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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

JUNE 9, 2017

(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 9th day of June, 2017, between the hours of 9:00 a.m. and 12:54 p.m., at the Texas Association of Broadcasters, 502 East 11th Street, Suite 200, Austin, Texas 78701.

INDEX OF VOTES

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

Documents referenced in this session

17-02 Discovery Subcommittee Proposed Amendments, January 2017

17-11 Proposed Amendment to Code of Judicial Conduct

17-12 June 8, 2017 Report of Appellate Rules Subcommittee

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CHAIRMAN BABCOCK: Welcome, everybody. Thank you for being here. We start out today on a sad note. Many of you know that Judge Estevez' husband died on May 19th in Amarillo, actually in Dallas in a hospital, but I don't know how many people knew Roger Williams. Tom probably did and may want to say something, but I didn't know him, but from everything I've heard about him, he was a terrific guy. He came to Amarillo and was one of the first people that started the Bell Helicopter facility there and sort of became known as the face of Bell Helicopter in the community. He was a terrific giver backer to the community. He was a cochair of the United Way. He drove refugees to church for classes. He got involved with refugees from Haiti and the Haitian problem, and just all in all a wonderful guy.

So we want to remember -- we want to remember Roger today, and I know the Judge is appreciative of all the prayers that were said for him by people who knew him and people in this room that knew of his circumstances before his passing. Tom, I don't know if you want to say anything, but --

MR. RINEY: I think you've said it well. He was known for Bell Helicopter, but I think the thing I admired the most about him is what he did for the

community, and I had the pleasure of serving with him on a board for several years. Great guy, and he was a great advisor. I was president of this group for a while, and he took me aside and gave me some valuable advice from time to time, and he was just a very enjoyable person to be around, and certainly Amarillo will miss him.

CHAIRMAN BABCOCK: Well, in his honor let's have a moment of silence. Okay.

(Moment of silence)

CHAIRMAN BABCOCK: Thank you, everyone. We'll get -- and, Judge, so sorry for your loss. So we'll get to our status report from the Chief, followed by Justice Boyd if he has any words of wisdom, and we'll go from there.

CHIEF JUSTICE HECHT: I'll just tell you a bit about what came out of the session, regular session, that was particularly important to the Court. The Legislature expanded guardianship case monitoring around the state and gave the Office of Court Administration a large part of what they asked for, about 80 percent, to fund all of that; and I think David Slayton, who is the director over there, thinks that that will be enough to make it possible for them to effectively expand their monitoring to statewide, to all courts in Texas. So we're pleased by that.

We had asked for the same general revenue for Access to Justice that we've gotten the last three sessions, but the wrinkle this time was that the Access to Justice also gets part of the state settlements of some lawsuits, basically consumer lawsuits; and the Access to Justice's share of the Volkswagen settlement that the state got was about $43 million, and together with other settlements that came in during the last biennium it got up to about $50 million, which is the cap. So the Legislature preferred that we spend that money rather than have more general revenue, but we argued that we needed to keep the general revenue component to Access to Justice funding so that we wouldn't have to rejustify in future sessions. And Governor Patrick agreed with that and the House did as well, and so we got about a fourth of the general revenue that we have been getting, which is about four and a half million dollars, but it does not hurt the mission.

In fact, because of the $50 million that we've gotten from the case settlements, we have more than we've had in a long time, and I think going forward there is complete understanding and sympathy in the Legislature for the mission of Access to Justice, so I think we're in good shape going forward.

The Children's Commission has been in

existence for about 14, 13, 14 years, and the Court oversees it, and its purpose is to develop better practices and procedures in cases involving children. It's been federally funded since the beginning, but by a quirk most of that funding was lost in differences between continuing resolutions last fall. It was recently restored in the latest continuing resolution, but who knows what it will be going forward. We argued to the Legislature that the loss of that federal funding really necessitated the state making up that because the Children's Commission does such valuable work. And they agreed and provided full funding for the Children's Commission. So if we get the federal funding after all, we'll have to decide what to do about -- about how to spend that.

The Court and the Judicial Council was supportive of legislation that would reform the collection of fines and fees in essentially traffic cases, Class C misdemeanors in the municipal and justice of the peace courts. That legislation passed with the agreement of the municipal judges association and the justices of the peace and the council of -- local council of county governments, so I think we'll see some changes there. The judges are very anxious to avoid the indigent going to jail problem that exists in so many other contexts.

We would have done more about that with the bail reform legislation, but it did not pass at the last minute. It passed the Senate, but it didn't pass the House. But the federal courts may have overtaken that issue; and, you know, you may have seen yesterday that Justice Thomas denied a stay of Judge Rosenthal's order in Houston, and Dallas County has already contacted the Office of Court Administration about making the same changes in Dallas County's bail system. Travis County already does it mostly. If we can get Bexar County on board, we may not be --

CHAIRMAN BABCOCK: Yelenosky is giving a thumbs up.

HONORABLE STEPHEN YELENOSKY: I just love it whenever Travis County is recognized for its progressiveness.

CHIEF JUSTICE HECHT: The straight ticket voting ended. It started out as a way to improve judicial selection, and then it ended up being across the board. Nobody knows exactly how that's going to affect things, but we'll see. It doesn't kick in until 2020, which is the next time I'm on the ballot, so --

CHAIRMAN BABCOCK: And Justice Boyd.

CHIEF JUSTICE HECHT: So we'll report back on that.

CHAIRMAN BABCOCK: Or not.

HONORABLE JEFF BOYD: If you have any insights let us know.

CHIEF JUSTICE HECHT: Legislation that would have originally done a lot to curtail access of electronically filed documents in the courts did not pass, and so the JCIT, the Judicial Committee on Information Technology, which Justice Boyd is the liaison, will continue moving ahead with some kind of PACER-like system to provide access to those documents, so that's good.

The restrictions, various restrictions on the Supreme Court's jurisdiction were removed, thereby simplifying the Court's jurisdiction. There was a quirk that came up in the middle of the session, a change in the definition of county courts in the Government Code some years ago, meant to simplify those statutes, I'm sure, had the effect, according to the Court of Criminal Appeals of making -- removing the Supreme Court and the Court of Criminal Appeals mandamus jurisdiction over the statutory county courts, and that -- that was inadvertent and has been cured. So that little problem was removed, and I don't know what else -- there were lots of things.

HONORABLE JEFF BOYD: Conflicts jurisdiction.

CHIEF JUSTICE HECHT: Yeah, conflicts

jurisdiction is gone.

HONORABLE JEFF BOYD: Dissent jurisdiction.

CHIEF JUSTICE HECHT: Yeah, dissent jurisdiction, election contest cases, all of those little restrictions that were in section 22.001 and 22.225 of the Government Code. So --

HONORABLE JEFF BOYD: So you no longer get to bill your clients for all of that research and writing to convince us that we have jurisdiction.

CHIEF JUSTICE HECHT: It's going to be harder and harder to justify a 15-page statement of jurisdiction. We got some rules assignments as a result of the session, and the Court met on those on Tuesday. Martha presented them to us, and we have a plan for addressing them going forward, and Martha has worked hard on all of that, so she's going to give you the details on that.

CHAIRMAN BABCOCK: Okay.

MS. NEWTON: So the Court has decided already to send three of the rule-making projects to this committee, so these will be coming to you very soon in a referral letter. The first is by January 1st of 2018 the Court has to adopt Rules of Evidence and Procedure to ensure that the enforcement of a foreign judgment or arbitration award in a family law case complies with the

Constitution and public policy. So this is HB 45, and the deadline is January 1, but the statute lays out what has to be in the rules, and it looks pretty straightforward, at least as far as I can tell. So there has to be a provision for timely notice by a party who wants to enforce a foreign judgment or award or oppose a judgment or award. There has to be a hearing on the record, and the trial court has to issue a written order with findings and conclusions.

Next, by May 1st, 2018, the Court has to amend the Rules of Appellate Procedure to permit a state actor appellant the right to supersede a judgment on appeal in a case that's not for money. So this is a response to the Court's 2014 decision in *In Re: State Board of Educator Certification* in which the Court held that the trial court has discretion to deny a governmental appellant the right to suspend a nonmoney judgment if the appellee posts security. So this legislation reverses or abrogates the Court's holding, and we will have to amend the TRAP accordingly.

And then the third is SB 179, known as David's Law. So this is a law that addresses cyberbullying, and it's named after a young man in San Antonio, a teenager who committed suicide after being cyberbullied. And this law creates a new chapter in the

CPRC that authorizes a victim of cyberbullying to obtain injunctive relief against the bully. And so what the Legislature directed the Court to do is to make forms for the victim or the victim's family to use for an application for injunctive relief and instructions for the forms.

So those three the Court will be asking this committee to work on. There are other rule-making projects that came out of this session that other groups will be doing the initial drafting and study work, but the committee may see some of this later down the road.

So the biggest of these I think is HB 7, which will require some rule making in parental rights termination cases and the appeal of those cases, and so this bill -- there are two specific things it does. It directs the Children's Commission, DFPS, and other interested stakeholders to make a recommendation to the Legislature by the end of this year whether broad form submission of jury questions in parental rights termination cases should continue to be the law. So back in 1990 I think the Court held that broad form submission should be used in PT cases as in other cases. In an early stage of this bill the bill actually amended the Family Code to prohibit the use of broad form submission, and then as it was amended it ended up with this provision

directing the Children's Commission and DFPS to study the issue and make a recommendation to the Legislature.

And then second, it directs the Court to make two specific kinds of rules, rules addressing conflicts between the filing of a motion for new trial and the filing of an appeal of a final order, and then also the period for a court reporter to submit the reporter's record in a SAPCR case.

So kind of separately from this legislation, Judge Dean Rucker, who chaired a previous task force appointed by the Court to make rules to expedite parental rights termination cases, approached the Court and said that they had heard from the courts of appeals that the 180-day deadline was difficult to meet and that other things could be improved in the appeal of these cases and asked the Court to reconstitute the task force to take a broader look at how to expedite and improve the appeal of these cases. And so the Court has decided to reconstitute the task force and will get that order out in the next few weeks and ask the task force to draft the rules required by the legislation, but also to make broader recommendations as it deems appropriate to expedite these cases.

And then HB 1020 amends the State Bar app to authorize inactive members to practice law under rules

promulgated by the Supreme Court. So what this is -- even though that language is broad, what it's intended to do is to allow retired lawyers or lawyers who have taken inactive status for other reasons to do pro bono work, and so this is a project that the Access to Justice Commission worked with the bar on. They started working on it before this section, kind of ran into the statutory language prohibiting inactive members from practicing law. So the legislation, really the purpose was to get that changed to pave the way for this pro bono program. So the bar has already been working on a draft of that rule. I believe they're going to -- the bar board is going to kind of considerate it at a meeting later this month, and then we should get it over the summer and then we'll decide how to proceed with it.

And then, of course, the State Bar and the Board of Law Examiners were under Sunset. SB 302 is the State Bar Sunset bill. You've probably heard by now that it makes big changes to the way that disciplinary rules will be adopted and amended going forward. It creates a new committee on disciplinary rules and referenda. It will be nine members, and the bill sets forth very specific time lines and procedures for the committee to do its work. So under the statute the Court will appoint five of the members, the bar president will appoint four

members, and those appointments have to be done by January 1.

And then the bill also makes some changes to the State Bar Act that will require amendments to the Rules of Disciplinary Procedure, but the good news is that the bill says that those changes don't have to go through the new committee or the referenda process since they're just to implement statutory changes. And those have to be done by March 1st, and the statute directs the Chief Disciplinary Council and the bar to propose the rules to the Court.

And then the Board of Law Examiners is also extended for several more years, and the Sunset bill makes some changes to the deadline for a prospective applicant to file an application to take the bar, and that will require some pretty -- I think minor and straightforward changes to rules governing admission to the bar, the Board of Law Examiners is already working on those and should approve them and get them to the Court in the next few weeks.

CHAIRMAN BABCOCK: Great. Thanks very much, Martha. Justice Boyd, any words of wisdom?

HONORABLE JEFF BOYD: Brief update to follow up on what the Chief mentioned about electronic filing and electronic access. So electronic filing, as you know, is

fully implemented statewide in civil cases. We're still on the calendar -- on the calendar schedule for roll out in criminal cases. Electronic access was -- I won't say delayed, but things started moving more slowly while we waited for the Legislature to consider the bills that were filed by the district clerks who had concerns about the plan. That bill did not pass, so I think things will pick up more quickly now to implement electronic access as we overcome the issues that have been identified.

On the electronic filing side, one area that's sort of left untouched is administrative law cases, because SOAH and the administrative agencies are still doing pretty much everything in paper, and what that means is when the administrative record gets filed in Travis County, it's a bunch of boxes, as Judge Yelenosky can tell you.

HONORABLE STEPHEN YELENOSKY: Which you can never find.

HONORABLE JEFF BOYD: Which affects how it goes then to the Third Court and so on. So I suspect that as JCIT continues focusing on electronic access sometime probably this fall, I've identified a list of key players in the main agencies, SOAH, PUC, Railroad Commission, others that we're going to -- there are a whole new set of obstacles that come into play when you're dealing at the

administrative level, but we do want to start looking at that and how to implement -- how to get the executive branch agencies to start looking at e-filing at the administrative level, which will then assist the Courts that are dealing with those cases as well.

CHAIRMAN BABCOCK: Thank you.

CHIEF JUSTICE HECHT: And I'll say one more thing about Access to Justice. You know that the office of management and budget has recommended that the Legal Services Corporation, which provides federal funding to legal service providers in all 50 states that the LSC be zeroed out and go out of existence. Lawyers across the country have written in support of continued funding for LSC. Many of your law firms joined a letter that Harriet Miers and Harry Reasoner asked you to join that asked for the same thing, and in April Eduardo and Harriet and Harry and Justice Guzman and I and several others met with all the members of our congressional delegation, and my sense is that they're about 80 percent supportive of LSC's funding. So all of these letters and calls make a difference. And Wednesday Justice Guzman and I met with the vice-president's council and counsel -- other people in the White House about LSC funding. We took Chief Justice Rush from Indiana with us, just to provide Indiana's perspective.

CHAIRMAN BABCOCK: Just a random --

CHIEF JUSTICE HECHT: Well, you know, heartland. And we were very well received. So this -- it's not always as bleak as it looks sometimes in a news report. We think we're in a stronger position going forward.

CHAIRMAN BABCOCK: Oh, great. The Governor has called a special session. I should know this, but is there anything in on the call that impacts rule making?

CHIEF JUSTICE HECHT: We don't think so.

CHAIRMAN BABCOCK: Okay. Great. Well, when we last left the discovery rules we had gotten to Rule 200 on page 53, but I know that Bobby and his subcommittee have been hard at work and had a session yesterday afternoon here in Austin, I believe. My spies tell me, and so Bobby may want to readjust how we're going to proceed, but, Bobby, what do you think? What do you want to do?

MR. MEADOWS: We did meet yesterday in connection with remaining work for our subcommittee, which was largely a question of spoliation and a new assignment as whether or not the rule of exclusion should apply to depositions as well as court proceedings and trials, and so we would like to get to those items today. We're close enough to the end of our proposed changes from January

that we would like to go ahead and march through that. I don't think it will take very long. You will remember --

CHAIRMAN BABCOCK: Famous last words.

MR. MEADOWS: Well, we have not -- really it's not that much in front of us, and I think we can get through it pretty quickly; but just for context, let me just remind everyone that our assignment once we introduced our proposed set of rules changes in January, what we did in February and April and now today is just march through that with the subcommittee taking in the votes, the better thinking around some of our recommended changes, with the idea that when we finally marched through the entire set of proposed changes we'll go back and rework it, submit a full new draft to this committee for consideration, hopefully reflecting the discussions and thinking that we obtained here. And so with that what I'd like to do is -- I think we have one last item around depositions that Jane can introduce. It will take very little time and lead into physical examinations and then I think that will take us directly to spoliation, and I'll frame that issue. We can talk about it at any level of depth that this committee thinks is appropriate and then we'll look -- have a discussion around the rule in this application.

CHAIRMAN BABCOCK: Okay. So you want to

start with --

MR. MEADOWS: Finishing the deposition proposed changes, and there's one, and Jane will do that.

CHAIRMAN BABCOCK: Okay. What page and what rule?

MR. MEADOWS: It is --

HONORABLE JANE BLAND: It's page 61, Rule 203.1(b), and the only -- the only change is to change the time for returning a signature page in connection with a deposition transcript, the witness' signature page, from 20 days to 30 days, and that was only to conform the time period to the federal court time period.

CHAIRMAN BABCOCK: Okay. Let me just catch up with you. It's 203.1(c)? Is that what you said?

HONORABLE JANE BLAND: (b). 203.1(b), and if you've got the draft from January 2017 that has the subcommittee's report with the redlined version --

CHAIRMAN BABCOCK: Yeah.

HONORABLE JANE BLAND: -- it's page 61 of that draft.

CHAIRMAN BABCOCK: 61, sorry. Okay. I'm with you.

HONORABLE JANE BLAND: This was really just a nonsubstantive change to conform the state signature time frame to the federal signature time frame.

CHAIRMAN BABCOCK: Okay. Anybody have any comment about that? All right. So I think you're getting off easy, Jane.

MR. MEADOWS: See, I was right about the level of interest. So our next rule to consider is Rule 204, physical and mental examination. The underlying work on this rule was done by Harvey Brown, so it's unfortunate that he can't be here to guide us through it, but I believe I can accomplish that. If everyone is with me on page 65 of the January proposed rule changes, we can look at what we have in front of us, which is primarily a change to Rule 204.1(a) to broaden those who can conduct examinations under the rule. It simply says that a physical and mental examination by a suitably licensed or certified examiner is authorized by the rule and extending the scope of examination rule beyond physicians and qualified psychologists.

CHAIRMAN BABCOCK: Okay. Richard Munzinger.

MR. MUNZINGER: What does "certified examiner" mean, and why is there a distinction between someone who is licensed and someone who is certified?

MR. MEADOWS: This is why we would like to have Harvey here, but the -- and maybe others on our committee can remember exactly why, but this was -- he felt strongly that the issue was coming up in litigation

where the nature of the examination could be -- should be conducted by someone other than a physician or psychologist, that there would be like vocational specialists and so forth. The term "certified" as opposed to "licensed," I'm not sure. We can take that into, you know, consideration, examine it more closely in terms of whether it ought to be one or the other, but the idea here I think for our purposes today is whether or not this committee thinks we should expand this rule to permit examinations by others than were originally listed.

CHAIRMAN BABCOCK: Yeah, Jim.

MR. PERDUE: So would this let a defense medical examination be done by just a therapist?

MR. MEADOWS: I personally don't think so, but as I say, whatever -- and again, we can explore the contours of this, but, you know, obviously the language that is being introduced is, you know, "suitably licensed or certified," and the, you know, precise meaning of that in terms of when Harvey wrote this, I'm not sure, but again, as I say for today --

MR. PERDUE: Well, I don't mean to put you on the spot, but that's exactly what my observation is. I don't know what that means, and I can see from my perspective at least in my practice a lot of breadth in allowing some new -- new folks to conduct, quote,

examinations for all variety of purposes. And, you know, the joke in the personal injury world is it's pretty easy to find somebody with a license.

MR. MEADOWS: Yeah. So I think what would be useful to us would be maybe to hear some conversation or some discussion around what would be tolerated or acceptable if we were to expand the rule beyond physicians and psychologists.

CHAIRMAN BABCOCK: Peter has got some thoughts.

MR. KELLY: I think it's not just expanding beyond physicians, but it has to be the right type of physician, and that's why I like the word "qualified." You don't want a neuropsych talking about back injuries, examining for back injuries. If they're just suitably licensed then that's not specific enough, and you need some further qualifications so you have the right -- the right specialty in there for the physician.

CHAIRMAN BABCOCK: Yeah. The note, Bobby, says this would permit vocational examinations. Jim, is that a phrase that you know about or --

MR. PERDUE: Well, sure, I mean, there are -- there are -- you know, it's like biomechanics. There are people who are vocational rehabilitation people that, I mean, what that is, what that study is, what that

involves to get that, quote, license, I mean, that's a pretty broad world.

CHAIRMAN BABCOCK: Yeah.

MR. MEADOWS: But this is not just, you know, pulled out of the air, and I don't mean to put Harvey unfairly in spite of his absence because we all considered it.

CHAIRMAN BABCOCK: Well, why not? He's not here. That'll teach him.

MR. MEADOWS: Well, I mean, in the culture of the committee I suppose it's okay. But the -- this is language lifted from the federal rule, for what that may be worth to you. I mean, we didn't just make it up. It's the idea that this rule should allow others beyond those currently designated to conduct the examinations, and the federal rule uses the language "suitably licensed or certified."

CHAIRMAN BABCOCK: Has anybody studied whether there's experience under the federal rule regarding this? And I'm sure I'm right about this, that the level of personal injury work in federal court is a tiny percentage of what you get in state court. Wouldn't that be right, Jim?

MR. PERDUE: I would -- absolutely. The things that would lead to a DME in federal court are

pretty rare.

CHAIRMAN BABCOCK: Yeah.

MR. PERDUE: I mean, Riney is over there just going "This is beautiful," I'm sure.

MR. RINEY: You know, I don't do much personal injury anymore, but I never used this rule ever. Now, the presence of the rule probably in a few circumstances has led to an agreement about an independent examination, but it's just not something I ever really -- any time I ever got an independent examination it was a catastrophe, so I couldn't do anything with it.

MR. PERDUE: So let me give you a concrete example, right. I just had a birth trauma case with a brain-damaged baby. Pediatric neurologist does the defense medical examination for purposes of the defense examination of the child.

CHAIRMAN BABCOCK: Right.

MR. PERDUE: This language would suggest to me that you could have a physical therapist then do a defense medical examination on behalf of the defendant, which leads to their calculation of the impairment. Now, that's -- without more contours in the rule, and I don't know what the federal law is, but, you know, that is subject to substantial question about whether that person is truly qualified. But this would mandate that or allow

it in concept, which you wouldn't be able to do now.

MR. LEVY: Chip?

CHAIRMAN BABCOCK: Yeah, Judge Estevez.

HONORABLE ANA ESTEVEZ: You know, it just reads to me like the examinations that are the written exams that they do to see how you're focusing, how you -- you know, how you mentally process. So it's not -- I don't know why if it's -- I guess I'm just not reading it as broad as everyone else is. It doesn't offend me. It makes me think of the people that are certified examination givers, and so that without being a psychologist or without being a doctor that they can come and testify regarding the tests they just gave. A polygrapher, you know.

CHAIRMAN BABCOCK: Okay. Buddy, and then Judge Busby.

MR. LOW: The question I have is it says "licensed." By whom and certified by whom? Different groups get together and they give you their certification, and I mean, you know, and licensed by Tijuana, Mexico. Now, maybe the word "suitably" takes care of that. I don't know. But I raise by whom?

CHAIRMAN BABCOCK: Yeah. Judge Busby.

HONORABLE BRETT BUSBY: I think Peter's suggestion of bringing back the word "qualified" may help

solve a lot of the concerns. I can see the reason why you might not want to limit it to doctors, but you do want to be sure, as Jim said, that it's somebody who is qualified on the particular issue that's being investigated; and just having the stamp of approval, as Buddy said, of any old certifying organization is not the only thing that you want. Probably the reason it says "certified or licensed" is that some organizations do one and some do the other as we were discussing in the interpreter context. Some are licensed and some are certified, but I think either licensed or certified doesn't necessarily mean that they're qualified to opine on the issue in the case. So bringing that word back I think would be helpful.

MR. MEADOWS: Well, can I just say for purposes of guidance here and discussion, I don't know that I see any real distinction between the word "suitable" and "qualified." I mean, that's the place where the court gets to make a judgment about whether or not someone who is licensed or certified is appropriate for the examination. So I don't think that -- I would just be interested to hear whether or not there is a view that a standard of being qualified is stricter or less so than the standard of whether or not someone is suitable.

CHAIRMAN BABCOCK: What's the interplay of this if the amendment is adopted so that the exam takes

place in front of, you know, Joe, the physical therapist? What's the interplay between that happening and then the Robinson/Daubert issue?

MR. MEADOWS: I think they would be -- I think they would be significant. I think this is part of -- I mean, I think that whole issue under Daubert would be -- you know, raises the -- it places the whole issue of suitability, whether or not the person, the expert, is appropriate --

CHAIRMAN BABCOCK: Yeah.

MR. MEADOWS: -- to be offering the testimony.

CHAIRMAN BABCOCK: Richard Munzinger, and then Justice Christopher.

MR. MUNZINGER: That brings into play also the question of who gets to choose the examiner. Is it the court? Is it the parties? And that can be a very serious issue. I recently had a case where the issue comes up whether this person had or had not been using drugs at material times, which were in the past as well as in the present; and so, you know, there's hair samples and this and that and so forth that can be done and different disciplines that can look into that question with different degrees of certitude; and so if I'm the party and I'm seeking the exam, that's one issue. If I'm the

party who is going to be examined or his counsel, that's another issue. If it's a court-appointed doctor, there's an aura of authenticity and approval by the court that this person was chosen by the court to do the examination as distinct from being chosen by a party.

I may want -- if I'm the guy's lawyer, I may want to be in a position to call my own competing expert on the same subject matter. You know, I mean, we all remember the days of Dr. Death when he was the psychiatrist in the capital murder cases. He was going all over the state, and he was testifying about the propensity to do the same thing in the future, and those of us who had faced the guy were in a problem, and so you had to -- then the question was do you have your own competing psychiatrist. So those are issues that I see that come up here that we may or may not have discussed.

CHAIRMAN BABCOCK: His name was Dr. James Grigson.

MR. MUNZINGER: I'm sorry?

CHAIRMAN BABCOCK: Dr. Death's name was Dr. James Grigson.

MR. MUNZINGER: Dr. Grigson. I told my fellow don't let him see the back of your ears because he'll diagnose you from the back of your ears.

CHAIRMAN BABCOCK: And his practice was

found unconstitutional in the case of *Ernest Benjamin Smith vs. Estelle* by the United States Supreme Court. So there. Judge Christopher.

MR. MEADOWS: Well, there's nothing about this rule that changes --

CHAIRMAN BABCOCK: Or Bobby.

MR. MEADOWS: I'm sorry?

CHAIRMAN BABCOCK: Justice Christopher was recognized.

MR. MEADOWS: Oh, excuse me.

HONORABLE TRACY CHRISTOPHER: This particular language has been in the federal rules since the 1991 amendments, and it was designed to capture people such as dentists or occupational therapists who are not physicians or clinical psychologists, but who may be well-qualified to give valuable testimony. "The requirement that the examiner be suitably licensed was new, and the court was, thus, expressly authorized to assess the credentials of the examiner to assure that no person is subjected to a court-ordered exam by an examiner whose testimony would be of such limited value that it would be unjust." This is the comments to that change, so this authority is not new under the federal rules. "The court always retained the discretion to refuse to order an exam or to restrict an exam. This provision was intended

to encourage the exercise of the discretion, especially with respect to exams by persons having narrow qualifications."

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: I didn't realize it was federal in origin, which makes it immediately suspect. We have an adversary system, and the idea that a court intervenes in the lawsuit and orders someone to be examined and the jury is then told "This examination was conducted by a court-appointed expert," that is going to end the question to the jury, and I'm not sure that that's what any of us want.

CHAIRMAN BABCOCK: Robert, then Skip.

MR. LEVY: Well, I think, though, that this provision is at the request of a party to get a physical examination. The court has to make the determination. It will balance the factors. It's going to look at whether the testimony or the examination will lead to an expert report, whether -- I think Daubert will come into play, and I think that's within the court's purview to make that judgment as to whether it's appropriate.

MR. MUNZINGER: Well, but that's my whole point. What is the -- in an adversary system why is the judge taking over this issue? This rule is silent as to who chooses the expert. If the judge chooses the expert,

he becomes the court's expert. The court is interested in justice. My poor client is getting screwed because the judge is choosing his expert. It's an adversary system, and so it's one thing for me to say to the judge, "Your Honor, I want this fellow to be examined by my doctor, ABC"; and then the defendant or the other party can say, "No, ABC is a shill. He's out there to do the work of the insurance company" or whoever it might be. This is very concerning to me. I've been in federal court, and I'm not happy when I'm there. I've been in the Western District of Texas over the last 30 or 40 years where there was -- by God, you got justice, and you got it in two days.

MR. LEVY: Richard, you have that problem with the way the rule is drafted now. This change isn't going to affect that.

MR. MUNZINGER: I understand that. It's a problem.

CHAIRMAN BABCOCK: I haven't done a lot of these, but the way it usually goes I think is that the defendant will propose a doctor and say he's going to do this and that and the other thing, and then the plaintiff will say "no" for whatever reason and then you go to the judge and the judge decides; but at least in my experience it hadn't been a court-appointed doctor. It's my doctor. I'm just trying to get approval for the exam. Is that how

it works, Jim, or not?

MR. PERDUE: Yes.

CHAIRMAN BABCOCK: Yeah. Judge Busby. Justice Busby.

HONORABLE BRETT BUSBY: It seems like we've got two different issues here. One is can somebody other than a doctor, a physician or psychologist, do these examinations, and the rule is intended to answer that yes, and I agree with that. I think that's appropriate, and then the other one is how do you require whoever this person is to be linked up to the testimony that's being given. Should we use "qualified," "certified," "licensed," "suitably"? What's the best linking word there? And I guess my question in trying to answer that is where is the burden of proof here? Because it seems like we haven't heard any suggestion that the word "qualified" that's in the rule now is not working to do what we want it to do, and so is there really a need to make a change to "suitably licensed or certified" if there are concerns about which one is narrower or broader? And "qualified" seems to be doing the work that we want it to do. You know, I don't -- I know there's a lot of history on the committee about if it's the federal rule we like it or we don't like it, but if our rule seems to be working okay I don't know that we need to change the words just to

follow the federal rule.

MR. MEADOWS: Well --

CHAIRMAN BABCOCK: Go ahead. Then Ken.

MR. MEADOWS: Well, on the burden, if it's -- the party seeking the discovery has to move for it, so typically the movant has the burden.

HONORABLE BRETT BUSBY: Just I wasn't talking about the movant's burden. I was talking about the burden of proposing a change to the rules, should we go with the change just because it's the federal rule or should we -- should this -- where should this body put the burden on making a change? Should we require that there be a demonstrated value to the new word over the old word, or should we go with the new word just because it's the federal rule? And I was suggesting that we should -- if "qualified" seems to be working, well, then there doesn't really -- you know, I think the burden should be to show that "qualified" is not working well in order to change to the word "licensed or certified."

MR. MEADOWS: I think that's fair. I would say that the word "qualified" would need to mean something more and different to us than the word "suitable" to have rules that are inconsistent. I mean, there is some value in having the federal rule be consistent with the state rule if they essentially mean the same thing. Because

otherwise, wouldn't someone be in a position to argue, "Well, qualified means something different in Texas than suitable means in federal court"? And then all of the sudden you've got this issue, this discovery issue that might be avoided if, in fact, there is no real difference between them.

CHAIRMAN BABCOCK: I missed Skip a minute ago, Kent. Sorry. So Skip and then Kent and then Roger.

MR. WATSON: I don't think it's a huge difference, but I think it may be a material difference. I think this is a case where the federal rule may not have changed to adjust the de facto common law. If the federal language came in in '91, Daubert came in in '93 and changed the world, and the de facto standard under the common law has been qualified since Daubert, and it's our standard, and changing from "qualified" to "suitable" connotes a reason for a change. And I would just respectfully suggest that the standard is "qualified," and we should stick with that and recognize that the federal rule is just out of date with the common law.

CHAIRMAN BABCOCK: Kent.

HONORABLE KENT SULLIVAN: Obviously one of the things that we are doing I think in this project is in many cases adopting, where appropriate, federal language; and there's a value to that in terms of consistency and

perhaps being able to draw on a larger body of law in interpreting of rules and getting people used to a more common practice, but I'm sensitive to the point that Jim raised, because I do think that when we look at specific instances of adopting federal language, the language in the federal rules, particularly the discovery rules, are almost always intended to facilitate very broad discretion by a federal district judge, and I think it's also no coincidence that there is essentially no federal discovery mandamus practice. None.

And so I think it's something that we need to think about in the sense that as we look at every particular case, where we're looking at adopting federal language potentially, you are looking at making a policy choice about providing very broad discretion to a trial judge generally by way of the federal language versus opting for something that's going to provide more bright line boundaries for what you can do. Just looking at this, I mean, we're going from, what, I guess qualified physician and qualified psychologist, which I think is kind of what Jim's point may have been, to suitably licensed -- licensed or certified examiner, and that's a substantial change. And I think it's just one of those things where we've got to decide in light of the differences between federal judiciary and the state

judiciary and the overlay if the amount of discretion that's intended is a good idea or not.

CHAIRMAN BABCOCK: Yeah. Roger.

MR. HUGHES: Well, I guess I have something of a preference for the use of the word "qualified," and that's because I don't think we want to freight into this rule any invitation that before you can pick or designate an expert you're going to have to do a full blown Daubert analysis of this expert's qualifications and whether they're capable of doing what they've proposed to do, et cetera, et cetera. I think once you've decided that this health care professional is generally capable of evaluating this condition, getting into the weeds over a -- you know, the rest of a Daubert challenge is a bit much, and at that point maybe -- at this point the question of whether they are licensed in this area, the "appropriately certified" is about as far as you need to drive down that trail.

The other thing is I sympathize with this, you know, what we are opening this up to, because I've had cases where on the defense side and they're saying my client's a drug addict or mentally impaired by use of -- you know, pick your favorite self-medication form; and all of the sudden, they're being -- they want to do an independent exam by their, you know, favorite psychologist

or whatever. And the thing of -- and the other thing is if you pick up the Occupations Code, there are innumerable forms of certification and licensing in the health care area.

That said, the other thing is, is the health care profession itself relies on nonphysicians and nonpsychologists. If you send someone in for psychological testing, the psychologist will have very little to do and will instead have batteries of standardized tests and short form interviews done by assistants, who are trained. They're professionals in their field, but they're not a licensed psychologist. And the same thing goes if you go in for treatment by a doctor. Frequently half of your care will be provided by a physician's assistant or a nurse or some other certification. So while I'm sympathetic to moving it to licensing, I think we have to be sensitive that this is a field that, as some people point out, it's kind of ripe for abuse.

CHAIRMAN BABCOCK: Robert.

MR. LEVY: A couple of things. One is it is possible that in the federal rules the reference to "certified" might be pertaining to states that use certification as the, quote, licensure. In Texas, I think licensure is the appropriate reference. From the broader

point, I think that there are going to be circumstances where a judge should be able to make a decision and a determination that it is appropriate for a testing by such as an audiologist or someone that is specialized in their field, and that information then might be used by the subsequent expert. Like a neurologist or somebody else to reach an expert opinion, so the audiologist is not necessarily needs to be Daubert qualified; but it's an appropriate test; and that's why I think that "suitable" reference is more appropriate in this kind of situation; and again, it's up to the judge. The judge is going to be making that determination, looking at all of the factors. So I think that this language does make sense using "suitably," maybe just licensed and not certified.

CHAIRMAN BABCOCK: Okay. Anybody else? Buddy.

MR. LOW: Chip, you know, we keep talking about Daubert, and that comes under 702, and 702 is still so broad it just says "will aid the jury."

CHAIRMAN BABCOCK: Yeah.

MR. LOW: But the court gave interpretations of that, and that's not a rule. Our rule, 702, still says "aid the jury," but the courts held it won't aid unless their testimony is qualified and the person is qualified, so they come back to that. So if we have a rule like

that, the court can determine those things without saying he's certified or, you know --

CHAIRMAN BABCOCK: Yeah. Anybody else? I just -- I think my view is sympathetic to Jim's that we're trying to simplify these rules, we're trying to make them less expensive, and now we're going to open up a whole new group of experts to come in and fight about. In other words, we're introducing, if we adopt this, another level of things to fight about in court; and I don't know if that's wise; and I don't know if that is what is in keeping with our charge. It is too bad Harvey is not here because he obviously has some thinking about it and maybe knows something on the federal side that none of us do, because I've never had it come up in federal court, only in state.

MR. PERDUE: I just -- I thought Judge Christopher's reading from the -- I guess that's the comment from the federal rule?

HONORABLE TRACY CHRISTOPHER: The comment, uh-huh.

MR. PERDUE: That is a helpful contour, because even from the plaintiff's perspective I get the idea of wanting a voc rehab person to be able to do an examination in certain cases. I mean, I understand that, and I'm sure Justice Brown could kind of verbalize if

that's the extent of it, but I -- without the language that you read in the commentary in the federal rule I get worried about this particular language.

CHAIRMAN BABCOCK: Yeah. Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, you know, just thinking back to trial court days, I can't imagine if the plaintiff had designated as an expert a vocational rehab person and the defense says, "I want my own vocational rehab person, you know, who is not an actual physician, just a vocational rehab person." I probably would have let them do it and thought I had the power under the old rule frankly. Same thing with a dentist. If the case involved dentistry and the expert on the plaintiff's side was a dentist and the other side wanted a dentist, I would have thought I had the power to do it.

CHAIRMAN BABCOCK: Yeah.

MR. PERDUE: I'm blessed to not have too many defense dentist medical examinations.

CHAIRMAN BABCOCK: All right. If there's nothing more -- yeah, Bobby.

MR. MEADOWS: The only thing is moving forward. So I think that the -- I can be corrected by the members of the subcommittee who are here if I'm wrong

about it, but I would think that the subcommittee would accept the formulation articulated by Robert, and that would probably be what we would want to come back with, unless there is an indication from this committee that your point of view or some other point of view should control. What Robert basically said is we would go with "suitably licensed exam."

CHAIRMAN BABCOCK: Yeah, it might not hurt to take a vote on this, see where people are coming out. So we'll take the language that's been proposed, understanding that maybe it will be tweaked some with Robert's language or others. How many people are in favor of this revised language on 204.1(a)(1)? If you are, raise your hand.

How many people opposed? Well, there were 10 people in favor and 13 opposed, the Chair not voting.

MR. MEADOWS: So that's helpful, and to break down, again, how we go forward, I think that the committee sees the value in permitting examinations by others than physician and psychologists, just as Justice Busby indicated, so that's certainly the view of the committee.

CHAIRMAN BABCOCK: The subcommittee or this committee?

MR. MEADOWS: The subcommittee, obviously.

CHAIRMAN BABCOCK: Right.

MR. MEADOWS: So maybe we need to vote on that, as to whether or not we change the rule at all to permit others beyond physicians and qualified psychologists in conducting exams.

CHAIRMAN BABCOCK: Okay. You want to frame the issue to vote on?

MR. MEADOWS: Well, should we leave the rule as it is and limit examinations to those stated --

CHAIRMAN BABCOCK: How many people are in favor of leaving the rule as it is?

All right, how many are opposed to leaving the rule as it is? Hang on. Everybody get their hands up.

Okay. There were 5 in favor of leaving as it is, and 18 opposed, the Chair not voting. So those two votes confused me a little bit. Kent.

HONORABLE KENT SULLIVAN: I'm not sure they're confusing. I mean, I think --

CHAIRMAN BABCOCK: That's what I'm looking for, reconciliation.

HONORABLE KENT SULLIVAN: I'll do my best. Reconciliation is certainly my strong suit. I think all we're talking about is everyone understands there's a need for a broader scope to the rule, but you want something

that provides brighter lines and boundaries for the Texas trial judiciary.

CHAIRMAN BABCOCK: Okay. Fair enough. Yeah, Skip.

MR. WATSON: I think most people -- but I could be wrong -- are in favor of broadening it to qualified examiners other than physicians or psychologists. That's what I would propose.

HONORABLE KENT SULLIVAN: Which is I thought essentially what I said.

MR. WATSON: Correct.

HONORABLE KENT SULLIVAN: That's what I was trying to imply.

CHAIRMAN BABCOCK: That was a more succinct way of saying what you said, at least in my view.

MR. MEADOWS: I think we can take it from here.

CHAIRMAN BABCOCK: Huh?

MR. MEADOWS: I think we can -- unless you want to break it down even further, I think we'll make a run at capturing this point of view.

CHAIRMAN BABCOCK: Okay. Good. That's great. All right. What next?

MR. MEADOWS: That brings us to the requirements of the order. This is a stylistic change

just to make it clear that the order must state who is to perform the exam, the proposed exam.

CHAIRMAN BABCOCK: Okay.

MR. MEADOWS: The next changes are also intended to be stylistic, I'm informed, under Rule 204.2, and that is it just breaks up our current rule into separate paragraphs and makes it clear that, for example, the contents of the report, that the report must state -- set out in detail. This is borrowed from the Federal Rule 35(b)(2) on the -- to ensure that the reports are not vague. They need to be in sufficient detail as to be, you know, instructive about what the witness is going to say.

CHAIRMAN BABCOCK: Okay. Any comments about the change? Robert.

MR. LEVY: Is there under this the ability of a court to seal a report or otherwise protect it from disclosure beyond the parties? Because there could be health information that maybe should be restricted. I'm not sure if the language you put in on limit delivery, is that applying to who gets it and whether it was filed?

MR. MEADOWS: Yes, that it can be limited, that it can be limited.

MR. LEVY: Okay. That makes sense.

CHAIRMAN BABCOCK: Okay. Any other comments about this?

MR. MEADOWS: I think the only --

CHAIRMAN BABCOCK: Go ahead.

MR. MEADOWS: Not to jump the gun.

CHAIRMAN BABCOCK: No, go ahead.

MR. MEADOWS: I think the only other point of discussion under these changes -- because I think (c) is essentially offered as a rewrite for stylistic reasons, but we get to waiver of the privilege, and again, I think we borrowed from the federal rule to make it clear that if there's an examination of the examiner or if there is -- well, primarily if there's a deposition of the examiner or the report is published, then that waives the privilege as to that issue in that case, that medical condition in that case.

CHAIRMAN BABCOCK: Yeah. Any comments on that? Okay.

MR. PERDUE: What -- this is the federal rule? This (d)?

MR. MEADOWS: That's -- yes, that's my understanding.

CHAIRMAN BABCOCK: That's what the note says.

MR. MEADOWS: This was borrowed from Federal Rule 35(b)(4).

MR. LEVY: It is in that rule.

MR. MEADOWS: I mean, I don't have the side-by-side comparison, but my note identifies this change as resulting from conforming with Federal Rule 35.

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: I can't find where the rule refers to whether the report should or should not be filed with the clerk. Is there anything in the rule concerning that subject?

MR. MEADOWS: Not to my knowledge. I don't know that that would -- that the current rule calls for that.

MR. MUNZINGER: Well, you obviously have privacy considerations in medical conditions regardless of -- they don't have to be medical conditions, but I just -- if this rule were adopted as it is now, my guess would be that most of the reports would be filed with the clerk.

MR. MEADOWS: I don't think so.

HONORABLE TRACY CHRISTOPHER: No.

MR. MEADOWS: I don't think that's the practice.

CHAIRMAN BABCOCK: Justice Bland. Then David.

HONORABLE JANE BLAND: Going back to your comment about (d), this looks like there's something wrong

with the language there. I think we need to take a look at it and see if we've got the right phrase.

MS. HOBBS: Yeah. I was confused.

HONORABLE JANE BLAND: Yeah. We'll take a look at that.

CHAIRMAN BABCOCK: Okay. David.

MR. JACKSON: (e) probably needs to be changed to conform with what we're doing here, "physician or psychologist fails or refuses," we need to change that to "examiner."

CHAIRMAN BABCOCK: Yeah, good point. Okay. Any other comments?

MR. MEADOWS: Well, again, it's Harvey's fault there, I'm sorry. Okay. Does that conclude the discussion of Rule 204?

CHAIRMAN BABCOCK: Unless there's anybody that has any other comments. Okay. So let's move on.

MR. MEADOWS: Okay. That pretty much marches us through the body of the discovery rules. We now enter Rule 215, which Alex essentially walked this committee through sometime ago, and not to -- I don't really want to commit her to this, but it's my recollection in visiting with others that what she did with Rule 215 was essentially reworked it to be more in conformity with the federal rule, but the point of

significance around our work in Rule 215 is with regard to spoliation.

CHAIRMAN BABCOCK: Okay.

MR. MEADOWS: Where we -- you'll find it on page 77, Rule 215.7 --

CHAIRMAN BABCOCK: Before we get to that, Bobby, we -- we left off at our last meeting on Rule 200, and today we skipped ahead to 203.1 (c).

MR. MEADOWS: I thought we had marched all the way through.

CHAIRMAN BABCOCK: We did not. We stopped right before Rule 200. And there's not a lot -- not a lot of changes except that there's an important note here, which I think deserves discussion; and that is on Rule 200, deposition upon written questions. "The discovery subcommittee does not recommend adopting the Federal Rule 30(a)'s 10-deposition rule for depositions on written questions," and the same is said about 201.1.

MR. MEADOWS: Right.

CHAIRMAN BABCOCK: That's what the note says, and I think that's -- that's worthy of some discussion because it's my experience and my belief that if you allow unlimited access to a particular discovery tool while limiting others, the lawyers are just going to go to the tool that doesn't have any limits on it. So if

you say, you know, 10 depositions for six or seven hours depending on the court system, that's fine. They'll take advantage of that, but then they'll send out, you know, 50 depositions on written questions if we don't have a limit. So I understand the subcommittee has recommended that. It would be interesting as to why they think that we should not have a 10-deposition limit for depositions upon written questions and if anybody has any contrary views on that, other than myself. So Justice Bland.

HONORABLE JANE BLAND: Chip, I think we did talk about this 10-deposition limit at our last meeting; and at the end the committee, the full committee, decided that we would go ahead and have a default hour limit on depositions in connection with level three cases, originally level three cases because they have case-specific discovery control plans. We're not going to have any sort of default in connection with limitations on depositions, and the committee voted to rather than have a limit on the number instead have a limit on the hours and adopted that limit, which I think is 60 in connection with level two cases. So that limit got imported into level three cases.

CHAIRMAN BABCOCK: Right.

HONORABLE JANE BLAND: And the discussion about not having the 10-deposition limit had to go with --

had to do with, you know, the hour -- hourly limit being one that was geared toward reducing expense and let lawyers have flexibility about how to use that time. And in terms of depositions on written questions I think some lawyers spoke up and said that that is an expedient way to prepare and present proof that's less expensive obviously than oral depositions --

CHAIRMAN BABCOCK: Yeah.

HONORABLE JANE BLAND: -- and that we shouldn't be limiting depositions on written questions while at the same time we're telling everybody limits on oral depositions.

CHAIRMAN BABCOCK: But, but --

HONORABLE JANE BLAND: And I think in particular with records, medical records and other sorts of records, depositions on written questions. And so I do think we had a discussion about it, because the federal limit was just 10 depositions overall. We talked about how, you know, there could be limits on oral depositions, written depositions, and that kind of thing. I do think we got some discussion from the committee on that.

CHAIRMAN BABCOCK: Yeah, I think you're right about that, but did we -- and I'm fine with hour limits. I mean, number of deposition or hour limits, either way, as long as there's some bright line there.

HONORABLE JANE BLAND: We did vote. I think it was overwhelming, only two dissenters. We checked that yesterday at our subcommittee meeting.

CHAIRMAN BABCOCK: That was with respect to --

HONORABLE JANE BLAND: We did vote to put that limit in on level three cases.

CHAIRMAN BABCOCK: For oral depositions.

HONORABLE JANE BLAND: Correct.

CHAIRMAN BABCOCK: But we currently have no limits on depositions on written questions, right?

MR. MEADOWS: Right.

HONORABLE JANE BLAND: Correct.

CHAIRMAN BABCOCK: Okay. So the issue is, and if we don't --

HONORABLE JANE BLAND: But we did discuss the fact that we had no limit and that the federal rule had a 10-limit, a 10-deposition overall limit.

CHAIRMAN BABCOCK: On written questions?

HONORABLE JANE BLAND: Right. We did discuss that.

CHAIRMAN BABCOCK: Okay. So any other thoughts about that?

MR. MEADOWS: Yeah. It would be good to hear because my recollection is that the no limit on

deposition by written questions was sort of a -- ran parallel with our limitation on oral depositions as a way to conduct needed discovery in a way that's less expensive and efficient. So there was a view, as I recall, that we didn't want to put a limit on deposition on written questions, but if that's not the view of this committee it would be good to hear it.

CHAIRMAN BABCOCK: Yeah. Well, I guess maybe I'm -- you know, you fight your -- you know, the next war you're fighting your last war, and I just got through a case where the other side in my judgment was abusing the discovery process, and for example, on this issue, the deposition on written questions weren't -- weren't for documents, which I can understand why you would want that, but they were all substantive, you know, pages and pages of questions that took, you know, multiple hours to answer. And then you had cross-questions and then the lawyers went to the deposition on written questions. So maybe that's such an outlier that it doesn't require us to spend a lot of time worrying about it, but -- but that is our charge to worry about things like that, so I bring it up again. Maybe again. I don't know if -- what I said last time, but that's concerning to me. So, Alistair, you look like you're ready to say something.

MR. DAWSON: Well, I think that your example is an outlier. I mean, I have never seen anyone use a deposition on written questions except to get documents proved up. And I don't think that -- I don't think we ought to limit that. I think it's an efficient way to get, you know, documents produced and perhaps in admissible form. And the other thing is, is if you're going to go to the number of hours as opposed to a number of depositions --

CHAIRMAN BABCOCK: Right.

MR. DAWSON: -- that you're going to do the 60 hours, then I don't see how you could use the deposition on written questions as a -- to limit, because --

CHAIRMAN BABCOCK: Well, because it doesn't apply. The hour limit doesn't apply to written -- depositions on written questions.

MR. DAWSON: I don't see how you could have -- how could you count -- oh, you're saying should there be a limit on the number of depositions on written questions.

CHAIRMAN BABCOCK: Yeah, some limitation. I don't care if it's hours or if it's --

MR. DAWSON: I mean, I don't think there should be, because I think we ought to be encouraging

people to use that form and get their documents and get them proved up.

CHAIRMAN BABCOCK: Sure.

MR. DAWSON: It's more efficient, and if somebody is, in your example, you know, trying to use it to get around the oral deposition limit, you can always seek protection from the trial court. So I'd rather have it done that way for the outliers if somebody is going to try and circumvent the rule rather than put an arbitrary limit on the deposition on written questions.

CHAIRMAN BABCOCK: Well, you could say -- just throwing this out. You could say that deposition on written questions may be used, you know, without limitation to prove up documents. However, if the deposition is going to be, you know, on substantive matters then you have this limit, whether it be in hours or number. Justice Bland.

HONORABLE JANE BLAND: Well, I mean, it usually is prove up documents plus. It might be, you know, "I certify that they're reasonable and necessary."

CHAIRMAN BABCOCK: And they haven't been altered.

HONORABLE JANE BLAND: Yeah.

CHAIRMAN BABCOCK: But it's always directed at the documents. I mean, you're trying to prove it up as

a business record or whatever it may be, and you may throw a question in there, you know, this hadn't been altered, it's an original or whatever, but it's always document-specific, but then if you go and there's a different --

HONORABLE JANE BLAND: There's sometimes an opinion. I mean, in the medical context there's sometimes an opinion.

HONORABLE TRACY CHRISTOPHER: And now under "paid or incurred," that's how they get the testimony about paid or incurred, are documents on -- deposition on written questions, and that has to go to every single medical provider. You know, how much was paid, how much did the insurance pay, how much was written off. I mean, those are substantive questions, you know, about a matter of controversy, but it's much cheaper to do it that way than a live deposition.

CHAIRMAN BABCOCK: Yeah. Somebody -- yeah, Tom.

MR. RINEY: I've had a couple of experiences like you have, usually in federal court, but they are very rare; and I think part of that is because drafting them and going through the process is very cumbersome; and they're ineffective most of the time, unless it's something that's essentially undisputed as we're talking

about as related to documents and so forth. So I think you balance the efficiency of using the DWQs against limiting them because of the rare abuse. I'd leave it the way that it is and just stick with the limits on the hours on the oral depositions.

CHAIRMAN BABCOCK: Yeah, Buddy.

MR. LOW: Is there any provision now against just taking a written deposition of somebody? "Who all did you talk to?" "How did you reach this policy?" And shortening your time when you take his oral deposition? I mean, nothing in the rule says that you limit the written, and I know what practice is, but lawyers get around practice. And so --

CHAIRMAN BABCOCK: You've noticed that, huh?

MR. LOW: Yeah. So what would prevent now me having the long written deposition of a man? "Where did you reach this policy?" "Who did you talk to," all that, and it shortens my time to question him orally.

CHAIRMAN BABCOCK: Well, there's nothing to prohibit that, I don't think.

MR. LOW: That would be a tool that lawyers would use. I'll guarantee you.

CHAIRMAN BABCOCK: Roger.

MR. HUGHES: We're going down that same road. What I have seen and what some lawyers in my firm

do is the moment we get a designation of experts from the other side, we send a record stripper out to their office. We don't just want what the rules say we get for a designation of experts. We want, you know, copies of every deposition in their hands, et cetera, et cetera. And that can be pretty onerous, and I've --

CHAIRMAN BABCOCK: Is that a good thing or a bad thing?

MR. HUGHES: Well, it keeps us in -- you know, it gives us something to do while we're setting up the oral deposition; but in other words, you use a deposition on written question to basically strip the record that you think you won't get otherwise in advance of the deposition. Or I've seen people send what essentially would be a DWQ for records. You know, "Produce these the day before your oral deposition." So, I mean, I could see some limit, but practically speaking, I'm not sure it's worth -- all you're going to do is in complex cases that's the first thing they're going to get rid of.

CHAIRMAN BABCOCK: Yeah. Anybody else? Okay. I think that's the only thing that I saw, Bobby, between 200 and where we started today at 203.

MR. MEADOWS: Mr. Chairman, before we leave 200, do we -- do you feel that we've got clarity on what

we should do with regard to the subcommittee's recommendation that there be no limit on written questions?

CHAIRMAN BABCOCK: Yeah. If I thought that there was support for a limit of some type, either number or hours, you know, I'd call for a vote, but I don't think there is. I don't sense that.

MR. MEADOWS: So I think that does bring us to Rule 215.

CHAIRMAN BABCOCK: Yeah.

MR. MEADOWS: And as I said, the body of Rule 215, the proposed changes, I would suggest we just leave them as they are. They've already been discussed by Alex Albright, who did the reformulation of the rule in an attempt to align it with the federal rule. So it can stay as it is, and when we come back with the new draft if there are issues or concerns about it we can take it up. I think the better use of our time today in terms of the subcommittee going back to work would be to get right into the spoliation rule, which has now been appended to Rule 215 as 215.7.

So on that let me just frame the issue if I might. Looking back at our assignment from Justice Hecht, we were asked to consider spoliation in the context of a proposed rule from the State Bar committee, which we did;

and our subcommittee in working through that concluded that we did not propose that rule, the adoption of that rule. I'm happy to get into the reasons why, but we as a -- we were unanimous in our subcommittee that the rule that had been submitted by that committee was not appropriate for the recommendation. We next considered the assignment of examining the amendments to the federal rules, primarily with regard to 37(e), which applies to spoliation in the context of ESI only. There's an interesting history around that in terms of what the federal system did to examine the question and limit its rule change to ESI. And our subcommittee was recommending unanimously that we adopt what the feds did with Rule 37(e) with a slight change that has already been discussed by this committee, the full committee, and that is that we do not -- we want clarification in our rule that severe sanctions will not apply to a spoliation that's not intentional.

So that's -- that's where we are. That's what we -- that's where we are -- where we stand right now. I say that our work in examining this -- these proposed rules, possible changes, and the discussion around it has raised questions. Questions have emerged in terms of whether or not we as a subcommittee should be conducting a more fundamental and original examination of

spoliation for Texas, a rule of spoliation for Texas, taking up, for example, the question of the duty. That is, what is the duty in context of preserving records. Should it be as it is now under Brookshire Brothers and in the Federal Rule 37(e), a substantive standard, that I believe everybody is familiar with in terms of whether or not you're aware of something that was likely to lead to litigation and so forth, and that's not the precise statement of the standard, or whether or not it should be something that is more particularized and objective. A bright line. When the lawsuit is filed, when you receive notice of it, that sort of thing.

And another issue that we could consider and are interested in pursuing at this committee if the Court wants us to, is some mechanism for testing the obligations of preservation in litigation. That is, a way to seek relief when confronted with either a concern or an expectation, express expectation by the opponent that a level of scope of preservation might be necessary. All of this is driven by the belief -- I mean, I think a documented concern -- that the cost of preservation of ESI is increasingly expensive and in a lot of cases view this unnecessary.

So that's where we are. We have a recommendation that we not accept the proposed rule

offered by the State Bar Rules Committee. We have a belief that we should go as far -- at least as far as Rule 37(e) with our language for clarification, and a question of whether or not we should look more deeply at a Texas spoliation rule around the questions that I've just identified in terms of duty and procedure.

CHAIRMAN BABCOCK: Okay. Good. Where do you want to start?

MR. MEADOWS: Jump ball.

CHAIRMAN BABCOCK: All right. Does anybody have any comments on any or all of the above?

What about -- go ahead, Justice Busby.

HONORABLE BRETT BUSBY: Is there a reason that this is limited only to electronically stored information and not covering other instances of spoliation?

MR. MEADOWS: No. There's not necessarily a recommendation by our committee that we stop at ESI. We definitely believe that what occurred in the federal rules with Rule 37(e) make sense. The part of our question for this committee is this larger issue about whether or not we should be doing something around spoliation in a broader context. That's what the State Bar Rules Committee attempted to do in terms of codifying the Brookshire Brothers common law. So that's part of the

question.

HONORABLE BRETT BUSBY: Well, I guess, my reaction is I don't see a substantive reason just to limit this to ESI. I mean, if we're going to have procedures and there is spoliation and it seems like it would be -- it should be the same standard.

CHAIRMAN BABCOCK: Okay. Kent.

HONORABLE BRETT BUSBY: Maybe there is one, but --

CHAIRMAN BABCOCK: Kent, then Robert, then Buddy.

HONORABLE KENT SULLIVAN: For me the issue was whether we should simply adopt the federal rule as is or whether we should more broadly explore, at least, other alternatives. It looks to me like we do this about once every 20 years or so.

CHAIRMAN BABCOCK: Give or take.

HONORABLE KENT SULLIVAN: I'm sorry?

CHAIRMAN BABCOCK: Give or take.

HONORABLE KENT SULLIVAN: Give or take. And given that this is the rule that more than perhaps any other really directly butts up against technology issues, I thought it was very important to consider at least taking some time once every 20 years to explore other alternatives to just adopting the federal rule; and I

think Bobby noted the two issues that I had identified; but, you know, I do that without limitation, because I suspect there are others.

One is the question of what's the proper trigger for a duty of document and data retention and should we consider at least a possibility of an objective trigger, whether that be by some form of written notice, or the filing of an initial pleading or potentially something else, but an objective standard as opposed to the continued use of a subjective standard.

And the second, to just put it a slightly different way, was the issue of whether or not it would be appropriate to consider a possible forum of some type to facilitate presuit management of document or data retention issues that otherwise under the current system affords no forum for relief or for any clarity, either as to whether any duty exists to retain document or data or, if a duty exists, what the scope of that should be. And I think increasingly that is very problematic; and for those who have, you know, seen the materials I won't belabor the point; but, you know, I read through a number of the materials filed with the federal rules committee or otherwise available.

One in particular that I would suggest people look at is the letter from counsel for Microsoft

that simply details certain information as to the level of data that they store and the attendant cost associated with it and what that projected curve looks like in terms of how quickly the numbers have increased and the cost has increased associated with that activity. I think it's a big deal. I think it's at least worth some attention.

And I'll make one final point, and that is from my own perspective I don't feel comfortable in either trying to formulate a rule or trying to vote on a rule without knowing more from people who have greater expertise in this area, and the area that I'm talking about is technology in general and the issue of data storage, data accumulation, and the like. I think we are from time to time criticized for always looking through the rearview window in terms of the management of the legal system; and I think we need to at this juncture, particularly on an issue like this, be prospective in our view; and we need to get more information from people who have more information and background and expertise than just lawyers and even judges about what the next 10 to 20 years look like in terms of technology and how it may impact the efficacy of the sort of rule we're looking at. Now's the time.

CHAIRMAN BABCOCK: Great. Your comment about always looking through the rearview window reminds

me of the GEICO commercial, "It's what we do." Robert.

MR. LEVY: I do echo Judge Sullivan's perspective on these issues. I think there is an opportunity to do more. There were many issues that the Federal Rules Advisory Committee looked at, ended up deciding not to address for a number of reasons, including limits under the Federal Rules Enabling Act that restrained them from entering into some of the topics that Kent talks about that I think we could consider to recommend to the Supreme Court. I will also reference Justice Busby's point about ESI versus more broadly. That was an issue that came up at the very end of the process in the analysis of the federal rules amendments; and the issue, as I understand it, that the committee was looking at was they were concerned about underlining the Silvestri line of cases which involved the loss of physical evidence. In this case I think it was a vehicle, a GM vehicle, and they were concerned about undermine -- or upsetting that line of cases.

I think that was a mistake, and one of the problems that we're already seeing is how do you define what is ESI? Is a videotape ESI? Well, the data on the videotape is electronically stored, but the videotape itself is physical. Similarly, if you have a memo, is the physical memo treated differently than the electronic

version of it? If you printed it out and you lost that and the electronic version, are there different standards to apply? So I think that the better approach for us is to look at a broader rule that applies to all evidence rather than narrowing it to ESI.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Chip, we could study this for a long time, but apparently the federal rule is working for now or nobody has shown that it hadn't, but if we got the federal rule only, they're going to wonder what happens with the regular documents? Did y'all consider, Bobby, just having a footnote "This does not change the law of Brookshire Brothers" and that, and for that look to that and let's let that develop and just make it clear that we're only doing electronic. And we might have these studies that Judge Sullivan calls for, but that's going to take a lot of time. And have y'all found anything that's made this provision in the federal rule show that it doesn't work, the federal court? Anybody? So what would be wrong, my question to you -- I have no information. I have a question. Why wouldn't that work?

MR. MEADOWS: I think that it's our view that if you leave it as it is, that is, essentially the adoption of 37(e), and you don't do anything else that what you just described is how it would work. The

Brookshire Brothers and the common law would control spoliation in all contexts other than ESI.

MR. LOW: And you would have a footnote to that. Quite often when we pass a rule we say, "This does not affect" -- you know. That's all.

CHAIRMAN BABCOCK: Justice Busby.

HONORABLE BRETT BUSBY: I guess the question then would be what's the value of having two separate regimes rather than one, and I understand the value of speed in getting this out as to ESI and then following up later, but is there anything other than that that would be a reason for having physical versus electronic treated differently?

And I guess to your question, Buddy, about whether it's working okay in federal court, it sounds like at least Robert had some experience that it's not. Because the question is then what is electronically stored information? And you end up with border wars about do memos that were written, you know, in physical form but then stored electronically, do they fit under Brookshire Brothers, or do they fit under this rule or both, or where are we?

MR. LOW: My question is what rule have we passed that's perfect?

CHAIRMAN BABCOCK: Okay. Yeah, Justice

Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I think the question is certainly we can have one rule that applies to all forms of potential discovery, documents, tangible items, electronically stored information, but do we want to have different standards for the different types of information?

I mean, some things you should know pretty obviously to save. You know, if the reindeer falls off the shelf and hurts somebody and they tell you they're hurt, you should save the reindeer; but saving electronically stored information to me seems to be a little more difficult, especially in the more complicated cases where risk manager gets notice that somebody has made a claim. We're in a big corporation. It doesn't get out to everybody, things don't get -- and in the natural course of business things just get destroyed. So, I mean, I think -- I personally think that there probably should be a little different standard between those kind of documents or things, but we could make one rule for everything.

CHAIRMAN BABCOCK: Robert.

MR. LEVY: Well, I -- I think that's a very important point. Potentially the rule as proposed, assuming you take out the ESI reference, provides a little

bit of that face point because the question is whether the party failed to take reasonable steps to preserve, and that's the premise. If you have reasonable steps and you still lost the evidence, the inquiry stops. So what you can look at is the failure to preserve the reindeer in the Wal-Mart case, was that reasonable under those circumstances. If not then you go to the next step, whereas it might have been more difficult and, therefore, reasonable to have a electronic data system that could have lost information. So potentially the rule will give us that ability to look at the circumstances of how you save electronic evidence differently than how you would save physical evidence.

CHAIRMAN BABCOCK: Okay. On the bright line duty of retention, it's really something to think about, but it's easier to think about it than to solve it. A few years ago -- well, a long time ago, 10 plus years ago, I was working with one of the TV networks about, okay, when do we -- when is it triggered that we have a duty to save. I said, well, you know, easy, I mean, if you get a complaint; and the network person said, "We get, no kidding, 30 complaints a day. You know, somebody will say that they were quoted out of context, and, you know, somebody will say, 'Well, you should have talked to this guy,'" and, you know, all of these things, and none of

them rise -- none of them ever result in a lawsuit. So their point was if you're telling me we have got to now start saving, you know, 30 complaints a day and go through that whole thing, that's just impossible to do. And, Robert, I know that from discussions with some of your senior people that, you know, you get the same -- same type of thing.

MR. LEVY: Right.

CHAIRMAN BABCOCK: You know, we're going to magnify the problem. On the other hand, you know, if you're in a general counsel's office what are you going to do? You're going to have to establish a bright line somehow. Surely if you get a letter from a lawyer saying "Save your documents" that would be a bright line where you probably ought to save your documents, but what if you just get a letter from a lawyer saying, "Hey, you know, my client's been damaged"? Is that enough? Kent.

HONORABLE KENT SULLIVAN: Well, that's one of the things I think needs to be considered, and one suggestion that was already thrown out was the notion that in the context of written notice it needs to -- there needs to be a rule that addresses what that is, and at least one suggestion that it ought to be very specific, and there are certainly requisites in order for that to, in fact, trigger a duty to retain documents.

And, again, that's not necessarily the solution, but it's something worth, I think, some consideration of how to solve the problem that you're suggesting. And, of course, the worst problem it seems to me is an entirely substantive standard. Anticipation of litigation. Presumably the universe of those type of possibilities is larger than the universe just driven by some written notice of whatever kind. So, you know, it seems to me the question of what level of certainty is appropriate in both the -- with respect to both the efficacy of the system working properly and some appropriate cost benefit analysis is something worth consideration.

CHAIRMAN BABCOCK: Yeah, because the other problem, you know, from the flip side, let's say we have a rule that says, you know, if these things happen you have a duty to preserve your evidence, whether it's ESI or other things. So if A, B, and C happens. Well, you know, what if the unskilled lawyer, who, you know, hadn't kept up with the amendments, just sends a little old letter, but it doesn't comply with A, B, and C. You know, can the recipient of the letter now go "gotcha" and dump all of their documents with impunity, you know, without any consequences?

HONORABLE KENT SULLIVAN: That's why it

needs consideration.

CHAIRMAN BABCOCK: Okay. So you're voting for consideration.

HONORABLE KENT SULLIVAN: I may have given that away.

CHAIRMAN BABCOCK: Led with your chin on that one. Bobby.

MR. MEADOWS: I just want to point out at this point in the discussion, the question that Tracy identified, which is this distinction between ESI and data and things. So with the falling reindeer, under the current standard, which is litigation is anticipated, you know you've got an obligation to keep this reindeer that's really broken and destroyed and would have otherwise be thrown away. So it doesn't seem -- in that context you probably don't want to have a bright line where you have to give notice of a lawsuit or some other formal notice before you have an obligation to deal with that potential evidence. But with ESI it's a completely different thing because the whole idea is the burden imposed on the person who suspects litigation is coming and has this huge preservation problem.

So, again, I'm just maybe issue spotting here as opposed to offering any kind of solution, but I do like the idea of an all-encompassing spoliation rule. I

just see difficulties in it.

CHAIRMAN BABCOCK: Do you agree with Kent that we ought to study the bright line issue?

MR. MEADOWS: Yes. I mean, I think that's the -- the subcommittee talked about this issue. That is the question of how deeply we should pursue this whole examination of spoliation rules. Should we stop where we are, should we go deeper, and I think we concluded that it was a good idea, but we wanted guidance from the Court and committee about whether or not we should be undertaking things as big as redefining the duty before there's an imposition of sanctions for spoliation.

CHAIRMAN BABCOCK: Yeah, Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I think we also have to consider if we -- if we in Texas redefine the duty, that still does not redefine the duty in other places.

CHAIRMAN BABCOCK: Right.

HONORABLE TRACY CHRISTOPHER: And it wouldn't redefine the duty in federal court. So basically what we have done in Texas by many of our rules is just take litigation that would normally have taken place here and pushed it someplace else. So that's what we would do. If we, you know, kind of go off on our own into some

different land other than anticipation of litigation.

CHAIRMAN BABCOCK: Okay. Robert.

MR. LEVY: You make a very important point. It was one of the challenges with the changes to the federal rules, that if we have litigation in state and federal court, which standard applies; and we have -- you know, many, many parties have litigation across the country. That being said, I think that there is real value in us looking at this and being a leader and trying to develop the law to help guide the national debate on the question. And --

HONORABLE TRACY CHRISTOPHER: But my fear, my fear is if we make some very strict this is what has to occur before you're under a duty to preserve litigation and companies start following that rule, then they're sued in another state that doesn't have that rule, and they're in trouble.

MR. LEVY: But we have to make -- we have to deal with that all of the time, and we've got the new federal rules actually. I understand -- it's on my phone, but we know that we still are going to have to count on being subject to the law in New York, which is much broader than --

HONORABLE TRACY CHRISTOPHER: Then have we done any good, because we're making a different rule?

MR. LEVY: We have, because we are moving -- we are moving the dial. We are pushing the process forward, and eventually these other states are going to follow because the state court decisions often cite the federal rules, and they cite other leading states. So it will make a difference. This is not a short-term effort. It's going to take quite some time, but that's not a reason for us not to move it forward.

And, you know, on the question of preservation, as I mentioned, the trigger, ultimately the committee felt it didn't have the power to deal with that because of the fact that under the Rules Enabling Act the rules should apply when a case is filed, and so if there was some event that happens before the case is filed that triggers the duty, the committee didn't feel that it could comment. It also suggested or some suggested that the duty to preserve was relatively well understood, but the fact is, it's not. As we've pointed out, there are many circumstances when you don't know when the trigger applies. And some courts have applied substantial certainty versus reasonable certainty that would solve the problem that you referenced in terms of the complaints that you get that never result in litigation. But the issue is I think that we can do really good work in this area to solve some significant problems that many parties

have. It's not going to answer all of the problems for everywhere, but at least it will deal with the issues in Texas and perhaps set a trend for the future.

CHAIRMAN BABCOCK: Alistair.

MR. DAWSON: So I would rather keep the "reasonably anticipated" language. One, you know, there is a body of law that's developed that gives us guidance on when that trigger occurs. Secondly, I'm not sure we can draft a rule that would be encompassing enough on when the trigger occurs if you did away with the "reasonably anticipated" language, but what I would like us to do and I don't know if the committee considered this is perhaps put -- or not perhaps. I would suggest we look at putting limits on the number of custodians from whom you have to provide documents. So say that, you know, we have limits on depositions, say you only have to preserve documents from 10, 15 custodians, and that would substantially reduce the cost; and in all likelihood if you had a reasonable number you're going to preserve 99, 98 percent of the documents anyway and probably a hundred percent of the important documents. And then the other thing I would suggest is that we eliminate the obligation to preserve backup tapes.

MR. LOW: Yeah.

MR. DAWSON: Because that's costly, and the

number of times when -- you know, companies typically recycle backup tapes, and if they have to preserve them then they can't recycle them, and there's cost involved in that. And the chances of there being something on the backup tape that is not otherwise produced in litigation is pretty small and in my judgment substantially outweighed by the costs. So rather than mess with the trigger, I would rather put limits on the preservation obligations.

CHAIRMAN BABCOCK: Yeah. Great. Dee Dee, we're working her fingers to the bone here. So we'll take a break, our morning break, come back at 11:05 and be in recess until then. Thank you.

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

CHAIRMAN BABCOCK: All right. We're back on the record. We've -- Bobby and the justices and I have had a little discussion during the break, and I think it's our view, collective view, that we probably should do a little more study at the subcommittee level on this whether we can do something worthwhile about the duty of retention, the first issue that Kent mentioned, and we think as well this idea -- this concept of some sort of mechanism to test things in a presuit kind of forum. But if there's something to be said that can advance the ball, something we can do that would be productive and

worthwhile to the jurisprudence of the state, we ought to do it, but if everybody gets in a room and says, "This is too hard," then, okay. That sort of, Justice Hecht reports, is somewhat what the Federal Rules Committee, which has been constricted by the Rules Enabling Act in ways that we're not, but at some point they have done as much as they can and just don't take it to the next step. There's no reason why we can't take it to the next step if there's a smart step to take, so we'll finish off this discussion. Bobby, go ahead.

MR. MEADOWS: Well, I think that brings us to the place where we can finish it off. If there are other views from the large committee that would be instructive to how we examine these questions of redefining duty, how we look at mechanisms for protecting parties from abusive discovery, we would appreciate it.

CHAIRMAN BABCOCK: Okay. Anybody have thoughts? Kennon?

MS. WOOTEN: No comment.

CHAIRMAN BABCOCK: Inside joke. Anybody else have any thoughts? Kent, you won.

HONORABLE KENT SULLIVAN: Because I was out of the room.

CHAIRMAN BABCOCK: Well, that's part of it. We are going to consider the issues further, the issues

that you raised; but right now, has anybody else got any thoughts about this duty of retention? And I'm going to ask Kent, you, in a minute to flesh out this presuit management issue that you talked about, but right now the duty of retention. Anybody else have any thoughts about that at this stage? Okay. Yeah, Peter.

MR. KELLY: Just a general comment on I think a bright line test does not work. It makes sense when you have the -- in the advanced commercial litigation context where sophisticated parties already have lawyers on the line. When you're dealing with the personal injury context somebody may not even have a lawyer for two to three months, and in that interim evidence can be destroyed. It's sort of a race to destroy the evidence on the part of a defendant before a lawyer gets hired. So having a reasonable basis, of course, you're going to get sued, someone died here, having a reasonable basis rather than a bright line test.

CHAIRMAN BABCOCK: Okay. Robert.

MR. LEVY: One issue I think we should also include in this discussion and I think it probably would be in further study is it's not just when a defendant is on notice, but it's also when a party bringing the claim -- and it could be a commercial case or an injury case -- when that party has a duty to initiate discovery; and

there is a more disconnected but interesting connection between when the work product privilege triggers, and is that the same point in time when the duty to preserve triggers. I think they're separate issues and aren't really connected, but it's raised a number of interesting situations, including a case in New York where they used them as the same and found that the -- in this case the defendant knew or sent e-mails or sent documents with work product privilege, and the court found that that meant that's when they should start preserving, and they had not.

CHAIRMAN BABCOCK: Yeah. There are a lot of cases where they're connected. Okay. Anybody else? All right. Kent, on this issue of a presuit management forum, can you tell us what you have in mind, or do you have any more detail as to what you're thinking about on that?

HONORABLE KENT SULLIVAN: Well, on a broad basis conceptually I think as this area continues to grow, that it makes little sense to have no forum of any kind to obtain relief or clarity from a duty or a perceived duty to retain data or documents, so I start there. As to an analog, one analog that you might consider is like a Rule 202 in terms of being able to file something presuit and get a hearing with a court under certain specified circumstances with notice to adverse parties to obtain

some level of clarity as to issues as to whether a duty exists and what the scope of the duty would be to retain on an ongoing basis.

CHAIRMAN BABCOCK: You would have to preserve in the interim, though, right, until you got a decision?

HONORABLE KENT SULLIVAN: As a practical matter, I started from a couple of assumptions. Number one is everybody is going to at a minimum be forced to retain documents and data according to their own internal preservation regime. So that's one starting point. If someone deviates from that, you know, that's an obvious issue.

Under the second is that you're always going to be able to allege that someone intentionally destroyed evidence for the specific purpose of depriving the other side from that evidence. That would be under any scenario and would always be improper, it seems to me. The question then of what triggers the duty and what are alternative objective standards to look to, I think that's part of this inquiry.

CHAIRMAN BABCOCK: So I'm just trying to see how it would work. You've got the company of Sullivan & Fuller, and they've got --

HONORABLE KENT SULLIVAN: I'm glad I got top

billing.

CHAIRMAN BABCOCK: Fuller & Sullivan, I mean. You guys go outside and work it out. Whatever. You've got a lot of data, and you've gotten this kind of vague claim from Perdue here about some claim his clients have got, and so you say, "Gee whiz, we don't know what we should do here." So you file this presuit petition to have the judge tell you what you've got to save? Is that the concept?

HONORABLE KENT SULLIVAN: Candidly, I think that these two issues that we're discussing need to be looked at in tandem. I think that if Jim Perdue wants to send written notice in a way that triggers some duty, then we ought to have a discussion and seriously look at what should that notice contain. My thought is it needs to clearly ask for document data retention, and it needs to with some specificity indicate the scope of what he's asking me to retain, and then that in turn creates a more specific issue for a court potentially to address, to the extent that my position is that Jim's request is unreasonable.

CHAIRMAN BABCOCK: So Jim sends you a letter, and he says you've got to save all of this stuff, and you say, "Well, no, that's overbroad." You call Jim and you say, "We can't possibly be required to save all of

this stuff. It doesn't have" --

HONORABLE KENT SULLIVAN: He won't take my call.

CHAIRMAN BABCOCK: -- "anything to do with your claim," and -- I'm sorry. What did you say? I always love a good joke.

HONORABLE KENT SULLIVAN: I said he won't take my call.

CHAIRMAN BABCOCK: Yeah, he won't take your call, but let's say he does. He's encouraged to take your call, and he says, "No, at this early stage of the litigation I meant what I said, and so you've got to preserve it." And you say, "Well, then we're going to go to -- we're going to invoke, you know, 215.10 and you're going to be a defendant for a little bit. Your client is going to be a defendant for a little bit, and we're going to get the judge to tell us." So that's the concept.

HONORABLE KENT SULLIVAN: That is the concept.

CHAIRMAN BABCOCK: Okay. And would there be appellate rights from that?

HONORABLE KENT SULLIVAN: I think that's a point of discussion. I mean, obviously I think you want to limit this because I think we're all concerned about cost, delay, or complication associated with satellite

litigation. At the same time to me that's not an excuse to not look at it at all.

CHAIRMAN BABCOCK: Okay. Richard.

MR. MUNZINGER: Why would that help anything? If I'm lawyer to the guy who was concerned that I should be saving everything, I've got to start saving the minute I file the petition.

CHAIRMAN BABCOCK: Right.

MR. MUNZINGER: I haven't saved anything.

CHAIRMAN BABCOCK: Well, except if the judge says, "Yeah, Perdue is out to lunch on this and you don't have to preserve all of this. You just preserve half of it." And so he goes, "Okay, great, I'm going to let my automatic delete go forward."

MR. MUNZINGER: And the other side appeals, and so I still am saving everything.

MR. LEVY: This is a fascinating topic, and this is one of the issues I deal with internally quite frequently. So there are a number of different scenarios. One is that you have a situation where a lawyer sends a notice of preservation. I think it's way overbroad. I'm going to do what I think needs to be done to preserve, but I'm not -- I'm not going to necessarily negotiate because I think I understand the duty. What I want to make sure is that as we develop this we wouldn't want to have a

presumption that the notice to preserve sets the standard and if I don't challenge it in this precase process that I'm foreclosed from arguing that it was overbroad.

But there are also some other scenarios that make this very complicated, which is, you know, you have a situation -- let's say you have an environmental event or you have a large nationwide class action or a statewide issue where you've got multiple different attorneys involved or an environmental event where you know you've got an issue but you don't know who the plaintiffs are, and you certainly don't know who the lawyers are going to be, but you know there's going to be litigation. Well, the question is can you get guidance even in a -- you know, potentially an ex parte way so that you get an independent view of whether what you're doing is reasonable? Should that be part of the process, because it's going to take time for the case to develop, but as you point out, we've got to make the decision immediately about the breadth of the scope; and if we start too narrow and the court comes in and says, "You were too narrow," you can't go back and resave the stuff that's already gone.

CHAIRMAN BABCOCK: You can often, however, go back and retrieve it.

MR. LEVY: It's a -- we've done --

CHAIRMAN BABCOCK: Brutally hard, I know.

MR. LEVY: It's really difficult and extraordinarily expensive and disruptive.

CHAIRMAN BABCOCK: Yeah. Yeah. Okay. Judge -- Justice Christopher.

HONORABLE TRACY CHRISTOPHER: I just don't think that creating this kind of a system would be useful in state court in Texas because we don't get those kind of cases in state court in Texas. We don't get class action cases in state court in Texas anymore, because it's too hard to certify a class. People choose to file elsewhere than they do in state court in Texas. I bet if you asked this room how many people have had trouble with electronic data in a state court case in Texas we could deal with that problem, but in all of the years that I was on the bench we never saw it, and we don't see it in our appellate cases either. So where is the problem? What kind of case are we addressing? In state court in Texas.

CHAIRMAN BABCOCK: Robert, confine your answer to state court in Texas.

MR. LEVY: State court in Texas. First of all, the dynamic has changed considerably since you were on the trial bench. I'm not saying that other trial judges aren't seeing that, but because -- because of the nature of electronic discovery, that's -- and the

proliferation, dealing with things like how do you preserve Motofones, things like that, and we don't have a process now. So the way that it works now is I'm going to make my decision. I don't have anything other than my judgment, and if the other side doesn't agree with what I've done, then you're going to hear about it later in a spoliation session. But the concept is you're able to foreclose that because you're able to get guidance early.

HONORABLE TRACY CHRISTOPHER: No, I understand the concept. What kind of case are you worried about?

MR. LEVY: We have cases all the time. We have an environmental event that happens in a particular refinery somewhere in the state, and we know we're going to be inundated with litigation, and so right now what we're doing is we're taking an overly broad, overly conservative approach of saving absolutely everything, which is extremely difficult and disruptive and expensive and impairing the efficiency of the work that people do because we don't have a way to narrow it other than, you know, taking the risk that later on we'll be called in for spoliation. The cases that the Supreme Court has issued recently have helped in narrowing for us where we think that this issue will be decided, but there is certainly I think value in considering a way to look at it earlier on

so that you can foreclose that. I think the reason why you're not hearing it from us is --

HONORABLE TRACY CHRISTOPHER: We're not hearing it. We don't see it in court. We don't see it in appellate courts.

MR. LEVY: Because we're solving the problem by saving way more than we need to and spending a lot of excess money doing it, and as Kent pointed out, we're saving tens of millions of documents to make sure that we have the, you know, few hundred thousand that end up in discovery and the few thousand that are actually used in the case.

CHAIRMAN BABCOCK: Okay. Kennon, you ready yet?

MS. WOOTEN: Well, I'll give another example of where it comes up. In representing pharmaceutical companies that are all over the world, have locations all over the world, and it comes up in the qui tam casesthat are under seal, so they are several years old, and they date back to marketing, alleged marketing practices going back to, you know, Eighties and Nineties, and that's an issue where we've encountered --

HONORABLE TRACY CHRISTOPHER: Qui tam is federal court, right?

MS. WOOTEN: No.

HONORABLE TRACY CHRISTOPHER: Also state?

MS. WOOTEN: This is Texas Medicaid Fraud Prevention Act.

MR. PERDUE: That's his fault.

HONORABLE KENT SULLIVAN: Guilty as charged.

CHAIRMAN BABCOCK: Peter.

MR. KELLY: I just don't see how it could work practically. I mean, if Sullivan & Fuller, they seek protection to say they can get rid of -- don't have to store the information. They file in Collin County. Perdue wants everything preserved. He files in Bexar County or down in the Valley. You're going to have -- how do you resolve who has venue? How do you prevent inconsistent adjudications by different trial courts? You know, the Valley judge might have a completely different view about what needs to be preserved as opposed to the Collin County judge. And does this fix venue? Do you get to fix venue for the entire case? What about the plaintiff's choice in the venue? You might have good reason to file in the Valley rather than Collin County.

I just don't see how you can get through all of these jurisdictional issues and having competing jurisdictions of two different trial courts if you have this procedure.

CHAIRMAN BABCOCK: Lisa.

MS. HOBBS: Well, we see the jurisdictional issues come up in the 202 context, so it is a problem. Apparently no one has jurisdiction over 202 applications. I'm just kidding. I think what I was going to say about this procedure is that it does seem like a very possible burden for the system to bear. And I wonder even if there's really a dispute such that we're asking our trial courts to issue an advisory opinion, because if you're saying, "Here's what I'm doing, I need someone to approve it," you don't actually know if there's someone out there who disapproves what you're going to do. So I'm not sure there's even a case in controversy. So I would just throw that out there.

CHAIRMAN BABCOCK: Yeah, Justice Boyce.

HONORABLE BILL BOYCE: Following up on that question, I'm trying to envision is this an evidentiary hearing? Is this akin to a TRO for preservation of the scene after the event occurs? Is this just -- is this affidavits? Is this legal argument?

MR. LEVY: I think that's -- sorry.

CHAIRMAN BABCOCK: No, go ahead.

MR. LEVY: I think that's part of what this, you know, thinking and analysis should look at, is how do you do it? Do you do it based on concepts and broad parameters, but then later on there might be evidentiary

issues as to whether you complied with what a judge determined? It would be more challenging if it became evidentiary because then you're going to want discovery, and you're going to create a miniwar about something that is just developing, but I think that there could be ways that a court could make preliminary judgments. And it might even be a rebuttable presumption that if you followed the guidance that you have a safe harbor, but it doesn't mean that later on the other side can't still challenge the issue, but based upon a higher burden, with evidence.

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: Who do you give notice to, and if I don't get notice, am I bound by the judgment? Is there a res judicata effect if I didn't get a notice? And so then if you say, well, there's a presumption that it was valid and you have a higher burden, I've still got the same due process problem it seems to me if I'm a party who didn't get notice. If it's an environmental problem, the Flint water thing, you could give notice to every resident. You give notice to people downstream in a different state. The complexities of it are massive. That's not news to anybody, but I've got a problem about whether I'm bound by it if we have a system where my rights are still my rights unless taken away after notice

and an opportunity to be heard.

CHAIRMAN BABCOCK: Well, let's say that you who did not get notice feel that Robert, with court sanction, did something wrong. I mean, they destroyed something they shouldn't have, and then you have a lawsuit. It's in a different court, maybe in a different state, and Robert comes in and says, "Well, you know, wait a minute. Don't complain to me. I did the right thing. I went to a judge, and the judge looked at this and said it was okay." May not be res judicata as to you, and you're certainly probably not collaterally estopped, but the new judge is probably going to give some weight to that prior proceeding, don't you think?

MR. MUNZINGER: It depends on the judge, and it depends on where the judge is.

CHAIRMAN BABCOCK: Well, sure. Always.

MR. MUNZINGER: It's a real problem.

CHAIRMAN BABCOCK: Yeah. Robert.

MR. MUNZINGER: I mean, from his point of view.

MR. LEVY: And I agree, Richard, and I might -- depending on the case I might decide that going to this process isn't going to help me because I know that I've got other cases other places that aren't going to necessarily be bound by this determination, whatever we

call it. So that's going to be a judgment that the party with the information and the preservation challenge is going to have to work through.

CHAIRMAN BABCOCK: But do you like the concept of having this mechanism?

MR. LEVY: I am -- I've got mixed feelings because one of the challenges will be if I'm forced into a proceeding and I've got to prove up my preservation process early on, that's going to put me in a difficult spot, and I also -- I'm not -- I think that what we do is appropriate and defensible, but out of context a judge might not agree; and if a judge makes the decision in a specific case that I've got to do something different, that doesn't just impact me in that case. That changes the entire paradigm of the way we have to address preservation, and that could be millions of dollars, tens of millions of dollars because of that one impact. So there are some real concerns about it as well. I do think it's an interesting concept to explore and flesh out a little bit more.

CHAIRMAN BABCOCK: Do you know that you got appointed to that subcommittee?

MR. LEVY: There's rumor of that.

CHAIRMAN BABCOCK: It was a secret ballot, but apparently it was unanimous.

MR. LEVY: I'm happy to help.

CHAIRMAN BABCOCK: Okay. Anybody else got any thoughts about this? Seeing no hands, Bobby, what else should we talk about here?

MR. MEADOWS: I think that concludes the -- our initial assignment. At least I think it advances what we're doing through the initial assignment in terms of examining the discovery rules, so the question now is whether we should spend a little time looking at our most recent assignment of whether or not the rule, Rule 614, the Rule of Evidence, and 267 should be -- should apply to depositions as well as trial.

CHAIRMAN BABCOCK: Okay.

MR. MEADOWS: It's an interesting question. Justice Hecht put some color around it. He may want to, you know, introduce it to this committee, but essentially what we're dealing with is something that was considered by this committee and the Court going back to the Eighties, and that is the question of whether or not we should have the rule of exclusion at trial of fact witnesses apply to depositions. The -- as I appreciate it, Justice Hecht, there was -- the issue was viewed differently around the state. The question was considered in this committee and was not resolved, and the compromise was the change we have to Rule 199.5, I think, which

expressly states who can attend a deposition. And so the -- the question has now been raised in terms of whether or not -- you know, what is the state of play. When the federal rules -- when Federal Rule 30 was amended in 1993, it was expressly stated that the Rule 615 in the federal rules did not apply to depositions, and so that has become the question for us.

CHAIRMAN BABCOCK: Okay. And I think this was kicked off by a --

MR. MEADOWS: A letter from a lawyer, Robert Rodney Alden, Austin lawyer with Byrd Davis, and then he was writing to Justice Hecht, who communicated through you to us that we were to look at the question. And just to jump to the bottom line, although I certainly don't want to forestall any discussions about it, I think it's the view of the -- well, it is the view of the discovery subcommittee that we adopt the federal approach to this and expressly state that the rules, our rules, 614, does not apply in discovery.

CHAIRMAN BABCOCK: Okay. Yeah. And I see it coming up in state practice a fair amount. Lawyers will pound the table and say, "You cannot have a witness in this deposition even if you have complied with the rule and given me notice that he's going to be there" and, you know, refused to participate in the deposition until the

guy leaves, you know. So it's something that happens. It's -- it may be in isolated cases, but it does happen, and obviously it's been lingering for a long time. So your subcommittee thinks we ought to expressly say that the rule may be the rule for trial, but it's not the rule for depositions.

MR. MEADOWS: Right.

CHAIRMAN BABCOCK: Okay. How does everybody feel about that? Everybody understand what the situation is? Yeah, Robert.

MR. LEVY: I --

CHAIRMAN BABCOCK: You're quite chatty today, aren't you?

MR. LEVY: I know. Well, I've thought about this issue in the past, and I find it very interesting that, you know, the idea as I understand the rule is to avoid the situation where a witness would be colored by another witness' testimony. So you exclude them from a deposition, but then if they can read the transcript, what's the point?

CHAIRMAN BABCOCK: Right.

MR. LEVY: Is the -- if the rule as it's currently applied, does that mean you can't show them the deposition or watch the video? So right now it doesn't really make sense anyway. So if you want the rule to work

all the way you need to tell them they can't look at the deposition and then it's difficult. Well, what happens if somebody tells them what they said. So I think that it does make sense that there is clarity that the rule just applies at trial.

CHAIRMAN BABCOCK: Yeah. I think so, too, but anybody else? Yeah, Peter.

MR. KELLY: To the extent that -- essentially the trial practice, or at the trial everybody says, "I want to call the next witness by deposition." You're not actually calling a witness. You're just presenting a recorded statement. A deposition is merely a recorded statement that has to be -- that has been taken by a court reporter. So by emphasizing that the rule only applies in trial and not to depositions, that would be conformity with that general principle that a deposition is just a recorded statement.

CHAIRMAN BABCOCK: Okay. Somebody else have their hand up? Well, doesn't seem like this is all that controversial. Okay.

MR. MEADOWS: There's unanimity? Is that what you're saying?

CHAIRMAN BABCOCK: Maybe there is, first time maybe ever.

MR. MEADOWS: Well, let's not test it with a

vote.

CHAIRMAN BABCOCK: Yeah, we won't test it. We'll just assume this one is by acclimation.

MR. MEADOWS: That concludes our report.

CHAIRMAN BABCOCK: Okay. Good for you. Well, it's only 20 of 12:00, so let's keep moving for a little bit on our agenda, and the next item is the amendments to the Code of Judicial Conduct. And, Jim, you and your subcommittee have dealt with this before and -- or the big committee has talked about this before, and what do you have to report today?

MR. PERDUE: Well, with due respect, I am going to give the floor to my co-chair, Justice Bland, who worked up the language that we have for the committee today.

CHAIRMAN BABCOCK: Thank you. Justice Bland.

HONORABLE JANE BLAND: Okay. So I think we can dispatch with this pretty quickly, but I have guessed wrong before about the committee. We had a request from a county judge to amend the Code of Judicial Conduct to exclude county judges from the prohibition contained in Canon 4F of the Code of Judicial Conduct against -- the prohibition against active full-time judges conducting arbitrations or mediations for compensation. And the

committee -- the full committee has discussed this earlier; and we took a vote; and the vote was that, you know, for various reasons that we didn't think it was a good idea to carve out an exclusion for county judges under Canon 4F. But the Court would like language that would effectuate this proposal, and so there's a memo that everybody received that sort of discussed the subcommittee's proposal for adopting this amendment to the Code of Judicial Conduct. And it's a pretty easy amendment to effect because we've got other exceptions carved out for other kinds of judges, and we've got some exceptions for county judges in the code even as it stands.

So if you've got the memo, at the top of the second page there's the current version of Canon 4F. Canon 4F says, "An active full-time judge shall not act as an arbitrator or mediator for compensation outside the judicial system, but a judge may encourage settlement in a performance of official duties." So that's the canon that precludes compensation as an arbitrator or mediator for a full-time judge. Canon 6 of the Code of Judicial Conduct is the canon that sets forth the applicability of various provisions of the Code of Judicial Conduct to various judicial officers. Canon 6B is the Code of Judicial Conduct that applies to county judges, and just below the

language of Canon 4F in your memo is the language of Canon 6B regarding county judges, and right now it reads, "A county judge who performs judicial functions shall comply with all provisions of this code except the judge is not required to comply with" -- and then it has right now four exceptions. And some of those have to do with investments, some have to do with sitting on government commissions, and one has to do with the practice of law, and so the fix or the proposed amendment to Canon 6B, which is on the third page of your memo, would be to add to Canon 6B a new exception that would then say, "A county judge who performs judicial functions is not required to comply" and then the new language would be "with Canon 4F, unless the court on which the judge serves may have jurisdiction of the matter or parties involved in the arbitration or mediation."

That language is lifted directly from another section of Canon 6 that applies to justices of the peace and municipal court judges, Canon 6C. The canons currently don't require justices of the peace or municipal court judges to comply with Canon 4F. So this would merely track that same language and insert it in Canon 6B where the exceptions are set forth for county court judges, and so that's what the subcommittee proposes to do in connection with incorporating this exception as an

amendment to the Code of Judicial Conduct.

CHAIRMAN BABCOCK: Okay. Since you have encyclopedic memory about what we've done before, when we talked about this before did we vote and were generally against doing this, or were we in favor, or what did we think about it?

HONORABLE JANE BLAND: The vote was against amending the code to create this exception, but we received direction from the Court that they would like language that would incorporate this exception, and so our committee has gone back and done that.

CHAIRMAN BABCOCK: Okay, great. That was what my less-than-perfect memory was, but the language that the subcommittee has proposed, any comments about it, Buddy?

MR. LOW: Chip, this only applies to constitutional county judges who perform judicial functions. In many counties they don't perform judicial functions, and some they without pay do arbitrate or mediate, so -- and it doesn't affect county court at law. I mean, it's just a constitutional county court that doesn't do -- and that's all it affects, if I've read it correctly, which I might not have done so. Am I correct? Is that -- that it only pertains --

HONORABLE JANE BLAND: Our understanding is

that it was a county judge that was seeking the exception, and so we put the exception under the canon that applies to the county judges who are performing judicial functions. If you're a county judge not performing judicial functions, you're not even governed by this.

MR. LOW: That's -- but my question, I wanted to limit so I for once know what I'm voting on. It's those that -- we're limiting only those that perform judicial functions, right?

HONORABLE JANE BLAND: Right.

MR. LOW: Okay.

CHAIRMAN BABCOCK: But that could be a county court at law, couldn't it, as well as a -- no?

MR. LOW: No.

CHAIRMAN BABCOCK: Don't they perform --

HONORABLE JANE BLAND: The way that we have written the exception and our understanding from the letter that was written by a county judge, not a county court at law judge, is that it's a county judge, capital C, capital J, County Judge. In other words, this exception tracks the judicial officer and not the court, because there is some -- there are some, you know, county court at law that are constitutionally created, and so we don't -- and that was a little bit confusing, but it looked like the Code of Judicial Conduct has looked at

that and the exceptions and the applicability go with the judicial officer not with the particular kind of court.

CHAIRMAN BABCOCK: Got it. Okay. That good, Buddy?

MR. LOW: I'm a little confused, but that's normal. I'm ready.

CHAIRMAN BABCOCK: You're ready to vote? Not straight ticket, I hope.

MR. LOW: No.

CHAIRMAN BABCOCK: Any other comments about the language? Yeah, Richard Munzinger.

MR. MUNZINGER: What do you mean "jurisdiction over parties" as distinct from "the matter"?

HONORABLE JANE BLAND: Well, I think -- I think it might be there isn't a case, there isn't a pending case, but you've got a party in your county that is seeking to arbitrate, and so the potential might be that that party -- that the matter -- that the case may come before you because of a party involved. But that would be just guessing on my part because this language is language that, as I said, has been lifted from another provision where we have excepted 4F for another set of judicial officers, those that are municipal court judges or justices of the peace.

CHAIRMAN BABCOCK: Yeah, by putting the word

"may" in there you're opening it up to a pretty broad or potentially broad group of cases, because if it hasn't been filed yet, it may be in his or her court or even if it has been filed and could -- and maybe could be transferred to his or her court, it wouldn't be appropriate to act as a mediator or arbitrator. The way I read it, but Lisa.

MS. HOBBS: I read it the same, and I think that is good policy.

CHAIRMAN BABCOCK: That's good policy?

MS. HOBBS: Yeah. It should be broad, and I think it's broad for the JPs and the municipal judges for a reason.

CHAIRMAN BABCOCK: Yeah. Nina.

MS. CORTELL: I think the breadth works if you limit it to matter, but may have jurisdiction over the parties separately, that could be -- you could be wiping out the whole purpose of this, because in any given circumstance -- I know, I don't want to be ridiculous, but I think that arguably you always may have jurisdiction over a party.

CHAIRMAN BABCOCK: You're talking about personal jurisdiction?

MS. CORTELL: Yeah.

CHAIRMAN BABCOCK: That's a good point.

MS. CORTELL: So I would strike "or parties." Although I realize that creates a discrepancy with the prior provision.

CHAIRMAN BABCOCK: Roger.

MR. HUGHES: Well, if you're talking about a county judge, you're talking about an administrative official, and there are a lot of units of local government that are beholding to county administration, and all of the sudden you find out the county judge is going to arbitrate the case over which -- and it's his administrative body that has a lot of input to whether you get funded next year. I can see that being a problem; and, of course, maybe it's because of where I practice. The possibility that the county judge is able to arbitrate and mediate, the district judges who practice in that county may find the county judge to be an ideal choice to appoint as an arbitrator, which could become very difficult or shall we say somewhat sticky. If you have units -- and it's possible now because the Local Government Code has been amended to permit a waiver of immunity for contracts for which immunity has been waived; and so you may have units of government that have signed arbitration agreements that will be enforced by the district court. And then they will appoint the arbitrator, who is the county judge, who is the one that

administratively decides the -- or has input over the funding for that litigant next year. You know, maybe that's out in left field, but it's possible in some places south of here.

CHAIRMAN BABCOCK: Yeah. Buddy.

MR. LOW: The county judge in Jefferson County raised some of the same things when I talked to him about it, and I don't think there is any shortage of mediators. I mean, you can find them pretty easily, and you can agree on somebody as an arbitrator, so I don't think there is any pressing need to do that.

CHAIRMAN BABCOCK: Except for this one guy.

MR. LOW: Well, yeah, we need to consider him. Okay.

CHAIRMAN BABCOCK: Okay. Any other comments? Okay. We've already taken a vote that we don't think it's a good idea generally, but now we have language. Having seen the language, does that change anybody's mind about whether what we thought about before that it's not a good idea no matter what the language says? Has anybody changed their mind about that? Everybody is shaking their head "no" that I can see. So the Court has got the benefit of our discussion, and the big thing was whether we're going to be broad with the "may" language and whether or not we might strike "or

parties," as Nina suggests, and with that I think we can leave this, right?

HONORABLE JANE BLAND: That's right.

CHAIRMAN BABCOCK: Okay. Cool. Let's keep working. We're on a roll now. So this matter is done. We're not going to come back to this one. But on the discovery rules, where is Bobby? Has Bobby left the building? Is he like Elvis?

HONORABLE JANE BLAND: He's out of the room, but I can submit that the plan for the subcommittee is to incorporate all of the suggestions that we have seen from the big committee and give you guys a new draft to then once again have a discussion about that incorporates the discussions we've had over the last three meetings.

CHAIRMAN BABCOCK: Yeah. Great. All right.

HONORABLE JANE BLAND: And I would like to -- Kayla Carrick has been our right hand in terms of keeping track of everybody's suggestions and the drafts, and we're very much indebted to her. She is an excellent lawyer, and I just wanted on the record to acknowledge what a great job she's doing for us.

CHAIRMAN BABCOCK: Yeah. Thank you, Kayla. You should remember this, Jane, because you remember everything about prior meetings. Didn't we acknowledge her once before?

HONORABLE JANE BLAND: You can never say "thank you" enough, Chip.

CHAIRMAN BABCOCK: That was going to be my point. We keep thanking you, Kayla. Thank you. But when we come back at our next meeting you'll incorporate everything and then we'll go through that, but specifically, we'll take a hard look at 215, which we've not done this time. We'll see if the subcommittee has come up with language on this duty of retention bright line concept and also whether the subcommittee has come up with language or some concept on the presuit management forum. So that in addition to everything else that's what we'll do. We won't do that, Tracy?

HONORABLE TRACY CHRISTOPHER: I'm sorry, when is the next meeting? That's lot of work for us to accomplish in the next two months over summer vacation.

CHAIRMAN BABCOCK: Yeah. The next meeting is on a date to be determined in August, and we don't have that date yet because the Chief's schedule is up in the air.

HONORABLE TRACY CHRISTOPHER: That's a lot of work and with people taking vacations.

CHAIRMAN BABCOCK: There is a lot of work there, and maybe since we're pretty much getting through our agenda, maybe we ought to just not have the August

meeting, and when is the next one after that? October.

MS. WALKER: October 27th.

CHAIRMAN BABCOCK: October 27th. Would October 27th give you enough time?

HONORABLE JANE BLAND: Well, I don't know that we're the only item on the agenda because we've got Martha's --

CHAIRMAN BABCOCK: Yeah. We're going to assign out some new projects, but I don't know that you'll be able to get to those by August, although we have a January 1 deadline on one of them.

MS. NEWTON: Yes. On one there is a January 1 deadline.

CHAIRMAN BABCOCK: But we'll have -- if we have the October meeting and we have December meeting, we will have two meetings to consider that. Would that be sufficient, do you think?

MS. NEWTON: I think without seeing a draft of the rule it's hard to say, but I think after -- we can get the assignment out pretty quickly in the next few weeks, and after the subcommittee kind of takes a look and they can let us know how involved they think it will be. My initial -- just looking at the statute I don't think it's too involved of a process.

CHAIRMAN BABCOCK: Yeah, you said on the

record it would be easy.

MS. NEWTON: Well, I didn't say it would be easy.

CHAIRMAN BABCOCK: You said very easy.

MS. NEWTON: I said it looks straightforward.

HONORABLE ANA ESTEVEZ: Ask Jane what she said.

CHAIRMAN BABCOCK: All right. It clearly is.

CHIEF JUSTICE HECHT: For a good committee it will be easy.

CHAIRMAN BABCOCK: For a good committee it would be easy. Whoa, ouch. Ouch.

Oh, okay. Marti says that we have to have the August meeting.

MS. WALKER: No.

CHAIRMAN BABCOCK: So it's all her fault.

MS. BARON: We've already ordered the food.

CHAIRMAN BABCOCK: We've already ordered the food. All right. So we'll advise everybody, but we will not put discovery on the August meeting. How about that? We'll save that for October. I'll make a note on that, save for October. Okay. Great. We've got one more item.

HONORABLE TRACY CHRISTOPHER: So, Chip,

before we do all of the work of revising everything that's been done, and we've taken a lot of individual votes with respect to the discovery changes.

CHAIRMAN BABCOCK: Yeah.

HONORABLE TRACY CHRISTOPHER: And I guess before we do all of that work again, is there a consensus in the group that this is a good thing we have done and we should move forward with it? Because I'm not really sure based upon a lot of the comments in here that the main body of this group thinks it's a good idea. Now, if the Supreme Court wants us to do it anyway, we'll do it, but would that be an interesting vote?

CHAIRMAN BABCOCK: It might be interesting depending on how easily you're amused, but --

HONORABLE TRACY CHRISTOPHER: Pretty easily.

CHAIRMAN BABCOCK: But I think it's the Court's thinking that --

HONORABLE TRACY CHRISTOPHER: Then we'll do it.

CHAIRMAN BABCOCK: Yeah.

HONORABLE TRACY CHRISTOPHER: Okay.

CHAIRMAN BABCOCK: And I could be contradicted by the gentleman to my left and the more important person, Martha. Yeah. I think we should go ahead and do that.

We've got one more item. And, Pam, I think you're --

MS. BARON: Yeah.

CHAIRMAN BABCOCK: -- in charge of that, are you not?

MS. BARON: I am.

CHAIRMAN BABCOCK: Okay.

MS. BARON: I'm sorry that Professor Dorsaneo --

CHAIRMAN BABCOCK: Yeah, how's he doing, by the way?

MS. BARON: I don't know.

CHAIRMAN BABCOCK: Does anybody know?

MR. JACKSON: I saw him a couple of weeks ago, and he's still in pretty bad shape. I mean, he's very cognizant of the rules. We talked about 76 and a bunch of other stuff, and he's still as sharp as ever at that, but his short-term memory is really bad.

CHAIRMAN BABCOCK: Mike.

MR. HATCHELL: I talked to him for about 30 minutes this morning.

MR. JACKSON: Oh, this morning.

MR. HATCHELL: Very encouraged.

CHAIRMAN BABCOCK: Great.

MR. HATCHELL: I'd like to go off the record

to talk about his health.

CHAIRMAN BABCOCK: Yeah. Okay. Well, we'll keep him in our thoughts.

(Off the record)

CHAIRMAN BABCOCK: Back on the record, and I think my last comment was let's keep him in our thoughts and prayers. Okay, Pam, up to you.

MS. BARON: All right. Thank you. The appellate rules subcommittee has been charged by the Court to look at whether or not the deadline for filing petition for review specified in rule -- TRAP Rule 53.7 could be modified in some way to accommodate a situation where an indigent parent represented by appointed counsel and appointed counsel either fails to file a petition at all or files it out of time when the indigent parent had wanted to pursue further appeal. And the questions from the referral letter or the first one was whether or not there was any jurisdictional bar to doing so, and then the second question was, if not, how do we go about providing for this kind of procedure.

And just to kind of bring you up to speed, the Texas Supreme Court decided *In the Interest of P.M.* case, and rehearing was denied in that case this morning, that the right to appointed counsel to an indigent parent in a parental termination suit brought by governmental

entity under Texas Family Code Section 107.013(a) does extend to representation at the level of the Texas Supreme Court. It had previously held -- and I think it's the *In the Interest of M* something. I'm sorry.

MR. RODRIGUEZ: M.S.

MS. BARON: M.S., yes. That the right to counsel under that statute -- and these are purely statutory rights we're looking at -- encompassed the right to have effective assistance of counsel. So the Court's referral letter speaks in terms of effective assistance of counsel. We've tried, as we'll discuss later, to narrow kind of what that means in the context of Supreme Court representation. So the first question was whether there's a jurisdictional impediment. The Texas Supreme Court has held probably for a century and to this day denies late petitions, not just dismissing them, but it dismisses them for want of jurisdiction. So it's recognized it as a jurisdictional question, but nothing in the Constitution or statutes of the state sets a particular time frame during which a petition has to be filed, and that comes from court Rule 53.7.

The U.S. Supreme Court in the *Bowles vs. Russell* case was looking at a sort of a similar issue, but there the time limit for perfecting appeal in federal court had been provided in the statute, and the Court

viewed that as a jurisdictional limitation, but said this is different than time deadlines for perfecting appeal that are set in a rule which are not jurisdictional. The Texas Court of Criminal Appeals has held that the time for perfecting appeal is not jurisdictional, although if you fail to do it within that time the court's jurisdiction is never invoked, so it has no ability to recognize equitable extensions of time. So it's sort of just terminology, but it effectively constitutes jurisdictional bar in the Court of Criminal Appeals. To me the idea that it's not jurisdictional kind of shakes me to my emotional core.

CHAIRMAN BABCOCK: Let the record reflect that Ms. Baron is shaken to her emotional core.

MS. BARON: Yes. But there are -- there is a body of case law that would support that conclusion. But what the committee in our discussions sort of came up with the idea that if it is jurisdictional -- and it may very well not be -- it's a jurisdictional bar of the Court's own creation. It doesn't come from the Legislature or the Constitution; and, therefore, the Court itself, what it has made it has the ability to change. So we think that regardless of the answer to that question and once you start reading those cases you fall into a very deep hole, doesn't necessarily affect what our subcommittee needed to do. And so we would recommend

filing a rule that accommodates this issue.

We had the benefit of input from the clerk of the court, Blake Hawthorne, in terms of how often this issue comes up. It's somewhat frequent, and turning away an indigent parent who may not have communicated with counsel because they were incarcerated or because of communications issues or because counsel failed to tell them of the right to proceed to the Texas Supreme Court does seem to require some type of special treatment. Blake was also good enough to point out that there is a current procedure in the rules in 4.5 to extend the time for filing a petition for review in another kind of case, which is when a litigant gets late notice of a court of appeals judgment and this is the deadline, because they didn't know. And we used that as a model and proposed to do something sort of similar in proposed new TRAP Rule 4.6, which somewhat parallels 4.5, but obviously involves a different fact situation.

So then we looked at -- so that's kind of the mechanism we came up with, was to try and track an existing rule and procedure that the clerk's office and the Court is familiar with, but apply it to indigent parents and parental termination suits. Then we kind of got into how broad a scope should the rule be, who's covered, who's not covered, and at this point in the P.M.

case and in the M.S. cases the right that's been identified by the Texas Supreme Court is a pure -- purely a statutory right under a particular statute, and it may be that there are parents in parental termination cases who aren't indigent. The statute also doesn't cover private termination suits, so there are other situations where parents may be being deprived of their children. They may have ineffective assistance of counsel, but the Supreme Court hasn't addressed whether that's a situation where special procedures or concerns come into play, if there's some constitutional right to effective assistance of counsel even if you are nonindigent or involved in any other kind of proceeding.

Also, the statute covers not just parental termination, but also conservancy of a child suit brought by a governmental unit and does provide for appointed counsel for indigent parents in that situation. And, again, that wasn't within the scope of the referral, so we footnoted it wouldn't be that hard to accommodate the other situation under the statute should the Court or the committee want us to do that.

Then we kind of looked at time limits, and there are a lot of concerns that have to be balanced in making that determination. You do want to afford an indigent parent who is having communication issues a

little bit of a buffer to discover that counsel has not proceeded as requested or that this procedure is available and they didn't know about it, but it can't go on forever because there are children out there whose future is being determined. Uncertainty and lack of finality may affect the ability to place them, so that was a concern, too.

So what we did is we punted a little bit, I will just say. We just took the 90 days that's in Rule 4.5 and applied it in parental termination suits. So they would have 90 days from -- right now you have 45 days to file a petition for review after the latest of two events, either the court of appeals judgment or the overruling of the last timely filed motion for rehearing of the court of appeals judgment. So instead of 45 days an indigent parent with a statutory right to appointed counsel would have 90 days. That 90 days wouldn't be to file your petition but to file a motion with the Texas Supreme Court asking for the extra time, and so the Supreme Court would decide, well, do you meet this, do you get the extra time. And once the extra time is found to be granted then your time for filing the petition runs from that date. So there's a fair amount of time built into this for the indigent parent.

Then we had trouble a little bit with what should the standard be. Just saying it wasn't filed due

to ineffective assistance of counsel kind of invites factual disputes and is a little bit difficult standard. We tried to make it a little bit more objective. I was kind of pushing to was it filed or was it not filed, but there are other situations where a client could affirmatively say, "Don't file," and at that point we shouldn't entertain giving parties who have at least knowingly said, "Don't file a petition for review" to come in and get the extra time and disrupt placement of the child on a more permanent basis.

So what we've asked is, one, the party coming in who wants extra time would have to show that a petition was not timely filed and that they either weren't informed by appointed counsel of their right to file a petition for review or they instructed counsel to file one and it wasn't done timely, and conceivably there could occasionally be fact issues under that scenario, but infrequently the clerk's office currently deals with late notice of judgment, which is similar. You have to make certain allegations about when you got it and have affidavits, and they seem to deal with that on a regular basis without the Court having very often to refer -- refer it back to trial court for an evidentiary hearing to determine that.

So we've tried to keep it sort of a switch

on or off standard that would make it easy for the indigent parents with appointed counsel or the indigent parent pro se to come in and make that showing. So I think -- oh, the other thing is I think I guess in the -- in the P.M. case the Court said appointed counsel can meet its obligation to make -- to provide representation in the Texas Supreme Court by filing a petition for review that complies with the *Anders vs. California* case, and the Court is seeing a lot more Anders briefs being filed by appointed counsel. In fact, their statistics are going up pretty significantly in terms of petitions filed as a result of that process.

We are going to treat -- sometimes they style them Anders briefs, according to Blake Hawthorne, the clerk of the court. Sometimes they're called Anders petitions for review. We're counting either of those for purposes of the rule as the filing of a petition for review by appointed counsel, and we are reluctant to start saying in the rule itself "petition for review or Anders brief." We don't really like to cite cases in rules, I think, generally in this body, so we have added a comment to that effect to let counsel know that's what we're considering. We're equating the two, and your obligations can be met by that filing.

So that with that as a background I guess I

would open it up to see if any subcommittee member wants to correct or add to anything I've said, and barring that then we'll go to the rule. Evan.

MR. YOUNG: I don't want to correct anything, but I do want to supplement. Everything that Ms. Baron said I agree with, and I am particularly grateful because she kind of grabbed this, realized we were coming up, and then we put this together because she worked so quickly to do it all. With respect to the jurisdictional question I think we all reached that consensus that whether it is or it isn't, it doesn't matter for these purposes. I do think that that word "jurisdictional" is a really messy word that at some point it might make some sense to give some deeper thought to; and that's what the U.S. Supreme Court is trying to do; but it doesn't make a whole lot of sense to me to think that a court-created rule that is being treated as subject matter jurisdiction in practice really is jurisdictional in the sense that we use that word, if that word is going to have the kind of precision we would like it to. But again, that shouldn't limit anything that's happening here.

The other aspect is this was the referral that we got based on this one particular context, based on this particular case. The problem that I foresee is that

it's not at all clear to me that creating a special rule just for this one kind of context can be so readily cabined. What is it about this one narrow circumstance that says that it uniquely out of all kinds of petitioners, out of all kinds of cases, not just in family law but in any other kind of law, should have the special solicitude of their own TRAP rule about special timing, relaxation of timing requirements. And it may be that this really is the only circumstance like that, but if it isn't, I would foresee demands from a host of others to say, "Well, wait, my client likewise is in some special need. My client likewise has some kind of right, statutory or constitutional, to effective representation" and counsel they had at the time appointed or pro se or whatever didn't deliver on getting something to the Texas Supreme Court. So I can imagine a demand for a proliferation of TRAPs that would identify and enumerate and tailor to all of these unique circumstances, which can't really be a good thing.

So given that the Court referred us this narrow question, I agree, this is within its power. It would solve a particular problem. It would be a justifiable way to do it, but I would think that it would be worth some consideration. If the Court is confident this is the only place it wants to go, it could by fiat

say, "Sure, there are others who are similarly situated and might have this claim. Too bad. We only care about parents, indigent parents, who are subject to this particular statute," or it might say, "We perhaps don't think that this remedial solution to this particular violation of a right makes necessary -- is necessarily the one, the fact that your right to effective counsel has been violated necessarily means the Supreme Court of Texas should give you special timing relaxation." Or it might consider saying, "Well, let's have something that's a little bit more generic that wouldn't be limited to this particular context," would still be limited in its application and scope to who could take advantage of this demand for extra time, but wouldn't necessarily invite the squawking about additional TRAPs for people who contend they likewise have had some unjust thing happen to them that means they should have more time than everybody else to file a petition for review.

So to summarize, I think everything that Ms. Baron said is absolutely correct. This is responsive to what the Court has asked us to do, but I'm not certain that that referral necessarily was contemplating all of these other potential developments; and if it was, then strike everything that I've just said. If not, maybe some further thought would be warranted.

CHAIRMAN BABCOCK: Judge Newell.

HONORABLE DAVID NEWELL: If I could weigh in on it, one of the things that -- I would agree with everything Evan is saying in that we have our own -- we're wrestling with the same problem with regard to notices of appeal in DNA appeals because there is a unique circumstance in criminal law whereby a defendant who asks for DNA testing and then can appeal that determination is not necessarily getting notice, and the reason we went to try to create this rule was because it could be cabined under the proviso that the criminal justice system is based on the idea that a sentence has to be pronounced in front of a defendant; and then his writ of habeas corpus that, which is going to return directly to us, he never has to be present when we issue the ruling. So the bulk of criminal law never has a problem with the defendant getting notice of what his appealable order is going to be except this brand new proceeding for DNA testing wherein the defendant doesn't have to be there when the trial court signs the order, and so we've done exactly what y'all are trying to do here with our own Rule 4.6, by the way. So we'll have to change it to 4.7 or something like that.

MS. BARON: Oh, no.

HONORABLE DAVID NEWELL: So we've done the

same thing, but the discussion that we had --

MS. BARON: You had it first.

HONORABLE DAVID NEWELL: -- is very much exactly what Evan was saying, people saying, "Well, what about this proceeding? What about this type of proceeding?" And because of that, it led to us holding off for about two years while this problem persisted, and so you have to be very careful I think of trying to say what is the independent justification for why this is the only circumstance whereby this rule can take place.

The other observation I have is just from a little bit of experience with ineffective assistance. You're still going to have factual disputes about whether or not the client actually told someone to do the PTR. It is probably better -- we have limited ours to lack of notice. That is the best that we can do, but I still see a great potential for a lot of factual disputes even in this rule. So anyway, that's it.

CHAIRMAN BABCOCK: Thank you. Pam, *Anders vs. California* I remember being a case where the appellate lawyer tells the appellate court that the appeal has no merit.

MS. BARON: Correct. That's what an Anders brief does. There are way more experts in this room than me on this subject, but as best I understand it, it says,

"The appeal has no merit. I've advised my client of this and their right to file separately from me to make an argument that it does have merit." Does that sort of colloquially covers it?

CHAIRMAN BABCOCK: So --

HONORABLE DAVID NEWELL: But they do have to go -- the lawyer has to go through and say, "These are the arguments I could have made. These are why they don't work." So it's not just saying, "I don't want to do it." It's like, "I've looked, I've looked, and I can't do it, but here you go. This is the benefit of what I've looked at, but you take a chance and look at it." And then he gets off. That's the whole idea. The premise behind it is that's the way the attorney on appeal can get off.

MS. BARON: Right.

HONORABLE DAVID NEWELL: That's what he has to do.

CHAIRMAN BABCOCK: So our invocation of Anders is -- I'm just trying to think of the circumstance. So the appointed counsel files with the Texas Supreme Court an Anders brief, says, "There's nothing to this."

MS. BARON: Right.

CHAIRMAN BABCOCK: And then somebody else can come in and say, "Oh, yes, there is" or how does that work?

MS. BARON: Yeah. They can come --
CHIEF JUSTICE HECHT: The party can.
CHAIRMAN BABCOCK: The party can.
MS. BARON: The party can.
CHAIRMAN BABCOCK: All right. Yeah, Judge Estevez.
HONORABLE ANA ESTEVEZ: Just to give you a little more information since I have the criminal side, too. Every now and then --
CHAIRMAN BABCOCK: Your court has criminal jurisdiction.
HONORABLE ANA ESTEVEZ: Right. I guess I didn't word that right.
CHAIRMAN BABCOCK: As opposed to --
HONORABLE STEPHEN YELENOSKY: Hey, look, we all do.
HONORABLE ANA ESTEVEZ: Another thing that does happen at least, and I'm sure it won't happen in the civil world, but in the court of appeals, the court of appeals sometimes sends back an Anders brief and tells the appellate lawyer to brief another issue that it finds it does have merit.
HONORABLE DAVID NEWELL: Right.
HONORABLE ANA ESTEVEZ: So --
HONORABLE NATHAN HECHT: The appellate court

is supposed to -- even though you get an Anders brief that says, "I've looked at these issues. There's no merit to any of them," the appellate court is supposed to do its own research and go through the record and make sure that's right.

CHAIRMAN BABCOCK: Yeah.

MS. BARON: Okay, good.

CHAIRMAN BABCOCK: Judge Busby.

HONORABLE BRETT BUSBY: And we do that and have in cases found an issue that the lawyer didn't find in the Anders brief, and so usually we send it back and have them appoint a new lawyer to brief that issue because this lawyer has asked to withdraw contemporaneously with filing the Anders brief.

HONORABLE ANA ESTEVEZ: They could have been ineffective, I suppose.

CHAIRMAN BABCOCK: Judge Higginbotham appointed me in a case where a lawyer had filed an Anders brief, and the thrust of the Anders brief was that the appeal had no merit because the defendant had admitted his guilt and cited to the record, and so I'm thinking, what am I going to say, right? So I went to the record, and in the record cite the defendant is saying, "I am not guilty of this crime." Maybe there was ineffective assistance, I don't know. Okay. Any other comments? Yeah, Richard.

MR. MUNZINGER: In terms of justifying a rule for this circumstance, if I understand the circumstance correctly, it is limited to indigent clients whose children have been taken away by government. That's a justification for a special rule, in my opinion.

CHAIRMAN BABCOCK: Yeah. Good point. Roger.

MR. HUGHES: I was -- I was a bit uncertain after I read the rule about what the scope of the rule would be because when I read the rule it appears that it only applies when the indigent parent has a court-appointed counsel at the intermediate level and somehow that lawyer is the one who doesn't get the brief -- who doesn't get the PFR filed on time, but somehow if the indigent parent had for-pay counsel in the court of appeals who as soon as the counsel got the opinion said, "I'm out of here. Goodbye. You're on your own," and the person is not informed by their paid counsel after the counsel is withdrawn of their right to appeal or doesn't know that they're indigent, the rule wouldn't give that parent an extension? Are they just out of luck?

MS. BARON: Well, that's certainly not the intent, and that's something we can fix.

MR. HUGHES: Yeah, because when I read it says, "A parent with a statutory right may move for

additional time to file if the parent's appointed counsel failed to file the petition timely." That may have been exactly the intent, but if you had paid counsel who jumped ship in the court of appeals, you don't get this rule. Also, I guess the next thing is what if they were pro se in the court of appeals, and after getting the opinion says, "Oh, my God, I should have asked for that court-appointed lawyer after all"? Is that -- how would that affect that parent? This just may be --

MS. BARON: My understanding is that you can't withdraw unless another counsel has been appointed when you have appointed counsel. I guess we had not addressed the situation where an indigent parent might choose not to exercise their right to appointed counsel. Is that something that happens, or is the trial court required to appoint anyway? I don't know that answer to that.

CHAIRMAN BABCOCK: Justice Busby has the answer.

HONORABLE BRETT BUSBY: Well, I don't think we've ever seen a case where the parent has been pro se. Part of the unique thing in this circumstance is that the statute puts it in terms of an attorney ad litem, so they're not actually representing the parent. They are representing the interest of the parent, but they do not

work for the parent when they're appointed in this capacity, and so there are additional hoops that have to be jumped through to discharge them and that sort of thing. So I don't think we've ever seen a case where the parent is pro se.

HONORABLE TRACY CHRISTOPHER: I have.

HONORABLE BRETT BUSBY: You have?

HONORABLE TRACY CHRISTOPHER: Well, I mean, I have seen one where they either want to be pro se or they want new counsel.

HONORABLE BRETT BUSBY: We do see that in the criminal context where people decline counsel, and there it's sort of, "Okay, if you want to do that then you're on your own"; and we allow people to -- you know, you also have a -- just as you have a right to be represented by counsel, you have a right not to have counsel foisted upon you if you don't want it; and so if you have exercised that right, then you're on your own. You know, and the judges -- typically we'll see records where they've made an inquiry, "Are you sure you want to do this, and do you understand what this means" and that sort of thing.

But I think the reason it doesn't address the other circumstance that you mentioned, Roger, which is you have paid counsel in the court of appeals who maybe

jumped ship is that you would have a malpractice claim at that point against the lawyer, but it also -- you might also -- I'm not sure that *In Re: P.M.* would apply to that circumstance because the court was only dealing with indigent counsel and saying counsel -- attorneys ad litem who had been appointed to represent indigent parents because that's all the statute covers and saying in that context the court was holding it does extend to the -- your obligation extends to filing a petition for review. You're not finished in the court of appeals. So I don't know whether the ruling would be the same if you had paid counsel or not. We don't have any direction from the Supreme Court on that.

CHAIRMAN BABCOCK: Skip.

MR. WATSON: Well, on the subcommittee I -- section 107.013 and *In The Interest Of P.M.*'s interpretation of that where the Court "shall appoint an attorney ad litem" in this situation if the person is indigent, I'm -- I'm not sure we can write a rule that deals with the trial court's failure to pick up from P.M. that "I don't care if you're paid or not paid, sir, before you withdraw, I have to make a determination of whether this person is indigent." You know, P.M. picks that up, that it's up to the trial court or the court of appeals *In The Interest Of P.M.* to be sure that that ball is not

dropped. The statute is mandatory. P.M. is mandatory. They just didn't think of that wrinkle, but I don't think we can draw -- do a rule that says, "Hey, pick up a step here, trial court."

CHAIRMAN BABCOCK: Any other comments? Yeah, Judge Newell.

HONORABLE DAVID NEWELL: The other thing I would -- one thing I would add, if you're looking for sort of one of the things I think gets to the bottom of why this rule would be special and suggesting why it is important to keep this rule special and limited cabin, because that's such an elegant verb, the thing to keep in mind is that there is no vehicle for a writ of habeas corpus post-termination in the civil context in the way that there is in criminal to restore these rights. You know, so whatever the deficiency on the part of the attorney is not something that you have any vehicle has ever existed. So this new -- this new rule of ineffective assistance is definitely unique and to this type of situation, type of proceeding, which might provide some limitation on the rule.

The downside to that very thing, though, is that that means this will have a tremendous tension to become your own brand new writ process in this context, so --

MS. BARON: Right.

HONORABLE DAVID NEWELL: I'm not saying good or bad. That's just my perspective.

MS. BARON: Don't ask for what you want, you might get it, right?

HONORABLE DAVID NEWELL: That's right. That's right.

CHAIRMAN BABCOCK: Okay. Any other questions, thoughts, comments about this? Justice Christopher.

HONORABLE TRACY CHRISTOPHER: So the indigent parent just asserts one of these two things. Is there a response or any sort of evidentiary finding on that? Or they just assert it and the court accepts it as true?

MS. BARON: I think the procedure right now under 4.5 on late notice of judgment, although I think that may usually be supported by affidavit, is that the court generally accepts the statement as true and grants the extra time. And, you know, probably the better side of caution is to give people this chance to file. The great majority, 99 percent of these cases, are not granted, but people do need to have the ability to be heard in that one percent that are. So I think that I guess counsel could come in and respond, "I told him, and

here's the letter," and at that point the court can either accept counsel's and deny the request or send it to the trial court just for a very short determination of whether notice was given or not or whether the filing of a petition was requested or not. I just don't know that the court would ask for that to happen very often.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, my only concern is that these appointed counsel who feel like they have covered their bases --

MS. BARON: Right.

HONORABLE TRACY CHRISTOPHER: -- and didn't file the petition for review because the client said, "Don't file the petition for review," now is being accused of being ineffective without any sort of way for that counsel to say, "I'm not." And, I mean, maybe, maybe the court will see frequent flyers up there that, you know, the appointed counsel isn't doing its job or her job, is not filing the Anders brief when they should have, and but that would be something that the trial court should know before they appointed that appointed counsel appointed counsel. But, I mean, I think appointed counsel do take it seriously when they're accused of being ineffective. All counsel do.

MS. BARON: Well, of course. Of course they

do.

HONORABLE TRACY CHRISTOPHER: And there's no mechanism here for saying "Huh-uh, not true."

MS. BARON: We could provide for optional response or the court could request a response. Would that take care of that problem?

HONORABLE TRACY CHRISTOPHER: I just think you take that out. You just say, "Here's an extra do over for the" -- you know.

MS. BARON: Take what out? I'm sorry.

HONORABLE TRACY CHRISTOPHER: Take out a requirement. It's just "My petition for review wasn't filed, and I want one, and I'm filing it within 90 days."

MS. BARON: Well, that's -- my subcommittee thought that was too liberal an approach in terms of clients that could have said "Don't file" and then say -- and then come in and now are saying, "Oh, they didn't file it," but I think I'm with you. I would like to see just a very easy switch on, switch off, without fact issues that have to be determined, but this was the compromise that we reached in terms of trying to not just grant it as a matter of right in any case where a petition wasn't timely filed. So that's a balancing, and I'm open to either side of that.

CHAIRMAN BABCOCK: Justice Busby.

HONORABLE BRETT BUSBY: We did discuss that in the subcommittee, and the first draft that we looked at was if it wasn't timely filed you get another -- all you have to do is the parent has to file a motion for an extension and say it wasn't timely filed, and they get a do over. My perspective is I think that's almost worse for appointed counsel because then you're looking -- you're ineffective without them even having to say, "Well, they didn't tell me." You just didn't file it, and P.M. says you're supposed to, so I think if we're concerned about counsel, that that's actually putting them in a worse position of being -- and we also used the terminology in one version of this "ineffective assistance of counsel," and so we took that out because we think really what they're talking about in this particular -- what we're dealing with is a more limited thing, which is did you file it or not. But I think if I were appointed counsel in one of these cases I would want a mechanism to say if one of these parents said, "Counsel didn't file one, and I want to file one," I would want a mechanism to say, "Yeah, I didn't file one because they told me not to. I talked to them and they said, 'I don't want to file a petition for review.'" And so I would much rather go with your -- with the suggestion that we provide for an optional response than to just say because you didn't file

a petition for review timely you get a do over, which may capture some circumstances when the parent said, "I don't want one" and then change their mind later.

CHAIRMAN BABCOCK: Evan, and then Lisa.

MR. YOUNG: It seems like if we don't have any criteria we're effectively just extending from 45 days to 90 days in this category of case. A much simpler thing to do is to say in all cases you have 45 days, except in this one case you have 90 days to file a petition for review or ask for an extension. And maybe that would be good, but it does seem like there are other interests that the court might be interested in, which is to say that the more time that passes with uncertainty the child is also in a situation where that future is increasingly in doubt, and you might be incentivizing that ill group of people who have incentives perhaps to play games with ex-spouses or whatever. So this seemed like the compromise that made the most sense, unless the Court just wants to extend that time, and wouldn't that effectively be what it would boil down to if we didn't have some requirement other than it just wasn't timely filed?

CHAIRMAN BABCOCK: Lisa. Then Skip.

MS. HOBBS: I don't have a strong opinion about what way you do it, with the standard or without a standard, but if you're going to have a standard I feel

like this should at least be verified so that they're swearing to the facts, and so I know it sounded like in the other rule it was done by affidavit, but I bet you could just make it a verified motion.

HONORABLE BRETT BUSBY: By an indigent parent in prison? I would --

HONORABLE TRACY CHRISTOPHER: Well, they can do the swear under oath.

MS. HOBBS: They can do the swear under oath. And I would put it in the rule and tell them what they need to say, too. I wouldn't even assume they knew what the word "verified" meant, but that's a pretty easy thing to add.

CHAIRMAN BABCOCK: Skip.

MR. WATSON: Well, I was of the view but didn't push it that the cleanest way to do it was what Judge Christopher and Pam originally -- the way Pam did it of just rather than setting up a mechanism where a response might come in and the thing gets drawn out or "No, you didn't do it," just because of the gravity of what we're dealing with and the fact that there is no do over, my guess is if this is going to get filed, even if it's disputed, it's probably going to get granted. So why not just set it up that if it's filed, it's granted, and we're moving on? You know, we're not building in the

extra steps. That was my view of it.

CHAIRMAN BABCOCK: Okay. Justice Christopher, then Justice Bland.

HONORABLE TRACY CHRISTOPHER: Well, it seems to me that it would be better to require, all right, so the Supreme Court has said you have to have appointed counsel, and appointed counsel may file Anders briefs. Right? So that means anyone who's been appointed now knows they have to file -- they have to continue to file and either file an Anders brief or have written permission from their client not to file.

MS. BARON: Right.

HONORABLE TRACY CHRISTOPHER: So why don't we just make that the rule and eliminate this whole step? Because that way they will file an Anders brief unless their client gave them written permission not to file and then you wouldn't have these pro se problems.

CHAIRMAN BABCOCK: Justice Bland, then Justice Busby.

HONORABLE JANE BLAND: Well, picking up on what Evan said about the timing and how this can be affected by this rule, if there is no petition for review filed and the plenary -- if there is no petition for review filed, our court -- and I think most, if not all of the appellate courts -- issue the mandate forthwith so

that -- so that the parties now have certainty about the status of this child. And that's important in these cases where we are trying to determine those rights at a time when, you know, it's important for this child to have -- to have parents; and so if we put this in the rule, you know, did y'all consider or think about what this does in connection with I think our plenary power will have expired and even under, you know, normal procedure we would be able to issue the mandate short of 90 days from the date of the judgment? And it looked like you tracked 4.5 where there hasn't been notice of the judgment, but in 4.5 you have to then do it within 15 days of when you do get notice but in no event later than 90 days. In other words, 90 days is the outside on that so what I'm wondering is whether this is too generous a time frame for cases and is only going to apply to a very few number of cases as has been discussed or, you know, very, very few, but this rule could delay cases for everybody.

CHAIRMAN BABCOCK: Justice Busby.

HONORABLE BRETT BUSBY: I think we're open to suggestions of shorter time periods, didn't have a strong feeling about that on the subcommittee, but as far as Justice Christopher's suggestion about getting written permission not to file, I think that's an interesting idea. I don't think it necessarily belongs in this rule

because I don't know if you -- because that would be a requirement on the appointed counsel, whereas this is talking about requirements for the indigent parent to get an extension. So I think we would probably need to put that someplace else in order that they would find it and know about it, and I don't know if there are equivalent rules for them or if that's all done by statute. So I don't know where we would put that necessarily, but that could be considered.

My main concern was if a lawyer has a conversation with an indigent parent and says, you know, "You've got no case. I have an obligation to file for you, but I think it would be a waste of time, but for these reasons" and the parent agrees, I don't think we ought to force them to file an Anders petition just to avoid this whole procedure here and spend the taxpayers money on that when the client has said, "I don't want it." So --

HONORABLE TRACY CHRISTOPHER: Well, I just think it ought to be in writing and signed and then --

HONORABLE BRETT BUSBY: Well, and that's fine. I think that would be fine, but --

HONORABLE TRACY CHRISTOPHER: And maybe filed with the court.

HONORABLE BRETT BUSBY: But we have to do

that someplace else other than here, I think, in this particular rule, but if the Court wants us to look at that we certainly can.

CHAIRMAN BABCOCK: Roger, and then Judge Estevez.

MR. HUGHES: Well, in the interest of calculating some just sort of deadline because I think that's a good point. Mandate has got to issue sometime, and the clerks need to know when to issue them. I was wondering whether the appellate justices here have any sort of feeling about when these motions extension have been rolling in? I mean, are we getting -- usually are these cases where the person goes -- comes screaming in a couple of days past the deadline, or are these like a lot of them like within 30 days? I mean, if you extend this out, what's the date that's most likely to catch all of them without getting us too far out? That's my question.

HONORABLE TRACY CHRISTOPHER: This is just at the Supreme Court, so --

HONORABLE BRETT BUSBY: Right. We did ask Blake about that, and he seemed to indicate that 90 days would be enough, but I don't think any of us pressed him on was there a number short of that that would catch most of them.

CHAIRMAN BABCOCK: Okay.

MS. BARON: I mean, right now all petitioners basically have 60 days because you have 45 days. Then you have 15 days in which to seek an extension. So this is really only an additional 30 days being provided outside of that time limit.

CHAIRMAN BABCOCK: Yeah. Okay. Any other questions or any other comments?

HONORABLE ANA ESTEVEZ: I just had a --

CHAIRMAN BABCOCK: Oh, I'm sorry, Judge Estevez. Yeah.

HONORABLE ANA ESTEVEZ: I just had a comment and a few of you guys touched on it, but the public policy of the Family Code and even in the termination when these are considered are always the best interest of the child. And what we're not thinking about when we're extending this is someone has determined that someone was a really bad, bad parent already, and you know; and maybe there's some error in the record; and they absolutely have a right to appeal. But the reality is there's been a full proceeding that has proved by clear and convincing evidence that something, you know, has -- they have met one of these termination. There is usually someone waiting who has been either a foster parent or a family parent or someone like that that is waiting to give certainty to this child and adopt this child and give them

this life that they truly believe in and should have, and I think we -- you know if it's only a 30-day extension then that's probably not going to create a world of difference for the child, but the reality is I see with the terminations that at the last minute they want one, and it's not necessarily for the child. It's "Oh, I might as well do it. It's free."

CHAIRMAN BABCOCK: Yeah. Evan.

MR. YOUNG: Sorry to be so chatty, but Justice Christopher's idea is kind of growing on me. I don't know where exactly it would go, but it would avoid the proliferation threat I think and perhaps advance these interest of finality and timeliness for interest of the child if when maybe the judgment of the court of appeals comes down or whatever or in the rules somewhere it says, "Appointed counsel in such-and-such a case must within the time allowed for a petition for review either file a petition for review or an Anders petition for review or a verified statement that their client has directed that no further contesting of the order shall proceed" or something like that.

To me that might be a lot better than having a whole standalone rule with all of the risks that we have talked about and incentivize everyone I think to move more rapidly and allow that to happen.

CHAIRMAN BABCOCK: Skip.

MR. WATSON: To wrap it up, I don't want us to lose sight of the first question that the Court asked in its charge of is this whole issue jurisdictional, and you know, I stopped and sort of pondered that, that the Court has said it's jurisdictional. So its asking us is it jurisdictional was sort of to me a way of saying, you know, "Look at this and see if it might should have been worded differently or could be worded differently." And I kind of came down, I think, like Pam, that it rocked me because I always assumed it was jurisdictional and the Court has always said it's jurisdictional, but when we looked at the cases that we're going through and saying it's jurisdictional if it's statutory. But if it's a court-made rule, I took them as saying the real issue is did you timely invoke the jurisdiction; and, you know, it might be helpful if the Court chose to clarify that. I can't imagine why that was asked if that wasn't a question in somebody's mind.

CHAIRMAN BABCOCK: Sure. Justice Busby.

HONORABLE BRETT BUSBY: And we did talk about that in the subcommittee, and I guess I came down sort of where Evan did, that at least under the way the U.S. Supreme Court has been considering this, it's probably not jurisdictional because it's set by rule, but

given that the Supreme Court has said that it's jurisdictional, you know, it sort of doesn't really matter whether it's jurisdictional or not because it's set by rule, and it can be changed by rule. But, you know, the Supreme Court has been sensitive in other contexts like Dubai Petroleum against Kazi and other cases about saying when something is really jurisdictional and when it's not.

So but I think one of the things that's significant is when the U.S. Supreme Court has clarified this it's done it in opinions rather than in rules; and so it seems like if the Court wants to clarify it, it's more appropriate to do that in an opinion; and that's why we didn't put anything in the rule about it whether it's jurisdictional or not.

CHAIRMAN BABCOCK: Okay. Any other comments? All right. Well, we've gotten through our agenda, which is great news for everybody.

MS. BARON: Can we -- should we take some votes? What do you want our subcommittee to do next?

CHAIRMAN BABCOCK: Well, I'll look for direction to my left, but I think -- well, you tell me, but I thought that maybe they would tweak and deal with Martha.

CHIEF JUSTICE HECHT: Yeah.

CHAIRMAN BABCOCK: Okay.

MS. BARON: Okay. Because I don't know that I have a consensus from the room whether we want it to be a file/no file standard or whether it should be a "They didn't tell us" or "They didn't follow our instruction" standard and whether 90 days should be shortened. I guess those were kind of -- and three, whether it should be verified. Those would be the three things that I don't think we have direction on.

CHAIRMAN BABCOCK: Okay. How many people think it should be verified?

HONORABLE ANA ESTEVEZ: Or just sworn.

CHAIRMAN BABCOCK: How many think it should not be verified?

MR. WATSON: You're assuming there's a standard in there to verify.

CHAIRMAN BABCOCK: Right. Ten think it should, five think it shouldn't. How many think it should be less than 90 days?

How many think it should be more that -- how many think it should be 90 days? So five for less than 90 days, 16 for 90 days. And your third vote was?

MS. BARON: Should there be a standard other than it didn't get filed timely?

CHAIRMAN BABCOCK: Everybody that thinks there should be a standard beyond it didn't get filed

timely, raise your hand.

HONORABLE BRETT BUSBY: I'm not sure that's clear enough for --

MS. BARON: That counsel screwed up. Should the standard be counsel screwed up or it just didn't get filed?

MR. YOUNG: Like "I asked for it to be filed and it didn't get filed" or "Counsel never told me."

MS. BARON: Right.

MR. WATSON: What it says now versus it doesn't say -- all it says is it didn't --

HONORABLE BRETT BUSBY: Well, it seems like there are three options on the table. One is it didn't get filed timely, another one is what it says now, and the third one is Judge Christopher's option of having to -- of having some sort of certification that there was written permission not to file.

MS. BARON: I'd like to deal with that third one separately if that's okay.

CHAIRMAN BABCOCK: Okay.

HONORABLE BRETT BUSBY: I'm not sure they are, but okay. I'm not sure how to vote.

CHAIRMAN BABCOCK: Well, the subcommittee chair has -- can frame the votes here, so the people who are in favor of limiting it -- you better phrase this,

Pam.

MS. BARON: Whether it should be as (b) as currently written, which requires either an instruction to file and it wasn't filed or a lack of informing petitioner of the right to file. That's option one. Okay. Option one is that.

CHAIRMAN BABCOCK: Everybody in favor of as currently written, raise your hand.

All right. And those who --

MS. BARON: The other option is it just didn't get timely filed.

CHAIRMAN BABCOCK: Just didn't get timely filed. So 6 for as written, 13 as for just didn't get timely filed. And there's a third option that Justice Busby is itching for us to vote on.

MS. BARON: It's not relevant now, right?

HONORABLE BRETT BUSBY: Right.

CHAIRMAN BABCOCK: Which is not relevant, so you're out of order.

HONORABLE TRACY CHRISTOPHER: No, I think it is relevant.

CHAIRMAN BABCOCK: Justice Christopher thinks it is relevant.

HONORABLE TRACY CHRISTOPHER: My proposition is we don't have this rule at all, and we have a mandate

that appointed counsel either file an Anders brief or file a statement with the Supreme Court that he has written permission from his client not to file.

HONORABLE BRETT BUSBY: Or file a petition.

HONORABLE TRACY CHRISTOPHER: Right.

CHAIRMAN BABCOCK: How many people are in favor of the Christopher proposal? Whoa, a late vote.

How many are against the Christopher proposal? So there are 10 in favor of the Christopher proposal, 3 against.

HONORABLE ANA ESTEVEZ: Can I make a comment real quick? That is the same standards as a criminal case, so it's not unusual. They get appointed for appellate purposes.

CHAIRMAN BABCOCK: Not only the Chair not voting, but a number of other people not voting, which is fine. Justice Boyce.

HONORABLE BILL BOYCE: Is there benefit to looking at the side-by-side comparison of these two approaches for further discussion? Because my short answer on the vote is I'd kind of like to think about that a little while and look at it. And rather than just --

CHAIRMAN BABCOCK: You're on the subcommittee, aren't you?

HONORABLE BILL BOYCE: I am, but

specifically in relation to Judge Christopher's suggestion, I'd be in favor of looking at drafts going both ways --

CHAIRMAN BABCOCK: Okay.

HONORABLE BILL BOYCE: -- and pondering this.

CHAIRMAN BABCOCK: I'll tell you what I would propose. Between now and our August meeting the subcommittee can -- based on these votes and on your motion to have additional time to consider, which is granted, y'all can get with Martha and make sure that she has what she needs. If we need to put it on the August agenda, we'll do it, and if the Court is satisfied with the discussion then we'll leave it off the August.

MS. BARON: Okay. And I appreciate Justice Boyce's offer to draft the alternative proposal.

MR. YOUNG: Here, here.

MR. DAWSON: I'm not sure that's what he said.

CHAIRMAN BABCOCK: He was very magnanimous about that.

HONORABLE BILL BOYCE: Boy, that was a very efficient comment. It had all sorts of things packed into there.

CHAIRMAN BABCOCK: All right. Before we --

we've got lunch, by the way. But, yeah, Justice Busby.

HONORABLE BRETT BUSBY: I was just going to say if anybody has a suggestion of where we might put such a requirement, that would be helpful because I honestly don't know where Justice Boyce's proposal is going, you know, what rule that should fit in. So if anybody has suggestions, it would be great to know that.

CHAIRMAN BABCOCK: Very good.

MS. BARON: Oh, and I had one more thing.

CHAIRMAN BABCOCK: Yes.

MS. BARON: Also, in light of other developments, the rule would be renumbered 4.7.

CHAIRMAN BABCOCK: Don't anybody leave yet because we have something very important to talk about other than the fact we don't have a date for August yet.

HONORABLE DAVID NEWELL: I was going to say about the rule numbering, I do appreciate that. By the same token, looking at the whole section, would it make more sense for us to be 4.7, because otherwise it's creating sort of a here's a civil rule, here's a criminal rule, here's a civil rule?

MS. BARON: That would make me super happy.

HONORABLE DAVID NEWELL: We've actually already done our 4.6.

MS. BARON: Oh, well, then never mind.

HONORABLE DAVID NEWELL: The question I would have would be we're going into comments process, would be whether or not we could renumber it at that time, but then I guess if we do it first then we would have to renumber it later. So I don't know.

CHAIRMAN BABCOCK: Justice Busby.

HONORABLE BRETT BUSBY: And it may not end up in Rule 4 at all if we need to put this requirement someplace else.

HONORABLE DAVID NEWELL: Fair enough.

MS. BARON: Oh, that's right. Okay. We'll stick with proposed 4.7 at this point.

CHAIRMAN BABCOCK: Okay.

MS. HOBBS: I would just offer the Court the advice that I think they have the -- probably have the authority to renumber a rule later and just make the correction to the number and not to the rule. So as your former general counsel, that is my advice to you.

CHAIRMAN BABCOCK: All right. Who knew. Okay. Well, we started this meeting noting a sad event, but we're going to end on a happy note. With the United States Supreme Court's opinion just a few weeks ago in *Water Splash, Inc. vs. Menon*, which I would like to read from a passage if that's all right. "The Texas Court of Appeals majority sided with Menon and held that the

Convention" -- The Hague Convention -- "prohibits service of process by mail. Justice Christopher dissented. The Court of Appeals declined to review the matter en banc, and the Texas Supreme Court denied discretionary review. The disagreement between the panel majority and Justice Christopher tracks a broader conflict among courts as to whether the Convention permits service through postal channels." Moving forward, "We vacate the judgment of the court of appeals because it refused to heed Justice Christopher's cogent and, dare we say, brilliant argument."

MR. HUGHES: Here, here.

(Applause)

MR. YOUNG: And it was unanimous.

CHAIRMAN BABCOCK: And it was unanimous, Justice Gorsuch not participating. I added a few words at the end there about it, but if I had been their clerk I would have put that down there. So that's good. So we've got lunch here if anybody is hungry, and we can be in recess until sometime in August, and thanks for all of your hard work, all of the subcommittees. Great pieces of work. Thank you.

(Adjourned)

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REPORTER'S CERTIFICATION
MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

* *

I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 9th day of June, 2017, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are $ 1,037.00 .

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Given under my hand and seal of office on this the 6th day of July, 2017.

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