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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

December 10, 2021

(FRIDAY SESSION)

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Taken before *D'Lois L. Jones*, Certified Shorthand Reporter in and for the State of Texas, reported by machine shorthand method, on the 10th day of December, 2021, between the hours of 8:59 a.m. and 11:44 a.m., at the REJ Conference Center, 1501 N. Congress Avenue, Austin, Texas 78701.

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CHAIRMAN BABCOCK: All right. Welcome to a strange configuration of our committee. And if there are people on Zoom, which I assume there are, exactly, Shiva, how are we going to call on them?

MS. ZAMEN: Well, they can hear and see us, which is good.

CHAIRMAN BABCOCK: Yeah.

MS. ZAMEN: And this camera will follow the room, so luckily whoever is speaking the camera will be on.

CHAIRMAN BABCOCK: Okay, good.

MS. ZAMEN: I mean, if they raise their hands like before, I can see them.

CHAIRMAN BABCOCK: Okay. You just call on them. So we all owe Shiva a debt of thanks. She has had a tough week. The TAB had a COVID outbreak and so canceled on us, and Shiva scrambled around and got this place for us, and then our normal caterer canceled on us earlier this week, and Shiva got a backup caterer, and they canceled yesterday, so we're on our third -- third caterer in a week, but I thought the food was pretty darn good this morning, and we're not going to have lunch catered because we're going to end it at noon.

So with that, we'll turn to the agenda and

hear from Chief Justice Hecht.

HONORABLE NATHAN HECHT: Thanks, Chip. You know, we have our ninth justice, Evan Young, who was appointed by the Governor last month and sworn in, and so I just remind you that the surest way to our Court is by membership on this committee, so we have gotten a lot of good committee members to the Supreme Court.

CHAIRMAN BABCOCK: I know.

HONORABLE NATHAN HECHT: Justice Huddle's swearing in finally is this afternoon, so I hope y'all will come, and in our parlance, we're swearing out Justice Green and Justice Guzman, and we've been waiting for this. It got postponed because of the pandemic and then session after session after session of the Legislature, so we couldn't get use of the chamber, but it will be this afternoon, so please come.

We don't talk much about this here, but one of the main supports of the Texas judiciary is the Office of Court Administration. And they support courts with legislative help, drafting bills. They're reporters for the Judicial Council, which works on policy issues, and they help trial courts with staffing, funding issues, all kinds of things. They've got an IT department that helps the courts with that, so they're a big operation, started back in the Eighties, but now it's really a very sizable

operation; and David Slayton, who has been our leader over there for about 10 years, got tapped to be vice-president of court management for the National Center of State Courts. And so our loss is the country's gain, and we have asked Megan LaVoie, who was pretty much his deputy, to take over, and she has agreed. And Mena Ramon, who has been the general counsel over there for 24 years, had been the interim administrative director, so the office has been in good hands since David's departure, and Megan, I'm confident, will do a great job.

You'll notice up here on the front, we've lost our paralegal, Pauline Easley. She's gone to North Carolina for court management.

On the emergency order front, we've issued 45 orders so far. The Emergency Order 44 continues the guidance and support for eviction relief diversion programs. I'm very proud that Texas had the very best eviction diversion program in the country, and a lot of other states tried to model ours, and we spent all the money, which only about three or four states have done that so far.

CHAIRMAN BABCOCK: Could you speak up a little bit? Apparently the people behind us can't hear.

HONORABLE NATHAN HECHT: Three or four states have tried to emulate our program, but have barely

done it, so we're very proud of the eviction diversion program. Even though we're out of the money, there are some of the local governments still have a little bit, Dallas does, maybe San Antonio. I'm not sure about Houston. But that order will remain in effect until the last applications get processed.

Then Emergency Order 45 extends the general provisions that we started out with in the beginning, with modifications that we've made along the way. But we signal in the order that courts should be moving toward in-person jury trials as much as possible to reduce the backlog. We're doing pretty well on the backlog in all areas of the Texas justice system. We've got some places that are backed up a little bit, except felony jury trials and to some extent smaller criminal jury trials, but we're making some progress. But the -- there's a lot of pressure, as you've probably noticed, in the bar to resume jury trials as quickly as you can. I know we're doing all we can, and I'm really proud of the trial courts for having done as much as they could, but we're moving in that direction, and the emergency order says that.

We gave preliminary approval to changes in TRAP 57, direct appeals to the Supreme Court, in August; and we are finalizing that rule, which is to take effect January the 1st. We have approved changes in the Code of

Judicial Conduct to let constitutional county judges act as arbitrators and mediators. We made some changes in the State Bar rules in response to the McDonald litigation, the major change being it prohibits State Bar representatives from speaking on behalf of the full bar. We also changed the rules, at the request of the board, to make all members of the State Bar members of TYLA, irrespective of age, so that's good for you, if they've been licensed 12 years or less, so that's not good for you, at the beginning of each fiscal year, so that clarifies the TYLA membership.

We reduced the number of trials necessary for certification in civil trial law, just because we're trying fewer cases, and kept the same experience requirements for staff attorneys. We talked about raising those.

And, excuse me, our Remote Proceedings Task Force, chaired by Chief Justice Christopher, Judge Miskel is on it, Marcy Greer, Lisa Hobbs, Jim Perdue, Kennon Wooten. I think that's everybody here. They've made a full report, as you might expect. It's very thorough and thoughtful, and it's coming to the committee to look at, and excuse me, this is an issue that every state in the country is looking at, trying to figure out best practices as a result of the new normal, and so we're trying to do

the same, and I think based on what I see at the National Center we're ahead of the curve on that, but everybody is working on it, so we will be, too.

And then finally, we put out the seizure exemption rules and forms Wednesday for comment to try to meet the May the 1st, I think it is, deadline that the Legislature asked us to meet. So those will be out there, and we talked about those the last two meetings, and so we were kind of on an expedited basis on them. There's quite a bit to chew on, and there are new provisions at the beginning over what the rules should be, but we hope that we've taken your comments and counsel and come up with rules that we'll get a lot of support for. So anyway, those are out for comments through the first part of March and then will be hopefully ordered by May the 1st as the Legislature has asked. And that's it.

CHAIRMAN BABCOCK: All right. Thank you. Justice Bland.

HONORABLE JANE BLAND: I have nothing to add.

CHAIRMAN BABCOCK: All right then.

HONORABLE JANE BLAND: Good morning.

CHAIRMAN BABCOCK: We'll go to the next -- we'll go to the 10th justice, Richard Orsinger, who has got a full agenda today, but he promises me that 162 will

last 15 minutes. And I said so I'll double that, and so we'll get there, but go ahead, Richard.

MR. ORSINGER: Thank you very much, Chip. The proposal for amendment for Rule 162 originated with an e-mail from Justice Schaffer or Judge Schaffer in Harris County.

MR. LEVY: Justice.

HONORABLE ROBERT SCHAFFER: No, you got it right the second time.

CHAIRMAN BABCOCK: "His Highness" is what we call him in Harris County.

MR. ORSINGER: So he was concerned about a potential conflict between Rule 162 and Rule 44. Let me explain. Rule 162 is the rule on dismissal or nonsuit, and I think for continuity in the record I would like to read the rule. It's fairly short, so as a foundation for the discussion so that anyone reading the transcript will have the context. Rule 162, dismissal or nonsuit, starts, "At any time before the plaintiff has introduced all of his evidence, other than rebuttal evidence, the plaintiff may dismiss a case or take a nonsuit, which shall be entered in the minutes. Notice of the dismissal or nonsuit shall be served in accordance with Rule 21a on any party who has answered or who has been served with process without necessity of court order."

New paragraph: "Any dismissal pursuant to this rule shall not prejudice the right of an adverse party to be heard on a pending claim for affirmative relief or excuse the payment of all costs taxed by the clerk. A dismissal under this rule shall have no effect on any motion for sanctions, attorney's fees, or other costs pending at the time of dismissal as determined by the court. Any dismissal pursuant to this rule, which terminates the case, shall authorize the clerk to tax the court costs against the dismissing party unless otherwise ordered by the court." That is the end of the rule.

Judge Schaffer's concern is that Rule 44 requires that a lawsuit brought by a next friend and settled requires that the settlement be approved by the district judge or by the court in which the case is pending, and apparently he's either seen or heard of instances where it appears that the settlement was reached through a next friend, which may, in fact, present the possibility that there's a conflict of interest between the interest of the child or a person who is representative next friend as well as the person that -- the next friend him or herself. And so ordinarily the safeguard is the district judge has to approve the settlement, but his concern, Judge Schaffer's concern, is that instead of getting approval there are instances in

which people will dismiss the lawsuit through a nonsuit and then there is no final judicial review, because the case law indicates that after a nonsuit the judge has a ministerial duty to dismiss the case, and the portion of the rule relating to counterclaims or pending motions or motions for sanction don't appear to apply.

So Judge Schaffer would like and has proposed language to add to the rule, which was included in the memo, and his proposal was to add in the middle of the following sentence, "Any dismissal pursuant to this rule involving a next of friend shall not be effective unless approved by the court pursuant to Rule 44." That's a simple solution, and what he's attempting to do is to be sure that if there's a suit with the next friend and there's an effort to bring a nonsuit, that it involves a settlement, it has to be presented to and approved by the court.

So we were on a short fuse. We had some email difficulties with the subcommittee, so we didn't have a full subcommittee vote on this, but at the time the meeting approached and so the subcommittee is presenting a memo with this proposed change from the judge, and those of us who were able to confer with each other in the limited amount of time that we have, given the intervention of Thanksgiving, vacation, et cetera, I

thought that this was a simple solution, but other persons involved in the subcommittee thought this change was unnecessary. So I think that that's a point we ought to discuss, is is there a problem and is this a good fix for the problem.

While we are looking at this rule, there are some -- there's a lot of confusion or uncertainty about how this rule operates, and these are outlined in the subcommittee memo, points one through seven. One is, is a dismissal something a judge does and a nonsuit is what a party does, or can a party both nonsuit and dismiss? And if the party dismisses in open court, that the clerk is required to enter it in the minutes, but don't know that -- that really doesn't constitute an order, so theoretically plenary power continues after the dismissal is noticed in the record. So a question is, is a nonsuit something a party does and a dismissal something the judge does, and if that's true then we need to rewrite that part of the rule.

The second point is what is the effect of a nonsuit if there is never a dismissal order. Presumably the plaintiff's claims are gone, but if the court has plenary power, does the court have the power to grant a new trial or reinstate the case even years later?

Third point is how do you enter an oral

dismissal on the minutes in this day and time? In the old days it was a handwritten note from the clerk that would go into the permanent paper records in the court. Now it's all electronic, so I think it's just perhaps we should discuss whether there's any modernizing of the rule that's necessary, and the second sentence of the rule says that it will be -- let's see. "Notice of dismissal of a nonsuit shall be served in accordance with 21a on any party who has answered or has been served with process, without necessity of a court order." What does "without necessity of a court order" refer to there? Does it refer to giving notice? Does it refer to entering it in the minutes? It seems to me that it's a little bit out of place, and I'm confused as to what it means, and I'd be curious to hear what people on the committee said. And in the absence of an order what happens?

So the fifth point is the entire second paragraph says that dismissals are subject to counterclaims and motions for attorney's fees and whatnot, but it doesn't say that nonsuits are. So if the plaintiff just takes a nonsuit and doesn't take a dismissal, then what is the status in the case? I presume these other motions are still pending. That seems confusing to me. I would be curious to hear what anyone says. In the case of *University of Texas vs. Estate of Blackmon*, the Supreme

Court of Texas ruled that a court can defer signing an order of dismissal for a reasonable time to adjudicate any pending motions for costs, attorney's fees, sanctions, et cetera; and so the question becomes since that's been developed in the case law that the court has a reasonable time before dismissal, should we add that to the rule? Because it's not apparent from the face of the rule, and also, I might add that the case law indicates that you can actually file one of these motions after the nonsuit and it still has to be heard before the dismissal.

The seventh point is should we add a comment to clarify any of these issues rather than a rule change. So the memo has case law, important case law. It has a very important provision out of McDonald and Carlson, Elaine Carlson, our own, which talks about dismissal procedure, and I'll quote from that treatise, Texas Civil Practice by McDonald and Carlson. "A plaintiff dismisses a case by filing a motion for nonsuit with the clerk of the court. If the motion is timely, as discussed below, nothing else is required. The nonsuit is effective the moment it is filed, and it must be entered in the minutes. No order ever needs to be entered," and the treatise cites *Strawder v. Thomas*, Corpus Christi 1992 846 S.W.2d 51. So it seems to me that there's a lot of clarity and that perhaps while we're looking at this rule we should discuss

other parts to the part that Judge Schaffer suggested, Chip.

CHAIRMAN BABCOCK: See what you started now.

HONORABLE ROBERT SCHAFFER: I am amazed at what all came out of this memo, because I don't have a problem with looking at 162, because I agree with a lot of what he said, but I was just trying to address a one small specific point when I started this.

CHAIRMAN BABCOCK: Yeah, the law of unintended consequences. I had a thought that, you know, in federal court in derivative actions you can't nonsuit without court approval, and I know we have a class action rule that says a certified class can't be dismissed without court approval, but what about an uncertified class or a derivative action in state court? Would that implicate this rule as well?

MR. ORSINGER: I think it would.

CHAIRMAN BABCOCK: Do you think so?

MR. ORSINGER: It seems to me.

CHAIRMAN BABCOCK: And by including this, are we excluding these other things that might -- might be applicable?

MR. ORSINGER: I think it's entirely possible, and I'm very curious to hear the discussion. This seems like a very inoffensive, unimportant rule, and

I've only experienced a few nonsuits in my lifetime, so I always file a counterclaim now to offset that. That's the general practice in my area of law now; but the rule, the idea of nonsuit, entry in the minutes, and dismissals, sounds to me like an earlier era of the practice of law, Chip; and I think that things are more complex now, there are more exceptions, and what we need to do is -- is there a clear distinction between nonsuit and dismissal? Is there even a difference between the two, and if there is, how do we define it, and what is the proper role of the lawyer, what is the proper role of the judge, and what exceptions are we going to make.

If we make one exception for next friend lawsuits, what do we do about the two that you mentioned, which are clear exceptions? Do we just hope people read the right cases? Do we put it in the comment, or do we say something in the rule "except otherwise as provided by law" or something? But the rule is a little bit archaic, and it made more sense in a local practice where everyone would meet for the docket on Monday morning, like happened in the rural counties when I started practicing. I'm not sure that it works so well in present time.

CHAIRMAN BABCOCK: Yeah. Professor Hoffman, you had resist --

PROFESSOR HOFFMAN: No, no, I'm going to

listen first. It's a new approach I'm adopting.

CHAIRMAN BABCOCK: Shocking.

MR. ORSINGER: Look first and shoot second.

CHAIRMAN BABCOCK: Yeah. John.

MR. WARREN: From the clerk's perspective, I'm not quite sure if a simple nonsuit actually satisfies the case, because we also have to report those filing dispositions to the Office of Court Administration. So a nonsuit in itself may not be what it's -- I think we need to go further than that, even if it's just the judges now have a -- a sort of dismissal docket where nonsuits automatically go, and they execute an order. I thought the role of the judge was to preside over the case and make sure that the law was applied, and so we want to make sure that there's a clear definition. You have a lot of young lawyers who may think that they are doing the right thing, and they may not be doing the right thing, and I think the judge should have oversight, like cases are getting more complex, and there should be some oversight as it relates to -- particularly in a case where it deals with a minor. I heard mentioned next friend. So I think the judge should have the final, even if it's just a review of the case, and that the clerks will have a clear definition of what's the final disposition of the case.

CHAIRMAN BABCOCK: Yeah. Robert.

MR. LEVY: So when I was a practitioner, this became a challenge in terms of a nonsuit should, as Professor Carlson says, immediately dismiss and end the action. No action by the judge is needed or even appropriate. It's over, if the nonsuit is filed by the party -- the claimant. If there's a counterclaim, it raises the question Richard pointed out, that the second paragraph refers to dismissal not applying. I think, as practically applied, the rule does not differentiate between nonsuit and dismissal. It operates the same way, but it is confusing. So typically you file a notice of nonsuit and dismissal to cover both those bases.

On the question that Judge Schaffer raises or the issue, I do think it's a problem, and his solution seems to fix it, although you correctly point out that under Rule 42 the Court has to approve a settlement or dismissal.

CHAIRMAN BABCOCK: Or dismissal, right.

MR. LEVY: And so perhaps the rule needs to include reference to Rule 42 as well. I think that part of the challenge, it would seem to me, is that you would need to give the clerk guidance to know when not to dismiss a case that's brought under 44 or 42, to give them notice to keep the case active on the docket.

CHAIRMAN BABCOCK: Okay.

MR. WARREN: And if I can add to that, if you have multiple parties and traditionally a nonsuit represents the end of the case, then if you have it and the nonsuit is only for one party and then so with that I think there should be more guidance as to how that actually works.

CHAIRMAN BABCOCK: Yeah, good point. Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Some parties file a motion for nonsuit instead of a notice for nonsuit, which also causes problem, so I agree that the rule could be modernized to sort of take into that -- into account.

CHAIRMAN BABCOCK: Y'all remember the -- the cattlemen cases -- Tom will -- in Amarillo against Oprah Winfrey? There were two cases. One was originally filed in federal court, and the other one was originally filed in state court, and they sued the local TV station that carried her programs, and then they nonsuited the local TV station. And then we, the -- Oprah's lawyers removed that to federal court and got it consolidated with the pending federal action, but then they -- they rejoined the nondiverse defendant, and after that the trial judge entered the order of nonsuit.

That was the point of appeal in the Fifth Circuit, and the Fifth Circuit threw its hands up and

said -- and relied on a doctrine that, hey, if you've gone to all this trouble to try the case, then we're not going to worry about the other stuff. Literally.

Yeah, Judge.

HONORABLE EMILY MISKEL: Just to add No. 8 to the list that's in the materials, one issue we've had is when a self-represented litigant comes in for a family violence protective order. They get ex parte protective order, and that order is served on law enforcement agencies, who will arrest the respondent on sight if they are caught in a place they are not supposed to be. What frequently happens is the petitioner will come in and file the suit asking for the protective order, get the ex parte protective order, and then nonsuit the case. The nonsuit -- the clerk is not directed to send a nonsuit to all of those law enforcement agencies, so the nonsuit, according to the *Blackmon* case, extinguishes the case from the moment it's filed; but law enforcement still has the registry of family violence protective orders, which are valid for 20 days; and so they don't know that that order, which on its face says it's valid for 20 days, has been extinguished, and it causes problems. So we've directed our clerk to send the nonsuits out to the law enforcement agency as well, but we recently went through all of this discussion on our county basis as well because it was

raised in that area.

MR. WARREN: If I may --

THE REPORTER: I can't -- don't --

CHAIRMAN BABCOCK: John, you're going to have to speak up. Speak to her.

THE REPORTER: Yeah, speak to me.

MR. WARREN: As it relates to that, was that a motion for nonsuit or a notice of nonsuit? I think those are two different things. If it's a motion I think you're asking the court to consider something, and if it's a notice, it's just, hey, we're done with it.

HONORABLE EMILY MISKEL: I think I saw something that said the nonsuit was supposed to be read broadly and not, first, very technically. So I think whether it's called a motion for nonsuit or a notice of nonsuit, under our Texas notice pleading standard we just consider that a nonsuit, and you're absolutely right. It's a ministerial duty.

CHAIRMAN BABCOCK: Judge Schaffer.

HONORABLE ROBERT SCHAFFER: Not to get back to the more mundane portion of this -- of this, I appreciate taking a look at 162, because I know that clerks in Harris County are often confused as to whether or not they should put this in the closed file or keep it open or what they should do with it, but the issue arises

when I'm going through my nonsuit orders involving minors, and I have to request a status conference to find out if any money has been paid, and there was a specific incidence with one of my colleagues where three minors were receiving $10,000 each, and that money was going to be paid to the parent, not into the registry of the court or any other manner that's allowed under the statute, and we didn't think that was the right way to go. We didn't think it was legal either, which is why I posed this question, so that we could make sure that nobody comes up and challenges me or the other judges, "Look, this nonsuit is effective as soon as I filed it, you don't have the authority here," and that's the issue I'm trying to address here. No one has done that since we've called these for these status conferences, but that's a problem, potential problem.

CHAIRMAN BABCOCK: Judge Miskel.

HONORABLE EMILY MISKEL: Can I ask a clarification question? So does Rule 44 say they're not supposed to compromise the claim without court approval, and then they are breaking Rule 44 and nonsuiting it, and you just are saying we need a check and balance so we catch people who are violating Rule 44?

HONORABLE ROBERT SCHAFFER: I wouldn't say it quite like that, but yes.

HONORABLE EMILY MISKEL: Okay.

HONORABLE ROBERT SCHAFFER: I mean, yes, Rule 44 says if you have a case involving next friend, settlements have to be approved by the courts.

HONORABLE EMILY MISKEL: And you're saying people are like doing settlements in violation of Rule 44 and then nonsuiting them, and you want a second chance to catch them?

HONORABLE ROBERT SCHAFFER: I'm not holding my hand over my mouth when I'm saying this. I'm saying directly that they're doing it. I compelled a couple of lawyers to come out of pocket, money that they had handed over to a parent and couldn't find, and put the money in the registry of the court for that child, so, yes, that's exactly what they're doing.

HONORABLE EMILY MISKEL: Because my concern is the clerks can't do things by discretion, right. They can't look at it and say, "Oh, this must be a Rule 44 case. That means this type of nonsuit has to be checked on," right? They have to purely have more of a strict you do this, I do this relationship to it, so my concern about putting this exception in 162 is, first of all, if people are already breaking one rule, making more rules is probably not an effective solution; but secondly, I think it introduces some discretion into the rule that causes

problems for clerks.

CHAIRMAN BABCOCK: Who is that? Judge Benton.

HONORABLE LEVI BENTON: First of all, this is not a new problem, and I'm glad you are bringing light to it, but what I can't remember is whether the court acting sua sponte has the authority to appoint an ad litem.

HONORABLE ROBERT SCHAFFER: I can tell you that it's being done.

HONORABLE LEVI BENTON: Yeah. You know, and when I would observe this, I would call defense lawyer Orsinger in and say, "Mr. Orsinger, I know you've got the settlement agreement and you require the plaintiffs to indemnify you, if years later these minors come back in and say, 'Hey, wait a minute, there was no court approval of this.'" And that will cause defense lawyer Orsinger to say, "Hmm, maybe I better ask the court to appoint an ad litem and let's do this on the up and up."

HONORABLE ROBERT SCHAFFER: That would be because defense lawyer Orsinger I think has a greater concern for closure --

HONORABLE LEVI BENTON: Yeah.

HONORABLE ROBERT SCHAFFER: -- than some people who are handling smaller cases.

HONORABLE LEVI BENTON: Yeah.

HONORABLE ROBERT SCHAFFER: Which might not get -- which might not have a defense lawyer like defense lawyer Orsinger representing the defendant.

HONORABLE LEVI BENTON: Yeah. But even -- I guess even without this language, the Court could sua sponte say, "I'm going to appoint an ad litem and we're going to have a hearing on it."

CHAIRMAN BABCOCK: Kent Sullivan.

HONORABLE KENT SULLIVAN: I consider myself a best practices guy, which is a fancy way of saying I like to copy off of everybody else's paper, and I do wonder to what extent the committee or others generally have looked at whether, what is it, Rule 41 of the federal rules would provide a solution or whether another state -- because we've got 49 other states out there, and I'll be willing to bet that one or more of them have crossed this bridge before. Have we looked at whether or not they have an adequate solution to this?

MR. ORSINGER: The subcommittee has not, but we can, if we have more time.

CHAIRMAN BABCOCK: Yeah.

HONORABLE KENT SULLIVAN: My point is simply that it has always struck me as inefficient at best and we're not as well-resourced as we could be at worst if we

don't look at what everybody else has already done on the same subject.

CHAIRMAN BABCOCK: Pete Schenkkan, and then Judge Yelenosky.

MR. SCHENKKAN: I've got a two-part question. One is is it possible to relatively expeditiously come up with a fix for the evasion of Rule 44, which seems to be the matter of some urgency and some clarity, and we have some challenges in it. As people have mentioned, you put one exception somewhere, and it may suggest there are to be others, and that's not true. It's not that it's a perfect way of dealing with it, but it's relatively straightforward, and it's urgent.

It seems to me that the bigger picture that Richard has raised and various people have reinforced here this morning of should we have something that the party can do on his own that the court doesn't have to do and what are its implications and should we have things that, you know, we have to do by motion to get a court order. And I believe the answer to that "or" question is, yes, we've got both, and I think the topic of which ones of these ought to be something -- need to be something that the plaintiff's lawyer can do by filing a notice and which ones require -- ought to require a motion and the court consideration is a big area and is going to take us a

while, and the committee is going to need a lot of time to do it. Subcommittee. I'm kind of hoping is there a way we can subdivide this task and try to get the first one done and give us some time to really dig into the subject?

CHAIRMAN BABCOCK: Yeah, got it. Judge Yelenosky, then Judge Miskel, and then Hayes.

HONORABLE STEPHEN YELENOSKY: I apologize for being late, so I first need to ask Richard.

THE REPORTER: Louder, please.

HONORABLE STEPHEN YELENOSKY: Oh, I'm sorry. You and I exchanged an e-mail about why we have a nonsuit.

MR. ORSINGER: Oh, yeah. It hasn't been covered, so go ahead and cover it.

HONORABLE STEPHEN YELENOSKY: Okay. Why do we have a nonsuit? When I started as a judge, I didn't sign nonsuits, and I told the lawyers, "You don't need me to sign them," and they said, "Yeah, but we need a date of dismissal." So in my experience, they're going to need a date of dismissal anyway, so why do we bother having a nonsuit for anything? Why doesn't everything require a judge's signature?

CHAIRMAN BABCOCK: Judge Miskel.

HONORABLE EMILY MISKEL: Okay. I raised my hand initially for something else, but I would briefly respond to that, which is our Texas state court system has

different needs than the federal system. More cases are filed in district courts in Texas than are filed in the entire U.S. federal district court system. So we need a way to process the vast quantity of cases that each judge deals with. I don't think federal court experience matches our task. So I do think we need a way for people to nonsuit their cases without court action. A lot of the nonsuits are done by self-represented litigants. They are never going to come back and give you an order on it, so I just think the practical needs of our system require this to exist and to be different from federal, because we just have different needs.

What was the -- oh, I know, what I originally raised my hand on was rather than modifying 162, the nonsuit rule, to address Rule 44 cases, would it make more sense to add another item to Rule 44 that just says, "A party may not nonsuit a case before seeking court approval"?

CHAIRMAN BABCOCK: Okay. I see nods around the room.

HONORABLE ROBERT SCHAFFER: Either would work. Either would work.

MR. DAWSON: Then you don't have the issue of --

THE REPORTER: I can't hear you.

CHAIRMAN BABCOCK: Alistair, you're going to have to speak up.

THE REPORTER: I cannot hear you.

MR. DAWSON: Then you wouldn't have the problem that you articulated about the certified class and having to address that rule. We just put it in Rule 44 and solve your problem.

CHAIRMAN BABCOCK: Shiva, do we have anybody on the Zoom that wants their hand raised or has their hand raised?

MS. ZAMEN: We're having some really bad -- we're restarting over here now. I've been telling people by --

CHAIRMAN BABCOCK: So the answer is we don't know.

MS. ZAMEN: So not yet.

CHAIRMAN BABCOCK: Sorry up there.

MR. ORSINGER: They're back moving again. They may be able to speak now.

CHAIRMAN BABCOCK: Okay. Do you see anybody with their hand up that is unmuted?

MR. ORSINGER: Raise your hand if you want to talk, anybody. No takers.

CHAIRMAN BABCOCK: Sorry about that. Yeah, Hayes.

MR. FULLER: From a best practices perspective, there are consequences to doing it right and consequences for doing it wrong, this whole issue of nonsuit and dismissal. Some of those consequences are catastrophic, some of those are not. Those that are catastrophic generally result in appeal, as we explained in the issues that Richard has raised in terms of the problems with this interaction between these two rules. That seems to me to be an inefficient way of cleaning up the problems necessarily, so if we can -- if we can touch the rule and clean it up a bit, we might be able to eliminate some of those issues. And so I think that's -- that's worth taking a look at.

But by the same token, I think one thing we need to be aware of in the small personal injury case is the situation that, Judge Schaffer, you're talking about. A lot of carriers now, if they've got really small settlements, don't want to incur the cost of an ad litem, nor do they want to incur the cost of getting court approval. Now, you know, the defense counsel in that instance has an interest to either go ahead and do it, but usually what they do is work through it by having the plaintiff's attorney insist upon it and then having the cost taxed for that, but it's something that does need to be looked it at, but I think it's going to be more of a

recurring problem as people try to focus on trying to save costs for approval in some of these smaller settlements.

As a general rule, you know, it's not best practices. The defense lawyer doesn't have finality for his clients, you know, and I think the carriers don't care if it's 20 years from now and that minor becomes an adult, everybody is gone, you know, and that's kind of what they're betting on. But it's not best practices, and like I said, it can have some -- I mean, sometimes it's done intentionally, if you're -- you know, if you're representing a corporate party that doesn't have insurance and 20 years from now there's not going to be anybody there and they don't have -- they've got a small amount of money to pay out anyway. It may not matter. Again, not best practices, but the consequences aren't catastrophic, but, yeah, I think we need to take a look at it.

CHAIRMAN BABCOCK: Okay. Any more ability for the Zoomers to say anything? Kennon.

MS. WOOTEN: I would just say if there's going to be an analysis of nonsuits generally that we should also look at Rule 726, and also Rule 91a, which addresses nonsuits, so there's as a comprehensive review.

CHAIRMAN BABCOCK: Yeah, I think 91a is on sanctions, isn't it, or attorney's fees?

MS. WOOTEN: Dismissal.

CHAIRMAN BABCOCK: Yeah. Yeah. And the case law is fairly well developed that you can't avoid sanctions or 91a by nonsuit. I think.

MS. WOOTEN: Also 91a is addressing what happens if a respondent files a nonsuit within a particular period of time.

CHAIRMAN BABCOCK: Right. Yeah.

MS. WOOTEN: And so this discussion about is it a notice, is it a motion, what's the impact, I think comes up in that instance; and I do think there's a lot of case law, robust case law, on nonsuits; and that's something that I think parties will go to before these rules.

CHAIRMAN BABCOCK: Yeah.

MS. WOOTEN: And for what it's worth, in my practice, I sometimes couple the nonsuit with the dismissal to avoid any gap, because I don't want to run into an issue when there's a lack of clarity, particularly when I'm crafting a settlement, but it does seem less than clear exactly how to go forward and the impact of the nonsuit alone in the text of the rule.

CHAIRMAN BABCOCK: Okay. Well, it's quite clear to me that Justice Shaffer has acquired a nickname today of Pandora.

MS. WOOTEN: Is it his nickname, or is it

somebody else's?

CHAIRMAN BABCOCK: So, Richard, I think since we've now gone 45 minutes on your 15-minute topic that we'll -- we'll ask you to reconvene the subcommittee. And I know you did this on very short notice.

MR. ORSINGER: Right.

CHAIRMAN BABCOCK: And we'll have a more comprehensive look at this rule, including the real problem that Judge Schaffer raised.

MR. ORSINGER: When I get a transcript of today, all of the people that volunteered comments will be able to help us with the task, too.

CHAIRMAN BABCOCK: Yeah, there you go. That's true. And the Chief missed one announcement. Kent Sullivan is trying out for the broadcast crew of Monday Night Football. I don't know if anybody --

MR. ORSINGER: He's going to provide color?

CHAIRMAN BABCOCK: Well, he's got the yellow jacket. He doesn't have the decal yet, so -- he's got the voice for it, too, you know.

All right. Let's go to 76a.

MR. ORSINGER: Okay. So this one --

CHAIRMAN BABCOCK: That will be 5 or 10 minutes, right?

MR. ORSINGER: I would say this is probably

a six or eight-hour debate.

CHAIRMAN BABCOCK: Yeah, let's just get started.

MR. ORSINGER: How do you eat an elephant in pieces? Okay. So the referral letter that Justice Hecht sent on October 25th, 2021, was rather -- rather short, but once you dig into it, you realize there's more depth here. Let me quote from Justice Hecht's letter. The portion relating to Rule 76a says, "Texas Rule of Civil Procedure 76a," period. "Since its adoption in 1990, the Court has received a number of complaints about the Texas Rule of Civil Procedure 76a. Courts and practitioners alike complain that the Rule 76a procedures are time-consuming and expensive, discourage or prevent compliance, and are significantly different from the federal court practice. The committee should draft any rule amendments that it deems advisable and in making its recommendations should take into account the June 2021 report of the legislative mandates committee," period. That's the end of it.

So it seems simple, but it does say "rule amendments that it deems advisable," so the subcommittee was moving very quickly. We never had a complete subcommittee meeting or an official vote on anything. We had some outside volunteers who offered to assist, and

there was some committee members that didn't get e-mails of the one Zoom session we had, and so what we've done for this meeting today is to prepare three items for consideration and discussion. One is the subcommittee report that I wrote, which wasn't vetted with any other subcommittee members, so you cannot blame them if there's something in error that you dislike or disagree with. The second is a memo from Judge Steve Yelenosky, who is not a member of the committee, who graciously volunteered to assist us, and he also wrote a revised Rule 76a for us to look at, to discuss and look at. The memo has not been reviewed or revised or approved by the subcommittee, and the rule, while it was conceptually discussed by some of the committee members in one Zoom meeting we were able to have, has not been voted on and is neither recommended or rejected.

I can say that some of the observations that were made, Judge Yelenosky graciously included amendments to his proposed rule. Others were excluded because Judge Yelenosky disagreed with them, I believe, and he'll have the opportunity --

HONORABLE STEPHEN YELENOSKY: It's my memo. It's my memo to you.

MR. ORSINGER: Okay. So we are at the preliminary stage. We are not ready to debate final

changes, in my opinion, and Judge Yelenosky made for me the very, I guess, disturbing suggestion that we look and see what happened in the past with regard to Rule 76a, and I thought, well, gosh, the rule is 31 years old, hasn't been changed in 31 years. How often have we looked at it? And rules attorney Jackie sent me a listing from her available resources and then I found another one from an earlier rules attorney, and since 2000 there have been probably 10 or 12 sessions involving -- where 76a was on the agenda, and so I started looking at those minutes, and I started looking at those court reporter transcripts, and I found out that either these proposals that came from various subcommittees were either briefly touched on or not even mentioned at all. And so basically there's been no committee-wide reassessment of where we are after 31 years of 76a practice.

So I thought maybe we could get context by going back to the original 1990 session in which Rule 76a was adopted. The first meeting governing it was on a Friday and carried over to Saturday, and at the end they reconvened the following Saturday and then the rule was done. So in an eight-day period, Rule 76a came from the imagination of a group of people to a proposed rule in the Supreme Court, and then it was forwarded to the Supreme Court. There were -- at the time the chair of the Supreme

Court Advisory Committee was Luther Soules, Luke Soules, from San Antonio. The Legislature adopted a statute for the Government Code directing the Supreme Court to adopt rules governing the sealing of court records. That became effective on September 1 of 1989.

Luke Soules appointed an ad hoc committee, not one of the standing committees, but an ad hoc committee, co-chaired by Lefty Morris in Fort Worth and Charles Herring in Austin, and the two of them conducted some public meetings and then they had competing drafts from what a rule might look like, and they prepared a co-chair proposal of a rule that was a compromise between two competing drafts, one that was pro-publicity or public access and one that was not anti-public access, but more concerned about putting limits on public access. So that compromise draft was brought to the advisory committee meeting. But then Tom Leatherbury, a lawyer from Dallas whose law firm was representing the *Dallas Morning News*, I believe, came up with his own draft of Rule 76a; and in the very first reading on this rule it was decided that Leatherbury's draft would be the point of discussion to vote to include or exclude, and the co-chairs of the committee draft was put to the side.

Now, there were a lot of overlaps, but remember, one was a compromise draft, and the other one

was a draft by the law firm representing the *Dallas Morning News*. So if you read the debate that went on between some of the greatest legal minds in Texas at the time, it's a surprisingly --

CHAIRMAN BABCOCK: You're excluding Leatherbury, I hope.

MR. ORSINGER: Yes. But Chip Babcock was there, and Justice Hecht was there.

CHAIRMAN BABCOCK: Well, you can include us. That's fine.

MR. ORSINGER: Absolutely. No, I'm really -- given the quickness with which all of this happened, it's remarkable -- Judge Peeples was there, too. I see him on the Zoom. You can see these names are written in history. The transcript, I've -- I decided that if we're going to do a 31-year review of Rule 76a, we ought to look at the wisdom of what was done originally, and so I included the agenda items that were attached when the rule was promulgated by the committee or recommended by the committee. There was a quite lengthy record that was attached to the agenda, and I've brought that forward so that we can have that context or that knowledge.

I will say this, that at the -- all I knew about this at the time was rumors that I heard because I wasn't on the committee, but I was a good friend of one --

of both of the family members -- family lawyers who were on the committee, but reading the actual transcript itself is really remarkable the degree of sophistication, and at the time the perception was that the plaintiffs' lawyers versus the defense lawyers, and you'll even see some of that in some of the transcript, but in reading the actual dialogue or multilogue that went on, there were many lawyers who I remember as being plaintiffs' lawyers who were making suggestions that would support the idea of preserving privacy of individuals. So it was a mixed bag, even though there were only two defense lawyers on the committee and quite a number of plaintiffs lawyers, it seems to me that policy was in the form of the debate, no matter which perspective of the docket you were on -- now, Chip, you may remember it differently, but anyway, let me get my piece said.

So the rule came out. Chairman Soules moved that train fast. I'm telling you, if you read it, it's shocking about how quickly votes were reached compared to my experience of the last 20 years where we have plenty of opportunity to say everything we want and then more and then more and then we take some votes, and the votes are real clear, and everybody has a chance to understand exactly what they're voting on. Well, this is a different experience if you read this transcript. So anyway, that

rule came out in eight days, and it was forwarded to the Court with a memo from Chuck Herring, and it was a long discussion with a lot of supporting material, and he talked about how controversial it was and constitutional issues and rights of privacy and all of this other stuff, and then he concluded his memo to the Supreme Court by saying "Good luck."

Okay. So then the rule goes to the Supreme Court, and I think in April is when they promulgated this rule, along with many, many other rule changes. And this is all in my memo, because I just almost couldn't believe it when I was reading it. The Supreme Court adopted Rule 76a as referred from the committee with two dissents, Justice Gonzalez and Justice Hecht; and that dissent, which is one-page long, is an eye-opener. And there were many issues that were -- that were looked at in the very abbreviated fashion at the committee level.

Now, let me put in context that there were some public meetings that predated the committee level, so this rule didn't go from imagination to reality in just eight days. There was actually more groundwork was laid, but the real process of this incredibly influential event being eight days is pretty amazing. And so as word leaked out, letters were sent from around the country, not just around Texas, but around the country, expressing alarm at

the effect that this might have, particularly on trade secrets; and that was really, I think, foremost in the minds, was the preservation of trade secrets amongst the debate and the compromising that went on; but anyway, these -- this correspondence is captured in the original agenda from that meeting, even though the correspondence and law review articles and briefs and alternatives may have been submitted before or may have been submitted after the committee meeting. So they're all there, and there is an incredible amount of wise observations, pro and con, and there's a lot of predictions about what good things would happen or bad things would happen from the draft that came out of the rules committee.

And so I think that if there's tolerance for it, now, 31 years later is a good time for us to reassess what everyone thought at the time that they adopted this rule or recommended this rule and the Supreme Court adopted this rule, and we can not only have the wisdom of the current committee, but we have available to us the wisdom of the original committee, and it's my view as the subcommittee chair that we should take this opportunity to reconsider some of these substantive or fundamental assumptions underlying Rule 76a and not just make adjustments to the procedures so that the hearings and notices are more widespread and the hearings operate more

smoothly.

Now, that's not my decision, but let me say that we live in a different world now. In the old days, meaning in 1990, if you wanted to find out what your judges were doing, you could go down to the courthouse and sit in the audience, and you could watch, and you're a voter, and these are your judges, and this is your courthouse, and these are your neighbors who are litigating in court. Well, now we live in a world where, at least at the present time, Texas court proceedings are going on YouTube; and they can be seen by anyone in the world, including foreign governments; and people now with Twitter and all of the social media, if certain information becomes public that might have previously been either private or inaccessible to anyone except someone who walks into the courtroom, now these kinds of details can be picked up by anybody who's watching, and in the flash of a passage of a few seconds it can be spread across the country and spread across the world. And so we live in a world where the dissemination of information from a lawsuit is -- is remarkably quick and remarkably broad, and once it's out there on the internet people can create responses that can damage reputations, can damage companies.

Now then, the main concern and tension at

the time seemed to be the impact of this disclosure on trade secrets, and secondarily, if we had dangerous products or products that were allegedly dangerous in commerce, there was a desire to stop the process of a manufacturer or a distributer, suddenly a damage case with a settlement agreement that had a confidentiality clause that kept the dangerous feature of the product or service secret so that the public wouldn't find out about it, and there was a concern that manufacturers or others might use the process of sealing or confidentiality to keep damaging information secret, which would then hurt the public. That also went over, well, some of these secrets were trade secrets. So you get in this big fight about whether a trade secret is a bona fide secret or whether it's just an effort to keep a damaging feature of a product out of the public eye, and so that was why so much of the comments -- so many of the comments were from the intellectual property bar who were attempting to defend their trade secrets that sometimes were the life of the company.

The Texas Legislature adopted the Uniform Trade Secret Act, which has provisions in it that require that trials be conducted in such a way or court proceedings largely -- larger than trials be conducted in such a way to protect trade secrets. So that whole debate

about 76a has really been modified by statute, and the rule needs to be changed to recognize what the Legislature has done with the adoption of the Uniform Trade Secrets Act.

What has been left out of the equation that for me is a bigger concern now is privacy of individual litigants. I'm not even sure whether a corporation has a right to privacy. Some common law -- or some law professor here can tell me, but I can tell you that individuals have privacy rights, and I know that the U.S. Supreme Court and the Texas Supreme Court has developed a doctrine of its own of privacy that all individuals are constitutionally entitled to keep private as against government involvement or government interference. So that's what I would call the constitutional zone of privacy, and the existence of that zone of privacy for individual litigants is not recognized in Rule 76a or its standard.

The second area of concern for me that goes beyond pure mechanics of notice and hearings is the tort concept of private facts, private embarrassing facts. The Texas Supreme Court has recognized a cause of action for damages and exemplary damages for invasion of privacy by exposing to the public private embarrassing facts, so there is a tort remedy if someone takes private

information about you or your family and puts it out in the public domain, and you can sue, and you can get damages, and you can get exemplary damages. If someone does this by filing a pleading or a response to a motion for summary judgment in a lawsuit under Rule 76a, by definition it's a court record, and all of these standards on presumption of openness and an elevated burden of proof in order to seal that information automatically applies, because 76a applies across the board, regardless of the nature of the lawsuit or the nature of the right involved.

So beyond the constitutional right to privacy we have a public privacy reflected in our tort system that information should not be made public, private embarrassing information; and if it is, then you can be sued and you could have exemplary damages. But if that's done by filing an attachment to a pleading, like a lawsuit I had recently, where 750 pages of exhibits were attached to an original petition and got filed in the public record, all of the sudden we have what may have been transgression of tort that may now be privileged because it was done in the context of litigation, and now it's a public record, and now someone has to move to seal it; and Rule 76a, there's a presumption that everything, including tax returns, because they were filed, the public has a right to know; and we have an elevated burden of proof on

the party trying to seal it to try to re-impose privacy.

The third area of concern for me is prelawsuit confidentiality agreements, like you would find between an employer and an employee. In many instances an employer and employee or maybe a company that's considering taking over another company will sign a confidentiality agreement; and in reliance on the confidentiality agreement, a party that has information that's private will share it with the other party, in reliance on the contractual promise that it will remain confidential. Now that confidential information is held by two people, but those two people are bound by a contract that says this information will remain confidential.

Now, let's assume that the employee files a lawsuit against the employer or let's assume that the company that's going to -- that was attempting to acquire files a lawsuit over the acquisition. They already have the confidential information in their possession. It's not like the typical personal injury case, products liability case, where if a request is made to produce information in discovery you can file a motion for a protective order, you can ask a district judge, "Wait, this is not relevant, this is overbroad, this is confidential, this is privileged, it shouldn't be made

discoverable"; and the trial judge will look at it and decide, "Yes, this is irrelevant and I'm going to make it narrower," or "Yes, this is confidential, I'm not going to allow it to be disclosed" or "Yes, this is privileged information. You're not allowed to receive in discovery."

Well, that protected mechanism of the district judge evaluating the discovery request and limiting discovery to what should be discovered, that doesn't exist where the both parties already have the confidential information; and what happens is because the plaintiff, for example, in this instance, has the information that's confidential already, they can unilaterally override the contractual confidentiality right by attaching confidential information to what they file in court. And under Rule 76a, the mere fact that this litigant has attached what is contractually confidential to a pleading makes it a court record, and there's a presumption of openness to the public, and there's an elevated burden of proof to impose the sealing order on that.

Now, in my view, that contract is a property right. It's protected by the constitutional -- the contract laws in the United States Constitution as well as the contract clause in the Texas Constitution, and we have U.S. Supreme Court cases and Texas Supreme Court cases

that both say there's a constitutional dimension to your right, your contract rights. So my third category of pre-existing confidentiality agreements creating a contract right, in my view, requires that those types of situations be handled differently.

So with these three categories -- and I have many other points that are mentioned here in the memo -- it seems to me that we should look not just at the mechanics of how we give notice and the mechanics of who participates and how, but also what is the substantive standard for privacy. Do we recognize only trade secrets as an exception to Rule 76a, or are constitutional zone of privacy an exception? Is the tort protected privacy an exception? Is the contractually agreed right an exception? If it's not an exception to the rule altogether then perhaps we should have a different standard.

So those are, I think, some fundamental philosophical questions that it is appropriate for us to revisit, considering the wisdom of the original debate together with what we might add to that. There are other aspects that are raised in the memo. I don't want to dominate this conversation too much, Chip, and so what I would suggest to the Court and to the committee chair, is that today we're making discussion proposals that haven't

been vetted fully and haven't been voted on by the subcommittee, but they are good foundations for discussions or debate, and I'm hoping and asking that we be given the opportunity to dig into this deeper and maybe set this off not one meeting, but two committee meetings to allow us to revisit the original debates, to integrate what we hear today, and to come back after 31 years with an assessment of whether, not only do we need to improve or modernize the way we give notice.

But we need -- poor Professor Dorsaneo, six times he's tried to get an appellate rule to govern this, and it's never made -- we got -- I've got it in the record, lots of subcommittee work done on how you would have sealing orders in appellate proceedings, and it's never made it to even a discussion to my knowledge in the Supreme Court Advisory Committee. I think we definitely need to consider appellate Rule 9, not today. So with that foundation, Chip, my suggestion is to either open the floor for discussion on these more philosophical matters or move on to Stephen Yelenosky's specific rule proposal, either one.

CHAIRMAN BABCOCK: Well, you can't see it because they're behind you, but either Stephen Yelenosky has had to go to the bathroom urgently during your talk, which I might add has touched on every hot button issue in

the country for sure, if not the world, although I think you left out the Russian buildup on the Ukrainian border.

HONORABLE ROBERT SCHAFFER: No, it's in there. He just decided not to talk about it.

CHAIRMAN BABCOCK: Yeah, he glossed over that, didn't he? Five seconds into your talk Lisa Hobbs had her hand up, so she'll go first, and then, Yelenosky, you've got 20 minutes to --

HONORABLE STEPHEN YELENOSKY: Thank you.

MS. HOBBS: Well, I was still living under my parents' roof in 1990, so anything I know about the historical debates of 76a is from being a former rules attorney at the Supreme Court, but I did just want to correct the record in that I think that the Texas Judicial Council worked on this rule before it went to the advisory committee, because I recall some memos and things from Denise Davis at the time. So I just wanted to -- that's why my hand went up quick, is that obviously objected opening by Richard Orsinger started off maybe factually incorrect about how quickly this rule was passed, and I obviously have a different view than Richard on the rule, but I know I will not say it better than Judge Yelenosky, so I will yield the floor to my friend.

HONORABLE STEPHEN YELENOSKY: Okay. First of all, Richard and I worked very well on this, some of

the specifics and -- a lot of specifics. We disagree about some things, but I'll say up front, the way I've drafted the rule tries to address trade secrets in a way it's never been addressed before. Well, since 1990. It also tries to address the fact that we have public hearings that no one attends and, therefore, makes them subject to requests.

Having said that, and this is a legal point, not a point of ad hominem. Richard, I think that all that happened prior to the Supreme Court's adoption of Rule 76a is worthy of consideration. It's very helpful, great minds, but to suggest that it lacks some legitimacy because of the amount of time it took to pass it and who said what to me is objectionable. We could say that about any rule, and so how many people voted, who looked at it, maybe it went through quickly because everybody agreed it was a great idea. We look at legislative history when we're trying to find intent. There's no doubt about the intent, and at least from what I've heard it was an attack on the legitimacy of the vote that was taken, and I think all of that could be ended by saying the Supreme Court adopted it. We don't need to deal with the vote prior to that.

As was said, and Richard said initially, his memo was not -- I'm not on the subcommittee, so I can say

whatever I want without worrying about the rest of the subcommittee. But Richard was very helpful or very willing to let me participate, but as Richard said at the beginning, what he just went through is his opinion, as far as I understand it, wasn't even read by the subcommittee. Is that right, Richard?

MR. ORSINGER: That's right.

HONORABLE STEPHEN YELENOSKY: Because I didn't receive it until a couple of days ago, so I didn't have a chance to respond to Richard had he let me. Again, I'm not on the subcommittee. So I think there are a lot of good points in there, but the other bookend I think he got to was -- and one of Richard's great concerns that I share and I don't know the solution to it, but the last thing Richard said, one of the last things he said, was it doesn't have to do with 76a. It has to do with the immunity to defiance, and the problem is that a bad actor -- let's call them a bad actor -- can file whatever he or she wants with impunity. So no matter what 76a says, if somebody can file something confidential and there's no consequence for that, 76a never gets to operate. So that part is not a criticism of the rule. It's a criticism of the immunity granted to whatever anybody wants to file in the court, and that's a philosophical or legal question, a mechanical question if there is one, but I wanted to take

that on in front because that's a big concern of Richard. It's a concern of mine. I don't know how prevalent that is.

You know, when you get to the constitutional issues, I'm not going to argue about, you know, whether this is -- it's constitutionally protected or not, but the rule itself considers all -- I think it's specific and substantial -- what's the language? I should know by now. Specific and substantial interest includes constitutional rights. Now, we can say it explicitly, but 76a largely, except for the presumption, is a mechanism for a judge to figure out what he or she is looking at, what's at issue, and as I draft the rule, is it a trade secret or not. Constitutional right of privacy, I agree it's there, but the parties can't just decide that. It's a 76a. It's an open records -- I mean it's a 76a issue and on sealing, and so a judge has to have a first look at that. Otherwise the parties can agree to whatever they want to agree to because it serves their purposes. So the judge's look at it doesn't exclude the consideration of constitutional interest, et cetera, but there has to be some preliminary consideration of it.

If you want to put in there constitutional rights specifically, that's fine, but I'd note that it still requires some review, and maybe it's not public at

that point, but I don't know any constitutional right that's absolute. First Amendment is not absolute, so I imagine the right to privacy is not either. And so there needs to be some recognition that there needs to be a process for a judge to decide what's at issue, and so 76a is largely a mechanism, but the two -- I mean, the big exception for trade secrets is, as Richard said, Trade Secrets Act flips the presumption, and it's not a presumption of openness to the public. It's a presumption that it should be kept confidential. And maybe you create that presumption if the judge decides what your constitutional right is, but that is -- that is I guess a philosophical question, but also a mechanical question about how you deal with that.

So I don't disagree that there are philosophical issues here, but I do disagree that 76a was ill-conceived, certainly not illegitimate. The Supreme Court adopted it, and all of that information going way back is very useful, but as Richard said at the end, what's more important is what's happened since so we can look at the 76a and how it's operated and how it hasn't operated well; and as I said very first paragraph of my memo, I agree, it hasn't operated well and why it hasn't; and there's some approaches to that that we could follow.

So overall, I think the conclusions that

Richard reaches -- and they are conclusions -- are premature for the very reason that he said, which is we should have a discussion of philosophical issues, and we need to discuss very importantly a non-76a issue, which is bad actors filing stuff with immunity that never goes through 76a.

CHAIRMAN BABCOCK: Great. Thank you.

HONORABLE STEPHEN YELENOSKY: Was that 20 minutes?

CHAIRMAN BABCOCK: No. I'm giving you back five minutes, so you can do a rebuttal.

HONORABLE STEPHEN YELENOSKY: Oh, great.

CHAIRMAN BABCOCK: Pete Schenkkan.

MR. SCHENKKAN: To those members of the full committee, like myself who has limited exposure to --

THE REPORTER: Look this --

CHAIRMAN BABCOCK: Pete, you've got to talk to her.

MR. SCHENKKAN: -- to the 76a issues before, to those members of the committee who have only had limited contact with these issues before, I was an active participant in the limited subcommittee discussions we've just had, so I'm a little bit of ahead of you on the learning curve, and I want to assure you that if you think after listening to Richard and Stephen that this is

complicated, it's worse than you think. It's a lot worse than you think. And what I'd like to try to suggest from my own experience of the last few days is some guides to listening and speaking in this discussion, to highlight some of the points that we need to sort of gradually get in focus before we can make intelligent decisions about what to recommend to the Court.

It's clear from what you've just heard that we have two very different kinds of sets of practical problems presented by the same rule. Trade secrets and personal sensitive information. I'm exaggerating, but those are two big subsets, and they present different issues, including the issues that are most sensitive in the trade secret area where you've got two private parties who have previously agreed to keep something confidential between them as part of a deal where consideration was paid, but the public interest, there's a public interest or may be a public interest in having that information publicly available, or at least some of it. So you've got two different kinds of substantive contexts that are problems.

These may raise different substantive law standards. You've heard now mentioned the constitutional protection of freedom of contract and constitutional protection of privacy, and then there is constitutional

law that is reflected in the Court's order about the right of the court -- of the people to public access to the courts.

So we've got three different sets of constitutional provisions out there. We've got a bunch of different statutory provisions that either directly address one part or another of the problem, like the Trade Secrets Act, or do so in kind of a backhanded fashion by saying that, you know, your HIPAA information is protected in some way and you can get in trouble if you disclose it without taking the proper steps, but don't really say what that means for this purpose. So you've got different statutory law that may apply, and of course, you may have different common law that applies.

So we've got, in looking at what legal criteria we are already bound by in the rest of the system, we've got a wide world we're going to have to look at and make careful we don't step over or kick over unintentionally. These may well involve -- these problems may well involve different procedures being warranted, and for that I would just remind you of the one example that came up in here, which is it's one thing to talk about protecting this stuff when we're in the trial court. It's another thing to talk about protecting this stuff when we're on appeal and we're dealing with what is in the

trial court record, and it's now going to be, to one degree or another, made more easily accessible in the world through this in the appellate briefs.

The -- Richard has highlighted a very good point about the change in the world we live in today from 1990, but I want to emphasize one implication of that that makes our job even harder, which is it's the internet, the reduction to virtually zero of the cost of transmitting information, that changes the tactical balance of what's worth using as a tactic either with the demand to make information public or with a motion to seal it. The consequences are different. The harm that can be done is different and so is the public advantage perhaps. So we're going to change the ground rules here that matter to the people who are looking, as well as to the litigants and their counsel.

And then I'm going to give you one more aspect as to how this is worse than you thought and then I'm going to stop, I promise. The real issue is we -- the rule as drafted and the words that we're looking at so far are focused on court records and documents and then there's some reference to court orders. All of those are important practical parts of the situation, but they're different. Documents could be obtained in discovery. What is the significance of that step in the process?

Documents could be filed with the court attached to a motion. The motion might be a dispositive motion, or it might not be, or they could be offered in evidence at the trial, may be cleared in advance with the motion in limine pretrial order discussion, maybe not. Or they could be ones that are part of the court record and arer on appeal.

So we've got a whole wide array of subcategories even under the word "documents." We've got a wide array of different court orders where we can think about this, and then finally, this isn't really about court records and documents. They're just a subset. It's about information, and that information could also have come out in the course of the trial itself where we're having to deal with things like, you know, limiting the public's access to a portion of the trial while the minor is testifying. We've got issues of what are we going to do with the hearings themselves.

It's worse than you thought, but it's actually also hugely interesting and fun. I just think we're going to have to work really hard to try to find out -- to carve at the joints to figure out what the decision points are in this thing and set them up in this fashion. So I'm hoping that helps the rest of you. I've spent hours over the last 10 days dazzled by all of this.

CHAIRMAN BABCOCK: This committee is all

about having fun, so let's do it. Robert and then --

MR. LEVY: One of the things that prompted this discussion related to our prior discussion in June on amendments to Chapter 98 of the Texas Civil Practice & Remedies Code dealing with claims under -- human trafficking claims, and the challenge there or the issue there is the right of parties to bring their claims under a pseudonym, but the challenge is that if you filed the claim under your own name, the law now requires that you be notified of your right to change the status to a pseudonym, and then quickly we discussed the problem with 76a(1), which requires that all court orders have to be public, so how can a court effect that relief without a public order that might disclose information. So that identified one of the issues that we needed to address.

One of the other points that I wanted to contextualize is that in many cases information that is sought in litigation and can become part of the public record comes from third parties who are not -- who are not in the courtroom, who don't have a stake in the action, but they obviously have concerns and rights regarding information that they share and provide; and while a court might sign a protective order to protect their interest, their property interest, that in the case of a -- of an exhibit being used at trial, they're not always going to

be able to argue their rights, or even if they can, 76a can bypass their rights or their issues. And so that I think also needs to be considered.

Additionally, the fact that a defendant, which is brought into court in effect involuntarily is still required to produce information, confidential information, that then can -- that confidentially or the value of that information can be lost if it is used at trial, and there are property rights involved, and obviously it's some questions of constitutional rights of the loss of the -- the value of their intellectual property if it is, in fact, forced to be disclosed and available to others. And I would also point out that the federal civil rules advisory committee is also looking at how to -- whether to and how to adopt a rule on sealing, because there is currently no standard rule in federal practice and each court looks at the issue differently, and so it is somewhat ad hoc, and it's an interesting question that -- that they are looking at, obviously as we are looking to revise our rule.

CHAIRMAN BABCOCK: Thanks. Judge Timms.

MS. TIMMS: I thought I would provide a little bit of historical perspective to the rule, because I was personal friends with the reporter at the *Dallas Morning News* that got this project started, and I will

tell you that a substantial reason for pursuing the Rule 76a and the legislation was a series of case -- or reports that a reporter made. Fundamentally what was happening in Dallas and around the state was people being sued for atrocious acts. Priests sexually abusing children, doctors sexually abusing patients. A lawsuit would be filed. The person would very quickly enter into a confidentiality agreement with the plaintiff, a settlement, seal the court records, we're done. The person is then allowed to go forward, continue their abuse, and that happened repeatedly. These people were repeat offenders, and they were using the sealing records to protect themselves as they went about doing their abuses. So as we think about how to preserve legitimate privacy rights, we need to think about how to carve out the people whose privacy interests are the privacy interests in abusing patients, and so there you have it.

CHAIRMAN BABCOCK: Justice Christopher, and then Levi Benton.

HONORABLE TRACY CHRISTOPHER: Well, I was looking at what the Supreme Court asked us to look at.

CHAIRMAN BABCOCK: Now, don't do that. This is all about having fun.

HONORABLE TRACY CHRISTOPHER: Okay. And is 76a time-consuming and expensive? Yes. Does it

discourage or prevent compliance? Yes, because people enter into agreed protective orders that judges often sign, and records get sealed without following Rule 76a. All of those things are true. And significantly different from the federal court practice, true. But the question is do we want to be more like the federal court practice, or do we want to be more like agreed protective orders that make discovery a lot less expensive for all parties, that doesn't require judges to have myriad of hearings, as Judge Yelenosky's proposal requires, to try to figure out what is or is not a trade secret when that is the crux of the case most of the time. So, I mean, we have to figure out where we want to go.

CHAIRMAN BABCOCK: Yeah. It sounds to me like you've answered the questions the Court was asking, so we're done.

HONORABLE TRACY CHRISTOPHER: But I'm, you know --

CHAIRMAN BABCOCK: Levi.

HONORABLE LEVI BENTON: Two things. First, for the record, the young lady who just spoke, I didn't get her name.

MR. ORSINGER: Cindy Timms.

MS. TIMMS: Cindy Timms.

HONORABLE LEVI BENTON: Did you say "Judge

Timms"?

CHAIRMAN BABCOCK: I did, but I misspoke.

HONORABLE LEVI BENTON: So that was misspoke.

CHAIRMAN BABCOCK: I called you a judge a minute ago, too.

HONORABLE LEVI BENTON: It's Mr. Benton. Okay.

CHAIRMAN BABCOCK: Sir.

HONORABLE LEVI BENTON: The second thing is, respectfully, I don't get it. We've had this rule 30 years. There's hardly a 76a case on the books. It's not like Tracy Christopher or any other justice around the state is throwing their hands up saying, "Hey, we've got all of these darn mandamuses or appeals on 76a. Help us out." So why are we talking about this? I rest my case.

CHAIRMAN BABCOCK: All right. Stephen, Judge Yelenosky, his middle name. Then Alistair.

HONORABLE STEPHEN YELENOSKY: Well, we're talking about it because of all of the letters that you reference. The problem doesn't show up in the court of appeals because these are people saying -- judges saying in the trial court and attorneys saying in the trial court, "I had to do this. I had to do that. I had to hold a hearing that nobody appeared at, which I

recognize." And so that's why we're addressing it.

As far as all of these hearings, Justice Christopher, I'm not saying that the mechanism I wrote is what we should end up with, and it's a point of discussion, but as far as hearings go, if your case is about trade secrets, you go to the judge and you say, "Judge, this is case about trade secrets," and the judge listens to both sides and says, "Yeah, this is about trade secrets." Somebody has to decide whether it's about trade secrets, and so that's the judge. Otherwise, it's the parties, and the parties can label anything a trade secret. So somebody has to decide that, whether you do it through a hearing or whatever. But what it does eliminate is the hearing that we've had, because the rule requires it when nobody wants the hearing, and so it puts it in a request mechanism for that.

CHAIRMAN BABCOCK: Yeah. Alistair, and then Levi. Alistair first.

MR. DAWSON: So Justice Christopher is right. As a practical matter we try and do everything we can to avoid compliance with 76a. So we put it in protective orders that -- or confidentiality orders. We say we can temporarily seal it under the rules. We can file it in camera with the court, and nine times out of ten that works, and the judge signs it, and we go on about

our business, and we don't have to worry about 76a. However, there are trial judges that they read a protective order or confidentiality order and say, "No, you have to comply with 76a," and so there are instances where we're not able to achieve our objective. It is cumbersome. It is time-consuming. It is expensive, and it achieves no real purpose. It doesn't do anything.

I would scrap it. I would let the parties file things under seal, just like you do in federal court. I would have the party who wants to file it under seal, they have the burden of proving it. Let the trial judge decide if it should remain sealed or not sealed. And it's not just about trade secrets. All kinds of confidential information that may not rise to the level of trade secrets that you want to protect. People's salary and things of that nature you wouldn't want out there in the public, so let people file it under seal.

In our confidentiality orders that we all have, it always allows the party receiving the documents to challenge the designation of confidentiality. And so if I file stuff that's -- and I mark it as confidential and my friend Jim Perdue is on the other side and he doesn't believe it's confidential, he can challenge it. We have a hearing about that, and if I don't think it's confidential and I lose, then it's free. I mean, it's

open for the public. You can use it, file it with the court, or do whatever. It no longer has a confidential designation.

So and the other thing I'll point out is that it is subject to deposition, and a member of this committee, not present toay, we had a case opposite each other years ago, and I was representing a computer company. He filed my entire document production with the court, and I had to apply under 76a and go down and have a hearing to prove up an entire document production. The hearing lasted five days, I think, evidentiary hearing.

CHAIRMAN BABCOCK: But not as long as what Richard just spoke about.

MR. DAWSON: Right. And so they were trying to get leverage in the case, and you know, I'm sure there's instances where people file stuff and as exhibits to make them court records and then you have to file a 76a, so I think it achieves -- you know, and the other thing is if part of the rule was to prohibit people from, you know, getting documents back at the end of the case, if that was part of the objective, people do that all the time. Every settlement agreement that I've ever signed or drafted has a provision that says you agree to destroy all of the documents I gave you and send me a certification that you destroyed them or you return them to me. So

that's still going on today. So I don't think it achieves anything, and it's subject to gamesmanship, and it's very cost prohibitive in all respects, and for most of the time we're figuring out ways to get around it.

CHAIRMAN BABCOCK: Judge Miskel, and then Judge Yelenosky, and then Shiva.

HONORABLE EMILY MISKEL: I just wanted to add just a quick thing because -- to respond to the bad actor point of anyone can file anything. Rule 59, TRCP 59, says what's allowed to be attached to a pleading, and so you can imagine in family law all kinds of -- you know, file all types of stuff for litigation advantage or whatever it might be. We had a recent case where one of the parties filed nude photos of the children attached to a pleading. Now, you don't have to seal it. My interpretation of Rule 59 is if someone attaches an exhibit that's not allowed under Rule 59 to be attached, you can strike it, and I have signed orders that strike the pleading and order the clerk to not make it available as if it had never been filed, and so I would propose that maybe clarifying 59 to say that if someone violates 59 and is a bad actor and files something that's not allowed to be filed, the court has the power to strike that pleading and effectively make it not sealed, but as if it had never been filed. That would address that issue.

And then I'm not going to speak at length, but I would just raise my hand on the side that I don't believe that people should be able to make information confidential or private just because they agree to it or just because it's embarrassing. I think that we need to monitor what our government is doing to people, and so I just am horrified by the concept that any time something is embarrassing your government gets to operate in secret. So I won't speak at length, but I'll take the opposite side of the spectrum from the private attorneys.

CHAIRMAN BABCOCK: Your point about the rule permitting a judge to strike pleadings, I think that's as far as it goes, so there's no further consequences to the lawyer or the party that has attached the document or the picture or whatever to the pleading that is subject of the motion to strike.

HONORABLE EMILY MISKEL: So Rule 59 doesn't explicitly provide a strike process. It just says no other instrument or writing shall be made an exhibit to the pleading, and so I'm inferring that I can strike it.

CHAIRMAN BABCOCK: I think there's another rule on striking somewhere.

HONORABLE EMILY MISKEL: But you can always do sanctions. I mean, that's in another rule and allows for litigation sanctions.

CHAIRMAN BABCOCK: Okay. Steve. And then somebody in the Zoom room.

HONORABLE STEPHEN YELENOSKY: Well, the comment was made that it doesn't do anything. I'm sorry, I apologize, what is your name?

MS. TIMMS: Cindy.

HONORABLE STEPHEN YELENOSKY: Judge Cindy --

MS. TIMMS: Judge Timms. Justice, Justice Timms.

HONORABLE STEPHEN YELENOSKY: Justice.

CHAIRMAN BABCOCK: We're honored to have a U.S. Supreme Court justice with us.

HONORABLE STEPHEN YELENOSKY: Pointed out an instance in which it would work, and that is where there is a sexual assault, for example, and somebody wants to seal it. I think there's some confusion between discovery and sealing. Anything that involves discovery but is not filed with the court is not subject to 76a, unless it falls under the provision, whatever it is, below that says --

CHAIRMAN BABCOCK: 76a(2)(c).

HONORABLE STEPHEN YELENOSKY: What's that?

CHAIRMAN BABCOCK: 76a(2)(c).

HONORABLE STEPHEN YELENOSKY: You got it. Unless it falls under that, and that's a rare situation.

So, sure, you could file a confidentiality agreement that says we're not going to reveal this to anyone and we're going to give it back when it's done, unless you file it and you want to file it under seal. That's different. But it doesn't do anything, from what I've heard, because people aren't complying with it. It would do something if people complied with it. Now, most of the time maybe people think it's a waste of time, which is why I do think the rule can be revised to make it more focused, let's say.

But to suggest that it doesn't work, I know, because lawyers come in with a confidentiality agreement, which is not just that we will keep it secret, but, oh, by the way, if we file it, it will be filed under seal. Well, the clerk sees that the judge has signed it, they seal it. I always take that out of the confidentiality agreement because it's not complying with 76a. Now, other judges don't. That's a problem. There's maybe an educational issue there or maybe they need to be reminded that 76a exists, and maybe the amendment will change it so it's more appealing and usable by people, but, having said that, I'll sit down.

CHAIRMAN BABCOCK: Okay. Shiva, do we have somebody in the Zoom room who wants to say something?

MS. ZAMEN: Marcy Greer.

CHAIRMAN BABCOCK: Marcy.

MS. GREER: Hello, how is everybody?

CHAIRMAN BABCOCK: We're good.

MS. GREER: I hope I'm not repeating what other people have said. Some of it we had trouble hearing, but -- and I don't want to be redundant, but I just want to say from the standpoint of practitioners, it is a real problem, and the reason it's not in mandamus opinions is because we try to wire around it as much as possible. It creates a lot of logistical problems in these complex cases, and I do think moving towards something like the federal law could be helpful. I'm not in favor of pleadings and orders being filed under seal. There's a political authority in the federal courts right now, and I think that's a bad idea, but there are times when confidential information needs to not be subject to being put on the internet and going everywhere, and I think the parties usually are able to work it out.

And if somebody overdesignates and then, you know, you want to file something in court, you would reach out to the other side and say, "Hey, does this really need to be sealed," and in those cases we're able to work it out. But I will tell you that the courts of appeals are now requiring -- they're no longer permitting documents to be submitted in camera, almost two to one I think they are

requiring a 76a procedure for a document to be submitted to the court in camera, even if it was submitted to the trial court in camera, if both parties sought it, and I think there's a different procedure if only one party sought it and is submitting it in camera for the judge's review, but if confidential information is given to the trial judge in camera, you still have to go back and do a sealing procedure in the court of appeals. So I'm in favor of raising it and talking about it and seeing if we can come up with a better way.

CHAIRMAN BABCOCK: Thank you, Marcy. Does anybody else have their hand up, Shiva?

MS. ZAMEN: Not right now.

CHAIRMAN BABCOCK: Not right now, okay. But I see somebody behind you that has his hand up.

HONORABLE LEVI BENTON: Yeah, you skipped me. I was supposed to be after Mr. Dawson. I would like to politely just ask the Chief or inquire of the Chief, since this was his memo to you, or maybe Jaclyn, do we have information or have a number of 76a cases? Because I am not getting all of this from some of my colleagues on this committee about all of this trouble. It is trouble, but Mr. Dawson's paid $1,200 an hour to fix the trouble, and I mean, this --

MR. DAWSON: Assumes facts not in evidence.

MR. ORSINGER: I move to seal. I move to seal.

CHAIRMAN BABCOCK: We don't need that in the public record, that's for sure.

MR. ORSINGER: It's your call. You're the chair. Are we going to seal that number?

CHAIRMAN BABCOCK: No, I think -- I think it's underestimated, if anything, so --

HONORABLE LEVI BENTON: I object, I'm being interrupted. It's a 30-year-old rule. Where are the cases?

CHAIRMAN BABCOCK: Well, I was going to bring that up, but there is a recent decision of the Texas Supreme Court that addresses the interplay between TUTSA, the Texas Uniform Trade Secret Act, and 76a, and it answers many of the questions -- not all, but many of the questions that have been posed today about trade secrets. So, Richard, you probably want to take that decision into account. And a couple of questions of historical maybe significance, maybe not, but as I recall, the Leatherbury draft, which you talked about, did not include 76a(2)(c); that is, the applicability of 76a to unfiled discovery. Is that right?

MR. ORSINGER: I haven't completed my review of the transcript, but I saw that that was kicked -- the

can was kicked down the road several times, and I don't know where that ultimately came in. It may have come in on day two. It didn't come in on day three.

CHAIRMAN BABCOCK: Yeah, it came in I think pretty late, and I don't know that the Leatherbury/*Dallas Morning News* draft had that in it, and frankly, in my experience that's where a lot of the mischief has been created with the unfiled discovery, because there's no certainty about whether or not you're in a case that is of the type that that provision of the rule addresses, so you've got to take into account, you know, whether your unfiled discovery is going to have to comply with 76a, and that leads to the problem that Alistair identified and Justice Christopher has talked about, and I agree, I think there's a lot of cumbersomeness to that.

You also excluded from your otherwise very thorough recitation of the history that the family bar very adroitly exempted themselves from 76a, so a lot of the -- a lot of the concerns that you have in your practice and your two colleagues who were on the committee at the time don't come up in family cases because 76a doesn't apply to family cases.

MR. ORSINGER: But some judges will use the 76a standards because there are no other standards for family law.

CHAIRMAN BABCOCK: Yeah. I'm just saying, it says it. Shiva, I'll call on you in a minute, but Judge Miskel has her hand up first.

HONORABLE EMILY MISKEL: I was going to say if we revise 76a, my first request was going to be that we eliminate the exception for family law cases.

CHAIRMAN BABCOCK: Okay. That will get the the fight started, for sure. One other thing, Richard, I'm not sure it's clear. You know, in privacy, there's a posture of four prongs of privacy, and Texas has quite clearly rejected false light, which is the first prong. It quite clearly has accepted intrusion, which is the second type. It, I think, has arguably accepted misappropriation of name or likeness, the so-called right of publicity, which seems an odd right of privacy, but in any event, but I'm not sure that the Court has adopted the privacy prong on misappropriation -- not misappropriation, but publication of private and embarrassing facts.

MR. ORSINGER: I'll dig into that. You think not?

CHAIRMAN BABCOCK: I don't think so, but I could be wrong.

MR. ORSINGER: Then I stand corrected if I'm wrong.

CHAIRMAN BABCOCK: Well, you may be right.

I'm just saying I don't think it's -- and I consulted with some people at this table about that.

MR. ORSINGER: Aha, well --

CHAIRMAN BABCOCK: Nobody could remember. Nobody could remember. So I think that's what I had in response or in reaction to your historical recite, although it is -- it is certainly true that the problems that were -- or at least one of the impetus for the rule, which -- which Cindy, Judge Timms, talked about is still with us. I mean, you know, we have state Legislature saying you cannot put a confidentiality provision into a settlement agreement on certain types of cases, mostly dealing with sexual abuse. So that -- that's a thirty-one, -two, -three year-old problem that is still with us that has to be dealt with.

And the last comment I would make is that it's true, as Alistair says, that, you know, in many, many instances it's up to the litigants to get together and agree or not on what's private and what's not, but the public does have an interest in some things, for example, the orders and opinions of the court. I mean, I cannot conceive of many instances where the public is not entitled to know what their judges are doing. The very first meeting I chaired over 20 years ago dealt with the legislation on judicial bypass, and some of you were here

for that, where a minor goes to a judge to get permission to have an abortion. Well, that statute says that the opinion of the court is sealed and it's not a matter of public record.

Now, the Supreme Court took several of those cases right after the statute was passed and did not seal their opinions, but the trial judges and the courts of appeals did, and that has always struck me as not a good thing. You can see why they did it, because, you know, some judge allows a minor to get an abortion, and the next election, you know, you can see -- you can imagine what happens, but is that a justification for sealing the judge's order? I personally don't think so, but the statute was passed, and it's the law, and nobody has challenged it, so there you go. Yeah, Kennon.

MS. WOOTEN: I'll just echo the comments that this is an issue in private practice, and the amount we're paid doesn't negate the importance of the issue because that is, of course, incurred by the clients, and many times in cases there have been many hours spent working through this procedure, going to the court, going to different judges at central docket in Travis County, by way of example, who handle this rule drastically different ways from judge to judge. So I do believe that we have an issue that should be addressed. I think that clients are

incurring unnecessary costs because of the way this rule is crafted now, and I hope that we can do some of what Judge Yelenosky suggested, including this online community that would simplify things somewhat and make it less burdensome and less costly to our clients as a result.

These problems occur as well in pro bono matters, so I love doing pro bono work. My firm supports that, but when you start incurring a lot of costs and you're not getting paid anything, that's also an issue. So I believe there are issues to be addressed. This isn't make-believe. I think we need to do something about this rule and modernize it and make it better.

MR. LEVY: Chip, and Rusty's iPad --

CHAIRMAN BABCOCK: We're in the back of the room and then we're going to go to the Zoom room.

MR. PHILLIPS: So and I'll just stand up just to be sure I can project. The other comment I've got is that if judges weren't seeing it, if what we're hearing in the room is we're trying to wire around the rule, then we're also missing the point of the rule. If we're filing -- people are filing motions for protective order that just have a sealing in it and hoping the judge will sign it because this rule is so complicated and so difficult to do that we're just hoping we can get around it with this order because the judge won't pay attention,

well, then we also have a problem. We may not be seeing it in court as a problem, but it's a problem because what we're trying to do with the rule isn't happening. We're not going through the process to make sure that what's getting sealed is what should be sealed, rather than just the parties getting together and hoping the judge will sign it without paying attention.

So the fact that some judges may not be seeing it as often maybe is an indication again that the rule isn't working because some parties aren't using it. They're trying to wire around it, sometimes legitimately, sometimes illegitimately.

CHAIRMAN BABCOCK: Great, thank you. Oh, Shiva had your hand up.

MS. ZAMEN: Yeah, it's for Rusty.

CHAIRMAN BABCOCK: Rusty Hardin. Muted, one of the few times.

MR. HARDIN: Thank you. At the end of the day is the purpose of this discussion right now is to decide whether to devote more time to it on another occasion? If that's the case, I would be all in favor of it, because I'm very schizophrenic about this whole issue back and forth as far as public disclosure. I disagree with Judge Benton that it's not worth messing with because this thing is hugely, hugely significant I think,

particularly as Richard has talked about, when you talk about the impact of social media. So those of us who periodically represent people who have some public exposure, the public knows who they are, and so sometimes the courtroom is the only way we can respond to -- if we want to try to avoid violating the cannon of ethics, as to what we say pretrial. The courtroom and our pleadings and other things are the only refuge we have, and so getting out a public disclosure becomes critically important that we can use the judicial process to answer things that just go out instantaneously, within eight hours. It's impossible to be able to get out in front of a major story, and the court proceedings are about the only way you can ever do it. So I opt there for as much public exposure and resistance of sealing as possible.

But on the other hand, if the same kind of irresponsible conduct by private litigants in terms of saying the most outrageous things and being protected by the judicial privilege, we've got to have a way for a judge to be able to do something about that. I think this merits -- this whole subject merits a much, much broader discussion for the committee, even though it might end up one day moving us back into additional Saturday meetings, and so I hope we're going to talk about this more in the future and in a much more extended basis, and I also want

to go -- I really, really enjoyed Richard's memo. Not only because of a trip down memory lane as far as the different lawyers and the history of the committee and these issues of the state, but I'm just dumbfounded about a private litigant who takes the time to have produced this product, so regardless of which side of the issue you're on, I think Richard deserves incredible kudos. I love this.

(Applause)

CHAIRMAN BABCOCK: We're applauding for you, Rusty, not Richard. He's got a big enough head as it is. Stephen.

HONORABLE STEPHEN YELENOSKY: I just want to make an observation, which is this rule is not just about everybody in this room, and let's talk about this. This is a public hearing. Who's here from the public who's not an attorney? No one. So I think the judges, given the 76a process, have an obligation to stand in and make people prove that they qualify to seal something under whatever mechanism that we set up, because there's nobody to do it among the parties. Parties will agree to all kinds of things when one party is going to pay the other party and one of the conditions is, well, we're going to seal this, and so that's why you need the judge to stand in for it. And remember that we're talking about how

burdensome it is on attorneys, and I agree it is, and it can be fixed, but to throw it out is to say that the public has no interest in this, and the public's interest in a court system is because it resolves disputes in a way that is civil, so to speak, but there are limits to that. I mean, the public pays for all of this. It's not just attorneys who, you know, and their clients who are getting paid for it. It's a public forum, and it's a public forum until you prove that part of it shouldn't be.

CHAIRMAN BABCOCK: Great. Alistair, would you mind if we took a break right now?

MR. DAWSON: I will not be insulted by that.

CHAIRMAN BABCOCK: Okay. Dee Dee's been going for two hours, and so we'll take a 10-minute break and be back here at 11:10, 11:10, and then we'll go to Levi's subcommittee, and we'll put this over as you requested, Richard, for two meetings.

MR. ORSINGER: Okay.

CHAIRMAN BABCOCK: So not the next meeting but the meeting after that.

MR. ORSINGER: Okay.

CHAIRMAN BABCOCK: Okay, great. Thanks, everybody. Great discussion.

(Recess from 10:58 a.m. to 11:15 a.m.)

CHAIRMAN BABCOCK: All right. We're back on

the record. Sorry this took longer than 10 minutes, and I apologize for that, but we are at the place in our agenda about Rule 506.1(b), and Levi Benton is the chair of this subcommittee and is going to take us through it.

HONORABLE LEVI BENTON: All right. So like the Orsinger committee, we didn't really meet. We communicated via e-mail, but unlike the Orsinger committee, we have attempted to answer just the question asked.

HONORABLE STEPHEN YELENOSKY: That's not fair because the charge said whatever else you think needs to be done.

CHAIRMAN BABCOCK: It was a catch-all.

HONORABLE STEPHEN YELENOSKY: Yes.

HONORABLE LEVI BENTON: So we were asked to consider whether the bond amount in the JP courts, which is double the amount of the judgment, is too high. And there may be members of this committee who, like -- like me, didn't really give any thought to what the jurisdiction of a JP court was or is. It's now $20,000, so a JP could issue a judgment of $20,000, and read literally, an appellant would have to post the bond of $40,000 in those circumstances, plus costs. And so our -- our answer to the question, is that too high, is "yes." I don't know how my colleagues on the -- I can tell you how

I got there, but I can't tell you how others on the subcommittee got there. The subcommittee is Stephen Yelenosky, Professor Carlson, and Judge Es --

MR. ORSINGER: Estevez.

HONORABLE LEVI BENTON: Estevez, excuse me. I get there because it's a lot of money, $40,000. It's just too much money for something out of the justice court. The Court asked or the committee asked us -- or the Court asked us to consider other changes, and the majority of the committee concluded that the JP courts ought to just use TRAP 24.2, try not to have a separate rule for the JP courts. I'll pause there. I know Judge Yelenosky probably has --

HONORABLE STEPHEN YELENOSKY: You must have eyes in the back of your head.

CHAIRMAN BABCOCK: Yeah, he's had his hand up since you began.

HONORABLE STEPHEN YELENOSKY: All over again. I don't -- were you done?

HONORABLE LEVI BENTON: Yes, sir.

HONORABLE STEPHEN YELENOSKY: Okay. Well, I didn't dissent because I don't really know the answer to this, but -- and part of it, really, I guess, would be the Legislature. What is the purpose of JP court? We start from there and then I say, well, are we trying to get

things to end in JP court? Is that where we want it to stop? It seems like, because it's cheaper and people can use that without a lawyer, so why -- why should we make it something where it's easier to appeal, if the purposes are to get things done in JP court and the jurisdiction is so high that people find it necessary to go to county court, then it seems to me that the jurisdiction is too high, which we can't do anything about.

But it seems the opposite of what we ought to be doing if we're trying to get things -- I mean, to lower it is the opposite of what we should be doing to have a finality in the JP court because then it is easier to appeal, and I don't know why we want things to happen in the JP court and then de novo done in county court, and so if that's the result of a high jurisdiction, you know, I think the bond, I'll state, is high to discourage that. Maybe the Legislature needs to lower the jurisdictional amount, but I don't think the goal is to increase the ability to get another hearing in county court.

CHAIRMAN BABCOCK: Thank you. Anybody else have comments? Yeah, John.

MR. WARREN: From a -- you mentioned de novo at the county courts, and that brings me in, so what happens with, like, say, the eviction cases that we will be getting at some point when that relief is over, so we

have to take that into consideration and the economic position of those individuals who actually go to for relief in the JP courts.

CHAIRMAN BABCOCK: Yeah. Who's got the -- Kent? No.

HONORABLE LEVI BENTON: Who's got what?

CHAIRMAN BABCOCK: Who's got the contrary? You said one member of your subcommittee.

HONORABLE LEVI BENTON: Yeah, it was Judge Yelenosky.

CHAIRMAN BABCOCK: Okay.

HONORABLE LEVI BENTON: And so his viewpoint is let's have finality, let's not necessarily have two bites at the apple, but the other side of it is was there ever really a bite at the apple, and let me explain what I mean by that. I don't -- I have to be very careful with what I'm about to say, we're on a public record. I didn't know this until I got into this project, but as we sit here today only nine percent of JPs across the state have any amount of legal training. So one has to ask have they really had in most cases a bite at the apple, and so I favor lowering the bond requirement so that there is some substantive chance to have a bite at the apple and to pay a fee to John Warren.

CHAIRMAN BABCOCK: Judge Yelenosky, you had

your hand up.

HONORABLE STEPHEN YELENOSKY: Well, my response to that is, well, get rid of JP courts then. What are they for? What is small claims court?

HONORABLE LEVI BENTON: Okay. I could go there, too, but that wasn't the question asked.

MR. ORSINGER: That goes beyond the scope of the assignment.

HONORABLE STEPHEN YELENOSKY: Well, what's the purpose of small claims if it's not to be there to be used by people who can't go to county court, either for eviction, at least initially, or you know, they've got some claim like, you know, some warranty wasn't complied with, something like that. What is the purpose of small claims court if you don't think it's a bite at the apple; and if you think, well, it's okay for some things to be a bite, but only that bite at the apple, because that's all people are going to get, then lower the jurisdictional amount.

CHAIRMAN BABCOCK: Yeah. John.

MR. WARREN: I was just going to say in addition -- well, my recommendation is that you set the bound amount at a percentage of the value of the case, and so if you have a -- if it's $1,500 in controversy, you make the bond amount maybe 40 or 50 percent of the value

of the case.

CHAIRMAN BABCOCK: Okay. Professor Hoffman.

PROFESSOR HOFFMAN: Stephen, can you talk real quick --

CHAIRMAN BABCOCK: You've got to speak up.

PROFESSOR HOFFMAN: Sorry. Why not use -- why not use the 24.2 TRAP provision? In other words, even if everything you say is right, why treat -- why require double the amount of the award from a JP case?

HONORABLE STEPHEN YELENOSKY: Well, because you're going de novo in the county court is the main reason. You're not appealing -- you just had the trial. It's not of record, as Levi says, and but you're getting a do over. Why should it be as easy to get a do over as to do an appeal, which is going to be limited to various points of error, but my question back to you is, well, what is small claims court for? And how do you achieve that goal.

CHAIRMAN BABCOCK: John.

MR. WARREN: I would like to add that in some instances, just like in Dallas County, county courts at law have the same jurisdiction as the district courts, but that's not always the case in other counties, so -- around the state, so it's going to be kind of offset, but I think it may be that we have to look at the -- just like

you have requirements for someone to be a judge. Perhaps we should look at some level of requirements for JP, if they're going to serve in that capacity.

CHAIRMAN BABCOCK: Yeah. Thank you. Shiva.

MS. ZAMEN: Professor Carlson has her hand raised.

CHAIRMAN BABCOCK: Professor Carlson.

PROFESSOR CARLSON: Yeah, I just want to remind the committee that JP courts are not courts of record. They have their own set of procedural rules. They are meant to be inexpensive, fairly quick proceedings that don't cost a substantial amount of money, and most times people represent themselves pro se, and I don't know the number, but I suspect there aren't that many de novo appeals.

HONORABLE STEPHEN YELENOSKY: Good.

MR. WARREN: That would depend on the county.

CHAIRMAN BABCOCK: Yeah.

MR. WARREN: Urban counties it's high.

CHAIRMAN BABCOCK: Yeah, I don't know if you heard that, Elaine, but John Warren said that in urban counties there are a high number of appeals. Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, it does

seem to me to be a little unfair to require a plaintiff to only pay a 500-dollar bond to get a trial de novo versus the defendant has to do twice the judgment. So I would suggest we should lower the defendant's and increase the plaintiff's, if we want --

CHAIRMAN BABCOCK: Parody.

HONORABLE TRACY CHRISTOPHER: -- to have a sort of a level playing field between the two sides.

CHAIRMAN BABCOCK: So you would -- you wouldn't go for the TRAP Rule 24.2. You would just write in there each have 500 or 750.

HONORABLE TRACY CHRISTOPHER: Right, too complicated. 24.2 is too complicated.

CHAIRMAN BABCOCK: Yeah. It struck me that in JP court if you start getting into what somebody's net worth is and having to decide all of that, that you sort of are contrary to the idea of JP court. But so you would just have a set number for --

HONORABLE TRACY CHRISTOPHER: I would kind of have it the same on both sides. I mean, because it doesn't seem right to me that the plaintiff gets a de novo trial for $500 bond and the defendant has to pay twice the judgment for a de novo trial. I mean --

CHAIRMAN BABCOCK: Yeah.

HONORABLE TRACY CHRISTOPHER: It doesn't

seem right.

CHAIRMAN BABCOCK: Yeah, the plaintiff's side of it I guess would be, well, I've won and I'm going to win on appeal, and this guy's going to, you know, disappear, and there's not going to be any bond that will satisfy, you know, the judgment that I'm ultimately going to get.

HONORABLE TRACY CHRISTOPHER: And the defendant's side is this is a frivolous lawsuit that should never have been brought, and now I have to try it again.

CHAIRMAN BABCOCK: Yeah. Yeah, Robert.

MR. LEVY: I -- I think that if we went with your approach, Judge Christopher, we're going to basically destroy the -- the use and value of the JP small claims court because the defendant will never pay a judgment. They'll just pay the $500 and just try to wait out the plaintiff, and the whole idea is to have an inexpensive disposition. I'm not saying that the issue about the plaintiff paying $500 is -- is right in that context, but I don't think we want to void a defendant paying a bond. I do think one difference would be that the $500 is gone, the plaintiff pays that, they don't get it back unless they get costs; whereas the defendant's bond does -- would apply against a future judgment in the county court case.

CHAIRMAN BABCOCK: Okay. Any other comments about this proposal? Yeah, Kent.

HONORABLE KENT SULLIVAN: I'll give my two cents.

CHAIRMAN BABCOCK: You've got to speak up because Dee Dee can't hear you.

HONORABLE KENT SULLIVAN: For what it's worth, I agree with Tracy. I think that this is not a court of record. It's not presided over by an officer that has judicial training. If a plaintiff is serious, to the point that was just made, you file the case in county court. As a practical matter, I have heard people describe JP court as legal mud wrestling. I, of course, would never say such a thing, but I think that for cases of any seriousness, it is at best an advisory type of process, and a serious case will end up in county or district court anyway. I think it is -- I think there is a manifest unfairness to it, just as Justice Christopher pointed out.

CHAIRMAN BABCOCK: Okay. Shiva, anybody else got their hand up behind me?

MS. ZAMEN: Not currently.

CHAIRMAN BABCOCK: Okay. Well, if there are no further comments, Levi, thank you for your work on this. The Court will consider these comments and decide

what to do, if anything. So we'll move now to the -- these two evidence rules. Is Buddy -- is Buddy around? Is he --

PROFESSOR HOFFMAN: He's not.

CHAIRMAN BABCOCK: Has anybody decided to --

PROFESSOR HOFFMAN: He's asked me to --

CHAIRMAN BABCOCK: There we go. Professor Hoffman.

HONORABLE EMILY MISKEL: I'm sorry, can I just add one thing to the prior discussion?

CHAIRMAN BABCOCK: Sure.

HONORABLE EMILY MISKEL: OCA does publish a report of cases appealed from justice court.

CHAIRMAN BABCOCK: Uh-huh.

HONORABLE EMILY MISKEL: It took me a minute to get to it. While it doesn't seem an excessively high number, I just wanted to speak and add that data is available in an easy-to-access way.

CHAIRMAN BABCOCK: Okay, great. Thank you. Professor Hoffman, back to you.

PROFESSOR HOFFMAN: All right. So I am filling in for Buddy Low, which are enormous shoes to fill. I will do the best I can. So we are going to start -- there are two different recommendations. Both of these come from AREC, the Administration of Rules of Evidence

Subcommittee of the State Bar. The first deals with Texas Rule of Evidence 404(b), so in the tabs that -- I'm going to be kind of reciting out of -- the shortest summary is Tab H, which is this November 11, 2021, memo.

So until 2020 the federal rule and the state rule on 404(b) were identical, and then the federal rule was amended, and the amendment adds additional notice requirements on the prosecution in a criminal case. AREC supports amending the state rule to track those federal changes. Our subcommittee met, we discussed it, and we were unanimous in agreeing with AREC that the rule should be changed to mirror the federal rule changes. I will flag just at the outset -- and we say this in the memo -- that since these rule changes are talking about criminal cases, it raises questions about the extent to which the Supreme Court may want to seek input either from the Court of Criminal Appeals or from lawyers and lower court judges who routinely handle criminal matters. We thought those were beyond our pay grade, so we just leave those to one side but flatten those.

All right. So why make the rule change? Primarily, as AREC's memo makes clear, and if you want to see AREC's memo, it is at the tab just above it, so that is tab -- Tab G. You'll see under there that they detail some of the federal changes from 2020. Primarily, the

prosecution has to identify evidence that it intends to offer pursuant to the rule, and it has to do that in a written notice form to the defendant in a timely manner. And they also have to articulate what's referred to as a nonpropensity purpose for which the evidence is offered. And so I guess I could say more and walk through the rule. If you want to see the rule changes you can see them. This is in the PDF page 875 of 889, and you can see the redlined version that would reflect the new Rule 404. So that's probably a pretty reasonably succinct summary that may get us started.

CHAIRMAN BABCOCK: Great. Thank you, Lonny. Rusty I bet will have an idea about this.

PROFESSOR HOFFMAN: So maybe I ought to just invite -- I don't know if there's anybody else on the subcommittee that wants to say anything before we open it up to the whole committee.

CHAIRMAN BABCOCK: Anybody on the subcommittee have comments?

PROFESSOR HOFFMAN: Okay.

CHAIRMAN BABCOCK: All right. Rusty, you still on?

MR. ORSINGER: Yes, he is.

CHAIRMAN BABCOCK: Are you still unmuted?

MR. HARDIN: There you go. It doesn't work

-- if I mute on my iPad, it doesn't seem to take care of it with y'all, so, yeah, I -- look, I think this is excellent, and I don't really have any observations or corrections about it.

CHAIRMAN BABCOCK: Okay. Anybody else have any thoughts about this? Do you see anybody on the screen?

MS. ZAMEN: No.

CHAIRMAN BABCOCK: All right. Well then, we're moving right along, aren't we?

PROFESSOR HOFFMAN: We are, yeah. All right. So then that takes us to the other and last evidentiary rule we considered. Again, it was a suggested change from AREC, and this relates to Rule 601(b), which we all probably know more affectionately as the dead man's rule. So if you want -- there are sort of three things you can look at. The one I'm going to start with is, again, the memo, so this is, again, Tab H, but I'll just mention there are two other things. There's an excerpt from Steven Goode's outstanding treatise on evidence that relates specifically to a little of the history of the dead man's rule, the statute, and then the rule. And then there is also AREC's memo on this, which again is at Tab G. So for those of you following along, I'm going to start at Tab H again.

So under 601(b), again, we again summarize the issue, but essentially what we're dealing with is we have a rule that has been in existence for as long as it has been critiqued. Or it has been critiqued as long as it has been in existence, and although the Supreme Court made a number of changes to the rule that helped significantly, as Professor Goode notes, this sort of fundamental sort of issue about whether to retain a rule prohibiting someone from testifying about something that someone said when that someone is deceased, remains a potential problem, and so the -- I think AREC's suggestions, which a majority of our subcommittee agreed with, are that, number one, the rule has been problematic, because it is written confusingly, because it can be applied in many ways that the work around is easy. All you need is to come up with some corroboration. Any evidence to corroborate what the deceased said is enough to get around the dead man's rule, and so it creates the problems.

And then, finally, we have the issue of or the critique of it being unnecessary because even if the rule is abolished other existing admissibility rules apply, most especially hearsay and the statute of frauds. Only a minority of states still maintain the rule, and so AREC recommends repealing the rule entirely. Most of the

subcommittee on this group that looked at it fully supported AREC's proposal to repeal the rule. Two of the subcommittee members suggested amending the rule, though, and then their suggested amendment appears below. So you can see the rule in its existing form at page 883, and at page 884, you'll see their proposed amendments to it from the two members of our subcommittee. I will let perhaps them or others talk about that rather than me trying to summarize their thoughts on that. What else can I say? Well, that's probably maybe enough, Chip, to get us started.

CHAIRMAN BABCOCK: Yeah.

PROFESSOR HOFFMAN: So to summarize, the majority of our committee favors AREC's recommendation to repeal in its entirety 601(b). A minority of our group would rather leave some version of the rule in, and I guess maybe I'll sort of generally summarize to say that their version of the amended rule would acknowledge that a person is indeed competent to testify about oral statements made by a testator, including someone who is deceased, but the jury may need to be instructed that they're the sole judges of the evidence and the weight to be given and that they don't have to accept that testimony as given, I guess is the way to say that.

CHAIRMAN BABCOCK: All right. Why don't we

do the same protocol, members of your subcommittee, especially the two that --

PROFESSOR HOFFMAN: Yeah.

CHAIRMAN BABCOCK: -- have proposed this language. Are they present?

HONORABLE LEVI BENTON: Only I am.

PROFESSOR HOFFMAN: One is.

HONORABLE LEVI BENTON: The other is Roger, and he's not here, and I -- the instruction that -- in fact, I don't know that Roger really felt strongly about this, and you know, I don't -- I don't argue as strenuously about this as I will 76a. It speaks for itself.

CHAIRMAN BABCOCK: Well, then let's talk about 76a again.

HONORABLE LEVI BENTON: Yeah. I don't have anything to add to what's in the report, Chip.

CHAIRMAN BABCOCK: Okay. Any other thoughts about -- Richard Orsinger.

MR. ORSINGER: I'd like to ask Professor Hoffman, if he knows, has the dead man's statute been revoked kind of around the United States of America, or does it seem to be prevalent?

PROFESSOR HOFFMAN: So I will give you and -- so I'm getting this -- I didn't do any independent

research of this, but I'm getting this from AREC's memo, so this is at Tab G. So the answer to Richard Orsinger's question, I'm getting it from the same place, if you want to look at it you can see, but it looks like a majority of the states, the vast majority, have gotten rid of any version of either the dead man's statute or the dead man's rule. There is -- there is one state, I think it was Colorado, that when they revisited it not long ago actually revised it and kept it on its books, but that was sort of the outlier from it. Yes, we are not alone in keeping it, but we appear to be in the minority in that regard. That's how I took it in their summary.

CHAIRMAN BABCOCK: Other comments? Questions?

MR. RINEY: Chip?

CHAIRMAN BABCOCK: Yes, Tom.

MR. RINEY: I recently did a little research on the dead man's statute for the first time in decades. I was defending a will contest, and you know, typical grounds, mental competency --

CHAIRMAN BABCOCK: Right.

MR. RINEY: -- and undue influence, and the law is very unclear right now. I thought I could get past hearsay for obvious reasons, but then there's some cases out there to suggest that maybe the dead man's statute is

a problem. So there's a lack of clarity and seems to be some unfairness in certain situations, so I think it's really a good idea to just abolish the rule.

CHAIRMAN BABCOCK: Just abolish the rule?

MR. RINEY: Yes.

CHAIRMAN BABCOCK: Okay.

PROFESSOR HOFFMAN: And I guess I can add just a little more to Richard's -- in response to Richard's comment. The ALI back in 1942 eliminated the rule in its model code of evidence. I'll add the federal rules, of course, don't incorporate any version of the dead man's rule, and, again, as I say, AREC's memo kind of summarizes the states that have kept it. The states that are in the minority that have retained it are Missouri, New York, Pennsylvania, and South Carolina.

CHAIRMAN BABCOCK: Say that again, I'm sorry.

PROFESSOR HOFFMAN: Sorry. So AREC's memo lists four states as retaining some version of the rule in addition to Texas, as New York, Missouri, Pennsylvania, and South Carolina.

CHAIRMAN BABCOCK: Okay. Except for us, all east of the Mississippi. Maybe not Missouri.

MR. ORSINGER: Missouri.

CHAIRMAN BABCOCK: Is Missouri west of the

Mississippi?

MR. ORSINGER: Yeah.

CHAIRMAN BABCOCK: Okay. Then we're two and two. Two and three. Okay. Any other comments about this rule? Okay. Well, thank you. Thank you, Lonny, for pinch hitting for Buddy, and we are at the end of our agenda. See, they said it couldn't be done, and not only that, we did it early. So I hope everybody has a good rest of the day, and I'll see some of you at the investiture of Justice Huddle and then hopefully at our next meeting, which will be when and where?

MS. ZAMEN: It's going to be at the TAB.

CHAIRMAN BABCOCK: It's going to be at the TAB.

MS. ZAMEN: Yes. And I believe it's February --

HONORABLE LEVI BENTON: Tab A or Tab B.

CHAIRMAN BABCOCK: The Texas Association of Broadcasters.

MS. ZAMEN: February 4th.

CHAIRMAN BABCOCK: February 4th. And we'll try to get our agenda out in a timely fashion, and thank you all for being here, both on Zoom and in person. So we will be adjourned. Thank you. Sir?

HONORABLE LEVI BENTON: Before we adjourn, I

was reminded before we started today that this meeting customarily had been our big ideas meeting.

CHAIRMAN BABCOCK: No. It's only -- it's every other year.

HONORABLE LEVI BENTON: I'm sorry?

CHAIRMAN BABCOCK: Our deep thoughts meeting is every other year right before the Legislature.

HONORABLE LEVI BENTON: Okay. I stand corrected.

HONORABLE STEPHEN YELENOSKY: Hold those deep thoughts.

HONORABLE ANA ESTEVEZ: We have another year before we have to think.

CHAIRMAN BABCOCK: Yeah.

MR. ORSINGER: We had a lot of deep thoughts.

(Adjourned)

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MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

* *

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