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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

MAY 27, 2022

(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 27th day of May, 2022,
between the hours of 9:00 a.m. and 2:33 p.m., at the South
Texas College of Law, 1303 San Jacinto Street, Houston,
Texas.

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1
2 CHAIRMAN BABCOCK: Let's go on the record.
3 Welcome, everybody. And glad to see -- glad to see you
4 here. I've had one request, which I make on behalf of the
5 committee and myself, speak up. I've got a microphone,
6 but not everybody does, so be sure to speak up so
7 everybody can hear. And without further adieu, we are so
8 delighted to be at the South Texas College of Law. And we
9 have the Dean here, and Dean Barry would like to make a
10 few opening and hopefully welcoming remarks.

11 DEAN BARRY: A little bit of both, yes.
12 Good day, everybody. For those who are on Zoom, I am the
13 little dot in the far corner. Hello.

14 My name is Mike Barry. I am the Dean and
15 President of South Texas College of Law, Houston. On
16 behalf of Elaine Carlson of your group, I am honored to
17 welcome you here to South Texas.

18 CHAIRMAN BABCOCK: Where is Elaine?

19 DEAN BARRY: Elaine is on Zoom, and I am not
20 allowed to disclose her actual location, so -- she
21 regretted not being able to be here in person.

22 I have been asked to give about 45 minutes
23 worth of remarks, so -- I'm just seeing who is paying
24 attention. That's good.

25 Just very quickly, as you walked in the door

1 today, you might have looked up on the right-hand side,
2 and the mission statement of the school is in very big
3 letters on the right-hand side of the school. We were
4 founded 99 years ago, our centennial will be next year,
5 and we have four hallmarks of the mission of the school
6 here. We are a school of excellence, we're a school of
7 opportunity, we're a school of service, and we're a school
8 of diversity. And I'll just hit two of those points very
9 quickly.

10 The first is the diversity point. As you
11 know, Houston is the most diverse city in the country.
12 And I have made the commitment that we will be the most
13 successfully and intentionally diverse law school in the
14 country, because that's the community we serve, and it's
15 the right thing to do for our profession. And we were
16 very honored last year when one of our alumnus gave us a
17 very sizable gift to create a diversity center here at
18 South Texas so that we could be the leader in the state
19 when it comes to increasing the diversity of the legal
20 profession.

21 The second is on service. Our clinical
22 program last year gave \$3.6 million worth of pro bono
23 service between the attorneys and the students to our
24 community. And one hallmark of that, particularly this
25 year, was with respect to ensuring that people maintained

1 housing during the pandemic. We are having a celebration
2 today because our faculty and students have helped 1,000
3 families stay in their homes this year alone.

4 Last year, the White House celebrated the
5 efforts of law schools to help people during the pandemic
6 maintain housing. They identified that there were about
7 10,000 people across the country who had been helped. At
8 that point, South Texas had helped 1200 of the 10,000
9 across. That's the commitment that this school makes to
10 the community.

11 We recognize the importance of training
12 people who are not only prepared, but who care about the
13 world that they will serve and the communities they serve.
14 And that's one of the reasons we're honored to have you
15 here today, because you help make the rule of law possible
16 by ensuring that we have the right processes and
17 procedures. If there's anything we can do to help, please
18 reach out. Thank you for being here. Come anytime.
19 We're happy to host you.

20 Back to you.

21 CHAIRMAN BABCOCK: All right. Dean Barry,
22 thank you very much.

23 (Applause)

24 CHAIRMAN BABCOCK: Thank you for your
25 students' and your faculty's pro bono commitments. That's

1 really terrific. Good for you. Thank you.

2 Thank you. So I have been the Chair for
3 almost 22 years, I think, of this committee. I was on the
4 committee for some lengthy period of time before that.
5 Chief Justice Hecht may have missed one meeting in all of
6 that time, but it would be only a overriding reason for
7 him not to be here, but he's not. But I think he's on
8 Zoom, and, if he's not, Justice Bland is here and ready to
9 fill in with the Chief's opening remarks.

10 But, Chief, if you're anywhere out there and
11 want to say something, speak now. Otherwise, Justice
12 Bland is going to do it.

13 HONORABLE NATHAN HECHT: I yield to Justice
14 Bland.

15 CHAIRMAN BABCOCK: Well, here she comes.

16 HONORABLE JANE BLAND: I don't hear that
17 that often. But it's nice, it sounds nice.

18 Good morning, everyone. As you -- as you
19 just heard, the chief has left us to our own devices, and
20 he had said that he was going to read the transcript. So
21 I was going to tell you to be sure not to -- you know, not
22 to go wild. But I think he got a little bit nervous about
23 it, so here he is on Zoom with us. So -- okay.

24 So Court's been busy working toward clearing
25 our docket this June. It's a commitment that the Court

1 made eight or so years ago and has successfully maintained
2 through the years, and we hope not to be the year that we
3 fall down on the job with that. So we're working hard to
4 get the remaining cases decided.

5 We -- this week the chief extended the
6 general emergency order, 51, until August 1st, 2022. As
7 you probably know being on this committee, when the
8 pandemic first started, these orders gave lots and lots of
9 flexibility to judges to manage their dockets and prevent
10 the spread of COVID. And then we moved more toward the
11 regional presiding judges and OCA urging caution and
12 giving direction and guidance to courts. And then as
13 conditions got better, we moved once back toward local
14 control.

15 There are really just two main provisions
16 left of the omnibus emergency order. The first maintains
17 the authority for remote proceedings until we get a rule
18 written. So that falls on this committee to -- to get our
19 work done there. And then the EO also clarifies that
20 local judges can continue to have the authority to
21 implement health controls as necessary to protect all
22 court participants and those who are visiting the
23 courthouse.

24 Also, the Court renewed its emergency order
25 concerning evictions. And just taking a page off of what

1 Dean Barry just spoke about in terms of the great help
2 that South Texas students have given to people to maintain
3 housing during the pandemic, a big part of that has been
4 through the eviction diversion program. And because the
5 program has been the most successful in the country, the
6 Treasury Department just recently allocated additional --
7 an additional \$47 million in emergency rental assistance
8 funds to the program, some through statewide allocation,
9 and then also Houston, San Antonio, and certain other
10 localities are going to get about 42 million. So the
11 total package is \$89 million.

12 And what happens in the eviction diversion
13 program is that an applicant who is on the brink
14 potentially of being evicted gets notice about rental
15 assistance in the court papers, and then the justices of
16 the peace are instructed to inquire whether tenants who
17 qualify are interested in going -- going through the
18 program with help from legal aid lawyers when they're
19 available. And what then happens is through a
20 negotiation, the eviction case is moved off the docket,
21 the landlord waives any fees, and rental assistance is
22 provided to secure continued housing for the person.

23 So it's been a -- it's been a good program.
24 I know the chief had spoken nationally with the Justice
25 Department showing -- showing how -- how we implemented it

1 and modeling it for other court -- other state courts
2 across the country.

3 Oh, the big topic now as we move kind of out
4 of the acute phase of the pandemic is backlog. And I know
5 you know that we have a backlog across the state, and we
6 are not unique in that, most states have one. But there
7 have -- the courts of appeals are pretty much caught up,
8 and some courts of appeals used the opportunity of the
9 pandemic to decrease an existing backlog that they had.
10 So they've done a great job.

11 The trial courts are more of a mixed bag,
12 and as you might expect, the 20 most -- the 20 counties
13 with the greatest amount of backlog kind of -- kind of
14 mirror the 20 most populous counties, although some
15 regions are doing better than others. And so -- and it
16 affects civil cases. I mean, the backlog is primarily on
17 the criminal side and, in particular, as you might expect,
18 criminal felony trials. But especially in places where
19 judges have general jurisdiction, you know, working
20 through a felony backlog means that civil cases can't get
21 reached and -- because those will take priority. And so
22 it's really important to all of us that we figure out a
23 plan for getting us back up to speed completely across the
24 state.

25 And to that end, Chief Justice Hecht and the

1 Office of Court Administration have asked for backlog
2 solution plans from the 20 counties that have the largest
3 backlogs, and they were due last week. OCA is reviewing
4 them now. Harris County is, you know, 21 percent of the
5 population, so it has the largest backlog, but they got
6 their plan in I think about two weeks ago. They were
7 ahead of the game there, and I know they're already taking
8 steps to try to implement it.

9 And we've also reached out to the National
10 Center for State Courts, which has been providing training
11 on backlog management and has even some contracts with
12 localities to help. And we have additional visiting judge
13 money, federal ARPA money it's called, to disburse in
14 response to the needs identified in the backlog plan. So
15 hopefully we're going to try -- through lots of good
16 management and farming out judicial assistance where it's
17 needed, we're going to try to catch up.

18 You also are probably aware, because it came
19 through this committee briefly last meeting, that the
20 Court accepted this committee's recommendation and
21 proposed changes to the appellate rules that clarify that
22 appellate counsel must identify in their briefing, not
23 only obviously themselves and trial counsel at the time of
24 final judgment, but any appellate counsel that's appeared
25 in the case and any trial counsel that's appeared in the

1 case.

2 And it's really important because that's the
3 way the courts of appeals and the Supreme Court identify
4 potential conflicts. And it's better to identify the
5 conflict on the front end then sort of as you're going
6 through the record and you see that someone has appeared
7 with some firm, and you had no idea. They may have been
8 there for a one-day hearing, but it could potentially
9 present disqualification or recusal issues, so we're
10 asking practitioners to follow the rules starting right
11 now. It's going to go into effect on August 1st. It's
12 available for public comment right now.

13 And we also finally -- and those who have
14 worked on rules or have been rules attorneys, and there
15 are a few of you on this committee, will be glad to hear
16 that we gave preliminary approval to the local rules
17 process. It's -- and this is something that this
18 committee has discussed off and on over the years, and --
19 and I think we've struck a good balance between sort of
20 making sure information about local rules is available to
21 any who practice in the court. So a local rule will not
22 be effective unless it is posted on an OCA website that's
23 going to warehouse and contain all local rules. But there
24 won't be this process where people have to go through lots
25 of layers to get their local rules approved by the Court

1 in advance of passage.

2 And as you might know, people were
3 implementing local rules anyway, whether they were
4 approved or not, and they were calling local rules
5 something other than local rules, like standing orders or
6 something like that, just to evade the process because
7 they weren't getting, you know, timely enough feedback
8 from the courts to -- to adopt these rules. So now we've
9 changed the rules to reflect that local rules cannot
10 conflict with other state or federal law or the Court's
11 statewide rules. But so long as they don't, and
12 there's -- and they're properly posted, they can become
13 effective.

14 Now you say, well, I'm a lawyer, and I am
15 seeing this terrible local rule, and it's onerous, and
16 it's ridiculous, and it violates the rules, and what do I
17 do? We have implemented a back-end process. So a lawyer
18 or anyone can notify the regional presiding judge of a
19 problem with a local rule in writing and then our court.
20 And we are going to try to handle it that way with the
21 idea that most local rules are helpful. It's a great way
22 for courts to experiment with piloting programs that maybe
23 are things that the whole judiciary will be interested in
24 at some point. And so long as there's no complaint about
25 the rule, we're not going to stand in the way of it, and

1 that there's transparency and people know about it.

2 And finally, we had an in-person new lawyer
3 swearing in ceremony, which is the first one we've had
4 since November 2019, so that was great. And we next
5 Tuesday are going to have the State Bar budget hearing.
6 And that's about all of our report for now.

7 CHAIRMAN BABCOCK: Great. Thank you,
8 Justice Bland.

9 I've got one announcement to make before we
10 start, two announcements. One, we're going to have to
11 revise the order of our topics today because of some
12 commitments that various people have. So we're going to
13 do the evidence rules first and then go to remote
14 proceedings. And, Professor Hoffman, while -- while I'm
15 making a second announcement, I wondered if maybe you
16 could get near a microphone. Either Levi has got one or
17 Richard has got one there next to him, and there's a seat
18 there. So that would be good.

19 And the announcement I wanted to make, for
20 those of you who don't know, I attended a function last
21 night where three of our members were honored. The person
22 sitting to my right, Justice Bland, was honored as the
23 appellate lawyer of the year. And she introduced Justice
24 Christopher, Chief Justice Christopher, who was also
25 awarded the appellate lawyer of the year.

1 HONORABLE PETER KELLY: Appellate judge.

2 CHAIRMAN BABCOCK: Appellate judge of the
3 year, sorry. And I didn't understand how that could
4 happen where you would have two, essentially the same
5 person, getting the award in the same year, but it was
6 explained that it was because we had to skip a year
7 because of COVID. So that's why Justice Christopher and
8 Justice Bland were both honored.

9 And the main event, the trial judge of the
10 year was our very own Judge Schaffer, sitting down at the
11 end of the table. And he -- he was honored at this dinner
12 last night as well, and it was terrific. And we know
13 we're the best in the state, but here it was, once again,
14 being recognized publicly.

15 And I'll say one final thing, and that is
16 that Jane introduced Judge Christopher. And if I ever
17 have to be introduced for anything --

18 MR. HARDIN: I agree with that.

19 CHAIRMAN BABCOCK: -- I want her to
20 introduce me. It was the best introduction I have ever
21 heard, and I learned things about Justice Christopher that
22 I did not know, and they may not have been true, but it
23 was terrific.

24 HONORABLE JANE BLAND: All true, a hundred
25 percent.

1 CHAIRMAN BABCOCK: What you said, so -- so
2 congrats to them.

3 So now, Lonny, that you're miked up,
4 Professor Hoffman will take us through one of these two
5 evidence rules, and please identify which one.

6 PROFESSOR HOFFMAN: Will do.

7 Okay. So we're talking about Texas Rule of
8 Evidence 503 and specifically (b)(1)(c), so 503(b)(1)(c).
9 This rule has come before the committee before in 2015,
10 and it came the same way that it has come to us now, which
11 is that the administration, the State Bar's Rules of
12 Evidence committee or AREC, A-R-E-C, has made an
13 recommendation for amending it. This committee voted 25
14 to 7 in favor of the changes that AREC proposed back in
15 2015. I don't have the back story for why sort of nothing
16 happened after that, but the rule has remained unchanged.
17 AREC has repropose almost the same changes, and I'll
18 highlight again the difference. The memo that I did tried
19 to concisely summarize it, and I'll just briefly talk
20 about it.

21 And so we again, as a subcommittee of the
22 Supreme Court Advisory Committee, we also again support
23 AREC's recommendation, though only in part, and I will
24 flag the difference.

25 So there are two changes. The first change

1 is identical to the change that AREC was recommending in
2 2015, which is to add, "or anticipated" to the rules. So
3 just to kind of translate that right now, the rule only
4 protects conversations among different folks when there is
5 pending litigation, and the proposal would be to add when
6 those conversations also cover anticipated actions.

7 That's the same change that AREC recommended
8 in 2015, it's the same change that our whole committee
9 voted 25 and 7 in favor of, and it's the same change that
10 the -- that our subcommittee, again, is recommending that
11 we support.

12 The other change that AREC is recommending
13 this time around, however, is also to add the word
14 "related," so it -- you can look in my memo on the first
15 page, and you can see it there highlighted in red and
16 underlined. They would add also the word "related" before
17 "pending or anticipated actions."

18 That is not a change that they recommended
19 in 2015, it is not a change that we support now, and the
20 memo talks about why, and there's essentially two points.
21 One of them is the word we think is not clear, and then
22 the second one, which I think is doing more significant
23 objection work, is that "related" adds an additional
24 requirement, thereby limiting the scope of this allied
25 interest privilege. That is to say, you now have to

1 demonstrate not only that there's a common interest in the
2 conversation, but that the proceedings pending or
3 anticipated are related to one another. And it was hard
4 for our committee to see what advantage, if any, there was
5 to adding that second requirement. It adds confusion,
6 and, among other things, it probably limits the scope of
7 the allied interest exception -- I'm sorry -- the allied
8 interest privilege, which is a strange thing to do given
9 that AREC was trying to expand it.

10 So we think that this may have simply been
11 an oversight or maybe not fully -- as fully thought
12 through on AREC's part. In any event, we don't support
13 it, and I would think as -- or perhaps a better way to say
14 this is more relevant than our opinion, Steve Goode shares
15 our views on that. So I'll leave it at that.

16 So that's mostly what I have to say. I do
17 have maybe one other comment that might -- may or may not
18 be productive. Certainly we can still talk about it if
19 any folks want to.

20 I will say for those of you who didn't
21 reread the 2015 transcript, no reason for you to have done
22 that, but those of you who didn't, there was a fairly long
23 discussion that we had about whether we should even have
24 the word "action" at all in the rules. So a suggestion
25 that -- I don't want to -- I'm not sure if it was a

1 suggestion that Richard Munzinger made, but it was a
2 comment that he raised, was can't we just leave it at if
3 parties and lawyers have a common interest that the allied
4 interest provision would apply. And all sorts of people,
5 including my dear friend Jim Perdue to my left, explained
6 one of the difficulties with that, which is if we do not
7 limit it to action in some way, you're allowing
8 conversations with lawyers of other businesses, other
9 companies, just so long as there's some common interest.
10 It could be a common business interest, it could be, you
11 know, common interest in baseball, I guess, could be an
12 interest in anything, and then we cloak those privileges.
13 No state in the country that we are aware of has ever
14 expanded the allied interest privilege so broadly.

15 I'll add that Frank Gilstrap, of classic
16 memory, also made the comment that if we were to attach
17 common interest from any kind of action requirement, he
18 made the observation that -- oh, again, sort of agreeing
19 with Jim, it would essentially have no limit at all as to
20 what it would cover and, again, far broader than any other
21 jurisdiction in the country.

22 So anyway, I'm happy to -- you know, people
23 can talk about it, whatever, but I thought I would flag
24 that kind of in advance. That is not on the table. We
25 talked briefly about it in our committee, but we're

1 unanimous in sharing the view that the allied interest
2 should be linked to a pending or anticipated action. AREC
3 has never considered that, Steve Goode has never
4 considered that a thing we should do. So I personally
5 hope this is a -- not a topic of conversation, but just in
6 case it is, I thought I would try to get the first words
7 in.

8 With that said, that's largely what I have,
9 Chip. I see Buddy, so I don't know whether Buddy wants to
10 weigh in or not, our fearless leader, on Zoom.

11 MR. LOW: One thing that I'll point out, the
12 Supreme Court in '22 in *Emerson vs. Wallace* held that the
13 words "related to" were slippery words. I consider these
14 related as like the same thing, that "arising from" and
15 "related" are both slippery words. I don't recommend -- I
16 follow Harvey's recommendation.

17 That's all.

18 CHAIRMAN BABCOCK: Okay, great. And just
19 for the sake of the record, Professor Hoffman, when you're
20 talking about AREC, you're talking about the State Bar's
21 Rules of Evidence committee?

22 PROFESSOR HOFFMAN: That's exactly right.

23 CHAIRMAN BABCOCK: Yeah. What's the A, is
24 it attorney?

25 PROFESSOR HOFFMAN: I think it's the

1 Administration of Rules of Evidence Committee.

2 CHAIRMAN BABCOCK: Okay. Administration of
3 Rules of Evidence --

4 PROFESSOR HOFFMAN: It could be the super
5 awesome Rules of Evidence committee.

6 CHAIRMAN BABCOCK: Could be that. Could be
7 that. Okay.

8 Robert, you've got your virtual hand raised.

9 MR. LEVY: Thank you. I'm sorry I couldn't
10 be there with you.

11 I did want to ask Professor Hoffman if the
12 language order was changed to say "pending," comma,
13 "related, or anticipated action," wouldn't that make it
14 clearer as to what was intended? Because as it looks now
15 without a comma and having "related" first, I think that
16 it might potentially be misinterpreted in terms of what
17 the intent was.

18 And the other issue about related, if the
19 word "related" is a concern, a word like "similar" could
20 be substituted. I do think, though, that it is helpful to
21 have the reference to related or something -- the same,
22 the same type of word. Because if you have different
23 proceedings with the same subject matter, the same issues,
24 and we often have situations where you have mass tort
25 cases, multiple cases that arise out of the same exact

1 issue, like super defense or something like that, just as
2 an example, and so you have a defense who's been working
3 together and they all might not be in the same case, so
4 having that controlling interest clearly apply I think
5 does serve the ends of justice and would be appropriate.

6 So those are my two questions or suggestions
7 regarding the rule.

8 PROFESSOR HOFFMAN: I guess, Robert, you're
9 right, that if we were to rewrite the proposal so it says
10 "pending," comma, "related," comma, "or anticipated," it
11 would avoid the overlap issue. But, I guess, from my
12 part, I would say I'm not clear what related means then or
13 how courts would define what related means separate from
14 common interest.

15 So, again, we have to -- the rule itself
16 requires that the communication has to concern a matter of
17 common interest. So if it already concerns a matter of
18 common interest, what work is "related" doing, and what is
19 this universe that an action could be somehow related and
20 also --

21 MR. LEVY: I think that the issue there is
22 you might have a defendant in case A, a separate defendant
23 in case B, and they want to coordinate together because
24 the issues are exactly the same, they just don't happen to
25 be parties in the same action. And so then the argument

1 would be that the joint interest privilege would not apply
2 because they are not in the same case.

3 PROFESSOR HOFFMAN: Right, but -- sorry.
4 But, Robert, so --

5 MR. LEVY: And the word "related to" would
6 resolve that.

7 PROFESSOR HOFFMAN: So I may not -- I just
8 may not be understanding then what you're saying. But no
9 matter what, there has to be a common interest. Again,
10 the rule says the communication concerns a matter of
11 common interest. So the idea behind pending -- adding
12 "anticipated" is that this is covering everything. It's
13 covering either a pending case or an anticipated case.

14 What's the third category of a related
15 action if it isn't already either pending or anticipated?

16 MR. LEVY: So the issue there is you might
17 have the joint interest parties, could be plaintiff, could
18 be defendant, they're not -- they're not joint in the same
19 case, they are joint in the same issue. But just because
20 of the nature of the way the cases are brought, they might
21 be defendants in separate -- completely separate cases,
22 but yet the interests are the same, and that's where the
23 argument is the joint defense or common interest privilege
24 should apply.

25 But if they're in separate cases, then I

1 think that argument, that defense, could be challenged
2 because of the way the rule is described. It says a case,
3 and if the other defendant is in a separate case, the
4 argument would be it's not applicable. But it should be
5 because the issues are the same and the interests are the
6 same. They just don't happen to be parties in one case
7 together.

8 PROFESSOR HOFFMAN: And, again, my only
9 follow-up, then I guess I'll turn it over to others, is
10 I'm just not following what you're saying, Robert.

11 The -- if we have two cases, and they're
12 both pending, and there's a matter of common interest,
13 then the allied interest privilege applies, period. They
14 don't -- it doesn't need another word.

15 MR. LEVY: If the word says "case" or
16 "action," I could see an argument that that applies to one
17 case, not two, and, therefore, the interest shouldn't
18 apply.

19 Now, if we -- we said "actions," that might
20 solve the problem because it -- just to make clear that
21 they don't have to be parties to the same proceeding for
22 the interest to apply.

23 PROFESSOR HOFFMAN: Okay. So just maybe for
24 everyone's benefit -- I think maybe -- tell me if I'm
25 saying this right, Robert.

1 You might be more comfortable if the
2 proposal was "in pending or anticipated actions."

3 MR. LEVY: Right.

4 PROFESSOR HOFFMAN: Then, if that were the
5 case, you wouldn't need the word "related," you just --
6 plural is enough.

7 MR. LEVY: I think that's right.

8 CHAIRMAN BABCOCK: Okay. All right.
9 Kennon.

10 MS. WOOTEN: This is more of a question, and
11 it pertains --

12 CHAIRMAN BABCOCK: Speak up, Kennon.

13 MS. WOOTEN: This is a question, and it
14 pertains to the word "anticipated" in the proposed rule.

15 In the definition of work product in the
16 Texas Rules of Civil Procedure, there is, of course, a
17 reference to anticipated litigation with a lot of case law
18 that's been developed to construe when litigation is or is
19 not anticipated. So one of the questions I have when
20 reading this proposal is whether the intent is to sort of
21 encompass that analysis that exists for work product
22 assessment or whether that just hasn't been discussed yet.

23 PROFESSOR HOFFMAN: So a very good question.

24 We did talk about it, and I think -- there
25 are others on the subcommittee that can weigh in. I think

1 it is correct to say that the sense of our group is that
2 we did imagine courts would look to the work product
3 doctrine to -- you know, 192.5 to think about what advice
4 to tease out what anticipated means. In our report, we do
5 say that we -- the Court may want to consider adding a
6 note, an advisory note to 503, saying that we expect
7 existing work product law should guide courts. We are not
8 recommending that in our text we recommended. We are just
9 simply making the observation that may be something the
10 Court wants to consider. So I do think Kennon is flagging
11 a nice point.

12 CHAIRMAN BABCOCK: Okay. Kennon, flag
13 something else.

14 MS. WOOTEN: Now I'll make a comment, and
15 that is that I think this is a needed change to our rules.
16 I have encountered so many situations in which people
17 don't understand that the rule in Texas is different from
18 the rule in many other jurisdictions. And by the time I
19 get involved with the case, often as local counsel, there
20 have been lots of conversations that they think are
21 protected, which are not, in fact, protected.

22 Oftentimes I see kind of allied litigant,
23 not even reference to that common interest, agreements
24 being crafted that will have no ability to protect
25 conversations in light of the existing rule on the books

1 and the way it's been construed by the Supreme Court of
2 Texas. So this is an area where I've seen it happen time
3 and time again, where very good, experienced lawyers fall
4 into -- I will call it a trap of thinking their
5 communications are protected when they're not, in fact,
6 protected.

7 So I am a huge proponent of changing the
8 rule as modified by the subcommittee of the Supreme Court
9 Advisory Committee.

10 CHAIRMAN BABCOCK: Okay. Any other comments
11 in the room? Yeah. Justice Kelly.

12 HONORABLE PETER KELLY: Sort of the Scylla
13 to Kennon's Charybdis is the -- if we liberalize it too
14 much, and if we were -- I think we're conscious of taking
15 the expansion of the rule too far, you start -- and I
16 remember the discovery days, Mr. Perdue might remember it
17 as well, when insurance companies, just by having the
18 lawyer conduct the investigation would claim something was
19 privileged. So by rinsing it through a lawyer, all of the
20 sudden it's a privileged communication, even though the
21 lawyer was just doing a routine factual investigation.

22 And so I think one of the fears of pushing
23 it too far and liberalizing it too far, which is why this
24 rule is sort of crafted very narrowly, is you could have
25 things -- two companies talking about a combination

1 restraint to trade. Somebody says, "Well, that's going to
2 get us sued." Well, now you're anticipating litigation.
3 Is it now privileged under this rule?

4 And I think that the rule is crafted finely
5 enough that that's not, and I think it should be made
6 clear that this is not -- the rule is not an expansion or
7 in any way a dilution of the ability of plaintiffs and
8 parties to get access to other communications that might
9 otherwise be illegal.

10 CHAIRMAN BABCOCK: Any comments offline?
11 Shiva, you got anybody with their hand raised? No hands
12 raised offline. Jim.

13 MR. PERDUE: Lonny, is the language of --

14 CHAIRMAN BABCOCK: Jim, speak up or speak
15 into that mic.

16 MR. PERDUE: Well, I may actually -- there
17 is no comparable rule in the federal rules, right?

18 PROFESSOR HOFFMAN: I think the answer is
19 no. No, there's common law.

20 MR. PERDUE: Right. They don't have
21 privilege rules in the federal rules. Okay.

22 CHAIRMAN BABCOCK: Any other comments?

23 HONORABLE HARVEY BROWN: If I could just say
24 one thing.

25 I am also in favor of having a comment that

1 defines anticipated so we don't have to have fights for
2 the next decade over what that means. So I think that
3 would be very helpful and could be very short.

4 MR. PERDUE: Because comments always prevent
5 fights.

6 HONORABLE HARVEY BROWN: Narrow the fights
7 at least. Hopefully.

8 CHAIRMAN BABCOCK: Sometimes they don't
9 prevent fights. Well, Harvey, do you have a comment in
10 mind?

11 HONORABLE HARVEY BROWN: No. I mean, it's a
12 pretty straightforward rule.

13 CHAIRMAN BABCOCK: You want Jackie to do a
14 comment? You want to assign her to do a comment?

15 HONORABLE HARVEY BROWN: That would be fine.

16 CHAIRMAN BABCOCK: All right. So if there's
17 nothing else, I think maybe we take a vote on not
18 accepting the "related" language, in other words, not
19 adding that term, but adding "or anticipated" and making
20 action, "actions," plural.

21 Lonny, is that where we are?

22 PROFESSOR HOFFMAN: Well, yeah. So the
23 turning action into plural is Robert's suggestion. The
24 committee hasn't --

25 CHAIRMAN BABCOCK: Oh, I thought you nodded

1 your head and said, yeah, that we could do that.

2 PROFESSOR HOFFMAN: I mean, I understand
3 Robert's point. But, I mean, again, that wasn't part of
4 our discussion.

5 Let me just add, I mean, it's totally clear
6 from the prior cases that multiple pending actions are
7 encompassed by this rule. I don't disagree that Robert is
8 raising a nice point that making it plural makes it a
9 little clearer, but it's not anything AREC talked about,
10 it's not anything we considered, and there hasn't been a
11 confusion in the case law at this point. So --

12 CHAIRMAN BABCOCK: Okay. Are you a plural
13 guy or a singular guy?

14 PROFESSOR HOFFMAN: I'm going to stay
15 singular now.

16 CHAIRMAN BABCOCK: You're a singular guy.
17 Okay. So let's vote on plural versus singular.

18 Since the subcommittee recommended singular,
19 that is just having the word "action" as opposed to
20 "actions" plural, everybody in favor of "action" singular,
21 raise your hand.

22 What's the count on the --

23 MS. ZAMEN: Six.

24 CHAIRMAN BABCOCK: Six in favor. Okay.

25 And everybody against raise your hand.

1 MR. STOLLEY: You mean for plural?

2 CHAIRMAN BABCOCK: No, no, no, no, no.

3 We're talking about action plural, "actions." Everybody
4 in favor of that, raise your hand.

5 So singular wins by 21 to 9.

6 And interestingly enough, Lonny, the
7 outlying virtual counties split six, six, so you carried
8 the day in person, but not virtually, which was a tie.

9 Okay. With that clarified, how about the
10 rule as proposed by the subcommittee, which would not
11 include "related," but would include "or anticipated
12 action," singular. Everybody in favor of that, raise your
13 hand.

14 And everybody opposed?

15 All right. So 21 to 1 that passes, so thank
16 you. John.

17 MR. WARREN: I have a question. So how does
18 this rule apply in a class -- in class action litigation?
19 Take the Delta plane that crashed in Dallas sometime ago.
20 You have lots of litigation. So how would this apply to
21 that?

22 PROFESSOR HOFFMAN: The rule doesn't
23 distinguish between direct and class action.

24 MR. WARREN: But should it?

25 PROFESSOR HOFFMAN: I don't think so. But

1 again, the way the rule is drafted, it's any action,
2 however conceived of that aspect. It could be a
3 representative action, it could be a direct action.

4 MR. WARREN: Even though you may have 20
5 different plaintiffs or 40 different plaintiffs?

6 PROFESSOR HOFFMAN: Or 40 different
7 defendants.

8 CHAIRMAN BABCOCK: Okay. Great. Thanks,
9 Professor Hoffman.

10 So now we will go to the next evidence rule,
11 803(16), which I believe Harvey is going to lead us
12 through, right?

13 HONORABLE HARVEY BROWN: Yes.

14 803(16) is the ancient documents hearsay
15 exception. It is rarely used, but when it is used, it can
16 be of great importance. It's been used in a lot of
17 litigation over old insurance policies, deeds, et cetera.

18 It has undergone a change in the federal
19 rules back in 2017, a fairly dramatic change. Let me give
20 you a little history because I think that history will
21 help you with the reasons for the rule.

22 So one of the foremost evidence commentators
23 in the country, a man named Daniel Capra, wrote a law
24 review article saying that he thought that the ancient
25 documents exception was now going to create havoc in

1 courts because of the advent of the internet. Because of
2 the internet, we now have blogs, we have all kinds of
3 postings on Facebook, et cetera, that began around 1998
4 and, therefore, would fall under the ancient records
5 exception. In other words, these documents would now be
6 ancient -- would be ancient documents and, therefore,
7 arguably admissible in court.

8 And he gave examples of, for example, events
9 involving elections, involving political candidates, et
10 cetera, that all of these things now somebody could offer
11 as an ancient document, and the ancient document exception
12 on its face says nothing about personal knowledge being
13 required. So they thought this was going to allow a whole
14 bunch of documents to possibly be admitted, and so they
15 suggested initially the complete elimination of the rule.
16 They said we're in an electronic age, we don't really need
17 this anymore. And to the extent that we do need it, it
18 can be taken up by two different rules. If you have an
19 ancient document in a lot of litigation, it's going to be
20 a business record ancient document, so that will do the
21 work we need. And if it doesn't come under the ancient --
22 under the business record exception, it will come under
23 the residual hearsay rule, 807.

24 So there was a long debate about whether to
25 eliminate it completely, and the committee -- the federal

1 evidence committee first did suggest that, and then there
2 was a strong backlash against that with over 200 comments
3 received saying, no, that goes way too far, we really do
4 need this rule in some litigation where people have very,
5 very old records, and people have died, and it's the only
6 way to prove things up, is through these documents.

7 So they went back and looked at it again,
8 and instead what they decided was what you see on the
9 first page of the memo in Tab E, the rule in the federal
10 rule, which AREC has recommended to us. And it says
11 statements in ancient documents -- "A statement in a
12 document that was prepared prior to January 1, 1998, and
13 whose authenticity is established."

14 Why 1998? Why does it have to be prepared
15 before 1998? Well, 1998 was when Google started, and so
16 they thought that was the right cutoff date. They
17 admitted it's a little arbitrary, but they thought that
18 things older than that, there's still a good chance that
19 there may be handwritten notes, et cetera. But things
20 after 1998, they thought most of that is going to be
21 electronic anyway, and they did not want this problem of
22 blogs and et cetera coming into evidence in courts.

23 So that's the rule that they've suggested.
24 We agree with that rule, we unanimously agreed with that
25 rule, and would suggest that we adopt it.

1 If you'll turn to page 10 of that memo,
2 you'll see we have three other recommendations, or maybe I
3 should say we have two and one other to discuss.

4 One of the motivating factors when you read
5 the debate and when you read the comments for this rule is
6 we can narrow the ancient documents exception because of
7 the two hearsay exceptions that I just talked about, the
8 business records exception and the residual hearsay
9 exception. But Texas doesn't have the residual hearsay
10 exception, so what do we do about that? And this
11 committee back in 2015, after AREC came to us and
12 recommended 807, and Professor Goode recommended it, this
13 committee voted in favor of recommending it, and the Court
14 has not adopted it. We don't know why, but we know the
15 Court hasn't.

16 So our committee has thought that if we're
17 going to adopt the ancient documents new rule, we should
18 adopt the residual hearsay rule, which is part of the
19 foundation for it. So we're recommending that.

20 Normally our committee does not make the
21 recommendation without it first going through AREC. So I
22 called Professor Goode to talk to him about it, and he
23 said he did not really know why it wasn't adopted. He's
24 still strongly in favor of it. He says the federal courts
25 have not had any problems with it in the last five years,

1 and, in fact, the rule's actually been simplified a little
2 bit a couple of years ago so that it's now a two-prong
3 test rather than four-prong test. But courts continue to
4 say it is an exception to be used sparingly, is the word
5 the courts have used.

6 So we recommend that -- kind of in a tandem
7 that the Court adopt both 803(16) and 807. But because
8 the Court did not adopt 807 in the past, we considered
9 could we allow the rule to come into play with the ancient
10 documents exception as now written and craft 807 into the
11 ancient documents exception itself. In other words, if
12 they don't want 807 for all documents, but they just want
13 it for ancient documents because of this rationale.

14 And so we lifted the language from the --
15 Federal Rule 807, and this is on page 10 again, the third
16 recommendation. And it says, if the Court does not adopt
17 807, put in 807's language verbatim into the rule. So
18 that's what we've done, we've put it verbatim into the
19 rule. So that is subpart (b).

20 So (a) is what is AREC, and federal rule (b)
21 is the part that we've added. Nobody else has done it, so
22 it would make us unique, but we're also -- I don't know if
23 we're totally unique, but we're certainly the minority in
24 not having a residual hearsay rule.

25 So those are the three recommendations we've

1 made. The first two were unanimous. The third one was
2 not unanimous. It was a four to two vote, and some people
3 felt like that rule -- that tweak or addition made it
4 overly complicated. It certainly makes it a lot longer,
5 and some -- well, Lonny was one of the opponents, so I'll
6 just let Lonny speak for himself as to why he thought that
7 that was an unnecessary addition to the rule.

8 CHAIRMAN BABCOCK: Yeah.

9 PROFESSOR HOFFMAN: You want me to do it
10 now?

11 CHAIRMAN BABCOCK: Yeah, Professor Hoffman,
12 now. Are you one of the dissenters on that four-two vote?

13 PROFESSOR HOFFMAN: Yeah, I just -- you can
14 look at the language, but, I mean, it's a -- it's a bear
15 to add all of that italicized language. This is an awful
16 lot of additional language to add for a problem that we're
17 not likely to ever really see in a meaningful way.

18 I mean, again, business records -- this is
19 just an exception to the hearsay rule. There are other
20 exceptions to the hearsay rule that work just fine most of
21 the time, the business records exception being the largest
22 of those.

23 And then finally, I agree with Harvey
24 that -- that we probably should have an 807 that applies
25 for everything, and so it is a strange thing to add a

1 residual exception just for ancient records, one of the
2 most rarely seen and rarely needed provisions, and then
3 just abandon it for everything else.

4 So instead, I'd rather keep pressure on the
5 Court to do what I think our whole committee does think it
6 ought to do, which is adopt a residual hearsay exception
7 like 807. So anyway, that's about it.

8 CHAIRMAN BABCOCK: Yeah. Makes a lot of
9 sense, Professor Hoffman. And, Buddy, if you have a
10 comment. But mine is if you're defining people or
11 anything prior to 1998 as ancient, then I guess everybody
12 on this committee is.

13 Richard, did you have a comment?

14 Richard? No? Okay.

15 Judge Miskel has a comment? Judge?

16 HONORABLE EMILY MISKEL: I was just putting
17 my hand up because I did have something to add when we get
18 to the discussion part about this. Is that -- are we at
19 the discussion part yet?

20 CHAIRMAN BABCOCK: We're wherever you want
21 to be, but I would say, yes, we're into the discussion
22 part.

23 HONORABLE EMILY MISKEL: Okay. This is an
24 issue that's very important to me because I have
25 researched and written and published a lot about

1 electronic evidence under both Texas law and federal law.
2 And Texas substantive law on electronic evidence, ESI, is
3 not 100 percent overlapped the same with federal law, so
4 it's -- right now, our Texas substantive law on this issue
5 is that we do not have separate Rules of Evidence for ESI,
6 and we do not treat ESI as presumptively more unreliable
7 than traditional documents. That approach is literally
8 referred to as the Texas approach. So if you read
9 articles about this area, they refer to that as the Texas
10 approach because that is named after our system.

11 So my concern is the report doesn't identify
12 any problems with the current 803(16). In fact, the
13 author says, like, nobody has identified any widespread
14 problems. So the reason this change is coming to our
15 committee is just to have conformity with the Federal
16 Rules of Evidence, but federal substantive law on ESI is
17 not the same as Texas substantive law on ESI.

18 So my concern is that by expressly codifying
19 this one rule that treats ESI differently from other
20 Texas -- or traditional documents, that that's going to
21 have unintended consequences and ripple effects because
22 you're putting in writing here's one way we treat ESI
23 different from additional documents, but the rest of our
24 Texas law is we do not treat ESI different from
25 traditional documents.

1 And so I want to make everyone aware that
2 this could be a change to our substantive law, it's not
3 just a mere cleanup of language to match federal
4 because -- because this is actually just a difference
5 between Texas and federal law.

6 So I just wanted to bring that up, that I
7 have concerns about putting in writing that we treat ESI
8 as some kind of presumptively more unreliable than
9 traditional documents. Because if you read our Texas case
10 law from the Texas Court of Criminal Appeals, from the
11 Texas Supreme Court, that's not what our substantive law
12 is right now.

13 CHAIRMAN BABCOCK: Judge, before you put
14 your hand down -- well, put your hand down. Do you have
15 any insight or thoughts about why 807 was -- was not
16 accepted or, alternatively, why a Rule 807 would depart
17 from -- either depart or be the same as federal law?

18 That's for you, Judge Miskel, but you'll
19 have to take yourself off --

20 HONORABLE EMILY MISKEL: I didn't realize
21 that question was for me. So can you repeat it, please?

22 CHAIRMAN BABCOCK: Yeah. Two parts, a
23 compound question, objectionable, of course.

24 But the first part is any insight as to why
25 we didn't accept -- why the Supreme Court did not accept

1 807 when it was proposed by this committee? And, number
2 two, whether doing so now would run afoul of the same sort
3 of criticism that you're making about the ancient document
4 exception?

5 HONORABLE EMILY MISKEL: So I don't know
6 about 807, but I don't share the same concern about 807,
7 because it doesn't codify an express difference in
8 reliability between ESI and traditional documents.

9 CHAIRMAN BABCOCK: Fair enough, but --
10 Harvey.

11 HONORABLE HARVEY BROWN: Just to be clear,
12 the amendment that is proposed by AREC and that we're
13 suggesting, and it's in the federal rule, does not on its
14 face talk anything about ESI. It doesn't create a new
15 definition, it doesn't substantively change anything about
16 ESI on its face.

17 What I was talking about ESI is the
18 rationale, the reasoning for the rule. So I -- I may be
19 missing something, but I don't think it's going to have
20 the substantive change of --

21 HONORABLE EMILY MISKEL: But the whole
22 reason that you're making this change is because people
23 are uncomfortable that e-mails from 2001 might be offered
24 into evidence under this ancient document hearsay
25 exception.

1 HONORABLE HARVEY BROWN: Well, sort of.
2 It's really not e-mails, it's they're very concerned about
3 blogs, postings, et cetera, and they think those should
4 not come in. The authors who wrote this and studied it
5 did admit this has not come up in any reported case that
6 they can find yet, but they thought it was a huge
7 potential problem. They, you know, had the statistics on
8 how many articles have been posted on the internet,
9 millions and millions, more since 1998 than have ever been
10 written in history combined, and so they thought they
11 should not wait for this problem to present itself and
12 harm people in litigation when it was a potentially big
13 problem.

14 HONORABLE EMILY MISKEL: And that's a
15 substantive change to Texas law because right now Texas
16 law does not treat blog posts and social media posts as
17 inherently or presumptively more unreliable than faxes or
18 books or whatever it might be. So if we're all discussing
19 this, because we are uncomfortable with treating a blog
20 post from 2001 as an ancient document, we are all agreeing
21 that we want to treat ESI as more inherently unreliable
22 than a paper document from that era. And I'm just
23 pointing out that that is a substantive change to current
24 Texas law.

25 CHAIRMAN BABCOCK: Yeah, it sounds like you

1 wouldn't have to scratch very deeply beneath the surface
2 to know that when the federal rules committee talks about
3 Google that they may be talking about ESI.

4 HONORABLE HARVEY BROWN: Oh, absolutely.
5 It's in their comments.

6 CHAIRMAN BABCOCK: Yes. And '98 is sort of
7 the demarcation for ESI, so -- okay. Any other comments?

8 HONORABLE HARVEY BROWN: I just wanted to
9 point out that the business record exception can't do all
10 the work for ancient documents because the business
11 records exception requires proof of six factors, one of
12 which is personal knowledge, and the ancient documents
13 exception expressly does not include a personal knowledge
14 requirement. In fact, a number of courts have said that's
15 not required.

16 In the federal rule, the fact that it's --
17 it was written over 20 years ago, presumably at a time
18 that there's no litigation incentives, is itself
19 considered enough evidence of reliability that you do not
20 have to independently prove personal knowledge and any of
21 the requirements of 803(6). So 803(6) will not fix the
22 problem completely if you don't have an 807 and you adopt
23 the federal rule that's now in the federal rules.

24 CHAIRMAN BABCOCK: Yeah, okay. Any other
25 comments in the room here? Yes, Robert.

1 MR. LEVY: Chip, this is Robert.

2 I think this is not a wise move. One of the
3 issues is that, with the record, the first thing you have
4 to do is prove it up under Rule 901. 901(8) specifically
5 talks about the same issue, the evidence about ancient
6 document statute, you have to demonstrate that it's in a
7 condition that creates no suspicion about its
8 authenticity. It's in a place where, if authentic, it
9 would likely to be found and is at least 20 years old. So
10 not only would we have to potentially change that rule as
11 well, but that rule I think solves the problem that the
12 committee was referencing from the federal court
13 perspective, that if there is a question about
14 authenticity, you can challenge it, based upon Rule 901 in
15 terms of its -- you know, just that it's proven up, and
16 then, you know, getting to the question of hearsay, it --
17 you know, the question there is if a blog says what a blog
18 says, it -- you know, it's a statement. And whether it
19 was stated verbally or stated in a written fashion, I
20 think that's going to be to the weight of the evidence.

21 And we're making a very risky move by
22 picking an arbitrary date because we're going to end up
23 excluding records that can't be proven up in any other
24 fashion. It might be a contract that's not clearly a
25 business record, and you don't have somebody to prove it

1 up, or other records that -- that's the reason why we have
2 the ancient records doctrine exception to hearsay. And I
3 think setting a date now, that 40 years from now we're
4 going to have evidence that can't be admitted because it
5 can't be proven up by any other means.

6 CHAIRMAN BABCOCK: Thanks, Robert.

7 Okay, Scott, and then Justice Kelly, and
8 then Tom Gray. There he is, back with his beard.

9 MR. STOLLEY: I'm going to move here closer
10 to the microphone.

11 I'd like to hear what the trial lawyers
12 think, but as an appellate lawyer, I have a concern about
13 this wholesale adoption of 807. It seems to me it has the
14 potential to swallow everything with respect to hearsay.
15 And the standard of review is abuse of discretion. And I
16 can tell you, as an appellate lawyer, it's very hard to
17 reverse a trial judge's evidentiary decision under the
18 abuse of discretion standard. So you've got to think
19 about what are we opening up if we have this residual Rule
20 807 in these rules.

21 CHAIRMAN BABCOCK: Thanks, Scott.

22 Justice Kelly.

23 HONORABLE PETER KELLY: My comment was just
24 in Mr. Levy's comment about, yes, it's an arbitrary date,
25 1998. We tried to work in Eliza Bean plus 21 years, but

1 that didn't quite -- nothing like the rule against
2 perpetuities go.

3 But the technology is changing so quickly.
4 I mean, it used to be in 1998, a company would have a
5 server, and someone would testify this came off of our
6 server. But now you go to a company, and they have --
7 they store everything on the cloud, and there's a third
8 party and fourth party and fifth party technological
9 storage issues.

10 So to address the earlier comment, yes, it
11 is inherently more unreliable because we're not talking
12 about something physical. It used to be ancient documents
13 were stuck in somebody's vault or in a file room at a law
14 firm, but now it's like we have no idea where it actually
15 was. And actually tracing it and proving it up, you know,
16 the fourth custody in the cloud is going to be very
17 difficult sometimes, so we do have to acknowledge that.
18 So I think it's wise to change the rule to put us
19 slightly -- to get rid of the presumption that an ancient
20 document is authentic.

21 CHAIRMAN BABCOCK: Okay. Justice Gray, and
22 then Lamont.

23 HONORABLE TOM GRAY: I apologize, I could
24 not hear most of that last comment, but I wanted to add on
25 to Judge Miskel's concern and comments that -- about the

1 difference in state and federal.

2 Specifically, my recollection -- and it's
3 been a long time since I've shown up in a federal court,
4 but that a federal trial judge can comment upon the weight
5 of the evidence when he gives the charge, he or she gives
6 the charge. And so the federal evidentiary system has a
7 protection against questionable evidence that the state of
8 Texas simply does not have.

9 As an -- just for clarification, I would
10 like to ask Lonny if my understanding is correct that, as
11 modified, if I printed Doogie Howser's diary at the time
12 that the series was popular, it would be admissible, that
13 print. But if I went to it today and printed it, it would
14 not be admissible, and if that's correct.

15 And just -- you know, the other thing that I
16 wanted to say was that to the extent that Professor Capra
17 thinks there was or is a problem in the federal system,
18 maybe that's where it needs to stay. Because we are more
19 likely to use this rule, I believe, anecdotally in Texas
20 with regard to land title disputes and other things that
21 are unique to Texas property law that we need this rule
22 the way it is and doesn't need to be tinkered with.

23 CHAIRMAN BABCOCK: Lamont.

24 MR. JEFFERSON: Yeah, I -- I'm not smart
25 enough to figure out all of the ramifications of the --

1 I'm not sure about all of the applications of the ancient
2 documents rule exception to the hearsay rule, but this
3 change makes sense to me, that the current rule says 20
4 years old, we're in a different era. We can't just ignore
5 that we're in an electronic era now, and so the change
6 from 20 years to the 1998 date, which in some respects is
7 a bit arbitrary, but it has logic behind it, advances the
8 ball.

9 And then all this is is an exception to the
10 hearsay rule. It has nothing about admissibility. So
11 that -- I think if we just define it as something that
12 makes sense in today's age, we've accomplished -- we've
13 done better.

14 On the Rule 807 situation, I would vote
15 against that. I don't think -- I just don't think it's
16 necessary. I think judges have enough discretion now and
17 enough judgment to decide whether evidence ought to get in
18 based on the other hearsay rules. So that seems like an
19 all-encompassing kind of change. I agree with Scott on
20 that.

21 CHAIRMAN BABCOCK: Great.

22 Harvey.

23 HONORABLE HARVEY BROWN: Two things. One on
24 the 807.

25 Judges who feel constrained to follow the

1 plain language of the rules sometimes will say things
2 like, "Tell me the rule number, show me where." I had a
3 case where I told the lawyer, when I was a trial judge, if
4 807 was here, it would come in, but there is no 807.
5 You've got to help me find a way to get it in under the
6 rules. I don't think it works, and I didn't admit it. So
7 I do think there's a reason to have 807.

8 I will point out that when I first read this
9 stuff I thought that Professor Capra didn't place enough
10 weight on Rule 403 for the problem that he was addressing.
11 I would think that Facebook posts, blogs, et cetera, et
12 cetera, could easily be kept out under Rule 403, and that
13 it was therefore unnecessary to narrow the ancient
14 documents exception. And that was the way I kind of
15 leaned, and then I thought that the arguments were strong
16 enough, though, that putting it into a rule where it gave
17 a little more predictability were good and, of course,
18 having uniformity with the federal rules is something we
19 generally strive for. But I think it's a close call.

20 CHAIRMAN BABCOCK: Okay. Thank you.

21 Professor Carlson, you just popped up on our
22 screen. And it looks like you're here, but you must be
23 hiding in your office. And, of course, you forgot to take
24 yourself off mute.

25 PROFESSOR CARLSON: All right. For people

1 who are watching remotely, if you unmute your -- actually
2 if you disable your microphone, you'll have clearer
3 reception, because we're having a little bit of an echo,
4 Chip.

5 CHAIRMAN BABCOCK: Yeah. What do you think
6 about 807?

7 PROFESSOR CARLSON: I think it's great. I'm
8 for it.

9 CHAIRMAN BABCOCK: There we go. Straight
10 from the library of South Texas College, School of Law.

11 Any other comments? Any -- anybody virtual,
12 any virtual comments? Anybody got their hand up, Shiva?

13 Okay. Let's -- let's vote, and let's vote
14 on the first recommendation, which was unanimous by the
15 subcommittee -- oh, yeah. Professor Carlson, you've got
16 your hand up now?

17 PROFESSOR CARLSON: Sorry, Chip. It went up
18 inadvertently.

19 CHAIRMAN BABCOCK: Ah, an inadvertent hand.
20 Everybody in favor of the subcommittee's
21 recommendation that 803(16) be amended in conformity with
22 the federal rules.

23 PROFESSOR HOFFMAN: Sorry. Just to be sure
24 I'm clear, you're saying who's voting in favor of the
25 January 1, 1998, date? We're not talking about the

1 additional italicized language yet?

2 CHAIRMAN BABCOCK: We're not talking -- yes,
3 that's correct, we're not talking about the additional
4 language, just the '98 date. Everybody in favor of that,
5 raise your hand.

6 All right. Everybody opposed?

7 All right. Well, the virtual -- the virtual
8 counties have defeated the rural by 17 to 13. 13 in
9 favor, 17 against. So there.

10 Let's go to the --

11 HONORABLE HARVEY BROWN: Chip?

12 CHAIRMAN BABCOCK: Yes.

13 HONORABLE HARVEY BROWN: On 807, we
14 recommend that to kind of address the 803(16), so I would
15 suggest we pass on that for today. Because typically we
16 do let AREC come in with its formal proposal on that, and
17 they are studying it themselves. So I think it would be
18 appropriate for our committee to withdraw that portion of
19 its recommendation.

20 CHAIRMAN BABCOCK: Okay. So you're afraid
21 807 is going to go down in flames here.

22 HONORABLE HARVEY BROWN: No, I'm happy to
23 vote on it. The Court didn't like it before, so I'm
24 guessing it won't like it now.

25 CHAIRMAN BABCOCK: No, that's fine. We can

1 defer 807 until AREC has given us their thoughts on it.

2 That's fine.

3 And I assume that since the 1998 date
4 amendment to the rule failed --

5 HONORABLE HARVEY BROWN: That it's
6 unnecessary to look at the other part.

7 CHAIRMAN BABCOCK: Unnecessary to look at
8 the other one, right.

9 HONORABLE HARVEY BROWN: Right.

10 CHAIRMAN BABCOCK: Anybody disagree with
11 that? Okay.

12 HONORABLE HARVEY BROWN: And by the way, we
13 had a comment that is in the federal rule that I
14 suggested, our committee never got to it, but if we don't
15 adopt the rule, we don't need a comment obviously. But
16 it's in the memo in case the Court wants it.

17 CHAIRMAN BABCOCK: Okay. Great. Jackie
18 appreciates it very much.

19 All right. So we're done with that one.

20 Pam Baron has got her hand up. Pam? But if
21 you're talking, we can't hear you, so you must be on mute.

22 MS. BARON: Yeah, sorry. I couldn't find
23 the button.

24 So you're ready for us?

25 CHAIRMAN BABCOCK: Well, depends on who us

1 is. If you're talking about the TRAP rule --

2 MS. BARON: Yes. Yes. We're ready.

3 CHAIRMAN BABCOCK: -- we're not ready for
4 you unless you want to go out of order.

5 MS. BARON: No, I'm good. I'm good. We're
6 moving to Tab G of your materials. The most recent
7 referral letter from the Court asked our subcommittee to
8 review and make recommendations on a proposal from the
9 State Bar Court Rules Committee that addresses TRAP Rule
10 39.7. TRAP 39 addresses oral argument in the court of
11 appeals. 39.7 in particular relates to request and waiver
12 of oral argument.

13 And the current rule provides that if you
14 fail to put the words on the cover of your brief "oral
15 argument requested," you waived oral argument, even if the
16 court later decides on its own motion or on the basis of a
17 request from another party, that it will hear oral
18 argument in the case. The court rules committee has
19 proposed changing that so that failure to request does not
20 waive the right to participate in oral argument, and all
21 parties filing a brief can participate if the Court
22 determines that it wants to hear oral argument in the
23 case. And our subcommittee unanimously thinks that's a
24 good idea, and we liked actually the language that the
25 court rules committee had proposed.

1 As you'll see in the court rules
2 subcommittee, the court rules committee, they have looked
3 at all of the various internal operating procedures of the
4 courts of appeals, and they diverged pretty substantially.
5 Five of them -- five courts of appeals provide that even
6 if you don't request oral argument on the cover of the
7 brief, and the court sets the case for argument, if you
8 file a brief, you are entitled to participate. Six are
9 silent in their internal operating procedures on what
10 happens in that situation, and three specifically require
11 a motion. And the motion -- you know, most motions are --
12 the courts require a 10-day advance filing, and the court
13 rules committee memo cites instances in which the court
14 has denied the opportunity to participate in oral argument
15 by parties who filed a motion because they did not put
16 those particular words on the cover of their brief.

17 We think our subcommittee agrees that the
18 rules should be consistent and that parties who file a
19 brief do have a right to be heard, even if they don't put
20 the magic words on the cover of the brief.

21 CHAIRMAN BABCOCK: Great. Thank you.

22 MS. BARON: So I open it up for discussion.

23 CHAIRMAN BABCOCK: Any discussion? Anybody
24 in the room want to talk about that? Anybody online?
25 Somebody has got their hand up. Who is it, Shiva?

1 Justice Gray.

2 HONORABLE TOM GRAY: Did you call on me,
3 Chip?

4 CHAIRMAN BABCOCK: I did. I did, Judge.

5 HONORABLE TOM GRAY: With great respect and
6 admiration for Richard Munzinger, I would like to attempt
7 to channel him at this moment. My God, this is not some
8 game we are playing here. These are real people with real
9 disagreements about the law to be applied to the facts.
10 And to refuse to allow one side to argue because they
11 submitted their brief and didn't think at the time it
12 would be helpful to the court to have oral argument, and
13 now the court wants argument from one side and to refuse
14 the other side oral argument is ridiculous.

15 It's 15 or 20 minutes, for Christ's sake.
16 Let both sides have their say and help the Court make the
17 right decision. This change needs to be made.

18 (Applause)

19 CHAIRMAN BABCOCK: Justice Gray, you just
20 missed one line. If Munzinger was here, he would add
21 "because this is America."

22 All right. Well, I think I know how this
23 vote is going to go. Any further comment?

24 Richard.

25 MR. MUNZINGER: Well, I'm honored that I was

1 cited. If you said "for Christ's sake," I would not have
2 said that, but I agree with everything you said.

3 CHAIRMAN BABCOCK: All right. Thank you.
4 Anybody else?

5 All right. Everybody in favor of this
6 change to the rule, raise your hand.

7 How about offline?

8 All right. Anybody opposed? Raise your
9 hand.

10 HONORABLE MARIA SALAS-MENDOZA: Can we note
11 me in favor? I was already --

12 CHAIRMAN BABCOCK: You're opposed?

13 HONORABLE MARIA SALAS-MENDOZA: Actually, in
14 favor.

15 CHAIRMAN BABCOCK: Thank you. Anybody else?

16 All right. It's unanimous, 31 to nothing.

17 Nicely done. Nicely done, Pam.

18 MS. BARON: Woohoo.

19 CHAIRMAN BABCOCK: Wow. Looks like she has
20 scored a touchdown. She's in the end zone dancing.

21 We'll take our morning break for 15 minutes.

22 Thank you.

23 (Recess from 10:17 to 10:41 a.m.)

24 CHAIRMAN BABCOCK: All right. Let's get

25 back to work, and we're now going to talk about remote

1 proceedings, even though nobody is here to talk about it.

2 MS. WOOTEN: I think that's the perfect
3 time.

4 CHAIRMAN BABCOCK: Perfect timing, so we're
5 going to ram this right through.

6 I know Justice Christopher could not be with
7 us today, and Kennon was unaware if she had delegated her
8 part of this to anybody else. And if anybody else has
9 been the delegees, raise your hand. We didn't think so.
10 And the second piece, Lisa Hobbs had, and she is not here,
11 we don't see. And if she delegated it to anybody, raise
12 your hand. And she didn't.

13 So, Kennon, that leaves it to you. So what
14 do you have to say about this that you haven't already
15 said?

16 MS. WOOTEN: Oh, there are a few additional
17 things to say about it. And --

18 MR. DAWSON: You can say whatever you want
19 because none of your committee members are here.

20 MS. WOOTEN: That's true. I'll speak for
21 the committee in its entirety today.

22 So what we have that's new for consideration
23 today is, in the materials, there's a memo from me dated
24 May 23rd, 2022, and it's about revisions that we discussed
25 at this committee and some additional changes that are

1 being made in an effort to perhaps better balance all of
2 the competing considerations relating to the subject
3 matter at hand. And let me go ahead and lay the
4 foundation a little bit more for the subject matter at
5 hand.

6 So we have, as a committee, on two prior
7 occasions discussed potential rule revisions for remote
8 participation in court proceedings, specifically in regard
9 to Texas Rules of Civil Procedure 21(d), 500.2(g) and
10 500.10, as well as a potential revision to Rule 21 of the
11 Texas Rules of Civil Procedure. And this is the subset of
12 the Remote Proceedings Task Force work that specifically
13 pertains, like I said, to how we participate or appear in
14 court proceedings.

15 So in Supreme Court Advisory Committee
16 meetings on February 4 and March 25, we had I think a
17 robust discussion about the concerns that people have
18 about remote participation in court proceedings, as well
19 as the perceived benefits for some cases of remote
20 participation in court proceedings. And after the
21 meetings, there was distribution of material from members
22 of this committee. And I believe the Court and committee
23 has also received materials relating to the various things
24 we've been discussing pertaining to remote proceedings.

25 So in the last meeting that we had, and in

1 the prior meeting, there was no vote taken on one of the
2 biggest questions I think that's on the table, and that is
3 whether you're going to carve out remote jury trials,
4 speaking generally, from the typical rule of giving the
5 court discretion whether to allow or require remote
6 participation in court proceedings.

7 And the takeaway that I had from the
8 meetings and the transcripts that I looked at is there was
9 unanimous consent that there should be a carve-out for
10 remote participation in jury trials, and so there was no
11 vote taken either in the first meeting or the second
12 meeting on that particular point.

13 But in the last meeting, more specifically
14 the meeting on March 25th, 2022, there was a vote taken,
15 21 to 5, to focus first on the justice court rules before
16 we make decisions about the rules governing district and
17 county courts.

18 So after the two meetings and that
19 particular vote, at the task force level, there was an
20 effort to revise the justice court rules to reflect
21 feedback received from this committee and others relating
22 to remote proceedings. But also at the task force level,
23 as I indicated earlier, there was discussion about whether
24 there might be a better way to balance all of the
25 competing considerations at hand relating to remote

1 participation in court proceedings. And what we have on
2 the table for consideration today is that effort to strike
3 a better balance.

4 So in the initial version of the proposed
5 rules, the basic structure was that the court, or the
6 trial judge to be more precise, had the discretion whether
7 to allow or require in-person or remote participation in
8 court proceedings. Under the initial proposal, the
9 mechanism for the party to say I want a different way was
10 to file an objection. And, generally speaking, the court
11 then could grant that objection if good cause was shown
12 for the appearance to be something other than what the
13 court had directed.

14 In the version that's on the table today for
15 consideration, that's changed such that now the court
16 still has discretion whether to allow or require a
17 particular type of participation, but then a party can
18 make a request to appear in a different manner, and that
19 request would be granted unless the court has good cause
20 not to grant it. So the way it's structured now gives the
21 party more of a say, I think, and puts that good cause
22 consideration in a different point in the process.

23 So that's something that I think is worth
24 discussion by this committee, if it's a better way, if
25 that addresses some of these concerns that some people

1 have had about whether there's maybe too much discretion
2 given to the trial courts in directing how people would
3 participate in court proceedings.

4 The other thing that is set forth in the
5 memo and I think we should discuss today is whether we
6 still as a committee feel across the board, or at least
7 have a strong majority, that there should be a carve-out
8 for remote jury trials. I think I know the answer to that
9 question, but because the structure of the rule has
10 changed, what we've done in the memo and in the proposals
11 is put in italics the carve-out for remote jury trials so
12 that we can take a nice, clean vote on this issue.

13 Again, I think I know how it's going to turn
14 out, but I just thought it would be good to get a vote on
15 it with this new structure, more specifically the new
16 structure again being that request granted unless there's
17 good cause not to grant it.

18 So what I will say beyond what's already
19 been said for the record, for anyone who's looking at this
20 transcript in the future, we, of course, have transcribed
21 meetings from the prior discussions on February 4, 2022,
22 and March 25, 2022. And I know that materials have been
23 distributed by committee members and, again, received by
24 committee members, and I would hope those would also be
25 made available to people so that they can see the context

1 of the discussions.

2 This is a difficult area. I think people
3 have very strong opinions. It's hard to strike the right
4 balance. One of the things I'll say before passing the
5 mic is I've tried and I think members of the subcommittee
6 have tried to think beyond our own practices and client
7 base to think about what's best for the state as a whole.
8 We live in such a diverse state, and I think we're all
9 mindful of that fact, but sometimes it's easy to lose
10 sight of it because we look through a lens that's based on
11 our personal experiences and our own client relationships.
12 So in that regard, I'll just say one more time that one of
13 the thoughts behind what's been proposed before and what's
14 being proposed now is the reality that some people won't
15 have access to justice if they don't have the ability to
16 appear remotely.

17 And with that, I'll turn it back to you,
18 Chip.

19 CHAIRMAN BABCOCK: Okay. Great. Thanks,
20 Kennon.

21 I think -- I think something you just said
22 struck me, and it's really true, that we have to do what's
23 best for the state as a whole. And I think we always
24 strive to do that, but it's good to be reminded every so
25 often, particularly on a subject that is as important as

1 this one.

2 And I think we usually as Texans are never
3 devoid of self-confidence and our influence, but through
4 Chief Justice Hecht's work with the -- with the Chief
5 Justices Association and some of the work our Court has
6 done and this committee has done, people do look to this
7 state as a -- as at least one way to intelligently
8 approach problems. And so I think, as I'm thinking about
9 this problem, I'm, of course, thinking first about Texas,
10 but I'm also thinking about beyond our borders.

11 And I know that the Chief Justice of
12 Michigan has some very strong views about this, and I know
13 our Chief does, too, and our Court does, and I do. And I
14 am worried about a society that is increasingly remote.
15 Starting in 1998 with -- as we've talked about before,
16 with communicating by e-mail and by text and by slap and
17 by chats, but not dealing with each other face-to-face,
18 and now because of the pandemic, keeping at least six feet
19 of distance from each other, you know, people lamented the
20 loss of the central docket.

21 Remember when we went -- we had the ceremony
22 down there when we moved from the old courthouse to the
23 new one, and they had the 25 cases with the central
24 docket? The central docket, probably no longer workable
25 here, although it is in some other counties, but it did

1 bring the bar closer together, and it did eliminate some
2 of the acrimony that you see in the bar today that did not
3 exist when you had to deal with the lawyers on a weekly or
4 maybe twice or three times a month basis, at least in
5 central docket. So I think we have to think very
6 carefully about further creating remoteness among
7 ourselves.

8 And we're a very important part of the
9 fabric of our society, and I think that this issue is so
10 important, and we have a -- a huge influence on this
11 issue. And I don't know if people are thinking about it
12 in the way that I just expressed it. I hope they are, I
13 know some people are, and I guess I just want us to think
14 about it broader than, hey, I don't want to have to go
15 down to the Valley for a five-minute hearing. Of course,
16 nobody wants to have to go -- you know, travel to El Paso
17 or to Amarillo from Houston for a five-minute hearing.
18 And that is -- okay, we want to go to Amarillo all the
19 time, Tom. Sorry. Riney is -- for those of you not here,
20 Riney is offended.

21 MR. RINEY: I'll pick you up at the airport.

22 CHAIRMAN BABCOCK: And I mentioned El Paso,
23 and now Munzinger is going to be on my case, so I am
24 really, really in trouble now. But you get the point.

25 At one end of the spectrum, we have the

1 routine five-minute status conference where we're going to
2 get a case management order put together, and somebody
3 shouldn't have to travel for a day or a day and a half to
4 go down there for that five-minute hearing. We get that.
5 And at the other end of the spectrum is the jury trial,
6 which there are not many of them compared to what there
7 was 20 years ago, or certainly in 1998. And figuring out
8 what to do in between those two, two ends of the spectrum
9 is something that's very important, and I think we need
10 to -- we need to be careful about it.

11 Alistair.

12 MR. DAWSON: So I think the change of moving
13 the good cause over to the judge is a good change, and I
14 support that. And I will say I am a big supporter of
15 access to justice. I serve on the commission along with
16 Kennon, and I recognize that having remote proceedings
17 improves access to justice, no question.

18 Having said that, I think that there are so
19 many problems with allowing a trial court to mandate a
20 jury -- a remote jury trial that I'm against that unless
21 the parties both agree. There's just an inordinate amount
22 of trouble and problems that can occur in a remote jury
23 trial. It's so hard to control the jurors. There's just
24 all kinds of problems.

25 And there are judges in our state who have

1 announced that they will no longer have in-person jury
2 trials, one of them resides here in Harris County, and so
3 they're going to mandate remote jury trials, regardless of
4 the parties' objections. And that's -- that's just wrong,
5 in my opinion. And I get it that our folks that need
6 access to justice, that that has an effect on it, but I
7 think it's relatively small because they'll still have the
8 ability to appear remotely for hearings for eviction
9 cases, for most debt collection issues. It's only if
10 they're actually going to trial by jury would they be
11 impacted by the carve-out rule, and I think that's a
12 relatively small number of cases. And I think the harm
13 there is more than outweighed by the harm in allowing
14 remote jury trials.

15 So I'm in favor of the carve-out
16 notwithstanding my great support for access to justice.

17 CHAIRMAN BABCOCK: Judge Miskel, and then
18 Kennon, and then John.

19 MR. LEVY: We can't hear you.

20 CHAIRMAN BABCOCK: Better unmute there,
21 Judge.

22 HONORABLE EMILY MISKEL: Okay. Sorry.

23 First I wanted to thank Kennon and Chief
24 Justice Christopher because I was supposed to be helping
25 with this, and I have been completely absent for the past

1 two weeks due to travel and being sick. So thank you,
2 Kennon, for taking over.

3 I would like to throw my hat in for -- I
4 support excluding jury trials from any change to the
5 remote appearance rule. I think no one wants remote jury
6 trials. When we bring up the concept of remote jury
7 trials, everyone freaks out. And I think if we push on
8 that, we risk losing -- you know, letting the perfect be
9 the enemy of the good, and we risk losing all of the
10 access to justice benefits for the indigent, for the
11 disabled and all of those people, because -- I don't
12 know -- Shiva, I asked am I able to share screen? I guess
13 I will give it a shot.

14 Okay. I'm going to put up on the screen --
15 can everybody who's in person see what's on the screen?

16 CHAIRMAN BABCOCK: Yeah, we can see it,
17 Judge.

18 HONORABLE EMILY MISKEL: Okay. So this is
19 some data from 2019. This is prepandemic. This is the
20 number of trials, bench trials and jury trials in
21 noncriminal cases in district court. So this is not every
22 level of court, this is just district court.

23 But you can see that there were about just
24 over 1,000 civil jury verdicts in the 2019 fiscal year.
25 In comparison, we had almost 92,000 family law bench

1 trials. So I don't think it's any impediment to take
2 these 1,000 -- well, and if you add the family law in,
3 1100 jury trials off the table to give us some flexibility
4 to the almost a hundred thousand other bench trials that
5 is the day-to-day work of the courts.

6 So I'll stop sharing that.

7 And then I'll just follow on by saying I'm
8 also our liaison to the Judicial Council, and the Judicial
9 Council met last Friday. What we discussed in our civil
10 justice committee for the Judicial Council, we got updates
11 from Legal Aid, we got updates from all of these access to
12 justice groups, and it was the consensus of the civil
13 justice committee of the Judicial Council that the
14 Judicial Council -- I'm just reading from my
15 recommendations so I don't make any mistakes. The
16 Judicial Council should work with other stakeholders to
17 recommend that courts continue to be able to make remote
18 appearances available where appropriate to increase access
19 to justice and the efficiency of our courts.

20 So I think if we just take jury trials off
21 the table, we have much more buy-in about the flexibility
22 of letting those who our traditional system has excluded
23 benefit from technology to be included.

24 CHAIRMAN BABCOCK: Anything else or is that
25 it?

1 HONORABLE EMILY MISKEL: That was it. Next.

2 CHAIRMAN BABCOCK: All right. Kennon, and
3 then John.

4 MS. WOOTEN: Just a couple points.

5 One, in regard to the carve-out for remote
6 jury trials -- which, by the way, is Tab B, and we have
7 attachment A for the justice court rules and attachment B
8 for rules governing district or county courts.

9 But the carve-out specifically now states
10 that a court may not require lawyers, parties, or jurors
11 to appear remotely for a jury trial, absent consent of all
12 parties involved in the jury trial. And I wanted to speak
13 to this briefly to call out that it would still allow, for
14 example, for certain witnesses potentially to come in and
15 appear remotely, but it would obviously on its face not
16 allow for parties, lawyers, or jurors to appear remotely
17 without that uniform consent.

18 And I'll share a recent example in support
19 of this particular phrasing. It was an in-person jury
20 trial set for three weeks. In that particular case, I was
21 representing, among others, multiple police officers, and
22 the potential trial list was about 70 deep. And so if you
23 were not going to allow some of these individuals to
24 testify remotely, they wouldn't know when they would need
25 to be there in person, it would take them out of the

1 field. And so having the ability for those witnesses to
2 come in remotely, even if you're in person, that can be a
3 very good thing for some trials.

4 But I just wanted to point out the language
5 to all of you so you'll know exactly how it's contemplated
6 now and understand that it would still allow for some
7 remote appearances by witnesses even in in-person jury
8 trials.

9 CHAIRMAN BABCOCK: Right. Yeah, I don't
10 think it addresses that, but that's a separate issue.

11 MS. WOOTEN: Uh-huh.

12 CHAIRMAN BABCOCK: Because having a witness,
13 and regardless of who the witness is -- I don't know what
14 kind of case you had, but a police officer, having the
15 jury being able to see them in person is different than
16 having them -- seeing them on a television screen.

17 So --

18 MS. WOOTEN: Yeah, certainly.

19 CHAIRMAN BABCOCK: -- that's a different
20 issue.

21 MS. WOOTEN: Certainly.

22 CHAIRMAN BABCOCK: But, John, you had a
23 comment.

24 MR. WARREN: Yeah, thank you. I'm just
25 going to basically echo what Kennon --

1 CHAIRMAN BABCOCK: Speak up a little bit,
2 please.

3 MR. WARREN: I'm going to echo what Kennon
4 and Judge Miskel said. From a clerk perspective and then
5 from my previous life as a court administrator, we get to
6 hear all of the anxieties from litigants. And given that
7 in Dallas -- and not just Dallas County, but a lot of
8 other counties, particularly in divorce cases, those are
9 all self-represented or pro se litigants. And to put them
10 under the pressure of trying to do -- represent themselves
11 in a matter where they are emotional and then trying to do
12 a virtual process, that's just going to mess them up, if
13 you will. And if the outcome is not what they like, it
14 would appear to them that the judicial system is not on
15 their side because they may feel that they didn't -- they
16 weren't able to express their views or to present their
17 case accordingly.

18 And so for that, I would say, as it relates
19 to jury trials, those should be taken off the table, not
20 considered as it relates to remote proceedings at all.
21 But also, think about worst case scenario. For anything
22 that would be considered a virtual process, we still have
23 those who are disenfranchised because of the lack of
24 internet access, so we have to take that into
25 consideration because they, too, will be considered that

1 they were not given an opportunity to fairly represent
2 themselves.

3 CHAIRMAN BABCOCK: Yeah. Thank you, John.
4 David Jackson.

5 MR. JACKSON: Yes, Chip, thanks.

6 From a court reporter's perspective, jury
7 trial would be really a problem to make a verbatim record
8 of. For example, this meeting alone, you take the 27
9 people who are virtual, we've all heard something
10 different than what that court reporter is sitting there
11 writing. Because of our technology, I may have a better
12 computer than someone else on this call using an iPhone.
13 They've got a lot of feedback. So if you're putting your
14 jury virtually, they're not all hearing the same thing,
15 and I just don't think you can make it work and keep an
16 accurate record.

17 CHAIRMAN BABCOCK: Thank you, David.
18 Judge Estevez.

19 HONORABLE ANA ESTEVEZ: I just want to echo
20 what Judge Miskel said. And I don't -- I think we take it
21 off the table. If there are some JP courts that want to
22 do it, I think that they need to not only have the
23 agreement of the parties and all parties involved, but
24 also the agreement of the judges. So I don't want parties
25 to agree to have a virtual jury trial because I don't want

1 to have a virtual jury trial. So --

2 CHAIRMAN BABCOCK: Thank you.

3 HONORABLE ANA ESTEVEZ: I think the judge --
4 I don't think it should just be up to the parties. I
5 think everyone involved needs to all be on the same page
6 if you're going to have any type of virtual jury trial.

7 CHAIRMAN BABCOCK: Thank you, Judge. Good
8 point.

9 And Richard Munzinger had his hand up, and
10 then Robert. Richard Munzinger.

11 MR. MUNZINGER: My view is that we should
12 not distinguish between jury trials and nonjury trials
13 unless -- I'm speaking now only for a nonjury trial,
14 unless the parties consent. I don't believe that any
15 litigant whose rights are being determined by a court of
16 law should be forced to participate in a Zoom proceeding
17 over that party's objection. What is the difference
18 between a jury trial and a nonjury trial? Many, of
19 course.

20 But facts are determined. The judge is the
21 fact finder. Facts depend upon credibility most often, in
22 my experience. How do you judge credibility from a
23 screen? You don't see body language. The camera may
24 be -- right now I'm looking at Chip. I can't see anything
25 about his face. He's probably 35, 40 feet from the lens

1 of the camera. I can't see anything about his face.
2 Because of the background that I'm looking at, I can't
3 really see anything about his legs.

4 CHAIRMAN BABCOCK: We'll stipulate it's very
5 handsome.

6 MR. MUNZINGER: I can't tell if he's
7 fidgeting, if he's crossing or uncrossing his legs. I
8 don't know what he's doing. And all of these little
9 signals, we all -- if you try jury cases, you know the
10 juries pick some of these things up. They may be right,
11 they may be wrong, but that's how they form their
12 judgments.

13 The second case I ever tried in my life was
14 given to me by a partner who instructed me to try it
15 nonjury. It was a breach of contract case, a minor case.
16 He instructed me to try it nonjury. I obeyed. I was an
17 associate. When I went there, the judge, who was one of
18 the greatest judges I ever worked in front of in my life,
19 George Rodriguez, Sr. -- fairest, smart, loved the law,
20 dang good trial judge. But he sat there -- it was a
21 contract case -- and he wrote down on a legal pad offer,
22 acceptance, consideration, breach, damages. And once
23 those were done, that's all he cared about. And I don't
24 mean that critically, he viewed it from a lawyer's
25 perspective. The witnesses were below him facing the

1 courtroom, not facing him. He didn't judge their
2 credibility. He listened to the case and judged it based
3 upon the law.

4 I don't think that I -- in 56 years of law
5 practice, I probably -- I can't really think of any
6 serious case that I ever tried nonjury because of that
7 experience. My client told the truth. The other client
8 didn't, the other guy didn't. And had you watched him,
9 you would have seen him, stick his finger in his shirt
10 collar, turn his face around, frown, stutter. The judge
11 was oblivious to all of this because he couldn't see the
12 man's face because of the way the witness box was set up.
13 That's compounded by Zoom trials.

14 And I don't want to take a lot of time. I
15 just don't think that any litigant should be deprived of
16 his or her or its right to have a trial in front of the
17 judge in person where the judge is the fact finder,
18 because that judge is the fact finder, and he's got to
19 make credibility judgments or she has got to make
20 credibility judgments in the resolution of a disputed
21 case.

22 And these are -- I know y'all laugh at me
23 sometimes, but the truth of the matter is we are dealing
24 with people's rights. When they wrote the Declaration of
25 Independence, they said, "We dedicate our lives, fortunes,

1 and sacred honor." And that's what you do in the
2 courtroom. That's what you deal with, lives, fortunes,
3 reputations. This is serious stuff. It's not -- the
4 problem that I have with the feds, they're all into
5 efficiency. They're all into efficiency. Well,
6 efficiency is a virtue certainly, but truth and justice,
7 that's the purpose of the courtroom.

8 I'm finished. Thank you.

9 CHAIRMAN BABCOCK: Thanks, Richard. Richard
10 Phillips, and then Robert Levy, and Judge Miskel, and then
11 Lonny.

12 MR. PHILLIPS: I'm in favor of the carve-out
13 as well. I just have one question about the language of
14 the carve-out. It ends with "consent of all parties
15 involved in the jury trial," and that language seems a
16 little squishy. I don't know if we want to just say
17 "parties to the case," or "the parties," since we're
18 talking about parties. But I -- we don't want it to be
19 read to suggest like is a juror a party -- they're not a
20 party, but considering the thing earlier about requiring
21 to appear, I would suggest we consider whether that
22 language ought to be tightened up just a little bit.

23 CHAIRMAN BABCOCK: Yeah, I had that same
24 thought. Because if you say "lawyers, parties, or
25 jurors," and then you repeat the phrase "parties" later,

1 but is that meant to encompass the three? So maybe
2 "litigants" or "parties to the lawsuit" or --

3 MS. WOOTEN: I think "parties to the lawsuit
4 or the case" would be clearer. That is the intent.

5 CHAIRMAN BABCOCK: Yeah. Okay, Robert.

6 MR. LEVY: I didn't want to first comment on
7 that, but I do agree with Richard's comments. And I'll
8 suggest that Richard's reference to the Constitution is --
9 carries extra weight because I think he was there when it
10 was signed.

11 But the question about the jury versus
12 nonjury trial, I do agree that the ultimate issue of the
13 case being adjudicated should be tried in the court,
14 should be tried in person. And there could be a provision
15 for remote trial, remote participation, but that should be
16 with the agreement, at least, of all the parties. And
17 that would particularly include the ability of a witness
18 to testify remotely.

19 You know, we have our rules about deposition
20 testimony and the admissibility, but the question of
21 having a witness there, being able to have the judge
22 address and assess the credibility is important. I know
23 Judge Miskel and other judges would suggest that having a
24 witness on Zoom is actually better, but I still think that
25 it -- it should be the witness being there in person, and

1 not only because of the judge, but the other people who
2 might be attending the trial. The trials are open. The
3 public has the right to access. They should be able to
4 walk into the courtroom and see all of the proceedings.

5 The issue about the changes that Kennon
6 discussed regarding the rules -- the rules, I think that
7 just excluding jury trials or generally trials still does
8 not solve the problem because the right to have a witness
9 or a party there to assess their testimony applies not
10 just in the trial context, but, as I've noted before, in
11 the context of a disputed fact issue that might be
12 presented to the judge, like a TRO hearing or a
13 preliminary injunction hearing where a witness might be
14 testifying. That witness -- the presumption should be
15 that the witness is there in person.

16 You can have a provision to enable them to
17 appear remotely with the agreement of the parties, or at
18 least showing that the benefit of that remote
19 participation outweighs the presumption that they should
20 be in person.

21 So, in short, my suggestion is that the
22 rules should clarify that the presumption is a trial
23 proceedings or pretrial proceedings will be in person, at
24 least if there is going to be testimony taken, absent a
25 showing that a remote participation is appropriate or on

1 the agreement of the parties to the case.

2 And one other question, David Jackson's
3 comment is well-taken. Does the -- what is the record in
4 the case? Is the Zoom video the record? Can you argue to
5 that on appeal? Can you -- does the court hear that?
6 Maybe they should, maybe they shouldn't.

7 Judge Miskel is saying no, and -- but the
8 problem is I might argue that, you know, the transcript is
9 wrong, or I might try to argue that, you know, some other
10 element of the reporting is appropriate to take up to
11 the -- it just raises some questions, and it leads to we
12 probably should clarify if we are going to adopt a rule
13 like this. I'll leave it at that.

14 CHAIRMAN BABCOCK: Thank you, Robert.

15 Judge Miskel, and then Professor Hoffman,
16 then Judge Stryker, and then Connie.

17 HONORABLE EMILY MISKEL: And just briefly,
18 to give the cite on the answer to your last question, the
19 Rules of Appellate Procedure define the record to be the
20 clerk's record and the reporter's record, and so there is
21 no way to compel the court of appeals to consider the
22 Zoom, which Texas could consider. Arizona sends audio and
23 video of trials to the court of appeals. Texas has not
24 done it that way, but that's a much longer side
25 discussion.

1 I was just going to talk about witnesses and
2 allowing witnesses. So currently witnesses can already
3 appear remotely without the agreement of the parties. For
4 example, witnesses can testify telephonically over the
5 objection of one party. So adding video to the telephonic
6 testimony would not be worse than the current system that
7 we have now.

8 The other thing that I just want to point
9 out about requiring the consent of all parties is that if
10 the purpose of this is to use remote appearances where
11 appropriate to expand access to justice, the problem that
12 you would have is that a game playing litigant or
13 attorney -- say the other side has a disability or
14 indigent, does not have a car, whatever it is. If I don't
15 want them there, and I want a default judgment against
16 them, it would be very easy for me to say, gosh, sorry, I
17 don't agree to them appearing remotely. Make them come in
18 person, which I know they can't do because they're in
19 another state or they're incarcerated or whatever it might
20 be.

21 So anytime we require unanimous consent,
22 that's not really how our system functions. Judges don't
23 require unanimous consent for anything else that we do
24 because we understand we're a dispute resolution system.

25 I had one other point, but now I've

1 forgotten, so I'm going to let the next person go.

2 CHAIRMAN BABCOCK: Okay. I do want to ask a
3 question about the witnesses. At least in my experience,
4 it's very rare to have a witness testify at a jury trial
5 remotely, prepandemic for sure. But -- but you're right
6 that that can happen, and it has happened from time to
7 time.

8 What's the standard when one side says, "I
9 want to call, you know, Joe Smith, who's going to testify
10 by video from New York," and the other side says, "No, we
11 object"? How does the -- what standard does the judge
12 apply in that circumstance?

13 HONORABLE EMILY MISKEL: Yeah, so there's no
14 rule on it, so I guess the standard would be abuse of
15 discretion.

16 MS. WOOTEN: And I think now --

17 CHAIRMAN BABCOCK: That would be the
18 appellate standard, but what is the -- what standard does
19 the trial judge apply?

20 MS. WOOTEN: I think now the trial judges
21 are relying on the emergency order, or at least I've seen
22 that happen. So the look to the language that was
23 referenced in the -- the directory remarks about what's
24 happening at the court and saying, you know, under this
25 order this is what can be done.

1 And I'll add on, at the risk of stating the
2 obvious, that a lot of video testimony is already
3 happening in jury trials through deposition video
4 presentation.

5 CHAIRMAN BABCOCK: Yeah, that's for sure.
6 Professor Hoffman.

7 PROFESSOR HOFFMAN: Let me go back to
8 something Judge Estevez raised. I think, I think I heard
9 her say even if the parties unanimously consent to appear
10 remotely in a court proceeding, the judge could veto that.
11 I don't know if I heard her right in saying that.

12 I guess my question to Kennon is --

13 HONORABLE ANA ESTEVEZ: I was talking about
14 a jury trial.

15 PROFESSOR HOFFMAN: Ah, okay.

16 HONORABLE ANA ESTEVEZ: I think the judge
17 should be able to veto that. I don't want to do a remote
18 jury trial, and I don't have the equipment to do a remote
19 jury trial, so I never want to agree to a remote jury
20 trial. I wouldn't be able to do it, and I wouldn't spend
21 all of my resources trying to figure out a way to do it.

22 MS. WOOTEN: Well, and I'll say to that
23 point, as structured in the version presented under Tab B,
24 I think the judge could veto it because it now states that
25 if -- even if you have consent, I think the judge can come

1 in and say you may want to appear this way, but I'm not
2 going to -- I'm not going to allow it, in part because we
3 don't have the technology to provide meaningful
4 participation.

5 HONORABLE ANA ESTEVEZ: So when I was going
6 to do one, when it appeared the pandemic was never going
7 to end and that was the only way I could get a civil jury
8 trial to go, OCA was kind enough to offer their resources.
9 So we had to make an appointment with them to get clean
10 iPads and all of this other equipment that we do not have.
11 So it's not that simple for just a judge to do a remote
12 jury trial when they haven't had the training or
13 everything else it would take, the equipment to do one.
14 It's not the same as, you know, don't let them use their
15 phones. You have all of these instructions. It's quite
16 complicated.

17 CHAIRMAN BABCOCK: Thank you.

18 Judge Stryker, and then Connie, then John
19 Kim, and then John Warren.

20 HONORABLE CATHLEEN STRYKER: I was just
21 wondering if there was any discussion when these rules
22 were being drafted about nonjury civil contempt
23 proceedings that can lead to jail time and -- and/or
24 termination proceedings, nonjury termination of rights,
25 parental rights.

1 HONORABLE EMILY MISKEL: So there has been a
2 remote jury trial regarding jury termination of parental
3 rights that was affirmed, but there's no -- so you're
4 asking because of the quasi-criminal nature of a contempt
5 proceeding and because of the heightened evidentiary
6 burden of clear and convincing evidence, I'm not so -- so
7 your first -- so your second question about nonjury
8 termination of parental rights, I -- in a civil case,
9 regardless of the burden of proof, their standard is due
10 process, not the Sixth Amendment confrontation clause. So
11 I don't think an increased evidentiary burden of proof
12 would take away from the fact that we're still talking
13 about due process, not a Sixth Amendment right to confront
14 witnesses. So I don't think parental rights termination
15 would be treated any differently for the purpose of having
16 a witness testify by telephone or having a witness testify
17 by Zoom in any other type of civil proceeding.

18 Now, for contempt proceedings, I have held
19 contempt proceedings during the pandemic. I've put people
20 in jail for contempt based on a Zoom proceeding, but no
21 one objected. So I have never had it come up -- if
22 someone objected, I probably wouldn't do it on Zoom. I
23 would do it in person.

24 Again, I would be happy to not do contempts
25 by Zoom. We can easily do those in person, and they are a

1 relatively small number of the business of our docket. So
2 because that may be treated -- because defendants are
3 entitled to the protections of a criminal trial, it
4 probably does make sense to do all of your contempt
5 proceedings in person. But as far as just because you've
6 got a heightened evidentiary burden of clear and
7 convincing, I don't think that converts it into, like, a
8 Sixth Amendment type of right.

9 Does that answer your question?

10 HONORABLE CATHLEEN STRYKER: Yes. I mean, I
11 agree with you on the second point.

12 I guess I would say I have a concern with
13 terminating someone's parental rights if they are
14 objecting to their -- the person who is trying to
15 terminate them appearing virtually, and the court
16 overruling that and having to have it virtual.

17 HONORABLE EMILY MISKEL: But realistically
18 that's a lot of what we have now, because oftentimes the
19 father is in federal prison, and we cannot get inmates
20 from federal prison to appear personally in court. And so
21 those fathers have either been defaulted, or they've
22 appeared by telephone or whatever we can get the federal
23 prison to allow. So we already have a system where we
24 allow non-in-person appearances for termination of
25 parental rights trials.

1 HONORABLE CATHLEEN STRYKER: Sure. I just
2 have great concern about it for folks that want to appear,
3 and want -- you know, want to be live. And if they end up
4 overruled on that, you know, the moms are getting
5 terminated. I just have concern with having nonjury
6 termination over the objection of the person who's being
7 sought to be terminated. I also have a concern about
8 anybody getting thrown in jail over Zoom.

9 HONORABLE EMILY MISKEL: And, Kennon, can
10 you maybe answer this question, but I think Judge
11 Stryker's concern may be alleviated by the new language
12 where you're saying if somebody -- basically the new
13 language is that people get to appear how they want to.
14 So if you -- absent some good cause, right? So if you
15 want to appear in person, that you should be able to
16 appear in person, absent some kind of good cause.

17 Am I stating that correctly?

18 MS. WOOTEN: You are.

19 HONORABLE CATHLEEN STRYKER: But they may
20 want -- the person that's trying to terminate them, you
21 know, if mom's trying to terminate dad, they may want to
22 see that person live and objecting to having anybody
23 appear remotely. And then, of course, the civil contempt
24 proceeding is more of a quasi criminal problem that I
25 think should be excepted, but that's just me.

1 MS. WOOTEN: And, Judge Stryker --

2 HONORABLE CATHLEEN STRYKER: Otherwise I
3 agree with everything that you've been saying.

4 MS. WOOTEN: Judge Stryker, I'm sorry to
5 interrupt you. That was inadvertent.

6 But I think the way the word -- the rule is
7 worded now, a party gets to file this request for a
8 participant to appear in a manner other than directed by
9 the court. So it's not just I get to file a request about
10 me or my client. It's a party in the case can file a
11 request for any participant involved in the proceeding.

12 CHAIRMAN BABCOCK: So we're probably
13 skipping ahead a little bit. But this subpart (b),
14 Kennon, is the way it would work is that the judge says,
15 "Okay, in two weeks, we're going to have a Zoom proceeding
16 on termination of parental rights," and then the father,
17 who is being terminated, says, "No, I don't want to do it
18 by Zoom, I want to do it in person." He files that within
19 a reasonable time, and the court has to rule on that and
20 tell the parties. But it doesn't have to have a hearing,
21 the judge doesn't have to have a hearing and can grant the
22 request unless there's good cause not to grant it.

23 Is that the way it would work?

24 MS. WOOTEN: Yes, that's the way it would
25 work. And I'll just add, the final sentence in the

1 proposed rule would require the judge to then go on and
2 document the good cause for not doing what the party has
3 requested. And the reason that language is there is to
4 have a record if there is an appellate proceeding that
5 stems from the judge's decision.

6 CHAIRMAN BABCOCK: Okay. So in Judge
7 Stryker's hypothetical, the parent files the request, and
8 the opposing parent says, "No, it's going to take too
9 long." He's in prison, can't get him here. And the judge
10 says, "Yeah, the request is denied," and the reason is
11 he's in prison and we can't get him here.

12 MS. WOOTEN: And then the question would be,
13 is that good cause?

14 CHAIRMAN BABCOCK: But in the meantime, the
15 parent would be terminated.

16 MS. WOOTEN: And it could be undone on
17 appeal if it's determined --

18 CHAIRMAN BABCOCK: Right. Sure.

19 MS. WOOTEN: -- that the judge's decision
20 wasn't supported by good cause.

21 CHAIRMAN BABCOCK: Yeah. All right.
22 Connie, sorry, took a long time to get to you.

23 Judge Stryker, are you done? Did you have
24 anything else?

25 HONORABLE CATHLEEN STRYKER: I do not have

1 anything else. Thank you.

2 CHAIRMAN BABCOCK: Thank you. Connie.

3 MS. PFEIFFER: That's okay. I think they
4 set up my question. So I had keyed in on a little bit of
5 the last part of 500.10(b), and that's where it says the
6 court must grant the request unless it finds there is good
7 cause not to grant, and this last sentence says, "Such
8 good cause must be documented in the ruling denying the
9 request," which caught my eye because it reminds me of the
10 Texas Supreme Court mandamus jurisprudence that says
11 orders granting new trials have to include good cause and
12 the reasons for granting the new trial, and that those
13 orders are reviewable on mandamus.

14 And so I'm curious -- I mean, this, to me,
15 looks like potentially this could be an order reviewable
16 by mandamus, and I'm curious if that's the thinking of the
17 language or if there is thinking and intent here.

18 CHAIRMAN BABCOCK: Kennon?

19 MS. WOOTEN: The thinking was that there
20 would be a right to mandamus relief. So to further
21 address your question for, I think, what could happen
22 other than what I stated as a possibility is that it stops
23 the proceeding, and there is mandamus review, and then the
24 appellate court decides how a party is going to appear.
25 Trial then ensues after the appellate court's decision.

1 CHAIRMAN BABCOCK: Great, thanks.

2 Connie, did you have anything else?

3 MS. PFEIFFER: No. That answers it.

4 CHAIRMAN BABCOCK: John Kim.

5 MR. KIM: Thank you.

6 CHAIRMAN BABCOCK: Where's the fire?

7 MR. KIM: May be that NRA thing.

8 MR. PERDUE: It's 45.

9 CHAIRMAN BABCOCK: Let's hope not.

10 MR. HARDIN: Actually, they are telling
11 people in our building, which is 5 Houston, that they
12 might have trouble getting through the streets after noon.
13 They're concerned over there about the
14 counter-demonstrations. So there are going to be
15 demonstrations against the NRA, and then the supporters of
16 the NRA have volunteered to show up if it comes to protect
17 the people at NRA. So that's what everybody is all
18 concerned about. It may turn out to be nothing, but --

19 CHAIRMAN BABCOCK: And you're wearing a
20 bright aqua-colored --

21 MR. HARDIN: So I'm a good target.

22 CHAIRMAN BABCOCK: All right. John Kim.

23 MR. KIM: Okay. So, first of all, thank you
24 to the committee and subcommittee, because I think we're
25 making a lot of progress. To that end, the first thing I

1 would like to note -- and I sent a copy of it to Shiva to
2 then formally put --

3 HONORABLE EMILY MISKEL: So the last two
4 speakers we haven't been able to hear. I don't know if
5 you guys can find a microphone.

6 MR. KIM: Yep.

7 CHAIRMAN BABCOCK: Yeah. The soft-spoken
8 Rusty Hardin and John Kim are having trouble being heard.

9 MR. HARDIN: But mine wasn't of substance.

10 MR. KIM: Okay. Better?

11 So I'd like to formally put into the record,
12 there was a letter that was sent to all the justices and
13 to you, Chip, that was jointly signed by TEX-ABOTA, by
14 TTLA, by TADC, by the Texas Civil Justice League, and the
15 litigation section for the State Bar, the state
16 representative of the American College, all in consensus
17 saying that this is a rule that bears great thought and we
18 should tread carefully because it is so fraught with not
19 only constitutional and due process issues, but also the
20 right to better access to the courts.

21 And so I appreciate everything that we have
22 done thus far with respect to the rule, but I will
23 candidly say that I think the language of saying just jury
24 trials is too restrictive. I think it should encompass
25 bench trials. I think it should encompass injunctive

1 hearings. I think it should encompass anything that is
2 evidence-based.

3 And I say that while giving tremendous
4 respect to all of the judges and their need to be able to
5 handle the administrative duties of their courts. And
6 I -- I concede Zoom is here for a while. I mean, it's
7 here for the future, but I just don't think it's here for
8 a jury trial, and I just don't think it's here for an
9 evidentiary hearing. And I just think -- you know, we've
10 talked about all of the nasty terribles with respect to
11 not being able to judge a person's credibility and
12 everything; but I think the biggest problem is this new
13 ground of science coming out that talks about how in a
14 remote proceeding, the participants over time, because of
15 the screen and everything, lose their sense of empathy.
16 And I think every fact finder and every fact presenter can
17 never lose that portion and that empathetic part of us
18 that hopefully governs how we resolve our disputes, which
19 is ultimately what we want to happen in a reasonable and
20 credible manner. And so I think jury trials in and of
21 itself is restrictive.

22 The other thing is -- and I appreciate the
23 good cause flip, but I think we should make more clear
24 that the presumption of this rule is to be in person. And
25 I don't know how to delicately say this because all of the

1 judges participating in this are experienced and are not
2 the problem, but we have brand-new judges -- and I'm just
3 going to pick on Harris County. We've got brand-new
4 judges in Harris County. If you put in the comments three
5 or four things that say this is good cause, they're never
6 going to expand off of that because they're not capable of
7 expanding off of that. They're just going to say, nope,
8 it doesn't fit into one of these three or four categories
9 that the rulemakers have put in the comments or notes, and
10 so there is no good cause, or there is.

11 And so I think we have to be careful with
12 that language to make sure it is, you know, clearly not
13 limiting in nature. That's all I've got.

14 CHAIRMAN BABCOCK: Great. Thank you, John.
15 John Warren.

16 MR. WARREN: I'm just going to repeat kind
17 of what John Kim said, but I had a more granular level.

18 CHAIRMAN BABCOCK: Put it into the
19 microphone so --

20 MR. WARREN: Pardon me. At a more granular
21 level. Doing remote jury trials -- and while you can send
22 remote devices out to those jurors and you can send wifis
23 or mifis out to those jurors, but if there's no
24 infrastructure there, that still will not allow them to
25 participate in a jury. And if that's the case, what

1 happens to having a really diverse jury panel? And what
2 also happens to Batson if that ends up being the case?

3 CHAIRMAN BABCOCK: Great. Great point,
4 John. Thank you.

5 Any other hands up remotely? I don't see
6 any, but -- there's one, and it's Justice Gray. Justice
7 Gray.

8 HONORABLE TOM GRAY: This is just an
9 anecdotal story that you need to consider with regard to
10 the rules. It was a -- there's at least one dad in Oregon
11 that really is glad that he was allowed to participate in
12 the termination of his parental rights remotely. Because
13 if he had shown up in Texas, he would have been arrested
14 for assaulting the mother, a previous woman, and he had --
15 one of the biggest problems of his compliance with the
16 department's plan for reunification was that he had just
17 gotten out of jail for assaulting a third woman. And so
18 the last thing he wanted to do was participate in an
19 in-person trial in the state of Texas, because he would
20 have been arrested and gone back to jail for violation of
21 his parole and several other things.

22 So that -- that kind of issue needs to be
23 factored into whatever it is we do. Thank you.

24 CHAIRMAN BABCOCK: Yeah. Thank you, Judge.
25 I'll get you in a second, Rusty.

1 And I think Judge Stryker's concern that she
2 articulated, when applied to those facts, Judge, might be
3 that the parent who was being terminated could, I would
4 think, waive his right to be present in person for
5 whatever reason, but -- for the reasons that you expressed
6 where he might be called upon to violate a condition of
7 parole or a judicial order, whatever it may be. So that
8 would, I would think, be an exception that perhaps Judge
9 Stryker would find acceptable.

10 But, anyway, Rusty.

11 MR. HARDIN: I -- I think we confused
12 something. I want to follow-up just real quickly, just
13 for the record, with John Kim, to echo that and give an
14 example.

15 I started a criminal trial -- and we're
16 not -- I'm not really talking about criminal versus civil
17 here. It's just a courtroom proceeding is the relevant
18 part of what I'm observing. And we started before the
19 pandemic, and then the pandemic hit about a month into
20 trial. I had -- we had -- we don't have the right, of
21 course, of depositions in Texas in criminal cases, but we
22 had had interviews and meetings with witnesses and knew
23 what they were like in person. When it broke, the same 13
24 jurors stayed available, available, available. We broke
25 in the middle of March. We resumed on September 20th out

1 at NRG.

2 The State -- we were defending, and the
3 State wanted a witness they thought would help them, and I
4 made a decision that every trial -- every trial lawyer
5 would do when they're given the deal. I only gave in
6 because I was allowed to choose or not or oppose it. If
7 either side opposed it, she wasn't going to allow it. I
8 allowed it because I knew that that witness they wanted to
9 call would be very difficult to successfully cross-examine
10 remotely, and since it was a witness that had information
11 that was helpful to me, even though the State wanted to
12 get certain other things out of them, I was willing to
13 have a remote witness, so we had a remote witness in a
14 jury trial. The fact that it was criminal versus civil is
15 irrelevant.

16 He was nowhere near the witness for the
17 State that he would have been in person. And -- and I
18 think sometimes when we talk about this, we fail -- we all
19 say judging the credibility of the witnesses, and we
20 usually talk about it in terms of the judge being able to
21 determine the credibility, but the experience that I've
22 had since remote proceedings started has made me very,
23 personally, strongly adversarial to remote proceedings
24 against the will of the lawyers that involve any type of
25 adversarial issues. Most of my practice involves -- and

1 trials are usually involving, on our side of the table,
2 cross-examination. An adversarial cross-examination is
3 inherently 10 times, in my opinion, more difficult and
4 lacking in success than it is in person, and so the trial
5 judge gets to watch, the jury gets to watch,
6 the participants -- we talk about terminating parental
7 rights, the thought that -- that my child could take -- be
8 taken away from me because I'm in jail and I don't have to
9 be -- you know, they didn't have to make me be there is
10 just mind blowing, because the lawyer for that person or
11 whoever is representing that person has a much better
12 chance of challenging the allegations in person than they
13 do.

14 So whether it's civil -- our practice, y'all
15 heard me say many times, is probably 85 percent civil
16 trial work, so I'm not really talking about it from the
17 perspective of historical criminal defense trial lawyers.
18 I'm talking about it from somebody who wants to challenge
19 what that person is saying, and I can do it nowhere near
20 as successfully remotely as I can in person. And it's not
21 just me. I respectfully suggest that's all trial lawyers.
22 So as we -- I really do agree also with John.

23 I really appreciate what's been happening
24 with this committee about it. Now, this is, what, maybe
25 it's been talked about either our third or fourth session.

1 It's hugely important, but I -- I want to reemphasize my
2 agreement with John, that it's just something to tread
3 very lightly on, but very, very carefully with, because it
4 has huge, huge implications for the person that civilly or
5 criminally is defending against an allegation, and their
6 best defense is putting what the other person says to the
7 test in person and having people really look at them and
8 do. I saw that witness in the trial that he was nowhere
9 near what he was like in person. So thank you.

10 CHAIRMAN BABCOCK: You bet. Yeah, Judge.

11 HONORABLE MARIA SALAS-MENDOZA: So I've been
12 handling the mic over here, doing really well. I just
13 want to comment on a few things. One is that I think
14 Kennon's introduction bears reminding, which is I think
15 the committee took into account all of these things.
16 We've had several meetings where these opinions and
17 experiences have been expressed, and -- and I think the
18 recommendation tries to reach a fair resolution with
19 regard to these issues that doesn't throw the baby out
20 with the bath water. I mean, we've learned that being
21 able to keep the courts open with remote proceedings has
22 been obviously excellent since we didn't shut down, we
23 were able to continue to handle our dockets, and -- and
24 there were some very good things.

25 There was a comment made about judges being

1 about the numbers, and that's how we decide what -- what
2 we do. Some of the information that was shared with the
3 committee was about that, in fact, remote proceedings take
4 longer, right? They -- they take longer for lots of
5 different reasons, so it's not necessarily more efficient.
6 These proceedings take longer. They're harder on the
7 participants. I will tell you that I personally am
8 exhausted from Zoom. I don't think it's normal to be on
9 your computer all day. I think that interaction with the
10 Brady Bunch boxes is not normal. That was also in the
11 materials. I thought they were talking to me. They
12 didn't talk to me about that. I don't think that's
13 normal. But I don't think that we should not support what
14 the committee has come up with because there are some
15 advantages.

16 Judge Miskel has already mentioned that the
17 trial judge has always had the ability to permit witnesses
18 in various ways. We've always had that authority, but we
19 didn't do it that often, you know. That's -- that's
20 great, because the judges are -- are prioritizing
21 in-person proceedings. That tells you the judges know
22 that it's important, but in unusual circumstances and in,
23 you know, extreme or unique cases, you might want to let
24 that person from prison participate by phone because it's
25 better than no participation.

1 What the committee is suggesting is even
2 better, because you could have someone who might
3 participate remotely in proceedings where they currently
4 have no option. And the example that Mr. Hardin just
5 gave, sometimes you'd rather go with plan B. It's not
6 what you prefer, but if the option is not having the
7 witness, this -- this gives us the ability to have
8 witnesses and parties to make that decision, so -- so I
9 just wanted to emphasize that I think that the carve-out
10 is good, just because I think that that takes a whole lot
11 of other -- we're not talking about having jury trials
12 remotely. Those judges who have done it have already
13 expressed the benefits of it, and we all have different
14 experiences, but I -- but I think it would be a mistake if
15 we didn't take advantage of all of the experience and all
16 of the information that's been shared to provide this
17 option.

18 And I just want to state again that I also
19 agree with Judge Estevez that it's important to allow the
20 judge to veto remote proceedings because of -- of all the
21 things she said, but -- and I want to reiterate, as -- as
22 John said, the OCA will make available the equipment, but
23 that's not all it takes, and so if a judge is not prepared
24 to do a remote proceeding, the judge also should be able
25 to veto that, even if the parties consent.

1 CHAIRMAN BABCOCK: Thank you. Thank you,
2 Judge. Justice Kelly, and then Kent Sullivan.

3 HONORABLE PETER KELLY: As a general
4 philosophical point, we have to bear in mind that the
5 appellate process is premised on -- and we have to give
6 great deference to the fact finder because they're the one
7 who have the ability to assess the credibility of the
8 witnesses, and anything that interferes with that ability
9 to assess the credibility of the witnesses, for instance,
10 having to watch it in a Brady Bunch box or have it purely
11 remotely, sometimes it's raised in my mind, has the
12 credibility really been assessed if it's been a remote
13 hearing that has now been transcribed and come up to me.
14 There's been some opportunity lost for give and take
15 through cross-examination or follow-up questions, or if
16 there's a breakdown, you know, sometimes -- I was reading
17 one transcript where a witness is testifying by remotely
18 and then the feed went off. Well, that ruins -- as any
19 trial lawyer would tell you, that ruins the rhythms of the
20 cross-examination. It can throw things off, give the
21 witness time to recuperate. But I've had the question
22 come up, well, do I give that less deference in terms of
23 how the trial court or the finder of fact has assessed the
24 credibility of the witness?

25 So if there's to be any change, we should do

1 whatever we can to permit the finder of fact to have the
2 greatest ability possible to assess the credibility.

3 CHAIRMAN BABCOCK: Thank you, Judge. Kent
4 Sullivan, and then Tom Riney.

5 HONORABLE KENT SULLIVAN: I really just
6 wanted to briefly punctuate the comments made by John Kim
7 and just, you know, add my thoughts about the need to be
8 very, very careful and not rush to -- to judgment with
9 respect to a rule in this area. I think almost any rule
10 is going to be dependent upon the thoughtful and
11 experienced exercise of judicial discretion; and as I
12 think John was very candid about and I think it's
13 something that we increasingly need to acknowledge, is
14 that our Texas trial judiciary now represents a very broad
15 range of experience and capabilities. The people who
16 populate the trial courts have very different experiences
17 that they bring to the bench.

18 In a number of cases, we're seeing folks
19 that have very, very limited experience, as some, of
20 course, as he pointed out, many brand new judges; and in
21 addition to the difficulty of acclimating themselves to
22 the bench, many bring very limited experience as -- as
23 trial lawyers. So sort of a double deficit that a number
24 are having to grapple with, I think, which means, of
25 course, lawyers and litigants are also having to deal

1 with -- with that reality in some of the courtrooms. So I
2 think increasingly we're looking at a situation which
3 rules like this need to offer very, very clear guidance to
4 the trial courts in terms of how they would handle issues
5 like this.

6 And I'll -- I'll also throw out the point
7 that I always try and make, and that is I think that we
8 ought to try and avoid the tendency that we all have to be
9 parochial about this and we ought to consider best
10 practices. By that, I mean to look to the experience of
11 other states in light of the -- in light of the pandemic,
12 you may well be able to even look to the experience of
13 other countries in terms of how they have handled remote
14 judicial proceedings, and I think that we've got to try
15 and adopt the very best practices available based on the
16 broadest experience that we can draw upon in terms of what
17 works and what doesn't. Thanks.

18 CHAIRMAN BABCOCK: Thank you, Kent. Tom
19 Riney. Come on down.

20 MR. RINEY: Is it coincidental that this
21 corner down here is the only part of the room that's
22 nowhere near a microphone?

23 CHAIRMAN BABCOCK: Well, you guys
24 self-selected where you're sitting, so don't blame me.

25 MR. RINEY: All right. Good point. I

1 really want to emphasize what John Kim and Rusty Hardin
2 just said. I'll try not to repeat it, but they're very,
3 very good points. One thing particularly is that John
4 said -- and, Kennon, thank you very much for your work.
5 You're dealing with a very, very difficult issue, and
6 while I disagree with some of your recommendations, I
7 appreciate your efforts. One of the reasons that it is
8 difficult is because we're talking about making
9 fundamental changes in our justice system.

10 John mentioned the -- briefly, the letter
11 that was sent from six different organizations of trial
12 lawyers in the state. Organizations who have fundamental
13 differences on -- on many, many issues, and they say that
14 they -- they oppose -- that they do not oppose remote
15 proceedings for uncontested, routine matters, but that
16 they do oppose it for adversarial proceedings such as
17 witness testimony, evidentiary hearings, dispositive
18 motions, or bench trials. I agree. My -- my shorthand is
19 if it's an evidentiary proceeding, it should not be remote
20 unless the parties agree.

21 Now, I think these organizations probably
22 would also agree that if there's certain, you know,
23 justice of the peace court matters, certain family law
24 matters, those may be perhaps a little bit different
25 situations; and I know I don't purport to having the

1 expertise regarding that, but think just for a moment
2 about one statement from this letter that says, "We are of
3 one mind that in-person proceedings must be preserved if
4 the parties desire them." It's difficult to get six trial
5 lawyers to be of one mind on any issue, but to get six
6 different organizations of trial lawyers to -- to make
7 that statement shows, I think, how profound this issue is
8 and how we must be -- be very careful.

9 They, of course, advocate that -- I would
10 think they would say that there must be, like John Kim
11 suggests, the default would be that there's always an
12 in-person proceeding. Don't put the burden of proof on
13 someone who seeks to have a traditional in court
14 proceeding to show good cause. I won't go over the
15 letter, but they talk about, please, carefully define good
16 cause if you have a good cause exception, because there
17 can be problems there.

18 Now, Chip, are we at this point just
19 addressing proposed subparagraph (a), or are we accepting
20 comments on some of the other subparts?

21 CHAIRMAN BABCOCK: Well, we're headed to a
22 vote on subparagraph (a), but if you want -- wish to
23 comment on (b), that is -- that's great.

24 MR. RINEY: Well, I actually had (b), (c),
25 and the comments I was going to comment on, but I can wait

1 until we get to those sections.

2 CHAIRMAN BABCOCK: Your pleasure.

3 MR. RINEY: All right. I'll defer.

4 CHAIRMAN BABCOCK: Okay. Great. Judge
5 Miskel.

6 HONORABLE EMILY MISKEL: Just to return to
7 the point of judging a witness' credibility on Zoom, I
8 don't think that's anything anyone is going to change
9 anyone's mind on. I think the people that believe you
10 can't do it aren't going to have their minds changed. And
11 I think the people that have seen you can do it are not
12 going to have their minds changed, but what I'll add is
13 there is some data coming out. So Professor Valerie Hans
14 from Cornell has already conducted a study where she got
15 funding to do a same -- do the same -- put on the same
16 trial to an in-person jury and a remote jury, and she's
17 already conducted her trial, and she's writing up the
18 paper, so we will have data on these things eventually.

19 I will say I've done, you know, upwards of
20 300 trials on Zoom, and I think it's perfectly fine to
21 judge a witness' credibility on Zoom, but I understand
22 that won't convince anyone who disagrees with me.

23 I do point out that it is kind of ironic, I
24 was at a program last week for implicit bias, and they
25 were just hectoring us about how you should not judge a

1 witness' credibility based on their appearance, based on
2 their body language, based on all of these things that are
3 subject to bias and prejudice and are improper, and you
4 should listen to the content and all this. And so it's
5 funny to me to go from a session on implicit bias where
6 they're saying you should not judge a witness' credibility
7 on shifty body language or whatever it might be, to come
8 to a meeting where we're talking about we can't do it on
9 Zoom because we must judge a witness' credibility based on
10 shifty body language and appearance.

11 So I will just note we are sort of in a --
12 in a transition period in our legal system about what is
13 appropriate to judge witnesses' credibility on, because I
14 got an opposite message at the implicit bias presentation.

15 One last thing, I would just please beg
16 everyone to consider the graphic that I showed at the
17 beginning of this discussion, which, if I can share again,
18 I'm going to put back up on the screen. Let's not throw
19 the baby out with the bath water. What I've heard
20 everyone say is, we disagree that Zoom should be used for
21 these 8,000 trials, but we have no experience with these
22 92,000 trials, and so I would say I have lots of
23 experience with these 92,000 trials, and I would say that
24 there are many, many times in family law that it improves
25 justice for parties to either be forced to appear remotely

1 or forced to appear in person without the consent of all
2 parties. And I could come up with just a variety of
3 examples in the trials that are the day-to-day work of
4 what we hear, that it would be 100 percent a good thing
5 and yet you won't get consensus unanimity on it because
6 it's a high conflict case or whatever the case may be.

7 For example, family violence protective
8 orders. Those are free for litigants to file, so many
9 times they will have all kinds of disputes, who -- who
10 gets the washer and dryer when they broke up and moved
11 out. It costs money to file a case about who gets the
12 washer or dryer. It does not cost money to file a
13 protective order, so a pro se applicant will come in and
14 file a protective order that on its face does not meet the
15 elements to be able to grant a protective order, but we
16 still have to set a trial of that lawsuit. Generally when
17 we have protective order trials, they are pro se on both
18 sides. They take approximately 15 to 20 minutes total for
19 the final trial. They come in and we say, oh, you don't
20 have the statutorily required relationship or you don't
21 meet the standard for other reasons, and the case is
22 dismissed or denied or whatever it might be.

23 We have some applicants who file these cases
24 repeatedly, and so what I have done is to say -- instead
25 of making the respondent constantly have to take off work

1 to come down and defend this frivolous game, we're just
2 going to do those on Zoom. Having that tool is great, and
3 it enhances justice, and I can think of a million examples
4 for family law, so I would just please request even if
5 everyone agrees that in your civil jury trials you don't
6 ever want fact finding to be done on Zoom, you've
7 expressly stated that you don't have experience with the
8 92,000 other trials out of 100,000 trials that Texas
9 courts are hearing in district court. So I'll stop there
10 and let Judge Estevez add or disagree.

11 HONORABLE ANA ESTEVEZ: She just knows I'm
12 going to agree. That's why she called on me.

13 CHAIRMAN BABCOCK: Well, but go ahead.

14 HONORABLE ANA ESTEVEZ: I'm going to -- I'm
15 just going to echo what Judge Miskel is -- is trying to
16 communicate. The amount of bench hearings, whether
17 they're final, temporary, whether it's in family law or
18 I'm doing a discovery dispute in civil. I mean, we keep
19 talking about the credibility of the witness, the
20 credibility of the witness, but most of the time, it's
21 just we're really weighing how much does that evidence
22 affect what we're going to do. So we don't have a lot of
23 people getting on here saying, no, that's not true, she
24 wasn't tardy that day at school. She doesn't have 45
25 tardies. They're giving us whatever the excuse might be,

1 and we're weighing the evidence that may be agreed, it's
2 contested, but they're trying to decide do we think this
3 is worse or are you a better parent, and -- and they're
4 not really saying that they've never engaged in these
5 behaviors.

6 Likewise, let's say we have a Daubert
7 hearing and we're listening to all of this stuff about an
8 expert. No one's -- the expert is not going to say, "No,
9 I really didn't" -- "you didn't really publish this." I
10 mean, the question is when we have all of the information
11 on most of these contested hearings, who's -- who's going
12 to prevail? Not whether or not a lot of that information
13 is true. I think when we have those true fact issues, was
14 the light green or was the light red, those are the issues
15 that they normally do go to a jury trial. I've actually
16 never had a bench hearing on what color the light was or
17 no one has presented any of those car wreck types of cases
18 for me as far as a bench -- bench hearing.

19 So when she's talking about these 90,000,
20 95,000 bench hearings, what we're usually looking at is
21 applying these facts to the law and determining who's the
22 best parent under the circumstances, what's in the best
23 interest of the child. It's not really -- there's just
24 not that many people that are lying unless you're talking,
25 you know, in the criminal cases, sure. I mean, they've

1 already taken that off -- that's off the table, so we
2 can't do those unless they're agreed, which by the way, I
3 mean, my last Zoom hearing was Monday. I've got family
4 law cases that they've asked me to do by Zoom that start
5 on Tuesday. I don't know if one of them is out of town
6 or, you know, I've had lots of them that one side moves
7 and the other one stays. And so it's just such an
8 important tool, and if one person wants to appear in
9 person, they can always appear in person at this point,
10 and so we shouldn't be taking away somebody's choice of
11 how they need to appear for them to be able to access
12 justice.

13 So I -- I just want you guys to think about
14 that. I mean, I've -- I've felt like the credibility
15 issues or judging my witnesses has been -- it's been a
16 total different dynamic. I mean, when you get somebody
17 didn't know what they were wearing at work before you get
18 to see them, you know, and I'm not saying I'm judging them
19 on that, I just see that. I see what's in the background.
20 They -- they act a little more like themselves, whatever
21 that might be. And I think most of y'all work with very
22 sophisticated clients. We're working with the -- with the
23 ones that don't have the resources to miss work. They
24 might be in the car. They may not have a car, so they may
25 be using someone else's phone on a lunch break or taking a

1 quick break so that they can be heard, and we just -- we
2 really have to be thinking of them. You will always be
3 able to object. You will always have, you know, when you
4 go in there, you'll have -- your client will have your
5 voice to object, make a record, but we need to think about
6 everyone.

7 CHAIRMAN BABCOCK: Thank -- thank you,
8 Judge. Something that Judge Miskel said sparked a memory,
9 and I know Tom Riney probably will remember this as well,
10 and Judge Schaffer saw an example of this last night --
11 where I had a case in Amarillo and a witness for the other
12 side flew down from Chicago to testify. And he was quite
13 adamant and animated in his testimony that something had
14 happened a couple of years earlier in front of him that he
15 had seen, and it was -- it was a particular way. He had a
16 clear memory of it, and this had happened, and he had
17 forgotten that the -- the day after the incident that he
18 was describing, he had given a television interview and
19 said the exact opposite of what he had testified to.

20 Now, the guy was either English or Irish,
21 very fair-skinned, you know, the pink skin, and he was
22 bald, and so when I caught him in this lie, the blood
23 rushed to his head, and I was very proud of myself for
24 thinking on my feet and saying, "How do you make your face
25 go red like that?" And that happened last night with

1 somebody who made a gaffe in introducing me to Judge
2 Schaffer, and my point is that that witness' credibility
3 was damaged greatly, I thought, and we later learned the
4 jury thought as well, by his blood rushing through his --
5 his head and his head exploding in red, and that might
6 have been lost on video. Maybe not, but probably would
7 have been, and I think that his credibility would have
8 been affected, whether that's a jury trial where the jury
9 is the fact finder or the judge, where the judge is a fact
10 finder and -- and seen that, or at least when I pointed
11 out that this guy had been caught in a lie and his face
12 was going red, it might have impacted things.

13 And Judge Miskel said, and it's true, that a
14 lot of times we -- we have video depositions at a trial,
15 but, think about it, it's always because -- almost always
16 because we can't compel that witness to come to trial and
17 we've taken their depositions in a remote place, and we
18 have to play it because we can't make them come to the
19 courthouse, or -- and I saw a case -- one case tried where
20 the witnesses typically could have been compelled, but had
21 done so badly in their depositions that they played the
22 depositions back-to-back-to-back, but that's a choice of
23 the litigants, and that's different from what we are
24 talking about where we're going to take that choice away
25 from the litigants.

1 Kennon, I know you want to speak, but
2 Justice Kelly has waited patiently while Judge Estevez
3 jumped the line on him, and I did, too. So sorry, Judge.

4 HONORABLE PETER KELLY: So it's 20 minutes
5 or half an hour ago when I raised my hand, but it seemed
6 there were two or three comments in a row dumping on new
7 judges. I think there's an old judge problem, too.
8 Sometimes judges have too much experience or won't read
9 the comments when they're applying rules, so I just want
10 to be clear that we're not changing rules or considering
11 things because there are new judges on the bench in 2022.
12 It can be a problem either way.

13 CHAIRMAN BABCOCK: Great -- great point,
14 well-taken. Kennon.

15 MS. WOOTEN: Just a couple of things I
16 thought would be good to say. Actually, three. First,
17 there is a hard-working subcommittee, it's not just me, so
18 I appreciate all of the kind words, but I want to kind of
19 say thank you to all of the people who have done work on
20 the proposed rules in an effort to strike the right
21 balance.

22 In regard to the letter that's been
23 referenced several times from ABOTA and others, I will say
24 I read that this morning for the first time, so those
25 statements aren't reflected in what we're considering

1 today, and I think in the past a lot of the focus has been
2 on jury trials, but I think it's going to be interesting,
3 if the Chair agrees to have a vote, on whether the
4 carve-out should apply to contested matters as opposed to
5 just jury trials, because it seems as though several
6 people would believe that the carve-out should be broader
7 than it is now.

8 The third and final --

9 CHAIRMAN BABCOCK: Let's take baby steps
10 first.

11 MS. WOOTEN: Yes, of course, but I just -- I
12 just wanted to acknowledge that this is developing
13 quickly, and the input is being received along the way,
14 but the draft sometimes get done before all of the
15 feedback comes in. The final thing in regard to the good
16 cause definition, welcome suggestions on how to make that
17 clearer. I will say that there's already a phrase in the
18 comment that I am guessing -- and I could be guessing
19 wrong -- but I'm guessing that some people who honor
20 grammar at the Texas Supreme Court might think is
21 unnecessary, because it states now that "When evaluating a
22 request, the court should consider factors, including, but
23 not limited to, the following." So "but not limited to"
24 is obviously unnecessary because the term "including" is
25 designed to convey it's a nonexhaustive list, but the

1 reason that unnecessary phrase is there is to drive the
2 point home for the people who are going to be reading this
3 comment, if it someday becomes something that goes on the
4 books, that this is not an exhaustive list and the
5 analysis does not begin and end with the enumerated
6 factors laid out.

7 CHAIRMAN BABCOCK: Yeah, great point. Judge
8 Wallace, did you have your hand up?

9 HONORABLE R. H. WALLACE: Yes, I did.

10 CHAIRMAN BABCOCK: I thought so. Get -- get
11 the microphone.

12 HONORABLE R. H. WALLACE: Of course, one
13 thing we're wrestling with is we're trying to formulate a
14 rule that there's one size fits all, and what I'm hearing,
15 access to justice in the family courts, that's probably a
16 much bigger issue than it is in just plain old civil
17 cases. There are very few pro se litigants in civil
18 cases. If they can't find a lawyer to represent them in a
19 civil case, it may be because the lawsuit is frivolous or
20 brought for just harassment purposes.

21 But in any event, I don't know, you know, if
22 there should be a carve-out talking about the one rule in
23 family courts and others in other courts. Probably not,
24 but that's kind of -- as a practical matter, that's the
25 difference.

1 Also, I think there's a huge divide, and
2 we're talking not necessarily about contested, but
3 evidentiary versus nonevidentiary. I mean, a summary
4 judgment can be contested, but I have no qualms about
5 hearing one of those by Zoom anytime, but I also think
6 that trial judges should have a whole lot of discretion in
7 deciding. I'm -- I'm carving out jury trials completely,
8 but just for everyday hearing, the trial judges should
9 have a lot of discretion, because there may be reasons
10 they want to hear a particular issue in person and see the
11 lawyers there that -- that don't appear in the black and
12 white record.

13 And -- and I have a -- I guess my last
14 comment is in the form of a question. As far as good
15 cause, let's say, Chip mentioned awhile ago the problem of
16 having to go to Amarillo or Brownsville or whatever.
17 Is -- is the cost -- would the cost and expense and time
18 of counsel be good cause for having a hearing remotely as
19 opposed to in person if -- if Tom says, "It's going to
20 take me X number of hours and cost me so much money that
21 my client's going to have to pay me to get to Brownsville
22 for this hearing," is that good cause? And if so, I don't
23 know if you want to go down that path. That's all I have.

24 CHAIRMAN BABCOCK: Yeah, thank you, Judge.
25 Yeah, Jim Perdue. Take the mic.

1 MR. PERDUE: Judge Brown did have his hand
2 up, but it was given to me, so --

3 CHAIRMAN BABCOCK: Well, I spotted you
4 first.

5 MR. PERDUE: I appreciate it. I'll be
6 quick, just because I don't want to repeat stuff, but
7 there's been some suggestion regarding data. There is a
8 report from the National Center of State Courts. As
9 everybody in this room may know, David Slayton was with
10 OCA and then he moved up there. They take a focus group
11 project of judges in Texas and that leads to a national
12 report on the Texas experience with remote proceedings.
13 It is -- it suffers from some selection bias, in my
14 opinion, because of the judges who were participants in
15 it, because it's voluntary, and they're trying to get a
16 cross-section of urban to rural, but even in this report,
17 which, frankly, from my perspective was designed to kind
18 of be a proponent of remote proceedings.

19 It picks up on a couple of things. One, the
20 promise of remote proceedings taking less time for the
21 courts and litigants is not true. They actually take
22 about 1.5 -- it's about 50 percent more in time, according
23 to this survey. In the report for the takeaways for, you
24 know, why would we abandon what was practice in February
25 of 2020 for a world that hopefully will get past this

1 pandemic, the -- the judges report that it is -- it is not
2 the type of case -- the way it's written is judges --
3 Texas judges agreed that the type of case is less relevant
4 than the type of hearing. Generally speaking, remote
5 hearings function most effectively with short hearings
6 that are limited in scope, such as setting hearing dates,
7 trial dates, permanency hearing, discovery hearings,
8 motion hearings of various types, summary judgments,
9 interestingly self-represented divorce dockets, and
10 nonevidentiary cases.

11 It comes to the same conclusion as the ABOTA
12 letter, that uniformly the judges don't believe the jury
13 trials work, and then that leads me to the language of the
14 rule, because the -- the language of the rule, two issues
15 for the subcommittee's -- and perhaps this committee's
16 consideration. The carve-out in -- in a limited sense to
17 just jury trials is also in the construct that the court
18 is the one determining the form of the proceeding, so that
19 the notice is essentially by the court of the -- of the
20 nature of the proceeding.

21 So one of the legislative compromises that
22 did not get passed this past session was in the bill that
23 came out of the Senate author, but it did actually say
24 "jury trials and contested evidentiary hearings." That
25 became the language that was agreed to by both sides. And

1 to your point, Judge Wallace, that terminology was
2 "contested evidentiary hearings" could not be remote
3 without the agreement of all of the parties.

4 And obviously I think there's general
5 consensus, even amongst those in the family bar and others
6 that the concept of jury trials, and this focus group data
7 seems to support it, so I would -- I would suggest that
8 maybe there's a consideration of what the language we look
9 at in -- in a carve-out that would carve out contested
10 evidentiary hearings. Is that too broad, is that too
11 narrow? I think it strikes a balance, because I think
12 you're going to have -- I think you want a rule with a
13 hard out, because of this scenario.

14 The way this reads now, a court sets the
15 means of the hearing, so you've got a bench trial, and
16 under the current system the way the rule is in flipping
17 the, quote-unquote, good cause showing, one of the parties
18 to that bench trial now must object and the court must
19 grant it unless it finds there is good cause, but realize
20 the comment says that the party wishing to do it
21 differently must state the reason why.

22 MS. WOOTEN: Or should.

23 MR. PERDUE: Or should.

24 MS. WOOTEN: It's permissive, yes.

25 MR. PERDUE: And then you have this

1 limitation on examples of good cause, which are always
2 dangerous because now there's examples, and to John Kim's
3 excellent point where if you're not one of the examples, I
4 agree, not including two should get you there, but Rusty
5 Hardin objects to a -- a virtual bench trial. Rusty
6 Hardin objected to a virtual jury trial, and I think had
7 to take it up on mandamus, but the judge -- and he does it
8 because he wants to cross-examine the adverse party in
9 person, and the judge finds good cause in that that person
10 has to travel from New York, has some immunodeficiency
11 history. They're doing business in this state, and
12 whether a plaintiff or defendant or a party and subject to
13 the jurisdiction of that court, under this rule as written
14 now, because of the way the defaults work with the court
15 setting the process, the party having the burden to make
16 the objection, and the objection must be granted, but with
17 the out and without a hard carve-out, you can see an easy
18 pathway for a serious matter involving contested
19 evidentiary decisions to be forced into a remote
20 proceeding context.

21 I'm struggling with the language for you
22 on -- on the alternate means out. My joke for the
23 appellate friends and appellate bar is everything looks
24 like mandamus, and I hate that, but you know, just today
25 in here for those of us in this room versus those of us

1 who are on Zoom, humbly it's not a matter of the
2 credibility of witnesses. The transcript of this today is
3 not going to really reflect this deliberation. The people
4 who have testified via Zoom on this TV screen, I don't
5 know if you've caught all of it. I'm proud of you for
6 doing everything you do. The people that are in here
7 listening to each other having differences, we've had
8 technology failures even with all of these resources.
9 This is just a difficult, difficult thing, and there is a
10 path forward, I believe, moving forward next year, but
11 there is some data regarding judges, takebacks, time
12 involved; and while the interest of access to justice is
13 certainly important, I don't believe the system was
14 failing to provide access to justice for whatever number
15 of people in February of 2020, so --

16 CHAIRMAN BABCOCK: Thank you. I'm not sure
17 who had their hand up first, either Judge Miskel or
18 Harvey, but who wants to go first? Judge Miskel.

19 HONORABLE EMILY MISKEL: I think that that
20 statement ties into the point I was going to make, which
21 is -- I mean, first of all, I'm glad to be here because
22 I've been sick in bed all week, and you wouldn't have
23 heard my voice today unless I had been allowed to
24 participate by Zoom, and I think the discussion would not
25 have had all of the perspectives that I've been able to

1 say, but thank you for allowing me to appear remotely and
2 present them.

3 CHAIRMAN BABCOCK: But we wouldn't have
4 wanted you here if you were sick anyway, so --

5 HONORABLE EMILY MISKEL: Our discussion, by
6 its very nature, is biased. We all have cool war stories
7 about things that happened with those witnesses who were
8 in court or the opposing party who was in court, because
9 they showed up; and what is harder to imagine is the
10 thought experiment of all of the things that would have
11 happened had we ever heard from all of the people who
12 didn't show up. And so in February of 2020, I had a
13 failure of imagination, because the people who didn't show
14 up weren't real to me, because they were the type of
15 people who never showed up; and so I never heard from them
16 and I never had to worry about them, and I'm not some sort
17 of technology zealot. I don't like technology for
18 technology's sake. The reason I'm so passionate is
19 because during the pandemic when I was forced to do things
20 on Zoom, I started seeing all of the faces of all of the
21 people who never showed up before and were never the
22 subject of those devastating cross-examinations because we
23 never heard from them, and so I became passionate because
24 those people are now real to me.

25 One thing I would say is I -- I spoke about

1 protective order trials, and so one of the things I want
2 to just add, the reason I brought that up, a final trial
3 can be a short matter that's very limited in scope. So I
4 do -- I don't know how many of those protective order
5 trials I do in a week, five to ten. And on average,
6 they're almost exclusively self-represented litigants, and
7 they take literally about 15 minutes beginning to end, but
8 they require those people to take off work, come to the
9 courthouse, wait around, all of that. Just for
10 perspective, our numbers that we're doing in trial courts,
11 I average 30 final trials a month. That means I'm doing
12 one and a half final trials a day, and that's because some
13 of our trials in family law cases are these 15-minute pro
14 se -- it's a lawsuit, it gets a final trial, but it's
15 quick, it's limited in scope.

16 Oftentimes it's technically contested on
17 paper, but that's because the self-represented litigants
18 aren't sophisticated enough to even know that they're not
19 actually contested, they actually agree, right. Final
20 divorce, both pro se litigants show up and I say, "Well,
21 who's the kid going to live with primarily during the
22 school week." "Oh, mom, of course," and we go through
23 each of the things in the pro se divorce form and they've
24 agreed on everything, but that was a contested hearing
25 because they didn't know beforehand that they agreed on

1 everything. Those are things that would help them to sit
2 on Zoom. And so that's the reason I push back against
3 requirements of unanimity, requirements that all contested
4 evidentiary things must be done in person, because those
5 are the things that are the barriers to access to justice
6 for the people that I have now seen their faces that were
7 totally excluded before February of 2020.

8 CHAIRMAN BABCOCK: Thanks, Judge. All great
9 points, but you're not trying to take away my war story,
10 are you?

11 HONORABLE EMILY MISKEL: War stories are
12 great. Now we can have war stories with all of the people
13 we never even got to, you know, devastate before.

14 CHAIRMAN BABCOCK: There you go. But did
15 you make any of them -- their faces go red, I think not.
16 Okay. Harvey.

17 HONORABLE HARVEY BROWN: Well, I wanted to
18 speak out in favor of -- of many points about --

19 CHAIRMAN BABCOCK: And go into the mic.

20 HONORABLE HARVEY BROWN: -- injunctions and
21 evidentiary hearings. I think we should have a -- a
22 carve-out for that. I've been persuaded by Judge Miskel
23 that we should create an exception for family law and
24 protective orders, at least initially.

25 CHAIRMAN BABCOCK: We've never done that.

1 We've never done that.

2 HONORABLE HARVEY BROWN: And I just wanted
3 to point out that we have two attachments, A and B, and
4 last time we had a justice of the peace speak very
5 strongly that those courts should maybe be treated
6 differently, and -- and in those courts maybe it should be
7 limited to just jury trials, and I just didn't want us to
8 lose that discussion. I'm not sure I'm persuaded or not,
9 but I do think district courts are a little different
10 because of the access to justice issues in -- in JP
11 courts.

12 CHAIRMAN BABCOCK: Well, and de novo appeal,
13 too.

14 HONORABLE HARVEY BROWN: Right.

15 CHAIRMAN BABCOCK: So, okay, anybody else
16 want to talk about subparagraph (a)? I think that we
17 probably, Kennon, could have a vote on -- on subparagraph
18 (a) of this exception language if we added the language
19 either substituting "litigants" for "parties," or "parties
20 to the lawsuit" and then adding -- and the court, pursuant
21 to Judge Estevez's comment. So the -- the court would
22 have to agree, too, right? Is that acceptable to the
23 chair of the subcommittee?

24 HONORABLE EMILY MISKEL: I think the
25 allowing of the court is already built in because it says

1 the court may allow or require, so I don't think the
2 language could ever be used to compel a court to allow a
3 jury trial.

4 MS. WOOTEN: It just says that the court
5 cannot.

6 CHAIRMAN BABCOCK: Yeah, it says the court
7 may not.

8 MS. WOOTEN: I think changing the last
9 phrase "involved in the jury trial" to --

10 CHAIRMAN BABCOCK: Yeah, and I didn't --

11 MS. WOOTON: -- quote, "to the lawsuit" or
12 something like that, so it would be all parties to the
13 lawsuit.

14 CHAIRMAN BABCOCK: Yeah.

15 MS. WOOTEN: I think that's better.

16 CHAIRMAN BABCOCK: Yeah, and delete
17 "involved in the" -- "in the jury trial."

18 MS. WOOTEN: Correct.

19 CHAIRMAN BABCOCK: If it were up -- if it
20 were up to me, I would put a belt and suspenders on it,
21 just Judge Miskel is right, it grants discretion in the
22 first sentence, but I would say "all litigants or all
23 parties to the litigation and the court."

24 MR. PERDUE: So how -- how would that work
25 then if the court ordered it in person, a litigant objects

1 to it being in person and wants it remotely, that must be
2 granted, but the court doesn't agree under (a)?

3 HONORABLE MARIA SALAS-MENDOZA: That's not
4 what's required.

5 CHAIRMAN BABCOCK: The court can require the
6 lawyers, litigants, or jurors to appear remotely for jury
7 trial, absent the consent of all litigants or all parties
8 to the litigation. So you don't want to add in the
9 court --

10 MR. PERDUE: Well, I'm -- I'm just curious,
11 because the -- the construct in (b), right, is a way other
12 than ordered by the court, not --

13 MS. WOOTEN: And the construct in -- in (b),
14 is really about things other than jury trials, because
15 what the exception -- that carve-out is there just to say,
16 look, that's off the table.

17 MR. PERDUE: Right. Right.

18 MS. WOOTEN: So the conversation is over
19 under this proposal if you don't have consent of all of
20 the parties to the lawsuit.

21 CHAIRMAN BABCOCK: Right.

22 MS. WOOTEN: I don't know that adding the
23 phrase "and the court" works with all of the other
24 parts --

25 CHAIRMAN BABCOCK: Yeah, no, I see what your

1 point is, yeah.

2 MS. WOOTEN: -- of this rule.

3 CHAIRMAN BABCOCK: Yeah, Judge Estevez,
4 what do you think about that, if you're not doing a
5 hearing right now?

6 HONORABLE ANA ESTEVEZ: I couldn't hear the
7 final part. I liked what you were saying before, but what
8 did she just say that she suggested? Can you repeat that?

9 CHAIRMAN BABCOCK: Yeah. Kennon was saying
10 that with this language in the italicized under proposed
11 500.10(a), "except that a court may not require
12 lawyers" -- I'm just going to say "litigants" -- "lawyers,
13 litigants or jurors to appear remotely for a jury trial,
14 absent the consent of all litigants." Or "all parties to
15 the lawsuit," one or the other, and she's -- she's
16 suggesting not inserting, "and the court" on the theory
17 that that's already provided for in the introductory
18 sentence. If I -- if I understand you correctly, Kennon;
19 is that right?

20 MS. WOOTEN: That's correct.

21 CHAIRMAN BABCOCK: Okay.

22 MS. WOOTON: I don't think that phrase
23 works --

24 CHAIRMAN BABCOCK: Yeah.

25 MS. WOOTON: -- considering that.

1 CHAIRMAN BABCOCK: So that's --

2 HONORABLE ANA ESTEVEZ: As long as it's
3 clear that no one can agree above what the court would --
4 that -- I just want to make sure the court gets their veto
5 power, because I don't think all the courts would allow
6 that even if they agreed. I think the majority of the
7 courts in Texas do not want to have remote jury trials,
8 but find that it is very beneficial to allow someone to
9 appear remotely, and it doesn't necessarily have to be a
10 remote proceeding, but you could have one person in-person
11 and the other person appear remotely. I think that is
12 beyond the majority. I would say 98 percent of the judges
13 would probably agree with that.

14 CHAIRMAN BABCOCK: Yeah.

15 HONORABLE ANA ESTEVEZ: So --

16 CHAIRMAN BABCOCK: Well, I'm with you, and
17 I'm going to read the language and then we're going to
18 vote.

19 HONORABLE ANA ESTEVEZ: But I think -- I
20 think it will be okay.

21 CHAIRMAN BABCOCK: I'm going to read the
22 italicized language as we have worked on it here, and
23 everybody who is in favor of it is going to raise their
24 hand. "Except that a court may not require lawyers,
25 parties to the lawsuit, or jurors to appear remotely for a

1 jury trial, absent the consent of all parties to the
2 lawsuit," period. Everybody in favor of that, raise your
3 hand.

4 MR. PERDUE: What's the vote, the language
5 you just read?

6 MS. WOOTEN: Yes.

7 HONORABLE HARVEY BROWN: And, Chip, that was
8 for the justice of the peace courts?

9 CHAIRMAN BABCOCK: This is for this Rule
10 500.10. Okay. Everybody opposed, raise your hand. So
11 that passes by a margin of 22 to 5.

12 HONORABLE ANA ESTEVEZ: I just -- I want to
13 ask, and everyone agrees that that was enough to give the
14 court veto power, correct?

15 CHAIRMAN BABCOCK: Yes.

16 HONORABLE ANA ESTEVEZ: Okay.

17 CHAIRMAN BABCOCK: That -- that's clear from
18 our discussion and we think from the language, but the
19 Supreme Court will have the last word on that.

20 MS. WOOTEN: Yes. And on many other things.

21 CHAIRMAN BABCOCK: On everything, but
22 what -- what the Supreme Court will not have the last word
23 on right now is our lunch break, which is now.

24 MR. KIM: Can I ask a question?

25 CHAIRMAN BABCOCK: Yeah. Off the record.

1 (Recess from 12:28 p.m. to 1:01 p.m.)

2 CHAIRMAN BABCOCK: While we're waiting for
3 others to join us from outside, Kennon, do we want to go
4 to (b), or John Kim wanted us to discuss whether or not
5 there would be other matters exempted from anything other
6 than juries, jury trials. So this concept of, you know,
7 any contested evidentiary hearings, and I don't know if
8 John is still around.

9 MS. WOOTEN: He had to leave.

10 CHAIRMAN BABCOCK: Did he leave? Okay.
11 Well, let's -- why don't we defer that issue until later,
12 because I think justice court, as somebody just said when
13 we broke, is different or could be different on that
14 issue.

15 MS. WOOTEN: I agree.

16 CHAIRMAN BABCOCK: So we'll just note in the
17 record that -- Shiva, note that John dissented from our --
18 our last vote, but without the understanding, and we're
19 going to go back and see whether or not it should be
20 broader or not than just jury trials, so let's go to
21 subparagraph (b) and talk about that.

22 MS. WOOTEN: Sounds good. So, again, for
23 the record, the big difference here when compared with the
24 initial proposal is as follows: The initial proposal
25 would have allowed the trial court to direct whether a

1 party or participant, more precisely, appears in person or
2 remote. Then the initial proposal then would have allowed
3 the party to object to what the court has done and would
4 have allowed the trial court to grant the objection with
5 good cause. So what we're looking at today for
6 consideration is in attachment B to the materials.
7 Specifically, though, it's attachment A to the memo from
8 me, dated May 23rd, 2022, subpart (b) of proposed new rule
9 500.10, and it would allow the party to file the request
10 to participate in a manner other than what's been directed
11 by the court and would provide for a granting of that
12 request, absent good cause; and I think, Chip, you did a
13 really nice job of fleshing it out and laying it out
14 earlier in the record, so I won't repeat what you said;
15 but, of course, there's more to this subpart (b) that I
16 just stated.

17 CHAIRMAN BABCOCK: Okay. Harvey.

18 HONORABLE HARVEY BROWN: I have a question.
19 It says the parties may file a request. May a lawyer file
20 a request?

21 MS. WOOTEN: I think when the lawyer is
22 acting on the party's behalf, yes.

23 HONORABLE HARVEY BROWN: Right, but if the
24 lawyer wants to appear remotely but the party is going to
25 appear in the courtroom, is that something that this rule

1 contemplates or not?

2 MS. WOOTEN: Not in its current form. It
3 would be driven by a party request, and again, if -- the
4 lawyer could certainly make requests on behalf of the
5 party for any participant to be there in a manner
6 different than what the court has directed.

7 HONORABLE HARVEY BROWN: Do you see any
8 disadvantage to allowing a lawyer to ask?

9 MS. WOOTEN: I'm thinking about potential
10 disadvantages, and the only one that's automatically
11 coming to mind is the possibility of lawyers maybe trying
12 to game the system a little bit, and the way it's drafted
13 now, it's driven by the actual parties to the lawsuit in
14 terms of how their proceeding would go through, but that's
15 the only thing that's come to mind right away. You may
16 have a counter to that and the lawyer should be able to --

17 CHAIRMAN BABCOCK: Well, if the lawyer wants
18 to do what Harvey suggests, wouldn't the lawyer say, you
19 know, "I'm Harvey Brown, counsel for" --

20 MS. WOOTEN: Yes.

21 CHAIRMAN BABCOCK: -- you know, "the
22 plaintiff"?

23 MS. WOOTEN: Yes.

24 CHAIRMAN BABCOCK: And -- and "moving on
25 behalf of the plaintiff, I want you to let me appear

1 remotely"?

2 MS. WOOTEN: Yes. I think that could
3 happen, and thinking aloud a little bit more on this
4 particular point to some kind of situation where a lawyer
5 wants something that the party doesn't want, well, at the
6 end of the day, the lawyer is there to represent the party
7 and carry out what the party wants, and so I don't know
8 that we need to identify lawyers specifically.

9 CHAIRMAN BABCOCK: I suppose Harvey could
10 say, "I'm representing the plaintiff, and I want to appear
11 remotely, but my client is going to be there in person,"
12 and the client files a letter or something with the court
13 and says, "No, no, no, I want my lawyer with me. I don't
14 want to be there by myself."

15 HONORABLE HARVEY BROWN: Right, but the
16 client might also consent. I mean, I -- I think of when
17 we were somewhat past COVID, but some people were still
18 very concerned and some lawyers who were a little older
19 really were concerned about it, and they might have wanted
20 to appear remotely, have their client in the courtroom; or
21 if you had more than one lawyer on your team, for example,
22 maybe your appellate lawyer wants to participate, but
23 they're in a different city and they want to participate
24 remotely, they may want to be able to have the ability to
25 ask for that.

1 CHAIRMAN BABCOCK: Yeah.

2 HONORABLE HARVEY BROWN: I guess I don't see
3 a downside in allowing the lawyer to ask because I don't
4 see how a lawyer would game the system, because what would
5 be the advantage of appearing remotely? I don't see an
6 advantage.

7 CHAIRMAN BABCOCK: No, I totally agree with
8 you, but I -- is the language where we say "a party," I
9 mean --

10 HONORABLE HARVEY BROWN: I guess I think --
11 when I think of a party, I think of the party itself, not
12 the lawyer acting on behalf of the party, so I would say
13 party or a lawyer.

14 CHAIRMAN BABCOCK: Okay.

15 HONORABLE MARIA SALAS-MENDOZA: Can I --

16 CHAIRMAN BABCOCK: Yeah, Judge.

17 HONORABLE MARIA SALAS-MENDOZA: More -- more
18 in the way of a war story, but we are seeing that some of
19 the access to justice issues are coming from lawyers, and
20 we do see a number of lawyers who, because of age or their
21 health conditions, have asked to appear remotely, even as
22 courts are returning, but I know we are specifically
23 addressing disability issues; and one of the articles that
24 was shared was about how the screens and the freezing and
25 all of those things really sort of can -- can set us all

1 off. So I do think there are circumstances where it's not
2 necessarily a -- for a strategic litigation position, but
3 just the request of the lawyer that has nothing to do with
4 the party's position or anything like that, and we are
5 seeing that. We are seeing some lawyers, for various
6 reasons, asking to participate remotely themselves.

7 CHAIRMAN BABCOCK: But are you seeing
8 situations where the lawyer says let me appear remotely,
9 but their client is going to be in court?

10 HONORABLE MARIA SALAS-MENDOZA: I have seen
11 it, because I've had pleas that were taken and the
12 defendant knows they've got to be present at a physical
13 location and -- and so I have seen lawyers request to
14 appear remotely for pleas when -- sometimes it's a
15 conflict, but I have seen the request for health reasons.

16 CHAIRMAN BABCOCK: Yeah. Okay.

17 HONORABLE MARIA SALAS-MENDOZA: So that's a
18 hybrid situation, but it's for a health reason, and we
19 have seen that.

20 CHAIRMAN BABCOCK: Yeah. Judge Miskel.

21 HONORABLE EMILY MISKEL: I was just going to
22 say since these are the justice court rules, I don't know
23 the answer to this, but do other places in the justice
24 court rules refer to parties and attorneys, or because
25 it's the justice court rules do they just refer to

1 parties, because I would just say whatever makes it
2 consistent with the rest of the justice court rules.

3 CHAIRMAN BABCOCK: Lamont, is that your hand
4 up, or you're just twirling your glasses?

5 MR. JEFFERSON: No, but I had a -- I had
6 a -- just a quick comment that to me lawyer is the party,
7 and I -- whether it's in county court or the district
8 court or justice court, if it's good for -- if it's good
9 for the lawyer, it's going to be good for their party --
10 for their client, and if that's not the case, then you've
11 got bigger problems, so but I don't think -- I don't think
12 we need to separate out and say, you know, it's the
13 lawyer's request as opposed to the party's request.

14 CHAIRMAN BABCOCK: Okay. Robert, and over
15 the lunch hour I received feedback that -- that your
16 mic is not as strong as some of the others, so maybe if
17 you could speak up a little bit, that would be great.

18 MR. LEVY: Sure. Sorry about that. The --
19 I just had a couple of comments. One is similar to what
20 was said earlier. I think that the rules should include a
21 presumption that the proceeding will be in person rather
22 than just leaving it as neutral. But the other point is
23 should this rule also permit a third party to also appear
24 remotely if we're allowing parties and their attorneys?
25 Because there might be a situation where somebody wants to

1 challenge a subpoena or other issue of request for
2 production and they want to appear remotely on behalf of
3 their client who is not a party in the case.

4 CHAIRMAN BABCOCK: Okay. Thank you. On the
5 issue of whether or not the word "party" is used in the JP
6 rules, Rule 500.2 asks -- specifically defines "party" as
7 "a person or entity involved in the case that is either
8 sitting" -- "is either suing or being sued, including all
9 plaintiffs, defendants, and third parties that have been
10 joined in the case." The lawyer is not defined. Attorney
11 is not defined. And I don't see on a quick look that
12 there is a distinction made between the party and the
13 lawyer, but I'm just -- in fact, just looking at some of
14 the rules, I don't think there is a distinction. Okay.
15 If anybody spots one, let me know.

16 HONORABLE HARVEY BROWN: Rule 500.8 in one
17 sentence talks about a party versus an attorney of record.

18 CHAIRMAN BABCOCK: 500.8. I didn't read far
19 enough.

20 HONORABLE HARVEY BROWN: Part (d). Third
21 sentence, "If the witness is a party and is represented by
22 an attorney of record." I'm not asking for a vote. I'm
23 just asking for it to be thought about.

24 CHAIRMAN BABCOCK: Okay.

25 HONORABLE HARVEY BROWN: Because I can

1 see -- I do know some lawyers who did not want to appear
2 personally at some proceedings --

3 CHAIRMAN BABCOCK: Right.

4 HONORABLE HARVEY BROWN: -- when COVID was
5 going on or even after we're somewhat over it.

6 CHAIRMAN BABCOCK: Great, all right. Any
7 other comments? Robert, do you still have your hand up?
8 Okay. Any other comments about the proposed 500.10(b) as
9 in boy?

10 MR. JEFFERSON: Just --

11 CHAIRMAN BABCOCK: Yeah, Lamont.

12 MR. JEFFERSON: Just real quickly, so and
13 the -- the relationship between (a) and (b), so if a -- if
14 a court says you have to appear one way or the other, then
15 can a party then basically make the judge explain by -- in
16 the -- in the second part, saying I want to appear in a
17 way that the court has not ordered or ordered the other
18 way? So I'm just trying to understand the dynamic between
19 the two. So the court says, "I'm requiring a participant
20 to appear by" -- "in person," and then you go to (b).
21 Then the party can file the request that says, "I
22 disagree, I want to appear remotely," and then the judge
23 has to justify why the judge wants that person to appear
24 in person. That's the way -- that's the dynamic.

25 CHAIRMAN BABCOCK: That's -- that's the way

1 I read it. Kennon, is that the way you read it?

2 MS. WOOTEN: That's the way I read it as
3 well.

4 CHAIRMAN BABCOCK: Yeah, okay. You got a
5 problem with that?

6 MR. JEFFERSON: Well, no, not necessarily,
7 it just seems like it puts a lot of -- it creates a -- a
8 strange kind of tension between the judge and the -- and
9 the party.

10 CHAIRMAN BABCOCK: Well, it -- Kennon in a
11 moment of weakness earlier today admitted that this
12 language was constructed that way for -- for mandamus.

13 MR. JEFFERSON: Oh, okay, well --

14 MS. WOOTEN: I do think you should be kinder
15 to me. I don't know what's going on already. I jest.
16 We're laughing, for the record.

17 No, but again, Lamont, to the -- to the
18 question you've raised, the idea of the request mechanism
19 was to try to balance the competing considerations that
20 we've heard both at this committee and -- and other
21 places. The other mechanism that we had initially would
22 have had an objection to what the court has directed and
23 would have required the party objecting to set for good
24 cause to have something other than what the court has
25 directed, so yes, this is a little different from the

1 norm, but it's an effort to strike a balance on all of the
2 competing considerations.

3 CHAIRMAN BABCOCK: Yeah, Judge Evans.

4 HONORABLE DAVID EVANS: Well, I've been
5 trying to understand the interplay between this set of
6 rules -- I've been trying to understand the interplay
7 between this set of rules and the rules on subpoenaing a
8 witness to trial, and the fact that the judge says you
9 can't appear remotely doesn't mean that you have to appear
10 at trial. You haven't been served -- you have been served
11 with a subpoena. Is that -- we're not overturning that,
12 are we?

13 MS. WOOTEN: No.

14 HONORABLE DAVID EVANS: Okay. And, Chip,
15 just for the record, you've got bad video, I can --
16 anybody can see me turn red on video stream anywhere.

17 CHAIRMAN BABCOCK: Well, I didn't -- I
18 didn't try that out on video.

19 HONORABLE DAVID EVANS: And you just turned
20 red, you did well.

21 CHAIRMAN BABCOCK: Totally, but you --
22 you're in person, so you can see that.

23 HONORABLE DAVID EVANS: You can see me --
24 you can see me through smoke.

25 CHAIRMAN BABCOCK: All right. Anything more

1 on -- on (b)?

2 HONORABLE HARVEY BROWN: So I think I
3 understand this, but let me just make sure. The judge
4 says, "I'm having remote hearings on all of my discovery
5 fights." One party objects and says, "I think it's much
6 more effective in person. I want to be there in person."
7 The judge says, "Well, I guess that's good cause, so I'm
8 going to have to do it by -- let you appear in person and
9 then everyone else, of course, is going to appear in
10 person if one person is there in person." So we're kind
11 of letting the parties trump the judge's practices for
12 what might be routine hearings. Some judges may not like
13 that.

14 CHAIRMAN BABCOCK: Okay. I don't think
15 that's fair to say. John.

16 MR. WARREN: Yeah, we -- we shouldn't
17 overlook the fact that even though you can have a remote
18 proceeding, you still have to have your courtroom
19 available, as the Texas Supreme Court defined as -- as it
20 relates to during the proceedings during COVID, because
21 you -- otherwise, you have a closed proceeding, so you
22 have to -- so whether -- if someone wants to appear in
23 person, they can still go to the courtroom and show up if
24 everyone else is -- is participating remotely, because the
25 courts still have to make that proceeding available to the

1 public.

2 HONORABLE DAVID EVANS: If --

3 CHAIRMAN BABCOCK: Yeah, Judge Evans.

4 HONORABLE DAVID EVANS: If we're under the
5 51st rule, the judge doesn't have to be in the courtroom.

6 MR. WARREN: But that's -- that's what I'm
7 saying, that the -- the courtroom can be vacant, but the
8 public still have to have access to observe a proceeding,
9 otherwise it's a closed proceeding.

10 HONORABLE DAVID EVANS: Well, that's --
11 that's the briefing from OCA, but that's not in the order.
12 The -- the only order right now says notice. I just
13 wanted -- that was the guidance during the pandemic, but
14 that had -- I may -- maybe I misread the 51st order, but
15 I'm not sure that that's incorporated in there, but -- and
16 I don't know that it has anything to do with these set of
17 rules, but I think that's one of the problems we've fixed
18 so far is we've had judges outside the courtroom, and
19 that's another issue, but not here. But I digressed a
20 little bit.

21 MR. WARREN: From -- from what I understand,
22 and it may have been one of the first rules, is that the
23 judge can have a virtual proceeding, this is on the onset
24 of the pandemic.

25 HONORABLE DAVID EVANS: Yes.

1 MR. WARREN: The judge can have a remote
2 proceeding; however, the courtroom had to be made
3 available for those individuals, the public, that did not
4 have access to the internet or to observe otherwise.

5 HONORABLE DAVID EVANS: I may have
6 understood it a little bit differently, and it had to do
7 with YouTube access versus in person to the courtroom,
8 because it wouldn't necessarily have -- you wouldn't
9 necessarily have the remote proceeding being played in the
10 courtroom. And so we may be talking about two different
11 things here.

12 MS. WOOTEN: I don't want to get ahead of
13 where we are, but subpart (d) of the proposal addresses
14 open courts issues, and so I realize we're not there yet,
15 but to be discussed in the future how that's handled.

16 CHAIRMAN BABCOCK: Right. Judge Miskel.

17 HONORABLE EMILY MISKEL: I put my hand down
18 because we're going to discuss that later, but the
19 courtroom is not required to be physically open. For
20 example, many of the uses of remote proceedings are when
21 we, like, had an electrical fire in our courthouse or ice
22 closed the building, we were still able to go forward
23 remotely.

24 CHAIRMAN BABCOCK: All right. Anything more
25 on (b)? All right. Then let's go to (c), the notice.

1 Any comments you want to make about (c), Kennon?

2 MS. WOOTEN: The only quick comment I'll
3 make is that the language here is the same as it was
4 before. I didn't anticipate needing to change it because
5 there wasn't a discussion focused on it previously.

6 CHAIRMAN BABCOCK: Any other comments on
7 (c)? Anybody got their hand up? Okay. Go on to (d),
8 which is what we were anticipating.

9 MS. WOOTEN: We have arrived.

10 CHAIRMAN BABCOCK: We have arrived at (d).

11 MS. WOOTEN: Yes. Okay. So this language
12 that's in subpart (d) of proposal 500.10 is actually
13 derived from legislative language that was discussed
14 during the last regular session of the Texas Legislature,
15 so it's copied in large part from what was being
16 contemplated at the legislative level. I can get into
17 deeper weeds on that if desired, but I did want you-all to
18 know that's the -- the basis for the provision.

19 CHAIRMAN BABCOCK: Any comments on (d)?

20 HONORABLE HARVEY BROWN: I have a question.

21 CHAIRMAN BABCOCK: Yeah, go ahead, Harvey.

22 HONORABLE HARVEY BROWN: So last time we
23 heard some stories of judges who were conducting hearings
24 in their cars and the -- the like.

25 CHAIRMAN BABCOCK: The grocery checkout

1 line. That's the one that resonated with everybody.

2 HONORABLE HARVEY BROWN: Right. Is that
3 being addressed in any of the rules?

4 MS. WOOTEN: It's not currently addressed in
5 the text of the rules, and one question that was discussed
6 during a break by some of us is whether it makes sense to
7 put the requirement here or in standards governing the
8 judges specifically, like the canons, and I don't know
9 the answer to that. I haven't given it extensive thought,
10 but the -- the answer to your direct question is that it's
11 not --

12 HONORABLE DAVID EVANS: Chip?

13 MS. WOOTEN: -- explicitly addressed in the
14 current version of the proposed rules.

15 HONORABLE DAVID EVANS: Well, what does (c)
16 do when it says location of proceeding? What does (c) do
17 below that, location of proceeding? Is that where the
18 judge is located?

19 MS. WOOTEN: Yes. So I think it's going to
20 be where the judge is located. If it's in person, right,
21 it's going to lay that out, and if -- if the judge is
22 going to conduct proceeding remotely, I don't know that it
23 would directly tell you where judge is located in its
24 current form, right, because judge could conduct that
25 proceeding remotely from the bench in his or her chambers

1 or remotely from home, I think the way it's crafted now,
2 but maybe you're getting at this potentially being a good
3 spot to clarify?

4 HONORABLE DAVID EVANS: It is this issue of
5 being in the grocery line or in the car, where is the
6 court -- where is the proceeding, and it's the same issue
7 if you go to the courtroom and see the proceeding. And
8 then you get into security issue for the judge, and you
9 have a visiting judge, say, and they're doing a remote
10 hearing, don't want to travel 400 miles in order to do
11 something, it -- and that won't happen in JP court, but
12 location of the proceeding doesn't have the same meaning
13 with remote proceedings as it did with a traditional
14 courtroom. And I think that's part of what the public
15 wants to know, is where is the judge.

16 MS. WOOTEN: Uh-huh.

17 CHAIRMAN BABCOCK: Judge Miskel.

18 HONORABLE DAVID EVANS: And --

19 CHAIRMAN BABCOCK: Sorry.

20 HONORABLE DAVID EVANS: And either you're in
21 the courtroom or remote from the courtroom.

22 CHAIRMAN BABCOCK: Judge Miskel.

23 HONORABLE EMILY MISKEL: I think since this
24 provision is speaking about open courts and public access,
25 it probably means where the public can observe the

1 proceeding.

2 MS. WOOTEN: So we have that -- and perhaps,
3 Judge Miskel, I'm missing a finer point, but we have that
4 language specifically in subpart (d).

5 HONORABLE EMILY MISKEL: That's what I
6 thought we were talking about, was (d).

7 MS. WOOTEN: I think you were referencing
8 (c) as well, weren't you?

9 HONORABLE DAVID EVANS: Yeah, well, (c) says
10 you've got to give notice of the location of the
11 proceeding, which is not a virtual proceeding -- location
12 as I would read it in traditional language. That's a
13 physical location.

14 MS. WOOTEN: Uh-huh. And I think that that
15 language is about the physical location, and especially
16 when you look at it in context, including location of the
17 proceeding, or instructions for joining remotely.

18 HONORABLE DAVID EVANS: That's right.

19 MS. WOOTEN: But I think there is a little
20 lack of clarity, for lack of a better phrase, in regard to
21 where the judge is sitting still, with the phrasing that
22 we have in the proposed rule.

23 CHAIRMAN BABCOCK: Okay. Jim Perdue.

24 MR. PERDUE: Kennon, do you know, when we --
25 this project got underway, right, six months into the

1 pandemic and we were reviewing just everything, and I
2 remember reviewing a bunch of Government Code provisions,
3 I don't remember drilling down to the JP courts.

4 MS. WOOTEN: I don't either.

5 MR. PERDUE: As far as the establishment of
6 JP courts and whether that language is similar to what you
7 see with district courts. Do you know?

8 MS. WOOTEN: I do not know, but I can
9 certainly research that between now and the next meeting.

10 MR. PERDUE: It -- just for the committee to
11 understand, and I think everybody, the court needs to
12 understand, and it may not be as much of a political risk
13 as I perceived it; but, you know, courts are a body of
14 government that are supposed to be accountable to their
15 locale; and the Government Code, at least with district
16 courts, establishes where you have to conduct your
17 proceedings, right? It sets -- it sets your building.
18 That's the reason why we have those buildings. So in
19 concept, you're talking about by rule-making authority
20 coming over the top of the Government Code.

21 HONORABLE EMILY MISKEL: For district courts
22 it's actually in the Texas Constitution.

23 MR. PERDUE: Then that -- that may or not be
24 an existential risk to the Court. It may be or may not be
25 an issue in the next legislative session. In driving the

1 history of this, the reason why there was -- there was a
2 discussion of a legislative fix is because the question
3 was, do you have to have an amendment into the Government
4 Code to provide for this as far as the, quote-unquote,
5 location, because there is -- seemingly there's an easy
6 way to read the Government Code if, you know, you're
7 having hearings -- and again, this concept is all in the
8 concept of at some point in time the state of emergency is
9 lifted, and therefore, we don't have the means to kind of
10 trump the Government Code. But you're kind of explicit
11 here and in a couple of places in the provisions
12 acknowledging that the proposed rule is coming over the
13 top of what is a legislative -- I won't say mandate, but
14 it's -- it's in -- it's in the code of the State of Texas.

15 CHAIRMAN BABCOCK: Yeah, Judge Evans.

16 HONORABLE DAVID EVANS: Well, for an elected
17 official in office, I think it's one thing for us to
18 discuss access for attorneys and parties and witnesses
19 remotely, but for a judge to conduct his business, her
20 business, from her home or outside of her courtroom is
21 detrimental, in my opinion. That's just my opinion on --
22 on the record. I've got a stack of complaints right now
23 where people can't get to talk to a court coordinator,
24 because the judge is still at home conducting court and
25 the coordinator is not there. Now, remote proceedings for

1 parties, witnesses, litigants, that's one thing, but I
2 don't -- I would urge the Court not to get into remote
3 proceedings for a judge to be remote from outside the
4 courtroom, except in exigent circumstances that could be
5 spelled out and defined, and that's just -- yeah, my
6 statement in the record. My bus leaves in an hour, so I'm
7 through talking.

8 CHAIRMAN BABCOCK: Judge Miskel, when you
9 were talking about the constitution regulating the place
10 where the proceedings will take place, it looks to me like
11 it's Article 5, section 7(d), "A district court shall
12 conduct its proceedings at the county seat of the county
13 in which the case is pending, except as otherwise provided
14 by law." Do you know what the exception is, if any?

15 HONORABLE EMILY MISKEL: So we're talking
16 about rule, and it doesn't say "except as otherwise
17 provided by rule," so my belief is that when the emergency
18 orders go away, district courts must conduct the
19 proceeding from the county seat, even if it's remote. But
20 for justice courts, though, the rule that we're talking
21 about, it looks like Government Code, Chapter 27, section
22 0515, sets the place where justice courts have to hold
23 court, and that's up to the commissioners.

24 CHAIRMAN BABCOCK: But theoretically, it
25 would be -- have to be the county commissioners, and that

1 would mean the county, right?

2 HONORABLE EMILY MISKEL: Right. So what it
3 says is -- oh, I'm sorry, 27.051, it says, "Each justice
4 shall hold the regular term of court at the justice's
5 office at times prescribed by the commissioner's court.
6 The commissioner's court shall set a time and place for
7 holding justice court."

8 MS. WOOTEN: It says at -- at the office?

9 HONORABLE EMILY MISKEL: And it says if
10 there's more than 75,000 inhabitants, the commissioner's
11 court shall furnish a place. If it's less than 30,000, it
12 can be another facility. So there's -- it's basically up
13 to the county commissioners for justice court.

14 CHAIRMAN BABCOCK: But if they -- if the
15 county commissioners establish a place, then presumably
16 the Government Code would require the court proceedings to
17 be at that place. Right?

18 HONORABLE EMILY MISKEL: And I think the
19 open question, though, is in the past it's been impossible
20 for the judge to be at a different place than where the
21 public would watch, and so I think what we're putting our
22 finger on right now is -- is where the judge is -- is the
23 proceeding where the judge is, or is the proceeding where
24 the public can watch?

25 CHAIRMAN BABCOCK: Except if the judge

1 doesn't have authority after the emergency order expires
2 to hold court anywhere other than the place that the
3 county commissioners establish, then that problem doesn't
4 exist, right, because the place is always going to be
5 where the public can watch.

6 HONORABLE EMILY MISKEL: Right. So in
7 normal circumstances, this probably means judges are in
8 the courthouse when they're doing remote proceedings. I
9 still have a question mark because some of the times we've
10 found remote proceedings useful is when the courthouse has
11 been shut down, so -- and not necessarily for statewide
12 emergency, but like I said, we had an electrical fire, we
13 had ice.

14 CHAIRMAN BABCOCK: I heard we had a flood in
15 Harris County, hard to remember that, but -- yeah, I mean,
16 floods and natural disasters, things like that. But --
17 but in those circumstances, there would be some sort of
18 emergency order, right?

19 HONORABLE DAVID EVANS: Anytime --

20 CHAIRMAN BABCOCK: Yeah, Judge Evans.

21 HONORABLE DAVID EVANS: Anytime -- anytime
22 we've had --

23 HONORABLE EMILY MISKEL: No.

24 HONORABLE DAVID EVANS: Anytime we've had a
25 flood down here, the courts issue an order with regard to

1 courthouses, on hurricanes.

2 CHAIRMAN BABCOCK: Yeah.

3 HONORABLE DAVID EVANS: Anytime -- and I
4 don't know about just the local --

5 HONORABLE EMILY MISKEL: I'm sorry. I can't
6 hear you. Can you speak into your microphone?

7 HONORABLE DAVID EVANS: I can. Every time
8 we've had, so far, a judge being allowed not to be in
9 their location, dictated by the Constitution or the
10 Government Code, it has been because there's an emergency
11 order of the Supreme Court that's gone into effect. I
12 didn't want to see us write a local rule of civil
13 procedure that would indicate to a judge that they should
14 be -- an elected judge, and I'm being very careful about
15 this, the judge who's in the office, being outside of
16 their -- having court outside of their office, except in
17 exigent circumstances that would be defined. Because I
18 think that's where the place is. It's not the same as a
19 lawyer being in Amarillo and a lawyer being in Houston and
20 needing access to a courtroom and appearing remotely and
21 good cause. There is no good cause reason for the judge
22 to be at home, unless the courthouse is closed due to some
23 sort of other issues.

24 CHAIRMAN BABCOCK: Yeah. There -- there are
25 rules that --

1 HONORABLE DAVID EVANS: That govern that.

2 CHAIRMAN BABCOCK: -- permit a -- for
3 example, the Texas Court of Criminal Appeals, a judge at
4 home can stay the execution in a capital case --

5 HONORABLE DAVID EVANS: Right.

6 CHAIRMAN BABCOCK: -- of the defendant.

7 HONORABLE DAVID EVANS: But that's spelled
8 out.

9 CHAIRMAN BABCOCK: But that's spelled out,
10 right. Okay. Kennon, you got this -- you got this
11 solved?

12 MS. WOOTEN: Well, my current thinking is to
13 consider adding a statement to the proposed rule that
14 explicitly addresses where the judge sits for a
15 proceeding, and I do feel we should nonetheless have
16 language like what is proposed in subpart (d) for
17 situations in which judge is not in that particular
18 location, but I think we can add a sentence in here. I
19 can do a little bit more research, kind of tracking how
20 things work for the JPs, and propose some language on that
21 front.

22 HONORABLE EMILY MISKEL: Well, I think one
23 other thing we've talked about is, for example, right now
24 when courts are trying to clear up COVID backlogs and
25 they're running double dockets, you might have a visiting

1 judge using a public courtroom and you might have the
2 sitting district judge, for example, in chambers doing a
3 remote proceeding. Well, if the parties are going to
4 participate or the public is going to watch that remote
5 proceeding, they won't be able to watch it in a public
6 courtroom because a second proceeding is going on there
7 with a visiting judge, and so it might still be -- you
8 could still be complying with the Constitution and the
9 Government Code, but the way to access the proceeding is
10 remotely.

11 MS. WOOTEN: I think that that's a great
12 point, and it's something that Judge Chu was describing, I
13 believe, in the last meeting that we had. So I don't -- I
14 don't think based on the language I've -- I've seen and
15 heard today that it's a strict requirement for the judge
16 to sit in a particular courtroom, necessarily, right, and
17 so I think I just need to dig a little deeper and come up
18 with some proposed language at the next meeting for where
19 the judge sits for the proceeding.

20 CHAIRMAN BABCOCK: Okay. Richard Munzinger,
21 and then Judge Estevez, and then Jim or Harvey, one of you
22 for sure.

23 MR. PERDUE: Harvey.

24 CHAIRMAN BABCOCK: Okay. So Richard
25 Munzinger.

1 MR. MUNZINGER: My comments are probably not
2 as applicable to justice court proceedings as to district
3 and the county court at law is, but the intent, if not the
4 language of the rule, is that the proceedings in the
5 courtroom should be open to the public and that the public
6 may observe the proceedings, which raises the question, if
7 the judge is looking at a screen and the lawyers are in
8 their offices or the witness is in Chicago or wherever,
9 how does the public get to observe and have notice of the
10 judge conducting whatever the judge is conducting by
11 screen? It's one thing to say I get to go and watch the
12 judge sit in the courtroom. Well, that doesn't mean
13 anything to me. So maybe it's a proceeding involving a
14 politician and everybody wants to keep it real quiet, and
15 we don't want the media and so we publish this thing or we
16 have this remote proceeding, but no one is given notice of
17 it, and even if they're given notice of it, is there
18 access to it?

19 Now, if the rules say that the public should
20 have access to the proceedings, they ought to have access
21 to the proceedings. And it isn't up to the courts for
22 efficiency sake to deprive the public of the right
23 guaranteed them by Texas law. I have a case where a
24 district -- a federal district court in the Eastern
25 District of Michigan held a hearing on a related matter

1 not in my case, and because of the way the federal court
2 does its work there, it gave notice of the proceeding that
3 it would be conducted remotely so that the judge was in --
4 either in the courtroom or in her chambers, I'm not sure
5 which it was. From the appearance, it appeared to me that
6 she was actually in the courtroom, but there was also
7 notice given on the docket as to how interested citizens
8 could observe the proceedings and participate by Zoom,
9 which several of us did, and we all listened to what was
10 said by the respective parties, with rapt attention.
11 Several of us ordered the transcript because of its
12 importance of some of the things that were said there.

13 All of these matters that I've just
14 mentioned are within the contemplation of the requirement
15 that the courts be open to the public. And so it seems to
16 me that -- and I understand the problem of divorce cases
17 and having motions that drive you crazy and all of this, I
18 understand that. I understand the case load, but at the
19 same time, if the law says that it's supposed to be open
20 to the public, then it ought to be open to the public, and
21 open to the public in the context -- in the context of a
22 Zoom meeting means full access to the Zoom proceedings, so
23 you can hear, observe, record, if you wish, everything
24 that is said. That's what the law requires. So it seems
25 to me that some -- something has to be said here about

1 notice and about the proceedings.

2 Was it the last meeting that somebody gave
3 the report -- gave the report that the judge was listening
4 to a telephone motion and said, "Excuse me, fellows,
5 I've got -- it's my turn at the cashier." She was in line
6 or he was in line at a grocery store listening to the
7 case. "Excuse me, fellows, it's my turn at the cash
8 register, I'll be right back with you." Justice in Texas,
9 remotely. That's ludicrous, it's embarrassing. It's
10 disgraceful. And the court needs to make, in my opinion,
11 the court needs to make arrangements that contemplate if
12 we're going to have a rule that says proceedings are open
13 to the public that contemplates allowing the public to
14 observe what goes on, and if that applies to justice
15 courts, so be it. If they are going to change it in the
16 rule, then comply with it. That's it.

17 HONORABLE EMILY MISKEL: Did you disagree
18 with the way section (d) says things have to be noticed to
19 the public?

20 MR. MUNZINGER: I I confess to you, I have
21 not read section (d) because I -- I live in California
22 now. I live in San Francisco, and sometimes I have a hell
23 of a time -- heck of a time getting my computer to read
24 the things that are sent to me because of the volume. I
25 apologize to you. I don't have a question with it,

1 because I haven't read it carefully. I apologize.

2 CHAIRMAN BABCOCK: Okay. Judge --

3 HONORABLE ANA ESTEVEZ: Call on me.

4 CHAIRMAN BABCOCK: Judge Estevez.

5 HONORABLE ANA ESTEVEZ: Well, I -- I started
6 off with wanting to say something and now I have so many
7 things to address, the first one being I am so glad you
8 get to participate with us from California, Richard,
9 because you wouldn't be able to do so, I don't believe,
10 without spending an extraordinary amount of money and
11 extraordinary amount of time traveling to Houston, which
12 for me, my issue this time was definitely time since I
13 wouldn't have even gotten home until tomorrow because of
14 the flight schedules, technically 12:05.

15 CHAIRMAN BABCOCK: Hey, don't underestimate
16 Munzinger. He's got his own private plane.

17 HONORABLE ANA ESTEVEZ: Well, if he has his
18 own private plane, I guess he can do whatever he wants to.
19 I'd like to -- I mean, obviously we have abuses from
20 judges that have been brought up. I think that, you know,
21 there's a lot of ways they can deal with that, and I think
22 the issue here is whether or not judges should be required
23 to always be in the courtroom, and I'm just going to -- I
24 know it's been said over -- and I don't know who was here
25 and what meetings other people have attended, but, you

1 know, when I had COVID, I never missed a day of work. I
2 was quarantined in my home, no one necessarily knew I had
3 COVID, because they couldn't tell that I couldn't taste or
4 smell anything, but I -- I worked every day, and I got a
5 lot of work done.

6 When we had an ice storm, I got to just keep
7 going. There wasn't -- no one left their homes. When
8 there was that -- they had the ice storm -- mine wasn't as
9 bad. We weren't on your -- on the grid, but I had other
10 people that could participate that were in the Dallas area
11 and -- and other areas where they hadn't had power for two
12 days, and they got on enough to -- to deal with whatever
13 cases they had; and of course, we -- we had ice problems,
14 too. So the reality is it shouldn't really make a
15 difference where the judge is. I think the preference,
16 because people feel like they want to see a car in the
17 parking lot, would be for them to be at the courthouse,
18 but when there's a circumstance in which they can't be, I
19 mean, I had a child, so in the past, before there was
20 COVID, I would actually take a sick child to work with me
21 and put them in my -- my chambers and would continue to
22 work, because the other option would be for me to cancel
23 that whole day of cases.

24 Now, I don't think that's acceptable any --
25 anymore, because everyone believes that everything is

1 contagious and I think they fear anyone that's coughing,
2 sneezing or sniffing, so there's just so many
3 circumstances in which the flexibility should be allowed.

4 As far as access to the public, I mean, I
5 totally disagree with Richard. I got off one of my
6 hearings once, and I had 123 random people that I don't
7 know watching my hearing that day. I seldom get off of a
8 Zoom hearing where some strangers have not been watching.
9 I don't know who they are, but it does show how many
10 people are watching live and how many times that video has
11 been shown, and so there's a -- a much higher
12 participation from the public than there ever was. I
13 don't know if somebody just sent out some e-mail and said,
14 "Please pray for my hearing, here's the YouTube
15 connection" or whatever it may be, but the reality is,
16 people are watching and people have access. And the other
17 reality is I've had to get my bailiff to take people out
18 of a courtroom before when they were publicly watching and
19 decided they had an outburst that they couldn't hold in,
20 and so we were in a safer type of environment when -- when
21 we do these cases and give the access remotely or I guess
22 through the YouTube channel.

23 I don't -- I don't think that's -- I think
24 they see everything we see, and I think it's a good way of
25 giving the open courts provision the amount of, I don't

1 know, deference that it deserves, but I -- I don't see an
2 open court issue. I think they're participating more than
3 they ever have. I don't usually have people in my
4 courtroom unless they're going to testify or they're
5 family, and those are usually criminal cases. Family
6 ones, they just -- they get on the Zoom, too, and I
7 usually have to tell them they're out because of the Rule,
8 and whether or not they're cheating, I don't know.
9 Because I guess they could be watching the YouTube
10 channel, but we always tell them not to.

11 I think it doesn't matter where the judge
12 is. I think that's my whole -- my whole point, and I
13 think that if there's a way we have to do that, whether
14 it's through the Legislature or whether you do it through
15 the rule, I think you should leave that flexibility. So
16 if you're talking about a rule and you should not restrict
17 the judge to any location, allow the Legislature to decide
18 that or leave it to a point where the parties can somehow
19 agree. And I will say that as far as the county seat, so
20 we're trying to catch up on our jail docket, so I
21 physically have gone to the jail to conduct pleas, so we
22 take the district attorney, we take our court reporter, we
23 take our bailiff. We take everyone -- all of the people
24 there, and we have the lawyers show up and meet with their
25 clients, and we get rid of 40 cases in four or five hours,

1 and that's very effective, and that, again, is the county
2 seat issue. We have the commissioners state that that's
3 okay, but we're not really sure that you can do that, so
4 we get a waiver from them as well.

5 CHAIRMAN BABCOCK: Okay. Thanks, Judge.
6 Harvey, did you have a comment?

7 HONORABLE HARVEY BROWN: I'll pass.

8 CHAIRMAN BABCOCK: You'll pass. Okay.
9 Well, we'll -- we'll continue the discussion about this
10 matter and the rest of the remote proceedings pieces at
11 our next meeting, and we have one final agenda item, and
12 that is Pam Baron, I hope is ready to talk about the
13 Anders brief and parental termination cases. Pam, are you
14 ready to talk about that?

15 MS. BARON: I am. Are you?

16 CHAIRMAN BABCOCK: I am totally ready. I am
17 so ready. I've been waiting for this moment all day.

18 MS. BARON: Okay. Well, this is your
19 materials at Tab H. This is the next step in our series
20 of developing rules for parental termination cases, in
21 terms of appointed counsel, effective assistance of
22 counsel. This is the next step that the Texas Supreme
23 Court had referred to us, and that is to look at the
24 proposal from the rule -- the House Bill 7 Task Force that
25 relates to an Anders briefs. And if you're familiar with

1 Anders briefs, they have their origin in criminal cases
2 where appellate counsel is required to bring forward an
3 appeal that determines that it is frivolous and files a
4 brief with the court that explains that conclusion and --
5 and how it was reached, but then the client has an
6 opportunity to come in and contest that. And the task
7 force -- and has migrated into the parental termination
8 context in Texas, in particular we are seeing Anders
9 briefs, and that the task force thought that should be
10 codified and brought into rules so that it is more
11 structured and uniform. And generally, our
12 subcommittee -- Bill Boyce, I should add has been heading
13 this up. He's been doing a great job. He is attending
14 his daughter's graduation ceremony today. She actually
15 graduated two years ago, but the ceremony was deferred
16 because of COVID. So anyway, Mazel Tov to Bill and his
17 family.

18 The subcommittee agreed with a concept that
19 there should be a rule that gives people a little more
20 information on Anders briefs and how they work. We
21 started as our basis the rule that was written by the task
22 force on House Bill 7. We made a number of changes. Let
23 me just generally outline their proposal. It's that
24 appointed counsel in a family law or child protection case
25 should not withdraw, if he or she concludes that the

1 appeal is frivolous, but should proceed and file with the
2 court a certification that they've reached that conclusion
3 and then a brief that explains basically that they're
4 familiar with the record, they've looked at particular
5 issues that we could or would be raised, and how he or she
6 reached that conclusion. Then the parent at that point
7 has an opportunity to come in, file a response, saying
8 there are nonfrivolous issues in this case, here they are.
9 Then the court of appeals can look at that and determine
10 whether they think that additional counsel should be
11 appointed to address the nonfrivolous issues.

12 So that's kind of the general scheme of it.
13 There are -- I think it would help our subcommittee if we
14 could focus maybe not so much on wordsmithing the rule,
15 but to look at seven particular questions that the
16 subcommittee kind of flagged as we went through the rule,
17 and the first is, you know, do we want a rule on Anders
18 briefing in parental termination cases? So that's
19 question one.

20 Question two is to what type of cases should
21 it apply to, and the way the task force wrote this, it's a
22 pretty broad term of parental termination and child
23 custody cases. To date, our committee has been working
24 with a more limited subset of that, and that's suits that
25 are initiated by a government entity to terminate parental

1 rights or -- let me get the language -- "in which
2 termination of the parental-child relationship or
3 appointment of a conservatorship for the child is
4 requested," so that's -- that's what we've been looking at
5 because that's been kind of the scope of where there is a
6 right to appointed counsel. So that's question two,
7 should it be more broad term or should it be more
8 specific?

9 Question three is the way it is -- task
10 force drafted it, it relates only to appointed counsel.
11 There are situations in which counsel that is actually not
12 appointed has filed Anders briefs. Clearly even if we
13 limited it to appointed counsel, hired counsel could
14 certainly follow this rule even if it were more limited.

15 The fourth question is the way the task
16 force drafted it, it kind of gave a little bit of
17 definition to the term "frivolous," and we have not done
18 that in other parts of the rule, and the subcommittee did
19 not remove the additional language, but I just point out
20 that in TRAPs 39.1 deals with oral argument. It says the
21 court doesn't have to grant oral argument if it determines
22 the appeal is frivolous, but it doesn't define frivolous.
23 Rules 45 and 62 allow the courts of appeals and the Texas
24 Supreme Court to impose sanctions for frivolous appeals.
25 Again, no definition. Texas Civil Practice and Remedies

1 Code, Chapter 10, talks about frivolous pleadings, and it
2 also does not define it. It's probably fleshed out in
3 case law and in -- in these other contexts that we've
4 seen, and so we thought we didn't want to define it here
5 if it's not defined elsewhere.

6 Fifth -- fifth question, in the rule it
7 requires the attorney who is filing the Anders brief to
8 say that they've gone through the parental termination
9 briefing checklist adopted by the Texas Supreme Court and
10 reviewed all of the particular issues that could be raised
11 and found no basis for raising them in the case, and we're
12 not going to get into the details of what that checklist
13 would contain today. I think it is in the materials
14 provided by the task force, but the question is, do we
15 want that checklist? Is it a good idea? And, I'm sorry,
16 there's so many questions here.

17 Question six, if the court of appeals
18 determines that a parent has raised some -- some possible
19 nonfrivolous grounds for appeal and wants to abate the
20 appeal to allow additional counsel to be appointed, do we
21 toll the 180-day time period for deciding the appeal under
22 the Rule of Judicial Administration 6.2, and I think we
23 determined to do that in an earlier context when the court
24 of appeals was sending the case back for determining
25 ineffective assistance of counsel, so we've kind of

1 crossed that bridge at least in -- in one regard.

2 And then finally, the task force has
3 recommended templates for the court of appeals' opinions
4 in sort of routine parental termination cases that kind of
5 go through the various steps from the checklist, and we're
6 not going to get into the details of those templates
7 today, but the question is, is that a good idea, is that
8 something we would like to -- to suggest the Texas Supreme
9 Court adopt templates for these cases in particular? So
10 those are the seven questions and then we also have the
11 rule.

12 CHAIRMAN BABCOCK: All right, thanks, Pam.
13 Do you want to dive into the rule, or do you want to get
14 these questions discussed?

15 MS. BARON: Well, I think it would be
16 helpful to go through these questions because I think
17 they'll kind of dictate what the rule language is, but I
18 guess it would be helpful to start with whether people
19 think it's a good idea to codify an Anders practice in the
20 Rules of Appellate Procedure.

21 CHAIRMAN BABCOCK: With respect to the
22 parental termination.

23 MS. BARON: Yes.

24 CHAIRMAN BABCOCK: Right. Anybody got any
25 thoughts on that? The Anders brief situation is a -- is a

1 real dilemma for -- for an attorney and -- and fraught
2 with peril, I would think. Some of the appellate lawyers
3 here would know better than I, but -- but it's a -- it's a
4 tough decision to make as an appellate lawyer. I would
5 think personally that it would be better to have some
6 guidance and better to have a rule than to not, but -- but
7 that's not my practice area, so I defer to people who --
8 who do practice in that area, like you, Pam and Scott, and
9 anybody else who has a thought about it. Richard, you,
10 too. Should we have a rule or not? Justice Gray.

11 HONORABLE TOM GRAY: Greetings. If I can
12 have 15 seconds before I talk about this specific, I want
13 to make sure that Richard Munzinger knows that my earlier
14 tribute to him was because of the utmost of respect, and I
15 think the rest of the committee shares that, and I was
16 only trying to make sure that the committee knew the
17 passion with which I was approaching that particular
18 issue, as Richard approaches passionately his search for
19 truth and justice, and I am indebted to him for that
20 dedication. I mean, he just exudes that dedication to the
21 law that I can only aspire to.

22 CHAIRMAN BABCOCK: Well, let me stop you on
23 that -- on that point, Judge, because I don't think there
24 is any ambiguity about that in this room of the people who
25 are here, because we all love and admire Richard

1 Munzinger, so I wouldn't worry about it from us. If
2 anybody remotely didn't catch the obvious affection that
3 you have for our colleague, Mr. Munzinger, then -- then we
4 appreciate the remarks, but hopefully Richard didn't think
5 you were mocking him but rather honoring him.

6 HONORABLE TOM GRAY: Yeah, thank you.
7 That's exactly the -- the emotion with which it was
8 offered. I hope to bring some of that same passion to
9 this discussion. I have done and participated in
10 literally hundreds of the termination appeals, many of
11 which have been Anders cases. I will say first and -- and
12 to go through the seven questions and the -- the
13 connection to seven is interesting. I would say -- well,
14 I won't be glib. I was going to just click through the
15 seven, but as to whether or not we need to codify this,
16 and I think this is important for the committee, the --
17 the large body to fully understand, is that the whole
18 purpose of the Anders is because of counsel's obligation
19 not to present frivolous issues to a tribunal. The result
20 of that genesis is that the appointed counsel has to do
21 something and they can't just present something frivolous,
22 and so what drove the Anders decision was the need -- they
23 file a motion to withdraw and then they file a brief in
24 support of that motion, to which the Supreme Court has
25 said that you have to give the client the opportunity to

1 file a response, and in which the CCA, the Court of
2 Criminal Appeals, has said in the criminal law context you
3 get to file -- the State will then get to file a response
4 if the client files a response, but otherwise the State
5 does not get to file a response. That is not addressed in
6 the rules that have been proposed.

7 So there is a vast body of law already
8 developed with regard to Anders and Anders briefs and the
9 procedure. In fact, the Waco court just this month in a
10 case called *Cummings vs. State* revisited our entire
11 procedure, and what drove that review was the fact that we
12 were having an increasing number of cases in which counsel
13 identified an issue, but it was not an issue that would
14 alter the judgment or the sentence of the defendant.
15 Therefore, they were not going to get relief in the form
16 of a new trial or a modification of their sentence, but
17 there was going to be some other tweak in the judgment.
18 Most often this has to do with court costs. I raise that
19 case only because what we are dealing with is a huge body
20 of law that has changed over time.

21 The Anders case, in fact, the United --
22 which was a United States Supreme Court case, the Supreme
23 Court has revisited Anders on a number of occasions. The
24 one that I would like to bring the subcommittee's
25 attention to most forcefully is a case called *Smith vs.*

1 *Robbins* at 528 U.S. 259. That case describes a different
2 procedure than the Anders case to use when you have
3 appointed counsel that thinks that the appeal is
4 frivolous. What the subcommittee and the task force have
5 proposed is almost that procedure. The fundamental
6 difference between that procedure and the Anders procedure
7 is what happens if the court identifies an issue of merit.
8 The existing procedure -- and Pam referenced this when she
9 was talking about abating the case and appointing new
10 counsel. Under the Wende procedure that is described in
11 this *Smith vs. Robbins* case, you don't have to abate it.
12 You send it back to the same lawyer to brief the issue
13 identified by the court. It is a much more streamlined
14 procedure. It is much more cost effective for the county,
15 and it has been determined to meet constitutional
16 requirements, and so I strongly encourage the committee to
17 look at that as an alternative if they are going to write
18 a rule at all.

19 The appellate courts have adopted the Anders
20 procedure. It is what we use. I don't know of any
21 substantive problem that we have encountered other than
22 the one created by *In Re: P.M.* about what to do with
23 counsel once we have determined that the appeal is, in
24 fact, frivolous. In the -- in the context of criminal
25 cases, we grant the motion to withdraw and that ends

1 counsel's responsibility to us, although the counsel still
2 is going to have responsibility to the client and, Pam
3 has -- they've discussed that in the duties to the client
4 as far as communicating to the judgment and where do they
5 go from here. I'm not going to revisit *In Re: P.M.* I
6 didn't get the last word on that. But I can't really tell
7 if Jane is smiling at this point, but they got the last
8 word on that, and, you know, they did what they did. I
9 just -- I do disagree with it. I think it would have been
10 perfectly logical to construe it the same way that we do
11 in criminal cases, that a petition for review is not an
12 appeal, but I -- shall we say I got outvoted on that, but
13 it wasn't the one that I got to participate in.

14 The only other comment -- well, let's see,
15 the third question, so going in order, Pam, first
16 question, no, I don't think we need a rule for Anders
17 cases in termination, which I would suggest if we do, we
18 need to go the Wende route, not Anders. Second question,
19 it needs to be the more narrow focus only when you're
20 dealing with appointed counsel. Number three, the only
21 reason that you can file an Anders brief is because you
22 cannot withdraw. If you are hired counsel, you can always
23 withdraw. You do not -- I say you can always withdraw,
24 subject to the court recognizing your inability to
25 communicate with your client, which usually means I'm not

1 getting paid, but if you have a frivolous case and you're
2 a hired attorney, you do not have the duty to file a
3 frivolous appeal, and you -- so we don't need it for
4 anything other than appointed counsel. Do you need to
5 define frivolous? No, it's all over the case books. It's
6 in other things that we do. We don't want to start trying
7 to put a -- a written definition at this point.

8 Do we want to use the checklist? I would
9 strongly encourage you not to do that. It will add
10 exponentially to the cost of doing these proceedings.
11 Most of the time you can read the record and you know
12 immediately whether or not it is a frivolous appeal.

13 Abate for new counsel, I've -- I've already
14 touched on the front end aspect of that, but should we
15 toll the 180 days? If you do the abatement process, I --
16 maybe, but I just don't think so, because the whole point
17 of the 180 days is to keep the fire lit under everybody to
18 get these cases disposed of. If it falls outside the 180
19 days, it's -- it's an -- it's an exception that has to be
20 looked at and explained. That's fine, let us explain it.
21 We can say we had to abate this one and we didn't meet our
22 180 days because it wasn't frivolous and it had been
23 briefed as frivolous, and finally, with regard to the
24 templates, those are not templates designed for Anders
25 cases.

1 Those templates that were proposed by the
2 task force, as I read them, are for merit cases on factual
3 sufficiencies. I have tried to use those at our court in
4 our termination cases and have found them to be difficult
5 or inefficient to implement. I appreciate the time that
6 you have offered me and that I have taken and that you've
7 given me, and with that, I will rest and give it back to
8 the committee. Thank you.

9 CHAIRMAN BABCOCK: Thank you, Your Honor.
10 Munzinger has had his hand up, almost to the moment you
11 started to speak so he obviously demands a retort.

12 MR. MUNZINGER: I just want to tell Justice
13 Gray, I knew you were being complimentary. I was honored
14 by it. Thank you. That's all.

15 CHAIRMAN BABCOCK: We knew that. Anybody
16 else? Judge Estevez.

17 HONORABLE ANA ESTEVEZ: Well, I want to jump
18 on the bandwagon of the admiration for Richard Munzinger
19 before I comment as well because he is always an
20 inspiration, and I feel just as strongly about most of the
21 things he feels strongly about. Every now and then we
22 disagree, which is -- there's not that many times, but I
23 do favor a rule, so I'm going to -- I'm going to vote yes
24 for codification of Anders. I have a lot of experience in
25 those through the criminal side, and I just -- I think

1 it's very -- I think it will be very helpful for
2 practitioners and for everyone to -- to know how to do
3 them and all of the expectations that go around that. I'd
4 say they're a narrow focus as well. I think it's for
5 appointed counsel, and I don't think I've ever -- I know
6 I've never received an Anders brief from anyone except
7 someone we've appointed and that being because anyone else
8 would just refuse to file it and would -- would request a
9 withdrawal. So when you're appointed, you have a
10 different type of responsibility. And I think that's all
11 I want to speak to as to right now, but I do really -- I
12 strongly -- I strongly believe that a rule would be
13 helpful.

14 CHAIRMAN BABCOCK: Thank you. Anybody else
15 on any of the seven questions that Pam posed to us at the
16 beginning?

17 MS. BARON: Worse -- it's worse than
18 passover, there are only, you know, four questions then,
19 so --

20 CHAIRMAN BABCOCK: All right. Well, you
21 want to dive into the rule, Pam, or you want to talk about
22 the *Smith vs. Robbins* case, which some suggest overruled
23 Anders?

24 MS. BARON: Well, you know, this is -- Bill
25 Boyce may know those cases, I don't. I'll just say that

1 up front so I won't be speaking out of complete ignorance.
2 I will say I really appreciate Justice Gray's comments. I
3 thought that they were very helpful, very insightful, and
4 I would agree with him on almost all of them, except that
5 I -- I still would put a rule in place. But if we
6 want to -- do we want to take votes on these seven items
7 and then go through the rule, or do we want to go through
8 the rule?

9 CHAIRMAN BABCOCK: Well, your pleasure, but
10 I would take votes on the seven items.

11 MS. BARON: You would, I'm sorry?

12 CHAIRMAN BABCOCK: I would -- I would
13 suggest we take a vote on each of the seven items.

14 MS. BARON: I would like that.

15 CHAIRMAN BABCOCK: Good, all right. Number
16 one, should we codify with a rule? Everybody in favor of
17 that, raise your hand.

18 MR. HARDIN: There is a shrug. I'm not sure
19 how you record a shrug.

20 MR. PERDUE: Rusty has got my vote.

21 CHAIRMAN BABCOCK: All right. All opposed?
22 All right. Pam, that's unanimous, 17 to 0, the Chair not
23 voting. What was question two again?

24 MS. BARON: What happened to Justice Gray?
25 I thought he did not want a rule?

1 HONORABLE TOM GRAY: I have my hand up. You
2 obviously can't see me, or you've chosen to ignore me.

3 CHAIRMAN BABCOCK: Shiva ignored you. I
4 didn't ignore you. So the vote is 17 to 1.

5 MS. BARON: Okay. Thank you.

6 HONORABLE Babcock: All right.

7 MS. BARON: Okay. Then question two was
8 whether it should be narrowly focused to suits and issues
9 by a governmental entity or it should be the more broader
10 parental termination and child custody cases? Can we say
11 raise your hand if you think it should be narrow?

12 CHAIRMAN BABCOCK: Everybody that thinks it
13 should be narrow, limited to governmental entity cases,
14 raise your hand.

15 Everybody who thinks it should be broader?

16 MR. HARDIN: I'm not sure I understand it.

17 CHAIRMAN BABCOCK: Well, nine for narrow,
18 five for broad, and one who doesn't understand it. So
19 Rusty -- Rusty, what --

20 MR. HARDIN: If we make it broader, what's
21 the ultimate result? That's what I'm trying to figure
22 out.

23 CHAIRMAN BABCOCK: That it would apply to a
24 broader a number of cases -- broader number of cases
25 rather than just cases brought by a governmental entity.

1 MR. HARDIN: Gotcha.

2 CHAIRMAN BABCOCK: So, Pam, it's a -- it's a
3 narrow vote with a number of people not voting, but it's
4 nine.

5 HONORABLE ANA ESTEVEZ: Can I -- can I ask a
6 question real quick, because there's a question in my mind
7 whether -- when you get court-appointed lawyers in the
8 first place in these type of cases, so it's clear that
9 anytime there's a termination where the government is
10 coming forward to take away your child, you are entitled
11 to court-appointed counsel, but when you're a private
12 person and let's say you're a foster parent and you have
13 the child, you -- you've been there -- no one else is --
14 and the CPS has left, so you need some sort of agreement
15 or somehow you're just the mom trying to terminate dad in
16 a private case, there's no -- there's no clear appointment
17 of counsel for that, so if you go broader, you are giving
18 everyone this -- this tool to use that shouldn't apply.
19 Because if you're -- unless we're court-appointing
20 appellate lawyers on every termination case, which we
21 don't appoint when there's a private suit, why would we be
22 giving it to them on appeal? So I'm mom, dad's been on
23 drugs forever, now he's in prison. CPS was never
24 involved. I go file a termination. The statute doesn't
25 say that they get a court-appointed lawyer.

1 MS. BARON: That's correct.

2 HONORABLE ANA ESTEVEZ: So why would they --
3 why would it apply and any type of Anders apply to a
4 private situation?

5 CHAIRMAN BABCOCK: So you were -- you were
6 one of the nine that voted not to have it apply broadly.

7 HONORABLE ANA ESTEVEZ: Well, I'm
8 wondering -- I mean, what you're saying when you apply it
9 broadly is you are now giving them a lawyer, because, I
10 mean, you're -- I mean, who's paying for that? You're
11 going to make your county pay for that? How --

12 MS. BARON: I don't think that's how I would
13 read the task force proposal. You know, I would -- I'm
14 definitely on the side of this should be narrow because
15 that's what the statute provides, that's what the Texas
16 Supreme Court case on right to appointed counsel
17 encompasses to date. It's only the scope of the statute.
18 I think they weren't saying you get appointed counsel.
19 They're saying if you have paid counsel, they can still
20 file this kind of brief rather than withdraw. They're
21 saying even paid counsel should not withdraw, despite I
22 think I agree with what Justice Gray just said, they
23 should not withdraw, but they should file a brief saying
24 the appeal is frivolous and here's why.

25 CHAIRMAN BABCOCK: Judge Miskel. Judge, are

1 you talking?

2 HONORABLE EMILY MISKEL: Sorry, my
3 microphone was unplugged. I voted for broad, but it
4 was -- it was incorrect. I want to change my vote because
5 I agree with Judge Estevez that -- so logically, if I
6 understand this, the Texas Family Code gives a parent the
7 right to counsel and court-appointed counsel if the
8 government is seeking to terminate their parental rights,
9 and because the Family Code has given them that right,
10 they are entitled to effective counsel, which was why we
11 were having this discussion, but since private parents do
12 not have the right to court-appointed counsel in a private
13 termination, they don't have that same right to private
14 effective counsel, I guess, but then I'm -- I'm not
15 educated on the point that Pamela just brought up, which
16 was even private counsel should not withdraw until X, so I
17 kind of missed that if that's important.

18 MS. BARON: Well, no, I think that was the
19 way the task force had written this, but private counsel
20 can always withdraw. They don't have an obligation to
21 move forward with a frivolous appeal. Appointed counsel
22 has to continue. They don't have the option to withdraw,
23 unless they can find somebody to come in and take their
24 place, so I think what we were saying, we were not saying
25 then with the task force broad writing on this because we

1 do think it should be limited to the statutory Texas
2 Supreme Court parameters, for now, unless the Texas
3 Supreme Court expands that.

4 CHAIRMAN BABCOCK: Let's go to question
5 three. You want to restate it, Pam?

6 MS. BARON: Well, I think we've -- we've
7 sort of already answered question three. The question is
8 whether it limited it to appointed counsel versus
9 appointed and private counsel. Bill Boyce's draft had
10 scratched out "appointed." I don't think I agree with
11 that, and I don't remember discussing it, but I could have
12 blanked out during our subcommittee meeting, I don't know.
13 But I think that the discussion we've just had would
14 suggest it should be limited to appointed counsel.

15 CHAIRMAN BABCOCK: Got it. Question four.

16 MS. BARON: I don't remember what question
17 four is.

18 CHAIRMAN BABCOCK: It's going to be hard to
19 vote on it.

20 MS. BARON: Oh, do we want to define
21 "frivolous" when it's not defined anywhere else? And I
22 think we've kind of answered that, unless somebody thinks
23 we need to define it here when we haven't defined it in
24 Rules 39, 42, or 65, or Chapter 10.

25 CHAIRMAN BABCOCK: Yeah. There is so much

1 case law on what is frivolous and what isn't.

2 MS. BARON: Okay. So I don't -- I don't
3 think we need a vote on that.

4 CHAIRMAN BABCOCK: Question five.

5 MS. BARON: Question five is -- oh, do we
6 want a checklist -- Justice Gray was firmly
7 anti-checklist. I'm probably not all that keen on
8 checklist, but I'm more agnostic about it.

9 CHAIRMAN BABCOCK: Anybody want to speak up
10 in favor of checklists? I don't see any appetite for
11 checklists, Pam. What's question six?

12 MS. BARON: Question six is whether -- and I
13 think we can -- maybe we should talk about Justice Gray's
14 point, which I think is a good point, which is instead of
15 abating the appeal and sending it back to get new counsel,
16 that they direct existing counsel to brief what appears to
17 be a nonfrivolous issue, and I -- I think he's right on
18 the money that that would definitely streamline the case
19 instead of bringing somebody new in who doesn't know
20 anything about the case. So I guess to see if -- if
21 people generally agree with that approach, and then the
22 second question -- the part B of question six would be do
23 we stay the 180-day provision because of the extra time
24 that would be given to counsel to brief the potentially
25 nonfrivolous issue?

1 CHAIRMAN BABCOCK: Okay. How many people
2 are in favor of requiring existing counsel to brief what
3 the court deems to be nonfrivolous grounds? Everybody who
4 believes that, raise your hand.

5 Everybody against? Oh, wait. Wait a
6 minute. Hang on. Ten.

7 Everybody against? All right.

8 HONORABLE ANA ESTEVEZ: Can I -- can I just
9 one more time, I'm sorry I'm interrupting, but the problem
10 is I thought the issue about doing it the way Pam was
11 suggesting was that the issue that came up was
12 ineffectiveness of counsel, and it was -- the problem was
13 that the lawyer they were talking about -- or the Haga
14 case would be in effect. I thought that that was one of
15 the issues we had brought up before. So I am -- I am
16 totally with Justice Gray regarding having -- on the
17 Anders brief where they bring up an issue and they say
18 it's frivolous or the court of appeals tells them to brief
19 another issue, it has nothing to do with that particular
20 lawyer, but I think when we do have an ineffectiveness of
21 counsel issue that we need to get that one out and start a
22 new one and have a new lawyer. I thought that was an
23 issue that we've brought up before, and that's why we
24 didn't discuss this. Am I --

25 MS. BARON: Yeah. We do have -- we did pass

1 a concept or maybe even a rule that allowed the court of
2 appeals to abate and require either a hearing on
3 ineffective assistance of counsel or appointment of new
4 counsel.

5 HONORABLE ANA ESTEVEZ: Okay. And that's
6 not the same thing we're doing here?

7 MS. BARON: This is really they have
8 appellate counsel who may or may not be existing trial
9 counsel, who comes in and tells the court there are no
10 grounds, and I think your point is if the client comes in,
11 files their response, and says, "Well, they didn't raise
12 ineffective assistance of counsel and they should have,"
13 that, yeah, in that situation you probably would not have
14 the same lawyer briefing that issue. But I think we can
15 write the rule in a way that the court of appeals has the
16 option of going either way, right? Because right now it
17 says, go appoint new counsel. We could say the court of
18 appeals can direct existing counsel to brief the issue or,
19 you know, abate and -- and have new counsel appointed, and
20 let them make that decision on which they think is most
21 expedient for this particular case.

22 HONORABLE ANA ESTEVEZ: I'd like to vote for
23 that option.

24 MS. BARON: Okay. Well -- well, let's say
25 that's the option we're going to vote on. All right.

1 CHAIRMAN BABCOCK: Is that --

2 MS. BARON: So the court of appeals gets to
3 choose whether to send it to existing counsel or appoint
4 new counsel.

5 CHAIRMAN BABCOCK: Okay. Just for the
6 record, the vote we just took was 17 to 1 in favor of
7 requiring existing counsel to brief issues the court of
8 appeals deemed to be nonfrivolous, but now there's been
9 a -- a suggested amendment such that what we're voting on
10 is whether it's a good idea to allow the court of appeals
11 to determine whether to require existing counsel to brief
12 what the court thinks are nonfrivolous grounds or to send
13 it back for the appointment of additional counsel, from
14 different counsel. Is that right?

15 MS. BARON: Yes. Yes.

16 CHAIRMAN BABCOCK: Okay. Everybody in favor
17 of that, raise your hands.

18 All right. Anybody opposed?

19 MS. BARON: What -- wait. I've got to put
20 my hand down.

21 CHAIRMAN BABCOCK: That passed 19 to 1.

22 MS. BARON: 19 to what?

23 CHAIRMAN BABCOCK: 19 to 1.

24 MS. BARON: Okay. Thank you.

25 CHAIRMAN Babcock: All right. Now question

1 seven.

2 MS. BARON: Well, we have 6(c) now.

3 CHAIRMAN BABCOCK: Well, is it 6(b) muted by
4 the vote we --

5 MS. BARON: This is -- is whether to write
6 into the rule an abatement under -- of the 180-day time
7 for making the decision under Rule of Judicial
8 Administration 6.2.

9 CHAIRMAN BABCOCK: Okay. So we just voted
10 on 6(a). So now we're going to vote on 6(b). 6(b) is to
11 require an abatement.

12 MS. BARON: Well, it's -- it's not really an
13 abatement. It's whether you get an extended deadline
14 under Rule of Judicial Administration 6.2. Justice Gray
15 says he doesn't think it's necessary.

16 CHAIRMAN BABCOCK: Okay. And what do you
17 think?

18 MS. BARON: I'm kind of leaning towards what
19 he says because he has much more experience with this than
20 I do.

21 CHAIRMAN BABCOCK: All right. How many
22 people think it's necessary? Raise your hand.

23 HONORABLE MARIA SALAS-MENDOZA: To have an
24 extension?

25 CHAIRMAN BABCOCK: How many people think it

1 is not necessary? All right. The not necessities have it
2 by a vote of 14 to 1, so now can we get to question seven?

3 MS. BARON: You're just in a hurry to get to
4 the end here, yes.

5 CHAIRMAN BABCOCK: Well, we have -- the
6 record should reflect that we have lost a quorum of our
7 committee.

8 MS. BARON: How dare they.

9 CHAIRMAN BABCOCK: So I'd like to get
10 through this before we lose the entire committee on this
11 one.

12 MS. BARON: I can guess what the answer is
13 going to be on this one, too, which is, you know, should
14 we have court of appeals opinion templates. Justice Gray
15 kabashed those as well. That was kind of the general
16 sense I had from Justice Boyce as well. Our subcommittee
17 determined that we would not spend lots of time going
18 through those until we got the sense of this committee
19 whether we should devote the time and resources to doing
20 that. So I guess the question is, is there any appetite
21 for opinion templates or not?

22 CHAIRMAN BABCOCK: I can frame the
23 question --

24 MS. BARON: And Justice Gray's observations
25 are correct. These are not the Anders type cases.

1 These -- this is a -- a separate -- actually, part of our
2 assignment was to look at these, and I should have made
3 that clear at the beginning, I apologize. But it would
4 help our subcommittee to know, you know, how we should
5 spend our time and resources.

6 CHAIRMAN BABCOCK: Okay. Well, I'm going to
7 rephrase the question slightly, with your permission, and
8 everybody who agrees with Justice Gray, raise your hand.

9 Everybody -- everybody who disagrees with
10 Justice Gray. On this question only.

11 HONORABLE ANA ESTEVEZ: Justice Gray is
12 disagreeing with himself on this question. I just want to
13 point that out.

14 CHAIRMAN BABCOCK: So the vote is 21
15 agreeing with Justice Gray and two disagreeing with
16 Justice Gray, including Justice Gray.

17 HONORABLE TOM GRAY: I did that in jest. I
18 pulled my hand down.

19 CHAIRMAN BABCOCK: All right. Let the
20 record reflect that this -- this meeting has descended
21 to -- to the absolute depths, and we have now lost not
22 only a quorum, but rational discourse. So, Pam, I think
23 we'll get to the rule itself in our next meeting and --

24 MS. BARON: Well, that's what I would
25 suggest at this point, too, because I think we have all of

1 the concepts we need to frame a more -- hopefully a nearly
2 complete rule. What I would ask is if any of the people
3 who -- the three people who are still at the meeting, have
4 any particular comments on the particular wording, if they
5 would e-mail them to either Bill Boyce or me, or both of
6 us or our subcommittee.

7 CHAIRMAN BABCOCK: All right.

8 MS. BARON: And that would help us when we
9 come back next time.

10 CHAIRMAN BABCOCK: Pam, thanks very much.

11 HONORABLE PETER KELLY: I would also like to
12 loop in one of my staff attorneys, the ones who actually
13 do the laboring more on the Anders stuff, to make sure
14 that in the worst way we get the work actually done here,
15 so --

16 MS. BARON: Yeah, I know that Bill has
17 looked at some of the things on our Fourteenth Court of
18 Appeals website to get guidance, usually more in the
19 criminal context on Anders. This is a -- you know, this
20 is different, and thought that what we had done so far was
21 consistent, but that would be very useful and helpful and
22 appreciated by the subcommittee.

23 HONORABLE PETER KELLY: Okay. I'm still
24 here, Chip, just --

25 MR. HARDIN: I think it's really impressive

1 that he went back to his office, made sure he had one
2 final thing to say, so we knew he did not abandon us. I'm
3 impressed.

4 CHAIRMAN BABCOCK: And he got a background
5 that looks like it's in New Orleans.

6 HONORABLE PETER KELLY: That's actually Sam
7 Houston right here in Hardy Park.

8 CHAIRMAN BABCOCK: All right, there we go.
9 Well, thank you, everybody, for sticking through this.
10 Dee Dee, thank you, and we'll be adjourned until our next
11 meeting, which is?

12 MS. ZAMEN: August 19th at Fort Worth.

13 CHAIRMAN BABCOCK: August 19th at Fort
14 Worth. So we'll see everybody there.

15 (Adjourned)

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REPORTER'S CERTIFICATION
MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

* * * * *

I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 27th day of May, 2022, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are \$ 1,356.25.

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Given under my hand and seal of office on this the 27th day of June, 2022.

/s/D'Lois L. Jones
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