* * * * * * * * * * * * * * * * * * * *

MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

SEPTEMBER 30, 2022

(FRIDAY SESSION)

* * * * * * * * * * * * * * * * * * * *

Taken before *D'Lois L. Jones*, Certified Shorthand Reporter in and for the State of Texas, reported by machine shorthand method, on the 30th day of September, 2022, between the hours of 9:00 a.m. and 4:43 p.m., at the Texas Association of Broadcasters, 502 E. 11th Street, Suite 200, Austin, Texas 78701.

INDEX OF VOTES

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

--*-*-*

CHAIRMAN BABCOCK: All right. Welcome, everybody. It's great to see you're all smiling faces, including Lonny, who is beaming today for -- you want to tell us your news? I'm just kidding, I don't think you have any news.

PROFESSOR HOFFMAN: I don't have any news.

HONORABLE JANE BLAND: No news is good news.

PROFESSOR HOFFMAN: Feeling a little frisky this morning, Chip?

CHAIRMAN BABCOCK: Okay. So we're going to start with a report from Justice Hecht, but you'll notice he's got an empty chair, which means that Justice Bland will give the comments from Justice Hecht, a report from Justice Hecht, and then she'll make her comments.

HONORABLE JANE BLAND: Good morning. Chief Justice Hecht is otherwise committed over at the Judicial Council meeting today. As you all know, that's the policy arm of the state judiciary, and several of our members are on Judicial Council, including Judge Miskel, who came for this part of the meeting, so I don't know why the Chief couldn't make it if you could make it, Judge Miskel, but I think he's preparing and over there, and he'll join us later.

So a lot has happened rules-wise since the

last time we met, and mostly it's the culmination of this committee's good work and getting out some preliminary orders for public comment, but before we get to those, we'll talk about we've issued now 55 emergency orders related to the pandemic. Unlike Aaron Judge, we are not going for 62, so hopefully those are starting to wind down. The current one is in effect till November 1st. We made a couple of changes to that order. We took remote jury trials off the table for district and county courts, in line with the discussions from this committee that we -- that we took note of.

Second, we changed the provision governing the location of judges. We wanted to clarify that judges should be at the courthouse or in the county seat, but continued with some exceptions to allow some courts, those with multicounty districts and courts where there are visiting judges assigned, to conduct proceedings away from their usual location to address their backlog. And we left room, too, for exigent circumstances, so that's where we are now. The emergency order still permits courts to conduct proceedings by Zoom from the courthouse and maintains authority for remote proceedings until we can get a rule written, which we are very close to, and so with the help of this committee, and we're going to hope to resolve most of our discussions about that at this

meeting. So -- and then the emergency eviction diversion program order is still in effect until November 1st as well.

The backlog, as you know, there are still 20 or so counties that are struggling with a backlog from the pandemic. We had asked through the Office of Court Administration for those counties to submit plans so we could figure out ways to afford assistance to those counties and get a handle on where they are and where we want to go, and last week we had the National Center for State Courts come into Austin, and it hosted several counties, those top 20 counties with the largest backlogs, and, you know, it was a dialogue about techniques for addressing the backlog so that everybody can start to formulate plans and hopefully get on it.

Okay. We also have been working on -- as you recall last meeting, we had emergency detention forms that this committee looked at that came from the Judicial Commission on Mental Health, and we issued an order yesterday to talk about those forms, and in particular, what it does is amend the Rules of Judicial Administration. Those are going to provide that a judge cannot make a party use a particular local form and cannot reject a properly completed form approved by the Court or a court-sponsored organization like the JCMH or the

Children's Commission or any other that reports to the Court. And this is, again, an order that comes from the discussions of this committee at the last meeting. These changes are expected to take effect on April 1st, and we're accepting public comment until March 1st. And then we will send the forms back to the JCMH, the emergency detention forms that you-all looked at and offered comments on last meeting, to the JCMH and they will then get them in final shape and approve them.

The local rules process, we had talked about this last year, and it was a cumbersome process for district and county courts to adopt local rules and change local rules, because every one of those had to come through the Texas Supreme Court, but now it's -- we're opting for more local control over those with transparency, so we will no longer be -- the Texas Supreme Court will no longer be involved in approving local rules on the front end. Instead, courts will be required to post their local rules on an OCA website. That site is going to go live on November 1st, and then it will be available to the public on January 1st, so courts can start uploading local rules November 1. Local rules will not be effective -- effective unless they're posted on the site, and then there is a process for back-end review. So the local rules cannot conflict with a statewide rule,

state law, or federal rules or law, and if they do, then that would be a basis for taking them down, but in addition, there's a process that goes through -- first through the regional presiding justices, judges, and then to the Supreme Court, should a litigant complain that the local rules are unfair or unduly burdensome. So that's where we are on that.

We have a new will kit. The Court gave preliminary approval to four sets of will forms and very grateful to the work of many stakeholders that participated with probate judges to help us compile what that should look like. This was a result of a legislative directive that asked that we create the forms, and so we're currently accepting public comment for those. So if you have a friend or relative, child perhaps, that doesn't have a will and they could get by with a very simple will, you might direct them to these new forms. But always tell them that it's better to have a lawyer.

Okay. Cyberbullying forms. We talked about this probably a year ago or so as well. We gave preliminary approval to a form application to seek preliminary relief from a trial court to stop cyberbullying. Like the will forms, this was created in response to a legislative directive, and we will accept public comment on those forms until December 1.

We amended the judicial bypass rules and forms in line with this committee's discussions in August. We had those changes take effect immediately, but we're accepting public comment until December 1st. And then finally, the Texas Board of Legal Specialization adopted two new specialty areas, aviation law and insurance law, and standards for certification for both of those areas. So a lot of -- a lot of work in the rules area. Thank you, Jackie. Thank you, Martha. So that's the report.

CHAIRMAN BABCOCK: All right. So we're done with the report. Now comments from Justice Bland.

HONORABLE JANE BLAND: Good to see everyone in person.

CHAIRMAN BABCOCK: All right. That's a great comment. All right. The first agenda item is 76a, and Richard has handed out a ballot survey that by my reading will take us until Wednesday at least to finish, and, Richard, this is your show, so you run it any way you want to, but we don't -- we can't dedicate all day to this --

MR. ORSINGER: Right.

CHAIRMAN BABCOCK: -- rule because we have other things, and we have to get done with the remote proceedings this -- this two-day session, so --

MR. ORSINGER: Well, Chip, this is a bit of

an experiment to submit --

HONORABLE TRACY CHRISTOPHER: We cannot hear down here, because of the AC, so --

MR. ORSINGER: This is a bit of an experiment to submit a series of questions like this, but the views on the issue of what, if anything, we should do to Rule 76a are so diverse that in trying to formulate a new iteration of the rule from the last meeting, you end up just selecting comments made by individuals that we don't know for sure whether there's a consensus or not, and you make changes and you don't know if they're representative, so I think to get to a final rule, I thought it would be good for us to know where there's a consensus and where there's not a consensus, and so that was why I proposed this. We don't have to answer all of these questions. Maybe we could turn this into a questionnaire that could be tabulated and we could determine what the votes were after the meeting, but at least this will allow us to focus on concrete aspects of the rule.

Now, in addition to that, Stephen Yelenosky has been very busy helping the committee and has come up with a new rule. Stephen was the -- the first rule that the subcommittee looked at he had proposed, and now we have a new one, and we're going to talk about that. Steve

is going to lead us through the changes that he suggested and why, but just a little bit of background. There is no federal trial court standard sealing rule, so every district, federal district judge, has his own rules, and sometimes districts in the same state are similar and sometimes federal districts in the same state are dissimilar. I read 95 pages of federal rules looking for common -- common concepts or approaches. A few emerged, but nothing that I would say is widespread, and that effort by some to get a standardized rule for federal district courts has been going on for some time. Best I can tell it's been assigned to the discovery committee and it's just been languishing there. So there are some good ideas that you can see, some bad ideas you can see by looking at the federal rules, but it's not really principles that we can say are tried and true and we should use on our rules.

Another model for us to consider was the Sedona Conference, which is included in this packet, your papers for this meeting, even though we saw them many months ago, but I thought it would be good to revisit. The Sedona Conference, as you probably know, is a -- a very diverse group of people from around the country that are involved in the legal process in different ways, many different perspectives, and they were addressing their

concern that under the protocols that existed most everywhere in the federal system, the party who wanted to file something under seal had the burden to prove that it should be under seal, and frequently the party that filed it didn't want it under seal. It was one of the other parties whose secret information or confidential information would be compromised, and so I think their driving motive was to figure out how to put the burden of proof for sealing on the party who wanted sealing, and so they came up with this process in which a party who is intending to file someone else's confidential information has to give advanced notice and then the person whose information is at stake has a period of time to come in and say either that's okay, you can file this unsealed, or, no, this shouldn't be filed unsealed, here are the reasons why it should be sealed.

They did not decide what kinds of information should be treated in this manner. They just created a procedure, which is reflected on the flowchart that's in your materials, but the start of the flowchart, first question is, do documents contain presumptively protected information? If so, then you have to -- you have a process here that you can follow that gives notice to the parties at stake and sets up a hearing. If the answer is no, that it doesn't contain presumptively

protected information, then you have a different set of procedures to go through. Well, what is the presumptively protected information that would send you down one path or the other?

And the Sedona group said, "We're not going to decide that. That's a policy question for the courts to decide." We're going to give you a procedure that depends on whether it's presumptively protected information, but we're not going to say what should be presumptively protected. So the idea on the Sedona group is that maybe for the ordinary confidential information that doesn't fit this special definition, you can do routine procedures, but there's certain categories of information that are presumptively protected and they should be handled in a different way. So the initial proposal from the subcommittee was to create a category of information that would be treated differently, and you could call it -- we didn't call it, but you could call it presumptively protected information. That was in section three of the rule that was proposed at the August meeting in Fort Worth, and it seems that it would be important for us to get a sense of the committee about whether we're going to have a category of information that is handled differently, whether it's expressed as a presumption, is reversed and the presumption is on the party unsealing, or

whether it's some other -- like a different test for whether it's sealed or not.

For example, a person could -- could reasonably say that if it's privileged information under the Rules of Evidence or some statute, that the standard for unsealing privileged information might be different from the standard for unsealing other information. So there are reasons to make distinctions, and initially when Rule 76a was adopted in 1990, there was much debate, but no distinction for trade secrets. So the Legislature came along later and passed a statute that said, yes, there is a distinction for trade secrets, for causes of action under the Texas Trade Secret Act. They didn't say trade secrets everywhere, all times, no matter what. They said in actions under this act.

So the Legislature came in, outside the rule process, inside the legislative process and said we are going to have different standards for trade secrets than Rule 76a provides.

They haven't, to my knowledge -- other than certain confidentialities about filing, which we've discussed and can discuss about victims of crime and minors and things of that nature, the Legislature hasn't stepped in and started defining other things as being in a special category, so since this is a review now 32 years

later, we should ask the question, besides trade secrets under -- in litigation under the Trade Secret Act, which the Legislature has told us has to be treated specially, are there other types of information that should be treated in a different way, and that was why the rule proposal last time had a section three where it mentioned trade secrets, other proprietary information, hard to define that. Maybe that's too vague to use, or maybe a court could define it.

Sensitive data under Rule 21c, you know, we already have a rule that says certain kinds of information like driver's license numbers, Social Security numbers, et cetera, are to be redacted, anything that's filed in court. So we already have a rule for that. Names of minors in different aspects of the filing process and the appellate process, the names of minors have to be redacted from not only the briefs, but also from the record that's brought forward. We've got pseudonyms that are required in the number of different criminal contexts by the Code of Criminal Procedure, so since we have a statute there, clearly that information is different from ordinary information. Then we have something that's a little more controversial, which is the constitutional zone of privacy. Earlier memos discuss some case law in Texas about the zone of -- constitutional zone of privacy. It's

recognized. It's recognized by the United States Supreme Court, it's recognized by the Texas Supreme Court. It's recognized by the various courts of appeals, and the question is, well, you know, if the government is restricted to some degree when dealing with what's inside the zone of privacy, which is often defined in terms of the family, then should that be treated differently if it's necessary or someone desires to file it in a court proceeding, is the zone of privacy ignored or is the zone of privacy have some effect?

Then we have statutes that make certain information confidential. That should be pretty easy for us, yes, if a statute says it's confidential, we shouldn't just repudiate the confidentiality because one party decides to file that information with the clerk of the court. Then we have state regulations and federal regulations, including especially HIPAA on the federal side for medical information. There is a justification for treating that differently because of the policy reflected in the regulations. Then we have the issue of confidentiality agreements inside the lawsuit, and back in 1990 there was a lot of discussions and after 1990 there were law review articles that while confidentiality agreements may turn too much power over to the parties to decide what the public should know and shouldn't know, the

argument in favor of recognizing confidentiality agreements is that it speeds the discovery process, and instead of people who are producing information that's sensitive, fighting the production of it, out of fear that producing it will result in it being filed and therefore public.

Instead, they -- the parties can agree you give this to me now for discovery purposes, and I promise not to file it in the public record, and that facilitates discovery, and there's, I think, a lot of writing out there that suggests that that's an important public policy, including one or two court of appeals' opinions that have mentioned that reducing the cost of discovery and the hearings associated with protecting information in discovery is a -- is a benefit to be weighed against the so-called public right to know, but for some people that's too much power to give to individual litigants, and there's a concern that wealthy defendants will -- will condition settlements with the plaintiff and the payment of money to the plaintiff on an overbroad sealing order, and that's a detriment, that's a bad thing that needs to be assessed and figured out.

Now, apart from the confidentiality agreements in the lawsuit, there are also out there in business and personal relations, there are nondisclosure

agreements or confidentiality agreements that are legitimately contractually created, based on consideration paid or received by both sides. They are contractually enforceable outside of any other context, but perhaps can be defeated by one party unilaterally filing information under a nondisclosure agreement and all of the sudden it's public, but can they be sued or sued for breach of contract when they didn't release it privately, but they filed it in the public domain where as a matter of law it became public information?

There is a justification for treating information that's subject to a nondisclosure agreement unrelated to the litigation -- treating it differently. One thing's for sure, and I think even in our subcommittee, which have many, many diverse views, I think probably most everyone agreed that if a third party, nonparty confidential information or secret information is going to be filed in this lawsuit, you should give notice to the nonparty, because it's their information that's going to be compromised, and there may be nobody in this lawsuit that's speaking for them. So I think there was a popular feeling in the subcommittee level that when you're going to file information of the nonparty in this record and make it public, you should give them notice in advance so they have the right to come forward and protect their

information if they want.

I skipped an element. We have confidential agreements between parties in lawsuits, but sometimes we have protective orders that are issued by judges, frequently by agreement of the parties, and so now all of the sudden we have a court order, not just a private agreement between litigants, but a court order saying this information cannot be filed except under seal. So that's another layer for us to consider. And there may be other categories that people have that could be considered to be special, whether they go into a category of what is called presumptively protected information, or whether the standard for whether it should be sealed should be lessened. For example, one could argue that if information is confidential under the attorney-client privilege or the mental health privilege as defined in the Rules of Evidence, that the mere fact that when the other party may have acquired it in discovery, they shouldn't be able to file it and waive the privilege. A judge should decide whether the privilege has to be waived and that the offensive-use doctrine or whatever the standard is, at least it's a standard that's employed by a judge and not by a party.

So then we have the question of, well, if we're going to have a special category, like the Sedona

group did, Sedona Conference, what's in it and what's the consequence of being in it? Do we reverse the presumption and say there's a presumption of nondisclosure for that special category, or do we leave the presumption on the party seeking to seal but change the test so that it's maybe not as onerous as the test is written right now on 76a for all information?

So then I think the committee needs to go on the record about whether we want to require notice to nonparties when their information is in risk of being compromised. Then we have something that's implicit in the Sedona group's -- Sedona Conference proposal, and that is that a party -- and this is in a number of federal district court rules, but I wouldn't say that it's widespread. The courts -- or the Sedona Conference has permitted a party to, if you will, get an advisory opinion if they need or want to file information that they want to remain under seal, but they need it for a summary judgment motion or a summary judgment response. Should they have the option of submitting it to the court in advance in camera and have the judge tell them either, yes, I'll let you file this sealed, or, no, I won't let you file this sealed, if you file it, it has to be unsealed? That way you know before you -- before it's put with the clerk of the court whether it's going to be sealed or not, and so

you could make a decision, I'm not going to include that exhibit on that motion for summary judgment response, or you can say, gosh, I needed it. It's so essential that even though the judge won't seal it, I'm going to file it any way knowing that it's going to go out to the world.

There doesn't seem to me to be anything harmful about allowing someone to find out in advance whether a document that they feel is important can be filed under seal or not. It could be you could just say that all documents in presumed -- that contain presumed protected information can automatically be filed sealed subject to a motion to unseal, but there's a risk associated with that because of the unsealing may happen even though you didn't intend it.

So some of the federal district courts will not permit you to file a motion, asking the court for permission to file certain documents sealed. You submit the documents under seal. The opposing party has the opportunity, usually not the public under any federal district court rule, has the opportunity to argue. Some of these courts require a memorandum of law to support your argument for why it should remain sealed and then the judge will decide. Some of these federal district courts if the judge says, no, if you file it, it's going to be unsealed, then you're allowed to withdraw the document

from the court system. Others say that something submitted in camera that's rejected for sealing remains sealed in the custody of the clerk and it will not be reviewed by the court.

So one possibility is to leave it -- to send it back where it came from, another one is to put it under seal and don't consider it, and the third one -- and there are a couple of district courts in U.S. that do this -- if you take your chances and you submit it and you lose, then it goes public. You can't take it back. So it's not like a free look in advance. So this proposed rule we had last time had this feature of being able to request for the court to evaluate in advance in camera whether your document if filed would be sealed or not.

So then the next question and maybe one of the biggest questions that maybe prompted this analysis is in our view under current Rule 76a, there has to be a hearing every time anything gets sealed unless it's temporary ex parte, temporary that expires, it's meant to be just provisional until there can be a hearing, that's not smart. It's just -- there's a lot of information that people want to keep confidential or out of the public eye. That's just not important to the public health or functioning of government or anything else.

And so should we have a situation in which

filing is -- a person can file for permission to seal and without a hearing it will get sealed. Can that ever happen? Should that ever happen? Well, probably you could say, well, it should happen for this presumptively protected information only. Then that was where we were at the rule in August, was if you give notice that you're intending to file something or that you have filed something under seal, and you have -- give notice to the world and no motion is filed or no request for a hearing is made within 14 days, then it gets automatically sealed without a hearing, or you can go to the greater extreme, which I think Stephen Yelenosky has, and I don't mean to call this rule extreme, but I think it --

HONORABLE STEPHEN YELENOSKY: That's all right.

MR. ORSINGER: But I think it's an extension.

HONORABLE STEPHEN YELENOSKY: Extreme, but correct would be fine.

MR. ORSINGER: There you go, closer to the truth, right?

CHAIRMAN BABCOCK: It's a cap five rule.

MR. ORSINGER: Which is the idea that doesn't matter what the information is, if you give notice that you intend to file it under seal and you give notice

to the parties and the third parties whose information is involved and the public and nobody within a certain period of time, I think 14 days, but it could be longer, nobody says, "I want a hearing," then it just gets sealed. There's no hearing is required because nobody wants a hearing. So then that leads to the question of, okay. Well, so we know that this is going to be filed or has been filed under seal. We know that notice has been given to all concerned parties. We know that nobody has bothered to express an interest. What is the judge's responsibility at that point? Should the judge say, "Well, the parties agree, so I'll sign whatever I need to"; or should the judge say, "It must not be very important to the public because no media persons, no industry persons, no lobbyists have done anything, so I'm going to -- I'm just going to sign off on it"?

HONORABLE STEPHEN YELENOSKY: That's the extreme proposal.

MR. ORSINGER: No, or should the judge be required or at least encouraged to do an independent review of the information and whether the representation about the nature of the privacy is accurate or not? And it's one thing to say that every judge must look at all of the confidential information every time, no matter how busy they are, no matter whatever, or to encourage them to

say, you know, you're the last bastion, you're the last -- the last soldier to protect the capitol if the parties are not doing it and nobody else is paying any attention and this is really -- you know, really important information to the public health or to the operation of an honest government, we would encourage the court to check the bona fides of the claim of confidentiality. So I think we should have some discussion about that, about whether we should tell courts that they must, and many of them probably won't, or to just encourage judges to do it so that the public policy is there.

And so then that moves us to the periods of time. We had some discussions that, you know, there tends to be a 14-day thing in our rules. Is 14 days too quickly for the whole world to -- or a third party to hire a lawyer and file a motion? Should we give them more than 14 days, is that enough? Should there be more time for it to trickle out into society so more people will find out about it? Once -- once a request for a hearing is made or a opposition is filed or a motion, something is filed, what is the period of time that the court must hear it? Are we going to require it? Or can the court just delay and delay and so now six months have gone by and it's under seal and no judge has looked at it? So is there a time period between the request and the hearing? And then

after the hearing there's another time period, which is how long after the hearing does the judge have to rule? It's not fair to make the judge rule on the spot specifically -- especially if there's voluminous information to review, and I know that some of the judges that have talked to me about it say, you know, any quick timetable is problematic for me, depending on where I am in my jury trial sequence or if I'm about to go on vacation or how many thousands of pages I have to review. So I think that's a separate question, is how much time after the hearing if it -- are we going to have a deadline by which the judge must rule, or are we just going to let the judge make the decision by themselves?

So, let's see, we have a process in the rule for temporary sealing, and I don't know for sure if that's designed to work for a party who's trying to seal their own information under seal or whether someone else has filed their information they tried to get the court on an ex parte basis to seal it before it goes out into the media. It would work, I suppose, in both instances, but I believe under current Rule 76a, there's no time limit on how long that temporary order lasts.

HONORABLE STEPHEN YELENOSKY: There is.

MR. ORSINGER: I'm sorry, Stephen, tell me what it is.

HONORABLE STEPHEN YELENOSKY: You have to state within the date of it -- right now, the date of the hearing, the permanency hearing.

MR. ORSINGER: Does it tell you what time -- what's the longest period of time you can wait? I don't think it does have it.

HONORABLE STEPHEN YELENOSKY: I don't think it does that.

MR. ORSINGER: Yeah, so the question -- I mean, another question for us to fairly ask is should we put a limit on the length of a temporary order like we do on a temporary restraining order, and should we have a limit on -- can it be renewed, extended, because the court can't get to the hearing? If so, how long can it be extended for, how many times can it be extended. Those are valid questions that we should ask about this rule that we have. If it's not going to be a specified period like 14 days, should we say that the court should give us a timetable, whether it's 10 days or 30 days, the judge should pick the length of time of the temporary order and write it in there. And the judge -- the judge would be sensitive to when the judge could have a hearing on it, so the judge may not be able to reasonably have a hearing within 14 days so they might say 21 days or 30 days. So I think there's something to say for the idea of requiring

the judge to put a limit on it, but letting the judge be the one who sets the limit, which then is going to make the whole process more workable.

Then we have the question of when the lawsuit is over. What do we do with sealed documents when the lawsuit is over? Some of the federal district courts return them to the party that filed them. Others put them in some black hole where they'll never be seen again. Others say that they will remain on file with the clerk until after the 10 years, they become public -- or 20 years they become public. So there's no really obvious choice there. I know that there's a statute about how long courts keep records and that it's required that they destroy them after that certain point in time. Certainly that's an ending time limit for us if it remains under seal until it's lawfully destroyed. So then another --

HONORABLE STEPHEN YELENOSKY: Richard, can I ask, what do you mean by destroyed if it's electronic?

MR. ORSINGER: Well, I don't know what they're doing with that, Stephen. Somebody might know, but I -- last time I was involved in trying to retrieve archives before they were destroyed they were paper archives.

HONORABLE STEPHEN YELENOSKY: Yeah.

MR. ORSINGER: So I don't know how you ever

delete -- I think once it's digitally recorded, it never -- never vanishes, but --

HONORABLE STEPHEN YELENOSKY: Yeah.

MR. ORSINGER: What about the so-called continuing jurisdiction under our rule? Somebody coming in after the lawsuit is over wanting to seal or unseal, but typically unseal something that was sealed. The way the rule is written now is that you're bound by the first sealing order if you participated in the proceeding as a party or as an interested third party, but my take on the rule is that you're -- there's really no res judicata effect to the original ruling if you were not a party or given notice or proof that you received notice, and that doesn't seem like a very good grounds for a res judicata bar.

It doesn't really matter so much who was in the hearing as to what was litigated in the hearing. If it was litigated in the hearing, you shouldn't have to relitigate those facts. If it wasn't litigated in the hearing, then anybody should be able to come in and say, "Wow, now we know something that makes this very important that we didn't know at the time."

So the proposal that is before the committee in August was to borrow the provision from the Family Code on modifying child-related matters, and the Legislature

requires a showing of a material and substantial change before you relitigate something that's already been litigated. So material and substantial is pretty good, because something that's not very -- something that's peripheral, shouldn't be the grounds maybe to make a new decision about old information, and if it's not a substantial change, if it's just an incremental change, then why relitigate the old stuff; but if you can show it's material and substantial, then it should be relitigated, whether that old information that was sealed 10 years ago should now be made public. There's nothing magic about those words "material and substantial," they've just been used in thousands of cases for the last 30 years, but we could find another standard.

But I guess the point is, is res judicata just going to apply to the people who were involved in the hearing, or is it going to apply to the information that were litigated and the circumstances that were litigated and anybody can come in at a later time under new circumstances and get a new evaluation?

And then what about the sanctions issue? Some people on the subcommittee were concerned that if there was a category of presumptively protected information or a category of information where the burden to seal was lessened, that some lawyers might try to take

advantage by putting things into that category when it doesn't belong there, and they might do that because they don't understand, they might do that inadvertently, or they might do that knowing that it doesn't fit, and that's going to burden the system because, number one, it may get by, in which event it shouldn't have, and number two, it may cause a lot of fights at hearings because you shouldn't have tried to do that in the first place to make the other side file a motion, have a hearing, and the judge rule that's crazy, this is not specially protected information.

HONORABLE STEPHEN YELENOSKY: Or the other side doesn't care. Right? And nobody looks at it unless the -- except the judge.

MR. ORSINGER: There we go, so then there's nobody enforcing the distinction except for just the ethics and honor of the party or the lawyer who's claiming special treatment. And so the idea was, well, you know, we don't need a new sanction rule. We've got Rule 13. We've got Chapter 9 for wrongful death cases. We've got Chapter 10, Civil Practice and Remedies Code for other civil litigation. It's all out there. The question is, are you going to do it, and our idea was -- or the idea originally was to write a sanction paragraph in here that didn't create a new sanction rule that said, hey,

everybody, you are subject to scrutiny, and if you violate these standards and violate the Rule 13 or Chapter 10, then sanctions can be imposed.

So that was like a warning sign, a signal to lawyers who might be cutting it too close to the line, but it was also a signal to judges, who might say, oh, well, you know, overruled, next case, so there's really no serious consideration of sanctioning a lawyer who you can prove violated Rule 13 or Chapter 10 of the Civil Practice and Remedies Code. So that was what prompted the idea of having a sanction mentioned, not a new sanction, but just a sanction mentioned, but Bill Boyce on the committee-at-large reacted to that by e-mail, and Bill is not here right now, but --

HONORABLE JANE BLAND: He's at the Judicial Council. He's coming.

MR. ORSINGER: He is?

HONORABLE JANE BLAND: Yeah.

MR. ORSINGER: Boy, they have all the brightest there, don't they? So Bill did not want to introduce a sanction -- a side show into this process, because, you know, once a sanction becomes available, then lawyers get into sanction wars, and, you know, this person did something, maybe they made an honest mistake, maybe they didn't, but the next thing you know, you've got a

motion for sanctions and then you've got all of this struggling going on that's parallel and has nothing to do with the outcome of the ruling. So I hope that if we're still having the discussion when Bill comes back he can express what his underlying concern was, but just be alert that there's arguments in favor of reminding the lawyers and judges that sanctions apply in this area, and then there's a countervailing argument that maybe we're just creating more trouble than we should. And Rule 13 is out there if somebody wants to use it, so why put it here.

Anyway, Chip, that's basically -- those are kind of the issues that we're at. I don't think that any of it's new that we haven't discussed before. So Stephen has a new rule which we need to look at because it brings a lot of these issues into focus, but I feel like we probably should try to do an organized assessment of what's popular and what's not popular so that we can go back and write a new rule that's consistent with the majority view or the alternative view, whatever you think.

CHAIRMAN BABCOCK: Well, I'll note this is not a popularity contest, Richard.

MR. ORSINGER: Oh, my --

CHAIRMAN BABCOCK: You're not even listening.

MR. ORSINGER: I'm sorry, Chip. My co-chair

has reminded me that as a result of a comment from a prominent member of the committee, that would be the Chair, we removed in -- in Stephen's current version, the unfiled discovery rule, which was hugely controversial in 1990. It didn't go through the subcommittee process. It didn't go through the public hearing process. It didn't even get part of the full meeting process, but finally on third day of meetings, half the committee was there and slightly more than half the committee approved the rule, the discovery rule that said that -- or 192.6, "To protect the movant from undue burden, unnecessary expense, harassment, annoyance, invasion of personal constitutional property rights, the court may make any order in the interest of justice and may, among other things, order that, number (5), the results of discovery be sealed or otherwise protected subject to the provisions of Rule 76a."

So what happened was at the last minute right before the rule went out the door, a pretty small group was able to say that discovery that's subject to a protective order cannot be sealed unless you meet the criteria of 76a, which would require a public hearing, so that became the rule. There were two dissents, Justice Gonzales and Justice Hecht, and they have been included in the materials for this meeting that -- their one-page

dissent to the adoption of Rule 76a and the way it was adopted, and I am reading between the lines that they're talking particularly about this, but unfiled discovery was a huge issue at the time, Chip, because there was a lot of products liability going on. There was the Firestone/Ford products liability issues about the tire and the rollovers and the design of the cars. There were other pharmaceutical litigation, and the arguments for plaintiffs' lawyers on the committee and in the society at large was, oh, my gosh, I spent five years getting this memo, which shows that management intentionally made the decision to do X, and it -- it is knowledge of a design defect or whatever. So that's been sealed by a judge or we had to seal it by agreement in order to get a settlement for my client, and so the next plaintiff's lawyer or every other plaintiff's lawyer has got to spend the same five years trying to get that same memo.

So why shouldn't -- why shouldn't -- even if the memo, even if the smoking gun memorandum is not in the public record, if it's in unfiled discovery, it should be available to the public upon request, which kind of creates an implied duty of the lawyers to preserve it or the parties to preserve it. It was a huge issue at the time. However, in the interim, it doesn't seem to have been used much, and I -- last meeting I asked Tom Riney,

who was the only one that said that he had had any kind of dealing with it in memory, and it was a situation in which his client in a civil lawsuit, evidence had been developed and then later on there was a criminal charge and the grand jury had issued a subpoena for his file in order to get information for purposes of the criminal prosecution, and he had to negotiate with the district attorney about what the DA was going to see out of his file.

But the law firm had a destruction policy at the end of five years. This occurred seven years later, and he said I can tell you for sure that we started abiding by our five-year destruction policy after that. But there's not much -- there doesn't seem to be much controversy, and so I think it's a problem. It makes lawyers custodians of the records for an undisclosed period of time. It's something that never got filed in the courthouse, so it's not a court record except it got defined as such, and so we decided to strike it and see where the committee is on that, because unfiled discovery was maybe a bridge too far, and it's -- it's kind of fallen out of use. So at any rate, thank you, Ana, for that reminder.

HONORABLE ANA ESTEVEZ: I thought he would be happier. I thought he would be giddy.

CHAIRMAN BABCOCK: Well, you know, if I

don't look giddy, I am totally giddy.

HONORABLE ANA ESTEVEZ: You don't look giddy.

MR. ORSINGER: Well, I mean, it's a problem. I mean, are lawyers custodians of the unfiled discovery and for how long? And if somebody appears at your office and says, "I want to see all the discovery in such and such a lawsuit," do you have a duty to say "yes"? Do you have to set them up? Do you have to give them a computer? How does it work? Anyway, I think it's time, Chip, if we can do it, to pass it on to Stephen and let him talk about his new rule, which is his version, taking into account a number of our comments last time to try to come up with a solution, and I think it's really important for us to look at it, but understand that in this editing process where we're not taking votes to support a change, we're just listening to arguments and deciding to make the change or not make the change, and that argument may have been very articulately presented by one person and not supported by anyone else. So that's the danger of continuing this rule revision based on debate rather than based on votes.

CHAIRMAN BABCOCK: Well, point one on giddiness, my thought about removing that provision about unfiled discovery was not just because I wanted to excise something from the rule, but rather in response to what

the Court asked us to look at, I believe, based on my practice in terms of representing mostly defendants in cases, that the unfiled discovery issue is very cumbersome with 76a if you are really going to follow 76a, and it doesn't, in my judgment, advance the interests that 76a was -- is and was at the time meant to support, which is the public should know what the judicial branch is doing in deciding cases, and that means that the public ought to be able to find out what the judges are saying about the cases and why they are saying it.

Unfiled discovery doesn't satisfy either of those two objectives, so -- but at the same time, it causes a lot of heartache for the trial judges and for the parties to try to deal with unfiled discovery and 76a. So I think, personally, not as chair, but personally, that that provision has outlived its usefulness. It is not correct to say that it's never been used, nor is it correct to say that some of the stakeholders still like it. I know the *Dallas Morning News* within the last, you know, years maybe, pre-COVID maybe, used that provision to try to get some documents regarding a story that they were -- they were doing. So it's not -- it's not correct to say it's never been used, but I don't think it advances the interest of the rule. So that's behind my comments --

MR. ORSINGER: Yeah.

CHAIRMAN BABCOCK: -- on excising that. So a couple of questions before we go to Judge Yelenosky. The Court said to us that their procedures are time-consuming and expensive, and one of them is clearly the unfiled discovery, which I've talked about. I think we ought to be clear about what the others are, and you've talked about some of them, the 14 days and all of that, but we ought to have clarity about what we're trying to fix, unless it's the view of the committee to just, you know, jettison the rule and start over, which it may be.

MR. ORSINGER: Well, okay.

THE COURT: One other point I want to -- one other question I want to add. And I apologize if we've already talked about this once. We probably have, but I can't remember. The Court asked us to take into account the June 2020 report of the legislative mandate subcommittee, which would be Mr. Perdue's subcommittee, and the look on his face suggests to me that he doesn't remember what that is either.

MR. ORSINGER: Well, I haven't seen if it's -- if I'm remembering the reference, it was a statutory provision about persons who were victims of sex trafficking, and they had to be anonymously treated in the court records, and if they had been filed under the Rule 99, they had to be changed. I think that was what the

presentment was at the time.

CHAIRMAN BABCOCK: Okay.

MR. ORSINGER: It may be broader than that now.

CHAIRMAN BABCOCK: Is that it, Jim?

MS. DAUMERIE: Yes, I think that's correct.

CHAIRMAN BABCOCK: I should have gone to you first, Jackie. Sorry.

MR. PERDUE: Can I defer to Jackie?

CHAIRMAN BABCOCK: Yes, you may.

MR. ORSINGER: So we have -- this rule has embedded in it court orders required to be sealed by statute because we may have more than one statute now and we will probably have more later. On your second point, Chip, I think that Stephen's current rule basically doesn't suspend the requirement of the hearing just for presumptively protected information, which Stephen doesn't recognize in his rule at all. He says, I think, if I'm not mistaken, that there will be no hearing on any kind of information, whether it's a special category or not a special category unless someone requests it or unless the judge wants it, and so that's going to be a great streamlining, it seems to me, that instead of requiring a hearing in every instance, now we're not requiring a hearing unless someone wants it, including the judge, and

that should -- that should help a lot.

CHAIRMAN BABCOCK: Okay. Yeah. I get that, but I'm focused now on the report of the subcommittee, and -- and if we're going to follow what the Court wants us to do, we ought to have a discussion about the issues raised in that subcommittee report.

And finally, I think you alluded to this, but I think we ought to have a clear record. The Court noted that the practice under 76a is significantly different than the federal court practice, and you said that, I think, but it seems to me that it's important -- we know what 76a says, but it would be important to be clear about what federal practice requires. My experience in -- and people here may have different ones, but that's pretty much dedicated to local rules, and the local rules are all over the map.

MR. ORSINGER: Right.

CHAIRMAN BABCOCK: Some courts don't have any rules. If you go to federal court in Florida and you try to get something sealed, you better be willing to put up your first born as security before they'll let you do it. I'm just being facetious, but you know what I'm saying.

MR. ORSINGER: Right.

CHAIRMAN BABCOCK: So it's different,

different standards depending on which federal court you're in. So those are just things I think we need to be sure are included in the records, because they are directly responsive to what the Court asked us about. So with that, I will be happy to yield to my brother Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, let me say up front seriously Richard talked about, you know, working on this. Richard and I have worked very closely on this, and we have a lot of agreement that's reflected in the last draft, and so the rest of the committee may not agree with us, but I want you to understand that this isn't unvetted. It's at least vetted by Richard. I've conceded some things that I -- that he thought were wrong, and he's conceded some things that I thought were wrong, and so this is just my proposal, but it is over a month of Richard sending an e-mail to me at 11:00 at night and me immediately responding to it at 9:00 in the morning. So that's just something to consider.

I think that the areas that -- to some extent we still contest are -- between one another, are the judge's role and obviously the presumption of confidentiality. The effect of a request for a hearing, not whether a hearing is dependent on a request, but whether a hearing request or the lack thereof has a

particular effect pursuant to the rule. And those are, I think, what are major. And I guess we could go through the rule and these issues will come up as we talk about the draft.

First of all, I apologize for how the draft appears. That's my fault. I think what you have is a PDF that on the right column has -- at least some of the documents have format up and down the page. I didn't realize when I did it in Word that it could come out that way in PDF, but that's my fault. So ignore the man behind the curtain for the formatting mentioned there. Should we, Richard, just go to -- I think we should start with the change from the last one.

MR. ORSINGER: Okay.

HONORABLE STEPHEN YELENOSKY: Because y'all have a foundation in the last one, and there is a mistake I made on that that I'll point to. So what we're looking at is -- and Jaclyn can tell us, because I don't have it labeled as an exhibit. It's the 9-20 -- Stephen Yelenosky's 9-20-22 compared to subcommittee 8-16-22.

HONORABLE TOM GRAY: Tab J.

HONORABLE STEPHEN YELENOSKY: J, thank you. Okay. So give you a minute to get to J if you're not already there.

MS. DAUMERIE: It's page 81 of the notebook.

HONORABLE STEPHEN YELENOSKY: Is that enough time? Anybody still looking? Okay. So this is -- there's not a lot of redline or strikeout here because there's not a lot of change from last time, or at least I want to highlight what the changes are. So you can see (1), (2), first change, which on mine anyway is underlined and in red is under (2)(a)(4), and I think Judge Miskel had proposed this change. I think it's a good change, but it's more -- it's -- it narrows the ability to protect -- through order protect the identity of a person, because what I had written originally was "person has a well-founded fear of violence," and Judge Miskel said, well, what does that mean? Why don't we know -- use something that we do know the definition of and that is the person has a protective order, domestic violence protective order, so that's why that's there.

Now, this is where I made the mistake. The 8-16 draft did have (c) in it, which is the undisclosed discovery, and the most recent draft does not. So that should be in strikeout. Here it just is gone, and we've already had a discussion about that. (3) is my extreme proposal, and that comes from a couple of things. One is at the last meeting I heard more opposition than I expected to hear to a presumption of confidentiality or at least with respect to a number of things, so I stripped it

back to what I think is required in terms of a presumption of confidentiality, which is the Texas Uniform Trade Secrets Act, and I say it's required because the Supreme Court in HouseCanary determined that it's required under TUTSA to apply that presumption. So it doesn't need to be in the rule, but, as I've drafted it, IT reflects that and the comment, I think, says that's why it's there, but that leaves all of the questions that Richard has about other things that might be appropriate for a presumption.

What I'd say about that -- what I think the first consideration there is a legal one, and that's what we can, consistent with constitutional law, what the cases say, what Professor Dustin Benham has argued in his paper. Can we reverse the presumption as a legal matter for anything else? I've talked with him. He has conceded what HouseCanary said, but he reads HouseCanary as applying only to misappropriation of trade secrets and not to trade secrets in other contexts.

So the question might be, well, if it's permissible for TUTSA, should it be permissible for trade secrets when they're introduced not in a misappropriation case, but in another case, and then there are some other provisions there we can talk about each that have been stricken here; but the comment I have on those, since you don't really have a suggestion as to the individual ones,

if you think that any of these individual ones legally could be -- could have a reverse presumption, then the question is more one of policy ultimately for the Supreme Court, but for opinions here.

CHAIRMAN BABCOCK: Stephen -- Stephen.

HONORABLE STEPHEN YELENOSKY: Yeah.

CHAIRMAN BABCOCK: Could I just stop you there for a second on the trade secret --

HONORABLE STEPHEN YELENOSKY: Yeah.

CHAIRMAN BABCOCK: -- issue? Because I think you and Richard have both noted the distinction between TUTSA and HouseCanary, but I remember at the time when 76a was promulgated, there were certain stakeholders that advanced the argument, much as Richard has articulated it, but if -- if it's a bona fide trade secret, why does it matter if it's a trade secret that comes up in discovery in just a normal case, a products case, or whatever it may be, in a TUTSA case? What's the rationale for that distinction?

HONORABLE STEPHEN YELENOSKY: Right, I agree that's probably true. I stripped it back to what I thought --

CHAIRMAN BABCOCK: No, no, no, I think you did the right thing. I just -- I don't -- I think one thing would be helpful would be to see if anybody can

articulate why that distinction should live on between TUTSA and non-TUTSA cases, so I --

HONORABLE STEPHEN YELENOSKY: I don't have an argument.

CHAIRMAN BABCOCK: I don't want to pick on anybody, but, Jim, it was primarily the plaintiffs' lawyers on the committee at the time that were advancing the trade secret articulation.

HONORABLE STEPHEN YELENOSKY: Well, it might have been because we didn't define it.

CHAIRMAN BABCOCK: Well, that could be.

MR. PERDUE: I -- so I didn't know there was a pop quiz today, and so --

HONORABLE STEPHEN YELENOSKY: We at least expected you to --

CHAIRMAN BABCOCK: Yeah, you were sitting thinking about the World Series coming up and --

MR. PERDUE: I think that -- I can't -- I'm not going to even attempt at this time in the morning to make a distinction between TUTSA and Canary.

CHAIRMAN BABCOCK: That was unfair. Justice Christopher. Sorry, Jim.

HONORABLE TRACY CHRISTOPHER: I might make the distinction between TUTSA and a mass tort in that a mass tort trade secret might involve public health and

safety, whereas a fight between two businesses, did you steal my trade secret, generally does not.

CHAIRMAN BABCOCK: Judge.

HONORABLE STEPHEN YELENOSKY: Well, that's a good -- that's -- I recognize that distinction. I guess devil's advocate would say, well, if that's the situation, it's just a reverse presumption and you would easily overcome that presumption because it would be harmful to the public health and safety not to overcome the presumption, but that's arguing the other side. I don't know what I think about that.

CHAIRMAN BABCOCK: Yeah, well, but just to flesh that out, Justice Christopher, in a mass tort case, so one -- so the defendant, I presume it would be the defendant would say, "Hey, I'm going to produce to the plaintiff's lawyers this document, but it contains a trade secret." And you as the trial judge are satisfied that that has been demonstrated, so what would be the argument about not allowing that to be sealed?

HONORABLE TRACY CHRISTOPHER: Well, because -- well, the mass tort situation is extremely complicated versus just trade secret between two businesses, because the mass tort situation involves, you know, plaintiffs generally across the country, right; and so as Richard was talking about, you know, I worked five

years to get this document and now we're sealing it; and what you'll see in mass tort litigation is, for example, a request for production of documents. Produce everything to me that you produced in this case where plaintiff's lawyer spent five years getting all the good documents, right? And it's interesting because in some jurisdictions the judges will prevent defendants to do that, prevent them from doing that until you pay the plaintiff's lawyer for their work on the case.

So, I mean, it's -- I mean, there is a lot of really weird orders that come out in a trade secret case. So that -- that is why, all right, so it's a trade secret, it shows that, you know, I need this to determine whether the product is defective or not, right? I give it to my expert, et cetera. If it's sealed, then is it discoverable in other lawsuits? Okay. So to me that's why it does make a difference, right? Well it's sealed, so, you know, I can't produce it, and so then just from a -- the idea of, you know, courts being open and if it's producible in one court, shouldn't it be producible in another court comes into play. I mean, it's a big issue in the mass tort world.

HONORABLE STEPHEN YELENOSKY: That may not reach the sealing issue, though, because it's a separate question as to whether in the subsequent suit a plaintiff

or defendant can get the discovery in another suit. That's a separate question from whether or not the sealing in the prior suit prevents or requires it to be sealed or not sealed in the new case.

HONORABLE TRACY CHRISTOPHER: True. I mean, because it could be unfiled discovery, but let's suppose it's a motion for summary judgment on my tire is not defective. Okay. And it all gets sealed up in Texas, right, because of this order. Well, someone else who is investigating is this tire defective comes to Texas to look at the Texas file, and it's all sealed.

HONORABLE STEPHEN YELENOSKY: Yeah.

HONORABLE TRACY CHRISTOPHER: So, I mean, that's the --

HONORABLE STEPHEN YELENOSKY: So it's an issue.

HONORABLE TRACY CHRISTOPHER: -- countervailing argument, to me.

HONORABLE STEPHEN YELENOSKY: So it's a real issue on a trade secret.

CHAIRMAN BABCOCK: Professor Hoffman had his hand up, and then Jim, who's now thinking about this.

HONORABLE TRACY CHRISTOPHER: I'm helping Jim with the plaintiff's argument.

CHAIRMAN BABCOCK: You were marking time

until Jim woke up.

HONORABLE TRACY CHRISTOPHER: Just helping him.

CHAIRMAN BABCOCK: Professor Hoffman.

PROFESSOR HOFFMAN: I think maybe it's a quick comment that without sort of taking a position on what we would do outside of TUTSA, I would just say that sort of as a follow-on to what Tracy said, is that HouseCanary, therefore, doesn't control what -- what policy decisions we might make. In other words, I mean, I think the other point here is, without regard to the merits, let's not fall into the bad trap of thinking that HouseCanary answered the question of whether trade secrets outside of misappropriation cases are or are not what's in relationship with 76a.

CHAIRMAN BABCOCK: Yeah. And I think Richard made that point, you know, recognized that point. But Jim.

MR. PERDUE: Well, there's two parts to -- to follow up to that, that address then your idea of the objection to unfiled discovery being this idea that 76a presumption for openness was court function.

CHAIRMAN BABCOCK: Right.

MR. PERDUE: And court activity. And what Justice Christopher is talking to you about is actually a

very, very real world example. It's more current in mass tort, but Richard did the analogy already. Firestone tires had internal documents that established a defect, and it was only through litigation -- but realize that the litigation had gone on for three years until a single law firm had captured five D tread rollover cases on Explorers, and in the interim, the evidence was that Ford knew of probably 40 additional deaths across the United States. So if you have -- if -- I'm not talking about in unfiled discovery, but I'm talking about policy, right. If you have a presumption that my response to your motion for summary judgment that we don't have a defect that includes the knowledge that we do, in fact, have a defect can get sealed, and I'm very concerned about the idea if nobody objects or asks for a hearing.

HONORABLE STEPHEN YELENOSKY: We haven't gotten to that yet.

MR. PERDUE: Because -- I know, I know, but that's the -- that's the second part of this, which is concerning because nobody knows to ask for a hearing, but you have very much a -- an issue of public concern, whether that reaches into the scope of sealing or not, if somebody objects, says, "Well, this shouldn't be sealed," but you have to realize that the fights that the plaintiffs' bar gets in on with somebody like Alistair

Dawson on this is -- everything should be confidential, and then if -- and we'll mark it confidential and really, really confidential, and then if you have an objection to that, you have to take that to the court; and if a document that's produced with that stamp of confidentiality needs to be attached to a motion, then you need to go through this predicate process to be able to attach it, otherwise you're violating the confidentiality order.

So the unwieldiness is moved off of the 76a process onto the parties, which may be a good -- may be a good procedural prescription, but I think it's worthwhile to dovetail then on what Justice Christopher is talking about to you, Chip, which is the court function and the public's right to know can include some really big issues that are related to subsequent litigation, bigger issues related to both the court's decision and other cases that can be easily put into a sealing order if you just kind of globalize the idea that all trade secrets are captured and the only way you uncapture them is you have to -- you have to ask for a hearing, but you don't know that there is a hearing, and that's -- it's very -- it is very concrete in mass torts. It has a legacy in products.

We don't really have the same issue in Texas anymore, but the -- so the policy distinction for trade

secrets in and of itself between HouseCanary and TUTSA, I'm not sure, but when you get into the public scope of what courts do, you can have a trade secret that is relevant to the public's right to know what a court is doing.

CHAIRMAN BABCOCK: Yeah. I see what you're saying. Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, and just also the defendants will put the plaintiffs in a hard position, you know, you want this discovery, you have to agree to this confidentiality order, or you have to agree to seal everything; and if you only have one client that has this particular, you know, issue, you agree to it, because that's best for your client, and, you know, you're not going to have -- you know, if you represent a hundred, well, maybe you'll fight the issue, but if -- so, I mean, that's why it's a problem with the agreed protective order.

CHAIRMAN BABCOCK: Yeah. Richard.

MR. ORSINGER: The discussion has brought two thoughts to mind. Number one is, under our conception of an environment in which documents are sealed without a hearing, the res judicata standard of relitigating would not apply unless there's a hearing by the judge. So if -- if we adopt a rule that allows documents to be sealed by

default, if you will, because no one files an objection, but someone later on has an interest, they can file a motion to unseal, and they're not bound by any prior determination because it was not really adjudicated. It was just kind of mechanical. That's one thing.

Secondly, the mechanics of this presumption are important and broader than just the issue of trade secrets. A presumption assigns the burden of coming forward with evidence and the burden of persuasion. If you are going to have a process where you have to decide who has the burden of producing evidence, you do that by assigning -- by creating a presumption that will operate absent evidence to the contrary. So if we're going to have a process in which sealing occurs automatically because no one has objected and a request has been made, it makes sense to say that the information that's been filed then is presumptively confidential or presumptively should not be sealed, and that condition of sealing will continue until contrary evidence is brought.

So to me the idea of a presumption that documents should be sealed goes hand in hand with the idea of what happens if a request is made and there's no hearing? Somebody has got to win. Whoever wins is based on the presumption. If we have a presumption that all records are open to the public, including trade secrets

that are not covered by the statute, that forces somebody to come forward with evidence, because without evidence, the presumption is, is that it should be sealed. So if we're going to go the route of eliminating hearings in cases where no one requests them, it seems to me we have to add a presumption that the information is confidential unless somebody comes forward and proves that it's not, but that's probably too broad to do -- well, maybe, not necessarily.

But It could be too broad to do with everything. I mean, that's a debate we could have, should it be just a laundry list of just six things that have a reverse presumption and then the absence of a request will be sealed, or should we just say, hey, that's it for everybody. Regardless of what the presumption is in the hearing, if there's no hearing, it gets sealed. Stephen.

CHAIRMAN BABCOCK: No. Wait a minute. Alistair had his hand up.

MR. DAWSON: Since Mr. Perdue has defamed me --

CHAIRMAN BABCOCK: Uh-oh.

MR. DAWSON: -- I feel compelled to speak in my defense. Let me first say, I don't think that there's a problem. I mean, Justice Christopher says there's a problem. I'm not aware of a problem where, you know,

people are hiding information or overdesignating it's confidential. I'm sure it happens on a case-by-case basis, but I don't know that it's a huge issue in litigation in Texas these days; and I will make a radical proposal and that is, we should scrap 76a in its entirety. It was written at a time when, you know, people didn't have the kind of access to court records that they have today, and, you know, there was some concern that people were doing settlements and getting documents, Firestone and people of that nature, and hiding them, but now days, you know, people can find out what you file in court, and if you filed documents and they're filed under seal, they're referenced in pleadings that are filed with the court, people can figure out what's in sealed documents. They may not know the details, but they know generally what's in there, so I would propose a whole new rule that's not -- that does not have the number 76a in it and just say people can file documents under seal that if the party producing that document reasonably believes that it contains confidential information, the court can seal it. If the court feels it's appropriate for other reasons, you know, if there's personal information that needs to be sealed in a court of record, you know, that should be allowed to be sealed, excuse me, and then allow anyone to intervene to challenge the sealing.

HONORABLE STEPHEN YELENOSKY: Who does that? Who does the intervention?

MR. DAWSON: Chip's newspaper clients, if they want to intervene to see the documents or a plaintiff lawyer from another case wants to intervene, they can intervene for the limited purpose of challenging the sealing, and the party requesting the sealing bears the burden of proof. Very simple, and you look at what they do in federal courts. Richard says they don't have a uniform rule, but I don't hear of a problem in federal courts. People seal documents all the time, and I don't hear that there's this swell of oh, my gosh, you're hiding stuff, and oh, my gosh, this is terrible, so let's just make it simple and let people seal stuff.

And the other thing I'll tell you is, in the real world nobody abides by 76a. Nobody. When was the last time anyone in this room had a 76a hearing? When was -- really? Y'all do that?

HONORABLE STEPHEN YELENOSKY: Long time.

PROFESSOR ALBRIGHT: A long time ago.

MR. DAWSON: We don't abide by them in Houston, I'll just say that.

CHAIRMAN BABCOCK: Justice Kelly.

MR. PERDUE: I know somebody does.

CHAIRMAN BABCOCK: Justice Kelly has his

hand up, and he lives in Houston.

HONORABLE PETER KELLY: Just a background note, most of us are from the metropolitan areas where the clerks -- we have electronic records or you can do what Alistair said and get online and see what was filed. I think Justice Christopher will agree with me that the records that come up from, say, Grimes County are very, very different from the ones that come up from Harris County. They will be literally Bates stamped and scanned in that way, so we don't have -- much of the state you don't have this instantaneous electronic access to records that we have in the metropolitan counties. So as we make an adjustment to the rules, just bear that in mind.

Secondly, 76a hearings happen. I wasn't personally involved, but it was a case I was in before I got on the bench, and the judge who was handling it just sealed the whole record, just sua sponte sealed the whole record and, you know, this took years for the parties to unwind because they had to go up to the court of appeals and then be remanded back down for a 76a hearing for an itemized sealing of it rather than just sealing the whole record, and when we get to appealability, I'll have further comments on that.

CHAIRMAN BABCOCK: Thank you. Judge Yelenosky and then Justice Christopher.

HONORABLE STEPHEN YELENOSKY: Two things -- I'm sorry, did you want Justice Christopher?

HONORABLE TRACY CHRISTOPHER: No, you first.

HONORABLE STEPHEN YELENOSKY: Let me respond to Alistair and then what Richard said earlier. I think we should -- we should have a debate about whether 76a should -- should be deleted, if, you know, you want to vote on that. I think what you're suggesting, though, is completely contrary to what the policy rationale was for 76a, and I also think there is some conflation of what parties can get and what the public can see and how the public sees that. Everything may be fine in the courtroom. Everybody gets what they want to get, but if there's no look over by the court and/or potentially a hearing and posting, there's going to be a lot of stuff that goes through that went through prior to 76a, and, you know, philosophically I guess you have to make a decision about that, but Richard's making a point that would come up later on, but he's made it a couple of times so I just want to say why I don't think it's pertinent.

Richard's talking about what happens if there's no request for a hearing, blah, blah, blah. I'm sorry, not blah, blah, blah, but what follows that, and the trigger is a request for a hearing in Richard's mind. I don't understand why a judge would have to request a

hearing, because I don't know how a judge ever requests anything other than "Please sit down." So why would we require a judge to request a hearing in order to have the authority to review the merits of the motion? That's -- that's the difference that I have with Richard.

So my feeling on it is judge always has authority, in all other cases has authority on the merits with a motion to seal. Not required to do anything, because if we require them, he can't enforce that anyway, but a judge should have the authority to do it. I think Richard acknowledges a judge should have that authority, but for some reason requires a judge to request a hearing in order to exercise that authority, which would mean, well, if it's a hearing, it's a public hearing. So if nobody in the public has requested a hearing and I'm looking at a motion to seal, nobody in the public has requested a hearing, and I look at it and go, "This is ridiculous." So in order to sign an order that says "denied," I've got to request a hearing as a judge, hold a hearing. Why? All I want is my authority, which I should have anyway. It's more cumbersome than what I'm suggesting, so every time you hear nobody requested a hearing, I would suggest that you keep in mind that maybe nobody requested a hearing, but yet the judge has a problem.

CHAIRMAN BABCOCK: Chief Justice Christopher.

HONORABLE TRACY CHRISTOPHER: I think we always have to keep in mind the distinction between motions and attachments, right? And I'm looking at your questionnaire, Richard, and there's a lot of problems in my mind between motions and attachments, right? So you can file a motion and redact, and people who want to see what's going on in your court can look at it and then perhaps just seal an attachment versus sealing the whole document. So, you know, I think that that -- it's cumbersome but is important, because I'm one of the believers in open courts. Although I -- I will say that on the countervailing side, I think that forces some businesses to put more arbitration clauses in their agreements to get out of the court system and keep everything private. But we get these agreed protective orders that has a paragraph in it that says, you know, if you file anything, you agree it's filed under seal, and I would always scratch that out as a trial judge --

HONORABLE STEPHEN YELENOSKY: I would, too.

HONORABLE TRACY CHRISTOPHER: -- and fax it back to the lawyers so that they would know I had made that change, but not all trial judges do that, and then things just -- just do get filed under seal by agreement.

So it's an issue, and then when it comes up, at least in our court, if we don't see a 76a order, we don't -- and somebody tries to say, you know, seal my brief, we say, you know, this isn't a proper sealing, go back to the trial court and get it sealed.

CHAIRMAN BABCOCK: Yeah. Richard, you had your hand up, and then Judge Estevez.

MR. ORSINGER: The justification for the judge giving notice to the parties that the judge is going to make a decision is to allow the proponents to know that their agreement is now being evaluated and to have the opportunity to come in and defend their position. It's most useful or maybe most important when it's a nonparty's confidential information that's being produced by a party to another party and the judge is going to override the agreement that that information will be confidential and the third party has no idea that they need to come into court and defend it. So to me it's just a question of due process. I don't question that the judge ultimately will make the decision. The question is should the judge let everyone know that the judge is considering it so that they have the chance to argue and -- so there's a trade-off there.

CHAIRMAN BABCOCK: Yeah, Judge.

HONORABLE STEPHEN YELENOSKY: Well, it

depends on what "hearing" means, because everywhere else in here "hearing" means public. The public gets notice, all of that procedure, right? If what you're saying instead, which I guess we hadn't discussed before, is like a bench trial, you know, come on in and let's hear it, that's a different kind of hearing. And that's fine.

MR. ORSINGER: I anticipated it would be a notice to the world kind of hearing, like, hey, the parties may have agreed to this, but the judge is requiring a hearing with notice to the world so that everybody can become involved if they want to.

HONORABLE STEPHEN YELENOSKY: Well, but then you have to notify the world when nobody has requested a hearing, which is contrary -- contrary to the idea of making this less cumbersome; and the rule will require, nonetheless, notice to anybody who is interested legally in the motion to seal, right? So they're going to get notice under paragraph (4) or whatever, right? So honestly, I'm arguing that we shouldn't have a hearing in the sense that we do when it's requested through the website and all of that if no one had requested a hearing, but that has nothing to do with the judge's authority. So if you want to say, though, there's an intermediate, which is if no one requests a hearing, the judge shall set a hearing in court with the parties and anybody else who's,

you know, been notified, that's fine.

MR. ORSINGER: To me all that's important is that the stakeholders know that there's going to be a judicial evaluation that they didn't expect.

HONORABLE STEPHEN YELENOSKY: Right. And they're all getting notice if they follow the rule.

MR. ORSINGER: Yeah. I think that's good.

CHAIRMAN BABCOCK: Judge Estevez.

HONORABLE ANA ESTEVEZ: So I am a proponent of something that was more similar to the Sedona Conference, and that was -- there's two tracks. I think that 76a is very cumbersome. I had a problem with a case personally before I got on the bench that I didn't seal because of the type of publicity or notice it would give. And so I think there should be two tracks, and I think that for mass torts and other things like -- it makes sense to go through 76a and have it exactly the way it is, but for the 95 percent or maybe even 99 percent of the rest of the cases, which would be medical malpractice, jury trials, you know, I think what we need to do is look at these (1) through (5), and maybe we take out the information subject to confidentiality agreement, but let's keep the information that is confidential under our Constitution, statute, or rule.

You know, HIPAA is an important statute, and

I think that people that file their personal health records either -- either it was filed because it was a jury trial or it was a summary judgment or it was a medical malpractice, I think those people should have a way of being able to have this sealed without having to have a hearing, and I would call it the other track, which is the -- you go through that there's not a presumption of openness to my medical records, to my right to privacy on those issues, and those should have the right, too. Unless somebody requests a hearing, I should be able to have that sealed without a judge reading all of my medical records to decide whether or not it should be sealed, and I don't think that's -- in any way affects the right to the newspapers or the public, because I think Lisa Hobbs said it earlier when we first started.

She's like, I don't care if you're going to do this if you give us a way to unseal, and I think that's the solution here. Let's make it not so difficult to be able to unseal. Let's give them the notice to unseal. If somebody wants to go and read those because they come to a judge, like an adoption, I unseal an adoption record very, very often, because somebody has got a health problem and they need to go find out something, or whatever it might be, but they have to give me good cause. So if someone comes and they say, "I'm litigating against this person

and I need to know if there's something in that file," well, that person has an interest as opposed to just generally going through, or I know this case had to do with this pharmaceutical drug and so I want to see what their symptoms were. I mean, there may be many reasons to unseal other than just someone's -- your ex-spouse's girlfriend wants to know what you did. So --

CHAIRMAN BABCOCK: Well, there's a -- on that issue, which has been touched upon before in this discussion, there is a timing issue. For example, in the Tuttle Jones case, which spawned all of this -- spawned 76a, it was a psychiatrist who was mistreating his female patients and had been sued multiple times, but each time it had been -- the whole records had been sealed, and it wasn't until years after the last case that the newspaper started investigating it. So --

HONORABLE STEPHEN YELENOSKY: Right.

CHAIRMAN BABCOCK: So they moved, the newspaper moved to unseal, years later after there had been a final judgment, and the end of it -- the end result of that litigation was the Supreme Court said final judgment, your time to attack it has passed and so too bad, so that's why you have some of those provisions in the rule, but forget about that. You know, suppose that -- that some historian, you know, 50 years from now

is doing research on the great Richard Orsinger and goes to the court records and sees that there has been substantial litigation where Richard's been a party, but it's all sealed.

HONORABLE ANA ESTEVEZ: They can ask to unseal it.

CHAIRMAN BABCOCK: Well, they ask to unseal it then?

HONORABLE ANA ESTEVEZ: Yeah.

HONORABLE STEPHEN YELENOSKY: You want me to get back to this?

CHAIRMAN BABCOCK: Yeah, let's get back to what we were talking about.

HONORABLE STEPHEN YELENOSKY: All right. So there are a number of things here, and if you want to talk about that, there's a response, but (a)(1) through (5) are -- here have been ones that were in the prior draft that should be considered and some of those have been discussed already. I can just recall a couple of comments that came up last time on information that is confidential under Constitution, statute, or rule, that there was a question as to what do you mean "confidential" under the Constitution? Information subject to a confidentiality agreement or protective order, the comment was, well, anybody can call anything a confidential agreement or

protective order, so why should it have presumption?

(4) was information subject to a presuit nondisclosure agreement with a nonparty. Similar to that would be, well, anybody can have a presuit nondisclosure, but it's intended to capture an NDA that probably has trade secrets in it or something, right?

MR. ORSINGER: Well, I mean, a lot of times it could be personal information like let's say it's a celebrity that hires a nanny for their kids and they sign an NDA not to repeat what goes on inside the home.

HONORABLE STEPHEN YELENOSKY: Sure, yeah.

MR. ORSINGER: And, of course, the intense media interest in everything about celebrities, but there's no public interest in knowing what celebrities do, so you could also have NDAs in business where people are hired. You could have NDAs in acquisition transactions where one business is inquiring into purchasing another, so they sign a nondisclosure agreement and then financial information is shared and then the deal falls apart and then later on there's a lawsuit that subpoenas that information. To me the reason that that's important is because there's a -- there's a constitutional right that protects contacts both in the federal Constitution and state Constitution, and so if someone who is -- has a contract right is going to have that broached -- breached

because of something that someone else is doing that's unrelated, we have rights to -- we have a constitutional public right to know, and we have a constitutional right to the enforcement of your contracts. We have a balancing that goes on there.

HONORABLE STEPHEN YELENOSKY: Well, thank you for answering that. As an aside, but I think it applies to all of this, to the extent 76a is not going to draw a request for a hearing from the public and it's in the hands of the judge, I'm not so sure it matters what the presumption is. Because the judge is going to figure out whether or not he or she thinks this is something that should be sealed based on the considerations here, but I doubt a judge is going to say, well, if I had the other presumption I would have done the opposite. So that's a comment overall when we're parsing this, but let me go on.

(B) was stricken because under (b) is -- well, first of all, you have all of (1), (2), (3), (4), (5) above, so you need something, and without those things you don't need (b), except if you want to say the effect of not requesting a hearing means that the judge automatically has to seal it or the judge has to himself or herself actually request it. So that's what's (b) and that's why (b) is out. (4) was in before, and the change is because the standard for when you have to give notice,

as I thought about it, even though I drafted it, was too vague. Because, you know, you have to notice if somebody's interest in the confidentiality is evident from the document. Well, that's probably true, and whose probable interest in the confidentiality of the information is otherwise known. That's -- it's too vague to have probable there. I think it needs to be somebody who knows it's been kept confidential. That's why I suggested that change to my own language. (5), do you want me to just keep going?

CHAIRMAN BABCOCK: Yeah, go ahead. Go ahead.

HONORABLE STEPHEN YELENOSKY: Okay. (5), the only strike there is the website reference, and I'm reminded that Justice Bland pointed out some website that may not be the same website as this, I don't know, but we don't want to put in a rule a website. It kind of reminds me of David Letterman early on when these things first came out, he always said "www" like before, you know. We don't do that anymore either, but it could be a different website, right?

HONORABLE TOM GRAY: Link Rock.

HONORABLE STEPHEN YELENOSKY: So anyway, that's a minor point. Now, (5)(b) is, I think, a significant thing, and Richard and I talked a lot about

this, and Richard was urging it, and it's proposed here. I think it's a -- I support it. Basically what (5)(b) says is that you can go before the judge, as in some federal local rules, and say, "I want to have this sealed," and the judge, whatever -- through whatever process says, "I'm not going to seal it. Your motion is going to be denied, or is denied". And then the party can say, "Well, if I can't file it sealed, I don't want to file it," you know, physically give it back or whatever, I'm not going to file it.

That is an out that wasn't apparent before or available before under 76a. But what has to be clear here is that if they say "I'm not going to file it," but the judge can't consider that, because that happens under the current 76a where lawyers will come in, happened to me a number of times, and say, "Well, Judge, we don't want to seal this, we just want you to read it." And so there was no understanding of the distinction between what's presented to the judge for merits or another purpose and what's presented to the judge solely for determining whether it should be sealed. Because that's a complete circumvention obviously of any kind of sealing rule, if all you have to do is say, "Judge, I just want you to look at it and then put it in your drawer," and, you know, this is an affidavit. So that's why that's drafted as it is.

CHAIRMAN BABCOCK: Judge, can I ask a question about this?

HONORABLE STEPHEN YELENOSKY: Sure.

CHAIRMAN BABCOCK: Would this be applicable in a situation, which I think is more common, where the party that wants to seal, wants to file something, and has confidential information, it's not anything they care to keep confidential. In fact, it's embarrassing or bad for the other side, so they're going to say, hey --

HONORABLE STEPHEN YELENOSKY: I want to be able to do that.

CHAIRMAN BABCOCK: -- I want to be able to file this, and if the judge doesn't say, "No, you can't," then it gets filed. So it would work the same way in either circumstance, right?

HONORABLE STEPHEN YELENOSKY: Well, if I understand your question, if the movant to seal is a party -- or not a party. It just says "movant," then that movant gets to decide whether or not --

CHAIRMAN BABCOCK: Yeah.

HONORABLE STEPHEN YELENOSKY: -- to file it.

CHAIRMAN BABCOCK: That's what I thought. Richard.

MR. ORSINGER: Let me respond to that and then to my earlier point. That's, I think, the value of

having a special category of information where you're required -- if you want it public, but you know they don't because it fits some category, it's either a trade secret or it's confidential information or privileged, then you've got to give notice to the other side. They have the opportunity to come into court and try to get it --

CHAIRMAN BABCOCK: Right.

MR. ORSINGER: -- try to get it -- keep it sealed, and the idea is that that puts the burden on the proper person and then the judge is going to decide you're okay to file it unsealed and then -- and then it becomes public, or the judge can say, no, it's going to remain sealed, in which event it may or may not get filed. But in this situation where you're asking for a preliminary assessment before filing, under the definition of court records, anything submitted to the court in camera solely for the purpose of obtaining a ruling on discoverability, I don't like discoverability because it ought to be on sealing anything that's put in for the court to consider in advance of filing, we're instructing that the court can't consider it, but we also need to provide that it remains sealed because it's not a court record. The judge has reviewed it only for purposes of in camera, said, "I'm not going to seal it," okay, then nothing gets filed, and they have to --

CHAIRMAN BABCOCK: Or it does get filed.

MR. ORSINGER: Well --

HONORABLE STEPHEN YELENOSKY: They choose.

CHAIRMAN BABCOCK: They choose.

HONORABLE STEPHEN YELENOSKY: The possessor of the confidential information chooses or the party chooses. I don't want to file this anyway.

CHAIRMAN BABCOCK: Yeah, the plaintiff has done discovery, and there's probably a protective order, maybe agreed to.

MR. ORSINGER: Uh-huh.

CHAIRMAN BABCOCK: And the defendant, Alistair's client, has slapped "confidential" on every document that he's produced, so Perdue knows that, you know, he's got to deal with a document that has "confidential" slapped on it pursuant to the protective order, but it's really bad for Alistair's client. So he goes to the judge and says, "Hey, I want to file this on a motion for summary judgment -- in support of a motion for summary judgment"; and the judge goes, "Yeah, go ahead" or "don't," doesn't matter, because then Jim is going to file it either not under seal or under seal. Right?

MR. ORSINGER: Right. So that --

CHAIRMAN BABCOCK: That's how it's going to work.

MR. ORSINGER: You've raised a question that really is important, is -- which I think was in the Tuttle Jones case. Wasn't there a summary judgment and then the case was settled after the summary judgment was denied?

CHAIRMAN BABCOCK: Yeah, I think that's right, yeah.

MR. ORSINGER: So the question becomes --

CHAIRMAN BABCOCK: But there was a lot of discovery and a lot of stuff in the, quote, court record, about the doctor.

MR. ORSINGER: So that's a different question that we're not addressing here, but if the document that's sealed is an integral part of the judge's disposition of the case, does that change things? In other words, because it wasn't peripheral but because it was a -- central to the outcome, does the public's right to know the judge's reasoning and the justification for it, is -- I don't -- we don't need to solve that today.

CHAIRMAN BABCOCK: No, but it's implicated for sure, and Judge Estevez says, look, as long as the Amarillo news can come in and get, you know, get her to make a ruling, and you don't object to it at some point --

MR. ORSINGER: Yeah.

CHAIRMAN BABCOCK: -- when they get interested in it, then that's okay.

MR. ORSINGER: So easy on sealing, but easy on unsealing.

CHAIRMAN BABCOCK: Well, it shouldn't be easy to seal, but --

MR. ORSINGER: Not easy, but easier than now.

CHAIRMAN BABCOCK: Easier than now.

MR. ORSINGER: Yeah.

HONORABLE STEPHEN YELENOSKY: Chip, I thought you were getting to the point of --

CHAIRMAN BABCOCK: Frustration.

HONORABLE STEPHEN YELENOSKY: -- whether a nonparty can get involved in this, and if that wasn't your point, I don't need to respond. I was just saying that Jim may want to put it in. Alistair may object to it, but somebody else may object to it as well or move to seal it, and that court has to consider that.

CHAIRMAN BABCOCK: Yeah. Has to deal with it. Yeah, sorry.

HONORABLE STEPHEN YELENOSKY: Okay. So motion to unseal, that's the same change I made in motion to seal. It's just the standard for when you have to notify someone else, and I just point out -- and this was in last time, but the reason that the burden is on the parties on the motion to unseal, the parties in the case

in which it was sealed, is because the person moving to unseal only knows what's been posted publicly. That's the whole idea of sealing, so here I am, the news or whatever, and I see something, this is sealing trade secret information about wrongful death or whatever it says. So the news only knows that, right, and they move to unseal. They don't know, you know, who's got an interest in preserving this confidentiality except by inference, so they can't be responsible -- the movant to unseal can't be responsible for notifying anyone other than the parties, because that's the only people they actually know have an interest, and then -- but the parties in the underlying case would have that knowledge.

HONORABLE ANA ESTEVEZ: I'm going to -- I'm just going to -- I don't know that I'm going to disagree with you, but I will say --

CHAIRMAN BABCOCK: Go ahead.

HONORABLE ANA ESTEVEZ: -- that I've had somebody -- well, I think it's important to note this. So when someone comes to me to ask me to unseal something and I -- again, the only one I've had are adoption records. I actually open the record to see if that information is in there before I give them whatever they're asking for. So I would suggest that if somebody filed a motion to unseal, assuming they have electronic files like I do, and it has

a sealed document, I can open it, and they can -- I could, as the judge, when they came to me filing that, let them know who the people were that needed that -- that were affected by it.

HONORABLE STEPHEN YELENOSKY: But that's an extra step for you that you shouldn't have to do.

HONORABLE ANA ESTEVEZ: Well, I mean, it just depends on how -- I mean, on this huge mess --

HONORABLE STEPHEN YELENOSKY: You certainly can do that. It doesn't preclude the judge from saying, oh, I know who's interested, send a notice to them.

HONORABLE ANA ESTEVEZ: I mean, it's a -- it's a lot easier on adoption. I mean, obviously you only have a mom and a dad, right?

HONORABLE STEPHEN YELENOSKY: Right. But this wouldn't preclude that, it just puts the burden on -- without the judge's intervention at all, puts the burden on the only people who can be said to know who has an interest in this document are the parties because nobody else, if it's sealed, really knows what it is and who might be interested in it. That's the point. So it doesn't preclude what you're saying, I don't think, Justice Estevez.

HONORABLE TRACY CHRISTOPHER: Except she's considering the substance of the information in making her

ruling. So, you know --

HONORABLE STEPHEN YELENOSKY: Are you at that point?

HONORABLE TRACY CHRISTOPHER: Yes.

HONORABLE ANA ESTEVEZ: Are you asking about what --

HONORABLE STEPHEN YELENOSKY: I didn't know -- I didn't hear her say that she would unseal it, that she would tell --

HONORABLE ANA ESTEVEZ: No, I would say any person that would have notice.

HONORABLE STEPHEN YELENOSKY: Yeah, that she would tell the movant to unseal, "Hey, I've looked at it. You need to give notice to these people."

HONORABLE ANA ESTEVEZ: Right.

HONORABLE TOM GRAY: So I want to know who my parents are so I go file a motion to unseal, and so she looks at the record and says, okay, you need to notify this man and this woman that we're going to unseal this record.

HONORABLE TRACY CHRISTOPHER: Exactly.

HONORABLE STEPHEN YELENOSKY: Good point. Good point.

HONORABLE TRACY CHRISTOPHER: Exactly.

HONORABLE ANA ESTEVEZ: I mean, I don't do

that. I've never done that, I guess --

HONORABLE STEPHEN YELENOSKY: So instead, you give notice to the attorneys who dealt with that adoption, and that takes care of that.

HONORABLE TRACY CHRISTOPHER: They aren't there.

HONORABLE ANA ESTEVEZ: I mean, usually it's their own stuff that they had. It's usually the birth parents that are lost.

HONORABLE STEPHEN YELENOSKY: The attorneys are dead? Yeah, that could be, the attorneys are dead. Well, we're not going to write a rule for attorneys dying.

HONORABLE ANA ESTEVEZ: I just wanted to say it would be possible to find out some of those people, but I understand.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: I mean, you know, Alistair says Christopher agrees that this rule is burdensome and unwieldy and costly, and I do, but it's really hard to write a rule that covers every situation. And that is why the rule has become, you know, burdensome and costly. I mean, like, you know, and sometimes a judge will just sort of do a wink and a nod, too. Like somebody comes in, a minor settlement, "Judge, we're not putting the money into the registry of the court. We want to put

the money into, you know, XYZ college fund that the parents have already set up," right? And so I have to know -- but we don't want the amount of the settlement, you know, in this court reporter's record, right? And so they just give me a piece of paper with the amount of the settlement on it, and I look at it, and I look at it for the amount to see whether I think the amount, you know, is a reasonable settlement, plus you get the ad litem's opinion on it and everything like that, because you actually have to decide as a judge whether you think the minor settlement amount is, you know, fair and reasonable, so --

HONORABLE STEPHEN YELENOSKY: Yeah.

HONORABLE TRACY CHRISTOPHER: It's really, really hard to write a rule that covers everything, to cover the adoption case, to cover the minor settlement case, to -- you know, is this a mass tort case where this document would be useful to other people, or is this just a, you know, PI case where we're going to keep all of the medical confidential? Is this -- is this a medical malpractice case where it's the first, the first bad thing this doctor has done as opposed to the tenth bad thing this doctor has done? You just think it's a one off when you have the first bad thing. So it's just there -- we can talk about so many different situations that -- that

can sort of derail writing a rule.

HONORABLE STEPHEN YELENOSKY: I got -- if there's no other response to that, I'll go on to (7). Hearing, Marcy, I think you recommended that we be more emphatic about no hearing is required, so that's why the first sentence is the Marcy Greer sentence. I guess we need to put asterisks and a comment. An attribution. The other thing, if the hearing is requested, I think it needs a deadline because somebody can come a month later and request a hearing, but 14 days is not magic, and I know Richard has a whole page of questions about how long --

CHAIRMAN BABCOCK: He has his hand up already.

HONORABLE STEPHEN YELENOSKY: -- how many pages.

MR. ORSINGER: So this is the -- this issue raises the problem with the mechanics of a rule without a category of presumptively protected information. If I'm a litigant and I want to file someone else's confidential information and I file a motion asking the court for permission to file -- I'm filing my own information, pardon me. I'm filing my own information. It's confidential. I'm filing a motion with the court for permission to file under seal. If no hearing is requested, there is no ruling. So in order to get a

ruling on my motion, I think I have to request a hearing.

If we were to have a category of protected information and say that if no hearing is requested within 14 days, then it will be sealed, then it gets sealed by operation of default for a selected category of information. But if we just say all information is the same except for trade secrets under the Trade Secret Act and you can file whatever motion you want, but there's no hearing on it unless somebody requests a hearing, doesn't the movant have to request a hearing in order to get a ruling on the motion?

So what -- the rule was designed at the meeting last time was to say there's some types of information that we're going to say is sealed automatically without a hearing, and it's going to be this, this, this, and this, and we ought to take a vote to find out what's on that list, but if it's on that list and someone wants it sealed and no one objects, then it ought to be sealed automatically. If we don't do that, we're requiring -- still requiring a hearing that every case where a motion is filed because you can't get a ruling from the judge without a hearing. So it seems to me like it's fine to say that there's no hearing unless one is requested, but what do you do with the requested relief if the judge doesn't rule on it?

HONORABLE STEPHEN YELENOSKY: I don't disagree with the point, but every time you say there's no hearing requested, I go to, well, what hearing are you talking about and are you saying the judge has to call a hearing and what kind of hearing is that? Because if you say "automatically," that to me means that the court would abuse its discretion if it didn't grant when the presumption is confidentiality, so I'm just asking you to concede that point if you --

MR. ORSINGER: I don't think that's -- I don't think that that's desirable to say that it's an abuse of discretion. I would just say in the absence of a judicial act of some kind, some kind of ruling or granting or denying, that it's just by default going to be sealed until there is some kind of court order.

HONORABLE STEPHEN YELENOSKY: Well, I just think the language needs to be clear because there's got to be a tendency on the part of a lot of judges just to automatically do it even though there's a comment saying you shouldn't do that. They're going to automatically do it, so I think it's worthwhile, like the comment, to say or to make clear that it doesn't automatically get sealed and doesn't use the word "automatically." It says that it is either sealed -- it is -- if the hearing is requested, the hearing is held. If no hearing is requested, then the

decision is made by the judge after a hearing with the parties, something like that.

MR. ORSINGER: But I'm certainly --

CHAIRMAN BABCOCK: Hold on. Marcy.

MS. GREER: I mean, I think the courts all have a submission process where you don't have to have a hearing if the parties agree. I mean, like I know that Travis County has, you know, central docket, so you can't get a ruling without -- but you can now do the submission docket, and I think Bexar County has that as well, right? And in the submission process, even if the parties agree I've gotten push back from the court saying, "Do I have jurisdiction to do this" or, you know, so the court actually reviews it. It's not like --

HONORABLE STEPHEN YELENOSKY: We're not a potted plant.

MS. GREER: Exactly, but, you know, it's just a process for getting an order. I agree there should be an order and it shouldn't be by operation of law, but by the same token, I don't think a hearing is necessary in every case.

CHAIRMAN BABCOCK: Okay. Yeah, Jim.

MR. PERDUE: So Richard's point has me trying to track the language in your draft, and I'm -- I'm trying to understand the flow sheet of -- so something's

marked as confidential and I file a motion or reply and then I file under seal the attachment.

HONORABLE STEPHEN YELENOSKY: Well, you file a motion to seal.

MR. PERDUE: Well, that -- but it's been marked as confidential by my opposing party.

HONORABLE STEPHEN YELENOSKY: Uh-huh.

MR. PERDUE: And I don't have 14 days to wait to file this reply. I need to get it on file.

HONORABLE STEPHEN YELENOSKY: Well, that's an issue, but if you're saying you're filing it under seal without a motion to seal, you're taking away review by the court entirely and the court is in essentially the agreement of the parties decides sealing, which is what we're trying to get away from.

MR. PERDUE: Okay. So that's -- that's really my question, right, because I can't file things under seal under the court procedures and the filing system without an order by the court.

HONORABLE STEPHEN YELENOSKY: Well, the way we've dealt with that in Travis County, because I understand there's timing, I've got to file my response, right? There's a paragraph that we suggest putting in a confidentiality agreement. First of all, taking out that it's sealed if it says "confidential," that says in the

event that you -- essentially you don't have time to seek a sealing order, right, you can provide whatever you have in your motion to the other party, and it will be dealed -- it will be deemed timely and then you can still have a motion to seal. It won't have been filed, but it will be deemed timely.

MR. PERDUE: All right. So I'm in litigation with not Alistair, but maybe somebody he knows, and they represent --

MR. DAWSON: You've been picking on me all day, just keep going.

MR. PERDUE: Well, you used the "defame" word, and I really -- that hurt me because I would never defame you. Slander you, but never defame you. But I've got -- I've got General Motors on the other side, and so I'm negotiating CMO1, which is a confidentiality order, and I'm not well-trained in this and it doesn't occur to me to get that provision in CMO1, and so I don't have it, and now I am six days out from a deadline to file a response to a motion that I have to get on file. I've got a document that's been marked confidential that I have to attach to be able to address it.

HONORABLE STEPHEN YELENOSKY: Well, then you seek a temporary sealing order.

MR. PERDUE: Why? But I don't want it

sealed. I just want to get my motion on file, his partner wants it sealed.

HONORABLE STEPHEN YELENOSKY: Okay. Well, okay, then you can say, his partner has to file the motion to seal, and if the partner files the motion to seal and therefore you can't file it, then obviously you're not responsible for not meeting the deadline, but there are different ways to deal with that.

MR. PERDUE: But I guess the -- the idea is the burden should be on the person seeking to seal. I think that we can all agree on that. But if I'm -- if I'm just a litigant and I've got something that's confidential whether it's in a list or not, but let's just say it's a trade secret, and I'm willing to file it under seal, like the document gets marked that way in the filing procedure with the clerk of the court. Under this provision where you don't need a hearing on a sealing order and there is no sealing order, what happens to that document?

HONORABLE STEPHEN YELENOSKY: Well, there is a sealing order. Just because you don't have a hearing. We're going round and round on this. The judge is going to make a decision ultimately.

MR. PERDUE: When and how?

HONORABLE STEPHEN YELENOSKY: When and how?

MR. PERDUE: So I file --

HONORABLE ANA ESTEVEZ: When it's in my queue.

MR. PERDUE: -- a motion under seal, I file a motion with a document under seal.

HONORABLE STEPHEN YELENOSKY: Right.

MR. PERDUE: The other party wants to keep it sealed, but I've filed it that way. But they never file for a hearing?

HONORABLE STEPHEN YELENOSKY: No. If you file a motion to seal -- and you could rely on paragraph (4), which says you notify anybody who has -- you know has something confidential, right, and you could say, well, then they have to file the motion to seal and the consequences of the time to get it done are on them, because they filed the motion to seal, but I've never thought how you would not end up with an order. You have a motion to seal. You may have a request for a hearing from the public or not, don't have any request for a hearing from nonparties, and then the judge has a motion before him or her that doesn't require a public hearing, let's say, or could be done on submission, and the judge rules on it.

Now, when is a different question, and you're saying, well, the judge needs to rule within a certain amount of time because of your deadline, right? I

don't -- I don't know what would meet every circumstance, but I understand your point. The way we've dealt with it has been don't file it, but give it to the other party until we have time to rule on whether or not it could be filed sealed or not.

CHAIRMAN BABCOCK: We're going to take our morning break. We'll be back in 15 minutes.

(Recess from 11:04 a.m. to 11:19 a.m.)

CHAIRMAN BABCOCK: All right, kids. All right, Lisa, let's get going. All right, guys, can we start again?

MR. ORSINGER: I'm here.

CHAIRMAN BABCOCK: I know you are. Nobody else is.

If we were on Zoom we would already be back talking because everybody would be back on their camera and where did Justice Bland go?

HONORABLE JANE BLAND: I'm here.

CHAIRMAN BABCOCK: There she is. All right. Lonny, let's break up this academic debate over here. We're back on the record. And, Richard, you'll be happy to know that we're going to keep going, but there's been a gag order imposed, which I was against --

HONORABLE ROBERT SCHAFFER: Wait a minute, you're the one that brought it up.

CHAIRMAN BABCOCK: -- on you and Yelenosky. You can't make any more comments, but I'm slightly --

HONORABLE STEPHEN YELENOSKY: That's a good -- that's a good rule, but when I suggested that Justice Hecht could cut me off at any time when I was talking too much he said, "Would that have worked?"

CHAIRMAN BABCOCK: So we'll keep talking about this for a little bit, but we will -- we will take a few votes, like Richard has been thirsting for, but we're not going to vote on his -- his multimillion page questionnaire, but the one thing I think is probably ripe for consideration is whether or not we should eliminate the provision of 76a that includes in the definition of court records, unfiled discovery. And that would be 76a(2)(c), and the vote is how many people are in favor of eliminating that from the rule and how many are not? If anybody wants to discuss that briefly, absent Orsinger and Yelenosky, then let's hear from you. Otherwise we'll take a vote. Anybody want to comment about that?

All right. Everybody who is in favor of eliminating from Rule 76a(2)(c), and that is discovery not filed of record, raise your hand.

MR. PERDUE: I'm abstaining.

MR. ORSINGER: We won't tell any --

HONORABLE ANA ESTEVEZ: I just want to know

if Chip is giddy.

CHAIRMAN BABCOCK: The Chair doesn't vote unless there's a tie. Okay. Everybody opposed to eliminating it? All right. That passes by a unanimous vote, the Chair not voting. So we've got that one --

HONORABLE STEPHEN YELENOSKY: And Mr. Perdue abstaining.

MR. PERDUE: I didn't know.

CHAIRMAN BABCOCK: There's vote number one.

MR. ORSINGER: Thank you.

CHAIRMAN BABCOCK: Now, with respect to the rule that Judge Yelenosky has gone through, his kind of redlining and proposals, let's have a general discussion about that rule from anybody not named Orsinger or Yelenosky who wants to comment on it.

HONORABLE ANA ESTEVEZ: I don't --

CHAIRMAN BABCOCK: I should have included you, but go ahead.

HONORABLE ANA ESTEVEZ: I mean, I think we feel -- we're not all on the -- I don't want to say I'm not on the same team, but I'm on a true two-track team.

CHAIRMAN BABCOCK: Okay.

HONORABLE ANA ESTEVEZ: And I think Judge Yelenosky is on a one-track team, and I think it would be helpful to know whether or not we should use any of our

time to talk about this, quote, presumptively protected information that would have a second track or if we're all agreed that there should be one track before you go into a whole lot of discussion, because it would just be a lot of --

CHAIRMAN BABCOCK: Yeah.

HONORABLE ANA ESTEVEZ: -- wasted time.

CHAIRMAN BABCOCK: That's a great point. And how would you define one track, which is his mind, of course, but versus two track?

HONORABLE ANA ESTEVEZ: Well, one would have a separate area that is a presumptive -- instead of the presumption being openness, it's a presumption of protection.

CHAIRMAN BABCOCK: Okay.

HONORABLE ANA ESTEVEZ: And so it would be a presumption to be sealed, in some information. I'm not saying what needs to be there. It could just end up being trade secrets. It could just be trade secrets and HIPAA information or whatever it might be, but just whether or not we should have two tracks.

CHAIRMAN BABCOCK: Okay. I think that's worthy of discussion. Yeah, Judge.

HONORABLE ROBERT SCHAFFER: Who decides -- who decides what goes under the second of your presumption

track?

HONORABLE ANA ESTEVEZ: The supremes. So us.

HONORABLE ROBERT SCHAFFER: That will take us about 10 years before we get to that.

HONORABLE ANA ESTEVEZ: It won't be the first time it took us 10 years.

MR. ORSINGER: No, in the rule process they would decide, not -- not in cases over time. So they'll say -- the Supreme Court is going to say category one, two, three, and four is your second track; forget five, six, and seven, they're out.

CHAIRMAN BABCOCK: Okay. What other comments about that? Is the presumption of openness, which finds expression, of course, in the cases, a -- one of the problems that the Court has identified with -- with the rule? Anybody have any information on that? Okay. Since you're not exempted --

HONORABLE ANA ESTEVEZ: I'm not going to say that they have articulated that. I believe that it would solve the efficiency problem. So they articulated efficiency of 76a as a problem, and if you had a separate track, you could take care of 95 percent of the efficiency issue.

CHAIRMAN BABCOCK: Okay. Any other comments

about the two-track issue? Yeah, Lisa.

MS. HOBBS: I mean, I definitely am opposed to it, but I think it's kind of -- I feel like it's kind of a losing battle. Like I appreciate that our charge has been to simplify, and so I think it does simplify things. I would definitely limit it to trade secrets, either I -- even though we fight all the time about what are trade secrets. I might limit it to trade secrets and misappropriation cases, but I think the other ones that have been eliminated from Judge Yelenosky's last draft are good and right to have been eliminated, and I support their elimination.

CHAIRMAN BABCOCK: Okay. So you would accept -- if you had your druthers, you wouldn't have any presumptions of confidentiality, but if you've got to accept something, you would do Judge Yelenosky's draft?

MS. HOBBS: Yes.

CHAIRMAN BABCOCK: Is that right? Okay. What other comments? Justice Gray?

HONORABLE TOM GRAY: I do find it odd that the Legislature in speaking to the subject has exempted a lot of information, and I notice that in the draft what is stricken through in four of the -- make that three, it starts with the word "information" under subsection (a), and so we're not talking about striking entire documents

or sealing or protecting. It's sometimes very discreet information, and for example, the Legislature has said you don't put entire Social Security numbers in a pleading, notwithstanding that some pleadings have to have Social Security numbers in them, and so I don't understand why we would do a rule that would require us to do something extra to seal or protect from public disclosure something that the Legislature has already approved to be not disclosed.

CHAIRMAN BABCOCK: Yeah. So what -- so you're saying that -- why would you put something in there when you've already got a statute that is going to govern it anyway?

HONORABLE TOM GRAY: And why wouldn't we in this rule where we're saying presumptively protected and I have trouble saying "sealed" because it's information that is being taken out of a document or a document that is not being filed in its entirety because there's some information in it, and maybe that's where our stumbling block is, but I think the first vote took out the biggest problem. Now we've got sort of the fringes -- it's in the details now, but what I'm trying to get to is what is the public entitled to know and see, and I think of that as anything that the judge is making a decision based upon, like Tracy was saying earlier.

If the judge is going to be making a decision based on it, then presumptively that should be information in the public record, and if it is in the public record -- and I say in the public record, public domain, let me say that, then we need to know whether or not the public can actually get access to it, and -- and that's the sort of where I'm trying to do. Because the fundamental question is, does the information that the ultimate judgment that the judicial system is required to make, does all of the information that is required to make that decision or that was reviewed to make that decision, should it be in the public domain?

CHAIRMAN BABCOCK: Yeah.

HONORABLE TOM GRAY: And there's a few pieces that we know shouldn't be, Social Security numbers, bank account information, you know, trade secrets, that kind of thing. But it still needs to be part of the record, because then somebody is going to be unhappy and they're going to file an appeal, and then I get real interested in what's in the record, not what's in necessarily in the public record, but what is in the record that that decision is based upon. And so -- and then on a maybe a bigger issue than where we are on this listing of whether or not we should have a section for presumptively sealable information is what is the

judge's -- and this really goes back to the hearing question of what is it that the judge is deciding at that point? The trial judge now I'm talking about, not the appellate judge, but -- and what is that judge's responsibility if there is not someone in front of that judge that has raised an objection? Peter and I were talking about this at the break, of whether or not the judge has an affirmative duty in the judicial branch now to protect the public's openness, or access.

CHAIRMAN BABCOCK: Access to openness.

HONORABLE TOM GRAY: And so, you know, I think we probably had a different view, because I look at it -- I come down on the adversarial system side of it, is we function in a three-part government. We're one part of it. The judge is the one that is assigned the role to be the arbiter, the referee, when there is somebody that is in front of them that has a dispute, and we are trying to resolve that dispute, and there are advocates on both sides, and the judge should not be in that role of being advocate for any interest group. And the question is, is the public's right to know an interest group? And I don't think that's my job as a judge at the court of appeals level to -- unless there's a complaint, somebody is objecting to something, they're making a motion that I have a role in that process.

HONORABLE STEPHEN YELENOSKY: Can I ask a question? I know I'm not allowed to talk, but I don't understand.

CHAIRMAN BABCOCK: I hear something down at the other end of the conference room. What is that?

HONORABLE STEPHEN YELENOSKY: I don't know. It's the same thing you heard from Richard a little earlier.

CHAIRMAN BABCOCK: No, Richard is biting his tongue. He's bleeding.

HONORABLE STEPHEN YELENOSKY: I don't understand the point he made.

CHAIRMAN BABCOCK: Okay. But Peter is going to explain it. Justice Kelly.

HONORABLE PETER KELLY: No, I just wanted to comment, a little bit in my own defense, but the idea that there is a public presumption that needs to be protected, and there's been couple of references to, well, the press will intervene, but the press that may have existed when 76a was drafted or the Constitution was drafted no longer really exists. You know, Watergate started because Woodward and Bernstein were down there at night arraignment call listening to misdemeanors being rattled off. So some of that is interesting, but there's nobody from the *Houston Chronicle* sitting down there listening to

night arraignment call right now.

So there is this idea that the press will protect the public's right to know. It is no longer a practical alternative, so who then does protect the public's right to know? And to some extent it needs to be the judge or the judicial branch to somehow preserve that because the press is no longer an active party in this litigation. The Chronicle is not going to have reporters down there and then hire Chip Babcock to go down and intervene for $200,000, or whatever, to get access to a document.

CHAIRMAN BABCOCK: Did you say $2,000 an hour? Yeah, you're way off.

HONORABLE TOM GRAY: He said $200,000.

HONORABLE PETER KELLY: Whatever your fee agreement is, but absent that check of the press as an optional participant in the judicial system or to an adversarial proceeding, who is protecting the public's interest?

CHAIRMAN BABCOCK: Yeah. Yeah, Judge Yelenosky, the point, I think, is -- and Justice Gray will correct me if I'm wrong, but the dialog between the two justices is, as a judge sitting there --

HONORABLE STEPHEN YELENOSKY: Oh, I understand that part. It was something else.

CHAIRMAN BABCOCK: Okay.

HONORABLE STEPHEN YELENOSKY: It was about information, using the -- the problem he had with information and what he wants to change it to. The word "information"?

HONORABLE TOM GRAY: I don't have a problem with the use of the word "information." I think the listing of presumptively sealed document or information, because what we see most often is a document with redacted information. Now, do you consider that sealed?

HONORABLE STEPHEN YELENOSKY: Are you asking me?

HONORABLE TOM GRAY: And, see, Tracy is shaking her head no, but I think it is sealed, because the information that was in the document is not available to the public. So is it sealed or not?

HONORABLE STEPHEN YELENOSKY: Can I respond?

HONORABLE TOM GRAY: I love this argument, Chip.

CHAIRMAN BABCOCK: That's right. You're out of order.

HONORABLE STEPHEN YELENOSKY: Well, my question was not actually that, but I'll wait to see if I can respond, but my question was you said, well, why would we have a rule that requires you to do something that's

already done, and I think we were talking about sensitive information, right? Paragraph (2) says you don't have to do that unless you seal it. It's not a court record.

HONORABLE TOM GRAY: It's not a court record?

HONORABLE STEPHEN YELENOSKY: Right. If it's not a court record, it doesn't go through 76a. It's not a court record as defined under (2) and under the current rule because it's already confidential under statutory law.

HONORABLE TOM GRAY: Then why list the Trade Secrets Act?

HONORABLE STEPHEN YELENOSKY: Because that's not already decided as confidential, but when you talk about sensitive data or anything that's confidential, adoptions, (2) is meant to exclude that from the rule and say we're not talking about court records if we're talking about sensitive information. That's the one that says it doesn't count as a court record because it's already confidential under statute.

HONORABLE TOM GRAY: Well, in that case, just being a user of the rule, and understand that this is in the Rules of Civil Procedure and I deal with TRAP the most, but as a user of rules, I didn't read it with that level of understanding.

CHAIRMAN BABCOCK: Got it. Well, back to the -- back to the laundry list of presumptions that we're trying to talk about, whether it's a single track or a double track, and I gather the single track we wouldn't have any presumptions or maybe just the limited presumption that is in Judge Yelenosky's rule. One thing we ought to be clear about with Judge Yelenosky's rule is that the presumption in TUTSA is there's a presumption -- well, first of all, the judge has got to take reasonable means to protect the secrecy of the trade secret. And the presumption in TUTSA is in favor of protective orders, so that suggests that there has to be some showing that it is a trade secret to begin with, and then the presumption to protect it is triggered and comes in. But again, TUTSA only applies to trade secrets that are -- are at issue under that act. Pete.

MR. SCHENKKAN: So, and I've been absent from all of this for months, and I'm sorry.

CHAIRMAN BABCOCK: Lucky you.

MR. SCHENKKAN: Well, no, okay, another time. But if I'm asking a question that's really stupid in light of all of the previous discussions, I apologize, but in terms of our efficiency of decision making and input to the Court right now, I'm really tempted by the idea that Stephen's proposal carves out the set of issues,

TUTSA issues, that are causing most -- and this is -- I should ask, is it, in fact, correct that these are the ones that are causing most of the money to be spent in many people's eyes, wasted inefficiently? And then if we get that right, then the rest of this is much less of a problem. Is that really the argument being made, and if it is, then I have a thought or question about how we proceed?

CHAIRMAN BABCOCK: Well, my view is we've already voted overwhelmingly to get rid of a section that is causing most of the problems, and --

MR. SCHENKKAN: I'm talking about most of what's left then, Chip.

CHAIRMAN BABCOCK: Yeah.

MR. SCHENKKAN: The second tier.

CHAIRMAN BABCOCK: So Judge Yelenosky's proposal about TUTSA and then expanding that to trade secrets that are not at issue, in other words, they come up but not in a TUTSA context, I personally think that's helpful, but like Lisa, I don't think, you know, having a whole bunch of laundry list of other things is going to make things easier. I think it will make things worse because then you're just going to have a bunch of litigation over that. My thought. Yeah, Jim.

MR. PERDUE: That was exactly -- so TUTSA is

at some level identifiable, right, and so if you've got a presumption that a trade secret that satisfies that definition, so when you look at the previous draft of the laundry list that in Judge Yelenosky's has been redlined out, (a)(1) is trade secrets. That's an identifiable thing. It may be a contested matter, but it will be identifiable. (3), which is the huge heartburn I have, is information subject to a confidentiality agreement. That is endlessly fought and in some ways unidentifiable, because the other side says it's subject to, well, does that mean -- I say it's not confidential, but it's subject to a confidentiality agreement, and if you read the literal terms, then it's subject to the confidentiality agreement and, therefore, it's presumed to be sealed. But I'm still fighting whether it is or isn't confidential. So the language itself is going to, I think, lead to collateral litigation on this issue. And I would second Lisa's point, yours as well, is that I'm, from my perspective, comfortable with the TUTSA idea and the trade secret idea, but some of these other things in this laundry list are untethered and very concerning.

CHAIRMAN BABCOCK: Yeah, and not to beat a dead horse, but that number (3), that gets you right back into unfiled discovery.

MS. HOBBS: Uh-huh.

CHAIRMAN BABCOCK: Because protective orders are for the parties to exchange information that may never make it into the court system in the sense of being asked to have a judge consider this document in making a ruling. So, yeah, Pete.

MR. SCHENKKAN: So hearing that, and I'm not taking a position on that. What's just been said sounds perfectly reasonable to me, but I'm just taking -- I'm just suggesting for the purposes of our getting our decision making done efficiently, why don't we take a vote on TUTSA? Is the solution on TUTSA okay, and then if that passes, then we take on TUTSA plus the trade secrets that aren't under TUTSA, and I -- frankly, I do not understand that part, but -- and then we take a vote on that. And then we look at the rest, including the kind of thing we just talked about, and we break those into the piece parts by their importance and controversial nature and see if we can really, you know, carve this whole thing down to -- I think we've got a lot of agreement on a lot of parts of this that are important, and then we can narrow it all the way down to the ones where we may really be divided.

CHAIRMAN BABCOCK: Nina.

MS. CORTELL: I'm overlapping with Pete really. I think we ought to have -- there are a group of documents that do not touch on the personal injury or

product design defect or the kinds of categories that are hot button, and I think that's one track, but another is just commercial sensitivity, proprietary, whatever you want to call it, trade secret where I don't think there's a huge public health, public interest issue. If we could take that out, it would simplify the rule and make it one that is more honored than it is now where it's so largely ignored.

CHAIRMAN BABCOCK: Great, thanks. What other comments on this? All right, Richard, you want to say anything? Huh? What?

MR. ORSINGER: Well, I don't want the rule recommendation process to be overly influenced by the draft that Stephen has done, which is like a consolidation of sequential discussions, and so I think we should all be mentally aware that we still haven't resolved the question of whether there should be a second category other than this -- what now appears to be a consensus for trade secrets. And that's very important, in my opinion, because it involves contract rights, personal rights, constitutional rights, and I think it deserves more discussion than it's had so far.

And then my next point that's super important is we have to do something about the presumption, because what happens if there's a motion

filed and there's no evidence? Who wins? The presumption tells you who wins if there's no evidence. So if we're anticipating a motion being filed and not having a hearing so that there's not any evidence presented, then who wins? We have to decide that in the presumption.

CHAIRMAN BABCOCK: Yeah. And the reference to TUTSA I think is helpful, because the protection by reasonable means is for the alleged trade secret under the act that is the subject of litigation. And then there is a presumption in favor of protective orders, so there will be perhaps a threshold issue for the court about whether it is or is not a trade secret.

MR. ORSINGER: Sure.

CHAIRMAN BABCOCK: And the person who is the proponent of the trade secret will have that burden, but in terms of while we're waiting to find that out definitively, then there's a presumption in favor of a protective order, right? Isn't that how it works?

MR. ORSINGER: Yeah.

CHAIRMAN BABCOCK: Okay. So --

MR. ORSINGER: And you have to ask yourself, well, that's the way it works under the statute for litigation under the statute, why should trade secretS that are not being litigated under the statute be handled differently?

CHAIRMAN BABCOCK: That was my point.

MR. ORSINGER: Exactly. And it's hard to justify that, but if you're going to protect privacy rights of corporations and intellectual property, what are you going to do about privacy rights of individuals that don't constitute intellectual property?

CHAIRMAN BABCOCK: It gets trickier. Justice Christopher, and then Judge Estevez.

HONORABLE TRACY CHRISTOPHER: Well, I can think of a huge category of cases involving trade secrets that are not under the act, in addition to products defect cases or noncompetes, okay, where, you know, did they give confidential information or trade secret information to the employee such that, you know, it provides the consideration for the noncompete? And then, you know, so that -- and that is never really protected, because people come down at the temporary restraining order stage, the TI stage. It's all in the record. So I would hate to see that presumably all sealed.

CHAIRMAN BABCOCK: Got it. And there is an argument to be made, I think, that if you're just going to limit it to TUTSA and not expand it to trade secrets in other contexts, then you don't need it, because TUTSA is what it is, and it's going to apply anyway, right?

HONORABLE STEPHEN YELENOSKY: That's right.

CHAIRMAN BABCOCK: But if you're going to expand it to trade secrets in other contexts like what you just described, and you described it exactly how it happens, then maybe there's a reason to have it, but we're going to vote on purity right now. We're going to vote on purely without the flipped presumption, the presumption of confidentiality, that's the single-minded track, or the double track. So everybody that is in favor of the single track?

MS. HOBBS: Wait, I have a question. Sorry.

CHAIRMAN BABCOCK: Yeah, Lisa.

MS. HOBBS: So this is a one track versus two track? I have to make up my mind without knowing what's on the second track?

HONORABLE ANA ESTEVEZ: Yes.

CHAIRMAN BABCOCK: Well, yeah. But I mean --

HONORABLE ANA ESTEVEZ: Can I just state something before you vote one track or the other, because I don't know if I misunderstood what was being said, but (2), court records, subsection (2) says "documents to which access is otherwise restricted by law." I don't think that includes this HIPAA documents or anything like that. I think that includes the things that we -- you don't have access to are adoption records and things that

are by statute sealed.

CHAIRMAN BABCOCK: Yeah, we're not voting on that.

HONORABLE ANA ESTEVEZ: I understand that, but if you're doing two tracks and somebody thinks that those are already included in court records, then they may not see that there might be a need for a second track because they think it's not a court record.

CHAIRMAN BABCOCK: No. Yeah.

HONORABLE ANA ESTEVEZ: And so what I'm saying is these HIPAA medical records are court records under (2), right?

CHAIRMAN BABCOCK: HIPAA court records, let's not get off on that right now, because what we're voting on is -- is the proposal that Judge Yelenosky has in (3). We're not talking about (2) yet. Is that okay or not?

HONORABLE ANA ESTEVEZ: I thought you were voting on whether or not we need a -- two tiers, one of them being presumptively protected information and something else being something -- then the other tier.

CHAIRMAN BABCOCK: Well --

HONORABLE ANA ESTEVEZ: And I thought trade secrets was the only thing that was going to be in that tier.

HONORABLE STEPHEN YELENOSKY: Can I propose a vote? Can I propose a vote?

CHAIRMAN BABCOCK: You can propose one.

HONORABLE STEPHEN YELENOSKY: All right. I think the vote is should there be a presumption of confidentiality for anything? That's the generic vote, and then we go down from there. Because if the vote is no, we're done.

HONORABLE TOM GRAY: Oh, no, not this committee. Because then we'll presume that the vote went the other way, and then we'll still have to make a list.

HONORABLE STEPHEN YELENOSKY: Yes, exactly. Because you're saying two tracks and what you're saying, there should be two presumptions.

HONORABLE ANA ESTEVEZ: Okay, two presumptions.

CHAIRMAN BABCOCK: I know what you're saying, and -- and I think Lisa makes a good point. Your draft here, which you've discussed and described has framed an issue, and that is you propose that we have a presumption of confidentiality for trade secrets and you've stricken the rest, right?

MS. HOBBS: Yes.

HONORABLE STEPHEN YELENOSKY: You're asking me?

CHAIRMAN BABCOCK: That's what the draft is.
HONORABLE STEPHEN YELENOSKY: In this draft?
CHAIRMAN BABCOCK: Yes.
HONORABLE STEPHEN YELENOSKY: It's only TUTSA.
CHAIRMAN BABCOCK: It's only what?
HONORABLE STEPHEN YELENOSKY: It's only TUTSA, but I would agree to other trade secrets. I agree that there's no reason to distinguish, but it doesn't say that. It should.
MR. SCHENKKAN: Okay. But it's one track, plus.
CHAIRMAN BABCOCK: Yes, one track plus.
MR. SCHENKKAN: One track plus some --
CHAIRMAN BABCOCK: Thank you, Peter. Everybody who is in favor of one track plus, raise your hand.
HONORABLE ANA ESTEVEZ: I don't know. Is the other one just one?
MR. ORSINGER: You might want to go further.
HONORABLE ANA ESTEVEZ: What's --
MR. PHILLIPS: What's the alternative?
HONORABLE ANA ESTEVEZ: What's the other vote before I --
CHAIRMAN BABCOCK: Hang on. Put your hands

down.

HONORABLE ANA ESTEVEZ: Is there a two plus or the other one just one?

CHAIRMAN BABCOCK: The other option is -- I should have defined it better. One track plus is the current proposal that we've been talking about. The plus is trade secrets. The plus is not anything else.

MS. GREER: Well, what about HIPAA, though? That's a no-brainer. That has to be sealed.

HONORABLE STEPHEN YELENOSKY: What, HIPAA?

CHAIRMAN BABCOCK: HIPAA is covered by (2).

MR. SCHENKKAN: And it's not a court record.

CHAIRMAN BABCOCK: HIPAA is a very complex statute that in a personal injury case, as Jim will tell you, the plaintiff often has to waive the confidentiality of HIPAA by producing records to the other side and by ultimately trying the case in a way where those -- those medical conditions that would otherwise be protected by HIPAA are put before the jury and the public.

MS. GREER: Right, but, I mean, they don't have to be -- well, I was thinking like the type of information like the personal information that is automatically redacted.

CHAIRMAN BABCOCK: The law right now is -- whether it's the common law or the first amendment is that

the records used in the adjudication of cases are presumptively open.

MS. GREER: Right.

CHAIRMAN BABCOCK: The proposal here is to flip that presumption and to make it presumptively confidential for certain types of information, beyond what is in (2), which is going to cover HIPAA, but is going to do other things.

MS. GREER: Okay.

CHAIRMAN BABCOCK: So when I say "one track plus," what I'm talking about is Judge Yelenosky's proposal in paragraph (3). But I am not talking about his -- what he has taken out of (3). That would be one track -- that would be -- we're going to call that two tracks.

MS. GREER: Okay.

CHAIRMAN BABCOCK: Okay?

MS. GREER: All Right.

CHAIRMAN BABCOCK: Does that make sense? Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, no, I'm sorry, it doesn't make sense to me, but I was talking to Stephen and I said, well, what about if a medical record is attached to a motion for summary judgment; and he says, well, 76a doesn't apply at all, and it can be sealed

without complying with 76a. Well, I didn't understand that. And I wonder if anybody else understood that.

HONORABLE ANA ESTEVEZ: I think that's what he's saying right now, but I've never heard that.

HONORABLE TRACY CHRISTOPHER: Never.

HONORABLE STEPHEN YELENOSKY: Well, court records is defined, right? There are exceptions to court records, but 76a only applies to court records. A HIPAA protected is not a court record because under (2) it's already -- it's already confidential. Medical records, right, if they're protected anywhere else in the law, is not a court record. Essentially (2) says we're not going to talk about these. The rule doesn't apply to anything in (2).

HONORABLE TRACY CHRISTOPHER: But I don't think anybody understands that. I mean, people don't know that they're allowed to file a medical record under seal, automatically. I don't know that.

HONORABLE STEPHEN YELENOSKY: Well, it's a structure of existing rule. We could change that.

CHAIRMAN BABCOCK: It's much more complicated than that.

MS. HOBBS: Yes.

MR. PERDUE: It is.

CHAIRMAN BABCOCK: Yeah, I mean --

HONORABLE TRACY CHRISTOPHER: So, but, I mean, it seems like the whole group doesn't understand that that's how 76a is supposed to work.

CHAIRMAN BABCOCK: Well, that's because we're doing this in a vacuum.

Jim, do you want to explain why it's different?

MR. PERDUE: Well, so there's an intersection between personal health information and the mandatory waiver of personal health information when you put that at issue in litigation. We've taken out unfiled discovery, so there's a huge swath of this that is now captured by that removal. Then as I read (2), Judge, if I'm filing a response to a motion for summary judgment, for example, saying the injuries are so identifiable causation can be established under Texas Supreme Court precedent, first I would say that medical record has already waived HIPAA privilege because the health -- the injury and the confidentiality of it is waived in personal injury litigation by Texas rule because you've put it at issue in the litigation. And so if I attach it to a court proceeding, then it is a public record. If I don't, it's unfiled discovery, so if -- you do have a multifactorial issue here, and I probably deal with medical records as much as anybody in the room, and I'm comfortable with not

having a laundry list that adds -- I'm comfortable with not having a laundry list that somehow gets into HIPAA.

CHAIRMAN BABCOCK: So there.

MR. PERDUE: Not that I speak for the bar.

CHAIRMAN BABCOCK: Yeah, so here's the vote. We're going to have single track plus, which is going to be the language for Judge Yelenosky in paragraph (3). That's one vote. If you want to do that, vote for that. If you want to do more than that, if you want to do double or what's the second track, then don't vote for single track one plus, vote against that, and vote for second track, which is going to have all of this other stuff in it. Okay.

HONORABLE ANA ESTEVEZ: Not necessarily all of that stuff.

MR. ORSINGER: Well, it remains to be decided whether it's two or three items extra.

THE COURT: Yeah, extra stuff, plus plus.

HONORABLE ANA ESTEVEZ: Plus plus.

CHAIRMAN BABCOCK: Plus plus. All right. So everybody who is in favor of single track plus, the plus being trade secrets, raise your hands?

All right. Everybody against? All right. That passed by a vote of 13 to 6, the Chair not voting. So we now have some guidance for the Court on that issue.

So, now, what other big issues do we want to talk about, and since, Judge, since I haven't muzzled you, what do you want?

HONORABLE ANA ESTEVEZ: I feel muzzled. We just lost the vote. Give me a second.

HONORABLE TOM GRAY: Oh, no, this is where you say, well, let's assume the vote went the other way, what would we include.

HONORABLE ANA ESTEVEZ: Well, let's assume there were two tracks then we would do this.

CHAIRMAN BABCOCK: You don't consider that, Justice Christopher.

HONORABLE ANA ESTEVEZ: I don't know that you need to talk about this other notice of filing the other part. I mean, are we still going to do that? Yes.

HONORABLE STEPHEN YELENOSKY: I'm not allowed to talk, so --

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, people voted for trade secret plus, so that means trade secrets in products liability cases, that means trade secrets in noncompetes? What -- what is the plus?

CHAIRMAN BABCOCK: Well, the language is the process required by this rule applies to trade secrets. Doesn't limit it in any way. You're not happy

about that?

HONORABLE TRACY CHRISTOPHER: Well, I voted against it, so, you know, but everybody else voted for it, so --

CHAIRMAN BABCOCK: Okay.

HONORABLE TOM GRAY: But that wasn't what (3) said. I thought you were going by what the proposal that Steve had made was that the presumption regarding trade secrets is governed by the Texas Uniform Trade Secrets Act.

HONORABLE STEPHEN YELENOSKY: But there's a plus.

CHAIRMAN BABCOCK: There's another sentence. There's a plus.

HONORABLE TOM GRAY: Okay. And the process -- oh, rule applies to all trade secrets. I voted against it anyway, so I'm -- I'm good with where I was.

CHAIRMAN BABCOCK: Emily, you've missed a lot of fun.

HONORABLE EMILY MISKEL: Sounds like you're right where I left off.

CHAIRMAN BABCOCK: There is some truth to that for sure.

HONORABLE STEPHEN YELENOSKY: Can we take a vote on hearings requested?

MS. HOBBS: On what?

CHAIRMAN BABCOCK: Pete. I'm sorry, Pete.

MR. SCHENKKAN: Well, I mean, I disagree, Mr. Chair, with the way you framed the question because it seemed to me we could agree to many, and a majority agreed despite the framing, that we do want the solution for trade secret plus, or TUTSA plus, but I do think that the Court may benefit by input from those who feel there is something that is not covered in TUTSA plus, that more needs to be said about, and we ought to look around the room at the scope of things that could be out there in that category, pick out the one that from the discussion there's been in the past that I haven't been here for as well as this morning, the one that has the most concern, and talk about it briefly and just, you know, amend -- if you want to pick on the rest of Stephen's draft and say, "Well, no, I don't like his solution to" -- and then you fill in the blank about whatever you're most worried about.

Let's talk about that briefly, at least to see what's in that space and see how much of it needs to be talked about. Because I didn't want the vote on TUTSA plus to mean there wasn't anything else to talk about. I meant if we agreed on that part, we've done a second big thing after getting rid of unfiled discovery. We've now

done two, or if you count plus as making it three, three big things, and now let's look for the fourth biggest.

CHAIRMAN BABCOCK: Yeah, I got it, but I viewed the vote, and I think fairly, as being against creating more presumptions of confidentiality.

MR. SCHENKKAN: Okay.

CHAIRMAN BABCOCK: Nina.

MS. CORTELL: Oh, well, to Pete's point, and so my vote may be not reflected in what you passed anyway would be (a)(1), the old (a)(1), trade secrets or other proprietary information. I think that in commercial litigation that's where a lot of the issues arise and do not have the public health implications or public interest implications that are otherwise triggered in personal injury, products, et cetera.

CHAIRMAN BABCOCK: Okay. So I think that there is another big issue that we discussed about this, whether there's got to be a hearing.

HONORABLE STEPHEN YELENOSKY: Well, whether hearings occur only if requested.

CHAIRMAN BABCOCK: Only if requested, and then the hearing has got to be done within 14 days, so let's have some discussion about --

HONORABLE ANA ESTEVEZ: I think you notice within 14 days. I don't know that you have to have the

hearing.

CHAIRMAN BABCOCK: Notice within 14 days, thank you. Lisa.

MS. HOBBS: Well, I just would want, if you're going to propose a vote on the topic of --

CHAIRMAN BABCOCK: I am going to propose a vote on the topic, so that's what we're talking about.

MS. HOBBS: That there might be individuals in the room who are okay with not having a hearing, meaning the Marcy Greer, it can be done by submission, concept. I think a separate, perhaps more philosophical position, that some in this room may take, and it might be a minority position, I have no idea, is that a judge has some obligation to make an actual determination whether there's a hearing or not. It's not a rubber stamp. They protect the public's interest in their role as a judicial officer, and so if you're just -- I just -- I'm already nervous about how you're going to tee up the wording of the vote that might leave me not knowing how I'm going to vote, because I am certainly fine with a judge doing something on submission if no one requests a hearing, but I also am equally committed to the fact of how Judge Yelenosky have viewed 76a is the way judges across Texas should view 76a.

HONORABLE STEPHEN YELENOSKY: Can I propose

a modification to the vote?

CHAIRMAN BABCOCK: Yes, you may.

MS. HOBBS: He hasn't even articulated it yet.

HONORABLE STEPHEN YELENOSKY: Well, I'm modifying it for you.

MS. HOBBS: Okay, good.

HONORABLE STEPHEN YELENOSKY: Let's vote where "hearing" means what hearing says in number (7), which is public notice, open court, and are we voting that a hearing as defined under paragraph (7) does not happen unless requested? And that puts aside all the other stuff you're talking about, which is judge hearing, submission, we're talking about a public hearing, I mean, a noticed public hearing.

CHAIRMAN BABCOCK: Okay. Yeah. I think that's fair, and that will give Lisa more clarity on what -- so would you -- would you amend the language?

HONORABLE STEPHEN YELENOSKY: You want me to amend the language?

CHAIRMAN BABCOCK: Well, let's all do it together.

HONORABLE STEPHEN YELENOSKY: Well, I mean, I would vote on (7), which includes a hearing on a motion to seal or unseal is not required unless requested. I

mean, you could just vote up or down on (7).

CHAIRMAN BABCOCK: Yeah.

HONORABLE STEPHEN YELENOSKY: Because that's there, and then we could go from there.

CHAIRMAN BABCOCK: Okay, good.

Judge Schaffer.

HONORABLE ROBERT SCHAFFER: This was mentioned earlier. The way I look at a hearing, and a hearing could be by submission or by oral hearing, is that's -- that's kind of a deadline for somebody opposing or wants to be heard to file a written response, and so this rule the way it's written here to me says I can file a motion and in 14 days I can rule on it whether anybody has done anything or not. I think it should be more clear that the hearing -- the consideration can't take place until a reasonable time has passed so that anybody who wants to file a response can file a response to it.

CHAIRMAN BABCOCK: Yeah, that's a great point. Don't you think, Judge? Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, "motion to seal," last sentence, "Motion must be electronically filed, public notice for at least 14 days before any judge may enter a final order sealing the record." So the judge can't do anything for 14 days. But that goes -- that's a separate question from paragraph (7), which I think can be

voted up or down. Because then we can talk about hearings that aren't defined by (7) where it's submission or whatever.

CHAIRMAN BABCOCK: Yeah. Help me work through this.

HONORABLE STEPHEN YELENOSKY: Well, the vote I would take --

CHAIRMAN BABCOCK: I don't know. I'm just trying to think, so I file this motion, and I don't really care if it's ever ruled on myself.

HONORABLE STEPHEN YELENOSKY: Right.

CHAIRMAN BABCOCK: But -- but I don't set it for hearing, and under this rule the judge is not going to set it either unless I do, but I also don't set it for submission, and typically judges are not going to put it on their submission calendar, right, unless I do something to do it, so that motion is just going to sit there.

HONORABLE ANA ESTEVEZ: So it's like a default. So like when I get an order from a default, that's when I go look for it. So if you filed the motion and the order at the same time, it will stay in my queue until I've ruled on it or I've sent it back and said "Please get a hearing."

CHAIRMAN BABCOCK: Is that -- Roger.

MR. HUGHES: Well --

HONORABLE ANA ESTEVEZ: Or otherwise I won't even know about it.

MR. HUGHES: Maybe I'm imposing complexity where there might be a simpler solution.

CHAIRMAN BABCOCK: That's our job.

MR. SCHENKKAN: And we're really good at it.

MR. HUGHES: But what I see as a problem here is you have -- there will be motions filed by people who go, look, I don't know if it's confidential or not, I just want to know whether I can file it or whether I've got to file it under seal, but I really don't care one way or the other.

CHAIRMAN BABCOCK: Right.

MR. HUGHES: And then there's going to be motions filed by people that say, "I need to use this document but it's really privileged and I want protection," and what I'm thinking is that maybe it would -- it would be simpler to say if you're filing, I just want to know how to file this dang thing. I really don't think it's privileged, but then we need to set a deadline for the other side to file an objection and say it's really privileged and it needs to be done and request a hearing, and if that doesn't happen, then maybe the judge can proceed to rule, but otherwise, if it's a motion that I need to use this document or I don't want it used

by anybody until it's sealed, then that's got to require a hearing.

HONORABLE STEPHEN YELENOSKY: Well --

MR. HUGHES: And I would further suggest that regardless that the burden of proof be on the person who claims -- the burden of proof for sealing needs to be on the person who claims that the document is confidential so that if somebody files a motion and says, "I don't know if it is or it isn't, I just want to know how to file this thing so that I don't get in trouble with the other side," they don't have the burden to actually prove that because they aren't taking a position.

CHAIRMAN BABCOCK: Right.

MR. HUGHES: The burden to prove it is going to be on the objecting party, but if you file a motion and say, "This is privileged and I need to use it, but I want to use it under seal," or "I don't want the other side to use it unless they seal it," that person has the burden to prove.

CHAIRMAN BABCOCK: Two different situations, I get it.

HONORABLE STEPHEN YELENOSKY: I think that unnecessarily complicates it. In response to your point it just sits there, somebody files a motion to seal, right, and it just sits there, right?

CHAIRMAN BABCOCK: Yeah.

HONORABLE STEPHEN YELENOSKY: They can't file it under seal.

CHAIRMAN BABCOCK: Right.

HONORABLE STEPHEN YELENOSKY: Right? So if somebody wants to file it under seal, they've got to get it before the judge and get an order. Now, we can modify number (9), which presumes there's going to be an order because it describes what the order says and make it explicit. Under number (9) we say the judge must rule on a motion to seal or unseal. If you need that in there, we can put that in there, but I think what you're suggesting, Roger, complicates things unnecessarily. You're having yet another type of ruling where somebody wants to know how they can file it. File a motion to seal and make sure the judge rules on it.

HONORABLE PETER KELLY: Or you just file the notice of intent to file confidential information.

HONORABLE STEPHEN YELENOSKY: Yeah.

HONORABLE PETER KELLY: And that builds in the 14 days. That gives the other side notice. Then the burden is then on the party seeking to make the information confidential --

HONORABLE STEPHEN YELENOSKY: That's true.

HONORABLE PETER KELLY: You have to file the

notice of intent first.

HONORABLE STEPHEN YELENOSKY: Yeah, that's what you would do.

CHAIRMAN BABCOCK: Chief Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Okay. So I have someone's confidential document. I send them this notice, and within the 14-day period they file a motion to seal, and it just sits there. That just prevents me from moving forward with whatever I wanted to file?

HONORABLE STEPHEN YELENOSKY: Yes. Unless you want to file it unsealed.

HONORABLE TRACY CHRISTOPHER: No, I want to file it unsealed. I want to file it unsealed, and I say to you, "I want to file your document unsealed." You file a motion to seal that document so that I can file it? I mean, it just seems like it's a reverse problem.

CHAIRMAN BABCOCK: That's what I was worried about.

HONORABLE MARIA SALAS MENDOZA: Wouldn't you just request a hearing?

CHAIRMAN BABCOCK: I wasn't able to articulate it like you did, but that's what I was worried about. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, so you

file a motion to seal something and --

HONORABLE TRACY CHRISTOPHER: No, no, no. I don't want to seal it, and I'm giving you notice. What happens next?

CHAIRMAN BABCOCK: The document has been marked confidential.

HONORABLE STEPHEN YELENOSKY: Then the nonparty out there says, "That's my stuff and I'm going to move to seal it," and so now you have a motion to seal before the court, which the court has to rule on, if you want to say it explicitly, and if you want to say within a period of time; but when the motion to seal is filed, as it says, judge can't do anything for 14 days, right, and you can't file it unsealed, so the person who wants to protect it pushes it forward on the motion to seal. The other party, once a motion to seal is filed, is in a position where they need an order one way or the other.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: The way the mechanics of this works is that I give notice, and at the end of 14 days, if nothing else has been filed, I can file unsealed. If you want to -- if you're the other side and it's your information and you want to stop them, you have 14 days to file a motion and then you're in the process of a hearing.

HONORABLE EMILY MISKEL: But I think what

she was saying is no one asks for a hearing. But couldn't you, if you're the one who wants to use it, couldn't you set their motion to seal for a hearing?

MR. ORSINGER: Sure.

HONORABLE STEPHEN YELENOSKY: Yeah, we went back and forth about this. There's a procedural who has the burden of going forward versus the presumption issue and all of that, and it is a little complicated, but there's always somebody who wants to file something and somebody who may not want it filed, so somebody -- or one person or the other, it seems to me, would want to push for an order. You don't want to file it sealed, you give me notice, and I go, "Wow, I'm not a party but that's my stuff," so I filed a motion to seal. And then I want an order sealing it.

CHAIRMAN BABCOCK: Justice Kelly.

HONORABLE PETER KELLY: Can we build in something saying the motion to seal is overruled by operation of law within 30 days?

HONORABLE TOM GRAY: How about granted within 14 by operation of law?

HONORABLE PETER KELLY: To preserve the presumption of open records, say the motion to seal is overruled. That way you don't have the party sitting on it and not setting it for submission or hearing. You file

a motion seal, and if they don't get a hearing, then it's denied.

HONORABLE TOM GRAY: So I'm out here a third party, not a party to the litigation. All of the sudden, hits my door, and somebody wants to use my trade secret that they were -- that was disclosed to them when I was negotiating a business deal that didn't work. Maybe it was a Twitter deal, and there were like phantom users, and so now they -- I have this -- anyway, you get my point. There's a trade secrete --

HONORABLE PETER KELLY: You're coming as a third party, but at that point you have 45 days to -- or 44 days, 14 days. I'm just throwing out 30 days. It's just a number for discussion, so you have the notice for 14 days, so you learn on one day. Then on 14 days you can file a motion to seal, and then if you don't get it set for hearing, so --

HONORABLE TOM GRAY: And so if I do everything I can to get it set for a hearing and even if I'm successful in getting a lawyer hired, getting them up to speed, getting a motion filed, getting my evidence in order, getting a setting, and then suddenly something happens, you know, pandemic, and all of the sudden -- or my time has run out, and my document that I'm not even fighting over, it's somebody else, is now public record.

HONORABLE PETER KELLY: Well, then you --

CHAIRMAN BABCOCK: Right. Roger.

MR. HUGHES: Well, what I see here are two problems. The first one is the original problem of how do we keep the cat in the bag until the judge decides, yeah, we can let the cat out of the bag, because once the cat is out of the bag, the internet will proliferate it everywhere. The second one is, as Justice Kelly pointed out, is the -- the dilatory motion. In other words, you file the motion that stops everything, and nothing can happen until it rules. You know, I see that problem from time to time, and I think the answer is, remember, there's two people in the ring, and if you see that a motion to seal has been filed and no order has been -- hearing requested, gee, the other party can ask for one. I've done that myself where I know the person wants to just hold things in place and not get a ruling, and I want them -- I want the matter ruled on, so I ask for a hearing. I think that's the way to deal with it.

I don't -- I think we're going to get in deep water if we start having granted or overruled by operation of law after certain dates, especially with the problem as just noted. I mean, I've been in counties where a judge rides a five county circuit, and trying to get a hearing before that judge, you know, in 15 or 20

days can be a real effort. Maybe Zoom will cure all of that, but I think it would be better to have some -- if you're going to say it's triggered by a notice of intent, well, then it can't be filed for 14 days to allow an objection to be filed. If objection is filed, then it can't be filed until it's ruled on. And if -- if the party wants to file it and is being stymied, feels they're being tooled around, they can ask for a hearing, just like the party who files the objection. That's my thought.

CHAIRMAN BABCOCK: Okay. Chief Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, if either side can ask for a hearing on it, you need to make that clear, because most of us in the trial court, if it's not your motion, you don't get a hearing on it. You don't get to ask for a hearing on something that's not your motion, so be sure and make sure that that's clear in the rules that you're allowed to do that. You know, I just think it also -- so the person has to file the motion, when do they have to give the judge a copy of the information in camera, you know, and if it's 20,000's of pages in camera or is it going to be -- you know, does there have to be some real limit, right, okay. You know, what if somebody does mischief, right, and says, "Well, I'm going to file a motion that includes these 10,000

pages of your confidential information"? Right? So I don't like this reverse system, but --

CHAIRMAN BABCOCK: Okay. Let me -- Kent Sullivan.

HONORABLE KENT SULLIVAN: Just a practical issue. When I looked through it, and maybe I missed some of the discussion because I had to go in and out and I apologize, but I didn't see any time line for requiring a ruling. Is there one? I don't think there is, correct?

HONORABLE STEPHEN YELENOSKY: I think it says as -- yeah, as soon as practical, but not less than 14 days.

MS. HOBBS: Has to be after 14 days.

HONORABLE KENT SULLIVAN: Right, that's the notice period, 14 days, right?

HONORABLE STEPHEN YELENOSKY: Right, and then is says, as soon as practicable but not less than 14 days.

HONORABLE KENT SULLIVAN: I guess my point is I think reality now suggests that you need to have a time line requiring a judge to rule, particularly on something like this. I do think you have a situation in which you will have some judges that don't rule.

CHAIRMAN BABCOCK: Judge Wallace.

HONORABLE R. H. WALLACE: Well, I may be

missing how complicated this is, but there is currently under Rule 76a a method to file a document and file a motion for a temporary sealing order, which can be filed contemporaneously with the filing of the sealed documents. Now, that doesn't solve the problem of whose got the burden of proving, but as a practical matter in cases that I think virtually every one I've seen, the parties have already agreed to some type of confidentiality order and those documents have been designated confidential, so everybody knows, either side or all the parties know if they want to file them, they've agreed in an agreed order to file them under seal, and if -- if it came out of my court on their confidentiality order, if it didn't already say it, I would put it in a little thing saying, "in accordance with Rule 76a." I don't get -- getting a temporary sealing order is not that difficult.

HONORABLE STEPHEN YELENOSKY: Right.

HONORABLE R. H. WALLACE: I mean, I don't know what we're -- I'm not sure we're simplifying the process that's already in place, but maybe I'm missing something as to why that doesn't work.

CHAIRMAN BABCOCK: Okay. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, I mean, we're talking about things that are dealt with all the time in other contexts. So the pandemic intervened.

Well, that's a problem in a lot of cases, right? Oh, so your public document becomes -- or your private document becomes public. People lose their lives because, you know, a motion wasn't filed timely in a habeas corpus or whatever. Those are problems that exist in any context. If you want a ruling -- if anybody wants a ruling because they want to go forward and somebody has filed a motion to seal and won't set it, file your own motion to seal. You know, these things can be dealt with.

THE COURT: Yeah, Pete.

MR. SCHENKKAN: At a bear minimum, if we only provided the fix that made it absolutely clear in this context that even if you're not the movant you can set it, wouldn't that solve the problem?

HONORABLE STEPHEN YELENOSKY: Well, it would, but why say it here when we don't say it in other contexts? Is this the only place?

MR. SCHENKKAN: Because apparently people don't understand and some judges don't believe it's the law.

HONORABLE TRACY CHRISTOPHER: They don't. Huh-uh.

HONORABLE STEPHEN YELENOSKY: Most judges don't understand it, so they don't understand 76a at all. This isn't the problem.

MR. SCHENKKAN: We can't solve -- that turns around on you, though, Stephen, because we can't solve the world's problems here including, e.g., pandemic.

HONORABLE STEPHEN YELENOSKY: Right.

MR. SCHENKKAN: So let's solve the one we can. If we did this here, if we said, and anybody who wants this thing set can get it set, even if they weren't the movant, then what's left of the problem?

HONORABLE STEPHEN YELENOSKY: I mean, I --

HONORABLE MARIA SALAS MENDOZA: That suggests another context if you're not the movant, you can't set the hearing.

CHAIRMAN BABCOCK: Can you speak up, Judge?

HONORABLE MARIA SALAS MENDOZA: Well, I was saying because then it suggests in other contexts that you can't set a motion that's been sitting around. I disagree. If someone wants to set a hearing, you need relief from the court, I think anyone can request a hearing on something that's pending. I do it all the time. So we're different, it doesn't happen, but I do, so if we put in this rule, it suggests that another context you can't if you're not the movant.

HONORABLE STEPHEN YELENOSKY: I let anybody set a hearing.

HONORABLE TRACY CHRISTOPHER: Respondent can

set something --

(Sotto voce discussion)

THE REPORTER: Hey, I'm not hearing this whole discussion down here.

HONORABLE TRACY CHRISTOPHER: Well, you know, if somebody files a motion for summary judgment and the respondent responds, but it doesn't get set because the movant doesn't want to move forward, I would never let the respondent set a hearing on that motion. I mean, I just wouldn't when I was a trial judge, and I can't imagine a scenario where you would.

CHAIRMAN BABCOCK: Yeah. Judge --

HONORABLE MARIA SALAS MENDOZA: So that's just different, right, because that's relief that the respondent doesn't want.

HONORABLE TRACY CHRISTOPHER: Well, no, maybe they want it denied to help with the settlement negotiations. You know, they're holding out this summary judgment over your head, well, I want it denied so that I'm in a better position. You know, I don't think that's common knowledge or a common practice --

CHAIRMAN BABCOCK: Yeah.

HONORABLE TRACY CHRISTOPHER: -- that you can set somebody else's motion.

CHAIRMAN BABCOCK: Boy, I've done it a

bunch. Lisa.

MS. HOBBS: Oh, I do think summary judgments are different, right? I mean, they are actually a trial.

CHAIRMAN BABCOCK: I agree with that, too.

MS. HOBBS: Yeah. But at least in Travis County and most of the counties that I practice in all over the state, if I needed -- if there was something holding up conduct that my client needed to take, I would absolutely e-mail the court coordinator and say, "I need this set for hearing. It's stalling us, for whatever reason," and I've never -- I've never experienced a judge telling me that they would not have a hearing because it was not my motion. And I know summary judgments are different. I agree with Judge Christopher on that, because that is a trial on the merits.

CHAIRMAN BABCOCK: Right.

MS. HOBBS: But these little things that keep piping up, like as you're going through it, yeah, I have never had one denied because it wasn't my motion or wasn't -- I mean, if I ask for a hearing, most of my experience has been that I would get one.

CHAIRMAN BABCOCK: Yeah. Roger.

MR. HUGHES: In listening to this, I'm thinking that the answer is maybe it would be a good idea to say anybody can ask for a hearing on it, even a third

party can come in and ask for a hearing on it, and I think that the difficult part of it is, is how it's going to affect resolving dispositive motions, because I'm seeing more and more pretrial orders saying you have a deadline to file a dispositive motion, usually about the time discovery ends, et cetera, et cetera, and I can see the parties going, if I have to -- if I have to wait until I file my motion to resolve this, it's going to -- it's going to impact the case management plan.

I think the answer to this, most trial attorneys will just simply build that in the same way we have started building into the discovery management plans when you have to file counter-affidavits to expense billing affidavits. The only pushback I can see is when lawyers start saying we have to push back the time -- the trial date and the dispositive motion date because we're going to have fights over sealing orders, and I don't know how the judiciary is going to respond to that, except to say, "Well, you need to anticipate that earlier and get it resolved before the dates" or whether they will be sympathetic and say, "Okay, I'll give you some more time."

But I still think that's a practical issue, and I also echoed the idea that the materials to be sealed should be -- I think the rule should say they could be submitted for in camera inspection. I think that's a

procedure everyone is familiar with, and we won't get into how do we submit these records under seal with a clerk, et cetera, et cetera.

CHAIRMAN BABCOCK: We're going to vote on the language in paragraph (7) as -- Judge Yelenosky, you better listen to this because I'm giving you a chance to amend.

HONORABLE STEPHEN YELENOSKY: I'm just listening to the chief justice.

HONORABLE TRACY CHRISTOPHER: I'm sorry. I don't think this rule has fixed what Jim was saying about what if I am responding to a motion and need to put in that privilege -- that confidential document, within a certain period of time.

CHAIRMAN BABCOCK: Yeah.

HONORABLE STEPHEN YELENOSKY: You can do a temporary sealing order.

HONORABLE TRACY CHRISTOPHER: Well --

MS. HOBBS: Only if there's a showing.

HONORABLE STEPHEN YELENOSKY: I mean, you file a temporary sealing order. The judge -- even I will grant that, and then you go forward.

MR. PERDUE: But that's moving an even more awkward burden onto the nonmovant, because I'm not -- so now you're saying that the person who doesn't want it

sealed needs to file a motion requesting a temporary sealing order.

HONORABLE STEPHEN YELENOSKY: No. No. You have my stuff.

MR. PERDUE: So I can get it filed.

HONORABLE STEPHEN YELENOSKY: The person who files the motion to seal can be anybody who's interested in having it sealed. So you file your motion for summary judgment. I want to respond, right, with -- and you say, "Well, you can't respond with my stuff," right. And then I say, "Well, you know, I'm going to file -- I'm going to file with a motion to seal and find out whether or not you're right." Or you say, "I'm going to file a motion to seal, find out what happens with this."

MR. PERDUE: I think the context is slightly different in that I know I'm going to -- I want to attach to a pleading something that has been marked confidential, and for purposes of where we are now, a trade secret. So I give you notice that I'm going to do that, and then other side files a motion to seal but doesn't ask for a hearing. Where does that put me as far as being able to respond to the pleading? Because now you have filed a motion to seal. It has not been set for hearing. I as the nonmovant am not seeking it being sealed, am either in a position of asking for a temporary sealing order. I'm

not in the position of an adversarial system wanting a temporary sealing order. I want a ruling, but I confront this regularly in motions to quash, Chapter 74 objections, discovery disputes, of the other side quashing a deposition, objecting to a 74 report or even a motion for protective order involving discovery, but they don't set it for hearing, and most courts that I know have a real hard time setting a hearing that the other side will not agree to the date when it's not my motion.

HONORABLE STEPHEN YELENOSKY: Okay, well then --

MR. PERDUE: That's just the reality of the practice of the nonmovant trying to seek a hearing. So the procedure in the rule says you can file a motion to seal with or without a hearing, but as it reads now you have to get a hearing to get a ruling?

HONORABLE STEPHEN YELENOSKY: No.

MR. PERDUE: So what if they file a motion to seal and they don't ask for a hearing?

CHAIRMAN BABCOCK: Justice Kelly.

HONORABLE PETER KELLY: To follow up on Justice Sullivan's point, put in the time line Rule 91a, dismissal of a baseless cause of action, specifically says, shall be -- "must be granted or denied within 45 days after the motion is filed." Put the burden on trial

court to rule within 21 days after the motion is filed. That way you don't have a presumption -- it's not overruled by operation of law, but you're going to get a ruling within 21 days, and that gives clarity to a movant and the nonmovant without it creating a presumption one way or the other. And the Supreme Court has already adopted Rule 91a and built that kind of time line in, so presumably it would be minimal to that type of process.

HONORABLE TRACY CHRISTOPHER: But even 91a requires that you ask, that somebody asks for a ruling, and, you know, if the judge won't give you a hearing, then people mandamus to make sure the judge gets the ruling. I mean --

HONORABLE PETER KELLY: Well, it says the motion is made, a response is made, but it doesn't say anything about setting it for submission or requesting a hearing.

HONORABLE TRACY CHRISTOPHER: Well, I think it does because it has to be within a certain period of time. I'll look again.

HONORABLE PETER KELLY: Response is due before the hearing. I mean, it just says there shall be a hearing. It doesn't say who has to request it.

CHAIRMAN BABCOCK: We're going to take a vote on paragraph (7).

HONORABLE ROBERT SCHAFFER: As written?

CHAIRMAN BABCOCK: As written. Unless we want to make -- the author wants to make an amendment to it prior to the vote, and he's holding tough, so no amendment to this. So the vote is going to be to either accept the additional language as indicated here in paragraph (7) or leave the rule as it is.

HONORABLE STEPHEN YELENOSKY: To be fair to everyone, this redline is between this draft and the last one from the subcommittee. There's also a redline comparing the 9-20 draft that I made with 76a. That's in your materials, too. It's K or L.

HONORABLE ANA ESTEVEZ: And you might want to say that the existing rule requires a hearing in every case so that -- so you have to give notice.

CHAIRMAN BABCOCK: Yeah. I think even if you look at this --

HONORABLE ANA ESTEVEZ: This first sentence says, "A hearing on a motion to seal or unseal is not required." But 76a requires a hearing on every one of them.

CHAIRMAN BABCOCK: Right. Hang on. Because Stephen's point is well-taken. The rule as it exists now --

HONORABLE STEPHEN YELENOSKY: Yeah, it

requires a hearing because --

HONORABLE ANA ESTEVEZ: On every case.

MR. ORSINGER: There is a redline in our materials. It shows the --

HONORABLE STEPHEN YELENOSKY: Yeah.

MR. ORSINGER: -- Stephen's rule against 76a.

HONORABLE STEPHEN YELENOSKY: Yeah, that's what I said.

MR. ORSINGER: You can see it very readily if you just look at that draft.

CHAIRMAN BABCOCK: The current rule says, and it's paragraph -- it's subpart (4) of 76a hearing -- "A hearing open to the public on a motion to seal court records shall be held in open court as soon as practicable, but not less than 14 days after the motion is filed and notice is posted. Any party may participate in the hearing. Nonparties may intervene as a matter of right for the limited purpose of participating in the proceedings upon payment of the fee required for filing a plea in intervention. The court may inspect records in camera when necessary. The court may determine a motion relating to sealing or unsealing court records in accordance with the procedures described by Rule 120a," so that's the current rule. Roger.

MR. HUGHES: I guess a point of clarification, the way it was written in Tab J, it says, "A hearing is not required, unless requested," and if the hearing is requested within 14 days, does this mean the court can rule before those 14 days?

HONORABLE ANA ESTEVEZ: No. No, there's another part.

HONORABLE STEPHEN YELENOSKY: I said it earlier, the judge cannot rule within 14 days.

MR. HUGHES: Okay.

HONORABLE STEPHEN YELENOSKY: That's the difference.

CHAIRMAN BABCOCK: Okay. So the vote is going to be this revised paragraph (7) or stick with the current rule, which is paragraph (4) of 76a. So everybody in favor of the language that's before us under paragraph (7) hearing, raise your hand.

Everybody opposed? So that passes by a vote of 14-5, the Chair not voting, and now we're going to take our lunch break.

(Recess from 12:39 p.m. to 1:48 p.m.)

CHAIRMAN BABCOCK: Okay, guys, let's get back to work. There is one issue on 76a that we need a little more discussion on, but not a lot. Now, Lisa, come on. Which is whether -- it's the great Kelly debate

without Kelly here, about whether judges have an independent obligation to protect the public on sealing orders. I will tell you from my experience that there are judges in different states who believe that they do, and then there are many judges that think, as Justice Gray articulated, that it's an adversary proceeding and if somebody wants to argue for sealing and the other guy wants to argue against it, the judge is supposed to be there to decide that dispute but not to get in the middle of it. So that's what we're going to talk about. I don't know if we need to take a vote or not, but in any event, that's an issue and the gag is off, Richard. Let's not abuse it.

MR. ORSINGER: So I think the choices are to require the court to evaluate the information, to encourage the court to evaluate the information, or to not say anything about it.

CHAIRMAN BABCOCK: That's a great way of putting it.

MR. ORSINGER: And Ana had an opinion to share.

CHAIRMAN BABCOCK: Judge, what's your opinion?

HONORABLE ANA ESTEVEZ: I don't want to review 20,000 pages to find which sentence should --

HONORABLE STEPHEN YELENOSKY: I can't hear you. I'm sorry.

HONORABLE ANA ESTEVEZ: I don't want to review 20,000 pages to decide, I mean, without a hearing, by submission, independently to decide whether or not something should be sealed when I'm in a three-week murder case and I've got 21 days to do it in.

CHAIRMAN BABCOCK: Lisa.

MS. HOBBS: Well, I feel like we've gone wrong if we think that this should be about 20,000 pages, right? Because -- and that goes back to Chief Justice Christopher's observation that the motion is different from the attachments. And whether you're on the one plus track or the two track, it really -- we should be talking -- and if the rule doesn't specify this and encourage this, we should be talking about a very limited amount of information or documents that is in dispute and might be sealed. And it's not seal the whole case. I mean, absent extraordinary --

HONORABLE STEPHEN YELENOSKY: Family Code.

MS. HOBBS: -- case. Yeah. I mean, there can be extraordinary cases when you would seal it, but in the general civil litigation we should be talking about an inside report that's five pages or a whatever. We're not -- we shouldn't be talking -- and the obligation on

the movant to seal, the proponent of sealing, should be to narrow it down much like TUTSA does, right? So I guess I just -- you know, I've said it several times, that I am fully in favor that a judge is the only person who will for sure have the public interest at heart, and so I am in favor -- because that person may be represented by a news media, maybe not. Most often not. And they are officers of a branch of government that is intended to be and only works when it's open to the public, and so I think they are the last line of defense. I love judges like Judge Yelenosky who always took their 76a duties seriously, but the idea that you should be looking at 20,000 pages of documents, that's -- that's -- we've done something wrong in the rule if that's where that lands.

CHAIRMAN BABCOCK: So when the judge gets to page six --

HONORABLE ANA ESTEVEZ: I'll do it during a hearing, because I get to ask all of those questions. You know, I'm just saying when no one is requesting a hearing and nobody is interested in whether or not it's going to be sealed, except for someone, which I'll be happy to unseal it for them if they come later.

CHAIRMAN BABCOCK: Judge Miskel.

HONORABLE EMILY MISKEL: I will 100 percent agree that anytime I've ever taken anything by submission,

the parties just attach hundreds and hundreds of pages of junk to it, and it takes -- it's worse to do things by submission, so I 100 percent support that. But I also agree that I believe that the judge should be required to stick up for the judicial branch, stick up for the public, stick up for the presumption of openness, because most of these are agreed. The party -- they're not opposed, they're not one person wants it sealed, and the other one doesn't. Most it's like "We all want it sealed. We don't want this to be open to the public," and the judge is the only person that can say, no, our system is open to the public.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Y'all need to be more judgey, I guess, in my opinion. I don't know how this -- this is a kind of thing that comes up in other contexts. Somebody gives me 2,000 -- he can tell you, I did it in front of him. Gives me 2,000 pages to read and say "Seal this." I look at it and I go, it is not possible that 199, or whatever, are worthy of sealing. So you take it back, and you come back to me with what you identify as truly worthy of sealing, because I'm not looking at 2,000 pages. So I don't know why, you know, our regular tool kit doesn't deal with these kind of problems.

As far as openness, I mean, I agree with this comment that somebody wrote. "The presumption of openness to the general public when it applies to the information at issue requires a judge to consider the merits of a motion without regard to any agreement of the counsel" -- "of counsel. A judge has this responsibility, because the general public is not represented by anyone in the proceeding, though some members of the public may participate, and no member of the public can see the information sought to be sealed." And that last one I think is particularly important. If you're asking to seal something, that means public can't see it, right? And the only person who sees it who's not a party position is the judge. And so I guess I would say it's just a fundamental question, do we think that there should be anything for -- any kind of check on sealing records, and if you don't support that, then we should get rid of 76a.

MS. HOBBS: Amen.

CHAIRMAN BABCOCK: Okay.

HONORABLE ANA ESTEVEZ: Frankly, people don't file 76a -- they don't seal much in Amarillo, so we just don't deal with it. So I'm not going to say that I've had 10,000 cases.

CHAIRMAN BABCOCK: Can you guys hear that?

HONORABLE STEPHEN YELENOSKY: No.

HONORABLE ANA ESTEVEZ: I just don't deal with it as much as you do. They don't -- they don't file it up there. We don't have a lot of 76a cases, and they don't put something sneaky under our nose. They just presume everything is still out there.

HONORABLE STEPHEN YELENOSKY: Yeah, I mean, you got it -- I think judges have to be proactive about that and say, no, kick back, you know, push back when they give you a confidentiality agreement that says everything we deem confidential shall be sealed by the clerk.

HONORABLE ANA ESTEVEZ: Yeah, we don't get those.

CHAIRMAN BABCOCK: Okay. Any other comments about this? Yeah. Justice Gray.

HONORABLE TOM GRAY: I guess the -- I guess part of the issue is, okay, trial level, now what are you going to do with that decision on appeal if nobody is complaining about it, because -- some people may or may not agree with this, but I'm a judge in the judicial system, too, and there's some ruling that's been made, and I need to do something with it. Nobody is complaining about it. It's not an issue on appeal, hasn't prevented the filing of briefs or the development of the appeal, but yet, there was a confidentiality order or something else done along the way. Am I suddenly becoming the supervisor

of the trial judge to review those kinds of things that the trial judge did? And while that's at the appellate level, yes, I recognize the distinction, but also how does that not feed back, and is that the proper role of the trial court judge, and then where does that shift, and if that's right for the trial judge, then what's right for the appellate judge? And I don't know that that even goes in the rule, but does it go with the -- kind of the tenor of the rule?

CHAIRMAN BABCOCK: Well, it goes with our discussion that we're having, and if you're presented with a case and nobody is complaining about an order that refused to seal documents, then thereby theoretically vindicating the public's right, then you've got nothing to do to say about that. On the other hand, if a judge has refused to seal, the trial judge, and you get an appellate point, then you have to decide that, and --

HONORABLE TOM GRAY: What if it's the other way? What if the -- there's an order that seals, and nobody is complaining about it?

CHAIRMAN BABCOCK: That's the -- that's where the issue that Justice Kelly raises would come into play for you. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, I think if by -- if by being the overseer, it means that you've

got to sua sponte look at everything that might have come through that somebody might think needs to be sealed, it doesn't. You don't have that obligation. Somebody has to file a motion to seal something before you have any -- at the trial court or above. The default is they can't seal it. So if nothing is done, it's not sealed. If something's done, then there's an order, and the order is reviewed, but if there's never a motion and order at the trial court, there's nothing for the court to --

HONORABLE TOM GRAY: What if there is an order at the trial court?

HONORABLE STEPHEN YELENOSKY: Well, then it is before you, and you ask for standard or --

HONORABLE TOM GRAY: You're assuming there's a motion.

HONORABLE STEPHEN YELENOSKY: Uh-huh.

HONORABLE TOM GRAY: But I'm just assuming there's an order.

HONORABLE STEPHEN YELENOSKY: No motion?

HONORABLE TOM GRAY: No motion.

HONORABLE STEPHEN YELENOSKY: Well, tell me why a judge would issue that order.

HONORABLE TOM GRAY: If I knew, we probably wouldn't be having this conversation because I would be making a lot more money doing something else, but, no, I'm

just telling you, you know, it's going to come up of -- I mean, and the other thing y'all have to understand is I see a lot of criminal cases. 70 percent of the filings in our court are criminal, and y'all won't be surprised, weird things happen in criminal cases, too, and so it's just -- I always thought of the judge's role in the adversarial system as we've got two capable parties represented by capable adversaries and those people advocate for their clients. They present issues to the trial judge. If they don't like the ruling or they think there's an error made, there's an objection made. It makes it into a record, and it comes up to me on appeal, and they argue -- they select the ones that they think affect them, and there are errors or not, but they're presented to us in briefs, and we decide those, and we don't -- you know, that's what we do.

HONORABLE STEPHEN YELENOSKY: Well, this is unique. I mean, there is another party under 76a, and he, she, they are not in the room. It's the public. And so it is unique in that respect, and again, it's a philosophical question when you're talking about who can see what in the public, should the judge have a responsibility there, because it is so different. I don't favor requiring the judge to do anything, because judges won't do it unless they want to or they're reversed

anyway, or mandamused, but I do think the philosophy behind openness is something worthy of expressing.

CHAIRMAN BABCOCK: All right. Judge Miskel, then Lisa, then Justice Christopher.

HONORABLE EMILY MISKEL: But I think the question -- so we've been talking about should the trial court have the independent duty to examine an agreed sealing and stick up for the public. I think his question is say the trial court just signs agreed orders to seal and it comes up to the appellate court, and no one is complaining because the parties wanted the agreed order to seal, does the appellate court have a similar independent duty to stick up for the public when no one asks? Was that your question?

HONORABLE TOM GRAY: Well, it's definitely trailed on the question of does the trial court have the duty, and then if the trial court has the duty and breaches it, then what would the appellate court do?

HONORABLE STEPHEN YELENOSKY: Well, the trial court's duty is triggered by a motion. I don't -- I can't speak to the appellate court, but I would guess that -- that, say, you have an order and nobody is arguing about it, but a member of the public could at that point intervene under continuing jurisdiction and I guess argue, well, there's a material and substantive change here

because the judge never actually reviewed this. I don't think that's going to happen, but I don't know. In an appellate court, suppose you get an order of another kind with no motion. What would you do then?

MS. HOBBS: My comment actually plays into this very question, is that courts of appeal actually handle this very different. There are some courts of appeals who are fine with an agreed order of sealing that we all know did not comply with 76a, and there are other courts of appeals that if you file a sealed record, they're like, wait a minute, where was 76a, and they will very well remand it back to the trial court to say, whoa, you need to make sure this was sealed under proper procedure. And having practiced in appellate court, all 14, or most of the 14, I can tell you that some are real sticklers. They will 100 percent send it back. I had one send it back, and it might have been my friendly chief justice over here, sent it back to the trial court to redo it, and then the trial court kind of went through the motions, and then the court of appeals is like, "Wait a minute, we can't write this opinion. Y'all have sealed too much. This can't be right," and sent us back a second time. So, yeah, some courts of appeal really do take it seriously their obligation to follow 76a, even though there's not a corollary in the TRAPs. They know that

they -- it should be followed in the trial court below, and they'll send it back.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, this is why I do not think we should eliminate public notice on the motions to seal. I'm perfectly happy with making public notice be on a website instead of, you know, down at the courthouse where all of the foreclosures are taking place, but that will at least give us some potential public interest protection in the sealing, and, yes, we -- you know, we -- if we don't see a 76a order, we send it back, but I think Justice Gray said they don't. So -- but --

CHAIRMAN BABCOCK: Is this a circuit split?

HONORABLE TRACY CHRISTOPHER: No, but what is our duty at that point? I mean, I would argue that our duty is to examine it to see if it is possible for us to make a public opinion without disclosing some of this information.

CHAIRMAN BABCOCK: Okay. Last word. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, and I take some responsibility, but Richard will take most of the responsibility for this I'm sure. I think there's some confusion about notice. The hearing question is

separate from the notice question. If you file a motion to seal, you've got to post it -- I mean, give notice on the website, period. The other -- and this rule is drafted you have to do that, and that's great, I think.

The separate question is, well, what if you've done that notice and nobody has asked for a hearing, and then the question following that is, well, what if somebody asks for a hearing, is it a public hearing? Under this rule it would have to be one open to the public where the public -- some members of the public could actually participate under the discretion of the court, and then the question of, well, if nobody asks for a hearing but the judge wants to consider it, should it be -- it just -- telling the lawyers "I'm going to set a hearing on this," just telling the parties to come in, because nobody in the public has requested a hearing.

So there are like four different, five different things we're talking about that we may be conflating.

THE COURT: Okay. Everybody in favor of advising the Supreme Court that the rule should contain a provision requiring to take the public interest into account, separate and apart from the parties advocacy, raise your hand.

And everybody opposed? It passes by a vote

of 16 to 3, the Chair not voting. So, Richard and Judge Yelenosky, for now we're going to put 76a aside and go to the important and time-intensive issue of remote proceedings and try to get that out of the way, and as you heard, the Court's already actively working on a rule and needs our input on the remaining issue, which I believe has to do with cameras and Zoom camera technology and that stuff, right, Lisa?

MS. HOBBS: That is right.

CHAIRMAN BABCOCK: Okay. So let's have it.

MS. HOBBS: Okay. First of all, our report starts on page 155 of your PDF, and I want to -- this is a proposal from the Supreme Court's remote hearing task force, and we were dubbed subcommittee one, that I chaired, but I really want to thank our subcommittee members who spent a lot of time presenting this proposal to this committee, which included Judge Roy Ferguson, Chief Justice Rebecca Martinez, John Browning, Courtney Perez, the Houston clerk Chris Prine, and our very own and beloved Marcy Greer. And I also just also want to thank Chief Justice Christopher who headed our task force, ensured we stayed the course and timely got out this report.

HONORABLE TRACY CHRISTOPHER: Well, thank you, but I just gave you deadlines.

HONORABLE STEPHEN YELENOSKY: Very judgey of you.

HONORABLE TRACY CHRISTOPHER: Very judgey.

HONORABLE R. H. WALLACE: What page did you say?

MS. HOBBS: It is page 155 is the start of the report, and I'll give you specific page numbers as I go through. What I would like to do in the interest of feeling productive is sort of reverse the order that are presented in the subcommittee report, meaning I would like to start with Rule 12 of the proposal, which I think is the easiest to knock out, go to the TRAPs, excluding broadcasting, and then go to the broadcasting rules because I think we can get a lot of votes done on the first two, and I'm intrigued by the conversation of how we will feel about the changes to the broadcasting rules, even though I don't think they are that controversial. They just invite controversy. If that's okay with the Chair.

CHAIRMAN BABCOCK: Absolutely. Go for it.

MS. HOBBS: Okay. So Rule 12 is on page 166 of your PDF, or the proposed changes to Rule 12 are on page 166. I think everyone in this room -- but just for the record, Rule 12 is sort of the Public Information Act of the judiciary, and we were tasked with looking at

public access to Zoom recordings. During the pandemic many courts around the State of Texas started recording -- broadcasting on Zoom and then recording those broadcasts, and we heard from judges across the state that individuals were filing Rule 12 requests, which are basically open records requests for those recordings.

The problem is that Rule 12 defines judicial records, and it expressly excludes anything related to the court's adjudicatory function. Okay. So Rule 12 is meant to be nonadjudicatory records. Adjudicatory records are subject to all kinds of openness, as we've talked about ad nauseam this morning, but Rule 12 is meant for basically administrative records, for shorthand of that, and so when judges get these Rule 12 requests, their response is always, well, this isn't actually subject to Rule 12, and they're kind of tired of saying that over and over. So we did a belt-and-suspenders approach, and we decided to make express in Rule 12 that any recording of a proceeding is not subject to Rule 12, so with the hopes that our trial judges would stop getting Rule 12 requests for Zoom recordings. You want to vote each one, comment each one? I've got three topics basically.

CHAIRMAN BABCOCK: Okay. Yeah, let's talk about the first one first.

HONORABLE TOM GRAY: I just -- are courts

actually not providing the recordings?

MS. HOBBS: So some are maintaining their YouTube channel, so if you go onto, you know --

HONORABLE TOM GRAY: Tenth Court of Appeal's website, you can see every oral argument.

MS. HOBBS: Exactly. And courts of appeals have a -- they're having more hearings, all-day hearings, so I think they're having capacity issues of actually storing that on YouTube. They may save it, but it's not the same as your --

HONORABLE TOM GRAY: YouTube channel.

MS. HOBBS: Yeah, exactly, but they may maintain the recording for whatever reason, but they may not continuously publish it, so they're getting requests for "I would like to" -- "you held a hearing on September 17th, 2021. I would like a copy of the recording of that hearing."

HONORABLE TOM GRAY: And they're declining to provide it?

MS. HOBBS: It is not subject to Rule 12. Whether they are declining to provide it, I'm not sure, but I do support them in that that is not a proper Rule 12 request.

HONORABLE TOM GRAY: Interesting, because I'm entirely on the other side of this issue that that is

a public record, and it's not -- you're right, it's not a Rule 12 because we frequently respond to requests for copies of documents that are filed or that are part of the adjudicatory function that you give us $0.10 a page, you got a copy of it. I don't care what it is, if it's a part of the public record in the case, and on these, I haven't revisited the issue in a long time because we put ours up on YouTube, and we just send them to the YouTube channel, but when we were getting electronic copies of information as part of our record, there's some provision in the rules about how to charge for that, but subject to the payment of the fee, it's a public record and they get it, so I'm surprised to --

MS. HOBBS: Their access to it is governed by many other laws, and they may have a right to access to it, but it's not through Rule 12.

HONORABLE TOM GRAY: It's not through Rule 12.

CHAIRMAN BABCOCK: Judge Miskel.

HONORABLE EMILY MISKEL: I know that courts of appeals have typically left stuff up on YouTube. I would say in the trial court there's a couple of ways to think about it this. One is most court reporters record audio, like our court reporter here is doing today, and so even before remote proceedings there were audio recordings

of trial courts, but those are -- the public can't get those. And so similarly, I may have recordings of the Zooms that I conduct on my court's Zoom account, just like my court reporter has an audio recording, but the public can't get my Zoom recordings from me either, because Rule 12 says a record that is related to a matter that's before a court is not subject to disclosure.

I think the rule is already clear, but I'm fine with the belt-and-suspenders approach, but I will say, like for trial courts, we take that stuff down right away. We don't leave the CPS -- if we do it on YouTube, which now that we're back in person, when we're doing Zoom doesn't mean it's on YouTube. So if it is on YouTube, I take it down right away, because that stuff doesn't need to remain up forever.

CHAIRMAN BABCOCK: Richard Orsinger.

MR. ORSINGER: So it seems to me like we're not talking about whether this information should be public or not. We're just talking about whether it should be retrieved under Rule 12 of the administrative rules. The Rule 12 and the Public Information Act are specifically designed to exclude the litigation-related matters of cases, and we're talking now about, you know, the business of being a judicial system other than litigating specific claims. So it seems to me like 76a

would determine whether they would get access to this, not Rule 12, so what we're doing is -- all we're doing is making it clear that this one has to do with the administration of the judicial system and not with the adjudication of cases.

MS. HOBBS: You are correct on your description of Rule 12. I don't know that a Zoom recording would be a document under 76a. I don't think it falls under 76a.

MR. ORSINGER: Well, it's certainly not a judicial administrative record under Rule 12, is it?

MS. HOBBS: It's not.

MR. ORSINGER: No, because it has to do with the functions relating to a specific case.

HONORABLE STEPHEN YELENOSKY: To be a court record, it has to be filed.

MR. ORSINGER: Okay.

HONORABLE STEPHEN YELENOSKY: Do you have to record these? I mean, I haven't been involved in recording them or not, but why are they being recorded?

MS. HOBBS: I think of the 254 counties and the three levels of courts within those counties, people -- some are recording them regularly and some are not.

HONORABLE STEPHEN YELENOSKY: I mean, when I

have a trial, all I have got is the court reporter. That's the real record, and the court reporter has got his or her recording. I don't get a videotape of the trial. Why would I record it? It's public, and it's more public than an in-person hearing.

MS. HOBBS: Some are streaming and feel like it's necessary for public access if you don't have a courtroom open that you would stream this.

HONORABLE STEPHEN YELENOSKY: Oh, I see. Well, streaming, but that's not recorded.

HONORABLE EMILY MISKEL: It is.

MS. HOBBS: It is recorded at that moment, and then it can be taken down, so to get it onto YouTube, you are recording it, and then you -- and it's published on YouTube, and then after your day's hearing, probably some court administrator comes down and takes them down, but they are in that moment -- our ability to see what you are doing via YouTube requires you to be recording the Zoom as it's happening.

HONORABLE STEPHEN YELENOSKY: Okay. Thank you.

CHAIRMAN BABCOCK: Yeah, Judge Mendoza.

HONORABLE MARIA SALAS MENDOZA: I just want to add that the instructions that we received through the OCA from the Court, I thought, was that we instruct

everyone not to record. So the YouTube streaming records it as a matter of its function, but we are to instruct others that it's not to be recorded, and again, you know, as Lisa said, people are doing different things, but the only official record is the court reporter's record, so I delete them almost immediately.

CHAIRMAN BABCOCK: Well, Lisa, does it matter if -- as happened during the pandemic that the only access for the public was through streaming or Zoom or some fashion?

MS. HOBBS: It matters not for Rule 12. It does matter as a matter of access.

CHAIRMAN BABCOCK: Yeah.

MS. HOBBS: Yeah. But not as far as Rule 12.

CHAIRMAN BABCOCK: Not as far as Rule 12. But now, what if -- what if the courtroom is wide open and the judge is on the bench, but you have lawyers, you know, who are being permitted to attend a scheduling conference, you know, in Corpus, but the lawyers are in Dallas? Is there a public access issue there, because you can walk right in the courtroom and see what's happening?

MS. HOBBS: There needs to be a means to access. I mean, Judge Ferguson wrote a great paper that's referenced in our memo that is published on the OCA

website about the risk to not providing some public access, but it could be in the courtroom where the public could come into the courtroom and there would be a video of what is going on on Zoom, or it could be on YouTube, or it could be just a traditional in-person hearing and someone's on the telephone. But there are concerns, and Judge Ferguson wrote a great paper about the concerns to make sure that there is some means to -- for the public, should they desire to access the courtroom, which is unrelated to Rule 12, which is not before us right now in this quick vote on whether we should amend Rule 12.

CHAIRMAN BABCOCK: Yeah. I get that, but if you take it one step further, you've got the Rule 12 problem largely articulated in terms of solution, but if the judge -- if the court is going to do a remote access rule, should you not -- should we not recommend how it should treat that issue of public access by keeping the recording, making the recording?

MS. HOBBS: We can. I mean, the Legislature could do it as a matter of a means of like how long you hold records, adjudicatory records, like subject to, you know, just like they have a -- there's at some point a clerk can destroy records in a case, right?

CHAIRMAN BABCOCK: Yeah.

MS. HOBBS: So it could be done by the

Legislature. You could write a separate rule about it if you really wanted them to hold onto something for some reason, but it's not Rule 12, and the reality is that in person, if we think remote hearings are supposed to be akin to in-person hearings, if you miss the 9:00 o'clock docket call, you miss the 9:00 o'clock docket call. Like there's no responsibility on the court to provide you post-9:00 a.m. access to the docket call, right? So I -- you could do that. We have not been charged with that, and that was not part of the task force recommendations.

CHAIRMAN BABCOCK: Okay. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, yeah, exactly what you said at the end there about, you know, the docket. YouTube has made trials, hearings much more accessible to the public, because you don't have to go down to the courthouse, right? So for me, that's not the question. It is more accessible. The question is why would we record, and other than it's a technical problem, and why can't we overcome that with YouTube, maybe, or something else, some new software -- I'm starting the company right now -- because that's just a technical problem, but we don't allow -- there's a rule that you can't bring a camera into the courtroom.

MS. HOBBS: We're going to talk about that one in just a minute.

HONORABLE STEPHEN YELENOSKY: Well, okay, if you want to change that, fine, but it's inconsistent to say I can keep a video camera out of the courtroom, but if I'm on Zoom I've got to record it. Those things are not consistent to me.

HONORABLE TRACY CHRISTOPHER: We're not saying you have to.

MS. HOBBS: No one's saying you have to. It's just if you do, it's not subject to Rule 12. This is actually -- we're going to have a lot of fun conversation when we get to the broadcasting rules, but this one is actually just -- it's not a judicial record, and we're just clarifying that it is not a judicial record.

HONORABLE STEPHEN YELENOSKY: What do you mean you don't have to record? I thought you said you do.

MS. HOBBS: Momentarily it has to be recorded.

HONORABLE STEPHEN YELENOSKY: Oh, so you're saying it's not recorded if it's taken down? Yeah.

CHAIRMAN BABCOCK: Okay. Why don't we go to your next issue?

MS. HOBBS: Okay. So now we're going to turn to the Texas Rules of Appellate Procedure, and if you want to turn to page 164 of your PDF, we're going to look first at Texas Rule of Appellate Procedure 39.8. This

would by rule authorize all courts of appeals to hold remote oral arguments should they so desire in all cases. My memo goes through what I believe to be general legislative authority for courts of appeals to do this anyway, but you have a little bit of like general authority and then some specific authority, and so it kind of makes it a little bit more confusing, but the draft of Texas Rule of Appellate Procedure is intended to give courts of appeals discretion to hold remote oral arguments in any type of case.

Just to go through the statutory provisions, the general one is Government Code 22.302. Any appellate court can, quote, "order that oral argument be presented through the use of teleconferencing technology," query whether Zoom is teleconferencing or not. 22.302 expressly authorizes the two high courts, so the Texas Supreme Court and the Court of Criminal Appeals, to record and post online their arguments. So they have very specific authority that was entered when the first time the Supreme Court got money to webcast their oral arguments, which they have been doing consistently since -- I forgot what year that was, but '04, I recall.

There is a provision in 73.003. This is in regard to transferred cases, so as you all know that courts of appeals equalize their dockets by statutory

mandate, so you may file a case in the Third Court of Appeals and it gets transferred to the 13th Court of Appeals, and 73.003 does require that those cases be heard in the originating appellate district unless all parties agree otherwise, but that statute in I think it's subsection (e) also allows the chief justice of an appellate court to, quote, "hear oral argument through the use of teleconferencing technology," even in transferred cases.

Along with that, some courts of appeals must hold oral argument in certain cities, a specific city or specific county within their district, and in our memo we give you a laundry list of all of those specifications, but again, because the 73.003 does allow an appellate court to hold argument remotely in lieu of in-person argument at a specific location, we were not bothered by those specific requirements, because of the general proposition that any chief justice can order teleconferencing of oral argument.

So we have drafted a rule that gives the courts of appeals discretion to hold oral argument remotely, and we believe that -- as a subcommittee, we believe that it is consistent with the statutory research that we did.

CHAIRMAN BABCOCK: Okay.

MS. HOBBS: If I can -- I'll just go on just on general TRAPS, too.

CHAIRMAN BABCOCK: Okay.

MS. HOBBS: We also -- if you scroll down to the bottom of that page and the next page, we also suggest amendments to 39.9 and 59.2. These are basically just notice requirements similar to what we did with trial court notice requirements. It's good policy, and it conforms with current practice by the courts of appeal clerks right now.

CHAIRMAN BABCOCK: Perfect. Any -- any comments on these rules? Yeah. I can't see who that is.

MR. WARREN: It's me, John.

CHAIRMAN BABCOCK: John.

MR. WARREN: As it relates to 39.9, can you also add the ability for the clerk to do the notice electronically?

MS. HOBBS: Yes. I envisioned it. I think all notices are electronic in the courts of appeals now, but we can certainly -- that would be an easy fix to specify.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: I would probably feel more comfortable if the Legislature got involved in the 73.03 about transferred cases than relying upon the

teleconferencing provision, but we transfer a lot of cases out of Waco right now. About probably 25 percent of our docket gets transferred. The -- I don't remember the last time a transferee court came to Waco to hear oral argument in a case, so I think that allowing it to be done remotely is a great step, at least encouraging that practice, so I would -- from that perspective, I would like to see it done. As I indicated in the discussion earlier, since we've started back doing any oral arguments after March 9 of 2020, they've all been done on Zoom, even if everybody was in the courtroom, live streamed on YouTube, and we've left them up on YouTube.

As soon as this 53rd, or whatever it is, emergency order expires, unless it's continued, that's probably a violation of the rules. So if we get this change done, I'll be able to continue to do that and plan to continue to do that, and so based on my read of the rules, I know you'll be surprised by this, but I advocate for their passage and adoptance -- adoption, that's the word I'm looking for, as proposed, because I do want to make sure that I have the authority to do what I'm doing.

CHAIRMAN BABCOCK: Right.

HONORABLE TOM GRAY: So --

CHAIRMAN BABCOCK: Got it. Anybody else?

MS. HOBBS: No, but I will just say that the

13th Court came to the Austin courtroom. I argued in front of the 13th Court in the Third Court of Appeals courtroom recently.

HONORABLE TOM GRAY: Did you? I've been to Houston, to Beaumont, to San Antonio, to Austin to hear oral arguments when we were a transferee court, Fort Worth, but, you know, I know that Texarkana and Eastland have been to Waco at times past.

CHAIRMAN BABCOCK: Rich, then Justice Christopher, then Richard.

MR. PHILLIPS: I'm happy to defer to Justice Christopher. I think she had her hand up first.

HONORABLE TRACY CHRISTOPHER: Oh, no, go ahead.

CHAIRMAN BABCOCK: It was a split second thing, but on instant replay I can see now that Justice Christopher --

HONORABLE TRACY CHRISTOPHER: I did pull mine down, so --

CHAIRMAN BABCOCK: Yeah, the ruling on the field has been reversed.

HONORABLE TOM GRAY: Been reviewed and removed.

CHAIRMAN BABCOCK: And Chief Justice Christopher has been recognized.

HONORABLE TRACY CHRISTOPHER: Oh, I'm sorry. Okay. Well, I did a survey, and not surprising, the 14 courts of appeals are quite different. We have some courts of appeals that never went remote and never broadcasted a thing. We have some courts of appeals that broadcasted and took those recordings off their website as soon as possible. We have some that are -- broadcast everything, even if they're in-person and put recordings on their website, and we have some that record, but put them up and take them down. So they're the -- you know, if the Court wanted to have some sort of policy on it, you know, that needs to be taken into account. You know, Tyler says they don't have the ability to do it, so they never did it during the pandemic and are not interested.

But, I mean, there is a little bit about apparently storage at some point when you get a whole lot of the oral arguments, but -- and I will say, with respect to Justice Gray's point, we are much more likely to give oral argument in a transferred case if we can do it remotely, and frankly, the participants are perfectly happy to do that, too, because, you know, normally we'll send them a notice saying, "Well, we'll give you oral argument, but only if you'll come to Houston, because we just really don't want to go to Austin," because we have no money for travel that's included in our budgets, so,

you know, the remote argument is really nice.

MR. DAWSON: Justice Christopher, was your survey as long as Richard's survey?

HONORABLE TRACY CHRISTOPHER: No.

CHAIRMAN BABCOCK: Whoa, getting your shots in.

MR. DAWSON: I received enough earlier. It's time to give some back.

MS. HOBBS: I did -- I forgot that included in your packet of information, the Council of Chief Justices, which is the -- all 14 chiefs of the courts of appeals, did request that the State Bar of Texas do a survey of the appellate section about remote oral argument and their preferences. I don't think it's that helpful to this discussion as all we're trying to do is make sure that the courts of appeals have the authority to do what they're already doing, but if anybody is curious what appellate practitioners think about Zoom oral arguments, that survey is in your material packet.

CHAIRMAN BABCOCK: Rich.

MR. PHILLIPS: So, actually, I was going to ask you a little bit about that and also when we had the discussion about remote proceedings in the trial court we had a whole big thing about what if the parties -- what do we do with what the parties want to do and do the judges

have to do that. Did you-all look at that? I mean, the way this rule is drafted it's kind of the court decides, and the parties lump it. Is there -- did you-all consider whether the parties should be able to request an in-person instead of a remote or --

MS. HOBBS: I don't know about you, Rich, but when a court of appeals calls you down to oral argument, do you think you have any say on how that's going to happen?

MR. PHILLIPS: I'm just, I mean --

MS. HOBBS: I'm being facetious, but, no, I think we accepted the reality that postponing argument and that, at least in the appellate courts historically, we are all at the court's mercy in a way that we're used to that litigators may not be used to in a trial court. So we really didn't delve into the opportunity to -- although the rule does allow -- I think it allows someone to object, right? I'm working off two different documents here.

MR. PHILLIPS: I was looking. I don't know that I saw that.

MS. HOBBS: I think the TRAP 39.8, I think someone can object, but maybe not. Maybe that's in the broadcast -- I'm probably confusing the broadcasting rule with it, but, no, we accept our position at the mercy of

the courts, but we can -- if the consensus is we should look at that, we certainly could.

MR. PHILLIPS: No, I just noticed, looking quickly through here on the survey, just that I think it was basically one of the double that the respondents still think that in-person is more effective than remote or Zoom, that they're comfortable with Zoom, but they would much prefer in-person, and then there's a lot of comments in there about good cause and things like that, and I just didn't know if you guys had thought about trying to incorporate that.

MS. HOBBS: To our credit the survey was done a year after our drafting, but yes.

THE COURT: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: So when our court and the First Court started to go back to in-person oral argument, we actually put in our notices, if for some reason you do not want to be in-person you may ask for Zoom, and we actually did have people that asked for Zoom. And on our Zoom oral arguments of cases from Austin, you know, we didn't say anything, because I think Austin knew if they objected, we would be like, oh, never mind, we don't need oral argument after all, because, I mean, it's discretionary on our part to grant it, so --

MR. PHILLIPS: Yeah. Fair enough.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: I was just going to say that this is not a new problem. I can remember cases in the El Paso Court of Appeals where they had us appear at a law school. I think it was the law school in San Antonio, argue, but, you know, that was happy for them, and it was happy for us because we didn't have to fly out there and they didn't have to fly up here. I've only had one oral argument by video, and I thought it was just as effective as being in person, so I don't know about -- I would be curious to know what the appellate justices say as opposed to the appellate lawyers because the appellate lawyers probably feel like the effectiveness of their advocacy is very strong, but the appellate justices may feel like it doesn't add much; and witness, 30 years ago, you got oral argument in every case and now oral argument is discretionary, so I would be more interested to find out what the appellate justices say; and if their attitude is a remote Zoom argument is just as effective as in-person, then, you know, I think we ought to go with what the judges think.

MS. HOBBS: I think my first Zoom argument was actually before Chief Justice Gray, and I bet he will tell you I was an exceptional advocate.

CHAIRMAN BABCOCK: I think we'll just

stipulate to that and move on.

HONORABLE ANA ESTEVEZ: The other question is, did you win?

MS. HOBBS: I can't remember.

THE COURT: That's a lie, she did win.

HONORABLE TOM GRAY: You never bring it up if you don't win, right?

CHAIRMAN BABCOCK: Exactly. Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, if you want to know just my personal opinion, I do like in-person better, because it's easier to ask questions. So Zoom is a little bit harder to ask questions on, and you saw that on the U.S. Supreme Court when they started to go to this, you know, let people talk and then ask questions afterwards, and that was just on telephone. So a little bit harder to ask questions just because you don't have that same cue that you're trying to ask a question on the Zoom situation, and we -- we liked it because then all three panel members are in the same room talking about the case, you know, before we go into oral argument and we're talking about the case after, but we did those conferences by Zoom before and after during the pandemic, but I think people were just kind of tired of remote, so -- so that's where we are.

But if anybody asked for Zoom, we gave it to them. You know, we would have people that were like just getting over COVID or, you know, they had somebody that they were more worried about, so they were more worried about COVID. I mean, we basically anybody who wanted it, we gave it remote. The only thing that we were not set up to do is the hybrid situation where -- although I think like the trial judges are set up for that, where one person would be in person and one would be remote. So if one person asked for remote, we went all remote, just from a technology point of view.

HONORABLE TOM GRAY: Well, and for the opportunity to be different, on an upcoming traveling argument -- and it's actually may be a case that Lisa is involved in, we're going to have one of our justices remote and use the Zoom feature, and so they're going to be from outside the district, so it will be --

MR. PERDUE: Chip, I --

CHAIRMAN BABCOCK: Yeah, Jim.

MR. PERDUE: I had, in the tradition of this committee, a hugely counterproductive existential observation, but it comes from the perspective of a trial lawyer before we get to the trial court proceedings, because I know this is an appellate rule and this is user-friendly apparently, but the second sentence of this

proposed 39.8 basically stands for the proposition that by rule the Court can declare that you are in compliance with the Government Code as far as either the transfer or the place of argument. And I know that there's some -- the trial bar, when it comes to the idea of remote proceedings and the location or how those things are conducted have a little bit of concern on the remote proceedings rule and that, and so I just wanted to say that it's -- it fixes the issue, especially on transfer cases, but it's a unique question that you have a rule that says doing this is still in compliance with the Government Code, "because we say so".

MS. HOBBS: I think it's a legitimate comment. I think we reconciled it in our head that the term "teleconferencing" is not defined in the statute. When I get a Zoom link, I have a link that if I happen to pop up a video on my computer, but I also sometimes when I don't want to shower on a Tuesday morning, I also take Zooms by teleconference. Like I just call in to the same number. So because teleconferencing is allowed under the Government Code, in transferred or non-transferred, in every case for every court of appeals, we didn't really think it was a stretch to -- and we don't really talk about it in terms of Zoom, right? But in our minds, we did not think it was a stretch to include Zoom under the

Government Code's definite -- nondefined term teleconferencing, but to be clear, under Chapter 22, every court of appeals is authorized to do teleconferencing. So in that regard, I don't think it's much a of stretch to put this rule into place under that authority. It just clarifies that we mean by audio, video, or other technological means.

MR. PERDUE: Yeah, and it would be a foolish form over substance to say it better be a 512 area code, but so I get it. I just, I wanted to --

MS. HOBBS: It's a fair comment. We felt it was consistent with the statute.

CHAIRMAN BABCOCK: Okay. Any other discussion about this? Lisa, do you feel like we need to take a vote? It seems like this is not --

MS. HOBBS: I've got consensus, I'm happy not to take a vote.

CHAIRMAN BABCOCK: Yeah, you've got consensus. Anybody opposed? All right. Let's go to the next bucket.

MS. HOBBS: Okay. I think we'll have less consensus on this one, but maybe y'all will surprise me. Okay. The broadcasting rules are two-part. 18c is the Trial Court Broadcasting rule, and Texas Rule of Appellate Procedure 14 is the appellate corollary, and so I think we

should start with Texas Rule of Civil Procedure 18c, which is on page 160, 160 of your PDF. It looks quite a bit different than the current Rule 18c, but I want you to know that it is mostly stylistic.

We took the appellate court broadcasting rules format and used that as the basis for the Texas Rule of Civil Procedure rule, because that is the oldest rule, and so it's not really kind of in the modern format that the Court likes to do the rules in, speaking as a rules attorney, former rules attorney. But so that said, most of this is stylistic, and that's why it's not redlined, because it would be impossible to redline, but it's not dramatically different than current Rule 18c, except that unbeknownst to me before I started on this subcommittee, Rule 18c does appear to require the consent of participants before a proceeding can be recorded or broadcast. And that seems to be inconsistent with a lot of what's happened in the pandemic when courts of appeals have been routinely broadcasting on their YouTube channels as a matter of public access.

This is also different from the appellate rule. The appellate broadcasting rule does not seem to require consent from all parties, but more interesting, it also does not seem to be consistent with the Texas Supreme Court's Miscellaneous Docket No. 92-0068, which was

adopted in 1992, which was adopted and has never been overturned. It still seems to be the current uniform broadcasting rule, and its purpose was to allow local rules -- local courts to use it as a template to adopt their local rules on broadcasting, so it's the template, the sort of best practices that you would do. It also does not seem to require consent of all parties, so I want to put that out there, because the subcommittee did change that part of 18c. But with that disclaimer, which might require a vote, I want -- I thought I would walk through the rule.

CHAIRMAN BABCOCK: Yeah.

MS. HOBBS: Okay. So --

HONORABLE STEPHEN YELENOSKY: What page?

MS. HOBBS: 160. Okay. So, again, most of the changes are stylistic. We have just put this in a modern format. The major distinction that the rule takes is it distinguishes between recording and broadcasting as a matter of course, and by that we mean when a judge decides to broadcast on a court-controlled medium, most often today meaning YouTube, we distinguish that from what 18c used to mostly cover, which is when a third party, usually a media entity, wants to come in and broadcast something on a noncourt-controlled medium. Okay. So (c)(2) gives the judge discretion to record and broadcast

on its own medium, but you need to give notice, tell the parties you're going to do it. We specifically state that notice on your website is sufficient notice, so this isn't individual notice. You can just say, "We are the 264th court, we broadcast all of our stuff on our YouTube channel." That would be sufficient notice, and it allows a party to object to a broadcasting on YouTube for a full part of the hearing or a portion of the hearing.

Then 18c(3) is the more traditional request. This is a media entity typically who is coming in and wants to cover broadcasts in a traditional format, a court proceeding, and that is upon request. So the broadcasting entity needs to request permission to do so, and the rule states specifically what they need to include in the request. Most local rules already have this in there, again, because we have a uniform court rule. This is not new. This is how most courts do it. It's also consistent with the Texas Rules of Appellate Procedure. It allows anybody to file a response to that. If you're going to object to a recording of a proceeding, it needs to be nonconclusory. You need to specifically state what part of the hearing you don't want broadcast and what specific injury you might have.

Again, this is consistent with current practice. It's also consistent with the Rules of

Appellate Procedure, and any party can request a hearing on those objections, which the court -- and we tweaked this language a little bit over and over, but "which may be granted so long as the hearing will not substantially delay the proceeding or cause undue prejudice to any party or participant." The reason for that is I think we've all shown up at a hearing and KVUE is standing there ready to go, and the judge -- this is the gist of the hearing. "Is anybody going to object to this? KVUE wants to record this, are you-all okay with this?" Here's the parameters of that we have or whatever, and we have it, but our hearing really just goes on at 9:00 a.m. like it was intended to go on at 9:00 a.m., so that was sort of incorporated into the rule as being part of the practice.

18c(4) is a decision of the court. This is the factors that a court -- a nonexclusive list of factors that the court should consider when deciding whether to allow broadcasting. In the subcommittee's mind these are the factors that the court already takes into consideration when they are deciding whether to publish on YouTube, a court-controlled medium, and they're the same factors, they do it -- that they're doing in their head, right, but these are the factors that if you're opposing or advocating for broadcasting that you would look to these factors to see whether they are -- whether you've

met that or not.

18c(5) clarifies that video -- or audio reproductions of a proceeding are not the official record. The official record is still the transcript by the court reporter, and then, again, taken from the TRAP rule, 18c(6) talks about violations of the rule. This does kind of go into -- as we all know, when we're on Zoom hearings right now, there is -- a judge must have like five different ways to tell us we are not supposed to be recording this proceeding. I don't know if a third party -- I mean, I know as a lawyer I would never violate the judge's direction to me on that, but I don't know how a judge would have authority over a third party who did record on their -- on their -- but this does say violations of the rule could result in disciplinary action for a lawyer or perhaps contempt, but again, that might be just something we really can't do or that judges really don't have authority over, so that is a summary of the Rule 18 as we are proposing it.

CHAIRMAN BABCOCK: Thanks, Lisa. Judge Estevez.

HONORABLE ANA ESTEVEZ: Yeah, I just have a question about 18c(3), and I think you said it was pretty close to what we have now, but just the way I read it, does that suggest that if all the parties agree to having

it broadcast that then --

MS. HOBBS: That's why I wanted to start with, we are changing substantively. Current 18c does require consent of the parties. I will tell you that in practice --

HONORABLE ANA ESTEVEZ: Well, I just say no. I've never asked the parties. I mean, except for one really big criminal case. So --

MS. HOBBS: In Travis County at least, and I'm trying to think of some others I know have been broadcast, the judge does ask us, but I think if we said no, they were probably going to decide for themselves whether they were going to allow it or not.

HONORABLE STEPHEN YELENOSKY: They're just being courteous.

MS. HOBBS: They're being very courteous to ask us, but I don't really think we have much of a say, but that is why I started my discussion with the substantive change is current Rule 18c, at least in writing, requires consent of the parties, and this rule does not.

HONORABLE ANA ESTEVEZ: Okay, but if the judge doesn't want to do it, doesn't want somebody to record, but the parties agree, are you -- the way I read this, if there is no objection, they get to record it.

And I would -- I would take issue with that, but it says --

MS. HOBBS: I mean, I think it goes into 18c(4). "In making the decision to record or broadcast court proceedings," and that means on your own medium or by request, "the court may consider all relevant factors, including but not limited to" -- blah, blah, blah. So I think those are the factors you should consider, and if you say no, that's your ruling, and if somebody wants to challenge you very quickly, that would be interesting to see how they got that reviewed.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: This is kind of fundamental, so maybe I should know the answer.

THE REPORTER: Louder, please.

HONORABLE STEPHEN YELENOSKY: I'm sorry?

THE REPORTER: Speak this way, please.

HONORABLE STEPHEN YELENOSKY: You're talking about streaming, broadcasting, recording, and I'm still stuck on these terms. Does this mean when it says "broadcast or record" that if the judge is doing a remote proceeding that he or she has the option of streaming it, broadcasting it, or instead just recording it and then later putting it up? Is that acceptable?

MS. HOBBS: I think, yes, that they could do

either, and I think the phrase "recording and broadcasting" comes probably from the appellate rules --

HONORABLE STEPHEN YELENOSKY: Uh-huh.

MS. HOBBS: -- where, as Judge Christopher said, some appellate courts just record it and then they post it, like you can just listen to an audio recording later. So I probably -- it's been a year since we drafted these, but I'm guessing I got that phrase from --

HONORABLE STEPHEN YELENOSKY: Well, it has "or," and so if they can do what I just said, then that's different from an in-person hearing in that there's no contemporaneous public access. Right?

MS. HOBBS: Uh-huh.

HONORABLE STEPHEN YELENOSKY: And that -- I would want to have this as close to the courtroom, which has -- cuts both ways, like you said and I said. If you miss the court hearing, that's your problem, but if there's a high profile case, let's say, and the media wants to observe it while it's going on, right? This seems to say the judge cannot broadcast it at all, just record it and put it up later. Is that right?

MS. HOBBS: I think they can. If you hold an in-person courtroom hearing, unless you're locking your courthouse doors --

HONORABLE STEPHEN YELENOSKY: Yeah.

MS. HOBBS: -- you are complying with the public's right to access.

HONORABLE STEPHEN YELENOSKY: So they couldn't do it as in court -- I mean, out of court, couldn't do a Zoom hearing out of court that they only record?

MS. HOBBS: Well, I just kind of think you're conflating the public right to access, which is a different and broader thing than are we going to record and/or allow third parties to broadcast our proceedings as they're happening.

HONORABLE STEPHEN YELENOSKY: Uh-huh.

MS. HOBBS: Which may be required as a matter of open access, if you are not in your courtroom.

HONORABLE STEPHEN YELENOSKY: Right.

MS. HOBBS: But otherwise is probably not -- like we don't have a right to immediate access or convenient access.

HONORABLE STEPHEN YELENOSKY: Well, you can be in the courtroom. I'm just talking about when you can't. You're a member of the media and you can't -- there's nothing happening in the courtroom, it's all happening on Zoom or whatever, and you can't see it as it's going on. You have to wait until it's recorded and put up. That's what I was asking about.

MS. HOBBS: And I don't know the answer to a -- the public's right to access, if subsequent access would be sufficient to comply with, but I know that this rule is not intended to encompass every element of the public's right to access to observe judicial proceedings.

HONORABLE STEPHEN YELENOSKY: Yeah, and I don't know whether it's here or not, but I would think the media would find it pretty important to be able to contemporaneously observe.

CHAIRMAN BABCOCK: That is surely the position they would take. That is surely the position they would take.

HONORABLE STEPHEN YELENOSKY: Yeah, and I could see why they would, and they have that right as long as it's in open court right now, so if you can instead have a completely virtual hearing that's just recorded and that's sufficient, then you eliminate the con -- the right to contemporaneous participation or observation.

CHAIRMAN BABCOCK: Yeah. That's right. Judge Miskel, and then Kent.

HONORABLE EMILY MISKEL: I think there are three things that are independent of each other. There's public access, there's recording, and there's broadcasting, and so I don't think the purpose of Rule 18 is to explain what satisfies the public's right of access.

So I just wanted to add there are times you could be recording without broadcasting. So presently when I'm doing any type of remote appearance, I'm physically in the courtroom. The courtroom is open to the public, and I may have one or more participants on Zoom. The Zoom automatically records it, so that's an example of where I am recording, but not broadcasting, and I'm not saving or publishing those recordings, just like the court reporter records the proceedings in open court, but doesn't publish them or broadcast them. So there can be times where you're doing one or more of the three, but not all of them, so that's why it's recording or broadcasting, right, because right now I'm not broadcasting on YouTube, but I am recording. There might be times where you are both broadcasting and recording. Does that make sense?

HONORABLE STEPHEN YELENOSKY: Yeah. The only one I'm concerned about is you're not in your courtroom, you're doing a Zoom hearing. It should be prohibited -- I mean, you should have to stream it.

HONORABLE EMILY MISKEL: So 18c doesn't say these are the ways you satisfy the public's right to access.

HONORABLE STEPHEN YELENOSKY: Well, where is that said?

HONORABLE EMILY MISKEL: In the public's

right to access, not the recording or broadcasting rules.

HONORABLE STEPHEN YELENOSKY: Okay. But does it say in that part --

HONORABLE EMILY MISKEL: Because in this rule, so like all proceedings have to be open to the public unless you go through the very specific procedure to close the courtroom to the public, right?

HONORABLE STEPHEN YELENOSKY: So what rule prevents me as a judge from sitting at home having a Zoom hearing, recording it, but not streaming?

HONORABLE EMILY MISKEL: So we have the materials, I think, are in here that were published by OCA during the pandemic to talk about why you can't do that.

HONORABLE STEPHEN YELENOSKY: It says you can't?

HONORABLE EMILY MISKEL: Correct.

HONORABLE STEPHEN YELENOSKY: Okay. Well, that's all I was concerned about.

HONORABLE EMILY MISKEL: But not the rule. The rule doesn't talk about -- the purpose of Rule 18 is not to talk about if a court does these things it satisfies the right of access. It's only talking about how you can record or broadcast or both.

HONORABLE STEPHEN YELENOSKY: Yeah, okay. Well, just somewhere I hope it says you can't -- you can't

do what I just described.

MS. HOBBS: And we could put a comment to --

HONORABLE EMILY MISKEL: So Exhibit C, which starts on page 169 is what was published during the pandemic to talk about why courts have to provide public access to court proceedings, and then I believe the procedure for closing the courtroom to the public is in case law. I'm not sure that's a rule or statute-based procedure.

CHAIRMAN BABCOCK: Kent, and then Justice Christopher.

HONORABLE KENT SULLIVAN: I just had a question about subsection (6) there on violations. I want to make certain that I understood the language of the rule. Does this contemplate that a judge could make a decision to broadcast a proceeding to the public but then order that no one further disseminate or record that?

MS. HOBBS: If you do it without approval of the judge, this says, "Any person who records, broadcasts, or otherwise disseminates imagery from the courtroom without the approval of the judge in accordance with the this rule."

HONORABLE KENT SULLIVAN: Even if the judge in the first instance has decided to broadcast this to the public?

MS. HOBBS: They do that everyday, and they tell you, you cannot record it.

HONORABLE ANA ESTEVEZ: Our videos say "do not record" on them.

MS. HOBBS: It literally has happened every day in Texas for the last two years.

HONORABLE KENT SULLIVAN: Well, that wasn't my question. I mean, I defer to the First Amendment experts in the house, but it just strikes me there's a First Amendment issue there, even potentially kind of a prior restraint issue. Maybe I'm wrong.

CHAIRMAN BABCOCK: No, there's certainly an issue there. Judge Wallace.

HONORABLE R. H. WALLACE: And the point there, the times that I've seen in civil cases, where there's a pro se defendant wants to come -- or pro se party wants to come in and record the proceedings, usually for some reason that's not good. You can bet they're going to go out and publish it when they -- once they're done.

HONORABLE KENT SULLIVAN: Let me make just certain that my comments were understood. I'm not suggesting that someone could come into the courtroom and say, "I want to record this," because a court -- a judge is always entitled to control his or her courtroom. My

predicate was the judge has decided to broadcast this, presumably on YouTube, and then says, "Oh, by the way, if anyone out on YouTube records it or further disseminates it in any way, they could be held in contempt by me." It seems to me there is a constitutional problem. I'm just noting all the -- that's the way I read the language of the rule.

MS. HOBBS: I do think a broadcaster on a YouTube, a court-controlled medium, could request from the court, "Can I tap into your YouTube channel and rebroadcast it" with permission from the court is really all this requires, and so it's turning that virtual courtroom on YouTube in the same -- with the same rules as we would require in a physical courtroom. But you could request, "Hey, we want to use this on the 5:00 p.m. news tonight."

HONORABLE KENT SULLIVAN: Let me clarify again. No doubt they could request it, and one would presume that most reasonable judges would allow that if that same judge had decided to broadcast the proceedings to the public anyway, but my question was, could perhaps a judge that was less than reasonable say, "Oh, no, in fact, you can't broadcast it, record it, et cetera, despite the fact I have made a decision to allow it to be broadcast to the public." That was what I was raising.

MS. HOBBS: I don't find that to be so unreasonable for this reason. Many of these judges are putting their dockets online at the moment. So if I want to see the judge's docket, I get on at 9:00 a.m. I see it, and then it's immediately taken down. So it's just like they are literally creating a -- a virtual courtroom that requires you to be in attendance at the time you want to hear it. I don't -- I mean, I'm certain there could be litigation about this if they want, but I am personally not bothered that they would then take it down immediately, because they are just creating access at the time that they're presiding, and then say, "And I don't want all you guys to record this," this isn't -- like we just gave you access so you could see what we were doing and hold us responsible in the moment that we were adjudicating cases, and then we're going to take it down and we're going to prohibit you from further disseminating that even though we are disseminating it in the first instance.

HONORABLE KENT SULLIVAN: And again, I assume I'm clear, and that is maybe good, maybe bad, is it constitutional? That's the question that I'm asking, and it seems to me the language raises a relatively serious issue.

CHAIRMAN BABCOCK: Yeah, it does for sure,

and the -- but the argument would be, I think, that if you come into my courtroom to observe proceedings, courtroom is open, you've got to be allowed to come in and watch it, and -- you are a reporter, you come in, you take notes. You have a sketch artist, they sketch, and then you go out and you publish a story and a sketch about what happened in the courtroom. When I -- when I as the judge record that, when I'm making that recording, the question becomes -- that's my recording in a sense, and do I have to allow other people to use my recording? You know, I think the --

HONORABLE KENT SULLIVAN: But in our hypothetical we've said that judge has decided to broadcast this to the public in the first instance. It's already out there.

CHAIRMAN BABCOCK: Right.

HONORABLE STEPHEN YELENOSKY: Right, yeah.

CHAIRMAN BABCOCK: And the point you raise is it is a prior restraint if the judge says, "You can't publish something -- republish something that I've already published," and that's a -- you know, that's a horse race for sure. Yeah, Judge Yelenosky, then Justice Christopher.

HONORABLE STEPHEN YELENOSKY: Yeah, I agree because once you broadcast it, okay, what's the next step?

The media's got it. They record it, right? So they've got this thing, right, that they want to put on TV or whatever.

CHAIRMAN BABCOCK: Yeah.

HONORABLE STEPHEN YELENOSKY: So what happens next? Judge Somebody tries to get a restraining order. That's a First Amendment issue, right? It's not a First Amendment issue in the courtroom because there isn't anything recorded. There's no thing that they can release that needs to be restrained, but for whatever reason, you've created something -- you've created something that's available and then you're saying that a judge can restrain you from putting that out there. I think -- I don't think it's a close call, actually.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I haven't -- I haven't studied this particular issue, and it might be useful to actually have someone study this particular issue, because I believe it would make a difference in the judge's decision whether to broadcast or not, which I have the right to decide. I have the right to tell you, you may not take a picture or record in my courtroom. I have the right to do that. So if I have made the decision that, you know, my courtroom is kind of small, only 30 people can fit in here, yeah, we can have a

line outside, and I can give out tickets to the 30 people that can, you know, fit in my courtroom, but maybe I'm going to let -- you know, I'm going to broadcast it so that 100 people could watch it. But, you know, if you're telling me that I have to allow rebroadcasting, maybe not. So -- and I don't mean to be threatening by that, but it's a factor that a judge would want to consider, so I think it's a useful thing if you really believe that, you know, you've waived your right to say no, then, you know, judges should know that.

CHAIRMAN BABCOCK: Yeah. Pete had his hand up first, Judge.

MR. SCHENKKAN: It seems to me that the judge ought to be able to say, "I'm going to broadcast this online," but a condition of anyone's witnessing the broadcast is they can't record and republish it, and I certainly defer to one of the nation's leading First Amendment experts on this in how close of a horse race that is under the First Amendment, but it seems to me it falls in a different category. You have been permitted by the government in to do something you could not otherwise do, but a condition of it is you don't do this other thing that you might want to do, and then that's the context in which the First Amendment should have to be considered.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, you can say that, but as a practical matter, it's broadcast. Somebody out there records it on their computer or whatever, judge doesn't know -- doesn't even know anything about it, right, and so they broadcast it. Now you've got a situation where you're going to punish them because they broadcast it, or if you hear about it in advance, you've got a situation where you're going to have to get a retraining order. As a practical matter, whether we say you're allowed to record or not and republish, if you're going to broadcast it, that's going to happen, and you're not going to be able to stop it from happening, because that's how the internet works now. And so anybody could record it, anybody could put it out there. So we can say you can't do that, and I understand the logic of that, but I don't see how it's practical.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: I guess I don't know enough about the area of the law, so I will ask the probably really dumb question, but does the government have a copyright; and if they do, does it belong to the judge whose proceeding is being broadcast, because the NHL prosecutes this kind of republication all the time.

CHAIRMAN BABCOCK: Yeah. Yeah, and the answer to that question is probably known to somebody, but

not me.

HONORABLE TOM GRAY: If not to you, then I bet nobody in this room knows.

CHAIRMAN BABCOCK: You know, there's a whole -- a whole line of cases about government speech and who is the owner of government speech, the Texas license plate case --

HONORABLE TOM GRAY: Okay.

CHAIRMAN BABCOCK: -- in the Supreme Court touches on that issue, so it would need for somebody to study for sure on this issue, as Justice Christopher suggested, and Jackie is to my right, and I'm not even looking at her, but she's tingling with anticipation of being able to research that issue for the Court. And having said that, we're going to take our afternoon break. 15 minutes.

(Recess from 3:13 p.m. to 3:38 p.m.)

CHAIRMAN BABCOCK: Our next agenda item and the last for today was led by Jim Perdue, who I think we gave him this project like two days ago, but as usual, Jim and his subcommittee have sprung into action and done a terrific job in a short period of time and have invited the person who knows exactly what this rule should say and has been very involved in drafting it, Jamie Bernstein, the executive director of the Supreme Court of Texas

Permanent Judicial Commission for Children. That's a pretty impressive title, and lived on the same street in Brooklyn that my great grandfather lived on. So we have that in common, Jamie, we always will. So, Jim, take it away.

MR. PERDUE: Thank you, Chip. Yes, your intrepid legislative mandate subcommittee comes back to you again.

CHAIRMAN BABCOCK: For the second time in a row.

MR. PERDUE: For the second time in a row on short notice, but in the famous last words of Ms. Hobbs, on something that should not be very controversial. What you have in front of you at whatever tab it is --

HONORABLE ROBERT SCHAFFER: Q.

MR. PERDUE: Pardon me?

HONORABLE ROBERT SCHAFFER: Looks like it's Q.

MR. PERDUE: Q. There's a three-page memo from the committee that will frustrate our Chair because it's not as definitive as sometimes the Chair seeks. We were referred a issue that is a legacy issue from the 2019 legislative session that lives in House Bill 2737, which is Exhibit 1 to your memo. That bill essentially created a new section of the Government Code, as the Legislature

has wanted to do, instructing the Court to do certain things, and in this case it has to do with, quote, "judicial guidance related to child protective services and juvenile cases." So the bill specifically requires the Court to work in conjunction with the Supreme Court of Texas Permanent Judicial Commission for Children, Youth, and Families. You are blessed today to have the executive chair of the Permanent Judicial Commission for Children, Youth, and Families, who has done the yeoman's work on this process.

And I will say, as the same person who brought to you the debtor and creditor's bar and worked through those constituencies rather severe disagreements, I think Jamie and her commission have done an amazing job bringing together diverse constituencies to a consensus, unlike that issue, which I still do not know what I did to Chip Babcock to deserve all of this, but there's a way I've got to apologize to him some day.

The bill lays out essentially five items that the Court was supposed to provide guidance on. 2(d) is a child's appearance before a court in a judicial proceeding, including the use of a restraint on the child and the clothing worn by the child during the proceeding. So by way of history, which Jamie can give you more fulsome explanation of, the Children's Commission worked

through the guidance on those five items, and there is only one item, subject of the referral, and there's only one item left subject to the discussion today. And that being (d), juvenile restraints. So you'll see attached to our memo Ms. Bernstein's memo from the commission that is a memo laying out the issue after a very large report from the, I guess, working group that was formed by the commission to study the particular issue, and that came up then after that -- those -- I mean, you're talking about judges, you're talking about civil servants, you're talking about lawyers, you're talking about even -- I think there was law enforcement presence on the body, and so from that diverse group, a collective did something that this group never does, and they came up with a rule.

So the -- the rule as proposed by the group is laid out here, so the subcommittee's job was to study the rule and give you a report on the rule that comes out of the commission, which is now the referral that the Court has asked because the end project here is a final satisfaction of 2737. I will say that I read the commission report. It's -- it's very thorough, and it's clear that they brought in everybody, I think, that perhaps unlike some of the litigants and even jurists in this room have dealt personally and extensively with juvenile proceedings.

My -- the footnote on page two is what I am calling the Sullivan footnote. It is a -- an answer to the question of best practices. Attached to the commission report is a just kind of a nationwide survey of other states' practices on this in a -- the commission clearly looked for other states' models on the proposition, on the policy, and on the solution, and in looking for that, I think there is some coalescence around the policy and some coalescence around kind of a model practice. I think you start with the proposition there is generally recognized nationwide a policy that prefers not shackling a juvenile in court. Juvenile proceedings are obviously different, but there are obviously competing policy concerns regarding the safety and other people. So a study of those rules -- and I will say Jackie has been a huge resource to the subcommittee, hugely assistance, tamped down conversations, inspired conversations, and a big help to me, and so I owe you a big gratitude for helping me through this, Jackie.

I would -- so this is what will not make Chairman Babcock happy. We don't have a strong recommendation to bring you, like a hard vote on the actual language of the rule, because we did not have time to really do what this committee does best, which is to parse the detailed language of the rule itself that is

brought before you. Four members of the committee were all in favor of a rule and are all in favor of a rule consistent with the rule that is brought to you. Judge Evans, who said he did not have personal -- and Judge Evans is not here because of inability to be here, had personal experience and says he had in favor of the rule, agreed with the policy proposition of the rule, but he had a helpful observation about one of the aspects of the rule, which was a clarification, which I as the subcommittee chair attempt to kind of lay out to you on page three of alternative language to subsection (c), which is the idea of the court's determination and the order embodying that determination to perhaps improve it by reduction and just clarify the issue that Judge Evans raised, which is the order itself should be the findings of fact rather than the potential for the language in the proposed rule, allowing for essentially oral findings of fact that is inconsistent with what he felt to be the policy, which is if you have a preference for not shackling and you are bypassing that and you are asking for specific facts as to why shackling should be appropriate, put that in the order, which I thought made sense and, therefore, you see the reduction of (c) to kind of take (3) into the language of the order, which was a prescription for Judge Evans.

So I would say -- and I defer to Richard on kind of where he is on it, but we were not in a position to really, in the time line we had, breakdown the rule that's brought to you. We brought one kind of suggested improvement to the rule, but I think most importantly for this group, it's appropriate to hear the report from Jamie and from the constituencies and the work that they put in, to bring, unlike other constituencies that have brought issues to us before, kind of a collective view of the issue and with a lot of good work. So I think with that, it would be appropriate to have Jamie kind of present the commission report, which is Exhibit 2 to the subcommittee's memo.

CHAIRMAN BABCOCK: Great. Welcome, Jamie, thank you.

MS. BERNSTEIN: Thank you very much. It's an absolute pleasure to be here. I'm Jamie Bernstein, executive director of the Supreme Court of Texas Permanent Judicial Commission for Children, Youth, and Families, which we love and we call the Children's Commission because it's a lot easier to say. So we have studied this issue. We were -- brought together a group of individuals from around the state. It was very important to us that both urban and rural jurisdictions were represented, that the juvenile probation officers were there, that the

courts were there, the security professionals were there with expertise, also parents who had lived the experience, who had been there and seen their child shackled in court, advocates, researchers, law school professors, et cetera, and really bring a balanced approach.

It was also important that we had the author of the bill as long as -- in addition to one of the coauthors. Representative White at the time was also there, and our goal was really to bring together folks to have a civil discourse about this issue, which can be contentious at times, but what we learned from them was there wasn't a lot of opposition to a rule. What we talked about was that there needs to be some particularity between what we say by "shackles." That could be handcuffs, that could be ankle chains, that could be both, with a connecting chain in the middle, and in some jurisdictions, they have full body irons for every juvenile proceeding, even when the child isn't a flight risk, even when they may not have a serious offense. There may be other reasons why they're detained and shackled.

We took aside the issue of transportation because that brings a lot of other issues of how to get juveniles to and from court. We were squarely focused on when the juvenile is appearing before the court, whether

they should be restrained in this way, and I think there was some agreement that so long as there is an ability in the court to make an individualized determination about which restraints are appropriate and in what circumstances those are appropriate, that there would be some support for a rule that is statewide. And I just want to add that in 31 states across the nation, there are some rule or law or administrative order on the books regarding this issue, and we did study those things and use those other examples to inform our proposal to this committee and to the Court. And I don't want to go into much more detail, but I'm happy to answer any questions that anybody has.

CHAIRMAN BABCOCK: Justice Gray, and then Justice Christopher. Beat you by just a fraction.

HONORABLE TOM GRAY: There's a phrase in the proposed rule that says, "unless the court determines that," and then it goes into the restraints options or determination, findings that need to be made. Where is the juvenile and how is the juvenile restrained at the hearing to determine whether or not he's going to be restrained?

MS. BERNSTEIN: I think the hope -- for the jurisdictions that have done this, that's occurred before the child appears in court. Probation has developed in some jurisdictions a paper with a checklist of this child

isn't a flight risk, they're not a safety risk, we would feel comfortable not shackling. In other places the attorneys have the ability to have kind of a bench conference about whether it would be appropriate, so I think it can look different.

HONORABLE TOM GRAY: So this hearing to determine whether or not the child is going to be shackled does not occur with the juvenile in court?

MS. BERNSTEIN: In some jurisdictions that's correct.

CHAIRMAN BABCOCK: If I had to answer how this rule talked about that temporal sequences, would this be before the juvenile was in court or while they were there and saying, all right, put the cuffs on him while he's there or what?

MS. BERNSTEIN: I think the preference would be to have that determination made before the child is in court because then the damage is done, they've already appeared before the court in shackles.

CHAIRMAN BABCOCK: So should that be made clear in this rule that when that decision is made?

MR. PERDUE: So I think (c)(2) is the effort to kind of provide that direction, but still leave for the flexibility that has been requested on a case-by-case basis given some of the logistics of all of this.

CHAIRMAN BABCOCK: When feasible, yeah. So you wouldn't -- you don't need it in (a) because you have it in (c)(2)?

MR. PERDUE: That's the way I read it.

HONORABLE TOM GRAY: Is it contemplating a specific type of proceeding that they should not be shackled in, or is this like their first court appearance for anything? I mean, because obviously my concern is you've got -- you've got someone who this is going to be an issue and they're going to be -- and I don't mean this as a pun, they're going to be bound by it, and yet they are not at the proceeding where it is their condition that is being decided.

MS. BERNSTEIN: I think that's a great point. Certainly counsel would be there to represent the child's interest, but we did talk about what types of hearing would be appropriate, and this came at a time where everybody was remote. We did a round table discussion via Zoom because of the pandemic, and we felt that in some ways the issue was moot because the children weren't appearing physically before the court or you couldn't see the shackles, but we did talk about that it would really be for any court hearing, but certainly the stakes are highest at the trial stage when the matter of guilt or innocence is being litigated.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I would like to know how common the use of any sort of restraint is currently in Texas juvenile courts, if you know that.

MS. BERNSTEIN: I can't comment on every county, but I can tell you that there were some counties we heard from that do it in every single case without distinction and full handcuffs, leg irons, and the body chain, and there are some jurisdictions, in general, the larger urban jurisdictions, that are not doing it at all, and they have not seen any courtroom security challenges in the instances that they've done it.

MR. SCHENKKAN: The report of the Children's Commission on the stakeholders conference is in your materials immediately behind the commission's three-page report, which is behind the subcommittee's report. That report is 13 pages long. The first page is the list of participants in the meeting. The rest, the remaining 12 pages, is a summary of discussion; and it contains what you can see about where things were in 2020 around the state; and there was some major counties, El Paso, for example, where this practice was routine in 2020; and I think we skipped maybe a little fast over either the Children's Commission's report or our own, where one of those two makes the point that the U.S. Supreme Court has

already held against this routine practice for adult criminal defendants, so we really shouldn't be in the position of having it be a standard practice that you shackle young people, even before you consider the fact this is really damaging to young people, apparently, according to the people who are specialists in all of this stuff. So it was a problem as of 2020 that there was a routine practice of shackling. It was not an isolated incident. It may or may not still be today, and the rule would at least stop that. Don't just shackle because we always shackle.

CHAIRMAN BABCOCK: Okay. Judge Miskel.

HONORABLE EMILY MISKEL: I have two questions. One is if this rule were approved, like where does this rule live? It's a rule of what?

MS. HOBBS: I'm only laughing because as a former rules attorney, I had the same question.

HONORABLE EMILY MISKEL: Like where does this rule go? That's not critical. I was just curious. But the second thing was if you're saying in other jurisdictions sometimes these determinations are done by like a checklist or a form, on (b), "any party may request a hearing on the necessity of restraints," would it make sense to say "either party may request" -- or "any party may request a determination on the necessity of

restraints" so it doesn't have to be delayed by noticing it for an in-person hearing, that it could be handled just by like here's the particularized checklist having to do with this child, it's not necessary or it is necessary?

CHAIRMAN BABCOCK: We are really going on not having hearings today, aren't we?

HONORABLE EMILY MISKEL: I just -- I mean, if they're going to require hearings, that's fine. It's just it may be uncontested in a lot of cases.

CHAIRMAN BABCOCK: I'm just being facetious because of our 76a.

MS. BERNSTEIN: That's a good edit. Thank you.

CHAIRMAN BABCOCK: Judge Estevez.

HONORABLE ANA ESTEVEZ: I don't know if this is a comment, but I just want to throw this out there, because I spoke to all of my juvenile judges yesterday to talk about this rule and see what their thoughts were and what I never would have considered just reading your rule, what they all told me is that they are all continuing to do only remote proceedings for all of their juveniles that are in custody, because every time they come out of custody and go into the courtroom, when they go back, they have a full body cavity search, and so they would rather them not be in person and not make -- subject them to that

issue, which they did call rape, or it would make them feel that way as opposed to worrying about whether or not they should be shackled. So I'm just presenting you that if we're doing best practices, should -- if we're not in a jury trial, should we not be considering the effect of what these searches are doing more than a temporary restraint?

They also stated that if they're out on bond, they treat them like everyone else. I never shackle anyone that comes into my courtroom that's out on bond. They state they are totally free. If they are not on bond and so they are coming in, then usually my bailiff makes that determination, but none of them had any objection to making findings on the record, because they basically make those finding anyway, so if they needed a written order, they don't -- you know, they treat them like the adults, so if you wouldn't have shackled someone that's here on a drug case but just couldn't make bond, you feel a lot differently than someone who has done 15 drive-by shootings and raped two kids. They may need to be shackled or that they have assaultive type of behaviors, so I'm not sure that that goes against your rule. I like your rule, but I wonder if we need to go a step back and say let's minimize some of those other issues.

HONORABLE EMILY MISKEL: Physical traumas.

HONORABLE ANA ESTEVEZ: The physical traumas, when this is probably not as significant as that, because they're not shackled when they're in their -- you know, in the juvenile detention center. They're there freely in front of a video. They may have someone else in the room with them, but isn't that going to be what we would prefer for these hearings? Especially since this is more civil than criminal, so we're not even talking about those rights that we had to deal with in the criminal realm. This is supposed to be treated as a civil.

MS. BERNSTEIN: That's part of the reason why we divorced the clothing issue because having to change to and from and look for contraband, and there's just a lot of logistical concerns, so we just looked at the shackling issue separately from the clothing and transport issues, but you make some great points. Thank you.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: I haD the same question, which is where did this rule fit, that Lisa and Emily mentioned, but I looked back into the background of this and Representative Wu had -- I was able to find three bills that he introduced into the Legislature that were -- that were amendments to the Family Code. I don't know on one of them, it was something else, but it was a mandatory

rule, and the bill that did get through, the one we're talking about, says that "the Supreme Court annually shall provide guidance to judges who preside over child protective service cases or juvenile cases," so that says "annually shall provide guidance." At the end of the statute, 2337, it says, "The Supreme Court shall adopt the rules necessary to accomplish the purposes of this section." So we have one part of the statute that says "annual guidance" and another part of the session -- of the bill that gives the Supreme Court the authority to use its rule-making authority.

Now, at the 2020 conference, Representative Wu, who is a defense attorney in Houston, made the comment that is reported in the report, that the bill was intended to provide courts with the opportunity to provide guidance on this issue rather than mandating a uniform statewide solution. Pardon me, uniform solution statewide. So I have to ask myself, you know, he had three bills that failed that appear to me to all have been statutory provisions that were mandatory, and he did have a bill that got through, which in both the Senate bill analysis and the House bill analysis, pointed out that it was supposed to be guidance from the Supreme Court, which to me is different from a rule, and so I'm wondering whether we're really keeping faith with the legislation and the

Legislature to adopt a uniform rule statewide when the bill is talking for annual guidance.

"Annual" means reviewed regularly, and "guidance" means that it's not mandatory, and yet we turned this into a rule that has the authority of whatever it is, whether it's in the Rules of Civil Procedure, because a juvenile proceeding is under the Family Code and not under the Code of Criminal Procedure. Maybe that's where it ends up, but I'm not sure that the rule is the way to go with this frankly, and so I just want to put that out there. Is there something that the Supreme Court should be doing by way of a guidance that is annually reviewed, rather than adopting a rule that's uniform across the state? So having said -- and I said at the subcommittee level an example of what I might envision as a guidance, but I didn't want to disseminate to the whole committee because it was just one person's opinion, but Jackie has a copy of it if anybody on the Court wants to see it.

CHAIRMAN BABCOCK: You were too busy with your questionnaire.

MR. ORSINGER: This is true also. So then the next question is, when does the guidance or rule trigger? And we have the problem of transportation, and we have the problem in some courts of having six or nine

juveniles sitting in the jury box while each juvenile is being processed through some kind of proceeding, and so are we saying that -- that none of these juveniles can be in handcuffs or leg restraints so that there's six or seven or eight or nine of them and one bailiff, or do we have to have two sheriff deputies in there or do we -- the ones that are sitting in the jury waiting for their turn, can they be restrained while the one that is brought up in front of the judge has to be free of restraint? So I think some thought should go into that or at least some latitude should be given to the judges, the bailiffs, and the sheriff's department as to how many and who they're going to unshackle and when.

My review of the other states, which was provided with this information that was given to the subcommittee, they -- they seemed to be focusing on the proceeding itself, which should be defined as when the juvenile's case is called before the court, and at that point, you're no longer in transport, you're no longer in detention waiting for anything. You're now appearing before the court individually, and it seems to me that it would be clear in the guidance or a rule or at least some discussion, that the requirement or the restrictions on restraints would be most effective starting at the time that the juvenile's court proceeding occurs.

On the other hand, if there's a jury involved, we don't want the jury to ever see the juvenile in handcuffs, and we don't ever want the jury to see the child in a uniform from the detention facility. So if there's a jury involved, I think that you can't even get close to the courthouse before you transition the juvenile from custodial environment to general civil. So in those situations, I think they would have to arrange for the juvenile not to be restrained before they get to the courthouse and to be in civilian clothing so that no juror who happens to be parking or walking by or driving by sees the juvenile in that way, so --

CHAIRMAN BABCOCK: Why don't you want the jury to see that?

MR. ORSINGER: Because it's obviously prejudicial. When the jury sees an adult or a juvenile that's wearing a uniform and handcuffs, they look like they're guilty of something. The presumption of innocence applies, but the practicalities require us that if they haven't bonded out, they have to be restrained, but that for the average person to see the person over here with three deputies and he's got his hands behind his back and he's got leg shackles on and he's wearing an orange uniform and shuffling into the courthouse, and then the next thing you know you're in court. It has -- I think

everyone feels like it has a prejudicial affect, which is why --

CHAIRMAN BABCOCK: Which is why you should never restrain them.

MR. ORSINGER: Well, I'm not going to say that, but I will say this, I myself wonder how traumatic is it to appear in front of the judge with handcuffs when you've ridden all the way from the jail in handcuffs and you've waited in detention in handcuffs and you're in a cell and unfree to walk into the hallway 24 hours a day while you're -- so I don't know how traumatic the actual court experience is, but to me, the whole dignity of the court system, the legal process, that -- it's very important I think psychologically for the community, for the judge, for the jury, and for the juvenile, that they not appear in front of the judge shackled or in any other way treated in a less than respectful manner, but that's just a personal opinion. It really has nothing to do with this rule.

CHAIRMAN BABCOCK: Hold on for a second. Marcy wanted to say something.

MS. GREER: It's actually more than a personal opinion. The U.S. Supreme Court has written an opinion in the Holbrook case that says if you have someone shackled or, you know, appearing restrained because of

their dangerousness, it creates an indelible impression on the jury's mind, and so you can only do that if there's been an active threat in the courtroom.

MR. ORSINGER: I agree with that, but that was a case involving adults, right?

MS. GREER: Well, I mean, I think it's even worse for juveniles.

MR. ORSINGER: Okay. So there I think we're extrapolating, and I think it's a justifiable extrapolation, but there was a time in which juveniles before *In Re: Gault* didn't even have 14th Amendment rights, so --

MS. GREER: Right.

MR. ORSINGER: -- it's something to be worked out, but it doesn't change what we're talking about.

Now, the requirement of the written order concerns me. I know that the reason you require a written order is so that the judge has to think through the steps that you're telling the judge that they have to go through in order to do something, but one of the reactions to a written order is to develop a form, and the form says all the stuff you want, the judge signs it and turns it in and you don't get the thought process. So some of the jurisdictions that I looked through required the court to

announce on the record the reasons why this particular juvenile was going to be restrained. To me that's more realistic and more likely to get the judge to think through the process than to have a written order.

Nobody is going to stop their docket to have -- type up a written order that's unique to this individual. I think what's going to happen with the written order requirement, that it's going to become perfunctory, that it's going to be done by forms, and that we would actually be better off if we required the judge to dictate into the record the reasons why this particular juvenile needs to be restrained, and then I guess that's -- I guess that's it.

CHAIRMAN BABCOCK: Okay. Yeah, Roger.

MR. HUGHES: I'm not too concerned about forms being perfunctory because if we're going to require them to sign an order and state the reasons on the record, I think the usual case law says that the written trumps the oral, and if there's a problem, we go with the written one, but the other thing about -- I think the main thing you're trying to avoid is the injury to the child. I mean, I'm -- I realize the actual appearance of shackles and orange jumpsuits in the courtroom can be pretty startling and leaving an indelible impression. One of the first cases I had to sit -- civil cases I had to sit

second chair, our client, who was the defendant in an accident, was in jail at the time because he had -- there was a -- facing a probation revocation hearing on unrelated matters.

We somehow managed to talk the judge into springing him each day, and we would have to give him a change of clothes in the detention block on the courtroom floor. I can tell you that after the second day of trial, most of the jurors had figured out there was a reason why every entrance to the courtroom had a deputy sheriff at it, and I think it's probably if you have a -- a person who is a genuine flight risk, et cetera, et cetera, they're going to get the idea, whether he's shackled or not, but I don't approve of shackles. I think if what they're describing is probably unnecessary to do, so I still -- I still favor -- the favor of the rule is written.

My one concern about changing the rule is if you're going to require that -- somebody mentioned this, I think, in the paper, was that the written finding could be used against the juvenile at a later state in the proceedings, and so the finding -- I think it would be better to phrase it in terms of a potential flight risk or the risk of violence, rather than to say it's absolute -- say it's for, you know, the child has violent tendencies

or whatever, because those could be used later. I'm not sure at trial, but certainly in defashioning an order, that could come back -- I'm sure the defense counsel would not enjoy having to listen to that later on at trial when they somehow come -- comes into evidence for some purpose.

CHAIRMAN BABCOCK: Okay. Pete.

MR. HUGHES: And so what I'm saying is --

CHAIRMAN BABCOCK: Hold on, Pete.

MR. HUGHES: -- the conditions on restraints is not going to be treated as any kind of -- anything relevant to the merits of why he's in the proceedings or what -- what should happen to him as a result.

CHAIRMAN BABCOCK: Now, Pete, go.

MR. SCHENKKAN: With respect to the first point Richard raised about annual guidance from the Court versus rule, yes, 2737 says both, and yes, the sponsor of the bill said we weren't going to impose a uniform solution statewide, but 2737 says the Supreme Court "shall," not can, "shall," adopt the rules necessary to accomplish the purpose of this section. So the question before the Court will be, what rule, if any, is necessary to stop occurring the situation where in at least some counties there is a uniform standard practice of requiring shackles. So the Court, if it thinks it's necessary to announce a rule to do that, certainly has the power to do

so.

So now the question is -- and then you say, well, then why did Representative Wu, the sponsor, say well, we're not imposing a uniform rule, and why does the bill analysis say that, and that is because the rule that we are talking about does not require a uniform result in every case. It is not a choice, you're either always going to shackle or you're never going to shackle. Instead what the bill intends and what the rule provides for is the judge will individually, case-by-case, make a decision of whether the harms of both kinds we've talked about, the harm to the jury's evaluation of the juvenile, but the trauma to the juvenile, whatever additional trauma it is in the courthouse on top of whatever they've already encountered in detention and in transport is outweighed by the safety risk or a risk of flight or something else, and that is an individualized decision, and it is individualized in two ways.

First, it is individualized by the facts of the youth's case. Some juveniles are safety risks to other people in the courthouse. Most are not. Some are imposing risk of flight. Most do not. So, first, there's that, but that's the easy part. Why would you say we're not doing a uniform rule statewide? It is because the physical facts of courthouses and their staffs statewide

vary, and those variations make it either harder or easier to manage this transition from transport to court, shackled to not shackled, and so the judge who is in the courthouse where this might be the problem gets to say, "In our building, we can't do it that way. We have to do it some other way," and the net result of that is, I'm sorry, I really don't like it, but they're going to have to be shackled until they get to this room and this door, and we have to think a little bit also practically about who might take offense at this idea.

The transport is not done by people who respond to the Supreme Court of Texas directly. It is done by the sheriffs, who are responsive to their voters and to their county commissioners and who take their authority over the detention and transport thing pretty seriously, and so we don't -- even if we think they're wrong in their shackling policies, we can maybe give them some guidance, but that's all. So where it gets harder is in that transition, and Richard has identified some problems, and I'm sure people here can identify some others, but that is -- that -- we got to design the rule so that it doesn't interfere with that flexibility, but it keeps people's eye on the ball, which is when, under what circumstances, is it necessary to shackle this individual more than you have to in transporting?

And then finally, the one practical concern that I think we really do have to wrestle with -- I think now several people have gotten on the table, and I just want to go ahead while I have the floor and then I'll shut up, weigh in on my view of it, and that is this question of what does the judge have to say when overcoming the presumption against shackling and for shackling. And I can see that there is a -- a reason to make the judge say something, so to discourage the judge that's issuing a routine practice of "because I say so," giving reasons is good in that sense; but on the other hand, as people have identified, well, what if those reasons can be used against you in some way, at a bear minimum, wouldn't those reasons themselves be a little traumatic to the youth who hasn't been tried or anything yet, but has been told by the judge, "I'm doing this because I find that you are a violent person"?

I think that's a really bad idea, and so I think the question of whether we even require findings of fact is worthy of discussion, and I think if we are going to go down that road at all, there should be discussion of, well, at what level. Could it be as someone suggested just categories, because I find in this particular case there's a safety issue or there's a flight issue, just those words. Something like that. Thanks. I think that

covers it.

CHAIRMAN BABCOCK: Judge Estevez.

HONORABLE ANA ESTEVEZ: I just want to respond. Both in the juvenile detention center and in a regular jail, there is communication coming in from security, so I'm going to agree, I wouldn't want to say, "I find you're a violent person," but the people that are in that detention center with that juvenile for the last 10 days or since his last detention hearing, will be aware of whether or not he or she did some very violent acts or very inappropriate acts in that period of time, and they do communicate it to our security people. So I always know if I have a higher risk, and we bring in those extra people in those rooms and the doors, or whatever we need to do to make sure that -- usually it's to make sure that defendant is aware that we have that extra security, so to help them make good decisions that day.

So I agree with you, I wouldn't want to make those findings because I wouldn't want to say that to the child, but I think that we would be in a position to make those findings, so I think it is in a -- it is a legitimate finding to make, even though they haven't been tried for whatever they're getting tried for. Because it could be a drug case, and it was just they just were, you know, a drug dealer at school, but when they were in juvie

they're exhibiting a huge amount of violent behavior there or inappropriate behavior in some way, and so you may still find them violent, and it has nothing to do with the case.

CHAIRMAN BABCOCK: Marcy.

MS. GREER: I actually think the rule is very well drafted, the proposed rule, because it's very specific to the words that we use in psychological context, in criminal context. It's do they pose a substantial risk of harm to themselves or others. I mean, that language is -- is -- that's the finding that you have to make, or they're a flight risk, and a flight risk isn't really a judgment. It's more of a statement of fact. You know, they have certain factors that they indicated that they may flight. So I think the way that it is drafted gives the judge cover to make those findings. I can understand maybe being uncomfortable saying that to them, but judges, I mean, maybe you handle that a little bit differently, but I think those are the findings that ought to be made and that children especially should not be shackled unless they -- a finding to that effect is made.

CHAIRMAN BABCOCK: Judge Yelenosky, then Justice Gray.

HONORABLE STEPHEN YELENOSKY: I can't say I've read all of this, but it sounds like there's a

discussion of the flexibility between places, but I'm also hearing shackle or not. Is it binary? Because there are different ways you might protect the jury or protect somebody from fleeing, and it seems to me it shouldn't be shackle or not. I hate the word "shackle" because it can mean -- it can have a real strong meaning for a lot of people, and does it allow that or least restrictive? Well, I think judges certainly need to have guidance on least restrictive. And my thought, for example, is well, if somebody is a flight risk, there are ways to prevent the flight that don't involve, you know, a mechanical restraint; and as somebody suggested, that you may need to have deputies right nearby.

So you need to -- a judge needs to be able to consider all of those things, and the judge needs to have guidance from the Supreme Court, which should include guidance from professionals, and one thing I can tell you -- maybe you've had contact with them, but Disability Rights Texas, because restraint of people with disabilities is a huge issue, and so there's a lot written about restraint this way, restraint that way, and most of that is when they're putting somebody down because they're misbehaving, and it doesn't have the jury issue here, but there is a -- a knowledge issue about how restraints can be done that needs to be addressed by the Court or the

Court assigns somebody to address it.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: So a really practical example of least restraint is that if the child is a flight risk, you could restrain them by the ankles without restraining their wrists, because in a court proceeding sometimes the defendant needs to be able to pass a note to his lawyer, and if you're wearing handcuffs and you're trying to write and do that, you can't do that, but you don't need to have handcuffs on to restrict a risk of flight. You only need to restrain the ankles, so in a situation like that, you know, a judge could justifiably say "Flight risk, yes; ankles, yes; wrists, no."

HONORABLE STEPHEN YELENOSKY: Sure.

MR. ORSINGER: But we need this rule -- well, I don't know, is this rule enough of a guidance, or is it -- that's the original point. Is there a guidance point component, and is it annual, or are we just adopting a rule and then moving on?

CHAIRMAN BABCOCK: Justice Gray, and then Roger.

HONORABLE TOM GRAY: To address the concern about the timing that Marcy raised, making the findings on the record or even in a written order, going back to my first question, the juvenile is not going to be there,

apparently, when this is being made, this hearing is being done, assuming there's a hearing at all that it's not done on the pleadings of some type and affidavits or by agreement and the order entered; and I'm not concerned about the form of the order, whether it's on the record or written order, as long as whatever I need to review when I get the mandamus that I have something that I can review. I mean, because the timing of this is going to be apparently on the front end before this juvenile winds up in a courtroom, and there's -- I could see a lot of ways it could be done, but I'm still concerned in the first instance of that, the juvenile not being present for a hearing that involves this type of overt appearance.

One word change could certainly change the emphasis of this rule, and that's in subsection (a), second line, where change the word "unless" to "until," and then you really put the focus on you've got to make this determination, the court's got to make this determination, before the child ever shows up in a courtroom. I don't -- I don't necessarily think that's necessary.

I think this would be -- I mean, if he shows up in handcuffs, I mean, we're in a building that doesn't allow for the defendants to come in through the back door into any but one of our criminal courtrooms, and so the

decision has been made long before they get there if they're going to dress up in the orange jumpsuit and the levels of shackles, and I hear them in the hallway all the time, and -- but I don't know that those -- those are adult prisoners coming to pretrial hearings and that kind of stuff, and I gather from what y'all have said that's not what y'all are addressing. Y'all are addressing part of the juvenile's psychology and damage to the juvenile as a result of these pretrial hearings and basically being shackled at all. So, in other words, I'm not concerned about the timing probably as much as Marcy was on the judge having to make these findings in or not within the presence of the juvenile.

CHAIRMAN BABCOCK: Roger.

MR. HUGHES: Two things. First, I think the rule contains a standard, at least proposed rule has a standard about what kind of restraints are appropriate, and was it (c)(4), least restrictive type of restraint necessary to prevent harm or flight? I think at that point, number one, it's a practical decision for the judge; and second, I assume the juvenile at this point would have some sort of counselor or advisor who would make the arguments Mr. Orsinger did about really, you know, what's necessary and what's overkill. Do I need the child's hands free to help -- to help me participate in

the hearing, et cetera, et cetera?

The other thing I ask out of ignorance is what's the age range we're talking about? I mean, when does -- what's a juvenile for the purpose of being affected by this rule, and I guess a subsidiary question is, is it possible that the juvenile ages out at some point so that the restraint rule applicable to juveniles doesn't apply to the person?

MS. BERNSTEIN: I believe it's 10 to 17 is the age range for how a child is defined under Title 3.

MR. ORSINGER: But that's at the time of the offense, right, not at the time of the trial or hearing? So Roger is saying --

HONORABLE ANA ESTEVEZ: 17 is an adult.

MR. ORSINGER: Again, that's at the time of the offense, so we have a juvenile that's now an adult. Does this rule apply to them because they were a juvenile at the time of the offense?

HONORABLE STEPHEN YELENOSKY: Why does it matter, in the adult rules by Supreme Court decision apply to them as adults?

MR. ORSINGER: Well, the adult would have a constitutional right to participate in the hearing, number one, and there may be others, too.

HONORABLE STEPHEN YELENOSKY: But all of

these juveniles are represented, right? So I'm a lawyer for a juvenile, and the question is should he or she be shackled coming in? I'm going to have a conversation with my client about that, and part of the conversation will be, "Do you want to be in the courtroom when we discuss this," and my advice might very well be, "I don't think you should be there and here's why," but it's not a constitutional violation -- going out on a limb here because I don't do criminal law -- if the attorney for the juvenile says, "Judge, my client's decided not to be present, I'm representing him here, and here's why there should be no restraint" or whatever. Or it might -- the attorney might agree without the client there, "I'm not going to argue against, you know, something that keeps the child from running, but I'm going to argue against everything else."

So those who know criminal law, is there a constitutional problem if you have counsel and you're not in the courtroom and you've either agreed not to be in the courtroom or the attorney has indicated "I've advised my client not to be in the courtroom"? Why is that a constitutional problem?

MR. ORSINGER: It wouldn't be. The constitutional problem was when you write a rule that says the minor is not allowed to participate in the hearing.

Not consensual anymore. It's handed down by the Supreme Court as a statewide rule, and it arguably deprives a constitutional right.

HONORABLE STEPHEN YELENOSKY: Well, sure. Sure. It does, but I don't know -- I mean, I don't think you can prevent -- yes, it does, and if that's the rule, then, yeah, I'm against it, but there's no problem necessarily with the child being out of the room when the child is represented, right? Along the lines that I --

MR. ORSINGER: Yeah, I mean, you've got to be there for the arraignment. I think the Constitution requires that you on the record acknowledge that you know the charges against yourself, and then you've got to be there for the trial. I'm pretty sure.

HONORABLE STEPHEN YELENOSKY: Well --

MR. ORSINGER: Or they'll send an arrest warrant out for you.

HONORABLE STEPHEN YELENOSKY: -- you have a right to be, but with discussion with your attorney, you can say, "I'm waiving that right," and that might be in the best interest of the child. Can't you waive that?

MR. ORSINGER: You know, adults can waive arraignment. They do that all the time. I guess juveniles assisted by a lawyer could waive an arraignment.

HONORABLE STEPHEN YELENOSKY: I mean, there

are best interest questions that we can't answer here, but in juvenile representation, there might be reasons why a lawyer would advise the client to waive something, and I don't know all of them, but the bottom line is that the constitutional right to something generally in the adult context can be waived.

MR. ORSINGER: Sure.

HONORABLE STEPHEN YELENOSKY: And be waived for different reasons than why it might be waived in the juvenile context, and so you know that they're represented, no juvenile goes to court without representation, so --

HONORABLE TOM GRAY: Actually, they do, but --

HONORABLE STEPHEN YELENOSKY: They do? Well, that may be in Waco, but nowhere else. No civilized places. I don't know. Aren't they all required to?

MR. ORSINGER: I thought they had appointed counsel.

HONORABLE STEPHEN YELENOSKY: I thought they had appointed counsel.

MR. HUGHES: Part of the reason I requested is that (a) says that "The restraints must not be used on a child during the juvenile proceeding," and I can see the argument is that once they age out, that is they reach 18

years of age, the rule doesn't apply and we're left to deal with the kind of -- you know, we're left with constitutional law. The same -- perhaps, a different word choice or perhaps -- I mean, depending on where we put the word, "child" might be a term of art and just merely mean the respondent and not necessarily under 17.

MS. BERNSTEIN: Yes, I'm very out of my intellect here, but I think the definition of "child" applies to the entire title, and if the incident occurred while the individual was a child, then they would be tried in the juvenile system for the offense, even if during the course of the proceeding they become legally an adult.

HONORABLE STEPHEN YELENOSKY: So it should just say, "juvenile proceeding." It doesn't matter whether it's child or not at that point.

MR. ORSINGER: Doesn't, yeah. They're in the civil juris -- they're in the civil justice system rather than the criminal justice system, even if they're an adult.

HONORABLE STEPHEN YELENOSKY: Right. Right.

MR. HUGHES: Maybe it's not an issue at all.

CHAIRMAN BABCOCK: What else? Any other comments? Do we need to take a vote on this rule? Seems to be pretty much consensus that it's --

HONORABLE TOM GRAY: Lisa wants to know

where to put it.

CHAIRMAN BABCOCK: Subject to Lisa causing trouble again.

MS. HOBBS: I think this could be included in the Rule of Judicial Administration is what I would recommend to the Court as far as placement.

CHAIRMAN BABCOCK: Well, okay.

MR. ORSINGER: You know, I don't -- I mean, I guess this is not a front burner issue, but it does seem to me that the term "annual guidance" has some import and that if all we do is adopt a rule and walk away from it, it may not be doing everything we should.

MR. FULLER: You need to remind them every year.

MR. ORSINGER: We just bring it up once a year to this committee.

MS. HOBBS: Jim concedes his position as chair and appoints you to remind us every year.

CHAIRMAN BABCOCK: Pete, and then Judge Miskel.

MR. SCHENKKAN: No, the Office of Court Administration can be directed to collect those statistics on how many orders have been entered and what grounds they cited, you know, what courts they were, and that can be some data on whether the original goal, which was to get

rid of a uniform rule at least in some major places that everybody -- every juvenile gets shackled is being achieved and maybe shed some light on, oh, now we have this other problem, let's take that up again, and maybe it's a problem that could be addressed by a -- what's it called, Richard, a miscellaneous docket order?

MR. ORSINGER: Yeah. Miscellaneous docket.

MR. SCHENKKAN: Or maybe it's one that could be addressed by a circular, or maybe it also requires a rule, but that can be taken up year by year. And then finally on that point, I want to just note that unlike this statute, which just says the Court shall provide annual guidance, the Labor Code says the division of workers compensation of the Texas Department of Insurance, which sets the rules that are called guidelines but are rules, that dictate what doctors, hospitals, and others treating injured workers shall revisit and revise those rules every two years. They have never done it, and the courts have held they don't have to. That's not mandatory because the statute doesn't provide any consequences for their not doing it. So the consequences are they never do it. This statute is addressed to the Texas Supreme Court's rule-making authority, and it says do the rules only to the extent necessary. I don't think this is a problem, Richard.

CHAIRMAN BABCOCK: Wow.

MR. ORSINGER: All right, I feel better. I feel much better.

MR. HUGHES: Maybe we should have a question-and-answer form.

CHAIRMAN BABCOCK: Judge Miskel.

HONORABLE EMILY MISKEL: I was just going to say the Supreme Court's Children's Commission sends out resource letters by e-mail, and they also make these, like, handbooks that we get at our judicial conference on a variety of topics like CPS or whatever. So I assume there's a juvenile handbook that gets made or something. So I would say annual guidance could be very easily in the resource letter or whatever it is.

CHAIRMAN BABCOCK: Yeah, good point. All right. Do we need to take a vote? Do you want to take a vote? Lisa, you don't want to vote?

MS. HOBBS: I'm happy to vote. Great rule.

CHAIRMAN BABCOCK: You're going to abstain?

MS. HOBBS: No, thumbs up on the rule.

CHAIRMAN BABCOCK: Oh, okay. Let me put it this way: Anybody opposed to the rule, even a little bit? Hearing nothing, the rule is approved by this committee and sent on to the Texas Supreme Court.

HONORABLE TOM GRAY: Which draft of (c)?

CHAIRMAN BABCOCK: Excuse me?

HONORABLE TOM GRAY: Which draft of (c) are we sending on, or are we sending the options?

CHAIRMAN BABCOCK: Which draft of (c)?

HONORABLE EMILY MISKEL: There was one that allowed oral findings and one that required written findings.

CHAIRMAN BABCOCK: Good point, Justice Gray.

HONORABLE TOM GRAY: That would be the one on 218 or the one on page 219.

MR. PERDUE: I think it was a friendly amendment, but I don't want to speak for the commission.

CHAIRMAN BABCOCK: Any discussion on that?

HONORABLE TOM GRAY: Send them with both options.

CHAIRMAN BABCOCK: Both options. We'll give the Court the discretion to choose either one, and we won't be mad, no matter what.

MR. PERDUE: The single day guidance.

HONORABLE PETER KELLY: Do we just want to make sure that there are reasons stated on the record that can be reviewed at some point?

CHAIRMAN BABCOCK: Yeah.

HONORABLE PETER KELLY: So just say "in the record," not necessarily written or oral.

CHAIRMAN BABCOCK: Fair enough, yeah. Let me ask a couple of questions about tomorrow. Bill, can we get through your part of the program, and, Justice Christopher, can we get through your part without taking the remaining 15 minutes today?

MS. HOBBS: You're looking at me, Justice Christopher?

HONORABLE TRACY CHRISTOPHER: I'm looking at you because we have to do the rest of your broadcasting. I mean, we still --

CHAIRMAN BABCOCK: No, we're done with that.

HONORABLE TRACY CHRISTOPHER: We're done with it?

CHAIRMAN BABCOCK: Yeah.

MS. HOBBS: I sent Jaclyn a few comments that I had gotten over break from individuals, just tweaking certain things. I sent those to Jaclyn.

CHAIRMAN BABCOCK: Yeah, we're done with remote rules, so we don't need to worry about that.

HONORABLE TRACY CHRISTOPHER: Oh, I'm sorry, yes, mine will not take long. I forgot I had another project.

HONORABLE ANA ESTEVEZ: She did work on it.

HONORABLE TRACY CHRISTOPHER: On a project that has no memo, but I am prepared.

CHAIRMAN BABCOCK: I'm sorry, I should have been more specific about what I was asking.

HONORABLE BILL BOYCE: So is the question do you want to do it now?

CHAIRMAN BABCOCK: Well, do we want to -- we won't finish it now, of course, but do we need the 15 minutes now or will we get it done tomorrow?

HONORABLE BILL BOYCE: I don't think this is going to take a bunch of time tomorrow.

CHAIRMAN BABCOCK: Okay. All right. So we will recess in a minute, but hang on. In our December meeting, which is on December 2nd, we're going to have deep thoughts, and there's some people here who have never been to a deep thoughts meeting, and that is something that we started maybe eight years ago, and in the December meeting before the legislative session we just sit around for a day and think deep thoughts and talk about them. And we have the beginnings of an agenda on some deep thoughts, and we usually have outside speakers, and we -- we will again, but every member of this -- of this committee is required to come up with at least one deep thought. Just kidding about that, you don't have to do that, but if anybody does have something that we want to talk about or present, and it's all relating to improving the civil justice system in Texas. If anybody has

anything, let me know as soon as you can, because I am trying to put together an agenda that will be interesting. And we always, in fact, invite legislators to attend. Sometimes they do, sometimes they don't, but in any event, we invite them, and it's generally -- generally a good time, and so there you have it. Any other comments about that or anything else?

HONORABLE ANA ESTEVEZ: Are you going to make it hybrid so we get deep thoughts from another location?

CHAIRMAN BABCOCK: No. And --

HONORABLE ANA ESTEVEZ: So we can't think deeply somewhere else.

CHAIRMAN BABCOCK: You have to think deeply here.

HONORABLE ANA ESTEVEZ: Or just forget about it.

CHAIRMAN BABCOCK: And to that point, thank you for bringing that up. I'm sure that somebody thinks that Shiva and I conspired to have this nonhybrid, but we were assured by TAB that they had the system, and in between the time of that assurance and a couple of weeks ago, apparently they bid it out and got a bid back for $50,000, which seemed high to them, considering they only needed Zoom capability for their board meetings, which are

between four and eight times a year, so they decided not to do that. And so that's why our hosts, who are very nice to host us, don't have Zoom capability. Or you can just blame it on Shiva for being Machiavellian.

Anything else, guys? All right. Hearing nothing, we'll be in recess. Thank you so much.

(Adjourned)

* *

REPORTER'S CERTIFICATION
MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

* *

I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 30th day of September, 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 $ 1,825.00 .

Charged to: The State Bar of Texas.

Given under my hand and seal of office on this the 24th day of October, 2022.

/s/D'Lois L. Jones
D'Lois L. Jones, Texas CSR #4546
Certificate Expires 04/30/23
P.O. Box 72
Staples, Texas 78670
(512)751-2618

#DJ-677