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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

OCTOBER 10, 2025

(FRIDAY SESSION)

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Taken before *D'Lois L. Jones*, Certified
Shorthand Reporter in and for the State of Texas, reported
by machine shorthand method, on the 10th day of October,
2025, between the hours of 9:00 a.m. and 4:51 p.m., at the
State Bar of Texas, 1414 Colorado, Austin, Texas 78701.

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

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2 CHAIR TRACY CHRISTOPHER: If we could have
3 everybody take their seat, we're going to try and get
4 started, and we're getting some extra chairs in here for
5 some of our task force members so they have a seat.

6 All right. So welcome, everybody, and I'm
7 going to turn it over immediately to Justice Bland for a
8 status report.

9 HONORABLE JANE BLAND: Good morning,
10 everyone. Welcome to our visitors from the Justice Court
11 Task Force. We greatly appreciate the resources that you
12 have provided us and good work for those changes that we
13 need to make to the rules associated with the eviction and
14 appeals from justice court to county court at law. So,
15 welcome, we're glad you're here.

16 So it's been a busy month at the Court.
17 We've had two rounds of oral argument, including 11 cases
18 heard this week, so if Justice Young and I start spouting
19 nonsense halfway through the meeting, it's because we're
20 both into some sort of briefing trance.

21 In addition, some of this committee's work
22 has made it to fruition. We put out draft conduct
23 commission rules that are rewrites in response to Senate
24 Bill 293 and numerous other suggestions that we had
25 received over the years. The Court had already been in

1 the process of revamping those rules, but this committee
2 had many good suggestions for making them easier to follow
3 for both the commission and those who appear before the
4 commission. Those rules have a December -- they had a
5 September 1 effective date to comply with Senate Bill 293.
6 They have a December 1st comment date.

7 As many of you know, there's a
8 constitutional provision that will be on the ballot that
9 goes in tandem with this bill, and the hope is that the
10 commission rules, as they've been rewritten, will dovetail
11 well with the constitutional amendments, should they pass.

12 We provided new rules for licensure of
13 military and military spouses, giving them the ability to
14 practice law in Texas. We've always had a rule, but we
15 made that rule a little more flexible in light of some
16 legislation. That, too, had a September 1 effective date
17 and November 1 comment deadline. After this committee's
18 discussions on Senate Bill 535 and the rape shield law, as
19 you know, the 535 expressly disapproved of the Texas Rules
20 of Evidence, and so we repealed that rule and replaced it
21 with the statutory language, also effective September 1.
22 The post-effective date comment period for that rule also
23 lasts until December 1st.

24 Finally, as many of you also know, in 1983,
25 by Supreme Court order, the Court delegated the

1 accreditation process for law schools in Texas to the
2 American Bar Association, and that -- that organization
3 set the standards for law school -- whether law school
4 graduates are eligible to sit for the Bar, so that's
5 Rule 1 of the rules governing admission to the Bar. The
6 Court has changed that rule to say that now the Court will
7 have the final say over whether a particular law school's
8 graduates are eligible to sit for the Bar exam, but the
9 order implementing the rule specifically says that all ABA
10 accredited -- accredited law schools continue to be
11 accredited by the Court, that we intend to preserve
12 portability so that law school graduates in Texas should
13 be eligible to sit for the Bar in other states and vice
14 versa.

15 We don't intend to change the list of
16 approved law schools, but we do intend, through the Board
17 of Law Examiners, to develop neutral and objective
18 standards for determining whether law schools -- what law
19 school's particular graduates are eligible to sit for the
20 Bar. That rule is accepting comments until December 1st.
21 The expected effective date of the rule -- it's a
22 preliminary rule -- is January 1. So those of you that
23 are interested in law school accreditation, or if you have
24 friends that are interested in law school accreditation,
25 we had already opened a public comment period ahead of the

1 draft rule, and we received many thoughtful comments
2 about the rule, and we expect that we'll receive more, and
3 we are very interested in those, as we are in comments for
4 every new rule.

5 We implemented the bail appeal rules. This
6 committee did great work in response to Senate Bill 9 with
7 the Texas Rules of Appellate Procedure to provide for the
8 immediate appeal that that statute provides the State in
9 connection with a contention that the bail set was
10 insufficient.

11 We collaborated with the Court of Criminal
12 Appeals on this rule, and they became effective September
13 1st. Those two are ongoing a public comment period, and I
14 know there are numerous trial judges that have comments
15 that they would like to share in connection with those
16 rules, and perhaps appellate court judges as well. If you
17 have comments, please send them in. December 1st is the
18 comment deadline for that. Obviously, the rules are in
19 effect, but that doesn't stop this committee from looking
20 at the rules to tweak them and from the Court adopting
21 tweaks to the rule, so look at that.

22 And then we have final approval of the
23 uniform -- Uniform Deposition Act. It's UIDDA, and I
24 don't remember all of the words, but it's the
25 deposition -- you know, it's to make the process easier

1 for out-of-state depositions and discovery and vice versa,
2 and it's the act that's been adopted in 46 states, so we
3 adopted it in part. We modified it slightly, in
4 particular, with respect to investigating premises, you
5 know, so we're going -- for on-premises investigations,
6 which were pretty much a free-for-all under the uniform
7 act, and we didn't think that was going to be as
8 palatable, and we didn't see problems with our existing
9 rule, you know, where parties go and when they need to go
10 to an accident site or something on someone's premises.
11 They obtain a court order to do so or a voluntary
12 agreement of the property owner.

13 Okay. That's a recap of what we have done,
14 and as you know, we have a lot to do, including today, a
15 very full agenda. The justice court rules, also the
16 summary judgment rule, which we discussed some at the
17 last -- last commission -- last advisory committee
18 meeting, but, of course, it's been overtaken by events,
19 because we have a bill now, signed by the Governor, that
20 tweaked the new summary judgment statute that we had. So
21 our committee that's been working on that has worked very
22 hard for a presentation today.

23 In addition, we have a couple of other
24 legislative mandates that the Court still needs to work
25 through and timely bring them into effect, and that

1 includes work certifications by trial court judges and the
2 summary judgment rule and the justice court rules, and
3 there may be a couple of others, but those are the primary
4 ones that come to mind. Some of these changes that the
5 Legislature has mandated require significant changes to
6 the technology infrastructure of the Court so that we can
7 keep track of what the Legislature has commanded that we
8 keep track of; and in discussions with Megan LaVoie and
9 the Office of Court Administration, it is our expectation
10 that the rule -- that the data tracking associated with
11 these new statutory mandates and rules won't come any
12 sooner than when the rule changes go into effect. And I
13 know there had been -- Chief Justice Christopher had let
14 us know that there were questions about that, but our
15 expectation is that there won't be any sort of data
16 collection ahead -- ahead of when the rules that govern
17 the data collection go into effect.

18 So our aim is to try to do those at the same
19 time, and OCA is working hard on trying to get processes
20 in place with local clerks and -- but, you know, TBD
21 whether that process can keep pace with our speedy
22 dispatch of amendments to rules by this committee.

23 The final word I'll say is that -- oh, one
24 other thing. We are still waiting. We are down to a
25 great eight at the Court. We're missing a tie-breaking

1 vote, so, you know, in the eventuality that we need one,
2 it would be great if we had a new judge, and our hope is
3 that we'll have one soon, but no word yet on that.

4 And then, finally, I'll just comment, as all
5 of you know, we lost a dear friend in Alistair Dawson, who
6 was at our last committee meeting and was a year ahead of
7 me in law school and a close friend, and, you know, I
8 won't go into the magnificent person and lawyer that he
9 was, because I'll get all choked up. But I just would ask
10 everyone who knows him from his work on this committee and
11 in so many other contexts, because he was, you know, just
12 simply a hurricane of ideas and good thoughts and
13 encouragement to so many, both in the Bar and outside of
14 the Bar, if you would just take a moment to reflect on
15 Alistair and all that he has done for this committee and
16 for the practice of law in Texas and, really, across the
17 country. And then I'll turn it over to Justice Young.

18 HONORABLE EVAN YOUNG: Who, like usual,
19 agrees with everything Justice Bland says, in particular,
20 that last point.

21 If during the course of this meeting one of
22 you discovers that a new justice has been appointed,
23 please shout it out, especially if it happens to somebody
24 in this room. That's it from me.

25 HONORABLE JANE BLAND: Okay. And then just

1 a moment for Alistair, and then we'll start.

2 (Moment of silence)

3 CHAIR TRACY CHRISTOPHER: All right.

4 Thank you. All right. Our first item on the agenda is
5 eviction rules, and we have the Eviction Rules Task Force
6 is going to present for us. Judge Rymell is the chair,
7 and I'll let her explain what we're doing here.

8 HONORABLE JENNIFER RYMELL: All right.

9 Thank you, Chief Justice Christopher. So, good morning,
10 Chair Christopher, members of the Texas Supreme Court and
11 the advisory committee. I'm Jennifer Rymell, and I'm a
12 civil county court at law judge in Fort Worth, Texas.
13 I've been on the bench -- it will be 23 years in January,
14 and I've had the honor of serving as the Chair of the
15 Eviction Rules Task Force.

16 I also want to introduce to you Bronson
17 Tucker, and he is the one who is actually going to be
18 walking through our report today, and he is the general
19 counsel for the Texas Justice Court Training Center, but I
20 just first want to say on behalf of myself and Bronson and
21 the other 12 members that are on your agenda of the task
22 force, we wanted to thank Chief Justice Blacklock and
23 members of the Supreme Court for this appointment and the
24 opportunity to work on this very important area of law. I
25 mean, I personally think we had an amazing task force, and

1 it was a pleasure to work with such brilliant and
2 committed and wonderful folks, and we had a very
3 compressed time. We had about a month to put this
4 together for you, and so I want to commend the work of the
5 task force.

6 As you know, the Legislature in the last
7 session, they passed Senate Bill 38, which I'm going to
8 refer to as SB 38, and it was signed into law by Governor
9 Abbott on June 30th, 2025, and this bill amends the law
10 relating to the eviction procedures, and the effective
11 date then of this new law is going to be January 1st of
12 2026. And section 16 of this bill requires the Texas
13 Supreme Court to adopt rules, as necessary, to clarify
14 eviction procedures, consistent with Chapter 24 of the
15 Texas Property Code, as amended. So in that regard, on
16 September 2nd, 2025, this task force then was appointed,
17 and we were asked to make sure that the justice court
18 rules, which is Texas Rules of Civil Procedure 500 to 510,
19 do not conflict with those amendments to the Property Code
20 set forth in SB 38.

21 Our report reflecting that work then was
22 sent to this committee on October the 3rd. I do want to
23 let you know that this task force, in going about its
24 work, it did take great care to abide by the language and
25 the legislative intent of SB 38; however, we were also

1 mindful that these rules are going to serve as practical
2 guidance then for self-represented litigants, which is
3 extremely prevalent in residential eviction cases. So we
4 tried to make the rules as user-friendly as possible, and
5 if there were parts of the rules that were even not clear
6 to us as lawyers, we tried to clarify those for those pro
7 se litigants.

8 I want to take a few minutes and then tell
9 you how the work of this task force was accomplished and
10 how we got to this report that's before you today. First
11 of all, I want to give credit to someone I've never laid
12 eyes on before, Jackie Daumerie, but I have been burning
13 up the e-mail with her, for providing us our scope of work
14 and the mission of the task force. She suggested dividing
15 SB 38 into three sections and having each subcommittee
16 work on the changes and clarifications to those sections,
17 and I know a good idea when I hear it, so that's exactly
18 what we did. We had three subcommittees that worked on
19 the changes and clarifications.

20 The first subcommittee, we had sections 1,
21 6, and 14 and was chaired by Judge Holly Williamson then.
22 She is Justice of the Peace Court for Precinct 8 in Harris
23 County. The second subcommittee was dealing with section
24 7, 8, and 13 and was chaired by someone here today, over
25 there, Judge Sylvia Holmes, who is Justice of the Peace

1 Court here in Travis County, Precinct 3; and then section
2 9, which really dealt with the appeals to county courts at
3 law, sections 9 through 12, and that was chaired by Judge
4 Manpreet Monica Singh from Civil County Court at Law No. 4
5 in Harris County.

6 The subcommittees met several times, and the
7 full task force then met four times during the month, and
8 the charge of each subcommittee was the day before each
9 task force meeting, at 2:00 o'clock, their work needed to
10 be distributed to the entire task force so that everybody
11 had at least a day to have an opportunity to read and
12 digest and make comments and questions on all of the work
13 of all three subcommittees. The weekly task force
14 meetings then were devoted solely to reviewing the work of
15 each subcommittee, and they lasted probably about 90
16 minutes, and it was very obvious that the Supreme Court
17 thoughtfully appointed the task force members because we
18 were a very diverse group. We represented urban areas,
19 rural areas. We had people that were very well-versed and
20 very passionate about tenant issues and landlord issues.

21 So having said that, we did have some very
22 vigorous debate on the rule changes and clarifications,
23 but I'm really proud to say that about 90 percent of the
24 time and 90 percent of the work that has been presented to
25 you was by consensus. After we were able to talk about

1 everything and ask questions, we were able to agree about
2 90 percent of the time on the language that has been
3 presented in this report. However, on those few times
4 that we weren't, we just did it the old fashion way under
5 Roberts Rules of Order. We had a discussion. We called
6 the question. We had a vote, and the majority vote of our
7 task force is reflected in the language in this report.

8 I am going to let you know that there are a
9 couple of issues in which we're going to be seeking the
10 guidance of this committee today, and a blessing, because
11 we clarified some things that were not exactly the black
12 letter rules of the statute, and I'm going to let Bronson
13 point those out as we move through.

14 In the end, we took the three subcommittee
15 reports, and Bronson did yeoman's work, along with Nelson
16 Mock, who is over here as one of the resource witnesses,
17 in synthesizing those reports, and hopefully, you feel
18 like this is a cohesive report that we have placed before
19 you today. As I said before, Bronson is going to be
20 presenting the actual report, but we anticipated that
21 maybe some members of this committee may have some more
22 granular questions about the work of each subcommittee,
23 such as did you think about this, what did you discuss,
24 and we wanted to make sure that we were prepared to answer
25 all of those questions today.

1 So I do want to introduce -- I'm talking
2 like if I'm testifying at the Legislature -- resources
3 witnesses that we have brought with us today that
4 represent each subcommittee. So we have Eric Kwartler in
5 the middle there, and he is from Lone Star Legal Aid. He
6 was a member of subcommittee one. We have Bronson and
7 Judge Holmes, who were members of subcommittee two, and we
8 have myself and Nelson Mock over there, from Rio Grande
9 Legal Aid, who were members of subcommittee three. So if
10 there are no questions for me regarding the methodology of
11 the task force or anything else, then, Chief Justice
12 Christopher, I am going to turn it over to Bronson Tucker.

13 CHAIR TRACY CHRISTOPHER: Bronson, if you
14 could, rather than focus on every single change, like give
15 us an overview of why you changed certain things.

16 MR. TUCKER: Sure. And I just want to echo
17 the comments from Judge Rymell and the appreciation of the
18 opportunity to be here today, the opportunity to be on the
19 committee. I do also want to really commend the committee
20 for their work and Judge Rymell for excellent leadership
21 as chair of the committee, really kept us on track, so
22 it's very much appreciated. Also would echo the comments
23 about Jackie, who has been a very helpful resource to the
24 process. It's very beneficial.

25 So, for us, what our -- kind of like Judge

1 Rymell said, our overarching plan here was to take the
2 language from Senate Bill 38 and then implement it into
3 the Rules of Civil Procedure in a way that would make
4 sense to people who are using these as a resource for
5 self-represented litigants, both on the plaintiff and
6 defendant side, in justice court in eviction cases, and to
7 try to make that consistent, to make it understandable, to
8 make it implementable, and also for the courts to
9 understand how that should work; and so we did take a
10 thought process and approach, also, of wanting the rules
11 to be kind of a one-stop shop where someone who is a
12 self-represented litigant -- you know, the citation, for
13 example, directs them to go look at these rules; and so we
14 felt like it was important to make sure that everything
15 that the person would need to handle their case and to
16 walk through the -- you know, sometimes the minefield of
17 being in court, they would be able to just use that, this
18 document, as a resource.

19 For example, there was a little bit of
20 discussion of, well, can't we just refer back to the
21 Property Code, can't we just say, well, you know, this is
22 like it is in, you know, section 24.0051, or whatever it
23 is; and the large majority of the committee felt like, no,
24 we shouldn't do that because when you're a
25 self-represented litigant, you get the citation, it says

1 look at these, and it says Property Code 24.0051, then
2 they may struggle with getting to that and knowing what to
3 do with that. And so I think that was our overall
4 viewpoint, was implementing these in a way that was true
5 to the legislative intent of Senate Bill 38, while also
6 being approachable and accessible for self-represented
7 litigants.

8 CHAIR TRACY CHRISTOPHER: Okay. Go ahead.

9 MR. TUCKER: Okay. All right. And so with
10 permission of the committee, my thought process was to
11 kind of just, like, talk about not necessarily each word
12 that we changed, but by rule, kind of what we did, why,
13 and see if there were questions per rule; and then,
14 obviously, at the end of it, if there's questions overall,
15 love to have any questions that are there.

16 I will say, overall, one thing that we did
17 that you'll see throughout, we tried to lean more to the
18 terms "plaintiff" and "defendant." As they currently
19 existed, the -- it kind of goes back and forth between
20 "landlord" and "tenant" and "plaintiff" and "defendant,"
21 and part of the issue -- and there are still a couple of
22 spots where it says "landlord" and "tenant," but part of
23 the issue is sometimes there's not actually a
24 landlord-tenant relationship, especially where we have
25 squatter cases, which is something else the Legislature

1 addressed in Senate Bill 1333, and so in that situation --
2 and one of the changes in Senate Bill 38 created a
3 specific process for when there is a squatter situation,
4 and there's really just not -- that person is not a
5 tenant. That person is not a landlord.

6 So we didn't want any confusion of, well, do
7 these rules actually apply if there's not a
8 landlord-tenant relationship. There's a couple of spots
9 where it specifically talks about rent being paid. Well,
10 if rent is being paid, then there is a landlord-tenant
11 relationship, but just as a note, throughout we lean more
12 toward "plaintiff" and "defendant."

13 We did also -- you'll see the first rule we
14 addressed is outside of the 500 series of rules, and this
15 is costs on appeal to county court. The reason we changed
16 this, the Senate Bill 38 requires that the trial in county
17 court happens within 21 days of the case being sent up to
18 county court, now under Senate Bill 38, and under this
19 rule the person has to pay costs within 20 days of being
20 notified from the county court, and so we felt like that
21 process really doesn't work in these eviction cases
22 because of the time frame. You know, you have 20 days
23 from notice, and apparently the process is generally that
24 the county court will wait to docket it until that
25 happens, so that was a real delay for the process. So we

1 excluded eviction cases from this rule, and we also added
2 clarity that was already in the Property Code that if the
3 person appealed with a statement of inability to afford
4 payment of costs or appeal bond, that they don't have to
5 put another appeal bond up to waive costs at the county
6 court level and don't have to pay costs at the county
7 court level, which was already in the Property Code but
8 wasn't in the rules.

9 CHAIR TRACY CHRISTOPHER: Any comments on
10 the changes to Rule 143a? All right. Go ahead.

11 MR. TUCKER: And then so Rule 500.2, we just
12 added definitions of "forcible entry" and "forcible entry
13 and detainer." The reason we did that was Senate Bill 38
14 creates a specific procedure for summary disposition that
15 only applies to forcible entry and detainer cases, and so
16 we wanted to define that in the list of definitions, and
17 so we basically -- the definitions we included, the
18 definition of forcible entry is directly taken from what
19 already existed in Chapter 24 of the Property Code, and
20 forcible entry and detainer just describes that, right,
21 that that's just when a person has committed a forcible
22 entry on someone else's property and won't surrender, so
23 basically kind of your squatter situation, but we just
24 wanted those definitions available to all of the
25 litigants.

1 CHAIR TRACY CHRISTOPHER: Any questions on
2 that? Any comments on those changes? All right. Our
3 next rule.

4 MR. TUCKER: Next one is Rule 501.2, and
5 that, we just separated out the reference to eviction
6 citations here since another thing Senate Bill 38 does is
7 it creates a mechanism where a landlord can use another
8 law enforcement officer other than a sheriff or constable
9 if they -- if the timing of the service of the citation is
10 not up to the standards of the statute, which it requires
11 a diligent effort within five days, and so that kind of
12 created this separate landscape of who can do that, and so
13 rather than kind of trying to halfway refer to it in Rule
14 501.2, we took those references out, and so that eviction
15 citation language will be entirely in Rule 510 of the
16 eviction specific rule.

17 CHAIR TRACY CHRISTOPHER: All right. Any
18 comments on that one? Should we -- do you think there
19 needs to be a comment as to where to go from that point,
20 if somebody was looking at citation and service and they
21 weren't a hundred percent sure where to go if it was an
22 eviction case?

23 MR. TUCKER: Gotcha. Yeah, that's certainly
24 a good question and a good comment. I think our thought
25 in the committee was that, given that there's a set rule,

1 Rule 510, that is referenced in that segment that covers
2 all of the bases of eviction cases, but people will
3 reasonably realistically go there. And there are other,
4 kind of, spots throughout the other 500 rules where
5 eviction cases -- those rules are different in eviction
6 cases, and they don't all contain that kind of reference
7 to that, but it's certainly a valid point to say if I'm
8 looking at this, you know, do I need to say, you know, as
9 provided in Rule 510.4 or whatever. But I think we
10 thought that would end up we would have a lot of those,
11 and it would get a little unwieldy, but it certainly would
12 be --

13 CHAIR TRACY CHRISTOPHER: Okay. Any other
14 comments on Rule 501.2?

15 Moving on to 503.

16 MR. TUCKER: Yeah. Thank you. Rule 503.2,
17 that's the existing justice court summary disposition
18 rule, which is the justice court analog to summary
19 judgment, which I know you guys will talk about later
20 today on the other summary judgment stuff, but in justice
21 court there are kind of specific summary disposition
22 rules, and then the Legislature in Senate Bill 38 created
23 a new process for summary disposition that only applies to
24 forcible entry and detainer eviction cases, which, again,
25 are where a person entered the property without

1 permission, so basically a squatter type situation, and so
2 we just added that reference there that summary
3 disposition, if it is a forcible entry and detainer case,
4 must be conducted pursuant to Rule 510. We put 510.XX
5 because we know that rule will get put somewhere in Rule
6 510, so we didn't worry about the numbering.

7 I will say there was some discussion in the
8 committee also about whether or not we should include
9 clarification about whether or not other eviction cases
10 that are not forcible entry and detainer could proceed as
11 a summary disposition under the standard rule here, 503.2.
12 As a matter of practicality, it's very difficult because
13 of the time frame on the summary disposition, the time
14 frame the parties have to respond. Eviction cases have to
15 go to trial within 21 days of filing, so it's very
16 difficult, practically speaking, to have a summary
17 disposition in an eviction case; however, it does happen
18 from time to time, especially when there's an abatement.

19 Obviously, during COVID when cases weren't
20 being able to be actually heard in court, some plaintiffs
21 were using summary disposition to go ahead and get
22 judgments in their eviction cases. So ultimately, we
23 decided to not explicitly remove other eviction cases from
24 Rule 503.2, but instead just reference that these special
25 categories have to be handled under Rule 510.XX.

1 CHAIR TRACY CHRISTOPHER: All right. Any
2 comments on that change? All right. Moving on to 503.4.

3 MR. TUCKER: Okay. And I guess I would
4 handle 503.4 and 503.5 kind of together because it's
5 basically the same type of language from Senate Bill 38.
6 Senate Bill 38 adds language that courts can't have local
7 rules or forums or standing orders that would require
8 either pretrial conferences or alternative dispute
9 resolution in eviction suits. So it doesn't mean that
10 those things necessarily can't happen, but they can't be
11 forced. They can't be under a local rule. It can't delay
12 the trial of the eviction suit, so basically just took the
13 language there from Senate Bill 38 and put that into those
14 two rules.

15 CHAIR TRACY CHRISTOPHER: I had one comment
16 on that, if someone else has another comment on that. I
17 don't understand the two sentences together.

18 MR. TUCKER: Okay. Okay.

19 CHAIR TRACY CHRISTOPHER: Because it seems
20 to me that the first sentence says you can't do it and
21 then the second says you can't do it if it would delay
22 trial.

23 MR. TUCKER: Right, okay. And so that
24 comment actually did come up in the subcommittee
25 discussion also, so that -- that may mean we should

1 certainly look at the verbiage of how those are intended.
2 The intent, I would say, of what we put together was the
3 first sentence is from Senate Bill 38, which is to say you
4 can't have a standing order or a local rule that basically
5 says all of our eviction cases have to go to this
6 alternative dispute resolution or all of these eviction
7 cases have to go to pretrial conference; and separately,
8 the second sentence, which was already part of the rules,
9 is you can't do these things if it would delay the trial
10 of the eviction suit. So like, as an example, a lot of
11 courts will, on their eviction docket, will say, "Hey, you
12 know, would it benefit you to go and discuss this for a
13 few minutes before we go to trial, maybe find a
14 resolution?" And so we would say that is still acceptable
15 under Senate Bill 38, because there's not a local rule.
16 There's not a form. There's not a standing order that
17 requires it, but it could occur, as long as it's not going
18 to delay trial.

19 So the court couldn't say, "Well, I tell you
20 what, you're here today, come back next week. Go figure
21 this out and then come back next week, and if you still
22 have a dispute, we'll have a trial." Well, we can't do
23 that because now we've delayed the trial. That's what we
24 were trying to go for, but I would certainly -- I would
25 say we would all be open to any suggestions that would

1 make that clearer to the courts and to the litigants what
2 is asked of them.

3 CHAIR TRACY CHRISTOPHER: Well, the same
4 thing about mediation. I mean, to me if you're not
5 supposed to have a rule for mediation and then they show
6 up for the trial and the court orders them to mediation,
7 that seems to me contrary to the statute. So I'm not
8 sure. You know, I mean, even your example, in a way,
9 seems contrary to the statute because it's going to delay
10 the trial, whether it's an hour or a day or a week. I
11 mean, that was my concern with those two. Judge -- Kent.

12 HONORABLE KENT SULLIVAN: Any or all of the
13 above, right? I know very little about the local rule
14 process for JP courts, and I was curious if somebody could
15 maybe educate me, and there may be others similarly
16 situated in terms of who is involved at a threshold level
17 of determining local rules for JP courts. Who provides
18 oversight for the rules that are ultimately promulgated?

19 HONORABLE NICHOLAS CHU: So in a former
20 life --

21 CHAIR TRACY CHRISTOPHER: Judge Chu.

22 HONORABLE NICHOLAS CHU: -- I was a JP and
23 got to work with Bronson and Judge Holmes a lot. So under
24 the Government Code that dictates the statutory authority
25 for your justice courts, there is a provision that says

1 that -- that the courts can institute local rules by a
2 majority of the vote of the JPs, and so that would be
3 different than local rules in district or county courts at
4 law or probate courts, but you still have to follow all of
5 the standard procedures in terms of posting onto the OCA
6 website or things like that, and they still follow, more
7 or less, the rules on can't be inconsistent with Rules of
8 Civil Procedure or statutes or anything like that.

9 What is different in how the local rules are
10 administered is that very few counties have local
11 administrative JPs, kind of similar to local
12 administrative district judges in all counties, and so a
13 lot of times these are voted amongst the majority of the
14 JPs in the county and then it's up to each county to kind
15 of enforce that amongst themselves as sort of a group.

16 HONORABLE KENT SULLIVAN: I'm just curious
17 about -- if I can follow up with a question. You said a
18 lot of times it's a majority of the JPs in the county, and
19 I'm concerned about the "lot of times." I mean, is there
20 a defined process, or in other words, how granular can
21 these local rules be? Can an individual JP create local
22 rules for that JP court? I'm just -- I just --

23 HONORABLE NICHOLAS CHU: Yeah. I mean -- I
24 mean, they could, just court procedures, but you have to
25 remember, out of the 254 counties, there's not a set

1 amount of JPs for each county.

2 HONORABLE KENT SULLIVAN: Understood.

3 HONORABLE NICHOLAS CHU: So some rural
4 counties are just one, two, three, four. Not all of them
5 are lawyers.

6 HONORABLE KENT SULLIVAN: That's precisely
7 why I'm asking the question.

8 HONORABLE NICHOLAS CHU: Yeah.

9 HONORABLE KENT SULLIVAN: In other words,
10 I'm wondering what the minimum universe of people would be
11 and how this works, but the JP system is obviously very
12 decentralized.

13 HONORABLE NICHOLAS CHU: Yeah.

14 HONORABLE KENT SULLIVAN: Very.

15 HONORABLE NICHOLAS CHU: Yeah.

16 HONORABLE KENT SULLIVAN: And also, the
17 issue of -- you know, of what people are sitting as JPs is
18 more ambiguous than, say, a district court judge and the
19 like, so it just gets more -- it's more interesting.

20 HONORABLE NICHOLAS CHU: Yeah. And, I mean,
21 to give everybody some historical background on this, I
22 mean, while this is -- I guess, because, me, during COVID,
23 Travis County and Harris County and a lot of urban
24 counties had local rules that spelled out specific
25 procedures on how evictions were going to proceed. The

1 CARES Act notification was a federal rule that required
2 how -- expanded the notice to vacate, according to some
3 courts. Other courts disagreed, but a lot of these courts
4 had specific procedures on, hey, you have to file this
5 specific document that was federal law, but wasn't in any
6 state rules.

7 That was more of a way to help with volume,
8 also to require screening of folks to go into, hey, you're
9 here for court, then you get to get screened by Legal Aid
10 and then you get your case reset. The thing was, was
11 that, you know, it increased the time it took to get to a
12 resolution, but it also helped those justice courts in
13 dealing with a massive amount of eviction cases during the
14 pandemic, and so I think this is a direct response to
15 that. You know, there are some criticisms, I think
16 legitimate, that it created a different system in urban
17 counties versus rural counties, and nobody knew the rule
18 until -- until you got to the actual court.

19 So the idea behind this was just to create a
20 blanket policy that said, hey, you can't do this, and that
21 doesn't -- that works for all courts, and so ideally, if I
22 go to Hays County, I go to Travis County, or I go to Fort
23 Bend, it would be the same procedure in terms of getting
24 to an eviction, and then within the realm of 21 days to
25 get that final disposition, which is the deadline to set

1 it for trial.

2 CHAIR TRACY CHRISTOPHER: Judge Chu, do you
3 see these two sentences as contradictory?

4 HONORABLE NICHOLAS CHU: Yeah, I mean -- not
5 contradictory, but I just think it's just easier if we
6 just follow the statutory language, delete sentence two
7 that says -- and just say, hey, we can't adopt local rules
8 or forms and just lay on the statutory required language.

9 CHAIR TRACY CHRISTOPHER: All right. Is
10 there anyone here from -- in the back, because, you know,
11 I can call for a vote on that, or we can have more
12 discussion on that as to whether we think sentences -- the
13 new sentence and the rule contradicts the second sentence.

14 Yes. Say your name for --

15 MR. KWARTLER: Eric Kwartler. I was on the
16 subcommittee, the task force, and I can tell you that,
17 much like Bronson articulated, the idea was that while you
18 cannot blanket say all cases are going to ADR, you can
19 say, well, in this case, a case can go to ADR as long as
20 it does not significantly delay the trial. Usually these
21 things are by agreement of the parties anyway. There's
22 similar provision next -- in the next portion. Also, this
23 does really track the statute, the language of the
24 statute. So, you know, we -- I understand the committee
25 feels these may be contradictory, but when we drafted

1 those rules, we didn't feel it was.

2 CHAIR TRACY CHRISTOPHER: Okay. Do we have
3 any other comments on this?

4 HONORABLE NICHOLAS CHU: Maybe it's worth
5 just putting a comment on that, deleting that second
6 sentence and putting a comment that says it does not
7 prohibit ADR or mediation in specific instances.

8 CHAIR TRACY CHRISTOPHER: By agreement?

9 HONORABLE NICHOLAS CHU: By agreement or
10 something like that. So it would be clear that this isn't
11 a blanket prohibition on mediation or ADR, just that you
12 guys have got to agree to it, which, I mean, if you don't
13 agree to it, how fruitful will ADR be, right?

14 CHAIR TRACY CHRISTOPHER: Yes, Judge Rymell.

15 HONORABLE JENNIFER RYMELL: Yes. And,
16 Chief, I know that it sounds kind of odd, but I know that
17 in Fort Worth in the justice courts, not all of the
18 justice courts, but also in the county court at law that
19 handles most of the eviction appeals, mediation is not
20 exactly what we think of as mediation. They have
21 mediators there. They have a mediator or two that is
22 actually there in court, and when the case is called, they
23 literally say, "Hey, go with your mediator. Go in this
24 corner of the courtroom. Go outside, see if you guys can
25 work something out." So the mediation, at least in Fort

1 Worth in some of the JP courts and definitely in the
2 county court at law, is done right then, right there in
3 the courtroom; and I think it's important, because they
4 settle a lot of cases by just getting face-to-face with
5 that mediator out in the hallway.

6 So I think it is important that we have
7 something that does set forth that those mediations are
8 allowed, because I know that we all, as other litigators,
9 you know, in other courts, we think of mediation going to
10 mediate, you're on Zoom. These are done right there,
11 right then, and there are mediators on site because there
12 are so many cases. They're calling 50 or 60 of these
13 cases, so that really helps. The only -- I mean, in my
14 experience, only a few of them actually end up going to
15 trial. A lot of them do get settled once they're
16 face-to-face, and they can have a mediator help them out.

17 CHAIR TRACY CHRISTOPHER: So having
18 mediators on site ready to go is great, but is that, in
19 effect, a local rule, form, or standing order for
20 mediation? I mean, it seems to me that the second
21 sentence should be the parties can agree to mediation, and
22 if you-all have that process set up, if the JPs have that
23 process set up and they're available, great. But I think
24 the problem is, you know, the court ordering of it versus
25 the statute. Yes, Bronson.

1 MR. TUCKER: Yeah, and just briefly, I would
2 agree, and that's why I would think the parties agreeing
3 to do the mediation is where we came from, is that the
4 court is not requiring it if the parties are agreeing to
5 it. I would certainly agree that the court shouldn't say,
6 "Do that, go out and talk to them." There's times when
7 they know it's not going to work, right. "We're not
8 interested in discussing. We want to go to trial." The
9 court should just let them do that.

10 I also just wanted real briefly to mention
11 also, on the pretrial conference, I think tweaking this or
12 making a note where it needs to be with agreement of the
13 parties for the ADR seems great. I have no problem. My
14 only concern with doing that for a pretrial conference, I
15 think the courts can't require all evictions to do
16 pretrial, but there are certainly certain cases where the
17 court needs to have some sort of pretrial conference.
18 Sometimes to determine if the court even has jurisdiction,
19 if there's a title issue that the court may need to abate
20 the case, or -- so I would hate to tell the court you
21 can't have a pretrial conference ever, because sometimes
22 they need to determine pretrial issues, and it's hard to
23 say that's with the consent of the party or the agreement,
24 because, you know, a lot of times, you know, a pro se
25 party is not going to understand why the court needs to

1 have that pretrial hearing or discussion.

2 CHAIR TRACY CHRISTOPHER: Do these pretrial
3 conferences happen at the time of trial?

4 MR. TUCKER: Occasionally. Occasionally,
5 they will be -- you know, potentially be filed, and it
6 will, on its face, raise this kind of jurisdictional
7 issue, and so the court will have a jurisdictional issue
8 hearing ahead of time. Often it is the day of trial, but
9 kind of, you know, that could sometimes be argued, again,
10 that that pretrial conference is delaying the trial, or
11 you know, if it's 30 minutes after the pretrial conference
12 or whatever. So that would be my slight concern if we --
13 yeah. You know, but we can't require that at all.

14 CHAIR TRACY CHRISTOPHER: Well, other than
15 jurisdictional issues, what other pretrial conferences
16 would be necessary?

17 MR. TUCKER: Yeah. Jurisdiction is by far
18 the most common. There are, rarely, other issues as far
19 as, you know, a party wanting to be able to have certain
20 evidence or, you know, making a small discovery request,
21 which is rare, obviously, in eviction cases, but, yeah,
22 you know, those -- jurisdiction is by far the most common.

23 HONORABLE NICHOLAS CHU: Well, and then also
24 failure to state a claim. A lot of times the pro se
25 landlord will fail to, like, check the box on why you're

1 trying to evict the person or something like that, so...

2 MR. TUCKER: Yeah. And along those lines,
3 in the new statute, it also requires that the court cannot
4 dismiss a claim based on a defective petition. That is
5 part of Senate Bill 38, and so in the rules, it says that
6 they can't do that, that the party might be able to amend
7 their petition to comply with the Rules of Civil
8 Procedure. So that could be an example also where the
9 court would have a pretrial where they're explained why
10 the petition is defective, and the party is given an
11 opportunity to modify that.

12 CHAIR TRACY CHRISTOPHER: Yes.

13 HONORABLE SYLVIA HOLMES: Judge Holmes.
14 I'll just say, often the pretrial is like a two-minute
15 discussion at the hearing, right. They'll raise the issue
16 that they're not actually the tenant or that is not the
17 title of the landlord, and sometimes we have a defendant
18 who is, like, in their car, like "I'm going with the
19 cashier's check to my landlord's office." And we'll say,
20 "All right. Landlord, do you want to take a recall, and
21 we'll give you 10 more minutes to see if they show up with
22 the check?" And the landlord will say, "Yes, I'd rather
23 get paid today," but the landlord, the petitioner, the
24 plaintiff, is going to have to agree that they want to try
25 to resolve that with the defendant. If the landlord says

1 "No, I want them out, let's have the hearing," right, the
2 local rules cannot change or delay what is otherwise
3 taking place.

4 So if a defendant asks me for a continuance,
5 if it's already at 21 days, the answer must be "no,"
6 unless the plaintiff in court says, "Judge, actually, we
7 think they're going to get Legal Aid. We would like to
8 wait another seven days to see if we get paid." And then
9 I would grant a continuance, but if a landlord says "no,"
10 that's that. The defendant can always appeal.

11 CHAIR TRACY CHRISTOPHER: Any other -- I
12 think, so we've agreed on the mediation, that the second
13 sentence should be revised to agreeing to mediation, but
14 on the second sentence of the pretrial conference, is
15 there some way we could revise it to make it more --
16 because, to me, the two sentences still contradict. So I
17 need to, you know, figure out a way not to have them
18 contradictory. Is there any suggestions?

19 Yes, Elaine.

20 PROFESSOR ELAINE CARLSON: Maybe something
21 like, "The court may order the parties to confer, but the
22 trial must proceed on the scheduled day." I mean, it
23 doesn't seem wise to take that ability of the court to ask
24 the parties to confer away, because it could be useful.
25 But isn't the legislative intent is we're not moving back

1 the trial?

2 CHAIR TRACY CHRISTOPHER: I'm not sure why
3 they wanted to get rid of pretrial conferences. Does
4 anyone have any ideas on that?

5 MR. TUCKER: I think the concern was --
6 sorry. Oh, go ahead, Nelson. I didn't see your hand. Go
7 ahead.

8 MR. MOCK: I would just say, I'm just
9 thinking of other examples where you might want a pretrial
10 hearing or a judge might want to be afforded that, and I
11 think that the idea here is that you cannot -- you cannot
12 have a local rule, but the judge -- the statute does not
13 deny the judge the ability to set those, a hearing, a
14 pretrial hearing. An example might be if there is a plea
15 in abatement that needs to be heard before the hearing.
16 That could be, you know, a day before the hearing.

17 If there is a request for discovery, which
18 has to be approved by the judge, that would -- that would,
19 again, be something that the judge might want to set a
20 pretrial hearing on, maybe even a telephonic one. If
21 there is a jury trial that is going to be set within the
22 21 days, but the judge wants to call the parties and
23 discuss how that's going to be working, sometimes judges
24 do that before the trial, and so I think that the purpose
25 of what the committee, the subcommittee, was looking at

1 was to say this is not to deny the judge the ability to do
2 this or, frankly, deny the judge the ability to mandate
3 mediation. It's just that you cannot have local rules
4 having to do with that.

5 MR. TUCKER: I did think of one other.
6 Motion to withdraw as counsel. We see that sometimes
7 where you have an attorney in an eviction case and then
8 they want to withdraw as counsel. So that's another time
9 when a judge would want to have a hearing and not do it
10 the day of trial, obviously, because then the party is not
11 ready to proceed.

12 CHAIR TRACY CHRISTOPHER: May I ask this
13 question? Who, like, if -- in county court and district
14 court, if, you know, the lawyer wants to withdraw, the
15 lawyer schedules the hearing. Okay. Are you telling me
16 that that does not happen in JP court? The parties don't
17 schedule the hearing. The judge schedules the hearing.

18 MR. TUCKER: Yeah.

19 HONORABLE NICHOLAS CHU: Yeah. Everything
20 is all judge-driven in terms of the schedule for JP court,
21 and, yeah. I mean, Nelson does bring a really important
22 thing that in every one of my eviction jury trials,
23 usually there really isn't a contested fact. It's just a
24 way to get a little extra time, and so having an ability
25 to get these folks in before their trial date, usually

1 prevents folks from having to come in, the jury from
2 coming in and having to hear a case that eventually is
3 just them agreeing to the eviction. So I think maybe,
4 Chief Justice Christopher, putting the comment that
5 this -- and I don't know what the wording would be, but it
6 would be more specific that this is a prohibition on a
7 blanket rule, but still the court has authority to have,
8 on a case-by-case basis, as long as it does not delay
9 disposition of the case.

10 MR. TUCKER: May I make a brief -- maybe a
11 suggestion on the pretrial conference? What if we said
12 "may not adopt local rules, forms, or standing orders in
13 all eviction suits that require any pretrial conference or
14 other proceeding before trial. The court may, for good
15 cause, schedule a pretrial conference in an eviction case
16 if it would not delay trial."

17 HONORABLE NICHOLAS CHU: Yeah.

18 CHAIR TRACY CHRISTOPHER: All right. Sounds
19 like a good compromise.

20 HONORABLE JENNIFER RYMELL: Yeah.

21 CHAIR TRACY CHRISTOPHER: Jackie, are we
22 going to have the task force do more work, or are you
23 going to take it from here?

24 MR. JACKSON: I'll take it from here.

25 CHAIR TRACY CHRISTOPHER: Judge Kelly.

1 HONORABLE PETER KELLY: Who has the burden
2 of showing good cause?

3 CHAIR TRACY CHRISTOPHER: I would assume
4 that's the judge.

5 HONORABLE PETER KELLY: It just struck me --

6 MR. TUCKER: Judge, jury, and executioner.

7 CHAIR TRACY CHRISTOPHER: Since the judge is
8 scheduling it.

9 HONORABLE JENNIFER RYMELL: All of it's good
10 cause.

11 MR. TUCKER: Which is similar language to
12 when a judge can grant a postponement in an eviction case.
13 It's for good cause. It's up to the judge in their
14 discretion to decide if there's good cause or not, would
15 be my thought.

16 HONORABLE PETER KELLY: And how does that --
17 I'm just -- how does that actually change the rule or the
18 practice now, if it's just in the judge's discretion? I'm
19 just trying to conform with the legislative intent, which
20 seems to be to get the evictions to happen, without the
21 judge taking mercy on the tenants or squatters. And, you
22 know, if that's the policy that's being advanced by the
23 Legislature, how does sort of restoring and/or formalizing
24 the judge's discretion for good cause, who knows what it
25 is from a standard of good cause is, how does that comport

1 with the legislative intent?

2 CHAIR TRACY CHRISTOPHER: I guess the
3 important thing is, now that we have this time deadline,
4 that it would have to happen before the time deadline.

5 MR. TUCKER: Right. I would say what the
6 Legislature expressly said is you can't have a local rule,
7 form, or standing order that requires it, and so I would
8 say if you're taking it on a case-by-case basis, that's
9 none of those things.

10 CHAIR TRACY CHRISTOPHER: Elaine.

11 PROFESSOR ELAINE CARLSON: Yeah, so these
12 are not courts of record, right? There's no court
13 reporter?

14 MR. TUCKER: Correct.

15 PROFESSOR ELAINE CARLSON: So you're going
16 to be looking at what's filed.

17 CHAIR TRACY CHRISTOPHER: All right. Any
18 other comments on that one? We'll let the Supreme Court
19 decide that issue, I think.

20 MR. TUCKER: Sounds very fair.

21 CHAIR TRACY CHRISTOPHER: All right. Moving
22 on to 510.

23 MR. TUCKER: Okay. Rule 510.1. This is
24 where we just implemented the language that the
25 Legislature put in, like kind of staked out their domain

1 here and basically says that Chapter 24 of the Texas
2 Property Code is the only mechanism to modify or suspend
3 eviction case procedures, and so that was just from the
4 bill.

5 CHAIR TRACY CHRISTOPHER: Okay. Go ahead.

6 MR. TUCKER: Okay. 510.2 is calculation of
7 time, and so (a) just brings in the direct language from
8 Senate Bill 38. That is what they put in there, period of
9 time for eviction cases, and that's all pretty standard.

10 The only difference between that and how
11 time was already being calculated in justice court is that
12 in the general justice court rules there's also a
13 provision that if any period of time -- I'm sorry, if the
14 court closes before 5:00 o'clock on any given day, the
15 period of time extends to the next day, and the logic on
16 that is that there are a lot of justice courts that close
17 before 5:00 o'clock so that they can, you know, finish up
18 their tills or do their administrative business, and so
19 they may close at 4:00 o 4:30. Some rural courts, for
20 example, may close at noon on a Friday or whatever.

21 And so the idea was you have a lot of
22 self-represented litigants who, oh, I need to file this by
23 October 10th, and so I show up at the court at 2:00 on
24 October 10th or 4:45 on October 10th and now the court's
25 closed, right, and so now I'm kind of poured out, even

1 though I'm within whatever traditional business hours. So
2 that's where we added (b), and so I did want to draw your
3 attention to (b), because (b) is definitely taking some of
4 the existing rules and some of the concerns and thought
5 processes of the committee rather than something that is
6 directly from Senate Bill 38. So I did want to make that
7 clear, and so --

8 CHAIR TRACY CHRISTOPHER: Okay. Let's call
9 for any comments on those changes to 510.2. Yes, Judge
10 Chu.

11 HONORABLE NICHOLAS CHU: And this is
12 probably a question for Bronson on this. So 500.5 has the
13 language for computing time generally. It's more or less
14 the same, except for a couple of things, like the mailbox
15 rule extension. Would it make sense, because this is more
16 or less statutorily mandated, to just copy this onto 500.5
17 so that there's this consistent language in terms of how
18 we count in JP court?

19 And then the second question would be, hey,
20 what do we do with the mailbox rule and then the extension
21 part, but at least for the (a) subpoint?

22 MR. TUCKER: Yeah. And I think the idea --
23 you know, you certainly could do that. I think we
24 probably felt that that was outside of our scope for the
25 committee, and I think -- and this is a little

1 speculative, but I think the committee would be a little
2 hesitant to lose like the close before 5:00 --

3 HONORABLE NICHOLAS CHU: Yeah.

4 MR. TUCKER: -- and then the mailbox rule in
5 justice court. I feel like those things are important,
6 and so I felt like we had to include (a) for eviction
7 cases because that's what the Legislature told us to do,
8 so I think we had to do that, but again, I think that's
9 where we tried to address that shortfall in (b), by saying
10 that if the court is closed or closes before 5:00 o'clock
11 for a filing or closed before the time in the notice to
12 pay rent into the registry, you know, because that's
13 another part that happens, is the person is ordered to pay
14 rent into the registry, and that notice has to tell them
15 what time the court closes on the day that it's due.

16 So it may say we close at 4:00 o'clock.
17 Well, I show up at 3:30, and it turns out this court has
18 one clerk, and they got sick, and so they closed early
19 that day. And so (b) would then say, well, you get until
20 the next day the court is open to pay that rent into the
21 registry.

22 HONORABLE NICHOLAS CHU: So if 510.2 as
23 drafted would be copied into 500.2, it would just copy (a)
24 and (b) and then maybe just stop at (b), at where it says
25 5:00 p.m., and then the stuff about the time period for

1 rent kind of falls off on the general --

2 MR. TUCKER: Well, so, Judge, would your
3 thought be to duplicate it and put it in or take it out of
4 this rule?

5 HONORABLE NICHOLAS CHU: Either way. What I
6 just want is one rule to count time so the clerks and the
7 judges can say --

8 MR. TUCKER: Right.

9 HONORABLE NICHOLAS CHU: -- this is the way
10 to count time.

11 MR. TUCKER: You know, I don't necessarily
12 have, like, a huge objection to that, not that it's up to
13 me or whatever, but I would say, my preference, my
14 suggestion would be if we do that, to duplicate it, for
15 the same reason I would like a party in an eviction suit
16 to look at Rule 510 only and give the specific eviction
17 procedures, right?

18 HONORABLE NICHOLAS CHU: And then, I guess,
19 then for the eviction procedure part, do we need to make a
20 comment or separate rule specifically saying that the
21 mailbox rule or that the extension part of 500.2 don't
22 apply in eviction cases?

23 MR. TUCKER: I think that's an open
24 question. I don't think we directly discussed that, and I
25 think you could honestly argue it either way, right,

1 because, like, the mailbox rule kind of applies in a
2 vacuum anyway.

3 HONORABLE NICHOLAS CHU: Yeah.

4 MR. TUCKER: It's just kind of specifically
5 mentioned in the 500.2, and so I don't know that the
6 Legislature expressly said that it doesn't apply in
7 eviction cases, but they gave us, you know, that language,
8 and that's what we put in 510.2, but I think it is
9 certainly open for discussion about if I mail a document
10 the day that it's due, is that good enough or not.

11 HONORABLE NICHOLAS CHU: Just because --
12 sorry, just one other. Just because that application of
13 500.2 would give 10 days, obviously that would defeat the
14 purpose of eviction counting.

15 MR. TUCKER: Right. Right. Yeah. And so,
16 you know, the previous computation rule included that if
17 you basically if you mail a document, like if I mail my
18 appeal, right, that's considered filed, but the court can
19 take steps. The court can issue -- can issue the writ of
20 possession, and so on and so forth.

21 HONORABLE NICHOLAS CHU: Yeah.

22 MR. TUCKER: And so, yeah, and so we did
23 remove that, and so I would agree that generally it's not
24 going to apply. I think your point is well-taken. Like,
25 it could be beneficial to include a statement that it

1 doesn't apply in eviction cases, since the Legislature
2 didn't explicitly include it, but we didn't have that
3 discussion when we were discussing it.

4 HONORABLE NICHOLAS CHU: I'm just concerned
5 about courts applying it one way or the other or just
6 saying, oh, hey, the mailbox rule applies to the statute
7 -- or this rule that doesn't apply to eviction cases.

8 MR. TUCKER: Right.

9 HONORABLE NICHOLAS CHU: So some kind of
10 guidance. I'm not advocating one or way or the other, but
11 just some guidance on does it apply or not would be
12 helpful.

13 CHAIR TRACY CHRISTOPHER: So sort of as, for
14 me, a general concern as I was reading this was exactly
15 that, and what other rules in the 500 series are going to
16 apply to an eviction case. So, for example, the rules,
17 unless I missed it, I don't see anything about getting a
18 jury in an eviction case, so you have to go to a different
19 rule to find out how to ask for a jury, and, you know,
20 you're having to go to the pretrial conference rule to
21 find out that you're not -- you can't have a pretrial
22 conference in the eviction cases.

23 I'm just wondering if there should be a
24 reorganization with, you know, here is a complete set of
25 eviction rules, and you don't have to look at anything

1 else.

2 MR. TUCKER: Yeah. The jury part is 510.7,
3 but I think the point on the addition that we made on the
4 pretrial conferences and the mediation, alternative
5 dispute resolution, going under Rule 510 would be --
6 actually, yes, I think that would be a great idea.

7 CHAIR TRACY CHRISTOPHER: So on the jury,
8 the 510.7, and again, this is also because of this summary
9 disposition that has been added. The judge finds a fact
10 question and then where do we go, right? Right? And if
11 somebody wanted a jury at that point, it doesn't seem like
12 the time in 510.7 works.

13 MR. TUCKER: In -- in, like, in the specific
14 situation where there is a summary disposition motion?

15 CHAIR TRACY CHRISTOPHER: Correct.

16 MR. TUCKER: And then the judge says, "No, I
17 think there's a genuine issue," and, well, and so courts
18 -- I will tell you, courts struggle right now with the
19 jury time frames in eviction cases, because it's narrow,
20 and it's going to get narrower January 1st. We haven't
21 gotten to this yet, but the Legislature now has shrunk
22 the time from service to trial. It used to be the party
23 had to be served at least six days before trial, so I know
24 six days in advance when my trial is. Legislature changed
25 that to four.

1 So I can be served my citation on Thursday
2 and be told to show up in court on Tuesday, which is a
3 quick turnaround, and the -- the rule is I have to request
4 my jury at least three days before trial. So, basically,
5 I would have to ask for a jury the next day. And so, yes,
6 if the -- if the situation is that it's a motion for
7 summary disposition because we have a squatter situation,
8 then, yeah, there is going to be a difficulty in meeting
9 all of the time frames that the Legislature has
10 prescribed, and I would certainly be open to ideas on how
11 to remedy that and address those time frames and make that
12 workable, but it is -- courts obviously struggle also
13 because, you know, it's, you know, "Oh, I've got my
14 eviction on Tuesday." Person comes in at 5:00 o'clock on
15 Friday. "Here's my jury trial request," and so now the
16 court shows up Monday morning and has to have a full jury
17 panel there Tuesday morning, which, you know, is not easy,
18 especially in, you know, rural areas. And they don't --
19 you know, we've had counties tell courts, "Sorry, we're in
20 charge of juries. We do juries once a month, so you just
21 have to push this till, you know, three or four weeks from
22 now, the next time we're going to have a jury."

23 Well, that doesn't really work with the
24 statutory and the rules time frames on having a trial 10
25 to 21 days from the day the case was filed either, and so

1 there is definitely loggerheads on how quickly some of
2 these time frames work, and like I said, with that six
3 days going to four, that's just going to exacerbate that
4 for sure.

5 CHAIR TRACY CHRISTOPHER: Not fixable by
6 rule unless we violate the statutory time frame for when
7 the case should go to trial.

8 MR. TUCKER: Right. Right. And obviously,
9 that would be a concern, right, of saying, you know, oh,
10 if a person requests a jury, the case can be postponed
11 for X number of -- you know, outside of the time frame,
12 because then, I mean, that will be the process, right.
13 Then everyone knows that's the button I push to postpone
14 it, and that's, I think, what the Legislature does not
15 want to have happen, and so that is a struggle; and
16 obviously, we struggled with this same issue in 2020 when
17 we weren't able to have jury trials; and so parties would
18 know, as long as I ask for a jury, this case isn't going
19 to get heard for months; and so, yeah, it is difficult,
20 and it is a constant struggle.

21 CHAIR TRACY CHRISTOPHER: Okay.

22 MR. TUCKER: If we can address the space
23 time continuum in the rules, that would be a great
24 advancement.

25 CHAIR TRACY CHRISTOPHER: Okay. Let's move

1 on to 510.3.

2 MR. TUCKER: Sounds awesome. 510.3 is the
3 petition rule. We added the language that the Legislature
4 put in Senate Bill 38, which is basically that the court
5 can't dismiss a case just because the petition is
6 defective, as long as the person could modify it to make
7 it not defective. Our training was never to dismiss cases
8 with those type of petitions, but that makes that clear.

9 We also added the requirement that they put
10 in the petition what type of presuit notice was given,
11 because the Legislature -- one of the changes Senate
12 Bill 38 made is that if the tenant had not previously been
13 delinquent in rent, the first notice given has to be a
14 notice to pay or vacate, meaning that the tenant, as long
15 as they pay within the notice period, they are allowed to
16 stay. The landlord can't proceed with an eviction.
17 Whereas, normally, on a normal notice to vacate, once I
18 give you that notice to vacate, even if you come to me and
19 go, "Oh, sorry, I was late. Here's my rent," I can still
20 proceed with the eviction against you because you breached
21 the lease by not satisfying the timely payment of rent
22 clause in my lease, so I can still move forward.

23 The Legislature changed that and said, hey,
24 first time they're delinquent, it has to be a pay or
25 vacate. So you kind of get one free one, as long as you

1 pay within the notice period. So the petition needs to
2 state what type of notice, because if they just gave a
3 notice to vacate and the tenant was never delinquent
4 previously, that's an invalid notice, and so the landlord
5 would not be entitled to possession. And also
6 corresponding to that, include a requirement that they
7 make a note in the petition whether or not the tenant had
8 previously been delinquent so that the court knows which
9 type of notice was appropriate in that case.

10 CHAIR TRACY CHRISTOPHER: All right.

11 MR. TUCKER: Sorry. And also, if the case
12 is based on forcible entry and detainer, squatter-type
13 case, if the landlord in that case -- or not landlord.
14 The plaintiff is including a sworn motion for summary
15 disposition.

16 CHAIR TRACY CHRISTOPHER: All right. So
17 that's 510.3 and 4. Or that's just 510.3?

18 MR. TUCKER: Just three.

19 CHAIR TRACY CHRISTOPHER: Any comments on
20 that one?

21 Okay. 510.4.

22 MR. TUCKER: Okay. 510.4 is the citation.
23 The change here, the Legislature included a -- some
24 additional language about the warnings, and so we did
25 discuss in the committee whether we just wanted to say all

1 warnings required by Chapter 24 of the Property Code or
2 spell them out, the exact warnings, in the rules. The
3 drawback of putting them all in the rules is any time the
4 Legislature modifies Chapter 24, we have to go back and
5 change the rule to include all of those.

6 The benefit, though, is kind of like what we
7 have said before. We would like for the rule to contain
8 all of the information that a party needs, and so if we
9 say, yeah, go look over there and see what it is, that's a
10 problem.

11 One note the committee did -- we included
12 the language in the draft. The committee did also feel
13 strongly that they would like to have the official -- the
14 statute requires that it be included in English and
15 Spanish in the citation, and the committee felt strongly
16 we would like the rule to specify the actual Spanish
17 translation. There's a couple of other spots in the rules
18 where that's done as well, rather than relying on each
19 individual court to translate this warning into Spanish.

20 CHAIR TRACY CHRISTOPHER: But you haven't
21 done that?

22 MR. TUCKER: We have not.

23 CHAIR TRACY CHRISTOPHER: But you would want
24 13 to have (a) and (b) translated into Spanish?

25 MR. TUCKER: Yes, Your Honor.

1 CHAIR TRACY CHRISTOPHER: Any comments about
2 that?

3 HONORABLE PETER KELLY: Could it be in the
4 comments?

5 CHAIR TRACY CHRISTOPHER: Pardon me?

6 HONORABLE PETER KELLY: Could it be in the
7 comments? Put the translation in the comments rather than
8 the rule.

9 CHAIR TRACY CHRISTOPHER: Yes. Okay.

10 MR. TUCKER: Then in (b) --

11 CHAIR TRACY CHRISTOPHER: Let me ask you
12 this. Does the task force have a translation to give to
13 the Supreme Court?

14 MS. DAUMERIE: We can get one from the
15 Office of Court Administration. They have a translation
16 team that I've worked with.

17 CHAIR TRACY CHRISTOPHER: Okay.

18 MR. TUCKER: Thank you. And then we've
19 modified (b) on who may serve it to reflect the change
20 that I mentioned earlier where the landlord, or plaintiff,
21 could be, can get another law enforcement officer to serve
22 the citation. Previously, it was only a sheriff or
23 constable or someone designated directly in writing by the
24 court. This allows that if the sheriff or constable
25 doesn't serve it within -- make a diligent effort to serve

1 it within five business days, the landlord can get some
2 other law enforcement who has been trained in civil
3 process service to serve the citation, so we added that
4 in.

5 CHAIR TRACY CHRISTOPHER: Okay. Any
6 comments to the service and return of citation changes?

7 All right. Then moving on to summary
8 disposition.

9 MR. TUCKER: So, actually, I have a note, a
10 discussion on Rule 510.5, the request for immediate
11 possession. We don't have any changes in the bill -- or
12 in the text, but we did include it here. And this is the
13 rule that Judge Rymell mentioned earlier that the
14 committee really wanted some input from the advisory
15 committee on this rule.

16 So very brief overview, right now, as it
17 works, an immediate possession bond, a landlord, when they
18 file an eviction suit, can file what's called an immediate
19 possession bond and request for immediate possession. So
20 they put up a surety bond, and if they put up that bond
21 and then the defendant gets notice, and there's a warning
22 that has to tell them, hey, this has been filed in this
23 case, if the defendant then doesn't show up or file an
24 answer -- so it's default judgment, no answer. Then the
25 landlord can get a writ of possession seven days after the

1 tenant got notice that that immediate possession bond was
2 filed so that it allows a landlord in default judgment
3 cases to get a writ of possession faster than the normal
4 time frame.

5 The Property Code does not describe anything
6 about immediate possession bonds at all, other than a note
7 in the time frame for writ of possession it says unless a
8 possession bond has been approved under the Rules of Civil
9 Procedure, the writ of possession has to be issued on this
10 day. And in the statute it said "and judgment is
11 thereafter granted by default," which matches what the
12 rule currently says. The Legislature, in Senate Bill 38,
13 went in and struck that language "and judgment is
14 thereafter granted by a default." So now the statute just
15 says "Unless a possession bond is granted under the Rules
16 of Procedure, writ of possession may not issue before the
17 sixth day after judgment."

18 So we discussed whether or not we should
19 just delete the part in the rule about "if the default."
20 The effect of that would allow a landlord to get an
21 immediate possession bond in every eviction case,
22 regardless of grounds or any ability of the court to
23 decide whether or not to grant that, which would mean that
24 the landlord could get a writ of possession the day of
25 trial in some situations, with no ability for the tenant

1 to stop that, and then that may mean that on the appeal,
2 due to some of the other changes that occurred in the
3 statute, there is an argument that the tenant can't have a
4 hearing on possession on the appeal.

5 I don't think that that's right because it's
6 a trial de novo, so all of the issues at issue in the
7 trial should be heard at the county court, but there is an
8 argument that possession is now moot because the landlord
9 has gained the possession of the premises; and so the
10 concerns of the committee were, number one, should we have
11 this rule at all, because the Property Code doesn't create
12 a procedure for this at all, and the Legislature has said
13 they're the ones who create the procedures. So this is
14 kind of created out of whole cloth. Or should we just
15 delete the default, but then the concern is that really
16 is, in a large way, erasing the ability of the defendant
17 to appeal these cases.

18 And so a large part of the committee felt
19 like if we're going to delete the part about default
20 judgment, then the court should have some sort of
21 discretion in when to issue an immediate possession bond.
22 For example, if the tenant is destroying the property or
23 is committing criminal offenses in the property or doing
24 these kind of things that are grounds for immediate
25 possession, rather than just every time I file a suit I'm

1 going to get a writ of possession the day of trial and you
2 don't get to even appeal the case.

3 So if the justice of the peace gets it
4 wrong, not that they ever would, but on the off chance
5 that that does happen, the tenant would basically be
6 prohibited from appealing at all in a lot of situations.
7 So we wanted to get the temperature of the committee on
8 thoughts on that rule.

9 CHAIR TRACY CHRISTOPHER: Did the committee
10 have a vote on whether this rule should be eliminated?

11 MR. TUCKER: We were pretty split overall on
12 -- some people wanted it completely eliminated. Some
13 people wanted it just delete the default part and just
14 leave it up to how it goes, and then another third group
15 also said if it's -- if we're deleting that, there needs
16 to be some sort of filter, but we felt uncomfortable just
17 creating a procedure out of whole cloth for this,
18 especially given the direction from the Legislature that
19 they want to be the control of those procedures. So there
20 really was not a majority.

21 CHAIR TRACY CHRISTOPHER: So we have an old
22 statute that says rules can be created in the Rules of
23 Civil Procedure, and we have a new statute that says only
24 the Legislature is making the rules here.

25 MR. TUCKER: Yeah. Yeah. And so for us to,

1 like, create a new -- like, for example, some of you may
2 remember when the -- during COVID, there were the -- and
3 I'm trying to remember what the term for it is now. It
4 was like the emergency evictions, or whatever, and that
5 was where these could proceed if the landlord can show
6 that the person, like I said, is destroying the property,
7 committing crimes on the property, something like that,
8 where there's an enhanced reason that, hey, I need to get
9 this person out.

10 So there were a lot of people that said if
11 we're going to delete the default requirement, that should
12 be added, but can we feel like we can add that, given the
13 direction of the new statute of the Legislature saying,
14 hey, we are the ones who create the procedures for this?

15 CHAIR TRACY CHRISTOPHER: Judge Chu.

16 HONORABLE NICHOLAS CHU: For the sake of not
17 opening up a can of worms, I do think it may be best to
18 leave the rule as-is for the time being, consider further
19 study, because this is a sizable change in how eviction
20 procedures are done, especially on the quick timeline.
21 See how this is implemented in a year or so. Once the
22 Legislature sees it, too, kind of see if we need to fix
23 the rule or if there's an amendment to the actual law to
24 do this.

25 The concern I have of just deleting out the

1 default part is the fact that -- and, Bronson, correct me
2 if I'm wrong. I feel like the case law says that in
3 evictions, possession is really the only issue and that
4 rent is just a secondary issue, or attorney's fees a
5 secondary issue. So for cases where the JP just decides
6 and then you can immediately get possession the next day,
7 we're essentially going to be closing down the right to
8 appeal for a whole swath of JP cases that, really, the
9 whole idea was we're not on the record, the reason why
10 we're not on the record is because there's a de novo trial
11 in county court, and that's the protection for making sure
12 the judge got it right.

13 I feel like if we change that in a drastic
14 fashion, we're about to see a bunch of due process issues
15 that -- let's just kind of take our time, see where we go
16 from the new changes, and if we need to tweak the
17 immediate possession, go from there.

18 CHAIR TRACY CHRISTOPHER: Any other comments
19 on the immediate possession issue?

20 All right. Moving on to summary
21 disposition.

22 MR. TUCKER: Okay. This is Rule 510.XX.
23 This is our addition of end of the rules of the procedure
24 the Legislature created with Senate Bill 38, which
25 basically is designed to be an express procedure to get

1 someone removed from a premises if they are a squatter.
2 They had never had an actual legal right to be on the
3 property, and so the landlord can file a sworn motion
4 saying, hey, you know, they had no right to be there,
5 there is no disputed facts here.

6 There is a warning that the Legislature
7 created. We would have the same request, Jackie, to have
8 the Spanish translation in the rule or the comments,
9 whatever the committee and Court decide on that. And the
10 tenant basically has four days to answer and claim that
11 there is a dispute, and if they don't do that, then the
12 judge can decide whether they feel there's a dispute, or
13 if they do answer, they can also decide, so they decide
14 regardless.

15 And then it kind of goes to your point,
16 Judge, from before there in (e). "If the court determines
17 that there are generally disputed facts and a trial
18 setting is not pending, the court shall set a trial date
19 no earlier than 10 days and no later than 21 days from the
20 date the petition was filed." So you're very correct in
21 noting that that is going to be a quick turnaround from
22 the time when we've had filing, a few days for service, a
23 few days for the tenant or the defendant to file a motion,
24 the court to decide. Then we're going to trial very soon,
25 and so if we are going to trial very soon, the ability for

1 either party to request a jury.

2 I mean, theoretically, right, the defendant
3 can -- with their response could also say, "I also want a
4 jury trial if it gets set." Do people -- are they going
5 to know that directly? Are they going to sometimes miss
6 the boat? I think they will sometimes miss the boat on
7 that. I do think, likely, mostly, we're not going to have
8 a lot of trials on these, because I think mostly
9 plaintiffs aren't going to file these unless it's clear
10 that these are the facts, right. This is clearly I showed
11 up at my lake house, and there's just a guy living here.
12 There's no lease. There's no ability for them to be here.

13 The concern will be certainly that some
14 plaintiffs will misconstrue or misunderstand what a
15 squatter is. Right? If I let my brother-in-law sleep on
16 my couch and live in my place, he's actually a tenant at
17 will and not a squatter, but I think people are like, "He
18 doesn't have a written lease. I just don't want him
19 anymore, and so this is one of these and so I can get a
20 summary disposition because he wouldn't leave," and
21 technically, no, which is why we put the definitions in
22 the rule of forcible entry and forcible entry and
23 detainer. So, yeah, this is going to create a time frame
24 that's a quick turnaround on these.

25 We did also -- the Legislature didn't

1 mandate this, but we did add the same language in here on
2 a notice of default judgment. If a default judgment is
3 granted on there, the court needs to follow the same
4 standard default judgment process of notifying the
5 defendant and sending out the judgment. That is (g)
6 there.

7 CHAIR TRACY CHRISTOPHER: Any comments on
8 the summary disposition rule? Judge Chu.

9 HONORABLE NICHOLAS CHU: Sorry, I promise I
10 won't dominate.

11 MR. TUCKER: That is literally why we're
12 here.

13 HONORABLE NICHOLAS CHU: Is (e), the trial
14 stuff, is that like a -- is that statutory language?

15 MR. TUCKER: Yes.

16 HONORABLE NICHOLAS CHU: Okay. Because it
17 just doesn't make any sense to me, because the JP would
18 always give the trial date once the filing happens, and so
19 there would always be a trial.

20 MR. TUCKER: So actually, yeah, let me -- we
21 added -- to be fair, we added "and a trial setting is not
22 pending."

23 HONORABLE NICHOLAS CHU: Okay.

24 MR. TUCKER: Because usually it will be,
25 like you said. The courts are required to put a trial

1 date in the citation, and so we added that "and a trial
2 setting is not pending" to make it clear that, like, the
3 court doesn't have to reset it because there's already a
4 trial setting in the citation. It's possible that that
5 might not work because, you know, there may have been --
6 we've set it on a hearing on your response. Now, one of
7 the parties got sick, so we had to continue it to seven
8 days, and so that trial setting is actually going to have
9 to go away and get reset.

10 HONORABLE NICHOLAS CHU: Okay.

11 MR. TUCKER: And so that's why we added that
12 "and a trial setting is not pending," but the rest of it
13 is statutory. Yes.

14 HONORABLE NICHOLAS CHU: Okay. Cool.

15 CHAIR TRACY CHRISTOPHER: All right.
16 Changes to 510.6?

17 HONORABLE JENNIFER RYMELL: I think
18 Professor Carlson had a comment.

19 CHAIR TRACY CHRISTOPHER: Oh, I'm sorry.
20 Yes.

21 PROFESSOR ELAINE CARLSON: Yeah. I noticed
22 that the tenant's response does not need to be sworn. And
23 can it be in Spanish or another language?

24 MR. TUCKER: Yeah. And so, yeah, the
25 Legislature didn't expressly describe how the tenant's

1 response had to be there. It does say that they have to
2 include any documents or things that they want to rely
3 upon. I will say certainly there will be times when that
4 response is in Spanish. We have a lot of courts where,
5 you know, we have -- we have courts where petitions are
6 being handwritten, filed in Spanish.

7 PROFESSOR ELAINE CARLSON: Yeah.

8 MR. TUCKER: And answers are filed in
9 Spanish, so that will certainly happen. The Legislature
10 didn't dig into that and neither did we.

11 PROFESSOR ELAINE CARLSON: Okay. Thank you.

12 MR. TUCKER: Yes. Thank you.

13 CHAIR TRACY CHRISTOPHER: All right. Any
14 changes to 510.6, 510.7? Those are the same timing
15 issues.

16 MR. TUCKER: Yeah, pretty -- pretty limited
17 there. 510.6, we just added, you know, defendant must
18 appear for trial on the day set for --

19 THE REPORTER: Whoa, slow down.

20 MR. TUCKER: Oh, I'm sorry. Sorry.
21 Coffee's kicking in. I'm sorry. So, (a), "defendant must
22 appear for trial on the day set for trial in the
23 citation." We just added "or subsequent trial setting"
24 for that same issue I just mentioned to Judge Chu where
25 there is times where the court has to set it for a

1 different day than the originally scheduled trial for
2 various reasons, and so we just wanted to make it clear
3 that that -- the requirement applies to those subsequent
4 settings also.

5 And then 510.7, also, just to tweak that
6 language to match what the statute said as far as the
7 limitations on postponements. And decrease in (a) there
8 the six days to four days that we've discussed prior.

9 CHAIR TRACY CHRISTOPHER: Would 510.6 and 7
10 need to say "if this is not a request for summary
11 disposition"? Because otherwise, it seems like we have
12 two different sets of when things are supposed to be
13 happening, and if I was just a pro se reading, I might not
14 understand that.

15 MR. TUCKER: Uh-huh. Yeah. I mean,
16 certainly you could add something like "unless judgment
17 has been granted in summary disposition," "unless a
18 summary disposition judgment has been granted," comma.

19 CHAIR TRACY CHRISTOPHER: No, I mean like
20 the trial date. Is the trial date and the answer date are
21 different, depending on whether it's summary disposition
22 or a regular case?

23 MR. TUCKER: Yeah. I -- yeah, I guess what
24 I -- I think our thought would be if it's summary
25 disposition, then -- and the judge grants it, then there's

1 just not going to be a trial. It's just over, and so, I
2 guess, inherently, kind of feel like, though, you know,
3 the 510.6 and 7 aren't going to directly apply if there is
4 a summary disposition, but, yeah, certainly would be open
5 to whatever kind of clarification to make that clearer to
6 parties if we feel that that's not clear, that these rules
7 basically are kind of thrown out the window if the judge
8 goes ahead and grants a summary disposition.

9 CHAIR TRACY CHRISTOPHER: Right. So, for
10 example, in 510.6, you can answer on the day of trial, but
11 if it's a summary, you've got to answer in four days. And
12 it has to be a written answer.

13 MR. TUCKER: Yes. You have to file that,
14 that response, correct. Correct.

15 CHAIR TRACY CHRISTOPHER: All right. Moving
16 on to 510.YY.

17 MR. TUCKER: Why, why? So this rule, the
18 Court had already added Rule 500.10 for justice courts,
19 which governs electronic appearance in justice court.
20 Then the Legislature added in Senate Bill 38 provisions on
21 electronic appearance in eviction cases. Those are
22 largely the same, with the only exception that under the
23 Legislature's provisions in Senate Bill 38, a party can't
24 be required to appear electronically without their consent
25 in an eviction case; whereas, under 500.10, for a normal

1 justice court suit, the judge can allow or require, at the
2 judge's discretion, parties to appear electronically. So
3 we just said that 510 applies to evictions, except that a
4 party can't be required to appear electronically without
5 their agreement.

6 CHAIR TRACY CHRISTOPHER: Yes, Richard.

7 MR. ORSINGER: When I first saw it I thought
8 it was a typo, but the more conventional way to stick a
9 rule in between two rules is to have like 510.7A, capital
10 A or a lower case (a). We have to do that in the Family
11 Code because the Legislature is very active.

12 MR. TUCKER: Exactly.

13 MR. ORSINGER: And I think that YY kind of
14 doesn't fit any, I guess, natural thought for me.

15 MR. TUCKER: Yes, sir. No, we would agree.
16 I think our thought when we did the XX and YY were just
17 that the committee and the Court would ultimately renumber
18 the rules when they put it in there, and we didn't know
19 what convention they would prefer to use, if they wanted
20 to do 510.75 or 7A or whatever it was, so that was kind of
21 us defaulting the numbers to their purview.

22 HONORABLE JENNIFER RYMELL: They were just
23 place keepers.

24 MR. TUCKER: Yes, sir. But I would agree.
25 We do not anticipate that it will show up in the rules as

1 YY.

2 MR. ORSINGER: Okay. All right.

3 CHAIR TRACY CHRISTOPHER: All right. I was
4 hoping to finish before our break this morning, but I
5 don't think we're going to get there, and we'll take a
6 10-minute break at this time.

7 (Recess from 10:30 a.m. to 10:44 a.m.)

8 CHAIR TRACY CHRISTOPHER: All right. We're
9 moving on to 510.8.

10 MR. TUCKER: Thank you. So Rule 510.8, the
11 part (d), that's just from the statute, where the judge
12 has to determine the rent and the rental pay period to be
13 included in the judgment. The statute now adds that even
14 if it's a case where there's not rent specifically being
15 paid, the judge has to just determine what that amount
16 must be, and so we included that language in the guidance
17 that the Legislature gave in making that determination;
18 and then, also, the payment of rent into the registry is
19 changing from the -- it currently only applies to
20 evictions based on nonpayment, and effective January 1st,
21 it will apply to all residential eviction cases,
22 regardless of the grounds.

23 So that reflects that, and then (e) is the
24 writ of possession section. We added the part about how
25 the landlord can get someone else to issue the -- and to

1 execute the writ of possession if the sheriff or constable
2 is taking longer than the statute allows and also adds the
3 language that the Legislature put in that the issuance of
4 a writ of possession is a ministerial act, not subject to
5 review or delay. We did add language to the statutory
6 language there, "upon a proper and timely demand," that an
7 issuance of a writ is a ministerial act, just to make
8 clear to the courts that they do have discretion to not
9 issue the writ. Like, say, if the landlord comes the next
10 day and they have to wait six days, well, they don't have
11 to issue it then, right, but as long as the demand is
12 proper and timely, the court doesn't have discretion to
13 not issue it, apparently. And in a few courts there had
14 been issues where the court would delay issuing the writ
15 of possession for a certain period of time or things like
16 that, and so the Legislature wanted to address that, and
17 so we did.

18 CHAIR TRACY CHRISTOPHER: All right. Any
19 comments on that section?

20 Moving on to 510.9.

21 MR. TUCKER: Okay. 510.9, we added the
22 language about -- that the Legislature added about a
23 defendant who appeals. They have to affirm under penalty
24 of perjury that they have a good faith belief that they
25 have a meritorious defense, this is not just for purposes

1 of delay. We did also add that that affirmation is not
2 reviewable by the court. That part is not in the statute,
3 but we did feel that it was important to clarify that.
4 The statute does not give the court any authority or
5 jurisdiction to review that affirmation, and we also felt
6 that that would be kind of a due process issue there for
7 the court that is being appealed to have unilateral
8 ability to just say, "Well, I don't think there's a good
9 reason for you to appeal, so you don't get to."

10 So that's why we added that clarifying
11 statement there. And then we also --

12 CHAIR TRACY CHRISTOPHER: Any comments on
13 that? Okay.

14 MR. TUCKER: Okay. And then in (b), we just
15 added that when the judge sets the appeal bond, they're
16 supposed to take into consideration the amount of money
17 that's already being paid into the registry. That
18 provision was already in the Property Code prior to Senate
19 Bill 38, so we just imported it also into the rules for
20 clarity there as well.

21 And then in (c)(1), we just added the same
22 thing we did to 143a to this language also, so that the
23 information that you don't have to do a new statement of
24 inability if you appeal with a statement of inability.
25 It's also in the justice court rules and not simply in

1 Rule 143a.

2 CHAIR TRACY CHRISTOPHER: All right. Moving
3 on to payment of rent in appeals.

4 MR. TUCKER: Okay. So, yeah.

5 CHAIR TRACY CHRISTOPHER: All based on the
6 statute?

7 MR. TUCKER: Yeah. So the part here on the
8 statute is all -- or the part payment of rent in appeals,
9 yeah, statutory changes, you know, making it where it
10 applies to all residential evictions. One -- one specific
11 change I did want to address here is in (b). The
12 Legislature took the notice that had to be given -- this
13 notice previously was given for the justice court for the
14 payment of rent into the justice court registry, and now
15 the notice is supposed to clarify that they have to also
16 continue to make ongoing rental payments as the rent
17 becomes due, and one of the issues that arose is that, in
18 that original statutory language, it states that it has to
19 include the time the court closes if it's before 5:00
20 o'clock.

21 And so the committee struggled with this in
22 this new notice requirement because this also includes
23 directing them to pay to the county court's registry, and
24 so there was concern that the justice court, in issuing
25 this notice, may not be aware of when the county court

1 will close. Obviously, in some counties it's going to go
2 to one of many different county courts, who may have
3 different closure schedules, and so in discussing that, we
4 discussed that the logistics really are that when they pay
5 to the county court registry, they're going to go through
6 the county clerk's office. And so, in drafting the rule,
7 we did modify the statutory language from a court that
8 closes before 5:00 to say the justice court or the county
9 clerk's office, as applicable, that closes before 5:00,
10 because the court will be able to ascertain when the
11 county clerk's office schedule is, and that's what the
12 party needs to know anyway. It's really irrelevant to me
13 when the county court closes if I have to go to the county
14 clerk's office anyway to pay that rent into the registry.
15 So that is a tweak to what the exact language from Senate
16 Bill 38 is, so I definitely wanted to draw attention to
17 that.

18 CHAIR TRACY CHRISTOPHER: All right. Any
19 other changes in this section that are not in the statute?

20 MR. TUCKER: No. No, the rest of it is
21 statutorily -- either was in the statute or things we
22 rearranged from existing rules just to shift the
23 organization of it to make it clear and flow accurately.

24 CHAIR TRACY CHRISTOPHER: All right. Any
25 comments on those changes?

1 All right. Moving on to 510.10.

2 MR. TUCKER: Okay. 510.10, Senate Bill 38
3 adds a time frame for when the justice court should
4 forward the appeal up to the county court. We did add
5 that there into the statute. We also replaced -- the
6 existing language in the rule was that the court needed to
7 sent a certified copy of all docket entries, and we --
8 when we discussed that, we were like what does that
9 actually even mean? How do you send a certified copy of
10 the docket entries? Because a lot of courts will have
11 entries of things like, you know, "person called today and
12 asked for a postponement" or something like that, and so
13 we simplified that to "the transcript and original papers,
14 together with any money in the court registry," so just
15 kind of simplified that language for what the court is
16 actually sending up to the county court. And then added
17 in (c) the requirement that the Legislature added that the
18 county court must hold that trial no later than the 21st
19 day after the date that transcript and papers are
20 delivered to the county court.

21 CHAIR TRACY CHRISTOPHER: Judge Chu.

22 HONORABLE NICHOLAS CHU: This is more of a
23 county court problem than a JP problem, but so if -- if
24 the appeal gets -- goes up to county court and they have
25 to do it within 21 days, are there any rules speaking to

1 the county court about procedurally how do we get this
2 21-day trial done in a court that traditionally doesn't do
3 trials within 21 days?

4 MR. TUCKER: Yeah. No, and -- no, and so
5 the Legislature didn't give any guidance on those
6 procedures, and so we didn't feel like, you know,
7 especially in the 510 series, we're good to try to
8 prescribe procedures for all the county courts. So, yeah,
9 I definitely think that's going to be a significant hurdle
10 in the implementation of Senate Bill 38, is being able to
11 get these things all to trial in county court in 21 days.

12 HONORABLE NICHOLAS CHU: And, I guess, maybe
13 flag for something in the future is that -- and we'll see
14 this eventually, probably in February after some JP cases
15 or evictions get done, is that once county court gets
16 these cases, if there is an amended pleading and then
17 answer, that's going to be pushing past the 21 days
18 already, and those county courts obviously aren't volume
19 driven like JP courts are, so, yeah.

20 MR. TUCKER: Yeah, and like I said, that's
21 why we made that edit to Rule 143a that we did to try to
22 acknowledge and address that.

23 HONORABLE NICHOLAS CHU: Okay.

24 MR. TUCKER: You'll see in a second we
25 deleted prior Rule 510.12, which required the defendant to

1 submit a written answer within eight days. The thought
2 was that these are turning around this fast and that
3 they're pro se litigants anyway, and there's nothing in
4 the Property Code that actually requires that answer. So
5 that got deleted, and so that's at least one less thing
6 that's having to happen and the court's going to have to
7 look for, but, yeah, I think there is going to be -- I
8 just taught an eviction class to some county judges on
9 Tuesday, and when I mentioned this was going into effect,
10 there was definitely kind of one of those look around the
11 room like how are we going to do that, so, yeah, it will
12 be --

13 CHAIR TRACY CHRISTOPHER: Could I ask you
14 what "the transcript" means here? I mean, we normally
15 think of that as a court reporter transcript.

16 MR. TUCKER: Exactly. That language is
17 there. The transcript -- and I agree with you. I don't
18 like this word being used in justice court rules and
19 statutes. It's used in a lot of rules and statutes. It's
20 what the statute for sending the appeal, that's how they
21 describe it. It's basically just the record of what
22 happened. Like, here's the day it went to trial, that
23 stuff, rather than a verbatim transcript of the -- you
24 know, like a court reporter transcript.

25 HONORABLE NICHOLAS CHU: The docket sheet.

1 MR. TUCKER: Docket sheet, yeah. And so I
2 agree. You know, we kept that language just because it's
3 used so many other places, but I concur. It is confusing,
4 because I think the common perception of that would be
5 exactly that.

6 HONORABLE JENNIFER RYMELL: It's usually the
7 docket sheet and any orders, is what I get, that were
8 signed down in the justice court. So it's exactly what
9 happened and then all of the orders that were signed and
10 the judgment that was signed and, if there was a contest
11 on the affidavit of inability, the order saying they grant
12 it, they deny it. So that's basically what the transcript
13 is.

14 MR. TUCKER: And I will say that that part
15 of the rule is directed, obviously, more at the court than
16 the litigants, and I would say the courts know basically
17 what that means, because they're kind of used to what they
18 send up on the appeal. So I don't think there is a huge
19 risk of a court being confused, and the parties aren't
20 doing that part, but I -- I would be happy for that -- the
21 word "transcript" to go away with the description in the
22 justice court.

23 CHAIR TRACY CHRISTOPHER: Harvey, then Judge
24 Chu.

25 HONORABLE HARVEY BROWN: I wonder if it

1 would be helpful to just put a definition of transcript in
2 this section. I mean, those definitions you have only
3 apply to this section, and it is used in an unusual way
4 for most lawyers.

5 MR. TUCKER: Yeah.

6 CHAIR TRACY CHRISTOPHER: Judge Chu.

7 HONORABLE NICHOLAS CHU: I just want to flag
8 something for the Court and for Jackie. I do think
9 that -- because, right now, the default is that the normal
10 Rules of Civil Procedure that govern district courts and
11 county courts govern these eviction appeals in county
12 courts in terms of procedures and how things are tried and
13 timelines and things like that, so I really do think it
14 would be necessary, given this new statutory framework,
15 that there needs to be some special county court at law
16 rules for eviction appeals or something like that, because
17 the current rules don't really align with this expedite
18 timeline.

19 CHAIR TRACY CHRISTOPHER: Okay.

20 HONORABLE NICHOLAS CHU: But future problem.

21 CHAIR TRACY CHRISTOPHER: The nonlawyer
22 representation, is that only to county court, or does that
23 include further appeals?

24 MR. TUCKER: I don't know the answer to that
25 question. In the Property Code, that was pulled from the

1 the Property Code language that governs there. I -- I
2 don't know if that applies directly to an appeal to the
3 court of appeals from the county court, off the top of my
4 head.

5 HONORABLE NICHOLAS CHU: Oh, actually, this
6 actually is a question for me. I'm not sure if (d) tracks
7 the Property Code language. I guess I'll look this up,
8 but -- but I felt like the Property Code says
9 multiresidential properties must be represented by an
10 attorney. It was, like, kind of a weird question that I
11 know in county court they have to have an attorney, but in
12 justice court, there's a rule that says this. I don't
13 know if, actually, there's actually a statutory basis for
14 this. Sorry. I just remembered this from the discussion.

15 CHAIR TRACY CHRISTOPHER: Yes.

16 MR. MOCK: This actually just struck me --

17 CHAIR TRACY CHRISTOPHER: We cannot hear
18 you.

19 MR. MOCK: This language is directly from
20 SB 38. It's a slight modification of the right of someone
21 who is not an attorney to --

22 CHAIR TRACY CHRISTOPHER: Does that include
23 appeal to the court of appeals or just to the county
24 court?

25 MR. MOCK: It, quite literally, is just the

1 language from the statute.

2 HONORABLE JENNIFER RYMELL: It's verbatim
3 from the statute.

4 CHAIR TRACY CHRISTOPHER: "In an appeal."
5 Okay.

6 MR. MOCK: "In an appeal." That's actually
7 a very good question.

8 MR. TUCKER: Exactly.

9 HONORABLE JENNIFER RYMELL: That's a great
10 question, but --

11 CHAIR TRACY CHRISTOPHER: Yes.

12 MS. HOBBS: I would just -- Jackie, just
13 look at what we did on the paraprofessional rules, because
14 I kind of think we took some liberty in those rules about
15 who could be represented or not. It's Kennon's
16 subcommittee report that spells out what she thought the
17 current rules were, and so I would just make sure that
18 we're consistent with them.

19 CHAIR TRACY CHRISTOPHER: All right. Then
20 changes to 510.12?

21 MR. TUCKER: Yes, Your Honor. So 510.12,
22 like I mentioned, we deleted the old version because it
23 had timing in it when no one replies and also contained
24 the requirement to answer within eight days for an
25 appealing tenant, which isn't in the Property Code

1 anywhere, and so didn't feel like there was a basis to put
2 it in the rules. And also, you know, it's a hurdle for
3 self-represented litigants, and the time frame with the
4 quick trial felt unnecessary.

5 We did add new 510.12, which is also taken
6 from the language of the Property Code, which just
7 requires that the county court include in their judgment
8 in an eviction case what the amount of the supersedeas
9 bond would be to get to move the appeal up to the court of
10 appeals and what those -- what has to be considered for
11 that. And that just has a note.

12 510.13, the only change in that is we now
13 refer back to Rule 510.12, which describes how that amount
14 is calculated, rather than that section of the Property
15 Code, which is where that language got pulled from.

16 CHAIR TRACY CHRISTOPHER: Does the payment
17 of rent into the registry -- is that considered part of
18 the supersedeas?

19 So what happens if they stop paying? For my
20 own sake, what happens if they stop paying rent, but they
21 filed a supersedeas bond, and it's on appeal to the court
22 of appeals?

23 MR. MOCK: Just to address that briefly, so
24 that's taken in consideration with the -- with the
25 determination of what the supersedeas is supposed to be.

1 So it takes into consideration -- and different courts do
2 it in different ways. There is some case law having to do
3 with supersedeas being payment of rent into the court
4 registry by the month. Sometimes judges will set the
5 supersedeas as an anticipation of how long the appeal is
6 going to take, 10 months, for example, and then the
7 supersedeas is the rent for that month, but that is up to
8 the judge to make that assessment based on the information
9 that's presented at the hearing.

10 CHAIR TRACY CHRISTOPHER: I guess my
11 question is, does this anticipate -- and I understand how
12 normally it's like 10 months of rent at a thousand
13 dollars, so your supersedeas bond is \$10,000, and they
14 don't post it and, you know, case is over. But what
15 happens if the supersedeas bond is you must pay a thousand
16 dollars every month and they're up on appeal and they stop
17 doing that? Anything in the statute that addresses that?

18 MR. MOCK: Well, the purpose of what the
19 property -- Chapter 24 of the Property Code addresses
20 specifically is that the -- that the -- the judgment is
21 stayed, and so, presumably, if they're not making that
22 payment, then the appellee could go and request that.
23 Since the judgment is no longer stayed, they would request
24 a writ of possession.

25 CHAIR TRACY CHRISTOPHER: And once they have

1 the writ of possession, the appeal on that is over?

2 MR. MOCK: With regard to possession, but
3 not with regard to other matters.

4 CHAIR TRACY CHRISTOPHER: So you would
5 anticipate that if they stop paying rent, that would be up
6 to the landlord to go get the writ of possession, and the
7 appellate courts wouldn't have to worry about it, other
8 than to the effect that it would moot part of the appeal.

9 MR. MOCK: That would be my -- that's always
10 been my understanding, that that would be what would
11 happen.

12 HONORABLE SYLVIA HOLMES: There's nothing
13 that says what happens if the tenant moves out while on
14 appeal. They may be appealing something, and then decide,
15 okay, I've gotten a better place, and I don't want to pay
16 my landlord anymore. Do they still have to keep paying
17 rent into the registry? I don't know, but the case could
18 still -- the underlying issues can still be litigated
19 without possession needing to be any more in dispute.

20 CHAIR TRACY CHRISTOPHER: Kent.

21 HONORABLE KENT SULLIVAN: I'm trying to keep
22 the big picture of the integrated process in mind, and I'm
23 probably confused about this, but I just wanted to go
24 through a couple of really basic points.

25 One, these cases have to originate in JP

1 court. I don't think there's any exception for that,
2 correct?

3 HONORABLE JENNIFER RYMELL: Correct.

4 HONORABLE SYLVIA HOLMES: Correct.

5 HONORABLE KENT SULLIVAN: But JP court is a
6 court of no record, and if you don't like the results, you
7 get a trial de novo. Start all over in county court.

8 The purpose of the statute is to expedite
9 this whole process. If you make it to county court, is
10 there something that ensures the county court process will
11 expedite it consistent with the intent of the statute? In
12 other words, I haven't seen any rules that we're talking
13 about that would force the county court to move it at a
14 speed that is consistent with the statutory intent.

15 HONORABLE NICHOLAS CHU: So there's only the
16 statutory rule -- the statute and the -- embedded in this
17 rule that a county court has to make a decision within 21
18 days of getting the appeal.

19 HONORABLE KENT SULLIVAN: Has to completely
20 dispose of the case --

21 HONORABLE JENNIFER RYMELL: Yes.

22 HONORABLE NICHOLAS CHU: Yeah.

23 HONORABLE KENT SULLIVAN: -- de novo within
24 21 days.

25 HONORABLE JENNIFER RYMELL: Yes. Under

1 510.10.

2 HONORABLE NICHOLAS CHU: Yeah.

3 HONORABLE JENNIFER RYMELL: And that's why
4 we were saying --

5 HONORABLE KENT SULLIVAN: But that's a JP.
6 I guess what I'm -- I'm sorry.

7 HONORABLE JANE BLAND: Just remember to not
8 talk over each other so that Dee Dee can get it correct
9 for the transcript.

10 HONORABLE KENT SULLIVAN: My apologies. But
11 that's a JP rule, right?

12 HONORABLE NICHOLAS CHU: No, no. There is a
13 JP rule requiring disposition within 14 -- 21 days, and
14 then there is a county court at law rule now, or law, that
15 says you have to dispose of the case within 21 days.

16 HONORABLE KENT SULLIVAN: That's in the
17 statute?

18 HONORABLE NICHOLAS CHU: Yeah. Yeah.

19 HONORABLE KENT SULLIVAN: Thank you.

20 CHAIR TRACY CHRISTOPHER: I think that's
21 what Judge Chu was saying, that maybe we need separate
22 rules for the county court judges to figure out how to
23 handle trial de novo in 21 days.

24 MR. TUCKER: Because it is -- it's kind of a
25 weird construction, and this is how it already was where

1 there's a few of the rules at the end here that kind of
2 apply to county court, but it's not like a robust, full
3 set like you would have for the justice court, so we kind
4 of kept that framework where there's some guidance that
5 matches how it goes, but, obviously, some more detailed
6 rules expressly for county court could be useful.

7 CHAIR TRACY CHRISTOPHER: All right. Any
8 final comments on the changes? Yes, Lisa.

9 MS. HOBBS: Just on 510.12. Is it regular
10 that the county court would put the supersedeas amount in
11 the final judgment? Because that's not regular for
12 civil -- is this something new? Is it required by
13 statute? Is it --

14 MR. TUCKER: It's a Property Code
15 requirement.

16 MS. HOBBS: Okay.

17 MR. TUCKER: Yeah. Yeah.

18 CHAIR TRACY CHRISTOPHER: Yes, Judge Kelly.

19 HONORABLE PETER KELLY: Just a very general
20 global comment is that perhaps some forms could be adopted
21 to utterly simplify this, because we understand these
22 rules and we're debating intricacies of it, but you're
23 talking about people who maybe have an eighth grade
24 education, maybe English is their second or even third
25 language. These will be opaque, to say the least, and

1 whatever task force is involved, if there's a charge from
2 the Supreme Court, maybe we could look at adopting
3 something that is even simpler for the tenants to
4 understand, because the way these are now, just -- what
5 y'all have done is very excellent and very detailed and
6 addresses a lot of the issues, but for the people who are
7 actually going to be using these, who will be subject to
8 these lawsuits, they'll be incomprehensible.

9 HONORABLE KENT SULLIVAN: Hear, hear.

10 CHAIR TRACY CHRISTOPHER: So we do have a
11 new referral from the Court for various forms in the
12 landlord-tenant area. I'm not sure if --

13 HONORABLE NICHOLAS CHU: I think Jackie --

14 CHAIR TRACY CHRISTOPHER: -- it would cover
15 everything.

16 HONORABLE NICHOLAS CHU: I think Jackie has
17 insight on this.

18 MS. DAUMERIE: Yes, there is a
19 Landlord-Tenant Forms Task Force, and they are charged
20 with making eviction forms. They have proposed a draft,
21 but then this bill took effect, and so they're reworking
22 what they've done to incorporate these changes. The Court
23 will be getting those.

24 HONORABLE PETER KELLY: And, for the record,
25 that's the basic conversation I had with Judge Sullivan,

1 and he just said "Hear, hear." So...

2 CHAIR TRACY CHRISTOPHER: Yes, Pete.

3 MR. SCHENKKAN: And in the same spirit, and
4 maybe has the same answer, but it appears to me that the
5 single most effective innovation that's been done in
6 helping people represent themselves is Texas Law Help.
7 Those tabs are really excellent for what they cover. I
8 have not looked at these, and I don't know how this works.
9 Are the people who are doing this also the ones who would
10 do that for Texas Law Help, who would see to it that when
11 you go to Texas Law Help and you're a tenant, you will
12 line up on a page that it tells you how to do each of
13 these things?

14 HONORABLE ANA ESTEVEZ: You gave us the
15 forms for the next meeting.

16 MR. SCHENKKAN: But those are forms. I'm
17 talking about a tab.

18 CHAIR TRACY CHRISTOPHER: I don't know who
19 handles Texas Law Help.

20 MS. DAUMERIE: I can't remember off the top
21 of my head, but I do have a contact with them, and, yes,
22 they are aware.

23 MR. SCHENKKAN: They will be following up
24 accordingly.

25 MS. DAUMERIE: Yes.

1 MR. SCHENKKAN: These are one-pagers, folks.
2 You can go there under the general category of
3 landlord-tenant, and then there's eight or ten or six, or
4 however many they are, different major topics, and for
5 each one of them, there's a page with key points and links
6 or telephone numbers or whatever.

7 MR. TUCKER: I will say -- oh, go ahead.

8 HONORABLE JENNIFER RYMELL: I was just going
9 to refer to our resource, yeah, witness, because I think
10 he's on that committee.

11 MR. MOCK: I can tell you that all of the
12 different legal services programs and also the folks that
13 are working on Texas Law Help are, frankly, kind of
14 waiting for the Court to come out with rules so that these
15 can be developed. We're all in the process of creating
16 and modifying forms and things of that sort, and hopefully
17 that will all happen before January 1st, but I think the
18 last piece of the puzzle for a lot of us is -- is the
19 rules themselves, to determine exactly what we're going to
20 be doing.

21 MR. TUCKER: I would add, also, on our site,
22 on the Justice Court Training Center's website, we do have
23 forms. We have flowcharts. We have an evictions desk
24 book, which is about 160 pages. That's all accessible to
25 the general public. We also have a self-represented

1 litigants page, which is tjctc.org/srl. And we have
2 information packets that are written in a very accessible
3 format for filing a small claims case, you're getting sued
4 in a small claims case, getting sued in an eviction,
5 you're filing an eviction, your utilities have been turned
6 off. And those are available in English and in Spanish,
7 and those will all be updated by January 1st as well.
8 Those are resources that courts direct people to a lot as
9 well.

10 HONORABLE PETER KELLY: They should be
11 attached to the lease. Everybody gets them from the
12 get-go.

13 MR. SCHENKKAN: Good idea.

14 MR. TUCKER: Of course, the problem is about
15 half of these eviction cases never had a written lease to
16 begin with.

17 HONORABLE JENNIFER RYMELL: Yeah. Correct.

18 CHAIR TRACY CHRISTOPHER: Yes, Pete.

19 MR. SCHENKKAN: And I want to check to see.
20 I'm anticipating that the large number of people who are
21 in the room at the moment are planning to leave as soon as
22 you bring the gavel down on this topic. There is another
23 one later in the day on which I have that same question
24 about Texas legal help, which is confidential identities,
25 people who need to sue under a pseudonym. The Legislature

1 has passed three statutes creating new causes of action in
2 which people have to be allowed to do that, and we've dug
3 into it a little bit and discovered there's lots of other
4 people who aren't covered by statutes who do it, and a lot
5 of them are pro se, and we would like you to get the word
6 after we finish our work, or the Court finishes it, on
7 confidential identity and take that up as well on Texas
8 legal help, so that there is a page that tells you how you
9 do it if you want to sue but you don't want people to know
10 your real name and residence, for good reason.

11 MR. MOCK: If I could address that really
12 quickly, I know the person who works on Texas Law Help at
13 legal services center, and I'm happy to let him know about
14 that.

15 MR. SCHENKKAN: Thank you.

16 CHAIR TRACY CHRISTOPHER: Thank you. Any
17 other comments on the eviction rules?

18 All right. We want to thank the task force
19 for their work, and I think this is passed on to the
20 Supreme Court at this time.

21 HONORABLE JENNIFER RYMELL: All right. I
22 just wanted clarification if you wanted us to continue
23 or --

24 CHAIR TRACY CHRISTOPHER: Not yet, but
25 sometimes you get called back in.

1 MR. TUCKER: Don't turn your phone off.

2 HONORABLE JENNIFER RYMELL: Don't turn your
3 phone off yet. Okay.

4 CHAIR TRACY CHRISTOPHER: Thank you very
5 much.

6 MR. TUCKER: Thank you very much. I
7 appreciate the questions.

8 HONORABLE JENNIFER RYMELL: Thank you so
9 much. Appreciate it.

10 CHAIR TRACY CHRISTOPHER: All right. We'll
11 move on to summary judgment. Richard, Giana.

12 MR. ORSINGER: Yes. So, first of all, I
13 want to thank -- this has become an ad hoc committee, and
14 we have many members of the ad hoc committee, and many
15 have contributed in many ways. I want to particularly
16 thank Giana Ortiz for helping with the subcommittee memo
17 and redrafting rules one and two, and Harvey Brown who
18 originated our version three and is back, didn't have the
19 opportunity to be with us when we went over it the first
20 time, so we're going to go over it again, but with the
21 sensitivity to the changes.

22 But what I wanted to do is, to use a
23 baseball analogy, is before we start running around, let's
24 go back and touch first base. If you look at the statutes
25 that we're dealing with, we started with Senate Bill 293,

1 which is at page 18 of Tab 2, and that was what originated
2 this. It has been amended by House Bill 16 in special
3 session, but only subsections (a) and (b) were amended.
4 So I want to just take a brief look at this statute.

5 On the very first page, on page 18 of 51, we
6 have section 23.03, pardon me, 23.303, and it says that
7 "The business court, a district court, or a statutory
8 county court shall, with respect to a motion for summary
9 judgment," and then it goes on with the requirements.
10 What I notice is that the statutory probate court is not
11 mentioned explicitly. Our rules, though, will apply to a
12 statutory probate court. Now, if that was an omission in
13 the statute, we can fix it in the rule, because the
14 statute prohibits the Court from deviating from the rule,
15 but it doesn't prohibit the court from supplementing the
16 rule. So I just wanted to see if anyone agrees with me
17 that this is an omission and whether we should consciously
18 fix it by recognizing that we are going to apply this rule
19 to the statutory probate court, even though the statute
20 doesn't require it. Does anybody have any any opinion on
21 that? I don't want to be the only person that thinks
22 this. I may have some misunderstanding, but I think that
23 the statutory probate court is different from the
24 statutory county court.

25 HONORABLE JERRY BULLARD: It is.

1 HONORABLE DAVID KELTNER: It is.

2 MR. ORSINGER: It is. So our rule is going
3 to apply to the statutory probate court, even though the
4 statute doesn't require it. And that's not a problem.
5 David, are you troubled?

6 HONORABLE DAVID KELTNER: Well, the
7 Legislature is treating them separately, and they are
8 different -- they go on different tracks for all kinds of
9 things, but I would include them and call Herman and
10 figure out what he thinks, but I would include them for
11 this, going forward on this, I would think.

12 MR. ORSINGER: Yeah. I would think we need
13 to, because there are serious financial issues and
14 things --

15 HONORABLE DAVID KELTNER: Absolutely.

16 MR. ORSINGER: -- in probate court, and, you
17 know, if this is a good way to handle summary judgments,
18 it's a good way for them as well, so that's just to make
19 note going down the road that we are actually
20 supplementing the statute there.

21 If you go on to page 19 of 51, you can see
22 that the old timetable, which was set out in subdivision
23 (a)(1), that has been amended. Originally, it was driven
24 -- the timetable was driven by the day the response to the
25 summary judgment motion was filed. Now it's driven, under

1 House Bill 16, by the day of filing.

2 Subdivision (2) is different only in that
3 it's the deadline to rule within the 90th day after the
4 motion was originally -- and this Senate bill says
5 "argued," but now in the House bill it says "heard,"
6 because the discussion made us aware that there are many
7 times that there is no oral argument. It's taken by
8 submission with nobody in court, so the Legislature fixed
9 that, I think, in House Bill 16.

10 Subdivision (c), which was not modified by
11 the House bill, is the clerk's reporting requirement of
12 all of these timetables and the courts meeting them or
13 failing to meet them. Subdivision (d) is the Office of
14 Court Administration's obligation to forward annual
15 reports to various heads of branches of the government,
16 and subdivision (e), which was not amended, says
17 "Notwithstanding section 22.004, subsection (a) or (b) may
18 not be modified or repealed by Supreme Court rule." So
19 (c), (d), and (e) are subject to modification, but we
20 haven't been dealing with that, and (a) and (b) can't be
21 modified, so we are stuck with their choice of language.

22 If you go to page 20, that's number 3 of
23 this Senate Bill 293, we see what this is all about. Just
24 to put this in context, if you look on section 4,
25 subdivision (b), they make reference to Article V in the

1 Constitution, section 1-a, subsection (6), talks about the
2 ability of the judicial commission to remove a judge from
3 office for willful or persistent conduct that is clearly
4 inconsistent with the proper performance of the judge's
5 duties, and then in this -- in this statute, they define
6 those judges duties to include the failure to meet
7 deadlines, performance measures, standards, or clearance
8 rates required by statute. So this is what's at stake
9 here. We're adopting rules that, if persistently violated
10 by a judge, could be the grounds to remove the judge from
11 office. So that's why this is being taken so seriously.

12 Now, I'd like to skip ahead to House
13 Bill 16, which is page 50 of the Tab 2, and we get to
14 subsection (a), which is the amendments that the House
15 bill made to the Senate bill, and we'll get into detail
16 later. This is just an overview, but basically, the
17 timing of counting backwards from the response or forward
18 from the response, it was just too crazy. None of us
19 could figure it out. It was hard to write anything that
20 made sense. Thank goodness we had a special session.
21 Thank goodness the Governor put it on the call, and we got
22 a quick fix. And so, now, everything is running from the
23 date that the motion is filed, which is consistent with
24 the way time unfolds in our -- our universe, right, and so
25 it's easier for us to understand, and we'll get into the

1 details, but the timetables are basically fundamentally
2 the same, except additional time has been added because we
3 are starting the clock back from the date of filing rather
4 than the date of response.

5 Now, when we move on through this, if you
6 look at subdivision (a)(2), it says that the court has to
7 file with the clerk of the court and provide the parties a
8 written ruling. We'll get to this a little bit later, but
9 Chief Justice Gray, who was not able to be here today,
10 sent two e-mails that arrived after our final versions of
11 these proposed rules came forward, so we'll try to do the
12 best we can to comment on Chief Justice Gray's comments.
13 He had an elaborate -- he had a printout of the proposed
14 rules and then had end notes that he wrote in pen, and
15 then at the end he has about 10 pages of detail about
16 those, so there are --

17 CHAIR TRACY CHRISTOPHER: But,
18 unfortunately, they were on the wrong draft.

19 MR. ORSINGER: Oh, they were on the wrong
20 draft? I saw the distinction.

21 CHAIR TRACY CHRISTOPHER: They were on the
22 August draft instead of your --

23 MR. ORSINGER: Okay. Well, some of it still
24 applies.

25 CHAIR TRACY CHRISTOPHER: Some of it still

1 applies.

2 MR. ORSINGER: And so it's going to be a
3 call for the Chair whether we want to go back to the
4 subcommittee to meld all of this together or whether
5 that's going to add to Jackie's plate. Not my call, but
6 we'll do it if the Chair wants. But Chief Justice Gray
7 objected to the use of the word "file with the clerk,"
8 because he says judges don't file. Parties file and
9 lawyers file, but judges don't file, so, you know, we'll
10 have to deal with that later.

11 HONORABLE ANA ESTEVEZ: Some judges do file,
12 though, now.

13 MR. ORSINGER: Well, I think if we use any
14 term other than "file," it would be so confusing that I
15 would rather -- I would rather use a word that's not a
16 hundred percent accurate all the time than to use a word
17 that nobody knows.

18 CHAIR TRACY CHRISTOPHER: So, Richard,
19 let's -- I don't want us to get too bogged down in Judge
20 Gray's technical --

21 MR. ORSINGER: No, we won't.

22 CHAIR TRACY CHRISTOPHER: -- requirements
23 because --

24 MR. ORSINGER: We won't. Okay.

25 CHAIR TRACY CHRISTOPHER: -- I told him that

1 Jackie would look at them before the rule got finalized,
2 so let's talk about the three versions.

3 MR. ORSINGER: Let me make one last comment.
4 Okay.

5 CHAIR TRACY CHRISTOPHER: Yeah.

6 MR. ORSINGER: On page 51, the last part of
7 the rule -- of the House bill, subsection (b)(1) is new.
8 It was not in the Senate bill, and it's pretty important.
9 It says "subsections (a) and (b)," which would be the
10 timetables, "do not apply to a motion for summary judgment
11 that is withdrawn." Now, as a result of the strictures of
12 the House bill, we were talking about denials of motion
13 without prejudice to refile if the court needed to somehow
14 save and reset the timetable, but withdrawal is a better
15 solution. If the plaintiff and the defendant say, "Judge,
16 we would like to go to mediation before we have a
17 hearing," the option is there then for the movant to
18 withdraw the motion and then the timetable is dead and
19 then they can refile later on if they want.

20 Okay. Having done that, now, Giana, I'll
21 turn it over to you. Will you walk us through one and two
22 and the subcommittee memo that explains that, please?

23 MS. ORTIZ: Thank you, Richard. I want to
24 just give you-all a very high level overview of versions
25 one and two. I think that Richard asked Harvey to give an

1 overview of version three, so that maybe we can determine
2 which of those warrants discussion by the committee, and
3 so, to that end, version one. Version one is simply
4 basically planting the language of SB 293, as modified by
5 HB 16, into the existing rule, with the existing timeline
6 structure of response date being triggered by the hearing
7 date.

8 And as you'll recall, meeting before last,
9 there was some discussion about whether we should impose
10 default timelines for response and reply. It was decided
11 no, because the way 293 had been drafted, that was not
12 necessary to change the practice for attorneys. However,
13 upon some discussion and some rolling around with the
14 issue over the past several weeks, we have decided that
15 that structure creates problems, and that is the reason, I
16 believe, that we have included version one, is mainly to
17 illustrate the problem created by simply adopting the
18 statutory language into the existing rule structure, and
19 on page two of our memo, which is about page 47 of the PDF
20 packet, we go through basically a normal timeline of
21 motion filed, hearing set in 21 days, then the response
22 will come in 14 days after the motion, and then you have a
23 reply on the day of the hearing as usual, and that all
24 works just fine.

25 The problem will be if the court, on day 59,

1 the day 59 after the motion has been filed, realizes, oh,
2 no, under House Bill 16, I have to have a ruling by
3 tomorrow, so I'm setting the hearing for tomorrow. And
4 you can imagine that there is no response on file when
5 that happens, because the response date is triggered by
6 the hearing date, so you have a situation where there's no
7 response on file at the time the motion is heard, and
8 that, of course, is a problem.

9 So we're basically, I believe, including
10 version one to illustrate that problem and introduce you
11 to version two, which does create -- is basically a simple
12 incorporation, we believe, of the statutory language into
13 166a, but adding a default response and reply timeline.
14 So, now, where the rule says "The hearing shall occur no
15 sooner than 21 days after the motion is filed," what we
16 have said is it should -- the hearing should occur no
17 later than 45 days after the motion is filed, and the
18 reason for that extension of timeline is to allow 21 days
19 for a response, seven days for a reply, and then 10, 12,
20 14 days before the hearing, so that everybody has time to
21 read all of the briefing before the hearing.

22 Now, those dates or those numbers in the
23 version could be easily modified. You might say, well, we
24 only want to give respondents 14 days as a default for a
25 response and seven days for a reply, so a hearing could

1 still occur 21 days, but that would be an easy fix for the
2 Court based on, you know, the discussion here and their
3 preferences; but the idea would be that there would be a
4 timeline before which a hearing could not occur so that
5 the default response timeline, right now in the draft 21
6 days, and the response reply deadline, right now in the
7 draft seven days from the response, could occur. The
8 motion would be ripe before any hearing occurs and that
9 that would occur in an orderly way.

10 We have also, in version two, added
11 clarification on withdrawal of a motion. The last note in
12 the HB 16 that Richard indicated makes clear that, if a
13 motion is withdrawn, these timelines no longer apply; and
14 it was raised, well, we need a clear withdrawal of the
15 motion, so we can't have a lawyer calling the clerk
16 saying, "Well, I can't come today," and she says, "Well,
17 then we're going to have to deny because of the
18 timelines," and he says, "Well, I withdraw." No. We
19 don't want that occurring. We want a clear withdrawal of
20 the motion, with a note to the court, the date of the
21 motion that is being withdrawn so that there is no doubt
22 to the court which one is being withdrawn, i.e., which
23 ones the timelines no longer apply to. So we've added
24 that into version two.

25 On subsection (d), I believe, it provides

1 for filing evidence and that it should be filed no later
2 than the time of the motion or the response, and so we
3 have updated that to conform with the default deadlines in
4 subsection (c).

5 One note for this committee, if we decide to
6 use this version as a starter, there was some discussion
7 on the subcommittee about reply evidence, and you'll see
8 right now in subsection (d) of version two, there is a
9 reference to reply evidence, where permitted or when
10 permissible, and so is that something we want to include?
11 Do we want to just assume there is no reply evidence
12 permissible and just delete that all together?

13 The other update to version two that we
14 believe is probably necessary based on the statutory
15 language is in subpart (g). Right now, that seems to let
16 a court just reset if there's not evidence available, and
17 we need to make clear in this part of the rule that
18 that's -- that's no longer an option, that if you would
19 like to give parties additional time to collect evidence,
20 that they should -- that the motion will either need to be
21 denied or withdrawn. I believe one of Justice Gray's
22 comments was about the language and the wording of that,
23 and I agree with his comment on that, but that's something
24 we can review more carefully if we decide to use this
25 version of the rule as a starter.

1 Richard, I think that's what I have on
2 versions one and two.

3 MR. ORSINGER: Okay. So you want --

4 CHAIR TRACY CHRISTOPHER: You want to let
5 Harvey explain version three?

6 MR. ORSINGER: -- to go through three and
7 then discuss it? Okay.

8 CHAIR TRACY CHRISTOPHER: Explain three and
9 then we'll see if we can get a vote between two and three,
10 it looks like.

11 MR. ORSINGER: Okay. Yeah.

12 MR. SMITH: I have a comment on one.

13 CHAIR TRACY CHRISTOPHER: Let's go with
14 Harvey first and then we'll have general discussions.

15 HONORABLE HARVEY BROWN: The genesis of
16 version three was, in the June meeting, I was reading
17 through all of the comments from the committee, and we,
18 you will recall, discussed the rule at that time, and it
19 had a history or examination of how a number of courts
20 give more than 14 days, and I commented that now that I'm
21 on the other side of the docket doing plaintiff's work,
22 I'm finding that only 14 days' notice really was very
23 difficult on my whole life, practically, in a major
24 motion, and so I asked for 21 days, and we voted that that
25 was a good idea, and then, as she said, it may not have

1 worked with the statute as it was revised.

2 So then I started just looking at the rule
3 and said subsection (c) is the longest rule I can remember
4 anywhere, and I think a lot of stuff gets lost in it. I
5 was helping a young associate recently, who didn't realize
6 one of the sentences in the middle of the rule, and I
7 think it's easy for things to get lost. I said, well, why
8 don't we fix that? We break rules down and make it easier
9 to find things. Why don't we do that here with this major
10 rule? And so I started thinking about that, and then I
11 noticed that there's also four places where we don't have
12 gender neutral language, and I said we should fix that
13 while we're doing it, so why don't we just kind of fix
14 this rule to comport with good practices and best
15 practices? And so that's the genesis of this.

16 It could be broken down different ways. For
17 example, Chief Justice Gray today suggested we combine (a)
18 and (b), and I think that's actually doable, or at least
19 he suggested we break up one of these other parts. I
20 think that's doable to make it more reader-friendly, but I
21 think kind of our stylistic reader-friendly idea would
22 suggest let's make this easier for people to follow. So
23 that's kind of the big picture.

24 A small picture is that there's a couple of
25 things in version three that are not in version two. If

1 you'll look on page 15 of 21 in version three, in subpart
2 (3) at the end, the last sentence starts with "If the
3 court fails to set the hearing within 60 days," and then
4 sets a procedure for a notice to the court so the court
5 will know it's maybe having a problem here and get it
6 fixed. The genesis of that is some comments were made at
7 the last meeting, and so we incorporated those into this,
8 and so we added that with this formal notice.

9 We also added, in subparagraph (6), the
10 second sentence, but on further reflection, we think we
11 can skip that. And I think those are the two major
12 changes. There was some other tweaking that Justice Gray
13 suggested that I think we could make easy fixes on, but
14 we'll save that for a later day or later this afternoon if
15 we get to it. So that's the main thing, is just fixing
16 the gender neutral stuff and breaking it down into a
17 little bit more manageable thing, and then that one new
18 sentence, the trial judges think that helps them.

19 CHAIR TRACY CHRISTOPHER: I think you also
20 added the language in three about "The clerk of the court
21 shall immediately call the motion to the attention of the
22 judge."

23 HONORABLE HARVEY BROWN: Yes.

24 CHAIR TRACY CHRISTOPHER: I don't think that
25 got into version two.

1 HONORABLE HARVEY BROWN: Yeah. I think
2 that's right.

3 CHAIR TRACY CHRISTOPHER: But some of that
4 could be moved into version two if we needed to.

5 HONORABLE HARVEY BROWN: Exactly.

6 CHAIR TRACY CHRISTOPHER: Right.

7 HONORABLE HARVEY BROWN: But, of course, the
8 more we move into version two, the more that paragraph
9 gets even longer.

10 CHAIR TRACY CHRISTOPHER: Right. Okay.
11 Discussions in general between version one, two, and
12 three. Roger. And then Quentin.

13 MR. HUGHES: On number two, I tend to favor
14 pegging it to the date the motion was filed. They do that
15 in federal court. Everybody has learned to live with it,
16 and it seems sensible. What troubled me in number two was
17 the nature of the reply. It troubled me because it seemed
18 to be an invitation for the movant to get a last crack and
19 slip in more evidence, if the hearing is coming up
20 shortly. I mean, I can see the function of the reply to
21 raise objection to the non -- to the nonmovant's evidence,
22 because it's been filed. I can see the function to
23 provide rebuttal legal arguments or maybe additional new
24 case authority, but if this is an opportunity to put in
25 more evidence that wasn't submitted the first time around,

1 then I think we're starting out a world where people are
2 going to ask for surrebuttals and rebuttals to rebuttals
3 to rebuttals, et cetera. We're just doing it on.

4 I tend to favor a version that if you
5 want -- if the movant wants to offer additional evidence,
6 they need to move to do that, but just the reply should
7 just not be carte blanche to submit additional evidence,
8 and that's my comment.

9 CHAIR TRACY CHRISTOPHER: All right.
10 Quentin.

11 MR. SMITH: I agree that it shouldn't have
12 new evidence with a reply, but I just had a quick question
13 on number one. Is the sole issue, like, the hypothetical
14 lazy judge that forgot to set it on time? And if that is
15 the issue, couldn't we not just require the judge to set
16 it within five days, but no more than 21 days after
17 filing, and does that resolve the whole problem? We could
18 keep our basic timeline.

19 MS. ORTIZ: If that --

20 CHAIR TRACY CHRISTOPHER: Well, we talked
21 about that.

22 MS. ORTIZ: Uh-huh.

23 CHAIR TRACY CHRISTOPHER: And under version
24 one, the judge, at day 45, based on these timelines,
25 everyone would have to know when day 45 was coming, so,

1 you know, the judge would then have to give, you know,
2 five days' notice, however many days notice of day 45.
3 So, I mean, that's -- the math started to get super
4 complicated in terms of when it was going to be set.

5 MR. SMITH: If they have to set it within
6 five days, then it's not going to run into that issue.

7 CHAIR TRACY CHRISTOPHER: Well, within five
8 days of day 45.

9 MR. SMITH: No, of the -- to the filing, so
10 if they set it within five days of the filing, it's not
11 responsive.

12 CHAIR TRACY CHRISTOPHER: Right. True, but
13 what day do they have to set it by?

14 MR. SMITH: Between 21 and 60.

15 CHAIR TRACY CHRISTOPHER: Yes. If it's
16 possible to do it that way. I think it's complicated.
17 Giana.

18 MS. ORTIZ: Right. I agree that it is more
19 complicated. It also puts a short trigger on the court,
20 which I think we were trying to avoid, and even though it
21 is trying to accommodate for the -- the rare judge who has
22 forgotten or refused to set a hearing until the eleventh
23 hour, the prejudice to the nonmovant is so great that we,
24 after, again, wrestling around with this quite a bit,
25 decided, no, it's better to just have a -- an idea from

1 the moment any motion is filed of how this is going to
2 play out from the time the motion is filed to give
3 predictabilities to everyone, movants, courts, nonmovants.

4 CHAIR TRACY CHRISTOPHER: Harvey.

5 HONORABLE HARVEY BROWN: Roger's issue on
6 reply evidence is in both two and three. We put the exact
7 same language. Just to give you a little bit of the
8 debate within our committee, I was against adding this,
9 because, as I understand the law -- and I could be wrong
10 about this, and I didn't go research it, but as I
11 understand it, a reply can have some evidence, but it's
12 evidence only that shows that the response's evidence is
13 no evidence. So if somebody says the light was green, and
14 the reply says, well, that guy is blind, you can file that
15 evidence to show the response's evidence is no evidence,
16 but I think that's the only reply evidence that's
17 permitted.

18 So then when we were talking about that,
19 Richard said, well, why don't we say "reply evidence, if
20 permissible," and that's why that language "if
21 permissible" was in there. I said I don't think we need
22 that because the current rule handles it just fine, let's
23 just leave it without it, and we said let's present it to
24 the committee. The committee can decide whether they want
25 to leave it as "reply, if permissible" or more like the

1 current rule, which just is handled just by case law.

2 CHAIR TRACY CHRISTOPHER: Let's see if we
3 can focus on do we want the going forward timeline or
4 maintain the going backwards timeline. Quentin is in
5 favor of the going backwards timeline. Does everybody
6 understand those two concepts?

7 Okay. So going forward would be motion
8 filed day one, response is due day 21, no matter what. It
9 doesn't depend on what day the hearing is actually set.

10 Going backwards would be motion is filed day
11 one, judge gets around to setting it, and we go back to
12 our how many days before the hearing does the response
13 have to be filed. So that's the backward going, the way
14 we currently have it. So going forward motion versus
15 going backwards.

16 MS. ORTIZ: For default response deadlines
17 or not.

18 CHAIR TRACY CHRISTOPHER: Right.

19 MS. ORTIZ: Right?

20 CHAIR TRACY CHRISTOPHER: Right. Any
21 discussions on that, because that will help us -- I guess
22 Quentin is in favor of version one. Most of the
23 subcommittee seemed to be in favor of version two or
24 three. Any other discussion among the big committee on
25 which way to go?

1 All right. Yes, Elaine.

2 PROFESSOR ELAINE CARLSON: Since the Texas
3 procedure and evidence section was eliminated from our Bar
4 exam, most students don't take Texas procedures, so it's
5 really important. A lot of young lawyers will be looking
6 at this for the first time. They won't have studied it,
7 because it's not a required course. Those of you who are
8 seasoned in your practice, stay there, because you're
9 going to win all of these cases. So I would go for
10 version two for the simplicity.

11 HONORABLE ANA ESTEVEZ: I didn't -- I just
12 didn't hear you.

13 CHAIR TRACY CHRISTOPHER: She said she would
14 go with version two. Okay. Any other comments on keeping
15 the current structure version one or moving to version two
16 or three, going forward version? Any other further
17 discussion?

18 All right. We'll take a straw poll vote on
19 that, obviously going to be up to the Supreme Court as to
20 which way they would rather do it. Who would be in favor
21 of moving to version two or three?

22 That's pretty much unanimous. Who's
23 against? I see none.

24 All right. Then between version two and
25 three, if we could have a little more discussion about why

1 Giana thinks it's better to keep version two and Harvey
2 thinks it's better to keep version three, or go to version
3 three.

4 MS. PFEIFFER: Can I ask a point of
5 clarification?

6 CHAIR TRACY CHRISTOPHER: Yeah.

7 MS. PFEIFFER: I really like the work that
8 Harvey did in breaking out (c) and making this clearer and
9 more bite-sized, easier to follow, and there's headings,
10 and for anybody who hasn't learned civil procedure,
11 they're going to be able to navigate this and find things
12 they might have missed in the big paragraph.

13 As far as the going forward timeline or
14 going backward, my concern about triggering anything from
15 a hearing date is that you don't know when the judge is
16 going to set a hearing. Sometimes the notices are just
17 not ideal, and we don't always get notice right away, and
18 there's just flukes that happen that make me very nervous
19 about having a deadline running from something I'm not
20 sure I'll get notice of. So from the motion, assuming
21 everything is served properly through our e-filing system,
22 I think it's a far more reliable starting point. So if we
23 could combine the forward running deadline with all of
24 these great stylistic versions, whatever version that is.
25 I'm not sure.

1 CHAIR TRACY CHRISTOPHER: So that's three.
2 Harvey went to the going forward version also.

3 MS. PFEIFFER: Then I'm a strong advocate
4 for three.

5 CHAIR TRACY CHRISTOPHER: Okay. Any other
6 discussions about two or three? Yes, Richard.

7 MR. ORSINGER: It was evident from the start
8 when this was assigned to the committee and then
9 subcommittee that there's a tremendous amount of interest
10 on this committee for people that do this regularly, and
11 there's a lot of pent-up frustration, I think, with the
12 way that it has worked in the past, and my experience in
13 the rule arena is that when you're focusing on something
14 like Rule 166a, because the Legislature made us focus on
15 it, we may not revisit this for another 10 or 15 years if
16 we don't do it now, and so my inclination is whatever --
17 now that we have all of these people paying all of this
18 attention with all of these good ideas, now is the time to
19 implement them. If we don't, then it may be 10 or 15
20 years before it comes back up.

21 CHAIR TRACY CHRISTOPHER: So that is in
22 favor of the more --

23 MR. ORSINGER: I would be in favor of taking
24 three seriously, or if the crowd is in favor of two,
25 moving the good parts of three back to two to make it

1 closer to three, but we may as well just call a spade a
2 spade and say, look, three makes everything easier to
3 read, easier to implement, easier to do, so why don't we
4 just do surgery on three? That's my thought.

5 CHAIR TRACY CHRISTOPHER: Okay. Pete. I
6 mean Tom. Sorry. Tom.

7 MR. RINEY: I prefer three. Harvey, I like
8 what you've done. I think it clarifies, but on paragraph
9 number (9) about issues expressly presented, I think the
10 title of that, the appeal, could be a little bit
11 misleading. I think we might ought to include like
12 "designation of issues" or something like that. I don't
13 have good language, but it would be easy to be careless
14 when you're preparing and responding to a motion and say
15 I'm worried about the motion and the response, not the
16 appeal at this point.

17 CHAIR TRACY CHRISTOPHER: Roger.

18 MR. HUGHES: Well, to give a different view,
19 while I think version three has a lot of useful changes
20 that would be good, my fear is that that's just going to
21 slow down making the changes that we have to change, and I
22 think it would probably be a better idea to focus on the
23 changes that we have to make now, and then the changes
24 that would be a good idea to make things a better world we
25 put off for a little for yet more discussion to focus on

1 those changes, as opposed to, you know, trying to juggle
2 the changes we've got to make and what other ones it would
3 be nice to have.

4 Now, the other thing is that I notice that
5 in almost all of these there is a provision that the court
6 shall file with the clerk of the court and provide the
7 parties with a written ruling not later than X number of
8 days. I looked at that, and I thought of a problem that
9 happened in a county somewhere in South Texas that will
10 remain nameless, and it was a contest between the district
11 clerk and the district judges about whether they had to
12 send orders of the court to the parties or that was the
13 court coordinator's job, and the district clerk took the
14 position as the only thing the rules say I have to send is
15 the final judgment. So if you sign orders, you are the --
16 it's the court's job to get that to the parties, not the
17 district clerk's problem.

18 I don't think that dispute existed
19 elsewhere, but when you read this rule carefully, I could
20 see some eagle eye district clerk going, "Well, you can
21 file it, but I don't have to send it to anybody. That's
22 the judge's problem." So I -- maybe I'm seeing problems,
23 because that got solved politically, so to speak, but
24 maybe this problem doesn't exist elsewhere. Maybe I'm
25 seeing problems that don't exist. I'm just concerned that

1 this then means that the rule puts it on the judge's
2 chambers to get the order to the parties, not the district
3 clerk. That's my observation.

4 CHAIR TRACY CHRISTOPHER: Quentin, and then
5 Lisa.

6 MR. SMITH: Just on three, is there a way we
7 can delete in (c)(2), "unless a different deadline is set
8 by local rule or court, a party may move for traditional
9 summary judgment"? Because I like moving for traditional
10 summary judgment any time someone answers. I don't want
11 to have like a local rule saying I can't do it for a year
12 or something like that.

13 HONORABLE HARVEY BROWN: I couldn't hear
14 you. I'm sorry.

15 MR. SMITH: Oh, sorry. In (c)(2), there's a
16 preamble that says, "Unless a different deadline is set by
17 local rule or court, a party may move for traditional
18 summary judgment at any time." I would suggest getting
19 rid of the preamble.

20 CHAIR TRACY CHRISTOPHER: Okay. Lisa. And
21 before we get into minutia, let's focus on are we keeping
22 it two or are we moving to three.

23 MS. HOBBS: I would be an advocate for
24 version three, much for the reasons that -- that Richard
25 has stated about, like, we just don't look at these

1 enough. If we can all -- when I was rules attorney back
2 in, I don't know, 25 years ago, I would pull out
3 Dorsaneo's old thing any time I changed a rule, and be
4 like what did Dorsaneo do that made this more simplistic
5 that the Court never adopted and can I incorporate some of
6 his ideas of making rules easier to understand, so I think
7 we're moving in the right direction with three.

8 I have had the same problem as you about not
9 getting notice of orders that are not final judgments, so
10 I do not think it's fair to put that only in the Valley's
11 area, but so I do -- I mean, I just thought since it was
12 on the table that I would say, yes, I would love for the
13 clerk to have more responsibility for major dissemination
14 of orders, although a summary judgment order can be a
15 final judgment, sometimes we're expecting the clerk to
16 understand when it is and when it isn't, so we may or may
17 not get notice of a, quote-unquote, final judgment.

18 CHAIR TRACY CHRISTOPHER: Well, it is too
19 bad our two clerks are not here today. Pete.

20 MR. SCHENKKAN: I am a very strong proponent
21 of our going the version three route, but I think,
22 procedurally, for purposes of the committee proceedings,
23 the important thing we ought to think about is the fact
24 that, of course, the decision whether we're going to do
25 version two or version three is by the Courts, so our job

1 should be go through carefully version three so that if
2 the Court wants to do version three, they have a good
3 version, that we fix any specific problems there may be,
4 which lots more heads are now looking at than -- even than
5 the large number that looked at them before.

6 So I'm in favor of having a good discussion
7 about version three, and then I'm hopeful at the end of
8 the day when we've done that there will be a very strong
9 vote in favor of version three.

10 CHAIR TRACY CHRISTOPHER: All right. Rich.

11 MR. PHILLIPS: I'll just say, too, version
12 three is absolutely the way to go. 166a(c) as it sits is
13 a mess. Trying to cram in everything we have to put in
14 now to deal with this is just going to make it worse, so
15 let's not do that and then go back later and try to make
16 it look better. Let's just make it look better now.

17 CHAIR TRACY CHRISTOPHER: All right. Let's
18 take a straw poll on getting into the minutia. Should we
19 start with version two or version three?

20 MS. ORTIZ: Can I say one thing?

21 CHAIR TRACY CHRISTOPHER: Giana, yes.

22 MS. ORTIZ: Just very briefly, on the
23 changes in version two, that is just a bare bones if the
24 Court decides the simplest answer is the way we're going
25 to go, this is the simplest way to incorporate.

1 Everything that's in version two, I believe, is in version
2 three, so if we focus discussion on version three, we will
3 be discussing what's been added to version two.

4 HONORABLE HARVEY BROWN: Yeah.

5 CHAIR TRACY CHRISTOPHER: Okay. Straw poll,
6 all in favor of going over version three, please raise
7 your right hand. All right.

8 MR. ORSINGER: Left hand.

9 CHAIR TRACY CHRISTOPHER: All opposed?
10 Yeah. All opposed?

11 Okay. That is nearly unanimous, one
12 dissenter.

13 MR. ORSINGER: Was that left-handed or
14 right-handed?

15 CHAIR TRACY CHRISTOPHER: I'm so used to
16 saying "raise your right hand" to be sworn, so, you know,
17 it's just -- it's just habit.

18 Okay. Let's start with version three, and
19 who would like to go through it step-by-step of the
20 committee?

21 MR. ORSINGER: Can the record reflect what
22 that vote was?

23 CHAIR TRACY CHRISTOPHER: Yes.

24 MR. ORSINGER: It was unanimous, except
25 for one vote?

1 CHAIR TRACY CHRISTOPHER: Yes. One
2 dissenter. I didn't count, but it was -- yes.

3 HONORABLE HARVEY BROWN: Maybe we could kind
4 of go back and forth, because there's parts of it that I
5 originated, there's parts that she originated, and we've
6 kind of mixed and worked together, so if you don't mind,
7 I'll start first.

8 I do think that (a) and (b), we should make
9 it gender neutral, take out the hises. We kept those
10 separated, but I'm convinced by Chief Justice Gray that we
11 could put those two together very easily into just a
12 subpart (a) that would say something like, "Any party
13 asserting a claim or defense may move for summary judgment
14 thereon." Period, and then the last sentence that's in
15 (a), "A summary judgment, interlocutory in character, may
16 be rendered on the issue of liability alone, although
17 there is a genuine issue as to the amount of damages."

18 CHAIR TRACY CHRISTOPHER: So my only concern
19 about that is it would allow a plaintiff to file a motion
20 for summary judgment with their petition.

21 MS. PFEIFFER: But if they can conclusively
22 establish something at the outset, wouldn't that be okay?

23 HONORABLE HARVEY BROWN: Well, if I can
24 respond, so part (2), (c)(2), takes care of that because
25 it says they may move for a traditional summary judgment

1 at any time after the adverse party has appeared. So that
2 language about when you make the motion is now in a
3 separate rule that is the time to file a motion.

4 CHAIR TRACY CHRISTOPHER: Okay.

5 HONORABLE HARVEY BROWN: So that's why we
6 moved that. We thought that's kind of an aside in (a),
7 let's make it its own rule and tell people exactly when to
8 file the motion.

9 CHAIR TRACY CHRISTOPHER: All right. So
10 you're agreeing with Justice Gray that we can combine (a)
11 and (b) into a simpler version.

12 HONORABLE HARVEY BROWN: But I'm just one
13 person. Yes.

14 CHAIR TRACY CHRISTOPHER: And he provided
15 some language, and I think we'll just let the Court decide
16 that, whether they want to make that change.

17 HONORABLE HARVEY BROWN: Good. Okay.

18 CHAIR TRACY CHRISTOPHER: All right. Moving
19 on to (c).

20 HONORABLE HARVEY BROWN: (c), we then, for
21 subpart (1), put the "Contents of the Motion" as the
22 title, as you can see. We kept the language about what a
23 traditional motion should be. I don't know if anybody
24 wants to debate the phrase "traditional motion," but at
25 least for this time we thought that was a fine way of

1 referring to it. You'll see we put the no-evidence motion
2 and traditional motion all in one rule now, instead of
3 having the no-evidence motion separated, because some of
4 the timing things we thought just worked better to have it
5 all in one place. We're not -- we're not wedded to that.

6 CHAIR TRACY CHRISTOPHER: Any discussion on
7 number (1)? Yes, Lisa.

8 MS. HOBBS: I would strike the word
9 "thereon" and just have "Motion and Proceedings." Just if
10 we're modernizing this, I don't think any of us say
11 "thereon" in our -- in the title.

12 HONORABLE HARVEY BROWN: Oh, yeah.

13 MS. HOBBS: And then on the definition of a
14 no-evidence motion for summary judgment, is there a
15 specificity requirement? I'm going to defer to you, Judge
16 Brown, but I would add -- I would use the actual language
17 from the case law about specificity, too.

18 HONORABLE ROBERT SCHAFFER: You mean the
19 specific elements?

20 MS. HOBBS: Yeah, it's like -- I can't
21 remember where. You must specifically state or you must
22 state the specific elements, but there's a -- there's a
23 specificity rule in there somewhere that --

24 HONORABLE HARVEY BROWN: Well, we do have
25 it, the second sentence, saying it must state the elements

1 that proves there's no evidence. Is there something more
2 you wanted than that?

3 MS. HOBBS: Yeah, specific elements or --

4 HONORABLE HARVEY BROWN: The specific, you
5 want the word "specific"?

6 MS. HOBBS: I just want to follow what case
7 law -- how it's evolved.

8 HONORABLE HARVEY BROWN: Okay.

9 MS. HOBBS: Does that make sense? I think
10 there's a word "specific" in there in the case law that I
11 would be in favor of, because lack of specificity is
12 sometimes the core of my trying to figure out what are you
13 actually saying I don't have.

14 HONORABLE HARVEY BROWN: So add the word
15 "specific" before "elements," or if there's something else
16 in the case law?

17 MS. HOBBS: Yeah, or whatever the case law
18 says.

19 HONORABLE HARVEY BROWN: That seems
20 reasonable to me.

21 CHAIR TRACY CHRISTOPHER: Rich, and then
22 Justice Kelly.

23 MR. PHILLIPS: So one of the things I
24 thought about with this whole thing, which, again, we
25 should do this restructuring, is making sure that -- and

1 maybe even thinking about a comment that this isn't
2 intended to make any substantive changes to the case law
3 that's been developed, right? This is just restructuring
4 the rule, whatever. Because of that I would be careful
5 about adding, like, words to this, because I think what I
6 would do is pull the same language, which I think they've
7 done, out of 166a(i) because that's been interpreted by
8 the courts, and we know what that means, and I would try
9 to -- I think we ought to try not to make what looked like
10 substantive changes to what these rules are supposed to
11 mean when the language has been interpreted by the Court.

12 CHAIR TRACY CHRISTOPHER: So you would bring
13 back in "no evidence of one or more essential evidence of
14 a claim or defense on which an adverse party would have
15 burden of proof at trial."

16 MR. PHILLIPS: Yeah, and then it also says,
17 "The motion must state the elements as to which there is
18 no evidence," which I think is what Lisa was talking
19 about, and that is sort of in there, but I would be in
20 favor of trying to use existing language as much as we can
21 so that we don't look like we're making substantive
22 changes. Unless we're trying to make substantive changes.

23 HONORABLE HARVEY BROWN: So, in other words,
24 you would want to take the language from subpart (i) and
25 just move some of that language in there, verbatim?

1 MR. PHILLIPS: That's what I would do.

2 CHAIR TRACY CHRISTOPHER: Correct.

3 HONORABLE HARVEY BROWN: Okay. I understand
4 that point.

5 CHAIR TRACY CHRISTOPHER: Justice Kelly.

6 HONORABLE PETER KELLY: I have complained
7 about this in this forum before, but having to deal with
8 the summary judgment in the past where the style is a
9 traditional, prayer of relief was traditional. There was
10 evidence attached, proposed orders of traditional summary
11 judgment, but there was a sub clause in one footnote that
12 said "and there's no evidence of causation." So,
13 technically, that complied with the rule that stated the
14 ground for which there was no evidence.

15 So one thing I've been wanting to see for
16 years is -- and on the court of appeals, having to deal
17 with this, what was this motion? Was it traditional? Was
18 it no evidence? Have a separate and specific statement of
19 the issues on which summary judgment is sought and under
20 what standard. So it -- we do that in, you know,
21 appellate briefs. We state the issues presented, but so
22 it's clear on page one or page two what issues are
23 traditional, what issues are no evidence, so you're not
24 sneaking something in with a sub clause that can later be
25 affirmed. I think maybe the phrase "separately and

1 specifically" might accomplish that.

2 CHAIR TRACY CHRISTOPHER: So if case law
3 currently allows you to combine the two --

4 HONORABLE HARVEY BROWN: Yeah.

5 CHAIR TRACY CHRISTOPHER: -- and I assume we
6 don't want to change that, do we want to acknowledge it?

7 HONORABLE PETER KELLY: The universe of
8 Jacobo hybrid motions, specifically acknowledge that in
9 the rules?

10 CHAIR TRACY CHRISTOPHER: Correct. Lisa.

11 MS. HOBBS: I sort of accept Rich's comment
12 on my comment, and I want to say there is no way in a
13 decent amount of time that gives more global understanding
14 of the changes the Legislature has made to summary
15 judgments that we're going to work out every flaw of
16 current summary judgment practice, so I'm kind of a little
17 weary of us solving all of the summary judgment problems
18 right now, because I can't tell you how many people don't
19 know this bill exists, and they do follow the rule
20 changes, and so I just -- yeah. Yes, I would like to do
21 -- acknowledge that there is hybrid motions, but I'm also,
22 like, I feel like the more we talk about this today I'm
23 going to backtrack from that statement as well.

24 CHAIR TRACY CHRISTOPHER: All right.
25 Something to think about. It's not in our current draft,

1 so we'll move on unless someone has language they want to
2 propose. Let's move on to number (2).

3 HONORABLE HARVEY BROWN: All right. So we
4 had a comment earlier about should we take out the first
5 clause of section (2), which references deadlines set by
6 local rule or court order. The reason that is in there is
7 because a lot of the judges do put in their scheduling
8 order, "No summary judgment before this date" or this is
9 your deadline for -- or this is the earliest you can file,
10 because they don't want to have a lot of motions for
11 continuance on no-evidence motions, so that's the reason
12 we put that in there.

13 CHAIR TRACY CHRISTOPHER: Judge Schaffer.

14 HONORABLE ROBERT SCHAFFER: I think that
15 clause should stay in there, because, as a practical
16 matter, the judges are probably going to do it that way
17 anyway. If we -- if the judge issues a docket control
18 order, they're not likely going to stay with it and go
19 with the dates in that order, and so I don't -- I don't
20 advocate taking that clause out of the rule.

21 CHAIR TRACY CHRISTOPHER: Pete.

22 MR. SCHENKKAN: I think -- I recall the
23 discussion by which we got to this, and I think that some
24 of the sensitivity was over the different deadlines being
25 set by local rule, with the whole reason we got into this

1 situation being a concern that we didn't have a uniform
2 statewide practice on summary judgments that was resulting
3 in them being promptly decided.

4 So if we were, perhaps, to consider paring
5 this unless a different deadline is set in the court's
6 docket control order, that surely recognizes something
7 which most people would think is a good potential
8 variation of the deadlines and stay away from the rest of
9 it. Do we really need the local rule option in here? Or
10 is that -- and do we need the court order to be broader
11 than scheduling orders?

12 CHAIR TRACY CHRISTOPHER: Rich, and then
13 Judge Kelly.

14 MR. PHILLIPS: Yeah. I'm okay with this if
15 we take out the words "local rule." There's so much
16 mischief that can be put in there. As somebody who has
17 had to live with the Dallas County judges who wanted to
18 enforce a 25-page limit on the motion and all of your
19 evidence, by not even a local rule that most people didn't
20 know about, I am not in favor of encouraging local rules
21 that nobody knows where they are. Scheduling order, fine,
22 but I would strike "local rule" out of that.

23 CHAIR TRACY CHRISTOPHER: Justice Kelly.

24 HONORABLE PETER KELLY: The problem is, is
25 that that first sentence makes sense if it's merely

1 Rule 166a as promulgated by the Supreme Court, but now we
2 have a legislative mandate that actually says,
3 notwithstanding, this may not be modified, repealed by
4 Supreme Court rule, or, presumably, any local court rule.
5 So these deadlines are put in that -- the new deadlines
6 per the statute can't be modified by a local rule or a
7 court order or a DCO, and to avoid confusion, we can't say
8 some of these deadlines -- some of these rules can be
9 modified by court order and some can't because of the
10 legislative. It's probably better to say that none of
11 them can be modified by court order, but we do have a
12 problem with what the Legislature is telling us to do.

13 CHAIR TRACY CHRISTOPHER: Lisa, and then
14 Harvey.

15 MS. HOBBS: I think that's a fair point,
16 except I think it could be unless a different deadline for
17 filing is set by local rule or court order, but if you do
18 "for filing" in that, that might fix that, that problem,
19 which I agree, Judge Kelly, is a --

20 CHAIR TRACY CHRISTOPHER: Harvey.

21 HONORABLE HARVEY BROWN: My point was
22 similar. This is only a local rule for moving, i.e., for
23 filing the motion. It's not for setting the hearing or
24 when you rule, because I agree with you. We can't change
25 what the Legislature has done on those issues.

1 CHAIR TRACY CHRISTOPHER: So I think there
2 was some concern or question that the judges are going to
3 have -- will feel like they have to back up that date 150
4 days to give themselves 60 days to set it and 90 days to
5 decide it, you know, before a trial date.

6 Now, I mean, obviously, that's just kind of
7 the consequence of having these deadlines. So but, you
8 know, if that's going to be the case, then it should be in
9 the court order. If that's, you know, when the court
10 wants it filed, by then, that many days before the trial,
11 then, you know, the judge is going to want to put it down.

12 HONORABLE HARVEY BROWN: Yeah, I think the
13 withdrawal of the "local rules" language is a good idea.

14 CHAIR TRACY CHRISTOPHER: Okay. Moving on
15 to section (3).

16 HONORABLE HARVEY BROWN: Section (3), you'll
17 notice we asked -- and this is a suggestion of the trial
18 judges. We asked for the motion to be specifically titled
19 "Motion for Summary Judgment." It occurred to me as I'm
20 sitting here that we could actually get back to Peter's
21 comment earlier, and we could say it should be labeled
22 either "Motion for Traditional Summary Judgment" or
23 "Motion For No-Evidence or Combined Motion," and I don't
24 know if you would want to do that, but that would at least
25 address your problem. But we do want the judges to know

1 what the motion is so everybody is aware of the deadline.
2 So that's the reason for the first sentence. That was at
3 the request of the trial judges.

4 And then we don't want them sitting on it is
5 the reason for the second sentence. We want them to
6 request the hearing so all of the stuff can get triggered
7 and going. Most of paragraph (3) is also -- or the next
8 couple of sentences I think are in version two also.
9 Giana, you can correct me if I'm wrong. Up until the last
10 sentence. So why don't we not talk about the last
11 sentence right now and come back to that? Instead, talk
12 about the second or third sentences. Giana, is there
13 anything you want to add?

14 MS. ORTIZ: In version two, we don't have
15 that the moving party must make a written request for
16 hearing upon filing of the motion and serve that. So that
17 part is different, but then we do have the withdrawal
18 specificity in both versions two and version three, which
19 follows that.

20 HONORABLE HARVEY BROWN: Thank you for
21 reminding me. Yeah. I think that was a trial judge
22 request that we got, that we want people to not just file
23 and nobody knows about it. We want you to make a request
24 for the hearing --

25 MS. ORTIZ: Uh-huh.

1 HONORABLE HARVEY BROWN: -- or submission
2 right away.

3 CHAIR TRACY CHRISTOPHER: Lisa, Macey, and
4 then Rich.

5 MS. HOBBS: In Travis, at least, we do an
6 electronic request for -- I don't know if that is a
7 written request, but we do everything online now, and I
8 doubt we're unique in that. Maybe we are. I don't know.
9 And then, but, in general, I don't know what the word
10 "immediately" means commensurate with the filing. You
11 know what I'm saying?

12 HONORABLE HARVEY BROWN: Yeah.

13 MS. HOBBS: I think what we're saying is
14 request a hearing right away. That helps the judge know
15 that his timeline or her timeline is ticking, and so just
16 some --

17 HONORABLE HARVEY BROWN: Good point.

18 MS. HOBBS: Yeah.

19 CHAIR TRACY CHRISTOPHER: Macey.

20 MS. STOKES: Yeah. That was my point, is
21 "immediately" means different things to different people,
22 and I would think "contemporaneously" might be a little
23 clearer, and I know in some courts, you know, like we
24 don't serve our notice of a hearing until we've talked to
25 the court coordinator and gotten a date, but I guess, you

1 know, and so maybe you wouldn't be able to immediately get
2 that date from the court coordinator, but I guess you
3 could still serve a request and then notice it. I mean,
4 there might be a little bit of a disconnect between those
5 things.

6 CHAIR TRACY CHRISTOPHER: So "immediately"
7 in the first sentence is from the finding of fact rule.

8 MS. STOKES: No, I meant the second
9 sentence, sorry, for clarity, that you have to immediately
10 file a written request for an oral hearing.

11 CHAIR TRACY CHRISTOPHER: And I think I
12 threw out at some point in our discussions whether there
13 needs to be a request for a hearing at all, since it's the
14 judge's responsibility to set it.

15 MS. STOKES: That's a good point.

16 CHAIR TRACY CHRISTOPHER: So, I think, Rich,
17 and then Ana.

18 MR. PHILLIPS: That's what I was going to
19 say. I don't understand what the work this sentence is
20 doing. If filing a summary judgment motion triggers a
21 deadline for a hearing, then why are we making parties go
22 through the rigmarole of saying, "Hey, that thing I filed
23 that you have to have a hearing on in 60 days, I'd like to
24 have a hearing." I don't understand the work we're doing,
25 and we're worrying about what "immediately" means, and we

1 don't know how the 254 counties handle setting a hearing.
2 If you file a motion, that's called to the court's
3 attention under the first sentence there. What other work
4 do we get from a request that you do what the statute says
5 you have to do?

6 CHAIR TRACY CHRISTOPHER: Judge Estevez.

7 HONORABLE ANA ESTEVEZ: So I somewhat agree
8 with you. What I wanted to state was what we have been
9 talking about how we're going to do it in our office.
10 We're now getting reports every day, so we know every day
11 whether a motion for summary judgment was filed, but I
12 think we should just change this to immediately request if
13 they want an oral hearing. I'm just going to have her set
14 it either every Friday afternoon, you know, after day 45,
15 anything that came in. If they want an oral hearing then
16 they have to call and ask for it. Other than that, day 45
17 will be their -- or either day 45 or Friday or whatever we
18 decide our policy is going to be. We will set it by
19 submission on a certain date, and we will use that as our
20 pattern every time, and no one is going to have anything
21 to do with it, because, frankly, they're not coming in, so
22 it should be at the time that I have, and I'll be the only
23 one setting that time aside as soon as this rule comes in.

24 But if you want an oral hearing, you better
25 call, because you're going to be in the middle of my jury

1 trial, and it's not going to work, and you're not going to
2 get an oral hearing. So I would just suggest that here we
3 should say, "The moving party shall immediately make a
4 request if they desire an oral hearing," in writing, and
5 take out the submission part, because after 60 days, I'm
6 going to have had a hearing one way or the other, and if
7 they never requested the oral hearing, then it was done.

8 CHAIR TRACY CHRISTOPHER: Okay. Judge
9 Keltner, and then Richard.

10 HONORABLE DAVID KELTNER: Two things. I do
11 think we need to talk about the oral hearing issue, but
12 what my comment was, is I think it's a good idea not to
13 have the parties set the hearing. I think that the
14 discussion is right that we ought to have the court do it,
15 but if we're going to have the court do it, I think we
16 ought to require the parties to designate their motions,
17 as, Chief Justice, you said, as traditional, hybrid, no
18 evidence. I think up front that's going to be an
19 important message, because the difference in those can
20 make a difference of in the hearing itself. So I would
21 put that requirement in. But we need to talk about the
22 oral stuff.

23 CHAIR TRACY CHRISTOPHER: Let's see.
24 Richard.

25 MR. ORSINGER: One of the suggestions that

1 was made at the subcommittee level is to mimic the Rules
2 of Appellate Procedure which require you to request oral
3 argument on the front page of your brief. We don't have a
4 brief, but we could have a requirement that let's just
5 assume the default is submission without oral argument,
6 and if the movant wants oral argument, they should put on
7 the face of the motion, rather than bury it on the 23rd
8 page. That's a possibility.

9 CHAIR TRACY CHRISTOPHER: Pete, Justice
10 Kelly, Connie.

11 MR. SCHENKKAN: (c)(3) is one of the two
12 places that version three is still trying to do too many
13 things in one section, one paragraph, for great clarity,
14 and I think to the extent we can improve that, we'll get
15 closer to something that's going to really be worth the
16 trouble to do version three now. So for the first
17 proposal, move the first half of the first sentence about
18 entitlement up to (1), so after you say a traditional
19 motion shall do this and a no-evidence motion shall do
20 this, then have a sentence that says and you can do a
21 traditional motion and label it a traditional motion or a
22 no-evidence motion or a combined traditional and
23 no-evidence motion.

24 HONORABLE DAVID KELTNER: Excellent idea.

25 MR. SCHENKKAN: And that gets -- that gets

1 you a little bit of the stuff out of the way, and then the
2 things we've just been talking about, shortening what
3 we're saying about the role of the moving party, which I
4 think is now down to say, "I want an oral hearing," and
5 that could go up there in (1) as well. "The moving party
6 shall say if they want an oral hearing."

7 So that's in the contents of the motion, and
8 now we're down to -- it seems to me, we've got the job of
9 the clerk is left as one thing. We have a withdrawal of
10 the motion, which it sort of appears out of the blue, and
11 then we have what happens if the court fails to set a
12 hearing. We've got the three kind of subparts, and I
13 haven't gotten any farther on those, but we're getting
14 closer to clarity if we move these other things.

15 CHAIR TRACY CHRISTOPHER: I think it was
16 Justice Kelly and then Rich.

17 HONORABLE PETER KELLY: One problem with
18 changing the title or putting the part of the title being
19 traditional or no evidence, there's all sorts of cases out
20 there that say it's not the title of the motion, it's the
21 substance of the motion, and that's precisely what I
22 encountered, was titled traditional but there was a clause
23 that was no evidence. So if you disregard the title,
24 you're still stuck with that.

25 Secondly, I think you could change it to

1 have the requirement that the title, as Richard said, say
2 whether it's on hearing or on submission. And I think
3 there's also an OCA -- it's been a while since I've
4 actually filed anything, but I think when you're filing
5 something, e-filing it, you click the type of motion it
6 is. You can specify whether it's summary judgment, having
7 those documents when you're e-filing designate whether
8 it's on hearing or on submission.

9 CHAIR TRACY CHRISTOPHER: Well, but the
10 court wouldn't know that. However it's designated
11 whenever it's filed, the court wouldn't know that. I
12 think it was Rich.

13 MR. PHILLIPS: Yeah. So understanding sort
14 of the concept of I want to know if it's going to be oral
15 or written, I just think that's something to be left to
16 the counties, to the judges, because it's done differently
17 in every county; and given that, I don't think we need to,
18 in the rule, try to come up with a way to have a statewide
19 something about getting your hearing, since it's going to
20 be different county by county. I think filing the motion
21 under the statute is a request that we have a hearing on
22 it, because the statute says once I file it, it has to be
23 heard in 60 days, and whatever the procedures are for
24 getting an oral hearing or telling the court you want
25 written submission, I don't know that we can set that

1 statewide.

2 The other thought -- and I really like, sort
3 of because (3) is long, the withdrawal thing, Pete's
4 comment. I think we ought to break withdrawal out into
5 its own sub thing. If we're going to have a whole thing
6 about withdrawing your motion, then there should be (6),
7 withdrawal of motion, and put it all in there.

8 MR. SCHENKKAN: And I think, if I may just
9 reinforce that, my understanding as someone who -- because
10 I do regulatory litigation, and we rarely have summary
11 judgments, practically ever. I'm listening to it more or
12 less for the first time, that the function of the
13 withdrawal is a lot of the time, as I understand it, a
14 motion for summary judgment is filed to force the other
15 side's lawyer to think seriously about whether this would
16 be a good time to talk to the client about settling this
17 thing, and as soon as it's served that agenda-forcing
18 purpose, if it makes any progress along those lines, it's
19 quite likely that the motion will be withdrawn.

20 So it's useful to have it as a separate --
21 its own separate subpart of (c) for that very purpose,
22 that everybody understands this is something that can
23 happen in a lot of these cases, because the summary
24 judgment has -- the filing of the motion has served its --

25 CHAIR TRACY CHRISTOPHER: Lisa.

1 MR. SCHENKKAN: Purpose, its dynamic
2 purpose.

3 MS. HOBBS: Your comment reminded me of 91a
4 and just, like, the tomfoolery that can sometimes go on
5 about withdrawing, and so I can't -- I can't -- this
6 thought came to me as Pete was talking. So is there a
7 deadline to withdraw? Does that make sense? Like, are we
8 creating a lot of work for the other side and then it's
9 withdrawn at the last minute?

10 CHAIR TRACY CHRISTOPHER: Well, that happens
11 all the time.

12 HONORABLE ANA ESTEVEZ: They get an out.
13 They get an out.

14 MS. HOBBS: I know.

15 CHAIR TRACY CHRISTOPHER: A lot of people
16 don't know that. Let's see. Roger, and then Giana.

17 MR. HUGHES: Well, I'm still trying to
18 figure out what's the real value of having the rule tell
19 you how to label the motion, because I don't know that we
20 have any other rule that says a motion has to be called
21 that specific name. I agree with Justice Kelly. It's the
22 substance that determines what it is, so I began to ask
23 myself why are we putting a title, and my first thought
24 was, well, so the clerk will know to tell the judge, and
25 I -- I'm not sure clerks have a real trouble figuring out

1 that if you call it a motion for summary judgment in the
2 title that they're supposed to bring it. So I'm not sure
3 that putting this in a rule is going to help the clerks,
4 because most parties will know that's what it is, that's
5 what you call it, and the clerk is going to see that and
6 tell the judge.

7 So then where the discussion seemed to be
8 going was that this is somehow information for the judge,
9 is it a traditional motion, is it a hybrid, or is it a
10 pure no-evidence, but then I'm going, well, why does -- I
11 mean, number one, how is this information going to get to
12 the judge? Because all the clerk is going to tell them is
13 it's a motion for summary judgment, you have to do
14 something in X number of days. So is -- what is the title
15 helping the judge decide to do, if I grant an oral hearing
16 or just a written submission only?

17 Well, I think in most cases trying to decide
18 whether the motion is -- which it's best suited for is
19 going to require actually looking at the motion. So, once
20 again, I bow to the judges who are actually having to live
21 with the rule as it is -- pardon me, the statute as it is
22 now. When they get this list, when they get this
23 information, is it really helpful to them to know hybrid,
24 traditional, or no-evidence? Like I said, if -- if it's
25 not helping the clerks and it's not helping, really

1 helping, the judges, I'm not sure why we want to have the
2 name in, because all I can see is that's just another way
3 to ding somebody, is like, "Well, you didn't call it a
4 motion for summary judgment. You called it a motion for
5 summary disposition, so your motion gets denied."

6 So, I mean, I would like to -- I suppose
7 what I would really like to hear from is the judges about
8 whether simply having the label and the title is going to
9 help them make some decision about how -- whether to hold
10 an oral hearing or a written submission.

11 CHAIR TRACY CHRISTOPHER: Okay. I think we
12 have Giana, and then Judge Keltner.

13 MS. ORTIZ: I believe that the titling the
14 motion, the written request for a hearing, and then the
15 notice of the past due summary judgment at the end of part
16 (3) were all sort of added as backstops for the courts,
17 just continuing to raise flags to the court that you need
18 to do something, you need to do something. I don't
19 disagree with eliminating that, because, I mean -- if the
20 Court thinks that courts will put in their own backstops,
21 and we don't need to make lawyers file all of these
22 different things in order to keep courts on their
23 timelines.

24 And then on the "no earlier than," I think
25 we've got it as 35 days here, but that's another date that

1 could be, you know, reduced if the Court feels that like
2 35 to 60 is not enough time. 25 days. And then, finally,
3 I take responsibility with that "withdrawal" sentence
4 being where it is. It does look strange now, as I look at
5 it in this meeting. The reason I think that that was
6 placed right there is because it is necessary to interpret
7 the next sentence, which is from the statute, unless a
8 motion is withdrawn it needs to be heard within X days.

9 So if we remove the definition of
10 withdrawing a motion from that paragraph, which I don't
11 disagree with doing that, I would bump it up before
12 setting oral hearing, either as part (2) in version three
13 or as a separate subparagraph before part (3).

14 CHAIR TRACY CHRISTOPHER: Judge Keltner.

15 HONORABLE DAVID KELTNER: I was actually
16 going to respond to Roger. I do think it makes a
17 difference of what type, because if it's no-evidence
18 summary judgment and that is it, pretty easy. There's
19 either evidence or there's not. It gets submitted. If
20 it's hybrid, it's a bit more difficult. If it's
21 traditional, it's more difficult, and the court has to do
22 some additional things.

23 The other thing is we are not yet educating
24 younger lawyers on the difference between the three, and
25 that accounts for Peter's situation. He's exactly right.

1 We see that all the time. I've seen more appeals where we
2 see a grant of a summary judgment that was titled one
3 thing and that was another, and I don't know that that
4 impacts here, but I think it is -- this is a good thing
5 for practitioners to know that the rules acknowledge a
6 significant difference, and you ought to, too, and it will
7 be up front in the rule.

8 On the -- the issues of calling it to the
9 court's attention, we've really not gotten to that. If
10 we're going to do that, you're doing it after the period
11 of time the deadline has run. Now, we do that with
12 findings of facts and conclusions of law already. Maybe
13 that's a good issue to do.

14 Final thing, on the hearing, I don't think
15 the party requesting the relief ought to be the sole --
16 sole person requesting a hearing. Obviously, if your
17 whole case is going to be dismissed, you ought to have a
18 say in it. So I think the issue is either if that goes to
19 the court or either party makes a request if they want
20 one, and I think that's going to be important for
21 practitioners.

22 CHAIR TRACY CHRISTOPHER: Bill.

23 HONORABLE BILL BOYCE: So to decouple what
24 the motion is called from what the motion does, is there
25 any appetite to tweaking (c)(1), the contents of the

1 motion, to have to require a separate issues presented,
2 and within that say, "and the issues presented shall
3 specify whether or not it's" -- "whether the particular
4 issues or grounds are no evidence or traditional"?

5 CHAIR TRACY CHRISTOPHER: Yes, but I think
6 Lisa's correct that, you know, the devil is in the
7 details, and Justice Bland has said this is the last time
8 we're going to be talking about it because they've got to
9 get a rule out. So, again, I think we're sort of in the
10 -- unless over lunch, which we're going to be taking
11 fairly soon, we come up with some concrete language, it
12 might be difficult to be making these changes on the fly,
13 is my only concern. R. H.

14 HONORABLE R. H. WALLACE: This goes back to
15 the phrase that the clerk shall immediately call such
16 motion to the attention of the court. Is there a
17 universal understanding as to how the clerk is going to do
18 that?

19 CHAIR TRACY CHRISTOPHER: You know, we just
20 took that language from the finding of fact rule and have
21 left it.

22 HONORABLE R. H. WALLACE: I know, but this
23 is a sea change. Maybe I was the odd duck, but as a
24 presiding judge, I could have cared less when a motion for
25 summary judgment was filed until it got set on the docket

1 for a hearing. So I think it's important.

2 CHAIR TRACY CHRISTOPHER: Yeah, but now you
3 have to set it.

4 HONORABLE R. H. WALLACE: Exactly. You need
5 to know when it's filed.

6 CHAIR TRACY CHRISTOPHER: Right.

7 HONORABLE R. H. WALLACE: So does the clerk
8 just sending snippets to your court coordinator constitute
9 notice that it's been filed? That's kind of what they do
10 in Tarrant County, but I don't know.

11 HONORABLE ANA ESTEVEZ: I'm getting a motion
12 for summary judgment docket every day that they ran the
13 whole entire county, so and this is what it looks like.

14 HONORABLE R. H. WALLACE: But it's
15 different. I mean, I'm thinking that it's going to be
16 different from county to county.

17 HONORABLE ANA ESTEVEZ: Right.

18 CHAIR TRACY CHRISTOPHER: Well, there's
19 definitely going to be education needed. Tom.

20 MR. RINEY: I think this issue is real
21 important, and I wish the district clerk representatives
22 were here today, too, because I keep hearing, for these
23 rural judges who have four or five counties, they've got
24 four or five district clerks that they're dealing with,
25 different levels of sophistication, shall we say, and, you

1 know, those judges, they're really busy because they're
2 handling all kinds stuff. They may only be in the county
3 a few days a month. This is really going to create
4 problems for them, and I would just like for us to be very
5 sensitive to that and try to have, if not in a rule, maybe
6 some understanding with the clerks about how this is going
7 to work, because it's going to create some real problems.
8 I'm telling you, this is going to be a big change.

9 CHAIR TRACY CHRISTOPHER: Well, that's why I
10 wanted the past due notice, so I was the one advocating
11 for that. Rich, and then Judge Keltner.

12 MR. PHILLIPS: And I don't know if I'm
13 jumping ahead of where we want to be, but I do have one
14 other thing in part (3) that confuses me, and it's the
15 verb "set." "The court shall set the motion for hearing
16 not later than the 60th day." We don't mean you have 60
17 days to set it, right? You think about setting the motion
18 is I'm sending out the notice saying the motion is going
19 to be heard on X day. They have to hold the hearing
20 within 60 days. So every time in here we say that it
21 shall be set no earlier than the 35th day or the court
22 shall set the motion for oral hearing, we need to be
23 careful about that verb, because I think what we mean is
24 the court shall hold the hearing within that time period,
25 not set the hearing within that time period.

1 HONORABLE ANA ESTEVEZ: Hear, hear.

2 CHAIR TRACY CHRISTOPHER: Giana. Oh, I'm
3 sorry, Connie.

4 MS. PFEIFFER: That's okay.

5 MS. ORTIZ: Just a quick note on that, is
6 that that is how the statute is drafted in the part that
7 says we cannot modify it and that the Court can't modify
8 it, so --

9 MR. SCHENKKAN: Well, you can say down in
10 the comment, "by which we mean" --

11 MS. ORTIZ: Right. And so House Bill 16
12 uses that "set the motion for hearing."

13 MR. PHILLIPS: The Legislature was unclear.
14 Shocking.

15 CHAIR TRACY CHRISTOPHER: Connie.

16 MS. PFEIFFER: I have a concrete language
17 proposal, which is to strike the second sentence. This is
18 the one dealing with the requesting the oral hearing or
19 written submission. Strike the whole sentence and say,
20 "Either party may request an oral hearing by stating that
21 request on the cover of its filing," and just kind of like
22 what the appellate courts do; but, you know, the default
23 would be a written submission, and you can request it, but
24 if it's on the cover, everybody knows you're requesting
25 it.

1 HONORABLE ANA ESTEVEZ: Well, would that be
2 when they file the response, though? So that might be 21
3 days later, and there's not that much time to set an oral
4 hearing. You've lost 21 days.

5 MS. PFEIFFER: Well, and I don't think --
6 first of all, I agree with David. Either party should be
7 able to make this request, not just the movant, and it
8 might not be until you get to the reply you realize, oh,
9 now I want an oral hearing, but it wouldn't be the
10 exclusive way to do it. You can still call the court and
11 notify everybody, but this is just one efficient way of
12 getting the request in writing and on notice to everybody.

13 CHAIR TRACY CHRISTOPHER: Yes, Judge
14 Estevez.

15 HONORABLE ANA ESTEVEZ: Can we deny -- like,
16 I deny oral hearings, and I tell them they have to have a
17 reason to have an oral hearing, except for just to bill
18 their client.

19 CHAIR TRACY CHRISTOPHER: Case law says you
20 can deny an oral hearing. Case law says it can be on
21 submission.

22 HONORABLE ANA ESTEVEZ: Has that changed, is
23 what I'm saying?

24 CHAIR TRACY CHRISTOPHER: No.

25 HONORABLE ANA ESTEVEZ: Has the statute in

1 any way changed that? Because what my concern would be is
2 they do the reply, and they, you know, seven days before
3 and now all of the sudden they want an oral hearing.

4 Well, my submission hearing was at a certain point, and
5 I'm not going to be able to hear it within that 60 days
6 now, and so I'm going to be in violation of a statute, and
7 I'm going to be violating this code of conduct if I give
8 you an oral hearing. I don't think that will happen all
9 the time, but I'm just concerned that I want to make sure
10 that none of the language somehow requires a court to
11 change a submission date to an oral hearing that we don't
12 make it appear that you're entitled to one just because we
13 say "may request."

14 CHAIR TRACY CHRISTOPHER: I think you could
15 probably go into your 60 to 90-day good cause area if you
16 pull it up on the submission docket and you start reading
17 it and you say, "Oh, both sides want oral argument," you
18 know, I've got -- I've got this window between 60 and 90
19 to give you that oral hearing. That's what I -- that's
20 what I was thinking of that I would agree with you, that
21 if I was a trial judge they would be on the submission
22 docket until I looked at it and said, "Oh, okay, you
23 know" --

24 HONORABLE ANA ESTEVEZ: Right.

25 CHAIR TRACY CHRISTOPHER: -- "let's see if I

1 can find an oral argument for you." I don't know what
2 other people were thinking, but that's what I was thinking
3 in terms of how that, you know, might work.

4 HONORABLE DAVID KELTNER: And that's what we
5 were discussing as well, but that would be -- the
6 important thing here, and I think the important thing for
7 the Court, is going to be this. Remember, the energy
8 industry right now is making rural courts very relevant,
9 and those are courts that may have four to five counties.
10 The judge is in a specific county two or three days. If
11 there's not a mechanism to alert the judge to set it, it's
12 going to create some problems, and you're seeing in the
13 appeals that are coming to your court the counties that
14 they are being tried in. They're great judges, who are
15 trying very hard, doing all kinds of work, but they need
16 as much notice as they can get, and, candidly, they
17 appreciate it when you send things to them to do that, and
18 they're very receptive, but there's got to be a mechanism
19 in the rule to alert the judge, as much as we can, for
20 people who are riding a docket.

21 CHAIR TRACY CHRISTOPHER: All right. Let's
22 take a lunch break. We'll try 45 minutes, because we're
23 still have quite a bit on the summary judgment motion.

24 (Recess from 12:31 p.m. to 1:18 p.m.)

25 CHAIR TRACY CHRISTOPHER: Harvey, are we

1 sill on -- we're still on (3).

2 HONORABLE HARVEY BROWN: Yes.

3 CHAIR TRACY CHRISTOPHER: Okay.

4 HONORABLE HARVEY BROWN: I think I already
5 commented on the last sentence was a result of your
6 comments at the last meeting, so if anybody wants to talk
7 about that last sentence.

8 CHAIR TRACY CHRISTOPHER: Okay. So the --
9 the date about the oral hearing shall be set no earlier
10 than the 35th day after the motion was filed.

11 HONORABLE HARVEY BROWN: Yes.

12 CHAIR TRACY CHRISTOPHER: That's based on
13 the extended timelines.

14 HONORABLE HARVEY BROWN: Yes. 21 days and
15 seven days.

16 CHAIR TRACY CHRISTOPHER: Okay. And should
17 we talk about that now, or should we talk about that -- or
18 you think we've already voted on it?

19 HONORABLE HARVEY BROWN: We did vote on it
20 once before. There was some discussion maybe even making
21 it 45 days, but 35 was kind of minimally voted on before.

22 CHAIR TRACY CHRISTOPHER: Okay. My trial
23 judge friends are still unhappy with the extensions and
24 wonder whether it would be possible to perhaps do it by
25 level three cases get more time and keep level one and

1 level two at the current versions.

2 HONORABLE HARVEY BROWN: I suppose that's
3 possible, just do we want to make the rule that much more
4 complicated, but, I mean, earlier in my career I did a
5 fair amount of promissory note work, and if my bank had
6 had to wait two extra weeks, I don't think it would have
7 changed anything.

8 CHAIR TRACY CHRISTOPHER: Yeah. Yeah. I
9 think they're thinking about it from a, you know, backing
10 up to the time of trial, and when these motions for
11 summary judgment are going to be filed, because people are
12 afraid that, you know, you file a motion for summary
13 judgment 30 days before trial, right, or you file a motion
14 for summary judgment 60 days before trial, so basically
15 we're just -- judges aren't going to be ruling on them
16 with the extra time built in.

17 HONORABLE HARVEY BROWN: Yeah, I'm not
18 strongly opposed to making a different rule for one and
19 two instead of three, level three.

20 CHAIR TRACY CHRISTOPHER: I agree with you
21 that it would make the rule a lot more complicated.
22 What is our deadline in federal court for filing a
23 response to the summary judgment?

24 HONORABLE HARVEY BROWN: I think that's set
25 by the judges individually. I think some federal judges

1 have 21 days, some have 30. I don't think anybody would
2 have as short as 14, but I just don't remember.

3 MR. RINEY: I think it's local rules,
4 generally, for the districts.

5 CHAIR TRACY CHRISTOPHER: Okay. All right.

6 MR. RINEY: It often was 14 days.

7 CHAIR TRACY CHRISTOPHER: Yeah, I thought I
8 had tried to look for it and couldn't find it, because if
9 we are trying to make it a little bit, you know, on the
10 going forward basis, to the extent we could follow a
11 federal rule, but if they don't -- it's not in the rules
12 of procedure.

13 HONORABLE HARVEY BROWN: I could be wrong
14 about that, but I do remember that you guys looked at it
15 in June and found some variety.

16 MS. ORTIZ: Local, right. Yes. I actually
17 don't remember looking at other districts, but in the
18 Northern District it's 21 days by local rule. I'm not
19 sure if there are any districts with 14, but that's --

20 CHAIR TRACY CHRISTOPHER: But 21 seemed to
21 be sort of a --

22 MS. ORTIZ: Yes.

23 CHAIR TRACY CHRISTOPHER: -- common
24 denominator in a lot of them?

25 MS. ORTIZ: Yes. I --

1 HONORABLE HARVEY BROWN: In the Northern
2 District, it's by local rule. The federal cases I have
3 dealt with, we have usually, frankly, more than that, but
4 that's by court order.

5 MS. ORTIZ: Yeah. Yeah.

6 CHAIR TRACY CHRISTOPHER: Okay. So then
7 we're on the last sentence, right, of section (3)?

8 HONORABLE HARVEY BROWN: Yes. Or second to
9 last, excuse me. The one with the notice of past due
10 summary judgment setting.

11 CHAIR TRACY CHRISTOPHER: Right. So I know
12 we had some people that said they didn't like it or didn't
13 think it was necessary. Any other comments? Yes, Connie.

14 MS. PFEIFFER: Well, I had a reaction to it,
15 probably because this is very reminiscent of the notice of
16 past due findings of fact and conclusions of law, and
17 that's probably the concept here, and what gave me pause
18 is that that's a context where you're preserving
19 something, and if you fail to do it, you haven't fully met
20 your preservation requirements. Whereas, here, it almost
21 strikes me as it's a useful thing to do to help get the
22 court's attention, but then I worry if the party fails to
23 do this, is there something that the nonmovant would take
24 out of that or the court would take out of that? Are we
25 in any way suggesting that now the duty is shifted to the

1 movant to make sure this happens? And that gives me
2 pause, and I don't have a proposed solution, because I do
3 like the idea of trying to get the court's attention, but
4 I don't like the idea of suggesting that a movant who
5 fails to do this has waived anything.

6 CHAIR TRACY CHRISTOPHER: Richard.

7 MR. ORSINGER: I think that this context is
8 pretty different from the requesting findings so that you
9 waive it if you don't request it, or if you don't file the
10 reminder, you waive it, because this is not grounds to
11 appeal the trial court's refusal to rule on your motion
12 for summary judgment. This is what gets into their
13 quarterly report and into the annual report that may lead
14 to them being pulled off the bench, and so the way I look
15 at this is that we're helping the judges be sure that they
16 don't run afoul of their duty to rule out of some slipup,
17 some overlook or slip between the clerk or the judge or
18 even the judge not paying attention to their
19 responsibility. So I had exactly the same thought, is
20 that I don't want there to be a waiver thing here, but
21 we're not waiving the right to a hearing. I mean, you
22 could still get the hearing 120 days after that. In fact,
23 you can't force a judge to have a summary judgment
24 hearing.

25 CHAIR TRACY CHRISTOPHER: Well, that is one

1 thing that Justice Gray brought up in his comments, and
2 it's all part of it, is what is the effect of the judge's
3 failure to not set the hearing or to not rule?

4 MR. ORSINGER: It goes in the report card.
5 That's the only effect it has.

6 CHAIR TRACY CHRISTOPHER: Right.

7 MR. ORSINGER: But I've had cases with
8 summary judgment motions that the judge doesn't set or
9 that's taken under advisement and hasn't ruled for a long
10 time. Your only recourse, other than to constantly, like,
11 for example, tell the clerk that if there's anything more
12 the judge would like for us to file or explain or any
13 supplemental briefs, trying to prompt the judge to do
14 something. You can ultimately go to the court of appeals
15 for a writ of mandamus or a writ of procedendo, but good
16 luck on that. I had to do one against a trial judge and
17 then also the court of appeals, and the Supreme Court
18 denied that, so --

19 CHAIR TRACY CHRISTOPHER: Judge Bullard.

20 HONORABLE JANE BLAND: You're not salty
21 about it, Richard, are you?

22 MR. ORSINGER: No. All I'm saying, I
23 haven't had to file many procedendos in my life, and I
24 don't think they're that effective. They're out there if
25 you need them, but how do you make a judge rule who won't

1 rule? But this doesn't fix that. This rule doesn't fix
2 that.

3 HONORABLE JERRY BULLARD: My initial
4 response when I saw it was since there's a "must," I was
5 kind of, like Connie was saying, is there some penalty if
6 you don't. To me, if you just say "may," they may do
7 that, the party may get that notice to the judge. It just
8 seems a little less harsh than a "must," but it still
9 accomplishes the same purpose.

10 CHAIR TRACY CHRISTOPHER: So I do understand
11 your concerns, and I was thinking of it more from a, you
12 know, trial judge's point of view, and perhaps it
13 shouldn't be in the rule, because it doesn't have any
14 effect, other than hopefully you would get a hearing on
15 your summary judgment, which presumably you want.

16 Yes, Connie.

17 MS. PFEIFFER: And I will say, litigants are
18 pretty aware that if they haven't got a hearing yet and
19 they want a hearing, they can call the clerk or they can
20 somehow contact the court, so I don't know that we need to
21 actually say that that's an option. I would probably be
22 in favor of just removing this.

23 CHAIR TRACY CHRISTOPHER: Okay. Harvey.

24 HONORABLE HARVEY BROWN: I'm not against
25 that idea, but I do want to point out that the idea of

1 changing it to a "may" instead of a "must" might help some
2 parties who think, "I really want to let the judge know
3 about this. I'm not sure calling the clerk is really a
4 very effective way to do it. If I file something and the
5 rule gives me permission to do something, the judge isn't
6 going to feel like I'm acting out of place." Some judges
7 do not want you to remind them that they have not ruled.
8 They take resentment that you are telling them that, so
9 the rule giving you permission to do so might help some
10 people get the judge that notice and actually help the
11 judge rule timely.

12 CHAIR TRACY CHRISTOPHER: Rich.

13 MR. PHILLIPS: I think I probably lean
14 towards we ought not to have it in here. I don't like it
15 with "must" because, again, what's the consequence of
16 failing to do so? There isn't one, but it makes it look
17 like there might be. But if we are going to have -- and
18 if we're going to take out the idea of filing a request
19 for a hearing at the same time you file your motion, then
20 the last sentence needs to be changed to account for that.
21 "State the date the motion was filed" instead of "the
22 request for hearing was filed." Again, I think I lean
23 towards we probably don't need this in here.

24 CHAIR TRACY CHRISTOPHER: Perhaps if we
25 said, you know, if the judge hasn't set it by, you know,

1 60 days, then you file a request, you know, rather than
2 making it sort of draconian the way it is in terms of a
3 past due notice that sounds like you're -- you know, you
4 might be giving up some deadline. I don't know. I would
5 like to give the judge a reminder, and I don't know the
6 best way to do it. Judge Estevez.

7 HONORABLE ANA ESTEVEZ: I know it says the
8 new statute says that you must set it for a hearing. I'm
9 just wondering, since all we're really doing is
10 considering it, wouldn't it be more like a -- you know,
11 once you have the response and all of those other dates
12 have passed, wouldn't it be more like a default hearing
13 where I just consider it whenever all of the things have
14 come across that need to be done? I mean, other than --

15 CHAIR TRACY CHRISTOPHER: The statute
16 says --

17 HONORABLE ANA ESTEVEZ: I mean, other than
18 them saying that. I mean, we know exactly when you would
19 have had to have ruled, because now that we're going
20 forward from the motion -- the date the motion for summary
21 judgment was filed, we're going forward 60 days, unless we
22 had an additional request, plus 90 days. So we know that
23 at 151 days it's overruled by operation of law, whether
24 there was a hearing or not. If we still have that
25 provision in there.

1 CHAIR TRACY CHRISTOPHER: If we have that
2 provision in there.

3 HONORABLE ANA ESTEVEZ: But I'm just saying
4 once the response has been filed and what other deadlines,
5 does it really matter when the court's really hearing it,
6 you know, when I'm going through? Like I go through my
7 queue, and I might not have time to look at this default
8 judgment and review everything, so I might do it three or
9 four hours later or two or three days later.

10 CHAIR TRACY CHRISTOPHER: So the statute
11 says it has to be set in 60 days, and then the 90 days
12 goes from the setting.

13 HONORABLE ANA ESTEVEZ: But that might be
14 only because at the time we set everything based on a
15 hearing date, and we went backwards. Maybe that's the
16 only reason they did it that way.

17 CHAIR TRACY CHRISTOPHER: I don't know how
18 we can get around -- and it also says -- I think, in the
19 order, doesn't it have to say the day you heard it?

20 HONORABLE ANA ESTEVEZ: Yeah.

21 CHAIR TRACY CHRISTOPHER: So you're going to
22 have to put a date in there.

23 HONORABLE ANA ESTEVEZ: Yeah, but if I
24 didn't hear it on that date, I mean, when I have something
25 by submission, I don't always get to it. Just like I

1 don't always finish a hearing the same date that we have
2 the hearing, and we reschedule, and we keep going. So
3 it's not necessarily that same date.

4 CHAIR TRACY CHRISTOPHER: No, no, I
5 understand what you're saying, that, you know, something
6 will be on your submission docket, and you don't rule on
7 it that day, but it was still submitted that day, is the
8 way I would look at it. It was still submitted that day,
9 and my 90 days runs from that. It doesn't run from when I
10 actually sit down and read it. So that's why there has to
11 be the submission date. And even if I, you know, put it
12 on the submission docket for, you know, day 60, and I
13 didn't read it until day 70, I would still put in my order
14 it was submitted on day 60. I would. Under the way
15 this -- I wouldn't say it was submitted on day 70 because
16 that's when I read it.

17 HONORABLE ANA ESTEVEZ: I put "on this day"
18 and then sign it, and it's not necessarily the day I
19 reviewed it. It was the day I actually drafted the order
20 that actually took three days to draft.

21 CHAIR TRACY CHRISTOPHER: You're going to
22 have to change that. I'm just saying. Lisa.

23 MS. HOBBS: Well, I agree, and that might
24 come from our appellate backgrounds that we have this
25 concept of --

1 CHAIR TRACY CHRISTOPHER: Right, submission.

2 MS. HOBBS: -- submission that is a legal
3 fiction. It's just the date that everything -- but I
4 agree with everything you're saying, is it makes it
5 cleaner that there is a submission date, even if the judge
6 doesn't actually -- and that's when everything should run
7 from and not just when the judge actually sits down and
8 looks at it.

9 CHAIR TRACY CHRISTOPHER: Yeah, I mean, you
10 would say that the -- because I think the order requires
11 you to say, "This case was submitted to me on day 60.
12 Today, at day 80, I am ruling X." So you would still be
13 saying "On this day, I'm making the ruling."

14 HONORABLE ANA ESTEVEZ: Let me ask you this.
15 This is the wording from the statute. "File with the
16 clerk" -- "file with the clerk of the court and provide to
17 the parties a written ruling on the motion not later than
18 the 90th day after the date the motion was heard or
19 considered," and so are you saying "considered" is the
20 word they're using for submission, because "heard" in
21 default judgments and all of the other ones means any --
22 just, to me, is also a submission date? So I would have
23 thought that I would have had to consider it within that
24 60 days, and it wasn't -- I didn't -- I don't consider
25 those the same thing. I think that would be redundant. I

1 don't know. I'm just throwing that out there for you
2 appellate people.

3 CHAIR TRACY CHRISTOPHER: Richard, and then
4 Justice Kelly.

5 MR. ORSINGER: So under Senate Bill 293,
6 originally, it said "not later than the 90th day after the
7 date the motion was argued or considered," so I think that
8 was their effort to have the oral hearing versus the
9 written submission. Under House Bill 16, it talks about
10 "set the motion for summary judgment for a hearing by oral
11 argument or by submission on a date." So, to me, the
12 Legislature is not thinking that that's the day of the
13 ruling any more than you have to rule at the conclusion of
14 oral hearings. Many judges take it under advisement and
15 go read the briefs or whatever, so I think everyone's
16 concept is there's going to be a point in time that's the
17 official date we all deal with.

18 Now, the judge doesn't have to rule on that
19 date, but that has to be the date that we have, because
20 we're not going to know necessarily when the judge might
21 rule. If we have a -- we have a deadline for the judge to
22 rule, it can't be the date the judge rules. It has to
23 be -- so we're stuck with this date, aren't we? We don't
24 have a choice.

25 CHAIR TRACY CHRISTOPHER: I mean, you know,

1 I think the statute gives you the flexibility to set it
2 for submission on day 60 and not really get to it for
3 another 90 days. I mean, you know, to issue your ruling.
4 I mean, you don't have to read it on day 60 and think
5 about it for 90 days. I think you can read it on day 70.

6 MR. ORSINGER: But if it's going to be
7 orally argued, you are forced to have the oral hearing
8 that day.

9 CHAIR TRACY CHRISTOPHER: Right.

10 MR. ORSINGER: But if it's written
11 submission, you're not required to read it that day. You
12 can read it a week later or even a month later.

13 CHAIR TRACY CHRISTOPHER: That's what I
14 think. That's how I would understand the concept.

15 HONORABLE ANA ESTEVEZ: But, like, what day
16 are you recording in the docket? And you're saying the
17 date that it was set.

18 CHAIR TRACY CHRISTOPHER: Correct.

19 MR. ORSINGER: That's assuming that the
20 hearing --

21 CHAIR TRACY CHRISTOPHER: That's the way
22 that I read it.

23 MR. ORSINGER: That's assuming that the
24 hearing occurs on the date that it was set. I know they
25 changed "argued" to "heard" because you don't argue

1 something if it's by written submission. I think that the
2 House bill was just attempting to pick a word that would
3 apply to both oral argument or written submission, but as
4 a practical matter, we have to have a date to start the
5 ruling clock, and that date has to be the date that it's
6 set. We can tell when the oral argument occurred because
7 there's a court reporter and there's a date. You don't
8 know when written submission occurs.

9 HONORABLE ANA ESTEVEZ: Well, you do if you
10 had to set it.

11 MR. ORSINGER: No. The submission date is
12 the same as the date for the hearing on oral argument.

13 HONORABLE ANA ESTEVEZ: And it's also the
14 same as --

15 MR. ORSINGER: The ruling clock -- the
16 ruling clock runs on that date, wherever it is. It's
17 either the date of oral (sic) submission or the date of
18 the oral argument -- what do they call it. Oral argument
19 or submission. We have to have that date. Okay. But
20 that doesn't mean the judge has to rule on that date. The
21 judge could rule the day -- he could -- the judge could
22 rule on the 90th day, right?

23 HONORABLE ANA ESTEVEZ: Yes, but if the
24 first time I look at that motion is day 80 and I rule on
25 it the same day I reviewed it for the first time, I guess

1 the question was, was that the day I considered it, or did
2 I really consider it on day 60?

3 MR. ORSINGER: Okay. So you're talking
4 about what do you write into the order as the date the
5 decision was made?

6 HONORABLE ANA ESTEVEZ: Well, also, I have
7 to make a docket entry.

8 MR. ORSINGER: Yes. To me, this is not
9 governed by the statute or the rule, but, to me, if you're
10 going to rule by submission, you put in the date that you
11 make up your mind, not the date that you had that it was
12 technically taken under advisement. But that's for the
13 judge. We're talking now about how does a judge decide to
14 date their ruling. If I was the judge, I would date the
15 ruling on the day that I conclude this is what I'm ruling.

16 CHAIR TRACY CHRISTOPHER: Well, that's what
17 you date the ruling as, but that doesn't mean you would
18 put in your order -- doesn't it have to be in the order,
19 or is it just in the docket sheet?

20 HONORABLE HARVEY BROWN: Docket sheet. I
21 think we're on paragraph (6). The last sentence says,
22 "The court shall record in the docket the date the motion
23 was heard or considered." Maybe we want to change
24 "considered" to "set for submission."

25 CHAIR TRACY CHRISTOPHER: Yeah.

1 HONORABLE ANA ESTEVEZ: And I'm specifically
2 looking at the legislative language on page 50 and 51. So
3 I wasn't looking at how we necessarily worded it for those
4 purposes, but just to make sure that we're consistent.

5 CHAIR TRACY CHRISTOPHER: Well, but how
6 would it work if they tell you you can set it for
7 submission on day 60 and you have 90 days to rule? I
8 mean, that obviously means you're going to be considering
9 it during those 90 -- that 90-day time period.

10 MR. ORSINGER: Sure.

11 CHAIR TRACY CHRISTOPHER: And whether it's,
12 you know, day 80 or day 89.

13 HONORABLE ANA ESTEVEZ: I'll just put "on
14 this day came to be considered, again."

15 MR. ORSINGER: I think there's a little bit
16 of confusion. In the final judgment realm, under Texas
17 law, the oral rendition of the judgment is the operative
18 date of the judgment, even though you might sign the
19 written document 30 or 60 or 90 days later. This is not
20 the same thing. We don't have -- we don't have a
21 situation where you orally render a judgment that's the
22 legally operative event and then you sign the memorandum a
23 month later. It's the ruling here is the rendition. It's
24 also -- it's also the written document, I guess, but you
25 could have a docket entry that is a ruling and then

1 somebody could submit a motion, and you could sign that at
2 a later time.

3 I think we're getting confused here. To me,
4 it's really not a problem. I think if you're a judge, you
5 can date it any day you want, but if I was a judge, I
6 would date it on the day that I make the decision, but
7 that's just me, and I'm not a judge. Never have been and
8 never will be.

9 CHAIR TRACY CHRISTOPHER: Well, no, when you
10 grant the summary judgment, you date it the day you grant
11 it.

12 HONORABLE R. H. WALLACE: Yeah.

13 CHAIR TRACY CHRISTOPHER: The question is,
14 you know, and if it's only on the docket sheet, we just
15 put down the set for submission.

16 HONORABLE HARVEY BROWN: Yeah. I think set
17 for submission fixes it.

18 MR. SCHENKKAN: "Considered" in this context
19 means the day it was submitted for submission.

20 CHAIR TRACY CHRISTOPHER: I think the
21 Legislature would understand that if we changed that one
22 word.

23 HONORABLE PETER KELLY: Although it's
24 curious it says in one section "argued or considered" and
25 then the next session was "considered without argument";

1 and is "considered" to be considered different from
2 "considered without argument," because one has that
3 particular modifier?

4 Now, I agree with Judge Christopher, and the
5 date of submission, it has to be the day -- you have 90
6 days, not when you get around to it, because consideration
7 is a process, not necessarily an event. So it has to
8 start on the date of the submission, but these are
9 legislators, not judges, and they probably don't
10 understand judicial process. I think "considered" would
11 be submitted or first started to be considered by the
12 court.

13 CHAIR TRACY CHRISTOPHER: Yeah. Even when
14 you have oral argument on day 60, you have 90 days to
15 think about it, and so you're considering during those 90
16 days. You might reread it during those 90 days.

17 HONORABLE ANA ESTEVEZ: What do you think a
18 written ruling means? Do you think a written ruling could
19 be an e-mail to the parties saying, "I am granting the
20 summary judgment, please" -- "and I am sustaining
21 objections one, two, and three. Please" --

22 CHAIR TRACY CHRISTOPHER: "Please send in an
23 order."

24 HONORABLE ANA ESTEVEZ: "Please send in an
25 order."

1 CHAIR TRACY CHRISTOPHER: There's a whole
2 bunch of cases about whether that's a ruling or not. So,
3 you know, I just -- it would be better to just have an
4 actual order.

5 HONORABLE HARVEY BROWN: We tried to
6 adopt -- we tried to fix that in the rule. We are now
7 requiring the parties to submit a proposed order.

8 CHAIR TRACY CHRISTOPHER: Right. Right.

9 Okay. So back to the last sentence -- last
10 two sentences of (3). Let's take a straw vote on who
11 thinks we should have a reminder notice of some sort and
12 who thinks we should not put it in the rules. So all in
13 favor of a reminder notice.

14 PROFESSOR ELAINE CARLSON: Is this a "must"
15 or a "may"?

16 MR. ORSINGER: Let's not decide that.

17 CHAIR TRACY CHRISTOPHER: Just a reminder
18 notice of some sort.

19 Okay. We've got one, two, three, four,
20 five, six.

21 All right. And who is opposed? One, two,
22 three, four, five, six, seven, eight, nine, ten, eleven.
23 Okay. So then we'll take that out. Okay.

24 HONORABLE HARVEY BROWN: Okay, (4). (4) is
25 really nothing substantive, except we specifically added

1 the word "objections" to the response. Right now, in the
2 existing rule, it just says "any other written response."
3 So we specifically said the objections should be filed at
4 that time, so the reply can address those if they need to.

5 Of course, we changed the number of days,
6 which we've already talked about. We also changed the
7 word "affidavits" to "evidence."

8 CHAIR TRACY CHRISTOPHER: Okay. Any
9 comments to the changes in (4)?

10 All right. Moving on to (5).

11 HONORABLE HARVEY BROWN: (5) is basically
12 the same thing, except we did add "A reply may not raise
13 new or independent summary judgment grounds."

14 CHAIR TRACY CHRISTOPHER: Okay. Yes.

15 MS. GREER: And we talked about adding
16 "evidence" to that, because I think -- I think that's
17 really important. People try to do that and come up in
18 their reply with new evidence, and that seems unfair.

19 HONORABLE HARVEY BROWN: Yeah, I was going
20 to talk about that when we get to the section that has
21 that discussion, which is subpart (d), but I'm in
22 agreement with you.

23 MS. GREER: Okay, sorry.

24 CHAIR TRACY CHRISTOPHER: If the response
25 raises a defense of some sort, could the reply not rebut

1 that defense, or is that a new ground?

2 HONORABLE HARVEY BROWN: I think that's a
3 new ground, but we do have an expert on civil procedure
4 here. Sorry to catch you there.

5 PROFESSOR ELAINE CARLSON: I'm just a
6 has-been.

7 HONORABLE HARVEY BROWN: If the response
8 raises an affirmative defense, can the reply then address
9 the response's affirmative defense with new evidence?

10 PROFESSOR ELAINE CARLSON: I can't say
11 definitively, but I'm thinking, yes, you can.

12 CHAIR TRACY CHRISTOPHER: I couldn't hear
13 you, Elaine.

14 PROFESSOR ELAINE CARLSON: I think you can,
15 but I'm not definitive on that.

16 CHAIR TRACY CHRISTOPHER: All right.
17 Quentin.

18 MR. SMITH: I think that's new ground. I
19 think there's some case law on that very circumstance that
20 says that's a new ground. There's lots of case law,
21 actually.

22 HONORABLE HARVEY BROWN: That says you can?

23 MR. SMITH: You cannot.

24 HONORABLE HARVEY BROWN: That's what I
25 thought.

1 MS. HOBBS: I agree with Quentin.

2 MR. HUGHES: I was just going to say,
3 without pulling out a book to look it up, usually the
4 question about an affirmative defense, et cetera, would go
5 to who has the burden to conclusively prove anything; and
6 in many cases, the movant has a burden not only to prove
7 -- for example, the plaintiff prove their cause of action
8 conclusively, but if an affirmative defense is raised,
9 part of that, their burden for summary judgment is to
10 conclusively destroy the affirmative defense.

11 So while the response may raise the -- you
12 can call it action, ground, affirmative defense, my
13 understanding in most cases, it's the original movant's
14 burden to conclusively disprove it, and so I'm not sure
15 what would be the function of a reply, other than to say
16 "I've carried my burden, and the respondent's evidence is
17 no evidence."

18 CHAIR TRACY CHRISTOPHER: So if I filed a
19 motion for summary judgment on a contract case and the
20 defendant had, you know, a laundry list of affirmative
21 defenses, I have to address all of them, or can I wait for
22 them to bring one up?

23 MR. SMITH: You move for no evidence.

24 MS. PFEIFFER: If they're raising an
25 affirmative defense, you know, as a way to defeat the

1 motion, isn't that really a cross-motion, because they
2 bear the burden of proof, and so what you're now dealing
3 with is cross-motions for summary judgment. Like, I think
4 all of this really should be thought of through the lens
5 of who has the burden, not claims and defenses so much as
6 just it's all about burden shifting or meeting a burden.

7 CHAIR TRACY CHRISTOPHER: Okay. The
8 language that you have in here in number (4), is that
9 currently in the rule?

10 HONORABLE HARVEY BROWN: In (5)?

11 CHAIR TRACY CHRISTOPHER: I mean in (5).

12 HONORABLE HARVEY BROWN: I don't remember,
13 but I don't think so. I don't think so.

14 CHAIR TRACY CHRISTOPHER: Then I am going
15 with Lisa on let's not add new language that may or may
16 not be different from case law.

17 HONORABLE HARVEY BROWN: Okay.

18 CHAIR TRACY CHRISTOPHER: Okay. Any other
19 comments on number (5)?

20 HONORABLE PETER KELLY: I had a comment on
21 number (4).

22 CHAIR TRACY CHRISTOPHER: Oh, sorry.

23 HONORABLE PETER KELLY: Not to go back, but
24 I was just trying to figure out whether the subsection
25 (g), statements or declarations that the affidavits are

1 unavailable, is that to be considered part of the response
2 that is to be filed under the subsection (4) timeline?

3 MS. HOBBS: Judge Kelly, can you say that
4 again?

5 HONORABLE PETER KELLY: So subsection (g)
6 says, "Should it appear from the affidavits or declaration
7 of a party opposing the motion that he cannot for reasons
8 stated present by affidavit facts essential to justify its
9 opposition," so the party that doesn't have the facts to
10 -- who needs a continuance, right, is the motion for
11 continuance part of number (4) response or not?

12 HONORABLE HARVEY BROWN: Yes. That's a
13 response saying, "You shouldn't hear this now."

14 CHAIR TRACY CHRISTOPHER: Then we should
15 move it under "response."

16 HONORABLE PETER KELLY: Pardon?

17 CHAIR TRACY CHRISTOPHER: We should move it
18 to "response."

19 HONORABLE KENT SULLIVAN: Agree.

20 HONORABLE PETER KELLY: Because in a way, I
21 think of a response as I'm responding to your motion
22 substantively, whereas, a continuance you ask it as a
23 response --

24 HONORABLE HARVEY BROWN: I mean, in
25 practice, usually you have a response towards the bottom

1 of the motion for continuance, "I don't have this or
2 that."

3 HONORABLE PETER KELLY: Part of this is I
4 have a longstanding concern about having the ability to
5 get a motion for continuance when you really need it. How
6 do you get that heard? We have a slightly longer timeline
7 here, and you have more of a possibility for getting your
8 motion for continuance heard, so, frequently, you are
9 through your motion for continuance, and even though I
10 don't have evidence, here's my response anyway, and it's a
11 whole lot of stuff to be waded through and drafted,
12 sometimes needlessly.

13 With a longer timeline, you have a better
14 chance for a meaningful response, a meaningful motion for
15 continuance, but I'm just wondering -- so I sort of treat
16 them slightly separately, because a continuance is not a
17 substantive response, but should we refer to the
18 continuance in number (4)?

19 CHAIR TRACY CHRISTOPHER: Pete.

20 MR. SCHENKKAN: I'm a little confused here.
21 I thought, at least the way version three is drafted and
22 my memory of the discussion by which we got to version
23 three, that the language in (g) explains the answer to
24 the -- this last discussion. It's not a continuance. It
25 results in a denial of the motion without prejudice. So

1 any clocks are going to be reset with a new motion that is
2 filed after what time is required for the party who is
3 going to have to respond to be able to respond with
4 whatever they're going to have.

5 HONORABLE HARVEY BROWN: Yeah, I think
6 that's right, because the statute basically does away with
7 continuances as a way of avoiding statutory deadlines. So
8 they have to now be denied without prejudice, if that's
9 what you wanted to do.

10 MR. SCHENKKAN: And I don't -- and, to me, I
11 thought when I first heard it, and still think when I just
12 read the words, that sounds like a workable situation. Is
13 there some practical problem with that? I'm not hearing
14 one.

15 MR. ORSINGER: I think the only out we have,
16 because we cannot reset the timetable, we cannot extend
17 the 90 days, the only thing we can do is back out the
18 starting clock by -- if I was a judge, I would say either
19 withdraw your motion, or I'm going to deny it without
20 prejudice, and most movants are going to withdraw their
21 motion so they don't have the stigma of denial, but if
22 they won't, the only way out of the timetable is to rule.

23 CHAIR TRACY CHRISTOPHER: Well, but I'd like
24 just to kind of -- and I think Tom brought this up. So
25 I'm filing my response at day 21, and the hearing is not

1 until day 60. Well, what if I run out and get two
2 depositions, you know, before our hearing date? You know,
3 so, you know, how do you account for that? Because now we
4 have this extra time built in. It shouldn't be right that
5 you just get to sit and do nothing between day 21 and day
6 60. You know, it seems like you should be making an
7 effort to get your discovery during that time period.

8 MR. ORSINGER: So is the question we're
9 considering now whether to include a request for a
10 continuance in the reply?

11 CHAIR TRACY CHRISTOPHER: Right.

12 MR. ORSINGER: Or to leave it as a separate
13 paragraph later?

14 CHAIR TRACY CHRISTOPHER: Correct.

15 MR. ORSINGER: So I guess, fundamentally, is
16 it part of a reply, or is it asking for more time to file
17 a reply? To me, the continuance exists independently from
18 the reply.

19 CHAIR TRACY CHRISTOPHER: It can be both.

20 R. H.

21 HONORABLE R. H. WALLACE: I don't think I
22 recall seeing it as a part of a reply.

23 MR. ORSINGER: Yeah.

24 HONORABLE R. H. WALLACE: Usually they file
25 a motion for continuance of the hearing.

1 MR. ORSINGER: To me, there's a reason to
2 keep the continuance request in a different paragraph from
3 the reply request, because as often as not, or if not more
4 often than not, the continuance will be filed before a
5 reply is filed.

6 HONORABLE R. H. WALLACE: Yeah.

7 MR. SMITH: It's in the reply response.

8 MR. ORSINGER: Response, yeah.

9 CHAIR TRACY CHRISTOPHER: Lisa.

10 MS. HOBBS: Yeah, okay, right. I thought we
11 were taking out the reply. We're talking -- so everything
12 you said, but it's the response.

13 MR. ORSINGER: I'm sorry.

14 CHAIR TRACY CHRISTOPHER: Right, talking
15 about the response.

16 MS. HOBBS: And then, also, I think you
17 might have been getting at, Justice Christopher, is that
18 you -- there could be room for continuing and still remain
19 in the parameters, I think is what you're saying, right?

20 CHAIR TRACY CHRISTOPHER: Right.

21 MS. HOBBS: And -- and that should be
22 allowed, but what I think Richard is saying is it won't be
23 allowed if it's outside the parameters. The only solution
24 is to withdraw or deny without prejudice.

25 CHAIR TRACY CHRISTOPHER: So my response is

1 due at day 21, but I want to -- but it's not set until day
2 60, so I want a continuance of my response date to day 50
3 so I can go get this deposition, but keep everything on
4 track, and, you know, I think the judge is going to be
5 more likely to say, sure, you know, get your discovery
6 done and then, you know, we can keep our day 60 hearing.
7 So I don't know how we account for that.

8 HONORABLE PETER KELLY: For some of us, we
9 have issues where there's a motion for summary judgment
10 filed while there are motions to compel pending, or
11 rather, that have not been complied with, and the
12 plaintiff might want to get that discovery before actually
13 having to respond.

14 CHAIR TRACY CHRISTOPHER: Yeah, you know, we
15 used a lot of the old language in (g), but it could
16 probably use more of a tweak, because that's what -- I
17 mean, we don't even call it a motion for continuance.
18 That's just, you know, what everybody has had it evolve
19 into.

20 MR. SCHENKKAN: Well, okay, so I'm reversing
21 what I said before. Why not just say it is a continuance
22 just for that purpose, just between what would otherwise
23 have been day 21 and day 50 or 53, whatever is the last
24 one that still leaves time for -- or 46, I guess, that
25 still leaves seven days -- leaves a reply seven days

1 before the date set for hearing or submission.

2 CHAIR TRACY CHRISTOPHER: Yeah.

3 MR. SCHENKKAN: So that within that where
4 you can still use it as an actual continuance, because
5 that's not screwing with the Legislature's deadlines,
6 right?

7 CHAIR TRACY CHRISTOPHER: Right.

8 MR. SCHENKKAN: So why not say we can do a
9 continuance?

10 MS. HOBBS: Yeah, I think what you -- just
11 change (g) to "Motion for Continuance" and give the trial
12 court discretion, really, for any reason, not just for
13 affidavits that you might need to supplement or whatever,
14 but you could do so, so long as it's still within seven
15 days before the date of your hearing.

16 MR. SCHENKKAN: Well, and it's got to be
17 more than seven days, because seven days before the
18 hearing is when the reply is due.

19 MS. HOBBS: No, we're taking out the reply.

20 MR. SCHENKKAN: Oh, I'm sorry, that's right.

21 HONORABLE HARVEY BROWN: No.

22 CHAIR TRACY CHRISTOPHER: No.

23 HONORABLE HARVEY BROWN: No, we were
24 misspeaking.

25 CHAIR TRACY CHRISTOPHER: We're taking out

1 the new evidence on the reply, I think was the --

2 MR. SCHENKKAN: Yes.

3 MS. HOBBS: I was hoping we were taking out
4 the reply, if I could advocate for that.

5 CHAIR TRACY CHRISTOPHER: No, we haven't
6 gotten to that yet.

7 MS. HOBBS: Oh, okay.

8 CHAIR TRACY CHRISTOPHER: We haven't taken a
9 vote on that, whether it should be included in the
10 timetable.

11 MR. SCHENKKAN: Well, so given that we don't
12 know whether we're taking out the reply, it's either can
13 push it to day 53 or to day 46.

14 CHAIR TRACY CHRISTOPHER: Right.

15 MR. SCHENKKAN: Some such --

16 MS. HOBBS: But I will say, currently,
17 there's not a deadline for a reply. There's a deadline
18 for a response that's seven days before the hearing under
19 the --

20 MR. SCHENKKAN: Current.

21 MS. HOBBS: -- current practice. So and --

22 MR. SCHENKKAN: Yes, right. That's a --

23 MS. HOBBS: -- and so we don't even
24 contemplate a reply under, and to the extent I'm filing
25 one, I'm often doing it on the day of the hearing, because

1 I'm doing my reply as I'm preparing for my summary
2 judgment presentation, and so this idea of some reply
3 deadline is really making me uncomfortable, because it's
4 not how most of the counties do it these days.

5 The response needs a deadline, and then the
6 continuance, like how far can you continue a response,
7 needs a cutoff time frame, but my advocate -- and I know
8 Judge Christopher just told me we're going to vote on that
9 later, but I would advocate for elimination of a concept
10 of reply and let that be how local rules -- or we hate
11 that word, sorry, but how the judges practice.

12 CHAIR TRACY CHRISTOPHER: Well, and then, of
13 course, you know, we haven't talked about late-filed
14 anything, you know, which as long as the judge puts in the
15 order "I considered it, even though it was late," then
16 it's considered. You know, we have that case law to
17 contend with, too. R. H.

18 HONORABLE R. H. WALLACE: Well, to Lisa's
19 point, again, looking at the way things happen, it's not
20 unusual for someone to file a reply the day of the
21 argument on the hearing, in my experience at least. Now,
22 the other side will gripe and complain about it, but
23 there's nothing in our current rule that says there's a
24 time limit on filing a reply. There's no time limit.

25 CHAIR TRACY CHRISTOPHER: I think that's

1 what Harvey was trying to fix.

2 HONORABLE R. H. WALLACE: Well, and I don't
3 know. Yeah, I guess that would --

4 HONORABLE HARVEY BROWN: That is unfair to
5 the respondent, who doesn't have a reply to until minutes
6 before the hearing, and it creates a delay for the trial
7 judge, because what happens? The respondent then says,
8 "Judge, I just got this reply. I need a week or 10 days
9 or two weeks to review it." Now we've just delayed the
10 whole process for the judges who have just lost more time
11 to rule on it. So having a deadline of seven days
12 beforehand fixes both of those problems. It lets the
13 parties be prepared. It lets the judge be prepared, and
14 lets the judge have all of the information to rule more
15 quickly.

16 CHAIR TRACY CHRISTOPHER: So let's continue
17 to talk on who thinks we should incorporate a reply into
18 the rule, and if so, when the reply would be due. We've
19 got Lisa says no. Harvey says yes. Any other discussion
20 on requiring or having a reply date? Judge Estevez.

21 HONORABLE ANA ESTEVEZ: My only response
22 will be then someone else is going to want to do a
23 surreply, and so it doesn't matter. Someone is always
24 coming the night before with something new, no matter
25 what. So if I give them seven days, then that does give

1 them time to respond, and they see it, and they file
2 something else, and it just keeps going. It's just
3 feeding it. It's not helping the problem.

4 CHAIR TRACY CHRISTOPHER: Maybe we should
5 say no replies.

6 HONORABLE ANA ESTEVEZ: You know, I don't
7 care when they --

8 CHAIR TRACY CHRISTOPHER: We've got a motion
9 and a response.

10 HONORABLE ANA ESTEVEZ: It doesn't bother me
11 when they -- it doesn't bother me when they bring in a
12 reply. I almost expect it. It's not even on my computer
13 yet. They're going, "Have you seen my reply?"

14 "No. It hasn't made it to the system yet.
15 That's how recent you filed it."

16 CHAIR TRACY CHRISTOPHER: Right.

17 HONORABLE ANA ESTEVEZ: And so I make them
18 have the hearing, with it or without it, and I just tell
19 them I'll strike it and then when we're done I'll look at
20 it and see if I'm going to let them -- you know, let them
21 argue whatever is in it.

22 CHAIR TRACY CHRISTOPHER: Okay. Quentin.

23 MR. SMITH: I think federal courts have
24 figured out how to work with designated reply deadlines,
25 so I think we can figure out, too, for one motion in

1 Texas.

2 CHAIR TRACY CHRISTOPHER: So they have a
3 designated reply deadline and a summary judgment also?

4 MR. SMITH: For most motions.

5 MS. GREER: But isn't it local rules?

6 MR. SMITH: Yeah.

7 MS. GREER: Yeah, it's local rules. Sorry,
8 I didn't raise my hand.

9 CHAIR TRACY CHRISTOPHER: No, go ahead.
10 That's okay. Rich.

11 MR. PHILLIPS: I think we ought to have
12 something in there about a reply, especially now that
13 we've got this expressly -- express concept in the rule of
14 a submission without oral argument. The movant should
15 have a chance to get that last thing they need to get in
16 response to the response -- or reply to the response, or
17 however you want to say it. I think if it's their burden,
18 they should get the chance to have that last word, so we
19 ought to provide for the reply, and I think setting a
20 deadline makes a lot of sense.

21 CHAIR TRACY CHRISTOPHER: Roger.

22 MR. HUGHES: I'd like to speak in favor of
23 some sort of reply, because, for example, a no-evidence
24 motion, may be for the first time you're seeing what their
25 arguments and evidence are. Well, you haven't put any of

1 that in your motion. Now, you are going to have to say
2 something about their evidence and arguments, other than
3 maybe objections to admissibility. And if you don't get a
4 chance to reply, then you're coming to the hearing and
5 flopping down a bunch of cases and making arguments, and
6 now, the respondent is going, "Well, Your Honor, this is a
7 no-evidence motion. I have no idea -- I never heard about
8 these cases. I had no idea they were going to argue this
9 stuff. Help me out." Whatever. So I think a reply,
10 especially in the area of no-evidence motions, would be of
11 some value.

12 CHAIR TRACY CHRISTOPHER: Harvey.

13 HONORABLE HARVEY BROWN: In June, there were
14 a number of trial judges who did not like having the reply
15 filed minutes before the hearing, because they said they
16 can't read and study it, think about it, so I just want to
17 point that out.

18 CHAIR TRACY CHRISTOPHER: Richard.

19 MR. ORSINGER: The way I see the reply is
20 that it's better for the judge. It's fairer to the judge
21 that the hearing will occur with the reply having been
22 filed, and it can be discussed, and the parties can
23 discuss, not only the motion and the response, but also
24 the reply. So, to me, it helps not only the judge to have
25 a more robust discussion, but it also helps the movant to

1 be sure that the issues raised in the response are put --
2 called to the attention of the trial judge. So, to me,
3 it's fair to all parties, really, to have a reply that's
4 before the hearing.

5 Now, under the current rule, there is no
6 deadline for a reply, and so you can file a reply a week
7 after oral argument if you haven't had a ruling yet. So,
8 to me, the question is do we want to have some kind of
9 structure, or do we want to force somebody to go on the
10 record before the hearing or before the submission, or do
11 we just let them file whatever they want up until the day
12 the judge rules? I would rather have the structure of a
13 deadline.

14 CHAIR TRACY CHRISTOPHER: Kent.

15 HONORABLE KENT SULLIVAN: I think we've
16 touched on this earlier, but I think it's -- bears
17 repeating, and it's an important practical point, because
18 I think increasingly our discussion of the rule, and in a
19 number of the comments, imply the need for a very close
20 coordination between the district clerk's office and the
21 judge, and sort of a seamless coordination, and I think
22 that we have to acknowledge that doesn't always exist.

23 And I don't know that there's any rule. I
24 don't know that the Supreme Court has ever stepped in to
25 try and regulate the clerk's office with respect to, you

1 know, this kind of seamless coordination that's necessary.
2 There are a lot of things that are being filed here in our
3 discussion, and underlying this is the assumption that
4 that immediately gets to the judge and the judge is made
5 aware of them and they have time to review and react and
6 the like. So it's just something I think worth some
7 consideration in terms of the practical operation of both
8 this process and the courts in general.

9 CHAIR TRACY CHRISTOPHER: Okay. Any other
10 discussions on -- Lisa.

11 MS. HOBBS: I just -- to clarify, I was -- I
12 just would not have a timeline for the reply. I would
13 still allow people to reply. I think Richard kind of
14 touched on that, and then, secondly, even though I don't
15 think we need a timeline on the reply, if we are going to
16 have one, I would advocate for three days instead of seven
17 days, so that's maybe Lisa A, I don't know, B, and instead
18 of --

19 MR. ORSINGER: YY. Lisa YY.

20 MS. HOBBS: And then, thirdly, I do think
21 that under local practice -- and I think that's the
22 problem with this, is that I work on summary judgments in
23 obviously not all 254 counties, but I have been in a lot,
24 as an appellate specialist who gets called in to do, and
25 things are all over the map, and many times I will send

1 something to the direction of the trial court coordinator,
2 usually not directly to the trial court, in many counties,
3 before a hearing so I make sure that they have an
4 opportunity to read it, and I think it would be very hard
5 for us to try to formalize things at that level on a
6 statewide basis at this point and under the time
7 constraints that we currently have, which is trying to
8 modify the summary judgment rules in response to a
9 specific legislative change.

10 CHAIR TRACY CHRISTOPHER: Okay. Let's take
11 a vote. Who would like to put a reply in rule? And this
12 is independent of a date. The first question is who would
13 like to put a reply in the rule? All in favor?

14 All right. Pretty much unanimous. All
15 opposed? Three against.

16 All right. So with respect to the reply,
17 the current timeline is seven days after the response is
18 filed. So that would mean that on day 28, all of the
19 briefing would be done in the summary judgment.

20 MR. SCHENKKAN: Unless a continuance for the
21 response had been granted.

22 CHAIR TRACY CHRISTOPHER: Right. Right.

23 HONORABLE ANA ESTEVEZ: And we're assuming
24 that our hearing date is day 60, right? So all of these
25 guys are just not going to say anything for all that time.

1 CHAIR TRACY CHRISTOPHER: Well, if you
2 are -- if your docket allows it, you could set the -- I
3 think we have it down here at day 35. You could set it at
4 day 35, which would be the 28 plus seven days to --

5 HONORABLE HARVEY BROWN: Read it and get
6 ready.

7 CHAIR TRACY CHRISTOPHER: -- to read it
8 before the hearing. So you could set it at day 35. And,
9 you know, some people probably will, on a submission
10 docket, so that tries to stop all of the replies.

11 All right. So that's the proposal. Harvey,
12 did I say the thinking of it?

13 HONORABLE HARVEY BROWN: Yeah.

14 CHAIR TRACY CHRISTOPHER: In terms of the
15 seven days?

16 HONORABLE HARVEY BROWN: Yes, gives the
17 judge time to read it, gives the parties time to prepare
18 better for the hearing.

19 CHAIR TRACY CHRISTOPHER: Okay. Anyone who
20 would prefer to have a different deadline? Or no deadline
21 at all? Speak now. Lisa.

22 MS. HOBBS: I've already spoken, but I stand
23 by it.

24 CHAIR TRACY CHRISTOPHER: You would like no
25 deadline.

1 MS. HOBBS: No deadline.

2 MR. ORSINGER: Or three days.

3 MS. HOBBS: At minimum, three days before
4 the hearing.

5 CHAIR TRACY CHRISTOPHER: Three days before
6 the hearing. Okay. Anyone else that would like to speak
7 on a different timeline for the reply?

8 MS. HOBBS: And if I could just add a little
9 bit, the Legislature is already putting a lot of pressure
10 on time frames for summary judgment, and for -- a lot of
11 trial lawyers who call me up, they're like, "Sure, Lisa,
12 just get this done." Like, we are putting an immense
13 amount of pressure, without a lot of room for extensions
14 and things like that, in this rule, and that bothers me
15 because the Legislature is already going to put some
16 pressure on us. I don't know why we're putting additional
17 pressure on litigants, one, and then, two, what happens if
18 you miss the reply?

19 I mean, to your point, I think, Judge
20 Christopher, early, it's like why have a deadline when the
21 judge can even consider if he says in his summary judgment
22 motion, "I considered a late" -- or "I considered the
23 reply, regardless of when it was filed." I don't -- to
24 me, it's like with a response, why you need it is because
25 you need, like, this is what is in on file. This is the

1 evidence that we're considering. This is a -- with a
2 reply, that's not the case. It's not the summary judgment
3 evidence. It's not the packet that the court of appeals
4 is going to be looking at in the same way that a response
5 is, and that's why the response deadline is so important
6 in a way that the reply deadline is not.

7 So I just -- I want to add that as my final
8 advocacy. Let's take the vote, and I'm sorry, Judge
9 Christopher, if I --

10 CHAIR TRACY CHRISTOPHER: No, that's fine.
11 Anyone else on the response -- the reply deadline?

12 MS. GREER: I'll just say --

13 CHAIR TRACY CHRISTOPHER: Yes.

14 MS. GREER: Listening to Professor Carlson's
15 point, that, you know, a lot of these young --

16 MS. STOKES: Could you speak up?

17 MS. GREER: Listening to Professor Carlson,
18 there are a lot of young lawyers who don't really -- who
19 haven't dealt with this. I think it would be beneficial
20 to have it in the rule, because they're going to be trying
21 to figure out where is the reply deadline? I know I kind
22 of freak out until I can actually see it in writing, so I
23 would personally be in favor of having a reply deadline
24 specified in seven days.

25 CHAIR TRACY CHRISTOPHER: Yes, Pete.

1 MR. SCHENKKAN: I know we haven't gotten to
2 this yet, but one of the possible functions of the reply,
3 without introducing new substantive merits testimony, is
4 to produce an affidavit that says -- definitively attacks
5 the respondent's summary judgment evidence, that says
6 there's a problem with the summary judgment response
7 evidence, says part of it is defective.

8 MS. GREER: You mean an objection?

9 MR. SCHENKKAN: Yeah, an objection. Yeah.
10 So there's a function of reply that's in addition to now
11 that I've heard the way the respondent frames the
12 argument, I can improve what I told you the first time,
13 Judge, about what my argument is, because I see where the
14 problem is, and it's a law problem, and here's the fix.

15 But that's not the only thing a reply can
16 do, and if the reply is doing objections to the evidence,
17 I think seven days is a good idea, for everybody to have
18 seven days to think about that objection before we have to
19 go argue it.

20 CHAIR TRACY CHRISTOPHER: Okay.

21 MS. GREER: And I would also just say I
22 think it benefits the judge to have the response, that
23 reply brief. They're going to be in a better position to
24 make a decision if they have -- to get brought back to
25 center.

1 CHAIR TRACY CHRISTOPHER: Okay.

2 MS. GREER: And I always like to have the
3 last word.

4 MS. HOBBS: Could I make a point of
5 clarification?

6 CHAIR TRACY CHRISTOPHER: Yes.

7 MS. HOBBS: Because I think there's being
8 two things tossed around. I understood the seven days was
9 seven days after the response was filed, and Pete seemed
10 to be indicating it was just seven days before the motion,
11 but technically, you could have this all bundled up and it
12 not be heard for 45 days or more.

13 HONORABLE ANA ESTEVEZ: Yeah. That was my
14 point.

15 MS. HOBBS: Yeah.

16 CHAIR TRACY CHRISTOPHER: It's possible.

17 MS. HOBBS: So it's not seven days from the
18 hearing. It's seven days after the response is filed.

19 MR. SCHENKKAN: It's both. It's seven days
20 after the response is filed, but if the response time in
21 relation to the hearing -- you can't push the reply
22 into --

23 MS. HOBBS: Closer than seven days.

24 MR. SCHENKKAN: Closer to the hearing date,
25 is my understanding of what we're trying to do with this.

1 I think we've done that, but I know that was the goal.

2 CHAIR TRACY CHRISTOPHER: Judge Estevez.

3 HONORABLE ANA ESTEVEZ: I was just going to
4 suggest, since there may be a huge amount of time that
5 passes before the hearing date, at the beginning of that
6 "except on leave of court," so that way if someone wants
7 to bring something up, they know that they can, once
8 again, ask for permission to file something else. Or even
9 push it to a later date because somebody is going to miss
10 that date, and it's not going to harm anyone.

11 CHAIR TRACY CHRISTOPHER: Well, we haven't
12 really -- I mean, one of the things is a continuance
13 motion, right?

14 HONORABLE HARVEY BROWN: We haven't gotten
15 to that yet.

16 CHAIR TRACY CHRISTOPHER: Which we haven't
17 gotten to continuance, which could be a continuance to --
18 you know, to make my response.

19 HONORABLE HARVEY BROWN: Or reply.

20 CHAIR TRACY CHRISTOPHER: It could be a
21 continuance to make my reply. Could be both of those
22 things.

23 MR. SCHENKKAN: Right. Right.

24 CHAIR TRACY CHRISTOPHER: All right. Who
25 thinks that the rule, as written, with the seven-day

1 deadline after the response is filed is the way to go?

2 Yes or no? Yes?

3 All right. And no?

4 Okay. We only had two noes. The rest were
5 yeses. Okay. The hearing.

6 HONORABLE HARVEY BROWN: The first line is
7 in the existing rule, except with a slight change in
8 wording. We decided, conferring today, to take out the
9 second sentence; and the third sentence, the last
10 sentence, we've just talked about earlier about 15 minutes
11 ago and suggested that it should read, "The court shall
12 record in the docket the date the motion was heard or set
13 for submission."

14 CHAIR TRACY CHRISTOPHER: Do we need the
15 second sentence, because it seems like it's just repeating
16 the setting?

17 HONORABLE HARVEY BROWN: I don't know where
18 we have that about the docket entry for that. It may be
19 here somewhere and I just forgot.

20 CHAIR TRACY CHRISTOPHER: That's the third
21 sentence. The second sentence. "On the day originally
22 set under (c) (3)," so we're just referring back to (c) (3).

23 HONORABLE ROBERT SCHAFER: I have a
24 question.

25 CHAIR TRACY CHRISTOPHER: Yes. Judge

1 Schaffer.

2 HONORABLE ROBERT SCHAFFER: Is this whole
3 process requiring the court and the court staff to make
4 actual docket entries?

5 HONORABLE ANA ESTEVEZ: Yes. Yes.

6 HONORABLE ROBERT SCHAFFER: Because that's
7 just adding a whole lot of work to everybody, which I
8 think is unnecessary if it's filed in the court's file.

9 HONORABLE ANA ESTEVEZ: It's in the statute.

10 HONORABLE ROBERT SCHAFFER: That it has to
11 be a docket entry?

12 HONORABLE ANA ESTEVEZ: Yes. Yes. Look on
13 page 50 and 51 of the statute. It's attached to the
14 Tab 2, page 50 of 51.

15 HONORABLE ROBERT SCHAFFER: You're just
16 adding a whole lot of work to court staff and the court
17 when it's in the file and the date of submission is in the
18 file. I don't want to violate the statute, however...

19 CHAIR TRACY CHRISTOPHER: All right. Any
20 other discussion of number (6), the hearing?

21 Number (7), the merits of the motion.

22 HONORABLE HARVEY BROWN: Justice Gray
23 suggested we break out this into two paragraphs. The
24 first paragraph would just address the merits of the
25 motion and state, basically, "The court shall grant a

1 traditional motion for summary judgment when, or if, there
2 is no genuine issue as to any material fact." In other
3 words, skip all of that stuff about what the evidence is
4 and then have a separate section that says "Summary
5 Judgment Evidence" and just have that section just talk
6 about the types of evidence. I do think it reads a little
7 clearer, because that is a very long sentence, as is
8 currently written.

9 CHAIR TRACY CHRISTOPHER: Is there anything
10 in number (7) that is different?

11 HONORABLE HARVEY BROWN: Tinkering. I mean,
12 we added declarations. We added admissions, documents,
13 ESI, but not really substantively.

14 CHAIR TRACY CHRISTOPHER: Any comments about
15 number (7)?

16 MR. SCHENKKAN: Yeah.

17 CHAIR TRACY CHRISTOPHER: Pete.

18 MR. SCHENKKAN: Same spirit and consistent
19 with Chief Justice Gray, I definitely think moving the
20 definition of summary judgment evidence into its own
21 category is a good idea, but that would still leave, not
22 only the first sentence that's down in (7), "No judgment
23 shall be granted except upon the grounds stated." We
24 should also -- this is where we should put what is now
25 (9), the appeal.

1 HONORABLE HARVEY BROWN: Okay.

2 MR. SCHENKKAN: And it should be, I would
3 suggest, slightly reworded. "No summary judgment issues
4 not expressly presented to the trial court by a written
5 motion" -- strike "answer" -- "or" -- strike "other" --
6 "by written motion or response shall be considered on
7 appeal as grounds for reversal." So we're saying two
8 things on the merits in (7). It won't be granted, except
9 on the grounds, and nobody has a position for reversal on
10 either side if they didn't present it in the motion or the
11 response.

12 HONORABLE HARVEY BROWN: Okay. That seems
13 to work.

14 MR. SCHENKKAN: So really trying to get
15 everybody's attention to you better make sure the argument
16 you want to rely on on appeal is on whichever one of those
17 two you were, the movant or the response, or we're not
18 going to pay any attention to you on appeal.

19 CHAIR TRACY CHRISTOPHER: But you do have to
20 be careful, because you can attack summary judgments on
21 appeal, even without a response.

22 HONORABLE PETER KELLY: Traditional motions.

23 MR. SCHENKKAN: Oh, that's --

24 CHAIR TRACY CHRISTOPHER: Even a no-evidence
25 one, if it -- you know, like, if it didn't include all

1 causes of action and the order disposed of all causes of
2 action.

3 HONORABLE HARVEY BROWN: That language in
4 (9) is verbatim in the existing rule.

5 CHAIR TRACY CHRISTOPHER: I know, but it's
6 troublesome.

7 HONORABLE HARVEY BROWN: I know.

8 MR. SCHENKKAN: It's just not the law.

9 CHAIR TRACY CHRISTOPHER: It's just not the
10 law, right.

11 MR. SCHENKKAN: Well, then let's strike it.

12 CHAIR TRACY CHRISTOPHER: I mean, when
13 Harvey sent his draft around, and I was like, where did
14 (9) come from? That can't be right. He was, like, "Oh,
15 it's in the current rule." I was like "Oh."

16 MR. SCHENKKAN: So why don't we just strike
17 that? Okay. Sorry, I withdraw that one. The only thing
18 I would do --

19 CHAIR TRACY CHRISTOPHER: I don't think it's
20 necessary in there.

21 MR. SCHENKKAN: -- is a nit, we're then
22 going to have the "shall grant a traditional summary
23 judgment motion if," simplified version, within the
24 no-evidence part is we need to go back to "shall." We've
25 shifted temporarily back to "must" there. Or maybe we

1 need to -- I can't remember which it is. The very bottom
2 of page 15, the sentence that begins in the middle of the
3 last line.

4 HONORABLE HARVEY BROWN: Okay.

5 MR. SCHENKKAN: That should be a "shall,"
6 right, not a "must"?

7 HONORABLE HARVEY BROWN: Yeah. They should
8 be consistent at least.

9 MR. SCHENKKAN: Yeah, for consistency.
10 Okay. So this is going to wind up being "No judgment
11 shall be granted except on the grounds stated," and then
12 we'll do the summary version of these two sentences, one
13 for traditional and one for no evidence.

14 CHAIR TRACY CHRISTOPHER: All right. Number
15 (8), the ruling.

16 PROFESSOR ELAINE CARLSON: Tracy.

17 HONORABLE HARVEY BROWN: Wait, you've got a
18 couple of comments.

19 CHAIR TRACY CHRISTOPHER: Oh, sorry.
20 Elaine.

21 PROFESSOR ELAINE CARLSON: At the end of
22 (7), I think you should add "to the challenged element or
23 elements," the last sentence. Because a first-year lawyer
24 is going to say, "Well, I put on" -- "I raised a genuine
25 issue of material fact on this element."

1 HONORABLE HARVEY BROWN: Yeah. Good idea.

2 CHAIR TRACY CHRISTOPHER: Peter.

3 HONORABLE PETER KELLY: I'm still trying to
4 work out the substantive difference, but you moved
5 admissions from subsection (ii), little (ii), two little
6 i's to little (i), but I think that actually groups it in
7 the wrong place. Admissions aren't evidence. They're
8 waivers of proof, and so that would more properly go in
9 little (ii), pleadings, affidavits, declarations, and
10 stipulations of the parties.

11 HONORABLE HARVEY BROWN: That's fine.

12 HONORABLE PETER KELLY: Rather than as a
13 statement.

14 HONORABLE HARVEY BROWN: Good catch.

15 HONORABLE PETER KELLY: So I don't know if
16 it makes it substantive at all.

17 HONORABLE HARVEY BROWN: If there's no other
18 comments on (7), I was going to just raise something
19 quickly, and we can probably skip it, and that is about
20 the middle, a little bit above the middle, it says, "The
21 court may consider any documents," quote, "on file." The
22 Texas Supreme Court, today, said that it does not have to
23 be attached to the motion for summary judgment, because
24 the word "on file," of course, means on file.

25 I think that's not the way most

1 practitioners practice. They think it has to be attached
2 to the motion, and so I would just raise the question, at
3 least just quickly in passing, on whether that should be
4 changed to say something about "attached to" or something
5 like that.

6 CHAIR TRACY CHRISTOPHER: I have strong
7 feelings about that, but I'll try not to say them. Roger.

8 MR. HUGHES: I haven't had a chance to study
9 the brief opinion that was issued today, but I thought the
10 existing law was if you -- it's either evidence -- summary
11 judgment evidence needs to be attached to the motion or
12 response, or if you're referring to it, you need to at
13 least identify it well enough so that the court knows what
14 document you're referring to, so they can find it, and
15 that you're referring to that document. I think -- I just
16 don't think you can say "documents on file."

17 And I have seen responses to summary
18 judgments say, you know, "I included Exhibits A, B, C, and
19 D, and everything on file with the clerk of the court."
20 And that should not be enough, I hope. I hope it doesn't
21 come to that. I think perhaps a better way to say it,
22 "referenced in the motion to" -- "referenced in the motion
23 and on file with the clerk of the court." Just so that we
24 don't have judges have to go on hunting expeditions.

25 CHAIR TRACY CHRISTOPHER: Connie. Oh, I'm

1 sorry. Peter.

2 HONORABLE PETER KELLY: I think "on file" is
3 proper, especially when you're dealing with replies,
4 because, in theory, the movant's evidence is set in the
5 motion; respondent's, nonmovant's evidence, is set in the
6 response. Sometimes in the reply you have to say
7 something like, "Well, wait, you've already waived that
8 argument. Let's look at these admissions that are on file
9 with the court." They're not necessarily attached to the
10 motion or the response, but they are part of the case, and
11 that's the point of little (ii) here. Things that are
12 part of the case, on file with the court, we can say,
13 "Well, wait, they never pled that," and you can't do that
14 if it's attached to the motion. Then you have to attach
15 the entire court file to the motion.

16 CHAIR TRACY CHRISTOPHER: Judge Estevez.

17 HONORABLE ANA ESTEVEZ: So this is just an
18 example to deal with this issue, but I recently had a case
19 in which someone had filed a motion for summary judgment,
20 and I had denied it about a year ago, and the nonmovant
21 was represented by counsel. I had granted some of the
22 summary judgments with other defendants, and, now, a year
23 later, that other defendant was filing another motion, and
24 it was an amended motion for summary judgment, but there
25 was no lawyer for the pro se litigant. And when I looked

1 through the file, the response that the lawyer filed a
2 year ago on a different motion defeated the summary -- he
3 didn't file a reply or a response, and yet there was a
4 response that would have been specific as to the summary
5 judgment questions, and so I think that these are those on
6 file things that I should have considered.

7 I told them I was planning to consider it,
8 because I had understood that that was how the law was
9 going regarding everything in the file, if it was properly
10 on file as evidence that I should be considering on some
11 of these issues, and so that's just an example of how this
12 comes about in a specific scenario in which there is no
13 response. It is a either -- I think it was both a
14 no-evidence and a traditional motion for summary judgment,
15 but, you know, 2,000 pages ago there was a response in my
16 file, because there's thousands of pages. This case has
17 been going on forever.

18 HONORABLE HARVEY BROWN: I just want to
19 throw it out. That's all I wanted to accomplish. We can
20 move on to (8).

21 CHAIR TRACY CHRISTOPHER: Well, I mean, on
22 file with the court and referred to specifically on file
23 with the court, as in look at everything? I mean, those
24 are big differences.

25 HONORABLE HARVEY BROWN: I think those are

1 huge differences. I haven't studied the opinion, but it's
2 my understanding that it's got to be referenced.

3 CHAIR TRACY CHRISTOPHER: Then we should
4 specifically say "referenced," you know, page number, date
5 filed, because, otherwise, I mean, you know, how are you
6 going to find something when you're reviewing a summary
7 judgment? You're looking at it on the computer.

8 HONORABLE ANA ESTEVEZ: Yeah.

9 CHAIR TRACY CHRISTOPHER: And somebody, you
10 know, "I'm attaching" or, you know, "I'm relying on the
11 affidavit filed in the," you know, "previous motion for
12 summary judgment" that then you have to dig back and find,
13 when the simplest thing would have been to reattach the
14 affidavit to the response rather than referring to
15 something else, but it's not -- if it's not specific and,
16 you know, it's kind of like referring to a deposition, and
17 we've got a lot of case law that says you can't just refer
18 to a deposition, and, you know, maybe you can just refer
19 to a deposition now. There's fact questions there in that
20 deposition.

21 HONORABLE PETER KELLY: Doesn't the case law
22 pretty much take care of it? Like the Eleventh Circuit
23 quote saying a judge shouldn't be like a pig hunting for
24 truffles in the record, in other --

25 CHAIR TRACY CHRISTOPHER: I just think the

1 Supreme Court is going a different way.

2 HONORABLE PETER KELLY: Okay.

3 CHAIR TRACY CHRISTOPHER: In their last
4 couple of cases on this point. So I --

5 MR. SCHENKKAN: But really --

6 CHAIR TRACY CHRISTOPHER: I think we should
7 look at those cases and, perhaps, rewrite the rule to
8 be -- to close some of the loopholes.

9 HONORABLE HARVEY BROWN: If you'll bear with
10 me, I have to leave in about five minutes, so could I
11 point out a couple of other things before I leave?

12 CHAIR TRACY CHRISTOPHER: Yeah.

13 HONORABLE HARVEY BROWN: One, on the ruling,
14 the next section, the second sentence says, "The court
15 shall sign a written ruling and provide the ruling not
16 later than 90 days after the oral hearing or written
17 submission date." I think we need to add at the end of
18 that "unless the motion is withdrawn," because it could be
19 withdrawn after the hearing or at the hearing, so I think
20 we need that in there.

21 And then the next sentence says, "A motion
22 for summary judgment is denied by operation of law," is in
23 brackets, "by operation of law." That was a request by
24 one of our committee members. I think that's a problem
25 because I think that undermines the whole statutory

1 intent, which is to have accountability, and if it's
2 automatically denied, there's no accountability.

3 So and then one last thing is I do think
4 subsection (g) should be tweaked to have kind of two
5 parts, one which is the denial of the motion without
6 prejudice and then a second, a continuance, de facto,
7 particularly for this -- you know, the hearing is not
8 going to be until day 60. We're going to let the response
9 be not 21 days, but 40 days, and the reply be 60 or, you
10 know, 50 days or whatever. I think a continuance for that
11 is a good idea and should probably be a little bit of a
12 separate issue.

13 CHAIR TRACY CHRISTOPHER: On the ruling,
14 (8), and (e), case not fully adjudicated on the motion, it
15 seems like that ought to be up there in the ruling,
16 because the idea behind it is that you can partially
17 grant. I mean, if we're modernizing and moving things
18 around. Same thing with the, you know, affidavits or
19 declarations unavailable, the continuance. Where does
20 that really belong?

21 I don't think we need the (1) through (4)
22 anymore in subsection (8), okay, because we -- and I agree
23 with you that "denied by operation of law" is a problem.

24 Okay. We already have, you know, "withdraws
25 the motion," so we don't need "passes the hearing."

1 "Grants a continuance," that should be in the separate
2 continuance rule, and the continuance says, and has always
3 said, that the judge can deny the motion if they needed
4 more time to get the evidence. So if the Legislature knew
5 that, that the court -- because that's the current summary
6 judgment law, that it could be denied, so I don't think we
7 need number (2) or (3) because of that. And I think, with
8 number (4), we just don't consider the late evidence, as
9 opposed to denying the motion.

10 MR. SCHENKKAN: I like that.

11 CHAIR TRACY CHRISTOPHER: And that way we
12 don't run into trouble with seeming to try to get around
13 what the Legislature wanted us to do. So even though very
14 early on in our discussions we were throwing these ideas
15 out, I think that we don't need them, and with some of the
16 tweaks by the second statutory change, plus the idea on a
17 continuance and adequate -- you know, need more time for
18 discovery, we've always had the ability to deny it. I
19 think practice was always just to continue it, but now the
20 practice will just be deny it and, you know, refile once
21 the evidence is there.

22 Any other comments on -- that was just my
23 opinion. Everybody else can weigh in whether they still
24 think it's necessary. Yes, Lisa.

25 MS. HOBBS: Is the "providing the ruling to

1 the parties not later than 90 days," is that statutory, or
2 was that added?

3 MS. ORTIZ: Uh-huh.

4 MS. HOBBS: So you have to sign it and
5 provide it within 90 days?

6 MS. ORTIZ: Yes.

7 MS. HOBBS: Okay. Well, if it's statutory,
8 I'm sorry that I didn't -- I looked at the statute, and I
9 didn't see it, but, obviously, it needs to be in there if
10 it's statutory, but that seems problematic.

11 MS. ORTIZ: Yes, part (a)(2) is "file with
12 the clerk of the court and provide to the parties a
13 written ruling not later than the 90th day after the date
14 the motion was heard or considered," and that's in House
15 Bill 16.

16 CHAIR TRACY CHRISTOPHER: R. H., and then
17 Peter.

18 HONORABLE R. H. WALLACE: Does the "deny
19 without prejudice" being reset for hearing, does that
20 anticipate no more filings, no more briefs, replies,
21 nothing? We'll just reset the hearing, or can they come
22 back and start filing new stuff? I'm just asking how do
23 you --

24 CHAIR TRACY CHRISTOPHER: Yeah, and that is
25 also problematic, the current language about being reset

1 for hearing, because I think Richard and I were kind of
2 talking about it, the way the rule is written, the motion
3 is filed, it has to be set. It has to be ruled on unless
4 it's withdrawn. Okay. If it's denied, you can always
5 file another summary judgment motion. Right? But it
6 needs to be a new summary judgment motion. It can't be a
7 reset summary judgment motion, because we're going from
8 the deadline of filing, setting, ruling. So, you know,
9 you can't reset. You have to refile to start the
10 timelines going again.

11 PROFESSOR ELAINE CARLSON: Even if it's
12 identical to the first one?

13 CHAIR TRACY CHRISTOPHER: Right. Yeah. I
14 mean, if you wanted to refile the same motion, and let's
15 say the judge said, "Okay, I'm going to give them six
16 months to do discovery," and they do their discovery, you
17 can refile your exact same motion, you know, after the
18 six-month timeline, but I don't see any way that we could
19 capture a reset. I think it will just have to be refiled.

20 Peter.

21 HONORABLE PETER KELLY: Just to follow up on
22 what you said, Justice Christopher, about trial judges
23 will have to -- where they previously continued motions,
24 they're now going to deny them, that should probably be
25 included in a note to a commentary to it to explain --

1 explaining the changes. It's not just the deadlines, but
2 it's also contemplated a practice -- a change in the
3 practice of continuing or delaying for further discovery.
4 Because the first thing that crossed my mind is how will
5 the trial judges know that, when most of them don't even
6 know this is coming yet?

7 CHAIR TRACY CHRISTOPHER: Yeah. Yeah. I
8 mean, the current rule, I mean, says, blah, blah, blah,
9 you do your affidavit, "The court may deny the application
10 for judgment or may order a continuance." I mean, common
11 practice was just to order a continuance, but I think,
12 given the way everything is now, it's just going to have
13 to be a denial.

14 HONORABLE PETER KELLY: I think it's worth
15 highlighting to the judges as they're reading the
16 changes --

17 CHAIR TRACY CHRISTOPHER: Yeah.

18 HONORABLE PETER KELLY: -- as to what they
19 have to do.

20 CHAIR TRACY CHRISTOPHER: We've decided
21 there's going to be some CLE on this point. Richard.

22 MR. ORSINGER: Originally, I think the birth
23 of this thought was that the timetable in the first
24 statute was so rigid that we had to have an out for
25 situations when somebody wasn't ready, needed more time,

1 no-evidence motion was filed prematurely and there wasn't
2 adequate time for discovery, and the continuance was ruled
3 out by the statute. So I think we concocted this idea of
4 a denial by operation of law.

5 I can -- I can feel more comfortable with a
6 denial by the judge, but denial by operation of law, if
7 it's -- it could be that the judge has just failed to meet
8 the deadlines, and the time, the 90th day has come by,
9 and, you know, do we -- does that trigger a denial without
10 a -- by operation of law, is it failure to rule? No,
11 these are all intentional acts of the judge.

12 The movant can do it by passing the hearing,
13 but he can't -- the movant can't pass the hearing, so it
14 has to deny the motion or withdraw the motion. Well, I
15 guess, do we still need the denial by operation of law? I
16 guess we do, because there's some situations where the
17 defendant or the responding party is the one that needs
18 the time. The movant won't withdraw the motion, so either
19 the judge has to actually deny it or we have to have the
20 law deny it because a continuance is granted. I don't
21 know.

22 MR. SCHENKKAN: Richard, I think we've got
23 them all covered as long as we have without -- I agree
24 with Judge Christopher. We don't need any of (1) through
25 (4), because the only real thing that we were worried

1 about is taken care of in (g).

2 CHAIR TRACY CHRISTOPHER: Right.

3 MR. SCHENKKAN: And it's taken care of in a
4 way that doesn't thumb a nose at the statute because it's
5 done as a denial without prejudice to permit the
6 opportunity for respondent to do the discovery.

7 CHAIR TRACY CHRISTOPHER: Right.

8 MR. ORSINGER: So that takes care of number
9 (2), which is granting a continuance, but --

10 MR. SCHENKKAN: And it takes care of the
11 substance of (3).

12 MR. ORSINGER: Yes, it does, because that's
13 essentially a continuance to allow the --

14 MR. SCHENKKAN: Well, it's either -- (3) is
15 drafted as "a party," which could include either the
16 movant or the respondent, but the movant can withdraw the
17 motion.

18 MR. ORSINGER: Sure.

19 MR. SCHENKKAN: They have an option, and the
20 respondent has a right to say, "Well, I need more time for
21 discovery," and if he wins on that, then he gets it -- the
22 effect of that is he wins the motion, but only without
23 prejudice.

24 CHAIR TRACY CHRISTOPHER: Right.

25 MR. SCHENKKAN: He gets a denial, but then

1 only -- the only additional work is the movant has to
2 refile the thing, but the movant will be refiling it after
3 the new evidence has been taken, so it's unlikely that the
4 words will be verbatim the same as they were the first
5 time.

6 CHAIR TRACY CHRISTOPHER: Okay. Rich.

7 MR. PHILLIPS: Yeah. There's no reason to
8 have any sort of operation of law. We don't need to worry
9 about a summary judgment motion that sits there and
10 doesn't get ruled on, because there's no consequence,
11 other than for the judge and their statistics.

12 MR. ORSINGER: Sure.

13 MR. PHILLIPS: For the case itself, it goes
14 to final judgment, it doesn't matter that the court didn't
15 rule. This isn't like a motion for new trial, that if
16 it's sitting out there without being ruled on, the court
17 still has plenary power. We don't need to have some sort
18 of drop-dead that it's going to be taken care of by
19 operation of law. And I echo the other comments. I think
20 putting something like that in there is an out -- violates
21 what the Legislature is trying to do here by making a
22 judge do something, not just sit on it until it goes away.
23 CHAIR TRACY CHRISTOPHER: Does anyone want
24 to speak in favor of this provision? All right. Take it
25 out.

1 I think that Judge Bland over here already
2 agrees that we should get rid of the appeal statement that
3 is number (9), so I don't know if we need to continue to
4 talk about that one more.

5 Roger.

6 MR. HUGHES: My pet peeve, judges who won't
7 rule on evidentiary objections. I would commend the idea
8 that (8) be amended that they rule not only on the motion,
9 but evidentiary objections as well. I imagine most people
10 will include in their draft orders favorable rulings on
11 the objections, that is, favorable to themselves, but
12 judges sometimes make their own rulings and issue their
13 own orders or tell them, "This is how I rule, and I'm
14 going to grant your motion in part. Go write the order."

15 I would like to see something in the rule
16 that requires them to rule on the objections when they --
17 as part of ruling on the motions so that we don't get into
18 this fight on appeal about, well, did you really bring the
19 remote -- the objections to the judge's attention? Well,
20 you know, if it's -- if it's in the response or the reply
21 and they've ruled on the motions, they've necessarily
22 ruled on the objections. You just don't know how they
23 ruled, and that could be an important point on appeal. So
24 I would commend that as a change.

25 CHAIR TRACY CHRISTOPHER: I agree with you.

1 The whole objection process is very troublesome in summary
2 judgments, but hard to fix. Peter.

3 HONORABLE PETER KELLY: Just an -- I think
4 this will actually loosen it a little bit by having looser
5 timelines. You can actually have objections. They get
6 a -- you can set a motion to strike summary judgment
7 evidence. When you only have 14 days, it's hard to get
8 something else on the court's docket, but if you have 60
9 days, you can persuade the clerk or the court of the need
10 to have a separate hearing at the same time as the summary
11 judgment motion to deal with the objections. That's what
12 I've done in the past, is a motion to strike summary
13 judgment evidence to be heard at the same time.

14 CHAIR TRACY CHRISTOPHER: Yeah.

15 Okay. I think the -- Giana, do you want to
16 take over? I think our next major issue was (d)(iii).

17 MS. ORTIZ: Yes. And so this was the
18 question raised at the top of the meeting, which is
19 whether or not to contemplate evidence being filed with a
20 reply, and I think I heard a number of people say no
21 evidence with the reply, and so, right now, as you can
22 see, part (d) does not contemplate evidence with a reply,
23 only with a response and motion, and so perhaps leaving it
24 out allows the case law to continue to deal with this on
25 an individual basis.

1 CHAIR TRACY CHRISTOPHER: Oh, no, I thought
2 the current draft included it as number (iii).

3 MS. ORTIZ: It does. It does. And I think
4 that Harvey may have -- or Judge Brown may have indicated
5 that we kept it in, even though there was some internal
6 disagreement about whether to include that so that it
7 could be discussed here.

8 CHAIR TRACY CHRISTOPHER: Who thinks -- so
9 the subcommittee was not in favor of (iii)?

10 MS. ORTIZ: It was not unanimous, correct me
11 if I'm wrong.

12 MR. ORSINGER: We were never able to take a
13 vote because there were too many options and choices. It
14 would be worse than this meeting.

15 MR. SCHENKKAN: That's true.

16 CHAIR TRACY CHRISTOPHER: All right. So who
17 would like to speak in favor of putting that in?

18 MR. ORSINGER: Well, I would just like to
19 ask this question. If we leave it out, do we leave the
20 case law the same, or is the rest of the rule overriding
21 the case law that there are certain instances in which
22 evidence is permitted? I don't want to change that rule
23 by something else we did that cuts it off. Do you see
24 what I'm saying? In other words, if our new language is
25 exclusive, the existing language is not exclusive, then

1 we've actually changed that law. Did I make sense?

2 CHAIR TRACY CHRISTOPHER: Quentin.

3 MR. SMITH: I think you're right, but I
4 guess the justices will tell us eventually whether
5 that's --

6 MR. ORSINGER: We have the option. I mean,
7 right now through the rules process we have the option to
8 eliminate 20 or 30 appeals by writing the rule clearly.

9 MR. SMITH: That's a lot of case law to
10 write in a rule.

11 MR. ORSINGER: Well, I mean, I'm okay with
12 eliminating (iii) as long as there's nothing else we've
13 done in this rule that makes the existing practice
14 exclusive, in which event we've cut it off.

15 CHAIR TRACY CHRISTOPHER: Lisa.

16 MS. HOBBS: I understand Richard's concern.
17 I think Rich had made a suggestion that we're not meant to
18 make substantive changes, but that was early on in this
19 discussion and query whether we have made substantive
20 changes, but we could solve Richard's current problem with
21 a comment.

22 CHAIR TRACY CHRISTOPHER: Okay. Roger.

23 MR. HUGHES: I'm in favor of deleting this
24 sentence, and here's why. I had a chance to actually look
25 it up a bit, and when the nonmovant raises an affirmative

1 defense to whatever is being brought -- whatever is being
2 sought in the original motion, the case law is they
3 need -- only need offer enough evidence to create a fact
4 question. They do not have to conclusively prove their
5 affirmative defense. They just need to make a prima facie
6 case. So at that point, there's nothing that a reply can
7 do, other than to point to the insufficiency of the
8 evidence.

9 Now, there may be the rare case where, so to
10 speak, the reply is "white man speaks with forked tongue"
11 and that there's something bogus about the evidence being
12 offered to create a fact question on the affirmative
13 defense, but I think that's rare and can usually be
14 handled by a motion for leave to late file evidence, which
15 is still provided for, but otherwise, I'm not seeing that
16 your reply is going to be needing to file evidence to
17 oppose whatever's being raised in the -- in the response.
18 I think that's the rare case.

19 CHAIR TRACY CHRISTOPHER: Rich.

20 MR. PHILLIPS: I think, to Richard's
21 concern, the language that's being changed in here from
22 what exists is only the deadlines, not what's being filed,
23 so I don't think that if we leave it as it is that we're
24 foreclosing whatever situations may allow filing evidence
25 at some point. So I would be in favor of not including it

1 to avoid confusion.

2 The other comment I would have here is this
3 keeps talking about "summary judgment proofs" and if such
4 proofs are to be used and proofs to be opposed. I would
5 advocate we ought to change that to "summary judgment
6 evidence" because that's what we call it everywhere else,
7 and that's just a -- I don't know. It's kind of odd
8 phrasing.

9 MR. ORSINGER: Can I respond?

10 HONORABLE PETER KELLY: Judge Gray raised
11 that as well, note number 33.

12 MR. PHILLIPS: Well, it must be right then.

13 MR. ORSINGER: So, Rich, look at paragraph
14 (5) on page 15 where we described the reply with new
15 language. "The movant may file and serve a reply with
16 responsive arguments and objections to a responding
17 party's response or evidence." So does that, by the rule
18 of exclusion, suggest that all you can include in a reply
19 is arguments and objections? That -- that idea that when
20 you list some things, you exclude others, that's in
21 contract interpretation, statutory interpretation, and
22 rule interpretation. So I want to be careful that -- and
23 the comment that Lisa suggests may cure the problem, that
24 we don't -- by listing only two things you can put in your
25 reply, we're not limiting you to those two things, but I

1 think we should be careful going forward. I don't want to
2 overturn that case law established necessary exception.

3 MR. PHILLIPS: I still think we ought to
4 have a comment that says, "Other than adopting the changes
5 that the Legislature has required, this reformatting of
6 the rule is not intended to be substantive change to the
7 law." And if we've got that in there, then I think we're
8 okay.

9 MR. ORSINGER: And this actual record may
10 end up being used in a case to prove what the legislative
11 history, quote-unquote, was for the rule change.

12 MR. SCHENKKAN: Good luck.

13 MR. ORSINGER: I've seen that used before,
14 but I'm glad we're talking about it, because I think we
15 all agree that we're not intending to preclude the
16 existing exception for a reply containing evidence. So
17 that's in the record now for whoever needs it in the
18 future.

19 CHAIR TRACY CHRISTOPHER: All right. Any
20 other people who would like to include (iii)? I think so
21 far it's all been "no."

22 All right. I don't even think we need to
23 take a vote on that one. So we won't include that.

24 Anything substantive in the remainder of the
25 changes?

1 MS. ORTIZ: Well, on part (e), just a note
2 that where we've added "oral hearing or written
3 submission," I note that, in the statute, the lawmakers
4 used the word "hearing" to mean either one of those
5 things, and I think that when the Court goes through to
6 make the changes, that it will come up with that
7 nomenclature and use it throughout. So that looks a
8 little bit different than what has been used previously in
9 the rule, but I think that would get worked out in the
10 final versions.

11 I'm looking here. I don't think -- it looks
12 like we've already talked about (g), which I think does
13 include some substantive revision, I believe. But other
14 than that, no, I don't think there are additional
15 substantive changes.

16 The no-evidence motion language has been
17 disbursed throughout the remainder of the rule.

18 MR. ORSINGER: I do have some comments.

19 CHAIR TRACY CHRISTOPHER: Yes, Richard.

20 MR. ORSINGER: So both with (f) and (g), I'm
21 concerned about the role of deposition evidence in summary
22 judgment. (f) is entitled "Form of Affidavits," and we've
23 added declarations, because declarations, unsworn
24 declarations, are a substitute for affidavits, but when
25 you drop down into the content here, there is no

1 discussion about the further testimony, i.e., deposition
2 testimony.

3 If you go to rule (g), "When affidavits or
4 declarations are unavailable," it's talking about the
5 motion for continuance, but it's a motion for continuance
6 for reasons that cannot be stated -- cannot state present
7 by affidavit or declaration facts essential to justify his
8 opposition. Once again, we omit deposition testimony both
9 from the title and from the context. It seems to me that
10 both (f) and (g) need to include the concept that the
11 problem that's being created, or the rules that are being
12 applied for personal knowledge, apply to deposition
13 testimony as well, because it's completely omitted from
14 those two paragraphs, so far as I can see it.

15 CHAIR TRACY CHRISTOPHER: Should (f) be
16 included more into the paragraph on summary judgment
17 evidence, which we had talked about breaking out in number
18 (7)?

19 MR. ORSINGER: Well, surely summary judgment
20 evidence includes affidavits, declarations, testimony, and
21 exhibits.

22 CHAIR TRACY CHRISTOPHER: Right.

23 MR. ORSINGER: So that would -- that would
24 bring depositions back into play, so you're suggesting
25 that we should combine (f) with an earlier section on

1 summary judgment evidence?

2 CHAIR TRACY CHRISTOPHER: I mean, what -- I
3 guess the purpose of (f) is to talk about the personal
4 knowledge aspect of affidavits?

5 MS. HOBBS: I think so, and it's kind of
6 odd, right?

7 CHAIR TRACY CHRISTOPHER: It's odd. Uh-huh.

8 MS. HOBBS: Because that should be true of
9 everything. I mean, to Richard's point, what is currently
10 subsection (7), the merits of the motion that we have
11 discussed breaking up, it does contemplate that
12 depositions, but you might object to deposition testimony
13 as lack of personal knowledge. You might object to it for
14 other grounds, too, and so it's just weird to me that we
15 have a summary judgment rule that it has to be based --
16 that affidavits or declarations have to be based on
17 personal knowledge when that's true in every -- in any
18 kind of evidentiary motion or hearing where you can use
19 affidavit or declaration testimony.

20 CHAIR TRACY CHRISTOPHER: It seems like the
21 important part of (f) is that defects have to be pointed
22 out by objection.

23 MS. HOBBS: Yeah.

24 CHAIR TRACY CHRISTOPHER: And that would be
25 to any evidence.

1 MR. ORSINGER: Right.

2 CHAIR TRACY CHRISTOPHER: Have to be pointed
3 out by objection.

4 MR. ORSINGER: And that would even be
5 documentary evidence --

6 CHAIR TRACY CHRISTOPHER: Right.

7 MR. ORSINGER: -- that's hearsay or that's
8 speculative or whatever.

9 CHAIR TRACY CHRISTOPHER: Right. And so if
10 we did that, that would cover everything.

11 MR. ORSINGER: So which is the earlier
12 paragraph that you think we could merge with this?

13 CHAIR TRACY CHRISTOPHER: Well, if we made
14 this, basically, the objections, objections to summary
15 judgment evidence, which we haven't really covered
16 anywhere else.

17 MR. SMITH: Yeah. I was going to say, you
18 can also object at the hearing, and so you have to -- the
19 movant on a no-evidence motion may be objecting closer to
20 the hearing, since it's the first time they will have it.

21 CHAIR TRACY CHRISTOPHER: It seems like (f)
22 should be moved -- should be some sort of separate, you
23 know, objections. Although if it's not personal
24 knowledge, some objections can be raised on appeal, so
25 without -- without having brought it up, so that just

1 makes it more complicated. Connie.

2 MS. PFEIFFER: There is a whole body of case
3 law around what is a defect in form or defect in
4 substance, and so this last sentence is like a
5 preservation waiver sentence. And then I think Lisa is
6 right. The whole first part of this is a little bit odd,
7 because it's not capturing everything, and it's stating a
8 trueism that's true also of testimony, so maybe it could
9 be reduced to just the final sentence.

10 MS. HOBBS: And --

11 CHAIR TRACY CHRISTOPHER: Yes, Lisa.

12 MS. HOBBS: My only concern with doing it is
13 I feel like -- and I just -- it would just be like an
14 asterisk by this, is sometimes I feel like some rules
15 reference back to summary judgment evidence, like if it's
16 competent summary judgment evidence, it's sufficient to
17 support X, Y, or Z other motion randomly, and so it seems
18 like this rule sometimes is cross-referenced by other
19 rules, and that makes me -- I doubt it would -- it's just
20 kind of an asterisk, let's make sure we're not messing up
21 other things.

22 CHAIR TRACY CHRISTOPHER: Giana.

23 MS. ORTIZ: I just want to flag that in
24 number (c)(4) and (c)(5) we do contemplate filing
25 objections with the response and with the reply, so that

1 would need to be married probably with this sentence.

2 CHAIR TRACY CHRISTOPHER: Right.

3 MR. SMITH: And that was my whole thing. It
4 sounds like that's going to be a requirement to file
5 objections with the reply.

6 CHAIR TRACY CHRISTOPHER: Yes. Yes,
7 Quentin, that is going to be the requirement. Maybe, if
8 the Supreme Court agrees. Richard.

9 MR. ORSINGER: So I think -- I see paragraph
10 (f) as doing two things. It's setting out some
11 instructions on what your proof is supposed to be, and
12 then it's also saying that, if you don't object to it, you
13 waive it. So it's like two things going on here. At the
14 beginning of (f), where it says "Form of Affidavits and
15 Declarations, Further Testimony," the first words after
16 that is "Supporting and opposing affidavits and
17 declarations." We could just say "supporting testimony."

18 Testimony is not documentary, but we're
19 really dealing with three things in the title, affidavits,
20 declarations, and testimony, but in the rule we're only
21 dealing with the first two. So we can either just keep
22 adding testimony at the end of "affidavits, declarations,
23 and testimony," or we can just use the word "testimony" to
24 supplant affidavits and declarations, but we need to
25 include testimony if we don't make any other changes,

1 because we're only allowing for the requirement to apply
2 to affidavits and declarations. So it seems to me like
3 we've got to be explicit about testimony in depositions.

4 CHAIR TRACY CHRISTOPHER: Okay. We're not
5 fixing this rule on the fly.

6 MR. ORSINGER: Okay.

7 CHAIR TRACY CHRISTOPHER: I mean, you know,
8 I'm not sure how we would fix it on the fly.

9 MS. GREER: Well, actually, I think that
10 makes a really important point, because we do attach a lot
11 of deposition exhibits, and "testimony" would cover all
12 three, and instead of using all of these words, we just
13 use the word "testimony."

14 MS. HOBBS: But it's in what is currently
15 subsection (7).

16 CHAIR TRACY CHRISTOPHER: Yeah. It's in
17 (7).

18 MS. HOBBS: This -- this is intended to do
19 something else, unclear what, except for -- but the idea
20 that we attach deposition testimony to summary judgment
21 motions and responses is already taken care of in
22 subsection (7).

23 MR. ORSINGER: Well, I see (f) as being kind
24 of like a rule of admissibility. In other words, your
25 testimony, whatever form it's in, has to be based on

1 personal knowledge. To me, that's what this rule says.

2 CHAIR TRACY CHRISTOPHER: Well, couldn't we
3 just say, you know, back in what is proper -- you know,
4 the summary judgment evidence, you know, "affidavits must
5 be based" -- "affidavits and declarations and deposition
6 testimony must be based on personal knowledge"?

7 MS. ORTIZ: Which arguably goes without
8 saying, right?

9 CHAIR TRACY CHRISTOPHER: Yeah, kind of,
10 but --

11 MR. ORSINGER: Well, it's -- it would be
12 inferred that you should apply the Rules of Evidence that
13 we're all familiar with to your affidavits, declarations,
14 and deposition testimony. I don't see, though --

15 CHAIR TRACY CHRISTOPHER: The important
16 thing is that you need to object if it doesn't meet those
17 requirements.

18 MS. GREER: Right.

19 HONORABLE PETER KELLY: Don't you have to
20 anyway?

21 MS. ORTIZ: Right.

22 MR. ORSINGER: Yes. I mean, do we want to
23 give anybody a warning that you better make an objection
24 or you're going to waive it? Do we want to tell the judge
25 and the parties that your evidence may be admissible,

1 should be admissible, before it's considered?

2 MS. HOBBS: Well, is this the authorization
3 to use declarations as opposed to deposition testimony?
4 Because we don't want to eliminate that, that your summary
5 judgment proof can include declarations, right?

6 MR. ORSINGER: Yeah. They were added on
7 here because they're substitutes for affidavits.

8 MS. HOBBS: Well, or affidavit. I just call
9 them declarations, but summary judgment proof can be in
10 the form of a declaration that is usually hearsay, but is
11 now bona fide, you know --

12 CHAIR TRACY CHRISTOPHER: Testimony.

13 MS. HOBBS: -- testimony.

14 CHAIR TRACY CHRISTOPHER: Right.

15 MS. HOBBS: Like you said, drafting this on
16 the fly just kind of makes me want to research the heck
17 out of why is that there, and it makes me nervous on what
18 we're doing.

19 MR. ORSINGER: Well, my takeaway is that (f)
20 does something different from (7). (7) is telling the
21 judge what you consider when you rule, and subdivision (f)
22 is saying what is competent summary judgment evidence, and
23 we have to be careful that we don't artificially limit
24 what's summary judgment evidence, and I -- it's -- you
25 would expect every lawyer would know if you don't object,

1 you can't appeal, but I don't see any harm in saying that,
2 if we have a paragraph saying this is the evidence that's
3 competent, and if it's not competent and you don't object
4 to it, you can't complain on appeal. So to me, it's
5 beneficial. You would expect every lawyer would know
6 both, but --

7 CHAIR TRACY CHRISTOPHER: Richard, there is
8 so many summary judgments where people just attach
9 documents without any supporting affidavits.

10 MR. ORSINGER: No authentication? Somebody
11 needs to object, and if they do object, the judge needs to
12 not consider it.

13 CHAIR TRACY CHRISTOPHER: Correct.

14 MR. ORSINGER: So do we tell them that? Do
15 we tell both of them that you need to object, and if they
16 do object, you need to disregard?

17 CHAIR TRACY CHRISTOPHER: Well, I mean, it
18 does say here "sworn or certified copies of all of the
19 papers or parts thereof shall be attached," and I assume
20 that that means you can't just attach the contract. You
21 have to swear that this is the contract, unless, you know,
22 they -- you attached it to your original petition and they
23 don't dispute the fact that it is the contract between the
24 parties; but, I mean, it has to be -- it has to be
25 admissible proof, I guess. Right? Except that we allow

1 an affidavit or a declaration to be admissible proof when
2 it's not admissible at a trial.

3 MS. HOBBS: Yeah. Competent summary
4 judgment and competent trial evidence are two different
5 things, and this is one of the differences in this
6 subsection.

7 CHAIR TRACY CHRISTOPHER: Right. All right.
8 Any other last comments on the summary judgment rule?

9 MR. ORSINGER: Rest in peace.

10 CHAIR TRACY CHRISTOPHER: Which may or may
11 not be fixable in time. Peter.

12 HONORABLE PETER KELLY: I was looking at
13 (h), affidavits made in bad faith. I just wanted to
14 comment it's rather archaically phrased, could use some
15 modernization, but then it occurred to me it's probably
16 duplicative of other motions for sanctions and discovery
17 abuse and bad faith filings, and I don't think we even
18 need it. That's not an opinion. That's just a
19 suggestion. I haven't compared it to the other rules, but
20 I think it's covered by other sanctionable conduct.

21 CHAIR TRACY CHRISTOPHER: Any other
22 comments? Final comments. Connie.

23 MS. PFEIFFER: Just should it also include
24 declarations?

25 CHAIR TRACY CHRISTOPHER: Yes.

1 MS. PFEIFFER: Okay.

2 MR. SCHENKKAN: Your declarations can be in
3 good faith, but not your answer.

4 MS. HOBBS: You can make declarations in bad
5 faith.

6 MS. PFEIFFER: Let's close the loophole.

7 HONORABLE ROBERT SCHAFFER: Add it in the
8 body, too.

9 CHAIR TRACY CHRISTOPHER: Yeah. All right.
10 Any other final comments?

11 Jackie, do you need anything else?

12 MS. DAUMERIE: No.

13 CHAIR TRACY CHRISTOPHER: All right. Thank
14 you. We'll take a 10-minute break.

15 (Recess from 3:04 p.m. to 3:19 p.m.)

16 CHAIR TRACY CHRISTOPHER: Okay. We are
17 going to go back to the business court, and that is you,
18 Marcy.

19 MS. GREER: All right. So as you probably
20 recall, at our last meeting, we talked a lot about the
21 rules that had been already submitted to the Court, but
22 then we got a little bit more time to talk about -- to go
23 back and relook at a couple of rules, and the real rule
24 that we looked at, other than minor stuff, was the rule
25 about cases pending before September 1 of 2024; and in

1 doing further study on it, Judge Bullard made the very apt
2 observation, why are we making a new rule for this when
3 it's so similar to the rule for transfers that are
4 judge-initiated; and so we decided instead to build it
5 back into -- to basically restructure 356, which was the
6 rule where a judge initiates the transfer to the business
7 court, as opposed to the parties removing, because the
8 process works very similarly.

9 You go to the regional presiding judge, and
10 they reach out to the presiding judge of the business
11 court and consider these various factors, including, you
12 know, whether or not this case has been languishing, and
13 obviously, the threshold piece is that it has to be by
14 agreement of the parties, if it was pending before
15 September 1 of 2024. And I think Judge Bullard said that
16 there have only been like two that have been attempted to
17 transfer, but they may also be waiting for the rule. We
18 don't know.

19 So anyway, we spent a lot of time working on
20 the rule, and I really need to give real credit to Judge
21 Bullard, Judge Evans, who is himself a regional presiding
22 judge, so that really was very helpful to the process, and
23 then Robert Levy, who did a lot of work on this. So we've
24 come up with an additional revised recommendation for Rule
25 356, and it is in the materials, and I'm happy to answer

1 any questions, but it's already been sent back to the
2 Court, and we look forward to hearing what they do with
3 it.

4 CHAIR TRACY CHRISTOPHER: Could I ask, were
5 these changes approved of by Judge Bullard and Judge
6 Dorfman?

7 HONORABLE JERRY BULLARD: Yes. We did run
8 the change by Judge Dorfman, and I'd also circulated it to
9 the rest of the court. Haven't heard much feedback from
10 them, but we have talked to them about it, and so -- and
11 he had -- just for the record, too, he had had some very
12 good comments on when we had it as a separate rule, and so
13 a lot of what we did with this one to streamline it was to
14 make sure we captured, as much as we could, in that
15 separate rule into this single rule, like we just pulled
16 into the existing transfer rule. And, of course, we ran
17 it by Judge Evans, too, since it impacted the PJs, and he
18 talked to the PJs. He said I could make this
19 representation, so he said he had talked to the PJs who
20 would be most impacted by this rule, and he said they
21 would be on board with it, too.

22 CHAIR TRACY CHRISTOPHER: All right. Does
23 anyone have any comments on the change as a whole?

24 All right. I think we will pass that on to
25 the Supreme Court then.

1 Bill, we're going to move to the Code of
2 Judicial Conduct.

3 HONORABLE BILL BOYCE: Okay. So this is
4 Tab 4 of your materials. This is a resumption of the
5 discussion we had at the last meeting, and it dovetails
6 with what Richard and others mentioned in the course of
7 our summary judgment discussions, which is the new and
8 very specific performance guidelines that have been
9 legislatively enacted are important, not only in terms of
10 the handling of individual cases, but it also ties into,
11 now, the grounds for which a judicial discipline can be
12 instituted for "willful or persistent conduct that is
13 clearly inconsistent with the proper performance of a
14 judge's duty," which is language that traces through from
15 the Constitution and also through the statute.

16 So the discussion at the last meeting
17 focused on where, when, and how to highlight this new
18 circumstance that judicial discipline can be based on a
19 violation of performance standards, instituted statutorily
20 and otherwise; and to recap the discussion from the last
21 meeting very briefly, the subcommittee had recommended, at
22 a minimum, flagging this in the preamble to the -- to the
23 code's language that says "Look at the standards set forth
24 in Chapters 22, 23, and 33 of the Government Code."

25 The direction from the committee was to also

1 have language that more explicitly, very explicitly,
2 references the fact that the discipline can now be based
3 on a failure to meet deadlines or performance measures,
4 and so this memo in front of you in Tab 4 provides two
5 places where this language might go. One is Canon 3B(9).
6 Another is Canon 8, and you've got them set out on pages
7 two and three of the memo here. I don't know that there
8 is necessarily a right place for it to go. It can
9 logically go in either one of these locations.

10 3B(9), at present, says, "A judge should
11 dispose of all judicial matters promptly, efficiently, and
12 fairly." Proposed language that would be added to this
13 would say as follows. This is proposed language for the
14 full committee's consideration. "A judge shall meet
15 deadlines, performance measures and standards, and
16 clearance rate requirements set by statute, administrative
17 rule, or binding court order. A judge is subject to
18 discipline for willful, persistent, and unjustifiable
19 failure to timely execute the business of the court,"
20 comma, "considering the quantity and complexity of the
21 business," comma, "including failure to meet deadlines,
22 performance measures or standards, or clearance rate
23 requirements." So that is a proposed addition, following
24 kind of the general admonition to run your court well.

25 Alternatively, Canon 8, entitled

1 "Construction" in "Terminology of the Code" provides
2 another possible place for it to go where it says, very
3 similar language, with the second to last paragraph, would
4 be added to say, "A judge is subject to discipline for
5 willful, persistent, and unjustifiable failure to timely
6 execute the business of the court, considering the
7 quantity and complexity of the business, including failure
8 to meet deadlines, performance measures or standards, or
9 clearance rate standards set by statute, administrative
10 rule, or binding court order."

11 One thing to focus on is that Canon 8
12 already has additional flex language. Let's call it that,
13 flex language. It's already in Canon 8 that -- if this
14 language were to be added to Canon 8 in the place
15 indicated, then the immediate next paragraph says -- has
16 all of the caveats and flexibility. "It is not intended
17 that every transgression will result in disciplinary
18 action." Look at all of the facts and circumstances, in
19 so many words.

20 So those are the options that we've brought
21 back to the full committee around the notion of if there
22 is going to be an explicit heads-up to judges that
23 discipline, now, by statute, incorporates a failure to
24 meet these standards under appropriate circumstances,
25 where does that heads-up go? We offer you Canon 3B and

1 Canon 8 for your consideration.

2 CHAIR TRACY CHRISTOPHER: Did your
3 subcommittee have a preference on where it should go?

4 HONORABLE BILL BOYCE: There was not a
5 preference expressed, because under time constraints, this
6 went straight to the larger committee.

7 CHAIR TRACY CHRISTOPHER: Okay. Any
8 comments on where people think it should go? Bob.

9 HONORABLE ROBERT SCHAFFER: I think it
10 should probably go in 8 so that it's side-by-side with the
11 next paragraph to tell everybody, look, this is what we
12 expect, but not every action or inaction should result in
13 a grievance filed against the judge.

14 CHAIR TRACY CHRISTOPHER: Any other
15 thoughts? We've kind of lost our judges.

16 MS. PFEIFFER: Yeah.

17 CHAIR TRACY CHRISTOPHER: R. H., any
18 thoughts?

19 HONORABLE R. H. WALLACE: No, I agree with
20 that comment. I mean, to me it seems like there should be
21 a bit of a -- some language to maybe dissuade the
22 overzealous litigator who can't get a ruling or a
23 political opponent from trying to capitalize on the judge
24 who is late on a ruling, but I will -- I have seen an
25 instance where it would have been justified, so I think

1 the rule is good.

2 CHAIR TRACY CHRISTOPHER: My thought would
3 be to split it up and put the first sentence in 3B(9) and
4 the second sentence in Canon 8.

5 HONORABLE BILL BOYCE: So you're looking at
6 the language that now appears on page two, to say the
7 sentence that would be added to (9) says, "The judge shall
8 meet deadlines, performance measures and standards, and
9 clearance rate requirements set by statute, administrative
10 rule, or binding court order," period, stop, and then the
11 being subject to discipline goes in 8?

12 CHAIR TRACY CHRISTOPHER: That would be my
13 suggestion, because it seems like 3B tells you -- you
14 know, outlines what you're supposed to be doing, right,
15 and it includes the "A judge should dispose of all
16 judicial matters promptly, efficiently, and fairly," and
17 now we're being told that we shall meet time requirements,
18 and it seems to me that that should be under 3B(9). But
19 then the actual discipline would be back in 8, with the
20 caveat. That would be my suggestion. Lisa.

21 MS. HOBBS: Yeah, that might be a good idea.
22 I just have a question about in 3B, the first one is "A
23 judge should dispose of all matters promptly" and then the
24 new language is "a judge shall."

25 HONORABLE BILL BOYCE: Statutory.

1 MS. HOBBS: That is statutory?

2 HONORABLE BILL BOYCE: Yeah.

3 MS. HOBBS: Okay. I just went back to read
4 the statute to see if I could see that.

5 HONORABLE BILL BOYCE: We had talked about
6 that some at the last meeting.

7 MS. HOBBS: Okay, I'm sorry.

8 HONORABLE BILL BOYCE: It's not
9 aspirational.

10 MS. HOBBS: Okay.

11 CHAIR TRACY CHRISTOPHER: But, obviously,
12 there are still many things that are not -- that aren't
13 specific guidelines on, and then it still should be
14 "should promptly, efficiently, and fairly dispose of
15 things."

16 MS. HOBBS: Uh-huh.

17 CHAIR TRACY CHRISTOPHER: So I don't -- at
18 first blush you might think, well, those are
19 contradictory, but I think they're in tandem.

20 MS. HOBBS: Well, and I know just, like in
21 my time as rules attorney, that we were moving away from
22 the word "shall." So I don't know if we've ever done it
23 where the Legislature has used that word, and we are like,
24 well, these are how we do it, but I just point that out.

25 CHAIR TRACY CHRISTOPHER: All right. Any

1 other comments on this one?

2 All right. We will move on to the Rules
3 of Evidence. Pete, sorry, you're going to the bottom. We
4 have put Roger off several times, and we're going to move
5 on to the Rules of Evidence. If we get finished, we'll
6 come back to you.

7 MR. HUGHES: Oh, my. Well, thanks for those
8 hearty souls who did not leave at the break for an
9 obviously more important event in another city. Actually,
10 there is three things left to deal with. The first one is
11 the impact of some changes to the Code of Criminal
12 Procedure on evidence -- on Texas Rules of Evidence 404
13 and 405. To refresh your memories, 404 deals with the
14 admissibility or nonadmissibility of character evidence to
15 prove traits, and basically, generally, prohibits it,
16 except in criminal cases, homicide cases. There it's
17 allowed, and then also as an exception to prove specific
18 other -- instances where it might be admissible to prove
19 other things.

20 And Rule 405, once again, in criminal cases,
21 allows only prior crimes for wrongdoings about his
22 character only if the witness knew about the character
23 issues beforehand, before the crime. What happened -- the
24 two criminal statutes, the Code of Criminal Procedure
25 statutes, that were amended were Article 38.37 and 38.072.

1 For those of you who want it -- to basically shorten, our
2 recommendation is we don't need to change Rules of
3 Evidence 405 or 404 based on these statutes at all.

4 Now, for the explanation. Article 38.37
5 dealt with specific sex crimes against minors and allowed
6 evidence of the defendant's other acts involving the child
7 victim that would be admissible if relevant to either
8 prove the defendant -- the defendant or the minor's state
9 of mind at the time, or during punishment would bear on
10 the relationship between the two of them. And also then
11 had a notice provision that the State had to give 30 days'
12 notice of the evidence, and the judge had to make certain
13 findings before the evidence was admissible.

14 Well, first, the amendment got rid of the
15 notice and findings sections all together, although 404
16 still has a general requirement of reasonable notice
17 before trial.

18 Second, Article 30.37 amended -- it expanded
19 the list of sex crimes and extended this to, not only to
20 minors, but in disabled victims, disabled persons who are
21 the victims of sex crimes; and if this evidence was
22 admissible about the other offenses committed by the
23 defendant, there was an automatic limiting instructions.
24 Also, basically, it preserved the section of the statute
25 which existed beforehand and remains the same, where there

1 the statute 38.37 overrides Rules of Evidence 404 and 405.
2 That was in it before and still is, and for that reason
3 alone, we recommend that there is no change, because the
4 statute already provides nothing in Rule 404 or 405
5 overrule -- supercede the statute.

6 First, the other one is pretty much the only
7 part of 404, it would -- it would -- that it would
8 override is the part about giving notice, and basically,
9 Rule 404's requirement of mere reasonable notice had
10 peacefully coexisted with the original statute. Judges
11 didn't seem to have a problem straightening it out, and we
12 see no reason to rewrite the rule to correct a problem
13 that never existed.

14 Now, the Code of Criminal Procedure 38.072
15 was basically a hearsay exception, and as originally
16 written, it was to make the first outcry of the minor
17 child victim of specific sex crimes that would be
18 admissible if it was about the offense and -- or if the --
19 if it was offered during the punishment phase. It could
20 be about offenses, other offenses, against the victim.

21 Well, they've changed that, and the -- the
22 change is it extended the types of statements to both
23 minors and disabled victims. It expanded the list of sex
24 crimes, and it allowed the statements to involve multiple
25 other offenses. In other words, you could offer multiple

1 statements as long as each statement was about a different
2 offense. Once again, this really didn't change anything,
3 and furthermore, one other reason is the statute
4 beforehand and now still says that anything admissible
5 offered under 38.072 also had to be -- and had to be
6 admissible under Rules of Evidence 404 and 405, so we
7 don't see any reason to change it based on the changes to
8 the Code of Criminal Procedure. You want to discuss that,
9 or shall I go on to the other ones?

10 HONORABLE PETER KELLY: Can I just make one
11 comment?

12 MR. HUGHES: Go ahead.

13 HONORABLE PETER KELLY: That when we were
14 discussing this, Harvey and I both agreed, when we were on
15 the bench, all of the appeals that came up regarding
16 outcry witnesses were all based on the statute. Nobody
17 was talking about the actual Rules of Evidence, so as long
18 as the Rules of Evidence did not conflict with the
19 statute, we just said leave it the way it is, because
20 that's how they litigate it anyway.

21 MR. HUGHES: Well, unless there's any other
22 discussion, I'll go on.

23 The remaining ones came from a project
24 involving several changes to the Federal Rules of
25 Evidence, and the questions came up should we make

1 companion changes to our Rules of Evidence. We discussed
2 them all, and there were only two left. The first one we
3 didn't discuss had to do with the admissibility in
4 criminal cases of statements against penal interest.
5 Originally, both Federal Rule 804, which had -- which
6 means statements that are admissible when the declarant's
7 unavailable, and under Texas Rule of Evidence 803(b)(24)
8 about statements that are all hearsay statements that are
9 always admissible. Basically, the --

10 CHAIR TRACY CHRISTOPHER: Roger, I'm sorry,
11 can you tell us where you are in your second memo? We
12 went through Rule 107.

13 MR. HUGHES: Well, no. We went all the way
14 to 801. We dealt with 107, 613 about prior statements.
15 801 about statements that would not be hearsay, statements
16 of the party's predecessor in interest, so we're talking
17 about eight and nine, pages eight and nine.

18 CHAIR TRACY CHRISTOPHER: Pages eight and
19 nine, Rule 804. Thank you.

20 MR. HUGHES: The rule, the federal rule and
21 our rule, basically states that, in a criminal case, a
22 statement is admissible if it tends to expose the
23 declarant to criminal liability and their corroborating
24 circumstances, indicating that the statement is
25 trustworthy. What the federal rule change was, to add the

1 statement that the statements clearly indicate
2 trustworthiness, and they added this, "after considering
3 the totality of circumstances under which it was made and
4 any evidence that supports or undermines it."

5 In other words, now, to judge
6 trustworthiness, the court looks at all of the
7 circumstances surrounding it, both those in favor of the
8 statement indicating criminal liability and evidence that
9 would undermine it, and this was basically to end certain
10 disputes in the federal bench about whether you consider
11 the totality of the circumstances or just the statement
12 itself. And, basically, the committee's recommendation on
13 this was, after talking to Professor Goode, we didn't have
14 this dispute under case law. There didn't seem to be a
15 problem, but he didn't think there was any harm in
16 adopting it. It might be of some help. So our
17 recommendation is to give it serious consideration, but
18 first talk to the Court of Criminal Appeals to see if they
19 have any problem with it or any suggestions.

20 All right. The last one is federal rule --
21 or Texas Rule of Evidence 1006, dealing with summaries.
22 Basically, the federal authorities completely overhauled
23 the summaries rule, and what they did was they made it
24 summaries may be admissible as evidence. The rule states
25 that a summary of -- now states that a summary of

1 voluminous evidence such as photographs, calculations,
2 et cetera, may be admissible as evidence to prove their
3 content, and it's not necessary to admit into evidence the
4 supporting documents that are the voluminous materials
5 that are summarized. Now, again, it's "may not." It must
6 admit, and the sea change, if you will, is that the
7 summary itself is evidence and not merely the supporting
8 documents.

9 The predicate, of course, is the proponent
10 of the evidence must make the underlying originals,
11 et cetera, available for examination or copying at a
12 reasonable time and place, and the court may order the
13 proponent to do that.

14 Now, the final provision is -- and this
15 would require adoption of Federal Rule 107 concerning
16 illustrative aids. The rule goes further to say that if
17 the summary is offered merely as an illustrative aid, that
18 must satisfy the new Federal Rule 107. It also has a
19 comment, and this is what we thought is something we ought
20 to adopt as an official comment, and that is the summary
21 still must pass muster under Rule 403, which would allow
22 then the opponent to object that the summary does not meet
23 the 403 balancing test, that perhaps it's too -- it's so
24 argumentative that it's prejudicial, it's inaccurate, or
25 would otherwise cause confusion. And so we think, while

1 we recommend adopting the rule, we also think we should
2 have an official comment that Rule 403 must also be
3 satisfied, and that acts as a check on summaries, shall we
4 say, that are too argumentative or prejudicial in some
5 other manner.

6 Any discussion?

7 CHAIR TRACY CHRISTOPHER: What is the
8 difference between a summary of voluminous materials and
9 an illustrative aid?

10 MR. HUGHES: I imagine that would depend on
11 the reason it's offered. I mean, a party may offer, like,
12 for example, say a PowerPoint slide that briefly
13 summarizes it. It may also have to do with the extent to
14 which it is a fair summary of the documents. I mean, for
15 example, if it's only a partial summary or it's, shall we
16 say, argumentative and not a fair summary of the material,
17 it would be an illustrative aid. But I think that depends
18 on what the proponent wants to offer it as. The proponent
19 may say, no, this is just an illustrative aid, you know, a
20 mile-high bullet point summary of it, rather than a -- an
21 attempt to make an accurate summary.

22 CHAIR TRACY CHRISTOPHER: Well, like one of
23 the most common summaries in state court are summaries of
24 medical records and medical record bills. So is that a
25 1006 summary, or is it a 1007 illustrative aid?

1 MR. HUGHES: Well, perhaps one way of saying
2 it is if you have a document that says there are seven
3 medical providers and each one charged X number of dollars
4 and the total number of dollars is Y, that might be an
5 illustrative aid, because it would not really be
6 purporting to summarize all of the bills. It's just
7 essentially reporting totals and summaries, but if, on the
8 other hand, you had a, you know, two or a three-page
9 document listing each of the medical charges, you know,
10 for, you know, Dr. Smith, and it lists dates and each one
11 of the services and their CPT numbers and the charge for
12 that and then listed them all in each of their columns and
13 then at the bottom summarized them, that might be a
14 summary that would be admissible. And I suppose it would
15 go to how detailed was the summary compared to the
16 voluminous documents.

17 I can recall in one mortgage collection case
18 I had, they offered an exhibit that was a summary of all
19 of the interest -- all of the payments, interest charges,
20 penalty charges, et cetera, which went on for a couple of
21 pages, and they didn't want to offer all of the bank
22 records for which those figures had been drawn. That
23 might be a summary. If, on the other hand, you merely
24 said -- had a chart showing amounts of credits, X, amounts
25 of payments Y, amounts of interest charges, Z, total,

1 whatever, that might be an illustrative aid.

2 CHAIR TRACY CHRISTOPHER: Justice Bland.

3 HONORABLE JANE BLAND: Did the committee
4 examine whether to require that the party introducing the
5 summary also disclose the underlying methodology for
6 deriving the summary, in the age of artificial
7 intelligence?

8 MR. HUGHES: No. I think that would come
9 under, you know, the previous discussion of using
10 artificial evidence -- pardon me, artificial intelligence
11 and then also the Daubert challenge problem, and there's a
12 whole separate kettle of fish, which we've discussed, but
13 we did -- it has a built-in procedure for allowing the
14 party to examine and copy the underlying materials, and
15 that would give them a basis perhaps to make such
16 challenges, but it's not baked into Rule 1006 itself.

17 CHAIR TRACY CHRISTOPHER: Richard.

18 MR. ORSINGER: I wanted to comment on
19 illustrative aids. It's frequent in my practice that we
20 use PowerPoint slides that are not just summaries of data,
21 but they're actually depictions of things, like an
22 organizational chart or triangles and boxes with arrows
23 that show a complicated transaction and simplify the
24 transfer of assets or money or things of that nature, and
25 we usually promote those through our expert witnesses, who

1 will use it to explain in simpler terms the complexity of
2 a transaction. It's not a summary of any particular
3 document. It's kind of like a summary or an analysis or a
4 simplification of an entire transaction.

5 I don't know what happens to illustrative
6 aids like that, but it's frequently used in, not only my
7 practice, but anyone who is involved in a complex
8 transaction and trying to simplify it, whether for a judge
9 or especially for a jury, and usually, in my experience,
10 you just go ahead and mark those as exhibits, and they go
11 in with the jury, or they go into evidence with the judge.
12 I don't know if this would change that practice, prohibit
13 it, or permit it.

14 MR. HUGHES: I think the answer is the --
15 they've adopted a Rule 107 to deal with illustrative aids.
16 That's why this rule says if this is an illustrative aid
17 you're talking about, this rule doesn't apply, apply
18 Federal Rule 107, which is why I said earlier if we're
19 going to adopt this rule as it is, we're going to have to
20 do something with Federal Rule 107, adopt something like
21 it.

22 MR. ORSINGER: So if we adopt this rule and
23 don't adopt a state equivalent to Rule 107, it doesn't
24 curtail the practice, but it doesn't authorize the
25 practice either.

1 MR. HUGHES: Yeah. Kind of leaves it as-is.

2 MR. ORSINGER: So 107 would, in a sense,
3 authorize the practice of using schematics or other kind
4 of demonstrative aids that are not summaries of voluminous
5 data.

6 MR. HUGHES: Well, the Texas Rules of
7 Evidence don't have a 107 --

8 MR. ORSINGER: Right.

9 MR. HUGHES: -- to deal with demonstrative
10 aids. If we don't adopt it, we're left with whatever we
11 had, and this rule, we would adopt everything but the
12 reference to a Rule 107. In other words, if we were to
13 adopt this without adopting also Federal Rule 107, or some
14 form of it, then we would have to delete the reference --

15 MR. ORSINGER: Sure.

16 MR. HUGHES: -- to summaries offered as an
17 illustrative aid.

18 MR. ORSINGER: So, basically, it would be
19 business as usual. In other words, this wouldn't affect
20 the practice of illustrative aids for which we have no
21 written rule.

22 MR. HUGHES: Well, we could put that in.
23 You could put in a sentence that if it's offered as
24 illustrative aid, it's not evidence, and it would --
25 current law applies, but I'm not sure how you would

1 elegantly say that.

2 MR. ORSINGER: Yeah. Is there a reason why
3 we should not consider adopting a Rule 107, if it
4 formalizes the practice of using illustrative aids? And
5 I'm -- am I hearing you say that they can't be evidence,
6 because they frequently are marked and offered and
7 received?

8 MR. HUGHES: Federal rule --

9 CHAIR TRACY CHRISTOPHER: 107 says not --
10 Federal Rule 107 says it's not.

11 MR. ORSINGER: Not evidence? That would be
12 a change in our practice.

13 MR. HUGHES: Well, it may or may not be.
14 I'm just saying we recommended adopting the Federal
15 Rule 107 or something like it, and from the Federal Rule
16 of Evidence, you get to present it, and it says it's not
17 evidence and it doesn't go to the jury for their
18 deliberations, unless the parties consent to it or the
19 court, for good cause, allows it. We might be able to
20 change that, but the whole point of it is the federal
21 rules, their position is illustrative aids are not
22 evidence, but a summary may be evidence.

23 MR. ORSINGER: Yeah. Well, that's not very
24 practical, and that's certainly not the way we practice
25 law right now.

1 CHAIR TRACY CHRISTOPHER: Tom.

2 MR. RINEY: I agree with Richard. We are
3 introducing illustrative aids into evidence on a fairly
4 frequent basis, and normally, we're doing it without
5 objection, because I want mine in, you want yours in, so
6 we don't object, but I think we could adopt this proposed
7 Rule 1006 and eliminate paragraph (c), because, in a way,
8 it's unnecessary. It's saying that it functions only as
9 an illustrative aid, and it's governed by Rule 107. Well,
10 if you don't meet the requirements of (a) and (b), then
11 it's not a Rule 1006 summary, and I think the illustrative
12 aid is a separate question, so I -- I'm agreeing with you,
13 but I think we could still adopt this and eliminate (c)
14 and serve the purpose.

15 MR. ORSINGER: I get that, and I don't do PI
16 work, but how many times is there a diagram of some part
17 of the human body or something like that and then it gets
18 marked and put into evidence?

19 MR. RINEY: Right.

20 MR. ORSINGER: That's not a summary of
21 voluminous information, but how are you going to -- how is
22 a jury going to deal with a malpractice case or an injury
23 case with no diagrams of the human body?

24 MR. RINEY: Or my scrawlings on a flip chart
25 that I have been marking.

1 CHAIR TRACY CHRISTOPHER: So can I ask this
2 question? If we did not adopt Rule 107 and got rid of (c)
3 in 1006, is there any advantage to changing our current
4 1006 to look like the Federal 1006, because they seem to
5 be accomplishing the same thing?

6 MR. HUGHES: My understanding is, is under
7 the current law, under 1006, the summaries are not -- the
8 summary is not evidence. It's the underlying materials
9 that are evidence, and they would have to be -- the
10 underlying materials would have to be offered into
11 evidence, and the summaries, I guess you might say, are
12 treated like an illustrative aid.

13 This way -- the advantage of adopting this
14 is we have something that says the summary is evidence,
15 and you don't need to bring the thousand pages of
16 documents or photographs or whatever that they summarize
17 and offer them into evidence. Now, you can, but you don't
18 have to.

19 CHAIR TRACY CHRISTOPHER: Rich.

20 MR. PHILLIPS: I've always understood 1006
21 to be the opposite. It is evidence.

22 MR. RINEY: Right, I agree.

23 MR. ORSINGER: I agree. I agree.

24 MR. PHILLIPS: The way it's written right
25 now, it says you can use the summary, chart, or

1 calculation to prove the content of the voluminous
2 writings and recordings or photographs. So I don't think
3 we need to say it's evidence. I think the rule says it's
4 evidence. The question really, for me, is, is this
5 version of it that they've now adopted in the federal
6 rules clearer than our version about what a summary is,
7 and ours already says you can use it to prove, which means
8 it's evidence. I mean, the new version expressly says the
9 court can admit that into evidence, so maybe that's a
10 benefit, but --

11 MS. HOBBS: I thought the federal rules were
12 trying to -- like the boxes and boxes and boxes of
13 underlying data doesn't have to go back to the jury room.

14 MR. PHILLIPS: Yeah. All 1006 says is the
15 court can order you to produce it. I mean, I've given
16 talks on this, on error preservation on how to do this,
17 right. You've got to make sure you've made it available
18 ahead of time. You've got to make sure you've got
19 everything to prove it up, that the voluminous stuff is
20 admissible itself, and then have it in court in case
21 somebody wants to see it.

22 I mean, does the new one -- I mean, it still
23 says that you have to make it available and that the court
24 can order it to be produced. I mean, the new federal rule
25 at the bottom of (b) has the same thing that we have in

1 our current 1006. I mean, I think there's a benefit to
2 our rules being similar to the federal rules when we're
3 trying to be similar, and I like the idea that this
4 specifically says it's admissible in evidence, but, I
5 mean, I think our rule already says that. This is just a
6 clarifying thing, is how I read this memo.

7 CHAIR TRACY CHRISTOPHER: Any other comments
8 on the illustrative aids issue? We have several people
9 that think that that's a bad -- bad rule and a bad
10 cross-reference. Anyone else?

11 HONORABLE R. H. WALLACE: Well, are we
12 talking illustrious aid, does that mean -- or illustrative
13 aid, the doctor who gets up to testify and brings his
14 little skeleton with him to show where your spine is hurt
15 and all that kind of stuff --

16 MR. ORSINGER: I think so.

17 HONORABLE R. H. WALLACE: -- that's an
18 illustrative aid.

19 MR. ORSINGER: I think that's illustrative.

20 HONORABLE R. H. WALLACE: That doesn't go to
21 the jury, but I'm not -- I'm more familiar with the term
22 "demonstrative aid," and lawyers, a lot of times, if they
23 offer an exhibit and there's an objection because they
24 haven't laid the proper foundation, and, okay, it's not
25 admitted. "Well, Judge, I'm only offering it as a

1 demonstrative exhibit," which to them means it doesn't go
2 to the jury, but the jury gets to see it and talk about
3 it. I don't know. The term "illustrative aid" is a
4 little foreign to me.

5 CHAIR TRACY CHRISTOPHER: So that's on page
6 two of this second memo, is the Rule 107, which we briefly
7 discussed, but I don't think we had a lot of people here
8 at the time we discussed this before and certainly not,
9 you know, what's the difference between a summary and an
10 illustrative aid, because that can be problematic, I
11 think.

12 HONORABLE R. H. WALLACE: And, Richard, the
13 situation you're talking about with all of the arrows and
14 stuff, to me that would be maybe a summary, if you prove
15 it up properly.

16 MR. ORSINGER: Well, but it's not a -- it
17 may be a summary of a transaction that occurred, but maybe
18 not a summary of voluminous evidence. The summaries that
19 were envisioned in this rule are stacks and stacks of
20 records.

21 HONORABLE R. H. WALLACE: Right.

22 MR. ORSINGER: And then you bring in a
23 summary of what the records in the aggregate show. What
24 if you're trying to explain a complex transaction that you
25 allege was fraud? There's maybe a dozen documents or

1 maybe there's 25 documents, but the diagram is to explain
2 the complexity of this transfer was made to this entity
3 and then it transferred to this and then there was a loan
4 that was guaranteed by this entity. The only way to
5 straighten all of that out is with a diagram, and if you
6 can't put the diagram in evidence and send it into the
7 jury room, the jury has to retain whatever they can
8 remember out of a seven or 14-day trial and go back and
9 try to figure it out.

10 So in the family law cases, we don't give a
11 second thought to this. All complex transactions are
12 explained with diagrams, not summaries of documents, but
13 explanations in simple terms, graphic terms, with
14 triangles, squares, and arrows showing who did what and
15 when; and to me, to say they can't be evidence, that would
16 be devastating. First of all, the family lawyers will be
17 forced to go to the Family Code to fix it, but secondly --

18 HONORABLE JANE BLAND: There it is.

19 MR. ORSINGER: It's not smart. It's not
20 smart for any practice. I don't do PI work, but if you
21 have a diagram of the arm or the head or even a full
22 skeleton and you have a physician up there explaining
23 parts of the body and you've got diagrams, that's an
24 illustrative aid. That's not a summary of voluminous
25 evidence, but, by God, you need it in order to try your

1 case.

2 CHAIR TRACY CHRISTOPHER: Tom.

3 MR. RINEY: I disagree. If you've got a
4 doctor up there and he says, "This correctly shows the
5 anatomy," that's no different than a photograph. He just
6 says it accurately and correctly portrays it. It's
7 neither an illustrative aid, nor is it a summary.

8 MR. ORSINGER: It's a photograph of whose
9 anatomy, the plaintiff's anatomy or somebody in a book?

10 MR. RINEY: If he testifies that it's
11 somebody's anatomy and he believes this patient is
12 similar, how is it different than a photograph or any
13 other things we use? I mean, I think we're -- just
14 because something illustrates something else doesn't make
15 it an illustrative aid, I don't think. And I think
16 adopting Rule 107 is just going to confuse the issue.
17 Like when Judge Wallace said, I mean, it kind of reminded
18 me of some tricks lawyers did in the old days. The
19 chiropractor would come in there with this spine, and the
20 defense lawyer would introduce it into evidence so he
21 couldn't take it to the next trial, and --

22 CHAIR TRACY CHRISTOPHER: Those things are
23 expensive.

24 MR. RINEY: That's right. We always heard,
25 and the judge would say, "No, you can't do that. He was

1 just using that to illustrate what's going on. It's not
2 evidence." And so I think there's a certain discretion in
3 the trial judge, and you're right, Richard, it's working.
4 Why do we need to complicate it by adding a Rule 107?

5 MR. ORSINGER: Yeah. All we can do is make
6 it worse. We can't make it better.

7 MR. RINEY: I agree.

8 CHAIR TRACY CHRISTOPHER: Marcy.

9 MS. GREER: Well, I have a related question
10 on when experts use PowerPoints, which are -- the
11 PowerPoint itself is not evidence, but you can't
12 understand their testimony without it; and what I've done
13 in most cases is get an agreement from the other side that
14 the PowerPoints will go into the record, because,
15 otherwise, you know, I mean, they're saying, well, this
16 and this, and if you look at this, and, I mean, you can't
17 follow their testimony without it.

18 MR. RINEY: But if yours goes in, mine goes
19 in. That's the way it's resolved.

20 MS. GREER: Right.

21 MR. ORSINGER: When you say "in the record,"
22 you don't mean into evidence and in the jury room. You
23 mean in the appellate record?

24 MS. GREER: Well, we do it in the appellate
25 record, but I'm wondering how the jury can follow it.

1 MR. ORSINGER: They can't. That's why
2 you've got to give it to them. To say that this is a
3 demonstrative aid and then not let them have it when
4 they're trying to figure out the evidence --

5 MS. GREER: I don't think we've been letting
6 them -- I mean, I don't think they've gone back with the
7 jury, but definitely, we've got to get it in the appellate
8 record, but it's kind of a mess.

9 CHAIR TRACY CHRISTOPHER: I personally think
10 more things should go back to the jury, but that's just --
11 so I'm agreeing with you and Tom that, you know, sometimes
12 you -- even though they're not evidence, the jury needs to
13 use them and look at them and understand them. I mean,
14 they have been sitting in there watching a trial where
15 this document was in front of them every day and then you
16 send them back to deliberate, and you say, "Oh, no, you
17 can't see that document anymore," and you're kind of like
18 "Why? Why?" Connie.

19 MS. PFEIFFER: I usually see things like
20 this attached as court exhibits, so it's not evidence for
21 a sufficiency review per se, but it is still part of the
22 record that can be seen and make sense of testimony. And
23 a jury can see it.

24 MS. STOKES: Yeah, but, yeah, only if you
25 request it, right? Like when you request statement of

1 facts of the trial and all of the exhibits, the court
2 reporter won't put in the demonstratives unless you've
3 given them to the court reporter and said, "Would you
4 please admit this as a court exhibit, not a real exhibit,"
5 and that's the distinction, but Marcy's right. Like when
6 you read a transcript, using the old term, you can't
7 understand what anybody is saying if you don't have the
8 demonstrative in there.

9 CHAIR TRACY CHRISTOPHER: It's true. Okay.
10 So in front of us, everyone -- any comment about changing
11 our current Rule 1006 to the federal language, but leaving
12 out (c)? Do people think that's an improvement, or should
13 we leave it as-is?

14 HONORABLE ROBERT SCHAFFER: Where is it?

15 MR. PHILLIPS: Last page of the PDF, very
16 bottom.

17 CHAIR TRACY CHRISTOPHER: Page nine of
18 Tab 7. Yes, Rich.

19 MR. PHILLIPS: I think this language is a
20 little weird. I think breaking it out to say here's the
21 procedure for it and then at the beginning saying this is
22 what you can do, expressly saying it gets admitted into
23 evidence, I don't think it makes a substantive change to
24 our 1006, but I do think it's clearer, and I think that's
25 worth considering doing just to make it easier to follow

1 the rules.

2 CHAIR TRACY CHRISTOPHER: All right. We've
3 had a rehearing on 107, to the extent we had people
4 supporting 107 before, so let's flip back to 107, which is
5 on page two, that we've certainly had some people against
6 it. Anyone in favor of 107 at this point? Or should we
7 just leave the practice as-is? Roger.

8 MR. HUGHES: I'm in favor of it. I realize
9 people -- the importance of what they talk about as
10 demonstrative evidence, which apparently the feds don't
11 like us somehow in whatever reason they want to call it
12 illustrative, but it seems to me what we're really talking
13 is that if I can't send back into the jury room my
14 expert's five point, big point -- you know, my expert's
15 five takeaway points that he put on that PowerPoint or I
16 can't take back into -- send back into the jury room my
17 witness' summary of this fraudulent transaction, it's not
18 evidence. It's not a summary.

19 It's basically, you know, the five takeaway
20 points of somebody's testimony, which I think is a lot
21 different from the -- from the expert witness who says,
22 "This is what a spine looks like." "This is how the
23 nerves exit the spine," or "This is where the muscles are"
24 and that's not a summary either, but I can see why it is
25 important then to have a rule like 107, that maybe these

1 things that we have been using, as you view as
2 demonstrative or illustrative aids, they're not really
3 evidence. They're just really our big bullet points for
4 the case, and we want those bullet points to go back to
5 the jury room, and that's not evidence. You know, it's
6 just some -- it's a emphatic reminder of what my case is
7 about, not necessarily evidence.

8 CHAIR TRACY CHRISTOPHER: So the lawyer is
9 going to have to say, "Jurors, write these five points
10 down, because you can take your notes back there with
11 you." They can't have the piece of paper that's got those
12 five points on it.

13 MS. GREER: Well, and they can't share their
14 notes with anyone else.

15 CHAIR TRACY CHRISTOPHER: True. Richard.

16 MR. HUGHES: And that's why we have final
17 argument, to tell them what those five big points to
18 remember are, and if they can't remember it five minutes
19 after they walk back into the jury room, maybe they
20 weren't that persuasive to begin with, but that's my
21 opinion.

22 CHAIR TRACY CHRISTOPHER: Richard.

23 MR. ORSINGER: We are not discussing what we
24 probably should be discussing, which is the demonstratives
25 that the lawyers use during voir dire, opening, and

1 closing argument. That's a completely different
2 discussion, and I don't have a problem with saying that
3 those PowerPoints are not evidence. That's argument. But
4 when you have an expert witness that's testifying to
5 complex things and explaining them by way of a diagram or
6 something that's not a summary of records, but an
7 explanation of the transaction or the things to consider
8 or the elements or whatever, to me, that is evidence,
9 because that's woven in to the testimony and helps you to
10 understand the testimony. And it's not hearsay because
11 the rules say that if the expert is -- if it's typical for
12 the expert to rely on that kind of information, it's not
13 inadmissible.

14 I think it's untenable to say you can't use
15 any technology other than summarizing written documents.
16 That's not realistic in many types of litigation, so I'm
17 against any kind of rule that's going to say that anything
18 other than a summary of words and numbers is inadmissible.
19 I don't agree that's the law. I don't agree that's the
20 way the law practice is. I don't agree that would be a
21 good place to take us, so if that's what 107 does, I'm
22 very opposed to it.

23 CHAIR TRACY CHRISTOPHER: Any other comments
24 back on 107?

25 Any other comments on 1006? All right. Is

1 that finished?

2 MR. HUGHES: Yes. That is it.

3 CHAIR TRACY CHRISTOPHER: Okay, great.

4 MR. HUGHES: And thank y'all for staying
5 here and not rushing off to more important things.

6 CHAIR TRACY CHRISTOPHER: All right. Pete.
7 Judge Bland wants to know if you can explain in a
8 nutshell.

9 MR. SCHENKKAN: I think so.

10 CHAIR TRACY CHRISTOPHER: Okay.

11 MR. SCHENKKAN: We have this problem that
12 these new statutes alerted us to, which there are various
13 situations in which people can sue under a pseudonym, and
14 we have a -- an existing rule that says the petition shall
15 state the name of the parties and their residences, if
16 known; and while, of course, the names, it doesn't say the
17 true names, everybody sort of assumes we were thinking
18 about the true names.

19 So we have to decide are we going to say
20 anything at all about the fact that people can sue under
21 pseudonyms, and if so, what? And the suggestion is, the
22 lead suggestion is, at page seven -- page eight of 37 of
23 the Tab 5, the amendment to Rule 79 that says -- and I'm
24 going to apologize for this, but "Except as required or
25 authorized under," and then ignore subsection (b), you'll

1 state the true names; but then the exception would be what
2 we would tell people they need to know, is "A claimant
3 using a pseudonym and an address other than the residence
4 or" -- "for a claimant or any other person," because we
5 don't just have claimants using pseudonyms. We have
6 claimants using pseudonyms about defendants, and we use
7 pseudonyms about relatives of parties and witnesses.

8 "A claimant using a pseudonym must provide
9 the clerk under seal the true name and residential
10 address, if known, for recusal purposes." We may need to
11 pause and talk about that. Richard tells me there's an
12 e-filing problem with that, but the basic idea is the
13 judge does need enough information to decide whether the
14 judge has a recusal problem.

15 And then you could stop there, and you could
16 rely entirely on if somebody is using a pseudonym and
17 somebody else who is a party or can properly get admitted
18 as an intervenor for this purpose can say they shouldn't
19 be allowed to use the pseudonym, if it were another party
20 they could specially except, as happened in one of the
21 Texas cases that's summarized, but -- or you could say
22 here's what needs to happen. And then those have two
23 subcategories.

24 If they're relying on a statute, the
25 suggestion is all they need to do is say, "I'm relying on

1 statute X. I'm using a pseudonym, and I'm relying on this
2 section of the Civil Practice and Remedies Code, in our
3 case." Or if it's a federal statute, whatever the
4 relevant federal statute is, but many of the people who
5 are using pseudonyms are not relying on any existing
6 statute or administrative agency rule promulgated with
7 statutory authority. They are saying my privacy interests
8 or the privacy interests of somebody I care about are such
9 that I shouldn't have to, as the price of suing, tell
10 everybody in the world who I am. We're looking skeptical
11 already.

12 HONORABLE JANE BLAND: Very skeptical.

13 MR. SCHENKKAN: Okay. All right. But this
14 is happening a lot, and the law is that under many --
15 under the totality of the circumstances, is the short
16 version of the summary of the balancing test. The words
17 vary from court to court quite a bit, but even the courts
18 in the cases in which they're applying the words
19 of their -- if they're a federal court, their federal
20 circuit court of appeals, they all say the actual details
21 and the words don't matter. The question is what's the
22 balance here of this specific case, and so you can do that
23 and people are doing that in Texas as well as in the
24 federal courts. Do you want to tell them anything about
25 what they have to do to do that and tell anybody anything

1 about what to do if they don't like it?

2 The suggestion would be, as drafted here in
3 this motion, if they're not relying on a statute or rule,
4 they have to file simultaneously with their petition, if
5 it's the petition, or their claim, if it's a counterclaim
6 or whatever. They have to file a motion giving fair
7 notice of the facts and other law they rely on, which
8 would be these are my privacy interests, or whatever the
9 other interests are, that I'm relying on, and here's some
10 case law where something like this has been argued, where
11 a conclusion is made that the person could go forward or
12 the conclusion was made they couldn't go forward in that
13 case because of this fact, but mine are different on that
14 point, so I get to go forward.

15 You don't have to do it that way. You could
16 just let them file in their original claim, saying I'm
17 proceeding under pseudonym, and then you could rely on
18 somebody who objects to specially except and say they
19 shouldn't be allowed to do that.

20 If you're going to have -- people in this
21 case have to be able to start by filing under a pseudonym.
22 Otherwise, it's already -- the very thing they seek to
23 avoid has happened. They have -- in a court filing, they
24 have magnified whatever harm they're suffering that
25 they -- the whole point of being able to file under a

1 pseudonym has been lost. So they do have to be able to
2 file it under a pseudonym first, and you could wait and
3 make somebody else move to object, which often they will
4 not.

5 An example I would use to really underline
6 the point is I read the court news for Travis County court
7 filings daily. Every week or so there are several suits
8 filed by Strike 3 Holdings against John Doe, accusing John
9 Doe of having illegally used a -- something called
10 BitTorrent to download plaintiff's adult movies. I don't
11 think John Doe is going to object, and the plaintiff has
12 already decided they're not going to object. So there may
13 not be an objection to it. But if you're going to then
14 have a fight, the fight needs to itself be confidential,
15 and if the party wishing to use the pseudonym loses, the
16 result has to be they can amend and use their real name or
17 the suit will be dismissed without revealing their
18 confidentiality. They have to at least still preserve the
19 option, well, if I can't go forward under a pseudonym, I'm
20 not going forward at all.

21 CHAIR TRACY CHRISTOPHER: And this is what's
22 happening in federal courts right now?

23 MR. SCHENKKAN: Yeah.

24 CHAIR TRACY CHRISTOPHER: And it's happened
25 in a state court?

1 MR. SCHENKKAN: Yes. In the memo here,
2 we've got snippet summaries of the five or six Texas
3 cases, Texas state court cases, as well as a couple of
4 selected ones of the very large number of federal cases
5 around the country, and in the federal case context of
6 this really excellent First Circuit Court of Appeals
7 federal case, that summarizes the whole nine yards and
8 addresses the basic alternative there is to this whole
9 scenario, which is to say let's have some more categories,
10 you know, like the categories we have in these three
11 statutes. There are folks who say there really ought to
12 be categories on this that say if you're in this category,
13 you get to do it, and if you're not, you don't.

14 But the problem with that is the categories
15 don't work very perfectly because it really is
16 complicated. There are a whole bunch of other facts, and
17 the other problem with the categories is the Legislature
18 ought to be the one to make the categories, not the Texas
19 Supreme Court. The Texas Supreme Court ought to weigh in
20 on the balancing test at the first appropriate time they
21 have a case in controversy that goes up there, but until
22 they do that, all we have out there here in Texas is there
23 are balancing tests, and people use them, including Texas
24 courts. We are sort of stuck with that's the way this is
25 going to be decided.

1 CHAIR TRACY CHRISTOPHER: All right. Any
2 comment on the proposed new rule on page eight?

3 I have a question on who the intervenor
4 might be in subsection (c).

5 MS. HOBBS: A media entity.

6 MR. SCHENKKAN: One possibility is a media
7 entity. It's -- I don't know enough about that to do more
8 than put the possibility of including an intervenor in
9 there. I don't know enough about the law of under what
10 circumstances does a media entity have a right to --
11 what's the legal basis of the proposition that a plaintiff
12 who is suing under a name that's not the one on their
13 birth certificate. What is the -- the people who talk
14 about the balancing test say that there is a presumption
15 against proceeding under a pseudonym, but when they try to
16 explain what the basis of the presumption is, they say,
17 well, it has overtones of the common law and
18 constitutional law. Overtones.

19 MS. HOBBS: And open courts.

20 MR. SCHENKKAN: But they don't say it's a
21 requirement of the Constitution or anything in the common
22 law. Hard press, the First Circuit in this 2022 case says
23 what this really is, is the federal version of common
24 procedural law, which is, of course, the business of the
25 courts. So we're just saying -- we, the courts, are just

1 saying there are some circumstances in which people should
2 be allowed to proceed under a name that protects their
3 identity. I mean, the clearest cases, the ones that
4 really demonstrate this has to be, is what if you have a
5 factually solid basis for contending that using the true
6 name increases the odds that you or a member of your
7 family is going to be killed. Right? And we don't need
8 to wait for the Texas Legislature to pass a statute that
9 says these people run that kind of risk often enough and
10 severely enough to where they get to sue, but if you don't
11 meet the exact parameters of the statute, you can't make
12 that argument.

13 CHAIR TRACY CHRISTOPHER: All right. Any --
14 any comments on this rule? Yes, Tom.

15 MR. RINEY: I think we need to proceed very
16 cautiously with this. There are a lot of issues, and I
17 don't really have any answers to it. I never thought
18 about an adult website suing someone as John Doe. I never
19 would have thought about the defendant John Doe and how
20 that would work, because, most of the time, most of these
21 involve some type of claim of sexual impropriety, assault,
22 harassment, and so forth; and if someone is allowed to
23 file that suit without -- under a pseudonym, but they name
24 the defendant, that can ruin the defendant's reputation,
25 right there, without the plaintiff being put at any risk

1 at all.

2 Now, I'm very sensitive to the fact that
3 victims might be concerned about coming forward, certainly
4 in the instance -- the example that you gave about a
5 potential plaintiff or family member being subject to
6 physical harm. I understand how we do that. I've been
7 involved in cases over the years, just a handful, but
8 where a -- something is filed, suit is filed and the names
9 are given, and then I get contacted by someone later
10 saying, hey, I heard that so-and-so filed this suit
11 claiming thus and such, and that's a fraud, and here's
12 why, and here's where you need to check. Now, I don't
13 live in Houston. I live in a smaller community. Probably
14 occurs there more often than in the larger communities,
15 but there's some value to someone is going to go into
16 court and seek relief, that they should have to give their
17 name.

18 So I'm not saying I'm against pseudonyms in
19 all circumstances, but I'm very reluctant to say someone
20 can file it and then we will decide later if they have a
21 basis for doing it, when we're talking about a balancing
22 test, but we apparently don't yet have a balancing test
23 under Texas law. And am I reading the memo right on that?

24 MR. SCHENKKAN: No, we don't have a Texas
25 Supreme Court opinion that says in Texas -- you know, the

1 First Circuit notes that they are -- that the number of
2 factors that are listed in the prevailing court of appeals
3 opinion for different other circuits varies from like
4 three to ten. That doesn't mean the test itself actually
5 varies that much, because in each case the real test is
6 the totality of the circumstances, and the totality of the
7 circumstances comes in two parts, which kinds of
8 circumstances and what weight is given to the different
9 ones on the different side in the balance.

10 And those things are intrinsically a matter
11 of discretion and reviewed -- as the one of the main
12 holdings in the court, reviewed under abuse of discretion,
13 with a little bullet explanation of what counts as abuse
14 of discretion, which is the same standard -- almost
15 identical to the Texas standard in lots of other contexts.
16 You've got to consider all of the relevant factors, no
17 irrelevant factors, and you've got to not make a serious
18 mistake of judgment or reach a wholly unreasonable result,
19 but we do have a balancing test. We just don't have a
20 single highest level court system holding that provides
21 any more guidance than that, which it might not do. I
22 mean, if the Court does render an opinion in such a case,
23 how much more guidance it's really going to amount to
24 is -- it remains to be seen.

25 CHAIR TRACY CHRISTOPHER: So we could adopt

1 (a), (b)(1), (2), to comply with the statutory --

2 MR. SCHENKKAN: Right.

3 CHAIR TRACY CHRISTOPHER: -- issues and then
4 consider more the (3).

5 MR. SCHENKKAN: We could.

6 CHAIR TRACY CHRISTOPHER: Because (3) is the
7 common law claim.

8 MR. SCHENKKAN: And the only reason that I
9 am nervous about only doing (b)(1) and (2) is I do think
10 that the -- as a practical matter today, the largest
11 number of potential litigants who need, as the claimant,
12 to proceed under a pseudonym are ordinary individual
13 people, many of them having to proceed pro se or nearly
14 so; and I think we need to make it as easy as possible for
15 them to know this is something I might be able to do and
16 get a little bit of Texas Law Help level guidance as to
17 how to do it; and so if the rule says, yes, you can do it,
18 you've got to -- you're going to have to file two pieces
19 of paper, your petition, which will be -- the rest of
20 which will be under Rule 47 and this -- well, three
21 pieces, the under seal and then your separate motion
22 saying this is why I think I need to be able to do this.

23 And then under (c) here, if that's
24 challenged, the court will hear an in-camera hearing,
25 which I'm realizing we're sort of going to need to explain

1 to lay people what "in camera" is, to decide.

2 CHAIR TRACY CHRISTOPHER: Well, I mean, I
3 kind of agree with Tom that perhaps we shouldn't
4 institutionalize the pseudonym usage at this point until
5 we look at it a little bit more, because I agree with you,
6 someone could say, "I'm going to sue Tom because he beat
7 me up," so I'm suing him for civil assault, and "I'm
8 afraid if I put my name down, Tom will come and kill me."
9 But so I've got this lawsuit against Tom saying Tom is an
10 assaulter, and Tom, you know, in the court of public
11 opinion is already guilty because he doesn't know that the
12 plaintiff is a known liar or the community doesn't know
13 that the plaintiff is a known liar. So I think we do have
14 to be very careful.

15 Most of the Jane Does I have seen are sexual
16 assault victims, which would be covered under the
17 statutes, wouldn't they?

18 MR. SCHENKKAN: I don't know whether --
19 sorry. I'm trying to remember enough about the other
20 statutes. The new statutes are -- are really deepfake
21 porn-oriented, and that's only one subset of the sexual
22 material. There's a second category, which can, in fact,
23 be driven by that, but isn't always, and that's, of
24 course, divorces. And in divorces routinely both sides --
25 the filing is anonymous on both sides, right, Richard?

1 CHAIR TRACY CHRISTOPHER: They shouldn't be.

2 MR. SCHENKKAN: No, but they are.

3 CHAIR TRACY CHRISTOPHER: Okay. Peter.

4 MR. SCHENKKAN: I would need Richard to
5 comment on that, not me.

6 HONORABLE PETER KELLY: I agree there are a
7 lot of policy interests, but on the other hand, there
8 already are penalties for filing a frivolous pleading,
9 whether it's 91a or sanctions for filing frivolous that
10 provide protection for people who are subjected to
11 frivolous or fraudulent claims, whether they're made by an
12 anonymous person or not. You have to balance that with
13 the positive considerations of some people who may be
14 honestly afraid of physical retaliation or being doxxed or
15 whatever forces are out there. So there already are
16 protections for the potentially wrongfully sued
17 defendants, but the plaintiffs who might be afraid,
18 especially now, people being doxxed and, you know, the
19 political violence going on out there, it's -- you might
20 want those protections, might need those protections
21 socially.

22 CHAIR TRACY CHRISTOPHER: Roger.

23 MR. HUGHES: Well, I kind of see both sides
24 of it, and I'm not sure if the threat of sanctions is
25 going to protect someone. I mean, if you're the victim of

1 one of these things, by the time you get around to filing
2 a motion for sanctions, the damage is done, and I'm not
3 sure what -- anyway, I'll get to my suggestion.

4 Perhaps (b)(3) could be modified to require,
5 instead of filing the petition first and then, you know,
6 asking for forgiveness, they file a motion to leave that
7 doesn't -- that doesn't identify either the plaintiff or
8 defendant, and that the petition desired to be filed be
9 filed under seal, and that way the potential defendant is
10 protected, that it doesn't get out until it is determined
11 this person is allowed to proceed under pseudonym. That
12 might be an alternative. It still then gets down to how
13 does all of this stuff get filed under seal until leave is
14 granted.

15 CHAIR TRACY CHRISTOPHER: Richard.

16 MR. ORSINGER: Yeah, before I go on to my
17 point, Roger, would you anticipate that's an ex parte
18 filing before the citation is issued and served on the
19 respondent or defendant?

20 MR. HUGHES: It could be ex parte in the
21 sense that the only issues determine whether the person
22 should be granted leave to file as a pseudonym.

23 MR. ORSINGER: Right.

24 MR. HUGHES: Defendant, at that point, is
25 under -- is not concerned, because whether or not they're

1 allowed to proceed has nothing to do with defendant's
2 reputation. In other words, you want to protect the
3 defendant's reputation for being sued frivolously,
4 et cetera, et cetera, by, you know, people filing
5 anonymous petitions. This then gives sort of a safety
6 valve for anybody who finds out the defendants -- the
7 prospective defendant's even involved, but it would, in
8 fact, yes, be an ex parte proceeding.

9 MR. ORSINGER: And so there's no one there
10 to advocate, well, if the plaintiff is allowed to go
11 anonymous, then the defendant should remain anonymous as
12 well. The only question is whether the plaintiff can file
13 anonymous?

14 MR. HUGHES: Yes.

15 MR. ORSINGER: Okay.

16 MR. HUGHES: I mean, possibly you could work
17 out some way that it's not an ex parte proceeding, that
18 the defendant would be notified, but I still think the way
19 to deal with protecting the defendant, you know, from
20 being hit by an ambush petition, is that the person filed
21 for leave to file it and that the petition that identifies
22 who the defendant is is treated as confidential until the
23 court grants leave.

24 CHAIR TRACY CHRISTOPHER: Pete.

25 MR. SCHENKKAN: I don't want to detract at

1 all from the importance of the problem where, if there's
2 going to be anonymity, it really probably ought to be for
3 both the plaintiff and the defendant. That's a legitimate
4 issue in the context we've been thinking about it, and it
5 hasn't been adequately resolved here with what I've
6 presented, but I do want to make it clear that there are
7 situations in which there isn't such a reciprocity issue.

8 A good example, this one was in federal
9 court but could, by its nature, have been a -- we could
10 have a counterpart one under Texas state law. It's at
11 page 17 of 37 of the memo, and it's a Lee Rosenthal
12 opinion, Southern District of Texas. *John Doe Corporation*
13 *vs. The Public Company Accounting Oversight Board*, saying
14 the Public Company Accounting Board Oversight is
15 conducting -- sent a civil investigative demand to me,
16 under the Sarbanes-Oxley Act, and by statute, the
17 documents in that investigation are exempt from disclosure
18 until the investigation is completely over and the SEC has
19 decided what they're going to do and has decided that they
20 should be released.

21 So this is confidential, but they shouldn't
22 be doing this at all. They're abusing their power in a
23 way that's illegal, substantively, but if I disclose that
24 it's me that they're investigating, I've already suffered
25 the harm of their improper investigation, so I should be

1 allowed to proceed pseudonymously, and in Judge
2 Rosenthal's court, the parties for the John -- the lawyers
3 for the John Doe Corporation filed a complaint and,
4 simultaneously, a motion saying, "We filed this and we
5 want to be able to proceed." And she held a hearing
6 solely on that and wrote an opinion explaining under the
7 balancing test, yeah, that this is in a category. We're
8 balancing the various interests.

9 There's a category of interests that is
10 often relevant and was offered to the First Circuit as one
11 of the four categories that courts ought to make a
12 categorical type. They said, nah, that's too much, but it
13 is a valid area, and that's where the court case needs to
14 be allowed to proceed under a pseudonym in order to
15 protect confidentiality in a prior lawsuit where it is
16 protected.

17 Now, it didn't fit squarely in that area of
18 balance, but even there, it's a balance, and, you know,
19 she struggled with the balance some. She goes into some
20 detail before she concludes, yeah, we're going to let John
21 Doe Corporation proceed as John Doe Corporation.

22 That could -- we could have that under a
23 Texas statute that allows one of our administrative
24 agencies to conduct some sort of investigation that says
25 we'll keep the investigative demand and its results

1 confidential, unless and until.

2 CHAIR TRACY CHRISTOPHER: All right. Any
3 other comments on this? Rich, and then Tom.

4 MR. PHILLIPS: Just one question.
5 Procedurally, how will they file this information under
6 seal with the court? They can't e-file it. They'll have
7 a 76a order. I'm afraid if you go to the clerk and say,
8 "I'm supposed to give this to you under seal," and the
9 clerk's going to say, "What am I supposed to do with this
10 and how do I file this under seal?" So I understand the
11 concept, but how do they do it, procedurally?

12 CHAIR TRACY CHRISTOPHER: I mean, you know,
13 they just -- somebody comes with an envelope, says it's
14 sealed, puts the cause number on it, and the clerk takes
15 it, puts a stamp on the outside of it. And then it just
16 goes -- you know, it's in a sealed documents room that's
17 locked.

18 MR. PHILLIPS: So a pro se or somebody who
19 needs to know that, the clerk will be able to explain that
20 to them?

21 CHAIR TRACY CHRISTOPHER: I think so.

22 MR. SCHENKKAN: Well, and this is part of
23 what would have to go on the Texas Law Help page and say
24 if you're going to do this, you're going to have to file
25 the thing itself, and you can e-file that, but you're

1 going to have to show up at the clerk's office and hand
2 them an envelope with the true names in it that says on
3 it, give this to the judge the case is assigned to to
4 evaluate recusal.

5 MS. GREER: Well, some of the courts you can
6 e-file. You e-file a redacted copy of whatever it is
7 with -- through the ECF system. And I'm sorry, that's
8 federal. Through the electronic filing system. Like we
9 just did this in Dallas last week, and then you e-mail the
10 judge, but you have to -- I mean, you have to know how the
11 court does it, but they are coming up with ways to do that
12 so that you don't have to actually go physically file it.
13 But to your point about a pro se, that's going to be
14 probably a physical file, but you send it to the court and
15 copy the opposing party through regular e-mail the actual
16 confidential document, and then the court doesn't make it
17 part of the file, so it's not subject to 76a.

18 MR. SCHENKKAN: I do have one more comment
19 about the sauce for the goose is sauce for the gander
20 proposition, which is it is certainly possible that a
21 plaintiff in the situation could do what we're talking
22 about in order to harm the defendant, but if -- in most
23 cases, the plaintiff's legitimate concern -- if the
24 plaintiff has a legitimate concern about confidentiality,
25 giving the true name of the defendant defeats it. Those

1 are cases in which, at least if the pro se person can
2 figure -- can think straight, they should not name the
3 defendant.

4 MS. GREER: Oh, I see what you're saying.

5 CHAIR TRACY CHRISTOPHER: But the defendant,
6 at some point, has to know who is suing them.

7 MR. SCHENKKAN: No, the defendant does. The
8 defendant does. And that's -- and that's what you would
9 have to cover in more --

10 CHAIR TRACY CHRISTOPHER: So if your fear is
11 that the defendant is going to kill me because I've sued
12 him, he's going to know that you sued him. So --

13 MR. SCHENKKAN: But it wouldn't -- the usual
14 case is not the defendant is going to kill me. The usual
15 case is somebody is going to kill me. Somebody else. In
16 the kill case. In these others...

17 CHAIR TRACY CHRISTOPHER: Tom.

18 MR. RINEY: Our courts are supposed to be
19 open, and if we're going to have confidence in our court,
20 we can't have secret proceedings. And you're right, if
21 you sue me and claim that I assaulted you, you've still
22 got to comply with Rule 47 and give me fair notice. I'm
23 going to figure out real quick who you are, and if I don't
24 knuckle under for a settlement right away because I've
25 already got this bad publicity and I want to settle, I

1 say, "No, we're going to trial." How do you conduct the
2 trial in secret?

3 I mean, I'm just not sure we're
4 accomplishing a whole lot by doing this, and so I
5 certainly don't have any problems with subparts (1) and
6 (2), but we've really got to think through number (3),
7 because it could be -- you know, like these cases from,
8 apparently, San Antonio where both sides agree we're just
9 going to use our initials in a divorce case so that nobody
10 knows who we are, that really destroys confidence in the
11 courts, I think, and so I really don't think we should do
12 that.

13 CHAIR TRACY CHRISTOPHER: Richard.

14 MR. ORSINGER: So this rule is a rule on
15 what's in your petition. It's not a rule on what happens
16 with depositions or what happens in open court trials.
17 It's a rule on what's in your petition, so the question is
18 are we going to force everybody, no matter what their
19 concerns are, no matter what their privacy rights are, if
20 they're not in a statute, they have to use their full
21 name? That's the question. In their original petition.

22 Now, we could easily have a rule that
23 says -- and this is the practice in Texas, not just in
24 family law, but across the board, if the petitioner or
25 plaintiff wishes to file anonymously, they can. The rule

1 requires it, but they ignore the rule. So what happens?

2 Well, the clerk won't reject the filing. We
3 know that. So what's going to happen is, is that when the
4 defendant gets served, they're going to say, wait a
5 minute, the plaintiff is not named in here, and so what
6 are they going to do? They're going to file a motion with
7 the court and say, "Don't let them initiate this lawsuit
8 without disclosing their name. Make them present their
9 name." And then we have the choice of, okay, well, you
10 filed it, so you've got to put your name in or we're going
11 to give you a choice, you either put your name in or you
12 withdraw it, which is what I think the federal courts do,
13 is they give you a chance to back out of the legal system
14 if it's being forced on you.

15 To me, this is not a complicated question
16 about finding out who the plaintiff is as the case goes
17 on. It's a question of what happens in the initial
18 pleading. The practical event, or what's going on in
19 Texas today, is that very few, but some, people file with
20 an alias, as it's sometimes called, or with a pseudonym,
21 and either the defendant does something about it or they
22 don't. If they don't do anything about it, it continues
23 on that way. If they do something about it, the judge
24 would make a decision, and the decision would be driven by
25 the balancing test.

1 So, for me, the question is are we forcing
2 people to reveal who they are before the judge has a right
3 to balance their privacy rights, or are we going to let
4 them file and then if anybody else objects, then the judge
5 applies the balancing test. And Rule 76a grappled with
6 all of this back in 1991, and they gave standing to the
7 media to come into court and be heard on whether the
8 documents should be sealed. Something like that could
9 occur.

10 There's a lot of controversy around 76a.
11 I'm not suggesting that that's a model for us, but you
12 could, for example, give the media the standing to have
13 the same right to come in and say, "We want to know who
14 the plaintiff is." But our decision is really pretty
15 simple. Are we going to only say that you have to put
16 your name in there unless you meet category (a) and (b),
17 or are we open to the possibility -- pardon me, (b)(1) and
18 (2), or are we open to the possibility that there is a
19 (b)(3) out there?

20 We're not going to put what the (b)(3) is,
21 but it does -- it possibly exists, and we're going to give
22 you a chance to file and have a judge decide whether you
23 have a privacy right that triggers this.

24 CHAIR TRACY CHRISTOPHER: Pete.

25 MR. SCHENKKAN: If I may follow up, Tom.

1 What actually happens, and one of -- this is actually
2 discussed in one of the few of the Texas cases we have.
3 It's a Third Court of Appeals opinion in a case. I've got
4 it. Sorry, memory no longer works as well as it used to.

5 Page 19 of 37. Third Court of Appeals in
6 *Topheavy Studios vs. Jane Doe* found that the district
7 court had not abused its discretion in issuing a temporary
8 injunction preventing any further manufacturing, marketing
9 and distribution of defendant's video game that used film
10 it had taken in a South Padre Island spring break trivia
11 contest, film of the plaintiff exposing her breasts.
12 Contestants or participants in this game were given forms
13 to sign in which they had to verify that they were adults.
14 This young woman misrepresented herself as an adult. She
15 was 17, and the main bulk of the opinion was about whether
16 the defendant was entitled to rely on her
17 misrepresentation or not. They concluded there was enough
18 evidence that they shouldn't have relied on that
19 misrepresentation to where the temporary injunction was
20 okay.

21 In two paragraphs, they address the
22 defendant's challenge to her Jane Doe pursuing under a
23 pseudonym, and the holding was that's a nonappealable
24 interlocutory order, so we shouldn't be deciding it, but
25 then *indicta* they rejected defendant's argument that her

1 proceeding pseudonymously would hinder its ability to
2 prepare an adequate defense, noting that the order
3 allowing her to proceed as Jane Doe specifically allows
4 for full discovery and state Doe's true name may be used
5 in depositions and in the investigation of the case, as
6 long as her name is given only to those individuals who
7 must know her name in order to participate in the
8 investigation. Essentially, the order only prevents the
9 disclosure of Doe's true name to the media or in a public
10 forum.

11 I'm supporting Richard's one. What we're
12 talking about right now is just do you pay the price at
13 the filing of the suit level of exactly the disclosure
14 that you're suing about, the kind of reputation harm
15 you're suing about, and that doesn't mean that we're
16 crippling any aspect of what happens after --

17 MR. RINEY: And I never meant to suggest
18 that it did. I'm saying it's going to be disclosed. How
19 much are we gaining by protecting them, allowing them to
20 file suit, when it's very clear we do not have a definite
21 standard in Texas to follow, which is going to be left to
22 the discretion of the trial judge, who is going to have to
23 guess, and I just don't think it's good policy.

24 MR. SCHENKKAN: Okay.

25 CHAIR TRACY CHRISTOPHER: All right. I

1 think -- I think we're done for the day, and we will get
2 back to the various committees as to any follow-up. But
3 summary judgment is for sure done, and I think the
4 evidence rules are for sure done, and the Code of Judicial
5 Conduct. Bill has left, but it's done.

6 Okay. Thank you.

7 (Adjourned)

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2 **REPORTER'S CERTIFICATION**

3 MEETING OF THE

4 SUPREME COURT ADVISORY COMMITTEE

5 * * * * *

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7

8 I, D'LOIS L. JONES, Certified Shorthand

9 Reporter, State of Texas, hereby certify that I reported

10 the above meeting of the Supreme Court Advisory Committee

11 on the 10th day of October, 2025, and the same was

12 thereafter reduced to computer transcription by me.

13 I further certify that the costs for my

14 services in the matter are \$ 2,379.00, which was paid or

15 will be paid by The State Bar of Texas.

16 Given under my hand and seal of office on

17 this the 4th day of November, 2025.

18

19 /s/D'Lois L. Jones

20 **D'Lois L. Jones, Texas CSR #4546**

21 Certificate Expires 04/30/27

22 P.O. Box 72

23 Staples, Texas 78670

24 (512) 751-2618

25 #DJ-834