyer, and what we mean by are  
8 they able to practice law, can they read, can they pass  
9 the bar exam. That's a competence requirement.

10 MR. GILSTRAP: But they've still got to  
11 really -- they've got to satisfy all three.

12 MS. HENRICKS: Yes, they do.

13 MR. GILSTRAP: Okay. One more question.  
14 You've changed it from "been convicted" to "been finally  
15 convicted," and I'm not sure what that means. Does that  
16 mean when your felony conviction is affirmed by the Court  
17 of Criminal Appeals? What is finality? And it looks to  
18 me like if you haven't been finally convicted, you don't  
19 have to satisfy any of this.

20 MS. HENRICKS: Well, you're correct in your  
21 understanding of the change, but as a practical matter, if  
22 someone has a pending criminal offense that has yet to be  
23 adjudicated, even a misdemeanor, the board has the  
24 authority under I believe it's Rule 15 to defer a  
25 determination on their application until that criminal



1 matter has been finally determined, because we're not in a  
2 position to really adjudicate the criminal charges. We  
3 can't conduct a trial on that. It would be -- you know,  
4 it wouldn't be an appropriate thing for us to do, and so  
5 we don't generally have hearings for people or approve  
6 them if they have a pending criminal matter, whether it's  
7 a felony or misdemeanor.

8 HONORABLE STEPHEN YELENOSKY: Can you show  
9 us that rule?

10 MS. HENRICKS: Yeah. Let me look here. I  
11 don't know if I can show it to you.

12 MR. GILSTRAP: Oh, go ahead.

13 MS. HENRICKS: I could -- I think I could  
14 find it and read it to you. Okay. It's Rule 15(b) of the  
15 Supreme Court's Rules Governing Admission to the Bar; and  
16 it says, "If there are pending proceedings involving the  
17 applicant or declarant" -- the declarant is a law student  
18 -- "the resolution of which could affect the determination  
19 of his or her character and fitness, the board may  
20 exercise its discretion to defer the hearing until such  
21 time as the pending proceeding is resolved."

22 MR. GILSTRAP: My comment is, of course,  
23 that's discretionary, and if the board chose to exercise  
24 its discretion and consider it, 15(d) under the present,  
25 if you say finally, 15(d) will simply not apply because it

1 only applies to final convictions.

2 MS. HENRICKS: Well, I can tell you that  
3 they wouldn't do that, but I see your point that the way  
4 the rule is written it's conceivable.

5 MR. GILSTRAP: All right. That's all I  
6 have.

7 CHAIRMAN BABCOCK: Thanks. Susan, and on  
8 this issue of finality, what if -- what if there's a  
9 pending habeas petition?

10 MS. HENRICKS: We don't generally consider a  
11 pending habeas to be -- to affect the finality of the  
12 decision, but that -- you know, I guess that could be  
13 discretionary. The panel might decide that it -- that it  
14 does impact the finality.

15 CHAIRMAN BABCOCK: What if the -- what if  
16 the trial judge had recommended to the Court of Criminal  
17 Appeals that the habeas be granted?

18 MS. HENRICKS: Yeah, I think that would be  
19 an instance where they might -- might decide that it's not  
20 final.

21 CHAIRMAN BABCOCK: Okay.

22 MS. HENRICKS: I think the reason we took --  
23 we added that language is that we are -- I believe we're  
24 deleting (d) (3).

25 CHAIRMAN BABCOCK: Okay. Professor Hoffman.

1                   PROFESSOR HOFFMAN: Thanks, Chip. So,  
2 again, I like the intent here, but I don't know that the  
3 execution really succeeds. So sort of specific to this  
4 section, (d), what you asked about, I mean, it seems to me  
5 that we're going to end up with a rule that says an  
6 individual guilty of a felony is presumed not to have good  
7 moral character and fitness and that it's likely to have  
8 the same effect that we're in right now, which is that a  
9 great many of the very small number of people to whom this  
10 applies are going to be deterred from even applying.  
11 There's no cross-reference here in any way to be special  
12 exception for good cause, and so I actually find myself  
13 agreeing with my good friend Tom Gray. Even though we  
14 might disagree sort of conceptually, I sort of like the  
15 idea of doing away entirely with a separate provision for  
16 treating people who have had felonies.

17                   If the -- if, Susan, the practical effect of  
18 this rule is, is that the board is going to take into  
19 consideration sort of a holistic assessment, just as they  
20 would any other applicant, well, then why have a separate  
21 rule about it then, which especially if written this way  
22 is likely to do the very thing you don't want it to do,  
23 which is misinform and deter people from applying for the  
24 exception.

25                   MS. HENRICKS: It could have that effect. I

1 think the thinking was that we wanted to signal to  
2 applicants that a felony conviction is still a very  
3 serious matter and that the board would expect there to be  
4 significant evidence of rehabilitation and a significant  
5 period of good conduct to overcome the presumption of lack  
6 of good character indicated by a felony conviction. I  
7 think that was the thought, just to give them notice that  
8 this is a serious element, because obviously the Court  
9 when they adopted Rule 4 originally took that view.

10                   PROFESSOR HOFFMAN: So, Chip, if I could  
11 have one quick follow-up on that?

12                   CHAIRMAN BABCOCK: Yeah, of course.

13                   PROFESSOR HOFFMAN: So -- so that makes  
14 sense to me if that's the case and if that's the sort of  
15 prevailing sentiment both on the Court and on the BLE, but  
16 then I think we ought to say that in the rule, and there  
17 ought to be a -- some sort of a reference to "for good  
18 cause shown" or something. Again, the problem with this  
19 revised version is no one is going to remember a few years  
20 from today -- certainly no one who is unrepresented is  
21 going to have any idea that the rule once said  
22 "conclusively" and now says "presumed," and thus, there's  
23 a small window of opportunity here. So I just -- I feel  
24 like you have a -- this is a very good intent that will  
25 end up practically making no difference if we make the

1 change that is being suggested.

2 MS. HENRICKS: Also, I would point you to  
3 4(f), which does have some -- explains that -- that they  
4 have the burden to show that these -- that they -- that  
5 they should be licensed, despite the felony conviction.  
6 So it gives them some guidance about what -- as you're  
7 mentioning good cause, effectively what good cause  
8 might -- might consist of.

9 CHAIRMAN BABCOCK: Robert Levy.

10 MR. LEVY: I wanted to go to the language  
11 reference on taking out the "and" between "moral  
12 character" and "fitness" and changing it to the "or." I'm  
13 concerned that this is a much broader issue and that the  
14 rule that you reference, Rule 15, I believe, also uses the  
15 "moral character and fitness," and I think it's a mistake  
16 to change it just here rather than doing a wholesale  
17 change throughout the rules to show that those are two  
18 different standards.

19 MS. HENRICKS: Okay.

20 CHAIRMAN BABCOCK: Stephen. You're muted,  
21 Stephen. You're muted.

22 HONORABLE STEPHEN YELENOSKY: Yeah, got it.  
23 I was looking at the rule that's in the -- in the printed  
24 materials for somebody who has previously been determined  
25 not to be fit or of good moral character, and the way it

1 phrases it there, I think it's subparagraph (f), is that a  
2 person or -- "seeking a redetermination of present moral  
3 character and fitness," which is -- which means, obviously  
4 that they were previously determined not to be morally --  
5 of good moral character and fitness. Then has to prove,  
6 by a preponderance of the evidence -- and then there's  
7 (1), (2), (3). Is that different from the presumption  
8 that we're talking about with the felony? Because why  
9 would they be different, and particularly I imagine  
10 there's a provision for prior disciplinary actions, and so  
11 why would those things be different? As I said, felony is  
12 a grab bag, and at least with these things we know  
13 whatever they did is directly related to the practice of  
14 law. So shouldn't that be considered? Are we being  
15 consistent?

16 CHAIRMAN BABCOCK: Thanks. Justice Gray.  
17 Nina, do it mechanically. That will put you  
18 in the queue.

19 MS. CORTELL: Okay.

20 HONORABLE TOM GRAY: On the "or" question in  
21 (d), to follow up on Robert Levy's concern, in (d)(2) it  
22 is not changed, and so that seems to create an issue  
23 there. The addition of the word "finally" in the fourth  
24 line of (d) may have been intentionally omitted originally  
25 or not. There is an inherent problem when you start

1 talking about felony convictions, because of the community  
2 supervision. There are two different types of community  
3 supervision. There is probation, and there is deferred  
4 adjudication. Deferred adjudication is referred to at the  
5 end of (d), and all I'm saying here in this context is I  
6 think very careful attention needs to be paid to just  
7 dropping in the word "finally" when you've used throughout  
8 the rule "period of probation," and everywhere I saw that,  
9 I thought you really intended to use the catch-all of  
10 community supervision, but then -- because it catches  
11 both, and yet you still have that "deferred adjudication"  
12 language up in (d).

13           And so there is -- there's a lot of  
14 potential unintended consequences when you start trying to  
15 define what is a final conviction. There's a whole body  
16 of law on that, because you can use a final conviction to  
17 enhance an offense to another level of felony, so be aware  
18 of that.

19           One other thing that's really kind of a  
20 gnat, but in (d) (2), the three words "under this rule" in  
21 the first line probably need to come out, because I'm not  
22 aware that there can be a felony under this rule. I  
23 understand what it meant in its original context, but I  
24 doubt that that's necessary to maintain.

25           CHAIRMAN BABCOCK: Roger.

1 MS. HENRICKS: Yeah, that's in the original  
2 rule.

3 CHAIRMAN BABCOCK: Roger, you're muted.

4 MR. HUGHES: I unmuted myself. Well, I'm  
5 going to speak in favor of having some sort of presumption  
6 about a felony conviction, and I think what tips it for me  
7 is the public perception. To simply jettison anything  
8 about felony convictions being a bar or a presumption and  
9 just say, well, it's going to be a -- a general weighing  
10 of fitness and character and competency, I think the  
11 public is going to say what are you doing? A felony ought  
12 to be a big red flag. Now, you and I know there are  
13 felonies and felonies and felonies, but the public  
14 perception is felonies are very serious crimes. That's  
15 why we give them to district judges instead of somebody  
16 else, so on and so forth.

17 So I think as a matter of restoring some  
18 sort of public confidence in who gets to be consider -- at  
19 least to be considered to be a lawyer, we need to have  
20 some sort of presumption, if not a bar, and I favor the  
21 presumption, because if that's what the -- they're doing,  
22 people ought to know about it. I think the most important  
23 thing is to set some very objective, minimum requirements  
24 to get a waiver, at least to make it look like people are  
25 being -- that waivers are not being handed out willy-nilly



1 or on a capricious basis. So that's my opinion.

2 CHAIRMAN BABCOCK: Thanks, Roger. Frank.

3 MR. GILSTRAP: I want to go back to  
4 "finally." It does narrow the rule. It creates a  
5 loophole, and I don't think it's a good enough answer to  
6 say, well, we're creating a loophole, but we'll never use  
7 it. That's not what we ought to do in a rule-making  
8 provision. As I understood, that was put in because we  
9 were getting rid of (3). I don't see anything wrong with  
10 (3). If you're -- if it's reversed or you get a pardon,  
11 the rule doesn't apply. The way we have it now is the  
12 rule doesn't apply if you haven't been finally convicted.  
13 I see -- I don't see any reason to make those changes.  
14 Take "finally" out, that way the rule applies to  
15 everything.

16 CHAIRMAN BABCOCK: Okay, Frank. Harvey  
17 Brown.

18 HONORABLE HARVEY BROWN: I want to agree  
19 with Frank on that about the "finally" requirement. I  
20 think since it's a presumption only, that we don't need to  
21 say that. They can talk about in their application that  
22 it's on appeal and why they think they're going to  
23 prevail, so that seems to me that it would be something  
24 that they could consider, but we don't need to put in the  
25 rule itself. As to the rule itself, I think subparagraph

1 (2) on the presumption could be slightly more clear for  
2 the nonlawyer who may be reading this than a presumption.  
3 I would probably say something like "creates a rebuttable  
4 presumption that the individual does not present" and then  
5 leave the rest as is, until you get to the end, and then  
6 at the end I would specifically reference subsection (f),  
7 since I found that helpful when we did that just now. I  
8 think the reader would find that helpful, so I would  
9 probably put it at the end, "subject to subsection (f)."

10 CHAIRMAN BABCOCK: Great, thank you. Nina,  
11 finally getting to you.

12 MS. CORTELL: Well, Justice Brown just said  
13 what I would have said, which is that I do think we can  
14 connect it up and say something about -- and I like the  
15 changed wording also, but I want to make sure Susan is  
16 comfortable, but make sure that (d)(2) references that it  
17 can be rebutted, you know, based upon considerations in  
18 Rule (d)4 or something like that.

19 CHAIRMAN BABCOCK: Great.

20 MS. CORTELL: So right at the outset you say  
21 there is a presumption, but there is a way to rebut it.

22 CHAIRMAN BABCOCK: Great. Thanks. Stephen.

23 HONORABLE STEPHEN YELENOSKY: Yeah, I think  
24 Roger makes a good point about public perception. Perhaps  
25 we -- we should be more specific about what the board is

1 considering when it's considering felonies, that there  
2 should be a reference to felonies, but there's no  
3 reference, I don't think, in there, Susan, to the nature  
4 of the crime. Is that right?

5 MS. HENRICKS: Not in the rule.

6 HONORABLE STEPHEN YELENOSKY: Right.

7 MS. HENRICKS: We have some -- we have some  
8 guidelines.

9 HONORABLE STEPHEN YELENOSKY: Right, but  
10 from public perception -- well, they probably don't see  
11 any of this, but if they don't see any of this, then  
12 Roger's point is kind of moot. But if they do see this,  
13 we should reveal -- if we're going to say something about  
14 possible rehabilitation from a felony, explain what that  
15 might be, which might be the nature of the crime or rather  
16 than crime, nature of the felony, because that is  
17 something that you clearly take into account, and which is  
18 something earlier on I said was important because there  
19 are felonies and there are felonies, as Roger has  
20 acknowledged, and then I want to throw a wrench into this  
21 by asking is it a conviction if you get a presidential  
22 pardon?

23 MS. HENRICKS: I don't think it would be.

24 CHAIRMAN BABCOCK: Okay. Any more hands? I  
25 don't see any, and, Nina, I don't know if a vote is in

1 order at this point on subparagraph (d), but if you think  
2 so, we'll -- we'll vote.

3 MS. CORTELL: Based on my notes, I would  
4 like to go ahead and ask Susan whether, kind of going in  
5 order here, "finally" is a term that you're wedded to, or  
6 is there some flexibility to take that one out? It seems  
7 to have created some issues.

8 MS. HENRICKS: Yeah, no, we're not. I mean,  
9 I think that, you know, the committee's vote on the  
10 overall intent of the revision is what's key here. That's  
11 consistent with our objective; and, you know, the details  
12 for how we best implement that, we're very flexible on  
13 that. And we spent a lot of time thinking about this and  
14 going back and forth about it, and I think it's, you know,  
15 it's subject to difference of opinion about how best to  
16 implement it.

17 CHAIRMAN BABCOCK: Susan, you have no idea  
18 of how many hours this committee has spent on the issue of  
19 finality.

20 MS. HENRICKS: I can imagine.

21 MS. CORTELL: Well, Chip, I think to your  
22 point, I have a sense of where the committee stands, and  
23 I've made some notes based upon the good suggestions here,  
24 and what I'm going to suggest to Susan and the Court is  
25 something along these lines, and we can tinker with it,

1 but to change (d) (2), perhaps delete "finally" and in  
2 (d) (2) say, "A felony conviction creates a rebuttable  
3 presumption that the individual does not have present good  
4 moral character and fitness, but that presumption may be  
5 rebutted based on considerations under Rule 4(f)," or  
6 something like that.

7 CHAIRMAN BABCOCK: Yeah.

8 MS. CORTELL: If that's okay with you then I  
9 don't think we need a vote, but I'll defer to you on that.

10 CHAIRMAN BABCOCK: Well, if you're deferring  
11 to me, that sounds fine, and if you're deferring to Susan,  
12 we'll see what she has to say.

13 MS. CORTELL: That's a good point, and then  
14 we also say, we haven't talked about 4(f), but let's wait  
15 on that and finish on 4(d) first.

16 CHAIRMAN BABCOCK: Right. Yeah. I was  
17 going to get to 4(f), and, Frank, we'll get to you in a  
18 second, but, Susan, are you comfortable with us proceeding  
19 in that way?

20 MS. HENRICKS: I am. I think the board  
21 would be fine with that approach.

22 CHAIRMAN BABCOCK: Okay. Frank.

23 MR. GILSTRAP: Well, I would just say that  
24 if we're going to take out "finally," I think you ought to  
25 put back in (d) (3). I mean, I don't see any possible

1 reason not to have a provision in there and saying if  
2 you're -- if a felony conviction is reversed or if you get  
3 an executive pardon, this doesn't apply.

4 CHAIRMAN BABCOCK: Yeah.

5 MS. HENRICKS: We'd still need to revise  
6 (d) (3) because of the "shall be permitted" language, but,  
7 you know, that could be done.

8 CHAIRMAN BABCOCK: Good point there, Frank.  
9 Thank you. Any other comments? Okay. Nobody -- no hands  
10 up, so we need to look at 4(f), I think, right, Nina?

11 MS. CORTELL: Correct. And then that will  
12 conclude it, and, Susan, we'll let you get back on your  
13 vacation.

14 MS. HENRICKS: I appreciate your time.

15 MS. CORTELL: So I think the changes to 4(f)  
16 are really reflective of the change, right, from  
17 conclusive to rebuttable basically?

18 MS. HENRICKS: That's the intention, yes.

19 CHAIRMAN BABCOCK: Okay. Any comments about  
20 4(f)? Going once. Okay. I don't see any hands raised  
21 about that, so we will -- we will proceed on that basis,  
22 and I think that's it, isn't it, Nina?

23 MS. CORTELL: That's it, and again, with  
24 great gratitude to Susan for helping us today and all of  
25 your guidance in this area. We appreciate it.

1                   CHAIRMAN BABCOCK: Wait a minute. One  
2 second. Justice Gray had his hand up. I don't know how I  
3 missed that.

4                   HONORABLE TOM GRAY: Well, it took me a  
5 while to find it again. The --

6                   CHAIRMAN BABCOCK: So when I said "going  
7 once" you were desperately trying to find the button.

8                   HONORABLE TOM GRAY: I had my mouse in my  
9 hand, and I'm going all over the screen, looking for how  
10 to raise my hand, but what I'm -- again, Robert's point  
11 about the "and/or" appears in (f); and the concept of  
12 community supervision, deferred adjudication, versus  
13 probation runs throughout the rule; and I don't know if  
14 Nina is intending to hand it off and not do any further  
15 come back with a draft with all of the changes in it or  
16 not, but I don't care as long as the Court is aware of the  
17 "and/or" issue throughout the rule and the question of  
18 probation, which is a subset of community supervision  
19 versus deferred adjudication.

20                   So I make those comments so that they can  
21 evaluate that in the context of making any revisions to  
22 the rule and specifically point out that on (d)(2) you've  
23 got sort of a -- the conflict -- an individual guilty of a  
24 felony, it does not take into account in that phrase  
25 whether or not they have been -- whether or not they're on

1 deferred adjudication, which is a type of community  
2 supervision.

3 MS. CORTELL: Well, I think we would take  
4 that language out under the revision.

5 CHAIRMAN BABCOCK: Yeah. Well, if -- unless  
6 Jackie or Martha or the Chief want to put this back on the  
7 agenda for next meeting, I would say we are done with this  
8 for now; and, Nina, you can coordinate with Jackie and  
9 Martha about any tweaking that needs to be done as a  
10 result of this conversation; and Susan, of course, is  
11 always invited to participate in that. And Susan, would  
12 we -- I would be shocked if you don't want to stay for the  
13 rest of our meeting until 5:00 today and hear some of the  
14 discussion that we have about these rules, but if you have  
15 to leave, go ahead.

16 MS. HENRICKS: Well, I feel that I must.  
17 But I trust that you will have a very robust coverage of  
18 the agenda items. I'm not worried about that.

19 CHAIRMAN BABCOCK: Yeah, I think we probably  
20 will. But thank you so much for joining us.

21 MS. WOOTEN: Thank you, Susan.

22 MS. HENRICKS: Okay. Thanks for having me.

23 CHAIRMAN BABCOCK: Great. Pam, first of  
24 many appearances on our docket today, suits affecting the  
25 parent-child relationship and out of time appeals in



1 parental rights termination cases. Judge Rucker of the  
2 Family Law Council had hoped to be here, but I think we  
3 got an e-mail from him yesterday saying that he was unable  
4 to -- I'm right about that, Marti? You're muted.

5 MS. WALKER: That is correct, Chip. He is  
6 not able to attend today.

7 CHAIRMAN BABCOCK: Okay, great. So Pam.

8 MS. BARON: Well, actually Bill Boyce is  
9 handling this for our subcommittee, so I turn it over to  
10 Bill.

11 CHAIRMAN BABCOCK: So Bill.

12 HONORABLE BILL BOYCE: Thank you, Chip. So  
13 I'm glad you highlighted the letter that the children's --  
14 that Judge Rucker sent as jurists and residents on behalf  
15 of the Children's Commission because we're going to lead  
16 off our discussion with that, and I want to highlight that  
17 letter to make sure that everybody is aware that that  
18 letter has been sent, because I think it highlights some  
19 policy choices that underlie the rule provisions that  
20 we've been discussing and tweaking and so on and so forth.  
21 So for purposes of today's discussion, I think the -- the  
22 two things to have handy in front of you are the August  
23 24th memorandum addressing appeals in parental termination  
24 cases.

25 Subsection A of the discussion hasn't

1 changed. Subsection B of the discussion, showing  
2 authority to appeal, has changed in the following respect.  
3 If you go to page seven and eight of the August 24th  
4 memorandum, you will see a draft Rule 306 that  
5 incorporates changes in an effort to address comments and  
6 suggestions that were raised at our prior meeting, our  
7 June meeting, regarding the mechanism for this proposed  
8 rule. I think Judge Rucker's letter is an invitation to  
9 take a step back and look at a larger policy choice that  
10 we're really talking about here in the form of rule  
11 provisions.

12           So this is recounted in the memorandum.  
13 I'll go over it at a high level here, but you will recall  
14 that the HB7 task force had initially recommended a motion  
15 to show authority or a requirement to show authority to  
16 appeal procedure for counsel in these cases that would  
17 roughly parallel Texas Rule of Civil Procedure 12, but  
18 would be specific to these cases, and the proposal from  
19 the task force was Texas Rule of Appellate Procedure  
20 28.4(c), certification by appointed counsel and motion to  
21 show authority, and the concept there was that there would  
22 need to be an affirmative showing that the desire to  
23 appeal was present on behalf of the parent whose rights  
24 were terminated, and I think there's two main  
25 considerations with that.

1                   One is the very legitimate consideration  
2 that the continuation of litigation, the continuation of  
3 appeals of termination of parental rights, creates  
4 uncertainty and disruption in the lives of the children  
5 involved for as long as that litigation is ongoing, and  
6 that's -- that's a very appropriate and legitimate  
7 concern, consideration. Going back to our discussions,  
8 really into 2019 around this topic, I think that the  
9 subcommittee's discussion and then later the full SCAC  
10 discussion really focused on the -- one of the  
11 practicalities, one of the realities of these types of  
12 matters, which is the potential difficulty of discerning  
13 the parent's -- the terminated parent's intent, in  
14 significant part because the terminated parent may or  
15 may -- may or may not be reachable, may or may not be  
16 involved in the case, may come in and out of a case  
17 intermittently, and so a -- a certification of authority  
18 to appeal in some ways presumes that you can locate and  
19 communicate with the parent at issue. And if you can't,  
20 then what happens.

21                   That was the discussion we had over multiple  
22 meetings, and that kind of morphed into the current rule  
23 proposal that appears at page seven and eight of the memo,  
24 and that is based more on essentially narrowing the  
25 circumstances under which an appeal is not going to go

1 forward, and maybe the way to -- the easiest way for me to  
2 think about this is as follows. We are having a  
3 discussion around this question, which comes up in a lot  
4 of different contexts. Which way does the silence cut,  
5 okay. If -- if it is not clear or if there is not an  
6 ability to get a clear determination of intent to appeal,  
7 what is the next step? Do you have a rule that  
8 essentially says that the appeal is not going to go  
9 forward in the absence of a clear ability to convey an  
10 intent to appeal? And I think in general terms that would  
11 be a -- what I hope is a fair characterization of Judge  
12 Rucker's concerns and comments and proposal and the  
13 initial proposed rule. So does the silence cut in favor  
14 of saying that in the absence of an ability to get a clear  
15 statement of intent to appeal the appeal is not going to  
16 go forward?

17           And that's certainly a legitimate approach  
18 to this. It reflects the notion of needing to have a  
19 procedure so that litigation over termination of parental  
20 rights doesn't continue indefinitely. It dovetails with  
21 the time limits that the Court has created for determining  
22 these types of appeals. It dovetails with the fact that  
23 these appeals are accelerated. In fact, they're very  
24 accelerated, so absolutely a legitimate policy choice and  
25 determination. Or are we going to have a determination

1 that the silence cuts in favor of having the appeal  
2 arising from a constitutionally protected right to go  
3 forward, except in very narrow circumstances.

4           The draft rule that appears in the memo  
5 reflects this approach, that unless somebody -- an alleged  
6 father has been completely not part of the litigation, the  
7 default is going to be that the appeal goes forward in  
8 recognition of the important and constitutionally  
9 protected nature of the rights at issue. And so I'm --  
10 I'm very cognizant that Judge Rucker is not part of the  
11 meeting today. I understand that Richard Orsinger is --  
12 was involved in these discussions leading to the letter.  
13 I don't understand him to be part of the meeting today, so  
14 I'm -- I'm very -- I want to be very cautious about not  
15 failing to characterize correctly the concerns that have  
16 been raised.

17           I'm giving you my understanding of where  
18 things are right now, and I think where things are in this  
19 discussion is that Judge Rucker's letter is potentially an  
20 invitation to talk about where the balance should be  
21 struck here between important policy considerations and  
22 important interests. Is it -- is it going to be struck  
23 more on the side of not having the appeals go forward,  
24 which may serve some interest of the children involved, by  
25 not having prolonged litigation. It may serve court

1 interests and court personnel interests in not creating  
2 what has been referred to before as the phantom appeals  
3 where the appeal goes forward, records are created, in the  
4 absence of clarity that somebody actually wants to appeal.  
5 That's a -- that's a legitimate policy choice, if that's  
6 where this committee wants to focus its votes. Ultimately  
7 the policy choices are going to be for the Court to make,  
8 based on recommendations and input and its experience.

9           Do we want to have the silence cut in that  
10 direction, or do we want to have the silence cut in favor  
11 of the appeal going forward unless there are narrow  
12 circumstances and good cause, however we want to define  
13 that? This rule takes a swing at it, but we can certainly  
14 have that discussion. However, we want to define good  
15 cause for not having an attorney, an appointed attorney,  
16 stay on to continue with the appeal. And so I really sort  
17 of see that in light of this letter there's -- there's,  
18 you know, a couple of ways we can approach this. We can  
19 have -- you know, we can take a step back and have this  
20 discussion about the policy choice that's reflected in the  
21 current draft Rule 306 that's been put out there for you.  
22 We may want to make sure that the -- the input is heard in  
23 person from Judge Rucker, from Richard, or whoever else  
24 wants to participate in that discussion.

25           I will confess to being a little bit

1 uncomfortable with significant concerns having been  
2 raised, but nobody here to articulate them in person to  
3 you, and so maybe we wait to make sure that they can be  
4 articulated in person. Maybe we've crossed this bridge  
5 already and the time is most spent productively looking at  
6 the draft, the revised draft of Rule 306, and seeing if it  
7 works for the purposes that it's supposed to work for.  
8 So, you know, the subcommittee will -- will accommodate  
9 whatever direction the full committee wants to go in. My  
10 understanding and belief is that the current August 24th  
11 draft reflects the direction that the full committee  
12 has -- has pointed towards over the last, you know, three  
13 or four meetings when this has come up, but nothing says  
14 we can't take a step back and re-evaluate that if that's  
15 the will of the committee as a whole. And so with that  
16 introduction, I guess I would ask for discussion or  
17 direction about whether we want to take a step back and  
18 look at this larger policy choice, or do we want to drill  
19 down and talk about the pros and cons and the wording of a  
20 particular proposed rule?

21 CHAIRMAN BABCOCK: Bill, let me ask you a  
22 couple of questions. Number one, I don't recall, is this  
23 something that we're under a time constraint on? Is this  
24 something that has got to get done right away?

25 HONORABLE BILL BOYCE: I will certainly

1 defer to the Chief Justice, but I'm not aware of a  
2 specific deadline that is for statutory requirement that  
3 we have to meet.

4           CHAIRMAN BABCOCK: Yeah. And the second  
5 question is Judge Rucker until yesterday was going to be  
6 here. I don't know what -- what conflict Richard Orsinger  
7 had, but is there any appetite to take -- to take this  
8 agenda item over to our next meeting and try to encourage  
9 one or both of them to be here?

10           HONORABLE BILL BOYCE: We'll certainly be  
11 comfortable with that as the subcommittee. I think it's  
12 really the question to the full committee about how it  
13 wants to proceed with that.

14           CHAIRMAN BABCOCK: I just got this letter a  
15 day or so ago and really haven't fully digested it. I  
16 doubt anybody else on the full committee has either. So,  
17 Frank, what's your thought about all of this? You've got  
18 to take yourself off mute, Frank.

19           MR. GILSTRAP: Sorry. Small thought and a  
20 larger thought. Small thought, Richard Orsinger is in  
21 mediation. I communicated with him yesterday, and he  
22 regrets that he can't be here. In the larger thought, one  
23 of the things that we've struggled with on this  
24 subcommittee is the fact that none of us work in this  
25 area.



1                   CHAIRMAN BABCOCK:  Yeah.

2                   MR. GILSTRAP:  We're all generalists, and so  
3 as a result, our fallback position for virtually every  
4 person on this court when you're confronted with this kind  
5 of question is due process, and so we're trying to give  
6 this -- this parent who is about to lose his child every  
7 break in the world, but -- but when people who work in  
8 this area come in, we see that there's really a  
9 countervailing issue, and it's a huge issue, and that is,  
10 one, the fact is that the -- the termination is probably  
11 going to be upheld.  We're talking about, you know, the  
12 people we're trying to -- whose rights we're trying to --  
13 to protect are showing that they're unfit because they  
14 won't communicate with their lawyer over this huge  
15 question.

16                   And so, you know, my -- and finally, of  
17 course, you think about the adoptive parents.  As I  
18 understand, the child is in the possession of the adoptive  
19 parent while this is going on.  Am I correct?  Maybe no  
20 one knows, but it's a huge thing.  I mean, I can recall a  
21 tragic case years ago in Tarrant County where these people  
22 had -- had adopted the child, they had had the child for a  
23 couple of years, and the decree came down that they had to  
24 give it up, and it was just -- it was just heart-ripping.

25                   So, you know, all I can say is I agree with

1 Bill. I think -- I think we need help on this. We need  
2 people who work in this area. They need to come in and  
3 tell us what they're concerned about. I appreciate the  
4 letter. I wish we had gotten it earlier, but it's really  
5 helpful that we got it in time, so I think -- I agree, I  
6 think we need to defer and get some help.

7 CHAIRMAN BABCOCK: Yeah, thanks, Frank. One  
8 of the things that occurred to me -- and Pete and Lisa,  
9 we'll get to you in a second. One of the things that  
10 occurred to me was is there any data on how many of these  
11 phantom appeals morph into a real honest-to-God appeal,  
12 and that will be an interesting thing to know. Pete.

13 MR. SCHENKKAN: I fully agree that we  
14 shouldn't go forward to a recommendation to the Court  
15 without Richard. That's one of the two things that you  
16 need to know, you know, how does this play out with actual  
17 people, the clients, and the people on all sides, and I  
18 just don't have a clue, and I wouldn't want it to take  
19 a -- make a recommendation without that. But the other  
20 key part of this is the impact as seen through the eyes of  
21 the judges, and we do have those here, and I'm wondering  
22 if it would be useful to at least have that part of the  
23 discussion here. If it is, the part I would be most  
24 interested in is can any of you give us some examples of  
25 situations in which the putative father, let us say, shows

1 up late and says, "Yeah, I do want to," and where we might  
2 be cutting something off that you think legitimately  
3 should have been considered, recognizing that that doesn't  
4 get you to the answer, because you've got to weigh it  
5 against all of these other things. But -- but, you know,  
6 that's the other part of what I don't know about that I'd  
7 like to have in mind. We can either do that now or wait  
8 until we have a chance with Richard.

9 CHAIRMAN BABCOCK: Okay. Thanks, Pete.  
10 Lisa.

11 MS. HOBBS: I certainly don't think we're  
12 under any time gun that we can't defer this to the next  
13 advisory committee meeting. It's certainly important  
14 enough to. I have the utmost respect for Judge Rucker and  
15 where his heart is in this. We fall on different sides of  
16 it. I was on the HB7 committee, along with Richard and  
17 Judge Rucker; and my partner, Karlene, is on the CPS  
18 wheel, so we probably do within our firm about, I don't  
19 know, I would guess 8 to 10 of these cases a year. So I'm  
20 certainly not as involved with them as Karlene is, but I  
21 definitely review every brief that's filed before it goes  
22 out. Justice Boyce has been awesome about reaching --  
23 even though I'm not on the subcommittee and nor is  
24 Karlene, but Justice Boyce has reached out to both of us  
25 for some amount of, like, practical consideration.

1                   And the problem is, to your point, Chip,  
2 about whether we have statistics or not, no, we don't. We  
3 have anecdotal evidence, which is kind of what House Bill  
4 7 was founded on, and then we know that it's not just the  
5 parents' constitutional rights. Like parents -- there are  
6 parent constitutional rights here, too, but there are  
7 children's constitutional rights, too. Children also have  
8 a constitutional right to a relationship with their  
9 biological parent. So the constitutional dimensions of  
10 this problem are twofold and might prompt someone to read  
11 Judge Rucker's e-mail and think, huh, I get it, you're a  
12 judge and a litigator, and, you know, rules work both ways  
13 for litigants, but we've always put children's rights  
14 above others and recognize that they're not really  
15 represented in the truest form, and so we make  
16 accommodations in our procedures to make sure that their  
17 own constitutional rights are protected.

18                   On the other hand, I was around when we  
19 started the Children's Commission. I was around when we  
20 got courts of appeals to have to decide these cases so  
21 quickly and we implemented our own procedures. I 100  
22 percent agree, and I think Bill -- Justice Boyce said it  
23 one hundred -- like his tee up of this issue could not  
24 have been more fair. There are countervailing policy  
25 choices on this. I just stand in a different relationship

1 with Judge Rucker, and statistically an -- my anecdotal  
2 statistics are more of these cases come up where there is  
3 a participant at trial, but then they're hard to either  
4 get in touch with later or timely get in touch with later,  
5 which is its own problem. Like I can eventually figure  
6 out how to get to a mom or dad in prison, but maybe not  
7 within -- it's not even 20 days, because the  
8 appointment -- an appellate appointment comes in sometimes  
9 even after the 20-day deadline, but certainly it gets  
10 really whittled down to where it's a matter of days, and  
11 there's no -- you get an order. You get no contact  
12 information about this parent. You have no idea even that  
13 there -- may be even in prison. You don't know what their  
14 mental issues are, and you're moving fast and as quickly  
15 as possible, but the safest thing that you can do is file  
16 a notice of appeal.

17           But going back to the subcommittee's  
18 proposal, what I like about it that's different than what  
19 Judge Rucker's proposal is -- and I might be getting too  
20 much into it, but it goes down into the philosophy of it,  
21 is it puts the onus on the judge when someone is in his or  
22 her courtroom to say, "You have a right to appeal. You  
23 have a right to an attorney." If I need to know -- I may  
24 be taking this under advisement or we just got the verdict  
25 or whatever the -- what happened at trial, but in that

1 moment when you have someone present, you get an  
2 indication from them right then whether they think they're  
3 going to appeal it or not.

4           That's probably anecdotally somewhere  
5 between -- if I'm conservative, 70 percent of those cases,  
6 up to, if I'm more idealistic, 90 percent of those cases.  
7 And again, this is just anecdotal Lisa, not actual  
8 statistics, but it will take care of a big part of the  
9 problem where you have that moment to ask the -- for the  
10 judge to ask the parent whose rights might be about to be  
11 terminated at that moment, "What do you think you're going  
12 to want to do?"

13           Then once you get -- but I think what Judge  
14 Rucker would rather do is put the onus on an appellate  
15 lawyer within 20 days to try to figure out how to get in  
16 touch with their client, which sometimes might be easy and  
17 sometimes might be almost impossible within that time  
18 frame to certify in some way that this appeal is intended  
19 to be taken by the client, and to me, that's just -- it --  
20 it is not the reality of my experience of our firm  
21 handling these cases over the last two years since Karlene  
22 has gotten on the CPS wheels. It's just -- it's just  
23 impossible. And if that determines whether or not this  
24 person has a right to appeal that affects the parent's  
25 constitutional rights as well as the child's

1 constitutional rights, I am not in favor of it. Although,  
2 I love Judge Rucker, and I agree that maybe we should  
3 pause and have a conversation where you can hear both  
4 sides of it, because everybody in this world has the best  
5 interest of these children at heart, and we lean one way  
6 or another, but everybody wants the best way to figure out  
7 how do you protect parents and kids and everything and  
8 have the best for them under our Rules of Civil Procedure  
9 and Appellate Procedure that don't necessarily lend  
10 themselves to that.

11           So that's a long-winded Lisa passionate way  
12 of saying that I would gladly defer to have this  
13 conversation when Judge Rucker could be here, too.

14           CHAIRMAN BABCOCK: Other than that you don't  
15 have anything to say?

16           MS. HOBBS: What?

17           CHAIRMAN BABCOCK: Other than that you don't  
18 have anything to say?

19           MS. HOBBS: Exactly.

20           CHAIRMAN BABCOCK: Good. Professor Carlson  
21 at one point had her electronic hand up, but it got  
22 lowered. Do you have anything, Professor Carlson?

23           PROFESSOR CARLSON: No. I was going to echo  
24 what Lisa said, that we did speak with Karlene, and she  
25 did present a number of instances in which it was very

1 difficult to reach the parent in a timely fashion.

2 CHAIRMAN BABCOCK: Okay. Scott.

3 MR. STOLLEY: Thanks, Chip. I want to give  
4 a great hat tip to Bill for chairing this subcommittee.  
5 I'm on the subcommittee as well, and we have talked about  
6 this at length, and like Lisa Hobbs, I fall on the side of  
7 affording the greatest possible process for this very  
8 significant legal issue, but I also agree that it makes  
9 sense to have some people who are in -- in the trenches on  
10 this issue everyday, so I'm in favor of putting it off  
11 until next time.

12 CHAIRMAN BABCOCK: Okay. Well, I think the  
13 Chair is going to make an executive decision and defer  
14 this until our next meeting. Marti, if I'm correct, that  
15 would be November 6th; is that right? If you're going to  
16 talk, you need to take yourself off mute.

17 MS. WALKER: Yes, that's correct, November  
18 6th.

19 CHAIRMAN BABCOCK: Okay. And so I'm going  
20 to suggest that the Chief enter an order commanding Judge  
21 Rucker and Richard Orsinger to be at the November 6th  
22 meeting, and that will prevent any mediations, court  
23 hearings, or anything else from interfering with our --  
24 with our work. And so with that, in order to give Dee Dee  
25 a little break here and to give ourselves a break, let's



1 take a 10-minute recess and then come back. Thanks,  
2 everybody.

3 (Recess from 10:42 a.m. to 10:54 a.m.)

4 CHAIRMAN BABCOCK: Okay. Let's get back to  
5 business here if we can. Give everybody a chance to put  
6 on their screens. Hello, Pam. All right. Procedures to  
7 compel a ruling, and, Nina, once again you are -- you are  
8 leading the class. So go for it.

9 MS. CORTELL: Well, thank you. Actually,  
10 it's Justice Boyce gets to do a twofer here. So he  
11 graciously agreed to lead the charge on this topic.

12 CHAIRMAN BABCOCK: Well, that's -- that will  
13 be great. The floor is yours.

14 HONORABLE BILL BOYCE: Thank you, Chip. So  
15 to recount the long and winding road that we've been on on  
16 this topic, this -- this began with a referral based on a  
17 letter from Chief Justice Gray identifying issues that --  
18 that he had encountered and I suspect many appellate  
19 judges have encountered in terms of mandamuses, filed  
20 primarily by persons who are incarcerated trying to get a  
21 ruling on a particular motion or suit. The case that  
22 Chief Justice Gray was focusing on was a DNA testing  
23 request, but the issue cut more broadly, which is the  
24 circumstance that happens frequently is mandamus is filed,  
25 but particularly given the circumstances of the

1 incarcerated person, they can't really show that there's  
2 been presentment of this motion or request to the trial  
3 court and refusal to rule, and it turns out to be a not  
4 very productive exercise.

5           Maybe the mandamus gets dismissed, maybe a  
6 response is requested, and then that prompts the ruling,  
7 but it's a cumbersome way to proceed. And so the  
8 discussion started out from there about whether there  
9 would be some kind of a procedure that would be  
10 appropriate to either create a presumption of -- by ruling  
11 that would allow a mandamus to proceed or a presumption of  
12 awareness of the motion, and that also sort of morphed  
13 into a larger discussion involving civil cases generally  
14 and not -- not limited to just criminal cases involving  
15 incarcerated persons -- not just civil cases involving  
16 incarcerated persons, but civil cases generally where from  
17 time to time difficulties are encountered in getting a  
18 ruling and difficulties are encountered in showing that  
19 the request had been presented to the trial judge for  
20 purposes of obtaining a mandamus to compel a ruling.

21           Over the course of the discussions, the  
22 scope of the proposed rule was narrowed by discussion and  
23 vote of the full committee not to encompass criminal  
24 matters, not to encompass all civil matters, but to  
25 encompass civil actions by incarcerated persons. And so

1 that winding road brings us to page five of the memo that  
2 was circulated for today's meeting, which basically adapts  
3 the prior notice process that was discussed as a proposed  
4 rule, but limits it to a particular context. When we got  
5 to looking at what was already on the books, it seemed  
6 that this really may dovetail with Chapter 14 governing  
7 inmate litigation.

8 Chapter 14 of the Civil Practice and  
9 Remedies Code, which already contains definitions of  
10 claim, contains definitions of an inmate. The scope of  
11 the chapter involves cases in which the inmate has filed  
12 an affidavit or unsworn declaration of inability to pay  
13 costs. It's a fairly narrow area, but obviously one  
14 that's significant enough to require legislation to  
15 address it, and so the thought was maybe this -- this rule  
16 could be made to dovetail with what's already on the  
17 books. And so it's basically the same rule proposal that  
18 we initially discussed at the last meeting, but with more  
19 narrow application.

20 One thing I want to flag for the committee  
21 is section 14.014 of the Civil Practice and Remedies Code,  
22 the part of this chapter dealing with these types of suits  
23 by inmates, which says that "This chapter may not be  
24 modified or repealed by a rule adopted by the Supreme  
25 Court." I'm not sure we're modifying the Chapter 14, but

1 I want to flag that as something that we should give  
2 consideration to in deciding if this is the approach we  
3 want to use. I would convey to the -- what I think is the  
4 sense of at least part of the subcommittee, is that with  
5 these narrow guardrails on it, this is a pretty limited  
6 rule as it currently is presented to you, dealing with  
7 very limited circumstances. There's a lot of absences of  
8 ruling that aren't going to get addressed by this. We had  
9 a lengthy discussion at the last meeting about whether  
10 this was more appropriately addressed by a rule or  
11 whether, you know, administrative type actions would be  
12 better to address it, and the vote ultimately came down on  
13 a rule approach and a rule approach with this narrow  
14 focus. There may be other points that other members of  
15 the subcommittee want to highlight, but -- but that's kind  
16 of where we got to the current proposal that is on page  
17 five of your memo.

18 CHAIRMAN BABCOCK: Great. Thanks, Bill.  
19 Comments, questions? Raise your electronic hand. Unless  
20 you think it's perfect, which given its proponent, it  
21 undoubtedly is.

22 HONORABLE TOM GRAY: I don't know if that  
23 proponent was attributed to me or to Bill, but I -- and if  
24 it was to me, I make a motion that this proposal be  
25 indefinitely tabled, because the narrow scope of the

1 proposal as done will achieve none of the benefits for  
2 which I had sought a solution.

3 CHAIRMAN BABCOCK: Well, we'll take a vote  
4 on whether or not you're the perfect one or Boyce is.  
5 We'll do that later, though. Other comments? Judge  
6 Estevez.

7 HONORABLE ANA ESTEVEZ: Well, I was -- I was  
8 hoping for a rule, if it was going to be an inmate rule,  
9 that after a certain period of time it would just be  
10 denied, not that somebody can mandamus me or do this extra  
11 motion to compel. I don't think that the inmates should  
12 have an extra way of forcing me to compel a ruling that  
13 all of the other litigants wouldn't be able to have. So I  
14 would just say that after 60 days that the motion is  
15 deemed denied, and then -- again, I think most of the time  
16 the judges aren't even aware of the motions that have been  
17 filed in a lot of these cases; and then the other ones are  
18 they're -- the requests they usually have are not -- I  
19 won't say all of them. That's not true. There's plenty  
20 of -- there's plenty of them that would be you need a  
21 hearing for, you know, it might be discovery because  
22 sometimes the other party may not feel compelled to answer  
23 discovery if an inmate is sending it to them. So I have  
24 had motions to compel, you know, hearings for motion to  
25 compel with inmates in which they were the prevailing

1 party, so I won't say that they should necessarily have  
2 it -- or that they necessarily file frivolous motions, but  
3 I think that it should just be deemed denied, and I guess  
4 they can file another motion at some other point if they  
5 feel like it should be considered or a motion for  
6 reconsideration. But I don't -- I don't like this, as a  
7 trial judge who has prisons in its jurisdiction and  
8 regularly deals with these issues.

9 CHAIRMAN BABCOCK: Thank you, Judge. Frank.

10 MR. GILSTRAP: Justice Gray, you brought  
11 this forward as a proposal for inmate litigation only, as  
12 I recall. Am I wrong?

13 HONORABLE TOM GRAY: Yes. That would be  
14 inaccurate.

15 MR. GILSTRAP: Well, I thought that your  
16 concern involved inmate litigation.

17 HONORABLE TOM GRAY: It was primarily  
18 because of inmate litigation, because the inmate, unlike  
19 other civil litigants, does not have the ability to go to  
20 the clerk's office, get the clerk or the judge involved  
21 directly, or, you know, you know, I rhetorically  
22 suggested, you know, what is the inmate supposed to do,  
23 break out of prison and go to the judge's house, show up  
24 at his door with a copy of the motion and say, "I need a  
25 ruling" because that's what we essentially require, is

1 evidence that the motion has been brought to the attention  
2 of the judge, and when it is actually my turn to speak and  
3 not responding to you, I'll talk about that, but so it was  
4 primarily about inmates and their inability to get the  
5 evidence necessary to then support a mandamus to merely  
6 compel a ruling. That was the background on it.

7 MR. GILSTRAP: Let me just ask one more  
8 question. Are you satisfied that if we limit it to inmate  
9 litigation, you make that decision that the current rule  
10 as proposed does that job?

11 HONORABLE TOM GRAY: Well, no, because the  
12 first thing that got cut out, as Bill said, was all the  
13 criminal, and that was probably 60 percent or more of the  
14 rulings that don't get made, is in criminal cases. But as  
15 to the civil side of it, it might address most of them.

16 MR. GILSTRAP: Well, speaking for myself,  
17 I -- you know, I like the idea of special -- a special  
18 rule for inmates because the reason you just talked about.  
19 They don't have the way to come -- maybe get the court to  
20 rule that an ordinary civil litigant does have. I would  
21 be very troubled by extending this broadly to all  
22 litigation. I'm -- I guess there is a problem with judges  
23 not ruling, and I can certainly see that problem arising  
24 with regard to -- to a final judgment where a judge just  
25 sits on a judgment that he should be signing. I'm really

1 concerned, though, about doing it for other types of  
2 procedures, most notably summary judgment. I've seen over  
3 the years judges do a very good job of carrying a summary  
4 judgment to trial and -- and using that to resolve, that  
5 threat to resolve the case, and if we -- if we apply this  
6 type of rule to all civil litigation, I think we're taking  
7 a lot of power away from the trial judge. That's all I  
8 have.

9 CHAIRMAN BABCOCK: Justice Gray, it's now  
10 your turn to not only respond, but speak substantively.

11 HONORABLE TOM GRAY: Thank you. In response  
12 to Frank's last comments, nothing would, I don't think,  
13 change that dynamic. Remember that you're only doing --  
14 and we've already crossed that bridge, so I'm not going to  
15 revisit that. We've already voted against applying it to  
16 all civil litigation, all criminal as well, so I won't  
17 replot that ground. The deemed denial issue was discussed  
18 fairly extensively at the subcommittee level. There  
19 are -- that Justice Estevez raised. The problem with that  
20 is you can really adversely affect the appellate timetable  
21 of something if the person is incarcerated and the -- he  
22 doesn't know when the time period necessarily starts,  
23 doesn't know if there's going to be a ruling, and then you  
24 get this deemed denial, and they're on lockdown, and they  
25 can't do anything with it for, you know, 30 or 60 days.



1 And remember that this only would trigger in those cases  
2 when the inmate on a specific motion wanted a ruling to  
3 pre-stage a need to do something, and so it's really a --  
4 would be fairly limited, I would think, because the  
5 inmates that we see here on mandamus, while enough to be a  
6 problem, it's not like there's, you know, hundreds of  
7 them, but they almost always have a specific problem that  
8 they need addressed, and they need a ruling before they  
9 can proceed to a direct appeal.

10           In answer to Judge Estevez's observations,  
11 which I think is 100 percent accurate, that most trial  
12 judges in this situation are completely unaware of the  
13 motion that -- on which the inmate wants ruled, I would  
14 add in the middle of the proposal -- and it literally is  
15 right in the middle where it shifts from the -- what the  
16 notice is to the consequences, so right where the word  
17 "if" is, that when one of these notices is filed, that it  
18 is the clerk's duty to provide a copy of the request for  
19 ruling and the motion to which it relates to the trial  
20 court within seven days of the filing of the request.  
21 That way the trial judge has a copy of the motion placed  
22 on his or her desk.

23           Whether that's electronic or paper, it  
24 doesn't matter, but at that point the inmate has advanced  
25 the ball, which is what the mandamus cases almost

1 uniformly now strike down as being inadequate to draw the  
2 trial court's attention to it, and so the mandamus is  
3 summarily denied, frequently without explanation so that  
4 the inmate doesn't even know why his mandamus was denied.  
5 But like I said, this has been pared down so narrow to  
6 such a small number of cases, I don't know that it's --  
7 because the next question we're going to have is where to  
8 put this rule, and that's going to create a whole other  
9 series of conversations and needs and pushback, and it's  
10 just probably not worth the effort, and I will never ask  
11 for another ruling, Nathan, another rules amendment, so  
12 you broke me of that.

13 CHAIRMAN BABCOCK: Well, we would love to  
14 hear what your comment was, Chief, but you were muted, and  
15 maybe perhaps that's a good thing. Who knows.

16 HONORABLE NATHAN HECHT: I said be careful  
17 what you ask for.

18 CHAIRMAN BABCOCK: Stephen Yelenosky.

19 HONORABLE STEPHEN YELENOSKY: Yeah, if this  
20 is going to be a rule that just applies to inmates, I  
21 think we need to do exactly the opposite of an automatic  
22 denial, because that just encourages judges to never even  
23 consider inmate motions, makes it easy. They're often  
24 ignored now. That's the problem, and I think that, you  
25 know, philosophically we talk about everybody -- everybody

1 has a right to be heard; but of course, the circumstances  
2 are such, as many have pointed out, that you can't be  
3 heard from jail, or at least you can't as easily be in a  
4 position to be heard. And so I think that if we're going  
5 to do an exception, it should not be an automatic denial.

6           What we do is we flag those. I mean in  
7 Travis County, what they do now, they flag those and they  
8 set them for phone hearing, every single inmate claim that  
9 comes in. Now, it's possible you do that and you still  
10 don't get a ruling, and so you need some backstop for  
11 that, but at the very least the inmate gets heard on the  
12 phone, and it may be that their problem is one that they  
13 don't understand needs to be addressed elsewhere, and so  
14 they get that kind of advice. So I would want something  
15 that makes it -- makes it possible for inmates to at least  
16 assure that a judge has put eyes on whatever it is that  
17 they've filed and ideally given them opportunity to  
18 literally be heard on it.

19           As for Frank's concern on the motion for  
20 summary judgment, I think that that could be taken care of  
21 by an exception, either for MSJ's, if we're going to apply  
22 it to all other civil cases, or just an exception for an  
23 order from the judge deferring things until trial,  
24 assuming it's summary judgment or anything else. So  
25 that's it.

1 CHAIRMAN BABCOCK: Thank you. Frank.

2 MR. GILSTRAP: Well, insofar as Justice  
3 Gray's concern about it being overly narrow, as I  
4 understand, what we have now is a rule that applies to  
5 civil litigation by inmates. That's what we have. And it  
6 could be broader, but I -- and that can certainly be  
7 tweaked, as Judge Yelenosky has pointed out. There are  
8 various ways to do it, but I think we ought to go forward  
9 and adopt it. And we've got -- it's kind of a laboratory  
10 really. We did this for inmates with regard to unsworn  
11 declarations. They couldn't get a notary public, so we  
12 let them file unsworn declarations. Nobody else could do  
13 it. It worked. Now it applies to everybody. I think we  
14 need to do the same thing here. Let's put this in place  
15 for civil litigation for inmates and see what happens. We  
16 can visit it later. Let's tweak it and fix it, but let's  
17 go forward.

18 CHAIRMAN BABCOCK: Richard Munzinger.

19 MR. MUNZINGER: I just wanted to note my  
20 agreement with Judge Yelenosky. I think he's spot on.

21 CHAIRMAN BABCOCK: Thanks, Richard. Any  
22 other comments? All right. If there are no further  
23 comments, then I think we have thoroughly discussed this  
24 rule, and I think everybody has got a sense of where the  
25 various positions are, so we're going to deem this

1 submitted, and go on to -- go on to our next topic, which  
2 is compensation for supervised practice. And, Nina, tell  
3 me where I should send this particular train to. You or  
4 to Kennon or --

5 MS. CORTELL: I get this one.

6 CHAIRMAN BABCOCK: You get this one. All  
7 right.

8 MS. CORTELL: So lucky me. I have a twofer  
9 today.

10 CHAIRMAN BABCOCK: You tricked me.

11 MS. CORTELL: All right. So it's agenda  
12 Item 7, and the document you should be looking at is D,  
13 tab D or item D on compensation for supervised practice,  
14 and this relates to some rules that the Court recently  
15 re-upped for I think in light of COVID and all of the  
16 implications of that, and the specific issue is in what  
17 way do we allow compensation for a qualified unlicensed  
18 law school graduate or, let's see, a supervised attorney,  
19 I believe also, under the rules; and the current rule does  
20 not allow direct billing by these practitioners, rather it  
21 must go through the supervising attorney, so the question  
22 was should we look back at that and loosen the reins and  
23 allow for billing by that attorney, or not yet licensed  
24 attorney, but practitioner, as long as the bills are  
25 countersigned by the supervising attorney.

1           So if you look at the document we've  
2 provided you, the current Rule 9 on compensation is  
3 provided there, and we're talking about qualified law  
4 students or qualified unlicensed law school graduates, and  
5 it says you can get paid, but not for direct billing. You  
6 can't do it directly. So it has to be through the  
7 supervising attorney. The subcommittee met on whether to  
8 loosen the reins here and allow for direct billing in the  
9 circumstances outlined by the Court. The subcommittee  
10 does not recommend that change. I provided in this  
11 document some of our concerns. This isn't all of them,  
12 but we didn't want to disincentivize close supervision by  
13 the supervising attorney. We didn't think the focus  
14 should be so much on billing but on the services provided,  
15 and we were unaware of a problem that needed to be fixed,  
16 although I think the reason behind the idea to loosen the  
17 reins here would be to expand the pool of supervising  
18 attorneys, perhaps make it easier for solos and not -- you  
19 know, persons not in a law firm situation. I think that  
20 was the motivating idea. Jackie or others maybe can help  
21 us on that.

22           But anyway, it's a pretty straightforward  
23 request, really, whether we want to allow direct billing  
24 by this category of practitioners as long as the bills are  
25 countersigned by the supervising attorney. So that's the

1 question. If there's an interest in looking at that, we  
2 have provided some suggested language at the bottom of the  
3 page. The new language is in italics.

4 CHAIRMAN BABCOCK: Great. Thanks, Nina.  
5 Anybody have any thoughts about whether we should just  
6 recommend the status quo and not try to amend the rule,  
7 and you know, once we discuss that, we'll go talk a little  
8 bit about the language that's proposed, but any comments  
9 about status quo, versus nonstatus quo? Nina, you've  
10 cowed people into submission.

11 MS. CORTELL: I doubt it. I doubt it.

12 CHAIRMAN BABCOCK: Yeah, Lisa Hobbs,  
13 never -- and Judge Wallace, who was falling into the lake  
14 the last time I saw him, may be coming back.

15 HONORABLE R. H. WALLACE: I would vote for  
16 the status quo.

17 CHAIRMAN BABCOCK: Judge Wallace is a status  
18 quo guy. Lisa, what about you?

19 MS. HOBBS: I don't have much to add besides  
20 what, you know, I think Nina tried to articulate, but I  
21 don't see a problem, and I see a lot of problems that  
22 could arise out of changing the status quo, so I am  
23 passionately against changing the rule, but for no more  
24 reasons than what the subcommittee has already presented  
25 to the group.

1                   CHAIRMAN BABCOCK: All right. Judge  
2 Estevez.

3                   HONORABLE ANA ESTEVEZ: More of a question.  
4 So right now, can I just ask you, Chip, like in your firm,  
5 if you had a clerk there, how do you bill your -- I didn't  
6 really understand how it's allowed now. Is it just when  
7 you review their memo, if you find it's accurate, you can  
8 bill your time for looking at it; or do they get to bill,  
9 you know, as a legal assistant or something like that? I  
10 didn't understand how -- what's allowed now. Like in  
11 these large law firms, because I'm going to guess the  
12 large law firms would love to bill them out at \$300 an  
13 hour because they're already getting paid more than most  
14 of the lawyers are in these really large law firms, so I  
15 don't know how I feel about it, because I don't really  
16 understand what's allowed right now. I've never been in  
17 that circumstance where I was aware of how they were  
18 billing my time, if they were billing my time before I was  
19 a lawyer.

20                   CHAIRMAN BABCOCK: Yeah, I can't speak for  
21 all large law firms, but, for example, in the summer you  
22 have law students who are typically first or second-year  
23 law students will spend the summer with you, and they'll  
24 work, and billing and getting paid are two different  
25 things, but I've never thought that there was a



1 prohibition on including in a bill that I review and send  
2 out to a client, having on it the work of a summer law  
3 clerk or a paralegal or any other -- you know, a IT person  
4 who is doing a document production. There are nonlawyers  
5 who find their way onto -- onto bills. Now, a lot of -- a  
6 lot of clients will say, "Well, if it's a law clerk, I'm  
7 not paying for that," so but that's a different question.  
8 The bills frequently have nonlicensed lawyers on the  
9 bills, in my experience, but Nina may -- she's in a big  
10 firm. She may have some other thoughts on that.

11 MS. CORTELL: The same is true for us.

12 HONORABLE ANA ESTEVEZ: Okay. So then  
13 what's the issue? Is this -- I guess I don't understand  
14 what needs to be changed. Or what's not allowed.

15 MS. CORTELL: Well, Jackie might want to  
16 speak to this, but I guess the feeling was that for  
17 these -- let's say you have a solo who wanted to be able  
18 to bill directly and not have to go through a law firm  
19 mechanism. This might loosen up that requirement. It  
20 might make it easier for persons not in large law firms.  
21 I think that's the basic idea, and to make perhaps, I  
22 think -- I don't know how it would work, but expand the  
23 pool of supervising attorneys. But I'm not sure why it  
24 would have that effect, but that -- Jackie provided us  
25 with some commentary by various persons, and that's what

1 we ascertained from the commentary.

2 MS. DAUMERIE: Yeah, I think the rule  
3 effectively requires the graduate to work at the same firm  
4 as the supervising attorney, so Nina couldn't supervise  
5 someone outside of Haynes & Boone on a mentoring goodwill  
6 basis, and so the question is whether we want to allow for  
7 that. Because right now the rule doesn't really  
8 sufficiently -- or, well, the question is whether the rule  
9 sufficiently helps graduates who don't have firm jobs.

10 CHAIRMAN BABCOCK: So a law student --  
11 somebody graduates from law school, they've either taken  
12 the bar or they're about to take the bar, but there's a  
13 period of time where they're not licensed, and so they  
14 come to Nina, who has got a big heart, and they say, "Hey,  
15 I'm going to hang out my shingle," so to speak, "and I  
16 want to start -- I want to get going, you know, I've got  
17 some neighbors that have got legal problems, and so I want  
18 to get going doing it, and but I want to bill them, but  
19 now I can't, so, Nina, will you, you know, take a look at  
20 what I'm doing and look at the bill and send it out?" Is  
21 that the concept? Is that the idea?

22 MS. DAUMERIE: Well, I think the idea would  
23 be that the graduate who's hanging up their shingle could  
24 send out their own bill, just as long as Nina signed off  
25 on it, yeah.

1                   CHAIRMAN BABCOCK: Right. If this proposal  
2 is accepted.

3                   MS. DAUMERIE: Right.

4                   CHAIRMAN BABCOCK: But otherwise they  
5 couldn't, right?

6                   MS. DAUMERIE: Correct. Yes.

7                   CHAIRMAN BABCOCK: Okay. All right. Lisa.

8                   MS. HOBBS: So as a small firm -- so I have  
9 the big firm experience; and I think my big firm  
10 experience is similar to what Chip and Nina have  
11 expressed, is that there are unlicensed attorneys' time  
12 who gets billed to clients, who decide they may or may not  
13 pay for it, depending on that; but as partners in those  
14 firms we reviewed the work product; and we, of course,  
15 would never pass off a fee to our client where we didn't  
16 think they were getting some substantive value of it,  
17 whether they were a licensed attorney or not. So that  
18 does happen all the time in a big firm environment, is my  
19 experience -- well, that was my experience. I can't say  
20 it happens all the time. That was my experience.

21                   But as a small firm, I've never hired an  
22 intern, which I think is kind of what this is, whether a  
23 summer associate or an intern, but I do use contract  
24 lawyers, and I don't understand why the fact that I would  
25 be the one to figure out what my arrangement was between

1 me and this law student or unlicensed lawyer, and then I  
2 would take care of billing for them. So I can choose to  
3 make the -- I mean, they may come to me and be an unpaid  
4 intern, or they may come to me and be a paid intern, but  
5 ultimately the obligation to discern whether they added  
6 value to a case in a way that makes it a reasonable fee  
7 that the client should pay for, that they offered value to  
8 that client, I want that to be a decision of a licensed  
9 attorney with a fiduciary relationship with their client,  
10 and so I don't understand -- like I don't understand why  
11 this would broaden things.

12 I mean, I kind of get the superficial  
13 context of like, well, I could bill them myself, but I  
14 think the harm that you could do to the system where I had  
15 like -- I don't know, like a paralegal billing my clients  
16 by themselves without me overseeing it? Like, no, that's  
17 not how this works. Like it's my -- ultimately my  
18 obligation as the one with the fiduciary relationship with  
19 the client to make sure that everything that I bill them  
20 is reasonable and necessary to the provision of legal  
21 services to them, and I don't -- I don't think it's a good  
22 policy for the State of Texas to let someone else have  
23 that screening process and be able to bill somebody. It  
24 just seems like it could just open up a whole can of worms  
25 that is just really problem -- and whatever -- whatever

1 problem is identified here is small enough that I'm just  
2 not so concerned about it, that I think I would be -- if I  
3 were the justices of the Supreme Court that I would be  
4 willing to open up the can of worms that it could open up.

5 CHAIRMAN BABCOCK: Judge Estevez.

6 HONORABLE ANA ESTEVEZ: I disagree with  
7 Lisa. I think that after hearing why you're doing it, it  
8 sounds like what you're trying to do is separate or take  
9 off the responsibility from that supervising attorney, and  
10 if that supervising attorney has a fiduciary duty, and --  
11 they should be supervising and also know what these bills  
12 are. I know you said they have to sign off on the bill  
13 still, so they would review the bill?

14 MS. CORTELL: Right.

15 HONORABLE ANA ESTEVEZ: Then why not just  
16 let them send the bill? You know, I mean, they're doing  
17 the same amount of work and then whatever gets recovered.  
18 It doesn't seem -- it seems like you're having the same  
19 amount of work anyway. You still had to review the work.  
20 I think it creates more problems than it solves, if it's  
21 solving any problems. So --

22 CHAIRMAN BABCOCK: Yeah, the -- go ahead,  
23 Nina.

24 MS. CORTELL: I think the idea is to allow  
25 this rule to take place to protect practitioners. That's

1 what I'm calling this other category, unlicensed  
2 practitioners, where they can do it outside of a law firm  
3 context. So the idea would be that there's no direct  
4 client relationship probably between the supervising  
5 attorney and the client. So you're in essence allowing  
6 more independent practice by this unlicensed person, which  
7 has its own bag of problems, but if you wanted to expand  
8 that pool and allow this to occur outside of any law firm  
9 context, not -- not just a big law firm, but a small law  
10 firm, and allow them to be independent practitioners, so  
11 it's only a countersigned bill. I think that's the idea  
12 here, to loosen those rings, open the pool.

13 CHAIRMAN BABCOCK: Richard Munzinger.  
14 You've got to go off mute. Yeah, take your mute off.

15 MR. MUNZINGER: Sorry. I think a rule that  
16 does not require some kind of a relationship between the  
17 certifying attorney and the client weakens the rule  
18 against the unauthorized practice of law and creates some  
19 ethical problems possibly, and certainly some -- if  
20 there's a dispute about it who is this -- the lawyer who  
21 has certified that something is reasonable and fair and  
22 necessary to the client, but he has no relationship with  
23 the client. How could he make such a certification? It  
24 doesn't make sense. The rule, if you're going to have  
25 nonlawyers bill people for services that they provided

1 that are legal services, they are not licensed to practice  
2 law. They shouldn't be doing it. If they do it, they do  
3 it under the auspices of an attorney who has a fiduciary  
4 relationship with the person who is being benefited by the  
5 services. That makes sense. Anything that is beyond that  
6 does not make sense. Thank you.

7 CHAIRMAN BABCOCK: Okay, Frank.

8 MR. GILSTRAP: Well, as long as we're  
9 talking about other contexts I'll give you -- I'll give  
10 you one. I've come across recently two cases that were  
11 terribly botched, and the business model was they had one  
12 lawyer and nine paralegals or legal assistants. They did  
13 all the work. The clients were ordinary consumers. They  
14 didn't know how to deal with lawyers, and they signed  
15 lengthy fee agreements when they came in the door, and  
16 that's going on now, and to the extent -- I can see these  
17 people hiring a part-time law student, say, "Hey, now  
18 we've got a part-time law student for you to talk to," but  
19 essentially the work is not being done by the lawyer, and  
20 to the extent -- or even reviewed by the lawyer in some  
21 instances, and to the extent that we could discourage  
22 that, I would be for any rule to do that.

23 CHAIRMAN BABCOCK: Thanks. Alistair.

24 MR. DAWSON: Yeah, so I guess I'm mostly  
25 going to agree with what Richard Munzinger said. You

1 know, at our firm we allow law students to come in, and  
2 we've done it this year because of the delay in taking the  
3 bar exam, where they come in and -- and we bill for their  
4 time, but -- but because we have obligations to our  
5 client, number one, we adjust the billing rate to  
6 recognize the fact that they're not licensed; and number  
7 two, we review the bills to make sure that the amount of  
8 time that they're spending is appropriate for the work  
9 that's being done, and we make whatever adjustments need  
10 to be made; and the concern that I have is here you've got  
11 the unlicensed attorney is billing his or her client, so  
12 the supervising attorney has no obligations to that  
13 client, has no role in the setting of the billing rate,  
14 has no ability to make adjustments to the bills to make  
15 sure that they're appropriate and reasonable for the  
16 services that are being charged.

17           And so I think it's fraught with danger  
18 for -- for abuse, frankly, and so I'm not in favor of the  
19 proposed change. I'm sympathetic to the situation  
20 involving unlicensed attorneys, but since they're not --  
21 if they're not going to be affiliated with a firm and the  
22 protections that come from that, then I don't favor the  
23 rule.

24           CHAIRMAN BABCOCK: Thanks. Judge Peeples.  
25 You've got to take your mic off mute, Judge.



1 HONORABLE DAVID PEEPLES: I think this shows  
2 the wisdom of our usual policy, which is if it ain't  
3 broke, don't fix it. There's no proposal out there  
4 saying, "Here's a problem, please fix it." The Court  
5 asked us to look at it, and we've done that. I've been  
6 listening carefully, and maybe 12 or 15 people have  
7 spoken, and nobody has really said there's a problem,  
8 let's fix it, and I think this random unfocused discussion  
9 just shows the wisdom of talking about it and moving on.

10 CHAIRMAN BABCOCK: Thanks, Judge. Chief  
11 Justice Hecht, it looked like maybe your hand shot up, not  
12 electronically, but actually. Nope? Okay. Anybody else  
13 have any comments about this? Jackie, you could get the  
14 last word if you want to be a proponent of this  
15 ill-conceived thought.

16 MS. DAUMERIE: I'm not a proponent. I  
17 just -- these were some concerns raised by the deans and a  
18 few members of the bar when we were looking at the  
19 supervised practice rules, so --

20 CHAIRMAN BABCOCK: Yeah, I sort of -- sort  
21 of agree with Judge Estevez, that if it's somebody working  
22 for you as an intern or as a summer clerk, I mean, you're  
23 going to send the bill out. They don't need to send the  
24 bill out; and if they're not working for you, you have all  
25 of the problems that Richard Munzinger just raised of not

1 having an attorney-client relationship with the client of  
2 the unlicensed attorney, so I guess maybe I'm in Judge  
3 Peeples' camp where this is a -- a solution in search of a  
4 problem. So, Nina, unless you want to overrule me or  
5 anybody else, the Chief or -- to discuss further, then I  
6 think we'll submit -- we'll submit this and move on to our  
7 next item.

8 MS. CORTELL: That's great, and it's in  
9 accord with what the subcommittee concluded as well.

10 CHAIRMAN BABCOCK: Okay. So we've got that  
11 going for us. All right. Good, that one is done. So now  
12 Texas Rule of Civil Procedure 306a(3), and, Frank, I see  
13 you as the chair of this one.

14 MR. GILSTRAP: All right. I'm ready to go  
15 if you are.

16 CHAIRMAN BABCOCK: I'm ready. Let's do it.  
17 We're on a roll.

18 MR. GILSTRAP: Right. This is Item 8 on the  
19 agenda. The first item in there is a six-page memo, but  
20 it's double-spaced, and you'll need to look at it,  
21 particularly pages two and three. I want to begin by  
22 telling a story. The other day in preparation for this  
23 presentation I actually electronically filed my own  
24 pleading. I know many of you do that, but I've never done  
25 it, and it was an amazing experience. I had -- it was

1 hard to get Internet Explorer working because it's a  
2 cranky program, but once I did, it was a few clicks and I  
3 had the pleading filed and I had notice given to the other  
4 side all in one fell swoop. There was no pen, there was  
5 no paper, there was no envelope, there was no postage,  
6 there was no three-day rule. There was no nothing.  
7 Obviously, it's a huge system and really a great system.  
8 I know that the people who worked on it back in 2013  
9 probably see all of the problems and warts, but from the  
10 outside it's a great thing, and obviously it's the way of  
11 the future.

12           It offers -- like a lot of the internet, it  
13 offers enormous savings in time and energy, and I thought  
14 the last discussion about how we bill our time was kind of  
15 interesting, and, you know, we could have that discussion  
16 about electronic filing, but here we're talking about  
17 concerns raised by people who don't get paid for their  
18 time, and these are the clerks, who are public servants  
19 and are concerned with the public fisc and the time of  
20 their employees. And the focus is on the fact that most  
21 of our rules or almost all of our rules were adopted  
22 before the time of electronic filing in 2013, and they  
23 have some provisions in there that are totally  
24 inconsistent with electronic filing or electronic notice.

25           Particularly, there are four rule provisions

1 that require the clerk to send notice of the judgment --  
2 of a judgment to the parties by first-class mail or their  
3 equivalent. These are ones that you're probably largely  
4 familiar with, are Rule 239a involving default judgments;  
5 Rule 165a involving dismiss for want of prosecution, DWOP.  
6 One that you may not be too familiar with, 119a involving  
7 divorce decrees, and finally, Rule 306a, which is the  
8 subject of our discussion today. But I'm simply saying  
9 this because if we decide to go to electronic notice with  
10 regard to 306a, there is almost no reason not to do it  
11 with regard to the other rules, and that will probably  
12 occur.

13                   Now, 306a is a nifty rule. It's 306a(3)  
14 says that the clerk has to send out notice of the judgment  
15 by first-class mail. If you look on page two of your  
16 memo, the second indented paragraph, which has a (3) in  
17 front of it, that's 306a(3). Take out the words  
18 "electronically." We'll talk about that later, and just  
19 imagine it without those words. That's the rule as  
20 written. It's mandatory. The clerk has to send out  
21 notice of the judgment by first-class mail. The way the  
22 rule works is if you can show -- if you're the defendant  
23 and you can show that within 20 days you did not get that  
24 notice and you didn't have actual notice, then you get to  
25 postpone the running of your post-judgment timetable.

1           If you've ever used it, it's a neat rule,  
2 and it works, but again, the problem is sending  
3 first-class mail. The obvious question is should we send  
4 notice electronically, and this came from the Joint  
5 Committee on Information Technology, and they noted  
6 correctly that clerks are already doing this, and they  
7 have authority to do this. They have authority under the  
8 next rule on page three, which is Rule 21(f)(10), which  
9 says, "The clerk may send notices, orders, or other  
10 communications about the case to a party  
11 electronically."

12           There is also at the very top of that page  
13 two, Rule 80 point -- excuse me, section 80.002 of the  
14 Government Code, which says that "A court, justice, judge,  
15 or magistrate or clerk may send any notice or document  
16 using mail or electronic mail. This section applies to  
17 all civil and criminal statutes requiring delivery of  
18 notice of a document." Well, the clerks up here, you  
19 know, arguably are within their rights doing it now. Why  
20 not bring the rule into accord with these provisions and  
21 with the current practice of the clerk, and it's --  
22 insofar as electronic filing, there is no reason not to do  
23 it. We can just do it as shown on page two. Again, the  
24 second indented paragraph, just add the words "or  
25 electronically" and it works.

1           But there is a problem. There are some  
2 people who don't file electronically. Here is the current  
3 regime. If you file, if you're an attorney, you have to  
4 file using the electronic filing master maintained by OCA,  
5 which means that you file electronically, and you have to  
6 provide an e-mail address. A nonlawyer can do that, and  
7 he is supposed to provide -- he or she is supposed to  
8 provide an e-mail address, but they don't have to.  
9 Remember, the clerk has to take -- if you file a pleading  
10 that's an answer to a lawsuit, the clerk has to take it.  
11 The clerk can't set it aside and say, "Oh, wait, you left  
12 off an address. You left off an e-mail address." They  
13 have to take the pleading, and there are some people who  
14 don't use the internet. There are some people who have  
15 e-mail addresses, but don't file electronically. What do  
16 we do with all of these people? And that's really the  
17 problem that we face here.

18           Our initial -- we dealt with it at the  
19 subcommittee level. Our initial response was to say,  
20 okay, we'll just put a provision in, carving out people  
21 who don't file electronically. Look on page two of the  
22 memo. There's two versions there. One carves out people  
23 who have not previously filed a document electronically;  
24 another, which is slightly different, carves out people  
25 who have not provided an e-mail address. We can quibble

1 over those, but there is a larger question. Should we  
2 do -- have a carve-out at all? And we had some pushback  
3 on our subcommittee, and it seemed to me that they had a  
4 good argument, and of course, they're going to get to talk  
5 in a second, but let me see if I can summarize it.

6           The problem is that -- and Sharena  
7 Gilliland, who is the clerk representative on the -- on  
8 the SCAC and who was very helpful on this, pointed out,  
9 look, fellows, if you carve out people who don't file  
10 electronically, you're destroying the efficiency of the --  
11 of the reform. And the problem is this: How do you know  
12 if someone in a file has not filed electronically? How do  
13 you know that there's not a pro se answer that was sent to  
14 the clerk by paper, scanned, and put in the file? You  
15 don't know. You can't go to the OCA or the electronic  
16 filing master because they don't keep track of people who  
17 don't file electronically.

18           Moreover, the clerks use two or three  
19 versions of case management software. It's not mandated.  
20 Ms. Gilliland says, you know, "Our version that we use in  
21 Parker County," which is a pretty up-to-date county. I've  
22 been there before. "We can't do it. There's no way we  
23 can go through that file and immediately tell whether or  
24 not there is a pro se party who hasn't filed  
25 electronically." I doubt if you're going to be able to do

1 that without redesigning or reprogramming the  
2 electronic -- the case management system that the clerks  
3 use. Well, then why not just go ahead and check each one?  
4 Well, you've got to open the file, you've got to look  
5 through it, and you've got to say, "A-ha, there is a pro  
6 se answer. And I'm going to go ahead for those people --  
7 I'm going to type up a notice of judgment and send it out  
8 by snail mail." That's the problem.

9           Moreover, there was some question as to  
10 really -- and this is kind of a cost-benefit analysis.  
11 It's kind of a junior version of the enormous questions  
12 that we dealt with on -- on termination cases earlier.  
13 How many people are we talking about, and are we -- is  
14 it -- is the -- and under a cost-benefit analysis, is it  
15 really worthwhile to jam the whole system so that these  
16 people get paper -- get notice of the default judgment?  
17 You know, initially, I, like most of you, my default  
18 position is due process; and I said, wait a minute, we  
19 can't do that. But wait a minute, we're talking about an  
20 enormous savings to the taxpayer, and let me give you some  
21 statistics.

22           Last year there were 42,000 judgments signed  
23 in Texas. First-class mail postage is 55 cents as -- and  
24 if we assume that we send them one first-class mail for  
25 each one of these -- these cases, that's about only



1 \$23,000, but it is taxpayers' money; and, you know, clerks  
2 are funny about taxpayers' money. They like to save it.  
3 There's also, I think, larger savings involved with time  
4 and energy.

5           So, you know, this is the way of the future.  
6 Are we going to let a few people stand in the way, who  
7 don't file electronically, of progress? Well, how many  
8 people are we talking about? Well, let me give you -- I  
9 couldn't find any answers on that. It would really be  
10 helpful to know how many pro se litigants there are in  
11 Texas who don't file electronically, but I -- you know, I  
12 can't imagine that there would be a way to figure that out  
13 in the whole 254 counties that we have. I did find some  
14 nifty statistics from something called the National  
15 Telecommunications Information Administration. I don't  
16 know whether that's a government agency or not, and they  
17 said that in -- these statistics are all 2019. 79 percent  
18 of Americans over age three -- I don't know how they came  
19 up with that number -- over age three use the internet.

20           Now, there's some variations. As you might  
21 expect, certain ethnicities or minorities have less, 47  
22 percent less. Also, as you might expect, there is an  
23 income disparity. People whose family income is below  
24 25,000, only 62 percent have access to internet, excuse  
25 me, 65 percent; and where it's over a hundred thousand, 80

1 percent; and finally, people 65 percent or over, about 68  
2 percent. Well, okay. Those are statistics. How does  
3 that translate into how many people file pro se answers  
4 without filing electronically? There is no way to tell,  
5 but I suspect -- but this is just a guess, that it's much  
6 longer -- much lower, excuse me.

7           So the question then -- and I think the  
8 question that we decided on the subcommittee to present to  
9 the full committee, because it's an important question, is  
10 do we have a carve-out at all? Once we make that decision  
11 and if you say we have a carve-out, we can draw one up  
12 real easy. It's no problem, and it won't be any problem  
13 to extend it to these other rules, although that may fall  
14 to other subcommittees. There would be problems --  
15 certain problems with each rule. For example, DWOP  
16 notices under Rule 165a are sent out in bulk. Well, we're  
17 not talking about searching one case. We're maybe  
18 searching 30 cases to make sure that there are no pro se  
19 answers where the people haven't filed electronically.  
20 And finally, with regard to default judgments, the people  
21 don't even know they've been sued. Are we going to leave  
22 them out? Are we going to not send electronic notice? Or  
23 not send paper notice to them?

24           There is one further thing. The fact is  
25 that people who don't get notice do have remedies. First

1 of all, the first rule is Rule -- Rule 306a. You get  
2 extra time if you can show that you didn't get notice in  
3 time. You don't have a restricted appeal because --  
4 because you can't show error on the face of the record,  
5 but your fallback position is a bill of review, and there  
6 are cases that do say that if people don't get notice of  
7 their judgment, that's -- they can get a bill of review.

8           So that's pretty much the controversy in a  
9 nutshell. I think, Chip, you know, I'll turn it back to  
10 you, but I think I'd like to hear or maybe you'd like to  
11 hear from members of the subcommittee on this point. Let  
12 me add one thing more. Even if the subcommittee had not  
13 disagreed, I still think we would bring this issue to the  
14 full committee because it's that significant. Thanks.

15           CHAIRMAN BABCOCK: Great summary, although I  
16 think that must be a bigger nut than we typically think of  
17 as being a small nutshell, but --

18           MR. GILSTRAP: Okay.

19           CHAIRMAN BABCOCK: All right. Great summary  
20 of the problem. Who has comments? We'll wait a second  
21 while people get their electronic hand. Roger.

22           MR. HUGHES: Well, I favor some sort of  
23 change on this, because I live in an area where the courts  
24 are being a little schizophrenic. I have one county that  
25 will remain nameless, and they will e-mail you the notice,

1 and they will e-mail you the final judgment, because they  
2 can. I have another county where they will absolutely  
3 positively refuse to electronically send you the final  
4 order of dismissal or judgment. Instead you get a letter  
5 and telling you that if you want a copy, send us a dollar  
6 a page plus the cost of mailing, even though you can go  
7 online and download a copy from the clerk's office. I  
8 don't understand that. I think it ought -- ought to be  
9 available -- the clerk ought to have the option to send it  
10 to you electronically, just to end the madness, and lower  
11 the expense.

12           I will say this, I think there is a problem  
13 with pro se litigants, because you -- they may have an  
14 e-mail address, but there's nothing in the record that  
15 will tell you what it is. They may have called the court  
16 coordinator and given them an e-mail address, and things  
17 will be sent to them, but nothing in the record will show  
18 that that's a good e-mail address. I even had one case  
19 where the lawyer withdrew, and the court started sending  
20 notices to the now pro se plaintiff by e-mail, and after  
21 summary judgment, six months later, up popped -- well, we  
22 used to call them writ of error. Now I call them  
23 accelerated appeals or whatever, and there was nothing in  
24 the clerk's record to show that the e-mail address to  
25 which all of this stuff had been sent to the pro se

1 plaintiff was a good e-mail address.

2           So the case -- the summary judgment had to  
3 be reversed. Without the litigant ever certifying that  
4 they hadn't gotten it, the question on the accelerated  
5 appeal was can you prove it in the record? So I would  
6 also suggest consideration of some official record being  
7 made or allowed to be made that a pro se -- either someone  
8 who filed pro se or became pro se during the course, what  
9 their e-mail address is, so we don't have the problem that  
10 they're getting stuff but we can't prove it, because even  
11 if there's something showing the court sent it to that  
12 e-mail address, there's no proof linking that e-mail  
13 address with the litigant. That's my two cents' worth.

14           CHAIRMAN BABCOCK: Thank you, Roger. This  
15 was a small point, but if the clerk doesn't have an e-mail  
16 address for the litigant, how are they going to -- how are  
17 they going to serve the judgment? I mean, they would have  
18 to default to first-class mail, wouldn't they, I would  
19 think? Frank.

20           MR. GILSTRAP: Well, unless we said they  
21 didn't have to. They, of course, would have an automatic  
22 access to Rule 306 -- to Rule 306a because you have to  
23 show that you either didn't get -- have actual notice or  
24 didn't get the notice from the clerk, and they didn't get  
25 notice from the clerk. Yes, that's a real problem, and we

1 don't know how many people we're talking about. I mean,  
2 you could think about maybe it's some isolated person out  
3 in the sticks like the unibomber, and maybe so, but -- and  
4 it is true, in fact, that there are a lot of people that  
5 you wouldn't expect to have e-mail addresses that have  
6 e-mail addresses. For example, homeless people go in to  
7 the public library all the time and check their e-mails.  
8 So, again, we just don't have any handle on that.

9           The -- one further thing. You know, in  
10 terms of what Roger said, you know, and Sharena Gilliland  
11 pointed out this in her -- in her memo, and it's in the  
12 materials, and it would be helpful for y'all to read that.  
13 She said, look, why send notice, why not just send the  
14 judgment itself? You're sending it electronically. Yes,  
15 it's 150 pages, but it's electronic. The requirement of  
16 notice was given back when you had to send it by mail.  
17 You don't have to now. So you could certainly make the  
18 system operate more efficiently then.

19           But if we don't do anything, if we leave it  
20 there, I predict the clerks are going to continue to send  
21 it out electronically. That's just what's happening.  
22 It's too big a savings, and there is support in the rule  
23 and the statutes for them to do it. That's all I have.

24           CHAIRMAN BABCOCK: Thank you. Professor  
25 Carlson.

1                   PROFESSOR CARLSON: Yeah, I just wanted to  
2 mention that 306a(4) only gives protection for 90 days if  
3 the litigant didn't or their attorney didn't have notice  
4 or knowledge of the judgment, but they do receive it  
5 within 90 days. After that, if you received notice after  
6 the 91st day, the Texas Supreme Court has said the rule  
7 does not help a litigant, doesn't extend the time for  
8 post-judgment motions or the time to appeal, but you still  
9 have, as Frank pointed out, the equitable bill of review  
10 avenue.

11                   And I wanted to echo what Frank said. I  
12 think it would -- if we're going to move in a direction of  
13 giving electronic notice of the signing of a judgment or  
14 appealable order, it ought to include the actual judgment  
15 or appealable order because it is not, I don't think,  
16 overly burdensome for the clerks to send that along with  
17 it. That's all I have.

18                   CHAIRMAN BABCOCK: Thanks, Elaine. Judge  
19 Wallace. Judge Wallace.

20                   HONORABLE R. H. WALLACE: There's a category  
21 of cases, your default judgments, where you're almost  
22 certainly not going to have an e-mail address and all  
23 you're going to have is a physical address. So I think,  
24 at least as to default judgments, if you don't send out a  
25 first-class mail to that address, then you may as well

1 just say that in default judgment cases they're not  
2 entitled to notice, because that's the only way you've got  
3 to give them notice. But that -- that could be a  
4 carve-out, I would think, when obviously you would have to  
5 send it by first-class mail.

6 CHAIRMAN BABCOCK: Yeah, thanks, Judge.  
7 Stephen.

8 HONORABLE STEPHEN YELENOSKY: Yeah, let me  
9 ask a question first. I was confused, Frank. You said  
10 that there's no way for the clerk to tell if a pro se  
11 litigant had filed electronically. Is that right?

12 MR. GILSTRAP: No. There is a way to  
13 tell -- well, I don't know. I presume that there is a way  
14 to tell if a pro se litigant has filed electronically, but  
15 it doesn't make any difference. If you send out notice  
16 electronically to everybody who has filed electronically,  
17 you're going to pick up the pro se litigants who have  
18 filed electronically. The problem --

19 HONORABLE STEPHEN YELENOSKY: Right, but  
20 you're not going to follow up with an e-mail because you  
21 just assume everybody got -- or they're not entitled to,  
22 if they --

23 MR. GILSTRAP: There is a halfway point  
24 there. There are a number of people who provide their  
25 e-mail. In fact, the rules say that you have to -- the



1 statute says you have to provide your e-mail address,  
2 although people don't do it. And but there's a problem  
3 there, and I think this is -- and that's this. Just  
4 because I have filed -- if I have filed a paper pleading  
5 and included my e-mail address, I'm not watching my  
6 e-mail. I mean, we are all lawyers. We know to look.  
7 When we see "no reply" on our e-mail, we know to look at  
8 that. People who are not filing electronically, who have  
9 been filing by paper, even though they provided an e-mail  
10 address, will not know to look for that.

11 HONORABLE STEPHEN YELENOSKY: Well, but  
12 that's a -- that problem is easier to understand why it  
13 would be incumbent on them to check e-mail if they have  
14 it. Now, putting aside that there are people who don't  
15 check e-mail, those who have e-mail, in my experience,  
16 check it several times a day, and some people just start  
17 to ignore their first-class mail because it's all junk,  
18 but the part I'm getting to is if -- if the clerk sends  
19 out notice through the electronic system, are they going  
20 to know if they also have an e-mail address to send it to?

21 MR. GILSTRAP: I don't know that.

22 HONORABLE STEPHEN YELENOSKY: Okay.  
23 Because --

24 MR. GILSTRAP: Certainly they can research  
25 the file to determine if that person has provided an

1 e-mail address.

2 HONORABLE STEPHEN YELENOSKY: Right.

3 MR. GILSTRAP: And also, just as a sideline  
4 on what Judge Wallace is talking about, if we do a default  
5 judgment, you have to file a certificate of last known  
6 address. You can include an e-mail address in there. But  
7 one more thing, and that's this: You and I may move at  
8 different circumstances, but I know a whole lot of people  
9 who don't check their e-mail.

10 HONORABLE STEPHEN YELENOSKY: More power to  
11 them, but it seems to me that we've got to give -- I  
12 think, you know, it's fine to give electronic notice, but  
13 if it turns out the person has not filed electronically,  
14 then that's a problem, and so we either need to be -- if  
15 you can't determine, but you have their e-mail address,  
16 you can send it to the e-mail. I think it's their problem  
17 to check it or not. They gave you the e-mail address.

18 The converse is why are you asking for their  
19 e-mail address if you're not going to use it, when you  
20 give notice of a judgment? So I don't know -- I mean, is  
21 there a savings from just saying we're going to send all  
22 these notices electronically and if we don't know we'll  
23 send it by e-mail or we'll send it electronically and by  
24 e-mail? How does the clerk deal with that as a practical  
25 matter?

1 MR. GILSTRAP: Well, the clerk, under --  
2 under the -- all of the proposals will have a choice.  
3 Right now the clerk has to send it by first-class mail,  
4 but the clerk will have the option to send by e-mail. As  
5 it turns out, as Sharena Gilliland's memo points out,  
6 there are clerks in some small counties that prefer  
7 regular mail.

8 HONORABLE STEPHEN YELENOSKY: Oh, I think  
9 they should have all of those options. I guess I was  
10 getting at I thought you were saying that some people are  
11 going to fall through the cracks and that's the price we  
12 pay for efficiency; and if you mean by fall through the  
13 cracks that they will -- they'll still get an e-mail,  
14 whether they look at it or not, then I'm fine with that.  
15 They've provided the e-mail address and ought to know they  
16 should be checking it if, in fact, they're involved in a  
17 suit, but I wouldn't want somebody who neither files  
18 electronically nor gives you an e-mail address to not get  
19 mail, and so I think everybody needs to get notice. In  
20 all of those options certainly electronic should be  
21 available.

22 I was going to point out, but it's already  
23 been pointed out, but 306a is only -- is only 90 days, and  
24 after that you're out of luck on that. I don't think  
25 these backstops -- if we're talking about pro se

1 litigants, talking about the backstops doesn't really  
2 help. Hopefully if they get notice of the judgment  
3 they'll do something with it or not. They're not going to  
4 be aware of 306a.

5           Final point is just that when I looked at  
6 all of this material earlier, it seems to me that -- and  
7 this would be a bigger project, but perhaps not, or a  
8 broader project, but perhaps not a bigger one. The whole  
9 thing on notice of judgment is confusing because of the  
10 way it's structured, and I think it could -- you could  
11 easily move things around, but there's a lot of places  
12 where it doesn't signal clearly that it's talking about  
13 notices from the clerk at all. 21 says "electronic  
14 filing" and then way down under (f) is "electronic  
15 filing." Way under (10) it talks about notice from the  
16 court and orders, doesn't say judgments there, but even  
17 regardless it's talking about electronic filing. Then you  
18 get into 306a, and 306a says "Periods to run from signing  
19 of judgment." But way down in there somewhere is the  
20 notice requirement, so under (3), so to me this should be  
21 reorganized and relabeled. That's a bigger issue.

22           MR. GILSTRAP: Yeah. Let me say this. I  
23 disagree with you on one point. I think if we're going to  
24 give paper notice to people who haven't filed --  
25 provided -- who merely filed a paper response and haven't

1 provided their e-mail, I think we ought to also give paper  
2 notice to people who have filed, but -- but and provided  
3 an e-mail address, but haven't filed electronically. You  
4 know, like I say, I look -- I know to look for my e-mail  
5 and to look at "no reply." That means I've probably been  
6 served. People don't know that. They don't know that  
7 from -- it's somebody in Kazakhstan trying to get to know  
8 them better. I mean, it's just there's no way that people  
9 are going to -- a lot of people are going to check their  
10 e-mail with the thoroughness that this requires.

11           Let me give you one further bit of  
12 information you need to have, and that's this. Apparently  
13 the clerk -- the Court, or at least OCA, looked at this  
14 question back in 2013 when Rule 21(f) was promulgated, and  
15 if you'll look over on page five of the memo, you see the  
16 original version of the provision involving clerk notice,  
17 and it's applied only to parties who file documents  
18 electronically. That was the original version, which I  
19 think was adopted in June or July of 2013, but when the  
20 final deal went down in December of 2013, they took that  
21 out, and they simply put the current provision, which we  
22 talked about earlier, which says the clerk may send  
23 notices, orders, or other communications about the case to  
24 a party electronically. I don't know, it would be helpful  
25 to know, what lay behind that decision. Was it a

1 technological problem, or did the Court decide we don't  
2 need to send notices -- we're going to send all notices  
3 electronically. We don't have that information, but it  
4 would be helpful.

5 HONORABLE STEPHEN YELENOSKY: Well, Frank,  
6 if somebody had -- if the clerk has the person's e-mail  
7 address, then they've gotten it somehow from that person,  
8 correct?

9 MR. GILSTRAP: Yes. Or maybe. Maybe  
10 they've gotten it from the opponent.

11 HONORABLE STEPHEN YELENOSKY: Okay. Well,  
12 that's an issue certainly, but if they get it from the  
13 individual it certainly could -- when they're served,  
14 because they're going to have to be served initially if  
15 they're the defendant, we could easily put in there a  
16 notice that "Please provide your e-mail address, and  
17 you'll receive all further communication through the  
18 e-mail address."

19 MR. GILSTRAP: That would help.

20 HONORABLE STEPHEN YELENOSKY: Yeah. I mean,  
21 that's what everybody else does now in the private world.  
22 You know, you essentially consent to notice  
23 electronically. Everything is moving that way, and so I  
24 don't know the answer to your problem. If they got the  
25 e-mail address from the plaintiff, maybe there's some

1 other way to fix that, but it doesn't seem to me that once  
2 the person knows, either by giving their e-mail address to  
3 the court or knows that the other side has given an e-mail  
4 address and confirms that it's correct, that we should  
5 worry at all whether they're checking their e-mail,  
6 because once they know that and with some other advice or  
7 notice about it, they should check for this particular  
8 e-mail, and like some entities do when they send you  
9 e-mail, they say to make sure you include us in your  
10 contacts so it doesn't go to spam. I mean, all of that is  
11 moving towards there, so if you do -- if you set it up  
12 right I'm not really concerned about sending something to  
13 a person's e-mail address.

14 MR. GILSTRAP: And what you're saying I  
15 think is suggesting that we amend the form of citation.

16 HONORABLE STEPHEN YELENOSKY: Maybe so.

17 CHAIRMAN BABCOCK: Sharena has been  
18 patiently waiting for about an hour.

19 MS. GILLILAND: Thank you. I really like  
20 the language proposal just to add "or electronically." I  
21 think I would interpret that as a clerk, if I have an  
22 electronic means to get somebody notice I can use that.  
23 If I don't, then I should be sending them first-class mail  
24 of that. That's how I would read it if you just said  
25 "first-class mail or electronically."

1           I think the broader "or electronically" is  
2 better than specifying the electronic case filing system  
3 or e-mail. As Frank mentioned, each county decides what  
4 kind of case management system that they want. Some are  
5 more sophisticated than others, and it would allow county  
6 by county if you want to use the e-filing system, you  
7 could. If your case management system could gather up all  
8 of those e-mails and massively send them out, it would  
9 allow you to do that and just give some flexibility in  
10 terms of what could come with case management systems in  
11 utilizing electronic addresses.

12           And Frank mentioned this, too. I would love  
13 to see instead of just notice if the clerk actually gave  
14 you an electronic copy of the order or judgment, that that  
15 satisfies notice. It doesn't need to be a separate  
16 notice. Just to CYA, we prepare a separate notice that  
17 says "final judgment" or "order" and then if you want a  
18 copy we can get you a copy, but we're -- in our office  
19 we're already e-filing every single signed order and  
20 judgment to the parties and going through the e-file  
21 system. So if we already just give them a copy of that  
22 signed order, I think that should satisfy that notice  
23 requirement.

24           With respect to default judgments, those may  
25 be somewhat more unique and somewhat different because we



1 haven't had any contact from that defendant, and so maybe  
2 that should remain just by paper, but at least maybe think  
3 about any electronic options if that's appropriate. But I  
4 do like, from the clerk's perspective, if you just leave  
5 it more broadly "electronically," that allows county by  
6 county to utilize whatever electronic means they have to  
7 fulfill that requirement.

8 CHAIRMAN BABCOCK: Great, thank you. Lisa.

9 MS. HOBBS: I might be the contrarian view  
10 here, and I appreciate the clerk's office perspective, of  
11 course, but we're only talking about final or appealable  
12 judgments, and put aside that even sometimes I don't know  
13 what is an appealable judgment or not, and I'm board  
14 certified in appellate law, but we all -- I think -- and  
15 we also sometimes don't know when something is a final  
16 judgment, so I was about to say we don't. But if  
17 something is marked "final judgment," the magnitude of  
18 that moment deserves something different, and I think that  
19 we should cautiously -- apart from all the practical  
20 problems that have been raised here today, I think we  
21 should be mindful of the significance of the moment of a  
22 final or appealable order, but mostly a final judgment,  
23 because I think the law is developing that sometimes  
24 appealable orders, like even though they are appealable at  
25 that moment you won't lose your rights if you don't appeal

1 it at that moment. But for sure final judgments, whenever  
2 possible it should be, you know, hey, this is not going to  
3 an old Gmail account. This is actually going to your  
4 residence, much like the start of the lawsuit is not just  
5 going to a Gmail account. We're doing something different  
6 with all of the other orders that you've gotten to say,  
7 hey, this order, this judgment, this is actually affects  
8 your rights in a big way.

9           So I -- I mean, I get it. You know, and to  
10 counteract Frank's story about him getting on e-filing,  
11 you know, in this -- when the appellate courts lost their  
12 means really in a lot of ways to communicate with us  
13 effectively over the early part of this pandemic, the  
14 Supreme Court started -- when you use -- when you get a  
15 notice from the Supreme Court, which is where I practice  
16 most often, you actually get a notice that comes from a  
17 different e-mail address. It's not from like a -- it  
18 doesn't look like my service copies that the other side is  
19 filing to me. It comes in, I don't know, some other way  
20 that I'm like, oh, whoa, Supreme Court is communicating  
21 with me, what are they saying, I've got to go, but in this  
22 period of pandemic when they didn't have full access to  
23 the TAMES system, they basically had the clerk serve me  
24 like orders and notices just like as if it were the other  
25 party serving me something. And not that I don't take

1 every service completely seriously, but in that scheme and  
2 in that chaos of, you know, March, April, May, the Supreme  
3 Court had ordered full briefing on a case where I was the  
4 petitioner, and I missed it. Like I just didn't get it.  
5 That's not the way I'm used to getting notices, and that's  
6 no fault of their own, but that's just the point of even  
7 seasoned lawyers and even seasoned -- you know, sometimes  
8 you need additional notice when you're like this is  
9 actually really important.

10           So I wouldn't change it. Even as somebody  
11 who e-files all the time and gets my notices from courts  
12 mostly electronically, I still think that final judgment  
13 should be mailed to me personally as a lawyer who  
14 participates in the e-filing system on behalf of my  
15 clients, I want to get the first-class notice of an actual  
16 final judgment.

17           I also -- just for the record, I do not  
18 think these clerks have authority to be doing anything  
19 differently. I think the specific controls over the  
20 general, and the fact that they think that they can be  
21 mailing final judgments out without doing it by  
22 first-class mail is completely wrong, and they don't have  
23 the authority to do it. There's some -- I get some  
24 ambiguity in that, but I think 306a(3) is pretty specific.  
25 So if any clerk wants my legal advice on that, you do not

1 have the authority to be doing it otherwise until we  
2 change the rule. So that's it.

3 CHAIRMAN BABCOCK: Great. Stephen. You've  
4 got to take yourself off mute, Stephen.

5 HONORABLE STEPHEN YELENOSKY: Yeah, I know.  
6 I was just trying to find the button. I guess we're in a  
7 transition phase regarding first-class mail, and we're  
8 also in a -- pro se litigants I think are in a different  
9 situation than a lawyer sitting in the office. You look  
10 at all your mail or someone looks at all of your mail.  
11 You send something to a pro se litigant, it's less likely.  
12 At least they're not going to be as rigorous in checking  
13 their mail. Maybe they don't check the e-mail, but that  
14 doesn't mean they look at every piece of paper that's  
15 coming through first class, and so like I said, maybe  
16 it's -- maybe it's a transitional thing, but I wouldn't  
17 assume that people still pay more attention to their paper  
18 mail than they do to their e-mail; and we know, as a  
19 matter of policy, the post office seems to be less and  
20 less equipped to deliver mail; and that's perhaps going to  
21 change. But in any event, I think it's transitional and  
22 so maybe -- maybe, Lisa, it's too early now, I don't know,  
23 but it seems to me to be changing.

24 CHAIRMAN BABCOCK: All right. Thanks,  
25 Stephen. Frank, it looks to me like we have four options

1 in front of us. One, the Hobbesian choice of no change.  
2 Two, just adding the two words "or electronically", the  
3 Gilliland proposal; or they've previously filed a document  
4 electronically; and the fourth choice, a party hasn't  
5 provided an e-mail address.

6 MR. GILSTRAP: I think --

7 CHAIRMAN BABCOCK: Is that how you see it,  
8 Frank?

9 MR. GILSTRAP: Yes, that's how I see it.

10 CHAIRMAN BABCOCK: Okay. Well --

11 MR. GILSTRAP: I think --

12 CHAIRMAN BABCOCK: Huh?

13 MR. GILSTRAP: I think we would probably  
14 maybe go in a different order. I think we first need to  
15 say are we going to allow the clerks to give electronic  
16 notice, and then the next question is do we -- do we -- do  
17 we carve out -- if we allow them to give electronic  
18 notice, do we carve out people who either haven't filed  
19 electronically or haven't provided their e-mail address.  
20 And with regard to that last one, should we -- should we  
21 change the citation Rule in 99. That might be something  
22 we talk about. Finally, the last issue -- and I think  
23 this is -- I think everybody agrees on this. If we allow  
24 electronic notice, we should allow the clerk to send the  
25 judgment instead of the notice. That would be the -- kind

1 of the super savings there.

2           CHAIRMAN BABCOCK: Okay. Well, it seems to  
3 me that the threshold issue is whether the committee votes  
4 to make a change at all.

5           MR. GILSTRAP: Yeah, do we accept the JCIT  
6 recommendation or do we reject it.

7           CHAIRMAN BABCOCK: Well, that's a loaded way  
8 of saying it, but --

9           MR. GILSTRAP: Okay.

10          CHAIRMAN BABCOCK: Lisa says, "I don't want  
11 to make a change," so that position is going to get one  
12 vote unless she changes her mind. But why don't we take a  
13 vote on that threshold issue first? Okay? So everybody  
14 that thinks that we should not make a change, raise your  
15 hand electronically, please.

16                   Well, it did get one vote, two votes, three.  
17 Keep coming. Four, five. Anybody else?

18          MS. HOBBS: Chairman Babcock, I would like  
19 to point out that these are some of the most esteemed  
20 members of our committee, myself excluded.

21          CHAIRMAN BABCOCK: Well, Schenkkan has got  
22 his hand up. Are you including him?

23          HONORABLE STEPHEN YELENOSKY: Lisa is right  
24 about that, but before I vote I think I need my notice by  
25 mail.

1                   CHAIRMAN BABCOCK: We're holding steady at  
2 five esteemed members. Everybody is esteemed. Pauline,  
3 do you have anybody -- any more than five?

4                   MS. EASLEY: I have five, but I wanted to  
5 point out that Nina had her hand raised before you started  
6 the vote, so I'm not sure if she had a comment or if it's  
7 an actual vote.

8                   CHAIRMAN BABCOCK: Good point. Nina,  
9 comment or vote?

10                  MS. CORTELL: I'm just, for all of the  
11 reasons that have been said -- and I don't mean to overly  
12 complicate -- I would actually provide for service both  
13 ways. I think this is so important, and for reasons said,  
14 there's mail issues as well as e-mail issues. This is an  
15 important deadline for people to be apprised of, so I  
16 would provide for both types of service, provided that the  
17 electronic information is available. But I would not -- I  
18 would not let go of the mail option, the mail requirement.

19                  MR. GILSTRAP: For anyone, right?

20                  MS. CORTELL: Correct. Correct.

21                  CHAIRMAN BABCOCK: So you're taking down  
22 your electronic hand on what we're voting for, which is no  
23 change in the rule. Okay.

24                  MS. HOBBS: And if I could maybe -- maybe  
25 clarify what the Hobbesian position is, that's kind of my

1 position, too, so maybe I didn't -- I thought no change,  
2 but I'm not opposed to also sending me electronic notice.  
3 I just want the mail notice, too, so maybe I've derailed  
4 this in an un --

5 CHAIRMAN BABCOCK: No, I don't think you  
6 did, because if you want to mandate mail notice, then  
7 you're going to say no change. Right?

8 MS. CORTELL: Well, no, but what we're  
9 saying is both, and that wasn't an option before, and  
10 that's why I voted for no change, is because I do think  
11 there should be by mail. I don't disagree with that. I  
12 would just add electronic if available, but I wouldn't  
13 take away mail. Sorry.

14 HONORABLE DAVID PEEPLES: I agree with that,  
15 too.

16 CHAIRMAN BABCOCK: All right. And --

17 MR. SCHENKKAN: And so do I. So do I.  
18 That's why I voted the way I did.

19 CHAIRMAN BABCOCK: Okay. All right.

20 MS. HOBBS: So I think the way to interpret  
21 that vote from I think now all five of us who voted that  
22 way, not that it matters because there's just five, but I  
23 think what we're saying is we're not opposed to electronic  
24 service, but we just don't want to take away the mail  
25 service, and it sounds like that was the consensus of



1 everybody who raised their hand for, quote-unquote, no  
2 change.

3 CHAIRMAN BABCOCK: Okay. We got it. Take  
4 your electronic hands down. So now there is a proposal to  
5 just add the words "or electronically" and not have a  
6 carve-out, as Frank calls it. This would be the language  
7 that would be on page two of the memo. How many people  
8 are in favor of that? Raise your electronic hand.

9 HONORABLE STEPHEN YELENOSKY: Can you give  
10 us a minute to find page two?

11 CHAIRMAN BABCOCK: Yeah, sure. Take your  
12 time.

13 HONORABLE ANA ESTEVEZ: I just want to  
14 clarify. This one would be if they electronically filed,  
15 then they get it by electronically -- they get electronic  
16 notice, and if they were a pro se or they have that  
17 address on a certificate of service, then it would -- they  
18 would get their service or their notice by e-mail.

19 CHAIRMAN BABCOCK: No. No, no, no, no, no.

20 HONORABLE ANA ESTEVEZ: Okay. I don't have  
21 the page in front of me, sorry.

22 CHAIRMAN BABCOCK: No, that's okay. The  
23 language on page two gives the clerk the option to either  
24 send it by first-class mail or electronically. It is  
25 silent about whether they have the address, whether

1 anybody has filed electronically. It's just -- it's just  
2 two words that are being added.

3 HONORABLE ANA ESTEVEZ: Okay. I think that  
4 would give the same effect, because obviously if they  
5 don't have an e-mail, they can't send it to them, so they  
6 will have a way -- if they had a way to give them notice,  
7 they would have to do one or the other, correct?

8 CHAIRMAN BABCOCK: I don't know. Okay.  
9 Pauline, how many do you have there?

10 MS. EASLEY: 15 now.

11 CHAIRMAN BABCOCK: Okay. I just saw another  
12 one.

13 MS. EASLEY: That's 16.

14 CHAIRMAN BABCOCK: Yeah. Anybody else? 17.  
15 Anybody else? Okay. Pauline, I've got 17 votes.

16 MS. EASLEY: Yes, 17.

17 CHAIRMAN BABCOCK: Okay. So that -- that  
18 has 17 votes in favor. How many people think we should  
19 have a carve-out, one or the other of the two carve-outs?

20 Okay. Everybody done?

21 MR. HUGHES: Chip, can you clarify what's  
22 the vote you're asking for right now?

23 CHAIRMAN BABCOCK: Whether there should be a  
24 carve-out. There's two options, but right now we're just  
25 going to say whether you think we should have one or the

1 other of the options, and then we'll vote on who thinks  
2 what is the best option.

3 PROFESSOR CARLSON: Chip, are you talking  
4 about the language on page three?

5 CHAIRMAN BABCOCK: I am. Yes. That's what  
6 Frank refers to as the carve out.

7 MR. GILSTRAP: That's correct.

8 CHAIRMAN BABCOCK: Okay. Everybody voted?  
9 I've got nine, Pauline. How about you?

10 MS. EASLEY: I show nine.

11 CHAIRMAN BABCOCK: Okay. Now, of the two  
12 carve outs, regardless of how you voted previously, do you  
13 like carve out number one, which is the first carve out on  
14 page three that talks about if a party had not previously  
15 filed a document electronically? Everybody in favor of  
16 that carve out as opposed to the other one, raise your  
17 hand.

18 Everybody done? Nope, there's another one.  
19 Pauline, I got four.

20 MS. EASLEY: Four.

21 CHAIRMAN BABCOCK: Okay.

22 MS. HOBBS: I think I'm another one, too,  
23 Chip, if we're allowing people to vote of the -- if you  
24 hate where we're going with this, but you still want a say  
25 in it, then I would be on that one, too.

1                   CHAIRMAN BABCOCK: Okay. So that's five.  
2 And so the second carve-out, how many people are in favor  
3 of that?

4                   Everybody voted? Pauline, I've got nine.

5                   MS. EASLEY: I'm showing 10. Hold on.

6                   CHAIRMAN BABCOCK: Yeah, one just added,  
7 yeah, since I said that. Ten.

8                   MS. EASLEY: Looks like 11 now.

9                   CHAIRMAN BABCOCK: Okay. Count that again.  
10 Oh, yep, there we go. Evan came in. Got it. So 11 for  
11 that, for the second, the second carve-out.

12                   So recapping, nine people -- nine members of  
13 our committee think there should be no change, 17 like  
14 just leaving it adding two words, "or electronically."  
15 But if we're going to have a carve-out, the second  
16 proposal, the proposed carve-out, which says "but if a  
17 party has not provided an e-mail address then notice must  
18 be given by first-class mail", that is preferred over the  
19 other carve-out by a vote of 11 to 5. So how about that  
20 for some voting, huh?

21                   MR. GILSTRAP: Very good, Chip.

22                   MR. HUGHES: I have a friendly suggestion  
23 for further study. It's Roger.

24                   CHAIRMAN BABCOCK: Who wants to suggest  
25 something?

1 MR. HUGHES: Roger, Roger Hughes.

2 CHAIRMAN BABCOCK: Okay, Roger, you may be  
3 -- hang on. There you are.

4 MR. HUGHES: Yeah. Okay. My suggestion is  
5 if people are worried about notice that we consider that  
6 the clerks have to mail it out with blue backs.

7 CHAIRMAN BABCOCK: And then we'll take our  
8 exam?

9 MR. HUGHES: Yeah.

10 CHAIRMAN BABCOCK: Wow. Frank -- we'll take  
11 that under advisement, Roger. Sorry.

12 MR. HUGHES: Yeah, okay.

13 CHAIRMAN BABCOCK: Frank, you want to exceed  
14 the scope of the inquiry and change Rule 99?

15 MR. GILSTRAP: I think so. I think if we're  
16 going to go with the second carve-out, then I think -- or  
17 even the first -- you know, let me say this. I think you  
18 probably ought to change Rule 99 in any event, to let  
19 people know that they can file electronically, because  
20 there will be people who do it and people who don't read  
21 the rule book. And if you decide, you know, you can put  
22 further language in there, but I think it's a good idea --  
23 and I know it's kind of radical to mess with Rule 99, but  
24 I think this warrants it. For everybody. You can file  
25 electronically, and if so, then this is how you do it.

1 CHAIRMAN BABCOCK: Okay. Professor Carlson.

2 PROFESSOR CARLSON: Yeah, I would also  
3 suggest, Frank, you take a look at Rule 57, which deals  
4 with signing of pleadings and imposes right now an  
5 obligation of counsel and a party not represented to  
6 provide an e-mail address.

7 MR. GILSTRAP: Yes. Yes. We do cite that  
8 in the memo in our footnote.

9 PROFESSOR CARLSON: Okay.

10 MR. GILSTRAP: And you're -- that could  
11 certainly be in Rule 99 that you -- you know, what you've  
12 got to provide in the answer. You've got to provide an  
13 address. If you've got an e-mail, you've got to provide  
14 it. And also you can also file electronically.

15 CHAIRMAN BABCOCK: Great. Harvey.

16 HONORABLE HARVEY BROWN: Did we vote on  
17 Lisa's suggestion that notice should be sent by both mail  
18 and e-mail when it's available?

19 CHAIRMAN BABCOCK: We didn't vote on that  
20 because I didn't perceive Lisa as advocating that, but  
21 maybe she was.

22 HONORABLE HARVEY BROWN: I thought she was,  
23 and I thought Nina seconded it.

24 MS. CORTELL: That's correct.

25 CHAIRMAN BABCOCK: Yeah, I'm in a voting

1 kind of mood. How many people -- how many people are in  
2 favor of requiring the clerk to send both first-class mail  
3 and electronically? Raise your hand, electronic hand. .

4 MS. GILLILAND: Can I comment on that?

5 CHAIRMAN BABCOCK: I figured you would. I  
6 was waiting for you to dive in on that.

7 MS. GILLILAND: Okay. That's just not  
8 practical. It's just not. When you're dealing with  
9 volume, even right now there's no case management system  
10 that keeps track, when you open up your case, who filed  
11 electronically and who filed in paper. Maybe you can dig  
12 through the e-file manager and be able to tell, so any  
13 efficiency with electronically is completely lost if you  
14 have to research and figure out who filed which way.  
15 Requiring both is a little over the top, I think.

16 CHAIRMAN BABCOCK: Hey, don't worry, you're  
17 winning. Only seven people are --

18 MS. GILLILAND: It's a bit -- it's a bit  
19 much, and any efficiencies are completely lost at that  
20 point, particularly when you get to your DWOP docket, if  
21 you want to go in that direction, because of the volume.  
22 That's just -- it's just overkill.

23 CHAIRMAN BABCOCK: Yeah, don't worry,  
24 there's only seven people have their hands raised on that  
25 one.

1 MS. GILLILAND: Okay. I wouldn't be doing  
2 my fellow clerks justice if I didn't say please don't go  
3 that way.

4 CHAIRMAN BABCOCK: I was shocked that you  
5 didn't, you know, start pounding the screen when that came  
6 up, so we're good. And we're at a stopping point, I  
7 think, for our lunch break, and so why don't we come back  
8 at 1:30. Does that work for everybody? That will give  
9 you about 50 minutes for lunch. Okay. We'll do -- we'll  
10 be in recess until 1:30. Thanks, everybody.

11 (Recess from 12:36 p.m. to 1:30 p.m.)

12 CHAIRMAN BABCOCK: Okay. Let's get going,  
13 everybody, if everyone is ready. I assume everybody can  
14 hear me. Okay, good, good. Next up is Texas Rule of  
15 Appellate Procedure 24.1(b)(2), and Pam, the ever-present  
16 Pam Baron, and the ever-present Bill Boyce. Who is going  
17 to lead us in this?

18 MS. BARON: This is my black bean here.

19 CHAIRMAN BABCOCK: All right.

20 MS. BARON: This is handout F in your  
21 materials, 24.1(b)(2), which involves the content and  
22 approval of supersedeas bonds. Right now, to be effective  
23 a supersedeas bond must first be approved by the trial  
24 court clerk, and the Court referred us this matter because  
25 they have heard from some practitioners that they were



1 running into issues getting approval of the trial court  
2 clerk in order to stop execution of a judgment and also  
3 input from some clerks who said they felt a little  
4 uncomfortable with their role in approving bonds. So to  
5 cut to the chase, our subcommittee explored a lot of  
6 options, which I'm going to lay out for you, but so that  
7 you can get completely freaked out upfront, our unanimous  
8 recommendation is to amend the rule to provide that  
9 supersedeas bonds are effective upon filing and no longer  
10 require approval of the clerk and that if a party has some  
11 problem with the bond, they can take it up with the trial  
12 court judge.

13           So to give you some background -- and I want  
14 to say we have three great resources I hope on this  
15 meeting. We have Sharena Gilliland, who just participated  
16 in our last discussion, District Clerk of Parker County,  
17 and also Nancy Rister, who is District Clerk of Williamson  
18 County, and I want to apologize to her, because I did not  
19 recognize her as a member of this committee on -- in my  
20 memo, but she is certainly one of many esteemed members;  
21 and we also have Professor Elaine Carlson, who is pretty  
22 uniformly considered to be the state's expert on  
23 supersedeas bonds.

24           So to give you a little background, I did  
25 follow up with Jackie to see -- get a little more sense of

1 what the comments were that the Court had been receiving.  
2 She put me in touch with Reagan Simpson. He used to be a  
3 partner at Fulbright & Jaworski. I think many of you know  
4 him, and he's now I think head of the appellate practice  
5 group at Yetter Coleman; and I've attached his letter,  
6 which he was nice enough to send in, that outlines some  
7 problems that he's encountered mostly in rural counties  
8 where the clerk's office is not either familiar with or  
9 not equipped to deal with supersedeas judgments in large  
10 cases where it's very important to the defendant to get  
11 that approved in order to stop execution. He's had  
12 problems with -- I'm not sure it made it into his letter,  
13 but he had one case where they started taking the trucks,  
14 and he's had one where he had to threaten the clerk with  
15 mandamus or where the clerk said, "I'm not going to  
16 approve it. It has to go to the judge."

17           Reagan's suggestion was that we move to a  
18 federal practice, which is that all supersedeas bonds in  
19 federal court are approved by the district judge. There  
20 were a lot of reasons -- well, I'll get into why we didn't  
21 think that was a great idea in a minute. And then Jackie  
22 also reached out to our district clerk members, both of  
23 whom said why can't we just accept it and then if people  
24 have problems, take it up to the judge. There's not much  
25 we do in terms of examining and approving the bond. We

1 can do, you know, a little Google search to see if the  
2 surety's okay; and then I also did get, with Justice  
3 Christopher's kind assistance, a copy of the policies --  
4 they're actually very detailed -- from the Harris County  
5 District Clerk, which is -- you know, they have their own  
6 section in the clerk's office for post-judgment matters.  
7 They're very well-equipped to handle this. They have an  
8 extensive checklist. Kind of the two major things they do  
9 is they do check the federal register to make sure that  
10 the surety is approved and that the amount of the bond is  
11 consistent with what they are approved to provide as  
12 surety, and they also check that the bond amount complies  
13 with the provisions of the statute.

14           There are some other relevant rules, and you  
15 should know that if a party files a cash bond, the clerk  
16 has no role in approving it. So we're treating  
17 supersedeas bonds different from cash bonds, and also, if  
18 a party files a net worth affidavit and it says, "My net  
19 worth is \$5. Clerk, here's \$5," the clerk really has no  
20 role in that either, and a party who wants to challenge  
21 the amount of the bond or the net worth again has to file  
22 a motion and take it to the trial court judge.

23           So just in further background, the approval  
24 by the clerk has been Texas law since the late 1800s.  
25 That kind of came as a surprise to me when I looked back

1 at this. It was statutory, and it's discretion that is  
2 not unlimited, and at least one court in describing it has  
3 said it is -- it's discretion of a judicial character that  
4 is exercised by the clerk in deciding whether or not to  
5 approve a bond, and that's a little bit unusual to have a  
6 clerk who's exercising what is something very similar to  
7 judicial discretion. They can be mandamus'd if they don't  
8 approve a bond that at least on its face is facially  
9 compliant, and they can also be mandamus'd for approving a  
10 bond that wasn't facially compliant with the rules, so  
11 basically what we came down to is kind of a list of maybe  
12 six or seven options. And in terms of what Reagan's  
13 comment was, which was to always go to the trial court  
14 clerk to approve the bond, our committee really thought,  
15 you know, this is working in most cases right now, even  
16 with the clerk approving it, we shouldn't let the  
17 exception kind of make everybody have to go through this  
18 extra step that will burden trial court judges, and they  
19 don't need more on their plate, and it could slow down  
20 getting the bond approved.

21           So we weren't enamored with that option, but  
22 how many alternatives are -- oh, and the last alternative  
23 would be write into the rule something very similar to  
24 what the procedures are that the Harris County District  
25 Clerk's office is currently doing so that there's a very

1 clear checklist of what is required for approval, so it  
2 makes it uniform across the state, because right now, some  
3 clerks, like Harris County, have these detailed  
4 guidelines. I checked with Bexar County through Judge  
5 Peeples, and they do not have written guidelines. They  
6 just refer to the rule and the statute. I assume that  
7 some of the smaller counties also do not have written  
8 guidelines. I did not check in Dallas. I would guess  
9 they are pretty on top of this.

10           But kind of the options that we were looking  
11 at is, you know, leave the rule the way it is, which we  
12 just did on something else, because it's working in most  
13 cases and that Reagan's cases are kind of the outliers.  
14 The second would be the Reagan Simpson idea, which is to  
15 require the trial court judge to approve the bond in all  
16 cases. A variation on that could be to give the litigant  
17 who is filing a supersedeas bond to at its option instead  
18 bypass the clerk and ask the judge to approve the bond.  
19 So that would be a variation on that. Fourth one is just  
20 to make the bond effective upon its filing, which filing,  
21 at least in my mind, is not just hitting the button to  
22 send, but the clerk also has to accept it, but not approve  
23 it, which is different, and then let the judgment creditor  
24 if they're unhappy with the amount of the bond or the  
25 sureties on the bond that they can, as they currently can

1 do now, take it up before the trial court judge.

2           We did have some concern with people filing  
3 junk bonds. Okay. Not like junk bonds on the financial  
4 markets, but bonds that are not compliant, the sureties  
5 are crummy; it's, you know, Uncle Joe or whatever. Just  
6 in order to stop execution, be able to move assets, and do  
7 whatever. That's a risk we already have now, to some  
8 extent, with the net worth affidavit. I suppose with cash  
9 bonds. There is a provision in Rule 24 that does permit  
10 the judgment creditor to seek injunctive relief from the  
11 trial court in certain limited circumstances to prevent  
12 the judgment debtor from transferring assets to avoid  
13 execution other than in the ordinary course of business,  
14 so there is some remedy there. We debated whether there  
15 needed to be new sanctions to kind of guard against the  
16 idea of people filing junk bonds in order to avoid  
17 execution, and we were reluctant to add yet another  
18 sanctions rule when we certainly have plenty and to invite  
19 ancillary or secondary litigation over sanctions in yet  
20 another context in our rules.

21           So that is kind of -- oh, and the last  
22 option was to write all of the very specific things that  
23 need to be checked in order to approve the bond and  
24 continue to have the clerk actual -- actually engage in  
25 approving the bond. We had a great discussion, and -- no,

1 we realized that this is a fairly major change in our  
2 practice. We did feel like it wasn't totally crazy,  
3 because we do want -- we felt uncomfortable, as some trial  
4 court clerks do, with them exercising what is essentially  
5 judicial discretion. We wanted to see a uniform practice  
6 throughout the state if we could accomplish that. File  
7 and challenge is already in place in our bonding rules in  
8 terms of cash bonds and net worth affidavits. And, you  
9 know, there is this injunctive relief, although that's  
10 fairly limited, and there are our general sanctions rules  
11 available for junk bonds.

12           So the rule we propose is on page six. It's  
13 probably also on page two, where we have changed  
14 subsection (2) to now read instead of "to be effective the  
15 bond must be approved by the trial court clerk" to provide  
16 that a bond is effective upon filing. "On motion of any  
17 party, the trial court will review the bond." That's what  
18 we've got.

19           CHAIRMAN BABCOCK: Thank you, Pam. Comments  
20 from people? Thoughts? If you have any, raise your  
21 electronic hand. Nina. Yeah.

22           MS. CORTELL: I'm sorry, did you say my  
23 name?

24           CHAIRMAN BABCOCK: Yeah, we can hear you  
25 now.

1 MS. CORTELL: Sorry, sorry. Just I fully  
2 agree. I've filed a lot of bonds and come into some of  
3 the situations that Reagan describes, and so I think it's  
4 an excellent change, and I would be in favor.

5 CHAIRMAN BABCOCK: Thank you. Roger.

6 MR. HUGHES: I have nothing to add.

7 CHAIRMAN BABCOCK: Take yourself off mute,  
8 Roger.

9 MR. HUGHES: I thought I had. No, when they  
10 originally revamped all of the supersedeas rules about  
11 what you count, what you don't count, what you bond, what  
12 you don't bond, there was a lot of confusion; and bonds  
13 would be held up for two, three days while clerks would be  
14 calling me, calling the county attorney, et cetera, et  
15 cetera. Things have calmed down, but still it may take a  
16 day or two, and in the meantime, if you've got a good  
17 bond, it means you're biting your nails wondering whether  
18 they're going to be out seizing property, et cetera. So I  
19 think it's a healthy change, and if people think the bond  
20 is bad or it's not in the correct amount, that's what  
21 judges are for. So I think it's -- I think --

22 CHAIRMAN BABCOCK: Thank you, Roger. Lisa.

23 MS. HOBBS: I agree. I think the  
24 subcommittee that -- and thank you, Pam, for letting me  
25 participate, even though I wasn't as good of a participant



1 as I should have been, but I was watching it all, and I  
2 agree. You know, good appellate lawyers are going to  
3 confer with the other side if there's anything -- area of  
4 the law or any portion of the bond that -- because we  
5 don't want to have to go get a bond a second time from --  
6 so we're having these conversations from the moment the  
7 judgment is signed until the -- and we may work it out or  
8 we may legitimately have disputes, but ultimately it needs  
9 to be filed. It needs to stop the execution of the  
10 judgment, and the onus should be on the other party to go  
11 get an order. The clerk should accept whatever is filed  
12 and then see what happens.

13 CHAIRMAN BABCOCK: Okay. Thanks, Lisa. Any  
14 other comments or thoughts? Yeah, Richard Munzinger.

15 MR. MUNZINGER: The draft of the rule says  
16 the court will review the bond. I think it ought to be  
17 mandatory, "must review the bond promptly" or something to  
18 that effect, because supersedeas can have some very  
19 serious consequences; and a knowingly false supersedeas  
20 bond or inadequate bond or one that cannot be cured can  
21 still cause havoc; and there ought to be some  
22 encouragement to the trial court to point out that, A, you  
23 must address the sufficiency of the bond if it's  
24 questioned, and, B, you've got to do so quickly. That's  
25 all.

1                   CHAIRMAN BABCOCK: Thank you, Richard. Good  
2 point. Who else? Anybody else? Yeah, Robert.

3                   MR. LEVY: I'll also speak in support of the  
4 proposal, and also I think Sharena had her hand up.

5                   CHAIRMAN BABCOCK: She has been recognized  
6 once. I don't know if she has it up again. I don't see  
7 it.

8                   MS. GILLILAND: I'll be quick and echo what  
9 has been said. I think taking the clerk out of the  
10 approval process is a good decision. Most of the time  
11 clerks aren't in a position to really know if it's a good  
12 bond or if it's junk, and I think if the parties have an  
13 issue after it's been filed, it's something that should be  
14 presented to the trial court judge to consider.

15                  CHAIRMAN BABCOCK: Great. Thanks, Sharena.  
16 Anybody else? Yeah, Professor Carlson. You have to take  
17 mute off, Elaine.

18                  PROFESSOR CARLSON: I am so sorry. I'm on  
19 the subcommittee, and I supported this change. There's a  
20 real uneven ability, I have found, in different clerk's  
21 office on being able to assess things like the sufficiency  
22 of the bond or even the law on what's compensatory  
23 damages. So I think there's -- I mean, you're weighing  
24 the rights of a judgment creditor against the judgment  
25 debtor, but a judgment creditor can seek a turnover order

1 and even the appointment of a receiver, you know,  
2 immediately after judgment; and it's vitally important to  
3 the defendant who is appealing that they be able to stop  
4 that; and I think the court already has the ability to  
5 enter sanctions if someone misuses the process. Thanks.

6 CHAIRMAN BABCOCK: Thanks. I don't think  
7 you had joined us yet, but at the very beginning Pam said  
8 that you were the most knowledgeable person about this  
9 issue of anybody in the state.

10 PROFESSOR CARLSON: It's very sad, isn't it?

11 CHAIRMAN BABCOCK: You mean we have minimum  
12 knowledge about this in the state? Justice Kelly. Peter,  
13 you're going to have to take your mute off.

14 HONORABLE PETER KELLY: There you are. An  
15 additional protection for judgment creditors in this  
16 situation is the Uniform Fraudulent Transfer of Assets  
17 Act, which gives a remedy in the trial court against the  
18 judgment debtor if they try to fraudulently hide assets,  
19 and so because there are several layers of protections for  
20 junk judgment creditors in this situation, I would support  
21 this change.

22 CHAIRMAN BABCOCK: Thank you, Judge.  
23 Anybody else have any comments? Pam, it seems to me, for  
24 the first time perhaps in the history of this committee  
25 since I've been on it, we have a quick consensus about the

1 work of a subcommittee. How do you feel about that?

2 MS. BARON: Stunned.

3 CHAIRMAN BABCOCK: Do you think we need  
4 further discussion?

5 MS. BARON: No.

6 CHAIRMAN BABCOCK: All right. Thank you.  
7 We have -- we will submit this to the Court for its  
8 review, and we will move on, and the next -- the next  
9 topic for us is Texas Rule of Appellate Procedure 34.5(a),  
10 and let's see if you and Bill can top your last  
11 performance, Pam.

12 MS. BARON: Well, I thought that was the  
13 hard one today, so I can only be disappointed.

14 CHAIRMAN BABCOCK: Good luck with that.

15 MS. BARON: I can only be disappointed from  
16 here on out. This is Item G. This is Rule 34.5(a), and  
17 that governs what is automatically included in the clerk's  
18 record on appeal without designation by a party. And we  
19 had -- the Court had communication from Ben Taylor, who  
20 asked that the Court consider whether the supersedeas  
21 bond, which was our subject of the afternoon, should  
22 automatically be included in the clerk's record and be  
23 added to that list, and the reasoning behind this is the  
24 appellant normally would not need to put the supersedeas  
25 bond when it designates other items to be put in the

1 record.

2           On the other hand, the appellate court in a  
3 number of circumstances needs the bond in order to draft a  
4 judgment, so if the judgment of the trial court is  
5 affirmed and there's a supersedeas bond in place, the  
6 judgment must render judgment against the sureties as well  
7 as the appellee, the party. So a clerk can't or the court  
8 itself can't formulate the judgment without knowledge of  
9 who the sureties are so that they can render judgment  
10 against them, and the Supreme Court has a parallel  
11 provision when it's affirming a judgment either via the  
12 court of appeals' judgment or the trial court judgment  
13 directly. And it can slow the process down. The appellee  
14 sometimes doesn't need to designate the record at all, so  
15 it adds additional expense to them. I did call upon Blake  
16 Hawthorne, who is clerk of the Supreme Court of Texas, and  
17 Michael Cruz, who is clerk of the Fourth Court of Appeals  
18 in San Antonio. They both supported the idea, thinking  
19 that it would be helpful in just streamlining it. It is  
20 very similar to other items that are automatically  
21 included in the clerk's record, like the bill of cost.  
22 Again, that's in there because the appellate court needs  
23 that in order to formulate the judgment and to assess  
24 costs against the parties as it sees fit under the rules.

25           So what we would propose is on page three of

1 your memo, is adding new section (13), that adds as  
2 automatically included in the clerk's record on appeal in  
3 civil cases any supersedeas bond and then renumbering the  
4 catch-all one, whatever else the parties have designated,  
5 as (14). A couple of people said, well, shouldn't we  
6 include any security document, like if there's a cash bond  
7 or whatever. The appellate courts don't need that to  
8 formulate the judgment, because they only have to render  
9 judgment against the sureties. So if they are reversing a  
10 judgment, they actually don't release the judgment against  
11 the sureties explicitly in the judgment. They reverse the  
12 judgment, and under the terms of the bond, because it's  
13 conditional, the sureties are released. That's it.

14 CHAIRMAN BABCOCK: Okay. Thank you, Pam.  
15 Comments from anyone? Raise your mechanical hand. I see  
16 no hands raised. Now there's one. Professor Carlson.  
17 You've got to take it off mute.

18 PROFESSOR CARLSON: I know. It took me a  
19 minute to find the button. The only thing I would add is  
20 that there's no real concrete deadline to file appellate  
21 security, so ordinarily you want to do it obviously as  
22 soon as the judgment is signed, but it -- you can run into  
23 a situation where the supersedeas is filed after the  
24 record is filed, and I don't know if we want to require a  
25 party to notify the appellate court of that or not.

1 MS. BARON: Uh-huh. Well, I think in that  
2 situation we should just say -- we could say, "Any  
3 supersedeas bond on file at the time the record is  
4 prepared." We can't put the onus on the clerk to have to  
5 do it twice.

6 PROFESSOR CARLSON: No, no, no. I didn't  
7 know if you wanted to have a party notify --

8 MS. BARON: Yeah.

9 PROFESSOR CARLSON: -- the appellate court.  
10 I don't know if it's that vitally important or not.

11 MS. BARON: I think this will sweep up most  
12 cases.

13 PROFESSOR CARLSON: Yeah.

14 MS. BARON: And I guess the question is in  
15 those few where somebody decides to file a supersedeas  
16 bond after the record has been designated, they can  
17 just -- I would just let them fix that later.

18 PROFESSOR CARLSON: Yeah. Okay.

19 MS. BARON: Unless somebody else feels  
20 strongly that we have to be super precise.

21 CHAIRMAN BABCOCK: Lisa.

22 MS. HOBBS: No, I agree with Pam's position.  
23 This captures most of the bonds that are going to be  
24 filed, and the ones that aren't are in no worse condition  
25 than where we are today, and so let's let it fly.

1                   CHAIRMAN BABCOCK: Makes sense. Anybody  
2 else? Okay. Pam, you may have set a Supreme Court  
3 Advisory Committee record for -- okay. All right.

4                   MS. BARON: If I had a football, I would be  
5 spiking it.

6                   CHAIRMAN BABCOCK: Getting two items  
7 through, both unanimously and in record time. So having  
8 finished with that, we'll go to the next item, which again  
9 is yours, the briefing rules, and I don't know if you're  
10 going to do it or Bill or somebody else.

11                  MS. BARON: I have all the black beans for  
12 the afternoon.

13                  CHAIRMAN BABCOCK: All right, good. We're  
14 on a roll, and let's not slow it down.

15                  MS. BARON: I only wish. Okay. This was a  
16 referral from the Court to examine certain of the briefing  
17 rules to see if they can be improved. This was a task  
18 with seven discrete subparts, so fasten your seatbelt,  
19 right, and they cover kind of a broad range of things. I  
20 would say the first four -- four of them are more  
21 mechanical and three of them are more substantive in terms  
22 of what's actually the content of the brief. We have  
23 decided to take them in order of what we thought was  
24 easier to hardest, because isn't that the way you want to  
25 do everything.



1                   So the first question is whether to remove  
2 the paper requirement, the paper copy requirement, because  
3 right now the rule says if you electronically file a  
4 document in the Supreme Court and the Court of Criminal  
5 Appeals, within X days you have to provide paper copies to  
6 the court, and the number of paper copies you have to  
7 provide to the court is determined by court order. And  
8 the Texas Supreme Court stopped requiring paper copies a  
9 long time ago, and the rule doesn't reflect that, and it  
10 confuses people who are not familiar with inside baseball,  
11 and so Blake Hawthorne, the court of the clerk, gets a  
12 number of calls of people or people trying to send him  
13 paper copies. So the Supreme Court pretty clearly wants  
14 it removed, and Blake agreed to contact the Court of  
15 Criminal Appeals clerk and start a dialogue with them to  
16 see what their druthers were; and at first they came back  
17 saying, "We don't know, we need to think about it," but my  
18 latest information is they probably want to keep getting  
19 paper copies. So what we would need to do is just change  
20 the rule on paper copies to say you don't have to do it in  
21 the Supreme Court, but you still have to do it in the  
22 Court of Criminal Appeals.

23                   So that was the -- I had originally set out  
24 two different options, one if both courts wanted to stop  
25 getting paper copies and one if just the Texas Supreme

1 Court wanted to stop getting paper copies, and so option  
2 one is on page two to three of your memo, and what it says  
3 is we remove references to the Supreme Court in terms of  
4 where the paper copies go, and we add a sentence at the  
5 end saying, "A party need not file a paper copy of an  
6 electronically filed document in the Supreme  
7 Court." That's our proposal.

8 CHAIRMAN BABCOCK: Okay. Comments?

9 MS. BARON: This seems like what's to  
10 comment, but --

11 CHAIRMAN BABCOCK: Well, but we want to have  
12 due process here on this committee, so --

13 MS. BARON: The Court doesn't want it, we're  
14 going to say they don't have to take them.

15 CHAIRMAN BABCOCK: The power is going to  
16 your head, Pam, I can see that. You want to ram these  
17 things through so you can --

18 MS. BARON: I'm ready. I'm ready now.

19 CHAIRMAN BABCOCK: All right.

20 MS. HOBBS: Hey, Pam, I think I probably was  
21 copied on communication, but you're saying that you did  
22 confirm with the Court of Criminal Appeals that they do  
23 still use the paper copies, because I've only filed once  
24 with them, and it was kind of a pain in my latter years of  
25 my practice that I wasn't used to that, but they are still

1 -- they are still useful to the Court of Criminal Appeals?

2 MS. BARON: I think some of them are still

3 -- yes, want the paper copies.

4 MS. HOBBS: Okay.

5 CHAIRMAN BABCOCK: Okay. So no dissent,  
6 Pam. Your roll continues, although as you promised, it's  
7 going to get harder.

8 MS. BARON: Yes. Okay. The second point is  
9 (b) on the bottom of page three of our memo, and it's  
10 whether to remove the requirement that makes mandatory  
11 inclusion of the court of appeals' judgment in the  
12 appendix to the petition for review, and that is in  
13 53.2(k)(1)(C). And if you have seen what courts of  
14 appeals issue, they issue an opinion, but there's a  
15 separate piece of paper that's the judgment, and a lot of  
16 even good practitioners like me, when it says "include  
17 the" -- the item says "court of appeals' opinion and  
18 judgment," a lot of times the only thing that will be  
19 included in the appendix is just the court of appeals  
20 opinion and not the separate piece of paper that's the  
21 judgment. And because it's mandatory, the clerk's office  
22 has to hold on to the petition and ask you to refile or  
23 provide the judgment before they can accept it as filed.  
24 So it slows things down. It doesn't affect the actual  
25 date of the filing of your petition, so your petition

1 isn't going to be late or anything.

2           I talked to Blake Hawthorne again about  
3 this, and what he indicated is all of these judgments are  
4 online. The staff attorneys say they're easy to get.  
5 They don't really need them. And it would just -- from a  
6 pragmatic point of view it would make everyone's lives  
7 easier if they didn't have to hold up these petitions to  
8 wait for people to refile with the judgment included in  
9 the mandatory appendix. Of course, you can always include  
10 anything you want in the appendix. There's optional -- a  
11 provision that says "optional," you can include whatever  
12 you want.

13           There was some just sadness on our committee  
14 about this idea of foregoing including the judgment,  
15 because you don't appeal opinions, you appeal judgments.  
16 The Court doesn't reverse opinions, it reverses or acts on  
17 judgments, and the judgment is really what our appellate  
18 life is all about, but pragmatism prevailed, and we did  
19 unanimously agree that the requirement should no longer be  
20 mandatory, especially in the world -- hopefully at some  
21 point we'll be moving to you don't have to include any of  
22 this because it will all be electronically forwarded to  
23 the court.

24           So what we would suggest is three quarters  
25 of the way or almost at the bottom of page four is to

1 change 53.2(k), (C) to -- capital (C), to no longer say  
2 "the opinion and judgment of the court of appeals," but to  
3 say "the opinion of the court of appeals" as a mandatory  
4 item to be included in the appendix to the petition for  
5 review only.

6 CHAIRMAN BABCOCK: Okay. They're lined up  
7 to get you now, Pam. Lisa.

8 MS. HOBBS: I'm not going to get her. I get  
9 where she's going. I actually have had a petition for  
10 review dinged when I did not include the judgment  
11 inadvertently, so I will just say that as a board  
12 certified lawyer, appellate lawyer, but I -- what I like  
13 about requiring the judgment is it does keep us focused on  
14 the Court's role, and much like I want -- there's some  
15 purity to wanting final judgments that mean something  
16 being snail mailed to people because they realize it's  
17 this -- this is the important thing, and much the same way  
18 I think that judgment of the court of appeals needs to be  
19 forefront in our minds, and I'm embarrassed when I forget  
20 to include it, in those rare times I forget to include it,  
21 I'm mostly embarrassed and I get it to them within like 15  
22 minutes. But I think there might be other people who are  
23 petitioning to the Supreme Court who really haven't  
24 thought about it or even looked at the judgment of the  
25 court of appeals, and we have seen significant cases that

1 depend on the wording of the judgment instead of the  
2 wording of the opinion and what to do when there's  
3 conflicts about them. And so just as an appellate purist,  
4 I would not support the subcommittee's -- even though if  
5 the Court wants to do that, I am on board with how the  
6 subcommittee has solved the problem, but I just want to --

7 CHAIRMAN BABCOCK: Stop sucking up to the  
8 Court. That's it, come on.

9 MS. HOBBS: I just want to go on record,  
10 like, we need everybody to keep focused on the judgment.  
11 That's what we're reviewing.

12 CHAIRMAN BABCOCK: Yeah, Kennon.

13 MS. WOOTEN: It's a related comment. If  
14 it's the judgment that's being reviewed, why not remove  
15 the opinion and keep the judgment. It just strikes me  
16 that the opinion is almost always more voluminous, taking  
17 up digital space. It's not what's being appealed. It is  
18 equally accessible online, so I'm struggling to understand  
19 why we took out the judgment and kept the opinion.

20 CHAIRMAN BABCOCK: Nina is going to tell us  
21 the answer to that.

22 MS. CORTELL: Well, I do think you need  
23 both. I mean, obviously how the court of appeals reached  
24 its conclusion is very important to the Texas Supreme  
25 Court in determining whether review is appropriate, so I

1 think the opinion comes in; but I also think the judgment  
2 should come in; and like everyone else would say, I've  
3 done it, too, gotten it thrown out, had to refile; but  
4 it's important to stay focused on the judgment, and if  
5 people aren't, then they're not -- sometimes actually  
6 there's problems in the judgment. It's not in accord with  
7 the opinion, it awards relief in a different way. So I  
8 think it's important to keep practitioners aware of a very  
9 key document, and then, of course, all the things you've  
10 already heard, which is just it is the judgment you are  
11 appealing.

12                   But I think beyond that, I don't think it's  
13 just an issue of appellate purity. I think it's an  
14 important document that everybody needs to be aware of as  
15 part of the process, and if we don't, then we are losing  
16 sort of a tickler, if you will, for all practitioners, not  
17 just appellate, you know, specialists, but all  
18 practitioners need to be reminded this is a key document.  
19 You need to know about it. This is what the Texas Supreme  
20 Court is going to be looking at, as well as the opinion,  
21 so it warrants being attached. So I would keep it in.

22                   CHAIRMAN BABCOCK: Okay. Roger.

23                   MR. HUGHES: Well, yeah, I just want to echo  
24 that. Initially when I read this, yeah, I thought, well,  
25 why do we need the judgment anymore, but several years ago

1 I read an article about the importance of the drafting of  
2 the judgment, especially as it pertains to the scope of  
3 remand, et cetera, et cetera, et cetera, and how sometimes  
4 there can be a conflict between the opinion and the  
5 judgment over what's going back if they're not synced  
6 properly. So I would add the point that it not only helps  
7 the appellate practitioner remember, it helps the person  
8 who wrote the judgment in the first place to think that  
9 this is -- this is not an after thought, and it encourages  
10 both the author and the reader to think a lot about what  
11 the judgment says. Leaving it out would be a subtle  
12 communication that this is not an important document  
13 either to write or to read. So that's my two cents.

14 CHAIRMAN BABCOCK: Okay. Thanks, Roger.  
15 Any other comments? Pam.

16 MS. BARON: Well, I like to make clerks'  
17 offices happy because they're the people you deal with  
18 everyday, so I would be inclined, because it has been a  
19 pain for them to have to review and bounce all of these,  
20 to let them do it, but if the will of the committee is to  
21 leave it in just to remind people of the importance of the  
22 judgment, that the justices could certainly tell the  
23 clerks "From this day forward, we will not bounce  
24 petitions just because the judgment is not there."

25 CHAIRMAN BABCOCK: Evan Young.



1                   MR. YOUNG:  The -- I share a lot of the  
2 concerns, and, Pam -- I guess I was sufficiently  
3 vociferous about it that Pam credited me in the memo with  
4 that.  I would just comment that at the U.S. Supreme  
5 Court, which is at least as assiduous about all of the  
6 technicalities and formalities and all the rest of it, a  
7 cert petition's appendix must -- must include the judgment  
8 sought to be reviewed if the date of its entry is  
9 different from the date of the opinion or order required  
10 in a -- in a different subparagraph, the opinion is  
11 accompanying the judgment.  So it's just interesting, of  
12 course, that court also -- it's reviewing judgments, not  
13 opinions.  That's the mantra, and the justices of that  
14 court are very fond of quoting it, but that court doesn't  
15 require judgments, unless it's of a different date.  
16 That's for a different reason, to compute whether or not  
17 it's jurisdictionally out of time given the relevant  
18 statute.

19                   So given Pam's referral to us of how the  
20 clerk's office says, "We don't need this, it's a real  
21 burden on us," you know, I would agree, I kind of like  
22 keeping it in just for all of those salutary reasons that  
23 are articulated; but, you know, these are to benefit the  
24 court, not really to benefit, you know, the appellate  
25 lawyer, who should know to look at the judgment; and, you

1 know, with that, it strikes me as a possible way of either  
2 doing what Pam mentioned, which is to say, "Well, we just  
3 won't bounce it if it fails to comply with this rule, but  
4 we'll leave it in the rule in order to be able to signal  
5 the importance of the actual operative document or take it  
6 out just on the grounds that if it's -- that the appendix  
7 is there to benefit the Court, and the Court already has  
8 it and doesn't need it, then, you know, that would be the  
9 message hopefully that will be conveyed, not the message  
10 that the judgment actually isn't significant.

11 CHAIRMAN BABCOCK: Thanks, Evan. Yeah, Pam,  
12 on the issue of blame, why don't we just tell Blake that  
13 it's all Jackie's fault, or whoever the rules attorney is  
14 at the time?

15 MS. BARON: She wouldn't be happy with that.

16 CHAIRMAN BABCOCK: Probably not. Okay. Any  
17 other comments? We're about to take a vote. Everybody  
18 who wants to take it out, which is the subcommittee  
19 proposal, raise your electronic hands.

20 Everybody voted who wants to vote? I count  
21 13.

22 MS. EASLEY: I got 14.

23 CHAIRMAN BABCOCK: All right. Let me look  
24 again. Yep, okay, 14. All of those who want to leave it  
25 in, raise your electronic hand.

1 MS. BARON: People have to lower their  
2 hands.

3 CHAIRMAN BABCOCK: Yeah, lower your previous  
4 vote hand and don't vote twice, and --

5 HONORABLE STEPHEN YELENOSKY: Pauline, can't  
6 you lower the hands for everybody after a vote?

7 MS. EASLEY: Yes, but they already started  
8 voting, so I can't determine who didn't lower their hands.

9 CHAIRMAN BABCOCK: We're going to trust  
10 them. So there's -- how many did you get on this vote,  
11 Pauline? Yeah, you're muted, so you would have to --

12 MS. EASLEY: 12.

13 CHAIRMAN BABCOCK: Yeah, that's what I got.  
14 So 13 take it out, 12 leave it in. So much for consensus,  
15 Pam. Your streak is over.

16 MS. BARON: If you had told me that we would  
17 have done that on this item compared to completely  
18 changing approval of supersedeas bonds, I'm still stunned,  
19 so all right.

20 CHAIRMAN BABCOCK: Well, a stunning result,  
21 but nevertheless, go on to the next item, and we'll be the  
22 judge as to whether it's difficult or not.

23 MS. BARON: Okay. This is the hardest  
24 conceptually for most people because it involves how the  
25 electronic filing system works, and Frank gave us a good

1 preview of that and also how case management works, but  
2 the question is whether to maintain a certificate of  
3 service requirement for e-filed documents in appellate  
4 courts. If you have not looked at a recent document filed  
5 in the Texas Supreme Court, it's worth doing that, because  
6 in the e-filing system the individual court can turn on a  
7 switch that says "produce an automatic certificate of  
8 service," and that then appends to the back of the  
9 document, and it shows exactly who was served through the  
10 e-filing system. And it doesn't matter what your  
11 certificate of service says, and many of them are wrong,  
12 or at least that's been my experience as somebody who  
13 doesn't get service or who hits the button to serve and  
14 then includes 50 people I didn't list on my certificate of  
15 service. The only way to know accurately who was served  
16 through the e-filing system is through the e-filing system  
17 report that's generated and then attached to the back of  
18 the document.

19           And on page five of your memo it shows all  
20 of the courts that have turned on this automatic  
21 certificate of service. It includes both the highest  
22 courts of the State and all but three of our courts of  
23 appeals, and those are the only courts we're talking about  
24 right now. The Second, Tenth, and Twelfth Courts of  
25 Appeals -- hi, Justice Gray, Chief Justice Gray -- have

1 not yet opted to turn it on, but my understanding is that  
2 Blake Hawthorne and the OCA, Office of Court  
3 Administration, is doing their best to persuade all of the  
4 courts in the State to move in this direction. And I have  
5 exchanged some e-mails with Blake Hawthorne, Clerk of the  
6 Texas Supreme Court. I've set out his comments. He  
7 thinks this works great. It's really the best way to  
8 know.

9           The two issues I saw with this are, one, you  
10 know, obviously we're going to have to maintain the  
11 certificate of service requirement for parties that do not  
12 file through the e-filing system. So you do get pro se or  
13 indigent parties or whatever, who are still filing paper  
14 copies with the court and not filing and serving through  
15 the e-filing system. The second is there are documents  
16 that are required to be filed in the appellate rules that  
17 actually are not filed in the appellate court. So your  
18 supersedeas bond is filed with the trial court clerk, your  
19 notice of appeal, a few other documents are just not filed  
20 in the appellate courts.

21           So what we have done -- and the subcommittee  
22 eventually saw their way to this. We had some struggles  
23 along the way, but we unanimously recommend what you see  
24 on the top of page six, and what we've done is documents  
25 that are served electronically, you can't serve a document

1 electronically unless you've filed it electronically, so  
2 it's also going to have been filed electronically. It  
3 says, "A proof of service and a certificate of service are  
4 not required for a document filed electronically" and then  
5 we add "in an appellate court," so we're not covering  
6 documents that are filed in trial courts that may or may  
7 not have turned on the automatic certificate of service  
8 and are also served electronically. And then we have  
9 documents not served electronically, and there we have  
10 done a little bit of renumbering, a little bit of  
11 tinkering, to add subsections that basically take the  
12 paper certificate of service that used to file and limit  
13 it only to documents that are not served electronically.

14 CHAIRMAN BABCOCK: Okay. Justice Gray had  
15 his hand up before you got your third word out, Pam.

16 MS. BARON: I imagine so.

17 CHAIRMAN BABCOCK: And he doesn't want us to  
18 hear him because he's muted. Nope, you're still muted.

19 HONORABLE TOM GRAY: I was trying to use the  
20 spacebar as Robert recommended, and for some reason that  
21 feature wasn't working at the moment. Well, see, first of  
22 all, I was trying to work with the Fourth Court of Appeals  
23 to make it where we were the Dr. Pepper courts, the 10, 2,  
24 and 4 that were not doing this. When Blake approached me  
25 on this, I told him that we would do it as soon as we got

1 a rule on it. So I'm in favor of the rule, because I  
2 don't want to do it, but right now the rule does not  
3 provide for a certificate of service, and so I try to play  
4 by the rules. So I'm in favor of it for that reason, do  
5 it, and I'll let it go at that.

6 CHAIRMAN BABCOCK: Thanks, Judge. Anybody  
7 else?

8 MS. HOBBS: Hey, I'm in favor of the rule,  
9 but I do want to correct something that Pam said that I  
10 think was innocuous and not -- but you actually can file  
11 and/or serve separately through the system without doing  
12 both. So I can serve discovery on somebody where I don't  
13 file something, and I can file something where -- if I'm a  
14 shit, which I'm not, but I could not actually serve  
15 something I filed, but the two screens are separate, and  
16 you actually can do those separately on the system, but  
17 what the -- it's irrelevant to this conversation, because  
18 what the screenshot will capture is who was served, which  
19 is what we're talking about, regardless of link -- it will  
20 capture everybody who is served.

21 MS. BARON: Right. I did not understand  
22 that, and I appreciate the correction.

23 CHAIRMAN BABCOCK: She's board certified,  
24 you know.

25 MS. BARON: Aren't we all?

1                   CHAIRMAN BABCOCK: No. We're not all board  
2 certified. All right. Any other comments? Yeah, Kennon.

3                   MS. WOOTEN: Two points, and they're kind of  
4 side notes. I'll be quick. First point is I continue to  
5 think that we need amendments to the Texas Rules of Civil  
6 Procedure to state more precisely the manner of service  
7 comparable to what we have in the appellate realm.

8                   The second point is that something about the  
9 certificate of service and how it's structured has always  
10 bothered me a bit, because you put it in your document  
11 before you file it, and you state you have served a  
12 document before you have served it, and I struggle with  
13 that because it's a representation that is on its face  
14 inaccurate. It hasn't happened yet. So I raise that just  
15 because I have myself at times put into certificates of  
16 service, "The document will be served" in expla -- because  
17 that feels more accurate to me, and I may be splitting  
18 hairs, but this is something that's always troubled me a  
19 little bit because the attorneys are making  
20 representations that aren't, in fact, true when they're  
21 being made.

22                   MS. BARON: Plus, they don't serve them  
23 themselves, so they don't really know.

24                   CHAIRMAN BABCOCK: Right. But in the old  
25 days, Kennon, your assistant, your legal assistant, would



1 frequently send out the service copies at or before the  
2 time that the runner went down to the courthouse to file  
3 it.

4 MS. WOOTEN: And I think it made sense to  
5 structure the certificate of service as stated when that  
6 happened, because the service, you know, maybe had  
7 occurred beforehand, but now you make that representation  
8 all the time before you've actually served, and then you  
9 encounter sometimes difficulties with effectuating service  
10 as intended. You've already made a representation in a  
11 filed document with the court, and it just raises some  
12 kind of unnecessary dilemmas I think in the mind of the  
13 attorney trying to be as honest as possible.

14 CHAIRMAN BABCOCK: Got it. Thank you.  
15 Robert.

16 MR. LEVY: I agree with Kennon. The  
17 statement or the practice of certifying service is  
18 anachronistic when we have electronic filing, and not only  
19 is the timing off, but you're trusting that the electronic  
20 system is doing what it's supposed to do, and you don't  
21 really know. You don't know if opposing counsel gets it.  
22 The system is designed to accomplish that, but the whole  
23 purpose of certifying service of process I don't think  
24 really should be in there.

25 MS. BARON: You do know that they got it,

1 because you can go into the e-filing system after you  
2 serve a document, and it shows who opened the document and  
3 who received it.

4 MR. LEVY: You can do that later, but you  
5 don't know it while you're doing it, plus it's not your --  
6 kind of your action. It's the system.

7 MS. BARON: You do know while you're doing  
8 it, because you put a check mark next to everybody in the  
9 list of counsel who you are serving, so you have -- and  
10 those are the people who are going to get served. It's  
11 extremely accurate. I think I've had cases where I think  
12 people affirmatively unchecked my name, which I don't  
13 quite understand the reason for that. When I represent an  
14 amicus they don't have to serve me, and so they decide  
15 they're just not going to, but that's a whole different  
16 issue, but, no, you know who you're serving through the --  
17 I file my own documents, so I know how these work.

18 MR. LEVY: Well, don't you -- don't you also  
19 get notification of filing even if you're not checked for  
20 service in those cases, if you're a listed counsel?

21 MS. BARON: No.

22 CHAIRMAN BABCOCK: Lisa.

23 MS. HOBBS: I think -- I mean, I think  
24 Kennon and Robert have raised a good point, but I think  
25 they're actually in favor of the rule change, right?

1 Because we're now not just like certifying that the  
2 lawyers are doing what they're supposed to do, but we're  
3 actually getting a third party confirmation that they did,  
4 in fact, do that thing. So, I mean, I think this is  
5 great. I mean, I'm probably going to be one of those old  
6 school like dinosaurs who still keep my certificate of  
7 service, and that's just tacked onto the end as it is with  
8 my Supreme Court filings right now, but maybe, you know,  
9 10 years from now, some associate is going to be like, why  
10 are you so old school, and I'll change it, but right now I  
11 believe the most accurate formation of who was actually  
12 served is from that third party server that says these  
13 parties were actually served, and I don't think there's  
14 better evidence of who was actually served than that --  
15 than that certificate that the clerk's office gets.

16 CHAIRMAN BABCOCK: Okay. Any more comments  
17 this?

18 MS. WOOTEN: I should have stated I agree  
19 with the rule instead of stating things that weren't  
20 really on point to the proposal. I do agree with the  
21 proposal.

22 CHAIRMAN BABCOCK: Yeah. Yeah, that  
23 occurred to me, Kennon, but we're moving on.

24 Okay. Hyperlinking. This is easy.

25 MS. BARON: If you've ever had to make your

1 own hyperlinks, it's not easy, but the question is whether  
2 or not we should move to a uniform system of citation --  
3 am I frozen?

4 CHAIRMAN BABCOCK: No.

5 MS. BARON: Okay. Uniform system of  
6 citation to the appellate record in the appellate courts,  
7 so that they can automatically hyperlink to the appellate  
8 record, and if you're not familiar with the appellate  
9 courts now currently have a system in Texas where they do  
10 automatically hyperlink to the cases that are cited. If  
11 they are online, they can, you know, click on the case,  
12 and it will I think pull it up in Westlaw or whatever.  
13 The Fifth Circuit has a program that automatically  
14 hyperlinks to the record. They have a uniform system.  
15 It's ROA and then the page number. In the Fifth Circuit  
16 the appellate record is one document. It's consecutively  
17 numbered, so it's pretty easy to figure out out how to  
18 connect that cite to that record in that case.

19 I've had a number of conversations with  
20 Blake Hawthorne, Clerk of the Supreme Court, on why the  
21 Fifth Circuit system currently cannot work in Texas, and I  
22 think you heard earlier from Sharena that all of the  
23 clerks and counties and district courts have different  
24 case management systems. Some are Mercedes and some are  
25 Hondas. And our records are produced a little bit

1 differently. They're produced by individual clerks from  
2 256 counties across the state, so they're not -- they're  
3 semiuniform. They're not super uniform. We have a  
4 separate reporter's record that's not consecutively  
5 numbered with the clerk's record, and as Blake explained  
6 it to me, he dumbed it down for me. He said think of it  
7 as like car parts. In the Fifth Circuit all of the car  
8 parts are standardized, so if you need a muffler,  
9 everybody uses the same muffler. In Texas we have  
10 basically every kind of car you can name, and so we can't  
11 develop a program at this point that plugs that muffler  
12 into an automatic hyperlinking system.

13           Obviously this is something that they are  
14 striving -- or desired to get to at some point in the  
15 future, but right now it's not technically feasible in  
16 Texas. The question is whether we want to develop a  
17 uniform system of citation just to get used to it right  
18 now. I'm not sure that the appellate courts are too  
19 burdened by not having a uniform system. Most people use  
20 one of two or three different formulations. You might --  
21 for the reporter's record you might put 1-RR and then the  
22 page number and in the clerk's record you put 2-CR and the  
23 page number, and then of course we have first supplemental  
24 and second supplemental and third supplemental clerk's  
25 records, but that's another story, and you develop just

1 some kind of thing that works, and I don't know that  
2 appellate courts and staff are having that much trouble  
3 interpreting the citations to the record at this point.

4           What I would say and, you know, we could do  
5 it. We might have to change it later if the technology  
6 becomes available with a uniform ability to hyperlink to  
7 the record. We probably would have to completely change  
8 what that citation to the record would be, so that would  
9 really not accomplish the ability to hyperlink in any way,  
10 and I guess in terms of we do have a lot of appellate  
11 practitioners on this call. We are very protective of our  
12 word count limit, and we would be vigorously opposed to  
13 anything that would add any extra spaces in the citation  
14 form, so that 1-CR-3 suddenly becomes three words instead  
15 of one word on a word count. But our committee  
16 unanimously agreed to propose no change at this time and  
17 to encourage OCA and the Joint Committee on Information  
18 Technology, whatever it is, to pursue exploring how we can  
19 have a uniform record so that we can get to this at some  
20 point in the future.

21           CHAIRMAN BABCOCK: Okay. Are there any  
22 proponents to change now? I know the subcommittee  
23 unanimously rejected that, but how about -- how about  
24 somebody like Justice Gray who wants to change now?

25           HONORABLE TOM GRAY: You will maybe find

1 this surprising, but I do like technology. I would really  
2 like to see this happen sooner rather than later, and I  
3 think that the way to do it is from the top, meaning that  
4 if the Supreme Court will impose the rules that make it  
5 the most efficient and economical way to do it, the courts  
6 of appeals will follow, then the trial courts will follow,  
7 and we will be there much, much sooner than waiting for  
8 JCIT to try to implement it from the ground up. This is  
9 one of those things where I strongly recommend to the  
10 Supreme Court to lead where the rest of us can follow. If  
11 they don't do it first, there will be a -- I think Pam  
12 said there's three or four different methods generally  
13 used in citations now. She must work with just three or  
14 four different appellants or appellees because they're all  
15 done different ways, and in the criminal arena where  
16 there's a lot more -- there's a lot fewer appellate  
17 specialists, we see a much wider range of kind of ways to  
18 cite things. I -- I just think if the Supreme Court takes  
19 the bull by the horns, cram down effect, we will get there  
20 sooner.

21 CHAIRMAN BABCOCK: Thanks, Justice Gray.  
22 Lisa.

23 MS. HOBBS: Yeah, I want to reiterate two  
24 points. One, Pam has already spoken on behalf of all of  
25 us who are appellate practitioners. There should be no

1 spaces in any of those record citations because that takes  
2 away our word count. We do not want to -- it needs to be  
3 just all one, how awkward you make it, capital letters, I  
4 don't care, but no spaces because I want one word for  
5 every record citation. But to Justice Gray's point, which  
6 is actually really important, you know, those of us who  
7 practice mostly in the Supreme Court, we have the benefit  
8 of at that point a mostly stagnate record, but I can't  
9 tell you -- I mean, I commiserate with Justice Gray about  
10 when I am in the court of appeals, I'll be writing my  
11 brief, and I'll realize either something I requested  
12 wasn't included in it or something I didn't even know  
13 existed was not included, but either way you get these  
14 supplemental records, and no clerk's -- of the 254 clerks  
15 offices, some will call it first supplemental record, some  
16 will call it supplemental record. Some will -- the names  
17 get a little bit lost, so I -- I think that's going to be  
18 the challenge, and because the Supreme Court has so many  
19 more stagnate records, it's very rare that I supplement at  
20 the Supreme Court level.

21 I think y'all may be able to look at your  
22 database and kind of assess the scope of those names in a  
23 way that would be hard among the 14 court of appeals.

24 CHAIRMAN BABCOCK: Okay. So the -- thanks.  
25 Thanks, Lisa. The recommendation is to wait for the



1 technology. Justice Gray says, come on, Court, be a  
2 leader, don't be a follower, but is there anybody else  
3 that wants to speak up in favor of we need to -- we need  
4 to get a rule -- we need to spend some time to get a rule  
5 before the Court to speed up the technology? Okay.  
6 Anybody feel strongly about it?

7                   Jackie, I think we'll leave it to you and  
8 Martha and the Court to tell us whether you want us to  
9 work on a specific rule, because right now we're just  
10 saying, you know, wait for the technology.

11                   MS. DAUMERIE: I'll get some feedback and  
12 get back to you.

13                   CHAIRMAN BABCOCK: That would be perfect.  
14 Thank you very much. Let's move on to whether to remove  
15 or limit the statement of jurisdiction.

16                   MS. BARON: Okay. This is Item E on page  
17 seven. Right now statement of jurisdiction is mandatory  
18 in both the petition for review and a petitioner's brief  
19 on the merits, and it's supposed to state without argument  
20 the basis of the Court's jurisdiction. The Court's  
21 jurisdiction used to be a little more complicated than it  
22 is now. There used to be a lot of subsections like  
23 dissent, conflict, cases involving state revenues or the  
24 Railroad Commission, and these were all amended in 2017,  
25 and basically it's a one-stop shop. It's is the issue

1 presented important to the jurisprudence of the state, and  
2 the interlocutory appeal statute was similarly amended so  
3 that it now falls under that same jurisdictional umbrella.  
4 So there's really not much on a normal petition to dispute  
5 about jurisdiction other than whether the issue is  
6 important. People like me, though, view this because the  
7 statement of jurisdiction is not included in the word  
8 count, we beef it up. It's like the free space in bingo.  
9 You go for it right there.

10 I can understand that the Court probably  
11 skips that most of the time now, because jurisdiction is  
12 really do they think it's important and are there enough  
13 votes to grant, and so we kind of came down with you don't  
14 need it, and so take it out in both. And also take out in  
15 the response to petition and respondent's brief on the  
16 merits, the reference to the statement of jurisdiction,  
17 and that recommendation is on page eight, just above F.

18 CHAIRMAN BABCOCK: Thank you. Comments  
19 about this? Eliminating the statement of jurisdiction.  
20 Nina.

21 MS. CORTELL: It's really more in the way of  
22 a question. I understand, and I'm -- I'm kind of neutral  
23 on this, but do you think that for those who don't  
24 regularly practice in the Texas Supreme Court, whether  
25 there isn't a purpose to be served here by making sure

1 that that person or that lawyer understands the way to  
2 frame the petition is to fall within this jurisdictional  
3 standard so that it's really not for this group that's  
4 here today, but for those who are less frequent visitors  
5 to the Court, whether it is important to remind them of  
6 the standard that they need to address, because if they  
7 miss it then their entire petition could be wrong headed.

8 CHAIRMAN BABCOCK: Thanks. Mike Hatchell.  
9 Take yourself off mute. And if you don't --

10 MR. HATCHELL: Sorry about that. No, I  
11 think it's useful to state the basis of jurisdiction. I'm  
12 not sure that -- even though we've had an amendment to our  
13 jurisdiction to eliminate subcategories, I'm not sure that  
14 all categories are the same, such as original proceedings  
15 may have a different statutory and constitutional basis,  
16 and there also is two or three unwritten grounds of  
17 jurisdiction. One would be *Eichelberger vs. Eichelberger*,  
18 which is of a constitutional dimension, and then there's  
19 the hidden appeal from courts of appeals that I won't go  
20 into, but since it's so short and there are varying  
21 reasons or varying bases for jurisdiction, I don't see any  
22 reason to take it out. I think it's very useful to have.

23 CHAIRMAN BABCOCK: Thanks. Roger. Take  
24 your -- there you go.

25 MR. HUGHES: I was going to say that I --

1 maybe Mike can address this, whether there were any  
2 oddball statutes of providing jurisdiction, aside from  
3 that in the Government Code such as direct appeals from  
4 the trial court, like some federal jurisdictions are not  
5 -- so that if there were, shall we say, something in  
6 addition to the general basis it might be worth a section  
7 so that the party could alert the Court to an additional  
8 basis. That's all.

9 CHAIRMAN BABCOCK: Thank you. Lisa next.

10 MS. HOBBS: Yeah, so I think what Hatchell  
11 and Roger are getting at is what would be the basis for  
12 the Supreme Court to on their own right, if -- if there is  
13 an unusual basis for jurisdiction, which would not be the  
14 traditional petition for review or even the petition for  
15 writ of mandamus, what would be their grounds if they  
16 doubted jurisdiction. Would the party be thrown out, or  
17 would the Court have some means to do it? And I think,  
18 you know, the short answer is that historically the  
19 Supreme Court has questioned its jurisdiction,  
20 particularly on direct appeals. Any time you bypass the  
21 Supreme Court and you allege some basis for it, they  
22 request a briefing purely on the jurisdictional issue  
23 and -- and Pam is raising her hand, and so I am going to  
24 defer to my esteemed colleague that she may know more than  
25 that, but that's kind of my concern, is I generally think

1 that section is useless in 99 percent of filings, but in  
2 the one percent that it is useful, then I do worry a  
3 little bit about it, along with Mike and Roger.

4 CHAIRMAN BABCOCK: Pam.

5 MS. BARON: Well, I think the one percent  
6 fall under different rules. So if you are filing for  
7 mandamus, that's a different rule. It does require a  
8 statement of jurisdiction. If you are bringing a direct  
9 appeal, that's a different rule. You file with the Court,  
10 you know, a document asking them to accept jurisdiction  
11 over the direct appeal, and the parties brief the basis  
12 for jurisdiction in all of those cases before the Court  
13 requests or accepts the case and requests briefing. So  
14 we're not talking about the one percent of cases. We're  
15 talking about the 99 percent of plain vanilla petition for  
16 review cases that are not under some extraordinary chutes  
17 and ladders way to the Court.

18 MS. HOBBS: So you're excluding -- you're  
19 excluding -- you're just doing the petition for review  
20 rule and not the petition for writ of mandamus, so if I  
21 have a mandamus against executive officer, I would still  
22 need to explain why the Court could mandamus an executive  
23 officer?

24 MS. BARON: Yes.

25 MS. HOBBS: Okay.

1 MS. BARON: Just in the petition.

2 CHAIRMAN BABCOCK: Okay. Scott.

3 MR. STOLLEY: Thanks, Chip. I'm on that  
4 subcommittee, and I agree with the recommendation to drop  
5 the statement of jurisdiction. I will say, though, as an  
6 alternative if the Court decides it still wants to have  
7 that section in, I think we all agree that we find that  
8 that section gets misused more often than not. It's  
9 turned into another argument section, so the alternative I  
10 would suggest is at least putting a very small word limit  
11 on that section if it's kept. Maybe 50 words, something  
12 like that. Not apply that toward the 4,500 word limit,  
13 but I think we've got to rein in these crazy long  
14 statements of jurisdiction that have just become another  
15 argument section.

16 CHAIRMAN BABCOCK: Yeah, Pam.

17 MS. BARON: I love it. I love the statement  
18 of jurisdiction section.

19 CHAIRMAN BABCOCK: Yeah, okay. So the  
20 subcommittee says take it out. How many in favor of take  
21 it out? Put up your electronic hands and be counted.

22 Everybody done? Pauline, how many do you  
23 get?

24 MS. EASLEY: 14. Well, 15 now. Someone  
25 else just voted.

1 CHAIRMAN BABCOCK: Okay. 15, take it out.  
2 How many for leave it in? Well, everybody lower your  
3 hand. Everybody lowers your hand, and now leave it in?

4 MS. BARON: Mine's still up.

5 CHAIRMAN BABCOCK: Well, take it down.

6 MS. BARON: Okay. I did.

7 CHAIRMAN BABCOCK: Everybody done voting? I  
8 got eight. Pauline, how many do you have?

9 MS. EASLEY: Eight.

10 CHAIRMAN BABCOCK: Okay. 15 to 8, take it  
11 out. All right. On to the next item, whether to add a  
12 reasons-to-grant section in the petition and brief. Are  
13 these words going to count, Pam, or not?

14 MS. BARON: Yes.

15 CHAIRMAN BABCOCK: Uh-oh.

16 MS. BARON: Reluctantly. To begin with, I  
17 guess I want to say our subcommittee believed that the  
18 petition and briefs are fundamentally different purposes,  
19 and I know that Evan Young on our subcommittee has been  
20 working with the Court to examine the petition for review  
21 brief on the merits two-stage process to see whether  
22 adjustments to that to parallel more the U.S. Supreme  
23 Court are in order, but the concept in the U.S. Supreme  
24 Court is that the petition is to convince the Court to  
25 grant review, and the purpose of the merits brief is to

1 actually brief the merits, and under our current system,  
2 you sort of have to make your pitch in both, but for  
3 purposes of examining changes going forward, we as a  
4 subcommittee thought it's best to recognize at least in  
5 theory that they do serve different functions, and so we  
6 did think that the idea of including reasons to grant in  
7 the petition for review was a great idea. We did not  
8 think it was such a great idea at the merits briefing  
9 stage where you're supposed to be briefing the merits and  
10 not trying to sell the product anymore.

11           So the rationale was a lot of good  
12 practitioners are already doing this. Many either do it  
13 in the introduction section or in the statement of  
14 jurisdiction section or in the summary of argument. They  
15 are addressing, "Court, here are the reasons the issues  
16 here are important to the jurisprudence of the State" and  
17 why they should -- why the petition should be granted, and  
18 a number of us already do, you know, "Summary V.  
19 Argument," colon, "Review is warranted." Or, you know,  
20 "Introduction: This case presents issues important to the  
21 jurisprudence of the state." And so adding this section  
22 is a way to try and up everybody's practice so that  
23 everyone is doing that, and we kind of discussed where and  
24 how it should go, whether it should be up front, and also,  
25 of course, vigorous discussion of how it would affect our



1 ever-protected word count limit. And what we did decide  
2 was right now in the petition, if you include something  
3 that's like introduction that explains why the Court  
4 should grant review, the summary of the argument is not  
5 super useful as a separate matter.

6           In fact, you know, summary of argument is  
7 required in the petition, and sometimes if you're not  
8 actually arguing about reasons to grant, there's not much  
9 to say in there, other than two sentences about everything  
10 you already are going to say in the next four pages. So  
11 it can be very, very redundant, so in terms of trading off  
12 on word count, we are willing to leave the 4,500 word  
13 count on the petition by substituting reasons to --  
14 introduction and reasons-to-grant section and deleting the  
15 summary of the argument on the theory that that's kind of  
16 a wash in terms of words, and our recommendation would be  
17 to put the introduction and reasons-to-grant section  
18 before this -- right after the issues statement, but  
19 before the statement of facts so that it would front-end  
20 load the petition and the Court could see right up front  
21 why you think this case merits their attention and a  
22 grant.

23           So our recommendation, unanimous again, is  
24 on -- it got a little complicated. Let's see, is on page  
25 10, so you can see in (c) -- excuse me, I had to talk way

1 more than I've talked in the last six months. I'll tell  
2 you that. We have taken out section (e), which was  
3 statement of jurisdiction, in accordance with our last  
4 discussion and renumbered issues -- relettered issues  
5 presented. We've added new section (f), introduction and  
6 statement of reasons to grant, and it says, "The petition  
7 must contain an introduction stating the reasons the Court  
8 should grant review." Then we have modified (h) and say  
9 that, you know, if you want a summary argument, you can  
10 have it. It's optional. And then instead of calling the  
11 argument "the argument," we are calling it "reasons to  
12 grant," again to help whoever is writing the petition to  
13 focus on what the purpose of the document is. And I think  
14 that covers it, and we did -- we did need to change the  
15 response to petition rule, which is right above (g) on  
16 page 11 where we give the respondent the ability to  
17 include a statement of the reasons the Court shouldn't  
18 grant review, which is what the whole purpose of the  
19 response to petition should be and not always is. And  
20 then we also determined or agreed that no parallel changes  
21 should be made to the briefing on the merits rule.

22 CHAIRMAN BABCOCK: Pam, just the -- the  
23 summary of your recommendations are at the top of page  
24 nine, right?

25 MS. BARON: Probably. Yes.

1                   CHAIRMAN BABCOCK: Okay. And then the  
2 actual language is on 10 and 11.

3                   MS. BARON: Yes.

4                   CHAIRMAN BABCOCK: Great. All right.  
5 Comments? Nina.

6                   MS. CORTELL: I agree with everything that  
7 has been recommended. I would suggest one slight  
8 modification, and that is the header on subsection (i). I  
9 would stay with "Argument." I think it's a little  
10 confusing, because -- as suggested, because you have  
11 statement of reasons to grant in (f) and then we've got  
12 reasons to grant again down in (i). I think argument is  
13 really what we're talking about here, and often -- at  
14 least how I've always done it, I have to say, and I've  
15 always done a reasons-to-grant section, so I've done that,  
16 but the argument, it can be a little bit different, and I  
17 think you make the point you want to make in the body  
18 where it says the argument should state the reasons why  
19 the Court should exercise jurisdiction so there's not  
20 confusion there. So I would stay with the original  
21 header.

22                   MS. BARON: I'm fine with that. It would be  
23 subject to -- I think this came from Evan Young in terms  
24 of changing that word, and, Evan, are you okay with that?

25                   MR. YOUNG: Well, it's not so much whether

1 I'm okay with it, whether the Court thinks it's useful.  
2 To me, honestly, the petition -- this is a distinction  
3 between the brief and the petition. What we would maybe  
4 characterize as argument might really just be a subset of  
5 the reasons to grant, if you accept the premise that the  
6 petition is -- is there, the documents to cause the Court  
7 to say, all right, we have a limited docket, why this case  
8 should be included, a plenary review on that plenary  
9 docket among the many, many cases that we get. One basis  
10 is, you know, the judgment below is wrong, or the opinion  
11 below is wrong even, I suppose we could say based on our  
12 prior discussion.

13           The others would be things like there's  
14 massive confusion or the case is really important, as it  
15 relates to the jurisdictional. It's just really important  
16 to the state. It involves a lot of governmental entities  
17 across the state. It will affect a lot of money,  
18 across -- whatever those thing are, those are reasons to  
19 take it that are not primarily about the merits, but one  
20 of them also just is this is an error in the law and you  
21 should fix it before it metastasizes beyond what already  
22 has happened, and to me all of those are -- we say those  
23 -- I think, Nina, maybe you had mentioned at least once  
24 today, what are we doing that signals to people what  
25 this -- this is for, and I think that deleting the word

1 "argument" helps people at the petition stage understand  
2 that everything I'm saying, yes, it's an argument, and we  
3 can be clearer, whether in the text or in guidance, but  
4 it's an argument that's focused not primarily, just on the  
5 lower court got it wrong. I would include that.

6           And I don't think it's important that it  
7 matches up with what the U.S. Supreme Court does, just  
8 because the U.S. Supreme Court does it; but they have been  
9 fairly successful in their certiorari process, not having  
10 an argument section at all but calling it "reasons," the  
11 "reasons" section, as this would do; and I think it really  
12 does make all practitioners, whether they are routinely in  
13 the U.S. Supreme Court or not, stop and recognize the  
14 distinction between an ordinary argument you make to an  
15 appellate court about why you're right versus something  
16 that's a little bit more nuanced and more useful to a  
17 court with discretionary reviews. I personally would  
18 prefer to keep it this way, but it wouldn't be the end of  
19 the world. It would still be a great advance, I think, to  
20 make these other changes.

21           CHAIRMAN BABCOCK: Lisa.

22           MS. HOBBS: Okay. So I kind of think I'm  
23 opposed to even the fundamental changes to the  
24 subcommittee recommendation, without making Pam mad at me  
25 that I didn't say that before because she was kind enough

1 to include me on a lot of correspondence with the  
2 subcommittee.

3 MS. BARON: Yeah, the statute of limitations  
4 has passed, Lisa.

5 MS. HOBBS: Okay. And here's the reason  
6 why. This is all an art form, and the petition is  
7 especially an art form. Okay. Like where we add value as  
8 appellate lawyers is at its height at the petition stage,  
9 I think, but we carry it on through the briefing.  
10 Obviously we're all really concerned about the development  
11 of the law, but I'm telling you, even though I appreciate  
12 as I read what's supposed to be in my petition for review,  
13 I have never done a summary of an argument. I have always  
14 said reasons why the petition should be granted if I'm  
15 petitioner or reasons to decline review if I'm the  
16 respondent, and never once has my brief been stricken for  
17 doing so, which is all to say, sure, it's good to -- like,  
18 we -- those of us who practice in the Supreme Court all  
19 the time, we know that that's our job.

20 We're either trying to convince the Court to  
21 take the case or try to convince the Court to let it go,  
22 but what you put on those headings is so not important and  
23 has never been stricken, at least in my experience, even  
24 when I didn't completely comply with it, because really  
25 what they're looking for is they want the art and not

1 the -- and some people have it; and, Pam, you have it, and  
2 Nina has it, and Evan has it, and you guys all have it,  
3 whether you're on the petitioner's side or the  
4 respondent's side, but changing those headings, it's sort  
5 of -- you're just -- I feel like it's missing the point,  
6 in my opinion; and it's not helpful and I'm not sure  
7 that -- and I hear the argument that it might make  
8 people -- other people who are not us in our little  
9 appellate world think about it more, but they probably  
10 also won't do as good of a -- like it won't really change  
11 the summary of the argument or the -- like it will still  
12 be a summary of the argument. Like they -- if you don't  
13 get the art, you don't get the art; and I don't know, I  
14 just feel like I'm -- honestly, I'm not opposed to any of  
15 this. It's what I do anyway, but I also don't think it's  
16 necessary, whether you call it a summary of the argument  
17 or reasons to grant review. It's never been dinged either  
18 way, and so I don't know. That's just my kind of opinion.  
19 Sorry.

20 CHAIRMAN BABCOCK: Sounds like you feel  
21 strongly both ways. Hatchell.

22 MR. HATCHELL: I'm for the change. I think  
23 most summaries of arguments these days at the petition  
24 stage are crammed into whatever few words you have left  
25 and are largely meaningless. I mean, they've just become

1 abstract statements, and I think the change would perhaps  
2 channel the nonspecialist into thinking more creatively  
3 about the underlying policies they use and adverse  
4 consequences involved in the case. My only change would  
5 be, which is what I do in petitions now, is I make it much  
6 earlier on. I would make it virtually the first thing you  
7 read when you turn the cover of the brief, and I mean,  
8 I -- most people know I absolutely detest what Bryan  
9 Garner has caused, these visually repulsive statements,  
10 single-spaced statements of the case, which I don't think  
11 anybody reads. So I think you ought to engage the Court  
12 very early on on what this case is about from a  
13 fundamental level by moving the reasons to grant forward.

14 CHAIRMAN BABCOCK: Okay. Thanks, Mike. So  
15 we have a -- we have recommendations from the  
16 subcommittee.

17 MS. HOBBS: Can I just say something in  
18 response to that?

19 CHAIRMAN BABCOCK: Go ahead, Lisa.

20 MS. HOBBS: I'm sorry. But never in my life  
21 have I thought that the contents of the petition for  
22 review had to be in that order. So there are times that I  
23 go heavy on the front end, because, again, it's an art,  
24 where I want to set the stage before you read the  
25 statement of facts. There's other times that the



1 statement of facts lead to my legal argument, and so I  
2 want -- but there's nothing in 53.2 that says this is the  
3 order, and I've never read it as such. But I -- I mean, I  
4 respect my appellate colleagues if they tell me I'm wrong  
5 on that, but I have never -- I've never read that rule to  
6 say there is an order, so are we really talking about  
7 requiring an order to those?

8 MS. BARON: No. No.

9 CHAIRMAN BABCOCK: That's not the way I read  
10 it either. Justice Gray.

11 HONORABLE TOM GRAY: "The petition for  
12 review must, under appropriate headings and in the order  
13 here indicated, contain the following items."

14 MS. BARON: Well, that's always been viewed  
15 as just a guideline, not a code.

16 CHAIRMAN BABCOCK: Well, we're all doing it  
17 wrong. We've got a recommendation, and we've had a nice  
18 discussion. How many people are in favor of the  
19 subcommittee's recommendation? Electronically raise your  
20 hand.

21 Pauline, I've got 18.

22 MS. EASLEY: I have 19.

23 CHAIRMAN BABCOCK: Okay. Maybe I missed one  
24 at the end there.

25 MS. EASLEY: Looks like 21.

1                   CHAIRMAN BABCOCK: Yeah, 21. All right.  
2 Those opposed to the recommendation? Everybody put their  
3 hands down.

4                   MS. BARON: Well, my --

5                   CHAIRMAN BABCOCK: Or, Pauline, you could  
6 put everybody's hands down. Okay. Now everybody opposed  
7 to the subcommittee. Anybody else want to vote?

8                   So by a vote of 21 in favor, 2 against, that  
9 will give the Court some sense of our subcommittee, or our  
10 committee's recommendation on that. Okay. We're on to G,  
11 the home stretch here, Pam.

12                   MS. BARON: Well, we have a whole other  
13 agenda item, but, yes.

14                   CHAIRMAN BABCOCK: Yeah, I know that, but on  
15 this agenda item.

16                   MS. BARON: Okay. This is whether to add a  
17 requirement to include a citation to where the argument  
18 has been preserved, and we viewed this as a question  
19 limited to Supreme Court petition and brief, and it's not  
20 that simple to say exactly where in the record the issue  
21 was preserved because it depends on a lot of things. It  
22 depends on whose burden it was at trial, whether it's  
23 JNOV, whether you were appellant or appellee in the court  
24 of appeals, whether the error arose at the trial court or  
25 in the court of appeals; and sometimes you have no

1 obligation to have preserved error; and it takes a lot of  
2 time and space to explain all of those factors; and again,  
3 we are zealously guarding our word count.

4           It didn't seem all that useful in most  
5 cases, because in most cases by the time you get to the  
6 Supreme Court, you're not really often fighting about  
7 whether the issue has been preserved. Usually it will  
8 have been addressed by the court of appeals, so you know  
9 it's been preserved at that point. And the Supreme Court,  
10 even in those cases where parties do challenge and dispute  
11 whether an issue has been preserved, takes a very liberal  
12 approach to preservation and generally does find that it  
13 has. So it would be using a lot of time, effort, energy,  
14 and words to provide information that in most cases is not  
15 necessary. And in those cases right now where  
16 preservation is an issue, the respondent is always free,  
17 and, in fact, maybe under the obligation, as is probably  
18 the petitioner's counsel, to show that it has not been.

19           So we generally thought this was not a great  
20 idea. We would leave it as it is. If the Court, for some  
21 reason, thinks it's that important to require this in all  
22 cases when it's only going to be at issue in a very small  
23 number, we would recommend that it have to be done on the  
24 issues page so that it doesn't count in the word count.

25           CHAIRMAN BABCOCK: Pam, you must have

1 thought that this was going to be the most difficult issue  
2 of all of these.

3 MS. BARON: No. This just kind of fell into  
4 the substantive changes, so that's where it ended. No, I  
5 thought the supersedeas one was going to be the worst.

6 CHAIRMAN BABCOCK: Okay. Lisa.

7 MS. HOBBS: Well, I want the record to  
8 reflect that I completely agreed with the supersedeas  
9 thing. Hey, Jackie, I just have a question. Was this  
10 proposed -- because as I understand it, and maybe around  
11 the time I was at the Court or around the time I left the  
12 Court, the law clerks have to do this section in their  
13 memo, and so the idea would be to create a section in the  
14 brief where it kind of centers the law clerks so that they  
15 don't have to go through the record, you know, so  
16 difficultly, that both parties have kind of addressed kind  
17 of whether this was preserved and where this was preserved  
18 in a way that helps them do their study memo. Is that  
19 kind of the thought behind this recommendation or --

20 MS. DAUMERIE: I honestly can't remember off  
21 the top of my head exactly where the recommendation came  
22 from. Martha, do you?

23 MS. NEWTON: Yes. This, I think, came many  
24 years ago from the Court Rules Committee, the State Bar  
25 committee, and it was kind of championed by a staff

1 attorney at an intermediate court of appeals. In my --  
2 and this was back when I was the rules attorney; and the  
3 impression that I got from that -- from being present at  
4 the meetings where that was discussed was that they have  
5 such a high volume of appeals that they, you know, have to  
6 go through; and I guess, in some cases there are people  
7 making -- you know, trying to make arguments for the first  
8 time on appeal that weren't preserved and that it adds to,  
9 you know, her time or it becomes burdensome on the court  
10 of appeals staff to have to go through and kind of weed  
11 through the record to try and find, you know, to see if  
12 the argument was preserved. I agree with the comments  
13 that this, I don't think, is really an issue in our court,  
14 just because of the nature of -- of, you know, the  
15 practice.

16 MS. BARON: And also -- I'm sorry. It also  
17 encourages, once you start down this road, more fights  
18 about preservation, once you start having to put it in  
19 there.

20 CHAIRMAN BABCOCK: Yeah, if there's a  
21 serious preservation issue, your opponent is going to  
22 point it out. The respondent is going to point it out, so  
23 Roger.

24 MR. HUGHES: Yeah, well, I'd like to sort of  
25 argue the other side, because I remember when we used to

1 do points of error, and the rules of procedure required  
2 that the point of error contain a reference where the  
3 error was preserved in the record, and I think that was  
4 useful because it focused people on what was the error,  
5 not what's your legal argument is, I mean, for a  
6 preservation point.

7           And so my suggestion would be is that,  
8 number one, we -- that would be useful in the court of  
9 appeals and then merely to put it in the issue statement  
10 as to where the error occurred or something about where  
11 it's preserved. That way it doesn't work against the word  
12 count, and if it becomes an issue, the court of appeals  
13 will deal with it. It will be in the opinion, and it  
14 doesn't need to be handled in your petition for review. I  
15 think maybe dropping -- not having it in the petition for  
16 review is a good idea because everybody worries now about  
17 the word count, but I think it would be a very useful, you  
18 know, return to the past for briefing in the court of  
19 appeals.

20           CHAIRMAN BABCOCK: Thanks, Roger. Mike  
21 Hatchell.

22           MR. HATCHELL: Roger is correct that this is  
23 kind of deja vu all over again. We used to have this  
24 requirement, and I would have to say that at the end of a  
25 briefing process it would sometimes take you as many as

1 four hours, maybe longer, to document all of that for an  
2 issue which may not even come up on appeal. So it's  
3 enormously expensive to the practitioner to have to  
4 document all of this. The rules already provide that you  
5 give record references, appropriate record references, to  
6 actual statements and arguments that you make. So it's  
7 already there, but Pam is absolutely correct that this is  
8 just not easy to decide. So -- so if you -- if you omit  
9 something, then now are courts going to start throwing you  
10 out of court because you forgot to put something in? Just  
11 in my experience the fights over preservation are very few  
12 and very easily determined. So I don't see any reason to  
13 go back in history and start this extremely expensive and  
14 perhaps largely useless process all over again.

15 CHAIRMAN BABCOCK: Thanks, Mike. Frank.

16 MR. GILSTRAP: The direction from the Court  
17 just said citations, and I thought that was ambiguous. I  
18 mean, there's citations to the record, and there's legal  
19 citation. Everybody here who practices in the Supreme  
20 Court says, oh, this means record citations. Well, it  
21 needs to -- if the Court puts something like that in here,  
22 it needs to say "citations to the record" because there  
23 are people who maybe don't practice as often in the court  
24 would look at that and say, oh, I've got to have legal  
25 citation to support preservation.

1 CHAIRMAN BABCOCK: Thank you. Kennon.

2 MS. WOOTEN: My spacebar trick also did not  
3 work, for the record.

4 CHAIRMAN BABCOCK: Who suggested that?

5 MS. WOOTEN: It's a good suggestion. It  
6 works sometimes, not all the time. But I digress. I will  
7 say from the State Bar Court Rules Committee recollection  
8 I have, there was some strong opinion from the staff  
9 attorney at the court of appeals about needing this  
10 information because there was a thought that it would  
11 reduce the burden that's on them, so I would throw that  
12 out there just because I think when we're considering  
13 burden on practitioner, we ought to be equally sensitive  
14 to the burden on the court personnel. I'm not speaking  
15 necessarily in favor of it, but it was something that  
16 struck me as worthy of attention when I was on the Court  
17 Rules Committee.

18 I'll note further a slight recollection --  
19 and Martha may have a better one than I do here, but my  
20 slight recollection is that the discussion at the Court  
21 Rules Committee level included an assessment of what the  
22 rule used to say and an effort to ascertain why the rule  
23 was changed, and we were not able to identify a real good  
24 explanation for why the rule was modified in the past.  
25 And I defer to Martha if she has a better memory than I do



1 on that front.

2 MS. NEWTON: I do not remember that.

3 CHAIRMAN BABCOCK: All right. Thank you.

4 Evan.

5 MR. YOUNG: Pam had mentioned that when we  
6 were thinking about this we were focused on this at a  
7 Supreme Court rather than court of appeals level, and now  
8 Martha and Kennon have clarified where that came from, but  
9 it actually makes me like it even less as an idea, just  
10 the idea that the other side isn't troubled by any of  
11 these arguments, that they aren't saying it hasn't been  
12 adequately preserved, but some staff attorney is just  
13 wanting to be Inspector Javert and go around and find ways  
14 to pour you out when the adversarial process is just -- I  
15 want to double my vote against adding this requirement  
16 now.

17 CHAIRMAN BABCOCK: Okay. You can vote  
18 twice, Evan. That's a deal. Roger, and --

19 MS. BARON: "Look down, look down."

20 MR. HUGHES: Well, look, if I may give a  
21 slightly more nuanced approach to the last comment. I  
22 have been in cases and I have seen cases in the courts of  
23 appeals where you're -- you make an assertion about an  
24 issue. The other side joins issue, argues it, never talks  
25 about error preservation, and then you get an opinion for

1 the first time and say, "Well, we don't think you  
2 preserved error, bye." Too bad, so sad. I think it's  
3 important in the court of appeals because there are clerks  
4 who, if they can't find it, they'll tell their judge it's  
5 not preserved and what a nice way to get rid of a  
6 difficult issue, and you don't get any answer, and then  
7 you file a motion for rehearing explaining where in the --  
8 where you think you preserved it, and all you do is get a  
9 postcard saying so sad.

10           And you never get -- you never get to join  
11 issue, because when the first time around they couldn't  
12 find it because you didn't tell them in your point of  
13 error where it is. So I think at least in the court of  
14 appeals it is an important hedge against getting a  
15 surprise, and it also means that if -- if the judge or a  
16 law clerk thinks you didn't preserve it, well, there it is  
17 in your brief explaining where, and they'll have to deal  
18 with it. So that's my opinion.

19           CHAIRMAN BABCOCK: Okay. Thanks, Roger.  
20 Justice Gray.

21           HONORABLE TOM GRAY: The rules by which we  
22 live is that we must address preservation first. We  
23 frequently don't because there's no argument, but we have  
24 to look at that with regard to the issues we address.  
25 Please remember that 60 percent of my docket is criminal

1 cases. Preservation is a bigger problem in criminal cases  
2 than in civil cases, because there are two types of  
3 error -- not even getting to charge error, but it's a case  
4 called Marin, cagetory one, category two, that don't  
5 require error preservation. Then whether or not it -- in  
6 the charge error if it was or wasn't preserved, it affects  
7 the harm analysis, how you approach the harm analysis, so  
8 in the court of appeals, if that's what we were actually  
9 talking about here, it would be very important because  
10 we're talking about petition and not briefing in the court  
11 of appeals. Frankly, that's after I have to deal with it,  
12 so I don't care.

13 CHAIRMAN BABCOCK: Richard Munzinger. No,  
14 you've got to unmute yourself, Richard.

15 MR. MUNZINGER: Sorry. I agree with Mike  
16 Hatchell's comment. This costs time and money to clients.  
17 We're talking about the petition for review and not  
18 briefing in the court of appeals. If there's an issue,  
19 the other side will raise it. You pointed that out, Chip,  
20 and I agree with that. If they raise it, then you go back  
21 and you say, no, it's in this or there or whatever it is.  
22 It becomes an issue if raised. If not, let the Supreme  
23 Court get on with it and deal with the jurisprudence of  
24 the state.

25 CHAIRMAN BABCOCK: Thanks, Richard. Lisa.

1 MS. HOBBS: I was about to text Pam. Like  
2 was this proposal just for the Supreme Court, or was it  
3 for the court of appeals? I thought it was just for the  
4 Supreme Court, but that may have been my own ignorance.

5 MS. BARON: Well, that's how I read it, and  
6 I guess if the Court wants to refer it back to us to look  
7 at court of appeals, we can do that. I don't know that I  
8 would change my opinion, but our subcommittee could  
9 discuss it.

10 MS. HOBBS: I'm not sure I would either.  
11 The rationale for the Supreme Court is that in the  
12 briefing attorney's memo they have to do a preservation  
13 section, so if they have that section in their memo, hell,  
14 I'm happy to like write that for them, and you just cut  
15 and paste what I say happened. And so it's worth my  
16 client's time for me to do it at that stage, but to  
17 Justice Gray's standpoint, preservation of error isn't --  
18 that's not fundamental error; and so if the other side  
19 doesn't raise it, I don't know why courts of appeals are  
20 going out of their way to raise it, because if I didn't --  
21 let's say my trial counsel did not raise an issue and the  
22 other side -- we go through full briefing at the court of  
23 appeals and they don't raise lack of preservation, I don't  
24 know, I kind of think that's waived.

25 Like, but I know smart people can disagree

1 with me, and you can disagree with me in a way that a  
2 different court of appeals might disagree with me, but we  
3 aren't talking about fundamental -- it's not like subject  
4 matter jurisdiction where you actually have an obligation  
5 to consider your jurisdiction, so I don't know. I feel  
6 like we're going down -- if anything, the conversation  
7 that we're going down is making me way, way, way less  
8 inclined to include this, even though I do think it would  
9 be helpful at the Texas Supreme Court level where I know  
10 within -- internally within their briefing memos that the  
11 law clerks do, they have to include this section.

12 CHAIRMAN BABCOCK: All right. The  
13 subcommittee recommends no change. How many people are in  
14 favor of no change? Raise your electronic hand.

15 Evan has got two votes. Sorry, good point.

16 MS. BARON: Does he have two hands?

17 CHAIRMAN BABCOCK: He has two hands, yeah.  
18 Okay, Pauline, I've got 22.

19 MS. EASLEY: So do I.

20 CHAIRMAN BABCOCK: All right. Everybody  
21 lower your hand. Okay. Anybody that wants a change,  
22 raise your hand.

23 Okay. Almost, Pam. You almost got  
24 unanimous. 22 to 1, so no change. The subcommittee  
25 recommendation is followed in terms of our recommendation

1 to the Court. So now we've got one more agenda item, but  
2 I think we'll give Dee Dee and everybody a break, and so  
3 why don't we come back at 10 minutes to 4:00. I mean, I'm  
4 sorry, 20 minutes to 4:00, so take about a 15-minute  
5 break.

6 MS. BARON: Okay.

7 CHAIRMAN BABCOCK: All right. Great.  
8 Thanks, everybody.

9 (Recess from 3:26 p.m. to 3:40 p.m.)

10 CHAIRMAN BABCOCK: Well, we're on the home  
11 stretch now, and this is an item that got added late  
12 because we had somebody else drop out. But this is  
13 vacating opinions, and surprise, surprise, the person  
14 leading this is Pam Baron, who is not back on screen yet,  
15 so we'll have to wait for Pam, but it's Tab I, the August  
16 13th, 2020, memo, regarding TRAP Rule 56.2. So as soon as  
17 Pam comes back --

18 MS. BARON: Sorry.

19 CHAIRMAN BABCOCK: -- we will get after it.  
20 Hey, Pam.

21 MS. BARON: Sorry.

22 CHAIRMAN BABCOCK: I gave you a huge  
23 build-up.

24 MS. BARON: What did you say?

25 CHAIRMAN BABCOCK: I said surprise,

1 surprise, leading our final item of the day is none other  
2 than Pam Baron.

3 MS. BARON: On the Guinness Book of World  
4 Records, I'll just go down as 10 items in a row.

5 CHAIRMAN BABCOCK: It's awesome. You are so  
6 awesome. It's incredible.

7 MS. BARON: Thank you. All right. Last  
8 item. Vacating court of appeals' opinions in moot cases.  
9 We have a little bit of an aberration in the appellate  
10 rules, and if you turn to page two of your memo and you  
11 compare Rule 56.2, moot cases, with 56.3, settled cases,  
12 and you read the last two sentences of settled cases that  
13 are in bold, it says, "The Supreme Court's order does not  
14 vacate the court of appeals' opinion unless the order  
15 specifically provides otherwise. An agreement or motion  
16 cannot be conditioned on vacating the court of appeals'  
17 opinion." There's no parallel provision for moot cases,  
18 and what it provides for in moot cases is simply that the  
19 Supreme Court dismisses the case.

20 There's a history of opinions from the Court  
21 that says merely vacating the judgment as you would do in  
22 a settled case or a moot case does not vacate the court of  
23 appeals' opinion. If you look at Rule 60.6, though, it  
24 does give the Court the authority to make whatever other  
25 orders deemed necessary in disposing of a case. The Court

1 had a case this term, *Morath vs. Lewis*. There the  
2 plaintiff sued the Commissioner of the Texas Education  
3 Agency for violating the statute relating to the STAARs  
4 exam in a particular year. The trial court denied the  
5 plea to the jurisdiction. The court of appeals affirmed,  
6 finding that the plaintiffs had sufficiently pleaded an  
7 ultra vires claim.

8           The commissioner took it up to the Texas  
9 Supreme Court. The Texas Supreme Court requested briefs  
10 on the merits. That shows interest in the case by at  
11 least three justices on the Court, and after that  
12 happened, the plaintiff filed a nonsuit and motion to  
13 dismiss as moot, and the commissioner opposed both, but  
14 alternatively asked that if you do grant the motion to  
15 dismiss and vacate as moot, please also vacate the court  
16 of appeals' opinion. And so the Court had to deal with  
17 this discrepancy between the rules that address moot cases  
18 and those that address settled cases, because in settled  
19 cases it specifically recognizes that the court in its  
20 order can, in fact, vacate the court of appeals' opinion.

21           And the Supreme Court kind of reviewed  
22 history and reviewed this disparity in the rules, and  
23 really, it concluded that they've been reluctant in the  
24 past to vacate court of appeals' opinions, but that  
25 doesn't mean they don't have the authority to do it, and



1 the lack of a specific provision in the moot cases rule  
2 didn't change that analysis. The Court did look at Rule  
3 60.6 as giving the authority to vacate a court of appeals'  
4 opinion in certain circumstances, and then the rest of the  
5 opinion -- this was issued per curiam this year in 2020 --  
6 discusses kind of what the criteria would be for doing  
7 that, and the Court found that this case in particular met  
8 it because in this situation the party that was winning in  
9 the court of appeals effectively took away the ability of  
10 the losing party to ever challenge it by filing the  
11 nonsuit. And the court of appeals' opinion, even though  
12 the Supreme Court had expressed some interest by  
13 requesting briefs on the merits, was basically  
14 unreviewable at that point; and it would be precedent for  
15 future cases across the State that involve similar facts;  
16 and so the Court determined that, yes, they would vacate  
17 the court of appeals' opinion in that circumstance.

18           A vacated court -- there's a difference when  
19 a -- just the judgment is vacated. The court of appeals'  
20 opinion remains persuasive authority. Is that right?  
21 It's like a writ dismissed case. A vacated court of  
22 appeals' opinion can still be cited. It's still on the  
23 books, but it's -- it's a vacated opinion. You can just  
24 argue it as persuasive in that circumstance.

25           Anyway, the committee looked at all of this,

1 and recommends that Rule 56.2, moot cases, be amended to  
2 parallel the same provisions that are currently included  
3 in 56.3, settled cases. So if you look on page four of  
4 the memo, the underlined, highlighted language is exactly  
5 what is currently provided in settled cases, and settled  
6 cases are really just a subset of moot cases, so it's odd  
7 that we even have this disparity. That's it.

8 CHAIRMAN BABCOCK: Ta-da. All right. Lisa  
9 has already got her hand up. Lisa.

10 MS. HOBBS: Okay. I just want to take a  
11 little bit of liberty to my esteemed colleague and mentor,  
12 who I adore with all of my heart, saying that settled  
13 cases are just a -- a subset of moot cases. They actually  
14 aren't. At the time that the court of appeals -- I don't  
15 know, now maybe I'm challenging myself a little bit, but  
16 at the time that the court of appeals decided the case, it  
17 was neither settled nor moot, so it wasn't an advisory  
18 committee -- an advisory opinion. The problem when you  
19 know a case has gone moot, whether it's at that moment at  
20 the Supreme Court or moot at some other time that you  
21 think it went moot, then you're going into an advisory  
22 committee -- an advisory opinion that is -- the Texas  
23 Constitution says you can't do.

24 So I take a little bit of issue with that  
25 comment, and I am sort of not -- I have not -- I have not

1 found my ground of where I fall on this. I think I'm -- I  
2 think I wish that the Court would be reticent to ever  
3 vacate an opinion as opposed to the judgment, but I don't  
4 know that I'm opposed to a rule that gives them the  
5 discretion to do it under certain circumstances. So --

6 CHAIRMAN BABCOCK: Okay. Frank.

7 MR. GILSTRAP: This strikes me as a complete  
8 no brainer. I mean, we're just codifying the rule in  
9 Morath, and the two provisions should be parallel.  
10 However, as we've drawn it, they're not, because 56.3  
11 begins with the words "in any event," and 56.2 leaves out  
12 those words. Gosh, the words are -- the provisions are  
13 different. Those words must mean something. Of course,  
14 they don't. So 56.3, we need to strike the words "in any  
15 event." That's it.

16 CHAIRMAN BABCOCK: Thank you. Roger.

17 You're talking to yourself, Roger.

18 MR. HUGHES: Yeah, okay, and not getting a  
19 very good audience. I understand the value in codifying a  
20 rule, but two things, what are we accomplishing here? If  
21 all we're doing is what the opinion says, then why codify  
22 the rule, and the second thing of it is, to -- I guess I  
23 sort of have to ask whether an attempt at codifying the  
24 rule is also an attempt to freeze it. I mean, if the  
25 Court is giving itself a considerable latitude and

1 discretion, the rule may advance; whereas trying to codify  
2 it may freeze it; and then the Court at some other time  
3 will go, well, yeah, but our equitable discretion goes  
4 even further. And I really -- I don't see this as a  
5 substitute. I mean, the subset.

6           When you have a settlement, you know, the  
7 parties are effectively agreeing, some out of condition,  
8 their arrangement on vacatur. But when you have either  
9 events have superseded a party or you have a party that  
10 goes, hey, I got a great opinion from the court of  
11 appeals, so let's -- let's pull the rug out and live to  
12 fight another day, because we've got precedent on our  
13 side. I mean, there may be other situations, but I don't  
14 see them as the same, so I guess my -- I'm -- myself, what  
15 I'm asking is, what are we gaining by codifying the rule,  
16 and what possible damage are we doing by then in a sense  
17 freezing the Court's discretion on the issue?

18           That's my two cents. I'm -- I'm really not  
19 sure we get anything by doing this, and I'm a little  
20 worried that we may be putting a roadblock in the way of  
21 progress. So I'll leave it there.

22           CHAIRMAN BABCOCK: Okay. Thanks, Roger.  
23 Lisa. No, Lisa, you've got to unmute yourself.

24           MS. HOBBS: Okay. As I understand the rule,  
25 is that parties can settle at any time, but the law as --

1 at the Supreme Court, once they get to the Supreme Court  
2 level, the law has developed in a way that the court of  
3 appeals has stated it at a time when there was not a moot  
4 controversy. And so we value the development of the law,  
5 and we're not -- we think -- we're not going to vacate  
6 opinions because the development of the law is as  
7 important as anything else, and we see this when we talk  
8 about why we love arbitration or not, right.

9           One of the disadvantages to arbitration is  
10 there is not the development of the law. These are  
11 private things that we don't know how they come out, and  
12 we don't know how the law is developed, but with different  
13 fact scenarios and different blah, blah, blah, and so the  
14 development of the law is actually really important, and  
15 that's why we don't let parties dictate whether we're  
16 going to vacate the opinion. Like they can dictate  
17 whether we're going to vacate the judgment, because those  
18 two are different, as we started today, and so we'll let  
19 them vacate -- we'll let them ask to vacate the judgment,  
20 but we won't let them eradicate the development of the  
21 law.

22           What I don't like about moot cases -- and  
23 again, I'm probably repeating myself, but if it goes moot,  
24 we're talking about subject matter jurisdiction. So now  
25 we are running up against a Texas Constitution that says

1 no court can give an advisory opinion. Now, when that  
2 happens, I know it can be complicated and da-da-da, but it  
3 is different, because the reason why there are two  
4 different rules is because one goes to the subject matter  
5 jurisdiction of the court and one goes through  
6 jurisprudential or whatever concerns that we might have  
7 about the development of the law, and so there actually is  
8 a really logical reason why there are two different rules.

9 CHAIRMAN BABCOCK: Okay. Thanks, Lisa. Any  
10 other comments? Yes, Richard Munzinger.

11 MR. MUNZINGER: If I understand the  
12 situation, the Supreme Court asked the committee to look  
13 at this issue. The Supreme Court is not doing anything  
14 regarding its own jurisdiction in this rule discussion.  
15 It's looking backwards to the court of appeals as to  
16 whether it should or should not vacate the court of  
17 appeals' opinion. When the case was heard before the  
18 court of appeals, presumptively it was not moot. The  
19 court of appeals had jurisdiction. There were two or more  
20 parties who were fighting over a part of law, and the  
21 court of appeals entered an opinion, and presumptively a  
22 judgment, resolving the issue. That's law, and it's law  
23 for that court of appeals until set aside by the Supreme  
24 Court. So now the Supreme Court says, well, wait a  
25 second, this case was up here on a petition. I don't know

1 nor does anybody know what the votes were within the  
2 Supreme Court, but the Supreme Court is in a unique  
3 position to know whether it is or isn't in the best  
4 interest of the state to allow the court of appeals'  
5 opinion to remain in force, because there's now law on the  
6 books.

7           As to Roger's question, if the case has been  
8 ruled by the Supreme Court to say they have the authority,  
9 why would you put it in the rule, so I don't have to brief  
10 it. I don't have to go and say, Supreme Court, do you  
11 have the authority to set this aside? Don't do this, et  
12 cetera, et cetera. I like the rule the way it's written.  
13 I think it's necessary, and I don't think it addresses any  
14 question at all of mootness at the Supreme Court level.  
15 Thank you.

16           CHAIRMAN BABCOCK: Thanks, Richard, and  
17 you've got to change your handle. It just looks like  
18 "rum" to me. So we're going to start calling you "rummy."  
19 Nina, and then Pam.

20           MS. CORTELL: I think Lisa made some very  
21 good points, that the settlement rule is really directed  
22 to something very different than the mootness rule, and  
23 mootness goes to jurisdiction and what can and can't  
24 happen and might depend on the particulars of the case.  
25 It's just a very different animal; whereas, settlement,

1 you're letting people know that you can go out there and  
2 settle a case and ask us to dismiss, but you can't anchor  
3 it to vacating an opinion. So I think that's an important  
4 point. I could see maybe accepting the first suggested  
5 additional sentence, but not the second.

6 CHAIRMAN BABCOCK: Thanks, Nina. Pam.

7 MS. BARON: Well, in Morath the case became  
8 moot because of the affirmative action of a party in  
9 dismissing its case, so the party had the absolute control  
10 whether or not that case was going to be mooted at the  
11 time it was pending in the Supreme Court and when things  
12 looked like they were going a little bit south, and in  
13 that situation, the Court should be able to decide whether  
14 the fact that the party has made the opinion unreviewable  
15 should be taken into account and whether it should  
16 diminish the persuasive or, you know, writ denied type  
17 case precedent value. I mean, that case will have  
18 precedent in the Third Court of Appeals district for all  
19 trial courts, all courts of appeals. It will be  
20 considered as a court of appeals' opinion across the  
21 state, only because the plaintiffs filed a nonsuit at the  
22 Texas Supreme Court level.

23 MS. CORTELL: I understand, but this is  
24 broader than Morath. This is all moot cases, so I totally  
25 get the issue in Morath, and I think it was correctly



1 decided, but that is not -- that is not the situation in a  
2 lot of mootness situations. That something becomes moot  
3 has nothing to do with a nonsuit.

4 CHAIRMAN BABCOCK: Lisa.

5 MS. BARON: Well --

6 CHAIRMAN BABCOCK: Or Pam. Point,  
7 counterpoint.

8 MS. BARON: Whatever, okay.

9 MS. HOBBS: No, I'll let Pam -- this is an  
10 important conversation between three people I very much  
11 respect, so I'll let Pam go next.

12 MS. BARON: Now, when you say you respect me  
13 that means you're about to disagree with me completely.

14 MS. HOBBS: No, I don't.

15 MS. BARON: I'm happy to take the second  
16 sentence out, if my subcommittee agrees to that, and I do  
17 think the Supreme Court, you know, stated in Morath what  
18 its criteria are for when it's going to do this in moot  
19 cases. It clearly has the authority to do it. We should  
20 let people know they have that.

21 MS. HOBBS: And just my counterpoint to that  
22 would be like when it became moot, and I think it  
23 dovetails perfectly with Nina's comment that things become  
24 moot for a lot of reasons at a lot of times, and no one  
25 disagrees that it was not moot when the opinion issued.

1 So that court had jurisdiction at that moment, and we're  
2 just talking about Supreme Court jurisdiction, and to me  
3 that makes a difference. And, look, we could probably,  
4 you know, go head-to-head in a case and totally disagree  
5 with that, but just on my initial thing it's like if the  
6 opinion -- the court of appeals' opinion was issued -- I  
7 don't know. I just -- I feel like mootness and parties in  
8 control are very different, because one triggers the Texas  
9 constitutional provision that our appellate courts cannot  
10 give advisory opinions, and so to me that is probably why  
11 the rule was originally written the way it was.

12 MS. BARON: I don't think that's why the  
13 rule is written this way. I think what happened is we  
14 went back and revisited 56.3 after the Court issued its  
15 series of per curiam opinions saying, "We don't generally  
16 vacate court of appeals' opinions." I would have to go  
17 back and look, but I'm pretty sure this is a change of  
18 somewhat recent vintage and nobody thought to look at  
19 56.2.

20 CHAIRMAN BABCOCK: Lisa, I'm -- are you  
21 arguing for the retention of this second sentence, or is  
22 your argument that we should delete it?

23 MS. BARON: I think she wants to delete all  
24 of -- she doesn't want to change the rule.

25 CHAIRMAN BABCOCK: Okay. Where did she go?

1 She left us. Okay. Because to me you shouldn't -- you  
2 shouldn't allow private parties to dictate whether a  
3 decided case, when the lower court has jurisdiction,  
4 vanishes from the face of the earth. That just doesn't  
5 seem to me to be right. I'm not an appellate specialist  
6 like the rest of you guys, but that just doesn't seem  
7 jurisprudentially to be the right thing to do. But that  
8 may just be me. Any other comments?

9 All right. Pam, do you want us to vote on  
10 the committee's proposal, or do you want to amend it in  
11 any way, or how do you want to frame this issue for a  
12 vote?

13 MS. BARON: I would vote on it as we propose  
14 it.

15 CHAIRMAN BABCOCK: Okay. Everybody that's  
16 in favor of the subcommittee's proposal to Rule 56.2,  
17 signify by raising your hand electronically.

18 Everybody finished voting?

19 MS. HOBBS: Hey, Chip, I'm sorry. I was  
20 trying to hit unmute, and apparently I did leave. Can you  
21 tell me what we're voting on and then I will cast my vote?  
22 And I apologize that I disappeared.

23 CHAIRMAN BABCOCK: Yeah. I asked you a  
24 question, and you were gone.

25 MS. HOBBS: I'm sorry. I was just trying to

1 unmute, and it was like "leave." Okay, great.

2 CHAIRMAN BABCOCK: We are voting on the  
3 subcommittee's proposal. Everybody in favor is raising  
4 their hand.

5 MS. HOBBS: Okay. Thank you.

6 CHAIRMAN BABCOCK: Pauline, I have got 14,  
7 but I may be off.

8 MS. EASLEY: I show 12.

9 CHAIRMAN BABCOCK: All right. One of us is  
10 off then. Let me try it again. One, two, three, four  
11 five, six, seven, eight, nine, ten, eleven, twelve -- now  
12 I got 11. I'm going to go with your vote, and you got 12?

13 MS. EASLEY: Uh-huh.

14 CHAIRMAN BABCOCK: Okay. Everybody that is  
15 against the proposal raise -- everybody drop your hands,  
16 and then everybody against the subcommittee proposal raise  
17 your hand.

18 Everybody finished voting, or anybody else  
19 want to vote? Yeah, I got seven on this. Is that what  
20 you have, Pauline?

21 MS. EASLEY: Yes.

22 CHAIRMAN BABCOCK: All right. So the vote  
23 is 12 in favor of the subcommittee's proposal, with 7  
24 against.

25 Pam, I'm going to say that this may be the

1 most successful afternoon in the history of this  
2 committee.

3 MS. BARON: All right.

4 CHAIRMAN BABCOCK: Actually, a very  
5 successful day. We've disposed of all the agenda items,  
6 with the exception of Item 5 which we deferred, and I'm --  
7 Marti, remind me to send an e-mail to Judge Rucker and to  
8 Richard Orsinger encouraging them to be at the November  
9 6th meeting, and I will tell them that if I get any back  
10 talk that the Chief is going to enter an order, so they  
11 better -- they better do it as I say. Does that work for  
12 everybody? Chief Justice Hecht, does that work for you?

13 HONORABLE NATHAN HECHT: It does. That's  
14 great. Great day, very productive.

15 CHAIRMAN BABCOCK: Yeah. Terrific day,  
16 everybody. Thanks so much, and we had really good  
17 attendance today. So thanks, thanks again. And, Pam,  
18 thank you and the appellate subcommittee for all of the  
19 hard work you-all did. So we'll be in adjournment until  
20 November 6th, and we'll be letting you guys know whether  
21 it will be Zooming again or whether we'll meet in person  
22 or some accommodation thereof.

23 MS. BARON: Skip -- I mean, I'm sorry, Chip.

24 CHAIRMAN BABCOCK: Yeah.

25 MS. BARON: We'll still have the option to

1 participate remotely, even if you meet in person?

2 CHAIRMAN BABCOCK: I think so, frankly.

3 Yeah, I think so.

4 MS. BARON: I'm pretty sure I'm not  
5 traveling through the end of the year, so --

6 CHAIRMAN BABCOCK: Yeah, okay. Yeah. You  
7 know, odds are there's going to be a total Zoom meeting,  
8 but, you know, hope springs eternal. Maybe there will be  
9 a vaccine by November 6th.

10 MS. BARON: Oh, yeah, right.

11 CHAIRMAN BABCOCK: Yeah, probably not.

12 MS. BARON: Okay.

13 CHAIRMAN BABCOCK: All right. So, yeah,  
14 anybody that doesn't want to be in person but wants to  
15 participate, we will certainly accommodate that. So all  
16 right. Thanks, everybody. That's great. Thanks so much  
17 again. Talk to y'all later. Bye-bye.

18 (Adjourned at 4:07 p.m.)

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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  
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Staples, Texas 78670  
(512)751-2618

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