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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

AUGUST 19, 2022

(FRIDAY SESSION)

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Taken before Kim Cherry, Certified Shorthand Reporter in and for the State of Texas, reported by machine shorthand method, on the 19th day of August, 2022, between the hours of 9:00 a.m. and 5:00 p.m., at the Texas A&M University School of Law, 1515 Commerce Street, 2nd Floor, Fort Worth, Texas.

INDEX OF VOTES

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

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CHAIRMAN BABCOCK: All right. Welcome everybody, let's get started. And Harvey will take his seat immediately.

Dean Ahdieh will be here at some point remotely to welcome us, but, in the meantime, I will welcome all of us, and a couple of announcements. Judge Newell is going to turn over the duties of liaison from the Court of Criminal Appeals to a designee to be named later. I feel like I'm in a trading deadline in baseball. But, in the meantime, Sian Schilhab, who is the general counsel, will be filling in for him with us.

We have a new date for our next meeting. It is going to be a two-day meeting, and it's going to be September 30 and October 1 as opposed to a week later. I hope that doesn't inconvenience too many people. It's all my fault. I screwed up something scheduling-wise and so blame me if there's -- if there's a problem.

Andy Jones is taking over for Cynthia Timms. And Andy is here, he's got a hearing at 9:00, so he says. But he's seated right over there. He'll be the liaison from the State Bar Rules Committee. And we have a court reporter, Kim Cherry, who is filling in for Dee Dee today, who is -- I think, got a court assignment that she can't avoid.

And I think those are all the announcements,

unless the Dean has appeared. He is here. So, Dean, the floor is now yours.

DEAN AHDIEH: Good morning, friends. I apologize that I'm not there in person, but welcome to the law school. If I were not traveling, I would, of course, be with you. It's such a pleasure for us here at the law school to have all of you here for this important gathering. We are, you know, obviously, in the academic business, and we're incredibly pleased with the impact and the successes we're having in terms of bringing in world class students and educating them and sending them out into the world. We're excited about the scholarly mission and the caliber of our faculty and the impact that they're having.

But as important as any of that is what I think of as the -- function that has been a priority for the law school, really, from the outset, but I've focused on it particularly since I became dean about four years ago -- this notion of the law school is a place where we come together to discuss some of the most pressing challenges and issues of the day. And so this gathering is really reflective of that.

Obviously, the work of the Supreme Court here in Texas, the work of the courts in general are among the most vital elements of preserving and maintaining and building upon the rule of law. And so this gathering being here at the law school, really, is a great honor and pleasure

for us. I invite all of you back for future occasions as well. But, for the moment, just wanted to thank you for being here and to welcome you to the law school. Thank you.

CHAIRMAN BABCOCK: Dean, thank you very much. And can you either confirm or dispel a rumor that the students here call you Dean Bobby? And, if so, how did that happen?

DEAN AHDIEH: So, yeah, Dean Bobby is actually progress. Dean Bobby has become the norm, although now that's complicated because, as many of you know, we now have two Dean Bobbys in Texas legal education. So we'll have to decide; Bobby Chesney and I, at the University of Texas, have been debating, you know, which one of us. I suggested I be Bobby the Elder and he be Bobby the Younger. He likes 2.0. So we're deciding that issue. But this is an improvement on, previously, the students before I became dean just called me Ahdieh, so I figure Dean Bobby is progress.

CHAIRMAN BABCOCK: Great. Well, thank you so much. And thank you so much for allowing us to use this terrific facility. It's a great space and your staff has been beyond belief; they've been very helpful to us. So thank you. Thanks very much.

All right. Now, without further ado, we will turn the floor over to Chief Justice Hecht for his usual report.

JUSTICE HECHT: Just a couple of things. The Court usually takes a break during the summer, and we did this year. And so things have been a little quieter in our court. We're expecting to issue another emergency order before this one expires September 1st. And over the course of time, we've been moving back towards standard procedure in the courts. And that's -- this order will probably move further in that direction while still allowing remote proceedings. So, of course, we're hoping for a rule soon from the committee that would replace the emergency order altogether.

We also have an emergency order on evictions. Texas has, by most accounts, the best eviction diversion program in the country. And we expect to get some more federal funding after September the 1st. So we'll keep that order in place trying to support eviction proceeding -- eviction diversion proceedings.

The courts are working very hard on their backlogs. I announced last time that the courts of appeals are pretty much caught up. I think there's only currently one exception to that. And everybody is closing in on it. The rest of the courts have worked very hard -- courts of appeals have worked very hard to become completely current on their dockets. The trial courts are having a little more difficulty. So some counties are caught up. Collin County

is one. And El Paso --

CHAIRMAN BABCOCK: Do we know anybody from there?

JUSTICE HECHT: We have a representative from there. El Paso is caught up. A lot of the Panhandle and Northwest Texas is caught up. A lot of East Texas is caught up. The big delays are in Houston, Dallas. San Antonio is digging out pretty well and Fort Worth. You read about some of that in the press. But they have extra funds for visiting judges. And several have developed a special program trying to identify cases that they can get cleared up. So everybody is hard at work on that.

It's going to take Houston, in particular, a little while to get rid of their backlog. They have a very heavy one. And part of it is left over from Hurricane Harvey because they were without a criminal courthouse for so long.

And I should mention that in all these areas, the backlog is really in the felony courts. The civil courts, the family courts are within three or four percent of being caught up. Juvenile courts are caught up. So it's -- and the misdemeanor courts are making a lot of progress. So it's really the felony courts that we have some work to do on.

Then this committee approved an expanded disclosure of counsel rule in the appellate rules requiring

counsel to state at the beginning, not just who the counsel are in that particular matter, but who have been counsel in the case in the past. So we're already getting fuller disclosures on that. And it will happen, for example, that -- as we discussed, that lawyer will appear as counsel at some early stage or another stage of the trial proceeding, and then some years later after the case is on appeal and maybe to our court, that lawyer will have dropped out. But it could be a disqualifying consideration for an appellate judge, a member of our court. So that broader disclosure is in place. And we're already getting, as I say, a longer list of people who have participated in the proceedings in the case.

And then the only other thing I'll mention is that we also have a new local rules process. So starting January 1st, the Supreme Court will no longer undertake to approve local rules. To be effective, local rules, standing orders, and the like have to be posted on OCA's website. And once they are, there will be a review process. So if anyone sees a local rule and they don't think it's -- should be the local rule, there will be a process for challenging that and considering challenges. And the regional presiding judges will pretty much oversee that process and make recommendations to the Court.

So that will be a change for us, and we hope

it will, kind of, reduce the burden on our court and provide a more thorough process for people who want to promulgate and review local rules. That's all I've got.

CHAIRMAN BABCOCK: Great. Thank you, Your Honor. Justice Bland.

HONORABLE JANE BLAND: Just add there's no rest for the weary in August, for those of you who are on subcommittees that are making presentations today. So we're very grateful for the work that you've put in over the last several weeks if you have an agenda item today. So thank you.

CHAIRMAN BABCOCK: Yep, we'll --

JUSTICE HECHT: And I meant to introduce Amy Starnes who is here today with the court staff. She's our public relations officer at the Court. You may remember Osler McCarthy, who served so many years in that capacity. If you think we've taken a step forward, why, we have.

CHAIRMAN BABCOCK: Be sure to tell Osler that.

JUSTICE HECHT: Yeah. Osler is a great friend. But we welcome Amy to the court and she's taken over Osler's responsibility. Of course, Martha from my staff and Jacki, rules attorney, are here as well.

CHAIRMAN BABCOCK: Terrific. Well, speaking of hard work on short notice, the committee that is chaired

by Jim Perdue got a very important project done on a few weeks notice and sprung into action and have produced a really terrific report. So all my thanks, Jim, and turn the forum over to you and lead us through it.

MR. PERDUE: Thank you, Chip.

Yeah. So let me begin by thanking Shiva who has always been a great support as far as the logistics of this. I don't know if she's here, but Kirsten Evans is the director of the physical plant of the building; I've been in contact with her. So thanks to her for also coordinating.

Obviously, after my just fantastic experience with the debtor and creditors bar, I deserved this assignment. And, fortunately, I'm blessed with a subcommittee membership that is incredibly knowledgeable, dedicated, and fair-minded. I will -- on behalf of Pete Schenkkan, who is apparently traveling back from the Arctic Circle via Norway, he sent his regards of why he can't be here. He's been very active in the deliberations and the discussions.

CHAIRMAN BABCOCK: And, by the way, Jim, he also sent a memo to us yesterday that we distributed to everybody and posted on the -- have we posted it, Shiva?

MS. ZAMEN: I need to do that.

MR. PERDUE: There's a two-page memo, it's statistics driven, regarding the numbers of these. And I've

got a hard copy, but -- if anybody wants to see it. It's a quick read.

So the issue that got handed to the legislative mandate subcommittee was this. With the Supreme Court's decision in Dobbs and with the Texas trigger bill, House Bill 1280, would we reanalyze the rules that the court has promulgated to give essentially procedural effect to Family Code Chapter 33?

And so let me -- I was thinking about this conversation today with all of you who have been colleagues of mine for over a decade, most of you. And I was thinking about something that Chip said, I think at the last meeting at the close of the last term, which is, one of the privileges of serving on this committee is to serve with people on both sides of the bar from across the state that can disagree, and disagree mightily, about propositions in a fair and reasonable fashion, in a model, so to speak, for civil discourse. And that has been the great tradition of this committee and it's been always important.

And I say that, really, for the public consumption to understand that while people in here can disagree over principles, everyone in here has always held to the principle that Chip described, which is that civil disagreement and discourse is always social and civil and with respect.

This is a particular issue -- when it comes to the policy proposition, is one of which I think people on both sides and with reasonable disagreements can disagree on passionately, but today is a proposition not on the policy proposition, but is more on the procedural proposition under Texas law and the effect of rules that are designed to give effect to a legislative mandate, thus my subcommittee.

Family Code Chapter 33 is still the law. And while there is a Health and Safety Code amendment that will be in effect as of next week after the Dobbs' decision, squaring the two remains a procedural proposition in the estimation of the subcommittee.

So there are examples relevant to this, but I will start with this basic syllogism. The Texas trigger law says that abortion remains legal in the limited circumstance where the health, life, and significant health risk of the mother is identified. There are definitions and terms around that.

The syllogism obviously is that that woman, as defined in the Health and Safety Code with a potential exception to allow for legal abortion, may be under the age of 18. That is implicitly undeniable. And if that is so, then Chapter 33 in the Family Code, which is still on the books and remains a mandate to the Supreme Court, remains a possibility that a woman under the age of 18 may be found to

be pregnant and be suffering from a medical condition of the pregnancy which is an impending threat to the life or safety of that mother.

So, in that context, the procedural proposition is this. Are there ways to, perhaps, address Chapter 33 in the situation of a woman under the age of 18 that has a procedural avenue under Texas law to achieve an alternative form of consent, not an alternative determination of the propriety or impropriety of the abortion? It has never been that. It is an alternative to a form of consent for a minor. And that's what Chapter 33 represents.

And those parental notification rules and judicial bypass rules then are laid out beginning page 2 of the memo. There has been outstanding work in the past on this of which we don't need historians, we have witnesses. Lisa Hobbs was part of the group that was instrumental in developing these rules in 2015. Alex Albright was a part of that group as well, and she reached out for some of that history. But I do not need to play historian because there were people there who were part of that work and witnessed it.

So the memo, as you will see, identifies what then in Chapter 33.003 specifically provides for a legislative determination. The rules that are in question are only an effort by the Court to provide procedural

guidance to effectuate a legislative mandate. And that legislative mandate in Family Code 33 remains on the books.

So, therefore, those rules were adopted by the Court, and there is a link to those rules. The packet provides you a substantial amount of materials. But essentially you have rules for the judicial bypass and then instructions and forms which will lead me to the rubber meeting the road at the end of the presentation.

In the context of medical emergencies, that is a definition set out in Chapter 171. That also pre-dates the trigger law. And so that was on, potentially, the books even during the existence of Chapter 33 during the bypass. So it has never been -- it has never been the situation under Texas law that the judicial bypass provision would be eradicated by the medical emergency definition because there's been a medical emergency definition in the law of the state of Texas during the efficacy of Chapter 33 and these rules.

So the trigger law, which is House Bill 1280, which basically, I think, most people understand. Dobbs predicates its applicability, as Dobbs came down in July. The result is that the trigger law would go into effect with the new codification of the language of an abortion ban with the medical emergency exception in Chapter 178 of the Health and Safety Code on August 25th.

Those definitions then are found -- they're

cross-referenced to Chapter 245. You'll see those on the bottom of page 4. And then the breadth of the prohibition on page 5 and then with the exception as laid out by the subcommittee in 170A.002(b).

And I think it's worthwhile to note that the exception itself is one that not -- not implicitly, but rather quite explicitly puts it in the medical determination of a reasonable physician. So you -- the definition itself begins with the concept of a licensed physician making the determination in reasonable medical judgment regarding the condition that would qualify for the very, very specific and very, very narrow proposition of a legal abortion under the exception.

I will say, just because it's a collateral research that's come up in a case, obstetrical literature published back in the 1600's has consistently embraced the proposition that the life of the mother was to be preserved in the tragic circumstance of where, in those times, most of them were failure to pass -- the baby was stuck. There was some really graphic procedures. But the historical practice of obstetrics has always been one through history that the -- that the life of the mother would be preserved by the physician when the delivering of the child threatened her life.

So the definition here then, one of reasonable

medical judgment that rests in a physician with a very specific definition, again, crafted by the legislature of the State of Texas regarding that exemption and without comment regarding the policy, but, again, rather back to the procedure. Let me start with this as well, Chip.

I think everybody can understand that the -- that a condition that poses a threat to the life or safety of a pregnant mother needs to be not conflated, but rather distinguished from a more narrow but often more broad terminology of an emergency medical condition. And so in EMTALA, which there's a section addressing the concept of EMTALA, which is the Emergency Medical Treatment and Active Labor Act of federal law deals very specifically with the concept of somebody who presents an emergency medical situation to an ER either in active labor or in unstable condition, and the responsibility to have a screening mechanism in that ER and then a stabilization responsibility in the hospital. That's a very narrow proposition and one that needs to be calculated, I think, just, again, to maybe take the plane up a little bit to the policy proposition.

A life-threatening condition can be the ten-centimeter tumor in my colon that's found on colonoscopy next week, but that doesn't mean I go to surgery in the next 12 hours. It is identified as a life-threatening condition, but it is not an emergency that would be the equivalent of a

placental abruption with active hemorrhage where a mother is losing some serious amounts of volume -- of blood volume. Those are two different propositions.

And, therefore, the definition as chosen by the legislature contemplates a -- not a medical emergency of acuity, but rather a situation that identifies a threat to the life and safety of the mother which may be urgent. But there is a distinction in medicine and in the law between urgency and medical emergency which is the acute delivery of care with or without consent, whether it be EMTALA or even under the state Health and Safety Code. Those are two different propositions.

And, therefore, the law as defined by the legislature, then the procedural effort to give voice to both the law in Chapter 33 of the Family Code, but in conformance to this narrow exception needs to recognize you don't need to be bleeding out actively to potentially have a situation where a woman under the age of 18 is pregnant and suffering a life-threatening condition.

But I think it's relevant to give you the EMTALA language, understand those definitions because of the potential interaction here, but it's important to distinguish, I think, some of those definitions when you get down to the responsibility and the recommendation of the subcommittee when it comes to the procedural proposition of

the rules.

The procedural proposition of the rules remains to give will to Chapter 33 of the Family Code. And there is nothing about giving will to the Family Code as the subcommittee has read it which would eradicate that statute or the procedural voice to that statute as crafted in 2015 even after the trigger law. So there are two basic recommendations of the subcommittee given that history and given that statement of the law.

Recognize that the rules, kind of, loyally track Chapter 33. And so that the rules that were crafted by the Court, again, in obedience to the legislative will rather than whole cloth, try not to do disservice to the procedural mandate and essentially incorporate much of the language of Chapter 33.003 into the rules themselves so that there was no, essentially, distance between the rules written by the Court and the legislative mandate that exists in Chapter 33.

Given the way the definition is laid out in the new Chapter 170A of the Health & Safety Code and trying to then make continued loyalty to Chapter 33 and the bypass procedure, but to recognize that the situation of an abortion globally is one of a very narrow exception, but then also to maintain loyalty to both the language of Chapter 33 and the language of Chapter 170A, which makes the determination of this proposition for an exception one of a medical

proposition rather than one of a judicial determination. And recognizing that the rules in Chapter 33 have always removed the judicial determination from one of a policy proposition or a marriage proposition to one solely of a procedural proposition on whether the two exceptions within Chapter 33 have been met, which is the maturity of the child or the circumstances that are a threat to the child justified, potentially, the bypass. That will can still be done with this -- with this recommendation.

The recommendation begins at the bottom of page 8, which is a new paragraph to the general provisions in Rule 1.1 applicability to recognize that the rule is not intended to be inconsistent with the current state of the law, with the prohibition on abortion unless there's a life-threatening condition. Nor is there to be a judicial determination considered to be deemed of that proposition through the judicial process of the bypass. It is only one that remains loyal to the language of the statute in Chapter 33 and whether the two exceptions as laid out in the procedures that are laid out and the rules that essentially try to incorporate those procedures have been met.

And then in addition to that proposed change from your subcommittee, there is an additional paragraph to forms that are these instructions given to an applicant. Now, obviously, these are given to an applicant of a variety

levels of sophistication, but they are also given to a variety of pro bono organizations and assistant organizations on both sides, by the way, that address that. And, therefore, the subcommittee thought a statement of the law post-Dobbs and post-House Bill 1280 into those rules so that the court can clarify procedurally that it is the policy of the State. And so this essentially represents a statement of policy in the procedural aspects that an abortion is only available under the very, very narrow definition and the narrow exception that has been written into 170A.

And that was our effort to try to not do violence to Chapter 33 in the Family Code, honor the Court's past work regarding having rules that are obedient to that procedural process set, and to square that, kind of, under the law with the revised Chapter 170A in the Health and Safety Code.

I will say as the chair, I am a big believer of something that's verbalized often in this committee, which is sometimes less is more. And that a prescription that tries to do as much service with the least amount of engineering oftentimes is a more eloquent solution. So if I added anything to that conversation with the subcommittee, it might have been that. And you are all very blessed to have the members of this subcommittee with the upstanding work. I can take zero credit for this, Chip. It was an effort by

all.

But, ultimately, I will say this. If there's any question about it, I'm here and available to take questions because I'm going to take full responsibility for this. My name is not on it, but you can consider it to be under my name.

CHAIRMAN BABCOCK: Thank you very much. While your modesty is noted, but not accepted, so -- for the purposes of the record, I think you said that the rules came into force in 2015. But I think there was a prior version of the rules back in 2000 or 2001.

MR. PERDUE: You are absolutely correct. The rules in 2015 were in response to amendments that were made in the session previously. So there were -- these rules have much more history, indeed, and the chapter, in fact, has much more history. It was -- to be precise, the history was -- it slightly changed in 2015, but it certainly pre-dates that.

CHAIRMAN BABCOCK: There are a few witnesses from 2000, but precious few. I'm still on this committee.

Everybody on your subcommittee, with the exception of Pete who is traveling from the Arctic apparently, is here, so they can speak their mind if they want. But was there any dissent in your committee for these two proposals?

MR. PERDUE: I would rather not address votes

of individual members. But I think it's fair to say that there was not dissent, but I would -- I don't want to have this laid out on any individual.

CHAIRMAN BABCOCK: Well, sure, nobody does. But there's no alternative language that is lurking out there for some -- with our rules?

MR. PERDUE: No, no, nothing like that.

CHAIRMAN BABCOCK: Okay. And if anybody on the subcommittee wants to comment about this, now is the time to do it; you get preference. So if anybody wants to say anything. I think only one member is remote and everybody else is here. Anybody want to say anything?

(No response.)

CHAIRMAN BABCOCK: Okay. We'll open it up to the floor. Let's -- let's talk about the first paragraph that starts with "these rules continue to apply." Are there any comments on the language of this proposal?

Peter Kelly, Justice Kelly, what's your thought about it.

HONORABLE PETER KELLY: My question is more general about relating to specific language; but just curious about whether there's an attempt to square the rules with the 1925 statute outlawing abortion? Which is currently pending before the Texas Supreme Court and my court, so I can't really comment any further on that. I'm just curious whether

y'all looked at that in formulating these rules.

CHAIRMAN BABCOCK: Okay. Jim, I think there's an answer to that question.

MR. PERDUE: There is. That was not in the scope of our project. We were very specifically referred the issue of House Bill 1280, and that was our focus.

CHAIRMAN BABCOCK: So the answer is no.

MR. PERDUE: So the answer is no.

CHAIRMAN BABCOCK: There you go.

MR. PERDUE: Your objection, nonresponsive, is well taken, but, yes, the answer is no.

CHAIRMAN BABCOCK: All right. Anybody else? Anybody have their hand up, Shiva?

Oh, yeah, Lisa.

MS. HOBBS: This is very minor, but in the second to last line, you refer to the female, which I think is probably tracking 170A, but you might want to say "minor" there, which is more consistent with 33. But it's just -- in the rest of the rules we seem to say -- refer to unemancipated minors. But that's very ticky-tacky, and I don't feel strongly about it.

CHAIRMAN BABCOCK: Former rules attorney.

MS. HOBBS: Exactly.

CHAIRMAN BABCOCK: You have license to be ticky-tacky.

Any other comments?

Yeah, Harvey?

HONORABLE HARVEY BROWN: Well, I thought that the second part of the sentence that has an order doesn't mean this, doesn't mean you made a determination in the medical necessity, to put in shorthand version, was really good given what Jim has said about the way they tried to match the statute with the rule -- with the prior rule. I guess in my mind when I read through this, I had a question. And that is whether that was, in fact, the way the statute needed to be interpreted. I don't have any -- a conclusion in my own mind, but I had a question.

So I looked at the two prongs, which are really going to whether the notice should be given, not to the medical issue you said, you're right about that. But I thought, well, if a young girl isn't mature enough to make a decision, in other words, doesn't meet prong A and so you're under prong B, which is best interest, who is making the decision for this person who's admittedly too immature to make this decision about whether the doctor's advice is advice that she wants to follow? I mean, I'm assuming that a lot of medical decisions are not bright lines, but there's some medical judgment to be exercised and, therefore, reasonable people might disagree with a physician. And I just wondered who gets to make that call when you have a

young girl who, by definition as A isn't met, can't do that?

CHAIRMAN BABCOCK: Is there a way this rule can answer that question?

HONORABLE HARVEY BROWN: Well, I kind of thought if A was answered, yes, that she wasn't mature enough, then I thought the best interest was -- you have to have some inquiry into the -- a review of an affidavit or a doctor. That was my immediate reaction because I just couldn't think who else could do that. Maybe an ad litem could do that? But it seemed like somebody had to do that, make that determination.

CHAIRMAN BABCOCK: Judge Evans.

HONORABLE DAVID EVANS: I don't dissent from the report of the committee, but the practicalities of conducting these is -- this second prong is a real issue. And the value of the order to the minor and the acceptance by the health care provider in the second circumstance that Judge Brown addresses is a concern of mine. And I don't know how to address that with the Court because I was persuaded by the other members that in that circumstance there wouldn't be a judicial determination. But, quite frankly, last night I went back and read part of Judge -- of opinion in Cook's Hospital, the Baby Tinslee case.

We see situations where parents and minors fight in open court over consent. I know the judges that do

these on bypasses. And there's -- there is a tragic vacuum of guidance on how to conduct that hearing. And they're difficult. You will hear the -- from the applicant, they'll go through a script, but at some point the emotion of the moment will catch them. The circumstances they find themselves in that they never wanted to be in. And they'll tell you everything. And, quite frankly, on maturity, you'll make the decision based on, as you do in all witness credibility, the spontaneity, not the canned testimony.

And it's a tough thing. I wish you would all forget that I'm a lifelong Republican, an Aggie, and male, and -- you know. In long ago experiences, I was in charge of race relations in Berlin and we would play a script where a black soldier would say one thing and a white soldier would say another and we would show how a group would perceive this. So I'm trying to put this as neutral as possible.

But this second prong is a real problem. The ad litem is a guardian ad litem, not a guardian. They can't go to the hospital and give consent. It's the order of the Court that the health care provider will rely upon. And I don't know the solution. But I do know this. There are no mulligans in this deal. You don't get to swipe at the ball and send it down the fairway and say, oh, that was a bad order. Let's run back and find the judge, reporter, the private area, the whole dang thing and let's get an order

that the health care provider will accept.

But we had spirited conversation. These are brilliant people I work with in this committee. But, yet, I didn't dissent, but that is my concern.

CHAIRMAN BABCOCK: Hopefully that little birdy noise wasn't a comment.

HONORABLE DAVID EVANS: It was, but that's okay.

CHAIRMAN BABCOCK: Is there any way to tweak this language to address the very difficult situation a trial judge faces.

HONORABLE DAVID EVANS: No. You don't have hotel rooms for a week. You don't have the time to do it. I think the Court has to think about where we are on this and whether directions need to be given to the judges on what their duties are and whether that -- I think this satisfies notification. But is that notification efficient and effective in situation No. 2? And I have an open question in my mind about that.

CHAIRMAN BABCOCK: Yeah.

HONORABLE DAVID EVANS: I understand the reluctance of those in the committee to have a judge make a judicial determination of medical necessity. I understand that that's driven by their perceptions of what the judge may do with that and their profiles of the judges. And I

understand that it's driven by the fact these are not open proceedings and the public doesn't have it. And so there's nothing to do but to suspect the worst and hope for the best.

But that women is not going to get an order that can be used, as far as I know, in situation No. 2 unless the judge has some sort of clear, convincing evidence. Well, I don't know about the finding. I won't launch into it. Just going to get an order that she's been here and I make the decision she get it and does the health care provider -- and this is way past it, but that's my concern about it. And I don't think I'm going to see many judges that are going to sign off on them in situation No. 2 unless they have some sort of proof from the doctor about the diagnosis. Unless the court just simply instructs them they can't consider it at all.

MR. WARREN: Wouldn't it be the doctor -- as it relates to a proceeding to make that determination, shouldn't the doctor be there to give expert testimony?

HONORABLE DAVID EVANS: I think the doctor's testimony is binding on the Court, if it's presented properly, if there's no question of it. There might be a couple of judges that think they practice medicine, but the great majority of us don't. And so that's -- that's where -- that's where I may differ and maybe we haven't ironed on that -- haven't gone that far. But these are tough things.

MR. WARREN: I guess because of this -- I didn't mean to interrupt because I'm certainly not a judge. But I think to prevent that type of activity, it's a legal point for the judge to legislate from the bench -- it's similar to a judge legislating from the bench as it relates to being -- not being a professional, but that it's required that the judge have expert testimony from an attending physician or some physician as it relates to making -- making a ruling in such a case.

HONORABLE DAVID EVANS: My hearing is failing all the time, but I'm not sure I got everything on that. But I will just say this. I've been groping with this for about two weeks now on this second prong and that has been my concern, Harvey, and that continues to be my concern as to what's going to come out.

CHAIRMAN BABCOCK: A couple of comments. One, when you're speaking, if you could speak up. There are microphones in the ceiling, but -- yeah, who knew? But if you're especially soft spoken as Judge Evans can be on occasion, although not always, the people on Zoom are having trouble hearing. And the people on Zoom, be sure to keep your mics muted until you're recognized. I think we just got some feedback a minute ago.

This admonition does not apply to Orsinger who would never be accused of speaking too softly, but beyond

that, Justice Gray?

HONORABLE DAVID EVANS: I think it's important for a court to recognize the point that Judge Brown made and for the committee to recognize that. Whether -- I don't know that you could fashion a solution for it, but that is an open question and it may be just speculation on my part. Me being soft-voiced would be -- boy, that's a thrill. Anyway...

CHAIRMAN BABCOCK: I didn't accuse you of that all the time.

Justice Gray?

HONORABLE TOM GRAY: I was going to try to make it a day without saying anything, and I didn't make it an hour, so here I am. But I thought from something that I read in the materials that this decision was entirely independent of the judge, of the medical providers' decision. And that, in fact, it could be anticipatory to a medical diagnosis that the bypass could be obtained, John, without any medical testimony. And, in fact, the medical testimony would be irrelevant to the decision on the bypass. And then in effect, the minor would present the bypass, if granted, to the physician who makes the medical decision at which time the procedure would occur.

And so I just want to make sure, did I misunderstand the process of how it was intended to work or at least an option of the way it would work, Jim?

MR. PERDUE: Well, I don't think process ever is designed to reflect an intent, it's a process. So there is nothing in the process currently or in this that would have anything to do with addressing, quote, unquote, timing. Obviously, the rule, the application packet, we did add in the paragraph to reflect the legality and illegality, right, of the circumstance for the applicant. And that was the -- the effort.

But the -- but -- so I don't know where to answer neither yours nor the judge's questions on the pragmatics because it's supposed to be a neutral proposition. You have a procedure that's available. It is not appropriate to get an abortion under Texas law now less than this circumstance. Can the procedure be accessed before that circumstance arises? Well, there's nothing in the current procedure in the legislative mandate of Chapter 33 that states that. Again, not to -- but what the judge is trying to address, I think, is what has been true under this -- under Chapter 33 of the Family Code for two decades, which is the pragmatics of these. And this committee repeatedly, kind of, recognizes the concept of a qualified judiciary and litigants of good faith. And in this process, by the way, Judge Brown, there is a mandatory appointment of a guardian item.

HONORABLE HARVEY BROWN: I know that. It's a

question of rule.

MR. PERDUE: That's right. That's right. What is the scope of that rule.

HONORABLE HARVEY BROWN: Right.

MR. PERDUE: But there is a guardian ad litem that is mandatorily appointed in these procedures that does stand, to the extent a guardian ad litem does, in a different situation than just a minor prove-up in a civil case -- they do stand in a proposition of best interest of child, but not in guardian role. But they certainly are not just a counselor to the court in these particular cases.

HONORABLE DAVID EVANS: They do have a further role. Let me -- if you find the young woman is mature, the game is over. Medical condition makes no difference, if she's mature. I just want to point out the way I read this is, if she's not mature and sufficiently well informed to make the decision and have an abortion performed without notification and consent of the parent, managing conservator, or guardian; or, number two, the notification and attempt to obtain consent would not be in the best interest.

There are circumstances, one which was made in Florida, I don't know that I -- why the judge reached that conclusion last week, that the young woman wasn't mature enough. But you could have that situation. And that's the only one I'm concerned about. Because, at that point, I

believe it is the court that is giving the informed consent for the minor to have the abortion, not the guardian ad litem or anyone else.

CHAIRMAN BABCOCK: Professor Albright and then Harvey.

PROFESSOR ALBRIGHT: Yes, thanks. I'm sorry on the phone; I'm in Colorado. So thank y'all for letting me talk this way. As I remember this procedure, the issue of best interest is not about whether it's in her best interest to have the abortion or not, but it's whether it's in her best interest not to include her parents in that decision. As I understand it, these are situations where there's been abuse by the parents, perhaps one of the parents or stepparent impregnated her. There's some situations where she doesn't have parents, one parent is dead, another is in jail and is not responding.

So it's not about whether she should have the abortion. The judicial bypass is only about whether her parents need to be involved in that decision. So I respect the angst and the difficulty and -- the judges have in having these hearings, but I think the focus needs to be on the notification and/or consent and not upon whether she should have the abortion or not.

And this is an issue that has always been there with these rules and these statutes. So it's nothing

new after Dobbs at all. So I just think we need to remember what the focus of these procedures are. Thanks.

CHAIRMAN BABCOCK: Thanks, Professor Albright. Harvey?

HONORABLE HARVEY BROWN: I was going to make the same point.

CHAIRMAN BABCOCK: Sure you were.

HONORABLE HARVEY BROWN: I really was. I was going to say best interest -- I mean, this is something I read through carefully yesterday. At first I thought best interest means, you know, the kind of the general definition. But it means best interest not to notify.

CHAIRMAN BABCOCK: Right.

HONORABLE HARVEY BROWN: But we still have the question of even when we discuss this, we talk about, quote, the decision. Who is making the decision? If she's not mature enough to make the decision, someone has to make the decision. Is it going to be the ad litem? If so, then I think the ad litem's role needs to be defined. Is it going to be just handed to the doctor and, say, the doctor is the one who decides without anybody questioning that medical judgment? Or is it going to be a judge? I don't see other options, but I may be missing one. It also occurred to me it's -- possibly you could have an ad litem for the unborn child. The statute defines the fetus, if you will, of the

unborn child as a child; therefore, it seems like that person may have interest in the proceeding and is unrepresented. So I wondered if that person is entitled to an ad litem too.

I didn't have an answer. These are just questions I had as I was reading it through. By way, great memo, well done. But I thought that was a difficult question as to what to do when it's under the second prong. I just thought it was worth talking about.

CHAIRMAN BABCOCK: Well, is the role of the ad litem -- to the extent it's unclear, wasn't that like a -- doesn't that exist today prior to this discussion?

HONORABLE HARVEY BROWN: It probably does, but before at least there wasn't a legislative finding this should only be done in this narrow circumstance. Now there's a legislative finding that this shall only be done under a narrow circumstance. And the question is who is going to make that determination. So, I mean, I think this is -- the rule is perfect before the new statute. The question is laying two things over each other that aren't clear how to lay them over. I think it was a great job, admirable job, but I just raise that.

CHAIRMAN BABCOCK: Okay. Lisa.

MS. HOBBS: I'm not finding it in the statute because I'm not looking at it on my computer. But my understanding was -- and, Jim, you can correct me if I'm

wrong, but my understanding is the subcommittee went to 170A and looked at the language of the statute and it says that it is a physician's determination about whether the pregnant minor's life is in danger or safety is in danger. That's how I understood the memo last night. Is that correct?

MR. PERDUE: That's -- that certainly seems to be the explicit language of the way the exception is defined. And it's the fifth page of the memo, Lisa. But you've got a three prong -- it's conjunctive, you have to have all three. And the proposition lives in the second, which is that -- is the reasonable medical judgment, not reasonable legal judgment. The reasonable medical judgment of a reasonable physician, the existence of the condition that would meet the narrow, narrow, narrow exception.

MS. HOBBS: Well, I mean, that's how I read it and that's what gives me more comfort without discounting the angst of -- we're all sympathetic to the judges who are in this situation. And what has been said today I know has been heartfelt.

But I just went back to the plain language of the statute and it seemed like the statute answers the question, is that it is the physician who does decide. And that's the way I read it. And I know it's not perfect. And I know it's not a perfect thing and --

HONORABLE DAVID EVANS: No, it's a fair

reading, but you're asking a human to ignore the statute. You're asking a human judge to ignore the circumstances. And there's nothing in the rule that tells the judge this at this point. There's -- we've addressed the warning to give to the minors, but we've never addressed how the judge is supposed to conduct the hearing. And if you do a formal poll, you can find out these things will be 15 minutes pro forma and they'll be one hour. And there's some unreported decisions up there about some problems that have existed where judges have gone too far on the issues of timing of it.

And so I've had my soul-baring; I'll get my scotch tonight, but I don't think you've got an effective order. And I'm the guy that has to replace the people that recuse themselves when this comes down. I've got to go out and find the talent that will do it. And I have to say, I can't tell you what you're supposed to do. I can tell you what some members and some people on each side of this question believe you're supposed to do, what the advocacy groups tell you to do. But I can't tell you how you're supposed to conduct that hearing, what evidence you're supposed to receive, and what you're supposed to know. And I can't not point you to a reported case. And that is going to -- there is, again, no do-overs in these things. And you don't want to put that woman through that.

CHAIRMAN BABCOCK: Judge Estevez.

HONORABLE ANA ESTEVEZ: So I think that it's -- the intent of the statute was to allow a doctor to treat any pregnant female, whether she's a minor or not, so even though we need to go apply it to this bypass rule. As a child, I would go with my cardiologist dad and do rounds with him and things like that, back before there was HIPAA. And there was a pregnant lady who was, I don't know, six or seven months pregnant and was going in for heart surgery. And that was the first time I was ever exposed to abortion because that was the only way to save her life. They were going to have to induce the pregnancy and she was at a state where they didn't think the baby would live. I don't know what happened.

But the way it reads, I mean, no one really has time to come to the judge. As a minor, they're treating someone and they've got -- they've got to make a choice. And so this is to protect the doctors. You know, the baby is going to -- the baby is there, no one is coming.

And I read the preeclampsia. You know, we all worry about that. All the people that have had a baby, we all, you know, worried about our blood pressure. Went in, our doctors did whatever they could do to lower it so that we wouldn't get into those conditions. So we understand those things.

But when that happens, that doctor doesn't

have time, even with preeclampsia, to go to get a court order or some sort of bypass. So even -- I understand we have to do this, but the reality is there will be not one case under legitimate life-threatening situations that they're going to be coming to us for a hearing to do a bypass. I mean, there's just -- it's just not going to happen. This is -- this is medical care. This is to protect the doctor from a murder or from someone else that wanted that baby more than they wanted their spouse or whatever that might have been.

So with that, if it did come up to the court, yes, the judge makes the decision. I mean, there's no question. We're making the decision

CHAIRMAN BABCOCK: Yeah.

HONORABLE ANA ESTEVEZ: We made the decision before and we're making the decision. Now we just hand them a piece of paper. Now, whether they go to the abortion clinic, you don't know. But --

CHAIRMAN BABCOCK: Right.

HONORABLE ANA ESTEVEZ: -- that order allows them to go somewhere and either have that performed or if they change their mind, they're always welcome to do that too. And there was always an appellate procedure. So even if it was denied, the court of appeals could decide that immediately.

CHAIRMAN BABCOCK: Yeah. I guess both of you,

both you and Judge Evans, is there anything that we could suggest as a committee or that the court could do to answer the situation that Judge Evans anticipates he will find himself in, which is, he's got to go to one of his colleagues and say, Hey, you got to do this. And the colleague says, Well, what do I do? And Judge Evans says, you know, I don't know.

HONORABLE DAVID EVANS: First off, you called for dissent on the opinion. I don't dissent with the report.

CHAIRMAN BABCOCK: No, I understand.

HONORABLE DAVID EVANS: I understand the reading of this is just notification. But I wanted to make sure -- I thought it would probably come up without having a dissent -- that the Court is aware that this doesn't answer the question in the end. And I don't know how you educate judges on how to conduct these. And I sure wouldn't -- that question hasn't been referred to the committee.

CHAIRMAN BABCOCK: Right.

HONORABLE DAVID EVANS: And --

CHAIRMAN BABCOCK: And if it is, we'll deal with it, but --

HONORABLE DAVID EVANS: If it is referred, it is. But this is not going to answer the -- this isn't going to answer -- this is not going to --

MR. PERDUE: If that question is referred, can it go back to the special committee from 2015?

HONORABLE DAVID EVANS: If it is, it's just a nightmare of what it would be. But at the end of the day, it's -- most of these come in -- most of these things are filed almost within ten days under the existing statute. Now you can say it's the bar that represents the women involved are putting -- trying to put the court up against a wall. And most of the urban areas have a local rule that designates a particular court. And so we know -- the clerk knows where they go. But at that point you have to scramble and have an ad litem. Usually there's a group of lawyers who work in this area, knowledgeable of what their tasks are. Then you have to find a hearing and a location that's confidential. And then you have to have a hearing. And many of these young women have to find -- schedule it in such a way that they avoid the people that could -- that they want to bypass.

So, you know, it is -- and it's not unusual in a large area. And when there's a lot being filed. And there's not a lot being filed as far as I know informally. In an urban area, it's not unusual to find the judge out of pocket when it's filed. So then you have to go scout somebody out and say, Guess what happened to you today? You've got to sit for another judge. Well, what do I do? Well, you can read these rules. But now with the overlay and

the referral of Roe and the events that are going on in the state, there's not -- I don't think there's a single judge that is not going to question whether they're under the 1925 act, whether they're supposed to consider that or not consider it, or whether they're supposed to consider HB 1280, should or should not. And I wouldn't even want to speculate on what the legislators that are involved think we're supposed to be considering.

Now it may be just a big -- maybe it's not a problem and maybe we won't see it. Because, frankly, I think most of these are going to be brought by the medical care providers and they're going to be open proceedings. But we have lawsuits where parents won't give consent because of their beliefs and the minor -- and the hospital and the minor has gotten outside legal help and the case is filed and the court then has to act in what Justice Birdwell would call over and over, parent -- but, at that point, the court steps in, parents usually resolve them. We're not getting -- it's not getting us anywhere. But I've voiced my concern.

CHAIRMAN BABCOCK: Yes. Thank you, Judge. Any other comments about this first paragraph?

(No response.)

CHAIRMAN BABCOCK: All right. Let's go to the next suggested language, which is on page 9 of the memo. An abortion in Texas is only available, that's the paragraph

we're talking about. Any comments on that language?

Lisa?

MS. HOBBS: No, that one we're good today. Good job, Jim.

MR. PERDUE: I can't take credit; Orsinger gets that one.

CHAIRMAN BABCOCK: Okay. Rick.

MR. PHILLIPS: Just one question is the verb "states." Because I went back and looked at 1280 and it says, determined. The medical provider has to determine. And I'm just wondering does that need to be -- what are they supposed to state? I just wondered about that verbiage, there was a reasoning that they chose "states" there rather than maybe "determined" which, I think, is the statutory language.

CHAIRMAN BABCOCK: That's an interesting point because I would -- in thinking about the situation that was being posited by the district judges, I wondered if a lawyer representing a minor could prophylactically go in and get a bypass order. I mean, his client is very sick, is likely to need emergency care to abort the fetus, the child, but hadn't happened yet because the physician hasn't said so yet. But wants to be sure that that piece is in place before that event happens. I can see that occurring under these rules. In which case, "determines" would frustrate that.

Yeah, Richard Orsinger.

MR. ORSINGER: Yeah, Chip, I would follow up on what you were saying. I mean, not all of these are emergencies. And the question is not whether there should be an abortion or whether an abortion would be legal, the question is whether the consent of the parents should be required. And some -- if an underage mother is starting to develop difficulties with her pregnancy, I don't see why someone couldn't go into court before the emergency. And then it's not a question of whether you meet the criteria of the statute, it's a question of whether the court is going to consent in lieu of the parents or managing conservator.

So the question of medical necessity or medical emergency is divorced, I think, from the question of consent. So I agree with you entirely that we should anticipate that people may go into court before the emergency in order to have everything lined up so they can take the necessary steps when that emergency arises.

CHAIRMAN BABCOCK: Yeah. Justice Christopher?

HONORABLE CHRISTOPHER: Yes, sir. I did want to talk about the first provision because, in a way, it's a bit misleading, in my opinion. When you're looking at the minor's reasons for not wanting to notify and obtain consent from a parent, the minor often testifies that the parents are against abortion and, you know, do not believe in it or

religious reasons or whatever reasons. They do not believe in abortion. So a judge would have to ask the follow-up question: Well, have you ever talked to your parents about an abortion if there's a medical reason for it? So you will be getting into the medical reason for it. And, you know, so to say at the beginning that we're not getting into the medical reason is not true because that will happen.

And when you -- when you put it up there at the top, it seems like it won't come up, but it will, you know, if you're in the best interest prong, it just -- because that's what happens in every single one of these cases. Because every case they come in and they -- first they try to establish maturity. And, secondly, they try to establish the second prong just in case the judge doesn't think they're mature enough.

I don't know if we're doing trial judges a service by saying we're not making this a medical decision. And I just would like to -- you-all to know that talking louder helps, but we're still having a really hard time hearing. Thank you.

CHAIRMAN BABCOCK: Yeah. Thanks, Judge. And were your comments -- I think they were directed at the first paragraph that starts on page 8 and spills over to page 9?

HONORABLE TRACY CHRISTOPHER: Yes.

CHAIRMAN BABCOCK: Okay. Great. Are you

having any trouble hearing me?

HONORABLE TRACY CHRISTOPHER: Yes, sometimes your voice just drops even when you're talking loudly. It's just spotty. We think maybe it's a WiFi problem.

CHAIRMAN BABCOCK: Could be. And plus sometimes I look down at the -- what I'm reading and the microphones are above my head, so we'll all try --

HONORABLE TRACY CHRISTOPHER: No, because just, like, right then you cut out and you were looking straight ahead, so...

CHAIRMAN BABCOCK: Okay. Well, we have technicians over there working even as we speak.

HONORABLE TRACY CHRISTOPHER: Thanks.

CHAIRMAN BABCOCK: Whoa, and your picture just popped up on the full screen; you're looking good.

All right. Any other comments about either paragraph, but we're focusing now on the paragraph on page 9?

MS. HOBBS: If I could just respond to Judge Christopher.

CHAIRMAN BABCOCK: I knew you would.

MS. HOBBS: Sorry, I can't help myself. I agree with Judge Christopher that in what's happening in, like, the full realm of things will come up in a hearing in a judicial determination of whether the minor needs to notify her parents before the procedure. And so I think Chief Gray

had said something about like it's irrelevant. I can't really imagine that it's irrelevant. Okay. It's going to come up, I agree with that. But I think how I read this provision as drafted by the subcommittee is there is a medical determination that will be made in Texas heretofore. And it is not a judicial determination about whether the abortion should happen or not.

And I know it's not going to be easy and I know it's not going to be clean, but I think the words on the paper as stated here are very clear whose role it is to decide whether the abortion given in Texas is legal or not. And it's not the judge's decision. And that's how I read what was written and I thought well written.

CHAIRMAN BABCOCK: Okay. Great. Anybody else have their hand up?

(No response)

CHAIRMAN BABCOCK: Any other further comments?

HONORABLE TOM GRAY: I just can't believe that Lisa Hobbs would not agree with me on something.

CHAIRMAN BABCOCK: Well, there's always time for a first, you know.

HONORABLE TOM GRAY: It's a real gnat, but right in the middle of the paragraph is an "our pregnancy" when it should be "your pregnancy," but...

MR. PERDUE: Yeah, thank you.

CHAIRMAN BABCOCK: That's a good catch. Thank you, Judge.

All right. Any other comments from anybody?

MS. HOBBS: Is that a period after perform on the second to last line or -- my eyes are shot now that I'm 40-something.

MR. PERDUE: They're going to fix that in postproduction.

MS. HOBBS: Got you.

CHAIRMAN BABCOCK: I think it's probably supposed to be a comma.

MS. HOBBS: Or nothing.

CHAIRMAN BABCOCK: Or nothing. Yeah, sure.

All right. Anything else?

(No response.)

CHAIRMAN BABCOCK: All right. Anybody violently opposed or even somewhat opposed to the language the subcommittee has come up with?

(No response.)

CHAIRMAN BABCOCK: All right. Hearing nothing, then we will submit this to the court again with thanks to Jim and his subcommittee for the excellent work you've done.

And we will turn our attention to the next agenda item which is procedure related to mental health,

another easy topic for us. And, Bill, I think you and Kennon are the team leaders on this one, so fire away.

HONORABLE BILL BOYCE: Thank you, Chip.

So at first glance the topic that we're discussing may look expansive and difficult and that's only because the general topic is expansive and difficult. But I think what has been referred specifically to this committee for consideration is actually pretty narrowly focused. So I'm going to provide a little bit of an introduction and overview, but I think it's important to focus on what we are being asked to address and what we are not being asked to address. I think what we are being asked to address is a specific rule potential addition to the Texas Rules of Judicial Administration.

What we are not being asked to do is, in this committee setting, is to decide the public policy choices or the wisdom of specific pieces of proposed legislation pertaining to procedures at intersection of the court system and mental health. So take a step back.

The report that you have that's attached as the first attachment to the memo comes from the Judicial Commission on Mental Health which was established in 2018 by joint order of the Texas Supreme Court and the Court of Criminal Appeals, co-chaired by Justice Bland and by Judge Hervey. And it's addressing a wide range of issues around

the general goal of improving the administration of justice for persons with mental illness and intellectual and developmental disabilities.

So the specific topics that you see referenced in this report are one slice of the much larger undertaking by the commission. The specific slice that is referenced in the report deals with one of the aspects of the intersection of the court system and persons with mental illness, which is circumstances when there may be emergency detention because somebody is in a mental health crisis and may be at risk of harming themselves or others and related issues; for example, the administration of psychotropic medications.

So, again, as a disclaimer, we are not being asked through this referral to address the policy choices underlying proposed legislation dealing with these and other difficult issues. The commission would certainly encourage input from everybody who has interest in this. And the commission member -- you've got commission representatives here and Justice Bland and myself. The commission regularly meets. So your input on those topics, if you have it, is certainly encouraged and welcomed. But it's not really what we're here to discuss today, as I understand the scope of the referral.

And I would hasten to add, Justice Bland, if there's anything that I leave out or omit or that you would

like to elaborate on, please elaborate.

HONORABLE JANE BLAND: Well, you are more than a member on the commission, you're the vice-chair, so I'll point that out.

HONORABLE BILL BOYCE: So I would encourage everybody to -- who has input, please provide input, but let's turn to the specific rule proposal that's before you.

So what you see in the Judicial Commission on Mental Health report as Appendix B to that report are a number of proposed plain language forms that the commission has created with input from the various stakeholders to address certain of these circumstances and motions. What do you bring to the court? What is -- the person who may be subject to emergency detention, what are they going to be informed of? Those sorts of things. And so there's really two pieces to the referral that we're addressing today.

Number one is a proposed addition to Rule of Judicial Administration 10 that tells courts generally about these forms and how to address them. And then, separately, the request was to suggest -- review and suggest any particular changes to the proposed forms themselves with an eye towards plain language, straightforward, easy to understand.

So I'm going to turn to the first part of this referral, which is a proposed addition to Rule of Judicial

Administration 10. And in part, I think our discussion today is going to echo discussions we've had in some other context, for example, family law context, about persons who may be using forms and how courts should address those forms.

So the basic gist of the proposed rule that the subcommittee is bringing to you today is -- has two components to it. And there's some bracketed language, we'll unpack that in a minute. But the background of this is recounted in the memo and it's recounted in the judicial commission report. And there has been some robust discussion among the stakeholders of the commission about the use of forms in this context.

And I think everybody will stipulate that when we're talking about some of these circumstances, emergency detention or the administration of medication, I mean, we are talking about serious personal liberty interests, public safety interests. We've got a lot of stakeholders involved here. You've got medical providers; you've got families; you've got the persons subject to these procedures; you've got law enforcement. There are multiple significant interests bound up in that.

And that recognition has led to discussion on the commission around the fact that there are 254 counties in Texas, some urban, many rural. And there's some recognition of the fact that no procedures can be one-size-fits-all

procedures. Forms cannot necessarily be one-size-fits-all because the circumstances that may exist in an urban area, where there is more readied access to emergency mental health treatment may well be different from a rural area where the closest in-person emergency medical health treatment may be some hours away or whether there may be some telehealth-type procedures.

So that's, kind of, the baseline for the discussion here about are there going to be forms? And, if so, what are we going to say about them? And you'll see Judge Herman's comments are reflective of the probate judges that he has visited with who would often be the judges addressing these circumstances.

So that's, kind of, the back drop, one size is not going to fit all. Taking that as a given, what do we want to say about forms? The commission has proposed forms, and the recommendation came from the commission to put forms out there with the notion that availability of forms is preferable to just not having guidance at all. But with that guidance, what do we want to say about the forms?

And so this proposed Rule 10 -- in addition to Rule 10 of the Rules of Judicial Administration -- really, has two concepts. Number one, use of approved forms is not required and; number two, a court should attempt to rule on requested relief on the merits without regards to

nonsubstantive defects in the filing. Those are the two core concepts in the proposed rule with some bracketed points for discussion.

So turning to the first bracketed point. You'll see that a proposed preamble to this rule language is with respect to procedures under Chapters 573 and 574 of the Texas Health and Safety Code. Those are the specific procedures we were talking about in terms of emergency detention and related issues.

Do you want to have that preamble in this proposed rule? The subcommittee's view on it -- I'm not sure that there was 100 percent consensus on it, which is why it's flagged and bracketed -- is it may be appropriate for you to use that bracketed limitation for this rule because that was the scope of the referral that we received. It was specific to this context based on issues the commission had addressed. But there's room for discussion about circumstances where -- are there circumstances where we want to say that absolute following of a particular form is required, an approved form? That's one big picture policy consideration.

Another is this, relating to the second bracket: If a form is used, the Court should attempt to rule on the requested relief without regard to nonsubstantive defects in the filing. Again, that narrowly cabins us based on the referral that we receive, but it raises a larger

question that goes beyond this specific mental health context. I'm hard pressed to think of circumstances where we want to tell courts that they should avoid ruling on requested relief based upon nonsubstantive defects. I don't think of a circumstance where that would be something that we would want to encourage. So, again, there may be a wider discussion to be had around that and that may be something to discuss or start discussing today. Maybe it goes over into other meetings or a broader referral or inquiry.

And then the last bracketed language -- and this is sort of a carryover from the discussion that we've had periodically regarding pro se litigants, particularly in a family law circumstance. And in that circumstance where pro se litigants may be, you know, bringing to a court forms that they printed off the Internet or something like that and asking for substantive relief in a family law setting.

So that is included as an additional consideration for discussion about whether or not a proposed addition to Rule 10 should have any reference to whether or not, you know, this is a pro se situation. You'll see from the forms themselves that -- I don't think the forms assume that there's going to be representation. There may be or there may not be, but the circumstances that are contemplated by these emergency situations are frequently the situation where someone has been diagnosed with significant mental

illness. They decompensate for whatever reason. And an emergency situation arises because the family members are trying to manage the circumstance, but they may feel there's safety threats; law enforcement is called or brought in; and it goes from there.

So these are circumstances that are prone to happening without a lot of formal legal run-on. And that's part of the reason why there's an emphasis on plain language, but it also highlights the fact that, you know, these may be circumstances where it's not neatly presented by somebody represented by an attorney.

So that's kind of the overview of the first discussion. So I think with that, I would hand the ball back to Chip for however you would like to handle the committee discussion.

CHAIRMAN BABCOCK: Great. Well, Judge Peeples has got his hand up, so let's see if he's got any wisdom.

HONORABLE DAVID PEEPLES: Thank you, Chip.

I'm a member of this subcommittee and I want to, you know, compliment Bill Boyce for his great leadership. I want to express something that I spoke up when we talked about the subcommittee meeting, but I didn't fight for this language that I'm going to suggest.

The context here is the draft on page 4 that Bill has been talking about gives, in my opinion, too much

deference to the local judges who don't want to use forms, who basically -- and these are my words -- they want to do things the way they've been doing it before and they don't want to change. And I think that we're in danger of yielding to that interest of some local probate judges at the expense of user-friendliness out in the field in 254 counties.

And a lot of times, we're dealing with rural situations where there are remote proceedings and the user-friendliness interest, I think, is more important than we are giving it here because family members are going to be using these forms and so will medical providers out in the field.

And so on the very next page of the memo that Bill has been looking at there are some bullet points at the very top. And the first bullet point on page 5 expresses the view that I have and I think other members of the subcommittee expressed or at least had concerns about.

I would like for there to be stronger language -- I'm just reading what Bill wrote here -- requiring the use, not making it optional, but requiring the use of these forms unless the judge, the local probate judge who wants to do something else, gets, you know -- sends his or her form and the reasons for using something different to his or her presiding judge and gets it approved.

In other words, letting people opt out when

they have a reason that they can't articulate other than "I've always done it this way," "I'm comfortable with the way I have been doing it." And, basically, the people out there in the field are conformed to what I want rather than me using forms that the state has issued, unless I can come up with a reason that I can articulate as to why I want to do something different.

And, again, at stake -- we need to be user-friendly to the people who are under pressure, and these are requests for emergency detention. The time is of the essence. And the interest in uniformity, which is mentioned in the memo from the JCMH, it seems to me has been given second rank status, and we need to take a look at that.

So what I would advocate is at the top of page 5, the first bullet point, requiring the use of the forms unless the local judge wants to opt out and can give or articulate reasons and language and so forth, the details as to why he or she ought to be able to require the people in the field to do something else.

One final point. No matter what we do, I don't think we can make judges rule a certain way. I just don't think it's possible even if we wanted to, to take away the discretion to say, No, I'm not going to grant this request for emergency detention. That will always be there. But I think the fundamental issue that Bill has put on -- up

for discussion is whether to require or not require these, and how easy it is for people to opt out. Thank you.

CHAIRMAN BABCOCK: Great. Robert had his hand up and then Lisa.

MR. LEVY: So I see this process as being of significant importance. It involves a deprivation of an individual's liberty, a situation where there is obviously going to be high emotions and focus of trying to achieve what's in the best interest of the individual. But this is not like paying for, paying costs. And I think that we need a clear, consistent form and process. And as Judge Peeples suggests, it should not be up to the deference of individual courts. That's why the charge is to develop a consistent process.

And the suggestion of the committee or the subcommittee that we should allow alternative forms leave significant uncertainty and would potentially put an individual in a position where the requirements of the law would not be followed in the same way in one county versus another county.

And I think that we can solve the issue about local -- you know, rural versus urban in terms of the forms. Judge Peeples' suggestion makes a lot of sense that there might be a variance, but that variance should be examined in the context of what the law would require. But this should

not -- I don't think this should be a situation where a local judge can decide to go his or her own way. This is too important.

CHAIRMAN BABCOCK: Thank you. Lisa, and then Harvey.

MS. HOBBS: I appreciate that discussion, and I think I agree with you, although I'm still listening to what everybody has to say. But I wanted to add one thought on this is that at the last Access to Justice Commission meeting, Justice Busby had mentioned the possibility that the Access to Justice Committee would look at a rule. And I think he envisioned that in the Rules of Civil Procedure and not necessarily in the Rules of Judicial Administration, but, again, I don't feel strongly on where you replace it. But he -- at least what I wrote down he proposed, and so if I'm overspeaking anything right here -- my notes reflect that he was wondering if we should add a rule that a judge cannot reject a filing simply because it's a form. And if there's a substantive reason to reject a form, the judge must state the reason in his order. And that last part goes a lot farther than what the Mental Health subcommittee is recommending to us today. But I would just throw it out there because forms obviously come up in a lot of different ways, and so I just want to make sure that any advice we're giving the Court is consistent in whether it's from a Mental Health perspective

or from an Access to Justice perspective.

CHAIRMAN BABCOCK: Thank you.

Harvey, and then Andy.

HONORABLE HARVEY BROWN: So I have a question for Judge Peeples. And it is: What happens if somebody goes on the Internet and they want to get a relative admitted. And so they go on the Internet and they look for a form and they don't find the State Bar form. They find some form put out, you know, in Tennessee, but it substantively has everything required. If you say they can only do it by this form, are we going to deny relief just because they used the wrong form even though it has everything Texas wants? I wouldn't think we would want to do that.

So I would think that something like what Lisa was suggesting or a preference for this form or something along those lines. I'm just afraid a pro se may not find the right form.

HONORABLE DAVID PEEPLES: Harvey, I think --

HONORABLE HARVEY BROWN: -- and time to go find the right form. If they're in court, do you want to say, oh, go do it, here's the new form? This may be an emergency.

CHAIRMAN BABCOCK: Andy.

HONORABLE DAVID PEEPLES: I think the judge would always have the discretion to go ahead and grant that

if the evidence is there and the circumstances justify that. I don't know how somebody could stop the judge from doing that. But my concern was more with not letting local judges decide in advance, I'm going to opt out and go my own way; the law is letting me do that, and I'm going to make people do it my way in every county that -- where it comes from. That's more of my concern.

CHAIRMAN BABCOCK: Thank you. Andy.

MR. JONES: So I don't necessarily have anything really substantive to add. By the way, this is my first meeting, so please make fun of me afterwards. But we had a very close family member with schizoaffective disorder, and we danced around this issue several times. And, luckily, my brother-in-law, they have an attorney on the phone and me that did help in this process.

But the powerlessness of this situation that my family members was put in would only be exacerbated by someone telling them that the form that they submitted was not the right form, and that we're down the road on an even bigger problem. So I would probably come down on the side of we need to make it about substantive defect as opposed to forms because the overwhelming powerlessness that the family members are, and the incredible intensity of the crisis. And they don't just happen once, they happen more than once.

And so I just really think, from my own

experience, making it a substantive defect requirement or whatever was just said about -- I'm a court rules chair. I'm going to take that thing that Busby said and talk about that because I think that's important. But it has to be a substantive defect, otherwise, you're pouring gasoline on a fire.

CHAIRMAN BABCOCK: Okay. John and then Rick.

MR. WARREN: Being the clerk of the court that does deal with mental illness cases, I think forms is absolutely -- standardized forms are absolutely necessary. Otherwise, you're going to have, just as it was said, a lot of judges doing a lot of different things and we haven't accomplished what we wanted to accomplish which is to get our hands around mental illness and addressing mental illness one single way.

As it relates to some of the comments I've heard, for me -- and I know a lot of my colleagues, we kind of get together -- as it relates to forms, we generally put forms on our website to make those accessible to the individual. If it requires that the form says this is for the state of Texas -- and, you know that's kind of an easy fix. But also as it relates to the judge, judges wanted to do things their own way. We talked about mental illness and everybody have a different view. Will that also now require that judges have some study in psychiatric health?

CHAIRMAN BABCOCK: Okay. Rich.

MR. PHILLIPS: So what I understood Judge Peeples' concern to be is a judge who doesn't want to accept these forms versus concerns about somebody finding a different form. Could we write the rule to say that a judge can't reject these forms because they have a preference for something else without saying that the applicant is required to use these forms? I think there's a distinction there.

If they find a different form that has what is required by the rule, then let them use it. But to say to a judge, you cannot turn somebody down just because they use this form versus something you prefer.

CHAIRMAN BABCOCK: Yeah, Justice Christopher and Robert.

HONORABLE TRACY CHRISTOPHER: I'm in favor of more mandatory language along the lines of that, you know, you have to accept this form. My concern about the proposed language that Judge Peeples said was that we might get, like, supplements to the form that doesn't have to go through the presiding judge. And that would, kind of, be an end-run around the idea of a form. So I think we need to be careful with that.

CHAIRMAN BABCOCK: Robert.

MR. LEVY: So, Rick, my response to you is that forms define the process. And what I don't think we

should advocate is the ability to have different processes in different counties or different requirements so that a judge in one location will require different findings, different facts, or constrain the rights of the individual in a different way. And so having a consistent form, I think, is critical.

If we -- if there was a situation in a local county, a rural county, where they aren't able to provide the same process at the right time, it's possible I think you might have additional amended or bypass procedures, but those would need to be understood and evaluated, I think, by the administrative judge to ensure that they are appropriate and not just meeting the local judge's issues.

And so that's why I think that not allowing deviation without -- without getting into the substantive issues -- because the substantive issues if you don't fill out the form exactly right, but you would have the information that's necessary somewhere in the materials, that should not be a bar to relief. But the forms that detail the process, the rights of the individual, all of those factors -- and I think these forms do a very good job with it -- I think should be consistently applied throughout Texas.

CHAIRMAN BABCOCK: Okay. Rich.

MR. PHILLIPS: I totally agree with that. My

only comment was we need to direct it, maybe, to the judge, you have to accept these forms rather than a judge that says, I don't like this form; I've got a different thing; I'm going to make you go back and do it again. So I think --

MR. LEVY: Yeah, but I'm just concerned about a judge who would say, you know, submit these forms, but I'm still going to follow my process. I don't care what the forms say, I'm going to do it my way. That, I think, is a problem.

MR. PHILLIPS: Totally.

CHAIRMAN BABCOCK: Marcy.

MS. GREER: Well, I agree with what Rich is saying in terms of we need to be as flexible as possible. These are pressure-filled situations and they are very difficult. And to tell somebody you filled out the wrong form -- if they have the information they need, I don't think that should be -- prejudice the judge.

That said, and I know this is a comment in the weeds and I'm going to apologize in advance, but it's super important that those forms be extremely accessible. And that doesn't mean scanning it and putting it on the website that is unusable, where somebody can't fill it in on a computer, where they don't have a printer or they don't have access. It needs to be available in a way that can be used.

And I run into this all the time where, you

know, something is not searchable, it's not scannable. It's, you know, where -- it really needs be a potentially fillable form that somebody can fill out on their computer and hit send without having to have any, you know, of those logistical concerns because they don't have time for that.

CHAIRMAN BABCOCK: Judge Miskel.

HONORABLE EMILY MISKEL: I was trying to research it live, you know, while we're here. I thought I recalled that in the 2021 legislature, a bill was passed for, for example, family violence protective orders requiring the use of the protective order form. It looks like that may have been vetoed. I couldn't figure it all out as we sit here right now. So there is some precedent for requiring the use of the standardized form.

In practice, we use those forms a lot in -- either we'll go on texaslawhelp.org and get the fillable one and they do type it, or they come in and get it from the clerk. So I had envisioned these would likely function the same way.

But I second the view that saying the judge can't reject the standard form. And then the other language I wanted to respond to, the bracketed "if a form is used, the court should attempt to rule on the relief without regard to nonsubstantive defects." I think either way, if a form is used or if it's handwritten on notebook paper, the court

should attempt to rule on the substance and not reject it based on the formatting of it.

And then I don't even know what "attempt to" adds to that sentence. So I would suggest the sentence could say, "The court should rule on the requested relief without regard to nonsubstantive defects in the filing or whether the filing party is represented by counsel."

CHAIRMAN BABCOCK: Okay. Was it Lisa or Kennon? Kennon.

MS. WOOTEN: Just a couple of comments. One, I think the idea that judges can't use forms other than the statewide approved form seems to be a little in tension with what's on the table now from the Texas Supreme Court in the latest docket number 229026 specifically addressing proposed amendments to Texas Rules of Civil Procedure 3A, Rule of Appellate Procedure 1.2, and Rule of Judicial Administration 10. So there's a little bit of tension, I think, between what's being discussed in requiring certain forms and what's been proposed by the Supreme Court of Texas in regards to forms generally.

But I just echo the comments that have been made already about the need for some flexibility in this space. I, too, have had family members with mental health conditions. And that would be awful to get rejected, to not get the help you need for somebody because a precise form

wasn't used in the process.

So I think if there were going to be a requirement to use a precise form, that you would have to give the judge some discretion not to use that form, perhaps, if there's good cause or with some other standard of that nature. Because the rigidity could be detrimental in many ways.

CHAIRMAN BABCOCK: John, and then we're going to take our morning break.

MR. WARREN: All right. Just quickly, and I'm continuing to advocate for standard process. A perfect example, a couple of -- some years ago we had a case, a mental illness case that was actually transferred to Dallas County from another county. It was an elderly parent. Had no family where they lived and so the only family was in Dallas County. So they moved it because at that interview, they actually needed to be having a guardian appointed. And so when you have -- that's one of the things where I think a standardized form is much better with structured language.

As it relates to forms, because my office is completely paperless and I know a lot of them are, and so everything we do is OCR searchable, all of our forms are fillable forms online. And so I think this is just a matter of us continuing to put our arms around it so that we can -- so that everything works for everyone, but still be in a

standardized process.

CHAIRMAN BABCOCK: Okay. Great. We're going to take our morning break. We'll be back in 15 minutes, which, by my watch, would be 11:05 central time. Thanks everybody.

(Break taken at 10:50 a.m. to 11:05 a.m.)

CHAIRMAN BABCOCK: Okay. All right. Bill, you wanted to say something?

HONORABLE BILL BOYCE: Yes. I wanted to, as we resume the discussion, make sure that we acknowledge the executive director Kristi Taylor and staff attorney Molly Davis from the Judicial Commission on Mental Health who have graciously been sitting in. Any hard questions need to go to them. But we're very appreciative of all the work they do. The report that's been circulated as part of our discussion today is just one very small facet of the tremendous amount of work that Kristi and her team do in service of the commission's mission and goal. So thank you for participating today.

CHAIRMAN BABCOCK: Great. Bill, while we're getting started, I had one question. Am I right, Rule 10 of the Judicial Administration rules is local -- is titled "Local Rules"?

HONORABLE BILL BOYCE: Yes.

CHAIRMAN BABCOCK: So this would be attached

to that as subpart F or something?

HONORABLE BILL BOYCE: Well, subpart whatever the next letter is.

CHAIRMAN BABCOCK: Yeah. E is the last one. So it would be -- is that the right place for it? Have you given any thought to that?

HONORABLE BILL BOYCE: Well, I think Rule 10, with the preliminarily approved amendments, may be have a broader reach now.

CHAIRMAN BABCOCK: Okay. Just wondering. All right. So --

HONORABLE BILL BOYCE: May I make one other --

CHAIRMAN BABCOCK: Yes, certainly.

HONORABLE BILL BOYCE: -- comment. I was going to follow up on Judge Miskel's comments about attempting to rule. And I think the logic behind that was the thought that sometimes it may not be entirely clear what is being asked for.

HONORABLE EMILY MISKEL: But I think that would be a substantive problem, not a nonsubstantative. Like, I can't tell what you're asking for, that's a substantive problem. So you should rule ignoring any nonsubstantive problem, and if it's just, like, I don't even know what this is, that's substantive. That was my thinking.

HONORABLE BILL BOYCE: Right. Okay.

CHAIRMAN BABCOCK: All right. So it sounds like we have a debate about whether or not the proposed rule ought to be tightened up to give the trial judges less discretion about rejecting forms, or how would you frame the debate, Judge Boyce?

HONORABLE BILL BOYCE: So, actually, I would suggest a preliminary vote on the first bracketed language before we get to the harder quest or the more robust discussions we've had about how mandatory or how emphatic do we want the rule to be. But I think the first -- the threshold issue would be the first bracketed language for Rule 10 about whether or not we're going to cabin this particular proposed rule for this particular Mental Health circumstance under these particular statutes.

And Justice Bland had pointed out during our break that this is really -- this proposed rule has its genesis in a specific legislative mandate. So, really, Perdue should have handled it, but that's --

CHAIRMAN BABCOCK: He was -- he was complaining about your encroaching on his jurisdiction.

HONORABLE BILL BOYCE: But I had a ready fix for that, but -- but returning to the main point. I think a first -- if we're to the point of voting, then I think a first vote would be, do we want to have this proposed rule

cabined by these provisions? And I think an answer to that would be to be within the bounds of the legislative mandate that they're responding to. That probably makes sense to have it be so limited. Certainly doesn't preclude a larger discussion about rules encouraging reaching of the merits of things without regard to nonsubstantive defects. But we don't need to run that into the ground for every context right now.

CHAIRMAN BABCOCK: Yeah, okay. Is there any argument against that? Lisa?

MS. HOBBS: Just on principle. I just think if, you know, all rules should be -- we need to develop -- let me say not we. The Court does need to be consistent with how we're going to handle court forms. And we keep -- this keeps coming up. And so I would not limit it to 573, 574, even though I do really respect Justice Boyce and Justice Bland's comment about this is partly a legislative mandate, which I actually had not realized. I thought it was a recommendation just from the Mental Health Commission. But I still want to be on principle. We should be treating all forms the same, whether family forms or mental health forms or any forms, so that's my only comment.

CHAIRMAN BABCOCK: Okay. Any other comments about it?

Okay. Any -- do we need a vote on this? But

maybe we do.

HONORABLE BILL BOYCE: Apparently we do.

MS. HOBBS: Are you going to stand by --

CHAIRMAN BABCOCK: Well, let's see if you can attract any support for your position, Lisa.

Everybody that's in favor of the bracketed language, raise their hand.

MR. PERDUE: The bold at the beginning of the draft?

CHAIRMAN BABCOCK: Yeah.

MS. HOBBS: The first sentence.

HONORABLE BILL BOYCE: Limiting the scope under Chapters 573 and 574.

CHAIRMAN BABCOCK: All right. Put your hands up online when you're on Zoom, if you're voting for it.

We're voting on whether or not to include the first bracketed language with respect to procedures under Chapters 573 and 574 of the Texas Health and Safety Code, end bracket, whether we're going to include that language or leave it out, that's the vote.

Keep your hand up on Zoom. We've already taken it in the room here.

(Voting.)

CHAIRMAN BABCOCK: Everybody opposed -- the people on Zoom take your hand down. Everybody opposed to the

bracketed language, raise your hand.

(Voting.)

CHAIRMAN BABCOCK: Okay. How about on Zoom?

(Voting.)

CHAIRMAN BABCOCK: Everybody raise their hand that wants to?

Okay. It carries by a vote of 14 to 7. Chair not voting. All right. So the bracketed language will be in there as part of our recommendation.

So, Bill, do you want to turn now to the question of whether or not we make it more mandatory?

HONORABLE BILL BOYCE: Yes. I think based on the discussion that we've had, I'm not sure that we need to wrestle with the second bracketed language if the form is used. If I'm understanding the flow of the comments, I think the question for a vote would be should -- should the current not required language -- use of forms is not required to be used or should there be something more mandatory and more emphatic about using the approved forms.

CHAIRMAN BABCOCK: Yeah, the suggestion, as I heard it, was to remove the word "not" and just say, "the use of approved forms is required unless the presiding judge articulates reasons not to," give or take.

Judge Miskel?

HONORABLE EMILY MISKEL: I think there were

two options. One is the use of the proposed forms as required, or, Option B, the court can't reject the use of the published forms.

CHAIRMAN BABCOCK: Okay. Richard?

MR. ORSINGER: I think we need to be careful that we don't suggest that the form must be used. For example, a lawyer may do something more elaborate or slightly different; that should be perfectly acceptable. So we have to be careful that the forms are not required, but if they're used, they can't be rejected.

CHAIRMAN BABCOCK: Okay. Yeah, Harvey.

HONORABLE HARVEY BROWN: Just to reiterate that, there's options there that are between the proposed language and the mandatory language, something like "approved forms should generally be used" or something that encourages their use, so we don't just have the two polar extremes, maybe a middle ground.

CHAIRMAN BABCOCK: Okay. Judge Peeples?

HONORABLE DAVID PEEPLES: Chip, I think the language is ambiguous as it's written right now. What I want is -- okay. I don't want local judges to say, I'm not using these, period. In my court, you got to use something else. I don't want that to happen unless they go through the process to say why to their PJ. On the other hand, I don't want to forbid people out in the field from using something

different or, you know, they didn't comply or it was handwritten on notebook paper as someone said, or a lawyer wants to draft it differently. If they get the message to the judge and it's adequate in the judge's opinion, I think that judge ought to be able to act on it. And I think this language is not clear enough. I'm not sure we should draft from the floor, but that's what I am for personally.

CHAIRMAN BABCOCK: Yep, okay. Anybody else? Yeah, Richard?

MR. ORSINGER: I would say that based on our experience with the family law forms, which were extremely controversial in the beginning -- there were some judges who said, I'm not going to do that in my court, and that is just the way they felt. But, over a period of time, I think that it's grown acceptance. And now I don't sense or hear any blanket resistance to the use of those family law forms.

So I would favor being real stern here at the start to push everybody to get in line, and then later on if we feel like the language is overly strong, we can weaken it. But I do think that there will be some pockets of resistance if we're not firm at this point

CHAIRMAN BABCOCK: So how would you propose being firm?

MR. ORSINGER: Gosh.

CHAIRMAN BABCOCK: Judge Peeples says we

shouldn't draft from the floor, but you've never been shy about that.

MR. ORSINGER: I don't know. I think that I would rather hear some other suggestions.

CHAIRMAN BABCOCK: Okay. Bill, and then Judge Miskel.

HONORABLE BILL BOYCE: So I'm wondering if we could frame a vote around the broader issue of do we need to make it -- leave it permissive like it is in this draft or do we want something more mandatory and emphatic? And if the vote is in favor of more mandatory and emphatic, then we'll go back and, you know, digest the comments and bring back something, because I'm not sure we'll be able to.

CHAIRMAN BABCOCK: Yeah, that's a good point. Judge Miskel.

HONORABLE EMILY MISKEL: I was just going to toss out some proposed language if that's the direction we want to go or not. But I think I'm hearing a consensus, at least as to the part that courts cannot reject the forms published by the Supreme Court.

CHAIRMAN BABCOCK: I think Bill's point is well taken that maybe let's have a vote on permissive versus more mandatory in some fashion. So everybody in favor of the rule as currently drafted, which we'll categorize as being permissive, raise your hand.

(Voting.)

CHAIRMAN BABCOCK: Lonely here. All right. Everybody that wants it to be more mandatory in some fashion, raise your hand. And online?

(Voting.)

CHAIRMAN BABCOCK: Okay. So the permissive crowd is going down to a stunning defeat 22-5. So more mandatory it is. So now we have to come up with that. Bill, what's your proposal? More mandatory language.

HONORABLE BILL BOYCE: I would like to hear some more discussion proposals. I mean, I'm not -- I'm not sure if we're at the point of voting more mandatory -- what more mandatory language looks like at this point or not, or if we just need to bring something back.

CHAIRMAN BABCOCK: Yeah, Judge.

HONORABLE ANA ESTEVEZ: Well, I would suggest that the next question -- vote could be whether it's that the judge can't reject it or that you must have it and then you can deal with how you draft it. But just conceptually, are we just going to state that a judge cannot reject the use of a form?

CHAIRMAN BABCOCK: Okay. Yeah, Robert.

MR. LEVY: I think what Judge Peeples was suggesting is that you should follow the process outlined in the forms unless you create an alternative that goes through

some review that might be in addition to or alter the approved process. So that's not exactly saying you have to follow the rules, but it's -- it allows for deviation, but not ad hoc.

CHAIRMAN BABCOCK: Judge Miskel, what was your thought again about how to do this?

HONORABLE EMILY MISKEL: So I think we're looking at two categories of people using forms. The judge requiring a particular form or people being forced to use a particular form or being able to use whatever form they want. So I think that's the two options we're deciding. Do you want to say the rule is, this form must be used unless you pass a different local under 3A or whatever, but this form must be used by the judge and by the people applying for it. Or whether you say if the Court can't reject the form, which means the judge must always accept it, but people can come in with whatever form they want to file, I think, are the two different views.

CHAIRMAN BABCOCK: Yeah, Richard.

MR. ORSINGER: I would be, as I said before, a little concerned if we say you must use this form. That if a lawyer doesn't use the form or even if a pro se doesn't use the form exactly or uses a form that's close to it, but not good, then all of a sudden the judge has said, I'm sorry, but the rule requires you to use the form. I'd much prefer the

approach that you can't reject this form because of what it says, but I think also the judge should go ahead and rule on the merits even if the form is a little sloppy or leaves out a paragraph or something like that.

So I'm attracted to Judge Miskel's suggestion, tell the judge you can't reject this because it's a form, but not require everyone to conform to it. Because if they don't, then you've got an argument of whether it's effective or not.

CHAIRMAN BABCOCK: Bill, what do you think about that?

HONORABLE BILL BOYCE: Yeah, I think we can draft something up. And we can either take a vote on what I understand Richard's proposal to be now or we can bring it -- you know, work something up so folks can look at it in context.

CHAIRMAN BABCOCK: Yeah, let's try to come up with some language.

HONORABLE BILL BOYCE: Okay.

CHAIRMAN BABCOCK: And maybe even over the lunch hour. And, yeah, John.

MR. WARREN: Am I missing something? I'm thinking it should be -- if it's -- it should be that the public should use the form because they won't have the legal understanding. They won't know what they're trying to do, so

they won't have that background of how to draft the -- as an attorney would. So I think it would be less confusing if you have -- if the requirement was more on the requirements of the public.

CHAIRMAN BABCOCK: I'm sorry, if it was more what?

MR. WARREN: If it was more -- if the form was more for public use versus attorney use.

HONORABLE EMILY MISKEL: I think he's arguing in favor of the must use option, everybody, judge and people must use the form.

CHAIRMAN BABCOCK: Okay. And, Richard, you would be against -- violently against that.

MR. ORSINGER: My concern about John's suggestion is if they don't, there's a justification for rejecting it. Because it says you must use it, you didn't, you're out of here. That's -- I mean, I know we want to encourage people to not be creative and to pay attention to the form, but we don't want to give judges a justification for rejecting something on the grounds that it didn't comply and then not addressing the merits. So I just -- we just feel like we need to be careful there.

CHAIRMAN BABCOCK: Yeah. And what could you do to the form to be creative with it? I mean, draw cartoons or what?

HONORABLE EMILY MISKEL: I can tell you all about that. We get all kinds of jacked-up forms.

MR. ORSINGER: And a lot of times the forms are by some private form seller that is approximately okay, but not really identical, but what's the point here? The point here is to allow a pro se individual --

CHAIRMAN BABCOCK: Right.

MR. ORSINGER: -- to get into court without having to hire a lawyer.

CHAIRMAN BABCOCK: And that's John's point too.

MR. WARREN: That's my point.

MR. ORSINGER: Right.

CHAIRMAN BABCOCK: Lisa.

MS. HOBBS: I went and looked up what the Court has said in its order approving the protective order task force kit that we have. So we have approved forms to get a protective order. And I was just curious what the Court has previously said. And this order -- which, Justice Boyce, is 20-9062, if you want to write it down. Use of the approved forms is not required; however, a trial court must not refuse to accept the application simply because the applicant used the approved forms or is not represented by counsel. If the approved forms are used, the Court should attempt to rule on the application without regard to

technical defects in the application.

CHAIRMAN BABCOCK: Some smart guys.

MR. ORSINGER: Wow.

MS. HOBBS: Good job, Jackie.

MR. ORSINGER: So I'll second that motion.

CHAIRMAN BABCOCK: Yeah. I think the chief was taking all the credit for that, the smug look on his face. Yeah, that language sounds pretty good.

Justice Gray.

HONORABLE TOM GRAY: There's a similar requirement in Rule 145 about the use of a sworn statement, so that would be another resource to look at as a source for the option -- the use of the form in substantially correct phrasing.

CHAIRMAN BABCOCK: Yeah, agreed. Well, I would maybe use that as a template to -- over lunch, you know, bring it back to the committee.

HONORABLE BILL BOYCE: I will be glad to that. But the observation is, that sounds fairly close to the proposal that we voted to make more mandatory, so I'm -- I'm a little uncertain.

CHAIRMAN BABCOCK: Well, that's because Lisa was tardy in coming up with that -- would change the vote.

Yeah, Richard.

MR. ORSINGER: So, Bill, are you saying more

mandatory on the pro se or more mandatory on the judge?

HONORABLE BILL BOYCE: Judge.

MR. ORSINGER: To me more mandatory on the judge is good, more mandatory on the pro se is bad. That's my bottom line view.

CHAIRMAN BABCOCK: That makes sense. We have a written comment to be read into the record. Shiva just wants to get on the record.

MS. ZAMEN: Judge Stryker: Maybe the Court should rule on the requested relief so long as all substantive requirements of Chapters 573 and 574 include in the motion without regard to nonsubstantive defects in the form of the filing.

CHAIRMAN BABCOCK: Okay. Judge, that's in the record, so we got that.

All right. Any other comments about this?

(No response.)

CHAIRMAN BABCOCK: Bill, why don't we just talk about it over lunch? Okay?

HONORABLE BILL BOYCE: Yeah. I mean, I'm happy to take a swing at some language. It's always easier to, you know, talk about specific language.

CHAIRMAN BABCOCK: Right. Okay. So that's Rule 10. Do we want to talk about the forms?

HONORABLE BILL BOYCE: I would invite any

comments that anybody wants to make about specific language used in the attempt to make plain language forms. I know Kennon had suggested some particular changes. If there's anything you want to highlight, Kennon, we can do that or any other changes that anybody wants to --

CHAIRMAN BABCOCK: And the forms start on page what?

HONORABLE BILL BOYCE: Well, they're Appendix D-2, to the --

MR. LEVY: I think it's page 200.

HONORABLE HARVEY BROWN: Page 223 of 516.

MS. WOOTEN: The changes I suggested really weren't substantive by and large, but more particularly in addition to clarity --

CHAIRMAN BABCOCK: Kennon, you're going to have to speak up because I can't hear you down here, so I'm sure they can't.

MS. WOOTEN: The changes I suggested weren't really substantive in nature, more so they were to increase clarity and consistency. And there were a couple of questions for consideration.

CHAIRMAN BABCOCK: Okay. Do you want to go through them?

MS. WOOTEN: Sure. Pulling up the redline now. So the first one comes on page 225 of the PDF. It's a

question about whether we should clarify the type of address being requested. The second change that I'm not seeing actually redlined here, so let me pull it up here. Oh, yes, it's redlined. If you look at the heading, specifically, the style, you'll see just a capitalization suggestion for consistency. And then I don't think it would be too helpful to go through all those instances of changes for consistency, they're pretty self-explanatory, but on page 229 of the PDF, you'll see a question about whether the phrasing should be a little broader to account for the possibility that there might be more than one facility administrator. And on that same page, Item 10, there's a modification suggested to acknowledge that some people do not have homes.

And then on page 230 of the PDF is a suggestion to increase clarity in paragraph 3 providing a definition of the term "movant." Clarification in paragraph 4 to recognize the circumstances being referenced are likely in the past.

Skimming through to see if there's anything else of note. I don't think there's anything else in that wording, but, Judge Boyce, please, let me know if there is.

HONORABLE BILL BOYCE: I'm not sure that we need to ask for a vote specifically on these forms. I think this is more in the nature of feedback to the commission, then we can incorporate or take consideration of as to

whether any tweaks of these forms are warranted. But I guess I would extend the invitation to anybody on the advisory committee if there are additional tweaks or comments that you have now or after today's meeting that you want to relay. Please relay them to me or to Kristi and I think those can be considered.

CHAIRMAN BABCOCK: Yeah, great. All right. Anybody else have any comments right now?

(No response.)

CHAIRMAN BABCOCK: All right. Let's see if we can come up with some language over lunch about Rule 10 --

HONORABLE BILL BOYCE: Yes.

CHAIRMAN BABCOCK: -- and then we'll finish this one off.

So now we will move to remote procedural rules. And, Kennon, I think you and Lisa are leading the charge today, along with Justice Christopher. But we have some distinguished guests to speak. Having known them for a long time, I know they're distinguished. But we'll take a vote on it.

Go ahead, Kennon.

MS. WOOTEN: Well, actually, I'm going to turn it over to Lisa to start because Lisa heads up the rules committee of the Texas Access to Justice Commission that, per Justice Busby's request, look at the proposals specifically

pertaining to the justice court rules. And I think it makes sense to start with their recommendations, responses to requests, and explanations. Because, essentially what happened, Chip, is that the subcommittee of the remote proceedings task force working on that rule adopted the suggestions from the rules committee of the Texas Access to Justice Commission and then made a few additional changes.

CHAIRMAN BABCOCK: Okay. Justice Christopher has her hand up, so before we get started, Justice Christopher.

HONORABLE TRACY CHRISTOPHER: I'm sorry, I was trying to get Kennon's attention. We really cannot hear her online. Bill Boyce's seat seems to be the best of every seat in the room. If I could -- if we can see what the issue is, but that was really useful. Bill's -- we could hear Bill.

MS. HOBBS: Can you hear me now?

HONORABLE TRACY CHRISTOPHER: It's better now, thanks.

MS. WOOTEN: So I'm going to turn it over to Lisa was the bottom line of the introductory comments.

MS. HOBBS: Okay. Well, before I get started because you guys all know me and get tired of hearing from me, I would like to introduce some of the other members of the Access to Justice Commission who are here. We have our esteemed chair, Harriet Miers, who is in person with us

today. And then, I believe, online we have some of our Access to Justice Commission professionals. I think Trish is on.

MS. MIERS: It's Trish, Cathryn, and Brianna.

MS. HOBBS: Okay. We have Trish, Cathryn, and Brianna all on. So if I can't answer any questions, we have ample resources to answer any questions specifically to how remote proceedings have really increased access to justice in the State of Texas.

We are so grateful to be here. I'm here anyway, but speaking on behalf of the commission, we are happy to be here to present to you. We were invited, really, through our liaison Justice Brent Busby who emailed us about three weeks ago, maybe six weeks ago -- summer has gone too fast -- and, sort of, invited our comments specifically on three areas that are addressed in our report that we sent out this week.

Our report is on page 429 of the PDF. And we cover three things. The first is just what is the definition of good cause as it relates to JP courts. And as we were studying that, we came up with a few tweaks to the 500 series that we would recommend. And that proposal is Kennon's proposal. And then -- so we tweaked a few things about the rule.

We gave some -- one of the current proposals

that the commission would agree with that the advisory committee has been working on right now is how to give notice to participants about how a -- how a hearing will be handled, whether remote or in person. And so we have a notice form that we attached to our report that I reread. It certainly could be tweaked, but it's good information and walks someone who may not be represented into how they're going to get online to participate remotely, if that's the case.

And then, thirdly, we were asked to provide some more data about how remote hearings do increase access to justice for poor Texans. And we are the beneficiary of a National Center for State Courts' report that studied hours, hours of Texas remote proceedings through the initial part of the pandemic in what I believe was eight counties in Texas and came up with some recommendations -- or some observations about how that went in Texas, in Texas counties.

And so the last part of our report is attempting to be a summary of how this really does increase access. More people are participating. We are having less defaults in Texas than before. We -- you know, we certainly encountered some technological problems that we've had to work through, but we have found many solutions for those technological problems.

And, by and large, our position -- and supported by the data that the National Center for State

Courts -- is our courthouses are open to more Texans when remote proceedings are an option for the system.

And so then specifically to the proposed rule, which is on page -- page 310 of our large PDF. We -- and I'm really looking at page -- okay. It's not redlined. Okay. Just run through some changes.

Specifically, we recommended and the subcommittee then mostly adopted them -- and I think my take on this -- exclusively adopted several additional factors in the comment to the 2022 rule changes. We made them more parallel, mostly, because they were not parallel in structure. And then we added a few items, which is really well articulated in our report, about what we believed each item meant and why we thought it was important as a commission.

We removed that the "request to appear by alternative means" would need to be filed. Judge Chu -- and I'm sorry, I did not give credit to our committee members who worked on this as I intended to. But this was an ad hoc group of the commission that included me, Harriet Miers, Kennon Wooten, Judge Ferguson from West Texas, and Judge Chu, who is a JP in Travis County as well as our professionals from the commission.

And Judge Chu, one of the things he pointed out is a lot of times when somebody is requesting to appear

remotely in his courtroom, it's really just an email to his court coordinator or something. So we just took out the word "filing" and suggested "request." And that is also consistent with what Kennon and I have both experienced in Travis County where often if we're moving -- you know, if the judge has said this is going to be remote or in person, we are, in Travis County as well, even in district and county courts, although this is just the JP rule, we are, in fact, more likely to communicate directly with the coordinator instead of filing a formal filing.

So we changed that. And then I believe we changed the word "must" to "should" so that it would allow more discretion to trial courts in implementing the intent of the rule, with our thought being we didn't want a judge to think he has to consider every factor. And we were trying to avoid a presumption one way or the other. And so that was our recommendation which the subcommittee also carried forward. And I think we made one change, right?

Okay. So thank you for allowing the Access to Justice Commission to appear today and give our input on this rule. We're honored to do so. And we -- we're glad to appear and speak for poor Texans.

CHAIRMAN BABCOCK: Okay. Harriet, do you want to say a few words?

MS. MIERS: Well, let me add my expression of

gratitude to the committee for allowing us to come and speak to you because we have been inundated with information about just the great reads across our state and particularly in terms of access to courthouses and access to technology and barrier of a large number of impediments that we believe it's the commission's charge to try to remove.

So if we can increase the use of remote proceedings, we can, we believe, make much more accessible to, not just the poor people of Texas, but to self-represented litigants and others, who would be able to access a court proceeding that their work schedule or their geographic location or whatever might cause them not to be able to participate.

So we are grateful to the committee for looking at these rules with respect to the JP courts. We hope those can be implemented as quickly as possible so we can move forward and see how effective they will be. And that's what we believe they will be. And I just really am grateful for this opportunity to be here and able to thank you for your work, generally, specifically as you help Texans across our state.

CHAIRMAN BABCOCK: Okay. Thank you very much.

And I was told that Brianna Stone is on remotely. She is with the Texas Access to Justice Commission. And I don't know if she's got remarks or not,

but if you've got some, fire away.

MS. STONE: No, sir, I think everybody has handled it quite ably. Thank you very much.

CHAIRMAN BABCOCK: You bet. I love it when they call me sir. That's a respect I don't usually get around here, Brianna.

MS. HOBBS: Well, Brianna deserves so much credit for this report and for our work that we did on drafting the rule, so thank you, Brianna, if I can say it here while everybody is listening.

Ms. STONE: Thank you, Lisa. I just want to say it's actually Cathryn Ibarra who did this particular report. I mean, we tag teamed, but she's the main force. So I just want to make sure she gets the credit. Thanks.

CHAIRMAN BABCOCK: Great. Thank you.

Do we want to talk about this rule or what's your suggestion, Kennon?

MS. WOOTEN: I want to talk about this rule some more, yeah.

CHAIRMAN BABCOCK: You can't let it go, can you?

MS. WOOTEN: No. I mean, I do think it would be helpful for me to just quickly summarize what the subcommittee of the task force did in addition to the changes that Lisa has discussed just now.

Specifically, one thing that we did in addition to the commission's work is to modify the open courts notice provision that's in Subpart D of proposed Rule 500.10. As drafted last time when we looked at it, it stated, "If a court proceeding is conducted away from the court's usual location, the court must provide reasonable notice to the public that the proceeding will be conducted away from the court's usual location and an opportunity for the public to observe the proceeding."

As it stands now, it's been broadened and simplified to state, quote, The court must provide reasonable notice to the public how to observe court proceedings, period, end quote. And the rationale for that change is laid out in the memo, Chip, but really it's two-fold. One, we believe the public should be informed of how to observe the court proceedings, whether they're conducted in person or remotely. And, two, we already have constitutional and statutory provisions that address where a judge must be when presiding over court proceedings. I'm happy to give an overview of the research on that particular question if anybody here wants it. But the bottom line is that we think that should be left to the constitution and the statutes as opposed to being reiterated or summarized in the rule.

CHAIRMAN BABCOCK: Okay. Great.

Any comments from the committee on the

proposed new Rule 500.2(G) or other comments thereto?

Yeah, Robert.

MR. LEVY: I think that this goes back to some of the prior discussions, in terms of whether there should be a presumption that the proceeding would take place in the court. And particularly to the extent -- I'm looking at Attachment B -- that this would apply to district courts. But if we're just talking about the justice courts, that there is a standard that it would take place physically, but if it -- you know, looking at the proposed language change, the suggestion would be that there would be no presumption.

And the other reference that I was struck by is that under this rule change, as I understood it, that you would have to list -- the court would have to list for every notice of hearing how to appear, whether remotely or in person. So anytime a proceeding is scheduled, you would have to -- if it was going to be in the courtroom, you would have to say it would take place in the courtroom and the public can attend.

Is that what was intended?

MS. WOOTEN: I think you're referring to subpart C of proposed rule 500.10. Is that right, Robert?

MR. LEVY: Is it B? Did you say B?

MS. WOOTEN: No, C.

MR. LEVY: Right. So every notice would have

to have that language?

MS. WOOTEN: Yes. That is the intent. And I'll give just a quick anecdote because I think it might be helpful here. After giving a recent CLE presentation on remote proceedings, somebody in the audience came up to me afterwards and said, you know, I've been practicing since 2020. The entire time I've been practicing, I've been appearing via Zoom. And I just assumed that's what I was supposed to do for a recent hearing and then realized -- because the notice didn't tell me I had to be there in person -- that I was supposed to be there in person. The judge got very upset with me and wondered how on earth I could not assume I was supposed to be there in person. But I've been practicing via Zoom my whole career, and so the assumption seemed fair to me.

But, really, beyond that, Robert, the discussion at the subcommittee level and also from the justice court working group people who participated initially with the drafting and this language goes back to that time, was that people need to know how to appear. And because that could be remote, they need to know the Zoom link for that; because it could be in person, they need to know that they should be there in person. So, yes, the idea was to spell it out in the notice.

MR. LEVY: So a question then, since this

language is a must language, could a party -- let's say a judge doesn't believe in remote proceedings and never schedules them at all and just puts in the notice the hearing will take place. The failure to do that is a defect in the rule. Would that be a substantive reason to challenge the ruling? I guess, you know, obviously the appeal of the justice court ruling is de novo typically anyway, although I'm not sure in all cases it would be. But, you know, do we want to have a substantive defect built into the rule? Because I guess my experience obviously is a little earlier, so we normally wouldn't put the room number where the hearing is or stating it will be in person.

MS. WOOTEN: I think the question that you're posing is whether "must" should be modified to say "should," for example. And that, frankly, isn't something I recall having a debate around at the subcommittee level. I think it would be good to have committee discussion about it. I will note that one thing I learned from participating in this process and having learned people from the justice courts is that it's the court issuing the notice there. So this is going to be not parties like, you know, I draft my notices and file it. This is going to be the court doing it.

So one thing, I think, to keep in mind when we have this conversation, if we have it, is that the courts will be doing this, the justice court, JP judges, and they're

obviously going to be trained, continue to be trained on what to do.

MR. LEVY: Is that -- and I'm not experienced in the JP court, but, like, forcible entry and detainer action, is it always the court that sends out the notice or could it be the movant that would do it?

MS. WOOTEN: I don't know the answer to that question. I can tell you my understanding from Judge Chu is that the courts are issuing the notices in the JP realm. But I don't want to speak definitively because, like you, I don't have as much experience in those courts as in district and county courts.

CHAIRMAN BABCOCK: Sorry. John.

MR. WARREN: Judge Miskel was first.

HONORABLE EMILY MISKEL: I was just going to respond. We did discuss this a little bit in one of the subcommittee Zooms that we had about it. And I was one of the ones arguing that either way, whether it's in person or remote, it should tell you how to appear. Because if you just say 470th District Court, I don't believe that gives due process notice to everybody who doesn't -- isn't a lawyer and doesn't know where the 470th Court is. So they get their hearing notice and it says, 470th District Court, it requires them to do another step of Googling the 470th District Court to figure out where that is. And so both for remote

proceedings and also for just increasing due process and consistency in all of that, it's important to really give a party notice of how they can appear and participate in their court hearing.

So, for example, I get on our D.A.'s office about this. For final trial notices in CPS cases, they don't have the address of the courthouse. And I'm, like, You're going to terminate someone's parental rights and didn't tell them the address where to show up. So I do believe it's important, whether it's in person or remote, that you give the person information about how to participate in their court hearing.

CHAIRMAN BABCOCK: John, hold on for one second; I skipped Judge Schaffer. Judge Schaffer, sorry.

HONORABLE ROBERT SCHAFFER: It's okay. Again, I just want to reiterate that we're having trouble hearing anyone, except for the microphone Judge Miskel is using, which after Zoom, is next to Judge Boyce. So I don't know if what I'm about to raise has been discussed or not.

But in deciding on whether or not these rules should be implemented, are we considering having rules for remote proceedings? And by that, I mean, cameras on, video on, video off, and things of that nature.

HONORABLE EMILY MISKEL: So I'll jump in because we expressly decided to leave that stuff out of the

rule, but we had talked about there are a number of bodies working on best practices. So the National Center for State Courts is working on publishing best practices for remote proceedings, and I believe Texas also has a group working on this. So the thinking was we wouldn't incorporate those best practices into the rule, but we would publish them and then teach them through the Texas Center for Judiciary or the JP training groups or whatever it might be, and do it that way was our expectation.

CHAIRMAN BABCOCK: John Warren, and then Justice Christopher.

MR. WARREN: Okay. Just a couple of things as it relates to remote proceeding notices. The address of the courthouse is always included on the paper notice. The address of the courthouse should be included in an electronic notice as well so that anybody who wished to come will know exactly where to go. If you are scheduling a -- whether it's a Team or Zoom court proceeding, once you put it on that calendar, the link is automatically there. And so a person would know, if they don't see the link, then they would know it's an in-person meeting, or if the link is there. But it could be that, you know, a lot of people aren't as technically savvy as others, so it could be that it may just say -- changing the language, in person.

A lot of the notices, majority of the notices

that we use are actually generated through our case management system. It's just a matter of changing the words. And you don't have to do it every time there's a hearing. If you're going to select an in-person, you have the notice to automatically do that. And it's not something that's changed every day. It's a -- once set-up and once you set it up, then that's something you use on a regular basis. So I think it's just a matter of the courts -- actually, the court's staff or the clerk's staff actually just making those changes and they're in place.

CHAIRMAN BABCOCK: Okay. Thank you.

Hey, can the remote people hear me better now? Or not.

MR. ORSINGER: I take it by your silence, that you --

CHAIRMAN BABCOCK: Apparently you can't hear me better. I thought maybe by turning the microphone on, that might help things.

MS. WOOTEN: A similar idea over here.

CHAIRMAN BABCOCK: Kennon.

MS. WOOTEN: In regard to Judge Miskel's comments, I just wanted to ask a couple of things. I think we, at this committee, perhaps indefinitely at the subcommittee level for the task force, discussed the possibility of the Judicial Committee on Information

Technology, JCIT, addressing standards that could be modified more regularly as technology evolves and remote proceedings evolve in line.

The other thing that I wanted to note is that in the Texas Access to Justice Commission materials, there are several best practices and guidelines that I think are quite useful and, if nothing else, a good starting point.

CHAIRMAN BABCOCK: Great. Thank you.

Any other comments to the proposed new rule 500.2(g) or 500.10.

Robert.

MR. LEVY: Yes. I would just propose, maybe, a threshold vote or question. My view is that we establish in-person proceedings and we should presumptively appear in person unless a judge rules otherwise. So I would propose that the rule be changed to include the presumption that it would be in person unless a determination is made to the contrary.

I do -- I am troubled with the idea that it's -- it's either/or. I am a proponent of access, to be certain, and there are very many circumstances, particularly in the justice courts, where it would be appropriate. But I still think that we should have a preference for an in-person proceeding, all things being equal.

CHAIRMAN BABCOCK: Do you think that this

proposed new rule 500.10 makes a determination against that presumption?

MR. LEVY: I think this language says it's -- it's totally up to the judge. And unless there's a statutory obligation to the contrary, a judge could hold all of their proceedings remotely and that would be fine. And I'm troubled by that. I just think that there is a -- there should be a preference to appearing in a courtroom; that's why we have courtrooms. And there -- again, there might be reasons to go remote, but --

CHAIRMAN BABCOCK: Yeah.

MR. LEVY: -- the threshold, the standard should be in person.

CHAIRMAN BABCOCK: So would you put some language at the beginning of A that says something like, you know, there's a presumption that there's going to be an in-person hearing, however a court may allow.

MR. LEVY: Yes.

THE COURT: Something like that?

MR. LEVY: Yes.

CHAIRMAN BABCOCK: What do people think about that? Kennon? Lisa? Don't look at each other.

MS. HOBBS: I mean, I just feel like we're taking two steps back. I think this has been what we've been talking about for three -- three advisory committee meetings.

And I feel like I can't go find the vote. Kennon is maybe -- probably looking right now. But I just feel like that is a discussion that has already been made and that we've drafted rules, at least for JP courts, in a way consistent with the prior discussions that we've had in this room.

MR. LEVY: And I apologize; if we have voted this issue, then I'll withdraw my suggestion.

CHAIRMAN BABCOCK: Anybody remember whether we voted this --

MS. WOOTEN: I don't think we voted on this particular question. I think we've discussed it. And one might say sensibly.

MR. LEVY: To death, yes.

HONORABLE EMILY MISKEL: I think that was the response. It hasn't been voted on, but it has been discussed.

MS. WOOTEN: And I will note, for what it's worth, that in the emergency order from the Court that we've been living under for quite some time, you see the "require or allow" language, I think. Judge Miskel, isn't that the genesis for it?

HONORABLE EMILY MISKEL: I know we did borrow some language from the emergency order, and I just can't remember what the latest one says, but I can pull it up.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Thank you. I'm sorry I couldn't hear you. We're having some funny comments on our chat about how this is a good example of a Zoom meeting going awry, because it is. We cannot hear what the vast majority of people are saying in the room. And for that, I am very sorry. I wish I could have been there in person.

Obviously, when hearings are happening by Zoom and something like this happens, the hearing has to be stopped, reset, whatever. I understand that you-all don't want to do that, that's fine. But just -- just so you know that those of us out here in Zoom land do not hear what is going on.

And I totally agree with what I think Kennon said, or maybe Judge Miskel, was that we are going backwards to take a vote on what Robert suggested, although I'm not exactly sure what Robert suggested because I could only hear about three words of what he was actually suggesting. So I do feel like those of us on the remote proceedings today are at a big disadvantage in being able to participate.

I would also just -- there was one point I did hear, which is -- is notice a substantive issue? And absolutely it is. It is a substantive issue.

And there's already a case out there where, you know, the judge said -- sent out a Zoom notice and the

person couldn't get on Zoom and tried to change it and the judge didn't see the request to change. All right. Well, it got reversed, yes. So notice is substantive. Notice -- and to say that you -- how difficult it is to say that notice is going to be in the, you know, 295th courtroom at 201 Caroline in Houston, Texas; that is not a difficult thing to put in your notice.

Thank you. And sorry for my unhappiness with not being able to hear what's going on.

CHAIRMAN BABCOCK: Well, we're all unhappy with that. This microphone that I'm now absolutely shouting into has a green light on it that suggests that it's on. But -- Tracy, can you hear me at all?

MS. WOOTEN: Okay. So she said --

HONORABLE EMILY MISKEL: Okay. So she's shaking her head no. If this is the microphone that everyone can hear, I'm happy to be the Vanna White today and --

MS. WOOTEN: Chief Justice Christopher, can you hear me now? There's something about this magical area right here.

MS. GREER: It's Bill Boyce.

CHAIRMAN BABCOCK: Please speak directly to the judge.

CHAIRMAN BABCOCK: Well, here's what the school has suggested. That we take an early lunch break and

that they try to fix this problem. Because, you know, we're going to skew our record fairly dramatically if we don't try to fix it anyway.

So why don't we take an hour lunch break and be back at ten minutes after 1:00. You probably didn't hear that, but we're going to lunch.

(Lunch break from 12:07 p.m. to 1:12 p.m.)

CHAIRMAN BABCOCK: Okay. Back on the record.

So now are we supposed to use these mics or not? Yeah, well, let's see if anybody -- who is that up here? Judge Peeples, can you hear me?

HONORABLE DAVID PEEPLES: (Thumbs up.)

CHAIRMAN BABCOCK: Thumbs up. All right. So we'll start there and see where we -- where we wind up. Where were we?

MS. WOOTEN: Passing the JP rule unanimously.

(Laughter.)

MR. ORSINGER: Chip, some people have already made up their mind, so we don't need to continue to discuss this.

CHAIRMAN BABCOCK: Has that ever happened before? I think we are at the -- at the point where Lisa and Kennon were saying let's not go backwards, but there was a consensus that we haven't actually formally voted on this presumption argument even though it has surely been discussed

before. Do you agree that's where we are?

MS. WOOTEN: Yes.

CHAIRMAN BABCOCK: Okay. So without going backwards, do we want to have a discussion -- further discussion about the presumption of in person subject to try to do it by alternate means or not? Anybody got any thoughts about it?

Yeah, Jim.

MR. PERDUE: So I recall a conversation about a presumption. It would strike me that any idea of a presumption goes in a preferred direction. And as I read this proposed write-up now, the idea is that the court may order the proceeding remotely or the court may order the proceeding in person; and, in either instance, the party may request, if it has been ordered remote, to have it in person, and the party may request to have it in person if it's been ordered remote.

MS. WOOTEN: That's correct.

MR. PERDUE: And then you get to the end point on both of those dual tracks which said the court should grant the party's motion, i.e., the preference is not only agnostic, it is completely into the contrary. It is mutually exclusive.

CHAIRMAN BABCOCK: Well, that sounds ominous.

MS. HOBBS: Well, it used to say "must" and that was the recommendation from the Access to Justice Commission, to change it to "should."

When you look at the factors, some go in favor of in person, some go in favor of remote. And so we started to get kind of confused as we were looking at the factors. Because usually if you have a presumption, then you're going to have these factors that then move you away from the presumption, right? Whereas these factors are more -- they could go either way. Some favor in person; some favor remote.

And so that made -- at least the ad hoc group looking at it from the Access to Justice perspective made us think we, kind of, lightened that up to should so that it accounts for these factors being -- moving in both directions.

MS. WOOTEN: And I'll add that in that working group, as a reminder, Judge Chu was a member. And he had taken the prior version of this draft to a judicial conference and discussed it with colleagues and had received feedback that there was a desire for some additional discretion. It doesn't go so far as to say may, of course, but it has been changed from "must" to "should."

MR. PERDUE: So, obviously, I speak primarily from a perspective on the district court. And as I read the

rules, the change to 500 is identical to the change to 21, except that 21 reflects the vote of this committee to have a very specific carve-out for jury proceedings.

MS. HOBBS: They both do.

CHAIRMAN BABCOCK: They both do. It's in 500.10 too.

MR. PERDUE: Well, I missed that. I knew -- before it did not have that, but now it's --

MS. WOOTEN: Now they both do.

CHAIRMAN BABCOCK: They both do.

MR. PERDUE: So be it. And I like the idea of instead of "must," "should," but I'm still wary. And since we're just -- we're debating it in the context of JP, and so I don't want to vote neutral on JP rules that then somehow reflects a will for this same language when it comes to the district court rules, so that's why I'm raising it now. And I have generally tried to be consistent on the jury proposition in both JP and district court, and so I want to be consistent here as well.

Somebody made a good point on part of the conversation that we had, as I recall it in Houston, about the judge's order for a remote proceeding being one of the dichotomy of whether the judge was physically where the court is supposed to be conducted versus not. And then more relevant to, I think, the practitioner's proposition, which

is because this obviously would capture a contested evidentiary hearing whether you are in an online world or in person. And I don't know that that is reflected either.

MS. WOOTEN: It's not. As I noted earlier, the statutes and constitutional provisions address where the judge must be physically when presiding. And so it could be that there a comment added about that, but to try to repeat what's in the statutes and rules as has been fleshed out by the courts didn't seem like a good use of our space here, because it's already addressed in other places. And it could change, of course, if the legislature decides to change that.

MR. PERDUE: So I'm not sure I disagree with that either, which takes me back then to the idea that you've got mutually exclusive preferences that if a party is making a -- a challenge or request for an in-person proceeding when the court has ordered a remote or if a party is making a request for a remote proceeding when the court has ordered it in person, the rule states that the court should grant either one of those with equal kind of consideration. And I think there are some members of the bar, call us dinosaurs, but think that the rule should reflect in some way a preference for in person when it comes particularly to contested evidentiary hearings. But I -- I am very sympathetic to the Access to Justice issues on the wide variety of hearings that

are captured by the rules. And I think we are also very conscious of the -- the breadth of contested evidentiary hearings in family matters that are somewhat distinct from the trial bar's concerns.

CHAIRMAN BABCOCK: A couple of things before Judge Miskel gets recognized. Apparently we now have to go to mics. And not just mics, but they have to be right up by your face. So if you have a communicable disease, be careful. My end of the table, we're fine, so nobody is getting sick up on this end. Because these guys to my right aren't using this, nor is Shiva, so it's just me.

But anyway, that's -- so now Judge Miskel has got a mic and so fire into it.

HONORABLE EMILY MISKEL: I was also just going to refresh that this is why we went from talking about remote proceedings to remote appearances. Because, for example, if the judge says, This is going to be a remote proceeding and a party says, But I need to appear in person because I don't have the technology. That doesn't convert the entire proceeding to an in-person proceeding, we just make arrangements for that one person to appear. So I think it's not as inevitably inconsistent as you're fearing because it's a request that a particular person.

Now, could both sides say, I want you to appear in person? No, I want you to appear. Yes, there's a

possibility, but the judge has the discretion to prevent game playing. I think this is -- you might very well have a case where one person needs to appear on Zoom for very good reasons and one person needs to appear in person for very good reasons and that can all be accommodated in the same hearing.

CHAIRMAN BABCOCK: Well, back to your point about the presumption. If you put a presumption in here, think about Judge Ferguson's letter and how would that presumption work? I don't know if everybody read that, but it's very compelling. And he presides over a remote area, you know, vast geographic portions of the state, multiple counties. So if you have a presumption, what does Judge Ferguson have to do with that, recognizing he doesn't want to travel. He doesn't want other -- he doesn't want to have people travel to him. And there are all these issues about people being able to get there, which is very hard.

So how does the presumption work? Does he say, okay, I'm going to have a hearing and anybody that wants -- even though there's a presumption it be in person, anybody who wants to be remote, just let me know? Is that how it would work, or not?

MS. WOOTEN: This goes back to the conversation we had the first time this committee discussed proposed rules in part, right? Because if you're going to

have a presumption, I think what it would be could vary depending on the kind of case. And that's why personally I don't think it makes sense to have a presumption across the board because I think in some instances some types of proceedings will be better remotely.

So if the concern is contested evidentiary hearings, specifically, maybe the way to address that is not with this presumption, but instead akin to something like the jury trial. Though, obviously, that's not what's been recommended by the subcommittee of the task force.

CHAIRMAN BABCOCK: So you got an urban area and the judge enters an order that says my docket -- I'm doing a motions docket Friday and everything is going to be remote. And since I haven't read the constitution or the statutes lately, you know, I'm going to do it from Wal-Mart because that's where I got to be that day picking up some stuff. How does that work?

CHAIRMAN BABCOCK: Go ahead, John.

MR. WARREN: I remember that grocery store instance. But I think we're forgetting one particular thing is that if it is a remote proceeding, the court, the original location of the court has to be available for the public; otherwise, it's a closed proceeding. So if a party wish to show up, they can still go to the court. If a party does not, they can still do it remotely. But that physical

courtroom has to be there for other observation. So I want to make sure we're not excluding that.

HONORABLE EMILY MISKEL: I don't think that's correct.

CHAIRMAN BABCOCK: Judge Miskel disagrees.

HONORABLE EMILY MISKEL: So, for example, our juvenile judge was using her physical courtroom for a visiting judge to handle juvenile proceedings, and she was on Zoom doing civil docket. And so if you were going to participate in person with the civil docket, it wouldn't be by automatically just going to the courtroom because you would be in the middle of a closed juvenile trial or whatever it might be. Does that make sense?

MR. WARREN: That makes sense, but what about those individuals who would like to -- who would like to be a part of that hearing that the judge is holding outside while a visiting judge is using their courtroom, and they're not able to because it's 100 percent remotely. How do they have access to that?

HONORABLE EMILY MISKEL: Right. They would have to contact the court to make arrangements for it. I think you were saying, oh, we can just assume that everyone can just go to the normal courtroom, and I was just correcting that that might -- notice has to say where court is and how to participate.

MS. HOBBS: And from the -- specific to the JP rule that we're actually talking about, not the county and district court, from the JP feedback that we're getting, they have a lot of other obligations. So they may be hosting some of their hearings when they're out on the road to declare someone dead or doing other things at the -- at the jailhouse and things like that.

So from the JP court's perspective, they are doing some of their hearings for reasons that are necessary for them to do their task -- do their -- complete their obligations outside of their physical courtroom when it's allowed.

CHAIRMAN BABCOCK: Alistair Dawson.

MR. DAWSON: So I can't hear much of what's being said which is ironic that we're having this discussion about remote hearings while we're having all these problems. But I think everyone should recognize that we have a significant access to justice problem in Texas and it's only getting worse. And the statistics and the data prove that having remote hearings improves access to justice. And I thought that this committee had a pretty strong consensus in favor of allowing remote proceedings where necessary and where appropriate.

And with all due respect to my friend Robert, having a presumption in favor of in person is a massive step

in the wrong direction. And so I think we should move forward with allowing remote hearings, remote proceedings where appropriate -- not for jury trials, that's a different issue, but remote hearings. And I also think, frankly, we need to start crafting these rules. Because I think courts all over the State want to hear what the rules are for allowing remote hearings and remote proceedings in the future.

So I would suggest we move forward with looking at the rules. If we want to have a vote, Skip, on thumbs up or thumbs down on remote jury trials on Rick or Robert's suggestion either one, fine, but let's get to the rule making part.

CHAIRMAN BABCOCK: Can you hear me?

MR. DAWSON: Off and on.

CHAIRMAN BABCOCK: How about right now?

Okay. This is Skip weighing in on this. Yeah.

HONORABLE ANA ESTEVEZ: Try lifting it.

CHAIRMAN BABCOCK: Like that?

HONORABLE ANA ESTEVEZ: Yes. That's how you sing. Yeah, try it. He may hear you now.

CHAIRMAN BABCOCK: Pretty much sure you don't want to hear me sing, Judge. Okay. I agree with -- yeah, Robert.

MR. LEVY: I just -- I think John had a very good point that we ought to at least consider. If you are a member of the public and you want to participate by watching a proceeding and you do not have the capability to appear or join a Zoom session -- and that's not going to be uncommon -- you will not have the chance. The rule doesn't provide for an alternative that needs to be available for you if you do not have Zoom. It doesn't say that the magistrate court has to set up a room for you to watch it. It simply says, notice needs to be provided.

And that might be appropriate -- a good, you know, an appropriate balance, but I do think that that's not an insignificant issue.

CHAIRMAN BABCOCK: Judge Estevez.

HONORABLE ANA ESTEVEZ: So I understood the issue that John brought up to be the open courts provision, which, when we started, we put them all on YouTube and we all have our YouTube stations that anybody can go on. And the last time I had to broadcast on YouTube was Friday, because I'm doing fully remote hearings because my court reporter is out on medical leave; and I've got court reporters from Florida and Dallas zooming in so that I can keep doing court for six weeks because I don't have another court reporter that's available. And our power went out in Amarillo, Texas, Friday at the courthouse. So I had to go home and then turn

on my YouTube so that I could comply with the open courts provision.

So I don't know if the JP courts are doing -- still doing the YouTube, but I'm going to assume that that's still in your rule. So I don't -- the public does not have the right to interrupt my hearing. The public has a right to know what I'm doing. So the fact that they're watching on YouTube doesn't take away their right of knowing what's going on. It's a secrecy issue. It is not a right to be there so they can stand up and say, I interrupt and I need to participate in your hearing. There is no participation of hearing right.

CHAIRMAN BABCOCK: All right. Judge Evans and then Richard Orsinger and then John Warren.

HONORABLE DAVID EVANS: Richard, could I have that microphone?

One thing Robert said that I wanted to -- he said that a spectator or a member of the public could participate by Zoom. And I think Judge Estevez made the point, they should participate or listen by YouTube. You don't want spectators in a Zoom conference or they'll distract, by their nonverbals, the proceedings. So just to correct that record there.

MR. LEVY: I did not intend for the public to be able to do anything, just to watch.

HONORABLE DAVID EVANS: Second point is, I'm disappointed to find out I have to listen during the meetings I attend and be held accountable for not doing it, but since Justice Bland did it to me early on when I was on this committee, I started learning maybe I should. I fail to understand how having a default location for a hearing cuts down on the right of the public and those that need access to justice from participating by Zoom. I think this lack of clarity of what the default proceeding is will lead to confusion for the court staff and for the people who participate.

There has been no problem with courts coming up with notices to say, Under the current order, you may have witnesses, litigants, and witnesses participate remotely. There has been no problem with noticing those hearings by Zoom and then noticing those hearings forward. And the judge could set that up as a default in his hearing notice. But I'm not sure if I have in a rule that I'm going to read -- that you've got to call the clerk every time and say, Which one are we in right now? I'm just a little bit worried about that.

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: I agree with Alistair -- we can't hear anything, I agree with Alistair. But to me the basic point is to maintain the integrity of the system. If

you're searching for truth, you have to adjust these electronic rules to allow for what people do to fudge. And that's what concerns me. I'm not talking about jury trials, I'm talking about hearings at which the court might take sworn testimony. Anytime that there's -- pardon me, sworn testimony, people are supposed to be telling the truth under oath so help them God -- we don't use God anymore, so help them, but the basic problem is to maintain the integrity of the system.

Efficiency is not the point, in my opinion. In my opinion, the point is to maintain the integrity of the system. We are supposed to have courts to produce justice, and we can't miss that. We have to have these electronic rules to preserve that.

I'm going to leave the meeting because I can't hear anything. Thank you, sir. Take care.

CHAIRMAN BABCOCK: You bet. Thank you, Richard.

John Warren and then followed by Judge Peeples.

MR. WARREN: Just one point of clarification. There is a distinction between a participant and an observer. I'm referring to the observers. Not everyone has access to Internet. You've got to remember there are lots of internet deserts where people -- we actually have students, high

school students who are pulling up to the parking lot at McDonald's and the Starbucks so that they can do their homework because there's no access in their areas. Those are the areas where I'm talking about, where they have to be able to come to a location so they can observe. You would be surprised at the number of people who are self-represented litigants who actually go to a court proceeding to see how they can expect -- what they expect to happen when they go to court to represent themselves. So there's a distinction between the two.

By all means, the more we can do, the more we can get done; it's always in an electronic format. But we still have to take into consideration that we cannot deny those people access to those proceedings.

CHAIRMAN BABCOCK: Thank you. Judge Peeples and then Judge Miskel.

HONORABLE DAVID PEEPLES: Chip, I want to be sure that you and the people in the room know what is happening out here in Zoom land, about 25 of us by my count. When Richard Munzinger spoke just a minute ago, I heard every single thing he said loud and clear. When John Warren spoke just a minute ago, I think I heard an occasional syllable. Okay.

Now, sometimes those of you in the room, when you have a good microphone, the volume is good, but sometimes

we hear half of the words, maybe one-third of the words are syllables. That's with the people where we've got volume. I would say two out of three speakers in the room -- and I'm serious about this -- sound like a mouse in a well. That's what they sound like. I mean, you can barely hear the little bitty noise.

We can't have a meeting like this. I mean, honestly, I have not heard one idea from anybody in the room since we came back from lunch. I mean, I couldn't tell you one single thought that was expressed by anybody in the room.

Now the speakers on Zoom, I think, are coming through loud and clear. And I don't know, since the lunch break, I haven't heard a good -- anybody had a good microphone that I heard everything they said. And that's what's happening out here.

Now, that's me. I'm on an iPad and I've got good internet service. I don't know what the rest of the people out in Zoom land are getting, but that's it. And I'm just not prepared to participate substantively in this meeting if I can't know what points are being made.

CHAIRMAN BABCOCK: Yeah, it would be -- can you hear what I'm saying now.

HONORABLE DAVID PEEPLES: Right now I hear you.

CHAIRMAN BABCOCK: Yeah. Well, I've got the

microphone inside my mouth, so -- but it's not fair to ask the people on Zoom to cast a vote when they can't hear what's going on. So we're going to have to -- we're going to have to go a different direction in terms of whether we vote on this or not, vote on things or not.

I can tell you about the plans that I had for our next meeting. And I think we -- we have to wrap up this remote proceedings issue, all aspects of it, because we haven't even talked about cameras in the courtroom yet and that's a big issue.

MS. WOOTEN: Or subpoenas.

CHAIRMAN BABCOCK: Or subpoenas. Subpoenas is a big issue. And so our next meeting we're just going to, you know, do it until we finish it. And it's -- we ought to plan on a day and a half. And if we have to run over noon on Saturday, we'll do that too. But, Judge Peeples, I sympathize with what you're saying and what Richard Munzinger and everybody else is saying. And all I can do is tell you we're sorry. And the people here at the law school have been working really, really hard to try to fix it. But after lunch, it seems like it's worse than it was before lunch.

HONORABLE ANA ESTEVEZ: Can he hear everything?

HONORABLE DAVID PEEPLES: Can I say this? For me, I heard everything that you said, about 95 percent loud

and clear. Why not have the people in the room line up, maybe, in ones and twos when they want to speak and go to the microphone that you just used and we can hear what they say. You know, they would have to walk to the microphone or the microphone would have to be taken around. I don't know, but you were in a class by yourself in what you just said compared to everybody else who has spoken from the room so far this afternoon. And that's what I heard.

CHAIRMAN BABCOCK: I'm asking the court reporter to mark the part where you said I'm in a class by myself and you can stop it right there.

We've got several mics here and we've been trying to talk into them.

MR. ORSINGER: David, can you hear me talk? This is Richard.

HONORABLE DAVID PEEPLES: No, that was very bad.

CHAIRMAN BABCOCK: Okay. My mic is a good one. How about Judge Miskel?

HONORABLE EMILY MISKEL: Judge Peeples, can you hear me?

HONORABLE DAVID PEEPLES: So far.

CHAIRMAN BABCOCK: How about the mic down there?

MS. WOOTEN: Judge Peeples, can you hear me?

This is Kennon.

HONORABLE DAVID PEEPLES: That was choppy and spotty.

CHAIRMAN BABCOCK: Well, another comment on one of our members, very sad. So looks like we got two mics that might work, mine and Judge Miskel's.

HONORABLE ANA ESTEVEZ: I'm going to try it with a different direction. Is this better?

HONORABLE DAVID PEEPLES: Whoever talked then, I couldn't hear --

HONORABLE ANA ESTEVEZ: Okay. Just thought I'd try. I promised I was going to break out in song if I grabbed this mic.

CHAIRMAN BABCOCK: So the answer is no, that was not better, so ditch that mic.

HONORABLE DAVID PEEPLES: Chip, rather than have people raise their hands, can you just look at the people who are on camera right now, on Zoom, and they can go thumbs up or thumbs down. I'm telling you what I hear and don't hear and I'm assuming it's the same for them. I'm seeing some chat messages, but Lonny just did a thumbs down. Are you not hearing me, Lonny?

LONNY: I can hear you; I can't hear anybody else.

CHAIRMAN BABCOCK: Lonny, how about me? This

is Chip, Lonny, can you hear me?

LONNY: It's the same issue. It's sometimes we hear you, but most of the time we can't hear most people. And, yes, it's gotten worse after lunch, yes.

CHAIRMAN BABCOCK: I don't know how to fix this. Maybe we should take a vote.

HONORABLE EMILY MISKEL: That's the alternative. We can close to our remote participants and we can become an in-person proceeding and exclude the people who can't be here in person.

CHAIRMAN BABCOCK: John.

MR. WARREN: What we can do is have several people log onto the Zoom link because they're able to hear.

HONORABLE DAVID PEEPLES: Can't hear a thing.

MR. WARREN: Well, this wasn't for you, this is just for --

CHAIRMAN BABCOCK: He doesn't want you to hear it. He doesn't even have a mic. He's proposing something. I'll repeat it if it has merit.

MR. WARREN: Get a number of people to log in to the Zoom link and they'll all be here. And so we can use a station that one is logged in --

HONORABLE ANA ESTEVEZ: The feedback is bad. When you do that --

(Discussion off the record.)

CHAIRMAN BABCOCK: We're going to try Jacki's suggestion which is to have a mic stand and my mic, which we all know works, and have people who want to make comments go up to the mic stand. Is that -- okay. So we're going to try that for a while and see what happens.

HONORABLE DAVID PEEPLES: I'll say this, I heard everything you said, Chip.

(Discussion off the record.)

CHAIRMAN BABCOCK: All right. Can everybody on Zoom hear me? Thumbs up.

So, Kent, you got your hand up, what do you want to say?

COMMISSIONER SULLIVAN: Other than agreeing with the comments of the irony of all of this, I just wanted to start by saying I agree with Alistair's comments that, aspirationally, we've got to expand the use of remote proceedings for a host of different reasons. At the same time, you know, there's a "but" here. And this makes it, you know, painfully clear, I think, the episode this afternoon. The scope and type of the proceeding you can have consistent with fairness, due process of the like, is in no small part depending on the quality of the technology that's being used and the standardization of that technology.

I have had the luxury of being in locations in which one conference room was connected by, you know, a Zoom

conference with another conference room, meaning multiple participants in each room. And the technology was extraordinarily good, with cameras that would zoom in on who was talking and with the room wired in such a way with microphones located that you could hear everything. In fact, I will say that I was warned, Don't go in the corner and try and whisper to someone, you need to go outside the room because that's the way the rooms were wired. But it was extraordinarily expensive. I mean, I made some inquiries because I was so impressed.

The point I'm making is that when we think about this and incorporating this concept in the legal system, it seems to me we've got to think of standardizing minimum best practices. And I think we can control for two variables, although it would take some time and certainly some money; and that is for the courts and the lawyers. And I think you're going to have to start small with, you know, things like fairly routine hearings, nonevidentiary hearings, and the like. It's just going to be tougher with everything uneven.

I don't know how you control for the variable of parties that may be pro se and the like and the dilemma there is -- and I think Alistair may have been implying this, is that those are some of the proceedings in which they're needed the most. Although, at a minimum, we could probably

very clearly indicate to pro se litigants or other independent parties that had some role to play what the minimum technology requirements were to participate in a hearing and do it in a way that was going to be efficacious.

In any event, those are just some thoughts. And, that is, I think without returning to the really important practical baseline of the technology components of what we're talking about, I think we run the risk of missing the mark. Enough said.

CHAIRMAN BABCOCK: Okay. Thank you, Kent.

So try to tie this off, let's take a vote on whether or not 500.10(b) should be amended to have some language at the beginning that says the presumption is that proceedings will be in person; however, everybody in favor of that, raise your hand.

(Voting.)

CHAIRMAN BABCOCK: Shiva, you're going to have to give me a count for --

MS. ZAMEN: Two.

CHAIRMAN BABCOCK: All right. Everybody opposed to that, raise your hand.

(Voting.)

CHAIRMAN BABCOCK: Shiva?

MS. ZAMEN: Six.

CHAIRMAN BABCOCK: So there were 10 in favor,

16 against, so we won't include that language.

Is there any other -- is there any other matter on 500.10 that we need to talk about?

MS. WOOTEN: The comment might be worthy of discussion because it has been modified since the last meeting.

CHAIRMAN BABCOCK: Okay. Everybody take a look at the comments.

MS. HOBBS: It defines good cause.

CHAIRMAN BABCOCK: It defines -- which defines good cause, right?

MS. WOOTEN: Nonexclusive exhaustive way.

CHAIRMAN BABCOCK: Nonexclusive.

HONORABLE ANA ESTEVEZ: Is that page 445?

MR. LEVY: 310.

MS. WOOTEN: So just to orient people --

CHAIRMAN BABCOCK: What page? They want to know.

MS. HOBBS: The redline is 433, and the --

MS. WOOTEN: So if you want to see a clean version, it's on page 310, I believe. So you can go there to see it in clean version and the redline is 4 --

MS. HOBBS: 433.

MS. WOOTEN: 433.

CHAIRMAN BABCOCK: You want to tell everybody

what you-all did?

MS. WOOTEN: Yes. I'll go over this again. So, essentially, what's happened here is an expansion of the factors that can be considered when assessing good cause. It's still nonexhaustive, it's just examples. And so the phrasing of the factors that were there before has been modified a degree and then additional factors have been added. All of the additional factors that have been added, in the modified phrasing, comes from the Texas Access to Justice Commission rules committee, but it was adopted by the task force subcommittee in full.

CHAIRMAN BABCOCK: Great. All right. Anybody have any comments, either online or in the room? And if you have a comment in the room, come join me at the -- in the television studio. Jim Perdue is making his way to the podium.

MR. PERDUE: This is my effort to frustrate Ms. Hobbs' agenda and her obedience to the issue that's at hand. We're talking about the JP rule and I've already told you that I'm more interested in the district court rule. And -- but it's an equal comment. So it applies to both because the rules are the same.

And the thought is this, which is: Would you be amenable to the idea of adding another enumerated thing in the comment of -- because you have the complexity and

numerosity of witnesses, and it occurred to me that, could you add contested evidence and credibility determinations as a potential factor that would assist the determination of whether good cause? That was just -- that was hopefully a productive -- even if off agenda -- comment.

CHAIRMAN BABCOCK: Jim, we've talked about that millions of times. That strikes me that's a good add.

Any other comments in the room? And then we'll go -- go to the Zoomers.

MS. WOOTEN: Yes. I think that's a good addition. We have complexity of the case already, like you said. And the only question would be -- and I don't think it matters where we put it -- but do you have a preference in the list? Okay.

CHAIRMAN BABCOCK: All right. Anybody else in the room have any comments? This having to walk to the camera is having an inhibiting factor influence on people who want to talk.

Okay. We've got somebody up. It's Judge Schaffer. Judge.

HONORABLE ROBERT SCHAFFER: I think that's a really good addition. Most of the other items are kind of external to the -- to the intricacies of the case, but this is an internal factor that is equally as important as all of the external factors are.

CHAIRMAN BABCOCK: Yeah, I think so too.

Kent.

COMMISSIONER SULLIVAN: I'm just a big fan of certainty. And I get concerned about suggesting what, in effect, is a balancing test. The court should consider and then a long list. That's like a kaleidoscope is what my concern is. You turn it one way and turn it a different way, people see different things and the results are all different, even though sometimes the circumstances seem to be nearly identical. I think we'd be better off with hard and firm rules, to the extent possible, as to when you can use remote proceeding and when you can't. I'd love to get it to the point where, you know, virtually everything is subject to remote proceedings. I cite as Exhibit A this afternoon; we're not there yet.

CHAIRMAN BABCOCK: Professor Hoffman.

PROFESSOR HOFFMAN: Thanks, Chip. So I guess my comment is specifically about the -- whether it makes sense to include all the substance -- separate from Kent's point that this may be too much. If we are going to include it, does it belong in the comment? And I guess I'm asking this not just as a stylistic matter, but I guess I am curious also for just our work going forward. Am I right in saying typically comments are not this sort of substantively ladened, typically? This feels like it's -- the comment is

doing a lot of substantive work in a way that is not as usual for the Court. So, anyway, I would be interested to hear what people have to say about that.

CHAIRMAN BABCOCK: Well, the comment sisters are talking to each other.

MS. WOOTEN: Lisa Hobbs and I were just talking about the fact that over the last few years, I guess it's become more common to have substantive comments to the statewide rules. And an example of that in the not too distant past is the expedited actions rule. And I believe that is actually what prompted this approach because the expedited actions rule comment addresses nonexhaustive factors of good cause.

CHAIRMAN BABCOCK: All right. Judge Peeples.

HONORABLE DAVID PEEPLES: In the comment, item two, complexity of the case, we probably mean the case and just as much the actual hearing that the judge is going to schedule. So, I mean, you could have a very complicated case, but a simple hearing. And so I think you ought to cover that. And then the preface -- the prefatory clause there, when evaluating a request under subpart B, I think I would want the Court to consider some of these factors in making the decision under number A or subpart A, maybe not all of them. Those are just thoughts.

MS. HOBBS: Hey, it's Lisa. Judge Ferguson and I talked quite extensively about that. Those are factors that a judge -- they're what a judge is looking at when they're deciding if their default, their own personal judicial default is going to be "come to the courthouse" or "come to the hearing" or "come do it remotely." So I think you're right. Like the thought process is in the judge's head when she decides how she's going to run her courtroom that week, that day, that afternoon. But, you know, we could lay it out under this rule and drop off subpart B, but it's what's happening already in the initial decision.

CHAIRMAN BABCOCK: Thank you. Alistair.

MR. DAWSON: So, you know, in response to Kent's comment about let's have hard and fast rules, I don't think that we can because there are a variety of factors that affect the determination of whether to have remote hearings or not. And I think that they're well captured by this comment, in addition to what Jim is suggesting.

And I don't know whether this makes a difference or not, but I wonder at the beginning, the second sentence, where it says, "The court should consider," whether that might not be better if we changed that to "may consider" so the Court can decide which of those factors to apply in making the determination.

CHAIRMAN BABCOCK: Yeah. Kennon and Lisa

think that's a good suggestion. They're off camera.

Yeah, Harriet. You may have to come over here, Harriet.

MS. MIERS: I told Chip earlier, I'm very hesitant to take work that's been going on for years and get in the middle of it. But with respect to these comments from an Access to Justice standpoint, we wanted to say to the judges who may not have thought about it, these things are things that you need to think about when litigants are having to travel a great distance to the courthouse or they have a family, an elderly parent, a child. We wanted to remind people, please think about these. So they are not dictating, but they are reminders.

And while I'm here, so I don't have to come back up, I want to say Judge Ferguson's letter is in there for a real reason. And that is that he's living this. And he's way down the road in using remote hearings to create economy, to give access, and to accomplish justice. And so I really commend close reading of his letter.

CHAIRMAN BABCOCK: Thanks, Harriet. Kent.

COMMISSIONER SULLIVAN. I just thought I would briefly respond to Alistair and give sort of an example of what I'm talking about. First, as I said before, I think that we need to specify the minimum technology requirements for the courts and certainly, at least, for the lawyers.

Second, I would think that you could easily facilitate nonevidentiary hearings in a very bright-line way. And I think we ought to encourage that. You're talking about essentially having the lawyers or pro se litigants and the court involved, all presumably on Zoom or similar technology. That's something that you could do in a very straightforward fashion.

The trick is, in my view, the last category, which would be some kind of evidentiary hearing. And I think you ought to try and facilitate that, but I suspect it's going to have to be circumscript. They're going to have to be limited with limited aims, limited numbers of moving parts. And I think that you could consider how to specify what you can do and what you can't do. I think full-blown trials, jury trials and the like -- currently my view is that's beyond the pale. But, in any event, that's my two cents.

CHAIRMAN BABCOCK: Okay. Any other comments on either online or in the room about 500.10 or the comment? Okay. So we've got that behind us.

What about Rule 21 is the next one?

MS. WOOTEN: That's correct.

CHAIRMAN BABCOCK: Why don't you come up --

MS. WOOTEN: The current version of proposed Rule 21 is on page 311 of the PDF, and it's redlined against

existing rules. And I should have said more precisely we have Rule 21 and Rule 21d. So the first part of what you see here on page 311 of the PDF is a redline of Rule 21 specifically to have amended notice requirements that track what we've already seen in the JP rules and already discussed in that context.

And then everything in 21d is -- would be new to the rules. In other words, this would be a brand-new rule. And as has been noted several times today, the language here tracks what you've seen in 510, with the exception that it doesn't include in 21d the notice requirements because that, of course, is covered in Rule 21.

CHAIRMAN BABCOCK: You said 510, you meant 500.10?

MS. WOOTEN: I did. Thank you.

CHAIRMAN BABCOCK: Okay. Any comments about this -- Richard, why don't you come on up here. It's lonely. It's lonely up here. Watch out guys, Robert is bringing his notebook.

MR. ORSINGER: Thank you, Chip. So it's -- we're discussing what we should put in notices to people who are participating in a court hearing, but what we're really debating is whether we ought to be having remote proceedings or not. And I think that it's fine for us to debate that

because obviously we haven't all made up our mind yet. But it seems to me that on a going-forward basis it would help me, and I hope maybe help others, just to keep a few things in mind. And this doesn't address the particular solution, but to me the first question is, Where will the judge be? And the second question is, Where will the court reporter be? And that may be in the same place or it may not. And it may be the court will be virtual or the court will be in the courtroom and present. But I think that that's the first question that we have to address and the presumptions and everything else applies to where will the judge be. Will the judge be in person, in the courtroom, or will the judge be virtual?

Secondly, we have options. The court could mandate that everything will be in person, so all the witnesses, all the lawyers, all the court personnel will be in person. Or the judge could make it elective that you can be in person or you can be by Zoom at your election. Or the third one is it's remote only and nobody will be physically present in the courtroom, which, I guess, is what I was saying, where are the judges is going to be.

And then the last point I would make is, we're giving notice not just to the participants and the witnesses, but also to the public. So I think that we need to recognize that our comments about the information that we're sharing is

not only going to the lawyers and the witnesses and the parties, but also to people in the public that may want to know how they can access the proceeding which wouldn't be by Zoom, it would be by YouTube, I think.

So I think if we can -- in our discussions, if we can maybe hone in on the part we're talking about, it might lend some clarity.

Chip, thank you.

CHAIRMAN BABCOCK: You bet, Richard.

MR. LEVY: May it please the Court. Just to note an issue that -- that Richard referenced. And I understand that you wanted to avoid the issue of where the trial judge should be, but I do think it would be helpful to include at least a comment with reference to applicable statutory or constitutional provisions because the average litigant and potentially even a court wouldn't necessarily be fully aware of that.

On this proposed rule -- and it really, I think, pertains to the language of 21d. I made my point on the issue generally, but I do think that we should draw a distinction similar to the distinction that's here on remote jury trials, that the same should apply to evidentiary proceedings where a witness will testify. So if the parties want the proceeding to be remote, that's fine. That will probably be used often. But if one of the parties wants the

ability to question a witness in front of a court, that should be the preference -- that should be an option. And maybe a higher standard to rule otherwise, but it shouldn't be an even call. So I would suggest adding that language basically under the language of 21d (a), after "for a jury trial or contested evidentiary proceeding where witnesses will testify."

CHAIRMAN BABCOCK: All right. Thanks.

Any other comments in the room? Any other comments on -- Alistair?

MR. DAWSON: So I agree with Robert on not having remote jury trials, but I disagree with his suggestion about basically allowing one party to mandate an in-person hearing by -- if it's going to be an evidentiary hearing because I do think that makes it more difficult for pro se litigants to appear. I think that it gives an advantage in, sort of like, debt collection cases to the party seeking to collect the debt. And, you know, I trust our trial judges to determine where it's appropriate to allow for remote proceedings. So mandating it in every contested evidentiary hearing and mandating in person is an unnecessary impediment to access to justice in my opinion.

CHAIRMAN BABCOCK: Thank you. Judge Peeples.

HONORABLE DAVID PEEPLES: A couple of remarks. And, by the way, I think that 21d and, you know, 500.10 are

fine pieces of work. And I think they're very, very good. But I would make this point first. Even though we have identical rules right now, basically, for JP courts and for district and county courts, we need to keep in mind that those courts can be very, very different.

The justice of the peace -- I can't think of any time when the JP would be holding court outside his or her county. And many times that's true of the district judge. But Roy Ferguson -- and, by the way, his memo that Harriet Miers mentioned is exquisite. And if you haven't read it, you need to read that four-page memo; it's incredible.

But he has five big counties that make up 20,000 square miles. And I don't know where he lives, but -- he lives in one county, he doesn't live in the other four. And to require him to be in those other courthouses would wreck his wonderful work out there. And so people like him and maybe -- in Houston too, sometimes judges will need to -- it makes sense for them not to be in the courthouse. But certainly a multi-county judge should not be subject to that kind of rule. And so it would be wrong, I think, for 21d to put any kind of requirement like that, that the judge has to be in the courtroom for trial.

Now, the second thing, we just need to remember -- and I'm steadfast on not letting a judge make

people try a jury case remotely unless everybody agrees. But I think nonjury merits hearings are different. For example -- and I've done a bunch of family law. I've had trials on the merits in family law that took five minutes, ten. Very common in family law cases for the people to walk in, trial on the merits, child custody maybe. Judge, we've agreed on every single issue in this case except child support or every single issue in this case except visitation. And the witnesses might be standing at the bench and might take a few minutes for both of them.

So we can't say that every merits hearing, trial on the merits, would have to be in person, you know, unless they agreed. I wouldn't want to give one litigant or one lawyer the right to veto whatever happens by saying I insist on my right to an in-person hearing if the other person is willing to do it remotely and might live several hours away. So there are lots of merits -- nonjury trials on the merits that are very, very simple and people might live a long way off and it makes complete sense to let them be remote.

I'm going to have some more to say about privacy issues and just -- I know it's not at issue in the language of this proposal, but that's all I have to say right now. Thanks.

CHAIRMAN BABCOCK: Thanks, Judge.

Judge Schaffer.

HONORABLE ROBERT SCHAFFER. Ultimately, someone has to have the final say. And I have found it's unusual that you get the parties to agree, especially in a highly contested matter. Second, I wholeheartedly agree with Alistair that I think the judges should be the one making the call, taking into consideration as many of the factors that you want the courts to take into consideration.

I think most people like the remote stuff we've been doing. I know I do. It's still my default on hearings. But I have colleagues down here in Harris County who are completely and totally in person now. Some want them; some don't. But I think it should be an option that the courts have.

And I think, ultimately, whether you do it or not should be in -- should be the decision made by the courts. I know that sounds odd because I'm one of the courts, but I really feel like I would be saying the same thing if I was one of the lawyers in the case too. It just makes sense that the judges make that decision. It also makes sense that the judges utilize everything they have at their disposal to make this call.

And I've talked with Roy Ferguson before. And he is a perfect example of why it's a good idea to do remote proceedings. But -- and there are times when it's not the

right thing to do. But I think it should be something that we have access to. And I think this 21d rule is a real good rule, and I plan to vote for it if you give me a chance to vote for it.

CHAIRMAN BABCOCK: Okay. Want to vote for it?

HONORABLE ROBERT SCHAFFER: Aye.

CHAIRMAN BABCOCK: All right. Professor Hoffman, you had your hand up, but then maybe came down. No? Okay.

Anybody -- yeah. Tom Riney is making his way to the podium as we speak.

MR. RINEY: Thank you. I don't want to repeat any arguments that we've heard over the last several meetings, but I'm sitting here thinking this afternoon and late this morning, if this were a hearing where I was representing a client in a temporary injunction which almost always involved very serious rights, I would have been moving for a mistrial. And I would hope that it would have been granted. But that's totally at the discretion of the judge under this rule.

I second what Robert said. There should be a carve-out like for jury trials for contested evidentiary proceedings without agreement of the parties. Agreement of the parties could always allow such a proceeding.

I read almost all of the letters that were

submitted. Not every one, but most of the them, and I read Judge Ferguson's letter. It occurred to me that most of the arguments being put forth with those are with respect to certain types of cases, certain types of nonevidentiary matters, certain types of CPS cases, family law matters and so forth. I would admit that I'm a little territorial. I don't know much about those types of cases and can't speak to them. But I do know on the ordinary civil case or civil case that doesn't involve those matters, there's almost uniform opposition to the lawyers involved.

We talked about the letter that was submitted by six different trial lawyer organizations in Texas. I think we have to give some account to that as well, in determining whether or not we want to give a trial judge total discretion to conduct contested evidentiary hearings using technology like we've seen today.

Let me also suggest that outside of the major metropolitan areas, what courts have the extra -- on technology and the staff available that we've seen here today. There were five technicians over here at one time. That's not the case in the average courthouse.

So I think Kent Sullivan's comments about we need to have some minimum standard procedures before we launch off and make this very major change in our -- the way we have proceedings, absent agreement. I think everyone here

agrees, there's certain proceedings that are very efficiently conducted by Zoom. But we need to at least have a carve-out at this period of time, at this type of technology for contested evidentiary proceedings. Thank you.

CHAIRMAN BABCOCK: Kent Sullivan.

COMMISSIONER SULLIVAN: I was just going to add, I agree with Tom's comments, very much so. And I thought Judge Peeples had some great points and I actually think you can, sort of, reconcile them. And, that is, I think as a general rule, there ought to be a carve-out for evidentiary hearings like is being suggested. And I think it's going to require very thoughtful consideration of the cases and situations. And Judge Peeples was illustrating some of those in his comments that would merit the use of remote hearings in, perhaps, evidentiary situations.

And I think we just are going to have to go relatively slow about that. Over time, I think you're going to see a convergence between the increase in the technological capabilities of the litigants, lawyers, and courts and the scope of what we can handle remotely. But right now, I think it's really important that we go in a really thoughtful and methodical manner in terms of adding those sorts of proceedings to the list.

And I don't think it should be just left up to the discretion of every individual judge. We've got an

extraordinary number of judges in Texas. I think they're very different in terms of their outlook, their experience, their capabilities. I think that's a real problem. I don't think that model works. Thank you.

CHAIRMAN BABCOCK: Thank you, Kent.

Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, yes, first of all, I would like to say, for those courts that don't have remote technology, this doesn't mandate it, right? And if somebody said if the judge did an in-person hearing and somebody said, Well, I want remote, and the court says, Well, sorry, we just don't have good technology here for remote, then, you know, that's good cause to deny his request to appear remotely. So I think the technology is kind of a red herring.

And while I do understand the concept and I know lawyers always think it's better if everybody agrees to everything, I echo what others have said about how that often doesn't happen. And let's examine that temporary injunction hearing, right? And maybe your witnesses are out of town. And maybe you have one witness that the only thing that they're going to do is prove up receipt of something.

Now, you know, are we going to scuttle the entire procedure by mandating that that witness has to come in person because, you know, I'm not agreeing. That's the

kind of call that, you know, people need their advocacy skills for. You know, I need to call this person remotely, please let me do it in the context of this situation.

So I think we've done an elegant solution. My subcommittees have worked really hard on it, and I hope you-all like it. Thank you.

CHAIRMAN BABCOCK: Alistair.

MR. DAWSON: So I would just point out that in the factors that are set forth in the comment, the Court can consider the complexity of the hearing, the complexity of the evidence that's going to be submitted. Those are factors that are included in the comment. And so the trial judge has the ability to, you know, consider the complexity of the hearing and complexity of the evidence that's going to be submitted at the hearing and make a determination whether remote proceedings are appropriate or not. And so that's a better way of handling it on a case-by-case basis rather than having an entire carve-out for any contested evidentiary hearing, in my opinion.

CHAIRMAN BABCOCK: Thanks, Alistair.

Here comes Judge Miskel, watch out.

HONORABLE EMILY MISKEL: I don't want to beat a dead horse. I know we've discussed this at length for three days now. What we've seen in the data reported by the National Center for State Courts, the Texas Access to Justice

Commission, the anecdotes from judges, all of it says that for cases where individuals are the clients, there are substantial increases in access to courts. And the loudest opposition that we hear relates to civil cases on the jury docket.

And so one thing I would shift away from our language today, we're treating this like this is some sort of hypothetical, theoretical, potential new thing that we can't predict when, in reality, each one of us has done thousands of these over the past two and a half years. So for every person that's saying, Well, I don't know how this can work -- I mean, we have millions of hours of examples of it working over the past two and a half years.

So what I would say is when we limit it to nonevidentiary, I wouldn't set a case on my docket for a nonevidentiary hearing. It doesn't -- people don't need to be in court unless we're taking evidence. So all I do all day is evidentiary hearings. And I totally agree with the judge that says -- oh, somebody -- I wrote down, quote, full-blown trial. A full-blown trial could be ten minutes to admit a paystub into evidence, ask the guy about overtime and apply a formula that's in the Family Code. And that person may work out of state or whatever it is. So to be prohibited from allowing that person to do that paystub calculation remotely if the other side prefers to have a default is

unjust to me.

I am passionate about this not because I like technology for the sake of technology, but because I've seen the faces of all the same people that we've heard about from the Access to Justice Commission, and I want them to continue to be included. I believe our Texas courts are for all Texans, and I think this COVID crisis has really shown us all the people we were excluding.

So I think the rule is great the way it is. If the thorn in everyone's side is civil cases set on the jury docket and you want remote appearances to be by agreement only in those cases, those aren't the injustices we're trying to prevent anyway. So if the rule is going to sink or swim on the opposition of people concerned about civil jury cases, then I would propose an exception for if your case is a civil case set on the jury docket; then remote appearances can be by agreement only as long as we can continue to do remote appearances for CPS cases, family cases, probate cases, self-represented litigants, all the people who don't do well in person.

So I, number one, propose that we approve the rule as is. If the vote happens and that fails, I would propose an exception for civil cases set on the jury docket; those can be by agreement only.

CHAIRMAN BABCOCK: Hang on for a second. What

about -- what about the argument that Tom makes about injunctions. The petitioner, the movant is trying to take away somebody's liberty, you know, their ability to move, see their kids or use their land or, you know -- what about that?

HONORABLE EMILY MISKEL: Yeah, so, I mean, injunctions are what we do in family law most of all. I mean, we have temporary injunctions in, you know, the majority of cases that we do. On my docket every day I set three final trials, I set three temporary injunction hearings, and I set up to three family violence protective orders. So each and every day of my life, that's what I'm doing.

And the alternative is to shut the door to those people that want to appear remotely. So it's like what if -- so you're trying to take someone's kids away, what if she's home with the toddlers and doesn't have a car, but says I can participate in my hearing about my kids by Zoom? You're going to say, No, it has to be by agreement only. You think the abusive husband is going to say, Sure, I agree to her participating remotely? Or do you think it's, Good news, I can close the doors to the courthouse to her?

So I think the judges are in the best position to evaluate all those factors that we listed, evaluate game playing, evaluate the sophistication of the parties, evaluate the complexity of the hearing, the technology of the court,

it's going to be different region to region, county to county. And I think the people on the front lines for the case are the ones who can best spot that type of inappropriate game playing that doesn't advance justice.

CHAIRMAN BABCOCK: Okay. Thank you.

Judge Mendoza, your hand is up.

HONORABLE MARIA SALAS MENDOZA: Good afternoon, everyone. The danger of following Judge Miskel. I want to say at every meeting she says exactly what I want to say. Written in my notes that a couple of people have said that we need to go slow. And I wanted to say, we have been doing this for over two years. We have been having evidentiary contested hearings for over two years. And I want to add, that I don't do family, so I know that's been busy, but those judges work really hard and they handle trials all the time, adjudicate, credibility. They're making disputed decisions all the time.

But I wanted to add that I'm even doing it in the criminal context. We have to have contested revocations if nothing else is holding a defendant in custody, we have to have evidentiary hearings. And that's essentially a trial in a revocation. And the only way that's happened over the last two years has been by remote appearance. And that includes inmates from the jail. So we would not be going fast, we would be going backwards if we don't move forward with these

rules because we have been doing this.

And I want to add that on those civil jury trials, if there needs to be a carve-out, I will tell you that takes care of itself as well. In the last month, I have tried two med mal cases and each one, the parties wanted to have their experts appear remotely. And they were able to question and cross-examine, and it wasn't perfect. By the way, I almost Zoomed off because it was so frustrating this morning. But this is so important, so I stayed on.

And I want to share with y'all, that we do have these problems. We do have technology problems, but it is a red herring. Because you figure it out and you move on. And in both trials, we had some -- the last one was an expert at Berkeley, and he was having trouble with his WiFi. So we had him log off and log back in. But the lawyers had no problem and it was their preference. Again, that's by agreement.

But I actually think that the civil lawyers want remote appearances too. And in my two -- last two med mal trials, that's what they did. If given the opportunity, I would vote for this very elegant, very thoughtful rule. We've -- I think the committee has done a lot of work on it and I would support it

CHAIRMAN BABCOCK: Thanks, Judge. Levi Benton.

HONORABLE LEVI BENTON: First, I intend to vote yes on this rule, I think it's a great rule. But I wish there were a tweak. And the tweak I would like to see was language giving the court discretion to assess travel costs and inconvenience where, say, someone insists on having a witness appear in person when it's really calculated just to harass. And after everything is all over, it's clear such witness didn't need to be there in person. And, anyway, that's all I got to say. I'm voting yes given the chance to vote.

CHAIRMAN BABCOCK: Thanks, Levi.

John.

MR. WARREN: Okay, everybody. Remote proceedings will not work unless we put them in place and define how we need to make them work. Build the parameters around them, but we have to have them in place. That's the only way we're going to figure it out. We don't want three years from now for anyone to say did we not learn anything from the pandemic. Those three years that everybody has been talking about is about how we make justice continue, how do we put remote proceedings in place so that we can continue with it. That's the work that we have to do. We have to make the tough decisions. Put remote proceedings in place. Figure out how to work around those little things we need to fix in order for it to be a perfect or close-to-perfect

system. Thank you, sir.

CHAIRMAN BABCOCK: Thanks, John.

All right. Any other comments in the room? I see no hands up online. So several people have been thirsting for a vote. I'm not sure what we're going to vote on if we do vote. There have been a couple of suggestions that you-all have thought were good ones.

MS. HOBBS: I think if I were the chair, the vote seems to be -- there seems to be this group of people who may want to remove -- carve-out contested evidentiary hearings. And I bet that's -- I bet we'll get a good sense --

CHAIRMAN BABCOCK: That's a fair point.

I don't know if you heard that online. But there -- Lisa suggested that we frame a vote around the issue of whether or not there should be a carve-out for contested evidentiary proceedings. And Kennon is going to make an amendment to that suggestion.

MS. WOOTEN: I just want to add that I think where things stand right now, I think a good suggestion is that we would have a factor for good cause in the comments addressing contested evidence and credibility determinations. So this is a vote from my perspective that's taken with that comment being in place.

CHAIRMAN BABCOCK: Yeah. That's what I was

alluding to when I said there was suggestions that you-all thought were appropriate.

MS. WOOTEN: Yes.

CHAIRMAN BABCOCK: Yeah, Harvey.

HONORABLE HARVEY BROWN: Just procedurally, we're voting only on the evidentiary hearing, not the jury trial issue for now. We might vote on one quicker than the other.

HONORABLE EMILY MISKEL: Jury is off.

HONORABLE HARVEY BROWN: Jury is off. I just wanted to make sure about that.

CHAIRMAN BABCOCK: We're not voting on jury trial. We did carve that out and we did vote on it and we did talk about it a lot. So now this would be --

HONORABLE ANA ESTEVEZ: I just want to clarify it, too. I just want to make sure that what I would be voting for is whether or not the judge still gets any discretion. You're saying at that point the court has no discretion to make it remote.

CHAIRMAN BABCOCK: Judge Estevez wants clarification on what we're voting on. And she suggests that the vote will include the concept that absent an agreement by the parties, the judge does not have discretion to order a remote proceeding when it involves contested evidentiary matters. Is that --

HONORABLE ANA ESTEVEZ: I just wanted it clarified. I don't want that.

CHAIRMAN BABCOCK: No, no, no. You want that clarified. That's the vote. That's what we're voting on. Is that what everybody agrees we're voting on?

MS. WOOTEN: Yes.

CHAIRMAN BABCOCK: Okay. So everybody that is in favor of a carve-out in these rules, similar to the jury carve-out, for contested evidentiary matters, raise your hand.

(Voting.)

CHAIRMAN BABCOCK: Everybody online?

(Voting.)

CHAIRMAN BABCOCK: Shiva, how many did you get?

MS. ZAMEN: I have five.

CHAIRMAN BABCOCK: All right. Everybody opposed?

(Voting.)

CHAIRMAN BABCOCK: Online?

MS. ZAMEN: Nine.

CHAIRMAN BABCOCK: All right. So opposed were 23; in favor, 14, the chair not voting. So that carve-out will be carved out.

MR. PERDUE: I heard a slightly different

iteration of the concept by Judge Miskel, as I heard it -- was some idea that if you're on a civil jury docket, that a contested evidentiary hearing -- as opposed to our special accommodations for the family lawyers, which is a historical fact of this committee.

CHAIRMAN BABCOCK: Jim Perdue is raising the point that Judge Miskel raised another point that is inconsistent with what we just voted on?

HONORABLE EMILY MISKEL: I said I only want that if I lose the vote.

CHAIRMAN BABCOCK: Yeah, it's -- this is Tinker, Tailor, Soldier, Spy stuff.

MR. PERDUE: Given that my amendment was acceptable to the author, I'm in a pretty good -- I pull that down, Chip.

CHAIRMAN BABCOCK: All right. I guess there's going to be no more discussion about that. So I think we've probably beaten this horse today.

Judge Peeples.

HONORABLE DAVID PEEPLES: I voted in favor of the rule as is and against that motion, but I am sympathetic to the arguments in favor of -- I don't know. Let me say it this way. There are lots of venues in this state where that discretion will not be exercised correctly. And so I -- I'm not so concerned about the family law cases, but what Tom

Riney and others said, stuff about injunctions and serious nonjury matters that are evidentiary, we've just allowed judges to ram down their throats a remote hearing. And sometimes that'll be the right thing to do, but sometimes it won't.

And I just think that before the court adopts this, hopefully they'll come up with some way to let judges know that there are lots of nonjury matters that are serious and ought to be done in person. I don't know. If you can give people the right to object and give judges the right to do this, it can be abused, and I'm concerned about that. But I think the vote is correct, just wanted to say that.

CHAIRMAN BABCOCK: No, that's helpful. Thank you Mr. Mandamus.

MS. WOOTEN: Yes. Just to get that point. I think that a comment made earlier today is worth repeating now. And that is that when we're drafting the rules, I think we draft them with a qualified judiciary in mind. And with the understanding that some judges are not going to do what they should, but that's part of the reason why this rule has built into it a mechanism for mandamus when that's needed.

CHAIRMAN BABCOCK: Great. Now, Judge Salas-Mendoza.

HONORABLE MARIA SALAS MENDOZA: So I wanted to add that I am very proud of the El Paso judiciary, as Justice

Hecht mentioned, again, still not a backlog. But I want to say that even within local, you know, judiciary, you're aware that not all judges are the same and that not everyone has the same rules. So I just want to share and also put on the record that what we're doing locally is trying to make sure that we're taking care of the bar so that if you have judges that are completely in person and you have other judges that are using remote, that we're trying to figure out our scheduling so that lawyers have the ability to make all of those hearings and be where they need to be to include having Zoom rooms. And we're doing that by floors.

And so there are ways that not just the qualified judiciary, but that a thoughtful and empathetic judiciary can take care of the bar. We know the concerns and we understand that not all judges are the same. But I think what we're recommending provides the necessary flexibility for the judiciary to take advantage of remote appearances and to increase access to justice when we can. But, also, we are aware that we need to take care of the litigants that come before us and that we are not all the same.

So I think those are things that, you know, y'all need to take -- may not exist everywhere, but I know a lot of other counsels are aware of how it's difficult for the bar and litigants when the judiciary is not on the same page. And there are ways to address that.

CHAIRMAN BABCOCK: Thank you, Judge.

Any other comments? Seeing none. We will -- we will turn to the always exciting Rule 76a. And here comes Richard Orsinger who will trace the roots of 76a back to biblical times. He's bringing a chair.

HONORABLE ANA ESTEVEZ: He wants me to come up there with him.

CHAIRMAN BABCOCK: I was going to say, is that for the lion or what?

MR. ORSINGER: All right. Thank you. Well, this has been a long time coming, it's been exciting. I feel a great deal of responsibility for reevaluating Rule 76A since it was adopted in 1990 the first time. At the time it was adopted, it was a standout in the whole country and to many -- many aspects, still a standout in the entire country.

Chip is right, I have done a deep dive into the history. My short article about it is appearing in the litigation magazine that Professor Lonny Hoffman is editor of. So you can look at that when it comes out; it should be out shortly.

How do we address this complex topic with so many diverse opinions? And one of the advantages we have is there are a number of people or several people who have been very involved in thinking about Rule 76a and what's good about it and what's bad about it, and then volunteered to

help our committee even though they weren't -- our subcommittee even though they weren't assigned.

And so the first thing I want to do is give recognition. And my first recognition is going to be my co-chair Judge Ana Estevez who, in addition to raising a child and running a district bench with federal -- I mean, with civil and criminal jurisdiction and also running the 9th administrative district for the State of Texas and all of her other activities and committees and what-not, has been instrumental in helping us to get to a final product to bring to this meeting today. And, Ana, I want to thank you very much for your assistance.

The other special mention I want to make is Steve Yelenosky. Not a member of the committee, but he came to the first committee meeting with his own version of a new Rule 76A. And since that time, has worked tirelessly with us to modify this rule in a way that would be presentable here at the meeting for discussion. Steve's rule was pretty radically -- from my perspective -- on one extreme of the perspectives about this issue. And he has, nonetheless, worked with us tirelessly to craft a rule that represents, if possible, a consensus view of what the subcommittee discussions were. And so I want to thank Steve personally and Steve will be online here and we're going to have him participating.

Now to facilitate today's discussion, we have three things that you can look at. One is the committee memo, one is a side-by-side comparison of the new rule and the old, and one is a redline of the literal changes that the subcommittee is proposing from the existing Rule 76a to the new Rule 76a.

And I want to publicly acknowledge that Ana Estevez drafted the first draft and continued in the revisions of both the memorandum and the side-by-side comparisons. So, Ana, thank you so much for helping us get that done. And then Steve has been responsible for keeping up the redline changes with all of the different discussions and emails and things that we've documented. Steve, thank you, again, for that.

My proposal about the best way to address the discussion today is to use a memorandum as background material and to keep the side-by-side comparison and the redline rule out in front of you so you can see what we're discussing when it comes to specific language.

Now, the first thing to do before we dive into specifics, I think, is a few general observations. One of the deficiencies, from my perspective and perhaps others, under the existing Rule 76a is that it's possible for a party who has possession of confidential or private information of another party to file it without advance notice to the other

party. And if that happens to your client, then all you can do is race to the courthouse and ask for a temporary sealing order to seal it until there can be a hearing on whether that information should be -- should remain in public view.

And what has happened with that procedure is it allows one individual litigant to make the decision whether information should be filed unsealed or not. And if the case is closely watched by the press or others, they can see that information before the judge has an opportunity to exercise his or her discretion under Rule 76a.

So one of the things that we would like to do, or at least I would like to do, in this proposed rule change is to eliminate the unilateral ability of one party to file someone else's confidential information without prior judicial review. And the vehicle for that change is a notice of intent to file information under seal or not under seal, and we have a certain category for when that occurs. But the idea, I think, arose not so much in the federal district system where each local district has their own rules, but in the -- the -- gosh, Robert, help me here, it was the -- Sedona Conference proposal which I think you sent me a copy of initially. They proposed that before certain kinds of information would be filed, you have to give notice to the other side.

Now, their concern was not breach of privacy

without judicial oversight. Their concern was that the party who was required to file notice of intent was -- maybe didn't even want the information sealed. And so the burden was on the wrong person. The burden was maybe on someone that didn't want the sealing at all to prove that sealing would be valid. But the idea of giving advance notice makes a lot of sense from the standpoint of preserving the judge's role to decide ultimately whether the public will see certain information or not.

So we've woven into this proposed rule a requirement of advance notice to -- of intent to file confidential information. And then we're going to have to agree on what is confidential.

The second is when 76a was adopted in the public comment -- which was mostly in the form of letters, but also two meetings as well as an unprecedented hearing in the Texas Supreme Court where justices asked individual questions of witnesses who came forward to talk to the Court about the adoption of Rule 76a -- there was very little serious evaluation of privacy claims. It wasn't ignored because in the dissent to the adoption of Rule 76a as submitted, Justice Gonzales and Justice Hecht both noted that there was not a sufficient consideration given to privacy interests.

And as we have moved along with technology

since 1990, what used to maybe be called practical obscurity, that you filed a document in the courthouse and somebody from India would have to get on an airplane and fly all the way here to look at it; well, not so anymore. To the extent this information is on the Internet, it becomes available to the world. And it can be misused. It can be used for political purposes, can be used for military purposes. Just all kinds of possibilities that exist today that didn't exist then.

I think there's also more of an awareness of the right of individuals to privacy, to have their private information remain within confined circles. And the mere fact that someone is sued in court should not mean that their tax returns or their psychological therapy records should become public to the entire world.

So I think in today's environment it makes more sense for us to engage in a balancing of the public's right to know, so to speak, against an individual or a party's right to privacy. And the right to privacy is recognized by the U.S. Supreme Court and the Texas Supreme Court. So there is a balancing that's introduced into the rule now in this proposal that is going to weigh privacy rights against the public's right to know.

Now, since Rule 76a was adopted in 1990, the Texas legislature has stepped in and so far as tracings are concerned, and they have given us a statutory mandate. So

Rule 76a was, if you will, curtailed as it applied to the litigation of trade secrets.

The question then becomes, are there other areas in which privacy rights, whether they're defined by intellectual property or whether they're defined by the 14th Amendment or 4th Amendment or whatever. So we will see that in this proposed rule that thought process of privacy rights, however they may be defined, against the public's right to know is now back, part of the discussion.

The next thing is while Rule 76a was probably ignored largely by the agreement between the parties to enter into a confidentiality agreement during discovery so that documents -- the confidentiality order, as part of the discovery process itself, might define the documents can't be filed without the permission, whatever. It seems like the rule is used less than was originally envisioned because of this -- this agreement, this complicity. And I don't mean anything negative by that, but an agreement between the parties to facilitate discovery or facilitate settlement, that parties can agree that certain information produced in discovery will not be made public.

And the rule, as conceived, is that every time that there was going to be any repressing of information, there would be a hearing, there would be a public notice, there would be newspapers, a judge would evaluate it. And at

least in theory, if not so much in practice, it probably led to a lot of hearings that nobody was interested in. Nobody cared about the information, nobody was seeking it, nobody planned to appear, nobody did appear.

So we have to sit back and look at the current Rule 76a, which appears to require a hearing before documents can be sealed. And so what you are going to find in the proposed rule that in certain categories of information, we're going to say if you're in this category of information, then you give notice of sealing and nobody says they want a hearing, then you don't have to have a hearing. The judge can always evaluate the claim personally, anytime they want, at a hearing, whatever. But the idea that you have to have a hearing in every instance before information is sealed we think will lead to or has led to a lot of phantom hearings that weren't needed, nobody wanted, and the outcome didn't make any difference.

So there will be certain situations in which this proposed rule that sealing will occur unless someone requests a hearing, in which event we will have a hearing. And the notice has to go not only to litigants, but also to the public so the public can be advised that there's some people here that are saying this information is going to be filed in the court system, but not be made public. If you're interested, file a notice or a motion or intervene. And if

they do, then there can be a hearing. But absent -- in these certain categories of information, absent someone saying I want a hearing, the rule doesn't require a hearing.

Now, another important thing -- feature that was left out of the original 76a and, frankly, is left out of most, but not all of the federal district court rules, is what happens if it's confidential information of a non-party, a third party, that's in the hands of a litigant and now the opposing party has requested the production of that information. So it's not the defendant -- let's say the plaintiff wants information from the defendant. It's not the defendant's confidential information that's at risk now. It's information the defendant has that belongs to a third party.

So, for example, there might have been a nondisclosure agreement in a business transaction and there was confidentiality that was relied upon and the release of documents from, say, Party X to Party B. Now Party B is in a lawsuit with Party A and Party A wants to see all the documents that Party B has that has anything to do with anyone like X. So now all of a sudden, Party X's confidential information is at risk and they don't know.

So what we have proposed in this rule is that anytime the information of a nonparty that fits certain categories of protected information, anytime that that

information is put at risk in the lawsuit, you have to give notice to the third party that their confidential information is at risk so they have the opportunity to come into court and request a hearing and ask for privacy.

The last -- or not the last, we'll say the next change that is noteworthy, perhaps not too controversial, is the concept of re-adjudication, continuing jurisdiction. In the memo we call it res judicata. It's not really res judicata because it's not a judgment. But the idea in the original Rule 76a was you can't come back in and relitigate sealing or unsealing if you are a party to the lawsuit or you had notice of the sealing hearing and didn't come in and participate.

So this so-called res judicata concept, the idea of not relitigating, was dependent on your status as a party or a third party with knowledge of the hearing. Our proposal is to shift that to a transactional res judicata concept that if the judge has adjudicated the confidentiality or the sealing or unsealing of these records, that adjudication is binding whether you were a party or not a party or knew about the hearing; and in order for you to have another court re-evaluate the sealable nature of those records, you have to show a change in circumstances. You have to show something is different either in society or in medicine or science or whatever, but it's not just a question

of that I wasn't in the courtroom when that decision was made. If the judge has considered sealing or nonsealing of a set of records on a set of facts, that's binding on everybody and you can't relitigate that unless you can come in and show change of circumstances.

And the last thing I would like to say on my general comments is many of the things that we have talked about in this rule would apply equally to exhibits used in court, but the argument is more compelling if you use an exhibit in court than if you just file it with the district clerk. But the public policies associated with protecting information and making it -- sealing it could apply just as readily in the courtroom like it does with trade secrets. And so while it's not part of Rule 76a explicitly, because 76a is talking about documents filed with the clerk, when something is marked as an exhibit and offered in court, not with the clerk yet, it's with the court reporter, but still many of the public policies would apply.

And the Trade Secret Act makes it clear that those protections of trade secrets have to be implemented even in the courtroom. And there's even some case law on the extent to which members of the public are entitled to see exhibits that were used in open court.

So having said those comments at a general level, I want to, first of all, ask my co-chair Ana Estevez

if you would like to add some general comments.

HONORABLE ANA ESTEVEZ: No, not unless you want to -- you want to talk about the five years --

MR. ORSINGER: No, I'm talking about on -- because after this, I think we're going to get into specifics.

HONORABLE ANA ESTEVEZ: You did a good job.

MR. ORSINGER: I appreciate that. So at this point -- and we're open to comment at any stage. Let me point out that our subcommittee had very diverse perspectives on many aspects of this rule. This subcommittee product does not represent something that everyone has bought into. There are many things -- many times that there was something that I wanted to put in there that got in, there was something that I wanted in that didn't get in. There was something Judge Miskel suggested that got in and got mentioned and some that didn't.

And so, as I said in the memo, everyone on this subcommittee -- no one is bound to this. And so if you're on the subcommittee, you don't like something, criticize it. If you're not on the subcommittee and you don't like something, criticize it. But this does not represent a consensus opinion of all of our diverse positions. Because some, at least initially, were unwilling to agree that anything should be sealed. And there are

others that have certain kinds of privacy rights that they felt very strongly should be protected.

And so what we've attempted to do -- and I compliment everyone in the process about stepping outside of their own personal views and attempting to arrive at a consensus product that we could all discuss. But unlike many subcommittees, this does not -- does not deliver to the full committee as if it's supported by the subcommittee. This is our best effort to capture the most important features and put them up for discussion.

So having said that, I would suggest that we look at the side-by-side comparison, which is an easy way to see the changes and also the redlines. Steve Yelenosky, you're still with us, I hope. Because as the author of the redline, there might be lots of time where you need to step forward.

Let me just, on the redline draft, call your attention to just a few things before we get into the specific details. First I want to call your attention -- and maybe the most important one in this whole rule -- is new paragraph 3. Because new paragraph 3 defines a category of information that we say would be presumptively confidential and should be filed unsealed. What goes in that category is open to debate.

And I received just an email this afternoon

forwarded by Steve Yelenosky from a law professor that was very much objecting to paragraph 3(a)(3). We'll to get that in just a second. But the reason we like to have a category of documents that are presumptively confidential is so we can say if these records fit within this category, then they're presumed to be subject to sealing unless somebody with notice of the intent to file unsealed -- sealed documents says, I have a stake in this. I have an opinion in this. I want a judge to decide this. Let's have a hearing.

The idea then is that once we agree on what this paragraph 3 information is, it would be presumptively sealed, unless someone proves it shouldn't be, then we don't have to have a hearing for that unless someone requests that. That's the fundamental idea.

Now, inside paragraph 3 is what I was talking about, these privacy rights. And these are the ones that we listed. And some of them didn't like any of them and some of them liked three or four of them, but not all of them.

So the first category is trade secrets or other proprietary information of a party or nonparty. That ought to be the easiest one here for us to agree on because we've got a legislative indictment that tells us that we have to have certain protections for trade secrets. So I would argue the legislature has already told us that that is a category of privacy rights that a presumption of openness

shouldn't apply to.

The second category is information that is confidential under a constitutional statute or rule. That's a broad category. And we've had some criticism of what constitutes something that's confidential under a constitution. Statutes are a little bit more specific. Rules like a rule of evidence, like attorney-client privilege, doctor-patient privilege, mental health privilege, that's a rule that says that that information is confidential. We already have a public policy saying that other people can't see it. Not only other strangers in society, but other litigants in the same lawsuit with you. So we already have a public policy that's been stated in the rules regarding confidential information. So that would fit under category two.

What would fit under the constitutional right of privacy? That's broader and vaguer. But we do know we do have some case law about certain kinds of information that is within the zone of privacy, constitutional zone of privacy inside the --

Category 3, probably the most controversial one, Information subject to confidentiality agreement or protected order. Well, that's probably one of the weaknesses of Rule 76a right now is that a plaintiff and a defendant can enter into a confidentiality agreement about documents

produced in discovery. Usually it's in the form of an order. It gets submitted to the court as an agreed order and gets signed. And as a practical matter, in most instances you're going to find that it's effective in a sealing order that was never treated as a sealing order and therefore published as a sealing order. So an argument can be made that category 3 is really one of the problems with 76a and perhaps it should be eliminated.

But the trade-off against that, which was in the original debate as well as in case law after the fact, is that really facilitates discovery if the plaintiff and the defendant can agree that information that's produced is not going to be filed in court. And then they don't have to fight at the discovery stage about not revealing the information out of fear that it might be filed later and become public.

So I think a lot of people that testified and wrote letters in the initial 1990 process, as well as communication since that time, is there is a public policy in plaintiffs and defendants agreeing that if you show this to me, I promise you I won't file it with -- of record without advance notice to you. And so then maybe a lot of cases that discovery moves through with fewer hearings, the courts are not burdened, it's less expensive for the litigants. But, you know, the party that received it always has the right to

say, I'm going to give you notice. I'm going to file a motion with the court. I'm going to ask the court to unseal it. So there is, I think, a way to protect against confidentiality agreements and protection orders gutting the rule.

Category 4 is information subject to a presuit nondisclosure agreement with a nonparty. We're talking here about in a business transaction, Party X reveals confidential financial information to Party B under a nondisclosure agreement and they -- financial information, legal information, who knows. And then Party B gets in a lawsuit with Party A and the discovery request would include Party X's records in Party B's possession. So the idea is that if it's subject to a bona fide nondisclosure agreement with a nonparty that's historical, not related to the lawsuit, pre-existing, there should be a presumption that they have a right to privacy with that. And it should only be revealed if a judge determines that it should be revealed.

And the last category is an order changing the name of a person to protect that person from well-founded fear of violence, which is statutorily driven, but also in the public policy in the Family Codes and all of the stuff we're doing about family violence. So, obviously, I mean, the most obvious one is if someone has been a victim of family violence or violence from connected party, we don't

want their address and telephone number and email address and job descriptions made public because they could be easily misused.

So that is a category in which we felt like it would be safe and be appropriate. In fact, it's already been held to be determined that our public policy is to protect those kinds of potential victims from having their information revealed.

Now, in the original 76a, there is no category that's presumed to be private. It's just all presumed to be public. And the party that comes in has to show all the extraordinary things that the current rule re -- current rule contains.

So this is a big sea change here, but in my view, it's an appropriate sea change. Because there are areas in which we can agree our government system, our society recognizes privacy rights as being more important than the public's right to know. And just remember, I mean, the original debates, the plaintiffs lawyers said, You know, I have to go into court and my client has to produce all of their medical records, all their psychological records and everything else. That's true. And they have to make an election about that. But does it have to be an election to make it public or just make it available to the defendant.

What about the defendant who gets sued who

didn't want to come into court at all, but now there's an allegation that their physical or mental health contributed to harm to the plaintiff? They didn't invoke the court system; they're just defending themselves. This is information that's confidential. So the question becomes to what extent is it necessary for the plaintiff in order to pursue their suit? Because the separate question, which is, to what extent is it necessary for the public to find out about this in order to achieve due process between the two parties?

One last thing I want to say on paragraph 3(a) is that in the event of the future if there's a discussion about it, there are two kinds of presumption that Texas law recognizes. One is a presumption that vanishes in the face of contrary evidence and the other is a presumption that lasts all the way to the final fact-finding.

And if you dig into the evidence law, the presumption that vanishes in the face of contrary evidence is called -- assigns the burden of production of evidence and is called a Thayer Presumption after Professor Thayer. Professor Morgan was of a contrary view that the presumption is a burden of proof in the final finding and that doesn't disappear even in the face of contrary evidence.

So I think for some future court of appeals case, they're going to want to know is if we have this

presumption, is it a Thayer presumption or is it a Morgan presumption? And it's my suggestion that it's a Morgan presumption. We want the presumption of privacy to apply until a judge decides that the evidence supports overturning the presumption. We don't want it to just vanish because there's contrary evidence.

So we're skipping over the whole thorny question, one of the biggest fights in the original 76a process which was unfiled discovery, and we're not attempting to change that. Although some of these principles are agreeable to your perception of what we should do, maybe we could look at that. But it's been my observation that there hasn't been a terrible lot of litigation about unfiled discovery. It was something that I think terrified some of the people that were involved in the process. But -- and, Tom, you probably have a better sense than I do whether anybody has ever tried to look into your files to get information from an old case. Does that ever happen to you? Has it happened recently?

MR. RINEY: No.

MR. ORSINGER: Okay. Well, it's a matter of concern and we didn't do anything about that. That doesn't mean it shouldn't be considered, but it was hugely controversial at the time the rule was originally adopted.

So then the next point I would like to move on

to is paragraph 3(b), and this is an important thing. Once we decide that there's a category of private documents, private information, then under (b) it will automatically be sealed on request without a hearing unless somebody requests a hearing. And to be sure that everyone who is a stakeholder knows that notice has to be given to the adverse parties, to the third parties whose information is involved, and to the public that a request has been made to seal this information.

And if it fits in the category of what we would call presumptively confidential information, no hearing is required unless someone asks for one. And that's in order to avoid these phantom hearings that nobody really wants, that nobody really cares about, but the judge has to conduct anyway because the rule is written in such a way that you have to have a hearing before you can seal.

So if we have a good definition of where the information is protected by presumption of privacy, then we have a workable (b) that unless somebody within 14 days of notice files a request for a hearing, it's going to automatically be sealed, subject always to someone filing a motion to unseal.

The next point is -- paragraph 4 is the notice of intent to file confidential information unsealed. Once we have a definition of confidential information, paragraph 3 information, and a party was to put it in the public record,

they have to give notice before they file that they're going to do that. And when that notice is given, then the other parties, whoever has their information at stake, has the opportunity to come into court and request that the court order that it be sealed.

Paragraph 6 is the notice to third parties. I talked to you about the people who are not litigants, but whose confidential information is about to be filed unsealed.

Paragraph 9 on order beefs up the specificity requirement that exists under current Rule 76a so that the court is more literally describing what information is being sealed. And there's an option of redacting paragraph numbers or sentences or social security numbers or whatever. But there's more of a requirement on the trial court under this proposed rule to be very specific about what part of a document you're going to seal. Because maybe one paragraph should be sealed and the rest not, but the inclination now is to seal the whole document. So we're trying to get the judges to be more specific about that.

On paragraph 10, I already mentioned this idea of continuing jurisdiction, who should be required to prove the change in circumstances when they come in later on. And our idea is that it's transactional rather than party status.

And then 13, we included a sanctions rule. Not a new sanctions rule, but a cross reference to existing

sanctions in Rule 13 or Chapter 9 or 10 of the Texas Civil Practices and Remedies Code. Because it's clear if we create this category of private information, that that can be manipulated or gamed by litigants or by lawyers. And so we want lawyers to be honest with the court and not misrepresent that certain documents fit in the category of privacy when it doesn't. And if somebody gets caught doing that, they should be punished. Not just out of a sense of vengeance, but as a deterrent to people misrepresenting to the court that we have section 3 information here, rule -- paragraph 3 information when we don't.

So the mention of the sanction is not to create a new sanction rule, but just to remind the lawyers and the judges that if this rule is misused so that it creates an injustice or sets up an injustice and the court is satisfied that Rule 13 was violated or Chapter 9 or 10, the court can consider sanctions.

So that's my high-level discussion of the specific paragraphs. Ana, do you have anything you want to say? Come up here please.

HONORABLE ANA ESTEVEZ: I just noticed a typo, so I just want to make it clear that where we had under paragraph -- comparative chart, but I did -- the one we renumbered the paragraphs. We referenced paragraph 5 A under paragraph 3B where it states after 14 days from the date of

the notice required under paragraph 5A, if you'll just take off that A. We had a 5A and a 5B and we ended up just renumbering all the paragraphs. That'll make more sense.

MR. JACKSON: If you're fixing typos, a temporary sealing order, you have two P's in paragraph.

HONORABLE ANA ESTEVEZ: Okay. Fix that too. Thank you.

MR. ORSINGER: Okay. Steve Yelenosky, are you on the line with us?

HONORABLE STEPHEN YELENOSKY: Yes. Can you hear me?

MR. ORSINGER: Yes, I can hear you quite clearly. Good. So, Steve, I think what I would like to do is to go through this proposed rule change with a highlight on the reds. And I'm happy to do it, but I would also be happy for you to do it because you are actually the author of this redline and you know some of the mental processes that went into what was done. Are you in a position where you think you could start us through the rule on a --

CHAIRMAN BABCOCK: Before you do that, we're going to take our afternoon break.

MR. ORSINGER: We have an afternoon break.

CHAIRMAN BABCOCK: So we'll be back in 15 minutes.

(Break taken from 3:17 p.m. to 3:31 p.m.)

CHAIRMAN BABCOCK: Let's go back on the record.

Before we get back into 76a, Bill Boyce prepared some alternate language called a permissive option and mandatory option from this morning. It has all been sent to everybody. You want to try to pull it up?

MS. ZAMEN: I can share the screen too.

CHAIRMAN BABCOCK: We're back on the Rule on Judicial Administration No. 10. So everybody got it pulled up?

All right. The permissive option modeled on Miscellaneous Docket 22-9053 says, As adopted to this rule, with respect to procedures under Chapters 573 and 574 of the Texas Health and Safety Code -- and I guess it's up on the screen right now -- use of forms approved by the Judicial Commission on Mental Health, it's not required, however, a court must not refuse to accept a filing simply because the applicant used the approved form, was not represented by counsel, the court should rule on a filing -- a little typo there -- without regard to nonsubstantive defects.

And then the mandatory option, which is modeled on Order No. 22-9053, as per Judge Peeples' proposal: With respect to procedures under Chapter 573, 74, a court must use forms approved by the Judicial Commission on Mental Health unless the court attains prior approval from the

presiding judge of the region to use an alternative form. A court must not refuse to use an alternate form. Must not refuse to accept a filing simply because the applicant used forms approved by the Judicial Commission on Mental Health or is not represented by counsel, the court should rule on the filing without regard to nonsubstantive defects.

Any comments on those two versions? Any questions of Bill?

We got a hand up by somebody, but I can't see it. Who's got their hand up? Justice Gray. Well, yeah, but he's here. Come on up here. This is the Price is Right, come on down.

HONORABLE TOM GRAY: It is not worth the trip. It's judges don't do filings, accept filings in this context.

CHAIRMAN BABCOCK: Judges don't do filings, they don't accept filings in this context. But this is not worth a trip for Justice Gray.

HONORABLE TOM GRAY: To the lectern.

CHAIRMAN BABCOCK: All right. But there was a remote comment. Who is it, Shiva?

MS. ZAMEN: Professor Hoffman had his hand up, but --

CHAIRMAN BABCOCK: Professor Hoffmann.

PROFESSOR HOFFMAN: That's referring -- that's

back to 76a.

MR. ORSINGER: That was left over from the 76a.

CHAIRMAN BABCOCK: Okay. So anybody -- okay. We're about to take a vote. Everybody is in favor of the permissive option, raise your hand?

MS. BABCOCK: Okay. How many online, Shiva?

MS. ZAMEN: Two.

CHAIRMAN BABCOCK: All right. Everybody in favor of mandatory? Is your hand up? Lisa, is your hand up.

MS. HOBBS: I walked in and I didn't realize there were two things. I was just focused on the second one.

HONORABLE ANA ESTEVEZ: I don't know what the question is either.

HONORABLE EMILY MISKEL: Can you clarify what we're voting on?

CHAIRMAN BABCOCK: We're voting on the one called mandatory option. The one that says mandatory option. That's what we're voting on now.

HONORABLE ANA ESTEVEZ: I thought we already voted on this.

CHAIRMAN BABCOCK: All right. People want to start over. So now we're voting on permissive option, so that's -- if you're in favor of permissive option, not

mandatory option, raise your hand. Permissive option, hands.

HONORABLE EMILY MISKEL: So permissive option means the judge can't reject it, but the party can use whatever form they want?

CHAIRMAN BABCOCK: It means what it says in that.

HONORABLE ANA ESTEVEZ: Is it the same vote we already took?

(Voting.)

CHAIRMAN BABCOCK: How many online?

MS. ZAMEN: Six.

CHAIRMAN BABCOCK: All right. Mandatory?

(Voting.)

CHAIRMAN BABCOCK: How many online?

MS. ZAMEN: One.

CHAIRMAN BABCOCK: All right. 18 to 2, permissive prevails in an upset. Chair not voting. All right. Let's go back to Judge Yelenosky. And, Richard, let me suggestion something. Rather than have Judge Yelenosky go through every redline, shouldn't we break it down -- sorry. Rather than have Judge Yelenosky go through every redline of the whole rule, shouldn't we break it down by here's the redline in one, discuss that. Here's the redline in two, discuss that.

MR. ORSINGER: Oh, yeah, I think we should do it one at a time because you may want to think about it.

CHAIRMAN BABCOCK: That's what I was thinking.

MR. ORSINGER: Okay. Steve, are you there?

HONORABLE YELENOSKY: Yeah.

MR. ORSINGER: Very good. So the first paragraph is the standard for sealing court orders which only has a small change. Stephen, explain it.

HONORABLE YELENOSKY: Well, the small change -- the big change is reference to 3(a), right? So that links it to 3(a) and that's why it's "except as provided below." Because 3(a) has a different presumption. And so this standard for sealing court records is the traditional openness and the standard under the proposed 3 is presumption of confidentiality. So that just links it to that.

The only other thing I'll note there is that we're using the word "information" carefully as well as the word "document" with the understanding that sealing may be information within a document. And that's important -- often ignored, I think, when orders are signed. But it's important to distinguish a document from information within it that might be a very small part of the document.

MR. ORSINGER: So, Stephen, it says -- the old rule says, No court order or opinion issued in the

adjudication of a case may be sealed, and then we've introduced an exception as provided below. Can you give us a preview, what's excepted?

HONORABLE STEPHEN YELENOSKY: Well, that's the 3(a) that you went over very well, I think you covered very well initially.

MR. ORSINGER: Is there not at least one instance in which there's a statute that requires that a judgment or order be unsealed?

HONORABLE STEPHEN YELENOSKY: Oh, yeah.

MR. ORSINGER: So we can't have an unqualified ban against sealing all orders because there's some statutes that require it, right?

MS. HOBBS: Well, you've listed one. So I don't know if you caught them all, but you listed one.

MR. ORSINGER: Okay. So at least we're recognizing now that there are instances in which an order can be sealed. So then go on to No. 2, court records are, A, all documents of any nature filed or sought to be sealed before filing. So we have to have that because of our notice of intent to file sealed documents, right?

HONORABLE STEPHEN YELENOSKY: Well, forever lawyers have, I think, properly -- and judges have said, well, you don't have to file the document unsealed in order to fall under 76a. That would be counterproductive, to say

the least. So it's always been interpreted to mean sought to be sealed. There's a motion to seal a document; it's not filed -- the document's not filed, the motion is presented, et cetera, et cetera. And then it's either sealed or not before it's filed. And if the sealing order is disallowed, then the question -- there's a question about addressing here in which is, well, can the lawyer then just withdraw the motion to seal and not file it? But that's not addressed here. But the reason for sought to be sealed is for that.

MS. ORSINGER: Okay. Kennon Wooten is going to come up here.

MS. WOOTEN: I was just wondering if it would be a little clearer if we said, Or sought to be filed under seal.

HONORABLE STEPHEN YELENOSKY: I don't have a strong reaction to that.

MR. ORSINGER: We're going to make a note of that.

Now, subdivision two has court records and then it has four exceptions. One and two existed before, we've added "court orders required to be sealed by statute" to recognize that once something is defined to be a court order, then it's in play. But there's some statutes that will never be in play no matter what. So we're going to exclude them from the definition of court records.

HONORABLE STEPHEN YELENOSKY: And I guess I missed that one up at the top. And that's also where an exception exists for orders.

MR. ORSINGER: So now paragraph three.

CHAIRMAN BABCOCK: Well, before you leave --

MR. ORSINGER: Chip has a comment.

CHAIRMAN BABCOCK: Sorry. I -- normally I don't get involved in these things substantively.

MR. ORSINGER: But you're a first amendment lawyer, Chip.

CHAIRMAN BABCOCK: But I happen to know something about these.

MR. ORSINGER: Maybe you ought to just take over the whole presentation.

CHAIRMAN BABCOCK: No, I don't think I should. But I appear to be fuzzy for some reason. You said that you-all didn't take on 2(c) which is discovery not filed of record. And to me that paragraph which, as you said, was controversial, but at the time -- and Chief Justice Hecht will, I think, confirm this, none of the interest groups other than Justice Doggett and perhaps plaintiffs groups, but I don't think so, certainly not the press groups, were advocating this. And it got put in here nevertheless. And it has led, in my opinion, to most of the mischief in this rule, if not all of it.

MR. ORSINGER: Well, Chip, let me say that having reviewed the historical record, I agree with you totally. And not only that, but this came in on the third day of the committee meeting where less than half of the committee was there and barely more than half of the people that were present voted in favor of it. And Luther Soules, who was chair of the committee, wrote a letter to the Supreme Court objecting to the way that that occurred and then the relative change in the discovery rules about confidentiality agreements. So it was hugely controversial.

I would also say in addition to Justice Doggett, there was also a contingent of plaintiffs' lawyers that wanted to make discovery on products liability available to other plaintiffs' lawyers. And their justification was, I spent $300,000 finding out about this defective part from General Motors and it's the same car that's involved in this lawsuit, why should they have to spend $300,000 doing the same discovery? So they wanted the discovery to be saved.

And then some defense lawyers wrote letters into the record after the fact saying that they were creating a secondary market for the sale of discovery information for a fee. And so it was hugely controversial. And perhaps we should look at it.

CHAIRMAN BABCOCK: Yeah. And I think we should because by keeping this in here, it leads to the

problems that you will find in 3(a)(1), and it leads to the problem that you find in 3(a)(3). Because, as you say, these protective orders that are often, if not routinely, entered are basically sealing orders in disguise.

MR. ORSINGER: Right.

CHAIRMAN BABCOCK: But if unfiled discovery is taken out of the rule, then there's nothing wrong with them because unfiled discovery -- you know, the court can handle it -- the parties can handle it as they wish. But, really, technically, every time you do one of these, you know, protective orders by agreement, you are -- you arguably are violating 76a, which is not a good thing. But you don't -- you don't want parties to be able to, by agreement, go to a judge and say we want -- we want to protect things that are already in the record, that's what led to this whole thing.

There's a case involving a psychiatrist who was alleged to be having sex with his patients and causing all sorts of harm. And the psychiatrist, through his counsel, was -- after the case was settled -- sealing all the pleadings, not just the records, but the pleadings in the case. And doing it by agreement and getting an order entered sealing records. And later on a newspaper got onto this psychiatrist, went to look at the court file and couldn't find it. So there was --

MR. ORSINGER: Was that the Times Herald case?

CHAIRMAN BABCOCK: Yeah. Jones versus Times Herald.

MR. ORSINGER: That was -- to my observation, that was the first sealing appeal that we had, Chip, and you were the lawyer for the Dallas Times Herald.

CHAIRMAN BABCOCK: That's right.

MR. ORSINGER: In fact, you started all this.

CHAIRMAN BABCOCK: I started this whole thing. I was not alone, however, in starting this mess. But, in any event, the unfiled discovery, you know, you sort of need something like this if you're going to have unfiled discovery. But my point is, you ought to take a hard look at unfiled discovery.

MR. ORSINGER: I think we should. But let me also say, though, Chip, that you may still want information subject to a confidentiality agreement or protective order to have a certain presumption; maybe you don't. That's maybe one of the more controversial parts of this. But in paragraph 3, we're attempting to define things that at first blush is not going to be an assumption it should be public. If there's reasons to think that it should be public, then you should come forward and prove why.

CHAIRMAN BABCOCK: That leads to another question. Have you-all found any 76a-type rules in any other jurisdiction -- principally Florida would be a comparable

jurisdiction -- where there's a presumption of confidentiality as opposed to a presumption of openness? The ones I'm familiar with do a presumption of openness and they leave it to case-by-case basis on whether something is confidential, unless the statute makes it confidential. So this would be a departure from a rule that is perhaps too open to one that is among the most closed in the states that I'm familiar with.

MR. ORSINGER: Okay. So you --

HONORABLE STEPHEN YELENOSKY: Can I speak to that a minute, Richard?

MR. ORSINGER: Go ahead.

HONORABLE STEPHEN YELENOSKY: Well, I think earlier Richard pointed out the Trade Secrets Act, which was reviewed in -- oh, gosh, what's the case? I can't -- what's that.

CHAIRMAN BABCOCK: It's reviewed in HouseCanary.

HONORABLE STEPHEN YELENOSKY: HouseCanary, yeah. And in HouseCanary it refers to -- well, it used the word "presumption" a couple of different ways. And, substantively, it refers to the Trade Secret Act sort of switching the presumption from openness to protection. It also uses the word "presumption" with respect to 76a procedure which I think is confusing in the opinion.

In any event, if you separated those two, they seem to be saying that the Trade Secret Act does, with respect to trade secrets, exactly what 3(a) would do to trade secrets and other things.

CHAIRMAN BABCOCK: Well, and other things. And by the way, TUTSA, which is the Texas Uniform Trade Secrets Act, by its terms applies to cases originally brought under the statute. It's not so broad as to apply to all trade secrets because there's lots of litigation where parties will try to hide behind trade secrets in not producing documents and get in a whole big fight. And the case has nothing to do with trade secrets; it's not brought under the act. It's just trade secrets are involved. So you've got to be careful about being too broad on something like this.

HONORABLE STEPHEN YELENOSKY: Well, I think so. And if I can just say overall -- Chip will certainly remember when my hand was up every time that Richard uttered a word about 76a. And as he said, I was either asking to speak or to go to the bathroom, one of the two, because it seemed very urgent. We've come a long way since then. Richard and I have a lot of agreement, we have a lot of disagreements, on what should be open and that kind of thing. But I realized, anyway, that something needed to be done to address all of the complaints about 76a and it being too

burdensome with the typical trade secret or proprietary matter even if it's not brought under the Trade Secrets Act.

So to me -- I'm sorry?

CHAIRMAN BABCOCK: Go ahead. I'm sorry.

HONORABLE STEPHEN YELENOSKY: I mean, to me, I mean, in terms of not the drafting, but just how I feel about it, I think there's some countervailing things that are very important in this rule regardless of what we do with 3(a). And if it's going to require something like 3(a) in order to get the rule through with some of the other changes, you know, that's a policy, and I guess, sort of, political question that I can't answer. But there seems to be a consensus or a large sense of the committee that, as I understood it, and argued against it, but it's still there, that it is too cumbersome, 76a is too cumbersome in the typical case where it's employed.

So if this is not the way we address that complaint, then I'm thinking there needs to be another way to address that complaint because my understanding, the impetus for the charge or referral to us from the Supreme Court was largely on the complaint of attorneys. Of course, I can't say that's why they did it, but subsequent to those complaints.

So my point is just that I don't support the idea of switching the presumption, but I think that there's a

sense we need to do something that would make it easier to use for these types of documents.

CHAIRMAN BABCOCK: I hear what you're saying. And at least the attorney complaints that I'm aware of stem from 2(c). But to the specific point about trade secrets, if you're trying to capture TUTSA, you're going to capture that by 3(a)(2) because TUTSA is a statute and it has its own procedures and it is outside 76a as the court --

MR. ORSINGER: Trade secrets are also confidential under the Texas Rules of Evidence, and they're not constrained by the statute.

CHAIRMAN BABCOCK: And the problem is what's a trade secret. And the problem is also what's other proprietary information. You know, we all know in discovery fights and the other side won't produce stuff because they say, oh, it's proprietary, or they want to make it attorney's eyes only. There are a whole bunch of problems that are raised in discovery, appropriately so if you've got 2(c) in the rule. But if you don't have 2(c) in the rule, then you can -- you can fix that. My opinion. Sorry.

MR. ORSINGER: Okay.

HONORABLE STEPHEN YELENOSKY: Okay.

MR. ORSINGER: So let me say the practical effect of having a paragraph 3 is two things. It recognizes a privacy right that reverses the presumption, and it also

establishes a category of information that if someone wants to file sealed, that order will be granted if, within 14 days of notice, no one has requested a hearing.

HONORABLE STEPHEN YELENOSKY: Unless --

MR. ORSINGER: Unless the court --

HONORABLE STEPHEN YELENOSKY: -- the judge says -- and hopefully judges scrutinize it enough to say, Well, you said this was a trade secret, but I've looked at it and it's not, so it's not under 3(a), what's it under? And if they say, Well, it's under 3(d) or 3, 4, and the judge says, No, it's not, then the judge is in a position to say, This is not a 3(a) case. And as the rule is drafted -- later on I think we added that sentence that says the judge says it's not 3(a), you can still go through the normal procedure and the normal presumption, which is openness.

MR. ORSINGER: So just to make it clear in the record. Even if no outsider or party files a motion to contest or seal, I think the trial judge always has the prerogative to review the documents and make the decision themselves that I don't buy that; let's have a hearing. I want more before I'm going to seal this.

So I think that's -- should be made more explicit. But, Chip, from the standpoint of what's in paragraph 3, the effect is it reverses the burden and puts the burden on the party attempting to get the unsealing to

show a probable adverse affect on general public health or safety. And we might consider adding honest government. You know, in the undisclosed discovery, it was more than just public health, it was also public honesty.

There was some -- if you look at the exception on the unfiled discovery, it says adverse of -- probable adverse affect on the general public health and safety or the administration of public office or the operation of the government. So I'm thinking back to some of the scandals that we've had here even in Texas involving -- so maybe it shouldn't just be if people are going to die. Maybe it should be if criminals are running our government, you know, we ought to have -- the public ought to have the knowledge of what they're doing.

And so, at any rate, it reverses the burden of proof, but it also creates a default, an environment in which unless someone says, I want a hearing, then you won't get a hearing.

CHAIRMAN BABCOCK: I don't want to do a little CBS Point/Counterpoint or what they do on Saturday Night Live? Anyway, think about how this is going to come up where you need a sealing order. If you take unfiled discovery out of it, then if I'm going to file a motion for summary judgment, right, and I say to my litigation opponent, Hey, I'm going to use this document and these pages from the

deposition and I want to file it in -- and that information, if it's relevant, will be used by the judge to make a determination. And the public is entitled to know what the judge bases her decision on, right? But there are countervailing arguments. So if it is something that is privacy, for example, then the other -- the litigation opponent will say, No, I don't agree to that. We're going to have to go to the judge and it's going to have to be sealed. There shouldn't be a presumption of that. It just -- it is or it isn't.

But the amount of work the judge has to do is centesimally smaller than if you just have this whole broad category without being tied to something that the public has an interest in, like a summary judgment or a motion to dismiss or a trial or some -- or an injunction hearing. You know, some -- some limited amount of information which the public would have an interest in because a judge is going to rely upon it to make her decision. So --

HONORABLE STEPHEN YELENOSKY: Can I respond to that, Richard? I agree with that. As a practical matter, I don't think what we call the presumption -- whether it's openness or otherwise, like you said, Chip, it either is or isn't something that should be protected -- and there's a lot of focus legally. I mean, the professor from Texas Tech argues, Well, you can't have a presumption of confidentiality

that's consistent with the first amendment in common law. But all that argument over what the law is as a practical matter.

I think, the bigger concern is, whether we call it a presumption of openness for anything or confidentiality, is whether the judge does his or her job and actually scrutinizes this stuff. And we can't really write that into the rule. But if people, like me, don't like the presumption of confidentiality, I don't know, really, Richard, that it's going to make a lot of difference there except that there's the provision says that, you know, if nobody -- if the judge doesn't determine that 3(a) doesn't apply and nobody asks for a hearing, then the judge shall, right, seal it. So that's a functional part of it.

But the presumption of openness, I think, is -- needs to be stated. But, either way, the real issue is are judges giving this serious attention under any -- under any standard?

MR. ORSINGER: So, Chip, my reaction to what you last said is that we don't need 3(a)(3), information subject to a confidentiality agreement or protective order if we take unfiled discovery out of the definition of court records, because unfiled discovery will not be a court record until somebody says, I want to file it. So if we take that unfiled discovery out, then we don't really need 3(a)(3).

CHAIRMAN BABCOCK: Or 1.

MR. ORSINGER: Well, you say 1, but, you know, there is a rule of evidence that makes trade secrets confidential and it's not the same as the statute and it applies in all proceedings, not just proceedings under the statute.

CHAIRMAN BABCOCK: 3(a)(2) says under constitution, statute, or rule.

MR. ORSINGER: I get your point. So 2 would subsume the rule of evidence as well as the statutory rule?

CHAIRMAN BABCOCK: Sounds like it to me.

MR. ORSINGER: Sounds like we're editing on the fly here, Chip. And that's okay with me.

CHAIRMAN BABCOCK: Who wants to do that?

MR. ORSINGER: Oh, they're coming from all sides.

CHAIRMAN BABCOCK: Now we're in trouble. He doesn't have his notebook.

MR. DAWSON: Richard, can I comment on what he just said?

MR. ORSINGER: Yes.

MR. DAWSON: Let me begin by saying I like these changes. And let me also say that from a practitioner's standpoint, 76a is a major pain to try and comply with, and I'm not sure that it does much good. You

know, every time -- we produce documents in cases all the time that are confidential to the producing party that the public could care less about. There's no public interest in those documents. You know, how the client goes about doing certain things or other confidential information and that ought not to be made public because it can be obtained by competitors, can be obtained by others.

And we need to be able to file that with the court and have it protected from being a public document without having to go through 76a. And if your newspaper, Chip, if it finds a motion and there's documents in there that it thinks that it wants to get that are filed under seal -- and I want to come back to that in a moment -- you have the ability to intervene and try to get it unsealed and argue that it should be made public. So I think you do need 3(a)(1) and (3).

I would also point out that in almost every confidentiality agreement or protective order, there's a provision for the receiving party to challenge any confidentiality designation. So if I produce documents to Chip and I mark everything that's confidential under the protective order, Chip has the ability to go to court and say all this stuff should not be confidential. It doesn't qualify as confidential. And if he wins, then it's then not subject to the protection of the protective order of the

confidentiality. So plaintiff lawyers, if they think it's, you know, information that is inappropriately designated, they can challenge that designation.

Let me also point out something, Richard, that I think you should take into consideration. And that is, it's been my experience that many clerks in courts across Texas don't know how to seal documents. And so if I file a motion for summary judgment and I say to the clerk, I'm filing documents that need to be sealed, they just -- they don't know how to do it.

HONORABLE STEPHEN YELENOSKY: Well, that's a -- yes, that's an issue. There are a lot of practical issues, but it doesn't really pertain to the rule, I don't think.

MR. DAWSON: Well, I was going to suggest -- here's how we normally do it and I was going to suggest this as you-all may include this. So what we normally do is, say, that documents that are marked confidential that need to be filed with the court are filed in camera. And so -- and there's a problem with that because you're circumventing Rule 76a; I get that. But you-all, I think, should address in your proposed rule how it is you file documents that are covered by 3(a), how are you going to file those with the court if they need to be filed with the court? Give us a suggestion so that we can get everybody in compliance with

76a.

MR. ORSINGER: With regard to that last comment, Alistair, there's -- in the federal system, you can file confidential. And I know Judge Estevez' system in her district allows you to file confidential, and they use it frequently in criminal matters so that it can be electronically accessed by the judge and not others. And I know that Judge Miskel said here during in the recent break, am I not right, that in Collin County there's a way to electronically seal something so that only the court sees it and the public doesn't.

HONORABLE EMILY MISKEL: Technologically, yes. The district clerks will not accept documents filed under seal.

MR. ORSINGER: Okay. So, technically, they can do it, but the district clerk won't accept documents filed electronically. But in Bexar County --

CHAIRMAN BABCOCK: Under seal.

MR. ORSINGER: Under seal. Under seal, I'm sorry. In Bexar County we're told that you have to file in paper form if you want it to be sealed. They just can't -- and it's my understanding that the general statewide electronic filing system doesn't permit you to designate something. So right now, it's just a primitive hand delivery in the envelope with duct tape is the way you file sealed in

Texas. And until we have a uniform, more sophisticated system like the feds, I think that's what we have to do.

HONORABLE STEPHEN YELENOSKY: Richard, can I respond to the point you made about where we don't -- you know, now I'm just following what I think is the logic here since I've already said, you know, it isn't something that I would choose. But the logic that I see of (3) -- (a)(3) is that if there is a confident -- a protective order, right, and then later on the parties -- well, the parties agree, let's say, to the protective order confidentiality on the discovery. And then later on one of them wants to file it, do they get the presumption or not when they go to the court?

So the way it's written here, they would even without the discovery provision in 2(c), they might want to file it. And does the fact that it was a -- it was under a confidentiality agreement flip the presumption? That's what I thought you were doing with 3, not -- it's discovery, yes. But what you would do under 3 is not just 2(c). It's filing something that has been under a confidentiality agreement, and does that give it some leg up on the presumption or switch the presumption when you go to court?

That, of course, would open it to attorneys agreeing to things that they shouldn't agree to as -- just as so they can get this advantage because the attorneys often agree they want to seal it. Of course, then, you know, that

then relies on the judge under (b) to say, well, no, you all agreed that this was subject to a confidentiality order or protective order, but that was just a sham.

MR. ORSINGER: Well, the historical record in the 1990s was that -- and the ability of the parties to agree that documents produced voluntarily in discovery would not be filed because of a confidentiality agreement, which was frequently a confidentiality order, in fact allowed the courts to avoid a lot of hearings over discoverability of certain things. In other words, people were motivated to fight discovery if they were afraid that once the document was turned over, it could be filed unsealed. And so it eliminated a lot of discovery fights.

And there were people that talked to the Supreme Court in its public session as well as in the committees and letters that there's a bona fide reason why our system might decide to defer those discovery fights from every instance to just those instances in which someone wants to file some discovery of record.

So there is a salutary -- yeah, that was Chip's point. Okay. So, Judge Miskel, I don't know if you wanted to talk and gave up, but, please -- oh, I'm sorry, Robert.

MR. LEVY: That's all right.

HONORABLE EMILY MISKEL: I have a super short

analysis and not substantive. Sorry, I'm cutting in line because mine is super short and not substantive. I wanted to clarify the previous question about district clerk accepting documents under seal. And if there's an order signed, the district clerk will accept documents under seal. They do have to be hand delivered, they can't be E-filed. But without an order, you can't just, on your own, submit documents under seal is my understanding. So if I misspoke before, that's it.

CHAIRMAN BABCOCK: At last. At last.

MR. LEVY: Well, I wanted to respond to Chip's comments. I do agree with you about the issue in 3(c), but there will be circumstance -- 2(c), correct, I'm sorry. Steve Yelenosky mentioned those types of situations where you would have, let's say, a confidential document that's subject to an agreement that's outside of the litigation that would be used in a motion to compel or a motion for protection or something like that where it does become part of the court record. And so then the question is, how do you deal with that? And so maybe here would be to try to streamline the process and also protect the interest of both parties as well as third parties who might have an interest in that information.

MS. SHIVA: We have some hands raised online.

HONORABLE HARVEY BROWN: Well, personally I

would like to say, ton of work. Thank you. You obviously can tell you spent a lot of time on it.

I'm a little confused about paragraph 3, so I just want to, kind of, walk through a scenario. I want to file a motion for summary judgment. And my motion for summary judgment is going to have some documents that you produced that are business documents, but you never designated them as a trade secret. You never designated them as proprietary. And I file the motion. The other side comes back and says, Those are trade secrets, that's proprietary information. I think I'm now subject to sanctions even though you never designated them as a trade secret or as proprietary information.

Same thing for privacy. You produce a document and I decide to use it. And it inadvertently has somebody's social security number on it and it shouldn't have. And I don't notice it and I file it. And then the other side moves for sanctions, and you never designated it as confidential and nothing told me it's confidential and I didn't see it.

HONORABLE STEPHEN YELENOSKY: Why is that -- why do you think that's sanctionable?

HONORABLE HARVEY BROWN: Well, because I will have filed something that is a trade secret or other proprietary information or that is confidential under a

statute and the sanction says, if I do that, I'm subject to sanction.

So I think you may need to say something like, information designated as a trade secret. It can't be that somebody, after the fact, looks at it and says, That was a trade secret or that was proprietary. It has to be a party that actually designates it as a trade secret or as confidential.

I don't want to have to try to figure out every statute that's out there. I don't want to be at risk that I missed the statute that's out there. It should be the other side tells me, Don't use this document because I think it's protected.

HONORABLE STEPHEN YELENOSKY: I can understand that, but Richard has made the point that several times in our meetings that a plaintiff's lawyer can come in before there's any other ruling in the court and just attach something to the plaintiff's pleading. So the other side doesn't have an opportunity to get -- to designate it.

HONORABLE HARVEY BROWN: Well, if that plaintiff's lawyer has gotten it through some public means, I don't know why they would be criticized for using that, a document.

HONORABLE STEPHEN YELENOSKY: Well, they might --

HONORABLE HARVEY BROWN: Are they supposed to --

HONORABLE STEPHEN YELENOSKY: Richard can answer that, I'll let him answer that.

MR. ORSINGER: Well, again, I'll just give you an example. I have one case that's under the Family Code, so it wouldn't be covered by this rule. But bill of review, a petition was filed with 800 pages of exhibits attached to it and they had some psychiatric records, they had a number of income tax returns, substantial numbers of documents that are confidential and self-identifiable as confidential. Filed a motion for sanctions; the judge never ruled on it.

What I don't want is for a party who has confidential information or information that a judge might seal to file unsealed before the judge has a chance to rule on it. And that's what I'm trying to avoid with this notice of intent.

Now your point is, Well, wait a minute, they gave me 10,000 pages and I didn't know that there was a trade secret in there. They didn't call it to my attention. So maybe we do need to say that it was information designated as a trade secret or other priority -- proprietary information, pardon me, so that you have notice before you file. And then that seems like a reasonable request to me.

But I am concerned about the fact that any

party today under Rule 76a can unilaterally unseal anything they want and then the other side, their only recourse is to get a temporary order and try to get the cow -- the horse back into the barn.

HONORABLE STEPHEN YELENOSKY: I feel like I'm arguing your earlier argument, Richard, which is what you just said. Somebody doesn't necessarily have an opportunity to designate before the other party puts it in the file, like your example on the bill of review. Did the other party have an opportunity to do that? Or is the other party going to always have that opportunity? I'm arguing your point that I thought I understood.

MR. ORSINGER: Yes. And I agree with you, Stephen. What my view is, if we define this paragraph 3 correctly, we will have information that you're not supposed to file without giving notice to the other side that you're about to file it. That's one of the functions of 3.

HONORABLE STEPHEN YELENOSKY: Okay.

CHAIRMAN BABCOCK: Well, I think -- I think you're talking about two different things. But Professor Hoffman has had his mechanical hand up patiently for, by my count, 20 minutes. And, apparently, the mechanical hand is crying uncle and he now wants to speak.

So, Professor Hoffman, you're up

PROFESSOR HOFFMAN: Thanks. So, look, there's

so many interesting issues here and hard issues. But I would say that at least from my part, one of the big ones that we've talked about, sometimes we've talked around, but I want to maybe try to suggest that I think it needs to be a more central part of the conversation is the question of whether there should be a presumption that something is sealed in the paragraph 3.

And I'm specifically most, kind of, significantly concerned about the third subpart there, the confidentiality agreement or protective order because I just think it essentially replicates existing practice where people can agree to things under a -- either a low or almost no standard as opposed to the meaningful standard that normally applies to seal something.

So I don't know -- I understand reasonable people can disagree about that, but I just want a flag that I think that that's in some ways one of the core debates we need to be thinking about. And I'll just say that Dustin Benham -- who's been referenced a couple of times here. He's the professor at Texas Tech, has written a fair bit on this -- also wrote to me about this and said, you know, his concern is that it turns the standard from one that is considered quite strict to one that is essentially not strict at all. And he would point us to, among other things, that the advisory committee on the federal side is in the middle

of the same conversation. And that the issues relating to First Amendment and common law protections that apply to openness are fairly widely recognized.

And so, anyway, for whatever it's worth -- and I think it's worth a fair bit -- I think we need to be thinking about that question. And it may be that we could solve this problem by just simply taking out -- with the concern I'm raising, take out confidentiality agreement, protective order, maybe, simultaneously, Chip, do what you suggest, which is take the unfiled discovery out, distinguishing discovery stage from the adjudicative stage kind of issues. That may be a nice way to balance that.

But another question might be just to ask why do we even need to have a presumption in favor of sealing? In other words, the subcommittee has done this very thoughtful work about creating a process by which the judge pays close attention to, you know, what should and shouldn't be here. Why does there need to be a starting presumption against openness?

So, anyway, I'll say all that. And then the very last thing I'll say, it'll be both a pitch and a preview. Richard mentioned it earlier, but THE ADVOCATE normally doesn't get involved, kind of, in the middle of debates, but this seemed like a nice opportunity to do that from a time standpoint. And so we do. And so we have this

issue that's coming out very soon, and I will email it around.

We've got articles from Professor Benham, from Justice Smith, who sits in Dallas, who has written on this before, from Tom Leatherbury, from Joe Cleveland, a number of people weighing their views on 76a and then on the federal side, Judges Elrod and Willett have an article that kind of expands on a case that they recently sat on a panel on. I'll just quickly mention because it is super helpful on this exact point, I was just mentioning, about confidentiality agreements, protective orders.

That cite is 990 F.3d 410. I'll say that again, 990 F.3d 410. What's interesting about that case, among others, is it also underlines that this is really not a traditional left/right issue the way that it often breaks. Right here two more conservative justices, judges, coming down much more strongly in favor of openness and against sealing.

So, anyway, we just have a number of articles coming out in THE ADVOCATE, and I'll circulate that. Thanks for everyone's patience in listening to me.

CHAIRMAN BABCOCK: Thanks, Professor Hoffman. Sorry you had to wait so long to comment.

Somebody has got their hand up. Is that Jim?

MR. PERDUE: Judge Miskel has got a

substantive --

CHAIRMAN BABCOCK: She's got a lead on you, doesn't she. We're on 3.

HONORABLE EMILY MISKEL: Okay. So I was on the subcommittee. I would describe myself as, sort of, in favor of, you know, I'm an openness extremist, so I'll put that -- I'll put myself in that camp. I did bring up some of these points in the subcommittee. They didn't win the day, but I just want to express them again here.

I share the concerns about the word "proprietary information." We looked through the statutes. It's not defined in the statutes, so we would be looking at a dictionary definition, I believe. And then what stops people from just claiming everything is proprietary?

My second big concern has to do with information that's confidential under a constitution. I could not think of something that is protected using the word "confidential" under a constitution. Typically we use the word "private" or "privacy." And my concern with saying that anything that involves a constitutional right of privacy is presumptively secret from the public just strikes me as extremely strange and wrong.

So while I think the judge could have the power to grant a motion sealing information that may be private under a constitution of a particular case, I think

it's dangerous and wrong to have a broad presumption that anything that touches a constitutional right of privacy would presumptively be sealed.

And then on 5, I don't believe I brought this concern to the committee, so I'm raising it now for the first time. But an order changing the name of a person to protect that person from a well-founded fear of violence. I might look to other statutes that already provide us some standards for that. So I don't know if well-founded fear of violence came from a statute; it might have.

HONORABLE STEPHEN YELENOSKY: It came from me because of name change orders. They're not an exception under 76a. And so I wanted something that would allow me to comply with 76a because I've been -- I've been violating it whenever a woman came in with a name change order and I sealed who she was.

HONORABLE EMILY MISKEL: Right. I was just -- I don't have a problem with that concept; I was going to replace the words "well-founded fear of violence" with something like a person the subject of a protective order under the Texas Family Code or Code of Criminal Procedure or a victim -- another word that's used in the Family Code is a victim of an offense involving family violence, stalking, or harassment. So I would just suggest we borrow words that are used elsewhere in the statute that we already know what they

mean.

I think those were my concerns. So my proposal would be to take out proprietary in 3(a)(1) and just leave trade secret. Under 3(a)(2), remove constitution as a presumption and just leave that up to a determination. And then 3(a)(5), I'm good with the concept, I would just tweak the wording to match words that are already used elsewhere in statutes.

HONORABLE STEPHEN YELENOSKY: Chip and Richard, we can draft this as the committee wants. And based on the subcommittee, this was the draft. And I don't know what the -- if there is a consensus of the full Supreme Court Advisory Committee about -- well, like was said, about presumptions here. We can't do the drafting unless we know that.

CHAIRMAN BABCOCK: Right. And I think my thought was to go through this rule today. We have another 35 minutes. And then I'm going to seek the advice of the Court to determine whether they want us to continue to discuss it and maybe, as you say, get the sense of the full committee on these various concepts. But at least we'll have one run through today.

HONORABLE STEPHEN YELENOSKY: Well, I would suggest then we skip over 3 because the other stuff doesn't all depend on 3. It is independent of it because it applies

with whatever the presumption is.

CHAIRMAN BABCOCK: Well, there's still people that want to talk about 3 and one is in the wings right now. So, Jim.

MR. PERDUE: It's relevant to 3 because the rule or the draft is inverting the presumption, but it does have relevance to the next steps because of what I would observe perhaps as an unintended consequence of this, which is a substantial increase in judicial involvement over these issues, whereas, 76a, for all its faults, has generally been a self-help process. Because -- let me give you a concrete example.

Medical records in a tort case. In concept, they are confidential by statute, a federal rule, HIPAA as private health information. A defendant wants to file a motion for summary judgment with those medical records. That defendant now, under this process, has a predicate of having to come to the plaintiff's lawyer to get permission to file three pages of medical records that are confidential by statute as attachments to a motion for summary judgment. And plaintiff's lawyer says, No, I'm not giving you permission to file those attached to the motion. We're going to go down and have a sealing. You can invert that from my perspective.

One of the things that I see -- Alistair touched on -- is confidentiality agreements -- extensive

negotiations over confidentiality agreements to address discovery issues.

And we get highly confidential, attorney-eyes-only confidential, and all of those designations. And then you are confronted with, I've got to go to the court to contest those stamps, and have the court involved in the hearings on individual pieces of paper involved in the scope of discovery so that the appropriate motions can be filed with the court, not subject to the sanction that Judge Brown was noticing out of 13, because of the mechanics that exist in 5 and 6.

And so I -- I have a real problem with 3(a)(3) because I'll give you another concrete example. A hospital would not produce their insurance policy, which is mandatorily to be produced, without a confidentiality order because they claimed that the insurance policy was proprietary information. So even in the scope of mandatory disclosures under Texas law, you're now talking about involvement of a judge over -- over the issue of production of available insurance coverage, which is allegedly proprietary, and now you've got judicial involvement, a stamp that then would require additional litigation or hearings or involvement of the parties to be able to determine what can be filed as it relates to that discovery fight.

And while 76a has been worked around and

definitely could use some updating, the way the inverting of the presumption works in this draft along with the mechanical elements on what would be -- what has to be, essentially, agreed to for proprietary filings on what is -- what happens in filings in the vast majority of litigation as opposed to -- because I got no problem with trade secrets, quite frankly. But there's unintended consequence, I fear, of a lot more collateral litigation, a lot more collateral litigation around something that right now is generally controlled by the parties pretty effectively. So that is what I wanted to say

CHAIRMAN BABCOCK: Okay. Judge, you're next.

HONORABLE ANA ESTEVEZ: All right. I want to talk as to why we have that 3(a). When the subcommittee that put it together -- we didn't want to change the standard. We didn't want to have two standards. We wanted to keep everything simple. So if you keep everything the same and you have to meet the standard, no matter what type of information you're talking about, the easiest way to do that was for us to find that it's coming in under the presumption -- and we're calling it the presumption of confidentiality, which I would disagree with that. It's just a presumption that -- exactly what it says, that 3(a) is being met.

And I think it's really, really important. I'm going to take -- where's Jim? I'm going to take his hypothetical and I'm going to change it a little bit. Because this isn't about the case in which you're doing the summary judgment, yes, there's all these medicals. This is the case and I'm -- somebody goes off and they get their fourth booster shot. Okay.

CHAIRMAN BABCOCK: I've already had mine.

HONORABLE ANA ESTEVEZ: Well, this causes this pregnant women --

CHAIRMAN BABCOCK: That's private, by the way.

HONORABLE ANA ESTEVEZ: Okay. I'm just telling you. This causes this pregnant woman the next day to have preeclampsia, high blood pressure. She goes into some sort of prelabor and her baby dies. So now we're getting all of the OB-GYN's records, and we have them all and we find that she's had three abortions.

And so now, Mr. Defense Attorney is thinking I'm going to file a motion for summary judgment and I'm going to attach all of these because I can, because they're all under the same affidavit, because that's what they always do to me. I get thousands and thousands and thousands of pages to read that have nothing to do with the summary judgment even though that's not what the rule says. The rule says

they have to pinpoint it, but they don't. I get the full deposition. I don't get three pages. I get 2,255 pages of deposition.

CHAIRMAN BABCOCK: Summary judgment denied.

HONORABLE ANA ESTEVEZ: No, no, I don't. I read it. So with that, that's the type of information we're talking about. I mean, not necessarily only abortions, but there's so many other issues that it's absolutely no one's business. It gives you a chilling effect. So this person now knows that there's this summary judgment out there, knows that they've got all her medicals and maybe she wants to settle because she doesn't want anybody to ever know what happened 25 years ago in her life. And so now she doesn't even want to litigate anymore because she doesn't want to go through a motion in limine. She doesn't want to go through a motion to seal that's open and public to everyone. She doesn't want to have to file this and ask for a notice of hearing and post that -- what she's going to try to close.

And when we think about more famous people and other individuals, I mean, there's a lot of private information. I went to an extreme case because I think that that usually gives you a better idea. But there are areas that we need to be protecting the right of litigation, where people don't have to decide whether or not they want their information out there for the public for absolutely no

reason. Or they want to be able to litigate a claim that they have a right to. So it -- I think making these changes makes our system better.

And I don't necessarily -- you know, I'm not sold on 3(a), (b), (3), you know all the numbers we have. I think we can tweak those and make them better. But I think we should come with a thought process of, yes, there's going to be things that we really do want to have people tell us before they file so that we can avoid that. That's it.

CHAIRMAN BABCOCK: Okay. Let's see if -- you want to say something? No, no, come on. I just want to make sure there's nobody there.

MR. ORSINGER: Okay. So, Jim Perdue, I want you to listen to my analysis and see whether it reassures you about the possibility of we're inadvertently creating a lot of court hearings. The way I see the mechanics of this working, if you have information that you want to file in a summary judgment or summary judgment response, the question is not whether you can file it. The question is whether you can file it under seal.

So if -- if it fits paragraph 3 category and you want to file it, then you would give notice that I want to file documents the following Bates numbers or whatever. And unless you request a hearing on sealing or unless the opposing party requests a hearing on sealing or after notice

unless a third party, like a newspaper requests a hearing on sealing, there won't be a hearing on sealing because it will automatically be sealed by operation of law because no one requested a hearing on sealing.

So if you look at the mechanics of the rule working this way, I want to file this category of information; I'm giving you notice of I'm intending to do it. If no one requests a hearing within 14 days, then it gets filed without being part of it -- then it -- the court approves the filing of the sealing. If you want it to be public -- it's not a question of whether you want it to be filed, it's question of whether you want it to be public or not, then you can request a hearing. But it's only when either the plaintiff or the defendant or a third party requests a hearing that the judge will get involved.

So does that make any difference? Is it less likely we're going be creating a plethora of hearings? So that's my thought anyway.

CHAIRMAN BABCOCK: Lisa.

MS. HOBBS: Okay. Richard, you just said something different that's important to me than what you said earlier and maybe it was Judge Yelenosky. But my understanding under the draft is that if somebody seeks to seal something, they give notice and somebody can request a hearing or not, but the judge is still supposed to do his job

and actually review to see if this is something that really meets the standard for sealing.

MR. ORSINGER: Well, this rule doesn't require the judge to do that, but we think it's the judge's option to do that.

MS. HOBBS: Well, I just don't want it to be sealed as an operation of law, when there are three interests involved here. The litigants and -- both litigants, the plaintiffs and the defendants, but there's this public interest of -- that has been recognized in common law and the constitution that the only person who really has the ability to guard that public interest is the judge. Because the plaintiffs don't always care, because maybe they get more documents or maybe they get more settlement money or -- and the defendants don't always care because they want to settle this. They want embarrassing information out of the court system. But the one person who needs to care, if we care about open courts, is the judge.

And so you -- I don't know how it's drafted. And, Judge Yelenosky, it might have been you who said it, but to me it's important not just that something gets sealed as a matter of law, sort of like my motions for new trial are denied as a matter of law. But I want -- I guess I would write a rule that does give the court some obligation to look at what the parties are saying should be sealed and make sure

it should be.

HONORABLE STEPHEN YELENOSKY: Can I respond while you're there? You'll see the first comment, which I really wanted, that says just what you said. And, frankly, as I've said before, what we tell judges they can do, must do, or should do isn't necessarily going to assure openness.

For me, the key to this revised rule is -- and I know you agree with this -- we need to have real notice that, frankly, the media can pick up. And this rule does that by establishing nobody's -- so far we haven't talked about it, but nobody on the subcommittee has objected to an official website where all motions to seal will be available. And, frankly, I think that's where the media will go and look for things that perhaps shouldn't be sealed.

Not to say we shouldn't address what judges should and should not do, but as Lonny said, we may not need to state that presumption. It may not make that much difference. The problem though, Lonny, I don't know whether you think the Trade Secrets Act then violates the First Amendment and the common law as interpreted by the Supreme Court here. And maybe -- maybe that wasn't squarely addressed, but certainly -- maybe it's indicative, but certainly the idea that there's a different presumption for trade secrets through the Trade Secrets Act is there and needs to be applied to Trade Secrets Act cases.

So, anyway, back to -- back to that, I -- most important thing to me are -- or is the ability of media or other members of the people to find out what's going on. Because whatever we require the judges to do or ask them to do, they may not do.

MR. ORSINGER: So, Lisa, let me get a little closer to the microphone picking up. We have a practical decision to make. We're either going to require judicial review when someone asks for it or we're going to require judicial review every time there's a sealing question. And the cost to the system and the cost of the parties in requiring the judge to review every sealing order no matter how confidential the information may be -- there's a cost to that.

One of the consequences is that the judges probably won't do that because they're too busy. And they're too busy having hearings where people are fighting with each other to take a bunch of stuff home and read thousands of pages to decide whether the public has an interest or not.

So what this rule does that's different than Rule 76a and different from what you're saying is we're not requiring judicial review of a certain category of information that everyone acknowledges has a privacy component to it. We're not requiring judicial review unless somebody asks for it. And that's a trade off. You don't get

100 percent review, but you don't get any phantom hearings either. So, to me, that's a policy decision and an important one.

MS. HOBBS: And one we probably disagree on.

MR. ORSINGER: That's fine, because neither one of us are deciding it.

MS. HOBBS: That's right.

CHAIRMAN BABCOCK: Okay. Let's move right along to paragraph 3(d).

JUSTICE TOM GRAY: Chip, I think you've got Judge Wallace up there.

CHAIRMAN BABCOCK: Oh, yeah, Judge, sorry. Judge Wallace.

HONORABLE R.H. WALLACE: Thank you. Thank you. I just wanted to follow up. As I understand the current Rule 76a -- and I've had a couple of cases where there's been documents filed under Rule 76a and notice is issued and hearings set, I don't think the judge has any duty or obligation to review those documents absent somebody coming in at a hearing and raising an issue. It's certainly been my view that I didn't have an obligation to make my own assessment of whether those were properly sealed or not. Normally, as a practical matter, what's happened, nobody shows up and, yes, you sign an order sealing the documents.

Let me point out an area where I think this

whole thing, though, can be run off the rail. Normally in a garden-variety wrongful termination case or breach of fiduciary duty, whatever, we're -- oftentimes, opposing parties are seeking each other's financial records, things of that nature. Usually what happens is about the first thing before there's any discovery exchanged is the parties will enter into an agreed protective order before they ever -- so in it they set out the procedure of how they're going to designate what's confidential and what's not confidential. And, therefore, somebody can't just go running off and filing something that they've designated as confidential.

But here's what happens in those cases. More often than not they will put language in those protective orders, the lawyers will, that if the documents are going to be filed in court either at trial or in a hearing, they can be filed under seal provided these steps are followed. And they'll set out, you know, give the other side notice. If they agree -- or unless they agree they shouldn't be filed under seal, they will be filed under seal. And then they go ahead and set out how if they're used in trial sometimes -- which I don't think I've ever encountered a case where they're used at trial.

The point I'm making is they circumvent Rule 76a, I think. There's no language in there that says you've got to comply with Rule 76a before you go filing documents

under seal. So I suspect if the attorneys get an order, a protective order like that signed by the judge, I suspect they feel they're under absolutely no obligations to comply with giving notice to anybody, as long as they follow their own little procedure of what they're going to do.

Now -- which is why, rightly or wrongly, I take my ballpoint pen and I interlineate provided the documents -- or provided the procedure for sealing under Rule 76a has been complied with or something.

HONORABLE STEPHEN YELENOSKY: Chip and Judge Wallace, I think this -- this is a good example of 76a and the understanding of it. The first paragraph of 76a says information -- says records -- currently now -- court records are presumed open and may be sealed only upon a showing of all the -- of all the following. That to me says to the judge, doesn't matter whether anybody else files for hearing or complains or anything else, I have the obligation that tells me I can't seal it unless that's shown. And so it seems you disagree with that reading of it. And the comment that's at the end of this one and the sentiment that Lisa expressed, which I agree with.

HONORABLE R.H. WALLACE: And I understand what you're saying and you may very well be right and I might have confessed on YouTube and everything else not doing my job. But that's -- as well. But I see what you're saying. I

agree.

CHAIRMAN BABCOCK: Well, and you know I agree with both of you. You're doing your job Judge Wallace. Justice, many judges are doing exactly what you described. And, frankly, I think Judge Yelenosky is right, too, that as long as 2(c) is in there and you have unfiled discovery at issue on a certain category of cases or matters, it's a very, very unworkable decision -- system.

But the point I was trying to make was by creating these presumptions, you are changing the dynamic unnecessarily. Because if I'm going to file a motion for summary judgment and I want to use some documents that I've only gotten because I've been entitled to them under discovery, but the other side has advised me they're confidential, then I go to them and I say, Hey, I want to use these three documents in my summary judgment motion. And they either say yes or no. If they say, No, then I go to the judge and I say, Judge, I don't think these are confidential, but they do, I want to file them. And so somebody -- Richard said they're either filed in the public record or they're filed under seal. If they're filed under seal, then the public is denied some opportunity to determine whether the judge has acted properly in granting or denying the motion. That's all I'm saying.

And now I want to talk about paragraph 3(b) to

the extent anybody has got a comment about it.

HONORABLE STEPHEN YELENOSKY: 3(b) is just a continuation of this discussion, I think. And that's all tied up in the very fundamental question we've been discussing about -- as you said, about the presumption and whether it ought to be switched. Because (b) goes away if the presumption doesn't switch.

CHAIRMAN BABCOCK: Yeah, I think that's right. Anybody else have any comments about 3(b)?

Shiva, any hands that I don't see? All right. Let's go to 4. Richard has got a hand. He's got two hands.

MR. ORSINGER: Okay. So the problem with dropping 3(b) is 3(b) is what eliminates the requirement to have a hearing in every sealing case. The idea in 3(b) is whatever is in 3(a), it's not -- it's going to get sealed unless someone requests a hearing. It's going to get sealed by operation of law unless someone requests a hearing. If we take 3(b) out of there, then we're back to 76a, which Steve just read to you that you can't seal unless there's been finding that these criteria have been met for sealing. So 3(b) is where we eliminate the phantom hearings that no one cares about involving information that no third party cares about. If we do away with 3(b), we're back to where we are in 76a.

HONORABLE STEPHEN YELENOSKY: Yeah. I mean,

that's what I was saying, Richard, I think. I mean, 3(b) -- we've had the discussion and the answer isn't here yet. But what you're saying is that -- what I think I said, which is 3(b) needs to be there if there is a change in the presumption, which you -- which you support. And all I'm saying is, well, if there's not a presumption, then there's no 3(b) because there's no 3(a).

MR. ORSINGER: But the presumption is, in a sense, not the ultimate question. The ultimate question is whether the information fits in the category that requires a hearing before sealing. It could be the presumption is on the party wanting to unseal. It could be the presumption is on the party wanting to seal. But the critical question is if it fits category 3(a), it doesn't require a hearing to seal unless someone requests one.

HONORABLE STEPHEN YELENOSKY: That's also true under 5. That's true under the things that are covered by the presumption of openness. No. 5, motion to seal, motion must give a brief description and must state that any person may request a hearing to be heard in opposition, may request a hearing; 7, if a hearing is requested. It applies to everything without 3(b).

MR. ORSINGER: Okay. So, Steve, let me ask you this. We know that Rule 76a, as written now, requires a hearing before sealing. Would you agree with that?

HONORABLE STEPHEN YELENOSKY: Yes.

MR. ORSINGER: Okay. And the whole purpose of 4 is about giving notice to the other side that you're going to file their information unsealed. And the purpose of 5 is to give notice to the world that you're going to try to seal some documents.

HONORABLE STEPHEN YELENOSKY: Right.

MR. ORSINGER: But if that notice relates to category paragraph 3(a) information, a hearing is not required unless it's requested. If we don't --

HONORABLE STEPHEN YELENOSKY: All I'm saying is a hearing is never required under this proposed revision unless requested.

MR. ORSINGER: Even if you take 3(b) out?

HONORABLE STEPHEN YELENOSKY: Yes.

MR. ORSINGER: What's the language that indicates that, Stephen?

HONORABLE STEPHEN YELENOSKY: Well, 5 says you've got to give notice that they can request a hearing. 7 says if a hearing is requested. And, let's see, got to post public notice. 6, if a hearing is requested, the bottom. Maybe there's a mistake somewhere, but I -- my drafting was to make it apply to everything and I think it does. The whole idea was that we have these, quote, unquote, phantom --

CHAIRMAN BABCOCK: You guys have to take this

outside here.

HONORABLE STEPHEN YELENOSKY: Well, that won't be new.

CHAIRMAN BABCOCK: Let's --

MS. GREER: Chip?

CHAIRMAN BABCOCK: Yes. Marcy, come on up here. What a welcome break from these two.

MS. GREER: Well, I think there may be a way to resolve some of these issues that are creating controversy by avoiding the word presumption in 3. Because what it's sounding like is the presumption that cancels out the presumption of openness that people are responding to. And I understand why that is. What if, instead, you used like prima facie case? Because, to me, what Richard is saying and I totally agree with is we don't need a hearing in every case, we need a mechanism to opt out of that. And one way to do it is if you put on a showing of a prima facie case of privilege. And I agree we probably need to drop out the confidentiality agreement and protective order.

And if we can take out unfiled discovery, my life gets so much better. Because I've never understood why that would be a court document. I mean, it's completely unworkable around this. And it takes care of a lot of things if we brought both of those out and go with something different. And I'm not wed to prima facie case, but

something other than presumption. What you're trying to do is create a second track for things that don't -- aren't presumed -- don't have to go through a hearing process is what I'm thinking.

And I do like how that's set up and then (b) works and then everything else ties together. And I hear what Judge Yelenosky is saying about the other features probably give rise to not requiring a hearing. But because it's been required for so long, I think we ought to state it positively and just come up with better words, maybe prime facie case if you're open to that or something where you can create -- you can put yourself on track two, which is, I don't -- unless somebody busts it.

HONORABLE STEPHEN YELENOSKY: Are you saying that it should be automatic if it's not under 3? It should be mandatory hearings? Because this draft doesn't do that. 76a has mandatory hearings; this draft does not.

MS. GREER: Okay. Well, then I think we just need to be very clear that there's no mandatory hearings and maybe prima facie case puts you in a separate category. Maybe I'm not following it. But if we're moving from we used to have a mandatory hearing and now we don't, then I think that ought to be explicit because that didn't come across to me.

CHAIRMAN BABCOCK: Thank you, Marcy.

Okay. In the four and a half minutes we have left, let's focus on paragraph 4, notice of intent to file confidential information unsealed. Is the notice unsealed or is it the confidential information?

HONORABLE STEPHEN YELENOSKY: Confidential information, intending to file it.

CHAIRMAN BABCOCK: Right.

MR. ORSINGER: So the intention, the notice of intent should describe it without revealing the confidential information and it could be Bates-numbered so-and-so, something like that.

CHAIRMAN BABCOCK: Any comments on this? Anybody had time to read it?

HONORABLE STEPHEN YELENOSKY: One thing I think that's substantive that people need to think about is the requirement that the party wants to file something unsealed, give notice to certain people, one of whom is somebody who has a probable interest, as this is drafted, which could be a little loosey-goosey. But that language might be something people want to change.

CHAIRMAN BABCOCK: So I want to file a motion for summary judgment and I want to include a document that I've obtained in discovery from the other side and the other side has marked it confidential. So -- but, frankly, I don't care if it's sealed or not.

MR. ORSINGER: Then you file your motion -- in that situation you file your motion of intent to file the document sealed. You don't object; they don't object. You file your notice at the state website; no third party objects; it's sealed automatically.

CHAIRMAN BABCOCK: Okay. So now you have a judge deciding the motion however and basing his decision on a critical document, a case -- a motion dispositive document --

MR. ORSINGER: Right.

CHAIRMAN BABCOCK: -- that is under seal.

MR. ORSINGER: So the trial judge at that point can sua sponte reassess because it was sealed by default.

CHAIRMAN BABCOCK: Who's going to do that? He's not going to do that.

MR. ORSINGER: Who is going to do it if it's not the judge?

HONORABLE STEPHEN YELENOSKY: Now it's a three-way argument. But, Chip -- I don't want to be arguing with Richard, but I don't agree with that.

CHAIRMAN BABCOCK: I don't.

All right. I think we've -- we've not completed this, as I had hoped, but we've got no time and it will be at the next meeting, except Lisa wants the last word,

so come on up here.

MS. HOBBS: No, no, no. It's totally -- I mean, but if the subcommittee is doing any drafting, if you're not going to make the a judge make a decision, like a determination, then will you reconsider your res judicata paragraph about that there was -- like, I think you need to apply, like, if we have this hearing and the judge makes a determination and it's not just, you know, as a matter of law, I would just make sure that's clear.

MR. ORSINGER: Lisa, our view is the judge shouldn't have to judge the same thing twice, but if it's sealed by operation of law without judicial hearing or notice or anything, nobody was there, that shouldn't --

MS. HOBBS: I just wanted to point it out in case they were going to draft some more.

HONORABLE STEPHEN YELENOSKY: I don't think there is sealing by operation of law under this, but we can talk about that later.

CHAIRMAN BABCOCK: Sealing by operation of law? Well, the great news is that we're going to recess exactly at 5:00 o'clock, as is our practice. Start at 9:00; end at 5:00. And in case anybody didn't hear who was online and Judge Christopher, I'll recognize you in a second, our next meeting is going to be September 29th and -- September 30th and October 1 at the TAB, a two-day meeting.

And Justice Christopher has a parting shot.

HONORABLE TRACY CHRISTOPHER: Well, I just have a little bit. So I get a bunch of documents that are marked confidential and I just do a prophylactic notice of intent to file a motion to seal. And so then, you know, like a whole ton of documents that are described in this notice get sealed, but then I don't actually file them at some point or I file them later. How do we keep track of them in the system?

CHAIRMAN BABCOCK: Great point.

Levi has got the answer, but not today. Levi, what do you want to say?

MR. BENTON: I know that this is subject to whatever the court would like us to do, but you said we're coming back to this. There's some -- there's some things later that I want to address we didn't get to today, but I have some issues that need to be addressed if we come back to it.

CHAIRMAN BABCOCK: Be sure you're at the next meeting.

MR. BENTON: I just need to remind you that the Red Sox are 17 and a half games behind the Astros. Thank you. Have a good weekend.

(Adjournment at 5:00 p.m.)

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REPORTER'S CERTIFICATION
MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

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I, KIM CHERRY, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 19th day of August, 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 $ 1,919.00 .

Charged to: The State Bar of Texas.

Given under my hand and seal of office on this the 2nd day of September, 2022.

/s/Kim Cherry
Kim Cherry, **Texas CSR #4650**
Certificate Expires 07/31/24
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